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Thompson on Real Property, Thomas Editions

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Publication Information

1 Thompson on Real Property, Thomas Editions Preface to Second Thomas Edition

Preface to Second Thomas Edition

A century ago, the body of scholarly writing on American property law was found more in substantial property law treatises than in law review articles. Even the law review articles of the time tended to be authoritative discourses on mainstream doctrines, rather than proposals for reform or abstract explorations of novel issues on the doctrinal fringe. During this age of the treatise, the works on property law abounded and found their ways into the daily work of both courts and law offices. For half a century spanning the late 19th and early 20th century, these omnibus works were as common as property law casebooks are today. Authors' names were widely familiar: Burdick, Hawley & McGregor, Hilliard, Hopkins, Jones, Kerr, Minor & Wurtz, Powell, Thompson, Tiedeman, Tiffany, Washburn, Walsh, and Williams, among others.

Prominent among these property law treatises was the monumental work of George Washington Thompson, first published in seven thick volumes by the Bobbs-Merrill Company of Indianapolis in 1924. The approach of this multi-volume treatise, typical for its era, was comprehensive coverage of detailed doctrinal points and heavy case documentation for each individual point in the treatise text. This had the effect of revealing and preserving the emerging American common law on these subjects, comprised of an ever-growing rush of case decisions. The first *Thompson on Real Property* included in its voluminous footnotes many case citations found in the fledging National Reporter System published by West Publishing Company, along with citations to a wealth of state decisions that pre-dated the National Reporter System. It was a truly encyclopedic snapshot of the American law of property that was unique and important for its time.

Fast-forwarding to the present and looking back over the fate of these numerous property law treatises, one sees that (with one exception), they one by one fell out of favor and went out of print. *Thompson on Real Property* hung on for longer than most, with supplements or reissues in 1929, 1939, 1964 and finally in 1980. After a brief period of annual supplementation for the 1980 edition, this work, too, quietly slipped out of print, leaving only one extant multi-volume American property law treatise.

In 1990, the Michie Company acquired the rights to the publication and engaged a general editor to work out a plan for reviving *Thompson*. The key question was whether to refurbish and update the most recent version, or to create an entirely new treatise. The Michie Company later became part of LexisNexis.

On the general editor's recommendation, an entirely new treatise was created, using the talents of about thirty seasoned property law professors from around the country. The general editor was the principal author and ultimately contributed about 70% of the content. All of the 106 chapters were new. Some of the chapters dealing with core doctrinal topics were based on Thompson's work, especially on his wealth of older case law citations from all American jurisdictions. Those chapters were reorganized, clarified, updated and rewritten. With the issuance of *Thompson on Real Property, Thomas Edition* in 1994, this treatise became one of only two multi-volume treatises on American property law currently in print.

Although a variety of intellectual and philosophical approaches is found in the various chapters, in general the authors chose to treat their topics in a rational, comprehensive and pragmatic way. Scholarly speculations and reform statements are occasionally included, but not as the principal focus of any of the chapters.

As has been typical of property law treatises of the past, the chapters are arranged in an orderly general sequence of major subject areas. That is probably less important to most users of the treatise, whose typical need for the treatise is for research on individual topics. Some of the chapters are surveys of topics covered in more detailed fashion specialty publications. Some of the chapters are the definitive published scholarly works in their field. Altogether, the treatise contains in accessible format the explanations and source references most property law researchers will need in most of their research tasks. The treatise will always be a good place to begin the research, and will often also be a good place to complete the research. The treatise is comprehensively updated annually, and individual volumes are revised and reissued in new editions on a regular schedule.

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What's New

1 Thompson on Real Property, Thomas Editions Scope

Scope

HIGHLIGHTS

Release 2010S1 September 2010

Updates
Updates throughout the treatise include analysis of new case law and statutes of national and international importance.
10 NEW CHAPTERS
The treatise now contains 14 volumes in the Second Thomas Edition: 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13 and 15.

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- **Philippines** (main volume 13); and
- **Romania** (main volume 13).

- **South Africa** *(volume 13 cumulative supplement)*;
- **Spain** *(volume 13 cumulative supplement).*

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CHAPTER 1 PROPERTY CONCEPTS AMONG LESS DEVELOPED CULTURES

1-1 Thompson on Real Property, Thomas Editions 1.syn

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§ 1.02 Property as Perceived in the State of Nature.

§ 1.03 The Importance of the Community in Cultures.

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CHAPTER 1 PROPERTY CONCEPTS AMONG LESS DEVELOPED CULTURES

1-1 Thompson on Real Property, Thomas Editions § 1.01

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§ 1.01 Introduction.

This chapter explains how peoples in less developed cultures of the past or the present have conceived of ownership or property rights. Unfortunately, the language used to describe this subject, though well-intended and seemingly innocuous, does present some possible controversy: differing notions abound about what constitutes "ownership," "property," or "property rights"; adjectives describing cultures as "less developed" or "early" or "primitive" may be seen by some as pejorative terms of disparagement rather than simply an objective description of a stage of cultural development. Even an early culture's emerging or incipient notions about property may not indicate the true origins of property.

The purpose of this opening chapter is not wholly academic. There is arguably some value in learning how humankind, in the beginning phases of social development, assigned value to the things of everyday life and how those values were institutionalized, preserved, and protected. Such inquiries sometimes reveal that certain cherished and stoutly defended contemporary notions of property rights are not necessarily natural, evolutionary offshoots of human need and instinct, and indeed, may even be cultural aberrations. Such inquiries also present an opportunity to re-examine and perhaps reform the values nourished in modern societies, so many of which are tied to property as humankind's greatest material resource.

Such a reassessment is beyond the scope of this chapter. Here it suffices to show how people in the formative societal stages have perceived and managed their material resources. That the examples cited may be somewhat disconnected in time and space helps to show the variety in property customs. Also within the variety of examples may be found certain generalities about the development of property concepts as they are linked to material and cultural progress.

In the world of cultural and social anthropology, which forms the basic environment of this chapter, evidence tends to be serendipitous, and conclusions are generalizations in search of exceptions. In this discipline, experts routinely refute other experts who have generalized on favorite issues, because interpretation and speculation are so often essential to the conclusions reached. Reliance on any one set of views, therefore, is to expose one's credibility to risk of easy impeachment by those holding other, equally sound views. In this chapter, the principal positions and responsible opposing viewpoints are presented.

This chapter introduces concepts of property in the state of nature, the importance of the community for early humans, and anthropologists' definitions of property. Specific examples and general conclusions are cited concerning property rights recognized in early hunting, herding, and farming cultures.

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CHAPTER 1 PROPERTY CONCEPTS AMONG LESS DEVELOPED CULTURES

1-1 Thompson on Real Property, Thomas Editions § 1.02

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§ 1.02 Property as Perceived in the State of Nature.

Even the earliest examples of property holding in emerging cultures cannot reveal how property concepts actually originated. With the information available, it simply is not possible to determine how humans in the "state of nature" first began to recognize some sort of property characteristics, either of possession or ownership. This lack of evidence has left the "state of nature" field wide open to the learned speculations of several disciplines, each promoting its own perceived rationality and none subject to final dismissal by the others. Whether the earliest humans were by nature peaceful or warlike, whether property was originally perceived as an individual or as a community asset, and whether property could be either tangible or intangible, are still matters beyond our knowledge.

What is clearly recognized is that property, however defined, has played a crucial role in the progression of human society to greater complexity. Thus, nomadic hunter-gatherers were likely less interested in claiming and marking off an individual plot of ground for a season than in ensuring that their prospects for hunting success in a larger, less specifically defined territory were not threatened. n1 Later, the long-term rights in specific land attained greater importance when agriculture took over as the main means of subsistence and prosperity. Further sophistication appeared out of necessity when resources became not only valued but scarce.

So, while knowledge about people and their property in the state of nature remains elusive, certain patterns of progression appear from what information is available about early or emerging cultures.

FOOTNOTES:
(n1)Footnote 1. *See* 1 William Graham Sumner, The Science of Society 287-302 (1927).

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CHAPTER 1 PROPERTY CONCEPTS AMONG LESS DEVELOPED CULTURES

1-1 Thompson on Real Property, Thomas Editions § 1.03

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§ 1.03 The Importance of the Community in Cultures.

It requires only rudimentary knowledge of early humankind to realize that lifestyles and survival were centered around one's immediate group, usually a group based on kinship. Even the persons most physically capable of providing for themselves needed the presence of the group to perpetuate the race, to help in times of disability, and in myriad other circumstances. Both common sense and abundant evidence suggest that the integrity and survival of the group were paramount, indeed, even more important than the survival of any individual member of the group. Submerging individuality within the group identity produced several important consequences. For instance, if the group was threatened by circumstance of hostility, all members would help to meet and overcome the threat. A threat or injury to any member of the group was considered a threat to the entire group, and a group response was necessary. Even minor threats, slights, or offenses, whether to the group or to a member, necessarily elicited a response, because to acquiesce would show weakness and vulnerability. If a group member committed an offense against a member of another group, atonement was from the offender's group to the victim's group, perhaps without directly involving either of the original individual parties.

Because recompense for injury was mostly a matter of satisfying group integrity and demonstrating that the group could not be attacked with impunity, the rightness or wrongness of harmful conduct might not be at issue. Thus a perpetual feud could easily develop when one group avenged itself for an injury, and the offender's group felt compelled to respond to the vengeful conduct, followed by a response to the response, and so on. Numerous examples of such conduct abound even in relatively modern times in rural areas of the United States, of which the famous feud between the Hatfields and the McCoys of the Appalachian mountains, beginning in the 1860s, is only a typical and well-known example. n2 In early cultures, mutually acceptable arrangements for ending the perpetual and suicidal violence of the feud were eventually developed.

With the group so all-important, individual identity and individual accountability with respect to those outside the group remained rudimentary. And yet norms and customs relating to individual members emerged within the group to regulate internal affairs, identifying and disciplining aberrational conduct, allocating resources, and recognizing property and inheritance rights, among other matters. So, despite the group mentality so evident among lesser developed cultures, and despite the obvious need of early peoples to share many tasks and resources in order to survive, individuality within the early communities seems to have flourished, and this is somewhat evident even in matters of property.

FOOTNOTES:
(n1)Footnote 2. *See* Otis K. Rice, The Hatfields and the Mccoys (1978).

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CHAPTER 1 PROPERTY CONCEPTS AMONG LESS DEVELOPED CULTURES

1-1 Thompson on Real Property, Thomas Editions § 1.04

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§ 1.04 Anthropologists' View of "Property."

Anthropologists have generally accepted a definition or conception of property rights that blends both the object and the relationships pertaining to the object:

> The anthropologist must perforce agree with the Hohfeldian view that the object is of less significance in "property" than is the network of legal relations which determine and prescribe permissible behavior with respect to that object. Property in its full sense is a web of social relations with respect to the utilization of some object (material or nonmaterial) in which a person or group is tacitly or explicitly recognized as holding quasi-exclusive and limiting demand-rights, privilege-rights, powers, and immunities in relation to that object.
>
> Thus there are two essential aspects of property: (1) the object and (2) the web of social relations, which establishes a limiting and defined relationship between persons and the object. n3

This same author in a later publication illustrated this view with an appropriate prehistoric scenario:

> As an illustration, a stone conveniently shaped for use as an axhead lies unnoticed and unused for years on the surface of the ground. It is not property. It is, in legal terminology, a *res nullius:* a nothing. A wandering tribesman finds it, takes it, and uses it as a hand ax. This in itself makes the stone merely an object of possession. If the social practices of the possessor's tribe are such that any other person could appropriate this tool at will, it would still be a mere matter of possession. But if the custom is such that his fellow tribesmen recognize that he has special *rights* in possessing that piece of rock and that all others have a duty to desist from using or taking it, then it is an object of property. The stone has not changed, but the social pattern with respect to it has. It is the special and peculiar set of social relations which has transformed the rock into an object of property. n4

If, for purposes of discussion, property in early cultures can be generally characterized as recognized rights of possession or ownership, then property rights in both personal chattels and in land would seem to have been widespread in such cultures. As will be shown in the following sections, however, individual rights in property were less commonly recognized than in modern society; group or communal rights were more common, especially in land.

FOOTNOTES:

(n1)Footnote 3. E. Adamson Hoebel, The Law of Primitive Man: A Study in Comparative Legal Dynamics 58 (1954). For a fascinating example of how complex this relationship can be, see also D.P. Crandall, *The Role of Time in Himba Valuations of Cattle*, The Journal of the Royal Anthropological Institute, March 1, 1998, at 1 (chronicling the central role of cattle in the Himba culture).

(n2)Footnote 4. E. Adamson Hoebel & Everett L. Frost, Cultural and Social Anthropology 248 (1976).

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CHAPTER 1 PROPERTY CONCEPTS AMONG LESS DEVELOPED CULTURES

1-1 Thompson on Real Property, Thomas Editions § 1.05

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§ 1.05 Recognition of Individual Rights in Personal Property.

§ 1.05(a) Private Property Rights in Food.

§ 1.05(a)(1) Private Rights in Food Subject to a Duty to Share.

In lesser developed cultures, private property rights in food warrant special mention, because food was so closely identified with survival, and the right and instinct to claim food as one's own was frequently counterbalanced by a customary and concomitant duty to share the food items with others. n5 This duty to share has been seen by some as a form of communal ownership, but that viewpoint has been criticized as overlooking the essentially private nature of the original possessory right. n6

Recognition of private property rights in food probably arose from the effort expended in the hunting, gathering, or growing of food. But customs of compelled sharing may have been based on a recognized interdependence. Thus, in studies of Baffin Land Eskimos n7 and of Comanches of the American plains, n8 it has been shown that the hunter who actually bagged the game was required by custom to share with other hunters in the area, or even with other tribespeople, once the kill was returned to camp. This pattern was so widespread that,

> sharing of food, even though the food is privately owned, is the basic virtue of almost all American Indian tribes and of most of the primitive hunters of the world. n9

Yet it has been pointed out that such sharing, even if dictated by custom, was not necessarily an altruistic concession by the individual person to communal ownership and necessity, because the private owner who shared readily obtained recognition for prowess and generosity. n10 In some cultures, food pooling occurred, again not as a form of communal ownership, but to enhance the leader's resources for impressive entertaining, for providing emergency relief when the group fell on hard times, or for aiding destitute members of the community. n11 If the owner or procurer of the food was in extreme hardship, sharing might be declined. n12

A contrary point of view maintains that such sharing was inconsistent with any notion of private property rights. n13 Nevertheless, underlying the customary sharing and pooling of food items could usually be found a pronounced private property right, n14 probably in recognition of the effort expended in obtaining or producing the item. n15

§ 1.05(a)(2) Private Rights in Food Corresponding to the Effort Expended in Obtaining the Food Items.

The attribution of private rights to things produced by private effort has been seen as less pronounced with respect to game and plants simply taken from the wild, n16 and more distinct as to cultivated food items and as to fabricated items such as tools and weapons. n17 Garden produce grown under individual effort on a plot of land subject to individual ownership or use would normally be considered private property; however, a number of cultures have been noted in which garden produce was either grown or distributed communally. n18

With a conspicuous exception in the state-owned llamas among the Incas, n19 most domesticated animals were privately owned in early cultures, even if their grazing land was considered common property. This was probably stimulated in part by the ease with which relationships of genuine affection could arise between a person and an individual animal. n20 The private property attributes of livestock undoubtedly strengthened notions of private property generally and led directly to early disparities of wealth among persons in the same community, inasmuch as cattle and other livestock were almost universally accepted as the hallmarks of affluence in early societies.

§ 1.05(b) Private Property Rights in Non-Food Items.

Anthropologists readily acknowledge the close relationship between an object or artifact that has been made by human effort and the rights of the person who made it or uses it. But disagreement has arisen over whether this relationship is really a recognition of private property rights in the thing. Perhaps the spear or axe was not so much the property of but only an extension of the personality of its maker.

> Indeed it is true to say that the savage has a more jealous regard for objects of personal use than a civilized child has for its toys. The relation between person and thing is deemed so intimate that the chattel is in a very real sense hardly more than an extension of the person. Objects of personal use are the subject of so many tabus that it is often considered perilous to drink from another's utensil. Especially under circumstances in which the claim to personal property may come into doubt, property marks are in wide use. Even children are considered to have rights in their own possessions.
>
> But is this attitude towards personal objects "ownership"? ... The "property" sense is apparently so little developed that there is among primitive peoples a widespread practice of destroying personal objects on the death of the owner, and these usually include even his hut. The concept of "possession" rather than ownership is far more suitable in describing the primitive institution... Until the creation of legal obligations becomes habitual there is no need for any claim of ownership. n21

The question of whether private property rights were recognized in personal artifacts is highlighted by the peculiar style of canoe "ownership" among the Trobriand Islanders in the southwestern Pacific. n22 "Ownership" of each canoe reposes in one person, but each crew-member has a right of use. At community fishing times, the canoe owner must join the fishing with his canoe, or let someone else take it, and the crew members must fulfill their tasks. One viewpoint proclaims this arrangement as a form of private ownership with reciprocal obligations to form the users into a team. n23 Another viewpoint questions whether any private ownership exists, if the "owner" cannot refuse the use of the canoe. n24 That latter viewpoint perhaps arises out of an overly rigorous and narrow conception of property rights, especially in the context of a less developed culture. Whatever the precise mix of private rights and duties customarily attributed to an "owner" of an object, it seems clear that those rights and duties were more than would have been recognized for possession or ownership on a merely communal basis.

§ 1.05(c) Private Property Rights in Intangibles.

Indeed, whether private ownership of an object was absolute, or was heavily burdened by rights in other members of the community, or partook of some arrangement in between, it seems clear that some pre-eminent private property or ownership rights were everywhere recognized in the person who found, captured, cultivated, made, or used the item of

property.

This pattern extended even to intangible, or incorporeal, things. Rituals, songs, charms, dances, names, legends, and the rights to perform certain tasks of labor are a few of the things in which private property rights seem to have been recognized. Inasmuch as rights in such intangible items would occasionally be transferred for consideration, it is apparent that both parties to the transfer acted on the premise that private proprietary rights were changing hands. Again, a dissenting voice maintains that such rights were held communally, rather than privately, that consideration was merely part of validating the ritual, and that private rights, if any, gained cognizance only if and when the culture progressed from its less developed stage. n25 Most likely, both private and communal ownership of intangibles occurred, and it has been observed that, "as a rule, the more specialized the intangible, the more likely it will be individually owned." n26

§ 1.05(d) Whether Personal Property in Early Cultures Was Predominantly Privately or Communally Held.

For purposes of the inquiry conducted in this chapter, the debate over whether early cultures commonly recognized private as opposed to communal property rights in things other than land is interesting, but not especially important. For even a right communally held by a kinship group some other limited community implies some concept of property rights beyond the notion of common property indiscriminately available to all. Moreover, the evidence is strong that individual property rights attained widespread recognition among primitive cultures.

To some extent, the debate over whether early peoples held property privately or communally has been stimulated by the desire or need of some to show that people's innate or instinctive notions about property favor private ownership, rather than communal or communistic ownership. Somehow, goes the reasoning, if property concepts in the "state of nature" can be established, that will be a guide for finding the most suitable property regimes in modern legal systems. Or, expressed even more simplistically, if humans instinctively favor notions of private property rights, even without the materialistic overlay of modern society, then the most appropriate contemporary political systems are democracies emphasizing individual agency and private property rights. Conversely, if the impulse of early innocence is to the shared rights of communal resources, then perhaps that defines the ideal of the future.

Several flaws in such syllogisms suggest that the debate over private versus communal property in primitive cultures really is not that important. The available evidence fails to show that either private or communal systems were the exclusive expression of property rights in emerging cultures. None of the peoples studied reveal humankind in the state of nature; the property notions of even the most unsophisticated cultures are shaped to some extent by time, place, and other circumstances. Even if the nature of property holding in the "state of nature" could be revealed, or even if a primeval preference for private over communal, or vice-versa, were shown, that is no sure guide to a suitable system of property laws today, when the extremes of material excess and resource scarcity present unprecedented challenges.

Yet, the examination of property right notions in emerging cultures can be instructive. If the impulse of early peoples was to accord special privileges of possession or ownership to the person who captures, finds, makes, or productively uses a thing, perhaps that is an inherently sensible philosophical foundation for modern property law. Similarly, if property rights in some primitive cultures were shared because they affected things essential to common subsistence or survival, that too, may be a good guide for modern humankind. n27

FOOTNOTES:

(n1)Footnote 5. For a discussion of theories on the evolution of food production, see C.C. Lamberg-Karlovsky & Jeremy A. Sabloff, Ancient Civilizations: The Near East and Mesoamerica 43 (2d ed. 1995).

(n2)Footnote 6. *See* Patrick J. Dubbs & Daniel D. Whitney, Cultural Contexts: Making Anthropology Personal 187 (1980).

(n3)Footnote 7. Franz Boas, The Eskimo of Baffinland and Hudson Bay, 15 Bull. Am. Museum Nat. Hist. 116 (1907).

(n4)Footnote 8. E. Adamson Hoebel, The Political Organization and Law-Ways of the Comanche Indians 119 (1940).

(n5)Footnote 9. E. Adamson Hoebel & Everett L. Frost, Cultural and Social Anthropology 251 (1976).

(n6)Footnote 10. Elizabeth Marshall Thomas, The Harmless People 182 (1959); R. Lowie, Primitive Society 207-10 (1947). *See also* Foundations of Social Inequality (T. Douglas Price & Gary M. Feinan, eds. 1995).

Another hypothesis of why hunter-gatherers share is "favorable attention from other group members [so] those who provide public goods are listened to and watched more closely than others and have a larger, readier pool of potential allies and mates." Kristen Hawkes, *Why Hunter-Gatherers Work: An Ancient Version of the Problem of Public Goods*, 34 Current Anthro. 341, 341-359 (1993); *Cf.* Barbara Thiel, *Further Thoughts on Why Men Share Meat*, 35 Current Anthro. 44041 (1994). *But see* Kim Hill and Hillard Kaplan, *On Why Male Foragers Hunt and Share Food*, 34 Current Anthro. 70110 (1993); H. Dieter Heinen and Danny Yee, *More on Why Hunter-Gatherers Work*, 35 Current Anthro. 28789 (1994); Duran Bell, *On the Nature of Sharing: Beyond the Range of Methodological Individualism*, 36 Current Anthro. 82630 (1995). However, other foraging models based on evolutionary and population ecology provide a different framework to explain routine sharing. *See* Bruce Winterhalder, *Work, Resources and Population in Foraging Societies*, 28 Man V. 32140 (1993).

See also Robert L. Kelly, The Foraging Spectrum: Diversity in Hunter-Gatherer Lifeways 291, 292 (1995). Kelly observes:

> Although there is no intrinsic reason why women should not hunt as much as men do, gathering is an interruptible activity and is more compatible with taking care of a child than hunting. We might expect women's status to be high where they bring in the most food, but this does not appear to be the case. Instead, by bringing in meat from large game that is shared, men have the potential to acquire the prestige that accompanies sharing, and the potential advantage to compete. Women are rarely in this position, and this may establish a basic inequality between men and women in perceived status and any advantage of one over the other in decisions about the couple's group membership.

(n7)Footnote 11. E. Adamson Hoebel & Everett L. Frost, Cultural and Social Anthropology 251 (1976).

(n8)Footnote 12. Mervyn J. Meggitt, Desert People: A Study of the Walbiri Aborigines Of Central Australia 120 (1965); E. Adamson Hoebel, The Political Organization and Law-Ways of the Comanche Indians 119 (1940).

(n9)Footnote 13. John Beattie, Other Cultures 194 (1964); William Seagle, A History of Law 56 (1946).

(n10)Footnote 14. As to private property rights in game, see, e.g., Ruth Landes, *The Ojibwa of Canada*, in Cooperation and Competition Among Primitive Peoples 90-91 (Margaret Mead ed. 1937).

(n11)Footnote 15. Patrick J. Dubbs & Daniel D. Whitney, Cultural Contexts 187 (1980).

(n12)Footnote 16. It was common, however, for a finder to mark as private property a beehive, an eagle's nest, a wild fruit tree, a hibernating bear's den, and similar discoveries. *See* E. Adamson Hoebel & Everett L. Frost, Cultural and Social Anthropology 252 (1976).

(n13)Footnote 17. Robert Anderson, The Cultural Context 220 (1976).

(n14)Footnote 18. E. Adamson Hoebel & Everett L. Frost, Cultural and Social Anthropology 252 (1976).

(n15)Footnote 19. John Howland Rowe, *Inca Culture at the Time of the Spanish Conquest, in* 2 Handbook of South American Indians 219 (Julian Haynes Steward ed. 1946-59).

(n16)Footnote 20. *See* E. Evans-Pritchard, The Nuer: A Description of the Modes of Livelihood and Political Institutions of Nilotic People 16-50 (1940).

(n17)Footnote 21. William Seagle, A History of Law 51-52 (1946).

(n18)Footnote 22. Bronislaw Malinowski, Crime and Custom in Savage Society 17-21 (1967).

(n19)Footnote 23. Bronislaw Malinowski, Crime and Custom in Savage Society 18 (1967).

(n20)Footnote 24. William Seagle, A History of Law 53 (1946).

(n21)Footnote 25. William Seagle, A History of Law 52 (1946).

(n22)Footnote 26. Patrick J. Dubbs & Daniel D. Whitney, Cultural Contexts 187 (1980).

(n23)Footnote 27. *See also* Eric T. Freyfogle, *Ethics, Community, and Private Land, 23 Ecology L.Q. 631, 632-638 (1993).* David Schmidz & Elizabeth Willott, 2003 *Symposium: Environmental Ethics and Policy: Bringing Philosophy Down to Earth Reinventing the Commons: An African Case Study*, U.C. Davis Law Review (2003) (essay explores incentives that led communities to switch from private to communal management).

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CHAPTER 1 PROPERTY CONCEPTS AMONG LESS DEVELOPED CULTURES

1-1 Thompson on Real Property, Thomas Editions § 1.06

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§ 1.06 Property Rights in Land Among Early Cultures.

§ 1.06(a) The Importance of Private Property Rights in Land Relative to the Economy of an Early Culture.

All societies are territorially based, and most sustenance is drawn from the soil, either directly or indirectly. n28

While the land itself is important to humankind at every stage of cultural development, the significance of establishing property rights in land varies profoundly with each stage of progress achieved by a particular culture or society. If a culture is at the so-called hunter-gatherer, or forager, stage of development, it is important to have access to enough land that an adequate supply of game and other edibles can be obtained. But other rights typically associated with property or ownership, such as the right to occupy or to transfer to someone else, are less irrelevant. If the people are transient or nomadic, then again, only the momentary adequacy of any given territorial expanse is at issue, for the means of subsistence or survival are not dependent upon having permanent possession of a particular, specific parcel of land. When those means can no longer be found, the particular land being occupied is abandoned and other, more fruitful land is sought and just as summarily occupied. The attachment or proprietary impulse is to what can be found on the land, not to the land itself. Of course, in case of great disparity in the abundance of yield between one parcel and another, then eagerness for particular land intensifies, but when that abundance is exhausted, the once desirable tract is easily forsaken.

This casual attitude toward land as property is forever forgotten once the culture has adopted any other economy, whether pastoral, agricultural, or industrial. In a pastoral culture, the keeping of flocks and herds may require large tracts of land, but not so much as required by the predecessor hunter-gatherer culture. Land is desirable essentially for its browse and water only, so, from that perspective, the particular tract of land used is not especially important. However, the land must be occupied in order to be exploited, even by the herdsman, and some grazing lands are more conveniently located than others; hence, interest in particular tracts of land intensifies. Nevertheless, interest in particular tracts of land is mostly at the group level, because "the necessity to rove makes individual ownership impractical." n29 Herders use land resources because they are members of a group, not because they have obtained private rights to the land. Therefore, they "tend to hold pasture and water resources in common." n30

Even greater interest in land is found in the cultures characterized by the so-called "shifting horticulturalist." That

economy has progressed from herding to farming, so smaller tracts of land are more intensively used, but not permanently. n31

> No one plot of land will support a household permanently; the farmer clears a plot, works it for several years, and moves on. During the years he cultivates it, however, he invests considerable time and labor in it. Groups following this system tend to favor a combination of private and communal landholding. The social group as a whole formally owns the land. The individual who works it has rights to the use and produce of a plot as long as he keeps it under cultivation. After the plot is abandoned, however, it reverts to the group as a whole, to be given to some other cultivator at a later date. n32

Anthropologists see this so-called "usufruct tenure" -- the right to enjoy the use and product of the land, but not to alienate it -- as a source of frequent misunderstanding and conflict in clashes between cultures. Europeans who thought they were buying land outright from African chiefs, with rights to alienate the land, were only getting allotments for temporary use, from the natives' perspective. n33 The same misunderstanding arose on the American frontier. n34

Finally, in developed societies with permanent, intensive agriculture and many other valuable land uses, private ownership of land is most pronounced, but many limitations are imposed by governments in behalf of communal interests. In summary:

> To the hunter ... land laws are really game laws. It is only among settled agricultural peoples who practise rotation of crops that individual appropriation of land begins. This is particularly true where intensive methods prevail, as in the cultivation of vines, trees, or gardens, or where irrigation has to be employed. n35

In less developed cultures, when land is "owned," it is almost always owned collectively, rather than individually, and the ownership is shared by members of a kinship or territorial group, but not by strangers. n36

§ 1.06(b) Property Rights in Land Among Hunter-Gatherer Cultures.

"In egalitarian hunting-gathering cultures, basic resources of land and water, plants and animals, and human labor are available and accessible to everyone." n37 The land is valuable only for its resources, which fluctuate with climate, seasons, and intensity of use. n38 A few examples of limited private land ownership in hunter-gatherer cultures have been found, such as among the Algonkian Indians of the American Northeast n39 or the Veddas of Sri Lanka. n40 In general, however, "common ownership of hunting territories by kin groups is commonplace," and even non-owners may have a right to use the land for hunting, an accommodation accorded in anticipation of reciprocity when survival is at stake. n41 In these cultures, private rights may be recognized in certain sites, such as a water hole, or for certain uses. The Pomo Indians of California recognized private rights in certain lands for the specific purpose of gathering of acorns. n42

The territoriality practiced by hunter-gatherer groups is not necessarily exclusive. n43 A Dobe Bushman group uses a territory within about a six-mile radius from a water hole where it temporarily camps, but the group makes no attempt to defend the territory against incursion by others. n44 The Hadza of Tanzania do not claim exclusive rights in lands where they hunt. n45 Australian aborigine clans develop emotional ties to particular land, but other clans have access to those lands. n46 However, Paiute Indians in the American Great Basin did claim and defend against others a hunting territory used by inhabitants of a particular group of villages. Possibly this was because the plant and animal resources were more abundant and predictable in certain areas. n47

In a society such as that of the Andaman Islanders in the Indian Ocean, in which the harvest of a particular tree or group of trees was assigned to one family, what appeared to be a form of ownership may in reality have been only a type of division of labor, especially since the harvest was then shared with others. n48 And the groups themselves may fluctuate

in their composition with the variation in resources accessible to the group, as among the !Kung in Africa. n49

§ 1.06(c) Property Rights in Land Among Pastoral Cultures.

It is clear that acquiring certain defined rights in particular land is of higher importance to pastoral people, who must watch over and provide feed for flocks and herds, than such land rights would be to peoples who rely only on hunting and foraging. Pastoral use of land is more intense and the need to obtain use of land with adequate grazing and water resources is more critical to survival. Although both hunters and herders can move on when the land no longer provides the sustenance they seek, and indeed, many pastoral peoples are nomadic, such moves are less desirable and more threatening for the herders. More commonly, pastoral peoples will locate more or less permanently in areas that provide the land that can be relied upon to meet the needs of their animals. n50

In general, "among pastoral peoples stock is owned by individual families, [and] pastures are held in common." n51 Thus, the property right interests of pastoralists lie in *possession* of animals, pastures, water rights and migration rights, rather than in *ownership* of the land. n52 In pastoral cultures, because of animals' need to rove, the boundaries of the grazing land in use, whether held individually or in common, would not be rigid, and in any event, individual ownership of grazing land would be impractical under some circumstances. n53

For some pastoralists, land rights are seasonal. Several nomadic herding groups in Persia hold grazing lands in common, but actually use the pastures sequentially, according to their schedules of migration. n54 The Kirghiz in Asia recognized particular rights in pasture lands only in the winter, when good lands were scarce; in the other seasons, all was common property. n55 And some herders have agreements with farmers for the use of newly harvested fields. n56

In modern times, pastoralists naturally seek to secure needed rights in land, usually by acquiring grazing rights in public lands or outright private ownership of the needed land. This is a natural development in economies where the land is recognized as a finite resource and where different users compete for the same land. Also, the communal way of life for many modern pastoralists has given way to private, individual ownership of both the animals and the land they use.

§ 1.06(d) Property Rights in Land Among Farming Cultures.

If culture, in accordance with the traditional view, becomes more sophisticated as peoples progress from hunting and foraging to pastoral pursuits, and from herding to farming, then it may also be said that interest in individual land rights also intensifies along the way. The herder makes more intense use of the land than the hunter, but the farmer exceeds them both in the need for a more permanent, private plot of ground.

Early farming techniques lead to soil exhaustion and require that farming peoples move on to other land from time to time. Thus, it is less likely that the form of property rights recognized will be permanent or will apply to land that is not actually occupied. n57

Land distribution among farmers in less developed economies typically is in the form of a temporary allocation by a chieftain, but the recipient family has exclusive use of the allocated land for the duration of occupancy. Ordinarily, the occupants would have no right to sell the land or transfer its use to someone outside their group. Tacitus reported of the ancient Germanic tribes of his day that they allocated land to families or similar kinship groups, and that periodic reallocations occurred, in order to maintain the land's fertility. n58

A Truk Islander who cultivates a plot of land or plants a breadfruit tree may use the land or tree exclusively for his lifetime, and may assign those rights to his children. However, he may not sell the land or the tree, and if he has not assigned their use to his children, the use rights revert to the larger kinship group. n59

From the Anglo-American legal perspective, viewing property as a varying collection of rights, several dimensions of

property might be recognized in a less developed farming society: property rights are held by the chief who allocates the land, by the family head who holds the allocated right of occupancy, and by the family member who actually cultivates the land. None of those "owners," however, assumes the right to sell the land, or to use it for other than agricultural purposes.

In some cultures, hunting, herding, and farming occurs. Among the Tsembaga in New Guineau, the people have access for hunting, foraging, or herding anywhere in the tribal territory, but the hunter's family garden may be located only within the area assigned to the particular clan or subclan. n60 In a mixed pastoral and farming culture, similar arrangements may prevail. Among the Nuer in Africa, however, individual persons hold the cattle; pastures and water are held by sections of the tribes; and garden plots may be planted wherever land is available. n61

Another tribe, the Kofyar, assigns all land to individual owners, so that the land will be fully used and exploited, but only the lineage group may transfer the land. n62 This same tribe recognizes personal property rights in movable structures, but considers permanent structures as part of the land. Various other multi-faceted systems of land ownership among less developed farming cultures have been noted by anthropologists. n63

The general pattern of land tenure in less developed farming cultures allocation by collective authority for use by individual families prevails all over the world, albeit with innumerable glosses. n64 Among some Indonesian peoples, any individual clan member may claim for cultivation any of the land held communally by the clan or village. The claimant may not sell the land, but may pledge it as security (although creditor foreclosure rights are limited), and the land is inheritable within the family line. If the line dies out, the land reverts to communal ownership. The clan or village may transfer use of the land to outsiders, but only for one year at a time with annual renewals. If the individual farmer later fails to cultivate the land, it either reverts to the group or it may be claimed by someone else who wishes to work it. n65

Among the Ifugao in the Philippines, social organization is based on individual families, with no village hierarchies. A cultivator's exclusive right of use continues even after a field is abandoned because of soil exhaustion. Another person could, without permission, cultivate an unused field for a period of time equal to the time the field had theretofore been unused, but then the right of the original cultivator was revived. Otherwise, abandoned land returned to the communal domain only when it fell back into the condition it was in when originally claimed for cultivation. Rice fields were held by families and were subject to inheritance rights. n66

Among American Pueblo Indians, fallow land could not be used by another without the consent of the person to whom the land was allocated. Grazing land was communal. All rights of land use, however, were dependent upon performance of certain civic duties related to the maintenance of the community. Upon failure to meet these conditions, land use rights could be revoked. n67

Similarly, the land allocation systems in effect among several African tribes required performance of civic duties, such as labor on public projects, payment of taxes, and military service. Land use rights could be inherited within the family. n68 This level of sophistication among less developed farming cultures bears some resemblance to the incipiently feudalistic land practices among the Anglo-Saxons n69 and continental Normans. n70

FOOTNOTES:

(n1)Footnote 28. E. Adamson Hoebel & Everett L. Frost, Cultural and Social Anthropology 249 (1976). These authors note that an entirely sea-based community of Malayan sea gypsies may be an exception to this statement.

(n2)Footnote 29. *Id.*

(n3)Footnote 30. Beryl Lieff Benderly et al., Discovering Culture: An Introduction to Anthropology 106 (1977).

(n4)Footnote 31. According to historian Chris Wickham, "Pastoralism used to be thought of as the first prehistoric development away from hunter-gathering, with agriculture as a further advance from that. Increasingly, however, it is being thought by prehistorians that agriculture must have preceded it, and that it was cultivators who first domesticated animals." Chris Wickham, Land and Power: Studies in Italian and European Social History, 4001200 124 (1994).

(n5)Footnote 32. *Id.*

(n6)Footnote 33. John Beattie, Other Cultures: Aims, Methods, and Achievements in Social Anthropology 193 (1964).

(n7)Footnote 34. Beryl Lieff Benderly et al., Discovering Culture: An Introduction to Anthropology 106 (1977).

(n8)Footnote 35. William Seagle, A History of Law 53-54 (1946).

(n9)Footnote 36. Carol R. Ember & Melvin Ember, Cultural Anthropology 99 (4th ed. 1985).

(n10)Footnote 37. Robert Anderson, The Cultural Context: An Introduction to Cultural Anthropology 220 (1976).

(n11)Footnote 38. *Id. See* S. James Anaya, *Maya Aboriginal Land and Resource Rights and the Conflict Over Logging in Southern Belize, 1 Yale H.R. & Dev. L.J. 17 (1998)* ; Nico Schrijver, Sovereignty Over Natural Resources: Balancing Rights & Duties (1997).

(n12)Footnote 39. Frank G. Speck, *The Family Hunting Band As the Basis of Algonkian Social Organization,* 17 Am. Anthropologist (n.s.) 289-305 (1915).

(n13)Footnote 40. Charles Gabriel Seligmann & Brenda Z. Seligmann, The Veddas 106-121 (1915).

(n14)Footnote 41. Joseph B. Aceves & H. Gill King, Cultural Anthropology 152 (1978).

(n15)Footnote 42. *Id.*

(n16)Footnote 43. *See generally* Robert L. Kelly, The Foraging Spectrum: Diversity in Hunter-Gatherer Lifeways (1995).

(n17)Footnote 44. Richard B. Lee, *What Hunters Do for a Living, or, How to Make Out on Scarce Resources*, in Man the Hunter 31 (Richard B. Lee & Irven DeVore eds. 1968).

(n18)Footnote 45. James Woodburn, *An Introduction to Hadza Ecology*, in Man the Hunter 49-55 (Richard B. Lee & Irven DeVore eds. 1968).

(n19)Footnote 46. L. R. Hiatt, *Ownership and Use of Land Among Australian Aborigines*, in Man the Hunter 99-102 (Richard B. Lee & Irven DeVore eds. 1968).

(n20)Footnote 47. Rada Dyson-Hudson & Eric Alden Smith, *Human Territoriality: An Ecological Reassessment,* 80 Am. Anthropologist 21-41 (1978).

(n21)Footnote 48. A. R. Radcliffe-Brown, The Andaman Islanders 41 (1922).

(n22)Footnote 49. Lorna Marshall, The !Kung of Nyae Nyae 251 (1965).

(n23)Footnote 50. *See* B. Erdenebaatar, The Pastoral Environment and the Economy, in Culture and Environment in Inner Asia 61 (Caroline Humphrey & David Sneath, eds., vol. 1, 1996) ("Pastoral migration is made in order to optimize grazing pressure and to avoid the unpleasant consequences of long-term intensive and uncontrolled grazing over the grazing area.").

(n24)Footnote 51. William Seagle, A History of Law 55 (1946). Among the Nama Khoikhoi (so-called Hottentots), a stable pastoral culture, land is held communally, but there is also a "tremendous emphasis on private property ... irrespective of the sex, age, and status of individual ... ." Peter Carstens, *The Inheritance of Private Property Among the Nama of Southern Africa Reconsidered*, 53 Africa 58, 68 (1983).

(n25)Footnote 52. Patrick J. Dubbs & Daniel D. Whitney, Cultural Contexts: Making Anthropology Personal 186 (1980). In a discussion of specific "house rights in cattle within the extended family" among some eastern and southern African societies, it was noted that such arrangements

> make it possible for the family head to manage his affairs and pursue his interests while acknowledging the interests of the house members. In decentralized systems the family head has no right to alienate cattle already allocated, but he has the right to use part of the incoming bridewealth for his own purposes. These complementary rights ensure that his own desire to marry several wives is not jeopardized, while at the same time house members' rights to cattle are respected. Conflicts between houses over cattle are minimized through this system.

Thomas Hakansson, *Family Structure, Bridewealth, and Environment in Eastern Africa: A Comparative Study of House-Property Systems*, 28 Ethnology 117, 132 (1989).

(n26)Footnote 53. E. Adamson Hoebel & Everett L. Frost, Cultural and Social Anthropology 249 (1976). For the Pastoral Maasai of Kenya, "Concepts of individual property boundaries are alien and, therefore, a hindrance to the enjoyment of [a] God-given right. Soil is important only as long as vegetation for their livestock is present." Joy K. Asiema & Francis D.P. Situma, *Indigenous Peoples and the Environment: The Case of the Pastoral Maasai of Kenya, 5 Colo. J. Int'l Envtl. L. & Pol'y 149, 149 (1994).*

(n27)Footnote 54. Fredrik Barth, Nomads of South Persia: The Basseri Tribe of the Khamish Confederacy 4-6, 54-55, 104-105 (1964). *Cf.* Property, Poverty and People: Changing Rights in Property and Problems of Pastoral Development (P.T.W. Baxter & Richard Hogg, eds. 1990).

(n28)Footnote 55. V. V. Radlov, Aus Siberien 414 (2d ed. 1968).

(n29)Footnote 56. Joseph B. Aceves & H. Gill King, Cultural Anthropology 152 (1978).

(n30)Footnote 57. *See generally* Richard F. Salisbury, From Stone To Steel: Economic Consequences of Technological Change In New Guinea (1962).

(n31)Footnote 58. Cornelius Tacitus, Germania 169-171 (Loeb ed. 1963).

(n32)Footnote 59. *See* Ward Hunt Goodenough, Property, Kin, and Community on Truk (1951). In Eastern Melanesia, land tenures are transferred based on given names at birth and social status. When the death occurs, the land is "handed back at death to the person bearing anew the same name or title, by choice or inheritance, and not to any landowning social unit." When a certain plot is thought to have significant mythological importance to the group as a whole, the location is controlled by a "master" or "servant" appointed by the social unit. Jean Guiart, *Land Tenure and Hierarchies in Eastern Melanesia*, 19 Pac. Studies 1, 67 (1996).

(n33)Footnote 60. Roy A. Rappaport, Pigs for the Ancestors 19-21 (1984).

(n34)Footnote 61. E. Evans-Pritchard, The Nuer: A Description of The Modes of Livelihood and Political Institutions of a Nilotic People 17, 77 (1940).

(n35)Footnote 62. Robert Mcc. Netting, Hill Farmers of Nigeria: Cultural Ecology of the Kofyar of the Jos Plateau

159 (1968).

(n36)Footnote 63. Joseph B. Aceves & H. Gill King, Cultural Anthropology 152 (1978).

(n37)Footnote 64. *See* Johannes M. Renger, *Institutional, Communal, and Individual Ownership or Possession of Arable Land in Ancient Mesopotamia from the End of the Fourth to the End of the First Millennium B.C., 71 Chi.-Kent L. Rev. 269, 269 (1995)* (arguing that specific land tenure regimes in ancient Mesopotamia were not only determined by ecological or natural factors, but were also profoundly shaped by social forces).

(n38)Footnote 65. Barend Ter Haar, Adat Law in Indonesia 81-127 (1948). Swazi tradition required that land be held by the king for the benefit of the nation. Land was not considered a commodity. Land could be transferred, but the transfers were *gratis* under the notion that land belonged to the nation. Land use in this culture is allocated by a chief based upon the household size of the homesteads comprising the tribe, with priority given to production of food for consumption rather than production of cash crops. Allocation was flexible in that the size of the plot could be increased or decreased depending upon the fluctuation in the number of homesteads. Bonginkosi A.B. Sikhondze, *Swazi Traditional Land Tenure Systems and Their Obstacles To Economic Development*, 23 Transafr. J. Hist. 69, (1994).

(n39)Footnote 66. Roy Franklin Barton, Ifugao Law 40-44 (1919).

(n40)Footnote 67. Mischa Titiev, Old Oraibi 181 (1944).

(n41)Footnote 68. Max Gluckman, Custom and Conflict in Africa 16-17 (1956). Middle Jubba villagers customarily acquired and owned land through "inheritance, purchase, gifting, and village council grants of unclaimed land." These land transfers were primarily to men with the intention that the land would be used to support their families first, and production for profit second. Land was also allocated based on the size of the family. Women, however, have begun to control land by forming partnerships with their sons who have acquired the land from their fathers. Thus, while traditional land transfers excluded women from control, these "mother-son" partnerships have allowed women to participate in control and ownership of land. Catherine Besteman, *Polygyny, Women's Land Tenure, and the "Mother-Son Partnership" In Somalia*, 51 J. Anthro. Res. 193 (1995).

(n42)Footnote 69. David A. Thomas, *Anglo-Saxon Antecedents of the Common Law, 1985 B.Y.U. L. Rev. 453, 497-501*.

(n43)Footnote 70. David A. Thomas, *Common Law Under the Early Normans, 1986 B.Y.U. L. Rev. 109, 116, 118-120.*

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CHAPTER 1 PROPERTY CONCEPTS AMONG LESS DEVELOPED CULTURES

1-1 Thompson on Real Property, Thomas Editions § 1.07

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§ 1.07 Summary of Property Rights Recognized in Primitive Cultures.

Despite the enormous variation in practice among the individual less developed cultures worldwide that have been studied, some general features emerge:

1. Practices and customs relating to property rights in less developed cultures are closely related to the means of survival. Because affiliation with some kind of group is essential to survival, the rights to determine and allocate many forms of property, especially land, are held ultimately by the group.

2. Individual rights in non-land property, such as artifacts, are recognized insofar as the items are essential to survival or are viewed as extensions of the person, such as a spear, but often the resources or goods produced by their use must be shared within the group or even with strangers.

3. Individual rights in land are usually only use -- or *usufruct* -- rights, with "reversionary" rights retained by the communal group. Rights of allocation may be exercised by the communal chief, perhaps through several levels of hierarchy, but the allocations, once made and properly maintained, usually may be inherited only within family lines.

4. Rights to alienate land outside the group usually rest, if they exist at all, only with the group, and not with any individual occupant of the land.

These conclusions should discourage any attempt to find in the property practices of early or less developed societies the foundation for value judgments about individual versus communal property rights. The adoption of any particular regime of communal or individual property rights by a particular people seems more closely related to economic conditions and personal convenience rather than to any primeval, intuitive notions about property in a perfect world.

A more intriguing question lies in evaluating the property practices associated with the supposed hierarchy of civilized development. If human society really does progress from hunting to herding to farming and highly commercial and technological economies, are the property rights recognized in the more advanced cultures superior to those of the less advanced cultures? If such rights are indeed superior, are they inherently superior (or at least morally superior), or do

they attain superiority merely because the cultures in which they arise are stronger? United States Chief Justice John Marshall briefly acknowledged the issue in affirming that, by virtue of conquest and of transmission of title from the British, the American government held title to land superior to the land rights of the native inhabitants then in occupancy:

> We will not enter into the controversy, whether agriculturists, merchants, and manufacturers, have a right, on abstract principles, to expel hunters from the territory they possess, or to contract their limits. n71

As a practical matter, of course, a system of government that asserts sovereignty over land also establishes the qualifications for and limitations upon property rights available to its individual citizens and inhabitants. Typically, the range of individual property rights is reduced as the land comes under more intense pressure from increasing population or becomes more valuable for more and diverse purposes. Value judgments about the desirability of retaining particular private rights under such circumstances may vary. On the one hand, recognition of private property rights may encourage and reward individual agency, ambition, and initiative. On the other hand, proper administration of property as a common source of wealth -- indeed, a commonwealth -- may help eliminate the worst forms of individual deprivation and raise the welfare of society generally. From this chapter perhaps it can be perceived that these same general considerations ultimately motivated the property practices among less developed societies.

FOOTNOTES:

(n1)Footnote 71. *Johnson v. M'Intosh, 21 U.S. (8 Wheat.) 543 (1823)* .

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CHAPTER 1 PROPERTY CONCEPTS AMONG LESS DEVELOPED CULTURES

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CHAPTER 2 LANDHOLDING IN ANCIENT BRITAIN

1-2 Thompson on Real Property, Thomas Editions 2.syn

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CHAPTER 2 LANDHOLDING IN ANCIENT BRITAIN

1-2 Thompson on Real Property, Thomas Editions § 2.01

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§ 2.01 Purpose of the Chapter.

The principal focus of this work is the property rights recognized within the American legal system, and the objective of the initial chapters is to show the historical evolution of those property rights. Inasmuch as the American legal principles rest upon a historical foundation of English law, an exposition of the origin of property rights under that legal system is relevant and instructive.

Of somewhat less relevance is a discussion of property rights recognized in Britain in the centuries before the common law began to flower. Britain's earliest prehistoric inhabitants were displaced by successive invasions of Celtic peoples, who were, in turn, harassed and displaced by Roman, Pictish, and Germanic invaders. Except for some written accounts from the Romans, only archaeological evidence remains from these centuries of habitation before the Anglo-Saxons arrived, and one discerns virtually no impact of those prehistoric cultures on the present Anglo-American legal systems.

It is useful, nevertheless, to devote a brief introductory chapter to summarizing available knowledge of these cultures and their property practices. Some subtle manifestations of their once pervasive acceptance remain even today, especially in farming practices of some parts of the British Isles. More importantly, a fuller understanding of ancient property practices in the direct ancestry of our own civilization, and of the circumstances producing those practices, enlightens us as to the merits and motives of modern practices.

In this chapter, then, will be summarized the available information concerning the property rights recognized in the mostly Celtic cultures that prevailed in Britain before the Roman invasions and conquest, the extent to which four centuries of Roman presence altered those customs, and how property practices may have been altered when clashes with Anglo-Saxons became widespread. In conclusion, the chapter contains some brief descriptive comments about modern survivals of these practices.

Numerous technical publications concerning the investigations of this era are available for consideration. In this chapter, cited sources are generally those that reliably and readably summarize and interpret the field work and original scholarly work that have made the primary contributions to the understanding of this largely non-documentary subject. Bibliographies in those cited sources make ample reference to the publications of original work in studies of ancient Britain.

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CHAPTER 2 LANDHOLDING IN ANCIENT BRITAIN

1-2 Thompson on Real Property, Thomas Editions § 2.02

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§ 2.02 Patterns of Landholding Among Britain's Earliest Peoples.

§ 2.02(a) Habitation of Britain After the Last Glacial Age.

According to the weight of expert opinion, Britain's last glacial period drew to a close about 8300 B.C. n1 Despite the hardships imposed until then by the long epochs of arctic and subarctic conditions, human occupation of Britain in the form of hunter-gatherer societies is in evidence for many millennia preceding that time. n2 By 6000 B.C., the meltwater from receding glaciers had rendered Britain an island, accessible from mainland Europe only by boat, and forcing cultural change into more insular patterns.

In anthropological terms, inhabitants of Britain after it became an island continued in a Mesolithic culture, with hunting and gathering of food resources as the primary means of subsistence.

§ 2.02(b) The Shift from Hunting and Gathering to Farming.

After 4000 B.C., archaeological evidence indicates that the Mesolithic culture gradually disappeared, replaced by a Neolithic culture introduced by settlers arriving from the mainland, and distinguished from the Mesolithic in its emphasis on farming n3 as the main means of subsistence. n4 It has been observed that this cultural change had implications for customs regarding both personal and real property:

> In the carefree days of the hunter and gatherer, people travelled light, for they were constantly on the move to fresh hunting and cropping grounds. Personal property was a hindrance, and travel gear would have been confined to a tent or a canoe and essential tools and weapons. Once men had achieved the distinction of a fixed address, they had to accumulate property. There were livestock to guard, field systems to tend, houses to build and repair. Even if it is assumed that property was held in common by the community (which is far from certain) there would have been outsiders from neighbouring villages eager to avail themselves of stock or possessions. n5

Evidence and sites for the earliest or pioneering farming groups fall within the period 3500-3000 B.C. Thereafter, the expansion of farming was rapid and the archaeological evidence for continuation of old hunter-gatherer groups all but disappears. n6 No doubt hunting and gathering continued, as evidence for those activities exists at sites of prehistoric

farming communities. n7 More noteworthy, however, is the evidence that the farming communities also practiced animal husbandry on a very wide scale, with cattle more abundantly manifest than sheep and pigs. n8

§ 2.02(c) Landholding Patterns in the Early Farming Cultures.

In these early centuries of farming culture, the predominant form of economic organization appears to have been the single homestead rather than a group of homesteads in a village. n9 Such farmstead settlements would most likely have been surrounded by fields and pastures, but no complete sites from the third millennium B.C. have yet been identified. In the southern and middle regions of England occasionally large ditched enclosures, sometimes called causewayed camps or causewayed enclosures, have been identified next to single farmsteads. Views vary as to the possible functions of these formations, but it is likely that they were part of the settlement and agriculture activities of the farmsteads. n10 From this period has also come isolated but intriguing evidence of communities fortified against aggression, and of larger structures suggesting the emergence of powerful chiefdoms. n11

At about 1500 B.C., a dramatic re-ordering of agricultural land appears to have occurred in several large areas throughout Britain:

> In Wessex [for example] very large field systems were laid out on the downland, sometimes incorporating barrows in the existing landscape... The main characteristics of these systems were their considerable size and their complex internal structure. They were evidently imposed on the landscape in a single operation, and for the most part they conform to clearly defined baselines, which can run across the country for several kilometres, ignoring the subtleties of local topography. n12

These field systems were laid out by means of stone banks, or hedges or ditches, which effectively enclosed the fields. The little circular houses of stone or wood, or of both, were either scattered among the fields or grouped together, sometimes within ditched areas; settlements and fields were connected by droveways. n13

> The unitary structure of these large areas of the landscape is remarkably clear, and the field systems are on a scale hardly equalled before the Roman period. They may be thought of as "cohesive" systems, as distinct from "aggregate" systems which form by piecemeal addition. This terminology suggests analogies with the planning of settlements and their internal buildings... The size and shape of some of the larger land blocks suggest that they should be considered as whole "territories", and not simply as internal land divisions of particular farms. n14

Throughout all the regional and local variations in such field systems runs the consistent inference that territorial privileges were important to these prehistoric peoples, and that the same extended families or communities remained on the same land more or less permanently.

Shortly after 1000 B.C., these individual field systems appear to have been abandoned, and in their place appeared large, open fields marked off by somewhat irregular earthworks, often referred to by archaeologists as ranch boundaries. n15

At this point in any discussion of British prehistory, it is easy to become mired in the still unsettled issues about when and in what sequence the various advances in civilization occurred. Introduction of some indicia of Bronze Age culture appears coincident with or immediately subsequent to the arrival of Beaker artifacts in Britain during the second millennium B.C. But evidence of Beaker culture does not suggest that these immigrants were numerous or that they absorbed the indigenous peoples. Nor can it be determined if the rise of Bronze Age culture occurred naturally among established inhabitants or was introduced by immigrants.

Further disagreement extends to the attempts to interpret the various waves or stages of immigration or invasion by

Celtic peoples from the mainland. n16 Again, such invasions as may have occurred seem coincident or connected with the appearance of Iron Age cultural characteristics, but it cannot be determined if these technological advances were introduced by the invaders, or independently developed by the established peoples building on Bronze Age foundations, or both. Moreover, it is also uncertain whether the various invaders simply arrived and integrated themselves into the existing populace, or actually conquered major parts of the British island. These questions may be passed over in the context of this chapter, because the Celtic landholding practices to be described in the next section are reasonably consistent throughout the period of Celtic presence in Britain; also, most of the reliable information on such customs and practices is derived from the later Celtic period, after any invasions had already occurred, so that the sequence and impact of the invasions are not especially important to an understanding of this topic.

FOOTNOTES:

(n1)Footnote 1. *See, e.g.*, J. V. S. Megaw & D. A. Simpson, Introduction to British Prehistory 6-8 (1979); John G. Evans, The Environment of Early Man in the British Isles 55 (1975).

(n2)Footnote 2. T. C. Darvill, Prehistoric Britain 28-38 (1987).

(n3)Footnote 3. It has also been suggested that the shift to a farming economy was at least partly indigenous. T. C. Darvill, Prehistoric Britain 48-49 (1987).

(n4)Footnote 4. Lloyd Laing & Jennifer Laing, The Origins of Britain 77-86 (1980); Richard Bradley, The Social Foundations of Prehistoric Britain 7 (1984). *See also* Francis Pryor, Farmers in Prehistoric Britain (1998).

(n5)Footnote 5. Lloyd Laing & Jennifer Laing, The Origins of Britain 80 (1980).

(n6)Footnote 6. T. C. Darvill, Prehistoric Britain 50-51 (1987).

(n7)Footnote 7. T. C. Darvill, Prehistoric Britain 53-54 (1987).

(n8)Footnote 8. T. C. Darvill, Prehistoric Britain 51 (1987); Peter G. Reynolds, Ancient Farming 38-44 (1987).

(n9)Footnote 9. I. H. Longworth, Prehistoric Britain 11 (1985). The beginning of heavy immigration by so-called Beaker people, about 2500 B.C., did not disturb this pattern; they apparently lived in widely scattered single houses. *See* James L. Forde-Johnston, Prehistoric Britain and Ireland 18, 36-38 (1976). The Beaker culture, however, may have consisted mostly of an infusion of artifacts.

(n10)Footnote 10. T. C. Darvill, Prehistoric Britain 57-63 (1987).

(n11)Footnote 11. Lloyd Laing & Jennifer Laing, The Origins of Britain 98-99 (1980).

(n12)Footnote 12. Richard Bradley, The Prehistoric Settlement of Britain 116 (1978); *see* Collin Bowen, *Pattern and Interpretation: A View of the Wessex Landscape from Neolithic to Roman Times*, in Recent Work in Rural Archaeology 44-55 (P. J. Fowler ed. 1975). *See also* Janet Bord & Colin Bord, Prehistoric Britain from The Air (1997).

(n13)Footnote 13. T. C. Darvill, Prehistoric Britain 108 (1987). In Wessex, the field systems described in the text are sometimes referred to as Celtic fields, even though they arose long before invasions of Celtic peoples commenced. Agriculture based on "small, rectangular "Celtic" fields ... is a striking feature of the Roman period...." P. Salway, Roman Britain 8 (1981).

(n14)Footnote 14. Richard Bradley, The Prehistoric Settlement of Britain 116-117 (1978).

(n15)Footnote 15. Susan Bowen, *Celtic Fields and Ranch Boundaries in Wessex*, *in* Susan Limbrey & John G. Evans, The Effect of Man on the Landscape: The Lowland Zone 115-121 (Council for British Archaeology Research Report No. 21, 1978).

(n16)Footnote 16. Some of the principal evidence for the waves of migration derives from the interpretation of "waves" of imported coins as representing movements of peoples. Obviously, such evidence reveals little about the motives or consequences connected with such migrations.

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CHAPTER 2 LANDHOLDING IN ANCIENT BRITAIN

1-2 Thompson on Real Property, Thomas Editions § 2.03

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§ 2.03 Patterns of Landholding Among the British Celts.

§ 2.03(a) The Rise of the Celts.

Archaeologists have identified various cultural traits of prehistoric peoples inhabiting Europe that gave rise to elements of Celtic culture, but the early culture that seems to be the direct ancestor of the Celts is known as the Urnfield culture. n17 After the collapse of Minoan and Mycenaean cultures and Aegean civilization generally around 1200 B.C., the so-called Urnfield culture arose in the area of modern Hungary and spread rapidly in all directions, eventually covering most of eastern and southern Europe. Some elements of Urnfield culture, best characterized as a Late Bronze Age culture, even appeared in areas of Spain, France, the Low Countries, and Britain. n18 Around 700 B.C., it is believed that Celtic peoples and the earliest phases of the European Iron Age emerged from the Urnfield culture; these Celtic peoples have been assigned a common identity because of shared language and cultural traits, but their political allegiances almost never extended beyond their individual tribes.

§ 2.03(b) Sequence of the Celtic Hallstatt and La Tene Cultures.

Discoveries and excavations of prehistoric Celtic communities at Lake Hallstatt in Austria, beginning in 1846, and at La Tene on the banks of Lake Neuchatel in Switzerland, beginning in 1858, have led to elaborate studies and theories of the progressive development of Celtic culture. Both sites have given their names as cultural labels for Celts. The earlier Hallstatt culture, which belongs to the Bronze Age, is assigned to the period 1100-700 B.C., while the later Hallstatt culture, an Iron Age culture, extended from the seventh century into the fifth century B.C. The La Tene culture began in the fifth century B.C., and continued until the Celts were expelled by Germanic tribes or overcome by the Romans at various times and places throughout Europe, but culminating with the Roman conquest of British Celts in the first century A.D.

§ 2.03(c) Theories on the Emergence of Iron Age Culture in Britain.

The traditional invasion hypothesis for Britain is that Celts of the Hallstatt culture invaded Britain beginning in the sixth century B.C., with heaviest settlement in the south and east. In the fourth and third centuries B.C., more aggressive Celts of the La Tene culture invaded the south, and clashes between these immigrants and the earlier Celtic settlers are thought to have stimulated much of the hillfort construction still so evident in England. A late La Tene culture was then

carried in by a third wave of Celtic invasion in the second and first centuries B.C., in the southeast of Britain. n19 These latest invaders were identified by Julius Caesar as of the Belgae tribe, n20 although evidence also exists for the presence of other tribes during this period. n21 This hypothesis accounts for the occurrence of La Tene characteristics in the south and east of Britain and of Hallstatt characteristics in the north and west.

The invasion hypothesis has been challenged by alternative explanations suggesting that the Iron Age culture traits were indigenous developments "immediately based on Bronze Age antecedents"; n22 moreover, the British hillfort tradition has been shown to predate the time assigned by the invasion hypothesis. The result of this archaeological debate has been to raise questions about whether the British Celts, who opposed Roman invasions in the first centuries B.C. and A.D., were relatively new arrivals or long-time settlers. From at least one perspective, that of language, the question is perhaps moot, because it is generally agreed that by the time of the Roman invasions, Celtic was the language spoken throughout Britain. n23

§ 2.03(d) Landholding Patterns in Britain During the Time of Celtic Domination.

Despite the common language, the peoples of Britain were at different stages in development of material culture at the time of the initial Roman invasions in the first century B.C. Inasmuch as British Celtic civilization of this time, whether Hallstatt or La Tene, can be generally characterized as of the Late Bronze Age, then the following description of landholding patterns is appropriate:

> Its people lived either in isolated farms or in hut-villages, situated for the most part on the gravel or river-banks or the light upland soils such as the chalk downs or oolite plateaux, which by that time had been to a great extent cleared of their native scrub; each settlement was surrounded by small fields, tilled either with a foot-plough of the type still used not long ago by Hebridean crofters, or else at best with a light ox-drawn plough which scratched the soil without turning the sod. Thus the land was inhabited by a stable and industrious peasant population, living by agriculture and the keeping of live stock, augmented no doubt by hunting and fishing... Judging by the absence of towns and the scarcity of anything like true fortification, these people were little organized for warfare, though there was certainly a distinction between rich and poor... n24

The pronounced variation in stages of cultural development at different locations throughout Britain may have meant little difference in landholding patterns, except to the extent that cultural development determined the form of social organization. This is because even the rudimentary information available today shows that differences in land settlement patterns seem to correspond to types of social organization, and, of course, to topography. n25 By 150 B.C., several distinct zones exhibiting different settlement patterns were in evidence in Britain. In the north, mostly homesteads surrounded by enclosures were to be found. The east and midlands were characterized by villages and open settlements. The southeast, south, and Welsh borderlands comprised the area dominated by hillforts and associated settlements. In Cornwall and west Wales were to be found strongly defended homesteads. n26 In certain areas, hillforts became very prominent in the political life of the people. Some of these became permanently occupied towns with pit dwellings; in general, they apparently arose in response to development of tribal organizations and tribal wars. n27

§ 2.03(e) Changes Introduced by the Belgic Celts.

Only with the invasion of the so-called Belgae tribe of Celts, in the decades before Julius Caesar arrived in Britain in the middle of the first century B.C., did the arrival of an intruder result in dramatic changes in land use patterns. Before invading Britain, the Belgae may have had significant contact with or even have become racially mixed with Germanic peoples on the mainland. In common with Germanic practice, the Belgic tribes had implements enabling them to work the heavier soils of woodland valleys and to thus spread out from the upland areas occupied by other Celts:

> Hence, for the first time in British history, the Belgae began to clear forests, and to exploit the heavier soils on which they grew; they covered the country with isolated farm-houses and stocked it with

> cattle; they settled in valleys and appropriated river-crossings ... they abandoned the hill-tops and built their towns in valley-sites which have been inhabited ever since... They also introduced into Britain a practice which we know to have been current among the early Germans: that of delimiting their territory by means of a continuous rampart or ditch. n28

§ 2.03(f) Landholding Patterns Inferred from Ancient Celtic Laws.

From such archaeological evidence it is difficult to discern the finer points of social organization and patterns of landholding. Indeed, the most reliable and detailed information seems to be that exhibited in written collections of Irish and Welsh laws, which collections date from several centuries later but are apparently of ancient origin. Such ancient laws of the Celts as are in our possession date from periods subsequent to the Roman occupation of Britain and depict a more elaborate social hierarchy than can be discerned for the pre-Roman period from archaeological evidence alone, but it is reasonable to believe that some similar social organization and laws existed in pre-Roman Celtic society.

These laws confirm that the tribe was the main unit of social organization among the Celts, that a tribe consisted of a number of related kinship groups or families, and that a family was typically composed of a man and wife or wives and up to four generations of direct descendants. A common variation of this family unit would be an expanded version, including the father and brothers of the family head, and two generations of the brothers' direct descendants. It is this expanded family group that typically shared inherited goods or participated in the paying of fines.

The ancient laws also reveal that land was held in common at the level of the kinship group, and was distributed for use among individual families. n29 If the kinship group was headed by a king, the king's power derived largely from the number of clients whose allegiance the king had secured. Clients were prominent members of the noble, warrior class. In return for the clients' loyalty and services, the king dispensed the use of property to the clients. More important clients could themselves have warriors of lesser social status as their own clients; a client was, in effect, a tenant farmer. n30

According to the laws, a client who was a freeman typically held numbers of livestock, certain essential farming implements and rights to certain grazing land. Under a contractual arrangement with the overlord for a definite period of time, usually set at seven years, the client rented stock from the overlord and, in return, rendered personal service in the overlord's household and paid a portion -- usually about one-third -- of his personal income in the form of finished goods. At the end of the rental period, the rented stock became the client's property and the client was free to enter into another contract with any overlord. n31

Clients who were lower on the social scale had less advantageous terms. Usually such clients performed field labor rather than personal household service, and they did not keep their stock at the end of the contract period. Furthermore, such clients each received at the outset of the contract a form of loan from the overlord, in the amount of a portion of the client's honor price, n32 but were seldom able to repay the loan at the end of the contract period; a form of serfdom developed as the inability to repay the loan left the client in more or less permanent bondage. n33

Other evidence also suggests that land was held in common by the tribe in Celtic areas. One tribe of Celts on the Iberian peninsula, the Vaccaei, are reported as having divided up the land among tribesmen each year and shared the harvest among the entire tribe. n34 Julius Caesar's writings did not mention the subject of land ownership among the Celts, and there is no evidence that such ownership in the chief was recognized in native Celtic custom. Only when the Romans imposed their more sophisticated legal system upon Celtic communities were tribal chieftains registered as the owners or at least the possessors of the land. n35

§ 2.03(g) Summary of Landholding Patterns Among the British Celts.

It appears that whether the British Celts lived in individual, isolated homesteads or in small village clusters, the farming

patterns were basically the same and had indeed been established among the indigenous inhabitants even before the time of Celtic domination. Where farming, rather than the keeping of herds and flocks, was practiced, the most common pattern was the cultivation of small, rectangular fields, marked off by low banks of earth or rocks or some similarly conspicuous boundary markers. Such land, and probably grazing land, too, was held by family groups, so that clusters of fields would have been worked by farmers connected through blood ties, and the rights to use these fields would quite likely have been passed on to kinship descendants. There is no evidence, however, that such land was alienable outside the family, so that it could have been sold, exchanged, or otherwise transferred to a stranger. n36 The property right of the occupants was apparently a *usufruct*, or use right only, in addition to limited inheritability. If, as may be inferred from sources on Celtic culture generally, the rights to land were ultimately held by the tribe as communal property, then alienability of land was a right resting with the tribe or with a kinship clan of the tribe. Property rights so held would have been quite consistent with landholding patterns among other cultures in similar stages of development. n37

FOOTNOTES:

(n1)Footnote 17. "With their vanity, their joy in eating and drinking and their precocity in the crafting of weapons and ornaments, the Urnfield people foreshadowed many of the qualities of their Celtic descendants. The Europe they inhabited was the one in which the Celts were soon to emerge." Duncan Norton-Taylor, The Celts 22 (1974).

(n2)Footnote 18. Barry W. Cunliffe, The Celtic World 15 (1979). *See also* Barry W. Cunliffe, The Ancient Celts (1997); Homer W. Sykes, Celtic Britain (1998).

(n3)Footnote 19. R. G. Collingwood & J. N. L. Myres, Roman Britain and the English Settlements 21-29 (2d ed. 1937).

(n4)Footnote 20. Julius Caesar, 12 De Bello Gallico (Moses Hadas trans. 1957).

(n5)Footnote 21. Peter Salway, Roman Britain 9-10 (1981).

(n6)Footnote 22. Peter Salway, Roman Britain 9-10 (1981). Neither migrations nor kinship relationships fully explain the cultural changes that occurred in Britain during the Later Pre-Roman Iron Age, which have too readily been dated by association with the movements of the Belgae.

(n7)Footnote 23. *See* Kenneth Hurlstone Jackson, Language and History in Early Britain 76 *et seq.* (1953). "The widespread occurrence of Celtic place-names in Romanized forms and the virtual absence of place-names obviously deriving from another language strongly support the hypothesis that by the time of the Roman conquest most of Britain was speaking Celtic." Peter Salway, Roman Britain 17 (1981).

> In language, all the various British tribes with whom the Romans came into contact, and probably all the inhabitants of the British Isles without exception, were by the beginning of the Roman period Celtic...
>
> It is not known when the Celtic language was introduced into Britain... One thing is clear: it was sufficiently early for pre-Celtic speech to have left no recognizable trace upon the British names of people or places which, from the time of Caesar onwards, Roman authors committed to writing.

R. G. Collingwood & J. N. L. Myres, Roman Britain and the English Settlements 18-19 (2d ed. 1937).

(n8)Footnote 24. R. G. Collingwood & J. N. L. Myres, Roman Britain and the English Settlements 20 (2d ed. 1937).

(n9)Footnote 25. "It is certain that a more detailed analysis of settlement types could define a clearer regional patterning and suggest more sensitive correlations with social organization than are possible at present." Martin Millett,

The Romanization of Britain: An Essay in Archaeological Interpretation 16 (1990).

(n10)Footnote 26. Barry W. Cunliffe, Iron Age Communities in Britain 332-335 (1978).

(n11)Footnote 27. R. G. Collingwood & J. N. L. Myres, Roman Britain and the English Settlements 23, 25 (2d ed. 1937).

(n12)Footnote 28. R. G. Collingwood & J. N. L. Myres, Roman Britain and the English Settlements 28 (2d ed. 1937).

(n13)Footnote 29. Barry W. Cunliffe, The Celtic World 49 (1979). *See also* New Directions in Archaeology: Celtic Chiefdom, Celtic State: The Evolution of Complex Social Systems in Prehistoric Europe (Bettina Arnold & D. Blair Gibson, eds. 1995); The Celtic World (Miranda J. Green, ed. 1995).

(n14)Footnote 30. Nora K. Chadwick, The Celts 116-117 (1970).

(n15)Footnote 31. Duncan Norton-Taylor, The Celts 70-73 (1974).

(n16)Footnote 32. The honor price was very similar to the Germanic wergild, the economic value attached to a person's life, based mostly on the person's social status. *See* Nora K. Chadwick, The Celts 117 (1970).

(n17)Footnote 33. Duncan Norton-Taylor, The Celts 72-73 (1974).

(n18)Footnote 34. Diodorus Siculus, 5:34.

(n19)Footnote 35. H. D. Rankin, Celts and The Classical World 130, 170 (1987).

(n20)Footnote 36. One emerging viewpoint among students of this topic is that the division of land by boundaries and the definition of settlements by ditched enclosures signify that "effective private control over land" had begun to be recognized even before the Roman conquest. *See* Martin Millett, The Romanization of Britain: An Essay in Archaeological Interpretation 96-97 (1990).

(n21)Footnote 37. *See supra* Chapter 1, *Property Concepts Among Primitive Cultures.*

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CHAPTER 2 LANDHOLDING IN ANCIENT BRITAIN

1-2 Thompson on Real Property, Thomas Editions § 2.04

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§ 2.04 Patterns of Landholding Among the Romano-Britons.

In describing how land was held in Britain before common law traditions began to develop, the period of Roman occupation presents an intriguing anomaly: despite almost four centuries of Roman domination in Britain and the sophistication of Roman property law, no lasting changes in British landholding practices occurred. This section will explain why that was so and also describe the profound distinctions between the rudimentary property customs of British Celts and the refined property law of their Roman overlords.

§ 2.04(a) Summary of the Roman Conquest and Occupation of Britain.

§ 2.04(a)(1) The Early Course of Conquest and Pacification.

Rome's interest in Britain as a potential province culminated in conquest only after many decades spent in resolving civil disorder in Rome itself. The first Roman move toward Britain occurred in the late summer of 55 B.C., n38 when Julius Caesar led two legions across the Channel in a somewhat abortive reconnaissance-in-force. Probably the main motive for this attack was to begin neutralizing Britain as a source of support for still rebellious Gauls. The legions fought only one major battle before a large part of the transport fleet was destroyed by stormy conditions while it lay at anchor. Thereafter, the Romans foraged and skirmished, using the time to repair the ships remaining afloat, and then returned across the Channel to Gaul as soon as possible.

Almost a year later, in the early summer of 54 B.C., Caesar again invaded, with a much larger force, and again lost part of his anchored fleet because of rough weather. After a sharp but brief campaign in the area between Dover and London, the Romans obtained submission of the Belgic Britons opposing them. Caesar and his legions, with many hostages and prisoners, returned to Gaul in September of that year, leaving heads of several British tribes nominally in fealty to Rome.

The subsequent civil disorders in Rome, including Caesar's assassination, the rule by the Triumvirate, and the ascension of Octavian as Augustus Caesar, are well documented and give adequate explanation for the failure of Roman forces to return to Britain for nearly a century. Finally, in A.D. 40, preparations for another invasion were made, and only at the point of embarkation from Boulogne was the project suddenly stopped, all under the direction of the unstable emperor Gaius, better known to modern readers as Caligula.

Shortly after the demise of Gaius and the ascension of Claudius as emperor in A.D. 43, a Roman expedition actually landed in Britain, at the site presently known as Richborough, and carried out a methodical campaign to reduce the resistance of the Britons. Following a Roman victory in a major battle at the crossing of the River Medway near Rochester, no substantial opposition was raised against their further advance:

> After advancing to the Thames, the legions halted to await the arrival of the emperor Claudius, who was making the six-week journey from Rome personally to participate in the now set-piece conquest of the native tribes. Undoubtedly, Plautius [the Roman military commander] made as many advance arrangements for peaceful tribal submission as possible. Crossing the Thames as soon as Claudius arrived, the army proceeded to Colchester, to which the Britons had retreated, and there Claudius received the submission of eleven tribes...
>
> Pursuing his policy of pacifying Britain through submission rather than conquest, Claudius set up several "client kings" to secure border areas: Cogidubnus at Chichester, Prasutagus in East Anglia, and shortly thereafter Cartimandua, queen of the Brigantes, who dominated a huge area of middle and northern Britain. After a sojourn of only sixteen days, Claudius returned to Rome... n39

Under the leadership of the future emperor Vespasian, other Roman forces swiftly overcame the hillfort-based resistance of tribes in the British southwest, including the Isle of Wight. These areas were also placed under the administrations of native leaders who promised loyalty to Rome. The ostensibly pacified area yielded by these early Roman triumphs in Britain included the territory to the south and east of a line from Exeter in the southwest to Lincoln and north to the River Humber. Whereas a process of Romanization in such pacified areas would normally have begun immediately after the conquest, this process was seriously impeded for two decades or more as Roman administrative blunders and insensitivities continued to incite revolt among the Britons. The most serious of these was the violent uprising led by Queen Boudicca in A.D. 60-61, the suppressing of which left much of southern Britain under some form of military rule until about A.D. 69.

On the frontier, intense military activity continued, with campaigns against Brigantes in the Midlands (A.D. 71-74), the Welsh in the West (A.D. 74-78), and the Caledonians in the North (A.D. 78-85). The northern limits of the Roman presence were never fully settled or stabilized, as best revealed by the construction of Hadrian's Wall, ca. A.D. 122-133, and of the Antonine Wall, beginning ca. A.D. 138, and by the several shifts of Roman defenses back and forth between those barriers.

§ 2.04(a)(2) The Beginnings of Romanization.

Even though the intensity of military activity varied from time to time and place to place in Roman Britain, inexorably the forces intended to Romanize the British Celts were set in motion:

> ... Rome's early approach to pacification was to leave loyal client rulers largely in charge, presumably prompting little initial change in social organization. Nevertheless, Roman life drew its essence from towns and town life, and the impulse to create and embellish urban centers in Britain is unmistakable. The economic base for urbanization consisted of developing trade and opening up markets for surplus goods. Although tribes beyond the Roman pale were not attuned to capitalism and production of surplus goods, it appears that some areas of southern and southeastern Britain rather quickly adapted to such urban Roman ways. The beginnings of the main towns [however] do not appear until near the end of the first century... n40

In his caustic commentary on Roman influence upon the Britons, Tacitus reveals some of the means used to further Romanization:

> In order that a population scattered and uncivilised, and proportionately ready for war, might be habituated by comfort to peace and quiet, he [Agricola] would exhort individuals, assist communities, to erect temples, market-places, houses: he praised the energetic, rebuked the indolent, and the rivalry for his compliments took the place of coercion. Moreover he began to train the sons of the chieftains in a liberal education, and to give a preference to the native talents of the Briton as against the plodding Gaul. As a result, the nation which used to reject the Latin language began to aspire to rhetoric: further, the wearing of [Roman] dress became a distinction, and the toga came into fashion, and little by little the Britons were seduced into alluring vices: to the lounge, the bath, the well-appointed dinner table. The simple "natives" gave the name of "culture" to this factor of their slavery. n41

An important element of Romanization was the settling of retiring legionary veterans in communities or "coloniae" of their own, and the founding of completely Romanized municipalities, with the special status of "municipia." Legionary "coloniae" were established at Colchester sometime before A.D. 60, and at Lincoln and Gloucester during the reign of Domitian, A.D. 81-96. The only known "municipium" was at Verulamium, near the modern St. Albans, north of London. n42

§ 2.04(a)(3) Early Changes in Landholding Practices Introduced by the Romans.

Implicit in the investiture of British tribal chiefs with administrative duties, and in the establishment of legionary colonies and a Roman municipality, were important changes in landholding practices in Britain. However, throughout the following discussion of those changes, and of Roman property law in effect during the period of Roman occupancy, it should be remembered that little is known about how extensively these changes were adopted in Britain. Most likely, the emergence of Roman property practices was confined to a few highly Romanized urban areas of Britain, and the old Celtic property arrangements in the vast majority of the countryside remained unchanged.

It has been previously shown in this chapter n43 that property ownership among the British Celts was probably communal in form, with ownership rights administered by the head of a tribe or other large kinship group. The individual farmers who were the actual occupants of the land probably held only a right to use the land and possibly to extend the use right to their descendants. The notion that the actual occupant of the land also had other ownership rights, such as the right to alienate, was probably unfamiliar to pre-Roman Britons. n44

These customs were probably interrupted first in the Colchester area, when the first colony of discharged legionaries was established. Ordinarily, the veterans would have been given parcels of land from territory that had belonged to and been forfeited by the now deposed native leader. On this occasion, however, the veterans forcibly took much additional land, dispossessing native farmers. Once in occupancy of such land, the soldiers were able, under Roman law, to exercise the full range of property rights pertaining to persons of their class of citizenship, which were much more extensive than the rights held by the native farmers.

Similarly, in the establishment of Verulamium as a Roman "municipium" with certain rights of self-government, property rights held by Roman citizens within this urban center would have been much more extensive than the property rights held by most Britons. In other tribal centers that the Romans turned into administrative centers, or "civitates," similar changes in property rights probably occurred. While it cannot be known whether comparisons of Roman and British property rights received much attention among the Britons, it can be assumed that the Roman presence alerted the native Britons to new ways of landholding. A summary of Roman property law in effect during the period of Roman occupation of Britain can help in understanding the changes in landholding patterns introduced by the Romans. n45

§ 2.04(b) The Impact of Roman Law on Britain.

The direct evidence for the presence of Roman law in Roman Britain is rather sparse. It consists of documentary references both to persons known to have been active in legal affairs and to legal procedures. From such evidence one

must make the best judgments possible about how deeply Roman law penetrated into the British populace, the classes of Romano-British society likely to have used or encountered Roman law, and Roman law's impact on Romano-British society as a whole.

Probably the original conquest of Britain during the reign of Claudius was formalized by a practice from republican times: the province was given a set of statutes, the *lex provinciae*. n46 The governor of the province assumed the office of legati Augusti and was directly accountable to the emperor, who was nominally and officially the governor or proconsul of all the frontier provinces. n47 As chief justice of his province, the governor headed the judicial service, heard legal petitions, and presided at trials, both in the capital and elsewhere in the province. He exercised primary jurisdiction in cases involving Roman citizens, capital punishment, condemnation to the mines or salt works, and amounts over a certain sum; his appellate jurisdiction extended to all other cases arising in the province. His judgment in cases between noncitizens was final.

Because the native noncitizens still lived under local laws to the extent they differed from Roman law, the governor's adjudicatory tasks were complicated by the variety of local Celtic laws that might be invoked in a legal controversy.

Extension of Roman influence and laws normally meant an increase of private litigation, and Roman legal terms have been found on tablets excavated in London, dating from the period of Roman territorial expansion late in the first century A.D. n48 Beginning with Vespasian's reign in A.D. 69, a special judicial officer, the *legatus iuridicus*, was sometimes appointed to assist the governor in legal matters. Six of these important legal officers in Britain are known, five by name. Two noted legal authorities among them were C. Salvius Liberalis Nonius Bassus, who was probably appointed during Agricola's governorship in A.D. 79, n49 and his successor L. Iavolenus Priscus. n50 The other *legati* were C. Sabucius Maior Caecilianus, who served during the reign of Marcus Aurelius, n51 M. Vettius Valens, n52 and M. Antius Crescens Calpurnianus, who served under Septimius Severus. n53 In addition, an anonymous *legatus iuridicus* in Britain set up an inscription celebrating one of Trajan's victories. n54

Only fragments of Romano-British litigation records have survived. A case described in Justinian's Digest tells of a slave-woman condemned to labor at the saltworks, but who was then kidnapped and later repurchased by her original owner, who sued the state to recover the purchase money. n55 In the Theodosian Code, one British case concerns tax revenues to be paid by decurions on behalf of their tenants. n56 Writing scratched on a wooden tablet found in the well of a Romano-British villa refers to the sale of real estate and uses Roman legal terms. n57

Other records are concerned with wills. In one case considered by the *legatus iuridicus* Iavolenus Priscus, the petitioner sought approval for an alternative disposition of property set in trust for a beneficiary who did not survive minority. n58 In another will case concerning the estate of a legionary who committed suicide, the decedent's will was held valid unless it could be shown that the suicide was to avoid punishment. n59 A will was usually written on tablets by someone with legal training. n60 It is not known how extensively British Celts practiced Roman law, but Juvenal refers to Gauls teaching to Britons the techniques of pleading. n61

Tacitus records Agricola's encouraging Britons to build courts of justice. n62 In one such court at York, the great Roman jurist Aemilius Papinian, who accompanied the emperor Septimius Severus to Britain in A.D. 208, administered justice while his emperor fought barbarian Picts and Scots on the British north border. n63

These fragmentary references to Roman law in Britain show that Roman law was perhaps an active factor in the lives of the Romano-British elite, but it is not known whether it had any impact at all on the large majority of the populace. n64

§ 2.04(c) Summary of Roman Land Law Concepts to A.D. 400. n65

Roman law accorded to land, as something tangible that could be perceived by the senses (*res corporalis*), the right to be possessed and owned. In the early stage of Roman legal development, ownership of land fell into two categories: the

land of Italy or land that enjoyed Italic rights (*res mancipi*), and all other land (*res nec mancipi*). The Italic lands could be transferred only by following certain formalities, whereas informal transfers sufficed for the other lands. Later, the distinction broke down and all transfers followed the less formal mode.

Also in the early stages of legal development, land in Italy was the only land that could be privately owned. All other land in the provinces was deemed the property of the people or -- at a later stage -- of the emperor, and concerning which a private party could obtain only certain use and possession rights, for which taxes were paid in return. Eventually, the rights associated with holding such provincial land became quite extensive, and included the rights to hold and enjoy the property, to transmit the holder's rights to heirs upon death, and to transfer possessory rights to others, along with protections for present possessory rights.

Although land could be transferred or acquired by several different methods, the usual method was by actual physical "delivery," which meant putting the transferee in possession and control of the property. In later stages of Roman legal development, delivery could be achieved symbolically, by delivery of a dirt clod or a brick for land or a building, or ownership could even be transferred merely by agreement, especially if actual possession did not change, as in a sale-leaseback arrangement. A form of adverse possession was recognized in permitting a good faith but mistaken possessor of land to acquire ownership of the land after two years of uninterrupted possession. Joint ownership and leaseholds were also recognized.

Land could also be burdened by servitudes. The earliest recognized servitudes included the right to cross the land of another with a right of way, for cattle, for a road, or for an aqueduct. Servitudes generally could not require affirmative action by the owner of the burdened land, but could prohibit certain activities on the burdened land or permit certain activities by the owner of the dominant land. Certain servitudes were recognized as attached to the land, and others were deemed personal, such as a right to make certain use of or take the fruits of the burdened land during one's lifetime.

Land could be used as security for a debt. At first, the debtor simply transferred ownership and possession to the creditor, and had to obtain a transfer back when the debt was paid. Later, transfer of possession without transfer of ownership was used as security. Finally, the land could be hypothecated: neither ownership nor possession was transferred to the creditor, but the creditor could satisfy the unpaid debt by taking over the pledged land.

§ 2.04(d) Extent of Roman Land Law Imposition on Celtic Britain.

§ 2.04(d)(1) Private Property in Towns.

Perhaps the most remarkable form of Roman influence on British landholding practices arose out of the practice of forming Roman provincial administrative centers, called "civitates," out of tribal centers. If the basic pattern established in other provinces was followed, the civitas was organized around a senate n66 controlled by the landowning class, which elected the council and magistrates. It is likely that several tribal areas would have been consolidated into the territory of one civitas, or that more than one civitas would have been formed in the area of a single tribe, each perhaps conforming to the area of a major clan within the tribe. Once the tribal aristocrats were stabilized in their power, prestige, and wealth, they were expected to contribute heavily to the construction and introduction of Roman municipal amenities:

> Power within the new structure brought its burdens. Municipal government was strongly paternalistic so some of the wealth controlled by the aristocracy was redistributed through private patronage and civic benefactions. n67

§ 2.04(d)(2) Villas and Farms in the Countryside.

The elite and leading members of the tribes obtained outright ownership of what had been tribal property. This enabled them to serve in public office, because of a property qualification imposed on those who would be public officials. The

construction of villas in the regions around the civitas also attests to the private property holdings of the native municipal leaders as well as of the Roman themselves. Archaeological evidence also shows, however, that many native farms alongside the villas continued to operate in the ways they had before the Roman invasion. n68 Indeed,

> The bulk of the countryside nevertheless still shows a strong continuity from the [Late Pre-Roman Iron Age], with even the major planned field systems of South Yorkshire and Nottinghamshire ... now shown to be Iron Age in origin and not the result of significant landscape alterations under Roman influence. n69

By the middle of the third century, economic conditions in the Roman empire had worsened to the point that the local aristocracy "became less and less willing to serve their communities and endow them with gifts and buildings." n70 Also in the later Roman period, it is possible to detect signs that landholdings were being consolidated, even among peasant farmers in the rural areas, possibly to accommodate multiple occupancy. n71

Another development in Romano-British landholding patterns revealed by archaeology is a form of dual residency in some of the villas. In these villas are found two or more self-contained residential units; possible interpretive explanations include a proprietor and heir maintaining an estate jointly, or two or more family members holding the power over the land, or a steward managing the estate during prolonged absences of the owner. n72 Other villas show structural forms which suggest housing for a single extended family, and thus a continuation of housing and social patterns from the pre-Roman era. n73

Even with all of this information, the housing patterns and social organization for the majority of the population, who did not live in stone villas, is unknown, although more work in this area is now underway. n74 With respect to rural settlements, it has been safer to assume that settlement patterns were more likely to remain unchanged from pre-Roman times in those areas where Romanization was least conspicuous. One writer has concluded:

> Roman manners and customs had less impact on the north and west of Britain... From Cornwall to Northumberland Romano-British hut clusters are found, with or without associated enclosures, singly or in groups, on open or defended sites...
>
> Throughout the north and west of England and Wales, round stone-built huts surrounded by oval, round or polygonal enclosure walls were a basic form for several centuries. These seem to be family settlements, single farms, but during the Roman period not only did their numbers multiply, but also homesteads which started as a single nucleus can be seen growing into hamlets or sizeable family settlements, made up of a series of such nuclear groups...
>
> Almost all of these upland homesteads and settlements were surrounded by walls or ditches, but these clearly had no military significance, being designed to keep cattle, sheep and children in, and thieves, wolves, and perhaps rodents out... n75

In the "coloniae," the towns for retired legionary veterans, land grants in place of cash gratuities were the rule, n76 especially if the settlement could be on sites of former military camps in the provinces. Roman soldiers often obtained Roman citizenship upon retirement from active duty, so undoubtedly a tradition of independent farmers was established early in the development of these communities. In the later stages of the Roman occupation, the agricultural landholding patterns of the areas surrounding the *coloniae* became indistinguishable from patterns in other nearby areas.

With the granting of universal Roman citizenship in A.D. 212, the possibility arises that resort to Roman law to determine property rights became more widespread. n77 Only one document relating to the sale of land from the period of Roman occupation of Britain has been found, and that document is based on Roman civil law. n78 As noted in the following paragraphs, however, no evidence has yet emerged to show that landholding patterns for most of Roman Britain differed from those that prevailed in the pre-Roman time.

§ 2.04(d)(3) Changes in Agricultural Landholding.

Agricultural organization and landholding patterns were not entirely unaffected by evolution within the Roman empire. As occurred elsewhere in the empire, the size of Romano-British landholdings increased, a result of the initial concession of private property rights to tribal leaders and the unprogressive system of Roman taxation, with its broad exemptions for the wealthiest landowners. Throughout the empire,

> This concentration of land led to the development of the colonate system, whereby a landowner ... whose estate was sufficiently large to need cultivation by others used tenants rather than slaves as labourers. These tenants (*coloni*) became tied to the land, and even to particular estates, both by custom and by the law, which required them to remain on the land for taxation purposes. The system developed into a form of heredity service which became *de facto* feudal, at least in provinces where, unlike Britain, there were severe pressures on agricultural production. n79

An entry in the Theodosian Code, dating from A.D. 319, n80 defining the tax liability of British landowners has been interpreted to indicate that the colonate system existed in Britain, n81 but there remains the possibility that some or even most of the peasant farmers remained free rather than under tenure. It is known that some *coloni* in Britain's tax jurisdiction were registered for taxation in their own villages rather than with the estates of other landowners, n82 which would indicate free rather than tenured status.

§ 2.04(e) Reversion to Celtic Tribalism in Britain after A.D. 400.

Whatever the impact of Roman property law and practice on landholding in Roman Britain, it seems to have been ground out of existence by the hard fighting against the Anglo-Saxons during the fifth and sixth centuries A.D. Concurrent with the breakdown of Roman authority in Britain at the end of the fourth century A.D. was the increase of hostilities from Germanic incursions along the south and east coasts and Pictish raids along the north border. It is now accepted that the protracted British resistance to these assaults, rather than accommodations such as were reached with the Franks in Gaul, led to the invaders destroying rather than subsuming and integrating Romano-British society. Abundant archaeological evidence attests that what was left of Romano-British society reverted rather swiftly to the old tribal ways of pre-Roman Celticism. n83 Indeed, this evidence shows that, as cities and towns declined, many Celtic Iron Age hillforts were renovated; Celtic warlords returned to the hills to occupy those defended sites that had been abandoned when the Romans conquered Britain.

The death throes of Roman civilization were wrenching and poignant throughout the empire, and Britain did not escape the anguish, aptly described by Collingwood and Myres:

> From 455, ... we hear of no more cultural and spiritual contacts between Britain and the Mediterranean world. The culture of the romanized upper classes has sunk into discredit and fades away, now that its owners have confessed their inability to control the political situation, and abdicated in favour of what today would be called a dictatorship. Roman Britain is now rapidly dying, and we are reaching the "sub-Roman" period when men lived on the relics of Romanity diluted in a pervading medium of Celticism.
>
> Thus from the middle of the [fifth] century onwards, the general tone of Romano-British society became more and more barbarized. As the Saxon settlements grew in strength, the Roman civilization of the lowland zone was declining into a Celto-Roman civilization where Celtic elements were more and more prevailing over Roman. Latin must have been less and less used. Rome was becoming a memory. n84

Archaeology further suggests that an almost complete interruption, or discontinuity, between Romano-Britons and Anglo-Saxons occurred among the landowning elite. No villa has yet been investigated that continued to be occupied

into Saxon times. n85 Yet it is possible that, with the replacement of one elite by another, the life of the rural peasant did carry on much as before, "that many Romano-British peasants remained to become Anglo-Saxon peasants." n86

FOOTNOTES:

(n1)Footnote 38. The outline of the Roman military campaigns in Britain is drawn in part from the fuller accounts found in R. G. Collingwood & J. N. L. Myres, Roman Britain and the English Settlements 32-119 (2d ed. 1937), and sources cited therein. The only ancient account of the conquest under the emperor Claudius is in Cassius Dio, Historia Romana. Other helpful modern discussions of the campaigns are found in Sheppard Sunderland Frere, Britannia (3d ed. 1987); John Peddie, Invasion: The Roman Conquest of Britain (1987); Peter Salway, Roman Britain (1981); Malcolm Todd, Roman Britain (1981); Graham Webster, The Roman Invasion of Britain (1980); H. H. Scullard, Roman Britain: Outpost of The Empire (1978); John Wacher, Roman Britain (1978); and Joan Liversidge, Britain In The Roman Empire (1968). *See also* John Peddie, Conquest: Roman Invasion of Britain (1997); D.C.A. Shotter, Roman Britain (1998); John Wacher, Roman Britain (1998).

(n2)Footnote 39. David A. Thomas, *The Disappearance of Roman Law from Dark Age Britain, 1984 B.Y.U. L. Rev. 563, 566-567.*

(n3)Footnote 40. *Id. at 579-580.*

(n4)Footnote 41. Cornelius Tacitus, The Life of Julius Agricola 21 (Loeb ed. 1963).

(n5)Footnote 42. At the beginning of the occupation, Rome claimed much of the land for the emperor. It is likely that these confiscated lands became part of *ihe patrimonium Caesaris*, or later of the *resprivata*. Scholars assume the lands became imperial estates which were either farmed by slave labor or created into tenancies supervised by an imperial procurator. For instance, much of East Anglia was likely confiscated after the Boudican Revolt forming a large imperial estate. *See* Birley, Anthony Richard. *Life in Roman Britain* (London: B. T. Batsford, 1964) 79-80; Birley, Anthony. *The People of Roman Britain* (BT Batsford: London 1979) 137-38; Faulkner, Neil. *The Decline and Fall of Roman Britain* (Tempus 2001) 56-57.

(n6)Footnote 43. *See supra* § 2.03(g).

(n7)Footnote 44. One emerging theory is that the Britons may have been moving to some forms of private land ownership even before the Roman conquest: It is more likely that effective private control over land had begun to emerge well before the conquest with the division of land by boundaries and the definition of settlements by ditched enclosures. Villas may not have been possible without the existence of private property, but this probably existed before villas emerged. Martin Millett, The Romanization of Britain: An Essay in Archaeological Interpretation 96-97 (1990).

(n8)Footnote 45. Successive landholding patterns apparently emerged among the ancient British Celts. First, entire clans, typically an extended family including up to four generations, would occupy and claim land. There was no concept of absolute ownership of land, which included concepts of alienation. The ruler of the community would divide all land into usable individual portions as well as sections which provided for the cornmunity-at-large and the disabled and aged. The clan as a whole had an interest in any proceeds of the land. The male members of this "clan" would retain their interest in the land following the death of any of its members. While some data is lacking, it seems that clan-chiefs or tribal leaders did not hold lands on behalf of the clan; the land was "owned" by the entire community. But with the Roman-occupation, Celtic lands began to be characterized as in the tribal chiefs' possession. A system developed which was less akin to free property ownership and more like an aristocracy, tenant-farmer, or servile tenant relationship. The aristocracy covenanted with its tenants; in exchange for protecting their dependants, the lords could expect an ample supply of livestock and produce. *See* Arnold, Bettina and D. Blair Gibson. *Celtic Chiefdom, Celtic State* (Cambridge University Press: 1995) 130-133; Audouze, Francoise and Olivier Buchsenschtitz, trans, by Henry Cleere. *Towns, Villages, and Countryside of Celtic Europe- from the Beginning of the Second Millennium to the End of the First Century BC* (Indiana University Press 1992) 171-175; Ellis, Peter Berresford. *Caesar's Invasion of Britain* (New York

University Press: 1978) 26-27; Green, Miranda J., ed. *The Celtic World* (Routledge, N.Y.: 1995) 89,169; Hubert, Henri, trans, by M.R. Dobie. *Celtes Depuis I'epoque de la Tene et la Civilisation Celtique*. (*The Greatness and Decline of the Celts*) (London: Constable 1987) 211-216; James, Simon. *The World of the Celts* (Thames & Hudson: London 1993) 70; Powell, T.G.E. *The Celts* (Thames & Hudson: London 1959) 76; Rankin, H.D. *Celts and the Classical World* (Areopagitica Press: 1987) 130, 133,170.

(n9)Footnote 46. *See* Peter Salway, Roman Britain 87 (1981). There is no conclusive evidence that the imposition of *lex provinciae* on stabilized provinces continued on into imperial times. *See also* Peter Salway, A History of Roman Britain (1997).

(n10)Footnote 47. The arrangement pertained to the "imperial" provinces under the direct charge of the emperor, but not to the "senatorial" provinces left to the supervision of the Senate.

(n11)Footnote 48. Sheppard Sunderland Frere, Britannia: A History of Roman Britain 184 (3d. ed. 1987).

(n12)Footnote 49. Inscriptiones Latinae Selectae, No. 1011 (Hermann Dessau ed. 1962).

(n13)Footnote 50. *Id.* No. 1015. Priscus later became a highly respected teacher and head of one of the two principal schools of Roman jurisprudence.

(n14)Footnote 51. *Id.* No. 1123.

(n15)Footnote 52. Corpus Inscriptionum Latinarum, No. 11.383 (Eugen Bormann ed. 1888). Valens was also appointed patron of the province, a post associated with the province council and an honor of high distinction.

(n16)Footnote 53. Inscriptiones Latinae Selectae, No. 1151 (Hermann Dessau ed. 1962). Calpurnianus was briefly in charge of all provincial affairs during one of the governor's absences.

(n17)Footnote 54. 1 R. G. Collingwood & R. P. Wright, The Roman Inscriptions of Britain Items 627, 1337, at 210, 442 (1965).

(n18)Footnote 55. Digesta Iustiniana 49.15.6, *translated and reprinted in* IX S. Scott, Corpus Juris Civilis The Civil Law (1973).

(n19)Footnote 56. The Theodosian Code 11.7.2 (Clyde Pharr trans. 1952), dated November 20, A.D. 319. *See* C. E. Stevens, *A Possible Conflict of Laws in Roman Britain,* 37 J. Roman Stud. 132-134 (1947).

(n20)Footnote 57. *See* Eric G. Turner, *A Roman Writing Tablet from Somerset, 46* J. Roman Stud. 115-118 (1956).

(n21)Footnote 58. Digesta Iustiniana 36.1.48, *translated and reprinted in* IX Samuel P. Scott, Corpus Juris Civilis The Civil Law (1973).

(n22)Footnote 59. Digesta Iustiniana at 28.3.6.7, 28.6.2.4.

(n23)Footnote 60. Romano-British examples are discussed in Joan Liversidge, Britain in the Roman Empire 304 (1968).

(n24)Footnote 61. Juvenal, Satires 15.111-15.112 (Rolfe Humphries trans. 1958).

(n25)Footnote 62. Cornelius Tacitus, The Life of Julius Agricola 21 (Loeb ed. 1963).

(n26)Footnote 63. IX Dio's Roman History 76.14 (Loeb ed. 1927). Papinian was at the time praetorian prefect, the

officer with general jurisdiction over all civil and criminal cases in the empire outside of Rome itself. One rescript (a written statement of the Roman emperor on a question of law) of British origin survives from this time, dated May 5, A.D. 210, and is discussed in Eric Birley, Roman Britain and the Roman Army 52 (1953).

(n27)Footnote 64. Most important historians of English law believe that early Anglo-Saxon legal customs and laws were not affected in any discernible or significant way by contemporary Roman law. *See, e.g.,* John Hamilton Baker, An Introduction to English Legal History 2 (2d Ed. 1979); 2 William Searle Holdsworth, A History of English Law 1214 (4th Ed. 1936); 1 Frederick Pollock & Frederic William Maitland, The History of English Law Before the Time of Edward I xxxixxxii (2d Ed. 1909); John Selden, Ad Fletam Dissertatio 103105 (David Ogg Trans. 1647 Reprint 1925); William Stubbs, The Constitutional History of England 5864 (2d Ed. 1875); Paul Vinogradoff, The Growth of the Manor 119120 (3d ed. 1920); William Francis Walsh, A History of Anglo-American Law 12 (2d ed. 1932); Robert Warden Lee, *The Interaction of Roman and Anglo-Saxon Law*, 61 S. Afr. L.J. 155, 158 (1944); W. Senior, *Roman Law in England Before Vacarius, 46 Law Q. Rev. 191, 192 (1930).* However, several writers have argued the other point of view, albeit with little evidence or persuasiveness. *See, e.g.,* Fustel De Coulanges, The Origin of Property in Land xxivxxxiii (William James Ashley trans. 2d ed. 1927); John Earle, A Hand-Book to the Land-Charters, and Other Saxonic Documents lixlxii (1888); 1 William Francis Finlason, Reeves History of the English Law xxxciii (1880) (Reeves himself did not accept the continuity theory); John Reeves, History of the English Law 23 (2d ed. 1787); Percy Henry Winfield, The Chief Sources of English Legal History 54-55 (1925) (doubting that Dark Age Britain escaped the influence of Roman law, but admitting that there is no "satisfactory evidence of any very appreciable or lasting transmission."); Edward D. Re, *The Roman Contribution to the Common Law, 29 Fordham L. Rev. 447, 455-460 (1961).* Re's statements favoring continuity in early Anglo-Saxon times, mostly conclusory or based on incorrectly analyzed sources, were renewed and reiterated in Edward D. Re, *The Roman Contribution to the Common Law, 39 Loy. L. Rev. 295 (1993).*

(n28)Footnote 65. While there is no dearth of written descriptions of Roman law, writings that organize and summarize the points of Roman law on particular subjects are not so abundant. The discussion in this section is drawn from two sources that are appropriate for the degree of detail provided in this section: Paul Van Warmelo, An Introduction to the Principles of Roman Civil Law 61-120 (1976); and Alan Watson, The Law of the Ancient Romans 49-57 (1970).

(n29)Footnote 66. Such a regional senate traditionally consisted of 100 members, but it cannot be determined how consistently this practice was followed in Britain. Frank Frost Abbott & Allan Chester Johnson, Municipal Administration in the Roman Empire (1926).

(n30)Footnote 67. Martin Millett, The Romanization of Britain: An Essay in Archaeological Interpretation 66 (1990). *See also* John Wacher, Towns of Roman Britain (1997).

(n31)Footnote 68. Martin Millett, The Romanization of Britain: An Essay in Archaeological Interpretation 92-93, 96-98 (1990).

(n32)Footnote 69. Martin Millett, The Romanization of Britain: An Essay in Archaeological Interpretation 120 (1990) (citing *New Approaches to Ancient Fields,* in Prehistoric Communities in Northern England 105-118 (Graeme Barker ed. 1981); D. N. Riley, Early Landscape from the Air (1980)).

(n33)Footnote 70. *The Burden of Roman Grandeur: Aspects of Public Building in the Cities of Asia and Achaea,* in The Roman West in the Third Century 189-198 (Anthony King & Martin Henog eds. 1981).

(n34)Footnote 71. J. T. Smith, *Villas as a Key to Social Structure,* in Studies in the Romano-British Villa 149, 170 (Malcolm Todd ed. 1978). *See also* J. T. Smith, Roman Villas: A Study in Social Structure (1997); David Keys, The Independent Archive: Roman "Villas" May Have Been Religious Centres, The Independent, 22 September 1998, p. *7.*

(n35)Footnote 72. Martin Millett, The Romanization of Britain: An Essay in Archaeological Interpretation 198-199

(1990); J. T. Smith, *Villas as a Key to Social Structure,* in Studies in the Romano-British Villa 149, 170 (Malcolm Todd ed. 1978).

(n36)Footnote 73. *See, e.g.,* John Hadman, *Aisled Buildings in Roman Britain,* in Studies in the Romano-British Villa 187-195 (Malcolm Todd ed. 1978).

(n37)Footnote 74. *See, e.g.,* Richard Hingley, Rural Settlement in Roman Britain 1-12 (1989).

(n38)Footnote 75. Brian K. Roberts, Rural Settlement in Britain 50-51 (1977).

(n39)Footnote 76. G. R. Watson, The Roman Soldier 147-148 (1969).

(n40)Footnote 77. For the view that local Celtic law remained very widespread even after the grant of universal citizenship, see A.L.F. Rivet, *Social and Economic Aspects,* in The Roman Villa in Britain 173-216 (A.L.F. Rivet ed. 1969).

(n41)Footnote 78. Eric G. Turner, *A Writing Tablet from Somerset,* 46 J. Roman Stud. 115-118 (1956).

(n42)Footnote 79. Martin Millett, The Romanization of Britain: An Essay in Archaeological Interpretation 203 (1990); *see* A. H. M. Jones, The Later Roman Empire A.D. 284-602: A Social, Economic and Administrative Survey 769-808 (2d ed. 1973).

(n43)Footnote 80. Theodosian Code 11.7.2 (Clyde. Pharr trans. 1952) dated November 20, A.D. 319.

(n44)Footnote 81. F. Haverfield, The Romanization of Roman Britain 45 (1912).

(n45)Footnote 82. A. H. M. Jones, The Later Roman Empire Ad 284-602: A Social, Economic and Administrative Survey 797 (2d ed. 1973). *See also* K. R. Dark, External Contacts & The Economy of Late-Roman & Post-Roman Britain (1996).

(n46)Footnote 83. *See* David A. Thomas, *The Disappearance of Roman Law from Dark Age Britain, 1984 B.Y.U. L. Rev. 563, 590-595. See* Nicholas Higham, Rome, Britain and the Anglo-Saxons 263 (1992).

(n47)Footnote 84. R. G. Collingwood & J. N. L. Myres, Roman Britain and the English Settlements 315-316 (2d ed. 1937). Roman law was remembered "with loathing as an instrument of oppression, a burden and a yoke." Michael E. Jones, The End of Roman Britain 142-143 (1996).

(n48)Footnote 85. R. G. Collingwood & J. N. L. Myres, Roman Britain and the English Settlements 317 (2d ed. 1937).

(n49)Footnote 86. Martin Millett, The Romanization of Britain: An Essay in Archaeological Interpretation 224 (1990). *See also* Lapidge, The Blackwell Encyclopedia of Anglo-Saxon England (1998).

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CHAPTER 2 LANDHOLDING IN ANCIENT BRITAIN

1-2 Thompson on Real Property, Thomas Editions § 2.05

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§ 2.05 Modern Vestiges of Ancient Landholding Patterns.

Strewn all over England and Wales are ghostly remains of the land's prehistoric and Romano-British past. Ceremonial sites at Stonehenge and Avebury, the West Kennet long barrow, the White Horse at Uffington, the Maiden Castle hillfort, the isolated legionary camps on wild Welsh hilltops, the baths at Bath, the theater at St. Alban's Verulamium, the deserted brick warehouse at Roman Wroxeter, the Saxon Shore forts, the villas at Chichester, Hadrian's Wall, and a thousand other sites, all bespeak centuries and millennia of human habitation. None of it, however, seems to have had much overt impact on the attitudes and lifestyles of today.

As to the land itself, and the numberless anonymous generations who have lifted their livelihood from it, even fewer reminders of the past catch the eye. Perhaps the so-called "Celtic fields" -- actually a field system pre-dating the Celts -- of Smacam Down, Cerne Abbas, and Dorset, will suffice as a reminder. Here one may find the little, rectangular fields formed up like so many ranks and files in a grid, still lined by low earthen borders, linear lumps under modern fields. These ancient field formations remind us that, then as now, land was important enough to be the substance of someone's individual stewardship, and that well-regulated relations among landholders will yield the maximum value from the land.

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§ 2.06 Bibliography.

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CHAPTER 3 PROPERTY RIGHTS IN ANGLO-SAXON ENGLAND

1-3 Thompson on Real Property, Thomas Editions 3.syn

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§ 3.syn Synopsis to Chapter 3: PROPERTY RIGHTS IN ANGLO-SAXON ENGLAND

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CHAPTER 3 PROPERTY RIGHTS IN ANGLO-SAXON ENGLAND

1-3 Thompson on Real Property, Thomas Editions § 3.01

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§ 3.01 Introduction.

When William the Conqueror felt secure in his sovereignty over Anglo-Saxon England, he issued a decree assuring the English people that their English property rights remained essentially intact. "This also I command and will, that all shall have and hold the law of King Edward in respect of their lands and all their possessions, with the addition of those decrees I have ordained for the welfare of the English people." n1

During the subsequent reigns of Norman and Angevin monarchs, many profound changes in the property law of England took place, but it was all on a foundation of the property rights developed during the period of Anglo-Saxon hegemony in England from the 5th to the 11th centuries A.D. It is therefore instructive to consider how Anglo-Saxon property law developed and what factors in society influenced the emphasis of certain rights over others. To some extent these priorities remain imbedded in the Anglo-American common law of property.

One function of this chapter is to trace, as fully as possible, the transformation of Anglo-Saxon property rights from the purely Germanic legal customs of the invasion period to the rather complex arrangements that formed the foundation of the common law of property. To this end, the chapter describes the available information about the continental origins and legal customs of the Anglo-Saxons, the changes in their social organization that occurred following their invasion and settlement of large parts of Britain, the rise of law and legal institutions during six centuries of Anglo-Saxon dominance, the impact of Viking invasions and settlement, and the emergence of early forms of feudalism in late Anglo-Saxon times.

FOOTNOTES:
(n1)Footnote 1. *"The Laws of William the Conqueror*," in 2 English Historical Documents 399-400 (David C. Douglas ed. 1953). The King Edward referred to was the so-called "Confessor," acknowledged by William as the last legitimate Anglo-Saxon king of England.

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CHAPTER 3 PROPERTY RIGHTS IN ANGLO-SAXON ENGLAND

1-3 Thompson on Real Property, Thomas Editions § 3.02

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§ 3.02 Origins of the Anglo-Saxons.

§ 3.02(a) The Traditional Origins Reported by Bede.

Much uncertainty still prevails about the identities and origins of the earliest peoples to inhabit the areas of modern Denmark and north Germany that were the homelands of Britain's 5th century invaders. n2 It is generally believed that Germanic peoples moved southward from Scandinavia into central Europe and in time displaced Celtic tribes that had previously moved into what is now middle and western Germany. By the time the various Germanic peoples had largely subdued or displaced the continental Celts in the 3rd century, B.C., they were arranged in three main tribal groups: (1) the northern tribes eventually became the Norse, Danes and Swedes; (2) the eastern tribes occupied lands between the Oder and Vistula rivers and would become known as Goths, Vandals, Burgundians and Lombards; and (3) the western tribes were found in areas now known as the Jutland peninsula, Schleswig-Holstein, north central Germany and the Rhine valley. The Germanic invaders of Britain would have been members of the western group of tribes.

Some of the western tribes came into armed conflict with Roman forces working their way along the Rhine in the late 2nd century B.C., and Roman influence along the left, or west, bank of the Rhine became pronounced after the pacification of Gaul about 51 B.C. Nevertheless, many of the western tribes had little or no contact with the Romans throughout the period of Roman hegemony. The tribes that invaded Britain are among those tribes that seem to have accepted no Roman influence into their way of life.

The traditional identification of Britain's invaders as Angles, Saxons and Jutes rests mostly on the writings of Bede in the early 8th century A.D. n3 Cloistered in a north English monastery, and dependent on visiting wayfarers for much information about ancient and distant occurrences, Bede's account still reflects the beliefs that prevailed at his time. He reported that the Anglo-Saxons actually consisted of three principal tribes, the Jutes from the Jutland n4 peninsula (modern Denmark and north Germany), the Angles from modern Schleswig-Holstein north of Hamburg, Germany, and the Saxons from the area south of the Angles. More modern archaeological research injected doubt into this account, because substantial evidence of other Germanic tribes was found in British sites of the invasion era, notably of the Frisians and Franks, and the Jutes remained a mysterious people, not subject to positive identification either in England or on the continent.

Currently, Bede's description has regained credibility, although the distinctions between the invading tribes are considered more blurred:

> The most plausible current reconciliation of all the evidence suggests that: (1) the Jutes, though obscure, were a distinct tribe inhabiting part of the Jutland peninsula; (2) by the fifth century A.D. the populous and mobile north German tribes may have undergone considerable intermixing, so that artifacts of other tribes, such as Frisians and Franks, would be among those of the Anglo-Saxons; (3) Angles, Saxons, and Jutes embarking for Britain would have moved down the Frisian coastline, perhaps with lengthy periods of settlement among both the Frisians and Franks, and would have brought with them objects that archaeologists would later identify as Frisian and Frankish; (4) in any event, some Frisians and Franks probably settled in Britain along with the other tribes. n5

Probably the most telling evidence in support of this traditional thesis is the strong stylistic correlations between artifacts, such as brooches and pottery, found in the invaders' continental homelands and first areas of settlement. n6

§ 3.02(b) Ancient Literary References to the Anglo-Saxon Tribes.

The first ancient writer to mention the Germanic tribes was Pytheas of Massilia (or Marseilles), who visited Britain and the coast of the North Sea in the 3rd or 4th century B.C. n7 During the Gallic wars in the 1st century B.C., Julius Caesar had contact with the Germans and provided some written description. n8 Written in the 2nd century A.D., Claudius Ptolemy's Geography mentions Angles and Frisians briefly, and provides some description of the Saxons. n9 Procopius, a Byzantine historian writing in the 6th century, also briefly refers to the Frisians. n10 The fullest account of Germanic culture as it existed in the 1st century A.D., is found in the writings of Cornelius Tacitus. n11

Tacitus mentions only one of the invading peoples, the Angles, which he describes as one of seven small tribes who worshipped the goddess Nertha at an island sanctuary near their North Sea or Baltic Sea coastline. n12 Probably this obscure tribe is therefore included in the general descriptions of Germanic customs and culture given by Tacitus. Because Tacitus was writing nearly four centuries before the invasions of Britain took place, it is possible that such a small tribe could have become more prominent and powerful in the ensuing centuries.

FOOTNOTES:

(n1)Footnote 2. For a summary of the various theories, *see* David A. Thomas, *"Anglo-Saxon Antecedents of the Common Law," 1985 B.Y.U. L. Rev. 453, 455-456.*

(n2)Footnote 3. Bede, Historia Ecclesiastica Gentis Anglorum i.15.

(n3)Footnote 4. Some scholars maintain that the names for the tribe of Jutes and for the Jutland peninsula are of different origin. D. J. V. Fisher, The Anglo-Saxon Age c. 400-1042, 25-27 (1973).

(n4)Footnote 5. David A. Thomas, *Anglo-Saxon Antecedents of the Common Law, 1985 B.Y.U. L. Rev. 453, 457. See* James Campbell, *"The Lost Centuries: 400-600,"* in The Anglo-Saxons 30-31 (James Campbell ed., 1982); D. P. Kirby, The Making of Early England 27-28 (1967); F. M. Stenton, Anglo-Saxon England 5-8, 56 (1943). The most recent authoritative statement of the modern accuracy and equivalencies of Bede's descriptions of Anglo-Saxon continental origins is by J. N. L. Myres:

> [Bede] goes on to locate the continental Saxons in the lands known in his day as those still inhabited by the Old Saxons, the Angles in a region known to him as Angulus which had been left empty by their migration, and the Jutes in a less well defined area situated somewhere beyond the Angles ...
>
> In deriving the Saxons from the districts occupied in his time by the Old Saxons, Bede is certainly pointing to the coastlands between the Elbe and the Weser valleys ... By Angulus, the region that lay

> between the Saxons and the Jutes, Bede certainly meant Schleswig, where the name is still found on modern maps as the district of Angeln. There has been much difference of opinion over the location of Bede's Jutes. But if, as he implies, they lay somewhere beyond the Angles, he must have thought of them either to the north of Schleswig, in Jutland, or to the east in modern Holstein, where again there is a suggestive district name, Eutin, which may indicate the home of some part of the tribe at one time. J. N. L. Myres, The English Settlements 46-47 (1986).

See also N.J. Higham, An English Empire: Bede and the Early Anglo-Saxon Kings (1995).

(n5)Footnote 6. J. N. L. Myres, The English Settlements 56-73 (1986). *See also* C.J. Arnold, An Archaeology of the Early Anglo-Saxon Kingdoms 190-191 (new ed. 1997) (concurring with the notion of ethnic blurring after arrival in England, but showing how some distinction may be made among ethnic groups by clothing styles as evidenced by burial sites).

(n6)Footnote 7. Pytheas was a navigator and also the author of a geography treatise, which is now lost. He is believed to have flourished sometime before 285 B.C. References to his work appear in the writings of the Greek geographer and traveler Strabo, who wrote during the last half of the first century B.C. *See* 8 The Geography of Strabo 453 (Loeb ed. 1939) (H. Jones trans.) (translator's description); 1 *id.* at 1.4.2-.3, 2.4.1-.2, 2.5.8 (Loeb ed. 1939); 2 *id.* at 4.2.1, 4.5.4 (Loeb ed. 1949).

(n7)Footnote 8. Julius Caesar, De Bello Gallico 4.1-.3; 6.21-.24 (M. Hadas trans. 1957).

(n8)Footnote 9. Claudius Ptolemy, Geography II.xi.7.

(n9)Footnote 10. Procopius, The Gothic War 4.20.7.

(n10)Footnote 11. Cornelius Tacitus, The Agricola and Germany of Tacitus (A. Church & W. Brodribb trans. 1885).

(n11)Footnote 12. *Id.* ch. 40.

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CHAPTER 3 PROPERTY RIGHTS IN ANGLO-SAXON ENGLAND

1-3 Thompson on Real Property, Thomas Editions § 3.03

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§ 3.03 Germanic Legal Customs Relating to Property.

§ 3.03(a) Observations by Ancient Writers.

The only written descriptions of Germanic social and legal customs from ancient times are from Julius Caesar in the 1st century B.C., Tacitus in the 1st century A.D., and from some collections of Germanic laws dating from about five centuries or more later. The half millennium in between is truly the dark age of Germanic law.

In connection with his military campaigns in western Europe during the middle of the 1st century B.C., Julius Caesar recorded a few observations about the Germanic tribes he encountered, including comments on their customs regarding property. The Germanic people appeared to rely mostly on flocks and herds as their form of wealth. They held their flocks and herds privately, while their land was held in communal ownership. Differences in wealth between individual German families were not large, and growth in such differences was inhibited by the practice of annually reallocating parcels of land to different kindreds or clan. n13

By the time Tacitus wrote in the late 1st century A.D., some changes in Germanic land customs had occurred, or else the particular tribes he described followed different customs. n14 He thus commented on landholding:

> Land proportioned to the number of inhabitants is occupied by the whole community in turn, and afterwards divided among them according to rank. A wide expanse of plains makes the partition easy. They till fresh fields every year, and they have still more land than enough; with the richness and extent of their soil, they do not laboriously exert themselves in planting orchards, inclosing meadows, and watering gardens. n15

According to Tacitus, therefore, the amounts and locations of land distributions were influenced by social standing, and were made to individual persons rather than to kindred groups. Wealth disparities thus widened as certain persons were able to accumulate wealth faster. It has been hypothesized that this change occurred after the Germanic tribes had been exposed to Roman goods and the Roman monetary system, which stimulated their desire for private property; the land allocation system was then modified to favor private holdings and production. n16 Tacitus also noted an abundance of arable land, an observation at odds with modern theories that Germanic migrations were prompted, at least in part, by population pressures.

Within this regime of land regulation, it does not appear that any system of estates in land was recognized.

Succession to ownership of personal property was also the subject of Germanic legal custom, according to Tacitus:

> [E]very man's own children are his heirs and successors, and there are no wills. Should there be no issue, the next in succession to the property are his brothers and his uncles on either side. The more relatives he has, the more numerous his connections, the more honoured is his old age; nor are there any advantages in childlessness. n17

The Germanic social characteristics mentioned by Tacitus are relevant in a general way to the eventual recognition of private property rights and may be summarized as follows:

a) tribal organization based on kinship relationships;

b) governance by both kings (or perhaps chieftains) and councils; chiefs elected by councils and responsible for administering law in the settlements;

c) blood feuds and composition by payments of fines;

d) requirements that fines or penalties be paid to the king as well as to the victim's family;

e) heavy powers of family regulation held by the husband;

f) laws or legal customs governing succession in ownership of personal property; and

g) regulated land holding, although probably no system of estates in land.

§ 3.03(b) Germanic Property Rights in the "Barbarian Laws."

Aside from the observations recorded by ancient observers of Germanic peoples, the only other literary evidence on how Germanic peoples perceived property rights is in the so-called "Barbarian Laws."

As the Roman Empire disintegrated and surrendered its western provinces to Germanic invaders, an official collection of imperial statutes gathered under Theodosius II, the Theodosian Code, was issued by consent of the emperor Valentinian III in A.D. 438. This code seems to have influenced various continental Germanic rulers who issued their own law codes in the decades that followed. These collections of laws exhibit varying degrees of influence from Roman and Christian sources, and some were intended to apply different legal rules to Germanic and Roman people living in the same area. Collectively these codes are known as the laws of the barbarians, or *Leges Barbarorum.* The earliest of these laws, which are contemporary with the Anglo-Saxon invasions and settlement of Britain, include law codes from several large Germanic tribes, including the Visigoths, Franks, Burgundians, Bavarians, Lombards, and the continental Angles and Saxons of the later Carolingian age.

The Visigothic laws, and more particularly the Code of Euric, are believed to have directly or indirectly influenced most Germanic law codes thereafter. The Code of Euric, from ca. A.D. 476, shows some Roman influence. The *Lex Romana Visigothorum* was promulgated by the Visigothic King Alaric II in A.D. 506, to govern Romans living in Visigothic territories. This collection is also known as the *Breviarium Alaricianum* (Breviary of Alaric). The *Leges Visigothorum* is a collection of laws that had been issued by Euric's successors, applying to both Gothic and Hispano-Roman subjects. The collection was promulgated in A.D. 654, and replaced the *Lex Romana Visigothorum.*

Euric's code seems to have been the immediate source for the early codes of both the Salian Franks n18 and the Burgundians, n19 and the Bavarian n20 and Lombard n21 codes also show Visigothic influence. Another early Frankish code, the *Lex Ribuaria*, n22 was based on the Salian Code, and it in turn influenced the codes of the continental Angles and Saxons of the Carolingian age.

Thus the best known of these early Germanic codes -- indeed the oldest Germanic code that is completely preserved -- is the code of the Salian Franks, or the *Lex Salica*. As a Germanic code that was in its origins contemporary with the Anglo-Saxon invasions, and one that is fairly free of Roman influence, it might be expected to reveal some information about Germanic customs relating to property rights.

In fact, the *Lex Salica* and other early Germanic codes do not fulfill this expectation. Consisting of both individual "statutes" and precedential judicial sentences (*Weisthuemer*), these codes do not refer to most customs of daily living, such as occupancy of land, personal property, commercial dealings, inheritance, family relationships, and class privileges. Instead, the *Lex Salica* has been accurately described as "primarily a penal law ... concerned with the redress of crimes (murder, theft, mutilation, exploitation of women) by monetary means." n23 The only references to land law in the *Lex Salica* are provisions requiring money payment for damage to agricultural fields, n24 blocking the way of another, n25 and improper fencing and enclosing. n26 From such provisions one may infer that real property was important and some individual possessory rights were recognized and protected, but any further enlightenment is not available in the documentary sources relating to the Anglo-Saxons or other contemporary Germanic tribes.

FOOTNOTES:

(n1)Footnote 13. Julius Caesar, De Bello Gallico 6.22 (M. Hadas trans. 1957).

(n2)Footnote 14. Tacitus is the single best source of information on ancient Germanic social and legal customs, but some consider his credibility compromised by his manifest anti-Roman and pro-German moralizing. Also, it is unlikely that he ever directly observed a Germanic people in their native habitat. *See* Cornelius Tacitus, De Origine et Situ Germanorum xix (J. Anderson ed. 1938) (editor's introduction).

(n3)Footnote 15. Cornelius Tacitus, The Agricola and Germany of Tacitus ch. 26 (Alfred J. Church & William J. Brodribb trans. 1885).

(n4)Footnote 16. E. A. Thompson, The Early Germans 7 (1965).

(n5)Footnote 17. Cornelius Tacitus, The Agricola and Germany of Tacitus ch. 20 (Alfred J. Church & William J. Brodribb trans. 1885).

(n6)Footnote 18. The code of the Salian Franks, or Lex Salica, is attributed to Clovis, A.D. 481-511.

(n7)Footnote 19. The Burgundian code was compiled between A.D. 483 and A.D. 532. The Lex Romana Burgundionum was issued ca. A.D. 500, for application to Roman citizens living in the Burgundian kingdom.

(n8)Footnote 20. The Lex Baiuvariorum is dated from about A.D. 744-748.

(n9)Footnote 21. The Leges Langobardorum were promulgated between A.D. 643 and 755.

(n10)Footnote 22. The Lex Ribuaria is believed to have been promulgated after A.D. 596, for the Ribuarian or western Franks.

(n11)Footnote 23. Laws of the Alamans and Bavarians 19 (Theodore John Rivers trans. 1977).

(n12)Footnote 24. Lex Salica tit. 9.

(n13)Footnote 25. Id. tit. 31.

(n14)Footnote 26. Id. tit. 34.

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CHAPTER 3 PROPERTY RIGHTS IN ANGLO-SAXON ENGLAND

1-3 Thompson on Real Property, Thomas Editions § 3.04

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§ 3.04 Anglo-Saxon Landholding Practices Arising from the Invasion and Settlement of Britain.

Even if it were possible to identify the landholding practices current among the Angles, Saxons, Jutes, Frisians and Franks who invaded Britain in the 5th century A.D., perhaps that would not provide much insight into the landholding practices that emerged from the period of invasion and settlement. Some evidence suggests that the circumstances of invasion and settlement may have been so unprecedented and unique as to upset the traditional Germanic loyalties and relationships prevailing up to that time. This evidence, however, is so tenuous that any statements about property practices of the early Anglo-Saxon settlers must remain highly speculative and hypothetical. However, if that evidence is used to construct even a general outline of invasion and early settlement history, it is possible to raise plausible theories about how property practices changed as Britain became Angle-land, or England.

§ 3.04(a) How the Anglo-Saxons Organized for and Conducted the Invasion and Settlement of Britain.

Archaeological evidence suggests that not later than the 3rd century A.D., Saxons began a general southwestward movement, replacing or subduing the Chauci and crowding the Frisians along the North Sea coastline between the Elbe and Rhine estuaries. This unstable situation may have "stimulated the more adventurous elements in all these peoples to seek fame and fortune through plunder, piracy, and even perhaps through settlement overseas." n27

In response, Roman imperial authority established a series of major naval stations on both sides of the English Channel, the bases on Britain's eastern and southern coasts being known as the forts of the "Saxon Shore." n28 One commander of the British naval force, a German from the Rhine estuary known as Carausius, himself resorted to piracy late in the 3rd century, and established a short-lived government of his own. In A.D. 367, Britain nearly fell to a combined assault of Picts, Scots, and Saxons.

As Roman authority in Britain weakened, attacks of varied intensity continued to issue from the north and west by Picts and Scots, and from the east and south by seaborne Germanic pirates, usually referred to as Saxons. In response, British leaders apparently hired Germanic mercenaries, and abundant archaeological evidence reveals that numerous Saxon settlements arose in southern and eastern Britain, often in areas near the Saxon shore forts. A plausible but unverifiable version of events during the mid-5th century A.D., depicts discontented mercenaries turning on their British masters, and then shifting from rebellion to conquest. The cross-channel raiders, meanwhile, turned to invasion and settlement.

In the first stage of the Anglo-Saxon conquest, from roughly A.D. 450 to 500, the British resisted the invaders but steadily lost ground near the east coast river estuaries, where no natural obstacles impeded the barbarian thrusts. By A.D. 500, the Anglo-Saxons occupied most of the coastal areas of southeast and eastern England and far inland up some rivers, territory that encompassed, in more modern geographical designations, Kent, Sussex, southern Hampshire, Essex, East Anglia, Lindsey, the East Riding of Yorkshire, and thence to the Cambridgeshire fens. n29

If one were to accept as generally accurate the accounts of the Anglo-Saxon Chronicle, which for this period relies only on very old traditions, and were to make allowance for much approximation in the dates, the sequence of invasion may be sketched in outline form.

§ 3.04(a)(1) The Earliest Stages of the Anglo-Saxon Conquest. n30

§ 3.04(a)(1)(i) Kent.

It appears that Kent n31 was the first to come under Germanic domination, under the leadership of an early mercenary settler and warrior named Hengest. Hengest fought the Britons in A.D. 455 and again with his son Aesc (or Oisc) in A.D. 457, after which the British fled Kent and retreated to London. Following battles in A.D. 465 and 473, Aesc became king in A.D. 488 and ruled Kent until A.D. 512. n32

§ 3.04(a)(1)(ii) Essex, Middlesex, and Surrey.

The early history of Essex (territory of the East Saxons) is locked in obscurity. The scant archaeological evidence reveals that Germanic settlement dates from early times, but no East Saxon king became important outside of Essex. Sometimes included in Essex were London and a separate area called Middlesex (territory of the Middle Saxons), although Middlesex, if not a separate kingdom, was probably autonomous for some time after the conquest. As an organized people, neither the folk of Middlesex nor of nearby Surrey (the "southern district") have an independent history. n33

§ 3.04(a)(1)(iii) Sussex.

Conquest of Sussex (the area of the South Saxons) began by seaborne invasion, rather than by rebellion of settled mercenaries. In A.D. 477, Aelle and his sons Cymen, Wlencing, and Cissa landed with three ships at a site identified as near Selsey Bill and drove the Britons into the Sussex Weald (an extensive forested tract). Aelle fought further battles in A.D. 485 and 491 and in the later conflict he and Cissa led forces that massacred all Britons gathered in the old Roman fort near Pevensey. n34 Aelle was identified by Bede as the first of the Anglo-Saxon *bretwaldas*, king not only of the south Saxons but of all people south of the River Humber. n35

§ 3.04(a)(1)(iv) Wessex.

The area known as Wessex (land of the West Saxons) was invaded about A.D. 494 by Cerdic and his grandson Cynric with five ships. They apparently completed the conquest in six years. n36

Some portion of the conquered territory may have been left under the rule of Stuf and Wihtgar, possible Jutish relatives of Cerdic, while Cerdic himself ruled a West Saxon kingdom located immediately south and west of the middle Thames. Cerdic came to be regarded as the founder of the West Saxon dynasty which eventually would rule all of England. n37

§ 3.04(a)(1)(v) East Anglia, Mercia, and Northumbria.

In East Anglia (territory of the East Angles), fifth century Germanic settlements were located along the waterways and

often close to Roman sites, suggesting peaceful immigration prior to the Saxon revolt. No kingdom arose in this area until well into the 6th century A.D., when a new wave of invaders struck, possibly from the northern Jutland peninsula or Danish islands.

Evidence shows that the kingdom of Mercia (the land of the marches or border areas) arose during the same time, as people from East Anglia advanced inland. The southern part of Northumbria (the land north of the River Humber), known as the kingdom of Deira, was settled in the 5th century A.D., probably by pre-revolt mercenaries, but Aelle, the earliest known king, has only been dated to about A.D. 558. North Northumbria, eventually the kingdom of Bernicia, was invaded by Ida about the same time as Aelle ruled Deira. n38

§ 3.04(a)(2) The Second Phase of the Anglo-Saxon Conquest.

§ 3.04(a)(2)(i) Wessex.

In a series of battles fought, according to the Anglo-Saxon Chronicle, in A.D. 552, 568, 571, 577, and 586, the Wiltshire Saxons and the Thames Valley Saxons united into the historic kingdom of Wessex. n39 Through the end of the 8th century A.D., further expansion was sporadic, and British resistance at times very effective. Complete dominance was not established until the Britons of Cornwall were defeated by Egbert in A.D. 838. n40

§ 3.04(a)(2)(ii) Northumbria.

In Northumbria, the separate kingdoms of Deira and Bernicia made painfully slow progress against powerful British rulers. The Germanic kingdoms were ultimately united under the Bernician King Aethelfrith about A.D. 593. n41 Despite subsequent dynastic struggles, the unified kingdom made major territorial gains through the seventh century A.D. Then, as the kingdom met stiffer resistance from both the Picts and the neighboring Anglo-Saxon kingdoms, its territory stabilized during the middle of the 8th century A.D. n42

§ 3.04(a)(2)(iii) Mercia.

The kingdom of Mercia originated in the thickly settled midland shires, with the Trent valley settlers overcoming other Germanic pioneers. This kingdom absorbed the lands known as Middle Anglia and the small kingdom of the Hwicce, and appeared in the middle of the 7th century as a powerful force among the Anglo-Saxon kingdoms. n43

§ 3.04(a)(2)(iv) The Heptarchy.

The kingdoms of East Anglia, Essex, Kent, and Sussex were not able to extend their territories during this second phase of hostilities, because of the activities of the more powerful neighboring kingdoms, but they did consolidate their conquests. n44 All seven of the kingdoms discussed in this section have been artificially grouped together by some historians and called the Heptarchy. n45 The kingdoms of the Heptarchy never acted in concert, but were dominated in turn by Northumbria, Mercia, and Wessex. The process of absorption and amalgamation which produced these seven kingdoms continued throughout the period of the Heptarchy, and was halted only by the Viking invasions of the 9th century:

> Kent after Aethelberht [died in A.D. 616], East Anglia after Raedwald [died between A.D. 616 and 627], and Essex and Sussex from an even earlier date, were never comparable in strength with the larger and later kingdoms created by the second phase of the conquest. Even before 600 the territory of the Middle Saxons had been taken over by the East Saxons, whose kings were themselves by then clients of the kings of Kent and later of the kings of the East Angles and of the West Saxons. From the middle of the seventh century Essex was little more than a dependency of Mercia and when, a century later, Aethelbald incorporated London and Middlesex into Mercia nothing politically significant was left ... The expansion of the Mercian kingdom resulted in the subordination of the kingdoms of the Hwicce ...

> and the Magonsaetan ... and of the Middle Angles in the east. The South Saxons, threatened by Wessex, sought to secure their independence by alliance with the rulers of Mercia; ... but the Mercian supremacy ultimately resulted in the relegation of the South Saxon kings first to the status of sub-kings, then of ealdormen of the Mercian kingdom; they never recovered their independence and in the ninth century Sussex was incorporated into Wessex ... In the [eighth] century Kent was subjected to Mercia and ultimately accepted the lordship of the kings of Wessex as the only alternative. n46

§ 3.04(b) Reorganization of Tribal Structure for Invasion and Conquest.

§ 3.04(b)(1) Pre-Invasion Social Structure.

In this period of the 5th and 6th centuries A.D., an era of almost universal illiteracy among the Anglo-Saxons, it is impossible to know precise details about their social organization in their continental homelands, or how they reorganized for invasion. However, it is reasonable to assume that the pre-invasion Germanic tribes and sub-tribal groups were divided essentially along kinship lines and that the warrior class placed greatest value on subordination and loyalty to the leader and on valor in battle. If land arrangements were still being conducted in the 5th century as Tacitus had described them in the 1st century A.D., then to be the leader of such a kinship group was also a sure means to material wealth. According to Tacitus, land was divided among the Germanic inhabitants according to rank.

§ 3.04(b)(2) Formation of New War Bands for Invasion and Settlement.

If, as evidence suggests, land occupied by continental Germanic tribes was becoming crowded under pressures of growing population and approaching invaders from the east, changes in social organization were inevitable. The opportunity presented by the vulnerability of Britain to seaborne raids, which was surely communicated back across the channel to the crowds on the Frisian shores, was for new leaders to rise up, forsaking old loyalties and forging new ones. Ambition and adventurism undoubtedly played their parts as both established and emerging leaders formed war bands and struck out in their boats:

> Any ambitious German chieftain inured to fighting and marked out for leadership by the prestige of noble birth had only to enlist a few hundred warriors, attracted by the hope of booty or conquest, and stake everything on the chance of carving out a kingdom for himself ...
>
> The land, the subject of the great struggle between Celt and Saxon, offered opportunities in plenty for newcomers either to take over such British estates as were still in working order or to tackle the vast areas not yet exploited. n47

War bands would have been recruited not only for the seaborne invasions, but for new conquests by those invaders already settled. Even the earliest Germanic settlers, the mercenaries hired to protect the Romano-British centers, were possibly outcasts and fugitives, eligible and willing to form new bands and loyalties:

> Hengist, the traditional founder of the Kentish royal family ... is portrayed as a man of noble stock from among the Jutish neighbors of the continental Angles who was in exile in Frisia, where he had taken part in activities which apparently breached the heroic code of conduct of the time and made his return home impossible or at least unwise.
>
> ...There may well have been many foot-loose chieftains from Jutland or southern Scandinavia like Hengist, or indeed like Beowulf later on. Such men could find plenty of good or bad reasons for leading a mixed band of followers in search of fame or fortune overseas in the fifth century. n48

The warbands, if successful, would have formed new settlements or taken over old ones. At first, perhaps unrelated by blood to comrades and enjoying the fruits of conquest, each surviving and successful warrior would have assumed a

measure of independence as he turned from fighting to farming. Only later, as family relationships re-emerged and local political authority developed, would stratification of land rights have become pronounced.

This absence of central authority during the period of invasion and conquest was a significant factor in the apparent absence of stratification in early Anglo-Saxon land rights. While kingship was probably not unknown to the continental Angles, Saxons, and Jutes, n49 apparently it did not play a role in the settlement of Britain. At least the earliest phases of the conquest were carried out by war bands that functioned independently under their own leaders. When successful war bands eventually combined, and migration and conquest in the 5th and 6th centuries A.D. compelled resort to stronger central rule, kingship then arose. An early example of such a king was the West Saxon Cerdic, who took the title of king several years after beginning the conquest of Wessex. n50

§ 3.04(c) Development of Early Anglo-Saxon Landholding Practices After Invasion and Settlement.

§ 3.04(c)(1) Romano-British Influence on Early Anglo-Saxon Landholding Practices.

While such central authority was coalescing, the new settlers probably occupied their territories under a wide variety of property arrangements. A simplistic traditional perception of Anglo-Saxon settlers pictured land being sectioned off to individual families, eventually to be grouped into hundreds n51 and shires. Now research is revealing that few such generalizations can be sustained. In areas where the first Germanic settlers were probably invited mercenaries, earliest landholding patterns may have followed closely the forms still found in the Romano-British communities to which the mercenaries were attached. An outstanding example is the system of "lathes" or provinces in Kent, recorded in the Domesday Book survey issued in A.D. 1086, and which "may well retain the outline of the Romano-British system, within which Hengist and his Jutes were permitted by such sub-Roman rulers as Vortigern to make their federate settlements." n52

A related but distinct pattern arose in parts of Northumbria, where the

> peculiarities of the later Northumbrian agricultural system have also been claimed as due to direct Celtic influence. There are strong traces of a system of local organization which probably goes back to British times... Such survivals clearly indicate that in much of Bernicia [a kingdom of Northumbria] a substantial quantity of the native lands was probably left in the occupation of tributary British subjects under the new military aristocracy. The situation was thus quite different from what happened in those parts of Britain where the invaders were rather seeking habitable lands for their own exploitation than to live on rents extracted from a dependent native population. n53

§ 3.04(c)(2) Absence of Stratification in Early Anglo-Saxon Landholding Rights.

One generalization that does appear valid is the absence of social stratification in the early Anglo-Saxon settlements and, by implication, in the land rights held by their inhabitants, described as "a striking feature of the period." n54 "Early Anglo-Saxon England is notable for the egalitarian quality of its modest farmsteads." n55 In archaeological terms, the adherence of initial Anglo-Saxon landholding practices to native traditions already in place has been suggested in that "the vernacular architecture of the Early Anglo-Saxon farm may be an expression of a peasant family/household unit which withstood the long depopulation of the countryside, the decline of the state and the demise of classical antiquity." n56

Similarly, analysis of artifacts found in graves of 5th and 6th century Anglo-Saxon cemeteries attests to lack of social ranking and the absence of great differences in material wealth during this period. n57

§ 3.04(c)(3) Possible Transfer of Contemporary Continental Landholding Practices.

From examination of Dark Age farmsteads of north Germany and Holland during the period of Anglo-Saxon migration,

it is possible to determine forms of agricultural organization with which the Anglo-Saxons were familiar. This information, however, sheds only limited light on Anglo-Saxon social organization of that period.

Despite some evidence for continuity of Romano-British field systems, as suggested in § 3.04(c)(1), *supra*, in most areas of Britain subject to Anglo-Saxon invasion "the Roman system of agriculture failed to survive through into the late Anglo-Saxon period." n58 Instead, the Anglo-Saxons may have brought with them the field systems best known to them from their continental homelands:

> In all probability the "Anglo-Saxons" who came to Britain during the fifth and sixth centuries were familiar with two types of settlement. On the one hand, there were the small dispersed settlements, many of which will have been no larger than individual farm complexes, each with its own small fields. On the other hand, there were also the varied mound settlements, the *Wurten/Terpen* [man-made mounds used in response to periodic flooding], some of which were individual in nature and others of which included several farms. n59

Only limited evidence shows that either of these systems was introduced into Britain by Anglo-Saxon settlers. Also, if the Anglo-Saxons had traditions of both individual farmsteads and small villages, it would be hard to distinguish these Germanic settlements from their previously existing Romano-British counterparts. In any event, it seems likely that most Anglo-Saxon settlement occurred before any type of communal open-field strip farming had developed on the continent or in Britain. n60

§ 3.04(c)(4) Property Rights Probably Recognized in Early Anglo-Saxon Times.

§ 3.04(c)(4)(i) Absence of Direct Evidence.

Any statement about land tenures or systems of ownership rights in the early Anglo-Saxon period must be considered almost entirely speculative. Contemporary evidence of any sort is wholly absent, and even intelligent guesses can be contrived only by extension back from the first written sources, the Anglo-Saxon charters of the 7th century A.D., or extension forward from the contemporary Romanized practices on the continent. The subject has been addressed by almost none of the recognized Anglo-Saxon scholars.

In hypothesizing about property rights during this early Anglo-Saxon period, A.D. 400-600, it can reasonably be assumed that land was the resource of greatest importance to the Anglo-Saxons then as it continued to be into modern times. The rights associated with possession of land must have varied, and inevitably those rights attained the power to define one's personal status as free or unfree. n61

If the first Anglo-Saxons in England were indeed composed essentially of free persons, members of war bands owing allegiance to a free-booting leader, or farmers and their families coming for land, eventually settlement of individual families on fixed parcels of land would have occurred.

The possession of land was an essential affirmation of one's status and right as a participant in the political and economic life of the group. Kemble believed that the Germanic aversion to city life or even to dwellings in close proximity to each other signified that "the Germanic community is in some sense ... bound to the soil: its members share in the arable, the forest and marsh, the waters and pastures: their bond of union is a partnership in the advantages to be derived from possession of the land, and individual interest in a common benefit." n62

§ 3.04(c)(4)(ii) Communal Holdings Apportioned by Lot.

According to Kemble, who attributed to Anglo-Saxons the traits of their Germanic contemporaries on the continent, "the district occupied by a body of new settlers was divided by lot in various proportions." n63 Some land would have been held in surplus for future apportionments, and other portions "remained in undivided possession as commons" and

as marches to define borders or defensive buffer lands with other settlements. n64 A share sufficient for the support of an individual family would eventually become known as a hide. n65

§ 3.04(c)(4)(iii) Holdings for Life Tenure Only.

It is also reasonable to assume that the possessory right held by the occupant of a hide of land could be best described in common law terms as a life estate. On the continent, such an interest arose originally out of Roman land law and survived into Europe's dark age. Known in that context as a *precarium*, it signified the practice of one party possessing and using another party's land, for whatever consideration seemed appropriate. The possessor of the land, or *beneficium*, was vulnerable to the bonds of patronage, and at some time might find it necessary to seek the protection of and yield to the power of the owner. Once written documentation of Anglo-Saxon land transactions began to appear in the 7th century A.D., there was some evidence that many landholders had rights of tenants rather than of absolute owners, n66 as if the custom of the continent had carried over to England. n67

The common usage of some form of life estate as a form of landholding rights is also shown in the Domesday Book of A.D. 1086. Although subsequent to the Norman Conquest, the Domesday Book reflects property rights of the late Anglo-Saxon period. It shows that some of the Anglo-Saxon aristocracy held land that they could not transfer without leave of their lords; others held their land with a right of alienation. Stenton believed that holdings without right of alienation had been obtained by gift from the lord; holdings with the right had come to the owner in the owner's own right. It cannot be known whether these distinctions had their antecedents in the early Anglo-Saxon period, but it seems likely that both forms of land acquisition would have occurred as soon as settlement began.

Use of some form of life tenancy also appears from the earliest extant Anglo-Saxon charters describing transfers of rights in land, dating from the 7th century A.D. These charters show that a three-fold division of landholding rights had already developed. One of these, the so-called "laenland," consisted of land loaned to individual tenants, usually by the English church, which had received many grants from kings and others. Possession of these lands was usually loaned out to members of the nobility, and sometimes even to the king, for the span of one or more lives, but never more than three lives. n68 Lump sum payments, or rent, or services would be required in return. n69

Even after the Norman Conquest, the life tenancy continued to be the usual form of landholding; an ordinary gift of land to a person was considered to convey only a life estate. n70

§ 3.04(c)(4)(iv) Land for Services or Payments.

> It seems well established in Germanic custom that the lord was expected to provide his follower with an endowment in land when he reached a certain age. In Bede's time [eighth century A.D.] it must have been customary for the sons of nobles to enter the service of the king, or other members of the royal family, at quite an early age; for the endowment in land was granted to them when they were about twenty-four or twenty-five years old, and enabled them to marry ...
>
> It is to be observed that these estates are described [in the poems] not as though they had passed from father to son in due course of inheritance, but as grants received as a mark of favour from the king. Whether there were at this time any lands which were inheritable in ordinary course is a question that we have no means of deciding. In later times there is a certain amount of evidence which suggests that tenure of land for three generations may have constituted a claim to permanent possession. But even if so we cannot tell how far such a custom goes back. n71

It cannot be shown by what arrangements the earliest Anglo-Saxon settlers held their land; however, a system of land rights can be shown relatively early in the Anglo-Saxon era by analysis of the written charters that began to be used in the 7th century A.D. Apparently the spread of Christianity led to the spread of literacy, especially in transactions involving the church, and these charters show that distinctive property rights had already developed, even if their

earliest form cannot be known.

These charters suggest that the land rights worked out after the Anglo-Saxon settlement must have always had some sort of service or payment obligations attached to the holding of the land. Rights of inheritability or alienability would have been extraordinary rights, perhaps also available from time to time by agreeing to render additional services or payments.

§ 3.04(c)(4)(v) The Beginning of Stratification in Property Rights.

The charters also show the beginnings of the close correlation between one's property rights and social status, and the developing stratification in types of property rights. Stenton promoted the thesis that "the general drift of English peasant life in these centuries was from freedom towards servitude:"

> The central course of Old English social development may be described as the process by which a peasantry, at first composed essentially of free men, acknowledging no lord below the king, gradually lost economic and personal independence From the moment when the kings of the migration age began to plant their companions upon the soil there must have existed communities in which expropriated Britons, and Englishmen too poor to be welcomed in settlements of their own people, were working for a lord in return for his protection...
>
> This depression was the result of several factors, of which the economic insecurity of the primitive ceorl was the most important. n72

While conceding that this thesis could not be supported fully by direct evidence, he described the process in persuasive terms, quoted at length below:

> There is no direct evidence to show the stages by which, within any single village, a community composed essentially of independent peasants developed into a community composed essentially of serfs. But the main features of the process seem fairly clear. In what appears to have been the normal case, it began with a grant from the king setting an ealdorman, a *gesith*, a bishop, or an abbot in his own place as the immediate lord of a village, and, in particular, as the recipient of the dues and services which its inhabitants had been accustomed to render to the king himself. The independence of the village group was not threatened at first. But the narrowness of an average ceorl's resources, and the many forms of disaster to which he was exposed, made it almost inevitable that sooner or later the village community would find itself unable to provide the food-rent which its lord had a right to demand. It was generally easier for the head of a peasant household to supply labour than to keep up a regular contribution to a communal food-rent. Most lords had need of labour on the "demesnes" which they had been acquiring through co-operation with the village community in the extension of the cultivated area, or by the creation of home farms within a ring fence. It seems that, within most villages, the duty of supporting the lord by a communal render in kind gave way, in time, more or less completely, to a system by which each of the regular holdings in the open fields -- hides, half-hides, and yardlands -- supplied labour for the lord's demesnes on a definite number of days in every week. In itself, the change was merely a matter of economic reorganization, which need have had no legal consequences. But in most cases it seems to have formed part of a wider revolution in which the individual peasants surrendered their holdings to the lord of the village and received them back from his hands, acknowledging themselves to be his men, and placing themselves under this protection. When this step had been taken by the whole or the greater part of a village community, the manorial economy of the middle ages was brought within sight. n73

§ 3.04(c)(4)(vi) Summary of Early Anglo-Saxon Property Rights.

If all of these surmises are correct, then the earliest Anglo-Saxon settlers would typically have obtained individual

farmsteads assigned to them by the leader of their war band. These settlers would also have received certain rights in common lands to be shared with other members or the group of community. These possessory rights probably would have carried with them certain communal obligations similar to those known to be customary in later generations, such as road and bridge repairs and maintenance of defensive works. If they settled in still functioning Romano-British farmsteads or communities, they probably adopted the customary rights and duties recognized by the native inhabitants. With improving stability in these early decades came centralization of political power and stratification of property rights. War band leaders became kings, who assigned land to their chief warriors, who allotted portions to farmers and their families, each grantor retaining rights relative to subsequent grantees. Rights of inheritability and alienation were probably rare and probably required acquiescence by or payment to lord or community. At the end of this process, the actual occupants of the land would eventually suffer a nearly complete loss of economic and personal independence. n74

FOOTNOTES:

(n1)Footnote 27. J. N. L. Myres, The English Settlements 53 (1986).

(n2)Footnote 28. "[A]lready in the late third century Saxon pirates had become such a menace to the Channel and North Sea coasts that the Romans built a series of forts from the Wash to the Isle of Wight, which were known as the forts of the Saxon Shore." Dorothy Whitelock, The Beginnings of English Society 13 (1974). The forts were mostly built between A.D. 270 and 285.

(n3)Footnote 29. *See, e.g.*, James Campbell, *"The First Christian Kings,"* in The Anglo-Saxons 52 (James Campbell ed. 1982); H. Munro Chadwick, The Origin of the English Nation 9-10 (1924).

(n4)Footnote 30. *See generally* The Origins of Anglo-Saxon Kingdoms (Steven Bassett ed. 1989); Martyn J. Whittock, The Origins of England 410-600 161-251 (1986).

(n5)Footnote 31. Kent, as a name, has its origin in the name of the Celtic tribe Cantiaci, conquered by the Romans in A.D. 43. Later Jutish conquerors called themselves Cantware. James Campbell, *"The Lost Centuries: 400-600,"* in The Anglo-Saxons 38-39 (James Campbell ed. 1982).

(n6)Footnote 32. F. M. Stenton, Anglo-Saxon England 16-17 (1943).

(n7)Footnote 33. *Id.* at 53. *See also* John Blair, Early Medieval Surrey: Landholding, Church and Settlement Before 1300 (1991).

(n8)Footnote 34. The Anglo-Saxon Chronicle (E) 13 annal 491.

(n9)Footnote 35. F. M. Stenton, Anglo-Saxon England 17-19 (1943).

(n10)Footnote 36. The Anglo-Saxon Chronicle (Parker) (genealogical preface).

(n11)Footnote 37. F. M. Stenton, Anglo-Saxon England 19-27 (1943).

(n12)Footnote 38. D. P. Kirby, The Making of Early England 21-23 (1967).

(n13)Footnote 39. D. J. V. Fisher, The Anglo-Saxon Age c. 400-1042, 32-35 (1973). *See also* Barbara Yorke, Wessex in the Early Middle Ages (1995).

(n14)Footnote 40. The Anglo-Saxon Chronicle (E) 61 annal 835.

(n15)Footnote 41. *Id.* at 21 annal 593.

(n16)Footnote 42. D. J. V. Fisher, The Anglo-Saxon Age c. 400-1042, 41-43 (1973).

(n17)Footnote 43. *Id.* at 43-44. *See* Della Hooke, The Anglo-Saxon Landscape (1985).

(n18)Footnote 44. D. J. V. Fisher, The Anglo-Saxon Age c. 400-1042, 108-109 (1973).

(n19)Footnote 45. The Heptarchy is a modern designation and refers to the kingdoms of Wessex, Sussex, Kent, Essex, East Anglia, Mercia, and Northumbria. *See* D. J. V. Fisher, The Anglo-Saxon Age c. 400-1042, 110 (1973).

(n20)Footnote 46. D. J. V. Fisher, The Anglo-Saxon Age c. 400-1042, 110-112 (1973).

(n21)Footnote 47. H. P. R. Finberg, The Formation of England 550-1042, 18 (1974).

(n22)Footnote 48. J. N. L. Myres, The English Settlements 109 (1986).

(n23)Footnote 49. Tacitus, writing in the 1st century A.D., remarked that the Germanic tribes sometimes elected kings in times of war. Anglo-Saxon literature gives other evidence that kingship was known at an early time, through tales of Offa, a 4th-century king of continental Angles, Widsith lines 35-44, and of Beowulf, a Swedish prince who dealt with kings of other peoples. Beowulf lines 11-21.

(n24)Footnote 50. The Anglo-Saxon Chronicle (E) 15 annal 495.

(n25)Footnote 51. In the earliest Anglo-Saxon settlements a hundred may have been theoretically the land required to sustain a hundred fighting men and their families. David A. Thomas, *Anglo-American Land Law: Diverging Developments from a Shared History, Part I: The Shared History, 34 Real Prop. Prob. & Tr. J. 143 (1999).*

(n26)Footnote 52. J. N. L. Myres, The English Settlements 124 (1986).

(n27)Footnote 53. *Id. at 200-201.*

(n28)Footnote 54. Richard Hodges, The Anglo-Saxon Achievement: Archaeology and the Beginnings of English Society 34 (1989).

(n29)Footnote 55. *Id.*

(n30)Footnote 56. *Id.* at 36.

(n31)Footnote 57. *Id.* at 38-42. These conclusions are based on the assumption that grave goods more or less faithfully reflect the decedents' relative status in life.

(n32)Footnote 58. *Id.* at 85.

(n33)Footnote 59. *Id.* at 88.

(n34)Footnote 60. *Id.*

(n35)Footnote 61. While very little evidence exists regarding Anglo-Saxon transfers of land prior to 700 A.D., scholars have confidently asserted that land was bought and sold as we recognize it in a modern sense by the late seventh-, eighth-, and ninth-century in England. James Campbell, The Anglo-Saxon State 231-34 (2000); Peter J. Fowler, Farming in Early Medieval England: Some Fields for Thought. from The Anglo-Saxons from the Migration Period to the Eighth Century: An Ethnographic Perspective, v. 2, at 247 (1997). Campbell believes this sudden change may have resulted from an evolution among how Anglo-Saxons valued property. He explains that prior to 700, A.D., personal property and treasure were valued more than real property. For whatever reason, Anglo-Saxons shifted and began to more highly value the worth of land. Campbell, 239-45. Others maintain that this change was merely a result of records and that land had no hereditary tenure among the Anglo-Saxons until tenure by book was introduced. Eric

John, Land Tenure in Early England, a Discussion of Some Problems 24-79 (1960).

(n36)Footnote 62. John Mitchell Kemble, The Saxons in England 89-90 (1876). As to some of what Kemble wrote on this subject, Pollock and Maitland's later assessment should be recalled: "It is now prudent rather than necessary to remind the reader that Kemble's brilliant conjectures [particularly on Anglo-Saxon folkland] were premature and largely unwarranted." Frederick Pollock & Frederic William Maitland, The History of English Before the Time of Edward I. 62 (2d ed. 1909);.Patrick Wormald, *Frederic William Maitland and the Earliest English Law*, 16 L. and Hist. Rev. 1 (Spring 1998).

(n37)Footnote 63. Frederick Pollock & Frederic William Maitland, The History Of English Before The Time Of Edward I. 90 (2d Ed. 1909). *See especially* examples of land division by lot set forth in note 1 on his page 90.

(n38)Footnote 64. *Id.* at 90.

(n39)Footnote 65. *Id.* at 91-92. The definition of "hide" has been somewhat in dispute, mostly because it fails to inform historians of the measuring standard: no one knows either what type and size of "family" or how much land was used to "support a single family." In attempting to specifically define the hide, Maitland postulated an average of 120 acres (though a hide could be as small as 40 acres). F.W. Maitland, Doomsday Book and Beyond 475-490 (1921). But most scholars agree that a hide measured quality rather than quantity, particularly that the hide was a measurement for taxes or food-rent tributes owed to the lord from his holding. Erich J. Richter, Transitions: English Feudal Development, 1016-1135 (Reed College: 1993); Richard Phillip Abels, Lordship and Military Obligation in Anglo-Saxon England 101 (1988). Hide assessments were often independent of the numbers of families present. *Id.* at 101-03.

(n40)Footnote 66. 2 William Holdsworth, A History of English Law 71 (reprint 1971).

(n41)Footnote 67. In cases where laenland was created by express agreement, "it may be compared with the Gallo-Frankish precarium, from which indeed it was perhaps derived." Frederick Pollock & Frederic William Maitland, The History of English Law Before the Time of Edward I. 61 (2d ed. 1909).

(n42)Footnote 68. Three lives did not mean the life spans of three persons living at the time of the loan, but meant the recipient of the loan and "two successive heirs." Frederic Maitland, Domesday Book and Beyond 309 (1897).

(n43)Footnote 69. Paul Vinogradoff, English Society in the Eleventh Century 292-332 (1925); 2 William Holdsworth, A History of English Law 70-71 (reprint 1971). The concept of laenland has no modern counterpart, but is perhaps best thought of as "loan land." The king could lend or loan his land to his subjects, usually as a return for some service rendered by the subject, and usually to secure loyalty to the king. These landholders could profit from the cultivation of the land by the lower classes, but did not truly "own" the land; the king always had the power to recall the grant. Also, if the landowner died, the property reverted back to the hands of the king, who could then grant the land to someone else. Erich J. Richter. Transitions: English Feudal Development, 1016-1135 (Reed College: 1993). Sons often attempted to prove their loyalty to the king in order to maintain control over the land: "Since the early Anglo-Saxon kings granted merely the enjoyment of land rather than hereditary title to these possessions, each generation had to win its land (and hence rank) anew. Land tenure, then, was hereditable, but not hereditary. Only through service to his father's lord could a warrior hope to win his paternal estate." Abels, *Lordship and Military Obligation in Anglo-Saxon England* 44 (1988).

(n44)Footnote 70. Bracton, n. 27; *Y.B. 15 Edw. 3* (R.S.) 322.

(n45)Footnote 71. H. Munroe Chadwick, The Origin of the English Nation 159-160 (1924).

(n46)Footnote 72. F. M. Stenton, Anglo-Saxon England 463 (1943).

(n47)Footnote 73. F. M. Stenton, Anglo-Saxon England 464-465 (1943).

(n48)Footnote 74. *See* Della Hooke, Anglo-Saxon Settlements (1988).

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CHAPTER 3 PROPERTY RIGHTS IN ANGLO-SAXON ENGLAND

1-3 Thompson on Real Property, Thomas Editions § 3.05

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§ 3.05 Development of Anglo-Saxon Laws and Customs Relating to Property after ca. A.D. 600.

By the time the Anglo-Saxons emerged from their dark age of illiteracy early in the 7th century A.D., their property rights had already undergone much sophisticated elaboration, complete with seeds of full-blown feudalism ready to flower when conditions became right. Many historians see as a key event in this emergence the arrival of the monk Augustine and other clerics in Kent at about A.D. 597. Sent from Rome as an emissary of Pope Gregory, Augustine was to persuade the Kentish King Aethelberht to formally accept Christianity and urge his people to do likewise. Aethelberht had been married for nearly forty years to Bertha, a Christian Frankish princess who maintained a spiritual adviser in her household. n75

Aethelberht's conversion, along with subsequent successful proselyting in Northumbria, began the long, halting process of establishing the Roman church in England and achieving at least a partial reconciliation with the British Christians in the north and west. The other important consequence of these changes was to increase interest in literacy and to bring into governing circles churchmen and others who could read and write. Newly Christianized kings were urged to order written collections of their laws, not only in imitation of great rulers of the ancient past, but also to formalize royal protections for the church and its officials; thus the laws or "dooms" of Anglo-Saxon kings began to be issued. Church officials also sought to secure rights of land tenure in some written form, and this led to the common use of written instruments called charters in conveying property rights to the church; use of charters eventually spread to some purely secular conveyances.

Thus, with respect to law and property rights, the emergence of the Anglo-Saxons from the dark age of illiteracy is characterized principally by the appearance of codes of written laws called "dooms," and the increasing use of written documents called "charters" to evidence conveyances of tenurial property rights. Although most of the charters deal directly with only one type of property, called "bookland" or "bocland," they provide insights into "laenland" and "folkland," the other forms of Anglo-Saxon landholding. n76

§ 3.05(a) The "Dooms" n77 of Kings Who Ruled Over Individual Anglo-Saxon Kingdoms.

§ 3.05(a)(1) Kent.

The most conspicuous legal activity of early Anglo-Saxon kings was the issuance of written law codes, known as

dooms. n78 The earliest of these was issued by Aethelberht of Kent, n79 and, because it was written in Anglo-Saxon, has the distinction of being the first set of Germanic laws written in the vernacular. n80 Indeed, dating from ca. A.D. 601-605, this code is the earliest Anglo-Saxon writing of any kind. n81

All of the Anglo-Saxon "codes" were codes only in the sense that they were organized somewhat systematically or logically, not because they were comprehensive statements of law. They probably reflected some customary law of the time, but in fact did not include the vast bulk of customary law. n82 Most of the codes were preoccupied with schedules of "composition" payments for specified offenses, and only incidentally give glimpses into the kings' other legal concerns. n83

It could be questioned why Aethelberht wrote a code at all. His people and surely most of his council were illiterate. n84 The traditional explanation that the code was prompted by his conversion to Christianity during Augustine's mission has been challenged, n85 but Christian influence is a certainty both in Aethelberht's and in all subsequent Anglo-Saxon codes. n86 The laws probably consisted of a set of judgments pronounced by the king and his *witan* (council), concerning both abstract propositions (similar to legislation) and concrete cases (similar to adjudications). n87

A brief topical summary of these 90 dooms suffices to show some of the king's legal concerns during this period:

> One doom establishes a compensation multiplier for offenses against the church its clerics, curiously and quite incongruously greater even than for offenses against the king. n88
>
> Eleven dooms establish a compensation multiplier and compensation amounts for offenses against the king and his servants or representatives and imply that in Kent, even at this early time, the king is the personal lord of every freeman. n89
>
> Two dooms establish compensation amounts for certain offenses against noblemen. n90
>
> Two dooms establish compensation amounts for certain offenses against non-noble freemen (and clauses 11 and 16 indicate that three classes of freedmen -- possibly referring to manumitted slaves or other subject people, including Britons -- are recognized). n91
>
> Five dooms deal with forcible entry into and theft from dwellings and fenced enclosures. n92
>
> Three dooms set fines for those supplying weapons by which offenses are committed. n93
>
> Six dooms deal with *wergilds* (the price of a person's life, varied according to social rank) for killing. n94
>
> One doom deals with false imprisonment. n95
>
> Fourteen dooms deal with women -- injuries, marital and family relations, and misconduct. n96
>
> Forty dooms list various personal injuries and their required compensation amounts. n97
>
> Five dooms deal with various offenses by and against servants and slaves. n98

The dooms of Aethelberht are not as varied in subject matter as the *Lex Salica*, the important early law code of the Salian Franks, but they are better organized. n99 If subject matter choice truly reflects the controversies with which the king was most often engaged, then these laws reveal the most difficult social problems confronting an emerging Anglo-Saxon society. It should also be noted that only five of the ninety dooms deal with offenses against rights in land (in the nature of trespass) and that the entire subject of ownership or possessory rights in land is apparently left to

unwritten custom.

A second Kentish code, usually called the Laws of Hlothhere and Eadric, appeared near the end of the 7th century A.D. The two kings probably did not rule jointly; Hlothhere reigned ca. A.D. 673 to 685, and was succeeded by his nephew and rival Eadric, who reigned only a year and a half. n100 Their decrees are introduced: "Hlothhere and Eadric, Kings of Kent, extended the laws which their predecessors had made, by the decrees which are stated below." n101 The 16 dooms in their laws are summarized as follows:

Four dooms assign additional *wergild* amounts for killings by servants. n102

One doom requires kidnapping to be adjudicated by oath. n103

One doom designates the custodian and guardian of a child whose father has died. n104

One doom regulates the recovery of stolen property. n105

Three dooms require certain accusations to be adjudicated by arbitration, compensation, or oath. n106

One doom assigns penalties for defamation. n107

Four dooms deal with offenses committed within the dwellings of others. n108

One doom calls for witnesses to certify purchases of property in London (which may have been part of Kentish territory at the time). n109

As with Aethelberht's code, these laws governed property only with respect to matters of misconduct on property and to certain conveyances, while leaving the vast subject matter of tenurial rights to still unwritten custom.

The third and final Kentish code is that of Wihtred, whose rule began about A.D. 690, during a period of considerable disturbance in southeast England. He issued these dooms in about A.D. 695, shortly after making peace with the Wessex King Ine. n110 One of his laws is identical to a contemporary doom of Ine. n111 These laws declare that they were drawn up by a council of "notables," including several church officials, and that they added to the Kentish legal usages. n112 The 28 dooms of Wihtred may be summarized as follows:

Two dooms grant the church immunity from taxation and establish its penalty entitlement as equal to the king's. n113

Four dooms define the consequences for entering into or aiding illicit unions and not repenting of the same. n114

One doom limits the hospitality to be granted to a wandering cleric not part of an order. n115

One doom regulates manumission of persons at the altar. n116

Three dooms prohibit work and travel on the Sabbath. n117

Two dooms penalize offerings to devils. n118

Two dooms penalize violations of fasting times. n119

Nine dooms regulate affirming by oath the statements and accusations of a bishop, king, abbot, priest, deacon, clerk, stranger at the altar, king's thegn (member of the aristocracy), commoner at the

altar, servant of the bishop or king, servant of a lord's company, lay servant, and ecclesiastical servant. n120

Three dooms establish alternative penalties for thieves caught in the act. n121

One doom requires that a man who leaves the road without giving warning is assumed to be a thief, to be slain or put to ransom. n122

Of these 28 dooms, 24 have a distinctly ecclesiastical flavor, reflecting the special interest of the important church officials on the council that drew up the decrees. Wihtred's dooms shed no light on property laws and customs of the time and added little to the customary law then being observed in the Kentish kingdom.

§ 3.05(a)(2) Wessex.

Although references exist to other codes -- now lost, only one other Anglo-Saxon law code survives from the era prior to when Alfred the Great and his successors began legislating for all of England. n123 This pre-Alfredian code is from Ine, one of Alfred's predecessors on the throne of Wessex, and is contemporary with the Code of Wihtred in Kent, dating to ca. A.D. 688-694. Ine, too, exhibited strong religious impulses and even abdicated in A.D. 725, to make a pilgrimage to Rome, where he died. n124 His laws proclaim that they were drawn up with the advice of his father, two of his bishops, his chief nobles, counselors, and many "servants of God." n125 Its 76 dooms may be summarized as follows:

One doom requires that clerics observe the rules of their respective orders. n126

One doom requires a child to be baptized within thirty days of birth. n127

One doom imposes penalties for working on the Sabbath. n128

Two dooms order payment of church dues. n129

On doom regulates the sanctuary of churches. n130

One doom penalizes fighting in the king's house, a monastery, a nobleman's house, and elsewhere. n131

Twenty-two dooms deal with theft, thieves, stolen property and unreturned borrowed property. n132

Ten dooms regulate adjudicatory procedure, including pledges, oaths, obtaining justice, and false witness. n133

One doom prohibits selling an Englishmen into slavery overseas. n134

Two dooms require a traveler to sound a warning when he leaves the road and permits him to be killed if he fails to warn. n135

Eight dooms deal with various circumstances of killing and the *wergild* amounts therefor. n136

Three dooms require maintenance for foundlings and for fatherless and illegitimate children. n137

One doom requires return of double the bridal price if a man buys a wife and the marriage does not take place. n138

Six dooms regulate moving without permission, eviction, and failure to enter into possession. n139

Inasmuch as they cast light on land tenures, they are quoted in their English translation:

39. If anyone moves away without permission from his lord and steals into another district, if he is discovered he shall return to where was before, and give his lord 60 shillings.

63. If a nobleman moves his residence he may take with him his reeve, his smith, and his children's nurse.

64. He who has [a holding of] 20 hides shall sow 12 hides of land under cultivation when he means to leave.

65. He who has [a holding of] 10 hides shall sow 6 hides of land under cultivation when he means to leave.

66. He who has [a holding of] 3 hides shall sow one hide and a half of land under cultivation when he means to leave.

68. If a nobleman is evicted, he may be expelled from his house, but not from the cultivated land.

Three dooms impose penalties for damage by stray animals. n140

Two dooms penalize destruction of trees. n141

Two dooms discuss penalties for breaking into fortified premises and for depredations by a lord's men. n142

Two dooms deal with obligations accompanying land use, including military service and rents. n143 These dooms, too, are quoted in full for what they reveal about Anglo-Saxon land tenures:

51. If a nobleman who holds land neglects military service, he shall pay 120 shillings and forfeit his land; a nobleman who holds no land shall pay 60 shillings; a commoner shall pay a fine of 30 shillings for neglecting military service.

67. If a man takes a yard [a quarter hide] of land or more, at a fixed rent, and ploughs it, [and] if the lord requires service as well as rent, he [the tenant] need not take the land if the lord does not give him a dwelling; but [in that case he must forfeit the crops]. n144

One doom penalizes illicit compacts. n145

Five dooms deal with transactions in animals, animal parts, and animal labor. n146

One doom sets a penalty for the early shearing of sheep. n147

Ine's code represents a departure from the dreary catalogs of *wergild* arithmetic found in the earlier Kentish codes; it is instead an attempt to deal with conspicuous social problems:

For its date it is a lengthy document, covering a wide range of human relationships, entering much more fully than any other early code into the details of the agrarian system on which society rested, and marked by a definite purpose of advancing Christianity. It is not a tariff of offences, but the result of a more serious attempt to bring together a body of rules governing the more complicated of the questions with which the king and his officers might have to deal. It is the work of a responsible statesman, capable of bringing his clergy and nobles into deliberation on the blending of ancient custom and new enactment in an elaborate body of law. It stands for a new conception of kingship, destined in time to replace the

simple motives which had satisfied the men of an earlier age. n148

§ 3.05(b) How Consolidation of Anglo-Saxon Monarchical Power Affected Property Rights.

The earliest Anglo-Saxon kings ruled people, not territories. n149 Only with consolidation of conquests and increasing stability did specific areas become identified as kingdoms. The earliest kingdoms have been depicted as rather simple organizations with law in a primitive state:

> Certainly [the early Anglo-Saxon kingdoms] were small and required little in the way of institutions. Their law was customary not royal, transmitted orally rather than in writing, and knowledge of it reposed in the body of the folk and was declared in the assembly of the folk by men specially learned in it. No sophisticated arrangements were needed to provide for the maintenance of the king and his retinue: they lived on the renders of their own estates and on the food farms [rent] paid by their subjects. The principal function of kings was to lead their people in war. n150

In the approximately 100 years from the time of the earliest Anglo-Saxon kings until Aethelberht issued his dooms, important changes occurred in the roles and conduct of the kings. These changes are illustrated by what is known of Aethelberht's reign. Known as a progressive monarch, his pattern of kingship presaged the styles of subsequent kings.

Aethelberht maintained contacts with "foreign courts" both in England and on the continent. He assumed personal responsibility for dealing with Augustine's mission, regulating preaching, and later legislating for protection of ecclesiastical interests. n151 His laws show that the "king's peace" was gaining recognition; offenses committed in the king's presence or in gatherings called by the king were assigned extra penalties. Personal offenses normally resolved by payments to the kindred also resulted in fines paid to the king, who now assumed the role of protector of the people in civil affairs. His dooms reveal a king who accepted responsibility for the development and enforcement of customary law and who exhibited considerable interest in the internal affairs of his kingdom. One could infer from his dooms that Aethelberht even had officials to collect fines and arrange compositions between kindred groups. n152

The king's most substantial resource was large tracts of land from which he rewarded his followers. While the land was technically the property of the entire people, the king had rights to rents, services, or other returns from occupancy of the land, which rights he could grant or release in return for faithful service. n153 Such grants and releases were made by royal diploma or charter and land affected by such written documents was called "bookland" or "bocland." n154 In Mercia, even a grant of land as "bookland" did not relieve the property of the customary duties of military service, bridge building, and fortress maintenance. n155 Elsewhere, "bookland" was exempt from the king's proprietary right to tax the land, known as *feorm*. n156 Revenue and tribute were also exacted from subject territories. n157 It may be concluded that royal grants of interests in land defined and refined property interests, generally.

In later times the king could also order extraordinary national taxation, as shown by the *danegeld* and *heregeld* assessments of the Viking era, n158 and he took a percentage of the fines imposed by courts. n159 The national tax levies, in particular, suggest considerable administrative machinery at the king's disposal, used to calculate and collect land assessments. National taxation based on land holdings promoted the assertion of comprehensive royal power over all the lands of the kingdom. n160

Ravages of the Danish Vikings during the 9th century A.D. disrupted every aspect of Anglo-Saxon society. Only Wessex under Alfred the Great survived the invasions. Alfred was able to stop the Danish advance, unify the proud and disparate peoples of other conquered Anglo-Saxon kingdoms, and begin recovering territory and ruling power from the Danes. From the time of Alfred, English laws would be issued by kings whose rule extended over all of England. n161

§ 3.05(c) "Dooms" Issued by Kings of England.

The laws, or "dooms," issued by Alfred and his successors are important because they applied to the entire English nation. However, in content the English dooms added little to the types of decrees found in earlier Anglo-Saxon codes.

§ 3.05(c)(1) Dooms of Alfred the Great.

Alfred reigned from A.D. 871 until his death in about A.D. 899. The date of his code is uncertain, estimated at A.D. 892-893, by one scholar n162 and prior to A.D. 889, by another. n163 A lengthy introduction contains a translation of the Ten Commandments and other passages from the book of Exodus, a brief apostolic history (quoting from the book of Acts of the Apostles), a description of the growth of church law, and a statement that schedules of compensations were decreed and written by many councils. The king then declared:

> Now, I, King Alfred, have collected these laws, and have given orders for copies to be made of many of those which our predecessors observed and which I myself approved of. But many of those I did not approve of I have annulled, by the advice of my councillors, while [in other cases] I have ordered changes to be introduced. For I have not dared to presume to set down in writing many of my own, for I cannot tell what [innovations of mine] will meet with the approval of our successors. But those which were the most just of the laws I found -- whether they dated from the time of Ine my kinsman, or of Offa, king of the Mercians, or of Aethelberht, who was the first [king] to be baptized in England -- these I have collected while rejecting the others.
>
> I, then, Alfred, King of the West Saxons, have shewn these to all my councillors, and they have declared that it met with the approval of all, that they should be observed. n164

These laws provide protection for ecclesiastical interests and assign penalties for various types of offenses, with greater punishments for misdeeds that threaten the king's peace. Thirty-four of the 77 clauses describe money penalties for various personal injuries. n165

Alfred's dooms contain a singular reference to land held by title deed or charter, called "bookland" ("boclande" in Anglo-Saxon), which was inheritable and could be limited by the transferor to alienation only within the kindred:

> We have further established that a man who holds land by title-deed ["bookland"], which his kinsmen have left him, shall not be allowed to give it out of his kindred, if there is documentary or [other] evidence that the power to do so is forbidden him by the men who first acquired it, or by those who gave it to him. [And he who contests such an alienation] shall make a declaration to this effect in the presence of his kindred, with the king and bishop as witnesses. n166

After Alfred's defeat of the Danish King Guthrum in A.D. 878, the so-called "Treaty of Alfred and Guthrum" was drawn up sometime between A.D. 880, and Guthrum's death in A.D. 890. The treaty set out procedures and penalties for certain offenses and also described the boundaries between the English and Danish areas. n167

§ 3.05(c)(2) Dooms of Other English Kings.

The so-called "Laws of Edward and Guthrum" are described in their introduction as those laws enacted first by Alfred and Guthrum and other laws enacted later by Edward the Elder and Guthrum. Because Guthrum died in A.D. 890, and Edward the Elder reigned from A.D. 899-924, this liaison is suspect. n168 In any event, the decrees draw further distinctions between penalties imposed in English and Danish districts, respectively. n169

Edward the Elder issued two other sets of laws. The first, consisting of only three clauses, makes reference to "folkland" ("folclande" in Anglo-Saxon) and "bookland." "Folkland" is of uncertain meaning, but may possibly refer to the land held communally by all the people, or to land held according to customary rights and duties:

> Further, we have declared what [penalty] he is liable to, who withholds from another his rights either in "bookland" or "folkland," And with regard to the "folkland" [we have declared] that he [the plaintiff] shall appoint a day when he [the defendant] shall do him justice in the presence of the reeve.
>
> § 1. If, however, he [the plaintiff] does not obtain his rights either in "bookland" or "folkland," he [the defendant] who withholds the rights shall forfeit a fine of 30 shillings to the king, and 30 shillings also on the second occasion, and on the third occasion the fine for insubordination to the king, that is 120 shillings, unless he has already desisted [from his wrong-doing]. n170

In the second set of laws of Edward the Elder, one of the eight clauses refers to the "domboc," probably the "doombook" n171 of laws of Ine and Alfred, which indicates that those laws had not been superseded. n172

Six series of laws, of uncertain dates, were issued by Aethelstan, who reigned from ca. A.D. 924-939. Their subjects and probable order of issuance are I (ecclesiastical matters), II (administration of justice), V (administration of justice from a council at Exeter), III (reiteration of the substance of series I, II and V in the form of a letter to the king from officials and people of Kent), IV (administration of justice), and VI (an ordinance governing guilds, drawn up by bishops and reeves from London). n173 Perhaps the most interesting of these provisions is found in clause 2 of the second series: "With regard to lordless men from whom no [legal] satisfaction can be obtained, we have declared that their relatives shall be commanded to settle them in a fixed residence where they will become amenable to public law, and find them a lord at a public meeting." n174

This statement illustrates the official distaste for "lordless men," and likely indicates that lordship had been significantly extended during the centuries of Anglo-Saxon rule.

Other aspects of Anglo-Saxon law appear in the laws of the English kings Edmund I (issued A.D. 942-946), Edgar (issued A.D. 946-963), and Aethelred II (issued A.D. 980-1016); in the laws of the Anglo-Danish king Cnut (issued A.D. 1027-1034); and in the various writings from and after the time of the Norman Conquest purporting to describe Anglo-Saxon law under Edward the Confessor and that were in effect at the time of the conquest in A.D. 1066.

§ 3.05(d) Customary Law Generally. n175

No direct evidence has yet appeared as to matters of customary government and law observed by the early Anglo-Saxon invaders of Britain. However, much evidence suggests that the earliest invading folk-groups were identified by the name of the original successful leader, and that name attached to the leader's body of followers wherever they happened to go. n176 By the 7th century A.D., as Anglo-Saxon society was becoming more territorial, some old folk-groups had stabilized into administrative districts, sometimes called provinces, or certain localities eventually called shires and hundreds. This terminology originated in Wessex and spread to most of the rest of England by A.D. 1016, primarily because of the West Saxon hegemony during the Viking conflicts. n177

Some shire boundaries probably conformed to the boundaries of the old folk-groups; others did not. Many shires were administered by important officials of the king, called ealdormen, some of whom were possibly the successors of the older folk-group leaders. Each of these officials had considerable legal power. Shires came to be divided into hundreds (or wapentakes in predominantly Danish areas), usually administered by an officer of the king called a reeve. The reeve's duties were to administer the king's lands and to preside over the hundred courts, as the ealdorman presided over the shire courts. Certain high reeves became the chief administrative officials over shires and were known as shire reeves, or more familiarly, sheriffs. n178

The main responsibilities of the reeves, and ultimately of the ealdormen, were to maintain law and order, punish criminals, collect royal dues, conduct courts, supervise tolls, exchanges and mints and -- especially in the case of ealdormen -- conduct military operations.

There is unfortunately little information about town life under the Anglo-Saxons. n179 Possibly the free inhabitants of towns formed themselves into *gylds* of uncertain nature, and they may have corporately enjoyed certain privileges. London, in particular, seems to have enjoyed substantial independence. n180

The property most commonly exchanged was probably cattle, and the mode of transfer was actual delivery. A bargain was probably bound by pledges and earnest money, although there is no direct evidence on any of these points. Written contracts were not in use. n181

Acceptance of Christianity influenced the development of Anglo-Saxon legislation and customary law in many ways, often too subtle and complex to be identified with precision. n182

In general, Christianity provided an impetus for kings to make laws to "protect churchmen and their property." n183 It also stressed legitimacy in determining heirs, but changes in the law and its application came slowly. n184

§ 3.05(e) Customary Law Regarding Real Property.

The rules for landholding at various times during the Anglo-Saxon age are best described in terms of the prevailing social structure, because the most distinctive feature of social classes was their respective relationships to the land. All land seems to have had impressed upon it certain public burdens: the obligations of military service, of bridge construction, and of fortress maintenance. n185

The kings reserved for themselves great tracts of land in subjugated territories. Some of this land was granted to their chief warrior companions who formed the noble class, and after Christian conversion, kings and others frequently made grants to the church. The grantees were supported by the rents and services of the humble agrarian folk who actually occupied and tilled much of the land. n186 These royal grants to private persons were probably only life interests; if a father wished to pass a holding on to a son, he probably had to seek the king's acquiescence. A younger son might serve in personal attendance on the king in anticipation of being favored with his own grant of land. n187

At some time, probably beginning shortly after conversion to Christianity occurred, the need for church endowments not limited to the life of one grantee became obvious. Anglo-Saxon rulers began granting land to the church by means of royal charters, giving virtually full possessory and hereditary rights. This land was always referred to as "boclande" or bookland. Obtaining such charters was at first the exclusive privilege of the church, but transparent subterfuges arose. A lay person could secure a grant of bookland by founding a church or a monastery and then bequeathing it to his descendants, who would have to take orders or the veil. The bequest was always in jeopardy if heirs died out or wished to remain lay persons, so commonly the local bishop was named the ultimate grantee. Also widespread was a practice, condemned by Bede, whereby many important persons had themselves tonsured and called their institutions monasteries, but whose commitment to orders was superficial. So much land was consumed by this practice in Northumbria that there was allegedly not enough land left for grants to young warriors, who often left the region. n188

While all land was normally subject to certain secular burdens -- taxation, military service, purveyance, labor, and judicial duties -- Ine of Wessex went so far in A.D. 704, as to declare church lands perpetually exempt from taxation, n189 and Wihtred of Kent exempted churches from all secular burdens, n190 an act ratified by a church council in A.D. 742. But in A.D. 749, the powerful Mercian monarch Aethelbald declared church lands would not be exempt from the secular burdens of bridge building and fortress work, although other exemptions would remain in effect. n191 A few years later his successor Offa added the requirement that holders of bookland, mostly ecclesiastical foundations, must meet quotas for military service. n192 Wessex followed, and by A.D. 842, Wessex land charters show that all three "common dues" were being imposed on bookland in Wessex. n193 This removed any barriers to extending bookland outright to lay persons, which in fact occurred during Offa's reign. n194

Although incidents of particular forms of landholding must have varied widely, apparently bookland usually carried the rights of alienation or devise. n195 The decree in Alfred's laws prohibiting holders of bookland from alienating it if ancestors had entailed it in the family was probably an aberration. n196

An English king might even grant part of his own demesne as bookland. As bookland rights were extended, they sometimes included the right to hold court, or at least to keep part of the fines assessed by courts held within the territory of the grant. n197

Land not granted by charter might have been held under a more precarious form of tenure called *laenland*, or, for convenience, loan land:

> In the later Anglo-Saxon period, land held of a superior, whether much or little, is called *laen-land*. It is not clear whether this term extended to customary tenures (those for example which would result from a grant of book-land as between the new lord and the occupiers) or was limited to interests created by an express agreement. In the latter case it may be compared with the Gallo-Frankish *precarium*, from which indeed it was perhaps derived. n198

Although it must be understood that any generalizations about *laenland* are derived from isolated references in the charters, some broad characteristics of this form of landholding seem evident. *Laenland* could not be alienated or inherited without the king's permission or charter. If permission or charter were granted, the land became bookland, but would revert to the king if the holder died without heirs. Such a holding could be described as a lease for a term of lives, usually up to three lives, followed by a reversion. n199 *Laenland* was subject to normal secular dues and it, like bookland, could be forfeited for failure to fulfill those dues.

The tracts of land granted by loan or book were usually very large, and the grantees were often members of the lay nobility or higher clergy. Substantial portions of their holdings were occupied by tillers of the soil from several other classes, with the social class generally corresponding to the terms of their tenures.

Again remembering that Anglo-Saxon society was not static, some broad generalizations about social class and property tenures may be made. Just below the nobility on the social scale was a class of free farmers, discussed at some length in the laws of Aethelberht, n200 and sometimes apparently labeled *geneats* or *radcnihts*. However, other than this source there is very little direct information about this class. Their land, even if free of rent obligation and freely alienable, would still have been subject to the secular dues owed to a lord or the king. Depictions of early Anglo-Saxon society as consisting mostly of such free farmers cannot be substantiated and, in fact, the Domesday Book shows that by the 11th century A.D. the free class had become surprisingly small, except in the heavily Danish areas. By this time it is possible that some of these freemen had become mounted retainers for their lords or the king, thus receiving a holding and being expected in return to pay rent, perform labor, and attend and ride on errands. n201 It is possible to see in this yeoman farmer-mounted servant a forerunner of the medieval knight, already in place before the Normans came. n202

In England a person could be economically dependent, and thus unfree, but still be personally free, especially in legal standing. Freemen are known to have been tenants in varying degrees of servitude. Other classes of free persons arose during the Anglo-Saxon age. n203 One of these classes, the so-called *geburs*, held much smaller tracts of land than the *geneats*, paid rent in kind and money, and performed labor for their lord. The lord, who had originally provided both the land and the livestock, reclaimed them when the *gebur* died. Still lower on the social scale, the class of *kotsetlan*, or cottagers, held land of the lord also, and performed heavy labor. Economically unfree, the *kotsetlan* probably could not move from their land, but were still personally free. n204 Even this nominal personal freedom would be lost if the *kotsetlan* were captured during civil strife or sold themselves into slavery during times of hardship. n205 It has been stated that "serfdom was much more of a personal bondage and less involved with the occupation of particular land before the Norman Conquest than after." n206

It may also be questioned whether kindred relationships continued to influence landholdings as the Anglo-Saxon age advanced through the centuries:

> As to the influence of the tie of kindred on the tenure and inheritance of land, the pre-Conquest evidence, though fairly copious, is unsatisfactory. Most of it refers to the estates of wealthy persons, who can deal with their properties by devises and testaments. Many of the documents which bear on this subject relate to land held under a royal charter, and therefore exempt from the ordinary rules of inheritance. Little information has been preserved about the customs which regulated the descent of land among the peasantry, and there are questions of great importance, such as the conditions under which a daughter might claim a share in her father's land, on which Old English authorities throw no direct light. Medieval practice suggests very strongly that the holding of the pre-Conquest ceorl had been partible among his sons, or among his daughters if he had no son, and that the conception of the holding as "family land" was so firmly established that its possessor had no right to alienate any part of it to the disadvantage of his expectant heirs. It seems reasonable to assume that the heirs of a ceorl whose holding was too small for profitable division remained on their father's land, and cultivated it jointly after his death. But it is clear that the house community of land-owning kinsmen to which such arrangements must often have given rise was in law a mere group of individuals which could at any time be dissolved by the action of its members. No text of Old English law ever attributes the ownership of land to a family. n207

The overall picture of Anglo-Saxon landholding, especially as related to social status, is one with little known consistency throughout England, and one that was in constant fluctuation throughout the Anglo-Saxon age. Certainly it appears that at several levels of social status landholding rights were granted in return for commitments to render services and agricultural products. At the very lowest levels, a lord who established a peasant family on a farm, with not only the land and agricultural seed, but with livestock, implements, and furniture, was considered entitled to the return of all the peasant's possessions upon the peasant's death. n208 Free peasant classes at various levels may have been made up of persons both descending and ascending the social scale, depending upon the economic fortune or vicissitudes they had encountered. And the presence of slaves in Anglo-Saxon England was pervasive:

> At the time of the Norman conquest personal servitude was widespread in England. More than 25,000 slaves (*servi*) were enumerated in Domesday Book. Men had been enslaved through war, capture in raids, sale by their families in time of need, and as a punishment for serious crimes ... How far manumissions kept pace with fresh enslavements is uncertain; it may be true that slavery was declining by the middle of the eleventh century, under pressure from economic change no less than ecclesiastical opposition. Even so, the Norman conquest was the first conquest that did not lead to an increase in the number of slaves. n209

These Anglo-Saxon arrangements for landholding, for the most part acknowledged only by immemorial custom, persisted through the Norman Conquest and into the period of common law development. They were the background and the foundation for the common law of property. Because bookland, laenland, and folkland are the only manifestations of a systematic approach to land law in Anglo-Saxon times, the next paragraphs will review what additional detail is known about these forms of property interests.

§ 3.05(e)(1) Bookland.

Anglo-Saxon bookland was entirely a creature of written instruments, called charters, that were eventually kept together in bound groups called books. The earliest charters were used for grants of land by the king either directly to the church or to a lay person for church-related purposes.

The practice of using charters was likely ecclesiastical in origin as well as impetus, probably having been introduced by the Roman missionaries sent to the pagan Anglo-Saxons. The earliest charters were written in the same script and in the same language (Latin) as other monastic documents, on the same type of material (vellum), with phrases threatening violators of charter covenants with religious rather than secular punishments, and whose uses were almost exclusively to convey land interests from a king to or for a religious institution. The "formulas" (standard phrasing of the operative provisions) were very similar to those used by the Roman Pope Gregory I, who sent the first Roman missionaries to the Anglo-Saxon King Aethelberht; this suggests that the very idea of using charters may have been introduced by the Italian missionaries sent to England. n210 As to the actual writing of the charters, "[u]ntil the tenth century, at least, it seems in fact that the writing of charters was the responsibility of the local bishop, the local abbot or their scribes [rather than the king's own clerks] (the important proviso being that such men were often in attendance on the king)." n211

While several scholars have been tempted to interpret charter conveyances under a uniform and consistent set of rules, it is likely impossible to ascribe a standard set of property rights as subject to conveyance by charter. Often the terminology in the charters is ambiguous and inconsistent. Under the assumption that by the 8th century A.D., when the earliest extant charters are dated, all occupied lands were subject to certain types of service (such as military service, road building, and fortress maintenance), it has been theorized that charters normally gave relief or immunity from such burdens. In fact, wording conferring such immunity does appear in later charters, but is absent from the earlier charters. This suggests that the earliest charters did nothing more than affirmatively convey the food-rent of an estate, known as the *feorm*.

The tenurial character of bookland also cannot be identified with certainty. The charter may have been used at first to ensure the ecclesiastical grantee that the grant would not be revoked. If early Anglo-Saxon land practices conformed to traditional Germanic practices, then certain lands -- held by kinship groups -- could be transferred only by inheritance within the group, but could not be alienated outside the group without group assent. Thus land granted to the church would have come from other, alienable lands held by the king, but there is some evidence that such acquired property interests could be later revoked by the royal grantor. n212 By use of the charter, the grantee's interest in such acquired property could be made perpetual, with documentary evidence against any presumed royal right to revoke. Such permanent transfers inevitably meant that kings drew upon a diminishing reserve of land with which to reward faithful followers; according to earlier practice, kings could withdraw previous conveyances and reconvey those lands to others.

Even these conveyances out of the royal demesne might sometimes find their way back into the holdings of inheritable kinship property. It appears that on occasion a grantee of bookland, perhaps an abbot who obtained the land for ecclesiastical purposes, passed the land on to his son who also succeeded him as abbot, whereupon the land began to be treated as inheritable kinship property with rights of the kindred attached. n213 Some evidence suggests that it was common practice for a prominent family to use the charter as a means of enhancing its land holdings by using bookland to found a monastery and then retaining governance of the monastery within the family:

> Bede's last work, a letter to Bishop Egbert written in the year before the pallium was sent to York, is heavy with foreboding. He deplored the profusion of land-grants which had left the kings without a reserve from which to maintain the class on which the safety of the realm depended, and he denounced in strong terms the connivance of church and state which permitted local magnates to turn their establishments into sham monasteries and thus to evade their public liabilities. n214

Apparently it later became acceptable to limit a conveyance by bookland to inheritability only with the kin. Thus a 9th century A.D. law of Alfred the Great prohibits a landholder from alienating bookland that was obtained under such a limitation. n215

Because most of the land "conveyed" by a charter would already be occupied by others, the effect of the charter might be better characterized as simply a surrender of royal rights:

> [T]hese charters always take the form of a simple conveyance of land, and ignore the fact that the gifts which they record mean, in effect, the alienation of rights by a king for the benefit of a subject. The rights themselves are expressed in the vaguest of words, which often amount to nothing more than a statement that the land at issue is to be free from all earthly service, qualified by certain reservations in the king's interest... For the rest, the king makes no attempt to intervene between the lord and the men who are to be under his authority ... The exaction of the ancient food-rents and services by which a new lord will henceforward profit can safely be left to the control of a custom which is none the less valid because it has never been reduced to writing ...
>
> Charters of this type generally include a clause stating that the recipient of the estate may alienate or bequeath it in his will. n216

It has been stated that "nothing but a royal charter could free land from the king's dues and services, and defeat the claims of expectant heirs." n217 In one surviving charter the king grants land to himself for the express purpose of removing certain secular burdens from the land, so the king can thereafter convey the land to another free of such obligations. n218

By the end of the eighth century A.D., charters were beginning to be used for purely secular grants. Sometimes the terms of the charter indicate that money has been paid, and presumably money may have been paid even in many cases where payment was not mentioned in the charter:

> The advantage to the receiver of having land which he could alienate at will and which was free from royal dues is obvious, and he was willing to pay for it. Moreover, to the king who made it, a grant of bookland may have afforded a means of rewarding his thanes and others for services rendered, or of raising ready money. The king always retained the jurisdiction over those men who held bookland, which meant that if any of them committed a deed which involved forfeiture, the land came into the king's hands. n219

Keeping in mind that conveyancing practices involving bookland and probably even the incidents of bookland changed over the centuries of the Anglo-Saxon age, it may still be helpful to make a general statement about the property rights associated with bookland. n220 Probably the estates created by bookland were allodial, which is to say that the owner did not hold the estate of any superior owner. Bookland was probably conveyed by delivery of the book and perhaps some additional ceremony signifying corporeal delivery of the land. Such a ceremony may have been similar to the later livery of seisin, during which the parties went on to the land and in the sight of witnesses exchanged possession of a dirt clod or similar object. No new book or deed would be required. Bookland probably carried with it the rights to alienate or devise, but subject to certain customary protections for heirs. However, if the charter specifically conferred rights of alienation and devise, as many but not all did, then transfer could occur without restraint from heirs. If a bookland owner died intestate, the bookland would pass to heirs, usually but not always to sons in equal shares. Rights of Anglo-Saxon women in land generally are discussed elsewhere. n221

The charters and incidents of bookland continued after the Norman Conquest, but not for long:

> The system of making grants by written instruments went on unchecked until, with the advent of the Normans and the system of feudal tenures, the old significance of the Anglo-Saxon book, as well as the name, almost disappeared. The importance of the book primarily lay in its opposition to the old Germanic customs and principles, and in the protection it afforded against the claims recognized by that system. When each and every estate formed but one link in the great feudal chain, there was no longer any use in the book as the Anglo-Saxons conceived it. The only characteristic it retained was as an evidence of title. Charters and deeds went on accumulating in great abundance, but the old Saxon book perished with the Conquest. In all Domesday, there is but one estate of boc-land mentioned... There was

> but one object left for a written instrument, to evidence title; and the Norman charters fulfilled that object. n222

§ 3.05(e)(2) Folkland.

Folkland, or "folcland," is of uncertain status in Anglo-Saxon property law. It may have been virtually any land not considered bookland, and thus still subject to alienation restrictions and to customary obligations and dues. n223

The documentary references to folkland are few and inde-terminative. The most authoritative statement on folkland is in a passage from the laws of Edward the Elder, issued ca. A.D. 900-925:

> 2. Further, we have declared what [penalty] he is liable to, who withholds from another his rights either in "bookland" or "folkland," And with regard to the "folkland" [we have declared] that he [the plaintiff] shall appoint a day when he [the defendant] shall do him justice in the presence of the reeve.
>
> > § 1. If, however, he [the plaintiff] does not obtain his rights either in "bookland" or "folkland," he [the defendant] who withholds the rights shall forfeit a fine of 30 shillings to the king, and 30 shillings also on the second occasion, and on the third occasion the fine for insubordination to the king, that is 120 shillings, unless he has already desisted [from his wrong-doing]. n224

A second reference is in the will of a 9th century A.D., ealdorman named Alfred, who bequeathed bookland to his son, expecting that the king would make an additional grant of folkland to the son. If the king were not forthcoming, the son would receive additional bookland from the testator's wife. n225 As viewed by Stenton:

> These terms show that a nobleman might hold both bookland and folkland, and suggest that while he was free to dispose of his bookland by will, he had no such power over his folkland... [T]his famous reference to folkland and bookland does little more than emphasize the contrast between these terms which is generalized in the laws of Edward the Elder. n226

As related by another charter, the king of Kent in A.D. 858, gave land to his minister Wulflaf in exchange for other land. The land that the king received in exchange was turned into folkland by the king for himself. n227 Again, according to Stenton:

> The whole tenor of the document shows that this transaction meant the imposition of public burdens on land which had previously been exempt from them, and that the king was compensating himself for the loss of *feorm* [food rents] and service from Wassingwell [the land given in the exchange] by imposing these burdens on the land at Mersham [the land received in the exchange]... To the man who wrote this endorsement, folkland meant land from which the king drew food-rents and customary services. n228

Pollock and Maitland pointed out that several gratuitous assumptions about folkland and been advanced and refuted during the 19th century, and concluded:

> Folk-land is a term which occurs only in a few documents, and then without any decisive explanation. In the most authoritative of these, a law of Edward the Elder, it is contrasted with book-land as if it included all land that was not book-land. Spelman, so reading the passage, defined folk-land as land held by common, that is customary law, without written title... Folk-land, then, appears to have been, as Spelman said, land held without written title under customary law. We have no right to assume that there were not varieties of tenure within this general description, or that custom was uniform even in

> the same kingdom. It is probable that the alienation of folk-land was difficult, and we do not know to what extent, if to any considerable extent, power to dispose of it by will had been introduced. n229

Another historian was of the view that folkland generally was alienable but subject to rights of heirs, and speculated that at least some folkland was held as "freehold allodial estates under the customary law": n230

> Folkland is the term applied to all land held in these ways under the customary law. By far the greater part of it was land held by village freemen subject to the common-field method of agriculture; and, to that extent, its ownership was limited by the customary rights of the community. That it descended to the heirs of the owner, his sons, on his death in equal shares, there can be no doubt. We have little or no direct evidence of the rules of law which determined the incidents of ownership of folkland; but in view of what we find existing after the Conquest, the inference is unavoidable that the freeholder could convey his land subject to restrictions, concerning the details of which we know nothing definitely, to his heirs ... [T]he general power of alienation which we find existing after the Conquest, subject to these restrictions in favor of heirs only, leads strongly ... to the conclusion that folkland could be conveyed, probably with some sort of ceremony involving formal renunciation by the donor and formal taking of possession by the donee, in the presence of neighbors through whom the transaction could subsequently be proved. n231

Whatever were the precise incidents of folkland, it surely made up the largest portion of occupied English lands, and was likely the direct source of the landholding rights that prevailed in most areas during the decades immediately following the Norman Conquest.

§ 3.05(e)(3) Laenland.

Late in the Anglo-Saxon era, documentary references to a type of landholding known as "laenland" occur. "Laen" is related to the modern German *Lehn*, or loan, and this type of property interest may be accurately described as "loaned" land. Laenland was a "grant of land for temporary use, made usually by the church or other holder of bookland, just as the book, or charter, creating bookland estates was usually made by the king." n232

The most explicit reference to laenland in Anglo-Saxon charters is an account by Bishop Oswald of Worcester, explaining how the church planned to lease or lend some of its lands to private parties. n233 Another charter refers to laenland descending to the cathedrals at Canterbury and Rochester. n234 From these documents it has been generalized that laenland was given in imitation of bookland charters, creating subordinate interests in prominent persons who themselves were not the actual occupants of the land. The grants varied in duration from one to three lives, and drew either periodic rent, a lump sum payment, or rendering of services. n235 It has also been theorized that the laenland device could have been widely used by all types of landholders to let out their lands on short terms under oral leases, especially since producing writings of any kind would have been difficult in that era. n236 Because these land loans were not always coincident with customary tenurial incidents "it must have been possible for a peasant to acknowledge one man as his lord and to rent land from two or three other landlords." n237

As far as the documentary evidence is concerned, in the terminology of later medieval times, bookland could be described generally as the land received from the king by tenants-in-chief, while laenland would be the land held of tenants-in-chief by lesser lords. n238 However, there is virtually no evidence in Domesday Book or any other early post-Conquest source that laenland holding was widespread or that it carried over into post-Conquest landholding practices in some modified form. The scarcity of direct evidence and the speculative nature of theories about laenland has opened and left unresolved a scholarly debate over whether laenland represented an incipient form of Anglo-Saxon feudalism, well-entrenched in the generations before the Norman Conquest. If one limits the concept of feudal tenures to fee interests requiring military or other knightly service, then these laenland tenures were probably not feudal: they do not appear to be fee interests, and the consideration given for the grants was usually something other than a

commitment for military service. n239 However, whether or not denominated as feudal, and whether commonly or rarely occurring, laenland appears clearly as a form of landholding based on services and other consideration in addition to or other than customary tenurial incidents. If laenland was not proto-feudalism, it might well have been the beginnings of landlord-tenant law.

§ 3.05(f) Rights of Women Under Anglo-Saxon Property Law.

As would have been true in the warrior societies of Dark Age Europe generally, Anglo-Saxon women were in most respects subordinate to men. However, as the rule of law emerged in Anglo-Saxon kingdoms, a certain evenhandedness regarding gender was a characteristic feature of the English legal codes and customs. This is perhaps no more clearly manifest than in matters of property rights.

Much information about rights of women under Anglo-Saxon property law can be gleaned from the charters. It is possible that the property rights of women apparent in these charters applied only to women of the social class that would normally use such charters, but there is in fact no evidence that the rough parity of gender before the law manifest in these documents was not a characteristic of Anglo-Saxon society generally. n240

In these instruments women appear in the capacities of grantor, n241 grantee, n242 vendor, n243 vendee, n244 plaintiff, n245 defendant, n246 testatrix, n247 and devisee n248 with no apparent distinctions in substance, form or procedure made on account of gender. In Anglo-Saxon legal proceedings, a woman was qualified to be a witness n249 or an oath-helper n250 in the same way as was a man.

In most respects this status of apparent equality prevailed even for married women. A husband could convey bookland to his wife. n251 Husband and wife could join as vendors, n252 grantors, n253 devisors, n254 and be joined as vendees, n255 grantees, n256 and devisees. n257

Less, however, is known about a married woman's rights in lands received as dowry, morning-gift or in some form of marriage settlement. Germanic custom concerning the commitment for marriage is a necessary background for understanding of this subject. Several references to marriage as a *sale* appear in various Anglo-Saxon dooms, n258 but it may be doubted that the transaction was as crass as sale of a chattel; perhaps it should be viewed more as a transfer of the rights of guardianship.

Guardianship in Germanic law was one respect in which women were categorically subordinated to men. It was axiomatic that a woman should be under the guardianship of a male, and the time of marriage marked the transfer of guardianship responsibilities and rights from the father to the new husband. That the references to Anglo-Saxon marriage or betrothal as a "sale" are really references to transfer of guardianship finds support in the fact that, in Germanic custom generally, the price paid was not derived from bargaining, but was simply the *wergild* of the bride, as fixed by her social status. The marriage price would be paid on the occasion of betrothal, and a woman who was untrue to her betrothal would owe a sum equal to her marriage price. Also, the guardian of the bride could not be compelled to specific performance, as it were, but only to pay damages in breach of contract n259 if he failed to complete the transaction. n260

The betrothal customs described in the preceding paragraph, which prevailed among Germanic tribes generally, had been altered slightly among the Anglo-Saxons as early as the 8th century A.D. n261 The Anglo-Saxon dooms show that, at least in some cases, the price was no longer paid at the betrothal, but only promised; instead a nominal sum of earnest money was paid to the guardian at the time of betrothal. n262 Also, when the full price was eventually paid, it was given directly to the bride rather than to the guardian. n263 Thus, over many generations, the characteristics of a sale that had previously attached to arrangements of marriage had been transformed into the characteristics of a contract.

The price of the betrothal, which custom eventually directed to be paid at the time of marriage, was only one endowment for the bride. It became, by comparison, of little importance in relation to the other bridal endowment, the so-called *Morgengabe* or morning-gift. The morning-gift was originally a free-will gift by the husband to the bride on the morning after the bridal night. n264 Consisting at first of chattels, it later came to be considered as a form of widow's maintenance, and thus was necessarily property of sufficient value to sustain the wife if she survived her husband. The morning-gift, therefore, came to be almost always a gift of land, normally granted at the time of betrothal by means of a written document (to prove ownership after the husband's death); alternatively, if a specific morning-gift were not granted at the betrothal or beginning of the marriage, then a certain portion of the husband's property, usually one-half, was assigned by law for maintenance of the bride if she became a widow.

Among the Germanic tribes on the continent, the bridal price and morning-gift, both promised at the time of betrothal, eventually merged and, on the continent, became the dower. In Anglo-Saxon kingdoms, the two gifts did not merge, but the morning-gift was clearly the more important of the endowments. By law and custom the morning-gift, usually one-half of the husband's property, was assured to the widow from a childless marriage. Approximately the same division of property was observed even if both husband and wife remained alive and married: if one or more live children were born to the marriage, then the couple held their real property as community property. Personal property was also held in community, even if no children were born. n265

Although the wife was considered under the guardianship of the husband, she was quite independent as to the household, as may be inferred from the following provisions of Cnut's laws regarding liability for stolen property brought into the house by the husband:

> 76. Concerning stolen goods.
>
> If anyone carries stolen goods home to his cottage and is detected, the law is that (the owner) shall have what he has tracked.
>
> § 1. And unless the goods had been put under the wife's lock and key, she shall be clear [of any danger of complicity].
>
> § 1a. But it is her duty to guard the keys of the following -- her storeroom and her chest and her cupboard. If the goods have been put in any of these, she shall be held guilty ... n266

Upon the husband's death, the widow became the owner of all property she had obtained by inheritance or gift as well as the morning-gift, either as described by charter, or, in the absence of charter, usually one-half of the husband's property. n267 Unless the wife's ownership rights in the morning-gift had been limited when given by the husband, the wife had full ownership, with power to dispose of it by conveyance n268 or devise. n269 However, a widow was required to remain chaste and unmarried for at least a year after her husband's death, and for violation of this restriction, all her property would be forfeited to her husband's next of kin; n270 accordingly, if she did not violate that restriction, the property was fully hers to take into her next marriage. n271 According to the laws of Cnut, if the wife was unfaithful to the husband, all her property was forfeited to her husband. n272 If the couple divorced by mutual consent and the children remained with the wife, she took half the property; if the children remained with the husband, the wife took only a child's portion of the property. n273

Apart from the above minutiae of Anglo-Saxon custom and law regarding women's property rights, one may conclude generally that women enjoyed a higher status and stronger property rights during the Anglo-Saxon centuries than during the high Middle Ages following the Norman Conquest in A.D. 1066. n274

FOOTNOTES:

(n1)Footnote 75. Peter Hunter Blair, The World of Bede 49-67 (1971).

(n2)Footnote 76. *See also* Daniel R. Coquillette, *The Lessons of Anglo-Saxon "Justice," 2 Green Bag 2d 251 (Spring 1999).*

(n3)Footnote 77. While the precise derivation and contemporary meaning of "doom" cannot be ascertained, it appears that the term is of purely Germanic origin and in general refers to a thing that is set up or established. *See* 3 Oxford English Dictionary 600-601 (1933).

(n4)Footnote 78. A. W. B. Simpson, *"The Laws of Aethelberht,"* in On the Laws and Customs of England: Essays in Honor of Samuel E. Thorne 5 (Morris S. Arnold et al. eds., 1981). Daniel R. Coquillette, *The Lessons of Anglo-Saxon "Justice," 2 Green Bag 2d 251,* Spring 1999.

(n5)Footnote 79. According to Bede, Aethelberht had his code drawn up "according to the example of the Romans." Bede, Historia Ecclesiastica Gentis Anglorum ii.5.

> [I]t is possible to detect parallels, between his code and seventh-century Continental laws; yet it and the others are in the vernacular. They give the impression of a sophisticated and wide-ranging approach to the establishment of custom and royal right; Aethelbert's code is well-organized, and some of its gaps are filled by his successors in Kent ... But gaps remain (for example on land tenure) ... In the end these codes, like their Continental counterparts, seem to be attempts to civilize the image of Germanic kings by giving them a role for which Roman emperors were famous; it was thus more important to write something of a people's custom or a king's judgements down, than to organize the material in a comprehensive way.

Patrick Wormald, *"The Age of Bede and Aethelbald,"* in The Anglo-Saxons 98 (James Campbell ed. 1982).

(n6)Footnote 80. *Id.* at 4. The Barbarian Laws discussed in § 3.03(b), *supra*, are known only through Latin manuscripts.

(n7)Footnote 81. The Laws of Aethelberht are of special interest as being the earliest document written in the English language. Some poems indeed, such as Beowulf, may have a longer history behind them, but it is highly improbable that they were committed to writing till a much later period. No other Teutonic language possesses any original records of equal antiquity, apart from short inscriptions. The remains of Gothic literature are indeed much older, but they consist entirely of translations, while the laws of the Continental Teutonic peoples, though they begin more than a century before Aethelberht's reign, are written in Latin down to comparatively late times.

The Laws of the Earliest English Kings 3 (F. L. Attenborough ed. & trans. 1922).

(n8)Footnote 82. *Cf.* Mary P. Richards, *Anglo-Saxonism in the Old English Laws*, in Anglo-Saxonism & The Construction of Social Identity 40 (Allen J. Frantzen & John D. Niles eds., 1997) (using the laws given by the Kentish kings to examine the Anglo-Saxon culture from which those laws sprang).

(n9)Footnote 83. Patrick Wormald, *"The Age of Bede and Aethelbald,"* in The Anglo-Saxons 98-99 (James Campbell ed. 1982):

> The greatest difficulty posed by early codes (and one on which the texts themselves lend no assistance) is to decide whether what they describe is traditional custom or governmental innovation. Historians have therefore seen them either as evidence of the persistence of the society described by Tacitus, or as evidence of increasing royal power ...

> ... Ultimately, it does seem probable that being made solemnly and permanently responsible for the statement of the law enhanced a king's power. Law was issued in the king's name and became the king's, in a way it may not have been before and was never to be in Scandinavia. If the early laws are most important as evidence for a stage in the history of English society, they are also a powerful symbol of the post-conversion transformation of English kingship.

(n10)Footnote 84. A. W. B. Simpson, *"The Laws of Aethelberht,"* in On the Laws and Customs of England: Essays in Honor of Samuel E. Thorne 15 (Morris S. Arnold et al. eds. 1981).

(n11)Footnote 85. H. G. Richardson & G. O. Sayles, Law and Legislation from Aethelberht to Magna Carta 1-13, 157-169 (1966).

(n12)Footnote 86. Clause 1 of the Laws of Aethelberht, while probably a later addition to the original dooms, gives extraordinary legal status to ecclesiastical persons and property and is included in the oldest surviving text of this code. *See* The Laws of the Earliest English Kings 5, Aethelberht cl. 10 (F. L. Attenborough ed. & trans. 1922). *See also* Charters of St. Augustine's Abbey, Canterbury and Minster-in-Thanet (Susan E. Kelly, Ed. 1995); N.J. Higham, The Convert Kings, Power and Religious Affiliation in Early Anglo-Saxon England (1997) (discussing the Christian influence on Anglo-Saxon law givers).

(n13)Footnote 87. A. W. B. Simpson, *"The Laws of Aethelberht,"* in On the Laws and Customs of England: Essays in Honor of Samuel E. Thorne 5 (Morris S. Arnold et al. eds. 1981).

(n14)Footnote 88. The Laws of the Earliest English Kings 5, Aethelberht cl. 1 (F. L. Attenborough ed. & trans. 1922).

(n15)Footnote 89. *Id.* at 5-7, cls. 2-12.

(n16)Footnote 90. *Id.* at 7, cls. 13-14.

(n17)Footnote 91. *Id.* at 7, cls. 15-16.

(n18)Footnote 92. *Id.* at 7-9, cls. 17, 27-29, 32.

(n19)Footnote 93. *Id.* at 7, cls. 18-20.

(n20)Footnote 94. *Id.* at 7-9, cls. 21-23, 25-26, 30.

(n21)Footnote 95. *Id.* at 7, cl. 24.

(n22)Footnote 96. *Id.* at 9, cl. 31; at 15, cls. 73-85.

(n23)Footnote 97. *Id.* at 9-15, cls. 33-72.

(n24)Footnote 98. *Id.* at 17, cls. 86-90.

(n25)Footnote 99. F. M. Stenton, Anglo-Saxon England 60 (1943):

> [D]espite Bede's statement that Aethelberht composed his dooms 'after the Roman manner', they shown no sign of Roman influence. It is unlikely that they owed anything definite to any model, and their general affinities lie, not with any law-book of the Western Empire, but with the Lex Salica, the great code which Clovis had issued for the Salian Franks. Even so, the affinities are in subject-matter and not in form; the Salic law is a far longer text than the ninety brief sections into which Aethelberht

compressed his laws, and primitive as is the content of the Salic law, it was written in Latin. The Laws of Aethelberht were written in English, and are of unique interest as by far the earliest body of law expressed in any Germanic language.

(n26)Footnote 100. The Laws of the Earliest English Kings 2 (F. M. Attenborough ed. & trans. 1922).

(n27)Footnote 101. *Id.* at 19, Hlothhere and Eadric (introductory passage).

(n28)Footnote 102. *Id.* at 19, Hlothhere and Eadric cls. 1-4.

(n29)Footnote 103. *Id.* at 19, cl. 5.

(n30)Footnote 104. *Id.* at 19, cl. 6.

(n31)Footnote 105. *Id.* at 19, cl. 7.

(n32)Footnote 106. *Id.* at 21, cls. 8-10.

(n33)Footnote 107. *Id.* at 21, cl. 11.

(n34)Footnote 108. *Id.* at 21, cls. 12-15.

(n35)Footnote 109. *Id.* at 23, cl. 16.

(n36)Footnote 110. *Id.* at 2-3.

(n37)Footnote 111. *Id.* at 31, Wihtred cl. 28, and at 43, Ine cls. 20-21 (requiring a traveler to sound a warning when leaving the road).

(n38)Footnote 112. *Id.* at 25, Wihtred (introductory passage).

(n39)Footnote 113. *Id.* at 25, Wihtred cls. 1-2.

(n40)Footnote 114. *Id.* at 25-27, cls. 3-6.

(n41)Footnote 115. *Id.* at 27, cl. 7.

(n42)Footnote 116. *Id.* at 27, cl. 8.

(n43)Footnote 117. *Id.* at 27, cls. 9-11.

(n44)Footnote 118. *Id.* at 27, cls. 12-13.

(n45)Footnote 119. *Id.* at 27, cls. 14-15.

(n46)Footnote 120. *Id.* at 27-29, cls. 16-24.

(n47)Footnote 121. *Id.* at 29-31, cls. 25-27.

(n48)Footnote 122. *Id.* at 31, cl. 28.

(n49)Footnote 123. The most significant lost code is undoubtedly that of the great Mercian king Offa, which code Alfred included in the description of laws he relied on for his own code as among "the most just of the laws I have found...." The Laws of the Earliest English Kings 63 (F. L. Attenborough ed. & trans. 1922).

(n50)Footnote 124. *Id.* at 34.

(n51)Footnote 125. *Id.* at 37, Ine (introductory passage).

(n52)Footnote 126. *Id.* at 37, Ine cl. 1.

(n53)Footnote 127. *Id.* at 37, cl. 2

(n54)Footnote 128. *Id.* at 37, cl. 3.

(n55)Footnote 129. *Id.* at 37, cl. 4 at 57, cl. 61.

(n56)Footnote 130. *Id.* at 39, cl. 5.

(n57)Footnote 131. *Id.* at 39, cl. 6.

(n58)Footnote 132. *Id.* at 39-61, cls. 7, 10, 12, 14-18, 22, 24-25, 28-29, 36, 46-48, 53, 57, 72-73, 75. As if to confirm a continental genealogy for Anglo-Saxon laws, cl. 29 of Ine's Dooms, dealing with failure to return borrowed property, is very similar to cl. 52 of the Lex Salica, issued two centuries earlier. The need to issue positive law on this matter hints at the profound importance of possession in Germanic law.

(n59)Footnote 133. *Id.* at 39-57, cls. 8-9, 13, 19, 30, 35, 37, 41, 54, 62.

(n60)Footnote 134. *Id.* at 41, cl. 11.

(n61)Footnote 135. *Id.* at 43, cls. 20-21 (compare with cl. 28 of the dooms of Wihtred, *id.* at 31, cl. 28).

(n62)Footnote 136. *Id.* at 43-61, cls. 23, 32-34, 70-71, 74, 76.

(n63)Footnote 137. *Id.* at 45, cls. 26-27; at 49, cl. 38.

(n64)Footnote 138. *Id.* at 47, cl. 31.

(n65)Footnote 139. *Id.* at 49, cl. 39; at 57-59, cls. 63-66, 68.

(n66)Footnote 140. *Id.* at 49, cls. 40, 42, 49.

(n67)Footnote 141. *Id.* at 51, cls. 43-44.

(n68)Footnote 142. *Id.* at 51-52, cls. 45, 50.

(n69)Footnote 143. *Id.* at 53, cl. 51; at 59, cl. 67.

(n70)Footnote 144. F. M. Stenton, Anglo-Saxon England 309-310:

> According to Stenton, this passage implies that the tenant is clearly a freeman, for the conditions on which he takes his holding have been determined by agreement between him and his lord. But the land is plainly regarded as the lord's; he has planted the tenant upon it, and expects it to yield rent or labour at his discretion... The fact that the tenant must abandon the crops if he refuses the lord's claim to service strongly suggests that his yardland ... had originally been sown with this Lord's seed... In any case, the passage is of outstanding important as the first recorded example of a type of relationship between lord and man which during the next three centuries was to change the whole character of English rural society.

(n71)Footnote 145. The Laws of the Earliest English Kings 53, Ine cl. 52 (F. L. Attenborough ed. & trans., 1922).

(n72)Footnote 146. *Id.* at 55, cls. 55-56 at 57, cls. 58-60.

(n73)Footnote 147. *Id.* at 59, cl. 69.

(n74)Footnote 148. F. M. Stenton, Anglo-Saxon England 71 (1943).

(n75)Footnote 149. D. P. Kirby, The Making of Early England 163 (1967).

(n76)Footnote 150. D. J. V. Fisher, The Anglo-Saxon Age c. 400-1042, 133 (1973). *See also* Steven Bassett, The Origins of Anglo-Saxon Kingdoms (1989).

(n77)Footnote 151. *See especially* cl. 1 of the laws of Aethelberht, The Laws of the Earliest English Kings 5, Aethelberht cl. 1 (F. L. Attenborough ed. & trans. 1922).

(n78)Footnote 152. D. J. V. Fisher, The Anglo-Saxon Age c. 400-1042, 134 (1973). Another example of a king's use of royal officials to aid in public affairs is found in the laws of Ine, from which it may be inferred that ealdormen preside over courts, and that their verdicts must be obtained before redress can be sought. The Laws of the Earliest English Kings 37, Ine cl. 1 (F. L. Attenborough ed. & trans. 1922). Valerie A. Sanchez, *Towards a History of ADR: The Dispute Processing Continuum in Anglo-Saxon England and Today*, 11 Ohio St. J. on Disp. Res. 1 (1996).

(n79)Footnote 153. F. M. Stenton, Anglo-Saxon England 302-303 (1943).

(n80)Footnote 154. H. P. R. Finberg, *"King Alfred's England,"* in The Agrarian History of England and Wales A.D. 43-1042, 458-462 (H. P. R. Finberg ed. 1972).

(n81)Footnote 155. Id. at 459.

(n82)Footnote 156. 1 Walter de Gray Birch, Cartularium Saxonicum 143, no. 99 (1885) (grant by Wihtred, King of Kent, on April 8, 699, A.D.); *id.* at 157, no. 108 (grant of privileges by King Ini [or Ine] on May 6, 704, A.D.).

(n83)Footnote 157. H. P. R. Finberg, *"King Alfred's England,"* in The Agrarian History of England and Wales A.D. 43-1042, 413 (H. P. R. Finberg ed. 1972).

(n84)Footnote 158. F. M. Stenton, Anglo-Saxon England 406-407 (1943).

(n85)Footnote 159. 2 John Mitchell Kemble, The Saxons in England 53-55 (1876).

(n86)Footnote 160. *See* F. M. Stenton, Anglo-Saxon England 262 (1943) (especially with respect to the so-called "Burghal Hidage"); Rutherford Aris and Bernard S. Bachrach, *Military Technology and Garrison Organization: Some Observations on Anglo-Saxon Military Thinking in Light of the Burghal Hidage*, 31 Tech. & Culture 1 (1990).

(n87)Footnote 161. Alfred's achievement in unifying English government and law was probably aided by the earlier unification of the English church. *See* H. P. R. Finberg, The Formation of England 550-1042, 51 (1974).

(n88)Footnote 162. 3 F. Felix Liebermann, Die Gesetze der Angelsachsen 34 (1916).

(n89)Footnote 163. The Laws of the Earliest English Kings 35 (F. L. Attenborough ed. & trans. 1922).

(n90)Footnote 164. *Id.* at 63, Alfred (introductory passage).

(n91)Footnote 165. *Id.* at 87-93, Alfred cls. 44-77.

(n92)Footnote 166. *Id.* at 83, cl. 41.

(n93)Footnote 167. *Id.* at 96-97, 99-101.

(n94)Footnote 168. The authenticity of the entire introduction is challenged in 3 F. Felix Liebermann, Die Gesetze der Angelsachsen 87 (1916).

(n95)Footnote 169. The Laws of the Earliest English Kings 97, 102-109 (F. L. Attenborough ed. & trans. 1922).

(n96)Footnote 170. *Id.* at 117, 1 Edw. cl. 2.

(n97)Footnote 171. *Id.* at 120, 2 Edw. cl. 5.

(n98)Footnote 172. *Id.* at 112.

(n99)Footnote 173. *Id.* at 112-113, 122-173.

(n100)Footnote 174. *Id.* at 129, II Aethelstan cl. 2.

(n101)Footnote 175. In addition to the more general works on Anglo-Saxons and on Anglo-Saxon law cited in this chapter, the problems of Anglo-Saxon property law have been addressed in Eric John, Land Tenure in Early England: A Discussion of Some Problems (2d ed. 1964).

(n102)Footnote 176. J. N. L. Myres, The English Settlements 36-40 (1986); F. M. Stenton, Anglo-Saxon England 314, n. 1 (1943).

(n103)Footnote 177. F. M. Stenton, Anglo-Saxon England 289-290 (1943).

(n104)Footnote 178. D. P. Kirby, The Making of Early England 175-179 (1967).

(n105)Footnote 179. However, in recent years more attention has been given to Anglo-Saxon town studies generally. *See, e.g.*, David Hill, *"Towns as Structures and Functioning Communities through Time: The Development of Central Places from 600 to 1066,"* and Tim Tatton-Brown, *"The Anglo-Saxon Towns of Kent,"* in Anglo-Saxon Settlements 197-212, 213-232 (Della Hooke ed. 1988).

(n106)Footnote 180. 1 F. Felix Liebermann, Die Gesetze der Angelsachsen 232-237 (1903).

(n107)Footnote 181. Frederick Pollock & Frederic William Maitland, The History of English Law Before the Time of Edward I 57-58 (2d ed. 1909).

(n108)Footnote 182. *See, e.g.*, Erika Nagy, *Fault in the Law: The Influence of the Penitentials on the Anglo-Saxon Legal System*, 31 Cath. Law. 264 (1987).

(n109)Footnote 183. N.J. Higham, The Convert Kings, Power and Religious Affiliation in Early Anglo-Saxon England 34 (1997).

(n110)Footnote 184. *Id.*

(n111)Footnote 185. H. P. R. Finberg, *"King Alfred's England"* in The Agrarian History of England and Wales A.D. 43-1042, 458 (H. P. R. Finberg ed. 1972).

(n112)Footnote 186. *Id.* at 446.

(n113)Footnote 187. *Id.* at 444-445.

(n114)Footnote 188. H. P. R. Finberg, The Formation of England 550-1042, 92 (1974).

(n115)Footnote 189. 1 Walter de Gray Birch, Cartularium Saxonicum 157, no. 108 (grant of May 26, 704, A.D.).

(n116)Footnote 190. *Id.* at 143, no. 99 (grant of April 8, 699, A.D.).

(n117)Footnote 191. *Id.* at 254, no. 178.

(n118)Footnote 192. H. P. R. Finberg, *"King Alfred's England"* in The Agrarian History of England and Wales A.D. 43-1042, 459 (H. P. R. Finberg ed. 1972).

(n119)Footnote 193. *See, e.g.,* 1 Walter de Gray Birch, Cartularium Saxonicum 390, no. 282 (grant by Brihtric, King of Wessex, in A.D. 801) (1885); 2 W. Birch, *id.* at 13, no. 438 (grant by Aethelwulf, King of the West Saxons, in A.D. 842) (1887).

(n120)Footnote 194. H. P. R. Finberg, *"King Alfred's England,"* in The Agrarian History of England and Wales A.D. 43-1042, 459 (H. P. R. Finberg ed. 1972). *See* Della Hooke, The Landscape of Anglo-Saxon Staffordshire: The Charter Evidence (1983).

(n121)Footnote 195. H. P. R. Finberg, *"King Alfred's England,"* in The Agrarian History of England and Wales A.D. 43-1042, 461 (H. P. R. Finberg ed. 1972).

(n122)Footnote 196. The Laws of the Earliest English Kings 83, cl. 41 (F. L. Attenborough ed. & trans. 1922).

(n123)Footnote 197. Frederic William Maitland, Domesday Book and Beyond 258-292 (1897); H. P. R. Finberg, *"King Alfred's England,"* in The Agrarian History of England and Wales A.D. 43-1042, 464 (H. P. R. Finberg ed. 1972).

(n124)Footnote 198. Frederick Pollock & Frederic William Maitland, The History of English Law Before the Time of Edward I 61 (2d ed. 1909); *see also* 4(c)(4)(iii), *supra*.

(n125)Footnote 199. 3 Walter de Gray Birch, Cartularium Saxonicum 321, no. 1091 (1893) (grant for life made by Bishop Oswald of Worcester in A.D. 962); *id.* at 382, no. 1136 (letter of Oswald, Bishop of Worcester, in A.D. 964). *See also* H. P. R. Finberg, *"King Alfred's England,"* in The Agrarian History of England and Wales A.D. 43-1042, 521 (H. P. R. Finberg ed. 1972).

(n126)Footnote 200. The Laws of the Earliest English Kings 5-9, Aethelberht cls. 4, 6, 9, 24, 27, 29, 31 (all referring to a "freeman" or friman) (F. L. Attenborough ed. & trans. 1922).

(n127)Footnote 201. H. P. R. Finberg, *"King Alfred's England,"* in The Agrarian History of England and Wales A.D. 43-1042, 514-515 (H. P. R. Finberg ed. 1972).

(n128)Footnote 202. Jack Lindsay, The Normans and Their World 301-311 (1974).

(n129)Footnote 203. *See generally* F. M. Stenton, Anglo-Saxon England 463-479 (1943).

(n130)Footnote 204. *See, e.g.,* 3 Walter de Gray Birch, Cartularium Saxonicum 111, no. 935 (1893) (grant by King Eadwig to Aelfwine in A.D. 956).

(n131)Footnote 205. H. P. R. Finberg, *"King Alfred's England"* in The Agrarian History of England and Wales A.D. 43-1042, 509-510 (H. P. R. Finberg ed. 1972).

(n132)Footnote 206. Frederick Pollock & Frederic William Maitland, The History of English Law Before the Time of Edward I 37 (2d ed. 1909).

(n133)Footnote 207. F. M. Stenton, Anglo-Saxon England 313-314 (1943).

(n134)Footnote 208. In an eleventh-century treatise for reeves on estate management called "*Rectitudines Singularum Personarum*," it is stated that such a peasant should have received from his lord two oxen, a cow, six sheep, seven acres already sown upon his yardland, implements for his husbandry, and furniture for his house. 1 F. Felix Liebermann, Die Gesetze der Angelsachsen 444-453 (1903); F. M. Stenton, Anglo-Saxon England 467-468 (1943).

(n135)Footnote 209. Marjorie Chibnall, Anglo-Norman England 1066-1166 187-188 (1986).

(n136)Footnote 210. "[The charters] are an ecclesiastical importation, modelled on the late Roman private deed, and they show us that the consent of the king's council was obtained for the act of creating bookland." Dorothy Whitelock, The Beginnings of English Society 153 (1974).

(n137)Footnote 211. Patrick Wormald, *"The Age of Bede and Aethelbald,"* in The Anglo-Saxons 97 (James Campbell ed. 1982). *See also* Daniel R. Coquillette, *The Lessons of Anglo-Saxon "Justice," 2 Green Bag 2d 251, 252-253 (Spring 1999).*

(n138)Footnote 212. Patrick Wormald, *"The Age of Bede and Aethelbald,"* in The Anglo-Saxons 97 (James Campbell ed. 1982).

(n139)Footnote 213. *See, e.g.,* 1 Walter de Gray Birch, Cartularium Saxonicum 308, no. 220 (1885) (grant by Abbot Ceolfrith, A.D. 757).

(n140)Footnote 214. H. P. R. Finberg, The Formation of England 550-1042, 92 (1974).

(n141)Footnote 215. The Laws of the Earliest English Kings 83, Alfred cl. 41 (F. L. Attenborough ed. & trans. 1922).

(n142)Footnote 216. *See, e.g.,* 1 Walter de Gray Birch, Cartularium Saxonicum 314, (1885) (grant by King Cynewulf to Earl Bica, A.D. 778); F. M. Stenton, Anglo-Saxon England 303-304 (1943).

(n143)Footnote 217. F. M. Stenton, Anglo-Saxon England 304 (1943).

(n144)Footnote 218. 2 Walter de Gray Birch, Cartularium Saxonicum 33, no. 451 (1887) (grant by King Aethelwulf to himself, Dec. 26, A.D. 847).

(n145)Footnote 219. Dorothy Whitelock, The Beginnings of English Society 154 (1974).

(n146)Footnote 220. A model and the sources for the convenient but somewhat speculative summary in the text are cited *in* William F. Walsh, A History of Anglo-American Law 16-17 (2d. ed. 1950).

(n147)Footnote 221. *See* § 3.05(f), *infra*.

(n148)Footnote 222. H. Cabot Lodge, *"The Anglo-Saxon Land Law,"* in Essays in Anglo-Saxon Law 112 (1905).

(n149)Footnote 223. Dorothy Whitelock, The Beginnings of English Society 154 (1974).

(n150)Footnote 224. The Laws of the Earliest English Kings 117, I Edward cl. 2 (F. L. Attenborough, ed. & trans. 1922).

(n151)Footnote 225. 2 Walter de Gray Birch, Cartularium Saxonicum 195, no. 558 (1887) (will of Duke Alfred, A.D. 781).

(n152)Footnote 226. F. M. Stenton, Anglo-Saxon England 307 (1943).

(n153)Footnote 227. 2 Walter de Gray Birch, Cartularium Saxonicum 100, no. 496 (1887).

(n154)Footnote 228. F. M. Stenton, Anglo-Saxon England 307-308 (1943).

(n155)Footnote 229. 1 Frederick Pollock & Frederic William Maitland, The History of English Law Before the Time of Edward I 61-62 (2d ed. 1909).

(n156)Footnote 230. William W. Walsh, A History of Anglo-American Law 33-34 (2d ed. 1932).

(n157)Footnote 231. *Id.* at 14-15.

(n158)Footnote 232. *Id.* at 18.

(n159)Footnote 233. 3 Walter de Gray Birch, Cartularium Saxonicum 382, no. 1136 (1893) (letter of Oswald, Bishop of Worcester, to King Eadgar, describing the leasehold tenures of certain church lands, ca. A.D. 964).

(n160)Footnote 234. *Id.* at 328, no. 1097 (1893) (record of the descent of land to the Canterbury and Rochester cathedrals, ca. A.D. 965).

(n161)Footnote 235. William W. Walsh, A History of Anglo-American Law 19 (2d ed. 1932).

(n162)Footnote 236. *Id.* at 19-20. *See* discussion of Worcester laenland grants to women, priests, deacons, and clerks, in R. Allen Brown, Origins of English Feudalism 55-56 (1973).

(n163)Footnote 237. D. P. Kirby, The Making of Early England 228 (1967).

(n164)Footnote 238. Frederic William Maitland, Domesday Book and Beyond 314 (reprint 1966).

(n165)Footnote 239. R. Allen Brown, Origins of English Feudalism 54-64 (1973).

(n166)Footnote 240. Although the discussion in the text is drawn as much as possible from primary sources, or at least the English translations of primary sources, this topic has been the subject of recent writing. *See, e.g.,* Christine E. Fell, Women in Anglo-Saxon England (1984); The Women of England: From Anglo-Saxon Times to the Present: Interpretive Bibliographic Essays (Barbara Kanner ed. 1979). *See also* Christine G. Clark, *Women's Rights in Early England, 1995 Byu L. Rev. 207* ; C.M.A. McCauliffe, *The Medieval Origin of the Doctrine of Estates in Land: Substantive Property Law, Family Considerations, and the Interests of Women, 66 Tulane L. Rev. 919 (March 1992).*

(n167)Footnote 241. 1 Walter de Gray Birch, Cartularium Saxonicum 552, No. 396 (1885) (grant of land by King Egbert, A.D. 830).

(n168)Footnote 242. *Id.* Two grants of laenland to women are discussed and documented in R. Allen Brown, Origins of English Feudalism 55-56 (1973).

(n169)Footnote 243. 2 Walter de Gray Birch, *id.* at 534, No. 789 (1887) (grant by King Edmund, A.D. 943); 4 John M. Kemble, Codex Diplomaticus Aevi Saxonici No. 789 (1846).

(n170)Footnote 244. *Id.*

(n171)Footnote 245. 3 John M. Kemble, Codex Diplomaticus Aevi Saxonici Nos. 693, 704 (1845).

(n172)Footnote 246. *Id.*

(n173)Footnote 247. 1 Walter de Gray Birch, Cartularium Saxonicum 575, No. 412 (1885) (will of the Reeve Abba, ca. A.D. 833); 3 Walter de Gray Birch, *id.* at 600, No. 1288 (1893) (will of Queen Aethelflaed); *id.* at 602, No.

1289 (will of Aelflaed).

(n174)Footnote 248. *Id.*

(n175)Footnote 249. 3 John M. Kemble, Codex Diplomaticus Aevi Saxonici Nos. 693, 704 (1845).

(n176)Footnote 250. 2 Walter de Gray Birch, Cartularium Saxonicum 155, No. 537 (1887) (grant by King Athelred to Cuthulf, the thegn, A.D. 872); 3 John M. Kemble, Codex Diplomaticus Aevi Saxonici No. 693 (1845).

(n177)Footnote 251. 2 Walter de Gray Birch, Cartularium Saxonicum 86, No. 486 (1887) (grant by King Aethelwulf to his thegn Dunn; Dunn's devise of the land to his wife).

(n178)Footnote 252. *Id.* at 119, No. 509 (grant by King Burhred and Queen Aethelswyth, A.D. July 25, 864); *id.* at 141, No. 524 (grant by King Burgred and Queen Aethelsuith, A.D. 869).

(n179)Footnote 253. 4 John M. Kemble, Codex Diplomaticus Aevi Saxonici No. 796 (1846); 6 John M. Kemble, *id.* at No. 1340 (1848).

(n180)Footnote 254. 3 Walter de Gray Birch, Cartularium Saxonicum 373, No. 1132 (1893) (will of Byrhtric and his wife Aelfswyth bequeathing real and personal property, A.D. 964); 4 John M. Kemble, Codex Diplomaticus Aevi Saxonici No. 971 (1846).

(n181)Footnote 255. 2 Walter de Gray Birch, Cartularium Saxonicum 92, No. 490 (grant by Alhwine to Aethelwulf and his wife Wulfthryth, A.D. 855).

(n182)Footnote 256. *Id.* at 465, No. 745 (grant by King Athelstan, ca. A.D. 929); 3 John M. Kemble, Codex Diplomaticus Aevi Saxonici No. 637 (1845).

(n183)Footnote 257. 2 Walter de Gray Birch, Cartularium Saxonicum 176, No. 553 (1887) (will of King Alfred, A.D. 880).

(n184)Footnote 258. *See, e.g.*, The Laws of the Earliest English Kings 46-47 (F. L. Attenborough ed. & trans. 1922), Ine cl. 31 ("If anyone buys a wife and the marriage does not take place."); *id.* at 14-15, Aethelberht cl. 83 ("If she is betrothed, at a price, to another man."); *id.* at 8-9, Aethelberht cl. 31 ("If [one] freeman lies with the wife of [another] freeman, he shall pay [the husband] his [or her] wergeld, and procure a second wife with his own money, and bring her to the other man's home.).

(n185)Footnote 259. The price plus one third.

(n186)Footnote 260. Ernest Young, *"The Anglo-Saxon Family Law,"* in Essays in Anglo-Saxon Law 164-165 (1905).

(n187)Footnote 261. *See generally*, Document 51 *"Concerning the Betrothal of a Woman," (c. A.D. 975-1030), in* 1 English Historical Documents 431 (David C. Douglas, gen. ed., Dorothy Whitelock ed. 1955). *See also* Mary Murray, The Law of The Father?: Patriarchy in the Transition from Feudalism to Capitalism (1994).

(n188)Footnote 262. The Laws of the Earliest English Kings 46-47 (F. L. Attenborough ed. & trans. 1922), Ine cl. 31; 72-73, Alfred cl. 18 1 (1922).

(n189)Footnote 263. Alfred Eccl. Laws 12.

(n190)Footnote 264. 2 Walter de Gray Birch, Cartularium Saxonicum 225, No. 582 (1887) (settlement of land by Bishop Werferth on Eadnoth, A.D. 872); 4 John M. Kemble, Codex Diplomaticus Aevi Saxonici No. 867 (1846).

(n191)Footnote 265. The Laws of the Earliest English Kings 54-57 (F. L. Attenborough ed. & trans. 1922), Ine cl. 57; 156-157, VI Aethelstan cl. 1, 1 (1922).

(n192)Footnote 266. The Laws of the Kings of England from Edmund to Henry I 213-215 (Agnes Jane Robertson ed. & trans. 1925), II Cnut cl. 76.

(n193)Footnote 267. The Laws of the Earliest Kings 14-15, Aethelberht cls. 78-81 (F. L. Attenborough ed. & trans. 1922).

(n194)Footnote 268. 2 Walter de Gray Birch, Cartularium Saxonicum 236, No. 591 (1887) (letter to King Edward setting forth events connected with the tenure of land, ca. A.D. 901); 3 Walter de Gray Birch, *id.* at 653, No. 1318 (1893) (three-year lease of land); 3 John M. Kemble, Codex Diplomaticus Aevi Saxonici No. 704 (1845).

(n195)Footnote 269. 3 Walter de Gray Birch, Cartularium Saxonicum 600, No. 1288 (1893) (will of Aethelflaed, queen of Edmund I); *id.* at 602, No. 1289 (will of Aelflaed, sister of Queen Aethelflaed); 6 John M. Kemble, Codex Diplomaticus Aevi Saxonici No. 1290 (1848).

(n196)Footnote 270. The Laws of the Kings of England from Edmund to Henry I 210-213, II Cnut cls. 73 and 73a (Agnes Jane Robertson ed. & trans. 1925).

(n197)Footnote 271. 3 Walter de Gray Birch, Cartularium Saxonicum 328, No. 1097 (1893) (record of the descent of land and related litigation).

(n198)Footnote 272. The Laws of the Kings of England from Edmund to Henry I 202-203, II Cnut cl. 53 (Agnes Jane Robertson ed. & trans. 1925).

(n199)Footnote 273. The Laws of the Earliest English Kings 14-15, Aethelberht cls. 79-80 (F. L. Attenborough ed. & trans. 1922).

(n200)Footnote 274. *See* Barbara Kanner, The Women of England: From Anglo-Saxon Times to the Present: Interpretive Bibliographical Essays (1980)."Women were judged differently from men in West Saxon lawcodes and generally not to their advantage." Barbara Yorke, Wessex in the Early Middle Ages 280-285 (1995). *See also*, Amy Louise Erickson, Women and Property in Early Modern England (1993).

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CHAPTER 3 PROPERTY RIGHTS IN ANGLO-SAXON ENGLAND

1-3 Thompson on Real Property, Thomas Editions § 3.06

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§ 3.06 Impact of the Viking Invasions on Property Rights in Anglo-Saxon England.

Raids of Vikings in Anglo-Saxon England began sporadically as early as A.D. 787, n275 but the sack of the church foundations on the island of Lindisfarne in A.D. 793, n276 was the most stunning announcement of the new danger. These early raids, mostly by Norwegians, continued to be sporadic until about A.D. 835, whereafter regular accounts appear in the Anglo-Saxon Chronicle. The new raiders were mostly Danish and continued to be essentially small and highly mobile warbands, each of which was capable of ranging widely over Europe in a single season.

The raiding parties remained relatively small, n277 were seeking portable wealth, and did not come to settle. Not until A.D. 850-851, was a band of Danish Vikings reported as having wintered over in England. n278 Thereafter, the scale of Viking attacks increased, so that fleets of 150-250270 n279 ships became common, and the "great" Viking armies of A.D. 865271 n280 and 871,272 n281 divided up the land they conquered in Northumbria, n282 Mercia, n283 and East Anglia. n284

Of the great Anglo-Saxon kingdoms, only Wessex survived, and was itself subjected to several bloody battles in A.D. 871. Then in A.D. 878, the Danish King Guthrum launched a surprise attack against Alfred's forces that drove Alfred and a few supporters into hiding in the marshes of Somerset. Their guerrilla campaign begun at that time and ultimate triumph over Guthrum is justly celebrated, and Guthrum eventually withdrew to his secure eastern territories and accepted Christian baptism. Thus, during Alfred's lifetime, Wessex and part of Mercia were left intact as Anglo-Saxon domains, but Northumbria, East Anglia, and the rest of Mercia came under total Danish domination, known as the Danelaw. However, debate continues to this day over the density of Danish settlement in the Danelaw and the extent of Danish influence over property and other legal customs.

As to the Danish influence on Anglo-Saxon law, little change seems to have occurred. Even into the 11th century, when Cnut, a great Danish King of England, issued a law code, it was "in the full stream of English legal achievement," exhibiting no Danish idiosyncracies. n285 This characteristic has been explained by the fact that Danish traditions of kindred organizations, *wergilds*, and public assemblies were very similar to those of the English. Moreover, when the Danes who settled in eastern and northern England accepted Christianity, they implicitly accepted the body of law associated with the church and were exposed to English clergy, who were usually responsible for written legal records. n286

Nevertheless, a doom of Edgar declares "that secular rights be in force among the Danes according to as good laws as they can best decide on," n287 and Aethelred issued parallel codes for Englishmen and Danes. n288 Several distinctively Danish legal practices emerged in Anglo-Danish England. In land law, terminology was Danish, and there was heavy reliance on independent sureties for land transactions. Land measurement and assessment in the Danelaw were altered, and received a new vocabulary.

In procedure, a public prosecutor may have been utilized in Anglo-Danish areas. Twelve leading thegns (members of the aristocracy) in each borough went from the court and swore on relics that they would neither accuse any innocent person nor protect any guilty one. A majority of eight determined the presentments of this body. Differences in assessing fines and difficulties in reconciling disparate monetary units existed in the Danelaw. Compensation paid to a slain man's lord was based on the victim's status, whereas in English areas that amount was determined by the lord's rank. A greater penalty was assigned for breach of the king's peace in the Danelaw, suggesting it was more highly valued (or more readily broken).

Most significantly, the Danes in England appear to have had a much greater proportion of free peasants in the areas they dominated. Historians are divided over whether this social difference was directly related to Scandinavian settlement or arose from regional peculiarities in place before the Danes arrived. It is appealing to attribute this freedom to "the infusion of large numbers of Scandinavian farmer warriors with their traditions of independence, reinforced by their nature as colonists." n289 Danes also made significant contributions to urban growth in England, particularly in York. n290

FOOTNOTES:

(n1)Footnote 275. The Anglo-Saxon Chronicle 53 annal 787.

(n2)Footnote 276. *Id.* at 54 annal 793.

(n3)Footnote 277. The evidence suggests that the early raiding parties seldom consisted of more than fifty ships, and such ships would carry hardly more than thirty warriors, even without horses, slaves or other cargo.

(n4)Footnote 278. The Anglo-Saxon Chronicle 62-63 annal 850.

(n5)Footnote 279. The raid of A.D. 893, is reported to have been conducted with 330 ships.

(n6)Footnote 280. So described *in* The Anglo-Saxon Chronicle 66-67 annal 865.

(n7)Footnote 281. *See Id.* at 68-69 annal 871.

(n8)Footnote 282. *Id.* at 72-73 annal 876.

(n9)Footnote 283. *Id.* at annal 877.

(n10)Footnote 284. *Id.* at 74-75 annal 879.

(n11)Footnote 285. Henry Royston Loyn, The Vikings in Britain 125 (1977). *See* Charlotte Neff, *Scandinavian Elements in the Wantage Code of Aethelred II*, 10 J. Legal Hist. 285 (1989). Loyn has written a subsequent book to include significant advances in the knowledge of the Viking world from the time his first book was published. Henry Royston Loyn, The Vikings in Britain 128 (1994).

(n12)Footnote 286. Henry Royston Loyn, The Vikings in Britain 125-127 (1977). *See also* Scandinavian Settlement in Northern Britain (Barbara E. Crawford, ed. 1995); David A. Thomas, *Anglo-American Land Law: Diverging Developments from a Shared History, Part I: The Shared History, 34 Real Prop. Prob. & Tr. J 143 (1999).*

(n13)Footnote 287. *"Edgar's Code Issued at 'Wihtbordesstan,' " in* 1 English Historical Documents 399, cl. 2.1 (David C. Douglas ed. 1955); 1 F. Felix Liebermann, Die Gesetze der Angelsachsen 211 (1903).

(n14)Footnote 288. *See, e.g., "King Ethelred's Code Issued at Wantage," in* 1 English Historical Documents 402-405 (David C. Douglas ed. 1955); 1 F. Felix Liebermann, Die Gesetze der Angelsachsen 228-233 (1903).

(n15)Footnote 289. Henry Royston Loyn, The Vikings in Britain 132 (1977).

(n16)Footnote 290. *Id.* at 135-137.

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CHAPTER 4 THE GROWTH OF THE ENGLISH COMMON LAW OF REAL PROPERTY

1-4 Thompson on Real Property, Thomas Editions 4.syn

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CHAPTER 4 THE GROWTH OF THE ENGLISH COMMON LAW OF REAL PROPERTY

1-4 Thompson on Real Property, Thomas Editions § 4.01

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§ 4.01 Introduction.

This chapter demonstrates how the Norman Conquest, beginning in 1066, and all the changes that flowed from it, affected the development of property law in England. Although Anglo-Saxon landholding practices are not well-known and were probably not uniform, it can be shown that the eventual effect of the Norman Conquest was to achieve a considerable elaboration and uniformity of the real property laws governing the English and their Norman overlords. The movement toward uniformity or consistency in all areas of the law eventually produced the common law, i.e. the law common to all of England.

This chapter will also show that foundational principles of English real property law were Anglo-Saxon and that the Normans introduced few novel substantive concepts. However, the techniques of government and administration developed by the Normans and their Angevin successors directly stimulated the growth of the common law and enabled it eventually to dominate the huge variety of ancient local customs. In the context of rights in land, the rise of common law was at first inseparably bound up with the institutions of feudalism, but as social conditions grew out of the feudal framework, the common law rules and institutions adjusted and also transcended many of their old feudal anachronisms.

While legal developments during the English Middle Ages were continuous and many-faceted, the 16th century represents a watershed of sorts for property law. The Statute of Uses in 1536 and Statute of Wills in 1540, worked out in brittle confrontation between King Henry VIII and Parliament, and the subsequent reinterpretation of those enactments in the common law courts, struck the last feudal shackles from the English system of property rights; in so doing they opened the way toward many key developments in modern Anglo-American property law. Therefore, this chapter will conclude its discussion of property law growth with the developments of the 16th century. n1

FOOTNOTES:
(n1)Footnote 1. *See generally* David A. Thomas, *Anglo-American Land Law: Diverging Developments from a Shared History Part I: The Shared History, 34 Real Prop. Prob. & Tr. J. 143 (1999);* David A. Thomas, *Anglo-American Land Law: Diverging Developments from a Shared History, Part II: How Anglo-American Land Law Diverged After American Colonization and Independence, 34 Real Prop. Prob. & Tr. J. 295 (1999). See generally* David A. Thomas, *Finding More Pieces for the Takings Puzzle: How Correcting History Can Clarify Doctrine, 75 U. Colo. L. Rev. 497* (Spring, 2004).

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CHAPTER 4 THE GROWTH OF THE ENGLISH COMMON LAW OF REAL PROPERTY

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§ 4.02 Summary of Property Rights in Late Anglo-Saxon England.

§ 4.02(a) Egalitarian Quality of Early Settlements and Land Rights.

As was shown in Chapter 3, "Property Rights in Anglo-Saxon England," a lengthy and continuing elaboration of property rights took place during the entire period of Anglo-Saxon dominance in England. Most likely the first Germanic settlers were either raiding war bands or disgruntled mercenaries who turned on their British employers, and when they did begin to establish farms and villages, it was probably as independent yeomen and warriors. n2 The old custom of the continental Germanic tribes by which the tribal chief or council of leaders periodically reallocated arable land to family groups may have carried over, but would have swiftly become irrelevant as soon as settlement and stability were achieved.

What may be inferred from modern archaeological investigations is that early Anglo-Saxon society had a certain egalitarian quality that affected landholding practices. As long as pronounced social stratification was absent from the early Anglo-Saxon settlements, stratification was not apparent in the modest farmsteads or other forms of property. n3

Perhaps it was the ancient egalitarian tradition that enabled King Alfred to exercise a form of public land use planning during the ninth century, as part of his overall defensive scheme against the Danes. Alfred created a system of fortified towns, called *burhs*, whose fortifications were to be paid for by an assessment system -- a kind of public property tax and labor assessment -- based on the amount of land associated with the *burh*. A unique record of the *burhs* and their associated lands was compiled in what is known as the "Burgal Hidage":

> The *burhs* of Wessex are among the most impressive administrative achievements of Anglo-Saxon government... [They] were so distributed that nowhere was more than about 20 miles (or a day's march) away from one... [I]n nearly all cases the length of the fortification corresponds to what the formula in the burgal hidage would lead one to expect.
>
> But it now seems clear that the *burhs* represented more than places of temporary refuge for the entire population of Wessex. Excavations at Winchester and elsewhere have shown that they share a common town-plan, with back streets running parallel to the main street, other streets at right angles to them, and a street around the inside of the wall ... [so that] many *burhs* were also planned as places of permanent

habitation and trade ... n4

§ 4.02(b) Specialization of Property Interests.

No definite information about Anglo-Saxon landholding practices is available until a full two centuries after the age of Conquest, and then the evidence pertains only to the more prominent persons of Anglo-Saxon society who were accustomed to conducting land transactions and making written records, or charters, of what they had done. The earliest charters, dating from the 7th century, show that elaboration of property rights had already begun, even though the common form of landholding was still what would today be termed a life estate. It is also apparent that most occupied land was subject to requirements of military service, road building and fortress maintenance.

Whatever the usual form of Anglo-Saxon landholding, the charters mention several specialized property interests. One of these is "bookland," a form of landholding created only by written charter that may have been used to obtain relief from some or all of such service requirements and to permit alienation of the land without leave of the king. "Laenland" also is mentioned in some charters, apparently referring to land that was loaned or rented to another either for a short term or for a period of up to three lives, meaning the grantee and two successive heirs. The remaining lands might have been included in the elusive term "folkland," land still subject to alienation restrictions and to customary obligations and dues.

§ 4.02(c) Stratified Society and Property Rights.

In addition to the possessory rights and restrictions recognized as pertaining to the immediate occupants of the land, a system of shared ownership rights was developing in Anglo-Saxon England. These rights were stratified, with some rights of ownership subordinated to and derived from ownership rights of a socially superior person, and were possibly a direct product of developing stratification in Anglo-Saxon society generally:

> With improving stability ... came centralization of political power and stratification of property rights. War band leaders became kings, who assigned land to their chief warriors, who allotted portions to farmers and their families, each grantor retaining rights relative to subsequent grantees. Rights of inheritability and alienation were probably rare and probably required acquiescence of or payment to lord or community. At the end of this process, the actual occupants of the land would eventually suffer a nearly complete loss of economic and personal independence. n5

By the time of the Norman Conquest, English society had suffered enormously from what Stenton called "the general drift of English peasant life from freedom towards servitude." Little direct evidence exists for how this occurred, but it is the most conspicuous aspect of Anglo-Saxon property rights in the generation before the Conquest. The inferences about this process that may be drawn from the available evidence were best expressed by Stenton:

> From the moment when the kings of the migration age began to plant their companions upon the soil there must have existed communities in which expropriated Britons, and Englishmen too poor to be welcomed in settlements of their own people, were working for a lord in return for his protection...
>
> There is no direct evidence to show the stages by which, within any single village, a community composed essentially of independent peasants developed into a community composed essentially of serfs, but the main features of the process seem fairly clear. In what appears to have been the normal case, it began with a grant from the king settling an ealdorman, a *gesith*, a bishop, or an abbot in his own place as the immediate lord of a village, and, in particular, as the recipient of the dues and services which its inhabitants had been accustomed to render to the king himself. The independence of the village group was not threatened at first. But the narrowness of the average ceorl's resources, and the many forms of disaster to which he was exposed, made it almost inevitable that sooner or later the village community would find itself unable to provide the food-rent which its lord had a right to demand. It was generally

> easier for the head of a peasant household to supply labour than to keep up a regular contribution to a communal food-rent. Most lords had need of labour on the "demesnes" which they had been acquiring through co-operation with the village community in the extension of cultivated area, or by the creation of home farms within a ring fence. It seems that, within most villages, the duty of supporting the lord by a communal render in kind gave way, in time, more or less completely, to a system by which each of the regular holdings in the open fields -- hides, half-hides, and yardlands -- supplied labour for the lord's demesnes on a definite number of days in every week. In itself, the change was merely a matter of economic reorganization, which need have had no legal consequences. But in most cases it seems to have formed part of a wider revolution in which the individual peasants surrendered their holdings to the lord of the village and received them back from his hands, acknowledging themselves to be his men, and placing themselves under his protection. When this step had been taken by the whole or the greater part of a village community, the manorial economy of the middle ages was brought within sight. n6

In Anglo-Saxon England it was still possible to be economically dependent but personally free in legal standing. Freemen are known to have been tenants in varying degrees of servitude, and it has been stated that Anglo-Saxon "serfdom was much more of a personal bondage less involved with the occupation of particular land before the Norman Conquest than after." n7

§ 4.02(d) Anglo-Saxon Property Rights as the Foundation for the Common Law of Property.

Anglo-Saxon landholding practices, and their correlation with social status, had little known consistency throughout England, and they must have been in constant fluctuation throughout the Anglo-Saxon age. For the most part, they were acknowledged only by immemorial custom, and persisted through the Norman Conquest and into the period of common law development. They were the foundation for the common law of property:

> It is in the greater landlords who hold by book or laen -- the future lords of manors -- that we can see not only the beginnings of individualistic ownership of the land, but also the germs of the idea of tenure. The grantees by book stand ... in close relation to the crown. They are, in fact, a class of great tenants-in-chief. Under them the cultivators of the soil occupy their holdings. The rise of laenland interposed another class between the great man and the peasant. Between the peasant and the crown there might be the thegn who holds laenland of the church and the church to whom it has been booked by the king. In many cases we can see the germs of what will be in later law the various classes of tenure. The land booked to the church for the salvation of the donor's soul was an out-and-out gift; no services were reserved. But the donor will expect the donee to remember him in his prayers. This is not unlike tenure by frank-almoin. If the king books land to a thegn, he books it in consideration of past faithful services, probably of a military sort; but he will sometimes stipulate for continued faithful service; and the amount of military service required is sometimes specified. All free men are obliged to serve in the fyrd; but this liability to serve in the fryd is coming to be attached to certain definite tracts of land -- to certain five-hide units... We have here various elements which may develop into tenure by military service... [W]e can see the germs not only of military and socage tenure, but also of tenure by serjeanty and even of villein tenure... n8 n9

FOOTNOTES:

(n1)Footnote 2. After examining the property-related provisions of the old continental Germanic law codes contemporary with the Anglo-Saxon invasions, the only conclusion that could be drawn in Chapter 3 was an inference

> that real property was important and some individual possessory rights were recognized and protected, but any further enlightenment is not available in the documentary sources relating to the Anglo-Saxons or other contemporary Germanic tribes.

Supra § 3.03(b).

(n2)Footnote 3. *Supra* § 3.03(b).

(n3)Footnote 4. Patrick Wormald, *The Burhs, in* The Anglo-Saxons 152-153 (James Campbell ed. 1982).

(n4)Footnote 5. *Supra* § 3.04(c)(4)(vi).

(n5)Footnote 6. F. M. Stenton, Anglo-Saxon England 463-465 (1943).

(n6)Footnote 7. Frederick Pollock & Frederic William Maitland, The History of English Law Before the Time of Edward I 37 (2d ed. 1909). *But see* Patrick Wormald, *Frederic William Maitland and the Earliest English Law*, 16 L. & Hist. Rev. 1 (Spring 1998) (contending that Maitland underrated the part played by the earliest Kings of England in shaping a distinctive English legal tradition).

(n7)Footnote 8. 2 William Holdsworth, A History of English Law 73-74 (reprint 1971).

(n8)Footnote 9. *See also* Ann Williams, The English and the Norman Conquest (1995).

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CHAPTER 4 THE GROWTH OF THE ENGLISH COMMON LAW OF REAL PROPERTY

1-4 Thompson on Real Property, Thomas Editions § 4.03

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§ 4.03 Summary of Property Rights Among the Pre-Conquest Normans.

§ 4.03(a) Origins of the Normans.

Even school children are taught that Normans were "Northmen," but little else is commonly known about these medieval marauders who conquered England and other European kingdoms. The Norman invasions fit squarely within the mainstream of Viking aggressions that afflicted Europe during the 8th through the 11th centuries; the Norman Conquest of England has been called "the last great Viking expansion." n10

The founder of the Norman dynasty is believed to have been an adventurer named Rolf or Hrolf in the Scandinavian sagas. n11 In the later continental chronicles, this same figure is referred to as Rollo. n12 Rolf was apparently a Norwegian Viking pirate n13 who operated in the Baltic during his early years. He was outlawed by the Norwegian King when, desperate for food, he raided for cattle in Norway. n14

Rolf was active during the early years of the 10th century, a time of violent unrest, but details are very sketchy. After a stay in the Hebrides, he probably took part in raids on what is now western France, n15 and he may also have visited the Danish King Guthrum in England at about this time. n16

During the second decade of the 10th century, Rolf helped lead several attacks in the area of modern Normandy and conducted an unsuccessful siege of Paris. It was possible that he also directed colonization by Norse settlers in territories brought under his control. In 911, the Frankish King Charles III (the Simple), struggling to hold together remnants of the Carolingian Empire, entered into a pact with Rolf, even after defeating Rolf in a battle at Chartres. n17 Reportedly Rolf agreed to be baptized, to marry Charles' daughter, and to give homage to Charles; in return he obtained formal control over the areas of Rouen, Lisieux, Evreux, and some minor additional territory, all later known as Upper Normandy. n18 With these arrangements in place, Rolf expanded his territories with grim efficiency. By taking over the districts of Bayeux and Sees, he extended his control into the west, and after 924 his son moved into the Avranches and Coutances districts, which added Lower Normandy to the territory effectively under his dominion. n19

The population thus brought within Norse control was probably Celtic, but had become considerably Romanized by the time the Saxons and Franks began invading in the fourth century. The Germanic invaders mingled with the people, but

did not impose their language upon the conquered. Thus a form of French was spoken when the early Viking raiders struck in the area. The Viking raiding parties themselves were possibly of mixed origins. In Rolf's case, his early commanders and raiders were probably Norwegian, but most of the Scandinavians who actually settled in Normandy were Danish. n20 The Viking intruders adopted French language and customs, but remained a separate ruling class.

In their role as overlords, the Normans continued consolidating their control during the tenth century, and were generally successful in maintaining independence from the aggressive Frankish and Breton princes who surrounded Normandy.

Rolf died sometime between 925 and 927 n21 and was succeeded by his son William I (Longsword). William I was murdered in 943, but in the year prior to his death had arranged for the succession of Richard I (the Fearless), his son by a Breton concubine. n22 Richard was bilingual, like his Father William and his grandfather Rolf, and he maintained his Scandinavian connections and culture, but under his rule the Norman state began to play a more active role in the Frankish politics of the region. n23 When Richard I's long reign ended with his death in 996, his oldest son Richard II, also illegitimate, succeeded him and began to rule in 998. During Richard II's reign, the conflicts between Christians and pagans within his dominions generally were resolved in favor of Christians, and feudal rules and relationships were significantly refined. n24

Richard II reigned until 1026, and was succeeded by his illegitimate son Richard III, who died that same year after falling ill at a feast. n25 Richard III's brother Robert took over in 1027 and soon thereafter sired a son by a Falaise peasant girl. In 1034 Robert made his vassals do homage to this illegitimate son, who was then only six years old, and then turned Normandy over to the boy and left on a pilgrimage to Jerusalem. When Robert died during the return journey from Jerusalem, the boy became William II, seventh duke of Normandy and eventually "the Conqueror" and King of England. n26

William was born only little more than a century after his Viking great-great-grandfather Rolf formalized the Norman presence in France. Even his grandfather Richard I had still maintained Norse language and customs. Thus the Norman contribution to English law after the Conquest is best understood in the context of its Scandinavian origins.

§ 4.03(b) Sketch of Scandinavian Law.

As was common in all Germanic cultures, Viking society was divided into classes of nobility, freemen, and slaves. n27 In early Viking times, before feudal tendencies were manifest, land held by persons in the classes of nobility or freemen was held communally by the family, albeit under the father's control. Upon the father's death, the oldest son succeeded to the entire holding, but he had to compensate the younger brothers and sisters for their shares. n28 Thus financed, younger sons were able to colonize new areas or to strike out on voyages of trade or piracy. n29

The land itself was free from obligations to overlords, but a landholder might assume the burdens of personal dues or services in return for protection or support from a lord. Such lordship arrangements were strictly personal and could be transferred to other lords without affecting the rights in land. One could obtain land by becoming the follower of a lord or chief; the chief was responsible to administer justice, give support in disputes, and distribute shares of spoils. n30 Women also could own and inherit land. n31

Divorce was easily obtained by either spouse, and illegitimacy was common. n32 Indeed, blurred distinctions between marriage and concubinage sometimes led to succession by illegitimate sons, as abundantly manifested in the Norman ducal genealogy. Of the seven Norman rulers between Rolf and William II (the Conqueror), three (Richard I, Richard II, and William II) are known to have been illegitimate.

Assemblies of free men were called Things and were common in all Nordic societies. These gatherings in each province pronounced judgments and administered the law in the area. Although the rulers dominated the Things, they were still

bound by custom to consult their constituents thus assembled. n33

Other traits common to Germanic societies, such as the responsibility of an entire kindred for individual offenses by its members, and compensations for such offenses based on wergild, were in full force in Scandinavia. As elsewhere in northern and western Europe, rulers attempted to restrict blood feud vengeance and to regulate assessment and payment of wergild fines for offenses. Generally, this regulation by the rules tended to fix responsibility for offenses more fully on the individual offender than on the entire kindred. This might have been achieved by requiring the offender personally to pay a portion of the wergild or by restricting the extent of family relationship included in the kindred. n34

The environment and way of life had a natural influence on local legal customs. For example, farm implements were left in the fields overnight to save time during the short harvest seasons, and laws imposed severe penalties for their theft. Other laws firmly obligated neighbors to assist those who otherwise could not get their harvests in on time. n35 Similarly, when wintering ships were pulled up into sheds for storing and repairs, laws defined the rights associated with such laying-up and required neighboring farmers to help pull under some circumstances. n36 Presumably, extensive Norse trading led to many legal customs regulating mercantile activities.

§ 4.03(c) Changes in Norman Legal Customs After the Settlement of Normandy.

After Norman settlement rights in Normandy were formalized in 911, fundamental changes in Norman legal customs began to occur. At first, Rolf's followers insisted on maintaining their egalitarian social status. Until the early years of Richard II's reign, which began about 998, widespread non-feudal landholding, peasant independence, and loyalty to pagan creeds persisted. n37 However, the Normans' need to fit into emerging French society changed these cultural characteristics. They gradually adopted a new language and diminished their pirate activity. Constant threats from aggressive neighbors in adjacent lands, not restrained by any natural barriers of topography, created pressures to feudalize -- that is, for landholders to seek security in submitting lands and lives to powerful warrior lords in return for physical protection. Many Normans, recognizing these inexorable forces, readily accepted feudal landholding, the French language, and even Christianity. This resulted in a substantial split from more traditional Normans, particularly from peasants who were losing their independence. n38

Richard I (942-996), apprehensive of French hostility, took the first halting steps toward feudalism. Military service began to be organized on the basis of feudal duties, replacing the traditional method of calling up all freemen. As a result, some allodial (non-feudal) tenures were changed to feudal tenures, and many free peasants lost their independent status. n39 A serious but unsuccessful revolt of free peasants under the subsequent reign of Richard II was probably a protest against these changes and undoubtedly slowed the spread of feudal practices into the lower classes. The eventual result was a Norman style of feudalism with a highly organized military structure, but with servile status in the lower class less pervasive than elsewhere in France.

It is estimated that 100 to 120 feudal baronies existed in Normandy under Richard I. n40 A vassal of one of these barons would have held his land as a sort of tenant at will, a tenure known in Roman law as a *precarium*. n41 By the time of Richard II (998-1026), a vassal who swore fealty to a lord would receive an interest in land known as a *beneficium* under Roman law, which granted the right to hold the property for life. As developments that had already taken place during the dominance of the Carolingian empire were imitated in Normandy, the vassal's interest evolved into the hereditary fief, or *feudum*, which could descend from father to son. n42 In return for giving up the right to revoke the land grant, the lord eventually gained the rights of wardship, to a succession duty upon inheritance, and to choose a husband for a vassal's heiress. n43 These changes occurred in no orderly or consistent fashion within the duchy, but were gradual and uneven.

Vassals' duties were only gradually defined or clarified, n44 but the more powerful lay magnates and churchmen, probably the most important landholders before the Conquest, held their land by some sort of military tenure, that is, subject to the duty to provide the services of a specific number of fully-equipped knights. n45 Because such military

tenures are hardly evident prior to 1047, they were probably developed in large measure by William after he assumed power as duke in Normandy; he may have seen such arrangements as an effective response to the serious internal and external threats against his early rule. n46

Indeed the fief -- land tenure derived from obligatory military service -- played an important part in William's military resources. Under some conditions, he could summon every man holding at least a knight's fee; on less serious occasions he might call up only some men holding military tenures, and then only for forty days' service. Under the worst circumstances, he could call out all free tenants. n47 The system in Normandy was still being shaped at the time of the Conquest, although apparently William did much to spread the principle of a fixed rate of knight service. n48 Subinfeudation occurred in Normandy and further complicated the military tenures: a vassal owing the service of five knights might let his land out to others for ten; or, more commonly, a tenant might hold land from several lords or might hold a mere fraction of a knight's fee. Vassals who made grants in subinfeudation held a relationship to their tenants similar to the duke's relation to themselves. n49

Over all these baronies and vassals, Duke Richard I and his successors administered certain functions through viscounts. Viscounts, on behalf of the duke, exercised control over troops, revenue, administration of justice, castles, and bishoprics (especially after the church was weakened during widespread civil strife). n50 Usually only leading barons would be appointed viscounts, and the office gradually came to be considered a hereditary right of certain feudal families. Viscounts paid a form of rent for their appointments, and then, with responsibility for tax collection, kept any revenue they could obtain. n51

The Norman dukes took other actions to improve order and stability within Norman society. For example:

> [p]rivate war could not be outlawed, but was strictly limited. It needed a ducal licence; the duke set its rules and claimed the right to supervise campaigns. Devastation of opponents' property in land disputes was forbidden, as were assaults and ambushes in ducal forests. Arms, horses or property of a man captured in a bloodfeud might not be retained. A licence was needed for the building of a castle. We do not know the exact date at which many of these regulations came in, but they formed the system that was steadily extended from Richard II to William II. n52

Information on other aspects of Norman law during this time is also scant. Rights of barons to hold local courts were firmly controlled by the duke, but otherwise no details are known. As there was no written law before the Conquest, the Norman dukes administered customary law. They did not issue writs or charters, as the Anglo-Saxons had been doing for four centuries, and the documents that were drawn up simply recorded gifts that had already been made. The most serious cases of misconduct -- murder, assault, arson, and rape -- were heard by the duke, although sometimes he appointed others to hear particular cases. By 1091 baronial jurisdiction in Normandy had been granted over assault, rape, and arson, but not over murder cases. It is believed that criminal justice followed the system of compurgation by oath that was common to Germanic societies, but no firm evidence of this has appeared for Normandy. It is also not known whether juries -- that is, bodies of inquest -- were used among the pre-Conquest Normans. However, the ordeal, including ordeal by battle, was used. n53

Ordeals were a conspicuous feature at the baronial councils convened by the dukes at festival times. Such councils, in addition to conducting trials by ordeal, resolved high-level disputes, decided whether to wage war, and occasionally proclaimed a ducal heir. n54 In 1047, William was instrumental in having a provincial council of ecclesiastical and lay magnates adopt the so-called "Truce of God," which restricted private warfare. This revealed William's penchant for involving the church, and controlling the church's involvement, in his administrative affairs. n55

Despite these known features of Norman legal practices, any comprehensive picture of Norman law remains obscure:

> Of the law of Normandy as it was on the eve of William's expedition, little is known for certain. To

> illustrate the period which had elapsed since the settlement of the Northmen in Neustria, there are no written laws, no books on law and very few charters, while the chroniclers have not much to tell about the legal structure of the duchy, and what they tell is not always trustworthy... Even in later days, after the duke of the Normans had become king of the English, the duchy was slow to follow the kingdom in the production of abiding memorials of its law... [W]e have every reason to believe that the conquerors of England had little, if any, written law to bring with them. n56

Such written laws and unwritten legal customs as had developed in Normandy were probably more French than Scandinavian:

> But not only had the Normans no written law of their own making; there was none that they could readily borrow from their French neighbors. Their invasions occurred in the very midnight of the legal history of France; indeed they brought the midnight with them. n57

Yet the question persists as to whether Norman law was mainly Frankish or Scandinavian:

> It is now generally admitted that for at least half a century before the battle of Hastings, the Normans were Frenchmen, French in their language, French in their law, proud indeed of their past history, very ready to fight against other Frenchmen if Norman home-rule was endangered, but still Frenchmen ... Their spoken language was French, their written Language was Latin, but the Latin of France; the style of their legal documents was the style of the French chancery; very few of the technical terms of their law were of Scandinavian origin. n58

FOOTNOTES:

(n1)Footnote 10. Jack Lindsay, The Normans and Their World 4 (1974).

(n2)Footnote 11. 1 Snorri Sturluson, The Heimskringla: A History of the Norse Kings 38-39 (Samuel Laing trans. 1907).

(n3)Footnote 12. *See* Dudo, *De Moribus et Actis Primorum Normanniae Ducum, in* Historiae Normannorum Scriptores Antiqui 70 (Andreas Duchesnius ed. 1619). A brief but helpful discussion of the source chronicles and of Dudo's occasional unreliability is found in R. Allen Brown, The Normans and the Norman Conquest 24-25 and n.18 (1969).

(n4)Footnote 13. Rolf's Norwegian origin is not certain, but seems probable. D. C. Douglas, *Rollo of Normandy*, 57 Eng. Hist. Rev. 417, 423 (1942).

(n5)Footnote 14. 1 Snorri Sturluson, The Heimskringla: A History of the Norse Kings 38-39 (Samuel Laing trans. 1907); Jack Lindsay, The Normans and Their World 18 (1974). *See generally* William H. Goetzman, The Atlas of North American Exploration: From the Norse Voyages to the Race to the Pole (1998).

(n6)Footnote 15. 1 Snorri Sturluson, The Heimskringla: A History of the Norse Kings 39 (Samuel Laing trans. 1907); Jack Lindsay, The Normans and Their World 19 (1974).

(n7)Footnote 16. Jack Lindsay, The Normans and Their World 18 (1974).

(n8)Footnote 17. *Id.* at 15.

(n9)Footnote 18. *Id.;* Dudo, *De Moribus et Actis Primorum Normanniae Ducum, in* Historiae Normannorum Scriptores Antiqui 79-84 (Andreas Duchesnius ed. 1619). The generous detail Dudo provides for the agreement and its attendant circumstances was probably partially fabricated. *See* D. C. Douglas, *Rollo of Normandy*, 57 Eng. Hist. Rev. 417, 428-429 (1942). However, the occurrence of these events generally is not disputed.

(n10)Footnote 19. John Le Patourel, The Norman Empire 5-11 (1976); Jack Lindsay, The Normans and Their World 17 (1974).

(n11)Footnote 20. D. C. Douglas, *Rollo of Normandy*, 57 Eng. Hist. Rev. 417, 423-424 (1942).

(n12)Footnote 21. *Id.* at 434-35.

(n13)Footnote 22. Jack Lindsay, The Normans and Their World 53-55 (1974).

(n14)Footnote 23. D. C. Douglas, *The Rise of Normandy*, 57 Proc. Brit. Acad. 101, 107-108, 112 (1971).

(n15)Footnote 24. D. C. Douglas, The Norman Achievement: 1050-1100 24-25 (1969); D. C. Douglas, *The Rise of Normandy*, 57 Proc. Brit. Acad. 101, 114-115 (1971).

(n16)Footnote 25. D. C. Douglas, William The Conqueror 31-32 (1964).

(n17)Footnote 26. *Id.* at 15, 35-37.

(n18)Footnote 27. Johannes Brondsted, The Vikings 238-242 (Kalle Skov trans. 1965). *See generally* P.H. Sawyer, The Oxford Illustrated History of the Vikings (1998).

(n19)Footnote 28. Jack Lindsay, The Normans and Their World 26 (1974). In addition to the compensatory payments for their shares of the family estate, the younger brothers also received their shares of other assets.

(n20)Footnote 29. Johannes Brondsted, The Vikings 24-25 (Kalle Skov trans. 1965). *See generally* P.H. Sawyer, The Oxford Illustrated History of the Vikings (1998).

(n21)Footnote 30. Jack Lindsay, The Normans and Their World 26 (1974).

(n22)Footnote 31. Land inheritance and ownership by women is in the tale told by a runic inscription found at Hillersjo, Uppland, Sweden:

> Germund married Gerlog, when she was a maiden. Later they had a son, before Germund was drowned. The son died later. Then she married Gudrik. They had children. Of these only a girl lived; she was called Inga. Ragnfast of Snottsta married her. Afterwards he died, and their son after him. And the mother inherited from her son. Inga afterwards married Erik. Then she died. Then Gerlog inherited from Inga, her daughter.

Ole Klindt-Jensen, The World of the Vikings 138 (1970).

(n23)Footnote 32. Johannes Brondsted, The Vikings 42 (Kalle Skov trans. 1965).

(n24)Footnote 33. Ole Klindt-Jensen, The World of the Vikings 178-183; Johannes Brondsted, The Vikings 242-243 (Kalle Skov trans. 1965). *See generally* P.H. Sawyer, The Oxford Illustrated History of the Vikings (1998).

(n25)Footnote 34. Ole Klindt-Jensen, The World of the Vikings 178 (1970). A description of similar customs in contemporary England is contained in the second set of the laws of Edmund, an Anglo-Saxon king. *See* 3 F. Felix Liebermann, Die Gesetze Der Angelsachsen 186-191 (1906). *See generally* P.H. Sawyer, The Oxford Illustrated History of the Vikings (1998).

(n26)Footnote 35. Jack Lindsay, The Normans and Their World 27 (1965).

(n27)Footnote 36. Haakon Shetelig & Hjalma Falk, Scandinavian Archaeology 352 (Eric V. Gordon trans. 1937).

(n28)Footnote 37. D. C. Douglas, *The Rise of Normandy,* 57 Proc. Brit. Acad. 101, 111-115, 118-119 (1971).

(n29)Footnote 38. R. Allen Brown, The Normans and the Norman Conquest 39-40 (1969); John Le Patourel, The Norman Empire 286-290 (1976).

(n30)Footnote 39. R. Allen Brown, The Normans and the Norman Conquest 40 (1969). Douglas has cautioned against assuming a wholesale adoption of feudal tenures during this time. D. C. Douglas, *The Rise of Normandy,* 57 Proc. Brit. Acad. 101, 118-119 (1971).

(n31)Footnote 40. Jack Lindsay, The Normans and Their World 59-60 (1974). *See generally* D. C. Douglas, *The Earliest Norman Counts,* 61 Eng. Hist. Rev. 129-156 (1946), explaining that, despite civil unrest, the cohesion of the Norman counts greatly contributed to the Norman achievements.

(n32)Footnote 41. 1 Frederick Pollock & Frederic William Maitland, The History of English Law Before the Time of Edward I 67-72 (2d ed. 1909); Jack Lindsay, The Normans and Their World 69 (1974). *See generally* Anthony Musson, The Evolution of English Justice: Law, Politics and Society in the 14th Century (1999); Frederic William Maitland, A Sketch of English Legal History (1998).

(n33)Footnote 42. By 1075 Norman magnates were routinely inheriting their land.

(n34)Footnote 43. 1 Frederick Pollock & Frederic William Maitland, The History of English Law Before the Time of Edward I 325-329 (2d ed. 1909).

(n35)Footnote 44. R. Allen Brown, The Normans And The Norman Conquest 39, 41 (1969).

(n36)Footnote 45. D. C. Douglas, William The Conqueror 101-103 (1964).

(n37)Footnote 46. *Id.* at 98-103.

(n38)Footnote 47. F. M. Stenton, The First Century of English Feudalism: 1066-1166 at 13-14 (1961).

(n39)Footnote 48. D. C. Douglas, William The Conqueror 31-32 (1964).

(n40)Footnote 49. John Le Patourel, The Norman Empire 289-290 (1976).

(n41)Footnote 50. D. C. Douglas, *The Earliest Norman Counts,* 61 Eng. Hist. Rev. 152-153 (1946); D. C. Douglas, William The Conqueror 139-144 (1964); John Le Patourel, The Norman Empire 258-260 (1976).

(n42)Footnote 51. Timothy Baker, The Normans 25 (1966); D. C. Douglas, William The Conqueror 139 (1964); R. Allen Brown, The Normans and the Norman Conquest 54 (1969). The tax collection system described in the text is usually referred to as "farming," and had a long tradition extending back to Roman times and beyond. This arrangement obligated the viscount to pay a fixed sum to the duke, which the viscount was then entitled to collect from the people in his jurisdiction. As a rule, the amount of the viscount's collections exceeded the required payment to the duke.

(n43)Footnote 52. Jack Lindsay, The Normans and Their World 69 (1974).

(n44)Footnote 53. *Id.* at 136-138.

(n45)Footnote 54. *Id.* at 136-137; R. Allen Brown, The Normans And The Norman Conquest 54, 145-146 (1969).

(n46)Footnote 55. D. C. Douglas, William The Conqueror 44, 51-52 (1964).

(n47)Footnote 56. Frederick Pollock & Frederic William Maitland, The History of English Law Before the Time of Edward I 64-65 (2d ed. 1909).

(n48)Footnote 57. *Id.* at 65.

(n49)Footnote 58. *Id.* at 66.

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CHAPTER 4 THE GROWTH OF THE ENGLISH COMMON LAW OF REAL PROPERTY

1-4 Thompson on Real Property, Thomas Editions § 4.04

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§ 4.04 Impact of the Norman Conquest on the Development of English Law.

§ 4.04(a) The Course of the Conquest.

Duke William II of Normandy would have angrily objected to being known as the "Conqueror" of England. No one of his time gave more attention to assuring the legitimacy of his claim to the English throne and to the notion that the Norman invasion and settlement of England was simply the necessary effort to reclaim the English throne from a usurper.

§ 4.04(a)(1) Norman Influence in England Before 1066.

Norman influence in England began no later than 1002, when the Anglo-Saxon King Ethelred II of England married Emma of Normandy, daughter of Duke Richard I and therefore William's aunt. Ethelred and Emma's son, known as Edward "the Confessor" when he was later King of England, was therefore William's first cousin. Ethnic ties with Normandy were even stronger and older, inasmuch as both Normandy and England were attacked, conquered and partially resettled by Scandinavian Vikings during roughly the same era.

During the marriage of Ethelred II and Emma, many Normans came to England as part of Emma's household. In 1013, Edward and his brother Alfred were sent by their father to Normandy, to join their mother who had preceded them, due to the growing menace of Viking assaults on England. Ethelred joined them briefly in 1013, but returned to England in 1014. When Ethelred died in 1016, Cnut of Denmark, by a combination of negotiation and battle, became King of England, and about the same time succeeded his own brother as King of Denmark. n59

In the very year he obtained the English throne, Cnut married Ethelred's widow, Emma of Normandy, so that, from 1016, once again some Norman influence was felt in England. Indeed, Cnut's Danish followers and Emma's Norman retainers shared a common homeland, culture, and ancestry less than a century in the past. Shortly after Cnut's death in about 1035, Ethelred's two sons Edward and Alfred, still in Norman exile, made short-lived expeditions to England, probably with Norman aid. However, the new King of England, Harold Harefoot, had Alfred murdered, with the complicity of Earl Godwin, father of the Harold who would oppose William at Hastings. King Harold Harefoot was Cnut's son by his first marriage, so Cnut's widow Emma had gone into exile in Flanders. After Harold Harefoot died in 1040, however, he was succeeded by Harthacnut, son of Cnut and Emma, who invited Edward, son of Emma and

Ethelred, to share the English kingship. Harthacnut died only a year later, so Edward became sole King of England in 1042. In that year Edward was 37 years old and had spent 28 of those years in Normandy, succored by Norman magnates. n60

When Edward assumed the throne of England, Norman influence grew stronger than ever. As stated by an anonymous contemporary biographer of Edward:

> When King Edward of holy memory returned from Francia, quite a number of men of that nation, and they not base born, accompanied him. And these, since he was master of the whole kingdom, he kept with him, enriched them with many honours, and made them his privy counsellors and administrators of the royal palace. n61

§ 4.04(a)(2) William's Claim to and Conquest of the English Throne.

Although the next events are attested only by Norman sources, there is no reason to doubt their reliability and mutual confirmation. In about 1051, Edward decreed that William of Normandy should be his successor, secured the agreement upon oath of the leading English nobility, and sent notification of the matter by messenger and hostages to William. William then came to England and was received and honored by Edward. In 1064, according to the same sources, Harold Godwin was sent to William in Normandy to confirm the succession and formally recognize William as Edward's heir.

But conflict was not to be avoided. Edward died on January 5, 1066, Harold Godwin was elected king by the *Witan* and crowned on January 6, 1066, and the succession was thrown into wide open dispute. Once the news reached Normandy, massive invasion preparations began, and William had a monk deliver a formal statement of William's claim to the English throne to Harold. Meanwhile, invasion preparations also had been undertaken in Norway, whose King Harald Hardrada raised a claim to the English throne. The same wind that kept William from crossing the English Channel in September 1066 enabled Harald Hardrada's forces to land near York, where they were totally defeated by Harold Godwin's Anglo-Saxons in the battle of Stamford Bridge. However, the Anglo-Saxon forces had arrived only after a forced march of 190 miles from London and withdrawing the fleet from guarding the southern coast against a Norman invasion. When the wind then suddenly changed and William crossed over to Pevensy and Hastings, Harold swiftly returned, gathered what forces were available, and gave battle more or less at a time and place of William's choosing. The outcome at Hastings was in doubt during the entire day of battle, but at the end the field lay strewn with "the flower of English nobility and youth." n62 Once the English had been defeated, with their king and other principal leaders slain, they seemed incapable of regrouping and offering any more resistance than an occasional regional revolt.

> Nevertheless, the Norman Conquest of England is not to be explained away by the luck of Fortune's favourites, for in these matters we may see the characteristic Norman gift for seizing opportunities and bending circumstances to their will. We must also surely see more weakness in the Old English kingdom than modern English historians are often ready to admit ... Conquered by Swein Forkbeard and Cnut only 50 years before Hastings, far from united (especially between north and south), presided over by a weak king and an over-mighty earl representing the Anglo-Scandinavian ascendancy whose dominance was resented by the surviving Old English ..., old fashioned in its organization and not least its military system, England on the eve of the Norman Conquest presents to the neutral historian plenty of internal reasons to explain a Norman victory in what was in effect one more disputed succession to the throne. n63

The contrast between the culturally superior Anglo-Saxon state and the politically stronger Norman state has been aptly expressed by Stenton:

> The Normans who entered into the English inheritance were a harsh and violent race. They were the closest of all western peoples to the barbarian strain in the continental order. They had produced little in

> art or learning, and nothing in literature, that could be set beside the work of Englishmen. But politically, they were the masters of their world. n64

§ 4.04(a)(3) Norman Settlement of England After the Conquest.

The Norman Conquest itself was not substantially finished until 1071. The Norman "settlement" of England began immediately in 1066 and was essentially completed with the Domesday Survey in 1086. William was crowned in London on Christmas day, 1066, but withdrew to Essex while three London castles (that afforded protection against the unruly London population) were completed. He returned in triumph to Normandy in March 1067, but was required back in England in December 1067, to conduct a winter campaign to subdue Exeter. William's wife Mathilda was brought to London to be crowned queen in the spring of 1068, but then William had to go pacify Northumbria and York, planting castles along the way. The next year, a rebellion broke out in York, and then prominent English leaders united with invading Danes to create a major uprising in Northumbria. To check simultaneous uprisings in Cheshire, Cornwall, Devon, Dorset, and Somerset, William dispatched trusted companions, and then personally led the forces to Northumbria. He rather quickly dealt with the military threat, but then, in the winter of 1069-1070, sought a permanent solution "by a deliberate attempt to ruin the population of the affected districts": n65

> Then in his anger he commanded that all crops and herds, chattels and goods of every kind should be brought together and burned to ashes with consuming fire, so that the whole region north of Humber might be stripped of all means of sustenance. n66

The effects of this effort became legendary:

> From the eleventh century onwards historians have noted the sustained ferocity with which the king set his men to destroy the means of life in northern England. Their generalities are abundantly borne out by the evidence of Domesday Book, which shows that within the country ravaged at this time vast areas were still derelict after seventeen years ... It was the most terrible visitation that had ever fallen on any large part of England since the Danish wars of Alfred's time. n67

Entering into legend were the resistance, escape from the Isle of Ely, and further adventures of Hereward the Wake during 1070-1071.

As to settlement, as opposed to conquest, William may at one time have intended to simply rule England as the legitimate heir of Edward. Redistribution of lands to his followers, however, as tenants in chief began immediately after Hastings, and continued with renewed pace after each revolt, so that by the time of the Domesday Survey in 1086 only two Anglo-Saxon lords of high rank were left in the realm:

> The extinction and disappearance, in death, in exile and by social suppression, of the Old English aristocracy is one of the few non-controversial results of the Norman Conquest which, sociologically, is the imposition of a new and alien ruling class upon the land ... So sweeping a change of personnel at the top was crucial in an age of personal kingship and personal lordship ... For a start the very nature of society changed to become what we call feudal, as the new lords and their new king naturally and automatically transplanted to England those forms of social organization, custom, tenure, military organization and tactics which were prevalent in Normandy and northern France. The law changed in consequence, not least the land law, and so did the dispensation of justice to accommodate feudal notions of jurisdiction... n68

Norman settlement, consisting of immigration from the continent, continued even after the death of William in 1087. Penetration of Scotland in the north and of Wales in the west proceeded until well into the twelfth century.

It is difficult for us, viewing the Norman Conquest after the passage of nearly a millennium, to appreciate the

monumentality of the Norman achievement or the disastrous consequences it held for the English. The stronger central rule that eventually arose from the Norman intrusion tends to obscure the decades of uncontrolled murder, oppression, rapine, humiliation, famine, and fear that the Norman invaders brought to much of England. Often, when the Norman barons could no longer find affluent Englishmen to plunder, they quarreled and fought among themselves, usually scourging the lands, manors, and peasants belonging to their opponents. Small wonder, then, that after numerous unsuccessful regional rebellions, the English, seeking relief from civil unrest, gave their allegiance to the Norman king rather than to discontented local magnates. This fitful and frightful struggle between the forces of chaos and control inexorably influenced English law and government.

From a different and perhaps grander perspective, the Norman Conquest has been depicted as a profound renewal of Old English society and culture:

> At the same time, through the agency of the new Norman prelates above all, England was brought culturally and intellectually into the mainstream of the new learning of northern France ... [Both] the Old English Church, [and] Old English society as a whole, ... were old fashioned by the standards of northern France, features of a surviving Carolingian-type realm still in full working order in spite of the Danes. It is not unfair to say that in England at Hastings in 1066 the Old World went down before the New ...
>
> [T]he most important single result of the Norman Conquest of England must be that it broke this country's close but barren ties with Scandinavia, and replaced both them and the affiliation with the increasingly obsolete German world by the closest bonds of absolute integration with northern France. n69

§ 4.04(b) Norman Legal and Administrative Activities.

§ 4.04(b)(1) Local Government and Administration.

No more typical example of the interplay between English and Norman impulses can be found than in the changes in royal administrative practices introduced after the Conquest. William took over English governmental institutions intact, but by 1071 he had brought local administration entirely into Norman hands. He achieved this primarily by strengthening the office of sheriff, so that it functioned much like the Norman viscount, although it was much more subordinate to the king. Anglo-Norman sheriffs were less independent than Norman viscounts, because those who obtained the offices were usually from the lesser nobility, were changed often, and did not inherit their positions.

Although the Anglo-Norman sheriffs' traditional enforcement duties increased naturally with the growth of feudal dues and forest laws, the most important growth in the office's power was in the expanded scope of its judicial functions. Royal writs could command a sheriff to bring a case to the royal court or, in the days before rounds by royal justices were common, could order the sheriff himself to hear and decide the case in its own locality. n70

§ 4.04(b)(2) The Royal Court.

The Norman administrative practice that had the most direct effect on the common law's growth was the royal court. Although it is difficult to find precise information on this institution, it appears that in the early years the court usually consisted of servants who performed judicial, financial and other administrative functions, and who usually witnessed royal writs. n71 Occasionally added to this ministerial group would have been some members of the most powerful nobility, companions and confidants of the king, with whom he discussed issues of the realm. Such groups would not have been a formal court of law, but collectively, as a royal court, they did from time to time issue writs and judgments. Writs extant from this time are brief and cite no rules or guidelines, only commands. However:

> we can be sure that the king often discussed with the barons such matters as the disposal of

> escheated fiefs, the settlement of conflicting claims to estates, and the marriage of heiresses; the decisions thus taken in the end determined the lines on which feudal practice was to develop. n72

At the three great annual church festivals, the king also assembled his great court, consisting of all his principal tenants in chief. This council, a natural extension of the Anglo-Saxon *Witan*, also heard important cases and is the direct ancestor of the English Parliament. n73

§ 4.04(b)(3) Early Norman Judicial Activity.

Inevitably, a routine of judicial administration more methodical than the impromptu gatherings of nearby Norman nobles became necessary. At the time of the Conquest, the monarch's representative in the various localities was the sheriff, who had some judicial powers. It was in the king's interest to hold the sheriff's powers in check; the best control achieved by the Normans, albeit inadvertently, was in connection with steps taken to deal with financial matters. The king's agent or deputy over financial matters came to be called the chief justiciar, or Justiciar of All England. He often presided over royal court gatherings at Easter and Michaelmas that accepted and audited money returns from sheriffs and other officers. The justiciar also resolved disputes arising from these accounts before the barons of the exchequer. By the time of William II (of England, 1087-1100), justiciars had been appointed over shires to perform comparable judicial and fiscal functions. n74

In addition, because the king had to resolve disputes between tenants in chief, a judge, or justiciar -- appointed as the king's agent, but still acting within the old Anglo-Saxon framework -- tried such cases, which were commenced by royal writ:

> The hearings were held at the full meetings of the shire courts where local men, including Englishmen, could pronounce on the custom of the country. Thus native tradition and feudal law were able to some extent to merge. There was not always time to examine the many witnesses closely. So the method used was of a sworn verdict being given by a group of men whom the court appointed. We cannot find a definite precedent in Normandy, though the Franks were familiar with the idea of a collective verdict, as also were the most populated parts of the Danelaw [in England]. The origins of the jury are lost in obscurity, but the wide use of it certainly goes back to William; Domesday Book was compiled from the verdicts of juries all over England. n75

Eventually, Henry II (1154-1189) removed local justiciars and replaced them with itinerant or traveling justices, who were regular judicial officers. n76 In the 13th and 14th centuries these justices sometimes exercised a sweeping jurisdiction referred to as the General Eyre. It has been observed that "there was much important legislation effected by means of instructions to the justices as they set out upon their Eyre," n77 and it should be noted that this was a crucial process in the formation of the common law. Centralization of judicial power continued, and eventually pleas concerning land were placed exclusively in royal jurisdiction.

Henry II also greatly increased the use of writs and sworn juries. n78 Writs, of course, had been a prominent feature of Anglo-Saxon administration. For the first four years of his reign in England, William retained Edward's Anglo-Saxon clerks, who assisted both the king and his justiciars. These clerks and their successors functioned under the direction of the chancellor, who was in charge of religious services and of writing activities. One of William's administrative improvements was to expand the issuance of writs, using them as a method of quickly sending commands throughout England. Writs were actually sent only after being authenticated by the seal of the chancellor. n79

Except for these rather subtle changes of practice at the highest administrative levels, the Anglo-Norman kings made no significant changes in the court system or procedures that had existed under the Anglo-Saxons. Even William's most important judicial innovation, establishing separate bishop's courts to enforce canon law as he had in Normandy, was aimed at reforming the church, not at improving the secular legal system. n80

Complaints against the aggressive and somewhat rapacious activities of the justices in Eyre led to yet another reform by Henry II: he chose five officials of his personal household to constitute a permanent court that would not depart from the King's Court, n81 and also would not have the financial functions that made the justices in Eyre so unpopular. This group of five justices was to remain with the king, and so was expected to travel with the king. Eventually known as the Court of Common Pleas, this court was eventually required by the Magna Carta to be in one place, n82 which place was naturally Westminster. Frequently the more important matters before the Court of Common Pleas were referred to the important counselors closest to the king, who eventually developed their own procedure for handling such referred matters and became a new court, the Court of King's Bench. The Court of King's Bench did not become an institution separate from the royal council until the reign of Edward I (1239-1307).

Maitland identified six ways in which the royal judicial institutions stimulated the development of the common law. These are, as summarized and paraphrased by Plucknett: n83

> (1) Under the Norman kings the Crown by its writ of right supplied the real or imaginary defects of justice in the feudal courts.
>
> (2) Under Henry II it was established that no man need answer for his freehold without a royal writ unless he cared to. n84
>
> (3) Henry II also ordained that a defendant in certain pleas of land in the King's Court could have a jury trial (grand assize) instead of battle if he chose.
>
> (4) The possessory assizes established by Henry deliberately ignored the feudal courts and by their swiftness immediately became very popular.
>
> (5) The idea of contempt was used very effectively. The King would issue a writ ordering a subject to do right and justice, and if he refused, he was guilty of contempt of the King's writ. The defendant in a writ of debt, for example, not only denies his liability, but also denies tort and force in resisting the King's command.
>
> (6) The idea of the King's peace was not only the basis of criminal jurisdiction, but could also be used to enlarge the civil jurisdiction of the King's Court. This was effected through the action of trespass, which although criminal in form was constantly becoming more and more a civil action.

§ 4.04(b)(4) Early Norman Law-making Activity.

Although much of early Norman law-making activity in England is lost from history, perhaps more has been preserved than is the case for other European governments of that period. William was keenly aware of the legal issues affecting his claim to the English throne and was eager to promote the continuity of life and law that only a legitimate successor could provide. At his coronation ceremony in Westminster Abbey, he swore "he would rule justly and with kingly care the whole people placed under him, that he would make and keep right law, and that he would utterly prohibit all spoliation and unrighteous judgments." n85

Only a few charters, writs, and legal decrees are known to have been issued during William I's reign. n86 At an early date, the decrees were compiled into a single document, known as "The Laws of William the Conqueror." The decrees effected no noteworthy change in English legal tradition. Indeed, their most important provision, Clause 7, quoted in full below, secures to the people their ancient legal customs. These decrees may be summarized as follows:

> 1. A wish for reverence for God, faith in Christ, and peace between English and Normans.
>
> 2. All freemen will affirm by oath their loyalty to William.

3. Special protection is given against murder of Normans, including fines to be paid by the entire hundred where the killing occurred.

4. Normans are to pay "scot and lot" according to English law.

5. Cattle sales are to be in towns before witnesses.

6. Trial by battle is an available procedure in disputes between English and Normans.

7. "This also I command and will, that all shall have and hold the law of King Edward in respect of their lands and all their possessions, with the addition of those decrees I have ordained for the welfare of the English people."

8. The frankpledge system is imposed, securing court appearances when summoned.

9. Slaves are not to be sold outside the country.

10. Punishment is to be by blinding or mutilation rather than by execution. n87

One other very important early Anglo-Norman legal document is the "Coronation Charter" of Henry I, believed to have influenced the Magna Carta. This document, summarized below, also preserves the old English laws, especially in Clause 13, which is quoted in full:

1. The Church is to be free of certain abuses and oppressions to which it was formerly subject.

2. Only just reliefs are to be charged for redemption of a decedent's land.

3. The king will not require payment for his counsel in marriage matters; widows will not be given in marriage without their consent.

4. Widows with minor children shall retain dowry and marriage portion, and will not be given in marriage without their consent.

5. Special taxes to compensate for depreciated coinage will no longer be levied.

6. Many pleas and debts owed to his brother the late king are forgiven.

7. Disposition of movable property belonging to a baron who dies intestate is explained.

8. Forfeitures by barons need to be covered by movable property only to the amount of the forfeiture.

9. All murder-fines incurred before the coronation are remitted; all future murder-fines are to be paid according to the law of King Edward.

10. The forests of William I are retained.

11. Men holding land in military tenure for knight service are exempted from taxes and other services, so that they may properly equip themselves.

12. "I establish a firm peace in all my kingdom, and I order that this peace shall henceforth be kept."

13. "I restore to you the law of King Edward together with such emendations to it as my father made with the counsel of his barons."

14. Property seized since the death of William II shall be returned. n88

Both of the above documents demonstrate the dearth of original Norman contribution to English law. These documents, as well as the low level of legislative activity by these Norman rulers, who were preoccupied with self-preservation, confirm that much of the legal foundation of the Old English state is the principal source of common law. The Normans excelled at adopting and adapting cultures of the people they dominated. Despite the fact that the transition from their rough Viking traditions and tongue to Gallo-Frankish ways was still relatively recent, they were able to assimilate the old English ways basically intact. This trait is well illustrated by the introduction of feudal military tenures into continental Norman landholding, the systematic use of such tenures by William to create a stable military force for Normandy, and William's further refinements of uniformity in applying these military tenures to an existing set of English tenures. n89

FOOTNOTES:

(n1)Footnote 59. Cnut eventually conquered Norway in 1028, adding it to his Anglo-Danish empire. *But see* Patrick Wormald, *Frederic William Maitland and the Earliest English Law*, 16 L. & Hist. Rev. 1 (Spring 1998) (contending that Maitland underrated the part played by the earliest Kings of England in shaping a distinctive English legal tradition).

(n2)Footnote 60. *See generally* Frank Barlow, Edward The Confessor (1970).

(n3)Footnote 61. Vita Aedwardi Regis, The Life of King Edward 17 (Frank Barlow ed. and trans. 1962).

(n4)Footnote 62. William of Poitiers, Gesta Guillelmi Ducis Normannorum Et Regis Anglorum 204 (R. Foreville ed. 1952).

(n5)Footnote 63. R. Allen Brown, The Normans 61-63 (1984).

(n6)Footnote 64. F. M. Stenton, Anglo-Saxon England 678 (1943).

(n7)Footnote 65. *Id.* at 596.

(n8)Footnote 66. 2 Orderic Vitalis, The Ecclesiastical History of Orderic Vitalis 232 (Marjorie Chibnall ed. 1969).

(n9)Footnote 67. F. M. Stenton, Anglo-Saxon England 596-697 (1943).

(n10)Footnote 68. R. Allen Brown, The Normans 71-73 (1984).

(n11)Footnote 69. *Id.* at 75, 77.

(n12)Footnote 70. D. C. Douglas, William The Conqueror 305-306 (1964).

(n13)Footnote 71. John Le Patourel, The Norman Empire 138 n.1, 139, 155-157 (1976).

(n14)Footnote 72. Jack Lindsay, The Normans and Their World 324-325 (1974).

(n15)Footnote 73. The early developments which eventually led to formation of a parliamentary body in England are described in 1 Frederick Pollock & Frederic William Maitland, The History of English Law Before the Time of Edward I 198-200 (2d ed. 1909).

(n16)Footnote 74. Francis James West, The Justiciarship in England 1066-1232 10-13 (1966); John Le Patourel, The Norman Empire 143-145, 274 (1976); 1 Frederick Pollock & Frederic William Maitland, The History of English Law Before the Time of Edward I 156-159 (2d ed. 1909).

(n17)Footnote 75. Jack Lindsay, The Normans and Their World 328-329 (1974).

(n18)Footnote 76. John Le Patourel, The Norman Empire 260 (1976). *See* Ralph V. Turner, Judges, Administrators and the Common Law in Angevin England, ch. 1 (1994).

(n19)Footnote 77. Theodore F. T. Plucknett, A Concise History of the Common Law 145 (5th ed. 1956).

(n20)Footnote 78. 1 Frederick Pollock & Frederic William Maitland, The History of English Law Before the Time of Edward I 138-153 (2d ed. 1909).

(n21)Footnote 79. D. C. Douglas, William The Conqueror 147-148, 292-293 (1964).

(n22)Footnote 80. *Writ of William I concerning spiritual and temporal courts (1072-1076, and probably April 1072), in* 2 English Historical Documents 604-605 (D. C. Douglas ed. 1953)."Although dramatically quickening the pace of change, the legal reforms of Henry II were to some extent a reflectionof a society that was already changing." Paul Dalton, Conquest, Anarchy And Lordship 275, ch. 7 (1994). *See also* John Hudson, The Formation of the English Common Law, ch. 7 (1996).

(n23)Footnote 81. Select Charters and Other Illustrations of English Constitutional History 131 (William Stubbs ed., 1881).

(n24)Footnote 82. Magna Carta, c. 17 (1215); c. 11 (1225).

(n25)Footnote 83. Frederic William Maitland, The Constitutional History of England 111-114 (1968), *summarized In* Theodore F. T. Plucknett, A Concise History of the Common Law 156 (5th ed. 1956).

(n26)Footnote 84. Glanvill, XII, 25.

(n27)Footnote 85. *Select passages from the annals ascribed to Florence of Worcester, in* 2 English Historical Documents 204, 214 (D. C. Douglas ed. 1953).

(n28)Footnote 86. *See* editor's introduction to *'The Laws of William the Conqueror,' in* 2 English Historical Documents 399 (D. C. Douglas ed. 1953).

(n29)Footnote 87. *"The Laws of William the Conqueror,' in* 2 English Historical Documents 399-400 (D. C. Douglas ed. 1953).

(n30)Footnote 88. *The 'Coronation Charter' of Henry I* in (5 August 1100), 2 English Historical Documents 400-402 (D. C. Douglas ed. 1953).

(n31)Footnote 89. *See generally* John Hudson, "*Anglo-Norman Land Law and the Origins of Property," in* Law And Government In Medieval England And Normandy 198-222. (George Garnett and John Hudson eds., Cambridge: Cambridge University Press, 1994).

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CHAPTER 4 THE GROWTH OF THE ENGLISH COMMON LAW OF REAL PROPERTY

1-4 Thompson on Real Property, Thomas Editions § 4.05

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§ 4.05 English Land Tenures and Feudalism After the Conquest.

§ 4.05(a) William the Conqueror's Claim to All English Land.

> England belonged to [William] in a sense in which it had never belonged to any previous king. All landholders, lay and ecclesiastical, were his tenants and held of him; moreover, all who held land of the greater tenants were also the King's men and owed him allegiance. Thus there was nothing comparable to freehold tenure in post-Conquest England. n90

It is clear that William assumed tenurial lordship over all English land, but it is unclear on what theory this claim was based. If William was the legitimate successor to Edward the Confessor, then he would have simply stepped into that king's prerogatives over English land, much of which (especially bookland) would perhaps have been held as freehold, without obligation to the king except for the occupants' customary duties of military service, road building and fortress repairs. n91 He also could claim ultimate ownership of lands forfeited by those English lords who had opposed him in 1066 and after. However, any claim to ownership over all English land would more logically be based on the right and result of conquest, a position objectionable to William in his striving for legitimacy in his rule of England. Not until 1086, 20 years after Hastings, did William require an oath of fealty from all free men, which would be consistent with his claim to ultimate ownership of all English land: "All free men will affirm by oath their loyalty to William." n92

It appears that William's earlier intention was to rule over a genuine Anglo-Norman state, with Norman barons replacing only those English who actively opposed William. Until 1069, this was still a realistic possibility, because, despite the forfeitures resulting from Hastings, in 1069 more than two-thirds of England was still held under English earls, and the king's writs were still written in English and being sent to mostly English sheriffs. n93 This changed after William overcame the series of rebellions that commenced in 1069, so that by the time of the Domesday Survey in 1086, only two Englishmen held lands directly of the king:

> William gave almost one-fourth of England to ten of his principal followers and made grants to lesser barons of the smaller fiefs or holdings of English earls and thegns. Normally, the grants were not of a compact territorial unit but consisted of manors scattered through several counties. n94

These grants to relatives and leading followers of the king were under a form of military tenure by which the recipient

of the land was required to swear fealty to the king and agree to provide a specific number of battle-ready knights when required by the king. Such requirements of knight service, considered to burden the land itself, were even imposed upon holders of church lands, whose quotas of knights amounted to about 800 of the 5,000 knights' services obtained by William through military tenures. The barons on whom these requirements were imposed directly probably did not number more than 180. n95 With such heavy reliance on military tenure, William was undoubtedly reluctant to depend on Englishmen who had not yet adopted the military tactics and organization used by William with such success at Hastings.

§ 4.05(b) Feudal Relationships in the Eleventh Century.

§ 4.05(b)(1) Characteristics of Feudalism.

Land held by military tenure was known as an honor or a fief, and was the main component of a social system that would be described as feudal. In a very general sense, feudalism can be said to have arisen as a necessary response to Viking aggressions throughout Europe:

> Consequently in all fields of life the military expert was predominant, and for a time even overshadowed his great mediaeval rival, the religious expert. Between the two of them, the military and the clergy, there was little room for anything else. So grave was the crisis that populations willingly (and wisely) accepted the domination of the knights and the clergy as the only means of saving Europe and its culture from barbarian invaders, and both of them did their duty. But the social consequences of this were serious and showed how high a price had to be paid for such precarious security as feudalism could afford. Towns and city life were hard put to find a place in the feudal system, while the peasantry had no alternative but to accept serfdom. n96

While no firm consensus can be established on the precise meaning or elements of feudalism, the feudal relationships that evolved on the continent and formed part of the Norman experience can be described in a general sense, with the cautionary reminder that change was constantly occurring and wide variations existed at any point in time:

> Feudal relationships and customs were based on the mutual obligations of lord and man (vassal), obligations which go back so far into the common Germanic past of northern Europe that their origins cannot be discerned. The tie between lord and vassal was established by the act of homage and oath of fealty. In the act of homage, the vassal knelt before his lord, offering his clasped hands which the lord enclosed in his own, and promised service and fidelity in return for protection. He then swore an oath, the oath of fealty, to the same effect, with his hands upon a relic or a gospel-book. The bond thus established was perhaps the most important social tie in northern Europe (including England) throughout the Dark Ages and the medieval period. n97

Despite such solemnity, the feudal relationship could be dissolved and was "decidedly weak; it was only while the religious and social sanctity attaching to homage endured that a lord could have any reasonable dependence upon the armed assistance of his vassals." n98

The attachment of feudal obligations to the land meant that, with the exception of those at the top of the "feudal pyramid," no lands in a feudal society were *owned*, they were *held*, and the holdings could be revoked for breach of feudal obligations. In societies just emerging into feudalism, the holdings extended only for the tenant's life, with regrants of the land to the landholder's descendants dependent upon the lord's discretion and favor.

The military nature of the most feudal obligations at the top of the system determined the organizational structure for feudal landholding. A land holding called a knight's fee was by definition required to provide one knight. The size of the holding might differ from place to place, but, especially in Norman England, the lands and the extent of their obligations for knights, were expressed with great specificity. After knights lost their preeminence in military activities,

such service was often commuted to money payments, and knights' fees continued to play an important role in the fiscal system of England.

Feudalism was also characterized by a remarkable decentralization of governing powers. Most defensive activity was carried out by local leaders exercising powers of government in their localities. n99 Especially prominent among the non-military powers was the exercise of legal jurisdiction, and the associated requirement of court attendance, over a lord's tenants.

§ 4.05(b)(2) Possible Sources of Feudalism.

While feudalism may have arisen in response to the Viking crises, its elements may have derived from several institutions extant in Europe during Roman and post-Roman times. These several streams of influence are summarized as individual elements and discussed in the following subsections: n100

§ 4.05(b)(2)(i) The *Comitatus.*

The comitatus in prehistoric Germany was the warrior band that resulted from an early Germanic custom by which a chief would surround himself with warrior companions and enter into a personal bond with them. n101 A comparable late Roman institution encountered by encroaching Germanic invaders would have been the band of soldiers retained by the emperor or general for his personal service. The leader provided each soldier with a military outfit, but upon the soldier's death, the outfit would be returned to the leader. From these arrangements feudalism may have derived the oath of fealty and the custom of returning military equipment upon the death of the knight/tenant.

§ 4.05(b)(2)(ii) Patronage.

A Roman institution, albeit extra-legal, that may have contributed to feudal traits, was patronage. In the old Roman practice, clients would "commend" themselves to the "faith" of a more wealthy and powerful patron. In practical terms, the clients gave service and counsel to the patron, who in turn defended the clients in litigation and in other ways. When the 5th-century Theodosian Code declaimed clients' attempts to commend their lands as well as themselves, that certainly revealed that land commendation had been introduced and somewhat abused. Land commendation to a patron may have been driven somewhat by Roman taxation, which fell heaviest on smaller landholders and left in place huge exemptions for the larger and more powerful owners. Thus, through patronage practices, smaller landholders may have gradually slipped into the status of dependant tenants.

§ 4.05(b)(2)(iii) The *Precarium* and the ***Precaria***.

A property interest that had only a tentative existence in Roman property law, the *precarium* may also have contributed to the development of feudal property interests. If a person petitioned a landowner for possession of some of the land, the petitioner might be granted a *precarium* the right to occupy and use a parcel of land, revocable at will or at the death of either party. Though fragile, this possessory interest was protected against third parties. In Roman practice, a debtor might surrender land to a creditor, receiving the land back as a *precarium*, until the debt was paid and the original property interests restored. When, under the patronage practices, commendation of land began to occur, the *precarium* would have facilitated the process: the client would turn over land to the patron, and receive back a possessory interest in the same land in the form of a *precarium*. By the 6th century, the Christian church had become a major landholder and very frequently granted *precaria* to its donors and others. Changes in custom occurred, so that some grants in *precarium* were for life, or for several generations, and others for a specific number of years. The grants for years would sometimes be renewable upon payment of rent, and came to be called a *precaria*, rather than a *precarium*. Little certain information about the origins and history of these interests is available, but there can be little doubt that they eventually contributed to the rise of feudal interests in land. n102

§ 4.05(b)(2)(iv) Conditional Grants by Merovingian Monarchs.

In their attempts to establish order and a semblance of stable government during the 6th and 7th centuries, Merovingian rulers made to their faithful followers large grants of land that were in theory allodial, or in more modern terminology, in freehold. Without other significant sources of revenue, however, these royal grantors came to expect some form of payment for their approval of succession to the lands by the donees' heirs. In any event, the grant was considered revocable, and might even be conditioned on the donee rendering future services. These developments, too, contributed to the rise of feudal practices.

§ 4.05(b)(2)(v) Use of *Precariae* by Carolingian Monarchs.

The Carolingian successors of the Merovingians concentrated their efforts on gaining control of the huge landholdings of the church. As an alternative to outright confiscation, the church agreed to grant *precariae* to donees designated by the monarch, with the donees expected to pay nominal rents to the church and render services to the monarch. Even without royal prodding, the church extensively used *precariae* (that is, a form of *precarium* under which some rent was given in exchange for the property interest), to secure tenants to work smaller, scattered holdings. These grants came to be called "benefices." n103

§ 4.05(b)(2)(vi) Military Service as a Condition of Grants in *Precarium*.

The grants of *precariae* given in response to royal recommendation had come, by circa 750, to be conditioned on the donee's rendering military service to the monarch (not necessarily to the grantor). By the time of Charlemagne's reign, all who held such interests were required to give some type of military service, not just those who held land directly from the monarch. Because many who held *precarium* interests were smallholders, they were permitted to combine their efforts to meet obligations of military service. This led to more definite notions of the extent of land that would support a knight, so that on the eve of the Norman Conquest, Normandy had recognized and regularized the so-called knight's fee.

§ 4.05(b)(2)(vii) Landholding and Jurisdictional Independence.

Deep in both German and Roman customs were impulses to recognize some degree of legal independence associated with landholding. The legal power of the landholder over his own household recognized by Germanic custom found its more extreme counterpart in Roman practice, which frequently accorded to the largest landowners the rights and profits of exercising legal jurisdiction in their domains. Within these rights of jurisdiction arose institutions that would eventually become feudal courts. Two streams of tradition are possible origins of the such courts. The old Germanic relationship of lord and vassal may have been the predecessor of the feudal jurisdiction and courts; on the other hand, there may have been a customary court conducted by the community of freemen, a type of public court, which came to be dominated by one or more large landholders. Some evidence suggests that French feudal courts derived from the old public courts that were taken over by private landowners. In such communal courts, judgment was given by landholders who were obligated to function in their court role because of their landholdings, and whose successors were therefore sometimes hereditary. When the fulfilling of these judicial functions became too burdensome for individual landholders, the local lord, drawing from the other stream of tradition, could compel designated vassals to perform the obligations of court.

§ 4.05(b)(2)(viii) Summary.

The rise of European feudalism was a complicated and attenuated process whose causes can only be guessed at from great distances of time and space. Moreover, devotees of the subject still disagree over feudalism's distinguishing features. Yet, the preceding paragraphs suggest several characteristics of medieval European society that evolved into a distinctive form of social organization that could be called feudal. Among these are: (1) the loyalty to a lord implicit in the comitatus and explicit in patronage; (2) the expression of that loyalty by relinquishing of land to a superior party, the lord, in return for protection and other benefits, and the return of that land with possessory rights only, and those much

burdened by conditions and obligations increasingly denoting relatively servile and dependent status; (3) the eventual prominence of military service as the condition of greatest importance, attached to the landholdings of those in the upper tiers of the social hierarchy; and (4) consistent with government decentralization forced by the social disintegration of the Dark Ages, a relinquishing of judicial and other public functions to the larger feudal landholders.

§ 4.05(b)(3) Description of Typical Feudal Tenures and Incidents.

§ 4.05(b)(3)(i) Military Tenure.

As with other feudal tenures, it is impossible to take a snapshot of English military tenure that accurately portrays this form of landholding for any other period and place:

> In some of our modern books military tenure has a definiteness and a stability which it never had elsewhere. Any army is settled on the land, is rooted in the land. The grades in "the service" correspond to, and indeed are, the grades of landholdership; the supreme landlord is commander-in-chief; each of his immediate tenants is the general of an army corps; the regiments, squadrons, companies, answer to honours and manors or knight's fees ... When, however, we look at the facts, all this definiteness, all this stability, vanish. n104

The viability of the military tenure as a tool of national defense in England extended for about a century after the Conquest. Military tenure itself had a much longer existence, however, being adapted to serve national needs in less direct ways. While military tenure had become somewhat characteristic of upper level Norman society, in fact the Conquest of England afforded the Normans both the opportunity and necessity of refining military tenures to hold fast their English gains. However, this process was not commenced by command, but was evolutionary:

> Soon after the Conquest a process begins whereby the duty of service in the army becomes rooted in the tenure of the land. This goes on for a century; but before it is finished, before the system of knight's fees has been well ordered and arranged, the kings are already discovering that the force thus created is not what they want, or is not all that they want. n105

In theory, at least, the tenant under obligation of military service provided the requisite number of battle-ready knights for a period of up to forty days, and for service only within the realm. The leading lords were bound to provide knights in multiples of fives or tens, but the actual number seemed to bear no relation to the richness of the tenant's property resources; rather, "political and personal considerations seem to have been uppermost." n106 The tenants in chief remained ready to meet this requirement either by retaining the knights in the lord's own household, or by granting parcels of land to others who would agree to supply part of the quota -- the process of subinfeudation -- or a combination of both methods. Not until about 1070 were the quotas for William's tenants in chief fixed, but there is some evidence that the process of subinfeudation was leaky, and that the leading lords' obligations were not fully supplied by their tenants.

As knight service became obsolete, or some of the great landholders deemed themselves ill-prepared to provide warriors, a substitute for knight service arose, called scutage, which was nothing more than a money payment in lieu of providing men. When scutage first appears in the available historical evidence at about 1100, it was being applied to landholdings of the church, but not many decades later it was being applied to all other kinds of tenants. Scutage also was paid by those who held by subinfeudation. Indeed, the obligation of scutage was typically imposed on the full hierarchy of subtenants.

Two forces combined to shorten the life of scutage. The cost of equipping a knight increased, making the burdens fixed in 1070 too great for some to bear; apparently by negotiations some quotas were reduced, and those tenants often preferred to send the reduced number of knights rather than the scutage substitute for the original higher number of knights. At the same time, when the scutage for a particular tenant became a fixed sum, the value of that sum steadily

declined in the face of inflation, and it became less attractive and effective for the monarchy to rely on scutage arrangements. By the end of the second century after the Conquest, scutage had become solely a source of revenue and in this role it served as an irritant to landowners until formally abolished in 1660.

§ 4.05(b)(3)(ii) Incidents of Military Tenure: Homage.

Besides the principal duty of military assistance, knight service carried several significant auxiliary conditions, or incidents. The most ancient of these was homage. Homage has been described as the "ceremony by which the tenant became the lord's man." n107 It consisted of a type of "bond" between tenant and lord, by which the tenant sought the lord's honor in all things. It has been said that by the bond of homage the tenant should "love whom his lord loves, [and] hate whom he hates." n108 The early felony arose when the tenant breached this duty of faithful service. Homage retained a vitality well beyond that of a merely traditional formality. Glanvill, in the 12th century, was concerned about the dilemma of owing homage to two lords who disputed with one another. n109 Even in the 13th century, Bracton's treatise provided a lengthy explanation of the reciprocal obligations implicit in homage and the precise wording of the oath of fealty that declared the homage relationship between lord and tenant. n110 A case from the Eyre Rolls tells of a tenant who surrendered his land and his homage to his lord, "when he felt himself aggrieved by the harsh lordship," on condition that he give it to an abbey. n111

Though homage was an incident of knight service, it, too, had incidents of its own:

> The effect of homage is this, that if one has done homage to another, his true lord or a non-lord, he cannot withdraw from such lord or his homage without judgment, as long as he holds the tenement, either in demesne or in service, by which he is bound to homage. Because of the bond of homage the tenant may do nothing to the disherison of his lord or his severe injury, nor conversely, may the lord so act toward the tenant. If either so acts homage is completely dissolved and extinguished, and the *nexus* and obligation of homage, since they act contrary to homage and the oath of fealty, and it will be a just judgment that they be punished with respect to that in which they offend, that is, if it is the lord, that he lose his lordship; if the tenant, his tenement... n112

In a particular case known to Bracton, a lord lost his lordship over land by exercising undue influence over a ward and wrongfully colluding with another to deprive the ward of her land. n113

§ 4.05(b)(3)(iii) Incidents of Military Tenure: Wardship.

Apparently connected with the incident of homage was the incident of wardship, the right of the lord to custody of a minor tenant's land until the tenant came of age. n114 In Normandy of the late twelfth century, it was declared that the wardship should not be exercised by the mother or kinsmen, because of possible conflict of interest, but only by the lord, because he was bound to the ward's late father through the tie of homage:

> A fatherless heir must be in ward to some one. Who shall be his guardian? His mother? No. Why not? She will take another husband and have sons by him, and they, greedy of the heritage, will slay their firstborn brother, or the step-father will slay his step-son. Who then shall be the guardian? The child's blood kinsmen? No. Why not? Lest, thirsting for his heritage, they destroy him. For the prevention of such faithless cruelty, it is established that the boy be in ward to one who was bound to his father by the tie of homage. And who is such an one? The lord of the land who never can inherit that land in demesne; for heirs of a noble race always have many heirs. Besides they should be brought up in good houses and honourably educated. Those who are brought up in their lords' houses are the apter to serve their lords faithfully and love them in truth; and the lords cannot look with hatred on those whom they have reared, but will love them and faithfully guard their woods and tenements and apply the profits of their land to their advancement. n115

However, recognizing the right of wardship in the lord may have been a Norman innovation following the Conquest. Apparently the Anglo-Saxon tradition had conferred the right of wardship on the widow and mother, n116 and this was still the practice at the beginning of the 12th century in England, as recognized in the so-called Coronation Charter of Henry I. n117 The first documentary evidence for a right of wardship in the lord does not appear until the Assize of Northhampton in 1176. n118

In some of the medieval documents a distinction is drawn between the right to have possession of the ward's lands and a comparable right to have custody and care of the ward's person. That such questions should even be raised probably means that rights of land occupants had advanced since the age when possessory prerogatives ended upon the tenant's death, and all power over the land reverted to the lord. n119 Additionally, the lord could treat the wardship as an assignable right and, quite frequently, wardships were bought and sold as rather lucrative investments.

§ 4.05(b)(3)(iv) Incidents of Military Tenure: Marriage.

Associated with wardship issues was the incident of marriage. If one underlying concern for proper supervision of a minor's lands was the fulfillment of feudal obligations, the same concern arose with respect to the widow of a landholder. Even in Anglo-Saxon times, remarriage of tenants' widows and daughters sometimes took place as directed by the tenants' lords. The Normans actively extended this practice. By 1100 a lord was required to consult with the king when marriage of the lord's daughter was proposed, and if the lord was dead, the king was entitled to determine the daughter's marriage and the disposition of her lands. n120 This practice persisted into the reign of Henry II in the latter part of the 12th century. n121 In 1193, however, is the first documentary evidence for the king directing the marriage of sons as well as daughters, and, of course, these decisions were made a matter of sale. Selling of wardships and marriages of widows and daughters by the king is shown by evidence a century older. n122 It has been observed that if the king was gradually losing prerogatives over tenants' lands as inheritability and alienability rights advanced, it was not without price, as "in England feudalism itself becomes commercial." n123

§ 4.05(b)(3)(v) Incidents of Military Tenure: Aids.

If any incident of knight service invited unrestrained caprice, it was the incident of aids. Theoretically, the obligation of aid owed by the knight tenant to the lord could be required for any one of numerous circumstances that were neither regular nor well-defined. Custom eventually settled on just three occasions when aid could be required: to ransom the lord, to knight the lord's oldest son, and to conclude the marriage of the lord's oldest daughter. As with scutage, the obligation to pay an aid would be passed on to the full hierarchy of subtenants. n124

§ 4.05(b)(3)(vi) Incidents of Military Tenure: Relief.

The incident of knight tenure called relief emerged from the times when a military tenant's holding was not automatically passed to the heir. When the military tenant died, the relief was the amount paid to the tenant's lord for permission for the tenant's heir to continue the tenancy. The amount of the relief payment was at first arbitrary, and thus subject to abuse, but later came to be regulated by charter n125 and statute, n126 varying in amount according to the extent of the tenant's holdings. When relief payments were stabilized, the inheritability of the knight's tenancy was secured. If the decedent was a tenant in chief of the monarch, the monarch had the right to require relief payments for all the decedent's holdings, whether or not held directly of the king.

§ 4.05(b)(3)(vii) Incidents of Military Tenure: Escheat.

Escheat, the reverting of land possession and ownership to the lord or the monarch, was another incident associated with knight tenancy, and could occur either upon the tenant's death without an heir or upon the tenant's commission of a felony. Although lands often escheated to the monarch, they would escheat to an intervening lord if the lordship could be shown. n127 Escheat could also occur when the tenant committed a felony, and the frequency with which such escheats occurred depended almost entirely on what acts were regarded as felonies. In the immediate decades after the

Conquest, refusing to render services due to the lord was one of the few felonies then recognized, but even that was soon removed from the list of felonies. Another restraint on the incidence of felony escheat was that eventually the monarch claimed a right to hold such escheated land for a year and a day and to commit waste on it during that time, before relinquishing possession to the lord.

§ 4.05(b)(3)(viii) Incidents of Military Tenure: Forfeiture.

Forfeiture was a related incident of knight tenure similarly limited in value to the lord:

> In the case of treason the whole of the traitor's lands, of whomsoever they were held, were forfeited to the Crown and the lord got nothing unless the Crown granted the escheated land away; in that case the mesne tenancies revived. n128

§ 4.05(b)(3)(ix) Serjeanty Tenures and Their Incidents.

Serjeanty tenures apparently arose in the thirteenth century, and so were not part of the feudal characteristics introduced by the earliest Anglo-Norman monarchs. Serjeanties that would be later identified as grand serjeanties were typically rendered by tenants in chief and, in earlier times, were scarcely distinguishable from knights' tenancies. The so-called "grand serjeanties" of the 13th century included such duties as carrying the banner of the king, carrying the lance of the king, leading the king's army, being the king's marshal, and carrying the king's sword at his coronation, among others. n129 It was also possible for tenants of lords other than the king to hold by serjeanty tenure, either to serve the lord or to serve the monarch.

Serjeanty tenures covered a huge variety of serving relationships, and perhaps that is why the incident of relief that applied to this tenure was still not fixed in amount even long after reliefs for other tenures were stabilized. Also, because so many of the serjeanty tenures were intended to render personal service directly to the king, royal permission to alienate such a tenure was consistently required, even after the king no longer insisted on being consulted to alienate other tenures. Because of the types of service required of a serjeanty tenure, it was considered not subject to partition among co-heiresses, but instead was taken in entirety by the oldest sister. Incidents common to other tenures also applied to serjeanty:

> As to wardship and marriage of tenants by serjeanty there was much dispute, and in course of time a line was drawn between what were called "grand" and what were called "petty" serjeanties. n130

§ 4.05(b)(3)(x) Free Socage Tenures and Their Incidents.

"Any tenure that on the one hand is free and on the other hand is not spiritual, nor military, nor 'serviential,' is called tenure in free socage." n131 Tenure in free socage eventually developed as the one great residual tenancy for almost every arrangement that was not military tenure. It also was free of the most burdensome incidents of military tenure, so that it became the tenancy of choice, even if holding it inferred a relatively lower social status.

The very wide variety of socage tenures arose from several types of circumstances. For instance, a tenant might be bound to render only nominal services or rents to the lord, either because the conveyance might be between related persons, or the grantee had actually purchased the land: "to have put the purchaser in the vendor's place might have been difficult, perhaps impossible [given the restrictions on alienability at the time]; so the purchaser is made tenant to the vendor at an insignificant rent." n132 For some socage tenures a more substantial rent in money or goods or produce was demanded, possibly the result of some bargaining by lords and tenants trying to strike the best deals that economic circumstances would allow. Other socage tenures imposed requirements of ordinary agricultural labor, even if the tenant was an important aristocrat. These duties would have been fulfilled by the socage tenant's undertenants and "seem to be the channel by which the term *socage* gradually spreads itself." n133 At times it might have been quite natural for a villein able to supply some needed labor services to step up into a socage tenure that was ordinarily open only to free

persons. Indeed, some socage tenants were barely distinguishable from the unfree villeins. n134

§ 4.05(b)(3)(xi) Tenure in Burgage.

Tenancy in burgage was an anomaly in the tenurial system. It was a tenure found only in the towns and boroughs and extended only to a burgess, a free member of the medieval commune or town. Burgage was similar to free socage in that the tenant, whose tenancy usually consisted of a house in the town, was required only to pay a small rent, with no other services required except for occasional light agricultural services. Burgage, like free socage, was free of the majority of tenurial incidents, including homage, aids, and marriage, although relief was occasionally required and wardship usually applied. In place of the absent incidents, burgage was subject to the local customs pertaining to the borough or town. If a town had obtained from its lord control over its courts and profits, then burgage actions would be tried in those courts. Most questions of private law pertaining to burgage tenure, such as inheritability and dower, were determined by the customs of the town or borough, rather than by common law rules; burgage was often inheritable, devisable, and alienable. When a manor attained the status of a borough, the change could be signified by abolition of labor services, with burgage tenures in their place.

§ 4.05(b)(3)(xii) Tenure in Free Alms (Frankalmoign).

Frequently lands would be given to the church under one of the ordinary tenures described above. Other gifts of land would require the donee to perform some specific spiritual service, and were called tenure by divine service. Such tenure might also carry a requirement of fealty to the lord. Still other gifts of land to the church might exact no precise spiritual service, but were given for general spiritual benefit, and for which no fealty was required; these tenures were known as frankalmoign, or free alms. Gradually, such tenures came to be recognized in perpetuity and to be free of requirement for any secular services. More importantly, frankalmoign tenures came to be free of secular jurisdiction, being instead subject to the ecclesiastical courts, except that any preliminary question of the actual existence of frankalmoign tenure could be decided in the secular court.

§ 4.05(b)(3)(xiii) The Unfree "Tenure" of Villeinage.

The very large majority of the English population in the eleventh century consisted of peasants who were considered unfree, and whose landholding was in the unfree tenure known as villeinage. Although there was a close correlation between personal status and land tenure, it was possible for a free man to hold a parcel of land by villein tenure. Other unfree tenures, such as tenancies at will and for years, came to be widely held by free persons. Villein tenure could be distinguished from other tenures on the basis of the services villeins were required to render, that "consist chiefly of the duty of cultivating the lord's demense." n135 While the extent of such services was precisely defined by custom, the particular work to be done from day to day remained uncertain under villein tenure, and this may be seen as a distinction from comparable agricultural services sometimes required of free tenures:

> This then seems to have been the test usually applied by the king's court. If the labour services are "uncertain," the tenure is unfree; and it is a test which condemns as unfree the great bulk of the tenures which obliged men to perform any considerable amount of agricultural labour for their lord, because, however minutely some particulars of those services may be defined, there is generally a spacious room left for the play of the lord's will. Thus the test roughly coincides with another: -- labour service is not necessarily unfree, but a service which consists of much labour, of labour to be done all year round, is almost of necessity unfree; for almost of necessity the tenant will be bound to obey, within wide limits, whatever commands the lord or the lord's bailiff may give him. n136

Villeins, who were in effect serfs, were also distinct in that they were required to pay the merchet, a payment for the lord's leave for such activities as to give a daughter in marriage outside the manor, or send a son to school, or have a son ordained, or sell livestock. Villein tenants were also subject to a tax on their persons called tallage. The details of all these characteristics of villeinage differed widely from case to case and were in fact defined by ancient custom. Perhaps

this necessary reliance on local custom was one factor prompting the judges of the royal courts to reject any jurisdiction of villein tenure. Instead, villein tenants had to seek protection and justice in the manor courts.

It is neither possible nor appropriate in this chapter to try recounting the long process by which villeinage, and indeed serfdom, came to dominate English society and economy. By the time of the Conquest, the process was no longer relevant because villeinage had become established, and the masses of villeins were perpetuated by birth. From a modern perspective it is easy to wince at the enormous restrictions on the personal liberties of villeins, but it should be acknowledged that these masses were nevertheless protected in their customary rights and not completely subject to the whims and caprice of their lords. n137

§ 4.05(b)(4) Early Rules on the Inheritability of Tenures.

The property law of post-Conquest England was characterized not only by a system of tenures and appurtenant incidents and burdens, but also consisted of rules for transferring these tenurial interests to others. In the period of the Conquest and ensuing settlement of England by the Normans, inheritability of free tenures had not yet been accepted and there was, in fact, much uncertainty about the duration of grants even to tenants in chief. Typically, the charters describing grants in the early post-Conquest years do not state whether the grant is for life, or whether the grantee's heirs have any claim on the tenancy. Thus the heir would usually have to obtain a regrant of the tenancy from the lord and to pay the lord a sum of money for that favor. Gradually, but in a relatively short time, the right of the heir to succeed to the tenancy came to be recognized, but the necessity to pay for the realization of that right also became a fixed custom, even if the amount of payment sometimes remained arbitrary. By 1100, the landholdings of tenants in chief were recognized as heritable, if the proper relief were paid, as affirmed in a charter of Henry I:

> If any of my barons, earls or other tenants-in-chief has died, his heir shall not redeem his land as he did in the time of my brother, but he shall pay the just and lawful relief for it.
>
> Similarly, the vassals of my barons shall pay the just and lawful relief for their lands to their lords. n138

Once the heritability of the highest tenures was recognized, it probably spread to the other tenures in the English feudal system. To the extent Anglo-Saxon bookland still influenced the customs by which land was held, such land could have been heritable, devisable, and alienable. n139

§ 4.05(b)(5) Early Rules on the Alienability of Tenures.

Alienation of land was a less urgent question in the 11th century, because the buying and selling of land was a rare occurrence. More commonly, land would be given to the church, and such alienation raised questions about the residual or latent rights of the donor's prospective heirs. To secure its title, the donee would obtain consents from the prospective heirs.

Quite likely the alienation of tenures occurred frequently from the time William I made the major grants to his chief followers after the Conquest. Those tenants in chief were permitted to transfer certain rights to portions of their lands to others in return for services or payments that would assist the tenant in chief to carry out the main feudal dues to the king, a process known as subinfeudation. Land so alienated by subinfeudation could be further alienated by the subtenants in the same way. Subinfeudation was widely practiced until prohibited by the Statute Quia Emptores in 1290; although it probably required the lord's consent, the consent would not be withheld if the customary sum of money was paid. That this was fixed by custom seems likely, because subinfeudation held potentially major disadvantages for the lord. While the services attached to the tenant's land could always be required, and forfeiture applied in case of default, subinfeudation threatened the potential value of the tenurial incidents to the lord. If, for instance, a tenant holding by knight service conveyed all or a part of the land to the church in frankalmoign and then died without heirs, the monetary value of the escheat to the lord would be insignificant.

Another form of alienation was substitution. This process simply replaced the old tenant with a new tenant, rather than creating a subtenancy. If subinfeudation may be likened to a sublease in modern landlord/tenant law, then substitution may be likened to an assignment. As with a modern assignment of a tenancy, the landlord could suffer some disadvantage if the new tenant was not as able or conscientious as the old, but the landlord's *rights* with respect to the tenancy were not harmed. Thus a substitution, while also subject to the customary requirement of consent and payment, was more freely permitted. Indeed, the same Statute Quia Emptores that prohibited subinfeudation in 1290, extended to all landholders but tenants in chief the right of substitution without payment of money to the overlord.

This discussion of alienation practices in the first generations after the Conquest must necessarily remain general, because there is very little direct and contemporary evidence of what actually occurred. By gathering inferences from statutes, legal writers and legal documents from later times, it is possible to make intelligent guesses about the practices of the 11th and 12th centuries. It must also be remembered that nowhere in England and at no time were such practices uniform; what is true for one locality at one point in time may not have been true for a neighboring area until 20 years later. Only with the emergence of a truly *common* law after the Conquest does it become more feasible to find principles of property law with general application. n140

§ 4.05(b)(6) Primogeniture.

If it is understood how a lord could object to subinfeudation because it threatened the value of tenurial incidents, or in some cases even the rendering of required services, then it is easier to understand why primogeniture had such a powerful appeal in a feudal system. Under primogeniture, the oldest assumes the tenancy upon the death of the father, and the younger sons take nothing. As applied to military tenures at times when the actual rendering of knight service was still important, primogeniture may have been somewhat of a necessity. Nevertheless, primogeniture persisted and even spread to other types of tenures long after the actual rendering of military services had lost its early importance. This is probably explained by the other attractions of keeping tenancies intact, as well as by the simple enduring power of custom.

While it has been surmised that English primogeniture was imported from Normandy, it is not clear that at the time of the Conquest Normandy had settled on a custom of primogeniture. A competing custom in Normandy divided the tenancy among all the surviving sons, but the shares of the younger brothers were all held feudally of the oldest. That primogeniture in England evolved at first as a matter of custom is shown by the fact that it was not universal. n141 While it was consistently applied at first only to the military tenures, it spread to the other tenures and even eventually to some of the villein tenures. These latter holdings most often descended in ultimogeniture, to the youngest son, as a means of keeping the holding intact, but it has also been suggested "that from a remote time many villein tenements have descended in a primogenitary course." n142

At the same time descent by primogeniture was spreading, customs were becoming more pronounced which prohibited a father from alienating land in ways inimical to expectant heirs. Thus, by Gla nvill's time at the end of the twelfth century, conveyances typically recited that the grantor's heirs apparent had consented to the transaction. n143 Even in the preceding century it was common in some areas for presumptive heirs to join in conveyances. n144 With the rise of primogeniture, however, it was no longer necessary to protect rights of children who would not inherit in any event, so the father's right of inter vivos alienation became less restrained. In fact, the father became free to alienate land in favor of younger sons, without the consent of the oldest son as expectant heir, and the oldest son would simply inherit whatever property was left when the father died. These changes were evolutionary, but they demonstrate the way in which the spread of primogeniture helped relax family restraints on alienation of land. Indeed, an oldest son could even be completely disinherited. If the grant were given with warranty, in which the grantor for himself and heirs ensured the grantee against other claims upon the grant, the oldest son had no rights in the land, even though he still had a burden of military service. n145

§ 4.05(b)(7) Mortmain.

Grants of land to churches and other institutional or corporate grantees effectively destroyed the value of some feudal incidents. These grants were referred to as grants in mortmain (dead hand), because the grantees were usually ecclesiastical corporations whose members, through their religious vows, were dead persons before the law.

Elimination or avoidance of feudal burdens had such a strong appeal that many landholders collusively granted lands to churches, but resumed possession as tenants of the grantee church. This abuse had reached such serious proportions by early in the thirteenth century that it was explicitly forbidden in the Magna Carta, upon penalty of forfeiture. n146 The prohibition was reiterated in the Statute of Mortmain in 1279, but by that time it was the practice to alienate in mortmain by first obtaining a license from the monarch. Great numbers of licenses were granted soon after passage of the statute, apparently for the immediate revenue they generated, and without regard for the losses in land such alienations might occasion for either the Crown or intermediate lords. n147

§ 4.05(c) The Domesday Survey and Its Influence.

The Domesday Survey is one of the most significant events in English and European medieval history. Representing, as it does, a record of the most thorough and methodical feudal state in medieval Europe, it is appropriate that its inception was explicitly and precisely noted in the contemporary record of The Anglo-Saxon Chronicle:

> The king spent Christmas with his councillors at Gloucester, and held his court there for five days, which was followed by a three-day synod held by the archbishop and the clergy....
>
> After this the king had important deliberations and exhaustive discussions with his council about this land, how it was peopled, and with what sort of men. Then he sent his men all over England into every shire to ascertain how many hundreds of "hides" of land there were in each shire, and how much land and live-stock the king himself owned in the country, and what annual dues were lawfully his from each shire. He also had it recorded how much land his archbishops had, and his diocesan bishops, his abbots and his earls, and -- though I may be going into too great detail -- and what or how much each man who was a landholder here in England had in land or in live-stock, and how much money it was worth. So very thoroughly did he have the inquiry carried out that there was not a single "hide," not one virgate of land, not even -- it is shameful to record it, but it did not seem shameful to him to do it -- not even one ox, nor one cow, nor one pig which escaped notice in his survey. And all the surveys were subsequently brought to him. n148

The project took about 18 months to complete. The principal focus of interest in the survey was the system of landholding and the customary conditions and services attached to the holdings, most of which pre-dated the Conquest. From ancient times the hide designated the amount of land needed to support a family of free persons. Although the acreage varied from place to place, often depending on the quality of the agricultural land, for revenue purposes the acreage was standardized at about 120. Comparable designations were the sulung in Kent and the carucate in East Anglia, Yorkshire, and the east Midlands. A quarter of a hide was a yardland, and an eighth of a carucate was a bovate.

The main purpose of the Domesday Survey cannot be determined with certainty. Traditionally, it was believed that the survey was intended to identify the Danegeld assessments. The Danegeld had originated in Viking times as an Anglo-Saxon device for raising money to buy off marauding Danish Vikings. A land tax, it was assessed according to the number of hides in a holding. William the Conqueror had already used the Danegeld assessments even before the Domesday Survey; it was an almost annual tax, imposed at a very high rate and based on detailed taxation records already in existence. The Domesday Survey did, however, gather data that was highly relevant to the Danegeld assessments and could have been used to update tax liabilities, some of which had not been reviewed since the eighth century. Also, because of a renewed threat of Danish invasion in 1085, William maintained a large force of foreign

mercenaries in England during that year and may have sensed how keenly necessary an updated tax assessment schedule would be.

Another obvious purpose of the Domesday project was to create a record of who held what lands after the massive changes in manorial lordships over the two prior decades of Norman dominance. n149 While the survey gave great detail on the terms by which most free tenancies were held, it did not record the terms by which tenants in chief or their principal undertenants held.

The inquest was commenced in January 1086, and completed later that same year, probably by August 1. The compilation of information into the two-volume set, still known today and preserved in the original as the Domesday Book, was probably completed by September 1087. With England divided into circuits, information for each circuit was compiled probably from the accumulated returns of several sources, including original returns by landholders, statements of hundreds of juries made in county courts, county geld accounts and hidage schedules. The instructions for the survey have been preserved for one of the circuits and are probably typical:

> Here follows the inquiry concerning lands which the King's barons made according to the oaths of the sheriff of the county and of all the barons and their Frenchmen, and of the whole hundred court -- the priest, the reeve, and six villagers from each village. They inquired what the manor was called; who held it in 1066; who holds it now; how many hides there are; how many ploughteams in demesne and how many belonging to the men; how many villagers; how many cottagers; how many slaves; how many freemen; how many sokemen; how much woodland; how much meadow; how much pasture; how many mills; how many fisheries; how much has been added to or taken away from the manor; what it was worth and what it is worth now; and how much each freeman and sokeman had and has. All this to be recorded thrice; as it was in 1066, when King William granted the manor, and now. And it was also noted whether more could be taken from the manor than is now being taken. n150

Scholarly work using Domesday information is ongoing, and important socio-economic data from the survey will continue to be mined for many years to come. For casting light on the history of Anglo-American property law, the Domesday survey is most valuable as a confirmation that the landholding rights and duties of most Englishmen remained unchanged after the Conquest; the relationship of people to property that emerged during the centuries of Anglo-Saxon society persisted through the Norman settlement and was the foundation on which the common law of property was built. n151

FOOTNOTES:

(n1)Footnote 90. Ann Williams, *The Land of the Conqueror, in* Domesday: 900 Years of England's Norman Heritage 47-48 (1986).

(n2)Footnote 91. It must be acknowledged, however, that even by his claim to "the entire range of powers that had belonged to any Old English sovereign," William held certain powers over all English land: "Private transactions in land were insecure until he had confirmed them, and he had a right to be consulted before a man of any position commended himself to a new lord." F. M. Stenton, Anglo-Saxon England 614 (1943).

(n3)Footnote 92. *'The Laws of William the Conqueror,' in* 2 English Historical Documents (D. C. Douglas ed. 1953); the Anglo-Saxon Chronicle (E or Laud version) confirms the requirement of the oath with this entry for 1086.

> Thereafter he journeyed around the country so that he came to Salisbury by Lammas, where he was met by his council and all the landholders who were of any account throughout England, no matter whose vassals they might be. All did him homage and became his men, and swore him oaths of allegiance that they would be faithful to him against all other men.

(n4)Footnote 93. F. M. Stenton, Anglo-Saxon England 616 (1943). *See generally* P.H. Sawyer, From Roman Britain To Norman England (1999).

(n5)Footnote 94. Kurtz, Sheldon F., Moynihan's Introduction to the Law of Real Property 2 (4th ed. 2005).

(n6)Footnote 95. F. M. Stenton, Anglo-Saxon England 626 (1943).

(n7)Footnote 96. Theodore F. T. Plucknett, A Concise History of the Common Law 508-509 (5th ed. 1956). David J. Seipp, *The Concept of Property in the Early Common Law*, 12 L. & Hist. Rev. 29 (Spring 1994).

(n8)Footnote 97. Theodore F. T. Plucknett, A Concise History of the Common Law 508-509 (5th ed. 1956).

(n9)Footnote 98. *Id.* at 507. For a slightly different view, see A. W. B. Simpson, A History of Land Law 3-4 (2d ed. 1986). Simpson argues that the invasion of England necessitated some method for persuading the military aristocracy to remain on the conquered land. William opted to reward his followers, and thus preserve his military strength, by dividing the land among the military leaders as tenants, who held the land by his grant. "In return he bargained for services; and most of his tenants were bound to serve in the royal army and bring with them a specified number of knights. The tenure thus created was knight-service" *Id.* at 4.

(n10)Footnote 99. Medieval Society and the Manor Court (Zvi Razi & Richard Smith, eds., Clarendon Press, Oxford 1996).

(n11)Footnote 100. The summary that follows in the text is based on Theodore F. T. Plucknett, A Concise History of the Common Law 510-515 (5th ed. 1956).

(n12)Footnote 101. *See generally* Stephen S. Evans, The Lords of Battle: Image and Reality of the Comitatus in Dark Age Britain (1998).

(n13)Footnote 102. *See* Shael Herman, *Trusts Sacred and Profane: Clerical, Secular, and Commercial Uses of the Medieval Commendatio, 71 Tul. L. Rev. 869, n.16 (1997)* (the precarious nature of land held in precaria).

(n14)Footnote 103. *See* Shael Herman, *Trusts Sacred and Profane: Clerical, Secular, and Commercial Uses of the Medieval Commendatio, 71 Tul. L. Rev. 869, 886 (1997).*

(n15)Footnote 104. 1 Frederick Pollock & Frederic William Maitland, The History of English Law Before the Time of Edward I 252 (2d ed. 1909).

(n16)Footnote 105. *Id.*

(n17)Footnote 106. Theodore F. T. Plucknett, A Concise History of the Common Law 532 (5th ed. 1956).

(n18)Footnote 107. A.W.B. Simpson, A History of Land Law 15 (2d ed. 1986).

(n19)Footnote 108. John Hudson, *Land, Law, and Lordship in* Anglo-Norman England 16 (1994).

(n20)Footnote 109. Glanvill, VII, 1.

(n21)Footnote 110. Bracton, fol. 80. *See also* John Hudson, Land, Law And Lordship In Anglo-Norman England (1994).

(n22)Footnote 111. Rolls of the Justices in Eyre for Gloucestershire, Warwickshire and Staffordshire 1221-1222, 607-608, No. 1450 (Selden Society vol. 59, 1940).

(n23)Footnote 112. Bracton, fol. 80b.

(n24)Footnote 113. Bracton's Note Book, no. 1840. Medieval Society and the Manor Court (Zvi Razi & Richard Smith, eds., Clarendon Press, Oxford 1996).

(n25)Footnote 114. Typically, the lord had the custody of the lands until a male heir became twenty-one. With respect to female heirs, the lord had custody until age fourteen (if the female was married) or age sixteen (if the female was unmarried). A.W.B. Simpson, A History of Land Law 18 (2d ed. 1986).

(n26)Footnote 115. 1 Frederick Pollock & Frederic William Maitland, The History of English Law Before the Time of Edward I 326 (2d ed. 1909) (translating a custumal of Normandy dated c. 1200).

(n27)Footnote 116. *See* Dorothy Whitelock, The Beginnings of English Society 94 (1974).

(n28)Footnote 117. "And the guardian of the land and the children shall be either the wife or some other relative who has a better right." *The Coronation Charter of Henry I*, cl. 4, § 1, *in* The Laws of the Kings of England From Edmund To Henry I 278-79 (Agnes Jane Robertson ed. and trans. 1925); *see also The 'Coronation Charter' of Henry I* (5 August 1100) cl. 4, *in* 2 English Historical Documents 400-02 (D. C. Douglas ed. 1953).

(n29)Footnote 118. William Stubbs, Select Charters And Other Illustrations of English Constitutional History 150, cl. 4 (1881).

(n30)Footnote 119. Shael Herman, *Trusts Sacred and Profane: Clerical, Secular, and Commercial Uses of the Medieval Commendation, 71 Tul. L. Rev. 869, n. 71 (1997)* (enfeoffment to child, then land to bailiff to avoid wardship). A.W.B. Simpson, A History of Land Law 18 (2d ed. 1986).

(n31)Footnote 120. *The 'Coronation Charter' of Henry I (5 August 1100)* cl. 3, *in* 2 English Historical Documents 400-402 (D. C. Douglas ed. 1953).

(n32)Footnote 121. Glanvill, VII, 9 and 10; IX, 4.

(n33)Footnote 122. *See* 1 Frederick Pollock & Frederic William Maitland, The History of English Law Before the Time of Edward I 324-325 (2d ed. 1909). Indeed the evidence, a Pipe Roll, shows Henry I as the seller, despite the proclamation in his Coronation Charter that he would not accept consideration for granting permission to marry:

> If any of my barons or other men wishes to give his daughter, or sister, or niece, or cousin in marriage, let him speak with me; but I will neither take anything of his for the licence, nor will I forbid him to give her away, unless it be to an enemy of mine.

Pollock and Maitland simply commented, "That Henry [I] made these promises is certain, that he broke them is equally certain." *Id.* at 325. What is uncertain is whether the declaration in the Coronation Charter represents the old law and customs that the Normans subsequently altered, or whether the charter represents relaxation of the old law in order to gain political advantage among the barons.

(n34)Footnote 123. *Id.* at 328-329.

(n35)Footnote 124. Theodore F. T. Plucknett, A Concise History of the Common Law 536 (5th ed. 1956). The three occasions were defined by the Magna Carta in 1215 and by statute in 1275. 3 Edw. I, st.1, c. 36, 25 Edw. III, st. 5, c. 11.

(n36)Footnote 125. "Similarly, the vassals of my barons shall pay the juste and lawful relief for their lands to the lords." *The Coronation Charter of Henry I*, cl. 2, § 1, *in* The Laws of the Kings of England From Edmund To Henry I 276-77 (Agnes Jane Robertson ed. and trans. 1925); *see also The 'Coronation Charter' of Henry I (5 August 1100)* cl. 2 *in* 2 English Historical Documents 400-402 (D. C. Douglas ed. 1953).

(n37)Footnote 126. Magna Carta, cl. 2, dating from 1215.

(n38)Footnote 127. In England, the old rules of escheat were officially abolished in 1925, and heirless property now all goes to the Crown.

(n39)Footnote 128. Theodore F. T. Plucknett, A Concise History of the Common Law 536 (5th ed. 1956). Forfeiture was limited to cases of high treason, particularly to an offense against the king. There were attempts to extend forfeiture to the commission of a felony which were defeated. A.W.B. Simpson, A History of Land Law 20 (2d ed. 1986).

(n40)Footnote 129. 1 Frederick Pollock & Frederic William Maitland, The History of English Law Before the Time of Edward I 282-283 (2d ed. 1909). *See also* John Hudson, The Formation of the English Common Law 92-93 (1996).

(n41)Footnote 130. 1 Frederick Pollock & Frederic William Maitland, The History of English Law Before the Time of Edward I 290 (2d ed. 1909).

(n42)Footnote 131. *Id.* at 291. *See also* John Hudson, The Formation of the English Common Law 91-92 (1996); Charles J. Reid, Jr., *The Seventeenth-Century Revolution in the English Land Law, 43 Clev. St. L. Rev. 232240 (1995); See also* Christine Steibstickler, In re *S.G.: Parens Patriae and Wardship Proceedings Exactly who in the State Should Determine the Best Interest of the Child? 7 Widener J. Pub. L. 377, fn 17 (1998)* (indicating there is no satisfactory definition of socage tenure and that it can only be defined in terms of what it was not; it was not tenure arising from service or military duty to the lord of the fee). Sarah Abramowicz, Note: *English Child Custody Law, 1660-1839; The Origins of Judicial Intervention in Paternal Custody, 99 Colum. L. Rev. 1344* (June, 1999) (explaining that the custody of infant heirs could be controlled through guardianship in socage).

(n43)Footnote 132. 1 Frederick Pollock & Frederic William Maitland, The History of English Law Before the Time of Edward I 291 (2d ed. 1909).

(n44)Footnote 133. 1 Frederick Pollock & Frederic William Maitland, The History of English Law Before the Time of Edward I 292 (2d ed. 1909).

(n45)Footnote 134. Medieval Society and the Manor Court (Zvi Razi & Richard Smith, eds., Clarendon Press, Oxford 1996).

(n46)Footnote 135. 1 Frederick Pollock & Frederic William Maitland, The History of English Law Before the Time of Edward I 365 (2d ed. 1909).

(n47)Footnote 136. *Id.* at 372.

(n48)Footnote 137. Medieval Society and the Manor Court (Zvi Razi & Richard Smith, eds., Clarendon Press, Oxford 1996).

(n49)Footnote 138. *The Coronation Charter of Henry I, in* The Laws of the Kings of England from Edmund to Henry I 276-277 (Agnes Jane Robertson ed. and trans. 1925).

(n50)Footnote 139. *See* L. Bonfield & L. R. Poos, *The Development of the Deathbed Transfer in Medieval English Manor Courts, 47 Cambridge L.J. 403 (1988). See also* Ralph V. Turner, Judges, Administrators and the Common Law in Angevin England, ch. 15 (1994).

(n51)Footnote 140. *See also* John Hudson, Land, Law and Lordship in Anglo-Norman England (1994); Medieval Society and the Manor Court (Zvi Razi & Richard Smith, eds., Clarendon Press, Oxford 1996).

(n52)Footnote 141. In 1255 Simon de Montfort imposed primogeniture upon his holdings in Leicester upon request of the people, who preferred it to the ultimogeniture (descent to the youngest son) that had prevailed until then. *XIII. Earl Simon's Charter introducing the law of Primogeniture into Leicester, instead of inheritance by the youngest son. [Oct. 22, 1255.], in* 1 Records of the Borough of Leicester 49-50 (Mary Bateson ed. 1899). *See generally* Frederic William Maitland, A Sketch of English Legal History., ch. 4 (1998).

(n53)Footnote 142. 2 Frederick Pollock & Frederic William Maitland, The History of English Law Before the Time of Edward I 279 (2d ed. 1909).

(n54)Footnote 143. Glanvill, VII, 1.

(n55)Footnote 144. Paul Vinogradoff, *The Transfer of Land, in* 1 Collected Papers 148-167, esp. 157 (1928). The examples of presumptive heirs joining in conveyances come from Anglo-Danish districts, where a stronger tradition of free alienation prevailed. Paul Vinogradoff, English Society In The Eleventh Century 9 (1908).

(n56)Footnote 145. Bracton's Note Book, no. 1054 (1225). Medieval Society and the Manor Court (Zvi Razi & Richard Smith, eds., Clarendon Press, Oxford 1996). (Ultimogeniture.)

(n57)Footnote 146. Magna Carta, c. 31.

(n58)Footnote 147. *See* Sandra Raban, Mortmain Legislation and the English Church, 1279-1500 (1982) for an extensive treatment of the Statute of Mortmain and its effects on the church and English society.

(n59)Footnote 148. Anglo-Saxon Chronicle (E or Laud version) ann. 1086. Robin Fleming, Domesday Book & The Law: Society & Legal Custom In Early Medieval England (1998).

(n60)Footnote 149. *See also* Ann Williams, The English and the Norman Conquest (1995). *See generally* Melville M. Bigelow, M. Placita Anglo Normannica: Cases from William I To Richard I (1984); John Hudson, The Formation of English Common Law: Law and Society in England from The Norman Conquest to Magna Carta (1996); Emily Z. Tabuteau, Transfers of Property In Eleventh- Century Norman Law (1988).

(n61)Footnote 150. This passage is from the Ely Inquest, which preserves the instructions for Circuit III. Robin Fleming, Domesday Book & The Law: Society & Legal Custom In Early Medieval England (1998).

(n62)Footnote 151. The Domesday Book: England's Heritage, Then and Now (Thomas Hinde, Ed., 1985); Medieval Society and the Manor Court (Zvi Razi & Richard Smith, eds., Clarendon Press, Oxford 1996); Pauline Stafford, Queen Emma and Queen Edith: Queenship and Women's Power in Eleventh-Century England (Blackwell Publishers, Oxford 1997).

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CHAPTER 4 THE GROWTH OF THE ENGLISH COMMON LAW OF REAL PROPERTY

1-4 Thompson on Real Property, Thomas Editions § 4.06

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§ 4.06 The Rise of the Common Law of Real Property.

The framework of feudal tenures did much to define the extent of and intricate relationships between rights held simultaneously by several persons in the same land. Within this framework, and surviving the eventual disappearance of the framework, was a system of land rights known as estates, that defined interests mostly in terms of duration. It must also be conceded that durational considerations did not exist in a vacuum, so that some substantive rights as to use and enjoyment of land were dependent upon the duration of one's ownership interest.

This section examines the system of estates in land that arose in England after the Conquest, and shows how the features of those estates underwent important changes until the Tudor era in English history. At that time, specifically in 1536 when the Statute of Uses was adopted, and 1540, when the Statute of Wills was adopted, a major change in the development of estates in land occurred, and discussion of these statutes and the ensuing changes is assigned to the following section. n152

§ 4.06(a) The Fee Simple.

Students of the common law are told that the fee simple absolute is the greatest estate in land known to the common law, and that its two chief characteristics are inheritability and alienability. The precise etymology of the term "fee" is uncertain, but it is obviously related to other terms signifying the feudal relationship, such as enfeoffment. In the medieval era, a holding in fee was a feudal holding, that is, subject to the rights and restrictions of feudal tenures; under the terms of these tenures enjoyment of land was conditioned upon rendering various services and payments to a superior owner. Thus ownership in fee could be contrasted with "allodial" ownership, by which one held free of any other owner's restrictions or concurrent rights, except the sovereignty of the state.

If the word "fee" signified property ownership within a feudal system, then the term "fee simple" came to describe a property interest, an estate, held by the grantee and the grantee's "heirs," that was actually a somewhat confusing way of stating that the interest was capable of descending by inheritance. It is believed that the use of the term "fee simple" to describe an inheritable estate, i.e., an estate granted to a man "and his heirs," became common at the end of the thirteenth century. Bracton's work discusses the characteristics of a fee simple in describing the operation of a charter of enfeoffment, by which land could be given to another to hold by specified services. n153 Land thus conveyed to the

grantee and "heirs," and thus inheritable, was the maximum estate known. The fee thus conveyed was "simple," because it was free of restrictions. In contrast to the fee simple was the conditional fee, a fee interest whose heritability was limited or restricted unless certain family conditions occurred.

Heritability of some land rights had already been recognized in Anglo-Saxon times, and thus was not necessarily a product of the Norman Conquest. However, heritability was not initially a part of the framework of Norman feudal tenures, and only gradually came to be accepted through an evolutionary process whose details remain completely obscure.

Some forms of Anglo-Saxon property rights, especially bookland, were both heritable and devisable, even as early as King Alfred's time in the 9th century. n154 Even the Anglo-Saxon laenland holding (that is, land loaned or rented out for a finite time) might be extended for as much as three generations after the original conveyance. These pre-Conquest forms of landholding, along with the endlessly varied arrangements for agricultural and other services pertaining to peasants' lands, remained in effect after the Conquest, as was amply demonstrated by the Domesday Survey. The dramatic result of the Conquest was to replace the great Anglo-Saxon lords with great Norman lords and to systematize their land rights with respect to the king and to their immediate undertenants. These tenures at the top of the newly organized Anglo-Norman feudal hierarchy were initially neither heritable nor alienable. Only with permission of the king could the property be secured for an heir, and the permission came only with a price, and often an arbitrary price at that. Only later could the availability of permission at a fixed and non-arbitrary price be assured by custom and then by royal decree. Meanwhile, the rights and duties of the actual occupants of the land remained as before, and some of those holdings were probably heritable or alienable or both. Thus the combination of intact Anglo-Saxon property customs at the bottom of the feudal ladder, and constant pressure to extend heritability and alienability at the top of the feudal ladder, probably led to the emergence of the heritable estate that came to be known as the fee simple. The fee simple of the thirteenth century was unlike the modern fee simple, mostly because the medieval estate consisted only of a set of feudal dues and responsibilities (all related to and burdening the land, of course), whereas the modern fee is simply full ownership subject to a less onerous set of sovereign prerogatives.

A conveyance to a grantee and heirs sufficed to create a heritable estate, but Bracton and others apparently had doubts about whether such an estate was also alienable. To provide assurance on this point, conveyances were drawn in favor of the grantee and the grantee's heirs *and assigns*. Charters making such conveyances began to appear about 1200, at the same time the practice of having the grantor's expectant heirs join in the conveyance ceased. This latter development signified advancing notions of alienability. Within the next century, the use of the word "assigns" was no longer necessary to indicate alienability. n155

In summary, then:

> [A] fee simple was inheritable by primogeniture since about 1200; ... it was alienable without the consent of presumptive heirs since about the same date; and ... nearly a century later it became freely alienable without the lord's consent as a result of the Statute Quia Emptores of 1290. The first two of these advances had already been made by the time of Bracton (early in the thirteenth century), and from his day, too, we have a large number of surviving charters which attest the frequency with which land was transferred. n156

§ 4.06(b) Forms of Conditional Fees.

Several types of fee interests could not be classed as fee simple estates, because some condition or limitation deferred or rendered contingent the heritability of the interest. In England, once heritability of an interest was accepted, it was not limited to inheritance by descendants of the original grantee, but could also extend to collateral heirs. Limitation of heritability to direct descendants, or conditional heritability upon the birth of children required specific expression of intent by the grantor.

Recognition of such interests was much older than Norman times, and even appears in one of Alfred's laws of the ninth century, describing bookland that was heritable but that could be limited by the transferor to alienation only within the kindred:

> We have further established that a man who holds land by title-deed [bookland], which his kinsmen have left him, shall not be allowed to give it out of his kindred, if there is documentary or [other] evidence that the power to do so is forbidden by the men who first acquired it, or by those who gave it to him. n157

While there is no evidence that this Anglo-Saxon practice was widespread or survived into post-Conquest times, circumstances did arise that prompted conveyances conditioned on the perpetuation of the family. If a well-to-do landholder wished to settle land on a younger son, as an additional branch of the family, or to endow a daughter, a natural impulse would be to require a reversion of the property if the new family did not materialize or stopped short because no heirs were born. The earliest example of this to arise after the Conquest was the *maritagium*, or gift in free marriage. Allusions to this interest appear in The Domesday Book, although in the Coronation Charter of Henry I, of 1100, there is a suggestion that the widow without children keeps property received from her own family at the time of her marriage. n158 In its 12th-century form, a father would give lands and his daughter to the daughter's new husband, usually by subinfeudation and free of feudal services until the third heir is born. n159 The third heir, meaning the third generation after the original grantee, would postpone the revival of feudal services for approximately 100 years, when the establishment of the new family and its ability to perform feudal obligations would be assured. n160 Also, homage would not be required until the third generation, but would be required from each heir thereafter. n161 If the third generation was not forthcoming, the tenancy would revert to the grantor.

With the *maritagium* as precedent and example, many varieties of conditional grants began to appear in the late twelfth century. Not only were variations of the *maritagium* spelled out in the conveyances, such as gifts to either husband or wife or to both jointly, and limitations to heirs of the body of either or both, but attempts were made to save reversions in conveyances for circumstances other than pending marriage. Considerable confusion enveloped the whole subject of conditional grants, and Bracton tried to draw some distinctions between the conditional grants in *maritagium* and other conditional grants. As to the *maritagium* grants, Bracton declared that the grant was a life estate until the birth of the prescribed heir; nevertheless, the grantee in *maritagium* could alienate the grant even before the heir was born, and the heir would be bound by the alienation. n162 Moreover, the alienation would also destroy the reversion held by the grantor, that would otherwise materialize if, after the alienation, in fact no heir was born. This statement upholding the alienation in direct contradiction to the grantor's intent and reversion was a serious irritant to landholders throughout the thirteenth century, and was finally addressed in 1285 in the Statute De Donis Conditionalibus, the first part of the Statute of Westminster II:

> [F]eofees have so far had the power of alienating the tenement so given and disinheriting thereof their issue against the will of the donors and against the express form of the gift; and moreover whereas on failure of issue of such feofees a tenement so given ought to revert to the donor or his heir according to the expressed form in the charter of the gift, nevertheless donors have thus far been excluded from the reversion of their tenements on account of the deed and feoffment of the donees of the conditional gift, although the issue (if there were such) had died -- which was manifestly against the form of the gift.
>
> Wherefore our lord the King perceiving how necessary and useful it is to appoint a remedy in the aforesaid case, has established that the will of the donor according to the form manifestly expressed in the charter shall henceforth be observed, in such wise that those to whom a tenement is thus given upon condition shall not have power of alienating it and preventing it from remaining to their issue after their death, or else to the donor or his heir if issue shall fail, either by reason that there was no issue at all or if there were, that the heir of such issue had failed. n163

The statute unified the rules for all conditional gifts, whether in *maritagium* or otherwise, and required that no alienation could defeat the inheritance rights of issue or the reversions of grantors if issue failed. Most importantly, it rather arbitrarily limited the meaning of "issue" to the first generation, rather than "an indefinitely long line of descendants of the prescribed class." n164 Despite this literal meaning of the statute, famous Year Book reports of 1312 reveal that the judges had reinterpreted the statute to extend protected issue to the third generation, and to do so for both *maritagium* grants and all other types of conditional grants. n165 So, the two forms of conveyance of less than a fee simple, that could now be called the *maritagium* and the fee tail, would be treated uniformly under judicial interpretation of the Statute De Donis. Ironically, this judicial reinterpretation did not stabilize the matter of how long an entail would endure. In a Year Book report of 1410, it is revealed for both the fee tail and the *maritagium* the entail will last as long as there are heirs, the so-called indefinite failure of issue. n166

It then came to be debated in the fourteenth century whether the grantee in tail had only a form of life estate and the issue had a remainder in fee, subject to some sort of reversion in the grantor. n167 This doctrine, too, failed to be accepted, so the fee tail suffered through another century of legal uncertainty:

> From the middle of the fourteenth century onwards we can clearly see the growth of the dogmas which are to be fixed in the middle of the fifteenth century in the great treatise of Littleton where we find the classical doctrine ... Attempts to identify [to make identical] the fee tail and the fee simple had failed, ... and the inevitable conclusion was at last reached that an entail in fact divides the fee among different people. n168

The history of the conditional fee and fee tail suggest some observations that perhaps enlighten the course of development for the whole common law. That grants in "marriage" and to the grantee and heirs of his or her body were both treated as conditional fees probably resulted from a pronounced bias in favor of free alienability among the royal justices. With a conditional fee, the grantee could alienate the interest as soon as a child was born, and the alienation remained valid even after issue failed, thus defeating any claims by the grantor to a reversion, or by any surviving issue to the property by descent. While this vastly enlarged alienability, it largely struck down the intentions of grantors. The Statute De Donis Conditionalibus in 1285 responded to the grantors' concerns, transforming the conditional fee of the law courts into a fee tail, a fee that had been cut down or "carved" or "tailored" to the grantor's desires; this fee tail protected interests of grantors and issue against alienation of anything more than the grantee's immediate possessory interest, and it assured descent only within the family line. Thus the large landholdings of great family dynasties could be held intact; they could not be defeated either by alienation or by forfeiture of anything more than the land occupant's present possessory interest. This state of legal affairs strengthened the ruling families against the monarch. Finally, in 1472 a royal court approved a method of overcoming the entail through a process known as common recovery, that turned the fee tail into a fee simple absolute. Even later, in the 19th century, the common recovery procedure was passed over in favor of giving power to the fee tail holder to accomplish the same thing simply by conveying a fee simple to another by deed.

Thus, in the struggle between the landed aristocracy seeking to perpetuate and strengthen dynastic landholdings, and the monarchy and merchant class seeking to weaken the nobility by freer land alienability, the common law doctrines of fee tail suffered an ambivalent course of development until finally the entire estate became obsolete. n169

§ 4.06(c) The Life Tenancy.

A person who held land in fee, whether fee simple or a conditional fee, usually had possession or "seisin" of the land and had a heritable interest. That a person might also hold land for his or her life only had also long been recognized in English law. The life tenancy was distinguishable from the fee, because it was not heritable; but it was a possessory interest, and if the life tenant was in possession, he or she was considered seised of a free tenement and entitled to all the legal protections connected with seisin. For all land held by life tenancy, there was also an owner or tenant in fee.

When the life tenant died, the land reverted to the fee tenant, even if no reversion was mentioned in the grant to the life tenant. Such a life tenant was considered to hold the land of the grantor, the fee tenant, and could be required to give an oath of fealty and render rent or services. If the grantor of the life tenancy directed that after the life tenant's death the land "remain" to another, then both the life tenant and the "remainderman" would hold of the grantor.

Some life estates arose by operation of law, such as the dower interest of a widow and the curtesy interest of a widower. Under curtesy, the widower held a life tenancy in the lands of his wife, while her heirs held the fee. Under dower, the widow held a life tenancy in a third of her late husband's lands, and his heirs held the fee. As a freeholder with seisin, the life tenant was able to enjoy the land much as a tenant in fee. n170 Concerns for the rights of reversioners and remaindermen led to a series of 13th-century statutes laying heavy penalties for waste, that is damage to the inheritance committed by a temporary occupant, such as a life tenant. n171

The life tenancy, and its relationship to the fee, could be said to have prompted the concepts of estates in the common law. If estates are viewed as forms of ownership on a plane of time, the temporary ownership represented by a life estate, or even a series of successive life estates, simply emphasizes that the ultimate and infinite ownership still rests with the owner in fee.

§ 4.06(c)(1) Dower.

The dower of English common law seems to have at least some of its antecedents in ancient Anglo-Saxon practices. Charters as early as the 8th century show that the marriage price was promised, with perhaps a nominal sum as earnest money, at the time of betrothal, and, when paid, was given directly to the bride rather than to a guardian. Of more importance was the morning-gift, originally a free-will gift by the husband to the bride on the morning after the bridal night:

> Consisting at first of chattels, it later came to be considered as a form of widow's maintenance, and thus was necessarily property of sufficient value to sustain the wife if she survived her husband. The morning-gift, therefore, came to be almost always a gift of land, normally granted at the time of betrothal by means of a written document (to prove ownership after the husband's death); alternatively, if a specific morning-gift were not granted at the betrothal or beginning of the marriage, then a certain portion of the husband's property, usually one-half, was assigned by law for maintenance of the bride if she became a widow. n172

By Glanvill's time in the late 12th century, dower was theoretically a gift made by the husband to the bride at the church door and was required by both spiritual and secular law. n173 Bracton also recognized this requirement. n174

Although the dower eventually arrived at a standard meaning of a life estate in one-third of the lands held by the husband during the marriage, it had not yet reached that point by the 13th century. In that period, a husband could either endow the bride with specific lands, not to exceed one-third of his holdings, or could make no specific endowment, in which case it was understood that she had an endowment of one-third of the lands of which he was then seised. There was no dower right in lands that came to the husband during the marriage. The dower right was gradually enlarged. Even in the Magna Carta that is, the 1217 version -- the dower is described as one-third of the lands held by the husband during his lifetime, unless the wife had accepted a lesser specific endowment "at the church door." n175 Later, it was possible for the wife to reject the lesser specific endowment in order to claim the legal maximum of one-third. However, in the 13th century:

> a third of the husband's land is the maximum dower that can be claimed in lands held by military service, and from the frequency with which a [specific endowment] is mentioned, we should gather that many widows of high station had to be content with less. n176

For a time, the typical dower for socage tenure was one-half, based on the notion that a widow had fully shared ownership rights with her husband in socage land, n177 but with the emergence of a common doctrine on this point, the one-third share relating to military tenures prevailed.

The life tenancy of dower could be alienated. However, under at least some local practices, the widow would forfeit her dower if she remarried or was unchaste, a rule also contained in the 11th-century pre-Conquest laws of Cnut. n178 If the specific lands of the endowment had been previously assigned, the widow could enter into possession immediately upon her husband's death. If not, then the husband's heir or the heir's guardian was required to assign her portion within forty days after the husband's death. During that period, the widow was entitled to remain and to be maintained in the principal house. n179

Dower was obviously an impediment to alienation of the husband's land. If the husband alienated after the marriage, without the wife's consent, she could recover the land or a portion of the land from the grantee after the husband's death. Of course, if the wife consented to the conveyance, it would be freed from any dower claim. In the first years after the Conquest, if the husband's lands were forfeited because of treason, the dower interest sometimes survived; however, by the thirteenth century it was settled that the dower was always lost in forfeiture or escheat. n180 Even such a development did not much dilute the strength of dower, that had progressed from a voluntary gift to an estate arising by operation of law.

But dower was an anomaly in the feudal scheme: "the widow's right in a very common case comes into conflict with the claim of a lord who is entitled to wardship." n181 The changing law eventually operated against dower, "partly perhaps in the interest of expectant heirs, partly in the interest of a militant state, that regarded the land as a fund for the support of warriors." n182 As the Middle Ages progressed, it became easier for husbands to surmount dower interests, and dower was excluded from certain popular forms of landholding, such as joint estates, uses and trusts. n183 In England, dower was no longer significant after passage of the Dower Act of 1833; however, in the American colonies dower law was usually received as part of the common law. n184

§ 4.06(c)(2) Curtesy.

Curtesy, too, has an obscure origin, but in its full medieval development came to signify the widower's life estate in all his wife's lands, if issue had been born alive. Whereas dower was contrary to the feudal impulse, interfering with alienability and assuring property to women who might be incapable of carrying out the commitments of military tenure, curtesy was consistent with feudal concepts. The surviving husband could render the military service; also, the widower with curtesy retained the guardianship of his children, whereas the dowager lost the guardianship right to the lord. Perhaps this factor of guardianship is one of the reasons for the rise of curtesy rights, which were wholly dependent upon the birth of live issue. Another tradition concerning the origin of curtesy suggests that it was a rule created to help poor Normans who married English heiresses, and were left with nothing when the wife died and her lands descended to her heirs. n185

The customs of Kent departed from this discrimination, and there the right of "free bench" conferred on either surviving spouse, as long as he or she remained single, a life estate in one-half of the land of the decedent spouse, whether or not a child was born. Furthermore, in Kent the surviving spouse could possibly obtain a guardianship over the other half of the land, and so could ultimately enjoy possession of the decedent's entire holdings.

In general, however, not only did the surviving husbands have the stronger right, as compared with dower, and fewer difficulties in integrating the curtesy rights into the feudal system, but they also often exceeded the generous rights already accorded them. Two thirteenth-century statutes sought to curb abuses of curtesy rights, n186 and Year Book cases also show husbands trying to deal with the lands of their late wives in ways beyond the life estate granted them by curtesy. Curtesy, like dower, was eventually abolished.

§ 4.06(d) The Term of Years.

The term of years, although ostensibly similar to the life estate in many ways, did not play an important role in English landholding until several generations after the Conquest, and was accorded vastly different treatment under the common law. In Anglo-Saxon times, the few references to "laenland," land that was loaned out in return for lump sum or periodic rent payments, were more similar to a life estate than a term of years, because the duration of the laenland conveyance was measured usually by one or more lives. Leases for shorter terms were rare but not unknown, possibly because they are naturally reflective of vigorous commercial activity that hardly existed in Dark Ages economies. The more common motive for seeking out land would have been to create a home and farm, and for those purposes, finite terms would not do. Thus the few leases for term that do appear in the records soon after the Conquest are almost never used for establishing households. n187 Instead, such leases were part of the process of raising revenue, especially by means of the gage. The surviving records suggest that forty years was viewed as the maximum duration of a term of years, possibly because after that time it would be difficult to find witnesses to the conveyance, but leases for much longer terms, even exceeding a lifetime, were acceptable. n188

The key historical question regarding the term for years is why it was at first given so little legal protection when compared with tenancies in fee or for life. In the twelfth century the term was regarded by some as not even an interest in land; the tenant threatened in occupancy had only a personal action against the lessor for breach of covenant. n189 If the termor also had a warranty and was ejected by a third person, an action could be brought against the lessor for compensatory relief. Otherwise, the termor had little or no protection against intrusion from third parties, until the trespass action became available about the middle of the 13th century.

Because the termor was not considered to have a right in the land, actions against the land were brought against the lessor. If the lessor wanted to destroy the termor's occupancy, the lessor could collude with another to default in an action against the land that was directed against the lessor and bypassed the termor. In 1278, the Statute of Gloucester gave the termor the right to intervene in such action. n190

All of these disabilities in legal remedies resulted from the position taken by common law judges that the tenancy for a term was not a "free" tenancy. This meant that the most important legal remedy for recovery and protection of the tenancy, the petty assize, was not available. The decision to consider the tenancy for a term as unfree appears to have been arbitrary, although different explanations have been offered. The term for years had some of the most important feudal attributes: it was considered a tenement; the termor was ostensibly seised of the land (although the termor is considered to have "possession" rather than seisin); the termor even did fealty in some instances. Also, termors were grouped together with tenants for life, all of whom were called "farmers," people who pay full rent.

Yet Pollock and Maitland suggested that in crucial decisions certain English judges were momentarily enamored of Roman law doctrine suggesting the termor had only a servitude to enjoy the fruits of possession, a usufruct, or a quasi-possession. n191 Another theory reminds the modern reader that the tenancy for a term was at first most often used to obtain loans of money and avoid the ecclesiastical prohibitions against usury. The borrower simply turned over to the lender a parcel of land for a long enough time that the principle and some profit could be recovered from the revenues of the land (keeping in mind that the land was already occupied by peasants and others owing various rents and services). By comparison, then, with other forms of landholding considered to be free tenements, the tenancy for a term was not a form of fairly permanent family property used to produce revenue for livelihood:

> The essence of the free tenement is that it should be the permanent and normal economic basis of the family. Herein lies the importance of giving it full and speedy protection, and for this purpose the petty assizes were invented. Contrasted with the free tenements the estate of the termor is merely a speculative arrangement, calculated to evade the law against usury, made between a grasping money-lender on the one hand, and on the other a man whose difficulties temporarily compel him to part with his patrimony -- and it must be remembered that during the middle ages a comparatively wealthy landowner would

> usually find it difficult to produce a small sum of money at short notice. There was, therefore, no reason whatever for protecting the termor by those assizes whose object was to fortify the family and its means of subsistence against wrongdoers of another type. n192

However accurate this picture of leases for usurious money-lending may have been in the earlier feudal times, it gradually gave way to another scene, in which the so-called husbandry leases, leases for agricultural purposes, became more prominent. Not until after the Black Death did husbandry leases become common, and by then other devices for using land as debt security had been created, so such disparagement of the term as there may have been in the fourteenth century was unjustified.

It is also not accurate to ascribe the unfree nature of the term to its being held by persons of unfree status, because persons from all social classes held tenancies for terms. However, the classification of a tenancy for a term as an unfree tenure was permanently cast, so new means of legal protection also had to be devised. Eventually the very serviceable trespass action, with a specialized writ for termors, gave the termor rights against anyone who came onto the property, at first for damages, and then later for possession, too. In these developments it seemed necessary to distinguish between the seisen of a freeholder and the possession of the unfree tenancy for a term; it was concluded that the freeholder lessor was seised, while the termor was possessed, of the leased land. This gratuitous distinction between possession and seisin is a persistent irritant to some modern students of the law, who can think of no better synonym for seisin than possession.

§ 4.06(e) Reversions.

From the very beginning of its history in the common law, the term "reversion" has had technical and popular meanings that have been somewhat at odds with each other. On the one hand, reversion connoted a coming back of the land to the grantor. Even in Anglo-Saxon times, a form of the term reversion was used to describe how the land "came back" to the grantor upon the expiration of the lease. The "coming back" was in pointed contrast to the remainder, by which the land "remained out" from the grantor and reposed with some third person.

On the other hand, it was easily shown that the reversion never left the grantor, that it was rather the residue the estate left in the grantor after a conveyance of less than the fee simple. This characteristic was to be most heavily emphasized later in connection with the rule against perpetuities, but even earlier it was a concept that was important in feudal relationships. For feudal purposes, a reversion was a present estate, seised in service if not in occupancy, and the reversioner had the relationship of lord over tenants for life and in tail. This permitted the reversioner to invoke the protective remedies of the common law, so that the reversion was virtually indestructible. Moreover, the statute De Donis Conditionalibus assured the reversioner that alienation by the grantee would not affect the reversion.

§ 4.06(f) Remainders.

§ 4.06(f)(1) In General.

In modern understanding, a grantor who grants an estate less than a fee simple to one grantee, and the balance of the interest to another grantee, has created a remainder in the second grantee. The remainder is similar to the reversion, but is taken by a third party rather than being retained by the grantor. It was possible to give a remainder for life, or remainders for successive lives, as well as a remainder in fee.

By the thirteenth century, terminology for both reversions and remainders was in use, although with occasional confusion. n193 Perhaps the earliest examples of remainders are from grants in *maritagium*. In Bracton's Note Book is recorded a grant in *maritagium* to Beatrice and Reginald, but if Beatrice died without issue, or if her issue died without issue, the land would go to Beatrice's sister Matilda and Matilda's heirs. n194 According to Bracton, a remainderman took by substitution rather than subinfeudation. n195 The remainder was from the beginning a less secure interest than

the reversion, because it was not possible to show that the remainderman had ever been seised. Therefore, some of the remedies derived from seisin were not available to protect the remainder interest. Several cases show vigorous challenges to the enforcement of a remainder. n196 Consequently, it was more secure to obtain the remainder through a judicial process known as a fine, than by deed. Through the fine process, the parties would appear in court with a prearranged settlement of their controversy, called a fine or final approval, and then obtain court approval for the compromise. The three-part written document containing the terms of the compromise, including one part for the public records, was regarded as an especially solemn form of conveyance and virtually unimpeachable. n197

§ 4.06(f)(2) Contingent Remainders.

The fine process was used with success even to create contingent remainders, despite the real difficulties such interests caused in feudal arrangements. In a 1304 case, a tenement created by fine granted to a man and his wife and "to the heirs of their bodies begotten," was granted to the man's heirs in remainder if the couple should die without heirs of their bodies. With only the mildest skepticism, the court observed, "This, however, is strange seeing that the remainder was not granted to any certain person." n198 A few years later, another grant by fine was to Robert for life, and upon Robert's death to C and the heirs of his body, but if C died without such heirs, to the heirs of Robert. All grantees were to hold their interests "of the chief lord of the fee," but Justice Bereford was compelled to ask who was to do homage. n199 Both cases illustrate the danger that a contingent remainder in fee could leave a lord uncertain about who was to perform feudal services. If a remainder was contingent at the time it was granted, but had vested by the time it was subject to litigation, it could be upheld. n200

As for seisin, sometimes it was attributed to the life tenant, but held to benefit the remainderman. However, if the life estate terminated prematurely, the remainder, being dependent upon the life estate, was also deemed terminated.

Common law contingent remainders were subject to destruction if the supporting freehold estate were forfeited through tortious alienation. If the holder of the life estate attempted to convey a fee simple, the attempted alienation would be deemed tortious and the life estate would be forfeited before the contingent remainder vested; the contingent remainder was deemed destroyed. n201

§ 4.06(g) Concurrent Estates.

§ 4.06(g)(1) Tenancy in Coparcenary.

Tenancy in coparcenary arose when two or more heirs obtained a tenancy by descent, rather than by inter vivos conveyance. Coparcenary was thus distinguishable from the other concurrent estates of joint tenancy and tenancy in common, which could be created only by inter vivos conveyance, until the Statute of Wills was enacted in 1540. Coparcenary was, like a joint tenancy, characterized by the "unities" of time, title, interest, and possession; however, like the tenancy in common, it carried no right of survivorship. n202 Coparcenary was further distinct from the other co-ownerships in that each coparcener had the right to compel partition of the estate. n203 The right of partition was not conferred upon joint and common tenants until 1539 and 1540. n204

The origins of the tenancy in coparcenary are very obscure, but it is reasonable to assume that it was a useful and needed form of landholding in a society that had adopted primogeniture, either for when no son existed to inherit, or the local custom did not follow primogeniture. Most likely coparcenary would arise in the former circumstance, and coparceners would usually be sisters. The most direct early source of information about coparcenary is Bracton, who, in addition to the relatively succinct statement quoted below, wrote at great length about the process of partition, a serious event in feudal times:

> *Where partition ought to be made among co-heirs*
>
> When there are several heirs having one right and the inheritance ought to be divided among them,

> either because of the nature of the thing inherited or of the persons inheriting, let a division [or] partition of the inheritance be made among them immediately after homage has been taken. In the writ *de partitione facienda* there ought to be no action between co-heirs acknowledged as heirs, even though there is disagreement among them, [for example], that one of them has a greater share than he ought to have, because the writ provides nothing except that (an extent having been made) each have his rightful portion. But if before such disagreement is settled he who has the larger portion dies seised, his heir, whether of age or a minor, shall not answer without writ, because of his ancestor's seisin, right or wrongful ... But since a partition cannot be made among co-heirs without an extent and valuation, and an extent and valuation cannot be made without knights who, with the sheriff, make the extent, who sometimes are called justices, when they are appointed by the king, sometimes chosen by the parties by common consent, we must first see who they are appointed by the king and by what writ... n205

Although isolated references to parceners occur in the statutes of many American states, it is a property interest of almost complete obscurity in modern times. Thus it is interesting to see the detail devoted to it by Bracton, not only in the introductory comments quoted above, but in the very elaborate procedural instructions, occupying almost 20 printed pages in modern editions. A sampling of these issues, and an intriguing insight into the kinds of property issues that preoccupied the medieval landholder, is contained in headings for the rest of the material on parceners' partition found in Bracton:

Writ for appointing justices to make a partition.

Writ appointing justices to be present at a partition.

Writ when the parties by common consent choose others to make the partition.

Writs in another form but of the same kind, where partition was improperly made by others.

Writ to deliver seisin to co-heirs when they have agreed among themselves as to the partition.

Another writ of the same kind: where a tenant parcener has acknowledged his share to his parcener; that an extent be made.

Writ that one be present to take the oath of the extenders if the extent is to be made outside the county.

Writ where the extenders have done nothing in response to the first order.

Writ where the knights appear but the sheriff is negligent.

Writ where an extent has been improperly made.

Forms of interlaced writs, where knights of two counties must come together to make an extent.

Writ on the complaint of an eldest daughter and parcener who does not have her rightful share nor her seniority; of making a reasonable partition by knights.

Writ to produce bodies of extenders so they may certify.

The duty of extenders.

Writ to the sheriff for giving seisin to co-heirs after partition. n206

§ 4.06(g)(2) Joint Tenancy.

During Bracton's time, the only form of concurrent ownership other than tenancy in coparcenary was joint tenancy. The joint tenancy is a property interest held by two or more persons simultaneously, with the survivor of them to retain the entire interest. The right of survivorship distinguishes the joint tenancy from the tenancy in common. Each joint tenant's right to compel partition, secured by statute in 1539, n207 distinguishes the joint tenancy from the tenancy by the entirety. The joint tenancy is also distinct from the tenancy by the entirety because of the dual nature of the joint tenancy, expressed by Bracton with the famous phrase "per my et per tout": each joint tenant possesses the entire tenancy ("per tout"), and each also possesses an equal fractional undivided share of the tenancy ("per my"). The fractional shares are called moieties. A tenancy by the entirety, on the other hand, is considered to be only a single ownership of the entire tenancy, with ownership held by both spouses considered as one person.

The singular ownership attribute of a joint tenancy was especially compatible with feudal values, which discouraged any splitting of tenancies that threatened performance of feudal obligations. This unified ownership was promoted by the doctrine that joint tenants took their interest all together under identical circumstances, the so-called "unities" of time, title, interest, and possession. At first, the requirement of maintaining the unities meant that a joint tenancy could be created only by inter vivos conveyance. It was held that heirs could not take a joint estate by descent, because the individuality of their status as heirs was inconsistent with the unity theoreticallly required for a joint tenancy. This was usually not a problem, because under primogeniture usually only the oldest son would inherit the property. When only daughters survived the landholder, they obtained the property by descent in a form of joint ownership called tenancy in coparcenary. However, the impact of heirs' individuality was shown in the rule that no right of survivorship applied to tenancies in coparcenary.

Inasmuch as Bracton is the only early documentary source for the common law origin of joint tenancies, his cryptic comments are quoted as follows:

> We have explained in the preceding portion who may give [a gift of land] and who may not. Now we must show to whom a gift may be made. It is clear that it may be made ... to a woman or to a man, a wife as well as a husband, to them together or separately to each ... Also not only to one but to several, to all together and at the same time or successively, by the *modus* of gift, as will be explained below ... Since all were enfeoffed together and hold in common, the children do not succeed one the other, and if one of them dies without heirs his portion will accrue by the *jus accrescendi* to the survivors and their heirs, from several such to one, and will not revert to the donor as long as one survivor remains or one has heirs. But if all die without heirs, the whole will revert to the donor. n208

The aspects of survivorship rules that smack of tenancy in common in the above passage from Bracton are somewhat accounted for by feudal tenurial relationships: if the children in Bracton's illustration were considered tenants in common and then died without heirs, their portions would escheat. Instead, Bracton described a rudimentary form of survivorship that not only avoided the escheat, but postponed any reversion to the grantor until all of the joint tenants had died without heirs.

Although joint tenancy enjoyed early favor in the Middle Ages, because it inhibited the splitting of tenures, it could also be used to avoid some feudal incidents and obligations. For instance, if land were granted in joint tenancy to a father, a mother, a son, and the son's heirs, it could defeat a lord's claim to wardship of a minor heir or a relief from an adult heir, because the estate had already passed at the time of the original conveyance. A statutory response to the conveyancers' creativity was soon forthcoming:

> As touching them that use to infeoff their eldest sons and heirs, being within age, of their heritage, for to defraud the lords of the fee of their wardships, it is provided, accorded, and agreed, that by occasion of any such feoffment no chief lord shall lose his ward. n209

Even a joint tenancy to a husband and wife could cost the lord a wardship. If a man, married and with an infant son, conveyed in fee to another, then took back a conveyance in fee to himself and his wife, as joint tenants, the estate would belong to the wife if he predeceased her, and the lord would not have an occasion to claim a wardship. Despite these occasional problems, joint tenancies had much appeal, and during the Middle Ages any conveyance in fee or for life to two or more persons was presumed to create a joint tenancy.

A joint tenancy could be partitioned, but only with the consent of all the cotenants; in this respect it differed from tenancy in coparcenary, under which any one coparcener could compel partition. n210

§ 4.06(g)(3) Tenancy in Common.

Even though the early common law evinced a strong preference for construing joint conveyances as joint tenancies, alternative constructions became necessary, because one of the four unities might be missing. In that event, during the fourteenth century, a concurrent conveyance to separate persons began to be recognized as a tenancy in common, and royal courts of that era were able to distinguish between tenancies in common and joint tenancies. n211 The tenancy in common had no right of survivorship and, until 1540, could be created only by inter vivos conveyance; after 1540 the Statute of Wills permitted a tenancy in common to be devised. Without a right of survivorship, tenants in common were not able to enter into collusive conveyances designed to cut off feudal incidents. As with early joint tenancies, partition of tenancies in common during medieval times could be made only upon the consent of all the cotenants.

§ 4.06(g)(4) Tenancy by the Entirety.

The tenancy by the entirety resembles a joint tenancy as between husband and wife, because it can exist only if the four unities are present and also holds the right of survivorship. However, it is distinct in also requiring the condition of a valid marriage between the tenants and in not recognizing a right in either individual tenant to compel partition.

The origin of tenancy by the entirety is unknown, but Bracton acknowledged some form of concurrent ownership between husband and wife:

> Some tenements are privately owned, the property of an individual by himself, without a parcener or one joined to him, others are not held alone but with another joined to him or a parcener: with one conjoined, as where a man holds with his wife, or conversely, who are not called parceners because their rights and the property do not admit of division, for they are one flesh though different souls... n212

§ 4.06(h) The Gage and the Mortgage.

> The development of the mortgage is an interesting example of the interplay between legal doctrine and conveyancing custom. The gage, which is the root idea of the transaction, is really a relic of the days when credit was not yet in existence. It has been conjectured that in its oldest form the gage (in Latin *vadium*, and in modern English "pledge") was payment, subject only to the option of the purchaser to substitute at a later time payment in a different kind. Under this arrangement the handing over of the gage settled the debt; the creditor could not demand the substitution of a different kind of payment, and the debtor had no way of recovering any excess value in the gage over the price which he could substitute later. n213

The gage, or something like it that made land available as security for a loan of money, appears in transactions described in Anglo-Saxon land charters. In one of its forms, land would be turned over to a lender of money, who would satisfy the loan obligation out of the returns from the land, and then convey the land back to the borrower. Three entries in Domesday Book reveal land in the possession of persons to whom it was gaged. n214

§ 4.06(h)(1) The Gage During Glanvill's Time.

In Glanvill's work, of the late 12th century, one may read lengthy provisions about the gage, but little is known of these gages outside those passages. The following excerpts are typical:

> The loan for consumption may, however, be accompanied by the deposit of a gage; when this happens, sometimes movables such as chattels are deposited as gage, sometimes immovables such as lands and tenements and rents (which may consist of money or other things). When creditor and debtor agree to the deposit of a gage, whatever the nature of the gage, then the debtor, after he has received the loan, either immediately gives the creditor seisen of his gage or does not. Moreover, the gage may be for a fixed term, or with no fixed term. Furthermore, sometimes the gage is a dead gage (mortgage) and sometimes not; it is called mortgage when the fruits and rents accruing during its continuance do not count towards repayment of the loan...
>
> Furthermore, when anything is deposited as a gage for a fixed term, creditor and debtor either agree that if the debtor does not redeem his gage at the end of the term the gage shall become the property of the creditor who may deal with it as with his own property, or else there is no such agreement. n215

Because under a mortgage the fruits and rents of the land, while held by the creditor, were not to be applied toward reducing the principle of debt, n216 these fruits and rents were effectively a form of interest for the creditor, that under the religious doctrine of the time, constituted a usurious transaction forbidden to Christians:

> Such a bargain is a kind of usury; but apparently it is a valid bargain, even though the creditor be a Christian. He sins by making it, and, if he dies in his sin, his chattels will be forfeited to the king; but to all seeming the debtor is bound by his contract. As to the Jew, he was not prohibited from taking usury from Christians; he took it openly. Even the Christian, if we are not much mistaken, was very willing to run such risk of sin and punishment as was involved in the covert usury of the mortgage. The plea rolls of the thirteenth century often show us a Christian gagee in possession of the gaged land, but we have come upon no instance in which he was called upon to account for the profits that he had received. We infer that the gagee was usually a mortgagee in Glanvill's sense of that term. n217

The gage as outlined in Glanvill could result from an explicit agreement or bargain that was either reduced to a fixed term or left open-ended. If it was based on a fixed term, and the parties had agreed that the gagee could keep the property if the debt were not paid, then if the debt were not repaid by the end of the term, the gagee would simply keep the land without further action. If the gage were on a fixed term, but without an explicit agreement for the gagee to keep the property upon default, then at the end of the term, the gagee could obtain a judgment against the debtor, ordering payment of the debt within a reasonable time and declaring ownership of the gaged property in the gagee if the debt were not paid. If the gage was given without a specific term, then the gagee could call the loan at any time, obtain a judgment requiring payment within a reasonable time, and be declared the owner if payment were not made. n218 The resemblance to later equity courts' foreclosure decrees is unmistakable.

The utility of the procedure outlined in Glanvill was restricted by obstacles rooted in feudal relationships. First, the gagee had to be put in possession of the land, or protective remedies of the royal courts would not be available. Once in possession, the gagee had a form of seisin, but, again, an unconventional seisin that was not protected by the usual remedies available to those with seisin. For instance, if the gagee were ejected, only the gagor had the right to seek recovery of the land. Even if the gagor ousted the gagee, the gagee could not recover the land, only the debt. n219 Thus neither the gagor nor the gagee had protected possession of the premises. Moreover, if the mortgagee died while the mortgage was still in effect, thus while still engaged in the sin of usury, the property could be forfeited to the monarch. These procedural limitations on the gagee's interest existed, because that interest did not fit neatly into the feudal tenurial system. Only if the gagee could be treated as a tenant for years, for life, or in fee could the available remedies

be invoked.

§ 4.06(h)(2) The Gage During Bracton's Time.

By the time Bracton wrote a couple of generations later, the gagee's interest had been adjusted to the feudal tenurial system. The gagee lent the money and took from the gagor a term of years and a conditional fee in the land to be used a security. If the debt were timely paid, the term of years expired, and the condition for retaining the fee would not materialize, and the fee and seisin returned to the gagor. During the term of the gage, the gagee had a termor's seisin, while the gagor had the seisin in fee, all of which was in harmony with feudal rules and capable of being spelled out in the single document creating the gage. n220 Even this feudally consistent formula was eventually simplified to the conditional feoffment mortgage of the classical common law: an enfeoffment from the gagor/debtor to the gagee/creditor and heirs upon condition that, if the debt is timely paid, the feoffer and heirs may re-enter and resume ownership of the land. n221

During this time, various arrangements for possession of the gaged property were made. Most gagees probably took possession of the property. Sometimes the gagor conveyed the land to the gagee without rent, and the gagee reconveyed to the gagor with a rent, with a covenant that the gage would terminate when enough rent had been received to pay back the loan. While the Christian gagees most often took possession of the gaged properties, the Jewish gagees were often able to make arrangements to leave the debtors in possession of the property, prompting Pollock and Maitland to comment:

> We may guess that, if the Jews had not been expelled from England, the clumsy mortgage by way of conditional conveyance would have given way before a simple method of securing debts, and would not still be incumbering our modern law. n222

With the expulsion of the Jews, the tendency of royal courts was to construe common law mortgages literally and strictly; such mortgages:

> suffered from the incurable defect that they employed formulas which contradicted the true nature of the operation -- they spoke of feoffments in fee, and leases for years, when the transaction was really neither -- and such forms inevitably attracted several doctrines of seisin and the derivation of estates, which tended to defeat their purpose. n223

§ 4.06(h)(3) Rise of the Classical Common Law Mortgage.

At some time during the 15th or 16th century, the form of mortgage shifted from an enfeoffment on condition of defeasance or of re-entry to an enfeoffment with a covenant for reconveyance. The covenant was more readily enforceable through the device of a writ of covenant, and both common law and equity courts during this period were willing to order reconveyance, if the payment conditions had been met. Eventually even the power of sale was developed, so the mortgagees no longer needed to proceed in court to satisfy their rights. Despite the additional protections afforded mortgagees by these changes, mortgagees were still frequently taking possession of the property, even into the middle of the 17th century.

But protections for the mortgagors also began to develop. Equity courts became reluctant to enforce penalties, and, near the end of the 16th century, began to develop doctrines on the equity of redemption. The equity of redemption was the right of a mortgagor, even after default, to cure the default and satisfy the obligation within a reasonable time, and rescue the property from forfeiture. Implicit in this doctrine was the recognition that the mortgage was really a security, not a conveyance.

§ 4.06(h)(4) Other Security Devices.

In the towns, an alternative to gages and mortgages was afforded by the Statute of Merchants and the Statute of Staples. The Statute of Merchants n224 enabled creation of a creditor's estate as tenant by statute merchant until the debt was discharged. This security interest was created by a procedure that took place by the parties appearing before the chief magistrate of a trading town. These procedures were termed "recognizances" or "statutes," because they were entered into under the Statute of Merchants. It is worthy of note that this statute permitted executions that would today be considered drastic, apparently in response to complaints by merchants who experienced difficulty in debt collection under traditional common law remedies. Execution actually began with the imprisonment of the debtor, who then had three months to sell property to satisfy the debt; if the debtor was unsuccessful in thus satisfying the debt, the property would be turned over for sale by the creditor. If the security was in land, then it applied to all lands held by the debtor at the time of entering into the statute, even if the lands were later alienated.

The later legislation, called the Statute of Staples, n225 similarly enabled creation of a creditor's estate or tenancy by statute staple until the debt was discharged. The estate was created in a procedure carried out before the mayor of the staple. n226

Under both of these procedures, if a creditor obtained a judgment and then obtained the land in execution of the judgment, the creditor's possession was considered a freehold; the statutes authorized protection of such possession by the assize of novel disseisin.

§ 4.06(i) Conveyancing.

§ 4.06(i)(1) Early Conveyances by Charter Only.

The principal issue in the early history of English conveyancing is whether any of the various documentary forms in use were actually effective to convey real property interests, or merely memorialized a conveyance accomplished by other means. Transfers of Anglo-Saxon bookland and laenland were recorded in written charters, but it is not known whether some other ceremony was also a necessary part of the conveyance. As to Anglo-Saxon folkland, apparently not even written documents were used. The early charters, and the hundreds of county court ceremonies used with them in transfers, were elaborate. Simpler documents took their place at the close of the Anglo-Saxon period. The only direct evidence of Anglo-Saxon conveyancing comes from bookland and laenland charters, and the wording of these charters suggests that the execution and delivery of those documents themselves effected the conveyances. To deliver the original deed to land that had once been booked seems to have been sufficient to transfer the property. It is not known what significance may have attached to the occasional reports of a turf being placed upon an altar in connection with a bookland transfer.

The charters used in England after the Norman Conquest invariably used such phrases as "I give and grant," suggesting that the charter itself was the effective instrument of transfer. Gradually, however, the phrasing "I have given and granted," was adopted, suggesting that the charter was not the conveyance, but was only recording an act that had already occurred. Often, delivery of these charters was accompanied by other tangible symbols, such as a knife, rod, or helmet, and the delivery took place usually in a church or a court. What is unclear in these early Anglo-Norman conveyances is whether the charter with its symbol constituted the actual conveyance, i.e., delivery of seisin, or some other conveyancing procedure was necessary to complete the transaction. Even in the latter event, the symbolic ceremony probably gave rise to a right to have the conveyance made. n227

§ 4.06(i)(2) Early Conveyances by Livery of Seisin.

Eventually, however, the confusion was resolved and the judges began imposing strict requirements that transfer of ownership be accomplished by ceremonies taking place on the land itself, if possible. This notion was aided by the availability of juries to give witness to such public ceremonies. However, there was undoubtedly a time of transition and confusion, when delivery of a document sufficed to transfer, or when parties performed ceremonies on the land and

execution of documents and other pertinent acts:

> As a matter of fact, in the first half of the thirteenth century it was still common for the feoffor and the feoffee to attend the county or hundred courts, to have their charter read there and to procure its attestation by the sheriff and the leading men of the district. In addition to this, if the gift was to be made to a monastery, the charter would be read in the chapter house and then it would be carried into the church and offered upon the altar along with knife or rod. Beside this there would be a ceremony on the land, including sometimes a perambulation of boundaries in the presence of witnesses; and this was the more necessary because the charter rarely described the many small strips of land which made up that hide or virgate which had been bestowed. One could not be too careful; one could not have too many ceremonies. But what the king's court demanded was a real delivery of a real possession. n228

The strict distinction being drawn between charter and seisin was well illustrated by the conveyancing practices of the king: not only was a charter sent out, but the monarch also sent a writ to the local sheriff ordering him to make livery of seisin. Priority between conflicting charters was resolved on the basis of the earlier seisin. n229

However, in all of these conveyances, whether by king or subject, it is not enough to speak only of livery of seisin. The grant of land consisted of two elements, the feoffment and the livery of seisin. The feoffment was the gift of a freehold estate, such as the fee or a life estate. The enfeoffment could be expressed either by a written document or orally. n230 Even into the thirteenth century, conveyances of freeholds without charter were common. n231 By that time and for some time earlier, however, when the charters were used, their language suggested only that they recorded a conveyance that had already occurred, not that they were the instrument of conveyance.

The instrument of conveyance was the livery of seisin:

> The donor and the donee in person or by attorney must come upon the land. There the words of gift will be said or the charter, if there be one, will be read. It is usual, though perhaps not necessary, that there should be some further ceremony. If the subject of the gift is a house, the donor will put the hasp or ring of the door into the donee's hand...; if there is no house, a rod will be transferred ... or perhaps a glove. Such is the common and the safe practice; but it is not indispensable that the parties should actually stand on the land that is to be given. If that land was within their view when the ceremony was performed, and if the feoffee made an actual entry on it while the feoffer was yet alive, this was a sufficient feoffment. But a livery of seisin either on the land or "within the view" was necessary. n232

Some of the more colorful elaborations of livery of seisin, often popularly ascribed to the English common law, were in fact practices of the continental Germanic tribes of an age before the Norman Conquest of England:

> The two men each with his witnesses appear upon the land. A knife is produced, a sod of turf is cut, the twig of a tree is broken off; the turf and twig are handed by the donor to the donee; they are the land in miniature, and thus the land passes from hand to hand. Along with them the knife may also be delivered, and it may be kept by the donee as material evidence of the transaction; perhaps its point will be broken off or its blade twisted in order that it may differ from other knives. But before this the donor has taken off from his hand the war glove, gauntlet or thong, which would protect that hand in battle. The donee has assumed it; his hand is vested or invested; it is the *vestita manus* that will fight in defence of this land against all comers; with that hand he grasps the turf and twig ... Even this is not enough; the donor must solemnly forsake the land. May be, he is expected to leap over the encircling hedge; may be, some queer renunciatory gesture with his fingers ... is demanded of him; may be, he will have to pass or throw to the donee the mysterious rod ... which, be its origin what it may, has great contractual efficacy ... When under Roman influence, the written document comes into use this also can be treated as a symbol; it is delivered in the name of the land ... Just as of old the sod was taken up from the ground in

> order that it might be delivered, so now the charter is laid on the earth and thence it is solemnly lifted up or "levied" (*levatio cartae*) ... And lastly there are ... advantages to be gained by a conveyance made before a court of law after some simulated litigation; and part of the original ceremony can be performed there; the donor or vendor can in court go through the solemnity of surrendering or renouncing the land; the rod or *festuca* can be passed from hand to hand in witness of this surrender. n233

If, as is believed, the livery of seisin practices on the continent had so far progressed that it was no longer necessary to go onto the land, and merely ceremonial passing of the symbols sufficed for the conveyance, then it is all the more surprising that in England of the thirteenth century the courts began to insist upon the literal elements of livery seisin, the handing over of some part of the land, while on the land or within view of the land. n234

§ 4.06(i)(3) Quitclaim Without Livery of Seisin.

For two types of transfers the livery of seisin was not required. One type of transfer occurred when one party held as tenant for years or life, with the fee in another party, or one party held adversely to another, and the out-of-possession party wished to yield the property rights to the party in possession. This could be done by a document; no ceremony of enfeoffment was necessary. n235 No standard terminology applied to such a document at first, although a quitclaim was commonly used to yield adverse rights. n236 Later the document terminology became standardized with various kinds of releases.

§ 4.06(i)(4) Surrender Without Livery of Seisin.

The second type of transfer for which livery of seisin was not required arose when a tenant wished to surrender the tenancy to the lord. Because the lord was already seised -- either in fee if the tenancy were for a term, or in service if the tenancy were for life or in fee -- probably neither deed nor livery was necessary. Quite frequently, however, a deed of surrender was used.

§ 4.06(i)(5) Transfers to Change the Type of Tenancy.

For those who wished to change the nature of their tenancy -- for instance, from fee simple to fee tail -- usually two enfeoffments were required: the first to a disinterested grantee, and the second from that grantee back to the original grantor with the proper tenancy incorporated into the second enfeoffment. Probably the grantee would have to take seisin before making the second enfeoffment.

§ 4.06(i)(6) Transfers Between Freeholders with Villeins in Occupancy.

Yet another procedure for conveyancing was required when neither party to the conveyance was in actual occupancy, although the occupant was a tenant of the grantor. Of course, the occupancy rights would have to be taken into account when making the conveyance, but the method of doing that depended on whether the occupant was a freeholder or held in villeinage. If the tenancy was in villeinage, the grantor simply enfeoffed the grantee with livery of seisin. However, the parties could also direct that the villeins involved acknowledge the transfer of lordship. When Richard de Turville conveyed to the Abbot of Missenden, he sent letters patent to the villeins, and after the villeins had gathered, Richard delivered seisin of them and their tenements to the abbot. The abbot took their fealty and demanded rent; because no rent was due, the abbot lent some pennies to the villeins, who then each paid a penny for the right to remain in occupancy. n237

§ 4.06(i)(7) Transfers Between Freeholders with Freeholders in Occupancy; Attornment to the Grantee.

If, on the other hand, a freeholder was in occupancy, a different procedure took place. The grantor was perceived as granting the incorporeal lordship (seignory) or reversion rather than the corporeal land itself, although there must still be some symbolic transfer of the land. The incorporeal right thus was conveyed by a document that came to be called a

deed of grant, and in addition the occupant was required to attorn to the grantee. n238 To attorn meant to "turn over" the tenant to the new lord, the grantee. If the tenant in occupancy would not agree to attorn himself or herself to the new grantee, then resort to the court was possible; the court could compel the tenant to make an acknowledgement that the tenancy was held of the new lord. The court could hold that the new lord was seised of the tenant's service, but would not require the tenant to do homage to the new lord. n239

§ 4.06(i)(8) Elements of the Charter or Deed. n240

Even though the written charter or deed came to be merely evidence of a conveyance, rather than effecting the conveyance itself, and even though much land was transferred without deed, there were still advantages to using a deed. In addition to its use for a grant, the deed form could be used for a release and a surrender. Moreover, after it became settled that certain interests, such as reversions, rents and other incorporeal interests, could be granted even though livery of seisin was not possible, then a deed was necessary to transfer those interests.

§ 4.06(i)(8)(i) Recitals in the Deed.

The early deeds were quite simple and uniform in format, and almost always were unilateral in the sense that they were given in the name of the grantor. As innovations in the form arose, such as inclusion of the word "assigns" or of a warranty clause, their widespread adoption rapidly followed. The standard form first recited that the grantor had given, and by charter confirmed to the grantee and heirs and assigns forever, certain land, the boundaries to which the deed would describe with particularity. Then followed the habendum clause describing the nature of the interest taken by the grantee. Because subinfeudation was no longer possible after the Statute Quia Emptores, deeds thereafter had to recite that the grantee held of the grantor's lord by the services customarily due. Any rights reserved by the grantor (such as rent), or created for others (such as remainders), would also be described in the deed.

In early times the deed usually concluded with a clause stating that the deed was sealed, in order that the grant "may remain forever good and valid." However, even though a seal remained a requirement for validity, by the fourteenth century a recital of seal was often omitted, and then statements of sealing and of witnesses were replaced by a clause stating the time and place of the deed. A recital that livery of seisin had taken place was endorsed on deeds beginning in the fifteenth century, and signatures were placed on deeds beginning only in the sixteenth century, although not to become common until after the Statute of Frauds was enacted in the seventeenth century.

§ 4.06(i)(8)(ii) Warranties in the Deed.

Perhaps the most important benefit of a deed in fee simple was the clause of warranty it typically included, by which the grantor and heirs and assigns warranted the land to the grantee and heirs and assigns "against all men forever." The warranty had a twofold purpose: to compel a response from the grantor if the grantee's title was challenged (and to obtain compensation or equivalent land from the grantor, if the challenge was successful), and to bar the grantor and grantor's heirs from later challenging the conveyance. The warranty undoubtedly helped establish the alienability of fee simple interests, even overcoming family restraints.

In transfers of interests other than in fee simple, the warranty was more troublesome. When a person holding a dower or curtesy interest enfeoffed another (tortiously) with warranty, even though the feoffor had a child, the warranty would usually bar the child as heir from claiming what would normally be the inheritance. This bar by warranty was partially removed by statute in 1278. n241 The statutory relief expressly applied only to warranties created by tenants in curtesy, but in 1306 was judicially extended to tenants in tail who had received no assets by descent. n242 Before this an enfeoffment or fine by a tenant in tail, with warranty, could bar the feoffer's heir, to whom the estate in tail was limited by descent. Attempts to bar claims by heir through use of warranties continued for several centuries more. The trend generally was to recognize that warranties accomplished the bar, although the bar of certain "collateral" warranties was abolished in 1706. n243

Frequently, however, the bar of a warranty affected only the inheritance right, and not reversions and remainders. Such interests were more effectively barred by fines, and in the case of fee simple interests a fine barred all claims after a year and a day. In 1361, the bar effect of the fine was completely abolished by statute. n244 Unhappiness with that state of affairs prompted a partial reversal in the next century, so that a fine could be a bar after five years and after fulfilling certain procedural requirements. n245 However, even with this change, the fine would only bar issue in tail, but not most remainders and reversions. Only in a later century would the barring of remainders and reversions be facilitated by the procedure known as common recovery.

§ 4.06(i)(8)(iii) Physical Form of the Deed.

If a deed contained especially elaborate provisions, it might be made in two copies on one page, with the page then divided by an indented cut that angled through the word "Chyrographum." The deed thus became an indenture or indented writing.

Many deeds were also enrolled in the courts, especially if the transfer itself took place in court. For a small charge a person could have a deed entered on the pipe roll (a treasury account kept in the Exchequer), and later such deeds were frequently enrolled on the backs of the close rolls (closed records of sealed letters or grants from the monarch to particular parties).

§ 4.06(i)(9) The Fine or Final Concord.

The impulse to improve the authority and security of deeds by invoking court proceedings, and by making multiple copies, came together in the important procedure called the fine, or final concord, that was practiced from 1195 to 1833.

Much experimentation had taken place before 1195. Charters had been copied onto the pipe roll and the close rolls. If a court case dealing with a conveyance was brought to conclusion, charters from the court and parties confirming the outcome might be obtained. Seisin determined by legal action could be especially secure. It was acceptable for parties to embark on a procedure of trial by battle and, at a prearranged moment, the exchange was stopped by friends, a peaceful accord was presented and approved by the court, and the effect was the same as if the battle had been carried to conclusion. n246 Not only was the contest between the immediate parties concluded with finality, but any others who might have an interest or claim in the matter would be barred if they did not quickly come forward. n247 Most importantly, the terms of the concord could be enforced by further court action. A form for such agreements was developed, and once adopted by the royal court, soon spread to lesser courts. n248

The royal court then developed a form for recording the agreements on parchment, and some of the early chirographs, or indented writings, are these so called "final concords." n249 One such document dated July 15, 1195, proclaims itself to be the first chirographic final concord that was made in three parts, one of which was to remain as a record in the royal treasury.

The action to have a fine "levied" began with a writ, usually either a form of writ of covenant or writ of warranty. In imitation of the simulated battle trials, the parties would carry the litigation to some length before presenting their concord. Later, they would present the concord as soon as all parties had joined the action and were before the court. Leave of court to compromise the action was required and had to be requested, of course with a fee attached.

Court involvement was not merely cosmetic. The most important supervisory function exercised by the judges was to examine married women appearing before them as grantors, to be assured that the women understood what they were doing, that is, surrendering dower and other rights. Indeed, even by Bracton's time, the fine had become the conveyance of choice for married women. n250

The fine was also advantageous for other kinds of conveyances. If a non-possessory interest such as a lordship (seignory) or a reversion was to be conveyed, and it was uncertain whether the tenant would willingly attorn to the grantee, the fine action included a regular procedure for compelling the grantee's attornment or accomplishing attornment by the court. The types of conveyances often involved in family settlements also were often best accomplished by fine. If a landholder wished to settle property on family members, that meant changing the grantor's own form of tenancy, normally accomplished by a two-step conveyance to a third person and then back to the family members, the risks of that procedure could be avoided by the fine. By the fine, the entire settlement could be achieved in one step, with court sanction.

These features of the fine did not come fully formed. Transfer of seisin and the land were at first still necessary, and could only be compelled when the fine was submitted to execution. In the typical family settlement, the fine recorded that the third party had been enfeoffed before granting back to various family members the specified interests, when in fact no enfeoffment had occurred. (The fine, after all, could be termed a collusive action and a feigned compromise.) The settlor's heir was not bound by that fine n251 until the heir's plea was taken away by statute in 1299. n252 Indeed, that statute went far toward making all aspects of the fine truly final.

FOOTNOTES:

(n1)Footnote 152. *See* David J. Seipp, *The Concept of Property in the Early Common Law*, 12 L. & Hist. Rev. 29 (1994) (discussing the concepts and vocabulary of "property" during the formative stages of the common law).

(n2)Footnote 153. Bracton, fol. 17.

(n3)Footnote 154. The laws or dooms of King Alfred contain a single reference to bookland, which was heritable but, when transferred, might be limited by the transferor to future alienation only within the kindred. The Laws of the Earliest English Kings, Alfred cl. 41 (F. L. Attenborough ed. & trans. 1922).

(n4)Footnote 155. This is the opinion expressed in 2 Frederick Pollock & Frederic William Maitland, The History of English Law Before the Time of Edward I 14 (2d ed. 1909).

(n5)Footnote 156. Theodore F. T. Plucknett, A Concise History of the Common Law 558 (5th ed. 1956). Pollock and Maitland asserted that most alienations of that time were by way of subinfeudation, which was not prohibited until enactment of the Statute Quia Emptores in 1290. *See* Roger Virgoe, *Inheritance and Litigation in the Fifteenth Century: The Buckenham Disputes*, 15 J. Legal Hist. 23 (1994).

(n6)Footnote 157. The Laws of the Earliest English Kings Alfred cl. 41 (F. L. Attenborough ed. & trans. 1922).

(n7)Footnote 158. *The 'Coronation Charter' of Henry I (5 August 1100)*, c. 3, § 2, *in* 2 English Historical Documents 400-02 (D. C. Douglas ed. 1953).

(n8)Footnote 159. It should also be noted that the father could provide this property for his daughter and her husband even without the consent of sons who were the expectant heirs, and this during a period when such consent was usually required for alienation.

(n9)Footnote 160. In some cases the grantor remained in possession until the reversion was removed by arrival of the third generation, although Glanvill considered this no completed gift, only the promise of a gift. Glanvill, VII, 1.

(n10)Footnote 161. GlanvilL, VII, 18.

(n11)Footnote 162. Bracton, fol. 17b.

(n12)Footnote 163. Statute of Westminster II (Statute De Donis Conditionalibus), 13 Edw., c. 1 (1285).

(n13)Footnote 164. Theodore F. T. Plucknett, A Concise History of the Common Law 552 (5th ed. 1956).

(n14)Footnote 165. *Belyng v. Anon., Y.B. 5 Edw. 2,* Easter Term, No. 2 (1312) (Year Books of Edward Ii, 5 Edward IL 176 (Selden Society Vol. 31, Vol. 11 Year Book Series, 1915)); *Anon., Y.B. 5 Edw. 2,* Trinity Term, No. 25 (1312) (Year Books of Edward II, 5 Edward II 22 (Selden Society Vol. 33, Vol. 12 Year Book Series, 1916)). The explanation for the striking departure from the express wording of the statute was that the drafter had been careless and had actually intended to draft the statute to cover the third generation of issue rather than just the first.

(n15)Footnote 166. Y.B. 12 Henry 4, Michaelmas Term, No. 9 (1410).

(n16)Footnote 167. The argument was pressed most vigorously in *Y.B. 20 & 21 Edw. (Rolls Series), 58 (1292); see also Anon., Y.B. 5 Edw. 2,* No. 78 (1311) (Year Books of Edward Il, 5 Edward Il 269 (Selden Society Vol. 63, Vol. 10 Year Book Series, 1947)).

(n17)Footnote 168. Theodore F. T. Plucknett, A Concise History of the Common Law 556 (5th ed. 1956).

(n18)Footnote 169. *See* C.M.A. McCauliff, *The Medieval Origin of the Doctrine of Estates in Land: Substantive Property Law, Family Considerations, and the Interests of Women, 66 Tul. L. Rev. 919 (1992).*

(n19)Footnote 170. According to Bracton, doweresses had fairly extensive rights on their lands to commit what would normally be considered waste. Bracton, fols. 315, 316.

(n20)Footnote 171. *See* Ch. 70, *infra*.

(n21)Footnote 172. § 3.05(f), *supra*.

(n22)Footnote 173. Glanvill, Vi, 1. C.M.A. McCauliff, *The Medieval Origin of the Doctrine of Estates in Land: Substantive Property Law, Family Considerations, and the Interests of Women, 66 Tul. L. Rev. 919, 925 (1992).*

(n23)Footnote 174. Bracton, fol. 92.

(n24)Footnote 175. Magna Carta, c. 7 (1217).

(n25)Footnote 176. 2 Frederick Pollock & Frederic William Maitland, The History of English Law Before the Time of Edward I 421 (2d ed. 1909).

(n26)Footnote 177. Bracton, fol. 93. Borough tenancies were also frequently one-half, and villein widows usually obtained the entire tenement in dower.

(n27)Footnote 178. The Laws of the Kings of England From Edmund To Henry I 202-03, II Cnut cl. 53 (Agnes Jane Robertson ed. & trans. 1925).

(n28)Footnote 179. Bracton, fol. 96, 97.

(n29)Footnote 180. Bracton's Note Book, no. 1334 (1217).

(n30)Footnote 181. 2 Frederick Pollock & Frederic William Maitland, The History of English Law Before the Time of Edward I 426 (2d ed. 1909).

(n31)Footnote 182. *Id.*

(n32)Footnote 183. *See* Jennifer Drobac, *The Perfect Jointure: Its Formulation After the Statute of Uses, 19 Cambrian L. Rev. 26 (1988).*

(n33)Footnote 184. *See* Joseph Biancalana, The Writs of Dower and Chapter 49 of Westminster I, *49 Cambridge L.J. 91 (1990). See generally* Medieval Society and the Manor Court (Zvi Razi & Richard Smith, eds., Clarendon Press, Oxford 1996); Pauline Stafford, Queen Emma and Queen Edith: Queenship and Women's Power in Eleventh-Century England (Blackwell Publishers, Oxford 1997).

(n34)Footnote 185. C.M.A. McCauliff, *The Medieval Origin of the Doctrine of Estates in Land: Substantive Property Law, Family Considerations, and the Interests of Women, 66 Tul. L. Rev. 919, 984 (1992).*

(n35)Footnote 186. The Statutes of Gloucester, 6 Edw., c. 3 (1278); Statute of Westminster II, 13 Edw., c. 3 (1285).

(n36)Footnote 187. The discussion of early tenancies for term is based on 2 Frederick Pollock & Frederic William Maitland, The History of English Law Before the Time of Edward I 106-117 (2d ed. 1909).

(n37)Footnote 188. *See, e.g.,* Bracton, fol. 27.

(n38)Footnote 189. The termor's occupancy could be disturbed, for example, by a guardian in chivalry, by a doweress, or by an assignee of the lessor.

(n39)Footnote 190. The Statutes of Gloucester, 6 Edw., c. 11 (1278).

(n40)Footnote 191. In an evil hour the English judges, who were controlling a new possessory action, which had been suggested by foreign models, adopted this theory at the expense of the termor. He must be the *conductor* who does not possess, or he must be the usufructary who does not possess the land but has "*quasi*-possession" of a servitude.2 Frederick Pollock & Frederic William Maitland, The History of English Law Before the Time of Edward I 114-15 (2d ed. 1909).

(n41)Footnote 192. Theodore F. T. Plucknett, A Concise History of the Common Law 573 (5th ed. 1956).

(n42)Footnote 193. *See, e.g.,* Bracton, fol. 18.

(n43)Footnote 194. Bracton's Note Book, no. 86 (1220).

(n44)Footnote 195. Bracton, fol. 68b.

(n45)Footnote 196. *See, e.g., Neuton v. Staynford, Y.B. 5 Edw. 2,* Michaelmas Term, No. 24 (1311) (Year Books of Edward Ii, 5 Edward 2, 98 (Selden Society, Vol. 63, Vol. 10 Year Book Series, 1947)); *Y.B. 18 & 19 Edw. 2* (Rolls Series), 378 (1345).

(n46)Footnote 197. In *Y.B. 18 & 19 Edw. 2* (Rolls Series), 378 (1345), reference is made to the practices of two prominent royal judges who accepted as parties before them remaindermen who held by fine, but not remaindermen who held by deed.

(n47)Footnote 198. *Y.B. 32 & 33 Edw. (Rolls Series), 328 (1304).*

(n48)Footnote 199. *Y.B. 2 Edw. 2, 4 (1309).*

(n49)Footnote 200. *Y.B. 10 Edw. 3,* Michaelmas Term, No. 8 (1336); *Y.B. 11 Rich. 2, 283-288 (1388).* J. H. Baker, *Sir John Melton's Case (1535): Cockermouth Castle and the Three Silver Luces, 55 Cambridge L.J. 249 (1996)* (example of treatment of contingent remainders under common law).

(n50)Footnote 201. *See, e.g., Archer's Case, 1 Co .Rep. 66b, 76 Eng. Rep. 146 (1597).*

(n51)Footnote 202. Some dispute existed about whether coparceners had a right of survivorship, but the courts ultimately and consistently held that they did not. *Y.B. 14 & 15 Edw. 3* (Rolls Series), 34 (1341); *Y.B. 17 & 18 Edw. 3* (Rolls Series), 174 (1343).

(n52)Footnote 203. Bracton, fol. 72-77b.

(n53)Footnote 204. *31 Hen. 8,* c. 1 (1539); *32 Hen. 8,* c. 32 (1540).

(n54)Footnote 205. Bracton, fol. 72.

(n55)Footnote 206. Bracton, fols. 72-77b.

(n56)Footnote 207. *31 Hen. 8,* c. 1 (1539).

(n57)Footnote 208. Bracton, fol. 13.

(n58)Footnote 209. *Statutes of Marlborough, 52 Hen. 3,* c. 6 (1267).

(n59)Footnote 210. Bracton, fol. 72.

(n60)Footnote 211. *Y.B. 14 Edw. 3* (Rolls Series), 198, 200 (1341); *Y.B. 38 Edw. 3,* Michaelmas Term, 26b (1364).

(n61)Footnote 212. Bracton, fol. 208. John V. Orth, *Tenancy by the Entirety: The Strange Career of the Common-law Marital Estate, 1997 BYU L. Rev. 35, n. 51* (effect of a joint estate between a husband and wife and a third person). *U.S. v. Craft, 535 US 274 (2002)* (tax lien on husband's share of property held in tenancy by the entirety attached to the couple's joint interest in the property).

(n62)Footnote 213. Theodore F. T. Plucknett, A Concise History of the Common Law 603 (5th ed. 1956). In a footnote to the quote in the text, Plucknett added, "Remember that the mediaeval 'pledge' (*plegius*) is almost always a person, not a thing. The Teutonic *wed* has come down to us by various routes as 'gage', 'engagement', 'wage', 'wager', and 'wedding'. Charles J. Reid, Jr., *The Seventeenth-Century Revolution in the English Land Law, 43 Clev. St. L. Rev. 293, 299 (1995).*

(n63)Footnote 214. 2 Domesday Book 137, 141, 217.

(n64)Footnote 215. Glanvill, X, 6.

(n65)Footnote 216. An alternative explanation for the "dead" gage is that if the debt is not paid, the land is dead as to the debtor; if the debt is paid, the land is dead to the creditor. The payment arrangement of a gage could also be gradually killing or "amortizing" the debt.

(n66)Footnote 217. 2 Frederick Pollock & Frederic William Maitland, The History of English Law Before the Time of Edward I 119 (2d ed. 1909).

(n67)Footnote 218. Glanvill, X, 8.

(n68)Footnote 219. Glanvill, X, 11.

(n69)Footnote 220. Bracton, fols. 20, 268-269.

(n70)Footnote 221. *See, e.g., Rye v. Tumby, Y.B. 8 Edw. 2,* Michaelmas Term, No. 9 (1314) (Year Books of Edward Ii, 8 Edward II 36 (Selden Society vol. 37, Vol. 18 Year Book Series, 1920)); *Walsham v. Walsham, Y.B. 8 Edw. 2,* Michaelmas Term, No. 10 (1314) (Year Books of Edward Ii, 8 Edward II 52 (Selden Society Vol. 37, Vol. 18 Year Book Series, 1920)).

(n71)Footnote 222. 2 Frederick Pollock & Frederic William Maitland, The History of English Law Before the Time of Edward I 124 (2d ed. 1909).

(n72)Footnote 223. Theodore F. T. Plucknett, A Concise History of the Common Law 606 (5th ed. 1956).

(n73)Footnote 224. De Mercatoribus, 13 Edw. (1285).

(n74)Footnote 225. *Statute of Staples, 27 Edw. 3,* c. 9 (1353).

(n75)Footnote 226. The mayor of the staple was the chief officer of the staple or great market at Westminster who took acknowledgements of estates created under statutes staple as security for debts.

(n76)Footnote 227. *See also* John Hudson, Land, Law and Lordship in Anglo-Norman England (1994).

(n77)Footnote 228. 2 Frederick Pollock & Frederic William Maitland, The History of English Law Before the Time of Edward I 90 (2d ed. 1909). *See also* Bracton's Note Book pl. 375 (1230), pl. 754 (1233).

(n78)Footnote 229. Bracton, fol. 56b.

(n79)Footnote 230. Bracton, fol. 33b.

(n80)Footnote 231. *See, e.g., Y.B. 20 & 21 Edw. 1* (Rolls Series), 32 (1292); *Statutes at Marlborough, 52 HEN. 3,* c. 9 (1267).

(n81)Footnote 232. 2 Frederick Pollock & Frederic William Maitland, The History of English Law Before the Time of Edward I 83 (2d ed. 1909). *See* Bracton, fols. 40, 41; *Y.B. 20 & 21 Edw. 1* (Rolls Series), 256 (1292).

(n82)Footnote 233. 2 Frederick Pollock & Frederic William Maitland, The History of English Law Before the Time of Edward I 85-86 (2d ed. 1909)..

(n83)Footnote 234. *See also* John Hudson, Land, Law and Lordship in Anglo-Norman England (1994).

(n84)Footnote 235. *See* Bracton fol. 41.

(n85)Footnote 236. "Quit-claim" derives from *quietum clamare*, to "cry quits."

(n86)Footnote 237. Bracton's Note Book, pl. 524 (1231).

(n87)Footnote 238. Throughout this chapter the terms grantor and grantee, rather than donor and donee, are used because of their meaning for the modern reader; however, as is explained in the text, the only proper medieval usage for the grant terminology is when transfer of lordship occurs while a freehold tenant is in occupancy.

(n88)Footnote 239. Bracton, fols. 80b, 81b; *Y.B. 32 & 33 Edw. 1* (Rolls Series), 43 (1304).

(n89)Footnote 240. This section is based on Theodore F. T. Plucknett, A Concise History of the Common Law 610-613 (5th ed. 1956).

(n90)Footnote 241. Statutes of Gloucester, 6 Edw., c. 3 (1278).

(n91)Footnote 242. *Y.B. 33 & 35 Edw. (Rolls Series), 388 (1306).*

(n92)Footnote 243. 4 & 5 Anne, c. 3, s. 21 (1706).

(n93)Footnote 244. *34 Edw. 3,* c. 16 (1361).

(n94)Footnote 245. *1 Rich. 3,* c. 7 (1484) ; *4 Hen. 7,* c. 24 (1489).

(n95)Footnote 246. Bracton's Note Book, pl. 101 (1220), 147 (1222), 168 (1222), 316 (1229), 363 (1229), 815 (1233), 851 (1234), 1035 (1225), 1619 (1223).

(n96)Footnote 247. Bracton declared the bar to be effective as soon as the chirograph was delivered to the parties, not less than fifteen days after the agreement was struck in court. Bracton, fol. 436. At other times the period may have been a year and a day.

(n97)Footnote 248. *See* Bracton's Note Book, pl. 992 (1224), 1223 (1238), 1616 (1223), 1619 (1223).

(n98)Footnote 249. *See* Glanvill, VIII.

(n99)Footnote 250. Bracton, fol. 321b.

(n100)Footnote 251. Bracton, fols. 242b, 262, 270; Bracton's Note Book, pl. 125 (1222), 778 (1233), 853 (1234); *Y.B. 33 & 35 Edw. 1* (Rolls Series), 201, 435 (1306).

(n101)Footnote 252. Statute de Finibus Levatis, 27 Edw., Stat. I (1299).

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CHAPTER 4 THE GROWTH OF THE ENGLISH COMMON LAW OF REAL PROPERTY

1-4 Thompson on Real Property, Thomas Editions § 4.07

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§ 4.07 Uses.

§ 4.07(a) Origins of Uses.

The term "use" in English law derives from the Latin "opus," signifying a benefit or "on behalf of." One person could give land or chattels to another, for the use or benefit of a third person. Uses were employed by knights embarking on crusades, by one wishing to confer the benefit of land on a religious order not authorized to hold land, and by villeins who could convey their land only by yielding it to the lord "for the use of" the intended grantee. n253 When a wardship was taken from an unfaithful guardian and given to another, the new guardian held "to the use of" the ward. n254

Uses had apparently become quite common during the fourteenth century, because several statutes of the latter part of that century deal with uses. One statute made lands held to the use of defrauding debtors subject to execution for their debts. n255 Another statute made uses for the benefit of religious houses and other corporations subject to the Statute of Mortmain, n256 meaning that no uses could be created for the benefit of such institutions, upon pain of forfeiture (except that mortmain practice permitted such conveyances after first obtaining a royal license). n257 By statute uses became forfeitable for treason, as were other real property interests. n258

§ 4.07(b) Advantages and Disadvantages of Uses.

The beneficiary of the use, the "cestui que use," was frequently the party benefiting from a collusive or fraudulent arrangement, and perhaps just as frequently the party victimized by an unfaithful feoffee who would not honor the terms of the use. Certainly much mischief could be accomplished by wrongful employment of the use:

> The purpose of such conveyances frequently was to enable the landowners to deal with their lands in a manner not countenanced by the common law or to evade the liabilities incident to legal ownership, such as the rule of destructibility. Thus suppose O, the owner of Blackacre in fee simple absolute, wished to dispose of Blackacre by will at a time when disposition by will was not recognized by the law courts, i.e., prior to 1540. To accomplish this goal, O would be enfeoff Bin fee simple absolute to hold to O's use during O's lifetime and after his death to transfer the land according to O's will. Upon O's death, B, the owner of Blackacre in fee simple absoulte, would then carry out the terms of O's will and transfer Blackacre to O's intended beneficiaries. Likewise, a dying land owner could by a conveyance to several

> feoffees to use (who would take a joint tenants) deprieve the lord of the fee of the important incidents of wardship, marriage or relief. n259

It was also the rule that dower and curtesy would not attach to uses, which significantly aided the free alienability of uses.

Succumbing to the attractive features of the use, however, the landowner became very vulnerable to a false feoffee:

> It is obvious that the success of a feoffor's attempt to put the legal ownership of his land in someone else and retain the beneficial ownership in himself depended on the feoffee keeping his promise to deal with the land according to the agreement made at the time of the feoffment. Unless some way could be found to enforce the feoffee's promise the feoffor's position was indeed precarious. In law the feoffee was the true owner; the cestui que use in possession was only a tenant at will. Seisin had vested in the feoffee by virtue of the feoffment and the law was not at all concerned with the feoffee's promise to deal with the land for the benefit of the feoffor or his nominees. n260

§ 4.07(c) Equitable Intervention in the Development of Uses.

The situation was a natural setting for intervention by the Chancellor, acting on equitable principles to provide relief unavailable under the common law. So, early in the fifteenth century, the Court of Chancery began accepting cases in which feoffees were accused of not honoring their instructions on behalf of a cestui que use. The Chancery Court did not interfere with the feoffees' legal title, but did impose fines and imprisonment for misconduct of feoffees. n261

§ 4.07(d) Early Statutory Reform of Uses.

Legitimizing uses under equity jurisdiction did not necessarily quell the abuses, and movements for statutory reform continued to gain momentum. One statute permitting a remedy against a person receiving the profits of land, n262 and another statute enabling a cestui que use to convey a legal estate, n263 reflected a policy position that the cestui que use should be treated as a legal owner of the property, not merely as an equitable owner. Based on this same position, other statutes declared void certain trusts and uses of chattels to the use of a settlor (similar to a modern grantor trust), n264 declared that wardship and reliefs would be due from the cestui que use of military land, n265 and decreed that execution could be had against land held under a use, with the cestui que use permitted the same defenses available to the legal owner. n266 When Richard III became king, after he had been enfeoffed to use by several of his associates, a statute required that such lands of which he was seised for the use of others were to be vested in the cestui que use, n267 another example of treating the owner of the use as the legal owner. This long-emerging legislative policy of treating the equitable interest of the cestui que use as a legal interest culminated in the great Statute of Uses of 1536.

§ 4.07(e) Conveyancing of Uses.

Before the Statute of Uses, however, an extensive conveyancing practice involving uses had developed. At the time of an enfeoffment to use, the uses could be included in a written document, stated orally, or declared to be the uses included in the grantor's will. If uses were not made known at the time of the enfeoffment, the grant was presumed to be for the use of the feoffer.

> While a use was typically created or raised by a feoffment to uses, it could also be created in connection with any other common-law type of conveyance, such as a fine, common recovery, lease, release or grant. Generally, a use could be created wiht or without a transfer of possession. A use was raised with a transfer of the possession where it was created upon an actual transfer of the seisin as in the case of a feoffment to uses. No technical words were necessary to create a use, and the declaration of the use could be oral or written. The word "use" was frequently employed but it was not essential. Any words expressing the feoffer's intention that the legal estate should be held for the benefit of another

> person were sufficient. A declaration that the feoffee should hold land upon trust or confidence for C and his heirs, or that he should permit C and his heirs to take the profits, was sufficient to raise a use. n268

Eventually, uses become so common that when a fee simple enfeoffment occurred and no use was declared, but the transaction was without consideration, a use was presumed in the feoffor. This implied use in the feoffer was termed a "resulting use."

Uses were often conveyed to several persons as joint tenants; this arrangement offered some security against simultaneous dishonesty by all the feoffees and through operation of survivorship avoided questions of dower or feudal incidents when any of the joint tenants died.

A use was also frequently raised by a bargain and sale. By a bargain and sale agreement, oral or written, an owner accepted monetary consideration in return for a promise to sell the land to the buyer. The promise alone effected no conveyance of the legal title, but the bargainee would be treated in equity as the beneficial owner and, by a suit in equity, the bargainee could compel the bargainor to convey legal title. This arrangement was also a natural vehicle for raising a use. By bargain and sale the owner could agree to hold the land for use or benefit of the buyer and the buyer's heirs. Again, the buyer could compel the seller to permit the buyer's use of the land, including its rents and profits. As early as the fifteenth century, a bargain and sale that had not proceeded to conveyance of the legal title was deemed to have raised a use in the bargainee. For those who actually wanted no more than the use, the bargain and sale arrangement would thus be left in this suspended, uncompleted state, with the purchasers holding only equitable title in the form of a use. From the point of view of feudal tenurial doctrine, this circumstance was significant, because it meant, as mentioned above, that a use could be raised without a transfer of seisin. Parties also found appealing the confidentiality of the transaction, because without conveyance of the legal title, there was no occasion to make a public record of the transaction. n269

§ 4.07(f) Enactment and Effects of the Statute of Uses (1536).

§ 4.07(f)(1) Circumstances Leading to the Enactment of the Statute of Uses.

Conveying land to uses became extremely widespread and resulted in much abuse, complication, and fraud. Most of this was peremptorily wiped away with the enactment of perhaps the most famous and significant English property law statute, the Statute of Uses, that became effective in 1536. The circumstances that finally prompted the monarchy to act against uses and force restrictive legislation through Parliament have been well-summarized by Moynihan:

> This statute is probably the most important piece of legislation dealing with English land law, and its far-reaching consequences are still felt in our own times. The causes which led to its enactment are to be found in an English King's need of money. The Statute was primarily designed to restore to the Crown the feudal revenues which were being lost by means of the conveyance of lands to uses. In the sixteenth century the incidents of tenure, such as wardship, marriage, relief, primer seisin and escheat, were burdensome exactions on the tenant and, correspondingly, a profitable source of revenue for the lord of the fee. Since the king "alone was always lord and never tenant" he lost heavily when landowners by conveyances to joint feoffees to uses rid themselves of the incidents of tenure by retaining only the beneficial ownership. Henry VIII by means of the Statute of Uses sought to put an end to this drainage of the royal revenues ... The abolition of uses was not looked upon with favor by the land owning class who feared the loss of power to devise their lands, but Henry was able to enlist the support of the common law lawyers in Parliament in putting through the Statute because of their deep-rooted jealousy of the Court of Chancery. As Maitland well puts it, the Statute "was forced upon an extremely unwilling Parliament by an extremely strong-willed king." n270

§ 4.07(f)(2) The Operating Principle of the Statute of Uses.

The method of the Statute of Uses was simple: it simply declared that whoever held the use would now also be deemed the holder of the legal title. Its essential but arcane language was paraphrased by Maitland:

> Where any person or persons shall be seised of any lands or other hereditaments to the use, confidence, trust of any other person or persons, in every such case such person and persons that shall have any such use, confidence or trust in fee simple, fee tail, for term of life or for years or otherwise shall stand and be seised deemed and adjudged in lawful seisin, estate and possession of and in the same lands and hereditaments in such like estates as they had or shall have in use. n271

§ 4.07(f)(3) The Impact of the Statute of Uses on Conveyancing.

The Statute of Uses did not alter the traditional common law methods of conveying interests. Livery of seisin was effective to convey a freehold estate, a grant conveyed a vested remainder or a reversion, and an agreement and entry sufficed to convey a term of years. The common law rule that a freehold to commence at some time in the future could not be created by conveyance remained in effect. The important impact of the Statute of Uses was to add several new possibilities for conveyancing. n272

§ 4.07(f)(3)(i) Feoffment to Uses.

The feoffment to use as practiced prior to the Statute of Uses was still a legitimate vehicle for conveyancing, but the interests conveyed previously as uses were converted by the Statute of Uses into legal interests. This had its advantages. By a feoffment to uses before the Statute a man could convey a use directly to himself and his wife, a conveyance that, if applied to legal interests, was not permitted under common law. After the Statute of Uses, a man could convey a legal estate directly to himself and his wife by means of a feoffment to uses, which use was converted by the Statute into the equivalent legal interest.

§ 4.07(f)(3)(ii) Resulting Uses.

Before the Statute of Uses, a resulting use in a grantor arose when a landowner conveyed to another with no consideration and no use declared. Such a resulting use in the grantor was converted into the equivalent legal interest by the Statute of Uses, so the conveyance became circular and meaningless. Conveyancers countered this result by including in conveyances an express declaration of use in the grantee, so no executed use in the grantor would be inferred.

§ 4.07(f)(3)(iii) Bargain and Sale.

Before the Statute of Uses, a bargain and sale was used to raise a use. Inasmuch as this use was converted to a legal interest after the Statute, the bargain and sale became an appropriate method of creating a legal estate. Indeed, the Statute vested the seller's seisin in the buyer by operation of law. Because no livery of seisin was necessary after the Statute, and no writing was required for a bargain and sale, the possibility arose that oral, unrecorded, and therefore secret conveyances of freeholds could take place by bargain and sale. Such secret conveyances were deemed undesirable. Therefore, in the same year as the Statute of Uses Parliament also enacted the Statute of Enrolments, n273 requiring freehold conveyances by bargain and sale to be in writing, under seal, and to be entered or enrolled in certain public offices.

§ 4.07(f)(3)(iv) Lease and Release.

To evade the public writing requirement of the Statute of Enrolments, conveyancers devised the lease and release. An owner of land would by bargain and sale convey the land to the grantee for a term of years (the lease), not required to be in writing or to be enrolled under the Statute of Enrolments, because it was not a conveyance of a freehold estate. The grantor's reversion would then be "released" by common law release to the termor, who thus obtained the entire estate.

The release was also not required to be in writing or enrolled, because the Statute of Enrolments applied only to bargain and sale transactions. Because the term for years was created by bargain and sale, the grantee obtained the term without entering into possession, and the interest was vested by operation of the Statute of Uses. Having not entered into possession, the grantee was eligible to accept the release of the reversion:

> From approximately 1620 until 1845 the conveyance by lease and release was the most commonly used method of conveying land in England. It had the advantage (from the viewpoint of the parties) of transferring the title by means of a secret conveyance that involved none of the inconveniences of the common law methods. It was not necessary for the parties to go upon the land as in the case of a transfer by feoffment, nor was it necessary for the conveyee to make an actual entry as in the case of a transfer of an estate for years by agreement and entry. Moreover, the requirement of recording and payment of a fee therefor under the Terms of the Statute of Enrolments was circumvented... Another advantage of conveyance by lease and release was that it could be used to effectuate family settlements of land by declaring uses on the release... All of the uses would be executed by the Statute of Uses into legal estates or interests. n274

§ 4.07(f)(3)(v) Covenant to Stand Seised.

Even after the Statute of Uses, a mere agreement by one person to hold land for the use of another did not create an enforceable use. Lacking was the element of consideration, which is why a bargain and sale or a feoffment to uses were enforced as raising uses that were "executed" or converted into legal interests by operation of the Statute of Uses. However, not long after enactment of the Statute, it was held that such an agreement, or covenant, to hold to the use of another, even without the traditional consideration, could be enforced as raising a use. Such a covenant to stand seised was required to be written, to be under seal, and to be supported by the consideration of natural love and affection (if to the use of a relative) or of marriage. n275 Once it was conceded that such a covenant to stand seised raised a use, the use was executed, or converted into the legal estate, by the Statute of Uses.

The covenant to stand seised was used mostly to effect family settlements, or distributions, of land to other family members, because -- under its particular consideration requirements -- it was valid only as to parties who were related by blood or marriage. The covenant to stand seised could remain secret, because it, too, was not required to be enrolled under the Statute of Enrolments.

§ 4.07(f)(3)(vi) Executory Interests.

A major effect of the Statute of Uses was the introduction of several new types of future interests. Before the statute's enactment, the only future interests recognized in the common law were reversions and remainders, and these --especially the remainders -- were hedged about by limits linked to the logic of tenures and estates. n276 It was not permissible, for instance, for a legal freehold estate to be granted at one moment in time, but not actually commence as an interest until some time thereafter. Under the practice of uses prior to the Statute of Uses, however, such a conveyance was common: an owner might enfeoff land to a feoffee to the use of another, such use to not commence until the occurrence of some event in the future. The transaction was called a springing use, but when such a use was "executed" into a legal interest by the Statute of Uses, the springing use became a springing "executory" interest, such as was formerly forbidden under the common law. The feoffer, making such a conveyance after the Statute of Uses, would still hold the estate in fee simple (because the conveyance to a feoffee to use would have been ineffective), but the estate would be subject to an executory interest in the party that would formerly have held the springing use. After the Statute of Uses and upon the occurrence of the event that would have commenced the use, the executory interest would have become the fee simple interest, with no interest left in the feoffor. This conveyance could be created by means of a bargain and sale, an enfeoffment, or a covenant to stand seised.

Another future interest not possible under the common law was a conveyance of successive future interests with a gap

in time between the end of one and the beginning of the next. Such a conveyance to use, however, was another variety of springing use and was possible before the Statute of Uses. An enfeoffment to the feoffee for the use of another for life, with the permanent use to go over to yet another party one year after the use for life ended, was valid. Such uses would have been "executed" by the Statute of Uses, so that the holder of the use for life would have a life estate, the feoffor would have a reversion for a year, and the holder of the permanent use would have an executory interest, to become a fee simple one year after the life estate ended. This conveyance could be created by means of a bargain and sale, an enfeoffment, or a covenant to stand seised.

Yet a third variety of springing use became a valid legal interest after the Statute of Uses. A conveyance in use, such as a bargain and sale, to one for a term of years and then to the heirs of another who was then living, created a contingent interest following a term of years. This is because the remaindermen could not be vested until the death of the ancestor and determination of heirship, which might be long after the end of the preceding term. Again, the Statute of Uses "executed" such springing uses into valid legal estates, so that the conveyance became an estate for years, a reversion in the grantor if necessary until heirship of another was determined, and then an executory interest in the nature of a springing use in those prospective heirs. This conveyance could be created by a bargain and sale or a covenant to stand seised.

In addition to the varieties of springing use described in the preceding paragraphs, the Statute of Uses also executed a type of "shifting" use into a valid executory interest. A conveyance to one, in use, with the use to go over to another upon the happening of a certain event, such as making a particular forbidden use of the property, was not possible under the common law. When the Statute of Uses executed the use, then the conveyance to the grantee became an estate in fee simple, subject to a shifting executory interest in another, that would ripen into a fee simple if the property were used in the forbidden way. This conveyance could be created by a bargain and sale, a covenant to stand seised, or an enfeoffment.

§ 4.07(f)(3)(vii) Devises.

Before the Statute of Uses it had not been possible to devise a legal estate, except in some areas by local custom, but a feoffment to uses declared in a will was upheld. When the feoffee's interest was "executed" by the Statute of Uses into a legal interest, it suddenly was no longer able to be devised. The strong opposition to this state of affairs was placated by enactment of the Statute of Wills in 1540, n277 which gave limited powers of devise. Under these limitations, a landowner could devise any lands held under socage tenure, and up to two-thirds of lands held by knight tenure. Devisees were made liable for feudal obligations as if they had taken by descent. Because livery of seisin was not required for an effective devise, the common law restrictions on certain types of future interests were deemed inapplicable; therefore, it was possible to devise springing and shifting future interests that would have been inappropriate as inter vivos conveyances of legal future interests. Such devises are executory devises and are included with inter vivos shifting and springing interests as executory interests.

§ 4.07(f)(3)(viii) Contingent Remainders.

It has already been mentioned that common law contingent remainders were subject to destruction, if the supporting freehold estate were forfeited through tortious alienation. Under this rule of destructibility, if the holder of the life estate attempted to convey a fee simple, the attempted alienation would be deemed tortious and the life estate would be forfeited before the contingent remainder vested. Thereupon the contingent remainder was deemed destroyed. n278 When executory interests were first recognized, they were considered subject to the same rule of destructibility, but that position was later reversed in the courts. n279 Common law contingent remainders, however, were still destructible, and the rule of destructibility was even extended to contingent remainders created by use and by devise.

§ 4.07(f)(3)(ix) Uses Not Executed by the Statute of Uses.

Several kinds of uses were not converted into legal estates by the Statute of Uses. According to the wording of the statute, only uses derived from one who was seised of the land were to be executed into legal interests. Because seisin applied only to freehold estates, if one held a non-freehold estate to the use of another, that use was not executed. Uses raised on an estate held for a term of years, or on personal property such as chattels or a chose in action, were unexecuted.

If a person was seised to the use of another, who held to the use of yet another -- a so-called use limited on a use -- the second use was held void before the Statute of Uses was enacted. After the Statute of Uses, the second use was at law deemed unexecuted, and in equity was still treated as void, so no interest at all passed under the second use. Sometime in the late seventeenth century, n280 after enactment of the statute abolishing tenures in 1660, n281 a use upon a use came to be upheld in equity. n282 This in turn once again enabled landholders to split their interests between legal and equitable titles, and the second use came to be commonly referred to as a trust. The holders of the first uses, executed into legal interests, became the trustees, not only holders of the legal title but bound to act in the interests of the trust owners or beneficiaries.

A few years after enactment of the Statute of Uses, still another category of uses were held exempt from execution into legal interests. These were the so-called active uses, created by a conveyance to use with the grantee to perform affirmative duties on behalf of the cestui que use. Typically, such affirmative duties might consist of collecting and paying to the cestui que use the rents and profits from the property, or conveying the property at the direction of the cestui que use. This exemption for active uses is not in the wording of the Statute of Uses, but was invoked by judicial decision.

The equitable estates arising out of unexecuted active uses tended to merge with the unexecuted uses upon use and emerged in the 18th century as early forms of the modern trust.

FOOTNOTES:

(n1)Footnote 253. Several reasons have been given for the origin of "uses" in the Middle Ages. Because of the Crusades, many landowners needed to keep someone in control of their lands. Additionally, friars would often "use" others' lands in order to achieve complete poverty. Avoidance of forfeiture by treason was another reason. Simpson gives four main reasons for the creation of uses: 1) to assist in simple fraud; 2) to avoid feudal dues; 3) to gain power of devise over land; and 4) to facilitate the creation of settlements of land. A.W.B. Simpson, A History of Land Law 174-175 (2d ed. 1986).

(n2)Footnote 254. Statute of Westminster I, 3 Edw., c. 48 (1275).

(n3)Footnote 255. *50 Edw. 3*, c. 6 (1376).

(n4)Footnote 256. 7 Edw., Stat. 2 (1279).

(n5)Footnote 257. *15 Rich. 2*, c. 5(4) (1391).

(n6)Footnote 258. *21 Rich. 2*, c. 3 (1397):

> And he for him and his heirs shall forfeit all the lands, tenements, and possessions, liberties and all other hereditaments, which he hath or *any other hath to his use*, or had the day of the treason done as well in fee tail as in fee simple to the King and his heirs, as well such lands holden of other as of himself forever; *and also such possession as other have to his use*. (Emphasis added.)

(n7)Footnote 259. Kurtz, Sheldon F., Moynihan's Introduction to the Law of Real Property 229 (4th ed. 2005).

(n8)Footnote 260. *Id.*

(n9)Footnote 261. It has been suggested that one purpose of the Statute of Uses was to curtail sharply the role of the Chancellor in giving equitable relief to disappointed or cheated holders of uses. In this function, the Chancellor was perhaps seen as the "ecclesiastical conscience of the State" in carrying on enforcement mechanisms formerly wielded by the Roman church in England in connection with testamentary instructions. To limit the Chancellor's power of enforcement was therefore also to reduce the power of religious institutions within the state. *See* Stephen W. DeVine, *Ecclesiastical Antecedents to Secular Jurisdiction Over the Feoffment to Uses to be Declared in Testamentary Instructions, 30 Am. J. Legal Hist. 295 (1986).*

(n10)Footnote 262. *1 Hen. 7,* c. 1 (1485).

(n11)Footnote 263. *1 Rich. 3,* c. 1 (1484) .

(n12)Footnote 264. *3 Hen. 7,* c. 4 (1487).

(n13)Footnote 265. *4 Hen. 7,* c. 17 (1489).

(n14)Footnote 266. *19 Hen. 7,* c. 15 (1504).

(n15)Footnote 267. *1 Rich. 3* , c. 5 (1484).

(n16)Footnote 268. Kurtz, Sheldon F., Moynihan's Introduction to the Law of Real Property 233-234 (4th ed. 2005).

(n17)Footnote 269. *See* Stephen W. DeVine, *The Franciscan Friars, the Feoffment to Uses, and Canonical Theories of Property Enjoyment Before 1535*, 10 J. Legal Hist. 1 (May 1989); Stephen W. DeVine, *The Concept of Epieikeia in the Chancellor of England's Enforcement of the Feoffment to Uses Before 1535*, 21 U. Br. Colum. L. Rev. 323 (1987).

(n18)Footnote 270. Cornelius J. Moynihan, An Introduction To The Law of Real Property 178-179 (2d ed. 1988). Similar language is found in Sheldon F. Kurtz, Moynihan's Introduction to the Law of Real Property 236-237 (4th ed. 2005). A detailed discussion of the political causes leading to the Statute of Uses is in 4 William Holdsworth, A History of English Law 450-461 (3d ed. 1945). The quoted passage of Maitland is from Frederic William Maitland, Equity, Also The Forms of Action At Common Law 35 (1909), who added:

> It [the Statute of Uses] was very unpopular and was one of the excuses, if not one of the causes, of the great Catholic Rebellion known as the Pilgrimage of Grace. It at once seemed that it would deprive men of that testamentary power, that power of purchasing the repose of their souls, which they had long enjoyed. The king was the one person who had all to gain and nothing to lose by the abolition of uses.

(n19)Footnote 271. Frederic William Maitland, Equity, Also The Forms of Action At Common Law 35 (1909).

(n20)Footnote 272. *See, e.g.,* Jennifer Drobac, *The Perfect Jointure: Its Formulation After the Statute of Uses, 19 Cambrian L. Rev. 26 (1988).*

(n21)Footnote 273. *27 Hen. 8,* c. 16 (1536).

(n22)Footnote 274. Kurtz, Sheldon F., Moynihan's Introduction to the Law of Real Property 243-244 (4th ed. 2005).

(n23)Footnote 275. Sharrington v. Strotton, Plowden 298 (1566).

(n24)Footnote 276. *See* Roe *ex dem.* Wilkinson v. Tranmer, 2 Wils. 75, *95 Eng. Rep. 694 (1757).*

(n25)Footnote 277. *32 Hen. 8,* c. 1 (1540).

(n26)Footnote 278. *See, e.g.,* Archer's Case, 1 Co. Rep. 66b, *76 Eng. Rep. 146 (1597).*

(n27)Footnote 279. Pells v. Brown, Cro. Jac. 590 (1620).

(n28)Footnote 280. The earliest case acknowledging the validity of the second use is the 1676 case of Grubb v. Gwillim, 1 Lord Nottingham's Chancery Cases 347, No. 487 (Selden Society, Vol. 73, 1957).

(n29)Footnote 281. Tenures Abolition Act, 12 Car. 2, c. 24 (1660).

(n30)Footnote 282. A. W. B. Simpson, A History of the Land Law 198-207 (2d Ed. 1986).

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CHAPTER 4 THE GROWTH OF THE ENGLISH COMMON LAW OF REAL PROPERTY

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CHAPTER 5 ENGLISH PROPERTY LAW AFTER THE MIDDLE AGES

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§ 5.01 Introduction.

This chapter resumes the discussion of developments in English property law commenced in Chapter 4. In that chapter, those developments were described through the latter half of the 16th century, after the principal effects of the Statute of Uses (1536) had been made manifest. This chapter describes how, throughout the 16th, 17th, and 18th centuries, landowners, lawyers and legislators struggled with the task of fitting the feudal framework of property law to the many new features of the emerging modern English state. The adaptations were piecemeal and tended to obscure and only partially cover the archaic aspects of land law, rather than reform or remove them. By the time of the really meaningful statutory reforms in the 19th century, property law, like other aspects of English law, had become exceedingly and unnecessarily complex, trying to respond to new elements in English society while perpetuating traditional rules from the ancient and honored past. This chapter will conclude by relating how those 19th and 20th-century statutory reforms effectively transformed property law, eradicating most vestiges of medievalism and creating a modern and model regime of property law for the original common law state. n1

FOOTNOTES:
(n1)Footnote 1. *See generally* David A. Thomas, *Anglo-American Land Law: Diverging Developments from a Shared History, Part I: The Shared History, 34 Real Prop. Prob. & Tr. J 143 (1999)* and David A. Thomas, *Anglo-American Land Law: Diverging Developments form a Shared History, Part II: How Anglo-American Land Law Diverged After American Colonization and Independence, 34 Real Prop. Prob. & Tr. J. 295 (1999).*

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CHAPTER 5 ENGLISH PROPERTY LAW AFTER THE MIDDLE AGES

1-5 Thompson on Real Property, Thomas Editions § 5.02

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§ 5.02 Summary of Early Developments in the Common Law of Property.

Although the elements of property law in England after the Norman Conquest were generally Anglo-Saxon in substance, the extent to which those elements entered into the *common* law was almost entirely a result of Norman activity. The Normans are sometimes credited with introducing feudalism into England, yet feudal characteristics of property were present among the Anglo-Saxons, at least in incipient form. Likewise, the administration of law and custom regarding property was largely left to the local institutions of government, including the local courts.

§ 5.02(a) Early Norman Influence on English Legal Developments.

The Norman impact, by contrast, was imposed at the apex of the feudal structure. William the Conqueror assumed the position as the only allodial landowner in England, the only holder of land who did not hold of any superior lord, and simultaneously he was the ultimate lord of all other landholders in England. Although he carefully followed feudal strictures and observances, essential to his claim of royal legitimacy, during his lifetime he exercised the lord's power over the large majority of English land, often by declaring forfeiture of lands held by those Anglo-Saxon aristocrats who had unsuccessfully opposed him. n2 Near the end of his reign he reinforced his position at the peak of English feudalism by obtaining an oath of fealty from all landholders, whether or not they held directly of him.

The Norman monarchy early and directly asserted itself into local legal machinery through the office of the sheriff. The Anglo-Norman sheriff, more subordinate and responsive to the king than his Anglo-Saxon predecessor had been, acquired expanded judicial functions, both in bringing cases before royal courts and in sometimes even hearing and deciding cases.

In addition to influencing legal activity in the shires and villages through the sheriffs, the Norman monarchs also gradually developed legal functions for the royal court. Initially the royal court was simply a group of servants who occasionally performed ministerial functions of a judicial nature and sometimes witnessed royal writs. This group was augmented from time to time by the king's closest or most powerful tenants-in-chief, who would discuss important issues and, acting collectively, sometimes issue writs and judgments. At the three annual religious festivals all the principal tenants-in-chief came together in the royal council to hear important cases.

Also, at the Easter and Michaelmas gatherings, financial returns from local officers were audited by the king's chief justiciar, who also resolved disputes connected with those accounts. During the reign of William II (1087-1100) other justiciars were appointed to perform similar financial and judicial duties in the shires. These same local justiciars could also try cases in the shires between tenants-in-chief. A century after the conquest, during the reign of Henry II (1154-1189), local justiciars were replaced with itinerant or traveling justices sent out by the monarch. With their broad jurisdiction and sometimes explicit instructions, these justices enlarged the influence of the monarchy in legal matters, and at the same time brought more consistency to the rules of law being applied in various localities.

Complaints about lack of restraint in some traveling justices exercising their broad jurisdiction led to the appointment of five judges to sit as a permanent royal court. At first this royal court was expected to travel with the king, but by the time of Magna Carta in 1215 it was required to remain at Westminster, and was eventually known as the Court of Common Pleas. When some matters were considered too weighty for this court, they were referred to a group of counselors close to the king, which group became a separate court known as the Court of King's Bench. During the reign of Edward I (1239-1307), the Court of King's Bench officially separated from the king's council.

The centralizing of judicial power in the monarchy and the consequent reduction of particularized local legal customs to broader, more uniform principles were key factors in the formation of the common law.

From the beginning the Normans, through a decree from William the Conqueror, promised the English that they could "have and hold the law of King Edward in respect of their lands and all their possessions, with the addition of those decrees I have ordained for the welfare of the English people." n3 After a time of disorder following the Conqueror's death, Henry I again promised to restore to the people "the law of King Edward together with such emendations to it as my father made with the counsel of his barons." n4

But even this foundation of Anglo-Saxon law and William's persistence in his claim to be the legitimate successor of Edward, the last Anglo-Saxon king, could not mask the profound changes the Normans imposed on English landholding practices. Under Edward, no doubt much land, especially bookland, was held free of obligation to the monarch, subject only to the customary duties of military service, road building and fortress repair. At first William asserted ownership only over the lands of those Anglo-Saxons who had actively opposed him, but after suppressing a series of rebellions beginning in 1069, he took huge additional tracts of land and asserted ownership over all English land; eventually he replaced almost all of the principal English landholders with Norman barons owing fealty directly to the monarch.

§ 5.02(b) Introduction of Feudal Tenures.

Those who held land directly of the king almost always owed some sort of military service, so that the rights of landholding they enjoyed could be referred to as military tenure. The characteristics of military tenure endured in Anglo-Norman land law long after this type of military service ceased to serve the monarch's needs. Leading landholders parceled out their obligations of knight service to others through subinfeudation, and basic units of land parcels sufficient to support a mounted warrior were referred to as knight's fees. The resulting hierarchy of landowners, under military and other forms of tenure, placed all landholders other than the king either in the relation of tenant to a lord, or lord to a tenant, or most commonly in both relationships simultaneously, and often in multiple dual relationships. These tenurial relationships imposed on both parties several rights and duties called incidents, and these feudal incidents eventually became the rights and duties attached to the land itself. n5

As the land became the means of securing loyalty, protection and services between landholders, it also continued in its ancient role as the principal source of wealth. Land was the "glue" holding together family dynasties and political and social relationships, so landholding needed to be stabilized, assuring that feudal obligations would be met and that future generations of great families could continue their high status. However, as the main source of prosperity in an active economy, land also needed to be freely transferable if its full value were to be realized, even though such transferability could jeopardize feudal and family resources.

These conflicting impulses were the driving forces behind development of English land law in the Middle Ages. Feudal incidents institutionalized in the early law were constantly challenged by innovative conveyancing practices and new forms of landholding that threatened or even overtly evaded the most onerous feudal obligations. Many, if not most, of the feudal incidents represented sources of income and thus continued as part of the property law long after the society that spawned them had been succeeded by other relationships and values. Even after the most persistent feudal incidents were finally abolished by statute, many of their underlying philosophical values and presumptions carried on into elements of modern property law that remained essentially feudal in origin and purpose.

§ 5.02(c) Incidents or Characteristics of Tenure.

In military tenures, the most important feudal incidents may be summarized as follows:

Homage: A tenant under homage was bound to do nothing that would injure the lord or the land, and likewise the lord was so obligated toward the tenant.

Wardship: In a Norman change from Anglo-Saxon practice, the lord, and not the mother, took custody of a minor tenant's land (a lucrative privilege, in most cases) until the ward came of age. The change was prompted by feudal values: the lord was bound by homage to act fairly; the mother could presumably remarry and shift loyalty from the minor to the new husband.

Marriage: The lord had a right to grant or withhold approval for the remarriage of a widow or the marriage of a daughter. In practice, this approval was available for a price and also became a source of revenue.

Aids: A lord could require financial or other aid of a tenant on important or exigent occasions, typically to ransom the lord, to knight the lord's oldest son, or to celebrate the marriage of the lord's oldest daughter. The incident of aids invited abuse as a source of revenue.

Relief: The lord's permission for the heir of a deceased tenant to continue the tenancy was called relief, was obtained by payment, and was also an important source of revenue. When the amount of relief payments became fixed by custom, inheritability of the tenancy was effectively assured.

From this brief summary it can be seen that feudal incidents of military tenures were economically significant and would not be lightly surrendered by their claimants, even if their original purposes no longer pertained. Conversely, those upon whom the incidents were imposed became all the more eager to escape them when the incidents became mere money charges without contemporary purpose or function.

Other types of "free" tenures developed their own lists of incidents, frequently quite similar to the incidents of military tenure. These other tenures included the serjeanty tenures, usually involving a form of personal service to the royal court, tenure in burgage for some lands in the towns and boroughs, and tenure in free alms or frankalmoign, for some lands given to the church.

All lands not held under these tenures or military tenure were considered to be held in free socage tenure. Freed of the most burdensome incidents of military tenure, free socage tenure eventually became the great residual free tenancy and the tenancy of choice; usually the socage tenants were bound only to pay rent or perform labor services. If a substantial lord held in socage tenure, required labor services would be performed by the lord's own tenants on the land.

The large majority of the medieval English population consisted of "unfree" agricultural peasants, or villeins, who were more or less bound to their land and rendered agricultural labor services in return for their small landholdings. Their obligations were generally fixed by custom, but the precise work they would do from day to day remained uncertain, so

these villein tenures were termed "unfree." n6 No strict correlation existed between unfree tenure and unfree social status. As marks of unfree status many villein tenants were required to pay the merchet, the lord's leave for various activities, and the tallage, a form of tax on persons, in amounts and on occasions as defined variously by local custom, but also many villeins were not under those obligations.

§ 5.02(d) Duration of Tenures Under the System of Estates.

§ 5.02(d)(1) Duration Extended by Inheritability.

These free and unfree tenures, with their respective incidents and privileges, could be held under various arrangements as to duration, known as estates. The development of various estates derived from emerging rules about whether any of the tenures could be freely inherited or alienated. Inheritability of certain tenures was established earliest, based on payment of a fixed sum relief to obtain the lord's permission for a deceased tenant's heir to continue in the tenancy. Once it was recognized for military tenures, inheritability spread to other tenures.

§ 5.02(d)(2) Tension Between Inheritability and Alienability.

Recognition of inheritability necessarily implied rights in the heirs of a landholder, and such rights posed some obstacle to the free alienability of land. While land was not frequently bought and sold during the early Middle Ages, gift transfers to the church were common and often raised questions about residual rights in the donor's heirs. Consequently, consents for such transfers would often be obtained from the donor's prospective heirs, before the gifts were made.

Eventually, the risks to fulfillment of feudal obligations posed by sharing of tenancies among multiple heirs were resolved by the spread of primogeniture, the rule that only the oldest son would inherit the patrimonial tenancy. This in turn obviated the need to obtain consents for inter vivos transfers from other prospective heirs. Eventually, it even became no longer necessary to obtain consent from the oldest son as prospective heir, and through inter vivos alienations any prospective heirs could be completely disinherited by the father.

Another common form of transfer was subinfeudation, by which holders of military tenures transferred portions of their holdings to others in return for commitments to fulfill some part of the transferor's original feudal obligations. Until subinfeudation was prohibited by the Statute Quia Emptores in 1290, it was widely practiced and probably required the lord's consent, readily obtainable upon payment of a customary sum of money.

In some instances, a tenant desired to leave the tenancy altogether, and so would seek the lord's permission to turn the tenancy over to a substitute. This transfer, too, could be achieved by obtaining the lord's permission upon payment of a sum of money. The same Statute Quia Emptores that in 1290 prohibited subinfeudation also gave to all landholders but tenants in chief the right to substitution of tenants without any payment of money to the lord.

One type of transfer that was very inimical to the feudal system was a grant in mortmain (signifying dead hand). These were transfers to the church or to other institutional or corporate donees whose members, because of their religious vows, were considered dead persons before the law and therefore incapable of fulfilling feudal obligations. Because such grants effectively nullified feudal obligations, some landholders would make grants in mortmain and then continue to occupy the land as tenants. So widespread was this abuse that it was specifically prohibited by the Magna Carta in 1215 and by the Statute of Mortmain in 1279. n7 Even then, a grant in mortmain could be made after obtaining a royal license, which often was readily granted upon payment of a sum of money.

§ 5.02(e) Types of Estates.

The property interest of an English landholder was thus partly defined by the type of tenancy under which the land was held, and the type of tenancy was characterized by whatever rights of inheritability and alienability were customary for that tenancy at any given time and place. The other major component of a landholder's property interest was the estate

by which the tenancy was held. In its most simplistic form, the estate could be described as the duration of the tenancy. In time, the duration of the tenancy became the most important determinant of the various property rights associated with the tenancy; as the early distinctions between tenancies or tenures tended to meld and finally disappear, the estates became the chief distinguishing characteristics between different types of landholding.

The various types of estates that developed in medieval England may be summarized as follows:

Fee simple: The term "fee" signified an interest in land, and the term "simple" came to mean fully inheritable, that is, inheritable without restrictions, and therefore potentially endless in duration. A property interest granted to a person "and heirs" came to mean an inheritable estate and thus the estate of maximum duration. In addition to inheritability, after about 1200 the fee simple also came to be alienable without the consent of presumptive heirs; after the Statute Quia Emptores in 1290 it became alienable even without the consent of the lord. The fee simple estate has endured in the common law system of property rights, even though the various property rights to which it pertains have altered over time. As stated in an earlier chapter:

> The fee simple of the thirteenth century was unlike the modern fee simple, mostly because the medieval estate consisted only of a set of feudal dues and responsibilities (all related to and burdening the land, of course), whereas the modern fee is simply full ownership subject to a less onerous set of sovereign prerogatives. n8

Conditional fee and fee tail: Conditional fees were fee interests that were not necessarily fully inheritable. The most common conditions imposed upon these fee interests were that inheritability would arise only upon the birth of a live child, or that only direct descendants could inherit from the landholder, or that a conveyance would be irrevocable only upon the birth of an heir of the third generation after the original grantor. Such conditions were considered important for keeping landholdings in the family, but they were also obstacles to alienability. When customs and court decisions affirming alienability despite such conditions prevailed, the Statute De Donis Conditionalibus in 1285 decreed that fees limited to inheritability by the heirs of the grantee's body, the so-called fee tail, would remain conditional, with a reversion in the grantor, as long as the possibility existed that the line of natural descendants would expire. This meant that the present holder of such an interest could effectively convey only the present possessory interest, and that the interests of prospective heirs were protected from disinheritance by alienation of property. In a later century it became possible rather easily to convert the fee tail into a fee simple.

Life estate: The life estate was not inheritable, and was limited in duration to the life of a specified person; upon the expiration of that life, the possession of the land reverted or went over to the fee tenant. Life estates could either be created through conveyance or arise by operation of law, such as dower and curtesy interests. While a life tenant enjoyed broad rights of possession, a significant restriction was that the "inheritance" could not be damaged by depletion, destruction or change, according to the law of waste.

Term of years: While the fee estates and life estates were considered "free" or "freeholds" because of the judicial protections available to such estates, the term of years struggled for recognition. One who held land as a lessee for a specified period of time, a so-called term of years, was at first regarded as not even having an interest in the land; legal actions concerning the land were brought by or against the lessor, until in 1278 the Statute of Gloucester gave the lessee the right to intervene in such actions. n9 For one or more of several possible reasons, including the fact that tenancies for term were held by either free or unfree persons, the estate of term of years was deemed an "unfree" tenure and was given little legal protection until the trespass action became available about the middle of the 13th century.

§ 5.02(f) Other Forms of Property Interests Within the System of Estates.

Whenever land was held by any estate other than a fee simple, then some other person necessarily held the balance of the total property interest, usually either a reversion or a remainder. When more than one person held an estate

concurrently, such a concurrent estate would be a joint tenancy, tenancy in common, tenancy in coparcenary or tenancy by the entirety. If a person intended to make only a provisional conveyance in order to provide security for a loan, then the lender would hold the land by gage or mortgage. Other creditor's estates or tenancies were created by the Statute of Merchants n10 and the Statute of Staples. n11

§ 5.02(g) Uses.

By the fourteenth century it had become common for a landholder to grant land to a grantee, to be held for the use of a third person. The third person was the intended beneficiary of the possessory rights in the land and was said to hold a "use," a term derived from the Latin "*opus*," signifying a benefit. The purpose of such an arrangement frequently was to avoid feudal incidents; n12 however, the beneficiary of the use, or "*cestui que use*," who enjoyed possession of the land without its attendant feudal obligations, also risked being victimized by an unfaithful grantee who might deal with the land adversely to the rights of the use. The common law courts, wedded to the technicalities of seisin, were sometimes unable to protect such a victim, so early in the 15th century the Court of Chancery began to intervene in cases accusing unfaithful grantees and, under equity rules, imposed fines and imprisonment for misconduct. Even with this assistance from equity, abuses of feudal obligations by grantors to use were still left unchecked. Several statutes attempted to declare the *cestui que use* as the legal owner of the land, and therefore obligated to render the feudal dues, but not until the Statute of Uses n13 became effective in 1536 was such a policy position instituted for all uses.

By declaring that any person who held a use would be deemed the holder of the legal title, the Statute of Uses peremptorily eliminated the worst problems associated with uses. However, in the years and decades after 1536, a series of other significant impacts flowed from the Statute of Uses, impacts which, when fully felt, permanently transformed the law of property. For instance:

(1) Several methods of conveyancing unique to uses became available for conveying legal title, including enfeoffment directly to the grantor and spouse, bargain and sale (which under the Statute of Enrolments was required to be in writing and to be enrolled in a public office), lease and release, and the covenant to stand seised used for effecting family settlements;

(2) new future interests were created when shifting and springing uses were "executed" or transformed into legal executory interests; and

(3) a use on a use was at first held unexecuted under the statute and void in equity, but after the abolition of tenures in 1660 it gained recognition in equity as a trust; even earlier, judges had held "active" uses exempt from execution under the Statute of Uses, and the equitable interests of such unexecuted uses emerged in the 18th century as the early forms of the modern trust. n14

FOOTNOTES:
(n1)Footnote 2. By the time of the Domesday Survey in 1086 only two Anglo-Saxon lords of high rank were left in England.

(n2)Footnote 3. *'The Laws of William the Conqueror,'* 2 English Historical Documents 399-400 (D. C. Douglas ed. 1953).

(n3)Footnote 4. *The 'Coronation Charter' of Henry I (5 August 1100),* 2 English Historical Documents 400-02 (D. C. Douglas ed. 1953).

(n4)Footnote 5. *See generally* Paul Dalton, Conquest, Anarchy And Lordship: Yorkshire, 1066-1154 (1994); John Hudson, Land, Law And Lordship In Anglo-Norman England (1994).

(n5)Footnote 6. The relationship of unfree tenure to uncertainty of daily labor was explained by Pollock and

Maitland as follows:

> If the labour services are "uncertain," the tenure is unfree; and it is a test which condemns as unfree the great bulk of the tenures which obliged men to perform any considerable amount of agricultural labour for their lord, because, however minutely some particulars of those services may be defined, there is generally a spacious room left for the play of the lord's will. Thus the test roughly coincides with another:--labour service is not necessarily unfree, but a service which consists of much labour, of labour to be done all year round, is almost of necessity unfree; for almost of necessity the tenant will be bound to obey, within wide limits, whatever commands the lord or the lord's bailiff may give him.

1 Frederick Pollock & Frederic William Maitland, The History of English Law Before the Time of Edward I 372 (2d ed. 1909).

(n6)Footnote 7. *7 Edw. 1 (1279).*

(n7)Footnote 8. Ch. 4, at § 4.06(a), *supra*.

(n8)Footnote 9. 6 Edw., c. 11 (1278).

(n9)Footnote 10. 13 Edw. (1285).

(n10)Footnote 11. *27 Edw. 3*, c. 9 (1353).

(n11)Footnote 12. The avoidance was achieved because the grantee who was technically bound to perform the feudal obligations did not have seisin or possession of the land and thus theoretically did not have the means to fulfill the obligations.

(n12)Footnote 13. *27 Hen. 8*, c. 10 (1535).

(n13)Footnote 14. *See* David A. Thomas, *Anglo-American Land Law: Diverging Developments from a Shared History, Part I: The Shared History, 34 Real Prop. Prob. & Tr. J. 143 (1999).*

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CHAPTER 5 ENGLISH PROPERTY LAW AFTER THE MIDDLE AGES

1-5 Thompson on Real Property, Thomas Editions § 5.03

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§ 5.03 The Impact of Changing Social Conditions on the Common Law of Property.

§ 5.03(a) The Rise and Decline of the Manorial System.

§ 5.03(a)(1) General Description of English Manors.

Pollock and Maitland ventured a very generalized description of medieval manors in England:

> Now speaking very generally we may say that a man who holds a manor has in the first place a house or homestead which is occupied by himself, his bailiffs or servants. Along with this he holds cultivable land, which is in the fullest sense (so far as feudal theory permits) his own; it is his demesne land. Then also, as part of the same complex of rights, he holds land which is holden of him by tenants, some of whom, it may be, are freeholders, holding in socage or by military service, while the remainder of them, usually the large majority of them, hold in villeinage, by a merely customary tenure. n15

The physical and legal organization of the manor was inextricably bound up with the economic and agricultural practices of the period, especially the common field system:

> We have usually therefore in the manor lands of three kinds, (1) the demesne strictly so called, (2) the land of the lord's freehold tenants, (3) the *villenagium*, the land holden of the lord by villein or customary tenure. Now in the common case all these lands are bound together into a single whole by two economic bonds. In the first place, the demesne lands are cultivated wholly or in part by the labour of the tenants of the other lands, labour which they are bound to supply by reason of their tenure. A little labour in the way of ploughing and reaping is got out of the freehold tenants; much labour of many various kinds is obtained from the tenants in villeinage, so much in many cases that the lord has but small, if any, need to hire labourers. Then in the second place, these various tenements lie intermingled; neither the lord's demesne nor the tenant's tenement can be surrounded by one ring-fence. The lord has his house and homestead; each tenant has his house with more or less curtilage surrounding it; but the arable portions of the demesne and of the various other tenements lie mixed up together in the great open fields. There will be two or three or perhaps more great fields, and each tenament will consist of a number of small strips, of an acre or half-acre apiece, dissipated about in each of these fields. These fields are subjected to

> a common course of agriculture, a two-field system or a three-field system, so that a whole field will lie idle at one time, or be sown with winter seed or, as the case may be, with spring seed. After harvest and until the time for tilling comes, the lord and the tenants turn their beasts to graze over the whole field. n16

§ 5.03(a)(2) Origins of English Manors.

According to Vinogradoff, the manorial system in England originated in two developments that occurred during the period of Anglo-Saxon dominance. One was the practice of voluntary patronage or commendation by which a person would enter into a formal and subservient but protective relationship with a socially and materially superior person. Although the relationships were voluntary, they were stabilized and prolonged, if satisfactory, and eventually expanded into numerous additional material obligations, such as loans, gifts, endowments, rents, and tenancies. Some commendations became involuntary: "a householder commended to a great man had usually to stick to his patron, or to put it another way, patronage had a tendency to strike roots and to develop into a lasting lordship over free men and their land." n17

Concurrent with the highly individualized relationships that grew out of commendation were frequent grants of private judicial jurisdiction, defined by territorial boundaries, made by Anglo-Saxon monarchs to their important allies among the landholding aristocracy:

> Fines had to be imposed and levied, local means provided for the easy discharge of petty causes, and great men were considered the best local agents for enforcing obedience and taking up the settlement of local disputes. Small people were freed, on their side, from costly peregrinations and processes, while great people obtained new sources of income and influence. Many interests worked together in this way for the institution of aristocratic franchises on a territorial basis. n18

As the royal courts arose and defined their function, they determined that questions of villein tenure, as distinct from villein or unfree status, would be outside their powers and more appropriate for consideration by the manorial customary courts.

Jurisdictional subjection eventually led to economic subjection: the freeman who was required to appear and pay fines at a lord's court "came to be considered as a paying dependent, and indeed as a rent-paying tenant of the lord." n19 The powers over territorial districts granted with estates acted in concert with the powers over individual persons created by commendation, shifting society into a system of subjection to local lords that was the essence of manorial economy. The lords themselves grew out of an increasingly important military class which, while not formalized until the Norman period, was quite fully formed before the Conquest:

> [The thane's] estate was tending to become a unit of police and jurisdiction on the basis of governmental claims. In this way the political changes which followed the rise of the military class and the extension of commendation and franchise led in a considerable degree to the formation of a lordship as a superstructure of the township. n20

Even in areas where the lord had not reserved certain lands for personal use and cultivation, the ancient tradition of progressive travel by lord or monarch through tenants' lands, with pauses to receive in kind tribute and rents and therewith to be hosted and feasted, eventually led to domainal holdings, surrounded by dependent holdings. The rise of these holdings required "a number of officers, servants and labourers, who have to take care of the lord's interests, to perform the special work of the demesne, supervise the services and to exact the dues from the peasant population." n21

More widespread, however, was the rise of requirements for services to be rendered for the lord's domain by the peasant population. Initially, the specific nature and extent of the work were not prescribed with precision, but customs formed

to fix these firmly in tradition.

As to factors fostering the Anglo-Saxon origins of the manorial system, Vinogradoff thus concludes:

> On the whole we are, perhaps, warranted to conclude, firstly, that the manorial system arises at the end of the Old English period mainly in consequence of the subjection of a labouring class, and, secondly, that the personal authority of the lord of the manor is gradually gaining the mastery over a rural economy of ancient and independent growth. n22

It seems clear enough that by the time of the Conquest, a large majority of the English population lived and worked under some sort of manorial arrangement, although the individual details varied enormously. After the Conquest the Normans "found little difficulty in expressing the situation in tenurial terms," so that in a short time "the humble peasant class of cultivators had been fitted neatly into the universal tenurial system." n23

The economic subservience of the manorial relationship was not always coincident with personal subservience. And even if a person were unfree in the relationship with the lord of the manner, such a person would still enjoy the rights of a free person with respect to the world outside the manor territory. One who was personally free could still hold the tenure characteristic of a person who was not free, the so-called villein tenure.

As has been pointed out earlier in this chapter, villein tenures were under obligations fixed by custom, but the precise work to be done from day to day remained uncertain until the call actually went out from the reeve or bailiff. n24 The duty to respond with personal service under such circumstances of uncertainty, subordinating even the need to pursue one's own crucial agricultural tasks of the moment, was what characterized a tenure as "unfree," and distinguished it from free tenures, for which often similar work was required, but whose type and extent were firmly fixed and limited by custom.

§ 5.03(a)(3) Decline of English Manors.

Villeinage as a matter of personal status steadily declined in England throughout the Middle Ages and had entirely disappeared by early in the 17th century. During the peasant revolt of 1381, one of whose underlying causes was the Black Death beginning in 1348-1349, many peasants sought out and destroyed manorial records in attempts to eliminate any evidence of servile status. As more and more villeins became personally free, they continued to hold their lands in unfree or villein tenure. This in turn prompted the common law courts finally to take cognizance of some cases dealing with the unfree tenures, but this did not occur until the end of the 15th century. Meanwhile, equity was available in many cases of villein tenures.

Beginning in the 14th century, an even more significant development was underway, the commuting of services in kind for money payments. With the money from such payments the lord of the manor would hire laborers, rather than rely on the work of the villein tenants. The process began with a succession of famines and then was dramatically accelerated after 1348-1349 by the Black Death and a series of subsequent plagues; so many villein tenants died that the survivors could rather easily hire out for wages driven up by manpower shortages, despite statutory attempts to thwart such competition. n25 A century later, most villein tenants were paying a fixed sum of money in place of their tenurial services, and the natural progress of inflation made such monetary obligations ever lighter.

The breakdown in villeinage occasioned by judicial recognition of villein property rights and by gradual but massive personal emancipation of serfs combined with a third factor to destroy the medieval manorial system; this was the series of great enclosure movements in the 16th through the 18th centuries. Enclosures were encouraged and carried out by landowners to reform the old strip-farming system and to enclose and allot portions of common land. By the time most of the enclosures were completed, the village community of the English Middle Ages, and the manorial system to which it was tied, had been completely transformed.

§ 5.03(b) Changes in the Law of Property Coincident with the Decline of the Manorial System.

§ 5.03(b)(1) Copyhold Tenure and Judicial Recognition of Villeins' Property Rights.

Although originally a strong correlation existed between villein status and villein, or unfree, tenure, the determination of what constituted villein tenure derived only from characteristics of the tenure itself, without regard to the personal status of one who held such tenure. While the work owed by one in villein tenure might be very similar to the work owed by a free tenant, if the timing or precise nature of the work was uncertain, left somewhat in the discretion of the lord of the manor, then the tenure would usually be considered unfree. The royal common law courts took the position that legal issues within such tenures should be left to the jurisdiction of the manorial lords whose interests such tenures most closely served. Even if a free person held land under unfree tenure, the common law courts considered their jurisdiction determined by the nature of the tenure rather than by the status of the person.

This dichotomy between personal status and tenure among villeins had two consequences for legal developments. One was that the natural tendency of villeins to seek and obtain free status carried on without the need to transform the property interests they already held. This must have left the emancipation processes less restrained than they might otherwise have been, and the same royal courts that declined jurisdiction of villein tenures adopted legal rules that encouraged villein emancipation.

The other consequence of royal court rejection of jurisdiction over villein tenures was the way in which such tenures did finally achieve recognition in the law. The villein tenures did indeed have a certain characteristic of uncertainty about them, but their aspects that could be specified came to be firmly defined by local custom, considered to be binding on both lord and laborer. The manorial court, in its role as a court of custom, took cognizance of such local customs to confer a measure of protection on villeins who had no status in the royal courts.

The customs in some manors were reduced to writing, both because court rolls were kept for some manorial courts and because some manors were systematically surveyed as to tenurial obligations and the survey results were recorded:

> In practice the villein tenant could be as well off as the tenant who held by free tenure. His services were fixed and recorded, and so were the various incidents of his tenure. Furthermore, manorial courts often modelled their procedure upon that of the royal courts, so that actions imitating novel disseisin and the other real actions were allowed in them. Some manors even went so far as to copy statutory law, the most notable instance of this being the recognition of a custom allowing entails in some manors, in imitation of the Statute De Donis. n26

Perhaps the most common reason for making a written record of villeinage rights and obligations was to facilitate transfers of those tenures. Because the lord of the manor was theoretically all-powerful with respect to villein tenures, any transfer from one villein to another first required a grant or surrender of the tenure from the transferor villein to the lord (upon payment of the customary fee or fine, of course); then the lord re-granted the tenure to the transferee villein and admitted the transferee to the land. A written record of the transaction would be entered in the manorial court rolls. Thus the court roll eventually became a record of villein "title," and a copy of the court roll was prepared to help resolve disputes over villein tenures without having to look up the information in the court rolls. The copy itself became authoritative evidence of title, so that it could be said a villein held "by copy of the court roll." Not all villein tenants were copyholders, but enough of them were that there developed an assumption that one who held by copy held in unfree tenure.

Late in the 15th century the common law courts began to extend some legal protection to copyholders. Up to this time, the common law courts only recognized the lords' rights in villein tenures, and the lord was considered as holding the freehold and seisin in those tenures. A villein tenant wishing to resolve some question over the tenancy that did not involve the lord could request that the lord pursue an action in one of the royal common law courts. An action between

the tenant and the lord was relegated to the manorial court, which was obviously subject to some influence by the manorial lord. For at least those villeins who were copyholders, however, common law protection in disputes against the lords began to emerge. In one 1467 case a judge stated that a lord had no right to eject a copyholder who had defaulted in his services (even though the lord had a common law right to eject a tenant at will). n27 In another case from 1481 a judge declared that a lord who breached the manorial custom by ejecting a copyhold tenant could be sued in trespass and subjected to a judgment for damages. n28 These views were included in a 1530 edition of Littleton's famous work on tenures.

If the copyholder were ejected by a third person, however, the common law courts still afforded no relief. The copyholder could either pursue the matter in the manorial court or ask the lord to take up the action in a law court. Late in the 16th century, first the Court of King's Bench n29 and then the Court of Common Pleas n30 permitted a copyholder to sue in ejectment for recovery of lands.

Equity protection for copyholders was slowly developing during this same period, and the steady stream of petitions to the Chancellor during the 15th century n31 may eventually have influenced the law courts to recognize some copyholder rights. By the first half of the 16th century it was established that the copyholder could have the Chancellor's assistance against various forms of misconduct by the lord of the manor:

> ... and therefore if the lord will put out his copyholder that payeth his customs and services, or will not admit him to whose use a surrender is made, or will not hold his court for the benefit of his copyholder, or will exact fines arbitrary when they be customary and certain, the copyholder shall have a subpoena to restrain or compel him as the case shall require. n32

The action in ejectment to recover land was permitted in the Exchequer court in 1596. n33

When the common law courts did extend jurisdiction to copyholders, it was under the theory that they were simply enforcing the custom of the manor, which, of course, varied widely from place to place and was not part of the *common* law. Copyholders, therefore, came into court with interests defined by local manorial custom rather than a set of standard legal rules. Thus a common law of copyholds never did develop; however, because copyholders' entry into common law courts was by means of an action in ejectment, copyholds obtained protection similar to that afforded freeholds and leaseholds, so some common rules did emerge. Also, courts tended to form uniform procedures for determining and applying the varied manorial customs:

> Thus the main principles of the modern law as to copyholds were constructed by the judges out of manorial customs which they censored, interpreted, and, when necessary, supplemented, by the doctrines of the common law ... [T]hey harmonized the rules of manorial custom and the principles of the common law, so in the construction of that part of the law which regulated the relations of lord and tenant, they aimed at harmonizing and giving due recognition both to the custom of the manor and to the will of the lord. n34

The old theoretical notion that copyholders had no estate but were merely tenants at will was, as a practical matter, readily refuted by establishing the custom of the manor. However, the concept of tenancy at will was not completely surrendered, and the lord and copyholder were recognized as having concurrent rights in the property. The lord's rights in copyhold tenures included a limited right to exploit mines, minerals, and timber, the right to prohibit the tenant's waste, the right to prohibit leases longer than one year, and the right to collect old feudal exactions, such as heriot, rents and fines. n35

Copyholders could hold essentially the same estates and interests as could freeholders, including entailed estates. Common recoveries to bar entails were also used with copyholds until 1833, when the Fines and Recoveries Act n36 went into effect.

Despite the facts that copyholds remained mostly outside the common law, and that copyholders were drawn from the humblest class of the English landholding population, Sir Edward Coke declared as early as 1584 that the "great part of the land within the realm is in grant by copy." n37 Copyhold tenure was born and nurtured within the manorial system and proved flexible in adapting to new circumstances when that system became obsolete. It was a tenure that was held by large numbers of English landowners until formally abolished and converted into free and common socage on January 1, 1926, by the 1922 Law of Property Act. n38

§ 5.03(b)(2) The Black Death and Emancipation of the Villeins.

The impact of the Black Death on the manorial system and unfree tenures has been succinctly summarized by Plucknett:

> The nation was already weakened by a series of famines when the arrival of the Black Death (1348-1349) from the East wrought a revolution in social and economic conditions. The terrible mortality from this plague completely disorganized the manorial system, which had hitherto depended upon a plentiful supply of labour born and bred within the manor. The plague accelerated and intensified forces which were already at work, and the result was a very serious depletion of the labour supply. Consequently lords began to compete among themselves for such free labour as was available. This tempted servile inhabitants of manors to leave their holdings and become hired labourers. n39

It would be easy to overestimate the effect of the Black Death on villeins' status, because that effect was so dramatic. Less conspicuous but equally effective were the general economic conditions that impelled manorial lords to commute their villeins' service dues into monetary obligations. n40

Perhaps more revealing than the generalizations for the English nation as a whole are the anecdotal and local studies of conditions at these times. The tiny village of Landbeach, north of Cambridge, is likely typical of thousands of English villages in its experience, but is more fortunate in the richness of documentation available to modern researchers. In the following lengthy excerpt from The Domesday Inheritance, a history of Landbeach, it is possible to grasp the profound stresses of the 14th century, with famines, floods and pestilence, the looting and lawlessness that followed, and the new opportunities for personal and economic freedom:

> The great flooding and disease of the farm animals were followed by what was probably the worst natural catastrophe to strike these islands in recorded history, the Pestilence as all the contemporary documents called it ... In 1349 it swept through Landbeach and adjoining villages ...
>
> After the shock of the pestilence, we can glimpse a little of the aftermath. In 1350 an investigation was ordered to list the names of all those who had appropriated and carried away window shutters, doors and other timber from divers houses currently in the lord's hand. For a moment there is a glimpse of a half-ghost village, with looting where the plague had passed on. The court rolls tell more. Walls and fences had become ruinous from failure to make essential repairs. Animals were straying in the hay and growing corn. Bands of villeins failed to turn up for their harvest works. The lord did not find it possible to replace all his dead villein landholders with men prepared to accept the old conditions. Five tenements were let for life at a small cash rent with an obligation to provide one man for one day in hay harvest for lifting the crop. This was practically giving the land for nothing compared with the heavy labour services under the pre-plague terms. Too much had been lost through failure to cope with getting the harvest home to miss even one man's work for a single day. In any case, he was taking land that no one seemed to want.
>
> Of nine cattle caught wandering and impounded as strays, not one was claimed.
>
> Leases changed, and the main clauses of many were the obligation to inhabit and maintain the

> tenement. Desperate times called for desperate remedies. Peasants helped themselves to the lord's corn and turf for sale. At one court in 1356, nine peasants were presented for stealing the lord's corn and a further 32 for trespass in the lord's crops. By 1357 things were getting even more out of hand. John Emme went out into the fen by night, stealing the turves of several of his neighbours to sell in Cambridge. A woman and her daughter raided a villein's house for timber. Stealing from the lord had been one thing, although before the Pestilence it was not frequent, and stealing from fellow villagers very rare. Now the villeins seem to have learnt the habit of looting, and are prepared to steal from their fellows quite flagrantly ...
>
> In 1365 the most dramatic change in the manor of Chamberlains [the most prominent landholding in Landbeach] began. The demesne arable, all two hundred and six acres of it, was let to sixteen villeins in varying amounts for thirteen years at 18d. an acre ...
>
> Some of the old disabilities of villeinage were beginning to soften. In practice it was becoming harder to prevent a villein from leaving the manor. After the Second Pestilence flight becomes more frequent as the chances of escape seem to improve. In the old days, the need of a licence from the lord to marry a daughter had enabled the lord to charge what the traffic would bear; in the last quarter of the fourteenth century it would no longer bear very much. n41

One can surmise that villein emancipation and the breakdown of manorial tenures would have eventually occurred even without the devastation of the Black Death. But there must be little doubt that the massive mortality among the land's laborers hastened and made irreversible the movement to modern conditions. In terms of property law, the decline of villein tenures infused with new importance the free tenures and leaseholds and contributed to the eventual demise and abolition of tenures altogether. n42

§ 5.03(b)(3) The Consequences of Enclosures.

As has been previously described, the common field or open field strip system characterized English agriculture from Anglo-Saxon times almost to the modern era. It was the system of agricultural organization out of which the common law of property and the manorial system arose. Despite the persistence of this system, discontent with it was of long standing:

> This system of agriculture came to appear more and more anomalous with the lapse of time. It was impossible to do anything without the consent of a large number of persons who were not likely to agree; and any attempts to carry through improvements were met by the decided opposition of what was in those days the most ignorant and conservative class in the community. We are not surprised, therefore, to hear that it was denounced by all writers on agriculture from the sixteenth to the nineteenth century. n43

The obvious but profoundly difficult solution was to implement what was referred to as the process of enclosure. Enclosure, or inclosure, actually consisted of two quite distinct activities, even the most benign of which could mean a traumatic adjustment for the inhabitants of a village or manor. This least offensive aspect of enclosure consisted simply of combining the individual field strips into contiguous plots of land which were then reassigned to individual ownership:

> Enclosure was the replacement of two or three large open fields round a village, whose strips were owned individually but whose crops and stock were controlled by the community of owners, according to ancient rights and practices, by smaller, individually owned fields whose cropping and stocking could be controlled by the owner. Such a change affected the whole structure of rural society. n44

The other type of enclosure was far more odious, disruptive and unfair to the small farmer. These enclosures took over the areas of commons or waste, extinguishing the ancient and essential peasant rights in such lands and their resources;

they also converted lands long used for tillage into huge pasture areas, evicting the farmers and razing or forcing abandonment of their farmhouses and buildings. Even though enclosures generally meant important improvements in agricultural techniques and yields, much of this enclosure activity was illegal and utterly devastating to smaller landholders. n45

Some enclosures took place in the 16th and 17th centuries, but most of the land remained unenclosed during that period; open field agriculture was still common enough then that it was transplanted to British colonies in New England. n46

Beginning early in the Tudor period, enclosures become the subject of frequent Parliamentary enactment, with varying motives. One motive was to legitimize some enclosures in the face of unrest and disruption among the villein class. Another motive was to afford some protection to such small landholders against overly rapacious lords. Yet another was to give expression to official preferences for particular types of land use after enclosure became an accomplished fact. For instance, apparently the Tudor governments believed that enclosures to enhance productivity of tilled land was commendable: labor demand was not diminished and land yields increased. Enclosures in order to turn tilled land into pastures were condemned: families were evicted, buildings fell into ruin, and large tracts of land were left without any persons to provide a modicum of defense and security.

The first general act resulting from enclosures in 1489 operated to penalize large aggregations of pasture land; lessees with farms of twenty acres or more were required to maintain buildings serving tillage activities on that land or else pay half their profits to the Crown until the buildings were repaired. n47 A similar act was passed a quarter-century later. n48 Two decades later an act prohibited and penalized keeping more than 2,000 sheep; n49 and still later a requirement issued that as much land should remain in tillage as was tilled at the beginning of Henry VIII's reign. n50

The litany of complaints against these early enclosures was aptly expressed in the preamble to the act of 1533-1534:

> Forasmuch as divers and sundry persons of the King's subjects of this realm, to whom God of his goodness hath disposed great plenty and abundance of moveable substance, now of late within few years have daily studied, practised, and invented ways and means how they might accumulate and gather together into few hands, as well great multitude of farms as great plenty of cattle, and in especial sheep, putting such lands as they can get to pasture, and not to tillage, (2) whereby they have not only pulled down churches and towns, and inhanced the old rates of the rents of the possessions of this realm, or else brought it to such excessive fines that no poor man is able to meddle with it, but also have raised and enhanced the prices of all manner of corn, cattle, wool, pigs, geese, hens, chickens, eggs, and such other, almost double above the prices which have been accustomed; (3) by reason whereof a marvellous multitude and number of the people of this realm be not able to provide meat, drink and clothes necessary for themselves, their wives and children, but be so discouraged with misery and poverty, they fall daily to theft, robbery and other inconveniences, or pitifully die for hunger and cold; (4) and as it is thought by the King's most humble and loving subjects, that one of the greatest occasions that moveth and provoketh those greedy and covetous people so to accumulate and keep in their hands such great portions and parts of the grounds and lands of this realm from the occupying of the poor husbandmen, and so to use in pasture, and not in tillage, is only the great profit that cometh of sheep; ... (7) which things, thus used, be principally to the high displeasure of Almighty God, to the decay of the hospitality of this realm, to the diminishing of the King's people, and to the let of the cloth-making, whereby many poor people have been accustomed to be set on work; and in conclusion, if remedy be not found, it may turn to the utter destruction and desolation of this realm, which God defend... n51

The complexity of these acts, with their various exceptions and difficulties of enforcement, led in 1624 to the repeal of all of them, except the 1533-1534 act quoted above. None of this early Tudor legislation, however, directly prohibited enclosures generally, but was intended mostly to prevent an imbalance from developing between land in tillage and land in pasturage. By the time enclosure acts were formally repealed in 1624, much enclosure had occurred, especially for

tillage. Not only did enclosures other than for pasturage proceed essentially unhindered, n52 but even some statutory assistance was given. n53

On the one hand, during the 16th and 17th centuries, many defenseless folk were dispossessed and enclosure riots did occur. Some lords applied improper pressure on their tenants and without compassion exercised rights to evict or to not renew leaseholds. On the other hand, many enclosures were consensually and equitably carried out. The Council and the Star Chamber gave special attention to redressing complaints from the dispossessed. But the government and the more ambitious, enterprising farmers could hardly ignore the economic reality that enclosures were immensely beneficial. With new wealth from commercial enterprises, and new land entering the market from forfeiture of church holdings, it was only natural that individual, self-contained farms let to individual, enterprising yeoman farmers would be by far the most sensible method of landholding and conducting agriculture.

By the end of the 17th century, the outcry against enclosures had somewhat diminished and no comprehensive legislation was attempted for a century thereafter. Some acts tried to make consensual enclosures easier to achieve, n54 while others attempted to improve administration of the remaining open field operations. The failure of the act attempting to improve administration of open field farms probably led to the popularity of private legislation as the primary method of advancing enclosures during the 18th century.

The private acts were the source of much mischief in the progress of enclosures:

> No doubt these Acts did make for the greater efficiency of all branches of the agricultural industry. But there is also no doubt that they were passed with too little regard for the rights of small owners and commoners; and that the elimination of their rights had grave social and economic effects, which ... "left behind it a permanent legacy of bitterness." n55

The problem was not so much that the poor were directly dispossessed; usually the private legislation provided for division of the enclosed areas but also that each landholder bear a proportionate part of the heavy expenses incurred in obtaining the legislation and fencing the land. Such burdens were impossible for numerous small landholders and left them indebted and landless. Parliament remained unaware of and insensitive to these injustices, and was in any event favorably disposed toward the larger landholders who made up a large share of its membership, and so failed to cure these defects with comprehensive legislation.

The heavy dominance of private enclosure acts at the end of this era may be seen in the numbers of private enclosure acts passed during successive monarchies of the 17th and 18th centuries:

Reign	**Number of private enclosure acts**
James I	1 n56
William and Mar	1 n57

y	
Ann e	2
Geor ge I	16
Geor ge II	276
Geor ge III	336 0 n58

Statistics, of course, tell nothing of the individual lives disrupted or enriched by enclosures and their consequences. Turning again to the village of Landbeach, near Cambridge, as described with its rich historical documentation in The Domesday Inheritance, n59 readers in modern times are able to glimpse a moment or two of the medieval milieu in which enclosures operated. First, before enclosure became an issue, villein tenures slowly turned into copyhold:

> Gradually the customary tenements or bondage holdings of the villeins turned into copyhold, customary tenure proved by copy of the court roll, with labour services replaced by cash rents, usually fixed by custom, and all taint of personal unfreedom gone. Where custom fixed the cash rent the inflations of the sixteenth century would reduce its value until it remained a mere nuisance and the peasants felt themselves full owners. Heriot [a requirement that upon the tenant's death the decedent's best beast or some equivalent thing be given over to the lord] often remained, but as a slighter nuisance. n60

Already the lord of the principal manor in Landbeach had turned the entire manor into a cash enterprise. As early as 1352, just three years after the first attack of the Pestilence, no demesne was retained by this manor, but all such land had been rented to others for cash rents. All labor services had been converted or commuted to cash:

> It followed hard on the heels of the great Pestilence, a very early example of a lord responding to that disaster by giving up cultivation, with all the problems of a desperate labour shortage, and attempting to live from rents. n61

The manor then came into the ownership of Corpus Christi College in Cambridge, whose records for 1467-68 show that rent-paying peasants could take odd jobs with the lord in Cambridge and thus earn cash with which to pay their rents.

A century later, during the reign of Elizabeth I, the tenants of this manor had to unite in resisting the aggressions of Richard Kirby, lord of another manor in Landbeach, who seemed consumed by insatiable greed, and who found enclosures and associated legal procedures as convenient means to serve his covetousness. When Kirby came into his lordship in 1521, rapid inflation was occurring in the English economy, and much blame for this was laid on enclosures that were converting tilled land into pasture land, especially for sheep. The Corpus Christi manor already had ample grasslands available and remained quite stable with respect to enclosures. But Kirby exemplified almost every abuse criticized in the anti-enclosure legislation of Henry VIII's reign, including having let his copyholder's houses fall into ruin, so that almost none were left. With empty houses and untilled arable lands, Kirby designed to turn those lands into pasture, especially suitable for lambing and winter care, because they were near the manor, rather than some distance out in the fens. He eventually enclosed 22 acres of arable land.

Once this conversion was accomplished, he encroached on and took over some of the field ways n62 and sought to further consolidate some contiguous holdings by exchanging some tenements with another owner. He then sought to take over the commons, but not by direct enclosure. Instead:

> He tried to use his power as lord to impound strays, in a move to drive the peasants from the commons. For such animals as were straying on land belonging to *his* manor, and lawfully impounded, could be regained by their owners only on payment of a sum, called a 'replevin', which the lord could fix, although it was supposed to be at a reasonable amount... He needled the peasants by impounding their oxen straight from the ploughing when they were manifestly not straying, and so held up urgent work. n63

He brought vexatious but groundless lawsuits, used and wore out animals falsely impounded, and hired thugs to physically ambush and attack men and women on their way to the commons with their cattle. One peasant was wounded with a sword while Kirby's men were illegally enclosing a part of the commons. When the peasants finally collectively resisted, Kirby brought a petition in the Star Chamber, whose decision is not known, but after which the conflicts and violence in Landbeach apparently ceased.

Contemporaries of Kirby were also actively acquiring grazing lands in the nearby village of Cottenham. A man who eventually became the sheriff of Cambridgeshire and Huntingdonshire had, in 1488, let a house in Cottenham fall into ruin in order to claim the commons rights pertaining to the house. In the same area, another prominent person in 1560 claimed as his own 5,000 acres of fenland, including two large enclosures, but two men had broken into the enclosures and destroyed the fences. This enclosure activity was governed somewhat by private agreement:

> There had been agreements in the 1560s and 1580s giving the lord some right to enclose, but the final agreement came in 1596. This described in detail the enclosures in Longhill, Marehill and Tilling which the lord could keep for himself, yielding up in turn all his common rights. It listed all the tenants with common rights, detailing these. Most important of all in the long run, it was agreed that no more regulations of the fields should be made by the manor court. The commoners' meetings, with their ordermakers, fen reeves and other officers, took over power. Two of the orderbooks survive, recording variations made from time to time on the Articles, the statutes of a village parliament, one might say. On occasions even the voting for and against any change is recorded.
>
> Some of the lists of ordermakers suggest that the ordermakers were chosen as freeholders and copyholders, manor by manor
>
> The Articles of Agreement of 1596 were of the greatest practical value to the peasants and farmers of Cottenham right up to enclosure in 1846, and many copies survive, both printed and in manuscript. n64

In Landbeach itself, the commoners did not begin to act in concert until much later, when in 1735 they reached an agreement on control of the open field agriculture and management of the fens. Later in that century a concerted propaganda effort by the national Board of Agriculture tried to promote enclosure and discourage continuation of open fields, in order to improve agricultural productivity. Reports on the status of agriculture and productivity were provided to the Board on a county-by-county basis. In 1794 the report on Landbeach proclaimed:

> The enclosures in severalty contain about 150 acre and are rented at twenty shillings per acre. The commons contain about one thousand acres, all of which, except about sixty acres, are high and dry... The common husbandry of two crops and a fallow is here the usual practice. An enclosure is greatly desired, under the encouragement of which very considerable improvements in the stock and husbandry of the parish would immediately take place... n65

A contemporaneous description by one Robert Masters, an enclosure enthusiast and the author of a description of the nearby village of Waterbeach, adopts a similar tone and was also given to one of the Board Commissioners:

> Landbeach is of a good natural soil: yet although cultivated by judicious farmers, its produce is unequal to that of some neighbouring parishes. The quantity of arable land is less than 1,000 acres, whilst that of the enclosed pastures does not greatly exceed 100. There is a fine common nearly equal in quantity to the arable fields, which enclosed and well cultivated would be superior to them in quality, and not less profitable than in its present state... An enclosure of a very considerable part at the least of these commons would be highly beneficial, and will, I should hope, be soon adopted by those who are wise enough to discover their own true interest therein. n66

Because the expense of buying out commons rights was prohibitive, the private enclosure act covering Landbeach was not enacted until 1807, and the Award was not signed until 1813. In time the allocations were made, the old common was taken from the villagers, n67 the old boundaries obliterated, and the new borders established:

> Slowly, especially by steam ploughing between the two World Wars, the patched corduroy pattern of ridge and furrow in the furlongs was smoothed out. Straight fences, ditches, paths and roads replaced the organic pattern of the old field ways: access to the countryside began to be lost to all but the farmers...
>
> The complicated pattern of the ploughman's ridge and furrow began to disappear in time: the lawyers' tangle of strips in divers hands was disentangled. n68

The mass of private enclosure acts waned in the 19th century; at the same time a series of public acts n69 promoted enclosures until 1876:

> In 1835 an Act was passed to facilitate the exchange of lands in the common fields; and in 1836 it was provided that such lands should be enclosed if two-thirds in the number and value of the persons having an interest in these lands consented ... in 1845 an elaborate Act was passed under which, and its amending Acts, most of the remaining common fields were enclosed, and rights of common which prevented the profitable use of the land were got rid of.
>
> These Inclosure Acts did not eliminate the small holders, but they did materially diminish their number. n70

In 1876 a concern over diminishing open spaces prompted passage of the Commons Act of 1876, n71 which imposed the present strict limits on enclosure. By the time the progress of enclosure was thus halted, the manorial structure of the villages had been almost completely altered. Today common rights remain significant only in those mountainous areas of the country used for grazing flocks of sheep. n72 n73

FOOTNOTES:

(n1)Footnote 15. 1 Frederick Pollock & Frederic William Maitland, The History of English Law Before the Time of Edward I 363 (2d ed. 1909).

(n2)Footnote 16. *Id.* at 364. The authors cite one illustrative instance in which a holding of only five acres was scattered about in fourteen noncontiguous strips. *See generally* Henry Stanley Bennett, Life on The English Manor (1974).

(n3)Footnote 17. Paul Vinogradoff, The Growth of the Manor 213 (3d. ed. 1920).

(n4)Footnote 18. *Id.* at 214. *See* John S. Beckerman, *Procedural Innovation and Institutional Change in Medieval*

English Manorial Courts, 10 L. & Hist. Rev. 197 (1992); L. Bonfield and L. R. Poos, *The Development of the Deathbed Transfer in Medieval English Manor Courts, 47 Cambridge L.J. 403 (1988).*

(n5)Footnote 19. Paul Vinogradoff, The Growth of the Manor 215 (3d. ed. 1920).

(n6)Footnote 20. *Id.* at 221. *See* John S. Beckerman, *Procedural Innovation and Institutional Change in Medieval English Manorial Courts*, 10 L. & Hist. Rev. 197 (1992).

(n7)Footnote 21. Paul Vinogradoff, The Growth of the Manor 227 (3d. ed. 1920).

(n8)Footnote 22. Paul Vinogradoff, The Growth of the Manor 235 (3d. ed. 1920).

(n9)Footnote 23. A. W. B. Simpson, A History of the Land Law 156-57 (2d ed. 1986).

(n10)Footnote 24. *See* § 5.02(c), *supra*.

(n11)Footnote 25. This process is more fully described in the following section, § 5.03(b).

(n12)Footnote 26. A. W. B. Simpson, A History of the Land Law 159-60 (2d ed. 1986).

(n13)Footnote 27. *Y.B. 7 Edw. 4*, Michaelmas Term, f. 19, pl. 16 (1467).

(n14)Footnote 28. *Y.B. 21 Edw. 4*, Michaelmas Term, f. 80, pl. 27 (1481).

(n15)Footnote 29. *See, e.g.*, Melwich v. Luter, 4 Co. Rep. 26a, *76 Eng. Rep. 935 (1588); Rumney v. Eves, 1 Leon. 100, 74 Eng. Rep. 93 (1588).*

(n16)Footnote 30. *See, e.g.*, Petty v. Evans, 2 Brownl. 40, *123 Eng. Rep. 652 (1610); Ever v. Aston, Moo. K. B. 271, 72 Eng. Rep. 575 (1599); Stephens v. Eliot, Cro. Eliz. 484, 78 Eng. Rep. 735 (1596).*

(n17)Footnote 31. 2 The Reports of Sir John Spelman 187-192 (J. H. Baker ed., Selden Society, vol. 94, 1977); Select Cases in Chancery xxxix (William Paley Baildon ed., Selden Society, vol. 10, 1896) ("1465-1467; case 146. The plaintiff, a villein, had agreed with his lord, the defendant, for manumission, the deed of which was to be kept by A until the money was paid. This having been done, A has of malice given the deed back to the defendant, who refuses to deliver it to the plaintiff.").

(n18)Footnote 32. Cary 3 (1557).

(n19)Footnote 33. *Goodwin v. Longhurst, Cro. Eliz. 535, 78 Eng. Rep. 782 (1596).*

(n20)Footnote 34. 7 William Holdsworth, A History of English Law 304 (2d ed. 1937).

(n21)Footnote 35. A.W.B. Simpson, A History of the Land Law 168-69 (2d ed. 1986).

(n22)Footnote 36. 3 & 4 Will. 4, c. 74 (1833).

(n23)Footnote 37. Heydon's Case, 3 Co. Rep. 8b, *76 Eng. Rep. 640 (1584).*

(n24)Footnote 38. Certain incidents of copyhold tenure were expressly preserved, unless the parties agreed to their abolition:

(a) Any commonable rights to which the tenant is entitled.
(b) Any right of the lord or the tenant to mines, minerals, gravel, pits or quarries, whether in or under the land.

(c) Any rights of the lord in respect of fairs, markets or sporting.
(d) Any liability for the construction, maintenance, cleansing or repair of any dykes, ditches, canals, sea or river walls, bridges, levels, ways, etc.

E. H. Burn, Cheshire and Burn's Modern Law of Real Property 84-85 (13 ed. 1982).

(n25)Footnote 39. Theodore F. T. Plucknett, A Concise History of the Common Law 32 (5th ed. 1956).

(n26)Footnote 40. *See* H. S. Bennett, Life on the English Manor 280 (1937) (*see* especially the sources cited in n.1).

(n27)Footnote 41. Jack Ravensdale, The Domesday Inheritance 56-60 (1986).

(n28)Footnote 42. *See* L. Bonfield & L. R. Poos, *The Development of the Deathbed Transfer in Medieval English Manor Courts, 47 Cambridge L.J. 403 (1988). See also* Lewis C. Vollmar, Jr., M.D., *The Effects of Epidemics on the Development of English Law from the Black Death through the Industrial Revolution, 15 J. Legal Med. 385 (1994);* Michael Bennett, *The Impact of the Black Death on English Legal History*, 11 Austl. J. L. & Soc'y 191 (1995); David J. Seipp, *The Concept of Property in the Early Common Law*, 12 L. & Hist. Rev. 29 (1994). *See also* Phillip R. Schofield, *Tenurial Developments and the Availability of Customary Land in a Later Medieval Community*, 49 Econ. Hist. Rev. 250267 (May 1996). *See* Senn, M.A, *English life and law in the time of the Black Death*, 38 Real Property, Probate and Trust Journal 3, 507-88 (Fall 2003).

(n29)Footnote 43. 2 William Holdsworth, A History of English Law 60 (4th ed. 1936).

(n30)Footnote 44. J. H. Plumb, England in the Eighteenth Century 18 (1963).

(n31)Footnote 45. 4 William Holdsworth, A History of English Law 364 (3d ed. 1945).

> Consequently the old cultivating community was broken up, many of the smaller owners were evicted from the land, and rights of common either in the open fields or in the waste disappeared ... if by agreement, purchase, or eviction a whole manor was enclosed, existing rights of common disappeared with disappearance of those entitled to exercise them. That these enclosures raised the value of the property is clear. *Id.*

(n32)Footnote 46. 2 W. Cunningham, The Growth of English Industry and Commerce 548 (4th ed. 1907) (*see* especially n.1, p. 548, noting examples of New England open field survivals described *in* 1 William B. Weeden, Economic and Social History of New England, 1620-1789 58-62 (1890)).

(n33)Footnote 47. *4 Hen. 8*, c. 19 (1489).

(n34)Footnote 48. *6 Hen. 8*, c. 5 (1514-1515).

(n35)Footnote 49. *25 Hen. 8.*, c. 13 (1533-1534).

(n36)Footnote 50. 5 & *6 Edw. 6*, c. 5 (1551-1552).

(n37)Footnote 51. *25 Hen. 8*, c. 13 (preamble) (1533-1534).

(n38)Footnote 52. "No statute made it unlawful for a man to buy out his neighbours, or for all the inhabitants to agree to inclose their common fields." 4 William Holdsworth, A History of English Law 369 (3d ed. 1945).

(n39)Footnote 53. In *35 Hen. 8*, c. 17, § 6 (1543), was enacted a procedure by which justices of the peace could assist in enclosing and dividing wooded land, in which several persons had rights, when those persons could not reach agreement privately.

(n40)Footnote 54. For example, in *29 Geo. 2* , c. 36 (1754), lords and tenants of common land were given a consensual procedure to enable them to plant timber on the land; in *13 Geo. 3* , c. 81 (1773), three-fourths of the occupants of a common field system were empowered to make rules for the entire holding (an act that proved to be ineffective probably because it was still very difficult to achieve even a three-fourths majority consent on many issues).

(n41)Footnote 55. 11 William Holdsworth, A History of English Law 455 (1938).

(n42)Footnote 56. 4 Jam., c. 11 (1606-1607).

(n43)Footnote 57. 3 & 4 W. & M., c. 31 (1693).

(n44)Footnote 58. 11 William Holdsworth, A History of English Law 624-625 (1938).

(n45)Footnote 59. Jack Ravensdale, The Domesday Inheritance 65-88 (1986).

(n46)Footnote 60. Jack Ravensdale, The Domesday Inheritance at 65.

(n47)Footnote 61. Jack Ravensdale, The Domesday Inheritance 65 (1986).

(n48)Footnote 62. Field ways were peasant paths through commons and waste, out to the common fields.

(n49)Footnote 63. Jack Ravensdale, The Domesday Inheritance 72 (1986).

(n50)Footnote 64. Jack Ravensdale, The Domesday Inheritance 80-81 (1986).

(n51)Footnote 65. Jack Ravensdale, The Domesday Inheritance 153-54 (1986).

(n52)Footnote 66. Jack Ravensdale, The Domesday Inheritance 154 (1986)..

(n53)Footnote 67. Jack Ravensdale, The Domesday Inheritance 64 (1986).

(n54)Footnote 68. Jack Ravensdale, The Domesday Inheritance 155 (1986).

(n55)Footnote 69. The first nineteenth-century public act facilitating enclosure was enacted in 1801, *41 Geo. 3,* c. 109 (1801), and an act in 1845, 8 & 9 Vict., c. 118 (1845), established a Board of Inclosure Commissioners to regulate enclosure proposals presented to them; this act effectively eliminated the need for any further private enclosure acts.

(n56)Footnote 70. 13 William Holdsworth, A History of English Law 353 (1952).

(n57)Footnote 71. 39 & 40 Vict., c. 56 (1876).

(n58)Footnote 72. A. W. B. Simpson, A History of the Land Law 261-62 (2d ed. 1986).

(n59)Footnote 73. *See* Robert C. Allen, Enclosure And The Yeomen, part I (1992); Charles J. Reid, Jr., *The Seventeenth-Century Revolution in the English Land Law, 43 Clev. St. L. Rev. 243 -259 (1995).* Lisa Thurau-Gray, Symposium: *Children and Education: Tensions within the Parent-Child-State Triad: The Trend towards Turning Public Education into A Gated Community, 11 Cornell J.L. & Pub. Pol'y 665* (Summer, 2002) (author compares trends in public education to the Enclosure Acts in England).

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CHAPTER 5 ENGLISH PROPERTY LAW AFTER THE MIDDLE AGES

1-5 Thompson on Real Property, Thomas Editions § 5.04

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§ 5.04 Major Developments in English Property Law Before 1926.

§ 5.04(a) Abolition of Tenures.

The establishment of tenures during the Middle Ages n74 and their reinforcement by the Statute of Uses in 1536 n75 have been described in the preceding chapter. For the most part, tenures had long ceased to be a useful means of providing the services for which they were originally intended. As with the scutage payments substituted for knight service, many other services were commuted into money payments; when the amounts became fixed by custom, they were driven into insignificance by continuing inflation. Homage and fealty also lapsed into unimportant formalities. Only a few generations after the Conquest, tenures were desirable principally for the income they generated through incidents of marriage, wardship, aids, reliefs and fines. These impositions, however, remained burdensome irritants, the more so because in time they lost all relevance. The society which spawned such incidents was one in which less powerful persons relied heavily on the warrior class for protection and civil stability. The feudal tenurial incidents could be justified as a form of individualized taxation for provisions of civil services and order. After the feudal order was replaced by a strong central government in England, the tenurial incidents became merely means of obtaining revenue, either for private landholders or for the government itself, as the greatest of feudal lords.

Quite naturally, landholders and their lawyers exhibited great ingenuity in evading the exactions of tenurial incidents. Perhaps the most conspicuous of these devices to escape tenurial impositions was the use. Through a conveyance to use, one person could give land to another, but specify that the land was to be only nominally held by the grantee, while it was actually used by or for the benefit of a third person, the so-called "*cestui que use*."

Early conveyances to uses were intended to strengthen tenurial relationships: a knight embarking on a crusade might convey land to another who could be responsible for feudal obligations, but would actually hold the land for the benefit of the knight's family; through a use, the benefit of landholding could be conferred on a religious order not authorized to actually hold land; a villein, not ordinarily authorized to convey land, could accomplish the purpose by conveying to the lord "for the use of" the intended grantee; and when a guardianship was transferred, the new guardian would hold "to the use of" the ward.

However, the potential for uses as means to avoid feudal obligations was not overlooked:

> The purpose of such conveyances frequently was to enable the landowners to deal with their lands in a manner not countenanced by the common law or to evade the liabilities incident to legal ownership, such as the rule of destructibility. Thus suppose O, the owner of the Blackacre in fee simple absolute, wished to dispose of Blackacre by will at a time when disposition by will was not recognized by the law courts, i.e., prior to 1540. To accomplish this goal, O would enfeoff B in fee simple absolute to hold to O's use during O's lifetime and after his death to transfer the land according to O's will. Upon O's death, B, the owner of Blackacre in fee simple absolute, would then carry out the terms of O's will and transfer Blackacre to O's intended beneficiaries. Likewise, a dying land owner could by a conveyance to several feoffees to use (who would take as joint tenants) deprive the lord of the fee of the important incidents of wardship, marriage or relief. n76

The reaction of the government and major landholders to such developments was to protect and enforce the incidents, often by means of statute. Beginning late in the 15th century, a series of statutes initiated piecemeal reforms by declaring the cestui que use as holder of the legal title (and therefore the one responsible for performing feudal tenurial obligations) in certain, specific situations. However, comprehensive reform did not occur until the Statute of Uses in 1536, and that was prompted by the interests of the English government, as the greatest of feudal lords and the entity with the most to gain by preserving tenurial incidents. By the simple tactic of declaring holders of uses to be the holders of the legal title, the Statute of Uses was able to solve a major problem in the feudal system and give new life to the feudal tenures, which were actually otherwise no longer relevant in English society:

> The causes which led to its enactment are to be found in the King's need of money. The Statute was primarily designed to restore to the Crown the feudal revenues which were being lost because of the conveyance of land to uses. In the sixteenth century the incidents of tenure, such as wardship, marriage, relief, primer seisin and escheat, were burdensome exactions on the tenant and, correspondingly, a profitable source of revenue for the lord of the fee. Because the king "alone was always lord and never tenant" he lost heavily when landowners by conveyances to joint feoffees to uses rid themselves of the incidents of tenure by retaining only the beneficial ownership. Henry VIII by means of the Statute of Uses sought to put an end to this drainage of the royal revenues. n77

Thus the Statute of Uses at bottom was a device to resuscitate tenurial incidents and give new life to a system that was already terminally ill. In the end, the Statute of Uses did little to revive the failing tenurial system, but it did lead to an enormous elaboration of property law in England. For instance, methods previously used to convey uses, not bound by common law conveyancing restrictions, became available to convey legal estates. These new conveyancing methods included a feoffment to uses, resulting use, bargain and sale, lease and release, and covenant to stand seised. Also, several uses incorporating future interests outside the common law rules, such as shifting and springing uses, were "executed" into legal interests and, as executory interests, became "new" future interests with new legal rules. The ability to transfer property interests by devise was expanded as a result of the Statute of Uses. When the courts began to treat certain uses as outside of and unexecuted by the Statute of Uses, new rules and new applications for such uses began to develop, including the entire law of trusts.

At first, the Statute of Uses achieved its avowed purpose of preserving and recovering tenurial revenues for the Crown and other major landholders. In 1540, four years after the Statute of Uses, the Court of Wards and Liveries was established to oversee the collection of such tenurial charges. n78 The court was effective, and landowners chafed under the renewed exactions. The monarch even became dependent upon such revenues, especially in the struggle between Crown and Parliament in the 17th century, when that income enabled the king for a time to function without Parliament and its taxing power. When the Long Parliament was finally summoned by King Charles I, both the Commons and the Lords passed resolutions in 1645 calling for abolition of feudal dues, mostly as a means of weakening the monarch. The resolutions were confirmed by an act of Parliament in 1656, which act, after the Restoration, was itself confirmed by the Tenures Abolition Act of 1660. In connection with this legislation, the Crown received some compensatory revenue for the loss of feudal income: n79

> The effect of the Act of 1660, which is extraordinarily ill-drawn, was to abolish knight-service and grand serjeanty, and convert these tenures into free and common socage, that is into socage tenure where no services were due and no special customs applied. The statute expressly abolishes all the burdensome incidents of military tenure which mattered in practice, except forfeiture and escheat. The honorary incidents of grand serjeanty were preserved, frankalmoin was not affected at all, and existing socage tenures were largely unaffected. The Act did not in any way affect copyhold tenure. An incidental and important effect of this statute was that land held before in knight-service, of which only two-thirds had previously been devisable, could now all be devised by will, apart only from entailed property, it being impossible to bar an entail by will...
>
> In effect, therefore, from 1645 onwards the only free tenure of any importance which remained was socage, and the preservation of the feudal revenues had ceased to be of any importance. The economic purpose of the Statute of Uses had disappeared. n80

Tenures have had a fundamental impact on English land law in the sense that they stand in the place of outright ownership. Because of tenure, any occupier of land other than the monarch always "held" of someone else; absolute ownership rested only and completely with the sovereign. And it could perhaps be said that tenures, especially military tenures, were functionally important with respect to shaping property law for only the first one or two centuries of their 600-year existence; thereafter their effects were financial, and their chief influence on the law issued from the conflicts between those who wished to preserve tenures and those who sought to avoid them. By the time the major tenures were formally abolished in 1660, property law had moved on and remained essentially unaffected; the abolition merely removed a fiscal irritant.

Nevertheless, the doctrine of tenure still infuses the land law, in that even today one only holds the land, but does not own it outright. In their modern form tenures have undergone profound changes: English landholders now, for the most part, hold directly of the Crown, with all intermediate lordships having disappeared; feudal burdens attached to tenures have also been eliminated; all tenures except leasehold tenure have been converted into the single tenure of free and common socage:

> [T]he first thing to teach a student of land law is the doctrine of tenure, the second is that it has no importance. Unfortunately, it cannot be ignored completely because the ghost of tenure has left its imprint on the language of modern law. The language of possession is still used. Today, the student will find sometimes the language of possession, sometimes that of ownership. He will find both the expressions "freehold owner" and "freehold tenant." He will read both that a freeholder owns the land and that he holds it as tenant. Again a life tenant may be described as a limited owner. Theoretically, the language of possession is more correct; in practice the language of ownership is more apt. n81

§ 5.04(b) Leaseholds.

The concept of tenure is still of significance in leaseholds. Because early feudal leaseholds were distinguished from freehold tenures, they were technically outside the laws governing real property and were treated as chattels, or personal property. Today leaseholds in English law are still technically chattels, although there is, of course, a tenurial relationship between the landlord and tenant.

It was pointed out in the preceding chapter that leaseholds, that is, tenancies for a term, may have been treated differently under the law because they performed a different function in medieval English society. If the land's main value was as a source of livelihood and sustenance for the population, then more or less permanent settlement and cultivation of the land were to be encouraged by legal doctrines. Thus the rules regarding estates in land and the tenures by which landholding was governed were all oriented to the interests of the long-term occupant; they held the so-called "free tenements." The finite term for years, or leasehold, on the other hand, was often simply a device for raising

revenue, land turned over to a money-lender until the debt was repaid:

> The essence of the free tenement is that it should be the permanent and normal economic basis of the family. Herein lies the importance of giving it full and speedy protection, and for this purpose the petty assizes were invented. Contrasted with the free tenements the estate of the termor [the leasehold] is merely a speculative arrangement, calculated to evade the law against usury, made between a grasping money-lender on the one hand, and on the other a man whose difficulties temporarily compel him to part with his patrimony... There was, therefore, no reason whatever for protecting the termor by those assizes whose object was to fortify the family and its means of subsistence against wrongdoers of another type. n82

So the position of the leasehold tenant was indeed precarious under early English land law. A tenant disturbed in occupancy by someone other than the lessor could only bring an action for breach of covenant against the lessor. Not until a trespass action was made available in the mid-13th century could a lessee bring an action directly against such a third party.

By defaulting in an action against the land brought by a colluding third party, a lessor could extinguish the lessee's right of occupancy; not until 1278 did the Statute of Gloucester give the lessee the right to intervene in such an action. n83 By being excluded from the "free tenements," leaseholds were held not entitled to the protection of the petty assizes, a form of action for recovery and protection of the tenancy.

This deficiency was overcome when the trespass action was made available to lessees, including even a specialized writ. With this action, a lessee could achieve direct protection against any person who disturbed occupancy, with a remedy either in damages, or much later, at the end of the 15th century, for actual recovery of possession. n84

The need for greater protection arose from changes in the way leaseholds were used. Especially after the Black Death in the mid-14th century, leases for farming purposes, so-called husbandry leases, became common as lords sought new arrangements to bring workers back onto their manorial lands. Indeed, rather than being used as security for a disingenuous moneylending scheme, the lease was entered into "regularly by a freeman whose capital is insufficient to purchase much land, although he is active and enterprising enough to work the land of other owners." n85

This process at a very local level is well-illustrated from the post-Pestilence accounts for the medieval village of Landbeach, north of Cambridge:

> The lord did not find it possible to replace all his dead villein landholders with men prepared to accept the old conditions. Five tenements were let for life at a small cash rent with an obligation to provide one man for one day in hay harvest for lifting the crop. This was practically giving the land for nothing compared with the heavy labour services under pre-plague terms...
>
> Leases changed, and the main clauses of many were the obligation to inhabit and maintain the tenement. n86
>
> In 1365 the most dramatic change in the manor of Chamberlains [one of the two manors in the village] began. The demesne arable, all two hundred and six acres of it, was let to sixteen villeins in varying amounts for thirteen years at 18d. an acre... n87
>
> We have less information about the manor of Brays [the other manor in Landbeach], but by 1401 at least they had a farmer (lessee)... n88

After it became possible for the lessee through the trespass action to obtain actual recovery of the leasehold, additional legal protections arose. In the early 16th century, the old feudal rule permitting a lord as guardian to oust the lessee

during the minority of the lessor was changed. n89 Then a statute in 1529 prohibited the practice by which a lessor could recover the leasehold by defaulting in a collusive action by a third party against the leasehold. n90 In 1540 lessees were given some statutory protection against ousters by landlords' successors. n91

Improving security for the lessee's interest did not resolve the questions concerning what kind of interest the leasehold was in legal terms. Through the confusion of conflicting court decisions, it appeared that a leasehold was real property for purposes of tenures, but was not for purposes of estates. Because a lease was not real property in terms of estates, and chattels could not be the subjects of estates, the lessee could not create remainders in or entail the leasehold. Eventually, this restriction was held applicable only to *inter vivos* transfers, and remainders and entails were permitted by devise. n92 But even though estates in leaseholds could be devised, they could not be created or limited through intestate inheritance. This was because chattels passed to executors or administrators, rather than to heirs. And because of the dual nature of a leasehold, part real property and part personal property, it came to be called a chattel real.

The length of lease terms was determined to be not limited, but it became common for some agricultural leases to be limited to 21 years and some building leases to 99 years. In the 15th century, a leasehold without a fixed duration left most lessees as tenants at will. At first, periodic tenancies were also treated as tenancies at will, n93 but after two centuries of judicial conflict, the courts finally agreed that a periodic lease created a tenancy for the initial term, followed by successive tenancies for each term during which the lease was continued. n94 Thereafter, tenancies whose nature was unclear were usually construed as periodic tenancies rather than as tenancies at will. n95

The law of leaseholds also intersected with the law of covenants. By the seventeenth century, lessors were including covenant obligations of right to demise, of quiet enjoyment, of freedom from encumbrances, and of further assurances. The lessee covenanted to pay rent. By analogy from earlier authority on restrictive covenants, n96 both the benefits and burdens of these covenants ran with the lease, and by statute the grantees of reversions were empowered to enforce lease covenants. n97

With these changes, leaseholds came to cover a large portion of English lands:

> The landed gentry retained freehold interests, commonly under settlement, and exploited the land at one remove, and left a class of tenant farmers in actual occupation of the soil... The landlord and tenant divided between them the burden of providing capital for agriculture, and a progressive landlord could do a great deal to encourage, and indeed insist upon, good husbandry... In the course of time the legislature has found it necessary to intervene to protect tenants against the abuses which rapacious landlords could readily perpetrate under the common law... With the exception of the statute of 1540, of restricted scope, these interventions begin in the nineteenth century with the series of statutes dealing with settled land. n98

After the massive English property reform legislation of 1925, leases became estates and remained the only tenures of any significance. According to these acts, an estate is an interest in land of defined duration, and the only two types of *legal* estates now recognized are the fee simple absolute in possession and the term of years absolute. The term of years absolute is the right to possess land for a period of fixed and certain duration, even for less than a year, and can include periodic tenancies. It need not be a presently possessory interest, and can be created to commence at some time in the future less than 21 years from the time the lease was created.

Because of flexibility in duration, leases have achieved a unique utility in English land law. For instance, leases may be used to provide a form of security in certain conveyances. Typically, a mortgagor will give a long-term lease of 3,000 years to the mortgagee, with the term of years to cease when the loan is repaid. A building lease may also be exceptionally long:

> Under a building lease, for example, the land is let for a long term at a ground rent, the tenant puts

> up a building at his own expense, and at the end of the term this becomes the landlord's property; such a lease is therefore a valuable long-term investment for the landlord. Leases of anything up to 999 years, or even more, are sometimes granted for similar purposes; here the reversion is too remote to have any value, but the advantage to the landlord is that he can control the use of the land by means of covenants in the lease, and a greater variety of covenants are enforceable under a lease than under an outright conveyance of the fee simple. Such very long term leases may therefore be useful when a landlord is developing an estate and wishes to keep control over its appearance and character. n99

In addition to its function as a security device in a mortgage, the lease may also serve to secure trust payments to minor beneficiaries. Under such a trust settlement, the trustee would grant a long-term lease to the settlor, but neither the settlor nor the mortgagee lessee typically would take possession of the land.

Piecemeal legislation since the 19th century has brought much of leasehold law under statute. Reforms introduced by the Agricultural Holdings (England) Act of 1875, the Agricultural Holdings Act of 1923, the Agriculture Act of 1947, the Agricultural Holdings Act of 1948, and the Agriculture Act of 1958 have made agricultural tenancies more secure, requiring a year's notice to terminate in every instance, even after expiration of the regular term. Even those terminations operate in only narrowly specified circumstances. Otherwise, agricultural tenancies continue indefinitely until terminated according to the provisions of the applicable statute. More recent changes in these laws were made by the Agriculture Act of 1976 and the Agricultural Holdings Act of 1977.

Business tenants were made more secure in their tenancies after the Landlord and Tenant Act of 1927. Tenants in occupancy for more than five years who could prove that business goodwill had become attached to the premises had a right to renew the lease. These rights were expanded and strengthened by the Landlord and Tenant Act of 1954.

Tenants of furnished dwellings first obtained statutory protection in 1920 and have since received the attention of numerous items of legislation. n100 Tenant rights, both as to security of tenure and as to rent limits, in both private and public housing, are protected under current legislation. n101

§ 5.04(c) Changes in Future Interests.

§ 5.04(c)(1) Reversions and Remainders.

§ 5.04(c)(1)(i) Reversions.

The early common law often interchanged the terminology of reversions and escheats, but after the Statute De Donis Conditionalibus in 1285, it became more clear that the interest of a fee simple holder who died without heirs would "escheat" to the lord; after the death of a life tenant, however, the land could "revert" to the grantor as holder of the fee.

§ 5.04(c)(1)(ii) Remainders.

If the land did not revert upon the death of the life tenant, it might "remain" to some person other than the grantor who held the fee. Not all the features of these remainders were fully defined during this period. There is some evidence, for instance, that even in the late twelfth century remainders were created following conditional fees, a conveyance that would be impermissible under modern law even if conditional fees were still recognized. n102

§ 5.04(c)(1)(iii) Contingent Remainders.

A contingent remainder was hesitatingly upheld in a case as early as 1304, n103 but, conscious of the feudal order, judges were troubled over who would do homage. n104 Common law contingent remainders were fragile interests, subject to destruction upon forfeiture for tortious alienation (an attempt by a life tenant to convey a fee simple was considered a tortious alienation). The rule of destructibility had enough vitality to extend even to contingent remainders

created by use or devise. Cases beginning as early as 1336 suggest that contingent remainders could be upheld if the remainders subsequently vested, n105 and that the death of a living person was the only contingency recognized at law. But in a 1550 case n106 it was stated as settled law that a remainder could be based on any condition that was not illegal or repugnant. n107 Contingent remainders were also then destructible and were destroyed if they could not take effect upon termination of the precedent estate, such as a contingent remainder to a posthumous son. n108 As noted before, an attempt by a life tenant to convey a fee (the so-called tortious alienation), as well as disseisin of the life tenant, also resulted in destruction of a contingent remainder. n109

Despite destructibility, contingent remainders had an alluring role to play in achieving disposition of family lands, so-called family settlements, in a way that would inhibit alienability by individual family members. In the 17th century, conveyancers who wished to create a life tenancy with contingent remainder as part of a family settlement began to insert a remainder in trust for the life of the life tenant, in case the life estate terminated prematurely, threatening the contingent remainder with destructibility. The vested nature of the remainder in trust was upheld in 1740. n110

§ 5.04(c)(1)(iv) The Rule in *Shelley's Case*.

An important early gloss on the normal rules for creating and conveying remainders came to be known as the Rule in *Shelley's Case*, although that case in 1581 was only the culmination of more than two centuries of judicial development. The foundation of the rule, though obscure, was apparently deeply anchored in feudal formalism. Simply stated, this formalism required that if the heir of a certain landholder succeed by inheritance to the seisin of the land, then the usual feudal payments would be due to the lord. No such feudal dues would be owed by a successor who entered by way of purchase, that is, by means other than inheritance. Thus early attempts were made to convey a life estate to one with remainder in the life tenant's heirs, so that those heirs would come into their interest by means of the conveyance rather than by normal inheritance from the life tenant. Accordingly, as early as 1350 n111 and 1366 n112 courts were agreeing that a remainder in fee to a life tenant's heirs should be treated as a fee in the life tenant; therefore, the life tenant's heirs would take, if at all, through inheritance and be liable for the usual feudal dues.

The rule has been labeled by the decision in *Shelley's Case* probably because it was given relatively succinct expression in that case, even though by that time much of the feudal justification for the rule had dissipated:

> [I]t is a rule in law, when the ancestor by any gift or conveyance takes an estate of freehold, and in the same gift or conveyance an estate is limited either mediately or immediately to his heirs in fee or in tail; that always in such cases, "the heirs" are words of limitation of the estate, and not words of purchase. n113

Thus a remainder to the life tenant's heirs was simply a remainder in fee, so indicated by the use of the word "heirs," and this remainder in fee was considered to belong to the life tenant and not to the heirs. Through operation of the principle of merger, the life tenant who obtained the remainder in fee pertaining to the land held in life tenancy, would have the fee simple absolute, if there was no intervening estate.

> The Rule had such vitality that it survived in full force for many centuries after the conditions which gave it birth were only dimly discernible in history. It became "part and parcel of the law of England." When feudal conditions could no longer justify its existence, its continuance was assured by the inertia of precedent and the fact that it tended to increase the alienability of land. It was extended in scope so as to include equitable interests in land. But the Rule did not have a peaceful existence. A mass of literature grew up on the subject and a legion of cases, containing many fine distinctions, filled the reports. n114

The Rule in *Shelley's Case* was not abolished in England until enactment of the Law of Property Act in 1925. n115

§ 5.04(c)(1)(v) The Doctrine of Worthier Title.

A rule of law less well known but born of the same impulse is the doctrine of worthier title. According to the doctrine of worthier title, a landholder could not convey or devise a remainder to his or her own heirs. The remainder would be considered void, leaving the fee in the grantor. The heirs who therefore could not obtain the fee by conveyance or devise were presumed to ultimately receive it by inheritance and, just as under the Rule in *Shelley's Case*, would also be liable for the payment of feudal dues. It was therefore "worthier" (and, it might be added, "worth" more to the feudal lord) for the heir to receive the ancestor's land by inheritance (as distinguished from devise) than by gift or purchase. Despite this feudal explanation for the expressions of this rule, the label of worthier title is American in origin. n116

The first documentary manifestation of this rule was in the 13th-century Statute of Fraudulent Feoffments, n117 which voided a landholder's conveyance to his heir apparent. The earliest cases applying the rule did not appear in the reports until the 16th century. n118

As with the Rule in *Shelley's Case*, the doctrine of worthier title was applied long after its feudal justifications had disappeared. As applied to devises the rule had to be frequently taken into account on behalf of certain creditors, who could reach assets held by a decedent's heirs, but not by the decedent's devisees. The rule was applied as a rule of law rather than as a discretionary rule of construction. While the rule lives on in American jurisprudence, it was statutorily abolished in England in 1833. n119

§ 5.04(c)(2) Reversionary Interests.

§ 5.04(c)(2)(i) Possibilities of Reverter.

Even more obscure are the origins of the reversionary interests associated with defeasible fees. One of these types of defeasible fees, the determinable fee, was the subject of considerable controversy among legal scholars a century ago. The controversy concerned whether the Statute Quia Emptores in 1290 operated to prohibit the creation of determinable fee simple estates. Implicit in this controversy was the notion that interests like determinable fees had been possible before 1290, n120 and that interests like possibilities of reverter that were derived from such limited fees and had likewise existed before 1290. The better view seems to be that the Statute Quia Emptores operated only on fee simple absolute interests, and that the determinable fees, while not especially common, were acceptable interests both before and after 1290. Some evidence for the existence and acceptability of determinable fees (and, by inference, for possibilities of reverter) emerges from case reports during the reign of Elizabeth I and from the writings of Littleton and Coke. Except for the interest one might have in completing the historical record, the question has been mooted by modern developments:

> But whatever one may think about historical arguments as to the existence of fees determinable, the short answer to the whole question is that there are no decisions denying their existence, and that one recent English case [1944] and numerous American cases have recognized them. It is too late now, in view of these numerous decisions, to say that there is no such thing as a determinable fee. n121

§ 5.04(c)(2)(ii) Rights of Entry or Powers of Termination.

Another defeasible fee simple interest known in modern terminology as a fee simple subject to a condition subsequent also was connected to a reversionary interest, known either as a right of entry or a power of termination. Its origins, too, are obscure, but from early cases it seems certain that this type of estate and its accompanying future interest were being created and recognized perhaps as early as the 12th century. n122 In 1220 the grantor of such a fee on condition obtained a royal writ to recover the land following occurrence of the condition. n123 However, in the less certain terminology of the time, the future interest following a conditional fee was often called a remainder.

The rules regarding rights of entry for breach of condition were settled by the time of Littleton in the 15th century, and by the time of the Tudors the right of entry was held to arise implicitly in the creation of the condition, and did not need to be expressly included in the conveyance. n124 Also, "under the early common law, an actual entry was generally

necessary to effect a forfeiture of a condition subsequent annexed to a freehold estate," n125 probably so the grantor could once again obtain the seisin. In modern times no formal entry is necessary to recover the estate, and as actual entry is infrequent, some prefer the more technically correct term of "power of termination" as the proper name for this future interest.

§ 5.04(c)(3) Executory Interests.

§ 5.04(c)(3)(i) Springing Interests.

In the preceding chapter it was described how the Statute of Uses gave rise to new forms of future interests. n126 Certain uses were given as future interests in forms that were prohibited for legal interests under the common law. When the Statute of Uses in 1536 converted most use interests into legal interests, the future interest uses also became legal interests, but not subject to the traditional common law restrictions. For instance, a so-called springing use was created when one enfeoffed land to a feoffee to the use of another, such use to not commence until some time in the future. When "executed" by the Statute of Uses this springing use became a legal springing executory interest: the feoffor held the estate in fee simple (the grant to the feoffee having been invalidated by the Statute of Uses), but the fee simple estate was subject to the executory interest. Other springing executory interests resulted from conveyances of successive uses with gaps of time in between. Also, a conveyance to one in use with remainder in use to the heirs of a person then living would create yet another variety of springing executory interest, because a gap of time might be required to determine heirship.

§ 5.04(c)(3)(ii) Shifting Interests.

A *shifting* use resulted from a conveyance to one, in use, with the use to go over to another upon the occurrence of a specified event, a conveyancing sequence also forbidden for legal interests under the common law. After execution by the Statute of Uses, such shifting uses became legal shifting executory interests.

After passage of the Statute of Wills in 1540, it was also possible to devise springing and shifting interests, and these devises became known as executory devises.

§ 5.04(c)(4) Fees Tail.

With respect to all of these future interests, once their formative period was past, little change occurred in their inherent characteristics until modern times. However, several significant changes did occur in the availability and utility of these interests and their underlying estates. The career of the fee tail presents perhaps the most interesting example.

When in the 12th century it became common for landholders to give land to a grantee and the heirs of his or her body, the grantor was commonly considered to have a reversion if the grantee had no issue. By the mid-13th century it was common for holders of such conditional fee interests to transfer them to others free of the conditions. This practice was prohibited by the Statute De Donis Conditionalibus in 1285, which required that the land be inherited by the grantee's issue, if there be any, or if not, that it revert to the grantor. With these new characteristics, the interest called the fee tail arose out of the statute.

While the statute on its face applied only to the first generation of issue, leaving such issue to alienate freely after they acquired the estate, some court decisions shortly after Quia Emptores insisted that the restrictions as to issue be observed until the fourth generation of issue. Even that extension of the statutory restriction was not stable, and by early in the 15th century the restriction of the fee tail to possession by descendant issue, with reversion to the grantor if such descendants should fail, was held to be of indefinite duration. Parliament resisted petitions to ameliorate these restrictions, because of the fee tail's other advantages: after the tenant's lifetime the fee tail was not subject to attainder for felony or forfeiture for treason, nor could it be reached to satisfy debts of former tenants in tail. Not until Littleton's treatise at the end of the 15th century were some of these rules stabilized.

Meanwhile, persons who promoted such rules as aids to maintaining family dynastic landholdings were opposed by those who sought to realize the market value of their landholdings and therefore to lift or lighten the restrictions. This latter interest was most often aided by the courts. In a 1472 case, n127 the court acknowledged that the rights of issue could be barred by a collusive procedure known as a common recovery.

> The collusive common recovery worked in the following way. Suppose Smith to be tenant in tail in possession of Blackacre, which he wishes to sell for a fee simple to Jones. A collusive real action is brought by Jones against Smith on a feigned title, Jones having already paid or agreed to pay Smith for the land. In this action Jones claims a fee simple in the land. Smith appears in court and vouches one Brown to warranty. Brown does not dispute his obligation to warrant Smith's title, and the action then proceeds between Jones and Brown. Instead of putting up a defence Brown asks for 'leave to imparl,' that is, he asks the court for an adjournment whilst he talks the matter over with Jones in the hope of reaching a settlement, and he and Jones leave court to have their imparlance. Brown promptly disappears. This is a contempt of court, and when Jones arrives back before the Justices and tells them that Brown has absconded, they at once give judgment in favour of Jones. The judgment is that Jones recovers the land, and that Brown is to convey to Smith lands of equal value to those recovered. Unfortunately Brown, who has been carefully selected for this reason (and paid for his trouble), has no land, so that the judgment can never [be] satisfied. If it ever was satisfied, then the land conveyed would be held on the same terms as that lost to Jones; it would be subject to the entail and to any interest in remainder or reversion after Smith's estate... A blind eye is turned to the fact that the whole procedure is an obvious fraud, and neither the issue nor the remaindermen are allowed to do anything about it.
>
> Around the common recovery hangs a great mystery. In the first place we do not really know when it was evolved, and in the second place there is no full understanding of the theoretical justification which allowed its entrance into the law. n128

The common recovery was probably practiced before *Taltarum's Case* in 1472, but probably was not fully developed until sometime afterward; indeed it seems that the judge in *Taltarum's Case* allowed the recovery only on the assumption that the vouchee really would provide lands of equal value. When Littleton was writing his treatise on tenures at about that same time, he did not consider the fee tail a barrable estate. Later judges did not rest on that optimistic assumption, and by the middle of the 16th century it is clear that any expectation that the vouchee could satisfy a judgment had been abandoned: the court crier became the standard vouchee. n129 Still later in that century it was decided that the common recovery would bar not only the issue but also any reversioners or remaindermen. n130

Much mystery surrounds the courts' motives for acceding to such devices:

> It is commonly said that the real reason was the desire of the judges to permit the breaking of entails, and encourage free alienation. This all suggests a judicial enthusiasm for free trade in land which is quite anachronistic, though judges might well have favoured a policy of allowing heads of families to reorganise their land holdings as family needs changed...
>
> It is much more likely that judges were not so much influenced by a desire to establish a free market in land, or a commitment to the landowner's freedom to alienate the family patrimony, as by the difficulty of finding any technical flaws in a very ingenious device which was principally employed to resettle family lands. n131

During the reign of Henry VIII the notion that entails could be barred had been accepted and the common recovery procedure, sometimes involving more than one vouchee, apparently came to be considered too cumbersome; an already established procedure known as the fine, or final accord, was also allowed to bar entails. According to the fine procedure, participating parties would engage in litigation over rights in land, pause to ostensibly reach a compromise,

and then have the court accept and record the terms of the compromise, which were actually the terms of the intended original conveyance. In its collusive aspects it was similar to the common recovery and no doubt seemed an appropriate alternative procedure for barring entails. The availability of the fine for this purpose was suggested by a statute of 1490, n132 judicially accepted in 1527, n133 and the decision was reinforced by a statute in 1536. n134 The fine procedure was used to convert the entailed estate into a fee simple until both fines and recoveries were abolished by the Fines and Recoveries Act of 1833. n135 Thereafter the entailed estate could be "barred" or "docked" by means of a deed recorded with the Chancery Court.

§ 5.04(d) Family Settlements or Succession.

Estates in tail were a major factor in English family settlements. Land, as the principal form of wealth, was often "settled" on family members, especially younger siblings perhaps starting out with their own new family units. When trusts began to be fashionable for family settlements, the grantor of the trust was and still is frequently referred to as the settlor. From a modern perspective, the family settlement was simply a means of conferring on the children of a family their respective inheritances. Probably the main concern during the Middle Ages was to provide each new generation with appropriate lands, yet to keep the lands "within the family," so that large, dynastic landholdings could be maintained. Thus a primary purpose in family settlements was to restrict grantees' abilities to alienate their lands outside the family, and no form of landholding more closely fit this purpose than the fee tail.

On the other hand, a younger family member in possession of settled lands frequently needed cash, or the more flexible wealth represented by land, so that the restrictions on alienation imposed through family settlements were obstructive and generally undesirable. Those who held entailed lands were the persons most likely to seek out some way to bar the entail, either through common recovery or fine or some other device.

In response, settlors as early as the 14th century began using combinations of a life estate with entailed fee in remainder to the life tenant's oldest son and successive remainders to younger sons. If the oldest or other sons were not yet born, the remainder in fee tail would be simply conferred on the life tenant's heir, in an age before the Rule in *Shelley's Case* turned such a conveyance into a fee simple absolute for the erstwhile life tenant. The entailed remainders became less functional as settlement devices as the courts removed obstacles to their alienability.

During the 16th century, settlors acquired new tools for working out family settlements. The Statute of Uses in 1536 and the Statute of Wills in 1540 provided broad new means for both *inter vivos* and testamentary dispositions of landed interests. Powers of appointment were created by the Statute of Uses: before the Statute of Uses a grantor could convey to a feoffee to such uses as the feoffee would declare; after the Statute of Uses, such a declaration resulted in a legal estate being conferred on the person named in the declaration.

> The 16th century saw the rise of a new aristocracy and a new landed gentry, which seems to have been obsessed with a desire to entrench its position in society. The landowners, many of whom were lawyers themselves, aided by their conveyancers, attempted expedient after expedient to give permanence to their families; the confused state of the land law and the passion for litigation gave rise to case after case in which this or that form of settlement came under review, to be upheld or struck down for reasons which appeared incomprehensible at times to lawyers, let alone to their clients. Towards the end of the seventeenth century, however, the activities of a number of eminent conveyancers ... produced some order by designing model conveyances which satisfied the desires of the landowners and kept within reasonably well settled doctrines of the law; there arose a conveyancing tradition, and in the courts a respect for that tradition, which has continued to this day. n136

Out of this era of ingenuity came the so-called strict settlement, based on the notion that in family settlements only a life tenant should ever be in actual possession of the land, and that entailed interests should always be remainder interests. If the entailed remainderman ever came into actual possession, then the entailment could be barred by fine or common

recovery and become freely alienable. In a typical strict settlement, usually worked out at the time of the child's marriage, the owner in fee would settle the land on his son for life, with remainder in tail to the son's unborn oldest son, and successive remainders to any other unborn younger grandsons, all such remainders being contingent. The settlement would be in trust with the trustee instructed to preserve the contingent remainders of the unborn younger grandsons, and whose legal interest effectively blocked the settlor's son from destroying his own life estate. This made the life tenancy secure and this security is what made the settlement "strict" or inviolable. n137

Before the entailed remainderman took steps to bar the entail, the tenant in possession would agree to provide an attractive income based on the lands in return for the remainderman's agreement to resettle the lands on the same terms for another generation. Income provisions for the wife and the younger children would be secured by the land and raised by trustees accumulating profits from the land. Sometimes these so-called "portions" were paid in advance by the oldest son, in order to clear the charges against his land title. Through use of powers of appointment, a child more able than the oldest son might occasionally be chosen for the first remainder. By enlarging the normal rights of life tenants, those in possession could be protected against claims for waste, encouraged to invest in improving the land, and even empowered to lease, sell or exchange the land. This arcane procedure was in common use from the end of the 17th century to very modern times, made unpopular only by various forms of 20th-century taxation, especially death duties.

The strict settlement was particularly well-suited to meet the uncertainties of marriages involving two wealthy families:

> In the negotiations, the bride's family offered their daughter and a financial contribution for the endowment of the new family; the groom's family, in turn, their son and their part of the endowment. Granted the legal subservience of women, it was essential, if the bride and her children were to be protected from the risk that the groom might prove unreliable, and her family's status protected, that the groom's power of disposition over the family landed endowment be restricted. The mechanism for achieving this result was the strict settlement, whose function it was to ensure that the lady and her future offspring were kept in the manner in which they were accustomed, or entitled. For the groom's point of view the settlement was the price that had to be paid to make a good marriage. The pressure to settle property is thus explicable. But marriages take place every generation, and if the next round of matchmaking was to be handled satisfactorily, there must be new treaties and new prices to pay. In the dynastic world therefore, there needs to be a chance to readjust matters each generation, and the system of settlement and resettlement achieved just that. In substance the strict settlement functioned as an entail of unlimited duration, subject to revision by family conference at appropriate intervals. n138

With large tracts of settled land held in life tenancy, and not all such life tenants enjoying broadened powers of use and disposition, the prevalence of strict settlement came to be viewed as harmful, hindering the full utilization of land.

§ 5.04(e) The Rule Against Perpetuities.

That, through the connivance of the law, large portions of land would be held unalienable and not fully utilized was a constant apprehension of many judges and lawyers who shaped English land law. The rule against perpetuities and various other rules favoring alienability of land are expressions of this perspective, which, however, was always tempered by desires of those who obtained land to secure their holdings:

> The lawyers and judges who moulded the more modern rules upon perpetuities in the period between 1450 and 1700 were themselves great purchasers and settlors of land; it could thus be that the rules worked out in the courts represent an attempt to balance the conflicting desires of their authors, and produce a body of law which indulged to some extent both the desire for an active land market and the desire to retain land in the family. n139

Land whose alienability remained restricted indefinitely was a great irritant to many in English society, and the issue of

perpetuities in family settlements and other contexts had troubled judges, landowners and conveyancers for centuries. The archetype of such restricted land was land held in fee tail, with the entailment not subject to being barred. Thus devices were created to enable barring of the fee tail estate in some circumstances, making of it in essence a fee simple absolute.

The modern rule against perpetuities went considerably beyond concerns for barring entailed land and has its genesis in *The Duke of Norfolk's Case* in 1681. n140 The judge in that case had to determine if vesting was too remote in a devise of leasehold property. Specifically, a leasehold was devised to trustees for the benefit of the settlor's second son, in tail, but if the oldest son were to die without male issue during the lifetime of the second son, or if the settlor's patrimony descended to the second son, then the leaseholds would go over to the third son. The interests were upheld on the conclusion that they would have to vest in the third son, if at all, not later than during the lifetime of the second son. On this occasion the judge also announced a new rule of remoteness, superseding previous perpetuities rules, that an interest, to be valid, must vest, if at all, during the lifetime of a person in being at the time of the settlement. Judges in subsequent decisions extended the time slightly to a period of a life in being plus twenty-one years. The rule against perpetuities remains an active element in English land law today.

§ 5.04(f) Emergence of Trusts.

Even though the 1536 Statute of Uses applied to conveyances of "use, confidence or trust," the term "trust" eventually came to signify those uses that were not considered to be executed by the Statute. Among those unexecuted uses were uses declared on a term of years, which term, of course, was not a freehold estate. While some equity courts were at first reluctant to enforce such uses, because they could be viewed as attempts to evade the effects of the Statute of Uses, the Statute of Uses itself lost its practical vitality after abolition of tenures in 1660 and leasehold uses, known as trusts, became common after that time.

Certain freehold uses were also treated as unexecuted by the Statute of Uses. If a use was active, such as a use requiring the feoffee to make a further conveyance or to collect rents and pay debts, the judges ruled them unexecuted by the Statute, and they, too, were termed trusts.

A use on a use was also not executed, although before the eighteenth century such conveyances were probably the result of mistake and inadvertence. In 1668 a court seemed to suggest that the first *cestui que use* would hold in trust for the second, n141 and in 1700 a trust was recognized in a use deliberately created on a use. n142 Gradually, and with much hesitation, courts began consistently to regard a use on a use as not executed, not recognized by the common law courts, and enforceable only as a trust in equity:

> The general recognition of trusts was followed by the intricate process of working out the details of the system of equitable ownership. In essence the new trust was the old use in a new guise, but the Chancery did not follow precisely their ancient model ... [T]here came to be important differences between the old equitable ownership of the use and the new equitable ownership of the trust. Trusts were not so restricted in their enforceability ... The trust bound the land into whosoever's hands it came, excepting only the purchaser for value without notice ... Trusts could arise although no personal confidence had ever been reposed by one person in another, an impossibility with the use... n143

Trusts, labeled by one and considered by many to be "a brilliant invention of English jurisprudence," n144 play a huge role in the practical aspects of modern English and American property law.

§ 5.04(g) Servitudes.

§ 5.04(g)(1) Relationship to Incorporeal Hereditaments.

The English law of servitudes has arisen from that branch of property law dealing with incorporeal hereditaments, by

which term is meant rights that are treated as property. Corporeal hereditaments are the *physical objects* such as land, buildings and fixtures that are governed by property law. Incorporeal hereditaments, on the other hand, consist of a wide variety of *rights* considered to be property and governed by property law. Bracton recognized the distinction between corporeal and incorporeal hereditaments, but questioned whether one could have seisin of incorporeal things. n145 In the almost contemporary treatise known as Britton, it was conceded that livery of seisin was not possible for incorporeal hereditaments, which must instead be conveyed by a grant in deed: n146

> In Britton's day the correct method of grant was delivery of a charter in view of the lands to which they related, which was about as near to livery of seisin as one could get. But the grantee, if he wanted to alienate, must acquire seisin by enjoying the right before he alienated, and until he did so his title was imperfect. n147

For Bracton, all incorporeal hereditaments were servitudes. n148 Of the incorporeal hereditaments listed later by Blackstone, all were either then accepted as servitudes or were analogous to servitudes. Today, easements and profits, as the incorporeal hereditaments that are still of some importance, are also considered servitudes.

The following lengthy excerpt from an authoritative modern English property treatise best depicts the variety and, with the exception of easements and profits, the essential anachronism of incorporeal hereditaments:

> 4. Principal incorporeal hereditaments. The following may be listed as incorporeal hereditaments.
>
> (i) Rentcharges. A rentcharge is an annuity secured on some specified land.
>
> (ii) Annuities and corodies. These differ from rentcharges in not being secured upon or connected with land. An annuity, e.g., £ 100 a year, could be granted or devised to a person and his heirs and would then devolve as an hereditament, like land. A corody was paid in kind, and was a grant, usually by a religious house, to some person of board and lodging, and sometimes of clothing, of a certain kind for a certain period. In early times corodies were popular as a form of salary or pension, but they have long been obsolete.
>
> (iii) Advowsons. An advowson is the right of presentation to an ecclesiastical living.
>
> (iv) Tithes. A rather similar right was "multure" of a mill, being the right of the owner to take a certain proportion of the corn ground.
>
> (v) Easements. An example of an easement is a private right of way. It is only in modern times that easements have been recognised as incorporeal hereditaments.
>
> (vi) Profits *a prendre*, for example, rights of common or of shooting or fishing.
>
> (vii) Titles of honour, e.g., peerages. A baronetcy has been held to be "land," and also a "tenement" capable of being entailed.
>
> (viii) Offices. Offices, like titles of honour, were in early times governed by land law, since an office holder was commonly remunerated by a grant of land. When this feudal practice died out offices were still thought of as property; they could be granted in fee simple, or for life, or in tail, and an aspirant to an office might obtain a grant of the reversion to it. Thus the office of Marshal of England could be entailed, as could also those of Chamberlain of the Exchequer, steward of a manor, or forester. Other offices of inheritance mentioned by Coke are those of constable, bedell, parker (i.e., keeper of a park), falconer and master of hounds. Indeed, any office properly granted can probably be made inheritable, but the only inherited offices now to be found are probably ancient. Even in early times the grant of an office for a term longer than a life was a rarity. But grants for life or for a term of years were common.

> (ix) Franchises. These were royal rights or privileges granted by the Crown to a subject. In the early Middle Ages they were of many kinds. Examples are fairs, markets, the right to wrecks and treasure trove, and free fisheries. Lords of manor, also, were often given special rights of jurisdiction, such as the right to hang thieves, or the right to the chattels of condemned felons which normally belonged to the Crown...
>
> Reversions and remainders have been called incorporeal hereditaments by most modern authorities; but this is thought to be wrong ... reversions and remainders cannot themselves be hereditaments; they describe merely the nature of the estate for which some hereditament is held. n149

From the preceding list, it is seen that easements and profits are the servitudes currently considered incorporeal hereditaments. Easements, however, were not considered incorporeal hereditaments before the 18th century, because the only easements then recognized were appurtenant to a dominant tenement, so the easement was merely a "right" appurtenant to a corporeal hereditament, that is, to the dominant tenement. Profits, too, were often appurtenant, but they could also exist in gross, and to that extent were always considered incorporeal hereditaments. Since the 18th century, English land law no longer draws the distinction between incorporeal hereditaments and those rights considered to be merely appurtenances to other land, so now, all easements and profits, whether appurtenant or in gross, are treated as incorporeal hereditaments. Restrictive covenants are later and strictly equitable interests, and so are a variety of servitude outside the doctrines of incorporeal hereditaments.

§ 5.04(g)(2) Profits.

In Bracton's time in the 13th century, profits were more prominent than easements. Profits and easements were included in Britton's description of servitudes, "granting that another who has nothing therein, shall have a right of pasturing or mowing or fishing or of driving cattle or of way or of carrying therein or by other servitudes, which may be infinite and numberless...." n150 Profits were distinguished as being rights to take something of value *away* from the servient land.

The most numerous types of profits in the Middle Ages were rights to common, either created by grant from the lord to one of his freeholders, or arising by custom.

> These common rights were a necessary part of that common or open field system upon which most of the land of England was cultivated for many centuries. Thus we find commons of turbary, or the right to cut turf for fuel; common of estovers, or the right to cut timber, underwood, furze, etc., for fuel or litter; common of piscary, or the right to fish in another's water; and, by far the most important of all, the right to common of pasture. n151

Profits that were not appurtenant to lands within the manor, that benefited persons outside the manor and were therefore in gross, were created or acquired by grant, reservation or long use. n152

The long use required to establish a profit was described by Bracton as:

> user for a long time with peaceful, continuous and uninterrupted enjoyment of the right, the lord knowing of it and neglecting to interfere; for this is regarded as equivalent to a legal transfer, provided that the enjoyment has not been by violence, or clandestinely or by request and permission... n153

The time requirement for long use became one of the most ludicrous fictions of the common law:

> The long user became the common law's 'time whereof the memory of man runneth not to the contrary', and until after the time of Littleton there were lawyers who were prepared to take this phrase sensibly and literally. Unhappily, the view which prevailed, and which is to be found in the early year books, required user to be shown since 1189, with the absurd results all know. The date was selected by

> analogy with the period of limitation fixed in 1275 for the writ of right; until the Prescription Act (1833) the only attempt to mitigate the resulting injustices was the judicial invention of the fiction of the lost grant. n154

Frequently a freehold tenant would claim a common of pasture profit in waste land of the manor as an incident of the freehold tenure. Rather than proving long use, the tenant was required only to prove the tenure and show that the tenure was created before the Statute Quia Emptores of 1290. This right of common pasture was the most common and most essential of the profits claimed by manorial tenants and even in the early common law are found suggestions that such appurtenant, appended or annexed rights arose by long use or ancient custom. n155

In the 15th century it was held that all freeholders had a right of common pasture by operation of law, and this freeholder right was labeled appendant. n156 Appendant rights were limited to freeholders and to their animals considered commonable, such as cattle and horses.

Rights of common pasture available to both free and villein tenants were categorized as appurtenant, in gross, "*pur cause de vicinage*," and common of shack. Appurtenant rights were other profits attached to a dominant tenement that arose by prescription or grant, and pertained to animals not considered commonable, such as pigs, donkeys, goats and geese, or pertained to land not anciently arable, such as land recently drained or reclaimed from waste. Common of pasture in gross was not connected with any dominant tenement, common "*pur cause de viciniage*" occurred when two waste land areas from adjoining manors ran against each other and tenants from either manor were permitted to use both areas. A common of shack existed in some areas over lands between the time of harvest and re-sowing.

Rights of common in waste lands were among the earliest victims of enclosures. Lords of manors were considered to have rights of approvement, the right to approve enclosure of manorial waste lands, subject to the limitation that adequate land was left to serve common rights. n157 The approvement right applied only to waste lands and only against freehold tenants and against appendant and appurtenant common rights.

The law as to profits was stabilized by a series of cases in the late 16th and early 17th centuries, n158 and conceptually remains essentially unchanged today. n159 Creation and acquisition of profits by grant, reservation or prescription has been much affected by statutory reform. Problems arising from the ancient and varied natures of profits prompted passage of the Commons Registration Act of 1965, to ascertain what commons rights are still claimed and to extinguish the others.

§ 5.04(g)(3) Easements.

When the law of profits was being clarified four centuries ago, the law of easements was still very new and was able to benefit from emerging rules for profits:

> The definition of these various classes of incorporeal things helped to bring out into clearer relief the nature of easements, and customary rights in the nature of easements. We have seen that the nature of the classes of incorporeal things which have just been described, was fairly well ascertained in the Middle Ages; but that the law relating to easements was still in a very uncertain state. We shall see that, during the sixteenth and seventeenth centuries, their nature began to be better understood. But it is significant that Blackstone does not describe easements in general, and that the only easements which he mentions in his list of incorporeal things are various rights of way. As we shall now see, it is not till after Blackstone wrote, that the rules as to easements, which had been evolved during this period, were elaborated and combined into a definite body of legal doctrine, which defined the incidents, both of easements in general, and of particular kinds of easements. n160

Social conditions furthered the development of easement law. Urbanization and progressive enclosure of agricultural

land required more precise identification of landowners' respective holdings and rights: "In the days of common fields there was for example no need for many of the rights of way which exist today, for the local population could wander where they wished through the unfenced countryside without causing annoyance or injury, and the modern desire for privacy was hardly known." n161

However, Holdsworth was quick to assure that more law on easements existed than was revealed in Blackstone. n162 It is generally believed that easement law remained in a rudimentary state until early in the 19th century, Charles James Gale wrote his Treatise on the Law of Easements. His depiction of the state of the law of easements has been accepted:

> The difficulties which arise from the abstruseness and refinements incident to the subject, have been increased by the comparatively small number of decided cases affording matter for defining and systematizing this branch of the law. Upon some points, indeed, there is no authority at all in the English law; of the decisions some depend upon the circumstances of the particular case, and some are irreconcilable with each other.
>
> Water-courses are the only class of Easements with regard to which the law has been settled with any degree of precision ...
>
> As in many other branches of the Law of England, the earlier authorities upon the Law of Easements appear to be based upon the Civil Law, modified, in some degree, probably, by a recognition of customs which existed among our Norman ancestors. n163

Before Gale's treatise, easement law was largely reflective of the law of profits. That an easement was the right to use the land of another and a profit the right to take something of value from the land of another required few distinctions in applying the pertinent rules of law. But during the 19th century some important principles of easement law were settled. In 1868 it was declared that no easement could be in gross. n164 It had earlier been held that an appurtenant easement could be used only for purposes connected with the dominant tenement. n165 Easements were considered perpetual, n166 but inasmuch as the rules against perpetuities were being refined in the 19th century, easements as perpetual charges or encumbrances on the land came to be sharply limited. Thus in 1833 an English judge announced that "incidents of a novel kind cannot be devised, and attached to property, at the fancy and caprice of the owner...." n167

This well-known reluctance of English judges to approve new kinds of easements was not directed at affirmative easements. In addition to rights of way, the most common of the affirmative easements, Gale's treatise lists 28 other varieties of affirmative easements that have been judicially approved. n168

As to negative easements, however, he wrote only the following:

> The principal negative easements are:
>
> Right to receive light by ancient apertures.
>
> Right to receive air by a defined channel.
>
> Right to support for buildings from land; or from buildings.
>
> Right to receive a flow of water in an artificial stream. n169

During the 19th century, English courts approved no new types of negative easements, and, indeed it is commonly believed that "the English courts in the nineteenth century called a halt to the creation of negative easements other than the four traditional kinds." n170 A modern English property treatise proclaims that "the list of easements is not closed." n171 However, it also asserts that there are limits, expressed in

> the overriding principle that the various kinds of proprietary interests are fixed by law, and finite in number. Even though the list of easements is not closed, it is not open to interests which do not conform to the rules about the general nature of easements. For example, a right to an unspoilt view or a right to put out pleasure boats on a lake cannot exist as an easement. Nor can the right to have the wall of a house protected from weather by an adjoining house, as contrasted with a right of support which is a well-recognised easement and which often exists in favor of semi-detached houses. n172

Indirectly, this passage of commentary on modern law suggests that no new negative easements are likely to be approved in English jurisprudence.

§ 5.04(g)(4) Licenses.

A license is by definition not a right in property n173 and was early defined as a revocable permission to commit some act that would otherwise be considered unlawful. n174 When, in the 19th century, the revocability of a license coupled with the grant of an interest was contested, n175 some licenses were held to be irrevocable. Irrevocable licenses were then in some cases elevated into property rights, binding not only on the immediate parties to the license, but also on their successors in interest. n176

§ 5.04(g)(5) Covenants.

§ 5.04(g)(5)(i) Real Covenants.

A covenant has been traditionally distinguished from an easement as binding only the actual parties to the covenant, whereas an easement pertains to whoever owns the dominant and servient tenements. However, even in the Middle Ages it was recognized that some covenants were so annexed to the land that they could be enforced by anyone who held that estate in land, although the enforcing party had to hold the same estate as the original covenantee. These covenants, therefore, ran with the estate, and not with the land. n177

Early covenants probably arose in connection with express warranties attached to medieval conveyances. A feoffee would include in the deed warranties that no claim would be made by heirs or others; such warranties were in effect covenants attached to the estate in land being conveyed. In the 16th and 17th centuries the warranties were transformed into covenants for title, and rules as to the running of covenant benefits and burdens were worked out:

> [A]s early as 1401 it was recognized that the assign [of the benefit] must, to enable him to sue, have the land to which the covenant was annexed ... Hence we get the modern rule that the benefit of covenants made with the purchaser of land will, if they relate to land, run with that purchaser's estate in the land, that is they can be enforced by successive tenants of that estate. It was partly this settlement of modern rule as to the conditions under which the benefit of covenants will run with the estate in the land, and partly the convenience of the procedure available to enforce a warranty, which has led to the substitution of the modern covenants for title for the old warranties express or implied. In the course of the 16th and 17th centuries covenants for seisin, for the right to convey, for quiet enjoyment, for freedom from incumbrances, and for further assurance, became usual covenants on a conveyance of land. They are at the present day by far the commonest class of covenants, the benefit of which runs with the estate in land. n178

As to the running of covenant burdens, Bracton expressed the view that the burden of a warranty could pass to the grantee of the land, n179 but in fact the matter remained unsettled until almost modern times. In a 13th-century case it was stated that "No one can bind his assigns to warranty, because the burden of warranty always extends only to heirs who claim by succession, and not to those who claim by assignment." n180 Coke noted that covenant benefits could be annexed to land, but said nothing about covenant burdens being annexed to land. Finally, in 1885 the matter was settled in a decision that the burden of covenants relating to the land could not run with the land:

> I am not prepared to say that any covenant which imposes a burden upon land does run with the land, unless the covenant does, upon the true construction of the deed containing the covenant, amount to either a grant of an easement, or a rent charge, or some estate or interest in the land. n181

One additional aspect of the question about whether covenant burdens would run with the land was whether covenant burdens would run to a reversioner. Very little medieval authority on the question is known, but what there is suggests that neither benefits nor burdens of covenants would run with the reversion. A statute of 1540 dealing with reversions following gifts for life or for years contained a preamble reciting an apparent common law prohibition against covenant benefits and burdens running: n182 "no stranger to any covenant ... shall take any advantage or benefit of the same...." n183 The effect of the statute itself, however, was to permit both benefits and burdens to run with respect to reversions of leases for life or years arising from royal grants. Subsequent case authority was deeply split on the larger question of covenants running. n184

Not until *Spencer's Case* in 1583 n185 was it clarified as to which covenants the statute should apply:

> If the covenant touched or concerned the estate in the land demised or something actually on it, not only the benefit, but also the burden of it, ran with that estate. Probably the rule that the burden ran with the estate in land as well as the benefit, was due to considerations of convenience, and was perhaps new law ... If, however, the covenant related to something to be newly done on the land demised there was nothing in being to which the covenant could be annexed ... the benefit and burden of such covenants would only run with the estate in the land if assigns were named; and, though this rule has been criticized, it is still the law ... The same principles as were applied to covenants running with the land were applied to covenants running with the reversion, by the resolution that the statute of 1540 extended "to covenants which touch or concern the thing demised and not to collateral covenants." n186

As subsequent cases continued to work out covenant law, it was held that the original lessee and covenantor would continue to be liable on the covenant even after assignment, n187 and that the liability of an assignee of the land is not personal, but ends when tenure of the land ends. n188

§ 5.04(g)(5)(ii) Equitable Servitudes.

The running of covenants in equity did not occur until the famous decision in the 1848 case of *Tulk v. Moxhay*. n189 By the time of that case it had been well established in English law that the running of covenants related to land ("real covenants") was significantly restricted and that burdens did not run at all in covenants that were part of a conveyance in fee. In just such a conveyance, the court in *Tulk* held that the burden of a covenant therefore unenforceable against an assignee at law could be enforced against the assignee in equity if the assignee had notice of the covenant. Eventually most English courts accepted the notion that such a covenant imposed an equitable servitude on the land itself, rather than merely on an owner with notice, under a contract theory. n190

§ 5.04(h) Mortgages.

It was pointed out in the preceding chapter n191 that during the 15th or 16th century, the form of mortgage shifted from an enfeoffment on condition of defeasance or of re-entry to an enfeoffment with a covenant for reconveyance upon timely repayment of the debt, the so-called classical common law mortgage. This form of mortgage increased greatly in popularity during the 16th century, when the Chancellor began specifically enforcing the covenant of reconveyance rather than just granting money damages for breach. In time, a power of sale was recognized in the mortgagee who had not been paid, but even with this and other protections, mortgagees even into the mid-17th century were still frequently taking possession of the property.

An alternative to the classical common law mortgage, that eventually overtook it in popularity, was the grant of a

long-term lease to the mortgagee. These long-term leaseholds had several variants. A mortgagor might grant a leasehold of 500 years with a provision that the mortgagor could retain possession until default occurred, if at all. The lease would become void upon repayment. Or the mortgagee might grant a sublease back to the mortgagor with a provision that the sublease would be void if default occurred. During the 17th and 18th centuries mortgages by lease were perhaps more popular than the classical form of mortgage. Besides being applicable to both freeholds and leaseholds, they created a chattel interest in the mortgagee which upon death passed to the mortgagee's heirs, the persons most likely entitled to the debt repayment. However, the fee simple reversion left in the mortgagor, even after default, was inconvenient and this form of mortgage was little used after the 18th century. n192

Protections for mortgagors also emerged. At the beginning of the 17th century, equity courts began intervening to provide relief against remedies in the nature of a penalty and against terms that were usurious. If a mortgagee had been effectively repaid from the rents and profits of possession, the mortgagor was given an equitable remedy. n193 Equity intervened if the mortgagor repaid the debt on time but the mortgagee refused to reconvey. n194 The equity of redemption, allowing mortgagors who defaulted an opportunity to redeem the land upon payment of the debt and expenses, was allowed as early as 1594 n195 and is mentioned in a case in 1612. n196 These early cases developed the rule that redemption could be granted upon special hardship, but even this requirement was dropped by 1625. n197 The relief of equity of redemption produced a countering remedy of foreclosure for mortgagees, first mentioned in a case in 1629. n198 The equity of redemption eventually took on a life of its own and became a separate species of property, subject even to being entailed in equity. n199

> An equity of redemption is considered an estate in land; it will descend, may be granted, devised, entailed, and that equitable estate may be barred by a common recovery. This proves that it is not considered as a mere right, but as such an estate whereof, in the consideration of this court, there may be a seisin, for without such a seisin, a devise could not be good. n200

This was part of a larger movement to perceive the mortgage transaction in land as one for security rather than strictly as a conveyance:

> By the end of the seventeenth century this new conception of the mortgage had become established, and a long line of cases begins, some defending it against attempts to "clog the equity", and others settling the rights of successive mortgagees, a complication which now became possible under the new view of the mortgage. We already find early seventeenth-century cases on consolidation and tacking, subjects whose elaboration was the special mission of the eighteenth-century Chancellors. n201

Now mortgagors customarily remained in possession of the land until default, n202 and mortgagees in possession became strictly accountable for profits of the land during their possession. Mortgages began to include express powers of sale in order to free land from the equity of redemption. n203 These arrangements for mortgagors and mortgagees remained in effect until the reforms introduced by the massive property legislation of 1925.

§ 5.04(i) Statutory Reforms.

Statutory reform of archaic common law property doctrines was not significant until the 19th century. In the 17th century, the only two important pieces of legislation were the Statute of Tenures in 1660 n204 and the Statute of Frauds in 1677. n205 The Statute of Frauds, as it related to real property, required writings for conveyances of freeholds, for leaseholds of longer than three years, for devises of real property, for trusts of land, and for contracts to convey interests in land. n206

In the 18th century several attempts were made to establish registries for conveyances, either general or local. Only a few local registries resulted: the West Riding of Yorkshire in 1703, n207 the East Riding of Yorkshire and Kingston-upon-Hull in 1707, Middlesex in 1708, n208 and the North Riding of Yorkshire in 1735. Some defects in

common recoveries procedure were corrected in a statute of 1741. n209

The reluctance to embark on the more urgent matters of reform has been attributed to a combination of vested interests in and ignorance of the English property law in effect during the 18th century:

> The resistance to reform arose from a number of factors. There was amongst laymen a reluctance to suggest interference with so incomprehensible a mystery as the law of property, which they could not understand. Until the *Commentaries* of Blackstone appeared in the 1760s there was no way of acquiring the elements of the law of property, unless one was prepared to become a practitioner. Even amongst the practitioners only a few possessed an extensive grasp of the law, which was essential to any intelligent proposals for reform. Those who did understand the system encouraged the view that it was dangerous or even beyond the wit of man to meddle with so elaborate a structure, upon which the sacred property rights of the people were based. The property-owning classes saw that the system could be made to work, at a price, and realized that the system of primogeniture enshrined in the strict settlement was the very basis of their whole way of life. Even if they were sympathetic to schemes to reduce the expense and delay involved, they were not anxious to interfere with the fundamentals of the law.
>
> In the expense and delay the common run of lawyers had, of course, a vested interest: simple cheap conveyancing and certainty of title do not increase the emoluments of attorneys. n210

In the early 19th century lawyers obtained a legislative monopoly over conveyancing for gain and thus intensified their special interest in maintaining the complex system of conveyances.

Reform momentum did increase in the 19th century, however, and in 1829 Real Property Commissioners were appointed to conduct studies and make recommendations. Their extremely significant reports generated a series of profoundly important legislative reforms. Their first report in 1829 covered inheritance, dower, curtesy, fines, recoveries, prescription, and limitation. The second, in 1830, covered proposals to establish a general registry of deeds and other instruments dealing with land. The third, in 1832, included recommendations for tenures, contingent remainders, future interests, perpetuities, covenants, and limitation of ecclesiastical land rights. The fourth report, in 1833, dealt with will and probate proceedings.

From these reports resulted the Inheritance Act of 1833, n211 the Fines and Recoveries Act of 1833, n212 the Real Property Limitation Act of 1833, n213 abolishing all but three of the real actions, the Dower Act of 1833, n214 the Wills Act of 1837, n215 and the Prescription Act of 1832. n216 The Real Property Act of 1845 n217 enacted some of the reform proposals omitted from legislation of the 1830s. Some procedural aspects of property-related actions were altered by the Common Law Procedure Act of 1852 n218 and some minor and incomplete reforms were embodied in the Contingent Remainders Act of 1877. n219

Agitation continued for a system of registration of deeds or titles. A system for voluntary registration of indefeasibly vested titles after examination was introduced by Lord Westbury's Act of 1862, n220 but volunteers were not forthcoming. Then in 1875, Lord Cairns' Act n221 permitted registration for mere possessory titles, but this act, too, was voluntary and generated little interest. Finally the Land Transfer Act of 1897 n222 introduced compulsory registration, but made it immediately applicable only to the County of London and, in 1902, to the City of London. Other localities could request extension of the system to their areas, but none did before legislation in 1925 set up a new but similar system. Compulsory title registration was consistently opposed by the solicitors.

Because so many land occupants were only life tenants of lands held under strict settlement, it became important to expand the freedom of such tenants to deal with their land. A series of enactments made the position of such life tenants more comparable to that of a fee simple owner, "whilst providing that for the purposes of beneficial enjoyment the life tenant remained a limited owner, entitled only to the income of the settled estate, not the capital, and unable freely to

alter the beneficial provisions of the settlement." n223 These acts included drainage acts, n224 the Improvement of Land Act in 1864, n225 the Settled Estates Act of 1858, n226 the Settled Land Act of 1877, n227 and the Settled Land Act of 1882. n228

The common law disabilities of married women in dealing with their property, which effectively required the husband's concurrence to make dispositions of the property, were removed by a series of statutes beginning with the Married Women's Property Act of 1882, n229 and continuing with the Married Women's Property Act of 1907, the n230 Law Reform (Married Women and Tortfeasors) Act of 1935 n231 and the Married Women (Restraint upon Anticipation) Act of 1949. n232

> If one excepts the Married Woman's Property Act of 1882, which belongs to the special history of family law, one cannot but be struck by the air of caution which characterizes the nineteenth-century reforming legislation. The legislation was indeed very tender to the rights of property, and there are only a few instances where anything which could be viewed as expropriation, or as direct attacks on freedom of contract, took place. n233

FOOTNOTES:

(n1)Footnote 74. § 4.05(b)(3)-(7), *supra*.

(n2)Footnote 75. § 4.07, *supra*.

(n3)Footnote 76. Kurtz, Sheldon F., Moynihan, Introduction to the Law of Real Property 228-229 (4th ed. 2005).

(n4)Footnote 77. Kurtz, Sheldon F., Moynihan, Introduction to the Law of Real Property 236 (4th ed. 2005). *See also* Richard J. Ross, *The Memorial Culture of Early Modern English Lawyers: Memory as Keyword, Shelter, and Identity, 1560-1640, 10 Yale J.L. & Human. 229 (1998).*

(n5)Footnote 78. *32 Hen. 8*, c. 46 (1540).

(n6)Footnote 79. 12 Car. 2, c. 24 (1660).

(n7)Footnote 80. A. W. B. Simpson, A History Of The Land Law 199 (2d Ed. 1986).

(n8)Footnote 81. Michael Harwood, Modern English Land Law 7-8 (2d ed. 1982).

(n9)Footnote 82. Theodore F. T. Plucknett, A Concise History of the Common Law 573 (5th ed. 1956). *See* Susan Staves, *Chattel Property Rules and the Construction of Englishness, 1660-1800*, 12 L. & Hist. Rev. 123 (Spring 1994).

(n10)Footnote 83. 6 Edw., c. 11 (1278).

(n11)Footnote 84. Theodore F. T. Plucknett, A Concise History of the Common Law 574 (5th ed. 1956).

(n12)Footnote 85. *Id.*

(n13)Footnote 86. Jack Ravensdale, The Domesday Inheritance 57 (1986).

(n14)Footnote 87. Jack Ravensdale, The Domesday Inheritance 60 (1986).

(n15)Footnote 88. Jack Ravensdale, The Domesday Inheritance 62 (1986).

(n16)Footnote 89. 2 The Reports of Sir John Spelman 182 (J. H. Baker ed., Selden Society, vol. 94, 1977).

(n17)Footnote 90. *21 Hen. 8* , c. 15 (1529).

(n18)Footnote 91. *32 Hen. 8* , c. 28 (1540).

(n19)Footnote 92. Lampet's Case, 10 Co. Rep. 46b, *77 Eng. Rep. 994 (1612)* ; Manning's Case, 8 Co. Rep. 94b, *77 Eng. Rep. 618 (1609)* .

(n20)Footnote 93. *See, e.g., Y.B. 21 Hen. 7* , Michaelmas Term, f. 38, pl. 47 (1506).

(n21)Footnote 94. *Leighton v. Theed, 1 Ld. Raym. 707 (1702).*

(n22)Footnote 95. 2 William Blackstone, Commentaries Ch. 9, Sec. II. 145.

(n23)Footnote 96. Spencer's Case, 5 Co. Rep. 16a, *77 Eng. Rep. 72 (1583)* .

(n24)Footnote 97. *32 Hen. 8* , c. 34 (1540).

(n25)Footnote 98. A. W. B. Simpson, A History of the Land Law 251 (2d ed. 1986).

(n26)Footnote 99. R. E. Megarry and H. W. R. Wade, The Law of Real Property 620 (3d ed. 1966).

(n27)Footnote 100. These include the Rent and Mortgage Restrictions Acts of 1920-1939, the Furnished Houses Act of 1946, the Landlord and Tenant Act of 1949, the Housing Repairs and Rents Act of 1954, the Rent Act of 1957, the Rent Act of 1965, the Rent Act of 1968, the Housing Act of 1969, the Housing Finance Act of 1972, the Counter-Inflation Act of 1973, the Rent Act of 1974, the Rent Act of 1977, and the Housing Act of 1980.

(n28)Footnote 101. *See* Peter Sparkes, *Certainty of Leasehold Terms, 109 Law Q. Rev. 93 (1993).*

(n29)Footnote 102. Under modern law, a remainder typically may follow only an interest that is less than a fee.

(n30)Footnote 103. *Y.B. 32 & 33 Edw. (Rolls Series), 328 (1304).*

(n31)Footnote 104. *Y.B. 2 Edw. 2, 4 (1390).*

(n32)Footnote 105. *Y.B. 10 Edw. 3*, Michaelmas Term, No. 8 (1336).

(n33)Footnote 106. Colthirst v. Bejushin, 1 Plowden 20, *75 Eng. Rep. 33 (1550)* .

(n34)Footnote 107. An example of a repugnant condition would be a series of successive remainders with forfeiture by any remainderman who attempted to alienate the interest, but with the alienee also being the next or only remainderman.

(n35)Footnote 108. *Reeve v. Long, 3 Lev. 408 , 1 Salk. 227, 4 Mod. 282, 87 Eng. Rep. 395 (1695)* .

(n36)Footnote 109. *Saltmarsh v. Redeness, Y.B. 11 Edw. 2,* Michaelmas Term, pl. 8 (1317) *in* Year Books 11 Edward II 1317-18 12 (John P. Collas & William S. Holdsworth eds., Selden Society Vol. 61, Year Book Series vol. 22, 1942). For a discussion on some of the objections to contingent remainders, see A.W.B. Simpson, A History of Land Law 95-96 (2d ed. 1986).

(n37)Footnote 110. *Dormer v. Packhurst, 6 Bro. P. C. 351 (1740),* upholding *Duncomb v. Duncomb, 3 Lev. 437, 83 Eng. Rep. 770 (1697)* .

(n38)Footnote 111. *Y.B. 24 Edw. 3, 70* no. 9 (1350).

(n39)Footnote 112. *Y.B. 40 Edw. 3,* f. 9 no. 18 (1366).

(n40)Footnote 113. Shelley's Case, 1 Co. Rep. 88b, 93b, *76 Eng. Rep. 199, 206 (1581)* . Simpson has a good discussion of three various applications of the rule, the reasoning behind these applications, and their uses. A.W.B. Simpson, A History of Land Law 96-102 (2d ed. 1986).

(n41)Footnote 114. Kurtz, Sheldon F., Moynihan's Introduction to the Law of Real Property 189 (4th ed. 2005).

(n42)Footnote 115. 15 & *16 Geo. 5*, c. 20, § 131 (1925).

(n43)Footnote 116. *See, e.g., Ellis v. Page, 61 Mass. (7 Cush.) 161 (1851)* .

(n44)Footnote 117. *52 Hen. 3* , c. 6 (1267).

(n45)Footnote 118. These cases are cited and summarized in Joseph W. Morris, *"The Inter Vivos Branch of the Worthier Title Doctrine," 2 Okla. L. Rev. 133, 135-138 (1949).*

(n46)Footnote 119. 3 & 4 Will. 4, c. 106, § 3 (1833).

(n47)Footnote 120. *See* examples cited in Richard R. B. Powell, *"Determinable Fees," 23 Colum. L. Rev. 207, 212 (1923).*

(n48)Footnote 121. 1 Lewis F. Simes & Allan F. Smith, The Law of Future Interests 283, pp. 332-35 (1956).

(n49)Footnote 122. 2 Frederick Pollock & Frederic William Maitland, The History of English Law Before the Time of Edward I 17-19, 23-29 (2d ed. 1909).

(n50)Footnote 123. Bracton's Note Book, Nos. 61, 86 (1220).

(n51)Footnote 124. Mary Partington's Case, 10 Co. Rep. 35b (1613). "But in the United States it is generally necessary to include an express provision giving the grantor a right of entry or power to terminate upon breach of the condition in order to create an estate on condition subsequent." Roger A. Cunningham et al., The Law of Property § 3.5, p. 100 (2d. ed. 1993).

(n52)Footnote 125. 1 Lewis M. Simes & Allan F. Smith, The Law of Future Interests § 254, p. 294 (2d ed. 1956).

(n53)Footnote 126. § 4.07(f)(3), *supra*.

(n54)Footnote 127. *Taltarum's Case, Y.B. 12 Edw. 4, Michaelmas Term, f. 14, pl. 16, f. 19, pl. 25, 13 Edw. 4,* Michaelmas Term, f. 1, pl. 1 (1472).

(n55)Footnote 128. A. W. B. Simpson, A History of the Land Law 130 (2d ed. 1986).

(n56)Footnote 129. The first reported case in which the court crier appears as the common vouchee is Anon (1538).

(n57)Footnote 130. Capell's Case, 1 Co. Rep. 54a, 61a, *76 Eng. Rep. 121, 134 (1581)* .

(n58)Footnote 131. A. W. B. Simpson, A History of the Land Law 134-35 (2d ed. 1986).

(n59)Footnote 132. *4 Hen. 7,* c. 24 (1490).

(n60)Footnote 133. *Anon, Dyer 2b, 73 Eng. Rep. 7 (1527)* .

(n61)Footnote 134. *28 Hen. 8,* c. 36 (1536).

(n62)Footnote 135. 3 & 4 Will. 4, c. 74, 15, 40 (1833).

(n63)Footnote 136. A. W. B. Simpson, A History of the Land Law 235 (2d ed. 1986).

(n64)Footnote 137. *Cf.* Stanley Hooper, *Peter Thelluson's Will, 147 New L.J. 1046 (1997)* (discussing an unusual variation of this concept and the nineteenth century legislation it engendered).

(n65)Footnote 138. A. W. B. Simpson, A History of the Land Law 238 (2d ed. 1986).

(n66)Footnote 139. A. W. B. Simpson, A History of the Land Law 209 (2d ed. 1986).

(n67)Footnote 140. *Howard v. Henry Duke of Norfolk, 3 Cas. in Chan. 1, 2 Swans. 454, 36 Eng. Rep. 690 (1681)* . Charles J. Reid, Jr., *The Seventeenth-Century Revolution in the English Land Law, 43 Clev. St. L. Rev. 261, 268 (1995).*

(n68)Footnote 141. Ash v. Gallen, 1 Ch. Cases 114, *22 Eng. Rep. 720 (1668)* .

(n69)Footnote 142. *Sympson v. Turner, 1 Eq. Cas. Abr. 383 (1700)* .

(n70)Footnote 143. A. W. B. Simpson, A History of the Land Law 206 (2d ed. 1986). Charles J. Reid, Jr., *The Seventeenth-Century Revolution in the English Land Law, 43 Clev. St. L. Rev. 281, 288 (1995).*

(n71)Footnote 144. Jesse Dukeminier & James E. Krier, Property 233 (2d ed. 1988).

(n72)Footnote 145. Bracton, f. 7.

(n73)Footnote 146. Britton, II, 8 and 9.

(n74)Footnote 147. A. W. B. Simpson, A History of the Land Law 106 (2d ed. 1986).

(n75)Footnote 148. Bracton, f. 53.

(n76)Footnote 149. R. E. Megarry & H. W. R. Wade, The Law of Real Property 786-787 (3d ed. 1966).

(n77)Footnote 150. Britton, II, 23, 3.

(n78)Footnote 151. 3 William Holdsworth, A History of English Law 143 (5th ed. 1942).

(n79)Footnote 152. Bracton, f. 222.

(n80)Footnote 153. Bracton, f. 222.

(n81)Footnote 154. A. W. B. Simpson, A History of the Land Law 109-110 (2d ed. 1986).

(n82)Footnote 155. *See Statute of Westminster II, 13 Edw. 1,* st. 1, c. 46 (1285); *Solers v. Parson of Dorstone, Y.B. 11 Edw. 2,* Michaelmas Term, pl. 8 (1317), *in* Year Books 11 Edward II 1317-18 91 (John P. Collas & William S. Holdsworth eds., Selden Society Vol. 61, Year Book Series vol. 22, 1942); *Y.B. 27 Edw. 3* (Rolls Series), 353 (1343).

(n83)Footnote 156. *Y.B. 22 Hen. 6* , Michaelmas Term, pl. 13, f. 9, at f. 10 (1462).

(n84)Footnote 157. *Statute of Merton, 20 Hen. 3* , c. 4 (1235); Statute of Westminster II, 13 Edw., c. 46 (1285).

(n85)Footnote 158. Tyrringham's Case, 4 Co. Rep. 36b, *76 Eng. Rep. 973 (1584)* ; Gateward's Case, 6 Co. Rep. 59b, *77 Eng. Rep. 344 (1607)* ; Wyat Wyld's Case, 8 Co. Rep. 78b, *77 Eng. Rep. 593 (1610)* ; *Mellor v. Spateman, 1 Wms. Saund. 339, 343, 85 Eng. Rep. 489, 495 (1669)* ; *Weekly v. Wildman, 1 Ld. Raym. 405, 91 Eng. Rep. 1169 (1699)* .

(n86)Footnote 159. *See* R. E. Megarry & H. W. R. Wade, The Law of Real Property 818-23 (3d ed. 1966).

(n87)Footnote 160. 7 William Holdsworth, A History of English Law 321 (2d ed. 1937).

(n88)Footnote 161. A. W. B. Simpson, A History of the Land Law 262 (2d ed. 1986).

(n89)Footnote 162. *Id.* at 322, citing *Peers v. Lucy, 4 Mod. 355, 362, 87 Eng. Rep. 441, 444 (1695)* .

(n90)Footnote 163. Charles James Gale, A Treatise on the Law of Easements vii (Preface to the First Edition) (11th ed. by F. Graham Glover, 1931).

(n91)Footnote 164. Rangeley v. Midland Ry. Co., L. R. 3 Ch., App. 306 (1868).

(n92)Footnote 165. Ackroyd v. Smith, *10 C. B. 164, 138 Eng. Rep. 68 (1850).*

(n93)Footnote 166. This principle was suggested as early as the 13th century, Bracton, f. 233a.

(n94)Footnote 167. Keppel v. Bailey, 3 My. & K. 517, *39 Eng. Rep. 1042 (1833)* .

(n95)Footnote 168. Charles James Gale, A Treatise on the Law of Easements 28-31 (11th ed. by F. Graham Glover, 1931).

(n96)Footnote 169. Charles James Gale, A Treatise on the Law of Easements 31 (11th ed. by F. Graham Glover, 1931).

(n97)Footnote 170. Jesse Dukeminier & James E. Krier, Property 871-72 (2d ed. 1988).

(n98)Footnote 171. R. E. Megarry & H. W. R. Wade, The Law of Real Property 807 (3d ed. 1966).

(n99)Footnote 172. R. E. Megarry & H. W. R. Wade, The Law of Real Property 807-08 (3d ed. 1966).

(n100)Footnote 173. *Y.B. 20 Edw. 4*, Trinity Term, pl. 2, f. 4.

(n101)Footnote 174. *Thomas v. Sorrel, Vaughan 330, 124 Eng. Rep. 1098 (1674)* .

(n102)Footnote 175. *Wood v. Leadbitter, 13 M. & W. 838, 153 Eng. Rep. 351 (1845)* .

(n103)Footnote 176. *See, e.g., Errington v. Errington, 1 K. B. 290 (1952).*

(n104)Footnote 177. 3 William Holdsworth, A History of English Law 158 (5th ed. 1942).

(n105)Footnote 178. 3 William Holdsworth, A History of English Law 162-63 (5th ed. 1942).

(n106)Footnote 179. Bracton, ff. 382, 382b.

(n107)Footnote 180. Y.B. 32, 33 Ed. 1 (R.S.) 516.

(n108)Footnote 181. Lindley, L.J., *in* Austerberry v. Corporation of Oldham, 29 *C. D. 750, 781 (1885).*

(n109)Footnote 182. The statute was passed on the occasion of the dissolution of the monasteries, which resulted in transfers of many reversionary interests. The words prohibiting running of covenants are found in the preamble, concerning which Holdsworth remarked,

> it is clear that some of the statements in the preamble are too wide, as they would negative the possibility of any covenant running, not only with the reversion, but also with the land; and, as we have

seen from the preamble to the statute of Uses, we cannot place very much reliance on the preambles to the Tudor statutes.

7 William Holdsworth, A History of English Law 288 (2d ed. 1937).

(n110)Footnote 183. *32 Hen. 8* , c. 34, preamble:

Where before this time divers, as well temporal as ecclesiastical and religious persons, have made sundry leases, demises and grants to divers other persons, of sundry manors, lordships, ferms, meases, lands, tenements, meadows, pastures, or other hereditaments, for term of life or lives, or for term of years, by writing under their seal or seals, containing certain conditions, covenants and agreements to be performed, as well on the part and behalf of the said lessees and grantees, their executors and assigns, as on the behalf of the said lessors and grantors, their heirs and successors; (2) and forasmuch as by the common law of this realm, no stranger to any covenant, action or condition, shall take any advantage or benefit of the same, by any means or ways in the law, but only such as be parties or privies thereunto, by the reason whereof, as well all grantees of reversions ... be excluded to have any entry or action against the said lessees and grantees, their executors or assigns, which the lessors before that time might by the law have had against the same lessees for the breach of any condition, covenant or agreement comprised in the indenture of their said leases, demises and grants...

(n111)Footnote 184. Holding that covenants did not run with reversions, *see Barker v. Damer, 3 Mod. 336, 338, 87 Eng. Rep. 223, 224 (1691)* ; *Thursby v. Plant, 1 Wms. Saund. 230, 237, 85 Eng. Rep. 254, 268 (1669)* . To the contrary, *see Attoe v. Mennings, 2 Bulstr. 281, 80 Eng. Rep. 1123 (1613)* ; *Harper v. Burgh, 2 Lev. 206, 83 Eng. Rep. 521 (1677)* ; *Vyvyan v. Arthur, 1 B. & C. 410, 107 Eng. Rep. 152 (1823)* .

(n112)Footnote 185. Spencer's Case, 5 Co. Rep. 16a, *77 Eng. Rep. 72 (1583)* .

(n113)Footnote 186. 7 William Holdsworth, A History of English Law 289-90 (2d ed. 1937).

(n114)Footnote 187. Walker's Case, 3 Co. Rep. 22a, *76 Eng. Rep. 676 (1587); Thursby v. Plant, 1 Wms. Saund. 230, 237, 85 Eng. Rep. 254, 268 (1669)* ; *Barnard v. Goodschall, Cro. Jac. 309, 79 Eng. Rep. 264 (1613)* ; *Bachelour v. Gage, Cro. Car. 188, 79 Eng. Rep. 765 (1631)* ; *Brett v. Cumberland, Cro. Jac. 521, 79 Eng. Rep. 446 (1617)* .

(n115)Footnote 188. Pitcher v. Tovey, 1 Salk. 81, *91 Eng. Rep. 76 (1693)* .

(n116)Footnote 189. Tulk v. Moxhay, 2 Phil. 774, *41 Eng. Rep. 1143 (1848)* .

(n117)Footnote 190. *London County Council v. Allen, 3 K. B. 642* (C.A.) (1914); David J. Hayton, *"Restrictive Covenants as Property Interests," 87 Law Q. Rev. 539 (1971).*

(n118)Footnote 191. At § 4.06(h)(3), *supra*.

(n119)Footnote 192. A. W. B. Simpson, A History of the Land Law 242-43 (2d ed. 1986).

(n120)Footnote 193. Holman v. Vaux, Tothill 133 (c. 1616); Bodenham v. Halle (1456), *in* Select Cases in Chancery A.D. 1364-1471 137 (William Paley Baildon ed., Selden Society, Vol. 10 (1896)).

(n121)Footnote 194. *Y.B. 9 Edw. 4,* Trinity Term, f. 25, pl. 34.

(n122)Footnote 195. Langford v. Barnard, Tothill 134 (1594).

(n123)Footnote 196. Hanmer v. Lochard, Tothill 132 (1612).

(n124)Footnote 197. *Emmanuel College v. Evans, 1 Ch. Rep. 18 (1625).*

(n125)Footnote 198. *How v. Vigures, 1 Ch. Rep. 32, 21 Eng. Rep. 499 (1629).*

(n126)Footnote 199. *Roscarrick v. Barton, 1 Ch. Cas. 217, 22 Eng. Rep. 767 (1673)* .

(n127)Footnote 200. *Casborne v. Scarfe, 1 Atk. 598, 26 Eng. Rep. 377 (1737)* .

(n128)Footnote 201. Theodore F. T. Plucknett, A Concise History of the Common Law 690 (5th ed. 1956).

(n129)Footnote 202. *Stone v. Grubham, 2 Bulstrode 225, 80 Eng. Rep. 1079 (1615)* .

(n130)Footnote 203. *Tucker v. Wilson, 1 P. Wms. 261, 24 Eng. Rep. 379 (1714)* .

(n131)Footnote 204. 12 Car. 2, c. 24 (1660).

(n132)Footnote 205. 29 Car. 2, c. 23 (1677).

(n133)Footnote 206. The requirement of a writing for real estate contracts was countered by the emergence of the equitable doctrine that part performance of the contract could overcome the absence of a writing.

(n134)Footnote 207. 2 & 3 Anne, c. 4 (1703).

(n135)Footnote 208. 7 Anne, c. 20 (1708).

(n136)Footnote 209. *14 Geo. 2* , c. 20 (1741).

(n137)Footnote 210. A. W. B. Simpson, A History of the Land Law 272-73 (2d ed. 1986).

(n138)Footnote 211. 3 & 4 Will. 4, c. 106 (1833).

(n139)Footnote 212. 3 & 4 Will. 4, c. 714 (1833).

(n140)Footnote 213. 3 & 4 Will. 4, c. 27 (1833).

(n141)Footnote 214. 3 & 4 Will. 4, c. 105 (1833).

(n142)Footnote 215. 7 Will. 4 and 1 Vict., c. 26 (1837).

(n143)Footnote 216. 2 & 3. Will. 4, c. 71 (1832).

(n144)Footnote 217. 8 & 9 Vict., c. 106 (1845).

(n145)Footnote 218. 15 & 16 Vict., c. 76 (1852).

(n146)Footnote 219. 40 & 41 Vict., c. 33 (1877).

(n147)Footnote 220. 25 & 26 Vict., c. 53 (1862).

(n148)Footnote 221. 38 & 39 Vict., c. 87 (1875).

(n149)Footnote 222. 60 & 61 Vict., c. 65 (1897).

(n150)Footnote 223. A.W.B. Simpson, A History of the Land Law 284 (2d ed. 1986).

(n151)Footnote 224. Settled Lands Act, 3 & 4 Vict., c. 55 (1840); Settled Estates Act, 8 & 9 Vict., c. 56 (1845).

(n152)Footnote 225. 27 & 28 Vict., c. 114 (1864).

(n153)Footnote 226. 21 & 22 Vict., c. 77 (1858).

(n154)Footnote 227. 40 & 41 Vict., c. 18 (1877).

(n155)Footnote 228. 45 & 46 Vict., c. 38 (1882).

(n156)Footnote 229. 45 & 46 Vict., c. 75 (1882).

(n157)Footnote 230. *7 Edw. 7,* c. 18 (1907).

(n158)Footnote 231. 25 & *26 Geo. 6* , c. 30 (1935).

(n159)Footnote 232. 12, 13 & *14 Geo. 6* , c. 78 (1949).

(n160)Footnote 233. *See also* 15 William Holdsworth, A History of English Law 176-192 (1965).

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CHAPTER 5 ENGLISH PROPERTY LAW AFTER THE MIDDLE AGES

1-5 Thompson on Real Property, Thomas Editions § 5.05

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§ 5.05 Twentieth-Century Reforms in English Land Law.

The spirit of reform mildly but persistently in evidence during the 19th century carried into and gained momentum during the 20th century. During the first quarter of the 20th century the English Parliament culminated an extensive period of law reform by enactment of the Property Acts of 1925, consisting of several statutory components: the unrepealed portions of earlier reform acts, especially of the Law of Property Act of 1922 n234 and the Law of Property (Amendment) Act of 1924; n235 the Settled Land Act of 1925; n236 the Trustee Act of 1925; n237 the Law of Property Act of 1925; n238 the Land Registration Act of 1925; n239 the Land Charges Act of 1925; n240 and the Administration of Estates Act of 1925. n241 Since 1925, specific areas of property law have also been subject to reform statutes, including, among others, the Perpetuities and Accumulations Act, n242 the Law of Property (Joint Tenants) Act, n243 the Matrimonial Homes Act, n244 the Leasehold Reform Act, n245 another Law of Property Act, n246 the Charging Orders Act, n247 and the Limitation Act. n248 Particularly during the twentieth century, English land law reforms have been characterized by increasing governmental regulation to achieve public benefits or protections at the expense of purely private interests. n249

FOOTNOTES:
(n1)Footnote 234. 12 & *13 Geo. 5* , c. 16; Law of Property (Amendment) Act, 15 & *16 Geo. 5* , c. 5.

(n2)Footnote 235. 15 & *16 Geo. 5* , c. 5.

(n3)Footnote 236. 15 & *16 Geo. 5* , c. 18.

(n4)Footnote 237. 15 & *16 Geo. 5* , c. 19.

(n5)Footnote 238. 15 & *16 Geo. 5* , c. 20.

(n6)Footnote 239. 15 & *16 Geo. 5* , c. 21.

(n7)Footnote 240. 15 & *16 Geo. 5* , c. 22, later replaced by the Land Charges Act of 1972, c. 61.

(n8)Footnote 241. 15 & *16 Geo. 5* , c. 23.

(n9)Footnote 242. 1964, c. 55.

(n10)Footnote 243. 1964, c. 63.

(n11)Footnote 244. 1967, c. 75.

(n12)Footnote 245. 1967, c. 88.

(n13)Footnote 246. 1969, c. 59.

(n14)Footnote 247. 1979, c. 53.

(n15)Footnote 248. 1980, c. 24

(n16)Footnote 249. *See* David A. Thomas, *British and American Real Property Law and Practice: A Contemporary Comparison*, 34 Real Property, Probate And Trust Journal 443 (Fall 1999) (Part III of the series Anglo-American Land Law: Diverging Developments from a Shared History).

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1-5 Thompson on Real Property, Thomas Editions § 5.06

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CHAPTER 6 DEVELOPMENT OF PROPERTY LAW IN ENGLAND'S AMERICAN COLONIES

1-6 Thompson on Real Property, Thomas Editions 6.syn

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CHAPTER 6 DEVELOPMENT OF PROPERTY LAW IN ENGLAND'S AMERICAN COLONIES

1-6 Thompson on Real Property, Thomas Editions § 6.01

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§ 6.01 Introduction to the Chapter.

In strict chronological sequence this chapter should fall between Chapter 4 and Chapter 5. In Chapter 4 the progress of English property law is traced to roughly the end of the 16th century, by which time most of the effects of the 1536 Statute of Uses had revealed themselves. Chapter 5 is a discussion of the significant subsequent changes in English property law up to modern times. At about the same time as the chronological division between these two chapters, the English exploration and colonization of North America was just getting underway, and early in the 17th century, the first permanent English settlements began to be established. Therefore, the state of affairs in English property law as described in Chapter 4 provides an appropriate background for understanding the beginnings of property rights in England's earliest American colonies.

In this Chapter, the property law developments in each of the 13 English colonies are examined, up to the time of national independence. Basic American property law developments thereafter, including developments in each of the states, are covered in Chapter 7.

The content of Chapter 6 consists of an independent section for each of the 13 colonies, beginning with the earliest to have permanent European settlements. The transformation of property law described in Chapters 6 and 7 parallels, and may be usefully compared with, the contemporary property law changes in England, as described in Chapter 5. It will, of course, be abundantly evident that developments unique to one country were prompted by forces and circumstances peculiar to that country, despite the shared origins of English and American law.

It is also noteworthy that in the earliest of England's North American colonies, the acclaimed common law of England had little specific influence when the colonists actually had to form rules to govern their everyday affairs, such as working out rights in land. Property arrangements were often a combination of what the colonists had learned from limited firsthand experience in their homelands and of their aspirations for a better society. Only later in the colonial era would the common law of England be routinely held up as the protective shield for English citizens' most important personal and civic rights. n1

FOOTNOTES:
(n1)Footnote 1. *See* Chapter 1, *Property Rights in the Colonial Era and Early Republic, in* James W. Ely (ed.),

Property Rights In American History (Levittown, Penn: Garland Publishing, 1997).

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CHAPTER 6 DEVELOPMENT OF PROPERTY LAW IN ENGLAND'S AMERICAN COLONIES

1-6 Thompson on Real Property, Thomas Editions § 6.02

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§ 6.02 Development of Property Law in Virginia (from 1607).

§ 6.02(a) The Charter of 1606.

The royal charter that led directly to establishment of Jamestown, Virginia, as the first permanent English settlement in North America was probably drafted in 1606 by the Lord Chief Justice of England, Sir John Popham. Popham's group, which included prominent merchants and other men from London, Bristol and Plymouth, then petitioned King James I for a patent to validate the charter, and letters patent were granted by the king on April 10, 1606.

The charter asserted English sovereignty over a huge area of North America, between 34 and 45 degrees north latitude from coast to coast and one hundred miles into each ocean, all called Virginia. The land granted included all land:

> along the sea coasts, between four and thirty degrees of Northerly latitude from the Equinoctial line, and five and forty degrees of the same latitude, and in the main land between the same four and thirty and five and forty degrees, and the Islands thereunto adjacent, or within one hundred miles of the coasts thereof. n2

With our modern knowledge of North American geography, it is hard to take seriously the magnanimous extent of this grant:

> This tremendous tract included, in addition to the area of the present state of Virginia, in part the states of Maine, Michigan, Wisconsin, Minnesota, South Dakota, Montana, Idaho, Oregon, North Carolina, South Carolina, Georgia, Alabama, Mississippi, Arkansas, Texas, New Mexico, and Arizona; and in their entirety or very nearly their entirety, the states of Maryland, Delaware, New Jersey, Pennsylvania, New York, Connecticut, Rhode Island, Massachusetts, New Hampshire, Vermont, Ohio, West Virginia, Kentucky, Tennessee, Indiana, Illinois, Missouri, Iowa, Oklahoma, Kansas, Nebraska, Wyoming, Colorado, Utah, Nevada, and California. In short, this vast virginal tract included all or part of each of forty-two of the present fifty states. The territory embraced as well Lake Ontario and Lake Erie and much of Lakes Huron and Michigan. In addition, its boundaries encompassed part of what is today the Canadian province of Ontario. This transcontinental grant stretched approximately two thousand five hundred miles in an eight hundred mile wide belt from the Atlantic to the Pacific. It also extended one

> hundred miles into each of those oceans ... n3

This swath, then, ran from Passamaquoddy Bay in Maine to Cape Fear River in North Carolina, and extended from coast to coast. Even contemporaries realized it was a vast tract; witness the comment of Captain John Smith:

> This Virginia is a country in America between the degrees of 34 and 45, of the North latitude. The bounds thereof on the East side are the great Ocean: on the South lyeth Florida: on the North nova Francia: as for the West thereof, the limits are unknowne. n4

The patentees who were from London were authorized to establish a privately funded joint stock company in order to set up a colony anywhere on the coast between 34 and 41 degrees latitude, and to take jurisdiction of a tract 50 miles north and 50 miles south of the settlement and one hundred miles out to sea and one hundred miles inland. This London group was designated the "first colony," while the group from Plymouth and Bristol, called the "second colony," was given similar instructions pertaining to a second joint stock company and a colony in the territory between the 38th and 45th parallels. n5

In each colony a council of thirteen persons was to govern "according to such laws, ordinances, and instructions, as shall be in that behalf, given and signed with our hand or sign manual, and pass under the privy seal of our realm of England." n6 These two colonial councils were made subject to the direction of another council of thirteen, sitting in England, called the Council of Virginia. n7

The charter secured to all persons dwelling or born within the colonies the right of English citizens to "have and enjoy all liberties, franchises, and immunities, within any of our other dominions, to all intents and purposes, as if they had been abiding and born, within this our realm of England, or any other of our said dominions." n8 Supplemental instructions drafted in November 1606, proclaimed that,:

> for the good government of the people to be planted in those parts, and for the good ordering and disposing of all causes happening within the same, and the same to be done for the substance thereof, as neer to the common lawes of England, and the equity thereof, as may be ... n9

Thus was expressed from the outset a fundamental commitment to a rule of law based on the rules of common law and equity in the English jurisprudence of the time.

The provision for two colonies with potentially overlapping territories (between 38 and 41 degrees latitude), with the injunction that the colonial seats should be at least 100 miles apart, meant that the territory in the middle could be jointly settled, but that the "first colony" would effectively determine the land of joint occupation by selecting its colonial seat first.

For the power over the land itself, the 1606 letters patent, in which James I as grantor assumed the tone of the royal "We," proclaimed with respect to both colonies,:

> And do therefore, for us, our heirs, and successors, grant and agree ... that the patentees shall have all the lands, woods, soil, grounds, havens, ports, rivers, mines, minerals, marshes, waters, fishings, commodities, and hereditaments, whatsoever, [within the boundaries of the colony] ... and that no other of our subjects shall be permitted, or suffered to plant or inhabit behind, or on the backside of them, towards the main land, without the express licence or consent of the council of that colony, thereunto in writing first had and obtained. n10 The grants included several orders for the new settlers. "They shall order the search for gold, silver and copper, giving to us our heirs and successors the one-fifth part of such gold and silver, and one-fifteenth part of all copper found. Authority is granted to capture any persons, ships or goods which shall be trafficking without license within the limits of said plantations.

> Upon petition, we shall grant unto such persons and their heirs and assigns, as either council shall nominate, all the lands and tenaments which shall be within that colony." Alfred N. Chandler, *Land Title Origins: A Tale of Force and Fraud* 49 (1945).

The patentees were not, however, empowered to make outright grants of land to their settlers. Instead, the colonial council would petition the king for letters patent to individual settlers:

> And finally, we do, for us, our heirs, and successors, grant and agree, to and with the [patentees] ... that we, our heirs, and successors, upon petition in that behalf to be made, shall, by letters, patent under the great seal of England, give and grant unto such persons, their heirs, and assigns, as the council of that colony, or the most part of them, shall, for the purpose nominate and assign, all the lands, tenements, and hereditaments, which shall be within the precincts limited for that colony, as is aforesaid, to be holden of us, our heirs, and successors as of our manor of East-Greenwich in the county of Kent, in free and common socage only, and not in capite ...
>
> All which lands, tenements, and hereditaments, so to be passed by the said several letters patent, shall be sufficient assurance from the said patentees ... n11

In this language the invoking of and reliance upon the English common law of property is obvious. Nominees for land patents received them directly from the monarch, not as tenants in chief, or *in capite*, but in the tenure known as free and common socage (with the manorial holding of East Greenwich in Kent as a model). This tenure, evolved from earlier feudalism, has been described earlier in this work as follows: n12

> Any tenure that on the one hand is free and on the other hand is not spiritual, nor military, nor 'serviential,' is called tenure in free socage. n13

Tenure in free socage eventually developed as the one great residual tenancy for almost every arrangement that was not military tenure. It also was free of the most burdensome incidents of military tenure, so that it became the tenancy of choice, even if holding it inferred a relatively lower social status.

The very wide variety of socage tenures arose from several types of circumstances. For instance, a tenant might be bound to render only nominal services or rents to the lord, either because the conveyance might be between related persons, or the grantee had actually purchased the land: "to have put the purchaser in the vendor's place might have been difficult, perhaps impossible [given the restrictions on alienability at the time]; so the purchaser is made tenant to the vendor at an insignificant rent." n14

For some socage tenures a more substantial rent in money or goods or produce was demanded, possibly the result of some bargaining by lords and tenants trying to strike the best deals that economic circumstances would allow. Other socage tenures imposed requirements of ordinary agricultural labor, even if the tenant was an important aristocrat. These duties would have been fulfilled by the socage tenant's undertenants and "seem to be the channel by which the term *socage* gradually spreads itself." n15

At times it might have been quite natural for a villein able to supply some needed labor services to step up into a socage tenure that was ordinarily open only to free persons. Indeed, some socage tenants were barely distinguishable from the unfree villeins.

At the time of the Virginia patents, the tenure of free and common socage was simply the almost universal "tenure" by which land was held. By this time most tenures themselves were unimportant; only certain revenue-producing tenurial incidents were still protected by their beneficiaries. Half a century later, tenures would be officially abolished in England by legislation. n16

The supplemental instructions of November 20, 1606, added further confirmation that property rights rested on the established rights under the laws of England:

> ... [A]nd moreover wee doe hereby ordaine and establish for us, our heires and successors, that all the lands, tenements, and hereditaments to be had and enjoyed by any of our subjects within the precincts aforesaid, shall be had and inherited and enjoyed, according as in the like estates they be had and enjoyed by the lawes within this realme of England ... n17 n18

The instructions of November 1606, not only contained no express prohibition of private property in land, but indeed suggested that private land grants would be made in the future. However, the joint trading regulations and overall communal rules for the colony were not conducive to private property holdings. For persons other than the patentees, private property rights in Virginia lands did not appear until several years after the initial settlements.

As leaders of a proprietary form of colony, the Virginia patentees had control of the economic and commercial activities of their colonies, and the powers of government rested with the two resident councils subject to the overall direction of the Council of Virginia sitting in London. When the three vessels bearing the first, or London, company's complement of settlers arrived in Virginia in May 1607, the Jamestown site was selected and work began immediately on clearing land and constructing a protective fort and dwellings. The settlers of the second, or Plymouth, company did not arrive until the end of August 1607, and selected a site they called Sagadahoc near the mouth of the Kennebec River, at a latitude of 431/2 degrees. The corporate management of both settlements was identical:

> The colonies which were founded at Sagadahoc and Jamestown were both plantations, owned, officered, and managed by the proprietors or company. The colonists were servants of the company. They were freely transported to Virginia in its vessels, and there worked for the company under prescribed regulations. They were fed and housed out of the products of the total labor of the colony, supplemented by cargoes of provisions received from home. When, if ever, the colony became able to furnish a surplus product, -- lumber, furs, tobacco, --- it was sent home in the vessels of the company and sold for the benefit of the adventurers. n19

The settlement at Sagadahoc started badly and was abandoned a year later. The severe threats to Jamestown's existence, both from internal dissension and from external calamities, are well known and documented. Preoccupation with survival ensured that neither colony, especially under the governance arrangements of the 1606 charter, would expand its affairs beyond the enterprise of a single settlement. n20 Despite the charter's assurance that English rights would be preserved, the corporate management form soon deteriorated into autocratic rule by a few or even by one, and individual property rights were not yet in existence.

§ 6.02(b) The Charter of 1609. n21

Early in 1609 the patentees drafted a new charter, which was approved by James I on May 23, 1609. The main objective of the new charter was to replace the old unworkable system of resident and London-based councils with a hierarchy of individual officers, such as governor and lieutenant governor. Most importantly, under the 1609 charter the king released all but nominal control over the Virginia colonies, leaving governing powers with the patentees of the company. The day-to-day rule was conducted by the resident governor, although he would exercise his powers only "according to such directions" as he received from the company in London.

The charter of 1609 required continuation of the plantation system, by which the colonists worked in groups under various officials as overseers. The workers were to live in common quarters and take their meals all together.

With respect to property rights, the 1609 charter reconfirmed that the patentees were authorized to acquire such rights

after first obtaining royal permission:

> And that [the patentees] and their successors, shall be, from henceforth, forever enabled to take, acquire and purchase, by the name aforesaid (license for the same, from us, our heirs or successors, first had and obtained) any manner of lands, tenements, and hereditaments, goods and chattels, within our realm of England, and dominion of Wales. n22

The 1609 charter also confirmed that such property rights were the rights recognized under existing English law, although this time an additional form of consideration was exacted, one-fifth of the yield of any gold and silver mines:

> [The patentees] are to have and to hold, possess and enjoy, all and singular the said lands, countries and territories, with all and singular other premises, heretofore by these presents granted, or mentioned to be granted ...; to the sole and proper use of [the patentees], their successors and assigns for ever; to be holden of us, our heirs, and successors, as of our manour of East Greenwich, in free and common socage, and not in capite; yielding and paying, therefore, to us, our heirs, and successors, the fifth part only of all ore of gold and silver, that from time to time, and at all times hereafter, shall be there gotten, had, or obtained for all manner of services. n23

Property rights previously granted were ratified, except that the northern boundary of the territory open to Virginia Company colonization was shifted back from the 41st to the 40th parallel. n24

The new charter stimulated a new interest in Jamestown, and more colonists and supplies were shipped to succor the struggling settlement. By the time these arrived in the summer of 1609, however, Jamestown was nearly dead; fewer than one-third of all previous colonists there were still alive. Conditions grew even worse. The 100 survivors and 400 new arrivals were wracked by starvation and disease throughout the next winter, so that only about 60 of the 500 survived to the summer of 1610. On June 17, 1610, they had abandoned Jamestown and boarded ship back to England when they met the new governor upon his arrival, who had them disembark and start anew.

The new governing arrangements authorized by the 1609 charter were more fully installed in 1610. The following year, in 1611, even a law code was prepared, the "Lawes and Orders, Divine, Politique, and Martiall, for the Colony of Virginia," n25 for up to this time no written laws had existed in the colony:

> According to this code, freedom of action within the colony was to be reduced to a minimum. The colony was to be regarded and treated as an absolute unit. The traditional forces of military discipline, several penal enactments, and strict religious observance were brought to bear, to repress disorder and direct the productive energies of the settlement. n26

Under such a regimen, probably necessary for the colony's survival, the leaders hoped that their farmers could be soldiers too, with military obedience and diligence characterizing their efforts to conquer the land. The colony now had not only a governor, but also a marshal, who -- according to a familiar model -- was responsible for directing the activities and maintaining the discipline of the colonists. Sir Thomas Dale arrived at Jamestown on May 19, 1611, and assumed duties as deputy governor but was referred to as, and functioned as, marshal.

Under Dale the colonists quickly founded a new settlement, called Henrico, about 40 miles upriver from Jamestown, and in 1613 secured the entire peninsula from Indian attacks. Much of Jamestown's population relocated to the new site, and an unprecedented measure of health and prosperity began to emerge.

This success was marred by the severity of discipline imposed by Dale, especially after he became acting governor in 1614. During this time it could be said of the Virginia settlements that:

> a planned economy was placed in operation for the first time in American history. Supervision of

> crop production was the very least of the economic controls imposed ...
>
> Virginia's economy was essentially communistic. To the colony accrued the products of its lands. To the government fell the task of distribution. n27

§ 6.02(c) The Charter of 1612.

In the meantime, the patentees had sought and on March 12, 1612, the king had approved a third charter. This charter reaffirmed the grants of the earlier charters and extended the Virginia boundaries to include islands lying within 300 leagues (900 miles) of the continent between 30 and 41 degrees latitude, and it accepted numerous additional subscribers. n28 No subscribers were permitted to join the company for less than £12 10s:

> This amount finally entitled the payer to a share of not less than 100 acres in Virginia. Of those who paid their subscriptions and took therefor bills of adventure, it may be stated, as approximately correct, that about one third came to Virginia themselves and settled on their lands; about one third sent over their agents, or finally their heirs, to occupy theirs; while the remaining third sold their shares to others, who generally settled on the lands. These classes were the landed gentry, and they brought, or sent, over another class as servants, etc. n29

The charter of 1612 reiterated the language of the two previous charters concerning the holding of lands in free and common socage, and of the 1609 charter concerning payment of one-fifth of the yield from any gold and silver mines. n30 It also confirmed interests previously granted n31 and declared that questions in construing or interpreting any of the charter provisions should be resolved in favor of the company. n32

§ 6.02(d) Introduction of Private Landholding.

Under the desperate circumstances of Jamestown's early years, of course, there could be little thought of private property interests in land for the individual colonists, yet the land was there in such unimaginable abundance:

> The sheer quantity of land was a powerful attraction. So far as anyone knew in 1607 the amount was boundless, and for the English, whose homeland was a small island, that thought was mind-boggling. Owning ground was what made gentlemen back home. In Virginia a man could take of it as he desired and do with it as he pleased. Very quickly, that realization bred a belief that Virginia was a place without limits; and, over the long run, that conviction had profound consequences for the colony's future. n33

But the dream of possessing one's own land was not yet the lot of the Virginia colonists because of the militaristic plantation system enforced with renewed vigor again after 1610, and especially after the introduction of the severe code of military rules in 1611. Human nature soon asserted itself against the new communalism, as described in a contemporary account:

> When our people were fed out of the common store, and labored jointly together, glad was he who could slip from his labor, or slumber over his task he cared not how, nay, the most honest among them would hardly take so much true pains in a week, as now they themselves will do in a day: neither cared they for the increase, presuming that howsoever the harvest prospered, the general store must maintain them. n34

Dale was not oblivious to those sentiments, and as early as 1611 he had consulted the Council about allotting to each colonist a private garden. It was not until 1614, however, that he actually introduced a form of private property into the colonial economy. At that time, a large number of colonists were assigned private plots of three acres each, which they held under lease. The lessees, called farmers in accordance with contemporary English land terminology, n35 were to pay two and one half barrels of corn annually as rent and were declared exempt from community labor during eleven

months of the year. Other arrangements were soon introduced to attract new settlers:

> In order further to encourage the development of tenant right, and the cultivation of commodities which were useful as food, Dale assured to every man with a family who came into the colony a house with four rooms, which he was permitted to occupy for at least a year without the payment of rent. Twelve acres fenced and adjacent to the house assigned for cultivation. With this went tools, live stock, and provisions adequate to the support of the family during a twelvemonth. After that time the newcomer was expected to maintain himself. n36

By the time Dale left in 1616, four settlements in addition to Jamestown and Henrico had been established, and the 381 surviving settlers appeared acclimated and fit to further the colony's development.

§ 6.02(e) The Spread of Private Landholding.

According to company regulations, the system of joint land management was to expire in 1616, and dividends on the stock issued in 1609 fell due. Because no profits had accumulated during the subsequent seven years, the company was able to pay the dividend only in land. The stockholders were therefore promised fifty acres for each share and told that an additional two hundred acres per share might be later given, but that in order to cover the costs of surveying, each was invited to contribute an additional £12 10s, in return for an additional fifty acres. The results of all of these promotions were inadequate, so:

> the Company in 1617 offered fifty acres for each person going to settle in Virginia, the land assigned to the one paying expenses. This was the beginning of the headright system of land grants which was the chief method of distributing land in Virginia throughout most of the seventeenth century, and, in a modified form, for many years later. n37

In the colony itself, other preparations were made for division of the land near the settlements. In 1617 some indentured laborers, who in 1614 had been promised their freedom after three years' work, were actually emancipated and probably joined the ranks of the tenant farmers. In addition, some lands were most likely held in fee simple, having been so granted by former governors to some of the earlier colonists. n38 When a new governor arrived in 1617, however, the land distributions ceased, and a new requirement was imposed on each tenant to plant at least two acres in grain, a hedge against the temptation to plant nothing but tobacco.

A new charter was issued in 1618 but was never delivered, because the new governor bringing it with him died while making the ocean crossing. Later that year, on November 18, 1618, the Virginia Company in London issued instructions that transferred governmental power to the colony in Virginia and mandated that the colony be governed by both appointed officers and an assembly consisting of colonists' representatives. These instructions, the so-called "Great Charter" of Virginia, were of greatest importance because they led to the swift assembling of the earliest representative legislative body in North America. The General Assembly, consisting of the governor, six councilors and twenty-two burgesses elected by the colonists, first met at Jamestown on July 30, 1619. n39

In addition, a large part of the company instructions dealt with major changes in the management of land:

> These instructions provided that no land patents should be granted until after thorough consideration and approval by the Company. [The governor] was to secure corn and cattle for new settlers by restoring to cultivation the public lands, which had been largely abandoned ... [and to] "lay out a convenient portion of public lands for the maintenance and support, as well of magistracy and officers, as of other public charges ...." n40

Three thousand acres were set aside as land and residence for the governor, to be cultivated by the governor's guard and fifty tenants; an additional three thousand acres at each of the principal settlements were assigned to pay the expenses

and salaries of councilors and public officers of the colony, and some of the later arriving settlers were placed on these under seven-year tenancies:

> There were also provisions in these instructions ... for the granting of one hundred acres of land (and more later) to each individual adventurer or planter who had already bought a share of £12 10s. in the Company's stock, or who had come over at his own expense and had died or had remained in the Colony for at least three years, or who had come over at the Company's expense before [the former governor] Dale's departure in 1616 and who had completed his term of service to the Company. But because Dale's able administration had brought greater "ease and security," only fifty acres each were given to those coming over at their own expense after Dale's departure. The headright system of granting land to those who brought in settlers was continued, and the system of granting lands for particular plantations, or subsidiary colonies, was greatly extended. n41

Embodied in these rules, therefore, was a liberal right to acquire fee simple in land. Even common laborers were able to become landholders under the farmers' tenure:

> Far more powerful was the influence of a fee simple title upon those who received this invaluable gift on account of their long connection with the Colony; it is stated [by Captain John Smith, *Works*, p. 542] that a strong rivalry at once sprang up among them as to which one should excel in building and planting. n42

As to the lands assigned for the support of public offices, it was necessary to also provide the means for making the lands productive:

> The apportionments of land would have been worthless if no provision had been made for their cultivation. A system of leases in consequence was adopted. To the Governor one hundred tenants were allowed; to the Treasurer and Marshal, fifty each; to the superintendent of the Company's lands, forty; to the Secretary and Physician, twenty apiece; and to the Vice-admiral, twelve. Each one of these public officials, when his tenure ceased, was required to transmit to his successor the whole number of tenants who were by law attached to his office. It was the intention of the Company that each one should receive such an area of land and such a number of servants as would be sufficient to afford him an ample support as well as to sustain the dignity of his position. The plan was in large measure carried into practical effect. n43

§ 6.02(f) Tenancy in Land.

The tenancy attached to such lands at that time was a form of landholding resting somewhere in the middle of the progression from the medieval unfree villein tenure and the modern agriculture tenancy known today. The Jamestown tenants were not indefinitely bound to the soil and subject to the needs and directions of the lords of the manor, as their peasant forebears may have been; still, the farmer's seven year term was a form of servitude, requiring payment of half the annual crops and labor services for the entire seven years n44:

> [It was] openly asserted that the officers of the Company made an improper use both of their tenants and the tenants' servants. The servants were taken away from their masters and removed by the officers to their private estates, while the tenants themselves were kept so constantly engaged in rowing the officers to and fro between Jamestown and the lands assigned to the different official positions ... that it was not in their power to pay the rent expected of them ... The amount of rent exacted of the tenants was undoubtedly too large, being very much in excess of that which was required of the farmers during the administration of [former governor] Dale. n45

Not more than three years after this system went into effect, the tenants obtained a change in the arrangements favorable

to their situation. The rent was changed from one-half the crop (no rent if the crop failed) to 20 bushels of grain, sixty pounds of tobacco, and one pound of silk, plus six days' labor on public works. To ensure performance, no fewer than three tenants were required to live together, each being bound for the rent requirements.

§ 6.02(g) Land Grants to Private Societies.

Yet another form of land grant commenced in 1618, a type of sub-patent issued to private societies. Under this arrangement several prominent colonists banded together, combining their own shares and sometimes purchasing additional shares, and offered to form a plantation at their own expense. The result was the assigning of very large tracts of Virginia land for private plantations, which tended to quickly use up the available land:

> The first private plantation thus granted was Southampton or Smith's Hundred, consisting of two hundred thousand acres ... Within this some three hundred tenants were settled. Shortly after other grants were made to "Argall and his associates," "Hamor and his associates," "Martin and his associates." Of these the last, known as Martin's Plantation or Hundred, n46 [was] the only one of the three to be developed ... The grantee was Captain John Martin, who had been connected with the fortunes of the colony from the outset. The grant contained eighty thousand acres. n47

Among the terms of the private plantation grants or patents was that the grantees could regulate their servants and business in ways not repugnant to the laws of England. This was tested when, at the time the first assembly met, John Martin claimed the privileges of an English manorial lord over his plantation, but he was directed instead to submit to usual company regulations. Nevertheless, the grantees of private plantations were called commanders and seem to have had some semi-military powers of governance. When the company was eventually dissolved and Virginia became a royal province, the characteristics of local government that had grown up with private plantation settlements were preserved.

§ 6.02(h) Summary of How Private Landholding Progressed.

Thus, by several devices the vast lands of tidewater Virginia began to shift into private ownership. Farmers completing their tenancies might be in position to buy land outright; settlers could receive land for their work, and if they properly exploited their first grant, they could receive a second grant of equal size without further investment; likewise, investors received grants in recognition of their stock, with further grants to follow if the first were profitably developed; private societies obtained large "plantation" tracts; large tracts were reserved for public institutions and officials, which were worked by soldiers, servants and tenants; and under the headright system, those who sponsored and sent colonists received grants of land for every person they sent.

The significance of the headright system cannot be over-emphasized:

> The system of head rights played a prominent part in the settlement of Virginia, and of the other provinces as well, for generations to come, and by it the supply of the colonies with a due proportion of servants was insured. As an additional inducement to private settlers it was ordered that those who received their bills of adventure before midsummer 1625, should be free from the payment of quitrents. Those issued later than this date were subject to that obligation. As the result of successive divisions and the multiplication of private grants, large and small, the unoccupied land of the province gradually became the property of the individual freeholders. Those who possessed the smaller estates worked them themselves with the aid of a few laborers or servants. The larger grantees employed many servants, -- or later, slaves, -- and in some cases leased their estates partly or wholly to tenants ...
>
> General indolence, of which John Smith and Dale complained, disappeared with the advent of the system of individual estates. n48

§ 6.02(i) Changes in Governance Affecting Private Landholding.

The deaths of Pocahontas in 1617 in England and of her father, Powhatan, in Virginia the next year eventually led to changed relations with the natives. On March 22, 1622, Powhatan's successor was able to coordinate widespread surprise attack on numerous Virginia settlements, resulting in the massacre of about 350 men, women and children -- a quarter of the colony's population at the time. An attack of plague only a few months earlier had been even more devastating.

The discouragement following these disasters prompted King James I, later in 1622, to involve himself more directly in the affairs of the company, fearing the conditions in the colony were fomenting too much independence and possible sedition. He submitted names of his own candidates in elections of company officers, but when they were rejected, he began planning for the destruction of the company. Following the contrived work of a royal investigative commission, James offered the company a guarantee that their property interests would be preserved if they would surrender their charter to royal control, which proposition was also rejected. Then James had his attorney general issue a *quo warranto* against the company; when the matter came before the King's Bench on June 26, 1624, the company's charter was revoked on a technicality -- an alleged error in pleading.

With the return of the colony to royal governance, a commission was appointed with the objective of reinstating the plan of government described in the 1606 charter. James died, however, before the commission could finish its work. His successor, Charles I, then officially proclaimed Virginia a royal colony, and in the end no major changes were made to the form of government that was in place in 1624. The Virginia assembly did not meet officially between 1624 and 1628; but following this hiatus, they resumed meeting and legislating, albeit without formal sanction from the king. Finally, in January 1639, Charles gave formal consent to the restoration of the assembly as a permanent institution of the colony. This was the first representative assembly in an English royal colony. During this period the settlement of land continued, impeded only by the presence of large abandoned tracts owned by those who had died or returned to England. In 1648:

> by authority of his instructions Governor Berkeley allowed colonists to settle in the James River Valley on lands previously granted to others but which either had been abandoned or never settled. Former owners who protested were given lands in unsettled regions elsewhere. This doubtless marked the end of many particular plantations on paper. n49

For defensive purposes, commanders were authorized to build forts at designated locations and to keep the forts and the property belonging to them so long as they maintained the garrison. Similarly, to encourage exploration, a 1652 act of the assembly authorized exploration projects under which the explorers could choose for themselves a portion of the land discovered. In 1653 the assembly established reservations for certain Indian tribes and required colonists within those areas to move. In 1656 the Indians were prohibited from selling or trading their land without assembly consent.

The huge territory of the colony was also destined for division. The issuance of the Maryland charter in 1632 hemmed in Virginia on the north. In 1663 eight persons received from King Charles II proprietary rights to the region between Virginia and Spanish Florida on the south. When Charles seized New Netherlands in 1664, he granted it to his brother, the Duke of York. Even before coming to power, Charles had made direct grants of Virginia land to several of his friends, although eventually they fully submitted to the authority of the colonial government. When Charles II in 1673 granted almost all of Virginia to two of his favorites, in disregard of established grants and governments already in place, the Virginians were able to undo most of his mischief. Thereupon they petitioned for a completely new charter, but the charter they received did little more than confirm titles to lands.

§ 6.02(j) The Influence of English Common Law on Landholding.

§ 6.02(j)(1) Adoption of English Common Law in Virginia.

The adoption of English common law, as modified by local circumstances, appeared in early Virginia patents almost as an afterthought. When the Stuart monarch was restored to the throne in 1660, however, it seemed appropriate to the assembly to confirm their allegiance to that rule of law. Thus, the assembly proclaimed that Virginians "have also endeavoured in all things (as neere as the capacity and constitution of this country would admitt) to addhere to those excellent and often refined laws of England, to which we profess and acknowledge all due obedience and reverence ...." n50

The underlying assumption that the laws of England applied in colonial Virginia, except where local circumstances dictated otherwise, was made more explicit after the Stuart Restoration in 1660. The Virginia assembly sorted through its past enactments, and those to be kept were compiled in a new code of laws adopted by the assembly in March 1662:

> By the statutes of 1661-1662, procedure in the courts was regulated. At the time of the Restoration, Virginia seems to have been especially anxious to show herself loyal to England, and these enactments breathe a deep respect for the common law. In the preamble it is stated that the legislature has endeavored in all things to adhere to these "excellent and refined laws of England to which we profess to acknowledge all due obedience and reverence." As a reason for enacting laws at all they assign the vast volume of the English law from which courts would be unable to collect the necessary principles without the aid of such codification. The former laws are repealed and a new code is enacted. As some former laws restrained the trial by jury quite contrary to the laws of England, the law of juries is restated with special carefulness and precision. It is interesting to note in this connection that the colonists express their regret that they are unable to comply with the requirement of the English jury system that the jurors shall come from the immediate neighborhood of the place where the fact was committed; but they state that they desire to approach as near as possible to compliance by enacting that six men of the ablest and nearest of the inhabitants of the county shall be on the jury ... In this code the period of prescription for land is limited to five years. n51

In 1666 the assembly appropriated money to purchase law books, in order to more faithfully adhere to English common law:

> Whereas for the better conformity of the proceedings of the courts of this country to the lawes of England, as appeares necessary for their better direction therein, all the former statutes at large and those made since the beginning of the raigne of his sacred majestie that now is and a few other approved books of law should be purchased, It is therefore by this grand assembly and the authority thereof enacted accordingly that all the aforesaid statute books, and Daltons justice of the peace, and office of a sherriffe, and Swinburnes book of Wills and Testaments may be sent for by the auditor for the use of the general courts and assembly, ... and the like books be sent for by some of the commissioners of the severall county courts for the use of the respective counties, and paid for out of the county levy. n52

Given the background of colonial Virginia's early leaders, reliance on English common law was only natural:

> Throughout the nearly two decades that the London Company managed Virginia, it recruited the colony's leaders from England's ruling classes. Those men were well schooled in English law and custom. They had been educated at the universities or Inns of Court; some knew martial law, and they all enjoyed ties to the court and Parliament. Despite such qualifications these men were to leave only a slight impression on colonial law. Few survived or stayed in Virginia long enough to make much of a mark. Furthermore, there was little agreement before 1625 as to which of England's legal traditions were most suitable to a struggling colony. The question of what law should prevail was only vaguely addressed before formulation of *The Lawes Divine, Morall and Martiall* [the very severe code adopted for Jamestown in 1611, and sometimes enforced]. The Charter of 1618 supplanted *The Lawes,* but that

> change merely introduced the possibility of adopting a more familiar form of law. Thus it was the members of the post-1625 general assemblies, together with their counterparts in local government, who assumed the greater role in grafting English common law to colonial needs. n53

§ 6.02(j)(2) Regulation of Attorneys.

While the English legal system of the 17th century may have been implicitly accepted as the rule of law in Virginia, the colonists seemed eager to act against defects in the system. Prominent among the defects was the conduct of attorneys, that is, of persons acting on behalf of others in litigation. In 1642 the Virginia Assembly commenced an amazing series of enactments regulating attorneys that knows no parallel for legislative schizophrenic paranoia.

The 1642 act provided for licensing attorneys and limiting their fees; n54 in 1645 the assembly prohibited attorneys from collecting fees, labelling those who did as mercenary attorneys and, in effect, expelling them from office. n55 In the session of 1645-1646, the 1642 act (for licensing attorneys) was repealed and the 1645 act (expelling attorneys) was confirmed in perpetuity. n56 In 1647, the assembly further prohibited even any indirect compensation to those who functioned as attorneys but empowered the courts to chose from among the people someone who could help weaker litigants. n57 In 1656, all acts against mercenary attorneys were repealed, and a licensing provision was once again put into place:

> And be it enacted that the Governour and Councill shall appoint and allow such as they shall find fitt and able to be attornies in the quarter courts, and the commissioners to do the like by nominateing attornies for the county courts, Provided that no attorney be admitted to practice or plead, before he have taken this oath following: [The oath is omitted from the extant manuscripts.]
>
> And if any controversies arise between attornie and his client about their fee, it shall be determined in the court where the cause is pleaded, Provided allwaies that those onely be called councellors at law, who have allreadie been qualified thereunter by the lawes of England, and those so qualified to enjoy all priviledges those lawes give them. n58

Nevertheless, the assembly of 1657-1658 reversed itself again and reinstated the expulsion of attorneys. n59

§ 6.02(k) Virginia Landholding During the Later Colonial Period.

§ 6.02(k)(1) Early Legislative Provisions Concerning Land.

Title to lands and numerous other rules regulating interests in real property were implicitly drawn from the common law of England. As to the management of lands, little changed after the form of government stabilized. During the 1620's and 1630's, the Virginia Assembly typically enacted provisions regulating the surveys of land, the settling of new lands, and the disposing of abandoned lands, and required homesteads to be palisaded in defense against Indian attacks, but in general, the typical English property law invoked by the earliest charters remained intact.

The occasional minor land regulation that was enacted gives a glimpse into everyday early colonial life, when land transactions were an ordinary activity. For instance, a provision enacted by the Assembly of 1639-40 declared that "A deed or mortgage made without delivery of possession [is] to be adjudged fraudulent unless entered in some court." n60 Other examples of legislative provisions indicating that private land transactions were being conducted frequently include:

> a requirement that mortgages be registered in quarter or monthly courts, or be deemed fraudulent as to creditors; n61
>
> assignment of abandoned lots in Jamestown to others; n62

prohibiting alienation of orphans' lands during their minority; n63

resolving settlers' rival claims to the same land; n64

confirming all former surveys of land; n65

the evidence and surveys required to claim patents by head rights; n66

prohibiting desertion of plantations that had already been seated; n67

granting proprietary forts and adjoining land, on condition that proprietors keep the forts garrisoned and supplied; n68

a five-year limitation on actions for claims and titles to land; n69

requiring fencing of cleared ground; n70

regulating surveyors; n71

abolishing property taxes in favor of taxes only upon persons; n72

prohibiting alienation of Indian lands without assembly approval; n73

a holding in litigation that a devise not using the words of fee simple, or heirs and assigns forever, passed only a life estate; n74

a holding in litigation describing how to assign dower lands (division into thirds, with the widow having first choice of the divided portions); n75

confirmation of Statute of frauds provisions enacted in 1642 and 1643; n76

regulating the form of land patents; n77

confirmation of former patent rights, even if not recorded or indexed in the records; n78

condemnation of land; n79

validating conveyances by husband and wife, if the wife conveyed freely, even though not done by fine and recovery; n80 and

validating a large entailed conveyance in trust with provisions for settlement upon family members. n81

In 1670, the franchise was restricted to freeholders who held at least fifty acres. The Council that assisted in the ministerial functions of government had the responsibility for "making grants, and passing all the patents for land," according to a report of 1705. The colonial secretary, chosen from the Council, was:

> to keep the public records of the [colony], and to take care that they be regularly and fairly made up; namely, all judgments of the General Court, as likewise all deeds and other writings there proved; and further to issue all writs, both ministerial and judicial, relating thereto; to make out and record all patents for land, to file the rights by which they issued, and to take the return of all inquests of escheat. n82

§ 6.02(k)(2) Quit rents in Virginia.

In the assembly session of 1639-40, the issue of quitrents first appeared as a matter of legislative concern: "Seven years after date of patents, 2s. per hundred acres quit rents to be paid yearly, at some convenient place to be appointed in each county." n83 Quitrents are of more than passing interest because they are an unequivocal indication that landholding was still considered tenurial rather than allodial. Enforcement, or even recognition, of quit rents was only patchy in the British colonies as a whole, but in Virginia, quitrents were more successfully collected than in any of the other colonies.

Quitrents were usually associated with the tenure of free and common socage and consisted of a typically small service or sum rendered to the grantor in recognition of a persisting but nominal tenurial relationship.

> There can be no doubt that lands in the original American colonies were held in tenure. Some of the early royal grants of lands specified that the lands should be held in free and common socage [a form of tenure] and reserved nominal services, such as the annual render of "two beaver skins" stipulated in the grant to William Penn. Since [the Statute] *Quia Emptores* [in 1290] did not bind the king he could grant to his tenants in chief the right to sub-infeudate [and thus impose tenures reserving services in return] and this power was expressly given to some of the proprietaries. The Penns, for example, made grants of lands to be held of them in free and common socage. The service reserved was usually the payment of a small sum of money annually and was called a quit rent. In New England, quit rents were exceptional and long before the Revolution land was held completely free of any feudal service or incidents. After the Revolution, lands were deemed to be held in tenure of the state as sovereign in place of the Crown. Several states passed statutes, or enacted constitutional provisions, declaring lands to be owned allodially [owned outright rather than under some form of tenure] and abolishing tenure. In the remaining states it would seem that lands are still held in tenure of the state as overlord. In those states in which tenure exists *Quia Emptores* is in force, except in South Carolina and, perhaps, in Pennsylvania.
>
> From the practical standpoint it is not important today whether lands are owned allodially or are held in tenure. If tenure exists in a particular state and *Quia Emptores* is deemed to be in force there can be no sub-infeudation. If tenure exists and *Quia Emptores* is not in force a rare question might conceivably arise as to the nature of the rent reserved on a conveyance in fee. n84

As to quitrents during colonial times and beyond,

> In the charters granted to Lord Baltimore and to Penn they were given the right to erect manors and to hold therein courts-baron and courts-leet. Perhaps the closest approach to a successful attempt to set up a manorial system took place in New York. Some of the grants made by Colonial governors to the great proprietors purported to confer manorial privileges. The proprietors in turn made to settlers numerous conveyances in fee reserving in the deeds a perpetual rent payable in wheat, "fat hens" and a day's service "with carriage and horses" and a fine for alienation. These perpetual rents resulted in the 1840s in resentment, rioting, litigation and legislation. n85

Quitrents were not mentioned in the early Virginia charters, but the charter of 1609 was interpreted as reserving the right to reserve a quitrent. n86 The quitrents in force in Virginia, subject to the provisions enacted during the 1639-40 Assembly, were not required to be paid until seven years after the patent was granted, and then they were in the standardized sum of 2s. per hundred acres. Additional early legislative enactments concerning quitrents were issued by the assemblies of 1642-1643, n87 of 1645, n88 of 1647, n89 of 1660-1661, n90 and of 1661-1662. n91

Quitrents were more successfully collected and applied to various public works in Virginia than in any other American colony. However, Virginians resisted when quitrent rights were granted to individual proprietors, rather than being exercised by the crown, because they feared the revenue would not be applied for public purposes. n92

In the colonies generally:

> there is no doubt that the quit-rent as a source of revenue influenced the nobility of the seventeenth and early eighteenth centuries in seeking lands in America ... For more than a century and a half, lords and gentlemen of rank tried to obtain a footing on American soil and to introduce there the feudal rights and privileges which they exercised upon their own franchises at home. Had they succeeded they might have fastened upon the colonies feudal obligations that the New World would have found it difficult to shake off, as was the case with Canada under the French regime. In England these seigniorial rights continued to exist because they had a financial value; and it was apparently easy for the manorial lord at home to believe that he could recoup his failing resources in a similar manner from lands granted to him in America.
>
> Of all the seigniorial rights the collecting of a quit-rent was the most important ...
>
> ...The quit-rent in the domain of real property, like the royal prerogative in the field of government and the navigation acts in the field of commerce, was an obstacle to complete colonial independence, and a check upon the ability of people to utilize its own resources for its own benefit and advantage. n93

§ 6.02(k)(3) Impact of Landholding Practices on Virginia Society.

The continuing availability of land ownership exercised a powerful effect on Virginia and, eventually, on American society:

> [A] blurring of customary [social] distinctions occurred. For one thing, landownership was not restricted to a few. Land existed in abundance, and anyone could become a landowner; at least that was the promise if not always the practice. Primogeniture, the legal device Englishmen employed to keep real estate in the hands of the few by requiring that it descend to the eldest son, never worked either. Even though possession of land helped to fix an immigrant's status, its mere acquisition did not assure a high place in Virginia society. For another, settlers unaccustomed to work stood little chance of survival. That truth had been evident since the days when John Smith bemoaned the presence of too many gentlemen among the first immigrants. In contrast to English society, in Virginia the fundamental social division was between bondsmen and planters.
>
> Indentured servants and slaves constituted the lowest of Virginia's social groups ...
>
> ... Like an apprentice, servants contracted with masters to work for specified periods of time, usually four to seven years. Masters generally agreed to pay the costs of transporting servants to Virginia, to maintain them for the duration of their terms, and to give them freedom dues -- corn, tools, and clothing -- when their contracts expired. They sometimes promised to provide a piece of land or other goods as well. n94

Right on through the colonial period in Virginia, land distribution continued to be a central issue. Abuse of headrights was rife: ships' crews claimed headrights every time they entered Virginia, and captains claimed headrights for the same crews each time; no one followed up on whether the minimum improvements were installed on the acreage thus claimed, and unimproved land never reverted back to the government. Headrights were also claimed for imported slaves. This latter abuse was corrected in 1699, but none of the others was changed.

This laxness perhaps led more readily to a change in land distribution that was intended to encourage settlement of western lands. Beginning in the 1690's, settlers were granted their acreage before they actually arrived, under the assumption that they would achieve the "seating" of their lands within a specified period of time, but no reversions ever occurred for non-compliance. As part of this system, however, land speculators were able to amass huge holdings in the West, and eventually the plantation system of the tidewater country worked its way west.

By the end of the American Revolution, tax lists showed that half of adult white males in Virginia owned land, about a third were agricultural laborers, and the rest were tenants. Although the "bulk of the land was not widely held ... most white Virginians in the eighteenth century were small farmers ...," and "[l]andholding was more widely distributed in Virginia than in the mother country, and two to three times as many persons by percentage of the population had the vote in the colony as in contemporary Britain." n95

FOOTNOTES:

(n1)Footnote 2. *Letters Patent to Sir Thomas Gates et al., April 10, 1606,* art. I, *in* 1 William Waller Hening, The Statutes at Large, Being a Collection of All the Laws of Virginia 57-58 (1823). Finbarr McCarthy, *Participatory Government and Communal Property: Two Radical Concepts in the Virginia Charter of 1606, 29 U. Rich. L. Rev. 327 (March 1995).*

(n2)Footnote 3. Alf J. Mapp, Jr., The Virginia Experiment 11 (3d ed. 1987).

(n3)Footnote 4. 1 John Smith, The General Historie of Virginia 43 (1624).

(n4)Footnote 5. *Letters Patent to Sir Thomas Gates et al., April 10, 1606,* arts. IV and V, *in* 1 William Waller Hening, The Statutes at Large, Being a Collection of All the Laws of Virginia 58-60 (1823).

(n5)Footnote 6. *Letters Patent to Sir Thomas Gates et al., April 10, 1606,* art. VII, *in* 1 William Waller Hening, The Statutes at Large, Being a Collection of All the Laws of Virginia 60-61 (1823).

(n6)Footnote 7. *Letters Patent to Sir Thomas Gates et al., April 10, 1606,* art. VIII, *in* 1 William Waller Hening, The Statutes at Large, Being a Collection of All the Laws of Virginia 61 (1823).

(n7)Footnote 8. *Letters Patent to Sir Thomas Gates et al., April 10, 1606,* art. XV, *in* 1 William Waller Hening, The Statutes at Large, Being a Collection of All the Laws of Virginia 64 (1823).

(n8)Footnote 9. *"Articles, Instructions and Orders," etc., Nov. 20, 1606, in* 1 William Waller Hening, The Statutes at Large, Being a Collection of All the Laws of Virginia 68 (1823).

(n9)Footnote 10. *Letters Patent to Sir Thomas Gates et al., April 10, 1606,* arts. IV and V, *in* 1 William Waller Hening, The Statutes at Large, Being a Collection of All the Laws of Virginia 58-60 (1823).

(n10)Footnote 11. *Letters Patent to Sir Thomas Gates et al., April 10, 1606,* arts. XVIII, XIX and XX, *in* 1 William Waller Hening, The Statutes at Large, Being a Collection of All the Laws of Virginia 65-66 (1823).

(n11)Footnote 12. *See* § 4.05(b)(3)(x) in ch. 4, *supra.*

(n12)Footnote 13. 1 Frederick Pollock & Frederic William Maitland, The History of English Law Before the Time of Edward I 291 (2d ed. 1909).

(n13)Footnote 14. *Id.*

(n14)Footnote 15. *Id.* at 292.

(n15)Footnote 16. Tenures Abolition Act, 12 Car. 2, c. 24 (1660).

(n16)Footnote 17. *"Articles, Instructions and Orders," etc.*, Nov. 20, 1606, *in* 1 William Waller Hening, The Statutes at Large, Being a Collection of All the Laws of Virginia 69 (1823).

(n17)Footnote 18. Lynda L. Butler, *The Commons Concept: An Historical Concept with Modern Relevance, 23 Wm. & Mary L. Rev. 835, 868 (Summer 1982).*

(n18)Footnote 19. 1 Herbert L. Osgood, The American Colonies in the Seventeenth Century 34 (1904).

(n19)Footnote 20. *See* Christopher Tomlins, *The Legal Cartography of Colonization, The Legal Polyphony of Settlement: English Intrusions on The American Mainland in the Seventeenth Century, 26 Law & Soc. Inquiry 315 (Spring 2001).*

(n20)Footnote 21. In 1612 King James I issued a third charter for the Virginia Company, which extended the Virginia boundaries to include islands lying within 300 leagues of the continent between the 30th and 41st latitudes, and accepted numerous additional subscribers. *See* 2 Alexander Brown, The Genesis of the United States 540-553 (1890). *See* § 6.02(c), *infra.*

(n21)Footnote 22. *The Second Charter to the Treasurer and Company, for Virginia,* art. IV, *in* 1 William Waller Hening, The Statutes at Large, Being a Collection of All the Laws of Virginia 88 (1823). The King increased the number of grantees from the original four in the Charter of 1606 (Sir Thomas Gates and three others), by including eight earls, twelve lords, 106 knights, one bishop, one divine, three ministers, fifty-seven captains, the mayor of London, twenty-eight esquires, four doctors, and fifty-six trade guilds. Among these grantees, over one-hundred were former members of parliament. Alfred N. Chandler, *Land Title Origins: A Tale of Force and Fraud* 50-51 (1945).

(n22)Footnote 23. *The Second Charter to the Treasurer and Company, for Virginia,* art. VI, *in* 1 William Waller Hening, The Statutes at Large, Being a Collection of All the Laws of Virginia 89 (1823).

(n23)Footnote 24. *The Second Charter to the Treasurer and Company, for Virginia,* art. XXVII, *in* 1 William Waller Hening, The Statutes at Large, Being a Collection of All the Laws of Virginia 97 (1823). The second charter designated the London (Virginia) Company as "The Treasurer and Company of Adventures and Planters of the City of London for the First Colony in Virginia." The original grant of ten thousand square miles was expanded to around one million square miles. "Its bounds were to run two hundred miles north and two hundred miles south of Point Comfort (approximately between Wilmington, Delaware and Wilmington, North Carolina), and in depth all the land from sea to sea, north and northwest (which became the basis for Virginia's claim to the land north of the Ohio River) and all the islands within a hundred miles along the coast of both seas, together with all soils, ports and mines. This territory was made over to the sole use of the company and their assigns for ever, with authority to distribute and assign the lands therein granted." This charter did not affect the Plymouth Company. Alfred N. Chandler, *Land Title Origins: A Tale of Force and Fraud* 50 (1945).

(n24)Footnote 25. This code was prepared in 1611 and codified and published in 1612.

(n25)Footnote 26. *Id.* at 70.

(n26)Footnote 27. Alf J. Mapp, Jr., The Virginia Experiment 34 (1987).

(n27)Footnote 28. 2 Alexander Brown, The Genesis of the United States 540-553 (1890). The patentees' principal reason for seeking a third charter was the discovery of the Bermudas (or Somers Islands) which were located far too distant to be included in the 1609 Charter. Marshall Harris, *Origin of the Land Tenure System in the United States* 86-87 (1953).

(n28)Footnote 29. 2 Alexander Brown, The Genesis of the United States 549-550 (1890).

(n29)Footnote 30. *A Third Charter of K. James I. to the Treasurer and Company, for Virginia,* art. IV, *in* 1 William Waller Hening, The Statutes at Large, Being a Collection of All the Laws of Virginia 101 (1823).

(n30)Footnote 31. *A Third Charter of K. James I. to the Treasurer and Company, for Virginia,* art. XXI, in 1 William Waller Hening, The Statutes at Large, Being a Collection of All the Laws of Virginia 109 (1823).

(n31)Footnote 32. *A Third Charter of K. James I. to the Treasurer and Company, for Virginia*, art. XX, in 1 William Waller Hening, The Statutes at Large, Being a Collection of All the Laws of Virginia 109 (1823).

(n32)Footnote 33. Warren M. Billings, John E. Selby & Thad W. Tate, Colonial Virginia a History 25 (1986).

(n33)Footnote 34. *Reported in* 1 Herbert L. Osgood, The American Colonies in the Seventeenth Century 72 (1904).

(n34)Footnote 35. A farmer was a person who paid rent as a condition of his tenure.

(n35)Footnote 36. 1 Herbert L. Osgood, The American Colonies in the Seventeenth Century 76 (1904). In exchange for these benefits, each tenant was to grow exclusively wheat, corn, roots and herbs. Alfred N. Chandler, *Land Title Origins: A Tale of Force and Fraud* 53 (1945). Additionally, the company bore all charges of maintaining the plantation and obtaining supplies until 1618 (when the land was supposed to be divided). No private goods were to be sold until that time. The company was to supply food, clothing, and home-building material. The colonists had to trade together and purchase all of their needs from the same places. Marshall Harris, Origin of the Land Tenure System in the United States 87 (1953).

(n36)Footnote 37. Richard L. Morton, Colonial Virginia 46 (1960); 2 Alexander Brown, The Genesis of the United States 774-780 (1890).

(n37)Footnote 38. 1 Philip Alexander Bruce, Economic History of Virginia in the Seventeenth Century 221 (1896)."Surveyors were sent to Virginia to make maps and allotments to the shareholders, such allotments to be capable of transfer as an estate of inheritance. To prevent fraud, deeds were not valid until ratified by the quarter-court, a committee of the board of directors of the company in London." Alfred N. Chandler, *Land Title Origins: A Tale of Force and Fraud* 53-54 (1945).

(n38)Footnote 39. Alf J. Mapp, Jr., The Virginia Experiment 44 (1987). According to the modern calendar, the date would have been designated August 9, 1619; according to older authority, the assembly was first called together near the end of June, 1619. 1 William Waller Hening, The Statutes at Large, Being a Collection of All the Laws of Virginia 119-121 (1823).

(n39)Footnote 40. Richard L. Morton, Colonial Virginia 52-53 (1960).

(n40)Footnote 41. *Id.* at 54.

(n41)Footnote 42. 1 Philip Alexander Bruce, Economic History of Virginia in the Seventeenth Century 227-228 (1896).

(n42)Footnote 43. *Id.* at 229-30.

(n43)Footnote 44. Lynda L. Butler, *The Commons Concept: An Historical Concept with Modern Relevance, 23 Wm. & Mary L. Rev. 835, 870 (Summer 1982).*

(n44)Footnote 45. 1 Philip Alexander Bruce, Economic History of Virginia in the Seventeenth Century 232-233 (1896).

(n45)Footnote 46. A hundred was one of the political divisions in Virginia on which representation in the assembly was based and, as a territorial division, originated in England:

> In England a hundred was a county division sufficiently large to have its own court or hundred moot. The word comes to use from the Anglo-Saxons. Some philologists think that the term was originally used to designate an area comprising one hundred hides. In old Saxon nomenclature, a hide was enough

> land to support a family. Other etymologists think that "hundred" was used to designate a territory which could be counted on to furnish a hundred warriors. The term, as has been suggested, was particularly appropriate because of the plan of 1616 under which "Particular Plantations" were granted to stockholders who bore the cost of sending one hundred settlers to Virginia. It was natural that Englishmen, faced with the necessity of describing sparsely-settled tracts not designated as cities, should appropriate the time-honored and familiar English name for a division of a county.

Alf J. Mapp, Jr., The Virginia Experiment 43 (1987).

(n46)Footnote 47. 1 Herbert L. Osgood, The American Colonies in the Seventeenth Century 84-85 (1904). A later writer distinguishes between Martin's Brandon (on the west bank of the James River) and Martin's Hundred or Plantation (on the peninsula, on the east bank of the James River), indicating that Martin's Hundred was settled by Richard Martin. Richard L. Morton, Colonial Virginia 62-65 (1960). Curiously, even Osgood, at page 91, recognized that the two settlements were in two different locations.

(n47)Footnote 48. 1 Herbert L. Osgood, The American Colonies in the Seventeenth Century 87 (1904).

(n48)Footnote 49. Richard L. Morton, Colonial Virginia 150 (1960).

(n49)Footnote 50. *Virginia Assembly of 1660-61, Preamble, in* 2 William Waller Hening, The Statutes at Large, Being a Collection of All the Laws of Virginia 43 (1823).

(n50)Footnote 51. Paul Samuel Reinsch, *The English Common Law in the Early American Colonies, in* 1 Select Essays in Anglo-American Legal History 367, 405-406 (1907) Association of American Law Schools.

(n51)Footnote 52. *Virginia Assembly of 1666*, Act XX *in* 2 William Waller Hening, The Statutes at Large, Being a Collection of All the Laws of Virginia 246 (1823).

(n52)Footnote 53. Warren M. Billings, John E. Selby, Thad W. Tate, Colonial Virginia 75 (1986).

(n53)Footnote 54. *Virginia Assembly of 1642-1643*, Act LXI, *in* 1 William Waller Hening, The Statutes at Large, Being a Collection of All the Laws of Virginia 275 (1823).

(n54)Footnote 55. *Virginia Assembly of 1645*, Act VII, *in* 1 William Waller Hening, The Statutes at Large, Being a Collection of All the Laws of Virginia 302 (1823).

(n55)Footnote 56. *Virginia Assembly of 1645-1646*, Act VIII, *in* 2 William Waller Hening, The Statutes at Large, Being a Collection of All the Laws of Virginia 313 (1823).

(n56)Footnote 57. *Virginia Assembly of 1647*, Act XVI, *in* 1 William Waller Hening, The Statutes at Large, Being a Collection of All the Laws of Virginia 349 (1823).

(n57)Footnote 58. *Virginia Assembly of 1656*, Act VI, *in* 1 William Waller Hening, The Statutes at Large, Being a Collection of All the Laws of Virginia 419 (1823).

(n58)Footnote 59. *Virginia Assembly of 1657-1658*, Act CXII, *in* 1 William Waller Hening, The Statutes at Large, Being a Collection of All the Laws of Virginia 482-483 (1823).

(n59)Footnote 60. *Virginia Assembly of 1639-1640*, Act XVI, *in* 1 William Waller Hening, The Statutes at Large, Being a Collection of All the Laws of Virginia 227 (1823).

(n60)Footnote 61. *Virginia Assembly of 1642-1643*, Act XII, *in* 1 William Waller Hening, The Statutes at Large,

Being a Collection of All the Laws of Virginia 248-249 (1823).

(n61)Footnote 62. *Virginia Assembly of 1642-1643*, Act XIX, *in* 1 William Waller Hening, The Statutes at Large, Being a Collection of All the Laws of Virginia 252 (1823).

(n62)Footnote 63. *Virginia Assembly of 1642-1643*, Act XXXII, *in* 1 William Waller Hening, The Statutes at Large, Being a Collection of All the Laws of Virginia 260 (1823).

(n63)Footnote 64. *Virginia Assembly of 1642-1643*, Act XXXIII, *in* 1 William Waller Hening, The Statutes at Large, Being a Collection of All the Laws of Virginia 260 (1823).

(n64)Footnote 65. *Virginia Assembly of 1642-1643*, Act XXXVIII, *in* 1 William Waller Hening, The Statutes at Large, Being a Collection of All the Laws of Virginia 262-263 (1823).

(n65)Footnote 66. *Virginia Assembly of 1642-1643*, Act LVIII, *in* 1 William Waller Hening, The Statutes at Large, Being a Collection of All the Laws of Virginia 274 (1823).

(n66)Footnote 67. *Virginia Assembly of 1644-1645*, Act VII, *in* 1 William Waller Hening, The Statutes at Large, Being a Collection of All the Laws of Virginia 291 (1823).

(n67)Footnote 68. *Virginia Assembly of 1646*, Act II, *in* 1 William Waller Hening, The Statutes at Large, Being a Collection of All the Laws of Virginia 326-327 (1823).

(n68)Footnote 69. *Virginia Assembly of 1646*, Act XIII, *in* 1 William Waller Hening, The Statutes at Large, Being a Collection of All the Laws of Virginia 331 (1823).

(n69)Footnote 70. *Virginia Assembly of 1646*, Act XV, *in* 1 William Waller Hening, The Statutes at Large, Being a Collection of All the Laws of Virginia 332 (1823).

(n70)Footnote 71. *Virginia Assembly of 1646*, Act XXIV, *in* 1 William Waller Hening, The Statutes at Large, Being a Collection of All the Laws of Virginia 335 (1823).

(n71)Footnote 72. *Virginia Assembly of 1648*, Act VI, *in* 1 William Waller Hening, The Statutes at Large, Being a Collection of All the Laws of Virginia 356 (1823).

(n72)Footnote 73. *Virginia Assembly of 1655-1656*, Act I, *in* 1 William Waller Hening, The Statutes at Large, Being a Collection of All the Laws of Virginia 396 (1823).

(n73)Footnote 74. *Bromfeild v. Crumpe*, *Virginia Assembly of 1655-56*, *in* 1 William Waller Hening, The Statutes at Large, Being a Collection of All the Laws of Virginia 405 (1823).

(n74)Footnote 75. In the matter of Burbage, *Virginia Assembly of 1655-1656*, *in* 1 William Waller Hening, The Statutes at Large, Being a Collection of All the Laws of Virginia 405 (1823).

(n75)Footnote 76. *Virginia Assembly of 1656*, Act IV, *in* 1 William Waller Hening, The Statutes at Large, Being a Collection of All the Laws of Virginia 417-418 (1823).

(n76)Footnote 77. *Virginia Assembly of 1657-1658*, Act LXXXVII, *in* 1 William Waller Hening, The Statutes at Large, Being a Collection of All the Laws of Virginia 472 (1823).

(n77)Footnote 78. *Virginia Assembly of 1666*, Act XIX, *in* 2 William Waller Hening, The Statutes at Large, Being a Collection of All the Laws of Virginia 245 (1823).

(n78)Footnote 79. *Virginia Assembly of 1667*, Act I, *in* 2 William Waller Hening, The Statutes at Large, Being a Collection of All the Laws of Virginia 256 (1823).

(n79)Footnote 80. *Virginia Assembly of 1674*, Act VII, *in* 2 William Waller Hening, The Statutes at Large, Being a Collection of All the Laws of Virginia 374 (1823).

(n80)Footnote 81. *Virginia Assembly of 1674*, Act X, *in* 2 William Waller Hening, The Statutes at Large, Being a Collection of All the Laws of Virginia 321-325 (1823).

(n81)Footnote 82. Alf J. Mapp, Jr., The Virginia Experiment 212 (1987).

(n82)Footnote 83. *Virginia Assembly of 1939-40*, Acts XXIV, V *in* 1 William Waller Hening, The Statutes at Large, Being a Collection of All the Laws of Virginia 228 (1823).

(n83)Footnote 84. Kurtz, Sheldon F., Moynihan's Introduction to the Law of Real Property 24-25 (4th ed. 2005).

(n84)Footnote 85. *Id.* at 23, n.1.

(n85)Footnote 86. Beverly W. Bond, Jr., The Quit-Rent System in the American Colonies 32 (1919, reprint 1965).

(n86)Footnote 87. *Virginia Assembly 1642-43*, Act LXXII, *in* 1 William Waller Hening, The Statutes at Large, Being a Collection of All the Laws of Virginia 280 (1823). (reiterating that quit rents need not be paid until seven years after the grant).

(n87)Footnote 88. *Virginia Assembly of 1645*, Act XIV, *in* 1 William Waller Hening, The Statutes at Large, Being a Collection of All the Laws of Virginia 316 (1823).(quitrents could be paid in tobacco at three pennies per pound).

(n88)Footnote 89. *Virginia Assembly of 1647*, Act XX, *in* 1 William Waller Hening, The Statutes at Large, Being a Collection of All the Laws of Virginia 351 (1823) (distraint upon the land available as a remedy for delinquency in payment of quitrents).

(n89)Footnote 90. *Virginia Assembly of 1660-1661* , Act XXXVI, *in* 2 William Waller Hening, The Statutes at Large, Being a Collection of All the Laws of Virginia 31 (1823) (quitrents payable in tobacco at two pennies per pound).

(n90)Footnote 91. *Virginia Assembly of 1661-1662*, Act LXXIV, *in* 2 William Waller Hening, The Statutes at Large, Being a Collection of All the Laws of Virginia 99 (1823) (quitrents payable in tobacco at two pennies per pound).

(n91)Footnote 92. *See generally* Beverly W. Bond, Jr., The Quit-Rent System in the American Colonies (1919, reprint 1965).

(n92)Footnote 93. Charles M. Andrews, *Introduction to Beverly W. Bond, Jr., The Quit-Rent System in the American Colonies* 18-19, 21-22 (1919, reprint 1965). F. Thornton Miller, *John Marshall in Spencer Roane's Virginia: The Southern Constitutional Opposition to the Marshall Court, 33 J. Marshall L. Rev. 1131 (Summer 2000).*

(n93)Footnote 94. Warren M. Billings, John E. Selby, & Thad W. Tate, Colonial Virginia 56 (1986).

(n94)Footnote 95. *Id.* at 209-212.

Thompson on Real Property, Thomas Editions

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CHAPTER 6 DEVELOPMENT OF PROPERTY LAW IN ENGLAND'S AMERICAN COLONIES

1-6 Thompson on Real Property, Thomas Editions § 6.03

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§ 6.03 Development of Property Law in Massachusetts (from 1620).

§ 6.03(a) The Plymouth Colony.

§ 6.03(a)(1) Origins of the Pilgrims.

Massachusetts' first settlers were Puritans, and the first Puritans in Massachusetts included a particular variety called Separatists, later referred to as "Pilgrims" in William Bradford's history, written many years later. The Puritans in England were a faction, or movement, within the Church of England, that sought to purify doctrine and practice by returning to the original teachings, simplicity and, indeed, austerity of the Christian church. The Separatists agreed but believed that a complete separation from the Anglican church was essential. Though they were in congregations widely scattered throughout England, the Separatists were heavily persecuted by the English government. The congregation in Scrooby, Nottinghamshire, with which William Brewster and William Bradford affiliated, moved to Holland in 1608, settling first in Amsterdam and then in Leiden. Although enjoying religious freedom, they did not have citizenship and were thus limited in occupational possibilities; this kept their economic circumstances depressed. In addition, they felt that their children were being drawn from the faith by their worldly surroundings. n96 The Separatists who came to Massachusetts in 1620 were made up of a portion of the Leiden congregation and additional Separatists from England; about sixty percent of this first group also consisted of those who were not Separatists but were called "Strangers."

§ 6.03(a)(2) The Legal Beginnings of Plymouth Colony.

The legal origin of the Plymouth colony lies in the original Virginia charter of 1606, which extended from 34 to 45 degrees latitude. The group obtaining that first charter consisted of prominent merchants and others from London, Bristol and Plymouth. The London patentees were then authorized to establish the "first colony" in the southern sector of that grant, while the group from Plymouth and Bristol was also authorized to form a joint stock company and establish a "second colony" in the northern sector. Accordingly, the Jamestown settlers of the first group landed in May 1607, and a second group of settlers attempted to found a northern colony in August 1607. Their site, which they named Sagadahoc, was located near the mouth of the Kennebec River in present-day Maine, but they abandoned it a year later:

> After the failure of the experiment at Sagadahoc, the Plymouth patentees limited their efforts to fishing voyages and to the detailed exploration of the coast of northern Virginia. The number of

> patentees was small and their resources were limited. They slumbered on while the London merchants procured two new charters, by which the extent of their domain was made more definite, and under the authority of which they successfully founded a colony on the James River. n97

In 1620 the Plymouth patentees successfully petitioned the king for a new charter for northern Virginia, now named New England, seeking rights to the territory between the 40th and 48th parallels from sea to sea. The charter was granted November 3, 1620 -- after the first group of settlers was already well on their way -- and created a new corporation called The Council Established at Plymouth in the County of Devon for the Planting, Ruling, Ordering and Governing of New-England in America, better known as the Council for New England. After reciting the granting of the Virginia charter of 1606 and the separation of the London and Plymouth companies under the Virginia charter of 1609, the provisions of this 1620 New England patent, which are important for the history of colonial property law, are as follows:

> [Various named persons] to be the first Councill ..., [to receive, hold, and dispose of real and personal property] ...
>
> And Wee do further grant that it shall be lawfull for the said Councill, in their discretions to admitt such Persons ... to have any Lands or Hereditaments in New-England, as they shall think fitt, according to the Laws, Orders, Constitutions, and Ordinances, by the said Councill and their Successors from time to time to be made and established by Virtue of, and according to the true Intent of these Presents, ... and also to make all Manner of Orders, Laws, Directions, Instructions, Forms, and Ceremonies of Government and Magistracy fitt and necessary for any concerning the Government of said Collony and Plantation, so always as the same be not contrary to the Laws and Statutes of this our Realme of England ... And Wee do further absolutely give, grant, and confirm unto the said Councill all the aforesaid Lands together also, with the Firme Lands, Soyles, Grounds, to be holden of Us as of our Manor of East-Greenwich, in our County of Kent, in free and common socage and not in Capite nor by Knight's Service... [English settlers, and their children born in the colony, are to have the rights of natural-born Englishmen. Rights granted in previous charters are confirmed, except those altered by this charter]. n98

Meanwhile, in February 1620, the London Company granted a patent to a group of private adventurers, and one member of that group attempted to recruit the Separatists of the Leiden congregation as settlers. Articles of agreement were drawn up between the adventurers (those who were investing funds in the enterprise) and the settlers (principally, the Separatist congregation of Leiden) but, in fact, were never signed because of a dispute over some changes introduced to secure more investors. Specifically, one of the changes deleted provisions securing to the settlers the right to separate houses and home lots for themselves and their families, as well as the right to two days a week in which to work for themselves. Otherwise, the articles established a venture patterned after the arrangements in Virginia: the plantation would be managed as a joint stock company for seven years, with contributions to and withdrawals from a common stock, and with shareholders entitled to a division of land at the end of that time. In the end, the settlers from the Leiden congregation refused to sign the agreement without restoration of desired provisions.

The *Mayflower* sailed apparently without specific instructions as to where to land, but the colonists probably intended to settle near present-day Manhattan. When they did ultimately land, they were without any rights regarding the region they proposed to settle. They had not formally concluded an agreement with their sponsoring adventurers (who were acting on authority granted to the London Company), and in any event, during their sea crossing, a new royal patent had been issued giving authority over this area to the Plymouth Company. Realizing their ambivalent situation, they undertook the first steps toward self-government:

> I shall a litle returne backe and begine with a combination [the *Mayflower Compact*] made by them before they came ashore, being the first foundation of their governmente in this place; ... That when they came a shore they would use their own libertie; for none had power to command them, the patente they

> had being for Virginia, and not for New-england, which belong to an other Government, with which the Virginia Company had nothing to doe. And partly that such an acte by them done (this their condition considered) might be as firme as any patent, and in some respects more sure. n99

In this agreement they made no mention of government according to the laws of England, but instead agreed to enact such laws as they thought best for the general good of the colony:

> We ... covenant and combine our selves togeather into a civill body politick, for our better ordering and preservation and furtherance of the ends aforesaid; and by vertue hearof to enacte, constitute, and frame such just and equall lawes, ordinances, acts, constitutions, and offices, from time to time, as shall be thought most meete and convenient for the generall good of the Colonie, unto which we promise all due submission and obedience. n100

§ 6.03(a)(3) Early Landholding in Plymouth.

Because the settlers had not signed the articles of agreement that omitted their right to establish separate houses and lots, they quickly created separate homesteads:

> We divided by lot the plot of ground whereon to build our town, after the proportion formerly allotted. We agreed that every man should build his own house, thinking by that course men would make more haste than working in common. n101

Of course, after the brutal hardships of that first winter of 1620-1621, when about half of the 102 original Pilgrims died of disease and exposure, common fields were established adjacent to the settlement and were worked by the common labor of the colonists. Indeed, late in 1621 the articles of agreement were finally signed, without the provisions for individual homesteads, so it is likely that no private labor occurred except around the private dwellings and garden plots already established.

In 1623, well before the division of land scheduled for 1627, the settlers introduced a serious departure from the system of common labor:

> So they began to thinke how they might raise as much corne as they could, and obtaine a beter crope then they had done, that they might not still thus languish in miserie. At length, after much debate of things, the Gov'r (with the advise of the cheefest amongest them) gave way that they should set corne every man for his own perticuler, and in that regard trust to them selves; in all other things to goe on in the general way as before. And so assigned to every family a parcell of land, according to the proportion of their number for that end, only for present use (but made no devission for inheritance), ranged all boys and youth under some familie. This had very good success; for it made all hands very industrious, so as much more corne was planted then other waise would have bene by any means the Gov'r or any other could use, and saved him a great deall of trouble and gave far better contente. n102

Governor Bradford devoted a lengthy comment in his history to the implications of this move toward private property:

> The experience that was had in this commone course and condition, tried sundrie years, and that amongst godly and sober men, may well evince the vanitie of that conceite of Platos and other ancients, applauded by some of later times; -- that the taking away of propertie, and bring in communitie into a comone wealth, would make them happy and florishing; as if they were wiser then God. For this comunities (so far as it was) was found to breed much confusion and discontent, and retard much imployment that would have been to their benefite and comforte. For the yong-men that were most able and fitt for labour and service did repine that they would spend their time and streingth to worke for other mens wives and children, with out any recompence. The strong, or man of parts, had not more in

> devission of victails and cloaths, then he that was weake and not able to doe a quarter the other could; this was thought injuestice. The aged and graver men to be ranke and equalised in labours, and victails, cloaths, etc., with the meaner and yonger sort, thought it some indignite and disrespect unto them. And for mens wives to be commanded to doe servise for other men, as dresing their meat, washing their cloaths, etc., they deemd it a kind of slaverie, neither could many husbands well brooke it. Upon the poynte all being to have alike, and all to doe alike, they thought themselves in the like condition, and one as good as another; and so, if it did not cut of those relations that God hath set amongest men, yet it did at least much diminish and take of the mutuall respects that should be preserved amongst them. And would have bene worse if they had been men of another condition. Let none object this is men's corruption, and nothing to the course it selfe. I answer, seeing all men have this corruption in them, God in his wisdome saw another course fiter for them. n103

Later that year additional colonists arrived, including a group known as the "Perticulers," accompanied by instructions that they should receive separate allotments of land but should remain under the colonial government. Their allotments were assigned within the town itself, and because they did not participate in the common labor, they were taxed.

Because of the success realized from the experiment of letting the settlers plant corn for themselves, the settlers each received in perpetuity an acre of land near the town.

By this time, the colony's "chain of title" problems had been partially resolved. As soon as it was realized that the colony was north of the 40th parallel, and therefore subject to the New England Council, the group that in 1620 had obtained a grant for New England lands from the London Company in June 1621, obtained a deed of grant from the New England Council. The grantees' original London grant had been rendered obsolete by the patent given the Plymouth Company in November 1620, and the June 1621 grant from the New England Council was based on the authority of that patent. The new grant

> contained simply a grant of land, in amount proportional to the number of permanent settlers ... No attempt was made to bound the grant or to specify its location otherwise than by the statement that the land taken up should not lie within ten miles of any other English settlement, unless the two were on opposite sides of some large navigable river. Provision was made for the payment to the council of a quitrent of two shillings per hundred acres. The patentees were temporarily granted the power to issue such ordinances as were necessary "for their better government," and to put them into execution through elected officers. They were also promised that, if after seven years the request was presented, the grantees should be incorporated with some fit name and received additional powers of government ... n104

Notwithstanding these provisions, in 1627 the settlers and their sponsoring adventurers/investors decided to part company. The settlers agreed to buy-out the adventurers' interests for a specified sum of money, with eight of the most prosperous planters acting as sureties. About the time this agreement was reached, the period of required joint land tenure expired, and the heads of families and young men assembled to work out a division of the tillable land. A division of arable land near the town was worked out by lot, with the more remote land and meadow being left as common. In 1633 the meadow was also divided because of increasing numbers of livestock and the need for more hay. To pay off the debt, the trade of the colony continued to be carried out on a joint basis. The planters also obtained patents for other settlements, but only the satellite settlement on the Kennebec River continued for very long. When the colony's last debts were finally paid in 1646, it completed the process of change from a proprietary plantation to a corporate colony.

The Plymouth colony received another patent in 1629, the so-called "Warwick Patent," issued in the name of William Bradford, who, as governor, held the grant as trustee for the colony. The political development of the colony was unaffected by the patent. Eventually, settlements were commenced, which became towns with their own local officials

and the power to grant land. The first of these was Scituate in 1636, followed by Duxbury in 1637, and others in close succession. These towns remained a part of Plymouth colony and were subject to colonial supervision in several important respects. In 1641 Bradford surrendered his trusteeship and assigned the patent to the freemen of the colony.

§ 6.03(a)(4) The Foundation of English Land Law in Plymouth.

In addition to patents and charters, the colony also issued numerous decisions in legal disputes, as well as legislative pronouncements on specific issues. Periodically, the laws in force were gathered into "codes," or compilations, that revealed the colonists' attitudes towards sources of law, and the efficacy of English law in general. Four compilations of Plymouth's colonial laws were issued during the 17th century, in 1636, 1658, 1671, and 1684. The significance of the 1636 code has been characterized as follows:

> The compilation of 1636 has been variously described as the first comprehensive body of law to be enacted in North America, as the first American code of laws, and as a simple model upon which subsequent bodies of American law were patterned. All of those claims can easily be defended, but from the point of view of the framers the compilation was regarded as the "ordering of a body politick" agreeable to the Mayflower Compact and the Warwick patent [issued in 1629]. Some of its clauses were based upon English law and custom, such as the regulation of inheritances according to the custom of East Greenwich, and the requirement that jury trials be conducted as nearly as possible to English practice. In other instances, such as the provision for civil marriage, equality of descent, liberal provisions for women and widows, and the institution of a recording system, all unknown in England, we find partly an attempt to fill the needs of a frontier society and partly the Puritan predilection to enact laws based upon scriptural authority. The discretionary power of Magistrates, for example, was based upon *Romans* 13, the division of lands upon *Deuteronomy* 21, civil marriage upon *Ruth* 4, and capital offenses upon various admonitions.
>
> Two months after the compilation of 1636 was enacted, the General Court met in legislative session and passed six additional miscellaneous measures; it marked the beginning of a regular legislative process that was to continue unabated until the demise of the colony. n105

Several passages of the 1636 code suggest that a comprehensive basis of English law existed even in Plymouth. In Act 1 the drafters declare:

> And finding that as freeborne subjects of the State of England we hither came indewed with all and singular the priviledges belonging to such, in the first place we think good that it be established for an act. That according to the ... due priviledge of the subject aforesaid no imposicon of law or ordnance be made or imposed upon us by ourselves [or others at] present or to come but such as shall be made [or] imposed by consent according to the free liberties [of the] State and Kingdome of England and no otherwise. n106

Other provisions relating to reliance on English law or, specifically, to regulation of real property rights are as follows:

> That all trialls whether Capitall or between man and man be tryed by Jewryes according to the presidents of the law of England as neer as may be. n107
>
> That all sales exchanges gifts and morgages leases or other Conveyances of howses and land and the sale to be acknowledged before the Gov'r or any one of the Assistants and committed to publick Record and the fees to be payd. n108
>
> That Inheritance to descend according to the commendable custome of England and hold of East Greenwich. n109

> That If the husband died the wife shal have a third pt of his land during her life and a 3d of his goods to be at her owne disposing. n110

In 1658 a new compilation replaced that of 1636 and subsequent legislation. A lengthy preamble contained:

> a succinct summary of the puritan philosophy of law, which held essentially that the only true law was the law of God as revealed in His Holy Scriptures, and that laws made by man must be derived from them and conformable to them in all respects. The puritans found the divine origins of all civil authority in the thirteenth part of *Romans*, and the introduction to the 1658 compilation stressed that God had endowed man with right judgment and true laws (Scripture) as well as with a capacity to be guided by "good and wholesome lawes" derived from and agreeable to the "Ancient platforme of God's Lawe." The framers then went on to proclaim that they had been guided accordingly in the preparation of the new revision of the laws. n111

The code also declared that its drafters:

> "the Associates of New Plymouth coming hether as freeborne Subjects of the State of England [this impersonal reference to the government was used during the Commonwealth] Indowed with all and singular priviledges belong to such [do enact that law] which is according to the free liberties of the State of England." n112

The 1658 code served until a new code was produced in 1671, which included an entire chapter (Chapter X) of five sections, devoted to "Lands, Inheritances, and Wills." These sections covered the tenure of landholding, acknowledgement of conveyances, lands held in partnership, escheat of estates, and a statute of limitations. The chapter concludes with the statement, "It having been the usual manner and custome of this Court, as much as may be to have recourse to the commendable Laws of England in such case wherein there is no other Law by this Court provided more suitable to our condition." n113

A final code of the colony was drawn up in 1684 and published in 1685. It, too, devoted a chapter (Chapter XII) to "Lands and Inheritances," that was substantially similar to the counterpart provisions of the 1671 code. One detail was added to specifically invoke English law in a matter of real property: "It is Ordered and Declared by this Court and the Authority thereof; That all Lands heretofore Intailed, and that shall be Intailed hereafter, shall descend and enure as by the Law of England the same ought to do." n114

However, signaling that no wholesale reception of English property law should be presumed, the very next section made an original modification of primogeniture:

> It is Ordered and Declared, etc. That all the Sons of any Person, having Lands in fee simple, shall be Heirs (paying and satisfying in case as is by Law provided) the Eldest Son shall have double to any of his Brethren; and all the younger equal Shares of the Land of their Ancestors; and where there is but one Sone, he shall be sole Heir, paying and satisfying, as aforesaid; And where there is no Son, all the Daughters shall Inherit alike." n115

Even taking full account of the Plymouth settlers' religious motivation, it must still be conceded that the availability of land was a powerful inducement for immigration, and that English land law was still the foundation of property rights. Eventually, the attraction of seemingly unlimited acreage helped weaken the cohesion of Plymouth colony:

> Bradford, to whom Plymouth was a Zion, deplored the trend of his friends, colleagues, and fellow settlers to desert Plymouth in favor of greater acres elsewhere. "But yet seeking to keep the people together as much as might be," Bradford wrote, they agreed that the owners of the near acres would share their land with the owners of the far acres, and thus Plymouth could be kept as a compact community...

> In his account of the year 1632, Bradford laments that "there was no longer holding them together, and they must of necessity go to their great lots...." Still trying to keep Plymouth together as much as possible, Bradford records that "to prevent any further scattering from this place and weakening of the same, it was thought best to give out some good farms to special persons that would promise to live at Plymouth ...." These favored people would keep their cattle and farms there, maintained by servants, but would themselves continue living in Plymouth. "But, alas," cried Bradford, with the benefit of hindsight, "this remedy proved worse than the disease."
>
> ... [T]he promise of land grants was an important inducement in attracting servants to Plymouth Colony, and some of these servants eventually acquired considerable land holdings... In fact, a perusal of court records shows the court handing out grants [to servants and free persons] as if land were one of the world's cheaper commodities, a procedure which could not continue indefinitely... The abandonment of primogeniture from the beginning guaranteed that holdings would on the average get smaller as a number of sons inherited from a father. n116

The development of land law in Plymouth was inevitably similar to, and eventually was merged with, the counterpart land history in the Massachusetts Bay Colony. As the Massachusetts Colony resisted imposition of English trade controls, its charter was revoked by King Charles II in 1684. King James II began his rule in 1685 and established a royal government in Massachusetts in 1686, but he was overthrown in 1688. William and Mary granted the colony a new charter in 1691, which combined the Plymouth and Massachusetts Bay colonies. n117

§ 6.03(b) The Massachusetts Bay Colony.

§ 6.03(b)(1) Events Leading to the First Charter.

The Plymouth colony's parent governing authority, the New England Council in England, made an attempt to recruit more investors by specifying the land they would receive for their investors' shares. The colony was divided on paper into vast tracts proposed for grants under feudal tenures, but no effective efforts to take possession of or colonize such grants were made by the council or any of the investors-adventurers:

> Since ... no steps were taken by those adventurers who had received allotments in 1623 to improve them or even to take out patents for them, all that could be done by the council was to grant its domain in parcels to such as would undertake to found private or subordinate public plantations. It was too weak to directly colonize or govern... It was ... proposed that all patents should be called for, perused, and confirmed, if the council saw fit; that a surveyor should be sent over to set the bounds of every grant that had been made, and that other steps should be taken to uphold the monopoly of the council, and to regulate affairs within its domain. But no effective measures were taken to execute these plans. n118

Several of these individual grants were made over the years, but few were perfected and of even fewer was seisin actually taken. The grants were not carefully drawn and often overlapped, conflicted with, or superseded other grants, even occasionally grants that were being actively settled. When the council made grants for private plantations, it specified that the tenants or freeholders should not alienate without prior council approval and that a certain number of people should be settled, with livestock and other possessions, within five years after the grant was issued. The product of the land and of related trade would typically be managed in common between the grantee who actually settled the land and the partners in England who helped underwrite the grant. At the end of the five-year period, the land and accumulated profits would be divided between the settler and the other partners, and the partnership would be dissolved. This pattern was typical of many smaller settlements in the area.

The New England Council also planned to make grants with governmental institutions in the nature of sub-fiefs. Conferred on these public plantations were the powers to call assemblies, make laws, and appoint magistrates. The council actually had no right to grant such powers without first obtaining the sanction of the monarch.

Although the number of grants that materialized into settlements was relatively small, development was steady. In 1623 a group of adventurers from Dorchester, England, founded a fishing station at Cape Ann, after first securing a permit from Plymouth settlers who also occupied the area under an indenture from an English nobleman. The enterprise struggled, prompting the adventurers to abandon the enterprise in 1626, and thereafter the Dorchester settlers moved a short distance west to the area of modern Salem. Obtaining a patent from the New England Council for their new territory in 1628, the grantees, who were not incorporated, were granted the land for themselves, their heirs and their assigns, with no governmental powers. They became direct tenants of the monarch, because subinfeudation had not been permitted since the Statute Quia Emptores of 1290. In March 1629, after adding new associates, the group obtained a royal charter confirming the territorial grant and adding full powers of incorporation and of government, thus creating the company of Massachusetts Bay.

§ 6.03(b)(2) Early Landholding in Massachusetts Bay.

The charter of the Massachusetts Bay Company was patterned after the charter of the London Company from two decades earlier. Quarter courts, elections, a governor and other officials, and associated powers were all provided for in the charter. By way of difference, the Massachusetts charter called for a quorum of six in order to conduct business and permitted its membership to be enlarged by the addition of "freemen." The plantation was instructed to acquire and extinguish Indian claims by purchase. While fishing was conducted as a joint enterprise, joint landholding was never practiced at Salem:

> The planters were under no contract which required it, and in the summer of 1629 an instruction was sent to [Governor] Endicott to allot to the adventurers in the proportion of two acres for each sum of 50, or fraction or multiple thereof, which was invested in the enterprise. The grantees were given the liberty to build and improve where they pleased, except that a tract should be reserved for a town. A town lot one-half acre in extent should also be granted to each adventurer who desired it. Planters who had also purchased shares in the common stock should receive fifty acres for each person in their families, while persons other than adventurers who brought families at their own expense into the colony should receive fifty acres for the master of the family and such additional allotments as, "according to their charge and quality," might be provided through special agreement with the company or by the magistrates in the colony. Those who brought or at their own charge sent servants into the colony should receive fifty acres for each of them. No mention is made in the records of the requirement of a quitrent on any of the grants to adventurers, but those who were not such must annually render suit or service... Provision was made in the scheme for private plantations... [T]he company also had its plantations, which were cultivated by servants and managed by the governor under instructions from England. It thus appears that, before it had been in existence a year, the colony at Salem reached the stage of development which was inaugurated in Virginia by Governor Dale. n119

Of special significance in this early history of the Massachusetts Bay Colony is the omission from the charter of the usual clause requiring election of the governor and officers in England. The omission was probably intentional from the colonists' perspective; from the royal ministers' perspective, the omission was probably inadvertent, or at least undesired. Even without the English residency requirement, the colony's corporation still conducted its business in England for several months after the charter was granted. The removal to New England was effected in the spring of 1630, as virtually all the officers, and several patentees, together with their charter, made the Atlantic crossing. With this transfer, the company's direct involvement in colonial trading ceased; trade was carried on as private enterprise, subject to the regulations of the colonial government.

At this same time, the corporation, now resident in New England, no longer functioned as a land company and did not seek to profit from land transactions. Indeed, the company was not even able to cultivate its own lands because there was so much sickness when the immigrants of 1630 arrived that even the company's servants had to be released to

engage in agriculture in their own behalf. The newcomers soon established seven small settlements around the bay. The seat of government was moved from Salem to Charlestown, and then to Boston. These settlements became towns, which as communities were the grantees of the company land. The towns' proprietors held the lands within their boundaries either in common or conveyed the lands to individual grantees. Monetary gain seemed to play no role in these grants: no quitrents were established, the land was seldom sold or leased, and rent was a rarity. It is also significant that as numerous persons applied as "freemen" for membership in the corporation later in 1630, an additional qualification was added, that they must be "members of some of the churches within the lymitts [of the body politic]."

The fundamental form of land regulation in effect in the Massachusetts Bay Colony was, in most respects, identical to that of Plymouth:

> The form of group settlement which we have seen developing in Plymouth was reproduced throughout New England, and wherever New Englanders settled. The joint action of the settlers in locating dwellings and home lots, in laying out village streets, in subdividing the adjacent arable land, in subjecting the meadow and forest for a time to common management, resulted in the founding of the town of Plymouth...
>
> That which occurred at Plymouth happened also at Salem, in each of the settlements about Massachusetts bay, in the towns of Plymouth colony, as one after another they came into existence, among the settlements of northern New England, in the towns which were founded on the shores of Narrangansett bay and along the course of the Connecticut river. On Long Island, too, and wherever in New Jersey New Englanders found their abode, the same form of settlement was reproduced. n120

In none of the New England colonies were land sales intended to be a primary source of public profit. No colony established a land office; land was not sold directly by a colony and was rarely rented. Most land grants were to towns, which then re-granted to individual settlers, acting with delegated authority from the colony. Quite a high degree of regulation was imposed in both the founding and development of towns. As to those fields held in common, an 1643 act of Massachusetts colony gave typical direction:

> Whereas it is found by experience that there hath bene much trouble and difference in severall townes about the manner of planting, sowing, and feeding of common corne fields, & that upon serious consideration wee finde no generall order can provide for the best improvement of every such common field, by reason that some consists onely of plowing ground, some haveing a great part fit only for planting, some of meadowe & feeding ground; also so that such an order a may bee very wholesome and good for one field may be exceeding priudiciall & inconvenient for another, -- it is therefore ordered, that, where the commoners cannot agree about the manner of improvement of their field, either concerning the kind of graine that shall be sowen or set therein, or concerning the time or manner of feeding the herbage thereof, that three such persons in the several townes that are deputed to order the prudential affairs thereof, shall order the same, or in case where no such are, then the maior part of the freemen, who are hereby enioyned with what convenient speed they may to determine any such difference as may arise upon any information given them by said commissioners.

Thus, throughout New England there was substantial similarity in the

> system followed by those colonies in the establishment of plantations, the recognition of them as towns, the fixing and maintenance of their bounds, the regulation of the granting of lands, of common fields, fences, herds, the punishment of trespass, the admission of inhabitants and freeholders, the requirement that fence-viewers and pound-keepers should be appointed, [and] that records of land titles should be kept... n121

§ 6.03(b)(3) The Role of Towns in New England Private Landholding.

The conspicuous role of the New England towns in bringing about a broad base of private landownership has been well summarized by Osgood:

> The most prominent feature of the New England land system was the town grant, which in every case became the territorial basis of a group settlement. Though grants were made by the general court to individuals, they were the exception rather than the rule. The result was that the landed estate of nearly every individual in New England was located in one or more towns, and was subject to the regulations which were made by town for the management of land. The territorial affairs of the colony were largely administered through the towns as agencies. Land passed from joint control to individual ownership chiefly by means of town allotments. The towns came nearer to performing the function of proprietors than did any other administrative bodies in New England.
>
> In the corporate colonies, moreover, the characteristic elements of the fief were lacking. The quitrent does not appear as a distinct form of income, and land was not extensively leased. The result was that the tenement or holding, which was so characteristic of English land law, was practically obliterated, and an allodial system was substituted. Had the New England governments sought revenue from the land in the form of rents, this result could not have followed. A system of tenure would have been perpetuated, and the general court would have acted as proprietor. As it was, the court avoided the private legal attitude toward land, and kept itself well within the range of public law. The only revenue which it sought from land was in the form of taxes. This is one of the most notable consequences which resulted from the founding of the corporate colonies of New England. n122

§ 6.03(b)(4) Property Regulation and Codification of Laws in Massachusetts Bay.

A more general influence on the development of property law in the Massachusetts Bay Colony was the adoption of a code of laws. The drafting process actually began in 1635, but the long delay in accepting a draft resulted from the colonists' reluctance to frame laws in anticipation of conditions that might require imposition of those laws. There was also resistance to limiting colonial laws to those that were consistent with laws of England, as required by the charter. Nevertheless, in 1641 a code was accepted by the colony's General Court, and styled "A Coppie of the Liberties of the Massachusets Collonie in New England." This original code was never printed, but it was officially adopted in 1644, so manuscript copies could be made. Revisions were cumulated into a collection published in 1648 as the famous *Book of the General Lauues and Libertyes Concerning the Inhabitants of the Massachusets*. Provisions relating to real property are as follows:

> It is therfore ordered by this Court, & Authority therof, That no mans life shall be taken away; no mans honour or good name shall be stayned; no mans person shall be arrested, restrained, bannished, dismembred nor any wayes punished; no man shall be deprived of his wife or children; no mans goods or estate shall be taken away from him; nor any wayes indammaged under colour of Law or countenance of Authoritie unles it be by the vertue or equity or some expresse of law of the Country warranting the same established by a General Court & sufficiently published; or in case of the defect of a law in any particular case by the word of God. And in capital cases, or in cases concerning dismembring or banishment, according to that word to be judged by the General Court.
>
> *Abilitie.* All persons the age of twenty-one years, and of right understanding & meamorie whether excommunicate, condemned or other, shall have full power and libertie to make their Wills & Testaments & other lawfull Alienations of their lands and estates. n123
>
> *Age.* It is ordered by this Court & the Authoritie therof, that the age for passing away of lands, or such kinde of hereditaments, or for giving of votes, verdicts or sentences in any civil courts or causes, shall be twenty and one years: but in case of chusing of Guardions, fourteen years.

Conveyances fraudulent. It is ordered by this Court and the Authoritie therof, That all covenons or fraudulent alienations or conveyances of lands, tenements or any hereditaments shall be of no validitie to defeat any man from due debts or legacyes, or from any just title, claim or possession of that which is so fraudulently conveyed.

For avoiding all fraudulent conveyances and that every man may know that estate or interest other man have in any houses, lands or other hereditaments they are to deal in, it is therefore ordered by the authoritie of this Court;

That after the end of October 1640 no morgage, bargain, sale, or graunt made of any houses, lands, rents or other hereditaments where the Graunter remains in possession, shall be of force against other persons except the Graunter and his Heirs, unles the same be acknowledged before some Magistrate & recorded as is heerafter expressed: and that no such bargain, sale or graunt already made, in way of morgage, where the Graunter remains in possession shall be of force against other but the Graunter or his Heirs, except the same shall be entred as is heerafter expressed within one month after the date aforementioned: if the partie be within this Jurisdiction or else within three months after he shal return...

Deeds and writings. It is ordered by this court and Authoritie thereof; That no conveyance, deed or promise whatsoever shall be of validitie, if it be gotten by illegal violance, imprisonment, threatening or any kinde of forcible compulson, called Dures.

Dowries. Forasmuch as no provision have yet been made for any certain maintainance for Wives after the death of their Husbands, be it ordered and enacted by this present Court and Authoritie therof;

That every married Woman (living with her Husband in this Jurisdiction or other where absent from him with his consent or through his meer default, or inevitable providence, or in case of divorce where she is the innocent partie) that shall not before marriage be estated by way of joynture in some houses, lands, tenements or other hereditaments for term of her life, shall immediately after the death of her Husband have right and interest by way of *dower,* in, and to one third part of all such houses, lands, tenements, rents and hereditaments as her said Husband was seized of, to his own use, either in possession, reversion or remainder in any estate of inheritance ... at any time during the marriage to have and injoy for term of her natural life according to the estate of such Husband free, and freely discharged of and from al titles, debts, rents, charges, judgements, executions and other incumbrances...

Escheats. It is ordered by this Court and Authoritie therof, That where no Heir or Owner of houses, lands, tenements, goods or chattels can be found: they shall be seized to the publick Treasurie till such Heirs or owner shall make due claim therto, unto whom they shall be restored upon just and reasonable terms.

Indians. It is ordered by Authoritie of this Court; that no person whatsoever shall henceforth buy land of any Indian, without licence first had & obtained of the General Court: and if any shall offend heerin, such land so bought shall be forfeited to the Countrie.

Lands, Free lands. It is ordered, and by this Court declared; that all our Lands and Heritages shall be free from all Fines and Licenses upon alienations, and from all Hariots, Wardships, Liveries, Primerseizins, year, day and wast, Escheats and forfeitures, upon the death of Parents or Ancesters, be they natural, unnatural, casual, or judicial and that for ever.

Liberties Common. It is ordered by this Court, decreed and declared...

Every Inhabitant who is an hous-holder shall have free fishing and fowling, in any great Ponds, Bayes, Coves and Rivers so far as the Sea ebs and flows, within the precincts of the town where they

> dwell, unles the Free-men of the same town, or the General Court have otherwise appropriated them. Provided that no town shall appropriate to any particular person or persons, any great Pond conteining more then ten acres of land: and that no man shall come upon anothers proprietie without their leave otherwise then as heerafter expressed; the which clearly to determin, it is declared that in all creeks, coves and other places, about and upon salt water where the Sea ebs and flows, the Proprietor of the land adjoyning shall have proprietie to the low water mark where the Sea doeth not ebb above a hundred rods, and not more wheresoever it ebs farther...
>
> *Wills intestate.* It is ordered, and by this Court declared; that when Parents dye intestate, the eldest son shall have a double portion of his whole estate, reall, and personall unles the General Court upon just cause alledged shall Judge otherwise. And when parents dye intestate, having no Heirs males of their bodyes, their daughters shall inherit as copartners, unles the General Court upon just reason shall judge otherwise. n124

Additional compilations of Massachusetts laws were issued in 1660 and 1672. A revision begun in 1679 became moot when the colony's charter was revoked in 1684. In 1692 Massachusetts was merged with Plymouth, Maine, Nova Scotia, Nantucket, Martha's Vineyard and the Elizabeth Islands into the Royal Province of Massachusetts Bay in New-England, and legislative activity resumed. A new compilation of laws was then issued in 1699. Occupying 158 printed pages in its published form, this 1699 code provided much more detailed enactments for the various activities relating to land, but it introduced no matters that would have been unfamiliar to one schooled in English law of the time. n125

FOOTNOTES:

(n1)Footnote 96. William Bradford, Of Plymouth Plantation 25 (Samuel Eliot Morison ed. 1959).

(n2)Footnote 97. 1 Herbert L. Osgood, The American Colonies in the Seventeenth Century 98 (1904).

(n3)Footnote 98. *Select Charters and Other Documents Illustrative of American History 1606-1775)* 24-33 (William MacDonald ed. 1914).

(n4)Footnote 99. Bradford's History of Plymouth Plantation 106 (William T. Davis ed. 1908).

(n5)Footnote 100. *Id.* at 107.

(n6)Footnote 101. *As reported in* 1 Herbert L. Osgood, The American Colonies in the Seventeenth Century 110 (1904).

(n7)Footnote 102. *Bradford's History of Plymouth Plantation* 146 (William T. Davis ed. 1908).

(n8)Footnote 103. *Id.* at 146-147.

(n9)Footnote 104. 1 Herbert L. Osgood, The American Colonies in the Seventeenth Century 116 (1904).

(n10)Footnote 105. *The Laws of the Pilgrims* xiv (John D. Cushing ed. 1977) (a facsimile edition of The Book of the General Laws of the Inhabitants of the Jurisdiction of New-Plimouth 1672 & 1685, introduction by John D. Cushing).

(n11)Footnote 106. 11 Records of the Colony of New Plymouth in New England 6 (David Pulsifer ed. 1861).

(n12)Footnote 107. *Id.* at 12.

(n13)Footnote 108. *Id.*

(n14)Footnote 109. *Id.*

(n15)Footnote 110. *Id.* at 13.

(n16)Footnote 111. The Laws of the Pilgrims xv (John D. Cushing ed. 1977) (a facsimile edition of The Book of the General Laws of the Inhabitants of the Jurisdiction of New-Plimouth 1672 & 1685, introduction by John D. Cushing).

(n17)Footnote 112. 11 Records of the Colony of New Plymouth in New England 78 (David Pulsifer ed. 1861).

(n18)Footnote 113. *Id.*, 1671 Code at 34-35.

(n19)Footnote 114. *Id.*, 1685 Code at 42.

(n20)Footnote 115. *Id.*

(n21)Footnote 116. Eugene Aubrey Stratton, Plymouth Colony, Its History & People 1620-1691 at 169-170, 176-177 (1986).

(n22)Footnote 117. David A. Thomas, *Anglo-American Land Law: Diverging Developments from A Shared History Part II: How Anglo-American Land Law Diverged After American Colonization and Independence, 34 Real Prop. Prob. & Tr. J. 295 (Summer 1999).*

(n23)Footnote 118. Eugene Aubrey Stratton, Plymouth Colony, Its History & People 1620-1691 at 122-123 (1986).

(n24)Footnote 119. *Id.* at 135-136.

(n25)Footnote 120. 1 Herbert L. Osgood, The American Colonies in the Seventeenth Century 424 (1904).

(n26)Footnote 121. *Id.* at 435.

(n27)Footnote 122. 2 Herbert L. Osgood, The American Colonies in the Seventeenth Century 16 (1904).

(n28)Footnote 123. In the 1641 laws, a disability status was attached to married women, but this had apparently been repealed by the time of the 1648 code:

> 14. Any Conveyance or Alienation of land or other estaite what so ever, made by any woman that is married, any childe under age, Ideott, or distracted person, shall be good, if it be passed and ratified by the consent of a generall Court.

Select Charters and Other Documents Illustrative of American History 1606-1775 at 72, 75 (William MacDonald ed. 1914).

(n29)Footnote 124. 1 The Laws and Liberties of Massachusetts 1641-1691, 3-61 (John D. Cushing ed. 1976).

(n30)Footnote 125. *See* Massachusetts Province Laws 1692-1699, 17-178 (John D. Cushing ed. 1978).

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CHAPTER 6 DEVELOPMENT OF PROPERTY LAW IN ENGLAND'S AMERICAN COLONIES

1-6 Thompson on Real Property, Thomas Editions § 6.04

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§ 6.04 Development of Property Law in New Hampshire (from 1623).

§ 6.04(a) Legal Origins of the Earliest Settlements.

The territory of present-day New Hampshire was explored by Englishmen perhaps as early as 1583. In 1614 Captain John Smith sailed north from Virginia and perused the coast, reporting his pleasure at the prospect of fine land free of feudal restraints and available in abundance:

> Here should be no hard landlords to rack us with high rents, or extorted fines to consume us; here every man may be master and owner of his own labor and land in a short time...." n126

He would have been disappointed that the two English aristocrats principally responsible for New Hampshire's earliest settlements had a different view of land rights:

> Smith's dream of a colony where landlords and quitrents should be unknown was far enough from the plans of [Captain John] Mason or [Sir Ferdinando] Gorges. They believed fully in the patents and monopolies which excited popular and parliamentary hostility in the Stuart reigns, and they aimed at baronies and lordships in New England similar to those of England and Scotland. They were ready to spend money in colonizing, but the colonists were to be their tenants, governed by their kindred and friends as a ruling class...
>
> Mason and Gorges preferred a colony resembling what Virginia soon became, -- an aristocracy closely depended on the crown, and supplied with a loyal clergy selected by careful English bishops, who should preach passive obedience, so far as the turbulence of new colonies would permit that servile doctrine. n127

In what is now the state of New Hampshire, the first permanent European settlements were not coincident with status as a separate colony. Two of the first four New Hampshire settlements, Dover and Portsmouth, had their legal origins in the 1620 charter that created the corporation known as the Council for New England and which was given jurisdiction over all of New England.

By a grant in 1621 the council had validated the settlement at Plymouth and later would authorize the grants for the Massachusetts Bay Colony. To boost its flagging efforts in recruiting investors for colonization, the council began to grant its domain to individual "adventurers" who would undertake to settle and cultivate the land. Only a few of these grants ever materialized into settlements or private plantations, but two of them were in New Hampshire, at Hilton's Point, later known as Dover, and at Strawbery Banke, later known as Portsmouth. Edward Hilton received an informal council grant for Dover and built up the settlement between 1623 and 1628. The grant was formalized in March of 1630. Of these grants, it was stated earlier in this chapter that:

> The grants were not carefully drawn and often overlapped, conflicted with, or superseded other grants, even occasionally grants that were being actively settled. When the council made grants for private plantations, it specified that the tenants or freeholders should not alienate without prior council approval and that a certain number of people should be settled, with livestock and other possessions, within five years after the grant was issued. The product of the land and of related trade would typically be managed in common between the grantee who actually settled the land and the partners in England who helped underwrite the grant. At the end of the five year period, the land and accumulated profits would be divided between the settler and the other partners, and the partnership would be dissolved. This pattern was typical of many smaller settlements in the area. n128

Among the other individual grants made by the New England Council was a patent issued in March 1622, to Captain John Mason for lands lying between the Salem and Merrimac Rivers in present-day northern Massachusetts. In August 1622, Mason and Gorges obtained a joint grant of lands between the Merrimac and Kennebec Rivers, covering part of present-day New Hampshire and southern Maine, and designated the province of Maine.

Then on November 7, 1629, the part of the joint grant to Mason and Gorges lying between the Piscataqua and Merrimac Rivers was re-granted by the council to John Mason, individually, to be called New Hampshire. Ten days later, a group styling itself the "Laconia Company" -- including Mason, Gorges and others -- obtained a large, vague grant of land in the region, for the exploiting of which the group established settlements on both sides of the mouth of the Piscataqua River, the southern settlement being known as Strawbery Banke. A patent to the Piscataqua lands being settled was obtained by the Laconia Company in November 1631. In 1634 Mason and Gorges, the two principal investors, purchased the lands of the Laconia Company on the northeast bank of the Piscataqua River from others who withdrew from the company, while other company lands southwest of the river remained in common ownership. In 1635, however, Mason obtained from the New England Council a grant, called New Hampshire, confirming all his previous grants, but he died before that latest grant could be confirmed.

§ 6.04(b) Landholding Rights in the Earliest Settlements.

The language of this unconfirmed charter tells much about the assumptions underlying landholding rights in these colonial ventures: Mason was to have "power over the land and water, forests, mines, and fisheries, according to the right and powers 'had, used and enjoyed by the now or any former Bishop of Duresme within the County Palatine of Duresme.' " n129 The people of New Hampshire and their descendants

> were to be "holden, reputed and had as the faithful liege people of Us [the crown], our heirs and successors, originally springing up within our Realm of England." And they were to take by descent or purchase, and freely possess, property in the three kingdoms, as if living therein; and to have "all the liberties, franchises and privileges of this our realm of England, without any impediment whatsoever, -- any statute to the contrary notwithstanding...
>
> ... Power also was given to Mason and his heirs, "lest the way to honor and renown might seem difficult and hard to find in so remote and far distant a country," to create and bestow titles, "so they be such as in England now are in use," and "to create villages and into boroughs, and boroughs into cities... We do declare and ordain, that the said Province of New Hampshire shall be immediately subject to our

> Crown of England, and dependent upon the same for ever." n130

These provisions were never confirmed and thus remained only expressions of intent and assumption. After Mason's death the Laconia Company went bankrupt, and the New England Council also dissolved, leaving the Hilton and Stawbery Banke settlers without governing authority. The various grants just described could be, and occasionally were, interpreted to overlap, and there was also a competing claim of the Massachusetts Bay Company to the entire area, so the potential for conflict over governance and over land titles was great.

As to landholding itself, the patents were quite consistent in conferring full ownership on the patentees. According to the 1622 grant of "Maine" from the New England Council to Gorges and Mason:

> Now this Indenture witnesseth that the said President and Councill ... doe give grant ... and confirme unto the said Sir Ferdinando Gorges & Captain John Mason their heirs and assignes all that part of the maine land in New England ... n131

Likewise, the grant to Mason called "New Hampshire" in 1629 was in terms of full ownership: " ... the said President and Council ... do give, grant ... and confirm unto the said Captain John Mason, his Heires and Assigns, all that Part of the main Land in New-England [description of grant] ... which said Portions of Lands with the Appurtenances, the said Captain John Mason, with the Consent of the President and Council intends to name *New-Hampshire:*...." n132 Both the 1622 and 1629 grants cited the 1620 grants to the New England Council as the source of their rights to make grants.

A third source of New Hampshire settlement emerged in 1638, when religious dissenter John Wheelwright, under sentence of banishment from Massachusetts, purchased lands in the Piscataqua region from the Indians. In 1639 the 35 families in this settlement entered into a civil compact that acknowledged loyalty to the English monarch, but only "according to the libertys of our English Colony of Massachusetts." n133

A fourth area of settlement in New Hampshire was opened directly by Massachusetts, which in 1636 directed the establishment of a plantation at Hampton. The settlement was granted town status in 1639, so that:

> by 1640, there were four separate and unrelated settlements in New Hampshire, each originating from England (Dover and Strawbery Banke, or Portsmouth) or Massachusetts (Exeter and Hampton). All faced a generally similar frontier environment but reacted to it according to their own needs and interests as they interpreted them. n134

At this key point in the history of New Hampshire colony, it could be said that:

> The confusion of patents and grants, whether made by the king, by the New England Council, by the towns of Massachusetts before 1642, or by Massachusetts afterwards, was very great at first, and continued to be a source of litigation for nearly a century and a half. The patents of the Hiltons on the Piscataqua, and of Thomas Wiggin in what is now Stratham, though conflicting with the general grants made to Mason and Gorges, were sustained by the local courts; and in Wiggin's case he was finally taxed in the town of Hampton, though never residing within its proper limits. The Hiltons, opposing the claim of Mrs. Mason to the ownership of their land, which at one time was allotted to her, finally recovered it... n135

§ 6.04(c) Landholding Rights After Massachusetts Assumed Control.

In 1640 the Dover settlers, fearing a takeover by Massachusetts, entered into a civil compact known as the Dover Combination, by which they pledged loyalty to the laws of England "together with all such orders as shall be concluded by a major part of the freemen of our Society." n136 However, for various reasons the inhabitants of all four early New Hampshire settlements by 1643 had acquiesced in Massachusett's assertion of jurisdiction over their territories.

Massachusetts hegemony in New Hampshire prevailed until 1679, when the crown ordered Massachusetts to withdraw from the New Hampshire communities and appointed a royal governor. Throughout this period and extending until 1746, land titles and incidents were in a constant state of tension because heirs and successors of the Mason grants persisted in asserting their claims against the colonial occupants of the land. From time to time, these claims were instrumental in the long effort to bring about the withdrawal of Massachusetts from New Hampshire.

> [Mason's] grandiose plans for founding a hereditary principality in American might even then have been realized had he not suddenly died in 1635... The validity of Mason's claims to his vast holdings, and their subsequent disposition, were to be the source of endless altercation and political confusion, typing up hundreds of acres of land for almost 125 years. The litigations, changes of ownership, sales, claims, counterclaims, comings and goings of Mason descendants trying to secure their inheritance -- and the boundary and border disputes that resulted -- are an inextricable part of New Hampshire history. n137

§ 6.04(d) Landholding Rights After Becoming a Royal Province.

After appointment of the royal governor in 1679, events moved quickly. Shortly before his death in 1684, King Charles II revoked Massachusett's charter and proposed to unite Massachusetts, Maine, New Hampshire, Rhode Island and Connecticut into one province. James II took the throne in 1685 and carried out this plan by creating the Dominion of New England. Governor Edmund Andros arrived in Boston in December 1685, and soon began to exercise his powers of government, including the power to inject further confusion into already turbulent landholding arrangements:

> By this commission, the governor with his council, five of whom were a quorum, were impowered to make such laws, impose such taxes, and apply them to such purposes as they should think proper. They were also empowered to grant lands on such terms and subject to such quitrents, as should be appointed by the king. Invested with such powers, these men were capable of the most extravagant actions. Though Androsse, like his master, began his administration with the fairest professions, yet like him, he soon violated them, and proved himself a fit instrument for accomplishing the most execrable designs... Let it suffice to observe that the press was restrained; liberty of conscience infringed; exorbitant fees and taxes demanded, without the voice or consent of the people, who had no privilege of representation. The charter being vacated, it was pretended that all titles to land were annulled; and as to Indian deeds, Androsse declared them no better than "the scratch of a bear's paw." Landholders were obliged to take out patents for their estates which they had possessed forty or fifty years; for these patents extravagant fees were exacted, and those who would not submit to this imposition had writs of intrusion brought against them, and their land was patented to others. n138

These oppressions ended suddenly in 1688 when James II was overthrown, but the turbulent times had made it impossible for a stable government to form in New Hampshire. Therefore, the colony rejoined Massachusetts for a short time, until it was designated a royal province by William and Mary in 1691.

§ 6.04(e) Land Distribution Practices in the Local Communities.

The preceding discussion has shown on what basis the rule of law and the laws for landholding took form in colonial New Hampshire. To a certain extent, these foundational legal features remained theoretical and not quite consonant with landholding practices actually in force within the early settlements of New Hampshire. Moreover, the presumptive application of English land law implied in the charters was at best a generality and gave no instruction about specific practices of land distribution. For such information, one may look to the histories of individual early communities in New Hampshire.

Regular land distribution in New Hampshire occurred more frequently after the colony came under the jurisdiction of Massachusetts in the 1640's. Following Massachusetts' well-established pattern for setting up towns whose governments' primary function was to distribute land, orderly settlement proceeded much more rapidly. n139 Generally,

the original settlers received generous grants of land and then imposed some restrictions on those who came later. During the 1650's such restrictions were relaxed as the settlements competed for recruits. In the 1660's usable land became scarce, and grants of land were ended; newcomers were required to purchase lands in established communities. Where grants were given, their size often depended on the means and abilities of the grantees to offer needed assistance to the community.

By way of example, Hampton's first land grants to its founders varied from 80 to 300 acres. In the second land grant, in 1640, grants of 10 acres each for house lots were made to numerous non-freemen, and one grant of 100 acres was made to a freeman. In 1645, 200 acres of land was set aside as a cow commons to be shared in various proportions by 58 people.

In Exeter,

> all meadows were divided into four equal parts, with the first three parts apportioned according to the number of cattle owned by each inhabitant and the fourth part divided into equal lots for those who had no cattle; the "upland lots for planting" were given on the basis of the number of persons and cattle in each family; and the marshes were divided among all the inhabitants, with those owning cattle receiving proportionately larger shares. Family size and herd size -- the practical needs and agricultural potential of each family -- guided Exeter's approach to land policy.
>
> Other values also entered into Exeter land policy. When new marsh lands were found in 1643, the town rewarded individual initiative by voting that marshes of less than twenty acres belonged to the finder "forever," but marshlands of twenty acres or more became town property with the finder receiving a double portion.
>
> ... The town exemplified its strong community cohesiveness by granting the sons of inhabitants at least thirty acres of land within the town when they were ready to set up for themselves.
>
> When it came to granting the common lands or new areas to the town inhabitants, the principal basis for division was the proportion of tax each individual paid in support of the minister; this proportion was in turn based upon his taxable property or "ratable estate." n140

In Dover, the earliest recorded land grants, in 1642, were of twenty-acre lots to twenty-three persons. Between 1642 and 1655, 42 grants were given, ranging between 3 and 500 acres in size.

The New Hampshire government also granted townships, which, in turn, had authority to make local land grants. The townships were similar to those of Massachusetts, with one twist:

> The New Hampshire government required the payment of a nominal quitrent from each new township: an ear of Indian corn, a pound of hemp, a pint of turpentine, a pound of flax, or a peck of potatoes served this function. Although these quitrents were payable only if demanded by the government, an action which seldom if ever occurred, nevertheless, the inclusion of quitrents in New Hampshire land grants originated from the colony's royal status and from the uncertain legality of the Masonian proprietary claims to the land of the colony. n141

After New Hampshire became a royal colony it typically imposed requirements on individual proprietors in its township grants, usually requiring of each proprietor certain minimum land improvements, a certain number of acres under cultivation, and assistance in obtaining and supporting a minister. Proprietors who failed to meet the requirements forfeited their shares to the others. Once the township was officially established, however, its proprietors assumed all power over land grants within their jurisdiction.

§ 6.04(f) New Hampshire's Earliest Published Laws.

Despite the early date of its first settlement (1623), New Hampshire was very late in developing its own law:

> In contrast to Massachusetts and Plymouth, New Hampshire was settled by a number of commercial companies, each operating under the terms of its own charter, and interested primarily in extracting profits from the natural resources of the area. Most of the settlers were nothing more than employees of the proprietors; they clustered near the site of their operations and those settlements soon became towns. They appear to have had no strong desire to establish a well-ordered state governed according to precepts derived from scriptural law, as was the case in Massachusetts. Moreover, there was no clear-cut charter authority to establish a system of civil government and thus the earliest laws of the area were orders of the proprietors' agents and the self-generated regulatory measures adopted by the people assembled in town meeting. In short, for many years each town was an entity unto itself. n142

While New Hampshire was officially under the governance of Massachusetts Bay, between approximately 1641 and 1679, the laws of Massachusetts applied in New Hampshire. Under independent New Hampshire's first president, John Cutt, a code of laws was compiled, based largely on laws of Plymouth and Massachusetts, and the colony also made some use of a compilation of English statutes that had been sent. In this Cutt Code, the laws of England were invoked to decide questions of real property. The president and council were established as a "constant and setled Court of record," to hear pleas in civil suits and actions:

> whether ye same do concern ye realty, and relate to a right of freehold and inheritance, or whether ye same do concern ye personalty, and relate to some matter of debt, contract, damage, or other person, iniury, and also in all mixt actions wch may concern both realty and person... : so always yt ye forms of proceeding in such cases and ye judgment thereupon to be given, be as consonant and agreeable to ye Laws and Statutes of this Our Realm of Engd, as ye prent state and condition of our subjects inhabiting within ye limits aforesaid, and ye circumstances of ye place will admit. n143

The Cutt Code confirmed existing land rights and made provisions for the continued adjudication of the claims of Mason heirs. Its sparse provisions relating to landholding are adequately summarized by recitation of the headings: forcible detaining possession; burning fences; breaking down fences; defacing landmarks; townships, & c, confirmed; controversies of land to be tried by a jury; former laws to stand; n144 province rate [of tax, upon persons and estates]; and age to make a valid act [21]. n145

A short code was also issued in 1682 under the brief and unpopular regime of the second president, Edward Cranfield. The few land-related provisions of this code also deal with burning fences, defacing landmarks, and property tax rates. n146 After Cranfield's departure in 1685, New Hampshire was part of the Dominion of New England until the dominion fell and New Hampshire temporarily reunited with Massachusetts. In 1691 New Hampshire resumed status as an individual colony with its own governor, and in 1699 a short compilation of laws was printed. No provisions of this compilation deal directly with land.

A printing of a comprehensive compilation of New Hampshire laws was authorized in 1701 but was not completed until 1716. This much more extensive collection contains numerous provisions dealing with real property: prohibition of unfettered horses on the commons; prohibition against fencing the commons; recording deeds and conveyances, and validating all former deeds and conveyances; property tax collection; preventing trespass; regulating cutting of mast trees; preventing encroachments on highways; dealing with property interests of persons under disability; regulating dower; proceeding against forcible entry and detainer; partition of lands; regulating executors and administrators; regulating bankrupts and insolvent estates; preventing common nuisances; repairing highways; preventing trespass of cutting down trees on unfenced land; regulating strays and lost goods; regulating mills; making lands and tenements liable for payment of debts; preventing concealment of estates from assessors; settling and distributing estates of

intestate decedents; enabling towns, villages and proprietors in common and undivided lands to sue and be sued; regulating powers of towns; preventing illegal purchase of Indian lands; preventing encroachments and encumbrances on highways; enacting a statute of frauds; redeeming mortgaged land; and prohibiting trespassing on the town commons.

Compared with contemporary colonial laws, this 1716 compilation from New Hampshire promulgates one of the most extensive regimes of real property regulation during the colonial period.

FOOTNOTES:

(n1)Footnote 126. Frank B. Sanborn, New Hampshire, An Epitome Of Popular Government 7 (1904).

(n2)Footnote 127. *Id.* at 8-9.

(n3)Footnote 128. § 6.03(b), *supra.*

(n4)Footnote 129. Frank B. Sanborn, New Hampshire, An Epitome Of Popular Government 13 (1904).

(n5)Footnote 130. *Id.* at 14-15.

(n6)Footnote 131. Select Charters and Other Documents Illustrative of American History 1606-1775 at 36-37 (William MacDonald ed. 1914).

(n7)Footnote 132. *Id.* at 50-51.

(n8)Footnote 133. David E. Van Deventer, The Emergence of Provincial New Hampshire 1623-1741 at 8 (1976).

(n9)Footnote 134. *Id.* at 9.

(n10)Footnote 135. Frank B. Sanborn, New Hampshire, An Epitome Of Popular Government at 24-25 (1904).

(n11)Footnote 136. David E. Van Deventer, The Emergence of Provincial New Hampshire 1623-1741 13 (1976).

(n12)Footnote 137. Elizabeth Forbes Morison and Elting E. Morison, New Hampshire, A Bicentennial History 11-12 (1976).

(n13)Footnote 138. 1 Jeremy Belknap, The History of New-Hampshire 232-234 (1792).

(n14)Footnote 139. *See* § 6.03(b)(3), describing the role of New England towns in bringing about the private ownership of land.

(n15)Footnote 140. David E. Van Deventer, The Emergence of Provincial New Hampshire 1623-1741 23-24 (1976).

(n16)Footnote 141. *Id.* at 39.

(n17)Footnote 142. Acts and Laws of New Hampshire 1680-1726 vii (John D. Cushing ed. 1978).

(n18)Footnote 143. *Id.* at 197-198.

(n19)Footnote 144. "soe far as they will sute our constitution and be not repugnante to ye Laws of England." *Id.* at 219.

(n20)Footnote 145. *Id.* at 195-229.

(n21)Footnote 146. *Id.* at 231-248.

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CHAPTER 6 DEVELOPMENT OF PROPERTY LAW IN ENGLAND'S AMERICAN COLONIES

1-6 Thompson on Real Property, Thomas Editions § 6.05

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§ 6.05 Development of Property Law in New York (from 1624).

§ 6.05(a) The Dutch West India Company Charter of 1623.

In the service of the Dutch in 1609, Henry Hudson sailed up the river which now bears his name almost as far as Albany. Although disappointed in his objective of finding the mythical Northwest Passage, he passed on to his employers descriptions of a fruitful land. The Dutch eventually formed a new venture, called the West India Company, to colonize the territory which they claimed and named "New Netherland." The company's charter from the Dutch government was issued in 1621. In 1623 New Netherland was officially designated as a province of the Company, and in 1624 the first settlers arrived.

§ 6.05(b) The Charter of Privileges to Patroons of 1629.

The charter of June 3, 1621, conferred on the company a monopoly over trade and traffic to the New World for a period of 24 years. Conspicuously absent from the charter is any mention of power in the company to deal with land. n147 Nevertheless, the company exercised such power, and no stronger example of that may be found than in the Charter of Privileges to Patroons, adopted in 1629. The background and significance of this charter has been explained as follows:

> The government of the Dutch West India Company, chartered in 1621, was vested in five chambers, or boards, established in as many Dutch cities, with a board of nineteen for the exercise of general executive powers. Of the chambers, that of Amsterdam was the most important. The region known as New Netherland was not named in the charter, but was included within the jurisdiction of the Company. On the final organization of the Company under the charter, in 1623, New Netherland was made a province, and placed under the immediate control of the Amsterdam chamber. The continued unprofitableness, however, of the trade of New Netherland, except for the fur trade, led to a change of policy; and the Charter of Privileges to patroons, drafted in March, 1628, but not adopted by the board of nineteen until June, 1629, was intended to encourage private individuals to establish settlements at various points on the Hudson and Delaware, or North and South, rivers. Numerous grievances, occasioned by friction between the patroons and the Company, were partially allayed by a new charter in 1640, restricting the area of the grants, and encouraging independent settlement; but the feudal privileges of the patroons were not interfered with. "Many of the old patroon estates long remained undivided, and

> the heirs of the founders claimed some semi-feudal privileges well into the nineteenth century." n148

The somewhat vague boundaries of the province supposedly extended from the Delaware River to the Connecticut River. The first settlers were mostly Walloons, the French-speaking Hugeunots who had fled France into what is now part of Belgium. Of the four settlements commenced by this first group, one was located a little south of Albany, another on Governor's Island off the southern tip of Manhattan, a third just south of present-day Philadelphia, Pennsylvania, and the fourth near present-day Hartford, Connecticut.

The policy of encouraging settlement by patroons imparted significant consequences for landholding in New Netherlands. Patroons can be best described as the Dutch equivalents of English manorial lords. A patroon who held land held it according to a feudal system of land rights, which included the rights to require services as well as rents from tenants who were occupying the patroon's lands, and the right to exercise judicial and other governmental powers over the patroon's holdings. Only the patroon held the land outright; others could only be tenants of the patroon. The patroons of New Netherlands obligated themselves to commence a colony with at least 50 persons during a four-year period of time, in return for which each patroon received manorial and proprietary rights to sixteen miles of Hudson River shoreline and the lands behind the shoreline.

The following excerpts from the 1629 Charter of Privileges to Patroons amply illustrate this explicit introduction of feudalism into North America:

> III. All such [members of said Company as may be inclined to settle a Colonie in New Netherland] shall be acknowledged Patroons of New Netherland who shall, within the space of four years next after they have given notice to any of the Chambers of the Company here, or to the Commander or Council there, undertake to plant a Colonie there of fifty souls, upwards of fifteen years old; one-fourth part within one year, and within three years after the sending of the first, making together four years, the remainder, to the full number of fifty persons, to be shipped from hence, on pain, in case of wilful neglect, of being deprived of the privileges obtained...
>
> IV. They shall, from the time they make known the situation of the places where they propose to settle Colonies, have the preference to all others of the absolute property of such lands as they have there chosen ...
>
> VI. They shall forever possess and enjoy all the lands lying within the aforesaid limits, together with the fruits, rights, minerals, rivers and fountains thereof; as also the chief command and lower jurisdictions, fishing, fowling and grinding, to the exclusion of all others, to be holden from the Company as a perpetual inheritance, without it ever devolving again to the Company ...; and further, no person or persons whatsoever shall be privileged to fish and hunt but the Patroons and such as they shall permit. And in case any one should in time prospere so much as to found one or more cities, he shall have power and authority to establish officers and magistrates there, and to make use of the title of his Colonie, according to his pleasure and to the quality of the persons.
>
> VII. There shall likewise be granted to all Patroons who shall desire the same, ... liberty to dispose of their aforesaid heritage by testament.
>
> VIII. The Patroons may, if they think proper, make use of all lands, rivers and woods lying contiguous to them, for and during so long a time as this Company shall grant them to other Patroons or private persons...
>
> XIX. [The Company] will not take from the service of the Patroons any of their colonists, either man or woman, son or daughter, manservant or maid-servant; and, though any of these should desire the same, they will not receive them, much less permit them to leave their Patroons, and enter into the

> service of another, unless on consent obtained from their Patroons in writing, and this for and during so many years as they are bound to their Patroons...
>
> XX. From all judgments given by the Courts of the Patroons for upwards of fifty guilders, there may be an appeal to the Company's Commander and Council in New Netherland.
>
> XXI. In regard to such private persons as on their own account, or others in the service of their masters here (not enjoying the same privileges as the Patroons), shall be inclined to go thither and settle, they shall, with the approbation of the Director and Council there, be at liberty to take up and take possession of as much land as they shall be able properly to improve, and shall enjoy the same in full property either for themselves or masters. n149

In the end, only one patroonship ever succeeded, that of Kiliaen Van Rensselaer. Over lands covering present-day Albany and Columbia and Rensselaer counties in New York, he established a feudal tenant system that persisted until tenants rebelled early in the 19th century. The patent to Van Rensselaer, dated August 13, 1630, contained the following language describing the property rights conveyed:

> We, the Director and Council of New England, ... [do hereby convey and make over] to the Mr. Kiliaen van Rensselaer ... the respective parcels of land hereinbefore specified, with the timber, appendencies and dependencies thereof, together with all the action, right and jurisdiction to them the grantors conjointly or severally belonging, real and actual possession thereof, and at the same time giving him full, absolute and irrevocable power, authority and special command to hold, in quiet possession, cultivation, occupancy and use, ... the land aforesaid. n150

A nearly contemporary patent of land, dated July 15, 1630, used similar language in the grant, conveying the lands "with all the action, right and jurisdiction to them" and giving "full and irrevocable authority, power and special command, to hold in quiet possession, occupancy and use...." n151

As a feudal lord, the patroon enjoyed several traditional privileges relating to the land and labor of the patroonship's tenants:

> At the close of the harvest, the farmer was bound to hand in a return of the amount of grain which he had for sale, after deducting what was due to the landlord by the lease, and offer to him or his commissary the preemption of such produce. In case he refused to buy it, then the farmer was at liberty to sell the same elsewhere. The like rule obtained in regard to cattle. When these were to be sold, the first offer was also to be made to the Patroon, in order, we presume, that he should have an opportunity of retaining the stock within the colonie. Every settler was, likewise, obligated to grind his corn at the Patroon's mill, and the latter was equally obligated to erect, and keep such mill in repair, at his own expense, for the accommodation of his colonists. No person could hunt or fish within the limits of the colonie, without license from the Patroon, who, on the exchange, sale, and purchase of real estate within his jurisdiction, was entitled to the first offer of such property; or if he declined to resume it, to a certain portion of the purchase money, except such mutation occurred in the natural line of descent. Finally, it was his right, as "lord of the manor," to succeed to the estate and property of all persons who might die intestate within his colonie. n152

Leaseholds were also granted, and typical provisions of leaseholds are the following from a lease dated September 7, 1646:

> This day ... the presiding officers of the Colonie Rensselhaerswyck on one side, and Thomas Chamber on the other, have agreed and consented about a certain parcel of land ... [described], which land he, Thomas aforesaid, shall occupy as a bouwerie [farm] for the term of five successive years,

commencing the 15th of November, anno 1647, on the following conditions:

[The lessee agreed to build houses, barns and fences, and turn the improvements over to the lessor at the end of five years; "the said houses, barns, and fences, shall be the Patroon's rent for the aforesaid five years]." n153

§ 6.05(c) Conflicts Between Company and Patroon Landholding.

Inevitably, the institutions of colonial government clashed from time to time with the feudalistic independence of the patroons. The monopolistic powers exercised by the Dutch West India Company as colonial proprietor were very extensive. Even when its monopoly was abolished in 1640, its director and council remained the principal organs of government in the province:

Few formal instructions [from the company] appear, but orders were transmitted in the letters concerning grants of land, recall of grants, duties and all the minutia of trade relations, claims and suits against the company, dealings with the Indians, relations with the English on the north and the south and with the Swedes, the appointment and removal of officials, and the claims of patroons. n154

The director and council exercised legislative power, especially in the absence of any popular legislative assembly similar to those appearing in contemporary English colonies. Their power over management of the land was almost total:

By ordinances concerning land, provisions were made for the extinguishment of Indian claims, for issue of patents, for the annulment of extravagant and unimproved grants, for the fencing of land, for the levying of tenths and other taxes upon it, for the collection of rents, and the prevention of trespass. Courts were established under the authority of these ordinances; their jurisdiction was prescribed, and provision was made for their officials. Provisions for land grants and for courts, when combined, led to the origin of local government within New Netherland. n155

When the company revised its rules of settlement in 1640, under a grant entitled Freedoms and Exemptions for New Netherland, n156 its colonial monopoly was surrendered, and the possibility of colonies being founded by private persons was opened. If settlements in such private colonies grew into towns or villages, the company was required to grant to such villages powers of local government; eventually, village magistrates exercised authority to pass ordinances regulating land, fences, highways, schools, and churches. Even during the Dutch era, a large proportion of the villages were populated by English settlers, so it is not surprising that the first bestowal of village rights was on English towns within Dutch territory on Long Island in 1644. Other bestowals of village rights on Dutch communities followed quickly and continued right up to the time of the English takeover in 1664. In addition to these developments, officials in the patroonships sought to exclude completely any exercise of provincial government within the patroon holdings; these conflicts also continued unresolved right up to the end of Dutch rule in New Netherland.

§ 6.05(d) Early Incursions by English Settlers.

The English formed another fertile source of conflict. It may be recalled that the original grant of Virginia land to the London Company included coastal and inland territory extending northward to and including most of New England. Indeed, the Plymouth Company that had been organized in connection with the London Company had planted a settlement at Sagadahoc, near present-day Salem, Massachusetts, in August 1607, only to abandon the project a year later. Clearly, the Dutch colony of New Netherland was a technical intrusion into lands already claimed by the English, although not settled or in any way occupied by the English. The first overt outbreak of strife occurred in the spring of 1632, when a Dutch ship returning to Holland was forced by weather to put into Plymouth, where the vessel and its passengers were detained while the governments at home bickered over their respective claims. The ship was released in May, but the English asserted the release was "without any prejudice to his majesty's rights." n157

Further contentions followed in 1633. English trading with the Indians was obstructed; colonists from Plymouth began a settlement in territory along the Connecticut River claimed by the Dutch, and by 1635 numerous families from Massachusetts Bay had followed. By 1639 migration into New Netherlands was originating from both New England and Virginia. From as many English settlers as possible, the Dutch colonial government obtained an oath of fidelity:

> to their High Mightinesses the Lords States General, his Highness of Orange, and the Noble Director and Council of New Netherland; to follow the Director or any of his Council, wherever they shall lead; faithfully to give instant warning of any treason, or other detriment to this country that shall come to their knowledge; to assist to the utmost of their power in defending and protecting with their blood and treasure, the inhabitants thereof against all its enemies. n158

The English soon commenced a settlement at New Haven and purchased Indian land in all the surrounding areas. As for Long Island, "the Plymouth Company had taken upon itself to grant, at the request of Charles I, in 1635, the whole of Long Island to William Alexander, Earl of Stirling, who, in the early part of the following year, appointed an agent to dispose of the lands thus conveyed to him, to all who were desirous to purchase and settle them." n159 While the English were settling the eastern end of Long Island, the Dutch were purchasing and settling the western lands of the island. A series of isolated confrontations led, in 1641, to negotiations between the Dutch and English, which resulted in an agreement that the English could settle in territory claimed by the Dutch according to the provisions of the 1640 charter revising the Freedoms and Exemptions for New Netherland. Several families which had been considering a move from Massachusetts to Long Island then declined to do so, for the new arrangement tacitly conceded the Dutch rights to colonize.

Nevertheless, the provisions of the 1640 charter "formed the basis of all future grants from the Dutch to the English." n160 According to those provisions, English settling in Dutch territory:

> were to take the oath of allegiance to their High Mightinesses the States General and the West India Company, and in return, to enjoy free exercise of religion, and if they desired to have a magistracy from among themselves, they were to be allowed to nominate three or more persons from the most respectable among them, from which the Director-general would select one or more schepens, or magistrates... In criminal cases, they might proceed to, but not inflict capital punishment. They were empowered to erect towns, but could not construct forts except by special leave. Lands were to be shown to them free of expense, and whatever ground they might select, they were to hold free of rent or taxes for ten years; at the expiration of which time, they should be holden to pay the tenths of the produce. They were, in addition, to enjoy free hunting and fishing, and unshackled commerce, conformably to the privileges granted to New Netherland, but they were bound, in return, to make use of the weights and measures of the country. n161

In March 1642, several families from Massachusetts, under the leadership of the Rev. Francis Doughty, a dissenting minister, obtained a patent for 13,342 acres on Long Island and resettled there. Families from Lynn had obtained a similar patent in June 1641. Under both patents, the English settlers had the usual privileges of free manors, including free exercise of religion and powers to establish towns, churches, and systems of civil and criminal justice, all according to the charter of 1640. The patent to Francis Doughty and associates, dated March 28, 1642, used the following language to confer these land rights and privileges:

> We, [the Director-general and the council of New Netherland] ... do give and grant, unto Francis Doughty and associates, their heirs and assigns, in real, actual, and perpetual possession, all and every parcel of land situate on Long Island [boundaries described] ...
>
> With power to establish, in the aforesaid tract, a town or towns; to erect a church or churches; to exercise the Reformed Christian Religion and church discipline, which they profess; also, to administer,

> of right, high, low, and middle jurisdiction; to decide civil suits not exceeding fifty Dutch florins; to impose definitively and without appeal in criminal matters, fines to an equal amount; to pronounce the first sentence in other criminal actions of greater moment, and to execute the same ...: together with the right of hunting, fowling, fishing, and of trading, according to the immunities granted, and to be granted to the colonists of this province, without any exception: --
>
> Wherefore the aforesaid F. Doughty and his associates, their heirs and assigns, shall be obligated, so long as they are in possession of the above-mentioned lands, to acknowledge the aforesaid lords for their sovereign Lords and Patroons; to pay, after the lapse of ten years, the tenth part of the produce of the land, whether cultivated with the plough, hoe, or otherwise, orchards and kitchen-gardens, not exceeding one Dutch acre, excepted. n162

§ 6.05(e) Landholding After the English Takeover in 1664.

§ 6.05(e)(1) The 1664 Patent to the Duke of York.

The English, who had never officially acknowledged Dutch claims to the territory of New Netherlands, took over the colonial government by force, but without much violence, in 1664. By means of a royal charter dated March 12, 1664, and despite King James I having included the same lands in the 1606 patent for the Virginia colony, the English King Charles II granted full rights over the province to his brother the Duke of York -- the future King James II. The patent was expressed in terms of the fullest property rights consistent with the feudal incidents still connected with the tenure of free and common socage, including a nominal annual rent of 40 beaver skins:

> And by these presents for us our heires and Successors Doe give and Graunt unto our dearest Brother James Duke of Yorke his heires and Assignes [boundaries described], Together with all the lands Islands Soyles Rivers Harbours Mynes Mineralls Quarries Woods Marishes Waters Lakes fishings hawking hunting and fowleing and all other Royalities proffitts Comodities and hereditaments to the said several Island lands and premises belonging and appertaineing with their and every of their apurtennes AND all our Estate right title interest benefitt advantage Clayme and demaund of in or (to) the said lands and premises together with the yearely and other the Rents Revenues and proffitts of all and singuler the said premisses and of every part and parcell thereof to HAVE AND TO HOLD ALL and singuler the said lands Islands hereditaments and premisses with their and every of their appurtenncs hereby given and Graunted (or hereinbefore menconed to bee given and granted) unto our said dearest Brother James Duke of Yorke his heirs and Assignes for ever To the only proper use and behoofe of the said James Duke of Yorke his heires and Assignes for ever To bee holden of us our Heires and Successors as of our Manor of East Greenwich in our County of Kent in ffree and Comon Soccage and not in Capite or by Knights Service YEILDING AND RENDERING And the same James Duke of Yorke Doth for himselfe his heirs and Assignes covenant and promise to yeild and Render unto us our heires and Successors of and for the same yearely and every yeare ffortie Beaver Skynns when they shall be demanded or within Nynety days after... n163

The grantee, as a feudal lord, was given extensive powers of government and court jurisdiction. The laws to be administered in the granted lands were to be not contrary to and as near "as conveniently may bee" to the laws of England, and judicial judgments and sentences were subject to a right of appeal in England:

> AND WE DOE FURTHER of our speciall grace certaine knowledge and meere mocon for us our heires and Successors give and Graunt unto our said dearest Brother James Duke of Yorke his heires Deputyes Agents Commissioners and Assignes by these presents full and absolute power and authority to Correct punish Pardon Governe and Rule all such the Subjects of us our heires and Successors as shall from tyme to tyme Adventure themselves into any the parts or Places aforesaid ... according to such Lawes Orders Ordinances direccons and Instruments as by our said dearest Brother or his Assignes shall

> bee established ... as well in all Causes and matters Capitall and Criminall as Civill both Marine and others SOE ALLWAYES as the said Statutes Ordinances and Proceedings bee not contrary to but as neare as conveniently may bee agreeable to the Lawes Statutes and Governement of this our Realme of England AND SAVEING and reserveing to us our heirs and Successors the receiving heareing and determineing of the Appeale and Appeales of all or any Person or Persons of in or belonging to the Territories or Islands aforesaid in or touching any Judgment or Sentence to bee there made or given... n164

The terms of this patent appear to have been designed to expressly supersede any previous and conflicting grants of the same lands:

> AND LASTLY OUR WILL and pleasure is and wee doe hereby declare and Graunt that these our Letters Pattents or the Inrollment thereof shall bee good and effectuall in the Law to all intents and purposes whatsoever NOTWITHSTANDING the not reciteing or menconing of the premisses or any part thereof or the Meets or Bounds thereof or of any former or other Letters Patents or Graunts heretofore made or Graunted of the premisses or of any part thereof by us or of any of our Progenitors unto any other Person or Persons whatsoever Bodyes Politique or Corporate or any Act Lawe or other Restraint incertainty or ymperfeccon whatsoever to the contrary in any wise notwithstanding... n165

§ 6.05(e)(2) The "Duke's Law" of 1665.

These powers were implemented in 1665, when the Duke appointed a governor who promulgated a simple code known as the "Duke's Law." This law eventually governed the Duke's vast American grant, which included (along with New York) Delaware, New Jersey, and Pennsylvania. With the exception of New York City, the settlers in the Dutch areas were permitted to be governed by their traditional laws, especially as to landholding. A brief of revival of Dutch rule in 1673 and 1674 resulted in the Duke's Law replacing even these traditional Dutch laws after English rule was restored in 1674.

The Duke's Law has been described as rudimentary, probably because it was patched together from laws of other English colonies in America. Nevertheless, it is a lengthy code, occupying almost 100 pages in its most recent printing:

> The Duke of York's Laws for the government of the Colony of New York were compiled from the statutes for the government of the other English colonies in America, under the direction of Nicolls, the first English Governor. They were promulgated at Hempstead, on Long Island, March 1, 1665, and copies were transmitted to the several ridings, constituting the shire of Yorkshire. n166

The provisions of the Duke's Laws dealing with property matters cover the following topics, in terms typical of English laws adapted to the frontier environment:

> Bounds (of towns, requiring marks to be renewed every three years)
>
> Cattle, corn, fields, fences
>
> Conveyances, deeds and writings
>
> Dowries
>
> Purchase of Indian lands
>
> Laws (to be "not Contrary to the known Lawes of England")
>
> Orphans

Possession (persons holding for the past four years without interruption, shall be confirmed in their holdings.)

Records (of bargain and sale or other conveyances)

Townships

Lands, affirming rights of present occupants, and quoted in full as follows (and probably reflecting the statutory abolition of feudal tenures that had been enacted in England only five years earlier):

All Lands and heritages within this Goverment shall be free from all fines and Licenses, upon Alienation and from all Heriotts, Wardships liveryes Primier Seizins year day and wast, Escheats, and forfeitures upon the Death of Parents or Auncestors Natural, unnatural, Casuall, or judiciall, and that for ever (Cases of high treason only Excepted.)

To the end all former Purchasers may be ascertained to the present possessor or right owner They shall bring in their former Grants, and take our new pattents for the same from the present Gouvernoure in the behalfe of his Royall Highness the Duke of Yorke.

All Purchaseres of implanted Lands shall of their Cost and Charge, Cause a Survey and Draught thereof to be made within one yeare after such Purchases and deliver the same into the Office of Records, whereby the bounds and Limits thereof may bee justly distinguished, and if the purchasors shall not within three years after the Survey plant Seat or Inhabit upon the said purchasse they shall forfeit their Right, Title, and Interest therein.

Every Purchasor in acknowledgment of the propriety of such Lands belonging to his Royal Highness James Duke of Yorke, shall upon Sealing of the Pattent Pay unto the Governoure So much as they shall agree upon; Not exceeding for every hundred Acres.

And upon the Seating of a Towne two Towne Lotts shall be reserved by the Purchaser to the use of the Gouvernoure (Gratis) to dispose of to such as he shall thinke fitt. n167

§ 6.05(e)(3) The Second Grant to the Duke of York in 1674.

When the English retook the lands from the Dutch in 1674, Charles II issued a second grant to the Duke of York, specifying certain territories in addition to those described in the first grant, but describing the rights in those lands in terms essentially identical to the wording of the first grant. n168 These grants and laws remained formally in effect even after the "Glorious Revolution" in England in 1688, when the Stuart monarchy was ejected. A provincial assembly met in 1690, which temporarily kept in force the existing laws:

With the "Duke's Law" still in effect, the earliest work of the new legislature was directed toward proclaiming and defining the new political authority, establishing courts, adjusting municipal boundaries, establishing a body of liberties, repairing the damage done by the [Leisler] rebellion, and establishing the law of England as the basis of all provincial legislation. Thereafter, as in all other jurisdictions, the assembly confined itself to meeting the current and ever-changing needs of the province, and its enactments eventually became sufficiently extensive to replace the "Duke's Law." n169

§ 6.05(e)(4) Additional Land Legislation After 1691.

In 1693 a legislative committee began reviewing all legislation enacted since 1691 and preparing it for printing. It became the first printed collection of laws for New York.

The enactments relating to land included in this collection are as follows:

> An Act for the Settling, Quieting and Confirming unto the Cities, Towns, Mannours and Freeholders within this Province, their several Grants, Patents and Rights respectively ("Rights and Priviledges formerly held by and granted should be now ratified and confirmed...")
>
> An Act for the Regulating the Buildings, Streets, Lanes, Wharffs, Docks and Alleys of the City of New-York
>
> An Act for the supervising Intestates Estates, and Regulating the Probate of Wills, & granting Letters of Administration
>
> An Act declaring what are the Rights & Priviledges of Their Majesties Subjects inhabiting within Their Province of New-York.

Pertinent land law provisions of this important "body of liberties" enactment are quoted in full, revealing their heavy reliance on Magna Carta, among other sources:

> That no Free-man shall be taken or imprisoned, or be deprived of his Free-hold or Liberty, or free Customs, or Out-Lawed, or Exiled, or any other wayes destroyed; nor shall be passed upon, adjudged or condemned, but by the lawful Judgment of his Peers, and by the Law of this Province.
>
> Justice nor Right shall be neither Sold, Denyed or Delayed to any Person within this Province.
>
> That no Aid, Tax, Talliage or Custom, Loan, Benevolence, Gift, Excise, Duty or Imposition whatsoever shall be laid, assessed, imposed, levied or required of or on any of Their Majesties Subjects within this Province, &c. or their Estates, upon any manner of Colour or Pretence whatsoever, but by the Act and Consent of the Governour and Council, and Representatives of the People in General Assembly met and convened.
>
> That no Man, of what Estate or Condition soever, shall be put out of his Lands, Tenements, nor taken, imprisoned, nor disinherited, nor banished, nor any ways destroyed or molested, without first being brought to answer by due court of Law.
>
> That a Free-man shall not be amerced for a small Fault, but after the manner of his Fault, and for a great Fault after the greatness thereof, saving to him his Free-hold; and a Husband-man, saving to him his Wainage and none of these Amercements shall be assessed, but by the Oath of Twelve Honest and Lawful men of the Vicinage ...
>
> That no Free-man shall be compelled to receive any Souldiers or Marriners, except Inholders, and other Houses of publick Entertainment, who are to quarter for ready Money into his House, and there suffer them to sojourn again their Wills; provided it be not in time of actual War within this Province ...
>
> That all the Lands within this Province shall be esteemed and accounted Lands of Free-hold, and Inheritance in free and common Soccage, according to the Tenor of East-Greenwich in their Majesties Realm of England.
>
> That no Estate of a Feme-Covert shall be sold or conveyed, but by Deed acknowledged by her in some Court of Record, the Woman being secretly examined, if she doth it freely, without threats or compulsion of her Husband ...
>
> That all Lands and Heritages within this Province and Dependencies shall be free from all Fines,

> Lisences upon Alienations, and from all Heriots, Wardships, Liveries, Primiers, Seizins, Year and Day, and Waste, Escheat and Forfeiture upon the Death of Parents and Ancestors, Natural, Unnatural, Casual or Judicial, and that forever, Cases of High-Treason only excepted ... n170

The thoroughness of common law adoption in New York after 1700 can be illustrated by the fact that it was only in 1782, after the Revolution and after adoption of a state constitution, that the state legislature acted to abolish primogeniture, reestablish partible inheritance, and eliminate further entails. n171

§ 6.05(f) Summary of Landholding Arrangements in Colonial New York.

§ 6.05(f)(1) Land Grants.

At the top of the landholding hierarchy in colonial New York were those who received their proprietary grants directly from the European government, whether Dutch or English. These grants were estates of inheritance, descending to heirs, and the grantees were landlords. Because they also obtained powers of government, they in effect functioned as territorial lords in the feudal sense. They could sell, mortgage, lease, devise or convey in trust any portion of their holding. Because the prohibitions of the English Statute Quia Emptores forbidding subinfeudation were not enforced in New York, a proprietor could make further grants "on such conditions as he chose -- limited by the nature of his own patent, -- to erect or permit the erection of manors, to devise the machinery necessary for surveying, issuing, and recording grants and collecting rents." n172

When the proprietors were preparing for colonization, they issued documents containing "concessions," "conditions of plantation," or "instructions" that stated the terms under which the land would be granted to the colonists. Although this was the model among the English provinces, the pattern of Dutch administration over New Netherland did not significantly differ. The patroonships and other settlements were commenced under the authority of the 1629 charter of Freedoms and Exemptions, which charter constituted a sort of "conditions of plantation." When the English administration was substituted for the Dutch in 1664, and again in 1674, Dutch titles were confirmed, and there was a general renewal of patents, accompanied by the requirement of an oath of allegiance to the English monarch.

Since the English had taken the entire estate of the Dutch West India Company, unoccupied land in New York became subject to their administration. The English governor in New York prescribed regulations for the settlement of those lands, including making purchases from the Indians, extending temporary exemptions from taxes, and establishing towns. In New York, many such rules were drawn from well-established regulations in both New England and Maryland. The size of individual holdings was also affected by this system:

> In general, estates were much larger in the provinces [such as New York] than they were in the corporate colonies. The few scores of acres which, as the result of a series of town allotments, ordinarily came into the possession of a New England farmer, were almost insignificant when compared with the princely estates of the Dutch patroons ... n173

Among all the English colonies in America, only in New York did any fully developed manors come into existence, and these originated in the patroonship system introduced by the Dutch, exhibiting many features of continental feudalism. Ultimately, however, only the patroonship of the Van Rensselaer family survived the vicissitudes of frontier life to become an enduring fixture in New York landholding arrangements.

> Owing to these events, toward the close of the period of Dutch rule the manorial influence declined and ceased practically to exist in the southern part of the province. From time to time, however, both by Stuyvesant and by the early English governors, grants of considerable size were made. Some of these, notably Fordham, Pelham, and Phillipsburg in Westchester, assumed the name and to an extent the organization of manors. Toward the close of the Dutch period the Van Cortlandt family began to build up its large estate. During the administration of Governor Dongan the first grants were made which resulted

> in the development of the Livingston manor. By these events the manorial system began again to assume a prominence in New York like that from which, since the dissolution of the early association of patroons, it had declined. The social and political development of New York has been deeply affected by the family alliances and the system of tenant right which, as the result of these grants, extended so widely within its borders. n174

Small grants, most under 1,000 acres in size, were also made under the Dutch charter of Freedoms and Exemptions of 1629, and these were encouraged even more under the amended version of the charter issued in 1640. These smaller grants were nominally organized as manors, with regulations for leases and rents, but were often left unsettled and neglected. Because land was so frequently in need of settlers, usually it was simply granted under conditions of settlement and, in New York, only rarely sold for money, except at the highest proprietary level.

Certain English settlements in which the grant was made collectively to a group arose during the period of Dutch rule, especially on Long Island and in the area of Westchester County, and these settlements shared characteristics with New England towns, from whence their founders had migrated.

Throughout the period of Dutch rule, as an alternative to settlement under manorial patroonships, individual settlers ventured into unoccupied land, purchased rights from the Indians, and had their purchases confirmed by the colonial government. Eventually, these settlements or groups of them received patents as towns and thereby obtained rights of local governments. After issuance of the town patent, the town itself made grants of land to individual persons. Common rights also arose within the towns:

> Within towns thus organized unoccupied land was treated as commons, and the system of common fields, pastures and woods, with town herds and common fences, appears, much as in New England. As time progressed the towns divided their commons by lot, as they did in New England. A genuine village community system existed among the Dutch, as it did among the New Englanders, but in the two sections it come into existence in a somewhat different way. In New England, as a rule, the group of settlers was original, and secured the town grant and managed it from the first. Among the Dutch, as a rule, the villages originated from aggregations of farms, and attained their corporate life in consequence of such preexistent aggregation. When the Dutch village community had once been formed, it exhibited most of the characteristics of the New England village, though it was always subject to certain limitations which did not attach to the latter. Moreover, in New Netherland the village was by no means the only form of settlement, and it did not determine the form of society to the extent which was true of the villages in New England. n175

With the eventual elimination of all but one patroonship, the towns and villages played a large role in establishing the patterns of landholding in New York. n176

§ 6.05(f)(2) Leases and Quit Rents.

The quitrents that figured prominently in some of the proprietary provinces were not a consistent part of the Dutch landholding arrangements in New Netherland:

> In the Dutch ground briefs no definite provision was made for the payment of a rent. In some of the patents the payment of a tenth of the products of the soil was required. In many only the general obligation of submission and allegiance was enforced, with some special duty, such as that of fencing the land. The West India company owned six boweries, which were situated on the east side of Manhattan island outside the limits of the Dutch town. They were furnished with buildings and with cattle, and were leased for short periods, with the stock and other outfit, on such terms as were customary throughout the province. The farms of the colony of Rennselaerswyck were managed according to the same system of

> stock leases. Some were let at a fixed rent, payable in grain, beaver, or wampum, while others were let at halves or thirds, including one-half of the increase of the stock and a few pounds of butter as a recognition. The tenant was bound to keep the buildings and tools in good repair.
>
> The English Conquest in 1664 resulted in no immediate change in the land law of the province. n177

The articles of capitulation guaranteed that the Dutch could "enjoy their own customs concerning their inheritances" and that land records would be preserved. The oath of allegiance required by the English effectively broke the tenure of landholding under the Dutch and re-established it under the English tenure of free and common socage.

Those who held land rights under the Dutch were directed by the Duke's Law of 1665 to turn in their old grants and receive new patents from the English; in most of these confirmations no mention was made of a quitrent, especially with respect to lots in New York City. However, the confirmation of Indian deeds and the bestowal of new grants were usually conditioned on payment of the customary rent for new plantations; this nominal rent was usually in kind, such as a bushel of wheat, a lamb, or a barrel of fish. When English rule was interrupted and then re-established in 1673-1674, and old grants were again asked to be renewed, quitrents were more prominent, but hardly universal:

> In 1686 Governor Dongan reported that the quitrents, at his arrival in the province, were very inconsiderable, the larger part coming from the Delaware region under the terms of the patents granted by Andros. But Andros even had renewed Indian purchases and township grants with the former reservation of a lamb only as a quitrent. Dongan, however, insisted that all patents or deeds which were recorded during his administration should contain provision for a quitrent. No exception was made even in the case of city lots.
>
> Rent in the city was made payable in money, but in the country it was payable in wheat, fish, or other commodities. Albany was made the place of payment for the northern part, and New York for the southern part, of the province. At first rents were payable to the duke, but later, after his accession, to the king. Dongan himself explains how he succeeded in increasing the quitrent in some of the towns. He found that certain tracts of land within their limits had not been purchased from the Indians and were at the disposal of the government. By threatening to grant them to outside parties, he induced the proprietors of the town to submit to an increase of rent. By these measures the system of quitrents was extended throughout New York, and its practice in this respect was brought into conformity with that of the other English provinces. n178

Even the inhabitants of the English towns that arose during the period of Dutch rule eventually became subject to quitrents, even though quit rents were completely absent from the New England traditions from which the settlers of these communities had issued.

No separate land office existed in New York, so the chief provincial officials were responsible for making surveys, issuing patents, and collecting rents. New York laws provided that a registry be established for leases, mortgages, conveyances, and wills.

FOOTNOTES:

(n1)Footnote 147. 1 E.B. O'Callaghan, History of New Netherland 399-407 (1846).

(n2)Footnote 148. Select Charters and Other Documents Illustrative of American History 1606-1775 43 (William MacDonald ed. 1914).

(n3)Footnote 149. Select Charters and Other Documents Illustrative of American History 1606-1775 43-50 (William MacDonald ed. 1914).

(n4)Footnote 150. 1 Documents Relative to The Colonial History of the State of New York 44 (E.B. O'Callaghan ed. 1856).

(n5)Footnote 151. *Id.* at 43.

(n6)Footnote 152. 1 E. B. O'Callaghan, History of New Netherland 325-326 (1846).

(n7)Footnote 153. *Id.* at 473-474.

(n8)Footnote 154. 2 Herbert L. Osgood, The American Colonies in the Seventeenth Century 99 (1904).

(n9)Footnote 155. *Id.* at 104.

(n10)Footnote 156. 1 Documents Relative to the Colonial History of The State of New-York 118-123 (E.B. O'Callaghan ed. 1856).

(n11)Footnote 157. 1 E. B. O'Callaghan, History of New Netherland, or New York Under the Dutch 130-136 (1845).

(n12)Footnote 158. *Id.* at 298.

(n13)Footnote 159. *Id.* at 209-210.

(n14)Footnote 160. *Id.* at 237.

(n15)Footnote 161. *Id.*

(n16)Footnote 162. 2 E. B. O'Callaghan, History of New Netherland 425-426 (1845).

(n17)Footnote 163. The Earliest Printed Laws of New York 1665-1693 at 103-104 (John D. Cushing ed. 1978).

(n18)Footnote 164. *Id.* at 104-105.

(n19)Footnote 165. *Id.* at 106-107.

(n20)Footnote 166. *Id.* at 110.

(n21)Footnote 167. *Id.* at 148.

(n22)Footnote 168. *Id.* at 109.

(n23)Footnote 169. *Id.* at viii.

(n24)Footnote 170. *Id.* at 19-23.

(n25)Footnote 171. New York Laws of 1782, ch. 2.

(n26)Footnote 172. 2 Herbert L. Osgood, The American Colonies in the Seventeenth Century 20 (1904).

(n27)Footnote 173. *Id.* at 24.

(n28)Footnote 174. *Id.* at 31-32.

(n29)Footnote 175. *Id.* at 50.

(n30)Footnote 176. Christine A. Desan, *Remaking Constitutional Tradition At The Margin Of The Empire: The Creation Of Legislative Adjudication In Colonial New York, 16 Law & Hist. Rev. 257 (Summer 1998).*

(n31)Footnote 177. 2 Herbert L. Osgood, The American Colonies in the Seventeenth Century 39-40 (1904).

(n32)Footnote 178. *Id.* at 41-42.

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CHAPTER 6 DEVELOPMENT OF PROPERTY LAW IN ENGLAND'S AMERICAN COLONIES

1-6 Thompson on Real Property, Thomas Editions § 6.06

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§ 6.06 Development of Property Law in Connecticut (from 1633).

§ 6.06(a) The Founding of the Connecticut River Towns.

§ 6.06(a)(1) Settlement from Massachusetts.

A congregation of Puritans under the leadership of the Rev. John Warham immigrated to the Massachusetts colony in 1630 and eventually began a settlement that became the town of Dorchester. A few years later they moved to the Connecticut River and founded the town of Windsor. Another congregation, under the Rev. George Phillips and a magistrate named Sir Richard Saltonstall, settled at Watertown, and also later moved to the Connecticut River to found the town of Weathersfield. The Rev. Thomas Hooker, a well-known but persecuted non-conformist minister from Chelmsford, England, fled to Holland in 1632 and thence to Boston in 1633. Many of his followers had settled earlier in Weymouth and in Newtown (Cambridge). Upon Hooker's arrival, they congregated in Newtown. This congregation later founded a third settlement on the Connecticut River: Hartford. All three of these first Connecticut settlements, Weathersfield, Windsor, and Hartford, were founded between 1634 and 1635.

§ 6.06(a)(2) Warwick Patent of 1631.

Meanwhile, in 1630 the Plymouth Company in England granted to Robert, Earl of Warwick, an aristocratic friend of Hooker and president of the Council of Plymouth, a large tract of land including most of present-day Connecticut. The grant was confirmed by a patent from King Charles I. On March 19, 1631, Warwick granted the same Connecticut territory to eleven persons, including Sir Richard Saltonstall, whose subsequent patentees were the settlers of the Connecticut River and New Haven colonies. The validity of the grant to Warwick was questioned, especially after the Plymouth Company re-granted the same lands to the Marquis of Hamilton in 1635, but Hamilton's claim was later held barred by prescription. n179

§ 6.06(a)(3) Confrontation with the Dutch.

In 1632 members of the Plymouth Colony selected a site for a trading post at Windsor, which they began to construct in earnest in 1633, after purchasing the land from the Indians. Meanwhile, the Dutch were asserting a claim to Connecticut by commencing a settlement at the site of Hartford, a few acres of which they also purchased from Indians. The Dutch

even launched a military assault on the Plymouth trading house, but they were repulsed; afterwards, the settlement groups lived in uneasy peace.

§ 6.06(a)(4) Migration Under Massachusetts' Jurisdiction.

In 1634 settlers at Newtown with their pastor Thomas Hooker, complaining about unavailability of land, petitioned the Massachusetts General Court for permission to migrate to Connecticut, but they were denied. In 1635, however, people from Watertown, Dorchester and Roxbury were permitted to migrate on the condition that they agreed to continue to be governed by Massachusetts. It is believed that Newtown settlers were allowed to leave under the same condition later in the year. Because the Connecticut River settlements were outside the Massachusetts territory, this condition was quite unusual and could not be a permanent arrangement for governmental organization. At first, the Massachusetts General Court in 1636 appointed a commission of eight persons to regulate affairs in the Connecticut settlements for a period of one year. The commission was empowered to control trade, grant land lots, and regulate building, military discipline, defensive war, and the conduct of judicial proceedings. Undoubtedly, distribution of land took place, and landholding arrangements were fashioned, exactly as was then occurring in the Massachusetts settlement, and has been described in this chapter, §§ 6.03(a)(3) and 6.03(b)(2), *supra*.

§ 6.06(a)(5) Self-government Under the 1639 Fundamental Orders.

When the year's term expired in 1637, a general court of Connecticut settlers met in Hartford and began to function as an independent, indigenous colonial government. Conferences with Massachusetts leaders about uniting the colonies were conducted in 1638 but broke down. So, late in 1638 Connecticut leaders drafted a frame of government, the Fundamental Orders, which was adopted in January 1639. This document has been described as "the first written constitution known to history that created a government." n180 The Fundamental Orders included detailed provisions for the establishment of a general assembly or court and the appointment or election of various public officials. In the general court reposed the basic governing power:

> In which said Generall Courts shall consist the supreme power of the Commonwelth, and they only shall have power to make lawes or repeale them, to graunt levys, to admitt of Freemen, dispose of lands undisposed of, to severall Townes or persons, and also shall have power to call ether Courte or Magestrate or any or any other person whatsoever into question for any misdemeanour, and may for just causes displace or deale otherwise according to the nature of the offence; and also may deale in any other matter that concerns the good of this commonwelth, excepte election of Magestrats, which shall be done by the whole boddy of Freemen. n181

The legislative powers of this Connecticut General Court were essentially the same as in Massachusetts.

More than the substantive provisions, the preamble of the Fundamental Orders has attracted attention:

> If marked originality is to be found anywhere in the Fundamental Orders, it must appear in the preamble. This is, in fact, the part of the document which has chiefly attracted the attention and awakened the imagination of historians. The frank declaration of independence which is there made, and the announcement of the fact that in the opinion of the framers an original compact was being formed, has given to this document most of its interest. The preamble has been dwelt on at greater length and with much greater enthusiasm than have the provisions of the constitution concerning government. It has been made to signify much more than the Mayflower Compact, and its adoption has been regarded as the initial act in the development of American democracy. But really there is nothing in the preamble, or in the body of the Fundamental Orders, to indicate that, if the settlers of Connecticut had possessed a royal charter, they would have proceeded in a manner essentially different from that of the colonists of Massachusetts. n182

Among its other extensive powers, the general court had comprehensive control over land distribution and management:

> The business of the general court was very extensive. Besides its two regular sessions, many extra sessions were held. In 1645 it met seven times; in 1658 it met twice in March and once in May, in August and in October; in many years it met as often as in these. As in the other corporate colonies, its work was legislative, administrative, and judicial; while the character and volume of its product in each of these lines were not materially different from that which appears elsewhere in New England. Its most important legislation ... had reference to towns, military affairs, moral and ecclesiastical relations, the levy of rates, Indian relations, crimes and their penalties. Not only did the general court legislate comprehensively, as in October, 1639, for the establishment and regulation of towns, but by special orders it provided for the enforcement of this legislation, and controlled the action of towns in many ways. As a result of these acts and a series of land grants, a town system similar to that of Massachusetts and Plymouth was developed; and by means of this system the territory of the colony was extended eastward to include the Pequot country, southward to the mouth of the river, and westward till it was met by the counter claims of the Dutch. n183

This colony of Connecticut River towns thus proceeded to develop in an orderly way, even though it had no royal charter. In a short time it expanded by absorbing two other colonies. One was the settlement that had been founded at Saybrook by settlers acting under the terms of the Warwick patent, although that patent did not extend to the area they had settled. This colony was added to the river towns by purchase in 1644. The second colony, New Haven, had been settled by strict Puritans who had first landed in Boston, remained for only a few months, and then chose New Haven as a permanent location.

§ 6.06(b) The Founding of the New Haven Colony.

This New Haven group was remarkably independent from colonial regulation imposed either by English or by Massachusetts authorities. Consistent with the efforts to form a government that had occurred in Hartford, the New Haven settlers held a "general meeting" in June 1639, and reached agreement upon the fundamental rules for self-government, called the Fundamental Articles of New Haven. n184 The first public assembly or court held thereafter, of which there is record, took place in October 1639, and at that meeting the colonists:

> sought by a single resolution, not only to exclude English statute and common law from their settlement, but to forestall the necessity of important legislation on their own part. They resolved "thatt the worde of God shall be the onely rule to be attended unto in ordering the affayres of government in this plantation." n185

Several other plantations and settlements grew up in the general vicinity of New Haven, and some of these were as independent of New Haven as New Haven was of England or Massachusetts; others, such as Stamford and Branford, for instance, were settled by seceders from Weathersfield, one of the river towns, and obtained land grants directly from New Haven. In 1643 New Haven -- along with the colonies in Connecticut, Plymouth and Massachusetts Bay -- formed the United Colonies of New England in order to achieve concerted action in matters of warfare, boundary dispute resolutions, division of conquered Indian territory, and taxation of goods moving between colonies. n186

§ 6.06(c) Property-related Legislation in Early Connecticut.

§ 6.06(c)(1) Connecticut Code of 1650.

Both New Haven and Connecticut colonies were active in legislating. Connecticut produced a code in 1650, the third code produced in New England (after Plymouth in 1636 and Massachusetts in 1648), but the code was not printed, being instead distributed in manuscript form to various settlements in the colony. Provisions of the 1650 Connecticut code relating to land are quoted or summarized as follows:

> ... no mans goods or estate shall bee taken away from him, nor any wayes indamages, under colour of Law or countenance of Authority, unless it bee by the vertue or equity of some express Law of the Country warranting the same, established by a Generall Courte, and sufficiently published, or in case of the defect of a Law in any perticular case, by the word of God.

Ability

Age

Bounds of Townes and Perticular Lands

Cattle, Cornefeilds, Fences

Common Fields

Caveats Entred (recording of creditors' claims against debtors' lands)

Conveyances Fraudulent

Escheats

Fences

Forgerie

Highe Wayes

> Lands; Free Lands: It is ordered, and by this Courte declared, that oure Lands and Heritages shall bee free from all fynes and lycenses uppon Alienations, and from all Harriots, Wardships, Liveries, Primer seizins, yeare, day and waste, escheats and forfeitures uppon the death of parents or ancestors, bee they naturall, unnaturall, casuall or juditiall, and that for ever.

Rates [of property taxation]

Records

Timber

Trespasses

> Home Lotts: Whereas there is creeping in, in severall Townes and plantations within this Jurissdiction, a great abuse of buying and purchasing Home Lotts and laying them together, by meanes whereof great depopulations are like to follow. It is ordered that all dwelling or mansion houwses that are or shall bee allowed in any plantation or Towne within this Jurissdiction, shall bee upheld, repaired and meinteined sufficiently in a comely way: As allso, whosoever shall possess and injoye any homelotts within any such plantation or Towne, that is not yet built uppon, shall, within twelve months after the making of this order, erect and build a howse there, fitt for an inhabitant to dwell in, unless the Courte, uppon knowledge of the case, finde cause to abate, give longer time for building. n187

§ 6.06(c)(2) New Haven Laws of 1656.

New Haven Colony actually preceded the Connecticut river towns in producing a printed compilation of its legislation in force. A work entitled *New Haven's Settling in New England*, published in London in 1656, "included the text of the New England Confederation, the fundamental agreement of 1639, and a remarkably sophisticated code of laws based upon the Massachusetts code of 1648, and presumably the supplements of 1650 and 1654 as well." n188 Provisions of this compilation relating to land are quoted or summarized as follows:

> ... no mans goods, or estate shall be taken from him, under colour of Law, or Countenance of authority, unlesse it be by vertue, or equity of some expresse Law of this Jurisdiction, established by the Generall Court, and sufficiently published, or for want of a Law in any particular case, by the word of God...

Age

Cattell, Corn, Fields, Fences

Charges publick (taxes on property)

Conveyances fraudulent

Distresse

Dowryes

Escheates

Forgery, or Falsifying

Plantations

Records

Wills, Inventories, and the Estates of such as dye intestate

No provisions relate to the public authority or private power to convey lands in this compilation, undoubtedly because these practices had been well-established and orderly, on the Massachusetts model, from the beginning.

§ 6.06(c)(3) The Royal Charter of 1662 and Unification of Connecticut and New Haven Colonies.

The Stuart Restoration in England, in 1660, once again exposed the Connecticut colonies' lack of charter or patent, so colonial governor John Winthrop was delegated to go to England and seek a charter. He succeeded in obtaining a very favorable charter, dated April 23, 1662, which also included the New Haven settlements, and over much objection by some New Haven colonists, that colony was absorbed into Connecticut during the two years following issuance of the charter. This charter of 1662 remained of fundamental importance for Connecticut until well after statehood:

> The delay [of New Haven] in proclaiming Charles II, and its tender treatment of the regicides, had brought it into disfavor with the king; and it now ... resisted annexation, and appealed to the Commissioners of the United Colonies. But the conquest of New Netherland by the English, in 1664, and the grant to the Duke of York of territory as far east as the Connecticut River, hastened submission; and in December of the latter year a committee was appointed to arrange for the union. A *quo warranto* was

> issued against the Connecticut charter in 1684, but judgment was not entered. When Andros demanded the charter, in 1687, it was secreted, and remained hidden until 1689, when, upon the deposition of Andros, government under the charter was resumed. The State constitution of 1776 continued the charter in force, with a few changes, and it remained the fundamental law of Connecticut until the adoption of a new constitution in 1818. n189

Important excerpts from this charter establishing the rule of English law and the power of the colonial government over land affairs are as follows:

> [The Colony of Connecticut] to have, take, possess, acquire, and purchase lands, tenements, or hereditaments, or any goods, or chattles, and the same to lease, grant, demise, alien, bargain, sell, and dispose of, as other our liege people of this our realm of England...
>
> ... that all, and every the subjects of us, our heirs, or successors, which shall go to inhabit within the said colony, and every of their children which shall happen to be born there, or on the sea in going thither, or returning from thence, shall have and enjoy all liberties, and immunities of free, and natural subjects within any the dominions of us, our heirs, or successors, to all intents, constructions, and purposes whatsoever, as if they, and every of them were born within the realm of England...
>
> ... and also from time to time to make, ordain, and establish all manner of wholesome, and reasonable laws, statutes, ordinances, directions, and instructions, not contrary to the laws of this realm, of England...
>
> ... And know ye further, that we of our abundant grace, certain knowledge, and meer motion, have given, granted, and confirmed, and by these presents for us, our heirs, and successors, do give, grant, and confirm unto the said governour, and company, and their successors, all that part of our dominions in New England [boundaries described], with the islands thereunto adjoyning, together with all firm lands, soyles, grounds, havens, ports, rivers, waters, fishings, mines, minerals, precious stones, quarreys, & all & singular other commodities, jurisdictions, royalties, privileges, franchises, prehiminences, and hereditaments whatsoever, within the said tract, bounds, lands, and island aforesaid, or to them, or any of them belonging. To have and to hold the same unto the said Governour & Company, their successors, and assigns for ever, upon trust, and for the use, and benefit of themselves, and their associates, freemen of the said colony, their heirs, and assigns, to be holden of us, our heirs, and successors, as of our mannor of East-Greenwich, in free, and common socacage, and not in capite, nor by knights service, yielding, and paying therefore to us, our heirs, and successors, only the fifth part of all the oar of gold, and silver, which from time to time, and at all times hereafter, shall be there gotten, had, or obtained, in lieu of all services, duties, and demands whatsoever, to be to us, our heirs, or successors therefore, or thereout rendered, made, or paid... n190

§ 6.06(c)(4) Connecticut Laws of 1673.

After the charter was obtained, the 1650 code of Connecticut colony was replaced by a new, printed compilation in 1673. Provisions of the 1673 Connecticut code relating to land are quoted or summarized as follows:

> ... no mans Goods or Estate shall be taken from him, nor any wayes indamaged under colour of Law, or countenance of Authority, unless it be by the vertue or equity of some express Law of this Colony warranting the same, established by the General Court, and sufficiently published; or in case of the defects of a Law in any particular case by some clear and plain Rule of the word of God, in which the whole Court shall concurre.

Ability

Age

Bounds of Towns and particular Lands

Cattle, Corn-fields

Caveats Entred

Common-Fields and Fences

Commons to be cleared

Conveyance fraudulent

Distresse

Dowries

Escheats

Farms (militia manpower requirements for farms remote from towns)

Fences

Forgery

Gates, Bars, and Fences

High-Wayes

> Home Lotts: Whereas there hath been a great abuse in several Towns, and Plantations in this Colony, of buying and purchasing Home lots, and laying them together, by means whereof great depopulation may follow, for the prevention whereof: It is Ordered by the Authority of this Court; That all dwelling or mansion houses, that are or shall be allowed in any Plantation or Town within this Jurisdiction, shall be upheld, repaired and maintained sufficiently in a comely way, as also, whosoever shall possess and enjoy any Home-lots within any such Plantation or Town that is not yet built upon, he shall within twelve months after the publication hereof, erect and build a house there fit for an Inhabitant to dwell in, if his Lot be one Acre and half, unless the Court upon knowledge of the case, find cause to abate or give longer time for building, upon the penalty of twenty shillings per year, for every breach of this order, to be paid to the Town Treasury.

Houses and Lands to be tendered to the Town before sold

Houses and Lands to be Secured for Heirs.

Housing to be kept in repair for Legatees.

> Lands the tenour [tenure] of our Lands: It is Ordered by the Authority of this Court; that whatsoever Lands have or shall be granted by the Court to the respective Townships, or to any particular persons

> either by the Court or particular Town ships, shall be held to them, their Heirs, Successors and Assignes for ever, according to the most free Tenour of East Green-wich in the County of Kent in the Realm of England, according to our Charter Grant.

Lands not to be purchased by particular persons of the Indians

Mines and Minerals

Possession [confirming titles based on long possession]

Rates [of property taxation]

Records

Timber

Town-ships

Trespass

Trespasses

§ 6.06(d) Land Distribution and Management in Connecticut.

The methods for distribution and management of land were similar throughout New England:

> The form of group settlement which we have seen developing in Plymouth was reproduced throughout New England and wherever New Englanders settled. The joint action of the settlers in locating dwellings and home lots, in laying out village streets, in subdividing the adjacent arable land, in subjecting the meadow and forest for a time to common management, resulted in the founding of the town of Plymouth. The agrarian policy of the settlers constituted the most characteristic element in the town organization.
>
> That which occurred at Plymouth happened also at Salem, in each of the settlements about Massachusetts bay, in the towns of Plymouth colony, as one after another they came into existence, among the settlements of northern New England, in the towns which were founded on the shores of Narrangansett bay and along the course of the Connecticut river...
>
> ... The town has been likened to the manor, and the analogy to an extent is justified... The manor, especially in its later and customary form, was a democratic group with a monarchical head. The New England town was a democratic group without a monarchical head. n191

The huge role of the towns in land distribution and management produced a land system among New England settlers that differed fundamentally from the land systems in the private proprietary colonies:

> The Puritan colonies as such did not seek to profit from their land, but granted it freely to actual settlers and in such amounts as suited their immediate and prospective needs. No distinct land office was established by any New England colony. Land was not sold by the colony; neither, except in the case of certain islands and very rarely of some other tract, was it leased. Rent formed no appreciable part of the colony revenue... By far the greater part of the land in the New England colonies was granted to towns, that is, to groups or communities of settlers by whom it was allotted to individuals. The grants to towns

> were made in large tracts, six miles square or more, the grant often being described in the most general terms, without even a specification of its bounds.
>
> ... From the existing hive swarms might be sent off in any direction, and might establish a new hive at any point... It is clear that circumstances of climate and soil were more favorable to the extension of settlement in the northern than in the southern colonies. But the process of settlement itself was more effective and vital in New England than was that which obtained under the proprietary regime in the south. n192

Because the founding of towns and allotment of land was usually a group process at the beginning, the transformation of landholding to individual interests was evolutionary:

> The settlement of a town normally began with the laying out of the village plot and the assignment of home lots. The idea of a home lot was a plot of ground for a dwelling-house and outbuildings, for a dooryard and garden, and usually also an enclosure for feeding cattle and raising corn... At Hartford some contained two acres and others only half an acre each...
>
> The assignment of the first home lots was accompanied or immediately followed by the earliest allotments of arable land and meadow. This process steadily progressed with the increase of population in the towns and with the clearing of forests. By means of it the settlers secured planting land, and the process advanced through various stages until the available land of the towns was approximately or entirely occupied. When the process was completed the township had been entirely laid out, and settlement within it had assumed a relatively permanent form. This was accomplished in part by the granting of lots to individuals and in part by the laying out of common fields. The common fields, too, in their turn were later subdivided among their proprietors. As the result of this process a system of individual ownership gradually took the place of a system of joint ownership and management... n193

As has been noted with respect to other New England colonies, quitrents were only rarely imposed and collected. n194

FOOTNOTES:

(n1)Footnote 179. 1 Benjamin Trumbull, A Complete History of Connecticut 10 (1898).

(n2)Footnote 180. Select Charters and Other Documents Illustrative of American History, 1606-1775 60 (William MacDonald ed. 1914).

(n3)Footnote 181. *Id.* at 64-65.

(n4)Footnote 182. 1 Herbert L. Osgood, The American Colonies in the Seventeenth Century 312 (1904).

(n5)Footnote 183. *Id.* at 317.

(n6)Footnote 184. Select Charters and Other Documents Illustrative of American History, 1606-1775 67-72 (William MacDonald ed. 1914).

(n7)Footnote 185. 1 Herbert L. Osgood, The American Colonies in the Seventeenth Century 323 (1904).

(n8)Footnote 186. *See* the "Articles of Confederation betwixt the Plantations" printed as part of New Haven colony's first printed compilation of laws *in* The Earliest Laws of the New Haven and Connecticut Colonies, 1639-1673, 4-8 (John D. Cushing ed. 1977).

(n9)Footnote 187. 1 J. Hammond Trumbull, The Public Records of the Colony of Connecticut 509-563 (1950).

(n10)Footnote 188. John D. Cushing, The Earliest Laws of the New Haven and Connecticut Colonies, 1639-1673 viii (1977).

(n11)Footnote 189. Select Charters and Other Documents Illustrative of American History, 1606-1775 116 (William MacDonald ed. 1914).

(n12)Footnote 190. John D. Cushing, The Earliest Laws of the New Haven and Connecticut Colonies, 1639-1673 65-70 (1977).William Michael Treanor, Note, *The Origins and the Original Significance of the Just Compensation Clause of the Fifth Amendment , 94 Yale L.J. 694 (1985).* Mary Moers Wenig, *The Marital Property Law of Connecticut: Past, Present, and Future, 1990 Wis. L. Rev. 807 (1990).* Adam Mossoff, Article: *What is Property? Putting The Pieces Back Together, 45 Ariz. L. Rev. 371* (Summer, 2003) (Article offers overview of the development of property law during the American Colonial period); David A. Thomas, *Finding More Pieces for the Takings Puzzle: How Correcting History Can Clarify Doctrine, 75 U. Colo. L. Rev. 497 (Spring 2004)* (challenges some conclusions of Treanor and others).

(n13)Footnote 191. 1 Herbert L. Osgood, The American Colonies in the Seventeenth Century 424-426 (1904).

(n14)Footnote 192. *Id.* at 428-432.

(n15)Footnote 193. *Id.* at 438-440. More detailed descriptions for allotments of individual land parcels in Connecticut settlements are found in *id.* at 445-447, 449-450, 453-454, 463-465.

(n16)Footnote 194. *See* §§ 6.03(b)(2) and 6.03(b)(3), *supra.*

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CHAPTER 6 DEVELOPMENT OF PROPERTY LAW IN ENGLAND'S AMERICAN COLONIES

1-6 Thompson on Real Property, Thomas Editions § 6.07

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§ 6.07 Development of Property Law in Maryland (from 1634).

§ 6.07(a) The Charter of 1632.

After much importuning, George Calvert -- who had seven years earlier been raised to the peerage as the first Baron of Baltimore -- obtained in 1632 the king's assent for a grant of the land known as Maryland. This first Lord Baltimore died on April 15, 1632, so the charter for Maryland issued on June 20, 1632, named as grantee George's son Cecilius, the second Baron of Baltimore. The Maryland grant included lands that had been earlier granted to the Virginia Company in their charter of 1609, but, according to one legal theory, unoccupied parts of Virginia became subject to re-grants when the Virginia province changed from proprietary to royal status in 1624.

The Maryland charter was distinctly feudal in tone and has been described as conferring "on the grantee probably the most extensive political privileges ever enjoyed by an English subject, since the great houses had bowed before the successive oppression of Yorkist and Tudor rule." n195 These extensive rights applied both to powers of government and to rights of holding and granting land:

> IV. ... We do Grant, and likewise confirm unto the said Baron of Baltimore, [the lands previously described] with all, and singular such, and as ample Rights, Jurisdictions, Privileges, Prerogatives, Royalties, Liberties, Immunities, and royal Rights, and temporal Franchises whatsoever, as well by Sea as by Land, within the Region ... aforesaid, to be had, exercised, used, and enjoyed, as any Bishop of Durham, within the Bishoprick or County Palatine of Durham, in our Kingdom of England, ever heretofore hath had, held, used, or enjoyed, or of Right could, or ought to have, hold, use, or enjoy.
>
> V. And WE do by these Presents ... Make, create and constitute Him, the now Baron of Baltimore, and his Heirs, the True and Absolute Lords and Proprietaries of the Region aforesaid, and of all other the Premises ...; to hold of us ... as of our Castle of Windsor, in our County of Berks, in free and common Soccage, by Fealty only for all Services, and not in capite, nor by Knight's Service, Yielding therefore unto Us ... two Indian arrows of those Parts, to be delivered at the said Castle of Windsor, every Year...: And also the fifth Part of all Gold and Silver Ore, which shall happen from Time to Time, to be found within the aforesaid limits...

> VII... We ... do grant unto the said now Baron, ... and to his Heirs, for the good and happy Government of the said province, free, full, and absolute Power, by the tenor of these Presents, to Ordain, Make, and Enact Laws, of what kind soever, according to their sound Discretions, whether relating to the Public State of the said Province, or the private Utility of Individuals, of and with the Advice, Assent, and Approbation of the Free-Men of the same Province... So Nevertheless, that the Laws aforesaid be consonant to Reason and be not repugnant or contrary, but (so far as conveniently may be) agreeable to the Laws, Statutes, Customs and Rights of this Our Kingdom of England...
>
> XVIII... We ... do give ... unto the aforesaid now Baron of Baltimore, his Heirs and Assigns, full and absolute Licence, Power, and Authority ... [to] assign, alien, grant, demise, or enfeoff so many, such, and proportionate Parts and Parcels of the Premises, to any Person or Persons willing to purchase the same, as they shall think convenient, to have and to hold ... in Fee-Simple, or Fee-tail, or for Term of Life, Lives, or Years; to hold of the aforesaid now Baron of Baltimore, his Heirs and Assigns, by ... such ... Services, Customs and Rents of this kind, as to the same now Baron of Baltimore, his Heirs and Assigns, shall seem fit and agreeable, and not immediately of Us ...

It has been pointed out that the charter not only secured feudal rights and jurisdictions to the proprietors, but also guaranteed to the settlers the rights of Englishmen:

> In other words, Baltimore was to exercise the rights of an absolute lord in this vast new land, with the King called Maryland, after his wife Henrietta Maria. But at the same time, each settler was to be "held, treated, reputed, and esteemed as the faithful Liege-Men of US and our Heirs and Successors, born within our Kingdom of England...." and since the rights of true-born Englishmen of the seventeenth century were quite different from those of the feudal vassals of the fifteenth century Bishops of Durham, a seed of conflict between the Lord Proprietor and the freemen of his colony was planted. And this conflict was destined to grow and develop and never to be ended until the Revolution eliminated the property system. n196

The feudalistic powers of Lord Baltimore were far-ranging indeed, and their significance was long felt in Maryland:

> As Lord Proprietor, Baltimore answered only to the king for his government of Maryland; while the settlers were to enjoy the rights of Englishmen, Calvert owned all the territory within the boundaries of this grant, expected to receive traditional rents, taxes, and fees, appointed all officials necessary to enforce the law, and exercised final political and judicial authority in his domain. He received full power to build fortifications and wage defensive war, to confer honors and titles, incorporate boroughs and towns, and license trade. As head of the church, he had authority to erect and consecrate chapels and churches. Like a baron of old, Baltimore also enjoyed the right of subinfeudation, the power to grant lands within his realm just as the king had bestowed Maryland on him. All these "ample rights, liberties, immunities, and temporal franchises" belonged as an inheritance to the lords Baltimore for all time. n197

§ 6.07(b) The Proprietor's "Conditions of Plantation."

As the actual process of land distribution was about to begin, Lord Baltimore issued "conditions of plantation" describing the terms on which land would be granted to colonists. Such statements were issued in 1633, 1636, 1642 and 1648. n198 The earliest of these, issued even before the settlers left England, became a contract between the individual colonists and the proprietor, providing:

> that each free planter should pay the cost of his outfit and transportation, which amounted to about £20. To every married man who thus provided for the voyage, and for that of his family, the proprietor promised one hundred acres of land for himself, and one hundred for his wife, if she accompanied him; one hundred acres also for each adult servant, and fifty for each child under sixteen years of age. Two

> thousand acres of land should also be given to each adventurer who, in the year 1633, should take into the province, for the purpose of settlement, five men between the ages of sixteen and fifty... By each new issue [of conditions of plantation] former conditions were amended or revoked... The conditions of 1648 were especially elaborate, and provided at length for the erection of manors, the reserve of one-sixth of each manor as demesne, and the grant of the remainder by the lord to tenants under such terms as should not infringe on the jurisdiction of the proprietor or prevent his collecting the rents reserved in the original patents. These privileges were to obtain in every grant of two thousand acres, though under earlier conditions grants of one thousand acres might carry with them manorial rights. n199

§ 6.07(c) Later Land Distribution.

This method of land distribution, an example of the headright system intended to encourage colonists, was abolished in 1683, and thereafter land was obtained only by purchase or other conveyance from someone who already held land. A settler who obtained land under the headright system was issued a warrant which authorized the services of a surveyor to lay out the specified acreage wherever vacant land was available. When the certificate of the surveyor was returned, showing metes and bounds of the parcel, a patent under the provincial seal conveyed title, subject to a usually modest quitrent. n200 Because lands were selected according to the subjective choice of individual settlers, a haphazard pattern of settlement resulted:

> Lands from which grants were made according to the conditions of plantation became known as vacant land, and was left uncultivated. A considerable quantity of this remained in nearly all parts of the province down to the final overthrow of the proprietary government. But it had been the practice to locate under land warrants by selecting the most rich and fertile land without regard to the regularity of its area or making it in any way coincide with the boundary of land previously granted. Therefore, especially in the older counties, the most of what came to be left of this vacant land was not only the poorest in quality, but it lay in such small irregular parcels as to be of but little value. n201

For persons who could not afford passage or outfit, those costs could be exchanged for service. A servant might accompany his or her master, or an aspiring colonist might enter into an obligation with the sea captain, who would sell the rights to the services upon arrival. Upon completion of the term of service, usually four or five years, the master was obligated to provide the servant with a set of clothes, a year's provision of corn, and the right to fifty acres of land. n202

§ 6.07(d) Creation and Administration of Manors.

In addition to such individual grants, it was possible for manorial holdings to be conveyed:

> It is clear that Lord Baltimore desired to establish as a support for his palatine dominion a landholding aristocracy after the pattern of feudal England. He offered the courts leet and baron to regulate the numerous tenantry that was expected to settle as retainers of the manorial lords. Some few manors were actually laid out, and from two of these records of the feudal courts have survived as an indication that the manorial system was tried in colonial Maryland. But feudalism never flourished on new world soil. The land holding pattern from the earliest years was characterized by the small plantation unit. When settlers could acquire land in their own right, they were reluctant to accept the status of manorial tenants. Thus family plantations of 250 acres or less dominated the tidewater. n203

Indeed, after 1670, possession of a 50-acre freehold (or a tangible estate of £40) was added to "free" personal status as a qualification for voting, so colonists had even more incentive to avoid the manorial tenancies. Ultimately, only a few manors with feudal institutions of courts leet and baron succeeded in functioning for even a few years:

> [F]our-fifths of the proprietary grants between 1660 and 1700 were for plantations of less than 350 acres. When in 1683 the Lord Proprietor changed the basis of land grants from head rights to ordinary

> purchase, any freeman who could find the caution money might become a landowner. Those unable to command the purchase price were often able to buy from larger landowners or from speculators. The trend, already evident in the earliest years, continued to carry Maryland in the direction of a province of yeoman freeholders, instead of a feudal palatinate. n204

While some aristocratic landowners with very large holdings appeared in early colonial Maryland, it is clear that the majority of land was held by small freeholders. By 1676 about 60 manors had been established in Maryland, averaging about 3,000 acres each, n205 but only on a few of those manors were the feudalistic proprietary rights exercised, so most "manors" were, in reality, simply very large freeholds. Of the ordinary freeholds granted before 1663, 60 were of 1,000 acres or more, 241 of between 500 and 1,000 acres, 778 of between 200 and 400 acres, and 389 grants were of less than 200 acres each.

While the Maryland manors did not achieve the importance in the colony the proprietors had hoped for, they represented the most intriguing and anomalous throwback to English feudalism to be practiced in the American colonies. An earlier historian has given the following summary of the manorial practices in early Maryland:

> A manor differed from a mere freehold in that it was given a name, and in that the grantee was allowed to hold court-baron and court-leet, and have all fines and profits belonging thereto. Further, the early grants of manor gave the grantee the advowsons of churches and unrestricted privileges of hunting for any game. The court-baron was given jurisdiction over civil cases in which the damages did not exceed a fine of forty shillings, while the court-leet took cognizance of criminal offenses committed within the precincts of the manor. To what extent such courts were held, there remains no evidence except the records of a court-baron held on St. Gabriel's Manor in the year 1656, and the records of a few sessions of both court-baron and court-leet held on St. Clement's Manor between the years 1659-72. The records of the latter manor show that it had its steward, constable, and bailiff, and that a jury of twelve men, after hearing the charges or complaints, made its presentments, often fixing the fines, and occasionally referring the matter to the governor of the province. If the fine imposed by the jury was thought to be too excessive, it might be revised by affeerors sworn for that purpose.
>
> Only in the grants of the first three manors was any portion of the land set apart as demesne land, that is, land which was not to be granted out in tenancy nor in any way severed or aliened from the said manor. The grant of a manor, like that of a freehold, subjected the grantee to the payment to the proprietor of the annual rent, and the fine for every alienation.
>
> In 1665 the proprietor issued instructions directing that in every county at least two manors, containing not less than six thousand acres each, be surveyed and set apart for his private use. Each of these proprietary manors was placed in charge of a steward, who leased it in parcels to tenants usually for three lives, or for a long term of years, at a rent seldom exceeding ten shillings per hundred acres. Owing to failure to preserve the bounds of them, these manors much dwindled in size or, in some cases, entirely vanished; while such portions of them as were preserved suffered from shameful neglect by poorly paid and incompetent stewards. As a consequence, the bounds between tenements could not be found, leases were lost, and the rents not paid.
>
> In addition to the proprietary manors, the proprietor made several other reserves for the purpose of confining surveys and settlements to those parts of the province in which it was desired that they should be made, or because of the appearance of copper or other ore, the extraordinary fertility of the soil, or the contiguity to towns. Although portions of such reserves were leased, yet none of them were surveyed, laid out, and named as the manors were.
>
> In 1766 the proprietor appointed a commission to sell his manors and reserves; and although the sale of them was somewhat slow, yet nearly fifty thousand acres were sold in seven years, and this meant that

> the proprietary lands corresponding to those of the lord's demesne in the medieval fief were to disappear. n206

In at least one respect, landholding according to fundamental precepts of English law had a substantial impact, and that was in the matter of escheat. Because all land was held by the tenure of free and common socage, it was subject to escheat, which under the broad interpretation adhered to by the proprietor -- could occur in several ways. The most common circumstances for escheat were death of the landholder with no surviving heirs or nonpayment of the quitrent. In the early years of the province history, a person who suspected land was subject to escheat could petition for a legal action, always with a jury, to make that determination. If it was decided that the land was escheated, the successful petitioner could apply for a resurvey and eventually obtain the land.

By the early 18th century, the feudalistic proprietary claims had all been fatally weakened:

> The proprietor was unable, after 1738, to enforce his claim to surplus land, while his benefit from the disputed right to escheated land was doubtful. The attempt to erect manors for the largest tenants, and thereby to create a nobility on which he might rely for support, was given up before the close of the seventeenth century. Everything was, therefore, nearly levelled to the simple freehold from which the proprietor continued to receive his rents and some alienation fines. n207

§ 6.07(e) Restriction of Church Rights in Land.

The strong representation of Catholics among Maryland's settlers led to another unique element of Maryland land law. The presence and activity of Catholic priests, especially Jesuits, created situations in which it was possible to obtain grants of land rights from Indians and other sources for the Roman church. But a proclamation from the proprietor in 1648 forbade any person from alienating lands to a church or other society for uses forbidden by the statutes of mortmain, without permission from the proprietor. The mortmain statutes of England generally operated against conveyances to charitable organizations, which were deemed uneconomic uses of the land. "In no other British-American colony was such a precaution necessary, but it kept the land law of Maryland in harmony with that of the mother country and of the other colonies." n208

§ 6.07(f) Local Legislative Regulation of Provincial Land Law.

§ 6.07(f)(1) Achievement of Legislative Initiative.

The activities of Maryland's legislative body, or Assembly, also played a role in shaping early land law. At the outset of this colony's history, the proprietor assumed, with the support of the charter, that all legislation would be initiated with the proprietor and that the representative assembly's function was simply to confirm or deny the propositions. This was stoutly resisted by the legislators, however, and in 1638, after four years and two sessions of the Assembly, the Lord Proprietor conceded that the colonists themselves could initiate legislation.

This concession resulted partly from the Assembly's refusal to approve several propositions that would have vastly strengthened the feudal and medieval character of the province:

> Had the freemen acknowledged that right [of the Proprietor alone to initiate legislation] to be vested solely in him, it is highly probable that the sale of manors would have been forbidden by law. It is equally probable that the laws of the province would have required that on every manor there should be at least twenty freemen, that fifteen of them should be trained as soldiers and kept ready for the service of the country, and that the lord of the manor should maintain them in time of such service. But instead of succeeding in thus providing the land system with the military features of a fief, the bills containing those requirements failed to become laws, and in August, 1638, the lord proprietor conceded to the Assembly the right of initiating legislation. n209

§ 6.07(f)(2) Reception of English Law.

This early legislative deadlock left in doubt just how fully the law of England applied in the colony. In the opinion of one scholar, "The common law of England seems here rather to be looked upon as a system useful for illustration and guidance than a subsidiary law; equity and good conscience was considered to afford proper rules to fill the omissions of the positive law." n210

In 1662 the Assembly enacted a provision declaring that in the absence of provincial law, justice would be sought according to the laws and statutes of England and "that all courts shall judge of the right pleading and the inconsistency of the said laws with the good of the province according to the best of their judgment." n211 Though in force for only a short time, this Maryland provision has been described as "the first definite recognition in America of the power of the courts to apply the common law of England to colonial conditions, and to reject provisions deemed unsuitable." n212 Still unsettled for many decades thereafter was the extent to which English statutes were considered adopted in the colony. Not until an enactment in 1732 was the controversy neutralized by the equivocal provisions that the colony could call upon "the laws and statutes and reasonable customs of England, as used and practiced within the province." n213

§ 6.07(f)(3) Compilation of Legislative Enactments.

The earliest Maryland legislation was not printed, but kept in manuscript form and circulated as needed. Even when Maryland became a royal province in 1692, shortly after the accession of William and Mary, no printed version of the laws appeared until 1700. A second compilation was issued in 1707 and a third in 1718, in the midst of the controversy over how extensively English statutes were received into the colony's jurisprudence. The topics relating to property law found in the 1718 compilation are summarized below, illustrating the extent to which the Assembly had attempted to regulate landholding, even though it was fundamentally based on English common law:

Changing communities designated as towns into ports and towns

Marking highways and making waterways passable

Confirming titles of land given to churches

Conferring right of action of trespass on those with lands lying within Indian land

Ascertaining boundaries of Indian land

Preserving harbors and landing places

Empowering justices to regulate parish boundaries

Ascertaining the height of fences

Quieting possessions, enrolling conveyances and securing the estates of purchasers

Securing person's rights to town lands

For better administration of justice in testamentary affairs, granting administrations, recovery of legacies, securing filial portions, and distribution of intestates' estates

Encouraging settlements by ascertaining the manner of paying alienation fines and quit-rents

Ascertaining land boundaries n214

§ 6.07(g) Land Management in Colonial Maryland.

The management of land in Maryland was shaped by its character as a proprietary colony. During the colony's early years, the issuing of patents for lands claimed by headrights, and the collecting of rents and other land-based income were carried out by the governor, council and secretary. Rents were collected by sheriffs as agents of the colonial government. In 1680 a land office was organized, and in 1684 the proprietor commissioned a land council consisting of four members from the council of state to take over most ministerial duties relating to land:

> Thus the business of granting land, collecting revenue therefrom, and keeping the land records was organized under one distinct office, which continued in existence until 1689, and after a suspension of five years was reopened and remained in activity, with certain administrative changes, as long as Maryland was a province. n215

Land arrangements were also effected from time to time with various Indian tribes, but eventually, the encroaching white settlement rendered most of these agreements unworkable. A treaty would typically be concluded by throwing open Indian lands for white settlement and inviting Indians to submit claims of wrongs n216 to certain designated colonial officials. Weaker tribes sought the protection of the colonists against more aggressive tribes and would be given lands as a permanent refuge, within which white settlement would be prohibited. Such was the arrangement extended to the Pascataway Indians in 1668.

FOOTNOTES:

(n1)Footnote 195. Select Charters and Other Documents Illustrative of American History, 1606-1775 53 (William MacDonald ed. 1914).

(n2)Footnote 196. Morris L. Radoff, *The Settlement*, in The Old Line State, A History of Maryland 4 (Morris L. Radoff ed. 1971).

(n3)Footnote 197. Robert J. Brugger, Maryland, A Middle Temperament, 1634-1980 12 (1988).

(n4)Footnote 198. According to one authority, new statements of conditions of plantation, superseding all previous statements of conditions, were issued in 1641, 1648, 1649, and 1658. Newton D. Mereness, Maryland as a Proprietary Province 50 (1901).

(n5)Footnote 199. 2 Herbert L. Osgood, The American Colonies in the Seventeenth Century 20-21 (1904). The possible text of a version of "conditions" from 1636 is published in 2 John Leeds Bozman, The History of Maryland 35-38 (1837).

(n6)Footnote 200. Quit rents in Maryland were not formally abolished until 1780.

(n7)Footnote 201. Newton D. Mereness, Maryland as a Proprietary Province 54-55 (1901).

(n8)Footnote 202. Robert J. Brugger, Maryland, A Middle Temperament, 1634-1980 16 (1988).

(n9)Footnote 203. Aubrey C. Land, *The Colonial Period*, in The Old Line State, A History of Maryland 14 (Morris L. Radoff ed. 1971).

(n10)Footnote 204. *Id.* at 17.

(n11)Footnote 205. Newton D. Mereness, Maryland as a Proprietary Province 52 (1901).

(n12)Footnote 206. *Id.* at 53-54.

(n13)Footnote 207. *Id.* at 58.

(n14)Footnote 208. 2 Herbert L. Osgood, The American Colonies in the Seventeenth Century 33 (1904).

(n15)Footnote 209. *Id.* at 96-97. Robert L. McLaughlin, *Theories of Land Tenure and the Charismatic Line in Mason & Dixon, 24 Okla. City U. L. Rev. 799 (Fall 1999).*

(n16)Footnote 210. Paul Samuel Reinsch, *The English Common Law in the Early American Colonies,* in Association of American Law Schools, Select Essays in Anglo-American Legal History 401 (1907).

(n17)Footnote 211. *Id.*

(n18)Footnote 212. *Id.* at 402.

(n19)Footnote 213. *Id.* at 402-403.

(n20)Footnote 214. According to Osgood, "fines on alienation were actually enforced only in Maryland." In the conditions of plantation issued in 1658, the alienation fine was set at the equivalent of one year's rent, due within one month after sale. 2 Herbert L. Osgood, The American Colonies in the Seventeenth Century 34 (1904).

(n21)Footnote 215. 2 Herbert L. Osgood, The American Colonies in the Seventeenth Century 44 (1904). *See generally* John F. Hart, *The Maryland Mill Act, 16691766: Economic Policy and the Confiscatory Redistribution of Private Property, 39 Am. J. Legal Hist. 1 (Jan. 1995).*

(n22)Footnote 216. A typical trespass might be caused by livestock of white settlers breaking through fences and trampling Indians' cornfields.

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CHAPTER 6 DEVELOPMENT OF PROPERTY LAW IN ENGLAND'S AMERICAN COLONIES

1-6 Thompson on Real Property, Thomas Editions § 6.08

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§ 6.08 Development of Property Law in Rhode Island (from 1636).

Unlike the other New England colonies of Plymouth, Massachusetts, and Connecticut, the colony of Rhode Island did not originate as a conscious project of settlement. The colony's genesis lay in three settlements -- Providence, Portsmouth and Newport -- founded independently of one another and of any of the other colonies between 1636 and 1639. Later, the town of Warwick joined with the other three. In 1647, acting with the authority of a charter obtained from a revolutionary English government, they combined into a colony. Before that time, Rhode Island had been independent of any superior government authority or authorization:

> More than any other American colony, the settlement of Rhode Island was the result of unforeseen conditions, for which immediate provision had to be made. No man was its founder; that appellation belongs to no single group of men. It was settled by bands of fugitives, who came from different quarters and at different times. Their movement was not the result of concerted action, though they removed thither to escape oppression in the strictly Puritan colonies or conditions there which to them had become intolerable. With the exception of the few who came from Salem, none were disciples of Roger Williams, nor did they go into exile in order to testify to the truth of his beliefs, or to their loyalty to him as a man. And yet common opposition to Massachusetts and the policy of which it was the leading representative, brought them into practical harmony with him. As time passed and the dangers which continued to surround them became evident, this was generalized into a principle, that of the exclusively secular community. It was declared first among the orders of Providence, later among those of the plantations on Aquedneck and in the legislation of the colony. But this action was occasioned by the relations that existed between the inhabitants of all those settlements and by the struggle in which they were all engaged, rather than by the personality or direct influence of Roger Williams. n217

§ 6.08(a) The Settlement at Providence.

Roger Williams, a refugee from Massachusetts Bay Colony, with a few companions, settled the area that is now Providence and, as was his practice, procured a "deed" to the land from local Indian chiefs. The grant extended from the Pawtuxet River on the west to the Pawtucket River on the east, although the inland extent of the grant was left indefinite.

Whether Williams actually obtained a document of gift at the time of first settlement is not known; however, about two years later a "memorandum" describing the grant was signed by the two chiefs, Miantunnomi and Cannonnicus. The memorandum described the terms of the original deed and, in a separate paragraph, extended the grant to the "grass and meadows" along the Pawtuxet River, which was well beyond the original grant. Thus, the settlers were given the right to graze their livestock as far up the river as they wished:

> Memorandum, that we Cannaunicus and Miantonomi, the two chief sachems of Nanhiggansick, having two yeares since sold unto Roger Williams, ye lands and meadows upon the two fresh rivers, called Mooshausick and Wanasqutucket, doe now by these presents, establish and confirme ye bounds of those lands, from ye river and fields at Pautuckqut, ye great hill of Notquonckanet, on ye northwest, and the two of Maushapogue on ye west.
>
> As also, in consideration of the many kindnesses and services he hath continually done for us, both with our friends at Massachusetts, as also at Quinickicutt and Apaum or Plymouth, we doe freely give unto him all that land from those rivers reaching to Pawtuxet river; as also the grass and meadows upon ye said Pawtuxet river. n218

Although this "deed" has been characterized as Williams' attempt "to extinguish the claims of the Indians to the land of the plantation," n219 in fact the Indians -- about 5,000 Narragansetts and about 1,500 Wampanoags -- continued to roam in the granted area as before. The more limited grant of grazing and water privileges along the full extent of the named streams was "understood by Williams to concede to the English by 'courtesy,' joint use of the lands with the Indians." n220

Williams and those who accompanied him began holding town meetings in 1636, under a form a government that was memorialized the next year in a written covenant:

> We whose names are hereunder, desirous to inhabit in the town of Providence, do promise to subject ourselves in active and passive obedience to all such orders or agreements as shall be made for public good of the body in an orderly way, by the major consent of the present inhabitants, masters of families -- incorporated together in a Towne fellowship, and others whom they shall admit unto them only in civil things. n221

With this form of government in place -- theoretically able to promulgate all laws thought necessary by the settlers, including those related to landholding -- these first Providence folk then determined the qualifications for one to become an inhabitant of the town. As stated later by Roger Williams:

> it was agreed between us, that every person that should be admitted into the fellowship of injoying landes and disposing of the purchase, should pay thirtye shillinges into the public stock; and ffirst about thirtye poundes should be paid unto myselfe by thirty shillings a person, as they were admitted. n222

Thereafter, Williams apparently obtained his thirty pounds, so in 1638 he made out a deed to himself and twelve associates. A memorandum of the deed recited:

> Memorandum, that I Roger Williams having formerly purchased of Conanicus and Miantonomi, this our situation or Plantation of New Providence, ... in consideration of thirty pounds, received from the inhabitants of the said place, do freely and fully pass grant and make over equal right and power of enjoying and disposing the same ground and lands unto my loving friends and neighbors ... and such others as the major part of us shall admit unto the same fellowship with of vote us. n223

"The effect of the document was to transfer the land to the thirteen -- of whom Williams was one -- as an association or quasi-corporation, to be held temporarily in trust by them for the rising town." n224 Also in 1638, Williams and the

others entered in an agreement dividing up certain meadowlands:

> ... all the meadow ground at Pawtuxet, bounding upon the fresh river upon both sides, is to be impropriated unto these thirteen persons, ... and to be equally divided among them, and every man to pay an equal proportion to raise up the sum of twenty pounds for the same, and if it shall come to pass, that some or any of these thirteen persons abovesaid do not pay or give satisfaction ... that they or he, shall leave their or his proportion of meadow ground unto the rest of those thirteen persons. n225

Even before these documents were executed, apparently the town government had exercised the power of distributing land to the inhabitants. Minutes of a town meeting held on June 10, 1637, record that "portions of grass and meadow ... were confirmed [to several named persons] as their proper right and inheritance to them and theirs...." n226

After the agreement and declaration of 1638, differences between Williams and some of the other twelve began to develop. Apparently Williams conceived of an ever expanding democratic community, with inhabitants admitted to town membership and granted land ownership on an equal footing with the original thirteen. Some of the other twelve, however, were striving to establish a narrow, exclusive town proprietorship, with themselves and their designated successors as the perpetual proprietors. For a time, this group succeeded in conducting the affairs of Providence according to their proprietary notions. "They consolidated the board of proprietors, controlled the town meeting, and through that the granting of land and the admission of freemen." n227

Despite this control, controversies over land increased. In 1640, a "board of five arbitrators or 'disposers' was chosen by the town meeting, not only to settle disputes, but to dispose of town lands, fix their bounds, and act as an executive board for the town." n228 A major controversy developed around one Samuel Gorton, who twice tried unsuccessfully to be admitted to town privileges, and who then joined other disaffected persons who also had not been admitted to the town or given access to the common land. They were aware that Providence had no proper authority from England to conduct itself as a colony. The tumult caused by these dissidents was such that some of the proprietors appealed to neighboring Massachusetts for protection. The immediate problem dissolved when Gorton moved, but the need for a colony charter was made clear.

§ 6.08(b) The Settlement at Portsmouth.

The island of Aquedneck was settled by other refugees banished from Massachusetts because of religious nonconformance. Through Roger Williams' assistance, a deed to the land was obtained from the Indian chiefs Cannonicus and Miantunnomu, the same two who had made the Providence grant, and the chiefs also secured the removal of twenty Narragensett Indians from the island in preparation for the immigration of the English settlers. The deed recited

> That we Cannonnicus and Miantunnomu ... have sold unto Mr. Coddington and his friends ... the great Island of Acquednecke...; allso the grasse upon the rivers ... for the full payment of forty fathom of white beads...
>
> That by giveinge by Miantunnomus' ten coates and twenty howes to the present inhabitants, they shall remove themselves from off the Island before next winter... n229

Even before the deed was obtained, eighteen of the prospective original proprietors of this settlement and one other person met at Providence in March 1638, and entered into a plantation covenant. The covenant stated nothing specific about land, but it declared that the covenantors "incorporate ourselves into a Bodie Politick and submit our persons ...to all those perfect and most absolute laws of [Jesus Christ] given us in his holy word of truth, to be guided and judged thereby." n230 Coddington was chosen as judge, and he covenanted "to do justice and Judgment impartially according to the lawes of God, and to maintaine the Fundamentall Rights and Privileges of this Bodie Poliltick...." n231 The town assembly also was an incipient colony, with those at the town meetings "passing orders like that at Providence or

elsewhere, about the laying out and sale of lots, care of the unimproved land, locating the meeting-house, repairing highways, building a mill, local police, and other similar affairs. It controlled its own membership under an order reserving to 'the body' the right to receive inhabitants or freemen." n232 According to minutes of a general meeting on May 13, 1638, persons were to be admitted as "inhabitants or Freemen, to build or plant upon the Island" upon the consent of the proprietors and agreeing to submit to the island's government. n233

The land distribution and landholding practices in Portsmouth differed markedly from those at Providence:

> Unlike Williams's group, who tried to give equal plots of land to all respectable settlers, Coddington's government allocated land in proportion to the wealth and social rank of each settler. "Gentlemen" received larger grants than millers or coopers; and they, in turn, had larger shares than common laborers. Moreover, land was given sparingly to newcomers, at first; hence, only a minority of the inhabitants were entitled to vote. n234

Whether because of or in spite of these land distribution patterns, the island settlement of Portsmouth prospered and grew faster than Providence:

> The community at Portsmouth took shape ... as an agricultural one, with a common field or pasture at the north end of the island just beyond the cluster of houses. Allocation of land, and soon the placement of dwellings, spread around the coast, drawn by the need for water transportation. Apart from lingering preference for living in a compact village, only the ferry to the mainland and the original common field preserved a geographical focal point. n235

When several of the leading men of Portsmouth moved to a better site, now known as Newport, the remaining members adopted a new covenant on April 30, 1639. A striking change from the first covenant is that the signers departed from their earlier position of recognizing no earthly superior governing authority. They agreed that they "[doe acknowledge] ourselves the legall subjects of [his Majestie] King Charles, and in his name [doe hereby binde] ourselves into a civill body politicke, unto his lawes according to matters of justice." n236 Seven men were designated to "lay out lands as they shall be disposed." n237

§ 6.08(c) The Settlement at Newport.

Only four months after settling at Portsmouth, Coddington and others removed to a better harbor at the southwest end of the island, the site of the present-day Newport. Ten men who embodied a definite aristocratic spirit, including Coddington as judge, entered into a compact, dated April 28, 1639:

> [We] doe engage ourselves to bear equall charges, answerable to our strength and estates in common; and that our determinations shall be by major voice of judge and elders; the Judge to have a double voice. n238

In Newport, land distribution patterns followed closely those of Portsmouth:

> [T]he apportionment of land provided many farms of middling size and gave the leading men enormous estates which they generally put in the hands of tenants for development... The new town from the start had its center around the brook running into the harbor, with buildings slowly extending south by the water's edge and northeast inland. The first settlers gave themselves allotments of various sizes, but each man's grant ordinarily included a house lot by the harbor, a meadow lot, and a much larger tract of arable land. n239

§ 6.08(d) Newport and Portsmouth United.

The Newport colonists in 1640 acknowledged King Charles as their sovereign and made overtures of union toward Portsmouth. The union was amicably achieved; five men were chosen for laying out Portsmouth lands, and three men were selected for laying out Newport lands. n240 Further, as to land distribution:

> It is ordered, that Libertie is granted for the Major parte of the Freemen of each Towne to select certaine men from among themselves to proportion forth to each man his propriety of Land, and then having it layd forth orderly, it shall be recorded at the General Court. n241

A general court, or assembly, held at Newport on May 6, 1640, gave further instructions for land management:

> It is ordered, that all such who shall have a Howse lott granted unto them within any of our Townes, shall build a Howse thereon within a yeare after the Grant thereof, or else it shall be forfeited to the Towns use. Repealed...
>
> It is ordered, that Commission be directed to the Treasurers to make demands of all such monies as are due to the Treasury for the Lands assigned forth to particular men, and to make returns of all such who shall be therein remiss, at the next particular Courte who are to be ordered thereby according to Law ... n242

Another general court of March 16-19, 1641, attempted once again to identify and confirm the source of governmental authority:

> It is ordered and unanimously agreed upon, that the Government which this Bodie Politick doth attend unto in this Island, and the Jurisdiction thereof, in favour of our Prince is a Democracie, or Popular Government; that is to say, It is in the Powre of the Body of Freemen orderly assembled, or the major part of them, to make or constitute Just Lawes, by which they will be regulated, and to depute from among themselves such Ministers as shall see them faithfully executed between Man and Man. n243

At this same assembly, an order to establish systematic land records was also given:

> It is ordered, that each Towne shall provide a Towne Book, wherein they shall Record the Evidences of the Lands by them impropriated; and shall also have Powre to give forth a Coppie thereof, which shall be a clear evidence for them and theirs, to whom it is so granted. n244

A form of land tenure conferring nearly absolute ownership was declared for the two settlements:

> It is ordered, Established and Decreed, unanimouslie, that all men's Properties in their Lands of the Island, and the Jurisdiction thereof, shall be such, and soe free, that neyther the State nor any Person or Persons shall intrude into it, molest him in it, to deprive him of anything whatsoever that is, or shall be within that, or any of the bounds thereof; and this Tenure and Propriety of his therein shall be continued to him, or his; or to whomsoever he shall assign it for Ever. n245

In a general court held September 19, 1642, the power of town freemen to appoint juries was described, affirming "that they shall have powre as well to appoint the Inhabitants, as Freemen for that service, by virtue of the Tenure and grant of their lands which is freehold...." n246 Also, all persons were prohibited from making "any sale of his lands (in or belonging to our Jurisdiction) to any other Jurisdiction, or person therein, unless that Jurisdiction or person shall be subject to the Government here established, upon paine of forfeiture of the said lands so proferred." n247

At a general court held on March 13, 1644, it was acknowledged that many land transactions had occurred without being recorded, so persons holding such lands were invited to come forward with documentary or testimonial evidence

so that a proper recording could be made. When the transaction was thereupon recorded by the secretary, the record would be "authentick to [the landholder] or them, their Heirs, Executors or Assigns, as if the said Lands had been originally granted, and according to that Tract in all points observed." n248

§ 6.08(e) The Settlement at Warwick.

During this period one Samuel Gorton achieved notoriety throughout the Massachusetts and Rhode Island settlements for his refusal to submit to most forms of government (except as properly authorized by England) and to most exercises of governmental authority. The misadventures of him and his associates led him to purchase from the Indians a large tract of land running twenty miles west from Narragansett Bay, south of Providence. Local Indians and other settlers objected to the colonization and sought the aid of Massachusetts in bringing it to a halt. Meanwhile, the settlers conceded that they had no authority to govern themselves but denied that any of the other Rhode Island towns had any such authority. They did not combine together as a corporation or attempt to exercise any powers of government. Massachusetts then acted to claim power over the Warwick tract, arrested Gorton and others, and eventually sentenced them to hard labor and banishment from the Warwick area.

While political machinations proceeded, the settlement grew slowly, with landholding practices similar to those of its sister settlements:

> The little town there grew slowly, requiring two or three decades to reach fifty families. The house lots at the head of the Cove made a town center. Newcomers who did not acquire a stake in the Shawomet Purchase [the original tract purchased from the Indians] lived on the west side on the edge of a large tract. Warwick Neck to the east of the Cove was for the purchasers and their successors. There they created common fields and pastures, taking advantage of the many geographical features that facilitated fencing out predators and closing in livestock, and set about providing themselves with the necessities of life. n249

§ 6.08(f) The First Charter for the Rhode Island Settlements in 1644.

All four settlements in the Rhode Island area shared the common characteristic of being utterly without a superior governing authority; they were, therefore, necessarily without any authority to colonize or conduct governmental activities, except such authority as they agreed to exercise among themselves. That this left the settlements vulnerable to larger, more legitimate and acquisitive neighbor colonies was punctuated in 1643, when Massachusetts, Plymouth, Connecticut and New Haven formed a federation specifically excluding the Rhode Island settlements. The federation not only belabored lack of legal title in the Rhode Island settlers, but they asserted their own claims, based on conquests of and treaties and alliances with the Indians. In addition, settlers in Providence had submitted to Massachusetts' authority in an attempt to obtain assistance.

Roger Williams therefore traveled to England and obtained a patent in 1644. The timing of his arrival was fortunate, inasmuch as King Charles had fled from London in 1642, and governmental power was in the hands of the Puritans, giving Williams early access to persons with power. While the patent ostensibly applied to all the Rhode Island settlements, it was not readily accepted because the Newport and Portsmouth settlers had not requested Williams to obtain a patent, and the Warwick settlers decided to seek their own patent. On behalf of this latter group, Gorton obtained a confirmation of the original purchase from the Indians in 1646, but by the time he returned to Rhode Island in 1648, delegates from all four colonies had met to establish laws for a centralized government.

The patent of 1644, obtained by Roger Williams, declared the basic authority for law and governance, and confirmed the rights to the land: The Earl of Warwick, as governor in chief of the plantations, and a majority of commissioners by the authority of Parliament:

> do .. give, grant, and confirm, to the aforesaid Inhabitants of the Towns of Providence, Portsmouth,

> and Newport, a free and absolute Charter of Incorporation ... Together with full Power and Authority to rule themselves, and such others as shall hereafter inhabit within any Part of the said Tract of land, by such a Form of Civil Government, as by voluntary consent of all, or the greater Part of them, they shall find most suitable to their Estate and Condition ... Provided, nevertheless, that the said Laws, Constitutions, and Punishments, for the Civil Government of the said Plantations, be conformable to the Laws of England, so far as the Nature and Constitution of the place will admit. n250

§ 6.08(g) The Code of 1647.

The meetings with representatives from all four colonies culminated in May, 1647, with the "Code of Laws" adopted by the First General Assembly of "The Incorporation of Providence Plantations." This legislation has been described as the "first body of American law to permit absolute and unqualified religious freedom throughout the colony." n251

The provisions of the 1647 Code relating to governance of landholding are summarized as follows:

> 6. The delegates consent to be governed by the laws of England, "together with the way of the Administration of them, soe far as the nature and constitution of this Plantation will admit...."

For the Province of Providence:

> ... the form of Government established in Providence Plantations is Democraticall; that is to say, a Government held by ye free and voluntarie consent of all, or the greater parte of the free Inhabitants.

Touching Laws:

> 1. That no person, in this Colonie, shall be taken or imprisoned, or be disseized of his Lands or Liberties, or be Exiled, or any other otherwise molested or destroyed, but by the Lawfull judgment of his Peeres, or by some known Law, and according to the Letter of it, Ratified and confirmed by the major part of the Generall Assembly lawfully met and orderly managed.
>
> Burning of houses is prohibited.
>
> Forcible entry and detainer is defined, described, and penalized.
>
> Various trespasses are prohibited, and punished with double damages.
>
> Fraudulent Dealing:
>
> Various transactions are to be in writing.
>
> Fraudulent, Deceitfull and Fained Deeds, Bonds and Gifts made by Debtors to avoid their Creditors ... shall be void ... And the parties to such fraudulent Deeds, not made in good faith and upon good consideration, shall forfeit one yeare's rent of the Lands and Tenements; the whole value of the Goods and Chattells, and so much money as shall be conteyned in the Bond, the one moytie wherof is the King's Custome, the other goes to the party grieved.
>
> [N]o Lands, Tenements, or other Hereditaments, shall pass, alter or change from one to another, whereby any state of inheritance or Freehold shall be made or take effect in any person or persons, or any use thereof to be made by reasons only of any bargaine and sale thereof, except the same bargaine and sale be made by writing, indented, sealed and enrolled in a Meeting of the Towne, where such Lands, or Tenements soe bargained doth lye ...

> Forging of deeds and records is prohibited and remedies are prescribed.
>
> Probate of wills is provided for and regulated in detail.
>
> Provision is made for a general recorder.
>
> In court actions, a person may plead his or her own case, may use an attorney, or may use one of the two attorneys assigned to the court. n252

This prescriptions of this "code" remained the basic laws of the Rhode Island settlements for some decades to come, even though the colony remained entangled in political controversy for many years to come. A brief review of the contending interests has been expressed as follows:

> Internal squabbles broke out in the towns and sometimes pitted the local authority against that of the colony. Several of the Pawtuxet men still claimed to be in Massachusetts, and Warwick feared another military expedition from Boston. Suddenly Coddington returned with a document from the Council of State in England naming him governor of Aquidneck for life, with complete judicial powers. Thereupon three of his former friends rushed to London to get the grant annulled. Then the mainland towns, believing that the island towns were reestablishing their separate commonwealth, installed Samuel Gorton in place of Nicholas Easton, the Newport man who had been elected president, and sent Roger Williams off to England to seek reconfirmation of the patent of 1644. Easton had no notion of stepping down or joining Coddington, so there were three governments instead of one -- two claiming jurisdiction on Aquidneck, one of them based on the same patent of 1644 that the mainland government thought it was using. n253

§ 6.08(h) The Royal Charter of 1663.

A reconfirmation of the original patent was obtained and brought back to the colony in 1652, but it was not until 1658 that the various factional interests receded and a single government exercised authority over all four settlements. With the restoration of the Stuart monarchy in England in 1660, a new peril arose, for the 1644 patent had not been issued as a royal grant. Rhode Island as a colony thus quickly professed allegiance to Charles II and acted to obtain a royal charter, which was finally issued in 1663. n254

The charter finally gave authoritative guarantees of fundamental rights:

> Unlike the first patent, the royal charter of 1663 prescribed a form of government. It differed from the constitution worked out in 1647 and 1648 primarily by enhancing the powers of magistrates. The rights to operate a government and dispose of the colony's land were given to the governor and company as a corporation -- that is, to the freemen...
>
> Under the charter, Rhode Islanders received welcome assurances of good standing among the English Americans. They were guaranteed rights to travel and carry on business in the other English colonies, regardless of old sentences of banishment. They were given rights to fish off New England. They could engage in commerce with other ports in the king's dominions. The monarch declared that the territory of Rhode Island should not be invaded by armed men from neighboring colonies without consent of local officials... n255

In the matter of land rights, the charter offered the same specifics that applied in the other New England colonies:

> The charter also laid down a few fundamentals of law for Rhode Island. Existing statutes and practices were to continue in force until changed. As before, any new colonial legislation was required to

conform to English law as nearly as circumstances would permit. The terms of land ownership were to be the same as in the king's manor of East Greenwich, thus providing the colony with the most attractive variety of land tenure in English law attractive because it was the kind with fewest medieval features. Somewhat loosely, it was said that Rhode Island land was held in "fee simple" -- that is, full ownership subject only to paying taxes. n256

In the royal charter, the named patentees and others thereafter admitted to their number, were constituted "a Body Corporate and Politick in Fact and Name" and "They and their Successors, shall and may have Perpetual Succession ... And also to have, Take, Possess, Acquire, and Purchase Lands, Tenaments and Hereditaments, or any Goods or Chattels; and the same to Lease, Grant, Demise, Aliene, Bargain, Sell and dispose of, at their own will and Pleasures, as other our Leige People of this Our Realm of England ...." n257

§ 6.08(i) Land-related Legislation of the Rhode Island Assembly.

Both before and after the royal charter of 1663, the various colonial assemblies of Rhode Island met and enacted various statutes related to landholding and land rights. The subjects of these provisions may be summarized as follows:

No person to be disseised of lands except by the lawful judgment of peers or by some known law.

Burning of dwellings or of barns

Forcible entry and detainer

Trespass

Fraudulent deeds

Forged records and writs

Probate of wills and granting of administrations

Laying out the township of East Greenwich

Intruders on lands

Regulating fences

Prohibiting the recorder from being an attorney

Assembly consent for land purchases from Indians

Requirement of a writing for certain bargains and deeds

Regulating execution proceedings and distraints on goods and chattels

Preventing inhabitants from subjecting their lands to any other government

Preventing excessive riding [speeding] on streets and highways

Establishing townships

Confirming land grants made in Newport, Providence, Portsmouth, Warwick and Westerly prior to the royal charter of 1663:

Be it therefore Enacted ... That all the Lands Lying and being, with the Limits of each and every of the aforesaid Towns, ... Be and hereby is Allowed of, Ratified and Confirmed, to the Proprietors of each of the aforesaid Towns ... their Heirs and Assigns for ever ...; and whereas there is within several of the Towns within this Colony, considerable of Lands, Lying yet Uncommon or Undivided; And for the more orderly way and manner of the several proprietors ... and that the Exact Boundaries of each and every Mans Allotments, when Laid to him may be kept in perpetuam ...That it shall and may be lawful for the Proprietors, to chuse and appoint a Clerk, and a Surveyor ... as they shall judge needful and convenient, for the orderly carrying on and management of the whole affairs on such Community ...

Regulating ferries

Preventing unauthorized settlements

Invoking the law of England where no law of the colony provides a remedy

Regulation assessments for and collecting of taxes

Preventing forest fires

Regulating deer hunting

Quieting possession (confirming old grants and confirming title upon twenty years' possession)

Whereas at the first settling of this Colony, and for sundry Years afterwards, Lands were of little or no Value, and Skilful Men in the Law were much wanted, whereby many Deeds, Grants and Conveyances were weakly made, which may Occasion Great Contests in Law, if not timely prevented.

Be it therefore Enacted ... That all Grants, Charters, Profits, Rights and Priviledges, heretofore Granted and Given by the General Assembly ... hereby are Ratified and Confirmed to be Good and Effectual ... to the Persons therein Mentioned, and their Heirs and Assigns for ever.

... where any Person ... shall by the space of Twenty Years, be in the Uninterrupted, Quiet, Peacable and Actual Seisin and Possession of any Land or Hereditaments within this Colony, for and during the said time, Claiming the same as his, her or their proper, sole and Rightful Estate in Fee Simple, such Actual Seisin and Possession, shall be allowed to give and make a Good and Rightful Title to such person or persons, their Heirs and Assigns for ever...

Preventing purchase of Indian lands without governmental consent

Recording deeds and conveyances

Laying out highways and roads in the towns

Appointing overseers to lease out lands in behalf of Ninigret the Indian chief

Distributing and settling intestates' estates. n258

§ 6.08(j) Summary of Land Rights in Colonial Rhode Island.

One of the most distinctive features of Rhode Island's early colonial history is the absence of any effective jurisdiction exercised by a superior governmental authority. The first settlers were entirely on their own, utterly without authority or restraint from any other English colony or, indeed, from England itself. Their very immigration to the Rhode Island area

was an attempt to escape or avoid such authority. This absolute independence of action, coupled with their own background of New England colonial experience in which land was held virtually free of any feudal burdens, led directly to landholding in the form of absolute ownership. At first, the absolute ownership rested with the original proprietors of each township, but their rights to individual land parcels were eventually sold or given to others. Rights retained by the proprietors consisted mostly of the usual rights of government, while the conveyance and possession of land carried full rights of seisin. What controversies did surround landholding in Rhode Island were usually associated with disputed rights of government, apportioning the size of land grants to the grantees' social status, and difficulties in tracing title:

> In the Narragansett [Rhode Island] settlements the towns were always much more independent of colony action than they were elsewhere... The colony laws make no important reference either to that, or to the regulation of town lands and herds... [I]n the management of their lands, as in everything else, the towns of Rhode Island pursued a more independent course than did those in the other New England colonies. A comparison, however, of their internal history with that of the towns in the adjacent colonies will show that in all essential particulars they conformed to the New England model. The original Narragansett towns were themselves offshoots of Salem, Boston, and other pre-existing towns, and their founders remained true to the polity with which they were familiar...
>
> ... [I]n those colonies there was no *land system* apart from the towns... The management of land throughout those colonies was left to the towns...
>
> In nearly all cases the settlements which were made prior to 1660 were located on arms of the sea or on the banks of streams within the tide-water area. The land which was subject of grant, when cleared, consisted of upland, meadow, salt marsh, and fresh marsh or swamp. In many cases the upland which was first utilized was an Indian corn-field or clearing...
>
> The settlers made use of the upland for home lots and planting fields. The meadow was generally utilized for hay and pasturage. From the marshes and swamps hay and thatch were also procured. In the remote uncleared or only partially cleared tracts, swine, sheep, and young cattle were pastured. Oxen, horses, and milch cows were pastured upon land nearer the village...
>
> Several of the towns which later formed the colony of Rhode Island were established by the spontaneous act of their settlers and upon land which they had occupied in most cases after the extinguishment of Indian claims...
>
> The settlement of a town normally began with the laying out of the village plot and the assignment of home lots. This to an extent determined the location of highways, of the village common, and of some of the outlying fields. On or near the common the church was built, and in not a few cases the site that was chosen for this building went far toward determining the entire lay-out of the town. The ideal of a home lot was a plot of ground for a dwelling house and outbuildings, for a dooryard and garden, and usually also an enclosure for feeding cattle and raising corn... In Providence [home lots] contained five acres.
>
> The assignment of the first home lots was accompanied or immediately followed by the earliest allotments of arable land and meadow. The process steadily progressed with the increase of population in the towns and with the clearing of the forests. By means of it the settlers secured planting land, and the process advanced through various stages until the available land of the towns was approximately or entirely occupied. When the process was completed the township had been entirely laid out, and settlement within it had assumed a relatively permanent form. This was accomplished in part by the granting of lots to individuals and in part by the laying out of common fields. The common fields, too, in their turn were later subdivided among their proprietors. As the result of this process a system of

> individual ownership gradually took the place of a system of joint ownership and management; a settled and cultivated township came to exist where previously there had been only an unappropriated forest and waste. n259

Osgood's excellent work also provides specific commentary on the evolution of individual landholdings through the early decades of Rhode Island settlement and of New England colonization, in general:

> A necessary consequence of the method of allotting land ... was, that the estate of each individual would consist of a number of small tracts located in different parts of the town plot...
>
> ... But before the towns had long been settled, a tendency toward consolidation of estates appears. Many exchanges of land were effected which had this as their object. Purchases and sales often had a similar effect. So did intermarriages and inheritance. The result of this process, operating through generations, has been to substitute for the early system of parcelled estates the consolidated farms of the present day.
>
> Common fences and herds were characteristic accompaniments of the system of common fields and joint cultivation which were the basis of the town economy... As a rule, instead of fencing off by itself the allotment of each individual in a field or meadow, the entire field was surrounded by a common fence, and this was furnished with gates and approached by paths or highways. All grants of land were made subject to the right of the community to open highways through them ... Of the common fences, each shareholder was bound to build and keep in repair the part which was adjacent to his lot or lots...
>
> In Warwick, Rhode Island, the "front fence" which separated the homesteads from the large common that lay west of the village marked a most important line of division. Orders for its repair continually recur, and it was maintained both summer and winter...
>
> In the assignment of town lots and the drafting of regulations for the use of common lands a rigid numerical equality was occasionally maintained; each individual received just so many acres and just as much accommodation as any other, no more and no less. But in most instances an effort is discernible to make the grants proportional to what might be called the investment of the individual settler in the enterprise of founding the town. This assumed two forms, that of the expense or cost to which he was subjected and that of the ability which he contributed to the undertaking. In the case of the early towns ... on Narragensett Bay (Rhode Island), the cost, small though it was, of extinguishing the claims of the Indians had to be borne by the towns rather than the colony... Those who met those [and other expenses, such as surveying and building a common house] were proprietors and received their dividends in the form of lands...
>
> The original contribution to the founding of a town by a natural transition developed into the town rate...
>
> The colonists possessed the elements [for making contributions] in varying proportion. Some had served out their indentures as servants, and in consequence of a small grant from their former masters or from the town had found a place among the class of cottagers. On the outskirts of the settlement, in the tracts which had early lain common as pasture, provision was usually made for families of this class ...
>
> ... In 1652 Warwick, in Rhode Island, laid out its meadow near the town, for the inhabitants who, as yet, had not been provided for...
>
> ... Town records also abound in references to grants, the purpose of which was to equalize inequalities which had resulted from earlier allotments. Individual allotments were frequently eked out and inconveniences of location were removed in this way...

> ... The land of the towns, their herds and fences, were subject to joint management. But the question arises, To what extent did this originate with the town meetings or how far did it proceed from distinct boards of proprietors?
>
> ... The town meeting was at the same time a meeting of proprietors, or might easily become such. In the early history of towns a very important part of the business of the town meetings consisted in making grants of land ...
>
> ... In Rhode Island ... boards of proprietors of common lands appear at an early date in the towns of Providence and Warwick, though in Portsmouth the town lands were directly controlled by the town meeting.
>
> But in all towns, even from the outset, there were certain grantees of land who were not admitted to the body of proprietors. They might become freemen of the town and thus have a voice in town meeting, or even be freemen of the colony, and yet not find admission with the circle of proprietors. The idea of freemanship was political in its nature, that of proprietorship was territorial...
>
> In every towne there were also certain cottagers who, in the language of the Hartford records, "were granted lotts to have onely at the towne's courtesie, with liberty to fetch woode and keepe swine or cowes on the Common." These were not even freemen, and their admission to the town was safeguarded in such as, if possible, to prevent their adding to the number of the town poor. They were simply inhabitants...
>
> ... As the supply from which allotments could be made grew less, land became an increased object of desire, both to those who controlled it and to those who were seeking to possess it... [I]n towns where the number of non-commoners came to equal that of the proprietors, struggles over the management of the town lands were very likely to occur...
>
> ... [T]he earliest controversy of this kind developed in Providence... n260

Not only in Providence, but in other Rhode Island towns the controversies over land distribution flared up persistently:

> On Aquidneck (Portsmouth and Newport) the founders planned communities with traditional gradations from gentleman to servant. The levels were initially marked out by the amounts of land given to the various settlers -- from several hundred acres to none at all. Those in the upper half of the spectrum were to have political rights, the rest would not. The levels were assigned roughly in accord with rank held previously in other places, but a few men, selected mainly on the basis of wealth, were to be lifted to the status of gentlemen and rulers. There were no settlers of genuinely high birth to begin with... In Portsmouth some of the men given little land and no political rights clamored for higher positions and brazenly set up their own meeting to seek their goals...
>
> In Providence, by contrast, the conflict seemed to begin over religious liberty, but came to rest on land. Williams wanted to keep the town open for victims of religious persecution. To do this he espoused an egalitarian social policy: let everyone who was admitted have the same shares of land -- a package of allocations including a house lot, meadow, crop land, and privileges to use the commons. His earliest companions, however, wanted special consideration. After heated exchanges with them, Williams agreed that part of the town should be set aside for them (and himself), leaving the rest to be divided up among the first settlers plus a growing number of other people. Still the townsfolk were not satisfied. Some newcomers were admitted only to quarter-share rights; ultimately admissions with full land allocations were stopped after about one hundred had been made. n261

Shortly after Williams' death in 1683, Providence began granting small lots, 400 to 600 square feet, along the waterfront

for use as wharves or warehouses, and at that time began the town's rise to commercial prominence. n262

In the early years of the 18th century, the colonial government became much more assertive in resolving long-standing land disputes based on the perceived inequities in early allotments. To end disputes over common land -- in the few places where any remained after 1715 -- it was generally parcelled out entirely to individual grantees. The power of proprietors, especially of the Narragansett proprietors, was gradually weakened, and more of their lands were opened for settlement, with consequent economic progress for the colony. Also, with new lands more freely available, some were able to add to their already large holdings.

FOOTNOTES:
(n1)Footnote 217. 1 Herbert L. Osgood, The American Colonies in the Seventeenth Century 334 (1904).

(n2)Footnote 218. 1 Records of the Colony of Rhode Island and Providence Plantations 18 (John Russell Bartlett ed. 1856).

(n3)Footnote 219. 1 Herbert L. Osgood, The American Colonies in the Seventeenth Century 335 (1904).

(n4)Footnote 220. *Id.* at 336.

(n5)Footnote 221. 1 Records of the Colony of Rhode Island and Providence Plantations 14 (John Russell Bartlett ed. 1856).

(n6)Footnote 222. *Id.* at 23.

(n7)Footnote 223. *Id.* at 19-20.

(n8)Footnote 224. 1 Herbert L. Osgood, The American Colonies in the Seventeenth Century 338 (1904).

(n9)Footnote 225. *Id.* at 20-21.

(n10)Footnote 226. *Id.* at 17.

(n11)Footnote 227. 1 Herbert L. Osgood, The American Colonies in the Seventeenth Century 339 (1904).

(n12)Footnote 228. *Id.* at 340. Osgood further noted, "This cumbersome machinery furnished a weak substitute for government in a plantation of squatters, that was rent by internal strife and was adjacent to two colonies which were ready to absorb it." *Id.*

(n13)Footnote 229. 1 Records of the Colony of Rhode Island and Providence Plantations 45-46 (John Russell Bartlett ed. 1856).

(n14)Footnote 230. *Id.* at 52.

(n15)Footnote 231. *Id.* at 53.

(n16)Footnote 232. 1 Herbert L. Osgood, The American Colonies in the Seventeenth Century 342 (1904).

(n17)Footnote 233. Records of the Colony of Rhode Island and Providence Plantations 53 (John Russell Bartlett ed. 1856).

(n18)Footnote 234. William C. Mcloughlin, Rhode Island, A Bicentennial History 21 (1978).

(n19)Footnote 235. Sydney V. James, Colonial Rhode Island, A History 26 (1975).

(n20)Footnote 236. 1 Herbert L. Osgood, The American Colonies in the Seventeenth Century 70 (1904).

(n21)Footnote 237. *Id.* at 71.

(n22)Footnote 238. 1 Records of the Colony of Rhode Island and Providence Plantations 87 (John Russell Bartlett ed. 1856).

(n23)Footnote 239. Sydney V. James, Colonial Rhode Island, A History 27-28 (1975).

(n24)Footnote 240. 1 Records of the Colony of Rhode Island and Providence Plantations 100-102 (John Russell Bartlett ed. 1856).

(n25)Footnote 241. *Id.* at 102.

(n26)Footnote 242. *Id.* at 103.

(n27)Footnote 243. *Id.* at 112.

(n28)Footnote 244. *Id.* at 114.

(n29)Footnote 245. *Id.* at 116.

(n30)Footnote 246. *Id.* at 124.

(n31)Footnote 247. *Id.* at 126.

(n32)Footnote 248. *Id.* at 128.

(n33)Footnote 249. Sydney V. James, Colonial Rhode Island, A History 31-32 (1975).

(n34)Footnote 250. John Russell Bartlett, Records of the Colony of Rhode Island and Providence Plantations 143-146 (1856).

(n35)Footnote 251. The Earliest Acts and Laws of the Colony of Rhode Island and Providence Plantations, 1647-1719 vii (John D. Cushing ed. 1977).

(n36)Footnote 252. *Id.* at 3-56.

(n37)Footnote 253. Sydney V. James, Colonial Rhode Island, A History 63 (1975).

(n38)Footnote 254. Patrick T. Conley, *Separation of Powers in Rhode Island, 44 R.I. B.J. 9 (Oct. 1995).*

(n39)Footnote 255. *Id. at 68-69.*

(n40)Footnote 256. *Id. at 69.*

(n41)Footnote 257. The Earliest Acts and Laws of the Colony of Rhode Island and Providence Plantations 1647-1719 128 (John D. Cushing ed. 1977).

(n42)Footnote 258. *Id. at 57-120, 135-236.*

(n43)Footnote 259. 1 Herbert L. Osgood, The American Colonies in the Seventeenth Century 435-440 (1904).

(n44)Footnote 260. *Id.* at 448-467.

(n45)Footnote 261. Sydney V. James, Colonial Rhode Island, A History 78-79 (1975). *See also* Charles Wyman Hopkins, The Home Lots of the Early Settlers of the Providence Plantations (1886).

(n46)Footnote 262. *Id.* at 262.

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CHAPTER 6 DEVELOPMENT OF PROPERTY LAW IN ENGLAND'S AMERICAN COLONIES

1-6 Thompson on Real Property, Thomas Editions § 6.09

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§ 6.09 Development of Property Law in Delaware (from 1638).

§ 6.09(a) Land Rights in Early Dutch Settlements.

European exploration of the territory that was to become the colony of Delaware commenced in August 1609, when Henry Hudson, in the employ of the Dutch, entered Delaware Bay and later reported his observations to his Dutch employers. As a result of his reports, Dutch trading vessels made frequent visits to both the Hudson and Delaware Rivers in attempts to develop a profitable fur trade. In 1610 the English sailor Samuel Argall entered Delaware Bay seeking protection from a storm while on a voyage from Virginia, and named the area for the then governor of Virginia, Lord de la Warr. The English later extended the name to the entire bay, the river, and the land on the western shore.

As early as 1624, the Dutch settled a few Walloon families along the Delaware River, but they were removed to Manhattan in 1628, and the Dutch maintained only a small vessel at the site to facilitate the fur trade. Then in 1629, some of the wealthy members of the company's Amsterdam chamber secured the Charter of Exemptions and Privileges, authorizing creation of the feudalistic patroonships in New Netherland. Two persons who were among the first to act under this Charter, Samuel Blommaert and Samuel Godwyn, in 1629 sent two agents to buy lands from the Indians. The purchases, the first within the area of modern Delaware, were recognized by the company by means of a "deed" issued on the island of Manhattan and dated July 15, 1630, with granting language as follows:

> We, the Directors and Council of New Netherlands ... hereby acknowledge and declare, that on this day, the date underwritten, came and appeared before us in their proper persons, Queskacous and Entquet, Siconesius and the inhabitants of the village, situate at the South Cape of the bay of South [Delaware] River, and freely and voluntarily declared by special authority of the rulers, and consent of the commonality there, that they already on the first day of June, of the past year 1629, for, and on account of certain parcels of cargoes, have transferred, ceded, given over, and conveyed, in just, true, and free property, as they hereby transport, cede, give over, and convey to, and for the behoof of Messrs. Samuel Godwyn and Samuel Blommaert absent... n263

Although it was typical -- indeed, even essential -- to secure a surrender of native rights in land already obtained under a grant from a European authority, the patroons and others undoubtedly realized that the Indian "deeds" had only limited value:

> The European concept of land-holding was unknown to the Indians, ... and incompatible with their culture. It did not occur to the natives that the Europeans might demand that the Indians quit some or all of their lands along the river and move elsewhere; they understood that the "purchase" conferred on the [European purchasers] the right to share the land with them -- to hunt, fish, plant crops, and build houses, but not to *own* it in the sense that a man owned his bows and arrows. In the Indians' way of thinking, land was comparable to water and air -- it was free for the use of all. That concept, an important part of the Indians' belief that man was part of nature, led to numerous misunderstandings between natives and newcomers, especially when the wily Dutch, more used to dealing with the natives, made haste to "buy" the same land for themselves to undermine [the] tenuous claim [of Sweden's earlier purchasers]. The Indians, of course, understood only that they had agreed, for the price of some foreign artifacts, to share their land with yet another European nation. To the Swedes, the Indians' action was proof of a despicable lack of integrity. n264

The first Dutch settlers for this land arrived in April 1631, and founded Zwaanendael. Thus, the first European settlement in Delaware was one of the first patroonships authorized under the 1629 Charter and was, therefore, under the same regime of property rights as described for the New Netherland patroonships in § 6.05(b), *supra*. However, even before the next supply ship arrived in 1632, a misunderstanding with the Indians resulted in the massacre of the entire Zwaanendael settlement in Delaware.

§ 6.09(b) Land Rights in Early Swedish Settlements.

No further European settlement was attempted in Delaware until Swedish and Finnish settlers arrived near the site of present-day Wilmington in 1638 and founded a colony they called New Sweden. Unable to base claims to land on rights of discovery or conquest, the Swedes "purchased" lands from the Indians. The purchaser was nominally the Swedish South Sea Company, which had received its first letters patent from King Gustavus Adolphus in 1624, and an essentially similar second charter in 1626. No settlement activity occurred at that time because Sweden became distracted by a long war with Spain, but by 1637, the Swedes were once again ready to consider colonization in America.

In 1640 the Swedish West India Company granted to certain Dutch investors a charter effectively creating a patroonship so that they could found another settlement in New Sweden. The grantees held their land under the protection of Sweden as hereditary property, with the feudalistic high and low jurisdiction. Meanwhile, contention over concurrent Swedish and Dutch claims to the same land in Delaware continued, and even an English settlement had arisen nearby. For those who agreed to recognize Swedish jurisdiction in the colony and were not bound as servants, "they were at liberty to build and settle themselves where they thought proper and to return home when they pleased." n265 For his zeal in protecting Swedish interests in the colony the governor Johan Printz in about 1645 was awarded a grant of land as a perpetual possession for himself and his heirs forever. n266 For the most part, however, the rival Dutch and Swedish colonies competed in "purchasing" lands from the Indians. The rivalry erupted into open hostilities, resulting in a surrender of the Swedish settlements to Dutch jurisdiction in 1655. The Dutch agreed to respect the customs, religion, and private property claims of Swedish settlers who wished to remain. When the Dutch took up possession of this territory, their land management practices were also introduced:

> In the settlement of the country, the colonists were to concentrate themselves in families of sixteen to twenty in number, and were to pay annually for their lands twelve stivers a morgen [approximately two acres] in lieu of tenths. The town lots [in what is today's New Castle] were forty feet by fifty, and the streets from four to five rods in breadth. The Swedes were to be closely watched, and if any should be found disaffected, they were to be sent away ... and, if possible, induced to come to Manhattan. n267

§ 6.09(c) Land Rights in Delaware After the English Conquest of 1664.

Events elsewhere in America soon overtook the struggling Delaware settlements. In 1664 the English king Charles II granted to his brother the Duke of York lands that included much of what the Dutch claimed in America; this led directly to the English takeover of New Amsterdam, quickly renamed New York. An English fleet then approached the Delaware settlements and obtained the acquiescence of the Swedish colonists and, after a brief battle, the surrender of the Dutch. The English also took some territory of the Dutch that was not included in the grant to the Duke of York, but had, in fact, been included in the 1632 grant of Maryland to Lord Baltimore.

From 1664 to 1682, Delaware was ruled as part of New York, so that New York laws pertaining to land also applied in Delaware. n268 For one brief interlude, the Dutch reconquered New Netherland in 1673 and reoccupied Delaware without resistance, but they lost it all again in 1674. The "Duke's Law" of 1665 was supposedly in effect in Delaware, but over a decade passed before even a copy of the laws reached the Delaware settlements. Meanwhile, a brisk land business was carried on:

> New lands were being taken up in a rather haphazard fashion, with the government seeking an income from land, both by fees to confirm possession and by quitrents, modest annual charges upon landowners (usually one bushel of wheat per hundred acres) in lieu, theoretically, of services that might have been demanded of them.

Some of the new lands were taken up by old Swedish, Finnish, and Dutch settlers moving westward up the Christina [River] or southward from New Castle. Of the English settlers, some came from Maryland, bringing slaves with them. The government sought to attract settlers on terms as favorable as in neighboring Maryland or in New England. In theory, a tract of fifty acres was assigned to each member of a family, but in actuality the grants seem to have been larger, varying from under two hundred to over one thousand acres.

As central Delaware was gradually settled, farmers on the St. Jones River appealed to the governor for a court of their own so they would not need to go to Lewes or New Castle to register deeds, probate wills, or settle disputes over land... [I]n 1680 the governor approved their request, appointing justices of the peace and thereby creating the third Delaware county, called St. Jones. n269

§ 6.09(d) Land Rights in Delaware After Coming Under the Governance of Pennsylvania.

§ 6.09(d)(1) Land Grants and Sales.

Delaware's relative isolation permitted localities to develop their own customs and practices with respect to landholding, but important changes began to take place in the 1680's. By a royal patent dated March 4, 1680, William Penn received a patent for lands and governmental authority in the province of Pennsylvania from King Charles II. By deed of feoffment dated August 4, 1682, the Duke of York granted to Penn all the lands in the New York provincial territory covered by the royal patent to Penn, which meant conveyance of title to the Delaware lands. n270 In contrast to the previous colonial practice of simply giving land to settlers willing to come and stay, Penn began selling land:

> In New Netherland and New York ... during the [early] period..., a price seems never to have been put upon the land. Land was sold in Pennsylvania from the very first. As soon as he had secured his title, Penn offered for sale shares of five thousand acres at £100 each. After 1684 this land was also to be liable to a quitrent. The practice of selling land was steadily continued, the prices varying with the period of time which had elapsed since the settlement of the province, with the character and location of the land, and with such other conditions as might affect a bargain. After 1732 prices become more permanent. For thirty years from that date the price was £15, 10s. per hundred acres. Prices were always fixed by the proprietor and his officials ...
>
> ... Escheated land, with such improvements as had been made upon it, was sold at auction, and the larger part of the purchase money went to the proprietor. It was a requirement in all the provinces that

> land should be settled within a brief period -- often designated as three years -- after the issue of the patent. Squatters' rights, as evidenced by "improvment," were as a rule generously enforced. n271

Landholdings in at least two of Delaware's counties tended to be quite large. According to surviving rent rolls, "55 percent of the landowners in Kent and Sussex owned five hundred acres or more." n272 This was three times larger than the average holding in contemporary Pennsylvania counties.

§ 6.09(d)(2) Quit Rents.

In the matter of quitrents, the experience in Delaware was typical of most American colonies and, indeed, after 1684, was identical to Pennsylvania's experience. In Delaware's early colonial history under the Dutch, however, quitrent was seldom a factor, and this changed only gradually after the English took over in 1664:

> In the Dutch ground briefs no definite provision was made for the payment of a rent. In some of the patents the payment of a tenth of the products of the soil was required. In many only the general obligation of submission and allegiance was enforced, with some special duty, such as that of fencing the land...
>
> The English conquest in 1664 resulted in no immediate change in the land law of the province...
>
> Dutch ground briefs and transports were very generally submitted to the English officials for confirmation, and in most of the English patents or deeds which were granted in their stead no express mention was made of a quitrent. This is emphatically true in the case of confirmation of city lots. Confirmation of Indian deeds and new grants were made subject to "the accustomed rent of new Plantations in this country," or to such payment and conditions as should be designated by the Duke of York and his officers. In some cases the annual payment of a lamb, or of a barrel of codfish or a bushel of winter wheat, was demanded. Confirmations of patents on the Delaware and the issue of new grants in that region were always accompanied by the condition that a quitrent should be paid in wheat.
>
> At the close, in 1674, of the Dutch reoccupation there was another renewal of patents. But even then the system of quitrents was not fully introduced. In 1686 Governor Dongan reported that the quitrents, at his arrival in the province, were very inconsiderable, the larger part coming from the Delaware region under the terms of the patents granted by Andros. But Andros even had renewed Indian purchases and township grants with the former reservation of a lamb only as a quitrent. Dongan, however, insisted that all patents or deeds which were recorded during his administration should contain provision for a quitrent. No exception was made even in the case of city lots.
>
> Rent in the city was made payable in money, but in the country it was payable in wheat, fish, or other commodities. n273

By the time Governor Dongan of New York was reporting quitrent payments from Delaware, the colony had passed over to the jurisdiction of Pennsylvania. In Pennsylvania and its territories, including Delaware, quitrents were actively pursued, and so the various issues and controversies surrounding colonial quit rents became important in Delaware:

> The most characteristic form of territorial revenue was the quitrent, paid annually at a rate prescribed by the proprietor and received in lieu of all services. It appears in all the provinces...
>
> In all transactions, and in all the colonies, the form of payment was a matter of importance to the people. So scanty was their supply of money, that payment in kind was always strongly their preference. The proprietors, and afterward the crown, always found their interest in securing money payments whenever it was possible. This in many cases gave rise to controversies over quitrents, which in turn

> occasioned the interference of the assembly in a matter which the proprietors claimed as exclusively their own ...
>
> In all the provinces quitrents were an object of aversion. They were continually falling into arrears. Payment was avoided whenever it was possible; and it was not infrequently resisted. In the last resort payment could be enforced by distress, the assistance of the sheriff being called in for the purpose. In Pennsylvania, as in other provinces, these conditions were ever and anon recurring ... n274

§ 6.09(d)(3) Administration of Land Affairs.

Both the sales of land and the administration of quitrents under the rule of Delaware by Pennsylvania required the creation of a rudimentary bureaucracy:

> ... Pennsylvania had a land office, though until after 1732 its affairs were very much in confusion... The long absences of Penn from his province made it impossible for him to attend in person to the details of selling and letting land and collecting rents. Not until 1741 was the care of these matters intrusted to the governors. Instead, a commission or board of property was from time to time designated, which acted as the special agent of the proprietor. The board consisted of a secretary, -- who was at the same time secretary of the province, -- the surveyor-general, and from three to five special commissioners. Closely associated with the board was the receiver-general, the keeper of the seal, and master of the rolls. The special duties of the commissioners related to the granting of lands, but, as their powers developed, they also became concerned with the collection of rents. After 1741 the governors became members of this board, but their authority to act with it was conveyed through a special commission... n275

In the view of one important historian, the land systems in the proprietary colonies were kept strictly within the control of the executive and away from legislative regulation:

> In all the provinces the land system was kept as free as possible from the control of the legislature. It was organized and regulated under instructions and proclamations of the proprietors and their appointees. Any attempt to regulate it by legislation was resented and opposed. It was regarded as the private concern of the proprietor and its administration as distinctly as an executive function ...
>
> ... In the absence of a legislature [such as in New Netherland and proprietary New York] such an issue could not arise. But in the Carolinas, the Jerseys, and Pennsylvania it arose, and the occasion which usually brought it to the front was some dispute over the payment of quitrents. It was at this point that the territorial regulations of the proprietor touched the pocket of the colonist. Like a tax, the rent was a constantly recurring burden. Over its amount and the form of its payment the individual desired in some way to secure such control as had been effected in the case of taxation. Efforts to secure this helped to initiate the process of legislation related to territorial affairs. n276

As will be shown in the next section, however, legislation in matters touching land was both common and comprehensive in Delaware under Pennsylvania administration.

§ 6.09(d)(4) Legislation Relating to Landholding.

Soon after the 1682 conveyance from the Duke of York, Penn issued the Frame of Government of the Province of Pennsylvania, consisting of a bill of rights and other laws that would become effective when ratified by the colonists in the province, including Delaware. In 1683, Penn issued a Charter of Privileges, which was revised in 1701, and which added further governing provisions applicable to Delaware as well as to Pennsylvania and Penn's other territories. Meanwhile, the Duke's Law also remained in force in Delaware. For Delaware then, the Duke's Law of 1665, and Penn's 1682 Frame of Government and 1683 Charter of Privileges were all potential sources of laws governing

landholding. The fundamental legal rules for property were lodged in the Duke's Law and are described in the context of colonial New York in §§ 6.05(e) and 6.05(f), *supra*. The property provisions of the 1682 Frame of Government and the Charter of Privileges of 1683 and 1701 are summarized in the following paragraphs.

§ 6.09(d)(4)(i) Penn's Frame of Government of 1682.

In his 1682 Frame of Government, Penn granted to "the freemen, planters and adventurers, of ... the ... province, these liberties, franchises, and properties [as granted to Penn], to be held, enjoyed and kept by the freemen, planters and inhabitants of the said province of Pennsylvania for ever." n277 In addition to this conferral of rights, the other singular feature of the Frame of Government was the establishment of representative government in the form of the Provincial Council and General Assembly. The Provincial Council was directed to divide itself into four standing committees, the first of which would be "a committee of plantations, to situate and settle cities, ports, market-towns and high-ways, and to hear and decide all suits and controversies relating to plantations." n278 Laws proposed by the Provincial Council were subject to rejection or ratification by the General Assembly. In April 1683, a new frame of government was drawn up, taking into account the incorporation of the Delaware settlements and providing for a reorganization of the council and general assembly. n279

§ 6.09(d)(4)(ii) Laws for the Colony Agreed upon in England.

Even before the earliest legislative assembly met, certain laws for Pennsylvania were proposed and agreed to by the colonial leaders while they were still in England, subject to ratification by the colonists in America. Those provisions pertaining for landholding are as follows:

> First. That the charter of liberties [Frame of Government] ... is hereby declared and approved, and shall be for ever held for fundamental in the government thereof, according to the limitations mentioned in the said charter.
>
> Second. That every Inhabitant in the said province, that is or shall be a purchaser of one hundred acres of land or upwards, his heirs and assigns, and every person who shall have paid his passage, and taken up one hundred acres of land, at a penny an acre, and have cultivated ten acres thereof, and every person that hath been a servant or bondsman, and is free by his service, that shall have taken up his fifty acres of land, and cultivated twenty thereof, and every inhabitant, artificer, or other resident in the said province, that pays scot and lot n280 to the government, shall be deemed and accounted a freeman of the said province...
>
> Fourteenth. That all lands and goods shall be liable to pay debts, except where there is legal issue, and then all the goods, and one third of the land only.
>
> Fifteenth. That all wills and writing attested by two witnesses, shall be of the same force, as to lands and other conveyances, being legally proved within forty days, either within or without the said province.
>
> Sixteenth. That seven years quiet possession shall give an unquestionable right, except in cases of infants, lunaticks, married women, or persons beyond the seas...
>
> Twentieth. And to prevent frauds and vexatious suits within the said province, that all charters, gifts, grants and conveyances of land, (except leases for a year or under) and all bills, bonds, and specialties have five pounds, and not under three months, made in the said province, shall be enrolled or registered in the public enrolment office of the said province within the space of two months next after the making thereof, else to be void in law. And all deeds, grants, and conveyances of land (except as aforesaid) within the said province, and made out of the said province, shall be inrolled or registered as aforesaid, within six months next after the making thereof, and settling and constituting an enrolment office or

registry within the said province, else to be void in law against all persons whatsoever...

Thirty-first. That for the encouragement of the plants and traders in this province, who are incorporated into a society, the patent granted to them by William Penn, Governor of the said province, is hereby ratified and confirmed... n281

§ 6.09(d)(4)(iii) The Charter of Privileges of 1683 and 1701.

The Charter of Privileges, issued in 1683 and revised in 1701, gave specific instructions for choosing members of the General Assembly but contained only one additional provision touching upon property rights:

Eighthly: If any person, through Temptation or melancholly, shall Destroy himself, his Estate, Real & Personal, shall, notwithstanding, Descend to his wife and Children or Relations as if he had Died a natural Death; and if any person shall be Destroyed or kill'd by Casualty or accident, there shall be no forfeiture to the Governour by Reason thereof... n282

§ 6.09(d)(4)(iv) Delaware Legislation After 1704.

When the legislature established by William Penn first met, colonists in the Delaware region, known as the Three Lower Counties, had the same number of representatives as colonists in the Pennsylvania region. As Pennsylvania thereafter embarked on much more rapid growth, the Delaware colonists soon feared becoming outnumbered in the legislature. Thus, in 1701 they refused to meet with the Pennsylvania legislators and requested from William Penn the privilege of establishing their own legislature, which was granted. As a result, from 1704 Delaware had its separate legislature, although the region was still under the jurisdiction of the Pennsylvania governor, who had the power to approve or disallow all enactments of the Delaware legislature. This arrangement continued until 1777, when Delaware voters elected their own chief executive.

The earliest compilation and arrangement of these Delaware legislative enactments was not completed and printed until 1741 or 1742. The topics of those provisions dealing with property rights are noted as follows:

Orphans' courts

Settling intestates' estates

Building mills

Establishing courts of law and equity (to "hear and determine all actions real, personal and mixt, according to the Laws and Constitutions of this Government, as fully and amply to all Intents and Purposes, as the Justices of the King's-Bench, Common-Pleas and Exchequer in England, or any of them may or can do.")

Taking lands in execution for payment of debts

Against removing landmarks

For better confirmation of the owners of lands and their just rights and possessions

Regulating fences

Against unseasonable firing of woodlands and marshes

For preventing accidental fires in towns and villages

Partitioning land into 200-acre lots for sale to the public

Constructing roads, bridges, highways and causeways

Against forcible entry, barratry, maintenance, champerty and embracery

Acknowledging and recording deeds

Preventing destruction of timber and other trees

Limitations of actions

Probate of estates. n283

From this review of Delaware's colonial history, it is clear that despite early settlements from several European nations, the colony eventually adopted English law as the basis of its legal system and regime of property rights.

FOOTNOTES:

(n1)Footnote 263. 1 J. Thomas Scharf, History of Delaware 1609-1888 31 (1888).

(n2)Footnote 264. Carol E. Hoffecker, Delaware, A Bicentennial History 14 (1977).

(n3)Footnote 265. 1 J. Thomas Scharf, History of Delaware 1609-1888 48 (1888).

(n4)Footnote 266. *Id.* at 49.

(n5)Footnote 267. 1 J. Thomas Scharf, History of Delaware 1609-1888 62 (1888).

(n6)Footnote 268. *See* § 6.05(e), *supra.*

(n7)Footnote 269. John A. Munroe, History of Delaware 33-34 (2d ed. 1984). *See also* John A. Munroe, Colonial Delaware, A History 74-75 (1978).

(n8)Footnote 270. The interesting peculiarities of this conveyance, with strong overtones of medieval English land law, have been explained as follows:

> There were actually four legal documents involved in these grants, an absolute deed (called a "deed of feoffment") and a lease for ten thousand years for New Castle and the circle around it, and another deed and a similar lease for the land from twelve miles south of New Castle to Cape Henlopen ... Probably the division is explained by the duke's desire to get some revenue from these territories ... but not to interfere with Penn's use of New Castle or with his revenues from it ... Perhaps both deed and lease were used because of the uncertainty of the duke's legal rights to Delaware ...
>
> Then on October 28 [the day after Penn's arrival on October 27, 1682], in a ceremony called "livery of seisin," Penn formally took possession of New Castle and the territory within twelve miles about it, except on the east side of the Delaware. After the deeds from the Duke of York were read, Penn took the key to the New Castle fort, entered and locked himself in alone, then came out and received a piece of turf with a twig upon it and a porringer with river water and soil as symbols of his new possession. John A. Munroe, Colonial Delaware, A History 83-84 (1978).

(n9)Footnote 271. 2 Herbert L. Osgood, The American Colonies in the Seventeenth Century 34-35 (1904).

(n10)Footnote 272. John A. Munroe, Colonial Delaware, A History 94 (1978).

(n11)Footnote 273. *Id.* at 39-42.

(n12)Footnote 274. *Id.* at 36-37.

(n13)Footnote 275. *Id.* at 46.

(n14)Footnote 276. *Id.* at 46-47.

(n15)Footnote 277. The Earliest Printed Laws of Pennsylvania 1681-1713 200 (John D. Cushing ed. 1978).

(n16)Footnote 278. *Id.* at 196.

(n17)Footnote 279. *See* No. 41. *Pennsylvania and Delaware Frame,* in Select Charters and Other Documents Illustrative of American History, 1606-1775 199-204 (William MacDonald ed. 1914).

(n18)Footnote 280. In English law scot was a form of tax on one's share of a customary contribution. Scot and lot was a particular customary contribution imposed upon subjects according to their ability to pay. In certain English boroughs, persons retained their franchise only by paying the scot and lot. A reference to scot and lot in Delaware appears in *Frieszleben v. Shallcross, 19 A. 576 (1890)* , and is defined as "customary contribution laid upon all subjects according to their ability." *19 A. at 578* .

(n19)Footnote 281. The Earliest Printed Laws of Pennsylvania 1681-1713 201-205 (John D. Cushing ed. 1978).

(n20)Footnote 282. The Earliest Printed Laws of Delaware 1704-1741 1-8 (John D. Cushing ed. 1978).

(n21)Footnote 283. *Id.* at 9-290.

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CHAPTER 6 DEVELOPMENT OF PROPERTY LAW IN ENGLAND'S AMERICAN COLONIES

1-6 Thompson on Real Property, Thomas Editions § 6.10

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§ 6.10 Development of Property Law in New Jersey (from 1638).

§ 6.10(a) Early English Grants of New Jersey Land.

The land that ultimately became the colony of New Jersey was first the subject of English land grants in late 16th century conveyances to Sir Humphrey Gilbert and to Sir Walter Raleigh. Next, the land was included in the letters patent granted on April 10, 1607, by King James I for the colonization of Virginia. Patentees from London were authorized to establish a privately funded joint stock company to colonize the southern half of the territory included in the patent, between the 34th and 41st parallels, roughly from southern North Carolina to southern Pennsylvania. Other patentees, principally from Plymouth, were authorized to similarly found a second colony somewhere in the northern part of the patent, between the 38th and 45th parallels, extending from northern Virginia to the middle of Maine.

The area in the middle of the patented territory, between 38 and 41 degrees latitude, which could be settled by either the Virginia Company or the Plymouth Company, included most of present-day New Jersey. When the Virginia Company obtained a second patent in 1609, this overlapping area was reduced by being shifted back to 40 degrees latitude, and thus, most of New Jersey was assigned unequivocally to the Plymouth Company's northern part of the Virginia patent. While haphazard exploration by the English occurred after this time, no meaningful attempt at colonization took place until the Dutch began to arrive several years later.

§ 6.10(b) First Settlements by the Dutch.

In the absence of English settlers during the early years of the 17th century, Dutch colonists founded the first permanent European settlement in New Jersey. The precursors of Dutch settlers on New Jersey land were members of Henry Hudson's *Half Moon* crew in 1609, and these may indeed have been the first white men to set foot on New Jersey soil. No further Dutch activity occurred until 1610, when Amsterdam merchants sent a ship to the area to open trade with the Indians. In 1611 the Dutch government licensed two ships to proceed to the Bay of New York.

In 1614 the Dutch government issued an edict by which Dutch citizens were invited to explore the territory and thus obtain exclusive privileges of settlement. Pursuant to the edict, explorers for the newly formed United Netherland Company reached the American coast, made extensive investigations, and returned and reported. In October 1614, this United New Netherland Company obtained an exclusive right to visit and navigate in New Netherland, lying between

the 40th and 45th parallels. During the years to follow, the company began to form a small trading settlement on Manhattan Island and undoubtedly explored the lands west of the Hudson River.

Their first settlement, on an island in the Hudson called Fort Orange (near Albany), was abandoned for the more favorable Fort Amsterdam site on Manhattan Island. In 1615, a small fortification was established opposite the Manhattan settlement on New Jersey territory. Sometime between 1617 and 1620, another settlement may have been established at Bergen. n284 It is believed that sometime in 1614, the Dutch at Manhattan were visited by a Captain Argall of the English colony at Jamestown, who forced them to submit themselves and their settlement to the English monarch. Then in November 1620, the old Plymouth Company was revived with a grant of all lands between 40 and 48 degrees latitude (roughly between southern Pennsylvania and northern Maine) to Sir Ferdinando Gorges and others, naturally in complete disregard of any Dutch claims.

While the Dutch settlers were threatened with conflicting claims from the English, their original company license expired. In 1621 the Dutch government granted a new charter to the West India Company with much broader powers of government and stronger participation by the government. As stated earlier in this chapter, n285 the 1621 charter gave the company a monopoly over trade and traffic to the New World for a period of twenty-four years but contained no mention of any company power to deal with land. Nevertheless, the company did exercise power over land transactions.

In 1624 the first Dutch settlers in New Jersey, consisting of two families and eight single men, took up residence on what is now called Burlington Island, in the Delaware River, but it was abandoned by 1630. A small trading post at Fort Nassau, in the present city of Gloucester, was set up in 1626, but was occupied only intermittently. No permanent settlement in New Jersey arose until after the Charter of Privileges to Patroons was announced in 1629.

The patroonships constituted an attempt by the company to completely delegate responsibility for colonization to affluent and interested adventurers. The owner of a patroonship was vested with certain manorial rights, as described earlier in this chapter: n286

> The policy of encouraging settlement by patroons imparted significant consequences for landholding in New Netherlands. Patroons can be best described as the Dutch equivalents of English manorial lords. A patroon who held land held it according to a feudal system of land rights, which included the rights to require services as well as rents from tenants who were occupying the patroon's lands, and the right to exercise judicial and other governmental powers over the patroon's holdings. Only the patroon held the land outright; others could only be tenants of the patroon. The patroons of New Netherlands obligated themselves to commence a colony with at least 50 persons during a four-year period of time, in return for which each patroon received manorial and proprietary rights to sixteen miles of Hudson River shoreline and the lands behind the shoreline.

The following excerpts from the 1629 Charter of Privileges to Patroons amply illustrate this explicit introduction of feudalism to North America:

> III. All such [members of said Company as may be inclined to settle a Colonie in New Netherland] shall be acknowledged Patroons of New Netherland who shall, within the space of four years next after they have given notice to any of the Chambers of the Company here, or to the Commander or Council there, undertake to plant a Colonie there of fifty souls, upwards of fifteen years old; one-fourth part within one year, and within three years after the sending of the first, making together four years, the remainder, to the full number of fifty persons, to be shipped from hence, on pain, in case of wilful neglect, of being deprived of the privileges obtained ...
>
> IV. They shall, from the time they make known the situation of the places where they propose to settle Colonies, have the preference to all others of the absolute property of such lands as they have there

chosen ...

VI. They shall forever possess and enjoy all the lands lying within the aforesaid limits, together with the fruits, rights, minerals, rivers and fountains thereof; as also the chief command and lower jurisdictions, fishing, fowling and grinding, to the exclusion of all others, to be holden from the Company as a perpetual inheritance, without it ever devolving again to the Company; and further, no person or persons whatsoever shall be privileged to fish and hunt but the Patroons and such as they shall permit. And in case any one should in time prospere so much as to found one or more cities, he shall have power and authority to establish officers and magistrates there, and to make use of the title of his Colonie, according to his pleasure and to the quality of the persons.

VII. There shall likewise be granted to all Patroons who shall desire the same, ... liberty to dispose of their aforesaid heritage by testament.

VIII. The Patroons may, if they think proper, make use of all lands, rivers and woods lying contiguous to them, for and during so long a time as this Company shall grant them to other Patroons or private persons ...

XIX. [The Company] will not take from the service of the Patroons any of their colonists, either man or woman, son or daughter, manservant or maid-servant; and, though any of these should desire the same, they will not receive them, much less permit them to leave their Patroons, and enter into the service of another, unless on consent obtained from their Patroons in writing, and this for and during so many years as they are bound to their Patroons...

XX. From all judgments given by the Courts of the Patroons for upwards of fifty guilders, there may be an appeal to the Company's Commander and Council in New Netherland.

XXI. In regard to such private persons as on their own account, or others in the service of their masters here (not enjoying the same privileges as the Patroons), shall be inclined to go thither and settle, they shall, with the approbation of the Director and Council there, be at liberty to take up and take possession of as much land as they shall be able properly to improve, and shall enjoy the same in full property either for themselves or masters. n287

None of the patroonships in New Jersey were ultimately successful. Patroonship rights were either never claimed by actual settlement or were abandoned or were sold back to the company. However, even without official patroonship administration, some of the lands designated as patroonships remained undivided and at least nominally under feudal obligations:

... the Charter of Privileges to patroons was intended to encourage private individuals to establish settlements at various points on the Hudson and Delaware, or North and South, rivers. Numerous grievances, occasioned by friction between patroons and the Company, were partially allayed by a new charter in 1640, restricting the area of the grants, and encouraging independent settlement; but the feudal privileges of the patroons were not interfered with. "Many of the old patroon estates long remained undivided, and the heirs of the founders claimed some semi-feudal privileges well into the nineteenth century." n288

The first permanent settlement in New Jersey originated with a patroonship, the Manor of Pavonia, which was registered in 1630 and included most of the modern shoreline of Jersey City and Hoboken. The settlement struggled, and by about 1634, the patroonship rights had been sold back to the company. By 1638, however, the settlement had become permanent.

Even though the patroonships failed, the principles announced in the patroonship charter remained as permanent characteristics of Dutch governance and land arrangements:

> This charter formed the principal basis upon which the civil institutions of New Netherland came to be placed... The principal directors of the plan were ready to seize for themselves the advantages offered; in the character as Patroons, they secured acquisitions in the province which almost gave them a monopoly in land, and thus they were able to retain, in their own hands, some of the most important privileges yielded in the charter. To the mass of actual settlers nothing whatever was given. The charter contemplated or allowed, the establishment of a kind of feudal or manorial rule, by which the colonists would be held in a state of complete independence. No provision was made for the division of lands, either present or prospective. The people to be sent by the Patroons, were regarded, and were to be controlled by the owners of the soil, as a servile class. They were to become American serfs ...
>
> By a wiser provision, the charter gave liberty to private adventurers to make a selection of lands and to enjoy the same by personal right. n289

When Willem Kieft arrived as the new governor of New Netherland in 1638, there were only one bowery and four plantations in the New Jersey portion of the province. n290 Upon Kieft's arrival, settlements were begun at present-day Hoboken, Ridgefield Park (Old Hackensack), and Old Tappan. n291 Typical of them all was the landholding arrangement at Hoboken, where on January 1, 1641, a settler named Aert Teunissen leased a bowery within the bounds of the old Pavonia patroonship for a term of ten years, during which time he cleared the land, fenced the fields, and built a house. n292 The Pavonia settlements were devastated by Indian attacks in 1643-1645 and 1655-1658. Finally, in 1660 the Town of Bergen, New Jersey's first town, was founded on the site, families were allotted town plots, and the town was permitted to have a court and local government powers. The nearby settlement of Communipaw was also strengthened. By 1664, after half a century of Dutch colonizing, Bergen and Communipaw were the only two villages in New Jersey.

§ 6.10(c) Attempted Colonization by Swedes.

Meanwhile, a feeble Swedish attempt at colonization began with a settlement at Wilmington, on the Delaware side of the Delaware River, in 1638, followed by a settlement on the New Jersey side in 1643. The latter site was abandoned after a few years, but the Swedes sought to extend their control of the river all the way to Trenton, building forts and blockhouses along the way. A show of Dutch force in 1655 convinced the Swedes to retreat. While some Swedish settlers left the area, others remained, but without the auspices of their government.

§ 6.10(d) English Take-over in 1664.

During none of these decades did the English show any sign of relinquishing their claims to New Jersey land, which ultimately rested on John Cabot's 1497 discovery voyage. New Jersey land had been included in the Elizabethan grant to Raleigh and Humphries, King James I's Virginia grants in 1606 and 1609, the Argall visit of 1614, and the Plymouth Company grant of 1620; nevertheless, in 1634 King Charles I granted New Jersey land to Sir Edmund Plowden and his associates, who called their grant New Albion. n293 Beginning in 1642 and continuing thereafter, English colonists from New Haven made short-lived attempts to claim New Jersey lands along the Delaware River near present-day Salem. Finally, in 1664 King Charles II made his famous grant to his brother, the Duke of York (the future King James II), of the lands which encompassed the future states of New York, New Jersey, Delaware and Pennsylvania.

The royal charter of 1664 is discussed in detail in § 6.05(e)(1), *supra*. Here it is necessary only to reiterate that "the patent was expressed in terms of the fullest property rights consistent with the feudal incidents still connected with the tenure of free and common socage"; that "the grantee, as a feudal lord, was given extensive powers of government and court jurisdiction"; that "the laws to be administered in the granted lands were to be not contrary to and as near 'as conveniently may bee' to the laws of England, [with] judicial judgments and sentences subject to a right of appeal in

England"; and that "the terms of this patent appeared designed to expressly supersede any previous and conflicting grants of the same lands." n294

§ 6.10(e) Landholding Rights Under the English Proprietors.

§ 6.10(e)(1) Application of The Duke's Law in 1665.

The powers of the 1664 charter were implemented by the "Duke's Law" of 1665, although, at first, settlers in the former Dutch areas were permitted to be governed by their traditional laws. Even this changed when English rule resumed after a brief Dutch interlude in 1673-1674. The provisions of the "Duke's Law" related to landholding, typical of English laws adapted to the frontier environment, are summarized in § 6.05(e)(2), *supra*.

§ 6.10(e)(2) Berkeley and Carteret's 1665 "Concessions and Agreement."

The Duke of York was also had to subdue the Dutch of New Amsterdam in order to make good his claim to his vast American grant, but so sure was he of success, that even while his fleet was underway to attempt the task, by deed of lease and release he re-granted a large portion of his land, an area encompassing most of New Jersey, to John Lord Berkeley and Sir George Carteret.

Because the Duke of York had been granted governmental rights over his grant, Berkeley and Carteret assumed that their grant from the Duke also included rights of government, as if it were a feudal fief. In fact, the New Jersey patent of 1664 included only rights to the soil, for only the king could grant directly rights of government. These nearly feudal proprietorships typically included features annoying to individual colonists, such as requiring an oath of loyalty to the proprietor and the payment of quitrents.

To offset such objections, in 1665 the proprietors Berkeley and Carteret issued a set of "Concessions and Agreement of the Lords Proprietors of the Province of New Caesarea or New-Jersey" to induce settlers into New Jersey. This document was the first explicit expression of fundamental law in New Jersey:

> This instrument of government possessed the nature of a constitution even though, being handed down by a superior claiming both the right of territory and the right of government, it differs from the modern concept of an organic law as one created by the sovereign power residing in the people. It provided for a governor representing the proprietors, a council appointed by him and other officials designated by the proprietors or by him, and a general assembly consisting of the governor, members of the council, and elected representatives. The franchise was limited to freeholders and annual elections for the twelve representatives of the lower house were authorized. The legislature had authority to create courts of law, to levy taxes, to raise a militia, to establish local units of government, and to enact all other necessary laws provided they were "consonant to reason and, as neare as may be conveniently agreeable to the Lawes and Customes of his Majesties Kingdom of England" and not against the interest of the proprietors or their heirs. The proprietors reserved the right to give their assent or refusal to such legislation. Certain private rights were assured, among them the guarantee of liberty of conscience. No taxes were to be levied without the consent of the representatives. Possession of land for seven years operated as a proscription against review or resurvey. n295

The specific provisions of the "Concessions" relating to land rights may be summarized as follows:

> General Provisions:
>
> Item 3: The chief secretary shall record all grants, conveyances, leases (of more than one year) of land and houses, which shall be witnessed, acknowledged, and attested.

Item 4: A surveyor general shall be appointed to lay out and bound all lands granted within the province.

Item 6: All persons who swear allegiance to the King of England shall be admitted to plant and become freemen of the province.

Powers of the Assembly:

2. To make necessary laws "as neere as may be conveniently agreeable to the Lawes and Customes of this Majesties Kingdom of England."

4. To lay equal taxes and assessments upon lands.

5. To create as many manors in the province as seems "meet and convenient."

9. To prescribe the quantities of land to be allotted to each person, to make rules for casting of lots for land.

10. To make provision for collecting quitrents.

Powers of the Governor and Council:

vii. To make warrants and to seal grants of land.

For the Security of the Proprietors and Inhabitants:

2. Lands quietly held, planted and possessed for seven years after survey shall not be subject to review or survey or alteration of bounds.

3. No one whose cattle stray on public land within the province is liable for trespass, provided custom of commons is not claimed nor any person hindered from taking up and appropriating land so grazed upon, and the cattle are not intentionally grazed upon such lands.

For More Speedily Settling the Province [the following head rights apply]:

1. Persons already in the province before January 1, 1665

Freemen with arms and provisions -- 150 acres

For servants with arms and provision -- 150 acres

For weaker servants, slaves over 14 years of age -- 75 acres

For Christian servants, upon completion of service -- 75 acres

2. Persons who shall go to the province before January 1, 1665

Masters and mistresses -- 120 acres

Masters and mistresses -- 120 acres

For able-bodied male servants -- 120 acres

For weaker servants or for slaves over 14 years of age -- 60 acres

Christian servants, for their own use -- 60 acres

3 & 4. Persons who arrive during 1665

90 acres for each free person and able-bodied servant

45 acres for each weaker servant, slave over 14, Christian servant

5. Persons who arrive during 1666

60 acres for each free person and able-bodied servant

30 acres for each weaker servant, slave over 14, Christian servant

6. Various occupancy requirements

To Provide that Lands be More Regularly Laid Out and Titles and Possession Better Ascertained:

i. Lands shall be divided into lots of not less than 2,100 acres nor more than 21,000 acres.

ii & iii. The Governor or his deputy shall sign and seal warrants, and other provisions to survey, certify and record conveyances, with grants of land to be in approximately the following form:

> The Lords Propriators of the Province of New Cesaria or New Jersey doe hereby Grannt unto A B of the Province aforesaid A plantation conteyning acres English measure bounding (as in the Certificates) To hold to him (or her) his (or her) heires and assignes for ever, Yeilding and payeing yearely to the said Lord Propriators their heires or assignes every 25th day of March according to the English account, One halfe penny or One penny of lawfull money of England for every of the said acres To be holden of the Manor of in free and common Soccage, the first payment of which Rent to begin the 25th day of March which shall be in the yeare of our Lord according to the English account 1670 ...

iv. Convenient portions of lands are granted for highways and streets not more than 100 feet wide, and 200 acres for parish churches.

v. Lands laid out for streets and churches are exempt from rents and taxes.

vi. Quitrent of one half penny per acre paid yearly.

vii. Inhabitants have "free passage through or by any Seas, bounds creeks rivers rivuletts &c. in the said Province through or by which they must necessarilie passe to come from the maine Ocean to any part of the Province aforesaid." n296

Meanwhile, even before the 1665 "Concessions and Agreement," the governor of New York in 1664 purchased large tracts of New Jersey lands from Indians and made grants of those lands to settlers from Long Island wishing to establish a town. The grants conferred the usual rights and required the payment of quitrents, but they remitted the quitrent payments until 1670. These settlers moved in under the New York grants and then took the oath of loyalty to the proprietary governor of New Jersey. The New York governor subsequently made another large grant of New Jersey land in 1665, this one deferring quitrent payments until 1672. Again the settlers swore loyalty to the New Jersey governor, who issued confirmatory deeds of subsequent grants and, when he issued a town charter, required that town quitrent be paid.

The towns founded during this period were each planned before settlement. The typical town settler obtained by purchase a home lot with some meadow and upland acreage as well, distributed either by assignment or by lot. The town quitrents were also accorded a period of grace, but when that period ended, the towns objected to the quitrents; their objections rested on the theory that their land rights actually derived from the earlier grant to Berkeley and Carteret (with no quitrent specified, because the grant preceded the "Concessions and Agreement") rather than from the New York governor's grant. One town even based nonpayment on the theory that its land was obtained from the Indians.

Finally, in 1672 in England, the Duke of York responded angrily to the situation by revoking all grants from the New York governor and requiring obedience from all. To follow up with this retrenchment, on December 6, 1672, the proprietor Carteret issued changes in the government and land rules in a document styled "A Declaration of the True Intent and Meaning of the Concessions and Agreement."

§ 6.10(e)(3) Clarification of Land Rights in 1672.

The 1672 order of the proprietors called "A Declaration of the True Intent and Meaning of us Lords Proprietors, and Explanation of their Concessions made to the Adventurers and Planters of New-Caesarea or New-Jersey," among other provisions, required that no person could be considered a freeholder and able to vote unless already holding lands by patent, that is, by proprietary title: n297

> All landowners must obtain proprietary patents lest their lands be forfeited, and the constables were ordered to collect quitrents by action of distraint ... Henceforth the governor and council alone would qualify freemen, establish courts, charter town corporations, appoint provincial officers, and allot lands. They alone would decide what measures would be introduced in the assembly. Those participating in the rebellion must yield submission, and all individuals and towns must pay their quitrent arrears immediately. Though the revolt was put down, the grievances that were engendered festered until the end of the proprietary period in 1702. n298

§ 6.10(f) Division of the Province into East New Jersey and West New Jersey.

Berkeley sold his interest in New Jersey in 1674, but the buyer went bankrupt in 1676. One of the trustees managing his affairs was William Penn, and in 1676, Penn and the other trustees persuaded Carteret to permit a division of New Jersey into East New Jersey (3,000 square miles) and West New Jersey (4,600 square miles), with the western portion coming under the stewardship of Penn and the other trustees. This division of New Jersey would last until 1702.

§ 6.10(f)(1) Landholding in East New Jersey.

In East New Jersey, the basic law that had been adopted earlier by the first assembly of the whole province, in a five-day session held at Elizabethtown in 1668, was continued in force. After the division, the East New Jersey assembly met sporadically and adopted, with minor modifications, portions of the "Duke's Law."

The pattern of landholding differed between East and West Jersey:

> In the eastern division the holdings were smaller, except probably among the Dutch, the land being more intensely cultivated. This was due somewhat to the nature of the soil, and the fact that a commercial spirit was more prevalent than in West Jersey. n299

In East New Jersey the discontent among the settlers continued over the issue of how much power rested with the proprietors. Finally, in 1682 the Carteret heirs sold their proprietorship over East New Jersey to a group headed by William Penn (who was already immersed in the affairs of West New Jersey). The conveyance was accomplished by a deed of lease and release, dated February 1-2, 1682, reciting that the purchasers had bought the soil, all arrears of quitrents, and the right of government. These new proprietors, along with others added to their number shortly

thereafter, drew up "Fundamental Constitutions" for East New Jersey, revealing the proprietors' strong feudal orientation, but the provisions were never adopted by the assembly.

Upon the arrival of a new deputy governor (the chief official in residence in the province) in 1684, the proprietors instructed him to continue land purchases from the Indians, to resurvey patents in dispute, to collect quitrents in arrears, and to review the validity of disputed land titles. In 1685 the proprietors created the Board of Proprietors of the Eastern Division of New Jersey with broad powers. The Board:

> could approve acts of the assembly until reviewed by the British proprietors; it could settle matters at issue between the proprietors and the inhabitants, especially pretenses to land, arrears of quitrents, and the validity of titles; it could lease proprietors' lands, purchase land from the Indians, and determine the boundary lines with West New Jersey and New York ...

Because East New Jersey land was held by twenty-four proprietors, conveyances were expressed as fractional shares of a proprietorship:

> By now the system of land conveyancing was causing untold confusion in both Jerseys. For instance, the transfer of 1/32 of 1/16 of 1/2 share (of 24) by Nicholas Brown of Shrewsbury to Stephen West of New England is a prime example of the process in East Jersey... n300

Therefore, the Board was instructed to refine the land distribution procedures:

> As instructed, the board strove to perfect the orderly laying out of the proprietors' lands. They would be sold at not less than £10 per acre. To prevent engrossing, no one might buy or lease more than 1,000 acres on one site. On individual holdings the quitrent was reduced to 1d. per acre. When huge tracts were purchased from the Indians, such as the 24,000-acre holding at Barnegat, they would be divided into twenty-four parts, and small purchases would be assigned in rotation to a few proprietors in turn. Assessments of £5 and £10 were levied from time to time for land development on all proprietors. n301

A dispute over quitrent payments was finally settled by a test case in the provincial court, following which the towns capitulated and paid their quitrents.

§ 6.10(f)(2) Landholding in West New Jersey.

In West New Jersey, Penn and his associates prepared the famous "Concessions and Agreements of the Proprietors, Freeholders, and Inhabitants of the Province of West New Jersey," written in 1676 (probably by Edward Byllynge, the chief proprietor) and issued in 1677. The substantial rights of self-government and liberal land provisions of this document have been summarized as follows:

> The Concessions of 1677 provided for an elected assembly with power to enact laws providing they were in conformity with the laws of England and the Concessions themselves. All adult males, with few exceptions, were entitled to vote on measures of the assembly. The first duty of an assemblyman was to present the recommendations or grievances of his constituents, and should he fail to do so he could be challenged by the other members of his district. All bills could be amended, and a two-thirds vote was required for passage. Until the assembly met -- the first meeting was scheduled for March 25, 1681, the beginning of the year, old style -- the province would be governed by appointed commissioners who would also serve as magistrates. The Concessions also contained a carefully prepared code of law, embodying Quaker notions of justice which were adopted with little change.
>
> Since the trustees expected to dispose of all 100 shares, there could be no proprietary system of overlordship. The commissioners were instructed to purchase large tracts of land from the Indians and to

> divide each purchase into 100 parts. The first dividend of land was stipulated at 5,000 acres per full share, with the fractioner receiving land in proportion [by 1714 each full proprietary share had yielded its owner 16,500 acres in four dividends]. The quitrent system did not take root in West Jersey, because the shareholder imposing quitrents would have had little chance of selling his lands. The unit of settlement became a medium-sized farm cultivated by the owner and his family. The Concessions provided a headright system, and liberal terms 50 acres and freedom dues were offered indentured servants at the expiration of a three or four-year term. n302

Over time the "medium-sized farm" evolved into a larger holding in West Jersey:

> In the western division the settlers took up large tracts, and through the consolidation of estates, owing to intermarriages of members of the Society of Friends and a general observance of the rule of primogeniture, acre was laid to acre, until West Jersey passed under the control of comparatively few families. Consequently the growth of a landed aristocracy was a logical conclusion. While many of West Jersey's landed proprietors, by their interests in timber and in trade, were enabled to maintain their estates, others were plunged hopelessly in debt, as the result of improvident and expensive methods of cultivation. This condition became apparent long before the outbreak of the Revolutionary War, and caused young men in such families to "clear" less desirable but cheaper land in the "Pines," or to engage in business in Philadelphia. n303

§ 6.10(f)(2)(i) The 1677 "Concessions and Agreements" for West New Jersey.

The provisions of the 1677 "Concessions and Agreements of the Proprietors Freeholders and Inhabitants of the Province of West New Jersey in America" relating to landholding are listed or summarized as follows:

> Chapter 1: Commissioners to be appointed to obtain land and distribute it to shareholders, and to keep a registry; commissioners also to set out towns and establish boundaries.
>
> Chapter 2: Commissioners to ensure that lands are properly surveyed and registered.
>
> Chapter 4: Headright system established: during the first year, 70 acres per able-bodied person and 50 acres for each younger or weaker person; small acreages in subsequent years. Quitrents set at one penny per acre for town land and one-half penny per acre for other land, with declining amounts for land acquired later. Conditions of settlement and improvements set out for maintaining land grants; upon failure of an owner to meet the conditions, the commissioners may lease the land for a term of up to twenty years.
>
> Chapter 5: Regulations for surveying and registering the land.
>
> Chapter 6: Lands allotted for public facilities such as highways and streets, harbors and public houses. Rights in public lands described:
>
> That all inhabitants within the said Province of West Jersey have the Liberty of Fishing in Delaware River or on the sea coast and the Liberty of Hunting and Killing any Deer or other wild beasts the Liberty to Shoot or Take any wild Fowles within the said Province provided alwaies that they doe not Hunt Kill Shoot or Take any such Deer wild Beasts or Fowles upon the Lands that is or shall be surveyed taken up inclosed sowen and planted except the owners of the sd lands or their assignes.
>
> Chapter 7: Title to lands held at least seven years after survey and registration shall be secure.
>
> Chapter 8: Custom of commons affirmed, and the owner of stray cattle on such land shall not be

liable to trespass.

Chapter 11: No tax to be imposed on the inhabitants without their consent.

Chapter 17: No freeholder or inhabitant "shall be deprived or condemned of Life limb Liberty estate Property or any wayes hurt in his or their Priveledges Freedoms or Franchises without a due tryall and Judgement passed by twelve good and Lawfull men of his neighborhood first had ...."

Chapter 24: Registers of "all deeds evidences and conveyances of land" to be kept both in England and in the province of West Jersey. Instructions for execution and registration given for such documents, including leases and mortgages.

Chapter 26: Grants of Indian lands to be made in writing.

Chapter 29: Administration of decedents' estates and care of orphans.

Chapter 43: Taxes and assessments levied on lands shall be imposed equally. n304

§ 6.10(f)(2)(ii) The Ten "Fundamentals" of 1681.

The commissioners governed until the assembly first met in 1681. When the assembly did meet, its first act was to adopt ten "fundamentals" whose purpose was to keep governing power in the hands of the inhabitants. None of the ten "fundamentals" dealt directly with land rights, except number six, prohibiting the levying of any tax without authority of the assembly. n305

§ 6.10(f)(2)(iii) Later Land Regulations.

During the ensuing years, other laws and regulations dealing with land were adopted:

Commissioners for the Settling and Regulation of Lands were appointed and given broad powers. *Inter alia* they were instructed to mark the bounds of the several tenths and to lay out 64,000 acres in each for ultimate distribution to the proprietors or their assigns. Actually, with the creation of the Gloucester Court in May 1686, a typical county court, the system of tenths was gradually abandoned in favor of the county system, and by 1693 the county system of local government was fully established. Beginning with Burlington and Salem, township governments were instituted, with power to adopt local ordinances, assess local rates, and elect town officials. The commissioners also adopted regulations to forestall the creation of large estates and the accumulation of choice tracts by speculators. Except for Dr. Coxe's later feeble efforts at Coxe's Hall on Delaware Bay, there were no mesne lords following John Fenwick. Since most Quakers came as fractional owners or with some funds, the number of nonowners was small. Land was plentiful and relatively inexpensive. n306

As in East New Jersey, the system of conveyancing had become complex and confusing. With the proprietor Fenwick holding 10 of the 100 shares and disposing of them independently, a typical West New Jersey conveyance would be the "sale of 1/32 of 3/90 of 90/100 shares by George Hutcheson to Anthony Woodhouse." n307

Among the West New Jersey proprietors, a Dr. Daniel Coxe purchased the holdings of the Byllynge heirs in 1687. In that same year, the West New Jersey assembly:

requested the resident proprietors to assume management of all proprietary lands. A group of fifty-nine resident proprietors, each owning a 1/32 share, organized as the Council of Proprietors of West Jersey in September 1688. From their number they elected nine commissioners, five from Burlington and four from Gloucester County. The principal responsibilities of the council were to record all proprietary

rights, supervise the distribution of dividends of land, issue warrants of survey, and administer unappropriated lands. The resident proprietors now felt in a position to safeguard their property interests vis-a-vis Coxe and the other English proprietors. With the establishment of the West Jersey Council on September 1, 1688 and the East Jersey Board of April 19, 1685, the two colonies, in matters of land management, were running a parallel course. n308

As a sop to Coxe, the West Jersey Council refrained from enforcing its restriction on the formation of great estates. Coxe's agents proceeded to buy up huge tracts, so that by 1692 Coxe owned probably twenty proprieties amounting to more than one million acres. He even attempted to establish a manor, called Coxe's Hall, with servants, feudal services, and quitrents. Worried about interference with the province by Governor Andros of New York, however, Coxe sold his holdings in 1693.

§ 6.10(g) Transforming the Proprietary Colonies into a Royal Province.

Proprietors of both New Jersey divisions were ready to transfer rights of government to the English crown in 1701. King William III approved the commission and instructions to the royal governor in November, 1702, but his death delayed the approval and execution of the Act of Surrender by Queen Anne until April 1703. The commission and instructions to the royal governor, with occasional enlargements and renewals, comprised the basic law of New Jersey until 1776.

§ 6.10(h) Instructions to the Royal Governor Pertaining to Land.

The provisions of the first royal governor's commission and instructions that related to landholding in the reunified New Jersey colony are listed or summarized as follows:

14. One general assembly for both East New Jersey and West New Jersey should be formed and called.

15. An assembly member must have a freehold interest in at least 1,000 acres situated in the division for which the member is elected; voters must have a freehold estate of at least 100 acres.

16. The governor is to collect, revise, correct and enact all previous laws of New Jersey as "shall be judged proper, and conducive to Our service and the Welfare of Our said Province, that they may be transmitted unto Us in Authentick Form, for our Approbation or Disallowance.

36. Our Will and Pleasure is that for the better quieting the minds of Our Good Subjects Inhabitants of Our said Province, and for settling the Properties and Possessions of all Persons concerned therein, either as General Proprietors of the Soyle under the first Original Grant of the said Province made by the late King Charles the Second to the late Duke of Yorke, Or as particular Purchasers of any Parcells of Land from the said General Proprietors, You shall propose to the General Assembly of Our Said Province the passing of such Act, or Acts, whereby the Right and Property of the said General Proprietors, to the Soyle of Our said Province may be confirmed to them according to their respective Rights and Titles; together with all such Quit-Rents as have been reserved or are or shall become due to the said General Proprietors from the Inhabitants of our said Province, and all such Priviledges as are exprest in the Conveyances made by the said Duke of Yorke; Excepting only the Right of Government, which remains in Us; And You are further to take care that by the said Act or Acts so to be passed the particular Titles and Estates of all the Inhabitants of that Province and other Purchasers claiming under the said General Proprietors be confirmed and Settled as of Right does appertain, under such obligations as shall tend to the best and speediest Improvement or Cultivation of the same. Provided always that you do not consent to any Act or Acts to lay any Tax upon Lands that lye unprofitable.

37. You shall not permit any other Person or Persons, beside the said General Proprietors, or their Agents to purchase any land whatsoever from the Indians within the Limits of their Grant.

38. You are to permit the Surveyors and other Person appointed by the aforementioned General Proprietors of the Soile of that Province, for Surveying and recording the Surveys of Land granted by, and held of them, to Execute accordingly their respective Trusts, And You are likewise to permit and, if need be, aid and Assist such other Agent or Agents, as shall be appointed by the said Proprietors for that End, To Collect and Receive the Quit-Rents which are or shall be due unto them, from the particular Possessors of any parcells or Tracts of Land from time to time ...

49. You are to take care that no Mans life, Member, Freehold or Goods be taken away or harmed in Our said Province, otherwise than by Established and known Laws, not repugnant to, but as much as may be agreeable to the Laws of England.

[P 34 of instructions following the numbered paragraphs]:

You are for the better Administration of Justice to Endeavour to get a Law passed (if not already done) wherein shall be set the Value of Mens Estates either in Good or Lands, under which they shall not be capable of Serving as Jurors. n309

The assembly of the now united province of New Jersey began to sit on a regular basis in 1703, issuing its session laws in printed form a few pages at a time. A collection of laws passed between 1703-1717 was published in 1717, with supplemented versions reprinted up through 1722. The laws relating to landholding in that legislation is listed or summarized as follows:

Ch. I (1703): Regulating the purchasing of land from the Indians.

Ch. XII (1709): Explaining grants and patents for land executed by Phillip Cartert and Council in the Eastern Division, "according to the true intent and meaning of the Grantor and Grantee."

Ch. XXIII (1709): Dividing and ascertaining the boundaries of all the counties of the province.

Ch. XXXIX (1713): Preventing waste of timber, pine and cedar trees and poles within the province.

Ch. XLVI (1713): Confirming letters of administration granted within the province.

Ch. XLVIII (1713): Regulating fences.

Ch. LI (1713): "An Act for Confirming of Conveyances of Lands made and to be made by Wills and Powers of Attorney, and declaring what Exemplifications of Records and other Things shall be holden and received for good Evidence of Estates of Inheritance, and for Transfering Uses into Possession." Included within this legislation is an intriguing section essentially reenacting the Statute of Uses, which had been in effect in England for 177 years and for 71 years before the first permanent English settlement in North America:

And be it enacted by the Authority aforesaid, That all and every Person or Persons to whom the use or uses of any Tract or Tracts of Land within this Province have been Sold, Given, Limited, Granted, Released or Conveyed by Deed, Grant or any other Legal Conveyance whatsoever, or that shall hereafter be granted by any Deed or Conveyance whatsoever, such Grantees, their Heirs and Assigns shall be Deemed, Taken and Esteemed to be in as Full and Ample Possession of such Lands, Tenements and Hereditaments, to all Intents, Constructions and Purposes as if such Grantees, their Heirs and Assigns were possessed thereof by solemn Livery of Seisin and Possession, and Usage or Custom to the contrary

notwithstanding.

Ch. LII (1713): Shortening of law suits, and regulating the practice of law.

Ch. LV (1713): Acknowledging and recording of deeds and conveyances of land within each county.

Ch. LXVI (1713): Enforcing the observation of the ordinance for establishing fees within the province [including a schedule of attorney's fees for drafting of specific documents].

Among the private acts from this 1713 session of the assembly were several relating to testamentary conveyances of land and authorizing owners of meadow and marshland to take measures on both their own lands and adjoining lands to stop tides from overflowing their lands.

An act of 1716 establishing a fee schedule for documents concerning titles to land.

An act of 1718 "for Running and Ascertaining the Line of Partition or Division between the Eastern and Western Divisions of the Province of New-Jersey, and for preventing Disputes for the Future concerning the same; and for securing to the general Proprietors of the Soil of each of the Divisions, and Persons claiming under them their several and respective Possessions, Rights and Just Claims."

An act of 1720 to prevent the multiplicity of lawsuits. n310

FOOTNOTES:
(n1)Footnote 284. Isaac S. Mulford, A Civic and Political History of New Jersey 41 (1851).

(n2)Footnote 285. *See* § 6.05(b), *supra.*

(n3)Footnote 286. *Id.*

(n4)Footnote 287. Select Charters and Other Documents Illustrative of American History 1606-1775 43-50 (William MacDonald ed. 1914).

(n5)Footnote 288. *Id.* at 43.

(n6)Footnote 289. Isaac S. Mulford, A Civic and Political History of New Jersey 57 (1851).

(n7)Footnote 290. If the farmer and family resided at the site, the site was called a bowery; if they resided elsewhere, the site was called a plantation.

(n8)Footnote 291. Adrian C. Leiby, The Early Dutch and Swedish Settlers of New Jersey 14-17 (1964).

(n9)Footnote 292. *Id.* at 17.

(n10)Footnote 293. Plowden visited New Jersey settlements on the Delaware River in 1642, but had no success in establishing his right to conduct government, so he eventually returned to England. Richard P. Mccormick, New Jersey From Colony to State 14 (1964).

(n11)Footnote 294. *See* § 6.05(e)(1), *supra.*

(n12)Footnote 295. Fundamental Laws and Constitutions of New Jersey 1664-1964 9-10 (Julian P. Boyd ed. 1964).

(n13)Footnote 296. *Id.* at 51-66.

(n14)Footnote 297. *Id.* at 67-70.

(n15)Footnote 298. John E. Pomfret, Colonial New Jersey, A History 31 (1973).

(n16)Footnote 299. Francis Bazley Lee, New Jersey as a Colony and as a State 193-194 (1902).

(n17)Footnote 300. *Id.* at 58.

(n18)Footnote 301. John E. Pomfret, Colonial New Jersey, A History 58-59 (1973).

(n19)Footnote 302. *Id.* at 41-42 (1973).

(n20)Footnote 303. Francis Bazley Lee, New Jersey as a Colony and as a State 193-194 (1902).

(n21)Footnote 304. Fundamental Laws and Constitutions of New Jersey, 1664-1964 71-104 (Julian P. Boyd ed. 1964).

(n22)Footnote 305. *The Fundamental Agreements of the Governor, Proprietors, Freeholders, and Inhabitants of the Province of West New Jersey, November 25, 1681*; Fundamental Laws and Constitutions of New Jersey, 1664-1964 at 104-108 (Julian P. Boyd ed. 1964).

(n23)Footnote 306. John E. Pomfret, Colonial New Jersey, A History 47-48 (1973).

(n24)Footnote 307. *Id.* at 58.

(n25)Footnote 308. *Id.* at 48.

(n26)Footnote 309. *The Instructions from the Queen in Council to the Governor of the Province of New Jersey, November 16, 1702,* in Fundamental Laws and Constitutions of New Jersey, 1664-1964, 126-154 (Julian P. Boyd ed. 1964).

(n27)Footnote 310. The Earliest Printed Laws of New Jersey, 1703-1722 1-145 (John D. Cushing ed. 1978).

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CHAPTER 6 DEVELOPMENT OF PROPERTY LAW IN ENGLAND'S AMERICAN COLONIES

1-6 Thompson on Real Property, Thomas Editions § 6.11

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§ 6.11 Development of Property Law in Pennsylvania (from 1643).

§ 6.11(a) Early Settlement Activity.

Entry of Europeans into the region that is now Pennsylvania began in 1609, when Henry Hudson sailed into Delaware Bay, soon to be followed by other Dutch parties exploring the Delaware River. In 1633 an employee of the Dutch West India Company purchased from the Indians a parcel of land near the Schuylkill River, to be used for establishing a trading post. Because the predominant Dutch interest was fur trading, large real estate holdings were not important.

In 1638 Swedish and Finnish settlers, under the leadership of the Dutchman Peter Minuit and the auspices of the New Sweden Company, purchased more land on the Pennsylvania side of the Delaware River, below the Schuylkill River, which they then divided into farms. As in their concurrent settlement activity in Delaware, the Swedes were unable to base claims to land on rights of discovery or conquest, so they "purchased" lands from the Indians. The purchaser was nominally the Swedish South Sea Company, which had received its first letters patent from King Gustavus Adolphus in 1624, and an essentially similar second charter in 1626.

In 1640 the Swedish West India Company granted to certain Dutch investors a charter effectively creating a patroonship, in order that they could found another settlement in New Sweden. The grantees held their land under the protection of Sweden as hereditary property, with the feudalistic high and low jurisdiction. For the most part, however, the rival Dutch and Swedish colonies competed in "purchasing" lands from the Indians.

§ 6.11(b) The Commencement of English Rule in 1664.

In 1664 the English King Charles II granted to his brother, the Duke of York, lands that included much of what the Dutch claimed in America; this led directly to the English takeover of New Amsterdam, which they quickly renamed New York. An English fleet then approached the Delaware settlements, obtaining the acquiescence of the Swedish colonists and the surrender of the Dutch after a brief battle. The lands included in this famous grant encompassed the future states of New York, New Jersey, Delaware and Pennsylvania. The English also took some territory of the Dutch that was not included in the grant to the Duke of York but had, in fact, been included in the 1632 grant of Maryland to Lord Baltimore.

The royal charter of 1664 is discussed in detail in § 6.05(e)(1), *supra*, and here it is necessary only to reiterate that "the patent was expressed in terms of the fullest property rights consistent with the feudal incidents still connected with the tenure of free and common socage"; that "the grantee, as a feudal lord, was given extensive powers of government and court jurisdiction"; that "the laws to be administered in the granted lands were to be not contrary to and as near 'as conveniently may bee' to the laws of England, [with] judicial judgments and sentences ... subject to a right of appeal in England"; and that "the terms of this patent appeared designed to expressly supersede any previous and conflicting grants of the same lands." n311

§ 6.11(b)(1) Application of The Duke's Law in 1665.

The powers of the 1664 charter were implemented by the "Duke's Law"of 1665 , although at first, settlers in the former Dutch areas were permitted to be governed by their traditional laws. Even this changed, however, when English rule resumed after a brief Dutch interlude in 1673-1674. The provisions of the "Duke's Law" relating to landholding, typical of English laws adapted to the frontier environment, are summarized in § 6.05(e)(2), *supra*. n312

§ 6.11(b)(2) Landholding in Pennsylvania Settlements Incident to Growth in Other Colonies.

In addition to the handful of Swedish, Finnish and Dutch settlers who remained on Pennsylvania soil after the English took over in 1664, a few English settlers moved in because the Pennsylvania land was near to settlement activity taking place in adjacent English provinces. For instance, while most of the English in the lower Delaware Valley were establishing themselves in West New Jersey by 1680, a few took up land across the river in Pennsylvania. Likewise, farther south, some settlers with land patents obtained from the Duke of York during the 1670's, moved in from Maryland; these Marylanders were tobacco farmers who brought slaves with them.

Virtually all of this settlement activity was confined to the Delaware Valley, or the valley of the Delaware River. While the east bank of the river was clearly in New Jersey Territory, the west bank, the so-called Three Lower Counties, was rather tenuously claimed by Maryland. In fact, this area had been included in the 1632 grant to Maryland's proprietor, Lord Baltimore, but the actual settlers had been mostly Dutch, initially under the governance of New Netherland and then under New York, but not under Maryland.

Landholding practices among these early settlers followed various patterns. In the Dutch communities, the basic assumptions underlying the patroonship system prevailed, even though patroonships themselves were not successful. Some lands designated as patroonships, even without official patroonship administration, remained undivided and at least nominally under feudal obligations:

> the Charter of Privileges to patroons ... was intended to encourage private individuals to establish settlements at various points on the Hudson and Delaware, or North and South, rivers. Numerous grievances, occasioned by friction between patroons and the Company, were partially allayed by a new charter in 1640, restricting the area of the grants, and encouraging independent settlement; but the feudal privileges of the patroons were not interfered with. "Many of the old patroon estates long remained undivided, and the heirs of the founders claimed some semi-feudal privileges well into the nineteenth century." n313

Even though the patroonships failed, the principles announced in the patroonship charter remained as permanent characteristics of Dutch governance and land arrangements:

> This charter formed the principal basis upon which the civil institutions of New Netherland came to be placed... The principal directors of the plan were ready to seize for themselves the advantages offered; in the character as Patroons, they secured acquisitions in the province which almost gave them a monopoly in land, and thus they were able to retain, in their own hands, some of the most important privileges yielded in the charter. To the mass of actual settlers nothing whatever was given. The charter

> contemplated or allowed, the establishment of a kind of feudal or manorial rule, by which the colonists would be held in a state of complete dependence. No provision was made for the division of lands, either present or prospective. The people to be sent by the Patroons, were regarded, and were to be controlled by the owners of the soil, as a servile class. They were to become American serfs ...
>
> By a wiser provision, the charter gave liberty to private adventurers, to make a selection of lands, and to enjoy the same by personal right. n314

After the Dutch assumed nominal control of the Swedish settlements in 1655, they agreed to respect the customs, religion, and private property claims of Swedish settlers who wished to remain. When the Dutch took up possession of this territory, their land management practices were also introduced:

> In the settlement of the country, the colonists were to concentrate themselves in families of sixteen to twenty in number, and were to pay annually for their lands twelve stivers a morgen [approximately two acres] in lieu of tenths. The town lots were forty feet by fifty, and the streets from four to five rods in breadth. The Swedes were to be closely watched, and if any should be found disaffected, they were to be sent away ... and, if possible, induced to come to Manhattan. n315

At the same time, a few English colonists from the New England settlements were migrating into the Pennsylvania region, bringing with them their notions of essentially democratic towns and absolute ownership of land. When England "conquered" the Dutch in 1664, assuming control over all Dutch territory in North America, little immediate increase of English immigration into the area occurred.

§ 6.11(c) The Proprietorship of William Penn.

By a royal patent dated March 4, 1680, William Penn received from King Charles II a patent for lands and a grant of governmental authority in the province of Pennsylvania. By deed of feoffment dated August 4, 1682, the Duke of York granted to Penn all the lands in the New York provincial territory covered by the royal patent to Penn from the king, which meant conveyance of title to the Pennsylvania lands. n316

§ 6.11(c)(1) Charter Provisions Relating to Property.

The charter of January 26, 1682, from King Charles II to William Penn came late enough in the English experience with North American colonies that provisions could be included for virtually every major source of concern that had arisen in the previous 75 years. It is a long and detailed document, exhibiting thoughtfulness toward both Penn's desire to conduct a benevolent experiment in Pennsylvania and England's greater assertiveness on matters of empire. The charter formed the basic law of the colony, and its provisions relating to land (excerpted below) were of fundamental importance:

The grant:

> ... [W]ee ... Have given and granted ... unto the said William Penn, his heires and assignes all that tract or parte of land in America, with all the Islands therein conteyned [boundaries and hereditaments described]...

The statement of proprietary ownership and the requirement of allegiance to England:

> Wee Doe ... make, create and constitute the true and absolute proprietaries of the Countrey aforesaid, and of all other, the premises, saving alwayes to us, our heires and successors, the faith and allegiance of the said William Penn, his heires and assignes, and of all other, the proprietaries, tenants and Inhabitants that are, or shall be within the precincts aforesaid...

The habendum, to the "use and behoofe" of Penn, and declaration of tenure in free and common socage, with annual payment of two beaver skins:

> To Have, hold and possesse and enjoy the said tract of Land ... unto the said William Penn, his heires and assigns, to the only proper use and behoofe of the said William Penn, his heires and assignes forever. To be holden of us, our heires and successors, Kings of England, as of our Castle of Windsor, in our County of Berks, in free and common socage by fealty only for all services, and not in Capite or by Knights service, Yeelding and paying therfore to us, our heires and Successors, two Beaver skins to bee delivered att our said Castle of Windsor, on the first day of January, in every yeare...

The declaration that the province is a seignory, or lordship:

> ... [W]ee do hereby Erect the aforesaid Country and Islands, into a province and Seigniorie, and doe call it Pensilvania and we have already made and ordeyned the aforesaid William Penn, his heires and assignes, the true and absolute Proprietaries of all the Lands and Dominions aforesaid.

The grant of governmental powers, consistent with the laws of England:

> ... [W]ee ... doe grant free, full and absolute power, by vertue of these presents to him and his heirs ... for the good and happy government of the said Countrey, to ordeyne, make, enact and under his and their Seals to publish any Lawes whatsoever ... by and with the advice, assent and approbacon of the freemen of the said Countrey, or the greater part of them ... Provided; Nevertheless, that the said Lawes bee consonant to reason, and bee not repugnant or contrarie, but as neere as conveniently may bee agreeable to the Lawes, statutes and rights of this our Kingdome of England...

The continuation of previously-established property rights:

> ... [A]nd our further will and pleasure is, that the Lawes for regulateing and governing of propertie, within the said Province, as well for the descent and enioyment of lands, shall be and continue the same as shall bee for the time being...

The power to create municipalities:

> ... And Wee Doe further ... give and grant unto the said William Penn ...free and absolute power to Divide the said Countrey, and Islands, into Townes, Hundreds and Counties, and to erect and incorporate Townes into Borroughs, and Borroughs into Citties...

The power to sell and grant real property interests, by any estate, and suspending the operation of the Statute Quia Emptores with respect to conveyances from Penn:

> ... Wee have given and granted ... unto the said William Penn full and absolute power, licence and authoritie, That he ... from time to time hereafter forever, att his ... will or pleasure, may assigne, alien, grant, demis or infeoffe of the premises, soe many, and such partes and parcells to him or them, that shall be willing to purchase the same, as they shall think fitt. To Have And To Hold to them, the said person and persons willing to take or purchase ... in fee simple or feetaile, or for the term of life, or liues, or yeares, to be held of the said William Penn ... as of the seigniory of Windsor, by such services, customes and rents, as shall seeme fitt to the said William Penn, and not imediately of us ... the Statute Quia Emptores terrarum ... in any wise notwithstanding...

The power to create manors, hold a court baron, and to hold view of frankpledge, and reinstating the operation of Quia Emptores with respect to conveyances from Penn's successors in interest:

> ... Wee give and grant licence unto the said William Penn to erect any parcells of Land ... into mannors, ... to have and to hold a Court Baron and to have and to hold view of frankpledge...; and Wee doe further grant licence and authoritie that every such person ...who shall erect any such mannor ... shall or may grant all or any parte of his said lands to any person ... in fee simple or any other estate of inheritance, to be held of the said mannors respectively, soe as noe further tenures shall be created, but that upon all further and other alienacons thereafter, to be made the said lands so aliened, shall be held of the same Lord and his heires, of whom the alien did then before hold, and by the like rents and services, which were before due and accustomed. n317

The overall effect of these charter provisions was to give Penn the full extent of feudal powers still recognized in his day, while still preserving all the prerogatives of the monarchy:

> By the charter Penn became the proprietor of a vast but loosely bounded domain... Of this vast area Penn was made the true and absolute proprietor, to hold the land in free and common socage, as of the royal castle of Windsor, paying therefor fealty and allegiance and two beaver skins on the first of January in each year. Though all reference to the palatinate of Durham was carefully omitted, Penn was given almost equivalent authority in the complete control he could exercise over the soil, in his right to determine the form of government, in his extensive privileges of local appointment, and in his ability to issue ordinances of his own in time of need. He could initiate and promulgate laws, but only with the advice, assent, and approbation of the freemen in assembly, that is, as later shown, by the freeholders. In all its main features the charter followed the standard type, differing, however, from the charters of the earlier period in that it reduced considerably the proprietary prerogatives, toned down the strictly feudal aspects so as to render them as innocuous as possible, and reserved to the king all his sovereign powers. In this respect Penn's charter, compared with that of Lord Baltimore, issued fifty years before, or even with that of the Duke of York, issued in 1664, represents the changes which had come over the mind of the English government since the king had been restored to his throne. n318

§ 6.11(c)(2) Land Distribution Practices.

In contrast to the previous colonial practice of simply giving land to settlers willing to come and stay, Penn began selling land:

> In New Netherland and New York ... during the [early] period..., a price seems never to have been put upon the land. Land was sold in Pennsylvania from the very first. As soon as he had secured his title, Penn offered for sale shares of five thousand acres at 100 each. After 1684 this land was also to be liable to a quitrent. The practice of selling land was steadily continued, the prices varying with the period of time which had elapsed since the settlement of the province, with the character and location of the land, and with such other conditions as might affect a bargain. After 1732 prices become more permanent. For thirty years from that date the price was 15, 10s. per hundred acres. Prices were always fixed by the proprietor and his officials ...
>
> ... Escheated land, with such improvements as had been made upon it, was sold at auction, and the larger part of the purchase money went to the proprietor. It was a requirement in all the provinces that land should be settled within a brief period -- often designated as three years -- after the issue of the patent. Squatters' rights, as evidenced by "improvment," were as a rule generously enforced. n319

§ 6.11(c)(3) Quit Rents.

In Pennsylvania quitrents were actively pursued, and, therefore, the various issues and controversies surrounding colonial quitrents became important:

> The most characteristic form of territorial revenue was the quitrent, paid annually at a rate prescribed by the proprietor and received in lieu of all services. It appears in all the provinces ...
>
> In all transactions, and in all the colonies, the form of payment was a matter of importance to the people. So scanty was their supply of money, that payment in kind was always strongly their preference. The proprietors, and afterward the crown, always found their interest in securing money payments whenever it was possible. This in many cases gave rise to controversies over quitrents, which in turn occasioned the interference of the assembly in a matter which the proprietors claimed as exclusively their own...
>
> In all the provinces quitrents were an object of aversion. They were continually falling into arrears. Payment was avoided whenever it was possible; and it was not infrequently resisted. In the last resort payment could be enforced by distress, the assistance of the sheriff being called in for the purpose. In Pennsylvania, as in other provinces, these conditions were ever and anon recurring... n320

§ 6.11(c)(4) Administration of Land Affairs.

Both the sales of land and the administration of quitrents in Pennsylvania required the creation of a rudimentary bureaucracy:

> ... Pennsylvania had a land office, though until after 1732 its affairs were very much in confusion. The long absences of Penn from his province made it impossible for him to attend in person to the details of selling and letting land and collecting rents. Not until 1741 was the care of these matters intrusted to the governors. Instead, a commission or board of property was from time to time designated, which acted as the special agent of the proprietor. The board consisted of a secretary, -- who was at the same time secretary of the province, -- the surveyor-general, and from three to five special commissioners. Closely associated with the board was the receiver-general, the keeper of the seal, and master of the rolls. The special duties of the commissioners related to the granting of lands, but, as their powers developed, they also became concerned with the collection of rents. After 1741 the governors became members of this board, but their authority to act with it was conveyed through a special commission... n321

In the view of one important historian, the land systems in the proprietary colonies were kept strictly within the control of the executive, away from legislative regulation:

> In all the provinces the land system was kept as free as possible from the control of the legislature. It was organized and regulated under instructions and proclamations of the proprietors and their appointees. Any attempt to regulate it by legislation was resented and opposed. It was regarded as the private concern of the proprietor and its administration as distinctly as an executive function...
>
> ... In the absence of a legislature [such as in New Netherland and proprietary New York] such an issue could not arise. But in the Carolinas, the Jerseys, and Pennsylvania it arose, and the occasion which usually brought it to the front was some dispute over the payment of quitrents. It was at this point that the territorial regulations of the proprietor touched the pocket of the colonist. Like a tax, the rent was a constantly recurring burden. Over its amount and the form of its payment the individual desired in some way to secure such control as had been effected in the case of taxation. Efforts to secure this helped to initiate the process of legislation related to territorial affairs. n322

As will be shown in the next section, however, legislation in matters touching land was both common and comprehensive in Pennsylvania.

§ 6.11(c)(5) Legislation Relating to Landholding.

Soon after the 1682 conveyance from the Duke of York, Penn issued the Frame of Government of the Province of Pennsylvania, consisting of a bill of rights and other laws that would become effective when ratified by the colonists in the province. In 1683, Penn issued a Charter of Privileges, which was revised in 1701, and which added further governing provisions applicable to Pennsylvania and Penn's other territories. Meanwhile, the Duke's Law also remained in force in Pennsylvania. Therefore, the Duke's Law of 1665, and Penn's 1682 Frame of Government and 1683 Charter of Privileges were all potential sources of laws governing landholding.

The fundamental legal rules for property were lodged in the Duke's Law and are described in the context of colonial New York in §§ 6.05(e) and 6.05(f), *supra*. The property provisions of the 1682 Frame of Government and the Charter of Privileges of 1683 and 1701 are summarized in the following paragraphs.

§ 6.11(c)(5)(i) Penn's Frame of Government of 1682.

In his 1682 Frame of Government, Penn granted to "the freemen, planters and adventurers, of ... the ...province, these liberties, franchises, and properties [as granted to Penn], to be held, enjoyed and kept by the freemen, planters and inhabitants of the said province of Pennsylvania for ever." n323 In addition to this conferral of rights, the other singular feature of the Frame of Government was the establishment of representative government, in the form of the Provincial Council and General Assembly. The Provincial Council was directed to divide itself into four standing committees, the first of which would be "a committee of plantations, to situate and settle cities, ports, market-towns and high-ways, and to hear and decide all suits and controversies relating to plantations." n324 Laws proposed by the Provincial Council were subject to rejection or ratification by the General Assembly. In April 1683, a new frame of government was drawn up, taking into account the incorporation of the Delaware settlements and providing for a reorganization of the council and general assembly. n325

§ 6.11(c)(5)(ii) Laws for the Colony Agreed upon in England.

Even before the earliest legislative assembly met, certain laws for Pennsylvania were proposed and agreed to by the colonial leaders while they were still in England, subject to ratification by the colonists in America. Those provisions pertaining for landholding are as follows:

> First. That the charter of liberties [Frame of Government] ... is hereby declared and approved, and shall be for ever held for fundamental in the government thereof, according to the limitations mentioned in the said charter.
>
> Second. That every Inhabitant in the said province, that is or shall be a purchaser of one hundred acres of land or upwards, his heirs and assigns, and every person who shall have paid his passage, and taken up one hundred acres of land, at a penny an acre, and have cultivated ten acres thereof, and every person that hath been a servant or bondsman, and is free by his service, that shall have taken up his fifty acres of land, and cultivated twenty thereof, and every inhabitant, artificer, or other resident in the said province, that pays scot and lot n326 to the government, shall be deemed and accounted a freeman of the said province...
>
> Fourteenth. That all lands and goods shall be liable to pay debts, except where there is legal issue, and then all the goods, and one third of the land only.
>
> Fifteenth. That all wills and writing attested by two witnesses, shall be of the same force, as to lands and other conveyances, being legally proved within forty days, either within or without the said province.
>
> Sixteenth. That seven years quiet possession shall give an unquestionable right, except in cases of infants, lunaticks, married women, or persons beyond the seas ...

> Twentieth. And to prevent frauds and vexatious suits within the said province, that all charters, gifts, grants and conveyances of land, (except leases for a year or under) and all bills, bonds, and specialties have five pounds, and not under three months, made in the said province, shall be enrolled or registered in the public enrolment office of the said province within the space of two months next after the making thereof, else to be void in law. And all deeds, grants, and conveyances of land (except as aforesaid) within the said province, and made out of the said province, shall be inrolled or registered as aforesaid, within six months next after the making thereof, and settling and constituting an enrolment office or registry within the said province, else to be void in law against all persons whatsoever...
>
> Thirty-first. That for the encouragement of the plants and traders in this province, who are incorporated into a society, the patent granted to them by William Penn, Governor of the said province, is hereby ratified and confirmed... n327

§ 6.11(c)(5)(iii) The Charter of Privileges of 1683 and 1701.

The Charter of Privileges, issued in 1683 and revised in 1701, gave specific instructions for choosing members of the General Assembly but contained only one additional provision touching upon property rights:

> Eighthly: If any person, through Temptation or melancholly, shall Destroy himself, his Estate, Real & Personal, shall, notwithstanding, Descend to his wife and Children or Relations as if he had Died a natural Death; and if any person shall be Destroyed or kill'd by Casualty or accident, there shall be no forfeiture to the Governour by Reason thereof... n328

§ 6.11(c)(5)(iv) Pennsylvania Landholding Legislation After Circa 1700.

Penn's long absences from England and the persisting conflict between the Pennsylvania governors and assemblies hampered the development of constructive legislation, even though the "Duke's Law" remained as a foundation. Thus, before 1700 there was no systematic and comprehensive compilation of provincial legislation, and no printed compilation until 1714. The 1714 printing "was the first compilation of Pennsylvania laws and purported to contain the text of all laws then in force, with repealed or obsolete statutes reported by title only." Summarized below are the provisions related to landholding found in the 1714 compilation:

Forcible entry

Removing of landmarks

Defacers of charters

Buying land of the natives

Taking lands in execution for the payment of debts

Regulating and maintaining of fences

Erecting of bridges and maintaining highways

Cutting timber

Burning of houses

Better confirmation of the owners of lands, in their just rights and possessions

Probates of wills and confirming devises of lands

Settling of intestates' estates

Collecting of quit rents

Attachments

Seven years' quiet possession

Confirming sales of lands by attorneys or agents, and ascertaining the proof of instruments or writings

Better enabling inhabitants of the province to hold and enjoy lands, tenements and plantations

Acknowledging and recording of deeds

Privileges to a freeman:

[N]o Free-man of this Province shall be taken or imprisoned, disseised of his Free-hold or Liberties, or to be Outlawed or Exiled, or any other ways hurt, damnified or destroyed, nor be tryed nor condemned but by the Lawful Judgement of his Twelve Equals, or by the Laws of this Province.

Preventing disputes that may arise about the dates of conveyances and other instruments and writings (affirming that March is considered the first month)

Regulating party walls and buildings in Philadelphia

Confirming patents and grants

Empowering religious societies to buy, hold and enjoy lands, tenements and hereditaments

Limitation of actions. n329

§ 6.11(d) Summary of Landholding Practices in Colonial Pennsylvania.

The grant to Penn was a proprietary grant, an estate of inheritance with as many feudal prerogatives as were still extant in that era. The province was literally Penn's private estate, and he was both owner and landlord. A proprietor such as William Penn might be an idealist, but he and the other proprietors were also an investors in land, and:

this, when combined with powers of government, made them territorial lords, and in order to collect their quitrents and fines on alienation, they had to institute a system of territorial administration. n330

Despite these extensive feudal prerogatives, the management of land in Pennsylvania was little affected by them:

Before Penn left England he disposed of large tracts of land to those known later as "first purchasers," a part of whose land was to lie in the "country" and a part in the city that he was planning to build. But when he found that in order to carry out the terms of such sales -- the allotment of ten acres in the city for every five hundred in the country -- he would have to enlarge his city beyond the capacity of any available site, he ordered an area to be set off adjoining the city proper to be known as the "liberties," for the purpose of taking up the excess. Thus the lands of the province fell into three disproportionate parts: the common land in city and country -- the largest portion of the territory -- from which allotments could be made by grants of one kind or another; the proprietary reserves of a certain number of acres out of every one thousand assigned, selected by lot and all in one piece; and the proprietary manors, of which there must have been over a hundred, some of them indistinguishable from the reserves and others in the

> form of sub-manors within the proprietary manors, none of which were manors in the legal acceptance of the word. Though there is no doubt that Penn expected courts leet and baron to be erected, there is nothing to show that manorial jurisdiction, properly so called, was ever introduced into Pennsylvania. During the earlier years land conditions were in great confusion. Grants were made very carelessly. Quarrels arose between the "first purchasers" and later arrivals, and claims were bandied about that were difficult of settlement because the original deeds were rarely recorded and the loose management of the land office gave ample opportunities for fraud. Not until the arrival of Penn's son Thomas in 1732 was the land system adequately organized and the tangle of claims straightened out. n331

Penn's seigniorial rights are well illustrated by his financial dealings with the rights in his provincial land during the years before his death. In 1708 he mortgaged Pennsylvania to nine persons in England. n332 He died ten years later, and in his will, he had devised the governmental powers to three named aristocrats, in trust, to dispose of to the queen or to any other person, as they determined. His lands, rents and profits in Pennsylvania were devised to his widow and eleven others, in trust, with instructions to pay off his debts. Other dispositions were made of Pennsylvania lands entirely, as if they were his private estate, as they legally were.

In most of the proprietary colonies, land was usually granted gratis, rather than sold, in order to draw in the maximum number of settlers. Pennsylvania was an exception:

> Land was sold in Pennsylvania from the very first. As soon as he had secured his title, Penn offered for sale shares of five thousand acres at £100 each. After 1684 this land was also to be liable to a quitrent. The practice of selling land was steadily continued, the prices varying with the period of time which had elapsed since the settlement of the province, with the character and location of the land, and with such other conditions as might affect a bargain. After 1732 prices became more permanent. For thirty years from that date the price was £15, 10s. per hundred acres. Prices were always fixed by the proprietor and his officials. n333

Contrasted with the enormous importance of the towns in governing the New England colonies, villages and towns had less involvement in Pennsylvania affairs. The more common form of settlement was the isolated farm or plantation.

Whether land allotments were made in the country, in the towns, or in the city of Philadelphia, quitrents were reserved, payable directly to Penn. While Philadelphia allotments were made to individual grantees, Germantown arose as a group settlement.

FOOTNOTES:

(n1)Footnote 311. *See* § 6.05(e)(1), *supra.*

(n2)Footnote 312. The Duke of York's Laws of 1665 were only slightly influenced by the New England legal codes. George L. Haskins, *Influences of New England Law on the Middle Colonies*, 4 L. & Hist. Rev. 238 (1983).

(n3)Footnote 313. WILLIAM MACDONALD, Select Charters and Other Documents Illustrative of American History 1606-1775 43 (1914).

(n4)Footnote 314. Isaac S. Mulford, A Civic and Political History of New Jersey 57 (1851).

(n5)Footnote 315. 1 J. Thomas Scharf, History of Delaware 1609-1888 62 (1888).

(n6)Footnote 316. The interesting peculiarities of this conveyance, with strong overtones of medieval English land law, have been explained as follows, in connection with Penn's assumption of title to land in Delaware:

> There were actually four legal documents involved in these grants, an absolute deed (called a "deed

of feoffment") and a lease for ten thousand years for New Castle and the circle around it, and another deed and a similar lease for the land from twelve miles south of New Castle to Cape Henlopen ... Probably the division is explained by the duke's desire to get some revenue from these territories ... but not to interfere with Penn's use of New Castle or with his revenues from it ... Perhaps both deed and lease were used because of the uncertainty of the duke's legal rights to Delaware ... .

Then on October 28 [the day after Penn's arrival on October 27, 1682], in a ceremony called "livery of seisin," Penn formally took possession of New Castle and the territory within twelve miles about it, except on the east side of the Delaware. After the deeds from the Duke of York were read, Penn took the key to the New Castle fort, entered and locked himself in alone, then came out and received a piece of turf with a twig upon it and a porringer with river water and soil as symbols of his new possession. John A. Munroe, Colonial Delaware, A History 83-84 (1978).

(n7)Footnote 317. The Earliest Printed Laws of Pennsylvania 1681-1713 181-190 (John D. Cushing ed. 1978).

(n8)Footnote 318. 3 Charles M. Andrews, The Colonial Period of American History 282 (1937).

(n9)Footnote 319. 2 Herbert L. Osgood, The American Colonies in the Seventeenth Century 34-35 (1904).

(n10)Footnote 320. *Id.* at 36-37.

(n11)Footnote 321. *Id.* at 46.

(n12)Footnote 322. *Id.* at 46-47.

(n13)Footnote 323. The Earliest Printed Laws of Pennsylvania 1681-1713 200 (John D. Cushing ed. 1978).

(n14)Footnote 324. *Id.* at 196.

(n15)Footnote 325. *See* No. 41. *Pennsylvania and Delaware Frame* in Select Charters and Other Documents Illustrative of American History, 1606-1775 199-204 (William MacDonald ed. 1914). *See* Alfred L. Brophy, *For the Preservation of the King's Peace and Justice: Community and English Law in Sussex County, Pennsylvania, 1682-1696,. 40 Am. J. Legal Hist. 167 (1996).*

(n16)Footnote 326. In English law scot was a form of tax of one's share of a customary contribution. Scot and lot was a particular customary contribution imposed upon subjects according to their ability to pay. In certain English boroughs, persons retained their franchise only by paying the scot and lot.

(n17)Footnote 327. The Earliest Printed Laws of Pennsylvania 1681-1713 201-205 (John D. Cushing ed. 1978). Albert W. Alschuler, *Rediscovering Blackstone, 145 U. Pa. L. Rev. 1 (1996).* David Schultz, *Political Theory and Legal Theory History: Conflicting Depictions of Property in the American Political Founding, 37 Am. J. Legal Hist. 464 (1993).*

(n18)Footnote 328. The Earliest Printed Laws of Delaware 1704-1741 1-8 (John D. Cushing ed. 1978).

(n19)Footnote 329. The Earliest Printed Laws of Pennsylvania 1681-1713 1-178 (John D. Cushing ed. 1978).

(n20)Footnote 330. 2 Herbert L. Osgood, The American Colonies in the Seventeenth Century 17 (1904).

(n21)Footnote 331. 3 Charles M. Andrews, The Colonial Period of American History 291 (1937).

(n22)Footnote 332. When he died ten years later, the mortgage was still not fully paid off.

(n23)Footnote 333. 2 Herbert L. Osgood, The American Colonies in the Seventeenth Century 34 (1904).

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CHAPTER 6 DEVELOPMENT OF PROPERTY LAW IN ENGLAND'S AMERICAN COLONIES

1-6 Thompson on Real Property, Thomas Editions § 6.12

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§ 6.12 Development of Property Law in North Carolina (from 1650).

§ 6.12(a) Property Rights in the Early Colonization Efforts.

§ 6.12(a)(1) Sir Humphrey Gilbert's Charter of 1578.

It has been rightly declared that almost nothing is known about the earliest settlers of North Carolina and that no regular government existed there until sometime after the first proprietary charter for the region was granted in 1663. n334 n335

Most well-known of the early North Carolina settlement efforts is Sir Walter Raleigh's "lost colony" of the late 16th century. This settlement project actually had its genesis in a charter granted by Queen Elizabeth I to Sir Humphrey Gilbert on June 11, 1578, which, by its terms, gave rights to colonize virtually any unoccupied lands in the New World. On the condition that a settlement be commenced within six years after the granting of the charter, the charter conferred on Sir Humphrey, and his heirs and assigns forever, the right to discover "such remote heathen and barbarous lands, Countries, and territories, not actually possessed of any Christian Prince or people":

> And the same to have, hold, occupy, and enjoy, to him, his heirs and Assigns, forever, with all commodities, jurisdictions, and royalties, both by sea and land. n336

Gilbert was given the rights to "all the soil of all such lands ... to be had or used with full power to dispose thereof, and of every part thereof, in fee simple or otherwise, according to the laws of England, as near as the same conveniently may be," reserving to the crown "for all services, duties, and demands, the fifth part of all the ore of gold and silver" discovered in those lands. n337 To Gilbert and all his fellow colonists was granted that they "shall and may have and enjoy all the privileges of free denizens n338 and persons native of England and within our allegiance...." n339 Powers of government, including the administration of justice, were also included in the charter, "so always, that the said statutes, laws, and ordinances may be, as near as conveniently may, agreeable to the form of the laws and policy of England...." n340

§ 6.12(a)(2) Sir Walter Raleigh's Charter and the "Lost Colony" at Roanoke Island.

Gilbert's short-lived 1583 settlement in Newfoundland and his death during the voyage back to England resulted in the renewal of Gilbert's charter in Raleigh's name, on March 25, 1584. Issued shortly before Gilbert's charter was to expire, Raleigh's charter was, in effect, a six-year extension and was virtually identical to Gilbert's charter in its grants of property rights and governing power. Raleigh's unsuccessful efforts to commence a colony in North Carolina, and their significance for all subsequent British American colonies, have been described as follows:

> In 1585, Raleigh sent out a colony ... which settled on Roanoke Island. This was the first English colony to settle in America. About a year later, the colonists returned to England, for they had not received needed supplies and reinforcements. A supply ship arrived only a few weeks after the colonists' departure, and soon afterward a relief expedition under Richard Grenville arrived. Grenville left a small garrison to hold possession and retain Raleigh's rights, but the garrison left the island and disappeared, after an attack by Indians.
>
> In late July, 1587, another colony sent by Raleigh arrived off Hatteras and settled on Roanoke Island. [They] had expected to settle in the Chesapeake region, ... but they were forced to remain at Roanoke Island, for Simon Fernandez, master of the largest ship in the expedition, refused to take them farther...
>
> At the urging of the other colonists, [Governor] White returned to England in late August to expedite the shipping of supplies, with the understanding that the colonists would move to the mainland and would leave at Roanoke Island directions for finding them. War with Spain prevented White's return until 1590, when he found Roanoke Island deserted; the only clues to the colonists' location were the letters CRO carved on a tree and the word CROATOAN carved at the entrance to the colonists' fort. Further search by White was prevented by damage to the ships in the expedition and by an unfavorable wind. No other immediate effort to find the lost colony is recorded, and later attempts, which appear to have been desultory, were unsuccessful. The fate of the colonists has never been learned. For many years, however, the colony was presumed in England to be in existence, and Raleigh's rights in "Virginia" were considered established. n341

Thereafter Raleigh's activities in the New World reflected only commercial interest. In 1602 he sent ships to trade with the Indians and obtain a cargo of timber and medicinal plants. In 1603 he sent ships to the Chesapeake region. Even before these ships returned, Raleigh had been imprisoned on charges of high treason. Upon his conviction, his charter rights were forfeited to the crown. Thus, "Virginia" became available for re-granting by King James I.

It is not known what property rights individual settlers in Raleigh's colonies enjoyed during their time of occupancy. If the pattern of the later Jamestown colony in Virginia was used, then these first North Carolina settlers commenced their colony by holding and working their lands as a community. Once stability had been achieved, then a plan for conveying some type of individual landholdings would have been formed. n342

§ 6.12(a)(3) The Early Influence of Virginia.

When King James I took the throne after Queen Elizabeth's death in 1603, several influential and wealthy men were still interested in colonizing ventures. Hoping to resume what Raleigh had not finished, they approached James about another charter, and this was granted to the Virginia Company on April 10, 1606. The Virginia Company charter, obtained only three years after the last of Raleigh's expeditions, was a continuation of the Gilbert and Raleigh projects and included among its principals several men who had participated in those earlier enterprises. The charter was divided into northern and southern sectors which were assigned to two different groups within the company; the charter's southern territory encompassed most of the coastal sector of North Carolina. Nevertheless, this charter was not as generous as the earlier charters given to Gilbert and Raleigh:

> The territory involved in the new charter was restricted to a prescribed region. The company was not

> given the right to own land, although it could parcel out land among settlers, to be granted to them by patents from the king. Governmental authority over colonies was reserved by the crown, to be exercised by a council resident in London, appointed and instructed by the king. The authority of the company chiefly consisted of recruiting, transporting, and supplying colonists, conducting trade, and handling other financial matters. Colonists were guaranteed the rights of Englishmen at home, such as trial by jury, habeas corpus, and the right to own and inherit property, but they were not given right to participate in government. n343

This charter is discussed in greater detail in connection with the Virginia Colony, in § 6.02(a), *supra.* The charter of 1606, of course, laid the foundation for the colony at Jamestown, the first permanent English settlement in North America. Members of the Jamestown colony explored the area of North Carolina and tried to locate the missing members of Raleigh's colonies. About 50 years after Jamestown was settled, colonists from there and other Virginia settlements moved into the region near Raleigh's original colonies and became the first permanent settlers in North Carolina.

As explained in § 6.02(b), *supra*, unsatisfactory aspects of the 1606 charter led to requests for a new charter, which was granted on May 23, 1609:

> The new charter granted additional territory and conferred upon the company rights of ownership over this and the territory formerly assigned to the London [southern] group; it also gave the company the right to sub-grant land to settlers and shareholders. n344

Driven principally by the desire to extend jurisdiction over the Bermuda Islands, the company obtained yet another charter on March 12, 1612, described in detail in § 6.02(c), *supra*:

> The democratic element introduced into the control of the company was the most significant provision of the new charter. The organization of the company as thus established appears to have served as a model when the government of the Virginia colony was reorganized in 1618. An important feature of the reorganization of the colony was the establishment of a popular assembly, which held its first meeting on July 30, 1619. This assembly became a precedent for other English colonies in America, and provision for such a body was included in all the later charters involving the North Carolina area. n345

Because of factional disputes within the colony, this charter was revoked by court decision in 1624, and the land and rights of the Virginia Company reverted to the crown. No permanent settlement had yet been established in North Carolina, so that land was available for re-granting by the crown.

§ 6.12(b) Property Rights under the Heath Charter of 1629.

Such a re-grant occurred five years later, when King Charles I granted most of present-day North Carolina to his attorney general, Sir Robert Heath. Heath was unable to assemble the resources needed to commence colonization, so in the 1630's he disposed of his interest in the tract. Several of Heath's assignees continued to promote a colony in North Carolina, but no settlement materialized. Eventually, the crown considered the grant lapsed because no colonies had been established, and because of this, King Charles II re-granted the Heath tract to eight other persons in 1663.

The Heath Charter, however, did not remain a dead letter. First, despite the royal grant of 1663, persons holding rights under the Heath Charter of 1629 began to press their claims to North Carolina territory. Those claims were rejected by an order in council of August 12, 1663, but the claimants and their heirs and successors persisted, finally obtaining a court judgment in 1668 that awarded them a settlement of 100,000 acres in New York. Second, the Heath Charter of 1629 was the model for the new royal charter of 1663, and the essential provisions of 1629 reappeared in the proprietors' charters of 1663 and beyond. It is useful, therefore, to examine the provisions of the 1629 Heath Charter

relating to colonial property rights in North Carolina.

The charter states that "we ... have Given, Granted, and confirmed ... to the said Sir Robert Heath, Knight, his heirs and assigns, for ever, ... all the lands, Tenements, and Hereditaments [in the described tract]...." n346 This grant of land was accompanied by a very broad grant of governmental authority that was as thoroughly feudal as was consistent with the times:

> Together with all ... Rights, Jurisdictions, privileges, prerogatives, Royalties, liberties, and immunities ...
>
> To have, exercise, use, and enjoy, in like manner as any Bishop of Durham within the Bishopric, or County Palatine, of Durham, in our Kingdom of England, ever heretofore had, held, used, or enjoyed, or of right ought or could have, hold, use, or enjoy.
>
> And, by these presents, we make, create, and constitute the same Sir Robert Heath, his Heirs and assigns, true and absolute Lords and Proprietors of the Region and Territory aforesaid, and all other the premises, for us, our heirs and successors;
>
> Saving always, the faith and allegiance due to us, our heirs and Successors... n347

The feudal nature of this proprietary grant was emphasized in the provision that described tenure as knight's service of a tenant-in-chief:

> To be held of Us, our Heirs and Successors, Kings of England, in chief, by Knight's service; and by paying for it, to us, our Heirs and successors, one Circle of Gold, formed in the fashion of a crown, of the weight of twenty Ounces, with this inscription engraved upon it, DEUS CORONET OPUS SUUM ["God crowns His work"], whensoever, and as often as it shall happen, that we, Our Heirs or Successors, shall enter the said Region. n348

The proprietor Heath was granted a very broad lawmaking power, but with provision for a legislative body, and as consistently as possible with English law:

> ... [W]e ... do give Power to the said Sir Robert ... and to his Heirs and assigns, for the good and happy Government of the said Province, to form, make, and enact, and Publish under the Seal of the said Sir Robert ... what Laws soever may concern the public state of the said province, or the private profit of all, according to the wholesome directions of and with the counsel, assent, and approbation of the Freeholders of the same Province, or the Major part of them...
>
> Yet, so that the foresaid laws and ordinances be consonant to Reason, and not repugnant or contrary but, as conveniently as may be done, consonant to the Laws, Statutes, Customs, and rights of our Realm of England. n349

Any person born into or coming into the colony would be considered an English subject or citizen, and their property rights would be the same as those of English subjects:

> And also, that they shall possess lands, Tenements, Rents, services, and Hereditaments whatsoever with our Kingdom of England and of our Dominions, to purchase, receive, take, have, hold, buy, and possess, and them to use and enjoy, and also, them to give, sell, alienate, and bequeath; and also, all liberties, franchises, and privileges of this our Realm to have and possess freely, quietly, and peacably; and that they may use and enjoy them as our lieges born or to be born within our Kingdom of England... n350

The charter also contained a somewhat unique provision giving the proprietor the right to create titles of nobility:

> Furthermore, lest the way to Honours and Dignities may seem to be shut and altogether barred up to men honestly born, and who are willing to undertake this present expedition, ... [we] Give full and free power to the aforesaid Sir Robert Heath, Knight, his heirs and assigns, to confer favours, graces, and honours upon those well-deserving Citizens that inhabit within the foresaid province, and the same with whatever Titles and dignities, provided they be not the same as are now used in England, to adorn at his pleasure... n351

Explicit power was also given to the proprietor to create local municipalities, "with privileges and befitting immunities to be erected and incorporated...." n352

Thus, the 1629 charter differed from earlier charters in that it conferred the extensive "bishop-of-Durham" feudal powers on the proprietors, authorized the proprietors to create a local nobility, and required that a representative lawmaking body have a role in the legislative process.

§ 6.12(c) Assertion of Virginia Authority in 1662.

Beginning in the early 1650's, settlers from Virginia began moving into lands located south of the present southern boundary of Virginia. By 1653, a trader named Nathaniel Batts had built a house and started to carry on trade with the Indians. He was still there in 1672 and was locally referred to as the "governor" of Roan-oak; "Roanoke" or "Old Virginia" were early labels sometimes attached to North Carolina territory to distinguish it from the territory of colonial Virginia. Other settlers from Virginia followed Batts, but without any regulation of landholding rights except for those with which they had become familiar in Virginia. Accordingly, they purchased land from the Indians and, out of caution, recorded these purchases and further conveyances in Virginia. Deeds as early as 1660 have been discovered. n353

As a result of these settlement activities, the council of Virginia decided to assert governmental authority. On October 9, 1662, the council appointed one Samuel Stephens as "commander of the southern plantation" and authorized him to appoint a sheriff, who would keep order and collect taxes. Although this is the beginning of governmental authority over settlers in North Carolina, nothing further is known about the activities of either commander or sheriff. n354

§ 6.12(d) The Royal Grant of 1663.

On March 24, 1663, shortly after Virginia appointed its "commander," King Charles II granted the old Heath tract to eight prominent men who had given important support toward the restoration of the Stuart monarchy. The tract did not actually include the area settled by the Virginians, but the omission was not immediately realized. In time, the eight new North Carolina proprietors authorized William Berkeley, one of their number who was also then governor of Virginia, to exercise governmental authority over the settlement of Virginians. North Carolina's legal authority over the settlement and other omitted territory was finally established in 1665, when a secondNorth Carolina charter was issued expanding on the original grant.

The 1663 charter followed the 1629 Heath charter in important particulars, especially in its provision for representative government, the feudal powers resting in the proprietors, and the right of the proprietors to create a colonial nobility.

As in the 1629 charter, the feudal powers of the proprietors were expressed in the "bishop-of-Durham" clause, "To have, use, exercise, and enjoy, and in as ample manner as any Bishop of Durham, in our Kingdom of England, ever heretofore have held, used, or enjoyed, or of right ought or could have, use, or enjoy." n355 This 1663 charter departed from the 1629 charter, however, in declaring the tenure by which the proprietors held. The earlier document had described

Heath's tenure as "in chief, by Knight's service," with a somewhat nominal payment obligation (a gold crown to be given over each time the monarch visited the province). The new charter abandoned this outmoded formula and adopted the new tenurial language commonly found in other colonies' charters: the free and common socage of East Greenwich royal manor: "To be held of us, our heirs and successors, as of our Manor of East Greenwich, in our County of Kent, in Free and Common Soccage, and not in Capite nor by knight's Service. n356

Again, the lawmaking power was subject to the requirement "that the said laws be consonant to reason and, as near as may be convenient, agreeable to the laws and Customs of this our Kingdom of England," and that ordinances "do not extend to the binding, charging, or taking away of the right or interest of any Person or Persons in their freehold, goods, or Chattels whatsoever." n357

Of course, like all colonial charters, the central feature of this 1663 charter was the right to make grants of land. The proprietors were given "full and absolute licence, power, and authority [to] Assign, Alien, Grant, Demise, or enfeoff the premises, or any part or parcels thereof, to him or them that shall be willing to purchase the same, and to such Person or Persons as they shall think fit." n358 In making such grants, the proprietors and, indeed, any grantors, could convey "in Fee simple or fee tail, or for term of life or years," to be held of the proprietors under feudal conditions, if they desired, "by such Rents, Services, and Customs as shall seem meet to [them]." Landholders could grant or hold by any estate that seemed expedient to the proprietors, even in ways contrary to the Statute Quia Emptores and other important property statutes:

> We do give and Grant Licence, ... authority, and power That such Person or Persons may have or take the premises, or any parcel thereof, of [any of the proprietors]...; and the same to hold to themselves, their heirs and Assigns; in what estate of Inheritance soever, in Fee simple or Fee tail or otherwise..; The Statute made in the Parliament of Edward, Son of King Henry, heretofore King of England, our Predecessor, commonly called the Statute of *Quia Emptores Terrarum*, or any other Statute, Act, or Ordinance, use, Law, Custom, or any other matter, Cause, or thing heretofore published or provided to the contrary in any wise notwithstanding. n359

As in the 1629 Heath charter, the 1663 charter continued the unusual provision permitting the proprietors to give titles of nobility:

> .. We do ... Give and Grant unto the [proprietors] full Power and Authority to give and Confer, unto and upon such of the Inhabitants of the said Province as they shall think do or shall merit the same, such marks of favour and Titles of Honour as they shall think fit; so as those Titles or honours be not the same as are enjoyed by or Conferred upon any the Subjects of this our Kingdom of England. n360

As if to ensure that there would be no mistake about the extent of feudal powers granted to the proprietors (though this was made clear in other provisions), the charter also gave specific authority to establish manors and to conduct the uniquely manorial courts baron and leet:

> ... We do ... give and grant Licence to [the proprietors ...
>
> ... to Erect and make in the Province ... so many Manors as to them shall seem meet and convenient; and in every of the same Manors to have and to hold a Court Baron, with all things whatsoever which to a Court Baron do belong; And to have and to hold Views of Frankpledge and Courts Leet ... n361

Appearing for the first time in the 1663 charter was a religious toleration provision, giving the proprietors "Licence, liberty, and Authority" to grant "Indulgencies and Dispensations" to those who in good conscience could not conform to the ceremonies and tenets of the Church of England. This may be instructively contrasted with practice in the early New England colonies, in which admission to a town and obtaining a town lot often required the grantee to be a member of the dominant church in the area.

§ 6.12(e) The Proprietors' Concessions and Agreements of 1665.

§ 6.12(e)(1) Introduction of the Concessions into the Settlements.

A few months after receiving the 1663 charter, the proprietors authorized one of their number, William Berkeley, who was then serving as governor of Virginia, to exercise governmental authority over the only settlers then in the North Carolina territory, who had almost all come from Virginia. In October 1664, Berkeley selected William Drummond as governor. Both before and after this appointment, however, exercise of governmental authority in North Carolina consisted only of the proprietors' provisional instructions and authorizations.

Earlier, in 1663, the proprietors had approved a formal document of governmental regulations, called "A Declaration and Proposals to All That Will Plant in Carolina," but the document applied only to new settlements, and none were ever established while the document remained in effect.

On January 7, 1665, the proprietors adopted another, more formal, plan of government, known as the "Concessions and Agreement between the Lords Proprietors and Major William Yeamans and Others", and this was the first constitution or frame of government actually used in North Carolina. These "Concessions" were made applicable not only to new settlements, but also to any existing settlements, such as that of the Virginians. It is not known when the "Concessions" were actually introduced into the Virginia settlement, but they were in effect by October 1667.

Also, in the spring of 1665, acting under of the 1663 charters, the proprietors convened a legislative assembly. This assembly had been specifically authorized by the charter of 1663, and was given broad powers under the 1665 "Concessions and Agreement," but its powers were later reduced.

§ 6.12(e)(2) The Effect of the Concessions on Landholding.

The provisions of the 1665 "Concessions and Agreement" relating to property rights and landholding may be summarized as follows:

> Certain settlers from Barbados were to have granted to them 500 acres of land for every 1,000 pounds of sugar they paid, the land to be taken up and settled within five years of the grant. To the leader was given a "head right" of 150 acres of land for himself, and between 150 and 50 acres for servants he would bring with him, with a quitrent of one half penny per acre annually, payable to the proprietors.
>
> Grants and conveyances of land to be recorded, and certain conveyances and leases must be in writing and in a certain prescribed format.
>
> A surveyor shall lay out and bound all lands granted.
>
> Procedures and powers of the legislative assembly are detailed. Among the assemblies' powers and duties are to establish and collect taxes on all lands and goods, to lay out rules for granting lands by "head right" (except on the unsettled lands of the proprietors), and to establish the standard quitrent at one half penny per acre.
>
> The governor is empowered to issue warrants for land entries and to seal grants of land.
>
> Land held and planted for seven years after being surveyed may be claimed without objection from the government.
>
> No trespass liability for cattle straying on unappropriated land; no "custom of commons" prevents any person from claiming and appropriating "any Lands so grazed upon."

Headrights are announced for persons already in the colony.

Counties are to be between 40 and 1,600 square miles.

Lots other than in or near cities are to be from 200 to 20,000 acres in size.

Detailed instructions for issuing land grants are given, including a form providing for payment of quitrent and tenure in free and common socage.

A register or record of instruments and grants is to be kept. n362

It appears that these arrangements were actually implemented among the Virginia settlers and that their assembly and court began meeting in 1665. These settlers suffered many natural calamities and burdens in their attempts to work the land, such as yearly hurricanes, excessive rain alternating with frequent droughts, sickness among the animals and people, and depredations of wild animals. Perhaps even worse than these, however, were the unnecessarily burdensome land policies pursued by the proprietors over these earliest settlers:

> Before issuance of the charter of 1663, settlers had obtained land by purchase from Indians or by patent from the Virginia government. Some held a thousand acres or more. The first Carolina charter contained a saving clause to protect such settlers, but the proprietors ignored the clause. In their instructions to Berkeley, in September, 1663, the London proprietors directed Berkeley to "persuade and compell" settlers with large holdings to give up the large tracts and be content "with such proportions as we allot to others." Those proportions, as directed in 1665, were eighty acres or less for each person brought into the colony. The second charter contained no clause protecting the titles of early settlers. In addition to reducing the amounts of land allowed, the proprietors increased the quitrent and introduced other policies which worked hardship on Albemarle [early Virginia] inhabitants. Thus the colonists of the 1660's had reason for discouragement despite their achievements. n363

The land distribution system was also complicated. The so-called "General Lots" of 2,200 to 22,000 acres in size were divided so that one-eleventh of each lot was assigned to the proprietors, and settlers' parcels were determined by time of arrival and casting of lots. The rent of one half penny per acre was double that charged in Virginia or earlier in Albemarle. For each 100 acres held by a colonist in excess of the original allotment, one servant had to be kept on the land, with forfeiture of the land as the penalty for failure to do so. No allotments for children of settlers were provided. n364

§ 6.12(e)(3) The Great Deed of Grant.

In about 1666, Albemarle allotments were increased, and in 1668 the proprietors directed the settlement's governor to grant land on the same terms as in Virginia and to abandon the system of land division and lot allocation. These proprietors' instructions came to be known as the "Great Deed of Grant." The key provision of the Great Deed stated:

> [W]e have appointed, to such Persons as shall come into our said County to plant or inhabit; to be held of us, our Heirs and Assigns, upon the same Terms and Conditions, that Land is at present usually Granted in Virginia; any thing in our Instructions and Concessions aforesaid to the contrary, notwithstanding." n365

Unfortunately, the proprietors simultaneously directed the governor to obtain action from the Albemarle assembly that would reinstate some of the objectionable land policies ostensibly abandoned by the Great Deed.

> By some means [the governor] induced the Albemarle Assembly to enact laws designed to achieve the proprietors' objectives. One act prohibited for five years the issuance of grants of more than 660 acres

> to anyone but a proprietor, a landgrave, or a cacique without express permission from the proprietors. It further limited the amount of land allowed in one warrant to that set forth in the proprietors' instructions of "forme of government." Another act provided that land on which improvements had been made but which was not lived on was to escheat to the proprietors if the grantee did not move to the land and live on it within six months after publication of the act. A third law prohibited sale of headrights by any person who had not lived in the county at least two years. Thus, by legislation of the Albemarle Assembly, some of the concessions made in the Great Deed of Grant were nullified. The chief concession left was the reduction in quitrent. n366

In 1672, after the government had been reorganized under the Fundamental Constitutions, the odious policies were still in effect, and additional objectionable policies had indeed been introduced by the Fundamental Constitutions; therefore, the governor, council and assembly petitioned the proprietors for changes.

Despite the detailed provisions for exercising power and organizing the government, no clause of charter or concessions suggested any means for resolving differences between the people and the proprietors. The Virginia settlers resented the impositions of the proprietors. Nevertheless, Berkeley began issuing land grants. Then the proprietors in London directed the establishment of three counties, to be named after proprietors. Albemarle took in the already established Virginia settlers. Clarendon County was settled briefly between 1662 and 1663 by New Englanders, and from 1664 to 1667 by Barbadians, but they all eventually abandoned the enterprise. Craven County eventually became part of South Carolina.

Meanwhile, in 1665, the Albemarle settlers had been "given" an appointed governor, an elected assembly, and courts. A quitrent on their lands had been announced, but deferred for several years to encourage more settlers to come in.

§ 6.12(f) The Charter of 1665.

The proprietors sought and obtained a new charter on June 30, 1665, ostensibly to correct the potential problem resulting from the 1663 charter having been granted before the Heath charter of 1629 had been declared void by an order in council. The new charter was very similar to the 1663 charter, but it did include a few amendments. These changes included a slightly different wording for the religious toleration provision and a new clause in which the proprietors were given "full power and authority to erect, Constitute, and make several Counties, Baronies and Colonies" and to make for them "laws and Constitutions ... according to their best discretion...." n367

§ 6.12(g) The Fundamental Constitutions of 1669.

§ 6.12(g)(1) The Feudal Scheme of the Fundamental Constitutions.

In 1669 the proprietors were ready to implement a plan of government that more nearly reflected the enormous feudal powers they had obtained through their charters, even though it meant reducing the rights of the settlers. On July 21, 1669, they adopted their "Fundamental Constitutions of Carolina," which they often referred to as their Grand Model:

> The Fundamental Constitutions were never implemented in their entirety, but they shaped the early history of the North Carolina colony. For two decades the government of the colony was a modified form of the system provided in the Grand Model. For many decades the governmental institutions of the colony bore the imprint of the Constitutions. In fact, certain features of North Carolina courts today, such as the method of selecting jurors, were provided in the Fundamental Constitutions. Furthermore, events in the colony, such as the so-called rebellions, were due in part to the way in which the colony was governed. n368

Even though never fully implemented, the scheme of the Fundamental Constitutions as it related to landholding should be described:

> The Fundamental Constitutions provided for the entire province of Carolina, instead of each county, to be a palatinate. The counties were to be the chief divisions of the province. Members of an hereditary nobility, who were to be feudal lords, were to be distributed equally among the counties. Land in each county was to be distributed systematically among feudal lords and freeholders, and governmental power was to be allocated according to modes of land tenure. By those means the proprietors undertook to establish and maintain in Carolina a "balance of Government" which would institute and perpetuate a feudal society and aristocratic control. n369

According to the arrangement linking governmental power with one's land tenure, the proprietors and hereditary nobility were to have control of the provincial government, with only limited participation by freeholders; in the local agencies of government, on the other hand, the freeholders were to be dominant; "serfs" or "leetmen" had no governmental role but were to be completely within the jurisdiction of the manorial courts, in accordance with their medieval models; slaves were to be entirely within the control of their masters.

Even from the beginning, the system of government described in the Fundamental Constitutions was not implemented. The proprietors apparently realized that differing circumstances in individual settlements required modification, so the plan of a centralized provincial government was abandoned at the very outset. Instead, the scheme of the Fundamental Constitutions was "temporarily" customized for each colony, first for the Virginia settlement in Albemarle County, and then for another settlement that had arisen at Port Royal, in territory that was to become part of South Carolina.

§ 6.12(g)(2) Landholding Under the Fundamental Constitutions.

Sometime in 1670 the Albemarle government was reorganized along the lines of the Fundamental Constitutions, but scarcity of early records makes it difficult to determine whether these changes had any important impact on the settlement or its landholding practices. In 1671 the colony's governor complained to the proprietors that a revised version of the Constitutions reinstated certain land policies offensive to the settlers that the proprietors had earlier agreed to withdraw. The proprietors made no response to any of the complaints and questions raised by the settlers over the next several years. Disorder arose over uncertainty about the legitimacy and competency of officials exercising governmental authority. As already mentioned, a central source of discontent and disorder in Albemarle was the land policy of the proprietors:

> The disturbances in Albemarle expressed a constant dissatisfaction which at times became desperation. The causes of discontent were many. Not only were the colonists confused regarding the legality of their government, dissatisfied with the form and conduct of the government, and frustrated by the seeming indifference of the proprietors, but they also were burdened with discouragement due to policies and conditions that made it impossible for them to prosper financially.
>
> One obstacle to prosperity was the land policy of the proprietors. Albemarle settlers sought large tracts of good land, for they wanted plantations similar to those in Virginia. The proprietors, on the other hand, visualized a province composed in large measure of compact settlements; they reserved large land-holdings for themselves, the nobility, and a few lords of manors. Consequently, their policies were designed to prevent colonists from obtaining large plantations. Furthermore, to attain their ideal of a systematically distributed population, the proprietors developed a method of land distribution that took no account of geographical realities, and they imposed conditions for retaining land which kept the colonists in perpetual danger of forfeiture. Under the proprietors' early policies, a settler could not be certain that even his small allotment would consist of good land; he might find that most or all of it was swamp. If he did get good land, he was in constant danger of losing it because of inability to meet the proprietors' conditions for retaining it. n370

It thus appears that the proprietors were relentless in pursuing their objective to create a feudal colony in North

Carolina. Their instructions to the Albemarle governor in 1667, the offensive Albemarle legislation in 1668 and 1669, and the Fundamental Constitutions sent to Albemarle in 1670 all tended to negate land rights which the settlers had obtained in the past (land titles obtained from the Virginia Council or from Indians were nullified) and to abandon the policies of the Great Deed of Grant that had been favorable to the small settlers. Moreover, the proprietors almost never responded to the written petitions and protests, and they failed to reconstitute or reorganize the government as appointments expired or vacancies arose.

A long period of violence and disorder followed, with various local settlers vying for political leadership positions and with the proprietors refusing to take any action at all. At length, in 1679, a new governor was appointed, and he was given instructions and a formal document containing a plan for reinstituting stable government in Albemarle. The instructions for Albemarle were contained in a document called "Temporary Laws," adopted on February 5, 1679; they remained in effect until the plan of the Fundamental Constitutions as a whole was suspended in 1691. In these instructions the proprietors apparently tried to adopt land policies more acceptable to the settlers: the governor and the council issued patents confirming pre-1663 land grants from Virginia at a quitrent of one farthing per acre; new grants were issued for land obtained after 1663 at a quitrent of a half penny per acre. For new arrivals, however, the quitrent on their allotments remained at one penny per acre. n371

In 1680, Virginia, which had reasserted a claim to the Albemarle region, sent tax collectors to the settlements there in attempts to collect taxes and quitrents.

Even though the land policies embodied in the Fundamental Constitutions were occasionally modified to meet settlers' objections, the basic land regulations and practices embodied in that document remained in effect until the government was reorganized in 1691. The provisions of the Fundamental Constitutions of 1669 dealing with land management practices or property rights not previously discussed in this section may be summarized as follows:

> 63. Only a freeholder with at least 50 acres could be a juror in a precinct court.
>
> 64. "It shall be a base and vile thing to Plead for money or Reward ..."
>
> 73. "Since multiplicity of Comments, as well as of laws, have great inconveniences, and Serve only to obscure and perplex, all manner of comments and expositions on any part of these fundamental constitutions, or on any part of the Common or Statute law of Carolina, are absolutely prohibited."
>
> 74. A registrar in every precinct shall enroll deeds, leases and judgments.
>
> 91. "No person above seventeen years of Age shall have any benefit or protection of the law, or be capable of any place of profit or honor, who is not a member of Some church or profession, having his name recorded in Some one, and but one Religion Record at once."
>
> 103. Whoever possesses a freehold shall, after 1689, pay an annual rent of one penny per acre.

§ 6.12(g)(3) The Demise of the Fundamental Constitutions.

As disorder and dissent under the Fundamental Constitutions continued, the proprietors attempted to make adjustments. Two revisions in 1682 were intended to meet objections from groups proposing to settle in the colony. Finally, in 1691 the proprietors informally and in 1693 officially suspended the Fundamental Constitutions. A new version in 1698 was never fully implemented. For all the controversy, it should be said that neither a landed nobility nor serfdom ever developed in North Carolina. Many of the large grants were never located or surveyed, and their legality was later denied; the feudal seigniories usually declined into ordinary proprietary holdings and eventually into plantations. n372 The rough and disorderly early history of this colony can be traced to not only the unrealistic land and other policies, but also to gross neglect and mismanagement by the proprietors and their appointees.

Despite the inadequacies and anachronisms of the Fundamental Constitutions, they did help to establish a system of representative government that eventually led to the demise of the proprietary system in North Carolina. Between 1689 and 1713, the administration of Carolina was formally divided between North Carolina and South Carolina; thereafter, the crown took over the colonies and in 1729 created the royal provinces of North and South Carolina.

§ 6.12(h) Other Laws of Colonial North Carolina Related to Landholding.

Until 1751, the laws of the colony were prepared and circulated only in manuscript form. The first printing in 1751 gave the full text of only the laws then in force, while obsolete or repealed acts were indicated by title only. The property-related legislation from the 1751 edition of North Carolina laws is summarized below, to help indicate that the North Carolina colonists were dealing with the same everyday real property issues as their contemporaries in other colonies:

1715:

Ch. XX: disposal of goods taken for execution; and for better regulation of distresses, for levies and quitrents.

Ch. XXVII: old titles of lands; limitation of actions.

Ch. XXVIII: passing of lands when the estate is in a feme covert.

Ch. XXIX: preventing disputes concerning lands already surveyed.

Ch. XXX: escheat lands and escheators.

Ch. XXXIII: regulating abuses in taking up lands; the method of taking up and surveying lands.

Ch. XXXVI: roads and ferries.

Ch. XXXVIII: appointment of public registers; method for conveying lands, goods, and chattels and for preventing fraudulent deeds and mortgages.

Ch. XLV: fences.

Ch. XLVIII: proving wills, granting letters of administration, and managing intestates' estates.

Ch. XLIX: orphans.

Ch. LIX: securing to Indians the right and property of their own lands.

Ch. LXIV [an example of private legislation related to landholding]: "An Act, impowering Johanna Peterson, Widow of Thomas Peterson, late of Albemarle County, Esq; to make Sale of Certain Lands, late belonging to the said Thomas Peterson; and to make other Provision for Ann, the Daughter of the said Thomas Peterson, to whom the said Lands do descend."

Ch. LXV [another example of private legislation related to landholding]: "An Act, Confirming the Titles of sundry Persons who have, or hereafter may, purchase Lands of Col. Thomas Cary, in Bath County."1723:

Ch. IV: settling titles and bounds of lands.

Ch. X: additional act on proving wills, granting letters of administration, and preventing fraud in managing intestates' estates.

1729:

Ch. II: for more quiet settling the bounds of certain Indian lands.

Ch. VI: for more effectual and speedy administration of the act for settling the titles and bounds of lands.

Ch. VII: confirming the Bath-Town common.

1740:

Ch. I [an example of granting municipal privileges]: "An Act, for Confirming Titles to the Town Lands of Edenton, for securing the Privileges heretofore granted to the said Town, and for further Encouragement and better Regulation thereof."

Ch. IX: exempting inhabitants of Bath from working on the public roads, and obliging them to clear and keep the town streets clear and in good order.

Ch. X: quitrents payable to the crown.

1741:

Ch. XXI: for relief of persons who have suffered from official neglect in recording deeds or who through ignorance have not had their deeds or conveyances acknowledged or recorded.

1743:

Ch. IV: regulating attorney fees.

1748 [second session]:

Ch. III: ascertaining bounds of certain Indian lands, and preventing settling or taking of such lands, by purchase or otherwise, so long as they are occupied by the Indians.

Ch. IV: forming a rent-roll of all lands in the province; quieting possession, and directing payment of quitrents.

1749:

Ch. IV: directing the method for cutting or docking entails of small estates.

1749 [second session]:

Ch. I: putting in force in the province certain enumerated statutes of England.

1749 [third session]:

Ch. IV: enabling justices to obtain law books for county courts.

1751:

Ch. III: additional act on feme coverts conveying their estates in land. n373

FOOTNOTES:

(n1)Footnote 334. 1 Editorial Note in The Earliest Printed Laws of North Carolina (John D. Cushing ed. 1977). Paul Finkelman, *Exploring Southern Legal History, 64 N.C.L. Rev. 77 (1985).*

(n2)Footnote 335. Stephen T. Newcomb, *The Native American Struggle: Conquering the Rule of Law: A Colloquium; The Evidence of Christian Nationalism in Federal Indian Law: The Doctrine of Discovery, Johnson v. Mcintosh, and Plenary Power, 20 N.Y.U. Rev. L. & Soc. Change 303, 326 (1993).*

(n3)Footnote 336. North Carolina Charters and Constitutions, 1578-1698 5 (Mattie Erma Edwards Parker ed. 1963).

(n4)Footnote 337. *Id.* at 6.

(n5)Footnote 338. "Denizen" ordinarily means an inhabitant or resident, although in British usage it may also mean a foreigner who is permitted certain rights of citizenship.

(n6)Footnote 339. North Carolina Charters and Constitutions, 1578-1698 7 (Mattie Erma Edwards Parker ed. 1963).

(n7)Footnote 340. *Id.* at 8.

(n8)Footnote 341. *Id.* at 11-12.

(n9)Footnote 342. David A. Thomas, *Anglo-American Land Law: Diverging Developments from A Shared History Part II: How Anglo-American Land Law Diverged After American Colonization and Independence, 34 Real Prop. Prob. & Tr. J. 295* (Summer, 1999).

(n10)Footnote 343. *Id.* at 19-20.

(n11)Footnote 344. *Id.* at 30.

(n12)Footnote 345. *Id.* at 48.

(n13)Footnote 346. *Id.* at 64-65.

(n14)Footnote 347. *Id.* at 65. The "Bishop of Durham" clause refers to the traditional expectation held of the bishop of Durham, located on the Scottish border, to help protect English land from foreign enemies who intruded on English land. To fulfill these expectations, the bishop enjoyed almost regal powers, including rights to enact laws, impose taxes, prepare for and conduct warfare, among others.

(n15)Footnote 348. *Id.* at 66.

(n16)Footnote 349. *Id.* at 66-67.

(n17)Footnote 350. *Id.* at 68-69.

(n18)Footnote 351. *Id.* at 70.

(n19)Footnote 352. *Id.*

(n20)Footnote 353. William S. Powell, North Carolina, A Bicentennial History 21-22 (1977).

(n21)Footnote 354. *Id.* at 22; 1 *"Introduction,"* in North Carolina Higher-Court Records 1670-1696 xv (Mattie Erma Edwards Parker ed. 1968).

(n22)Footnote 355. North Carolina Charters and Constitutions, 1578-1698 77 (Mattie Erma Edwards Parker ed. 1963).

(n23)Footnote 356. *Id.* at 78.

(n24)Footnote 357. *Id.* at 80.

(n25)Footnote 358. *Id.* at 84.

(n26)Footnote 359. *Id.* at 84-85.

(n27)Footnote 360. *Id.* at 85.

(n28)Footnote 361. *Id.* at 86.

(n29)Footnote 362. *Id.* at 107-127.

(n30)Footnote 363. *"Introduction"* in North Carolina Higher-Court Records , 1670-1696 xx-xxi (Mattie Erma Edwards Parker ed. 1968).

(n31)Footnote 364. *Id.* at xxxiii-xxxiv.

(n32)Footnote 365. 1 The Earliest Printed Laws of North Carolina, 1669-1751 following p. 353 (John D. Cushing ed. 1977).

(n33)Footnote 366. North Carolina Higher-Court Records , 1670-1696 xxxvi (Mattie Erma Edwards Parker ed. 1968).

(n34)Footnote 367. *Id.* at 94.

(n35)Footnote 368. *Id.* at xxiii.

(n36)Footnote 369. *Id.*

(n37)Footnote 370. *Id.* at xxxi-xxxii.

(n38)Footnote 371. *Id.* at lv.

(n39)Footnote 372. 2 Herbert L. Osgood, The American Colonies in the Seventeenth Century 26 (1904).

(n40)Footnote 373. 1 The Earliest Printed Laws of North Carolina, 1669-1751 1-353 (John D. Cushing ed. 1977).

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CHAPTER 6 DEVELOPMENT OF PROPERTY LAW IN ENGLAND'S AMERICAN COLONIES

1-6 Thompson on Real Property, Thomas Editions § 6.13

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§ 6.13 Development of Property Law in South Carolina (from 1670).

§ 6.13(a) Summary of South Carolina's Early Settlement History Shared with North Carolina.

South Carolina holds most of its earliest colonial history, and the foundation of its property rights, in common with North Carolina. These shared beginnings are discussed in detail in § 6.12(a)-(d), *supra*. The beginnings lie late in the 16th century, as a charter was granted to Sir Humphrey Gilbert in 1578, giving property and governmental rights to unoccupied North American lands, on condition that settlement be commenced within six years. A settlement was commenced within that time but survived only a few months, so a similar grant was conferred on Sir Walter Raleigh in 1584. Raleigh's ill-fated colony on Roanoke Island had entirely disappeared by the time a delayed supply ship was able to reach the site in 1590. Landholding was probably exercised communally during these colonizing ventures.

South Carolina territory next came under the jurisdiction of the Virginia Company according to its charter of 1606, discussed in detail in § 6.02(a), *supra*. The focal point of this company's colonial efforts in Jamestown did not have any direct effect on the Carolina territory until about 50 years after Jamestown was founded, when Virginia settlers moved into what is now northeastern North Carolina. The Virginia colonial regulations were revised by a new charter in 1609, discussed in § 6.02(b), *supra*, and again by a third charter in 1612, discussed in § 6.02(c), *supra*. All the charters were revoked in 1624, when Virginia Colony reverted to the English crown. By that time, still no permanent colony had arisen in Carolina territory.

With rights to the territory back in the hands of the monarch, King Charles I granted to his attorney general Robert Heath a huge tract that included virtually all of North and South Carolina. The grant extended from Virginia to Spanish Florida, and from the Atlantic Ocean to the Pacific Ocean, and is discussed in connection with North Carolina settlement in § 6.12(b), *supra*. Neither Heath nor any of his assignees were able to commence a colonization effort, so eventually the crown considered the grant lapsed and re-granted the territory in 1663. Claimants and their successors in interest under the Heath tract, after a long battle, were later able to establish their rights to some land and were awarded a compensatory tract in New York. More pertinent to South Carolina, however, was the fact that the 1629 charter set the pattern for the 1663 charter in defining the property rights of the Carolina colonists. The most noteworthy features of the 1663 charter, as explained in § 6.12(d), *supra*, were its provisions for representative government, for broad feudal powers resting in the private proprietors, and for authority in the proprietors to create a colonial nobility. The grant

under the 1663 charter was revised and expanded under an additional charter in 1665 to extend north to southern Virginia and south to St. Augustine, in present-day Florida.

§ 6.13(b) The Earliest Settlements in South Carolina.

Early in 1663 a group of colonists from Massachusetts tried to establish a settlement in South Carolina territory, but they abandoned the attempt after only a few months. Then, in 1665, Barbadians settled at the same site and planned a second community, but they had abandoned both the actual and the planned settlements by 1667. A short time later, in 1669, a detailed set of rules for colonial government and property rights called the Fundamental Constitutions was announced by the Carolina proprietors, and this is discussed in detail in § 6.12(g), *supra*. It was under the auspices of this frame of government and of a separate governor appointed for South Carolina in 1669 that the founders of the first permanent settlement in South Carolina established their site in March 1670, at the site of present-day Charleston. More precisely, the Fundamental Constitutions were actually suspended until the new colony obtained a greater population. In their place, the proprietors directed that executive and judicial powers be exercised by a Grand Council, composed of proprietors' deputies, freemen, and the governor.

Dissent arose over this form of government, and two dissenters protested that their land rights could not be secured until a regular parliamentary assembly was chosen, which would then confirm their past land grants. A parliament *was* held in July 1670. In August 1671, the proprietors issued a set of temporary laws for this first South Carolina colony:

> These [temporary laws] reveal anew the fact that the board intended to force upon the province the most important provisions of the [Fundamental] Constitutions. These temporary laws provided for an elaborate official system like that of England, for the development as rapidly as possible of the provincial nobility and its incorporation with the council, and for the exercise by the council of the right of initiation and the other powers prescribed for the grand council in the Constitutions. Parliaments were to be called biennially. The creation of landgraves also began at this time, and the governor and council were ordered to have their baronies surveyed when any of the provincial nobility should desire it. n374

The colony failed to progress satisfactorily, and the proprietors were required to make additional investments; they had also agreed to forego quitrents for a period of twenty years (1669-1689). A systematic survey of lands proved too difficult because of the numerous inland waterways and the irregular coastline; and "after the very early days the settlers refused to establish themselves in compact townships, but spread out in isolated plantations along the rivers." n375

> Only the city of Charles Town itself, to which the settlers moved in 1680, met some of the proprietors' expectations. Laid out on the neck of land between the Ashley and Cooper rivers with streets intersecting at right angles according to their instructions, it was one of the first planned cities in North America. Contemporaries were convinced that these arrangements would enable them to "avoid the undecent and incommodious irregularities which other Inglish Collonies are fallen into for want of any early care in laying out the Townes." n376

In 1682 several hundred English Presbyterians and other dissenters and a smaller body of Scottish Presbyterians immigrated to the province. The Scots induced by the prospect of an extended quitrent exemption but also bound to swear submission to the Fundamental Constitution as a condition of receiving land allotments settled at Port Royal, which was wiped out by the Spanish only three years later.

§ 6.13(c) Political Turmoil Centered on Land Issues.

Before the Spanish massacre, a division into three counties was ordered, but at first only one of them, Berkeley County, was even partially organized for its local government functions. The proprietors directed that future land grants must include a re-entry clause enabling the proprietors to recover the property if quitrents were not timely paid, and requiring payment in coin. Meanwhile, the proprietors also stepped up their efforts to have the Fundamental Constitutions fully

accepted by the colonists. The 1669 version was repudiated for the 1682 version, but the legislators rejected that, too, with a unanimous declaration that the province should be governed solley by the terms of its charter. No new laws were passed, and the temporary laws expired in 1690; by that time, no statute at all was in force in South Carolina.

A five-year period of persistent political disturbance followed, unrelieved by any generally accepted source of law for the colony. When a new governor was appointed in 1695, he carried new powers from the proprietors that were used to reach accords. Because most of the unrest was over land issues, settlement of those issues was also essential in stabilizing the government:

> [The legislature] immediately tackled the increasingly thorny issue of land titles and quitrents. The latter had been due since 1690 and, though the proprietors had reluctantly agreed to accept them in commodities appropriate for the English market as well as in coin, South Carolinians had not been paying. [Governor] Archdale and the assembly worked out a compromise. Speaking for the proprietors, he refused to give up the reentry clause previously incorporated into recent land grants but agreed to make no similar changes in the future without giving prior notice; he arranged for the outright sale of lands by the proprietors at a price considerably lower than what they had hitherto asked; he approved the payment of quitrents in purely local commodities, and he remitted part of the currently overdue rents. In return, he asked that the assembly make provision to repay the funds advanced by the proprietors over the last twenty-five years, to enforce the payment of quitrents, and to build a fort at Charles Town. The assembly agreed to the last and, in lieu of the first, arranged to pay the back salary of several proprietary governors. More important, the house also passed a strict law designed to ensure the payment of quitrents (though some individuals still managed to evade them). Finally, because this reasonably comprehensive settlement was supposed to be perpetual, Archdale permitted the assembly to stipulate that these laws could not be changed without its consent. This was more than the other proprietors could bring themselves explicitly to approve, and they never formally ratified these acts. But their failure to exercise a veto permitted the laws to remain in force for more than twenty years, during which the assembly came to regard them as establishing its right to enact legislation with which the proprietors could not subsequently tamper. Later in the decade, the house also demanded the right to repeal acts which the proprietors had approved. n377

The province nevertheless failed to produce more benefits than problems for the proprietors. A formal separation of South Carolina from North Carolina was effected in 1710; the proprietors, however, managed to retain actual title to the land and it was not until 1729 that the title was changed by purchase, the land reverted to the crown, and the royal provinces of North and South Carolina were established.

§ 6.13(d) Landholding Issues in the Later Colonial Period.

After takeover of the colony by the crown, governing officials in the 1730s promoted township arrangements similar to those that were so common in New England. In the South Carolina scheme, townships of 20,000 acres, or a square approximately six miles in each dimension, were reserved for new settlers who would agree to locate in close proximity to one another. Each family would be allotted a town lot, fifty acres of outlying land, and an attractive package of other benefits: exemption from quitrents for ten years; cost of conveyance and surveying paid by the government; and public assistance with costs of tools, food and transportation. These so-called land bounties were available not only to new immigrants but also to indentured servants who were finishing their time. By the 1760's thirteen such townships had been established, and by 1770 these inducements had led to a population with three-quarters of the inhabitants living outside the older settlements.

By holding out hope of better frontier security, the township scheme was one of several factors that dramatically increased the demand for South Carolina land in the 1730's. Also, since the proprietors had closed the land office more than a decade earlier, much demand had become pent up during that time. Improved market conditions for rice also

increased interest in acquiring acreage for rice lands. Before new grants of land could be made to meet this demand, however, a long and serious controversy over quit rents had to be resolved:

> There was no difficulty in working out the basic terms of a new [1731] quitrent act with the legislature: in return for remission of arrears in payment, all who held land from the proprietors would be required to register it with the appropriate officials and receive new grants. Thus the crown would presumably have an accurate roll of all lands on which it would be collecting quitrents. n378

Many speculators and planters resorted to unscrupulous devices to obtain grants to large tracts of land, despite the authority of the 1731 Quit Rent Act and the official policy encouraging smallholders. Moreover, the act did not require registration of lands acquired by private conveyance or by royal grant in the future. Even though these omissions were corrected by legislation in 1744, the collection of quitrents was lax, amounting to less than 20% of the total due by the time of the Revolution.

The initial acquisition of land in South Carolina was remarkably easy, especially for those induced to come "under the bounty":

> All an individual had to do was to petition the governor and council, who then issued a warrant authorizing the surveyor to stake out a tract of so many acres (during most of the colonial period, fifty or 100 for each member of the petitioner's family). The recipient or his surveyor chose an unoccupied site, made a survey, and returned the surveyor's map or plat to the proper office. In turn, a grant was issued in the name of the proprietors or the crown. [F]or most of the colonial period, grants provided a way for men and women of modest means to acquire land, and most grants were in fact made to them. n379

Eventually, it became clear that most of the low land fell into the hands of large landholders, while small farmers concentrated in the back country on farms averaging about 175 acres in size.

§ 6.13(e) Colonial Statutes Relating to Landholding.

In 1736, a mere seven years after South Carolina became a royal province, a retrospective collection of South Carolina laws was published, covering the period from the time of the earliest settlement to when the crown took over the province. A review of the laws then in force relating to landholding gives additional insight into the real property issues faced by South Carolina colonists. Following is a summary of the subjects of that early legislation relating to property rights and landholding, with the year of enactment indicated:

> Prevention of nuisances (1692).
>
> Escheat for nonpayment of quitrents (1694).
>
> Fences (1694).
>
> Payment of arrears in rents (1695).
>
> Forms of purchase grants (1696).
>
> Prevention of double mortgages and conveyances (1698).
>
> Encouraging immigration (1712).
>
> "An Act to put in Force in this Province the several Statutes of the kingdom of England, or South-Britain" (1712).

Limitation of actions (1712).

Collecting back taxes (1721).

Quitrents (1731).

Making effectual wills (1734). n380

FOOTNOTES:
(n1)Footnote 374. 2 Herbert L. Osgood, The American Colonies in the Seventeenth Century 215 (1904).

(n2)Footnote 375. Robert M. Weir, Colonial South Carolina, A History 61 (1983).

(n3)Footnote 376. *Id.* at 61-62.

(n4)Footnote 377. *Id.* at 69-70.

(n5)Footnote 378. *Id.* at 113.

(n6)Footnote 379. *Id.* at 148.

(n7)Footnote 380. The Earliest Printed Laws of South Carolina, 1692-1734 vol. 1, 67-541; vol. II, 23-141 (John D. Cushing ed. 1978).

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CHAPTER 6 DEVELOPMENT OF PROPERTY LAW IN ENGLAND'S AMERICAN COLONIES

1-6 Thompson on Real Property, Thomas Editions § 6.14

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§ 6.14 Development of Property Law in Georgia (from 1732).

§ 6.14(a) The Charter of 1732.

Georgia was the last of the thirteen English colonies in America to be formed and the only colony of the thirteen to be governed by trustees. England's desire to bring more settlers into the frontier areas of its South Carolina colony came together with the philanthropic motives of James Oglethorpe to produce the youngest of the American colonies:

> The plan for the colony originated with James Edward Oglethorpe, an English gentleman of good family, who had served with distinction under Prince Eugene of Savoy, and later had entered the House of Commons. Oglethorpe's sympathies having been enlisted on behalf of imprisoned debtors and discharged prisoners, he conceived the idea of establishing in America a colony where worthy persons of those classes could get a new start in life. The charter granted to trustees certain territory south of the Savannah river, which had originally formed part of South Carolina, but had been retained by the Crown when the Carolinas were surrendered by the proprietors in 1729. To this was added the one-eighth interest retained by Carteret at the time of the surrender, and which he now conveyed to the trustees. The charter was surrendered in 1752, and Georgia became a royal province. n381

The provisions of the 1732 Charter from George II to Oglethorpe and the other trustees relating to property rights and landholding are as follows:

> Reasons for the Charter:
>
> Whereas we are credibly informed, that many of our poor subjects are, through misfortunes and want of employment, reduced to great necessity, insomuch as by their labor they are not able to provide a maintenance for themselves and families; and if they had means to defray their charges of passage, and other expences, incident to new settlements, they would be glad to settle in any of our provinces in America where by cultivating the lands, at present waste and desolate, they might not only gain a comfortable subsistence for themselves and families, but also strengthen our colonies and increase the trade, navigation and wealth of these our realms.

The Grant:

[W]e have ... willed, ordained, constituted and appointed ... for us, our heirs and successors, that our right trusty and well-beloved [trustees] ... be, and shall be one body politic and corporate ... and that they and their successors ... shall and may forever hereafter, be persons able and capable in the law, to purchase, have, take, receive [etc.] ... any manors, messuages, lands, tenements, rents, advowsons, liberties, privileges, jurisdictions, franchises, and other hereditaments ... in fee and in perpetuity, ... also estates for lives, and for years ...

The Tenure and the Quit rent:

[T]o be holden of us, our heirs and successors as of our honour of Hampton-court, in our county of Middlesex in free and common soccage, and not in capite, yielding, and paying therefor to us, our heirs and successors yearly forever, the sum of four shillings for every hundred acres of said lands, which the corporation shall grant, demise, plant, or settle ...

Legislative Power:

And we do hereby ordain ... that for and during the term of twenty-one years, to commence from the date of these our letters patent, the said corporation assembled for that purpose, shall and may form and prepare, laws, statutes and ordinances, fit and necessary for and concerning the government of the said colony, and not repugnant to the laws and statutes of England ...

*

[I]t shall and may be lawful for the said common council ... to distribute, convey, assign and set over such particular portions of lands, tenements and hereditaments ... unto such of our ... subjects ... upon such terms, and for such estates, and upon such rents, reservations and conditions as the same may be lawfully granted ...

No Land Grants for Trustees:

Provided always that no grants shall be made of any part of the said lands unto any person, being a member of said corporation, or to any other person in trust, for the benefit of any member of said corporation; and that no person having any estate or interest, in law or equity, in any part of the said lands, shall be capable of being a member of the said corporation, during the continuance of such estate or interest.

Land Grants Limited to 500 Acres:

Provided also, that no greater quantity of lands be granted, either entirely or in parcels, to or for the use, or in trust for any one person, than five hundred acres; and that all grants made contrary to the true intent and meaning hereof, shall be absolutely null and void.

Corporate Duration of 21 Years:

And we do ... ordain ... that the said corporation and their successors, shall have full power and authority, for and during the term of twenty-one years...

Requirement to Register Property Interests:

And our further will and pleasure is, that the said corporation and their successors, do from time to time, and at all times hereafter, register or cause to be registered, all such leases, grants, plantings,

> conveyances, settlements, and improvements whatsoever, as shall at any time hereafter be made by, or in the name of said corporation, of any lands, tenements or hereditaments within the said province; and shall yearly send and transmit, or cause to be sent or transmitted, authentic accounts of such leases, grants, conveyances, settlements and improvements respectively, unto the auditor of the plantations for the time being, and also to our surveyor for the time being of our said province of South-Carolina ...
>
> Provided always ..., that all leases, grants and conveyances made by or in the name of said corporation, of any lands within the said province, or a memorial containing the substance and effect thereof, shall be registered with the auditor of the said plantations within the space of one year, to be computed from the date thereof, otherwise the same shall be void...
>
> Survey and Inspection for Quit rents:
>
> [To the auditor and surveyor] we do hereby grant full power and authority from time to time, as often as need shall require, to inspect and survey, such of the said lands and premises, as shall be demised, granted and settled as aforesaid: which said survey and inspection, we do hereby declare, to be intended to ascertain the quit rents which shall from time to time become due to us ... n382

§ 6.14(b) The Character of the Earliest Georgia Settlers.

Although it has long been the popular belief that Georgia was populated principally by paupers and imprisoned debtors, more recent research has yielded other information. Debtors were not sought from the prisons, and probably fewer than a dozen convicted debtors ever came to Georgia during the settlement period. Instead, the trustees sought out poor people from the English towns, who, as charity colonists, were then enabled to travel to Georgia at the expense of the trustees. Most were small tradespersons and artisans; sailors and soldiers were considered unfit; farmers were generally considered to be productive and therefore needed in England.

§ 6.14(c) The First Settlement at Savannah.

§ 6.14(c)(1) Securing Land Rights from the Indians.

When Oglethorpe selected the site for the first settlement, he conferred with the Indians there and received their permission for settlement. This led to more extensive negotiations with other tribes of the Creek Confederacy; in May 1733, they entered into a treaty ceding lands they were no longer using. n383

§ 6.14(c)(2) Laying Out the Town.

After an uneventful crossing, the site of modern Savannah was chosen for the first settlement. In a letter of February 10, 1733, to the trustees back in London, Oglethorpe described the first steps toward land allotment and distribution:

> Upon the River-side, in the Centre of this Plain, I have laid out the Town, opposite to which is an Island of very rich Pasturage, which I think should be kept for the Trustees Cattle ... I have marked out the Town and Common; half of the former is already cleared, and the first House was begun Yesterday in the Afternoon. A little Indian Nation, the only one within Fifty Miles, is not only at Amity, but desirous to be Subjects to his Majesty King George, to have Lands given them among us, and to breed their Children at our Schools. n384

The town layout at Savannah set the pattern for other Georgia towns during the trustee period and was itself probably derived from South Carolina's 1730 township plan. Each block, called a tithing, consisted of ten house lots sixty by ninety feet. Four tithings made up a ward, and each ward had a public square in the middle. Trustee lots were reserved for churches, markets and stores. Eventually, the Savannah township consisted of 24 square miles, or 15,360 acres.

Twelve thousand of those acres were intended for private grants (240 grants of 50 acres each), with the balance reserved for roads, streets, commons, and other trustee reserves:

> Immediately beyond the area of the town were the triangular shaped garden lots, which with the building lots, made up five acres to each grantee. Here settlers were supposed to raise vegetables and other garden truck for their tables. Beyond the garden lots were the forty-five acre farm lots where mulberry trees, corn, and other crops were to be planted. Beyond these farm lots, and outside the planned township area, were to be the larger grants of adventurers. The location of adventurer grants was never so rigidly controlled as were those of charity settlers. There were always settlements outside this basic plan, such as the outsettlements around Savannah. n385

The main motivation for this plan was to keep the settlers in fairly close proximity with one another, as a defense against aggression by the Spanish or French. The contiguous settlement pattern did not, however, take into account the varying quality of farm land in the outlying grants. Many settlers complained bitterly about the poor quality of the farm land grants assigned to them in such systematic fashion and a few were allowed to exchange lands, but only after months of struggle on the unfit farmland. Another difficulty with land grants in the townships was that the colony's surveyor could not keep up with the needs of the settlers.

§ 6.14(d) Conflict Over the Tenure of Early Land Grants.

Formal land grant regulations were not announced by the trustees until 1735, but even before that time the land grants probably conformed to the pattern expressed in the regulations. The regulations included:

> A limited grant of fifty acres for each head of a family,
>
> A restriction against alienation except by special permission from the trustees,
>
> A requirement that granted land be cleared and cultivated within ten years from the grant, or else the grant would revert,
>
> In order to commence silk production, a requirement that 100 mulberry trees be planted for every ten acres cleared, and
>
> Inheritance, or tenure, by fee tail-male only.

This latter limitation gave the most significant cause for colonists' concerns. From the beginning the colonists complained that the grants were not in fee simple, but rather in fee tail-male, meaning that the land could descend only to male heirs and only so long as the line of male heirs continued:

> The tail-male provision applied to charity and adventurer grants and was designed to insure a soldier upon each fifty acres. This provision undoubtedly kept many prospective settlers from coming to Georgia, but it was never rigidly enforced. If there was no male heir, women were freely allowed to inherit land upon special application of the Trustees. Tail-male was intended to aid in defense, to control the settlers coming into Georgia, to prevent the unfortunate charity settlers from losing their land, and to prevent individuals from acquiring more than the prescribed five hundred acres. Georgia was intended for unfortunates who would labor upon small land grants, not for economic opportunists to achieve wealth. n386

The restriction on alienation of lands held by the charity settlers was intended effectively to prevent them from divesting their landholdings in return for some more temporary or ephemeral form of wealth, or to prevent their lands from falling into the hands of creditors. More realistic, however, were the complaints from the colonists that tail-male tenure was of

questionable validity under current English law, and that they were unable to lease, mortgage or sell their lands, unless they obtained special permission from the trustees.

In 1738, three years after the 1735 trustee regulations were announced, 119 freeholders of Savannah petitioned the trustees to allow fee simple grants. After an investigation, the trustees denied the petition. Thereupon, Georgia settlers sent an even broader petition the next year:

> asking that land might be granted where it was convenient to the settlers, that excessive quitrents be relaxed, that constables and tithingmen be under the order of the Trustees and the magistrates only, and that the people be allowed to choose their own bailiffs. n387

Eventually, beginning in 1739, the trustees worked out extensive revisions in the land grant policies and included them in a complete land regulation which was adopted by Parliament in 1742 (but never given royal approval):

> Inheritance of land was now allowed to wives, daughters, other relatives, and any heirs at law when there was no member of the immediate family to inherit. Widows were guaranteed all the rights of inheritance they had in England. Colonists could now acquire through inheritance or marriage up to two thousand acres and could lease their lands for not over twenty-one years. White mulberry planting for cleared land was reduced to a hundred trees for every fifty acres, and land did not need to be cleared and cultivated on as rapid a schedule as originally specified. These changes did not affect the basic land policy of the trustees, which required colonists to hold land in tail-male, except that adequate inheritance provisions were made where there was no male heir. Lands still could not be bought and sold freely. n388

In 1750 the trustees abolished tail-male, some quit rents, and limitations on land ownership. n389

§ 6.14(e) Controversy Over Quitrents.

Under the 1732 charter, quitrents were set at four schillings per hundred acres, would not be payable until ten years after the land grants were made, and -- although paid to the trustees -- were ultimately to be given to the crown. In 1735 the trustees introduced a five-fold increase on grants to adventurers. At the time, this new rate was the highest quitrent anywhere in the American colonies. The trustees suggested various reforms in 1741 and 1742, but none were approved by the Privy Council. Thus, in 1745 the trustees directed that rent rolls be prepared so collection could begin; in the end, however, no rent rolls were prepared, and no collection took place during the trustee period, which ended in 1752.

§ 6.14(f) Changes in Landholding Patterns.

Not all landholding was controlled by the trustees and their officials. Some grants were abandoned and then taken up by others, without any form of permission or legality. Some ungranted lands were simply taken over, especially by those who entered the colony in some capacity other than settlers under the trustees. By 1742 the process of consolidating small landholdings into larger plantations had already begun. The earliest consolidations probably resulted from remarriages of widows, who obtained trustee permission to join their landholdings with those of their new husbands.

§ 6.14(g) Landholding in Colonial Georgia Under Royal Administration.

Once the trusteeship of George reverted to the crown in 1752, most landholding arrangements remained as they were, but several important changes in official land policy took place. Land was still granted free of charge, with the exception of surveying and land office fees. Headright grants were still available, at the rate of 100 acres for the head of the family and fifty acres for each other family member, and additional land for new family members. Larger headright grants could be obtained if the grantee could show an ability to use the additional land.

Coastal lands, of course, were the first to be granted, and by 1760 almost all good coastal land up to the boundary of Indian lands had been taken up. By the Treaty of Augusta of November 10, 1763, the Creeks ceded an additional 2,400,000 acres of land, which opened significant new territory and high quality land to Georgians. By 1772, most of the desirable land from this Indian cession had been granted. Another Indian cession occurred in 1773, but this time it was agreed that the Indians would be paid, so the land was sold (for sixpence an acre) rather than given to settlers, and sale proceeds were to be given to the Indians.

Consolidation of holdings, well under way during the trusteeship, accelerated during the crown colony years, but with the earlier emphasis on small holdings, never reached the extent of large holdings in neighboring South Carolina.

To meet the growing problem of abandoned lands, the new royal governor was instructed to make records for all trustee grants that were inadequately documented and then to issue new grants. Later, a local rule gave absentee owners three years to either record their trustee grant or forfeit it to the colony.

The rather onerous clearing and cultivating requirements were originally set at 5% annually, but in 1758 this was relaxed in several ways. Although records are inconclusive, quit rents were probably never collected even during the crown colony period. Nevertheless, a protest against quit rents was raised by some Georgians on the eve of the Revolution. n390

§ 6.14(h) Georgia Colonial Statutes Related to Landholding.

In 1762 a printer was commissioned to print Georgia colonial legislation then in force which, in published form, amounted to 35 separate acts passed between 1755 and 1763. The provisions of those laws and of subsequent legislation that relate to property rights and landholding in colonial Georgia are summarized below:

Confirming sales of land by attorneys or agents, and ascertaining the proof of instruments or writings (1757).

Preventing private persons from purchasing lands from the Indians (1758, 1765).

Limiting the time for persons claiming lands by virtue of warrants of surveys, allotments, nominal titles, or possession, derived from the late trustees or from others acting under their authority (1758).

Regulating fences (1759).

Preventing the building of wooden chimneys in Savannah; providing against accidental fires (1759, 1763).

Enabling feme coverts (married women) to convey their estates and validating prior conveyances and acknowledgements (1760).

Subjecting to attachment real and personal estates of debtors (1761).

Ascertaining the commons land of Savannah (1761, 1766, 1770).

Preventing fraudulent mortgages and conveyances, and validating prior deeds and conveyances (1763, 1768).

Preventing the throwing of ballast, rubbish or falling trees into rivers and creeks (1763, 1765).

Empowering the General Court of Pleas to grant writs of partition of lands and tenements held in coparcenary, joint tenancy and tenancy in common, and prescribing procedures (1763, 1767).

Preventing damage from dams or banks used to reserve or stop water (1763).

Empowering surveyors to lay out public roads (1764, 1766, 1767).

Preventing trespass on lands of the crown or on Indian lands (1764).

Directing executors and administrators in returning inventories and accounts of estates, and permitting commissions therefor (1764).

Preventing frauds and abuses in laying out crown lands (1765).

Cultivating and improving lands; regulating surveying and marking of lines (1765).

Raising quitrent rates (1765).

Encouraging settlers [by granting township lots] (1766).

Limitation of actions (1767).

FOOTNOTES:

(n1)Footnote 381. Select Charters and Other Documents Illustrative of American History, 1606-1775 235 (William MacDonald ed. 1914).

(n2)Footnote 382. *Id.* at 236-248. By-laws of the trustee corporation are *published in* 1 Allen D. Candler, The Colonial Records of the State of Georgia 31-42 (1904). Albert R. Saye, ed. Georgia's Charter of 1732 (1942).

(n3)Footnote 383. Kenneth Coleman, (ed.), A History Of Georgia, 18-19 (2d. ed. 1991).

(n4)Footnote 384. *Id.* at 27.

(n5)Footnote 385. *Id.* at 123.

(n6)Footnote 386. *Id.* at 122-123.

(n7)Footnote 387. *Id.* at 99.

(n8)Footnote 388. *Id.* at 124-125.

(n9)Footnote 389. Harold H. Martin, Georgia, A Bicentennial History 24-25 (1977).

(n10)Footnote 390. A History of Georgia 64 (2d ed. Kenneth Coleman ed. 1991).

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CHAPTER 7 DEVELOPMENT OF AMERICAN PROPERTY LAW AFTER INDEPENDENCE

1-7 Thompson on Real Property, Thomas Editions 7.syn

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CHAPTER 7 DEVELOPMENT OF AMERICAN PROPERTY LAW AFTER INDEPENDENCE

1-7 Thompson on Real Property, Thomas Editions § 7.01

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§ 7.01 Introduction to the Chapter.

One of the persisting realities of American legal life is the existence of a separate and lively jurisprudence in each of the states, lying beneath a thin and often deceptive veneer of common law uniformity. Also, next to and sometimes transcending the state laws and legal systems is a burgeoning body of American federal law.

In the first part of this chapter is a review of the extent to which each state has received the common law and the older statutory law of England as a foundational part of its general and property jurisprudence. n1 In the concluding section, major developments in state property law from a national perspective will be described.

FOOTNOTES:
(n1)Footnote 1. Norman F. Cantor, Imagining the Law-Common Law and the Foundation of the American Legal System (1998); Russell Benedict, Acts& Laws of the Thirteen Colonies & States: Constituting the Extraordinary Collection of Hon. Russell Benedict, Justice of the Supreme Court of New York (1922); Robin Cooke, Turning Points of the Common Law (1997); Richard B. Cappalli, American Common Law Method (1997); John Hudson, The Formation of the English Common Law: Law and Society in England from the Norman Conquest to the Magna Carta (1996); Roscoe Pound, The Spirit of the Common Law (1921); James M. Walker, The Theory of the Common Law (1852); Gregory S. Alexander, Commodity & Propriety: Competing Visions of Property in American Legal Thought 1776-1970 (1997); John A. Makdisi, "The Islamic Origins of the Common Law," *77 N.C. L. Rev. 1635 (1999).*

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CHAPTER 7 DEVELOPMENT OF AMERICAN PROPERTY LAW AFTER INDEPENDENCE

1-7 Thompson on Real Property, Thomas Editions § 7.02

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§ 7.02 Reception of the English Common Law of Property in the American States and the District of Columbia.

In this section the objective is to describe the events by which each state determined whether and to what extent it received the common and statutory law of England into its jurisprudence, either generally or for property. The emphasis is on chronological description and exposition of the primary documents in these developments, rather than on interpretive commentary. The result should be an enduring reference collection of primary materials relevant to foundational property jurisprudence in the American states.

The progression of most state areas from unexplored region, to federal territory, to statehood was often not along a straight line, and some states were affiliated with as many eight different territories before becoming a separate territory and then a state. Some states share a common history with one or more other states during most or all of their territorial history prior to statehood. In this chapter, some of the material describing pre-statehood governing arrangements is duplicated in the sections for such states. That duplication helps readers avoid taking one or more side trips into the historical background material for several other states. Therefore, the information provided for each state in its own section is sufficient by itself, and does not rely on reference to information provided for other states with partially common historical foundations.

§ 7.02(a) Alabama.

The area of the present state of Alabama was originally incorporated into the Territory of Mississippi in 1798. A separate territorial government for the Alabama portion of the territory was enacted in 1817, but the older territorial provisions continued to govern until Alabama attained statehood in 1819. n2 In the Mississippi territorial legislation of 1798, which in 1817 was continued in effect in Alabama Territory, no provision for reception of the common law is included, although the document does incorporate the rights granted under the Northwest Ordinance of 1787:

> That from and after the establishment of the said government, the people of the aforesaid territory, shall be entitled to and enjoy all and singular the rights, privileges and advantages granted to the people of the territory of the United States, northwest of the river Ohio, in and by the aforesaid ordinance of the thirteenth day of July, in the year one thousand seven hundred and eighty-seven, in as full and ample a manner as the same are possessed and enjoyed by the people of the said last mentioned territory. n3

The Northwest Ordinance, enacted while the Articles of Confederation were in effect, ensured to the inhabitants of the territory judicial proceedings according the course of the common law, among other rights:

> The inhabitants of the said territory shall always be entitled to the benefits of the writs of *habeas corpus*, and of the trial by jury; of a proportionate representation of the people in the legislature, and of judicial proceedings according to the course of the common law. All persons shall be bailable, unless for capital offenses, where the proof shall be evident, or the presumption great. All fines shall be moderate; and no cruel or unusual punishments shall be inflicted. No man shall be deprived of his liberty or property, but by the judgment of his peers, or the law of the land, and should the public exigencies make it necessary, for the common preservation, to take any person's property, or to demand his particular services, full compensation shall be made for the same. And, in the just preservation of rights and property, it is understood and declared, that no law ought ever to be made or have force in the said territory, that shall, in any manner whatever, interfere with or affect private contracts, or engagements, *bona fide*, and without fraud previously formed. n4

The Northwest Ordinance also required the appointment of a three-judge court, the judges to "have a common-law jurisdiction," and who, with the governor, "shall adopt and publish in the district such laws of the original States, criminal and civil, as may be necessary, and best suited to the circumstances of the district...." n5 In 1795 the governor and the judges of the Northwest Territory enacted the Virginia reception statute of 1776 (even though Virginia had in 1792 repealed the portion of the statute receiving English statutes):

> That the common law of England, all statutes or acts of parliament made in aid of the common law prior to the fourth year of the reign of King James the first, and which are of a general nature, not local to the kingdom, together with the several acts of the general assembly of this colony now in force, so far as the same may consist with the several ordinances, declarations, and resolutions of the general convention, shall be the rule of decision, and shall be considered as in full force, until the same shall be altered by legislative power of this colony. n6

Thus, while Alabama was a separate territory and on the threshold of statehood between 1817 and 1819, it was governed under a territorial law that incorporated the fundamental law described in the Northwest Ordinance of 1787, which was, for judicial proceedings, the "common law," and otherwise drawn from laws of established states. That law, as will be amply demonstrated throughout this chapter, was fundamentally English common law modified for American conditions.

The organizing and defining of Mississippi, Georgia and Alabama territories was complicated by the Yazoo land fraud engineered by the Georgia legislature in 1795. As part of the effort to settle land claims arising from that activity, Georgia ceded to the United States its claims to territory lying within the areas claimed by Mississippi and Alabama. The 1802 deed of cession from Georgia confirmed both British and Spanish land grants given before October 22, 1795, and stipulated that provisions of the Northwest Ordinance should extend to the lands being ceded. In 1845 the United States Supreme Court held that this provision extended the English common law even to those parts of the territory formerly held by Spain. n7

The question of reception of English statutes in Mississippi Territory (including Alabama) law was simplified after a digest of territorial laws was completed and compiled into one volume in 1807. The Mississippi territorial legislature adopted the volume as law in the territory with the proviso that "all statutes of England and Great Britain not contained in said volume of statutes, shall cease to have any force or validity in this Territory." n8

With this background of implied common law validity, in the enabling act for statehood, Alabamans were authorized to "form a constitution and state government for the people within said territory ... not repugnant to the principles of the [Northwest Ordinance]...." n9

Thus in Alabama's first constitution, of 1819, a provision continuing laws then in effect was included:

> All laws and parts of laws, now in force in the Alabama territory, which are not repugnant to the provisions of this constitution, shall continue and remain in force as the laws of this state, until they expire by their own limitation, or shall be altered, or repealed, by the legislature thereof. n10

This provision, after an absence from intervening constitutions, has reappeared in Alabama's present constitution, of 1901, in a slightly altered form:

> That all laws in force at the ratification of this Constitution and not inconsistent therewith, shall remain in full force until altered or repealed by the legislature; and all rights, actions, prosecutions, claims, and contracts of the state, counties, municipal corporations, individuals, or bodies corporate, not inconsistent with this Constitution, shall continue to be valid as if this Constitution had not been ratified.

After numerous judicial decisions invoking various aspects of English common and statute law, the Alabama legislature enacted a reception statute in 1907, and such a provision continues verbatim in the current code:

> The common law of England, so far as it is not inconsistent with the Constitution, laws and institutions of this state, shall, together with such institutions and laws, be the rule of decisions, and shall continue in force, except as from time to time it may be altered or repealed by the legislature. n11

That Alabama is a common law state continues to be affirmed by contemporary court decisions. n12 Before the statutory reception provision was enacted, Alabama courts had held that English statutes adopted before "the emigration of our ancestors" can constitute part of the common law, n13 and that the Alabama Supreme Court should follow the common law on subjects not changed by the legislature. n14 Additionally, the legislature presumably does not intend to make a change in the common law, unless its intent is shown expressly or by unmistakable implication. n15 A modern example of enduring common law doctrine in Alabama is a decision that a lease for years is personal property, a chattel real, for venue purposes. n16

§ 7.02(b) Alaska.

Alaska was obtained from Russia under a treaty dated June 20, 1867, and possession was formally transferred on October 18, 1868. For sixteen years thereafter Congress made no serious effort to provide a basic form of government or foundation of law for the territory. Military forces were withdrawn in 1877 and what little local government there was had receded into inactivity. Most of the laws relating to U.S. territories generally had no application to conditions in Alaska. n17 Finally, in 1884, Congress produced the first general statute on Alaska, the Civil Government Act, which declared the laws of Oregon applicable to Alaska:

> Sec. 7. That the general laws of the State of Oregon now in force are hereby declared to be the law in said district, so far as the same may be applicable and not in conflict with the provisions of this act or the laws of the United States ... n18

When a comprehensive civil code for Alaska was enacted in 1900, the common law was officially received:

> Sec. 367. So much of the common law as is applicable and not inconsistent with the Constitution of the United States or with any law passed or to be passed by the Congress is adopted and declared to be the law within the district of Alaska. n19

And when Alaska was organized as a territory, laws previously passed were continued in effect:

> Sec. 3. Constitution and Laws of United States extended ... except as herein provided all laws now in force in Alaska shall continue in full force and effect until altered, amended, or repealed by Congress or by the legislature ... n20

A statute specifically receiving the common law was enacted before statehood, and now continues in the current state code:

> So much of the common law not inconsistent with the Constitution of the State of Alaska or the Constitution of the United States or with any law passed by the legislature of the State of Alaska is the rule of decision in this state. n21

Shortly after the Civil Government Act of 1900 and before the reception statute just cited, an Alaska court had occasion to describe its concept of the common law:

> Ordinarily we mean by the "common law" the unwritten law, or the English common law, as sometimes stated, comprising the immemorial custom declared by the courts and particular local customs, the law merchant, or that part not defined by statute, and the canon and ecclesiastical law ... In *Doe ex dem. Patterson v. Winn, , 30 U.S. 233, 8 L. Ed. 108* , it is said, "The term 'common law' means both the common law of England, as opposed to written or statute law, and the statutes passed before the immigration of the first settlers to America." n22

A more recent opinion of the Alaska Supreme Court expressed an expanded concept of the common law, noting that Alaska also adopts the common law of the United States, some of which is over 300 years old, and that the common law of England is not controlling over the American common law. n23

§ 7.02(c) Arizona.

Land that is now in Arizona was first occupied by the United States in 1846 during the war with Mexico. A code of laws drawn up in 1846, during the American military governorship, continued in effect the earlier Spanish and Mexican laws. When territorial status was granted in 1850 for this area, then designated as New Mexico Territory, no provision was made either for continuing or discontinuing the effect of prior laws; apparently only applicable federal laws were received:

> And be it further enacted, That the Constitution, and all laws of the United States which are not locally inapplicable, shall have the same force and effect within the said Territory of New Mexico as elsewhere within the United States. n24

Also, the "Supreme and District Courts, respectively, shall possess chancery as well as common law jurisdiction." n25 This uncertain mix of Anglo-American and Spanish-Mexican elements in territorial law was noted in state courts, where the provision for common law jurisdiction was restricted to procedural matters only, and substantive rights were determined according to Mexican law. n26

When the Arizona area was split off and formed into its own territory in 1863, the territorial act declared that "all legislative enactments of the Territory of New Mexico not inconsistent with the provisions of this act, are hereby extended to and continued in force in the said Territory of Arizona, until repealed or amended by future legislation...." n27

In anticipation of statehood, Arizonans in 1891 drafted and approved a constitution declaring that "All laws now in force in the Territory of Arizona, which are not repugnant to this Constitution, shall remain in force until they expire by their own limitation, or shall be altered or repealed by the Legislation." n28 Statehood was delayed for two decades, but the new constitution of 1912 drafted after statehood was attained contained essentially the same continuation provision:

"All laws of the Territory of Arizona now in force, not repugnant to this Constitution, shall remain in force as laws of the State of Arizona until they expire by their own limitations or are altered or repealed by law...." n29

Meanwhile, soon after territorial status had been attained, a code of laws for the territory was prepared which included a wholesale reception of the common law and simultaneously and entirely "repealed" the Hispanic elements of the territory's legal history. n30 Subsequent legislation reincorporated individual elements of the old Mexican and Spanish laws, especially the community property approach to marital property, but a general common law reception statute is in the current Arizona statutes:

> The common law only so far as it is consistent with and adapted to the natural and physical conditions of this state and the necessities of the people thereof, and not repugnant to or inconsistent with the constitution of the United States or the constitution or laws of this state, or established customs of the people of this state, is adopted and shall be the rule of decision in all courts of this state. n31

State statutes also provide for application of common law in trial court procedure and in exercise of inherent judicial powers: "The superior court, in addition to the powers conferred by constitution, rule or statute, may proceed according to the common law." n32

Perhaps the most detailed exposition of Arizona's reception of the common law was provided by the Arizona Supreme Court in 1937:

> The question arises, though, as to what principles of English law are, within the meaning of our statute, "common law" and what are not. The large majority of our states have statutes which, in substance, recognize the English common law as part of the law of America, but the meaning of these words "common law" is by no means uniform in the various states. The reason for this lack of uniformity is that the Legislatures of many of the states have fixed the date at which the common law of England became crystallized, so far as its application to the particular state is concerned, at a time named in the statute of adoption. In most of the original thirteen states, where the Legislatures have not specifically fixed the date at which the common law of England is presumed to have crystallized, the courts have generally held it to be the lex non scripta [unwritten law] and the general statutes of Great Britain in amendment thereof which were in force at the time of the first immigration of our English ancestors to the continent ... On the other hand, many of the states take a different view. The matter is ably discussed in the case of *Browning v. Browning's Estate, 3 N.M. 659, 9 P. 677, 683* , where the court says:
>
> From the authorities cited, it is clear that there are three classes of 'common law as recognized in the United States of America': First, in those states which were a part of the original colonies, and which have not by legislation adopted statutes passed prior to a particular date, the unwritten law, and such general British statutes, applicable to their condition, as were in force at the time of the formation of the colonial governments, and such as were afterwards adopted, expressly or tacitly, constituted the common law; second, in those states which have adopted the common law, and the British statutes passed and in force prior to the dated fixed in the act of adoption, and were of a general nature, and suitable to their situation, such common law and statutes constitute their common law; and, third, in those states and territories which were not of the original colonies, and which have not in terms adopted any English statutes, but have adopted the common law, the unwritten or common law of England, and the acts of parliament of a general nature, not local to Great Britain, which had been passed and were in force at the date of the war of the Revolution, and not in conflict with the constitution or laws of the United States, nor of the state or territory, and which were suitable to the wants and condition of the people, are the common law of such states and territories.
>
> This territory belongs to the last class. It was not a part of the original colonies, but was acquired in 1848. The legislature has not in terms adopted any British statutes, nor has it undertaken to define what is

> embraced in the words 'common law,' or lex non scripta, and such British statutes of a general nature, not local to that kingdom, nor in conflict with the constitution or laws of the United States, nor of this territory, which are applicable to our condition and circumstances, and which were in force at the time of our separation from the mother country.
>
> We agree that the rule laid down by the Supreme Court of New Mexico is the one applicable to Arizona.
>
> "Common law" means the unwritten or common law of England, together with acts of parliament of a general nature, not local to Great Britain, which had been passed and were enforced at the time of separation of colonies from the mother country so far as they are suitable to wants, conditions, and circumstances in Arizona. n33

The interaction of the common law with Spanish law, and both with statutory law, is best illustrated in the area of Arizona's community property approach toward marital property. The Arizona Supreme Court's most authoritative statement on this matter was given in 1923:

> Much argument and citation are indulged in by counsel on both sides upon the question as to whether or not the principles of the common or the Spanish law should interpret the community property statutes. The terms in which the Legislature has adopted the common law do not necessarily exclude the application of all principles of the Spanish law, provided they are applicable to customs or enactments adopted from that law, and which are not inconsistent with the laws and customs of this state...; but the rule which appellants would have us adopt is inconsistent with both the laws and customs of this state. The statutes of this state make the adultery and abandonment of the wife, when judicially determined, work a forfeiture of all subsequent marital rights, including both status and property. It does not, however, impose as a penalty the loss of all property rights already gained. The exaction of the penalty which appellants urge upon us as authorized by the Spanish law is directly in conflict with the laws of this state, however it might be affected by the principles of the common law. Community property grows out of and depends upon the marriage relation. The regulation therefore of the marriage relation by statute, by common law, and by decision of court, necessarily and inevitably, indirectly at least, regulates community property rights. The marital institution in this jurisdiction is quite a different institution in some respects from the marital relation under the Spanish law. The premises upon which the Spanish courts reached their decisions are not the same premises upon which the courts of this state must decide community property rights, and the determinations of those courts are, therefore, not reliable precedents in a case of this sort. The institution of marriage and the consequences following a violation of marital rights are governed and controlled by the principles of the common law, the statutory law of this state which has been inspired by those principles, and judicial interpretation of those laws. n34

Similarly, the common law doctrine of riparian water rights was not included in the general adoption of the common law, because the streams qualified for use in irrigation had already been taken up as public property and subjected to various statutes regulating rights to divert for irrigation. n35 Moreover, the common law water rights doctrines were also abrogated by state statute. n36

§ 7.02(d) Arkansas.

As part of the territory in the Louisiana Purchase, Arkansas shares in the common French and Spanish legal heritage belonging to the early settlement history of that area. As far as permanent settlement and government are concerned, Spanish exploration in the 16th century, and French probes in the 17th and 18th centuries ultimately resulted only in the settlements in and around New Orleans and a tiny community at St. Louis. French governance over the region ended with the arrival of a Spanish governor in 1769, and Spanish authority ended in 1803. Upon his assumption of office in 1769, the Spanish governor officially proclaimed the substitution of Spanish law for all prior laws in the area. n37

When the new American governor arrived in New Orleans in 1804, he created a "court of common pleas" with proceedings in English, signifying an abrupt transition into an American common law system. Reacting to local protest, Congress later in that same year separated the area of Louisiana state, the Territory of Orleans, from the rest of the Louisiana territory, designating the remainder as the District of Louisiana and placing it administratively under the Territory of Indiana. n38 Existing law was continued in force for the District of Louisiana: "The laws in force in the said district of Louisiana, at the commencement of this act, and not inconsistent with any of the provisions thereof, shall continue in force until altered, modified or repealed by the governor and judges of the Indiana territory, as aforesaid." n39

The Indiana territorial government enacted certain laws of the new territory between 1804 and 1805, all of them with pronounced common law flavor, and in 1806 Congress established a separate administration for the area, redesignating it the Territory of Louisiana. Statutes enacted after this change also covered familiar common law subjects. In 1812 the Territory of Louisiana was granted the right to its own legislative assembly, and its name was changed to the Territory of Missouri. A territorial enactment in 1815 authorized the recording of land titles acquired during the period of Spanish government, but in 1816 the territorial legislature adopted a broad reception statute for the English common law:

> The common law of England, which is of a general nature, and all statutes made by the British parliament in aid of or to supply the defects of the said common law, made prior to the fourth year of James the first, and of a general nature, and not local to that kingdom, which said common law and statutes are not contrary to the laws of this territory, and not repugnant to, nor inconsistent with the constitution and laws of the United States shall be the rule of decision in this territory, until altered or repealed by the legislature, any law, usage, custom to the contrary notwithstanding, provided, however, that none of the British statutes respecting crimes and punishments shall be in force in this territory, nor shall any person be punished by common law, where the laws and statutes of this territory have made provision on the subject, but where the laws and statutes of the United States and this territory have not made provision for the punishment of offences, the several courts may proceed to punish for such offences, provided, the punishment shall in no case be other than fine and imprisonment, and the term of imprisonment shall not exceed two months; and the fine shall not exceed one hundred dollars. n40

A companion provision to this general common law reception statute indicated certain real property common law doctrines that were excepted from this reception:

> The doctrine of survivorship in cases of joint tenants shall never be allowed, in this territory. The doctrine of entails shall never be allowed, and in all cases where any real estate shall be entailed, the whole of the right and interest of, in, and to the same, shall vest in fee simple in the person having the first reversion or remainder in said estate, after the life estate is determined in said estate. n41

Just three years after enactment of this reception statute, in 1819, the Territory of Arkansas was created, n42 with the Missouri Territory laws then in effect adopted as its laws for the moment:

> And be it further enacted, That all the laws which shall be in force in the territory of Missouri, on the fourth day of July next, not inconsistent with the provisions of this act, and which shall be applicable to the territory of Arkansaw, shall, and continue, in force in the latter territory, until modified or repealed by the legislative authority thereof. n43

Leaders of Arkansas in 1836 drafted a constitution in anticipation of statehood, most of which document was effectively ratified when statehood was granted later that year. The new constitution provided "That all laws now in force in the Territory of Arkansas, which are not repugnant to this constitution, shall remain in force until they expire by their own limitations, or be altered or repealed by the general assembly." n44 An essentially similar provision is also in the present

Arkansas Constitution. n45

More specifically, a common law reception statute was enacted shortly after statehood and a modern counterpart is in the current Arkansas code:

> The common law of England, so far as it is applicable and of a general nature, and all statutes of the British Parliament in aid of or to supply the defects of the common law made prior to March 24, 1606, which are applicable to our own form of government, of a general nature and not local to that kingdom, and not inconsistent with the Constitution and laws of the United States or the Constitution and laws of this state, shall be the rule of decision in this state unless altered or repealed by the General Assembly of this state. n46

In addition, state statute requires that judicial jurisdiction and procedure not otherwise regulated are had and conducted according to the common law:

> Where [circuit court] actions and proceedings are not expressly provided for by statute, the actions and proceedings may be had and conducted by the circuit courts and judges, in accordance with the course, rules, and jurisdiction of the common law. n47

Another Arkansas statute touching on the real property common law regulates the legal status of time-share estates:

> A time-share estate is an estate in real property and has the character and incidents of an estate in fee simple at common law. It may include an estate for years with a remainder over in fee simple or an estate for years with no remainder if a leasehold. The foregoing shall supersede any contrary rule at common law. n48

The reception statute has been cited in support of the continuing effect of the rule in *Shelley's Case*, n49 the requirements and incidents of the tenancy by the entireties, n50 and for other matters. n51

§ 7.02(e) California.

Spanish outposts at San Diego and Monterey in California had been established by the beginning of the 19th century, but little governmental control was exercised, especially from Mexico after Mexican independence was achieved in 1821. Americans obtained control of California almost as soon as war with Mexico broke out in 1845. In the years between withdrawal of Mexican control in 1845-1846 and commencement of official American governance in 1850, existing law continued in force by military directive, and when Californians adopted a constitution in 1849, in anticipation of statehood, existing laws were again continued in force:

> All rights, prosecutions, claims and contracts, as well of individuals as of bodies corporate, and all laws in force at the time of the adoption of this Constitution, and not inconsistent therewith, until altered or repealed by the legislature, shall continue as if the same had not been adopted. n52

A provision similar in substance was included in the California constitution of 1879, n53 which is still the current provision on California laws in force.

When the California legislature convened in 1850, it enacted, over some opposition, a rather cryptic English common law reception statute:

> The common law of England, so far as it is not repugnant to or inconsistent with the Constitution of the United States, or with the Constitution or laws of California, shall be the rule of decision in all the courts of this state. n54

A virtually identical provision is in effect in the current California Civil Code. n55 California courts have held that this reception provision adopts not only the common law but also the common law procedure of the courts. n56 The adoption of the common law also signaled the rejection of laws derived from other legal regimes, such as the civil law, Roman law, and Mexican law. n57 The year 1850 is the key date in this reception, with laws preceding that year being superseded by the common law reception, n58 and with common law judicial powers being defined as of 1850. n59 An early California decision declared that English statutes were not included in the common law reception, n60 but later courts included in the received common law English statutes that influenced the common law, n61 as well as equity jurisprudence. n62

While it has been held that common law rules governing real estate titles n63 and riparian rights n64 were received, the English Statute of Enrollments, n65 the Statute of Uses, n66 and common law rules as to percolating waters n67 and that an illegitimate child could not inherit from its natural father n68 have all been held not in force in California. California's community property approach toward marital property is an example of common law reception having been superseded by state statute.

§ 7.02(f) Colorado.

Most of the area that is now in the state of Colorado was originally included in the Territory of Kansas that was established in 1854. The Territory of Kansas had been part of the Louisiana Purchase and theoretically shared in the common French and Spanish legal heritage belonging to the early settlement history of that area. As far as permanent settlement and government are concerned, Spanish exploration in the 16th century, and French probes in the 17th and 18th centuries ultimately resulted in no permanent settlements in Kansas. French governance over the region was effectively confined to the settlements at New Orleans and St. Louis and ended with the arrival of a Spanish governor in 1769; Spanish authority ended in 1803. Upon his assumption of office in 1769, the Spanish governor officially proclaimed the substitution of Spanish law for all prior laws in the area. n69

When the new American governor arrived in New Orleans in 1804, he created a "court of common pleas" with proceedings in English, signifying an abrupt transition into an American common law system. Reacting to local protest, Congress later in that same year separated the area of Louisiana state, the Territory of Orleans, from the rest of the Louisiana territory, designating the remainder as the District of Louisiana and placing it administratively under the Territory of Indiana. n70 Existing law was continued in force for the District of Louisiana: "The laws in force in the said District of Louisiana, at the commencement of this act, and not inconsistent with any of the provisions thereof, shall continue in force until altered, modified or repealed by the governor and judges of the Indiana territory, as aforesaid." n71

Such a provision was hardly meaningful in the region of Kansas, where no permanent settlements were established until 1820. However, in 1806, a ceremony had been conducted at an Indian village in Kansas to remove the Spanish flag and replace it with the American flag. Moreover, because it was anticipated that Kansas would be a prime location for resettlement of Indians, other settlements were not encouraged. This began to change when a military outpost was established in 1842 and emigrant trails were pushed through Kansas, spawning still more settlements. Settlement dramatically increased after passage of the Kansas-Nebraska Act in 1854, attempting to resolve the slavery question in new states and establishing the Territory of Kansas, which, as mentioned, included most of Colorado.

The lands in the Territory of Kansas had technically been under the legal rules enacted by the Indiana territorial government from the time of the Louisiana Purchase. This government enacted certain laws for the new territory between 1804 and 1805, all of them with pronounced common law flavor, and in 1806 Congress established a separate administration for the area of the Louisiana Purchase outside New Orleans, redesignating it the Territory of Louisiana. Statutes enacted for this territory after this change also covered familiar common law subjects. In 1812 the Territory of Louisiana was granted the right to its own legislative assembly, and its name was changed to the Territory of Missouri.

A territorial enactment in 1815 authorized the recording of land titles acquired during the period of Spanish government, which, of course, did not affect the Kansas area, but in 1816 the territorial legislature adopted a broad reception statute for the English common law:

> The common law of England, which is of a general nature, and all statutes made by the British parliament in aid of or to supply the defects of the said common law, made prior to the fourth year of James the first, and of a general nature, and not local to that kingdom, which said common law and statutes are not contrary to the laws of this territory, and not repugnant to, nor inconsistent with the constitution and laws of the United States shall be the rule of decision in this territory, until altered or repealed by the legislature, any law, usage, custom to the contrary notwithstanding, provided, however, that none of the British statutes respecting crimes and punishments shall be in force in this territory, nor shall any person be punished by common law, where the laws and statutes of this territory have made provision on the subject, but where the laws and statutes of the United States and this territory have not made provision for the punishment of offences, the several courts may proceed to punish for such offences, provided, the punishment shall in no case be other than fine and imprisonment, and the term of imprisonment shall not exceed two months; and the fine shall not exceed one hundred dollars. n72

A companion provision to this general common law reception statute indicated certain real property common law doctrines that were excepted from this reception:

> The doctrine of survivorship in cases of joint tenants shall never be allowed, in this territory. The doctrine of entails shall never be allowed, and in all cases where any real estate shall be entailed, the whole of the right and interest of, in, and to the same, shall vest in fee simple in the person having the first reversion or remainder in said estate, after the life estate is determined in said estate. n73

No changes in the laws applicable to the Kansas and Colorado areas occurred thereafter until the Kansas Territory was created in 1854 and the first legislature met in 1854. In the territorial enabling act, no explicit common law reception was mentioned. However, it was provided that the territorial supreme and district courts "shall possess chancery as well as common law jurisdiction," n74 and federal law, except for the 1820 Missouri Compromise legislation, was declared applicable in the new territory. n75

In 1855 the new Kansas territorial legislature enacted a general reception statute, providing that both English common law and pertinent English statutes were adopted:

> The common law of England and all statutes and acts of parliament made prior to the fourth year of James the first, and which are of a general nature, not local to that kingdom, and not repugnant to or inconsistent with the constitution of the United States, and the act entitled "An act to organize the territory of Nebraska and Kansas," or any statute law which may from time [to] time be made or passed by this or any subsequent legislative assembly of the territory of Kansas, shall be the rule of action and decision in this territory, and law, custom or usage to the contrary notwithstanding. n76

Colorado achieved its own territorial status, with the same boundaries as the eventual state of Colorado, when Kansas became a state in 1861. Colorado's legislature that same year enacted a different common law reception provision:

> That the common law of England, so far as the same is applicable and of a general nature, and all acts and statutes of the British parliament, made in aid of or to supply the defects of the common law prior to the 4th year of James the First (excepting the 2nd section of the 6th Chapter of 43rd Elizabeth, the 8th Chapter of 13th Elizabeth, and 9th Chapter of 37th Henry Eighth), and which are of a general nature, and not local to that kingdom, shall be the rule of decision, and shall be considered as of full force until repealed by legislative authority. n77

This territorial provision, with only minor punctuation changes, is continued verbatim as the state's reception statute in the current Colorado code. n78

When, after several abortive attempts at statehood and constitution making, Colorado attained statehood in 1876, its first constitution contained a provision continuing in force previous laws:

> That all laws in force at the adoption of this constitution shall, so far as not inconsistent therewith, remain of the same force as if this constitution had not been adopted until they expire by their own limitation, or are altered or repealed by the general assembly; and all rights, actions, prosecutions, claims, and contracts of the Territory of Colorado, counties, individuals, or bodies-corporate, (not inconsistent therewith,) shall continue as if the form of government had not been changed and this constitution adopted. n79

The 1876 constitution remains the fundamental constitution for Colorado today, and the current constitutional provision continuing previous laws in force has been modified only slightly from the original section. n80

The Colorado Supreme Court has drawn a contrast between the thirteen original states, whose common law adoption came by "inheritance" from previous practice, and Colorado, whose common law adoption was by legislative act, the court thus characterizing itself as a constitutional court with common law powers. n81 Modern Colorado decisions continue to recognize the viability of English common law in such matters as restraints on alienation. n82

§ 7.02(g) Connecticut.

Even though the first permanent settlers in Connecticut began occupancy as early as 1633, none of the charters or other fundamental documents for any of the Connecticut colonies contain provisions about governing law until the royal charter of 1662. Thus, as is shown in § 6.06(a), § 6.06(b), and § 6.06(c), provisions for the foundational law are absent from the Warwick Patent of 1631, the Fundamental Orders (of Connecticut) of 1639, the Fundamental Articles of New Haven of 1639, the 1643 Articles of Confederation for the United Colonies of New England, the Connecticut Code of 1650 n83, and from New Haven's "Settling in" compilation of 1656. A single provision in New Haven's laws suggests that fundamental law in this colony was God's law:

> [N]o mans goods, or estate shall be taken from him, under colour of Law, or Countenance of authority, unlesse it be by vertue, or equity of some expresse Law of this Jurisdiction, established by the Generall Court, and sufficiently published, or for want of a Law in any particular case, by the word of God... n84

In 1662 a royal charter was obtained for all the Connecticut settlements, and several provisions of this charter establish a foundation of English law in matters of property rights:

> [The Colony of Connecticut] to have, take, possess, acquire, and purchase lands, tenements, or hereditaments, or any goods, or chattels, and the same to lease, grant, demise, alien, bargain, sell, and dispose of, as other our liege people of this our realm of England ...
>
> * * *
>
> that all, and every the subjects of us, our heirs, or successors, which shall go to inhabit within the said colony, and every of their children which shall happen to be born there, or on the sea in going thither, or returning from thence, shall have and enjoy all liberties, and immunities of free, and natural subjects within any the dominions of us, our heirs, or successors, to all intents, constructions, and purposes whatsoever, as if they, and every one of them were born within the realm of England...

> and also from time to time to make, ordain, and establish all manner of wholesome, and reasonable laws, statutes, ordinances, directions, and instructions, not contrary to the laws of this realm, of England...
>
> * * *
>
> to be holden of Us, Our Heirs, and Successors, as of Our Mannor of East-Greenwich, in Free, and Common Soccage, and not in Capite, nor by Knights Service... n85

After the 1662 charter was obtained, the 1650 code of laws was replaced with a new code in 1673, but this new code did not make any explicit reference to the colony's fundamental law, but rather generally reiterated the earlier code's reliance on God's law:

> [N]o mans Goods or Estate shall be taken from him, nor any wayes indamaged under colour of Law, or countenance of Authority, unless it be by the vertue or equity of some express Law of this Colony warranting the same, established by the General Court, and sufficiently published; or in case of the defects of a Law in any particular case by some clear and plain Rule of the word of God, in which the whole Court shall concurre. n86

In addition, the 1673 code contains one reference to land laws as derived from English law and as based on the 1662 charter:

> Lands the tenour [tenure] of our Lands: It is Ordered by the Authority of this Court; that whatsoever Lands have or shall be granted by the Court to the respective Townships, or to any particular persons either by the Court or particular Town ships, shall be held to them, their Heirs, Successors and Assignes for ever, according to the most free Tenour of East Green-wich in the County of Kent in the Realm of England, according to our Charter Grant. n87

When national independence was achieved, Connecticut did not immediately adopt a new constitution, but continued to be governed by the 1662 charter until 1818. The affection for this 1662 charter was perhaps explained in part by the struggle endured by Connecticut colonists in maintaining it:

> The feudal terms of the grant made by the charter, as it turned out, gave the tenants in Connecticut considerably more freedom from the crown than their counterparts in other colonies, or even in England. Many tenurial rights in the mother country had fallen into disuse, and in fact had been flouted under the Commonwealth and would be formally repealed by Parliament within the decade; but for the colonial grantees, their continuation was an assurance of the firm control of the theocracy over the government of Connecticut. Because the rights were virtually self-perpetuating, the government in London soon was repenting of the liberality of the grant. James II, indeed, proposed at his accession to call in all of the colonial charters as part of a reorganization of imperial administration which would resume the traditional controls over the New World possessions. n88

The various writs to accomplish this surrender of the old charter were rejected by the colonial officials (including the traditional incident during which the charter was hidden in a hollow oak), and when James II lost his throne in 1689, the colonial authorities proclaimed a full restoration of the 1662 charter, "in ye full and free enjoyment of all our properties, priveledges and liberties both civill and sacred as therein granted to us...." n89

In 1776, Connecticut officials considered adopting a constitution, but decided to continue reliance on the 1662 grant, which decision was embodied in a legislative declaration. This declaration rather conspicuously invoked only the state's own indigenous law as its fundamental law:

> ...No Man's Goods or Estate shall be taken away from him, nor any Ways indamaged under the Colour of Law, or Countenance of Authority; unless clearly warranted by the Laws of this State...
>
> ...That all the free Inhabitants of this or any other of the United States of America, and Foreigners in Amity with this State, shall enjoy the same justice and Law within this State, which is general for the State... n90

When a constitution finally was adopted in 1818, and replaced in 1955 and again in 1965, no provision for reception of common law was included in any of the documents. Nevertheless, from time to time, Connecticut courts have considered the extent to which English common law is considered adopted in Connecticut:

> We have not yet adopted it [the common law], either by judicial recognition, or legislative enactment. Many of our sister states have, by constitutional or legislative provisions, recognized the common law of England as a part of their codes of law. We have not. We have, in our judicial practice, adopted so much of the common law as was operative as law, in the father-land, when our ancestors left it, and which was adapted to the new state of things here, under our colonial condition. This was our inheritance. But no abrogation or repealed law of England was considered as existing or binding here: the colonists brought no such law with them; they inherited no such law. n91

This view was reiterated generally in a 1932 Connecticut Supreme Court opinion:

> While Connecticut has not formally adopted the common law of England by constitutional or legislative provisions, we have made it our own by 'practical adoption' with such exceptions as diversity of circumstances and customs require. n92

§ 7.02(h) Delaware.

Although Delaware's first permanent settlement dates from 1638, English rule commenced only in 1664, and in 1665 the so-called "Duke's Law" was in effect in Delaware as in other middle Atlantic areas. Land law was explicitly English and probably reflected the statutory abolition of feudal tenures that had been enacted in England only five years earlier:

> All Lands and heritages within this Government shall be free from all fines and licenses, upon Alienation and from all Heriotts, Wardships liveryes Primier Seizins year day and wast, Escheats, and forfeitures upon the Death of Parents or Auncestors Natural, unnatural, Casuall, or judiciall, and that for ever... n93

Also, laws generally were to be "not Contrary to the known Lawes of England." n94

However, no copy of the "Duke's Law" was even brought to Delaware until 1675, and by 1682 William Penn had received a patent and a deed for lands in Delaware. Neither Penn's Frame of Government in 1682 nor the concurrent laws for the colony agreed upon in England specified that English common law governed in the colony. Nevertheless, when settlers in Delaware merged their government with that of Pennsylvania under the 1682 Act of Union, the provisions for the legislative assemblies declared that they "shall have all other Powers and Privileges of an Assembly, according to the Rights of the free-born Subjects of England, and as is usual in any of the King's Plantations in America." n95

In a compilation of 18th-century Delaware legislation dated at 1741-1742, colonial courts were directed

> to hear and determine all ... actions ... according to the Laws and Constitutions of this Government, as fully and amply to all Intents and Purposes, as the Justices of the King's-Bench, Common-Pleas and Exchequer in England, or any of them may or can do. n96

The first Delaware constitution, promulgated in 1776, was explicit on the matter of reception:

> The common law of England, as well as so much of the statute law as has been heretofore adopted in practice in this State, shall remain in force, unless they shall be altered by a future law of the legislature; such parts only excepted as are repugnant to the rights and privileges contained in this constitution, and the declaration of the rights, etc., agreed to by this convention. n97

The 1792 Constitution reincorporated and continued this common law reception by declaring that "All the laws of this State, existing at the time of making this constitution, and not inconsistent with it, shall remain in force, unless they shall be altered by future laws...." n98 Almost identical language appeared in the constitutions of 1831 n99 and 1897, the most recent constitution. The latter provision, currently in effect, is as follows:

> All the laws of this State existing at the time this Constitution shall take effect, and not inconsistent with it shall remain in force, except so far as they shall be altered by future laws. n100

Therefore, the common law of England (and English statutes) adopted in the 1776 Constitution continues in effect, except where altered by or inconsistent with state law.

§ 7.02(I) District of Columbia.

The question of the status of common law reception in the District of Columbia is best introduced by quoting a portion of the "History of the D.C. Code," published in Volume 1 of the District of Columbia Code Annotated:

> All of the many efforts to compile the laws relating to the District of Columbia were balked by the difficulty of determining and setting forth the laws of Great Britain and the early laws of the State of Maryland still in force in the District by virtue of the Acts of February 27, 1801, and March 3, 1901 (2 Stat. L. 103, ch. 15, 2, and 31 Stat. L. 1189, respectively). Yet these laws, access to which is through a labyrinth of toil and uncertainty, have been found pertinent by the courts of the District on no less than 127 reported occasions. The task was further complicated by the fact that much of the legislation affecting the District of Columbia was buried in appropriation acts. A summary of the situation was made by an eminent member of the District Bar, Mr. James S. Easby-Smith, before the Committee at a hearing on July 12, 1926. An excerpt from his statement is quoted:
>
>> The District of Columbia was created and became a federal district in the year 1800 (1 Stat. L. 130 and 2 Stat. L. 103). The District of Columbia, as created by the 1st Congress, was composed of a portion of Virginia and a portion of Maryland, the same being 10 miles square. That portion of the District of Columbia which was ceded by the State of Maryland was known as the County of Washington, District of Columbia; that portion which was ceded by the State of Virginia was known as the County of Alexandria, District of Columbia. At first there was a city organized and laid out called the City of Washington, while the remaining portion of that part of Maryland which had been ceded was called the County of Washington. The portion included the city also.
>
> Now the organic act (2 Stat. L. 103), provided that the laws governing that portion of the District of Columbia ceded by Virginia should be the Virginia statute not locally inapplicable, the acts of Congress, and the acts of the Virginia Legislature. That applied in and for the County of Alexandria, and the organic act provided that the laws in force in the County of Washington, District of Columbia, which was that portion taken from Maryland, were, first, the principles and maxims of equity as they existed in England, and in the colonies in the year 1776, the common law of England, and the statutes of the British Parliament which were in effect in the colonies in 1776, and which were not locally inapplicable. I think

> that the last British statute which is applicable to the District of Columbia was passed about 1771. I think that there were no statutes which were locally applicable after that year.
>
> Therefore,
>
> First, we have the maxims and principles of equity as developed in the court of chancery.
>
> Second, the common law as it existed in 1776.
>
> Third, the British statutes in effect in 1776.
>
> Fourth, all the laws of the legislature, not only of the State of Maryland, from 1776 to 1800, but the laws of the colonial Maryland government up to the year 1800, together with such acts of Congress as had been passed, or might thereafter be passed, for the District of Columbia, or that were applicable to the District of Columbia.
>
> We have that great body of law here. In other words, in the State of Virginia and the State of Maryland, the State courts administer the state laws, while the federal courts administer the federal laws, but all of those laws are embraced in the jurisdiction of the courts here...
>
> Alexandria County Having Been Re-Ceded to Virginia, that Feature of the Complication No Longer Exists. n101

The first code prepared for the District of Columbia was intended for enactment by Congress, but no action was ever taken on it. The contents of that code were drawn from

> the different statutes of Virginia and Maryland and the English statutes supposed to have been in force in Maryland, which [the compiler] supposed would be properly applicable to the whole District, with all their antiquated phraseology and long-since obsolete remedial provisions... n102

Much later, in June 1866, Congress appointed commissioners to revise and compile all federal statutes then in force, and the commissioners on their own initiative also made a separate revision and compilation for the District of Columbia. Both compilations were enacted into law, as the body of statute law then in force in the United States, effective June 22, 1874, and since known as the "Revised Statutes" of 1874. n103

The laws relating to the District of Columbia in this compilation begin with the act of February 21, 1871, establishing the territorial government in the district. n104 However, the "code" is neither complete nor systematic, and omits the old British statutes that were in force in Maryland at the time the district was ceded and the Maryland statutes that were in force at that time and were expressly continued in force by the 1801 act of Congress assuming jurisdiction over the district. Moreover, the "code" concluded with a general repealer:

> All acts of Congress passed prior to the first day of December, one thousand eight hundred and seventy-three, relating to the District of Columbia, any portion of which is embraced in the foregoing revision are hereby repealed; and the section applicable thereto shall be in force in lieu thereof... n105

The prior laws which survived this repeal provision are expressed in the following terms of the 1874 "code":

> Sec. 91. All laws and ordinances of the cities of Washington and Georgetown, respectively, and of the levy court of the District of Columbia, not inconsistent with this chapter, and except as modified or repealed by Congress or the legislative assembly of the District since the first day of June, eighteen hundred and seventy-one, or until so modified or repealed, remain in full force.

> Sec. 92. The laws of the State of Maryland not inconsistent with this Title, as the same existed on the twenty-seventh day of February, eighteen hundred and one, except as since modified or repealed by Congress or by authority thereof, or until so modified or repealed, continue in force within the District. n106

In 1894, at the direction of Congress an effort was made to identify and compile the statutes in force in the District of Columbia. The compiler

> included in his compilation the old English statutes in force in the Colonies, including Maryland, or supposed by him to be so, from Magna Charta to the 13th of George III, in the year 1773, and all the statutes of Maryland from the year 1704 to February 27, 1801, which had not been repealed and were declared to be in force in the District by the act of Congress of the last date, and the revised acts of Congress before referred to, reenacted in 1874, and also the acts of the Legislative Assembly of the District passed during its brief existence from June 2, 1871, to June 26, 1873, which were supposed to continue in force ...
>
> The old English statutes and some of the old Maryland statutes abound in antiquated English and redundant verbiage, which it was unnecessary to reenact, and many provisions in them are now inapplicable and obsolete by reason of changes in the practice of the courts and social and political conditions... n107

This elaborate codification effort of 1894 was approved by the District of Columbia Court, but never approved by Congress.

However, in 1901, Congress enacted a code for the district containing a common law reception statute, which provision continues in the current code:

> The common law, all British statutes in force in Maryland on February 27, 1801, the principles of equity and admiralty, all general acts of Congress not locally inapplicable in the District of Columbia, and all acts of Congress by their terms applicable to the District of Columbia and to other places under the jurisdiction of the United States, in force in the District of Columbia on March 3, 1901, shall remain in force except insofar as the same are inconsistent with, or are replaced by, some provision of the 1901 Code. n108

In applying this body of common law and English statutes to issues related to real property, n109 District of Columbia Courts over the years have invoked common law rules for will and probate matters, n110 for the descent of property, n111 and for regulation of surface waters. n112

§ 7.02(j) Florida.

Although Spain maintained a form of military occupation in Florida from 1565 to 1763, upon ceding the area to England in 1763 Spain removed almost all military and civilian personnel as soon as possible. The English colonization efforts of the next two decades were therefore entirely uninfluenced by Spanish law or legal custom. These in turn were voided by England's re-ceding Florida to Spain in 1783, and the English were consequently required to remove all English inhabitants and remove or abandon all English property from Florida within a few months. Spanish influence in Florida thereafter was much more intense, contacts with the United States -- both commercial and military -- more pervasive, and the force of Spanish law there did not formally end until Florida was ceded to the United States by treaty ratified in February, 1821.

Despite the end of Spanish government in Florida, the land grants and rights created thereunder were confirmed by the treaty:

> All the grants of land made before the 24th of January, 1818, by his Catholic Majesty, or by his lawful authorities, in the said territories ceded by his Majesty to the United States, shall be ratified and confirmed to the persons in possession of the lands, to the same extent that the same grants would be valid if the territories had remained under the dominion of his Catholic Majesty. But the owners in possession of such lands, who, by reason of the recent circumstances of the Spanish nation, and the revolution in Europe, have been prevented from fulfilling all the conditions of their grants, shall complete them within the terms limited in the same, respectively, from the date of this treaty; in default of which, the said grants shall be null and void. All grants made since the said 24th of January, 1818, when the first proposal on the part of his Catholic Majesty, for the cession of the Floridas, was made, are hereby declared, and agreed to be, null and void. n113

Florida, then divided into East Florida and West Florida, was transferred in 1821, with Andrew Jackson assigned as governor to organize a government. He was only partially successful in obtaining records of land grants, to be used in determining the titles of American settlers. While governor he issued executive orders invoking both common law and Spanish law. When the territory of Florida was established in 1822, n114 with legislative power exercised by the governor and a council, some subsequent enactments were based on Spanish law and civil law. The territorial enabling act also continued in force "the laws in force in the said territory, at the commencement of this act, and not inconsistent with the provisions thereof ...." n115 In 1828 the legislative council of the territory enacted a provision continuing in force a list of 82 prior laws and repealing all other prior public laws. Only 2 of those 82 continued acts related to property and were based on old Spanish law. n116 At the same time, a series of acts passed between October 31, 1828, and November 21, 1828, added many explicit common law provisions to Florida's property law. n117 A year later, by an act dated November 6, 1829, the Florida legislature committed the territory to wholesale reception of the English common law and procedure, both in civil and criminal matters:

> Sec. 1. . . . That the common and statute laws of England, which are of a general and not of a local nature, with the exception hereinafter mentioned, down to the 4th day of July, 1776, be, and the same are hereby declared to be of force in this Territory: Provided, the said statutes and common law be not inconsistent with the constitution and laws of the United States, and the acts of the Legislative Council of this Territory: And provided, also, that none of the British statutes respecting crimes and misdemeanors shall be in force in this Territory, except statutes declaratory of and in aid of the common law; nor shall any person be punished by the said common law, when there is an existing provision by the statutes of this Territory on the subject; but, when there exists no such provision by statute of the Territory, then the several courts of this Territory shall proceed to punish such offence by fine and imprisonment: Provided, that in no case the fine shall exceed five hundred dollars, or the imprisonment twelve months.
>
> Sec. 2. . . . That all the laws and ordinances in force in this Territory to the 22nd day of July, 1822, be, and the same are hereby repealed: Provided, nevertheless, that all causes of action arising under, and founded on, any of said laws and ordinances, shall be judicially determined according to principles and rules of said laws and ordinances, anything in this act to the contrary notwithstanding. n118

A constitution drafted in 1838, in anticipation of statehood, and finally adopted when statehood was attained in 1845, acknowledged in two separate provisions that both common law and Spanish law could continue in force in the state:

> The general assembly shall declare by law what parts of the common law and what parts of the civil law, not inconsistent with this constitution, shall be in force in this State. n119
>
> That all laws or parts of laws not in force, or which may be hereafter passed by the governor and legislative council of the Territory of Florida, not repugnant to the provisions of this constitution, shall continue in force until, by operation of their provisions or limitations, the same shall cease to be in force, or until the general assembly of this State shall alter or repeal the same... n120

Essentially the same provisions were included in the state constitution of 1865. n121 Provisions continuing prior law in force were also in the 1868 constitution n122 and the 1885 constitution. n123 In the current Florida constitution is a substantively similar but somewhat simplified provision: "All laws in effect upon the adoption of this revision, to the extent not inconsistent with it, shall remain in force until they expire by their terms or are repealed." n124

Meanwhile, the reception of the common law continues in Florida statutes, with reception in civil matters currently expressed as follows and almost identically to the terms of the 1829 reception:

> The common and statute laws of England which are of a general nature and not a local nature, with the exception hereinafter mentioned, down to the fourth day of July, 1776, are declared to be of force in this state; provided, the said statutes and common law be not inconsistent with the constitution and laws of the United States and the acts of the legislature of this state. n125

In property matters, common law has been invoked in Florida to adjudicate tenancies by the entireties, n126 restraints on alienation, n127 and use of the word "heirs" to create an estate of inheritance, n128 among other matters.

Also included in the current Florida statutory compilation is a listing of British statutes currently in force in Florida, as determined by a commission that convened in 1845. n129 This lengthy list includes portions of 273 old British statutes; property-related subjects represented in this list include charitable uses, distress, dower and jointure, estates for life, execution, executors and administrators, fines and recoveries, fraudulent conveyances, guardians, land measure, leases and terms for years, limitations of actions, maintenance and buying and selling pretended titles, mortgage, mortmain, real actions, n130 uses, waste, and wills. n131

§ 7.02(k) Georgia.

The land that is included in the modern state of Georgia was originally part of the Carolina territory granted in the 1663 royal charter and in the 1665 grant to the Carolina proprietors. The 1663 charter conferred upon the proprietors the most extensive feudal powers then recognized, using the so-called "Bishop of Durham" clause: "To have, use, exercise, and enjoy, and in as ample manner as any Bishop of Durham, in our Kingdom of England, ever heretofore have held, used or enjoyed, or of right ought or could have, use, or enjoy." n132 Land tenure was also based squarely on English law, with land "To be held of us, our heirs and successors, as of our Manor of East Greenwich, in our County of Kent, in Free and Common Soccage, and not in Capite nor by knight's service." n133 The legislative power in this colonial charter was subject to the requirement "that the said laws be consonant to reason and, as near as may be conveniently agreeable to the laws and Customs of this our Kingdom of England...." n134 The second charter in 1665 corrected minor technical problems but essentially continued in force the provisions of the 1663 charter. No permanent settlements arose in Georgia during the time these charters remained in effect.

Beginning in 1729 the English monarch began re-acquiring the interests of Carolina's proprietors in Georgia territory, and in 1732 made a re-grant of the land, under a new proprietary charter, to James Oglethorpe and several associates. In the 1732 charter the tenure was updated but, of course, still very much a matter of English common law: "[T]o be holden of us, our heirs and successors as of our honour of Hampton-court, in our county of Middlesex in free and common soccage, and not in capite ...." n135 Also, the legislative power was granted in the context of English law: "[T]he said corporation, formed for that purpose, shall and may form and prepare, laws, statutes and ordinances, fit and necessary for and concerning the government of the said colony, and not repugnant to the laws and statutes of England...." n136 The trusteeship of the proprietors reverted to the crown in 1752, and the foundation of English common law continued in force.

With the onset of the Revolution, Georgia only gradually overcame divided loyalties among its people and in 1777 adopted a constitution containing "rules and regulations ... for the future adoption of this State." n137 The legislative power defined in this constitution made no mention of the English common law as a foundation:

> The house of assembly shall have power to make such laws and regulations as may be conducive to the good order and well-being of the State; provided such laws and regulations be not repugnant to the true intent and meaning of any rule or regulation contained in this constitution. n138

At the end of the war and before a new constitution had been prepared, the Georgia legislature declared the common law of England to be in full force, "so far as it is not contrary to the constitution, laws and forms of government" of Georgia. n139

After ratification of the United States Constitution, a new constitution for Georgia was prepared in 1789. Again the legislative power was defined as the "power to make all laws and ordinances which [the general assembly] shall deem necessary and proper for the good of the State, which shall not be repugnant to this constitution." n140 However, no provision of that constitution made reference to the common law of England. The same provision for legislative power and absence of explicit reference to the English common law were also true of the 1798 constitution. n141

At the end of the Civil War in 1865, a Reconstruction constitution contained a slightly expanded definition of legislative power and a provision explicitly receiving the common law of England:

> The general assembly shall have power to make all laws and ordinances consistent with this constitution, and not repugnant to the Constitution of the United States, which they shall deem necessary and proper for the welfare of the State. n142
>
> Laws of general operation now of force in this State, are, 1st, as the supreme law, the Constitution of the United States; 2d, as next in authority thereto, this constitution; 3d, in subordination to the aforegoing [certain codes and legislation ratified during 1860-1862] and also so much of the common and statute law of England, and of the statute laws of the State of force in Georgia in the year eighteen hundred and sixty, as is not expressly superseded by nor inconsistent with said codes, though not embodied therein. . . . n143

When Congress found the 1865 Georgia constitution unacceptable, Georgians adopted a new constitution in 1868, which continued in force the two provisions on legislative power n144 and common law reception just quoted. n145

In reaction to the Reconstruction constitution of 1868, yet another constitution was adopted in 1877. This document also contained the provision on legislative power, n146 but in the section describing the laws of general operation in the state, omitted specific mention of the common law. Nevertheless, the provision continued in force previous laws:

> The laws of general operation in this State are [the U.S. and state constitutions]...
>
> * * *
>
> In subordination to the foregoing: All laws now of force in this State, not inconsistent with this Constitution, and the ordinances of this Convention shall remain of force until the same are modified or repealed by the General Assembly ... n147

In the current 1945 Constitution, the provision defining legislative power is omitted, and the perpetuation of laws in force is declared, again, without specific reference to the common law of England:

> In subordination to the foregoing: All laws now of force in this State, not inconsistent with this Constitution shall remain of force until the same are modified or repealed by the General Assembly. n148

These constitutional provisions must be considered in light of state legislation. In 1784, the Georgia legislature enacted

"An Act for reviving and enforcing certain laws therein mentioned and adopting the common laws of England as they existed on May 14, 1776." This act has survived all subsequent Georgia recodifications and continues in force today in *O.C.G.A. 1-1-10(c)(1)*. Georgia courts have accordingly recognized the reception of the English common law. In an 1831 opinion of the United States Supreme Court it was said:

> The common law is the law of Georgia; and the rules of evidence belonging to it are in force there, unless so far as they have been modified by statute, or controlled by a settled course of judicial decisions and usage [Two English statutes of 1550 and 1571] being passed before the emigration of our ancestors, being applicable to our situation, and in amendment of the law, constitute part of our common law. n149

The Georgia Supreme Court in 1854 gave an even more specific explanation of received common law:

> [W]e have recognized ... that we should look to that Law as it stood before the 14th day of May, 1776; and so of those principles of Equity, which are regarded as forming part of the Common Law. We have also recognized the rule, with a proper qualification, that in the effort to determine what was the Common Law at that period, we should consult the decisions of Courts in England, previously made; and that such decisions are to be regarded as the proper exponents of the Common Law, as it was adopted by our Legislature. The qualification upon which we insist is this: These decisions are to be received as evidence of the Law, and not the Law itself; and hence, to be conclusive on any question they should be clear and well settled. A mere preponderance, or even a strong current of decisions upon a given point, at that period, is not decisive, if, notwithstanding, in the opinion of the Court, the question was still *lis sub judice*. In such event, a Court in our state is free to adopt a different view, if it believes the Law was otherwise at that time. n150

§ 7.02(l) Hawaii.

In the era before Hawaii was officially annexed to the United States in 1898, common law principles had already attained a significant influence in Hawaiian land law. n151 At first, the influence of New England missionaries prompted the legislators in this so-called constitutional monarchy to accept a form of "God's law" as the legislative standard, n152 and this concept was included in Hawaii's first constitution, promulgated in 1840 under King Kamehameha III:

> It is therefore our fixed decree,
>
> I. That no law shall be enacted which is at variance with the word of the Lord Jehovah, or at variance with the general spirit of His word. All laws of the Islands shall be in consistency with the general spirit of God's law. n153

No similar provision is found in the 1852 constitution, but that instrument did continue prior laws in force:

> All laws now in force in this Kingdom shall continue and remain in full effect until altered or repealed by the Legislature; such parts only excepted as are repugnant to this Constitution. All laws now enacted or that may hereafter be enacted, contrary to this Constitution, shall be null and void. n154

Similar provisions were included in the constitution of 1864 n155 and in the constitution of 1887. n156

However, despite this idealistic guide, practical legislation on matters of real property in the mid-19th century relied on common law principles generally and statutes of Massachusetts specifically. n157 An 1847 statute authorized courts to follow either common or civil law as rules of decision, n158 and an enactment of the kingdom in 1892 officially received the common law:

> The common law of England, as ascertained by English and American decisions, is hereby declared to be the common law of the Hawaiian Islands in all cases, except as otherwise expressly provided by the Hawaiian Constitution or laws, or fixed by Hawaiian judicial precedent, or established by Hawaiian national usage, provided, however, that no person shall be subject to criminal proceedings except as provided by the Hawaiian laws. n159

A nearly identical common law reception provision continues in the current Hawaiian laws. n160

A few years before annexation, the monarchy was overthrown and replaced in 1894 by a republic with a new constitution; the new document also continued prior law in force. n161 When annexation occurred in 1898, the Congressional Resolution of Annexation continued prior land laws in force, except for public lands:

> The existing laws of the United States relative to public lands shall not apply to such lands in the Hawaiian Islands; but the Congress of the United States shall enact special laws for their management and disposition ...
>
> * * *
>
> The municipal legislation of the Hawaiian Islands, not enacted for the fulfillment of the treaties so extinguished, and not inconsistent with this joint resolution nor contrary to the Constitution of the United States nor to any existing treaty of the United States, shall remain in force until the Congress of the United States shall otherwise determine. n162

In the act creating the Territory of Hawaii, most laws were continued in force, but the Constitution of the Republic of Hawaii and many specific enactments were explicitly repealed, although the substance of their provisions were in many instances largely re-enacted in the new territorial law:

> Sec. 6. That the laws of Hawaii not inconsistent with the Constitution or laws of the United States or the provisions of this Act shall continue in force, subject to repeal or amendment by the legislature of Hawaii or the Congress of the United States.
>
> Sec. 7. That the constitution of the Republic of Hawaii and the laws of Hawaii, as set forth in the followings acts, chapter, and sections of the civil laws, penal laws, and session laws, and relating to the following subjects, are hereby repealed ... n163

Among the repealed laws were acts dealing with government lands, board of commissioners of public lands, bureau of agriculture and forestry, and water rights. Laws relating to court procedure were specifically continued in force: "That all laws of Hawaii relative to the judicial department, including civil and criminal procedure, except as modified by this Act, are continued in force, subject to modification by Congress, or the legislature." n164

Even after attaining annexation and territorial status, and despite reception of the common law, Hawaiians still faced the prospect of major land reform, because of the feudal land practices under the monarchy. An attempt to deal with this problem was made with the Hawaiian Homes Commission Act of 1921, whose overall purpose and effect have been described as follows:

> A comprehensive revision of the 1900 territorial act was effected in 1921 with passage of the Hawaiian Homes Commission Act, a statute which combined some of the features of a homestead law with reclamation and resource development and a government policy aimed at encouraging limitations upon large landholding by absentee owners in favor of native Hawaiians.
>
> The problem of land ownership -- a problem which was to continue into statehood nearly forty years

> later -- dated from the declaration in the Constitution of 1840 that "Kamehameha I was the founder of the Kingdom, and to him belonged all the land from one end of the Islands to the other." This feudal tenurial concept was modified only in degree in the Constitution of 1852, under which Kamehameha III promulgated the so-called Great *Mahele* (division), which separated crown lands from general government-owned lands and assigned about 40 percent of all the land to the leading chiefs. Only about 30,000 acres were left for commoners to own, and this proportion of landholding continued largely unchanged through succeeding constitutions, including the 1894 instrument which exchanged the monarchy for a republic. The property qualifications for electors and officeholders were explained by the continuation of this system, and in practice if not in terms it was continued in the territorial statute of 1900 (contrast Sections 34 and 40 of the act of 1900 with the Constitution of 1894, Articles 56 and 58).
>
> Even after the 1921 statute, the tenacious grip of the great landholders was still strong. At the time of statehood in 1959, studies indicated that nearly 75 percent of the privately-owned land in the Islands was in the hands of holders of 5,000 acres or more apiece. It was not until statehood, and a legislature -- elected on promises to make new efforts at land division -- that the problem [began] to abate. n165

This 1921 Act, which has been treated as an element of the Hawaiian constitution rather than a separate act of Congress, must be considered along with Hawaii's statutory common law reception statute in determining the source of Hawaii's land law. Courts construing Hawaii's reception statute have held that the common law includes English statutes enacted before the first settlers came to America. n166 On this basis the rule against perpetuities n167 and the Statute of Uses n168 have been included in the Hawaiian reception of common law, while for other reasons such common law precepts as the rule in *Shelley's Case*, n169 estates tail and fees simple conditional, n170 and the requirement that the word "heirs" be used to convey a fee simple estate n171 have been rejected.

§ 7.02(m) Idaho.

The area of the present state of Idaho was adjacent to the northwestern extremity of, but not included within, the territory of the Louisiana Purchase. Only after the beginning of the 19th century did settlement activity commence, and then for several decades it consisted only of explorations, trading posts and religious missions. Idaho was originally part of the Oregon Territory, but even before Oregon became a territory its inhabitants began to form a provisional government in 1841. In 1843 they prepared Articles of Provisional Government which were adopted in 1845. According to this document, laws of Iowa Territory and principles of common law and equity would be the laws in force in Oregon (including Idaho):

> The Laws of Iowa Territory shall be the Law of this Territory in Civil, Military and Criminal cases (where not otherwise provided for) and where no Statute of Iowa Territory applies, the principles of common Law and Equity shall govern. n172

Iowa had attained territorial status in 1838, n173 and by its territorial enabling act had adopted "the existing laws of the Territory of Wisconsin." n174 Wisconsin had become a territory in 1836, n175 and had as its law in force the laws imposed by the Northwest Ordinance and the laws of the Territory of Michigan. The Northwest Ordinance, enacted while the Articles of Confederation were in effect, ensured to the inhabitants of the territory judicial proceedings according the course of the common law, among other rights:

> The inhabitants of the said territory shall always be entitled to the benefits of the writs of *habeas corpus*, and of the trial by jury; of a proportionate representation of the people in the legislature, and of judicial proceedings according to the course of the common law. All persons shall be bailable, unless for capital offenses, where the proof shall be evident, or the presumption great. All fines shall be moderate; and no cruel or unusual punishments shall be inflicted. No man shall be deprived of his liberty or property, but by the judgment of his peers, or the law of the land, and should the public exigencies make it necessary, for the common preservation, to take any person's property, or to demand his particular

> services, full compensation shall be made for the same. And, in the just preservation of rights and property, it is understood and declared, that no law ought ever to be made or have force in the said territory, that shall, in any manner whatever, interfere with or affect private contracts, or engagements, *bona fide*, and without fraud previously formed. n176

The Northwest Ordinance also required the appointment of a three-judge court, the judges to "have a common-law jurisdiction," and who, with the governor, "shall adopt and publish in the district such laws of the original States, criminal and civil, as may be necessary, and best suited to the circumstances of the district ...." n177 In 1795 the governor and the judges of the Northwest Territory enacted the Virginia reception statute of 1776 (even though Virginia had in 1792 repealed the portion of the statute receiving English statutes):

> That the common law of England, all statutes or acts of parliament made in aid of the common law prior to the fourth year of the reign of King James the first, and which are of a general nature, not local to the kingdom, together with the several acts of the general assembly of this colony now in force, so far as the same may consist with the several ordinances, declarations, and resolutions of the general convention, shall be the rule of decision, and shall be considered as in full force, until the same shall be altered by legislative power of this colony. n178

Michigan Territory had been established in 1805, n179 and, even though the territory had a legal heritage of both English common law and elements of French law, it, too, was brought under the legal regime of the Northwest Ordinance. Michigan became a state in 1837, and was thus no longer a territory when Oregon and Idaho territories were established.

Therefore, the initial laws in force in the area of Idaho were the laws of Oregon territory, which were the laws of Iowa territory, which were the common law and the laws of Wisconsin. The laws of Wisconsin were the laws of the Northwest Ordinance and the laws of Michigan territory. The Northwest Ordinance, which was also extended to the Michigan territory, imposed a common law system over its jurisdictions.

After the United States and Great Britain began, by a treaty of 1846, to resolve their jurisdictional claims to what is now the Pacific Northwest area of the United States, the Oregon Territory was established in 1848. n180

The territorial enabling act for Oregon contained no provisions for common law reception or even for continuing prior laws in force. Instead, it declared that "all such laws, or any law or laws inconsistent with the provisions of this act, shall be utterly null and void," n181 and also voided prior land grants:

> [A]ll laws heretofore passed in said Territory making grants of land, or otherwise affecting or incumbering the title to lands, shall be, and are hereby declared to be, null and void; and the laws of the United States are hereby extended over, and declared to be in force in, said Territory, so far as the same, or any provision thereof, may be applicable. n182

One provision continuing prior law in force pertained to judicial proceedings pending at the time the territory was created, which were transferred to the territorial district court; also "penalties, forfeitures, actions, and causes of action" were made recoverable "in like manner as they would have been under the laws in force within the limits composing said Territory at the time this act shall go into operation." n183

In 1853 the Washington Territory was created out of the Oregon Territory, including within its boundaries the northern portion of Idaho. n184 As in the Oregon Territory enabling act, "all such laws, or any law or laws, inconsistent with the provisions of this act, shall be utterly null and void," n185 but the Washington act did explicitly continue prior laws in force:

> And be it further enacted, That the laws now in force in said Territory of Washington, by virtue of the legislation of Congress in reference to the Territory of Oregon, which have been enacted and passed subsequent to the first day of September, eighteen hundred and forty-eight, applicable to the said Territory of Washington, together with the legislative enactments of the Territory of Oregon, enacted and passed prior to the passage of, and not inconsistent with, the provisions of this act, and applicable to the said Territory of Washington, be, and they are hereby, continued in force in said Territory of Washington until they shall be repealed or amended by future legislation. n186

In 1859 the southern portion of Idaho was reunited to the northern portion as part of the Washington territory. In January, 1863, the Washington territorial legislature enacted a simple common law reception provision:

> That the common law of England, so far as it is not repugnant to, or inconsistent with the Constitution and laws of the United States and the organic act, and laws of Washington territory, shall be the rule of decision in all the courts of this territory. n187

In Idaho, meanwhile, territorial status was attained in March, 1863, n188 but the enabling act had no provision continuing previous laws in force or explicitly receiving the common law. The only provision in this organic act pertinent to reception was the declaration that "the said supreme and district courts, respectively, shall possess chancery as well as common-law jurisdiction." n189 With no organic provision for reception, the Idaho legislature the next year enacted a statutory common law reception provision, very similar to Washington's, and which continues in the current Idaho code:

> The common law of England, so far as it is not repugnant to, or inconsistent with, the constitution or laws of the United States, in all cases not provided for in these compiled laws, is the rule of decision in all courts of this state. n190

Idaho's authorization for statehood was enacted in 1890, n191 with a provision continuing prior laws in force: "... all laws in force made by said Territory, at the time of its admission into the Union, shall be in force in said State, except as modified or changed by this act or by the constitution of the State." n192 Accordingly, Idaho's constitution of 1889, and still its current constitution decrees, "All laws now in force in the territory of Idaho which are not repugnant to this Constitution shall remain in force until they expire by their own limitation or be altered or repealed by the legislature." n193

The reception of several common law doctrines relating to real property has been tested in Idaho courts. Because of a statutory substitution, the common law rule against perpetuities has been held to be not in force in Idaho. n194 The common law of marital property has been replaced by a community property regime. n195 The common law riparian water rights were at first considered received in Idaho, n196 and then later held not applicable to navigable streams in the state. n197 The court so holding stated:

> [T]his state did not adopt the common law of England when such common law was inapplicable to the conditions of the state. The territory and state of Idaho, following the lead of other states having similar statutory provisions, only adopted such provisions of the common law as were applicable to the conditions of the state. The English doctrine of riparian rights has been repeatedly held not applicable to this country, especially as to navigable, non-tidal rivers and lakes, since such rivers and lakes did not exist in England. n198

No element of Idaho jurisprudence has yet addressed the question of whether English statutes are included in the received common law.

§ 7.02(n) Illinois.

French exploring and fort-building activity in the late 17th century consolidated their control over the area now in the state of Illinois. The British assumed control after the French and Indian War, and in 1778, when George Rogers Clark captured Kaskaskia, that area became a county of Virginia known as Illinois County. n199 Although presumably the law in force in Virginia also applied to its new county, the Virginia act establishing the county also directed the civil officers to "exercise their several jurisdictions, and conduct themselves agreeable to the laws which the present settlers are now accustomed to." n200 In Virginia itself, a provision for reception of the English common and statutory law was never included in Virginia's various constitutions, the first of which was adopted in 1776. However, Virginia's legislature in that same year did enact a statutory reception provision:

> That the common law of England, all statutes or acts of parliament made in aid of the common law prior to the fourth year of the reign of King James the first, and which are of a general nature, not local to the kingdom, together with the several acts of the general assembly of this colony now in force, so far as the same may consist with the several ordinances, declarations, and resolutions of the general convention, shall be the rule of decision, and shall be considered as in full force, until the same shall be altered by legislative power of this colony. n201

The area that is now Illinois became part of the United States under the Treaty of Paris in 1783 when, in that same year, Virginia agreed to cede the area and its other western territories to the national government. Not until 1787, however, was national legal authority asserted under the Northwest Ordinance. The Northwest Ordinance, enacted while the Articles of Confederation were in effect, ensured to the inhabitants of the territory judicial proceedings according the course of the common law, among other rights:

> The inhabitants of the said territory shall always be entitled to the benefits of the writs of *habeas corpus*, and of the trial by jury; of a proportionate representation of the people in the legislature, and of judicial proceedings according to the course of the common law. All persons shall be bailable, unless for capital offenses, where the proof shall be evident, or the presumption great. All fines shall be moderate; and no cruel or unusual punishments shall be inflicted. No man shall be deprived of his liberty or property, but by the judgment of his peers, or the law of the land, and should the public exigencies make it necessary, for the common preservation, to take any person's property, or to demand his particular services, full compensation shall be made for the same. And, in the just preservation of rights and property, it is understood and declared, that no law ought ever to be made or have force in the said territory, that shall, in any manner whatever, interfere with or affect private contracts, or engagements, *bona fide*, and without fraud previously formed. n202

The Northwest Ordinance also required the appointment of a three-judge court, the judges to "have a common-law jurisdiction," and who, with the governor, "shall adopt and publish in the district such laws of the original States, criminal and civil, as may be necessary, and best suited to the circumstances of the district ...." n203 In 1795 the governor and the judges of the Northwest Territory enacted the Virginia reception statute of 1776 (even though Virginia had in 1792 repealed the portion of the statute receiving English statutes):

> That the common law of England, all statutes or acts of parliament made in aid of the common law prior to the fourth year of the reign of King James the first, and which are of a general nature, not local to the kingdom, together with the several acts of the general assembly of this colony now in force, so far as the same may consist with the several ordinances, declarations, and resolutions of the general convention, shall be the rule of decision, and shall be considered as in full force, until the same shall be altered by legislative power of this colony. n204

In 1800 substantial population growth led to formation of the Territory of Indiana, which included Illinois within its boundaries. n205 The Indiana territorial enactment called for "a government in all respects similar to that provided by [the Northwest Ordinance]; and the inhabitants thereof shall be entitled to, and enjoy all and singular the rights,

privileges and advantages granted and secured to the people by the said ordinance." n206 In 1807 the Indiana territorial legislature enacted its own reception statute:

> The common law of England, all statutes and acts of the British Parliament, made in aid of the common law, prior to the fourth year of the reign of King James the first (excepting the second section of the sixth Chapter of forty-third Elizabeth [costs in certain cases], the 8th Chapter, thirteenth Elizabeth [usury] and 9th Chapter, thirty-seventh Henry eighth [usury] and which are of a general nature, not local to that kingdom; and also the several laws in force in this Territory, shall be the rule of decision, and shall be considered, as of full force, until repealed by legislative authority. n207

By 1809, Illinois was ready for separate territorial status, but only because some major issues relating to land issues had been resolved:

> One of the major issues with which Congress also had to deal concerned the confusion of land titles in the territory. Grantees could trace their titles to a number of equally legitimate sources -- the pre-Revolutionary colonies, particularly Virginia, the French and British authorities, the Commonwealth of Virginia through its Illinois County, and various land companies of which the most ambitious had been the Ohio Company. Indian claims, as in all new territorial jurisdictions, also had to be disposed of, although the Treaty of Greenville in 1795 purported to limit Indian lands and ratify and confirm the titles of various settlers already in the territory. A Congressional enactment in 1796 had confirmed the arrangements under the Treaty of Greenville and renewed a surveying system of sections and townships originated in 1785.
>
> Under Governor [William Henry] Harrison a series of complementary treaties began, extinguishing Indian titles or moving tribes to areas presumably distant from the growing settlements. The most important of these, the Treaty of Vincennes in 1803, opened large areas west of the Wabash and encouraged a rapid influx of new settlers. The next year Congress passed an Act for the Disposal of Lands in the Indiana Territory *(2 Stat. 277)*, which among other things established a land office in Kaskaskia [in Illinois] and authorized the sale of lands in tracts as small as a quarter section (160 acres). With this further encouragement to newcomers, it was not surprising that by 1808 the Illinois country should have more than 10,000 settlers -- a factor encouraging Congress to redivide the "Old Northwest" again the following year. n208

As in the Indiana territorial enabling act nine years earlier, the Illinois territorial enabling act of 1809 n209 called for "a government in all respects similar to that provided by [the Northwest Ordinance]; and the inhabitants thereof shall be entitled to, and enjoy all and singular the rights, privileges and advantages granted and secured to the people by the said ordinance." n210 Swift population growth moved the territory quickly toward statehood, and the statehood enabling act in 1818 n211 required the state government to be "not repugnant to [the Northwest Ordinance]." n212 The new state constitution approved in that same year maintained prior laws in force:

> That no inconveniences may arise from the change of a territorial to a permanent State government, it is declared by the convention that all rights, suits, actions, prosecutions, claims, and contracts, both as it respects individuals and bodies-corporate, shall continue as if no change had taken place in this government in virtue of the laws now in force. n213

Thus, at the moment of attaining statehood, Illinois jurisprudence had thoroughly received the common law of England and associated statutes. Fittingly, the first enactment of the new state legislature was to adopt Indiana's 1807 reception statute, quoted above, and which appears in the current Illinois statutes in only slightly altered form:

> The common law of England, so far as the same is applicable and of a general nature, and all statutes or acts of the British parliament made in aid of, and to supply the defects of the common law, prior to the

> fourth year of James the First, excepting the second section of the sixth chapter of 43d Elizabeth, the eighth chapter of 13th Elizabeth, and ninth chapter of 37th Henry Eighth, and which are of a general nature and not local to that kingdom, shall be the rule of decision, and shall be considered as of full force until repealed by legislative authority. n214

The reported decisions of Illinois courts, as shown in the annotations to Illinois statutes, reveal several dozen cases giving almost literal application of the English common law to various issues of property rights. Property-related litigation has dealt with descent and distribution, wills, pecuniary legacies, administration of estates, charitable uses, conveyances, fraudulent conveyances, dedication, landlord and tenant, light and air, waters and water courses, nuisance, and married women's property rights. n215 In relatively recent examples of such cases, Illinois courts have insisted on strict adherence to common law requirements for joint tenancies n216 and declared that Illinois should not deviate from the English rule on percolating waters. n217 Nevertheless, statutory modification or supersession of the common law also occurs, as typified by the detailed Illinois legislation modifying application of the rule against perpetuities. n218

§ 7.02(o) Indiana.

As in Illinois, in the area of Indiana competing French and British forces were responsible for most of the 17th-century exploring activity. The British assumed control after the French and Indian War, but before the Revolution the only substantial settlement in the area of Indiana was Vincennes, and this was captured by George Rogers Clark on behalf of Virginia in 1778-1779. Vincennes was included with Kaskaskia (in Illinois) in the area that became a county of Virginia known as Illinois County. Illinois County of Virginia became part of the United States under the Treaty of Paris in 1783 and when, in that same year, Virginia agreed to cede the area and its other western territories to the national government. Not until 1787, however, was national legal authority asserted under the Northwest Ordinance. The Northwest Ordinance, enacted while the Articles of Confederation were in effect, ensured to the inhabitants of the territory judicial proceedings according the course of the common law, among other rights:

> The inhabitants of the said territory shall always be entitled to the benefits of the writs of *habeas corpus*, and of the trial by jury; of a proportionate representation of the people in the legislature, and of judicial proceedings according to the course of the common law. All persons shall be bailable, unless for capital offenses, where the proof shall be evident, or the presumption great. All fines shall be moderate; and no cruel or unusual punishments shall be inflicted. No man shall be deprived of his liberty or property, but by the judgment of his peers, or the law of the land, and should the public exigencies make it necessary, for the common preservation, to take any person's property, or to demand his particular services, full compensation shall be made for the same. And, in the just preservation of rights and property, it is understood and declared, that no law ought ever to be made or have force in the said territory, that shall, in any manner whatever, interfere with or affect private contracts, or engagements, *bona fide*, and without fraud previously formed. n219

The Northwest Ordinance also required the appointment of a three-judge court, the judges to "have a common-law jurisdiction," and who, with the governor, "shall adopt and publish in the district such laws of the original States, criminal and civil, as may be necessary, and best suited to the circumstances of the district." n220 In 1795 the governor and the judges of the Northwest Territory enacted the Virginia reception statute of 1776 (even though Virginia had, in 1792, repealed the portion of the statute receiving English statutes):

> That the common law of England, all statutes or acts of parliament made in aid of the common law prior to the fourth year of the reign of King James the first, and which are of a general nature, not local to the kingdom, together with the several acts of the general assembly of this colony now in force, so far as the same may consist with the several ordinances, declarations, and resolutions of the general convention, shall be the rule of decision, and shall be considered as in full force, until the same shall be altered by legislative power of this colony. n221

In 1800 substantial population growth led to formation of the Territory of Indiana. n222 The Indiana territorial enactment called for "a government in all respects similar to that provided by [the Northwest Ordinance]; and the inhabitants thereof shall be entitled to, and enjoy all and singular the rights, privileges and advantages granted and secured to the people by the said ordinance." n223 In 1807 the Indiana territorial legislature enacted its own reception statute:

> The common law of England, all statutes and acts of the British Parliament, made in aid of the common law, prior to the fourth year of the reign of King James the first (excepting the second section of the sixth Chapter of forty-third Elizabeth [costs in certain cases], the 8th Chapter, thirteenth Elizabeth [usury] and 9th Chapter, thirty-seventh Henry eighth [usury], and which are of a general nature, not local to that kingdom; and also the several laws in force in this Territory, shall be the rule of decision, and shall be considered, as of full force, until repealed by legislative authority. n224

Meanwhile, a series of Indian treaties -- notably the Treaty of Vincennes in 1803 -- opened up new lands for settlement, and federal land policy authorized disposal of land in smaller parcels, n225 thus encouraging a rush of new settlers.

The Indiana statehood enabling act, approved in 1816, n226 required a form of government not repugnant to the Northwest Ordinance. n227 Indiana's constitution of 1816 provided that "All laws and parts of laws now in force in this Territory, not inconsistent with this constitution, shall continue and remain in full force and effect until they expire or be repealed." n228 The same provision appeared in Indiana's 1851 constitution, n229 but has not been retained in the current version of that constitution.

However, state legislation of 1852 re-enacted the old territorial common law reception statute and this provision, with some elaboration, is still in the current Indiana statutes:

> The law governing this state is declared to be:
>
> First. The Constitution of the United States and of this state.
>
> Second. All statutes of general assembly of the state in force, and not inconsistent with such constitutions.
>
> Third. All statutes of the United States, in force, and relating to subjects over which Congress has power to legislate for the states, and not inconsistent with the Constitution of the United States.
>
> Fourth. The common law of England, and statutes of the British Parliament made in aid thereof prior to the fourth year of the reign of James the First (except the second section of the sixth chapter of forty-third Elizabeth, the eighth chapter of thirteenth Elizabeth, and the ninth chapter of thirty-seventh Henry the Eighth), which are of the general nature, not local to that kingdom, and not inconsistent with the first, second and third specifications of this section. n230

Indiana courts have been willing to turn away from common law rules when the rules appear outmoded, contrary to public policy, or otherwise without basis in state law. n231 In 1916 the Indiana Supreme Court delivered a lengthy but enlightening exposition on why a rigid view of early 17th-century English common law should not be applied in the state. This court represented the common law more as a system of jurisprudence based on certain general principles and adaptable to a variety of circumstances, rather than a regime of rigid and immutable rules:

> As viewed by this court, it was not the purpose of the Legislature by this [Fourth section of the reception] statute to adopt the rules of the common law as announced and applied by the courts of England prior to 1607, but that the purpose was to adopt the general principles of the common law which

underlie and control all rules of decision throughout all time, as the same were affected by the acts of the British Parliament passed in aid thereof prior to the time mentioned. The statute was declaratory in its nature, Indiana being carved out of that portion of America settled by the English colonists, who brought with them the common law at the time the settlement was established, and the statutes of Parliament in aid of the common law were to be distinguished from those passed in derogation of it. Such acts were to be distinguished also from the acts of the British Parliament passed after the physical separation from the mother country, after which time courts were to look particularly to American legislation and to the reports of American courts for improvements and modifications of the rules of the common law.

The common law of England was derived from the universal usage and custom of the early English people, and is a system of jurisprudence founded upon principles of justice as it was conceived and administered by the English courts of law in contradistinction to the methods of administering justice employed by the courts of equity, and that system of jurisprudence which formed the basis of the Roman or Civil Law. For this common-law system, and from the usages, customs, and maxims upon which it is founded, innumerable rules and principles emanated, as the courts from time to time declared what they understood to be the correct law applicable to the matter before them, and such law was determined by a system of reasoning and of administering justice consistent with the universal usages, customs, and institutions of the English people. The common law grew to be a system of applying to litigated instances just, reasonable, and consistent rules of decision, suitable to the genius of the people and to their social, political, and economic conditions and the system once established has never changed. The rules deduced from this system, however, were continually changing and expanding with the progress of society in the application of this system to more diversified circumstances and under more advanced periods. The common law by its own principles adapted itself to varying conditions and modified its own rules so as to serve the ends of justice as prompted by a course of reasoning which was guided by these generally accepted truths. One of its oldest maxims was that where the reason of a rule ceased the rule also ceased, and it logically followed that when it occurred to the courts that a particular rule had never been founded upon reason, and that no reason existed in support thereof, that rule likewise ceased, and perhaps another sprang up in its place which was based upon reason and justice as then conceived. No rule of the common law could survive the reason on which it was founded. It needed no statute to change it but abrogated itself...

The principles of the English common-law system, as its theory assumes and its history proves, were not applicable or suited to one country or condition of society only, but, on the contrary, by reason of their properties of expansibility and flexibility, their application to many became practicable. The adoption of the common law in the most general terms by the government of any country did not necessarily require or admit of an unqualified application of all its rules, without regard to local circumstances and the then present enlightened conception of reason and justice. This system of jurisprudence had been adopted by virtue of statutory enactment by most of the states of the Union; but, according to the prevailing decisions, the rules as declared by the English courts at one period or another have been controlling only so far as they were suited to and in harmony with the genius, spirit, and objects of American institutions. Whether so-called common-law rules have been followed strictly in the several states has depended upon the extent to which they have seemed reasonable, and for this reason what are considered proper rules of the common law in one state are not necessarily so considered in another, and likewise rules considered proper dictations of the common law in the eighteenth century are not now so considered in the twentieth. Since courts have had an existence in America they have never hesitated to take upon themselves the responsibility of saying what are the proper rules of the common law. While courts may properly refer to well-known repositories of legal learning, to ascertain and arrive at the correct rules applicable, and may look to American as well as English books, neither precedents nor opinions of judges can be said with strict propriety to be the law. Although they are to be regarded as proper exponents of the law as adopted, they are to be received merely as evidence of the law rather than

> as the law itself...
>
> We cannot believe, then, that our Legislature intended to petrify the rules of the common law as declared by judicial decisions at any one time or period, and to set them in such inflexible form as to make them absolute rules of decision throughout all time. The theory of our adopted system is that the law consists, not in the actual rules enforced by the decisions of the courts, but consists only in the principles from which these rules flow. Under the section of the statute relied on, where there are no governing enactments of the Legislature, the courts of this state are, in all matters coming before them, to endeavor to administer justice according to the promptings of reason and common sense, which are the cardinal principles of the common law, and they are not to accept blindly the decisions of the English courts of any particular time or period without inquiring as to the reasons upon which they rest. To do so would be to adopt a practice which would be in direct violation of the theory of that common law which the statute prescribes we are to follow... n232

A more dogmatic position on old common law doctrines was taken in a 1937 Indiana case, n233 but the view of that later case has not been adopted by any subsequent Indiana court.

§ 7.02(p) Iowa.

The entire area now forming the state of Iowa was originally made a part of the United States territory by inclusion within the Louisiana Purchase. Even though until the 1830's there were almost no Iowa inhabitants other than Indians, a legal regime still applied to the area as a result of Congressional legislation in connection with the Louisiana Purchase. French and Spanish governance over the territory of the Louisiana Purchase was meaningful only in the areas of settlement, essentially confined to New Orleans and St. Louis. French governance ended with the arrival of a Spanish governor in 1769, and Spanish authority ended in 1803. Upon his assumption of office in 1769, the Spanish governor officially proclaimed the substitution of Spanish law for all prior laws in the area. n234

When the new American governor arrived in New Orleans in 1804, he created a "court of common pleas" with proceedings in English, signifying an abrupt transition into an American common law system. Reacting to local protest, Congress later in that same year separated the area of Louisiana state, called the Territory of Orleans, from the rest of the Louisiana territory, designating the remainder as the District of Louisiana and placing it administratively under the Territory of Indiana. n235 Existing law was continued in force for the District of Louisiana: "The laws in force in the said district of Louisiana, at the commencement of this act, and not inconsistent with any of the provisions thereof, shall continue in force until altered, modified or repealed by the governor and judges of the Indiana territory, as aforesaid." n236

The Indiana territorial government enacted certain laws of the new territory between 1804 and 1805, all of them with pronounced common law flavor, and in 1806 Congress established a separate administration for the area, redesignating it the Territory of Louisiana. Statutes enacted after this change also covered familiar common law subjects. In 1812 the Territory of Louisiana was granted the right to its own legislative assembly, and its name was changed to the Territory of Missouri. A territorial enactment in 1815 authorized the recording of land titles acquired during the period of Spanish government, but in 1816 the territorial legislature adopted a broad reception statute for the English common law:

> The common law of England, which is of a general nature, and all statutes made by the British parliament in aid of or to supply the defects of the said common law, made prior to the fourth year of James the first, and of a general nature, and not local to that kingdom, which said common law and statutes are not contrary to the laws of this territory, and not repugnant to, nor inconsistent with the constitution and laws of the United States shall be the rule of decision in this territory, until altered or repealed by the legislature, any law, usage, custom to the contrary notwithstanding, provided, however, that none of the British statutes respecting crimes and punishments shall be in force in this territory, nor

> shall any person be punished by common law, where the laws and statutes of this territory have made provision on the subject, but where the laws and statutes of the United States and this territory have not made provision for the punishment of offences, the several courts may proceed to punish for such offences, provided, the punishment shall in no case be other than fine and imprisonment, and the term of imprisonment shall not exceed two months; and the fine shall not exceed one hundred dollars. n237

A companion provision to this general common law reception statute indicated certain real property common law doctrines that were excepted from this reception:

> The doctrine of survivorship in cases of joint tenants shall never be allowed, in this territory. The doctrine of entails shall never be allowed, and in all cases where any real estate shall be entailed, the whole of the right and interest of, in, and to the same, shall vest in fee simple in the person having the first reversion or remainder in said estate, after the life estate is determined in said estate. n238

When the State of Missouri was formed in 1821, no actual governmental authority applied to the Louisiana Purchase territory north of Missouri, including Iowa, until 1834, when Congress attached Iowa to the Territory of Michigan. n239 The Michigan Territory was subject to the prior law of the Northwest Ordinance, which imposed a common law system over its jurisdictions. In 1836, Wisconsin Territory was created with the land from the Territory of Michigan, except the portion designated as the state of Michigan, so Iowa was thus attached to the Wisconsin Territory. n240 According to its territorial enabling statute, Wisconsin law included the laws issued under the Northwest Ordinance generally, and the laws of Michigan Territory specifically:

> And be it further enacted, That the inhabitants of the said Territory shall be entitled to, and enjoy, all and singular the rights, privileges, and advantages, granted and secured to the people of the Territory of the United States northwest of the river Ohio, by the articles of the [Northwest Ordinance]; and shall be subject to all the conditions and restrictions and prohibitions in said articles of compact imposed upon the people of the said Territory. The said inhabitants shall also be entitled to all the rights, privileges, and immunities, heretofore granted and secured to the Territory of Michigan, and to its inhabitants, and the existing laws of the Territory of Michigan shall be extended over said Territory, so far as the same shall not be incompatible with the provisions of this act, subject, nevertheless, to be altered, modified, or repealed, by the Governor and Legislative Assembly of the said Territory of Wisconsin; and further, the laws of the United States are hereby extended over, and shall be in force in, said Territory, so far as the same, or any provisions thereof may be applicable. n241

Just two years after this shift, Iowa itself attained territorial status. n242 The territorial enabling act for Iowa continued in force the prior law of Wisconsin Territory, which, as mentioned above, continued in force the prior law of Michigan Territory and of the Northwest Ordinance:

> And be it further enacted, That the inhabitants of the said Territory shall be entitled to all the rights, privileges and immunities heretofore granted and secured to the Territory of Wisconsin and to its inhabitants; and the existing laws of the Territory of Wisconsin shall be extended over said Territory, so far as the same be not incompatible with the provisions of this act, subject, nevertheless, to be altered, modified, or repealed, by the Governor and Legislative Assembly of the said Territory of Iowa; and further, the laws of the United States are hereby extended over, and shall be in force in said Territory, so far as the same, or any provisions thereof, may be applicable. n243

The enabling act also declared that "the said supreme and district courts, respectively, shall possess a chancery as well as common law jurisdiction. n244

In 1840 the territorial legislature summarily repealed "all the acts of the Territory of Michigan and the Territory of

Wisconsin which were in force in the Territory of Iowa" on July 4, 1838, and decreed that "None of the statutes of Great Britain shall be considered as law in this Territory." n245 This act was still in effect when Iowa's admission to statehood was authorized in 1845, n246 and the new constitution of 1846 was adopted, continuing prior laws in force: "All laws now in force and not inconsistent with this constitution, shall remain in force until they shall expire or be repealed." n247 The same provision was continued in the 1857 constitution. n248 In that same year the Iowa Supreme Court held that common law dower was still the law in Iowa and issued a very restrictive reading of the legislation rejecting British statutes and the common law, declining to give it "any greater effect than is necessary":

> In the first place, according to our recollection of history, the common law was substituted for the civil law by the Missouri territory, of which this state was once a part. In the next place, so many rights and titles -- so great interests have grown up, as if by and under the common law, and not by and under the civil -- that it would be the duty of a court to hold that the people brought it with them. The territory has, from the beginning, including all private rights and titles, been administered upon the basis of the common law, and to hold that the civil, and not the common law, is the law of this state, would produce startling and revolutionary effects. The extent and magnitude of the interests involved, would require a court to hold to the common law, if there was no other reason.
>
> But, besides this, all our laws, back to the beginning of the territory, recognize -- assume the common law. They would many of them, be unmeaning, senseless, without it. All the proceedings of the courts would be so, and not a judgment heretofore recovered would be valid, nor a title under it. But the ordinance of 1787, for the government of the Northwest Territory, made it the law of that country; and that was extended over Wisconsin, and then the laws of Wisconsin, over Iowa. And although the statutes of Michigan and Wisconsin were repealed in 1840, the ordinance of 1787 was *not* affected, but remained in full vigor as before. That ordinance made the law of dower one of the fundamental laws. . . .
>
> * * *
>
> By the original common law, the doweress could not recover damages for the detention of her dower. This was remedied by the statute of Merton, 20 Hen. III, A.D. 1236...
>
> It becomes, in some measure important, then, to inquire what effect, if any, the statute of Merton has in this State. Experience, and the dictates of justice, produced the enactment of that statute, and they have lost none of their force in the periods which have passed since that time. It is urged that this ancient statute can have no effect here, because of the enactment of the sixth section of the act of July 30, 1840 (Special Session, 1840, chap. 29, p. 20), which is, that "none of the statutes of Great Britain shall be considered as law of this territory." The enactment of this chapter, containing a repeal of the laws of Michigan and Wisconsin, as well as the above declaration in reference to the statutes of Great Britain, was then, and has ever since been considered of very doubtful wisdom, and of no less doubtful effect. It seemed to be taking a step in the dark. That act did not receive the approval of the governor of the territory. He was a man of age, experience, and of careful forethought, and his approval was withheld through doubts and fears of the consequences of such a step. The *lawyer* can readily perceive that there was much reason for hesitation. The statutes of England, from time to time, modified and meliorated the common law to a considerable extent. Some of them were necessary to deliver the nation and the law from feudal principles, and some were requisite to adapt the law to an improved state of society emerging from feudal semi-barbarism, and to suit an increasing spirit of commercial enterprise. In this view of them, these statutes were as much required by the people of America, as by those of the mother country. Many of them of a general character, and an enabling or remedial nature, have been adopted by the different states (even by the new western ones), either by express statute provision, or by re-enactment, or by judicial construction; the latter sometimes declaring them adopted, and sometimes considering them as become the common law of the state. Sufficient has probably been said to recall to our minds the importance of some of these acts, and the necessity that we should, *in some manner,*

> receive the benefit of the leading and most important of them. And these remarks will justify us in saying, that we are not disposed to give the above named section, relating to the statutes of Great Britain, any greater effect than is necessary.
>
> Then the question is, whether the declaration of that section extends to the statutes of *England.* Great Britain is not the same with England, although it includes it. The greater part, if not all of those beneficial acts, which have been adopted into the laws of the American States, were enacted before the union with Scotland. The periods at which the English statutes have been held to cease operating upon American law, have been different in different states.
>
> Some have stopped at the fourth year of James I, which was about the period of the first emigration to this country; some have fixed the epoch of our revolution; and some, if we mistake not, that of the revolution of 1688. The above act of 1840 may reasonably be considered as having prescribed the event of the union of the crown of England with that of Scotland, which was nearly contemporaneous with that of the English revolution, it having taken place in the year 1707. This is more reasonable than to regard that declaration as to the statutes of Great Britain, as synonymous with a like declaration in relation to the statutes of England, which would receive support from neither history, language, nor the principles of interpretation. We conclude, therefore, that the statute of Merton is not deprived of any effect by the foregoing declaration of the act of 1840... n249

Subsequent Iowa courts have considered the common law not repealed, either accepting it as applicable to a question of state law, n250 or rejecting it for reasons other than repeal. n251

§ 7.02(q) Kansas.

The area that is now in the state of Kansas was originally included in the Territory of Kansas that was established in 1854. The Territory of Kansas had been part of the Louisiana Purchase and theoretically shared in the common French and Spanish legal heritage belonging to the early settlement history of that area n252. As far as permanent settlement and government are concerned, Spanish exploration in the 16th century and French probes in the 17th and 18th centuries ultimately produced no permanent settlements in Kansas. French governance over the region was effectively confined to the settlements at New Orleans and St. Louis and ended with the arrival of a Spanish governor in 1769. Upon his assumption of office in 1769, the Spanish governor officially proclaimed the substitution of Spanish law for all prior laws in the area. n253

Spanish authority ended in 1803, and when the new American governor arrived in New Orleans in 1804, he created a "court of common pleas" with proceedings in English, signifying an abrupt transition into an American common law system. Reacting to local protest, Congress later in that same year separated the area of Louisiana state, the Territory of Orleans, from the rest of the Louisiana territory, designating the remainder as the District of Louisiana and placing it administratively under the Territory of Indiana. n254 Existing law was continued in force for the District of Louisiana: "The laws in force in the said district of Louisiana, at the commencement of this act, and not inconsistent with any of the provisions thereof, shall continue in force until altered, modified or repealed by the governor and judges of the Indiana territory, as aforesaid." n255

Such a provision was hardly meaningful in the region of Kansas, where no permanent settlements were established until 1820. However, in 1806, a ceremony had been conducted at an Indian village in Kansas to remove the Spanish flag and replace it with the American flag. Moreover, because it was anticipated that Kansas would be a prime location for resettlement of Indians, other settlements were not encouraged. This began to change when a military outpost was established in 1842 and emigrant trails were pushed through Kansas, spawning still more settlements along the trails. Settlement dramatically increased after passage of the Kansas-Nebraska Act in 1854, attempting to resolve the slavery question in new states and establishing the Territory of Kansas, which also included most of Colorado.

The lands in the Territory of Kansas had technically been under the legal rules enacted by the Indiana territorial government from the time of the Louisiana Purchase. This government enacted certain laws for the new territory between 1804 and 1805, all of them with pronounced common law flavor, and in 1806 Congress established a separate administration for the area of the Louisiana Purchase outside New Orleans, redesignating it the Territory of Louisiana. Statutes enacted for this territory after this change also dealt with familiar common law subjects. In 1812 the Territory of Louisiana was granted the right to its own legislative assembly, and its name was changed to the Territory of Missouri. A territorial enactment in 1815 authorized the recording of land titles acquired during the period of Spanish government, which, of course, did not affect the Kansas area, but in 1816 the territorial legislature adopted a broad reception statute for the English common law:

> The common law of England, which is of a general nature, and all statutes made by the British parliament in aid of or to supply the defects of the said common law, made prior to the fourth year of James the first, and of a general nature, and not local to that kingdom, which said common law and statutes are not contrary to the laws of this territory, and not repugnant to, nor inconsistent with the constitution and laws of the United States shall be the rule of decision in this territory, until altered or repealed by the legislature, any law, usage, custom to the contrary notwithstanding, provided, however, that none of the British statutes respecting crimes and punishments shall be in force in this territory, nor shall any person be punished by common law, where the laws and statutes of this territory have made provision on the subject, but where the laws and statutes of the United States and this territory have not made provision for the punishment of offences, the several courts may proceed to punish for such offences, provided, the punishment shall in no case be other than fine and imprisonment, and the term of imprisonment shall not exceed two months; and the fine shall not exceed one hundred dollars. n256

A companion provision to this general common law reception statute indicated certain real property common law doctrines that were excepted from this reception:

> The doctrine of survivorship in cases of joint tenants shall never be allowed, in this territory. The doctrine of entails shall never be allowed, and in all cases where any real estate shall be entailed, the whole of the right and interest of, in, and to the same, shall vest in fee simple in the person having the first reversion or remainder in said estate, after the life estate is determined in said estate. n257

No changes in the laws applicable to the Kansas area occurred thereafter until the Kansas Territory was created in 1854 and the first legislature met in 1854. In the territorial enabling act, no explicit common law reception was mentioned. However, it was provided that the territorial supreme and district courts "shall possess chancery as well as common law jurisdiction," n258 and federal law, except for the 1820 Missouri Compromise legislation, was declared applicable in the new territory. n259

In 1855 the new Kansas territorial legislature enacted a general common law reception statute, providing that both English common law and pertinent English statutes were adopted:

> The common law of England and all statutes and acts of parliament made prior to the fourth year of James the first, and which are of a general nature, not local to that kingdom, and not repugnant to or inconsistent with the constitution of the United States, and the act entitled "An act to organize the territory of Nebraska and Kansas," or any statute law which may from time [to] time be made or passed by this or any subsequent legislative assembly of the territory of Kansas, shall be the rule of action and decision in this territory, and law, custom or usage to the contrary notwithstanding. n260

In 1862 this territorial provision was enacted without change by the Kansas state legislature, one year after statehood was achieved. n261

The 1861 Act of Admission n262 contained no reception provision, nor did the first Kansas constitution, which had been drafted in 1859. However, the constitution did maintain previous laws in force: "All laws and parts of laws in force in the Territory at the time of the acceptance of this constitution by Congress, not inconsistent with this constitution, shall continue and remain in full force until they expire or shall be repealed." n263

In 1868 the reception statute of 1862 was modified to the language that appears in the current Kansas statutes:

> The common law as modified by constitutional and statutory law, judicial decisions, and the conditions and wants of the people, shall remain in force in aid of the General Statutes of this state; but the rule of the common law, that statutes in derogation thereof shall be strictly construed, shall not be applicable to any general statute of this state, but all such statutes shall be liberally construed to promote their object. n264

In addition to the reception statute, other Kansas statutes relating to the common law specifically reject several older real property doctrines, such as certain rules governing concurrent tenancies, the rule in *Shelley's Case*, estates in tail, the indefinite failure of issue, certain grants for life, the doctrine of worthier title, and the rule in *Wyld's Case*. n265 The Kansas courts appear not to have addressed the matters of whether or to what extent English statutes are considered received with the common law, or at what point in time common law doctrines are considered fixed.

§ 7.02(r) Kentucky.

Kentucky was first explored by the French in the second half of the 17th century, and the first French trading post was established in 1756. In 1748, however, the English Virginia colony had made a grant of Kentucky land to an exploring party, English exploration had commenced in 1750, and the first English settlement followed soon after. Settlements under Daniel Boone and others were founded in 1775. Virginia, which claimed Kentucky land as part of Virginia's indefinite western boundary extension, had designated the area as Fincastle County in 1772; the western part of this county was made into a separate county, named Kentucky, in 1776. n266

Common law reception in early Kentucky is thus bound up with the matter of colonial Virginia's common law reception. Virginia's long colonial history, in turn, demonstrates at every stage a heavy reliance on English law. The royal charter that led directly to establishment of Jamestown in Virginia required that the supervising council govern "according to such laws, ordinances, and instructions, as shall be in that behalf, given and signed with our hand or sign manuel, and pass under the privy seal of our realm of England." n267 This charter secured to all persons dwelling or born within the colonies the right of English citizens, to "have and enjoy all liberties, franchises, and immunities, within any of our other dominions, to all intents and purposes, as if they had been abiding and born, within this our realm of England, or any other of our said dominions." n268 Supplemental instructions drafted in November, 1606, proclaimed that:

> for the good government of the people to be planted in those parts, and for the good ordering and disposing of all causes happening within the same, and the same to be done for the substance thereof, as neer to the common lawes of England, and the equity thereof, as may be... n269

Land grants in colonial Virginia were likewise governed by common law, as stated in the supplemental instructions to the colony of November 20, 1606:

> [A]nd moreover wee doe hereby ordaine and establish for us, our heires and successors, that all the lands, tenements, and hereditaments to be had and enjoyed by any of our subjects within the precincts aforesaid, shall be had and inherited and enjoyed, according as in the like estates they be had and enjoyed by the lawes within this realme of England... n270

Early in 1609 the patentees drafted a new charter, which was approved by James I on May 23, 1609. With respect to property rights, the 1609 charter reconfirmed that the patentees were authorized to acquire such rights, after first obtaining royal permission:

> And that [the patentees] and their successors, shall be, from henceforth, forever enabled to take, acquire and purchase, by the name aforesaid (license for the same, from us, our heirs or successors, first had and obtained) any manner of lands, tenements, and hereditaments, goods and chattels, within our realm of England, and dominion of Wales. n271

The 1609 charter also confirmed that such property rights were the rights recognized under existing English law:

> [The patentees] are to have and to hold, possess and enjoy, all and singular the said lands, countries and territories, with all and singular other premises, heretofore by these presents granted, or mentioned to be granted; to the sole and proper use of [the patentees], their successors and assigns for ever; to be holden of us, our heirs, and successors, as of our manour of East Greenwich, in free and common socage, and not in capite... n272

Property rights previously granted were ratified, except that the northern boundary of the territory open to Virginia Company colonization was shifted back from the forty-first to the fortieth latitude. n273

Soon Virginia patentees sought and obtained from the king a third charter on March 12, 1612. This charter reaffirmed the grants of the earlier charters and reiterated the language of the two previous charters concerning the holding of lands in free and common socage. n274 It also confirmed interests previously granted n275 and declared that questions in construing or interpreting any of the charter provisions should be resolved in favor of the company. n276

When the Stuart monarch was restored to the English throne in 1660, it seemed appropriate to the Virginia assembly to confirm their allegiance to English law. Thus the assembly proclaimed that Virginians "have also endeavoured in all things (as neere as the capacity and constitution of this country would admitt) to addhere to those excellent and often refined laws of England, to which we profess and acknowledge all due obedience and reverence ...." n277 In 1666 the assembly appropriated money to purchase law books, in order to more faithfully follow English common law. n278

A provision for explicit reception of the English common and statutory law was never included in Virginia's various constitutions, the first of which was adopted in 1776. However, in that same year, the year Kentucky was created as a separate administrative unit of Virginia, Virginia's legislature did enact a statutory reception provision:

> That the common law of England, all statutes or acts of parliament made in aid of the common law prior to the fourth year of the reign of King James the first, and which are of a general nature, not local to the kingdom, together with the several acts of the general assembly of this colony now in force, so far as the same may consist with the several ordinances, declarations, and resolutions of the general convention, shall be the rule of decision, and shall be considered as in full force, until the same shall be altered by legislative power of this colony. n279

Kentuckians' remoteness from the seat of their government led to early pressure for separate and independent status. The Virginia legislature obliged in 1785 by passing an enabling act, authorizing separate status upon certain conditions. n280 Among the conditions was that land rights prior to separation would remain valid and governed by the law of Virginia:

> That all private rights and interests in lands within the said district, derived from the laws of Virginia, prior to such separation, shall remain valid and secure under the laws of the proposed state, and shall be determined by the laws existing in this state. n281

No action was taken under that enabling act before a new enabling act issued from the Virginia legislature, but without most of the conditions in the prior act. n282 Kentuckians met in July, 1788, pursuant to this second enabling act, but adjourned in September and reconvened in November, uncertain about what to do in face of the new federal constitution then going through the ratification process, or the newly enacted Northwest Ordinance, soon to be followed by a "Southwest Ordinance" applicable to Kentucky. Later in 1788, while the reconvened Kentucky meetings were still in session, Virginia passed a third enabling act in conformance with requirements of the new federal constitution. n283 This new act contained the same provision regarding Virginia laws and prior land rights as found in the first enabling act, n284 but other conditions were objectionable. A fourth and final enabling act ensued, n285 with the same clause for prior land rights and the applicability of Virginia laws, n286 and the Kentuckians once again convened in June, 1790. Meanwhile, Congress had enacted the so-called "Southwest Ordinance" on May 26, 1790, imposing a temporary government over the area south of the Ohio River, including Kentucky, and declaring that the inhabitants of the territory "shall enjoy all the privileges, benefits and advantages set forth in the [Northwest Ordinance]" and that "the government of the said territory south of the Ohio, shall be similar to that which is now exercised in the territory northwest of the Ohio...." n287 The Northwest Ordinance, enacted while the Articles of Confederation were in effect, ensured to the inhabitants of the territory judicial proceedings according the course of the common law. However, Kentucky was technically still part of Virginia, and therefore not under the jurisdiction of the Southwest Ordinance.

In February, 1791, Congress authorized admission of Kentucky into the union as a separate state (the 15th), n288 and by April, 1792, Kentuckians had prepared a new constitution and were formally admitted as a state in June, 1792. The new constitution continued prior Virginia laws in force:

> All laws now in force in the State of Virginia, not inconsistent with this constitution, which are of a general nature, and not local to the eastern part of that State, shall be in force in this State, until they shall be altered or repealed by the legislature. n289

In June, 1792, Virginia's original common law reception statute was still in force, although later in 1792 Virginia would repeal the portion of the statute receiving English statutes.

Kentucky's constitution of 1799 contained a similar provision, fixing the borrowing of Virginia's common law reception as June 1, 1792:

> All laws which, on the first day of June, one thousand seven hundred and ninety-two, were in force in the State of Virginia, and which are of a general nature, and not local to that State, and not repugnant to this constitution, nor to the laws which have been enacted by the legislature of this commonwealth, shall be in force within this State, until they shall be altered or repealed by the general assembly. n290

The identical provisions appeared in the 1850 constitution, n291 and in the 1890 constitution 1, n292 which is the current provision. Whatever common law has been received under this statute borrowed from Virginia laws has been modified by the current Kentucky statute declaring that "The decisions of the courts of Great Britain rendered since July 4, 1776, shall not be of binding authority in the courts of Kentucky." n293

Only in a few cases have Kentucky courts been asked to explain the extent of common law reception in the state, and those judicial pronouncements have only restated the constitutional and statutory provisions. Perhaps the most recent statement was issued in a 1953 opinion, in which the Kentucky Court of Appeals stated simply, "The common law is in force in Kentucky except as it has been modified by the Constitution, a statute or by judicial decisions or public policy." n294 An earlier court gave a more detailed explanation:

> The principles and rules constituting a part of the common law prior to the time stated, which was

> March 24, 1607, that were of a general nature and not local to the kingdom are and have ever been in force in Kentucky except as they have been modified by constitutional and statutory law, judicial decisions and the conditions and wants of the people, or which are not repugnant to the spirit of our laws or the public policy of the state. The common law is of equal authority and binding force with the statute law. n295

In another court opinion:

> The history of the adoption is given as follows: "By an ordinance of 1776, Virginia adopted 'the common law of England, and all statutes or acts of parliament made in aid of the common law prior to the fourth year of James I., and which [were] of a general nature and not local to that kingdom.' And the eighth section of the sixth article of the constitution of Kentucky adopted, with certain qualifications, all laws which were in force in the state of Virginia ..." "... To declare that the common law and statutes enacted prior to that time should be in force was equivalent to declaring that no rule of common law not then recognized and in force in England should be recognized and enforced here. James I. ascended the throne of England in 1603 (March 24th), and the fourth year of his reign commenced March 24, 1607 [in fact, the fourth year commenced in 1606]; and when it is sought to enforce in this state any rule of English common law, as such, independently of its soundness in principle, it ought to appear that it was established and recognized as the law of England prior to the latter date." n296

§ 7.02(s) Louisiana.

The area of Louisiana was first explored by the Spanish in the 16th century and then by the French in the 17th century. In 1682 Lasalle formally claimed Louisiana territory, and indeed the entire Mississippi Valley for France, and serious settlement efforts were underway two decades later. King Louis XIV granted a private charter to Antoine Crozat in 1712, n297 in order to begin developing the resources of the area. In this Crozat charter it was specified that "Our Edicts, Ordinances and Customs, and the Usages of the Mayoralty and Shreevalty of Paris, shall be observed for Laws and Customs in said Country of Louisiana." n298

When this endeavor failed to progress, a new charter was granted in 1717 to the so-called Company of the West. n299 This Company, too, failed to prosper and was taken over by the French crown in 1731. The Company's charter had authorized it to "grant land, even allodially, to erect forts, and levy troops and recruits even in the kingdom, procuring the King's commission for this purpose." n300 No change in legal regime occurred thereafter until the French secretly ceded the territory west of the Mississippi River to the Spanish, whereupon the French and other inhabitants rebelled and were suppressed by Spanish authority. When the Spanish governor thereafter assumed office in 1769, he apparently first issued a proclamation maintaining French law in force and then a few weeks later issued a code of ordinances that placed Spanish law in force. As explained a few years later by the Louisiana State Supreme Court:

> [I]t is said, that ... the French law, called the *code noir*, ... was in force in this country. To establish this, a proclamation is produced, issued by Don Alessandro de O'Reilly [the Spanish governor], of the 27th of August, 1769, whereby it is continued in force. How far the Spanish officer, who took possession of Louisiana, was authorized to maintain the former laws or introduce the laws of Spain, is a subject on which vain inquiries have often been made here. It is probable he did not deposit among the archives of the province any copy of his instructions, or that, if he did, it has disappeared before the country was delivered to the government of the United States. We are therefore left to take it for granted that he did not act without authorisation. Admitting then that he had a discretionary power to preserve such of the existing laws as should be deemed fit, it appears that he thought proper on the 27th of August, 1769, that is to say, about a week after he had taken possession, to declare that the French *code noir* should continue in force. But that this was a measure resorted to on the spur of the moment, in the midst of the storm which then agitated the country, is evident from his subsequent conduct. We see him three months

> after, when tranquillity was restored, and when he could give the necessary attention to the business of legislation, publishing in the French language an extract from the whole body of the Spanish law, with references to the books in which they are contained, purporting to be intended for an elementary instruction to the inhabitants of the province; meanwhile the knowledge of the Spanish language should diffuse itself and enable them to read the laws in their original idiom. This publication, followed from that moment by an uninterrupted observance of the Spanish law, has been received as an introduction of the Spanish code in all its parts, and must be considered as having repealed the laws formerly prevailing in Louisiana, whether they had continued in force by the tacit or express consent of government. The observation made by counsel of the appellant that the French *code noir*, ordered by O'Reilly to continue in force, could co-exist with the Spanish laws afterward published, because it contains certain regulations for which the Spanish laws have made no provision, is probably correct. When a law is not absolutely and generally repealed, such of its provisions as are not repugnant with the subsequent laws, do not cease to have effect. n301

The code referred to in the *Beard* opinion, promulgated by the new Spanish governor in 1769, signaled the change in legal regime to Spanish law, as noted in the code's preamble:

> [I]t is indispensable to ... establish in [the stead of the council] that form of political government and administration of justice prescribed by our wise laws, and by which all the states of his majesty in America have been maintained in the most perfect tranquility, content, and subordination ... And as the want of advocates in this country, and the little knowledge which his new subjects possess of the Spanish laws, might render a strict observance of them difficult, ... we have thought it useful, and even necessary to form an abstract or regulation drawn from the said laws, which may serve for instruction and elementary formulary in the administration of justice and in the economical government of this city, until a more general knowledge of Spanish language may enable every one, by the perusal of the aforesaid laws, to extend his information to every point thereof. n302

Under the treaty of cession by which the United States purchased the Louisiana Territory in 1803 n303 the inhabitants were to maintain their rights under prior law:

> The inhabitants of the ceded territory shall be incorporated in the Union of the United States, and admitted as soon as possible, according to the principles of the Federal constitution, to the enjoyment of all the rights, advantages and immunities of citizens of the United States; and in the mean time they shall be maintained and protected in the free enjoyment of their liberty, property, and the religion which they profess. n304

When the new American governor arrived in New Orleans in 1804, he created a "court of common pleas" with proceedings in English, signifying an abrupt transition into an American common law system. Reacting to local protest, Congress later in that same year separated the area of Louisiana state, called the Territory of Orleans, from the rest of the Louisiana territory, designating the remainder as the District of Louisiana and placing it administratively under the Territory of Indiana. n305 This same legislation also created a federal district court for the Territory of Orleans, with the judge having the same jurisdiction and powers "which are by law given to, or may be exercised by the judge of Kentucky district ...." n306

Existing law was continued in force for the Territory of Orleans: "The laws in force in the said territory [of Louisiana], at the commencement of this act, and not inconsistent with the provisions thereof, shall continue in force, until altered, modified, or repealed by the legislature." n307 A parallel provision for the District of Louisiana was also included: "The laws in force in the said district of Louisiana, at the commencement of this act, and not inconsistent with any of the

provisions thereof, shall continue in force until altered, modified or repealed by the governor and judges of the Indiana territory, as aforesaid." n308

Land grants made under Spanish authority were also recognized:

> That all grants for lands within the territories ceded by the French Republic to the United States, by the treaty of the thirtieth of April, in the year one thousand eight hundred and three, the title whereof was, at the date of the treaty of St. Ildefonso, in the crown, government or nation of Spain, and every act and proceeding subsequent thereto, of whatsoever nature, towards the obtaining any grant, title, or claim to such lands, and under whatsoever authority transacted, or pretended, be, and the same are, hereby declared to be, and to have been from the beginning, null, void, and of no effect in law or equity. (a) Provided nevertheless, that any thing in this section contained shall not be construed to make null and void any bona fide grant, made agreeably to the laws, usages and customs of the Spanish government to an actual settler on the lands so granted, for himself, and for his wife and family; or to make null and void any bona fide act or proceeding done by an actual settler agreeably to the laws, usages and customs of the Spanish government, to obtain a grant for lands actually settled on by the person or persons claiming title thereto, if such settlement in either case was actually made prior to the twentieth day of December, one thousand eight hundred and three: And provided further, that such grant shall not secure to the grantee or his assigns more than one square mile of land, together with such other and further quantity as heretofore hath been allowed for the wife and family of such actual settler, agreeably to the laws, usages and customs of the Spanish government. n309

As the United States Congress thereafter sought to refine the governmental arrangements, it approved "An act for ascertaining and adjusting titles and claims to land, within the Territory of Orleans, and the district of Louisiana," which confirmed prior titles under both French and Spanish governments:

> [A]ny person or persons, and the legal representative of any person or persons, who on the first day of October, in the year one thousand eight hundred, were resident within the territories ceded by the French Republic to the United States, by the treaty of the thirtieth of April, one thousand eight hundred and three, and who had prior to the said first day of October, one thousand eight hundred, obtained from the French or Spanish governments respectively, during the time either of the said governments had the actual possession of said territories, any duly registered warrant, or order for survey for lands lying within the said territories to which the Indian title had been extinguished, and which were on that day actually inhabited and cultivated by such person or persons, or for his or their use, shall be confirmed in their claims to such lands in the same manner as if their titles had been completed ... n310

In 1805 the District of Louisiana was redesignated the Territory of Louisiana and its prior laws were continued in force; n311 legislative and judicial powers were vested in a governor and three judges, and the judges were given "the same jurisdiction which is possessed by the judges of the Indiana Territory...." n312

The legislature of the Territory of Orleans created a new code for the Territory in 1808, combining elements of colonial French and Spanish laws with the Napoleonic Code that had been published in France in 1805. In adopting this new code the territorial legislature declared the abrogation of whatever prior law was "contrary to the dispositions in said digest, or irreconcilable with them...." n313 Louisiana judges treated this provision as leaving prior Spanish law in force, unless it was directly contrary to or irreconcilable with new code. n314

This Territory of Orleans was authorized to prepare for statehood in 1811 n315 and was admitted in 1812. n316 The new constitution of 1812 was modeled after the Kentucky constitution of 1799, and in more than one provision continued prior law in force:

> That no inconvenience may arise from a change of a territorial to a permanent State government, it is declared by the convention that all rights, suits, actions, prosecutions, claims, and contracts, both as it respects individuals and bodies-corporate, shall continue as if no change had taken place in this government, in virtue of the laws now in force. n317
>
> All laws now in force in this Territory, not inconsistent with this constitution, shall continue and remain in full effect until repealed by the legislature. n318

However, in the judiciary article was a special provision for continuing prior law in force and preventing wholesale incorporation or reception of English common law:

> The existing laws in this Territory, when this constitution goes into effect, shall continue to be in force until altered or abolished by the legislature: Provided, however, That the legislature shall never adopt any system or code of laws by a general reference to the said system or code, but in all cases shall specify the several provisions of the laws it may enact. n319

In this same spirit resistant to common law reception an early Louisiana court denied that the use of a common law procedural term necessarily invoked the associated common law practices and procedures. n320

A new code was promulgated in 1825, which made an attempt to completely abolish received prior law of Spanish, French or Roman origin:

> From and after the promulgation of this Code, the Spanish, Roman and French laws, which were in force in this State when Louisiana was ceded to the United States, and the acts of the Legislative Council, of the legislature of the Territory of Orleans, and of the Legislature of the State of Louisiana, be and are hereby repealed in every case, for which it has been especially provided in this Code, and they shall not be invoked as laws, even under the pretense that their provisions are not contrary or repugnant to those of this Code. n321

Nevertheless, soon thereafter a Louisiana court recognized as valid certain provisions in the 1808 code that had not been expressly continued in the 1825 code. n322 In response, the Louisiana legislature enacted statutes expressly repealing virtually all provisions of the 1808 code that had not been reprinted in the 1825 code, n323 and abrogating "all the civil laws which were in force before the promulgation of the civil code lately promulgated [with one enumerated exception]." n324

A Louisiana court in 1836 held that this provision repealed "the whole body of Spanish law," n325 but three years later another court decided that the legislature could only repeal laws that it had enacted, leaving older civil law principles intact; n326 this reasoning has been followed by subsequent Louisiana courts. n327

In the new state constitution of 1845, the provisions maintaining prior laws and actions in force n328 and preventing wholesale reception of older laws n329 were continued. Indeed, they have continued through the numerous intervening state constitutions n330 and remain essentially unchanged in Louisiana's present constitution. n331 A Louisiana court has explained the scope of the provision prohibiting the adoption of a system of laws by mere general reference:

> We are inclined to think that the words "any system or code of laws," as used in the article, means systems of law, codes of law in vogue in other countries or jurisdictions; that these are not to be adopted by merely a general reference to the same, but that such systems or codes, or the several provisions of the same, wanted to be adopted or enacted here, are to be recited at length in the adopting act. n332

As if to emphasize that no reception of common law may be presumed for rules of decision, a Louisiana statute deals with cases lacking expressly applicable law:

> In all civil matters, where there is no express law, the judge is bound to proceed and decide according to equity. To decide equitably, an appeal is to be made to natural law and reason, or received usages, where positive law is silent. n333

§ 7.02(t) Maine.

The area of Maine was first visited by John and Sebastian Cabot, in the service of the English, at the end of the 15th century, and then a few years later by explorers for France and Spain. In 1602 an English adventurer landed on the coast of Maine and returned to England with timber and furs. In 1603 another English probe was sent out and, in that same year, the French King Henry IV issued a charter for settlement of the area. The French colony begun there in 1604 was abandoned in 1607.

An English charter was issued in 1607, and a colony on the Maine coast was founded in 1608, but the settlers returned to England in 1608. After the French set up Indian missions in 1611, the English expelled them in 1613. James I's patent for New England in 1620 covered the Maine area, and the Maine portion was conveyed to the English adventurer Sir William Alexander in 1621; meanwhile, an overlapping grant also covering Maine was issued in 1622 to Sir Ferdinando Gorges and Captain John Mason.

Each of these documents attempted to establish a basic law for the region. In the 1603 charter from the French King Henry IV, the grantees were "to ordaine, decide and cause to be executed all that which you shall judge fitt and necessary to bee done, for to maintaine, keepe and conserve the said places under our power & authority by the formes, waies and meanes prescribed by our laws." n334

The English grant to Sir Ferdinando Gorges and Captain John Mason sought to impose English law on the area:

> And the said Sr. Ferdinando Gorges and Capt. John Mason doe further covenant for them their heyres and assignes, that they will establish such government in the said porcons of lands and islands granted unto them, and the same will from time to time continue, as shall be agreeable, as neere as may be to the laws and customs of the realme of England. n335

The English presence continued to dominate, even though characterized by conflicting and overlapping claims. The underlying New England grant of 1620 was surrendered to the crown in 1635, and a new patent issued to Gorges in 1639. Again the grantee was given:

> power and authority with the assent of the greater parte of the Freeholders of the said Province and Premisses for the tyme being (when there shalbee any) whoe arae to bee called thereunto from tyme to tyme when and as often as it shalbee requisite to make ordeyne and publish Lawes Ordinances and Constitucons reasonable and not repugnant or contrary but agreeable (as neere as conveniently may bee) to the Lawes of England for the publique good of the said Province and Premisses and of the Inhabitants thereof ... n336

The Gorges patent was revoked in 1647, whereupon the Massachusetts Bay colony extended its jurisdiction over the Province of Maine.

Massachusetts colony was also founded on a firm footing of English law. Massachusetts had been incorporated by a group of English Puritans as "The Company for Massachusetts Bay," purchased nearby land from the New England Council in 1628, and the next year obtained a royal charter confirming the purchase and conferring legislative power on the corporation. This 1629 charter, too, recited the usual statement of English land tenure, "To be houlden ... as of [the king's] Mannor of East Greenewich in the County of Kent, in free and comon Soccage, and not in Capite nor by Knight's Service ...." n337 Also, the grant of legislative power was limited "soe as such Lawes and Ordinances be not

contrarie or repugnant to the Lawes and Statuts of this our Realme of England." n338

Following a lengthy drafting process a code of laws for the Massachusetts Bay colony was produced in 1641. Neither in this code nor in its famous published successor, the 1648 Book of the General Lauues and Libertyes Concerning the Inhabitants of Massachusetts, is there any explicit reference to a foundation of English law. Nevertheless, while departing from English law in individual details, the form and substance of these codes reveal a strong influence of English law. n339

In 1664 a successor and heir to Gorges secured another patent to the Maine area, again with authority to rule "according to such lawes orders ordinances direccons and instruments soe always as the said statutes ordinances and proceedings be not contrary to but as neare as conveniently may be agreeable to the lawes statutes and government of this our realme of England ... n340

There followed in 1674 a new grant of Maine land from England's King Charles II to his brother, the Duke of York, again with power to govern with laws that "bee not contrary to but as neare as may bee agreeable to the Lawes Statutes and Government of this our realm of England ...." n341 The Gorges interest was transferred by deed to Massachusetts in 1678, and Maine remained a district within Massachusetts until 1820.

During this period of joint governance over Maine, Massachusetts law continued be thoroughly English, with some unorthodox elements. Throughout the 17th century, various attempts by English officials to require that Massachusetts legislation be modified to conform to English law on individual points were strongly resisted. Ironically, a by-product of the resistance was that the colonists proclaimed infringement on their rights as Englishmen. n342 The assertion of royal power culminated with the union of Plymouth, Massachusetts, Maine and Nova Scotia colonies under a royal charter in 1691. This charter reiterated the tenure of free and common socage "as of our Manor of East Greenwich in the County of Kent," n343 and confirmed the legislative power:

> to make ordaine and establish all manner of wholsome and reasonable Orders Laws Statutes and Ordinances Directions and Instructions either with penalties or without (soe as the same be not repugnant or contrary to the Lawes of this our Realme of England) as they shall Judge to be for the good and welfare of our said Province or Territory ... n344

It may fairly be said, therefore, that as Massachusetts progressed toward statehood, its jurisprudence had a foundation that was inescapably based on the settlers' almost universal background of English law (however slight one's explicit acquaintance with the common law) mixed with a more conspicuous element of indigenous law derived from religious sources.

In the first Massachusetts Constitution, in 1780, the legislative power was not restricted or related in any way to an English common-law foundation; only the constitution itself was the legislative guide:

> And further, full power and authority are hereby given and granted to the said general court from time to time, to make, ordain, and establish all manner of wholesome and reasonable orders, laws, statutes, and ordinances, directions and instructions, either with penalties or without, so as the same be not repugnant or contrary to this constitution, as they shall judge to be for the good and welfare of this commonwealth ... n345

To the extent English common law influenced Massachusetts colonial legislation and judicial decisions prior to statehood and was still recognized, it was received under the following provision of the 1780 Constitution:

> All the laws which have heretofore been adopted, used, and approved in the province, colony, or State of Massachusetts Bay, and usually practised on in the courts of law, shall still remain and be in full

> force, until altered or repealed by the legislature, such parts only excepted as are repugnant to the rights and liberties contained in this constitution. n346

This 1780 constitution has been the subject of several subsequent state constitutional conventions, but despite the changes and attempted changes, it remains the current constitution of Massachusetts:

> The Massachusetts Constitution of 1780 is the oldest state constitution in the United States, and its unique history is at once simple and complicated for a collection such as this. Conventions in 1820, 1853, and 1917 considered a variety of amendments, and revisions, of the original document; but the fact remains that in each instance the recognizable contents and outline of the original document continued. n347

Eventually the provision for reception of prior colonial law in Massachusetts's 1780 constitution opened the way for judicial reception of the English common law. Shortly after Maine was separated from Massachusetts, the Massachusetts Supreme Court construed the phrase "laws which have heretofore been adopted" as:

> the great body of common law with those statutes made before the emigration of our ancestors, which were made in amendment of the common law, so far as these rules and principles were applicable to our condition and form of government ...
>
> Taking it then as well established that the rules and maxims of the common law, referred to in the constitution, were those which our ancestors brought with them, and which had been, to some extent, modified and adapted to our condition by the legislative jurisprudence of the colonial and provincial governments, it follows that these rules and principles were regarded as binding both upon legislators and judges in their respective departments. n348

The Massachusetts court had also held that an English statute amending the common law before the settlement of America was part of the common law received in America. As to the application of common law after American settlement:

> [Our ancestors] ... came to this country, bringing with them, as all agree, the rights and privileges of Englishmen, and the common law of that country, so far it should be found applicable to their new state and condition. They brought with them also a charter, containing power to make such new laws as their exigencies might require. They could live under the old law or make new ones. Whenever they legislated upon any subject, their own law regulated them; when they did not legislate, the law they brought with them was the rule of conduct. n349

Although these judicial pronouncements from Massachusetts courts occurred shortly after the separation of Maine, presumably they reflect assumptions about the reception of the common law that were current in Maine, too.

Finally in June, 1819, the Massachusetts General Court agreed to recommend the separation of Maine, stipulating:

> That all the laws which shall be in force within said District of Maine, upon the fifteenth day of March next, shall still remain and be in force, within the said proposed State, until altered or repealed by the government thereof, such part only excepted as may be inconsistent with the situation and condition of said new State, or repugnant to the Constitution thereof. n350

The constitution drafted in 1819 in anticipation of statehood also continued prior law in force: "All laws now in force in this State, and not repugnant to this constitution, shall remain and be in force until altered or repealed by the legislature or shall expire by their own limitation." n351 This provision remains in the present state constitution. n352

Massachusetts formally ceded Maine on February 25, 1820, n353 and Congress admitted Maine as a state approximately one week later on March 3, 1820. n354

In some respects Maine courts have been more forthright about their state's adoption of the common law than have Massachusetts courts, even though Maine's reception is derived from Massachusetts' reception. A Maine court in 1910 declared,

> When it is said that the early colonists brought over with them the English common law, adopting so much of it as they chose, it is not meant that they brought it over as a body of law, and recognized it as law because it was the law of England. Such a statement would be historically inaccurate. It would even be contrary to the truth, so far at least as the Massachusetts Bay Colony was concerned. While the founders of that colony recognized their political dependence upon England, they came to these shores with a fixed purpose to found a commonwealth with laws of their own...
>
> But the early colonists were Englishmen. And necessarily they brought over with them conceptions of personal and property rights which were based upon the common law. In that sense they brought over the common law. Such of these rights as they found suitable to their situation they adopted by usage and custom. And those usages and customs were judicially recognized and enforced. And thus it came about that much of the common law of England became the common law of the colonists and those who have succeeded them ...
>
> But in Maine, it must be conceded, the general situation differed from that of the Massachusetts Bay Colony. The early inhabitants did not come over with such independent and lofty ideas of government as were possessed by their Massachusetts brethren.
>
> ... The early settlers, ... like those of Massachusetts, brought with them conceptions of law, of the rights of property. Those conceptions, so far as they found them convenient and useful, they put into practice, and to that extent they adopted the common law. To that extent it was their law, because they used it. And except so far as they so adopted and used the common law, it was not in force here. It is on this ground that the courts have many times declared that various laws of England have never been laws here. n355

The Maine Supreme Court in 1953 was more firmly persuaded of Massachusetts' general reception of the common law and of Maine's derived reception. It characterized Massachusetts' reception (and, by inference, Maine's reception) as follows:

> In Commonwealth v. Churchill, 2 Metc., Mass., 118, 123, speaking of the Massachusetts Constitution as originally adopted, the court, speaking through Chief Justice Shaw, said:
>
> > By that constitution, it was declared that 'all the laws, which have heretofore been adopted, used and approved in the colony, province, or state of Massachusetts Bay, and usually practised on in the courts of law, shall still remain and be in full force, until altered or repealed by the legislature; such parts only excepted as are repugnant to the rights and liberties contained in this constitution.' This constitution has been construed as adopting the great body of the common law, with those statutes made before the emigration of our ancestors, which were made in amendment of the common law, so far as these rules and principles were applicable to our condition and form of government. *Commonwealth v. Leach, 1 Mass. 59* ; *Commonwealth v. Knowlton, 2 Mass. [530] 534* .
>
> Although this case was subsequent to the separation, in a Kennebec County case decided by the Supreme Judicial Court of Massachusetts at the June Term 1807, that court had said in the case of

Commonwealth v. Knowlton, 2 Mass. 530, at page 534 :

> Our ancestors, when they came into this new world, claimed the common law as their birth right, and brought it with them except such parts as were judged inapplicable to their new state and condition. The common law, thus claimed, was the common law of their native country, as it was amended or altered by English statutes in force at the time of their emigration. Those statutes were never re-enacted in this country, but were considered as incorporated into the common law. Some few other English statutes, passed since the emigration, were adopted by our courts, and now have the authority of law derived from long practice. To these may be added some ancient usages, originating probably from laws passed by the legislature of the colony of the *Massachusetts Bay*, which were annulled by the repeal of the first charter, and from the former practice of the colonial courts, accommodated to the habits and manners of the people.

So much therefore of the common law of *England* as our ancestors brought with them, and of the statutes then in force, amending or altering it; such of the more recent statutes as have been since adopted in practice; and the ancient usages aforesaid, may be considered as forming the body of the common law of *Massachusetts*, which has submitted to some alterations by the acts of the provincial and state legislatures, and by the provisions of our constitution.

This quotation was cited *in extenso* and with approval by this court in *State v. Temple, 12 Me. 214, at page 219* .

Interpreting the above quoted portion of the Massachusetts Constitution, the Massachusetts court in Commonwealth v. Churchill, supra, said:

> But it was contended, at the argument, that under this provision no principle or rule of the common law could be regarded as adopted, unless it could be shown affirmatively that it had been adjudicated before the revolution, but we apprehend this would be much too narrow a construction. Before the revolution, we had no regular reports of judicial decisions; and the most familiar rules and principles of law -- those which lie at the foundation of our civil and social rights -- could not be so proved. No: We rely on usage and tradition, and the well known repositories of legal learning, works of approved authority, to learn what are the rules of common law; and we have no doubt that these were the great sources to which the above pregnant provision of our constitution refers.

If there be language in the opinion in *State v. Knight, 43 Me. 11, 116* et seq., that would seem to place a different construction on the Massachusetts Constitution, Commonwealth v. Churchill being a decision of the Supreme Judicial Court of that Commonwealth is conclusive upon the construction of its Constitution.

It is upon the foregoing provisions of the Constitution of the Commonwealth of Massachusetts, the Act of Separation and the Constitution of Maine, and the foregoing decisions that we hold that the Statute of 21 Hen. VIII, ca. 4, is a part of the common law of this State. Although we have found no express holding by the Massachusetts court that said statute was a part of the common law of Massachusetts, it, together with an English case interpreting it, was cited with approval in the case of Sheldon v. Homer, 5 Metc., Mass., 462, 465. n356

§ 7.02(u) Maryland.

Colonial Maryland was unquestionably subject to English common law. Not only did the 1632 charter issued to Lord

Baltimore contain a "Bishop of Durham" clause granting extensive feudal privileges according to English land law, n357 but it also described the legislative power in the proprietors in terms of English law:

> VII ... We ... do grant unto the said now Baron, ... and to his Heirs, for the good and happy Government of the said province, free, full, and absolute Power, by the tenor of these Presents, to Ordain, Make, and Enact Laws, of what kind soever, according to their sound Discretions, whether relating to the Public State of the said Province, or the private Utility of Individuals, of and with the Advice, Assent, and Approbation of the Free-Men of the same Province So Nevertheless, that the Laws aforesaid be consonant to Reason and be not repugnant or contrary, but (so far as conveniently may be) agreeable to the Laws, Statutes, Customs and Rights of this Our Kingdom of England ... n358

Under this remarkably feudal grant, a controversy arose early between proprietors and settlers about whether the settlers could initiate legislation, which in turn left doubt about how fully the law of England was being applied in Maryland n359. One scholar noted:

> The common law of England seems here rather to be looked upon as a system useful for illustration and guidance than a subsidiary law; equity and good conscience was considered to afford proper rules to fill the omissions of the positive law. n360

In 1662 the Assembly enacted a provision declaring that in the absence of provincial law, justice would be sought according to the laws and statutes of England and "that all courts shall judge of the right pleading and the inconsistency of the said laws with the good of the province according to the best of their judgment." n361 This provision, even though in force for only a short time, has been described as "the first definite recognition in America of the power of the courts to apply the common law of England to colonial conditions, and to reject provisions deemed unsuitable." n362 Remaining unsettled for many decades thereafter was the extent to which English statutes -- in addition to common law decisions -- were considered adopted in the colony. Not until a Maryland legislative enactment in 1732 was the controversy neutralized, the provision authorizing the colony to call upon "the laws and statutes and reasonable customs of England, as used and practiced within the province." n363

Maryland's first constitution, adopted in 1776, opened with a Declaration of Rights which plainly declared the reception of English common law and of local laws enacted during the colonial period:

> [We, the delegates of Maryland ... declare] That the inhabitants of Maryland are entitled to the common law of England and the trial by jury, according to the course of that law, and to the benefit of such of the English statutes, as existed at the time of their first emigration, and which, by experience, have been found applicable to their local and other circumstances, and of such others as have been since made in England, or Great Britain, and have been introduced, used and practised by the courts of law or equity; and also to acts of Assembly, in force on the first of June seventeen hundred and seventy-four, except such as may have since expired, or have been or may be altered by acts of Convention, or this Declaration of Rights -- subject, nevertheless, to the revision of, and amendment or repeal by, the Legislature of this State: and the inhabitants of Maryland are also entitled to all property, derived to them, from or under the Charter, granted by his Majesty Charles I. to Caecilius Calvert, Baron of Baltimore. n364

A nearly identical provision appeared in the Declaration of Rights that introduced the 1851 Maryland constitution, n365 and again in the 1864 constitution n366 and 1867 constitution. n367 With the state's failure to approve a new draft constitution in 1968 (which would have eliminated specific reference to the English common law in its declaration of rights), the 1867 constitution contains the current statement of common law reception in Maryland.

Maryland courts have attempted to identify, as to individual points of law, the English common law at various specific

times. One decision was based on a finding of what was English common law at the time of the 1632 Maryland charter:

> I consider it established by the decision in the [cited English case] that it was the common law of England, at the colonization of Maryland, or the grant of the charter to Maryland, and long antecedent to that time ...
>
> Although the common law did undergo some change in England, by imperceptible degrees, as to [one issue in this case], yet the time and manner of such change cannot be defined with any precision, or in a satisfactory way. It is certain, beyond a doubt, that no change ever took place in the common law, as to [the other issue in the case] before the colonization of Maryland. n368

In another case a Maryland court rejected the English judicial construction of a 1585 English statute, because, among other considerations, the English judicial position was not established until 1807. n369 A Maryland court in 1912 adopted a minority English view. n370

§ 7.02(v) Massachusetts.

The earliest Massachusetts settlement, the separate colony of Plymouth, was authorized by a charter granted November 3, 1620, issued well after the group on the *Mayflower* was well under way. This charter authorized the colonial council:

> to make all Manner of Orders, Laws, Directions, Instructions, Forms, and Ceremonies of Government and Magistracy fitt and necessary for any concerning the Government of said Collony and Plantation, so always as the same be not contrary to the Laws and Statutes of this our Realme of England... n371

The grant of lands was given in the English tenure of free and common socage, "to be holden of Us as of our Manor of East-Greenwich, in our County of Kent, in free and common socage and not in Capite nor by Knight's Service...." n372 It was further declared that "English subjects settling in the colony, and their children there born, shall have all the rights of natural born Englishmen." n373

When the *Mayflower* landed, it was outside the jurisdiction to which the charter pertained, prompting the colonists to create their own rules by means of the so-called Mayflower Compact. In this agreement they made no mention of government according to the laws of England, but instead agreed to enact such laws as they thought best for the general good of the colony:

> We ... covenant and combine our selves togeather into a civill body politick, for our better ordering and preservation and furtherance of the ends aforesaid; and by vertue hearof to enacte, constitute, and frame such just and equall laws, ordinances, acts, constitutions, and offices, from time to time, as shall be thought most meete and convenient for the generall good of the Colonie, unto which we promise all due submission and obedience. n374

In 1629 the Plymouth colony obtained another charter, the so-called Warwick patent, that actually pertained to the land the settlers occupied; at first the patent was given in the name of William Bradford as trustee, but in 1641 he surrendered his trusteeship to the freemen of the colony. This patent, too, clearly rested on English common law. The lands were "To be holden of his Matie., his heirs and successors as of his mannor of East Greenwiche in the county of Kent in free and common soccage and not in capite nor by Knight's service...." n375 The legislative power granted to the colony was subject to the restriction "that the said lawes and orders be not repugnante to the lawes of Englande, or the frame of governmente by the said presidente and councill hereafter to be established." n376

The English common law foundation of Plymouth colony was evident not only in its patents and charters, but also in the decisions in legal disputes and in the legislative pronouncements that issued from the colony. Periodically, the laws

currently in force were gathered into "codes," or compilations, that reveal the colonists' attitudes towards sources of law and the efficacy of English law, generally. Four compilations of Plymouth's colonial laws were issued during the 17th century, in 1636, 1658, 1671, and 1684. The significance of the 1636 code has been characterized as follows:

> The compilation of 1636 has been variously described as the first comprehensive body of law to be enacted in North America, as the first American code of laws, and as a simple model upon which subsequent bodies of American law were patterned. All of those claims can easily be defended, but from the point of view of the framers the compilation was regarded as the "ordering of a body politick" agreeable to the Mayflower Compact and the Warwick patent [issued in 1629]. Some of its clauses were based upon English law and custom, such as the regulation of inheritances according to the custom of East Greenwich, and the requirement that jury trials be conducted as nearly as possible to English practice. In other instances, such as the provision for civil marriage, equality of descent, liberal provisions for women and widows, and the institution of a recording system, all unknown in England, we find partly an attempt to fill the needs of a frontier society and partly the Puritan predilection to enact laws based upon scriptural authority. The discretionary power of Magistrates, for example, was based upon *Romans* 13, the division of lands upon *Deuteronomy* 21, civil marriage upon *Ruth* 4, and capital offenses upon various admonitions.
>
> Two months after the compilation of 1636 was enacted, the General Court met in legislative session and passed six additional miscellaneous measures; it marked the beginning of a regular legislative process that was to continue unabated until the demise of the colony. n377

Several passages of the 1636 code suggest that even in Plymouth a comprehensive basis of English law existed. In Act 1 the drafters declare:

> And finding that as freeborne subjects of the State of England we hither came indewed with all and singular the priviledges belonging to such, in the first place we think good that it be established for an act That according to the ... due priviledge of the subject aforesaid no imposicon of law or ordnance be made or imposed upon us by ourselves [or others at] present or to come but such as shall be made [or] imposed by consent according to the free liberties [of the] State and Kingdome of England and no otherwise. n378

Other provisions relating to reliance on English law or specifically to regulation of real property rights are as follows:

> That all trialls whether Capitall or between man and man be tryed by Jewryes according to the presidents of the law of England as neer as may be. n379
>
> That Inheritance to descend according to the commendable custome of England and hold of East Greenwich. n380
>
> That If the husband died the wife shal have a third pt of his land during her life and a 3d of his goods to be at her owne disposing. n381
>
> In 1658 a new compilation replaced the 1636 code and subsequent legislation. A lengthy preamble contained a succinct summary of the puritan philosophy of law, which held essentially that the only true law was the law of God as revealed in His Holy Scriptures, and that laws made by man must be derived from them and conformable to them in all respects. The puritans found the divine origins of all civil authority in the thirteenth part of *Romans*, and the introduction to the 1658 compilation stressed that God had endowed man with right judgment and true laws (Scripture) as well as with a capacity to be guided by "good and wholesome lawes" derived from and agreeable to the "Ancient platforme of God's Lawe." The framers then went on to proclaim that they had been guided accordingly in the preparation of the new revision of the laws. n382

> The code also declared that its drafters, the Associates of New Plymouth coming hether as freeborne Subjects of the State of England [this impersonal reference to the government was typically used during the English Commonwealth period] Indowed with all and singular priviledges belong to such [do enact that law] which is according to the free liberties of the State of England. n383

The 1658 code served until a new code was produced in 1671, which included an entire chapter of five sections, Chapter X, devoted to "Lands, Inheritances, and Wills." These sections covered the tenure of landholding, acknowledgement of conveyances, lands held in partnership, escheat of estates, and a statute of limitations. The chapter concludes with the statement, "It having been the usual manner and custome of this Court, as much as may be to have recourse to the commendable Laws of England in such case wherein there is no other Law by this Court provided more suitable to our condition." n384

A final code of the colony was drawn up in 1684 and published in 1685. It, too, devoted a chapter, Chapter XII, to "Lands and Inheritances," that was substantially similar to the counterpart provisions of the 1671 code. One detail was added to specifically invoke English law in a matter of real property:

> It is Ordered and Declared by this Court and the Authority thereof; That all Lands heretofore Intailed, and that shall be Intailed hereafter, shall descend and enure as by the Law of England the same ought to do. n385

However, signaling that no wholesale reception of English property law should be presumed, the very next section made an original modification of primogeniture:

> It is Ordered and Declared, etc. That all the Sons of any Person, having Lands in fee simple, shall be Heirs (paying and satisfying in case as is by Law provided) the Eldest Son shall have double to any of his Brethren; and all the younger equal Shares of the Land of their Ancestors; and where there is but one Son, he shall be sole Heir, paying and satisfying, as aforesaid; And where there is no Son, all the Daughters shall Inherit alike. n386

Even taking full account of the Plymouth settlers' religious motivation, it must still be conceded that the availability of land was a powerful inducement for immigration, and that English land law was still the foundation of property rights.

A different group of Puritans, incorporated as "The Company for Massachusetts Bay," purchased nearby land from the New England Council in 1628, and the next year obtained a royal charter confirming the purchase and conferring legislative power on the corporation. This 1629 charter, too, recited the usual statement of English land tenure, "To be houlden ... as of [the king's] Mannor of East Greenewich in the County of Kent, in free and comon Soccage, and not in Capite nor by Knight's Service...." n387 Also, the grant of legislative power was limited "soe as such Lawes and Ordinances be not contrarie or repugnant to the Lawes and Statuts of this our Realme of England." n388

Following a lengthy drafting process a code of laws for the Massachusetts Bay colony was produced in 1641. Neither in this code nor in its famous published successor, the 1648 *Book of the General Lauues and Libertyes Concerning the Inhabitants of Massachusetts*, is there any explicit reference to a foundation of English law. Not only was there resistance among colonial leaders to limiting colonial laws to those that were consistent with the laws of England, as required by the charter, but there appears also in the codes a desire to rely on religious principles and scriptures as an important source of legal principle. Nevertheless, while departing from English law in individual details, the form and substance of these codes reveal a strong influence of English law. n389

Throughout the 17th century, various attempts by English officials to require that Massachusetts legislation be modified to conform to English law on individual points were strongly resisted. Ironically, a by-product of the resistance was that the colonists proclaimed infringement on their rights as Englishmen. n390 The assertion of royal power culminated with

the union of Plymouth, Massachusetts, Maine and Nova Scotia colonies under a royal charter in 1691. This charter reiterated the tenure of free and common socage "as of our Manor of East Greenwich in the County of Kent," n391 and confirmed the legislative power

> to make ordaine and establish all manner of wholsome and reasonable Orders Laws Statutes and Ordinances Directions and Instructions either with penalties or without (soe as the same be not repugnant or contrary to the Lawes of this our Realme of England) as they shall Judge to be for the good and welfare of our said Province or Territory... n392

It may fairly be said, therefore, that as Massachusetts progressed toward statehood, its jurisprudence had a foundation that was inescapably based on the settlers' almost universal background of English law (however slight one's explicit acquaintance with the common law) mixed with a more conspicuous element of indigenous law derived from religious sources.

In the first Massachusetts Constitution, in 1780, the legislative power was not restricted or related in any way to an English common law foundation; only the constitution itself was the legislative guide:

> And further, full power and authority are hereby given and granted to the said general court from time to time, to make, ordain, and establish all manner of wholesome and reasonable orders, laws, statutes, and ordinances, directions and instructions, either with penalties or without, so as the same be not repugnant or contrary to this constitution, as they shall judge to be for the good and welfare of this commonwealth... n393

To the extent English common law influenced Massachusetts colonial legislation and judicial decisions prior to statehood and was still recognized, it was received under the following provision of the 1780 Constitution:

> All the laws which have heretofore been adopted, used, and approved in the province, colony, or State of Massachusetts Bay, and usually practised on in the courts of law, shall still remain and be in full force, until altered or repealed by the legislature, such parts only excepted as are repugnant to the rights and liberties contained in this constitution. n394

This 1780 Constitution has been the subject of several subsequent state constitutional conventions, but despite the changes and attempted changes, it remains the current constitution of Massachusetts:

> The Massachusetts Constitution of 1780 is the oldest state constitution in the United States, and its unique history is at once simple and complicated for a collection such as this. Conventions in 1820, 1853, and 1917 considered a variety of amendments, and revisions, of the original document; but the fact remains that in each instance the recognizable contents and outline of the original document continued. n395

The provision for reception of prior colonial law in the 1780 Constitution has opened the way for judicial reception of the English common law. The Massachusetts Supreme Court has construed "laws which have heretofore been adopted" as:

> the great body of common law with those statutes made before the emigration of our ancestors, which were made in amendment of the common law, so far as these rules and principles were applicable to our condition and form of government. *Commonwealth v. Leach, 1 Mass. 59* ; *Commonwealth v. Knowlton, 2 Mass. [530] 534* .
>
> But it was contended, at the argument, that under this provision no principle or rule of the common law could be regarded as adopted, unless it could be shown affirmatively that it had been adjudicated

> before the revolution, but we apprehend this would be much too narrow a construction. Before the revolution, we had no regular reports of judicial decisions; and the most familiar rules and principles of law -- those which lie at the foundation of our civil and social rights -- could not be so proved. No: We rely on usage and tradition, and the well known repositories of legal learning, works of approved authority, to learn what are the rules of common law; and we have no doubt that these were the great sources to which the above pregnant provision of our constitution refers.
>
> Taking it then as well established that the rules and maxims of the common law, referred to in the constitution, were those which our ancestors brought with them, and which had been, to some extent, modified and adapted to our condition by the legislative jurisprudence of the colonial and provincial governments, it follows that these rules and principles were regarded as binding both upon legislators and judges in their respective departments. n396

In an earlier Massachusetts case the court had also declared the reception of common law:

> Our ancestors, when they came into this new world, claimed the common law as their birth right, and brought it with them except such parts as were judged inapplicable to their new state and condition. The common law, thus claimed, was the common law of their native country, as it was amended or altered by English statutes in force at the time of their emigration. Those statutes were never re-enacted in this country, but were considered as incorporated into the common law. Some few other English statutes, passed since the emigration, were adopted by our courts, and now have the authority of law derived from long practice. To these may be added some ancient usages, orginating probably from laws passed by the legislature of the colony of the *Massachusetts Bay*, which were annulled by the repeal of the first charter, and from the former practice of the colonial courts, accommodated to the habits and manners of the people.
>
> So much therefore of the common law of *England* as our ancestors brought with them, and of the statutes then in force, amending or altering it; such of the more recent statutes as have been since adopted in practice; and the ancient usages aforesaid, may be considered as forming the body of the common law of *Massachusetts*, which has submitted to some alterations by the acts of the provincial and state legislatures, and by the provisions of our constitution. n397

The Massachusetts Court has also held that an English statute amending the common law before the settlement of America is part of the common law received in America. As to the application of common law after American settlement:

> [Our ancestors] ... came to this country, bringing with them, as all agree, the rights and privileges of Englishmen, and the common law of that country, so far as it should be found applicable to their new state and condition. They brought with them also a charter, containing power to make such new laws as their exigencies might require. They could live under the old law or make new ones. Whenever they legislated upon any subject, their own law regulated them; when they did not legislate, the law they brought with them was the rule of conduct. n398

§ 7.02(w) Michigan.

In 1671 the French formally claimed the area that is now the state of Michigan, and Detroit, as the first settlement, had been established by 1701. After the French and Indian War, the British governed the area, legislating for it as part of their Canadian domain by means of the 1774 Quebec Act. n399 This act continued in force both French and English rights and titles:

> Provided always, and be it enacted, That nothing in this Act contained shall extend or be construed

> to extend, to make void, or to vary or alter any Right, Title, or Possession, derived under any Grant, Conveyance, or otherwise, however, of or to any Lands within the said Province, or the Provinces thereto adjoining; but that the same shall remain and be in Force, and have Effect, as if this Act had never been made. n400

Even after the American Revolution was formally concluded by the Treaty of Paris in 1783, the British continued to occupy Detroit and other forts in the region. In 1792 Detroit sent three representatives to the parliament of Upper Canada. Meanwhile, the Northwest Ordinance was enacted in 1787, American administrators were appointed in 1796, and in 1799 inhabitants of Michigan sent their first representative to the territorial legislature in Cincinnati. The Northwest Ordinance, enacted while the Articles of Confederation were in effect, ensured to the inhabitants of the territory judicial proceedings according the course of the common law, among other rights:

> The inhabitants of the said territory shall always be entitled to the benefits of the writs of *habeas corpus*, and of the trial by jury; of a proportionate representation of the people in the legislature, and of judicial proceedings according to the course of the common law. All persons shall be bailable, unless for capital offenses, where the proof shall be evident, or the presumption great. All fines shall be moderate; and no cruel or unusual punishments shall be inflicted. No man shall be deprived of his liberty or property, but by the judgment of his peers, or the law of the land, and should the public exigencies make it necessary, for the common preservation, to take any person's property, or to demand his particular services, full compensation shall be made for the same. And, in the just preservation of rights and property, it is understood and declared, that no law ought ever to be made or have force in the said territory, that shall, in any manner whatever, interfere with or affect private contracts, or engagements, *bona fide*, and without fraud previously formed. n401

The Northwest Ordinance also required the appointment of a three-judge court, the judges to "have a common-law jurisdiction," and who, with the governor, "shall adopt and publish in the district such laws of the original States, criminal and civil, as may be necessary, and best suited to the circumstances of the district...." n402 In 1795 the governor and the judges of the Northwest Territory enacted the Virginia reception statute of 1776 (even though Virginia had in 1792 repealed the portion of the statute receiving English statutes):

> That the common law of England, all statutes or acts of parliament made in aid of the common law prior to the fourth year of the reign of King James the first, and which are of a general nature, not local to the kingdom, together with the several acts of the general assembly of this colony now in force, so far as the same may consist with the several ordinances, declarations, and resolutions of the general convention, shall be the rule of decision, and shall be considered as in full force, until the same shall be altered by legislative power of this colony. n403

In 1803 Michigan became a part of Indiana Territory, which, when it was created in 1800, n404 had been required to create "a government in all respects similar to that provided by [the Northwest Ordinance]; and the inhabitants thereof shall be entitled to, and enjoy all and singular the rights, privileges and advantages granted and secured to the people by the said ordinance." n405 A separate Michigan Territory was established in 1805, n406 and the enabling act required the new territory to form a government in conformance with the Northwest Ordinance. n407

The territorial legislature apparently wished to start afresh with fundamental law, however, because legislation in 1810 purported to repeal all prior English statutes, French law and custom, and laws of the Northwest Territory and of the Indiana Territory, leaving only common law decisions in effect, by virtue of the Northwest Ordinance. This position was summarized in 1886 by the Michigan Supreme Court:

> The relations of this commonwealth to the common law are not altogether conformed to the holdings of some other states. In many of the states, statutes of parliament passed before or during the early days

> of the American colonies, as well as old colonial statutes and usages, have been recognized as part of the local common law, and have been construed and applied by the courts. Though Michigan was never a common-law colony, and while we have recognized the common law as adopted into our jurisprudence, it is the English common law, unaffected by statute. In 1810 an act was passed putting an end to all the written law of England, France, Canada, and the Northwest and Indiana territories, as well as the French and Canadian customs, leaving no statute or code law in force except that of Michigan territory and the United States. 1 Terr. Laws, 900. n408

Even earlier the Michigan Supreme Court acknowledged heavy dependence on common law for the fundamental law of the state:

> It is undoubtedly true that at one time the custom of Paris was in force here. It was expressly abrogated by the territorial legislature in 1810, and probably applied to a very few cases then, if to any. Practically the common law has prevailed here, in ordinary matters, since our government took possession; and the country has grown up under it. How, or by what particular means, it originated, would open an inquiry more curious than useful. A custom which is as old as the American settlements, and has been universally recognized by every department of government, has made it the law of the land, if not made so otherwise. Our statutes, without this substratum, would not only fail to provide for the great mass of affairs, but would lack the means of safe construction. We are of opinion that questions of property, not clearly excepted from it, must be determined by the common law, modified only by such circumstances as render it inapplicable to our local affairs ...
>
> The cases cited from Ohio, Indiana, Illinois, and Wisconsin, as well as from some of the older states, show, as we think, that the common law rule is the most desirable one, as far as fresh streams are concerned. n409

Michigan statehood was attained in 1837, n410 and a constitution drafted in 1835 went into effect, providing for continuation of prior laws: "All laws now in force in the Territory of Michigan, which are not repugnant to this constitution, shall remain in force until they expire by their own limitations, or be altered or repealed by the legislature." n411 Michigan's 1850 constitution contained an essentially similar provision, but one that also made explicit reference to common law then in force: "The common law and the statute law now in force, not repugnant to this constitution, shall remain in force until they expire by their own limitations or are altered or repealed by the legislature." n412 This identical provision continued in the 1908 constitution n413 and is also in Michigan's present constitution. n414

The common law has been held to be the law of the state under this constitutional provision, n415 although the common law under -- Michigan's flexible characterization of it -- is seen as merely the accumulated expressions of various judicial tribunals in their efforts to ascertain what is right and just between individuals in respect to private disputes. n416 It has even been held that the common law in effect in Michigan during the territorial period included English statutes. n417

§ 7.02(x) Minnesota.

Minnesota was explored by the French as early as 1654 and regularly traveled by them for a century. At the end of the French and Indian War, however, the area east and north of the Mississippi River was ceded to Great Britain, and the area west and south of the river to Spain. Few settlements had emerged by the time the British area was turned over to the United States by the Treaty of Paris in 1783, and, indeed, British traders continued on as before. Likewise, the Spanish portion had also not been developed by the time it was transferred to the French and then to the United States as part of the Louisiana Purchase in 1803.

As part of the territory in the Louisiana Purchase, Minnesota shares in the common French and Spanish legal heritage of

the area, even though only a few forts and trading posts had been established on Minnesota land. French governance over the region ended with the arrival of a Spanish governor in 1769, and Spanish authority ended in 1803. Upon his assumption of office in 1769, the Spanish governor officially proclaimed the substitution of Spanish law for all prior laws in the area. n418

When the new American governor arrived in New Orleans in 1804, he created a "court of common pleas" with proceedings in English, signifying an abrupt transition into an American common law system. Reacting to local protest, Congress later in that same year separated the area of Louisiana state, the Territory of Orleans, from the rest of the Louisiana territory, designating the remainder as the District of Louisiana and placing it administratively under the Territory of Indiana. n419 Existing law was continued in force for the District of Louisiana: "The laws in force in the said district of Louisiana, at the commencement of this act, and not inconsistent with any of the provisions thereof, shall continue in force until altered, modified or repealed by the governor and judges of the Indiana territory, as aforesaid." n420

The Indiana territorial government enacted certain laws of the new territory between 1804 and 1805, all of them with pronounced common law flavor, and in 1806 Congress established a separate administration for the area, redesignating it the Territory of Louisiana. Statutes enacted after this change also covered familiar common law subjects. In 1812 the Territory of Louisiana was granted the right to its own legislative assembly, and its name was changed to the Territory of Missouri. A territorial enactment in 1815 authorized the recording of land titles acquired during the period of Spanish government, but in 1816 the territorial legislature adopted a broad reception statute for the English common law:

> The common law of England, which is of a general nature, and all statutes made by the British parliament in aid of or to supply the defects of the said common law, made prior to the fourth year of James the first, and of a general nature, and not local to that kingdom, which said common law and statutes are not contrary to the laws of this territory, and not repugnant to, nor inconsistent with the constitution and laws of the United States shall be the rule of decision in this territory, until altered or repealed by the legislature, any law, usage, custom to the contrary notwithstanding, provided, however, that none of the British statutes respecting crimes and punishments shall be in force in this territory, nor shall any person be punished by common law, where the laws and statutes of this territory have made provision on the subject, but where the laws and statutes of the United States and this territory have not made provision for the punishment of offences, the several courts may proceed to punish for such offences, provided, the punishment shall in no case be other than fine and imprisonment, and the term of imprisonment shall not exceed two months; and the fine shall not exceed one hundred dollars. n421

A companion provision to this general common law reception statute indicated certain real property common law doctrines that were excepted from this reception:

> The doctrine of survivorship in cases of joint tenants shall never be allowed, in this territory. The doctrine of entails shall never be allowed, and in all cases where any real estate shall be entailed, the whole of the right and interest of, in, and to the same, shall vest in fee simple in the person having the first reversion or remainder in said estate, after the life estate is determined in said estate. n422

This portion of Minnesota that was included in the Missouri Territory was left without a territorial government structure, when Missouri was made a state in 1821. Although this deficiency was not significant, because virtually no settlement activity was taking place, it was not corrected until 1834, when this part of Minnesota was made part of the Michigan Territory.

Meanwhile, the portion of Minnesota not included within the Louisiana Purchase was in the Northwest Territory and thus subject to the Northwest Ordinance of 1787. The Northwest Ordinance, enacted while the Articles of Confederation were in effect, ensured to the inhabitants of the territory judicial proceedings according the course of the

common law, among other rights:

> The inhabitants of the said territory shall always be entitled to the benefits of the writs of *habeas corpus*, and of the trial by jury; of a proportionate representation of the people in the legislature, and of judicial proceedings according to the course of the common law. All persons shall be bailable, unless for capital offenses, where the proof shall be evident, or the presumption great. All fines shall be moderate; and no cruel or unusual punishments shall be inflicted. No man shall be deprived of his liberty or property, but by the judgment of his peers, or the law of the land, and should the public exigencies make it necessary, for the common preservation, to take any person's property, or to demand his particular services, full compensation shall be made for the same. And, in the just preservation of rights and property, it is understood and declared, that no law ought ever to be made or have force in the said territory, that shall, in any manner whatever, interfere with or affect private contracts, or engagements, *bona fide*, and without fraud previously formed. n423

The Northwest Ordinance also required the appointment of a three-judge court, the judges to "have a common-law jurisdiction," and who, with the governor, "shall adopt and publish in the district such laws of the original States, criminal and civil, as may be necessary, and best suited to the circumstances of the district." n424 In 1795 the governor and the judges of the Northwest Territory enacted the Virginia reception statute of 1776 (even though Virginia had in 1792 repealed the portion of the statute receiving English statutes):

> That the common law of England, all statutes or acts of parliament made in aid of the common law prior to the fourth year of the reign of King James the first, and which are of a general nature, not local to the kingdom, together with the several acts of the general assembly of this colony now in force, so far as the same may consist with the several ordinances, declarations, and resolutions of the general convention, shall be the rule of decision, and shall be considered as in full force, until the same shall be altered by legislative power of this colony. n425

The Michigan Territory to which Minnesota was added, part in 1818 and part in 1834, had originally been part of Indiana Territory, which, when it was created in 1800, n426 had been required to create "a government in all respects similar to that provided by [the Northwest Ordinance]; and the inhabitants thereof shall be entitled to, and enjoy all and singular the rights, privileges and advantages granted and secured to the people by the said ordinance." n427 A separate Michigan Territory was established in 1805, n428 and the enabling act required the new territory to form a government in conformance with the Northwest Ordinance. n429

The Michigan territorial legislature apparently wished to start afresh with fundamental law, however, because legislation in 1810 purported to repeal all prior English statutes, French law and custom, and laws of the Northwest Territory and of the Indiana Territory, leaving only common law decisions in effect, by virtue of the Northwest Ordinance. This, then, would have been the status of common-law reception in Minnesota when that region was part of Michigan Territory. Michigan courts later modified this position to include reception of some older English statutes.

When Wisconsin Territory was established in 1836, Minnesota became part of that territory until Wisconsin attained statehood in 1848.

Wisconsin's territorial enabling act n430 in 1836 authorized the formation of a government in conformance with the Northwest Ordinance and specifically continued in force the Michigan territorial laws in effect at the time:

> And be it further enacted, That the inhabitants of the said Territory shall be entitled to, and enjoy, all and singular the rights, privileges, and advantages, granted and secured to the people of the Territory of the United States northwest of the river Ohio, by the [Northwest Ordinance]; and shall be subject to all the conditions and restrictions and prohibitions in said articles of compact imposed upon the people of

> the said Territory. The said inhabitants shall also be entitled to all the rights, privileges, and immunities, heretofore granted and secured to the Territory of Michigan, and to its inhabitants, and the existing laws of the Territory of Michigan shall be extended over said Territory, so far as the same shall not be incompatible with the provisions of this act, subject, nevertheless, to be altered, modified, or repealed, by the Governor and Legislative Assembly of the said Territory of Wisconsin; and further, the laws of the United States are hereby extended over, and shall be in force in, said Territory, so far as the same, or any provisions thereof may be applicable. n431

The enabling act also declared that "the said supreme court and district courts, respectively, shall possess chancery as well as common law jurisdiction." n432

In 1838, while Minnesota was still part of Wisconsin Territory, the Wisconsin territorial legislature followed Michigan's example and declared that statutes of Great Britain would not be considered law in the territory; that same legislature also repealed prior acts of Michigan Territory, and then enacted a large compilation of laws borrowed mostly from Michigan, which in turn had been borrowed from New York, Ohio and Massachusetts. n433 However, much later and long after Minnesota was no longer part of Wisconsin, the Wisconsin Supreme Court followed the courts of Michigan and Iowa in reinvigorating the common law reception long after the legislative attacks. n434

Wisconsin was authorized for statehood in 1846, n435 and formally admitted in 1848. n436 From that time until 1849, Minnesota was once again without membership in an established territorial government. In 1849 Congress created the Territory of Minnesota, n437 with the laws of Wisconsin Territory in effect when Wisconsin was admitted as a state continuing in force:

> And be it further enacted, That the inhabitants of the said Territory shall be entitled to all the rights, privileges, and immunities heretofore granted and secured to the Territory of Wisconsin and to its inhabitants; and the laws in force in the Territory of Wisconsin at the date of the admission of the State of Wisconsin shall continue to be valid and operative therein, so far as the same be not incompatible with the provisions of this act, subject, nevertheless, to be altered, modified, or repealed, by the governor and legislative assembly of the said Territory of Minnesota; and the laws of the United States are hereby extended over and declared to be in force in said Territory, so far as the same, or any provision thereof, may be applicable. n438

In addition, the territorial enabling act declared that "the said Supreme and District Courts, respectively, shall possess chancery as well as common law jurisdiction." n439

Authorization for statehood preparations followed in 1857, n440 with statehood itself authorized in 1858. n441 The constitution for the new state, drafted in 1857, continued in force the laws of the Minnesota Territory: "All laws now in force in the Territory of Minnesota, not repugnant to this constitution, shall remain in force until they expire by their own limitation, or be altered or repealed by the legislature." n442

This provision was later dropped from the 1857 constitution and was not included in the present restructured constitution of 1974. A provision relating to certain common law real property rights was included in the 1857 constitution and continues in the present state constitution, restructured in 1974:

> All the lands within the state are allodial and feudal tenures of every description with all their incidents are prohibited. Leases and grants of agricultural land for a longer period than 21 years reserving rent or service of any kind shall be void. n443

With no explicit common law reception provision, or even a provision continuing prior law in force, it has been left to the judiciary to declare the position of common law in Minnesota jurisprudence. The most definitive statement on this

point was issued by the Minnesota Supreme Court in 1924:

> [W]e recognize that no legislative adoption is necessary to affirm the existence of the common law, but that statutory enactment is essential to repeal, abrogate, or change the rules or doctrine of the common law. The rules of common law are not to be changed doubtful implication ... But where the implication is obvious it cannot be ignored. No statute is to be construed as altering the common law farther than its words and circumstances import We must recognize that it is the province of the Legislature, and not of the court, to modify the rules of the common law. In re *Hulett's Estate, 66 Minn. 327, 69 N.W. 31, 34 L. R. A. 384, 61 Am. St. Rep. 419* . The court has no more right to abrogate the common law than it has to repeal the statutory law. *Francis v. W. U. Tel. Co., 58 Minn. 252, 59 N.W. 1078, 49 Am. St. Rep. 507, 25 L. R. A. 406* . Of course, the common law applies to our state. *State v. Pulle, 12 Minn. 164* (Gil. 99) . Whether we came under the common law at a heroic period or under a heroic leader, as indicated in respondent's brief in *Dutcher v. Culver, 23 Minn. 584, 612, 616* , is not of special importance (though interesting) here, because, for the purpose of this case, it is the same whether the common law of England which became of force in this country may be said to be the common law the time of the Revolution, or whether it was the common law of England in force at the time of the Ordinance of 1787. Either is sufficient here. We cannot, however, say that the inquiry as to how the common law became the law of the region comprising the Northwest Territory is "more curious than useful." n444

§ 7.02(y) Mississippi.

Mississippi Territory was formed in 1798. In the territorial legislation no provision for reception of the common law was included, although the document incorporated the rights granted under the Northwest Ordinance of 1787:

> That from and after the establishment of the said government, the people of the aforesaid territory, shall be entitled to and enjoy all and singular the rights, privileges and advantages granted to the people of the territory of the United States, northwest of the river Ohio, in and by the aforesaid ordinance of the thirteenth day of July, in the year one thousand seven hundred and eighty-seven, in as full and ample a manner as the same are possessed and enjoyed by the people of the said last mentioned territory. n445

The Northwest Ordinance, enacted while the Articles of Confederation were in effect, ensured to the inhabitants of the territory judicial proceedings according the course of the common law, among other rights:

> The inhabitants of the said territory shall always be entitled to the benefits of the writs of *habeas corpus*, and of the trial by jury; of a proportionate representation of the people in the legislature, and of judicial proceedings according to the course of the common law. All persons shall be bailable, unless for capital offenses, where the proof shall be evident, or the presumption great. All fines shall be moderate; and no cruel or unusual punishments shall be inflicted. No man shall be deprived of his liberty or property, but by the judgment of his peers, or the law of the land, and should the public exigencies make it necessary, for the common preservation, to take any person's property, or to demand his particular services, full compensation shall be made for the same. And, in the just preservation of rights and property, it is understood and declared, that no law ought ever to be made or have force in the said territory, that shall, in any manner whatever, interfere with or affect private contracts, or engagements, *bona fide*, and without fraud previously formed. n446

The Northwest Ordinance also required the appointment of a three-judge court, the judges to "have a common-law jurisdiction," and who, with the governor, "shall adopt and publish in the district such laws of the original States, criminal and civil, as may be necessary, and best suited to the circumstances of the district...." n447 In 1795 the governor and the judges of the Northwest Territory enacted the Virginia reception statute of 1776 (even though Virginia had in 1792 repealed the portion of the statute receiving English statutes):

> That the common law of England, all statutes or acts of parliament made in aid of the common law prior to the fourth year of the reign of King James the first, and which are of a general nature, not local to the kingdom, together with the several acts of the general assembly of this colony now in force, so far as the same may consist with the several ordinances, declarations, and resolutions of the general convention, shall be the rule of decision, and shall be considered as in full force, until the same shall be altered by legislative power of this colony. n448

The organizing and defining of Mississippi, Georgia and Alabama territories was complicated by the Yazoo land fraud engineered by the Georgia legislature in 1795. As part of the effort to settle land claims arising from that activity, Georgia ceded to the United States its claims to territory lying within the areas claimed by Mississippi and Alabama. The 1802 deed of cession confirmed both British and Spanish land grants given before October 22, 1795, and stipulated that provisions of the Northwest Ordinance should extend to the lands being ceded. In 1845 the United States Supreme Court held that this provision extended the English common law even to those parts of the territory formerly held by Spain. n449

The question of reception of English statute law was simplified after a digest of territorial laws was completed and compiled into one volume in 1807. The Mississippi territorial legislature adopted the volume as law in the territory with the proviso that "all statutes of English and Great Britain not contained in said volume of statutes, shall cease to have any force or validity in this Territory." n450

When Mississippi became a state in 1817, its first constitution included a provision continuing in force its prior laws:

> All laws and parts of laws now in force in the Mississippi Territory, and not repugnant to the provisions of this constitution, shall continue and remain in force as the laws of this State, until they expire by their own limitation, or shall be altered or repealed by the legislature thereof. n451

Similar versions of this continuation section were included in the constitutions of 1832 n452 and 1868. n453 The current constitution, dating from 1890, also provides for continuance of former laws:

> The laws of this state now in force, not repugnant to this Constitution, shall remain in force until amended or repealed by the legislature, or until they expire by limitation. All statute laws of this state repugnant to the provisions of this Constitution, except as provided in the next three sections [laws repealed by the constitution, election laws, and apportionment laws], shall continue and remain in force until the first day of April, A.D. 1892, unless sooner repealed by the legislature. n454

Without an explicit reception statute, a Mississippi court has held that Mississippi law includes "only the common law, and statutes of our own government, for the determination of the rights of the citizen"; English statutes are excluded. n455 Another state court expressed reluctance to introduce changes into the common law judicially, preferring to defer to the legislative power:

> The argument has frequently been urged, by those who assign a feudal origin to the rule [in *Shelley's Case*], that inasmuch as the feudal system has been abolished, the reason for the rule has ceased; and, therefore, the rule itself should be abrogated. However cogent this argument may be when addressed to the legislature, yet courts of justice cannot so far recognize its potency as to make it the basis of their decisions. Whenever a principle of the common law has been once clearly and unquestionably recognized and established, the courts of the country must enforce it, until it be repealed by the legislature, as long as there is a subject matter for the principle to operate upon; and this, too, although the reason, in the opinion of the court, which induced its original establishment, may have ceased to exist. This we conceive to be the established doctrine of the courts of this country, in every State where the principles of the common law prevail. Were it otherwise, the rules of law would be as fluctuating and

> unsettled as the opinions of the different judges administering them might happen to differ in relation to the existence of sufficient and valid reasons for maintaining and upholding them. n456

An inference of common law reception appears in identical Mississippi constitutional and statutory provisions governing property litigation:

> In suits to try title, to cancel deeds and other clouds upon title, and to confirm title to real estate, the chancery court shall have jurisdiction to decree possession and to displace possession, to decree rents and compensation for improvements and taxes. In all cases where said courts heretofore exercised jurisdiction auxiliary to courts of common law, it may exercise such jurisdiction to grant the relief sought, although the legal remedy may not have been exhausted or the legal title established by a suit at law. n457

§ 7.02(z) Missouri.

As part of the territory in the Louisiana Purchase, Missouri shares in the common French and Spanish legal heritage belonging to the early settlement history of that area. As far as permanent settlement and government are concerned, Spanish exploration in the 16th century, and French probes in the 17th and 18th centuries ultimately resulted only in the settlements in and around New Orleans and a tiny community at St. Louis. French governance over the region ended with the arrival of a Spanish governor in 1769, and Spanish authority ended in 1803. Upon his assumption of office in 1769, the Spanish governor officially proclaimed the substitution of Spanish law for all prior laws in the area. n458

When the new American governor arrived in New Orleans in 1804, he created a "court of common pleas" with proceedings in English, signifying an abrupt transition into an American common law system. Reacting to local protest, Congress later in that same year separated the area of Louisiana state, the Territory of Orleans, from the rest of the Louisiana Territory, designating the remainder as the District of Louisiana and placing it administratively under the Territory of Indiana. n459 Existing law was continued in force for the District of Louisiana: "The laws in force in the said district of Louisiana, at the commencement of this act, and not inconsistent with any of the provisions thereof, shall continue in force until altered, modified or repealed by the governor and judges of the Indiana territory, as aforesaid." n460

The Indiana territorial government enacted certain laws of the new territory between 1804 and 1805, all of them with pronounced common law flavor, and in 1806 Congress established a separate administration for the area, redesignating it the Territory of Louisiana. Statutes enacted after this change also covered familiar common law subjects. In 1812 the Territory of Louisiana was granted the right to its own legislative assembly, and its name was changed to the Territory of Missouri. A territorial enactment in 1815 authorized the recording of land titles acquired during the period of Spanish government, but in 1816 the territorial legislature adopted a broad common law reception statute:

> The common law of England, which is of a general nature, and all statutes made by the British parliament in aid of or to supply the defects of the said common law, made prior to the fourth year of James the first, and of a general nature, and not local to that kingdom, which said common law and statutes are not contrary to the laws of this territory, and not repugnant to, nor inconsistent with the constitution and laws of the United States shall be the rule of decision in this territory, until altered or repealed by the legislature, any law, usage, custom to the contrary notwithstanding, provided, however, that none of the British statutes respecting crimes and punishments shall be in force in this territory, nor shall any person be punished by common law, where the laws and statutes of this territory have made provision on the subject, but where the laws and statutes of the United States and this territory have not made provision for the punishment of offences, the several courts may proceed to punish for such offences, provided, the punishment shall in no case be other than fine and imprisonment, and the term of imprisonment shall not exceed two months; and the fine shall not exceed one hundred dollars. n461

A companion provision to this general common law reception statute indicated certain real property common law doctrines that were excepted from this reception:

> The doctrine of survivorship in cases of joint tenants shall never be allowed, in this territory. The doctrine of entails shall never be allowed, and in all cases where any real estate shall be entailed, the whole of the right and interest of, in, and to the same, shall vest in fee simple in the person having the first reversion or remainder in said estate, after the life estate is determined in said estate. n462

When Missouri attained statehood in 1821, its new constitution provided for continuing existing laws in force: "All laws now in force in the Territory of Missouri, which are not repugnant to this constitution, shall remain in force until they expire by their own limitations, or be altered or repealed by the general assembly." n463 A similar provision continues in the current constitution. n464

The current statutory common law reception provision in Missouri has been modified only slightly from its original 19th-century form:

> The common law of England and all statutes and acts of parliament made prior to the fourth year of the reign of James the First, of a general nature, which are not local to that kingdom and not repugnant to or inconsistent with the Constitution of the United States, the constitution of this state, or the statute laws in force for the time being, are the rule of action and decision in this state, any custom or usage to the contrary notwithstanding, but no act of the general assembly or law of this state shall be held to be invalid, or limited in its scope or effect by the courts of this state, for the reason that it is in derogation of, or in conflict with, the common law, or with such statutes or acts of parliament; but all acts of the general assembly, or laws, shall be liberally construed, so as to effectuate the true intent and meaning thereof. n465

The Missouri Supreme Court gave a lengthy explanation of its view of common law reception in Missouri in rejecting a claim based on primogeniture:

> The doctrine of primogeniture is contrary to the theory upon which this and other commonwealths were built. This fact is conceded in the opinion of the commissioner cited by the appellant Lucas R. Gillilan ... All that the commissioner stated in that case with reference to the underlined clause above, is that it might furnish "a verbal reason" for a claim that the statute had adopted primogeniture in this state. He, however, immediately added that no such doctrine could exist in this country, citing in support of his conclusion Tiedeman on Real Property ...
>
> No part of the common law which was "repugnent to" or "inconsistent with" our federal Constitution or state laws was ever adopted as a part of the jurisprudence of this state ...The doctrine of primogeniture is radically opposed to the spirit, if not the letter, of both, and what the learned commissioner meant by the term "verbal reason" was probably a satirical or derisive allusion to an argument which might be made a verbal play on the language of the statute, but which had no real substance. The idea that any such preference in the descent of real property could coexist in the laws of any of the states, with the axioms of the federal Constitution guaranteeing equal protection of the laws to all persons and a republican form of government for each state, or with the social and political life modeled on these fundamental principles, is an unthinkable absurdity. Any intimations of a different import in any of other decisions of this court are hereby expressly disapproved. n466

Missouri courts are willing to make independent judgments about common law reception, such as in a case noting that joint tenancy, an important concurrent estate in English common law, is not so favored in the United States. n467

§ 7.02(aa) Montana.

The area of Montana was first explored by French Canadians in the mid-18th century, but was released from French claims in 1763 at the end of the French and Indian War. Most of Montana was included in the Louisiana Purchase and was traversed twice by the Lewis and Clark expedition during 1804-1806. The first trading posts were established in 1807 and 1809.

The part of Montana that was part of the Louisiana Purchase shares only nominally in the common French and Spanish legal heritage belonging to that area, inasmuch as no permanent settlements existed in Montana before the Louisiana Purchase. French governance over the region ended with the arrival of a Spanish governor in 1769, and Spanish authority ended in 1803. Upon his assumption of office in 1769, the Spanish governor officially proclaimed the substitution of Spanish law for all prior laws in the area. n468

When the new American governor arrived in New Orleans in 1804, he created a "court of common pleas" with proceedings in English, signifying an abrupt transition into an American common law system. Reacting to local protest, Congress later in that same year separated the area of Louisiana state, called the Territory of Orleans, from the rest of the Louisiana Territory, designating the remainder as the District of Louisiana and placing it administratively under the Territory of Indiana. n469 Existing law was continued in force for the District of Louisiana: "The laws in force in the said district of Louisiana, at the commencement of this act, and not inconsistent with any of the provisions thereof, shall continue in force until altered, modified or repealed by the governor and judges of the Indiana territory, as aforesaid." n470

The Indiana territorial government enacted certain laws of the new territory between 1804 and 1805, all of them with pronounced common law flavor, and in 1806 Congress established a separate administration for the area, redesignating it the Territory of Louisiana. Statutes enacted after this change also covered familiar common law subjects. In 1812 the Territory of Louisiana was granted the right to its own legislative assembly, and its name was changed to the Territory of Missouri. A territorial enactment in 1815 authorized the recording of land titles acquired during the period of Spanish government, but in 1816 the territorial legislature adopted a broad common law reception statute:

> The common law of England, which is of a general nature, and all statutes made by the British parliament in aid of or to supply the defects of the said common law, made prior to the fourth year of James the first, and of a general nature, and not local to that kingdom, which said common law and statutes are not contrary to the laws of this territory, and not repugnant to, nor inconsistent with the constitution and laws of the United States shall be the rule of decision in this territory, until altered or repealed by the legislature, any law, usage, custom to the contrary notwithstanding, provided, however, that none of the British statutes respecting crimes and punishments shall be in force in this territory, nor shall any person be punished by common law, where the laws and statutes of this territory have made provision on the subject, but where the laws and statutes of the United States and this territory have not made provision for the punishment of offences, the several courts may proceed to punish for such offences, provided, the punishment shall in no case be other than fine and imprisonment, and the term of imprisonment shall not exceed two months; and the fine shall not exceed one hundred dollars. n471

A companion provision to this general common law reception statute indicated certain real property common-law doctrines that were excepted from this reception:

> The doctrine of survivorship in cases of joint tenants shall never be allowed, in this territory. The doctrine of entails shall never be allowed, and in all cases where any real estate shall be entailed, the whole of the right and interest of, in, and to the same, shall vest in fee simple in the person having the first reversion or remainder in said estate, after the life estate is determined in said estate. n472

When the State of Missouri was formed in 1821, no actual governmental authority applied to the Louisiana Purchase territory north of Missouri, including Montana, until 1834, when Congress attached Montana to the Territory of Michigan. n473 The Michigan Territory was subject to the prior law of the Northwest Ordinance, which imposed a common law system over its jurisdictions. In 1836, Wisconsin Territory was created with the land from the Territory of Michigan, except the portion designated as the state of Michigan, so Montana was thus attached to the Wisconsin Territory. n474 According to its territorial enabling statute, Wisconsin law included the laws issued under the Northwest Ordinance generally, and the laws of Michigan Territory specifically:

> And be it further enacted, That the inhabitants of the said Territory shall be entitled to, and enjoy, all and singular the rights, privileges, and advantages, granted and secured to the people of the Territory of the United States northwest of the river Ohio, by the articles of the [Northwest Ordinance]; and shall be subject to all the conditions and restrictions and prohibitions in said articles of compact imposed upon the people of the said Territory. The said inhabitants shall also be entitled to all the rights, privileges, and immunities, heretofore granted and secured to the Territory of Michigan, and to its inhabitants, and the existing laws of the Territory of Michigan shall be extended over said Territory, so far as the same shall not be incompatible with the provisions of this act, subject, nevertheless, to be altered, modified, or repealed, by the Governor and Legislative Assembly of the said Territory of Wisconsin; and further, the laws of the United States are hereby extended over, and shall be in force in, said Territory, so far as the same, or any provisions thereof may be applicable. n475

In 1854 this part of Montana that had originally been part of the Louisiana Purchase was included in the newly designated Nebraska Territory. In the territorial enabling act, n476 no explicit common law reception was mentioned. However, it was provided that the territorial supreme and district courts "shall possess chancery as well as common law jurisdiction," n477 and federal law, except for the 1820 Missouri Compromise legislation, was declared applicable in the new territory. n478 Thereafter, in its first session, the Nebraska territorial legislature enacted a common law reception provision:

> That so much of the common law of England as is applicable and not inconsistent with the constitution of the United States, with the organic law of this Territory, or with any law passed or to be passed by the Legislature of this Territory be and the same is adopted and declared to be law within said Territory. n479

This part of Montana remained in Nebraska Territory until 1861, when it was included in the newly formed Dakota Territory. n480 In 1863 this Montana land was joined with other land that is now in the present state of Montana as part of the Idaho Territory.

That other part of the present state of Montana was adjacent to the northwestern extremity of but not included within the territory of the Louisiana Purchase. Instead, it was within the area referred to as the Oregon Territory, although even before territorial status was attained, settlers began to form a provisional government in 1841. In 1843 they prepared Articles of Provisional Government, which were adopted in 1845. According to this document, laws of Iowa Territory and principles of common law and equity would be the laws in force in Oregon (including the pertinent portion of modern Montana):

> The Laws of Iowa Territory shall be the Law of this Territory in Civil, Military and Criminal cases (where not otherwise provided for) and where no Statute of Iowa Territory applies, the principles of common Law and Equity shall govern. n481

Iowa had attained territorial status in 1838, n482 and by its territorial enabling act had adopted "the existing laws of the Territory of Wisconsin...." n483 Wisconsin had become a territory in 1836, n484 and had as its law in force the laws imposed by the Northwest Ordinance and the laws of the Territory of Michigan. The Northwest Ordinance, enacted

while the Articles of Confederation were in effect, ensured to the inhabitants of the territory judicial proceedings according the course of the common law, among other rights:

> The inhabitants of the said territory shall always be entitled to the benefits of the writs of *habeas corpus*, and of the trial by jury; of a proportionate representation of the people in the legislature, and of judicial proceedings according to the course of the common law. All persons shall be bailable, unless for capital offenses, where the proof shall be evident, or the presumption great. All fines shall be moderate; and no cruel or unusual punishments shall be inflicted. No man shall be deprived of his liberty or property, but by the judgment of his peers, or the law of the land, and should the public exigencies make it necessary, for the common preservation, to take any person's property, or to demand his particular services, full compensation shall be made for the same. And, in the just preservation of rights and property, it is understood and declared, that no law ought ever to be made or have force in the said territory, that shall, in any manner whatever, interfere with or affect private contracts, or engagements, *bona fide*, and without fraud previously formed. n485

The Northwest Ordinance also required the appointment of a three-judge court, the judges to "have a common-law jurisdiction," and who, with the governor, "shall adopt and publish in the district such laws of the original States, criminal and civil, as may be necessary, and best suited to the circumstances of the district...." n486 In 1795 the governor and the judges of the Northwest Territory enacted the Virginia reception statute of 1776 (even though Virginia had in 1792 repealed the portion of the statute receiving English statutes):

> That the common law of England, all statutes or acts of parliament made in aid of the common law prior to the fourth year of the reign of King James the first, and which are of a general nature, not local to the kingdom, together with the several acts of the general assembly of this colony now in force, so far as the same may consist with the several ordinances, declarations, and resolutions of the general convention, shall be the rule of decision, and shall be considered as in full force, until the same shall be altered by legislative power of this colony. n487

Michigan Territory had been established in 1805, n488 and, even though the territory had a legal heritage of both English common law and elements of French law, it, too, was brought under the legal regime of the Northwest Ordinance. Michigan became a state in 1837, and was thus no longer a territory when Oregon and Idaho territories were established.

Therefore, the initial laws in force in this area of Montana that was not part of the Louisiana Purchase were the laws of Oregon territory, which were the laws of Iowa territory, which were the common law and the laws of Wisconsin. The laws of Wisconsin were the laws of the Northwest Ordinance and the laws of Michigan Territory. The Northwest Ordinance, which was also extended to the Michigan Territory, imposed a common law system over its jurisdictions.

After the United States and Great Britain began, by a treaty of 1846, to resolve their jurisdictional claims to what is now the Pacific Northwest area of the United States, the Oregon Territory was established in 1848. n489

The territorial enabling act for Oregon contained no provisions for common law reception or even for continuing prior laws in force. Instead, it declared that "all such laws, or any law or laws inconsistent with the provisions of this act, shall be utterly null and void," n490 and also voided prior land grants:

> [A]ll laws heretofore passed in said Territory making grants of land, or otherwise affecting or incumbering the title to lands, shall be, and are hereby declared to be, null and void; and the laws of the United States are hereby extended over, and declared to be in force in, said Territory, so far as the same,

> or any provision thereof, may be applicable. n491

One provision continuing prior law in force pertained to judicial proceedings pending at the time the territory was created, which were transferred to the territorial district court; also "penalties, forfeitures, actions, and causes of action" were made recoverable "in like manner as they would have been under the laws in force within the limits composing said Territory at the time this act shall go into operation." n492

In 1853 the Washington Territory was created out of the Oregon Territory, including within its boundaries the portion of Montana not included in the Louisiana Purchase. n493 As in the Oregon Territory enabling act, "all such laws, or any law or laws, inconsistent with the provisions of this act, shall be utterly null and void," n494 but the Washington act did explicitly continue prior laws in force:

> And be it further enacted, That the laws now in force in said Territory of Washington, by virtue of the legislation of Congress in reference to the Territory of Oregon, which have been enacted and passed subsequent to the first day of September, eighteen hundred and forty-eight, applicable to the said Territory of Washington, together with the legislative enactments of the Territory of Oregon, enacted and passed prior to the passage of, and not inconsistent with, the provisions of this act, and applicable to the said Territory of Washington, be, and they are hereby, continued in force in said Territory of Washington until they shall be repealed or amended by future legislation. n495

In January, 1863, the Washington territorial legislature enacted a simple common law reception provision:

> That the common law of England, so far as it is not repugnant to, or inconsistent with the Constitution and laws of the United States and the organic act, and laws of Washington territory, shall be the rule of decision in all the courts of this territory. n496

In March, 1863, the Idaho Territory was created n497 and included both parts of Montana, that which had been in the Washington Territory, and that portion which was originally in the Louisiana Purchase and until 1863 was part of the Nebraska Territory and then of the Dakota Territory. Idaho's territorial enabling act (and Dakota Territory's before Idaho's) had no provision continuing previous laws in force or explicitly receiving the common law. The only provision in this organic act pertinent to reception was the declaration that "the said supreme and district courts, respectively, shall possess chancery as well as common-law jurisdiction." n498 With no organic provision for reception, the Idaho legislature the next year enacted a statutory common law reception provision, very similar to the provision that had been in effect for the Washington Territory:

> The common law of England, so far as it is not repugnant to, or inconsistent with, the constitution or laws of the United States, in all cases not provided for in these compiled laws, is the rule of decision in all courts of this state. n499

Later in that same year the Territory of Montana was created, n500 but the enabling act contained no common law reception statute and no provision continuing prior law in force, only a provision declaring that the territory's "supreme and district courts, respectively, shall possess chancery as well as common-law jurisdiction." n501 However, the first session of the territorial legislature did enact a reception provision the next year:

> That the common law of England, so far as the same is applicable and of a general nature, and not in conflict with special enactments of this Territory, shall be the law and rule of decision, and shall be considered as of full force until repealed by legislative authority. n502

When Montana was authorized for statehood in 1889, n503 the enabling act continued prior territorial law in force: "all laws in force made by said Territories, at the time of their admission into the Union, shall be in force in said States, except as modified or changed by this act or by the constitutions of the States, respectively." n504

The new state constitution of that same year also continued in force the prior territorial law, again limited to "laws enacted by" the territorial legislature:

> All laws enacted by the Legislative Assembly of the Territory of Montana and in force at the time the State shall be admitted into the Union and not inconsistent with the constitution or the constitution or laws of the United States of America, shall be and remain in full force as the laws of the State until altered or repealed, or until they expire by their own limitation... n505

No comparable provision is in Montana's present constitution, which was adopted in 1972.

In the present Montana code, the reception provision has been somewhat elaborated from the statute adopted in 1865:

> 1-1-107. Unwritten law defined. Unwritten law is the law not promulgated and recorded, as mentioned in 1-1-104, but which is, nevertheless, observed and administered in the courts of the country. It has no certain repository but is collected from the reports of decisions of the courts and treatises of learned men.
>
> 1-1-108. Common law -- applicability of. In this state there is no common law in any case where the law is declared by statute. But where not declared, if the same is applicable and of a general nature and not in conflict with the statutes, the common law shall be the law and rule of decision.
>
> 1-1-109. Common law of England -- when rule of decision. The common law of England, so far as it is not repugnant to or inconsistent with the constitution of the United States or the constitution or laws of this state, is the rule of decision in all the courts of this state. n506

According to a federal court interpreting Montana law:

> The "common law of England" as used in the statute "means that body of jurisprudence as applied and modified by the courts of this country up to the time it became a rule of decision in this commonwealth," and "that time began with our first territorial Legislature." n507

State courts have agreed that "the common law has been a part of our jurisprudence from the organization of Montana territory to the present day" n508 and that the common law of England "means that body of jurisprudence as applied and modified by the courts of this country up to the time it became a rule of decision in this commonwealth." n509

§ 7.02(bb) Nebraska.

Nebraska's first settlements were French outposts along the Missouri in the late 18th century. Nebraska land was wholly included in the area of the Louisiana Purchase, which had previously been at least nominally subject to the influence of Spanish and French law. French governance over the region ended with the arrival of a Spanish governor in 1769, and Spanish authority ended in 1803. Upon his assumption of office in 1769, the Spanish governor officially proclaimed the substitution of Spanish law for all prior laws in the area. n510

When the new American governor arrived in New Orleans in 1804, he created a "court of common pleas" with proceedings in English, signifying an abrupt transition into an American common law system. Reacting to local protest, Congress later in that same year separated the area of Louisiana state, called the Territory of Orleans, from the rest of the Louisiana Territory, designating the remainder as the District of Louisiana and placing it administratively under the Territory of Indiana. n511 Existing law was continued in force for the District of Louisiana: "The laws in force in the said district of Louisiana, at the commencement of this act, and not inconsistent with any of the provisions thereof, shall continue in force until altered, modified or repealed by the governor and judges of the Indiana territory, as aforesaid."

n512

The Indiana territorial government enacted certain laws of the new territory between 1804 and 1805, all of them with pronounced common law flavor, and in 1806 Congress established a separate administration for the area, redesignating it the Territory of Louisiana. Statutes enacted after this change also covered familiar common law subjects. In 1812 the Territory of Louisiana was granted the right to its own legislative assembly, and its name was changed to the Territory of Missouri. A territorial enactment in 1815 authorized the recording of land titles acquired during the period of Spanish government, but in 1816 the territorial legislature adopted a broad common law reception statute:

> The common law of England, which is of a general nature, and all statutes made by the British parliament in aid of or to supply the defects of the said common law, made prior to the fourth year of James the first, and of a general nature, and not local to that kingdom, which said common law and statutes are not contrary to the laws of this territory, and not repugnant to, nor inconsistent with the constitution and laws of the United States shall be the rule of decision in this territory, until altered or repealed by the legislature, any law, usage, custom to the contrary notwithstanding, provided, however, that none of the British statutes respecting crimes and punishments shall be in force in this territory, nor shall any person be punished by common law, where the laws and statutes of this territory have made provision on the subject, but where the laws and statutes of the United States and this territory have not made provision for the punishment of offences, the several courts may proceed to punish for such offences, provided, the punishment shall in no case be other than fine and imprisonment, and the term of imprisonment shall not exceed two months; and the fine shall not exceed one hundred dollars.

n513

A companion provision to this general common law reception statute indicated certain real property common law doctrines that were excepted from this reception:

> The doctrine of survivorship in cases of joint tenants shall never be allowed, in this territory. The doctrine of entails shall never be allowed, and in all cases where any real estate shall be entailed, the whole of the right and interest of, in, and to the same, shall vest in fee simple in the person having the first reversion or remainder in said estate, after the life estate is determined in said estate. n514

When the State of Missouri was formed in 1821, no actual governmental authority applied to Nebraska until 1854, when Nebraska was made a Territory, because the area was maintained as Indian country and officially closed to settlement (although the great emigration trails passed through the state). In the territorial enabling act, n515 no explicit common law reception was mentioned. However, it was provided that the territorial supreme and district courts "shall possess chancery as well as common law jurisdiction," n516 and federal law, except for the 1820 Missouri Compromise legislation, was declared applicable in the new territory. n517 Thereafter, in its first session, the territorial legislature enacted a common law reception provision:

> That so much of the common law of England as is applicable and not inconsistent with the constitution of the United States, with the organic law of this Territory, or with any law passed or to be passed by the Legislature of this Territory be and the same is adopted and declared to be law within said Territory. n518

Nebraska was authorized for admission to statehood in 1864, n519 and became a state in 1867. n520 Its first constitution of 1866 had no reception provision but provided that "all laws now in force shall remain in force until altered, amended, or repealed by the legislature." n521 Nebraska's present constitution has no provision continuing present laws in force. However, current Nebraska statutes have carried forward the territorial common law reception statute:

> Common law; applicability. So much of the common law of England as is applicable and not inconsistent with the Constitution of the United States, with the organic law of this state, or with any law passed or to be passed by the Legislature of this state, is adopted and declared to be law within the State of Nebraska. n522

Nebraska courts have held that by this statute Nebraska "adopted the common law of England and not the statutory law of England." n523 They also accord a large flexibility to the concept of the common law:

> What is the meaning of the term "common law of England"...? Does it mean the common law as it stood at the time of the Declaration of Independence, or as it stood when our statute was enacted, or are we to understand the common-law system, in its entirety, including all judicial improvements and modifications in this country and in England, to the present time, so far as applicable to our conditions? We cannot think, and we do not believe this court has ever understood, that the Legislature intended to petrify the common law, as embodied in judicial decisions at any one time, and set it up in such inflexible form as a rule of decision. The theory of our system is that the law consists, not in the actual rules enforced by decisions of the courts at any one time, but the principles from which those rules flow; that old principles are applied to new cases, and the rules resulting from such application are modified from time to time as changed conditions and new states of fact require "We may look to American as well as English books, and to American as well as English jurists, to ascertain what this law is, for neither the opinions nor the precedents of judges can be said, with strict propriety, to be the law. They are only evidence of law." *Forbes v. Scannell, 13 Cal. 242, 286* . On this ground it was held in *Sayward v. Carlson, 1 Wash. St. 29, 33 Pac. 830* , that a statutory provision in Washington making the common law of England the rule of decision in all the courts did not confine the courts to the decisions of the English courts, and of those American courts which have followed them closely, for the interpretation of the law. Such has been the understanding of this court from the beginning. What Sir Frederick Pollock has called "the immemorial and yet freshly growing fabric of the common law" is to be our guide, not the decisions of any particular courts at any particular period. The term "common law of England," as used in the statute, refers to that general system of law which prevails in England, and in most of the United States by derivation from England, as distinguished from the Roman or civil law system, which was in force in this territory prior to the Louisiana purchase. Hence the statute does not require adherence to the decisions of the English common-law courts prior to the Revolution, in case this court considers subsequent decisions, either in England or America, better expositions of the general principles of that system. n524

§ 7.02(cc) Nevada.

Nevada was part of the huge western portion of the United States that was nominally under Spanish and Mexican sovereignty until the mid-19th century. No permanent settlements were established in Nevada until after settlers arrived in what is now the state of Utah in July, 1847. Those settlers, members of the Church of Jesus Christ of Latter-day Saints ("Mormons") began arriving in huge numbers fleeing religious persecution in the Midwest and by 1851 had founded small communities in Carson Valley and elsewhere.

Until 1848, the region was nominally under Spanish governance, although this governance was never effective beyond California. Spanish outposts at San Diego and Monterey in California had been established by the beginning of the 19th century, but little governmental control was exercised, especially from Mexico after Mexican independence was achieved in 1821. From the time that American settlers arrived in Utah until effective American governmental control was asserted in both Utah and Nevada a few years later, church officials established governmental institutions and commenced a vigorous effort of widespread settlement throughout the intermountain area.

While the church organizations dealt effectively with local problems, a larger government movement was underway by

the founding of the State of "Deseret" (a religious term) in 1849, a huge entity extending from Nebraska to California, and from Oregon to and including Arizona. The constitution for the State of Deseret made no explicit references to the common law, but the governmental institutions established by the document were familiar in most American common law jurisdictions. n525

In 1850, the authorization for the Territory of Utah was enacted by Congress, n526 with boundaries including the present states of Utah, Nevada, the southwest corner of Wyoming, and a large part of western Colorado. According to this act, the territorial supreme and district courts "shall possess chancery as well as common law jurisdiction," n527 and federal law was extended over the area, but no prior laws were declared to be in force. n528

When Nevada was authorized for its own territorial status in 1861, n529 that act, too, declared that the territorial supreme and district courts "shall possess chancery as well as common-law jurisdiction," n530 and federal law was extended over the area, but no prior laws were declared to be in force. n531

At the first meeting of the territorial legislature in 1861, a common law reception statute was enacted:

> The common law of England, so far as it is not repugnant to or inconsistent with the Constitution or Laws of the United States, or the Laws of the Territory of Nevada, shall be the rule of decision in all Courts of this Territory. n532

In 1864 Nevada Territory was authorized to form a state, n533 and, although the enabling act contained no provision for continuing prior laws in force, the first Nevada constitution, which became effective when statehood was attained that same year, n534 did have such a provision:

> All laws of the Territory of Nevada, in force at the time of the admission of this State, not repugnant to this constitution, shall remain in force until they expire by their own limitations or be altered or repealed by the legislature. n535

This remains the current provision on prior laws in force in the Nevada constitution. In 1872, this provision was held by the Nevada Supreme Court to have continued in force the 1861 common law reception statute:

> The first legislature of the territory of Nevada (Stat. 1861, Page 1), declared that, "the common law of England, so far as it is not repugnant to or inconsistent with the constitution or laws of the United States, or the laws of the territory of Nevada, shall be the rule of decision in all courts of this territory.["] Our state constitution adopted this, like all other laws of the territory, by section two of the schedule [of the state constitution], which declares that all laws of the territory of Nevada in force at the time of the admission of the state, not repugnant to the constitution should remain in force until repealed by the legislature; hence, although the common law might, in the opinion of the judges, be inapplicable, still, if not in conflict with the constitution or laws of the United States, or the constitution or laws of Nevada, it must nevertheless be enforced. n536

Nevada's present common law reception statute differs little from the 1861 version:

> The common law of England, so far as it is not repugnant to or in conflict with the Constitution and laws of the United States, or the constitution and laws of this state, shall be the rule of decision in all the courts of this state. n537

An early judicial explanation of common law reception in Nevada still applies today:

> [I]n adopting the common law of England in this country, it seems to be the established doctrine that it is adopted as amended or altered by English statutes in force at the time of the emigration of our

> colonial ancestors ...
>
> * * *
>
> When the common law of England, consisting in part of statutes, as we have shown, has been adopted in the United States, why may not Americans, like the adventurous emigrants of other nationalities, carry with them the common law of their country into the Territories acquired since the Revolution?
>
> And whenever that law, without exception, is declared, as it has been here, to be the rule of decision, why shall it not prevail? In *Norris v. Harris (15 Cal. 226*), Chief Justice Field, after stating that the common law of England was repeatedly presumed to exist in the original States, and in those carved out of them, adds: "A similar presumption must prevail as to the existence of the common law in those States which have been established in Territories acquired since the Revolution, where such Territory was not, at the time of its acquisition, occupied as an organized and civilized community, when in fact the population of the new State upon the establishment of government, was formed of the emigration from the original State." This language possesses peculiar force in this State. n538

In addition to developing its own mining and water law n539, Nevada also followed California's example and adopted the community property system of marital property. n540

§ 7.02(dd) New Hampshire.

The earliest New Hampshire settlements arose under widely varied auspices and equally varied sources of law. The two earliest settlements, at Dover and Portsmouth, had their legal origins in the 1620 charter that created the Council for New England and which was given jurisdiction over all of New England. It was under this charter that the *Mayflower* sailed, and it authorized the colonial council:

> to make all Manner of Orders, Laws, Directions, Instructions, Forms, and Ceremonies of Government and Magistracy fitt and necessary for any concerning the Government of said Collony and Plantation, so always as the same be not contrary to the Laws and Statutes of this our Realme of England... n541

The grant of lands under this charter was given in the English tenure of free and common socage, "to be holden of Us as of our Manor of East-Greenwich, in our County of Kent, in free and common socage and not in Capite nor by Knight's Service...." n542 It was further declared that "English subjects settling in the colony, and their children there born, shall have all the rights of natural born Englishmen." n543

The "adventurers" who founded Dover and Portsmouth obtained individual grants under the authority of the 1620 charter. John Mason, the Portsmouth grantee, obtained a new grant from the New England Council in 1635, confirming his various previous grants, and even though this latest grant was not confirmed before Mason died, its language reveals much about the English law foundation of New Hampshire settlers' property rights. Mason was to have "power over the land and water, forests, mines, and fisheries, according to the right and powers 'had, used and enjoyed by the now or any former Bishop of Duresme within the County Palatine of Duresme.' " n544 The people of New Hampshire and their descendants:

> were to be "holden, reputed and had as the faithful liege people of Us [the crown], our heirs and successors, originally springing up within our Realm of England." And they were to take by descent or purchase, and freely possess, property in the three kingdoms, as if living therein; and to have "all the liberties, franchises and privileges of this our realm of England, without any impediment whatsoever, -- any statute to the contrary notwithstanding ...."

> * * *
>
> ....Power also was given to Mason and his heirs, "lest the way to honor and renown might seem difficult and hard to find in so remote and far distant a country," to create and bestow titles, "so they be such as in England now are in use," and "to create villages and into boroughs, and boroughs into cities...." "We do declare and ordain, that the said Province of New Hampshire shall be immediately subject to our Crown of England, and dependent upon the same for ever." n545

These provisions were never confirmed and thus remained only expressions of intent and assumption.

A third source of New Hampshire settlement emerged in 1638, when religious dissenter John Wheelwright under sentence of banishment from Massachusetts, purchased from the Indians lands in the Piscataqua region. In 1639 the 35 families in this settlement entered into a civil compact that acknowledged loyalty to the English monarch but only "according to the libertys of our English Colony of Massachusetts." n546

A fourth area of settlement in New Hampshire was opened directly by Massachusetts, which in 1636 directed the establishment of a plantation at Hampton, all presumably under the laws adopted and received in Massachusetts. n547 In 1640 the Dover settlers, fearing a takeover by Massachusetts, entered into a civil compact known as the Dover Combination, by which they pledged loyalty to the laws of England "together with all such orders as shall be concluded by a major part of the freemen of our Society." n548 However, by 1643 the Massachusetts influence became pervasive as, for various reasons, the inhabitants of all four early New Hampshire settlements by 1643 had acquiesced in Massachusetts' assertion of jurisdiction over their territories. Massachusetts hegemony in New Hampshire prevailed until 1679, when the crown ordered Massachusetts to withdraw from the New Hampshire communities and appointed a royal governor.

After appointment of the royal governor in 1679, events moved quickly. Shortly before his death in 1684, King Charles II revoked Massachusetts' charter and proposed to unite Massachusetts, Maine, New Hampshire, Rhode Island and Connecticut into one province. James II took the throne in 1685 and carried out this plan by creating the Dominion of New England. Governor Edmund Andros arrived in Boston in December, 1685, and soon began to exercise his powers of government, including power to inject further confusion into already turbulent landholding arrangements. This mischief ended suddenly in 1688 when James II was overthrown, but the turbulent times had made it impossible for a stable government to form in New Hampshire. Therefore, the colony rejoined Massachusetts for a short time until designated a royal province by William and Mary in 1691.

The supposed foundation of English common law in New Hampshire, whether indigenously developed or derived from Massachusetts, remained somewhat theoretical inasmuch as actual practices in the colony were somewhat at variance with the common law, both in property rights and other respects.

While New Hampshire was officially under the governance of Massachusetts Bay, between approximately 1641 and 1679, the laws of Massachusetts applied in New Hampshire. Under independent New Hampshire's first president, John Cutt, a code of laws was compiled based largely on laws of Plymouth and Massachusetts, and the colony also made some use of a compilation of English statutes that had been sent. In the Cutt Code, the laws of England were invoked to decide questions of real property. The president and council were established as a "constant and setled Court of record," to hear pleas in civil suits and actions,

> whether ye same do concern ye realty, and relate to a right of freehold and inheritance, or whether ye same do concern ye personalty, and relate to some matter of debt, contract, damage, or other person, iniury, and also in all mixt actions wch may concern both realty and person...: so always yt ye forms of proceeding in such cases and ye judgment thereupon to be given, be as consonant and agreeable to ye Laws and Statutes of this Our Realm of Engd, as ye prent state and condition of our subjects inhabiting

> within ye limits aforesaid, and ye circumstances of ye place will admit. n549

After 1685, New Hampshire was part of the Dominion of New England until the dominion fell and New Hampshire temporarily reunited with Massachusetts. In 1691 New Hampshire resumed status as an individual colony, with its own governor, and from 1699 to 1741 New Hampshire and Massachusetts had separate governmental organizations but a common governor.

While the Cutt Code was in effect the governors made vigorous efforts to discourage or reject legislation that was considered repugnant to English law, and the settlers persisted in promoting their local laws, especially those relating to land:

> It was quite natural, also, that complicated and cumbersome English laws should be replaced by others which were simpler and more direct. The laws relating to inheritances, the ownership and occupation of real estate and the transfer of rights in the same were very different from and simpler than those in England. Instead of the intricate and artificial system of English conveyancing there was a simple, yet comprehensive system. Instead of the doctrine of primogeniture in cases of descent, there was the doctrine of equality, except that the oldest son received a double portion as under the Jewish law. Real estate was made liable for debts, and all estates were allodial. n550

With independence came the need to replace the government structure, which New Hampshire did on a makeshift basis with its brief constitution of 1776. This cryptic document made no reference to the common law or the nature of the legislative power, but proclaimed "that we never sought to throw off our dependance upon Great Britain, but felt ourselves happy under her protection, while we could enjoy our constitutional rights and privileges." n551 The more comprehensive constitution of 1784 has remained the state's basic constitution. The legislative power under this document is not based on any express reliance on English common law, but rather is:

> to make, ordain and establish, all manner of wholesome and reasonable orders, laws, statutes, ordinances, directions and instructions, either with penalties or without; so as the same be not repugnant, or contrary to this constitution, as they may judge for the benefit and welfare of this state... n552

However, another provision made a broad reception of previous laws still in force:

> All the laws which have heretofore been adopted, used and approved, in the province, colony, or state of New-Hampshire, and usually practiced on in the courts of law, shall remain and be in full force, until altered and repealed by the legislature; such parts thereof only excepted as are repugnant to the rights and liberties contained in this constitution... n553

In the current constitution, which is the 1784 document as amended, both the provisions defining the legislative power n554 and receiving prior laws n555 remain in their original wording.

§ 7.02(ee) New Jersey.

New Jersey was originally the subject of 16th century English grants, then the Virginia patents of 1606 and 1609, and still other grants of 1620 and 1634, but no English settlement occurred there for many years. Meanwhile, Dutch and Swedish colonists moved into the area. English claims were dramatically renewed in 1664 when King Charles II made his famous grant to his brother, the Duke of York and future King James II, of the lands included in the future states of New York, New Jersey, Delaware and Pennsylvania.

The 1664 patent was expressed in terms of the fullest property rights consistent with the feudal incidents still connected with the tenure of free and common socage, "To bee holden of us our Heires and Successors as of our Manor of East Greenwich in our County of Kent in ffree and Comon Soccage and not in Capite or by Knights Service." n556

The laws to be administered in the granted lands were to be not contrary to and as near "as conveniently may bee" to the laws of England, and judicial judgments and sentences were subject to a right of appeal in England:

> AND WE DOE FURTHER ... give and Graunt unto our said dearest Brother James Duke of Yorke his heires Deputyes Agents Commissioners and Assignes by these presents full and absolute power and authority to Correct punish Pardon Governe and Rule all such the Subjects of us our heires and Successors as shall from tyme to tyme Adventure themselves into any the parts or Places aforesaid according to such Lawes Orders Ordinances direccons and Instruments as by our said dearest Brother or his Assignes shall bee established as well in all Causes and matters Capitall and Criminall as Civill both Marine and others SOE ALLWAYES as the said Statutes Ordinances and Proceedings bee not contrary to but as neare as conveniently may bee agreeable to the Lawes Statutes and Governement of this our Realme of England AND SAVEING and reserveing to us our heirs and Successors the receiving heareing and determineing of the Appeale and Appeales of all or any Person or Persons of in or belonging to the Territories or Islands aforesaid in or touching any Judgment or Sentence to bee there made or given... n557

The terms of this patent appeared designed to expressly supersede any previous and conflicting grants of the same lands:

> AND LASTLY OUR WILL and pleasure is and wee doe hereby declare and Graunt that these our Letters Pattents or the Inrollment thereof shall bee good and effectuall in the Law to all intents and purposes whatsoever NOTWITHSTANDING the not reciteing or menconing of the premisses or any part thereof or the Meets or Bounds thereof or of any former or other Letters Patents or Graunts heretofore made or Graunted of the premisses or of any part thereof by us or of any of our Progenitors unto any other Person or Persons whatsoever Bodyes Politique or Corporate or any Act Lawe or other Restraint incertainty or ymperfeccon whatsoever to the contrary in any wise notwithstanding... n558

These powers were implemented in 1665, when the Duke appointed a governor, who promulgated a simple code known as the "Duke's Law." This law eventually governed the Duke's vast American grant, which included, along with New York, Delaware, New Jersey, and Pennsylvania. In the Dutch areas, except for New York City itself, the settlers were permitted to be governed by their traditional laws, especially as to landholding. A brief revival of Dutch rule in 1673 and 1674 resulted in the Duke's Law replacing even these traditional Dutch laws after English rule was restored in 1674.

The "Duke's Law" has been described as rudimentary, probably because it was patched together from laws of other English colonies in America. It, too, contained a provision that laws adopted in the Duke's colonies were to be "not Contrary to the known Lawes of England." n559 At first, under the "Duke's Law" the Dutch settlers were permitted to be governed by their traditional laws, but this changed when English rule resumed after a brief Dutch interlude in 1673-1674. When the English retook the lands from the Dutch in 1674, Charles II issued a second grant to the Duke of York, specifying certain territories in addition to those described in the first grant, but describing the rights in those lands in terms essentially identical to the wording of the first grant. n560 These grants and laws remained formally in effect even after the "Glorious Revolution" in England in 1688, when the Stuart monarchy was rejected.

Even before the "Duke's Law" took effect in New Jersey, the Duke in 1664 granted most of New Jersey to John Berkeley and George Carteret, who in 1665 issued governmental provisions called "Concessions and Agreement" to attract settlers. Described as the first explicit expression of fundamental law in New Jersey, the Concessions authorized a legislature with authority to enact necessary laws that were "consonant to reason and, as neare as may be conveniently agreeable to the Lawes and Customes of his Majesties Kingdom of England...." n561 In guaranteeing religious toleration the Concessions gave assurance of such freedom "any law, statute or clause contained or to be contained, usage or custom of this realm of England to the contrary thereof in any wise notwithstanding." n562 Later conflict over

the issue of quitrents would develop between towns that received grants under the "Duke's Law" and before the "Concessions and Agreement" and those that received their grants later, indicating a split over what was the source of fundamental law in the province.

When New Jersey became divided into East and West portions in 1676, separate legislation emerged from the two sectors. William Penn became heavily involved in West Jersey affairs in 1676, and in 1682 he and some associates assumed the proprietorship of East New Jersey. In the West, they had issued "Concessions and Agreements" in 1677, which contained no explicit reference to English common law. In East Jersey, Penn and the other proprietors drew up "Fundamental Constitutions" which presented a strongly feudal scheme of government, but made no mention of English common law. When the portions were combined into one royal province in 1702, the governor was instructed, among other things:

> to take care that no Mans life, Member, Freehold or Goods be taken away or harmed in Our Said Province, otherwise than by Established and known Laws, not repugnant to, but as much as may be agreeable to the Laws of England. n563

If English common law was resisted in favor of local legislation throughout New Jersey's colonial history, it is also true that English common law was always present, even if in the background, and formed the foundation for rule of law in New Jersey.

New Jersey's first constitution, in 1776, not only received the previously accumulated statutory law then in force, but also adopted English common law:

> XXI. That all the laws of this Province, contained in the edition lately published by Mr. Allinson, shall be and remain in full force, until altered by the Legislature of this Colony (such only excepted, as are incompatible with this Charter) and shall be, according as heretofore, regarded in all respects, by all civil officers, and others, the good people of this Province.
>
> XXII. That the common law of England, as well as so much of the statute law, as have been heretofore practised in this Colony, shall still remain in force, until they shall be altered by a future law of the Legislature; such parts only excepted, as are repugnant to the rights and privileges contained in this Charter; and that the inestimable right of trial by jury shall remain confirmed as a part of the law of this Colony, without repeal, forever. n564

A single provision that effectively combines both sections of the 1776 constitution was included in the New Jersey Constitution of 1844:

> The common law and statute laws now in force not repugnant to this constitution, shall remain in force until they expire by their own limitation, or be altered or repealed by the legislature; ...The several courts of law and equity, except as herein otherwise provided, shall continue with the like powers and jurisdiction as if this constitution had not been adopted. n565

In the current constitution of 1947, an equivalent provision carries on former law, but has dropped the specific mention of common law:

> All law, statutory and otherwise, all rules and regulations of administrative bodies and all rules of courts in force at the time this Constitution or any Article thereof takes effect shall remain in full force until they expire or are superseded, altered or repealed by this Constitution or otherwise. n566

The New Jersey courts have been appropriately selective about adoption of English legal sources. In a 1941 case a New Jersey court refused to adopt as binding a statement from an 1844 English case; n567 but the next year the English

common law was invoked as the rule of law on a matter of land ownership. n568

§ 7.02(ff) New Mexico.

Land that is now in New Mexico was first occupied by the United States in 1846 during the war with Mexico. A code of laws drawn up in 1846, during the American military governorship, continued in effect the earlier Spanish and Mexican laws. When territorial status was granted for New Mexico Territory in 1850, no provision was made either for continuing or discontinuing the effect of prior laws; apparently only applicable federal laws were received:

> And be it further enacted, That the Constitution, and all laws of the United States which are not locally inapplicable, shall have the same force and effect within the said Territory of New Mexico as elsewhere within the United States. n569

Also, the "Supreme and District Courts, respectively, shall possess chancery as well as common law jurisdiction." n570

This uncertain mix of Anglo-American and Spanish-Mexican elements in territorial law was noted in state courts, where the provision for common law jurisdiction was restricted to procedural matters only, and substantive rights were determined according to Mexican law. n571 Matters were clarified somewhat in 1876, when the territorial legislature enacted a general reception provision: "In all courts in this territory the common law as recognized in the United States of America shall be the rule of practice and decision." n572 This provision has been continued verbatim into the current New Mexico code, n573 along with a companion provision accepting the rules of equity. n574 Other statutes reaffirm common law principles in specified subject areas despite interposition of some state statutory regulation. n575

Because the reception provision's "common law as recognized in the United States" was different in each state, the territorial supreme court held that what was received was

> the unwritten or common law of England, and the acts of parliament of a general nature, not local to Great Britain, which had been passed and were in force at the date of the war of the Revolution, and not in conflict with the constitution or laws of the United States, nor of the state or territory, and which were suitable to the wants and conditions of the people. n576

The reception statute was also held to have continued in force the law in the prior territorial statutes, including those elements of the law that were Spanish and Mexican, n577 which was in contrast to the explicit repeal of Hispanic law that occurred in Arizona Territory. n578

New Mexico's view of the common law elements thus incorporated into state law was ably described by its Supreme Court in 1886:

> From the authorities cited, it is clear that there are three classes of "common law as recognized in the United States of America": First, in those states which were a part of the original colonies, and which have not by legislation adopted statutes passed prior to a particular date, the unwritten law, and such general British statutes, applicable to their condition, as were in force at the time of the formation of the colonial governments, and such as were afterwards adopted, expressly or tacitly, constituted the common law; second, in those states which have adopted the common law, and the British statutes passed and in force prior to the dated fixed in the act of adoption, and were of a general nature, and suitable to their situation, such common law and statutes constitute their common law; and, third, in those states and territories which were not of the original colonies, and which have not in terms adopted any English statutes, but have adopted the common law, the unwritten or common law of England, and the acts of parliament of a general nature, not local to Great Britain, which had been passed and were in force at the date of the war of the Revolution, and not in conflict with the constitution or laws of the United States, nor of the state or territory, and which were suitable to the wants and condition of the people, are the

> common law of such states and territories.
>
> This territory belongs to the last class. It was not a part of the original colonies, but was acquired in 1848. The legislature has not in terms adopted any British statutes, nor has it undertaken to define what is embraced in the words 'common law,' or lex non scripta, and such British statutes of a general nature, not local to that kingdom, nor in conflict with the constitution or laws of the United States, nor of this territory, which are applicable to our condition and circumstances, and which were in force at the time of our separation from the mother country. n579

Under this view, the English statute of frauds has been held to be part of the common law, n580 but other common law doctrines have been specifically rejected, such as treble damages for waste, n581 destructibility of contingent remainders, n582 common law marriage, n583 common law water rights, n584 and, of course, common law rights of dower and curtesy. n585 The statutory community property rights of husband and wife in New Mexico are drawn from Spanish law, which may be used for interpretation. n586 Many land titles in New Mexico antedate 1846, when American governmental authority was first imposed. n587

§ 7.02(gg) New York.

Fundamental law and the basic institutions of government in what is now New York state were at first entirely Dutch. The first settlements, the first land distributions, and the first organizations of local government were all under the authority and influence of Dutch law.

Although the first settlements in the area that is now New York state were by the Dutch, the charter authorizing the Dutch West India Company to undertake colonization made no mention of the company's rights to deal with interests in land. Emphasis on settlement and an orderly land distribution did not emerge until the Charter of Privileges to Patroons was approved in 1629.

The policy of encouraging settlement by patroons imparted significant consequences for landholding in New Netherlands. Patroons can be best described as the Dutch equivalents of English manorial lords. A patroon who held land held it according to a feudal system of land rights, which included the rights to require services as well as rents from tenants who were occupying the patroon's lands, and the right to exercise judicial and other governmental powers over the patroon's holdings. Only the patroon held the land outright; others could only be tenants of the patroon. The patroons of New Netherlands obligated themselves to commence a colony with at least 50 persons during a four-year period of time, in return for which each patroon received manorial and proprietary rights to sixteen miles of Hudson River shoreline and the lands behind the shoreline.

In the end only one patroonship ever succeeded, that of Kiliaen Van Rensselaer. Over lands covering present-day Albany, Columbia and Rensselaer counties in New York, he established a feudal tenant system that persisted until tenants rebelled early in the 19th century.

Inevitably, the institutions of Dutch colonial government clashed from time to time with the feudalistic independence of the Dutch patroons. The monopolistic powers exercised by the Dutch West India Company as colonial proprietor were very extensive, and even when its monopoly was abolished in 1640, its director and council remained the principal organs of government in the province:

> Few formal instructions [from the company] appear, but orders were transmitted in the letters concerning grants of land, recall of grants, duties and all the minutia of trade relations, claims and suits against the company, dealings with the Indians, relations with the English on the north and the south and with the Swedes, the appointment and removal of officials, and the claims of patroons. n588

The Company's director and council exercised legislative power, especially in the absence of any popular legislative assembly similar to those emerging in contemporary English colonies. Their power over management of the land was almost total and was tied closely to exercising powers of local government:

> By ordinances concerning land, provision was made for the extinguishment of Indian claims, for issue of patents, for the annulment of extravagant and unimproved grants, for the fencing of land, for the levying of tenths and other taxes upon it, for the collection of rents, and the prevention of trespass. Courts were established under the authority of these ordinances; their jurisdiction was prescribed, and provision was made for their officials. Provisions for land grants and for courts, when combined, led to the origin of local government within New Netherland. n589

When the Company revised its rules of settlement in 1640, under a grant entitled Freedoms and Exemptions for New Netherland, n590 its colonial monopoly was surrendered and the possibility of colonies being founded by private persons was opened. If settlements in such private colonies grew into towns or villages, the Company was required to grant to such villages powers of local government; eventually village magistrates exercised authority to pass ordinances regulating land, fences, highways, schools, and churches.

Even during the Dutch era, a large proportion of the villages were populated by English settlers, so it is not surprising that the first conferring of village rights was on English towns within Dutch territory on Long Island in 1644. Other bestowals of village rights on Dutch communities followed quickly and continued right up to the time of the English takeover in 1664. While these developments in local government organization were occurring, officials in the patroonships sought to exclude completely any exercise of provincial government within the patroon holdings; these conflicts also continued unresolved right up to the end of Dutch rule in New Netherland.

Because the Dutch colony of New Netherland was technically an intrusion into lands already claimed by a grant to the Virginia Company in 1606, conflict with the English was bound to ignite. The first overt outbreak of strife occurred in the spring of 1632 when a Dutch ship returning to Holland was forced by weather to put into Plymouth, where the vessel and its passengers were detained while the governments at home bickered over their respective claims. The ship was released in May, but the English asserted the release was "without any prejudice to his majesty's rights." n591

Further contentions followed in 1633. English trading with the Indians was obstructed, colonists from Plymouth began a settlement in territory along the Connecticut River claimed by the Dutch, and by 1635 numerous families from Massachusetts Bay had followed. By 1639 migration into New Netherlands was originating from both New England and Virginia. From as many English settlers as possible, the Dutch colonial government obtained an oath of fidelity:

> to their High Mightinesses the Lords States General, his Highness of Orange, and the Noble Director and Council of New Netherland; to follow the Director or any of his Council, wherever they shall lead; faithfully to give instant warning of any treason, or other detriment to this country that shall come to their knowledge; to assist to the utmost of their power in defending and protecting with their blood and treasure, the inhabitants thereof against all its enemies. n592

The English soon commenced a settlement at New Haven and purchased Indian land in all the surrounding areas. As for Long Island,

> the Plymouth Company had taken upon itself to grant, at the request of Charles I, in 1635, the whole of Long Island to William Alexander, Earl of Stirling, who, in the early part of the following year, appointed an agent to dispose of the lands thus conveyed to him, to all who were desirous to purchase and settle them. n593

While the English were settling the eastern end of Long Island, the Dutch were purchasing and settling the western

lands of the island. A series of isolated confrontations led, in 1641, to negotiations between the Dutch and English, as a result of which it was agreed that the English could settle in territory claimed by the Dutch according to the provisions of the 1640 charter revising the Freedoms and Exemptions for New Netherland. Several families then considering moving from Massachusetts to Long Island thereafter declined to do so, because the new arrangement tacitly conceded the Dutch rights to colonize. Nevertheless, the provisions of the 1640 charter "formed the basis of all future grants from the Dutch to the English." n594 According to those provisions, English settling in Dutch territory:

> were to take the oath of allegiance to their High Mightinesses the States General and the West India Company, and in return, to enjoy free exercise of religion, and if they desired to have a magistracy from among themselves, they were to be allowed to nominate three or more persons from the most respectable among them, from which the Director-general would select one or more schepens, or magistrates... In criminal cases, they might proceed to, but not inflict capital punishment. They were empowered to erect towns, but could not construct forts except by special leave. Lands were to be shown to them free of expense, and whatever ground they might select, they were to hold free of rent or taxes for ten years; at the expiration of which time, they should be holden to pay the tenths of the produce. They were, in addition, to enjoy free hunting and fishing, and unshackled commerce, conformably to the privileges granted to New Netherland, but they were bound, in return, to make use of the weights and measures of the country. n595

In March, 1642, several families from Massachusetts, under the leadership of the Rev. Francis Doughty, a dissenting minister, did obtain a patent for 13,342 acres on Long Island and resettled there. Families from Lynn had obtained a similar patent in June, 1641. Under both patents, the English settlers had the usual privileges of free manors, including free exercise of religion and powers to establish towns, churches, and systems of civil and criminal justice, all according to the charter of 1640.

The English, who had never officially acknowledged Dutch claims to the territory of New Netherlands, took over the colonial government by force but without much violence in 1664. By means of a royal charter dated March 12, 1664, and despite King James I having included the same lands in the 1606 patent for the Virginia colony, the English King Charles II granted full rights over the province to his brother the Duke of York and future King James II.

The grantee, as a feudal lord, was given extensive powers of government and court jurisdiction. The laws to be administered in the granted lands were to be not contrary to and as near "as conveniently may bee" to the laws of England, and judicial judgments and sentences were subject to a right of appeal in England.

These powers were implemented in 1665, when the Duke appointed a governor, who promulgated a simple code known as the "Duke's Law." This law eventually governed the Duke's vast American grant, which included, along with New York, Delaware, New Jersey, and Pennsylvania. Those who held land rights under the Dutch were directed by the Duke's Law of 1665 to turn in their old grants and receive new patents from the English; however, in the Dutch areas, except for New York City itself, the settlers were permitted to be governed by their traditional laws, especially as to landholding. When a brief period of revived Dutch rule in 1673 and 1674 ended with the English once again in control, the Duke's Law was applied even in the traditional Dutch areas.

The "Duke's Law" has been described as rudimentary, probably because it was patched together from laws of other English colonies in America. Nevertheless, it is a lengthy code, occupying almost 100 pages in its most recent printing:

> The Duke of York's Laws for the government of the Colony of New York were compiled from the statutes for the governments of the other English colonies in America, under the direction of Nicolls, the first English Governor. They were promulgated at Hempstead, on Long Island, March 1, 1665, and copies were transmitted to the several ridings, constituting the shire of Yorkshire. n596

This law, too, contained a provision that laws adopted in the Duke's colonies were to be "not Contrary to the known Lawes of England." n597

At first, under the "Duke's Law" the Dutch settlers were permitted to be governed by their traditional laws, but this changed after English rule resumed in 1673-1674. When the English retook the lands from the Dutch in 1674, Charles II issued a second grant to the Duke of York, specifying certain territories in addition to those described in the first grant, but describing the rights in those lands in terms essentially identical to the wording of the first grant. n598 These grants and laws remained formally in effect even after the "Glorious Revolution" in England in 1688, when the Stuart monarchy was rejected.

A provincial assembly met in 1690, which temporarily kept in force the existing laws:

> With the "Duke's Law" still in effect, the earliest work of the new legislature was directed toward proclaiming and defining the new political authority, establishing courts, adjusting municipal boundaries, establishing a body of liberties, repairing the damage done by the [Leisler] rebellion, and establishing the law of :mb England :mx as the basis of all provincial legislation. Thereafter, as in all other jurisdictions, the assembly confined itself to meeting the current and ever-changing needs of the province, and its enactments eventually became sufficiently extensive to replace the "Duke's Law." n599

In 1693 a legislative committee began reviewing all legislation enacted since 1691 and preparing it for printing. The product of the committee's efforts became the first printed collection of laws for New York. One enactment included in this collection, "An Act declaring what are the Rights & Priviledges of Their Majesties Subjects inhabiting within Their Province of New-York" showed the colony's heavy reliance on the Magna Carta and other sources of English law, as revealed in examples of individual provisions quoted below:

> That no Free-man shall be taken or imprisoned, or be deprived of his Free-hold or Liberty, or free Customs, or Out-Lawed, or Exiled, or any other wayes destroyed; nor shall be passed upon, adjudged or condemned, but by the lawful Judgment of his Peers, and by the Law of this Province.
>
> Justice nor Right shall be neither Sold, Denyed or Delayed to any Person within this Province.
>
> That no Aid, Tax, Talliage or Custom, Loan, Benevolence, Gift, Excise, Duty or Imposition whatsoever shall be laid, assessed, imposed, levied or required of or on any of Their Majesties Subjects within this Province, &c. or their Estates, upon any manner of Colour or Pretence whatsoever, but by the Act and Consent of the Governour and Council, and Representatives of the People in General Assembly met and convened.
>
> That no Man, of what Estate or Condition soever, shall be put out of his Lands, Tenements, nor taken, imprisoned, nor disinherited, nor banished, nor any ways destroyed or molested, without first being brought to answer by due court of Law.
>
> That a Free-man shall not be amerced for a small Fault, but after the manner of his Fault, and for a great Fault after the greatness thereof, saving to him his Free-hold; and a Husband-man, saving to him his Wainage and none of these Amercements shall be assessed, but by the Oath of Twelve Honest and Lawful men of the Vicinage ...
>
> That no Free-man shall be compelled to receive any Souldiers or Marriners, except Inholders, and other Houses of publick Entertainment, who are to quarter for ready Money into his House, and there suffer them to sojourn again their Wills; provided it be not in time of actual War within this Province ...
>
> That all the Lands within this Province shall be esteemed and accounted Lands of Free-hold, and

> Inheritance in free and common Soccage, according to the Tenor of East-Greenwich in their Majesties Realm of England.
>
> That no Estate of a Feme-Covert shall be sold or conveyed, but by Deed acknowledged by her in some Court of Record, the Woman being secretly examined, if she doth it freely, without threats or compulsion of her Husband ...
>
> That all Lands and Heritages within this Province and Dependencies shall be free from all Fines, Lisences upon Alienations, and from all Heriots, Wardships, Liveries, Primiers, Seizins, Year and Day, and Waste, Escheat and Forfeiture upon the Death of Parents and Ancestors, Natural, Unnatural, Casual or Judicial, and that forever, Cases of High-Treason only excepted... n600

The thoroughness of English common law adoption in New York after 1700 can be illustrated by the fact that it was only in 1782, after the Revolution and after adoption of a state constitution, that the state legislature acted to abolish primogeniture, reestablish partible inheritance, and eliminate further entails. n601

Well before the Revolutionary period, the colonial courts and judicial procedure had been revised after resumption of English rule, so that in 1684, English common law forms of procedures became the rule in New York n602. In 1691, the colonial legislature created the Supreme Court of Judicature which was to function "as fully and amply to all Intents & purposes whatsoever, as the Courts of Kings Bench, Comon Pleas, & Exchequer within their Majestyes Kingdome of England, have or ought to have...." n603 This court has been described as "the instrument by which the great body of the jurisprudence of the English common law was applied to New York." n604 In 1774 the New York royal governor declared that "the common law of England is the fundamental law of the province, and it is a received doctrine that all the statutes enacted before the province had a legislature are binding upon the colony." n605

The first state constitution was adopted in 1777 with an explicit common law reception provision:

> And this convention doth further, in the name and by the authority of the good people of this State, ordain, determine, and declare that such parts of the common law of England, and of the statute law of England and Great Britain, and of the acts of the legislature of the colony of New York, as together did form the law of the said colony on the 19th day of April, in the year of our Lord one thousand seven hundred and seventy-five, shall be and continue the law of this State, subject to such alterations and provisions as the legislature of this State shall, from time to time, make concerning the same. That such of said acts, as are temporary, shall expire at the times limited for their duration respectively. That all such parts of the said common law, and all such of the said statutes and acts aforesaid, or parts thereof, as may be construed to establish or maintain any particular denomination of Christians or their ministers, or concern the allegiance heretofore yielded to, and the supremacy, sovereignty, government, or prerogatives claimed or exercised by, the King of Great Britain and his predecessors, over the colony of New York and its inhabitants, or are repugnant to this constitution, be, and they hereby are, abrogated and rejected. n606

The essence of this provision was continued in the 1821 constitution, n607 in the 1846 constitution, n608 and throughout the subsequent piecemeal constitution revision process in New York.

This same 1777 constitution also made specific provision for certain land rights, especially those that might be affected during the transition to independence:

> That all grants of lands within this State, made by the King of Great Britain, or persons acting under this authority, after the fourteenth day of October, one thousand seven hundred and seventy-five, shall be null and void; but that nothing in this constitution contained shall be construed to affect any grants of land within this State, made by the authority of the said King or his predecessors, or to annul any charters

> to bodies-politic by him or them, or any of them, made prior to that day. n609

Beginning with the 1846 constitution, specific provisions as to land rights ensured recognition of sovereignty in the state of New York and the final demise of feudalistic landholding practices:

> Sec. 11. The people of this State, in their right of sovereignty, are deemed to possess the original and ultimate property in and to all lands within the jurisdiction of the State; and all lands the title to which shall fail, from a defect of heirs, shall revert or escheat to the people.
>
> Sec. 12. All feudal tenures of every description, with all their incidents, are declared to be abolished, saving, however, all rents and services certain which at any time heretofore have been lawfully created or reserved.
>
> Sec. 13. All lands within this State are declared to be allodial, so that, subject only to the liability to escheat, the entire and absolute property is vested in the owners, according to the nature of their respective estates.
>
> Sec. 14. No lease or grant of agricultural land for a longer period than twelve years, hereafter made, in which shall be reserved any rent or service of any kind, shall be valid.
>
> Sec. 15. All fines, quarter sales, or other like restraints upon alienation reserved in any grant of land hereafter to be made, shall be void. n610

These identical provisions were continued in the 1897 constitution. n611 This 1897 constitution, as significantly revised in 1938, is New York's current constitution, and these provisions remain mostly intact, although rearranged. The sovereignty and allodial land ownership provisions have been combined in one section; n612 the common law provision has retained most of its original wording; n613 the section validating certain older land grants has continued with certain additions; and the provisions abolishing feudal tenures have been dropped.

After the 1777 constitution went into effect and after independence was established, New York courts made appropriately selective application of English common law. In one 1799 case, the common law applicable in New York was drawn from an English case decided only five years earlier; n614 in another 1799 case the English common law of ejectment was rejected as unsuitable to govern New York's western frontier lands. n615 English statutes of limitation enacted in 1541 and 1624 were applied in an 1835 New York case. n616

English common law continues to be the last resort rule of decision in 20th century New York cases, n617 under a constitutional provision whose wording has been somewhat altered from the 1777 version:

> Such parts of the common law, and of the acts of the legislature of the colony of New York, as together did form the law of the said colony, on the nineteenth day of April, one thousand seven hundred and seventy-five, and the resolutions of the congress of said colony, and of the convention of the State of New York, in force on the twentieth day of April, one thousand seven hundred and seventy-seven, which have not since expired, or been repealed or altered; and such acts of the legislature of this state as are now in force, shall be and continue the law of this state, subject to such alterations as the legislature shall make concerning the same. But all such parts of the common law, and such of the said acts, or parts thereof, as are repugnant to this constitution, are hereby abrogated. n618

New York courts have recognized that determining what was the common law rule as of 1775 can be an uncertain undertaking. It is easiest "where recognized printed reports of the English courts prior to 1775 show that the common law on any particular subject was by such case established and determined as therein stated, [so that] such reports are the best and highest evidence of such common law." n619 However,

> where the rules of the common law relating to a matter under consideration are not expressly stated in the reported cases of the English courts prior to 1775, the statement of the courts of this country and of England subsequent to that time, especially when they do not purport to modify the common law, are not only entitled to careful consideration, but to great weight in determining the common-law rule prior to 1775. An unreserved statement by a court as to the common-law rule will in the absence of other authority, be assumed to be based upon custom and the unwritten law antedating such time. n620

As an example, it has been held that the English statute of frauds in effect in 1677 was a part of the common law of New York, n621 and a ruling that a state has priority over its citizens in obtaining payment of debts owed has been held to derive from the common law. n622

§ 7.02(hh) North Carolina.

The first English charter for land located in what is now North Carolina was that granted in 1578 to Sir Humphrey Gilbert. The application of English law to any of such lands that were eventually colonized under the charter was confirmed in Gilbert's rights to "all the soil of all such lands ... to be had or used with full power to dispose thereof, and of every part thereof, in fee simple or otherwise, according to the laws of England, as near as the same conveniently may be." n623 To Gilbert and all his fellow colonists was granted that they "shall and may have and enjoy all the privileges of free denizens n624 and persons native of England and within our allegiance...." n625 Powers of government, including the administration of justice, were also included in the charter, "so always, that the said statutes, laws, and ordinances may be, as near as conveniently may, agreeable to the form of the laws and policy of England...." n626

Gilbert's short-lived 1583 settlement in Newfoundland, and his death during the voyage back to England, resulted in the renewal of Gilbert's charter in Raleigh's name, on March 25, 1584. Issued shortly before Gilbert's charter was to expire, Raleigh's charter was, in effect, a six-year extension, and, in its grants of property rights and governing power, was virtually identical to Gilbert's charter. Raleigh's single colonization effort in North Carolina was the legendary "lost colony" of Roanoke Island, discovered abandoned in 1590, and his colonial privileges were thereafter lost when he was imprisoned and convicted for high treason. Because his charter rights were forfeited to the crown upon his conviction, North Carolina land, as part of "Virginia," became available for re-granting by King James I.

When King James I took the throne after Queen Elizabeth's death in 1603, several influential and wealthy men were still interested in colonizing ventures. Hoping to resume what Raleigh had not finished, they approached James about another charter, and this was granted to the Virginia Company on April 10, 1606. The Virginia Company charter, obtained only three years after the last of Raleigh's expeditions, was a continuation of the Gilbert and Raleigh projects and included among its principals several men who had participated in those earlier enterprises. Charter lands were divided into northern and southern sectors assigned to two different groups within the Company, and the southern territory included in the charter encompassed most of the coastal sector of North Carolina. Nevertheless, this charter was not as generous as the earlier charters given to Gilbert and Raleigh:

> The territory involved in the new charter was restricted to a prescribed region. The company was not given the right to own land, although it could parcel out land among settlers, to be granted to them by patents from the king. Governmental authority over colonies was reserved by the crown, to be exercised by a council resident in London, appointed and instructed by the king. The authority of the company chiefly consisted by recruiting, transporting, and supplying colonists, conducting trade, and handling other financial matters. Colonists were guaranteed the rights of Englishmen at home, such as trial by jury, habeas corpus, and the right to own and inherit property, but they were not given the right to participate in government. n627

Unsatisfactory aspects of the 1606 charter led to requests for a new charter, which was granted on May 23, 1609. Driven

principally by the desire to extend jurisdiction over the Bermuda Islands, the Company obtained yet another charter on March 12, 1612. Because of factional disputes within the colony, this charter was revoked by court decision in 1624, and the land and rights of the Virginia Company reverted to the crown. Still no permanent settlement had been established in North Carolina, so that land was available for re-granting by the crown. Such a re-grant occurred five years later, when King Charles I granted most of present-day North Carolina to his attorney-general Sir Robert Heath. Heath was unable to assemble the resources needed to commence colonization, so in the 1630's he disposed of his interest in the tract. Several of Heath's assignees continued to promote a colony in North Carolina, but no settlement materialized. Eventually, the crown considered the grant lapsed, because no colonies had been established, and because of this King Charles II re-granted the Heath tract to eight other persons in 1663.

The Heath Charter, however, did not remain a dead letter. First, despite the royal grant of 1663, persons holding rights under the Heath Charter of 1629 began to press their claims to North Carolina territory. Those claims were rejected by an order in council of August 12, 1663, but the claimants and their heirs and successors persisted, finally in 1768 obtaining a court judgment that awarded them a settlement of 100,000 acres in New York. Second, the Heath Charter of 1629 was the model for the new royal charter of 1663; the essential provisions of 1629 reappeared in the proprietors' charters of 1663 and beyond.

The Heath Charter was based entirely on a foundation of English law, indeed, upon English law with its entire remaining feudal accessories. The charter states that "we ... have Given, Granted, and confirmed ... to the said Sir Robert Heath, Knight, his heirs and assigns, for ever, ... all the lands, Tenements, and Hereditaments [in the described tract]...." n628 This grant of land was accompanied by a very broad grant of governmental authority that was as thoroughly and feudally English as was consistent with the times:

> Together with all ... Rights, Jurisdictions, privileges, prerogatives, Royalties, liberties, and immunities ...
>
> To have, exercise, use, and enjoy, in like manner as any Bishop of Durham within the Bishopric, or County Palatine, of Durham, in our Kingdom of England, ever heretofore had, held, used, or enjoyed, or of right ought or could have, held, use, or enjoy.
>
> And, by these presents, we make, create, and constitute the same Sir Robert Heath, his Heirs and assigns, true and absolute Lords and Proprietors of the Region and Territory aforesaid, and all other the premises, for us, our heirs and successors;
>
> Saving always, the faith and allegiance due to us, our heirs and Successors... n629

The feudal and English nature of this proprietary grant was emphasized in the provision that described tenure as knight's service of a tenant-in-chief:

> To be held of Us, our Heirs and Successors, Kings of England, in chief, by Knight's service; and by paying for it, to us, our Heirs and successors, one Circle of Gold, formed in the fashion of a crown, of the weight of twenty Ounces, with this inscription engraved upon it, DEUS CORONET OPUS SUUM ["God crowns His work"], whensoever, and as often as it shall happen, that we, Our Heirs or Successors, shall enter the said Region. n630

The proprietor Heath was granted a very broad lawmaking power, but with provision for a legislative body that would function as consistently as possible with English law:

> [W]e ... do give Power to the said Sir Robert ... and to his Heirs and assigns, for the good and happy Government of the said Province, to form, make, and enact, and Publish under the Seal of the said Sir Robert ... what Laws soever may concern the public state of the said province, or the private profit of all,

> according to the wholesome directions of and with the counsel, assent, and approbation of the Freeholders of the same Province, or the Major part of them ...
>
> Yet, so that the foresaid laws and ordinances be consonant to Reason, and not repugnant or contrary but, as conveniently as may be done, consonant to the Laws, Statutes, Customs, and rights of our Realm of England. n631

Any person born into or coming into the colony would be considered an English subject or citizen, and their property rights would be the same as those of English subjects:

> And also, that they shall possess lands, Tenements, Rents, services, and Hereditaments whatsoever within our Kingdom of England and other our Dominions, to purchase, receive, take, have, hold, buy, and possess, and them to use and enjoy, and also, them to give, sell, alienate, and bequeath; and also, all liberties, franchises, and privileges of this our Realm to have and possess freely, quietly, and peacably; and that they may use and enjoy them as our lieges born or to be born within our Kingdom of England... n632

On March 24, 1663, King Charles II granted the old Heath tract to eight prominent men who had given important support toward the restoration of the Stuart monarchy. To resolve a territorial dispute with Virginia, a second North Carolina charter was issued in 1665 expanding on the original grant.

The 1663 charter followed the 1629 Heath charter in important particulars, especially in its provision for representative government, the English feudal powers resting in the proprietors, and the foundation of English law. As in the 1629 charter, the feudal powers of the proprietors were expressed in the "Bishop of Durham" clause, "To have, use, exercise, and enjoy, and in as ample manner as any Bishop of Durham, in our Kingdom of England, ever heretofore have held, used, or enjoyed, or of right ought or could have, use, or enjoy." n633 However, in declaring the tenure by which the proprietors held, this 1663 charter departed from the 1629 charter. The earlier document had described Heath's tenure as "in chief, by Knight's service," with a somewhat nominal payment obligation (a gold crown to be given over each time the monarch visited the province). The new charter abandoned this outmoded formula and adopted the new tenurial language commonly found in other colonies' charters, the free and common socage of East Greenwich royal manor: "To be held of us, our heirs and successors, as of our Manor of East Greenwich, in our County of Kent, in Free and Common Soccage, and not in Capite nor by knight's Service. n634 Again, the lawmaking power was subject to the requirement "that the said laws be consonant to reason and, as near as may be conveniently, agreeable to the laws and Customs of this our Kingdom of England," and that ordinances "do not extend to the binding, charging, or taking away of the right or interest of any Person or Persons in their freehold, goods, or Chattels whatsoever." n635

Grants of land were entirely in the context of English law, with the charter specifying even certain features of English law, such as Statute Quia Emptores, that would be suspended for the purpose of making these grants:

> We do give and Grant ... Licence, authority, and power That such Person or Persons may have or take the premises, or any parcel thereof, of [any of the proprietors]...; and the same to hold to themselves, their heirs and Assigns; in what estate of Inheritance soever, in Fee simple or Fee tail or otherwise...; The Statute made in the Parliament of Edward, Son of King Henry, heretofore King of England, our Predecessor, commonly called the Statute of *Quia Emptores Terrarum*, or any other Statute, Act, or Ordinance, use, Law, Custom, or any other matter, Cause, or thing heretofore published or provided to the contrary in any wise notwithstanding. n636

In 1669 the North Carolina proprietors finally moved to implement the enormous feudal powers they had obtained through their charters, even though it meant reducing the rights of the settlers. On July 21, 1669, they adopted their "Fundamental Constitutions of Carolina," which was to apply colony-wide, but ultimately was implemented only

partially and only in individual settlements. The Fundamental Constitutions made no explicit reference to reception or adoption of the common law of England, but their entire premise derived exclusively from the last feudal vestiges of English law. Lest any modern colonist reflect too deeply on its anachronisms, one provision of the "Constitutions" even prohibited commentary on the colonial laws:

> Since multiplicity of Comments, as well as of laws, have great inconveniences, and Serve only to obscure and perplex, all manner of comments and expositions on any part of these fundamental constitutions, or on any part of the Common or Statute law of Carolina, are absolutely prohibited. n637

Despite the inadequacies and anachronisms of the Fundamental Constitutions, they did help establish a system of representative government that eventually led to the demise of the proprietary system in North Carolina.

Between 1689 and 1713 the administration of Carolina was formally divided between North Carolina and South Carolina; thereafter the crown took over the colonies and in 1729 created the royal provinces of North and South Carolina.

Until 1751 the laws of the colony were prepared and circulated only in manuscript form. The first printing in 1751 gave the full text of only the laws then in force, while obsolete or repealed acts were indicated by title only. One of the superseded acts from 1711 contained a lengthy provision on the applicability of English law in the colony:

> III. And whereas this Province is annexed to and declared to be a member of the Crown of England, yet notwithstanding disputes do often arise concerning the Laws of England, how far they are in force in this Government; and it appearing by the Charter that the power therein granted of making Laws are limited with the expression Viz. Provided such Laws be consonant to reason, and as near as may be agreeable to the Laws and Customs of Our Kingdom of England, from whence it is manifest that the Laws of England are the Laws of this Government, so far as they are compatible with our way of living and Trade, Be it therefore Enacted by the authority aforesaid, and it is hereby Enacted and declared that the common Law is and shall be in force in the Government except such part of the practice in the issueing out and return of Writts, and proceedings in the Court of Westminster which for want of several Officers, cannot be put in execution, which ought to be supplied by Rules of the General Court of this Government, being first approved of by the Governor in Council which shall be good in Law from time to time till it shall be altered by Act of Assembly.
>
> IV. And be it further Enacted and Declared by the authority aforesaid that all statute Laws of England made for maintaining the Queen's Royal Prerogative and the security of her royal person and succession of the Crown, and all such Laws made for the establishment of church and the Laws made for granting Indulgencies to the protestant dissenters, and all Laws providing for the privileges of the people and security of trade as also statute Laws made for Limitation of Actions and for preventing vexatious Lawsuits, and for preventing immorality and frauds, and confirming Inheritances and Titles of Land are and shall be in force here, altho' this province or the plantations in general are not therein named. n638

A North Carolina enactment of 1715, repealed in 1745, required an oath of fealty to English law of every member of the Council or proprietor's deputy who might be called upon to give "his opinion or determination in any cause":

> [Every council member or deputy] shall upon his entering into that Office take an Oath that he will do right to all manner of persons according to the best of his Judgment & understanding of the Laws and Usages of the Kingdom of Gt. Britain... n639

The North Carolina Assembly, in its second 1749 session, enacted a lengthy provision specifying approximately 202 chapters of about 110 English statutes "to be in as full Force, Power, and Virtue, as if the same had been specially Enacted and made for this Province, or as if the same had been made and Enacted therein, by any General Assembly

thereof...." n640 In the third session of the same 1749 Assembly, an appropriation was made enabling justices to obtain specified law books. n641

Upon attaining independence and statehood, North Carolina continued its reliance on the English common law. In its first constitution, of 1776, no direct provisions concerning common law were included, only a section confirming land titles:

> That nothing herein contained shall affect the titles or possessions of individuals holding or claiming under the laws heretofore in force, or grants heretofore made by the late King George II or his predecessors, or the late lords proprietors or any of them. n642

Another section required the future legislatures of the state "to regulate entails, in such a manner as to prevent perpetuities." n643 This provision was continued in the 1868 constitution, n644 along with a new provision in the judicial article declaring that "The laws of North Carolina, not repugnant to this constitution or to the Constitution and laws of the United States, shall be in force until lawfully altered." n645 Both provisions were continued in the constitution of 1876. n646 In the current constitution, of 1972, appears only the declaration that "The laws of North Carolina not in conflict with this Constitution shall continue in force until lawfully altered." n647

The more direct mode of common law reception in the state of North Carolina has been by legislation, beginning in 1778:

> I. Whereas doubts may arise, upon the Revolution in Government, whether any and what Laws continue in force here: For Prevention of Which,
>
> II. Be it enacted by the General Assembly of the State of North Carolina, and it is hereby enacted by the Authority of the same, That all such Statutes, and such Parts of the Common Law, as were heretofore in Force and Use within this Territory, and all the Acts of the late General Assemblies thereof, or so much of the said Statutes, Common Law, and Acts of Assembly, as are not destructive of, repugnant to, or inconsistent with the Freedom and Independence of this State, and Form of Government therein established, and which have not been otherwise provided for, in the Whole or in Part, not abrogated, repealed, expired, or become obsolete, are hereby declared to be in full force within this State. n648

With only minor modifications, this provision is carried in the current North Carolina statutes:

> All such parts of the common law as were heretofore in force and use within this State, or so much of the common law as is not destructive of, or repugnant to, or inconsistent with, the freedom and independence of this State and the form of government therein established, and which has not been otherwise provided for in whole or in part, not abrogated, repealed, or become obsolete, are hereby declared to be in full force within this State. n649

Judicial interpretations of this legislative provision have added some detail to the matter of reception. For instance, it has been held that under this section is adopted the common law of England as of the date the Declaration of Independence was signed. n650 In a modern property-related instance of the continuing viability of the common law in North Carolina, the common law rule that future interests in personal property may be created by will but not by deed was applied in a 1952 case. n651

§ 7.02(ii) North Dakota.

The southwestern part of North Dakota was first part of French territory when La Salle made a claim for the entire Mississippi River drainage system in 1682. The northeastern portion of North Dakota also became subject to French claims for territory south of Hudson, but this claim was ceded to the British in 1713. First explorations in the area were

by the French beginning in 1738. From these activities, and even after the Lewis and Clark expedition in 1804-1806, only a few forts and trading posts were established, and the land remained inhabited almost entirely by Indians.

The sovereignty over the land was nominally French at first. The southern part of North Dakota (land south or west of the Mississippi River) was included in the territory of the Louisiana Purchase, but hardly shared in the common French and Spanish legal heritage belonging to that area, inasmuch as virtually no permanent settlements existed in North Dakota before the Louisiana Purchase. French governance over the region ended with the arrival of a Spanish governor in 1769, and Spanish authority ended in 1803. Upon his assumption of office in 1769, the Spanish governor officially proclaimed the substitution of Spanish law for all prior laws in the area. n652

When the new American governor arrived in New Orleans in 1804, he created a "court of common pleas" with proceedings in English, signifying an abrupt transition into an American common law system. Reacting to local protest, Congress later in that same year separated the area of Louisiana state, called the Territory of Orleans, from the rest of the Louisiana territory, designating the remainder as the District of Louisiana and placing it administratively under the Territory of Indiana. n653 Existing law was continued in force for the District of Louisiana: "The laws in force in the said district of Louisiana, at the commencement of this act, and not inconsistent with any of the provisions thereof, shall continue in force until altered, modified or repealed by the governor and judges of the Indiana territory, as aforesaid." n654

The Indiana territorial government enacted certain laws of the new territory between 1804 and 1805, all of them with a pronounced common law flavor, and in 1806 Congress established a separate administration for the area, redesignating it the Territory of Louisiana. Statutes enacted after this change also covered familiar common law subjects. In 1812 the Territory of Louisiana was granted the right to its own legislative assembly, and its name was changed to the Territory of Missouri. A territorial enactment in 1815 authorized the recording of land titles acquired during the period of Spanish government, but in 1816 the territorial legislature adopted a broad common law reception statute:

> The common law of England, which is of a general nature, and all statutes made by the British parliament in aid of or to supply the defects of the said common law, made prior to the fourth year of James the first, and of a general nature, and not local to that kingdom, which said common law and statutes are not contrary to the laws of this territory, and not repugnant to, nor inconsistent with the constitution and laws of the United States shall be the rule of decision in this territory, until altered or repealed by the legislature, any law, usage, custom to the contrary notwithstanding, provided, however, that none of the British statutes respecting crimes and punishments shall be in force in this territory, nor shall any person be punished by common law, where the laws and statutes of this territory have made provision on the subject, but where the laws and statutes of the United States and this territory have not made provision for the punishment of offences, the several courts may proceed to punish for such offences, provided, the punishment shall in no case be other than fine and imprisonment, and the term of imprisonment shall not exceed two months; and the fine shall not exceed one hundred dollars. n655

A companion provision to this general common law reception statute indicated certain real property common law doctrines that were excepted from this reception:

> The doctrine of survivorship in cases of joint tenants shall never be allowed, in this territory. The doctrine of entails shall never be allowed, and in all cases where any real estate shall be entailed, the whole of the right and interest of, in, and to the same, shall vest in fee simple in the person having the first reversion or remainder in said estate, after the life estate is determined in said estate. n656

When the State of Missouri was formed in 1821, no actual governmental authority applied to the Louisiana Purchase territory north of Missouri, including North Dakota, until 1834, when Congress attached it to the Territory of Michigan. n657

Meanwhile, the portion of North Dakota not in the Louisiana Purchase was ceded by Britain to the United States in 1818 and added to the Michigan Territory. The Michigan Territory had originally been part of Indiana Territory, which, when it was created in 1800, n658 had been required to create "a government in all respects similar to that provided by [the Northwest Ordinance]; and the inhabitants thereof shall be entitled to, and enjoy all and singular the rights, privileges and advantages granted and secured to the people by the said ordinance." n659

A separate Michigan Territory was established in 1805, n660 and the enabling act required the new territory to form a government in conformance with the Northwest Ordinance. n661 The Northwest Ordinance, enacted while the Articles of Confederation were in effect, ensured to the inhabitants of the territory judicial proceedings according the course of the common law, among other rights:

> The inhabitants of the said territory shall always be entitled to the benefits of the writs of *habeas corpus*, and of the trial by jury; of a proportionate representation of the people in the legislature, and of judicial proceedings according to the course of the common law. All persons shall be bailable, unless for capital offenses, where the proof shall be evident, or the presumption great. All fines shall be moderate; and no cruel or unusual punishments shall be inflicted. No man shall be deprived of his liberty or property, but by the judgment of his peers, or the law of the land, and should the public exigencies make it necessary, for the common preservation, to take any person's property, or to demand his particular services, full compensation shall be made for the same. And, in the just preservation of rights and property, it is understood and declared, that no law ought ever to be made or have force in the said territory, that shall, in any manner whatever, interfere with or affect private contracts, or engagements, *bona fide*, and without fraud previously formed... n662

The Northwest Ordinance also required the appointment of a three-judge court, the judges to "have a common-law jurisdiction," and who, with the governor, "shall adopt and publish in the district such laws of the original States, criminal and civil, as may be necessary, and best suited to the circumstances of the district." n663 In 1795 the governor and the judges of the Northwest Territory enacted the Virginia reception statute of 1776 (even though Virginia had in 1792 repealed the portion of the statute receiving English statutes):

> That the common law of England, all statutes or acts of parliament made in aid of the common law prior to the fourth year of the reign of King James the first, and which are of a general nature, not local to the kingdom, together with the several acts of the general assembly of this colony now in force, so far as the same may consist with the several ordinances, declarations, and resolutions of the general convention, shall be the rule of decision, and shall be considered as in full force, until the same shall be altered by legislative power of this colony. n664

The Michigan territorial legislature apparently wished to start afresh with fundamental law, however, because legislation in 1810 purported to repeal all prior English statutes, French law and custom, and laws of the Northwest Territory and of the Indiana Territory, leaving only common law decisions in effect, by virtue of the Northwest Ordinance. This, then, would have been the status of common law reception in the northern part of North Dakota when that region was part of Michigan Territory. Michigan courts later modified this position to include reception of some older English statutes.

When Wisconsin Territory was established in 1836, the northern part of North Dakota became part of that territory until Wisconsin attained statehood in 1848.

Wisconsin's territorial enabling act n665 in 1836 authorized the formation of a government in conformance with the Northwest Ordinance and specifically continued in force the Michigan territorial laws in effect at the time:

> And be it further enacted, That the inhabitants of the said Territory shall be entitled to, and enjoy, all and singular the rights, privileges, and advantages, granted and secured to the people of the Territory of the United States northwest of the river Ohio, by the [Northwest Ordinance]; and shall be subject to all the conditions and restrictions and prohibitions in said articles of compact imposed upon the people of the said Territory. The said inhabitants shall also be entitled to all the rights, privileges, and immunities, heretofore granted and secured to the Territory of Michigan, and to its inhabitants, and the existing laws of the Territory of Michigan shall be extended over said Territory, so far as the same shall not be incompatible with the provisions of this act, subject, nevertheless, to be altered, modified, or repealed, by the Governor and Legislative Assembly of the said Territory of Wisconsin; and further, the laws of the United States are hereby extended over, and shall be in force in, said Territory, so far as the same, or any provisions thereof may be applicable. n666

The enabling act also declared that "the said supreme court and district courts, respectively, shall possess chancery as well as common law jurisdiction." n667

In 1838, while the northern part of North Dakota was still part of Wisconsin Territory, the Wisconsin territorial legislature followed Michigan's example and declared that statutes of Great Britain would not be considered law in the territory; that same legislature also repealed prior acts of Michigan territory, and then enacted a large compilation of laws borrowed mostly from Michigan, which in turn had been borrowed from New York, Ohio and Massachusetts. n668 However, much later and long after North Dakota was no longer part of Wisconsin, the Wisconsin Supreme Court followed the courts of Michigan and Iowa in reinvigorating the common law reception long after the legislative attacks. n669

Wisconsin was authorized for statehood in 1846, n670 and formally admitted in 1848. n671 In 1849 Congress created the Territory of Minnesota, n672 and included the northern portion of North Dakota, with the laws of Wisconsin Territory, in effect when Wisconsin was admitted as a state, continuing in force:

> And be it further enacted, That the inhabitants of the said Territory shall be entitled to all the rights, privileges, and immunities heretofore granted and secured to the Territory of Wisconsin and to its inhabitants; and the laws in force in the Territory of Wisconsin at the date of the admission of the State of Wisconsin shall continue to be valid and operative therein, so far as the same be not incompatible with the provisions of this act, subject, nevertheless, to be altered, modified, or repealed, by the governor and legislative assembly of the said Territory of Minnesota; and the laws of the United States are hereby extended over and declared to be in force in said Territory, so far as the same, or any provision thereof, may be applicable. n673

In addition, the territorial enabling act declared that "the said Supreme and District Courts, respectively, shall possess chancery as well as common law jurisdiction." n674

In 1854 all of North Dakota was included in the newly designated Nebraska Territory. In the territorial enabling act, n675 no explicit common law reception was mentioned. However, it was provided that the territorial supreme and district courts "shall possess chancery as well as common law jurisdiction," n676 and federal law, except for the 1820 Missouri Compromise legislation, was declared applicable in the new territory. n677 Thereafter, in its first session, the Nebraska territorial legislature enacted a common law reception provision:

> That so much of the common law of England as is applicable and not inconsistent with the constitution of the United States, with the organic law of this Territory, or with any law passed or to be passed by the Legislature of this Territory be and the same is adopted and declared to be law within said Territory. n678

North Dakota remained in Nebraska Territory until 1861, when it was included in the newly formed Dakota Territory. n679 The territorial enabling act had no provision for continuing prior laws in force, but did decree that the territorial supreme and district courts "shall possess chancery as well as common-law jurisdiction...." n680 In the territorial legislation thereafter only a slight acknowledgement of common law reception was made in the provision that "In this Territory there is no common law in any case where the law is declared by the Codes." n681

When North Dakota was approved for statehood in 1889, n682 the enabling act continued prior laws in force:

> [A]ll laws in force made by said Territories, at the time of their admission into the Union, shall be in force in said States, except as modified or changed by this act or by the constitutions of the States, respectively. n683

The 1889 constitution of North Dakota contained a provision continuing prior laws in force, and, although this document remains the current state constitution, that provision has since been repealed:

> All laws now in force in the territory of Dakota, which are not repugnant to this Constitution, shall remain in force until they expire by their own limitations or be altered or repealed. n684

The current North Dakota statutes more fully acknowledge the existence of the common law than did the territorial legislature, but the following series of statutory provisions, undoubtedly affected by the Dakota Territory adoption of the Field codification in 1866, hardly amount to an overt reception of the common law:

> 1-01-02. Origin of law. Law is a rule of property and of conduct prescribed by the sovereign power.
>
> 1-01-03. Expression of law. The will of the sovereign power is expressed by:
>
> 1. The Constitution of the United States.
>
> 2. Treaties made under the authority of the United States.
>
> 3. Statutes enacted by the Congress of the United States.
>
> 4. The constitution of the state.
>
> 5. The statutes of the state.
>
> 6. The ordinances of other and subordinate legislative bodies.
>
> 7. The decisions of the tribunals enforcing those rules, which, though not enacted, form what is known as customary or common law.
>
> 1-01-04. Common law divided. The common law is divided into:
>
> 1. Public law, or the law of nations; and
>
> 2. Domestic or municipal law.
>
> 1-01-05. Evidence of common law. The evidence of the common law is found in the decisions of the tribunals.
>
> 1-01-06. Code excludes common law. In this state there is no common law in any case where the law is declared by the code. n685

Despite this somewhat offhanded treatment of common law reception, North Dakota courts have accepted the common law as the rule of decision where there is no express constitutional or statutory declaration on a subject; n686 "common law is by statute ... declared to be the basic law ..."; "by statute the provisions of the Civil Code are to be considered as but continuations of the common law...." n687 An example of the interplay between the common law and statutory law was noted by a federal bankruptcy court in North Dakota:

> The [North Dakota state] court held that common law lien rights are not defeated by a statute's silence because the Code is a continuation of the common law and the two must be construed together where the Code merely declares a lien already recognized at common law but is silent on the question of priority. n688

§ 7.02(jj) Ohio.

Ohio was first claimed in rather vague fashion by the French during the 17th century, ceded by treaty to the British in 1697, and, following Queen Anne's War in 1701-1703, was an area of predominantly French influence. When Virginia obtained huge tracts of Ohio land for sale to settlers, beginning in 1750, the French responded by building forts and repulsing a British military expedition under General Braddock in 1755. However, the area returned to British control in 1763 at the end of the French and Indian War. Under the terms of the 1774 Quebec Act, Ohio was governed as part of British Canada. n689 This act continued to enforce both French and English rights and titles:

> Provided always, and be it enacted, That nothing in this Act contained shall extend, or be construed to extend, to make void, or to vary or alter any Right, Title, or Possession, derived under any Grant, Conveyance, or otherwise, however, of or to any Lands within the said Province, or the Provinces thereto adjoining; but that the same shall remain and be in Force, and have Effect, as if this Act had never been made. n690

During the American Revolution, the Ohio area was captured and controlled for Virginia by George Rogers Clark, and eventually ceded to the United States under the terms of the Northwest Ordinance. The Northwest Ordinance, enacted while the Articles of Confederation were in effect, ensured to the inhabitants of the territory judicial proceedings according to the course of the common law, among other rights:

> The inhabitants of the said territory shall always be entitled to the benefits of the writs of *habeas corpus*, and of the trial by jury; of a proportionate representation of the people in the legislature, and of judicial proceedings according to the course of the common law. All persons shall be bailable, unless for capital offenses, where the proof shall be evident, or the presumption great. All fines shall be moderate; and no cruel or unusual punishments shall be inflicted. No man shall be deprived of his liberty or property, but by the judgment of his peers, or the law of the land, and should the public exigencies make it necessary, for the common preservation, to take any person's property, or to demand his particular services, full compensation shall be made for the same. And, in the just preservation of rights and property, it is understood and declared, that no law ought ever to be made or have force in the said territory, that shall, in any manner whatever, interfere with or affect private contracts, or engagements, *bona fide*, and without fraud previously formed. n691

The Northwest Ordinance also required the appointment of a three-judge court, the judges to "have a common-law jurisdiction," and who, with the governor, "shall adopt and publish in the district such laws of the original States, criminal and civil, as may be necessary, and best suited to the circumstances of the district...." n692 In 1795 the governor and the judges of the Northwest Territory enacted the Virginia reception statute of 1776 (even though Virginia had in 1792 repealed the portion of the statute receiving English statutes):

> That the common law of England, all statutes or acts of parliament made in aid of the common law prior to the fourth year of the reign of King James the first, and which are of a general nature, not local to

> the kingdom, together with the several acts of the general assembly of this colony now in force, so far as the same may consist with the several ordinances, declarations, and resolutions of the general convention, shall be the rule of decision, and shall be considered as in full force, until the same shall be altered by legislative power of this colony. n693

Ohio settlers' first representative under the terms of the Northwest Ordinance was appointed in 1799, and in 1800 Congress formed the Territory of Ohio and by 1802 had already acted to authorize formation of the state of Ohio. n694 A constitution was drafted in 1802, and then Ohio was admitted as a state in 1803. n695 Neither the statehood enabling nor admission acts contained provisions for reception of the common law or for continuing prior law in force, but the new constitution included such a provision: "All laws and parts of laws not in force in this Territory, not inconsistent with this constitution, shall continue and remain in full effect until repealed by the legislature, [except for an act regarding attorney qualifications...]." n696 The new constitution also declared that the state courts had both common law and chancery jurisdiction. n697

References to the state courts' common law and chancery jurisdiction were not included in Ohio's next constitution of 1851, but a provision to continue prior laws in force did appear: "All laws of this State in force on the first day of September, one thousand eight hundred and fifty-one, not inconsistent with this constitution, shall continue in force until amended or repealed." n698 This constitution and this provision remain currently in effect in Ohio.

Laws passed during the period of governance under the Northwest Ordinance were repealed by the state legislature in 1805, n699 and no common law reception statute has been subsequently enacted. However, in 1972, the state legislature did authorize consideration of common law as an aid in statutory interpretation:

> If a statute is ambiguous, the court, in determining the intention of the legislature, may consider among other matters:
>
> (A) The object sought to be attained;
>
> (B) The circumstances under which the statute was enacted;
>
> (C) The legislative history;
>
> (D) The common law or former statutory provisions, including laws upon the same or similar subjects;
>
> (E) The consequences of a particular construction;
>
> (F) The administrative construction of the statute. n700

Despite the absence of constitutional or statutory authority for common law reception, Ohio courts have presumed reception. The Ohio Court of Appeals declared the common law in effect insofar as it is adaptable to the needs of the jurisdiction:

> It has been rightly said that the common law has no force in this state, except in so far as it derives authority from judicial recognition in the practice and course of adjudication in our courts. But when natural justice requires, and reason prompts, the principles and rules of the common law are adopted in our theory of jurisprudence, when such do not conflict with statute and are adaptable to our circumstances. And we are drawn to the conclusion by the authorities, and the rule and reason of the common law, and its adaptability in this instance to our form of procedure... n701

Much earlier the Ohio Supreme Court had actually declared that the common law may provide the rule of decision in

Ohio courts, when not inconsistent with Ohio circumstances and institutions, even though not explicitly adopted by the state legislature:

> We profess to administer the common law of England, in so far as its principles are not inconsistent with the genius and spirit of our own institutions, or opposed to the settled habits, customs, and policy of the people of this State, thereby rendering it inapplicable to our situation and circumstances.
>
> It has not been adopted by express legislative enactment, but brought to the old States by our fathers, and constantly claimed as their birthright. Its introduction here by their descendants was almost a matter of course, and its terms and foundation principles have been so interwoven with our constitution and laws, so blended with the remedies we afford, and so constantly enforced by our courts, that its implied recognition by the government and people, may be fairly assumed; and if it cannot be said to be in force as the common law of England, it may not inaptly be termed the common law of Ohio. To it we constantly resort, when the positive law is silent or insufficient. Built up, as it has been, from the experience of ages, and constantly adapting itself to the business and relations of men in society, we seldom fail to find principles which, if carried to legitimate results, are not altogether sufficient to settle every controversy. If no precedent is found for a remedy to enforce an acknowledged right, one of its own cherished principles requires us to adapt one to the exigency, and to make good the maxim, that there is no legal right, without a legal remedy.
>
> Whatever is not prohibited, may be lawfully done. Whatever a man possesses, that the law recognizes as property, and may be used for his benefit, in a lawful manner. What it allows to one, it allows to all, and secures to all the enjoyment...
>
> These [are] the general principles of the common law... n702

§ 7.02(kk) Oklahoma.

The land that is now Oklahoma was first explored and claimed for Spain in 1541, then, without exploration, claimed for France as part of the Mississippi River drainage system late in the seventeenth century. When it was sold to the United States in 1803 as part of the Louisiana Purchase, it came under the same governance arrangements as the other parts of that region, although virtually no settlements existed to be governed at that time.

French governance over the region ended with the arrival of a Spanish governor in 1769, and Spanish authority ended in 1803. Upon his assumption of office in 1769, the Spanish governor officially proclaimed the substitution of Spanish law for all prior laws in the area. n703 When the new American governor arrived in New Orleans in 1804, he created a "court of common pleas" with proceedings in English, signifying an abrupt transition into an American common law system. Reacting to local protest, Congress later in that same year separated the area of Louisiana state, the Territory of Orleans, from the rest of the Louisiana territory, designating the remainder as the District of Louisiana and placing it administratively under the Territory of Indiana. n704 Existing law was continued in force for the District of Louisiana: "The laws in force in the said district of Louisiana, at the commencement of this act, and not inconsistent with any of the provisions thereof, shall continue in force until altered, modified or repealed by the governor and judges of the Indiana territory, as aforesaid." n705

The Indiana territorial government enacted certain laws of the new territory between 1804 and 1805, all of them with pronounced common law flavor, and in 1806 Congress established a separate administration for the area, redesignating it the Territory of Louisiana. Statutes enacted after this change also covered familiar common law subjects. In 1812 the Territory of Louisiana was granted the right to its own legislative assembly, and its name was changed to the Territory of Missouri. A territorial enactment in 1815 authorized the recording of land titles acquired during the period of Spanish government, but in 1816 the territorial legislature adopted a broad reception statute for the English common law:

> The common law of England, which is of a general nature, and all statutes made by the British parliament in aid of or to supply the defects of the said common law, made prior to the fourth year of James the first, and of a general nature, and not local to that kingdom, which said common law and statutes are not contrary to the laws of this territory, and not repugnant to, nor inconsistent with the constitution and laws of the United States shall be the rule of decision in this territory, until altered or repealed by the legislature, any law, usage, custom to the contrary notwithstanding, provided, however, that none of the British statutes respecting crimes and punishments shall be in force in this territory, nor shall any person be punished by common law, where the laws and statutes of this territory have made provision on the subject, but where the laws and statutes of the United States and this territory have not made provision for the punishment of offences, the several courts may proceed to punish for such offences, provided, the punishment shall in no case be other than fine and imprisonment, and the term of imprisonment shall not exceed two months; and the fine shall not exceed one hundred dollars. n706

A companion provision to this general common law reception statute indicated certain real property common law doctrines that were excepted from this reception:

> The doctrine of survivorship in cases of joint tenants shall never be allowed, in this territory. The doctrine of entails shall never be allowed, and in all cases where any real estate shall be entailed, the whole of the right and interest of, in, and to the same, shall vest in fee simple in the person having the first reversion or remainder in said estate, after the life estate is determined in said estate. n707

When the State of Missouri was formed in 1821, no actual governmental authority applied to Oklahoma until 1834, when Congressional legislation declared that region "taken and deemed to be Indian country." n708 The part of the Indian country including Oklahoma was annexed to the Territory of Arkansas. n709 Arkansas Territory had been creation in 1819, just three years after enactment of the Missouri reception statute, with the Missouri Territory laws then in effect adopted as its laws for the moment:

> And be it further enacted, That all the laws which shall be in force in the territory of Missouri, on the fourth day of July next, not inconsistent with the provisions of this act, and which shall be applicable to the territory of Arkansaw, shall, and continue, in force in the latter territory, until modified or repealed by the legislative authority thereof. n710

When Arkansas became a state in 1836, presumably the Missouri reception statute was left in effect in the Oklahoma Indian country, although it would have been considered applicable only to settlements of non-Indians in the area. In the event that the developing law of the state of Arkansas continued to be applicable in Oklahoma, it should be noted that leaders of Arkansas in 1836 drafted a constitution in anticipation of statehood, most of which document was effectively ratified when statehood was granted later that year. The new constitution provided "That all laws now in force in the Territory of Arkansas, which are not repugnant to this constitution, shall remain in force until they expire by their own limitations, or be altered or repealed by the general assembly." n711 More specifically, a common law reception statute was enacted in Arkansas shortly after statehood and a modern counterpart is in the current Arkansas code:

> The common law of England, so far as it is applicable and of a general nature, and all statutes of the British Parliament in aid of or to supply the defects of the common law made prior to March 24, 1606, which are applicable to our own form of government, of a general nature and not local to that kingdom, and not inconsistent with the Constitution and laws of the United States or the Constitution and laws of this state, shall be the rule of decision in this state unless altered or repealed by the General Assembly of this state. n712

Oklahoma was still Indian country in 1889 when a federal court was established there and the area was made subject to procedural laws of Arkansas.

However, in 1890, the Territory of Oklahoma, which encompassed only part of the present state of Oklahoma, was created n713 and declared subject to certain specific provisions of Nebraska state law, including Nebraska's 1855 common law reception statute. n714 In Nebraska's territorial enabling act, n715 no explicit common law reception had been mentioned. However, it was provided that the territorial supreme and district courts "shall possess chancery as well as common law jurisdiction," n716 and federal law, except for the 1820 Missouri Compromise legislation, was declared applicable in the new territory. n717 Thereafter, in its first session, the Nebraska territorial legislature had enacted a common law reception provision in 1855:

> That so much of the common law of England as is applicable and not inconsistent with the constitution of the United States, with the organic law of this Territory, or with any law passed or to be passed by the Legislature of this Territory be and the same is adopted and declared to be law within said Territory. n718

Nebraska had been authorized for admission to statehood in 1864, n719 and had become a state in 1867. n720 Its first constitution of 1866 had no reception provision but provided that "all laws now in force shall remain in force until altered, amended, or repealed by the legislature." n721 Current Nebraska state statutes have carried forward the territorial common law reception statute:

> Common law; applicability. So much of the common law of England as is applicable and not inconsistent with the Constitution of the United States, with the organic law of this state, or with any law passed or to be passed by the Legislature of this state, is adopted and declared to be law within the State of Nebraska. n722

Nebraska courts, in decisions subsequent to the adoption of Nebraska law in Oklahoma, but likely revealing the proper understanding of that law in 1890, have held that by this statute Nebraska "adopted the common law of England and not the statutory law of England." n723 They have also accorded a large flexibility to the concept of the common law:

> What is the meaning of the term "common law of England"...? Does it mean the common law as it stood at the time of the Declaration of Independence, or as it stood when our statute was enacted, or are we to understand the common-law system, in its entirety, including all judicial improvements and modifications in this country and in England, to the present time, so far as applicable to our conditions? We cannot think, and we do not believe this court has ever understood, that the Legislature intended to petrify the common law, as embodied in judicial decisions at any one time, and set it up in such inflexible form as a rule of decision. The theory of our system is that the law consists, not in the actual rules enforced by decisions of the courts at any one time, but the principles from which those rules flow; that old principles are applied to new cases, and the rules resulting from such application are modified from time to time as changed conditions and new states of fact require ... "We may look to American as well as English books, and to American as well as English jurists, to ascertain what this law is, for neither the opinions nor the precedents of judges can be said, with strict propriety, to be the law. They are only evidence of law." *Forbes v. Scannell, 13 Cal. 242, 286* . On this ground it was held in *Sayward v. Carlson, 1 Wash. St. 29, 33 Pac. 830* , that a statutory provision in Washington making the common law of England the rule of decision in all the courts did not confine the courts to the decisions of the English courts, and of those American courts which have followed them closely, for the interpretation of the law. Such has been the understanding of this court from the beginning. What Sir Frederick Pollock has called "the immemorial and yet freshly growing fabric of the common law" is to be our guide, not the decisions of any particular courts at any particular period. The term "common law of England," as used in the statute, refers to that general system of law which prevails in England, and in most of the United States by derivation from England, as distinguished from the Roman or civil law system, which was in force in this territory prior to the Louisiana purchase. Hence the statute does not require adherence to the

> decisions of the English common-law courts prior to the Revolution, in case this court considers subsequent decisions, either in England or America, better expositions of the general principles of that system. n724

In 1893, the Oklahoma territorial legislature enacted its own common law reception provision:

> The common law, as modified by constitutional and statutory law, judicial decisions and the condition and wants of the people, shall remain in force in aid of the Statutes of Oklahoma; but the rule of the common law, that statutes in derogation thereof, shall be strictly construed, shall not be applicable to any general statute of Oklahoma; but all such statutes shall be liberally construed to promote their object. n725

The part of the present state of Oklahoma that had not been included in Oklahoma Territory in 1890 was left in what was designated as Indian Territory and was made subject to certain statutes of Arkansas, n726 in addition to Arkansas procedural rules that had been made applicable in 1889. As has been discussed above, Arkansas state law at that time included a common law reception provision.

The parts of Oklahoma that were in Oklahoma Territory and Indian Territory were united into the State of Oklahoma, under Congressional authority enacted in 1906. n727 Laws in effect in the Territory of Oklahoma at the time statehood was attained would continue "in force throughout said State..." n728 Oklahoma was admitted as a state in 1907. n729 Current state statutes contain a reception provision n730 virtually identical to the 1893 enactment, quoted above and a separate provision limiting the rule of common law calling for strict construction of states in derogation of the common law. n731

The Oklahoma courts have taken a broad view of the common law, including within the concept not only the old English elements but also the notion of a flexible state court jurisprudence:

> The common law, followed in Oklahoma, refers not only to the ancient unwritten law of England, but also to that body of law created and preserved by decisions of courts. The common law is not static, but is a dynamic and growing thing and its rules arise from the application of reason to the changing conditions of society. Flexibility and capacity for growth and adaptation is its peculiar boast and excellence. n732

The Oklahoma Supreme Court, considering a case on the common law of waste, has also decided that English statutes enacted prior to the settlement of the earliest American colonies are part of the law of Oklahoma:

> We can only find four cases where the issue [reception of English statutes] has been addressed by the [Oklahoma] Supreme Court. Two of these cases construed the law prior to statehood. These two early decisions stated that the territory of Oklahoma was governed by the rule of common law as recognized and promulgated by the American courts; such law to include not only the unwritten English law but such English statutes mandatory of the common law, which were in general application and suited to our conditions, and which were enacted prior to the settlement of the colonies... [I]n most states English statutes are a part of the common law when such English statutes were adopted prior to the settlement of our colonies and are of a general nature and suitable to conditions in the states. Only three states have not adopted this view. We agree with the majority view and therefore shall follow the two pre-statehood Oklahoma decisions that English statutes adopted prior to the settlement of our colonies that were in general application and suited to our conditions as recognized and promulgated by the American courts are part of the common law of Oklahoma.
>
> We must now determine whether the Statute of Gloucester was an English statute that was recognized and promulgated by the American courts as appropriate to the different conditions and

> situations of an early America? The Statute of Gloucester changed the common law punishment for waste to forfeiture of the thing wasted and treble damages. The Statute of Gloucester was ignored for more than 300 years in England after its enactment, and was repealed in 1879 ... It is generally held that the Statute of Gloucester did not become a part of our common law as the strict English law of waste has never been appropriate to a new country like ours. We hold pursuant to the clear weight of authority that Oklahoma has not adopted the Statute of Gloucester as a part of the common law. Absent a permissible statute, forfeiture as a remedy for waste is not available. Oklahoma has no such statute. n733

§ 7.02(ll) Oregon.

The first formal European claim to the region that is now Oregon was made by the Spaniard Jose Estevan Martinez in 1789, but a more effective American claim was made soon after in 1792. While the area of Oregon state was not officially included in the Louisiana Purchase, part of the later established Oregon Territory was, and in any event, the Lewis and Clark expedition explored the lands of the Purchase and extended itself all the way to the Pacific coast. An American fur settlement was established in 1811, but sovereignty over the Oregon region changed hands during the War of 1812, and subsequent treaties attempted to resolve claims of rival Canadian and American fur companies. Not until 1839 did the first large group of American immigrant settlers arrive, prompting the formation of a provisional government in 1841. n734

In 1843 the settlers prepared Articles of Provisional Government, which were adopted in 1845. According to this document, laws of Iowa Territory and principles of common law and equity would be the laws in force in Oregon:

> The Laws of Iowa Territory shall be the Law of this Territory in Civil, Military and Criminal cases (where not otherwise provided for) and where no Statute of Iowa Territory applies, the principles of common Law and Equity shall govern. n735

In addition to this enactment, the provisional government's legislative committee adopted a similar provision governing judicial power in 1844:

> All of the statute laws of Iowa territory passed at the first session of the legislative assembly of said territory, and not of a local character, and not incompatible with the conditions and circumstances of this country, shall be the law of this government, unless otherwise modified; and the common law of England and principles of equity, not modified by the statutes of Iowa or of this government, and not incompatible with its principles, shall constitute a part of the law of this land. n736

Following adoption of the Organic Act in 1845, another enactment adopted as the laws of Oregon the statute laws of the territory of Iowa

> so far as applicable to the conditions of this country where not otherwise provided for by "the acts of the people of the House of Representatives of the Territory" and it was further provided that the common law of England should govern in all cases where no statute law had been made or adopted. The acts passed by the legislative committee of 1844 not incompatible with the original organic laws and not repealed by the house of representatives in 1845 were adopted as the laws of Oregon by a bill enacted August 23, 1845. n737

The predilection for Iowa law has been explained by the circumstance that there happened to be a copy of the Iowa code in Oregon at the time. n738

Iowa had attained territorial status in 1838, n739 and by its territorial enabling act had adopted "the existing laws of the Territory of Wisconsin...." n740 Wisconsin had become a territory in 1836, n741 and had as its law in force the laws imposed by the Northwest Ordinance and the laws of the Territory of Michigan. The Northwest Ordinance, enacted in

1787 while the Articles of Confederation were in effect, ensured to the inhabitants of the territory judicial proceedings according the course of the common law, among other rights:

> The inhabitants of the said territory shall always be entitled to the benefits of the writs of *habeas corpus*, and of the trial by jury; of a proportionate representation of the people in the legislature, and of judicial proceedings according to the course of the common law. All persons shall be bailable, unless for capital offenses, where the proof shall be evident, or the presumption great. All fines shall be moderate; and no cruel or unusual punishments shall be inflicted. No man shall be deprived of his liberty or property, but by the judgment of his peers, or the law of the land, and should the public exigencies make it necessary, for the common preservation, to take any person's property, or to demand his particular services, full compensation shall be made for the same. And, in the just preservation of rights and property, it is understood and declared, that no law ought ever to be made or have force in the said territory, that shall, in any manner whatever, interfere with or affect private contracts, or engagements, *bona fide*, and without fraud previously formed. n742

The Northwest Ordinance also required the appointment of a three-judge court, the judges to "have a common-law jurisdiction," and who, with the governor, "shall adopt and publish in the district such laws of the original States, criminal and civil, as may be necessary, and best suited to the circumstances of the district...." n743 In 1795 the governor and the judges of the Northwest Territory enacted the Virginia reception statute of 1776 (even though Virginia had in 1792 repealed the portion of the statute receiving English statutes):

> That the common law of England, all statutes or acts of parliament made in aid of the common law prior to the fourth year of the reign of King James the first, and which are of a general nature, not local to the kingdom, together with the several acts of the general assembly of this colony now in force, so far as the same may consist with the several ordinances, declarations, and resolutions of the general convention, shall be the rule of decision, and shall be considered as in full force, until the same shall be altered by legislative power of this colony. n744

Michigan Territory had been established in 1805, n745 and, even though the territory had a legal heritage of both English common law and elements of French law, it, too, was brought under the legal regime of the Northwest Ordinance. Michigan became a state in 1837, and was thus no longer a territory when Oregon invoked Michigan law in its provisional frame of government.

Therefore, the initial laws in force in the area of Oregon were the laws of Iowa territory, which were the common law and the laws of Wisconsin. The laws of Wisconsin were the laws of the Northwest Ordinance and the laws of Michigan territory. The Northwest Ordinance, which was also extended to the Michigan territory, imposed a common law system over its jurisdictions.

After the United States and Great Britain began, by a treaty of 1846, to resolve their jurisdictional claims to what is now the Pacific Northwest area of the United States, the Oregon Territory was established in 1848. n746

The territorial enabling act for Oregon contained no provisions for common law reception or even for continuing prior laws in force. Instead, it declared that "all such laws, or any law or laws inconsistent with the provisions of this act, shall be utterly null and void," n747 and also voided prior land grants:

> ...all laws heretofore passed in said Territory making grants of land, or otherwise affecting or incumbering the title to lands, shall be, and are hereby declared to be, null and void; and the laws of the United States are hereby extended over, and declared to be in force in, said Territory, so far as the same, or any provision thereof, may be applicable. n748

One provision continuing prior law in force pertained to judicial proceedings pending at the time the territory was created, which were transferred to the territorial district court; also "penalties, forfeitures, actions, and causes of action" were made recoverable "in like manner as they would have been under the laws in force within the limits composing said Territory at the time this act shall go into operation." n749

A portion of Oregon territory was assigned to the newly formed Washington Territory in 1853. n750 When Oregon attained statehood in 1859, the enabling act n751 included no provision for reception of common law or for continuing prior laws in force. However, two years earlier, in anticipation of statehood, citizens had adopted a constitution containing a provision continuing prior laws in force, and this section is still in effect:

> All laws in force in the Territory of Oregon when this Constitution takes effect, and consistent therewith, shall continue in force until altered or repealed. n752

The Oregon Supreme Court has interpreted this provision as leaving in force the common law, in the sense of an evolving body of law, insofar as it is not in conflict with legislation or constitutional provisions:

> The "common law of England" was adopted prior to statehood or official territorial status by Oregon's provisional government. Act of July 5, 1843, Art 12, *reprinted in* Harris, *History of the Oregon Code, 1 Or L Rev 129, 135 (1922);* Act of June 27, 1844, Art III, 1 *reprinted in id. at 138.* The common law, in the sense of an evolving body of law, continues in force insofar as it is not in conflict with legislation or constitutional provisions. *See* Or. Const., Art. XVIII, 7; *Peery v. Fletcher, 93 Or. 43, 52-54, 182 P. 143 (1919)* . n753

The state Supreme Court, in a case cited with approval by the 1987 Court, as noted above, has also held that English statutes were included in Oregon's common law reception:

> It is stated as a general rule that English statutes passed before the emigration of our ancestors, in aid or amendment of the common law, applicable to our condition, and not repugnant to our institutions, constitute a part of our common law...
>
> The common law, as it existed in England at the time of the settlement of the American colonies, has never been in force in all of its provisions in any colony or state of the United States. It has been adopted so far only as its general principles were suited to the habits and conditions of the colonies, and in harmony with the genius, spirit, and objects of American institutions. Different geographical conditions may justify modifications, and whether common-law rules will be followed strictly in the United States will, necessarily, where no vested rights are actually concerned, depend upon the extent to which they are reasonable and in consonance with public policy and sentiment. What may be the common law in one state is not necessarily so considered in another. In many jurisdictions in the United States the rules of the common law of England have been held by the courts to be in full force so far as the same are applicable and of a general nature, and are not in conflict with the Constitution or special enactments of the Legislature. This is the rule in Oregon... In some of the states all statutes and acts of the British Parliament of James the First are declared to be a part of the law of the state... The common law with all the statutes amending it prior to a certain time was adopted excluding statutes passed afterwards unless expressly adopted. In applying the general rule to a state which, like ours, had no political existence before the Revolution, it must in harmony with reason be held that, when our territorial Legislature and the framers of our Constitution and our courts recognized the existence here of the common law, they must have had reference to that law as it existed, modified, and amended by the English statutes passed prior to the Revolution... It is not necessary in the case at bar to fix the exact age of the English statutes which were ingrafted into the common law and recognized as a part of the law of this state. n754

In matters of land law Oregon has legislated extensively, including statutory regulation of such matters as the rule

against perpetuities n755 and extinguishment of certain future interests. n756 Oregon previously adopted and then repealed a community property law for marital property.

§ 7.02(mm) Pennsylvania.

Beginning in 1638, Swedish and Dutch settlements arose in land that is now Pennsylvania. In 1664 the English King Charles II granted to his brother the Duke of York lands that included the present states of Pennsylvania, as well as New York, New Jersey, and Delaware, and encompassing much territory that the Dutch claimed in America; this led directly to the English takeover of New Amsterdam, quickly renamed New York. The royal charter authorizing this was based firmly on English common law, expressed in terms of the fullest property rights consistent with the feudal incidents still connected with the English tenure of free and common socage. The grantee, as a feudal lord, was given extensive powers of government and court jurisdiction and told that the laws to be administered in the granted lands were to be not contrary to and as near " 'as conveniently may bee' to the laws of England, [with] judicial judgments and sentences ... subject to a right of appeal in England." The powers of the 1664 charter were implemented by the "Duke's Law" of 1665, a collection of typical English laws adapted to the frontier environment.

For the next fifteen years, uncoordinated settlement activity emanating from several sources proceeded, until by a royal patent dated March 4, 1680, William Penn received from King Charles II a patent for lands and a grant of governmental authority in the province of Pennsylvania. By deed of feoffment dated August 4, 1682, the Duke of York granted to Penn all the lands in the New York provincial territory covered by the royal patent to Penn from the king, which meant conveyance of title to the Pennsylvania lands. n757

Pursuant to the patent, Penn had obtained a charter in January, 1682, which declared the colony's reliance on English common law:

> ...[W]ee ... doe grant free, full and absolute power, by vertue of these presents to him and his heirs for the good and happy government of the said Countrey, to ordeyne, make, enact and under his and their Seals to publish any Lawes whatsoever by and with the advice, assent and approbacon of the freemen of the said Countrey, or the greater part of them Provided; Nevertheless, that the said Lawes bee consonant to reason, and bee not repugnant or contrarie, but as neere as conveniently may bee agreeable to the Lawes, statutes and rights of this our Kingdome of England... n758

The creation of English property rights, including suspension of certain statutory restraints, was also authorized:

> ...Wee have given and granted ... unto the said William Penn ... full and absolute power, licence and authoritie, That he ... from time to time hereafter forever, att his ... will or pleasure, may assigne, alien, grant, demis or infeoffe of the premises, soe many, and such partes and parcells to him or them, that shall be willing to purchase the same, as they shall think fitt. To Have And To Hold to them, the said person and persons willing to take or purchase in fee simple or feetaile, or for the term of life, or liues, or yeares, to be held of the said William Penn as of the seigniory of Windsor, by such services, customes and rents, as shall seeme fitt to the said William Penn, and not imediately of us the Statute Quia Emptores terrarum ... in any wise notwithstanding. n759

Any reliance on English common law or the rights and liberties of English citizens was not made explicit in the subsequent documents promulgated by Penn to govern the colony, including the 1682 First Frame of Government, the 1683 Charter of Liberty, the 1683 Second Frame of Government, the 1696 Third Frame of Government, or the 1701 Charter of Privileges.

Likewise, in the 1776 constitution is no provision adopting or receiving in force the English common law. In the 1790 constitution is found a provision receiving laws already in force, without specific reference to the common law:

> That no inconvenience may arise from the alterations and amendments in the constitution of this commonwealth, and in order to carry the same into complete operation, it is hereby declared and ordained:
>
> Section 1. That all laws of this commonwealth, in force at the time of making the said alterations and amendments in the said constitution, and not inconsistent therewith, and all rights, actions, prosecutions, claims, and contracts, as well of individuals as of bodies-corporate, shall continue as if the said alterations and amendments had not been made. n760

This provision was continued in later Pennsylvania constitutions, but is not included in the current constitution. However, by legislation in 1777 a type of reception statute was enacted, and in the following form this lengthy legislation appeared in modern Pennsylvania statutes until repealed in 1972:

> § 151. Whereas by the unconstitutional power claimed by the British king and parliament over the American colonies, and the cruel and oppressive measures which the said king and parliament have pursued to establish that power, it became necessary for the colonies to declare themselves free and independent states, which was accordingly done, pursuant to a resolve of the Continental Congress; whereupon all authority being in any person under the said king consequently ceased, and the laws enacted by his representatives here became of no force or effect, although the same were for the most part suited to the circumstances of the people; whereas it is absolutely necessary for the well-governing of every state, that laws properly adapted to the circumstances of the inhabitants be at all times in force.
>
> § 152. Each and every one of the laws or acts of general assembly, that were in force and binding on the inhabitants of the said province on the 14th day of May last, shall be in force and binding on the inhabitants of this state, from and after the 10th day of February next, as fully and effectually, to all intents and purposes, as if the said laws, and each of them, had been made or enacted by this general assembly: and all and every person and persons whomsoever are hereby enjoined and required to yield obedience to the said laws, as the case may require, until the said laws or acts of general assembly, respectively, shall be repealed or altered, or until they expire by their own limitation: and the common law and such of the statute laws of England, as have heretofore been in force in the said province, except as hereafter excepted.
>
> § 154. Provided always, that so much of every law or act of general assembly of the province aforesaid, as orders taking or subscribing any oath, affirmation or declaration of allegiance or fidelity to the king of Great Britain, or his successors, or oath of office; and so much of every law or act of general assembly aforesaid, as acknowledges any authority in the heirs or devisees of William Penn, Esq., deceased, the former governor of the said province, or any other person whomsoever as governor; and so much of every law or act of general assembly, as ascertains the number of members of assembly in any county, the time of election and the qualifications of electors; and so much of every law or act of assembly aforesaid, as declares, orders, directs or commands any matter or thing repugnant to, against, or inconsistent with the constitution of this commonwealth, is hereby declared not to be revived, but shall be null and void, and of no force or effect; and so much of the statute laws of England aforesaid relating to felonies, as takes notice of or relates to treason or misprision of treason, or directs the style of the process in any case whatsoever, shall be, and is hereby declared, of no force or effect, anything herein contained to the contrary notwithstanding. n761

This reception statute has now been modernized and streamlined into the following text:

> § 15.03. (a) English law. -- The common law and such of the statutes of England as were in force in the Province of Pennsylvania on May 14, 1776, and which were properly adapted to the circumstances of the inhabitants of this Commonwealth shall be deemed to have been in force in this Commonwealth from

and after February 10, 1777.

(b) Provincial statutes. -- The statutes enacted on or before May 14, 1776, under the authority of the late Proprietaries of the Province of Pennsylvania have the same validity and effect as statutes enacted under the authority of this Commonwealth.

(c) Exceptions. -- The rules specified in subsections (a) and (b) of this section shall not be applicable to any statute or law which:

(1) has been heretofore or is hereafter amended or repealed or which has expired by its own limitation;

(2) orders the taking or subscribing any oath, affirmation or declaration of allegiance or fidelity to the British crown;

(3) acknowledges any authority in the heirs or devisees of William Penn, Esq., deceased, the former Governor of the Province of Pennsylvania, or any other person whomsoever as Governor of the Province of Pennsylvania; or

(d) is repugnant to the Constitution of this Commonwealth or of the United States. n762

Similar to the undertaking by North Carolina in 1749, in 1807 the Pennsylvania legislature ordered the Supreme Court judges to determine which English statutes were then in force in the state and should be continued in force. n763 The resulting report identified 180 statutes then in force, all but fourteen of which should be continued in force. n764 Accompanying this element of the report was a lengthy but informative comment on the factors considered in determining the reception of common and statutory law, especially with respect to property rights:

It is provided by the charter, that the laws for the regulating and governing of property, as well for the descent and enjoyment of lands, as likewise for the enjoyment and succession of goods and chattels, and likewise as to felonies, within the said province, shall be and continue the same as they shall be for the time being, by the general course of the law in the kingdom of England, until the said laws be altered by the said William Penn, his heirs or assigns, and by the freemen of the said province, their delegates or deputies, or the greater part of them. Notwithstanding the generality of these expressions, it has always been held, that many of the :mb English :mx laws, relating both to property and to felonies, would have been improper for the state of things in an infant colony; and accordingly they were never practically extended here. It is the true principle of colonization, that the emigrants from the mother country carry with them such laws as are useful in their new situation, and none other. A multitude of English statutes, relating to the king's prerogative, the rights and privileges of the nobility and clergy, the local commerce and revenue of England, and other subjects unnecessary to enumerate, were improper to be extended to Pennsylvania. In order to execute the duty required of them, it was necessary for the judges to examine the code of English statute law from the beginning to the time of the settlement of Pennsylvania; and to weigh deliberately which of them were proper to be adopted. But this was not all. It was essential that our own statute book should be examined, to see in what cases the English law had been altered, or in what cases it had been expressly extended here. Wherever our own legislature had enacted a law on the same subject on which an English statute was to be found, it has been supposed that the English statute had no force here, even if it contained more extensive provisions than our own act of assembly; because it was reasonable to presume, that our assembly were acquainted with the English statute, and designedly omitted some of its provisions.

Besides these inquiries, it was necessary to ascertain, what had been the decisions of our own courts, respecting the extension of English statutes. This was no easy task, as we have no printed reports prior to

> our revolution, of cases determined in our courts of justice. Of course these decisions are only to be known by tradition, or manuscript notes in the possession of the gentlemen of the bar, or judges.
>
> With respect to English statutes enacted since the settlement of Pennsylvania, it has been assumed as a principle, that they do not extend here, unless they have been recognized by our acts of assembly, or adopted by long continued practice in courts of justice. Of the latter description there are very few, and those, it is supposed, were introduced from a sense of their evident utility. As English statutes they had no obligatory force but from long practice they may be considered as incorporated with the law of our country. n765

Among the modern judicial commentary on common law reception in Pennsylvania is a 1949 decision declaring rather broadly that the English common law became the law of the commonwealth of Pennsylvania, n766 a 1955 decision noting that the common law of England as to crimes is in force except insofar as it has been abrogated by statute, n767 and a 1961 decision declaring a statute of Henry VIII still in effect as to lessors' reversionary interests. n768

§ 7.02(nn) Rhode Island.

Rhode Island emerged almost inadvertently out of an amalgamation of three independent settlements -- Providence, Portsmouth and Newport -- and later joined by the town of Warwick. In 1647, acting with the authority of a charter obtained from a revolutionary English government, they combined into a colony. Before that time, Rhode Island had functioned independent of any superior government authority or authorization.

The natural impulse of these independent settlers was apparently not to invoke the common law as a legal foundation for their enterprises. When the Portsmouth settlers did bother to formalize their local government structure, they entered into a plantation covenant, declaring that the covenantors "incorporate ourselves into a Bodie Politick and ... submit our persons ... to all those perfect and most absolute laws of [Jesus Christ] given us in his holy word of truth, to be guided and judged thereby." n769 The man chosen as judge covenanted "to do justice and Judgment impartially according to the lawes of God, and to maintaine the Fundamentall Rights and Privileges of this Bodie Polltick...." n770

When several of the leading men of Portsmouth moved to a better site, now known as Newport, the remaining members adopted a new covenant on April 30, 1639. A striking difference from the first covenant is that the signers departed from their earlier position of recognizing no earthly superior governing authority. They agreed that they "[doe acknowledge] ourselves the legall subjects of [his Majestie] King Charles, and in his name [doe hereby binde] ourselves into a civill body politicke, unto his lawes according to matters of justice." n771

Meanwhile the Newport colonists in 1640 acknowledged King Charles as their sovereign and made overtures of union toward Portsmouth, which union was amicably achieved. A general court of the unified communities on March 16-19, 1641, restated the settlers' notions of their source of governmental authority:

> It is ordered and unanimously agreed upon, that the Government which this Bodie Politick doth attend unto in this Island, and the Jurisdiction thereof, in favour of our Prince is a Democracie, or Popular Government; that is to say, It is in the Powre of the Body of Freemen orderly assembled, or the major part of them, to make or constitute Just Lawes, by which they will be regulated, and to depute from among themselves such Ministers as shall see them faithfully executed between Man and Man. n772

All of the first Rhode Island settlements shared the common characteristic of being utterly without a superior governing authority and -- necessarily -- being without any authority to colonize or conduct governmental activities, except such authority as they agreed to exercise among themselves. Roger Williams therefore traveled to England and obtained a patent in 1644. That patent obtained by Roger Williams declared the basic authority for law and governance, and

confirmed the rights to the land: The Earl of Warwick, as governor-in-chief of the plantations, and a majority of commissioners by the authority of Parliament,

> do ... give, grant, and confirm, to the aforesaid Inhabitants of the Towns of Providence, Portsmouth, and Newport, a free and absolute Charter of Incorporation ... Together with full Power and Authority to rule themselves, and such others as shall hereafter inhabit within any Part of the said Tract of land, by such a Form of Civil Government, as by voluntary consent of all, or the greater Part of them, they shall find most suitable to their Estate and Condition ... Provided, nevertheless, that the said Laws, Constitutions, and Punishments, for the Civil Government of the said Plantations, be conformable to the Laws of England, so far as the Nature and Constitution of the place will admit. n773

In 1647 a code of laws was drawn up by representatives from all the settlements. In this code, the delegates consented to be governed by the laws of England, "together with the way of the Administration of them, soe far as the nature and constitution of this Plantation will admit...." n774 They agreed that their legislation "shall be conformable to the laws of England so far as the nature and constitution of our place will admit. n775

Upon restoration of the Stuart monarchy in 1660, it was necessary to obtain a new charter, which was issued in 1663. In this charter the rights of the people in conducting their land affairs as if in England was confirmed. The named patentees and others thereafter admitted to their number, were constituted "a Body Corporate and Politick in Fact and Name" and

> They and their Successors, shall and may have Perpetual Succession... And also to have, Take, Possess, Acquire, and Purchase Lands, Tenaments and Hereditaments, or any Goods or Chattels; and the same to Lease, Grant, Demise, Aliene, Bargain, Sell and dispose of, at their own will and Pleasures, as other our Leige People of this Our Realm of England...." n776

Another provision invoked the law of England where no law of the colony afforded a remedy.

The 1663 charter remained in force until Rhode Island adopted its first constitution in 1842. A provision in this document, which remains in force today, continues the validity of existing statutes and rights of actions, but otherwise does not mention the common law of England:

> All statutes, public and private, not repugnant to this constitution, shall continue in force until they expire by their own limitations, or are repealed by the general assembly. All charters, contracts, judgments, actions and rights of action shall be as valid as if this constitution had not been made. n777

While common law reception does not appear in the Rhode Island constitution, a type of statutory reception has been enacted. In 1749 the Rhode Island assembly appointed three of its members to determine which of the English statutes should be considered in force in the colony. After this list was submitted and accepted by legislative enactment, a digest of local laws, prepared in 1766 provided that the laws of England should govern on matters not covered by a law of the colony or act of parliament. This provision was modified in 1798, invoking statutes of England where Rhode Island's own common law or statutes did not apply. In 1822, this provision of English statutes was again amended into essentially the form in which it now appears in Rhode Island's current statutes:

> § 43-3-1. English statutes as common law. -- In all cases in which provision is not made herein, the English statutes, introduced before the Declaration of Independence, which have continued to be practiced under as in force in this state, shall be deemed and taken as a part of the common law thereof, and remain in force until otherwise specially provided. n778

The English common law itself, excluding the old English statutes, appears to be in effect in Rhode Island where the state's own statutes and common law, or unique circumstances, have not superseded those rules. In a 1942 decision, the common law tenancy by the entirety was held to be still recognized in Rhode Island, because it had been recognized

before the first colonial settlement in 1636 and because no other subsequent ruling or law of the colony or state touched upon it. n779 The court declared, in effect, that the common law of England was received into Rhode Island's common law even on points not actually applied in colonial court cases:

> This historical background in matters of law convinces us that the common law of England, with reference to the nature of the estates in which land might be held in this state and the attributes of any particular estate that might be created under that law, was adopted at the time of the Revolution and became a part of the common law of this state. n780

In 1884 a federal court applying Rhode Island law upheld a right of dower based on a common law marriage, even though state legislation could have been viewed as preempting this issue. n781 A 1965 decision rejected reception of an English statute that was not among those identified by the 1749 committee. n782

§ 7.02(oo) South Carolina.

South Carolina's earliest colonial history, and the foundation for its reception of English common law and property rights, are held in common with North Carolina. As discussed *supra* in 7.02(hh), these shared beginnings lie late in the sixteenth century, as a charter was granted in 1578 to Sir Humphrey Gilbert, giving property in and governmental rights to unoccupied North American lands, on condition that settlement be commenced within six years. A settlement was commenced within that time, but survived only a few months, so a similar grant was conferred on Sir Walter Raleigh in 1584. Raleigh's ill-fated colony on Roanoke Island had entirely disappeared by the time a delayed supply ship was able to reach the site in 1590. Both of these charters conferred on the grantees full power to dispose of the land "according to the laws of England, near as the same conveniently may be," and with powers to legislate, "so always, that the said statutes, laws, and ordinances may be, as near as conveniently may, agreeable to the form of the laws and policy of England." n783

When South Carolina territory next came under the jurisdiction of the Virginia Company according to its charter of 1606, colonists were guaranteed the rights of Englishmen, but this meant nothing for South Carolina, which was not to have any colonists for many decades to come. Similarly, new Virginia charters granted in 1609 and 1612, and ultimately revoked in 1624, had no impact on South Carolina.

With rights to the territory back in the hands of the monarch, King Charles I granted to his attorney general Robert Heath a huge tract that included virtually all of North and South Carolina. Heath and his associates and successors were given legislative power over their grant, but on a foundation of English law:

> Yet, so that the aforesaid laws and ordinances be consonant to Reason, and not repugnant or contrary but, as conveniently as may be done, consonant to the Laws, Statutes, Customs, and rights of our Realm of England. n784

Neither Heath nor any of his assignees was able to commence a colonization effort, so eventually the crown considered the grant lapsed and re-granted the territory in 1663. Claimants and their successors in interest under the Heath tract, after a long battle, were later able to establish their rights to some land and were awarded a compensatory tract in New York. More pertinent to South Carolina, however, was the fact that the 1629 charter set the pattern for the 1663 charter in defining the property rights of the Carolina colonists. The most noteworthy features of the 1663 charter were its provisions for representative government, for broad feudal powers resting in the private proprietors, and for authority in the proprietors to create a colonial nobility, all based on English law. The grant of legislative power under the 1663 charter was subject to the requirement "that the said laws be consonant to reason and, as near as may be conveniently, agreeable to the laws and Customs of this our Kingdom of England." n785 Grants of land were entirely in the context of English law, with the charter specifying even certain features of English law, such as Statute Quia Emptores, that would be suspended for the purpose of making these grants:

> We do give and Grant ... Licence, authority, and power That such Person or Persons may have or take the premises, or any parcel thereof, of [any of the proprietors]...; and the same to hold to themselves, their heirs and Assigns; in what estate of Inheritance soever, in Fee simple or Fee tail or otherwise...; The Statute made in the Parliament of Edward, Son of King Henry, heretofore King of England, our Predecessor, commonly called the Statute of *Quia Emptores Terrarum*, or any other Statute, Act, or Ordinance, use, Law, Custom, or any other matter, Cause, or thing heretofore published or provided to the contrary in any wise notwithstanding. n786

The grant under the 1663 charter was revised and expanded under an additional charter in 1665, extending the granted territory to southern Virginia on the north and south to St. Augustine, in modern Florida.

In 1669 the North Carolina proprietors finally moved to implement the enormous feudal powers they had obtained through their charters, even though it meant reducing the rights of the settlers. On July 21, 1669, they adopted their "Fundamental Constitutions of Carolina," which were to apply colony-wide, but ultimately were implemented only partially and only in individual settlements. The Fundamental Constitutions made no explicit reference to reception or adoption of the common law of England, but their entire premise derived exclusively from the last feudal vestiges of English law. Lest any colonist reflect too deeply on its anachronisms, one provision of the "Constitutions" even prohibited commentary on the colonial laws:

> Since multiplicity of Comments, as well as of laws, have great inconveniences, and Serve only to obscure and perplex, all manner of comments and expositions on any part of these fundamental constitutions, or on any part of the Common or Statute law of Carolina, are absolutely prohibited. n787

It was under the auspices of this frame of government and of a separate governor appointed for South Carolina in 1669 that the founders of the first permanent settlement in South Carolina established their site in March, 1670, at the site of modern Charleston. More precisely, the Fundamental Constitutions were actually suspended until the new colony obtained a greater population. In their place, the proprietors directed that executive and judicial powers be exercised by a Grand Council, composed of proprietors' deputies, freemen, and the governor.

Dissent arose over this form of government, and two dissenters protested that their land rights could not be secured until a regular parliamentary assembly was chosen and would then confirm their past land grants. A parliament *was* held in July, 1670. In August, 1671, the proprietors issued a set of temporary laws for this first South Carolina colony:

> These [temporary laws] reveal anew the fact that the board intended to force upon the province the most important provisions of the [Fundamental] Constitutions. These temporary laws provided for an elaborate official system like that of England, for the development as rapidly as possible of the provincial nobility and its incorporation with the council, and for the exercise by the council of the right of initiation and the other powers prescribed for the grand council in the Constitutions. Parliaments were to be called biennially. The creation of landgraves also began at this time, and the governor and council were ordered to have their baronies surveyed when any of the provincial nobility should desire it. n788

Because of South Carolina settlers' objections to the restrictions in 1669 Fundamental Constitutions, a revised version was put forward in 1682, but that was rejected, too, with a unanimous declaration from the legislature that the province should be governed solely by the terms of its charter. No new laws were passed, the temporary laws expired in 1690, and by that time no statute at all was in force in South Carolina.

A five-year period of persistent political disturbance followed, unrelieved by any generally accepted source of law for the colony. When a new governor was appointed in 1695, he carried new powers from the proprietors that were used to reach accords. Because most of the unrest was over land issues, settlement of those issues was also essential in stabilizing the government. The province nevertheless failed to produce more benefits than problems for the proprietors.

A formal separation of South Carolina from North Carolina was effected in 1710; the proprietors, however, managed to retain actual title to the land and it was not until 1729 that the title was changed by purchase, the land reverted to the crown, and the royal provinces of North and South Carolina were established. After takeover of the colony by the crown, governing officials in the 1730's promoted township arrangements similar to those that were so common in New England.

In 1736, a mere seven years after South Carolina became a royal province, a retrospective collection of South Carolina laws was published, covering the period of earliest settlement until the crown took over the province. Within this collection is a most significant enactment listing all of the English statutes deemed then to be in force in South Carolina. The English statutes were declared "to be in as full Force, Power and Virtue, as if the same had been specially enacted and made for this Province, or as if the same had been made and enacted therein by any General Assembly thereof." n789

In addition to the specifically enumerated statutes, the Reception Act also included "all such Statutes in the Kingdom of England, as declare the Rights and Liberties of the Subjects, and enact the better Securing the same...." n790 This massive listing of over 160 separate English enactments and several categories of other acts was concluded with a statement intended to make this a final list:

> ... all the Statute Laws of the Kingdom of England, which are not enumerated and made of Force in this Province by this Act, (such only excepted which release to or concern her Majesty's Customs and the Acts of Trade or Navigation) are hereby declared impracticable in this Province. n791

Significantly, the act also included a reception of English common law:

> That all and every part of the Common Law of England, where the same is not altered by the above enumerated Acts, or inconsistent with the particular Constitutions, Customs and Laws of this Province, excepting so much thereof as hath relation to the ancient Tenures which are taken away by [the act of 1660, 12 Charles II, ca. 24], is hereby enacted and declared to be of as full Force in this Province as if particularly enumerated by this Act... n792

When South Carolina prepared its first constitution upon declaring independence, previous laws were declared in force in the new state:

> That the resolutions of this or any former congress of this colony, and all laws now of force here, (and not hereby altered,) shall so continue until altered or repealed by the legislature of this colony, unless where they are temporary, in which case they shall expire at the times respectively limited for their duration. n793

The same provision was included in the 1778 Constitution, n794 but a slightly modified version appeared in the 1790 Constitution:

> All laws of force in this State at the passing of this constitution shall so continue, until altered or repealed by the legislature, except where they are temporary, in which case they shall expire at the times respectively limited for their duration, if not continued by act of the legislature. n795

A further modification of this reception provision was introduced into the unaccepted constitution of 1865, n796 and carried over into the Constitutions of 1868 n797 and 1895: n798

> All laws now in force in this State and not repugnant to this Constitution, shall remain and be enforced until altered or repealed by the General Assembly, or shall expire by their own limitations. n799

Little discussion of and dissent from common law reception appears in South Carolina jurisprudence. A century after the statutory adoption of English common law in 1712, a judge commented:

> I do not know by what other law we should be governed; for the Common Law is as much the law of this country as of England. I do not mean to say, that we are bound by every decision made by the court of England. We have a right to take our own view of the Common Law; but when a principle of law has been settled for ages, by a series of uniform decisions, the reasons must be very strong, that would authorize a departure from it; and, in no case, ought an established rule to be given up, without substituting another in its place. n800

The list of received statutes, though continued in South Carolina's code revision of 1872, n801 was dropped from the codification of 1912. However, a reception statute for the common law was introduced into South Carolina's 1962 Code and is continued in its present code:

> All, and every part, of the common law of England, where it is not altered by the Code or inconsistent with the Constitution or laws of this State, is hereby continued in full force and effect in the same manner as before the adoption of this section. n802
>
> The rule of common law that statutes in derogation of that law are to be strictly construed has no application to this Title. n803

A quite literal application of this provision has been adopted by both state n804 and federal courts n805 adjudicating South Carolina law n806.

§ 7.02(pp) South Dakota.

Until the time the states of South Dakota and North Dakota were formed from the Dakota Territory in 1889, the two areas shared most of their history. Whereas North Dakota land lay partially within the area of the Louisiana Purchase and partly in the region ceded by Great Britain to the United States in 1818, South Dakota, with the exception of a small parcel of land in the northeast corner of the present state, lay almost entirely within the territory of the Louisiana Purchase.

South Dakota, in common with the southwestern part of North Dakota, was first part of French territory when La Salle made a claim for the entire Mississippi River drainage system in 1682. First explorations in the area were by the French beginning in 1738. From these activities, and even after the Lewis and Clark expedition in 1804-1806, only a few forts and trading posts were established, and the land remained inhabited almost entirely by Indians. The first permanent settlement in South Dakota, Fort Pierre, was founded in 1817 by the Frenchman Pierre Chouteau.

As with the southern part of North Dakota, the sovereignty over the land was nominally French at first. South Dakota was included in the territory of the Louisiana Purchase, but was hardly influenced by the common French and Spanish legal heritage belonging to that area, because of the absence of settlement before the Louisiana Purchase. French governance over the region ended with the arrival of a Spanish governor in 1769, and Spanish authority ended in 1803. Upon his assumption of office in 1769, the Spanish governor officially proclaimed the substitution of Spanish law for all prior laws in the area. n807

When the new American governor arrived in New Orleans in 1804, he created a "court of common pleas" with proceedings in English, signifying an abrupt transition into an American common law system. Reacting to local protest, Congress later in that same year separated the area of Louisiana state, called the Territory of Orleans, from the rest of the Louisiana territory, designating the remainder as the District of Louisiana and placing it administratively under the Territory of Indiana. n808 Existing law was continued in force for the District of Louisiana: "The laws in force in the said district of Louisiana, at the commencement of this act, and not inconsistent with any of the provisions thereof, shall

continue in force until altered, modified or repealed by the governor and judges of the Indiana territory, as aforesaid." n809

The Indiana territorial government enacted certain laws of the new territory between 1804 and 1805, all of them with pronounced common law flavor, and in 1806 Congress established a separate administration for the area, redesignating it the Territory of Louisiana. Statutes enacted after this change also covered familiar common law subjects. In 1812 the Territory of Louisiana was granted the right to its own legislative assembly, and its name was changed to the Territory of Missouri. A territorial enactment in 1815 authorized the recording of land titles acquired during the period of Spanish government, but in 1816 the territorial legislature adopted a broad common law reception statute:

> The common law of England, which is of a general nature, and all statutes made by the British parliament in aid of or to supply the defects of the said common law, made prior to the fourth year of James the first, and of a general nature, and not local to that kingdom, which said common law and statutes are not contrary to the laws of this territory, and not repugnant to, nor inconsistent with the constitution and laws of the United States shall be the rule of decision in this territory, until altered or repealed by the legislature, any law, usage, custom to the contrary notwithstanding, provided, however, that none of the British statutes respecting crimes and punishments shall be in force in this territory, nor shall any person be punished by common law, where the laws and statutes of this territory have made provision on the subject, but where the laws and statutes of the United States and this territory have not made provision for the punishment of offences, the several courts may proceed to punish for such offences, provided, the punishment shall in no case be other than fine and imprisonment, and the term of imprisonment shall not exceed two months; and the fine shall not exceed one hundred dollars. n810

A companion provision to this general common law reception statute indicated certain real property common law doctrines that were excepted from this reception:

> The doctrine of survivorship in cases of joint tenants shall never be allowed, in this territory. The doctrine of entails shall never be allowed, and in all cases where any real estate shall be entailed, the whole of the right and interest of, in, and to the same, shall vest in fee simple in the person having the first reversion or remainder in said estate, after the life estate in determined in said estate. n811

When the State of Missouri was formed in 1821, no actual governmental authority applied to the Louisiana Purchase territory north of Missouri, including South Dakota, until 1834, when Congress attached it to the Territory of Michigan. n812

In 1854, all of South Dakota was included in the newly-designated Nebraska Territory. In the territorial enabling act, n813 no explicit common law reception was mentioned. However, it was provided that the territorial supreme and district courts "shall possess chancery as well as common law jurisdiction," n814 and federal law, except for the 1820 Missouri Compromise legislation, was declared applicable in the new territory. n815 Thereafter, in its first session, the Nebraska territorial legislature enacted a common law reception provision:

> That so much of the common law of England as is applicable and not inconsistent with the constitution of the United States, with the organic law of this Territory, or with any law passed or to be passed by the Legislature of this Territory be and the same is adopted and declared to be law within said Territory. n816

South Dakota remained in Nebraska Territory until 1861, when it was included in the newly-formed Dakota Territory. n817 The territorial enabling act had no provision for continuing prior laws in force, but did decree that the territorial supreme and district courts "shall possess chancery as well as common-law jurisdiction." n818 In the territorial legislation thereafter, only a slight acknowledgement of common law reception was made in the provision that "In this

Territory there is no common law in any case where the law is declared by the Codes." n819

When South Dakota was approved for statehood in 1889, n820 the enabling act continued prior laws in force:

> all laws in force made by said Territories, at the time of their admission into the Union, shall be in force in said States, except as modified or changed by this act or by the constitutions of the States, respectively. n821

South Dakota's original constitution, adopted in 1889 and still the current constitution, had no provision for continuing prior laws in force, although existing "writs, actions, prosecutions, claims and rights" were continued. n822 State legislation in 1890 more explicitly continued prior law in effect and also formally adopted the common law where it was not superseded by statute. n823 After 1913, the phrasing of South Dakota's current reception statute, similar in some respects to North Dakota's code-influenced law, was substituted:

> 1-1-22. Law defined. Law is a rule of property and of conduct prescribed by the sovereign power.
>
> 1-1-23. Expression of sovereign will. The will of the sovereign power is expressed by:
>
> (1) By the Constitution of the United States;
>
> (2) By treaties made under the authority of the United States;
>
> (3) By statutes enacted by the Congress of the United States;
>
> (4) By the Constitution of this state;
>
> (5) By statutes enacted by the Legislature;
>
> (6) By statutes enacted by the voters;
>
> (7) By the ordinances of authorized subordinate bodies;
>
> (8) Rules of practice and procedure prescribed by courts or adopted by departments, commissions, boards, officers of the state or its subdivisions pursuant to authority so to do.
>
> 1-1-24. Common law and law merchant applied -- Evidence of common law. The evidence of the common law, including the law merchant, is found in the decisions of the tribunals. In this state the rules of the common law, including the rules of the law merchant, are in force, except where they conflict with the will of the sovereign power, expressed in the manner stated in § 1-1-23. n824

The South Dakota Supreme Court has recognized that the "common law of this state ... is flexible and susceptible of adaptation to the needs and demands of changing times." n825 This may be especially true in a state that is predominantly agricultural:

> It is well settled that the common law of a state may differ from that of other states or may even vary from time to time in order to meet the peculiar, and perchance varying, conditions and circumstances of the state ... The rights acquired and the burdens undertaken by those who settle upon or purchase lands in a particular locality are such rights and burdens of those people who may become possessed of other lands in the same locality. These right[s] and burdens must, from the very nature of things, depend upon the purposes for which nature has apparently fitted and intended such lands. n826

Despite this somewhat offhanded treatment of common law reception, North Dakota courts have accepted the common

law as the rule of decision where there is no express constitutional or statutory declaration on a subject; n827 "common law is by statute declared to be the basic law."; "by statute the provisions of the Civil Code are to be considered as but continuations of the common law." n828 An example of the interplay between the common law and statutory law was noted by a federal bankruptcy court in North Dakota:

> The [North Dakota state] court held that common law lien rights are not defeated by a statute's silence because the Code is a continuation of the common law and the two must be construed together where the Code merely declares a lien already recognized at common law but is silent on the question of priority. n829

§ 7.02(qq) Tennessee.

Tennessee's first settlers came west from North Carolina and in about 1772 formed their own local government. A lingering dissatisfaction over the association with North Carolina, which vaguely claimed the Tennessee area as part of its western territory, was inflamed when North Carolina proposed to cede the area to the federal government. Fearing that the cession act had "thrown us into such a situation that the influence of the law in common cases was almost a nullity, and in criminal jurisdiction had ceased entirely; which reduced us to the verge of anarchy," n830 the Tennessee settlers attempted to form their own "State of Franklin," complete with constitution, in 1784.

North Carolina withdrew its cession act and reclaimed jurisdiction over Tennessee, and Franklin functioned under the laws of North Carolina, albeit as an independent entity. In 1790, North Carolina once again ceded its western lands to the federal government, and the cession was accepted by Congress. n831 The North Carolina deed of cession accepted by Congress provided "[t]hat the laws in force and use in the State of North Carolina, at the time of passing this act, shall be, and continue in full force within the territory hereby ceded, until the same shall be repealed, or otherwise altered by the legislative authority of the said territory." n832

Less than two months later Congress enacted the "Southwest Ordinance," imposing a temporary government over the area south of the Ohio River, including Tennessee, and declaring that the inhabitants of the territory "shall enjoy all the privileges, benefits and advantages set forth in the [Northwest Ordinance]" and that "the government of the said territory south of the Ohio, shall be similar to that which is now exercised in the territory northwest of the Ohio...." n833 The Northwest Ordinance, enacted while the Articles of Confederation were in effect, ensured to the inhabitants of the territory judicial proceedings according the course of the common law, among other rights:

> The inhabitants of the said territory shall always be entitled to the benefits of the writs of *habeas corpus*, and of the trial by jury; of a proportionate representation of the people in the legislature, and of judicial proceedings according to the course of the common law. All persons shall be bailable, unless for capital offenses, where the proof shall be evident, or the presumption great. All fines shall be moderate; and no cruel or unusual punishments shall be inflicted. No man shall be deprived of his liberty or property, but by the judgment of his peers, or the law of the land, and should the public exigencies make it necessary, for the common preservation, to take any person's property, or to demand his particular services, full compensation shall be made for the same. And, in the just preservation of rights and property, it is understood and declared, that no law ought ever to be made or have force in the said territory, that shall, in any manner whatever, interfere with or affect private contracts, or engagements, *bona fide*, and without fraud previously formed. n834

The Northwest Ordinance also required the appointment of a three-judge court, the judges to "have a common-law jurisdiction," and who, with the governor, "shall adopt and publish in the district such laws of the original States, criminal and civil, as may be necessary, and best suited to the circumstances of the district...." n835

The Southwest Ordinance, incorporating the borrowed law of the Northwest Ordinance, was in effect over Tennessee

from 1790 until Tennessee became a state in 1796, and during that time the territorial governor was also the governor of North Carolina. Therefore, the laws in force in Tennessee prior to statehood were officially the common law as adopted under the Northwest Ordinance, but as a practical matter Tennessee settlers had traditionally relied more on the laws of North Carolina.

North Carolina had a long tradition of reliance on English common law. The first English charter for land located in what is now North Carolina was that granted in 1578 to Sir Humphrey Gilbert. The application of English law to any of such lands that were eventually colonized under the charter was confirmed in Gilbert's rights to "all the soil of all such lands ... to be had or used with full power to dispose thereof, and of every part thereof, in fee simple or otherwise, according to the laws of England, as near as the same conveniently may be." n836 To Gilbert and all his fellow colonists was granted that they "shall and may have and enjoy all the privileges of free denizens n837 and persons native of England and within our allegiance...." n838 Powers of government, including the administration of justice, were also included in the charter, "so always, that the said statutes, laws, and ordinances may be, as near as conveniently may, agreeable to the form of the laws and policy of England...." n839

Gilbert's short-lived 1583 settlement in Newfoundland, and his death during the voyage back to England, resulted in the renewal of Gilbert's charter in Raleigh's name, on March 25, 1584. Issued shortly before Gilbert's charter was to expire, Raleigh's charter was, in effect, a six-year extension, and, in its grants of property rights and governing power, was virtually identical to Gilbert's charter. North Carolina later was included in the rights and land granted to the Virginia Company, beginning with the charter of 1606, which required conformance with English law. Various North Carolina land grants lapsed until King Charles II made new grants in 1663, but under the terms of a 1629 charter that was based entirely on a foundation of English law. That charter also provided for a legislative body that would function as consistently as possible with English law. Grants of land in North Carolina were entirely in the context of English law, with the charter specifying even certain features of English law, such as Statute Quia Emptores, that would be suspended for the purpose of making these grants.

Between 1689 and 1713 the administration of Carolina was formally divided between North Carolina and South Carolina; thereafter the crown took over the colonies and in 1729 created the royal provinces of North and South Carolina.

Until 1751 the laws of the colony were prepared and circulated only in manuscript form. The first printing in 1751 gave the full text of only the laws then in force, while obsolete or repealed acts were indicated by title only. One of the superseded acts from 1711 contained a lengthy provision on the applicability of English law in the colony. The North Carolina Assembly, in its second 1749 session, enacted a lengthy provision specifying approximately 202 chapters of about 110 English statutes "to be in as full Force, Power, and Virtue, as if the same had been specially Enacted and made for this Province, or as if the :qf same

had been made and Enacted therein, by any General Assembly thereof...." n840 In the third session of the same 1749 Assembly, an appropriation was made enabling justices to obtain specified law books. n841

Upon attaining independence and statehood, North Carolina continued its reliance on the English common law. In its first constitution, of 1776, no direct provisions concerning common law were included, only a section confirming land titles:

> That nothing herein contained shall affect the titles or possessions of individuals holding or claiming under the laws heretofore in force, or grants heretofore made by the late King George II. or his predecessors, or the late lords proprietors or any of them. n842

Another section required the future legislatures of the state "to regulate entails, in such a manner as to prevent perpetuities." n843 North Carolina has relied on legislation to express reception of the common law, beginning with this

provision in 1778:

> I. Whereas doubts may arise, upon the Revolution in Government, whether any and what Laws continue in force here: For Prevention of Which,
>
> II. Be it enacted by the General Assembly of the State of North Carolina, and it is hereby enacted by the Authority of the same, That all such Statutes, and such Parts of the Common Law, as were heretofore in Force and Use within this Territory, and all the Acts of the late General Assemblies thereof, or so much of the said Statutes, Common Law, and Acts of Assembly, as are not destructive of, repugnant to, or inconsistent with the Freedom and Independence of this State, and Form of Government therein established, and which have not been otherwise provided for, in the Whole or in Part, not abrogated, repealed, expired, or become obsolete, are hereby declared to be in full force within this State. n844

Tennessee was admitted as a state in 1796, n845 and implemented a constitution which had been adopted early that same year. The new constitution continued in force in prior laws of the territory:

> All laws and ordinances now in force and use in this Territory, not inconsistent with this constitution, shall continue to be in force and use in this State, until they expire, be altered, or repealed by the legislature. n846

Similar provisions were carried over into the successor constitutions of 1834 n847 and 1870, n848 so that the current constitutional provision is as follows:

> All laws and ordinances now in force and use in this State, not inconsistent with this Constitution, shall continue in force and use until they shall expire, be altered or repealed by the Legislature; but ordinances contained in any former Constitution or schedule are hereby abrogated. n849

Glimpses of received common law appear in the Tennessee statutes. Certain county constables are "vested with all the power and authority belonging to the office of constable by common law." n850 Another section preserves

> the common law remedies, including damages, of a surface owner or any other person against the oil and gas developer for the unreasonable, negligent or otherwise wrongful exercise of the contractual right, whether express or implied, to use the surface of the land for the benefit of his interest. n851

Also, the Tennessee Rules of Evidence require courts to take judicial notice of the common law. n852

Several early Tennessee judicial opinions described the extent of common law reception in the state. In an 1842 case, the borrowing from North Carolina was described:

> The revolutionary statute of North Carolina adopts all such portions of the common law as had theretofore been in force and use in the Province. This portion had before that time been and subsequently continued in force and use in that State, and has been adopted and enforced in this State from its origin. The whole body of the common law on the subject of domestic relations, and especially the relation of baron and feme, except so far as changed and modified by statute, has been adopted among us. n853

A legislative enactment of 1858, repealing most prior enactments, was argued to have also nullified the old English statutes previously received, a point conditionally accepted by a Tennessee court in 1883:

> It is then insisted that since the Code no statute, except such as are therein provided for, are in force in this State, therefore the decisions based on the law, as founded on these English statutes, are not

> authority...
>
> * * *
>
> [W]e have no doubt of the proposition, that no English statute as such is in force in our State since the Code.
>
> But while we have no doubt on this question, we do not think it follows that all principles and rules of law that had been adopted by our courts, that may originally have grown out of the provisions of ancient English statutes, are necessarily to be held as swept away, or abrogated as established law among us.
>
> Numerous cases since the Code have adopted the principle [at issue in this case], it having become a settled rule of property long recognized. But this no more went on the idea that the English statute was in force, or involved it, than does the fact that a large mass of our law as familiarly administered in our courts, especially courts of equity, is derived from Roman law, involved the proposition that the civil law as such is in force to any degree in our State.
>
> So we hold the cases referred to ... have announced a rule of law originally derived from old English statutes, or resulting from them by construction of the courts, but which have been adopted as rules of property and settled principles governing this question, as rules of law in accord with sound public policy, and therefore should not be disturbed or abrogated, or overruled, except on the same principles and for the same reasons we would overrule any other rule of law heretofore announced by this court. n854

§ 7.02(rr) Texas.

A small portion of the northern part of the present state of Texas was included within the territory of the Louisiana Purchase and was thus nominally subject to the same governmental arrangements as the other, more settled portions of that area, although virtually no settlements existed to be governed at that time.

French governance over the region ended with the arrival of a Spanish governor in 1769, and Spanish authority ended in 1803. Upon his assumption of office in 1769, the Spanish governor officially proclaimed the substitution of Spanish law for all prior laws in the area. n855 When the new American governor arrived in New Orleans in 1804, he created a "court of common pleas" with proceedings in English, signifying an abrupt transition into an American common law system. Reacting to local protest, Congress later in that same year separated the area of Louisiana state, the Territory of Orleans, from the rest of the Louisiana territory, designating the remainder as the District of Louisiana and placing it administratively under the Territory of Indiana. n856 Existing law was continued in force for the District of Louisiana: "The laws in force in the said district of Louisiana, at the commencement of this act, and not inconsistent with any of the provisions thereof, shall continue in force until altered, modified or repealed by the governor and judges of the Indiana territory, as aforesaid." n857

The Indiana territorial government enacted certain laws of the new territory between 1804 and 1805, all of them with pronounced common law flavor, and in 1806 Congress established a separate administration for the area, redesignating it the Territory of Louisiana. Statutes enacted after this change also covered familiar common law subjects. In 1812 the Territory of Louisiana was granted the right to its own legislative assembly, and its name was changed to the Territory of Missouri. A territorial enactment in 1815 authorized the recording of land titles acquired during the period of Spanish government, but in 1816 the territorial legislature adopted a broad reception statute for the English common law:

> The common law of England, which is of a general nature, and all statutes made by the British parliament in aid of or to supply the defects of the said common law, made prior to the fourth year of

> James the first, and of a general nature, and not local to that kingdom, which said common law and statutes are not contrary to the laws of this territory, and not repugnant to, nor inconsistent with the constitution and laws of the United States shall be the rule of decision in this territory, until altered or repealed by the legislature, any law, usage, custom to the contrary notwithstanding, provided, however, that none of the British statutes respecting crimes and punishments shall be in force in this territory, nor shall any person be punished by common law, where the laws and statutes of this territory have made provision on the subject, but where the laws and statutes of the United States and this territory have not made provision for the punishment of offences, the several courts may proceed to punish for such offences, provided, the punishment shall in no case be other than fine and imprisonment, and the term of imprisonment shall not exceed two months; and the fine shall not exceed one hundred dollars. n858

A companion provision to this general common law reception statute indicated certain real property common law doctrines that were excepted from this reception:

> The doctrine of survivorship in cases of joint tenants shall never be allowed, in this territory. The doctrine of entails shall never be allowed, and in all cases where any real estate shall be entailed, the whole of the right and interest of, in, and to the same, shall vest in fee simple in the person having the first reversion or remainder in said estate, after the life estate in determined in said estate. n859

By far the largest and most important part of Texas was, however, not part of the Louisiana Purchase, but was sovereign territory of first Spain and then of Mexico. Spanish exploration began as early as 1519, but two centuries later only a few missions and three small settlements had emerged. When the United States acquired the territory of the Louisiana Purchase, the main portion of Texas became conveniently accessible to numerous uncontrolled and unbidden American settlers. In 1819, the United States renounced American interest in Texas as part of an arrangement to settle claims in Florida, and in 1821 Mexico won its independence from Spain and succeeded to the sovereignty of Texas.

However, the incursion of American settlers continued unabated, and in 1836 the American settlers obtained their independence from Mexico by military action and established themselves as an independent republic.

In 1833, even before achieving independence, a provisional constitution had been drawn up, which was intended to establish a state government nominally subordinated to the Mexican government. This constitution was signed as the Provisional Constitution of 1835, but never put into operation. Despite the acknowledgement of Mexican governance, this document explicitly adopted the common law in criminal jurisprudence:

> Every Judge, so nominated and commissioned, shall have jurisdiction over all crimes and misdemeanors recognized and known to the common law of England: he shall have power to grant writs of "habeas corpus" in all cases known and practised, to and under the same laws... n860
>
> All trials shall be by jury, and in criminal cases the proceedings shall be regulated and conducted upon the principles of the common law of England... n861

Early in 1836, the Texas congress adopted the French law of Louisiana for its laws of succession, probate and administration of estates.

Texas declared its independence from Mexico and promulgated a new constitution in March, 1836. This constitution required the common law generally to be adopted by statute, and invoked the common law as the rule of decision in criminal proceedings:

> The congress shall, as early as practicable, introduce, by statute, the common law of England, with such modifications as our circumstances, in their judgment, may require; and in all criminal cases the common law shall be the rule of decision. n862

Laws previously enacted or adopted were continued in force:

> That no inconvenience may arise from the adoption of this constitution, it is declared by this convention that all laws now in force in Texas, and not inconsistent with this constitution, shall remain in full force until declared void, repealed, altered, or expire by their own limitation. n863

Thus the previously adopted French legal principles for succession, probate and administration of estates were continued in force in the new republic.

The new constitution also contained a mandate for law revision and codification, including reformation of the land laws:

> So soon as convenience will permit, there shall be a penal code formed on the principles of reformation, not of vindictive justice; and the civil and criminal laws shall be revised, digested, and arranged under different heads; and all laws relating to land-titles shall be translated, revised, and promulgated. n864

Pursuant to this mandate, the Anglo-American conveyancing laws were adopted by the Texas Congress in December, 1836. However, the system of community property derived from Spanish law remained in force.

In 1840, the Texas Congress enacted a broad common law reception provision that was, however, limited in its scope, by a companion provision continuing prior laws in force:

> That the Common Law of England (so far as it is not inconsistent with the Constitution or Acts of Congress now in force) shall, together with such acts be the rule of decision in this Republic, and shall continue in force until altered or repealed by Congress.
>
> Be it further enacted, That all laws in force in this Republic, prior to the first of September, one thousand eight hundred and thirty-six (except the Laws of the Consultation and Provisional Government, now in force, and except such Laws as relate exclusively to grants and the colonization of lands in the State of Coahuila and Texas, and also such Laws as relate to the reservation of Islands and Lands, and also of Salt-Lakes, Licks and Salt-Springs, Mines and Minerals of every description; made by the General and State Governments) be, and the same are hereby repealed. n865

Texas was approved for annexation as a state in 1845, n866 and its new constitution of that same year continued prior laws in force:

> All laws or parts of laws now in force in the Republic of Texas, which are not repugnant to the Constitution of the United States, the joint resolutions for annexing Texas to the United States, or to the provisions of this constitution, shall continue and remain in force as the laws of this State until they expire by their own limitation, or shall be altered or repealed by the legislature thereof. n867

This 1845 constitution also contained several other provisions impacting on land law:

> Perpetuities and monopolies are contrary to the genius of a free government, and shall never be allowed; nor shall the law of primogeniture or entailments ever be in force in this State. n868
>
> All property, both real and personal, of the wife, owned or claimed by her before marriage, and that acquired afterwards by gift, devise, or descent, shall be her separate property; and laws shall be passed more clearly defining the rights of the wife, in relation as well to her separate property, as that held in common with her husband. Laws shall also be passed providing for the registration of the wife's separate

property. n869

> The legislature shall have power to protect, by law, from forced sale a certain portion of the property of all heads of families. The homestead of a family, not to exceed two hundred acres of land, (not included in a town or city, or any town or city lot or lots,) in value not to exceed two thousand dollars, shall not be subject to forced sale for any debts hereafter contracted; nor shall the owner, if a married man, be at liberty to alienate the same, unless by the consent of the wife, in such manner as the legislature may hereafter point out. n870

In the current Texas statutes, several provisions touch upon the extent to which the common law pervades Texas jurisprudence generally and land law specifically. A rather uniquely worded common law reception statute establishes the rule of decision:

> The rule of decision in this state consists of those portions of the common law of England that are not inconsistent with the constitution or the laws of the United States, the constitution of this state, or the laws of this state. n871

Another provision establishes limits on the extent to which particular common law doctrines are received in Texas:

> (a) The common law rules known as the rule in *Shelley's Case*, the rule forbidding a remainder to the grantor's heirs, and the doctrine of worthier title do not apply in this state.
>
> (b) A deed, will, or other conveyance of property in this state that limits an interest in the property to a particular person or to a class such as the heirs, heirs of the body, issue, or next of kin of the conveyor or of a person to whom a particular interest in the same property is limited is effective according to the intent of the conveyor.
>
> (c) Status as an heir or next of kin of a conveyor or the failure of a conveyor to describe a person in a conveyance other than as a member of a class does not affect a person's right to take or share in an interest as a conveyee.
>
> (d) Subject to the intention of a conveyor, which controls unless limited by law, the membership of a class described in this section and the participation of a member in a property interest conveyed to the class are determined under this state's laws of descent and distribution. n872

A special provision governs land titles established before adoption of the common law in 1840:

> That in any case where any land in the State of Texas was titled prior to the adoption of the Common Law on March 20, 1840, and there has been a judicial finding that the original grantee of said land abandoned said land prior to the adoption of the Common Law, and the State of Texas has at any time instituted suit for the recovery of said land, resulting in a final judgment adverse to the State of Texas whether on demurrer, exception, or a jury finding of fact, it shall be conclusively presumed that those now claiming said land under conveyance from, or judgment against, the original grantee or his heirs, are vested with all title to said land which was vested in said original grantee by virtue of any patent or title from the sovereignty of the soil to him. n873

Landlord/tenant relationships rest upon a base of common law, except where changed by statute:

> (a) The duties of a landlord and the remedies of a tenant under this subchapter are in lieu of existing common law and other statutory law warranties and duties of landlords for maintenance, repair, security, habitability, and nonretaliation, and remedies of tenants for a violation of those warranties and duties.

> Otherwise, this subchapter does not affect any other right of a landlord or tenant under contract, statutory law, or common law that is consistent with the purposes of this subchapter or any right a landlord or tenant may have to bring an action for personal injury or property damage under the law of this state. This subchapter does not impose obligations on a landlord or tenant other than those expressly stated in this subchapter. n874

Likewise, common law liens also may be imposed in Texas:

> Except as provided by Chapter 59, this subtitle does not affect:
>
> (1) the right to create a lien by special contract or agreement; or
>
> (2) a lien that is not treated in this subtitle, including a lien arising under common law, in equity, or under another statute of this state. n875

In a case concerning a controversy about surface water rights, the Texas Supreme Court has also declared that "absent a statute governing the rights of land holders, those owners whose title derives from Spanish or Mexican land grants are governed by the civil law, whereas those whose title derives from subsequent grants are governed by the common law." n876

Early in the history of the state, Texas courts held that English statutes were not adopted with the common law:

> Such statutes and such policy constitute elements in the judicial mind, in establishing rules of construction, which it cannot discard, however much it may struggle to escape their trammels. The English judges, in numberless decisions, acknowledge their force and influence especially in the interpretation of devises, in which they feel constrained to conform their judgments in such cases to the policy of the government in its peculiar tenure of landed estates... But it clearly shows that even they who, without detracting from the distinguished jurists of other countries, may be regarded as the great expounders of the common law, compound their rules of construction of the common law, of the statutes, and of the policy of the government. Our own judicial authorities are constrained by the same moral necessities; and the rules of construction and interpretation are composed of like elements -- the common law, legislative enactments, and the policy of the government. It is a singular fact, that, although this state has adopted the common law by express legislative enactment, yet, unlike most, if not all, of the states which have adopted the common law, we have not, as they have, also adopted all English statutes of a general nature, up to a particular period, not repugnant to or inconsistent with the constitution and laws of the state. Hence our rules of construction and interpretation must be predicated upon the common law, upon our statutes, and upon the general policy embodied in our varied form of government. It would be dangerous, as we think, to submit too implicitly to rules of construction founded entirely upon English jurisprudence. n877

This restrictive view of Texas common law reception was reaffirmed nearly a century later:

> The question of common law recoupment in Texas is to be determined in accordance with the decisions of this Court. Texas never was a British colony nor an American territory and the common law comes to us by adoption rather than by inheritance, so to speak. The Congressional Act of January 20, 1840, ... simply makes the common law of England, so far as it is consistent with our constitutional and legislative enactments the rule of decision in Texas. No English statutes were adopted ... and although Texas was an independent republic in 1840, the Act of the Congress of that year was construed as referring to the common law as applied in England in 1840, but rather to the English common law as declared by the courts of the various states of the United States ...The common law of Texas is somewhat unique in origin and its development has not in all respects coincided with the general course of

evolution discernable throughout the other American states... n878

§ 7.02(ss) Utah.

No permanent settlement in the area that is now the state of Utah occurred until July, 1847, when members of the Church of Jesus Christ of Latter-Day Saints ("Mormons") began arriving in huge numbers fleeing from religious persecution in the Midwest. At the time the region was nominally under Spanish governance, although this governance was never effective beyond California. Spanish outposts at San Diego and Monterey in California had been established by the beginning of the 19th century, but little governmental control was exercised, especially from Mexico after Mexican independence was achieved in 1821. From the time that American settlers arrived until effective American governmental control was asserted a few years later, church officials established governmental institutions and commenced a vigorous effort of widespread settlement throughout the intermountain area.

While the church organizations dealt effectively with local problems, a larger government movement was underway by the founding of the State of "Deseret" (a religious term) in 1849, a huge entity extending from Nebraska to California, and from Oregon to and including Arizona. The constitution for the State of Deseret made no explicit references to the common law, but the governmental institutions established by the document were familiar in most American common law jurisdictions. n879

In 1850 the authorization for the Territory of Utah was enacted by Congress, n880 with boundaries including the present states of Utah, Nevada, the southwest corner of Wyoming, and a large part of western Colorado. According to this act, the territorial supreme and district courts "shall possess chancery as well as common law jurisdiction," n881 and federal law was extended over the area, but no prior laws were declared to be in force. n882

Numerous applications for statehood and accompanying draft constitutions were rejected because of a federal policy strongly opposed to the practice of plural marriage among the Mormons, so statehood was delayed until after the church prohibited the practice in 1890.

Meanwhile, territorial courts were considering the nature and sources of fundamental law in Utah. In 1873, the Utah territorial supreme court commented:

> In *American Ins. Co. v. Canter, 1 Pet. 511* , the Court, by Judge Marshall, say substantially, that the laws of Florida, as they were when the Territory was ceded, so far as not inconsistent with the Constitution and Laws of the United States, continued in force until altered by the newly created power of the State ... This appears to be the settled doctrine in regard to conquered and ceded Territory in the absence of special treaty stipulation. It applies to territory acquired from Mexico, since the treaty of Guadaloupe made no special provision on the subject. Utah was embraced in that acquisition. As in Florida, the pre-existing law was Spanish. So in Utah, it was Mexican, and in both cases the laws were derived mainly from the laws of Rome. In neither did the English Common Law ... prevail. Congress made no special change, and the Territorial Legislature, upon whom authority was conferred, have made no express enactment upon the subject.
>
> This Territory was first settled in 1847, and from that time to the acquisition and treaty in 1848, the settlers were comparatively few in number. There were no settled laws, usages and customs among them. They came here as American citizens, under the flag, and claiming the protection of the United States Government.
>
> The particular class of persons forming the great, if not entire, bulk of emigrants, claim to have furnished troops from among their own numbers to assist this Government in its war against Mexico.
>
> At the time of the acquisition and treaty, they could not claim Mexican citizenship, and have never

> adopted its laws and customs.
>
> Soon after the change of sovereignty by the treaty, emigrants in large numbers flocked in from the States and surrounding Territories, and for many years there has been an organized community.
>
> When we turn to the communities from whence these emigrants proceeded, we find that they differed one from another, more or less, in regard to their laws and institutions. No two are alike. In the most, it is true, many common law principles and doctrines were in force. Still the body of the common law in each was peculiar to the particular State, and it was rather the common law of the State than English Common Law. In some, the English statutes had been received as Common Law; in others, not.
>
> These diversities make it impossible to assume that any specific body of the Common Law was transplanted to the Territory by the fact of immigration.
>
> But one course was open, and that was for the whole body of the people to agree, expressly or tacitly, upon a common measure. It was to be expected that the emigrants would not be contented with the loose and alien institutions of an outlying Mexican department, and they have not been.
>
> They have tacitly agreed upon maxims and principles of the Common Law suited to their conditions and consistent with the Constitution and Laws of the United States, and they only wait recognition by the courts to become the Common Law of the Territory. When so recognized, they are laws as certainly as if expressly adopted by the law-making power. n883

Three years later this court, in an opinion without accompanying reasoning or documentation, declared that the common law had been extended to Utah by the territorial enabling act:

> [T]he Common Law ... is most positively extended over the Territory of Utah by the express language of the Act of Congress providing a Territorial Government for Utah, approved September 9th, 1850, the 17th section of which was relied on by the plaintiff in error, and reads as follows, viz: "That the Constitution and Laws of the United States, are hereby extended over and declared to be in force in said Territory of Utah, so far as the same or any provision thereof may be applicable." n884

In 1894, Utah was authorized for statehood, n885 and the enabling act decreed that "all laws in force made by said Territory at the time of its admission into the Union shall be in force in said State, except as modified or changed by this Act or by the constitution of the State...." n886 A similar provision appeared in the Utah Constitution of 1895, which went into effect when the territory attained statehood in 1896, n887 and remains the current provision for continuing prior laws in force:

> All laws of the Territory of Utah now in force, not repugnant to this Constitution, shall remain in force until they expire by their own limitations, or are altered or repealed by the Legislature... n888

In 1898 the state legislature enacted a general common law reception provision, which appears in the current Utah code as follows:

> The common law of England so far as it is not repugnant to, or in conflict with, the constitution or laws of the United States, or the constitution or laws of this state, and so far only as it is consistent with and adapted to the natural and physical conditions of this state and the necessities of the people hereof, is hereby adopted, and shall be the rule of decision in all courts of this state. n889

In subsequent litigation the Utah Supreme Court stated, in opposition to the territorial court opinion of 1873, cited *supra*, that the common law was not received in Utah until enactment of the 1898 reception statute, and that Mexican

civil law prevailed until Utah became a territory in 1850:

> Utah is of territory which, in 1846, passed from the possession of Mexico into that of the United States by the treaty of Guadalupe Hidalgo, which terminated the Mexican War. The original territory so acquired embraced the region west of the summit of the Rocky Mountains, east of California, and between the thirty-seventh and forty-second parallels of north latitude. At the time of the treaty and cession the civil law prevailed in the republic of Mexico. It continued to so prevail in the acquired and ceded territory until changed by the new sovereign... A provisional government was established in the territory by its people in 1849. There is nothing in that to show that the English common law was established by them. In 1850 Congress created the acquired territory into a temporary government by the name of the territory of Utah, and passed what is known as the Organic Act for the territorial government of Utah Territory. Later Nevada, portions of Idaho, and of Wyoming and Colorado, and other territory, were carved out of Utah Territory. The last section of the act reads:
>
> > That the Constitution and laws of the United States are hereby extended over and declared to be in force in said territory of Utah so far as the same or any provision thereof may be applicable.
>
> By that it is claimed on the one side, and denied on the other, that Congress extended over and transplanted the English common law into the territory so acquired from Mexico. There are no other enactments on the subject, either by Congress, the territorial Assembly, or the state Legislature of Utah, until 1898, when the state Legislature adopted this [current reception provision].
>
> Not until then was the common law of England adopted in this territory or state by a positive enactment.
>
> Our conclusion, therefore, is that, while Congress, by extending over the territory of Utah the Constitution and laws of the United States, put in force, in the language of the Supreme Court of the United States, "the system of common law and equity which *generally prevails in this country*," yet did not so extend or transplant the *common law of England*, with all its rigor and harshness, but only so much of it as was and had been generally recognized and enforced in this country, and as is and was suitable to our conditions. n890

More recently the Utah Supreme Court has expressed a preference for English common law as expounded by American courts:

> A glance at our decisions clearly shows that we follow the common law of England as developed and expounded by the courts of last resort in this country, but that only on rare occasions do we refer to or rely on the English decisions but constantly rely on the decisions of our sister states. Thus it is clear that by this statute we adopted the common law of England only where it is suitable to our conditions, morals, history and background, that generally we look to the system of common law and equity which prevails in and has been and is now being developed by the decisions of this country and that we reject the common law of England which is not suitable or adapted to our needs, morals or ideals. n891

§ 7.02(tt) Vermont.

In its pre-statehood history, the land that is now Vermont was claimed at various times by Massachusetts, New York and New Hampshire. The rival claims were still being vigorously contested when the War for Independence broke out, so local residents took advantage of the distraction and in 1777 declared the Republic of the Green Mountains as a sovereign state. The constitution drawn up in 1777 contained no provision directly referring to the common law. Possible inferences of common law foundation could be perceived in provisions conferring chancery powers on the

courts, requiring recordation of land deeds and mandating legislation regulating entails so as to prevent perpetuities. n892 When Massachusetts and New Hampshire gave up their claims to Vermont Territory in 1786, a new constitution was drafted. This document, similar to its predecessor, authorized creation of a court of chancery, required recording of land deeds, and called for legislation regulating entails so as to prevent perpetuities, but made no explicit reference to the common law. n893 New York finally ceased pursuing its claims in 1790, and in February, 1791, Vermont was authorized for admission as the fourteenth state. n894 A new constitution, drafted in 1793 and adopted in 1796, also made no explicit reference to the common law but contained versions of the three provisions just mentioned. n895

Meanwhile, even before statehood, legislative adoption of the common law was emerging. Commenting on the Vermont legislature's failure to fulfill its constitutional mandate for legislation regulating entails and perpetuities, the Vermont Supreme Court in an early decision described the gradual recognition of common law reception:

> After the first constitution was adopted, at the session of the legislature holden in 1778, they had recourse to Connecticut for their laws, and from the journal of the legislature we learn they passed several acts as the said acts stand in the Connecticut law book... In February, 1779, they enacted "that common law, as it is generally practiced and understood, in the New England States, be, and is hereby established as the common law of this state." Common law, as practiced and understood, probable meant, as considered or altered by statute or by judicial constructions, and as it was adapted to our local circumstances and usages, generally adopted. It is most probably they had reference to the common law as understood and established by usage, or the determination of the courts in Connecticut, as that appears to be the state to which the legislature had particular reference in passing laws...
>
> ...In June, 1782, the legislature passed an act, wherein they recited that "the inhabitants of this state have been habituated to conform their manners to English law, and hold their real estate by English tenure," and enacted, "that so much of the common law of England as is not repugnant to the constitution, or any act of the legislature, be adopted, and shall be, and continue to be, law within this state;" and that such "statute laws and parts of laws of the kingdom of England, passed before October, A.D. 1760, for the alteration and explanation of the common law, &c., shall be, and continue to be, law within this state." This law was continued to the revision made in 1797, with the alteration only, that, in the laws passed in 1787, adopting the statute laws of England, they omit the word "alteration," and adopt only such as were made for the explanation of the common law. n896

The Vermont court's edited version of the concluding paragraphs from the 1782 reception legislation should be more accurately reported as follows:

> And whereas, the statute law of England is so connected and interwoven with the common law, that our jurisprudence would be incomplete without it; therefore,
>
> Be it further enacted, that such statute laws and parts of laws of the kingdom of England, as were passed before the first day of October, Anno Domini one thousand seven hundred and sixty, for the alteration and explanation of the common law, and which are not repugnant to the constitution, or some act of the legislature, and are applicable to the circumstances of the State, are hereby adopted and made, and shall be and continue to be, law within this State: and all courts are to take notice thereof, and govern themselves accordingly. n897

A simpler version of the common law reception provision is in the current Vermont statutes:

> So much of the common law of England as is applicable to the local situation and circumstances and is not repugnant to the constitution or laws shall be laws in this state and courts shall take notice thereof and govern themselves accordingly. n898

The Vermont Supreme Court in this century has declared that:

> The common law of England thus adopted is the unwritten law of England as amended or altered by acts of Parliament in force at the time of the migration of settlers to this country, and such other acts of Parliament, passed since the migration, which have been adopted by our courts. n899

§ 7.02(uu) Virginia.

The royal charter that led directly to establishment of Jamestown in Virginia as the first permanent English settlement in North America asserted English sovereignty over a huge area of North America between 34 and 45 degrees north latitude, from coast to coast and one hundred miles into each ocean, all called Virginia.

The patentees who were from London were authorized to establish a privately funded joint stock company in order to set up a colony anywhere on the coast between 34 and 41 degrees latitude, and to take jurisdiction of a tract 50 miles north and 50 miles south of the settlement and one hundred miles out to sea and one hundred miles inland. This London group was designated the "first colony," while the group from Plymouth and Bristol was called the "second colony" and was given similar instructions pertaining to a second joint stock company and a colony in the territory between the 38th and 45th parallels. n900

In each colony a council of thirteen persons was to govern "according to such laws, ordinances, and instructions, as shall be in that behalf, given and signed with our hand or sign manuel, and pass under the privy seal of our realm of England." n901 These two colonial councils were made subject to the direction of another council of thirteen, sitting in England, called the Council of Virginia. n902

The charter secured to all persons dwelling or born within the colonies the right of English citizens, to "have and enjoy all liberties, franchises, and immunities, within any of our other dominions, to all intents and purposes, as if they had been abiding and born, within this our realm of England, or any other of our said dominions." n903 Supplemental instructions drafted in November, 1606, proclaimed that

> for the good government of the people to be planted in those parts, and for the good ordering and disposing of all causes happening within the same, and the same to be done for the substance thereof, as neer to the common lawes of England, and the equity thereof, as may be... n904

Thus was expressed from the outset a fundamental commitment to a rule of law based on the rules of common law and equity in the English jurisprudence of the time. n905

The language of the charter conferring power to make grants of land obviously invoked and relied upon the English common law. The supplemental instructions of November 20, 1606, added further confirmation that property rights rested on the established rights under the laws of England:

> ...and moreover wee doe hereby ordaine and establish for us, our heires and successors, that all the lands, tenements, and hereditaments to be had and enjoyed by any of our subjects within the precincts aforesaid, shall be had and inherited and enjoyed, according as in the like estates they be had and enjoyed by the lawes within this realme of England... n906

Early in 1609 the patentees drafted a new charter, which was approved by James I on May 23, 1609. With respect to property rights, the 1609 charter reconfirmed that the patentees were authorized to acquire such rights, after first obtaining royal permission:

> And that [the patentees] and their successors, shall be, from henceforth, forever enabled to take, acquire and purchase, by the name aforesaid (license for the same, from us, our heirs or successors, first

> had and obtained) any manner of lands, tenements, and hereditaments, goods and chattels, within our realm of England, and dominion of Wales. n907

The 1609 charter also confirmed that such property rights were the rights recognized under existing English law:

> [The patentees] are to have and to hold, possess and enjoy, all and singular the said lands, countries and territories, with all and singular other premises, heretofore by these presents granted, or mentioned to be granted ...; to the sole and proper use of [the patentees], their successors and assigns for ever; to be holden of us, our heirs, and successors, as of our manour of East Greenwich, in free and common socage, and not in capite... n908

Property rights previously granted were ratified, except that the northern boundary of the territory open to Virginia Company colonization was shifted back from the forty-first to the fortieth latitude. n909

Soon patentees sought and obtained from the king a third charter on March 12, 1612. This charter reaffirmed the grants of the earlier charters and reiterated the language of the two previous charters concerning the holding of lands in free and common socage. n910 It also confirmed interests previously granted n911 and declared that questions in construing or interpreting any of the charter provisions should be resolved in favor of the company. n912

A new charter was issued in 1618 but was never delivered, because the new governor bringing it with him died while making the ocean crossing. Later that year, on November 18, 1618, the Virginia Company in London issued instructions that transferred governmental power to the colony in Virginia and mandated that the colony be governed by both appointed officers and an assembly consisting of colonists' representatives. These instructions, the so-called "Great Charter" of Virginia, are of greatest importance because they led to the swift assembling of the earliest representative legislative body in North America. The General Assembly, consisting of the governor, 6 councilors and 22 burgesses elected by the colonists, first met at Jamestown on July 30, 1619. n913

In these rules was embodied a liberal right to acquire fee simple in land. Even common laborers were able to become landholders under the farmers' tenure. Yet another form of land grant commenced in 1618, a type of sub-patent issued to private societies. Under this arrangement several prominent colonists banded together, combining their own shares and sometimes purchasing additional shares, and offered to form a plantation at their own expense. Among the terms of the private plantation grants or patents was that the grantees could regulate their servants and business in ways not repugnant to the laws of England. This was tested when, at the time the first assembly met, John Martin claimed the privileges of an English manorial lord over his plantation, but was instead directed to submit to usual company regulations.

In 1622, King James I was prompted to involve himself more directly in the affairs of the company, fearing the conditions in the colony were fomenting too much independence and possible sedition. He had his attorney general issue a *quo warranto* against the company; when the matter came before the King's Bench on June 26, 1624, the company's charter was revoked on a technicality, because of an alleged error in pleading.

With the return of the colony to royal governance, a commission was appointed with the objective of reinstating the plan of government described in the 1606 charter. However, James died before the commission could finish its work, his successor Charles I then officially proclaimed Virginia a royal colony, and in the end no major changes were made in form of government that was in place in 1624. The Virginia assembly did not meet officially between 1624 and 1628, but then resumed meetings and legislating, albeit without formal sanction from the king. Finally, in January, 1639, Charles gave formal consent to restoration of the assembly as a permanent institution of the colony.

When the Stuart monarch was restored to the throne in 1660, it seemed appropriate to the assembly to confirm their allegiance to English law. Thus the assembly proclaimed that Virginians "have also endeavoured in all things (as neere

as the capacity and constitution of this country would admitt) to addhere to those excellent and often refined laws of England, to which we profess and acknowledge all due obedience and reverence...." n914 The assembly sorted through its past enactments and those to be kept were compiled in a new code of laws adopted by the assembly in March, 1662:

> By the statutes of 1661-1662, procedure in the courts was regulated. At the time of the Restoration, Virginia seems to have been especially anxious to show herself loyal to England, and these enactments breathe a deep respect for the common law. In the preamble it is stated that the legislature has endeavored in all things to adhere to these "excellent and refined laws of England to which we profess to acknowledge all due obedience and reverence." As a reason for enacting laws at all they assign the vast volume of the English law from which courts would be unable to collect the necessary principles without the aid of such codification. The former laws are repealed and a new code is enacted. As some former laws restrained the trial by jury quite contrary to the laws of England, the law of juries is restated with special carefulness and precision. It is interesting to note in this connection that the colonists express their regret that they are unable to comply with the requirement of the English jury system that the jurors shall come from the immediate neighborhood of the place where the fact was committed; but they state that they desire to approach as near as possible to compliance by enacting that six men of the ablest and nearest of the inhabitants of the county shall be on the jury... In this code the period of prescription for land is limited to five years. n915

In 1666 the assembly appropriated money to purchase law books, in order to more faithfully follow English common law:

> Whereas for the better conformity of the proceedings of the courts of this country to the lawes of England, as appeares necessary for their better direction therein, all the former statutes at large and those made since the beginning of the raigne of his sacred majestie that now is and a few other approved books of law should be purchased, It is therefore by this grand assembly and the authority thereof enacted accordingly that all the aforesaid statute books, and Daltons justice of the peace, and office of a sherriffe, and Swinburnes book of Wills and Testaments may be sent for by the auditor for the use of the general courts and assembly, and the like books be sent for by some of the commissioners of the severall county courts for the use of the respective counties, and paid for out of the county levy. n916

Given the background of colonial Virginia's early leaders, reliance on English common law was only natural:

> Throughout the nearly two decades that the London Company managed Virginia, it recruited the colony's leaders from England's ruling classes. Those men were well schooled in English law and custom. They had been educated at the universities or Inns of Court; some knew martial law, and they all enjoyed ties to the court and Parliament. Despite such qualifications these men were to leave only a slight impression on colonial law. Few survived or stayed in Virginia long enough to make much of a mark. Furthermore, there was little agreement before 1625 as to which of England's legal traditions were most suitable to a struggling colony. The question of what law should prevail was only vaguely addressed before formulation of *The Lawes Divine, Morall and Martiall* [the very severe code adopted for Jamestown in 1611, and sometimes enforced]. The Charter of 1618 supplanted *The Lawes*, but that change merely introduced the possibility of adopting a more familiar form of law. Thus it was the members of the post-1625 general assemblies, together with their counterparts in local government, who assumed the greater role in grafting English common law to colonial needs. n917

A provision for reception of the English common and statutory law was never included in Virginia's various constitutions, the first of which was adopted in 1776. However, Virginia's legislature in that same year did enact a statutory reception provision:

> That the common law of England, all statutes or acts of parliament made in aid of the common law

> prior to the fourth year of the reign of King James the first, and which are of a general nature, not local to the kingdom, together with the several acts of the general assembly of this colony now in force, so far as the same may consist with the several ordinances, declarations, and resolutions of the general convention, shall be the rule of decision, and shall be considered as in full force, until the same shall be altered by legislative power of this colony. n918

This provision was partially repealed, as to English statutes, in 1792, and its modern and current counterpart, originally enacted in 1919, is more narrow:

> § 1-10. The common law. -- The common law of England, insofar as it is not repugnant to the principles of the Bill of Rights and Constitution of this Commonwealth, shall continue in full force within the same, and be the rule of decision, except as altered by the General Assembly.
>
> § 1-22. Acts of Parliament. -- The right and benefit of all writs, remedial and judicial, given by any statute or act of Parliament, made in aid of the common law prior to the fourth year of the reign of James the First, of a general nature, not local to England, shall still be saved, insofar as the same are consistent with the Bill of Rights and Constitution of this Commonwealth and the Acts of Assembly. n919

Virginia courts have consistently and unhesitatingly applied English common law in appropriate cases throughout the period of statehood. Decisions of English courts both before and after the Revolution have been found acceptable. n920 They have recognized that the reception is not only selective, but that even adopted common law principles may be modified to suit local conditions, suggesting a substantial rather than a literal compliance with common law. n921 It has also been recognized that the common law rules are still living and changing, adapting to contemporary needs. n922 Common law reception cases continue to emerge in Virginia jurisprudence. n923

§ 7.02(vv) Washington.

The area of Washington state was first claimed by the Spanish in 1775 and then by the English in 1787. The first British fur trading post was established in 1810, and in 1811 an American trading post was also founded. Following the War of 1812 and subsequent treaty activity, the Americans and British agreed in 1818 to ten years of joint occupation of the area, extended indefinitely in 1827. Increased American settlement in the southern portion of the area (later Oregon) prompted formation of a provisional government there and resolution of the British-American boundary in 1849.

In 1853 the Washington Territory was created out of the northern portion of the Oregon Territory. n924 As in the Oregon Territory enabling act, "all such laws, or any law or laws, inconsistent with the provisions of this act, shall be utterly null and void," n925 but the Washington act did explicitly continue prior laws in force:

> And be it further enacted, That the laws now in force in said Territory of Washington, by virtue of the legislation of Congress in reference to the Territory of Oregon, which have been enacted and passed subsequent to the first day of September, eighteen hundred and forty-eight, applicable to the said Territory of Washington, together with the legislative enactments of the Territory of Oregon, enacted and passed prior to the passage of, and not inconsistent with, the provisions of this act, and applicable to the said Territory of Washington, be, and they are hereby, continued in force in said Territory of Washington until they shall be repealed or amended by future legislation. n926

As explained in 7.02(ll), *supra*, the initial laws in force in the area of Oregon were the laws of Iowa territory, which were the common law and the laws of Wisconsin. The laws of Wisconsin were the laws of the Northwest Ordinance and the laws of Michigan territory. The Northwest Ordinance, which was also extended to the Michigan territory, imposed a common law system over its jurisdictions n927.

A new common law reception provision was enacted by the Washington territorial legislature in 1863, n928 and its

counterpart in the current Washington statutes is nearly identical:

> The common law, so far as it is not inconsistent with the Constitution and laws of the United States, or of the state of Washington nor incompatible with the institutions and condition of society in this state, shall be the rule of decision in all the courts of this state. n929

Against this common law reception background, Congress finally passed a statehood enabling act for Washington and several other states in 1889, n930 with a brief clause continuing in force prior laws: "and all laws in force made by said Territories, at the time of their admission into the Union, shall be in force in said States, except as modified or changed by this act or by the constitutions of the States, respectively." n931 The state constitution of 1889 also continued prior law in force, by means of a provision still in effect:

> All laws now in force in the Territory of Washington, which are not repugnant to this Constitution, shall remain in force until they expire by their own limitation, or are altered or repealed by the legislature: Provided, That this section shall not be so construed as to validate any act of the legislature of Washington Territory granting shore or tide lands to any person, company or any municipal or private corporation. n932

The Washington Supreme Court has held that the state's common law reception has included English statutes:

> The common law prevails in this state, so far as it is not inconsistent with the constitution and laws of this state, nor incompatible with the institutions and conditions of society.
>
> The common law of England, including the English statutes in force at the time of the Declaration of Independence, as adopted by the territorial law of 1863, continues to be the law of this state, except so far as modified by statute. n933

In matters relating to property rights, the rule in *Shelley's Case* has been adopted as a rule of decision, n934 common law arbitration rules have been recognized, n935 and Washington has adopted the community property approach to marital property. n936

§ 7.02(ww) West Virginia.

Until 1863, when Virginia's western counties refused to concur in Virginia's secession from the Union and were admitted as the new state of West Virginia, its history of common law reception was the same as Virginia's.

The initial royal charter for Virginia in 1606 established for each of its colonies a council of thirteen persons to govern "according to such laws, ordinances, and instructions, as shall be in that behalf, given and signed with our hand or sign manuel, and pass under the privy seal of our realm of England." n937

The charter secured to all persons dwelling or born within the colonies the right of English citizens, to "have and enjoy all liberties, franchises, and immunities, within any of our other dominions, to all intents and purposes, as if they had been abiding and born, within this our realm of England, or any other of our said dominions." n938 Supplemental instructions drafted in November, 1606, proclaimed that

> for the good government of the people to be planted in those parts, and for the good ordering and disposing of all causes happening within the same, and the same to be done for the substance thereof, as neer to the common lawes of England, and the equity thereof, as may be... n939

The supplemental instructions of November 20, 1606, added further confirmation that property rights rested on the established rights under the laws of England:

> ...and moreover wee doe hereby ordaine and establish for us, our heires and successors, that all the lands, tenements, and hereditaments to be had and enjoyed by any of our subjects within the precincts aforesaid, shall be had and inherited and enjoyed, according as in the like estates they be had and enjoyed by the lawes within this realme of England... n940

Early in 1609 the patentees drafted a new charter, which was approved by James I on May 23, 1609. This charter confirmed that such property rights were the rights recognized under existing English law:

> [The patentees] are to have and to hold, possess and enjoy, all and singular the said lands, countries and territories, with all and singular other premises, heretofore by these presents granted, or mentioned to be granted...; to the sole and proper use of [the patentees], their successors and assigns for ever; to be holden of us, our heirs, and successors, as of our manour of East Greenwich, in free and common socage, and not in capite... n941

When the Stuart monarch was restored to the throne in 1660, it seemed appropriate to the Virginia assembly to confirm their allegiance to English law. Thus the assembly proclaimed that Virginians "have also endeavoured in all things (as neere as the capacity and constitution of this country would admitt) to addhere to those excellent and often refined laws of England, to which we profess and acknowledge all due obedience and reverence...." n942 In 1666 the assembly appropriated money to purchase law books, in order to more faithfully follow English common law.

A provision for reception of the English common and statutory law was never included in Virginia's various constitutions, the first of which was adopted in 1776. However, Virginia's legislature in that same year did enact a statutory reception provision:

> That the common law of England, all statutes or acts of parliament made in aid of the common law prior to the fourth year of the reign of King James the first, and which are of a general nature, not local to the kingdom, together with the several acts of the general assembly of this colony now in force, so far as the same may consist with the several ordinances, declarations, and resolutions of the general convention, shall be the rule of decision, and shall be considered as in full force, until the same shall be altered by legislative power of this colony. n943

This provision was partially repealed, as to English statutes, in 1792.

Virginia courts consistently and unhesitatingly applied English common law in appropriate cases throughout the period of statehood. Decisions of English courts both before and after the Revolution were found acceptable. n944

In anticipation of a separation, inhabitants of Virginia's western counties drafted a constitution in 1861, which included a common law reception provision:

> Such parts of the common law and of the laws of the State of Virginia as are in force within the boundaries of the State of West Virginia when this constitution goes into operation, and are not repugnant thereto, shall be and continue the law of this State until altered or repealed by the legislature. n945

A virtually identical provision is in West Virginia's current constitution. n946

West Virginia was authorized for statehood late in 1862, and formally admitted by presidential proclamation in 1863. n947 A new constitution of 1872 contained essentially the same reception provision as its predecessor constitution. n948 In addition, a constitutional provision on land titles continued in effect the prior land law:

> All private rights and interests in lands in this State derived from or under the laws of the State of

> Virginia, and from or under the constitution or laws of this State prior to the time this constitution goes into operation, shall remain valid and secure and shall be determined by the laws in force in Virginia, prior to the formation of this State, and by the constitution and laws in force in this State prior to the time this constitution goes into effect. n949

This provision, too, remains in the current constitution. n950

West Virginia's statutory common law reception provision emphasizes the 1863 break from Virginia's laws:

> The common law of England, so far as it is not repugnant to the principles of the constitution of this state, shall continue in force within the same, except in those respects wherein it was altered by the general assembly of Virginia before the twentieth day of June, eighteen hundred and sixty-three, or has been, or shall be, altered by the Legislature of this state. n951

Several other statutory provisions limit the extent to which common law is received in West Virginia:

> The common law of England in regard to ancient lights is not in force in this state. n952
>
> The provisions of section one [36-1A-1, Uniform Statutory Rule Against Perpetuities] of this article do not apply to...:
>
> (7) A property interest, power of appointment, or arrangement that was not subject to the common-law rule against perpetuities or is excluded by another provision of this code. n953
>
> The right and benefit of all writs, remedial and judicial, given by any statute or act of parliament made in aid of the common law prior to the fourth year of the reign of James the First, of a general nature, not local to England, shall still be saved, so far as the same may be consistent with the Constitution of this State, the acts of the general assembly of Virginia passed before the twentieth day of June, eighteen hundred and sixty-three, and the acts of the legislature of this State. n954

West Virginia courts have held that the 1792 Virginia statute repealing all British statutes then in force, "with certain savings," was also the law in West Virginia. n955 State courts have also had to resolve a controversy over whether the judiciary has inherent power to alter established common law principles. Answering in the affirmative, the West Virginia Supreme Court has declared:

> Based on the foregoing law, we hold that *Article VIII, Section 13 of the West Virginia Constitution* and *W. Va. Code, 2-1-1*, were not intended to operate as a bar to this Court's evolution of common law principles, including its historic power to alter or amend the common law. n956

In clarifying this stance a few months later, the court said,

> We did not hold in *Morningstar* that we would ignore the English common law, but only that we are not required to accept it as forever binding on us to the point where we cannot make our own assessment of the reasonableness of an ancient common law rule in light of the present condition of our society. n957

§ 7.02(xx) Wisconsin.

In the area that is now Wisconsin, the first formal claim on behalf of a European power was made for France in 1634. French exploration and fur trading activities resulted in the founding of the first settlement, at Green Bay in 1684. The British assumed formal control after the French and Indian War, and the Americans became sovereign after the Treaty

of Paris in 1783. However, no effective American governmental activity disturbed the British Canadian influence until after the War of 1812.

During the period of nominal American sovereignty, Wisconsin area underwent numerous changes of territorial designation, each with its own particular type of common law reception. At first, the area was simply part of the Northwest Territory and under the legal regime of common law as required by the Northwest Ordinance. The Northwest Ordinance, enacted while the Articles of Confederation were in effect, ensured to the inhabitants of the territory judicial proceedings according the course of the common law, among other rights:

> The inhabitants of the said territory shall always be entitled to the benefits of the writs of *habeas corpus*, and of the trial by jury; of a proportionate representation of the people in the legislature, and of judicial proceedings according to the course of the common law. All persons shall be bailable, unless for capital offenses, where the proof shall be evident, or the presumption great. All fines shall be moderate; and no cruel or unusual punishments shall be inflicted. No man shall be deprived of his liberty or property, but by the judgment of his peers, or the law of the land, and should the public exigencies make it necessary, for the common preservation, to take any person's property, or to demand his particular services, full compensation shall be made for the same. And, in the just preservation of rights and property, it is understood and declared, that no law ought ever to be made or have force in the said territory, that shall, in any manner whatever, interfere with or affect private contracts, or engagements, *bona fide*, and without fraud previously formed. n958

The Northwest Ordinance also required the appointment of a three-judge court, the judges to "have a common-law jurisdiction," and who, with the governor, "shall adopt and publish in the district such laws of the original States, criminal and civil, as may be necessary, and best suited to the circumstances of the district." n959 In 1795 the governor and the judges of the Northwest Territory enacted the Virginia reception statute of 1776 (even though Virginia had in 1792 repealed the portion of the statute receiving English statutes):

> That the common law of England, all statutes or acts of parliament made in aid of the common law prior to the fourth year of the reign of King James the first, and which are of a general nature, not local to the kingdom, together with the several acts of the general assembly of this colony now in force, so far as the same may consist with the several ordinances, declarations, and resolutions of the general convention, shall be the rule of decision, and shall be considered as in full force, until the same shall be altered by legislative power of this colony. n960

When the Indiana Territory was created in 1800, n961 it included Wisconsin land within its boundaries, and this territory, too, was required to create "a government in all respects similar to that provided by [the Northwest Ordinance]; and the inhabitants thereof shall be entitled to, and enjoy all and singular the rights, privileges and advantages granted and secured to the people by the said ordinance." n962 In 1807 the Indiana territorial legislature enacted its own reception statute:

> The common law of England, all statutes and acts of the British Parliament, made in aid of the common law, prior to the fourth year of the reign of King James the first (excepting the second section of the sixth Chapter of forty-third Elizabeth [costs in certain cases], the 8th Chapter, thirteenth Elizabeth [usury] and 9th Chapter, thirty-seventh Henry eighth [usury], and which are of a general nature, not local to that kingdom; and also the several laws in force in this Territory, shall be the rule of decision, and shall be considered, as of full force, until repealed by legislative authority. n963

Wisconsin land was then transferred to the Territory of Illinois in 1809. As in the Indiana territorial enabling act nine years earlier, the Illinois territorial enabling act of 1809 n964 also called for "a government in all respects similar to that provided by [the Northwest Ordinance]; and the inhabitants thereof shall be entitled to, and enjoy all and singular

the rights, privileges and advantages granted and secured to the people by the said ordinance." n965

In 1818 Wisconsin became part of the Territory of Michigan. When the Michigan territory had been formed in 1805, n966 its enabling act also required the new territory to form a government in conformance with the Northwest Ordinance. n967 But the territorial legislature apparently wished to start afresh with fundamental law, because Michigan legislation in 1810 had purported to repeal all prior English statutes, French law and custom, and laws of the Northwest Territory and of the Indiana Territory, leaving only common law decisions in effect, by virtue of the Northwest Ordinance. This, then, was the received common law in Michigan Territory then Wisconsin became a part of that territory. The Michigan territory -- already including the areas of Michigan, Wisconsin and part of Minnesota -- was augmented in 1834 with land from the rest of Minnesota, and from Iowa and much of the Dakotas. Then in 1836, the Territory of Wisconsin was established with all of the land from the old Territory of Michigan, except the new state of Michigan, and in 1838, the Territory of Iowa was formed from part of Wisconsin Territory.

Wisconsin's territorial enabling act n968 in 1836 authorized the formation of a government in conformance with the Northwest Ordinance and specifically continued in force the Michigan territorial laws in effect at the time:

> And be it further enacted, That the inhabitants of the said Territory shall be entitled to, and enjoy, all and singular the rights, privileges, and advantages, granted and secured to the people of the Territory of the United States northwest of the river Ohio, by the [Northwest Ordinance]; and shall be subject to all the conditions and restrictions and prohibitions in said articles of compact imposed upon the people of the said Territory. The said inhabitants shall also be entitled to all the rights, privileges, and immunities, heretofore granted and secured to the Territory of Michigan, and to its inhabitants, and the existing laws of the Territory of Michigan shall be extended over said Territory, so far as the same shall not be incompatible with the provisions of this act, subject, nevertheless, to be altered, modified, or repealed, by the Governor and Legislative Assembly of the said Territory of Wisconsin; and further, the laws of the United States are hereby extended over, and shall be in force in, said Territory, so far as the same, or any provisions thereof may be applicable. n969

The enabling act also declared that "the said supreme court and district courts, respectively, shall possess chancery as well as common law jurisdiction." n970

In 1838 the Wisconsin territorial legislature followed Michigan's example and declared that statutes of Great Britain would not be considered law in the territory; that same legislature also repealed prior acts of Michigan territory, and then enacted a large compilation of laws borrowed mostly from Michigan, which in turn had been borrowed from New York, Ohio and Massachusetts. n971 However, the Wisconsin Supreme Court followed the courts of Michigan and Iowa in reinvigorating the common law reception long after the legislative attacks:

> This case presents the simple question, whether the landlord's common law right of distress for rent exists in this state...
>
> There is perhaps no better rule established than that which holds that the common law, so far as applicable to our condition, exists in the states of this country, except those whose systems were based upon the civil law or some other foreign code...
>
> I have sometimes heard it denied that any part of the common law was in force in this state, though I have never heard the reasoning by which that conclusion was arrived at. The same claim has, however, been made in other states similarly situated, and to show how it has been met I will quote from a few decisions. In *Lorman v. Benson, 8 Mich., 25* , the court says:
>
>> Some reference was made on the argument to the general system of law prevailing here in view of the former history of the country, but we deem it useless to enter into any

> extended examination of this question. It is undoubtedly true that at one time the custom of Paris was in force here. It was expressly abrogated by the territorial legislature in 1810, and probably applied to a very few cases then, if to any. Practically the common law has prevailed here, in ordinary matters, since our government took possession; and the country has grown up under it. How, or by what particular means, it originated, would open an inquiry more curious than useful. A custom which is as old as the American settlements, and has been universally recognized by every department of government, has made it the law of the land, if not made so otherwise. Our statutes, without this substratum, would not only fail to provide for the great mass of affairs, but would lack the means of safe construction. We are of opinion that questions of property, not clearly excepted from it, must be determined by the common law, modified only by such circumstances as render it inapplicable to our local affairs.

In *O'Ferrall v. Simplot, 4 Iowa, 381* , the court says:

> The defendant suggests the further question, whether the complainant would be entitled to dower in this lot if she had not signed the deed. And under this he starts the query whether the common law is the law of this state. This question has been suggested in this court before, but it has not been with apparent seriousness, and therefore it has received no formal answer: and it is not now pressed with an appearance demanding more than a suggestive reply. In the first place, according to our recollection of history, the common law was substituted for the civil law by the Missouri territory, of which this state was once a part. In the next place, so many rights and titles -- so great interests have grown up, as if by and under the common law, and not by and under the civil -- that it would be the duty of a court to hold that the people brought it with them. The territory has, from the beginning, including all private rights and titles, been administered upon the basis of the common law, and to hold that the civil, and not the common law, is the law of this state, would produce startling and revolutionary effects. The extent and magnitude of the interests involved, would require a court to hold to the common law, if there was no other reason. But, besides this, all our laws, back to the beginning of the territory, recognize -- assume the common law. They would many of them, be unmeaning, senseless, without it. All the proceedings of the courts would be so, and not a judgment heretofore recovered would be valid, nor a title under it. But the ordinance of 1787, for the government of the Northwest Territory, made it the law of that country; and that was extended over Wisconsin, and then the laws of Wisconsin, over Iowa. And although the statutes of Michigan and Wisconsin were repealed in 1840, the ordinance of 1787 was not affected, but remained in full vigor as before.

> I have quoted thus at some length from these two decisions, for the reason not only that they are so applicable to the point, but that they were given by courts of states with both of which this state has in a territorial condition been connected. And all that they say about their entire system of laws having from the beginning assumed the existence of the common law, is equally true here. And, as if to remove all pretense for raising the question, our constitution itself expressly assumed the existence of the common law here, and provided that such parts of it as were then in force, not inconsistent with the constitution, should "be and continue part of the law of this state until altered or suspended by the legislature." n972

Wisconsin was authorized for statehood in 1846, n973 formally admitted in 1848, n974 and adopted a new constitution in that same year. This constitution, as noted in *Coburn*, contained a provision continuing the common law in force: "Such parts of the common law as are now in force in the Territory of Wisconsin, not inconsistent with this Constitution, shall be and continue part of the law of this State, until altered, or suspended by the Legislature." n975 The

identical provision continues in the state's current constitution. n976

As in Michigan, the legislative rejection of statutes of Great Britain apparently did not necessarily apply to earlier English statutes. As noted by *Coburn*,

> when our territorial legislature and the framers of our constitution recognized the existence here of the common law, they must be held to have had reference to that law as it existed, modified and amended by English statutes passed prior to the [American] revolution. n977

A later Wisconsin court elaborated on this chronological dividing point for common law statutory reception:

> The rule fixing the period of our revolution as the time from which the English statutes and acts of parliament shall be considered as part of the common law of this country, or that those statutes enacted before that time and which were adapted to our condition and circumstances as a people, shall be so considered, is a general one adopted for convenience merely, and which should govern in the generality of cases, but not one intended to apply always and to all cases or to all statutes which may have been so enacted, without regard to any other facts or circumstances. The fundamental idea represented by the rule and upon which it is based is, that those statutes which were so enacted and which were suited to the condition and circumstances of our colonial ancestors, had been received, acted upon and ratified by them as part of the jurisprudence and laws of the colonies before the separation from the mother country, and which, upon the separation, the colonists took with them as the still continuing law, except where subsequently repealed or modified by positive legislative enactment. This view of the reasons and grounds of the rule would seem to exclude the statute in question from it, since the same was enacted on the very eve of the revolution, and at a time when we know our ancestors, in their colonial state, could not have become familiar with, or have ratified or adopted it, and at a time, too, when, as history shows, all or nearly all respect for British sovereignty and British laws or acts of parliament then being passed, was well nigh extinct throughout the colonies. That our ancestors did not, and could not have adopted and acted upon this statute as part of their laws, before their independence, is, therefore very certain. n978

More recent Wisconsin cases have reaffirmed this position, n979 although one case has fixed the common law reception as of the "time of the State Constitution." n980

To a large extent, questions concerning common law reception for property issues has been mooted by extensive legislation on interests in property. Major chapters in the Wisconsin statutes deal with interests in property, trusts, powers of appointment, condominiums, landlord and tenant, multiple-party and agency accounts, conveyances of real property (including recording and titles), mortgages and land contracts, and other miscellaneous provisions. n981 In addition, Wisconsin has adopted the Uniform Marital Property Act, which effectively invokes a community property approach toward marital property. n982

§ 7.02(yy) Wyoming.

All but the southwestern fifth of Wyoming was included in the Louisiana Purchase. The governance of that minor portion originated variously with the annexation of Texas in 1845, the cession from Mexico in 1848, and in the Oregon territory. Part of Wyoming was included in the Utah-based "State of Deseret" beginning in 1849; part of it was in the Colorado-based "State of Jefferson" beginning in 1859, although Wyoming was officially part of Nebraska Territory beginning in 1854.

As part of the Louisiana Territory, Wyoming was hardly influenced by the common French and Spanish legal heritage belonging to that area, because of the absence of settlement before and for long after the Louisiana Purchase. French

governance over the region ended with the arrival of a Spanish governor in 1769, and Spanish authority ended in 1803. Upon his assumption of office in 1769, the Spanish governor officially proclaimed the substitution of Spanish law for all prior laws in the area. n983

When the new American governor arrived in New Orleans in 1804, he created a "court of common pleas" with proceedings in English, signifying an abrupt transition into an American common law system. Reacting to local protest, Congress later in that same year separated the area of Louisiana state, called the Territory of Orleans, from the rest of the Louisiana territory, designating the remainder as the District of Louisiana and placing it administratively under the Territory of Indiana. n984 Existing law was continued in force for the District of Louisiana: "The laws in force in the said district of Louisiana, at the commencement of this act, and not inconsistent with any of the provisions thereof, shall continue in force until altered, modified or repealed by the governor and judges of the Indiana territory, as aforesaid." n985

The Indiana territorial government enacted certain laws of the new territory between 1804 and 1805, all of them with pronounced common law flavor, and in 1806 Congress established a separate administration for the area, redesignating it the Territory of Louisiana. Statutes enacted after this change also covered familiar common law subjects. In 1812 the Territory of Louisiana was granted the right to its own legislative assembly, and its name was changed to the Territory of Missouri. A territorial enactment in 1815 authorized the recording of land titles acquired during the period of Spanish government, but in 1816 the territorial legislature adopted a broad common law reception statute:

> The common law of England, which is of a general nature, and all statutes made by the British parliament in aid of or to supply the defects of the said common law, made prior to the fourth year of James the first, and of a general nature, and not local to that kingdom, which said common law and statutes are not contrary to the laws of this territory, and not repugnant to, nor inconsistent with the constitution and laws of the United States shall be the rule of decision in this territory, until altered or repealed by the legislature, any law, usage, custom to the contrary notwithstanding, provided, however, that none of the British statutes respecting crimes and punishments shall be in force in this territory, nor shall any person be punished by common law, where the laws and statutes of this territory have made provision on the subject, but where the laws and statutes of the United States and this territory have not made provision for the punishment of offences, the several courts may proceed to punish for such offences, provided, the punishment shall in no case be other than fine and imprisonment, and the term of imprisonment shall not exceed two months; and the fine shall not exceed one hundred dollars. n986

A companion provision to this general common law reception statute indicated certain real property common law doctrines that were excepted from this reception:

> The doctrine of survivorship in cases of joint tenants shall never be allowed, in this territory. The doctrine of entails shall never be allowed, and in all cases where any real estate shall be entailed, the whole of the right and interest of, in, and to the same, shall vest in fee simple in the person having the first reversion or remainder in said estate, after the life estate is determined in said estate. n987

When the State of Missouri was formed in 1821, no actual governmental authority applied to the Louisiana Purchase territory north of Missouri, including Wyoming, until 1834, when Congress attached it to the Territory of Michigan. n988

In 1854 all of Wyoming was included in the newly-designated Nebraska Territory. In the territorial enabling act, n989 no explicit common law reception was mentioned. However, it was provided that the territorial supreme and district courts "shall possess chancery as well as common law jurisdiction,"

n990 and federal law, except for the 1820 Missouri Compromise legislation, was declared applicable in the new

territory. n991 Thereafter, in its first session, the Nebraska territorial legislature enacted a common law reception provision:

> That so much of the common law of England as is applicable and not inconsistent with the constitution of the United States, with the organic law of this Territory, or with any law passed or to be passed by the Legislature of this Territory be and the same is adopted and declared to be law within said Territory. n992

In 1863, Wyoming was made part of the Dakota Territory. n993 The territorial enabling act had no provision for continuing prior laws in force, but did decree that the territorial supreme and district courts "shall possess chancery as well as common-law jurisdiction." n994 In the territorial legislation thereafter only a slight acknowledgement of common law reception was made in the provision that "In this Territory there is no common law in any case where the law is declared by the Codes." n995

While Wyoming was part of Dakota territory, it was shuttled into the Idaho territory for one year, 1863-1864. Idaho, which had attained territorial status in March, 1863,90 n996 had in its enabling act no provision for continuing previous laws in force or explicitly receiving the common law. The only provision in this organic act pertinent to reception was the declaration that "the said supreme and district courts, respectively, shall possess chancery as well as common-law jurisdiction." n997 With no organic provision for reception, the Idaho legislature the next year, while Wyoming was still part of the territory, enacted a statutory common law reception provision, very similar to Washington's, and which continues in the current Idaho code:

> The common law of England, so far as it is not repugnant to, or inconsistent with, the constitution or laws of the United States, in all cases not provided for in these compiled laws, is the rule of decision in all courts of this state. n998

In 1864, after enactment of this Idaho territorial provision, Wyoming was re-assigned to the Nebraska Territory, and then organized as the Territory of Wyoming in 1868. n999 The enabling act, in addition to confirming the "chancery as well as common law jurisdiction" of the territorial supreme and district courts, n1000 placed the current laws of Dakota Territory in force in Wyoming:

> That all general territorial laws of the Territory of Dakota in force in any portion of said Territory of Wyoming at the time this act shall take effect shall be and continue in force throughout the said Territory until repealed by the legislative authority of said Territory, except such laws as relate to the possession or occupation of mines or mining claims. n1001

The next year, in 1869, the Wyoming territorial legislature enacted a traditional common law reception statute, the current version of which is as follows:

> The common law of England as modified by judicial decisions, so far as the same is of a general nature and not inapplicable, and all declaratory or remedial acts or statutes made in aid of, or to supply the defects of the common law prior to the fourth year of James the First (excepting the second section of the sixth chapter of forty-third Elizabeth, the eighth chapter of thirteenth Elizabeth and ninth chapter of thirty-seventh Henry Eighth) and which are of a general nature and not local to England, are the rule of decision in this state when not inconsistent with the laws thereof, and are considered as of full force until repealed by legislative authority. n1002

When Wyoming was authorized for statehood in 1889, the enabling act continued in force existing territorial laws: "all laws in force made by said Territory, at the time of its admission into the Union, until amended or repealed, shall be in force in said State, except as modified or changed by this act or by the constitution of the State... n1003

Wyoming's constitution of 1889 also continued territorial laws in force, with a provision that is still current: "All laws now in force in the Territory of Wyoming, which are not repugnant to this constitution, shall remain in force until they expire by their own limitation, or be altered or repealed by the legislature." n1004

Wyoming courts have delivered an unusually generous commentary on various aspects of common law reception in the state. However, probably the earliest full judicial discussion of Wyoming's reception statute was issued by the Supreme Court of Utah. Following a lengthy discussion of authorities, the Utah Supreme Court concluded in 1904 that:

> the phrase "common law of England," as used in section 2695 of the Wyoming Revised Statutes of 1899, was not intended and does not include the judicial decisions of England upon the subject rendered subsequently to the independence of America. But, notwithstanding such decisions are not a part of the common law adopted by the state of Wyoming, and are not, therefore, binding upon the courts of that state, yet, as evidence of what the common law, as so adopted, is, they are entitled to respect, and in particular cases may properly be regarded as conclusive. n1005

The Wyoming Supreme Court has adopted a pragmatic attitude toward the state's reception statute:

> [A]lthough W.S. 8-1-101 adopts the common law as the law of this state, we have held that we will recognize the common law as modified by judicial decisions and will adopt that interpretation which seems best... Moreover, we have previously expressed a reluctance to recognize, or continue a recognition of, a common law rule that had its genesis in a social, economic and political climate entirely foreign to Wyoming in current times. n1006 The common law is not exactly the common law of 1607. Many, and probably most of the rules of the common law of 1607, aside from equitable rules and aside from fundamental maxims, have been modified by judicial decisions. And that is true with the rule under discussion. Our statute ... does not state what are the judicial decisions to which reference is made. However, it is, and has been, the constant practice of courts in common law jurisdictions to freely cite cases from other common-law courts, and we take it that the legislature had in mind the judicial decisions of all of the various jurisdictions. The cases may differ; one court may take one view, another another. Hence we cannot consider these various decisions as the law in this state, but as interpretations of the common law, and we are at liberty to adopt that interpretation which seems to be the best. n1007
>
> The adoption of common law by Wyoming was not an adoption of a set code of law. By nature, the common law is not a set code of law. Nor was the adoption one of static and nonchanging law...
>
> With reference to the ... statute, we have said that:
>
> > "[W]e must decide this case in accordance with the decisions subsequent to the time of James I, in so far as not inconsistent with the laws of this state, and the decision which must govern us, to the extent mentioned, are not only the English decisions..., but other decisions as well, comparatively recent though they may be, and we are at liberty to follow any of them, or rest our decision upon the fundamental principle underlying all of them...." *Johnston v. Laird, 48 Wyo. 532, 538, 52 P.2d 1219, 1220 (1935)* . n1008

In adopting a particular construction of the rule in *Shelley's Case*, the Wyoming Supreme Court adopted the English approach, "and we view it as the correct approach, notwithstanding the fact that there is respectable American authority to the contrary." n1009

FOOTNOTES:

(n1)Footnote 2. "And be it further enacted, That all offices which may exist, and all laws which may be in force, in said territory, within the boundaries above described, at the time this act shall go into effect, shall continue to exist, and be in

force, until otherwise provided by law." An act to Establish a separate territorial government for the eastern part of the Mississippi Territory, Ch. LIX, § 2, *3 Stat. 371 (1817).*

(n2)Footnote 3. Act of April 7, 1798, Chap. XXVIII, § 6, *1 Stat. 549-550 (1798).*

(n3)Footnote 4. *An Ordinance for the government of the territory of the United States northwest of the river Ohio* [Northwest Ordinance], art. II, § 14 (1787), published as a footnote in 1 United States Statutes at Large 51-53.

(n4)Footnote 5. *An Ordinance for the government of the territory of the United States northwest of the river Ohio* [Northwest Ordinance], art. II, §§ 4, 5 (1787), published as a footnote in 1 United States Statutes at Large 51-53.

(n5)Footnote 6. 9 William Walter Hening, The Statutes at Large, Being a Collection of all the Laws of Virginia 127, P VI (1823).

(n6)Footnote 7. *Pollard's Lessee v. Hagan, 44 U.S. 212 (1845)* .

(n7)Footnote 8. Statutes of Mississippi Territory, Ch. V, § 4 (1807).

(n8)Footnote 9. Ch. XLVII, § 5 (1819).

(n9)Footnote 10. Alabama Constitution of 1819, Schedule, § 5.

(n10)Footnote 11. *Ala. Code § 1-3-1*.

(n11)Footnote 12. *Ex Parte H.H., 830 So. 2d 21, 33 (Ala. 2002)* (special concurrence of Chief Justice Moore); *Weaver v. G. D. Searle & Co., 558 F. Supp. 720 (N.D. Ala. 1983)* ; *Swartz v. United States Steel Corp., 304 So. 2d 881 (Ala. 1974)* ; *Swanner v. United States, 275 F. Supp. 1007 (M.D. Ala. 1967)* ; *Hollis v. Crittenden, 37 So. 2d 193 (Ala. 1948)* .

Romaine S. Scott III, *The Title Question: Do Bankruptcy Courts Have Jurisdiction Over Mortgaged Alabama Real Property?, 45 Ala. Law. 248 (1984).*

(n12)Footnote 13. *Nelson v. McCrary, 60 Ala. 301 (1877)* ; *Clark v. Goddard, 39 Ala. 164 (1863)* ; *Carter v. Balfour, 19 Ala. 814 (1851)* .

(n13)Footnote 14. *Smith v. United Constr. Workers, Dist. 50, 122 So. 2d 153 (Ala. 1960)* .

(n14)Footnote 15. *Beasley v. MacDonald Eng'g Co., 249 So. 2d 844 (Ala. 1971)* .

(n15)Footnote 16. *Nottingham v. C. H. & B., Inc., 522 So. 2d 777 (Ala. 1988)* .

(n16)Footnote 17. 1 William F. Swindler, Sources and Documents of United States Constitutions 159-168 (1973).

(n17)Footnote 18. Ch. 53, *23 Stat. 24.*

(n18)Footnote 19. Ch. 786, *31 Stat. 321*, § 367.

(n19)Footnote 20. Ch. 387, *37 Stat. 512*, § 3 (1912).

(n20)Footnote 21. *Alaska Stat. § 01.10.010*.

(n21)Footnote 22. *Valentine v. Roberts, 1 Alaska 536 (1902)* .

(n22)Footnote 23. *Howarth v. Pfeifer, 443 P.2d 39 (Alaska 1968)* . James R. Pomeranz, Note, *The State of Caveat*

Emptor in Alaska as it Applies to Real Property, 13 Alaska L. Rev. 237 (1996); Donald Craig Mitchell, *Alaska v. Native Village of Venetie: Statutory Construction or Judicial Usurpation? Why History Counts,* 14 Alaska L. Rev. (1997).

(n23)Footnote 24. Territorial Act of 1850, § 17.

(n24)Footnote 25. Territorial Act of 1850, § 10.

(n25)Footnote 26. *Leitensdorfer v. Webb, 1 N.M. (1 Gild.) 34 (1853), aff'd, 61 U.S. 176 (1857)* .

(n26)Footnote 27. Federal Territorial Act, § 2, *12 Stat. 664 (1850).*

(n27)Footnote 28. Arizona Draft Constitution of 1891, art. XXII, § 3.

(n28)Footnote 29. Arizona Constitution, art. XXII, § 2.

(n29)Footnote 30. The rejection of Hispanic law was explicit:

> All laws, customs, ordinances, and decrees of the Mexican Republic; all laws, customs, ordinances, and decrees of the kingdom of Spain; and all legislative enactments of the Territory of New Mexico, now or heretofore in force in this Territory, are hereby repealed...

Ariz. Comp. Laws, Ch. 61, § 1.

(n30)Footnote 31. *Ariz. Rev. Stat. Ann. § 1-201*.

(n31)Footnote 32. *Ariz. Rev. Stat. Ann. §12-122*.

(n32)Footnote 33. *John W. Masury & Son v. Bisbee Lumber Co., 68 P.2d 679 (Ariz. 1937) . See also Patterson v. Connolly, 77 P.2d 813 (Ariz. 1938)* (declaring that the common law of Arizona includes the English common law as amended by statute down to the time the union between the colonies and England was severed). *See* Sherry Hutt and C. Timothy McKeown, *Control of Cultural Property as Human Rights Law, 31 Ariz. St. L.J. 363 (Summer 1999). See also* Emily Sherwin, *Two- and Three-Dimensional Property Rights, 29 Ariz. St. L.J. 1075 (Winter 1997).* M. June Harris, *Who Owns the Pot of Gold at the End of the Rainbow? A Review of the Impact of Cultural Property on Finders and Salvage Laws, 14 Ariz. J. Int'l & Comp. Law 223 (1997);* Rebecca Tsosie, *Privileging Claims to the Past: Ancient Human Remains and Contemporary Cultural Values, 31 Ariz. St. L.J. 583 (1999).*

(n33)Footnote 34. *Pendleton v. Brown, 221 P. 213 (Ariz. 1923)* .

(n34)Footnote 35. *Boquillas Land & Cattle Co. v. Curtis, 89 P. 504 (Ariz. 1907)* ; *Boquillas Land & Cattle Co. v. Curtis, 213 U.S. 339 (1909)* .

(n35)Footnote 36. *Austin v. Chandler, 42 P. 483 (Ariz. 1895)* .

(n36)Footnote 37. This substitution is discussed in Beard v. Poydras, 4 Mart. 348 (La. 1816) .

(n37)Footnote 38. *2 Stat. 283 (1804).*

(n38)Footnote 39. *2 Stat. 13 (1804).*

(n39)Footnote 40. 1 Laws of a Public and General Nature, of the District of Louisiana, of the Territory of Louisiana, of the Territory of Missouri, and of the State of Missouri up to the Year 1824 § 1 (1842).

(n40)Footnote 41. 1 Laws of a Public and General Nature, of the District of Louisiana, of the Territory of

Louisiana, of the Territory of Missouri, and of the State of Missouri up to the Year 1824 § 2 (1842).

(n41)Footnote 42. *3 Stat. 419.*

(n42)Footnote 43. 3 Stat. § 10.

(n43)Footnote 44. Arkansas Constitution of 1836, Schedule, § 2.

(n44)Footnote 45. Arkansas Constitution, Schedule, § 1.

(n45)Footnote 46. *Ark. Code Ann. § 1-2-119. See Moore v. Sharpe, 91 Ark. 407, 121 S.W. 341 (Ark. 1909)* .

(n46)Footnote 47. *Ark. Code Ann. § 16-13-201*.

(n47)Footnote 48. *Ark. Code Ann. § 18-14-104(a).*

(n48)Footnote 49. *Horsley v. Hilburn, 44 Ark. 458 (1884)* ; *First Nat'l Bank v. Graham, 113 S.W.2d 497 (Ark. 1938)* . Anthony W. Juneau, *Survey of Legislation: Title 18-Property Law, 26 U. Ark. Little Rock L. Rev. 459* (Winter, 2004) (the 2003 state legislature abolished the use of Shelley's Rule in Arkansas courts).

(n49)Footnote 50. *Stewart v. Tucker, 208 Ark. 612, 188 S.W.2d 125 (Ark. 1945)* .

(n50)Footnote 51. *Smith v. Wright, 779 S.W.2d 177 (Ark. 1989)* ; *Meadows v. State, 722 S.W.2d 584 (Ark. 1987)* . Stephen J. Maddex, Case Note, *Propst v. McNeill*: *Arkansas Landlord-Tenant Law, A Time for Change, 51 Ark. L. Rev. 575 (1998).*

(n51)Footnote 52. California Constitution of 1849, Schedule, § 1. Myra K. Saunders, *California Legal History: The California Constitution of 1849, 90 Law Libr. J. 447 (1998);* Paul J. Boudreaux, *The Quintessential Best Case for "Takings" Compensation--A Pragmatic Approach to Identifying the Elements of Land-Use Regulations That Present the Best Case for Government Compensation, 34 San Diego L. Rev. 193 (1997).*

(n52)Footnote 53. California Constitution, art. XXII, § 1. Susan F. French, *Toward A Modern Law of Servitudes: Reweaving the Ancient Strands, 55 S. Cal. L. Rev. 1261 (1982).*

(n53)Footnote 54. Laws of California, Ch. 95.

(n54)Footnote 55. *Cal. Civ. Code § 22.2*. David Dudley, *The Civil Law and Field's Civil Code in Common-Law California Note on What Might Have Been*, 5(1) W. Legal Hist. 13 (1992).

(n55)Footnote 56. *Ferguson v. Keays, 484 P.2d 70 (Cal. 1971)* ; *Reed v. Eldredge, 27 Cal. 346 (1865)* .

(n56)Footnote 57. *Lux v. Haggin, 4 P. 919, 10 P. 674 (Cal. 1886)* .

(n57)Footnote 58. *Lux v. Haggin, 4 P. 919, 10 P. 674 (Cal. 1886)* .

(n58)Footnote 59. *Ferguson v. Keays, 484 P.2d 70 (Cal. 1971)* .

(n59)Footnote 60. *In re Fair, 60 P. 442, 64 P. 1000 (Cal. 1901)* .

(n60)Footnote 61. *Moore v. Purse Seine Net, 118 P.2d 1 (Cal. 1941)* ; *Martin v. Superior Ct., 168 P. 135 (Cal. 1917)* .

(n61)Footnote 62. *Martin v. Superior Ct., 168 P. 135 (Cal. 1917)* .

(n62)Footnote 63. *Strong v. Shatto, 187 P. 159 (Cal. 1919)* .

(n63)Footnote 64. *Chow v. Santa Barbara, 22 P.2d 5 (Cal. 1933)* . *See* Mark T. Kanazawa, *Efficiency in Western Water Law: The Development of the California Doctrine, 18501911, 7 J. Legal Stud. 159 (1998);* Michael Graf, *Using the Public Trust Doctrine to Achieve Proportionate Reductions of Water Diversions from the Delta, 13 Ucla J. Envtl. L. & Pol'y 263 (1995)* .

(n64)Footnote 65. *Chandler v. Chandler, 55 Cal. 267 (1880)* .

(n65)Footnote 66. *Tennant v. Tennant (John) Mem. Home, 140 P. 242 (Cal. 1914)* .

(n66)Footnote 67. *Katz v. Walkinshaw, 70 P. 663, 74 P. 766 (Cal. 1903)* .

(n67)Footnote 68. *Lund Estate, 159 P.2d 643 (Cal. 1945)* . Susan E. Dalton, Article: *From Presumed Fathers to Lesbian Mothers: Sex Discrimination and the Legal Construction of Parenthood*, 9 Michigan Journal of Gender & Law 261 (2003) (Article criticizes the traditional legal status afforded parents in light of societal changes).

(n68)Footnote 69. This substitution is discussed in Beard v. Poydras, 4 Mart. 348 (La. 1816) .

(n69)Footnote 70. *2 Stat. 283.*

(n70)Footnote 71. *2 Stat. 13.*

(n71)Footnote 72. 1 Laws of a Public and General Nature, of the District of Louisiana, of the Territory of Louisiana, of the Territory of Missouri, and of the State of Missouri up to the Year 1824 § 1 (1842).

(n72)Footnote 73. 1 Laws of a Public and General Nature, of the District of Louisiana, of the Territory of Louisiana, of the Territory of Missouri, and of the State of Missouri up to the Year 1824 § 2 (1842).

(n73)Footnote 74. Kansas-Nebraska Act, § 27, *10 Stat. 277, 283.*

(n74)Footnote 75. Kansas-Nebraska Act, § 32, *10 Stat. 277, 283.*

(n75)Footnote 76. Kan. Terr. Stat., Ch. 96, § 1.

(n76)Footnote 77. Colo. Terr. Laws 35.

(n77)Footnote 78. *Colo. Rev. Stat. § 2-4-211*.

(n78)Footnote 79. Colorado Constitution of 1876, Schedule, § 1.

(n79)Footnote 80. Colorado Constitution, Schedule, § 1.

(n80)Footnote 81. *People ex rel. Att'y Gen. v. News-Times Pub'g Co., 84 P. 912 (Colo. 1906) , appeal dismissed, 205 U.S. 454 (1907)* .

(n81)Footnote 82. *Perry v. Brundage, 614 P.2d 362 (Colo. 1980)* ; *Malouff v. Midland Fed. Sav. & Loan Ass'n, 509 P.2d 1240 (Colo. 1973)* .

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(n83)Footnote 84. The Earliest Laws of the New Haven and Connecticut Colonies, 1639-1673 13-14 (John D. Cushing ed. 1977).

(n84)Footnote 85. The Earliest Laws of the New Haven and Connecticut Colonies, 1639-1673 65-70 (John D. Cushing Ed. 1977).

(n85)Footnote 86. The Earliest Laws of the New Haven and Connecticut Colonies, 1639-1673 75 (John D. Cushing Ed. 1977).

(n86)Footnote 87. The Earliest Laws of the New Haven and Connecticut Colonies, 1639-1673 112 (John D. Cushing Ed. 1977).

(n87)Footnote 88. 2 Sources and Documents of United States Constitutions 137 (William F. Swindler ed. 1973).

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(N89)Footnote 90. Constitutional Ordinance of 1776, Address to the King, June 13, 1689, 2 Sources and Documents of United States Constitutions 143 (William F. Swindler ed. 1973).

(n90)Footnote 91. *Baldwin v. Walker, 21 Conn. 168, 181 (1851)* .

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(n93)Footnote 94. The Earliest Printed Laws of New York 1665-1693 148-149 (John D. Cushing ed. 1978).

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(n95)Footnote 96. 2 Source and Documents of United States Constitutions 53 (William F. Swindler ed., 1973).

(n96)Footnote 97. Delaware Constitution of 1776, art. 25, in 2 Source and Documents of United States Constitutions 203 (William F. Swindler ed., 1973).

(n97)Footnote 98. Delaware Constitution of 1792, art. VIII, § 10, in Delaware Constitution of 1776, art. 25, in 2 Source and Documents of United States Constitutions 214 (William F. Swindler ed., 1973).

(n98)Footnote 99. Delaware Constitution of 1831, art. VII, § 9.

(n99)Footnote 100. Delaware Constitution of 1897, Schedule, § 18.

(n100)Footnote 101. *History of the D.C. Code*, 1District of Columbia Code 1-2 (1981 ed.).

(n101)Footnote 102. *History of the D.C. Code*, 1District of Columbia Code 4 (1981 ed.).

(n102)Footnote 103. *18 Stat. 1-149* (Part 2).

(n103)Footnote 104. *18 Stat. 2* (Part 2).

(n104)Footnote 105. *18 Stat. 149* (Part 2).

(n105)Footnote 106. *18 Stat. 9* (Part 2).

(n106)Footnote 107. *History of the D.C. Code*, 1District of Columbia Code 12 (1981 ed.).

(n107)Footnote 108. *D.C. Code Ann. § 49-301*. *Little v. United States, 709 A.2d 708 (D.C. 1998)* (Common law of

District of Columbia encompasses all common law in force in Maryland in 1801, unless expressly repealed or modified; this is a criminal case).

(n108)Footnote 109. J. Randall T. Shepard, *Land Use Regulation in the Rehnquist Court: The Fifth Amendment and Judicial Intervention, 38 Cath. U.L. Rev. 847 (1989).*

(n109)Footnote 110. *In re Lee's Estate, 80 F. Supp. 293 (D.D.C. 1948)* . Herman Schwartz, *Property Rights and the Constitution: Will the Ugly Duckling Become a Swan?, 37 Am. U.L. Rev. 9 (1987).*

(n110)Footnote 111. *Cunningham v. Rodgers, 267 F. 609 (D.C. Cir. 1920) , aff'd, 257 U.S. 466 (1922)* .

(n111)Footnote 112. *Baltimore & Ohio R.R. v. Thomas, 37 App. D.C. 255 (1911)* .

(n112)Footnote 113. Treaty of Amity, Settlement and Limits, 8, *8 Stat. 252 (1819).*

(n113)Footnote 114. *3 Stat. 654.*

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(n115)Footnote 116. John P. Duval, Compilation of the Public Acts of the Legislative Council of the Territory of Florida, Passed Prior to 1840 5, 45 (1839).

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(n118)Footnote 119. Florida Constitution of 1838, art. XVI, § 6.

(n119)Footnote 120. Florida Constitution of 1838, art. XVII, § 1.

(n120)Footnote 121. Florida Constitution of 1865, art. XVI, § 6; art. XVII, § 1.

(n121)Footnote 122. Florida Constitution of 1868, art. XVI, §§ 1, 2.

(n122)Footnote 123. Florida Constitution of 1885, art. XVIII, § 2.

(n123)Footnote 124. Florida Constitution, art. XII, Schedule, § 6(a).

(n124)Footnote 125. *Fla. Stat. Ann. § 2.01*.

(n125)Footnote 126. *First Nat'l Bank of Leersburg v. Hector Supply Co., 254 So. 2d 777* (Fla.) , mandate conformed to, *257 So. 2d 83 (Fla. 1971)* . Susan N. Gary, *Marital Partnership Theory and the Elective Share: Federal Estate Tax Law Provides a Solution, 49 U. Miami L. Rev. 567 (1995).*

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(n127)Footnote 128. *Reid v. Barry, 112 So. 846 (Fla. 1927)* .

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(n129)Footnote 130. Jonathan D. Colan, Comment, *You Can't Take That Away from Me: The Sanctity of the*

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(n130)Footnote 131. 1 Fla. Stat. Ann. §§ 14 - 24.

(n131)Footnote 132. North Carolina Charters and Constitutions, 1578-1698 77 (Mattie Erma Edwards Parker ed. 1963).

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(n134)Footnote 135. Select Charters and Other Documents Illustrative of American History, 1606-1775 242 (William MacDonald ed. 1914).

(n135)Footnote 136. Select Charters and Other Documents Illustrative of American History, 1606-1775 243 (William MacDonald ed. 1914).

(n136)Footnote 137. Georgia Constitution of 1777, [Preamble] *in* 2 William F. Swindler, Sources and Documents of United States Constitutions 444 (1973). Alan Watson, *The Transformation of American Property Law: A Comparative Law Approach, 24 Ga. L. Rev. 163 (1990).*

(n137)Footnote 138. Georgia Constitution of 1777, art. VII, in William F. Swindler, Sources and Documents of United States Constitutions 445 (1973).

(n138)Footnote 139. 2 Allen E. Candler, The Colonial Records of Georgia 290-292 (1911). This act was styled as "An Act for reviving and enforcing certain laws therein mentioned and adopting the common law of England as they existed on May 14, 1776," and was approved on February 25, 1784. The act has survived all Georgia recodifications and is specifically preserved in Georgia's current code, Official Code of Georgia Annotated (O.C.G.A.) 1-1-10(c)(1).

(n139)Footnote 140. Georgia Constitution of 1789, art. I, § 16, in 2 William F. Swindler, Sources and Documents of United States Constitutions 453 (1973).

(n140)Footnote 141. Georgia Constitution of 1798, art. I, § 22, in 2 William F. Swindler, Sources and Documents of United States Constitutions 460 (1973).

(n141)Footnote 142. Georgia Constitution of 1865, art. II, § 5, P I, in 2 William F. Swindler, Sources and Documents of United States Constitutions 491 (1973).

(n142)Footnote 143. Georgia Constitution of 1865, art. V, § 1, P V, in 2 William F. Swindler, Sources and Documents of United States Constitutions 495 (1973).

(n143)Footnote 144. Georgia Constitution of 1868, art. III, § 5, P I, in 2 William F. Swindler, Sources and Documents of United States Constitutions 503 (1973).

(n144)Footnote 145. Georgia Constitution of 1868, art. XI P III, in 2 William F. Swindler, Sources and Documents of United States Constitutions 511 (1973).

(n145)Footnote 146. Georgia Constitution of 1877, art. III, § VII, P XXII, in 2 William F. Swindler, Sources and Documents of United States Constitutions 524 (1973).

(n146)Footnote 147. Georgia Constitution of 1877, art. XII, § I, PP I-III, in 2 William F. Swindler, Sources and Documents of United States Constitutions 544 (1973).

(n147)Footnote 148. Georgia Constitution of 1945, art. XII, § I, P III.

(n148)Footnote 149. Doe dem. *Patterson v. Winn, 30 U.S. 233 (1831)* .

(n149)Footnote 150. *Robert & Wife v. West & Reid, Trustees, 15 Ga. 122 (1854) . See also Grimmett v. Barnwell, 192 S.E. 191 (Ga. 1937) . See* T. Daniel Brannan and William J. Sheppard, *Survey Article: Real Property, 51 Mercer L. Rev. 441 (Fall 1999).*

(n150)Footnote 151. *See* Walter F. Frear, Hawaiian Statute Law, Address to the Hawaiian Historical Society at its Annual Meeting (January 22, 1906) 15-42. Mari J. Matsuda, *Law and Culture in the District Court of Honolulu, 32 Am. J. Legal Hist. 16 (1988);* Calvin G. C. Pang, *Slow-Baked, Flash-Fried, Not to be Devoured: Development of the Partnership Model of Property Division in Hawai'i and Beyond, 20 Hawaii L. Rev. 1 (1998)* .

(n151)Footnote 152. Walter F. Frear, Hawaiian Statute Law, Address to the Hawaiian Historical Society at its Annual Meeting (January 22, 1906) 25.

(n152)Footnote 153. Hawaii Constitution of 1840, *in* 3 William F. Swindler, Source and Documents of United States Constitutions 15 (1974); The Fundamental Law of Hawaii 1 (Lorrin A. Thurston ed. 1904).

(n153)Footnote 154. Hawaii Constitution of 1852, art. 103.

(n154)Footnote 155. Hawaii Constitution of 1864, art. 78.

(n155)Footnote 156. Hawaii Constitution of 1887, art. 79.

(n156)Footnote 157. The Fundamental Law of Hawaii 44, 71-72, 137-147 (Lorrin A. Thurston ed. 1904); Walter F. Frear, Hawaiian Statute Law, Address to the Hawaiian Historical Society at its Annual Meeting, (January 22, 1906) 49-50, 59. *See also* Isaac Moriwake, Comment, *Critical Excavations: Law, Narrative, and the Debate on Native American and Hawaiian "Cultural Property" Repatriation, 20 Hawaii L. Rev. 261 (1998)* .

(n157)Footnote 158. Hawaii Compiled Laws 823; Walter F. Frear, Hawaiian Statute Law, Address to the Hawaiian Historical Society at its Annual Meeting (January 22, 1906) 47.

(n158)Footnote 159. Laws of Hawaii, ch. 57, § 5 (1892).

(n159)Footnote 160. *Haw. Rev. Stat. § 1-1*.

(n160)Footnote 161. Hawaii Constitution of 1894, art. 92, § 1.

(n161)Footnote 162. Resolution of Annexation, *30 Stat. 750.*

(n162)Footnote 163. Hawaii Territorial Act, §§ 6, 7, *31 Stat. 141.*

(n163)Footnote 164. *Id.* § 83 .

(n164)Footnote 165. 3 William F. Swindler, Source and Documents of United States Constitutions 105 (1974); Daniel G. Mueller, Comment, *The Reassertion of Native Hawaiian Gathering Rights Within the Context of Hawai'i's Western System of Land Tenure, 17 Hawaii L. Rev. 165 (1995)* ; Gina M. Watumull, Comment, *Pele Defense Fund v. Paty* : *Exacerbating the Inherent Conflict Between Hawaiian Native Tenant Access and Gathering Rights and Western Property Rights, 16 Hawaii L. Rev. 207 (1994)* ; Douglas W. MacDougal, *Private Hopes and Public Values in the*

"Reasonable Beneficial Use" of Hawaii's Water: Is Balance Possible?, 18 Hawaii L. Rev. 1 (1996) ; Kent D. Morihara, Comment, *Hawai'i Constitution, Article XI, Section 1 : The Conservation, Protection, and Use of Natural Resources, 19 Hawaii L. Rev. 177 (1997)* .

(n165)Footnote 166. *Achiles v. Cajigal, 39 Haw. 493 (1952)* ; *Hawaiian Trust & Inv. Co. v. Barton, 16 Haw. 294 (1904)* .

(n166)Footnote 167. *In re Estate of Chun Quan Yee Hop, 469 P.2d 183 (Haw. 1970)* .

(n167)Footnote 168. *Hawaiian Trust & Inv. Co. v. Barton, 16 Haw. 294 (1904)* .

(n168)Footnote 169. In the *Matter of the Estate of Holt, 19 Haw. 78 (1908)* .

(n169)Footnote 170. *Rosenbledt v. Wodehouse, 25 Haw. 561 (1920)* .

(n170)Footnote 171. *De Freitas v. Coke, 380 P.2d 762 (Haw. 1963)* .

(n171)Footnote 172. 8 William F. Swindler, Sources and Documents of United States Constitutions 193 (1979).

(n172)Footnote 173. *5 Stat. 235.*

(n173)Footnote 174. *5 Stat. 12.*

(n174)Footnote 175. *5 Stat. 10.*

(n175)Footnote 176. *An Ordinance for the government of the territory of the United States northwest of the river Ohio [Northwest Ordinance],* art. II, § 14 (1787), published as a footnote in 1 United States Statutes at Large 51-53.

(n176)Footnote 177. *5 Stat. 10* §§ 4, 5.

(n177)Footnote 178. 9 William Walter Hening, The Statutes at Large, Being a Collection of all the Laws of Virginia 127, P VI (1823).

(n178)Footnote 179. *2 Stat. 309.*

(n179)Footnote 180. *9 Stat. 323.*

(n180)Footnote 181. *Id.* § 6 .

(n181)Footnote 182. *Id.* § 14 .

(n182)Footnote 183. *Id.* § 17 .

(n183)Footnote 184. *10 Stat. 172.*

(n184)Footnote 185. *Id.* § 6 .

(n185)Footnote 186. *Id.* § 12 .

(n186)Footnote 187. Wash. Terr. Laws p. 83, § 1.

(n187)Footnote 188. *12 Stat. 808.*

(n188)Footnote 189. *Id* § 9 .

(n189)Footnote 190. *Idaho Code § 73-116*.

(n190)Footnote 191. *26 Stat. 215 (1890).*

(n191)Footnote 192. *Id.* § 21 .

(n192)Footnote 193. Idaho Constitution, art. XXI, § 2.

(n193)Footnote 194. *Locklear v. Tucker, 203 P.2d 380 (Idaho 1949) . See also Note: Dynasty Trusts and the Rule against Perpetuities, 116 Harv. L. Rev. 2588* (June, 2003) (examines the common law reception of the rule against perpetuities); T.P. Gallanis, Article: *The Future of Future Interests, 60 Wash & Lee L. Rev. 513* (Spring, 2003) (similar).

(n194)Footnote 195. *Idaho Code §§ 32-901 - 32-920*.

(n195)Footnote 196. *Drake v. Earhart, 23 P. 541 (Idaho 1890) .*

(n196)Footnote 197. *Northern Pac. Ry. v. Hirzel, 161 P. 854 (Idaho 1916) .*

(n197)Footnote 198. *161 P.2d at 858.*

(n198)Footnote 199. 9 William Walter Hening, The Statutes at Large, Being a Collection of all the Laws of Virginia 552 (1823).

(n199)Footnote 200. *Id.*

(n200)Footnote 201. 9 William Walter Hening, The Statutes at Large, Being a Collection of all the Laws of Virginia 127, P VI (1823).

(n201)Footnote 202. *An Ordinance for the government of the territory of the United States northwest of the river Ohio* [Northwest Ordinance], art. II, § 14 (1787), published as a footnote in 1 United States Statutes at Large 51-53.

(n202)Footnote 203. *Id.* §§ 4 , 5.

(n203)Footnote 204. 9 William Walter Hening, The Statutes at Large, Being a Collection of all the Laws of Virginia 127, P VI (1823).

(n204)Footnote 205. *2 Stat. 58.*

(n205)Footnote 206. *Id.* § 2 .

(n206)Footnote 207. Indiana Terr. Laws, Ch. 24.

(n207)Footnote 208. 3 William F. Swindler, Sources and Documents of United States Constitutions 229 (1974).

(n208)Footnote 209. *2 Stat. 514.*

(n209)Footnote 210. *Id.* § 2 .

(n210)Footnote 211. *3 Stat. 428.*

(n211)Footnote 212. *Id.* § 4 .

(n212)Footnote 213. Illinois Constitution of 1818, Schedule, § 1. Substantively similar provisions were included in

the Illinois Constitution of 1848, Schedule, § 1; and in the Illinois Constitution of 1870, Schedule, 1; and is included in the current Illinois Constitution, Transition Schedule, § 9.

(n213)Footnote 214. Ill. Ann. Stat. ch. 1, P 801.

(n214)Footnote 215. John Edward Cribbet, *Concepts in Transition: The Search for a New Definition of Property, 1986 U. Ill. L. Rev. 1 (1986);* George M. Armstrong, Jr., *From the Fetishism of Commodities to the Regulated Market: The Rise and Decline of Property, 82 Nw. U.L. Rev. 79 (1987).*

(n215)Footnote 216. *Minonk State Bank v. Grassman, 432 N.E.2d 386* (Ill. App.) , *aff'd, 447 N.E.2d 822 (Ill. 1982)* .

(n216)Footnote 217. *Lee v. City of Pontiac, 426 N.E.2d 300 (Ill. 1981)* .

(n217)Footnote 218. Ill. Stat. Ann. ch. 30, PP 191-196. *Teachers Ins. and Annuity Ass'n of America v. La Salle Nat'l Bank, 691 N.E.2d 881 (Ill. App. 1998)* (legislature has inherent power to repeal or change common law and may do away with all or part of it).

(n218)Footnote 219. *An Ordinance for the government of the territory of the United States northwest of the river Ohio* [Northwest Ordinance], art. II, § 14 (1787), published as a footnote 1 United States Statutes at Large 51-53.

(n219)Footnote 220. *Id.* §§ 4, 5.

(n220)Footnote 221. 9 William Walter Hening, The Statutes at Large, Being a Collection of all the Laws of Virginia 127, P VI (1823). *See also* Ray F. Bowman III, *English Common Law and Indiana Jurisprudence, 30 Ind. L. Rev. 409 (1997).*

(n221)Footnote 222. *2 Stat. 58.*

(n222)Footnote 223. *Id.* § 2.

(n223)Footnote 224. Indiana Terr. Laws, Ch. 24. Ray F. Bowman III, *English Common Law and Indiana Jurisprudence, 30 Ind. L. Rev. 413 (1997).*

(n224)Footnote 225. *See especially* the Land Act, *2 Stat. 73 (1800),* and the Disposal of Lands in the Indiana Territory, *2 Stat. 277 (1804).* Sarah Harding, *Justifying Repatriation of Native American Cultural Property, 72 Ind. L.J. 723 (1997).*

(n225)Footnote 226. *3 Stat. 289.*

(n226)Footnote 227. *Id.* § 4.

(n227)Footnote 228. Indiana Constitution of 1816, art. XII, § 4.

(n228)Footnote 229. Indiana Constitution of 1851, Schedule, § 1.

(n229)Footnote 230. *Ind. Code Ann. § 1-1-2-1*.

(n230)Footnote 231. *Morton v. Merrillville Toyota, Inc., 562 N.E.2d 781 (Ind. App. 1990)* . William A. Reppy, Jr., *Judicial Overkill in Applying the Rule in Shelly's Case, 73 Notre Dame L. Rev. 83 (1997)* .

(n231)Footnote 232. *Ketelson v. Stilz, 111 N.E. 423, 424-425 (Ind. 1916)* . *See generally* Ray F. Bowman III, *English Common Law and Indiana Jurisprudence, 30 Ind. L. Rev. 415 (1997).*

(n232)Footnote 233. *New York Life Ins. Co. v. Finkelstein, 8 N.E.2d 598 (Ind. 1937)* . *See* Joseph C. Bowman and Michael A. Dorelli, *Recent Developments in Property Law. 32 Ind. L. Rev. 973 (1999)* .

(n233)Footnote 234. This substitution is discussed in Beard v. Poydras, 4 Mart. 348 (La. 1816) .

(n234)Footnote 235. *2 Stat. 283.*

(n235)Footnote 236. *Id.* § 13.

(n236)Footnote 237. 1 Laws of a Public and General Nature, of the District of Louisiana, of the Territory of Louisiana, of the Territory of Missouri, and of the State of Missouri up to the Year 1824 § 1 (1842).

(n237)Footnote 238. *Id.* § 2.

(n238)Footnote 239. *4 Stat. 701*.

(n239)Footnote 240. *5 Stat. 10.*

(n240)Footnote 241. *Id.* § 12.

(n241)Footnote 242. *5 Stat. 235.*

(n242)Footnote 243. *Id.* § 12.

(n243)Footnote 244. *Id.* § 9.

(n244)Footnote 245. Iowa Terr. Laws, Special Session, Ch. 29.

(n245)Footnote 246. *5 Stat. 742 (1845).* Iowa's actual admission to the union was accomplished by the Act of Admission, *9 Stat. 117 (1846).*

(n246)Footnote 247. Iowa Constitution of 1846, art. XII, § 2.

(n247)Footnote 248. Iowa Constitution of 1857, art. XII, § 2.

(n248)Footnote 249. *O'Ferrall v. Simplot, 4 Iowa 381, 399-402 (1857)* .

(n249)Footnote 250. *In re Proestler's Will, 5 N.W.2d 922 (Iowa 1942)* .

(n250)Footnote 251. *Pierson v. Lane, 14 N.W. 90 (Iowa 1882)* (the Statute De Donis Conditionalibus rejected because its purpose was to restrain alienation, contrary to Iowa policy).

(n251)Footnote 252. *See generally* Paul E. Wilson, *How the Law Came to Kansas,* 63 J. Kan. B.A. 26 (1993).

(n252)Footnote 253. This substitution is discussed in Beard v. Poydras, 4 Mart. 348 (La. 1816) .

(n253)Footnote 254. *2 Stat. 283.*

(n254)Footnote 255. *Id.* § 13. Michael J. Davis, *Survey of Kansas Law: Real Property, 41 Kan. L. Rev. 669 (1993)* .

(n255)Footnote 256. 1 Laws of a Public and General Nature, of the District of Louisiana, of the Territory of Louisiana, of the Territory of Missouri, and of the State of Missouri up to the Year 1824 § 1 (1842).

(n256)Footnote 257. *Id.* § 2.

(n257)Footnote 258. Kansas-Nebraska Act, § 27, *10 Stat. 277, 283.*

(n258)Footnote 259. *Id.* § 32.

(n259)Footnote 260. Kan. Terr. Stat., Ch. 96, § 1.

(n260)Footnote 261. Kan. Laws 678.

(n261)Footnote 262. *12 Stat. 126.*

(n262)Footnote 263. Kansas Constitution of 1859, Schedule, § 4.

(n263)Footnote 264. *Kan. Stat. Ann. § 77-109*.

(n264)Footnote 265. *Kan. Stat. Ann. §§ 58-501 - 58-506*.

(n265)Footnote 266. Act of December 6, 1776, 9 William Walter Hening, The Statutes at Large, Being a Collection of all the Laws of Virginia 257 (1823). Elizabeth K. Rouse, *Kentucky Law Survey: Mineral Law, 72 Ky. L.J. 437 (1983).* Frances E. Catron, *Kentucky Law Survey: Wills, Probate, and Real Property Law, 71 Ky. L.J. 333 (1983)* . Carolyn S. Bratt, *Kentucky Law Survey: Property, 73 Ky. L.J. 459 (1984).*

(n266)Footnote 267. Article VII, Letters Patent to Sir Thomas Gates et al., April 10, 1606, *in* 1 William Walter Hening, The Statutes at Large, Being a Collection of all the Laws of Virginia 60-61 (1823).

(n267)Footnote 268. Article XV, Letters Patent to Sir Thomas Gates et al., April 10, 1606, *in* 1 William Walter Hening, The Statutes at Large, Being a Collection of all the Laws of Virginia 64 (1823).

(n268)Footnote 269. "Articles, Instructions and Orders," etc., Nov. 20, 1606, *in* 1 William Walter Hening, The Statutes at Large, Being a Collection of all the Laws of Virginia 68 (1823).

(n269)Footnote 270. "Articles, Instructions and Orders," etc., Nov. 20, 1606, *in* 1 William Walter Hening, The Statutes at Large, Being a Collection of all the Laws of Virginia 69 (1823).

(n270)Footnote 271. Article IV, The Second Charter to the Treasurer and Company, for Virginia, *in* 1 William Walter Hening, The Statutes at Large, Being a Collection of all the Laws of Virginia 88 (1823).

(n271)Footnote 272. Article VI, The Second Charter to the Treasurer and Company, for Virginia, *in* 1 William Walter Hening, The Statutes at Large, Being a Collection of all the Laws of Virginia 89 (1823).

(n272)Footnote 273. Article XXVII, The Second Charter to the Treasurer and Company, for Virginia, *in* 1 William Walter Hening, The Statutes at Large, Being a Collection of all the Laws of Virginia 97 (1823).

(n273)Footnote 274. Article IV, A Third Charter of K. James I. to the Treasurer and Company, for Virginia, *in* William Walter Hening, The Statutes at Large, Being a Collection of all the Laws of Virginia 101 (1823).

(n274)Footnote 275. Article XXI, A Third Charter of K. James I. to the Treasurer and Company, for Virginia, *in* William Walter Hening, The Statutes at Large, Being a Collection of all the Laws of Virginia 109 (1823).

(n275)Footnote 276. Article XX, A Third Charter of K. James I. to the Treasurer and Company, for Virginia, *in* William Walter Hening, The Statutes at Large, Being a Collection of all the Laws of Virginia 109 (1823).

(n276)Footnote 277. Preamble, 1661-1662, vol. 2, 43.

(n277)Footnote 278. Act XX, Virginia Assembly of 1666, *in* 2 William Walter Hening, The Statutes at Large,

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(n278)Footnote 279. 9 William Walter Hening, The Statutes at Large, Being a Collection of all the Laws of Virginia 127, P VI (1823).

(n279)Footnote 280. Act of October 1785, *in* 12 William Walter Hening, The Statutes at Large, Being a Collection of all the Laws of Virginia 37 (1823).

(n280)Footnote 281. *Id.* at P II.

(n281)Footnote 282. Act of October 16, 1786, *in* 12 William Walter Hening, The Statutes at Large, Being a Collection of all the Laws of Virginia 240 (1823).

(n282)Footnote 283. Act of December 29, 1788, *in* 12 William Walter Hening, The Statutes at Large, Being a Collection of all the Laws of Virginia 788 (1823).

(n283)Footnote 284. *Id.* at P I, third clause.

(n284)Footnote 285. Act of December 18, 1789, *in* 13 William Walter Hening, The Statutes at Large, Being a Collection of all the Laws of Virginia 17 (1823).

(n285)Footnote 286. *Id.* § 7.

(n286)Footnote 287. *1 Stat. 123.*

(n287)Footnote 288. *1 Stat. 189.*

(n288)Footnote 289. Kentucky Constitution of 1792, art. VIII.

(n289)Footnote 290. Kentucky Constitution of 1799, art. VI, §8.

(n290)Footnote 291. Kentucky Constitution of 1850, art. VIII, § 8.

(n291)Footnote 292. Kentucky Constitution of 1890, § 233.

(n292)Footnote 293. *Ky. Rev. Stat. § 447.040*.

(n293)Footnote 294. *Burks v. Commonwealth, 259 S.W.2d 68, 70 (Ky. 1953)* .

(n294)Footnote 295. *Commonwealth v. Donoghue, 63 S.W.2d 3, 4 (Ky. 1933)* .

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(n296)Footnote 297. 4-A William F. Swindler, Sources and Documents of United States Constitutions 23-30 (1975).

(n297)Footnote 298. *Id.* at P VII.

(n298)Footnote 299. 4-A William F. Swindler, Sources and Documents of United States Constitutions 31-33 (1975).

(n299)Footnote 300. *Id.* at 31.

(n300)Footnote 301. Beard v. Poydras, 4 Mart. 348, 366-368 (La. 1816) .

(n301)Footnote 302. 4-A William F. Swindler, Sources and Documents of United States Constitutions 34 (1975).

(n302)Footnote 303. *8 Stat. 200.* Judith Shafer and Warren Billings, *The Louisiana Purchase Bicentennial Series in Louisiana History*, An Uncommon Experience: Law And Judicial Institutions In Louisiana 1802-2003, Vol. XIII (1997).

(n303)Footnote 304. *8 Stat. 200*, art. III.

(n304)Footnote 305. *2 Stat. 283.*

(n305)Footnote 306. *Id.* § 8 .

(n306)Footnote 307. *Id.* § 11.

(n307)Footnote 308. *Id.* § 13.

(n308)Footnote 309. *Id.* § 14.

(n309)Footnote 310. § 1, *2 Stat. 324.*

(n310)Footnote 311. § 1, 9, *2 Stat. 331*.

(n311)Footnote 312. *Id.* § 4 .

(n312)Footnote 313. La. Acts, ch. 29, § 2 (1808).

(n313)Footnote 314. Cottin v. Cottin, 5 Mart. 93 (La. 1817) (referring to Spanish laws "which were, and have continued to be ours, where not repealed"); Hayes v. Berwick, 2 Mart. 138 (La. 1812) . John A. Lovett, Article: *On the Principle of Legal Certainty in the Louisiana Civil Law Tradition: From the Manifesto to the Great Repealing Act and Beyond, 63 La. L. Rev. 1397* (Summer, 2003) (Article highlights the conflicts between the civil and common law experienced in Louisiana); Vernon Valentine Palmer, Article: *The French Connection and the Spanish Perception: Historical Debates and Contemporary Evaluation of French Influence of Louisiana Civil Law, 63 La. L. Rev. 1067* (Summer, 2003) (Article explores the influence French law on Louisiana code); J.R. Trahan, Article: *The Continuing Influence of le Droit Civil and el Derecho Civil in the Private Law of Louisiana, 63 La. L. Rev. 1019* (Summer, 2003) (argues that although Louisiana law has evolved from its French and Spanish connections, the state's code still closely resembles the systems).

(n314)Footnote 315. *2 Stat. 641*.

(n315)Footnote 316. *2 Stat. 701*.

(n316)Footnote 317. Louisiana Constitution of 1812, Schedule, § 1.

(n317)Footnote 318. Louisiana Constitution of 1812, Schedule, § 4. Also, "All laws contrary to this constitution shall be null and void." *Id.* at art. VI, § 25.

(n318)Footnote 319. Louisiana Constitution of 1812, art. IV, § 11.

(n319)Footnote 320. Agnes v. Judice, 3 Mart. 182 (La. 1813) .

(n320)Footnote 321. Art. 3521, La. Code of 1825.

(n321)Footnote 322. *Flower v. Griffith, 6 Mart. (n.s.) 89 (La. 1827)* .

(n322)Footnote 323. La. Acts, No. 40.

(n323)Footnote 324. La. Acts, No. 83, § 25.

(n324)Footnote 325. *Handy v. Parkinson, 10 LA. 92 (1836)* .

(n325)Footnote 326. *Reynolds v. Swain, 13 La. 193 (1839)* . John A. Lovett, Article: *On the Principle of Legal Certainty in the Louisiana Civil Law Tradition: From the Manifesto to the Great Repealing Act and Beyond, 63 La. L. Rev. 1397 (2003)* (Article traces the development of Louisiana law and the relationship between legal certainty on one hand, and flexibility and equity on the other hand); Thomas W. Tucker, Article: *Interpretations of the Louisiana Civil Codes, 1808-1840: The Failure of the Preliminary Title, 19 Tul. Eur. & Civ. L.F. 57 (2004)* (explains the manner in which the *Reynolds* court interpreted the Louisiana Civil Codes).

(n326)Footnote 327. *Moulin v. Monteleone, 115 So. 447 (La. 1928)* ; *Hugh v. New Orleans R.R., 6 La. Ann. 495 (1851)* .

(n327)Footnote 328. Louisiana Constitution of 1845, Tit. IX, art. 142.

(n328)Footnote 329. Louisiana Constitution of 1845, Tit. VI, art. 120.

(n329)Footnote 330. Louisiana Constitution of 1852, Tit. VI, art. 117; Tit. X, art. 143. Louisiana Constitution of 1864, Tit. VII, art. 120; Tit. XIII, art. 149. Louisiana Constitution of 1868, Tit. VI, art. 116; Tit. X, art. 149. Louisiana Constitution of 1879, arts. 31, 258. Louisiana Constitution of 1898, arts. 33, 325. Louisiana Constitution of 1913, arts. 33, 325. Louisiana Constitution of 1921, art. III, 18; art. XXII, § 1.

(n330)Footnote 331. Louisiana Constitution, art. 3, 15(b); art. 14, § 18.

(n331)Footnote 332. *State v. De Hart, 33 So. 605, 607 (La. 1903)* .

(n332)Footnote 333. La. Civ. Code Ann. art. 21.

(n333)Footnote 334. Charter of Acadia (November 8/18, 1603) (English text), *in* 4 William F. Swindler, Sources and Documents of United States Constitutions 252, 258 (1975).

(n334)Footnote 335. Grant of Province of Maine (August 10, 1622), *in* 4 William F. Swindler, Sources and Documents of United States Constitutions 263, 266 (1975).

(n335)Footnote 336. Grant of Province and County of Maine (April 3/13, 1639), *in id.* at 268, 270.

(n336)Footnote 337. The Charter of Massachusetts Bay - 1629, *in* 5 William F. Swindler (ed.), Sources and Documents of the United States Constitutions 32 (1975).

(n337)Footnote 338. *Id.* at 37.

(n338)Footnote 339. *See* Paul Samuel Reinsch, *The English Common Law in the Early American Colonies, in* 1 Select Essays in Anglo-American Legal History 367, 3372-386 (1907).

(n339)Footnote 340. Grant of Province of Maine (March 12, 1664), in *id.* at 278, 279.

(n340)Footnote 341. Grant of the Province of Maine (June 29, July 9, 1674), in *id.* at 282.

(n341)Footnote 342. *See* Paul Samuel Reinsch, *The English Common Law in the Early American Colonies, in* 1 Select Essays in Anglo-American Legal History 367, 383-384 (1907).

(n342)Footnote 343. The Charter of Massachusetts Bay of 1691, *in* 5 William F. Swindler (ed.), Source And Documents of United States Constitutions 80 (1975).

(n343)Footnote 344. *Id.* at 84.

(n344)Footnote 345. Massachusetts Constitution of 1780, Ch. I, § I, art. IV, *in id.* at 97.

(n345)Footnote 346. Massachusetts Constitution of 1780, Ch. VI, art. VI, *in id.* at 108.

(n346)Footnote 347. Editorial Note, *in id.* at 2.

(n347)Footnote 348. Commonwealth v. Churchill, 2 Met. 118, 123, 124 (Mass. 1840) .

(n348)Footnote 349. *Sackett v. Sackett, 8 Pick. 309, 315 (Mass. 1829)* .

(n349)Footnote 350. Act of Separation of 1819, *in id.* at 299 , 311.

(n350)Footnote 351. Maine Constitution of 1819, art. X, § 2.

(n351)Footnote 352. Maine Constitution, art. 10, § 3.

(n352)Footnote 353. Act of Cession of 1820, *in* 4 William F. Swindler (ed.), Sources and Documents of United States Constitutions 331 (1975).

(n353)Footnote 354. *3 Stat. 544.*

(n354)Footnote 355. *Conant v. Jordan, 77 A. 938, 941-942 (Me. 1910)* .

(n355)Footnote 356. *Davis v. Scavone, 100 A.2d 425, 427-428 (Me. 1953)* .

(n356)Footnote 357. William MacDonald (ed.), Select Charters and Other Documents Illustrative of American History, 1606-1775 55 (1914).

(n357)Footnote 358. *Id.* at 56 .

(n358)Footnote 359. *See* Francis J. Mootz III, *Legal Classics: After Deconstructing the Legal Canon, 72 N.C. L. Rev. 977 (1994).*

(n359)Footnote 360. Paul Samuel Reinsch, *The English Common Law in the Early American Colonies, in* 1 Select Essays in Anglo-American Legal History 401 (1907).

(n360)Footnote 361. *Id.*

(n361)Footnote 362. *Id.* at 402.

(n362)Footnote 363. *Id.* at 402-403. Michael Carlton Tolley, *Maryland and its Anglo-Legal Inheritance,* 11(3) Legal Hist. [Great Britain] 353 (1990).

(n363)Footnote 364. Maryland Constitution of 1776, Declaration of Rights art. III, *in* 4 William F. Swindler, Sources and Documents of United States Constitutions 372 (1975).

(n364)Footnote 365. Maryland Constitution of 1851, Declaration of Rights art. III, *in id.* at 393.

(n365)Footnote 366. Maryland Constitution of 1864, Declaration of Rights art. 4, *in id.* at 417.

(n366)Footnote 367. Maryland Constitution of 1867, Declaration of Rights art. 5, *in id.* at 448.

(n367)Footnote 368. Coomes v. Clements, *4 H. & J. 480 (Md. 1819)* .

(n368)Footnote 369. *Mayor and City Council v. Williams, 6 Md. 235 (1854)* .

(n369)Footnote 370. *Dudrow v. King, 83 A. 34 (Md. 1912)* .

(n370)Footnote 371. Select Charters and Other Documents Illustrative of American History, 1606-1775 27 (William MacDonald ed. 1914).

(n371)Footnote 372. *Id.* at 28 .

(n372)Footnote 373. *Id.* at 32 .

(n373)Footnote 374. Bradford's History of Plymouth Plantation 107 (William T. Davis ed. 1908).

(n374)Footnote 375. 5 William F. Swindler, Sources and Documents of United States Constitutions 27 (1975).

(n375)Footnote 376. *Id.* at 29-30 .

(n376)Footnote 377. The Laws of the Pilgrims xiv (John D. Cushing ed. 1977) (a facsimile edition of The Book of the General Laws of the Inhabitants of the Jurisdiction of New-Plimouth 1672 & 1685, Introduction by John D. Cushing). *See* Martin Donahue, *The History of Administrative Law in Massachusetts, 16291932,* 8 J. Legal Hist. 330 (1987).

(n377)Footnote 378. 11 Records of the Colony of New Plymouth in New England 6 (David Pulsifer ed. 1861). *See also* Henry E. Huntington, *The Laws & Liberties of Massachusetts: Reprinted from the Copy of the 1648 Edition in the Henry E. Huntington Library (1998).*

(n378)Footnote 379. *Id.* at 12 .

(n379)Footnote 380. *Id.*

(n380)Footnote 381. *Id.* at 13 .

(n381)Footnote 382. The Laws of the Pilgrims xv (John D. Cushing ed. 1977) (a facsimile edition of The Book of the General Laws of the Inhabitants of the Jurisdiction of New-Plimouth 1672 & 1685, Introduction by John D. Cushing). *See also* Gordon S. Wood, *The Origins of Vested Rights in the Early Republic, 85 Va. L. Rev. 1421 (1999)* .

(n382)Footnote 383. 11 Records of the Colony of New Plymouth in New England 78 (David Pulsifer ed. 1861).

(n383)Footnote 384. *Id.*, 1671 Code at 34-35.

(n384)Footnote 385. *Id.*, 1685 Code at 42.

(n385)Footnote 386. *Id.*

(n386)Footnote 387. The Charter of Massachusetts Bay -- 1629, in 5 Sources and Documents of the United States Constitutions 32 (William F. Swindler ed. 1975).

(n387)Footnote 388. *Id.* at 37 .

(n388)Footnote 389. *See* Paul Samuel Reinsch, *The English Common Law in the Early American Colonies, in* 1

Select Essays in Anglo-American Legal History 367, 372-86 (1907). *See also* Jose L. Fernandez, *Untwisting the Common Law: Public Trust and the Massachusetts Colonial Ordinance, 62 Alb. L. Rev. 623 (1998).*

(n389)Footnote 390. *Id.* at 383-84.

(n390)Footnote 391. The Charter of Massachusetts Bay of 1691, *in* 5 Source And Documents of United States Constitutions 80 (William F. Swindler ed. 1975).

(n391)Footnote 392. *Id.* at 84 .

(n392)Footnote 393. Mass. Const. of 1780, art. IV, ch. I, § I, in *id.* at 97 .

(n393)Footnote 394. Mass. Const. of 1780, at. VI, ch. VI, in *id.* at 108 .

(n394)Footnote 395. Editorial Note, *in id.* at 2.

(n395)Footnote 396. Commonwealth v. Churchill, 2 Met. 118, 123-124 (Mass. 1840) .

(n396)Footnote 397. *Commonwealth v. Knowlton, 2 Mass. 530, 534 (1807)* .

(n397)Footnote 398. *Sackett v. Sackett, 8 Pick. 309, 315 (Mass. 1829)* . One author has concluded that Massachusetts law "did change substantially in the seventy years between 1760 and 1830," which changes "also reflected more basic changes in American thought and society in the same seventy-year period." William E. Nelson, Americanization Of The Common Law: The Impact of Legal Change on Massachusetts Society, 1760-1830 vii (1975).

(n398)Footnote 399. *14 Geo. 3* , ch. 83 (1774).

(n399)Footnote 400. *Id.* at P III.

(n400)Footnote 401. *An Ordinance for the government of the territory of the United States northwest of the river Ohio* [Northwest Ordinance], art. II, § 14 (1787), published as a footnote *in* 1 United States Statutes at Large 51-53.

(n401)Footnote 402. *Id.* §§ 4 , 5.

(n402)Footnote 403. 9 William Walter Hening, The Statutes at Large, Being a Collection of all the Laws of Virginia 127, P VI (1823).

(n403)Footnote 404. *2 Stat. 58.*

(n404)Footnote 405. *Id.* § 2 .

(n405)Footnote 406. *2 Stat. 309.*

(n406)Footnote 407. *Id.* § 2 .

(n407)Footnote 408. *Lamphere's Case, 27 N.W. 882, 883 (Mich. 1886)* .

(n408)Footnote 409. *Lorman v. Benson, 8 Mich. 18, 24, 33 (1860)* .

(n409)Footnote 410. *5 Stat. 144 (1836).*

(n410)Footnote 411. Mich. Const. of 1835, Schedule, § 2.

(n411)Footnote 412. Mich. Const. of 1850, Schedule, § 1.

(n412)Footnote 413. Mich. Const. of 1908, Schedule, § 1.

(n413)Footnote 414. Mich. Const. art. 3, § 7 .

(n414)Footnote 415. *Beech Grove Inv. Co. v. Civil Rights Comm'n, 157 N.W.2d 213 (Mich. 1968)* .

(n415)Footnote 416. *Semmens v. Floyd Rice Ford, Inc., 1 Mich. App. 395, 136 N.W.2d 704 (Mich. App. 1965)* .

(n416)Footnote 417. *In re Sanderson, 286 N.W. 198 (Mich. 1939)* . Carl W. Herstein, *Real Property, 44 Wayne L. Rev. 1019 (1998)* .

(n417)Footnote 418. This substitution is discussed in Beard v. Poydras, 4 Mart. 348 (La. 1816) .

(n418)Footnote 419. *2 Stat. 283.*

(n419)Footnote 420. *Id.* § 13 .

(n420)Footnote 421. Laws of a Public and General Nature, of the District of Louisiana, of the Territory of Louisiana, of the Territory of Missouri, and of the State of Missouri up to the Year 1824 1, § 1 (1842).

(n421)Footnote 422. *Id.* § 2 .

(n422)Footnote 423. *An Ordinance for the government of the territory of the United States northwest of the river Ohio* [Northwest Ordinance]," art. II, § 14 (1787), published as a footnote *in* vol. 1 United States Statutes at Large 51-53.

(n423)Footnote 424. *Id.* §§ 4 , 5.

(n424)Footnote 425. 9 William Walter Hening, The Statutes at Large, Being a Collection of all the Laws of Virginia 127, P VI (1823).

(n425)Footnote 426. *2 Stat. 58.*

(n426)Footnote 427. *Id.* § 2 .

(n427)Footnote 428. *2 Stat. 309.*

(n428)Footnote 429. *Id.* § 2 .

(n429)Footnote 430. *5 Stat. 10 (1836).*

(n430)Footnote 431. *Id.* § 12 .

(n431)Footnote 432. *Id.* § 9 .

(n432)Footnote 433. Statutes of the Territory of Wisconsin.

(n433)Footnote 434. *Coburn v. Harvey, 8 Wis. 147-151 (1864)* .

(n434)Footnote 435. *9 Stat. 178.*

(n435)Footnote 436. *9 Stat. 233.*

(n436)Footnote 437. *9 Stat. 403.*

(n437)Footnote 438. *Id.* § 12 .

(n438)Footnote 439. *Id.* § 9 .

(n439)Footnote 440. *11 Stat. 156.*

(n440)Footnote 441. *11 Stat. 285.*

(n441)Footnote 442. Minn. Comst. of 1857, Schedule, § 2.

(n442)Footnote 443. Minn. Const., Art. 1, § 15 .

(n443)Footnote 444. *Congdon v. Congdon, 200 N.W. 76, 82-83 (Minn. 1924) . See also Lake v. Wal-Mart Stores, Inc., 582 N.W.2d 231 (Minn. 1998)* (Supreme Court has the power to recognize or abolish common law).

(n444)Footnote 445. Act of April 7, 1798, Chap. XXVIII, § 6, *1 Stat. 549-550 (1798).*

(n445)Footnote 446. *An Ordinance for the government of the territory of the United States northwest of the river Ohio* [Northwest Ordinance], art. II, § 14 (1787), published as a footnote *in* vol. 1 United States Statutes at Large 51-53.

(n446)Footnote 447. *Id.* §§ 4 , 5.

(n447)Footnote 448. 9 William Walter Hening, The Statutes at Large, Being a Collection of all the Laws of Virginia 127, P VI (1823).

(n448)Footnote 449. *Pollard's Lessee v. Hagan, 44 U.S. 212 (1845) .*

(n449)Footnote 450. Statutes of Mississippi Territory, ch. V, § 4.

(n450)Footnote 451. Miss. Const. of 1817, Schedule, § 5.

(n451)Footnote 452. Miss. Const. of 1832, Schedule, § 4.

(n452)Footnote 453. Miss. Const. of 1868, Schedule, § 2.

(n453)Footnote 454. Mississippi Constitution, Schedule, § 274.

(n454)Footnote 455. *Boarman v. Catlett, 21 Miss. (1 S. & M.) 149 (1849) .*

(n455)Footnote 456. *Powell v. Brandon, 24 Miss. 343 (1852) .*

(n456)Footnote 457. Miss. Const., art. 6, § 160 ; *Miss. Code Ann. § 11-17-37* . W. Rodney Clement, Jr., *Enforcing Security Interests in Personal Property in Mississippi, 67 Miss. L.J. 44 (1997)* . Robert A. Weems & Katherine L. Evans, *Mississippi Law of Intestate Succession, Wills, and Administration and the Proposed Mississippi Uniform Probate Code: A Comparative Analysis, 62 Miss. L.J. 1 (1992) .*

(n457)Footnote 458. This substitution is discussed in Beard v. Poydras, 4 Mart. 348 (La. 1816) .

(n458)Footnote 459. *2 Stat. 283.*

(n459)Footnote 460. *Id.* at § 13 .

(n460)Footnote 461. Laws of a Public and General Nature, of the District of Louisiana, of the Territory of Louisiana, of the Territory of Missouri, and of the State of Missouri up to the Year 1824 § 1, 1 (1842).

(n461)Footnote 462. *Id.* § 2 .

(n462)Footnote 463. Mo. Const. of 1820, Schedule, § 2.

(n463)Footnote 464. Mo. Const., Schedule, § 2.

(n464)Footnote 465. *Mo. Rev. Stat. § 1.010* .

(n465)Footnote 466. *Gillilan v. Gillilan, 212 S.W. 348 (Mo. 1919)* .

(n466)Footnote 467. *Wantuck v. United Sav. & Loan Asso., 461 S.W.2d 692 (Mo. 1971). See also* Stuart Banner, *The Political Function of the Commons: Changing Conceptions of Property and Sovereignty in Missouri, 17501850, 41 Am. J. Legal Hist. 61 (1997)* .

(n467)Footnote 468. This substitution is discussed in Beard v. Poydras, 4 Mart. 348 (La. 1816) .

(n468)Footnote 469. *2 Stat. 283.*

(n469)Footnote 470. *Id.* § 13 .

(n470)Footnote 471. Laws of a Public and General Nature, of the District of Louisiana, of the Territory of Louisiana, of the Territory of Missouri, and of the State of Missouri up to the Year 1824 § 1, 1 (1842).

(n471)Footnote 472. *Id.* § 2 .

(n472)Footnote 473. *4 Stat. 701.*

(n473)Footnote 474. *5 Stat. 10.*

(n474)Footnote 475. *Id.* § 12 .

(n475)Footnote 476. Kansas-Nebraska Act of 1854, *10 Stat. 277 (1854).*

(n476)Footnote 477. *Id.* § 9 .

(n477)Footnote 478. *Id.* § 14 .

(n478)Footnote 479. Neb. Terr. Laws, 328 (1st Sess. 1855).

(n479)Footnote 480. *12 Stat. 239.*

(n480)Footnote 481. 8 William F. Swindler, Sources and Documents of United States Constitutions 193 (1979).

(n481)Footnote 482. *5 Stat. 235.*

(n482)Footnote 483. *Id.* § 12 .

(n483)Footnote 484. *5 Stat. 10.*

(n484)Footnote 485. *An Ordinance for the government of the territory of the United States northwest of the river Ohio* [Northwest Ordinance], art. II, § 14 (1787), published as a footnote *in* 1 United States Statutes at Large 51-53.

(n485)Footnote 486. *Id.* §§ 4 , 5.

(n486)Footnote 487. 9 William Walter Hening, The Statutes at Large, Being a Collection of all the Laws of

Virginia 127, P VI (1823).

(n487)Footnote 488. *2 Stat. 309.*

(n488)Footnote 489. *9 Stat. 323.*

(n489)Footnote 490. *Id.* § 6 .

(n490)Footnote 491. *Id.* § 14 .

(n491)Footnote 492. *Id.* § 17 .

(n492)Footnote 493. *10 Stat. 172.*

(n493)Footnote 494. *Id.* § 6 .

(n494)Footnote 495. *Id.* § 12 .

(n495)Footnote 496. Wash. Terr. Laws, p. 83, § 1.

(n496)Footnote 497. *12 Stat. 808.*

(n497)Footnote 498. *Id.* § 9 .

(n498)Footnote 499. *Idaho Code § 73-116* .

(n499)Footnote 500. Territorial Act of 1864, *13 Stat. 85.*

(n500)Footnote 501. *Id.* § 9 .

(n501)Footnote 502. Mont. Terr. Laws 356, § 1 (1st Sess.).

(n502)Footnote 503. Enabling Act of 1889, *25 Stat. 676.*

(n503)Footnote 504. *Id.* § 24 .

(n504)Footnote 505. Mont. Const. of 1889, art. XX, § 1.

(n505)Footnote 506. *Mont. Code Ann. §§ 1-1-107 - 1-1-109* .

(n506)Footnote 507. *Smith Eng'g Co. v. Rice, 102 F.2d 492, 497 (9th Cir. 1938)* .

(n507)Footnote 508. *State v. Young, 170 P. 947, 948 (Mont. 1918)* .

(n508)Footnote 509. *Aetna Acc. & Liab. Co. v. Miller, 170 P. 760 (Mont. 1918)* .

(n509)Footnote 510. This substitution is discussed in Beard v. Poydras, 4 Mart. 348 (La. 1816) .

(n510)Footnote 511. *2 Stat. 283.*

(n511)Footnote 512. *Id.* § 13 .

(n512)Footnote 513. Laws of a Public and General Nature, of the District of Louisiana, of the Territory of Louisiana, of the Territory of Missouri, and of the State of Missouri up to the Year 1824 § 1, 1 (1842).

(n513)Footnote 514. *Id.* § 2 .

(n514)Footnote 515. Kansas-Nebraska Act of 1854, *10 Stat. 277.*

(n515)Footnote 516. *Id.* § 9 .

(n516)Footnote 517. *Id.* §14 .

(n517)Footnote 518. Neb. Terr. Laws, 328 (1st Sess. 1855).

(n518)Footnote 519. *13 Stat. 47.*

(n519)Footnote 520. *14 Stat. 820.*

(n520)Footnote 521. Neb. Const. of 1866, Schedule, § 1.

(n521)Footnote 522. *Neb. Rev. Stat. § 49-101* .

(n522)Footnote 523. *Brooks v. Kimball Cty., 256 N.W. 501, 504 (Neb. 1934)* .

(n523)Footnote 524. *Williams v. Miles, 94 N.W. 705, 708 (Neb. 1903)* . *See also Bloomfield State Bank v. Miller, 75 N.W. 569-571 (Neb. 1898)* . *See also* Yasuhide Kawashima, Law and the Great Plains: Essays on the Legal History of the American Heartland (1996). A. Dan Tarlock, *Touch and Concern Is Dead, Long Live the Doctrine, 77 Neb. L. Rev. 804 (1998)* . Stephen D. Mossman, *"Whiskey Is for Drinkin' But Water Is for Fightin' About": A First-Hand Account of Nebraska's Integrated Management of Ground and Surface Water Debate and the Passage of L,B. 108, 30 Creighton L. Rev. 67 (1996)* .

(n524)Footnote 525. Constitution of the State of Deseret, 1849, *in* 31st Cong., 1st Sess., H. Misc. Doc. No. 18; *also published in* 9 Sources and Documents of United States Constitutions 375-381 (William F. Swindler ed. 1979).

(n525)Footnote 526. *9 Stat. 453.*

(n526)Footnote 527. *Id.* § 9.

(n527)Footnote 528. *Id.* § 17.

(n528)Footnote 529. *12 Stat. 209.*

(n529)Footnote 530. *Id.* §9.

(n530)Footnote 531. *Id.* § 16.

(n531)Footnote 532. Nev. Terr. Laws, 1st Sess., ch. I.

(n532)Footnote 533. *13 Stat. 30.*

(n533)Footnote 534. *13 Stat. 749.*

(n534)Footnote 535. Nevada Constitution, art. XXVII, § 2 .

(n535)Footnote 536. *Vansickle v. Haines, 7 Nev. 249, 285-286 (1872)* .

(n536)Footnote 537. *Nev. Rev. Stat. § 1.030* .

(n537)Footnote 538. *Hamilton v. Kneeland, 1 Nev. 40, 44, 46-47 (1865)* .

(n538)Footnote 539. Melody L. Luetkehans, Recent Development, *What's New in Nevada Real Property*, 7-AUG Nev. Law. 18 (1999); Greg Walch, *Treading Water Law --A Nevada Water Rights Primer*, 6-Nov Nev. Law. 18 (1998).

(n539)Footnote 540. *Nev. Rev. Stat. §§ 123.130 - 123.259* .

(n540)Footnote 541. Select Charters and Other Documents Illustrative of American History, 1606-1775 27 (William MacDonald ed. 1914).

(n541)Footnote 542. *Id.* at 28.

(n542)Footnote 543. *Id.* at 32.

(n543)Footnote 544. Frank B. Sanborn, New Hampshire, an Epitome of Popular Government 13 (1904).

(n544)Footnote 545. *Id.* at 14-15.

(n545)Footnote 546. David E. Van Deventer, The Emergence of Provincial New Hampshire 1623-1741 8 (1976).

(n546)Footnote 547. *See* § 7.02(v) *supra*.

(n547)Footnote 548. David E. Van Deventer, The Emergence of Provincial New Hampshire 1623-1741 13 (1976).

(n548)Footnote 549. Acts And Laws of New Hampshire 1680-1726 197-198 (John D. Cushing ed.), (1978).

(n549)Footnote 550. William H. Fry, New Hampshire as a Royal Province 433-436 (1908).

(n550)Footnote 551. N.H. Const. of 1776, *in* 6 William F. Swindler, Sources and Documents of United States Constitutions 342 (1976).

(n551)Footnote 552. N.H. Const. of 1784, *The General Court* in *id.* at 348.

(n552)Footnote 553. N.H. Const. of 1784, *Encouragement of Literature, etc.*, in *id.* at 356.

(n553)Footnote 554. N.H. Const., part II, art. 5.

(n554)Footnote 555. N.H. Const., part II, art. 90.

(n555)Footnote 556. The Earliest Printed Laws of New York 1665-1693 103-104 (John D. Cushing ed., 1978).

(n556)Footnote 557. *Id.* at 104-105.

(n557)Footnote 558. *Id.* at 106-107.

(n558)Footnote 559. *Id.* at 148-149.

(n559)Footnote 560. *Id.* at 109.

(n560)Footnote 561. Fundamental Laws and Constitutions of New Jersey 1664-1964 9-10 (Julian P. Boyd ed. 1964).

(n561)Footnote 562. *Id.*

(n562)Footnote 563. *The Instructions from the Queen in Council to the Governor of the Province of New Jersey, November 16, 1702, in* Fundamental Laws and Constitutions of New Jersey, 1664-1964 126-154 (Julian P. Boyd ed. 1964). *See also* Christine A. Desan, *The Constitutional Commitment to Legislative Adjudication in the Early American*

Tradition, 111 Harvard L. Rev. 1381 (1998) .

(n563)Footnote 564. N.J. Const. of 1776, §§ XXI, XXII, *in* 6 Sources and Documents of United States Constitutions 452 (William F. Swindler ed. 1976).

(n564)Footnote 565. N.J. Const. of 1844, art. X, § 1, in *id.* at 463.

(n565)Footnote 566. N.J. Const. of 1947, art. XI, § 3.

(n566)Footnote 567. *Girard Trust Co. v. Schmitz, 20 A.2d 21 (N.J. Eq. 1941)* .

(n567)Footnote 568. *Caparell v. Goodbody, 29 A.2d 563 (N.J. Eq. 1942)* .

(n568)Footnote 569. Territorial Act of 1850, § 17.

(n569)Footnote 570. *Id.* § 10 .

(n570)Footnote 571. *Leitensdorfer v. Webb, 1 N.M. (1 Gild.) 34 (1853), aff'd, 61 U.S. 176 (1857)* . J.R. Remacha, *Traces of the Spanish Legal System in New Mexico,* 69(3) N.M. Hist. Rev. 281 (1994). *See also* Malcolm Ebright, *Frontier Land Litigation in Colonial New Mexico: A Determinant of Spanish Custom and Law*, 8(2) W. Legal Hist. 203 (1995). *See generally* Daniel Tyler, *The Spanish Colonial Legacy and the Role of Hispanic Custom in Defining New Mexico Land and Water Rights,* Colonial Latin Am. Hist. Rev. 162 (Spring 1995).

(n571)Footnote 572. N.M. Laws, ch. 2, § 2 (1876).

(n572)Footnote 573. *N.M. Stat. Ann. § 38-1-3* .

(n573)Footnote 574. N.M. Stat. Ann. § 338-1-4 : "Generally in all matters in which there is any conflict or variance between the rules of equity and the rules of the common law, with reference to the same matter, the rules of equity shall prevail."

(n574)Footnote 575. "Nothing herein shall adversely affect the rights or the enforcement of rights in trademarks acquired in good faith at any time at common law." N.M. Stat. Ann. § 57-3-12 . "The Mortgage Loan Company and Loan Broker Act is not intended to impair any remedies available to injured parties under other statutes or under common law." *N.M. Stat. Ann. § 58-21-25* .

(n575)Footnote 576. *Browning v. Estate of Browning, 9 P. 677 (N.M. 1886)* .

(n576)Footnote 577. *Bent v. Thompson, 23 P. 134 (N.M. 1890) , aff'd, 138 U.S. 114 (1891)* . *See also* David A. Reichard, *The Politics of Village Water Disputes in Northern New Mexico, 18821905. 9(1)* W. Legal Hist. 9 (1996).

(n577)Footnote 578. The rejection of Hispanic law in Arizona Territory was explicit and comprehensive:

> All laws, customs, ordinances, and decrees of the Mexican Republic; all laws, customs, ordinances, and decrees of the kingdom of Spain; and all legislative enactments of the Territory of New Mexico, now or heretofore in force in this Territory, are hereby repealed ...

Ariz. Comp. Laws, ch. 61, § 1.

(n578)Footnote 579. *Browning v. Estate of Browning, 3 N.M. 659, 9 P. 677 (N.M. 1886)* . *See also Boddy v. Boddy, 420 P.2d 301 (N.M. 1966)* (New Mexico's adoption of the common law made it binding as the rule of practice and decision in the courts of this state); *Yeo v. Tweedy, 34 N.M. 611, 286 P. 970 (N.M. 1929)* .

(n579)Footnote 580. *Alvarez v. Alvarez, 383 P.2d 581 (N.M. 1963)* .

(n580)Footnote 581. *Blake v. Hoover Motor Co., 212 P. 738 (N.M. 1923)* .

(n581)Footnote 582. *Abo Petr. Corp. v. Amstutz, 600 P.2d 278 (N.M. 1979)* .

(n582)Footnote 583. *In re Gabaldon's Estate, 34 P.2d 672 (N.M. 1934)* .

(n583)Footnote 584. *Martinez v. Cook, 244 P.2d 134 (N.M. 1952) , aff'd, 258 P.2d 375 (N.M. 1953)* .

(n584)Footnote 585. *Hernandez v. Becker, 54 F.2d 542 (10th Cir. 1931)* .

(n585)Footnote 586. *McDonald v. Senn, 204 P.2d 990 (N.M. 1949)* . *See generally* Malcolm Ebright, *Frontier Land Litigation in Colonial New Mexico: A Determinant of Spanish Custom and Law,* 8(2) W. Legal Hist. 201 (1995).

(n586)Footnote 587. *See United States v. San Pedro & Canon del Agua Co., 17 P. 337 (N.M. 1888)* .

(n587)Footnote 588. 2 Herbert L. Osgood, The American Colonies in the Seventeenth Century 99 (1904).

(n588)Footnote 589. *Id.* at 104.

(n589)Footnote 590. 1 E. B. O'Callaghan (ed.), Documents Relative to the Colonial History of the State of New-York 118-123 (1856).

(n590)Footnote 591. 1 E. B. O'callaghan, History of New Netherland, or New York Under the Dutch 130-136 (1845).

(n591)Footnote 592. *Id.* at 298.

(n592)Footnote 593. *Id.* at 209-210.

(n593)Footnote 594. *Id.* at 237.

(n594)Footnote 595. *Id.*

(n595)Footnote 596. *Id.* at 110.

(n596)Footnote 597. *Id.* at 148, 149.

(n597)Footnote 598. *Id.* at 109.

(n598)Footnote 599. *Id.* at viii.

(n599)Footnote 600. *Id.* at 19-23.

(n600)Footnote 601. New York Laws of 1782, ch. 2.

(n601)Footnote 602. *See* Steven J. Eagle, Article: *The 1997 Regulatory Takings Quartet: Retreating from the "Rule of Law" 42 N.Y.L. Sch. L. Rev. 345 (1998)* . Dominic R. Massaro, *Taking Title to New York: The Enduring Authority of Roman Law* 72 Jan N.Y. St. B.J. 44 (2000).

(n602)Footnote 603. The text of this colonial legislation is quoted and explained in *In re Steinway, 53 N.E. 1103 (N.Y. 1899)* .

(n603)Footnote 604. Robert Ludlow Fowler, *Organization of the Supreme Court of Judicature of the Province of*

New York, 19 Albany L.J. 209, 211 (1879). Deborah A. Rosen, *Courts and Commerce in Colonial New York, 36 Am. J. Legal Hist. 39 (1992)* .

(n604)Footnote 605. Quoted in Paul Samuel Reinsch, *The English Common Law in the Early American Colonies, in* 1 Select Essays in Anglo-American Legal History 394-395 (1907).

(n605)Footnote 606. N.Y. Const. of 1777, art. XXXV.

(n606)Footnote 607. N.Y. Const. of 1821, art. VII, § 13.

(n607)Footnote 608. N.Y. Const. of 1846, art. I, § 17.

(n608)Footnote 609. *Id.* at art. XXXVI.

(n609)Footnote 610. N.Y. Const. of 1846, art. I, §§ 11-15.

(n610)Footnote 611. N.Y. Const. of 1987, art. I, §§ 10-14.

(n611)Footnote 612. N.Y. Const., art. I, §1 0 .

(n612)Footnote 613. *Id.* art. I, § 14.

(n613)Footnote 614. Hamilton v. Holcomb, 1 Coleman & Caines 67 (N.Y. 1799).

(n614)Footnote 615. *Saltonstall v. White, 1 Johnson 221 (N.Y. 1799)* .

(n615)Footnote 616. *Bogardus v. Trinity Church, 4 Paige 178 , aff'd, 15 Wend. 111 (N.Y. 1835)* .

(n616)Footnote 617. *See Matter of Murphy, 63 N.E.2d 49 (N.Y. 1945)* ; *Matter of Chambers, 54 N.Y.S.2d 88 (1945)* .

(n617)Footnote 618. N.Y. Const., art. I, § 14 .

(n618)Footnote 619. *Horace Waters & Co. v. Gerard, 82 N.E. 143, 147 (N.Y. 1907)* .

(n619)Footnote 620. *Id.*

(n620)Footnote 621. *Harmon v. Alfred Peats Co., 214 N.Y.S. 353* (Sup. Ct. App. Div.) , *rev'd on other grounds, 154 N.E. 314 (N.Y. 1926)* .

(n621)Footnote 622. *Matter of Melvin, 483 N.Y.S.2d 941 (Surr. Ct. 1984)* . Dominic R. Massaro, *Taking Title To New York: The Enduring Authority of Roman Law., 72 N.Y. St. B.J. 44 (January 2000)* .

(n622)Footnote 623. North Carolina Charters and Constitutions, 1578-1698 6 (Mattie Erma Edwards Parker ed. 1963).

(n623)Footnote 624. "Denizen" ordinarily means an inhabitant or resident, although in British usage it may also mean a foreigner who is permitted certain rights of citizenship.

(n624)Footnote 625. North Carolina Charters and Constitutions, 1578-1698 7 (Mattie Erma Edwards Parker ed. 1963).

(n625)Footnote 626. *Id.* at 8.

(n626)Footnote 627. *Id.* at 19, 20.

(n627)Footnote 628. *Id.* at 64, 65.

(n628)Footnote 629. *Id.* at 65. The "bishop of Durham" clause refers to the traditional expectation held of the bishop of Durham, located on the Scottish border, to help protect English land from foreign enemies who intruded on English land. To fulfill these expectations, the bishop enjoyed almost regal powers, including rights to enact laws, impose taxes, prepare for and conduct warfare, among others.

(n629)Footnote 630. *Id.* at 66.

(n630)Footnote 631. *Id.* at 66, 67.

(n631)Footnote 632. *Id.* at 68, 69.

(n632)Footnote 633. North Carolina Charters and Constitutions, 1578-1698 77 (Mattie Erma Edwards Parker ed. 1963).

(n633)Footnote 634. *Id.* at 78.

(n634)Footnote 635. *Id.* at 80.

(n635)Footnote 636. *Id.* at 84, 85.

(n636)Footnote 637. 7 Source And Documents of United States Constitutions 391 (William F. Swindler ed. 1978).

(n637)Footnote 638. 2 The Earliest Printed Laws of North Carolina 1669-1751 167 (John D. Cushing ed. 1977).

(n638)Footnote 639. Chapter XXII, § XI, in *id.* at 26 .

(n639)Footnote 640. *Id.*, vol. 1 at 293-301.

(n640)Footnote 641. *Id.* at 321, 322.

(n641)Footnote 642. N.C. Const. of 1776, Declaration of Rights, § XXV.

(n642)Footnote 643. N.C. Const. of 1776, art. XLIII.

(n643)Footnote 644. N.C. Const. of 1868, art. II, § 17.

(n644)Footnote 645. *Id.* at art. IV, § 24.

(n645)Footnote 646. N.C. Const. of 1876, art. II, 15; art. IV, § 19.

(n646)Footnote 647. N.C. Const., art. XIV, § 4 .

(n647)Footnote 648. N.C. Laws of 1778, ch. 5, I, §§ II.

(n648)Footnote 649. *N.C. Gen. Stat. § 4-1* .

(n649)Footnote 650. *Steelman v. City of New Bern, 184 S.E.2d 239 (N.C. 1971)* .

(n650)Footnote 651. *Woodard v. Clark, 72 S.E.2d 433 (N.C. 1952)* . David A. Thomas, *Anglo-American Land Law: Diverging Developments from A Shared History Part II: How Anglo-American Land Law Diverged After American Colonization and Independence, 34 Real Prop. Prob. & Tr. J. 295 (Summer 1999)* .

(n651)Footnote 652. This substitution is discussed in Beard v. Poydras, 4 Mart. 348 (La. 1816) .

(n652)Footnote 653. *2 Stat. 283.*

(n653)Footnote 654. *Id.* § 13 .

(n654)Footnote 655. Laws of a Public and General Nature, of the District of Louisiana, of the Territory of Louisiana, of the Territory of Missouri, and of the State of Missouri up to the Year 1824 § 1, 1 (1842).

(n655)Footnote 656. *Id.* § 2 .

(n656)Footnote 657. *4 Stat. 701*.

(n657)Footnote 658. *2 Stat. 58.*

(n658)Footnote 659. *Id.* § 2 .

(n659)Footnote 660. *2 Stat. 309.*

(n660)Footnote 661. *Id.* § 2 .

(n661)Footnote 662. *An Ordinance for the government of the territory of the United States northwest of the river Ohio* [Northwest Ordinance], art. II, § 14 (1787), published as a footnote *in* vol. 1 United States Statutes at Large 51-53.

(n662)Footnote 663. *Id.* §§ 4 , 5.

(n663)Footnote 664. 9 William Walter Hening, The Statutes at Large, Being a Collection of all the Laws of Virginia 127, P VI (1823).

(n664)Footnote 665. *5 Stat. 10.*

(n665)Footnote 666. *Id.* § 12 .

(n666)Footnote 667. *Id.* § 9 . Herbert L. Meschke & Ted Smith, *The North Dakota Supreme Court: A Century of Advances, 76 N.D. L. Rev. 217 (2000)* .

(n667)Footnote 668. Statutes of the Territory of Wisconsin.

(n668)Footnote 669. *Coburn v. Harvey, 8 Wis. 147, 148-151 (1864)* .

(n669)Footnote 670. *9 Stat. 178.*

(n670)Footnote 671. *9 Stat. 233.*

(n671)Footnote 672. *9 Stat. 403.*

(n672)Footnote 673. *Id.* § 12 .

(n673)Footnote 674. *Id.* § 9 .

(n674)Footnote 675. Kansas-Nebraska Act of 1854, *10 Stat. 277.*

(n675)Footnote 676. *Id.* § 9 .

(n676)Footnote 677. *Id.* § 14 .

(n677)Footnote 678. Neb. Terr. Laws, 328 (1st Sess.).

(n678)Footnote 679. *12 Stat. 239 (1861).*

(n679)Footnote 680. *Id.* § 9 .

(n680)Footnote 681. Dak. Civ. Code § 6.

(n681)Footnote 682. *25 Stat. 676 (1889).*

(n682)Footnote 683. *Id.* § 24 .

(n683)Footnote 684. N.D. Const. of 1889, Schedule, § 2.

(n684)Footnote 685. *N.D. Cent. Code. §§ 1-01-02 to 1-01-06* .

(n685)Footnote 686. *Anderson v. Blixt, 72 N.W.2d 799 (N.D. 1955)* ; *Brignall v. Hannah, 157 N.W. 1042 (N.D. 1914)* .

(n686)Footnote 687. *Reeves & Co. v. Russell, 148 N.W. 654, 658 (N.D. 1914)* .

(n687)Footnote 688. *In re Reinhardt, 81 B.R. 565, 569 (D.N.D. 1987)* .

(n688)Footnote 689. *14 Geo. 3* , ch. 83 (1774).

(n689)Footnote 690. *Id.* at P III.

(n690)Footnote 691. *An Ordinance for the government of the territory of the United States northwest of the river Ohio* [Northwest Ordinance], art. II, § 14 (1787), published as a footnote *in* 1 United States Statutes at Large 51-53.

(n691)Footnote 692. *Id.* §§ 4 , 5.

(n692)Footnote 693. 9 William Walter Hening, The Statutes at Large, Being a Collection of all the Laws of Virginia 127, P VI (1823).

(n693)Footnote 694. *2 Stat. 173.*

(n694)Footnote 695. *2 Stat. 201*.

(n695)Footnote 696. Ohio Const. of 1802, Schedule, § 4.

(n696)Footnote 697. Ohio Const. of 1802, art. III, §§ 2, 3.

(n697)Footnote 698. Ohio Const. of 1851, Schedule, § 1.

(n698)Footnote 699. Ohio Laws, ch. 113, § 1.

(n699)Footnote 700. *Ohio Rev. Code Ann. § 1.49* .

(n700)Footnote 701. *McAllister v. Schlemmer & Graber Co., 177 N.E. 841, 842 (Ohio App. 1930)* .

(n701)Footnote 702. *The Cleveland, C. & C. R.R. v. Kearney, 3 Ohio St. 201, 205-206, 208 (1854)* .

(n702)Footnote 703. This substitution is discussed in Beard v. Poydras, 4 Mart. 348 (La. 1816) .

(n703)Footnote 704. *2 Stat. 283.*

(n704)Footnote 705. *Id.* § 13 .

(n705)Footnote 706. 1 Laws of a Public and General Nature, of the District of Louisiana, of the Territory of Louisiana, of the Territory of Missouri, and of the State of Missouri up to the Year 1824 § 1 (1842).

(n706)Footnote 707. *Id.* § 2 .

(n707)Footnote 708. *4 Stat. 729.*

(n708)Footnote 709. *Id.* § 24 .

(n709)Footnote 710. § 10, *3 Stat. 419.*

(n710)Footnote 711. Arkansas Constitution of 1836, Schedule, § 2.

(n711)Footnote 712. *Ark. Code Ann. § 1-2-119 . See Moore v. Sharp, 121 S.W. 341 (Ark. 1909)* .

(n712)Footnote 713. *26 Stat. 81*.

(n713)Footnote 714. *Id.* § 11 .

(n714)Footnote 715. Kansas-Nebraska Act of 1854, *10 Stat. 277.*

(n715)Footnote 716. *Id.* § 9 .

(n716)Footnote 717. *Id.* § 14 .

(n717)Footnote 718. Neb. Terr. Laws, 328 (1st Sess.).

(n718)Footnote 719. *13 Stat. 47.*

(n719)Footnote 720. *14 Stat. 820.*

(n720)Footnote 721. Nebraska Constitution of 1866, Schedule, § 1.

(n721)Footnote 722. *Neb. Rev. Stat. § 49-101* .

(n722)Footnote 723. *Brooks v. Kimball County, 256 N.W. 501, 504 (Neb. 1934)* .

(n723)Footnote 724. *Williams v. Miles, 94 N.W. 705, 708 (Neb. 1903) . See also Bloomfield State Bank v. Miller, 75 N.W. 569, 570-571 (Neb. 1898)* .

(n724)Footnote 725. Okla. Stat. § 3874 (1893). *See also Okland Oil Co. v. Conoco Inc., 144 F.3d 1308 (10th Cir. 1998)* (common law remains in full force in Oklahoma unless expressly modified by statute).

(n725)Footnote 726. § 31, *26 Stat. 81 (1890).*

(n726)Footnote 727. *34 Stat. 267 (1906).*

(n727)Footnote 728. *Id.* § 21 .

(n728)Footnote 729. *35 Stat. 2160 (1907).*

(n729)Footnote 730. *Okla. Stat. tit. 12, § 2* .

(n730)Footnote 731. *Okla. Stat. tit. 25, § 29* .

(n731)Footnote 732. *McCormack v. Oklahoma Pub'g Co., 613 P.2d 737, 740 (Okla. 1980)* ; *Magnusson v. New York Times Co., 98 P.3d 1070 (Okla. 2004)* (court held that media broadcasts fell within the common law privilege of fair comment).

(n732)Footnote 733. *Creekmore v. Redman Indus., Inc., 671 P.2d 73, 76-77 (Okla. App. 1983)* .

(n733)Footnote 734. *See* Sam Bass Warner, *History of the Oregon Code, 1 Or. L. Rev. 129 (1922).*

(n734)Footnote 735. 8 William F. Swindler, Sources and Documents of United States Constitutions 193 (1979).

(n735)Footnote 736. Oregon Laws of 1843-1849, p. 98, as quoted in Sam Bass Warner, *History of the Oregon Code, 1 Or. L. Rev. 129, 138 (1922).*

(n736)Footnote 737. Oregon Laws of 1845, pp. 16, 42, as discussed in Sam Bass Warner, *History of the Oregon Code, 1 Or. L. Rev. 129, 140 (1922).*

(n737)Footnote 738. *See* Sam Bass Warner, *History of the Oregon Code, 1 Or. L. Rev. 129, 137 (1922).*

(n738)Footnote 739. *5 Stat. 235.*

(n739)Footnote 740. *Id.* § 12 .

(n740)Footnote 741. *5 Stat. 10.*

(n741)Footnote 742. *An Ordinance for the government of the territory of the United States northwest of the river Ohio* [Northwest Ordinance], § 14, art. II (1787), published as a footnote in 1 United States Statutes at Large 51-53.

(n742)Footnote 743. *Id.* §§ 4 , 5.

(n743)Footnote 744. 9 William Walter Hening, The Statutes at Large, Being a Collection of all the Laws of Virginia 127, P VI (1823).

(n744)Footnote 745. *2 Stat. 309.*

(n745)Footnote 746. *9 Stat. 323.*

(n746)Footnote 747. *Id.* § 6 .

(n747)Footnote 748. *Id.* § 14 .

(n748)Footnote 749. *Id.* § 17 .

(n749)Footnote 750. *10 Stat. 172.*

(n750)Footnote 751. *11 Stat. 383.*

(n751)Footnote 752. Oregon Constitution, art. XVIII, § 7 .

(n752)Footnote 753. *State v. Hansen, 743 P.2d 157 (Or. 1987)* .

(n753)Footnote 754. *Peery v. Fletcher, 182 P. 143, 146, 147 (Or. 1919)* .

(n754)Footnote 755. *Or. Rev. Stat. §§ 105.950-105.975* .

(n755)Footnote 756. *Or. Rev. Stat. §§ 105.770-105.774* .

(n756)Footnote 757. The interesting peculiarities of this conveyance, with strong overtones of medieval English land law, have been explained as follows, in connection with Penn's assumption of title to land in Delaware:

> There were actually four legal documents involved in these grants, an absolute deed (called a "deed of feoffment") and a lease for ten thousand years for New Castle and the circle around it, and another deed and a similar lease for the land from twelve miles south of New Castle to Cape Henlopen ... Probably the division is explained by the duke's desire to get some revenue from these territories but not to interfere with Penn's use of New Castle or with his revenues from it ... Perhaps both deed and lease were used because of the uncertainty of the duke's legal rights to Delaware ...
>
> Then on October 28 [the day after Penn's arrival on October 27, 1682], in a ceremony called "livery of seisin," Penn formally took possession of New Castle and the territory within twelve miles about it, except on the east side of the Delaware. After the deeds from the Duke of York were read, Penn took the key to the New Castle fort, entered and locked himself in alone, then came out and received a piece of turf with a twig upon it and a porringer with river water and soil as symbols of his new possession.

John A. Munroe, Colonial Delaware, A History 83-84 (1978).

(n757)Footnote 758. The Earliest Printed Laws of Pennsylvania 1681-1713 183, 184 (John D. Cushing ed. 1978).

(n758)Footnote 759. *Id.* at 188.

(n759)Footnote 760. Pennsylvania Constitution of 1790, Schedule, § 1.

(n760)Footnote 761. *Pa. Stat. Ann. tit. 46, §§ 151 - 153* (repealed 1972).

(n761)Footnote 762. 1 Pa. Con. Stat. Ann. § 1503.

(n762)Footnote 763. Act of April 7, 1807.

(n763)Footnote 764. Appendix, 3 Binney's Reports (1808).

(n764)Footnote 765. *3 Binn. at 596 (Pa. 1808).*

(n765)Footnote 766. *Commonwealth v. Smith, 60 Dauph. 35, 67 D. & C. 598 (Pa. 1949)* .

(n766)Footnote 767. *Commonwealth v. Mochan, 110 A.2d 788 (Pa. 1955)* .

(n767)Footnote 768. Klossman v. Friday, *108 P.L.J. 399 (Pa. 1961).*

(n768)Footnote 769. Records of the Colony of Rhode Island and Providence Plantations 52 (John Russell Bartlett ed. 1856).

(n769)Footnote 770. *Id.* at 53 .

(n770)Footnote 771. 1 Herbert L. Osgood, The American Colonies in the Seventeenth Century 70 (1904).

(n771)Footnote 772. Records of the Colony of Rhode Island and Providence Plantations 112 (John Russell Bartlett ed. 1856).

(n772)Footnote 773. Records of the Colony of Rhode Island and Providence Plantations 143-146 (John Russell Bartlett ed. 1856).

(n773)Footnote 774. *Id.* at 5.

(n774)Footnote 775. *Id.* at 14.

(n775)Footnote 776. The Earliest Acts and Laws of the Colony of Rhode Island and Providence Plantations 1647-1719 128 (John D. Cushing ed. 1977).

(n776)Footnote 777. Rhode Island Constitution, art. XIV, § 1 .

(n777)Footnote 778. *R.I. Gen. Laws § 43-3-1* .

(n778)Footnote 779. *Bloomfield v. Brown, 25 A.2d 354 (R.I. 1942)* .

(n779)Footnote 780. *Id. at 356* .

(n780)Footnote 781. *Mathewson v. Phoenix Iron Foundry, 20 F. 281* (Cir. Ct., D.R.I. 1884) .

(n781)Footnote 782. *Williamson v. General Fin. Corp., 210 A.2d 61 (R.I. 1965)* . In an interesting aside, this court also spurned use of legal Latin:

> Although not prohibited by statute, the use of Latin terms in pleadings is impermissible unless they have become so anglicized as to have been adopted as part of the English language and are so clearly intelligible as not to require resort to a law dictionary by one whose education did not include a study of the ancient language... Its use ... in the latter half of the twentieth century so clouds a pleading with indefiniteness and vagueness as not sufficiently to inform the adverse party of what he may be called upon to meet at trial and therefore to fall short of meeting the test that averments should be precise and definite as the nature of the case will permit.

Id. at 63-64 . Ernest G. Mayo, *Rhode Island's Reception of the Common Law, 31 Suffolk L. Rev. 609 (1998).*

(n782)Footnote 783. North Carolina Charters and Constitutions, 1578-1698 7-8 (Mattie Marie Edwards Parker ed. 1963).

(n783)Footnote 784. *Id.* at 67.

(n784)Footnote 785. *Id.* at 77.

(n785)Footnote 786. *Id.* at 84-85.

(n786)Footnote 787. 7 Source And Documents of United States Constitutions 391 (William F. Swindler ed. 1978).

(n787)Footnote 788. 2 Herbert L. Osgood, The American Colonies in the Seventeenth Century 215 (1904).

(n788)Footnote 789. 1 The Earliest Printed Laws of South Carolina 1692-1734 305 (John D. Cushing ed. 1978).

(n789)Footnote 790. *Id.* at 321.

(n790)Footnote 791. *Id.* at 323.

(n791)Footnote 792. *Id.* at 322.

(n792)Footnote 793. South Carolina Constitution of 1776, art. XXIX.

(n793)Footnote 794. South Carolina Constitution of 1778, art. XXXIV.

(n794)Footnote 795. South Carolina Constitution of 1790, art. VII.

(n795)Footnote 796. South Carolina Constitution of 1865 (not approved), art. VIII.

(n796)Footnote 797. South Carolina Constitution of 1868, art. XVII, § 10.

(n797)Footnote 798. South Carolina Constitution of 1895, art. XVII, § 10.

(n798)Footnote 799. South Carolina Constitution, art. XVII, § 10 .

(n799)Footnote 800. *Shecut v. McDowel, 6 S.C. L. (1 Tread.) 35 (1812)* .

(n800)Footnote 801. S.C. Rev. Stat. ch. 146, § 10.

(n801)Footnote 802. *S.C. Code Ann. § 14-1-50* .

(n802)Footnote 803. *Id.* § 14-1-60.

(n803)Footnote 804. *State v. Carson, 262 S.E.2d 918 (S.C. 1980)* ; *North Greenville College v. Sherman Constr. Co., 243 S.E.2d 441 (S.C. 1978)* .

(n804)Footnote 805. *Patel v. McIntyre, 667 F. Supp. 1131* (D.S.C.) , *aff'd without opinion, 848 F.2d 185 (4th Cir. 1987)* ; *McNeill v. United States, 519 F. Supp. 283 (D.S.C. 1981)* ; *Bruce v. Riddle, 464 F. Supp. 745* (D.S.C.) , *aff'd, 631 F.2d 272 (4th Cir. 1979)* .

(n805)Footnote 806. David A. Thomas, *Anglo-American Land Law: Diverging Developments from A Shared History Part II: How Anglo-American Land Law Diverged After American Colonization and Independence, 34 Real Prop. Prob. & Tr. J. 295 (Summer 1999)* .

(n806)Footnote 807. This substitution is discussed in Beard v. Poydras, 4 Mart. 348 (La. 1816) .

(n807)Footnote 808. *2 Stat. 283.*

(n808)Footnote 809. *Id.* § 13.

(n809)Footnote 810. 1 Laws of a Public and General Nature, of the District of Louisiana, of the Territory of Louisiana, of the Territory of Missouri, and of the State of Missouri up to the Year 1824, § 1 (1842).

(n810)Footnote 811. *Id.* § 2.

(n811)Footnote 812. *4 Stat. 701.*

(n812)Footnote 813. Kansas-Nebraska Act of 1854, *10 Stat. 277.*

(n813)Footnote 814. *Id.* § 9 .

(n814)Footnote 815. *Id.* § 14 .

(n815)Footnote 816. Neb. Terr. Laws, 328 (1st Sess.).

(n816)Footnote 817. *12 Stat. 239.*

(n817)Footnote 818. *Id.* § 9 .

(n818)Footnote 819. Dak. Civ. Code § 6.

(n819)Footnote 820. *25 Stat. 676.*

(n820)Footnote 821. *Id.* § 24 .

(n821)Footnote 822. South Dakota Constitution, art. XXVI, § 1.

(n822)Footnote 823. S.D. Laws, ch. 105, §§ 1, 2.

(n823)Footnote 824. *S.D. Codified Laws §§ 1-1-22 - 1-1-24* .

(n824)Footnote 825. *Truxes v. Kenco Enters., Inc., 119 N.W.2d 914, 916 (S.D. 1963)* .

(n825)Footnote 826. *Thompson v. Andrews, 165 N.W. 9, 12 (S.D. 1917)* .

(n826)Footnote 827. *Anderson v. Blixt, 72 N.W.2d 799 (N.D. 1955)* ; *Brignall v. Hannah, 157 N.W. 1042 (N.D. 1914)* .

(n827)Footnote 828. *Reeves & Co. v. Russell, 148 N.W. 654, 658 (N.D. 1914)* .

(n828)Footnote 829. *In re Reinhardt, 81 B.R. 565, 569 (D.N.D. 1987)* .

(n829)Footnote 830. *Constitution of the State of Franklin*, P 1, *in* 9 Sources and Documents of United States Constitutions 127 (William F. Swindler ed. 1979).

(n830)Footnote 831. *1 Stat. 101*.

(n831)Footnote 832. *Id.* at P 8 of the deed of cession.

(n832)Footnote 833. *1 Stat. 123.*

(n833)Footnote 834. *An Ordinance for the government of the territory of the United States northwest of the river Ohio* [Northwest Ordinance], § 14, art. II (1787), published as a footnote in 1 United States Statutes at Large 51-53.

(n834)Footnote 835. *Id.* §§ 4 , 5.

(n835)Footnote 836. North Carolina Charters and Constitutions, 1578-1698 6 (Mattie Erma Edwards Parker ed. 1963).

(n836)Footnote 837. "Denizen" ordinarily means an inhabitant or resident, although in British usage it may also mean a foreigner who is permitted certain rights of citizenship.

(n837)Footnote 838. North Carolina Charters and Constitutions, 1578-1698 7 (Mattie Erma Edwards Parker ed. 1963).

(n838)Footnote 839. *Id.* at 8.

(n839)Footnote 840. *Id.*, vol. 1 at 293-301.

(n840)Footnote 841. *Id.* at 321-322.

(n841)Footnote 842. North Carolina Constitution of 1776, Declaration of Rights, § XXV.

(n842)Footnote 843. North Carolina Constitution of 1776, art. XLIII.

(n843)Footnote 844. North Carolina Laws of 1778, Ch. 5, §§ I and II.

(n844)Footnote 845. *1 Stat. 491.*

(n845)Footnote 846. Tennessee Constitution of 1796, art. X, § 2.

(n846)Footnote 847. Tennessee Constitution of 1834, art. XI, § 1.

(n847)Footnote 848. Tennessee Constitution of 1870, art. XI, § 1.

(n848)Footnote 849. Tennessee Constitution, art. XI, § 1 .

(n849)Footnote 850. *Tenn. Code Ann. § 8-10-109* .

(n850)Footnote 851. *Tenn. Code Ann. § 60-1-608* .

(n851)Footnote 852. Tenn. R. Evid. 202(a)(1).

(n852)Footnote 853. *McCorry v. King's Heirs, 22 Tenn. 267 (1842)* .

(n853)Footnote 854. *State v. Miller, 79 Tenn. 620, 623, 627-628 (1883) . See also Glasgow's Lessee v. Smith & Blackwell, 1 Tenn. 144 (1807)* (a lengthy publisher's note following the opinion of the case lists English statutes then considered in force in Tennessee).

(n854)Footnote 855. This substitution is discussed in Beard v. Poydras, 4 Mart. 348 (La. 1816) .

(n855)Footnote 856. *2 Stat. 283.*

(n856)Footnote 857. *Id.* § 13 .

(n857)Footnote 858. 1 Laws of a Public and General Nature, of the District of Louisiana, of the Territory of Louisiana, of the Territory of Missouri, and of the State of Missouri up to the Year 1824 § 1 (1842).

(n858)Footnote 859. *Id.* § 2 .

(n859)Footnote 860. Texas Provisional Constitution of 1835, art. VI.

(n860)Footnote 861. *Id.* at art. VII.

(n861)Footnote 862. Republic of Texas Constitution of 1836, art. IV, § 13.

(n862)Footnote 863. Republic of Texas Constitution of 1836, Schedule, § 1.

(n863)Footnote 864. Texas Constitution of 1836, General Provisions, § 7.

(n864)Footnote 865. Cited and discussed *in* Ford W. Hall, *An Account of the Adoption of the Common Law by Texas, 28 Tex. L. Rev. 801, 808-809 (1950);* and *in* Edward Lee Markham, Jr., *The Reception of the Common Law of England in Texas and the Judicial Attitude Toward that Reception, 29 Tex. L. Rev. 904, 909-910 (1951).* Robert N. Jones, Jr., *A Jurisprudence Better Understood: The Adoption of the Common Law in Texas, 53 Texas B.J. 452 (1990) . See also* James W. Paulsen, *Community Property and the Early American Women's Rights Movement: The Texas Connection, 32 Idaho L. Rev. 644 (1996) . See also* Thomas M. Featherston, Jr. and Amy E. Douthitt, *Changing the Rules by Agreement: The New Era in Characterization, Management, and Liability of Marital Property, 49 Baylor L.*

Rev. 271 (Spring 1997) .

(n865)Footnote 866. *5 Stat. 797.*

(n866)Footnote 867. Texas Constitution of 1845, art. XIII, § 3.

(n867)Footnote 868. Texas Constitution of 1845, art. I, § 18.

(n868)Footnote 869. Texas Constitution of 1845, art. VII, § 19. Joseph W. McKnight, *Texas Community Property Law: Conservative Attitudes, Reluctant Change*, 56 Law & Contemp. Probs. 71, 73 81 (Spring 1993).

(n869)Footnote 870. Texas Constitution of 1845, art. VII, § 22.

(n870)Footnote 871. *Tex. Civ. Prac. & Rem. Code Ann. § 5.001* .

(n871)Footnote 872. *Tex. Prop. Code Ann. §§ 5.042(a)*-5.042(d).

(n872)Footnote 873. *Tex. Rev. Civ. Stat. Ann. art. 5414c* .

(n873)Footnote 874. *Tex Prop. Code Ann. § 92.061* .

(n874)Footnote 875. *Tex. Prop. Code Ann. § 51.001* .

(n875)Footnote 876. *Kraft v. Langford, 565 S.W.2d 223, 228 (Tex. 1978)* .

(n876)Footnote 877. *Paul v. Ball, 31 Tex. 10, 14-15 (1868)* .

(n877)Footnote 878. *Southern Pac. Co. v. Porter, 331 S.W.2d 42, 45 (Tex. 1960)* . Only a few years earlier the Texas Court of Civil Appeals in Dallas had declared that, "Our Texas courts are limited to the enforcement of rights under the common law as it existed on January 20, 1840, unless changed, modified, added to, or repealed by statute." *Milner v. Red River Valley Pub'g Co., 249 S.W.2d 227, 229 (Tex. Civ. App. 1952)* .

(n878)Footnote 879. Constitution of the State of Deseret , H. MISC. DOC. NO. 18, 31st Cong., 1st Sess. (1849); *also published in* 9 Sources and Documents of United States Constitutions 375-381 (William F. Swindler ed. 1979).

(n879)Footnote 880. *9 Stat. 453.*

(n880)Footnote 881. *Id.* § 9 . *But see* Edwin Brown Firmage & Richard Collin Mangrum, *Zion in the Courts*, ch. 9 (1988); Michael W. Homer, *The Judiciary and the Common Law in Utah Territory, 185061*, 21(1) Dialogue 97 (1988).

(n881)Footnote 882. *Id.* § 17 . Orma Linford, *The Mormons, the Law, and the Territory of Utah, 23 Am. J. Legal Hist. 213 (1979)* .

(n882)Footnote 883. *First Nat'l Bank v. Kinner, 1 Utah 100, 106-107 (1873)* .

(n883)Footnote 884. *People v. Moroni Green, 1 Utah 11 (1876)* .

(n884)Footnote 885. *28 Stat. 107. See also* Nancy J. Taniguchi, *The Shifting Significance of United States v. Sweet*, 9(2) W. Legal Hist. 131 (1996).

(n885)Footnote 886. *Id.* § 19 .

(n886)Footnote 887. *29 Stat. 876.*

(n887)Footnote 888. Utah Constitution, art. XXIV, § 2 .

(n888)Footnote 889. *Utah Code Ann. § 68-3-1* .

(n889)Footnote 890. *Hatch v. Hatch, 148 P. 1096, 1098, 1100 (Utah 1915)* . Jerrold S. Jensen, *The Common Law of England in the Territory of Utah*, 60(1) Utah Hist. Q. 4 (1992).

(n890)Footnote 891. *Cahoon v. Pelton, 342 P.2d 94, 98 (Utah 1959)* .

(n891)Footnote 892. Vermont Constitution of 1777, ch. II, §§ XXI, XXXI, XXXIV.

(n892)Footnote 893. Vermont Constitution of 1786, ch. II, §§ V, XXXII, XXXIII.

(n893)Footnote 894. *1 Stat. 191 (1791).*

(n894)Footnote 895. Vermont Constitution of 1793, ch. II, §§ V, XXXV, XXXVI.

(n895)Footnote 896. *Giddings v. Smith, 15 Vt. 344, 352-353 (1843)* .

(n896)Footnote 897. Vermont State Papers, The Early Journals of the General Assembly 450 (1823). *See also Clement v. Graham, 63 A. 146, 148-149 (Vt. 1906)* .

(n897)Footnote 898. *Vt. Stat. Ann. tit. 1, § 271* .

(n898)Footnote 899. *State v. O'Brien, 170 A. 98, 102 (Vt. 1934)* . *See also E. B. & A. C. Whiting Co. v. City of Burlington, 175 A. 35, 41 (Vt. 1934)* . *See also* Paul Gillies, *Not Quite a State of Nature: Derivations of Early Vermont Law, 23 Vt. L. Rev. 99 (1998)* .

(n899)Footnote 900. Articles IV and V, Letters Patent to Sir Thomas Gates et al., April 10, 1606, *in* 1 William Waller Hening, The Statutes at Large, Being a Collection of all the Laws of Virginia 58-60 (1823).

(n900)Footnote 901. Article VII, Letters Patent to Sir Thomas Gates et al., April 10, 1606, *in* 1 William Waller Hening, The Statutes at Large, Being a Collection of all the Laws of Virginia 60-61 (1823).

(n901)Footnote 902. Article VIII, Letters Patent to Sir Thomas Gates et al., April 10, 1606, *in* 1 William Waller Hening, The Statutes at Large, Being a Collection of all the Laws of Virginia 61 (1823).

(n902)Footnote 903. Article XV, Letters Patent to Sir Thomas Gates et al., April 10, 1606, *in* 1 William Waller Hening, The Statutes at Large, Being a Collection of all the Laws of Virginia 64 (1823).

(n903)Footnote 904. "Articles, Instructions and Orders," etc., Nov. 20, 1606, *in* 1 William Waller Hening, The Statutes at Large, Being a Collection of all the Laws of Virginia 68 (1823).

(n904)Footnote 905. E.A. Prichard and Gregory A. Riegle, *Searching for Certainty: Virginia's Evolutionary Approach to Vested Rights, 7 Geo. Mason L. Rev. 983 (Summer 1999)* .

(n905)Footnote 906. "Articles, Instructions and Orders," etc., Nov. 20, 1606, *in* 1 William Waller Hening, The Statutes at Large, Being a Collection of all the Laws of Virginia 69 (1823).

(n906)Footnote 907. Article IV, The Second Charter to the Treasurer and Company, for Virginia, *in* 1 William Waller Hening, The Statutes at Large, Being a Collection of all the Laws of Virginia 88 (1823).

(n907)Footnote 908. Article VI, The Second Charter to the Treasurer and Company, for Virginia, *in* 1 William Waller Hening, The Statutes at Large, Being a Collection of all the Laws of Virginia 89 (1823).

(n908)Footnote 909. Article XXVII, The Second Charter to the Treasurer and Company, for Virginia, *in* 1 William Waller Hening, The Statutes at Large, Being a Collection of all the Laws of Virginia 97 (1823).

(n909)Footnote 910. Article IV, A Third Charter of K. James I to the Treasurer and Company, for Virginia, *in* William Waller Hening, The Statutes at Large, Being a Collection of all the Laws of Virginia 101 (1823).

(n910)Footnote 911. Article XXI, A Third Charter of K. James I to the Treasurer and Company, for Virginia, *in* William Waller Hening, The Statutes at Large, Being a Collection of all the Laws of Virginia 109 (1823).

(n911)Footnote 912. Article XX, A Third Charter of K. James I to the Treasurer and Company, for Virginia, *in* William Waller Hening, The Statutes at Large, Being a Collection of all the Laws of Virginia 109 (1823).

(n912)Footnote 913. Alf J. Mapp, Jr., The Virginia Experiment 44 (1987). According to the modern calendar, the date would have been designated August 9, 1619; according to older authority, the assembly was first called together near the end of June, 1619. 1 William Waller Hening, The Statutes at Large, Being a Collection of all the Laws of Virginia 119-121 (1823).

(n913)Footnote 914. Preamble, 1661-62, vol. 2, 43.

(n914)Footnote 915. Paul Samuel Reinsch, *"The English Common Law in the Early American Colonies,"* 1 Select Essays in Anglo-American Legal History 367, 405, 406 (1907).

(n915)Footnote 916. Act XX, Virginia Assembly of 1666, *in* 2 William Waller Hening, The Statutes at Large, Being a Collection of all the Laws of Virginia 246 (1823).

(n916)Footnote 917. Warren M. Billings et Al., Colonial Virginia 75 (1986).

(n917)Footnote 918. 9 William Walter Hening, The Statutes at Large, Being a Collection of all the Laws of Virginia 127, P VI (1823).

(n918)Footnote 919. *Va. Code Ann. §§ 1-10* and 1-11 .

(n919)Footnote 920. *Long v. Vlassic Food Prods. Co., 439 F.2d 229 (4th Cir. 1971)* ; *Baring v. Reeder, 11 Va. (1 Hen. & M.) 154 (1806)* .

(n920)Footnote 921. *Weishaupt v. Commonwealth, 315 S.E.2d 847 (Va. 1984)* ; *Foster v. Commonwealth, 31 S.E. 503 (Va. 1898)* .

(n921)Footnote 922. *Williamson v. Old Brogue, Inc., 350 S.E.2d 621 (Va. 1986)* .

(n922)Footnote 923. *See, e.g., Byrd v. Gate Petr. Co., 845 F.2d 86 (4th Cir. 1988)* . Joseph A. Ranney, *Anglicans, Merchants, and Feminists: A Comparative Study of the Evolution of Married Women's Rights in Virginia, New York, and Wisconsin*, 6 Wm. & Mary J. of Women & L. 493 (2000) . Carol M. Rose, *A Dozen Propositions on Private Property, Public Rights, and the New Takings Legislation, 53 Wash & Lee L. Rev. 265 (1996)* . Jose L. Fernandez, *Public Trust, Riparian Rights, and Aquaculture: A Storm Brewing in the Ocean State, 20 Wm. & Mary Envtl. L. & Pol'y Rev. 293 (1996)* . John F. Hart, *"A Less Proportion of Idle Proprietors": Madison, Property Rights, and the Abolition of Fee Tail, 58 Wash. & Lee L. Rev. 167 (Winter 2001)* .

(n923)Footnote 924. *10 Stat. 172. See also* Mark L. Lazarus III, *An Historical Analysis of Alien Land Law: Washington Territory & State 18531889*, 12 U. Puget Sound L. Rev. 203 (1989) .

(n924)Footnote 925. *10 Stat. 6.*

(n925)Footnote 926. *Id.* § 12 .

(n926)Footnote 927. Brad Asher, Beyond The Reservation: Indians, Settlers, & The Law In Washington Territory, 18531889 (1998).

(n927)Footnote 928. Wash. Terr. Laws p. 83, § 1.

(n928)Footnote 929. *Wash. Rev. Code § 4.04.010* .

(n929)Footnote 930. *25 Stat. 676.*

(n930)Footnote 931. *Id.* § 24 .

(n931)Footnote 932. Washington Constitution, art. XXVII, § 2 .

(n932)Footnote 933. *In re Hudson, 126 P.2d 765, 771 (Wash. 1942) . See also Cooper v. Runnels, 291 P.2d 657 (Wash. 1955)* .

(n933)Footnote 934. *Fowler v. Wyman, 13 P.2d 501 (Wash. 1932)* .

(n934)Footnote 935. *Department of Social & Health Servs. v. State Pers. Bd., 812 P.2d 500 (Wash. App. 1991)* .

(n935)Footnote 936. Wash. Rev. Stat. §§ 26.16.010-26.16.210.

(n936)Footnote 937. Article VII, Letters Patent to Sir Thomas Gates et al., April 10, 1606, *in* 1 William Waller Hening, The Statutes at Large, Being a Collection of all the Laws of Virginia 60-61 (1823).

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(n938)Footnote 939. "Articles, Instructions and Orders," etc., Nov. 20, 1606, *in* 1 William Waller Hening, The Statutes at Large, Being a Collection of all the Laws of Virginia 68 (1823).

(n939)Footnote 940. "Articles, Instructions and Orders," etc., Nov. 20, 1606, *in* 1 William Waller Hening, The Statutes at Large, Being a Collection of all the Laws of Virginia 69 (1823).

(n940)Footnote 941. Article VI, The Second Charter to the Treasurer and Company, for Virginia, *in* 1 William Waller Hening, The Statutes at Large, Being a Collection of all the Laws of Virginia 89 (1823).

(n941)Footnote 942. Preamble, 1661-1662, vol. 2, 43.

(n942)Footnote 943. 9 William Walter Hening, The Statutes at Large, Being a Collection of all the Laws of Virginia 127, P VI (1823).

(n943)Footnote 944. *Baring v. Reeder, 11 Va. (1 Hen. & M.) 161 (1806)* .

(n944)Footnote 945. West Virginia Constitution of 1861, art. XI, § 8.

(n945)Footnote 946. West Virginia Constitution, art. 8, § 13 .

(n946)Footnote 947. *13 Stat. 371.*

(n947)Footnote 948. West Virginia Constitution of 1872, art. VII, § 21.

(n948)Footnote 949. West Virginia Constitution of 1872, art. XIII, § 1.

(n949)Footnote 950. West Virginia Constitution, art. 13, § *1* .

(n950)Footnote 951. *W. Va. Code § 2-1-1* .

(n951)Footnote 952. *W. Va. Code § 2-1-2* .

(n952)Footnote 953. *W. Va. Code § 36-1A-4(7)* .

(n953)Footnote 954. *W. Va. Code § 56-3-1* .

(n954)Footnote 955. *Cunningham v. Dorsey, 3 W. Va. 293, 306-307 (1869)* . *See also Powell v. Sims, 5 W. Va. 1 (1871)* .

(n955)Footnote 956. *Morningstar v. Black & Decker Mfg. Co., 253 S.E.2d 666, 676 (W. Va. 1979)* .

(n956)Footnote 957. *Markey v. Wachtel, 264 S.E.2d 437, 445 (W. Va. 1979)* .

(n957)Footnote 958. *An Ordinance for the government of the territory of the United States northwest of the river Ohio* [Northwest Ordinance], § 14, art. II (1787), published as a footnote on pp. 51-53 in vol. 1, United States Statutes at Large [individual paragraphs not identified by section numbers in this publication].

(n958)Footnote 959. *Id.* §§ 4 , 5.

(n959)Footnote 960. 9 William Walter Hening, The Statutes at Large, Being a Collection of all the Laws of Virginia 127, P VI (1823).

(n960)Footnote 961. *2 Stat. 58.*

(n961)Footnote 962. *Id.* § 2 .

(n962)Footnote 963. Indiana Territory Laws, Ch. 24.

(n963)Footnote 964. *2 Stat. 514.*

(n964)Footnote 965. *Id.* § 2 .

(n965)Footnote 966. *2 Stat. 309.*

(n966)Footnote 967. *Id.* § 2 .

(n967)Footnote 968. *5 Stat. 10.*

(n968)Footnote 969. *Id.* § 12 .

(n969)Footnote 970. *Id.* § 9 .

(n970)Footnote 971. Statutes of the Territory of Wisconsin.

(n971)Footnote 972. *Coburn v. Harvey, 8 Wis. 147, 148-151 (1864)* . *See* Joseph R. Ranney, *Molders and Shapers of Wisconsin Law*, 66 Wis. Law. 24 (1993).

(n972)Footnote 973. *9 Stat. 178.*

(n973)Footnote 974. *9 Stat. 233.*

(n974)Footnote 975. Wisconsin Constitution of 1848, art. XIV, § 13.

(n975)Footnote 976. Wisconsin Constitution, art. 14, § 13 .

(n976)Footnote 977. *Coburn v. Harvey, 18 Wis. 147, 153 (1864)* .

(n977)Footnote 978. *Spaulding v. Chicago & N.W. Ry., 30 Wis. 110, 117 (1872)* . *State v. Picotte, 661 N.W.2d 381 (Wisc. 2003)* (Wisconsin courts may properly change common law principles as legal principles evolve).

(n978)Footnote 979. *Davison v. St. Paul Fire & Marine Ins. Co., 248 N.W.2d 433 (Wis. 1976)* ; *In re Budd's Estate, 105 N.W.2d 358 (Wis. 1960)* .

(n979)Footnote 980. *State v. Borrell, 482 N.W.2d 883 (Wis. 1992)* . *State v. Borrell, 482 N.W.2d 883 (Wis. 1976) overruled in part on other grounds by State v. Greve, 681 N.W.2d 479 (Wisc. 2004)* (the court clarified its *Borrell* decision by withdrawing the language that implies there is a due process right of allocation under the federal constitution).

(n980)Footnote 981. Wis. Stat. Ann. chs. 700-710.

(n981)Footnote 982. *Wis. Stat. Ann. §§ 766.01 - 766.97* .

(n982)Footnote 983. This substitution is discussed in Beard v. Poydras, 4 Mart. 348 (La. 1816) .

(n983)Footnote 984. *2 Stat. 283.*

(n984)Footnote 985. *Id.* § 13 .

(n985)Footnote 986. Laws of a Public and General Nature, of the District of Louisiana, of the Territory of Louisiana, of the Territory of Missouri, and of the State of Missouri up to the Year 1824 § 1, 1 (1842).

(n986)Footnote 987. *Id.* § 2 .

(n987)Footnote 988. *4 Stat. 701.*

(n988)Footnote 989. Kansas-Nebraska Act of 1854, *10 Stat. 277 (1854).*

(n989)Footnote 990. *Id.* § 9 .

(n990)Footnote 991. *Id.* § 14 .

(n991)Footnote 992. Neb. Territory Laws, 328 (1st Sess.).

(n992)Footnote 993. *12 Stat. 239.*

(n993)Footnote 994. *Id.* § 9 .

(n994)Footnote 995. Dak. Civ. Code § 6.

(n995)Footnote 996. *12 Stat. 808.*

(n996)Footnote 997. *Id.* § 9 .

(n997)Footnote 998. *Idaho Code § 73-116* .

(n998)Footnote 999. *15 Stat. 178.*

(n999)Footnote 1000. *Id.* § 9 .

(n1000)Footnote 1001. *Id.* § 17 .

(n1001)Footnote 1002. *Wyo. Stat. § 8-1-101* .

(n1002)Footnote 1003. § 21, *26 Stat. 222.*

(n1003)Footnote 1004. Wyoming Constitution, art. XXI, § 3 .

(n1004)Footnote 1005. *Johnson v. Union Pac. Coal Co., 76 P. 1089, 1093 (Utah 1904)* .

(n1005)Footnote 1006. *Weaver v. Mitchell, 715 P.2d 1361, 1369 (Wyo. 1986) . See also Nulle v. Gillette-Campbell County Joint Powers Fire Bd., 797 P.2d 1171, 1172 (Wyo. 1990)* .

(n1006)Footnote 1007. *In re Smith's Estate, 97 P.2d 677, 681 (Wyo. 1940) . See also Krug v. Reissig, 488 P.2d 150, 152 (Wyo. 1971)* .

(n1007)Footnote 1008. *Choman v. Epperley, 592 P.2d 714, 716 (Wyo. 1979) . See also Snell v. Ruppert, 541 P.2d 1042, 1046 (Wyo. 1975)* .

(n1008)Footnote 1009. *Crawford v. Barber, 385 P.2d 655, 657 (Wyo. 1963)* .

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CHAPTER 7 DEVELOPMENT OF AMERICAN PROPERTY LAW AFTER INDEPENDENCE

1-7 Thompson on Real Property, Thomas Editions § 7.03

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§ 7.03 Patterns of Change in American Property Law.

This section will summarize the ways that changes in American property law have been described and explained. In a nation of several dozen different and diverse systems of jurisprudence, some skepticism toward such generalizations is appropriate. Occasionally the attempts of scholars to discern a movement, trend or change in a particular branch of the law, and to attach a rather arbitrarily chosen label, may seem contrived and artificial. Quite likely the judges, lawyers and litigants whose activities provided the stuff of the "trend" would have been surprised at the characterization and to be classed as participants. Nevertheless, it may be useful to risk the generalizations and to clarify how contemporary assumptions about American property law have been transformed from those of an earlier era.

It has always been remarkable to students of American history that a penchant for natural rights theories was so conspicuous at the time of the break with England. As should be evident from Chapter 6, the law developed and practiced in the English colonies of America was surprisingly indigenous, with common law foundations sometimes adopted only piecemeal or as if by afterthought. The impression is that American legal and governmental systems were pragmatic products of the pioneering experience, rather than the expressions drawn from innate notions of natural rights. Yet, when it became important and even necessary to rationalize the separation from England, the source country of the common law, it was said that England had violated "self-evident" and "inalienable rights." One scholar offered this explanation:

> One of the intriguing questions about the American Revolution is why radical versions of natural rights thought found such widespread acceptance in America, so that a society with comparatively little economic discontent or social unrest became a seedbed of subversion and treason in the name of liberty. The importance of early eighteenth century English radicalism in shaping the perspective of American revolutionaries has been documented; how did views marginal in England come to be dominant in America? One possibility is the different institutional structure of government in the colonies. By the mid-eighteenth century Americans were accustomed to a much greater freedom from governmental interference than their counterparts in England. For the colonists Parliament, the Privy Council, and the Crown were remote bodies; colonial governors were often mere functionaries; colonial assemblies reflected the parochial interests of their constituencies. The notion of autonomy from governmental control was part of the reality of the American experience; in this context talk of inalienable rights

> against the state was not revolutionary.
>
> Other contributing factors may have been the identification of America with newness, exploration, and freedom from the European past; the generally secular character of American settlements by [the time of] the Revolution, which made Enlightenment ideas about the primacy of man palatable; the fact that American growth occurred after the Glorious Revolution's reduction of the powers of the monarchy and articulation of ideas that were to become the foundations of natural rights theory in America. Whatever the explanation, the idea of natural rights gained a foothold in America and became a self-fulfilling prophecy as Great Britain sought to tighten her administration of the colonies in the 1760's and 1770's.
>
> * * *
>
> The authors of the Declaration of Independence and the framers of the Constitution were concerned primarily with declaring certain principles of natural rights to be "self-evident" and with effectuating their theory of popular sovereignty. They were apparently satisfied with letting the common law continue to develop independent of constitutional control and with codifying a tripartite system of governmental powers without deciding which of the three branches of government would have final authority to interpret what had been codified. n1010

The natural rights foundation of the Constitution may have been at least partially responsible for the first significant jurisprudential development to occur after adoption of the federal constitution: the courts' assumption of the role of interpreter of the law. Against suggestions that the Congress, as the legislative branch, should interpret the Constitution was posed the notion that even the legislative branch was bound by the natural law embodied in the Constitution; further, if the courts were the interpreters they would still be exercising their proper function under a natural law regime, that of declaring rather than making the law. All of this was premised upon the supremacy of the Constitution, which consisted of a collection of natural rights principles.

Both following independence as well as before, American law continued a course of dynamic development:

> That the law of property was not static during the nineteenth century can be demonstrated by even the most casual examination of the session laws of the various states. By the end of the first half-century of our history as an independent nation, this body of law had begun to take on characteristics all its own. It is true, such writers as Kent and Story tended to magnify the importance of English common law and to ignore innovations of the colonial period. But legislative change continued, sometimes by minor increments or amendments here and there, sometimes by the enactment of integrated codes of law. Thus, Hilliard, writing in 1838 and commenting on the numerous important changes by the various American states in the English land law, made this observation: "Take, for an example, such titles as Descent, Estate Tail, Dower, Mortgage; it is not too much to say, that upon these subjects the English law is not our law, but that the American statutes have built up a new system for the American states." n1011

According to several scholars, in the years following adoption of the Constitution, social and economic changes occurred in America that changed the way the law was viewed and the way the judiciary interpreted the law. In general, these changes have been described as the

> expansion and transformation of the economy (especially in its transportation sector), the decline of organized religion, the growth and diffusion of population, the development of a more heterogeneous ethnic base, the lure of vacant land, and the emergence of a literature deemphasizing social obligations and emphasizing individual freedoms and accomplishments, n1012

all of which led to law being used as a means of promoting individual action and accomplishment.

The private law in America of this post-Revolution era has been labeled "instrumental," in that it

> was no longer conceived of as an eternal set of principles expressed in custom and derived from natural law. Nor was it regarded primarily as a body of rules designed to achieve justice only in the individual case. Instead, judges came to think of the common law as equally responsible with legislation for governing society and promoting socially desirable conduct. The emphasis on law as an *instrument* of policy encouraged innovation and allowed judges to formulate legal doctrine with the self-conscious goal of bringing about social change. (Emphasis added.) n1013

Regardless of how one perceives eras or trends in the development of American law, several historical characteristics of American property law can be identified. One of the most important features of American land law, in particular, was the immense store of public lands subject to the administration of the federal and state governments, and those governments' consistent policy of divestment. The lands were not given away, but they were also not hoarded; for relatively nominal sums ordinary citizens could obtain all the land they could manage. When rules regarding minimum acreage were perceived as obstructions to ownership by small farmers, acreage minimums were reduced to more manageable allotments:

> Once land was surveyed, it was disposed of. Public-land law flowed from one basic choice. The government did not choose to manage its land as a capital asset, but to get rid of it in an orderly, fruitful way. A whole continent was sold or given away to veterans, settlers, squatters, railroads, states, colleges, speculators, and land companies... The government possessed a resource of incalculable value; but it was firm public policy to denationalize it as soon as possible. True, the land was sold for cash, and the government certainly wanted the money; but not to make itself powerful or to increase the size and scale of the public sector. And, in any event, divestment was the goal. n1014

Changes in laws governing private lands were also underway by the time the federal Constitution was adopted, most changes apparently driven by desires to increase the marketability of land interests. Almost all vestiges of primogeniture and feudal tenures, even though only nominally present in most states' jurisprudence, had been removed from state statutes by the end of the 18th century. The demise of the fee tail soon followed. The English legal preference for joint tenancy as the form of concurrent ownership was changed to an American preference for tenancy in common. Rules against perpetuities were more strictly interpreted and enforced; restraints against alienation were stricken if unreasonable.

To facilitate the huge increase in land transactions, old English modes of conveyancing, such as feoffments and liveries of seisin, were replaced with more simple and standardized forms of deeds, principally the warranty deed and the quitclaim deed; through such streamlining many conveyances were completed without the aid of lawyers. Litigation over land also lost much of its English intricacy, but increased enormously in the expanding American frontier, where conflicts between those holding formal titles and those actually occupying the land were endemic.

Certain wholly American innovations emerged in the land law of the early 19th century. Among these were mechanics' liens (first introduced in Maryland in 1791), homestead exemptions to protect property from creditors (created by the Texan republic in the 1830's, and adopted by the state of Mississippi in 1841), and mortgage laws tilted more toward debtors with introduction of redemption rights, and which spawned (beginning in the South) deeds of trust with private powers of sale.

The American law of wills introduced some streamlining as compared with counterpart English law, but will formalities requirements were generally extended from real property to personal property, as well. Yet, it has been estimated that more than 90% of the early nineteenth century American population "passed on without the benefit of probate": n1015

> In the early colonial period, probate was cheap, accessible, and relatively informal. In the 18th century, probate was more elaborate and costly; only the well-to-do made use of it. At some point, perhaps about 1800, the curve reached a peak and slowly changed direction. From then on participation in the probate process gradually increased, along with national literacy and wealth. In absolute terms, the number of nonfee dispositions (trusts, settlements, chains of future interests) certainly increased, in the 19th century -- at least as fast as the population and probably much faster. n1016

During the 19th century, other distinctly American property law developments emerged: some aspects of English easement law were rejected, most notably the doctrine of "ancient lights"; trusts and certain modifications of future interest law enjoyed new popularity as means of preserving family dynastic wealth; adverse possession doctrines seemed especially suitable for frontier conditions; with the filling of the frontier came creation of national parks and other conservationist measures; private covenants and other servitudes were used to enhance and preserve private property values; landlord/tenant law took on some characteristics of contract in some parts of the country, but became more oppressive in others, especially where share-cropping was common; rights of dower and curtesy came to be replaced by statutes offering surviving spouses the right to an elective share of the deceased spouse's estate.

The uniquely American institution of land title records was strained by the vastly enhanced marketability of huge areas of land:

> As before, so also after 1850, the traumatic weakness of land titles had a pervasive effect upon the land law. It played a role, for example, in the decline of dower. It hastened the decline of the common-law marriage, and stimulated the increasing formality of wills. As fast as institutions developed to make land more marketable and to improve the quality of titles, other events seemed to conspire to undo the good and make the situation worse. The vagueness of railroad, school, and land grants, for example, created serious problems of title in some of the Western states. In California and New Mexico, a legacy of confusion was inherited from the Mexican period...
>
> What made the situation worse was the sheer volume of land transactions. Deeds, mortgages, transfers, were counted in the thousands, then in the hundreds of thousands. The crude system of land registration could barely cope with the volume. Private solutions preceded public solutions to the problem. Title companies sprang up to check titles for a fee and to ensure landowners against mysterious clouds that might arise to befuddle their interests. n1017

As America moved into the twentieth century, the most conspicuous and urgent themes in property law development were sounded by burgeoning land use controls; urban renewal and development, with low-income housing as a ripple effect and landlord/tenant law reform in the private sector as a companion development; and by a huge and growing body of environmental laws and regulations. For the most part, these issues remain topical today. n1018

FOOTNOTES:

(n1)Footnote 1010. G. Edward White, *The Path of American Jurisprudence, 124 U. Pa. L. Rev. 1212, 1218-1220. See* Epstein, Richard A., *History Lean: The Reconciliation of Private Property and Representative Government, 95 Colum. L. Rev. 591 (Apr. 1995)* ; John A. Simmons, *Historical Rights and Fair Shares*, 14 Law & Phil. 149 (May 1995); Joseph C. Bowman and Michael A. Dorelli, *Recent Developments in Property Law, 32 Ind. L. Rev. 973 (1999)* ; William W. Fisher, *Symposium Texts and Contexts: The Application to American Legal History of the Methodologies of Intellectual History III, 49 Stan. L. Rev. 1065 (May 1997)* ; Gianmaria Ajani & Ugo Mattei, *Codifying Property Law in the Process of Transition: Some Suggestions from Comparative Law and Economics, 19 Hastings Int'l & Comp. L. Rev. 117 (Fall 1995)* ; Geoffrey R. Scott, *The Expanding Public Trust Doctrine: A Warning to Environmentalists and Policy Makers, 10 Fordham Envtl. L. J. 1 (Fall 1998)* ; Thomas W. Merrill, *Property and the Right to Exclude, 77 Neb. L. Rev. 730 (1998)* .

(n2)Footnote 1011. 1 A. James Casner, The American Law of Property § 1.45, p. 63 (1953).

(n3)Footnote 1012. *Id.* at 1223.

(n4)Footnote 1013. Morton J. Horwitz, The Transformation of American Law, 1780-1860 130 (1977).

(n5)Footnote 1014. Lawrence M. Friedman, A History of American Law 233-234 (2d ed. 1985).

(n6)Footnote 1015. *Id.* at 250.

(n7)Footnote 1016. *Id.* at 251.

(n8)Footnote 1017. *Id.* at 433.

(n9)Footnote 1018. Colonial legislators regulated land use more broadly than has been previously surmised, but this does not provide legal justification for applying the *Takings Clause* broadly to modern land use regulations. John F. Hart, *Colonial Land Use Law and Its Significance for Modern Takings Doctrine, 109 Harv. L. Rev. 1252 (1996) . See generally,* William R. Jones et al., Essays on English Law and the American Experience, 120135 (1994).

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CHAPTER 7 DEVELOPMENT OF AMERICAN PROPERTY LAW AFTER INDEPENDENCE

1-7 Thompson on Real Property, Thomas Editions § 7.04

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CHAPTER 8 THE RISE AND ROLE OF THE RESTATEMENTS OF PROPERTY AND THE RESTATEMENTS OF TRUSTS

2-8 Thompson on Real Property, Thomas Editions 8.syn

AUTHOR: Professor David A. Thomas J. Reuben Clark Law School Brigham Young University

§ 8.syn Synopsis to Chapter 8: THE RISE AND ROLE OF THE RESTATEMENTS OF PROPERTY AND THE RESTATEMENTS OF TRUSTS

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CHAPTER 8 THE RISE AND ROLE OF THE RESTATEMENTS OF PROPERTY AND THE RESTATEMENTS OF TRUSTS

2-8 Thompson on Real Property, Thomas Editions § 8.01

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§ 8.01 Introduction.

The purpose of this chapter is to describe the origins and functions of a form of secondary legal literature unique to American jurisprudence, the American Law Institute's § 8.01 Introduction.

The purpose of this chapter is to describe the origins and functions of a form of secondary legal literature unique to American jurisprudence, the American Law Institute's *Restatements*. Originally conceived as fresh reviews and re-expressions of prevailing common law principles in various foundational topics of American law, the *Restatements* have occasionally wandered from this path into the path of law reform; the results of this wandering have been mixed, both for the reform objectives and for the original objectives of common law review.

In addition to giving the general background of *Restatements*, this chapter will mainly focus on the *Restatements of Property* , the first and second of which are completed, and the third of which is in a lengthy drafting process. The chapter will also review the *Restatement of Trusts* , which is also relevant to much of property law.

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CHAPTER 8 THE RISE AND ROLE OF THE RESTATEMENTS OF PROPERTY AND THE RESTATEMENTS OF TRUSTS

2-8 Thompson on Real Property, Thomas Editions § 8.02

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§ 8.02 The Genesis and Purpose of the First Restatements.

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§ 8.02(a) The Founding of the American Law Institute.

"The desire of the legal profession for an orderly statement of our Common Law led to the formation of the American Law Institute in 1923." n1 According to the those who founded the American Law Institute (hereinafter ALI or the Institute) and promoted the *Restatements* , the common law system of jurisprudence in this country was threatened because of a "growing indigestible mass of decisions." n2 These concerns first surfaced through professional papers presented in 1914 and 1915, but attention was diverted by World War I. In 1920 a committee was appointed to investigate the founding of an institute as a "permanent organization for the improvement of the law." n3 It was hoped that such an organization "could produce an orderly *Restatement of the Law* tending to clarify and, as far as possible, simplify what we may term the general Common Law of the United States." n4

At a meeting in New York City called by Harvard law professor Joseph H. Beale as Chairman of the Committee of the Association of American Law Schools in May, 1922, a small group of leaders of the bar attended; there the group of twenty attendees formed a Committee on the Establishment of a Permanent Organization for the Improvement of the Law, with Elihu Root as chair and William Draper Lewis as secretary.

A report on the formation of the organization was drafted, revised, submitted to about four hundred persons, and then acted upon by the report distributees at a meeting in Washington, D.C., on February 22, 1923. Among the attendees at this meeting were two U.S. Supreme Court justices, five judges of the federal circuit courts of appeal, twenty-eight state supreme court justices, and representatives of the American Bar Association and the National Conference of Commissioners on Uniform State Laws. A resolution approving the formation of this organization, to be called the American Law Institute, was adopted unanimously and for the following objectives: "to promote the clarification and simplification of the law and its better adaptation to social needs, to secure the better administration of justice, and to encourage and carry on scholarly and scientific legal work." n5

§ 8.02(b) How the Work of the Restatements Was Originally Organized.

After the formalities of incorporation and selection of officers and council members were accomplished, the Institute set about the business of planning the subjects of study and raising funds to support the work. When the executive committee of the council met in May 1923, its members approved a standard plan for proceeding with the work of reviewing the law and producing *Restatements* :

> 1. The appointment of a Reporter for each subject undertaken. This Reporter prepares all drafts.
>
> 2. The appointment of a Committee of Advisers presided over by the Director as Chief of the Editorial Staff. The Committee with the Reporter for the subject considers all preliminary drafts and in a series of meetings each usually lasting from three to five days develops a final preliminary draft for the consideration of the Council; the Committee also reconsiders in the same manner any draft referred back to it by the Council or a meeting of the members. The Reporter is obliged to incorporate into a draft any statements of the law adopted by the Committee of Advisers or by the Council or by a meeting of the Members of the Institute; but except in the preparation for the printer of the text finally adopted by the Institute as the official draft, the Reporter registers his own dissent, if any, and on the request of any member of the Committee or the Council the dissent of such member.
>
> 3. The final preliminary draft is considered by the Council, the Reporter being present. The Council returns the draft for further consideration to the Committee of Advisers, or, as amended by them, submits it to the Annual Meeting of the Institute either as a tentative or as a proposed final draft.
>
> 4. The consideration of the tentative drafts by a meeting of the Institute and their return to the Council and the Committee of Advisers with any amendments adopted by the meeting for further study; the consideration of the proposed final drafts and their final adoption, with any amendments made, or their return for further consideration to the Council and the Committee of Advisers.
>
> When a proposed final draft is amended by the meeting it is re-submitted to the Council which either agrees with the meeting or asks it to reconsider its action. When both the Council and the meeting of members approve the same text, it is printed and promulgated as an "official draft." n6

As the drafting process is carried out under this plan, it means that an official draft consists of the work of three groups, with the Reporter's contribution as scrutinized by the advisers being especially significant:

> first, the advisers who have special knowledge of the subject; second, the Council, a body of some thirty-three eminent lawyers consisting mainly of judges and practicing attorneys, and finally, a meeting of the members of the Institute. In relation to any subject of the *Restatement* the most important person is the Reporter. The ultimate result is his work as discussed, changed and developed by group consideration. n7

As work progressed it became clear that the advisors could do more than read the Reporter's drafts and make suggestions. Ultimately, the advisers made many more original substantive contributions and became more involved in the formative stages of each *Restatement*.

A key rule in the preparation of the *Restatements* was that they should be prepared "in the light of case authority," so that each *Restatement* represented "the considered opinion of those constructing it, of the way in which the law would be decided in the light of decisions by the courts." n8

The preliminary drafts of each *Restatement* section were accompanied by rather complete citation of case authority for difficult or disputed points, but not as to familiar and settled points. Originally, it was hoped that treatises could be prepared to accompany each *Restatement*, with full citations and discussions of pertinent authorities as to all points, not merely the disputed points. In fact, the original scheme for the restatements included a plan for each committee to

produce parallel treatises for each restatement, to help demonstrate that the restatements were based on a very thorough examination of the sources. When the production of parallel treatises as a group project was soon revealed to be impractical, then the reporters were encouraged, although not formally requested, to prepare such treatises. By 1945, three reporters had in fact written treatises corresponding to their respective restatements: Samuel Williston for contracts (the second edition of a pre-Restatement work), Joseph Beale for conflict of laws, and Austin Scott for trusts.

When the notion of official parallel treatises for each restatement was abandoned, it was considered whether the reporter or committee notes and comments should include discussion of case authorities. The Institute ultimately decided that its own thoroughness and prestige sufficed to authenticate the points in the restatements, and citation to supporting authority was unnecessary. n9

The first restatements were commenced in June 1923, and covered the subjects of contracts, torts and conflict of laws. Agency was begun a few months later. The *Restatement (First) of Property* was begun on January 1, 1927, with Harry A. Bigelow of the University of Chicago as reporter. Professor Bigelow resigned in June 1929, upon his selection as dean of the University of Chicago Law School, at which time Professor Richard R. Powell of Columbia University Law School became and remained the property reporter. This first *Restatement of Property*, at five volumes the largest of the first restatements, was issued between 1936 and 1944.

In general, the work of the restatements was founded on initial drafts prepared by single experts, usually the reporters, embellished through review and comment by correspondence or in face-to-face meetings with committee members, and ultimately by submission of drafts to members of the Council and the ALI for comment, occasional amendment, and adoption.

§ 8.02(c) The Content of the First Restatements.

The first series of *Restatements* was quite clearly intended to "restate" or describe the then-prevailing common law rules in the United States:

> The *Restatement* states the law as it would be today decided by the great majority of courts. There is always the possibility that a State has followed in the past and will continue to follow a different rule. The variations are not nearly so numerous as was assumed at the beginning of the annotations work in 1927. They can be ascertained from state reports and digests, state and national. But the judge or practitioner in dealing with the law in a particular State should be enabled to find as quickly as possible the decisions, if any, in the State that are in accord or contra, as well as the variations made by statutes and their interpretations. n10

To enable judges and practitioners in any state more conveniently to ascertain whether their state's rule corresponded with a rule in a *Restatement*, committees were formed by the bar associations in several states to produce annotations of decisions and statutes in each state pertinent to the subject of each *Restatement*. By 1945, 127 separate state *Restatement* annotations publications had been issued, including 28 for contracts, 27 for conflicts, 26 for trusts, 19 for agency, and 11 for torts.

When the first *Restatement* was completed, its authors were satisfied that the original objective of discovering and articulating the prevailing common law rules in the states had been achieved:

> We started with the belief that out of the mass of case authority and legal literature could be made clear statements of the rules of the common law operative in the great majority of our States, expressed as simply as the character of our complex civilization admits. The result shows that this belief was justified. The Restatement of each subject expresses as nearly as may be the rules which our courts will apply today... The Restatement of a subject is thus more than a picture of what has been decided; it is a

> picture of present law expressed by foremost members of the profession... Though the rules are expressed in the form of a code, except in sporadic instances, there never has been any desire to give them statutory authority. The Restatement is an agency tending to promote the clarification and the unification of the law in a form similar to a Code. But it is not a code or statute. It is designed to help preserve not to change the common system of expressing law and adapting it to changing conditions in a changing world. n11

As a result of not only the *Restatement* work but also the annotations work, the *Restatement* drafters also concluded that there was less confusion and conflict, and more unity, in American common law than they had at first believed:

> One of the most interesting results of the annotations work is to dispel the idea very prevalent at the start, and even at the beginning of the annotations work in 1927, that the decisions of our courts are to a considerable degree full of conflicts. That there are conflicts in cases is, of course, true, but many apparent conflicts disappeared in the group discussions of the experts in the course of the development of careful statements of the law. We found the confusion in our case law more apparent than real. The impression that our common law is a mass of contradictions is in the main due to the variations in judicial language. When the pertinent facts of the cases are analyzed, much of the apparent contradiction disappears. A careful study of the State Annotations already published shows that on the average less than two per cent of the cases are contra to the statements in the Restatement text. Except for a few doubtful cases, the remainder are in accord. n12

The *Restatement* drafters, however, were surprised at how many rules were without supporting case authority in many jurisdictions. In some states well over half the *Restatement* rules had not yet been adjudicated. In response, the *Restatement* drafters have concluded that "In these instances the Restatement is the best evidence of the law which will be followed if and when a case arises in the State where no case authorities now exist." n13

From this last and several of the preceding declarations, it may be concluded that the first *Restatements* were intended to re-express and clarify the common law in the American states, especially to identify the prevailing rules in cases of conflicting rules among the states. Any notion of reforming the law at this early stage of the *Restatement* process was confined only to the technical reforms of clarification and unification. Substantive reform by promotion of new or minority rules was not an explicit objective of the first *Restatements*.

With respect to all the first *Restatements*, generally, it should be mentioned that, once the enormous influence of the Restatements was sensed, a means for monitoring the growth of that influence was put in place. In 1945 the ALI published the permanent edition of *Restatement in the Courts* , providing citations "to all those decisions in which the *Restatement* has been cited by Federal Courts and by the Appellate Courts of the States," covering all decisions published in the National Reporter System down to January 1, 1945. n14 Added to the case citations are references to law review items citing or discussing the *Restatements*.

Several of the *Restatements*, including the first and second *Restatements of Property*, have been enhanced by pocket parts for each volume, containing cumulative citations to Restatement references.

FOOTNOTES:

(n1)Footnote 1. American Law Institute, *History of the American Law Institute and the First Restatement of the Law in* Restatement in the Courts 1 (1945).

(n2)Footnote 2. *Id.*

(n3)Footnote 3. *Id.* at 2.

(n4)Footnote 4. *Id.*

(n5)Footnote 5. *Id.* at 3.

(n6)Footnote 6. *Id.* at 5-6.

(n7)Footnote 7. *Id.* at 6.

(n8)Footnote 8. *Id.* at 8.

(n9)Footnote 9. *Id.* at 9:

> It became clear that it was not necessary to add individual opinion to support the official statements of the Institute, and that the professional position of the Institute and the known care with which the Restatements were prepared in light of existing authorities permits it to speak with authority on the general law of the United States. The omission of the citation of case or other authority is practicable only because the Institute has attained an influence far greater than at the start of the work was thought possible. The Institute in its Restatement has become like the Courts an agency for the statement of the law.

(n10)Footnote 10. *Id.* at 12.

(n11)Footnote 11. *Id.* at 19.

(n12)Footnote 12. *Id.* at 20.

(n13)Footnote 13. *Id.*

(n14)Footnote 14. *Id.* at iii.

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CHAPTER 8 THE RISE AND ROLE OF THE RESTATEMENTS OF PROPERTY AND THE RESTATEMENTS OF TRUSTS

2-8 Thompson on Real Property, Thomas Editions § 8.03

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§ 8.03 How the Restatements of Property Were Prepared.

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§ 8.03(a) The First Restatement of Property.

The drafters of the *Restatement (First) of Property* subscribed fully to the overall objective of declaring the existing common law:

> The object of the Institute in preparing the Restatement is to present an orderly statement of the general common law of the United States, including in that term not only the law developed solely by judicial decision, but also the law that has grown from the application by the courts of statutes that have been generally enacted and have been in force for many years. n15

The property drafters also shared the institute's founders' apprehension of the danger to the common law system from too many uncontrolled, conflicting decisions, and that the *Restatements* would promote certainty and clarity:

> The Institute recognizes that the ever increasing volume of decisions of the courts, establishing new rules or precedents, and the numerous instances in which the decisions are irreconcilable, taken in connection with the growing complication of economic and other conditions of modern life, are increasing the law's uncertainty and lack of clarity. It also recognizes that this will force the abandonment of our common-law system of expressing and developing law through judicial application of existing rules to new fact combinations and the adoption in its place of rigid legislative codes, unless a new factor promoting certainty and clarity can be found.
>
> The careful Restatement of our common law by the legal profession as represented in the Institute is an attempt to supply this needed factor. n16

As mentioned above, Professor Harry A. Bigelow was the first reporter for the *Restatement (First) of Property* when work commenced on January 1, 1927. When he resigned to take the deanship of the University of Chicago Law School in June, 1929, Professor Richard R. Powell of Columbia University Law School, previously a special adviser to

Bigelow, took over as reporter. Professor W. Barton Leach of Harvard Law School functioned as special reporter for Chapter 15 on Statutes of Limitation. Typical of other *Restatement* committees, the property reporters prepared preliminary, tentative and proposed final drafts. The preliminary drafts were the result of an initial draft prepared by the reporter and subsequent discussion by the reporter and advisers. Preliminary drafts were then submitted to and discussed by the Council, with the result being tentative drafts. Tentative drafts were then submitted to the Institute for discussion and improvement, ultimately to be issued as final drafts.

The tentative drafts for the *Restatement (First) of Property* were produced between 1927 and 1935, with revision work occurring during 40 conferences of 3 to 7 days each. Professor Powell, as reporter, prepared monographs on individual subjects and questions contained in the first two volumes of the *Restatement (First) of Property*, and those were published, under Council authority but as his own statements, as appendices in those first two volumes.

The work on each of the five volumes of the *Restatement (First) of Property* may be summarized as follows:

> Volume 1: Reporters: Harry Bigelow (from January, 1927, to June, 1929); Richard Powell (from June, 1929). Work commenced in January, 1927, and was completed in 1936.
>
> Volume 2: Reporters: Richard Powell; Barton Leach for Ch. 15 ("Protection of Future Interests as Affected by Statutes of Limitations and the Doctrine of Prescription"). Work commenced in June, 1929, and was completed in 1936.
>
> Volume 3: Reporters: Richard Powell; Barton Leach for Ch. 25 ("Powers of Appointment"); James Casner for Ch. 23 ("Limitations to 'Heirs,' 'Heirs of the Body,' 'Next of Kin,' 'Relative' and to Other Groups Similarly Designated"). Work commenced in 1936 and was completed in 1940.
>
> Volume 4: Reporters: Richard Powell; James Casner, special reporter for Ch. 29 ("General Considerations [Restraints on Alienation]") and Ch. 30 ("Extent of Validity [Restraints on Alienation]"); Julian Bush, assistant reporter for Ch. 30 ("Extent of Validity [Restraints on Alienation]"), Ch. 31 ("Problems of Construction, Defenses to Enforcement and Termination [Restraints on Alienation]"), Ch. 32 ("Provisions in Restraint of Marriage [Restraints on Alienation]"), Ch. 33 ("Restraints Designed to Protect Testamentary Dispositions of Property [Restraints on Alienation]") and Ch. 34 ("Miscellaneous Restraints [Restraints on Alienation]"). Work commenced in 1940 and was completed in 1944. Volume 4 was superseded by Volume 1 of *Restatement (Second) of Property*, Donative Transfers, and is now out of print.
>
> Volume 5: Reporter: Oliver S. Rundell. Work commenced in October, 1934, and was completed in 1944.

As mentioned in the preceding section, all the *Restatements* were updated by publication of the permanent edition of *Restatement in the Courts* in 1945. This publication provided citations to all National Reporter System cases and law review articles that cited any of the *Restatements* and, of course, included citations to the *Restatement (First) of Property* . Presently, each volume of the *Restatement (First) of Property*, except Volume 4, has been enhanced by a pocket part containing cumulative citations to *Restatement* references to that volume.

In 1947, a number of important changes to the *Restatement (First) of Property* were approved and then published as pages 359-556 of the 1948 supplement to the *Restatement of the Law* .

§ 8.03(b) The Second Restatement of Property.

The work on the *Restatement (Second) of Property* began in 1972 and was intended in part to cover landlord/tenant law, a subject not thoroughly treated in the first *Restatement*. Landlord/tenant law drew attention not only because of the

earlier neglect but because of "current tensions and resultant legal change" in the area. n17 The *Restatement (Second)* was also intended to revisit topics covered in the first *Restatement* to the extent their significance had endured.

With hindsight it is easier to see now than perhaps it was in 1972 that the *Restatement* of landlord/tenant law signaled a profound change in the nature of the *Restatement* of property law. The momentous changes then occurring in landlord/tenant law -- indeed, the instability of those laws in many states -- made it difficult for the committee to simply restate long-established principles of common law, even if committee members had been so inclined. That they were not so inclined was evident at the outset, as explained in the introduction to the landlord/tenant volumes of the *Restatement (Second) of Property* .

> In dealing with landlord tenant law, the approach of the Institute has two distinctive features that an introduction should disclose. The first is the extent of the rejection of the ancient dogma that the covenants of the respective parties are entirely independent, in favor of a concept of mutual dependence akin to that accepted in the law of contracts. The second is the extent to which it is conceived to be appropriate that courts, in assessing the continuing vitality of precedents, rules and doctrines of the past, may give weight to the policies reflected in more recent, widespread legislation, though the statutes by their terms do not apply...

This portion of the *Restatement (Second) of Property* thus assumed the character of a call for reform, through adoption of positions that at the moment were accepted in only a minority of jurisdictions, although predictably some might eventually be adopted by most of the states. This placed the *Restatement* in the position of innovator, and undercut the description of the first *Restatement* as containing the general common law of property in the states. The Institute only indirectly acknowledged that this new approach sometimes adopted minority or novel positions in property law doctrines:

> The most significant consequence of these positions is to register support for the decisions, steadily increasing in their number, that imply an obligation of the landlord with respect to the fitness of leased premises for contemplated residential use and enlarge the tenant's remedies in case of default. Another instance of importance is the recognition of a limited defense for the tenant against retaliatory eviction by the landlord. This too is limited to residential property, reserving the question whether it may have a broader application. These examples suggest but they do not exhaust the implications of the Institute's acceptance of modern judicial innovation in this field.
>
> * * *
>
> Needless to say, the approach that I have noted and many, if not most, of its suggested applications were drawn in issue sharply in the Council's and the Institute's consideration of the preliminary and tentative drafts... That consideration led to much revision of specific formulations but both bodies were decisive in their votes of approval of text that is presented here. With patience, full discussion and hard work, the professional consensus that accords to the Restatements the authority they have was in due course attained. n18

Although the significance of achieving "professional consensus" among the *Restatement* drafters should not be minimized, it should also not be overlooked that this did not necessarily represent a consensus among judges and legislators, whose work provides the essence of the American common law. It meant that the *Restatement (Second) of Property* could no longer represent itself as always reflecting the general common law of property; its choices from among competing principles were based not necessarily on identifying the prevailing principles, but sometimes only on identifying what were deemed by the drafters to be the most desirable principles.

An example of the subtlety of this shift may be found in the section on retaliatory eviction, identified in the Introduction as an example of modern judicial innovation. In 2 *Restatement (Second) of Property*, § 14.8, retaliatory eviction is

defined. The Introductory Note preceding all the sections on retaliatory eviction simply describes circumstances under which a retaliatory motive can arise and how that motive may be a tenant defense against landlord exercise of traditional rights. It suggests that judicial participation in retaliatory eviction may violate a tenant's constitutional protections. The comments following the section describe in a matter-of-fact way the various substantive and procedural issues arising in a situation where retaliatory eviction is prohibited. In a special statutory note to the section, state laws prohibiting various forms of retaliatory conduct by a landlord are cited, and only by counting jurisdictions may the reader first perceive that this rule has only partial statutory acceptance in only a minority of jurisdictions.

The Reporter's Note following § 14.8 discusses how retaliatory eviction rules have been administered in individual cases, but does not address the matter of how widely a rule such as that in § 14.8 has been accepted. By contrast, most of the other sections of the *Restatement (Second) of Property* have, as the very first comment in the Reporter's Note, a paragraph beginning: "Comparison with present state of the law -- The rule of this section is consistent with well-settled case law," and followed by case citations. This pattern is present in § 14.6 and 14.7, immediately preceding § 14.8. By negative inference then, one may conclude that at the time it was published, § 14.8 did not represent "well-settled case law"; unfortunately, the *Restatement* presentation of information leading to that conclusion is so subtle as to be almost disingenuous.

It is possible that at some time in the future, the *Restatement* presentation on these points will indeed reflect the prevailing view in American jurisdictions, and perhaps the influence of the *Restatement* will have played a role in the nature of a self-fulfilling prophecy. In the meantime, those who have traditionally used the *Restatements* to identify the weight of authority on individual points of the American common law must be much more careful in using the *Restatement (Second) of Property* .

The second major step in producing the *Restatement (Second) of Property* (the first step being coverage of landlord/tenant rules in two volumes) was to review major areas originally covered in the *Restatement (First) of Property*, "but to do so... on a selective basis." n19 Ultimately, it was decided to devote the balance of the second property *Restatement* to the subject of donative transfers of property, "the typically central element in family estate planning." n20 This phase of the project extended to four volumes, and by this time the drafters made more open acknowledgement that the *Restatement (Second)* contained substantive as well as stylistic changes. A most conspicuous departure from a majority common law rule in this area was the *Restatement (Second)'s* adoption of the "wait-and-see" approach in applying the rule against perpetuities:

> The transforming change in style inaugurated by *Restatement, Second* is, of course, pervasively reflected in these pages: the systematic inclusion of extensive comments explaining and elaborating the black letter; the analysis of legislation addressed to the problems dealt with, coupled within the sense that courts (and, therefore, the *Restatement*) may, with subtle limits, accord weight in adjudication to legislative policy manifested in enactments that do not in terms resolve the instant question; and the incorporation of extensive Reporter's Notes, marshalling the decisions and other authoritative sources deemed by the Reporter to have bearing on the issues.
>
> The stylistic changes noted are by no means matched by shifts of substance in the Institute's positions on the problems dealt with in this volume, but one modification on a point of substance should be noted. Section 1.4 [of Donative Transfers] approves the version of the rule against perpetuities that measures the validity of a disposition by how long the vesting of the interest was in fact postponed, as distinguished from how long it could conceivably have been postponed, the rule the Institute supported almost forty years ago.
>
> The approval of this "wait-and-see" approach, adopted thus far in a small minority of our jurisdictions, was strongly opposed by the late Professor Richard R. Powell, who served as Chief Reporter for the first Restatement. The issue was debated vigorously at the 1978 Annual Meeting, with

> the robust participation of Professor Powell, and decision was postponed then for a year. The verdict in 1979 endorsing "wait-and-see" had the support of all but two of the Advisers, a unanimous Council and a definitive vote of the Meeting. The episode is a useful reminder that the Institute in its Restatement work does not deem itself to be constrained by a count of jurisdictions, but rather undertakes to weigh all of the considerations relevant to the development of common law that our polity calls on the highest courts to weigh in their deliberations. n21

This rather matter-of-fact assertion by the ALI Director Herbert Wechsler in 1983, just quoted, that "the Institute does not deem itself constrained by a count of jurisdictions..." seems to signal a significant shift from the *Restatement* role of reporting the common law as it *is* to promoting a version of the common law that some think it *ought to be*.

Indeed the role of the *Restatement (Second) of Property* as an instrument of law reform has been candidly discussed by Professor A. James Casner, the reporter for this Second *Restatement/t*:

> The major difference between the first and second *Restatements of Property* is the process used to determine what the law is that is to be restated. In the *Restatement (Second)*, a minority position may be selected if the Council and the Institute Membership can be convinced that it is the sounder view. There is no barrier to developing a position in previously uncharted waters. When a solid wall of judicial decisions forces a position, a criticism of it may be presented for the approval of the Institute. Furthermore, in evaluating the existing support for a position, policies supported by legislative developments may bolster such a position if that is the case. In other words, in determining what the law is that is to be restated, due consideration is to be given to the position that a court might be expected to take if it made a fresh examination of all relevant aspects of the problem in light of current circumstances. This approach leads to the possibility that "*Restatement*" and "legal reform" could become somewhat synonymous terms. The real question is whether the courts will, to any significant extent, reexamine previous contrary determinations on the basis of the *Restatement's* view about what the law is. n22

The reporter defended his law reform approach as a way of not letting the *Restatement* perpetuate undesirable judicial decisions:

> In the development of the *Restatement (Second) of Property*, in the search for what the law is that is to be restated, I have kept foremost in my mind that past judicial decisions that do not rest on a solid current foundation may and should be overruled either retroactively or prospectively. Consequently, the *Restatement* should not give these decisions longer life by recognizing them as representing what the law is that is to be restated. This policy has led to criticism on several occasions that we are legislating, not restating. I do not think the process of searching for what the law ought to be in evaluating the soundness of existing judicial decisions and recognizing in appropriate cases that what ought to be is what is, is legislating any more than the procedure adopted by the Supreme Judicial Court of Massachusetts [of giving prospective application to decisions changing established rules of law]. n23

One modern commentator has criticized this shift in approach as disingenuous:

> The approach of the immediate past director of the American Law Institute, that the new "*Restatement*" should set forth what the law ought to be rather than what the cases say it is, denigrates the "restate" in "Restatement." The "restate" can no longer be taken seriously as it was in the original *Restatement*. Furthermore, as was earlier pointed out, the approach of second *Restatement* is deceptive. One of its Reporters in fact stated, however inadvertently, the actual practice of the Institute when he noted: "The *Restatement (Second) of Property* could be somewhat *misleading* to the average reader if it adopted a *position that had little judicial support and this fact was not apparent*."

The drafters do adopt positions with little judicial support, and the fact is often far from apparent. It is *never* apparent from the Blackletter "law" set forth by these law-givers. It is true that sometimes it is to some extent disclosed in the notes. However, this is seldom, if ever, done by giving "equal time" to the alternative position so that an impartial judge could reconsider the matter *ab initio* and make an independent determination on the subject. Thus, it appears that the Reporter becomes an "advocate" of his position regarding changes in existing law and the choice of alternatives, often without disclosing that his writing is, in effect, a "brief" for his approach. n24

FOOTNOTES:

(n1)Footnote 15. 1 American Law Institute, Restatement of the Law of Property viii-ix (1936).

(n2)Footnote 16. *Id.* at ix.

(n3)Footnote 17. 1 American Law Institute, Restatement (Second) of the Law of Property: Landlord and Tenant, vii (1977).

(n4)Footnote 18. *Id.* at vii-viii.

(n5)Footnote 19. 1 American Law Institute, Restatement (Second) of Property: Donative Transfers, vii (1983).

(n6)Footnote 20. *Id.*

(n7)Footnote 21. *Id.* at viii.

(n8)Footnote 22. A. James Casner, *Restatement (Second) of Property as an Instrument of Law Reform, 67 Iowa L. Rev. 87, 89-90 (1981).*

(n9)Footnote 23. *Id. at 96.*

(n10)Footnote 24. W. Noel Keyes, *The Restatement (Second): Its Misleading Quality and a Proposal for Its Amelioration, 13 Pepp. L. Rev. 23, 50 (1986).*

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CHAPTER 8 THE RISE AND ROLE OF THE RESTATEMENTS OF PROPERTY AND THE RESTATEMENTS OF TRUSTS

2-8 Thompson on Real Property, Thomas Editions § 8.04

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§ 8.04 The Organization and Contents of the Restatements of Property.

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§ 8.04(a) The First Restatement of Property.

At the time they were written, the volumes of the *Restatement (First) of Property* represented the best thinking about how the American common law of property should be organized and expressed. This scheme of organization is perhaps best revealed by the following summary outline of division and chapter headings:

Division I. Introduction

Chapter 1. Definition of Certain General Terms

Division II. Freehold Estates

Chapter 2. Definition of Terms Relating to Estates

Chapter 3. Estates in Fee Simple Absolute

Chapter 4. Estates in Fee Simple Defeasible

Chapter 5. Estates Tail, Estates in Fee Simple Conditional and Related Estates

Chapter 6. Estates for Life

Division III. Future Interests

Part I. Introduction

Chapter 7. Future Interests Differentiated

Part II. Characteristics

Chapter 8. Transferability by Conveyance Inter Vivos

Chapter 9. Succession on Death

Chapter 10. Subject to the Satisfaction of Claims of Creditors

Chapter 11. Partition and Judicially Ordered Sales

Chapter 12. Protection of Future Interests Resulting from Requirements for Judicial Action Binding Upon Such Interests

Chapter 13. Protection of Future Interests as Against Acts and Omissions of the Owner of the Present Interest

Chapter 14. Protection of Future Interests as Against Acts and Omissions of Persons Other than the Owner of the Present Interest

Chapter 15. Protection of Future Interests as Affected by Statutes of Limitations and the Doctrine of Prescription

Chapter 16. Ineffectiveness of an Interest in Its Inception and Effect Thereof Upon Prior or Succeeding Interest

Chapter 17. Termination of an Interest as Affecting Succeeding Interests

Part III. Creation

Chapter 18. General Rules of Construction

Chapter 19. Construction of Limitations Purporting to Create Remainders or Executory Interests -- Requirement of Survival

Chapter 20. Construction of Limitations Purporting to Create Remainders or Executory Interests -- Death or Death Without Issue

Chapter 21. Construction of Limitations Purporting to Create Remainders or Executory Interests -- Miscellaneous Problems

Chapter 22. Class Gifts: Limitations to "Children," "Grandchildren," "Brothers," "Sisters," "Nephews," "Nieces," "Cousins," "Issue," "Descendants" or "Family"

Chapter 23. Limitations to "Heirs," "Heirs of the Body," "Next of Kin," "Relatives" and to Other Groups Similarly Designated

Part IV. Special Topics

Chapter 24. Interests of Expectant Distributees

Chapter 25. Powers of Appointment

Division IV. Social Restrictions Imposed Upon the Creation of Property Interests

Part I. The Common Law Rule Against Perpetuities

Chapter 26. The Common Law Rule Against Perpetuities -- General Aspects

Chapter 27. The Common Law Rule Against Perpetuities -- Applicability to Specific Types of Limitation

Chapter 28. The Common Law Rule Against Perpetuities -- Effects of Partial Invalidity

Part II. Restraints on Alienation

Chapter 29. General Considerations

Chapter 30. Extent of Validity

Chapter 31. Problems of Construction, Defenses to Enforcement and Termination

Part III. Provisions in Restraint of Marriage, No Contest and Allied Provisions in Wills and Miscellaneous Restrictions

Chapter 32. Provisions in Restraint of Marriage

Chapter 33. Restraints Designed to Protect Testamentary Dispositions of Property

Chapter 34. Miscellaneous Restraints

Part IV. Restrictions on Accumulations

Chapter 35. The Common Law Rule Against Accumulations

Chapter 36. Statutory Ingredients in the Rule Against Accumulations

Division V. Servitudes

Part I. Easements

Chapter 37. Definitions

Chapter 38. Creation

Chapter 39. Extent

Chapter 40. Succession

Chapter 41. Extinguishment

Chapter 42. Protection Against Third Persons

Part II. Licenses

Chapter 43. Licenses

Part III. Promises Respecting the Use of Land

Chapter 44. As Between Original Parties

Chapter 45. Running of Burdens

Chapter 46. Running of Benefits

Chapter 47. Duration -- Interpretation, Discharge and Defenses and Extinguishment by Public Authority

In this *Restatement (First) of Property* , the chapters are divided into sections, each of which makes a distinct and individual point of law, although some sections can become quite lengthy in listing variants of the principle point being made. A section may be followed by paragraphs called "Illustrations," often keyed to individual subsections. Also following the main section is usually a series of comments, addressed either to the section as a whole or to individual parts of the section. The comments, too, often include paragraphs called "Illustrations."

§ 8.04(b) The Second Restatement of Property.

The contents of the *Restatement (Second) of Property* are revealed in the following summary outline of division and chapter headings:

Landlord and Tenant

Part I. Creation of the Landlord-Tenant Relationship

Chapter 1. Nature and Duration of the Landlord-Tenant Relationship

Chapter 2. Formalities Required for Creation of Landlord-Tenant Relationship

Chapter 3. Freedom to Refuse to Enter into Landlord/Tenant Relationship

Part II. Tenant's Rights

Chapter 4. Paramount Title Prevents Contemplated Use

Chapter 5. Condition of Leased Property Prevents Contemplated Use

Chapter 6. Conduct of Landlord or Third Person Interferes with Permissible Use

Chapter 7. Nonperformance of Landlord's Promise

Chapter 8. Contemplated Use Interfered with by Eminent Domain

Chapter 9. Governmental Restraints on Use of Leased Property Prevent Intended Use

Part III. Tenant's Remedies

Chapter 10. Termination of the Lease and Damages

Chapter 11. Procedure with Respect to Rent Abatement, Rent Application and Rent Withholding

Part IV. Landlord's Rights and Remedies

Chapter 12. Tenant's Obligations that Inhere in the Landlord/Tenant Relationship

Chapter 13. Nonperformance of Tenant's Promise

Chapter 14. Expiration of Term of Lease -- Tenant Holds Over

Part V. Transfer by Landlord or Tenant of Interest in Leased Property

Chapter 15. Transferability of Landlord's or Tenant's Interest in Leased Property

Chapter 16. Effect of Transfer of Landlord's or Tenant's Interest on Burden and Benefit of Their Respective Obligations: Herein Promises Running with the Land

Part VI. Tort Liability of Landlord

Chapter 17. Liability for Physical Harm to Persons on the Leased Property

Chapter 18. Liability for Physical Harm to Persons Outside the Leased Property

Chapter 19. Liability of Landlord for Physical Harm to Persons Caused by Negligence of a Carefully Selected Independent Contractor

Part VII. Federal Bankruptcy Proceeding Involving One of the Parties to a Lease

Chapter 20. Continuation of the Lease After Bankruptcy

Chapter 21. Rejection of the Lease on Bankruptcy

Donative Transfers

Division I. Social Restrictions Imposed Upon the Creation of Property Interests by Donative Transfers

Part I. The Rule Against Perpetuities and Related Rules as Applied to Donative Transfers

Chapter 1. The Rule Against Perpetuities as Applied to Donative Transfers

Chapter 2. The Period of the Rule Against Perpetuities Used in Donative Transfers for

Purposes Other Than Controlling the Time of Vesting

Part II. Direct Restraints on Alienation in Donative Transfers

Chapter 3. Definitions

Chapter 4. Validity of Restraints on Alienation

Part III. Provisions in Restraint of Personal Conduct

Chapter 5. General Rules

Chapter 6. Restraints on Marriage

Chapter 7. Provisions Relating to Family Relationships

Chapter 8. Provisions Relating to Religion, Personal Habits, and Education or Occupation

Part IV. Restraints on Interference with Transferor's Dispositive Plan

Chapter 9. Restraints on Contests and Restraints on Attacking Fiduciaries

Chapter 10. Restraints on Enforcing Obligations of the Transferor or of the Transferor's Estate and Restraints on Asserting Any Right to Other Property Owned or Disposed of by the Transferor

Division II. Powers of Appointment, Class Gifts, and Related Matters

Part V. Powers of Appointment

Chapter 11. Definitions

Chapter 12. Creation of Power of Appointment

Chapter 13. Creditor of the Donee and Spouse of the Donee

Chapter 14. Release and Disclaimer of Powers of Appointment

Chapter 15. Revocation or Amendment of Power of Appointment or its Exercise

Chapter 16. Contracts to Appoint

Chapter 17. The Donee's Intent to Appoint

Chapter 18. Effectiveness of Appointments

Chapter 19. Permissible Appointments

Chapter 20. Excessive Appointments -- Fraud on Powers

Chapter 21. Exclusive and Non-Exclusive Powers

Chapter 22. Allocation of Appointive Assets to Attain Maximum Effectiveness

Chapter 23. Ineffective Appointments

Chapter 24. Gifts in Default of Appointment

Part VI. Class Gifts

Chapter 25. Primary Meaning of Class Gift Term

Chapter 26. Time Within Which a Class Member Must Be in Being in Order to Share in Class Gift--- Increase in Class Membership

Chapter 27. A Class Member Fails to Meet a Requirement of Survival or to Fulfill Some Other Condition -- Decrease in Class Membership

Chapter 28. Share of Each Class Member

Chapter 29. Gifts to Heirs and the Like as Words of Purchase

Chapter 30. Effect of Limitations to "Heirs," "Heirs of the Body," "Next of Kin," or "Relatives" Under the Rule in Shelley's Case and the Doctrine of Worthier Title

Division III. Requirements for Effectuating a Donative Transfer

Chapter 31. Accomplishing a Donative Transfer in Donor's Lifetime Without Using a Document of Transfer

Chapter 32. Accomplishing a Donative Transfer in the Donor's Lifetime by a Document of Transfer

Chapter 33. Accomplishing a Donative Transfer by a Will

Chapter 34. Failure of Attempted Donative Transfers

This *Restatement (Second) of Property* has been described as:

> distinctive in its extensive references to legislation and its use of legislation as a basis for rules of decisional law. It is also distinctive in the elaboration of rationale in the Comments, which explore the relevant competing considerations and alternative resolutions to a far greater extent than the first *Restatement*, and in the significance accorded to tax considerations. The comprehensive Statutory and Reporter's Notes develop fully the legislative, judicial, and scholarly bases for the positions taken in the black letter and Comments, and divergences from the first *Restatement* are identified and explained throughout. n25

The *Restatement (Second) of Property* is also notable for reflecting changes in social values since the first *Restatement* was published. For instance, in the matter of class gifts, treated in the fifth volume (the third volume of donative

transfers) of the *Restatement (Second)*, the evolution of community mores and changing public policy are noted in the new *Restatement* rules:

> The rules for construction of class gifts are based on assumptions about the normal relationships that obtain between a donor and possible donees, particularly the relationships within a family, including an extended family. These assumptions in turn reflect the evolution of community mores and changing public policy toward the family relationships as expressed in decisional and statutory law. For example, adopted children have now come to be regarded as equal in status with natural children. Interpretation of terms such as "children" and "grandchildren" in class gifts should be guided accordingly. Similarly, the status today of children in second marriages reflects change both in patterns of family formation and in expectations that result from second marriages. The formulation of the rules of interpretation in this Restatement reflects recognition of changes such as these. n26

The fourth and final volume of the donative transfers portion of the *Restatement (Second) of Property* is unique in that it addresses topics not covered in the first *Restatement*:

> Hence, the Reporter's Notes have no references to counterpart sections in the earlier *Restatement*. Absence of direct common law precedents on these topics has influenced the drafting of the black letter and Comments. Many sections draw heavily upon statutory law as a source of policy and as basis for reasoning by analogy to problems not directly addressed by statute. n27

FOOTNOTES:

(n1)Footnote 25. 4 American Law Institute, Restatement (Second) of Property: Donative Transfers, 2 viii (1986).

(n2)Footnote 26. 5 American Law Institute, Restatement (Second) of Property: Donative Transfers, 3 vii (1988).

(n3)Footnote 27. 6 American Law Institute, Restatement (Second) of Property: Donative Transfers, 4 vii (1992).

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CHAPTER 8 THE RISE AND ROLE OF THE RESTATEMENTS OF PROPERTY AND THE RESTATEMENTS OF TRUSTS

2-8 Thompson on Real Property, Thomas Editions § 8.05

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§ 8.05 How the Property Restatements Have Been Received.

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Every student of the law knows that *Restatements* are often cited in court opinions as important secondary sources; indeed, *Restatement* language is sometimes adopted as the rule of law for that point in that jurisdiction. *Restatements* have also attracted the attention of legal scholars, especially because they have been produced by legal scholars. However, it is not possible in any sense to measure how strong or pervasive has been the *Restatement* influence on American jurisprudence, and that cannot be the objective of this section. What is reported in this section are the points of praise and criticism appearing in the published reviews of the property *Restatements*, as those reviews have appeared in the law review journals of the legal profession. By summarizing these critical appraisals it is not intended to endorse or reinforce those views, but only to report the range of professional perceptions generated by the *Restatements*.

§ 8.05(a) The First Restatement of Property.

After the first two volumes of the *Restatement (First) of Property* were issued in 1936, a large number of brief reviews appeared in American law reviews. The points of praise and criticism about the first *Restatement (First) of Property* are summarized in the following paragraphs.

§ 8.05(a)(1) Features for Which the Restatement Has Been Praised.

1. "The stark precision of the language of the text... leaves little room for ambiguity as a more liquid prose might do..." n28

2. "These volumes constitute an excellent test and summary for student review." n29

3. "The work will be found extremely helpful as a source of information in regard to the more commonly enacted statutes on real property." n30

4. "The *Restatement* should prove an excellent text book on the Law of Property." n31

5. "[After annotated decisions of this state are issued,] on points not yet decided in Pennsylvania, the *Restatement* will be helpful in shaping decisions." n32

6. "The great use which this reviewer has found for the *Restatements*, and particularly the *Restatement on Property*, is to sharpen legal analysis... The technique of the *Restatement* meets this need admirably. Highly analytical, possessed of an outline and organization which make it virtually impossible to overlook the relationship of connected problems, and equipped with comment and illustration which convert a code into a text, the Restatement is ideal to reeducate the lawyer into the scholar. Then when the map of the field is clear again, one can turn to the cases with some understanding." n33

7. "[Volumes I and II] are clear, well organized, well indexed and highly usable." n34

8. "Happily the Restatement of the old English common law... did not eventuate. The tendency towards a detailed reception of the old English common law as the common law of the United States... disappeared from the *Restatement* and a much more modern trend took its place." n35

9. "The return of the Institute to characteristics first and patterns afterwards [a mode followed in the creative periods of property law, the 13th and 15th centuries] is an indication of an ideal in the Institute to be dynamic rather than static and in a field specially difficult for dynamics... [Various innovative rules] all point to the role of law maker rather than of law stater." n36

10. "The organization of material, from the strictly analytical point of view, is almost unimpeachable." n37

11. The Hohfeldian system of legal terminology is incorporated *in toto*. In general, the adoption of this terminology is to be commended, for in the field of property law especially it conduces to accuracy and clarity of expression." n38

12. "The inevitable Blackletter is remarkably good, with a few exceptions." n39

13. "Notwithstanding the criticisms directed toward particular portions of this work, it represents the most scientific treatment of its field which is available to the profession. Its preparation has called for the highest degree of skill, and has required arduous labor." n40

14. "At the beginning of each chapter is found an 'introductory note'. Some of these, such as the one dealing with estates tail, present a considerable amount of very valuable historical information as well as a summary of the various views adhered to by the different states." n41

15. "The use of Hohfeldian terminology, although frequently criticized, may do much to clarify existing legal conceptions inasmuch as it is quite definite. Although we have an established terminology in connection with the law of property, it is very much abused and misused, thus giving rise to much confusion. Perhaps the new terminology will be an aid to law students through whom is found the only sure way to legal improvements, even though the process is necessarily delayed." n42

16. "Obviously, there is much criticism of the rules of law as restated. No group could possibly restate the law of property so that all would be in agreement. Apparently, a rule of law most consistent with reason was stated if the opposing authorities were not too imposing. In this manner the Institute becomes an important agency in the growth of the law." n43

17. "The *Restatement of Property* is the most scientific system, from the standpoint of arrangement and classification of the common law of property, that we know of... From this partial evaluation, it is apparent that a real contribution to the

science of law will have been made when the entire field will have been covered." n44

18. "The *Restatement* is not only an accurate, clear and succinct presentation of the common law, as it exists in the United States today, but in addition, statutory changes have been considered and the law under existing statutes stated. Of particular value are the special notes printed in the body of the work which set forth alphabetically the states which have adopted a statutory modification of the common law. Where uniformity among the decisions does not exist, the conflicting rules are stated and the reasons in support thereof are considered. Unless the authorities in support of a rule are too imposing, the rule most consonant with reason is adopted. In particular if the authority upon a point is so scant that it cannot be said that the law upon the point is established at all, the purpose of the Institute has been to adopted the rule supported by reason." n45

19. "In the law of property uncertainty has frequently resulted from confusion of terms, from the use of terms having several meanings without a clear showing of the particular sense in which the term was used. This is avoided in the *Restatement* by uniform terminology." n46

20. "The work should be of great value to students, law teachers and practitioners. It represents the combined research and scholarship of the leading American authorities upon the subject. Their work in turn has been subjected to searching criticism by teachers, practitioners and judges. The natural result is that it is unequaled for clarity and accuracy of statement." n47

21. "Another forward step taken in the current volumes on Property consists in the inclusion of many references to statutory law... This method of handling statutory material, in a work intended primarily to state the common law, may open the door to inclusion in the present series of additional needed volumes in fields involving a considerable body of statutory law." n48

22. "Despite all the tiresome repetition, some of which could have been avoided and some not, despite the many thin distinctions and obvious, dull, or unreal illustrations, there is much in it that is useful to any worker in the field and much that cannot be found elsewhere." n49

23. "Many portions of the text could be singled out for peculiar excellence; most of the material on the characteristics of future interests is, in fact, more informative and stimulating than anything to be found in orthodox treatises. The same could be said of various sections and chapters on freehold estates. That pretty well covers both volumes. Technical excellence in sacred doctrine must indeed be taken for granted in a work subjected to so much scrutiny by so many scholars." n50

24. "This *Restatement* is in every respect the equal and in some respects, it is superior to the *Restatements* that have preceded it. It is entitled to receive, at least, the same favorable reception that has been accorded its predecessors." n51

25. "In fact the treatment of the mutual rights and duties of owners of future interests and of the possessory interests upon which the future interests are expectant, which one finds scattered through Chapter 6, entitled Estates for Life, and Chapters 12-15, entitled Protections of Different Kinds from Diverse Perils and Misfortunes, is quite the most satisfactory and complete treatment known to this writer." n52

26. "So accustomed has the profession become, as the result of the pedagogic systems adopted over an extended period of years by most of the law schools, to the case precedent presentation of the law that many will undoubtedly be loath to accord to the *Restatement* the worth that it merits. That the legal system is not yet ready, if it is not, to abandon the case precedent system is not to its credit and should not in the slightest degree detract from the intrinsic soundness of the *Restatement of Law* or of the form in which it is presented." n53

§ 8.05(a)(2) Features for Which the Restatement Has Been Criticized.

1. The "stark precision of the language does not make easy reading." n54

2. "It is regrettable that there is so little explanation of the reasoning and of the authority on which the presumably restated text is based." n55

3. "We may properly inquire upon what reasoning was the orderly statement of the common law selected and what was the state of authority on the point on which the selection was made." n56

4. "Surely [the monographs] are not the only rules of law set out in the *Restatement* upon which the profession and the courts hold contrary views." n57

5. "When the state annotations do not agree with the restated principles, then the need for a more comprehensive reporting of the general state of the authorities and of the reasons of the Institute is increased." n58

6. "The tremendous amount of material and research behind these volumes... is not available to the practicing lawyer who presents the statement of the law to the courts nor to the courts who make the common law and who must justify their decisions by some reasoning, and annotate them with some case authority, presented to them, whether the decision is right or wrong." n59

7. "The restaters have adopted the Hohfeldian terminology for stating the rules of property law. In our opinion, this will reduce the utility of the *Property Restatement* as a practical working tool in practice. Many of the rules are couched in language other than that used by the courts for centuries past and will require much translation to fit the *Restatement* rules into the language used by the courts. This rejection of terms used since feudal times for stating rules of property must inevitably result in confusion and accomplishes no worthwhile results." n60

8. "In [some] instances common statutory law has been rejected and extreme care will be necessary in the use of the rules to determine whether the rule is a statutory or decisional one. The Rule in *Shelley's Case* is restated as part of our common law although rejected by at least thirty-three states." n61

9. "At times the *Restatement* assumes the role of a prophet or predicter of things to come." n62

10. "It will be of little value to Pennsylvanians until the annotated decisions of this state are issued." n63

11. "The average lawyer may be hampered a little at first by a strange terminology. The determinable fee has become a fee subject to a special limitation...." n64

12. "Apparently the question whether existing law or socially desirable law should be restated has not yet been wholly laid to rest. In the main where vestigial principles which have outworn their reason still clog the law, this *Restatement* follows authority with a regretful comment, but some exceptions appear... Perhaps this is the best treatment in a work written in the hope of clarifying future development of the law, but it seems more than '*Restatement*.'" n65

13. "Not content with its new-found independence [of freedom of restating old English common law, and instead adopting a more modern trend], however, the Institute seems to have gone wild....." n66

14. "All credit to the Institution that is attempting such an ambitious role [as stating innovative rules of law], but what it is attempting should be recognized as such and not as a Restatement in the ordinary sense of that word. As a guide to the practicing lawyer, it is likely to be anything but safe." n67

15. "The adoption of a jurisprudential terminology, thought by many to have seen its best days or to be dying if not dead

at the time of its adoption, the new classification of remainders, and finally the quasi-legislative form of its utterances are among those things responsible for that strangeness and tediousness which were noted... The *Restatement of the Law of Property* is a work of much daring and great ingenuity, but it is not believed that it will be read or understood or accepted as a working guide by the legal profession." n68

16. "In some instances... rigid adherence to a scheme of scientific organization has impaired the practical value of the work." n69

17. "The reviewer doubts... whether adequate definitions of the basic legal concepts have been stated; and further doubts whether it was desirable to adopt the "power" concept in its full breadth as signifying the ability to change legal relations even by tortious action." n70

18. "A few of the illustrations employed are defective, frequently for want of facts." n71

19. "Many examples of more less inept phraseology could be cited." n72

20. "A question of basic importance in any Restatement is, what are the criteria whereby to determine the choice of rules to be "restated." In no Restatement has the reviewer been able to perceive any definite criteria. Actually, the result of this *Restatement* is a series of compromises between conflicting criteria. The rules declared are not in all instances those of the "common law" as that term is normally understood. Statutes of more or less general existence in the United States have had a persuasive influence upon the choice of rules. In some instances, the choice has been dictated by the Institute's idea of what the law ought to be, rather than by any actual course of judicial decision. The usual number of "caveats" appear to warn the reader that the Institute takes no position upon certain problems because of the absence of judicial authority. While the Institute has been reluctant to step in where courts have never trodden, it has not hesitated to promulgate rules in defiance of judicial precedent... While the Institute has thus addressed itself to the task of ridding the law of some illogical rules, and has set its face sternly against the 'embalming and preservation of an anachronism,' it has at the same time exhibited a tender solicitude and pious adoration for other rules equally outmoded." n73

21. "Several Sections are objectionable to the reviewer, because they state an undesirable rule, or because they do not deal with problems in their entirety, or because they do not present the applicable rules with sufficient certainty and clarity." n74

22. "Its value would be much enhanced if its propositions were fortified by citation of a limited number of carefully selected authorities. Such citations could have been included with little additional effort. The reviewer has always been skeptical of the reception to be accorded by lawyers and judges in general to the *ex cathedra* pronouncements of a small group of legal scholars. The profession in this country is not accustomed to rely largely upon the opinions of jurists as contrasted with case precedents. All the Restatements are open to the criticism that they state some rules which are approved by only a minority of American courts, and some rules which have no judicial approval whatsoever. The Restatement of any subject, taken by itself, is not a safe guide for a practicing lawyer." n75

23. "A great many 'caveats' are included, indicating particular questions on which the Institute did not wish to take a definite position. This procedure is subject to some criticism in that it partially fails to do what the Institute was designed to accomplish." n76

24. "Some objection might be raised to the restating of some practically obsolete rules, such as the rule in *Shelley's Case*, which has been rejected in at least thirty-three states, and the fee tail which exists only in theory in a few states. While this procedure may seem somewhat unfortunate as a needless perpetuation of outworn conceptions, the Institute evidently felt that such legal principles should be restated inasmuch as they do exist in some states." n77

25. "Many will regret that the law relating to the fee simple determinable and to a possibility of reverter has been

restated. The economic objections to such an estate are well known. The possibility of reverter, although of little value itself, constitutes a very heavy encumbrance insofar as the owner of a determinable fee is concerned." n78

26. "One serious criticism can be made with reference to form. Many cross references are used which are very confusing, especially to law students. References are sometimes made to other sections which in turn refer to still other sections or refer back to the original section. This seems to create an undue amount of confusion for the amount of space that actually is saved. This also opens the Restatement to the charge of evasiveness which is unfortunate in view of the true spirit and character of the Restatement." n79

27. "The reason for stating the common law rule even though it may not be the rule in most jurisdictions is explained by the Reporter as a desire for consistency of treatment, and further, that the approach of the Restatement, according to the Reporter, should state what the decision would be today in such cases in jurisdictions following the common law. However, the lawyer, searching for the law, must understand this technique, namely, restating in black letter type the common law rule, and proceed according to the notes and comments." n80

28. "The Institute has, at times, stated rules to be law that seem contra to judicial authority... [T]he lawyers may develop the suspicion that in other places the Institute is more concerned with stating what the law ought to be rather than with the Restatement." n81

29. "Certainly, here, rigid adherence to a plan which will necessitate a search for the rules of partition through five volumes (when completed) is not the most convenient arrangement." n82

30. "Whether the *Restatement* will be useful depends on whether it will be used. As it stands now it is safe to say that lawyers will buy it and leave it on library shelves. It must be annotated." n83

31. "[T]hese volumes, with their appendices, do contain a considerable sprinkling of historical and statutory material, case discussion and reasoned comment. Yet such interstitial contributions, necessarily meager and inadequate, fall far short of offering either a genetic account or a critical appraisal of institutions and doctrines. The many criticisms made of its predecessors are, on the whole, valid indictments of the *Restatement of Property*." n84

32. "Some reviewers have pointed to naivete in fundamental assumptions -- assumptions that certainty is obtainable and obtainable by high abstractions, that certainty is more important than flexibility, that "substantive law" is all-comprehensive and designed to govern human conduct in and out of courts, that the defects of "the law" can be cured by restating it as it is, that a restatement of the law as it is, is a restatement of it as it ought to be, and so forth; others have deplored the omission of historical, economic, and sociological backgrounds and of studies of comparative experience in other countries, the ignoring of, except by indirection, consideration of what "the law" ought to be, a failure to study the social consequences of institutions and doctrines, the omission of supporting authorities, reasoned discussion, and contrast of conflicting opinion, the use of 'doctrinal' rather than "factual" classifications and of the blackletter-comment-illustration formula of expression, and so forth. Yet to all of these criticisms the officials of the American Law Institute have remained impervious. Their only answer is that 'the most claimed for the *Restatement* is that it represents the *considered conclusions* of those who have for years been interested in a particular branch of the law,' that investigations of fact 'cost a lot of money and take a lot of time and the legal questions in individual cases can be learned,' and that 'many questions of policy are incapable of demonstration by any fact examination which it is possible to make.'" n85

33. "To assume that the judicial handling of property problems in contemporary America can be made more predictable by an authoritative canonization and rationalization of ancient, feudal-conditioned concepts and doctrines... is little short of fantastic." n86

34. "The reader quickly perceives that the black letter formulas are of relatively little value; that they are sometimes

inaccurate, often obscure, and always ponderous and dull. But he also soon comes to see that the undoubtedly great merit and value of the work as a contribution to legal literature is to be found in those portions of the text that are printed as ancillary to the rigidly formulated rules that appear in black letter type. Hard pressed by their association with the black letter formulations, these ancillary writings assume an unfortunately fragmentary form." n87

35. "[The *Restatement*] is unintelligible to all but the initiated. The terminology adopted is unfamiliar, esoteric. The style, particularly of the black letter rules, is ponderous, redundant, repetitious and therefore tiresome." n88

36. In appraising the quality and value of this work it is necessary to take into account the handicaps under which it was produced. In the manner of the work itself, these will be neatly catalogued. 1. The task undertaken was impossible from its inception. There is no "American law of property," and there can be none so long as the present federal system of government persists. 2. The plan of the *Restatement* is based upon the misconception that 'the law' is static and capable of formulary statement; that it is subject to still photography. 3. Such misconceptions wrought confusion in the minds of the draftsmen. They do not have any objective clearly in mind. They admit they are not legislating, and yet approach their task as would timid code draftsmen, with resulting inconsistencies and repugnancies. n89

37. "What then is the significance of these two volumes of the *Restatement of the Law of Property* viewed as a contribution to the literature of the law? And what will be the influence upon the future development of the law of property in America of the completed *Restatement* if the pontifical approach is retained in the remaining volumes? The answer must be: very little. The black letter rules have no literary merit, and as declarations of law, supported only by their own authority, they are absurd. The judge who would base his decision of any question of law upon these black letter declarations would be worse than lazy; he would be incredibly stupid. Even when accurately stated, which is too often not the case, and applicable in the jurisdiction, as they often are not, their language is too general to determine specific issues arising out of particular fact situations. These declarations of legal principles, like other non-legislative formulations, can rise no higher than their source in the juristic experience of the race, as evidenced by judicial precedents. These are almost wholly lacking in the *Restatement*, which generally discards even such collections of authorities as supported the tentative drafts." n90

§ 8.05(b) The Second Restatement of Property.

By comparison with the spate of reviews closely following the issuance of the first two volumes of the *Restatement (First) of Property* , the critical appraisals of the *Restatement (Second) of Property* have been sparse indeed. Some part of that paucity is doubtless because all the old conceptual criticisms were thoroughly aired a generation before, and there is little to be gained by reiteration. If a critical review is issued, it is more likely to give its attention to matters of content rather than philosophy. One such review did, however, give a broader comment:

> [T]he ALI has continued its relatively new policy of according weight to trends possibly manifested by legislation. The *Second Restatement* is significant for those involved with trusts and estates not only for its potential persuasive effect on the direction of American law, but also for its expanded format of comments, statutory notes, reporter's notes, and tax notes. These notes, prepared by the Reporter, Professor A. James Casner of Harvard, are marvelous research tools. For many substantive issues, the legal researcher would do well to bypass traditional methods and proceed directly to the reporter's notes." n91

FOOTNOTES:

(n1)Footnote 28. Leon H. Wallace, *Book Review, 12 Ind. L. Rev. 243 (1937).*

(n2)Footnote 29. *Id. at 244.*

(n3)Footnote 30. Harold S. Irwin, *Book Reviews, 41 Dick. L. Rev. 191, 192 (1937).*

(n4)Footnote 31. *Id. at 193.*

(n5)Footnote 32. *Id.*

(n6)Footnote 33. George F. James, *Reviews, 47 Yale L. J. 1238, 1239 (1938).*

(n7)Footnote 34. *Id. at 1241.*

(n8)Footnote 35. Percy Bordwell, *Book Reviews, 51 Harv. L. Rev. 565, 566 (1938).*

(n9)Footnote 36. *Id. at 568.*

(n10)Footnote 37. Merrill I. Schnebly, *Book Reviews, 37 Colum. L. Rev. 881 (1937).*

(n11)Footnote 38. *Id.*

(n12)Footnote 39. *Id. at 882.*

(n13)Footnote 40. *Id. at 886.*

(n14)Footnote 41. Paul E. Raymond, *Reviews, 23 Iowa L. Rev. 141, 142 (1937).*

(n15)Footnote 42. *Id. at 142-143.*

(n16)Footnote 43. *Id. at 143.*

(n17)Footnote 44. John P. Maloney, *Restatement of the Law of Property, 12 St. John's L. Rev. 1, 21 (1937).*

(n18)Footnote 45. Louis S. Herrink, *Book Reviews, 23 Va. L. Rev. 742, 743 (1937).*

(n19)Footnote 46. *Id.*

(n20)Footnote 47. *Id. at 744.*

(n21)Footnote 48. Albert Smith Faught, *Book Reviews, 11 Temp. L. Q. 455, 456 (1937).*

(n22)Footnote 49. Myres S. McDougal, *Book Reviews, 32 Nw. U. L. Rev. 509, 514 (1937).*

(n23)Footnote 50. *Id.*

(n24)Footnote 51. Harold C. Warner, *Book Reviews, 15 Tenn. L. Rev. 407-408 (1938).*

(n25)Footnote 52. William R. Vance, *The Restatement of the Law of Property, 86 U. Pa. L. Rev. 173, 188 (1937).*

(n26)Footnote 53. John S. Foster, *Book Reviews,* 2 U. of Newark L. Rev. 105 (1937).

(n27)Footnote 54. Leon H. Wallace, *Book Reviews, 12 Ind. L. Rev. 243 (1937).*

(n28)Footnote 55. *Id.*

(n29)Footnote 56. *Id. at 244.*

(n30)Footnote 57. *Id.*

(n31)Footnote 58. *Id.*

(n32)Footnote 59. *Id.*

(n33)Footnote 60. Harold S. Irwin, *Book Reviews, 41 Dick. L. Rev. 191, 192 (1937).*

(n34)Footnote 61. *Id.*

(n35)Footnote 62. *Id.*

(n36)Footnote 63. *Id. at 193.*

(n37)Footnote 64. George F. James, *Reviews, 47 Yale L. J. 1238, 1239 (1938).*

(n38)Footnote 65. *Id. at 1240.*

(n39)Footnote 66. Percy Bordwell, *Book Reviews, 51 Harv. L. Rev. 565, 566 (1938).*

(n40)Footnote 67. *Id. at 568.*

(n41)Footnote 68. *Id. at 570.*

(n42)Footnote 69. Merrill I. Schnebly, *Book Reviews, 37 Colum. L. Rev. 881 (1937).*

(n43)Footnote 70. *Id.*

(n44)Footnote 71. *Id. at 882.*

(n45)Footnote 72. *Id.*

(n46)Footnote 73. *Id. at 882-883.*

(n47)Footnote 74. *Id. at 883-884.*

(n48)Footnote 75. *Id. at 886.*

(n49)Footnote 76. Paul E. Raymond, *Reviews, 23 Iowa L. Rev. 141-142 (1937).*

(n50)Footnote 77. *Id. at 143.*

(n51)Footnote 78. *Id.*

(n52)Footnote 79. *Id. at 143-144.*

(n53)Footnote 80. John P. Maloney, *Restatement of the Law of Property, 12 St. John's L. Rev. 1, 9 (1937).*

(n54)Footnote 81. *Id. at 10, 11.*

(n55)Footnote 82. *Id. at 12.*

(n56)Footnote 83. *Id. at 16.*

(n57)Footnote 84. Myres S. McDougal, *Book Reviews, 32 Nw. U. L. Rev. 509, 510-511 (1937).*

(n58)Footnote 85. *Id. at 511.*

(n59)Footnote 86. *Id. at 513.*

(n60)Footnote 87. William R. Vance, *The Restatement of the Law of Property, 86 U. Pa. L. Rev. 173 (1937).*

(n61)Footnote 88. *Id. at 174.*

(n62)Footnote 89. *Id. at 178.*

(n63)Footnote 90. *Id. at 188.*

(n64)Footnote 91. Ronald C. Link, *Revised Provisions of Restatement of Property Provide Important Lessons for Estate Planners, 13 Estate Planning 21 (1986).*

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CHAPTER 8 THE RISE AND ROLE OF THE RESTATEMENTS OF PROPERTY AND THE RESTATEMENTS OF TRUSTS

2-8 Thompson on Real Property, Thomas Editions § 8.06

AUTHOR: Professor David A. Thomas J. Reuben Clark Law School Brigham Young University

§ 8.06 The Third Restatement of Property.

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Continuing work on donative transfers will become part of the *Restatement (Third) of Property* , and other subjects will be considered. n92

FOOTNOTES:
(n1)Footnote 92. *See, e.g.,* Susan F. French, *"Design Proposal for the New Restatement of Property -- Servitudes," 21 U.C. Davis L. Rev. 1213 (1988).*

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CHAPTER 8 THE RISE AND ROLE OF THE RESTATEMENTS OF PROPERTY AND THE RESTATEMENTS OF TRUSTS

2-8 Thompson on Real Property, Thomas Editions § 8.07

AUTHOR: Professor David A. Thomas J. Reuben Clark Law School Brigham Young University

§ 8.07 The Restatements of Trusts.

That many aspects of the law of trusts are essential for the student and practitioner of property law is a given. Therefore, a brief review of the *Restatements of Trusts* is included in this chapter. The comments and criticisms concerning the philosophy and general structure of the property Restatements are, for the most part, applicable to the *Restatements of Trusts*.

§ 8.07(a) The First Restatement of Trusts.

The *Restatement (First) of the Law of Trusts* was published in 1935, with Professor Austin W. Scott as reporter. A major, early content decision was to exclude discussion of constructive trusts from this title, but to include it in a Restatement of restitution, which would also include quasi-contracts.

The contents of the *Restatement (First) of Trusts* may be briefly summarized as follows:

Chapter 1. Definitions and Distinctions

Topic 1. Definitions

Topic 2. Distinctions

Chapter 2. The Creation of a Trust

Topic 1. Methods of Creating a Trust

Topic 2. The Capacity of the Settlor to Create a Trust

Topic 3. The Intention to Create a Trust

Topic 4. Consideration

Topic 5. Transfer of Property to the Trustee

Topic 6. Notice to and Acceptance by the Trustee

Topic 7. Notice to and Acceptance by the Beneficiary

Topic 8. Reservation and Creation of Powers

Topic 9. The Parol Evidence Rule

Topic 10. The Requirement of a Written Memorandum

Topic 11. The Creation of Testamentary Trusts

Topic 12. Purposes for Which a Trust can be Created

Topic 13. Illegality

Topic 14. Other Requirements

Topic 15. The Effect of the Statute of Uses

Chapter 3. The Trust Property

Chapter 4. The Trustee

Chapter 5. The Beneficiary

Chapter 6. Transfer of the Interest of the Beneficiary

Topic 1. Voluntary Transfers

Topic 2. Involuntary Transfers

Topic 3. Restrictions on Voluntary and Involuntary Transfers

Topic 4. Successive Conveyances by the Beneficiary of his Interest

Chapter 7. The Administration of the Trust

Topic 1. General Principles

Topic 2. Duties of the Trustee

Topic 3. Powers of the Trustee

Topic 4. Remedies of the Beneficiary and Liabilities of the Trustee

Topic 5. Investment of Trust Funds

Topic 6. Successive Beneficiaries

Topic 7. Compensation of the Trustee

Topic 8. Indemnity of the Trustee for Expenses

Topic 9. Liabilities of the Beneficiaries

Topic 10. Contribution of Indemnity from Co-Trustee

Topic 11. Instructions and Accounting

Chapter 8. Liabilities to Third Persons

Topic 1. Liability of the Trustee

Topic 2. Power of Creditor to Reach Trust Property

Topic 3. Liability of Beneficiary

Chapter 9. Liabilities of Third Persons

Topic 1. Persons Acting Adversely to the Trustee

Topic 2. Transferees of Trust Authority

Topic 3. Participation in Breach of Trust Otherwise Than by Receiving Transfer

Topic 4. Effect of the Statute of Limitations and Laches

Topic 5. Discharge by Beneficiary and Set-Off of Claim Against Beneficiary

Chapter 10. The Termination and Modification of the Trust

Chapter 11. Charitable Trusts

Topic 1. Definition

Topic 2. Creation of Charitable Trust

Topic 3. Nature of Charitable Purposes

Topic 4. The Administration of Charitable Trusts

Topic 5. Failure of Charitable Trusts -- The Doctrine of Cy Pres

Topic 6. Liabilities to Third Persons

Chapter 12. Resulting Trusts

Topic 1. General Principles

Topic 2. Where an Express Trust Fails

Topic 3. Where an Express Trust Does Not Exhaust the Trust Estate

Topic 4. Where Property is Transferred to One Person and the Purchase Price is Paid by Another

§ 8.07(b) The Second Restatement of Trusts.

The *Restatement (Second) of Trusts* appeared in 1959, with Professor Austin Scott as reporter. The Institute noted certain changes in this second effort:

> The effort in Trusts, Second, as in other subjects being dealt with in the new *Restatement*, is to provide fuller explanation for conclusions reached. We are endeavoring to state not only the rule but wherever helpful the reasons back of the rule. The end being sought is to give all possible aid to the practitioner, the judge and the law student.
>
> As in Agency, the new edition provides a set of Reporter's Notes. These cite a great deal of case law and whatever discussion the Reporter has felt to give. They are not part of the *Restatement* in the sense that they have been gone over by Advisers and considered by Council and Membership of the Institute. But that they will be helpful there is no doubt. n93

The contents of the second *Restatement (Second) of Trusts* may be briefly summarized as follows:

Chapter 1. Definitions and Distinctions

Topic 1. Definitions

Topic 2. Distinctions

Chapter 2. The Creation of a Trust

Topic 1. Methods of Creating a Trust

Topic 2. The Capacity of the Settlor to Create a Trust

Topic 3. The Intention to Create a Trust

Topic 4. Consideration

Topic 5. Transfer of Property to the Trustee

Topic 6. Notice to and Acceptance by the Trustee

Topic 7. Notice to and Acceptance by the Beneficiary

Topic 8. Reservation and Creation of Powers

Topic 9. The Parol Evidence Rule

Topic 10. The Requirement of a Written Memorandum

Topic 11. The Creation of Testamentary Trusts

Topic 12. Purposes for Which a Trust can be Created

Topic 13. Illegality

Topic 13A. Impossibility and Indefiniteness

Topic 14. Other Requirements

Topic 15. The Effect of the Statute of Uses

Chapter 3. The Trust Property

Chapter 4. The Trustee

Chapter 5. The Beneficiary

Chapter 6. Transfer of the Interest of the Beneficiary

Topic 1. Voluntary Transfers

Topic 2. Involuntary Transfers

Topic 3. Restrictions on Voluntary and Involuntary Transfers

Topic 4. Successive Conveyances by the Beneficiary of his Interest

Chapter 7. The Administration of the Trust

Topic 1. General Principles

Topic 2. Duties of the Trustee

Topic 3. Powers of the Trustee

Topic 4. Remedies of the Beneficiary and Liabilities of the Trustee

Topic 5. Investment of Trust Funds

Topic 6. Successive Beneficiaries

Topic 7. Compensation of the Trustee

Topic 8. Indemnity of the Trustee for Expenses

Topic 9. Liabilities of the Beneficiaries

Chapter 8. Liabilities to Third Persons

Topic 1. Liability of the Trustee

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Topic 4. The Administration of Charitable Trusts

Topic 5. Failure of Charitable Trusts -- The Doctrine of Cy Pres

Topic 6. Liabilities to Third Persons

Chapter 12. Resulting Trusts

Topic 1. General Principles

Topic 2. Where an Express Trust Fails

Topic 3. Where an Express Trust Does Not Exhaust the Trust Estate

Topic 4. Where Property is Transferred to One Person and the Purchase Price is Paid by Another

FOOTNOTES:
(n1)Footnote 93. 1 American Law Institute, Restatement (Second) of the Law, Trusts 2d vii-viii (1959).

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Supp. To CHAPTER 8 THE RISE AND ROLE OF THE RESTATEMENTS OF PROPERTY AND THE RESTATEMENTS OF TRUSTS

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Scope

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Supp. To CHAPTER 8 THE RISE AND ROLE OF THE RESTATEMENTS OF PROPERTY AND THE RESTATEMENTS OF TRUSTS

2-8 Thompson on Real Property, Thomas Editions Supp. to § 8.04

Supp. to § 8.04 The Organization and Contents of the Restatements of Property.

Add to Table of Contents:
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§ 8.04(e) The Third Restatement of Property--Donative Transfers (Division I Only) [Go To Main]

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Supp. to § 8.02 The Genesis and Purpose of the First Restatements.

Add to Table of Contents:
[Go To Main]

§ 8.02(a) The Founding of the American Law Institute. [Go To Main]

Add:

See also American Law Institute, The American Law Institute: Seventy-Fifth Anniversary, 1923-1998 (1998).

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2-8 Thompson on Real Property, Thomas Editions Supp. to § 8.03

Supp. to § 8.03 How the Restatements of Property Were Prepared

Add to Table of Contents:
[Go To Main]

§ 8.03(b) The Second Restatement of Property [Go To Main]

The first full paragraph should be indented as part of the quotation.

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2-8 Thompson on Real Property, Thomas Editions Supp. to § 8.04

Supp. to § 8.04 The Organization and Contents of the Restatements of Property.

Add to Table of Contents:
[Go To Main]

§ 8.04(c) The Third Restatement of Property--Mortgages [Go To Main]

At the end of the first sentence, add new footnote 27.1 n27.1

§ 8.04(d) The Third Restatement of Property--Servitudes. [Go To Main]

Replace the text of the subsection with the following:

The contents of the *Restatement (Third) of Property-Servitudes* are revealed in the following summary outline:

[At end of sentence, add new footnote 27.2] n27.2

Chapter 1. Definitions

1.1 Servitude Defined; Scope of Restatement

1.2 Easement and Profit Defined

1.3 Covenant Running with Land, Affirmative, Negative, and Restrictive Covenants Defined

1.4 Terms "Real Covenant" and "Equitable Servitude"

1.5 Appurtenant, In Gross, and Personal Defined

1.6 Conservation Servitude and Conservation Organization

1.7 General-Plan Development Defined

1.8 Common-Interest Community Defined

Chapter 2. Creation of Servitudes

2.1 Creation of a Servitude

2.2 Intent to Create a Servitude

2.3 Necessary Parties to Creation of a Servitude

2.4 Horizontal Privity Is Not Required to Create a Servitude

2.5 Estates or Servitudes Burdened and Benefited by a Servitude

2.6 Creation of Benefits in Gross and Third-Party

2.7 Formal Requirements (Statute of Frauds)

2.8 Failure to Comply with the Statute of Frauds

2.9 Exception to the Statute of Frauds

2.10 Servitudes Created by Estoppel

2.11 Servitudes Created by Implication

2.12 Servitudes Implied from Prior Use

2.13 Servitudes Implied from Map or Boundary Reference

2.14 Servitudes Implied from General Plan

2.15 Servitudes Created by Necessity

2.16 Servitudes Created by Prescription: Prescriptive Use

2.17 Servitudes Created by Prescription: Requirements

2.18 Acquisition of Servitudes by Governmental Bodies and the Public

Chapter 3. Validity of Servitude Arrangements

3.1 Validity of Servitudes: General Rule

3.2 Touch-or-Concern Doctrine Superseded

3.3 Rule Against Perpetuities Inapplicable

3.4 Direct Restraints on Alienation

3.5 Indirect Restraints on Alienation and Irrational Servitudes

3.6 Unreasonable Restraints on Trade or Competition

3.7 Unconscionability

Chapter 4. Interpretation of Servitudes

4.1 Interpretation of Servitudes

4.2 Supplementary Terms of a Servitude

4.3 Duration of a Servitude

4.4 Duration of Original Parties' and Successors' Obligations and Enjoyment Rights

4.5 Determining Whether a Servitude Benefit or Burden Is Appurtenant, In Gross, or Personal

4.6 Transferability of Servitude Benefits

4.7 Delegability and Transfer of Servitude Burdens

4.8 Location, Relocation, and Dimensions of a Servitude

4.9 Servient Owner's Right to use Estate Burdened

4.10 Use Rights Conferred by a Servitude

4.11 Use of Appurtenant Easement or Profit to Serve Property Other Than Dominant Estate

4.12 Rights of Holders of Separate Servitudes in Same Property

4.13 Duties of Repair and Maintenance

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Chapter 5. Succession to Benefits and Burdens of Servitudes

5.1 An Appurtenant Benefit or Burden Passes Automatically

5.2 Persons to Whom an Appurtenant Benefit or Burden Runs

5.3 Affirmative Covenant Benefits and Burdens That Run to a Lessee

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At the end of the section add new note 27.3: n27.3

FOOTNOTES:
(n1)Footnote 27.1. *See* Nelson, Grant S. and Dale A. Whitman, "Adopting Restatement Mortgage Subrogation Principles: Savings Billions of Dollars for Refinancing Homeowners," *2006 B.Y.U. L. Rev. 305.*

(n2)Footnote 27.2. Schwartz, Frederic S., "The New Restatement of Property and Class Gifts: Losing Sight of the

Testator's Intention," 22 *Quinnipiac Prob. L.J.* 221 (2009); Sheppard, Charles B., "Land Use Covenants: A Summary of Aspects of California Law Regarding Land Use Covenants With Comparisons to the Restatement (Third) of Property," *37 W. St. U. L. Rev. 27 (Fall 2009)*

Golten, Ryan, "Lobato v. Taylor: How the Villages of the Rio Culebra, the Colorado Supreme Court, and the Restatement of Servitudes Bailed Out the Treaty of Guadalupe Hidalgo," 45 *Nat. Resources* J. 457 (Spring, 2005); Wood, Joshua, "Powell v. Washburn: The the Restatement (Third of Property: Servitudes and Beyond," *49 Ariz. L. Rev. 193 (Spring 2007); see* American Bar Association, *Keeping Current Property, 16 Prob. & Prop. 12,14 (2002)* (quoting *MacMeekin v. Low Income Hous. List., 45 P.3d 570 (Wash. App. 2002)* (rejecting the *Restatement* minority rule that forced relocation is permissible in favor of the traditional majority rule that requires consent of the dominant owner)); *see also* Alfred L. Brophy, *Contemplating When Equitable Servitudes Run with the Land, 46 St. Louis U. L.J. 691 (2002)* (advocating the *Restatement* approach to servitudes); *see also* Gurdon H. Buck, *Book Review-Restatement of the Law Third-Restatement of the Law Property-Servitudes. American Law Institute (2000), 75 Conn. BJ. 160 (2001); see also* Susan F. French, *Highlights of the New Restatement (Third) of Property: Servitudes, 35 Real Prop. Prob. & Tr. J. 225 (2000);* Susan A. French, *Can Covenants Not to Sue, Covenants Against Competition and Spite Covenants Run with the Land? Comparing Results Under the Touch and Concern Doctrine and the Restatement Third, Property (Servitudes),* 38 Real Prop., Prob. & Tr. J. 267 (Summer, 2003); Joseph W. Morris, *The Worthier Title Doctrine: Does Draft Restatement III of Property Write a Premature Obituary? 45 Washburn L.J. 387 (Winter 2006).* John V. Orth, *Relocating Easements; A Response to Professor French,* 38 Real Prop., Prob. & Tr. J. 643 (Winter, 2004). Note, "Touch and Concern, The Restatement (Third) of Property: Servitudes, and a Proposal," *122 Harv. L. Rev. 938* (January, 2009).

(n3)Footnote 27.3. *See* John A. Lovett, "A Bend in the Road: Easement Relocation and Pliability in the New Restatement (Third) of Property: Servitudes," *38 Conn. L. Rev. 1* (Fall, 2005). David M. English, *The Uniform Trust Code (2000): Significant Provisions and Policy Issues, 67 Mo. L. Rev. 143 (2002)* (comparing the *Uniform Trust Code* to the common law and to the *Restatement (Third) of Property: Wills and Other Donative Transfers).* Ira Mark Bloom, *Powers of Appointment Under the Restatement (Third) of Property, 33 Ohio N.U. L. Rev. 755 (2007);* Lawrence W. Waggoner, *Class Gifts Under the Restatement (Third) of Property, 33 Ohio N.U. L. Rev. 993 (2007).* Note, "Touch and Concern, The Restatement (Third) of Property: Servitudes, and a Proposal," *122 Harv. L. Rev. 938* (January, 2009).

(n4)Footnote 27.3. *See* American Bar Association, *Keeping Current Property,* 16 pros. & prop. 12,14 (2002) (quoting *MacMeekin v. Low Income Hous. List., 45 P.3d 570 (Wash. App. 2002)* (rejecting the *Restatement* minority rule that forced relocation is permissible in favor of the traditional majority rule that requires consent of the dominant owner)); *see also* Alfred L. Brophy, *Contemplating When Equitable Servitudes Run with the Land, 46 St. Louis U. L.J. 691 (2002)* (advocating the *Restatement* approach to servitudes); *see also* Gurdon H. Buck, *Book Review-Restatement of the Law Third-Restatement of the Law Property-Servitudes. American Law Institute (2000), 75 Conn. BJ. 160 (2001); see also* Susan F. French, *Highlights of the New Restatement (Third) of Property: Servitudes, 35 Real Prop. Prob. & Tr. J. 225 (2000);* Susan A. French, *Can Covenants Not to Sue, Covenants Against Competition and Spite Covenants Run with the Land? Comparing Results Under the Touch and Concern Doctrine and the Restatement Third, Property (Servitudes),* 38 Real Prop., Prob. & Tr. J. 267 (Summer, 2003); John V. Orth, *Relocating Easements; A Response to Professor French,* 38 Real Prop., Prob. & Tr. J. 643 (Winter, 2004).

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Supp. To CHAPTER 8 THE RISE AND ROLE OF THE RESTATEMENTS OF PROPERTY AND THE RESTATEMENTS OF TRUSTS

2-8 Thompson on Real Property, Thomas Editions Supp. to § 8.05

Supp. to § 8.05 How the Property Restatements Have Been Received

Add to Table of Contents:
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At the end of the subsection add new note 27.4: n27.4

[Change all 8.07 references to 8.06]

Change § 8.06 to § 8.05(c).

Change the text of the subsection to read as follows:

Because the third restatement of property has been divided into several disparate topics, no writers have published general critiques of the third restatement's philosophical positions. Instead, various commentators have published their views on substantive aspects of various individual provisions in the third restatement.[91.1]

FOOTNOTES:

(n5)Footnote 27.4. *See* David A. Thomas, "Restatements Relating to Property: Why Lawyers Don't Really Care," 38 *Real Prop., Prob. & Tr. J.* 655 (Winter, 2004).

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Supp. To CHAPTER 8 THE RISE AND ROLE OF THE RESTATEMENTS OF PROPERTY AND THE RESTATEMENTS OF TRUSTS

2-8 Thompson on Real Property, Thomas Editions Supp. to § 8.06

Supp. to § 8.06 The Restatements of Trusts.

Add to Table of Contents:
[Go To Main]

§ 8.06(b) The Second Restatement of Trusts. [Go To Main]

Add:

American Law Institute, Restatement of the Law, Third, Trusts: Prudent Investor Rule (2001).

§ 8.06(c) The Third Restatement of Trusts. [Go To Main]

At the end of the text, add:

See Donald P. DiCarlo, *The Section 4944 Tax on Jeopardizing Investments: "Double Jeopardy" for Foundation Managers?: Prudent Investor vs. Prudent Man: What's a Foundation Manager to Do?,* 16 Prac. Tax Law. 33 (discussing the prudent man rule of the *Restatement (Second) of Trusts* and the prudent investor rule of the *Restatement (Third) of Trusts); see also* Ronald Chester and Sarah Reid Ziomek, *Removal of Corporate Trustees Under the Uniform Trust Code and Other Current Law: Does a Contractual Lense Help Clarify the Rights of Beneficiaries?,* 67 Mo. L. rev. 241 (2002); *see also* Bruce S. Ross, *Representing Estate and Trust Beneficiaries and Fiduciaries: Steering the*

Fiduciary Past the Shoals of Surcharge: Advice to Trustees and Their Advisors, SH002 ALI-ABA 149 (2002).

"Practical Application of the Prudent Investor Standard (Prudent Investor Rule)," 56 *Institute on Federal Taxation* 71 (1998); Martin D. Begleiter, "Does the Prudent Investor Rule Need the Uniform Prudent Investor Act--An Empirical Study of Trust Investment Practices," 51 *Maine Law Review* 27-85 (Apr. 1999); Dominic J. Campisi, "Representing Estate and Trust Beneficiaries and Fiduciaries: Damages for Breach of Trust," SG012 ALI-ABA 291 (2001); Jerold I. Horn, "Prudent Investor Rule, Modern Portfolio Theory, and Private Trusts: Drafting and Administration, Including the 'Give-Me-Five' Unitrust," 33 *Real Property, Probate and Trust J.* 1-62 (Spring 1998).

David H. Kirk, Note: *To Be Or Not to Be: A Trust's Investment Expense Deduction Subject to the Two Percent Limitation Under I.R.C. Section 67* , *1 Pitt. Tax Rev. 223* (Spring, 2004) (discussing the prudent investor standard of the Restatement [Third] of Trusts).

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CHAPTER 9 UNIFORM AND MODEL LAWS RELATED TO PROPERTY

2-9 Thompson on Real Property, Thomas Editions 9.syn

AUTHOR: Professor David A. Thomas J. Reuben Clark Law School Brigham Young University

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§ 9.02 Organization of the National Conference of Commissioners on Uniform State Laws.

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§ 9.06 Evaluative Comment on Uniform and Model Laws.

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CHAPTER 9 UNIFORM AND MODEL LAWS RELATED TO PROPERTY

2-9 Thompson on Real Property, Thomas Editions § 9.01

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§ 9.01 Introduction.

In this chapter is found a brief description of the movement to unify certain laws that exist in disparate forms throughout the fifty states. The rise and work of the most prominent proponent of that movement, the National Conference of Commissioners on Uniform State Laws, is related in some detail, followed by summaries of the Conference's proposed laws that relate to property. With these summaries is additional information on how broadly this work has been received among the states and a comment on the overall value of the work for development of American property law. The chapter concludes with additional summaries of other uniform and model laws related to property that have been promulgated from sources other than the National Conference on Uniform State Laws.

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CHAPTER 9 UNIFORM AND MODEL LAWS RELATED TO PROPERTY

2-9 Thompson on Real Property, Thomas Editions § 9.02

AUTHOR: Professor David A. Thomas J. Reuben Clark Law School Brigham Young University

§ 9.02 Organization of the National Conference of Commissioners on Uniform State Laws.

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§ 9.02(a) Why the National Conference Was Organized.

The National Conference of Commissioners on Uniform State Laws conducted its first meeting on August 24, 1892, just before the annual meeting of the American Bar Association in Saratoga Springs, New York. This three-day meeting was the outgrowth of the desire of some to attain uniformity of state law, a desire that had been germinating ever since the birth of the nation. In 1786, while the country was still laboring under the Articles of Confederation, a convention of state delegates was called at Annapolis, Maryland, to investigate creation of uniform commercial laws among the states, that is, to achieve a uniform regulation of trade. At that meeting, a resolution was introduced that resulted in the constitutional convention of the following year.

The resulting national constitution and its earliest amendments made some specific matters the subjects of a unified federal law, but explicitly left all other matters within the power of the respective states or of the people: "The powers not delegated to the United States by the Constitution, nor prohibited to it by the States, are reserved to the States respectively, or to the people." n1

That such large areas of law were left to the states, and that diverse legislation on the same matters of law could issue from the states was from the beginning seen by some as an evil to be corrected as soon as possible. For such persons the absence of a general uniformity of law that was inherent in the American federal system of government was simply a defect, and the only issue subject to debate was what method should be employed to correct the defect.

The call for uniformity was also consistent with the codification movement in the 19th century. If developing uniform laws made less complex the matter of discovering or ascertaining the law, and also tended toward selection of "better" laws, the process of codification shared the same goals. The notion that states might entertain genuine differences of opinion on which laws were "better" was generally brushed aside. As expressed by one of the early Connecticut Commissioners, Lyman D. Brewster:

> The effective argument in favor of uniform law is that it is a law for the state itself, as well as a law creating uniformity with the laws of other states. Besides, it accomplishes two things: first, it harmonizes

> all conflicting laws on the subject; and second, it makes the law more intelligible to the people who desire to know it. No objection can fairly be made to this method of uniformity, because all states, as has been well said, are equally interested in securing the administration of the same general rights, the realization of the same common freedom under the law, and as such, no state can lose its individuality in the least. n2

Perhaps the most telling argument in favor of uniformity was the hope of eliminating uncertainty about the law. With the growth of the nation and of legal activity in general, the rapidly increasing numbers of lawyers, litigants and courts generated huge increases in reported court opinions, all of which became a part of the common law, at least of each state. As reported in the preceding chapter, this mass of published decisions was one important impetus for the founding of the American Law Institute and the restatement projects: if the prevailing common law could be restated (and thus made "uniform" for all the states), it would reduce the hazards of trying to discover the right rule by researching the ever-growing body of decisional law. n3

Uniformity of legislation was even one of the announced purposes for the founding of the American Bar Association, and this statement still appears in the association's constitution:

> The purposes of the Association are ... to promote throughout the nation the administration of justice and the uniformity of legislation and of judicial decisions... n4

It was in pursuit of this objective that various persons and committees within the American Bar Association worked for several years to create support for a formal organization working on uniform legislation, and this culminated in the initial conference of August, 1892, noted at the outset of this section.

§ 9.02(b) How the National Conference Has Conducted Its Work.

§ 9.02(b)(1) The Founding of the National Conference.

In 1889 the Tennessee Bar Association appointed a special committee to follow up on remarks of the association president advocating uniform laws for the states. Later that year, a Tennessee delegate presented a resolution at the annual A.B.A. meeting, requesting the A.B.A. to appoint a special committee

> consisting of one from each state, who shall meet in convention at a time and place to be fixed by the President, and compare and consider the laws of the different states relating to these subjects, and prepare and report to this association such recommendations and measures as will bring about the desired result. n5

The "desired result," according to the resolution, was "uniformity in the laws of the several states, especially those relating to marriage and divorce, descent and distribution of property, acknowledgement of deeds, execution and probate of wills...." n6

The Special Committee on Uniformity of State Legislation thereupon created by the A.B.A. was not able to accomplish much in its first year, but did note that the New York legislature had created a commission to effect uniformity among states in certain legislation. The New York act suggested inviting delegates from other states to a convention to draft uniform legislation. The A.B.A. Special Committee then reported to the Association its recommendation that the Association Secretary invite all other states to enact similar legislation and thus participate in the uniformity project. The appropriate resolutions accompanying this report were adopted at the 1890 A.B.A. Annual Meeting and by the end of 1891, 5 other states had enacted legislation similar to New York's, creating commissions to work toward uniform laws.

An A.B.A. Committee on Uniform Laws was then created, and this committee corresponded with its members and

others to determine what progress was being made toward uniformity and what would be the best methods for further progress. The correspondence yielded a consensus on several points dear to the advocates of uniformity:

> 1. That variant and conflicting laws produce in all states the special evils or inconveniences of perplexity, uncertainty, and confusion, with consequent waste, a tendency to hinder freedom of trade and to occasion unnecessary insecurity of contracts, resulting in needless litigation and miscarriage of justice.
>
> 2. That greater uniformity is desirable and most urgently and immediately needed in matters affecting directly the business common to and coextensive with the whole country, such as the enforcement of contracts, the collection of debts, the transmission of property, the nature, validity, negotiability, and construction of commercial paper, and the formalities of all legal instruments and the proofs of their authenticity.
>
> 3. That sudden, radical, and fundamental changes in the laws of divorce, descent, and distribution, however desirable, would meet with the greatest difficulty, and in most States changes would be more likely to be adopted, if at all, after the general advantages of uniformity in commercial matters had been demonstrated by experience.
>
> 4. That the desired uniformity could be secured best by concurrent legislative action in the various states. n7

These points were contained in the Special Committee's report, which also responded to some objections to uniformity that were beginning to surface. To the objection that uniformity might destroy the autonomy or individuality of the states, tending toward national centralization at the expense of local self-government, the committee report responded that state uniformity effectively checked the tendency of the national government to pre-empt more areas of legislation:

> [A] state which unites with other states in framing such general and uniform laws in matters affecting the common interests of all the states, and in the spirit of mutual compromise, through mutual Commissions and investigations, yields, in so doing, nothing whatever of its state sovereignty. On the contrary, the proposed method of voluntary state action takes from the general government any excuse for absorbing powers now confined to the states, and therefore directly tends to preserve intact the independence of the states. n8

It was also suggested that uniformity by voluntary state action would not be as effective as that accomplished by national legislation; several advocates of uniformity actually favored the national approach:

> It is clear indeed that in these formative days the Conference and the American Bar Association saw no serious danger in uniformity gained through federal action, but rather felt that if federal jurisdiction extended into fields where the Conference thought uniformity desirable that federal legislation was the preferable means of achieving their goal. n9

This second objection was not really an objection to uniformity, and it no doubt reinforced the first objection that uniformity would come at the cost of state independence.

The meeting on August 24, 1892, at which the National Conference of Commissioners on Uniform State Laws was founded, was attended by representatives of seven states n10 that had already undertaken some action toward uniform legislation. Even without the formal structure of constitution, bylaws, or rules of procedure, the conference adopted and recommended to the states three "uniform" acts, the Acknowledgements Act, the Act Validating Wills Lawfully Executed Without the State, and the Act Recognizing as Valid Wills Probated in Another State. The conference also recommended legislative adoption of individual provisions relating to commercial transactions, written instruments, marriage and divorce.

The conference met once again in 1892, and again in 1893 and 1894, and annually thereafter, except in 1945. In addition to appointing internal administrative committees and an organizational structure, the conference appointed committees for the substantive areas of wills, marriage and divorce, commercial law, descent and distribution, deeds and other conveyances, certificates of depositions and forms of notarial certificates, state action in appointing presidential electors, and weights and measures.

A formal constitution and bylaws were adopted in 1905, when the conference became the Commissioners on Uniform State Laws, and in 1906 the organization adopted the Uniform Sales Act, the first adoption by a roll call of the states represented by commissioners. By 1912, every state was represented by commissioners at the conference meetings.

§ 9.02(b)(2) Early Criticism of the National Conference's Work.

Advocates of uniformity began to recognize that not only was individuality in state governments working against uniformity, but diversity among the courts was also impeding their efforts. This was noted by the Conference president as early as 1914, as he remarked in his annual address:

> Taking the country as a whole, there has been as pronounced a tendency to divergence in the decisions of the courts as there has been in the enactment of statutes in the respective states. This has not been a conscious tendency on the part of the courts, but it has been none the less alarming. It has been a menace to the accomplishment of our purpose, of such grave proportions, as to convince us that the attainment of our end would be jeopardized, unless some means could be found to mitigate or check the tendency. n11

In 1914 the first significant criticism of the desirability for uniformity was issued in a law review article written by John Bassett Moore of Columbia, an authority on international law. The writer first noted some of the accomplishments of and difficulties facing the Conference:

> In the United States the law is at present in a singularly shifting state. Proposals are constantly put forward for material and even radical change, not only in constitutional law but also in criminal law and in various branches of civil law, such as contracts and torts. The difficulties in dealing with such a situation are illustrated by the experience of the Conference of Commissioners on Uniform State Laws, whose members are appointed by the governors of the various States and Territories, under local law, for the purpose of conferring upon and recommending uniform laws in matters in which uniformity seems to be practicable and desirable. The moderation as well as the earnestness of this body is much to be commended, and the general interest in its work is shown by the circumstance that forty-eight States, two Territories, the District of Columbia and our insular possessions are represented in it. In the twenty-three years of its existence it has formulated ten drafts of statutes. The first of these, The Negotiable Instruments Act, has been adopted in forty-six States, Territories and possessions; the second, the Warehouse Receipts Act, in thirty. In no other instance has the number of adoptants exceeded eleven. The Divorce Act has, it may be observed, been adopted in only three States. It is true that some of the later recommendations have not been long before the public, so that their fate is not yet finally determined. But it is evident that, even where the need of uniformity is generally acknowledged, the task of formulating and securing the adoption of a uniform law is always attended with great uncertainty. n12

Critical of forcibly imposed uniformity at either the international or national level this writer noted that "Differences in social and political institutions spring from differences in disposition and in views of life," n13 and these will not disappear:

> In reality, if there existed all over the world one form of government, the habits, customs, laws, and even the institutions, of different peoples would continue to be different... n14

> We observe similar differences in social institutions and laws, proceeding from similar causes. In the United States we have witnessed more and more the development of a tendency to legislate on subjects which were formerly considered to lie within the sphere of individual action. Of this tendency an example is to be found in the spread of prohibitory laws; that is to say, laws prohibiting the sale and consumption of intoxicating liquors...
>
> But in considering the passion for uniformity, we must note a capital distinction. Like other natural forces, if wrongly directed or excessively indulged, it operates destructively; but if wisely directed and properly regulated, it may operate beneficially. Even before the Thirty Years' War, philosophers began to dream and to write of a uniform law for the regulation of international relations. More and more impressed with the demonstrated fatuity of the attempt to create uniformity by force, they conceived the necessity of recognizing the right to be different, and in order to make such recognition effective, adopted, as the very basis of the new system, the principle that independent nations have in the eye of the law equal rights. n15

This rather mild criticism of overzeal for uniformity was met with a sharp retort by the then Conference president, who labeled Moore's thesis "fatal error."

In 1925 another critical voice gave a strident rebuke against uniformity:

> Each and every piece of uniformity jockeyed through the dull legislatures of the several States is, in the final analysis an attack upon decentralized government and to that extent a theft from the States. The greater the uniformity, the greater will be the demand for more uniformity, until eventually the States will be but townships of the American Empire, and the people will be led and cajoled and driven like soldiers. It may be argued, perhaps, that this tendency should not be curbed, for the eradication of individualism and local government will be best for the rank and file, but it is submitted that this argument should not prevail unless and until the American experiment in government has definitely proven to be a failure. Mr. Madison's ideas of the rights of the States are still worth fighting for; it is not yet futile to contend against federal larceny by constitutional amendment, and it is still worth while to give battle against the half-brother of the federal larceny, the pressure for uniformity. n16

The Conference president's response asserted that uniform state laws could still have enough elasticity to meet local situations and that such uniform laws were the best defense against progressive nationalization and unification of American law.

§ 9.02(b)(3) Production and Publication of Uniform and Model Acts.

In 1915 the Conference constitution and bylaws were completely revised and the requirement introduced that each section of an act should be considered by the entire Conference during at least two annual meetings. As the years passed, certain adopted acts were re-labeled or revised, and others were withdrawn or declared obsolete. By 1919 this process had left 26 acts currently recommended for passage by state legislatures.

In 1922 the first publication of uniform laws occurred with issuance of the 10 volume *Uniform Laws Annotated* by the predecessor of West Publishing Company. Another published version appeared in 1931, when the annual Martindale-Hubbell lawyers' directory began to include the full text of current uniform and model acts. n17

In 1935, the Conference worked together with the American Law Institute jointly to draft acts in areas of common interest. The first two of these appeared in 1937, the Uniform Aeronautical Code and the Uniform Estates Act. Shortly thereafter, in 1939, the Conference and the American Bar Association came to an understanding that acts adopted by the Conference would be submitted to the A.B.A. Board of Governors and House of Delegates for A.B.A. approval.

Meanwhile, in 1936 the Conference agreed to begin drafting model acts as well as uniform acts. n18 While some acts were drafted directly as model acts, others were redesignated from uniform to model acts; in either case, model acts emerged according to the following criteria announced by the Conference:

> The National Conference of Commissioners on Uniform State Laws in the promulgation of its Uniform Acts urges, with the endorsement of the American Bar Association, their enactment in each jurisdiction. Where there is a demand for an Act covering the subject matter in a substantial number of the States, but where in the judgment of the National Conference of Commissioners on Uniform State Laws it is not a subject upon which uniformity between the States is necessary or desirable, but where it would be helpful to have legislation which would tend toward uniformity where enacted, Acts on such subjects are promulgated as Model Acts.

The Conference's work continued through the years of World War II, particularly with the Uniform Commercial Code, and by 1945 a series of tests for the appropriateness of subjects for uniform acts had been adopted:

> (a) Is the subject matter proposed an appropriate one, in view of the powers granted by the Constitution to the Congress, for state legislation? If it properly falls within the jurisdiction of the Congress, it is not ordinarily an appropriate one for uniform legislation by the several states.
>
> (b) Is it a matter primarily of local or state concern and without substantial interstate implication? If the answer to this question is in the affirmative, the subject is not an appropriate one for uniform legislation.
>
> (c) The appropriateness of a proposed subject for state legislation having been determined, is it one which through its uniform enactment into legislation by the several states would promote the interests (economic, social and political) of the people of each the states that enact the legislation? Subjects of this sort are proper ones for uniform legislation. n19

Also adopted was a two-part test for the appropriateness of subjects for model acts:

> [A model act should be an act which either]
>
> (a) provides, on a matter of interstate interest, a comprehensive well-worked-out model whose provisions can be lifted in whole or in part by a state, or
>
> (b) provides uniformity of underlying principle on a point of importance; but in the absence of interstate implications acts of this sort are definitely discouraged; or
>
> (c) provides a model for handling an emergent need to keep emergent legislation sane and harmonious. n20

Assessments of the Conference's work even a generation ago acknowledged that circumstances had changed. More areas of potential state legislation had been swept into the maw of federal legislative power. Perhaps the value of diversity among the states had stronger recognition; perhaps the hazards of prescribing for all what the law *ought* to be were better perceived, especially in the frequent failures of Conference products to obtain widespread adoptions. As noted by the Conference executive director in 1965:

> Theoreticians sometimes deduce from an analysis of legal theories that the solution of a particular problem "ought" to be such and such, and urge that law should be changed in order to conform with this theoretical "oughtness." Since theory has produced "the" solution, all states ought to adopt it and therefore have uniform law. Thus, argument in favor of uniformity is sometimes more pronounced in

> organizations where the delegates are frequently academicians from a system where theory tends to dominate the work of the academic community. In the United States, where the Commissioners on Uniform State Laws have been drawn from the judiciary, the practicing bar, and from the academic community, this justification for uniformity has not been heavily emphasized. n21

This same author recommended a more limited role for the Conference in the future:

> Now that Congress has legislative power in almost all of the areas where uniformity of state law was originally conceived of as "necessary," and now that there are numerous organizations -- bar associations, special purpose public interest groups, special purpose self-interest groups, and other law reform agencies, both public and private -- busily drafting legislation to improve the law, the role of the National Conference has substantially changed. That the organization is not dead can be seen from the success it has had with the Uniform Commercial Code, its most ambitious project in its entire history... The history of the Code would suggest that comprehensiveness may be an important criterion for future activity of the Conference. "Necessity" alone no longer appears sufficient, for if uniformity on a particular problem is substantially necessary, the modern tendency of seeking federal legislation reduces the strength of the National Conference -- at least if it does not commence the drafting process until after the demand or the necessity arises. It would appear that if it will not only exercise foresight in the sense of discovering particular areas likely to call for legislative solution, but will then proceed to draft a comprehensive law covering the whole subject matter including the area where there seems to be a demand for uniformity, the Conference still has a substantial role to perform. n22

In the present published version of the uniform laws, *Uniform Laws Annotated*, the National Conference is described as having been organized "to promote uniformity in state law, on all subjects where uniformity is desirable and practicable, by voluntary action of each state." n23

The current organization and procedures of the National Conference are described as follows:

> [The National Conference of Commissioners on Uniform State Laws] is composed of Commissioners from each state, the District of Columbia, and Puerto Rico. The number, terms of appointment, and appointment process vary from state to state. In most cases, an average of four Commissioners are appointed by the governor or by the legislature, under express legislative authority, for three-year periods. The membership is composed of lawyers, judges, legislators, and law school professors. All Commissioners are members of the bar. They are united in a permanent, state supported organization, under a constitution and bylaws, and meet annually immediately preceding the American Bar Association annual meeting. The record of the organization's activities, reports, and approved Acts are printed in the Annual Proceedings.
>
> The National Conference works through Standing and Special Committees. Proposals for Uniform Acts, received from many sources, are referred to the Standing Committee on Scope and Program which makes an investigation, and reports to the Executive Committee on whether the subject is appropriate for attention by the Conference, in keeping with specific criteria. If the Conference decides to accept a subject, a Special Committee of Commissioners is appointed to prepare a series of drafts of an Act. Tentative drafts are discussed and considered, section by section, by the entire Conference at no fewer than two Annual Meetings before the Conference may decide, by a vote of the states, whether to promulgate the draft as a Uniform Act. Each Act is, thus, subjected to the criticism, correction and recommendation of the Commissioners who represent the experience and judgment of a select body of lawyers chosen from every part of the United States.

In the current published version of the uniform acts, *Uniform Laws Annotated*, the text of an act is preceded by a

Prefatory Note prepared by the Commissioners, and followed by notes and comments for each section. In addition, pocket parts for each volume contain citations to reported court decisions citing or interpreting adopted versions of uniform acts. How each act has been received by the states is shown by tables and by general statutory notes detailing changes introduced by states which have adopted the acts. Other reference information and indexes are also included.

FOOTNOTES:
(n1)Footnote 1. U.S. Const. Amend. X.

(n2)Footnote 2. As *quoted in* Walter P. Armstrong, Jr., A Centennial History of the National Conference of Commissioners on Uniform State Laws 13 (1991).

(n3)Footnote 3. *See* Chapter 8, *supra*.

(n4)Footnote 4. American Bar Association Constitution art. 1, § 1.2.

(n5)Footnote 5. As *quoted in* Walter P. Armstrong, Jr., A Centennial History of the National Conference of Commissioners on Uniform State Laws 18 (1991).

(n6)Footnote 6. *Id.*

(n7)Footnote 7. *Id.* at 20-21.

(n8)Footnote 8. *Id.* at 21.

(n9)Footnote 9. *Id.* at 22.

(n10)Footnote 10. The seven states represented were Delaware, Georgia, Massachusetts, Michigan, New Jersey, New York, and Pennsylvania.

(n11)Footnote 11. As *quoted in* Walter P. Armstrong, Jr., A Centennial History of the National Conference of Commissioners on Uniform State Laws 50 (1991).

(n12)Footnote 12. John Bassett Moore, *"The Passion for Uniformity," 62 U. Pa. L. Rev. 525, 542-543 (1914).*

(n13)Footnote 13. *Id. at 529.*

(n14)Footnote 14. *Id. at 530.*

(n15)Footnote 15. *Id. at 529-531.*

(n16)Footnote 16. John Hemphill, *"The Uniform Laws Craze,"* 5 The American Mercury 59 (1925).

(n17)Footnote 17. According to the introductory explanation in current editions of the Martindale-Hubbell directory, "The Acts listed constitute those which fall within the scope of the Martindale-Hubbell Law Digests and are reprinted therein." Also the acts include some items earlier adopted and later withdrawn, because some of those are still in force in some states.

(n18)Footnote 18. Conference Handbook 118 (1936).

(n19)Footnote 19. *Id.* at 67.

(n20)Footnote 20. *Id.* at 67-68.

(n21)Footnote 21. Allison Dunham, *"A History of the National Conference of Commissioners on Uniform State*

Laws," 30 Law & Contemp. Probs. 233, 236 (1965). This article is not a history of the Conference, but a discussion of the problems of uniformity among the states and at the international level.

(n22)Footnote 22. *Id.* at 247-248.

(n23)Footnote 23. *See* "Explanation," printed at the beginning of each volume of Uniform Laws Annotated.

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CHAPTER 9 UNIFORM AND MODEL LAWS RELATED TO PROPERTY

2-9 Thompson on Real Property, Thomas Editions § 9.03

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§ 9.03 Overview of the Property-Related Uniform Laws and Their Adoptions.

[Go To Supp]

In this section appears a list of each uniform and model act relating to real property, with indication of the year of adoption, adopting action among the states, and to what extent the act incorporated other or prior uniform acts and model acts and codes.

§ 9.03(a) Uniform Acts.

§ 9.03(a)(1) Uniform Absence as Evidence of Death and Absentees' Property Act. n24

Approved in 1939. Adopted in 2 states: Tennessee (1941), Wisconsin (1941).

§ 9.03(a)(2) Uniform Act on Intestacy, Wills, and Donative Transfers. n25

Approved in 1991. Provisions of this act were previously incorporated into the 1990 revision of the Uniform Probate Code. Adopted in 3 states: New Mexico (1993), North Dakota (1993, eff. 1995), West Virginia (1992).

§ 9.03(a)(3) Uniform Ancillary Administration of Estates Act. n26

Approved in 1949. This act is a companion to the Uniform Powers of Foreign Representatives Act.Adopted in 1 state: Wisconsin (1951).

§ 9.03(a)(4) Uniform Common Interest Ownership Act. n27

Approved in 1982. Consolidates provisions of the Uniform Condominium Act, the Uniform Planned Communities Act, and the Model Real Estate Cooperative Act. Adopted in 4 states: Alaska (1984), Connecticut (1983), Nevada (1991), West Virginia (1986).

§ 9.03(a)(5) Uniform Condominium Act. n28

Approved in 1977, amended in 1980. Adopted in 10 states: Alabama (1990), Arizona (1985), Maine (1981), Minnesota (1980), Missouri (1983), New Mexico (1982), Pennsylvania (1980), Rhode Island (1982), Virginia (1974), Washington (1989).

§ 9.03(a)(6) Uniform Conservation Easement Act. n29

Approved in 1981. Adopted in 17 jurisdictions: Alaska (1989), Arizona (1985), District of Columbia (1986), Georgia (1992), Idaho (1988), Indiana (1984), Kansas (1992), Kentucky (1988), Maine (1985), Minnesota (1985), Mississippi (1986), Nevada (1983), New Mexico (1991), South Carolina (1991), Texas (1983), Virginia (1988), Wisconsin (1981).

§ 9.03(a)(7) Uniform Construction Lien Act. n30

Approved in 1987. Based on Art. V of the Uniform Simplification of Land Transfers. No adoptions.

§ 9.03(a)(8) Uniform Disclaimer of Property Interests Act. n31

Approved in 1978. Incorporated into the Uniform Probate Code as revised in 1990. Adopted in 9 jurisdictions: Alabama (1981), District of Columbia (1991), Illinois (1983), Maine (1979), Maryland (1978), New Mexico (1993), North Dakota (1993), Vermont (1985), West Virginia (1982).

§ 9.03(a)(9) Uniform Disclaimer of Transfers by Will, Intestacy or Appointment Act. n32

Approved in 1978. Incorporated into the Uniform Probate Code before that Code was revised in 1990. Adopted in 17 states: Alaska (1972), Arizona (1973), Colorado (1973), Delaware (1982), Florida (1974), Hawaii (1976), Idaho (1971), Illinois (1975), Kansas (1968), Kentucky (1974), Maine (1975), Minnesota (1965), Nebraska (1974), New Jersey (1979), North Carolina (1975), Oregon (1975), Utah (1975).

§ 9.03(a)(10) Uniform Disclaimer of Transfers Under Non-testamentary Instruments Act. n33

Approved in 1978. Incorporated into the Uniform Probate Code. Adopted in 6 states: Delaware (1982), Kansas (1968), Kentucky (1980), Maine (1975), North Dakota (1977), Oregon (1975).

§ 9.03(a)(11) Uniform Disposition of Community Property Rights at Death Act. n34

Approved in 1971. Adopted in 13 states: Alaska (1984), Arkansas (1981), Colorado (1973), Connecticut (1985), Florida (1992), Hawaii (1973), Kentucky (1974), Michigan (1975), Montana (1989), New York (1981), Oregon (1973), Virginia (1982), Wyoming (1985).

§ 9.03(a)(12) Uniform Disposition of Unclaimed Property Act. n35

Approved in 1954, revised in 1966. 1954 Act n36 adopted in 3 states: Maryland (1966), Vermont (1964), West Virginia (1966). 1966 Act n37 adopted in 14 jurisdictions: Alabama (1973), Arkansas (1979), District of Columbia (1981), Illinois (1961), Indiana (1967), Iowa (1967), Kansas (1979), Minnesota (1969), Mississippi (1982), Missouri (1984), Nebraska (1969), Nevada (1979), Oregon (1957), Tennessee (1978).

§ 9.03(a)(13) Uniform Dormant Mineral Interests Act. n38

Approved in 1986. Adopted in 1 state: Connecticut (1987).

§ 9.03(a)(14) Uniform Estate Tax Apportionment Act. n39

Approved in 1958, revised in 1964. Incorporated into the Uniform Probate Code. 1964 Act n40 adopted in 9 states:

Hawaii (1972), Idaho (1971), Maryland (1965), New Mexico (1993), North Dakota (1973), Oregon (1969), Rhode Island (1971), Vermont (1975), Washington (1986). 1958 Act n41 adopted in 5 states: Alaska (1972), Michigan (1963), Montana (1974), New Hampshire (1959), Wyoming (1959).

§ 9.03(a)(15) Uniform Federal Lien Registration Act. n42

Approved in 1978. Succeeds the Revised Federal Tax Lien Registration Act. n43 Adopted in 35 states: Alabama (1989), Alaska (1988), Arizona (1990), Arkansas (1989), California (1979), Colorado (1988), Connecticut (1967), Florida (1992), Idaho (1979), Illinois (1989), Iowa (1989), Kansas (1988), Louisiana (1987), Maine (1989), Maryland (1980), Michigan (1983), Minnesota (1979), Mississippi (1989), Montana (1983), Nebraska (1988), Nevada (1979), New Hampshire (1988), New Mexico (1988), New York (1987), North Carolina (1990), North Dakota (1979), Oklahoma (1988), Oregon (1981), South Dakota (1988), Texas (1989), Virginia (1988), Washington (1988), West Virginia (1989), Wisconsin (1979), Wyoming (1988).

§ 9.03(a)(16) Uniform Federal Tax Lien Registration Act. n44

Approved in 1966, revising the original 1926 act, and succeeded by the Uniform Federal Lien Registration Actin 1978. n45 Adopted in 4 states (many previous adoptions have been superseded by adoptions of the Uniform Federal Lien Registration Act): Delaware (1973), Georgia (1967), Kentucky (1948), South Carolina (1928).

§ 9.03(a)(17) Uniform Fraudulent Conveyance Act. n46

Approved in 1918, succeeded by the Uniform Fraudulent Transfer Act of 1984. Adopted in 8 states: Delaware (1919), Maryland (1920), Massachusetts (1924), Michigan (1919), New York (1925), Pennsylvania (1921), Tennessee (1919), Wyoming (1929).

§ 9.03(a)(18) Uniform Fraudulent Transfer Act. n47

Approved in 1984, succeeding the Uniform Fraudulent Conveyance Act of 1918. Adopted in 29 states: Alabama (1989), Arizona (1990), Arkansas (1987), California (1986), Colorado (1991), Connecticut (1991), Florida (1987), Hawaii (1985), Idaho (1987), Illinois (1989), Maine (1985), Minnesota (1987), Missouri (1992); Montana (1991), Nebraska (1989), Nevada (1987), New Hampshire (1987), New Jersey (1988), New Mexico (1989), North Dakota (1985), Ohio (1990), Oklahoma (1986), Oregon (1985), Rhode Island (1986), South Dakota (1987), Texas (1987), Utah (1988), Washington (1987), West Virginia (1986), Wisconsin (1987).

§ 9.03(a)(19) Uniform Gifts to Minors Act. n48

Approved in 1956, n49 revised in 1966. n50 Revised and restated by the Uniform Transfers to Minors Act of 1983. n51 1956 Act adopted in 1 state: Michigan (1959). 1966 Act adopted in 8 states: Connecticut (1957), Delaware (1957), Mississippi (1958), New Jersey (1963), New York (1966), South Carolina (1961), Texas (1957), Vermont (1957). These adoptions were of the 1954 Act, and were subsequently amended to conform the 1966 Act.

§ 9.03(a)(20) Uniform Land Security Interest Act. n52

Approved in 1985. The substantive provisions of the act track closely with Article 3 of the Uniform Land Transactions Actas amended in 1975. No adoptions.

§ 9.03(a)(21) Uniform Land Transactions Act. n53

Approved in 1975, amended extensively in 1977. Follows the structure of Articles 1, 2 and 9 of the Uniform Commercial Code. No adoptions.

§ 9.03(a)(22) Uniform Law on Notarial Acts. n54

Approved in 1982. Replaces the Uniform Acknowledgements Act and the Uniform Recognition of Acknowledgements Act. Adopted in 8 jurisdictions: Delaware (1984), District of Columbia (1991), Iowa (1989), Kansas (1984), Minnesota (1985), Oklahoma (1985), Oregon (1983), Wisconsin (1983).

§ 9.03(a)(23) Uniform Marital Property Act. n55

Approved in 1983. Adopted in 1 state: Wisconsin (1983).

§ 9.03(a)(24) Uniform Marketable Title Act. n56

Approved in 1990. Originally appeared as part of the Uniform Simplification of Land Transfers Act in 1977. No adoptions.

§ 9.03(a)(25) Uniform Non-probate Transfers on Death Act. n57

Approved in 1991. This act was approved in 1989 and at that time was part of the Uniform Probate Code. Adopted in 4 states: Colorado (1990), Minnesota (1992), New Mexico (1992), North Dakota (1991), Oregon (1991), Washington (1993), Wisconsin (1989), Wyoming (1993).

§ 9.03(a)(26) Uniform Planned Community Act. n58

Approved in 1980. Closely parallels the Uniform Condominium Act. No adoptions.

§ 9.03(a)(27) Uniform Premarital Agreement Act. n59

Approved in 1983. Adopted in 18 states: Arizona (1991), Arkansas (1987), California (1985), Hawaii (1987), Illinois (1989), Iowa (1991), Kansas (1988), Maine (1987), Montana (1987), Nevada (1989), New Jersey (1988), North Carolina (1987), North Dakota (1985), Oregon (1987), Rhode Island (1987), South Dakota (1989), Texas (1987), Virginia (1985).

§ 9.03(a)(28) Uniform Probate Code. n60

Approved in 1969. The following uniform acts are incorporated into the Uniform Probate Code and may also be adopted as free-standing acts: Act on Intestacy, Wills, and Donative Transfers, Testamentary Additions to Trusts Act of 1991, Testamentary Additions to Trusts Act of 1960, Disclaimer of Property Interests Act, Disclaimer of Transfers by Will, Intestacy or Appointment Act, Statutory Rule Against Perpetuities, International Wills Act, Succession Without Administration Act, Estate Tax Apportionment Act (1964 and 1968 versions), Guardianship and Protective Proceedings Act, Durable Power of Attorney Act, Non-probate Transfers on Death Act, Multiple-Person Accounts Act, TOD [transfer-on-death] Security Registration Act. Adopted in 15 states: Alaska (1972), Arizona (1973), Colorado (1973), Florida (1974), Hawaii (1976), Idaho (1971), Maine (1979), Michigan (1978), Minnesota (1974), Montana (1974), Nebraska (1974), New Mexico (1975), North Dakota (1973), South Carolina (1986), Utah (1975).

§ 9.03(a)(29) Uniform Probate of Foreign Wills Act. n61

Approved in 1950. Adopted in 2 states: Texas (1955), Wisconsin (1951).

§ 9.03(a)(30) Uniform Recognition of Acknowledgements Act. n62

Approved in 1968. Replaced by the Uniform Law on Notarial Acts in 1982. n63 Adopted in 15 states: Alaska (1981),

Arizona (1943), Colorado (1969), Connecticut (1969), Illinois (1969), Kentucky (1970), Maine (1969), Michigan (1969), Nebraska (1969), New Hampshire (1969), North Dakota (1971), Ohio (1973), South Carolina (1972), Virginia (1970), West Virginia (1971).

§ 9.03(a)(31) Uniform Residential Landlord and Tenant Act. n64

Approved in 1972. Adopted in 15 states: Alaska (1974), Arizona (1973), Florida (1973), Hawaii (1972), Iowa (1978), Kansas (1975), Kentucky (1974), Montana (1977), Nebraska (1974), New Mexico (1975), Oregon (1973), Rhode Island (1986), South Carolina (1986), Tennessee (1975), Virginia (1974).

§ 9.03(a)(32) Uniform Simplification of Land Transfers Act. n65

Approved in 1976, amended in 1977. Produced as part of the project that produced the Uniform Land Transactions Act in 1975. No adoptions.

§ 9.03(a)(33) Uniform Simultaneous Death Act. n66

Approved in 1991. Originally adopted in 1940 and amended in 1953. 1991 Act adopted in 2 states: Kansas (1992), New Mexico (1993). n67 1940 Act n68 adopted in 48 jurisdictions: Alabama (1949), Alaska (1987), Arizona (1959), Arkansas (1941), California (1945), Colorado (1967), Connecticut (1943), Delaware (1945), District of Columbia (1965), Florida (1941), Georgia (1966), Hawaii (1941), Idaho (1943), Illinois (1941), Indiana (1941), Iowa (1963), Kentucky (1942), Maine (1941), Maryland (1941), Massachusetts (1941), Michigan (1941), Minnesota (1943), Mississippi (1956), Missouri (1947), Nebraska (1947), Nevada (1949), New Hampshire (1941), New Jersey (1947), New York (1966), North Carolina (1947), North Dakota (1943), Oklahoma (1959), Oregon (1947), Pennsylvania (1972), Rhode Island (1947), South Carolina (1948), South Dakota (1941), Tennessee (1941), Texas (1955), Utah (1953), Vermont (1941), Virginia (1942), Washington (1943), West Virginia (1953), Wisconsin (1941), Wyoming (1941).

§ 9.03(a)(34) Uniform Statutory Form Power of Attorney Act. n69

Approved in 1988. Adopted in 3 states: California (1990), Colorado (1992), Wisconsin (1992).

§ 9.03(a)(35) Uniform Statutory Rule Against Perpetuities. n70

Approved in 1986, amended in 1990. Incorporated into the 1990 revision of the Uniform Probate Code and into the freestanding Uniform Act on Intestacy, Wills and Donative Transfers. Adopted in 20 states: California (1991), Colorado (1991), Connecticut (1989), Florida (1988), Georgia (1990), Hawaii (1992), Indiana (1991), Kansas (1992), Massachusetts (1989), Michigan (1988), Minnesota (1987), Montana (1989), Nebraska (1989), Nevada (1987), New Jersey (1991), New Mexico (1992), North Dakota (1991), Oregon (1989), South Carolina (1987), West Virginia (1992).

§ 9.03(a)(36) Uniform Statutory Will Act. n71

Approved in 1984. Adopted in 2 states: Massachusetts (1987), New Mexico (1991).

§ 9.03(a)(37) Uniform Succession Without Administration Act. n72

Approved in 1983. Drawn from the Uniform Probate Code. No adoptions.

§ 9.03(a)(38) Uniform Testamentary Additions to Trusts Act. n73

Approved in 1991. Originally approved in 1960. 1991 Act incorporated into Uniform Probate Code as revised in 1990;

1960 act incorporated into Uniform Probate Code as it existed prior to revision in 1990. 1991 Act adopted in 5 states: Hawaii (1992), New Mexico (1993), North Dakota (1993, eff. 1995), Ohio (1992), West Virginia (1992). n74 1960 Act n75 adopted in 41 jurisdictions: Alaska (1972), Arizona (1961), Arkansas (1963), California (1965), Delaware (1988), Colorado (1967), Connecticut (1961), District of Columbia (1966), Florida (1961), Georgia (1968), Idaho (1963), Illinois (1955), Indiana (1953), Iowa (1963), Kansas (1968), Kentucky (1966), Maine (1963), Maryland (1959), Massachusetts (1963), Michigan (1962), Minnesota (1963), Mississippi (1958), Montana (1959), Nebraska (1974), Nevada (1967), New Hampshire (1961), New Jersey (1962), New York (1966), North Carolina (1955), North Dakota (1961), Ohio (1961), Oklahoma (1961), Oregon (1969), Pennsylvania (1957), South Carolina (1961), South Dakota (1963), Tennessee (1961), Texas (1961), Utah (1961), Vermont (1961), Washington (1965), Wyoming (1957).

§ 9.03(a)(39) Uniform Transfers to Minors Act. n76

Approved in 1983. Revises and restates Uniform Gifts to Minors Act, n77 which was originally adopted in 1956 and revised in 1966. Adopted in jurisdictions: Alabama (1986), Alaska (1990), Arizona (1988), Arkansas (1985), California (1984), Colorado (1984), District of Columbia (1986), Florida (1985), Georgia (1990), Hawaii (1985), Idaho (1984), Illinois (1985), Indiana (1989), Iowa (1986), Kansas (1985), Kentucky (1986), Louisiana (1987), Maine (1987), Maryland (1989), Massachusetts (1986), Minnesota (1985), Missouri (1985), Montana (1985), Nebraska (1992), Nevada (1985), New Hampshire (1985), New Jersey (1987), New Mexico (1989), North Carolina (1987), North Dakota (1985), Ohio (1986), Oklahoma (1986), Oregon (1985), Pennsylvania (1992), Rhode Island (1985), South Dakota (1986), Tennessee (1992), Utah (1990), Virginia (1988), Washington (1991), West Virginia (1986), Wisconsin (1987-89), Wyoming (1987).

§ 9.03(a)(40) Uniform Trustees' Powers Act. n78

Approved in 1964. Adopted in 16 states: Arizona (1984), Florida (1974), Hawaii (1985), Idaho (1965), Kansas (1968), Kentucky (1976), Maine (1979), Michigan (1978), Mississippi (1966), Nebraska (1980), New Hampshire (1969), New Mexico (1975), Oregon (1977), South Carolina (1990), Utah (1975), Wyoming (1965).

§ 9.03(a)(41) Uniform Trusts Act. n79

Approved in 1937. Adopted in 6 states: Louisiana (1964), Nevada (1941), New Mexico (1951), North Carolina (1939), Oklahoma (1941), South Dakota (1943).

§ 9.03(a)(42) Uniform Vendor and Purchaser Risk Act. n80

Approved in 1935. Adopted in 12 states: California (1947), Hawaii (1941), Illinois (1963), Michigan (1941), Nevada (1977), New York (1963), North Carolina (1959), Oklahoma (1965), Oregon (1955), South Dakota (1937), Texas (1989), Wisconsin (1941).

§ 9.03(b) Model Acts and Codes.

§ 9.03(b)(1) Model Eminent Domain Code. n81

Approved in 1974. Originally approved as the Uniform Eminent Domain Code in 1974 and changed to a model act in 1984. Adopted in 1 state: Alabama (1985).

§ 9.03(b)(2) Model Land Sales Practices Act. n82

Approved in 1966, changed from a Uniform Act to a Model Act in 1969. Adopted in 10 states: Alaska (1968), Connecticut (1969), Florida (1967, to be repealed in 1995), Hawaii (1967), Idaho (1972), Kansas (1967), Minnesota (1973), Montana (1969), South Carolina (1968), Utah (1973).

§ 9.03(b)(3) Model Real Estate Cooperative Act. n83

Approved in 1981. Closely parallels the Uniform Condominium Act and the Uniform Planned Community Act. Adopted in 1 state: Virginia (1982).

§ 9.03(b)(4) Model Real Estate Time-Share Act. n84

Approved as a uniform act in 1979; re-designated as a model act in 1980. Borrowed from and drafted to be consistent with the Uniform Condominium Act. Adopted in 3 states: Massachusetts (1987), Rhode Island (1984), Wisconsin (1987-89).

§ 9.03(b)(5) Model Surface Use and Mineral Development Accommodation Act. n85

Approved in 1990. No adoptions.

FOOTNOTES:
(n1)Footnote 24. 8A U.L.A. 1.

(n2)Footnote 25. 8B U.L.A. 1.

(n3)Footnote 26. 8A U.L.A. 133.

(n4)Footnote 27. 7 U.L.A. 231.

(n5)Footnote 28. 7 U.L.A. 421.

(n6)Footnote 29. 12 U.L.A. Supp.

(n7)Footnote 30. 7 U.L.A. Supp.

(n8)Footnote 31. 8A U.L.A. 149.

(n9)Footnote 32. 8A U.L.A. 161.

(n10)Footnote 33. 8A U.L.A. 179.

(n11)Footnote 34. 8A U.L.A. 191.

(n12)Footnote 35. 8A U.L.A. 207, 267.

(n13)Footnote 36. 8A U.L.A. 267.

(n14)Footnote 37. 8A U.L.A. 207.

(n15)Footnote 38. 7A U.L.A. Supp.

(n16)Footnote 39. 8A U.L.A. 331, 349.

(n17)Footnote 40. 8A U.L.A. 331.

(n18)Footnote 41. 8A U.L.A. 349.

(n19)Footnote 42. 7A U.L.A. 359.

(n20)Footnote 43. 7A U.L.A. 373.

(n21)Footnote 44. 7A U.L.A. 373.

(n22)Footnote 45. 7A U.L.A. 359.

(n23)Footnote 46. 7A U.L.A. 427.

(n24)Footnote 47. 7A U.L.A. 639.

(n25)Footnote 48. 8A U.L.A. 317, 405.

(n26)Footnote 49. 8A U.L.A. 405.

(n27)Footnote 50. 8A U.L.A. 317.

(n28)Footnote 51. 8A U.L.A. Supp.

(n29)Footnote 52. 7A U.L.A. Supp.

(n30)Footnote 53. 13 U.L.A. 469.

(n31)Footnote 54. 14 U.L.A. 125.

(n32)Footnote 55. 9A U.L.A. 97.

(n33)Footnote 56. 13 U.L.A. Supp.

(n34)Footnote 57. 8B U.L.A. 191.

(n35)Footnote 58. 7B U.L.A. 1.

(n36)Footnote 59. 9B U.L.A. 369.

(n37)Footnote 60. 8 U.L.A. 1.

(n38)Footnote 61. 8B U.L.A. 239.

(n39)Footnote 62. 14 U.L.A. 233.

(n40)Footnote 63. 14 U.L.A. 125.

(n41)Footnote 64. 7B U.L.A. 427.

(n42)Footnote 65. 14 U.L.A. 249.

(n43)Footnote 66. 8B U.L.A. 253, 267.

(n44)Footnote 67. 8B U.L.A. 253.

(n45)Footnote 68. 8B U.L.A. 267.

(n46)Footnote 69. 8B U.L.A. 299.

(n47)Footnote 70. 8B U.L.A. 321.

(n48)Footnote 71. 8B U.L.A. 383.

(n49)Footnote 72. 8B U.L.A. 413.

(n50)Footnote 73. 8B U.L.A. 451, 461.

(n51)Footnote 74. 8B U.L.A. 451.

(n52)Footnote 75. 8B U.L.A. 461.

(n53)Footnote 76. 8B U.L.A. 497.

(n54)Footnote 77. 8A U.L.A. 367.

(n55)Footnote 78. 7B U.L.A. 741.

(n56)Footnote 79. 7B U.L.A. 763.

(n57)Footnote 80. 14 U.L.A. 469.

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(n60)Footnote 83. 7B U.L.A. 225.

(n61)Footnote 84. 7B U.L.A. 351.

(n62)Footnote 85. 14 U.L.A. Supp.

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CHAPTER 9 UNIFORM AND MODEL LAWS RELATED TO PROPERTY

2-9 Thompson on Real Property, Thomas Editions § 9.04

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§ 9.04 Summaries of Principal Property-Related Uniform Laws.

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(n1)Footnote 86. 7 U.L.A. 231.

(n2)Footnote 87. 7 U.L.A. 421.

(n3)Footnote 88. 12 U.L.A. Supp.

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(n5)Footnote 90. 7A U.L.A. Supp.

(n6)Footnote 91. 7A U.L.A. 639.

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(n8)Footnote 93. 13 U.L.A. 469.

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(n10)Footnote 95. 7B U.L.A. 1.

(n11)Footnote 96. 7B U.L.A. 427.

(n12)Footnote 97. 14 U.L.A. 249.

(n13)Footnote 98. 8A U.L.A. Supp.

(n14)Footnote 99. *Id.*

(n15)Footnote 100. 14 U.L.A. 469.

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CHAPTER 9 UNIFORM AND MODEL LAWS RELATED TO PROPERTY

2-9 Thompson on Real Property, Thomas Editions § 9.05

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Sec. 4-105. Same; Time-Share Securities.

Sec. 4-106. Purchaser's Right to Cancel.

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FOOTNOTES:

(n1)Footnote 101. 13 U.L.A. 1.

(n2)Footnote 102. 7A U.L.A. 669.

(n3)Footnote 103. 7B U.L.A. 225.

(n4)Footnote 104. 7B U.L.A. 351.

(n5)Footnote 105. 14 U.L.A. Supp.

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CHAPTER 9 UNIFORM AND MODEL LAWS RELATED TO PROPERTY

2-9 Thompson on Real Property, Thomas Editions § 9.06

AUTHOR: Professor David A. Thomas J. Reuben Clark Law School Brigham Young University

§ 9.06 Evaluative Comment on Uniform and Model Laws.

The original impetus for the uniform law movement was the assumption that uniformity of law between the states was highly desirable and that, because of that desirability, thoughtfully drafted laws of common interest would be eagerly adopted by the respective state legislatures. The assumption of desirability was premised in part on the notions that (1) state legislatures and courts all sought to adhere to fundamental common law principles and therefore would rather be similar than different; (2) the burgeoning mass of reported decisions and state legislation made it increasingly difficult to determine what legal principles other states' courts and legislatures were following; and (3) if states did not act in a satisfactorily common fashion in certain legal areas, pressure would build for federal intrusion, either by federal courts or the Congress.

Those assumptions were mostly wrong, were demonstrably so at the outset of the uniform laws projects, and have become even more so with the passage of time. In areas of law left to states under the American constitutional system, it could be argued that diversity and pluralism are as useful as uniformity. The growing mass of laws and decisions did indeed make it difficult to monitor the activities of other states, but that became less important if one did not dogmatically insist on uniformity between the states. In any event, in the present generation, technology has made the task of monitoring manageable, if one wishes to undertake it. The fears of federal preemption were well-founded, although it is a reasonable speculation that preemption would have occurred regardless of how fully states coordinated their jurisprudence through uniformity.

The invalidity of basic assumptions underlying the uniform law movement is necessarily part of the reason why so many of the laws, all thoughtfully drafted and reviewed, have been ignored by the state legislatures. For the most part, the uniform laws have not represented the gems of legal truth for which state legislators have been earnestly seeking. Moreover, in most instances, they have not promoted uniformity, but have only added another element to the variety of approaches taken by states' laws on any given topic. Indeed, not only do many states insert their own subjective variations into the uniform laws they do adopt, but then the various state courts apply and interpret those "uniform" laws in their own characteristically independent manner. It thus seems evident now that uniformity of state legislation on important legal topics, as envisioned by the early commissioners, is a chimera.

Of what value, then, are the uniform and model laws? At the very least, the uniform and model laws represent examples

of thoughtful legislative drafting on topics of general interest to the states. State legislators recognizing the need for positive law on a particular topic, but lacking the will or means to undertake an original study of the subject, would do well to begin with available relevant uniform laws. In many instances, lawmakers will find the uniform laws product quite suitable; in other cases, perhaps the policy choices unavoidably imbedded in the commissioners' codes will not be acceptable, and a different direction will be sought. In either case, the uniform law may serve as a useful reference point and resource. It could be fairly said that the uniform and model laws have raised the quality of legislative drafting throughout the states, even if most individual uniform laws themselves have not been widely adopted.

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Supp. To CHAPTER 9 UNIFORM AND MODEL LAWS RELATED TO PROPERTY

2-9 Thompson on Real Property, Thomas Editions Supp. to § 9.02

Supp. to § 9.02 Organization of the National Conference of Commissioners on Uniform State Laws

[Go To Main]

§ 9.02(b) How the National Conference Has Conducted Its Work [Go To Main]

§ 9.02(b)(2) Early Criticism of the National Conference's Work

At end of subsection add new Note 16.1: n16.1

FOOTNOTES:
(n1)Footnote 16.1. *See* David A. Thomas, *Restatements Relating to Property: Why Lawyers Don't Really Care,* 38 Real Prop., Prob. & Tr. J. 655 (Winter, 2004).

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Supp. To CHAPTER 9 UNIFORM AND MODEL LAWS RELATED TO PROPERTY

2-9 Thompson on Real Property, Thomas Editions Supp. to § 9.03

Supp. to § 9.03 Overview of the Property-Related Uniform Laws and Their Adoptions.

[Go To Main]

Add, at end of section:

Adoptions refer to both verbatim and substantially similar adoptions.

§ 9.03(a) Uniform Acts. [Go To Main]

At end of subsection add new Note 23.1: n23.1

§ 9.03(a)(1) Uniform Absence as Evidence of Death and Absentees' Property Act.

Add:

Superseded and withdrawn from recommendation in 1981.

§ 9.03(a)(3) Uniform Ancillary Administration of Estates Act.

Add:

Superseded and withdrawn from recommendation in 1978.

2008 Act adopted in 1 state: Delaware (2009).

Change:

***footnote from* 8A U.L.A. 133 *to* 8A U.L.A. 157.**

§ 9.03(a)(4) Uniform Common Interest Ownership Act.

Change *footnote from* 7 (part I) U.L.A. 471 *to* 7 (Part IB) U.L.A. 223.

At end of subsection add new Note 27.1: n27.1

§ 9.03(a)(5) Uniform Condominium Act.

Add:

(Although the following states have not adopted the entire Uniform Condominium Act, they have adopted substantial portions of the Act: Louisiana (1979), Nebraska (1983), and New Hampshire (1977)).

Add:

Louisiana (1979), Nebraska (1983), and New Hampshire (1977).

Change:

***footnote from* 7 (Part II) U.L.A. *to* 7 (Part II) U.L.A. 485.**

Delete:

Parenthetical added to Page 57. Note 28.

§ 9.03(a)(6) Uniform Conservation Easement Act.

Switch:

Alaska (1989) (should be second) and Alabama (1997) (should be first).

Add:

Oklahoma (1999).

Add:

Arkansas (1983), Virgin Islands (2006), Wyoming (2005).

Change:

***footnote from* 12 U.L.A. 199 to 12 U.L.A. 165.**

§ 9.03(a)(7) Uniform Construction Lien Act.

Change:

***footnote from* 7 (Part II) U.L.A. 381 to 7 (Part III) U.L.A. 1.**

At end of subsection add new Note 30.1: n30.1

§ 9.03(a)(8) Uniform Disclaimer of Property Interests Act.

1978 Act was replaced by the 1999 Act. The following states have either repealed the 1978 Act and then adopted the 1999 Act; or merely adopted the 1999 Act: Arizona (2005), Arkansas (2003), Delaware (2006), District of Columbia (2006), Florida (2005), Hawaii (2000), Indiana (2003), Iowa (2004), Maryland (2004), Massachusetts (2008), Nevada (2007), New Mexico (2001), North Dakota (2001), Oregon (2001), Virginia (2003), West Virginia (2002).

***Change footnote from* 8A U.L.A. 149 *to* 8A U.L.A. 159; 8A U.L.A. 191.**

§ 9.03(a)(9) Uniform Disclaimer of Transfers by Will, Intestacy or Appointment Act.

Add:

Superseded and withdrawn from recommendation in 2001.

***Change footnote from* 8A U.L.A. 161 *to* 8A U.L.A. 209.**

§ 9.03(a)(10) Uniform Disclaimer of Transfers Under Nontestamentary Instruments Act.

Add:

Superseded and withdrawn from recommendation in 2001.

***Change footnote from* 8A U.L.A. 179 *to* 8A U.L.A. 211.**

§ 9.03(a)(11) Uniform Disposition of Community Property Rights at Death Act.

Superseded and withdrawn from recommendation in 2001.

***Change footnote from* 8A U.L.A. 191 *to* 8A U.L.A. 213.**

§ 9.03(a)(12) Uniform Disposition of Unclaimed Property Act.

Add:

The 1966 Act was superseded and withdrawn from recommendation in 1981.

The 1954 Act was superseded and withdrawn from recommendation in 1984.

***Change footnote from* 8A U.L.A. 207, 267 *to* 8A U.L.A. 229, 231.**

In 1997, West Virginia in 1997 amended its laws that previously conformed to the 1954 Uniform Disposition of Unclaimed Property Act so that they now constitute an adoption of the 1995 Uniform Unclaimed Property Act.

In 1999, Arkansas repealed the 1966 Uniform Disposition of Unclaimed Property Act and enacted in lieu thereof the 1995 Uniform Unclaimed Property Act.

In 1973, Alabama amended the 1954 Uniform Act so that it now conforms substantially to the 1966 Revised Uniform Act.

In 1990, Georgia repealed the 1966 Uniform Disposition of Unclaimed Property Act, and enacted in lieu thereof the 1981 Uniform Unclaimed Property Act. Note, however, that the title of the Georgia act continues to be the "Disposition of Unclaimed Property Act."

In 1983, Hawaii repealed the 1966 Uniform Disposition of Unclaimed Property Act, and enacted in lieu thereof the 1981 Uniform Unclaimed Property Act.

In 1988, Maine repealed the 1966 Uniform Disposition of Unclaimed Property Act, and enacted in lieu thereof the Unclaimed Property Act of 1981.

In 1983, Montana amended its laws which previously had conformed substantially to the Uniform Disposition of Unclaimed Property Act of 1966, so that it now conforms substantially to the Uniform Unclaimed Property Act of 1981.

In 1989, New Mexico amended, repealed, and reenacted the Uniform Disposition of Unclaimed Property Act so that the New Mexico act now substantially conforms to the Uniform Unclaimed Property Act of 1981.

In 1985, North Dakota repealed the Uniform Disposition of Unclaimed Property Act and enacted in lieu thereof the Uniform Unclaimed Property Act.

In 1991, the Oklahoma Act, which formerly conformed to the Uniform Disposition of Unclaimed Property Act of 1966, has been amended so that it now conforms substantially to the Uniform Unclaimed Property Act of 1981.

In 1986, Rhode Island repealed the 1966 Uniform Disposition of Unclaimed Property Act and enacted in lieu thereof the Unclaimed Property Act of 1981.

In 1988, South Carolina repealed the 1966 Uniform Disposition of Unclaimed Property Act and enacted in lieu thereof the Unclaimed Property Act of 1981.

In 1992, South Dakota repealed the South Dakota Uniform Disposition of Unclaimed Property Act (1966) and enacted in lieu thereof the Uniform Unclaimed Property Act (1981).

In 1983, Wisconsin repealed the former chapter 177 state statute that substantially conformed to the

Uniform Disposition of Unclaimed Property Act of 1966 and enacted in lieu thereof a new chapter 177 that substantially conforms to the Uniform Unclaimed Property Act of 1981.

At end of subsection add new Note 35.1: n35.1

§ 9.03(a)(13) Uniform Dormant Mineral Interests Act.

Add:

Washington (1984).

***Change footnote from* 7A (Part I) U.L.A. Supp. *to* 7A (Part I) U.L.A. 194.**

§ 9.03(a)(14) Uniform Estate Tax Apportionment Act.

Add:

In 2000, Michigan repealed the Uniform Estate Tax Apportionment Act of 1958.

Both the 1958 and 1964 Acts were withdrawn from recommendation in 2003, having been superseded by the Uniform Estate Tax Apportionment Act of 2003.

The following states adopted the 2003 Act: Alabama (2007), Arkansas (2007), Idaho (2004), Massachusetts (2008), New Mexico (2005), Washington (2005).

***Change footnote from* 8A U.L.A. 331, 349 *to* 8A U.L.A. 261; 8A U.L.A 281; 8A U.L.A Supp.**

***Change footnote from* 8A U.L.A. 331 *to* 8A U.L.A. 261.**

***Change footnote from* 8A U.L.A. 349 *to* 8A U.L.A. 281.**

§ 9.03(a)(15) Uniform Federal Lien Registration Act.

***Change footnote from* 7A U.L.A. 359 *to* 7A (Part I) U.L.A. 328.**

***Change footnote from* 7A U.L.A. 373. *to* 7A (Part I) U.L.A. 328.**

§ 9.03(a)(16) Uniform Federal Tax lien Registration Act.

Add:

The 1966 Act was superseded and withdrawn from recommendation in 1978.

***Change footnote from* 7A U.L.A. 373 *to* 7A (Part I) U.L.A. 363.**

***Change footnote from* 7A U.L.A. 359 *to* 7A (Part I) U.L.A. 363.**

***Change footnote from* 7A U.L.A. 427 *to* 7A (Part 1I) U.L.A. 1.**

§ 9.03(a)(17) Uniform Fraudulent Conveyance Act.

Add:

Arizona (1990), California (1986), Delaware (1996), Idaho (1987), Massachusetts (1996), Michigan (1998), Minnesota (1987), Montana (1991), Nebraska (1989), Nevada (1987), New Hampshire (1998), New Jersey (1989), New Mexico (1989), North Dakota (1985), Ohio (1990), Oklahoma (1986), Pennsylvania (1993), South Dakota (1987), Washington (1998), Wisconsin (1998) and Wyoming (2006) repealed the Uniform Fraudulent Conveyance Act, and enacted in lieu thereof the Uniform Fraudulent Transfer Act.

***Change footnote from* 7A U.L.A. 427 *to* 7A (Part II) U.L.A. 2.**

§ 9.03(a)(18) Uniform Fraudulent Transfer Act.

Add:

Kansas (1998), Michigan (1998).

Georgia (2002), Mississippi (2006), Tennessee (2003), Wyoming (2006).

Change:

Indiana (1994) to Indiana (2002) (in 2002, Indiana repealed the former provisions of the Uniform Fraudulent Transfer Act and adopted the 1984 Act).

***Change footnote from* 7A U.L.A. 639 *to* 7A (Part II) U.L.A. 2.**

§ 9.03(a)(19) Uniform Gifts to Minors Act.

Add:

In 1987, New Jersey repealed the 1966 Gifts to Minors Act, but the repeal was not effective until July 1, 2007.

Add:

Both the 1956 Act and the 1966 Revised Act have been superseded and withdrawn from recommendation in 1984.

Florida (1985), Louisiana (1986), Michigan (1998), North Carolina (1987), Rhode Island (1985), and Virgin Islands (2001) have repealed the Uniform Gifts to Minors Act (1956) and enacted in lieu thereof the Uniform Transfers to Minors Act.

Alabama (1986), Alaska (1990), Arizona (1988), Arkansas (1985), California (1984), Colorado (1984), Connecticut (1995), Delaware (), District of Columbia (1986), Georgia (1990), Hawaii (1985), Idaho (1984), Illinois (1986), Indiana (1989), Iowa (1986), Kansas (1985), Kentucky (1966), Maine (1988), Maryland (1989), Massachusetts (1986), Minnesota (1985), Mississippi (1994), Missouri (1985), Montana (1985), Nebraska (1992), New Hampshire (1985), New Mexico (1989), North Dakota (1985), Oklahoma (1986), Pennsylvania (1992), South Dakota (1986), Tennessee (1992), Texas (1995), Utah (1990), Virginia (1988), Washington (1991), Wisconsin (1989), and Wyoming (1987) have repealed the Uniform Gifts to Minors Act (1966) and enacted in lieu thereof the Uniform Transfers to Minors Act.

Ohio (1986) has amended the Uniform Gifts to Minors Act (1956) so that it now constitutes a substantial adoption of the Uniform Transfers to Minors Acts.

Nevada (1985), Oregon (1985), and West Virginia have amended the Uniform Gifts to Minors Act (1966) so that it now constitutes a substantial adoption of the Uniform Transfers to Minors Acts.

***Change footnote from* 8A U.L.A. 317, 405 *to* 8A U.L.A. 297, 299.**

***Change footnote from* 8A U.L.A. 405 *to* 8c U.L.A. 299.**

***Change footnote from* 8A U.L.A. 317 *to* 8A U.L.A. 297.**

***Change footnote from* 8A U.L.A. Supp. *to* 8C U.L.A. 1.**

§ 9.03(a)(20) Uniform Land Security Interest Act.

Add:

Withdrawn from recommendation in 1999.

***Change footnote from* 7A U.L.A. Supp. *to* 7A (Part II) U.L.A. 244.**

§ 9.03(a)(21) Uniform Land Transaction Act.

***Change footnote from* 13 U.L.A. 469. *to* 13 (Part II) U.L.A. 160.**

At end of subsection add new Note 51.1: n51.1

§ 9.03(a)(22) Uniform Law on Notarial Acts.

Add:

New Hampshire (2005).

***Change footnote from* 14 U.L.A. 125 *to* 14 U.L.A. 201.**

At end of subsection add new Note 52.1: n52.1

§ 9.03(a)(23) Uniform Marital Property Act.

***Change footnote from* 9A U.L.A. 97 *to* 9A (Part I) U.L.A. 103.**

§ 9.03(a)(24) Uniform Marketable Title Act.

***Change footnote from* 13 U.L.A. Supp. *to* 13 (Part II) U.L.A. 305.**

§ 9.03(a)(25) Uniform Non-probate Transfers on Death Act.

Add:

District of Columbia (2001), Georgia (1999), New York (2005), North Carolina (2005), Rhode Island (1998), South Carolina (1997), Tennessee (1995), Vermont (1999).

Change:

Indiana (1997) *to* Indiana (2002).

Michigan (1996) *to* Michigan (1998).

***Change footnote from* 8B U.L.A. 191 *to* 8B U.L.A. 45.**

At end of subsection add new Note 55.1: n55.1

§ 9.03(a)(26) Uniform Planned Community Act.

***Change footnote from* 7B U.L.A. 1 *to* 7A (Part III) U.L.A. 233.**

Add:

North Carolina (1998).

At end of subsection add new Notes 56.1 and 56.2: n56.1 n56.2

§ 9.03(a)(27) Uniform Premarital Agreement Act.

***Change footnote from* 9B U.L.A. 369 *to* 9B U.L.A. 35.**

At end of subsection add new Note 57.1: n57.1

§ 9.03(a)(28) Uniform Probate Code.

Add:

Massachusetts (2008), New Jersey (2004).

Change:

Michigan (1978) *to* Michigan (1998) (in 1998, Michigan revised its Probate Code).

***Change footnote from* 8 U.L.A. 1 *to* 8 (Part I) U.L.A. 1.**

§ 9.03(a)(29) Uniform Probate of Foreign Wills Act.

Add:

Withdrawn from recommendation in 1978.

***Change footnote from* 8B U.L.A. 239 *to* 8B U.L.A. 129.**

§ 9.03(a)(30) Uniform Recognition of Acknowledgements Act.

Add:

Virgin Islands (1981).

Add:

Superseded and withdrawn from recommendation in 1984.

***Change footnote from* 14 U.L.A. 233 *to* 14 U.L.A. 341.**

***Change footnote from* 14 U.L.A. 125 *to* 14 U.L.A. 201.**

§ 9.03(a)(31) Uniform Residential Landlord and Tenant Act.

Add:

Alabama (2006), Connecticut (1979), Michigan (1972), Mississippi (1991), Oklahoma (1978), Washington (1973).

***Change footnote from* 7B U.L.A. 427 *to* 7B U.L.A. 285.**

***Change footnote from* 14 U.L.A. 249 *to* 14 U.L.A 343**

At end of subsection add new Note 62.1: n62.1

§ 9.03(a)(32) Uniform Simplification of Land Transfers Act.

change from 14 U.L.A. 249 to 14 U.L.A. 343.

§ 9.03(a)(33) Uniform Simultaneous Death Act.

Add:

Virgin Islands (1957).

In 2008, Massachusetts repealed the Uniform Simultaneous Death Act (1940), and enacted the Uniform Simultaneous Death Act (1993) to become effective on July 1, 2001.

In 2001, District of Columbia revised the 1940 Act, and adopted the 1993 Uniform Simultaneous Death Act.

In 1998, Michigan repealed the original Uniform Simultaneous Death Act, effective April 1, 2000.

In 1999, Oregon repealed the original Uniform Simultaneous Death Act.

Change:

Kentucky (1992) *to* Kentucky (1998).

Add:

The following jurisdictions have either revised or repealed the 1940 Act and adopted the 1993 Act: Arkansas (2005), District of Columbia (2001), Oregon (1999), Wisconsin (1997).

North Carolina (2007), Ohio (2002), Washington (2007) to the jurisdictions that have adopted the 1993 Act.

***Change footnote from* 8B U.L.A. 253, 267 *to* 8B U.L.A. 141; 8B U.L.A. 159.**

***Change footnote from* 8B U.L.A. 253 *to* 8B U.L.A. 141.**

***Change footnote from* 8B U.L.A. 267 *to* 8B U.L.A. 159.**

Delete:

In 2001, District of Colombia

In 1999, Oregon

Add:

Parenthetical to Virgin Islands (1957) *explaining that jurisdiction adopted 1940 Act.*

§ 9.03(a)(34) Uniform Statutory Form Power of Attorney Act.

Add:

Arkansas (1999), District of Columbia (1998), Ohio (2005).

Change:

Approved in 1998 *to* 1988.

***Change footnote from* 8B U.L.A. 299 *to* 8B U.L.A. 191.**

§ 9.03(a)(35) Uniform Statutory Rule Against Perpetuities.

Add:

Arkansas (2007), District of Columbia (2001), Virginia (2000).

In 2003, Utah amended the provisions of Utah's Uniform Statutory Rule Against Perpetuities such that it can no longer constitute an adoption of the uniform act.

Change:

Indiana (1991) *to* Indiana (2002)

Remove:

Utah (1998)

***Change footnote from* 8B U.L.A. 321 *to* 8B U.L.A. 223.**

At end of subsection add new Note 68.1: n68.1

§ 9.03(a)(36) Uniform Statutory Will Act.

Add:

Withdrawn from recommendation in 1996.

***Change footnote from* 8B U.L.A. 383 *to* 8B U.L.A. 293.**

§ 9.03(a)(37) Uniform Succession Without Administration Act.

Add:

Withdrawn from recommendation in 1998.

***Change footnote from* 8B U.L.A. 413 *to* 8B U.L.A. 321.**

§ 9.03(a)(38) Uniform Testamentary Additions to Trusts Act.

Add:

Idaho (1999), Nebraska (1999), North Carolina (2007) and Virginia (1999) to the list of jurisdictions which have adopted the 1991 Act.

In 2008, Massachusetts repealed the Uniform Testamentary Additions to Trusts Act (1960) and enacted the Uniform Testamentary addition to Trusts Act (1991) to become effective on July 1, 2011.

Modify the text of § 9.03(a)(38) by adding and removing the information indicated below:

1991 Act: add North Carolina (2007), Utah (1998).

1960 Act: change 27 states to 28 states; delete North Dakota (1961).

In 1999, Idaho amended the Uniform Testamentary Additions to Trusts Act (1960) so that it now constitutes an adoption of the major provisions of the Uniform Testamentary Additions to Trusts Act (1991).

In 1998, Kentucky repealed the Uniform Testamentary Additions to Trusts Act (1960) and enacted in lieu thereof the Uniform Testamentary Additions to Trusts Act (1991).

In 2000, Michigan repealed the Uniform Testamentary Additions to Trusts Act (1960).

In 1999, Nebraska amended the Uniform Testamentary Additions to Trusts Act (1960) so that it now constitutes an adoption of the major provisions of the Uniform Testamentary Additions to Trusts Act (1991).

In 1973, North Dakota repealed the Uniform Testamentary Additions to Trusts Act (1960) and reenacted said Uniform Act as part of the North Dakota Uniform Probate Code. In 1993, North Dakota amended its Uniform Probate Code so that said provision constitutes an adoption of the Uniform Testamentary Additions to Trusts Act (1991), effective January 1, 1996.

In 1992, West Virginia amended the provisions which had constituted the Uniform Testamentary Additions to Trusts Act (1960) so that such provisions now constitute an adoption of the Uniform Testamentary Additions to Trusts Act (1991).

***Change footnote from* 8B U.L.A. 451, 467 *to* 8B U.L.A. 355; 8B U.L.A. 367.**

***Change footnote from* 8B U.L.A. 451 *to* 8B U.L.A. 355.**

***Change footnote from* 8B U.L.A. 467 *to* 8B U.L.A. 367.**

§ 9.03(a)(39) Uniform Transfers to Minors Act.

Delete:

Nebraska (1974), North Carolina (1955), North Dakota (1961), Michigan (1962)

Add:

Virgin Islands (2001).

Change:

Ohio (1986) *to* Ohio (2006) (repealed the 1986 act and reenacted the Uniform Transfers to Minors Act in 2006).

***Change footnote from* 8B U.L.A. 497 *to* 8C U.L.A. 1.**

***Change footnote from* 8A U.L.A. 367 *to* 8A U.L.A. 297, 299.**

At end of subsection add new Note 74.1 n74.1

§ 9.03(a)(40) Uniform Trustees' Power Act.

Add:

The following states repealed the Uniform Trustee's Powers Act and enacted the Uniform Trust Code: Florida (2006), Kansas (2002), Maine (2004), Nebraska (2003), New Mexico (2003), Oregon (2005), South Carolina (2005), Utah (2004).

The following states repealed earlier versions of their Uniform Trustees' Powers Act and reenacted a newer version: Michigan (1998), Wyoming (2003).

***Change from* 7B U.L.A. 741 *to* 7C U.L.A. 675.**

§ 9.03(a)(41) Uniform Trusts Act.

Add:

Virgin Islands (1957).

Superseded and withdrawn from recommendation in 1984.

Change:

Wyoming (1965) to Wyoming (2003).

Delete:

Kansas (1968), Maine (1979), Nebraska (1980), New Mexico (1975), Oregon (1977), South Carolina (1990), Utah (1975) from list of jurisdictions adopting the Uniform Trustee's Powers Act.

***Change from* 7B U.L.A. 763 *to* 7C U.L.A. 723.**

Renumber Uniform Vendor and Purchaser Risk Act to § 9.03(a)(44) and add new sections § 9.03(a)(42). Trust Code, and § 9.03(a)(43). Uniform Unclaimed Property Act:

§ 9.03(a)(42) Uniform Trust Code.

Add: Alabama (2006), Arizona (2008), Arkansas (2005), District of Columbia (2004), Florida (2006), Kansas (2002), Maine (2004), Missouri (2004), Nebraska (2003), New Hampshire (2004), New Mexico (2003), North Carolina (2005), North Dakota (2007), Ohio (2006), Oregon (2005), Pennsylvania (2006), South Carolina (2005), Tennessee (2004), Utah (2004), Virginia (2005), Wyoming (2003).

§ 9.03(a)(43) Uniform Unclaimed Property Act

Add:

Adopted in 12 states. Alabama (2004), Arizona (2001), Hawaii (2008), Indiana (2002), Kansas (2000), Louisiana (1997), Maine (1997), Montana (1997), Nevada (2007), New Mexico (1997), North Carolina (2000), Vermont (2006), Virgin Islands (2008), West Virginia (1997). *See also* n. 9, Ch. 91, in vol. 11.

§ 9.03(a)(44) Uniform Vendor and Purchaser Risk Act.

***Change footnote from* 14 U.L.A. 469 *to* 14 U.L.A 689.**

§ 9.03(b) Model Acts and Codes. [Go To Main]

§ 9.03(b)(1) Model Eminent Domain Code.

***Change footnote from* 13 U.L.A. 1 to 13 (Part I) U.L.A. 1.**

§ 9.03(b)(2) Model Land Sales Practices Act.

***Change footnote from* 7A U.L.A. 669 to 7A (Part II) U.L.A. 205.**

Add:

In 2008, Florida repealed the provisions of the Model Land Sales Practices Act.

Delete:

Florida (1967, to be repealed in 1995)

§ 9.03(b)(3) Model Real Estate Cooperative Act.

Change footnote from 7B U.L.A. 225 to 7B U.L.A. 49.

Add:

Pennsylvania (1992)

§ 9.03(b)(4) Model Real Estate Time-Share Act.

Change footnote from 7B U.L.A. 351 to 7B U.L.A. 175.

Add:

Louisiana (1983), Massachusetts (1987)

§ 9.03(b)(5) Model Surface use and Mineral Development Accommodation Act.

Change footnote from 14 U.L.A. Supp. to 14 U.L.A. 515.

FOOTNOTES:
(n2)Footnote 23.1. Dale A. Whitman, *Transfers by Vendors of Interests in Installment Land Sales Contracts: The Impact of Revised Article 9 of the Uniform Commercial Code*, 38 Real Prop., Prob. & Tr. J. 421 (Fall, 2003).

(n3)Footnote 27.1. *Yacht Club II Homeowners Ass'n v. A.C. Excavating, 94 P.3d 1177 (Colo. App. 2003)* (*Colo. Rev. Stat. § 38-33.3-302(1)(d)*, patterned after Colorado's Uniform Common Interest Ownership Act, gave standing for homeowner association to pursue damages on behalf of individual homeowners).

(n4)Footnote 30.1. *First Union Natl. Bank v. RPB 2, LLC, 674 N.W.2d 1 (N.D. 2004)* (North Dakota's mechanic's lien statute, modernized in part by North Dakota's Uniform Construction Lien Act, does not require consideration for a signed writing waiving an individual's right to a mechanic's lien to be effective).

(n5)Footnote 35.1. *Canel v. Topinka, 818 N.E.2d 311 (Ill. 2004)* (ruling on the manner in which Illinois applies the Uniform Disposition of Unclaimed Property Act).

(n6)Footnote 51.1. *Lawson v. Menefee*, 132 S.W.3d (Ky. Ct. App. 2004) (court recognizes that the Uniform Land Transactions Act is not binding in Kentucky, but applied the Act's reasoning because it is consistent with Kentucky law and represents the proper approach to the case at bar).

(n7)Footnote 52.1. *In re Baxter, 320 B.R. 30* ; *2004 Bankr. LEXIS 2184 (Bkrtcy. D. Dist. Col. 2004)* (case comments on the adoption of the Uniform Law on Notarial Acts in the District of Columbia).

(n8)Footnote 55.1. *In re Estate of Blake, 856 A.2d 1151 (D.C. 2004)* (court remanded case to consider the effects of the Nonprobate Transfers Act had on determining ownership of Maryland joint bank accounts); Paul J. Buser, *Domestic Partner and Non-Marital Claims Against Probate Estates:* Marvin *Theories Put to A Different Use*, Family Law Quarterly (Summer, 2004) (argues that the Nonprobate Transfers Act is insufficient to protect non-married domestic partners).

(n9)Footnote 56.1. *Saw Creek Comm. Ass'n, Inc. v. County of Pike, 581 Pa. 436* ; *866 A.2d 260 (Pa. 2005)* (decision held that the real property in the instant case is exempt from separate tax assessment).

(n10)Footnote 56.2. *Burgoyne v. Pinecrest Community Ass'n, Pa.Super.2007, 924 A.2d 675* (applying the UPCA retroactively to condominiums created eight years before the UPCA became effective).

(n11)Footnote 57.1. *Cannon v. Cannon, 384 Md. 537* ; *865 A.2d 563 (Md. App. Ct. 2005)* (declining to adopt the UPAA over the common law in Maryland); *In re Marriage of Shirilla, 89 P.3d 1* (discussing the adoption of the UPAA in Montana); *Binek v. Binek, 673 N.W.2d 594* (discussing the UPAA in North Dakota).

(n12)Footnote 62.1. *Waldner v. Stephens, Or.2008, 200 P.3d 556* (holding that the Residential Landlord Tenant Act creates a separate action and does not prevent a tenant from bringing a common-law negligence claim against his landlord); *Burke v. Oxford House of Oregon Chapter V, 103 P.3d 1184 (Or. App. Ct. 2004)* (discussing the legislative history of the URLTA in Oregon); *Caudill v. Acton, 175 S.W.3d 617 (Ky. App. Ct. 2004)* (holding tenant liable for damages to leased premises, including damages occurring during holdover periods of possession under the URTLA).

(n13)Footnote 68.1. Fifty-one Flowers: Current Perpetuities Law in the States. Lynn Foster. *22 Prob. & Prop. 30* (July/August 2008) . *Larson Operating Co. v. Petroleum, Inc., 84 P.3d 626 (Kan. App. Ct. 2004)* (holding that the Uniform Statutory Rule Against Perpetuities was constitutionally enacted in Kansas).

(n14)Footnote 74.1. *In re Hudson, 687 N.W.2d 156 (Mich. Ct. App. 2004)* (relying on the UTMA to determine the custody of a child); *Mangiante v. Niemiec, 843 A.2d 656 (Conn. App. Ct. 2004)* (holding that the UTMA establishes a fiduciary relationship between the custodian and the minor); *Radakovich v. Radakovich, 846 A.2d 709* (ruling on several provisions of the Pennsylvania UTMA); *Richardson v. Amresco Residential Mort. Corp., 267 Va. 43, 592 S.E.2d 65 (Va. 2004)* (holding that mortgagees who only deal with guardians in individual capacity are not entitled to the safe harbor protections of the UTMA in Virginia).

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Supp. To CHAPTER 9 UNIFORM AND MODEL LAWS RELATED TO PROPERTY

2-9 Thompson on Real Property, Thomas Editions Supp. to § 9.04

Supp. to § 9.04 Summaries of Principal Property-Related Uniform Laws.

[Go To Main]

§ 9.04(a) Uniform Common Interest Ownership Act. [Go To Main]

Change footnote from 7 (Part I) U.L.A. 471 to 7 (Part IB U.L.A. 223)

Change

Sec. 1-104. Variation by Agreement. to Sec. 1-104. No Variation by Agreement.

Sec. 1-205. Same; Exception for Small Pre-Existing Cooperatives and Planned Communities. to Sec. 1-205. Applicability to Small Preexisting Cooperatives and Planned Communities.

Sec 2-116. Easement Rights. to Sec. 2-116. Easement and Use Rights.

Sec. 3-102. Powers of Unit Owners' Association. to Sec. 3-102. Powers and Duties of Unit Owners Association.

Sec. 3-105. Termination of Contracts and Leases of Declarant. to Sec. 3-105. Termination of Contracts and Leases.

Sec. 3-110. Voting; Proxies. to Sec. 3-110. Voting; Proxies; Ballots.

Sec. 3-115. Assessments for Common Expenses. to Sec. 3-115. Assessments.

Add:

Sec. 1-116. Relation to Electronic Signatures in Global and National Commerce Act.

Sec. 1-209. Other Exempt Real Estate Arrangements.

Sec. 1-210. Other Exempt Covenants.

Sec. 2-124. Termination Following Catastrophe.

Sec. 3-120. Rules.

Sec. 3-121. Notice to Unit Owners.

Sec. 3-122. Removal of Officers and Directors.

Sec. 3-123. Adoption of Budgets; Special Assessments.

Sec. 3-124. Litigation involving Declarant.

Sec. 4-121. Effective Date.

§ 9.04(b) Uniform Condominium Act. [Go To Main]

Change footnote from 7 (Part II) U.L.A. 199 to 7 (Part II) U.L.A. 485.

§ 9.04(c) Uniform Conservation Easement Act. [Go To Main]

Change footnote from 12 U.L.A. 170 to 12 U.L.A. 165.

§ 9.04(d) Uniform Construction Lien Act. [Go To Main]

Change footnote from 7 (Part II) U.L.A. 381 to 7 (Part III) U.L.A. 1.

Delete:

(Alternative A) from Sec. 206.

§ 9.04(e) Uniform Dormant Mineral Interests Act. [Go To Main]

Change footnote from 7A U.L.A. Supp. to 7A (Part I) U.L.A. 194.

§ 9.04(f) Uniform Fraudulent Transfer Act. [Go To Main]

Change footnote from 7A U.L.A. 639 to 7A (Part II) U.L.A. 2.

§ 9.04(g) Uniform Land Security Interest Act. [Go To Main]

Change footnote from 7A U.L.A. Supp. to 7A (Part II) U.L.A. 244.

Add:

The Uniform Security Interest Act (1985) was withdrawn from recommendation in 1999.

§ 9.04(h) Uniform Land Transactions Act. [Go To Main]

Change footnote from 14 U.L.A. 469 to 13 (Part II) U.L.A. 160.

§ 9.04(i) Uniform Marketable Title Act. [Go To Main]

Change footnote from 13 U.L.A. Supp. to 13 (Part II) U.L.A. 305.

§ 9.04(j) Uniform Planned Community Act. [Go To Main]

Change footnote from 7B U.L.A. 1 to 7A (Part III) U.L.A. 233.

§ 9.04(k) Uniform Residential Landlord and Tenant Act. [Go To Main]

Change footnote from 7B U.L.A. 427 to 7B U.L.A. 285.

§ 9.04(l) Uniform Simplification of Land Transfers Act. [Go To Main]

Change footnote from 14 U.L.A. 249 to 14 U.L.A. 343.

§ 9.04(m) Uniform Statutory Rule Against Perpetuities. [Go To Main]

Change footnote from 8B U.L.A. 321 to 8B U.L.A. 223.

§ 9.04(n) Uniform Transfers to Minors Act. [Go To Main]

Change footnote from 8B U.L.A. 497 to 8C U.L.A. 1.

§ 9.04(o) Uniform Unclaimed Property Act. [Go To Main]

Add:

Footnote indicating the U.L.A. page number: 8C U.L.A. 87.

Sec. 18. Destruction or Disposition of Property Having No Substantial Commercial Value; Immunity from Liability.

Sec. 19. Periods of Limitations.

Sec. 20. Requests for Reports and Examination of Records.

Sec. 21. Retention of Records.

Sec. 22. Enforcement.

Sec. 23. Interstate Agreements and Cooperation; Joint and Reciprocal Actions with Other States.

Sec. 24. Interest and Penalties.

Sec. 25. Agreement to Locate Property.

Sec. 26. Foreign Transactions.

Sec. 27. Transitional Provisions.

Sec. 28. Rules.

Sec. 29. Uniformity of Application and Construction.

Sec. 30. Short Title.

Sec. 31. Severability Clause.

Sec. 32. Effective Date.

Sec. 33. Repeals.

§ 9.04(p) Uniform Vendor and Purchaser Risk Act. [Go To Main]

Change footnote from 8B U.L.A. 497. to 14 U.L.A. 689.

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Supp. to § 9.05 Summaries of Principal Property-Related Model Laws.

[Go To Main]

§ 9.05(a) Model Eminent Domain Code. [Go To Main]

Change footnote from 13 U.L.A. 1. to 13 (Part I) U.L.A. 1.

§ 9.05(b) Model Land Sales Practices Act. [Go To Main]

Change footnote from 7A U.L.A. 669 to 7A (Part II) U.L.A. 205.

§ 9.05(c) Model Real Estate Cooperative Act. [Go To Main]

Change footnote from 7B U.L.A. 225 to 7B U.L.A. 49.

§ 9.05(d) Model Real Estate Time-Share Act. [Go To Main]

Change footnote from 7B U.L.A. 351 to 7B U.L.A. 175.

§ 9.05(e) Model Surface use and Mineral Development Accommodation Act. [Go To Main]

Change footnote from 14 U.L.A. Supp. to 14 U.L.A. 515.

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Supp. to § 9.07 Bibliography.

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Add:

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CHAPTER 10 THEORIES OF PRIVATE PROPERTY FORMATION

2-10 Thompson on Real Property, Thomas Editions 10.syn

AUTHOR: David A. Thomas J. Reuben Clark Law School Brigham Young University

§ 10.syn Synopsis to Chapter 10: THEORIES OF PRIVATE PROPERTY FORMATION

§ 10.01 Introduction.

§ 10.02 Theories of Private Property Rights Advanced by Greek Writers.

§ 10.02(a) Private Property as a Natural Right; Equality of Holdings.

§ 10.02(a)(1) Plato.

§ 10.02(a)(2) Aristotle.

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§ 10.03(b) Views of Early Christian Writers in the Roman Tradition.

§ 10.04 Changing Views of Private Property in Medieval Christianity.

§ 10.04(a) Adjusting Natural Law Concepts to Accept Private Property.

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§ 10.09(a) Sources with Annotations.

§ 10.09(b) Sources without Annotations.

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CHAPTER 10 THEORIES OF PRIVATE PROPERTY FORMATION

2-10 Thompson on Real Property, Thomas Editions § 10.01

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§ 10.01 Introduction.

Philosophical and "historical" speculations about how humans first conceived notions of private property rights have existed for millennia. Speculation is the prevailing mode of discourse, because hard evidence of private property's origins is not available. n1 With the information available, it simply is not possible to determine how humankind in the "state of nature" first began to recognize some sort of property characteristics, either of possession or ownership. This lack of evidence has left the "state of nature" field wide open to the learned speculations of several disciplines, each promoting its own perceived rationality and none subject to final dismissal by the others. Whether the earliest humans were by nature peaceful or warlike, whether property was originally perceived as an individual or as a community asset, and whether property could be either tangible or intangible, are still matters beyond our knowledge. n2 The speculations we still have in written form are as early as the ancient Greek philosophers.

This chapter reviews the principal theoretical expositions of private property rights in mostly chronological fashion, beginning with the Greeks and following the thoughts on this topic into modern times. The author's intent is to present a discussion that is accessible to the ordinarily intelligent reader, so that improved understanding does not require that a reader have an unusually strong background or interest in this subject.

FOOTNOTES:
(n1)Footnote 1. *See* David A. Thomas, Chapter 1, "Property Concepts Among Primitive Cultures," *supra.*

(n2)Footnote 2. *Id.* at § 1.02.

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CHAPTER 10 THEORIES OF PRIVATE PROPERTY FORMATION

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§ 10.02 Theories of Private Property Rights Advanced by Greek Writers.

Not surprisingly, the Greeks who philosophized about private property rights succeeded in identifying the principal issues and the main theories that have informed the learned discussions ever since. They did not speculate on how private property rights arose in the state of nature, but instead stated their views on what the ideal of property rights distribution should be.

§ 10.02(a) Private Property as a Natural Right; Equality of Holdings.

§ 10.02(a)(1) Plato.

In the idealized conditions described by Plato in his *Republic*, the lowest classes would hold property privately, but subject to severe restrictions, and would use the property to provide the necessities of life for themselves and for the ruling class. The rulers would own no private property themselves, but would regulate the private property rights held by the lower classes, especially to guard against inequality, to regulate buying and selling, and to promote the notion that all held their property in common. n3

As an alternative to the idealized state of *The Republic*, Plato reiterated in his *Laws* that communal holding was best, but in consideration of human nature, citizens should all hold private property in land, which would be worked by slaves. By various regulations the number of citizens and their property holdings would remain constant; if inequalities arose, excess holdings would be turned back to the state. n4

Thus Plato saw property as best held communally, but approved of establishing private rights in land as necessary to satisfy human nature. In general, when private property rights are held, holdings should be equal and state regulations should guard against growth of inequality.

§ 10.02(a)(2) Aristotle.

Aristotle, too, speculated about ideals in private property ownership. While recognizing value in private ownership, he advocated equality in distribution. Thus, half the land would be held in common by citizens to provide for meals and public religion, while the other half of the land would be divided into private individual ownership, probably in equal

shares, although Aristotle was vague on that point. n5 All working of the land would be done by slaves in behalf of the free citizens.

Aristotle recognized that if individual persons hold their own private interests in property, less conflict will arise because all owners will be pursuing their own activities. Yet he also acknowledged that it is probably more virtuous for persons to hold and use property in common. Therefore, Aristotle's ideal is for property to be owned privately, but to be used in common, with law having the special function of encouraging citizens to be so beneficially disposed toward one another. n6

§ 10.02(b) Plato and Aristotle Compared.

One writer has concluded that "Plato is the first great theorist of communism" in the context of property ownership by the ruling classes;" Aristotle is the advocate of private ownership by the ruling citizens. When all inhabitants are considered, Plato does not appear to advocate extensive communal ownership and Aristotle does not support private ownership by the majority of people. n7

FOOTNOTES:
(n1)Footnote 3. Plato's The Republic 421, 424, 425 (B. Jowett trans., n.d.).

(n2)Footnote 4. The Laws of Plato, Book V, 739c et seq. (Thomas L. Pangle, trans. 1980).

(n3)Footnote 5. Aristotle, Politics, Book VII (T. A. Sinclair, trans. 1962).

(n4)Footnote 6. *Id.*, Book II.

(n5)Footnote 7. Richard Schlatter, Private Property: The History of an Idea 19 (1951).

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CHAPTER 10 THEORIES OF PRIVATE PROPERTY FORMATION

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§ 10.03 Theories of Private Property Rights Advanced by Roman Writers.

§ 10.03(a) The Natural Law Foundations of Property.

Both Cicero and Seneca were among the chief ancient Roman writers who posited a natural law foundation for rights in property. Natural law, for Cicero, n8 existed before law was expressed in writing n9 and all persons are equal before the law of nature. n10 However, persons are not equal in their ownership of property, and property should not belong to one who doesn't know how to use it. n11 This suggests that, for Cicero, property rights based on natural law should be limited to what one needs. Cicero also recognized property rights based on civil law, and he sharply criticized excessive governmental regulation of or interference with private property rights. n12

Writing a century later, Seneca expressed the view that humans in the state of nature held property in common, with equal access for the satisfaction of needs. The emergence of laws and customs governing property occurred only because the excessive greed of some necessitated regulation for order. n13

Great Roman jurists flourished in the first two centuries, C. E., the high point of Roman legal development. Roman lawyers of the sixth century, C. E., reviewed those writings for inclusion in their remarkable works published in the sixth century, C. E., under the auspices of the Emperor Justinian. Both groups of writers drew various and occasionally inconsistent distinctions between the law of nature, the law of nations (conventional or customary law widely recognized by various peoples), and the civil law. Thus Ulpian of the second century, C.E., is quoted in Justinian's *Digest* as proclaiming that by nature all men are equal n14 --that is, that they have equal access to resources--a view approved four centuries later in Justinian's *Institutes. n15* When Roman legal works, after long neglect, were discovered and studied again in medieval times, some of those scholars favored the notion that individual property rights did not arise out of natural law, but were created by the civil law in consequence of human shortcomings and corrupted nature, a view consistent with then prevailing Christian doctrines. Nevertheless, a perspective linking natural law and property rights persisted.

§ 10.03(b) Views of Early Christian Writers in the Roman Tradition.

The secular Roman notion that property in the state of nature was a resource accessible to all in common was congenial to early Christian attitudes toward material goods. These attitudes are revealed in the following passage from the Book

of Acts in the New Testament:

> And the multitude of them that believed were of one heart and of one soul: neither said any of them that ought of the things which he possessed was his own; but they had all things in common. n16
>
> ... for as many as were possessors of lands or houses sold them, and brought the prices of the things that were sold,
>
> And laid them down at the apostles' feet: and distribution was made unto every man according as he had need. n17

This attitude of the early Christian converts came to be revered by later Christians. When later Christian writers formulated theories of property rights, they sought to accommodate this attitude that prevailed in the early church with the Roman philosophies with which they were thoroughly familiar. Thus if one believed that Romans considered property as a communal resource according to natural law, and recognized private rights in property only as a concession to human imperfection, one could readily fit in Christian doctrine: Adam and Eve in the Garden of Eden--and the earliest Christians, having obtained more pure doctrine from Jesus--held their property in common; only after the Fall and only after early Christians began to accommodate the imperfections of their fellow saints, was private and unequal ownership of property permitted to develop.

According to these developing Christian doctrines, private rights in property were not embodied in natural law, but were based on conventional law that took human shortcomings into account. Clement of Alexandria in the third century urged that Christians adopt the principle of *using* property in common. n18 Ambrose taught that property was common by nature and should be held for common use. n19 Augustine also maintained that private rights in property were a human, not a divine, invention and convention. n20 Furthermore, only those who used property rightly were justified in their possession of property. n21

In summary, if in early Christian theory private rights in property resulted from the fall of man, then recognition and regulation of those rights was one way to both satisfy and contain the greed of fallen mankind. Common ownership and individual use would be the divine and natural ideal.

FOOTNOTES:

(n1)Footnote 8. Cicero, The Republic; and, the Laws, Republic, III, 32 (Niall Rudd, trans. 1998).

(n2)Footnote 9. *Id.*, Laws, I, 6.

(n3)Footnote 10. *Id.*, Laws, I, 10.

(n4)Footnote 11. Republic, I, 17.

(n5)Footnote 12. Cicero, De Officiis, II, 21, 22 (C. Atzert, ed. 1996).

(n6)Footnote 13. Seneca, Letters, 90 (E. P. Barker, trans. 1932).

(n7)Footnote 14. Justinian's Digest, L, 17, 32.

(n8)Footnote 15. Justinian's Institutes, I, 2, 2; I, 3, 2.

(n9)Footnote 16. Acts 4:32.

(n10)Footnote 17. Acts 4:34-35.

(n11)Footnote 18. Ante-nicene Fathers: The Writings of The Fathers Down to A.D. 325 (Alexander Roberts and James Donaldson, eds.); Clement of Alexandria, the Instructor, II (1994).

(n12)Footnote 19. XVI J.P. Migne (Ed.), Patrologiae Cursus Completus, Series Latina (1841).

(n13)Footnote 20. *Id.* at XXXV, *Homily* VI, 25.

(n14)Footnote 21. *Id.* at XXXIII, *Letter* 153, VI, 26.

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CHAPTER 10 THEORIES OF PRIVATE PROPERTY FORMATION

2-10 Thompson on Real Property, Thomas Editions § 10.04

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§ 10.04 Changing Views of Private Property in Medieval Christianity.

§ 10.04(a) Adjusting Natural Law Concepts to Accept Private Property.

These notions of early Christianity about property persisted into medieval times, but with considerable confusion. Institutions of the medieval church were major holders of property rights throughout the middle ages, and to rationalize this state of affairs some Christian theorists found rules of acquisition in the same unchanging natural law that held ownership to be vested in common. Among the many confusing attempts to reconcile these competing doctrines was the notion that, while possessory rights were at first departures from the natural order of all property held in common, they were now sanctioned by long custom and established earthly law. Another viewpoint considered the natural law remaining constant but changing its applications in different situations. Thus the human race in its perfection held property in common according to natural law, but once the race was reduced to a fallen state, natural law required the introduction of private property rights.

Once the dominant Christian theologians accepted and promoted the idea of private rights in property as necessary and even good, they advanced various additional justifications for private property. Thomas Aquinas, in unabashed acceptance of Aristotle, praised private property rights as promoting more careful stewardships, improved contentment, and more careful work from those obtaining benefits for themselves. n22

§ 10.04(b) Conflict Between Religious and Civil Regulation of Property Rights.

As the medieval Christian church accepted the notion that private property could benefit human life, the church could also maintain a vigorous defense of its own considerable property assets. Not only was it lawful for the church to own property, but it had power over its property superior to the authority of civil governments. Thus the attempts of secular rulers to tax or exercise other dominion over church property met fierce resistance. Yet feudal theory accorded to the monarch absolute ownership over all property, with vassals permitted to use the property upon fulfillment of certain commitments and conditions. It required only a slight adjustment of such feudal theory to posit God as the monarch at the top of the feudal ladder and the Pope as the earthly agent of divine power over property. n23

Defenders of secular authority responded that ecclesiastical ownership of property existed only because it was allowed by secular law. n24 Because under natural law all property is held in common, and under divine law all property is held

by God, earthly ownership of property is purely a product of human law, and legislative authority is entrusted by the people to their monarchs. n25 Moreover, the legislative authority of secular governments had the power to deprive the ecclesiastical owners of their property. n26

FOOTNOTES:

(n1)Footnote 22. Thomas Aquinas, Summa Theologica, II-II, Q. 66 (Laurence Shapcote trans., Daniel J. Sullivan, rev. 1990).

(n2)Footnote 23. Aegidius Romanus, De Regimine Pincipum Book II, cc. 1-12.

(n3)Footnote 24. John of Paris, Tractatus De Postestate Regia Et Papali, 108-109 (c. 1303, 1614 ed.).

(n4)Footnote 25. William of Occam, Dialogus, III, ii, 2, cc. 21-24.

(n5)Footnote 26. John Wycliffe, De Civili Dominio, I, chs. 37, 38, 42.

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CHAPTER 10 THEORIES OF PRIVATE PROPERTY FORMATION

2-10 Thompson on Real Property, Thomas Editions § 10.05

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§ 10.05 The Effect of the Reformation on Christian Views of Property Rights.

The various competing themes and values in Greek, Roman and Christian notions of private property rights contributed to the severe contentions of the sixteenth century and its preoccupation with religious reformation. As the idea of private property rights came to be more rationalized within and acceptable to orthodox Christianity, the next most logical query was how those rights should be established and distributed. Each of the competing points of view could find support somewhere in the long history of theorizing about property rights. In the sixteenth century attention focused on principles advanced by Augustine that holders of property were obligated to use it rightly, or their holdings could not be justified.

This idea took center stage during the religious-political conflicts in sixteenth century Europe. Opponents of Roman Catholicism usually objected to the church's great and conspicuous wealth. Secular leaders eagerly stripped the church of its property, in the first instance out of political expediency, but also in harmony with the religious view that the church had neither earned its property nor was using it rightly. Thomas More's defense of the church effectively noted that the landed nobility, who were busy confiscating church property, could be likewise condemned. n27

§ 10.05(a) Luther and Melancthon.

As in so many other areas, Luther's thoughts on property rights were quite his own--as he was enlightened by his understanding of the scriptures--sharing little with the main thinkers who preceded him. He condemned the property of the church both because it had not been earned by work and because it was not used to give relief to the poor. n28 Yet he defended the idea of private, individual property rights, citing Abraham's affluence and Christ's purse managed by Judas as his main scriptural examples. The communal property in early Christian Jerusalem was dismissed as an aberration followed in no other early Christian congregation. Property was not evil because persons contended over it; it was the contenders who were evil, not the property. n29 His strident condemnation of revolting peasants stemmed in part from their robbings of property.

Luther rejected classical notions of natural law, proclaiming that natural law and the Ten Commandments were the same, with private ownership grounded in the commandment against stealing. n30

Philip Melancthon, Luther's more scholarly collaborator, was more willing to speak of a natural law, albeit identified with the Ten Commandments, and held that under such natural law all property originally was to be used in common. Since the fall of humankind, however, "natural law" was altered in its application to require the division of property to keep the peace among people. n31 He considered private ownership natural also because people considered it natural, and thus it became part of the law of nations, an impulse probably planted in peoples' minds by the natural law. n32 Moreover, private property rights had become sanctioned by God through the commandment against stealing. It was God's will that people work, acquire property, and respect the property of others. n33

§ 10.05(b) Calvin.

Calvin was another reformer who found the Bible to be the principal source of natural law. Private ownership of property was a characteristic of fallen humankind, but it rested on divine sanction through the commandment against stealing. n34 By contrast, divine law, as expressed in the Bible, embodies true principles; application of those principles in the affairs of people on earth is left to natural human reason. While earthly rulers have discretion in their administration of laws governing property, including the collection of taxes, they would be condemned for squandering any of those resources. n35

§ 10.05(c) James I of England.

At the end of this century of reform, in 1598, James VI of Scotland, soon to become James I of England and Scotland, proclaimed absolute ownership of property by the monarchy through right of conquest. James conceded that property "lent" by the monarchs to their subjects should not have to be returned without good reason, and that monarchs should observe the laws of the land. n36 A French writer of the same period, emphasized the point that the state existed primarily to protect rights of ownership. n37

FOOTNOTES:

(n1)Footnote 27. Thomas More, *A Supplication of Souls*, The Complete Works of St. Thomas More (1963-).

(n2)Footnote 28. Martin Luther, on Christian Liberty (1520).

(n3)Footnote 29. Martin Luther, Exposition of The Book of Genesis, Ch. XIII (1535-45).

(n4)Footnote 30. Martin Luther, Wider Die Himmlischen Propheten (1525).

(n5)Footnote 31. Philip Melancthon, Philosophiae Moralis Epitome (C. L. Hill, trans. 1944).

(n6)Footnote 32. Philip Melancthon, Commentary on Artistotle's Ethics, 387-388.

(n7)Footnote 33. Philip Melancthon, Prolegomena in Officia Ciceronis.

(n8)Footnote 34. John Calvin, Institutes of The Christian Religion II, viii.

(n9)Footnote 35. *Id.* at IV, xii.

(n10)Footnote 36. James I, Trew Law of Free Monarchies (1598).

(n11)Footnote 37. Jean Bodin, Les Six Livres De La Republique Book I, ii.

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CHAPTER 10 THEORIES OF PRIVATE PROPERTY FORMATION

2-10 Thompson on Real Property, Thomas Editions § 10.06

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§ 10.06 Shifts Away from Religion-Based Property Rights.

§ 10.06(a) Grotius.

Hugo Grotius found natural law in the "dictate of right reason," rather than in the Bible and believed that in the state of nature people held property in common. Division of property followed by agreement. Once the agreed upon divisions occurred, the consent could not be withdrawn, and all this took place before governments emerged. n38

§ 10.06(b) Hobbes.

Thomas Hobbes also believed that private property rights originated in consent. However, that consent was expressed by conferring authority over property to a sovereign. This occurred because people who originally had equal rights to property needed a means for controlling conflict between those who asserted possession over that to which all had common access. Therefore, the sovereign ultimately obtains rights over property owners, who are equal in the sense that they are all free to acquire property. n39

§ 10.06(c) Pufendorf.

Samuel Pufendorf asserted that people were created equal, with equal rights to property ownership and equal obligations to respect others' rights. This resulted in a sort of communal ownership in nature, or a condition in which nothing was owned individually. Individual ownership arose by occupation, and governments arose to preserve people's agreements over property distribution. n40

§ 10.06(d) Locke.

John Locke agreed that originally nothing was owned, and believed that people gained ownership by their labor, an argument that would have been unacceptable had the feudal system had any vitality left at that time. While proclaiming people's natural rights to property created by their labor, Locke considered governments and laws put in place to protect property rights as products of conventional rather than natural law. Property rights thus were created by people rather than resting on natural law. Locke's views of property had immense impact on almost all theorists who came after him. n41

FOOTNOTES:

(n1)Footnote 38. Hugo Grotius, Three Books on the Law of War and Peace (1625).

(n2)Footnote 39. Thomas Hobbes, Leviathan 266-267 (1651).

(n3)Footnote 40. Samuel Pufendorf, De Jure Naturae Et Gentium 368-369 (1672).

(n4)Footnote 41. John Locke, of Civil Civil Government, Bk. II, ch. v ("Of Property).

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CHAPTER 10 THEORIES OF PRIVATE PROPERTY FORMATION

2-10 Thompson on Real Property, Thomas Editions § 10.07

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§ 10.07 The "Classical" Theories of Property.

Among the British thinkers who followed Locke, most sought to justify or rationalize the existing order. According to Blackstone, right of possession was based on occupancy, and as occupancy became permanent, possessory rights strengthened. n42 Others protested that concentration of English land ownership in the hands of a few violated others' rights: one should not be allowed to claim more than an equal share of property nor to claim any property not produced by the fruits of their labor. However, Burke believed that property was secured only by "prescription" or possession, which argued against equal possession. n43 Adam Smith wrote of the state of nature as where a "laborer owned the whole produce of his labor," but lost this right as private ownership developed and labor was sold to employers. n44

In contemporary America, private ownership of property was considered a natural right. However, it was uncertain whether a natural rights theory was acceptable if it was used to preserve landed wealth or other forms of tyranny.

Similar ambivalence also afflicted some French thinkers. According to Rousseau, mankind in the state of nature was equal, and property rights did not exist. When greed arose, equality disappeared, and property rights emerged through social contract, to be preserved by governments consented to by the people. While the state protects property rights, it can also act to prevent injustice resulting from extreme inequality. Unowned land in nature could be occupied and owned, but only to the extent needed for subsistence and subject to exploitation by labor. n45

The Napoleanic Civil Code defined property as "the right of enjoying and disposing of things in the most absolute manner," n46 a right of nature acquired through labor. A reliable right to property is essential to individual liberty.

FOOTNOTES:
(n1)Footnote 42. William Blackstone, Commentaries, Bk. II.

(n2)Footnote 43. Edmund Burke, Reflections on The Revolution in France 48 (Everyman ed.) (1790).

(n3)Footnote 44. Adam Smith, Wealth of Nations vol. 1, p. 49 (1920 London ed.) (1776).

(n4)Footnote 45. Jean Jacques Rousseau, Discourse on The Origin of Inequality pp. 214 et seq. (Everyman ed.) (1755).

(n5)Footnote 46. Civil Code Art. 544 (1804).

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§ 10.08 Utilitarian Theories of Property Rights.

For utilitarian thinkers, private rights in property could be justified only if they fulfilled some utilitarian objective. Rejecting Locke's labor theory, they denied that expended effort created any special bond between the laborer and the object; it only changed the substance of the object. n47 Because equal distribution of property was impossible to achieve, and thus not useful, unequal distribution was acceptable. n48 And the highest claims to ownership should belong to those who make the best use of property. n49 Others thought that where ownership was enjoyed out of proportion to the labor expended, it would be acceptable for a government to force redistributive changes. n50

Kant is generally credited with reviving a form of natural rights theory of property. He asserted that persons acquired property by working their will (not necessarily their labor) upon it, and as governments emerged to secure the general will of the people, that became recognition of rights in property. n51 For Hegel, state protection of private property promoted liberty because it opened the way for people to exercise their will on property. Only minimal regulation of private property rights was condoned; protection of private property rights would lead to protection of free individual expression. n52

Marxist thought, at least as expounded by Marx, accepted a labor theory of property rights, but viewed labor as the combined effort of a class rather than the effort of a single person. For Marx, capitalism violated this principle. n53 Also, even if property rights were presently based on labor, in the utopian future those rights would instead be based on need.

FOOTNOTES:
(n1)Footnote 47. David Hume, Treatise of Human Nature (1739-1740).

(n2)Footnote 48. David Hume, Essays Moral, Political, and Literary, vol. 2, p. 188.

(n3)Footnote 49. *Id.* at 189.

(n4)Footnote 50. John Stuart Mill, Principles of Political Economy 208 (1909 ed.).

(n5)Footnote 51. Immanuel Kant, Philosophy of Law 79, 92 (W. Hastie trans. 1887).

(n6)Footnote 52. Georg Wilhelm Friedrich Hegel, Philosophy of Right 48-49, 52-53, 58, 61, 65-68 (S.W. Dyde trans. 1896) (1821).

(n7)Footnote 53. Karl Marx, Capital 641, 848 (Everyman ed.).

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CHAPTER 10 THEORIES OF PRIVATE PROPERTY FORMATION

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§ 10.09 Contemporary Comment on Property Rights.

Little pure theory of property is advanced by contemporary writers of legal literature in the United States today. A selection of thoughtful books and articles is cited below, with annotations. n54

§ 10.09(a) Sources with Annotations.

Acheson, James M. *The Lobster Gangs of Maine* (1988).

This article discusses the social network and rules of the lobster industry. The author concludes that the ways the lobster "gangs" have formed their own areas and ways of policing other lobstermen have not been very successful in conserving resources.

Allen, Douglas W. & Dean Lueck. "The 'Back Forty' on a Handshake: Specific Assets, Reputation, and the Structure of Farmland Contracts," 8 *J. L. Econ. & Org.* 366 (1992).

This entertaining article discusses exchanges between farmers, in which contracts are simple and informal, mostly oral or short written forms, and concluded by a handshake.

Axelrod, Robert. *The Evolution of Cooperation* (1984).

This book examines the conditions that encourage cooperation in our society.

Barzel, Yoram. *Economic Analysis of Property Rights* (1989).

This article concerns the policing and ownership principles when slaves are used in the work force. The author bases his conclusions an the assumption that labor services are subject to contract and reasons that slaves are on a type of

contract, and therefore are able to purchase their freedom.

Blackstone, William. *Commentaries on the Laws of England* (1766).

Blackstone examines the right of property, the origins of property rights, the right to exclude others, and the dominion exercised over property.

Calabresi, Guido & A. Douglas Melamed. "Property Rules, Liability Rules, and Inalienability: One View of the Cathedral," *85 Harv. L. Rev. 1089 (1972).*

This article explores "two primary questions: (1) In what circumstances should we grant a particular entitlement? and (2) in what circumstances would we decide to protect that entitlement by using a property, liability, or inalienability rule?"

Demsetz, Harold. "Toward a Theory of Property Rights," 57 *Am. Econ. Rev. Pag. & Proc.* 347 (1967).

In this article the author attempts to fashion some elements of an economic theory of property rights by discussing the "concept and role of property rights in social systems," offering guidance "for investigating the emergence of property rights," and setting "forth some principles relevant to the coalescing of property rights into particular bundles and to the determination of the ownership structure that will be associated with these bundles."

Ellickson, Robert C. *Order Without Law: How Neighbors Settle Disputes* (1991)

This article examines how owners of animals solve trespass problems both on the "open range" (where owners of livestock are not generally liable) and on the "closed range" (where owners of livestock are liable for damage). The article contains a very interesting discussion of how most of the ranchers try to work things out among themselves, using some self help and damaging gossip to control ranchers who consistently don't take care of their cattle. However, generally the ranchers take care of each other's stray cattle, knowing that their cattle will one day stray also. It is almost unheard of for a rancher to retain a lawyer to resolves these problems.

Ellickson, Robert C. "Property in Land," *102 Yale L. J. 1315 (1993).*

The author examines different types of land ownership, such as open-access regime, group ownership, and individual ownership. He concludes, after reviewing Jamestown, Plymouth, and the Mormon settlement, that private ownership of land works best to encourage productivity.

Ellickson, Robert C. "The Untenable Case for an Unconditional Right to Shelter," *15 Harv. J. L. & Pub. Policy 17 (1992).*

The author argues that advocates of a constitutional entitlement to minimum levels of shelter have failed to take into account that fact that incentives must be maintained for everyone to work. The article details changes that have come with homeless shelters being available to all, thus discouraging able people from working.

Epstein, Richard A. "Covenants and Constitutions," *73 Cornell L. Rev. 906 (1988).*

This articles explores the relationship between covenants ("all forms of servitudes, easements, and restrictions that one person can place on another's land") and constitutions ("documents that identify and entrench the fundamental law of a state or nation...").

Friedman, Milton. *Capitalism and Freedom* (1962)

The author states that there is "an intimate connection between economics and politics, that only certain combinations of political and economic arrangements are possible, and that in particular, a society which is socialist cannot also be democratic, in the sense of guaranteeing individual freedom." When dealing with governmental interventions with private property it is necessary to make a balance sheet and carefully weigh both the advantages and disadvantages, looking at the individual circumstances of each case.

Goffman, Erving. *Asylums: Essays on the Social Situation of Mental Patients and Other Inmates* (1961).

These writings examine the property rights of people in mental institutions, monasteries, prisons, and other places where a person is stripped of all possessions.

Hardin, Garrett. "The Tragedy of the Commons," 162 *Science* 1243 (1968).

This author analogizes "The Tragedy of the Commons" to the growth of the population. The tragedy of the commons may be briefly summarized as when everyone owns interest in a common area, but no one has the incentive to take care of it; thus it is abused and exploited instead of taken care of like privately owned property. The author concludes that limits must be placed on population growth to benefit the whole of society.

Kennedy, Duncan & Frank Michelman, "Are Property and Contract Efficient?" *8 Hofstra L. Rev. 711 (1980).*

This is an article concerned with cataloguing and refuting false arguments and suppositions about economic justifications for the legal institutions of private property and enforceable contract.

Merrill, Thomas W. "Property Rules, Liability Rules, and Adverse Possession," *79 Nw. U. L. Rev. 1122* (1984-1985).

"This article concerns two recent events that are bringing Adverse Possession back into the legal-academic world. The first event is the publication of Professor Richard Helmholz's law review article concerning the state of mind need for successful adverse possession. The second event is a judicial decision of the California Supreme Court in *Warsaw v. Chicago Metallic Ceilings, Inc., 35 Cal. 3d 564, 676 P.2d 584, 199 Cal. Rptr. 773 (1984).* The author asserts that these two events are related and they "suggest that liability rules may be an appropriate mediating device between the traditional policies supporting the institution of adverse possession--all of which apply whether the possessor is acting in good faith or in bad faith--and the evident reluctance of courts to 'reward' bad faith possessors by giving the adverse possessor an entitlement protected by a property rule... ."

Merrill, Thomas W. "Trespass, Nuisance, and the Costs of Determining Property Rights," *14 J. Legal Studies 13 (1985).*

The author examines why the right to exclude others differs when the intrusion is based on trespass or nuisance. He

asserts that when the costs of transacting are low usually strict liability rules of trespass apply. When the costs of transacting are high, the balancing or cost-benefit approaches of nuisance are used. He reviews other issues involving the rights to exclude and argues that the often overlooked "low-cost mechanical entitlement-determination rules play an important role in facilitating the exchange and modification of property rights."

Posner, Richard A. *Economic Analysis of Law* (4th ed. 1992)

The author discusses property right economics by examining the distinction between static and dynamic analysis. In the static analysis adjustments to change are assumed (somewhat unrealistically) to be instantaneous. Dynamic analysis is more relaxed as to instantaneous change, but more complex. For hundreds of years property laws have been used to create incentives to use property resources efficiently. The author also discusses various aspects of divided ownership and how law is more difficult to apply to divided ownership.

Radin, Margaret Jane. Market-Inalienability, *100 Harv. L. Rev. 1849 (1987).*

The author develops a theory of market-inalienability. She argues that "inalienabilities should not always be conceived of as anomalies" and demonstrates that the characteristic rhetoric of economic analysis is morally wrong when it is put forward as the sole discourse of human life. She evaluates "inalienabilites in connection with our best current understanding of the concept of human flourishing... ."

Radin, Margaret Jane. "Property and Personhood," *34 Stanford L. Rev. 957 (1982).*

This article explores the idea that to be a person, one needs some control (in the form of property rights) over resources in the external environment. The author reviews Locke's views of property of a person, Marx's "fetishism of commodities", Hegel's philosophy, the Utilitarian Dichotomy, the Personhood Dichotomy, and a number of legal issues viewed from the perspective of property for personhood.

Rawls, John. *A Theory of Justice* (1971)

The author tries to "formulate a reasonable conception of justice for the basic structure of society conceived for the time being as a closed system isolated from other societies." He also examines "the principles of justice that would regulate a well-ordered society", concluding that "the principles of justice are compatible with quite different types of regime[s]."

Rose, Carol M. "Crystals and Mud in Property Law," *40 Stanford L. Rev. 577 (1988).*

The author calls the bright line rules of property "crystals", and asserts that these rules help property owners to know where they stand within the law. However, because of the scarcity of resources and conflicts over these resources the "crystal" clear rules of property are being muddied. The author examines whether the crystal rules are still the best or if the muddier rules have advantages.

Rose, Carol M. "Possession as the Origin of Property," *52 U. Chi. L. Rev. 73 (1985).*

This article examines the fundamental proposition of how things come to be owned.

Rose, Carol M. "Property as Storytelling: Perspectives from Game Theory, Narrative Theory, Feminist Theory," *2 Yale J. L. & Humanities 37 (1990).*

This article discusses why theorists have turned to storytelling (a narrative explanatory mode), often diverging from scientific/predictive modes, to discuss property. The author questions the standard classical and neoclassical view that preference orderings are "just there," and suggestions that a lot of left over preference orderings have to be explained by an after the fact story. She explains the property stem of common property, explaining also that cooperative preferences are needed for the property institutions.

Sugden, Robert. *The Economics of Rights, Cooperation and Welfare* (1986)

This article focuses on the oil and gas reserves under the North Sea and how these rights were divided up, giving the property rights to each of the nations whose coastline happened to be the nearest, United Kingdom, Norway, and West Germany. The author believes that such conflicts are best resolved by appealing to convention that the one most closely "associated" would be in possession, and gives several interesting examples. The author argues that many of these conventions "exploit existing associations between claimants and objects," favoring possessors.

Sunstein, Cass R. "On Property and Constitutionalism," *14 Cardozo L. Rev. 907 (1993).*

The author concludes that, contrary to general belief, democratization, constitutional reform, transition to markets and efforts to promote economic development are all closely related. The "[t]he right kind of constitution could play an important role in fueling economic development and democratic reform;... [t]he wrong kind of constitution - or no constitution at all - could be devastating to progress in both of these areas."

Wilson, James Q. *The Moral Sense* (1993)

This article examines the San, African Bushmen, as a society where property is distributed equally. The author follows their life styles and customs and shows what changes happen when this group settles down and beings to accrue property.

§ 10.09(b) Sources without Annotations.

Cohen, Morris R. "Property and Sovereignty," *13 Cornell L. Q. 8 (1927).*

Cohen, Felix S. "Dialogue on Private Property," *9 Rutgers L. Rev. 357 (1954).*

Horwitz, Morton. *The Transformation of American Law, 1780-1860* (1977).

Katz, Stanley N. "Thomas Jefferson and the Right to Property in Revolutionary America," *19 J. L. & Econ. 467 (1976).*

Michelman, Frank I. "Property, Utility, and Fairness: Comments on the Ethical Foundations of 'Just Compensation,' " *80 Harv. L. Rev. 1165 (1967).*

Nedelsky, Jennifer. "Law, Boundaries and the Bounded Self," in Robert Post (ed.), *Law and the Order of Culture* 162 (1991).

Nozik, Robert, *Anarchy, State and Utopia* (1974).

Reich, Charles A. "The New Property," *73 Yale L. J. 733 (1964).*

Simon, William H. "Social Republican Property," *38 U.C.L.A. L. Rev. 1335 (1991).*

Singer, Joseph William. "The Reliance Interest in Property," *40 Stan. L. Rev. 614 (1988).*

Stone, Christopher D. "Should Trees Have Standing?--Toward Legal Rights for Natural Objects," *45 So. Cal. L. Rev. 450 (1972).*

Taft, William H. "The Right of Private Property," 3 *Mich. L.J.* 215 (1894).

Vandevelde, Kenneth J. "The New Property of the Nineteenth Century: The Development of the Modern Concept of Property," *29 Buff. L. Rev. 325 (1980).*

FOOTNOTES:
(n1)Footnote 54. The selection is based on Robert C. Ellickson Et Al, Perspectives on Property Law (2d ed. 1995).

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Supp. To CHAPTER 10 THEORIES OF PRIVATE PROPERTY FORMATION

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[Go To Main]

§ 10.06(d) Locke. [Go To Main]

Add:

see also Matthew H. Kramer, John Locke and the Origins of Private Property: Philosophical Explorations of Individualism, Community, and Equality (1997).

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Supp. To CHAPTER 10 THEORIES OF PRIVATE PROPERTY FORMATION

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CHAPTER 11 POSSIBLE FUTURE DEVELOPMENTS IN AMERICAN PROPERTY LAW

2-11 Thompson on Real Property, Thomas Editions 11.syn

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§ 11.syn Synopsis to Chapter 11: POSSIBLE FUTURE DEVELOPMENTS IN AMERICAN PROPERTY LAW

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CHAPTER 11 POSSIBLE FUTURE DEVELOPMENTS IN AMERICAN PROPERTY LAW

2-11 Thompson on Real Property, Thomas Editions § 11.01

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§ 11.01 Introduction.

This chapter, which is originally written and added to this work in the year 2000, is an attempt to identify changes in the American law of real property that may occur in the near and not-so-near future. Of course, American property law is no monolithic essence that could "change" in the ordinary sense; as the composite of jurisprudential activity in over 50 mutually exclusive jurisdictions, American property law is in constant, seething change. So, this chapter will merely try to identify some trends or patterns in those changes.

To provide a variety of viewpoints for this exercise, this chapter consists of an annotated bibliography of thoughtful articles published since 1994, discussing possible future changes in American property law.

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CHAPTER 11 POSSIBLE FUTURE DEVELOPMENTS IN AMERICAN PROPERTY LAW

2-11 Thompson on Real Property, Thomas Editions § 11.02

AUTHOR: David A. Thomas J. Reuben Clark Law School Brigham Young University

§ 11.02 Post-1994 Law Review Articles Discussing Possible Future Changes in American Property Law.

§ 11.02(a) Expanded Concept of Compensable Takings.

D. Benjamin Barros, Note, "Defining "Property" in the Just Compensation Clause," *63 Fordham L. Rev. 1853 (April 1995).*

This Note examines the possible definitions of property and the significance of those definitions for regulatory takings law. The author compares the "two dominant theoretical justifications of constitutional protection of property, libertarianism and utilitarianism" and then examines the conflicts between them, using modern takings law. The author concludes that the libertarian approach to just compensation is preferable. The author cites to *Lucas v. South Carolina Coastal Council, 112 S. Ct. 2886 (1992),* which was at the time the most recent Supreme Court regulatory takings decision. In *Lucas,* David Lucas purchased two coastline lots for $975,000 intending to build homes on them. However, two years later South Carolina's Beachfront Management Act barred the erection of any permanent habitable structure on Lucas' two lots, thus, claimed Lucas, making the property valueless. The trial court held that those actions under the Act did effect a taking and ordered $1,232,387.50 in just compensation. However, the South Carolina Supreme Court reversed, holding that the Act was intended to preserve the coastline, an important natural resource for the public; therefore, the court reasoned that the Act was intended to prevent serious public harm and held that "harm-preventing land use regulation is never a taking." The court reversed the South Carolina Supreme Court, because of its holding in *Pennsylvania Coal Company v. Mahon, 260 U.S. 393 (1992),* expressed by Justice Holmes, that "if [a] regulation goes too far it will be recognized as a taking" by setting up a categorical rule for regulatory takings. This rule is that "A regulation would be found to go 'too far' and violate the Fifth Amendment if it 'denie[d] all economically beneficial or productive use of land." *(Lucas v. South Carolina Coastal Council, 112 S. Ct. 2886, 2893 (1992)* (citing *Agins v. City of Tiburon, 447 U.S. 2454, 260 (1980); Nollan* v. *California Coastal Commission,* 483 (1987); *Keystone Bituminous Coal Association v. DeBenedictis, 480 U.S. 470, 495 (1987); Hodel v. Virginia Surface Mining & Reclamation Association, 452 U.S. 264, 295-96 (1981).* According to the *Lucas* court, "[a]nother formulation of the rule is when the owner of real property has been called upon to sacrifice all economically beneficial uses in the name of the common good, that is, to leave his property economically idle, he has suffered a taking."

The author notes exceptions to the new rule: nuisance and exercises of the police power. "Justice Scalia formulated a

common-sense exception to the categorical rule that a regulation that renders a property interest valueless requires compensation. If the right to engage in the prohibited activity is not possessed by the property owner, but is instead reserved in the state, no compensation is due." The property owner does not have any right to engage in a nuisance, therefore a regulation prohibiting nuisance is a legitimate exercise of police power, in that it takes nothing from the property owner. He discusses the role of property owners' expectations and concludes that protecting these expectations is a legitimate goal, but the expectations cannot be used as a source of property. The note includes an interesting discussion concerning fair compensation when the government takes less than the whole property.

The note concludes that in the context of regulatory takings, property should be defined by state property law, with primary responsibility for stating that law resting on the state courts. The federal judiciary, however, must enforce the Just Compensation Clause's protection of individual liberty. Federal courts must review the legitimacy of state court findings on property law to prevent state courts from abusing the flexibility of common law to write existing property interests out of existence.

§ 11.02(b) Wider Use of the Doctrine of Custom to Establish Public Easements.

Steven W. Bender, "Symposium: Castles in the Sand: Balancing Public Custom and Private Ownership Interests on Oregon's Beaches" *77 Or. L. Rev. 913 (1998).*

The article discusses Oregon's unique property laws concerning the coastline land. In 1969, in *State ex rel. Thornton v. Hay, 254 Or. 584, 462 P. 2d 671 (1969),* Oregon's Supreme court invoked the English doctrine of custom and declared an easement for the public to enjoy Oregon's privately titled dry sand beaches. (Custom has also been used in Florida, Hawaii, and Texas, although this issue has not yet reached the Supreme Court). Oregon is the only state that applies the law of custom throughout the state. Although much has been written concerning the constitutionality of the custom doctrine, this article assumes custom is constitutional, and instead examines the relationship between the rights of the public and the interests of the dry sand owner.

The author concludes that persons have the right to use the dry sand area for recreation by the same rights that exist by prescriptive easement. With this assumption, the author explores the relative rights and responsibilities of the owner and the public. The standard for easement rights in Oregon requires a balancing of the interest of the beach owner in profitable use of the land with the interests of the public in ensuring a safe and aesthetically pleasing recreation experience.

The article also examines what this custom doctrine does to the landowner's "Bundle of Sticks." Under the custom doctrine the landowner has no right to exclude others from the beach. However, under easement law, misuse of an easement is subject to an injunction, and in the unlikely event that an injunction won't suffice, the use of the easement may be forfeited. The author declares that in the case of a beach easement, "it is unclear whether sustained or episodic vandalism (particularly of the beach owner's adjoining uplands property), littering, disturbing the peace, unlawful burning, discharge of illegal fireworks, public nudity, violence, or criminal activity constitutes unreasonable use, particularly when the conduct is criminal and other enforcement mechanisms exist."

The conflicts between the landowners and the public are increasing as the population grows, and with the growth of windsail devices and all-terrain vehicles. Because courts apply the standard of reasonableness on a case-by-case basis there is no blanket rule for Oregon beaches.

The landowner (servient estate owner) can challenge an easement holder when the burden on the servient estate has been heavily increased. However, public use of Oregon beaches has undoubtedly increased since public recreation rights were recognized in 1969. In most cases the rise has been steady and in some cases this increased use has benefited the upland property owners, such as hotel and restaurant owners, which in turn has enhanced the property values of residential owners of upland property. Also the English doctrine of custom is flexible and may modify the

custom to vary with the prevailing fashion of recreation.

The author reviews differences when the easements are created by an express grant, where the court will also consider the intent of the parties. The author sarcastically points out that the landowners at least retain the right to use the beach with the rest of the public. However he concludes that this also means that the public may not erect any structure that would unreasonably burden the dry sand owner's use of the privately held beach. HHH

However, if the city issues an ordinance to make a curfew during nighttime hours on the beach would that curfew extend to the beach owner (or guests of a beach owner's adjoining motel operation)?

The custom doctrine also interferes with the right to construct improvements. The standard appears to be that the construction is allowed when the beach improvements will benefit the public. A road that will occupy or enclose great parts of the beach or impede public escape from tidal waters will not be allowed. On the other hand the Florida Supreme Court allowed a landowner's erection in the dry sand of a seventeen-foot diameter observation tower, claiming it was consistent with the recreational use of the land by the public. Generally courts allow the landowner to erect improvements to enhance recreation for free public and private use.

The Oregon Supreme Court has stated that 1969, the year public rights were first recognized, is not relevant to improvements on Oregon beaches; the public's easement rights pre-dated 1969 and came into being long before the private owners acquired their beach property. Many of these improvements were erected in the period after adoption of the Beach Bill in 1967. The Beach Bill required the landowner to seek a special permit for beach improvements, and generally the public was considered to have no recreational rights. However the Beach Bill declared that all public easement rights to Oregon beaches were vested in the state of Oregon. Because of this the owners could not declare the construction rights to be theirs by adverse possession.

Easements may also be lost by abandonment or the doctrine of estoppel. Abandonment requires more than mere non-use, it requires unequivocal proof of intent to abandon. Estoppel requires action by the servient owner to its material detriment in reliance on conduct of the easement holder. Arguably, the issuance by a municipality or county of a building permit would constitute an estoppel. However, it is unclear if the action would be attributed to the public, or to the state, as caretaker of the public's easement, and no defense in the nature of laches or estoppel may be asserted against the state.

Under the English doctrine of custom, Parliament could extinguish a customary right and presumably the legislature in Oregon could also do this before 1969. The court has vacated a platted but never constructed cliffside road.

In the landowner's bundle of sticks is the right to construct protective structures. The court examines how often the public uses the beach, the extent of dry sand area displaced by the structure, whether the structure jeopardizes public escape from wave action, and so forth. The author concludes that one way of reading the holding in *Stevens v. City of Cannon Beach, 854 P.2d. 449 (Ore. 1993)*, is that the beach owners have no property right to construct protective structures, unless the structures existed on January 1, 1977. The author believes that this reading is inconsistent with the common-law of easements, which considers easements on a case by case basis. "If this easement standard is applied to beach protective structures, then grounds may exist for takings challenges arising out of the denial of permits for their construction even for uplands property not developed before 1977. Under the standard for taking articulated in *Lucas v. South Carolina Coastal Council*, prohibiting construction might be seen as depriving the upland property of all economically beneficial use. Because the background principle of custom would not necessarily deprive the landowner of the right to construct the seawall, the custom doctrine would not save Oregon's outright prohibition of certain protective structures from being compensable on its face. Regarding protective structures sought for land developed before 1977, a different analysis applies that still holds the potential for a regulatory taking. Roughly, the existing regulatory considerations for approval of such structures are similar to what a court would consider under the easement standard of balancing. Should those regulatory standards be misapplied, a taking could result."

The right to remove or to prohibit removal of beach materials might be considered to infringe upon the public's easement rights. However the public's right to remove land materials, in the nature of a profit a prendre, ordinarily could not be claimed under the English doctrine of custom. It is unclear to what extent this limitation survives in Oregon, and because Oregon regulations require a permit to remove beach materials, with permission from the dry sand owner, this issue is not likely to result in litigation by the landowner.

The right to conduct commercial activities on the beach is regulated by the department of Parks and Recreation. Using the balancing standard, taken on a case by case basis, commercial activities of the landowner may be consistent with the public's custom rights. Regulations that restrict the activities of the landowner may be considered a taking, and commercial activities conducted by the public should be subject to injunction, if they infringe unreasonably on the rights of the beach owner.

Currently the United States Supreme Court has "described two situations in which regulation is compensable on its face without inquiry into the public interest it advances: regulation that results in a physical invasion of property and regulation that denies 'all economically beneficial or productive use of the land.' " To survive constitutional scrutiny, the regulation must also pass the state property law on nuisance. More particularly, exactions and development conditions require both an "essential nexus" between some "legitimate state interest" and the condition, as well as showing of "rough proportionality" between the condition and the impact of the proposed development. South Carolina's Beachfront Management Act prevented the petitioner in the *Lucas* case from erecting a habitable structure and left his coastal property without economic value. However, because the Oregon Supreme Court recognizes the custom of beach recreation, presumably any regulation that would deprive a beach owner of all economically beneficial use would survive a takings challenge. In cases in which custom would fail, confiscatory legislation might be challenged as a taking. For example, when a beach owner can demonstrate that the beach has little or no history of public use, the beach owner may hold title free of customary rights. Second, it is possible that the Supreme Court may substitute its own definition of state background principles of property law for that of a state court, and "would examine whether Oregon's use of custom ... was an 'objectively reasonable application of relevant [Oregon] precedents.' " Third, there is a discrepancy with the actual line of vegetation specified in *Thornton* as the landward boundary of the public's custom rights and the coordinate mapping of the vegetation line on Oregon's overlay of beach regulation. This is amplified by the ambulatory nature of the coastline and the potential for beach regulation to deal differently with a relocated vegetation line. Fourth, under the doctrine of custom, the public's recreation rights extend only to the line of vegetation. This does not include any scenic view easement, and so any efforts to regulate uplands development usually are determined without the principle of custom. Finally, although the public's custom rights leave the beach owner free to use the beach in any way that does not unreasonably interfere with the public's recreational use, the potential exists for the adoption of regulations that may be reasonable under common law.

"Because of the unique relationship between the dry sand beach and uplands property, these principles for a "total" economic taking may seldom apply to the takings claim of an Oregon beach owner. Also, there is a denominator problem in that it is rarely the case that regulations denying all economically beneficial use of the beach will have the same impact on uplands property. The author believes this issue needs guidance from the Supreme Court.

"In Oregon, the conflict between public and private interests on its beaches has surged in recent years. Following the use of custom in 1969 to establish easement rights in favor of the public came a wave of litigation defining the reach of custom on Oregon shores. Most recently, litigation has focused on whether the custom doctrine and complementary regulation effect a taking of the beach owner's property. As the public's customary rights mature in coastal titles, the focus of disputes will shift from landowner efforts to uproot the public interest entirely to efforts to define the respective rights and responsibilities of beach owners and the public in the same sands. Looking further ahead, increasing dissatisfaction with coastal condomania, combined with the likelihood of rising seas and retreating shorelines, will sweep the public's attention landward to what is now the uplands. Other coastal states will see similar struggles, but perhaps only in Oregon will they be viewed through the lens of the custom doctrine.

§ 11.02(c) Replacing Caveat Emptor with a Duty to Disclose.

Denis Binder, "The Duty to Disclose Geologic Hazards in Real Estate Transactions," *1 Chapman L. Rev. 13 (1998).*

This article reviews the history of caveat emptor, exceptions to the rule, and how in the last half of the twentieth century caveat emptor no longer provides protection for sellers of real property. This collapse in the caveat emptor doctrine has been superseded by the duty to disclose. The author hopes the duty to disclose will be formally adopted in regard to material geologic hazards, because geologically fragile areas are being increasingly settled and prospective buyers should be warned of the risk before purchasing the property.

The author cites to *Karoutas v. Homefed Bank, 283 Cal. Rptr. 809 (Ct. App. 1991),* where the beneficiary, the seller, had actual knowledge of soil conditions that materially affected the value of the property (the estimated cost to repair the property was in excess of $350,000), and no disclosure was made to the purchasers, who could not inspect the property before the trustee's sale. The purchasers paid $173,00 for the property. The court held that the seller had a duty to disclose these facts at the trustee's sale.

Also the author believes that natural risks are foreseeable, and that the seller and the seller's agent owe a duty to the buyer to disclose "all material geologic hazards of which they know or reasonably should know." The purpose of disclosure is to allow the purchaser to make an assessment of the risks and benefits of the proposed transaction; the potential purchaser may then negotiate a lower price, walk away from the deal, or disregard the warnings and complete the purchase.

§ 11.02(d) Inherent Limitations on Title.

Lynn E. Blais, "Takings, Statutes, and the Common Law: Considering Inherent Limitations on Title," *70 So. Cal. L. Rev. 1 (1996).*

This article explores the potential scope and impact of the exception to the new per se rule of regulatory takings jurisprudence decided in *Lucas v. South Carolina Coastal Commission:* "if the landowner would have been prohibited from engaging in the regulated activity by the State's background principles of property and nuisance law, then compensation for the regulation is not required under the Fifth Amendment." The author examines unclear areas, such as when a statute that restricts a land use is enacted before the landowner purchases property, but has never been applied to that particular parcel, does the preexisting legislation constitute an inherent limitation on title? He believes that the scope of "the exception to the total takings rule should not be defined (or limited) solely by reference to common law principles." Statutes have historically been used to establish the contours of private property rights and preexisting statutes should be used as "inherent limitations on title. "It reintroduces coherence into our conception of state property law ... it eliminates or reduces the focus on the hopelessly circular inquiry into reasonable investment-backed expectations" and "it limits the circumstances in which courts will have to apply the court's takings analysis at all."

In this article the author discusses the origin and development of nuisance. He cites to *Lucas* and locates the "nuisance exception in the topology of takings law, and examine(s) the reactions to *Lucas* in lower courts and in the academic literature." Then he "explores the possible justifications for the common law focus of the nuisance exception to the compensation requirement" and explains why those justifications do not support a limited, common-law based view of inherent limitations on title. He also "address(es) the role of federal legislation in the establishment of property rights, and conclude(s) that the federal environmental protection statutes should be understood to create inherent limitations on title."

The author cites to the following cases: *Lucas v. South Carolina Coastal Commission, 505 U.S. 1003 (1992), Loveladies Harbor, Inc. v. United States, 28 F.3d 1173 (Fed. Cir. 1994), "Bowles v. United States, 31 Fed. Cl. 37 (Cl. Ct. 1994), M & J. Coal Co v. United States, 30 Fed. Cl. 360 (Cl. Ct. 1994), aff'd, 47 F.3d 1148* (Fed. Cir.), *cert. denied, 116 S. Ct. 53*

(1995), Department of Health v. The Mill, 887 P.2d 993 (Colo. 1994) (en banc), *Stevens v. Canon Beach, 854 P.2d 449 (Or. 1993), cert. denied, 510 U.S. 1207 (1994), Ciampitti v. United States, 22 Cl. Ct. 310 (1991), Hunziker v. Iowa, 519 N.W. 2d at 367, Kim v. City of New York, 1997 N.Y. LEXIS 101,* at *11.

The author questions whether "our current understanding of the concept of inherent limitations on title includes background common law principles of land use but excludes generally drawn statutory land use restrictions enacted before a person purchases her property" is "mandated by or consistent with the Fifth Amendment's just compensation requirement." The author cites to *Erie Railroad Co. v. Tompkins, 304 U.S. 64 (1938),* to conclude that both common law and statutory law establish property rights, and that the court (in *Board of Regents v. Roth, 408 U.S. 564 (1972),* has consistently emphasized state law.

The article elaborates on three basic themes of just compensation: countermajoritarianism (term borrowed from Alexander Bickel, *The Least Dangerous Branch: The Supreme Court at the Bart of Politics* (2nd ed. 1986), settled expectations, and reciprocity of advantage.

In conclusion: "Contemporary takings doctrine is in a state of disarray, and appears to be growing less, not more, coherent. In this context, we should do all that we legitimately can to avoid its continued application. By treating generally drawn environmental protection statutes as inherent limitations on title, we can avoid many applications of the ad hoc takings test, without sacrificing the important countermajoritarian role of the Fifth Amendment, unduly upsetting settled expectations, or unfairly singling out individual landowners to bear burdens that, in fairness and justice, should be borne by the public at large."

§ 11.02(e) Greater Equality in Marital (especially Community) Property.

Elizabeth De Armond, "It Takes Two: Remodeling the Management and Control Provisions of Community Property Law," *30 Gonz. L. Rev. 235 (1995).*

The author argues that the rights and obligations of spouses with respect to community property should reflect the symbiotic nature of marriage, should restrict spouses' abilities to dominate each other through property transactions, and should encourage spouses to work together and act with care when dealing with their co-owned property. The article begins with a discussion of the development and current management and control provisions of American community property law. The author believes there are biases in the community property laws that create imbalanced power relationships in marriage detrimental to women. In responses, the author suggests creating a model of both equality and interdependence, requiring good faith and due diligence. "As a general rule, all spouses should consult with each other, giving full information and reaching a consensus, for all transactions with co-owned property that will have a material impact on the marriage relationship. Furthermore, spouses should be prohibited from carrying out transactions to which the other spouse has objected, whether they are material or not." The author would give spouses the greatest possible opportunity to make a marriage work and encourage them to work things out by not allowing limitations on claims to start running until the marriage actually breaks up. This proposal maximizes the opportunities for couples to develop an alternative marital property scheme that will reflect the unique nature of the particular individuals and their relationship with each other.

§ 11.02(f) Acceptance of the Concept of Sustainable Development.

John C. Dernbach, "Sustainable Development as a Framework for National Governance," 49 *Case Western Reserve L. Rev. 1* (1998).

This lengthy article focuses on sustainable development, development that is "socially equitable and protective of the natural resource base on which human activity depends." The author states that "sustainable development is a response to the deeply held view that environmental degradation prevents or threatens social and economic progress."

The article synthesizes Agenda 21, the Rio Declaration, and other texts into a conceptual framework for national governance. The author states that domestic acceptance, and implementation of international norms, are better achieved when understood and voluntarily accepted rather than coerced. Therefore one of the goals of the sustainable development movement is to have countries understand and internalize international rules, rather than have them imposed from external influences.

Sustainable development could have an impact on property law, because countries tend to encourage development of land without much consideration of the environment. This will likely occur only if the laws relating directly to real property ownership oblige owners to integrate environmental, social and economic considerations into their day-to-day decision-making." To alleviate the fears of property owners that "such laws would have to steer clear of constitutional prohibitions against governmental takings of property without compensation." Tradable use rights, disclosure requirements and property tax laws tailored to sustainable development could be used. The author states that laws can make "sustainable uses of land more economically attractive without directly affecting property rights" and mentions a Costa Rican law that compensates landowners for private property left in natural cover.

Another approach is to change property rights in ways that increase property values. Legislation or legal agreements might create economic value in natural features that are not now recognized to have economic value, such as the ability of forests to absorb carbon dioxide from the atmosphere, and allow landowners to benefit from the protection of those features. Many persons in developing countries advocate the creation of community or individual property rights in traditional knowledge or skills concerning the use of native plant and animal species, or even in the plants and animals themselves, particularly for their medicinal value. Because they would encourage property owners to engage in sustainable activities based on self-interest, such approaches could have more effective and widespread results than governmental regulation.

In summary, national governments should create legal and institutional arrangements that engage, encourage and even propel all parts of society toward sustainable development. They should integrate their decision-making concerning environmental, social, and economic issues; ensure that economic progress does not come at the expense of progress in other areas; and use precautions to protect the environment and natural resources. Countries will need to repeal or modify subsidies and other laws that encourage unsustainable development, and use a variety of legal and policy instruments to foster sustainable development.

§ 11.02(g) Balancing Ecological Integrity with Property Rights Without Backlash.

Terry W. Frazier, "Protecting Ecological Integrity Within the Balancing Function of Property Law," *28 Envtl. L. 53 (1998).*

Professor Frazier states that property laws must be developed in a way that the ecological integrity principle is balanced against the more traditional individual liberty and community interests. This is necessary because "the distinction between 'harm-preventing' and 'benefit-conferring' regulation is ... in the eye of the beholder." Hopefully this balancing of "harm-preventing" and "benefit-conferring" regulation will prevent a backlash against the ecological movement from property owners who are resenting the invasion of what they consider to be their personal property rights.

Too many people have been taken in by the false notion that they must choose between a healthy environment and a healthy economy. The truth is that a healthy economy ultimately requires a healthy environment. In the short-term, balance is simply common sense. In the long term, it's our moral responsibility.

§ 11.02(h) Preserving Private Rights in Ecologically Sensitive Lands.

Eric T. Freyfogle, "The Owning and Taking of Sensitive Lands," *43 UCLA L. Rev. 77 (1995).*

This article concerns the differing views on ownership of ecologically sensitive lands. Preservation is compared to conservation. The author forecasts future developments in environmental policy and suggests ways that just-compensation law needs to change. The article reviews two wetlands cases: *Loveladies Harbor, Inc. v. United States, 15 Cl. Ct. 381 (1988),* and *Rowe v. Town of North Hampton, 553 A.2d 1331 (N.H. 1989).*

In *Loveladies,* the corporation's aim was to develop soggy beachfront property along the coast in New Jersey. The developer worked closely with the local governments and developed 199 of the 250 acres it owned. Problems arose when it tried to get permits for the final 51 acres after new state wetlands rules had been developed. Loveladies Corp. finally obtained state permission to fill 12.5 of the acres by agreeing to leave the remaining acres unaltered. But when it applied to the Corps of Engineers it was officially denied a permit for the 12.5 acres. The Corps was influenced by the state regulatory agency, which claimed that the project did not comply with state requirements. Both the federal trial court and the appellate court upheld the Corps' power to deny the permit, but perhaps would require paying compensation. The United States Claims Court found that after the permit denial the land's highest market value was $1,000 per acre. The original purchase price was $1,250 per acre and market value without regulation was $212,400 per acre. The court concluded that regulation had gone too far; this residential development was not a nuisance but an appropriate use of this land. The court concluded that the essential question was "[h]owever vital wetlands might be, and however ecologically disruptive fill activities might be, a regulation limiting development did not restrain a prospective harm. Its effect rather, was to obtain a 'public benefit.' Hence, the essential question: was it fair to expect the landowner alone to pay for this 'benefit,' or should the community at large share the cost?"

In *Rowe,* the owner was not able to obtain a variance to build on her wetlands property and so she claimed a taking of private property under state law. The New Hampshire Court reasoned that Ms. Rowe was going to use the land in a way that changed the "essential natural character" of the land, a use for which "it was unsuited in its natural state" (quoting *Claridge v. New Hampshire Wetlands Bd., 485 A.2d 287, 290 (N.H. 1984).* The court held that it was not unreasonable to limit use of private property to its natural use in order to prevent harm to public rights.

"Courts cannot keep the common law up to date merely by looking to the past and making logical deductions. They must at all times keep one eye on the community and its evolving norms and expectations, and mix the values they find there with the heritage and language of the law."

§ 11.02(i) Using Personal Narrative to Address Property Rights Conflicts.

Eric T. Freyfogle, "Owning the Land: Four Contemporary Narratives," 13 *Journal of Land Use and Environmental Law* 279 (1998).

Professor Freyfogle begins this article in a narrative form, likening the New World to the Garden of Eden. He contrasts this view of America to an alternative view of America stressing the harsh realities of pioneer life. "As Locke interpreted the Bible, God originally gave the Earth to humankind collectively, as property in common, yet any individual who wanted could seize a thing from the common stock, including land, and make it his own simply by mixing his labor with it. Before the labor was added, the thing had no value. Once the labor was mixed in, value arose and the thing became private property."

The author declares that at the end of the nineteenth century land was considered to have inherent value and sometimes too much labor could be as detrimental as too little labor. As the land showed scars of misuse, calls for conservation, pollution control, and preservation of wildlife and wilderness became quite common. Man was demoted from conqueror of the land to tender of the land, and private property rights were limited in an effort to benefit the community.

The other narratives "explain where private property came from, why it exists, and what ownership ought to entail." This article discusses "the libertarian narrative of individual autonomy, ... [a] narrative of property focussed on

economic opportunity, a community-centered narrative that understands property as an evolving tool to meet community needs, and a biocentric narrative that looks to the land itself to prescribe the rules on how it can be used."

The author concludes that in order for a more environmental view to prevail in property law, fears of "being excluded from decision-making processes" and the fear that "changing laws will disrupt investments, expectations, and opportunities" must be addressed. To the excluded outsider, the possibility that traditional property law can no longer be depended on generates a real fear that investments are no longer safe. The author's solution to overcoming these fears is to include, and encourage, landowners and other citizens to help formulate land-use decisions.

§ 11.02(j) Expansion of Squatters' Rights Through Adverse Possession.

Brian Gardiner, "Comment: Squatters' Rights and Adverse Possession: A Search for Equitable Application of Property Laws," *8 Ind. Int'l & Comp. L. Rev. 119 (1997).*

This article deals mainly with adverse possession and squatters' rights, using the homeless population as examples of squatters. The author contrasts the different squatters' rights found historically in Great Britain, Germany, Denmark, Netherlands, the United States, and in less developed countries, Brazil, Malaysia, Philippines. The author shows how squatters are treated in these countries and concludes that the reason they are treated so differently is because of the different levels of support given by each community. So far squatters in Europe, where squatters have been given much support, have had more success in claiming land through adverse possession than squatters in the United States. Squatters' fates in lesser developed countries depend on how willing the government is to accept and foster squatters' rights; and if the government is not willing to foster this relationship then tragedy often results.

The author believes that utilitarianism and efficiency are the proper models for property law establishment and maintenance, because "the efficient use of property benefits all of society." "A mere accounting of governmental resources, adverse possession laws, and attitudes towards squatters, the homeless, and homesteaders may itself lead to the alleviation of homelessness." Governments should reform adverse possession laws, placing heavier burdens on private land owners and the government to monitor and preserve their land. Governments should encourage homesteading and establish guidelines for the health, safety, and welfare of squatter settlements. Additionally squatters "should not be viewed as opportunistic criminals," but as respected citizens who choose self-help over waiting for governmental solutions, to remedy their problems.

§ 11.02(k) Technobiological Impacts on Property Rights Concepts.

Richard Gold, "Owning Our Bodies: an Examination of Property law and Biotechnology," *32 San Diego L. Rev. 1167 (1995).*

This article examines whether property law provides an appropriate forum for determining who should have rights in human biological materials. Currently, in property law, goods are allocated according to market norms and therefore property law has difficulty dealing with non-market aspects of goods.

Biotechnological research on human tissue has two characteristics which cause it to differ from other types of research: biotechnology involving the human body yields products that a healthy human body naturally produces and such products are used primarily in the provision of health care.

This article explores whether property law is the most appropriate way to allocate control over human biological materials. The author discusses ways American society places values on human biological materials. He cites to *Diamond v. Chakrabarty, 447 U.S. 303 (1980),* in which the company was trying to secure a patent for a new bacterium created to break down crude oil. The Court held that the non-economic effects of granting a patent right to *Chakrabarty* would be minimal. While the failure to gain patent rights in generically engineered organisms might slow down the

pace of research in this field, no judicial decision, the court held, would deter the scientific mind from probing into the unknown any more than Canute could command the tides. The court further held that it was not competent to consider any but economic factors inhering in genetically engineered organisms. Other ways of valuing such organisms--for example, in terms of their effect on health, the environment, and human dignity--were matters of high policy that only Congress could address. *Gilliam v. American Broadcasting Cos., Inc., 538 F. 2d 14 (2d Cir. 1976)* is cited as an example of a party "seeking to use property law in order to vindicate non-market values. This case demonstrates that courts will entertain economic arguments but not non-market values when allocating property rights. *United Steel Workers of America v. United States Steel Corp., 631 F. 2d 1264 (6th Cir. 1980)* is also cited as an example of a party that "in attempting to vindicate the non-market value of community, could make no plausible economic argument in favor of its claimed property right." This is a very interesting case where the entire livelihood of a town depended on the two steel mills that were shutting down. The community attempted to force the company to keep the two mills operational or to sell the mills to the community. Although the trial judge was sympathetic to the community, he held that he had no authority upon which he could give a property right in the community to prevent this from happening. The Court of Appeals also expressed sympathy for the community, but also concluded that it could find no authority to support the grant of a property right to the community; only the legislature could do this. The author discusses *Moore v. Regents of the University of California, 51 Cal. 3d 120, 793 P.2d 479, 271 Cal. Rptr. 146 (1990),* in which the court addressed the issue of ownership of human biological materials; exploration of this case leads to a discussion of whether certain values can be translated into market value. The author concludes that the values are not translatable and then considers whether property law is flexible enough to allow direct examination of non-market values.

The author concludes new directions for the law to take by not allowing the body and health to be considered property, thereby allowing the body and health to be evaluated with the focus on a non-market value. This could leave the court with several options. First neither party would own the cell-line but it would belong to some non-profit non-governmental organization (i.e., Red Cross). Representatives of different segments of society could be put on an ethics board to make determinations about these materials along with "a mandate to pursue both research aimed at therapeutic uses of the cell-line and research aimed at discovering the interaction between individuals and the environment on the incidence of disease." The person donating the cell material could be allowed to choose which organization would control the cells. The researcher could be encouraged to conduct this type of research by being ensured of a license to use the cell-line. The author states that because values inhering in human biological materials take on different forms at different times, it is appropriate that there be no set formula for this suggested approach.

§ 11.02(l) Increasing Emphasis in Environmental Ethics.

Robert J. Goldstein, "Green Wood in the Bundle of Sticks: Fitting Environmental Ethics and Ecology into Real Property Law," *25 B.C. Envtl. Aff. L. Rev. 347 (1998).*

The basic premise of the article is that included in the bundle of sticks representing real property rights are a few sticks of "green wood." This "green wood" is being bent and reformed by the changes in society with regard to environmental issues. The author cites to the *Kim* case *(Kim v. City of New York, 681 N.E. 2d 312 (N.Y. 1997),* holding "that the law of property in New York includes the full body of New York law, inclusive of the state constitution, statutes, and common law." New York has adopted many environmentally friendly laws over the course of the past thirty years. Several issues raised by the *Kim* decision are "whether the rights of prior purchasers will be subject to a taking;" and the possibility of "public backlash against this disquieting of title, which could induce a legislative remedy to specifically remove the statutory enactments from consideration as property law."

§ 11.02(m) Subject Water Rights Transfers to Public Trust Considerations.

Douglas L. Grant, "Western Water Rights and the Public Trust Doctrine: Some Realism About the Takings Issue, Symposium: Current Issues in Western Water Law," 27 *Arizona State Law Journal* 423 (Summer, 1995).

This article is about the public trust doctrine that federal courts have long used to limit the power of state legislative and administrative bodies to transfer state-owned land under navigable waters into private ownership. Although the courts differ on when a grant of submerged land into private ownership violates a trust, all hold that such land is in a revocable trust for the public. "Within the last two decades, several western courts have used or expressed their willingness to use the public trust doctrine to limit state legislative and administrative power to sanction proprietary rights in water."

Although significant uncertainties remain in takings clause suits, there is no doubt, "that the owner-expectations and title-limitations inquiries require a court to examine relevant state law." The author explains that the analysis varies depending on the category of a water suit, but also identifies the important issue of "whether state law in fact has made existing appropriations inherently revocable to protect trust uses." In examining the state law issue of inherent revocability the author reviews lessons from legal realism on reading precedent and applies the lessons to public trust doctrine and appropriation doctrine precedents.

The author also examines "a number of public trust doctrine and appropriation doctrine cases in light of the lessons from legal realism on how courts deal with precedent." He cites to *National Audubon Society v. Superior Court of Alpine County, 658 P.2d 709, 727-29* (Cal.), *cert. denied, 464 U.S. 977 (1983),* which went beyond traditional public trust doctrine cases in three ways. First, traditional cases applied the doctrine to limit the power of state legislative and administrative bodies to fill state-owned submerged lands or grant them into private ownership. *National Audubon* applied it to limit the power of state legislative and administrative bodies to sanction proprietary rights in the overlying water. Second, traditional cases involved lands under tidal waters or under waters navigable according to the federal test of navigability for title. *National Audubon* said the doctrine also protects trust uses of nontidal waters that are navigable only under a laxer state test of navigability. Third, traditional cases used the doctrine to protect public access to the waters for navigation, commerce, and fishing. *National Audubon* used it to protect public enjoyment of the waters for recreational and ecological purposes. The author examines and discusses why western state courts generally have significant leeway in treating the issue of revocability.

§ 11.02(n) Expanding Property Rights in Personal Identity.

Ray D. Madoff, "Taxing Personhood: Estate Taxes and the Compelled Commodification of Identity," *17 Va. Tax Rev. 759 (1998).*

This article concerns estate tax problems raised by treating celebrity status as a commodity, and the problem of the current estate tax system's inability to recognize the decision not to treat celebrity status as a commodity. The author shows this difference by illustrating the difference between Howard Stern, who enjoyed celebrity status, and J.D. Salinger, author of *The Catcher in the Rye,* who treasured his privacy. Assuming that both live in jurisdictions which recognize a descendible right of publicity (14 states do recognize the right of publicity and the law is still evolving), included in each of their estates would be the value of the decedent's name and likeness. Stern's estate might have the funds necessary to pay the tax, while Salinger's estate, ironically, because he chose to avoid publicity, possibly might not have the necessary funds and would have to sell some estate assets to pay for this marketable commodity that Salinger in all likelihood would never have agreed to market.

The author notes that under the income tax system the value of a painting, which has appreciated, will not be subject to tax until the taxpayer sells or exchanges the painting. In the gift tax system the painting will not be subject to tax until the donor transfers the property by gift. Both of these systems require a voluntary action by the taxpayer. But in the estate tax system the only action that is required is the taxpayer dying, an unavoidable event, and the full market value of the painting will be subject to tax even if there are no plans to sell it.

Further, the author notes that "property is an expansionist concept, changing to accommodate broader changes in society." The author states that this expansion has broadened the application of estate tax and uses one of the more recently recognized property rights, the right of publicity, to demonstrate some of this expansion.

"The right of publicity was originally conceived of as part of the right of privacy. However, the right of publicity in its current form differs from the right of privacy in one significant respect: whereas the right of privacy is grounded in the protection of personal feelings, the right of publicity was established in recognition of the economic value of a person's celebrity status." In 1953 the right of publicity was first recognized as being separate and distinct from the right of privacy. In one case the court characterized the baseball players' interests in their images as a property interest capable of assignment. Once the right of publicity was recognized as a property right, it assumed other attributes of property, including assignability and descendibility. Some jurisdictions recognizing a descendible right of publicity require that the decedent have recognized the extrinsic commercial value by exploitation or assigning his right to someone else while living. However, other jurisdictions reason that "the theories underlying recognition of the right of publicity are not served or are even disserved by imposing such a requirement," because the right to publicity protects persons who choose not to exploit themselves on the market, as well as those who choose to do so.

The author also uses as an example Virginia C. Andrews, an author of children's paperback books. When Ms. Andrews died she was in the process of entering into a contract for two more books, and the editor was very interested in publishing more books under the V.C. Andrews name. By 1990 five more books were produced under her name, written by another author using a computer analysis of her previous books, and the books enjoyed tremendous success. This right of publicity benefited Andrews' estate, although her name was not listed as an asset of the estate for the estate tax return. Once the issue was raised, it was expected that the Internal Revenue Service would be able to include the value of the name in the estate. An interesting question raised by this case is its applicability to an estate that does not want to exploit a name or likeness. Under the basic estate tax rules, it is irrelevant whether there is any plan to realize market value or even whether any actual market exists, since a hypothetical buyer and seller standard determine the price.

The author notes the problem of when an estate consists of a vacation home the heirs do not wish to sell; yet if there are not enough other assets to cover the estate taxes the executor may be forced to sell the home. The forced sale of the right of publicity also has unsettling implications in that a family may be forced to sell other assets to cover the market price of the celebrity status, even if they are not planning to exploit this status.

§ 11.02(o) Clashes of Common Law and Indigenous Customary Law.

Paul M. Sullivan, "Customary Revolutions: The Law of Custom and the Conflict of Traditions in Hawai'i," 20 *University of Hawaii L. Rev.* 99 (1998).

This article focuses on the conflict between the concepts of "custom" and "usage" in the State of Hawaii. The debate is between customs and traditions of American and English law concerning private property ownership and recent claims calling for persons of Hawaiian ancestry to be allowed to use private land of others for "traditional and customary rights."

This article explains how the development of Hawaii's real property law in the nineteenth century left no room for the survival of customary access and gathering rights except as expressly preserved in what is now HRS section 7-1. The article then considers two fairly recent cases *(Sotomura v. County of Hawaii, 460 F. Supp. 473 (D. Haw. 1978)* and *Robinson v. Ariyoshi, 887 F. 2d 215, 2119 (9th Cir. 1989))* where custom and usage have been applied by the Hawaii Supreme Court in decisions which were subsequently challenged, with some degree of success, as unconstitutional takings. It concludes with a discussion of the *PASH* case *(Public Access Shoreline Hawai'i v. Hawaii County Planning Commission ("PASH"), 79 Hawai'i 425, 903 P.2d 1246 (1995), cert. denied sub. nom., Nansay Hawai'i, Inc. v. Public Access Shoreline Hawai'i, 116 S. Ct. 1559 (1996)* [hereinafter *PASH]),* including the many issues of interpretation and application which PASH left unresolved, and explores some possible bases for a constitutional challenge to the PASH case itself or to future decisions of judicial and administrative tribunals based on *PASH."*

The author concludes that *PASH* "is more appropriately viewed as a revolutionary manifesto, rather than a revolutionary

overthrow of an institution of established real property law."

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§ 11.02(e) Greater Equality in Marital (Especially Community Property) [Go To Main]

***Change Section Heading from* § 11.02(e). Greater Equality in Marital (especially Community Property) to:**

§ 11.02(f) Acceptance of the Concept of Sustainable Development [Go To Main]

After the last sentence of this section add footnote 1:

see also J.B. Ruhl, *Sustainable Development: A Five-Dimensional Algorithm for Environmental Law, 18 Stan. Envtl. L.J. 31 (1999);* David R Hodas, *The Role of Law in Defining Sustainable Development: NEPA Reconsidered*, 3 Wid. L. Symp. 1 (1998).

§ 11.02(l) Increasing Emphasis in Environmental Ethics [Go To Main]

After the last sentence of this section add footnote 2:

see also John C. Tucker, *Constitutional Codification of an Environmental Ethic, 52 Fla. L. Rev. 299 (2000).*

Add the following new section at end of chapter:

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CHAPTER 12 SPECIAL PROBLEMS OF REAL PROPERTY OWNERSHIP +

2-12 Thompson on Real Property, Thomas Editions 12.syn

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FOOTNOTES:
(n1)Footnote *. §§ 12.01 - 12.15

(n2)Footnote **. § 12.16

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CHAPTER 12 SPECIAL PROBLEMS OF REAL PROPERTY OWNERSHIP +

2-12 Thompson on Real Property, Thomas Editions § 12.01

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§ 12.01 Introduction.

This chapter discusses some of the barriers to ownership of real property interests faced by various persons and entities. While many traditional legal disabilities are gradually disappearing, some still persist with respect to aliens, married women, minors, and prisoners. Entities under various property ownership disabilities include non-profit unincorporated associations, unincorporated associations organized for profit, non-stock private religious corporations, non-stock private cemetery corporations, other non-stock private corporations, and certain stock private corporations.

+ § 12.16 has been adapted from George Lefcoe, Real Estate Transactions (Michie 1993).

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CHAPTER 12 SPECIAL PROBLEMS OF REAL PROPERTY OWNERSHIP +

2-12 Thompson on Real Property, Thomas Editions § 12.02

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§ 12.02 Rights of Aliens to Own Real Property.

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§ 12.02(a) Under Common Law in England.

In the early feudal era, nationalism was not yet pronounced, and landowners held property in several regions or under allegiance to several lords without being considered aliens. After national sentiments became more active, feudal fealty to two or more lords with hostile nationalistic sentiments or interests was unacceptable. n1 Thus a French lord with holdings in Normandy and England became alien with respect to the English after the English lost Normandy to the French. n2

After divided loyalties developed that could not be accommodated in a feudal system, the alien under common law did not have the right to acquire or hold property. Consistently, the alien also could not acquire property interests by operation of law, n3 such as by descent, n4 or through a dower, n5 or by curtesy. n6 Being unqualified to take by descent, the alien also could not be a conduit for one to take by descent, n7 and could not transfer property by descent. n8 Even a mortgage given to an alien could be defeated to the extent the mortgage was treated as a transfer of legal title. Any property interests attempted to be passed to aliens could be forfeited to the sovereign, n9 and forfeiture of the mortgage title also defeated the equity of redemption. n10

§ 12.02(b) In Early American Law.

In the American colonies, citizenship could be easily obtained and the traditional common law rules relating to aliens' property rights were of little significance. When independent nationhood was achieved and rules for citizenship became national and uniform, property rights remained mostly matters of state law. States fashioned their own rules for alien property rights, subject to the familiar constitutional restraints of the treaty power and, later, the Fourteenth Amendment provisions. n11 Searching for settlers, states generally took a liberal attitude toward aliens' rights. However, anti-alien sentiment in the midwestern states of the late 19th century still appears in some of those states' statutes. Similar statutes appeared in some western states during the 20th century. n12

§ 12.02(c) States That Have Removed All Alien Property Disabilities.

Alabama, n13 California, n14 Colorado, n15 Michigan, n16 and West Virginia n17 have constitutional provisions granting to resident aliens the same property and other rights as citizens. By statute, each of those states has also further extended those rights to all aliens, whether or not resident.

Delaware, n18 Florida, n19 Maine, n20 Massachusetts, n21 Missouri, n22 Nevada, n23 North Dakota, n24 Ohio, n25 Rhode Island, n26 Tennessee, n27 and Washington n28 have achieved the same result by legislation only. Vermont's courts have removed alien disabilities by judicial decision. n29

§ 12.02(d) States That Have Partially Removed Common Law Alien Property Disabilities.

Several states have partially removed the common law property disabilities of aliens. Minnesota n30 and Pennsylvania n31 have removed most of the significant disabilities by statute. In Indiana n32 and South Carolina, n33 aliens may engage in most land transactions, but in Kentucky n34 and Nebraska n35 most disabilities remain in place.

§ 12.02(e) Trend to Remove Property Disabilities of Non-resident Aliens.

Some states have removed property disabilities only as to resident aliens. North Carolina, n36 Wisconsin n37 and the District of Columbia n38 have left special disabilities applicable only to those aliens who have not established residence in the United States. Iowa, n39 Mississippi, n40 New Hampshire n41 and Oklahoma n42 impose special property disabilities on those aliens who are not residents of those respective states. Arguably Arkansas has also not removed property disabilities from non-resident aliens. n43

In some states, residence within the state is required for an alien to enjoy homestead rights. n44 If either the decedent or surviving spouse is not a resident of the state where homestead rights are sought, the surviving spouse may not claim homestead rights. A surviving spouse may not obtain homestead immunity from creditors by moving into the state of the homestead, n45 and may instead lose homestead rights by moving from the state of the homestead. n46

§ 12.02(f) Property Disabilities of Enemy Aliens.

Five states have removed property disabilities only from aliens who are friendly: Georgia, n47 Maryland, n48 New Jersey, n49 New York n50 and Virginia. n51 Three of those states -- Georgia, n52 New Jersey n53 and New York n54 -- have other statutes or decisions that may mitigate some of the disabilities of enemy aliens.

Ordinary aliens are transformed into enemy aliens whenever their countries are at war with the United States, and, during war, enemy aliens may become subject to special property disabilities imposed by both federal and state governments. n55 Even in a state that has removed property disabilities from aliens generally, may have that action counteracted by federal legislation for seizure or control of enemy alien property.

§ 12.02(g) Trend to Remove Property Disabilities of Aliens Ineligible for Citizenship.

In several states, aliens who are ineligible for citizenship have been subjected to property disabilities. Some states still impose restrictions on holding land, but many have eased and even removed these disabilities altogether.

California's Alien Land Law imposed property disabilities on certain ethnic aliens ineligible for citizenship, but was eventually held unconstitutional. n56 Another California law decreed that aliens ineligible for citizenship could take property in California only if there was a reciprocal agreement with the alien's own country; n57 that restriction was repealed in 1974.

Louisiana's constitutional provision against land acquisitions by aliens who were ineligible for citizenship n58 was repealed, and New Mexico's n59 similar restriction was rendered ineffective by statute. n60

Wyoming's constitution limits its guarantee of property rights to resident aliens only. n61 However, a Wyoming statute expressly prohibits aliens ineligible for citizenship from holding land. n62

Kansas, n63 Minnesota n64 and Wisconsin n65 impose property restrictions on aliens who are ineligible for citizenship, subject to any treaty provisions that may nullify the restrictions. Constitutional or statutory provisions in Arizona, Idaho, Montana and Oregon that imposed disabilities on aliens ineligible for citizenship have all been repealed in recent years.

§ 12.02(h) How Treaties May Affect Alien Property Disabilities.

United States treaties are given constitutional effect as the supreme law of the land, n66 so state regulation of alien property rights may be superseded by treaty provisions. n67 However, federal treaty interference with state laws on alien property rights has generally been restrained. n68

Usually, treaty provisions regulating alien property rights confer on aliens who are otherwise ineligible to acquire real property a period of time in which to sell off land they obtain by inheritance or devise. n69 Even without specific treaty provisions, some courts have held that more general treaties, especially of the "most favored nation" type, implicitly contain the privilege for aliens to acquire and hold land in the United States. n70 Whether or not such treaties confer those privileges may depend on whether ordinary treaties with other nations include such privileges and, if they do, whether they were specifically bargained for or simply included as a standard provision. If such ordinary treaties include alien property privileges as standard provisions, then such privileges could probably be implied in a "most favored nation" treaty. n71

§ 12.02(i) Restrictions on Alien Property Transactions Conducted Through Business Organizations.

Several states have statutes ensuring that aliens do not evade land restrictions by acting through a corporation or other business organization. Such legislation restricts property rights of corporations dominated by aliens or prohibits alien stock ownership in corporations authorized to deal in land. States with such restrictive statutes include Iowa, n72 Louisiana, n73 Minnesota, n74 Nebraska, n75 South Carolina, n76 and Wisconsin. n77

FOOTNOTES:

(n1)Footnote 1. Because all lands were held of the king as the sovereign or lord paramount, an alien could not hold them without acknowledging allegiance to the king; however, because the alien's allegiance remained to the former sovereign, the alien could not swear allegiance to a second sovereign. Samuel MacClintock, Aliens Under the Federal Laws of the United States 13 (1909).

(n2)Footnote 2. Frederick Pollack & Frederick William Maitland, The History of English Law Before the Time of Edward I (2d ed. 1898) 460-466 (2d ed. 1905).

(n3)Footnote 3. Calvin's Case, 7 Coke 1a, 25a, *77 Eng. Rep. 377, 407 (1606).*

(n4)Footnote 4. *Orr v. Hodgson, 17 U.S. (4 Wheat.) 453 (1819).*

(n5)Footnote 5. William Evan Davies, The Law of Aliens 163 (1931).

(n6)Footnote 6. *Burk v. Brown, 2 Atk. 397, 26 Eng. Rep. 640 (1742).*

(n7)Footnote 7. *Collingwood v. Pace, 1 Vent. 413, 86 Eng. Rep. 262 (1964).*

(n8)Footnote 8. The rule is referred to and mitigated by two statutes, 11 & *12 Wm. 3,* ch. 6 (1700), and *25 Geo. 2,* ch. 39 (1752).

(n9)Footnote 9. *Sharp v. St. Saveur, L.R. 7 Ch. App. 343 (1871);* Godfrey and Dixon's Case, Godbolt 275 (1619).

(n10)Footnote 10. John Joseph Powell, Mortgages 106 (Am. ed. 1828).

(n11)Footnote 11. *Terrace v. Thompson, 263 U.S. 197 (1923). See also* James Alan Hiuzinga, *Alien Land Laws: Constitutional Limitations on State Power to Regulate, 32 Hastings L. J. 251 (1980); Rights and Restrictions on Interests of Aliens in U.S. Estates: Federal and State Laws Affecting Administration and Distribution of U.S. Estates in Which Aliens Hold Interests,* 15 Real Property, Probate and Trust J. 659 (1980).

(n12)Footnote 12. *See* Joshua Weisman, *Restrictions on the Acquisition of Land by Aliens,* 28 Am. J. of Comparative L. 39 (1980).

(n13)Footnote 13. Ala. Const. § 34; Ala. Code tit. 35, § 1-1. *See also Nicrosi v. Phillipi, 80 So. 561 (Ala. 1890); Harley v. State, 40 Ala. 689 (1867).*

(n14)Footnote 14. Cal. Const. art. I, § 20.

(n15)Footnote 15. Colo. Const. art. 2, § 27; Colo. Rev. Stat. § 15-11-112.

(n16)Footnote 16. Mich. Const. art. 10, § 6; Mich. Stat. Ann. § 26.1105.

(n17)Footnote 17. W. Va. Const. art. 2, § 5; W. Va. Code §§ 36-1-21, 42-1-4.

(n18)Footnote 18. Del. Code Ann. §§ 25-306, 25-307.

(n19)Footnote 19. Fla. Const. art. 1, § 2; Fla. Stat. Ann. § 732.1101. *See also* Fla. Stat. Ann. § 198.04 (permitting property restrictions to be imposed on aliens ineligible for citizenship).

(n20)Footnote 20. Me. Rev. Stat. Ann., tit. 33, § 451.

(n21)Footnote 21. Mass. Ann. Laws ch. 184, § 1.

(n22)Footnote 22. Mo. Rev. Stat. § 442.560 (Missouri now limits holdings of agricultural land by non-resident aliens). *See* Stephen F. Mathews, *Recent Developments in Missouri: Agricultural Law,* 49 U. Mo.-K.C. L. Rev. 405 (1981).

(n23)Footnote 23. Nev. Rev. Stat. § 111.055.

(n24)Footnote 24. N.D. Cent. Code § 47-01-11 (North Dakota now limits holdings of agricultural land by non-resident aliens).

(n25)Footnote 25. Ohio Rev. Code Ann. § 2105.16.

(n26)Footnote 26. R.I. Gen. Laws § 34-2-1.

(n27)Footnote 27. Tenn. Code Ann. §§ 31-2-109, 66-2-101.

(n28)Footnote 28. Wash. Const. amend. 42; Wash. Rev. Code §§ 64.16.005, 64.16.140.

(n29)Footnote 29. *Lenahan v. Spaulding & Lamphrey, 57 Vt. 115 (1884); State v. Boston Concord and Montreal R.R. Co., 25 Vt. 433 (1853); Gilman v. Thompson, 11 Vt. 643 (1839).*

(n30)Footnote 30. Minn. Stat. Ann. § 500.221.

(n31)Footnote 31. *See* Pa. Const. Stat. Ann., tit. 68, §§ 22, 24, 28, 41-47, 53. *See also In re Gregg's Estate, 109 A. 777 (Pa. 1920); Cooke v. Doron, 64 A. 595 (Pa. 1906); Bridgeford v. Groh, 305 A. 260 (Pa. 1932).*

(n32)Footnote 32. Ind. Code Ann. §§ 32-1-7-1 - 32-1-8-3.

(n33)Footnote 33. S.C. Const. art. 3, § 35; S.C. Code Ann. §§ 27-13-10 - 27-13-40; *Tucker v. Atlantic Coast Lumber Co., 59 S.E. 859 (S.C. 1907).*

(n34)Footnote 34. Ky. Rev. Stat. Ann. §§ 381.290, 381.300, 381.320, 381.330, 391.040, 391.060; *Commonwealth v. Von Zedwitz, 285 S.W. 224 (Ky. 1926).*

(n35)Footnote 35. Neb. Const. art. 1, § 25 (1875); Neb. Rev. Stat. §§ 76-402, 76-403, 76-405, 76-409, 76-415; *Goos v. Brocks, 223 N.W. 13 (Neb. 1929).*

(n36)Footnote 36. N.C. Gen. Stat. §§ 64-1, 64-3.

(n37)Footnote 37. Wis. Const. art. 1, § 15.

(n38)Footnote 38. *48 U.S.C. § 1508;* D.C. Code Ann. § 45-1301; *Larkin v. Washington Loan & Trust Co., 31 F.2d 635 (D.C. Cir. 1929), cert. denied, 279 U.S. 867 (1929).*

(n39)Footnote 39. Iowa Const. art. 1, § 22; Iowa Code Ann. §§ 567.1 - 567.11; *In re Estate of Millers, 159 N.W.2d 441 (Iowa 1968); Arthur Elevator Co. v. Grove, 236 N.W.2d 383 (Iowa 1975).*

(n40)Footnote 40. Miss. Code Ann. § 89-1-23; *Guiseppe v. Cozzani, 118 So. 2d 189 (Miss. 1960).*

(n41)Footnote 41. N.H. Rev. Stat. Ann. §§ 477:20, 477:21; *In re Constan's Estate, 384 A.2d 495 (N.H. 1978).*

(n42)Footnote 42. Okla. Const. art. 22, § 1; Okla. Stat. Ann. tit. 60, §§ 121 - 124, 127; *Cooke v. Coronado Oil Co., 240 P. 739 (Okla. 1925).*

(n43)Footnote 43. Ark. Const. art. 2, § 20; *Applegate v. Lum Jung Luke, 291 S.W. 978 (Ark. 1927)* (holding the above-cited constitutional provisions inapplicable to resident aliens).

(n44)Footnote 44. Miss. Code Ann. § 27-33-3. Okla. Stat. Ann. tit. 31, § 3. *See* Note, *State Homestead Exemption Laws, 46 Yale L.J. 1023 (1937).*

(n45)Footnote 45. *Meyer Bros. Drug Co. v. Fly, 63 So. 227 (Miss. 1913); Ex parte Morrow, 190 S.E. 506 (S.C. 1937).*

(n46)Footnote 46. *Coile v. Hudgins, 70 S.W. 56 (Tenn. 1902).*

(n47)Footnote 47. Ga. Code Ann. § 1-2-11.

(n48)Footnote 48. Md. Real Prop. Code Ann. § 14-101.

(n49)Footnote 49. N.J. Rev. Stat. § 46:3-18; *See* Comment, *State Regulation of Nonresident Alien Inheritance -- An Anomaly in Foreign Policy, 18 U. Chi. L. Rev. 329 (1951).*

(n50)Footnote 50. N.Y. Real Prop. Law §§ 10, 15; *Techt v. Hughes, 128 N.E. 185 (N.Y. 1920), cert. denied, 254 U.S. 643 (1920).*

(n51)Footnote 51. Va. Code Ann. §§ 55-1, 64-4, 64.1-4; *Fairfax's Devisee v. Hunter's Leasee, 11 U.S. (7 Cranch) 603 (1813).*

(n52)Footnote 52. Ga. Code Ann. § 1-2-11.

(n53)Footnote 53. N.J. Rev. Stat. § 46:3-18; N.J. Laws ch. 145; N.J. Laws ch. 61; N.J. Laws ch. 232.

(n54)Footnote 54. *George v. People, 40 N.Y.S.2d 830, aff'd, 47 N.Y.S.2d 681 (1944); Dezsofi v. Jacoby, 36 N.Y.S.2d 672 (1942).*

(n55)Footnote 55. *See* Note, *Partnership Claims Before the Iran-United States Claims Tribunal, 27 Va. J. Int'l L. 307 (1987)* (relevant issues that arise when nations are not technically at war, but involved in some type of international conflict).

(n56)Footnote 56. *See Fujii v. State, 242 P.2d 617 (Cal. 1952).*

(n57)Footnote 57. Cal. Prob. Code § 259.

(n58)Footnote 58. La. Const. art. 19, § 21.

(n59)Footnote 59. N.M. Const. art. 12, § 22.

(n60)Footnote 60. N.M. Stat. Ann. § 45-2-112.

(n61)Footnote 61. Wyo. Const. art. 1, § 29.

(n62)Footnote 62. Wyo. Stat. § 34-15-101.

(n63)Footnote 63. Kan. Stat. Ann. § 59-511.

(n64)Footnote 64. Minn. Stat. Ann. § 500.221.

(n65)Footnote 65. Wis. Stat. Ann. § 710.02.

(n66)Footnote 66. U.S. Const. art. VI, § 2.

(n67)Footnote 67. *Giusseppi v. Cozzani, 118 So. 2d 189 (Miss. 1960);* In the *Matter of Johnston, 190 S.E.2d 879 (Miss. 1972).*

(n68)Footnote 68. Charles Cheney Hyde, International Law § 203 (1945); 4 John Bassett Moore, Digest of International Law 3843 (1906); Samuel MacClintock, *Aliens Under the Federal Laws of the United States, 4 Ill. Rev. 95 (1909).*

(n69)Footnote 69. *31 Stat. 1939; Hughes v. Edwards, 22 U.S. (9 Wheat.) 489 (1829); Doe ex dem. Dockstader v. Roe, 55 A. 341 (Del. 1903).*

(n70)Footnote 70. *Brown v. Daly's Estate, 154 N.W. 602 (Ia. 1915).* Most favored nation clauses implicitly grant foreign citizens under treaty the same favorable rights and benefits as are included in U.S. treaties with other nations.

(n71)Footnote 71. Charles Cheney Hyde, International Law § 536 (1945).

(n72)Footnote 72. Iowa Code Ann. § 567.1 (restricts corporate ownership of agricultural land when the majority of shareholders are aliens).

(n73)Footnote 73. La. Rev. Stat. Ann. § 2:132 (only prohibits foreign corporations from acquiring public airports once owned by governmental entities).

(n74)Footnote 74. Minn. Stat. Ann. § 500.221 (restricts corporate ownership of agricultural land when more than 20% of the corporate shares are owned by aliens, unless treaties provide otherwise).

(n75)Footnote 75. Neb. Rev. Stat. §§ 76-404, 76-406, 76-407, 76-411, 76-413.

(n76)Footnote 76. S.C. Code Ann. § 27-13-30 (limits holdings of alien-controlled corporation to 500,000 acres).

(n77)Footnote 77. Wis. Stat. Ann. § 710.02 (restrictions subject to treaties).

+ § 12.16 has been adapted from George Lefcoe, Real Estate Transactions (Michie 1993).

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CHAPTER 12 SPECIAL PROBLEMS OF REAL PROPERTY OWNERSHIP +

2-12 Thompson on Real Property, Thomas Editions § 12.03

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§ 12.03 Married Persons' Property Disabilities.

[Go To Supp]

§ 12.03(a) Historical Background.

§ 12.03(a)(1) Under Early Common Law.

At common law, the principal impact of marriage on individual property rights was to invoke rights of dower and curtesy. The dower right was the widow's life interest in one-third of each parcel of freehold land of which the husband was seised at any time during the marriage, and which land was inheritable by the issue of the couple. As to land held by the husband at the time of marriage, dower attached at the moment of marriage; as to land acquired later, the dower right attached upon acquisition. If the wife predeceased the husband, the inchoate dower right was extinguished; if she survived the husband, the dower right became possessory upon his death. Dower could not be defeated by divorce or by the husband's creditors; it could be released only with the wife's consent. The wife had a right to judicial scrutiny of the division of lands assigned to her for dower possession. n78

The husband's somewhat comparable curtesy right was a life estate in *all* freehold land of which the wife was seised during the marriage and which was inheritable by issue of the couple. Curtesy also was extended to all equitable estates owned by the wife during the marriage. Curtesy, however did not attach until the live birth of issue capable of inheriting the property. n79

During the marriage, at common law the husband had the sole right to manage and control the land held by the couple or either of them. The estates thus controlled by the husband consisted of an estate for the couple's joint lives and, upon the birth of a child, an estate for the husband's life. The husband's right of management and control over these estates meant that he could convey them without the wife's consent, and that his participation was necessary if the wife wished to convey from her property any estate greater than a life estate. n80 Also, one spouse could not convey land directly to the other. n81

Eventually, English courts recognized "equitable separate property of married women." n82 If a conveyance of land to a married woman was clearly intended for the separate use of the married woman, it was treated as a trust, free from the

husband's control and from his creditors and freely alienable by the wife herself. n83 The old restriction on direct conveyances between spouses was avoided by use of the lease and release, according to which one spouse conveyed to a third party for the use of the other spouse. The use thus created was executed into a legal title by the Statute of Uses after 1535. n84

§ 12.03(a)(2) Under Early American Law.

England's American colonies varied considerably in their approaches to the traditional property disabilities of married women. Some disabilities broke down early in some colonies, while other disabilities persisted long after they had disappeared in England. Even the well-established doctrine of equitable separate property of married women enjoyed only haphazard acceptance, because colonies did not accept English equity as eagerly as they received English common law. n85

Married women's property disabilities persisted until the 19th century, when states began to enact legislation known generally as "Married Women's Acts" or "Married Women's Property Acts." These state statutes in their own individual ways eliminated most of those disabilities. n86

Eliminating women's property disabilities has not affected other restraints on the property rights of married couples under American law, notably under homestead and community property rules. Viewed more as protections than as restrictions, the homestead exemption laws in almost every state typically exempt married persons' property from execution for debt, prohibit conveyance or encumbrance by one spouse alone, and confer on the surviving spouse a life estate in some or all of the land that was held by the couple while married. n87

Different disabilities exist in some American community property jurisdictions. In those jurisdictions still following the old Spanish rules for management of community property, the husband has full power over the property, including the power to convey, and the wife has no independent power. n88

§ 12.03(b) Current Property Disabilities Imposed on Married Women.

§ 12.03(b)(1) Sole Control of Property by Husband.

In Alabama n89 and Florida, n90 a conveyance or lease of an interest in land owned by the wife required, until recently, the joinder of the husband, but now no longer does. In the community property states of Louisiana n91 and Nevada n92 only the husband had power to convey community property, but now joinder of the wife is required for many conveyances. Some statutory exceptions are based on the insanity of the husband, divorce, abandonment, desertion, separation by agreement, non-residence, or fiduciary responsibility of the wife, n93 but these have tended to become obsolete as the number of jurisdictions supporting control by the husband has dwindled. New Hampshire recognizes some forms of husband control if the wife has acquired her property "by payment or pledge of the property of the husband." n94 Alabama n95 and Delaware n96 require special examination of the wife or acknowledgement by the wife when she conveys her own property.

§ 12.03(b)(2) Property Restrictions Related to Dower, Curtesy and Their Modern Equivalents.

Because both dower and curtesy conferred on the surviving spouse life estate interests in lands owned by the other spouse, any conveyance of an interest in those lands, while both spouses were alive, required joinder of the other spouse in order to be free of the dower or curtesy interest. Today, the curtesy right, where it survives has been reduced to a life estate in only a portion of the lands held by the wife at her death, rather than in all of the lands held by her at any time during the marriage. Concomitantly, in these jurisdictions, the restrictions on the wife's capacity to convey an interest in those lands during her lifetime have been wholly eliminated. n97 In several of those jurisdictions, the traditional rules restraining the husband from conveying lands affected by dower have also been entirely eliminated. However, in the rest of those jurisdictions, the restraints remain on the husband as to land under the dower rights. n98

In states where dower and curtesy no longer exist, but other protective substitutes have been enacted, protection intended for the surviving spouse consistently produces restrictions on the other spouse's capacity to deal in lands thus affected. This is especially true in those states where the share of the surviving spouse in the descendent's estate is about the same as under dower or curtesy, n99 and in those states that have increased the protected share of the surviving spouse. n100

If these devices for protecting the surviving spouse result in restrictions being placed on the capacity of the other spouse unilaterally to convey, those restrictions may be lifted because of the insanity of the spouse whose joinder is required, n101 or when a mortgage is given to secure part of the purchase price of the mortgaged property. n102 Such restrictions are also lifted in some states because of the non-residency of, desertion by, or separation by decree from the protected spouse. n103

§ 12.03(b)(3) Restrictions Related to Community Property Rights.

All community property states recognize that either spouse may have "separate" property that is free from any restrictions otherwise placed on the marital or community property. n104 With respect to community property itself, the community property states are divided as to the degree of restriction placed on the ability of individual spouses to deal with the property. In Arizona, n105 California, n106 Idaho, n107 Nevada, n108 New Mexico, n109 Washington, n110 and Louisiana n111 neither spouse may individually convey community property. Both must join in any such conveyance. In Texas, either spouse may convey the special community property over which he or she has sole right of management, but otherwise both spouses must join in conveyances of community property. n112

§ 12.03(b)(4) Restrictions on Homestead Rights.

In Virginia n113 and West Virginia, n114 apparently no restriction rests on either spouse who individually wishes to convey homestead land. In Georgia n115 and Tennessee n116 some vague or partial restrictions apply to an individual spouse who seeks to convey or encumber homestead land, while New Mexico n117 and Ohio n118 have now repealed their restrictions.

Most states that recognize homestead rights in property also require both spouses to join in any conveyance or mortgage of homestead property. n119

In several of these states, additional rules exist. The community property state of Texas will not even recognize a joint mortgage unless it is given for the purchase price, for taxes or for improvements relating to the land. n120 To ensure the wife's genuinely voluntary joinder in the conveyance, some states require that her acknowledgment be separate from her husband's. n121 Other states require that the acknowledgment contain language conceding that the conveyance destroys homesteadrights. n122

Exceptions to these restrictions apply in special circumstances in some states. An individual spouse may give a mortgage for part of the original purchase price, n123 or may convey the property if the other spouse is incompetent. n124 A few states permit one spouse to incur mechanics' liens on the homestead property, n125 or to act alone when the other spouse is a non-resident, n126 or has abandoned n127 or divorced the conveying spouse. n128

Conveyances in violation of applicable restrictions are usually void. n129 A deed can be canceled and the land returned; n130 a mortgage can be canceled by the non-joining spouse without repaying the loan. n131 Conveyances of leaseholds may likewise be canceled. n132

On rare occasions, conveyances in violation of homestead restrictions may be upheld. In Texas, a conveyance of homestead property by the husband may become valid if the land loses its homestead character, n133 and in other states

some conveyances of homestead lands from one spouse to the other are recognized. n134

§ 12.03(b)(5) Restrictions on Married Minors.

Minors who marry are subject to whatever property restrictions apply to married persons, but may be relieved of some property restrictions that apply to minors. State statutes vary widely in how they regulate property rights of married minors.

In a few states the property disabilities of minority are removed completely from married minors. n135 One state allows married minors to release dower, curtesy or homestead rights. n136 Still other states lift minority disabilities upon fulfillment of specific conditions. n137 In Rhode Island the property disabilities of minors are removed only from married families. n138

§ 12.03(b)(6) Restrictions on Conveyances Directly Between Spouses.

The common law prohibition of property conveyances directly between spouses still prevails in a few states. n139 In other states, the prohibition has been removed judicially n140 or by statute. If the statutory reform has been piecemeal, conveyances that took place at various times in the past may be treated differently. n141 However, statutes in several states have removed all such disabilities related to both present and past conveyances. n142

The statutory removal of restrictions may be limited to certain types of conveyances, such as husband to wife only, n143 wife to husband only, n144 recorded conveyances only, n145 or recorded conveyances other than mortgages. n146 Certain other restrictions still apply in a few jurisdictions, such as special acknowledgment procedures for the wife, n147 or the old common law requirement that the husband join in the wife's conveyances of her own property, even to himself. n148

In some states with no statutes explicitly removing prohibitions against conveyances between spouses, courts have applied related statutes to achieve the same end. For example, statutes permitting spouses to contract with one another have been so construed, n149 as have married women's property acts. n150

FOOTNOTES:
(n1)Footnote 78. III William Searle, Jr. Holdsworth, A History of English Law 185-189 (1923).

(n2)Footnote 79. *Id.* at 189-197.

(n3)Footnote 80. II Pollock and Maitland, *supra*, note 2 (2d ed. 1905).

(n4)Footnote 81. James Schouler, A Treatise on the Law of Marriage, Divorce, Separation and Domestic Relations §§ 72, 188, 197 (6th ed. 1921).

(n5)Footnote 82. *Id.* at §§ 247-285.

(n6)Footnote 83. II R. S. Donnison Roper, Husband and Wife 152 (2d ed. 1826).

(n7)Footnote 84. *Id.* at 53.

(n8)Footnote 85. Schouler, *supra* note 81, at §§ 210-214 (6th ed. 1921).

(n9)Footnote 86. *Id.* at § 286-295, 458, 463, 465.

(n10)Footnote 87. *See* Note, *State Homestead Exemption Laws, 46 Yale L. J. 1023 (1937).*

(n11)Footnote 88. William Q. De Funiak, Principles of Community Property § 113 (1943).

(n12)Footnote 89. Ala. Code § 30-4-12 (1975) (was held unconstitutional in *Peddy v. Montgomery, 345 So. 2d 611 (Ala. 1977),* so the requirement no longer applies).

(n13)Footnote 90. Fla. Stat. Ann. § 693.01 and 693.14 were repealed upon adoption of Fla. Const. art. 10, § 5 in 1968.

(n14)Footnote 91. La. Civ. Code Ann. arts. 2347, 2349 (However, donations of community property require joinder of both spouses).

(n15)Footnote 92. Nev. Rev. Stat. § 123-230 (requires joinder of wife in conveyances of community real property). An older case upholding the power of the husband alone to convey is *Nixon v. Brown, 214 P. 524 (Nev. 1923).*

(n16)Footnote 93. *See, e.g.,* Ky. Rev. Stat. Ann. § 404.050.

(n17)Footnote 94. N.H. Rev. Stat. Ann. § 460:1.

(n18)Footnote 95. Ala. Code § 30-4-12.

(n19)Footnote 96. Del. Code Ann. tit. 25, § 102.

(n20)Footnote 97. *Union Planters Nat'l Bank v. United States, 361 F.2d 662 (6th Cir. 1966);* Ark. Const. art. 9, § 7; Colo. Rev. Stat. § 14-2-207; *Barnhart v. Burkhardt, 574 P.2d 500 (Colo. 1978);* Conn. Gen. Stat. Ann. § 46b-36, 45a-436; *National Bank of Rochester v. Meadowbrook Heights, Inc., 265 N.W.2d 43 (Mich. App. 1978);* Miss. Code Ann. § 91-1-7; Mont. Code Ann. § 40-2-202; N.Y. Real Prop. Law § 11; N.D. Cent. Code § 14-07-04; Vt. Stat. Ann. tit. 14, § 461, 474; *Proulx v. Parrow, 56 A.2d 623 (Vt. 1948).*

(n21)Footnote 98. Ark. Stat. Ann. § 50-416, 57-437, 57-438; *Mickle v. Mickle, 488 S.W.2d 45 (Ark. 1972); Gross v. Gross, 585 S.W.2d 14 (Ark. 1979);* Iowa Code Ann. § 633.238; Utah Code Ann. § 75-2-201; *Thompson v. City of Centerville, 417 P.2d 670 (Utah 1966).*

(n22)Footnote 99. Del. Code Ann. tit. 12, § 502, 901; Mass. Ann. Laws, ch. 191, § 15; N.J. Rev. Stat. § 3A:35-1; 3A:35-2; *Fire Guard Sprinkler Corp. v. Manolio, 421 A.2d 592 (N.J. 1980);* Ohio Rev. Code Ann. § 2103.02, 5303.22 (1964); *Dick Adm'r v. Bauman, 55 N.E.2d 137 (Ohio 1944); Pfau v. Moseley, 222 N.E.2d 639 (Ohio 1966);* R.I. Gen. Laws Ann. § 15-4-6, 15-4-8, 33-4-1, 33-4-2; Va. Code Ann. § 55-35 - 55-37, 55-40; W. Va. Code Ann. § 48-3-2, 48-3-5.

(n23)Footnote 100. 755 I.L.C.S. 5/2-1, 5/2-2; *Mitchell v. Mitchell, 159 N.E. 274 (Ill. 1927);* Ind. Ann. Stat. § 29-1-2-1 - 29-1-2-3.1; Kan. Gen. Stat. Ann. § 59-505; *Mulsow v. Gerber Energy Corp., 697 P.2d 1269 (Kan. 1985);* Ky. Rev. Stat. Ann. § 392.020, 392.130, 392.140; Minn. Stat. Ann. § 507.02; Pa. Stat. Ann. tit. 20, § 2102, 2105.

(n24)Footnote 101. *See* nn. 11-13, *supra.*

(n25)Footnote 102. Del. Code Ann. tit. 25, § 2104.

(n26)Footnote 103. Kan. Gen. Stat. Ann. § 59-505; Minn. Stat. Ann. § 519.07; N.J. Stat. Ann. § 3A:37-2.

(n27)Footnote 104. Ariz. Rev. Stat. Ann. § 33-451; Cal. Family Code § 752 - 754, 770, 2035, 2036.5; Idaho Code Ann. § 32-903, 32-904; La. Rev. Stat. Ann. §§ 9:101 - 9:103, 9:105; Nev. Rev. Stat. §§ 123.170, 123.230; Tex. Fam. Code Ann. §§ 5.01, 5.21; William O. Huie, *Texas Constitutional Definition of the Wife's Separate Property, 35 Tex. L. Rev. 1054 (1957);* Wash. Rev. Code Ann. §§ 26.16.010, 26.16.020.

(n28)Footnote 105. Ariz. Rev. Stat. Ann. § 33-452.

(n29)Footnote 106. Cal. Family Code §§ 761, 5127; *Yearout v. American Pipe & Steel Corp., 168 P.2d 174 (Cal. 1946); Droeger v. Friedman, Sloan & Ross, 812 P.2d 931 (Cal. 1991).*

(n30)Footnote 107. Idaho Code § 32-912; *Morgan v. Firestone Tire and Rubber Co., 201 P.2d 976 (Idaho 1948); Keller v. Rogstad, 733 P.2d 705 (Idaho 1987).*

(n31)Footnote 108. Nev. Rev. Stat. § 123.230.

(n32)Footnote 109. N.M. Stat. Ann. § 40-3-13; *Hannah v. Tennant, 589 P.2d 1035 (N.M. 1979); Arch, Ltd. v. Yu, 766 P.2d 911 (N.M. 1989).*

(n33)Footnote 110. Wash. Rev. Code Ann. § 26.16.03.

(n34)Footnote 111. La. Civ. Code Ann. arts. 2346, 2347. Although art. 2346 permits either spouse to manage the property, art. 2347 requires consent of both spouses to a conveyance or an encumbrance of the property. *See Magee v. Amiss, 502 So. 2d 568 (La. 1987); Lupo v. Lupo, 475 So. 2d 402 (La. App. 1985).*

(n35)Footnote 112. Tex. Fam. Code Ann. §§ 5.02, 5.22, 5.24; *Valdez v. Ramirez, 574 S.W.2d 748 (Tex. 1978).*

(n36)Footnote 113. Va. Code Ann. § 34-9.

(n37)Footnote 114. W. Va. Const. art. VI, § 48; *Moran v. Clark, 4 S.E. 303 (W. Va. 1887).*

(n38)Footnote 115. Ga. Code Ann. § 44-13-17.

(n39)Footnote 116. Tenn. Code Ann. § 26-2-301.

(n40)Footnote 117. N.M. Stat. Ann. § 24-6-8 (1953) (now repealed).

(n41)Footnote 118. Ohio Rev. Code Ann. § 2329.82 (1964) (now repealed).

(n42)Footnote 119. Ala. Code § 6-10-3; *Lee v. Lee, 90 So. 2d 775 (Ala. 1956); Sims v. Cox, 611 So. 2d 339 (Ala. 1992);* Ariz. Rev. Stat. Ann. §§ 33-453, 33-1104; Cal. Civ. Code § 1242; Colo. Rev. Stat. Ann. § 38-35-118; *Knoche v. Morgan, 664 P.2d 258 (Colo. App. 1983). But cf. Commercial Factors of Denver v. Clarke & Waggener, 684 P.2d 261 (Colo. App. 1984)* (holding that signatures of both joint tenants (husband and wife here) are not needed to encumber property that was homesteaded solely by operation of automatic statutory provisions); Fla. Const. art. X, § 4; Fla. Stat. Ann. § 708.10(5); *Williams v. Foerster, 335 So. 2d 810(Fla. 1976)* (except for conveyances between spouses). *See* Harold B. Crosby and George John Miller, *Our Legal Chameleon, the Florida Homestead Exemption, 2 U. Fla. L. Rev. 12, 62-67 (1949);* Idaho Code Ann. § 55-1006; 750 I.L.C.S. 65/9; Iowa Code Ann. §§ 557.4, 561.13; Kan. Gen. Stat. Ann. § 60-2303; Ky. Rev. Stat. Ann. § 427.100; La. Rev. Stat. Ann. § 9:2801; Mass. Ann. Laws, ch. 188, § 7; Minn. Stat. Ann. § 507.02; Miss. Code Ann. § 89-1-29; *Hendry v. Hendry, 300 So. 2d 147 (Miss. 1974);* Mo. Ann. Stat. § 513.475; Mont. Rev. Codes Ann. § 70-32-301; Neb. Rev. Stat. § 40-104 (1960); Nev. Rev. Stat. § 123.230; N.C. Const. art. X, § 2(4); N.D. Cent. Code Ann. § 47-18-05; Okla. Stat. Ann., tit. 16, § 4 (except a lease for a period of less than one year); *Grenard v. McMahan, 441 P.2d 950 (Okla. 1968);* S.D. Code § 43-31-17; *Williams v. Saxon, 521 S.W.2d 88 (Tex. Civ. App. 1975); Villarreal v. Laredo Nat'l Bank, 677 S.W.2d 600 (Tex. App. 1984);* Vt. Stat. Ann. tit. 27, § 141; Wash. Rev. Code Ann. § 6.12.110; Wis. Stat. Ann. § 706.02; Wyo. Stat. Ann. § 34-2-121. *See* Clarice M. Davis, *Conveying the Homestead Without Joinder of Both Spouses, 20 Southwestern L.J. 794 (1966);* Shapiro, *Restraint on Alienation and Devise of Homestead*, 19 U. of Miami L. Rev. 72 (1964); Note, *Deeds to the Homestead Made by the Husband Without Joinder of Wife, 3 Baylor L. Rev. 414 (1951).*

(n43)Footnote 120. Tex. Const. art. XVI, § 50; *Toler v. Fertitta, 67 S.W.2d 229 (Tex. 1934).*

(n44)Footnote 121. *Colburn v. Mid-State Homes, Inc., 266 So. 2d 865 (Ala. 1972).*

(n45)Footnote 122. Wyo. Stat. Ann. § 34-2-121.

(n46)Footnote 123. Mich. Stat. Ann. § 26-224; Minn. Stat. Ann. § 507.02; *Hulbert v. Givens, 392 P.2d 729 (Okla. 1964); Faine v. Wilson, 209 S.W.2d 427 (Tex. 1948);* Vt. Stat. Ann. tit. 27, § 141.

(n47)Footnote 124. Miss. Code Ann. § 89-1-29; Neb. Rev. Stat. § 40-104; Nev. Rev. Stat. § 115.070; N.D. Cent. Code Ann. § 47-18-22; *Grotberg v. First Nat'l Bank, 210 N.W. 21 (N.D. 1926)* (court authorization also required); Okla. Stat. Ann. tit. 16, § 7; S.D. Code § 43-31-18; *Gersdorff v. Torres, 293 S.W. 560 (Tex. 1927).*

(n48)Footnote 125. Ark. Stat. Ann. § 16-66-210.

(n49)Footnote 126. S.D. Code § 43-31-17.

(n50)Footnote 127. *Kirkman v. Pittman, 111 So. 2d 583 (Ala. 1959); Sims v. Douglas, 381 So. 2d 617 (Miss. 1980);* Okla. Stat. Ann. tit. 16, § 4.

(n51)Footnote 128. N.C. Gen. Stat. § 31A-1; Okla. Stat. Ann. tit. 16, § 4; *Eagle Lumber Co. v. Trainham, 365 S.W.2d 702 (Tex. 1963); Rundell v. Rundell, 423 N.W.2d 77 (Minn. App. 1988).*

(n52)Footnote 129. *Mosley v. Clark, 362 So. 2d 615 (Miss. 1978); Christensen v. Arant, 358 N.W.2d 200 (Neb. 1984); State Bank of Drummond v. Christopherson, 286 N.W.2d 547 (Wis. 1980).*

(n53)Footnote 130. *Cleveland v. Milner, 170 S.W.2d 472 (Tex. 1943); McDaniel v. Pettigrew, 536 S.W.2d 611 (Tex. Civ. App. 1976).*

(n54)Footnote 131. *Villarreal v. Laredo Nat'l Bank, 677 S.W.2d 600 (Tex. App. 1984).*

(n55)Footnote 132. N.J. Stat. Ann. § 2:26-120.

(n56)Footnote 133. *Villarreal v. Laredo Nat'l Bank, 677 S.W.2d 600 (Tex. App. 1984).*

(n57)Footnote 134. *In re Canada v. Cavage, 384 So. 2d 1356 (Fla. App. 1980);* Wis. Stat. Ann. § 706.02; Wyo. Stat. Ann. § 34-2-121.

(n58)Footnote 135. Fla. Stat. Ann. § 743.01; Iowa Code § 599.1; Okla. Stat. Ann. tit. 16, § 1; *Pittman v. Time Sec., 301 S.W.2d 521 (Tex. Civ. App. 1957);* Utah Code Ann. § 15-2-1. *See also* Vivian G. Johnston, Jr., *Married Minors; Their Legal Status, 21 Ala. Lawyer 350 (1960).*

(n59)Footnote 136. Mo. Ann. Stat. § 442.040.

(n60)Footnote 137. Ga. Code Ann. § 13-3-20; Ind. Ann. Stat. § 32-1-13-1; Kan. Gen. Stat. Ann. § 38-101; Minn. Stat. Ann. § 48.245; N.C. Gen. Stat. Ann. § 39-13.2; R.I. Gen. Laws Ann. §§ 30-19-1 - 30-19-3, 30-19-5.

(n61)Footnote 138. R.I. Gen. Laws Ann. § 15-4-6. *See* Albert A. Ehrenzweig, *Contractual Capacity of Married Women and Infants in the Conflict of Laws, 43 Minn. L. Rev. 899 (1959).*

(n62)Footnote 139. *Kenny v. Peregoy, 78 A.2d 173 (Md. 1951);* Minn. Stat. Ann. § 519.06; Vt. Stat. tit. 15, § 61.

(n63)Footnote 140. *Bavido v. Weixel, 459 So. 2d 701 (La. App. 1984).*

(n64)Footnote 141. *See, e.g., McCarty v. Skelton, 172 So. 901 (Ala. 1937).*

(n65)Footnote 142. *See, e.g.,* Ark. Stat. Ann. § 18-12-401; Fla. Stat. Ann. § 689.11; N.J. Stat. Ann. § 37:2-18. *See* Note, *Presumptions as to Nature of Transfers from Wife to Husband, 5 Ark. L. Rev. 446 (1941).*

(n66)Footnote 143. An example of this type of restriction is D.C. Code Ann. § 30-205 (1967), which has now been repealed.

(n67)Footnote 144. *See* Pa. Stat. Ann. tit. 48, § 71. *See also In re Vandergrift's Estate, 161 A. 898 (Pa. 1932).*

(n68)Footnote 145. Miss. Code Ann. § 93-3-9.

(n69)Footnote 146. *See* Mass. Ann. Laws ch. 209, § 3. *See also Aims v. Chandler, 164 N.E. 616 (Mass. 1929).*

(n70)Footnote 147. *Perry v. Stancil, 75 S.E.2d 512 (N.C. 1953).*

(n71)Footnote 148. Fla. Stat. Ann. § 689.11; *Dice v. Reese, 21 A.2d 89 (Pa. 1941).*

(n72)Footnote 149. Ala. Code § 30-4-9; *McCarty v. Skelton, 172 So. 901 (Ala. Dist. Ct. App. 1937); Horsman v. Maden, 157 P.2d 882 (Cal. App. 1945). See* Note, *Community Property -- Conveyances Between Husband and Wife -- Presumptions, 1 So. Cal. L. Rev. 388 (1928);* Mont. Rev. Codes Ann. § 40-2-301; *Petition of Fuller, 159 P.2d 579 (Nev. 1945).* N.M. Stat. Ann. § 40-2-2; N.D. Cent. Code § 14-07-06; Ohio Rev. Code Ann. § 3103.05; S.D. Code § 25-2-10.

(n73)Footnote 150. 765 I.L.C.S. 5/19; *Pure Oil Co. v. Bayler, 58 N.E.2d 26 (Ill. 1944);* Kan. Gen. Stat. Ann. § 23-202; *Withroder v. Weideroder, 134 P.2d 381 (Kan. 1943);* Ky. Rev. Stat. Ann. §§ 404.020, 404.030; *Nickel v. Gregory, 256 S.W.2d 517 (Ky. App. 1953); Smith v. Hughes, 167 S.W.2d 847 (Ky. 1942);* La. Civ. Code Ann. art. 1746; Mo. Ann. Stat. § 451.290; *Hall v. Hall, 145 S.W.2d 752 (Mo. 1940);* Neb. Rev. Stat. § 42-202; *Currier v. Teske, 120 N.W. 1015 (Neb. 1909);* Wyo. Stat. Ann. § 20-1-201.

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CHAPTER 12 SPECIAL PROBLEMS OF REAL PROPERTY OWNERSHIP +

2-12 Thompson on Real Property, Thomas Editions § 12.04

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§ 12.04 Property Disabilities Applied to Minors.

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Eighteen years of age has now become the universal minimum age qualification for voting in the United States, n151 and has also become the age of majority throughout the states for most purposes. Minority of itself is no bar to acquiring and owning land, n152 but a minor normally still has the right to disaffirm land transactions made during minority. n153 Disaffirmance can occur either during minority n154 or within certain time limits after reaching majority. Those time limits may be either specific, n155 or may be described as a reasonable time after majority, n156 or are simply governed by principles of laches and estoppel. n157 Disaffirmance can be asserted only by the minor or, after the minor's death, by the minor's personal representative or successor while the privilege still exists. n158

The right of disaffirmance is narrowed in some jurisdictions if the transaction is for land on which the minor will live or for some other necessity. n159 Disaffirmance may also be conditioned upon the minor's restoring what was obtained in the transaction. n160 Disaffirmance rights do not apply if the minor's conveyance is made pursuant to court order.

FOOTNOTES:
(n1)Footnote 151. U.S. Const. amend. XXXVI.

(n2)Footnote 152. *Kenwood Sav. and Loan Ass'n v. Williams, 220 N.E.2d 582 (Ohio 1966); See* Milton G. Gershenson, *Can an Infant Obtain Specific Performance of a Contract to Buy Real Property? 22 Brooklyn L. Rev. 49 (1955).*

(n3)Footnote 153. *Pipkin v. Lantz, 354 S.W.2d 87 (Tenn. App. 1961).*

(n4)Footnote 154. *Smith v. Wade, 100 N.W.2d 770 (Neb. 1960).*

(n5)Footnote 155. *Walker v. Ellis, 207 S.W.2d 39 (Ark. 1948).*

(n6)Footnote 156. *Harrod v. Kelly Adjustment Co., 179 A.2d 431 (D.C. App. 1962);* Iowa Code § 599.2; Mont.

Rev. Codes Ann. § 41-1-304.

(n7)Footnote 157. *Burnand v. Irigoyen, 186 P.2d 417 (Cal. 1947).*

(n8)Footnote 158. *Huish v. Lopez, 218 P.2d 727 (Ariz. 1950);* Mont. Rev. Code Ann. § 41-1-304.

(n9)Footnote 159. *Merrick v. Stephens, 337 S.W.2d 713 (Mo. App. 1960).*

(n10)Footnote 160. *Burnand v. Irigoyen, 186 P.2d 417 (Cal. 1947);* Idaho Code Ann. § 32-103; Iowa Code § 599.2; Mont. Rev. Code Ann. § 41-1-304.

+ § 12.16 has been adapted from George Lefcoe, Real Estate Transactions (Michie 1993).

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CHAPTER 12 SPECIAL PROBLEMS OF REAL PROPERTY OWNERSHIP +

2-12 Thompson on Real Property, Thomas Editions § 12.05

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§ 12.05 Property Disabilities Applied to Mental Incompetents.

§ 12.05(a) Historical Background.

In England before 1603 a conveyance by one without the mental capacity to consent was void. n161 However, a key court ruling in 1603 held that one could not plead one's own insanity as a defense to a transaction. n162 This rule remained unchanged until 1848, when it was held that a conveyance by an incompetent could be upheld only if the competent party was unaware of and gained no unfair advantage from the other party's incompetency. n163 Thus the conveyances by mental incompetents were originally void, then usually valid, then often voidable, according to the uncertain evolution of the English rule.

§ 12.05(b) Conveyances Before Adjudication of Incompetency.

Mental incompetents are deemed capable of acquiring land, so long as no specific obligations are attached to the acquisition. n164 Property interests may also descend from or through mental incompetents. n165 However, mental competency may affect the capacity to convey of one who is grantor. n166

The legal standard for mental capacity to convey is that the grantor must have the ability to understand the nature and effect of the conveyance at the time it is made. n167 Conveyances by a grantor who does not meet this standard even before being adjudicated mentally incompetent, are held void in some states. n168

In most states, however, a pre-adjudication conveyance by one who is mentally incompetent is simply voidable, rather than void. n169 Such a conveyance is usually voided by the grantor, or by the committee acting for the grantor, or by those entitled to the grantor's estate after his death. n170

The general rule of voidability just expressed is subject to numerous qualifications in the state courts. The right to cancel may be limited if the transaction is no longer fully executory. n171 The right to cancel may also be subject to a statute of limitations or some notion of reasonable time after the agreement is created. n172 The right may be lost if the incompetent grantor or the grantor's agent ratifies the transaction. n173 Also, cancellation may be conditioned upon restoring of parties to their pre-transaction status, n174 unless the competent party knew of the grantor's incompetence

n175 or the grantor did not receive payment. n176 No restitution requirement is imposed in Maine, Massachusetts and Nebraska. n177

In a few states, the rule of voidability resembles the English rule, in that it denies cancellation if the grantee was unaware of grantor's incompetence and obtained no unfair advantage from the transaction. n178

§ 12.05(c) Conveyances After Adjudication of Incompetency.

By means of a court proceeding a committee may be appointed to manage the property of a mentally incompetent person. An attempted conveyance by an incompetent person after such a committee has been appointed is usually void, either according to statute n179 or by judicial decision. n180 Such conveyances are treated as voidable in only a few states. n181 Without statutory authorization, the committee for a mentally incompetent person probably cannot exercise a power of appointment held by the incompetent person. n182

FOOTNOTES:

(n1)Footnote 161. *See* W. G. H. Cook, *Mental Deficiency in the English Law of Contract, 21 Colum. L. Rev. 424 (1921).*

(n2)Footnote 162. Beverly's Case, 4 Coke 123b, *76 Eng. Rep. 1118 (1603).*

(n3)Footnote 163. *Moulton v. Camroux, 2 Exch. 487, 4 Exch. 17 (1848).*

(n4)Footnote 164. *Brooklyn Trust Co. v. Podvin, 89 A.2d 672 (N.J. 1952).*

(n5)Footnote 165. *In re Kowalke's Guardianship, 76 N.E.2d 899 (Ohio App. 1946).*

(n6)Footnote 166. *See* Henry Weihofen, *Mental Incompetency to Contract or Convey, 39 S. Cal. L. Rev. 211 (1966); Mental Illness and the Law of Contracts, 57 Mich. L. Rev. 1020 (1959);* Note, *Real Property -- Validity of Conveyance by Mental Incompetents, 3 Wayne L. Rev. 73 (1956).*

(n7)Footnote 167. *Hansford v. Robinson, 340 S.E.2d 614 (Ga. 1986); In re Estate of Cunningham, 565 N.E.2d 301 (Ill. App. 1990);* La. Civ. Code. Ann. art. 1925; *In re Guardianship and Conservatorship of Estate of Tennant, 714 P.2d 122 (Mont. 1986); Matter of Estate of Raney, 799 P.2d 986 (Kan. 1990). See also* Restatement (Second) of Contracts §§ 12, 15 (1979).

(n8)Footnote 168. Cal. Civ. Code §§ 38, 39; Idaho Code §§ 32-106, 32-107; N.D. Cent. Code § 14-01-01; Okla. Stat. Ann. tit. 15, §§ 22, 23; *Brown v. Weik, 725 S.W.2d 938 (Tenn. App. 1983).*

(n9)Footnote 169. Cal. Civ. Code § 39; Idaho Code § 32-107; *First Interstate Bank v. First Wyo. Bank, 762 P.2d 379 (Wyo. 1988);* Okla. Stat. Ann. tit. 15, § 23. *See* Note, *Contracts -- Mental Capacity -- The Ability to Exercise Will Is an Element of Mental Capacity. 6 Tex. Tech. L. Rev. 1147 (1975);* Note, *Contracts -- Competency to Contract of Mentally Ill Person Who Fully Understands Transaction But is Unable to Control Conduct, 16 Wayne L. Rev. 1188 (1970);* Note, *The Mentally Ill and the Law of Contracts, 29 Temple L.Q. 380 (1956).*

(n10)Footnote 170. Idaho Code Ann. § 32-107; *Beam v. Almond, 157 S.E.2d 215 (N.C. 1967). See* Raymond D. Cotton, *Agreements of the Mentally Disabled: A Problem of New Jersey Law, 3 Rut.-Cam. L.J. 241 (1971). See also* the authorities collected in Annotation, *Validity and Enforceability of and Relief from Contract Made in Good Faith with Incompetent before Adjudication of Incompetency,* 95 A.L.R. 1442 (1935); Annotation, *Validity and Enforceability of Contract Made in good Faith with Incompetent before Adjudication of Incompetency,* 46 A.L.R. 416 (1927). *See also* Note, *Contracts -- Insane Persons' Transactions in North Carolina, 13 N.C. L. Rev. 504 (1935);* Note, *The Agreements of Insane Persons, 32 Colum. L. Rev. 504 (1932); Insane Persons -- Ratification or Avoidance of Conveyances or Other Transactions, 4 U. Cin. L. Rev. 244 (1930); Contracts with Non-Adjudicated Insane Persons--Good Faith--Inability to*

Return Consideration, *9 B.U. L. Rev. 49 (1929); Insane Persons -- Contracts -- Good Faith of Other Party -- Promissory Note*, *20 Colum. L. Rev. 220 (1920);* Note, *Contracts of Insane Persons*, *14 Colum. L. Rev. 674 (1914);* Note, *The Effect of Insanity Upon Contractural Powers*, *6 Colum. L. Rev. 115 (1906).*

(n11)Footnote 171. *Todd v. Mutual Aid Sav. & Loan Ass'n, 88 A.2d 676 (N.J. Super. 1952).*

(n12)Footnote 172. *Andres v. Andres, 613 S.W.2d 404 (Ark. App. 1981);* La. Civ. Code Ann. art. 1926.

(n13)Footnote 173. *Sawtelle v. Tatone, 201 A.2d 111 (N.H. 1964).*

(n14)Footnote 174. *Knighten v. Davis, 358 So. 2d 1022 (Ala. 1978); Upton v. Hall, 300 S.E.2d 777 (Va. 1983). See* Maxine Boord Virtue, *Restitution from the Mentally Infirm*, *26 N.Y.U. L. Rev. 132 (1951);* Annotation, *Restoration of Status Quo as Condition of Avoidance of Suretyship or Accommodation Contract of Incompetent*, 34 A.L.R. 1403 (1925).

(n15)Footnote 175. *Upton v. Hall, 300 S.E.2d 777 (Va. 1983); Metter Banking Co. v. Millen Lumber & Supply Co., 382 S.E.2d 624 (Ga. App. 1989). See* Restatement (Second) of Contracts § 15(2) (1979).

(n16)Footnote 176. *McKenzie v. Frey, 198 S.W. 1009 (Tex. Civ. App. 1917).*

(n17)Footnote 177. *Cleaveland v. Malden Sav. Bank, 197 N.E. 14 (Mass. 1935).*

(n18)Footnote 178. *McElwain v. Wells, 322 S.E.2d 482 (W. Va. 1984).*

(n19)Footnote 179. Idaho Code § 32-108; Nev. Rev. Stat. § 41.300; N.D. Cent. Code § 14-01-03; Okla. Stat. Ann. tit. 15 § 24; *Marion v. English, 121 A. 397 (R.I. 1923)* (discussing R.I. Gen. Laws, ch. 321, §§ 11, 37; *cf. John P. Bleeg Co. v. Peterson, 215 N.W. 529 (S.D. 1927)* (assignment of note a nullity where payee adjudicated incompetent and guardian appointed).

(n20)Footnote 180. *Beavers v. Weatherly, 299 S.E.2d 730 (Ga. 1983); Witt v. Ward, 573 N.W.2d 201 (Ohio App. 1989).*

(n21)Footnote 181. *Antrim v. McKelroy, 319 S.W.2d 209 (Ark. 1958); see In re Walker, 540 A.2d 468 (Me. 1988).*

(n22)Footnote 182. *Jones v. Clyman, 188 N.W. 954 (Iowa 1922).*

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CHAPTER 12 SPECIAL PROBLEMS OF REAL PROPERTY OWNERSHIP +

2-12 Thompson on Real Property, Thomas Editions § 12.06

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§ 12.06 Property Disabilities Imposed on Prisoners.

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Even after England abolished corruption of blood, attainder and forfeiture of property as consequences of crime, English law still provided that convicts were incapable of conveying or encumbering property. n183

Under earlier laws in the United States, the civil rights of felons under life sentences were considered at an end, n184 and in a few states the felon's assets were then distributed as if the felon were already dead. n185 For felons with lesser sentences their civil rights were considered merely suspended for the period of imprisonment, n186 and some states authorized the appointment of committees to manage such prisoners' assets. n187 A prisoner's property has also been applied under court order to meeting the prisoner's debts or the needs of the prisoner's dependents. n188 In such situations, the prisoners in those states were effectively disabled from engaging in property transactions.

In more modern times, the significant trend has been to remove the civil disabilities of prisoners, although that may not yet be fully reflected in the statutes or decisions of each state. Property rights are cognizable under the Civil Rights Act, n189 and it appears that property divestment upon conviction "is a limited and almost nonexistent concept." n190 A life prisoner will be divested of property only under express statute and only Rhode Island n191 and Hawaii n192 have express divestment statutes. Also, fewer than half the states have specific statutory provision for appointment of a guardian, trustee or committee to manage a prisoner's estate, and even in these states various limitations severely restrict the utility and use of those provisions. n193

FOOTNOTES:
(n1)Footnote 183. 33 & 34 Vict., ch. 23, § 8 (1870).

(n2)Footnote 184. *See, e.g.,* Cal. Penal Code § 2600; N.Y. Civ. Rights Law § 79-a. *See also,* Note, *Civil Death Statute -- Medieval Fiction in a Modern World, 50 Harv. L. Rev. 967-68 (1937).*

(n3)Footnote 185. *Ward v. Morton, 242 S.W. 966 (Mo. 1927);* R.I. Gen. Laws §§ 13-6-1, 13-6-7.

(n4)Footnote 186. *See, e.g.*, Cal. Penal Code § 2600; N.Y. Civ. Rights Law § 79; Okla. Stat. Ann. tit. 21, § 65, & tit. 15, § 11; R.I. Gen. Laws § 13-6-3.

(n5)Footnote 187. Mo. Ann. Stat. § 460.110; *Hunter v. Hunter, 237 S.W.2d 100 (Mo. 1951). See also* P. Pierre Dominique, *Some Aspects of Civil Death in Missouri*, 1 St. Louis U. Intramural L. Rev. 200, 210-213 (1951); N.Y. Correct. Law §§ 320, 322; Va. Code Ann. §§ 53.1-221 - 53.1-228.

(n6)Footnote 188. W. Va. Code §§ 28-5-33, 28-5-38.

(n7)Footnote 189. *Lynch v. Household Fin. Corp., 405 U.S. 538 (1972).*

(n8)Footnote 190. *See* Special Project, *The Collatoral Consequences of Criminal Conviction, 23 Vander. L. Rev. 929, 1079-1109 (1970).*

(n9)Footnote 191. R.I. Gen. Laws § 13-6-1.

(n10)Footnote 192. Haw. Rev. Stat. § 353-38.

(n11)Footnote 193. Special Project, *The Collateral Consequences of Criminal Conviction, 23 Vand. L. Rev. 929, 1101-09 (1970).*

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CHAPTER 12 SPECIAL PROBLEMS OF REAL PROPERTY OWNERSHIP +

2-12 Thompson on Real Property, Thomas Editions § 12.07

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§ 12.07 Property Rights of Non-profit Unincorporated Associations.

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§ 12.07(a) Non-profit Unincorporated Associations Defined.

A non-profit unincorporated association is a group of persons joined together, other than by incorporation, for particular purposes, which purposes do not include producing profit for the group. n194 Partnerships are excluded from this definition, because their purpose is to make profit for the partnership. n195 For the same reason, joint ventures are also not included in the definition of non-profit unincorporated association. A joint venture is not considered a partnership if its objective is not to make profit for the group. n196 Labor unions and trade associations seek profits for their individual members, not for their groups as such, and are therefore not partnerships, and so may be non-profit unincorporated associations. n197

Nonprofit unincorporated associations often produce revenue, but are not considered profit-making entities if the money is used for the associations' non-profit objectives. n198

Typical non-profit unincorporated associations are church congregations; n199 fraternal and benevolent orders; n200 hunting, fishing, civic and social clubs, n201 labor unions and trade associations; n202 stock exchanges; n203 literary groups; n204 certain political parties and committees; n205 religious communes; n206 patriotic societies; n207 various co-operative activities; n208 charitable trusts; professional associations; and condominiums. n209

§ 12.07(b) Rights of Non-profit Unincorporated Associations to Acquire and Hold Real Property Interests.

§ 12.07(b)(1) Conveyances Considered as Void.

Courts and legislatures were traditionally reluctant to recognize unincorporated associations as entities qualified to acquire real property interests. This has been partly because an unincorporated association is not a single person and has not fashioned a single legal personality through incorporation. Also, the unincorporated association may be transient in nature. Thus, it has been difficult to fashion legal rules to identify who would be the owner of the property interests sought to be acquired.

One form of legal response to attempted conveyances or devises of real property interests to non-profit unincorporated associations has been to tread the conveyances as void. n210 In a few states this response is required by statute. n211

§ 12.07(b)(2) Conveyances Considered as Conveyances to Group Members in Cotenancy.

Some courts consider transfers to non-profit unincorporated associations as conveyances to the individual members of the grantee groups, who hold the property either as joint tenants or as tenants in common. n212 Members who withdraw from the association thereby lose their rights to the association property. n213 This approach has been criticized from several perspectives: the intent of the grantor may be frustrated, if the transfer was made to promote the objectives of the group but becomes instead a collection of individual gifts to group members; the interest cannot be later conveyed without cooperation of *all* group members or their successors in interest; each member-owner has a right of partition; the property may be subject to claims of creditors of individual member-owners; n214 and non-cooperating members have disproportionate power, because of their ability unilaterally to veto proposed conveyances. n215

§ 12.07(b)(3) Conveyances Considered as Conveyances in Trust.

Another way to view a conveyance to a non-profit unincorporated association is to treat the conveyance as one made in trust. Such a conveyance in trust to a non-profit unincorporated association can arise in several ways: the association members may designate trustees to hold title on their behalf, n216 or courts may create constructive trusts, designating trustees, such as the officers of the association, to take title for the association. n217 One court held that association members taking title as joint tenants held it in quasi-trust and were required to use the property for the purposes of the association. n218 State law may permit property to be held by a non-profit unincorporated association in a statutory trust as set forth in the state statutes. n219

Use of a trust device as a means of holding property interests usually is not extended to all non-profit unincorporated associations. The common law rule against perpetuities forbids holding title in trust for more than two lives in being (the lifetime of the survivor of two designated persons), unless the association is charitable. Non-profit unincorporated associations that are not charitable would thus be limited by the rule, although the rule is undergoing modification in many states. n220 The judicial creation of a constructive trust to preserve a conveyance to an unincorporated association may thus, in some states, be ordered only for charitable associations. n221

§ 12.07(b)(4) Conveyances Permitted to Be Made to the Association Directly.

Some state courts recognize a right in non-profit unincorporated associations to acquire and hold land titles directly in the name of the association, without appointment of a trustee. n222 In other states, this is permitted by statute in, either by allowing the officers to take title as "a body corporate," n223 or by allowing the association to take title in its group name. n224 Such statutes are typically limited in their application to non-profit associations that are "charitable" -- i.e., religious, scientific, or educational -- rather than those that are organized for trade, business, or profession. n225 A few non-profit unincorporated associations have been permitted to obtain property interests in the group's name by prescription. n226

§ 12.07(b)(5) Determination of the Applicable Law.

The law of the state where the land is located determines whether the non-profit unincorporated association has the capacity to acquire real property interests, n227 although a few decisions apply the law of the association's state. n228

§ 12.07(c) Specific Rights to Hold Real Property Interests.

Land purchases by any type of corporation were not favored at common law, because such acquisitions were frequently for charitable purposes and thus not economically useful. To convey to a corporation, which was usually ecclesiastical,

was to alienate land in mortmain, or literally, to place the property in a dead hand and out of circulation, and was prohibited by statute early in English history. The British Mortmain Act of the early 18th century, and similar statutes in the American states, were intended to prevent excessive accumulations of property by corporations. n229 Some of these mortmain statutes have been extended by analogy or explicitly by their own terms to unincorporated associations that pursue purposes similiar to those of corporations regulated by the statute. n230

Many jurisdictions impose quantitative ownership restrictions directly on non-profit unincorporated associations. These restrictions are in the form of permissible acreage, n231 "reasonableness," n232 capital value, n233 or annual income. n234

When an unincorporated association's property acquisitions exceed permissible limits, states are not uniform in dealing with the excess property. n235 For example, in some states the excess property may revert to the grantor or grantor's estate, n236 or the association may claim ownership subject only to challenge by the state. n237

§ 12.07(d) Rights of Unincorporated Associations to Control, Manage, and Transfer Real Property.

§ 12.07(d)(1) Associations That Are Subject to Hierarchical Control.

Non-profit unincorporated associations subject to some sort of hierarchical control are usually governed by that hierarchy in their ability to control, manage, and transfer real property interest. Much more influence is usually accorded hierarchical control in cases involving religious denominations than with respect to groups unrelated to churches. n23831y

In the context of religious denominations, some state statutes recognize hierarchical domination. n239 In other states, courts have respected the hierarchical prerogative by not permitting a seceding local congregation to retain its property against the claims of the parent church. n240 Also, courts have often upheld the decisions of denominational tribunals resolving property disputes between local congregations, n241 and have decreed denominational control over property of local groups that have ceased to function. n242 The cases reveal that hierarchical control usually prevails even when adherents of a dissenting faction outnumber those in the orthodox group, and even if the consideration for the property acquisition was provided by the dissenters. n243 However, some courts that have held in favor of local control have found that the conveyance was intended solely for the benefit of the local congregation. n244

When non-profit unincorporated associations are not religious in nature, the predominance of hierarchical control has been recognized in decisions n245 and statutes. n246 Some decisions hold that hierarchical control is not applicable in specific local instances. n247

§ 12.07(d)(2) Associations That Are Not Subject to Hierarchical Control.

Nonprofit unincorporated associations that are not subject to hierarchical control are governed by the provisions of their own constitution and bylaws or by an express agreement for governance of association affairs. Actions of the association's officers or members in controlling, managing, and transferring real property are valid if carried out in conformance with such provisions. Courts have upheld association representatives becoming lessees, n248 bringing suit for breach of warranty covenant covering association property, n249 subjecting association lands to liens or assessments, n250 registering title, n251 conveying timber rights n252 or even conveying complete title, n253 mortgaging association land, n254 and distributing association assets upon dissolution. n255 When required by the association's rules, n256 judicial approval must be obtained. If the association representatives do not conform to the rules of their authority, their acts will not bind the association. n257

The association's local governing provisions will also determine how to resolve differences between members. Although such differences are usually resolved by majority rule, n258 a minority whose conduct is faithful to

association purposes and procedures will often prevail over an unorthodox majority. n259 Also, association representatives who act within their authority may prevail in a dispute with a dissenting majority. n260

FOOTNOTES:

(n1)Footnote 194. *See* Howard L. Oleck, *Non-Profit Types, Uses, and Abuses, 19 Clev. St. L. Rev. 207, 211 (1970).*

(n2)Footnote 195. Uniform Partnership Act § 6(1).

(n3)Footnote 196. *Nancy W. Bayley, Inc. v. Maine Emp. Sec. Comm'n, 472 A.2d 1374 (Me. 1984); See* 1 Zolman Cavitch, Business Organizations with Tax Planning § 13.05 [2] (1983).

(n4)Footnote 197. *Marshalltown Mut. Plate Glass Ins. Ass'n v. Bendlage, 193 N.W. 448 (Iowa 1923)* (trade association); *State v. Ritholz, 100 N.W.2d 722 (Minn. 1960)* (labor union); *Teamsters Local 516 v. Santa Fe Packing Co., 300 P.2d 660 (Okla. 1956)* (labor union); *Blair v. Southern Clay Mfg. Co., 121 S.W.2d 570 (Tenn. 1938)* (trade association).

(n5)Footnote 198. Curtis v. Albion-Brown's Post 590 Am. Legion, 219 N.E.2d 386 (Ill. App. 1966).

(n6)Footnote 199. *See, e.g., Ervin v. Davis, 199 S.W.2d 366 (Mo. 1947); Stony Island Church of Christ v. Mannings, 509 N.W.2d 572 (Ill. App. 1987).*

(n7)Footnote 200. *See, e.g., Farnow v. Las Vegas Aerie No. 1213, Fraternal Order of Eagles, 188 P.2d 615 (Nev. 1948).*

(n8)Footnote 201. *See, e.g., Florio v. State ex rel. Epperson, 119 So. 2d 305 (Fla. App. 1960).*

(n9)Footnote 202. *See, e.g., United Bhd. of Carpenters and Joiners, Local No. 1846, Inc. v. Stephens Broadcasting Co., 39 So. 2d 422 (La. 1949); United States v. Rainbow Family, 695 F. Supp. 294 (E.D. Tex. 1988).*

(n10)Footnote 203. *See Belton v. Hatch, 109 N.Y. 593 (1888).*

(n11)Footnote 204. *Lamm v. Stoen, 284 N.W. 465 (Iowa 1939).*

(n12)Footnote 205. *See Fennel v. Hauser, 14 P.2d 998 (Or. 1932).*

(n13)Footnote 206. *Forsberg v. Zehm, 143 S.E. 284 (Va. 1928).*

(n14)Footnote 207. *See Ostrom v. Greene, 161 N.Y. 353 (1900).*

(n15)Footnote 208. *Branagan v. Buckman, 207 N.Y. 719 (1913).*

(n16)Footnote 209. *See* Howard L. Oleck, Non-profit Organizations, Organizations and Associations § 47 (4th ed. 1980).

(n17)Footnote 210. *Society for Propogation of Faith v. Joswick, 180 A.2d 617 (Del. Ch. 1962).*

(n18)Footnote 211. N.Y. Est. Powers & Trusts Law § 3-1.3(b) (1952); Okla. Stat. Ann. tit. 18, § 589.

(n19)Footnote 212. *Venus Lodge No. 62 v. Acme Benevolent Ass'n, 58 S.E.2d 109 (N.C. 1950); See also Raulston v. Everett, 561 S.W.2d 635 (Tex. Civ. App. 1978).*

(n20)Footnote 213. *Liggett v. Koivunen, 34 N.W.2d 345 (Minn. 1948); Raulston v. Everett, 561 S.W.2d 635 (Tex. Civ. App. 1978).*

(n21)Footnote 214. *See Apostolic Holiness Union v. Knudson, 123 P. 473 (Idaho 1912); See* Howard A. J. Ford, *Dispositions of Property to Unincorporated Associations, 55 Mich. L. Rev. 67 (1956).*

(n22)Footnote 215. *Trett v. Lambeth, 195 S.W.2d 524 (Mo. App. 1946).*

(n23)Footnote 216. *O.K.C. Corp. v. Allen, 574 S.W.2d 809 (Tex. Civ. App. 1978).*

(n24)Footnote 217. *Lincoln Rochester Trust Co. v. Smith, 158 N.Y.S.2d 367 (1956); See* Annotation, *Power and Capacity of Members of Unincorporated Association, Lodge, Society, or Club to Convey, Transfer, or Encumber Association Property, 15 A.L.R.2d 1451 (1951).*

(n25)Footnote 218. Ind. Code Ann. §§ 23-10-2-1, 23-10-2-11; N.Y. Ben. Ord. Law §§ 2, 3, 3a; Pa. Stat. Ann. tit. 10, §§ 81, 121 *See* Marc J. Lane, Legal Handbook for Non-Profit Organizations 23 (1980).

(n26)Footnote 219. Ga. Code Ann. § 22-409; Ind. Code Ann. §§ 25-1501, 25-1513; N.Y. Ben. Ord. Law §§ 2, 3, 3a; Pa. Stat. Ann. tit. 10, §§ 81, 121. *See* Lane *supra* n.218, at 23.

(n27)Footnote 220. *In re Rathbone's Estate, 11 N.Y.S.2d 506 (1939).*

(n28)Footnote 221. Trustee appointed only for charitable organizations: *State v. Sunbeam Rebekah Lodge No. 180, 127 P.2d 726 (Or. 1942).* Trustee appointed for non-charitable organizations: *Matter of Wiley, 136 N.Y.S.2d 309 (1954).*

(n29)Footnote 222. *Rehder v. Rankin, 91 N.W.2d 399, 403 (Iowa 1958); Loving Savior Church v. United States 556 F. Supp. 688 (D. S.D. 1983), aff'd, 728 F.2d 1085 (8th Cir. 1984).*

(n30)Footnote 223. Ind. Code Ann. §§ 23-10-2-9; Mass. Ann. Laws ch. 68, §§ 1, 2, 4, 5, 10, 12; Tex. Rev. Civ. Stat. Ann. arts. 1399, 1400; W. Va. Code §§ 35-2-1, 35-2-6, 35-2-7, 35-3-1. Some courts have achieved the same result without such a statute: *Reid v. Barry, 112 So. 846 (Fla. 1927); Shrader v. Erickson's Ex'r, 145 S.W.2d 63 (Ky. 1940); Shipp v. Joseph, 12 A.2d 49 (Pa. 1940).*

(n31)Footnote 224. N.Y. Agric. & Mkts. Law § 290; Ohio Rev. Code Ann. § 1715.43; W. Va. Code § 35-1-1; Wyo. Stat. § 17-161.

(n32)Footnote 225. Ind. Code Ann. § 23-10-2-1; La. Rev. State. Ann. § 9:1051; N.C. Gen. Stat. § 39-24.

(n33)Footnote 226. *Slaughter v. Land, 21 S.E.2d 72 (Ga. 1942); O.K.C. Corp. v. Allen, 574 S.W.2d 809 (Tex. Civ. App. 1978).*

(n34)Footnote 227. *See Reisig v. Associated Jewish Charities, 34 A.2d 842 (Md. 1943).*

(n35)Footnote 228. *In re Kirby's Will, 240 N.Y.S.2d 214 (1963).*

(n36)Footnote 229. *Perin v. Carey, 65 U.S. (24 How.) 465 (1860); See* G. Stanley Joslin, *"Mortmain" in Canada and the United States: A Comparative Study, 29 Can. B. Rev. 621 (1951).*

(n37)Footnote 230. Tenn. Code Ann. § 66-2-20.

(n38)Footnote 231. Ark. Code Ann. § 18-11-201; D.C. Code Ann. §§ 29-901, 29-916; Ind. Code Ann. § 23-10-2-1. *But see Kentucky Christian Missionary Soc'y v. Moren, 102 S.W.2d 335 (Ky. 1937);* Tenn. Code Ann. §§ 48-4-301, 62-2-202; Va. Code Ann. §§ 57-12, 57-20, 57-26; W. Va. Code §§ 35-1-8, 35-2-8, 35-3-1.

(n39)Footnote 232. Miss. Code Ann. § 79-11-33.

(n40)Footnote 233. Wyo. Stat. § 17-161.

(n41)Footnote 234. N.H. Rev. Stat. Ann. ch. 306 §§ 3, 10, 11.

(n42)Footnote 235. *See* Annotation, *Right of Heirs or Next of Kin to Attack Devised Corporation on Ground of Its Incapacity to Take,* 69 A.L.R. 1359 (1930).

(n43)Footnote 236. *Letcher's Trustee v. Letcher, 194 S.W.2d 984 (Ky. 1946).*

(n44)Footnote 237. *Sunday Sch. Union of African Methodist Episcopal Church v. Walden, 121 F.2d 719 (6th Cir. 1941).*

(n45)Footnote 238. *See, e.g., Suffridge v. O'Grady, 84 N.Y.S.2d 211 (1948).*

(n46)Footnote 239. Kan. Stat. Ann. §§ 17-1716d, 17-1716e; Pa. Stat. Ann. tit. 10, § 81; Va. Code Ann. §§ 57-7, 57-16; W. Va. Code § 35-1-9.

(n47)Footnote 240. *Kelley by Kelley v. Lutheran Church in Am., 589 A.2d 1155 (Pa. Super. 1991).*

(n48)Footnote 241. *Trinity Lutheran Evangelical Church v. May, 510 A.2d 904 (Pa. Cmwlth. 1986).*

(n49)Footnote 242. *In re Evangelical Church, 24 A.2d 42 (Pa. Super. 1942); see Dillard v. Jackson, 403 S.E.2d 136 (S.C. App. 1991).*

(n50)Footnote 243. *Presbytery of the Covenant v. First Presbyterian Church, 552 S.W.2d 865 (Tex. Civ. App. 1977).*

(n51)Footnote 244. *African Methodist Episcopal Church, Allen Chapel v. Independent African Methodist Episcopal Church, 281 S.W.2d 758 (Tex. Civ. App. 1955); see Board of Bishops of the Church of the Living God v. Milner, 513 A.2d 1131 (Pa. 1986).*

(n52)Footnote 245. *National Grange of Order of Patrons of Husbandry v. O'Sullivan Grange, 667 P.2d 1105 (Wash. App. 1983).*

(n53)Footnote 246. N.Y. Ben. Ord. Law §§ 2-3a, 5; Wis. Stat. Ann. § 188.02; Wyo. Stat. § 17-161.

(n54)Footnote 247. *Grand Lodge of Odd Fellows v. Lakeside Lodge No. 105, 8 N.W.2d 19 (Minn. 1943); Robertson v. Knighten, 139 P.2d 601 (Okla. 1943).*

(n55)Footnote 248. *Uptown Fed. Sav. & Loan Ass'n v. Collins, 245 N.E.2d 521 (Ill. App. 1969).*

(n56)Footnote 249. *Floyd S. Pike Elec. Contractor, Inc. v. Goodwill Missionary Baptist Church, 214 S.E.2d 276 (N.C. App. 1975).*

(n57)Footnote 250. *Monroe v. Krause & Managan Lumber Co., 24 So. 2d 501 (La. App. 1946); Board of Trustees v. City of Oklahoma, 166 P.2d 91 (Okla. 1946).*

(n58)Footnote 251. *Glader v. Schwinge, 168 N.E. 658 (Ill. 1929).*

(n59)Footnote 252. *Parrish v. Looney, 194 S.W.2d 419 (Tex. Civ. App. 1946).*

(n60)Footnote 253. *Jacobs v. St. Mark's Baptist Church, 415 So. 2d 253 (La. App. 1982).*

(n61)Footnote 254. *Ervin v. Davis, 199 S.W.2d 366 (Mo. 1947).*

(n62)Footnote 255. Willow Dip Lodge v. Wenzel, *94 Pa. L.J. 271 (1945).*

(n63)Footnote 256. *In re Pettisville Union Church Soc'y, 323 Ohio Op. 443 (1946).*

(n64)Footnote 257. *Barrett v. New Hope Baptist Church No. 1, 152 So. 2d 646 (La. App. 1963); see also Smith v. Riley, 424 So. 2d 1166 (La. App. 1982).*

(n65)Footnote 258. *Bishop and Diocese v. Mote, 668 P.2d 948 (Colo. App. 1983), rev'd on other grounds, 716 P.2d 85 (Colo. 1986); Piletich v. Deretich, 328 N.W.2d 696 (Minn. 1982).*

(n66)Footnote 259. *Holiman v. Dovers, 366 S.W.2d 197 (Ark. 1963); Zaiser v. Miller, 656 S.W.2d 312 (Mo. App. 1983); Eastern Conference of Original Free Will Baptists v. Piner, 147 S.E.2d 581 (N.C. 1966);* Church of God in *Christ, Inc. v. Stone, 452 F. Supp. 612 (D.C. Kan. 1976);* Schismatic and Purported Casa Linda Presbyterian Church in *Am. v. Grace Union Presbytery, Inc., 710 S.W.2d 700 (Tex. Civ. App. 1986).*

(n67)Footnote 260. *Antioch Temple, Inc. v. Parekh, 422 N.E.2d 1337 (Mass. 1981). See* Annotation, *Change of Denominational Relations or Fundamental Doctrines by Majority Faction of Independent or Congregational Church as Ground for Award of Property to Minority, 15 A.L.R.3d 297 (1967).*

+ § 12.16 has been adapted from George Lefcoe, Real Estate Transactions (Michie 1993).

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CHAPTER 12 SPECIAL PROBLEMS OF REAL PROPERTY OWNERSHIP +

2-12 Thompson on Real Property, Thomas Editions § 12.08

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§ 12.08 Property Rights of Unincorporated Associations Organized for Profit.

Unincorporated associations organized for profit have also been limited in their real property activities, but have more readily achieved the legal status of an entity entitled to hold property, and have overcome many of the disabilities of the non-profit groups. In the next sections of this chapter, the real property rights of the three major types of unincorporated associations organized for profit will be discussed: joint stock companies, business trusts, and partnerships.

§ 12.08(a) Property Rights of Joint Stock Companies.

A joint stock company is a business association whose capital is divided into transferable shares representing and corresponding to members' respective interests. n261 Each member's individual interest is considered personal property, even if the company's assets are in the form of real property. n262 Members may transfer their shares without consent of the other members n263 and are not considered agents of the company, n264 but may be held personally liable for company debts. n265 The joint stock company does not automatically dissolve upon the death, insanity or bankruptcy of a member. n266

During the colonial era, abuses of investors by means of schemes involving joint stock companies during the colonial era led to some statutory regulation of these types of companies. Subject to those statutory restrictions, n267 joint stock companies are generally governed by their articles of association, which usually provide that their business is controlled by officers or directors. n268

Traditionally, the joint stock company was not considered an entity that could hold real property interests n269 and could not acquire land in the company name, n270 unless the company was authorized to do so by statute. n271 Thus, even today a joint stock company usually takes and holds title to land in the name of a designated officer, n272 who also has power to encumber or convey the land. n273 In conducting company business, that officer is bound to be faithful to the interests of company members as if the officer were a trustee. n274

§ 12.08(b) Property Rights of Business Trusts.

The traditional limitations on corporations' rights to own land led to the development of the business trust, which is

often called the Massachusetts trust, because it first became popular in that state. n275 The business or Massachusetts trust is also referred to as a common law trust, because its existence rests on contract rather than on statute. n276

The fluctuating popularity of the business trust has depended on its tax treatment. Use of the business trust was common during a brief period when it was not subject to federal corporate income tax, and use revived again after 1960, when real estate investment trusts were granted tax treatment as conduits. n277 Property-related businesses that have been conducted by means of the business trust have been described as follows:

> "The following are examples, reflected in decisions of courts, of the varied businesses and activities in which Massachusetts or business trusts have engaged: holding, managing, developing, and dealing in real estate; promoting the establishment of a city; owning timberlands and operating sawmills, and developing and colonizing lands; cemetery business; operation and management of apartment houses; ownership and operation of an office building; carrying out an irrigation project; operation of a ferry; dealing in and developing oil and gas properties and marketing products thereof; refining petroleum; mining; manufacturing bottling; mercantile business; dealing in livestock, meat, and hides; operating restaurants; summer resort business; construction and operation of a golf course; building and equipping a racing speedway." n278

As with any other trust, the business trust is created by a declaration of trust that states the aims of the enterprise and designates one or more trustees. The trustee is the legal owner and the manager of the assets and business, including any land, and functions as directed or permitted by the trust declaration. n279 If subscribers or investors in the trust have retained any substantial control in the management of the property, and the trustee appears to be the subscribers' agent, courts may treat the trust as a partnership and impose personal liability for trust debts on the members. n280 Thus, the trustee owns legal title to the property and functions as a principal with fiduciary responsibilities to the beneficiaries and personal liability for contracts. n281

The interest of a subscriber to the trust is evidenced by a certificate. The subscriber's interest, however, is only a beneficiary's equitable interest in the trust assets, including the land, n282 and the subscriber is not personally liable for the acts of the trustee.

Most states recognize business trust as trusts, n283 but some states treat them as partnerships or corporations. n284 Even these states usually permit trustees to deal in land according to the terms of the trust declaration. n285

§ 12.08(c) Property Rights of Partnerships.

§ 12.08(c)(1) Partnerships Prior to the Uniform Partnership Act.

Some form of the Uniform Partnership Act (U.P.A.) has been adopted by the District of Columbia and every state except Louisiana. n286 Prior to these adoptions acquisition of real property interests by a partnership occurred through one of the following methods:

a. the deed conveyed the land to all the partners, individually naming each partner as grantee; n287 or

b. the deed conveyed the land to a non-partner third person, who held title for the partnership; n288 or

c. the deed individually named and conveyed land to some of the partners, who were the designated grantee partners, n289 and who were regarded as holding the land in trust for the partnership; n290 or

d. the deed conveyed land to the partnership by use of the partnership name.

This last form was awkward, because the partnership was not recognized as a legal entity. n291 However, courts often upheld such conveyances by treating the grantor as a sort of "trustee" for the partnership or by admitting parol evidence to identify persons intended to be grantees under a conveyance to the partnership. n292 Some conveyances were construed to give each partner a share in the property as tenant in common. n293

When partners came to be regarded as tenants in common of partnership property, other difficulties arose. One difficulty was that each cotenant could convey only an undivided fractional interest in the property. n294 Moreover, each cotenant's share of partnership property could be threatened by the cotenant's personal liabilities n295 and on the death of the cotenant, that his share passed to the cotenant's estate. n296 In response to these problems, some courts have held that a conveyance of partnership land, even if the conveyance was by a partner with less than complete title, effectively conveyed the whole title. n297 Other courts have held that the partnership land became personal property through equitable conversion under the partnership agreement, n298 and some courts upheld a conveyance, by a partner who did not hold legal title. n299 Still other courts have held that a partner holding legal title could convey a title free of the other partners' equitable interest to a bona fide purchaser. n300 The uncertainty created by such remedial decisions has been largely resolved by the provisions adopted in the Uniform Partnership Act.

§ 12.08(c)(2) Partnerships Under the Uniform Partnership Act.

Under the Uniform Partnership Act, a partnership is permitted to acquire and convey land in the partnership name. n301 Rights of an individual partner's spouses, heirs and creditors may not be asserted against real property owned by the partnership. n302 As between the partners, the land is treated as personal property, n303 and each partner's rights in specific land owned by the partnership may not be assigned except as part of an assignment of the rights of all the partners in the same property. n304 This provision is subject to state recording acts. If the title to the land owned by the partnership is recorded in the name of only one partner, with no indication in the record of the partnership's interest, a grantee of the record owner who acquires the title in good faith without notice of the partnership interest is protected from partnership claims in the property. n305

An individual partner may convey the partner's interest in partnership property if the grantees consist of all the other members of the partnership, n306 or if the conveyance is a transfer of or a charge against the grantor's entire interest in the partnership. n307

The Uniform Partnership Act allows land held in the partnership name to be conveyed in the partnership name by a deed executed by a single partner. n308 The Act also deals with a conveyance of land held in the partnership name by one partner using the partner's own name, with a conveyance by all the partners of partnership land held in their individual names, and with a conveyance by the partnership of partnership land held in the names of other persons. n309 Also, the lessee duties incurred by one partner are enforceable against all the partners. n310

A deceased partner's interest in the partnership property vests in the surviving partner or partners. n311 The surviving partner's power to wind up partnership affairs unilaterally is quite comprehensive. n312 Partnership property distributed to the deceased partner's estate is considered personal property. n313

§ 12.08(c)(3) Limited Partnerships Under the Uniform Limited Partnership Act.

The Uniform Limited Partnership Act (U.L.P.A.) of 1916 was adopted in 23 states and the District of Columbia. n314 A Revised Uniform Limited Partnership Act (R.U.L.P.A.) was promulgated in 1976 and has since been adopted by 30 states, only four of which had previously adopted the 1916 Act. n315 As a result, every state but Louisiana has adopted a uniform limited partnership act.

Under both of these acts the general partner in a limited partnership has all the rights and obligations of a partner in an ordinary partnership, except that the general partner may not possess partnership property or assign limited partners'

rights in partnership property for other than a partnership purpose, without consent or ratification by the limited partners. n316 A general partner may also not continue the partnership business with partnership property, upon the death, retirement, or insanity of another general partner, without consent or ratification of the limited partners, or unless permitted by the partnership certificate. n317

Contributions into the limited partnership by limited partners may be in the form of real property, n318 but absent special provision consent, return of limited partners' contributions will only be in cash. n319 A limited partner who has not contributed, or has received wrongfully returned property, or has not paid property stated in the certificate as contributed by the partner, holds the property as trustee for the partnership. n320 A limited partner's interest in partnership property is personal property. n321 The executor of the estate of a deceased limited partner exercises the rights of the decedent in the partnership for the purpose of settling the estate. n322

FOOTNOTES:

(n1)Footnote 261. *See* Frank Evans, *The Evolution of the English Joint Stock Limited Trading Co., 8 Colum. L. Rev. 461 (1908). See also Hammond v. Otwell, 154 S.E. 357 (Ga. 1930).*

(n2)Footnote 262. *In re Finkelstein's Estate, 245 N.Y.S.2d 225 (1963).*

(n3)Footnote 263. *Hammond v. Otwell, 154 S.E. 357 (Ga. 1930).*

(n4)Footnote 264. *Hossack v. Ottowa Dev. Ass'n, 91 N.E. 439 (Ill. 1910).*

(n5)Footnote 265. *Howe v. Keystone Pipe & Supply Co., 274 S.W. 563 (Tex. 1925); See Apahouser Lock & Sec. Corp. v. Carvelli, 528 N.E.2d 797 (Mass. App. 1988).*

(n6)Footnote 266. *Weaver v. First Nat'l Bank, 224 S.W.2d 813 (Ark. 1949).*

(n7)Footnote 267. N.Y. Gen. Ass'ns Law, §§ 3-11; *Superior Oil & Ref. Syndicate v. Handley, 195 P. 159 (Or. 1921).*

(n8)Footnote 268. *Earlsboro Gas Co. v. Vern H. Brown Drilling Co., 52 P.2d 730 (Okla. 1935); see* Richardson v. *Clarke, 364* N.E.2d 804 (Mass. 1977).

(n9)Footnote 269. *In re Willmer's Estate, 138 N.Y.S. 649 (1912).*

(n10)Footnote 270. *State ex rel. R.R. & Whse. Comm'n v. U.S. Express Co., 83 N.W. 465 (Minn. 1900).*

(n11)Footnote 271. *First Nat'l Bank v. Vanden Brooks, 172 N.W. 582 (Mich. 1919).*

(n12)Footnote 272. *Willson v. Kuhn, 96 S.W.2d 128 (Tex. Civ. App. 1936).*

(n13)Footnote 273. *Earlsboro Gas Co. v. Vern H. Brown Drilling Co., 52 P.2d 730 (Okla. 1935).*

(n14)Footnote 274. *Fairman Bros. v. Ogden Gas Co., 161 A. 634 (Pa. Super. 1932).*

(n15)Footnote 275. *State Street Trust Co. v. Hall, 41 N.E.2d 30 (Mass. 1942); see* Inside Scoop v. Curry, 755 F. Supp. (D.D.C. 1989), *aff'd, 932 F.2d 201 (D.C. Cir. 1991). See* H. L. Wilgus, *Corporations and Express Trusts as Business Organizations, 13 Mich. L. Rev. 71, 205* (1914-15); S. R. Wrightington, *Voluntary Associations in Massachusetts, 21 Yale L.J. 311 (1912).*

(n16)Footnote 276. *Schumann-Heink v. Folsom, 159 N.E. 250 (Ill. 1927); see In re Trust Known as Great N. Iron Ore Props., 263 N.W.2d 610 (Minn. 1978); Arms v. Watson, 439 U.S. 835 (1978).*

(n17)Footnote 277. I.R.C. §§ 856-58.

(n18)Footnote 278. Annotation, *Massachusetts or Business Trust,* 156 A.L.R. 22, 80-82 (1945).

(n19)Footnote 279. *Id.* at 65-71.

(n20)Footnote 280. *Earlsboro Gas Co. v. Vern H. Brown Drilling Co., 52 P.2d 730 (Okla. 1935).*

(n21)Footnote 281. *Schumann-Heink v. Folsom, 159 N.E. 250 (Ill. 1927); see Federal Deposit Ins. Corp. v. Slinger, 913 F.2d 7 (1st Cir. 1990).*

(n22)Footnote 282. *Sagendorph v. Lutz, 281 N.W. 553 (Mich. 1938).*

(n23)Footnote 283. *See* Annotation, *Massachusetts or Business Trust,* 156 A.L.R. 22, 54-58 (1945).

(n24)Footnote 284. *McClaren v. Dawes Elec. Sign & Mfg. Co., 156 N.E. 584 (Ind. App. 1927); see* Richardson v. *Clarke, 364* N.E.2d 804 (Mass. 1977).

(n25)Footnote 285. *Thomle v. Soundview Pulp Co., 42 P.2d 19 (Wash. 1935).*

(n26)Footnote 286. *See* Table of Jurisdictions Wherein [Uniform Partnership] Act Has Been Adopted, *in* current *Cumulative Annual Pocket Part,* 6 Uniform Laws Annotated (1968).

(n27)Footnote 287. *Buckley v. Doig, 80 N.E. 913 (N.Y. 1907).*

(n28)Footnote 288. *Bond Realty Co. v. Pounds, 112 N.Y.S. 433 (1908).*

(n29)Footnote 289. *Davis v. Tadevic, 699 P.2d 1140 (Or. App. 1985).*

(n30)Footnote 290. *Bankers' Trust Co. v. Knee, 270 N.W. 438 (Iowa 1936); Jewell v. Jewell, 602 S.W.2d 315 (Tex. App. 1980); see* William Draper Lewis, *The Uniform Partnership Act, 29 Harv. L. Rev. 158 (1915).*

(n31)Footnote 291. *See* Frands M. Burdick, *Partnership Realty, 9 Colum. L. Rev. 197 (1909).*

(n32)Footnote 292. LaFayette Land Co. v. Caswell, *52 S. 140 (Fla. 1910).*

(n33)Footnote 293. *Simmons v. Quick-Stop Food Mart, Inc., 296 S.E.2d 275 (N.C. 1982).*

(n34)Footnote 294. *Jolly v. Kent Realty, Inc., 729 P.2d 310 (Ariz. App. 1986).*

(n35)Footnote 295. *Bankers' Trust Co. v. Knee, 270 N.W. 438 (Iowa 1936); Tom v. First Nat'l Bank, 104 S.W.2d 130 (Tex. App. 1937).*

(n36)Footnote 296. *McGowin v. Robinson, 39 So. 2d 237 (Ala. 1949).*

(n37)Footnote 297. *Attaway v. Stanolind Oil and Gas Co., 232 F.2d 790 (10th Cir. 1956); Kristerin Dev. Co. v. Granson Inv., 394 N.W.2d 325 (Iowa 1986).*

(n38)Footnote 298. *Fowler v. Franklin, 148 S.W.2d 663 (Ark. 1941).*

(n39)Footnote 299. *Dallas Joint Stock Land Bank v. Burch, 102 S.W.2d 1074 (Tex. App. 1937).*

(n40)Footnote 300. *Bond Realty Co. v. Pounds, 112 N.Y.S. 433 (App. 1908).*

(n41)Footnote 301. U.P.A. §§ 8(3), 10; *Windham Nat'l Bank v. Klein, 254 N.W. 602 (Minn. 1934).*

(n42)Footnote 302. U.P.A. §§ 25(a), 25(e); *In re Binkow's Estate, 120 So. 2d 15 (Fla. App. 1960).*

(n43)Footnote 303. *Reyes De Licea v. Reyes, 410 N.E.2d 179 (App. 1980).*

(n44)Footnote 304. U.P.A. § 25(b); *Altman v. Altman, 67 N.Y.S.2d 119 (App. 1946), aff'd, 80 N.E.2d 359 (N.Y. 1948).*

(n45)Footnote 305. *Barton v. Ludy, 76 P.2d 654 (Cal. 1938).*

(n46)Footnote 306. *In re Decker, 295 F. Supp. 501 (W.D. Va. 1969).*

(n47)Footnote 307. *Herman v. Pepper, 166 A. 587 (Pa. 1933); Murdock v. Murdock, 123 A. 683 (Pa. 1924).*

(n48)Footnote 308. U.P.A. § 10(1).

(n49)Footnote 309. *Id.* §§ 10(2), 10(3), 10(4); *Scheurman v. Farbman, 224 N.W. 604 (Mich. 1929).*

(n50)Footnote 310. *Kavalaris v. Cordalis, 18 N.W.2d 137 (Minn. 1945).*

(n51)Footnote 311. U.P.A. § 25(d).

(n52)Footnote 312. *Wharf v. Wharf, 137 N.E. 446 (Ill. 1922).*

(n53)Footnote 313. *Hall's Estate, 109 A. 697 (Pa. 1920).*

(n54)Footnote 314. *See Table of Jurisdictions Wherein [Uniform Limited Partnership] Act Has Been Adopted, in* current *Cumulative Annual Pocket Part,* 6 Uniform Laws Annotated (1968).

(n55)Footnote 315. *See Table of Jurisdictions Wherein [Revised Uniform Limited Partnership] Act Has Been Adopted, in* current *Cumulative Annual Pocket Part,* 6 Uniform Laws Annotated (1968).

(n56)Footnote 316. U.L.P.A. § 9(1)(d). Section 403 of the Revised Act does not contain a comparable provision.

(n57)Footnote 317. *Id.* § 9(1)(g). Section 403 of the Revised Act does not contain a comparable provision.

(n58)Footnote 318. *Id.* § 4. Section 501 of the Revised Act has a similar provision.

(n59)Footnote 319. *Id.* §§ 10(2), 16(3). Section 605 of the Revised Act has a similar provision.

(n60)Footnote 320. *Id.* § 17(2). There is no comparable provision in the Revised Act.

(n61)Footnote 321. *Id.* § 18. Section 701 of the Revised Act has a similar provision.

(n62)Footnote 322. *Id.* § 21. Section 705 of the Revised Act has a similar provision.

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CHAPTER 12 SPECIAL PROBLEMS OF REAL PROPERTY OWNERSHIP +

2-12 Thompson on Real Property, Thomas Editions § 12.09

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§ 12.09 Property Rights of Non-stock Private Religious Corporations.

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§ 12.09(a) Property Rights Related to Corporate Governance.

In some early American religious congregations, the minister or similar leader conducted all of the group's temporal affairs, including property-related activities, and the group, through such a leader, was treated as a corporation sole. n323 In other congregations, several persons could take title to land as trustees for the group and be recognized as a trustee corporation. n324 Disputes between such trustee corporations and their constituents promoted some courts to declare all members of the group as members of the corporation. n325 Thus, depending on judicial interpretation or -- in some jurisdictions -- state statute, title to the land of a religious congregation might be held in the name of a single leader or officer (corporation sole), or in the names of a small group of trustees (trustee corporation), or in the name of the congregation on behalf of all its members (membership corporation).

§ 12.09(b) Property Rights Related to Statutory Regulation.

State statutes that authorize the formation of private corporations usually include provisions pertaining to land transactions. Statutes with liberal statements of permissible corporate purposes usually also confer broad property powers on the corporations. n326 Conversely, statutes that are more specific are usually also more restrictive as to permissible corporate purposes and property powers n327 or they are silent as to particular property rights. n328

Additional regulation of private corporation property rights may be imposed by non-profit corporations statutes that govern transfer of land title to a new corporation, from members of its unincorporated predecessor association, n329 or from an inactive non-profit corporation. n330

State statutes generally permit non-stock private religious corporations to exercise whatever property rights are accorded them by their denominational hierarchies. In some statues, separate provisions recognize the individual governance schemes of each denomination, n331 while other statues simply declare that property rights and procedures of individual religious corporations must conform to the rules of their respective governing denominations. n332 Judicial approval is required for some conveyances. n333

In a few states, private religious corporations are under restrictions as to how much land they can acquire, limited either by acreage, value or productivity. n334 These regulations usually do not deal adequately with the issues of post-acquisition increases in value n335 or determination of the proper remedy for excessive acquisitions. n336

In the citations below are some examples of private religious corporations' property rights that are affected by both statutory and common law. n337

FOOTNOTES:

(n1)Footnote 323. Ariz. Rev. Stat. §§ 10-426, 10-427; Cal. Corp. Code § 10008; *Reid v. Barry, 112 So. 846 (Fla. 1927); Hurley v. Werly, 203 So. 2d 530 (Fla. App. 1967); Galich v. Catholic Bishop of Chicago, 394 N.E.2d 572 (Ill. App. 1979); Inhabitants of the First Parish v. Dunning, 7 Mass. 445 (1811);* Nev. Rev. Stat. §§ 84.040, 84.080; N.H. Rev. Stat. Ann. § 306:6; *Akscyn v. Second Nat'l Bank, 98 A. 519 (N.H. 1916).*

(n2)Footnote 324. *First Born Church of Living God v. First Born Church of Living God, 22 So. 2d 452 (Fla. 1945);* Ill. Ann. Stat. ch. 805, § 110/35; Mass. Gen Laws Ann. ch. 68, § 1; Mich. Stat. Ann. § 21.160; Minn. Stat. Ann. § 315.01; N.H. Rev. Stat. Ann. § 292:12; N.J. Stat. Ann. §§ 16:1-1, 16:1-2; N.C. Gen. Stat. § 39-24; *Cage v. Cansler, 248 P. 612 (Okl. 1926);* Tenn. Code Ann. § 66-2-203; Vt. Stat. Ann. tit. 27, § 701; Wis. Stat. Ann. § 188.03. *See* Zollman, *American Church Law,* 113-123, 127-129 (1933); Claude D. Morgan, *The Significance of Church Organizational Structure in Litigation and Government Action, 16 Valparaiso L. Rev. 145, 150 (1982).*

(n3)Footnote 325. N.Y. Relig. Corp. Law § 5; *Trustees of the Presbytery of Willamette v. Hammer, 385 P.2d 1013 (Or. 1963).*

(n4)Footnote 326. Cal. Corp. Code §§ 5111, 7111, 9100; Ill. Stat. ch. 805 § 105; Mo. Stat. Ann. §§ 352.020, 352.130; Tex. Ann. Civ. Stat. art. 1396-2.01; W. Va. Code §§ 31-1-7, 31-1-8(d).

(n5)Footnote 327. Me. Rev. Stat. Ann. tit. 13, § 901; Mass. Ann. Laws ch. 180, § 4; N.Y. Ben. Ord. Law § 2; N.Y. Coop. Corp. Law § 13; N.Y. Gen. Corp. Law §§ 2, 3; N.Y. Not-for-Profit Corp. Law § 201; N.Y. Relig. Corp. Law (numerous specialized provisions for various denominations).

(n6)Footnote 328. *Barger v. French, 253 P. 230 (Kan. 1927).*

(n7)Footnote 329. *Adams v. Bethany Church, 380 So. 2d 788 (Ala. 1980);* N.J. Stat. Ann. § 46:7-2; N.Y. Not-for-Profit Corp. Law § 403; N.Y. Relig. Corp. Law § 4; Wis. Stat. Ann. § 188.03.

(n8)Footnote 330. Colo. Rev. Stat. Ann. § 7-50-106; Fla. Stat. Ann. § 617.12; Mo. Stat. Ann. § 352.230; N.J. Stat. Ann. §§ 16:2-19, 16:5-26, 16:6-1, 16:7-1, 16:10A-14, 16:1-23, 16:12-16, 16:13-15; N.Y. Relig. Corp. Law §§ 16, 17, 17a; Ohio Rev. Code Ann. §§ 1715.05, 1715.15.

(n9)Footnote 331. Mich. Stat. Ann. §§ 21.1691 - 21.2016; N.J. Stat. Ann. §§ 16:1-1 - 16:1-47, 16:2 - 16:19; N.Y. Religious Corp. Law §§ 6, 7; Wis. Stat. Ann. §§ 187.01 - 187.17; *see* William W. Boyer, Jr. *Property Rights of Religious Institutions in Wisconsin, 36 Marq. L. Rev. 329 (1953).*

(n10)Footnote 332. Ala. Code § 10-4-25; *Britton v. Jackson, 250 P. 763 (Ariz. 1926); First English Evangelical Lutheran Church v. Dysinger, 6 P.2d 522 (Cal. App. 1931);* Del. Code Ann. tit. 27, § 111; *Trustees of Pencader Presbyterian Church v. Gibson, 22 A.2d 782 (Del. 1941);* Ga. Code Ann. § 14-5-46; *Jones v. Wolf, 260 S.E.2d 84 (Ga. 1979); Church of God v. Finnery, 101 N.E.2d 856 (Ill. App. 1951); Babcock Mem. Presbyterian Church v. Presbytery of Baltimore of the United Presbyterian Church, 464 A.2d 1008 (Md. 1983);* Mass. Gen. Laws Ann. ch. 68, § 8; Mich. Stat. Ann. §§ 21.1709, 21.1731, 21.1748, 21.1769, 21.1784, 21.1837, 21.2010, 21.2011; Minn. Stat. Ann. §§ 315.12, 315.17; *Piletich v. Deretich, 328 N.W.2d 696 (Minn. 1982); Tea v. Protestant Episcopal Church in Diocese of Nev., 610 P.2d 182 (Nev. 1980);* N.H. Rev. Stat. Ann. § 292:4; *Mathis v. Holmes, 34 A.2d 645 (N.J. Ch. 1943);* N.Y. Relig. Corp.

Law §§ 5, 69, 277, 295; *Harlem Church of the Seventh Day Adventists v. Greater N.Y. Corp. of Seventh Day Adventist, 198 N.E. 615 (N.Y. 1935); Walters v. Braswell, 272 S.E.2d 363 (N.C. App. 1980);* Okla. Stat. Ann. tit. 18, § 562; Trinity Evangelical Lutheran Church of Clairton, Inc. v. May on Behalf of W. Pa. - W. Va. Synod of Lutheran Church in *Am., 510 A.2d 904 (Pa. 1986); Presbytery of Huron v. Gordon, 300 N.W. 33 (S.D. 1941);* Tenn. Code Ann. § 66-2-203.

(n11)Footnote 333. *Application of First Methodist Church, 56 A.2d 120 (N.J. 1947);* N.Y. Relig. Corp. Law § 12; *Catholic Foreign Missionary Soc'y of Am., Inc. v. Oussani, 109 N.E. 80 (N.Y. 1915);* Ohio Rev. Code Ann. §§ 1715.41; *Nussbaum v. Wooster Baptist Temple, 121 N.E.2d 59 (Ohio App. 1953);* Va. Code §§ 57-12, 57-14, 57-15; *see* Carl Zollman, American Church Law, 171-176 (1933).

(n12)Footnote 334. Ariz. Rev. Stat. Ann. § 10-1005; Mass. Gen. Laws Ann. ch. 180, § 6; Mich. Stat. Ann. § 21.1729; Mo. Ann. Stat. § 352.130; *Levy v. Levy, 33 N.Y. 97 (1865);* W. Va. Code § 35-1-8; *State v. American Baptist Home Mission Soc'y, 123 S.E. 440 (W. Va. 1924).*

(n13)Footnote 335. *Edwards v. Rector of Trinity Church, 77 F.2d 884* (2d Cir.), *cert. denied, 296 U.S. 628, 56 (1935).*

(n14)Footnote 336. Miss. Code Ann. § 79-11-33; *Osnes v. Morris, 298 S.E.2d 803 (W. Va. 1982).*

(n15)Footnote 337. St. Nicholas Catholics of Russian Orthodox Church in *No. Am. v. Kedroff, 344 U.S. 94 (1952);* Ala. Code §§ 10-4-1, 10-4-4; *Lauderdale v. Peace Baptist Church, 19 So. 2d 542 (Ala. 1944);* Ariz. Rev. Stat. Ann. §§ 10-422, 10-424; *Presbytery of Riverside v. Community Church, 152 Cal. Rptr. 854 (1979), cert. denied, 444 U.S. 974 (1979);* Colo Rev. Stat. § 7-50-106; *American Lutheran Church v. Evangelical Lutheran St. Paul's Church, 343 P.2d 711 (Colo. 1959);* Conn. Gen. Stat. §§ 33-268 to 33-278a, 33-278b, 33-279 to 33-281, 33-281a; *Marvel v. Sadtler, 18 A.2d 231 (Del. Ch. 1941);* Kan. Stat. Ann. §§ 17-1711 - 17.1713c, 17-1714 - 17-1716h, 17.1735 - 17.1737; *Jackson v. Jones, 287 P. 603 (Kan. 1930); Sisters of Charity v. Emery, 81 So. 99 (La. 1919);* Me. Rev. Stat. Ann. tit. 13, §§ 2982, 2986; Mass. Ann. Laws ch. 67, §§ 40, 41-43, 44-46; ch. 68, §§ 7, 10, 11; Mich. Stat. Ann. §§ 21.1691, 21.1692, 21.1701 - 21.1773, 21.1781 - 21.1809, 21.1831 - 21.1842, 21.1851 - 21.1863, 21.1881 - 21.1890, 21.1921 - 21.1928, 21.1941 - 21.1949, 21.1961 - 21.1970, 21.2001 - 21.2016; *Michigan Congregational Conf. v. United Church, 48 N.W.2d 108 (Mich. 1951);* Minn. Stat. Ann. §§ 315.17 - 315.20; *Trinity Church of Infinite Science v. First Spiritualist Church, 20 N.W.2d 534 (Minn. 1945); Sosna v. Fishman, 154 S.W.2d 398 (Mo. 1941);* Neb. Rev. Stat. § 21-1993; *State ex rel. Home Sav. and Loan Ass'n v. Davis, 299 N.W. 291 (Neb. 1941);* N.J. Stat. Ann. §§ 16:2-1 - 16:2-21, 16:3-1 - 16:3-11, 16:5-1 - 16:5-27, 16:6-1 - 16:6-3, 16:7-1 - 16:7-6, 16:8-1, 16:10A-1 - 16:10A-15, 16:11-1 - 16:11-24, 16:12-1 - 16:12-31, 16:13-1 - 16:13-17, 16:14-1, 16:15-1 - 16:15-17, 16:15A-1 - 16:15A-6, 16:17-1 - 16:17-12; *Application of First Methodist Church, 56 A.2d 120 (N.J. 1947);* N.Y. Relig. Corp. Law, §§ 5, 12, 42, 58, 69, 91, 101, 107, 139, 140, 169, 169-d, 171, 181, 189, 200, 202, 203, 207, 225, 225-j - 225-m, 271, 277, 295, 304; *Harlem Church of the Seventh Day Adventists v. Greater N.Y. Corp. of Seventh Day Adventists, 198 N.E. 615 (N.Y. 1935); Western Conf. of Original Free Will Baptists v. Creech, 123 S.E.2d 619 (N.C. 1962), rev'd, 129 S.E.2d 600 (N.C. 1963); Russian Orthodox Greek Catholic St. Peter and St. Paul's Church v. Burdikoff, 189 N.E.2d 451 (Ohio App. 1962); St. Michael and Archangel Russian Orthodox Greek Catholic Church v. Uhniat, 259 A.2d 862 (Pa. 1962), cert. denied, 400 U.S. 823, reh'g denied, 400 U.S. 930 (1969), appeal after remand, 301 A.2d 655 (Pa. 1973); Masse v. Church of Our Lady, 141 A. 703 (R.I. 1928); Reformed Bethanian Church v. Ochsner, 31 N.W.2d 249 (S.D. 1948).*

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CHAPTER 12 SPECIAL PROBLEMS OF REAL PROPERTY OWNERSHIP +

2-12 Thompson on Real Property, Thomas Editions § 12.10

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§ 12.10 Property Rights of Non-stock Private Cemetery Corporations.

[Go To Supp]

Property rights of non-stock private cemetery corporations are subject to the terms of the corporate charters as well as to the jurisdiction's legal rules and regulations for private corporations.

Certain additional land-related privileges and restrictions apply because of these corporations' burial activities. One additional property right often conferred upon non-stock private cemetery corporations is the power to condemn land for cemetery use. n338 Typical restrictions include being made subject to location regulations imposed by local boards of health or similar agencies, n339 limits on how much acreage may be acquired, n340 and restrictions on the powers to convey or encumber land acquired for cemetery purposes. n341 The objectives of these special rules are to ensure availability of adequate, undisturbed tracts of land for burials without unduly interfering with other ordinary land uses. n342

FOOTNOTES:
(n1)Footnote 338. Cal. Health & Safety Code § 8501; Colo. Rev. Stat. § 7-47-102; Conn. Gen. Stat. § 48-18; Kan. Gen. Stat. Ann. § 17-1315; Ky. Rev. Stat. Ann. § 416.210; Mass. Ann. Laws ch. 114, §§ 11 to 13; Mont. Code Ann. § 35-20-104; N.Y. Not-for-Profit Corp. Law § 1401(j); Ohio Rev. Code Ann. § 1721.02; Okla. Stat. Ann. tit. 27, § 5; Vt. Stat. Ann. tit. 18, §§ 5482, 5487; W. Va. Code § 54-1-2(h); *Fork Ridge Baptist Cemetery Ass'n v. Redd., 10 S.E. 405 (W. Va. 1889).*

(n2)Footnote 339. La. Rev. Stat. Ann. §§ 8:61, 8:66, 8:67; Md. Ann. Business Regulation § 5-201; Mass. Ann. Laws ch. 114, §§ 8, 9; Mont. Code Ann. § 35-20-201; N.J. Stat. Ann. § 8A:2-1; *State v. Slavonian Catholic Church, 42 A.2d 578 (N.J. 1944), aff'd, 42 A.2d 580 (N.J. App. 1945);* N.Y. Not-for Profit Corp. Law §§ 1401(g), 1401(m); *Holy Sepulchre Cem. v. Town of Greece, 79 N.Y.S.2d 683 (Sup. 1947), aff'd, 79 N.Y.S.2d 863 (App. 1948);* Vt. Stat. Ann. tit. 18, § 5487.

(n3)Footnote 340. Cal. Health & Safety Code § 8125; D.C. Code Ann. § 27-102; Md. Code Ann. Bus. Reg. § 5-201; Mass. Ann. Laws ch. 114, §§ 2, 8; Mich. Stat. Ann. §§ 21.876, 21.933; Nev. Rev. Stat. § 83.050; N.J. Stat. Ann.

§ 8A:6-1; N.Y. Not-for-Profit Corp. Law § 1401(h); Ohio Rev. Code Ann. § 1721.01; Okla. Stat. Ann. tit. 8, § 3; Tenn. Code Ann. § 46-2-101; Wis. Stat. Ann. § 157.064.

(n4)Footnote 341. Kan. Gen. Stat. Ann. §§ 17-1302, 17-1322; La. Rev. Stat. Ann. §§ 8:313, 8:901, 8:904; Mich. Stat. Ann. §§ 21.822 21.879, 21.914, 21.916; *Richmond Hills Mem. Park Ass'n v. Richardson, 266 N.W. 396 (Mich. 1936);* Minn. Stat. Ann. §§ 306.02, 306.63, 306.64; N.J. Stat. Ann. § 8A:6-10; *Fidelity Union Trust Co. v. Union Cem. Ass'n, 40 A.2d 205 (N.J. Ch. 1944), aff'd, 45 A.2d 670 (N.J. App. 1946);* N.Y. Not-for-Profit Corp. Law §§ 1401(r), 1401(w), 1401(x), 1401(mm); N.Y. Real Property Law § 450; *Matter of Hope Cem. Ass'n, 109 N.Y.S.2d 831 (1952);* N.C. Gen. Stat. § 65-69(a); *Blue Ridge Mem. Park v. Union Nat'lBank, 75 S.E.2d 617 (1953);* Ohio Rev. Code Ann. §§ 1721.08, 1721.15; Okla. Stat. Ann. tit. 8, § 31; Tenn. Code Ann. § 46-2-102; *State v. Forest Lawn Lot Owners Ass'n, 254 S.W.2d 87 (1953);* W. Va. Code Ann. § 35-5-2; Wis. Stat. Ann. § 157.08.

(n5)Footnote 342. Ala. Code § 22-20-4; Cal. Health and Safety Code § 8500; Conn. Gen. Stat. Ann. § 19-154; Del. Code Ann. tit. 12 §§ 3551 - 3553; Mich. Stat. Ann. § 21.856; *Rowley v. Laingsburg Cem. Ass'n, 215 Mich. 673 (1921);* Minn. Stat. Ann. § 306.02; N.Y. Not-for-Profit Corp. Law § 1401(n); *In re Pearsall's Estate, 211 N.Y.S. 841 (1925);* Ohio Rev. Code Ann. §§ 1721.13, 1721.181; Vt. Stat. Ann. tit. 18 § 5431.

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CHAPTER 12 SPECIAL PROBLEMS OF REAL PROPERTY OWNERSHIP +

2-12 Thompson on Real Property, Thomas Editions § 12.11

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§ 12.11 Property Rights of Other Non-stock Private Corporations.

Non-stock private *religious* corporations are usually subject to whatever restrictions on property rights are imposed by their denominational hierarchies, a position usually reinforced by statue. However, property rights of non-stock private corporations not affiliated with religious denominations are often regulated directly by state statute. Those statutory provisions may (1) include no restrictions at all; n343 (2) permit acquisitions only in pursuit of corporate purposes; n344 (3) require that land be used and conveyed only in conformance with the terms under which it was acquired; n345 (4) impose special procedural requirements for conveying or encumbering the land; n346 (5) require certain hierarchical controls within the corporation; n347 (6) impose maximum acreage restrictions; n348 (7) impose maximum land value restrictions: n349 or (8) prohibit all or certain types of land conveyances. n350

FOOTNOTES:
(n1)Footnote 343. Cal. Corp. Code §§ 10200, 5110 *et seq.,* 9110 *et seq.* (1977); Fla. Stat. Ann. § 619.07 (1977); Md. Corps. & Ass'ns Code §§ 5-504(9), 6-410(c); Md. Educ. Code Ann. § 16-203(e) (1985); *Diggs v. Morgan College, 105 A. 157 (Md. 1918);* Mich. Stat. Ann. §§ 21.1241 - 21.1243, 21.1271 - 21.1277, 21.1321 - 21.1329, 21.1341 - 21.1351, 21.1401 - 21.1405, 21.1451 - 21.1454, 21.1601 - 21.1606, 21.1671 - 21.1678 (1983); N.Y. Not-for-Profit Corp. Law § 1406(f) (1970); Vt. Stat. Ann. tit. 27, §§ 701, 702; *Fenwick Borough v. Town of Old Saybrook, 47 A.2d 849 (Conn. 1946).*

(n2)Footnote 344. Del. Code Ann. tit. 27, § 302 (1974); Ga. Code Ann. § 33-15-8 (1992); *Middle Tenn. Elec. Membership Corp. v. State ex rel. Adams, 246 S.W.2d 958 (Tenn. 1952); Benton Harbor Fed'n of Women's Clubs v. Nelson, 3 N.W.2d 844 (Mich. 1942);* Mo. Ann. Stat. § 352.130; *Rockhill Tennis Club of Kansas City v. Volker, 56 S.W.2d 9 (Mo. 1932); Piscataway Twp. v. State Bd. of Tax Appeals, 29 A.2d 389 (N.J. 1944).*

(n3)Footnote 345. D.C. Code Ann. § 29-806; Mich. Stat. Ann. §§ 21.1231 to 21.1236.

(n4)Footnote 346. La. Rev. Stat. Ann. §§ 17:87, 30:152; *see also* William O. Bonin *Public Mineral Leasing in Louisiana, 27 Tulane L. Rev. 246, 249;* Mass. Ann. Laws ch. 67, § 25; N.Y. Ben. Ord. Law § 10; Not-for-Profit Corp. Law § 1404(c).

(n5)Footnote 347. Mich. Stat. Ann. § 21.140; *Grand Lodge of Pa. Indep. Order of Odd Fellows by See v. Van Camp Lodge No. 140, Indep. Order of Odd Fellows, 479 A.2d 544 (Pa. Super. 1984);* In some circumstances courts have been reluctant to recognize hierarchical control of locally owned property: *Eureka Lodge No. 5 Int'l Benevolent & Protective Order of Elks v. Eureka Lodge Modern Elks, 30 S.E.2d 126 (Va. 1944).*

(n6)Footnote 348. D.C. Code Ann. §§ 29-702, 29-807; Ind. Stat. Ann. § 23-13-15-1; Nev. Rev. Stat. § 85.040; N.Y. Not-for-Profit Corp. Law § 1408(a).

(n7)Footnote 349. Ind. State. Ann. § 23-13-15-1; Mich. Stat. Ann. §§ 21.1241 - 21.1243, 21.1291 - 21.1294, 21.1301 - 21.1312, 21.1361 - 21.1365, 21.1371 - 21.1374, 21.1381 - 21.1389, 21.1431 - 21.1438; Ohio Rev. Code Ann. § 1828.01.

(n8)Footnote 350. N.Y. Ben. Ord. Law § 10; N.Y. Educ. Law § 5706; *Resnick v. Croton Park Colony, 151 N.Y.S.2d 328 (1955);* Ohio Rev. Code Ann. §§ 1711.13, 1711.33.

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CHAPTER 12 SPECIAL PROBLEMS OF REAL PROPERTY OWNERSHIP +

2-12 Thompson on Real Property, Thomas Editions § 12.12

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§ 12.12 Property Rights of Stock Private Corporations Generally.

[Go To Supp]

Stock private corporations are also subject to whatever property rights provisions are in their charters and in statutes that authorize the granting of the corporate charter or otherwise regulate such corporations. The broad variety of statutory property right provisions may (1) affirm that the corporation has all the property rights of a natural person, except as restricted by its charter or other law; n351 (2) grant power to acquire and hold land appropriate for corporate purposes; n352 (3) specify which types of land conveyances are within corporate purposes, implying prohibition of those omitted; n353 (4) require consent from a majority or more of directors n354 or members, n355 occasionally coupled with required compensation for dissenters; n356 (5) specify the formalities of execution; n357 or (6) restrict self-dealing n358 and transactions under threat of insolvency. n359

Some statutes expand the rights of stock private corporations to deal in land by (1) including after-acquired property in a mortgage; n360 (2) permitting acquisition of land in other jurisdictions; n361 (3) permitting grants of leaseholds for terms longer than the life of the corporation; n362 (4) granting the power to condemn even where the public character of the proposed use is questionable; n363 (5) or applying equitable conversion, changing realty to personalty, where the right to acquire land by devise is doubtful. n364

Only the state may challenge a stock private corporation that has acquired property in excess of its rights. n365 Such excess property escheats to the state, n366 unless the corporation first makes a valid conveyance of the property. n367 Other claimants to rights or benefits in such excess property have generally had their claims denied. n368

FOOTNOTES:
(n1)Footnote 351. Ala. Code § 10-2A-20; Cal. Corp. Code § 207; Wash. Rev. Code Ann. § 23B.03.020.

(n2)Footnote 352. Mass. Gen. Laws Ann. ch. 156, § 14(c); N.Y. Gen. Corp. Law § 14:3; S.D. Const. art. XVII, § 7; W. Va. Code § 31-2-2.

(n3)Footnote 353. N.Y. Bus. Corp. Law §§ 202(a)(5), 909(a), 909(b), 909(c), 911; Trans Corp. Law § 29; *In re*

Bronson, 164 N.Y.S. 179 (1917).

(n4)Footnote 354. Or. Rev. Stat. § 708.400(3); Tex. Rev. Civ. Stat. Ann. art. 852a-5.04; W. Va. Code Ann. § 31-7-11(a)(7) (1982); Wyo. Stat. Ann. § 13-7-104(c).

(n5)Footnote 355. Cal. Corp. Code § 1000; D.C. Code § 29-203; *O'Flaherty v. Schwimmer, 601 N.Y.S.2d 381 (1993); Voight v. Remick, 244 N.W. 446,* (Mich. 1932); N.Y. Bus. Corp. Law § 911; *Bradley v. East Williston Shopping Ctr., Inc., 222 N.Y.S.2d 943 (1961), appeal denied, 288 N.Y.S.2d 1026 (1962); Hospitality Inns, Inc. v. South Burlington R.I., Inc., 571 A.2d 40 (Vt. 1989);* Wis. Stat. Ann. § 188.71.

(n6)Footnote 356. N.Y. Bus. Corp. Law §§ 623, 910; *Anderson v. International Mining & Chem. Corp., 67 N.E.2d 573 (N.Y. 1945).*

(n7)Footnote 357. Kan. Gen. Stat. Ann. § 58-2318; N.D. Cent. Code §§ 47-10-05.1; Pa. Stat. Ann. tit. 15, § 402; Wis. Stat. Ann. § 221-14(6).

(n8)Footnote 358. N.J. Stat. Ann. § 14A:6-8; N.Y. Bus. Corp. Law § 713; N.Y. Gen. Corp. Law § 60(2); Not-for-Profit Corp. Law § 715. *See also* Note, *The "Unfair" Interested Director's Contract Under the New York Business Corporation Law, 16 Buffalo L. Rev. 840 (1967);* Note, *Corporations: Interlocking Directorates: Statutory Regulation of Dealings Between Corporations with Interlocking Directorates,* 23 Cornell Law. Q. 445 (1938); *Hill v. Hill, 420 A.2d 1078 (Pa. Super. 1980). See also* § 41 of the Model Business Corporation Act , which addresses director conflicts of interest.

(n9)Footnote 359. Nev. Rev. Stat. § 78.625. *Repealed. See* Chapter 442, Statutes of Nevada 1991 at page 1318.

(n10)Footnote 360. Md. Corps. & Ass'ns Code Ann. § 1-301; *Garner v. Union Trust Co., 45 A.2d 106 (Md. 1945);* N.H. Rev. Stat. Ann. § 299:2; Wis. Stat. Ann. § 190.10.

(n11)Footnote 361. Cal. Corp. Code § 207; Minn. Stat. Ann. § 302A.161(4); N.Y. Gen. Corp. Law § 17; Pa. Stat. Ann. § 1302(4).

(n12)Footnote 362. *Tate v. Neary, 65 N.Y.S. 40 (1900).*

(n13)Footnote 363. *Pollnow v. State Dep't of Nat. Resources, 276 N.W.2d 738 (Wis. 1979).* W. Va. Code Ann. § 31-3-2.

(n14)Footnote 364. *Downing v. Marshall, 23 N.Y. 366 (1861); In re Battles' Estate, 257 N.Y.S.2d 91 (1965).*

(n15)Footnote 365. *S.D.K. Med. Computer Servs. Corp. v. Professional Operating Mgt. Group, Inc., 354 N.E.2d 852 (Mass. 1976); State ex rel. State Hwy. Comm'n v. Chicago B. & Q.R.R., 539 S.W.2d 760 (Mo. App. 1976).*

(n16)Footnote 366. *Oklahoma Nat. Gas Co. v. State ex rel. Vassar, 101 P.2d 793 (Okla. 1940); see also* Model Business Corporation Act § 7 (c) and Revised Model Business Corporations Act § 6.

(n17)Footnote 367. *Wolfe v. State ex rel. Presson, 21 P.2d 1067 (Okla. 1933); see also* Annotation, *Power of Corporation to Pass Title to Real Property Which It Holds in Excess of Its Powers,* 37 A.L.R. 204 (1925).

(n18)Footnote 368. *Southwestern Pub. Serv. Co. v. Public Util. Comm'n, 578 S.W.2d 507 (Tex. Civ. App. 1979). See also* Model Business Corporation Act § 7; Annotation, *Who May Assert Invalidity of Sale, Mortgage, or Other Disposition of Corporate Property Without Approval of Stockholders, 58 A.L.R.2d 784 (1958).*

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CHAPTER 12 SPECIAL PROBLEMS OF REAL PROPERTY OWNERSHIP +

2-12 Thompson on Real Property, Thomas Editions § 12.13

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§ 12.13 Property Rights of Stock Private Corporations for Public Utilities.

[Go To Supp]

Stock private corporations for public utilities are usually under the same types of statutory regulations as apply to stock private corporations generally, but the governing statutes are usually directed specifically to the utilities corporations. Such statutes will typically confer general authorization for the utilities corporations to acquire, hold and convey real property interests. n369 Some statutes also have detailed provisions on the permissible modes of acquisition, n370 or explicitly restrict corporate use of land to the terms of the grant, n371 or bar adverse possession between the utilities corporation and adjacent or servient owners. n372

An important property right often conferred on public utility corporations is the power to condemn interest in land for a variety of public purposes. n373 Statutes extending this right may be either general or specific, and court decisions interpreting the statutes may also expand or limit their scope. Statutes giving a broad, general power to condemn may be limited to particular types of utilities corporations. n374 Statutes that are more limited in scope usually place restrictions on purposes and amount of land acquired. n375 These statutes may also designate the types of land not subject to condemnation, n376 or regulate utilities that are competing for the same land. n377

Some courts have given expansive interpretations of the powers granted by statute, whether the statutes are general or specific. n378 Other courts have tended to interpret such statutes in favor of private property ownership rights. n379

If the public utility corporation condemns only an easement interest, that interest will be terminated when the corporation abandons the easement, and the servient owner resumes ownership. n380

FOOTNOTES:
(n1)Footnote 369. Ariz. Rev. Stat. Ann. § 40-808; Cal. Pub. Util. Code § 7526; Idaho Code Ann. §§ 62-104; Kan. Gen. Stat. Ann. §§ 17-619, 17-623, 17-625, 17-626; Me. Rev. Stat. Ann. tit. 35-A, §§ 7903, 7904; Mich. Stat. Ann. §§ 22.201, 22.212(b); Minn. Stat. Ann. § 222.27; Neb. Rev. Stat. § 74-305; N.J. Stat. Ann. §§ 48:5-7, 48:6-14; S.D. Cod. Laws § 49-30-5.

(n2)Footnote 370. Idaho Code Ann. § 62-104(2).

(n3)Footnote 371. Kan. Gen. Stat. Ann. § 66-501.

(n4)Footnote 372. R.I. Gen. Laws Ann. § 39-6-9; Vt. Stat. Ann. tit. 30, §§ 705, 2519; *Netherlands Am. Mtg. Bank v. Eastern Ry. & Lumber Co., 252 P. 916 (Wash. 1927).*

(n5)Footnote 373. Ala. Code §§ 10-5-1, 10-5-4; Ariz. Rev. Stat. Ann. 12-1111, 12-1142; Cal. Pub. Util. Code §§ 611 to 623; Colo. Const. art. 16, § 7; Del. Code Ann. tit. 26, § 901(b), 1302; Idaho Code § 62-104; *Burlington Northern, Inc. v. Finneman, 530 P.2d 940 (Idaho 1978);* Kan. Gen. Stat. Ann. §§ 17-618, 17-627, 17-903, 17-4604(j), 66-501(3); Me. Rev. Stat. Ann. tit. 23, §§ 6002, 6006; Mich. Stat. Ann. §§ 22.212, 22.218; *Detroit Int'l Bridge Co. v. American Seed Co., 228 N.W. 791 (Mich. 1930);* Minn. Stat. Ann. §§ 222.27, 222.36; *Minneapolis Gas Co. v. Dahle, 171 N.W.2d 813 (Minn. 1969);* Neb. Rev. Stat. §§ 74-308, 86-302; N.H. Rev. Stat. Ann. ch. 372, §§ 9, 23; N.J. Stat. Ann. §§ 48:5-18, 48:6-15.1, 48:7-3.1, 48:10-1.1, 48:12-35.1, 48:13-12.1, 48:14-10.1, 48:14-21.1, 48:17-9.1, 48:19-15.1; Wash. Rev. Code Ann. §§ 81.36.010, 81.36.030; Wis. Stat. Ann. § 32.02.

(n6)Footnote 374. Cal. Pub. Util. Code §§ 611 - 624; *Cash v. Southern Pacific R. Co., 177 Cal. Rptr. 474 (1981); Clark v. Gulf Power Co., 198 So. 2d 368 (Fla. App. 1967);* Kan. Gen. Stat. Ann. § 17-618 (1985); Minn. Stat. Ann. § 222.36 (1972); N.H. Rev. Stat. Ann. ch. 371, § 1; *Minneapolis Gas Co. v. Dahle, 171 N.W.2d 813 (Minn. 1969).*

(n7)Footnote 375. Ala. Code §§ 10-5-2, 10-5-3; N.J. Stat. Ann. § 48:12-35.1; Wash. Rev. Code Ann. § 81-36-010, 81.52.050.

(n8)Footnote 376. Ala. Code § 10-5-3(c); N.Y. Transp. Corp. Law §§ 83, 88 (156); *Laureldale Cem. Co. v. Reading Co., 136 A. 851 (Pa. 1927).*

(n9)Footnote 377. Ala. Code §§ 10-4-320(3), 10-4-320(6); Mich. Stat. Ann. § 22.220; Minn. Stat. Ann. § 222.36; N.J. Stat. Ann. §§ 48:6-15.1, 48:12-36; *Montana-Dakota Util. Co. v. Divide County Sch. Dist. No. 1, 193 N.W.2d 723 (N.D. 1971); President and Fellows of Middlebury College v. Central Power Corp. of Vt., 143 A. 384 (Vt. 1928);* Wash. Rev. Code Ann. § 80.36.030; *Baltimore and Ohio R.R. v. Pittsburg, W. & Ky. R.R., 17 W. Va. 812 (1881).*

(n10)Footnote 378. *Kennedy v. Yates Petro. Corp., 725 P.2d 572 (N.M. 1986).*

(n11)Footnote 379. *Roman Catholic Dioces of Newark v. Borough of Ho-Ho-Kus, 220 A.2d 97 (N.J. 1966).*

(n12)Footnote 380. Cal. Pub. Util. Code § 7554 (1965); *State ex rel. Dep't of Transp. v. Penn Cent. Corp., 445 A.2d 939 (Del. Super. 1982).*

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CHAPTER 12 SPECIAL PROBLEMS OF REAL PROPERTY OWNERSHIP +

2-12 Thompson on Real Property, Thomas Editions § 12.14

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§ 12.14 Private Property Rights of Stock Private Corporations for Finance-Related Enterprises.

Property rights of finance-related corporations are also restricted by specific statutory provisions. Stock private corporations for national banks may acquire, hold and convey only such real property as is necessary for their business, or such property as they acquire as security for or in satisfaction of debts. Property acquired as debt security may not be held for more than five years. n381

The purposes for such restrictions probably include making the bank assets more readily available to depositors n382 and reducing banks' ability to engage in hazardous land speculation. n383

State statutes impose similar restrictions on state banks and savings and loan associations, although with great variety in detail and approach. The state statutes typically permit the corporation to grant leaseholds in the excess space at its business site, but acquisition of the site itself may be subject to cost limitations or approval by a state agency. n384

Some state statutes respond to the concern that the corporation will deal in real estate under the pretense of obtaining real property as security for debt although some provisions prohibit buying land at any price higher than necessary to protect the corporation's security interest n385 and some regulatory provisions govern the management and exchange of such lands. n386

State statutes usually impose a maximum holding period for real property located at other than the business site. The maximum period varies from two years n387 to ten, n388 but is usually five years with the possibility of an extension. n389 If the holding period is exceeded, the land may escheat to the state unless the corporation conveys it. Other statutes promote such conveyances by requiring the realty assets to be carried on the corporation's books at a much reduced valuation. n390

The corporation in the role of mortgagee may be further restricted by statute. Loans may be limited to certain percentages of the land's appraised value, n391 or of corporate assets, n392 or of paid in capital plus surplus. n393 Such restrictions usually do not apply when the corporation acts as trustee. In that situation, the corporation is governed by the trust instrument. n394

Insurance companies are similarly restricted, n395 although occasionally they are permitted to hold land for investment. n396

FOOTNOTES:
(n1)Footnote 381. *12 U.S.C. § 29.*

(n2)Footnote 382. *Smith v. Rennix, 204 N.W. 843 (N.D. 1925).*

(n3)Footnote 383. *Union Nat'l Bank v. Matthews, 98 U.S. 621 (1978).*

(n4)Footnote 384. Cal. Fin. Code § 6702; Del. Code Ann. §§ 5-761, 5-762; *Maine Unemp. Compensation Comm'n v. Maine Sav. Bank, 3 A.2d 897 (Me. 1939);* Minn. Stat. Ann. § 48.21; N.Y. Banking Law §§ 98, 235(9), 381; *State Sav. and Loan Ass'n v. Bryant, 81 P.2d 116 (Or. 1938).*

(n5)Footnote 385. Okla. Stat. Ann. tit. 6, § 414C (1966); *Meyers v. Central Nat'l Bank of Okmulgee, 80 P.2d 584 (Okla. 1937).*

(n6)Footnote 386. Cal. Fin. Code §§ 750, 751, 6708, 6710; Minn. Stat. Ann. § 50.13; N.H. Rev. Stat. Ann. § 393:24; *Caldwell Bldg. and Loan Ass'n v. Henry, 185 A. 394 (N.J. 1936);* Wis. Stat. Ann. § 215.22; *see* Annotation, *Power of National Bank to Deal with Property Taken to Secure Debt,* 10 A.L.R. 1045 (1920).

(n7)Footnote 387. Ark. Code Ann. § 23-38-214.

(n8)Footnote 388. Wis. Stat. Ann. § 215.22.

(n9)Footnote 389. D.C. Code Ann. § 26-414; N.Y. Banking Law §§ 98 (3), 381 (3); Wash. Rev. Code Ann. § 30.04.210.

(n10)Footnote 390. Ark. Code Ann. § 23-48-214.

(n11)Footnote 391. Mont. Code Ann. § 32-1-423; N.Y. Banking Law §§ 103(4), 235(6), 380.

(n12)Footnote 392. N.Y. Banking Law § 103(4c).

(n13)Footnote 393. N.Y. Banking Law § 103(4b).

(n14)Footnote 394. Ark. Code Ann. § 23-32-702; *Barlow v. Southern Trust Co., 280 P. 531 (Cal. 1929);* Idaho Code Ann. § 30-901; Minn. Stat. Ann. § 48.38 (1967); R.I. Gen. Laws Ann. §§ 19-5-5 - 19-5-9; Wash. Rev. Stat. Ann. §§ 11.100.060, 30.04.210; Wis. Stat. Ann. § 223.03.

(n15)Footnote 395. D.C. Code Ann. §§ 35-634, 35-1419, 35-1519 (1967); *National Reserve Life Ins. Co. v. Moore, 219 P. 261 (Kan. 1923);* N.H. Rev. Stat. Ann. §§ 411a-23, 411a-32; Utah Code Ann. § 31a-18-105; *see* John W. McPherson, *Some Economic and Legal Aspects of the Purchase and Lease of Real Estate by Life Insurance Companies,* 97 U. of Penn. L. Rev. 482 (1949).

(n16)Footnote 396. Idaho Code Ann. §§ 41-728, 41-729; N.J. Stat. Ann. §§ 17:18-3, 17:24-1; Wash. Rev. Code Ann. §§ 48.13.160, 48.13.170.

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CHAPTER 12 SPECIAL PROBLEMS OF REAL PROPERTY OWNERSHIP +

2-12 Thompson on Real Property, Thomas Editions § 12.15

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§ 12.15 Property Rights of Private Corporations in Other Jurisdictions.

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Under the rules of comity, but subject to any applicable state law, many states permit an out-of-state corporation to exercise whatever property rights it possesses under the law of its own jurisdiction. n397 Exceptions as to type of corporation n398 and limitations as to the scope of the comity doctrine are common. n399

State laws that usually restrict the scope of the comity doctrine are those regulating the power of out-of-state corporations to do business in the state. n400 If an out-of-state corporation has not been properly authorized to do business in the state, its land-related activities are still valid according to some states n401 but not in others. n402 Once properly authorized to do business in the state, an out-of-state corporation usually has the same property rights as a similar domestic corporation. n403

Statutes that restrict the property rights of out-of-state corporations may a(1) prohibit acquisition of rural or farm land except as necessary for authorized business; n404 (2) prohibit acquisition of land outside incorporated municipalities; n405 (3) or impose time limits on property holdings. n406

If an out-of-state corporation acquires land in violation of applicable restrictions, it may be challenged only by the state. n407

Corporations chartered in other countries may come under other state statutory restrictions. n408

FOOTNOTES:
(n1)Footnote 397. Del. Code Ann. tit. 25, § 305; *Davenport Mach. & Foundry Co., A Div. of Middle States Corp. v. Adolph Coors Co., 314 N.W.2d 432 (Iowa 1982); see* Annotation, *Leasing of Real Estate by Foreign Corporation, as Lessor Lessee, as Doing Business Within State Within Statutes Prescribing Conditions of Right to Do Business, 59 A.L.R.2d 1131 (1958).*

(n2)Footnote 398. Conn. Gen. Stat. Ann. § 38a-43.

(n3)Footnote 399. Kan. Stat. Ann. § 17-7303.

(n4)Footnote 400. *Ashbury Hosp. v. Cass County, 326 U.S. 207 (1945).*

(n5)Footnote 401. Fla. Stat. Ann. § 607.1503; *Crockin v. Boston Store, 188 So. 853 (Fla. 1939).*

(n6)Footnote 402. Idaho Code Ann. § 30-1-106(g); *Franklin Bldg. and Loan Co. v. Peppard, 93 P.2d 925 (Utah 1939).*

(n7)Footnote 403. Ariz. Rev. Stat. Ann. §§ 10-107, 10-114, 10-116, 10-119, 10-120; *Work v. United Globe Mines, 100 P. 813 (Ariz. 1909), aff'd, 231 U.S. 595 (1914);* Fla. Stat. Ann. § 607.1505; Mass. Ann. Laws Ch. 181, § 9; Minn. Stat. Ann. § 303.09.

(n8)Footnote 404. *U.S. Gypsum Co. v. State ex rel. Rutherford, 328 P.2d 431 (Okla. 1958).*

(n9)Footnote 405. Neb. Rev. Stat. §§ 76-402 - 76-405, 76-414.

(n10)Footnote 406. Neb. Rev. Stat. § 76-411.

(n11)Footnote 407. *Byerly v. Camey, 161 S.W.2d 1105 (Tex. Civ. App. 1942).*

(n12)Footnote 408. Minn. Stat. Ann. § 500.22.

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CHAPTER 12 SPECIAL PROBLEMS OF REAL PROPERTY OWNERSHIP +

2-12 Thompson on Real Property, Thomas Editions § 12.16

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§ 12.16 Choice of Entity for Acquiring and Holding Real Property Interests.

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§ 12.16(a) Tax, Structural, and Securities Law Considerations.

§ 12.16(a)(1) Selecting the Entity for Multi-party Ownership of Real Estate: The Menu.

Real estate developers and investors join together to form business entities for many reasons: to raise equity capital, enhance the range of their political and business contacts, build in construction "know how," strengthen family or friendship ties, and share gains and losses efficiently in light of tax rules.

Once committed to forming an organization, real estate people need to select an entity for doing business. If they don't select one, they may be giving tax officials and state courts disastrous leeway to characterize the relationship in ways most damaging to the participants.

The menu of choices includes: General Partnership; Joint Venture; Tenancy in Common; C Corporation; Limited Partnership; Limited Liability Company; S Corporation; Real Estate Investment Trust (R.E.I.T.).

The reference to C and S corporations derives from sub-chapters C and S of the Internal Revenue Code.

The following chart shows how existing ownership patterns are divided among individuals, partnerships, and corporations:

Individuals	$5,099
Corporate	1,699
Partnerships	1,011
Not-for-Profits	411
Government	234
Institutional	128

Financial Institutions	114
Other	92
Total	$8,777

WHO OWNS AMERICA'S REAL ESTATE? The vast majority of U.S. real property is owned by U.S. citizens and corporations, not foreign investors, according to a new study conducted by Arthur Andersen & Company for the Institute of Real Estate Management and the I.R.E.M. Foundation. Residential real estate represents $6,122 trillion, or 70 percent of the total real estate wealth in the country; 83 percent of all residential units are owned by individuals, while corporations own about 11 percent, and government agencies about 9 percent. On the commercial side, corporations control nearly 62 percent, while partnerships control 13 percent, and not-for-profits control about 12 percent. The total value of the U.S. real estate stock in 1990 was about $8,777 trillion, of which foreign ownership accounts for $35.8 billion. The accompanying table lists the major owners. (Marketing the Future: Real Estate in the 1990's, September 1991; Institute of Real Estate Management, 430 N. Michigan Avenue, Post Office Box 109025, Chicago, Illinois 60610-9025; (312) 661-1953.) n409

Certain questions must be answered by the participants regardless of the entity they choose.

The participants must decide on the amount and form of each one's contribution, the effect of a failure to make that contribution, the manner of compensation of the promoters and/or managers, the allocation of profits, losses and distributions, the form, manner, and limitations of management and control of the entity and if, how and when interests in the entity may be transferred. n410

§ 12.16(a)(2) Factors Relevant to Selection.

Here are the questions frequently asked by lawyers, accountants, and other professionals trying to assist business people in selecting an entity for real estate development or investment:

Management: Is it to be centralized in one or a few of the investors or shared equally by all?

Liability: Are some or all of the investors eager to limit their potential losses to no more than the sums they contribute initially to the venture? Or, are they willing to make additional contributions, if necessary, to keep the venture afloat? Are they prepared to incur personal liability in tort or contract as a result of the venture?

Transferability: Can one individual sell her interest in the property if her co-venturers don't want to keep the entity going? Will the departing participant be able to have the entity dissolved or can it survive her departure? If she sells her interest in the venture, what rights will her buyer have?

Continuity: If one of the partners dies, sells or withdraws, will the entity automatically cease to exist?

§ 12.16(a)(3) Tax Factors in Entity Selection.

Taxation: Selection of an entity is often tax motivated. Professor Edward McCaffery divides tax considerations that bear on selecting an entity into three groups:

Basic Tax Burden: Is the total tax burden increased by the use of a particular entity? This happens if the entity is subject to tax at the entity level, and the investors are taxed again when the entity distributes earnings to them. Or, is the entity treated as a "nontaxable conduit through which tax consequences flow

directly to each constituent member"? n411

Loss Pass Throughs: When there are losses for tax purposes, some entities are allowed to pass those deductions to individual investors. Other entities can only deduct the loss at the entity level. The owners of the entity aren't entitled to claim it on their personal tax returns.

Flexibility: The rate of tax on ordinary income is considerably higher than it is on capital gains. Can ordinary income be allocated to one investor and capital gains to another?

Suppose the project generates a positive cash flow but also a tax loss because of the nuances of tax accounting. Can one investor be allocated the cash, and another the paper loss? One investor might be a pension fund exempt from tax. The other might be a heavily taxed professional. Can the pension fund get the cash and the professional the paper loss?

To appreciate how tax rules affect real estate equity investment, it is necessary to see just what those rules are and how they change an investor's "bottom line."

§ 12.16(a)(3)(i) Determining the Profitability of Rental Real Estate.

Business school texts recommend the following procedure for analyzing the profitability of, say, owning and operating an apartment house and eventually selling it. Tax rules, the most important of which are described in the following section, will complicate this analysis significantly, as we shall see, and sometimes convert what would have been losses into gains or gains into losses. But these simple formulas are a good place to start before we look at the impacts of taxation on real estate investment:

Gross Income:

-- Operating Expenses (repairs and maintenance, insurance premiums, utility charges, real estate taxes)

= Net Operating Income

-- Debt Service (principal and interest payments)

= Before Tax Cash Flow

-- Taxes

= After Tax Cash Flow

The real estate investor might eventually sell the property. She could calculate the results this way:

Selling Price

-- Expenses of Selling (brokerage, escrow, and legal fees)

= Net Sale Proceeds

-- Unpaid Mortgage Balance

= Before Tax Equity Realized

-- Tax on Sale

= After Tax Equity

The investor's profit on the sale is:

After Tax Equity

-- Basis (original "equity," or downpayment)

= Net Yield on Equity

§ 12.16(a)(3)(ii) Key Tax Rules.

Certain tax rules dramatically affect both the returns from owning and operating rental property and the yield when it is sold.

Basis. When an investor buys real estate, the starting point for determining the basis for tax purposes is ordinarily the cost of purchasing the property. n412 When the investor sells, the basis will be deducted from the net sale proceeds in determining the taxable gain. This is tax talk for explaining the simple proposition that an investor should be taxed on gains only, not on what property cost to buy. One rationale for allowing the taxpayer to deduct the basis, or purchase price from the eventual sales price is to avoid taxing the investor twice on money invested. The investor probably already paid tax on the money used to buy the property if, say, that money was received in the form of salary or stock dividends. In some situations, such as when the property is acquired by gift or tax-deferred exchange, some other rule may apply.

Suppose A and B form a partnership. B contributes $1 million cash. A contributes land purchased twenty years ago for $10,000 that is now worth $1 million. A's "adjusted basis" in the land for tax purposes is still $10,000. B's basis in the partnership is $1 million. A's basis in the partnership is $10,000.

Secured Debt Included in Basis. Generally, a taxpayer's basis is what the property cost to buy. Although "cost" isn't defined in the statute, case law has now made clear that cost or original basis is the entire purchase price, not just the cash downpayment. A taxpayer who contracted to pay, say, 10% down, and the rest of the price in installments would doubtless see the "purchase price" as the full amount the taxpayer was obligated to pay under the contract. Similarly, if the purchaser borrowed the money from a third-party lender instead of buying on a deferred installment sale, or assumed an existing loan for part of the purchase price, the purchaser would regard the acquisition price as the total sum, including the mortgage obligation. Even if the borrower isn't obligated personally to repay the debt, the borrower still stands to lose the "equity" in the property if upon default. The bottom line is that basis usually includes borrowed sums with a few exceptions noted later.

Thus, a taxpayer who buys an apartment house for $1,000,000, with only $100,000 down and borrows $900,000 to make the acquisition has a basis in the property of $1,000,000.

Incidental Costs of Acquisition Are Part of Basis. The taxpayer also adds to basis the expenses of acquiring the property -- such as title, escrow, and legal fees. If the taxpayer has to file a suit for specific performance against a reneging seller, the costs of that lawsuit become part of the taxpayer's basis or acquisition cost.

Adjusted Basis. The taxpayer's basis, as we shall see, is adjusted downward when the taxpayer takes depreciation and other tax allowances. The basis is adjusted upward for improvements and other capital outlays.

Every year the property owner is allowed to deduct from gross income ordinary and necessary operating expenses incurred. The owner is only taxed on her income less expenses. This is called "adjusted gross income," the income left after deducting the cost of operating expenses.

Not all the money an owner spends in the course of operating a commercial property is immediately deductible. If the owner spends money for an improvement that will last beyond the current tax year, that outlay is usually treated as a capital expenditure and not as an ordinary and necessary business expense. The taxpayer can't deduct capital expenditures in a single year; he is only allowed to depreciate them over their useful life.

The point of distinguishing between expenses and improvements is to force the taxpayer to match the timing of the deduction with the income derived from or attributable to it. Otherwise the taxpayer could get the benefit of the tax deduction now and defer paying tax on the resulting income until later years. The "benefit now, pay later" philosophy, called deferral, is every taxpayer's goal.

Capital expenditures could include a new roof, a major replumbing or rewiring, and almost all structural work. Each of these would be depreciable over the I.R.S. estimates of its useful life.

Another capital expense of great concern to real estate developers is the value of land they are compelled to dedicate for schools, parks, and roads as part of the subdivision approval process. Developers would like to treat these as charitable gifts and take the deduction in the year that title is transferred or accepted by the government.

The Internal Revenue Service knows, however, that these aren't really gifts. They are exactions, part of the price of obtaining subdivision approval. So they must be added to the developer's acquisition and development cost schedule. When the developer sells her subdivided lots, she can subtract these along with all the other costs of development from the gross sales price in determining taxable gain on sale.

The Cash Flow Consequence of the Taxpayer Having to "Capitalize" Expenditures. For the property owner there is a significant cash flow consequence of making capital improvements. The developer spends the money on a capital improvement in the current taxable year but is taxed as if the developer hadn't. Say a developer's gross income from an apartment house is $100,000. The developer incurs $35,000 in operating expenses, and makes capital improvements of $65,000. The developer is taxed on $65,000 less one year's depreciation, even though all $65,000 was spent on capital improvements. The tax bill is the adjusted gross income ($65,000) multiplied by the tax rate (say 31%). Where will the developer get the cash to pay taxes? Not from apartment house rents in the current year.

The Depreciation Deduction. Partially to offset the fact that taxpayers are forbidden from deducting the full cost of long-term property improvements in the year they are made, the Internal Revenue Service Code § 167(a) authorizes taxpayers to deduct "a reasonable allowance for the exhaustion, wear and tear (including a reasonable allowance for obsolescence) of property used in the trade or business or held in the production of income."

The taxpayer pays income tax only on "adjusted" gross income. Adjusted gross income is gross income less the taxpayer's allowable expenses in producing the income, and includes depreciation.

The depreciation deduction compensates the owner of a wasting asset for the fact that some of the income being received for the asset is not a return on the investment. It is partly a return of the investment in the sense that eventually the building or any other depreciating asset will wear out.

Calculating the Entitlement. Depreciation involves estimating the life use of the asset, determining what it will be worth at the end of its life use (salvage value), and allocating the excess of original cost over salvage value across the taxable years the property is potentially useable by the taxpayer.

There are many ways to calculate depreciation. n413 Currently, the Internal Revenue Code § 168(c) mandates a straight-line cost recovery period of 271/2 years for residential real estate, and 311/2 years for commercial. n414 The half-year periods mesh with the Code's presumption that property bought in the midst of a tax year has been purchased

midway through the year. n415 The taxpayer also has the option of electing a 40-year depreciation period. Under the straight-line method of depreciation, the sum to be depreciated (acquisition cost less salvage value) is apportioned equally across the appropriate number of years.

Types of Realty that Qualify for the Deduction. Depreciation is only available for property (1) used in a trade or business (a grocer's store, a doctor's office equipment), or (2) held for the production of income (such as an office building, shopping center, or apartment house). n416

Someone who buys an apartment building in order to convert it into individual condominiums for sale would not qualify for the depreciation deduction because the buyer wouldn't have been holding the building for its annual income, but rather as inventory, much like a car dealer holds automobiles for sale to customers. The dealer can't depreciate the cars on the showroom floor and neither may the would-be condo converter depreciate the condo inventory. A homeowner can't depreciate a house either since it is held for personal use, not in a trade or business and not for the production of income.

Land isn't depreciable according to I.R.S. regulations. n417 This avoids costly disputes about rapidly fluctuating land values. But it also prevents owners whose sites are actually eroding or otherwise physically deteriorating from taking depreciation deductions.

Who is Entitled to Take Depreciation? The investor in property, the one who incurred responsibility for its acquisition price, is entitled to the depreciation deduction. The mortgagor gets the depreciation allowance, not the mortgagee. The lessor gets to depreciate the asset, not the tenant -- unless the tenant actually paid for the improvement.

Depreciable Basis for Tax Purposes Includes Most Borrowed Funds. The real estate investor gets to depreciate the basis in the property -- including that portion bought with borrowed funds. The taxpayer could have been restricted to depreciating only the cash personally invested, not borrowed sums. This would complicate depreciation calculations on mortgage financing, especially when part of each monthly mortgage payment goes to repay principal. If the basis rose with each dollar used to pay down the mortgage principal, the taxpayer's depreciable basis would have to be adjusted monthly as the contribution to principal increases over the life of the loan. This administrative complexity is avoided by allowing the taxpayer's basis to include borrowed funds, permitting a depreciation deduction which includes borrowed funds, and disallowing a deduction as the taxpayer repays the mortgage debt.

The taxpayer gets the full depreciation allowance if she is "at risk" on the loan. "At risk" means the borrower is personally liable for repaying the mortgage loan.

Even real property owners who aren't "at risk" can depreciate sums borrowed to acquire property but only for "qualified non-recourse financing." "Nonrecourse" means the borrower has no personal liability for the debt, that the borrower is not "at risk." A qualified non-recourse mortgage loan is one made by a lender who regularly makes loans to borrowers who aren't personally liable for repayment. The loan can't be made by the seller. A person related to the taxpayer can make a qualified non-recourse loan, but only if the loan is made on commercially reasonable terms, the same as an unrelated person would have made. A convertible mortgage for which the borrower is not "at risk" doesn't qualify. Nor does a loan made by someone who is earning a fee in the transaction like the broker. Knowledgeable real estate investors meticulously avoid these exceptions so that they can include borrowed sums in their basis even though it is non-recourse.

Depreciation Deductions Are Subtracted From Basis in Calculating an Owner's Taxable Gain on Sale. A day of reckoning comes for the owner who has enjoyed depreciation deductions when the owner sells. An owner who sells is taxed on the difference between the net sales price and the "adjusted basis." Adjusted basis is the original acquisition price (including mortgage financing) less any depreciation deductions she has enjoyed during her period of ownership. So the owner is eventually taxed on the depreciation deductions taken. The benefit to the taxpayer is deferral.

For example, suppose a person buys an apartment house for $1,200,000. The land is valued at $200,000 (based on the real property tax assessor's allocation of the property tax between land and buildings). So only $1,000,000 is depreciable. Using a 271/2-year straight-line method, the owner can deduct $1,000,000/27.5 = $36,363.36 per year even if the owner has not invested one dime of personal money but borrowed all the acquisition price.

Thus, if the annual gross income from the building is $100,000, and the owner has spent $35,000 in deductible operating expenses in the current tax year, the owner will pay tax on $65,000 (net operating income) less a depreciation deduction of $36,363.36, and thus will be taxed only on $28,636.64 of income.

When Depreciation Deduction is a Tax Shelter. Real estate is sometimes called a tax shelter precisely because of this depreciation deduction. Few buildings depreciate as rapidly in their early years as they do in later years. n418 Thus, under a straight-line depreciation schedule the owner may be able to deduct a sum greater than her actual economic loss in the first decade of ownership.

The fact that the owner pays taxes on the sums deducted for depreciation when the sale occurs doesn't mean the depreciation deduction was worthless. The taxpayer has benefitted from having saved taxes in all the years the taxpayer took the deduction. The gain can be measured by the time value of money: the net present value of all those deductions minus the net present value of the ultimate payback. The depreciation deduction has been described as an interest-free loan from the government for the period of the taxpayer's ownership of the building. The taxpayer will additionally benefit from the deferral if the capital gains tax rate on sale is lower than the taxpayer's ordinary income rate.

A taxpayer who sells the building early enough may escape ownership during the years when the depreciation deduction might actually fall short of the actual rate of the property's wear and tear. So the taxpayer could get the interest-free deferral of taxation without bearing the burden of a concomitant economic depreciation.

But the depreciation deduction isn't necessarily a tax dodge. It can equal or even be less than the actual rate at which the property is losing value. Suppose you go into the car rental business. You buy a new car for $20,000. During the year you gross $5,000 in car rental fees. Your expenses (taxes, insurance, maintenance) are $3,000. Have you made a profit of $2,000, a 10% return on your $20,000 investment?

Probably not. At the end of the year the car isn't going to be worth $20,000. Suppose it were worth $15,000. Did you make $2,000 in your first year of operation? Or did you lose $3,000 because the car depreciated $5,000 in value?

If you were allowed a tax depreciation deduction greater than $5,000, you would truly be receiving a tax "break." If you were allowed less than $5,000, and ended up paying income tax on your $2,000 paper gain you would be paying taxes on ostensible, but not real, earnings.

It is extremely difficult for a depreciation schedule to reflect value changes perfectly unless someone actually appraises the car at the end of the year, a costly administrative burden.

Imagine a tax system in which you didn't get to claim the depreciation until you actually "realized" it -- when you sold the car. Alternately, you could have been allowed a deduction for the entire $20,000 when you bought the car, assuming you bought the car for your car rental business and not for personal use. An income tax based on consumption would work this way. Depreciation over the car's estimated life use is a compromise between these extremes.

The depreciation deduction debate is complicated by the fact that the Internal Revenue Code takes no account of inflation in calculating gain. If there were runaway inflation, you might be able to sell the car after the first year for $25,000. Superficially, this looks like you pulled a fast one on the system. You seem to have gotten $5,000 in depreciation deductions for a car that didn't depreciate at all, one that increased in value by $5,000. Your taxable gain

on the sale would be the original purchase price ($20,000) less the sums you took as depreciation ($5,000) plus your resale price ($25,000). This amounts to a taxable "gain" of $10,000.

Will this make you and the tax system even? Not necessarily. If the rate of inflation during the year had been 100% then half your gain was nominal, not real. You were not $5,000 better off than you had been a year earlier. In fact, the $25,000 nominal price was the equivalent of $12,500 in the year you bought the car. In real dollars you would have lost $7,500 on your investment; yet you will be taxed as if you had a gain. The depreciation deduction can be seen as partial compensation for the failure of capital gains taxation to reflect inflation.

You can construct a persuasive demonstration of how the depreciation deduction could result in a taxpayer receiving "tax free" earnings by assuming the car really didn't depreciate at all. It was one of those rare models that collectors value. There was no inflation. In this case the depreciation deduction would have been a true tax shelter.

Some real estate investments look like the collector car example because land, which is not depreciable for tax purposes, often appreciates. No tax adjustment is made each year for this unrealized appreciation. Only when the investor sells will the gain be taxed. Moreover, the investor can defer being taxed on that gain by refinancing instead of selling; proceeds an owner pockets from a refinancing aren't subject to tax. Or the investor can defer the tax on the gain by exchanging the property for another one of like kind under § 1031 of the Internal Revenue Code.

Mortgage Amortization Is Not Deductible. Mortgage interest payments are deductible as ordinary and necessary business expenses for owners of commercial real property. Payments to reduce the mortgage debt are not deductible. The taxpayer's depreciation deduction includes mortgaged funds. To allow a deduction for principal amortization as well would be to give the taxpayer a double deduction for the same debt.

When mortgages are repaid in equal monthly installments, the amount of each payment attributable to principal reduction starts out small and grows each month. As the amortization portion of each monthly loan payment increases, the share of the payment that represents interest declines, and with it the deductibility of the mortgage payment.

This leads to a situation in which the taxpayer gets taxed on income she can't keep, income she uses to repay mortgage principal. In any year that the repayment mortgage principal exceeds allowable depreciation the taxpayers can experience a "negative" after-tax cash flow.

Suppose the taxpayer has a highly leveraged investment, 100% financed. The annual gross income is $100,000. The taxpayer's expenses are $35,000. The debt service is $65,000, but of that sum, $30,000 is principal repayment, and only $35,000 is interest. The taxpayer will have to pay income taxes on the $30,000 mortgage principal reduction payment even though the taxpayer really had to write a check for this money during the tax year.

Real estate investors try to avoid digging into their pockets to pay taxes that exceed their actual cash flow from commercial real estate by refinancing their loans when amortization payments become substantial. They also look for balloon payment loans with deferred or no amortization until the end of the loan term. Or, they plan on selling out before amortization payments become so great on their mortgages as to result in a negative after-tax cash flow.

Limitations on the Deductibility of Tax Losses. Before 1986, taxpayers who invested in a real estate project with tax losses could deduct those from income from other sources. A lawyer or doctor who bought an interest in an apartment house which generated excess depreciation could shelter professional earnings with the apartment house depreciation. Such investors would pay good money for real estate projects that were losing money just for the right to take those losses against earned income.

Tax law changes in 1986, I.R.C. § 469, now prohibit this. The code divides all sources of income into three categories: active, portfolio, and passive. *Active* income includes salaries, fees, and profit or loss from a trade or business in which

the taxpayer materially participates. *Portfolio* income includes investment income and losses such as interest, dividends, royalties, and securities sales. *Passive* income encompasses income and deductions attributable to a trade or business in which the taxpayer does not materially participate. It also includes gain from the sale of property held for investment. For instance, someone who constructs an apartment house with the idea of selling it, and doesn't hold it as rental property for at least a year, derives portfolio income from the sale. Income from rental property is defined as passive income no matter how actively the taxpayer oversees the rental property. So is all income earned by a limited partnership.

Individuals can only deduct losses from passive activity against gains from the operation or sale of similar passive activity, as defined by the code. If the losses can't be taken, they are carried forward until the "passive activity" property is sold to an unrelated party in a taxable transaction. Only then can losses from "passive" activity be used to offset earned (active) income or portfolio income.

The result of the passive activity loss rules is that an investor who is losing money on one rental real estate investment can only deduct the loss from gains generated by a like investment (passive income generators, or P.I.G.s, as they are called).

There are two exceptions to the passive activity loss rules, under I.R.C. § 469. (1) An individual may deduct up to $25,000 each year of passive losses from rental real property to offset non-passive income if the individual "actively participates" in managing or maintaining the property, owns at least 10% of the property, and doesn't have income above certain qualifying levels. Someone who buys an apartment house will qualify, even if there is a resident manager, as long as she participates in making key decisions -- setting rents, deciding on capital improvements, overseeing the selection of new tenants. The $25,000 allowance is phased out as the individual's adjusted gross income (computed without taking passive losses into account) increases from $100,000 to $150,000. An individual whose earnings exceed $150,000 can't deduct any rental property losses from earned or portfolio income. (2) Rental real estate activities of people in the real property business are not automatically treated as passive activities.

§ 12.16(a)(3)(iii) Implication of Tax Rules for Cash Flow.

Tax rules open the possibility of there being a substantial difference between a property owner's net operating income or loss as it appears on the owner's books, and the cash pocketed after taxes:

1. The depreciation deduction is especially good for the taxpayer because it can reduce the owner's net taxable income and does not require the taxpayer to make any out-of-pocket cash expenditure.

2. Some deductions -- like mortgage interest, property taxes, and ordinary and necessary operating expenses -- are neutral as tax "shelters" because they require the taxpayer to fork over one dollar of actual cash for every dollar deducted from the taxpayer's gross income for tax purposes.

3. The worst items for the taxpayer are mortgage principal payments and undepreciated capital improvement expenditures. The taxpayer spends actual cash dollars for these but gets no immediate reduction in her current tax bill.

To illustrate how an owner's particular cash flow situation can be better or worse because of the tax rules, consider the following three cases.

Owner A takes in $100,000 in gross rents from her property. Her operating expenses are $60,000. Her mortgage interest payment is $9,000. Her mortgage principal payment is $1,000. Her depreciation deduction is $10,000.

Her taxable income would be computed as follows:

Her cash flow would be computed:

Gross income		$100,000
-- Operating expenses	$60,000	
-- Mortgage interest	9,000	
-- Depreciation deduction	10,000	79,000
Taxable income		$21,000

Her cash flow would be computed:

Gross income		$100,000
-- Operating expenses	$60,000	
-- Debt service (principal and interest)	10,000	70,000
Before tax cash flow		$30,000
Less tax at 31% rate on $21,000		6,510
After tax cash flow		$23,490

In this case the taxpayer is pocketing a great deal more cash than she is being taxed on in the current year.

Owner B also received $100,000 from rents. She also has spent $60,000 to keep the property in good condition. But only $10,000 of what she spent is deductible in the current tax year. The rest is being depreciated because her expenses were deemed capital improvements. The sums allowed for the amortization of these capital expenditures are already included in the $10,000. Her mortgage interest payments are $1,000, and the mortgage principal payment is $9,000. Her depreciation deduction is $10,000.

Her taxable income:

Gross income		$100,000
-- Operating expenses	$10,000	
-- Mortgage interest	1,000	
-- Depreciation deduction	10,000	21,000
Taxable income		$79,000

Her cash flow:

Gross income		$100,000
-- Operating and capital expenses	$60,000	
-- Debt service (mortgage interest and principal)	10,000	70,000
Before tax cash flow		$30,000

Less tax at 31% rate on $79,000		24,490
After tax cash flow		$ 5,510

The impact of taxation on after-tax cash flow is that *Owner A* pockets $23,490 while *Owner B* keeps $5,510 -- although their income and expenses are identical.

Now we introduce *Owner C*. She also has $100,000 of gross income, $60,000 of operating expenses, and a $10,000 mortgage payment. All of her mortgage payment is interest. Her property qualifies for a $50,000 annual depreciation allowance.

Her taxable income:

Gross income		$100,000
-- Operating expenses	$60,000	
-- Mortgage interest	10,000	
-- Depreciation deduction	50,000	120,000
Taxable income (loss)		($20,000)

Her cash flow:

Gross income		$100,000
-- Operating expenses	$60,000	
-- Debt service	10,000	70,000
Before Tax Cash Flow		$30,000

She will pocket all $30,000 because she owes no tax. In fact, she has a tax loss of $20,000. Since this loss derives from rental real estate it is a passive activity loss. It cannot be deducted from active or earned income, or from portfolio income unless she qualifies for one of the exceptions. Should she be unable to deduct this loss, she can carry it forward as a deduction against future passive activity gains. These could include rental income from other property or from this property in future years, or profit from the sale of passive activity property.

§ 12.16(a)(3)(iv) Tax Implications When Mortgaged Property Is Sold or Foreclosed: Depreciation Payback Time.

Calculating the Taxpayer's Obligation on the Sale of Depreciated Property. Just as it is possible for a taxpayer like Owner C to realize a positive cash flow while reporting a whopping tax loss, on the sale of property it is possible for an owner to become liable for a sizeable capital gains tax bill while realizing little or no cash.

Capital gains tax is paid on the difference between the selling price (minus selling expenses) and the taxpayer's adjusted basis. Acquisition cost less depreciation equals the adjusted basis for tax purposes.

To calculate tax liability on a sale of property:

1. Start with the selling price.

2. Subtract actual selling expenses, including brokerage fees.

3. Subtract the price you paid originally for the property (including borrowed funds).

4. Deduct from the acquisition price the depreciation allowances you took during the years you owned the property.

5. The sum that remains is taxable gain.

Let us say that Owner C bought her property several years ago for $1,000,000 and sells it now for $1,200,000. Her cost of sale is $80,000, including a 6% brokerage fee. She bought the property by paying $100,000 of her own funds and borrowing a $900,000 mortgage loan. She hasn't reduced any of her mortgage debt. This was an "interest only" loan. The loan is now due and payable. She took $500,000 in depreciation deductions during her years of ownership.

Selling Price		$1,200,000	
-- Expenses of sale	$80,000		
-- Adjusted basis (acquisition price less depreciation)	500,000	580,000	
Taxable gain		$ 620,000	
	$173,600		Capital Gains Tax on sale (gain x.28)

In order to satisfy her tax liability of $173,600, she will have to reach deeply into the sale proceeds. Her net sales price (selling price - costs of sale) was $1,120,000, but the first $900,000 goes to repay her loan. This leaves $220,000 minus her tax payment of $173,600. Her net is $46,400, not too bad considering her original equity was only $100,000.

This happens because the taxpayer was taxed on two sources of gain. One was property appreciation of $200,000. The other source of gain was the depreciation deduction of $500,000. If she weren't taxed on this money now, she would have gotten the benefit of a half million dollars in depreciation on a property which didn't actually depreciate. It appreciated by $200,000.

A Sale of Heavily Mortgaged Property, a Sale at a Loss, or a Foreclosure Sale Can All Be Taxable Events for the Borrower. If the taxpayer could escape liability for the depreciation deductions previously taken, imagine the consequences for high-risk real estate deals. The game would be a heads-the-taxpayer-wins, tails-the-federal-treasury-loses. Shrewd dealers would be tempted to leverage to the sky. If the investment paid off, they could shelter their net operating income with depreciation deductions. If the investment failed, they could walk away. With little or no equity invested, and non-recourse loans, there would be nothing to stop them except the discipline of the marketplace.

The Internal Revenue Service has put a brake on these high roller strategies. The taxpayer must include in basis a mortgage whether the taxpayer agreed to repay it. The taxpayer is treated as having a taxable gain when the property sells for less than the unpaid balance of non-recourse mortgage debt. n419

A foreclosure sale is treated just like a voluntary sale for tax purposes. The taxpayer is subject to a gain or loss according to § 1001 on the occasion of a "sale or other disposition" of property. This language doesn't imply a voluntary sale. Even if it did, the debtor voluntarily entered the mortgage loan transaction in the first place, assuming or taking subject to the loan. n420 So it doesn't help the taxpayer to default on her mortgage loan when she has depreciated the

property below the sum she could net after a sale.

This threat of post-foreclosure tax liability keeps many an owner of equity-less property negotiating "work outs" with mortgage lenders to avoid foreclosure. Even owners who aren't personally liable on the mortgage could become personally liable to the Internal Revenue Service if the lender forecloses, the foreclosure sales price barely repays the lender, and the owner realizes taxable gain on the foreclosure sale with no compensating source of revenue from which to pay it.

A conveyance to the lender by deed "in lieu of foreclosure" produces the same dire tax consequences for the borrower. n421

Mortgagors can only defer the day of tax reckoning by hanging on to the property or, perhaps, transferring it into a joint venture with the lender, a joint venture to which the mortgagor contributes her equity and managerial/development skills and the lender contributes the mortgage.

How to calculate the exact amount of the taxpayer's loss on foreclosure when the taxpayer's basis *exceeds* the foreclosure sales price is explained by the Tax Court by the following opinion in *Aizawa v. Commissioner*. n422

§ 12.16(a)(4) General Partnership: Matching the Forms Against the Factors.

We return now to the five variables investors and their advisors use in selecting an entity -- management, liability, transferability, continuity, and tax. We compare the most likely entity candidates against these factors, starting with the General Partnership.

§ 12.16(a)(4)(i) Management: All General Partners Run the Show.

Statutory Presumption. The Uniform Partnership Act, adopted by every state but Louisiana, defines a partnership as "an association of two or more persons to carry on as *co-owners* of a business for profit." n423 Every partner is presumed to be a co-owner and co-equal for management purposes.

Absent a written partnership agreement, whether a partnership exists is usually a question of fact, and depends on evidence "that the parties have entered into a contractual relation whereby they have combined their property, labor, and skill in an enterprise or business, as co-owners for the purpose of joint profit." n424

The partnership form is perfect for family-run businesses or when a few competent people who get along well together intend to share in management decisions and profits.

Each Partner Can Bind the Others. One drawback of a general partnership is that each partner may bind the others. As the Uniform Partnership Act, § 9, mandates:

Every partner is an agent of the partnership for the purpose of its business, and the act of every partner, including the execution in the partnership name of any instrument, for apparently carrying on in the usual way the business of the partnership of which he is a member binds the partnership, unless the partner so acting has in fact no authority to act for the partnership in the particular matter, and the person with whom he is dealing has knowledge of the fact that he has no such authority. n425

Law of Agency. By characterizing each partner as an agent of the partnership the U.P.A. incorporates the law of agency. Each partner becomes a general agent and can bind the partnership if she has real (express or implied) authority or apparent authority. Take the case of a real estate brokerage partnership that works out of an office building it owns. Each partner broker can bind the others when it comes to ordering office supplies or contracting for advertising listed

properties. But whether an individual partner can sell the building turns on whether she would be "carrying on [business] in the usual way."

No One Partner Can Terminate by Selling Partnership Property Without the Consent of All Partners Unless the Business of the Partnership Was Buying and Selling Property; the Right to Manage Distinguished from the Rights to Liquidate or Terminate. A distinction needs to be made between a partner's interest in the partnership and that partner's interest in the partnership property. The partnership owns partnership property; the individual partners don't. Even if title is vested in the partners as individuals, if a court determines that the property in fact should belong to the partnership, it does.

The Uniform Partnership Act declares that a partner's right in specific partnership property is "not assignable except in connection with the assignment of rights of all the partners in the same property." n426 However, if the business of the partnership involves buying and selling property, then § 9 of the Act applies, and any partner can bind the others to a sale.

Whether one partner is legally entitled to bind others turns on whether a partner selling partnership property is "carrying on in the usual way." Here are two conflicting cases on the topic.

Case One. Three partners -- father, mother and son -- bought a motel. n427 Record title was in the parents' names only. The parents contracted to sell the motel without the son's consent. When the son refused to go along with the sale, the parents offered the buyers $10,000 to forget the whole thing. But they wouldn't. Instead, they filed suit for specific performance.

Persuading the court to annul the sale, the son argued that the purpose of the partnership had been to operate and manage a motel, not to buy and sell it. Earlier California courts had renounced the subtle distinction between partnerships formed for trading in real property and those formed for running a business. But this appellate court resuscitated the distinction when it set aside the sale of the motel on the theory that the partnership had been set up "for operating" only.

The court reckoned that the motel was the partnership's only asset. California Corporations Code § 15009(3)(c) provides that "partners acting without the approval of the remaining partners may not do any act which would make it impossible to carry on the ordinary business of the partnership." If the motel were sold, the partnership would have no business to run.

Of course, there was no way for the buyers to have known about the son's interest, or to have realized the sellers were engaged in a partnership which did not include among its purposes the selling of the motel. The buyers lost anyway.

Case Two. An Iowa court reached the opposite result and enforced the sale when only two of three partners' signed a contract to sell the partnership's sole property. The three had formed a partnership and bought a small apartment building. Their written partnership agreement didn't specify the business of the firm or indicate whether all of them had to sign conveyances of partnership real estate.

Four years later two partners signed a contract to sell the apartment house. A dispute arose with the buyers over title, and the sellers wanted to cancel the contract. The buyers sued for specific performance. The sellers defended, contending that all three partners' signatures would be needed to bind the partnership to a sale of its real estate.

The court ruled for the buyers:

> [O]ne partner can bind the partnership to a contract if he or she appears to act in the usual course of the partnership business. A contract to sell partnership real estate is no exception...."

> If... the business [of the partnership] was selling this property, the jury could have found the two partners were carrying on business in the usual way when they executed the "offer." n428

These two cases, turning ostensibly on the purposes of the partnership, show how difficult it can be to balance the interests of innocent third parties lured into a deal by a partner with apparent authority to bind the partnership against the interests of a partner not wanting an agent without actual authority to tie her to a deal she doesn't like.

A thoughtful commentator has recommended that partners be required to file a Statement of Partnership with the state, indicating, among other things, whether all the partners must concur in the sale of partnership real estate. n429 Prospective purchasers could then examine that statement to make sure the partner purporting to sell actually possessed the right to convey good title. n430 The hard decision would be whether courts should presume -- in the absence of a filed statement to the contrary -- that one or more partners had the authority to sell the business or the partnership's sole asset without the consent of all the partners, or that unless all the partners join in the sale of the partnership's sole asset, the sale is voidable.

Management Can Be Centralized By Agreement. Everything is negotiable as far as the arrangements partners can make among themselves for management, the allocation of profits and losses, and termination. The partnership vehicle offers great flexibility in allowing the partners to contract for precisely what they want from the deal and from each other. Typically, the managing partner or a majority of the partnership makes operational decisions, but unanimity or a supermajority vote is required for a sale or refinancing of all or substantially all of the partnership's assets.

§ 12.16(a)(4)(ii) Liability.

It Is Unlimited. Unlimited tort and contract liability for partnership acts is the big risk in the general partnership form. The Uniform Partnership Act (U.P.A.), §§ 14 n431 and 15, n432 binds a partnership to each partner's wrongful conduct and holds all partners personally liable jointly and severally.

State courts are divided on the issue of whether a creditor must first exhaust partnership assets before proceeding against the partners individually. n433 The R.U.P.A. would adopt the partnership-assets-first rule unless creditors were promised otherwise by the partners. n434

Mitigating the Risks of Unlimited Liability. The risks of limitless liability can be mitigated by the partners obtaining "non-recourse" agreements from secured lenders and all-risk insurance to protect both the partnership and the individual partners. In the case where some partners have the right to manage and others do not, "contribution and indemnity agreements" may be given by insiders to shelter outsiders.

The effects of unlimited liability might also be mitigated by a partner holding his or her interest in corporate form. The corporate partner is fully liable for partnership debts, but the shareholders of the corporate partner are only liable to the extent of their investment in the corporation. If the corporation contained no assets other than those owned by the partnership, creditors and other third parties could look no further than the corporate shell for recompense if things went badly. But astute and cautious lenders might require the principals in the deal to sign personal guarantees if the partnership assets were too thin to cover their loans.

Unlimited Liability and the Problem of Cost Overruns. In a development and construction project, a major cost overrun could easily subject participant investors to substantial personal liability. Participants in a general partnership are advised to:

> Determine if the budget is accurate; make sure the project has a construction lender; find out if the construction lender is confident there is enough money available to build the project; be sure the project will work; and if there is a mistake, know beforehand if there is a money partner willing and able to

make up the shortfall. n435

Investors look to the partnership agreement to see how cost overruns are allocated. Partnership agreements often provide for additional contributions and buy/sell agreements.

Buy/Sell Agreements as a Way Out of Cost Overrun Deadlocks. The buy/sell, also called the "Russian roulette" clause, allows a partner wishing to sell to force non-moving partners to choose between two options: purchase the moving partner's interest at a price set by her, or sell his interest to her at that same price. This clause may become operative if the project runs over-budget and the developer won't or can't cover his share of the shortfall.

The buy/sell provision favors creditworthy partners with ready access to cash. Also, if one partner has signed loan guarantees it may not be possible for the other partner to find a substitute guarantor acceptable to the lender. Suppose a rich partner who also guaranteed the loan sets the buy/sell price well below fair value knowing that his co-partner doesn't have the money to pay it. Is he breaching the fiduciary duty one partner always owes another? Could the cash-strapped partner get a judicial partition sale of the property to prevent forfeiture? No and no. The buy/sell has been held enforceable even under these circumstances. n436

Buy/sells are not an elegant solution for an incomplete project. It can take a while to set the price and close the buy out. Meanwhile, development must continue apace and deadlocked issues somehow need to be resolved. Yet neither party will usually let the other call the shots until the buy-out is a "done deal."

"Squeeze Downs" as a Way to Force a Partner Out in an Overrun Situation. A less drastic variation allows the partner who doesn't want to put up more cash to retain her interest, but at a diluted value. These are called "squeeze downs" because those who do put up more money receive an increased interest in the partnership at the expense of those who don't. n437

Trading a General for a Limited Partnership Interest as an Answer to the Overrun Problem. Alternately, the reluctant partner could be allowed to become a limited partner, capping liability at the sum the partner had already invested with no further exposure if the project falters. n438

Take-Outs. One lawyer suggests the possibility of using a take-out agreement, in case one partner wants out early and the other prefers to proceed. Let the one who wants to stay with the project buy out the other's interest for the sum actually invested. n439

Cap With Take-Out. Another approach to overruns appears in the Haight Properties limited partnerships:

> The partnership agreement provided for an extra capital call of a minimum amount above and beyond the initial contribution. After that point [the general partner] would be on his own.
>
> In the event that a limited partner cannot meet [even his pre-agreed] share of the loss, the agreement provides for his interest to be purchased... at quite a minimal price. n440

§ 12.16(a)(4)(iii) Transferability.

What a Partner Has a Right to Sell. A general partner has three rights, only one of which is freely assignable -- absent a contrary agreement. Those rights are: (1) an interest in the specific partnership property; (2) the right to participate in the management of the business; and (3) the right to distributions (profits). A partner has no right to assign (1) an interest in specific property or (2) the right to share in management, just (3) the right to assign the partner's share of the partnership "take" as distributed. This is understandable because partners are all personally liable to the partnership for its debts. It would be unfair to "thrust upon the partners an assignee they did not choose, who could then participate in

managing the partnership's business affairs and create liabilities for the partnership." n441

Continuing Liability of Transferor and Transferee. It isn't clear when partner A assigns to outsider B whether A remains liable for debts the partnership incurs after the assignment, n442 and whether B is liable for them since B never explicitly assumed them. A's claim for release is that A is no longer involved in running the business. But A has left A's former associates to shoulder future losses on their own. B isn't involved in decisionmaking either but will share in the gains on distribution, so why not the losses? B's inevitable answer: "If the other partners give me no voice in business policies why should I have to pay for their failures?"

Invalid Transfers. Those who deal with an individual partner to secure their personal loans with partnership property should beware. Accepting a mortgage from one partner who is mortgaging partnership property to secure an individual debt may give the unwary creditor, at best, that partner's interest in the partnership, possibly a right to partnership distributions, or absolutely no collateral of any kind. The outcomes seem to depend on the jurisdiction and whether the creditor was already involved with the partnership. n443

Statutory Provisions on Transferability: U.P.A./R.U.P.A.. The Uniform Partnership Act section on assignment:

> A conveyance by a partner of his interest in the partnership does not of itself dissolve the partnership, nor, as against the other partners in the absence of agreement, entitle the assignee, during the continuance of the partnership, to interfere in the management or administration of the partnership business or affairs, or to require any information or account of partnership transactions, or to inspect the partnership books; but it merely entitles the assignee to receive in accordance with his contract the profits to which the assigning partner would otherwise be entitled. n444

A few subtle changes to this provision are proposed in the Revised Uniform Partnership Act (R.U.P.A.): n445

> (1) A partnership interest would be made explicitly assignable.
>
> (2) Partners could by agreement restrict assignability.
>
> (3) A person ceases to be a partner on assigning her interest but this does not cause a "winding up" of the partnership.
>
> (4) The assignee becomes entitled to "allocations and distributions," not "profits." Some "distributions" of cash might not be "profits" either as the tax code defines "profit" or as that term is used by economists or business people.
>
> (5) The remaining partners would be obligated to honor the rights of the assignee as long as the partnership agreement hadn't prohibited assignment.

§ 12.16(a)(4)(iv) Continuity.

Basic Provisions. The death, withdrawal, or insanity of a general partner causes a *dissolution* of the general partnership unless the partnership agreement provides otherwise.

"Dissolution" under the U.P.A. doesn't mean that the partnership has terminated; it means that the relationship among the partners has changed. Dissolution begins the process of termination. The partners need to wind up partnership affairs (and pay off creditors) before termination becomes effective.

A Partner's Rights and Liabilities Following "Dissolution" or "Dissociation." One consequence of this "limbo" status

between dissolution and termination is that the departing partner remains liable not only for partnership debts incurred before "dissolution," but also for any business begun while still a partner. Thus, an attorney named Walters, a partner in a law firm, was held liable for a malpractice judgment to a client he had never met, arising out of work done by another attorney in the firm after Walters had resigned. n446

The Revised Uniform Partnership Act would allow a partnership to continue even after a partner dissociated from it by allowing those remaining to buy out the interest of the departing partner if they elect not to wind up the partnership. n447

An endorsement may now be purchased from many title companies in which the insurer promises not to invoke the defense used in this case against an insured partnership.

Loan Provisions Encourage Partners to Modify the Statutory Presumptions Against Continuity. Loans usually specify that the death, withdrawal, or expulsion of a general partner is a condition of default. In the absence of provisions for dissolution, any partner may elect at will to dissolve the partnership, n448 or may seek dissolution by court order. n449 A partnership can avoid a breach of a loan's continuity clause by providing for continuity even if a partner dies, withdraws, or is expelled. The agreement should specify the continuing liability of a departing partner, whether the departing partner can still bind the partnership, and how her partnership account is to be valued and settled. Even if the agreement can't limit the liability of a departing partner to third parties, it can govern the obligations and provide for indemnity by the remaining partners to the departing one for post-departure events.

Continuity Can't Be Forced Upon a Partner Determined to Quit. Even if the partners had agreed to continue the venture for a definite term, the Uniform Partnership Act gives any partner the power to dissolve the partnership, and the dissolving partner is liable only to the other partners for damages caused by the wrongful, premature dissolution. One reason for this is to allow a person to put a lid on otherwise unlimited personal liability. Another is to provide for liquidation on death. A partner feeling the strains of mortality may welcome the thought that when the partner dies, the partnership will be dissolved, and the partner's share will go to the partner's heirs or estate.

Arrangements to Let Partners Out Without Dissolving the Partnership. The interest of an impatient or deceased partner can be liquidated without the partnership having to be dissolved.

> The death or bankruptcy of an inactive partner may constitute a dissolution of a partnership in a technical sense without in any way impairing the earning capacity or survivability of the business. In such instances the business is likely to be continued by the surviving partners much as before, with some provision being made for the interest of the inactive partner. n450

Partnership agreements often give those who want to keep the partnership going a right of first refusal or an option to buy a disenchanted or deceased partner's share.

Bankruptcy and Dissolution. Although § 31(5) of the Uniform Partnership Act provides for dissolution on bankruptcy, bankruptcy of a general partner doesn't automatically dissolve the partnership. n451 The debtor's trustee can probably reject or assume the general partner's interest in a partnership. n452 Under Bankruptcy Code § 365(b), a debtor's executory contracts may not be automatically terminated. These include the debtor's interest under a partnership agreement. n453 A general partner's trustee might be able to assume a partnership agreement even if the agreement provided that a partnership would dissolve if a general partner filed bankruptcy. This is to make sure that the debtor isn't shortchanged out of the fair value of the partnership interest. However, Code § 365(e)(2)(A) makes room for parties who contract for personal services and non-delegable duties to terminate their relationship to the debtor who files bankruptcy. The partners probably can't be forced to continue doing business as a partner of the bankrupt debtor or the debtor's trustee, but they would have to give the debtor full value for her interest if they invoked a bankruptcy dissolution provision.

Mike Sfregola, a Los Angeles real estate lawyer, explains the consequences of trying to continue a partnership when a debtor's trustee tries to step into the shoes of a bankrupt general partner: "The remaining partners get a cautious trustee in place of a talented entrepreneur." An alternative Mr. Sfregola sometimes suggests to his investor clients is to enter a management contract with the developer partner. "Then the bankruptcy trustee would be kept out of the inner circle of entity decision makers. If the developer went broke, the investors would be free to find a new talent and keep things going."

§ 12.16(a)(4)(v) Tax.

The general partnership form passes all three of Professor McCaffery's tests. First, the partnership isn't taxed at the entity level. All of its income, gains, losses, deductions, and credits are passed directly to the individual partners. n454 It files a tax return but pays no taxes on it.

Second, gains and losses can be allocated to partners in different amounts. When real estate generates large tax losses, partnerships are a preferred form for real estate activity because the losses can be passed to the individual partners. Partnership gains and losses are passed directly to the individual partners. n455

Third, within limits, the partnership form allows flexibility so that losses may be allocated to some partners and gains to others, or operating income to some and capital gains to others. Gains and losses can be allocated to different partners in different amounts as long as the allocation has "substantial economic effect" other than tax savings. n456 The allocation of tax benefits for partnerships is enormously complicated and is a suitable topic for a separate course or treatise. Generally, however, the allocation of tax losses follows the ratios of capital each partner contributes to the partnership. This allocation survives until the tax losses equal the amount of capital invested in the entity. Thereafter, losses may be allocated equally among the partners. n457

Allocations disproportionate to each partner's capital contribution are usually honored as long as there is a good chance eventually that the partners who benefitted from the tax shelter of depreciation will have to pay it back out of sale proceeds. No partner can have a tax loss greater than her basis in the partnership. n458 "Basis" includes cash or other property the partner contributed to the partnership, plus the partner's share of partnership debt.

A partner can't claim a share of partnership debt who is *not* liable on the mortgage note if some partners *are* liable. In that case, only the partners "at risk" on the mortgage can depreciate the share of the partnership property paid for with borrowed funds.

All of these advantages will be lost if the IRS decides to treat a partnership under state law as a corporation for tax purposes. It will do this when the characteristics of a corporation have been built into the partnership agreement.

Those are: (1) the association has more than one participant, (2) they are engaged in a business for profit, (3) there is limited liability, (4) indefinite continuity, (5) centralized management, and (6) free transferability of interests. n459 An entity with two or fewer of these will ordinarily be taxed as a partnership. n460

The general partnership escapes tax at the entity level by qualifying on the last four of the six relevant counts. The general partnership offers no shield against liability and, as an organizational form, extends to every partner the right to participate in management decisions. So it has no centralized management and no limited liability the way corporations usually do. Further, continuity could be limited by a distant but fixed termination point. Transferability might be blocked by a requirement that partners need the consent of their copartners or a certain percentage of them to sell.

§ 12.16(a)(4)(vi) Aggregate or Entity?

Conceptually, the partnership for some purposes is an entity distinct from the individual partners. Title to real property is held by the partnership, not the individual partners; legal actions can be brought in the name of the partnership; the partnership can buy title and casualty insurance for the benefit of partnership property; and judgments can be levied against partnership debt.

For other purposes the partnership is treated as nothing more than an aggregate of individuals. Individual partners are taxed as though the partnership didn't exist apart from themselves; each partner is fully liable for partnership debts; and the partnership dissolves when a partner departs.

§ 12.16(a)(5) Incentive Management Agreements (I.M.A.s) as an Alternative to a Partnership Interest.

Under an I.M.A. a developer becomes a manager and is paid a fixed fee for development and management, an overhead reimbursement or fee, and an incentive fee based on the financial performance of the project.

The money partners enjoy total legal priority over the developer if the developer has only a management contract and no interest in the entity that owns the property being developed or managed. The money partners or owners receive all the tax benefits of ownership. Their interest is freely marketable without the consent of the developer/manager. They can control the operation and marketing of the project subject only to the developer's rights under the I.M.A. contract. They can more readily replace the manager/developer than if he were a general partner. Of course, they also have to bear all the losses themselves. They could try allocating some losses to the manager by contract, but then they risk having the I.M.A. recharacterized as a partnership. n461

The idea of a "money" partner giving the operating partner a contract, and not an interest in the ownership entity, is getting a boost from bankruptcy worries, as many developers go under and Mr. Sfregola's prophesies come true. The I.M.A. can probably be made lawfully terminable as a contract for personal services, under Bankruptcy Code § 368(e)(2)(A).

The move to I.M.A.s from partnerships also signals the current shift to the position that "who has cash is king." Developers accept I.M.A.s in place of interests in general partnerships because they don't have much choice. They appreciate the risk that if they and their money partners come to an impasse, they may be shuffled out of the deal. Most developers prefer being a general partner unless they are sure the deal is doomed from the start. Then an I.M.A. might look pretty good with its immunity to downside risk.

§ 12.16(a)(6) Tenancy in Common.

§ 12.16(a)(6)(i) Management.

Each cotenant owns an undivided interest in the entire property and they may deal with their undivided shares as they please. A cotenant may manage the share separately subject to a cotenancy agreement. Absent agreement, unanimous consent is the hallmark of decisionmaking in a tenancy in common.

> When a [number] of investors acquire property as tenants in common, [they] normally enter [into] a cotenancy agreement to establish management rights, provide for the sharing of profits and losses, and deal with related matters. In content and scope, such agreements often resemble partnership agreements. n462

Tenancy in common decisionmaking can be cumbersome, and often proves fragile.

§ 12.16(a)(6)(ii) Limited Liability.

The tenancy in common form is rarely used by real estate investors, despite its simplicity. n463 It does have advantages

over the partnership form. A cotenant can't act or contract on behalf of other cotenants without their prior consent or ratification. Tenants in common are not liable for each other's debts even if those debts were incurred for the benefit of the cotenancy property. "Consequently, the tenancy in common generally affords an insulation from liabilities created by co-venturers not found in a general partnership." n464

While tenants in common usually escape all liability for the acts of their cotenants, liability for most environmental laws is joint and several. This puts each cotenant at risk for the full cost of bringing the cotenancy property into compliance with such laws as C.E.R.C.L.A.

Further, all cotenants would have to sign a note and mortgage to get the maximum loan on cotenancy property. In turn, each could insist that a foreclosing mortgagee join all of them and foreclose all of their interests "for the reason that the sale of an undivided interest does not ordinarily bring as good a proportionate price as a sale of the entirety." n465 If a cotenant pays off a mortgage that was a lawful lien on the entire property, she has a right of contribution from the cotenants whose interests in the cotenancy she rescued from foreclosure. n466

§ 12.16(a)(6)(iii) Community Property v. Cotenancy.

There is one situation for which the tenancy in common may merit more frequent use than it receives. A happily married couple in a community property state might be better off dividing their community property into separate shares and forming a cotenancy.

Take the case in which one of the pair is a high-income earner but subject to potentially devastating tort liability well beyond reasonably insurable limits -- an accountant, architect, engineer, or surgeon. Debts of one become debts of the community. An outraged jury could render a judgment that would deplete community property assets. But the debts of an individual cotenant reach only that cotenant's share of the community property. Of course, this strategy will be defeated if the transfer takes place after the liability accrues or is an attempt to defraud anticipated creditors.

Additionally, a person who sells or encumbers community property without the consent of the spouse not only conveys incomplete title -- but the spouse may not even be able to convey his or her share of the title. California courts have held that to allow one spouse to sell or mortgage his or her share without the consent of the other would be to force the unwilling spouse into undivided ownership with a stranger. n467

When community property is transformed into cotenancy by consent, each spouse is free to deal with an undivided one-half. Unanimity isn't required. Partition of cotenancy property is a matter of right. n468

Community property, though, possesses an enormous tax advantage when one of the owners dies. The basis of the property is stepped up to its fair market value on that day. This means the survivor can sell the property a day later and avoid paying a capital gains tax on the amount by which the property appreciated during the time the decedent owned it. n469 A surviving cotenant enjoys no such tax advantage.

§ 12.16(a)(6)(iv) Transferability.

The transfer of a partnership interest conveys only a right to partnership assets, not to management and control. A cotenant is able to transfer complete title. The transferee becomes an owner of an undivided share of the cotenancy property.

Written cotenancy agreements usually restrict transfer. Often each tenant enjoys a right of first refusal or a right of first offer -- to match the best price a selling cotenant has obtained from a third party or would accept for the cotenants interest in the cotenancy property. Sometimes the price is set by an appraised value, a formula, or an arbitration proceeding to determine fair value. If the project is for new construction, cotenancy agreements often bar transfer until

the project is completed except at a buy-out price well below the cotenant's actual cost. n470 These restrictions on transfer have to be drafted so as to avoid state laws against unreasonable restraints on alienation. n471

Restrictions on transfer might be drafted to preserve each cotenant's legitimate expectations of the other. An investor cotenant might not be allowed to transfer except to another of "comparable" or "bank acceptable" credit. A managing or development cotenant might be limited to selling only to someone experienced in managing the type of asset the cotenants own.

§ 12.16(a)(6)(v) Continuity.

If the tenants do not get along, state laws give each and every cotenant the right to have the property partitioned, sold, and the proceeds divided among the cotenants according to the percentage of their original contribution. The right to partition may not be fully waivable. n472 On the death of a cotenant, if the decedent's estate is difficult to untangle in probate, it may not be easy to sell cotenancy property pending the probate outcome. Each cotenant's signature will be required on a deed to an informed buyer.

§ 12.16(a)(6)(vi) Tax.

On Professor McCaffery's three-part rating scale, tenancies in common fare well on the first count. The tenancy in common isn't taxed as an entity; all its gains and losses are passed directly to the individual cotenants. Each cotenant pays tax on the cotenant's undivided share of the cotenancy property.

Matters are more complicated on the second and third counts, concerning flexibility and directing gains and losses, and in allocating tax losses. As Madison and Zinman explain in *Modern Real Estate Financing*:

> The following are the advantages of the tenancy in common as compared to both partnership and corporate taxations:
>
> > i. Any election affecting the computation of taxable income may be made separately by each tenant. For example, one co-owner may capitalize carrying charges (see I.R.C. § 266) or (under prior law) claim accelerated depreciation while another may elect to currently deduct or "expense" such charges or claim straight-line depreciation.
> >
> > ii. No partnership return is required for a tenancy in common. Thus, if a tenant is audited, it is less likely that his co-owner will be audited, since there is no return filed that links them to one another.
>
> * * *
>
> The following are the disadvantages of a tenancy in common as compared to both partnership and corporate taxations:
>
> > 1. Each tenant must separately report only her proportionate part of net operating income or net gain from the sale or exchange of the property. For example, if one tenant pays a larger share of the total expense than do the others, she is entitled to deduct only her pro rata share. The excess payment is treated as an advance to her co-owners. E.g., *Estate of Webb v. Commissioner, 30 T.C. 1202 (1958),* acq. *1959-2 C.B. 3.*
> >
> > 2. A corollary disadvantage lies in the fact that tenants in common, unlike partners and joint venturers, may not reallocate income and deduction items such as depreciation in a ratio at variance with their interest in the common-owned property. n473

A tenant in common yearning to take advantage of the tax-free exchange rules n474 will find doing it far simpler than a partner who seeks that option when the co-partners aren't interested in rolling over the investment into a "like kind" venture. The co-tenant "owns" an undivided "property" interest. The partner "owns" a share of a partnership which holds legal title to real estate. The I.R.S. has been hostile to partners using § 1031 to trade "shares" in one venture for "shares" in another. The most troubling tax aspect of the tenancy in common form is the excellent chance that the I.R.S. will treat the tenancy in common as a partnership for tax purposes. Treasury regulations give the Service latitude in treating any "syndicate, group, pool, joint venture, or other unincorporated organization" as a partnership. The Service does not regard itself as bound by state law definitions of partnership in deciding whether to classify an entity as a partnership. n475 I.R.S. regulations provide that cotenants will be taxed as partners if they actually engage in a business instead of merely investing in property. n476 Co-owners of an apartment house, for instance, could be taxed as tenants in common unless they provided "noncustomary" services -- meals or housekeeping.

§ 12.16(a)(7) Joint Venture.

A joint venture differs from a partnership because it is usually formed just to carry out one project in a brief time. n477 Otherwise its characteristics are either those of a tenancy in common or a partnership. It is usually treated as a partnership, though, both under state property laws, and by the Internal Revenue Service in applying tax laws. n478

§ 12.16(a)(8) Corporation.

When the corporate form is used for real estate ventures each participant subscribes to shares in proportion to its capital contribution. Often they enter shareholder agreements further defining their rights and responsibilities. But the corporate form is less flexible than the partnership form in many respects. For instance, a corporate stockholder's rate of return on investment can't be as easily varied over the different phases of a project as the allocation of partnership gains and losses can be.

§ 12.16(a)(8)(i) Management.

The management of a corporation is almost always centralized in a board of directors elected by the shareholders.

§ 12.16(a)(8)(ii) Liability.

Limited Liability. The big advantage to the corporation is the limited liability it affords the investor who is a shareholder. n479 Shareholders are at risk only for the capital they invest -- nothing beyond that except in quite unusual circumstances.

In legal theory the corporation is an entity totally distinct from its shareholders, officers, managers, and employees.

> The corporate shareholder's potential liability... is generally limited to the amount of his investment, regardless of his management activity... Thus, where the principal investors intended to be active in managing the business, and the venture involves a relatively high degree of risk, limited liability may well be the key non-tax consideration favoring use of the corporate vehicle. n480

Limited liability wasn't always a characteristic of the corporate form. It wasn't woven into the fabric of English corporate law until 1855. n481 In the United States the existence of the corporation and the scope of shareholder liability is up to each state, "upon such terms and conditions as States may think proper to impose." n482 Starting in the 19th century, states enacted liberal incorporation rules. They wanted to make it easy for all business people who wanted to use the corporate form to do so without having to get special charters from the state. States also sought to make their laws competitive with each other to attract corporate activity. n483

Usually a parent corporation can manage to free itself of the debts of wholly-owned subsidiaries. n484 With some exceptions, the corporate form also protects successor corporations from liability when one corporation sells its assets to another and dissolves. The exceptions: (1) the successor agrees to assume the predecessor's liabilities, expressly or impliedly; (2) the transaction is a fraudulent attempt to escape liability; (3) the transaction is a *de facto* merger or consolidation; (4) the successor is a "mere continuation of the predecessor." n485

How Limited Liability Can be Lost. For shareholders to maintain their limited liability status, they must contribute a reasonable amount of capital. The rule of limited liability yields when a corporation is found to be undercapitalized. n486 Wise creditors don't depend on court determinations of whether a corporation is adequately capitalized. They frequently insist that key shareholders pledge their own credit as a condition to the company borrowing funds. n487

Shareholders must actually form a corporation, and keep its records. The corporate form requires the filing of articles of incorporation with a state agency, the drafting of bylaws, and the documenting of the organizational meetings of the directors. Most states, including California, allow small corporations (called "close Cs") to opt out of a certain amount of formality.

A lender to a corporation (or an entity) can become fully and personally liable for entity debts by engaging too actively in the management of the entity.

The cloak of limited liability is only as thick as state laws make it. For instance, in New York and Wisconsin, shareholders are liable for corporate obligations for employee wages. n488

Increasingly, the corporate shield of limited liability is being punctured by courts in cases arising out of the Comprehensive Environmental Response, Compensation and Liability Act of 1980 (C.E.R.C.L.A.). An intricate jurisprudence separates the situation in which federal statutes override state corporate law rules from those in which federal law is deemed subordinate to state law. n489 A description of those rules is beyond the scope of this text except to note that the corporate veil has been pierced and individual officers and employees have been held liable under C.E.R.C.L.A. Courts rely on *42 U.S.C. § 9607,* establishing liability for "operators" and "persons" who illegally dispose of toxic of hazardous wastes:

> A person who illegally directs the dumping of toxic waste into a river at midnight cannot defend against personal liability on the ground that he was acting as an employee of a corporation. Limited liability has never protected employers or agents from personal liability for illegal acts. n490

Some courts have held parent companies liable for the C.E.R.C.L.A. violation of their subsidiaries, n491 and successor corporations for acts of their predecessors which violate the Superfund law. n492 In any event, shareholders have yet to be held liable under federal environmental laws for violations committed by the companies in which they hold stock.

§ 12.16(a)(8)(iii) Dissolution.

Following the dissolution of a corporation, shareholders are free of claims arising after dissolution although the dissolved corporation may not be. Not surprisingly, some real estate developers form a separate corporation for each project undertaken, dissolving it when the project is completed.

Dissolution limits shareholder liability unless shareholders got corporate assets that should have been reserved for potential claims known to the corporate directors before dissolution. Post-dissolution exposure remains, though, in many states for assets of the corporation discovered after dissolution and for claims against the corporation's insurers. n493

§ 12.16(a)(8)(iv) Transferability.

The ease with which corporate shares may be pledged or sold, or new shares issued, makes this the most liquid of the various ownership forms. A shareholder who wants out simply sells the shares.

Yet there is more to selling out, viewed practically, than the formal legal rules governing it. The practical marketability of an interest in any real estate venture, whether held in corporate or partnership form, depends on underlying value. In a close corporation as in a partnership, the market for shares may vary. Minority interests may be especially hard to sell. n494 So a minority owner eager to exit from a corporation may need a court partition and sale of the entire corporate property in order to retrieve the fair value of the minority interest.

Individual shareholders can pledge their shares to secure personal loans. The corporation can use its shares as security for loans to the firm. It is a gross over-simplification, though, to say that the same firm, by incorporating, can raise capital from outsiders with much greater facility than if it were a partnership. Just because a business has a certificate of incorporation, it does not follow that the public will buy its shares or that lenders will accept them as good collateral for loans. Furthermore, often the principal participants -- whether in a corporation or partnership -- have to sign the firm's note to its major lenders. Hence, in many cases there is little difference between the partnership and corporate form in raising additional equity money through debt. n495

One clear advantage, though, for the lender to a corporation is that corporate borrowers are exempt from the protection of usury laws in thirty states. Partnership borrowers are not.

§ 12.16(a)(8)(v) Continuity.

A corporation has perpetual duration and succession in its corporate name. n496 A corporation survives the death, retirement, legal incompetence, or bankruptcy of a shareholder. It survives the sale of even a majority interest.

> However, a sharp distinction should be drawn between legal continuity and economic continuity. If the key shareholder and manager of a corporate business should die, it may be impractical to continue the business despite the perpetual duration of a corporation. There simply may be no one to run the business. n497

§ 12.16(a)(8)(vi) Bankruptcy.

A parent development corporation with subsidiary projects may risk potential liability unless the subs are operated separately and independently from the parent. Sister companies are better than subs.

> A bankruptcy court can order a substantive consolidation. Substantive consolidation is a term of art. If a subsidiary files for bankruptcy then the creditors may petition the court to bring in the parent corporation through a substantive consolidation. If they succeed, the assets of the parent company will become available to creditors.
>
> Sister corporations are harder to consolidate. It doesn't mean the creditors won't try anyway. But the fact that the parent owns all or at least 80 percent of the stock of the subsidiary and is therefore considered to be the controlling entity can be devastating. n498

Haight Properties, a development and management corporation, deals primarily with multi-hundred-unit apartment complexes. It forms sister entities to minimize parent/subsidiary liability. Each of its apartment complexes is held and run by a separate limited partnership. These limited partnerships enter management contracts with Haight Properties to operate the apartments. Haight Properties owns nothing; it is a management company only. Philip Haight is the general partner of each limited partnership. Why this complex structure? Richard Wolff, Vice President of Acquisitions for

Haight Properties, explains:

> Were we to buy all the properties through one umbrella corporation, and any property went bad, it would be a drain on all the other properties. So we form a separate limited partnership for each with different limited partners for each entity and Philip Haight as the General Partner. If one project declares bankruptcy, there is no way to bring in a parent corporation or deplete the assets of the other subsidiaries to pay its debts. The only one personally liable is Philip Haight. His liability is minimized through non-recourse loans and personal liability insurance. n499

§ 12.16(a)(8)(vii) Tax.

The Reason the Corporate Form Has Little Appeal to Real Estate Investors. The corporation fails two of Professor McCaffery's three tests. First, of the potential entities discussed here only the C corporation is subject to taxation of the same earnings twice: (1) a corporate tax as corporate profits are accrued, and (2) a personal income tax when earnings are distributed to shareholders as dividends.

There are ways for corporations to minimize double taxation. Corporate earnings funneled to shareholders as salaries, rent, or interest are deductible expenses for the corporation. n500 But the I.R.S. permits deductions only in reasonable amounts. Corporations can seek to build up their appreciated value and avoid the "double" tax by paying small or no dividends. Again, the I.R.S. sets limits to this strategy.

Second, the corporation's taxable income (adjusted by applying certain tax accounting rules) is attributable only to the corporation. Tax losses and depreciation deductions of a C corporation can only be used by the corporation to offset its own taxable income. They can't be passed through to the tax returns of individual shareholders.

Third, however, the corporation has considerable flexibility in allocating different types of income to discrete groups of shareholders. For instance, a C corporation can issue preferred stock with guaranteed dividends that might be quite attractive to pension funds and other entities because they are exempt from taxation. The same corporation could distribute dividends only sparingly to holders of common stock who would look forward to selling their shares at appreciated value taxed at lower capital gains rates.

Why Some Real Estate Partnerships Have Converted to Corporations. The 1986 Tax Reform Act did give some real estate professionals reason to take a second look at the C corporation form. The rules that restrict the deductibility of passive activity losses to passive activity income can be avoided through the corporate form. A firm can deduct losses from rental real estate against income derived from real property trades or business, including fees it earns managing property. For this reason some real estate firms that had been doing business as partnerships in the 1980's heydays of commercial property development are now becoming corporations. Their losses from properties in their current portfolios are large enough to shelter their management fee income.

Taxation of a Decedent Shareholder: Partnership is Better Than a Corporation. The estate or heirs of a corporate shareholder are treated far less favorably than the heirs or estate of a property-owning individual or general partnership. If the underlying property has to be sold in order to raise cash to pay the tax, and the property is held by a corporation, there would be a tax on the gain at the corporate level. The heir would also have to pay an estate or gift tax on the value of the shares. For tax purposes the estate would be valued based on what the decedent had paid for the shares.

If the decedent had held the property individually or in a partnership, the beneficiary of the estate would be taxed on the value of the underlying property at the date of the decedent's death. Had the property appreciated considerably since the decedent acquired it, that appreciation would escape estate taxation. If the beneficiary had to sell the property to pay the estate tax, and the property were held by a partnership, the partnership would not have to pay tax on the gain. n501

This is why some lawyers warn their elderly clients to avoid the corporate form for holding assets that have appreciated greatly in value. Other lawyers recommend the corporate form as an ideal estate planning device. Clients give their legatees $10,000 worth of stock each year to deplete the estate incrementally and thus avoid estate taxes. There is no gift tax on annual gifts of $10,000 or less.

§ 12.16(a)(9) Limited Partnership.

> If a general partnership is an attractive entity to use for the ownership, development, and operation of [a] real estate [venture] then, in many cases, a limited partnership may prove irresistible. n502

The limited partnership form, a creature of statute, n503 offers the attractions of centralized management and limited liability found in the corporation with the tax advantages of a partnership, i.e., no entity level (double) taxation.

§ 12.16(a)(9)(i) Management.

The management of a limited partnership is conducted by the general partner(s). Even if the general partners employ a management company or investment advisors to handle day-to-day operations, they usually retain for themselves the right to mortgage, lease, refinance, or sell the realty.

A limited partnership usually exists to consolidate control in one or a few general partners. Though central control is often advantageous, it is also an obstacle when the investor limiteds want to remove the general, and the general doesn't want to depart quietly.

The partnership agreement, like any other contract, cannot be modified unless all contracting parties agree. n504 Limited partners have no authority under the U.L.P.A. to remove a general partner who doesn't want to go unless the limiteds can prove the general committed fraud. n505 The partnership agreement may allow removal of the general by a majority or supermajority vote of the limiteds. But even then it may take an amendment of the agreement to substitute a new general partner for the old one. If the partnership agreement can be amended only with the consent of all the partners, the limited partners may be stuck with their unwanted general. n506 To avoid gridlock, limited partnership agreements can be drafted to give the limited partners the right to replace the managing general by majority vote. But if the general partner resists replacement, even with such a provision, a court battle can take years while the partnership assets are mismanaged and depleted. n507

§ 12.16(a)(9)(ii) Liability.

To form a limited partnership there must be at least two parties, one general partner and one limited partner. The general partner in a limited partnership must be subject to unlimited liability. In the language of the Revised Uniform Limited Partnership Act (1976), § 403: "[a] general partner of a limited partnership has the liabilities of a partner in a partnership without limited partners to persons other than the partnership and the other partners." n508

The general partner in a limited partnership need not be a person; a specially formed corporation will suffice. If the corporation acting as the general partner of a limited partnership is capitalized too thinly, it could be disregarded, exposing its owners to unlimited liability. Also the I.R.S. might see this as good cause to recharacterize the entire partnership as a corporation. The I.R.S. insists that the corporate general partner in a limited partnership be adequately capitalized.

Some foreign investors teaming up with local developers like the limited partnership form precisely because it puts the developer at risk while limiting the risk of the absentee investor. In other cases, the foreign investor becomes the general partner so it can control and manage the property while the domestic owner becomes a limited partner with an opportunity to share in cash flow and profits. This arrangement is sometimes used when the foreign investor is buying a

project built by the domestic partners. Instead of paying all cash, some of the purchase price is deferred by converting it into a limited partnership interest. The domestic partner might have gotten a lien against the property for the balance of the purchase price, but that would make acquisition financing more difficult to secure and could also give the domestic partner, the seller, less incentive to provide ongoing advice to the foreign buyer.

A promoter selling limited partnership interests to large numbers of relatively naive investors may secure himself against the limitless liability of a general partner by forming a shell corporation with no substantial assets by the general. A corporate-shell-as-general is also used in deals where a small number of investors are seeking limited partnership status to restrict the potential claims of third parties.

The limited partner in a limited partnership is usually only liable for losses up to the amount of her contribution to the partnership under the Revised Uniform Limited Partnership Act (R.U.L.P.A.), n509 which has been enacted in 43 states. n510 In some jurisdictions the limit of liability extends to cash distributions they receive from the partnership.

Limited partners have little control over the operation and management of the partnership and its real estate. If they succeed in exerting control, they risk tort and contract liability since these follow management control in a limited partnership. A limited partner who plays too active a part in the business risks becoming liable as if she were a general partner.

The R.U.L.P.A. gives the limited partner a more extended role and expanded approval rights. It also protects a limited partner by insulating her from liability unless the disappointed creditor had reasonably believed, "based upon the limited partner's conduct, that the limited partner [was] a general partner." n511

§ 12.16(a)(9)(iii) Continuity.

The death of a limited partner or a transfer of a limited partnership interest will not cause dissolution of the entity. n512 The limited partnership is dissolved on the death, dissolution, or bankruptcy of the *general partner* unless the partnership certificate provides for survival of the partnership or the surviving partners agree to it.

§ 12.16(a)(9)(iv) Transferability.

A limited partner may freely assign or sell her shares and becomes entitled to all the rights of her assignor. n513 The price she gets for them depends on whether anyone is out there making a market for such interests. When Wall Street brokerage firms have organized trading in real estate limited partnerships, usually called Master Limited Partnerships, they created a market for partnership interests. Absent such arrangements, the limited partner's best way out may be through a sale to the remaining partners, governed, perhaps, by a buy-sell or right of first refusal agreement among them.

§ 12.16(a)(9)(v) Tax.

With careful tax planning the limited partnership can satisfy all of Professor McCaffery's tests. First, there is no tax at the entity level unless the entity is treated as an "association" and subject to the corporate tax. n514

The regulations specify six criteria. The first two are that it have associates and the objective of carrying on a business and dividing the gain. All limited partnerships do. The tax challenge is to make sure the limited partnership possesses no more than two of the remaining four: centralized management, continuity of life, limited liability, and free transferability.

Centralized management and limited liability are what distinguish limited from general partnerships. So these characteristics, too, are usually built-in. Counsel is left with continuity of life and transferability. By placing limits on

these they secure the pass-through tax status of the limited partnership. Continuity is prevented by specifying a definite but remote date of termination. Transferability is restrained by the partnership usually requiring the limited partner to obtain the general's approval for any sale or disposition of her interest.

Requiring approval would be a good idea anyway because if 50% or more of the total interest in the partnership capital and profits is sold or transferred in any tax year, the partnership is deemed to have been terminated for tax purposes -- and all partners become liable for their capital gains tax on the imputed sale, even those who didn't actually intend to sell. n515

Second, tax losses are passed directly to the partners.

Third, there is considerable flexibility in the allocation of gains and losses subject to the complex rules governing partnership allocations described earlier. Within the bounds of the "substantial economic effect" rule, n516 tax losses can be allocated among partners that do not reflect their capital accounts.

In order for a limited partner to deduct depreciation attributable to property bought with borrowed funds, none of the partners must be personally liable on the debt or all of them must be. If none are liable, and the loan is "qualified non-recourse," then each partner may depreciate her share of the property -- even that portion bought with loan proceeds.

> *Example*: G is a general partner and L a limited partner in a partnership formed to acquire an apartment building costing $1 million. Each makes a cash contribution of $100,000 and the partnership obtains a mortgage in the amount of $800,000 to fund the balance of the construction costs. Under the terms of the partnership agreement they are to share profits equally, but L's liabilities are limited to the extent of his contribution. Neither the partnership nor either of the partners assumes any liability on the mortgage, and the loan is obtained from a "qualified" lender who regularly makes loans and who is not related to the partnership.
>
> *Results*: The basis of G and L for their partnership interest is increased from $100,000 to $500,000, since each partner's share of the partnership liability has increased by $400,000. However, had G assumed personal liability by not insisting on an exculpatory provision in the mortgage note, G's basis for her interest would have increased by $800,000, and L's basis would remain at $100,000. n517

§ 12.16(a)(10) S Corporation.

§ 12.16(a)(10)(i) Tax.

The Internal Revenue Code, Subchapter S, allows certain corporations to avoid the entity level corporate tax. All the S corporation's income, losses, deductions, and credits are passed through to shareholders. Real estate investors seldom use the S corporation form for two reasons. First, in order to elect Subchapter S status, a corporation must meet the statutory definition of a "small business corporation." n518

> (1) A corporation created or organized in the U.S.,
>
> (2) which is an eligible corporation, n519
>
> (3) has 35 or fewer shareholders, each of whom is either an individual, n520 decedent's estate, estate in bankruptcy of individual, or eligible trust,
>
> (4) has no nonresident alien shareholder, and

(5) has only one class of stock. n521

Compare the above restrictions with the flexibility of the partnership format. Nonresident aliens can be general or limited partners in a partnership. There are no restrictions on the number of partners in a partnership. A partnership can have as few as two partners or as many as ten thousand. Several of the master limited partnerships on the New York Stock Exchange have more than ten thousand partners, although they are now generally taxed as C corporations as a result of an amendment to the I.R.C. A partner can be an individual, corporation, trust, estate, or partnership. n522

The second reason real estate people steer clear of electing S corporation status is that the S corporation is not good for passing tax losses attributable to borrowed (leveraged) debt through to shareholders. The tax losses that can be passed to shareholders cannot exceed each shareholder's adjusted basis in the shares. That basis is what the shareholder paid for the shares and any amount the shareholder loaned to the corporation. The shareholder cannot take into basis any allocable share of the corporation's nonrecourse mortgage debt.

> In other words, while a partner is able to obtain a step-up in its adjusted basis equal to its share of mortgage liabilities, a Subchapter S shareholder cannot. Therefore, in the case of a typical leveraged real estate investment that is funded by non-recourse financing an investor may not be able to take full advantage of its share of tax losses if the venture is organized as a Subchapter S corporation. n523

Another tax snare awaits the unprepared S corporation shareholder. The investor in a profitable S corporation will be taxed on corporate earnings, even those the company elects not to distribute. An investor with the tax liability and no compensating dividend may be caught short of cash. Hence, the S corporation investor needs to know how corporate dividend policy is to be made, and who will be making it.

§ 12.16(a)(10)(ii) Management.

The S corporation, like a C corporation, provides great flexibility for keeping some investors from interfering in the operation of the business and for tagging others for key management functions.

> Under the Uniform Limited Partnership Act, consent of a certain percentage of the limited partners to certain actions of the general partner is required... n524 Consent would not be necessary in the S corporation context. n525

The S corporation can also provide an opportunity for substantial shareholder participation in management without the investor risking unlimited liability as would a limited partner who exercises too much control over partnership business.

§ 12.16(a)(10)(iii) Transferability.

If the sale of S corporation stock isn't restricted by agreement, the eligibility of S corporation status could be in jeopardy. Any S corporation shareholder could transfer to an unqualified shareholder such as a trust or nonresident alien. This is why "S" corporation documentation usually invalidates transfers that would result in loss of the "S" corporation status. Like "C" corporations, transfers may also be subject to securities laws. n526

One point in the S Corporation's favor: although it is unlikely, if over fifty percent of the total interest in capital and profits of a partnership are sold or exchanged within a twelve-month period, the partnership will automatically terminate for tax purposes. n527 In an S Corporation, the owners of over one-half of the corporation's shares can elect to terminate its S Corporation status and convert it to a true corporation. n528

§ 12.16(a)(10)(iv) Continuity.

Like all corporations, the S corporation has the advantage of surviving the death, removal, or disability of any or all

shareholders and executives -- subject to the rules restricting shareholder eligibility.

§ 12.16(a)(10)(v) Liability.

The S corporation shareholders enjoy limited liability. Limited partners also benefit from limited liability. But even when the limited partnership deploys a corporate entity as its sole general partner, that corporation must meet certain net worth requirements. n529 An S corporation avoids even this limited scrutiny -- except that under state law, any corporation too thinly capitalized risks being unveiled.

§ 12.16(a)(11) The Limited Liability Company.

Many states are now considering, and fifteen have already enacted, n530 a hybrid form called a limited liability company (L.L.C.), a Wyoming partnership, a *limitada* (modeled after a South American business form), a limited partnership association or a partnership association. n531 This could become "the dominant form of business for non-public companies." n532

This form combines the advantages of a corporation with none of its disadvantages. The limited partnership company (L.L.C.) is a non-corporate entity in which all owners (known as members) enjoy limited liability for obligations of the company. n533 It avoids the corporate income tax while protecting members' personal assets against unlimited liability. Unlike a limited partnership, there need be no general partner with limitless liability for partnership debts. It has none of the I.R.C. drawbacks of S corporations.

L.L.C. members are directly liable to relying on creditors for the capital contributions they pledged, but didn't pay to the L.L.C. Not all state L.L.C. laws require that creditors prove reliance to obtain those pledged contributions. But that is the limit of L.L.C. member liability -- the sums pledged to the L.L.C.

All partners are entitled to share in the management of the company "in proportion to their contribution to the capital of the limited liability company." n534 There need be no board of directors as in a corporation. But L.L.C.s can have centralized management if their members desire it. Unlike limited partners in a limited partnership, L.L.C. partners don't risk limitless liability by participating in management.

L.L.C. interests are transferable, but the assignee can't participate in management decisions without unanimous consent of the remaining members. n535

The L.L.C. dissolves "when the period fixed for the duration of the limited liability company shall expire," by unanimous consent, or on the "death, retirement, resignation, expulsion, bankruptcy" of a member unless the remaining members elect to continue the L.L.C. n536 A Wyoming L.L.C. may be organized for a period not exceeding 30 years. n537

In 1988 the I.R.S. ruled that a Wyoming L.L.C. would be taxed as a partnership. n538 Thus, properly structured L.L.C.s will be treated as pass-through entities for federal income tax purposes.

The members of a L.L.C. doing business outside its state of origin, particularly in a state with no L.L.C. statute, may not be accorded the limited liability and tax status it enjoys in its home state. Choice of law principles apply and could result in the L.L.C. as an entity foreign to the host state being treated as a corporation, general partnership or limited partnership, but not as a L.L.C. n539

§ 12.16(a)(12) Real Estate Investment Trust (R.E.I.T.).

§ 12.16(a)(12)(i) Introduction.

The Real Estate Investment Trust is attracting considerable attention among real estate developers right now because traditional mortgage lenders such as banks, insurance companies, and thrifts are cutting back on their mortgage lending and the stock market is hot. R.E.I.T.s can be publicly traded -- many are -- and have significantly outperformed the Standard & Poor 500 Index over the past 20 years. n540 So real estate developers are considering whether the R.E.I.T. vehicle might be the right way to go public, and attract the dollars of stockmarket investors. n541

The R.E.I.T. is a creature of the Internal Revenue Code, the Real Estate Investment Trust Act of 1960. n542 The act's purpose was to allow small investors to realize the same advantages of real property ownership as are enjoyed by mutual fund investors in stocks and bonds. The R.E.I.T. can deduct income it distributes to shareholders -- and thus largely avoid the "double" taxation associated with the corporate form of ownership. Yet because the R.E.I.T. can be a corporation, its shareholders enjoy the limited liability of all other corporate shareholders.

"The word 'trust' is a misnomer. The real estate investment trust is usually a corporation although it could be a trust or an incorporated association. There is no requirement that a R.E.I.T. be a trust under local law." n543

> Basically, the R.E.I.T. is a corporation or an unincorporated trust managed by one or more trustees with 100 or more beneficiaries with transferable shares. It avoids tax on income which it distributes to its beneficiaries if it meets an array of requirements relating to its organization, the type of assets it owns, the type of income it receives, and the percentage of its income it distributes. n544

§ 12.16(a)(12)(ii) Qualifying Requirements of the Internal Revenue Code.

Management. To escape classification as a corporation and the resultant imposition of double taxation, the R.E.I.T. must be managed by one or more trustees. n545 The trustees and the advisors they hire to assist in making investment decisions are prohibited from having their own funds at risk in the trust. Hence, this is the only investment vehicle where the interests of the investors and the interests of the managers are kept separate by law. Since the trustee/advisors are often compensated on the basis of the size of the R.E.I.T. and its volume of transactions, it is possible for investors to do badly even as trustees prosper. This happens when the "gross" volume of the R.E.I.T. is large, measured by the size and volatility of the portfolio, and the net profit from the R.E.I.T.'s portfolio is small or negative.

Ownership. The ownership interest of the R.E.I.T. must be represented by transferable shares. The shares must be held by 100 or more persons, and five or fewer investors may not own more than half the value of the stock. n546 "The trustee may retain the power to refuse to transfer shares in order to maintain the requirements of R.E.I.T. status." n547

The requirement that there be 100 or more beneficial owners may eliminate the R.E.I.T. as an entity for use by a closely held venture. However, an individual acting as a general partner may have a R.E.I.T. as a limited partner. Conversely, if the business activity of a venture qualified, a R.E.I.T. might itself serve as a general partner or shareholder.

When a few large investors provide funding for a R.E.I.T., the 100-investor requirement may be met by issuing single shares to lawyers, secretaries, or anyone else at hand.

The requirement of "five or fewer" not being able to own 50% or more of the value is a bigger impediment for trusts who manage large portfolios like those of pension funds. If only five or fewer investors are ready to finance a particular deal, the R.E.I.T. may have to be dissolved in favor of a limited partnership. n548 Alternately, the R.E.I.T could become a partner in general or limited partnership. The R.E.I.T. investors would own an interest in the partnership. The partnership would become the owners of the assets.

Income Sources. R.E.I.T.s avoid tax at the entity level as long as their earnings are derived predominantly from "passive" activity.

The Code does not define "passive." But § 856(c) of the Internal Revenue Code specifies in great detail what sources of income are available to a R.E.I.T. to preserve its "pass through" entity status, and how much of that status is lost for each particular transgression. Basically, a R.E.I.T. may not hold any property primarily for sale to customers in the ordinary course of business, and it may not operate an "active" trade or business.

R.E.I.T.s must be very careful about their sources of income and can't safely leave this issue to a developer partner. Mike Sfregola, n549 a Los Angeles real estate lawyer, offers the example of an office building with income from parking revenues. To the developer there is no difference between parking fees and office rents as far as tax liability goes; it is all reportable income. To the R.E.I.T., however, office rents are acceptable "passive" income, but fees from operating a parking structure don't qualify for "pass through" taxation. They are "active" earnings that could -- if the sums were a large enough percentage of total R.E.I.T. income -- trigger the "double taxation" R.E.I.T.s are set up expressly to avoid. R.E.I.T.s need to monitor income to avoid fees and other non-rent sources of income.

"Active" income can usually be diverted. In the parking fee example, if the parking concession were leased to an operator -- even the developer -- the concession fee would be "passive" income, like rent. The developer, not the R.E.I.T., would collect parking fees for operating the concession. Only if the R.E.I.T. operated the concession directly would the R.E.I.T. be earning "active" income.

Partly because of the limitations on the sources of its earnings, the R.E.I.T. form is ideal for pension funds. Like R.E.I.T.s, pension funds must obtain their income from passive sources:

> Some pension funds like the REIT structure because the REIT protects them from being taxed on "unrelated business income." If pension funds receive income from active sources like development and sales they are vulnerable to losing... the right to escape taxation at the corporate level. Even excessive borrowing, mere leverage, could move them away from passive to active income... So they prefer to invest in a REIT as opposed to a limited partnership. The REIT's being limited itself to passive income cuts down on the risk of that income being reclassified as active when it is passed to the pension fund. n550

Distributions. The special tax benefits of a R.E.I.T. are not available unless the trust pays to its shareholders dividends in the amount of 95% of its R.E.I.T. taxable income for such taxable year, and the trust complies with certain record-keeping requirements. "If the association fails to meet the requirements for the taxable year, it will be subject to tax as a corporation, regardless of its classifications." n551

This induces R.E.I.T.s to distribute nearly all their earnings to their shareholders annually, quite important to a shareholder subject to federal (and state) income taxation. Thus, the R.E.I.T. shareholder is more likely than, say, an S corporation shareholder n552 actually to be sure of the R.E.I.T. distributing 95% of its income each year so the shareholder has a source of cash to pay her taxes.

After deducting dividends paid, the R.E.I.T. is subject to the imposition of income tax on any remaining income.

§ 12.16(b) Application of Securities Laws.

§ 12.16(b)(1) Promoter's Burden of Complying.

Real estate developers looking for other people's money to finance their ventures often structure their deals as corporations, partnerships, or syndications, and need to know whether state or federal securities laws will apply. These laws are designed to protect the investing public against fraud and manipulation, and to compel disclosures to the investor of all the facts material to the investment decision.

The promoter who is found to be offering a security needs to meet rigorous registration and reporting standards administered by the Securities and Exchange Commission under the securities acts. Further, only licensed securities brokers are legally authorized to sell securities.

Tom Loo, an eminent securities lawyer, explains why promoters need to comply with securities' laws:

> When deals fail, investors can rescind and get back their money who can successfully claim that the interests they bought qualify as securities under federal or state laws, and weren't registered. These investors may have claims not only against the promoters of failed deals but against the lawyers and accountants who helped package the unregistered offerings.

Even if the "security" was properly registered, if the offering statement contained false or misleading information, or if it omitted material facts, disappointed investors may also obtain rescission -- a full refund of their investment. The anti-fraud provisions of state and federal securities laws give disappointed investors easier claims for damages than common law fraud rules. Securities statutes don't impose the burden on investors of proving that they *relied* on the fraudulent statements. They need only allege they didn't actually know the truth, the statements made to them were false or misleading, "material," and resulted in actual damage or loss. They don't have to prove fraud, negligence or that the promoters *knew* their claims were false on the day they were made. n553

Naturally, investors in successful deals don't assert their right to rescind under federal or state securities laws. Only the investors in losing deals come forward to claim refunds for unregistered securities or false and misleading prospectus information.

§ 12.16(b)(2) What Is a "Security"?

What is a "security" for regulatory purposes? Similar definitions of "security" appear in the Securities Act of 1933, n554 and The Securities Exchange Act of 1934: n555

> [u]nless the context otherwise requires... the term "security" means any note, stock, treasury stock, bond, debenture, evidence of indebtedness,... investment contract... or, in general, any interest or instrument commonly known as a "security...." n556

The definitional problem Congress faced was tricky. If "securities" meant only "stocks" or "bonds," shady promoters could escape these laws simply by labeling the interests they sold anything but a "stock" or a "bond." If Congress defined "security" too broadly, an IOU between friends could get swept into the regulatory net. Federal courts, and especially the U.S. Supreme Court have had a difficult time with the definition. n557

The Securities and Exchange Commission (S.E.C.) has proposed that an offering be labeled a security if it involves: (1) an investment of money, (2) the expectation of profit, and (3) reliance on "the efforts of others" to realize that profit.

Case law has added a criterion: (4) the investment must involve a "common enterprise." The phrase has no authoritative Supreme Court definition. n558 The "commonality" requirement is sometimes mentioned by the U.S. Supreme Court and sometimes seems to be forgotten. Many securities scholars question its legitimacy and meaning.

Does "a common enterprise" imply that the offeror tried to attract a large number of investors? This is sometimes referred to as "vertical commonality." If "vertical commonality" is required, one-on-one transactions are implicitly exempt.

Many courts and scholars believe a promoter should not escape the securities laws simply because he didn't catch or even try to catch very many investors. They believe whether an offering is a security should depend on factors other

than how many offerees there were. The "commonality" requirement has been met in the eyes of many courts even though there was only one investor. n559

There are exemptions in the act and regulations for offerings to only a few people, i.e., "nonpublic" offerings. A promoter who advertises widely for investors even though ending up with very few doesn't escape the scrutiny of the securities laws. His extensive marketing effort may disqualify his offering from being exempt as non-public.

The "common enterprise" criterion is ambiguous in another sense. Does the "commonality" test require an investor's funds to be pooled with the investments of others, all of them somehow connected and interdependent, the way shareholders in a corporation are connected? This is called "horizontal commonality."

The third test -- reliance on the efforts of others -- raises a further ambiguity. Is the investor buying a security if the investor isn't relying *solely* on the efforts of others to realize the profit? Will it suffice if the investor is relying *predominantly* on a third party? This distinction is significant because it might allow shrewd promoters to exempt themselves from the securities laws by involving investors in the management of the enterprise in modest ways. Then the investors couldn't be said to be relying solely on the efforts of others. Further, in most real estate deals, investors are counting on general market conditions as well as promoter's skills to realize profits. Someone who buys a limited partnership share of a shopping center would never be relying solely on the efforts of others if courts defined "solely" strictly. Usually, they do not.

Some courts have articulated a "more realistic test, whether the efforts made by others than the investor are the undeniably significant ones, those essential managerial efforts which affect the failure or success of the enterprise." n560

One point is clear. The U.S. Supreme Court is determined not to stretch the statutory definition of "security" to cover every case in which an investor alleges she has been defrauded. The court has made clear that it doesn't believe Congress intended the securities laws to be a shield against any and every fraud perpetrated in the country.

§ 12.16(b)(2)(i) Distinguishing Sales of Securities from Sales of Realty.

Fee Title Acquisitions of Real Estate. The fact that the investor receives legal title to real estate does not preclude a court finding that the investor has also purchased a security or an interest in an investment contract. If the investor actually acquires title, and not, literally, a security, the legal issue becomes whether the investor's interest can meet judicial and S.E.C. tests for an "investment contract."

Again, the test usually invoked depends on the investor (1) investing money, (2) with the expectation of profit, (3) in a common enterprise, and (4) relying solely on the efforts of others.

Almost everyone who buys any type of real estate hopes that it will appreciate in value. Real estate brokers encourage buyers to believe this. But if the purchaser is buying primarily to occupy the property or to use it in a trade or business, her profit expectation may be insufficient to meet the second part of the test, the expectation of profit.

Further, if the investor receives title to a particular property which can be sold at will, it is difficult to say that the investor is investing in a common enterprise, and relying solely on the efforts of others to realize profit. The investor holds legal title and can thus be free from reliance on the promoter or developer. As an investor, one can sell or rent the property on one's own.

One type of real estate acquisition that sometimes runs afoul of the securities laws is the sale of units in condominiums, often in resorts either in fee or through time-sharing arrangements. In a time-share project the purchaser expects to occupy the apartment only a few weeks each year, and may hope that ownership costs can be met by renting out the unit

the rest of the time. If one contracts to rent out the apartment on one's own or through an agent unaffiliated with the developer, one is not relying on the developer for profits.

Condo developers risk having their offerings characterized as a security by insisting that the buyer designate the promoter or an affiliate as the exclusive rental agent, or by agreeing to pool rents from all the units and apportion them among all the unit owners. n561 Aggressive sales agents stressing the profit potential of the acquisition worsen the developer's case. Finally, if the developer obtains funds from buyers before the project is actually built, the investor is truly relying on the efforts of others to realize anything; if the project is never built, the investor could be totally out of luck. The promoter or developer who avoids these practices and conveys a fee simple title to the buyer should be safely out of the thicket of securities law.

Developers marketing subdivided lots have almost always escaped their sales being characterized as securities because buyers are seldom able to prove that they purchased solely in reliance on the developer's future efforts to make the investment profitable. n562 The Ninth Circuit, though, has given real estate brokers and ordinary condo owners trying to sell their units cause for concern whether they might be unwittingly offering securities when they list or market condo units. n563

Real Estate Acquired Through Purchase of Stock. Sometimes the real estate investor doesn't get fee simple title evidenced by a deed. She gets a share of stock in an entity which owns the real estate. This distinction is important because the sale of "stock" is specifically included in securities act definitions of securities. The seller who transfers stock to the buyer instead of fee simple title will be held presumptively subject to the securities acts if the stock or equity interest possesses the normal attributes of a security. These are: profit sharing, voting rights, negotiability, and appreciation value.

To see what this means in actual deals, consider two instances of it:

> (1) The owner of a cooperative apartment in Manhattan sells her home. What she sells is a stock share in a cooperative owners' association and a long-term lease to her apartment. The association, technically, holds title to the building. If the apartment had been organized as a condominium, each owner would have had title to an identified piece of airspace, separately recorded, and could have sold by deed, clearly not a "security."
>
> (2) Or take the case of a developer who holds title to his shopping center in corporate form. Instead of selling "the center" by deed, he sells 100% of the corporate stock to a buyer. Has the developer sold "securities" or real property?

§ 12.16(b)(2)(ii) When General Partnership Interests Are an Investment Contract.

To appreciate the complexity of the "economic reality" test as mentioned by the U.S. Supreme Court in *Landreth Timber*, consider whether a general partnership interest can ever be an investment contract and, hence, a security. Theoretically, a general partner is never relying "solely" on the efforts of others. Under the Uniform Partnership Act:

[a] general partner is an agent of his firm, notice to one partner is deemed notice to all, and partners are subject to unlimited liability for partnership losses. Also, every general partner has equal rights in the management and conduct of partnership business and every partner has an absolute veto power over any act that contravenes the partnership agreement. n564

Hence, some courts have held that if state law prohibits a partner from relinquishing her legal right to manage the business, a general partnership interest can never be a security, even if only some of the partners actually managed the business day-to-day. n565

A second view turns on the "economic reality" of how a particular general partnership functions. Even an investor who retains substantial control over her investment to protect herself from the managing partner may be able to invoke the securities laws under an "economic reality" test if the investor was "unable to exercise meaningful partnership powers." n566 Here are some of the relevant factors:

> A general partnership or joint venture interest can be designated a security if the investor can establish, for example, that (1) an agreement among the parties leaves so little power in the hands of the partner or venturer that the arrangement in fact distributes power as would a limited partnership or (2) the partner or venturer is so inexperienced and unknowledgeable in business affairs that he is incapable of intelligently exercising his partnership or venture powers; or (3) the partner or venturer is so dependent on some unique entrepreneurial or managerial ability of the promoter or manager that he cannot replace the manager of the enterprise or otherwise exercise meaningful partnership or venture powers. n567

This view invites a trial on the securities question in nearly every instance to determine the competence of the parties and how the partnership was actually managed.

Yet a third position focuses not on the reality of actual control but on the terms of the partnership agreement at issue. It asks whether "the partnership agreement does *not* in fact create a general partnership but creates a limited partnership interest akin to an offering of preferred stock." n568 If managerial control and access to information remained by agreement in the hands of all the general partners, none could claim the partnership interest was actually an "investment contract," even if a few partners actually managed the partnership business. Conversely, if the agreement deflects access to information and managerial choice from some of the partners to others, the partnership could be an "investment contract."

Federal courts of appeals thus divide on when, if ever, general partners can be said to have bought "investment contracts." The U.S. Supreme Court could someday clarify this matter.

§ 12.16(b)(2)(iii) When Is a "Note" a Security?

The statute isn't always a reliable guide for defining what is a security. The 1933 statute labels the sale of "any note" a "security." As *Landreth Timber* indicates, the U.S. Supreme Court has ruled that this only makes notes rebuttable securities.

Compare these four "notes":

> 1. A Wall Street underwriter purchases 10,000 mortgages from F.N.M.A. and offers investors a chance to buy an interest in the mortgage pool. Underlying the investment are 10,000 notes and mortgages signed by individual borrowers. This arrangement is called "securitization." n569
>
> 2. A lead bank about to make a $100,000,000 construction loan to a development company solicits other banks to share the loan through a syndication or participation arrangement. n570
>
> 3. A developer buying a vacant 2-acre site signs a note for almost 100% of the purchase price, secured by a deed of trust designating the seller as beneficiary. The seller's "purchase money" loan is to be subordinate to a first lien that the developer will obtain to build an apartment house on the site. n571
>
> 4. The seller advertises in a local newspaper to find a buyer for the developer's note and deed of trust.

Assume that in all four cases the lender makes statements the lender knew to be false and which misled the investors or borrowers. The investors in cases (a) and (d) and the borrowers in cases (b) and (c) sue to be released from liability on the loan or investment contract, and maybe for punitive damages above the loan or investment amount. Assume, too, that in none of the four cases has the lender bothered to comply with the securities laws. Have these four borrowers and investors struck pay dirt?

Until 1990 various tests had been proposed and applied by federal courts of appeals in their effort to determine whether an instrument denominated as a "note" is truly a security under the securities acts. When a "note" was a "security" has also been of great interest to scholars. n572 The 1933 law itself included the word "note" in its list of securities, but the list was preceded by the cautionary phrase "unless the context otherwise requires."

In 1990, the U.S. Supreme Court adopted what is known as the "family resemblance" test:

> [t]ypes of notes that are not "securities" include "the note delivered in consumer financing, the note secured by a mortgage on a home, the short-term note secured by a lien on a small business or some of its assets, the note evidencing a 'character' loan to a bank customer, short-term notes secured by an assignment of accounts receivable, or a note which simply formalizes an open-account debt incurred in the ordinary course of business (particularly if, as in the case of the customer of a broker, it is collateralized)."
>
> [s]ome standards must be developed for determining when an item should be added to the list.
>
> An examination of the list itself makes clear what those standards should be... First, we examine the transaction to assess the motivations that would prompt a reasonable seller and buyer to enter into it. If the seller's purpose is to raise money for the general use of a business enterprise or to finance substantial investments and the buyer is interested primarily in the profit the note is expected to generate, the instrument is likely to be a "security." If the note is exchanged to facilitate the purchase and sale of a minor asset or consumer good, to correct for the seller's cash-flow difficulties, or to advance some other commercial or consumer purpose, on the other hand, the note is less sensibly described as a "security...." Second, we examine the "plan of distribution" of the instrument... to determine whether it is an instrument in which there is "common trading for speculation or investment...." Third, we examine the reasonable expectations of the investing public: The Court will consider instruments to be "securities" on the basis of such public expectations, even where an economic analysis of the circumstances of the particular transaction might suggest that the instruments are not "securities" as used in that transaction... Finally, we examine whether some factor such as the existence of another regulatory scheme significantly reduces the risk of the instrument, thereby rendering application of the Securities Acts unnecessary.
>
> We conclude, then, that in determining whether an instrument denominated a "note" is a "security," courts are to apply the version of the "family resemblance" test that we have articulated here: a note is presumed to be a "security," and that presumption may be rebutted only by a showing that the note bears a strong resemblance (in terms of the four factors we have identified) to one of the enumerated categories of instrument. If an instrument is not sufficiently similar to an item on the list, the decision whether another category should be added is to be made by examining the same factors. n573

In sum, the Supreme Court gave us a list of notes that are not "securities" and a list of questions to ask when deciding whether other "notes" should be added to the exempt list. Sometimes the answers will all point in the same direction, and it will be easy to see whether the note is a security or not. At other times the answers may point in different directions, offering less predictable outcomes.

§ 12.16(b)(3) Federal Securities Laws.

§ 12.16(b)(3)(i) Registration Process.

The United States Securities and Exchange Commission n574 has the responsibility of administering and enforcing the federal securities laws. n575 It is an independent regulatory agency consisting of five members appointed for staggered five-year terms by the President, with the concurrence of the Senate. n576 The Commission's principal office is in Washington, D.C., and it has nine regional offices. The S.E.C. enforces the federal securities laws by conducting investigations in large part through its regional and branch offices which may lead to criminal prosecutions, civil actions for injunctive relief, or administrative proceedings to impose remedial sanctions on broker-dealers and investment advisers.

The Securities Acts are important to real estate venture participants. The issuer must register with the Securities and Exchange Commission under Section 5 of the Securities Act of 1933 n577 before offering any non-exempted sale of securities. Interest in a real estate venture classified as a security can't be sold legally until it is registered and meets subsequent reporting procedures, unless the sale is exempt.

These are the burdens of the issuer of securities: (1) Registering with the S.E.C. the issuer prepares and obtains S.E.C. approval of a prospectus to be disseminated to prospective investors; (2) A company with securities registered under either of the Securities Acts must file annual, quarterly, and other periodic reports. These are not distributed directly to prospective investors but are available for review by analysts, investment advisers, financial publications, and others. (3) Companies with securities registered under the Securities Exchange Act are subject to the proxy rules which require the dissemination of a proxy or information statement in connection with the election of directors and other shareholder action. The proxy statement must be preceded or accompanied by an annual report to shareholders which must include certain prescribed information, including financial statements.

The prospectus contains information useful to investors, and also displays facts of interest to competitors and the idly curious. For example, a financial columnist for Newsday faulted Donald J. Trump on his boast that he had built the Taj Mahal resort in Atlantic City "on time" and "on budget." A prospectus for the project, prepared because debt financing came from the public issuance of $675,000,000 worth of bonds, disclosed a $65,000,000 cost overrun, $11.8 million of which covered interest paid on the Taj's bonds accruing between the time the project was supposed to open and when it actually opened. n578 So the prospectus proved the project was neither on time nor within budget.

§ 12.16(b)(3)(ii) Exemptions.

Because an S.E.C. registration is costly and time-consuming, syndicators often seek to fit their offerings within one of the exemptions from the requirements for registration and prospectus delivery created by the Securities Act.

> If, for example, the offering is exclusively intrastate, the syndicator may try to qualify it under Section 3(a)(11) of the Securities Act, the "intrastate offering" exemption. n579 Rule 147, n580 promulgated under Section 3(a)(11), exempts an offering from registration if all offers and sales are made to residents of one state and if the partnership is resident and doing business in the state and is using most of the offering proceeds to purchase properties within the state. n581

Another commonly employed series of exemptions used by real estate syndicators are the "safe harbor" rules of Regulation D, promulgated by the S.E.C. n582 These rules exempt certain offerings that meet specified terms and conditions. Among the exempting variables is the amount of money being sought. The greater the sum, the less readily it will be exempted. Also relevant is the number of investors solicited, and whether the solicitation is targeted for "accredited" investors. The definitions of "accredited" flow over three pages and include such factors as the individual's net worth and income, and whether the person is an officer or partner of the issuer.

Failure to comply with Regulation D's specific criteria will not, however, necessarily defeat the syndicator's claim for

exemption. The syndicator may still try to qualify the offering under the more liberal terms of § 4(2) of the Securities Act n583 for transactions "not involving any public offering." There are other exemptions as well. n584

§ 12.16(b)(4) State Securities (Blue Sky) Laws.

Real estate syndicators and developers need to look at state securities laws, too. State securities regulation in the United States dates back to 1911 n585 when Kansas adopted the first comprehensive scheme of regulation, popularly referred to as "blue sky" laws, because early sponsors viewed them as designed to reach "speculative schemes which have no more basis than so many feet of blue sky." n586 Securities laws in some form are in effect in all fifty-three jurisdictions: the fifty states, plus the District of Columbia, Guam, and Puerto Rico. n587 Congress preserved the concurrent jurisdiction of the states to regulate securities. This has led to "considerable overlap of federal and state regulatory authority." n588

Historically, though, the state exemptions have had little relationship to the federal exemptions. A few states have had exemptions for private offerings similar to § 4(2) of the Securities Act. n589

Securities listed on the principal stock exchanges (New York and American, for the most part), are exempt from state regulation. n590 In most jurisdictions, when appropriate information concerning the security is included in a recognized securities manual (primarily Moody's and Standard and Poor), the securities are similarly exempt from state regulation. n591

California's regulation of securities offerings reaches past the objectives of federal law and the blue sky laws of most states. Unlike disclosure and anti-fraud types of laws, California's more interventionist and ambitious goal is to make sure investors are offered securities only on terms that are "fair, just and equitable." n592 Disclosure of a very bad deal isn't enough in California; the law is designed to block such deals from being made available to investors.

The details of offerings are examined closely by the Commissioner of Corporations. n593 Guidelines have been promulgated and appear in the California Corporations Code and California Code of Regulations. n594

§ 12.16(b)(5) Summary: Application of Securities Law to Entities Used for Acquiring and Developing Property.

§ 12.16(b)(5)(i) Limited Partnership.

Limited partnership interests fit easily within the standard legal definition of a security: "an investment in a common venture premised on a reasonable expectation of profits to be derived from the entrepreneurial or managerial efforts of others." n595 Limited partnership interests are usually regarded as securities since the legal status of a limited partner is quite similar to that of an equity shareholder. The offer for sale of limited partnership interests is generally subject to the registration requirements of both federal securities laws and state blue sky laws. n596 A limited partner who takes over the management of the partnership may forfeit his limited liability status, but retains his rights as a limited partner to invoke the securities laws against the general partner. In one case, a limited partner became actively involved in managing the partnership and ousted a general partner. He was held entitled to retain his right to sue the general partner he forced out for violating federal securities laws. n597 "And, even if the offering is exempt from registration, it must nonetheless comply with the anti-fraud rules imposed by federal and state law." n598

A general partner in a limited partnership will have difficulty invoking the securities laws, however, when the alleged offering was made by the limited partnership in which the complainant was a general partner. n599 A developer who bought a limited partnership interest in order to acquire a large tract of land for development which the partnership owned was not entitled to invoke the securities laws because he was purchasing the partnership interest to use the land and not to make an investment in the limited partnership per se. n600

§ 12.16(b)(5)(ii) General Partnership.

Interests in a general partnership, although literally within that portion of the definition of a security which includes "certificate of interest or participation in any profit-sharing agreement," generally are not securities. The exceptions outlined at the beginning of this section involve situations in which a general partner's rights may resemble those of limited partners. Except in unusual situations, general partnership interests seldom are treated as securities. n601

§ 12.16(b)(5)(iii) C Corporation.

While there are some differences, the basic definition of a security under the Securities Act of 1933, n602 the Securities Exchange Act of 1934, n603 and state blue sky laws is the same. n604 Selling property interests through shares in a C corporation will, in all likelihood, subject the offeror to securities regulations. Only if the offering qualifies for one of the exemptions will it escape the registration, disclosure, and record-keeping requirements of the securities regulations.

§ 12.16(b)(5)(iv) S Corporation.

Not all investments are securities. Before the *Landreth Timber* n605 case, excerpted earlier in this section, it seemed as if an investor who participated in the management of the investment might not be able to claim her interest was a "security." After *Landreth*, even a majority investor probably owns a "security." n606

§ 12.16(b)(5)(v) Real Estate Investment Trusts.

Real estate investment trusts, as defined by Internal Revenue Code § 856, and securities of other issuers whose business is primarily acquiring and holding for investment real estate or interests in real estate are registered on Form S-11. A Form S-11 registration statement requires appropriate summary and risk factor sections, a use of proceeds section, a dilution section, a description of the securities and how the offering price was determined, ratio of earnings to fixed charges, a description of the plan of distribution, a basic information package, an in-depth disclosure, and information pertaining to the investment policies of the registrant, just to name a few.

§ 12.16(b)(5)(vi) Individual Acquisition of Real Estate Entities.

Generally, a purchaser motivated by a desire to occupy a house or develop land personally is not seen as buying a security when making a purchase. But one who purchases a condo unit or a time-share in a resort project may be buying a security if one is relying on management to rent condo units and pool all unit rents for distribution among the condo owners. As mentioned earlier, the Securities and Exchange Commission has published guidelines for determining when an offering of condos may be viewed as a security. n607 The Ninth Circuit, however, has cast a wider net in defining what counts as an investment contract to bring condo resales by owners unconnected to rental pools within the definition.

When the promoter/developer lures buyers by promising them a share of rents from the project to cover a good portion of the individual's ownership costs, and the rental pool is managed by the project developer or an affiliated company, the condo offering is probably a security. If, on the other hand, the management and rental activity is conducted by a firm unrelated to the condo promoter, and the buyer isn't obliged to enter a contract to share rents on a project-wide basis, the question of whether the offer is a security is one of fact. In *Hocking v. Dubois*, n608 a condo resale was classified as a security if the buyer could prove he had been lured into the deal by a broker's promise of profits from a rental pool agreement.

§ 12.16(b)(6) Conclusions.

An entity financing real estate activity or selling real property may need to satisfy securities law requirements. The two most significant variables in determining what constitutes a security are the form of the offeror entity and the way

management decisions are to be made after the sale or financing. The corporate, R.E.I.T., and limited partnership forms are *prima facie* subject to securities regulation. The general partnership form is not. Other investment arrangements not labelled securities may be classified as if they were depending on whether investors have continuing control over how their funds or the purchased real estate are to be used, whether they bought property for personal use or primarily for profit, and whether they acquired an interest they can sell themselves -- the value of which does not depend on the continuing efforts of the seller or offeror. Even if an offering is a security, it may be exempt if the offering is private, or marketed totally within one state.

FOOTNOTES:

(n1)Footnote 409. 24 Land Use Digest 9, Urban Land Institute (Washington, D.C., Sept. 1991).

(n2)Footnote 410. Norton Steuben, Real Estate Planning 9 (1980), construing Marvin Leon, *Designing the Real Estate Joint Venture to Work,* 3 #1 Real Est. Rev. 33 (1973); William A. Kelley, Jr., et al. *Multiple Use Land Development: Real Property and Tax Problems,* 7 Real Prop. & Tr. J. 585 (1972).

(n3)Footnote 411. Michael Madison & Robert M. Zinman, Modern Real Estate Financing 144 (1991).

(n4)Footnote 412. *See* 2 Boris I. Bittker & Lawrence Lokken, Federal Taxation of Income, Estates and Gifts 41-3, 41-7 (2d ed. 1991).

(n5)Footnote 413. *Id*. at 23-81 to 23-87.

(n6)Footnote 414. I.R.C. § 168(c)(1). For non-residential property placed in service after May 13, 1993, 39 years.

(n7)Footnote 415. *Id.* § 168(d)(4)(A).

(n8)Footnote 416. *Id.* §§ 168(c)(1)(A) and (B).

(n9)Footnote 417. I.R.S. Reg. § 1.167(a)(2).

(n10)Footnote 418. P. Taubman & R.H. Rasche, *Economic and Tax Depreciation of Office Buildings, 22 Nat'l Tax J. 334 (1969)* (office and apartment building depreciation minimal in first 10 years).

(n11)Footnote 419. *Crane v. Commissioner of Internal Revenue, 331 U.S. 1 (1946)* (whether an unassumed and unpaid mortgage is included in basis); *Commissioner of Internal Revenue v. Tufts, 461 U.S. 300 (1983)* (whether taxable gain results from sale of property for less than unpaid mortgage balance). The rule in the *Tufts* case has been codified at I.R.C. 7701(g).

(n12)Footnote 420. *See* Boris I. Bittker & Lawrence Lokken, *supra* note 412, § 40.84, at 40-41, text at n.15.

(n13)Footnote 421. The lender, on the other hand, gets to write off any uncollected deficiency as a loss. The deficiency is measured as the difference between the market value of the property (less expenses) and the adjusted basis of the debt. *Rev. Rul. 68-523, 1968-2 C.B. 82.*

(n14)Footnote 422. *99 T.C. 197 (1992).* The rule in the *Tufts* case has been codified at I.R.C. 7701(g).

(n15)Footnote 423. U.P.A. § 6.

(n16)Footnote 424. *Cyrus v. Cyrus, 64 N.W.2d 538 (Minn. 1954).* For a partner to transfer separately owned property to the partnership, the transfer must meet the statute of frauds or come under one of the exceptions to it. Annotation, *When Real Estate Owned by a Partner Before Formation of a Partnership Will Be Deemed to Have Become Asset of Firm, 45 A.L.R.2d 1009 (1956).*

(n17)Footnote 425. U.P.A. § 9, 6 U.L.A. 132 *et seq.*

(n18)Footnote 426. U.P.A. § 25.

(n19)Footnote 427. *Patel v. Patel, 260 Cal. Rptr. 255 (1989).*

(n20)Footnote 428. *Kristerin Dev. Co. v. Granson Inv., 394 N.W.2d 325, 329-331 (Iowa 1986). See* Daniel M. Fessler, Alternatives to Incorporations for Persons in Quest of Profit 75-79 (3d ed. 1991).

(n21)Footnote 429. The California Corporation Code provides that a Statement of Partnership be filed.

(n22)Footnote 430. Rodman Elfin, *Revision of the Uniform Partnership Act, An Analysis and Recommendations, 23 Ind. L. Rev. 655, 656-658 (1990).*

(n23)Footnote 431. U.P.A. § 14, 6 U.L.A. 1 *et seq.*: "The partnership is bound to make good the loss: (a) Where one partner acting *within the scope of his apparent authority* receives money or property of a third person and misapplies it; and (b) Where the partnership in the course of its business receives money or property of a third person and the money or property so received is misapplied by any partner while it is in the custody of the partnership." [Emphasis added.]

(n24)Footnote 432. U.P.A. § 15, 6 U.L.A. 1 *et seq.*: "All parties are liable (a) Jointly and severally for everything chargeable to the partnership under sections 13 and 14; (b) Jointly for all other debts and obligations of the partnership; but any partner may enter into a separate obligation to perform a partnership contract." The U.P.A. has been adopted in 49 states, including California. The National Conference of Commissioners on Uniform State Laws has undertaken a complete revision of the Act. *See* U.P.A. Revision Subcommittee of the Committee on Partnerships and Unincorporated Business Organizations, American Bar Ass'n, *Should the Uniform Partnership Act Be Revised?, 43 Bus. Law. 1212 (1987).*

(n25)Footnote 433. *Compare Horn's Crane Serv. v. Prior, 152 N.W.2d 421, 423 (Neb. 1967)* (creditor must allege there is no partnership property sufficient to pay the debt before suing partners individually) *with Catalina Mtg. Co. v. Monier, 800 P.2d 574, 578 (Ariz. 1990)* (partner's assets can be reached by direct suit even if the partnership or other partners aren't sued). Among states with "partnership-assets-first" rule are Oklahoma, New York, Utah and Michigan. Among the partner-as-primary-obligor states: Missouri, Texas. "Where partner liability for partnership assets is joint, the virtually unanimous rule is that partnership assest must be exhausted -- or the partnership shown to be insolvent -- before partnership creditors can reach partners' individual assets to enforce their liability." Alan R. Bromberg, Larry E. Ribstein, 2 Bromberg and Ribstein on Partnership 5:59 (1994).

"Where partner liability for partnership obligations is joint and several, the prevailing rule is that partnership assets need not be exhausted -- or the partnership shown to be insolvent -- before partnership creditors can reach partners' individual assets to enforce their liability." Id. at 5:63 (1994).

(n26)Footnote 434. R.U.P.A. § 307(c) (Draft for Partial Approval, June 7, 1991). This position is criticized in J. Dennis Hynes, *The Revised Uniform Partnership Act: Some Comments on the Latest Draft of RUPA, 19 Fla. St. U.L. Rev. 727, 734-39 (1992).*

(n27)Footnote 435. Reconstruction of Interview by Mark Feldman with Benedict J. J. Adelson, of Counsel with Fierstein & Sturman Law Corp., Los Angeles, Cal. (Jan. 26, 1990).

(n28)Footnote 436. *Schwartz v. Shapiro, 229 Cal. App. 2d 238 (1964); Graham v. Stratton, 339 F.2d 1004 (7th Cir. 1964).*

(n29)Footnote 437. In *Baldwin v. Marina City Prop., Inc., 145 Cal. Rptr. 406 (1978),* the general partner made a

large capital call of $500,000 from each limited partner. Only one limited partner responded -- Marina City Properties, a subsidiary of Hughes Aircraft. Thereafter, Marina City Properties caused the Certificate of Limited Partnership to be amended to reflect their 90.91% interest in the limited partnership.

(n30)Footnote 438. Nina B. Matis, *Partnership Management: Problems In a Declining Economic Market,* A.C.R.E.L., Real Est. Partnerships 101, 115-16 (A.B.A. 1991).

(n31)Footnote 439. *Id.* at 116.

(n32)Footnote 440. Reconstruction of Interview by Mark Feldman with Benedict J. J. Adelson, of Counsel with Fierstein & Sturman Law Corp., Los Angeles, Cal. (Jan. 26, 1990).

(n33)Footnote 441. Donald H. Siskind, *Transfers of Partnership Interests,* A.C.R.E.L., Real Est. Partnerships 121, 128 (A.B.A. 1991).

(n34)Footnote 442. A federal court in Texas held the assigning partner liable for pre- but not post-assignment debts in *Thomas v. Price, 718 F. Supp. 598, 607 (S.D. Tex. 1989).*

(n35)Footnote 443. *Compare Columbia Mtg. Co. v. Hsieh, 708 P.2d 1226 (Wash. 1985)* with *Stoebel-Polasky Co. v. Slatcha, 308 N.W.2d 273 (Mich. App. 1981); United Bank of Bismarck v. Glatt, 420 N.W.2d 743 (N.D. 1988); Wellsville Bank v. Nicolay, 638 P.2d 975 (Kan. App. 1982).*

(n36)Footnote 444. U.P.A. § 27(1), 6 U.L.A. 1 *et seq.*

(n37)Footnote 445. National Conference of Commissioners on Uniform State Laws, R.U.P.A. (1989 draft), as described by Donald H. Siskind, *Transfers of Partnership Interests,* A.C.R.E.L., Real Est. Partnerships 121, 122 (A.B.A. 1991).

(n38)Footnote 446. *Redman v. Walters, 152 Cal. Rptr. 42 (1979).*

(n39)Footnote 447. R.U.P.A., Articles 7 and 8. *See* Donald J. Weidner, *Three Policy Decisions Animate Revision of Uniform Partnership Act, 46 Bus. Law. 427 (1991). See also* Note, *The Revised Uniform Partnership Act Breakup Provisions: Should They Be Adopted?, 25 Creighton L. Rev. 701 (1992).*

(n40)Footnote 448. *See generally* U.P.A. §§ 31 and 32, 6 U.L.A. 1 *et seq.* A recent Texas case held that a partnership is dissolved when a lender forecloses on a partner's interest in the partnership, even though the partnership agreement specifically allowed each partner to grant security interests in her share of partnership profits and surplus. *Thomas v. Price, 718 F. Supp. 598 (S.D. Tex. 1989);* Steven A. Waters & Florence P. Berkley, *Partnerships, 44 Sw. L.J. 203 (1990).*

(n41)Footnote 449. *See* U.P.A. § 32(2), 6 U.L.A. 1 *et seq.* Dissolution by decree of court may occur "on the application of the purchaser of a partner's interest under sections 28 or 29; (a) After the termination of the specified term or particular undertaking, (b) At any time if the partnership was a partnership at will when the interest was assigned or when the charging order was issued."

(n42)Footnote 450. Robert W. Hamilton, Cases and Materials on Corporations Including Partnerships and Limited Partnerships 16 (2d ed. 1984).

(n43)Footnote 451. U.P.A. § 31(5) was promulgated in 1914. At that time the only kind of bankruptcy was a liquidation. Corporate reorganizations were not authorized by Congress until two decades later. Pub. L. No. 72-474 § 207, *48 Stat. 912.*

Some courts have held that § 31(5) doesn't apply to reorganizations. *In re Safren, 65 B.R. 566, 569 (Bankr. C.D. Cal.*

1986); In re Priestly, 93 B.R. 253 (Bankr. D.N.M. 1988). Other courts have upheld state dissolution-on-bankruptcy provisions modeled after § 31(5). *See, e.g., In re Sunset Devs., 69 B.R. 710 (Bankr. D. Idaho 1987).*

(n44)Footnote 452. Lawrence D. Cherkis, *Partnership -- Effect of the Bankruptcy of a General Partner,* ACREL, Real Est. Partnerships 285, 291 (A.B.A. 1991); Lewis R. Kaster & jeffrey K. Cymbler, *The Impact of a General Partner's Bankruptcy Upon the Remaining Partners,* 21 Real Prop., Prob. & Trust. J. 539 (1986).

(n45)Footnote 453. *See, e.g., In re Rittenhouse Carpet, Inc., 56 B.R. 131, 133 (Bankr. E.D. Pa. 1985).*

(n46)Footnote 454. I.R.C. §§ 701, 702.

(n47)Footnote 455. *Id.* § 704(d).

(n48)Footnote 456. *Id.* § 704(b). *See generally* William S. McKee et al., Federal Taxation of Partnerships and Partners, §§ 10.01 to 10.07 (2d ed. 1991).

(n49)Footnote 457. I.R.C. § 705(a).

(n50)Footnote 458. *Id.* § 704(d).

(n51)Footnote 459. Treas. Reg. § 301.7701-2.

(n52)Footnote 460. *Id.* § 301.7701-2(a)(3).

(n53)Footnote 461. Phillip R. Nicholson & John R. Cauble, Jr. *Incentive Management Agreements: Do They Solve the Problem of Partnerships?,* ACREL, Real Est. Partnerships 329, 337 (A.B.A. 1991).

(n54)Footnote 462. Gerald J. Robinson, *Setting up the Real Estate Venture: An Overview, 3 J. Real Est. Tax'n 28, 36 (1975).*

(n55)Footnote 463. Michael Madison & Robert M. Zinman, *supra* n.411, at 144 (1991).

(n56)Footnote 464. Robinson, *supra* note 462, at 36.

(n57)Footnote 465. Annotation, *Right Under a Mortgage By Co-Owners of Undivided Interests to Foreclose as Against Less than All of Such Interests,* 82 A.L.R. 1347 (1933).

(n58)Footnote 466. Annotation, *Cotenant's Right to Allowance in Partition in Respect of Amount Paid to Discharge Mortgage or Other Lien Upon Premises as Affected by Statute of Limitations or Laches,* 117 A.L.R. 1442 (1938). *See also* Annotation, *Contribution, Subrogation, and Similar Rights, as Between Cotenants, Where One Pays the Other's Share of Sum Owing on Mortgage or Other Lien, 48 A.L.R.2d 1305 (1956).*

(n59)Footnote 467. *See, e.g., Droeger v. Friedman, Sloan & Ross, 812 P.2d 931 (Cal. 1991); Andrade Dev. Co. v. Martin, 138 Cal. App. 3d 330 (1982). But see Mitchell v. American Reserve, 110 Cal. App. 3d 220 (1980).*

(n60)Footnote 468. Cal. Civ. Proc. Code § 872.010 *et seq.*

(n61)Footnote 469. I.R.C. § 1014(b)(6).

(n62)Footnote 470. David K.Y. Tang, *Foreign Investors In U.S. Real Estate Joint Ventures,* ACREL, Real Est. Partnerships 243, 254 (A.B.A. 1991).

(n63)Footnote 471. *Richardson v. Danson, 270 P.2d 802 (Wash. 1954).*

(n64)Footnote 472. *See, e.g., Vollmer v. Wheeler, 183 P. 264 (Cal. App. 1919); Schulties v. Schulties, 675 P.2d 634 (Wash. App. 1984).*

(n65)Footnote 473. Michael Madison & Robert M. Zinman, Modern Real Estate Financing (1991) [Madison & Zinman] Copyright © 1991 by Little, Brown & Company. Reprinted with permission.

(n66)Footnote 474. I.R.C. § 1031.

(n67)Footnote 475. Treas. Reg. § 1.761-1(a).

(n68)Footnote 476. *Id.* § 1.761-1(1).

(n69)Footnote 477. Walter H. E. Jaeger, *Partnership or Joint Venture, 37 Notre Dame L. Rev. 138 (1961).*

(n70)Footnote 478. I.R.C. § 761(a).

(n71)Footnote 479. Norton Steuben, *supra* n.410, at 94 (1980). *See generally* Charles F. Jensen, *The Use of Corporations in Real Estate Transactions: Judicial Acceptance of the Agency Theory, 8 J. Corp. L. 361-88* (1982-83).

(n72)Footnote 480. David L. Wolfe & Ralph E. DeJong, *The S Corporation as an Alternative Form of Business Organization After ERTA, TEFRA and the Subchapter S Revision Act of 1982, 32 DePaul L. Rev. 811, 814 (1983).*

(n73)Footnote 481. An Act for Limiting the Liability of Members of Certain Joint Stock Companies, 18 & 19 Vict., ch. 133 (1955).

(n74)Footnote 482. *See, e.g., Paul v. Virginia, 75 U.S. (8 Wall.) 168, 181 (1868).*

(n75)Footnote 483. William A. Klein & John C. Coffee, Business Organizations and Finance 114 (5th ed. 1993).

(n76)Footnote 484. *Overstreet v. Southern Ry., 371 F.2d 411* (5th Cir.), *cert. denied, 387 U.S. 912 (1967).*

(n77)Footnote 485. 15 William Meade Fletcher, Cyclopedia of the Law of Private Corporations § 7122, at 231 (rev. perm. ed. 1983).

(n78)Footnote 486. *Anderson v. Abbott, 321 U.S. 349, reh'g denied, 321 U.S. 804 (1944).*

(n79)Footnote 487. Norton Steuben, *supra*, n.410 (1980) (*citing* William L. Cary, Cases and Materials on Partnership Planning 34-35 (1970)).

(n80)Footnote 488. N.Y. Bus. Corp. Law § 630; Wis. Stat. Ann. § 180.0622(13).

(n81)Footnote 489. *42 U.S.C. § 9607 et seq.*

(n82)Footnote 490. Dale A. Oesterle, *Viewing C.E.R.C.L.A. as Creating an Option on the Marginal Firm: Does It Encourage Irresponsible Environmental Behavior?, 26 Wake Forest L. Rev. 39, 46-49 (1991).* The author explains why corporate shareholders, protected by limited liability, might rationally file bankruptcy if C.E.R.C.L.A. liability exceeded the value of the firm, after carefully and slowly selling off valuable bits of the firm.

(n83)Footnote 491. *Compare Smith Land & Imp. Corp. v. Celotex Corp., 851 F.2d 86 (3d Cir. 1988)* (holding successor corporation liable based on implied congressional interest) with *Joslyn Mfg. Co. v. T.L. James & Co., 893 F.2d 80 (5th Cir. 1990), cert. denied, 111 S. Ct. 1017 (1991)* (no liability for parent because it wasn't owner or operator of facility at time of violation). *See* Whitney & Donnelcon, *The Demise of Limited Liability of Parent and Successor Corporations Under Superfund,* 4 Hofstra Prop. L.J. 1, 25-31 (1990).

(n84)Footnote 492. *Id.* at 31-35.

(n85)Footnote 493. *Penasquitos, Inc. v. Superior Court, 812 P.2d 154 (Cal. 1991)* (statutes in California (Cal. Civ. Code § 399), New York, Ohio, and New Jersey provide similar post-dissolution claims opportunities).

(n86)Footnote 494. Robert Hamilton, Cases and Materials on Corporations Including Partnerships and Limited Partnerships 16 (1986).

(n87)Footnote 495. Norton Steuben, Real Estate Planning 18 (1980).

(n88)Footnote 496. *See* Revised Model Business Corporation Act § 3.02: "Unless its articles of incorporation provide otherwise, every corporation has perpetual duration and succession in its corporate name and has the same powers as an individual to do all things necessary or convenient to carry out its business and affairs...."

(n89)Footnote 497. Robert W. Hamilton, Cases and Materials on Corporations Including Partnerships and Limited Partnerships 16 (1986).

(n90)Footnote 498. I.R.C. § 368(c) defines control as "the ownership of stock possessing at least 80 percent of the total combined voting power of all classes of stock entitled to vote and at least 80 percent of the total number of shares of all other classes of stock of the corporation."

(n91)Footnote 499. Reconstruction of Interview by Mark Feldman with Richard Wolff, Vice President of Acquisitions, Haight Properties, Inc., Los Angeles, Cal. (Feb. 2, 1990).

(n92)Footnote 500. Dividends are not deductible at the corporate level when determining net income for tax purposes.

(n93)Footnote 501. The person acquiring the partnership interest would have to make an election to receive a stepped-up basis under I.R.C. § 754.

(n94)Footnote 502. Norton Steuben, Real Estate Planning 52 (1980).

(n95)Footnote 503. Uniform Limited Partnership Act (U.L.P.A.) §§ 1 - 31, 6 U.L.A. 550 *et seq.*; Revised Uniform Limited Partnership Act (R.U.L.P.A.) Articles 1-11.

(n96)Footnote 504. *Waite v. Galestrom, 294 N.W.2d 338 (Neb. 1980).*

(n97)Footnote 505. *See, e.g., Remencheck v. Whittington, 757 S.W.2d 836 (Tex. Ct. App. 1988)* (when general partner conspired with contractor to steal funds from limited partners he ceased to be agent for limited partnership).

(n98)Footnote 506. *See* Kenneth Hooker, *The Power of Limited Partners to Remove and Replace the General Partner of a Limited Partnership, 19 Tex. Tech L. Rev. 1 (1988).*

(n99)Footnote 507. In *DeSimoni v. Brusco, 236 Cal. Rptr. 711 (1987),* the managing partner, Brusco, brought an action challenging his removal by fellow partners. He refused to accept his removal, and rejected requests to turn over the books and records of the apartment complex to partner DeSimoni. Eventually the court removed Brusco, but not until after many years of litigation, trial, and appeal.

(n100)Footnote 508. R.U.L.P.A. § 801(3). If a sole general partner withdraws, the limiteds can prevent dissolution by all of them agreeing to maintain the partnership, and finding a willing general partner within 90 days.

(n101)Footnote 509. R.U.L.P.A. § 303(a).

(n102)Footnote 510. Michael Madison & Robert M. Zinman, Modern Real Estate Financing 149 (1991) offers these citations: Cal. Corp. Code §§ 15611 - 15723; Mass. Ann. Laws ch. 109, §§ 1 - 62; N.J. Stat. Ann. §§ 42:2A-1 - 42:2A-72; Ohio Rev. Code Ann. §§ 1782.01 - 1782.62; Va. Code Ann. §§ 50-73.1 - 50-77. *See also* 6 U.L.A. 226-27. *See generally* Stephen I. Burr, *Potential Liability of Limited Partners as General Partners, 7 Mass. L. Rev. 22 (Winter 1982);* Kempin, *The Problem of Control in Limited Partnership Law: An Analysis and Recommendation, 22 Am. Bus. L.J. 443 (1985);* Robert A. Kessler, *The New Uniform Limited Partnership Act: A Critique, 48 Fordham L. Rev. 159 (1979).*

(n103)Footnote 511. R.U.L.P.A. § 303(a).

(n104)Footnote 512. *Id.* § 603.

(n105)Footnote 513. *Id.* §§ 702, 704. Under the earlier U.L.P.A., § 19, the assignee who did not become a "substantial limited partner" had no right to require any information or accounting of the partnership, "or to inspect the books." He did get profit shares. But without a right to an accounting, he would not have an easy way of knowing whether he was getting his fair share of profits or whether the general partner was increasing expenses by self-dealing contracts so that there were no profits. *See, e.g., Kellis v. Ring, 155 Cal. Rptr. 297 (1979).* Under § 19, the purchaser of a limited partnership interest could protect himself only by becoming a substituted limited partner. To become a substituted limited partner, all the partners had to agree and the partnership certificate had to be amended, or the partnership certificate had to allow full substituted assignability. The R.U.L.P.A. is now the dominant law in the field. It fully empowers the assignee of a limited partnership interest.

(n106)Footnote 514. Treas. Reg. §§ 301.7701-2 - 301.7701-4.

(n107)Footnote 515. I.R.C. §§ 708(b)(1) and 741.

(n108)Footnote 516. *Id.* § 704(b).

(n109)Footnote 517. Michael Madison & Robert M. Zinman, Modern Real Estate Financing 158 (1991). [Madison & Zinman] Copyright © 1991 by Little, Brown & Company. Reprinted with permission.

(n110)Footnote 518. I.R.C. §§ 1362(a) and 1361(a).

(n111)Footnote 519. The Treasury Regulations define an "ineligible corporation" as a corporation that is (1) a member of an affiliated group (determined under I.R.C. § 1504 without regard to any exception contained in subsection (b) thereof), whether or not that affiliated group has ever filed a consolidated return; (2) a financial institution to which I.R.C. § 585 or § 593 applies, whether or not that financial institution uses the "reserve from bad debts" method provided in I.R.C. § 166(c); (3) an insurance company subject to tax under Subchapter L, Chapter 1 of the Code; (4) a corporation to which an election under I.R.C. § 936 (concerning Puerto Rico and possession tax credits) applies; or (5) a domestic international sales corporation (D.I.S.C.) or former D.I.S.C. There are certain exemptions for insurance companies. *See* Treas. Reg. § 1.1361-1A(c).

(n112)Footnote 520. Husband and wife count as one individual, so there could be as many as 70 shareholders if all of them were married couples. A subsequent divorce of a couple could be a disaster for the other investing couples.

(n113)Footnote 521. *See* Peter M. Fass, *A Comparison of the Partnership Structure and the S Corporation for Owning and Operating Real Estate,* 2 Hofstra Prop. L.J. 29 (1988). *See also* Norton Steuben, Real Estate Planning 15 (1980), *construing* Jerald D. August & Mark L. Silow, *S Corporation v. Partnership for Real Estate Ventures, 1 J. Tax'n Investments 91 (1983).*

(n114)Footnote 522. *See* U.P.A. § 6, 6 U.L.A. §§ 1 *et seq.*: "A partnership is an association of two or more persons to carry on as co-owners of a business for profit." *See also* U.P.A. § 2, 6 U.L.A. §§ 1 *et seq.*, which further defines

"person" as an individual, partnership, corporation, or other association.

(n115)Footnote 523. Peter M. Fass, *A Comparison of the Partnership Structure and the S Corporation for Owning and Operating Real Estate,* 2 Hofstra Prop. L.J. 29, 159-60 n.140 (1988).

(n116)Footnote 524. *See* U.L.P.A. § 9, 6 U.L.A. § 559 *et seq.*, which states in part that:

a general partner shall have all the rights and powers and be subject to all the restrictions and liabilities of a partner in a partnership without limited partners, except that without the written consent or ratification of the specific act by all the limited partners, a general partner or all of the general partners have no authority to...

(n117)Footnote 525. Peter M. Fass, *A Comparison of the Partnership Structure and the S Corporation for Owning and Operating Real Estate,* 2 Hofstra Prop. L.J. at 32-33 (1988).

(n118)Footnote 526. Assuming a private placement exemption has been used for the initial offering, the securities may need to be registered before they can be resold. For example, S.E.C. Rule 144, which affects private placements of S corporation stock as well as similarly placed partnership interests, restricts the resale of such interest for two years. 17 C.F.R. § 230.144.

(n119)Footnote 527. *See* I.R.C. § 708(b)(1)(B).

(n120)Footnote 528. *See* I.R.C. § 1362(d)(1)(B).

(n121)Footnote 529. *See Rev. Proc. 89-12, 1989-71 I.R.B. 22.*

(n122)Footnote 530. *See, e.g.*, John R. Maxfield et al., *Colorado Enacts Limited Liability Legislation,* 19 Colo. Law. 1029 (1990); Colo. Rev. Stat. §§ 7.70.101 - 7.70.931; Fla. Stat. chs. 608.401 - 608.471; Ind. Code Ann. § 23-16-10.1; Iowa Code Ann. § 545.901; Kan. Stat. Ann. §§ 17-7601 - 17-7650; Alson R. Martin, *The Kansas Limited Liability Acts, Business and Tax Considerations,* J. Kan. B. Ass'n (Oct. 1990); La. Rev. Stat. Ann. § 9:3431; 2 Md. Ann. Code § 4A-204; Minn. Stat. § 211B.15 (1990); Nev. Rev. Stat. Ann. §§ 86.011 - 86.571; Tex. Rev. Civ. Stat. Ann. art. 1528n, arts. 1.01 - 9.02; Utah Code Ann. §§ 48-26-101 - 48-26-156; Va. Code Ann. §§ 13.1-1000 - 13.1-1069; Allan G. Donn, *Limited Liability Company: The New Form of Business Organization,* 6 Va. Bus. 8 (Spring 1991); W. Va. Code § 31-1A-1; Wyo. Stat. §§ 17-15-101 - 17-15-136.

(n123)Footnote 531. *See generally* Tanner, *California Limited Liability Company Issues, Recent Developments,* Sec. Corps. Bus. Law, Cal. St. B. Program 521 (1991). It isn't clear whether California courts would respect an out-of-state L.L.C.'s limited liability status. *Id.* at 530. *See also* Robert R. Keatinge et al., *The Limited Liability Company: A Study of the Emerging Entity, 47 Bus. Law. 378 (1992).*

(n124)Footnote 532. Alan I. Wilensky, Deputy Assistant Treasury Secretary for Tax Policy, *quoted in* Saffrey A. Tannenbaum, *States Are Sanctioning New Forms of Business,* Wall St. J., July 17, 1992, at B1.

(n125)Footnote 533. Wyo. Stat. §§ 17-15-101 - 17-15-136; § 17-15-113.

(n126)Footnote 534. *Id.* § 17-15-116.

(n127)Footnote 535. *Id.* § 17-15-122.

(n128)Footnote 536. *Id.* § 17-15-123.

(n129)Footnote 537. *Id.* § 17-15-107(a)(ii).

(n130)Footnote 538. *Rev. Rule 88-76, 1988-2 C.B. 360, 361-38.* The Treasury ruling was based on a Wyoming

L.L.C. not having continuity of life, and so meeting one of two tests necessary to establish it wasn't an "association" taxable as a corporation. If a member of the L.L.C. ceases to be a member for any reason, continuity is not assured. A member's interest in a Wyoming L.L.C. is not freely transferable in the sense that the assignee can participate in managing partnership affairs without the unanimous consent of the other partners. Thus, two of the four characteristics of a corporation were missing. The Service had earlier concluded after six years of study that limited liability alone should not preclude an entity from being classified as a partnership. *Announcement 88-118, 1988-38 I.R.B. 25. See* Arthur B. Willis et al., Partnership Taxation § 34.10 (4th ed. 1989).

(n131)Footnote 539. *See* Comment, *Wyoming Limited Liability Companies: Limited Liability and Taxation Concerns in Other Jurisdictions, 27 Land & Water L. Rev. 539 (1992).*

(n132)Footnote 540. James L. Kuhle, *The Long-Term Performance of Real Estate Investment Trusts,* 9 Real Est. Fin. J. 25 (1992) (equity R.E.I.T.s have performed considerably better than mortgage R.E.I.T.s).

(n133)Footnote 541. Stan Ross & Richard Klein, *REITs as a Source of Capital: Considerations for Sponsors,* 9 Real Est. Fin. J. 13 (1992).

(n134)Footnote 542. The operational rules for a R.E.I.T. are quite complex as are many of the special status entities created by the Internal Revenue Code. *See generally* Kenneth C. Aldrich, *Real Estate Investment Trusts: An Overview, 27 Bus. Law. 1165 (1972);* Linda Galler, *Tax Reform Act of 1986 Changes Affecting Real Estate Investment Trusts,* 18 Tax Adviser 178 (1987).

(n135)Footnote 543. Norton Steuben, Real Estate Planning 166 (1980).

(n136)Footnote 544. Carol MacMillan Stanley, *The Real Estate Investment Trust: Legal and Economic Aspects, 24 U. Miami L. Rev. 155, 158 (1969).* The task of policing R.E.I.T.'s ownership is assumed by transfer agents who block disqualifying transfers.

(n137)Footnote 545. *Id. at 159.*

(n138)Footnote 546. An in-depth discussion of an Internal Revenue Code § 542 personal holding company is beyond the scope of this chapter. A personal holding company is created when 50% or more of the stock is owned by five or more individuals. The Internal Revenue Code is replete with income distribution requirements for such an entity. Suffice it to say the entity is taxable as a corporation if this occurs.

(n139)Footnote 547. As R.E.I.T.s come to be publicly taded on securities exchanges, this task becomes easier in the sense that listed securities are likely to widely held, and more difficult in the sense that ownership concentrations is less readily preventable.

(n140)Footnote 548. Interview with Bruce L. Ludwig, Senior Partner, and Stanton H. Zarrow, Senior Partner, TCW Realty Advisors, Los Angeles (Apr. 9, 1990).

(n141)Footnote 549. Michael F. Sfregola, Allen, Matkins, Leck, Gamble & Mallory, Lecture at Univ. of S. Cal. Law Ctr. (Nov. 30, 1990).

(n142)Footnote 550. Interview by Mark Feldman with Stanley Ross, Co-Managing Partner, Kenneth Leventhal & Co., Los Angeles (Mar. 23, 1990).

(n143)Footnote 551. Norton Steuben, *supra* n.410 at 169.

(n144)Footnote 552. Even though the proper dividend is not paid, the entity will not forfeit its R.E.I.T. status if failure was due to mistake (not fraud) and is promptly cured by a dividend distribution. The R.E.I.T. will be subject to a 4% excise tax on the excess of the required distribution for the year over the actual distribution for the year. I.R.C. §

4981(b); *id.* at 170.

(n145)Footnote 553. Thomas S. Loo, Partner in Bryan Cave; Adjunct Professor of Law, Univ. of S. Cal. Law Ctr., Lecture at Univ. of S. Cal. Law Ctr. (Nov. 30, 1990). Ignorance on the part of the seller can be a defense. Annotation, *Defense of Ignorance of Untruth or Omission in Civil Action Under § 12(2) of Securities Act of 1933, 109 A.L.R. Fed. 444 (1992).*

(n146)Footnote 554. *15 U.S.C. § 77*(b), (1) (§ 2(1)) of the Securities Act of 1933 *et seq.* (hereinafter referred to as the "Securities Act"). The Securities Act generally requires the registration of securities publicly offered by a company or persons controlling a company, and the use of a prospectus in connection with such public offering. The Securities Act also regulates against fraud in connection with the sale of securities.

(n147)Footnote 555. *15 U.S.C. § 78a et seq.* (hereinafter referred to as the "Exchange Act" or "Securities Exchange Act"). The Securities Exchange Act generally requires the registration of securities prior to listing and trading on an exchange, as well as the registration of over-the-counter securities in which there is a significant trading interest. The Securities Exchange Act also requires the registration with the Commission of broker-dealers, national securities exchanges, and associations of securities dealers. It also regulates fraud and manipulation in connection with the purchase or sale of securities, and generally regulates trading markets in securities.

(n148)Footnote 556. *Matek v. Murat, 862 F.2d 720, 724 (9th Cir. 1988).*

(n149)Footnote 557. *See* Alan R. Bromberg & Lewis D. Lowenfels, Securities Fraud and Commodities Fraud § 2.4 (1991).

(n150)Footnote 558. *See* Marc I. Steinberg & William E. Kaulbach, *The Supreme Court and the Definition of "Security": The "Context" Clause, "Investment Contract" Analysis, and Their Ramifications, 40 Vand. L. Rev. 489, 520-521 (1987).*

(n151)Footnote 559. *See* Robert C. Art, *Sell a Condominium, Buy a Securities Lawsuit: Unwarranted Liabilities in the Secondary Market, 53 Ohio St. L.J. 415, 423 n.36, citing* cases from the Fourth, Eighth, Ninth, and Tenth Circuits (1992).

(n152)Footnote 560. *Securities & Exchange Comm'n v. Glenn W. Turner Enters., 474 F.2d 476, 482* (9th Cir.), *cert. denied, 414 U.S. 821 (1973).*

(n153)Footnote 561. The S.E.C. has warned condo developers they may be offering securities when condo sales are tied to promises of profitability to the buyer by renting the unit, entering a rental pool agreement, or requiring the buyer to make the condo available for rental part or all of the year. Release 5347, Offers and Sales of Condominium Units in a Real Estate Development, Securities Act Release No. 33-5347, 1 Fed. Sec. L. Rep. (C.C.H.) § 1049 (Jan. 4, 1973) (listed at 17 C.F.R. § 231.5347).

See, e.g., Wooldridge Homes, Inc. v. Bronze Tree, Inc., 558 F. Supp. 1085 (D. Colo. 1983) (purchaser of unbuilt condos made $25,000 downpayment which developer placed in escrow account but developer obtained construction funds on strength of pre-sale).

(n154)Footnote 562. *De Luz Ranchos Inv., Ltd. v. Coldwell Banker & Co., 608 F.2d 1297 (9th Cir. 1979);* Note, *Real Estate as Securities: Sales of Residential Subdivision Lots, 1979 Wash. U. L.Q. 965 (1979).*

(n155)Footnote 563. *Hocking v. Dubois, 885 F.2d 1449 (9th Cir. 1989).* The *Hocking* case is criticized in Robert C. Art, *Sell a Condominium, Buy a Securities Lawsuit: Unwarranted Liabilities in the Secondary Market, 53 Ohio St. L.J. 414 (1992).*

(n156)Footnote 564. *Matek v. Murat, 862 F.2d 720, 726 (9th Cir. 1988).*

(n157)Footnote 565. *See Goodwin v. Elkins, 730 F.2d 99 (3d Cir. 1984); Odom v. Slavik, 703 F.2d 212, 215 (6th Cir. 1983)* (*per curiam*); *Hirsch v. du Pont, 396 F. Supp. 1214, 1220 (S.D.N.Y. 1975), aff'd, 553 F.2d 750 (2d Cir. 1977); New York Stock Exch., Inc. v. Sloan, 394 F. Supp. 1303, 1314 (S.D.N.Y. 1975).*

(n158)Footnote 566. *Williamson v. Tucker, 645 F.2d 404, 424* (5th Cir.), *cert. denied, 454 U.S. 897 (1981).*

(n159)Footnote 567. *Id. See also Matek v. Murat, 862 F.2d 720 at 729 (9th Cir. 1988).*

(n160)Footnote 568. *Matek v. Murat, 862 F.2d 720, 730 (9th Cir. 1988).*

(n161)Footnote 569. The court in *In re National Mtg. Equity Corp., 723 F. Supp. 497 (C.D. Cal. 1989)* held that mortgage-backed certificates weren't securities under federal and California securities laws because the investors weren't relying on the managerial or entrepreneurial efforts of others.

(n162)Footnote 570. Most court decisions have found loan participations not to be securities. *See, e.g., Banco Espanol de Credito v. Security Pac. Nat'l Bank, 763 F. Supp. 35* (S.D.N.Y.), *aff'd, 973 F.2d 51 (2d Cir. 1992); First Citizens Fed. Sav. & Loan Ass'n v. Worthen Bank & Trust Co., N.A., 919 F.2d 510 (9th Cir. 1990); First Fin. Fed. Sav. & Loan Ass'n v. E.F. Hutton Mtg. Corp., 834 F.2d 685 (8th Cir. 1987); McVay v. Western Plains Serv. Corp., 823 F.2d 1395 (10th Cir. 1987); United Am. Bank of Nashville v. Gunther, 620 F.2d 1108 (5th Cir. 1980). But see Lehigh Valley Trust Co. v. Central Nat'l Bank, 409 F.2d 989 (5th Cir. 1969).* For a good argument that loan participations should be treated as securities, *see* Robert F. Kornegay, Jr., *Bank Loans as Securities: A Legal and Financial Economic Analysis of the Treatment of Marketable Bank Assets Under the Securities Acts, 40 U.C.L.A. L. Rev. 799 (1993).*

(n163)Footnote 571. *Cf. Amfac Mtg. Corp. v. Arizona Mall of Tempe, Inc., 583 F.2d 426 (9th Cir. 1978).* A mortgage lender sued a shopping center developer, builder, and surety for securities law violations. The court held that the note and accompanying security instruments weren't securities because the lender wasn't taking an equity position in the deal. Payments of loan principal and interest were due the lender whether the center was profitable or not. Further, the loan was for construction and was to be disbursed not all at once but in phases as construction progressed. *See also McGovern Plaza Joint Venture v. First of Denver Mtg. Inv., 562 F.2d 645 (10th Cir. 1977). But see First Fed. Sav. & Loan Ass'n v. Mortgage Corp. of the South, 467 F. Supp. 943 (N.D. Ala. 1979).* In this case, the court suggested that a construction loan secured by an apartment complex and motel could be a security. The notes in this case were for 20 years and accounted for the bulk of the capital in the project.

(n164)Footnote 572. Arnold S. Jacobs, *The Meaning of "Security" Under Rule 10b-5, 29 N.Y.L. Sch. L. Rev. 211 (1984);* Michael J. Kaplan, Annotation, *Promissory Notes As Securities Under § 2(1) of the Securities Act of 1933 and § 3(a)(10) of the Securities Exchange Act of 1934, 39 A.L.R. Fed. 357 (1978);* Steven M. Larimore, Note, *The Economic Realities of Defining Notes as Securities Under the Securities Act of 1933 and The Securities Exchange Act of 1934, 34 U. Fla. L. Rev. 400 (1982);* Harlan S. Abrams, Comment, *Commercial Notes and Definition of "Security" Under Securities Exchange Act of 1934: A Note is a Note is a Note?, 52 Neb. L. Rev. 478 (1973);* Martin Lipton & George A. Katz, *"Notes" Are Not Always Securities, 30 Bus. Law. 763 (1975);* Stephen Jurman, Comment, *Bank Loan Participations as Securities: Notes, Investment Contracts and the Commercial/Investment Dichotomy, 15 Duq. L. Rev. 261 (1977);* Nathan W. Burchinow, Note, *Liability of Lead Banks in Syndicated Loans Under the Securities Acts, 58 B.U. L. Rev. 45 (1978);* William L. Stern & Douglas M. Rambler, *Federal Securities Laws: The Dangers for Financial Institutions, 108 Banking L.J. 445 (1991);* Thomas Cookson, Note, *Loan Participation Agreements as Securities: Judicial Interpretations of the Securities Act of 1933 and the Securities Exchange Act of 1934, 24 Wm. & Mary L. Rev. 295 (1983);* Park McGinty, *What is a Security?* (unpublished paper on file with author).

(n165)Footnote 573. *Reves v. Ernst & Young, 494 U.S. 56 (1990).*

(n166)Footnote 574. Hereinafter the "S.E.C."

(n167)Footnote 575. The securities laws administered and enforced by the S.E.C. include: (1) the Securities Act of 1933, discussed *supra*; (2) the Securities Exchange Act of 1934, discussed *supra*; (3) the Trust Indenture Act of 1939, *15 U.S.C. §§ 77aaa* - 77bbbb, which requires the use of an independent trustee in connection with the public offering of debt securities, and generally requires that such securities be issued only pursuant to a trust indenture, which contains certain prescribed provisions, including provisions controlling the responsibility and liability of the trustee; (4) the Investment Company Act of 1940, *15 U.S.C. §§ 80a-1* - 80a-52, which requires the registration of investment companies and imposes a number of substantive requirements relating to the functioning of such companies; and (5) the Investment Advisers Act, *15 U.S.C. §§ 80b-1* - 80b-21, which requires investment advisers with fifteen or more clients to register with the Commission, unless their business is exclusively intrastate. It also regulates fraudulent and other practices, and authorizes the Commission to impose remedial sanctions on specified grounds.

(n168)Footnote 576. Securities Exchange Act of 1934, *15 U.S.C. § 78d.*

(n169)Footnote 577. *15 U.S.C. § 77e.*

(n170)Footnote 578. Allan Sloan, *Trump's Margin for Error on the Taj Is Not Big*, L.A. Times, Apr. 9, 1990, at D5.

(n171)Footnote 579. *15 U.S.C. § 77c*(a)(11).

(n172)Footnote 580. *See* S.E.C. Release No. 5349, Notice of Proposed Rule 147, in Real Estate Securities Guidelines '73, at 303-16 (1973), for a fuller explanation of Rule 147.

(n173)Footnote 581. Paul Goldstein, Real Estate Transactions 787 (rev. 2d ed. 1988).

(n174)Footnote 582. 17 C.F.R. § 230.501 *et seq* .

(n175)Footnote 583. *15 U.S.C. § 77d*(2).

(n176)Footnote 584. *See* Billie J. Ellis, Jr., A Compliance Guide to Land Sales Marketing Regulation 68 (1992). Section 4(6) of the 1933 Act adopted the following in 1980:

> The provisions... shall not apply to transactions involving offers or sales by an issuer solely to one or more accredited investors, if the aggregate offering price of an issue of securities offered in reliance on this paragraph does not exceed the amount allowed under Section 3(b) of this title, if there is no advertising or public solicitation in connection with the transaction by the issuer or anyone acting on the issuer's behalf, and if the issuer files such notice with the Commission as the Commission shall prescribe...

Regulation A, 17 C.F.R. §§ 230.551 - 230.264, comprised of Rules 251 through 264, provides a method for an issuer to sell up to $1,500,000 of securities in a 12-month period. Adopted by the S.E.C. pursuant to its authority under Section 3(b) of the 1933 Act, Regulation A is labeled an exemption but actually represents a simplified registration.

(n177)Footnote 585. *See* James S. Mofksy, Blue Sky Restrictions on New Business Promotions 5-14 (1972), for a full history of the development of state blue sky laws.

(n178)Footnote 586. *See Hall v. Geiger-Jones Co., 242 U.S. 539, 550 (1917).*

(n179)Footnote 587. Harold S. Bloomenthal et al., Securities Law Handbook 7 (1990-1991 ed.).

(n180)Footnote 588. *Id.* § 9.14, at 331.

(n181)Footnote 589. *Id.* at 331. Section 402(b)(9) of the Uniform Securities Act limits the exemption to offers made to just a few persons within the state in a 12-month period. In states with a similar exemption for limited offering, the number varies from 10 to 25 months.

(n182)Footnote 590. *Id.* at 331.

(n183)Footnote 591. *Id.* Excellent secondary sources exist which discuss state securities law exemptions. *See id.* at ch. 7 for a complete discussion of the exemptions granted by each state.

(n184)Footnote 592. Cal. Corp. Code § 25140(b); *Alford v. Pierno, 104 Cal. Rptr. 110 (1972); Jones v. H.F. Ahmanson & Co., 460 P.2d 464 (Cal. 1969).*

(n185)Footnote 593. Cal. Corp. Code § 25000 *et seq.*; Cal. Code Regs. tit. 10, § 250 *et seq. See Quattrone v. Superior Court, 118 Cal. Rptr. 548 (1975).*

(n186)Footnote 594. Cal. Corp. Code § 25000 *et seq* .; Cal. Code Regs. tit. 10, § 250 *et seq* . Those guidelines set limits on how much of any investor's funds the promoter can siphon into personal wages, finders fees, and marketing to other investors. Cal. Code Regs. §§ 10.260.140 *et seq* . and 10.260.216 *et seq.* Moreover, if the offeror hasn't acquired or built the promised project, funds raised by investors must be escrowed and kept out of the promoter's pockets except for use as pledged. Cal. Code Regs. § 10.266.140 *et seq.*, 10.260.216 *et seq.*, and 10.260.151. *See Southern Cal. First Nat'l Bank v. Quincy Cass Assocs., 478 P.2d 37 (Cal. 1970).*

(n187)Footnote 595. *United Hous. Found., Inc. v. Forman, 421 U.S. 837, 852 (1975). See also S.E.C. v. Joiner Corp., 320 U.S. 344, 351 (1943)* (an interest in a limited partnership is a security).

(n188)Footnote 596. *See* Annotation, *Partnership and Joint Venture Interests as Securities Within Meaning of Federal Securities Act of 1933 (15 U.S.C.S. § 77a et seq.) and Securities and Exchange Act of 1934 (15 U.S.C.S. § 78a et seq.), 58 A.L.R. Fed. 408, 416 (1982).*

(n189)Footnote 597. *Goodman v. Epstein, 582 F.2d 388 (7th Cir. 1978), cert. denied, 440 U.S. 939 (1979), criticized in* Conrad E.J. Everhard, *The Limited Partnership Interest: Is It a Security? Changing Times, 17 Del. J. Corp. L. 441 (1992).*

(n190)Footnote 598. Paul Goldstein, Real Estate Transactions 787 (rev. 2d ed. 1988).

(n191)Footnote 599. *Frazier v. Manson, 651 F.2d 1078 (5th Cir. 1981).*

(n192)Footnote 600. *Sea Pines of Va., Inc. v. PLD, Ltd., 399 F. Supp. 708 (M.D. Fla. 1975).*

(n193)Footnote 601. *See Farnsworth v. Nevada-Cal Mgt., Ltd., 188 Cal. App. 2d 382 (1961),* where a limited partnership that was not a public offering was held not to be a security within the purview of the corporate securities act, and compliance was not necessary to effect a valid transfer of such limited partnership interest.

(n194)Footnote 602. *15 U.S.C. § 77a et seq* .

(n195)Footnote 603. *Id.* § 78a *et seq* .

(n196)Footnote 604. Securities Act of 1933 § 2(1), *15 U.S.C. § 77b*(1); Securities Exchange Act of 1934 § 3(a)(10), *15 U.S.C. § 78c*(a)(10); Uniform Securities Act § 401(1).

(n197)Footnote 605. *Landreth Timber Co. v. Landreth, 471 U.S. 681 (1985).*

(n198)Footnote 606. *See generally* Lynn et al., Real Estate Limited Partnerships 133-69 (1977).

(n199)Footnote 607. Offers and Sales of Condominiums or Units in a Real Estate Development, Securities Act Release No. 33-5347, 1 Fed. Sec. L. Rep. (CCH) § 1049 (Jan. 4, 1973) (listed at 17 C.F.R. § 231.5347).

(n200)Footnote 608. *Hocking v. Dubois, 839 F.2d 560 (9th Cir. 1988), 885 F.2d 1449 (9th Cir. 1989).*

+ § 12.16 has been adapted from George Lefcoe, Real Estate Transactions (Michie 1993).

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Supp. To CHAPTER 12 SPECIAL PROBLEMS OF REAL PROPERTY OWNERSHIP

2-12 Thompson on Real Property, Thomas Editions Supp. to § 12.02

Supp. to § 12.02 Rights of Aliens to Own Property.

[Go To Main]

§ 12.02(f) Property Disabilities of Enemy Aliens. [Go To Main]

Add:

Gonzalez v. Department of Transportation, 2004 Ga. App. LEXIS 198 (No. A03A1975, Feb. 13, 2004) (the right of aliens to bring suit in Georgia belongs only to aliens whose place of residence is within the United States).

Add:

Al Odah v. United States, 321 F.3d 1134, 355 U.S. App. D.C. 189 ; *rev'd Rasul v. Bush, 124 S. Ct. 2686 (2004)* (the court described enemy aliens as ones who had status as nationals of a country which is at war with the United States).

Add:

Coronel-Ortiz v. Gonzales, 203 Fed. Appx. 839 (9th Cir. 2006) (an alien was held to have no constitutionally protectable property right to obtain discretionary judicial relief from an order of removal); *Ashkir v. United States, 46 Fed. Cl. 438 (2000)* (a nonresident alien, a citizen of the Republic of Somalia, was denied standing to invoke the *takings clause* against the United States for *5th Amendment* compensation claimed because of destruction of his property during U.S. armed forces' occupation of Somalia).

§ 12.02(g) Trend to Remove Property Disabilities of Aliens Ineligible for Citizenship. [Go To Main]

In line 2 of the second full paragraph change "However, a Wyoming statute expressly prohibits aliens ineligible for citizenship for holding land." to

"However, Wyoming repealed a statute prohibiting land ownership by nonresident aliens ineligible for citizenship."

In line 3 of the second full paragraph change "Kansas, Minnesota, and Wisconsin impose property restrictions on aliens ... " to

"Minnesota and Wisconsin impose property restrictions on aliens ... "

In line 5 of the second full paragraph change "Constitutional or statutory provisions in Arizona, Idaho, and Oregon that imposed disabilities on aliens ineligible for citizenship have all been repealed in recent years" to

"Constitutional or statutory provisions in Arizona, Idaho, Kansas, Oregon, and Wyoming that imposed disabilities on aliens ineligible for citizenship have all been repealed in recent years."

Add:

Gabriel J. Chin, *Heart Mountain Symposium Articles: Citizenship and Exclusion: Wyoming's Anti-Japanese Alien Land Law in Context, 1 Wyo. L. Rev. 497 (2001).*

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Supp. To CHAPTER 12 SPECIAL PROBLEMS OF REAL PROPERTY OWNERSHIP

2-12 Thompson on Real Property, Thomas Editions Supp. to § 12.03

Supp. to § 12.03 Married Persons' Property Disabilities.

[Go To Main]

§ 12.03(a) Historical Background. [Go To Main]

§ 12.03(a)(2) Under Early American Law.

Note 86, add:

Fred Franke, "Asset Protection and Tenancy by the Entirety," *34 ACTEC J. 210 (Spring 2009)* (Married Women's Property Acts abrogated the dominance of a husband over his wife's property, thus reversing the common law and bringing parity of property rights to both spouses.)

Kenneth W. Kingma, "Property Division at Divorce or Death for Married Couples Migrating Between Common Law And Community Property States," *35 ACTEC J. 74 (Summer 2009)* (explaining married Women's Property Acts gave women the right to own property even upon divorce)

Nancy Ray, Notes & Comments: III. *Joint Accounts and Divorce Joint Accounts, Setoff, and Distribution of Marital Property in North Carolina*. *4 N.C. Banking Inst. 475* (April, 2000).

add:

Canjar v. Cole, 770 N.W.2d 449 (Mich. App. 2009) (explaining although many legal structures remain intact to protect the marital estate, "nothing in the law today functions to prevent one spouse from acquiring property in an individual capacity without the consent of the other");

In re Estate of Miltenberger, 753 N.W.2d 219 (Mich. 2008) (Corrigan, J., concurring) (noting married women's property acts removed the disabilities of coverture).

§ 12.03(b)(2) Property Restrictions Related to Dower, Curtsey and Their Modern Equivalents.

Add:

Inlow v. Inlow, 797 N.E.2d 810 (Ind. App. 2003) (affirms statutory division of estate assets: 50% goes to the surviving spouse and 50% divided by the children).

Add:

Canjar v. Cole, 770 N.W.2d 449 (Mich. App. 2009) (explaining property acquired before marriage and property acquired independently during marriage remain a woman's property and she may dispose of them as she sees fit).

Add:

Elizabeth Barker Brandt, "The Origins of Idaho's Community Property System: An Attempt to Solve a Legislative Mystery," *46 Idaho L. Rev. 37 (2009).*

§ 12.03(b)(4) Restrictions on Homestead Rights.

Add:

In re Littleton, 2009 Bankr. LEXIS 2012 (interpreting Tennessee's homestead exemption); *Butturini v. Farmer, 2009 U.S. Dist. LEXIS 509* (interpreting Tennessee's homestead exemption); *In re Staggs, 2008 Bankr. LEXIS 84* (applying Tennessee's homestead exemption).

Add:

Nelson v. Nelson, 2010 Ala. Civ. App. LEXIS 34 (holding a spouse could not dissent from a conveyance of the marital estate after she signed a postnuptial agreement waiving her homestead rights); *Yeager v. Lucy, 2008 Ala. LEXIS 58* (holding that for a spouse to be protected by the homestead exemption, the property at issue must be the spouse's place of actual residence, and holding that one spouse can abandon a homestead interest); *Sheffield v. FDIC, 2009 U.S. Dist. LEXIS 84308* (holding a husband may cancel a mortgage on the ground he forged his wife's signature, but that he must

restore consideration paid by the mortgagee); *In re Cox, 2009 Bankr. LEXIS 1551* (imposing an equitable mortgage on a husband and wife despite the fact the wife's signature was not on the mortgage because the wife indicated through her actions that should would have signed the mortgage had it been presented to her); *Nat'l City Bank v. Engler, 777 N.W.2d 762 (Minn. App. 2010)* (holding the statute requiring both spouses to sign a conveyance of homestead property is complied with when a non-signing spouse participates in the mortgage process, including the closing, obtains a benefit from the mortgage, and waives any rights to the homestead). *See Mask v. Wells Fargo Minn., 2009 Bankr. LEXIS 4199* (finding a deed of trust valid, despite it never having been signed by the wife); *cf. In re Burks, 2009 Bankr. LEXIS 4120* (holding a deed of trust was not a purchase money security interest and therefore invalid, because it was not signed by both spouses); *see also Ramsey v. Countrywide Home Loans, Inc., 2009 Bankr. LEXIS 3541* (invalidating a mortgage because the husband had no knowledge of the mortgage executed by the wife and his signature was forged); *In re Grinstead, 2009 Bankr. LEXIS 2352* (explaining the homestead exemption does not give a spouse a property interest, merely the power to veto attempted conveyances by the other spouse alone); *Countrywide Home Loans, Inc. v. Parker, 2008 Miss. LEXIS 104* (invalidating a mortgage because it was not signed by the husband); *Szawicki v. Szawicki, 2009 Neb. App. LEXIS 144* (finding a deed not signed by the wife which did not divest her of any interest in the property she would have been able to claim through the marriage was valid); *Kaler v. Linne, 2008 Bankr. LEXIS 3559* (holding a mortgage was not enforceable because it was neither executed in the presence of witnesses nor notarized by both spouses); *Hill v. Discover Bank (Discover Card) SA Discover Fin. Servs., 2008 Okla. Civ. App. LEXIS 88* (holding a husband's signature was not required for a wife to convey the couple's homestead because the husband's prior quitclaim deed to his wife stripped him of all ownership claims to the homestead).

Add:

Perry v. Dearing, 345 F.3d 303, 315 (5th Cir. 2003) (one who has a homestead interest in the possessory estate of a tenancy is able to protect the possessory interest from all creditors who do not have a better title, including the owner).

§ 12.03(b)(6) Restrictions on Conveyances Directly between Spouses.

Add:

Howard Fink, June Carbone, *Between Private Ordering and Public Fiat: A New Paradigm for Family Law Decision-making, 5 J. L. Fam. Stud. 1 (2003).*

add:

15A Am. Jur. 2d Community Property § 67 (discussing generally restrictions on transfers between spouses in community property states).

§ 12.03(b)(7) Restrictions Relating to Same Sex Married Couples.

Courts in every state face the challenge of forming jurisprudence relating to recognition of same sex marriages and any property rights associated with participants in those marriages. For at least the foreseeable future, it is likely that same

sex couples generally will not enjoy the same range of property rights accorded heterosexual couples, either married or unmarried.

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Supp. To CHAPTER 12 SPECIAL PROBLEMS OF REAL PROPERTY OWNERSHIP

2-12 Thompson on Real Property, Thomas Editions Supp. to § 12.04

Supp. to § 12.04 Property Disabilities Applied to Minors

[Go To Main]

add:

Cf. Peters v. ContiGroup, 292 S.W.3d 380 (Mo. Ct. App. 2009) (holding mere occupancy is enough for a minor to maintain a nuisance action).

Add:

A variety of transactions involving minors are governed by statute. *See, e.g., Wilson v. Wilson, 154 P.3d 1136 (Kan. App. 2006)* (reimbursement to parent-custodian in behalf of minor, governed by Kansas Uniform Transfer to Minors Act); *McGehee v. McGehee, 342 B.R. 587 (W.D. Mo. 2006)* (joint education account for mother (debtor) and her daughter not established in accordance with Missouri Uniform Transfers to Minors Act, and was therefore included in the bankruptcy estate).

add:

Juanda Lowder Daniel, "Virtually Mature: Examining the Policy of Minors' Incapacity to Contract Through the Cyberscope," *43 Gonz. L. Rev. 239* (2007/2008) (explaining a minor generally must return property if he or she disaffirms a contract).

§ 12.05(b) Conveyances Before Adjudication of Incompetency [Go To Main]

Add:

In re Estate of Johnson, 739 N.W.2d 493 (Iowa, 2007) (attempt by joint tenant to convey her interest in property was rendered invalid by her incompetency).

Add:

McMahan v. Webb, 990 So.2d 825 (Miss. App. 2008) (holding a deed executed by a woman that converted her fee simple interest into a tenancy in common with her sister was invalid because the deeding sister could not have understood the consequences of her conveyance); *In re Marriage of Harp, 278 S.W.3d 681 (Mo. App. 2008)* (holding that in the absence of clear, cogent, and convincing evidence that the party was mentally incompetent at the time a deed was signed the court would not set aside the deed); *In re Estate of Pringle, 751 N.W.2d 277 (S.D. 2008)* (holding despite evidence of later mental incompetence, a testator was not mentally incompetent when she signed her will); *In re Moran v. Necaise, 821 So. 2d 903* (Miss. App., 2002) (held that a father's mental weakness did not reach the level of incompetence necessary to justify the setting aside of a deed).

Add:

See also Estate of Lee v. Hiler, 141 S.W.3d 517 (Mo. Ct. App. 2004) (following *Gifford v. Geosling*).

Change Bowden v. Griffin to Bowden v. Grindle.

§ 12.05(c) Conveyances After Adjudication of Incompetency. [Go To Main]

add:

Acuff v. Bumgarner, 2009 Ark. App. LEXIS 1003 (reversing a grant of summary judgment and ordering further review where one party knew at the time a deed was signed the other party had previously been deemed mentally incompetent in a court proceeding in another state).

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Supp. To CHAPTER 12 SPECIAL PROBLEMS OF REAL PROPERTY OWNERSHIP

2-12 Thompson on Real Property, Thomas Editions Supp. to § 12.06

Supp. to § 12.06 Property Disabilities of Prisoners.

[Go To Main]

add:

Isaac Colunga, "An Alternative Look at the *Takings Clause* and Inmate Trust Accounts," *39 U. Tol. L. Rev. 791 (Summer 2008)* (providing a history of common law prisoner property rights).

Add:

But see, Harrison v. Fed. Bureau of Prisons, 611 F. Supp. 2d 54 (D.D.C. 2009) (Civil Action No. 07-1543 (PLF), D.D.C. 2009) (the prisoner did not have a property right or liberty interest in commissary pricing). *Dickens v. Taylor, 464 F. Supp. 2d 341 (D. Dela. 2006)* (a prisoner had no property interest in determining his prison classification or housing assignment).

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Supp. To CHAPTER 12 SPECIAL PROBLEMS OF REAL PROPERTY OWNERSHIP

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Supp. to § 12.07 Rights of Non-profit Unincorporated Associations to Acquire and Hold Real Property Interests.

[Go To Main]

§ 12.07(b) Rights of Non-profit Unincorporated Associations to Acquire and Hold Real Property Interests. [Go To Main]

§ 12.07(b)(1) Conveyances Considered as Void

In line 2 of the second paragraph of the subsection, change "tread" to "treat"

§ 12.07(b)(4) Conveyances Permitted to Be Made to the Association Directly.

Add:

Edwards v. Burke, 102 P.3d 1271 (Mont. 2004) (following *Rehder v. Rankin*).

§ 12.07(d) Rights of Unincorporated Associations to Control, Manage, and Transfer Real Property [Go To Main]

§ 12.07(d)(1) Associations That Are Subject to Hierarchical Control

Add:

See, Lloyd J. Lunceford, *A Guide to Church Property Law: Theological, Constitutional and Practical Considerations* (2006).

Add:

From the *Heart Church Ministries, Inc. v. African Methodist Episcopal Zion Church, 370 Md. 152, 803 A.2d 548* (Md., 2002) (Question of ownership of property between local church and parent church must be resolved without inquiring into ecclesiastical questions).

Akoury v. Roman Catholic Archbishop of Boston, 2004 Mass. Super. LEXIS 349 (Mass. Super. Ct. 2004) (holding that the court cannot interfere with a church's ability to close local congregations).

Add:

Alivin J. Esau, *The Judicial Resolution of Church Property Disputes: Canadian and American Models, 40 Alberta L. Rev. 767* (April, 2003) .

Add:

Jewish War Veterans' Mem. Home Ass'n v. Jewish War Veterans of the United States of America, 2004 U.S. Dist. Lexis 5426 (No. 03-40136, Mar. 30, 2004) (A subordinate organization cannot change its contractual relationship with the parent organization by amending the bylaws).

§ 12.07(d)(2) Associations That Are Not Subject to Hierarchical Control.

add:

Episcopal Church v. Gauss, 2009 Conn. Super LEXIS 226 (following the Trinity decision); *Episcopal Church Cases, 198 P.3d 66 (Cal. 2009)* (holding where the governing documents of the association made clear that property was held in trust for the general church, a local church could not maintain its claim to the property).

Add:

Viravgona v. Wat Buddha Samakitham, 279 S.W.3d 44 (Ark. 2009) (following Holiman's holding). *Tubiolo v. Abundant Life Church, 605 S.E.2d 161 (N.C. Ct. App. 2004)* (holding that local members have established property rights in their congregation and could challenge termination); *but see Emory v. Jackson Chapel First Missionary Baptist Church, 598 S.E.2d 667 (N.C. Ct. App. 2004)* (finding that local members had no established property rights).

Add Subsequent History to Antioch Temple, Inc. v. Parekh:

Overruled in part by, explained by Callahan v. First Congregational Church of Haverhill, 808 N.E.2d 301 (Mass. 2004) (explaining that the right to organize voluntary religious associations, disseminate religious doctrine, and to create religious tribunals is unquestioned while holding that congregational and hierarchical churches are entitled to autonomy over church disputes touching on matters of doctrine canon law, polity, discipline, and ministerial relationships).

Daniel R. Suhr, "On the Freedom of a Congregation: Legal Considerations when Lutherans Look to Change Denominational Affiliation," 13 *Tex. Rev. L. & Pol.* 365 (2009); Note, "Church Property and Institutional Free Exercise: The Constitutionality of *Virginia Code Section 57-9*," *95 Va. L. Rev. 1841 (2009)* (arguing Virginia's statute that attempts to resolve property disputes in the event of church division may be unconstitutional).

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Supp. to § 12.09 Property Rights of Non-stock Private Religious Corporations.

[Go To Main]

§ 12.09(a) Property Rights Related to Corporate Governance. [Go To Main]

Add:

Camp St. Mary's Assn. of the W. Ohio Conference of United Methodist Church, Inc. v. Otterbein Homes, 889 N.E.2d 1066 (Ohio App. 2008) (absolute and irrevocable gift of property to a church-related nonprofit corporation); *Maffei v. Roman Catholic Archbishop of Boston, 867 N.E.2d 300 (Mass. 2007)* (gift of real property from parishioners to the Roman Catholic Archbishop of Boston, a corporation sole).

Second International Baha'i Council v. Chase, 106 P.3d 1168 (Mont. 2005) (in a dispute over property held by a religious organization, the trial court considered the issue of the leader's control of the property in his capacity as corporate president).

See, Meghaan Cecilia McElroy, Note, "Possession is Nine Tenths of the Law: But Who Really Owns a Church's Property in the Wake of a Religious Split Within a Hierarchical Church?" *50 Wm. & Mary L. Rev. 311 (2008).*

§ 12.09(b) Property Rights Related to Statutory Regulation [Go To Main]

add:

VA. CODE ANN. § 57-20 (benevolent associations cannot hold more than five acres of land at any one time).

Add:

Merkos L'Inyonei Chinuch, Inc. v. Sharf, 873 N.Y.S.2d 145 (2009) (action by religious organization to recover possession of property used by the congregation).

In the *Matter of Holy Spirit Association for the Unification of World Christianity, 125 P.3d 1090 (Kan. App. 2006)* (tax exemption for religious property used exclusively for religious purposes); *Condemnation Proceeding by Redevelopment Authority of Philadelphia, 891 A.2d 820 (Pa. Commw. 2006)* (taking private property by eminent domain, as part of a redevelopment project, and then turning the property over to private religious organization to construct and operate a school violates the establishment clause).

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Supp. To CHAPTER 12 SPECIAL PROBLEMS OF REAL PROPERTY OWNERSHIP

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Supp. to § 12.10 Property Rights of Non-Stock Private Cemetery Corporations

[Go To Main]

delete:

N.J. STAT. ANN. § 8A:6-1 (statute has been repealed).

In line 8 of note 342 change "TENN. CODE ANN. § 46-2-102" to 'TENN. CODE. ANN. § 46-1-108".

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Supp. to § 12.12 Property Rights of Stock Private Corporations Generally

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***Change* ALA. CODE § 10-2A-20 *to* ALA. CODE § 10-2b-3.02.**

delete:

OR. REV. STAT. § 708.400(3).

Add:

In re Barfield, 261 B.R. 793 (Bankr. M.D. Fla. 2001) (A corporation may transfer property outside the ordinary course of business if it has the approval of the shareholders).

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Supp. To CHAPTER 12 SPECIAL PROBLEMS OF REAL PROPERTY OWNERSHIP

2-12 Thompson on Real Property, Thomas Editions Supp. to § 12.13

Supp. to § 12.13 Property Rights of Stock Private Corporations for Public Utilities

[Go To Main]

add:

Hash v. United States, 2008 U.S. Dist. LEXIS 23098 (applying *Idaho Code § 62-104*).

In line 1 of note 377 change **WASH. REV. CODE ANN. § 81-360010** ***to*** **WASH. REV. CODE ANN. § 81-36-010.**

add:

TE Prods. Pipeline Co., LLC v. Davidson Ranch, Inc., 2009 U.S. Dist. LEXIS 50103 (holding a utility's right of condemnation under Arkansas law does not include a right to condemn private property for the purpose of accessing its right-of-way).

Add:

City of Freeman v. Salis, 630 N.W.2d 699 (S.D. 2001) (City is given great discretion in finding necessity, the findings

must substantially violate logic and indicate gross abuse).

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Supp. To CHAPTER 12 SPECIAL PROBLEMS OF REAL PROPERTY OWNERSHIP

2-12 Thompson on Real Property, Thomas Editions Supp. to § 12.15

Supp. to § 12.15 Property Rights of Private Corporations in Other Jurisdictions

[Go To Main]

Change:

In line 1 of note 405 change

IDAHO CODE ANN. *§ 30-1-106(g) to IDAHO CODE ANN.* § 30-1-1501(g) (statute providing an out-of-state corporation must be certified to transact business in the state).

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Supp. To CHAPTER 12 SPECIAL PROBLEMS OF REAL PROPERTY OWNERSHIP

2-12 Thompson on Real Property, Thomas Editions Supp. to § 12.16

Supp. to § 12.16 Choice of Entity for Acquiring and Holding Real Property Interests

[Go To Main]

§ 12.16(a) Missing [Go To Main]

§ 12.16(a)(1) Missing

§ 12.16(a)(1)(i) The Role of the Lawyer in Setting Up the Entity

Rule 2.2 of the Model Rules of Professional Conduct has been deleted (http://www.abanet.org/cpr/mrpc/mrpc_toc.html). Presumably, the type of conflict described in this section is now governed by Model Rules 1.7-1.10.

Add:

Manion v. Nagin, 2004 U.S. Dist. LEXIS 1776 (No. 3-02-CV-2294-N, Feb. 6, 2004) (State rules of professional responsibility are designed to make it easier for the attorney to represent the interests of the corporation without the conflicting responsibility to represent the individual members of the corporation.)

Add:

William H. Simon, *Whom or (What) Does the Organization's Lawyer Represent?: An Anatomy of Intraclient Conflict, 91 Calif. L. Rev. 57 (2003).*

Darian M. Ibrahim, Article: *Solving The Everyday Problem of Client Identity in the Context of Closely Held Businesses, 56 ALA. L. REV. 181* (Fall, 2004).

§ 12.16(a)(4) Management, all General Partners Run the Show

add:

See Uniform Partnership Act (1994)(1997), http://www.nccusl.org/Update/uniformact_factsheets/uniformacts-fs-upa9497.asp (listing the states that have adopted a version of the Uniform Partnership Act).

§ 12.16(a)(4)(i) Management: All General Partners Run the Show

Add:

Ingram v. Deere, 288 S.W.3d 886 (Tex. 2009) (explaining the determination of whether a partnership exists is based on the totality of the circumstances, including profit sharing and intention of the parties, among other factors); *Walker v. White, 2009 U.S. Dist. LEXIS 125581* (following the Ingram v. Deere decision). *Cap Care Group, Inc. v. McDonald, 561 S.E.2d 578 (N.C. App. 2002)* (Evidence supported conclusion that valid partnership was formed between commercial real estate companies and a business partner; wife stated that she was aware of partnership and that the course of business indicated that there was a partnership).

§ 12.16(a)(8) Corporation.

§ 12.16(a)(8)(ii) Liability

Add:

Estate of Crescent Machinery v. Roberson, 2003 Bankr. LEXIS 546 (No. 02-41005-DML-11, Jun. 5, 2003).

add:

E. Hampton Union Free Sch. Dist. v. Sandpebble Builder, Inc., 66 A.D.3d 122 (N.Y. App. Div. 2009) (holding the evidence was insufficient to show an owner abused the corporate privilege because, in part, there was no evidence the owner undercapitalized the business).

§ 12.16(a)(8)(iii) Dissolution.

Add:

C-One Tech. v. Mount & Stoelker, P.C., 2008 U.S. Dist. LEXIS 77642 (N.D. Cal. Oct. 3, 2009) ; *Valley Forge Ins. Co. v. APL Co., 2010 U.S. Dist. LEXIS 35857* (C.D. Cal. March 16, 2010) (finding that an insurance company could be sued

even after dissolution of a corporation in the course of winding up the corporation's affairs); *City of Rialto v. United States DOD, 2005 U.S. Dist. LEXIS 2219* (C.D. Cal. Feb. 3, 2005) (explaining the holding in *Penasquitos, Inc. v. Superior Court*).

§ 12.16(a)(9) Limited Partnership

§ 12.16(a)(9)(i) Management

In line 1 of note 538 change DeSimoni v. Brusco, 235 Cal. Rptr. 711 to DeSimoni v. Brusco, 236 Cal Rptr. 711.

§ 12.16(a)(9)(iii) Transferability

***In line 4 of note 566 change* two years *to* one year.**

§ 12.16(a)(10) S Corporation.

§ 12.16(a)(10)(iii) Management.

Add:

Luiz v. Commisioner, 87 T.C.M. (CCH) 838 (T.C. 2004) (criticized the 11th Circuit's *Selfe* decision and held that taxpayers could only deduct losses in connection with an S corporation up to, but not exceeding, their basis in the corporation).

§ 12.16(a)(11) The Limited Liability Company.

Add:

Fla. Stat. Ann. § 608.401 amended by 2002 Fla. Sess. Law Serv. Ch. 2002-272 (C.S.H.B. 787).

§ 12.16(a)(11)(i) Tax.

Add:

Rev. Rul. 88-76, 1988-2 C.B. 360, 361 superseded by *Rev. Rul. 98-37, 1998-2 C.B. 133, 133-34* .

, *Cal. Rev. & Tax. Code §§ 23091, 23092* have been repealed.

In line 1 of note 585 change **CAL. REV. & TAX CODE §§ 23901, 2902, 23153** ***to*** **CAL. REV. & TAX CODE §§ 17941-17947.**

§ 12.16(a)(11)(ii) Management.

In line 3 of note 586 change

Texas H.B. No 278 § 46, Arts. 2.12 and 2.13 *to TEX. BUS. ORGS. CODE §§ 101.607, 101.608.*

Add:

ALA. CODE § 10-12-21; *COLO. REV. STAT. §§ 7-80-108*; [Go To Main] (permitting the LLC agreement to modify the duties of members and managers, as long as the agreement does not eliminate liability in certain situations).

§ 12.16(a)(11)(iii) Transferability.

In line 1 of note 595 change

UTAH CODE ANN. *§ 48-2b-131(1) to UTAH CODE ANN.* § 48-2c-804(2).

In line 1 of note 603 delete:

COLO. REV. STAT. ANN. § 7-80-204(b); 95; *KAN. STAT. ANN. § 17-7607(a)(2)*; Tex. H.B. No. 278, § 46 art. 3.02(2); 1991 NEV. STAT. § 290(b) (the limitation no longer appears in any of these statutes; only the Wyoming statute continues to have a 30-year limitation)

§ 12.16(a)(11)(iv) Continuity.

Add:

Rev. Rul. 88-76,1988-2 C.B. 360, 361 superseded by , *Rev. Rul. 98-37, 1998-2 C.B. 133, 133-34* .

§ 12.16(a)(11)(v) Liability.

In line 1 of note 609 change

1710(a) to 17101(a)

In line 1 of note 609 change

"Neither the members, the managers, nor the employees of a limited liability company are personally liable under a judgment, decree, or order of the court or any other manner, for a debt, obligation, or liability of the limited liability company. *UTAH CODE ANN. § 48-2b-109*" to "[N]o organizer, member, manager, or employee of a company is personally liable under a judgment, decree, or order of a court, or in any other manner, for a debt, obligation, or liability of the company or for the acts or omissions of the company or of any other organizer, member, manager, or employee of the company. *UTAH CODE ANN. § 48-2c-601*."

§ 12.16(a)(11)(viii) Limited Liability Partnerships for Professionals

In line 1 of note 622 change

MINN. STAT. ANN. *§ 323.14 to MINN. STAT. ANN.* § 323A.0306.

In line 1 of note 622 delete:

As the reporters' notes to *Minn. Stat. Ann § 323.14* state: "The shield protects only against liability derived from partner status; it does not affect claims based on personal misconduct. For example, a partner who is culpably negligent cannot use the L.L.P. shield to defend against his or her own personal liability." (This statute has been repealed and thus the reporter's note to this section is no longer relevant)

Add:

Douglas R. Richmond, "The Partnership Paradigm and Law Firm Non-equity Partners," *58 Kan. L. Rev. 507 (2010)* (discussing LLP liability regimes).

In line 2 delete:

"DEL. CODE ANN. § 6-156(a) (requires a minimum financial responsibility of $1,000,000 for L.L.P.s)." (this statute has been superseded by *6 DEL. CODE ANN. § 15-1001-04* which does not require liability insurance).

In line 1 change

CAL. CORP. CODE § 15002 to *CAL. CORP. CODE § 16101(14)*.

In line 1 of note 627 change

TEX. REV. STAT. ANN. Art. 6132b, § 5 to *TEX. BUS. ORGS. CODE § 152.801-0*4.

In line 1 of note 627 delete:

"*6 DEL. CODE ANN. § 6-1515*; *KY. REV. STAT. ANN. § 362.220*" (these statutes have been superseded by statutes that provide for more than just tort liability protection).

Add:

KY. REV. STAT. ANN. § 362.200(2) (providing for protection from contract liability).

In line 1 change

"DEL. CODE ANN. § 6-1544 (Registration and Annual Renewal: $100 multiplied by the number of partners, Maximum $150,000)" to "*6 DEL. CODE ANN. § 15-1207* (identifying the costs associated with LLP filing)".

In line 2 change

"*FLA. STAT. ANN. § 620.78* (Registration and Annual Renewal: $100 multiplied by the number of partners, Maximum $150,000)" to "*FLA. STAT. ANN. § 620.81055*".

In line 3 of note 629 change

TENN. CODE ANN. *§ 61-1-143 to TENN. CODE ANN.* § 61-1-1001

In line 5 of note 629 change

(Registration: $25 for the first two partners, plus $3 multiplied by the number of partners over the first two; annual renewal $25) to (Registration: $35, plus $3 multiplied by the number of partners over the first two; annual renewal $25).

Registration:

Change:

ARIZ. REV. STAT. ANN. *§ 29-244 to ARIZ.REV. STAT. ANN.* § 29-1101o.

Change:

CAL. CORP. CODE § 15049 to *CAL. CORP. CODE § 16953*.

Change:

CONN. GEN. STAT. *§ 34-81b to CONN. GEN. STAT.* § 34-419.

Change:

DEL. CODE. ANN. § 6-1546 to *6 DEL. CODE. ANN. § 15-1001*.

Change:

D.C. CODE ANN. *§ 41-143 to D.C. CODE ANN.* § 33.110.01.

Change:

1995 Fla. Sess. Law Serv. 242 § 620.78 to FLA. CODE ANN. § 628.9001o.

Change:

IDAHO CODE *§ 53-343A to IDAHO CODE* § 53-3-306.

Change:

ILL. REV. STAT. Ch. 805 act 205 § 8.1 to *805 ILL. COMP. STAT. ANN 206/1001*.

Change:

IND. CODE ANN. *§ 23-4-1-35 to IND. CODE ANN.* § 23-4-1-45.

Change:

IOWA CODE *§ 486.44 to IOWA CODE* § 486A.1001.

Change:

KAN. STAT. ANN. *§ 56-345 to KAN. STAT. ANN.* § 56a-306.

Change:

MD. CORPS & ASS'NS CODE ANN. § 9-801 to *MD. CORPS & ASS'NS CODE. ANN. § 9A-801*

Change:

MINN. STAT. *§ 323.44 to MINN. STAT.* § 323A.1001.

Change:

MISS. CODE ANN. *§ 79-12-87 to MISS. CODE ANN.* § 79-13-1001.

Change:

"1995 N.J. ALS 96. Will be codified at *N.J. REV. STAT § 42:1-40*" *to* "*N.J. REV. STAT. § 42:1A-2*.

Change:

N.M. STAT. ANN. *§ 54-1-44 to N.M. STAT. ANN.* § 54-1A-1001.

Change:

OHIO REV. CODE ANN. *§ 1775.61 to OHIO REV. CODE ANN.* § 1776.61.

Change:

"1995 Or. ALS 689. Will be codified at *OR. REV. STAT. § 68.620*" to "*OR. REV. STAT. § 67.590*".

Change: .

1994 Pa. Legis. Serv. 106 § 8201 to 15 PA. C.S. § 8506

Change:

S.D. CODIFIED LAWS ANN. *§ 48-7-108 to S.D. CODIFIED LAWS ANN.* § 48-7A-1001.

Change:

TENN. CODE ANN. Article 8 of the Uniform Commercial Code § 61-1-1001.

Change:

TEX. REV. CIV. STAT. ANN. Art. 6132b, § 45-A to *TEX. BUS. ORGS. CODE § 152.802*.

Change:

VA. CODE ANN. *§ 50-43.1 to VA. CODE ANN.* § 50-73.132.

Change:

1995 Wash. Legis. Serv. 337 *§ 25.04.3 to WASH. REV. CODE* § 25.05.500.

Change:

"1995 Wis. ALS 97. Will be codified at *Wis. Stat. § 178.40*" to "*WIS. STAT. § 178.40*".

Liability:

Change:

ARIZ. REV STAT. ANN. *§ 29-215 to ARIZ. REV STAT. ANN.* § 29-1026.

Change:

CAL. CORP. CODE § 15015 to *CAL. CORP. CODE § 16306*.

Change:

CONN. GEN. STAT. *§ 34-53 to CONN. GEN. STAT* § 34-327.

Change:

DEL. CODE. ANN. § 6-1515 to *6 DEL. CODE. ANN. § 15-306*.

Change:

D.C. CODE ANN. *§ 41-146 to D.C. CODE ANN.* § 33-103.06.

Change:

1995 Fla. Sess. Law Serv. 242 § 620.79 to FLA. CODE ANN. § 620.8306.

Change:

IDAHO CODE *§ 53-315 to IDAHO CODE* § 53-3-306.

Change:

ILL. REV. STAT. Ch. 805 act 205, § 15 to *805 ILL. COMP. STAT. ANN 206/306*.

**

Change:

IOWA CODE *§ 486.15 to IOWA CODE* § 486A.306.

Change:

KANS. STAT. ANN. *§ 56-315 to KAN. STAT. ANN.* § 56a-1001.

Change:

MD. CORPS & ASS'NS CODE ANN. § 9-307 to *MD. CORPS & ASS'NS CODE ANN. § 9A-307*.

Change:

MINN. STAT. *§ 323.14 to MINN. STAT.* § 323A.0306.

Change:

MISS. CODE ANN. *§ 79-12-29 to MISS. CODE ANN.* § 79-13-306.

Change:

"1995 N.J. ALS 96. Will be codified at *N.J. REV. STAT § 42:1-15*" to "*N.J. REV. STAT. § 42:1A-18*".

Change:

N.M. STAT. ANN. *§54-1-48 to N.M. STAT. ANN.* § 54-1A-306.

Change:

N.D. CENT. CODE *§ 45-22-03 to N.D. CENT. CODE* § 45-22-08.

Change:

OHIO REV. CODE ANN. *§ 1775.61 to OHIO REV. CODE ANN.* § 1776.36.

Change:

"1995 Or. ALS 689. Will be codified at *OR. REV. STAT. § 68.279*" to "*OR. REV. STAT. § 67.105*".

Change:

1994 Pa. Legis. Serv. 106 § 8204 to 15 PA. C.S. § 8523.

Change:

S.D. CODIFIED LAWS ANN. *§ 48-2-15 to S.D. CODIFIED LAWS ANN.* § 48-7A-306.

Change:

TENN. CODE ANN. *§ 61-1-114 to TENN. CODE. ANN.* § 61-1-306.

Change:

Article 9 of Uniform Commercial Code, *§ 15* to *TEX. BUS. ORGS. CODE § 152.801*.

Change:

VA. CODE ANN. *§ 50-15 to VA. CODE ANN.* § 50.73.96.

Change:

1995 Wash. Legis. Serv. 337 *§ 15.04.7 to WASH. REV. CODE.* § 25.05.125.

Change:

"1995 Wis. ALS 97. Will be codified at *Wis. Stat. § 178.12*" to "*WIS. STAT. § 178.12*".

§ 12.16(b) Application of Securities Laws [Go To Main]

§ 12.16(b)(2) What Is a Security?

In line 1 of note 646 change"

15 U.S.C. § 77(b), (1) (§ 2(1)) to *15 U.S.C. § 77a(2)(a)(1).*

In line 1 of note 646 change

15 U.S.C. § 77b(1) to 15 U.S.C. § 77a(2)(a)(1).

add:

James D. Gordon III, "Common Enterprise and Multiple Investors, a Contractual Theory for Defining Investment Contracts and Notes," *1998 Colum. Bus. L. Rev. 635 (1998)* (discussing the problems with the commonality tests used by various courts).

Add:

Schruefer v. Winthorpe Grant, 2003 U.S. Dist. LEXIS 3650 (No. 99 cv 9365 (GBD), Mar. 12, 2003).

§ 12.16(b)(2)(iii) When is a "Note" a Security?

Add:

See also SEC v. Edwards, 540 U.S. 389 (2004) ; *SEC v. Global Teecom Servs. L.L.C., 325 F. Supp. 2d 94 (D. Conn. 2004)* ; *United States v. Pendergraph, 388 F.3d 109 (4th Cir. 2004)* ; *SEC v. Mut. Benefits Corp., 323 F. Supp. 2d 1337 (S.D. Fla. 2004)* ; *Boo'ze v. State, 2004 Del. LEXIS 145 (Del. 2004)* ; *Silvia v. Sec'y of the Commonwealth, 810 N.E.2d 825 (Mass. App. Ct. 2004)* ; *Perrysburg Twp. V. City of Rossford, 814 N.E.2d 44 (Ohio 2004)* ; *Bailey v. State, 2004 Tex. App. LEXIS 7992 (Tex. App. 2004)* ; *State v. Pedersen, 95 P.3d 385 (Wash. App. 2004)* .

add:

Liberty Prop. Trust v. Republic Props. Corp., 577 F.3d 335 (D.C. Cir. 2008) (holding limited partnership interests were a security because real estate developers did have sufficient control of the limited partnership); Consolidated Mgmt. Group, LLC v. Dep't of Corps., 2008 Cal. App. LEXIS (applying the Williamson v. Tucker factors and finding the interests, although general partnership-like, were securities).

§ 12.16(b)(3) Federal Securities Laws

§ 12.16(b)(3)(iv) Liability Issues for Non-Promoters

Add:

Stoneridge Inv. Partners, LLC v. Scientific-Atlanta, Inc., 552 U.S. 148 (U.S. 2008) (discussing and following the Central Bank holding). *S.E.C. v. Peretz, 2004 U.S. Dist. LEXIS 9512* (No. 00-11981-PBS, Apr. 13, 2004).

§ 12.16(b)(4)(ii) State Subdivided Lands Act.

In line 1 of note 702 change

First Amendment to *ARIZ. REV. STAT. ANN. § 33-1223 et. seq.*

§ 12.16(b)(4)(iii) State Securities (Blue Sky) Laws

In line 1 of note 723 delete

ARK. CODE ANN. § 67-1246.

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Supp. To CHAPTER 12 SPECIAL PROBLEMS OF REAL PROPERTY OWNERSHIP

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Lloyd J. Lunceford, *A Guide to Church Property Law: Theological, Constitutional and Practical Considerations* (2006).

Add to Articles:

Brandt, Elizabeth Barker "The Origins of Idaho's Community Property System, an Attempt to Solve a Legislative Mystery," *46 Idaho L. Rev. 37 (2009).*

Brower, Todd "It's Not Just Shopping, Urban Lofts, and The Lesbian Gay-By Boom: How Sexual Orientation Demographics Can Inform Family Courts," 17 *Am. U. J. Gender Soc. Pol'y & L.* 1 (2009).

Colunga, Isaac "An Alternative Look at the establishment clause and Inmate Trust Accounts," *39 U. Tol. L. Rev. 791 (Summer 2008).*

Daniel, Juanda Lowder "Virtually Mature: Examining the Policy of Minors' Incapacity to Contract Through the Cyberscope," *43 Gonz. L. Rev. 239* (2007/2008).

Ehrlich, Elizabeth. "Taking the Religion Out of Religious Property Disputes," *46 B.C. L. Rev. 1069* (September, 2005).

Finetti, Cristina. "Limiting the Scope of Religious Land Use and Institutionalized Persons Act: Why RLUIPA Should Not Be Amended to Regulate Eminent Domain Actions Against Religious Property," *38 Seton Hall L. Rev. 667 (2008).*

Angela M. Ford, "Private Alienage Discrimination and the Reconstruction Amendments," *49 U. Kan. L. Rev. 457 (Jan.*

2001).

Franke, Fred "Asset Protection and Tenancy by the Entirety," *34 ACTEC J. 210 (Spring 2009).*

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Moritz, J. Kenneth. "Pacific Gas and Electric Co. v. California Public Utilities Commission: Property in an Envelope," *49 U. Pitt. L. Rev. 229 (Fall 1987).*

Note, "Church Property and Institutional Free Exercise: The Constitutionality of *Virginia Code Section 57-9, 95 Va. L. Rev.* 1841 (2009).

Peluso, Stephen. "Protecting and Managing the Property of Persons with Mental Retardation," 5 *Conn. Prob. L.J.* 125 (1989).

Richmond, Douglas R. "The Partnership Paradigm and Law Firm Non-equity Partners," *58 Kan. L. Rev. 507 (2010).*

Robin Rose Stiller, "International Estate Planning 101: A Basic Guide to Estate Planning for Non-Citizen Clients," *15 Akron Tax. J. 121 (2000).*

Rosich-Schwartz, Damaris, "Tenancy by the Entirety: The Traditional Version of the Tenancy is the Best Alternative for Married Couples, Common Law Marriages, and Same-Sex Partnerships," *84 N.D. L. Rev. 23 (2008).*

Strasser, Mark "As Iowa Goes, So Goes The Nation: Varnum v. Brien and its Impact on Marriage Rights for Same-Sex Couples: Symposium Article: The Legal Landscape Post-DOMA," 13 *J. Gender, Race & Just.* 153 (2009).

Suhr, Daniel R. "On the Freedom of a Congregation: Legal Considerations when Lutherans Look to Change Denominational Affiliation," 13 *Tex. Rev. L. & Pol.* 365 (2009).

Vladeck, Stephen I. Enemy Aliens, Enemy Property, and Access to the Courts, *11 Lewis & Clark L. Rev. 963 (Winter 2007)* .

Zayac, Sandra R. Zagier and Robert A. Zayac, Jr. "Georgia's Married Women's Property Act: An Effective Challenge to Coverture," *15 Tex. J. Women & L. 81 (Fall 2005).*

Add to Annotations:

Annotation, *Gift or Other Voluntary Transfer by Husband as Fraud on Wife, 49 A.L.R.2d 521* .

Annotation, *Power of either spouse, without consent of other, to make gift of community property or funds to third party, 17 A.L.R.2d 1118* , sec. 6.

Annotation, *Partner's Breach of Fiduciary Duty to CoPartner on Sale of Partnership Interest to Another Partner, 4 A.L.R. 4th 1122* .

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CHAPTER 13 THE AMERICAN LAW OF PERSONAL PROPERTY

2-13 Thompson on Real Property, Thomas Editions 13.syn

AUTHOR: Professor David A. Thomas J. Reuben Clark Law School Brigham Young University

§ 13.syn Synopsis to Chapter 13: THE AMERICAN LAW OF PERSONAL PROPERTY

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CHAPTER 13 THE AMERICAN LAW OF PERSONAL PROPERTY

2-13 Thompson on Real Property, Thomas Editions § 13.01

AUTHOR: Professor David A. Thomas J. Reuben Clark Law School Brigham Young University

§ 13.01 Introduction.

This chapter sets out the principal points of law governing personal property in American jurisdictions, especially as those points relate to or impact on the American law of real property. The distinctions between personal and real property are often vague and shifting, so exposition of real property law is incomplete without a discussion of the legal doctrines of personal property that lurk at the edges of land law.

The major topics of this chapter are gifts, sales, lost property, intestate transfers, fixtures, bailments and liens.

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CHAPTER 13 THE AMERICAN LAW OF PERSONAL PROPERTY

2-13 Thompson on Real Property, Thomas Editions § 13.02

AUTHOR: Professor David A. Thomas J. Reuben Clark Law School Brigham Young University

§ 13.02 Definition and Characteristics of Personal Property.

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§ 13.02(a) Definitions; Personal Property Distinguished from Real Property.

§ 13.02(a)(1) Personal Property as All Property That Is Not Real Property.

Between the two terms "real property" and "personal property" should be encompassed all the forms of property recognized in American law. Thus one relatively unhelpful way to define personal property is to describe it as all types of property that are not considered to be real property. To discuss either type of property is potentially meaningless without a common understanding of the term "property" itself. Here it will suffice to say that something can be considered property if it is subject to being owned.

§ 13.02(a)(2) Personal Property as Distinguished by Personal Actions Rather than Real Actions; the Hybrid Property Traits of Chattels Real.

The modern distinctions between real and personal property are not quite consistent with the traditional meanings of the terms "real" and "personal." As these meanings emerged in laws governing English feudalism, "real" property came to mean that property which was entitled to the judicial protections known as "real" actions. Real actions were distinguished by the possibility that the successful litigant could recover the property itself, rather than mere monetary compensation. Real actions almost always related to land, especially in a feudal society where the land and the unique set of feudal obligations attached to any particular parcel of land were the essence of social structure; the relationship of a person to the land made it necessary that a claimant to land be able to recover the land itself, with all of its attendant unique rights and obligations.

For wrongs to property other than land it was usually not necessary for the claimant to recover the thing itself, but to recover only the value of the thing, or some equivalent thing as a substitute. A legal action could be pressed directly against the wrongdoer, as a personal action, rather than against the particular land that one would hope to recover in a real action. Property rights that could be protected by means of a real action, affording the possibility of recovering the property itself, came to be commonly referred to as real property. Property rights which could be protected only by personal actions for damages, generally without the right to recover the property at issue, came to be referred to as

personal property.

The distinction between real and personal property arising out of their respective judicial protections served adequately in most situations, but one prominent hybrid form of property, the non-freehold estates, did not fit neatly into either of those categories. Originally, estates in land held at will or only for a term of years were distinguished from the so-called freeholds of life estates and the various fee estates because the at-will and term interests technically did not endure for the life of the holder or longer. Termed non-freehold estates, they were at first not eligible for the protections afforded by real actions, because the tenants were considered to have no interest in the land, but only contractual rights with the lessor. Because the tenant's rights in the real property of land were personal, the tenant's interest was called a chattel real, chattel signifying a type of personal property. n1 By the time real actions later became available to these tenancies, the label of non-freehold estates and their inclusion with personal property interests for many purposes had become permanent.

§ 13.02(a)(3) Personal Property as Movable Rather than Immovable Property.

Another popular way to distinguish personal property from real property is on the basis of movability. According to this view, real property interests are based on land which is obviously immovable; personal property interests derive from things that are movable. However, this distinction, while serviceable in most instances, is misleading in others. Some immovables are considered personal property in certain circumstances, such as unharvested crops and standing timber or real property subject to equitable conversion. Also, some personal property interests are intangible, and as such are arguably not movable. Even some real property interests can be movable in a limited sense, since elements of the earth and its contents can move by either natural or artificial means without necessarily losing their character as real property.

Movability appears to be the key distinction in those incidents when some part of real property is severed from the land and thus becomes personal property. Such severance alone is usually not sufficient to effect the change, but if the severance is coupled with intent to make the change, such items as shells, sand, gravel, coal, other minerals, mud, humus, topsoil, leaf mold, and dirt and soil generally are changed from real to personal property upon severance from the land. n2 Accordingly, where severance without intent occurs, such as the collapse of a house causing building materials to be scattered upon impact, no change in the character of the property takes place. n3 Usually, a transformation from realty to personalty does not occur until the time of severance, such as when water is diverted from a stream, n4 but under the doctrine of constructive severance the change to personal property may occur when an owner contracts in advance for the sale of an item yet to be severed. n5 For instance, a contract for the sale of a building attached to realty is a contract for the sale of personal property, assuming the parties intend the transaction to affect only the building. n6 Building materials are personal property, but become real property when they are incorporated into a structure built upon land, just as fence rails become realty upon being incorporated into a fence. n7

§ 13.02(a)(4) Intangible Forms of Personal Property.

If the concept of property includes things that are "owned," and ownership is likely to be asserted over rights that are of value, it is clear that some such rights do not arise from things that are tangible:

> [M]any rights do not ... concern specific tangible things but consist of claims against third persons which, since they may be enforced by action, and, if the law permits, be assigned for a price, are of value and thus entitled to be termed property in the broader sense. Bank accounts, debts generally, corporate stock, patents and copyrights are common instances of this class of property. To distinguish between these two classes, lawyers have from early times used the terms "choses (i.e., things) in possession," and "choses in action." Thus choses in possession refer to rights in definite tangible things over which possession may be taken, and choses in action to rights of property which, though they may be represented by a piece of paper, like a promissory note, are essentially intangible in that they can ultimately only be claimed or enforced by action, not by taking physical possession. As these terms have

> a long history antedating the development of our modern commercial life, the attempt to give to them exact definitions and to determine just what interests are allocable to each seems rather a futile task. n8

§ 13.02(a)(5) Examples of the Uncertain Distinction Between Personal and Real Property.

While it would be impossible and pointless to create an exhaustive list of the various forms of personal property, it is helpful to describe a variety of examples of personal property, including examples in which the distinction between personal and real property is often blurred or variable according to context. One such extensive list appeared in the earlier *Thompson* edition:

> While all property must fall into one of the classifications of realty, personalty or chattels real, the jurisdictions are by no means in harmony as to the category in which particular property or property interests fall. Real estate itself may under certain circumstances be treated in the eyes of the law as personalty, as lots offered for sale by a real estate partnership may be treated as personalty for purposes of partnership law.
>
> There is disagreement as to the extent that a shareholder or member's interest in a real estate corporation is realty or personalty.
>
> While Congress has authorized the taxation of real property owned by the Unites States but leased to private citizens, such property cannot be taxed as real estate but only as personalty, and matters usually personalty may become realty. Ordinarily, a building becomes a part of the land upon which it stands, but it may be treated as personalty as between persons who deal with it as such. Under the law of Illinois, a building permanently connected with the soil is considered real property. As to fixtures no absolute rule can be stated since the maxim, "whatever is affixed to the soil, belongs to the soil," has always had exceptions, and they increase with the ever-varying necessities and exigencies of society.
>
> Royalty interests in mineral rights are personal property, but where the mineral interest in land and the surface rights are owned separately each interest is regarded as realty. So a contract for sale and removal of a fixture was held a contract for sale of goods. An easement in gross, being a personal right is an interest in real property but is not personal property, there being no dominant tenement. Where a sales contract provided for access to a pool but the deed omitted reference, only a personal license resulted.
>
> Leasehold estates and estates for years are for some purposes treated at common law as personal property. Upon the death of the lessee the unexpired term of the lease becomes an asset in the hands of the executor or administrator. While oil and gas leases are, in many respects, dissimilar to ordinary leases, some cases treat them to all intents and purposes as personalty. But it has been held that an oil lease is an interest in realty and is governed by the same rule as that which governs property rights.
>
> Under one rule it would seem the grant of an exclusive privilege to go upon land for the purpose of exploring for oil or gas, the grantor to receive part of the oil or gas mined, does not vest in the grantee any estate in the land or oil or gas, but is merely a license or grant. Such a lease creates an incorporeal hereditament only, and the lessee has no right or title to the oil or gas lying under the surface of the land. Whether a conveyance creates a fee in the minerals under the surface of the land or an incorporeal hereditament entitling the grantee to mine and remove minerals, giving no right in them until mined, is to be determined by the intention of the parties as disclosed by the instrument read in the light of the surrounding circumstances rather than from the instrument itself. It is sometimes held that oil rights or leases are corporeal hereditaments, incorporeal hereditaments, profits a prendre, resting in grant and not in livery and are incapable of possession. So a gross products tax on production of oil and gas is a tax on personalty.

Interests in fugitive minerals in place are treated as realty for purposes of the Statute of Frauds, recording acts, venue, homestead laws, rights of co-tenants, measure of damages to realty and taxation. A royalty interest in the grantor of a mineral lease passes with the sale of the land, but not if there is a community lease. In the latter case the royalty is in an incorporeal hereditament in gross.

An overriding royalty in oil and gas leases is an interest in realty within the Statute of Frauds.

Immovability is not of itself a final test as between realty and personalty.

Reservations of oil royalties are personalty.

A condominium unit's characteristics are those of personalty, not realty.

As between the parties, property may be treated as realty or personalty. Growing trees are usually realty but they may under circumstances, as in the case of nurseries, be personalty, on the other hand, they may remain realty after severance. A grant of perpetual rights to manufacture turpentine from timber growing on land is valid. Where a first refusal has been executed, an oil, gas and mineral lease is a sale of interest in the land for the purpose of such refusal. Crude turpentine in turpentine boxes in pine trees in a state to be dipped up is personalty.

The courts divide as to whether matured but unharvested crops are personalty or whether they are realty and pass with a sale of land.

As is seen elsewhere herein, trade fixtures are, by some courts, held to be chattels while others treat them as having become realty, severable under certain conditions. The interest of a beneficiary in a land trust is personalty.

Railroad tracks are realty or personalty depending on the "benefit of the land" test.

While the property in a church pew is considered as partaking of the character of real estate, it is in some jurisdictions a mere usufructuary right, and easement or privilege in the freehold of another.

The vendor's interests under an executory real estate contract are personal property.

Under the doctrine of equitable conversion, when a land sales contract becomes binding, the seller's interest is considered personalty and the buyer's interest realty. The same rule has been applied in contracts to devise and in directions in wills to the executor to sell realty.

Upon the doctrine that courts of equity consider that done which should have been done, money is sometimes treated as real estate.

Under the doctrine of equitable conversion, money directed to be employed in the purchase of land is considered as land. When land is converted into money, as by a trustee under a trust with power to sell, unless there is an intent manifested by the settlor of the trust that by its disposition its nature shall be thereby changed, the fund takes the place of the land which yielded it and is to be applied and disposed of in the same manner, until the object of the trust is accomplished. Where the trustee sells the land which he is directed by the instrument creating the trust to convey to certain persons, the proceeds of the sales will be treated as real estate and distributed accordingly. A fund derived from a payment by the city for lands taken for school purposes for the benefit of unknown owners must be treated as real estate. Also, insurance money realized from the destruction of buildings on devised real estate will be treated as real property. Upon a conveyance of land by the executor of a testator in pursuance of an option given by the testator during his lifetime, the proceeds of the sale pass as real estate. The proceeds of the sale of

real estate, made by decree of court in a partition suit, retain the character of real estate for the purposes of distribution. Likewise, where there is a compulsory conversion of real estate, as in the exercise of the power of eminent domain, and without the consent or against the will of the owner of the fee, the compensation awarded will be treated as real estate until the owner, being *sui juris*, accepts it as personal property. Also, where the real estate of a deceased testator is taken under the power of eminent domain, the rights of beneficiaries previously determined by law are not affected, the damages awarded for the land are distributable as realty. Where real estate is purchased with stolen money, the owner of the money does not become the owner of the land.

An equitable conversion of real estate into money is accomplished under a will if there is a positive direction to sell, an absolute necessity to sell in order to carry out the provisions of the will or such a blending of realty and personalty by the testator in his will as to clearly show an intention to create a fund out of all of his property and to bequeath it as money. It has been held that real estate purchased by a guardian with his ward's money descends as personalty on the ward's death.

Where real estate of a decedent is converted into money for the payment of debts, whatever surplus remains after a proper application of the funds for that purpose retains the character of real estate for the purpose of succession or distribution.

The owner of a tax certificate has an equitable right in the property with a right to call in the legal title by producing the certificate of purchase in case there has been no redemption.

It has been held that a tax certificate is real property and upon the death of the purchaser, passes to his heirs at law.

A house may be personalty and not a fixture as against a prior mortgagee, if not for agricultural purposes, and if the owner and the licensee who built the house so intended. An interest of a partner in the partnership was held personalty though the partnership owned realty.

A beneficial interest in a land trust in Illinois is personalty and a general intangible under the Uniform Commercial Code.

There is a growing tendency to treat the creation of a lease as the "sale" of space, thus invoking covenants of warranty that accompany sales of personalty.

Fixed minerals after extraction become personalty.

An easement is an interest in land.

There is a disagreement as to the extent that a shareholder or member's interest in a real estate corporation is realty or personalty.

An article may as between the vendor and vendee remain a chattel but becomes real property as between a mortgagor and mortgagee. n9

§ 13.02(b) Fixtures as Personal Property.

Items of personal property that become affixed or annexed to real property, but retain their separate identity, generally are known as fixtures, and are considered real property by definition:

The law of fixtures concerns those situations where the chattel annexed still retains a separate identity in spite of annexation, for example a furnace or a light fixture. Where the chattel annexed loses

> such identity, as in the case of nails, boards, etc., the problem becomes one of accession... n10

In some circumstances, if something less than a permanent annexation of the personal property item was intended, the item will not be considered annexed or affixed, will not be deemed a fixture, and will thus retain its character as personal property. For example, if a mobile home has not been permanently attached to the land, it remains personal property. n11 Another test for annexation is whether the item supposedly annexed can be removed without damage to the item or the realty to which it was attached; however, other factors to be considered in connection with this "removal without damage" test are the intent to make a permanent annexation, and how well the annexed item has been adapted for the use intended. n12 An item affixed to the land for only a limited purpose may remain personal property. n13

Apart from annexation itself, the most important factor in determining whether personal property has become a fixture is the intent of the parties. Even an annexed item will remain personal property if the parties agree that it should remain personal property. n14

A major category of fixtures that do not become realty is the class of items called trade fixtures. These are items of personal property necessary for carrying on a trade or business, but which are expected to be removed when their commercial use is no longer needed. Typically, trade fixtures are introduced into leased premises, and the parties intend that upon either the termination of the lease or some other conclusion to the enterprise, the trade fixtures will be removed; and, indeed, the doctrine does not apply to one who annexes fixtures onto one's own land and who wishes to retain the fixtures upon sale of the land. n15

Even after fixtures become annexed to and a part of real property, they usually retain some semblance of separate identity and several issues of personal property rights may pertain to those fixtures in the future. These are discussed more fully in this chapter in § 13.07, *infra*.

§ 13.02(c) Crops as Personal Property.

Crops are the huge variety of growing things that can be harvested or gathered, and have traditionally been grouped into one of two categories:

> As to crops, the courts have made a distinction between those resulting from the bounty of nature or from perennial plants, the so-called fructus naturales, and those produced annually by the care and labor of man, the so-called fructus industriales. To this latter type of crop has been given the name of emblements, a word derived from the old French, meaning to sow with grain. n16

The significance of this distinction lies in the likelihood that a court will consider as realty a crop that is *fructus naturales*. n17 However, for most purposes crops of either variety are usually treated as personalty. For instance, the Uniform Commercial Code, in its article on Sales, extends its provisions to "growing" crops without distinction between *fructus naturales* and *fructus industriales*, except that timber is usually still considered realty. n18

All of the legal rules regarding crops begin with the assumption that growing crops are part of the land and should therefore be considered realty, but that upon severance the crops become personalty. For the most part, legal rules about crops attempt to describe situations when departures from this basic assumption are proper.

For instance, a tenant for an uncertain term may return to harvest crops that were growing at the time the tenancy was terminated, which suggests that the crops were personalty. However, even though a mortgagor may continue in possession during foreclosure proceedings, as soon as the right to possession ends and the mortgagee takes possession, the mortgagee also becomes entitled to the growing crops (at least in title theory states), which suggests that the crops were realty all along.

§ 13.02(d) Choses in Action as Personal Property.

Choses in action belong to that group of property rights classed as "intangibles." "Choses [pronounced 'sho' ses']," simply means things and are rights in tangible things that can be possessed; such property rights are often referred to as "choses in possession." Other "choses" are referred to as "choses in action," when they represent truly intangible rights of property enforceable only by legal action rather than by taking possession. Among such intangible property rights usually considered choses in action are bank accounts, stock in corporations, patents, and copyrights. It may be assumed that the largest share of individual wealth is in the form of choses in action, of "claims by one person against another for the performance of acts which will be of value to the former." n19 Although in early law choses in action were not transferable either for consideration or as gifts, they are now intrinsically transferable and usually only the means chosen for transfer is the subject of legal challenge.

FOOTNOTES:

(n1)Footnote 1. The entry for "Chattel" in 2 *The Oxford English Dictionary* 302 (1970) is partially as follows:

> a. OF. *chatel, chetel* (ONF. *catel.* Pr. *captal, capdal*): -- late L. *captale,* L. *capitale* principal, property, goods, etc., see CATTLE. *Chatel,* pl. *chateaux,* was the form adopted in legal Anglo-French; it appears in vernacular use in the 13th c., and the pl *chateaux* is occasional as a technical term in ME [middle English]; but the actual form adopted in Eng. was the Norman *catel,* later *cattell, cattle.* In the 16th c., (as shown under CATTLE) this was gradually restricted to 'live stock', and at the same time *chatel, chattel,* began to pass from law French into general use for the wider sense 'article of property.'

(n2)Footnote 2. *Derbofen v. T. L. James & Co., 148 So. 2d 795 (La. App. 1962)* (mulch, humus, top soil, leaf mold and other forms of dirt are treated as commodities of commerce completely separate from the owner's land in actions for damages on wrongful removal); *Barron v. Edwards, 206 N.W.2d 508 (Mich. 1973)* (soil treated as commercial product is personalty and within the U.C.C., and not within the statute of frauds.

(n3)Footnote 3. *Guernsey v. Phinizy, 39 S.E. 402 (Ga. 1901)* (after an accidental fire destroys a house, the bricks and other debris remain a part of the realty, because there was no intent to sever or convert them).

(n4)Footnote 4. *Brighton Ditch Co. v. City of Englewood, 237 P.2d 116 (Colo. 1951).*

(n5)Footnote 5. *Pleasant Valley Campground, Inc. v. Rood, 411 A.2d 1104 (N.H. 1980)* (a mobile home previously attached to the realty and specifically described in a bill of sale as an item of personal property was treated as personalty); *Courtright Cattle Co. v. Dolsen Co., 619 P.2d 344 (Wash. 1980)* (apparatus for treating waste from potato-processing system is deemed a fixture even though a bill of sale specifically described the apparatus as personalty).

(n6)Footnote 6. *Stiles v. Gordon Land Co., 44 So. 2d 417 (Fla. 1950)* (a building was deemed personal property even though attached to the land, because of the contractually expressed intention that the building was being sold separately from the land).

(n7)Footnote 7. *State v. Rullis, 191 A.2d 197 (N.J. Super. 1963)* (granite fence posts are to be part of the real property to which they are attached).

(n8)Footnote 8. Ray Andrews Brown, The Law of Personal Property 11 (3d ed., Walter B. Raushenbush ed. 1975).

(n9)Footnote 9. 1 George W. Thompson, Commentaries on the Modern Law of Real Property 74-75, § 19 (Grimes ed. 1980).

(n10)Footnote 10. Ray Andrews Brown, The Law of Personal Property 514-515 (3d ed., Walter B. Raushenbush

ed. 1975).

(n11)Footnote 11. *Cooper's Mobile Homes, Inc. v. Simmons, 617 P.2d 415 (Wash. 1980)* (mobile home considered personal property for purposes of the joinder statute).

(n12)Footnote 12. *Prospecting Unlimited, Inc. v. Norberg, 376 A.2d 702 (R.I. 1977)* (prefabricated modular homes assessed a use tax because the purchasers affixed the modules to the realty).

(n13)Footnote 13. *Anderson v. Columbia Contract Co., 184 P. 240 (Ore. 1919), reh'g denied, 185 P. 231 (Ore. 1919)* (fish traps deemed to be personal property because there was no intention that they be permanently affixed).

(n14)Footnote 14. *Hargrove v. Jenkins, 383 S.E.2d 636 (Ga. App. 1989)* (buyer of shed sued purchaser of land upon which shed was located, claiming title to shed had passed by sale before the real property sale had closed); *Milner v. New Edinburg School Dist., 200 S.W.2d 319 (Ark. 1947)* (land but not improvements reverted to grantor if land ceased to be used for school purposes).

(n15)Footnote 15. *Young Elec. Sign Co. v. Erwin Elec. Co., 477 P.2d 864 (Nev. 1970)* (action to foreclose mechanic's lien lodged against electric sign); *Cusack v. Prudential Ins. Co. of Am., 134 P.2d 984 (Okla. 1943)* (the trade fixtures doctrine does not apply to the pit wagon scales installed on a mortgaged farm by the owner of the land).

(n16)Footnote 16. Ray Andrews Brown, The Law of Personal Property 588 (3d ed., Walter B. Raushenbush ed. 1975).

(n17)Footnote 17. *See, e.g., Key v. Loder, 182 A.2d 60 (D.C. 1962).*

(n18)Footnote 18. U.C.C. §§ 2-105(1) and 2-107(2).

(n19)Footnote 19. Ray Andrews Brown, The Law of Personal Property 154 (3d ed., Walter B. Raushenbush ed. 1975).

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CHAPTER 13 THE AMERICAN LAW OF PERSONAL PROPERTY

2-13 Thompson on Real Property, Thomas Editions § 13.03

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§ 13.03 How Ownership of Personal Property Is Originally Acquired.

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§ 13.03(a) The Importance of Possession.

Ownership of personal property connotes various relationships between the owner and the thing owned, which may include possession, control, a right of use, holding of legal title, and holding of equitable title. Specially limited types of ownership pertain to a mortgagor in possession, a bailee, and a purchaser under a conditional sales contract who is in possession and control.

Although one may hold ownership of an item of personal property without also having possession, possession is the most common and powerful incident and manifestation of ownership. n20 One who possesses personal property is presumed to be the owner. n21

The concept of possession is typically divided between actual possession and constructive possession, the latter being a type of possession implied in the law. For instance, the actual possession of a thing by an employee may be imputed to the employer, who can then be said to have constructive possession of the thing; the employer, while not having actual possession, has the right to immediate actual possession. If an owner of personal property without actual possession knows where the item is and could recover possession if the owner desired, then the owner is in constructive possession. n22 Thus where the owner gives actual possession to another, such as a bailee, for the purpose of having the possessor do something with the item given, constructive possession in the owner results. n23

Possession, whether actual or constructive, is said to be the right of exclusive physical control, coupled with the intent to possess. While -- as a matter of common sense -- it would seem that one can have actual possession of an item, even without knowing about the item, it has been held that -- as a matter of law -- one does not possess a thing of which one is unaware. n24

§ 13.03(b) Original and Successive Acquisition of Possession.

In the modern world only relatively rarely does one have opportunity to acquire personal property by establishing original possession. Other than acquiring rights by reducing wild animals to possession, the most common occasions for

acquiring ownership of personal property by original possession are by taking possession of abandoned property, some estrayed animals, escaped or fugitive gas and oil, and drifted and stranded timber or logs, of which it may be said that no person is the owner. Thus, if one lawfully takes possession of abandoned personalty, then the taker becomes the owner. n25

In other circumstances, one may obtain ownership by taking possession, but such possession is not original possession; instead, it may displace an already established owner. Under certain conditions, taking possession of lost property may eventually lead to ownership in the finder. More commonly, ownership may be obtained by a successful adverse possessor, who displaces a previously established owner.

§ 13.03(c) Personal Property Rights in Wild Animals.

Wild animals, too, may be said to have no owner and are therefore subject to becoming owned once reduced to someone's possession. This simplistic statement must be qualified by recognizing that modern governments have often asserted rights to regulate the taking of wildlife, n26 and that one who takes possession of wild animals while trespassing on the private land of another must surrender title to the landowner. n27 A further qualification lies in the notion that one who has so pursued that taking possession is inevitable may have rights superior to one who intervenes to make the actual capture. n28

The ownership gained by one who properly reduces a wild animal to possession is limited; if the animal escapes captivity, the ownership right is lost, and the animal becomes subject to recapture by anyone. n29 Some courts have denied the title in the second captor, if the animal habitually returned to the original captor. n30

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LEXIS: wild animal w/20 property

FOOTNOTES:
(n1)Footnote 20. *In re Dillingham's Estate, 238 P. 367 (Cal. 1925)* (property held temporarily in trust, for exclusive use and benefit of decedent, held not exempt from inheritance tax).

(n2)Footnote 21. *Rick v. Boegel, 205 N.W.2d 713 (Iowa 1973)* (action for possession of decedent's corporate stock).

(n3)Footnote 22. *State v. Matarazzo, 207 S.E.2d 93 (S.C. 1974), cert. denied, 420 U.S. 945 (1975)* (lessee of a mobile home convicted of possession of a controlled substance found in the mobile home).

(n4)Footnote 23. *Jacobson v. Aetna Cas. & Sur. Co., 46 N.W.2d 868 (Minn. 1951)* (action to recover for loss by theft of automobile voluntarily surrendered to the thief).

(n5)Footnote 24. *Durfee v. Jones, 11 R.I. 588 (1877)* (the finder, who used but did not own the safe, was entitled to possession of money found in the safe and not belonging to the owner).

(n6)Footnote 25. *Sickman v. United States, 184 F.2d 616 (7th Cir. 1950), cert. denied, 341 U.S. 939, reh'g denied, 342 U.S. 843* and *342 U.S. 874 (1951)* (migratory geese held not to be in the possession of the United States government in an action to recover for damage to crops).

(n7)Footnote 26. *State ex rel. Visser v. State Fish & Game Comm'n, 437 P.2d 373 (Mont. 1968)* (action by hunters for the value of a tagged elk confiscated by the state).

(n8)Footnote 27. *State v. Repp, 73 N.W. 829 (Iowa 1898)* (wild bees in the woods are property of the owner of the

woods).

(n9)Footnote 28. *Liesner v. Wanie, 145 N.W. 374 (Wis. 1914)* (hunters who mortally wound a wolf have ownership even though others fire the final shots); *Pierson v. Post, 3 N.Y. (Cai. R.) 175 (1805)* (a hunter in pursuit of a fox has no right of possession against the person who finally kills and takes the fox).

(n10)Footnote 29. *Koop v. United States, 296 F.2d 53 (8th Cir. 1961)* (prosecution for hunting wild ducks claimed to be in possession and control of dude ranch owner).

(n11)Footnote 30. *Manning v. Mitcherson, 69 Ga. 447 (1883)* (tamed canary that returned when called is recoverable by the original owner when another took possession of the bird).

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CHAPTER 13 THE AMERICAN LAW OF PERSONAL PROPERTY

2-13 Thompson on Real Property, Thomas Editions § 13.04

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§ 13.04 How Ownership of Personal Property Is Transferred.

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§ 13.04(a) Transfers by Gift.

§ 13.04(a)(1) Types of Gifts.

A gift may be defined as a voluntary transfer of property to another, without consideration. The ordinary gift is an unconditional transfer of a present interest. One may also make a gift in expectation of imminent death and which is revocable if death does not occur, the so-called gift *causa mortis.* Distinct from the revocable gift *causa mortis* is the gift intended to take effect at some time in the future, which, without consideration, is a mere unenforceable promise to make a gift in the future. Finally, gifts may be testamentary, which means that the intent to make a gift is expressed in a valid will, and the gift itself is not effective until the donor's death, and frequently the donee does not actually obtain possession of the gift until the terms of the testamentary instrument are carried out. These types of gifts are individually discussed in the following sections.

§ 13.04(a)(2) Inter Vivos Gifts.

In a general and somewhat unhelpful sense, it may be said that a valid inter vivos gift is based on the fulfillment of three requirements: first, there must be delivery of the item, or some symbolic or constructive substitute for actual delivery; second, the donor must have the intent to make a gift; and third, the donee must accept the gift.

§ 13.04(a)(2)(i) Delivery.

The foundational legal rule for delivery is that manual, actual delivery is required to make a gift of anything capable of such manual delivery. n31 Even though some of the more archaic reasons for this rule no longer pertain, this is still the beginning rule, as noted in this more modern expression:

> When the character of the goods and the situation of the parties is such that a delivery can without unreasonable inconvenience be made, there is generally said to be no valid donation without it. n32

It is presumptively ineffective and insufficient merely to make an oral or parol declaration of a gift when the item is capable of manual delivery to the donee, but courts have authorized numerous departures from the presumptive rule. If the intent to make a gift is unequivocal, courts often hold that some form of delivery can be found in the circumstances of the case.

In general, a valid delivery requires not only that the thing being delivered pass from the control of one party to that of another, but also that the donor intend that such delivery take place. Thus, the donor must possess not only the general intent to make a gift, but also the specific intent to achieve delivery in a particular manner. If transfer of possession and control passes unaccompanied by the donor's intent, no gift occurs; conversely, if the donor intends to effect a delivery, but no actual transfer of possession and control occurs, again no gift occurs. A bedridden donor who expressed a desire to make a gift of clothing that was placed in a trunk, but then retained control of the key to the trunk, was held to have not made a completed gift. n33 Another donor gave to the donees a writing describing a gift of a trunk containing valuable items, but the trunk itself was deposited with a bailee without instructions for delivery; no gift occurred. n34 In both cases, while the intent to make a gift was evident, the donor did not effectively surrender control of the item to be given. If donative intent is expressed, but no delivery takes place, the intent to make a gift is subject to revocation and in any event is revoked by the death of the donor. n35

In some cases, even the intent to make a gift and the actual delivery of the item will not constitute a gift, if it appears that the delivery is merely so the erstwhile "donee" can hold the item as agent of the donor:

> [I]n an inter vivos situation, a purported intention to give and a delivery, when coupled with facts indicating that the purported donor has not really relinquished control, will ordinarily not result in a valid completed gift. n36

Once the gift is completed by successful delivery coupled with donative intent, the donee may subsequently relinquish control, such as for resale, or even replace the item in the custody of the donor for safekeeping, usually without compromising the validity of the gift. n37

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LEXIS: gift w/10 complet! w/50 deliver! w/20 donative
intent w/50 control

Delivery may be achieved by transfer to a third person, especially if the third person subsequently delivers the item to the intended donee. However, if the third person simply holds the item delivered, without further transmission to the intended donee, then the completion of the gift depends on whether the third person accepted the delivery as agent of the donor or the donee. If the third person receiving the delivery was the agent of the donor, then the donor could be viewed as not having yielded control of the item, and the gift would be incomplete. If the third party recipient is considered the agent of the donee, then the gift is considered complete upon delivery to the third party. A third party recipient who takes delivery, at the request of the donor, on behalf of an intended donee who is a child, n38 or to simply hold the item for the donee, would be considered acting on behalf of the donee. n39

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LEXIS: gift w/50 deliver! w/20 third person

Quite commonly, delivery will be made to a third person, with instructions for further delivery to be made to the donee upon the donor's death. This may be considered a present gift of a future interest in the item; title to the item vests at the time of delivery to the third person, but possession and enjoyment by the donee are postponed. Under one variant of this arrangement, the donor may make a gift, but reserve a "life estate," the right to use the property until the donor's death.

To sustain such an arrangement as a gift, it must be distinguishable in some way from a mere promise to make a gift, to be effective at the donor's death, which is not only without substance as a gift but will probably also be considered void as testamentary in nature.

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LEXIS: gift w/50 deliver! w/20 third person and

Although manual delivery of personal property gifts would be the ideal, and would eliminate much conflict and misunderstanding, such delivery is frequently not possible or practicable. Even movable chattels may sometimes be so bulky that physical transfer is undesirable or very inconvenient. In other instances, the distance of the proposed delivery is an impediment to manual delivery. In such cases, American courts have long accepted some other action as a substitute for manual delivery, collectively labeled as symbolic or constructive delivery:

> What will amount to a delivery must depend upon the nature of the thing and the circumstances of the case. Actual manual delivery is not in all cases necessary. When the thing is incapable of manual delivery, or where the situation of the parties or the circumstances of the case will not admit of it, it may be symbolic or constructive. n40

The distinction between symbolic and constructive deliveries has been explained as follows:

> A delivery is symbolic, when instead of the thing itself, some other object is handed over in its name and stead. A delivery is constructive, when in place of actual manual transfer the donor delivers to the donee the means of obtaining possession and control of the subject matter, or in some other manner relinquishes to the donee power and dominion over it. n41

Discerning a coherent judicial approach to questions of constructive delivery has proved almost impossible. Courts have exhibited an understandable desire to affirm a gift where the donative intent is obvious; yet in the absence of manual delivery, the actions validated as a substituted constructive delivery should represent the donor's best effort to make a delivery and a delivery that is reasonably similar to what an actual manual delivery would have been. Moreover, many courts take the position that such constructive delivery should be accepted only if manual delivery is genuinely inconvenient, unreasonable, or impossible. Under these considerations, delivery of a key to a safe deposit box may suffice as constructive delivery if the donee and the box are widely separated, but possibly should not suffice if it is easy or convenient for the donor actually to deliver the contents of the box to the donee. n42

These restrictions on the validity of constructive delivery of a key may break down in the face of a very clear donative intent. However, delivery of a key will be insufficient delivery if the key itself does not represent surrender of dominion and control. If a donor delivers one key to a safe deposit box, but retains a duplicate key, delivery of the gift has not occurred; n43 however, the opposite result has been reached in light of obvious intent to make a gift. n44 Other shared control cases, such as revealing to the donor a hiding place where the items are kept, have usually resulted in holdings that a completed gift has occurred. n45

Donative deliveries of goods held by bailees are complete when the bailee delivers the goods to the intended donee or agrees that the bailment is now held on behalf of the donee. If the bailee refuses to accept the new arrangement or to make the delivery to the intended donee, the cases are in conflict over whether a gift occurs. n46

Somewhat related to the bailment cases are those instances when the gift item is already in the physical possession of the donee. The gift in those cases is completed merely by the donor's expression of intent to make a present gift, and no formal, distinct delivery is required. n47 If evidence of donative intent is weak, the absence of a conspicuous act of delivery could cast even more doubt on the allegation of gift.

Another variant of the same problem arises when the donor and donee share possession, such as when they live in the same household, and when a bulky gift such as a piano is transferred from the donor's to the donee's ownership. To require some event of delivery to effect such gifts would be unreasonable, yet such gifts also raise the danger that creditors will be too easily defrauded or that conflict among family members will result. For the finding that a gift has occurred in such cases, therefore, courts do not insist on delivery, but do look for evidence that the donee has subsequently exercised a different kind of dominion over the item. This could be achieved by the donee using the item, after it was allegedly given, without first seeking the donor's permission, as might have been done before the gift when it was in shared possession. n48 If there is no evidence that the control relationship regarding the item has changed, a court may find that a gift has not occurred. n49

The requirement of manual delivery is also disregarded when a gift is made by deed. n50 The term "deed" in the context of gifts of personal property carries its traditional meaning, an instrument sealed by the executing party; it is not restricted to its popular modern meaning of an instrument for conveying of real property interests. Today, even "deeds" in the traditional sense of sealed instruments are often not required to be sealed; n51 either the "seal" is provided by some verbal indication such as "seal" or "l.s." or is entirely absent, and often the absence of any seal at all is authorized by state statute. All these factors have combined, in some jurisdictions, to allow a gift to be made symbolically through the delivery of an ordinary writing rather than by manual delivery of the thing itself.

If the fact of delivery is questionable, such as when the location of the thing given does not change, then a subsequent declaration of donative intent by the donor may support the finding of a delivery; such a declaration, however, is not a substitute for a delivery. A common example of this circumstances is when, among the contents of a safe deposit box examined after the donor's death, is found a written statement from the donor declaring that the contents belong to the donee. n52 If the donor's declaration under those circumstances indicates merely an intent to make a gift in the future, it may be assumed that no delivery has taken place and no completed gift results. n53 The ambivalence of the courts in these circumstances has been noted:

> Where there is other competent evidence of a delivery, or where the alleged donee is already in possession of the subject matter of the claimed gift or the donor and donee both have access to such subject matter it would seem clear that a declaration by the donor that he "had given" the chattels in question, or that the same were the property of the donee, would with such attendant circumstances be sufficient to authorize a finding of an effected gift. When, however, the goods, at the time the donee makes his claim, are in the possession of the alleged donor or of his personal representative, and there is no objective proof that any delivery had ever occurred, a finding of gift on the evidence alone of subsequent admissions of the donor should only with hesitancy be sustained. Nevertheless, there is a considerable authority upholding the claim of gift under such circumstances. Other courts have, however, refused to sustain findings of gift under the same circumstances, and some have been so strict as to overrule such findings even when the donee was in possession of the property. In a few cases it has been dogmatically asserted that mere admissions by the donor that he made a prior gift, uncorroborated by other evidence, are insufficient to prove a delivery. n54

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LEXIS: symbolic! w/10 deliver!
constructiv! w/10 deliver!

§ 13.04(a)(2)(ii) Intent.

The mere transfer or delivery of an item of personal property, without more, does not necessarily constitute a completed gift. If a transfer occurs without the donor intending a gift to be made, then the delivery may not be characterized as a

gift. Even a delivery prompted by the intent to give is voidable, if the intent was induced by fraud, duress, or undue influence. n55

A frequently troublesome issue involving donative intent arises from gifts intended to take effect at some time in the future. The intent necessary to sustain a valid gift is that some present interest in the gift item pass at the time the gift is delivered or made. If the donor postpones the transfer of a present interest in the gift until the donor's death, for instance, the gift is deemed testamentary in nature and invalid if not executed according to requirements for testamentary dispositions.

However, most courts do not require that the right to present possession or enjoyment of the gift be passed at the time the gift is made. It is sufficient that there be intended a present transfer of title to the item, with an irrevocable right to the actual enjoyment of the item at some time in the future. n56 A donor may also intend to give present interest in some item of personal property, such as a fund in an account, and reserve a life estate in the donor, resulting in interest from the fund being paid to the donor until the donor's death; the arrangement has been upheld as a valid gift of the principal. n57 Crucial in demonstrating the donative intent necessary to accomplish such a gift would be the delivery to the donee of some evidence of the present interest being transferred.

Another troublesome issue of intent surrounds the giving of gifts coupled with conditions precedent. A condition precedent that postpones the vesting of any interest until the condition occurs generally indicates an intention not to make a present gift of anything. However, if the condition precedent is the occurrence of a future event that is nevertheless certain to occur, such as the donor's death, courts will usually find an intention to transfer a present right to the gift, with only enjoyment being postponed until the donor's death. n58 If the condition's occurrence or performance is within the control of the erstwhile donee, possibly a contract rather than a gift arises upon the donee's giving the consideration of fulfilling the condition.

Conditions precedent usually compromise the intent to give a present interest necessary to sustain a present gift; however, conditions subsequent may usually be attached to gifts:

> [G]ifts are sometimes completed by delivery of the res to the donee, but with a condition annexed that the donor may recall the same should he need the funds at any time during his life, or on condition that the subject matter should revert to the donor, should the donee predecease him. So also gifts may be made subject to such conditions, operating subsequently, as that the donee should pay annual interest to the donor, should support the donor, or assume definite obligations in regard to the care of the res. n59

A common source of contention in this area is the giving of engagement rings or other valuable items, gifts presumably subject to revocation upon the condition subsequent that the marriage does not take place. n60 Some courts, however, have held that the ring need not be returned if the breakdown of marriage plans is not the donee fiancee's fault (a conclusion that may not reflect the donor's intent). n61 In other, less emotional circumstances, donors have given items to donees, but have stipulated that the items will be recalled if the donor needs them. Some courts have refused to characterize such arrangements as gifts, because the donor did not manifest the intent to surrender dominion. n62 Other courts have found a completed gift, subject to right to recall or revoke; the gift remained presently intact so long as the right to recall was not exercised. n63

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LEXIS: donative intent w/50 present interest
donative intent w/50 condition precedent
donative intent w/50 condition subsequent

§ 13.04(a)(2)(iii) Acceptance.

The donee's acceptance of a gift is a formal requirement for the completion of a gift, but has less importance because of the presumption that a beneficial gift is accepted by the donee. The reality of the acceptance requirement is illustrated by those cases upholding the right of a donee to reject a gift. n64 This inference of acceptance is strong enough to attribute acceptance by and thus accomplish the completion of a gift delivered to a third person and announced to the donee only after the donor's death, n65 of a gift to an infant, n66 and of a gift to one who is legally incompetent. n67 In those instances where realistically no actual acceptance has occurred, the donee could later repudiate the gift.

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LEXIS: gift w/20 accept!

§ 13.04(a)(3) Gifts*Causa Mortis*.

A gift *causa mortis* is distinguishable from the ordinary inter vivos gift on two points: the "gift" is made in expectation of imminent death, n68 and the "gift" is revocable. The gift *causa mortis* is theoretically subject to the same basic delivery requirements as the gift inter vivos, but it is well-known that some relaxations of those rules as applied to inter vivos gifts are not extended to gifts *causa mortis.* Also, if the gift *causa mortis* is revoked because the anticipated death of the donor does not occur, the revocation is effected automatically as a matter of law.

Although a donor who is approaching death and makes a gift is presumed to be making the gift *causa mortis*, n69 the presumption can be overcome. Such a donor intending to make a present inter vivos gift need only make such intention manifest. n70

In general, the delivery requirement for gifts *causa mortis* is the same as for present inter vivos gifts, but in some jurisdictions, some of the substitute delivery circumstances are not allowed to sustain *causa mortis* gifts. For instance, many courts have refused to find delivery of a *causa mortis* gift where the item is already in the donee's possession. n71 Also some jurisdictions do not accept delivery of a gift *causa mortis* by means of a sealed writing, because that method so closely resembles a testamentary disposition that testamentary formalities should not be avoided. n72

While it is possible to view the donor's death in a gift *causa mortis* situation as a condition precedent to the completion of the gift, especially since the gift is a nullity if the death does not occur, most courts view the donor's death as a condition subsequent. According to this view, the proper gift *causa mortis* is a valid gift when made, but is subject to failure or revocation or divestment if the donor does not die as anticipated. Indeed, sometimes the gift is a nullity even if death occurs, but the cause of death was other than the anticipated cause. n73

In one situation, American courts are likely to treat a gift *causa mortis* as a gift subject to a condition precedent. If the donor delivers the item or funds to a third person, with instructions for delivery to the donee upon the donor's death, the deferral of delivery leads to the conclusion that the gift was not a completed, present gift, but was testamentary in nature, with the donor's death as a condition precedent. n74 Some American courts favor the condition precedent interpretation of all gifts *causa mortis*, even if delivery is not deferred. n75

The distinction between gifts *causa mortis* as presenting a condition precedent or a condition subsequent as been criticized as, at bottom, representing nothing more than a trap for the unwary donor:

> Nonetheless, the distinction drawn by the majority of American courts between the gift that vests presently, though subject to revocation, and the gift that is to vest only upon the death of the donor is unfortunate. The distinction is a highly artificial one, not, it is safe to say, apt to be in the contemplation of a layman in his last illness. The practical substantive rights of the donor are the same in both cases. A slight change in the words used, or in the testimony of the witnesses as to the words used, can easily shift

> the gift from one class to the other. Where there is an actual delivery of the subject matter, and the intent of the donor to make some gratuitous disposition of his property is clearly proven it seems harsh to thwart his intent because of a failure to put the transaction in the proper technical form. n76

The revocability of gifts *causa mortis* is implied by law, even if not expressed by the donor. Thus a donor who made such a gift while in extreme illness, then recovered temporarily from the illness so as to resume normal activity for a few months before actually dying from the illness, was considered as having revoked the original gift. n77 In a few cases, the issue has been raised whether the donor's recovery simply gives the donor the option to revoke, with the gift remaining valid if the opportunity to revoke was not exercised. This approach is generally not accepted. However, it is clear that the donor does have an independent option to revoke the gift *causa mortis* at any time before death occurs, which possibility is simply one other condition subsequent attached to the gift. n78 An attempt to revoke by means of a will is inadequate, because the will does not become operative until the donor's death, when the power to revoke has lapsed in any event. n79 Although the point is without known judicial authority, it is reasonable to assume that a gift *causa mortis* is revoked if the donee predeceases the donor.

The continuing conflict over viability of gifts *causa mortis* reflects the competing values. On the one hand, it is commendable to effect the intent of a donor, even if not all technical legal requirements are observed (and especially not during times of the donor's personal distress); on the other hand, those technical requirements are safeguards against fraud and misconduct that can so readily occur both before and after the donor's death. The result seems to be that courts still speak in some terms of hostility toward gifts *causa mortis*, but in general still ultimately find ways to approve of most such gifts. This judicial ambivalence was well-expressed over a century ago:

> Gifts causa mortis are not favored in law. They are a fruitful source of litigation, often bitter, protracted and expensive. They lack all of those formalities and safeguards which the law throws around wills, and create a strong temptation to the commission of fraud and perjury. Lord Hardwicke declared, more than a hundred years ago, that it was a pity the statute of frauds and perjuries did not set aside all such gifts. Justinian was so justly apprehensive of fraud with respect to them that he required them to be made in the presence of five witnesses. If the law limited such gifts to articles of small value, and required the gift to be executed in the presence of disinterested witnesses, they would be less objectionable. But if large estates, amounting to thousands of dollars, may be thus disposed of, and the title of the donee supported mainly by his own testimony and that of near relatives, the public feeling of security may well be startled. Unfortunately the common law has not adopted any of these precautions. n80

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LEXIS: gift w/5 causa mortis

§ 13.04(b) Transfers upon Death.

§ 13.04(b)(1) Succession Under Intestacy.

§ 13.04(b)(1)(i) General Rules.

Ownership of a decedent's personal property passes to those entitled to it under relevant state statutes of descent and distribution, if the decedent has not otherwise disposed of the property by will or some form of inter vivos transfer. Technically, the "descent" part of those statutes refers to succession to ownership of the real property, while "distribution" refers to succession to ownership of the personal property.

The descent and distribution statutes are intended to provide for orderly succession to the decedent's property in all circumstances when the decedent has not made provision therefor. All American states have enacted such statutes,

although in some states a distinction is no longer drawn between real and personal property, the same scheme of succession applying to both. Several of the older standard rules for descent, the so-called English canons of descent, are rejected in all American jurisdictions; these rejected principles include prohibition of lineal ascent, preference for male over female heirs, and preference for the oldest male heir.

Although some states impose the same mode of succession for both real and personal property, it may still be important to distinguish between realty and personalty even in those jurisdictions. For instance, in most jurisdictions, the decedent's personal property is the primary fund for paying the decedent's surviving debts, so that those debts should first be satisfied out of and exhaust the decedent's personal property before the real property may be applied. n81 Similarly, heirs of encumbered real property are often entitled to have the decedent's personal property applied to remove, or exonerate, those encumbrances. n82

An interesting substance-procedure dichotomy exists in matters of succession to personal property, in that actual succession is governed by the law of the decedent's state of domicil, while the rules of administration derive from the state where the personal property is located.

Title to personal property vests in the rightful successors immediately upon the decedent's death, but the actual distribution may be delayed in the course of estate administration, so that debts may be paid and other matters affecting distributive shares may be properly determined. If an estate is not to be probated or administered, and no requirement therefor exists, the heirs may take immediate possession of the decedent's personal property.

Traditionally, and technically, those who succeeded to a decedent's real property were termed "heirs," while those who succeeded to the personal property were referred to as "next of kin." In both common speech and statutory language the two terms are now often interchanged, so whether they are intended to have distinct meanings must often be gathered from the context.

A statute of distribution will typically designate the decedent's children and their descendants as successors, or the decedent's parents and their descendants as successors, and then -- in the absence of those close relatives, pass the property to the "next of kin." Which relatives constitute the "next of kin," and which classes of relatives have priority, is determined by the so-called civil law method -- adopted in most states -- or the common-law method, sometimes also called the canon law method. By the civil law method, the kin are assigned a degree of proximate relatedness to the decedent, with children and parents in the first degree, and grandparents, grandchildren, brothers and sisters in the second, and further degrees being correspondingly further generations removed from the decedent. Where both ascendants and descendants or lateral relatives are in the same degree of relationship, those who are younger or are descendants are preferred. Thus children are preferred over parents, and siblings over grandparents. These degree relationships under the civil law method may be summarized as follows:

Relationship Degrees of a Decedent's Next of Kin
(civil law or majority method) n83

First Degree: Children

Parents

Second Degree: Siblings

Grandparents

Grandchildren

Third Degree: Nieces

Nephews

Aunts

Uncles

Great-grandparents

Fourth Degree: First cousins

Great aunts

Great uncles

Great-great-grandparents

Fifth Degree: First cousins once removed (children of first cousins)

Children of great aunts or of great uncles

Great-great-aunts

Great-great-uncles

Sixth Degree: Second cousins n84

Relationship Degrees of a Decedent's Next of Kin (common law or canon law method) n85

The background and features of the canon law method of ascertaining degrees of kinship has been explained as follows:

> There was another method of ascertaining kinship, namely, the method of the canon law which was used by the church to determine what marriages between relatives were forbidden. According to the canon law the steps from the common ancestor to each of the persons involved were counted as in the case of the civil law. However, instead of taking the sum of these two figures, only the larger was taken. This represented the degree of relationship according to the canon law. The common law adopted this method of computation for the purpose of limiting the number of successive donees in frankmarriage. The canon or common-law manner of determining kinship was never applied in England under the Statute of Distribution. It should be understood, however, as a few American jurisdictions adopt the plan. n86

First Degree: Parents

Siblings

Second Degree: Nieces

Nephews

Aunts

Uncles

Grandparents

First Cousins

Third Degree: Grandnieces

Grandnephews

Great-grandparents

First cousins once removed

Great aunts

Great uncles

Children of great aunts and great uncles

Second cousins

Fourth Degree: First cousins twice removed

Second cousins once removed

Fifth Degree: Second cousins twice removed n87

Despite the wide variety of state statutory approaches in matters of descent and distribution, a few basic principles are rather uniformly implemented. A surviving spouse will have a share in the decedent's property, along with the decedent's children or descendants of deceased children. The surviving spouse's share may be fixed or may vary according to the number of decedent's children who also take. If there is no surviving spouse, the children take all; only if there are no surviving spouse and children do any other next of kin take any part of the intestate decedent's estate. Children who succeed to the decedent's property include adopted children and children of the decedent's other marriages and now, according to statutory provision, in many states also include the decedent's children born out of wedlock. n88 Indeed, a total statutory disallowance of inheritance because of illegitimacy has been held unconstitutional. n89 When the estate passes to only the children, they take in equal shares. Descendants of children do not take any part of the estate if their next-of-kin parent is alive, but if not, they take their parent's share. Stepchildren and stepparents usually will not take a portion of the estate, unless they have been adopted or some special statutory provision has been made for them. Siblings of the half-blood will usually take if they are related by blood to the decedent.

If the decedent's entire estate passes to children, they take equal shares and may be said to take "per capita," the size of share determined by the number of heirs in that class. However, any of the decedent's grandchildren who stand as heirs in the place of a deceased parent, they -- regardless of their number -- take only their deceased parent's share, by representation or "per stirpes." This same principle would seemingly prevail where inheritance applies to next of kin in other degrees of relationship; however, the usual American rule is that where all the primary heirs are deceased and

their own descendants (the so-called remote issue) are all of the same degree, they take per capita. Thus if the decedent's next of kin are all grandchildren, they would take per capita rather than per stirpes.

A surviving spouse would not be considered a decedent's heir or next of kin at common law and is usually accorded special treatment in the state statutes of descent and distribution. In a very general sense, all states make statutory provision for surviving spouses, apart from whatever dower or curtesy rights may still be recognized, and in addition to other property rights arising from the marital relationship. The state statutes vary enormously in the share of the decedent's estate accorded the surviving spouse, from a share that replicates what dower or curtesy principles would have yielded, to a share that differs depending on the number of children, to a fixed share. The share for personal property may differ from the share for realty. Many states have adopted the provisions of the Uniform Probate Code, which govern succession rights of surviving spouses according to the provisions set forth in the next section.

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LEXIS: intes! w/20 succession

§ 13.04(b)(1)(ii) Uniform Probate Code Provisions for Intestate Succession.

The Uniform Probate Code, adopted in fifteen states, n90 regulates matters of intestate succession according to the following provisions:

Section 2-101. [Intestate Estate.]

Any part of the estate of a decedent not effectively disposed of by his will passes to his heirs as prescribed in the following sections of this Code.

Section 2-102. [Share of the Spouse.]

The intestate share of the surviving spouse is:

(1) if there is no surviving issue or parent of the decedent, the entire intestate estate;

(2) if there is no surviving issue but the decedent is survived by a parent or parents, the first [$50,000], plus one-half of the balance of the intestate estate;

(3) if there are surviving issue all of whom are issue of the surviving spouse also, the first [$50,000], plus one-half of the balance of the intestate estate;

(4) if there are surviving issue one or more of whom are not issue of the surviving spouse, one-half of the intestate estate.

ALTERNATIVE PROVISION FOR COMMUNITY PROPERTY STATES

Section 2-102A. [Share of the Spouse.]

The intestate share of the surviving spouse is as follows:

(1) as to separate property,

(i) if there is no surviving issue or parent of the decedent, the entire intestate estate;

(ii) if there is no surviving issue but the decedent is survived by a parent or parents, the first [$40,000], plus one-half of the balance of the intestate estate;

(iii) if there are surviving issue all of whom are issue of the surviving spouse also, the first [$50,000], plus one-half of the balance of the intestate estate;

(iv) if there are surviving issue one or more of whom are not issue of the surviving spouse, one-half of the intestate estate.

(2) as to community property,

(i) the one-half of community property which belongs to the decedent passes to the [surviving spouse].]

Section 2-103. [Share of Heirs Other Than Surviving Spouse.]

The part of the intestate estate not passing to the surviving spouse under Section 2-102, or the entire intestate estate if there is no surviving spouse, passes as follows:

(1) to the issue of the decedent; if they are all of the same degree of kinship to the decedent they take equally, but if of unequal degree, then those of more remote degree take by representation;

(2) if there is no surviving issue, to his parent or parents equally;

(3) if there is no surviving issue or parent, to the issue of the parents or either of them by representation;

(4) if there is no surviving issue, parent or issue of a parent, but the decedent is survived by one or more grandparents or issue of grandparents, half of the estate passes to the paternal grandparents if both survive, or to the surviving paternal grandparent, or to the issue of the paternal grandparents if both are deceased, the issue taking equally if they are all of the same degree of kinship to the decedent, but if of unequal degree those of more remote degree take by representation; and the other half passes to the maternal relatives in the same manner; but if there be no surviving grandparent or issue of grandparent on either the paternal or the maternal side, the entire estate passes to the relatives on the other side in the same manner as the half.

Section 2-104. [Requirement That Heir Survive Decedent for 120 Hours.]

Any person who fails to survive the decedent by 120 hours is deemed to have predeceased the decedent for purposes of homestead allowance, exempt property and intestate succession, and the decedent's heirs are determined accordingly. If the time of death of the decedent or of the person who would otherwise be an heir, or the times of death of both, cannot be determined, and it cannot be established that the person who would otherwise be an heir has survived the decedent by 120 hours, it is deemed that the person failed to survive for the required period. This section is not to be applied where its application would result in a taking of intestate estate by the state under Section 2-105.

Section 2-105. [No Taker.]

If there is no taker under the provisions of this Article, the intestate estate passes to the [state].

Section 2-106. [Representation.]

If representation is called for by this Code, the estate is divided into as many shares as there are surviving heirs in the nearest degree of kinship and deceased persons in the same degree who left issue who survive the decedent, each surviving heir in the nearest degree receiving one share and the share of each deceased person in the same degree being divided among his issue in the same manner.

Section 2-107. [Kindred of the Half Blood.]

Relatives of the half blood inherit the same share they would inherit if they were of the whole blood.

Section 2-108. [Afterborn Heirs.]

Relatives of the decedent conceived before his death but born thereafter inherit as if they had been born in the lifetime of the decedent.

Section 2-109. [Meaning of Child and Related Terms.]

If, for purposes of intestate succession, a relationship of parent and child must be established to determine succession by, through, or from a person,

(1) an adopted person is the child of an adopting parent and not of the natural parents except that adoption of a child by the spouse of a natural parent has no effect on the relationship between the child and either natural parent.

(2) In cases not covered by Paragraph (1), a person is the child of its parents regardless of the marital status of its parents and the parent and child relationship may be established under the [Uniform Parentage Act].

Alternative subsection (2) for states that have not adopted the Uniform Parentage Act.

[(2) In cases not covered by Paragraph (1), a person born out of wedlock is a child of the mother. That person is also a child of the father, if:

(i) the natural parents participated in a marriage ceremony before or after the birth of the child, even though the attempted marriage is void; or

(ii) the paternity is established by an adjudication before the death of the father or is established thereafter by clear and convincing proof, but the paternity established under this subparagraph is ineffective to qualify the father or his kindred to inherit from or through the child unless the father has openly treated the child as his, and has not refused to support the child.]

Section 2-110. [Advancements.]

If a person dies intestate as to all his estate, property which he gave in his lifetime to an heir is treated as an advancement against the latter's share of the estate only if declared in a contemporaneous writing by the decedent or acknowledged in writing by the heir to be an advancement. For this purpose the property advanced is valued as of the time the heir came into possession or enjoyment of the property or as of the time of death of the decedent, whichever first occurs. If the recipient of the property fails to survive the decedent, the property is not taken into account in computing the intestate share to be received by the recipient's issue, unless the declaration or acknowledgment provides otherwise.

Section 2-111. [Debts to Decedent.]

A debt owed to the decedent is not charged against the intestate share of any person except the debtor. If the debtor fails to survive the decedent, the debt is not taken into account in computing the intestate share of the debtor's issue.

Section 2-112. [Alienage.]

No person is disqualified to take as an heir because he or a person through whom he claims is or has been an alien.

[Section 2-113. [Dower and Curtesy Abolished.]

The estates of dower and curtesy are abolished.]

Section 2-114. Persons Related to Decedent Through Two Lines.]

A person who is related to the decedent through 2 lines of relationship is entitled to only a single share based on the

relationship which would entitle him to the larger share.

Section 2-201. [Right to Elective Share.]

(a) If a married person domiciled in this state dies, the surviving spouse has a right of election to take an elective share of one-third of the augmented estate under the limitations and conditions hereinafter stated.

(b) If a married person not domiciled in this state dies, the right, if any, of the surviving spouse to take an elective share in property in this state is governed by the law of the decedent's domicile at death.

Section 2-202. [Augmented Estate.]

The augmented estate means the estate reduced by funeral and administration expenses, homestead allowance, family allowances and exemptions, and enforceable claims, to which is added the sum of the following amounts:

(1) The value of property transferred to anyone other than a bona fide purchaser by the decedent at any time during marriage, to or for the benefit of any person other than the surviving spouse, to the extent that the decedent did not receive adequate and full consideration in money or money's worth for the transfer, if the transfer is of any of the following types:

(i) any transfer under which the decedent retained at the time of his death the possession or enjoyment of, or right to income from, the property;

(ii) any transfer to the extent that the decedent retained at the time of his death a power, either alone or in conjunction with any other person, to revoke or to consume, invade or dispose of the principal for his own benefit;

(iii) any transfer whereby property is held at the time of decedent's death by decedent and another with right of survivorship;

(iv) any transfer made to donee within two years of death of the decedent to the extent that the aggregate transfers to any one donee in either of the years exceed $3,000.00.

Any transfer is excluded if made with the written consent or joinder of the surviving spouse. Property is valued as of the decedent's death except that property given irrevocably to a donee during the lifetime of the decedent is valued as of the date the donee came into possession or enjoyment if that occurs first. Nothing herein shall cause to be included in the augmented estate any life insurance, accident insurance, joint annuity, or pension payable to a person other than the surviving spouse.

(2) The value of property owned by the surviving spouse at the decedent's death, plus the value of property transferred by the spouse at any time during marriage to any person other than the decedent which would have been includible in the spouse's augmented estate if the surviving spouse had predeceased the decedent to the extent the owned or transferred property is derived from the decedent by any means other than testate or intestate succession without a full consideration in money or money's worth. For purposes of this paragraph:

(i) Property derived from the decedent includes, but is not limited to, any beneficial interest of the surviving spouse in a trust created by the decedent during his lifetime, any property appointed to the spouse by the decedent's exercise of a general or special power of appointment also exercisable in favor of others than the spouse, any proceeds of insurance (including accidental death benefits) on the life of the decedent attributable to premiums paid by him, any lump sum immediately payable and the commuted value of the proceeds of annuity contracts under which the decedent was the primary annuitant attributable to premiums paid by him, the commuted value of amounts payable after the decedent's death under any public or private pension, disability compensation, death benefit or retirement plan, exclusive of the Federal Social Security system, by reason of service performed or disabilities incurred by the decedent, any property held at the time of decedent's death by decedent and the surviving spouse with right of survivorship, any property held by decedent and transferred by contract to the surviving spouse by reason of the decedent's death and the value of the share of the surviving spouse resulting from rights in community property in this or any other state formerly owned with the decedent. Premiums paid by the decedent's employer, his partner, a partnership of which he was a member, or his creditors, are deemed to have been paid by the decedent.

(ii) Property owned by the spouse at the decedent's death is valued as of the date of death. Property transferred by the spouse is valued at the time the transfer became irrevocable, or at the decedent's death, whichever occurred first. Income earned by included property prior to the decedent's death is not treated as property derived from the decedent.

(iii) Property owned by the surviving spouse as of the decedent's death, or previously transferred by the surviving spouse, is presumed to have been derived from the decedent except to the extent that the surviving spouse establishes that it was derived from another source.

(3) For purposes of this section a bona fide purchaser is a purchaser for value in good faith and without notice of any adverse claim. Any recorded instrument on which a state documentary fee is noted pursuant to [insert appropriate reference] is prima facie evidence that the transfer described therein was made to a bona fide purchaser.

Section 2-203. [Right of Election Personal to Surviving Spouse.]

The right of election of the surviving spouse may be exercised only during his lifetime by him. In the case of a protected person, the right of election may be exercised only by order of the court in which protective proceedings as to his property are pending, after finding that exercise is necessary to provide adequate support for the protected person during his probable life expectancy.

Section 2-204. [Waiver of Right to Elect and of Other Rights.]

The right of election of a surviving spouse and the rights of the surviving spouse to homestead allowance, exempt

property and family allowance, or any of them, may be waived, wholly or partially, before or after marriage, by a written contract, agreement or waiver signed by the party waiving after fair disclosure. Unless it provides to the contrary, a waiver of "all rights" (or equivalent language) in the property or estate of a present or prospective spouse or a complete property settlement entered into after or in anticipation of separation or divorce is a waiver of all rights to elective share, homestead allowance, exempt property and family allowance by each spouse in the property of the other and a renunciation by each of all benefits which would otherwise pass to him from the other by intestate succession or by virtue of the provisions of any will executed before the waiver or property settlement.

Section 2-205. [Proceeding for Elective Share; Time Limit.]

(a) The surviving spouse may elect to take his elective share in the augmented estate by filing in the court and mailing or delivering to the personal representative, if any, a petition for the elective share within 9 months after the date of death, or within 6 months after the probate of the decedent's will, whichever limitation last expires. However, non-probate transfers, described in Section 2-202(1), shall not be included within the augmented estate for the purpose of computing the elective share, if the petition is filed later than 9 months after death.

The court may extend the time for election as it sees fit for cause shown by the surviving spouse before the time for election has expired.

(b) The surviving spouse shall give notice of the time and place set for hearing to persons interested in the estate and to the distributees and recipients of portions of the augmented net estate whose interests will be adversely affected by the taking of the elective share.

(c) The surviving spouse may withdraw his demand for an elective share at any time before entry of a final determination by the court.

(d) After notice and hearing, the court shall determine the amount of the elective share and shall order its payment from the assets of the augmented net estate or by contribution as appears appropriate under Section 2-207. If it appears that a fund or property included in the augmented net estate has not come into the possession of the personal representative, or has been distributed by the personal representative, the court nevertheless shall fix the liability of any person who has any interest in the fund or property or who has possession thereof, whether as trustee or otherwise. The proceeding may be maintained against fewer than all persons against whom relief could be sought, but no person is subject to contribution in any greater amount than he would have been if relief had been secured against all persons subject to contribution.

(e) The order or judgment of the court may be enforced as necessary in suit for contribution or payment in other courts of this state or other jurisdictions.

Section 2-206. [Effect of Election on Benefits by Will or Statute.]

A surviving spouse is entitled to homestead allowance, exempt property, and family allowance, whether or not he elects to take an elective share.

Section 2-207. [Charging Spouse With Gifts Received; Liability of Others for Balance of Elective Share.]

(a) In the proceeding for an elective share, values included in the augmented estate which pass or have passed to the surviving spouse, or which would have passed to the spouse but were renounced, are applied first to satisfy the elective share and to reduce any contributions due from other recipients of transfers included in the augmented estate. For purposes of this subsection, the electing spouse's beneficial interest in any life estate or in any trust shall be computed as if worth one half of the total value of the property subject to the life estate, or of the trust estate, unless higher or lower values for these interests are established by proof.

(b) Remaining property of the augmented estate is so applied that liability for the balance of the elective share of the surviving spouse is equitably apportioned among the recipients of the augmented estate in proportion to the value of their interests therein.

(c) Only original transferees from, or appointees of, the decedent and their donees, to the extent the donees have the property or its proceeds, are subject to the contribution to make up the elective share of the surviving spouse. A person liable to contribution may choose to give up the property transferred to him or to pay its value as of the time it is considered in computing the augmented estate.

Section 2-301. [Omitted Spouse.]

(a) If a testator fails to provide by will for his surviving spouse who married the testator after the execution of the will, the omitted spouse shall receive the same share of the estate he would have received if the decedent left no will unless it appears from the will that the omission was intentional or the testator provided for the spouse by transfer outside the will and the intent that the transfer be in lieu of a testamentary provision is shown by statements of the testator or from the amount of the transfer or other evidence.

(b) In satisfying a share provided by this section, the devises made by the will abate as provided in Section 3-902.

Section 2-302. [Pretermitted Children.]

(a) If a testator fails to provide in his will for any of his children born or adopted after the execution of his will, the omitted child receives a share in the estate equal in value to that which he would have received if the testator had died intestate unless:

(1) it appears from the will that the omission was intentional;

(2) when the will was executed the testator had one or more children and devised substantially all his estate to the other parent of the omitted child; or

(3) the testator provided for the child by transfer outside the will and the intent that the transfer be in lieu of a testamentary provision is shown by statements of the testator or from the amount of the transfer or other evidence.

(b) If at the time of execution of the will the testator fails to provide in his will for a living child solely because he believes the child to be dead, the child receives a share in the estate equal in value to that which he would have received if the testator had died intestate.

(c) In satisfying a share provided by this section, the devises made by the will abate as provided in Section 3-902.

Section 2-401. [Homestead Allowance.]

A surviving spouse of a decedent who was domiciled in this state is entitled to a homestead allowance of [$5,000]. If there is no surviving spouse, each minor child and each dependent child of the decedent is entitled to a homestead allowance amounting to [$5,000] divided by the number of minor and dependent children of the decedent. The homestead allowance is exempt from and has priority over all claims against the estate. Homestead allowance is in addition to any share passing to the surviving spouse or minor or dependent child by the will of the decedent unless otherwise provided, by intestate succession or by way of elective share.

Section 2-401A. [Constitutional Homestead.]

The value of any constitutional right of homestead in the family home received by a surviving spouse or child shall be charged against that spouse or child's homestead allowance to the extent that the family home is part of the decedent's estate or would have been but for the homestead provision of the constitution.]

Section 2-402. [Exempt Property.]

In addition to the homestead allowance, the surviving spouse of a decedent who was domiciled in this state is entitled from the estate to value not exceeding $3,500 worth of exempt property in the estate, the spouse or children are entitled to other assets of the estate, if any, to the extent necessary to make up the $3,500 value. Rights to exempt property and assets needed to make up a deficiency of exempt property have priority over all claims against the estate, except that the right to any assets to make up a deficiency of exempt property shall abate as necessary to permit prior payment of homestead allowance and family allowance. These rights are in addition to any benefit or share passing to the surviving spouse or children by the will of the decedent unless otherwise provided, by intestate succession, or by way of elective share.

Section 2-403. [Family Allowance.]

In addition to the right to homestead allowance and exempt property, if the decedent was domiciled in this state, the surviving spouse and minor children whom the decedent was obligated to support and children who were in fact being supported by him are entitled to a reasonable allowance in money out of the estate for their maintenance during the period of administration, which allowance may not continue for longer than one year if the estate is inadequate to discharge allowed claims. The allowance may be paid as a lump sum or in periodic installments. It is payable to the surviving spouse, if living, for the use of the surviving spouse and minor and dependent children; otherwise to the children, or persons having their care and custody; but in case any minor child or dependent child is not living with the surviving spouse, the allowance may be made partially to the child or his guardian or other person having his care and custody, and partially to the spouse, as their needs may appear. The family allowance is exempt from and has priority

over all claims but not over the homestead allowance.

The family allowance is not chargeable against any benefit or share passing to the surviving spouse or children by the will of the decedent unless otherwise provided, by intestate succession, or by way of elective share. The death of any person entitled to family allowance terminates his right to allowances not yet paid.

Section 2-404. [Source, Determination and Documentation.]

If the estate is otherwise sufficient, property specifically devised is not used to satisfy rights to homestead and exempt property. Subject to this restriction, the surviving spouse, the guardians of the minor children, or children who are adults may select property of the estate as homestead allowance and exempt property. The personal representative may make these selections if the surviving spouse, the children or the guardians of the minor children are unable or fail to do so within a reasonable time or if there are no guardians of the minor children. The personal representative may execute an instrument or deed of distribution to establish the ownership of property taken as homestead allowance or exempt property. He may determine the family allowance in a lump sum not exceeding $6,000 or periodic installments not exceeding $500 per month for one year, and may disburse funds of the estate in payment of the family allowance and any part of the homestead allowance payable in cash. The personal representative or any interested person aggrieved by any selection, determination, payment, proposed payment, or failure to act under this section may petition the Court for appropriate relief, which relief may provide a family allowance larger or smaller than that which the personal representative determined or could have determined.

§ 13.04(b)(2) Testamentary Transfers.

Another common way of transferring ownership of personal property upon the owner's death is by testamentary transfer, that is, by carrying out the instructions of the decedent owner's valid will. As with the administration of an intestate decedent's estate, carrying out the provisions of a will often requires that a distinction be made between the decedent's real and personal property. Generally, the administration of the estate and the validity of a will are determined by the law of the state in which the decedent's immovable property (for most purposes, the immovables are considered real property) is located, and, for the movable property (the personalty), the state in which the decedent was domiciled at the time of death. Because every state has its own statutory provisions for wills, determining the applicable state law is important.

The variety of state will provisions still permits certain generalizations to be expressed about the requirements for creating a valid will. All states require that wills be written, but some states make provision for oral (nuncupative) wills. The oral wills are severely restricted in the assets to which they apply, usually limited to a few hundred dollars worth of personal property.

As to the written wills, a distinction must be made between the formal wills, which are usually typed or printed, signed by the testatrix or testator, and properly witnessed, and the so-called holographic wills, which are written and signed in the decedent's hand and may or may not be witnessed. A substantial minority of the states permit probate of holographic wills.

The ordinary formal will is in written form and, at the end, signed by the testatrix or testator. In some states, if the signature is not at the end of the will, it may invalidate an otherwise effective document. It is usually permissible for someone to sign for the testatrix or testator, if the alternative signing is at the direction and in the presence of the testatrix or testator. Often the alternative signer must also append the alternative signer's own signature. This signing should also be in the presence of witnesses, the required minimum number of whom is usually two and rarely three, and who must also subscribe their attestation. In some jurisdictions it is sufficient if the signing is later acknowledged before witnesses, who must also subscribe their attestation. In some states, if the witnesses' signatures are written before a notary public or similar officer, the will is considered "self-proving," the notarial attestation making it unnecessary for

the witnesses to appear when the will is presented for probate. Traditionally, if a witness had an interest in the estate, the entire will or its provisions relating to that witness could be invalidated. The more modern approach treats this circumstance only as a factor in a possible challenge to the will's validity.

Holographic (or olographic) wills are required to have been written and signed by the decedent. In some states, it is required that the entire document, or at least all of the substantive dispositive provisions, have been handwritten by the decedent. A few jurisdictions have also insisted that such a will be fully dated. Certain writings, such as letters and suicide notes, have been accepted as holographic wills, if sufficient testamentary intent appeared from the contents of the writings.

A will is applicable to property acquired after it is signed, and may be revoked any time before the testatrix or testator dies. States often have statutory provisions for a spouse to take a specified portion of the estate in preference to the portion assigned in the will, especially if the person became the decedent's spouse after the will was signed and had therefore been omitted from the will; these provisions effectively revoke portions of a will by operation of law. Likewise, some pretermitted (intentionally omitted) children of the decedent are accorded statutory shares in contravention of the will provisions. Some jurisdictions also provide that a divorce revokes portions of the decedent's will pertaining to the former spouse.

Alongside these "revocations" by operation of law are the explicit and intentional revocations made by the will drafters themselves. The revocation is usually accomplished by creating a new valid will or by defacing or destroying the old will. An amendment, or codicil, to a will may also have the effect of revoking portions of the original will. These revocations are sometimes ambiguous in that they may work a revocation only by inference from inconsistency between original and amending provisions. If a new will does not contain an express revocation of all former wills, former wills are revoked only to the extent they are explicitly superseded by the provisions of the new will. Wills that are lost may have their provisions proved by competent evidence.

Statutes governing will requirements are notoriously jurisdiction-specific, a situation exacerbated by the tendency of courts to insist on strict compliance with such requirements. The following will provisions of the Uniform Probate Code, adopted in fifteen states, offer a somewhat generalized view of prevailing statutory will requirements, although it should be noted that this uniform act represents the modern approach of reducing and liberalizing formal requirements as much as possible:

Section 2-501. [Who May Make a Will.]

Any person 18 or more years of age who is of sound mind may make a will.

Section 2-502. [Execution.]

Except as provided for holographic wills, writings within Section 2-513, and wills within Section 2-506, every will shall be in writing signed by the testator or in the testator's name by some other person in the testator's presence and by his direction, and shall be signed by at least 2 persons each of whom witnessed either the signing or the testator's acknowledgment of the signature or of the will.

Section 2-503. [Holographic Will.]

A will which does not comply with Section 2-502 is valid as a holographic will, whether or not witnessed, if the signature and the material provisions are in the handwriting of the testator.

Section 2-504. [Self-proved Will.]

(a) Any will may be simultaneously executed, attested, and made self-proved, by acknowledgment thereof by the testator and affidavits of the witnesses, each made before an officer authorized to administer oaths under the laws of the state where execution occurs and evidenced by the officer's certificate, under official seal, in substantially the following form:

I, _____, the testator, sign my name to this instrument this _____ day of _____, 19_____, and being first duly sworn, do hereby declare to the undersigned authority that I sign and execute this instrument as my last will and that I sign it willingly (or willingly direct another to sign for me), that I execute it as my free and voluntary act for the purposes therein expressed, and that I am eighteen years of age or older, of sound mind, and under no constraint or undue influence.

Testator

We, _____, _____, the witnesses, sign our names to this instrument, being first duly sworn, and do hereby declare to the undersigned authority that the testator signs and executes this instrument as his last will and that he signs it willingly (or willingly directs another to sign for him), and that each of us, in the presence and hearing of the testator, hereby signs this will as witness to the testator's signing, and that to the best of our knowledge the testator is eighteen years of age or older, of sound mind, and under no constraint or undue influence.

Witness
Witness

The State of _____
County of _____

Subscribed, sworn to and acknowledged before me by _____, the testator, and subscribed and sworn to before me by _____, and _____, witnesses, this _____ day of _____.

(Seal)
(Signed)
(Official capacity of officer)

(b) An attested will may at any time subsequent to its execution be made self-proved by the acknowledgment thereof by the testator and the affidavits of the witnesses, each made before an officer authorized to administer oaths under the laws of the state where the acknowledgment occurs and evidenced by the officer's certificate, under the official seal, attached or annexed to the will in substantially the following form:
The State of _____
County of _____

We, _____, _____, and _____, the testator and the witnesses, respectively, whose names are signed to the attached or foregoing instrument, being first duly sworn, do hereby declare to the undersigned authority that the testator signed and executed the instrument as his last will and that he signed willingly (or willingly directed another to sign for him), and that he executed it as his free and voluntary act for the purposes therein expressed, and that each of the witnesses, in the presence and hearing of the testator, signed the will as witness and that to the best of his knowledge the testator was at that time eighteen years of age or older, of sound mind and under no constraint or undue influence.

Testator
Witness
Witness

Subscribed, sworn to and acknowledged before me by _____, the testator, and subscribed and sworn to before me by _____, and _____, witnesses, this _____ day of _____.

(Seal)
(Signed)
(Official capacity of officer)

Section 2-505. [Who May Witness.]

(a) Any person generally competent to be a witness may act as a witness to a will.

(b) A will or any provision thereof is not invalid because the will is signed by an interested witness.

Section 2-506. [Choice of Law as to Execution.]

A written will is valid if executed in compliance with Section 2-502 or 2-503 or if its execution complies with the law at the time of execution of the place where the will is executed, or of the law of the place where at the time of execution or at the time of death the testator is domiciled, has a place of abode or is a national.

Section 2-507. [Revocation by Writing or by Act.]

A will or any part thereof is revoked

(1) by a subsequent will which revokes the prior will or part expressly or by inconsistency; or

(2) by being burned, torn, canceled, obliterated, or destroyed, with the intent and for the purpose of revoking it by the testator or by another person in his presence and by his direction.

Section 2-508. [Revocation by Divorce; No Revocation by Other Changes of Circumstances.]

If after executing a will the testator is divorced or his marriage annulled, the divorce or annulment revokes any disposition or appointment of property made by the will to the former spouse, any provision conferring a general or special power of appointment on the former spouse, and any nomination of the former spouse as executor, trustee, conservator, or guardian, unless the will expressly provides otherwise. Property prevented from passing to a former spouse because of revocation by divorce or annulment passes as if the former spouse failed to survive the decedent. If provisions are revoked solely by this section, they are revived by testator's remarriage to the former spouse. For purposes of this section, divorce or annulment means any divorce or annulment which would exclude the spouse as a surviving spouse within the meaning of Section 2-802(b). A decree of separation which does not terminate the status of

husband and wife is not a divorce for purposes of this section. No change of circumstances other than as described in this section revokes a will.

Section 2-509. [Revival of Revoked Will.]

(a) If a second will which, had it remained effective at death, would have revoked the first will in whole or part, is thereafter revoked by acts under Section 2-507, the first will is revoked in whole or in part unless it is evident from the circumstances of the revocation of the second will or from testator's contemporary or subsequent declarations that he intended the first will to take effect as executed.

(b) If a second will which, had it remained effective at death, would have revoked the first will in whole or in part, is thereafter revoked by a third will, the first will is revoked in whole or in part, except to the extent it appears from the terms of the third will that the testator intended the first will to take effect.

Section 2-510. [Incorporation by Reference.]

Any writing in existence when a will is executed may be incorporated by reference if the language of the will manifests this intent and describes the writing sufficiently to permit its identification.

Section 2-511. [Testamentary Additions to Trusts.]

A devise or bequest, the validity of which is determinable by the law of this state, may be made by a will to the trustee of a trust established or to be established by the testator or by the testator and some other person or by some other person (including a funded or unfunded life insurance trust, although the trustor has reserved any or all rights of ownership of the insurance contracts) if the trust is identified in the testator's will and its terms are set forth in a written instrument (other than a will) executed before or concurrently with the execution of the testator's will or in the valid last will of a person who has predeceased the testator (regardless of the existence, size, or character of the corpus of the trust). The devise is not invalid because the trust is amendable or revocable, or because the trust was amended after the execution of the will or after the death of the testator. Unless the testator's will provides otherwise, the property so devised (1) is not deemed to be held under a testamentary trust of the testator but becomes apart of the trust to which it is given and (2) shall be administered and disposed of in accordance with the provisions of the instrument or will setting forth the terms of the trust, including any amendments thereto made before or after the execution of the testator's will), and, if the testator's will so provides, including any amendments to the trust made after the death of the testator. A revocation or termination of the trust before the death of the testator causes the devise to lapse.

Section 2-513. [Separate Writing Identifying Bequest of Tangible Property.]

Whether or not the provisions relating to holographic wills apply, a will may refer to a written statement or list to dispose of items of tangible personal property not otherwise specifically disposed of by the will, other than money, evidences of indebtedness, documents of title, and securities, and property used in trade or business. To be admissible under this section as evidence of the intended disposition, the writing must either be in the handwriting of the testator or be signed by him and must describe the items and the devisee with reasonable certainty. The writing may be referred to as one to be in existence at the time of the testator's death; it may be prepared before or after the execution of the will; it may be altered by the testator after its preparation; and it may be a writing which has no significance apart from its effect upon the dispositions made by the will.

Section 2-601. [Requirement That Devisee Survive Testator by 120 Hours.]

A devisee who does not survive the testator by 120 hours is treated as if he predeceased the testator, unless the will of decedent contains some language dealing explicitly with simultaneous deaths or deaths in a common disaster, or requiring that the devisee survive the testator or survive the testator for a stated period in order to take under the will.

Section 2-602. [Choice of Law as to Meaning and Effect of Wills.]

The meaning and legal effect of a disposition in a will shall be determined by the local law of a particular state selected by the testator in his instrument unless the application of that law is contrary to the provisions relating to the elective share described in Part 2 of this Article, the provisions relating to exempt property and allowances described in Part 4 of this Article, or any other public policy of this State otherwise applicable to the disposition.

Section 2-603. [Rules of Construction and Intention.]

The intention of a testator as expressed in his will controls the legal effect of his dispositions. The rules of construction expressed in the succeeding sections of this Part apply unless a contrary intention is indicated by the will.

Section 2-604. [Construction That Will Passes All Property; After-acquired Property.]

A will is construed to pass all property which the testator owns at his death including property acquired after the execution of the will.

Section 2-605. [Anti-lapse; Deceased Devisee; Class Gifts.]

If a devisee who is a grandparent or a lineal descendant of a grandparent of the testator is dead at the time of execution of the will, fails to survive the testator, or is treated as if he predeceased the testator, the issue of the deceased devisee who survive the testator by 120 hours take in place of the deceased devisee and if they are all of the same degree of kinship to the devisee they take equally, but if of unequal degree than those of more remote degree they take by representation. One who would have been a devisee under a class gift if he had survived the testator is treated as a devisee for purposes of this section whether his death occurred before or after the execution of the will.

Section 2-606. [Failure of Testamentary Provision.]

(a) Except as provided in Section 2-605 if a devise other than a residuary devise fails for any reason, it becomes a part of the residue.

(b) Except as provided in Section 2-605 if the residue is devised to two or more persons and the share of one of the residuary devisees fails for any reason, his share passes to the other residuary devisee, or to other residuary devisees in proportion to their interests in the residue.

Section 2-607. [Change in Securities; Accessions; Non-ademption.]

(a) If the testator intended a specific devise of certain securities rather than the equivalent value thereof, the specific devisee is entitled only to:

(1) as much of the devised securities as is a part of the estate at time of the testator's death;

(2) any additional or other securities of the same entity owned by the testator by reason of action initiated by the entity excluding any acquired by exercise of purchase options;

(3) securities of another entity owned by the testator as a result of a merger, consolidation, reorganization or other similar action initiated by the entity; and

(4) property owned by testator at his death as a result of foreclosure, or obtained in lieu of foreclosure, of the security for a specifically devised obligation.

(b) If specifically devised property is sold by a conservator, or if a condemnation award or insurance proceeds are paid to a conservator as a result of condemnation, fire, or casualty, the specific devisee has the right to a general pecuniary devise equal to the net sale price, the condemnation award, or the insurance proceeds. This subsection does not apply if after the sale, condemnation or casualty, it is adjudicated that the disability of the testator has ceased and the testator survives the adjudication by one year. The right of the specific devisee under this subsection is reduced by any right he has under subsection (a).

Section 2-609. [Non-Exoneration.]

A specific devise passes subject to any mortgage interest existing at the date of death, without right of exoneration, regardless of a general directive in the will to pay debts.

Section 2-610. [Exercise of Power of Appointment.]

A general residuary clause in a will, or a will making general disposition of all of the testator's property does not exercise a power of appointment held by the testator unless specific reference is made to the power or there is some other indication of intention to include the property subject to the power.

Section 2-611. [Construction of Generic Terms to Accord with Relationships as Defined for Intestate Succession.]

Halfbloods, adopted persons, and persons born out of wedlock are included in class gift terminology and terms of relationship in accordance with rules for determining relationships for purposes of intestate succession. [However, a person born out of wedlock is not treated as the child of the father unless the person is openly and notoriously so treated by the father.]

Section 2-612. [Ademption by Satisfaction.]

Property which a testator gave in his lifetime to a person is treated as a satisfaction of a devise to that person in whole or in part, only if the will provides for deduction of the lifetime gift, or the testator declares in a contemporaneous writing that the gift is to be deducted from the devise or is in satisfaction of the devise, or the devisee acknowledges in writing that the gift is in satisfaction. For purpose of partial satisfaction, property given during lifetime is valued as of the time the devisee came into possession or enjoyment of the property or as of the time of death of the testator, whichever occurs first.

If a will has been validly created and its provisions properly executed, personal property will pass to the intended recipient. In a few cases, those intended recipients are prohibited by circumstance or law from taking those bequests, in which case those assets return to the residuum of the estate for appropriate alternative disposition. In the past, convicted felons could not inherit, but today most of those restrictions have been removed. The few remaining state restrictions on inheritance by non-resident aliens apply only to inheritance of real property interests. Sometimes bequests to charities or to corporations were rejected because of a state requirement that bequests must be directed to persons, considered to mean humans. Even gifts to animals may be upheld, if they are made indirectly to a person who will administer the property for the benefit of the animal.

Although a beneficiary who does not survive the testator normally takes nothing under the will, this has been altered in many states by statute. A will provision for a beneficiary who died before the will was even signed is void; a provision for a beneficiary who died after the will was signed but before the testatrix or testator died merely lapsed. However, "anti-lapse" statutes in almost all states provide for alternative beneficiaries (usually children of the deceased beneficiary), subject to the decedent's contrary intention.

Beneficiaries may also renounce their bequests, and, in some cases, one who has murdered the decedent may be restricted from benefitting from the death by means of will provisions.

§ 13.04(c) Transfer by Sale.

Transferring ownership of personal property by transactions of sale is an ordinary and familiar process. The need for and provision of legal regulation for such transactions was apparent even in ancient societies, and the universality of these circumstances has led even the proudly diverse American states to seek uniformity in the law of sales. One of the earlier and more successful attempts at preparing uniform legislation for possible adoption by the states was the Uniform Sales Act, promulgated in 1906 and eventually adopted by 34 states. Using a codification approach to problems arising from sales of personal property, the provisions of this act effectively anticipated most of the conflicts and problems arising from sales of personal property. The Uniform Sales Act was replaced by Article 2 of the Uniform Commercial Code in 1953, and this code and its subsequent revisions have been adopted in 49 states; these code provisions therefore are the basic law governing sales of personal property. As described in the Code section on scope, Article 2 of Uniform Commercial Code is directed to personal property in the form of "goods":

§ 2-102. Scope; Certain Security and Other Transactions Excluded From this Article.

Unless the context otherwise requires, this Article applies to transactions in goods; it does not apply to any transaction which although in the form of an unconditional contract to sell or present sale is intended to operate only as a security transaction nor does this Article impair or repeal any statute regulating sales to consumers, farmers or other specified classes of buyers.

The application of Article 2 to "goods" excludes certain intangible forms of personal property that are within the scope of this chapter. Some of those intangible rights are covered by other articles of the Uniform Commercial Code. However, the focus on tangible goods in Article 2 is reinforced by the definition of "goods":

> § 2-105.Definitions. Transferability; "Goods"; "Future" Goods; "Lot"; "Commercial Unit."
>
> (1) "Goods" means all things (including specially manufactured goods) which are movable at the time of identification to the contract for sale other than the money in which the price is to be paid, investment securities (Article 8) and things in action. "Goods" also includes the unborn young of animals and growing crops and other identified things attached to realty as described in the section on goods to be severed from realty (Section 2-107).

The Uniform Commercial Code defines the extent of its coverage in the obscure area between real and personal property as follows:

§ 2-107. Goods to Be Severed From Realty; Recording.

(1) A contract for the sale of minerals or the like (including oil and gas) or a structure or its materials to be removed from realty is a contract for the sale of goods within this Article if they are to be severed by the seller, but until severance a purported present sale thereof which is not effective as a transfer of an interest in land is effective only as a contract to sell.

(2) A contract for the sale apart from the land of growing crops or other things attached to realty and capable of severance without material harm thereto but not described in subsection (1) or of timber to be cut is a contract for the sale of goods within this Article whether the subject matter is to be severed by the buyer or by the seller even though it forms part of the realty at the time of contracting, and the parties can by identification effect a present sale before severance.

(3) The provisions of this section are subject to any third party rights provided by law relating to realty records, and the contract for the sale may be executed and recorded as a document transferring an interest in land and shall then constitute notice to third parties of the buyer's rights under the contract for sale.

It should also be noted that in 1987 the official text of the Uniform Commercial Code added Article 2A, which "applies to any transaction, regardless of form, that creates a lease," n91 although the leases covered are only those relating to goods. n92

Keeping in mind this focus on tangible goods, it is meaningful to consider the philosophy and arrangement behind Article 2's regulation of sale transactions, as expressed in this original official comment introducing Article 2:

> This Article is a complete revision and modernization of the Uniform Sales Act which was promulgated by the National Conference of Commissioners on Uniform State Laws in 1906 and has been adopted in 34 states and Alaska, the District of Columbia and Hawaii [sic].
>
> The coverage of the present Article is much more extensive than that of the old Sales Act and extends to the various bodies of case law which have been developed both outside of and under the latter.
>
> The arrangement of the present Article is in terms of contract for sale and the various steps of its performance. The legal consequences are stated as following directly from the contract and action taken under it without resorting to the idea of when property or title passed or was to pass as being the determinative factor. The purpose is to avoid making practical issues between practical [persons] turn upon the location of an intangible something, the passing of which no [person] can prove by evidence and to substitute for such abstractions proof of words and actions of a tangible character. n93

The Uniform Commercial Code's emphasis on the contract aspect of sales of goods has in turn impacted American contract law. The result is a rather uniquely serviceable set of legal rules governing sales of goods:

> Some of the Article Two provisions on the formation of contracts for the sale of goods have not only radically altered sales law but have influenced the new Restatement (Second) of Contracts as well. In

most fundamental terms, Article Two expands our conception of contract. It makes contracts easier to form, and it imposes a wider range of obligations than before. Contract formation is easier in several ways. Parties may form a contract through conduct rather than merely through the exchange of communications constituting "offer and acceptance." Section 2-204(1) says, "A contract for sale of goods may be made in any manner sufficient to show agreement, including conduct by both parties which recognizes the existence of such a contract." Sections 2-206(1) and 2-207(3) also expressly allow for the formation of contracts partly or wholly on the basis of such conduct. Further, Article Two reduces the formalities required for contract formation. The statute of frauds (section 2-201) requires only a writing that "indicate[s]" a contract was made, and 2-206 and 2-207(1) abandon the requirement than an acceptance must coincide precisely with all terms of the offer. Section 2-204(3) states: "Even though one or more terms are left open a contract for sale does not fail for indefiniteness if the parties have intended to make a contract and there is a reasonably certain basis for giving an appropriate remedy." As we will see, Article Two itself helps provide this "reasonably certain basis" through numerous provisions which fill gaps in an agreement that might otherwise fail for indefiniteness.

Article Two contracts are also more expansive in content than before. Thus 1-201(11) defines "contract" as the "total legal obligation which results from the parties' agreement," and 1-201(3) defines "agreement" to mean "the bargain of the parties in fact as found in their language or by implication from other circumstances including course of dealing or usage of trade or course of performance as provided in this Act." Section 2-305 defines course of dealing and usage of trade while Section 2-208 defines course of performance. The Code therefore adds to sales agreements much that is not made express by the parties. Section 2-103 on supplemental general principles also feeds much general contract law into Article Two sales contracts. Further, 1-102(3) and 1-203 of the Code impose obligations of good faith which may be thought of as part of any Article Two contract. And Article Two broadens the notion of contract insofar as 2-202 on parol evidence permits parties to prove "extrinsic terms not provable under various pre-Code versions of the parol evidence rule." n94

The legal issues arising from transfer of ownership of personal property by sales of goods are revealed by the headings to the provisions in Article 2:

ARTICLE 2

SALES

PART 1. SHORT TITLE, GENERAL CONSTRUCTION AND SUBJECT MATTER

Section

2-101. Short Title.

2-102.Scope; Certain Security and Other Transactions Excluded From This Article.

2-103. Definitions and Index of Definitions.

2-104.Definitions: "Merchant"; "Between Merchants"; "Financing Agency".

2-105.Definitions: Transferability; "Goods"; "Future" Goods; "Lot"; "Commercial Unit".

2-106.Definitions: "Contract"; "Agreement"; "Contract for Sale"; "Sale"; "Present Sale"; "Conforming" to Contract;

"Termination"; "Cancellation".

2-107. Goods to Be Severed From Realty: Recording.

PART 2. FORM, FORMATION AND READJUSTMENT OF CONTRACT

2-201. Formal Requirements; Statute of Frauds.

2-202.Final Written Expression: Parol or Extrinsic Evidence.

2-203. Seals Inoperative.

2-204. Formation in General.

2-205. Firm Offers.

2-206. Offer and Acceptance in Formation of Contract.

2-207. Additional Terms in Acceptance or Confirmation.

2-208.Course of Performance or Practical Construction.

2-209. Modification, Rescission and Waiver.

2-210.Delegation of Performance; Assignment of Rights.

PART 3. GENERAL OBLIGATION AND CONSTRUCTION OF CONTRACT

2-301. General Obligations of Parties.

2-302. Unconscionable Contract or Clause.

2-303. Allocation or Division of Risks.

2-304.Price Payable in Money, Goods, Realty, or Otherwise.

2-305. Open Price Term.

2-306. Output, Requirements and Exclusive Dealings.

2-307. Delivery in Single Lot or Several Lots.

2-308. Absence of Specified Place for Delivery.

2-309.Absence of Specific Time Provisions; Notice of Termination.

2-310.Open Time for Payment or Running of Credit; Authority to Ship Under Reservation.

2-311. Options and Cooperation Respecting Performance.

2-312.Warranty of Title and Against Infringement; Buyer's Obligation Against Infringement.

2-313.Express Warranties by Affirmation, Promise, Description, Sample.

2-314.Implied Warranty: Merchantability; Usage of Trade.

2-315.Implied Warranty: Fitness for Particular Purpose.

2-316. Exclusion or Modification of Warranties.

2-317.Cumulation and Conflict of Warranties Express or Implied.

2-318.Third Party Beneficiaries of Warranties Express or Implied.

2-319. F.O.B. and F.A.S. Terms.

2-320. C.I.F. and C. & F. Terms.

2-321.C.I.F. or C. & F.: "Net Landed Weights"; "Payment on Arrival"; Warranty of Condition on Arrival.

2-322. Delivery "Ex-Ship".

2-323.Form of Bill of Lading Required in Overseas Shipment; "Overseas".

2-324. "No Arrival, No Sale" Term.

2-325. "Letter of Credit" Term; "Confirmed Credit".

2-326.Sale on Approval and Sale or Return; Consignment Sales and Rights of Creditors.

2-327.Special Incidents of Sale on Approval and Sale or Return.

2-328. Sale by Auction.

PART 4. TITLE, CREDITORS AND GOOD FAITH PURCHASERS

2-401.Passing of Title; Reservation for Security; Limited Application of This Section.

2-402.Rights of Seller's Creditors Against Sold Goods.

2-403.Power to Transfer; Good Faith Purchase of Goods; "Entrusting".

PART 5. PERFORMANCE

2-501.Insurable Interest in Goods; Manner of Identification of Goods.

2-502.Buyer's Right to Goods on Seller's Insolvency.

2-503. Manner of Seller's Tender of Delivery.

2-504. Shipment by Seller.

2-505. Seller's Shipment Under Reservation.

2-506. Rights of Financing Agency.

2-507.Effect of Seller's Tender; Delivery on Condition.

2-508.Cure by Seller of Improper Tender or Delivery; Replacement.

2-509. Risk of Loss in the Absence of Breach.

2-510. Effect of Breach on Risk of Loss.

2-511.Tender of Payment by Buyer; Payment by Check.

2-512. Payment by Buyer Before Inspection.

2-513. Buyer's Right to Inspection of Goods.

2-514.When Documents Deliverable on Acceptance; When on Payment.

2-515. Preserving Evidence of Goods in Dispute.

PART 6. BREACH, REPUDIATION AND EXCUSE

2-601. Buyer's Rights on Improper Delivery.

2-602. Manner and Effect of Rightful Rejection.

2-603.Merchant Buyer's Duties as to Rightfully Rejected Goods.

2-604.Buyer's Options as to Salvage of Rightfully Rejected Goods.

2-605.Waiver of Buyer's Objections by Failure to Particularize.

2-606. What Constitutes Acceptance of Goods.

2-607.Effect of Acceptance; Notice of Breach; Burden of Establishing Breach After Acceptance; Notice of Claim or Litigation to Person Answerable Over.

2-608. Revocation of Acceptance in Whole or in Part.

2-609. Right to Adequate Assurance of Performance.

2-610. Anticipatory Repudiation.

2-611. Retraction of Anticipatory Repudiation.

2-612. "Installment Contract"; Breach.

2-613. Casualty to Identified Goods.

2-614. Substituted Performance.

2-615. Excuse by Failure of Presupposed Conditions.

2-616. Procedure on Notice Claiming Excuse.

PART 7. REMEDIES

2-701.Remedies for Breach of Collateral Contracts Not Impaired.

2-702.Seller's Remedies on Discovery of Buyer's Insolvency.

2-703. Seller's Remedies in General.

2-704.Seller's Right to Identify Goods to the Contract Notwithstanding Breach or to Salvage Unfinished Goods.

2-705.Seller's Stoppage of Delivery in Transit or Otherwise.

2-706.Seller's Resale Including Contract for Resale.

2-707. "Person in the Position of a Seller".

2-708.Seller's Damages for Non-acceptance or Repudiation.

2-709. Action for the Price.

2-710. Seller's Incidental Damages.

2-711.Buyer's Damages for Non-delivery or Repudiation.

2-712."Cover"; -- Buyer's Procurement of Substitute Goods.

2-713."Cover"; Buyer's Damages for Non-delivery or Repudiation.

2-714.Buyer's Damages for Breach in Regard to Accepted Goods.

2-715. Buyer's Incidental and Consequential Damages.

2-716.Buyer's Right to Specific Performance or Replevin.

2-717. Deduction of Damages From the Price.

2-718.Liquidation or Limitation of Damages; Deposits.

2-719.Contractual Modification or Limitation of Remedy.

2-720.Effect of "Cancellation" or "Rescission" on Claims for Antecedent Breach.

2-721. Remedies for Fraud.

2-722.Who Can Sue Third Parties for Injury to Goods.

2-723. Proof of Market Price: Time and Place.

2-724. Admissibility of Market Quotations.

2-725. Statute of Limitations in Contracts for Sale.

That items of personal property are transferred from one owner to another by means of purchase and sale is clear without further comment. However, a much more troublesome legal problem is presented by the innocent purchaser, the so-called bona fide or good faith purchaser, who obtains the item from one who is not the real owner. In the modern contests between the true owner and the bona fide purchaser, the latter often triumphs with ownership of the item of personal property by virtue of the good faith purchase, even though the erstwhile "seller" had no title to confer.

In consequence of the old common law rule that one cannot convey a better title than one has, it is still true in sales of goods that even an innocent purchase from one with void title is of no efficacy to the purchaser. A possessor with void title is generally one who obtained possession without any intent or participation of the true owner, such as one who has received stolen goods, or received goods by mutual mistake of the parties, or received goods improperly delivered by a bailee. In all of these instances the true owner did not intend to part with the goods, and the "title" of the miscreant recipient may be said to be void; even a bona fide purchaser cannot enlarge upon a void title.

In many other instances, however, when one has inappropriately obtained possession of goods, the possessor's title is considered "voidable" rather than "void," and a good faith purchase from such a possessor will result in the purchaser obtaining full ownership rights. In general, it is assumed that the transferor of voidable title intended to part with possession, even though that intent may have been induced by misconduct of the recipient. That misconduct gives the true owner the right to revoke the transfer at any time before a further transfer of possession to an innocent purchaser. But if such revocation does not occur, then transfer to an innocent purchase may permit the innocent purchaser's rights to be so enlarged that they are superior to those of the true owner. These rules, originally developed in equity, have now been codified in the Uniform Commercial Code and adopted in forty-nine states, as follows:

Section 2-403. Power to Transfer; Good Faith Purchase of Goods; "Entrusting."

(1) A purchaser of goods acquires all title which his transferor had or had power to transfer except that a purchaser of a limited interest acquires rights only to the extent of the interest purchased. A person with voidable title has power to transfer a good title to a good faith purchaser for value. When goods have been delivered under a transaction of purchase the purchaser has such power even though

(a) the transferor was deceived as to the identity of the purchaser, or

(b) the delivery was in exchange for a check which is later dishonored, or

(c) it was agreed that the transaction was to be a "cash sale," or

(d) the delivery was procured through fraud punishable as larcenous under the criminal law.

(2) Any entrusting of possession of goods to a merchant who deals in goods of that kind gives him power to transfer all rights of the entruster to a buyer in ordinary course of business.

(3) "Entrusting" includes any delivery and any acquiescence in retention of possession regardless of any condition expressed between the parties to the delivery or acquiescence and regardless of whether the procurement of the entrusting or the possessor's disposition of the goods have been such as to be larcenous under the criminal law.

(4) The rights of other purchasers of goods and of lien creditors are governed by the Articles on Secured Transactions (Article 9) and Documents of Title (Article 7).

[Alternative (4)]

(4) The rights of other purchasers of goods and of lien creditors are governed by the Articles on Secured Transactions (Article 9), Bulk Sales (Article 6) and Documents of Title (Article 7).

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LEXIS: bona fide purchase! w/50 remed!

§ 13.04(d) Transfers to Adverse Possessors.

Adverse possession is a more familiar doctrine in the context of real property, but it is also possible to obtain ownership of personal property by adverse possession. The process of adverse possession is essentially governed by of the relevant state statutes of limitations; in some states that statute by its terms applies to both real and personal property, and in some states a separate limitations provision applies to personal property. The English statute, from which most American state provisions are ultimately derived, applied a limitations provision directly to personal property:

> III. And be it further enacted, That all actions of trespass *quare clausum fregit*, all actions of trespass, detinue, action for trover, and replevin for taking away of goods and cattle ... shall be commenced and sued within the time and limitation hereafter expressed ... within six years next after the cause of such action or suit, and not after... n95

A typical American state statute requires that within three years (or some similar relatively short time) the plaintiff bring an "action for taking, detaining, or injuring personal property, including actions for specific recovery thereof... n96 or be barred from the right to do so in the future.

Despite the common origins of English and American provisions, their respective effects differ. In the United States, the

running of the statute of limitations not only bars the right of legal action to recover the possession or value of an item of personal property, but also extinguishes the owner's title and transfers that title to the successful adverse possessor. n97 In England only the legal remedy is barred.

The characteristics of personal property possession that will confer ownership through adverse possession are the same as for the more familiar doctrines of adverse possession of real property:

> [M]ere possession [of personal property] is not enough of itself to confer an adverse title, but it must be of a certain defined character. In the first place it must be adverse or hostile and not in subordination to the rights of the true owner. There "must be some act of dominion or use on the part of the possessor inconsistent with an absolute right of property in the owner." And the burden of proof is on him who claims title by adverse possession. Accordingly, bailees and others who hold property with the express or implied consent of the owner do not, by such holding, acquire title thereto. They do not hold adversely. The owner's mere right to return of the property does not amount to a cause of action against which the statute of limitations can run. The cause of action accrues only when the possession becomes clearly hostile to the rights of the owner, as when demand for return of the property is made and refused. Again, not only must the holding be adverse but it must also be open and notorious. While an innocent removal of the chattel from the locality or even from the state does not alone prevent the statute operating, simple morality requires than one who intentionally, by removal, concealment, or otherwise prevents the owner from ascertaining his property's whereabouts should not by such means defeat the latter's cause of action and acquire title to the withheld goods. While it is possible that a thief, with knowledge may hold so openly and notoriously as to acquire title, secret rather than open holding will be presumed. On the other hand, in the case of the bona fide purchaser the presumption would probably be just the reverse. Whether the possession is open or covert will ordinarily be a question of fact for the determination of the jury. n98

In the well-known 1980 case of *O'Keeffe v. Snyder,* n99 the New Jersey Supreme Court recognized the inherent difficulty of applying standard adverse possession rules to movable personal property, such as the painting involved in that case. When the chattel can be moved from place to place and, even though placed in a public building, still be essentially removed from public view, how does one determine whether the holding by the erstwhile adverse possessor has been "open and notorious"? The *O'Keeffe* court announced a gloss on the typical operation of the statute of limitations for the purpose of determining adverse possession title to personal property: the statute of limitations would not begin to run until the true owner knew or should have known of the whereabouts of the item, assuming the true owner was pursuing the search with diligence. The diligently searching true owner who failed to discover the missing property could thus indefinitely postpone the running of the statute of limitations for adverse possession purposes, thus removing the circumstantial advantage of the adverse possessor, who might have placed the chattel in a public yet obscure place.

Despite the inordinate attention among commentators generated by the *O'Keeffe* decision, the case has gained virtually no judicial acceptance outside its own state; it is still correct to state that in most cases in most jurisdictions the traditional rules of adverse possession still apply to personal property.

A more conventional use of the "discovery rule," similar to that announced in *O'Keefe* and also applicable in some tort actions, is the statutory discovery rule applicable to attempted adverse possession of branded cattle:

> [I]n all cases where the subject of the action is a domestic animal usually included in the term "livestock," which at the time of its loss has a recorded mark or brand, if the animal strayed or was stolen from the true owner without the owner's fault, the cause does not accrue until the owner has actual knowledge of such facts as would put a reasonable man upon inquiry as to the possession of the animal by the defendant. n100

A rather strict view of how statutes of limitations operate would demand that if one prospective adverse possessor passes possession to another before the required time of possession has fully run, possession by the recipient would give rise to a new cause of action in the true owner and thus re-start the running of the limitations period. A few cases so hold. n101 However, the majority of courts have allowed such successive adverse possessors to "tack" their possession periods together, just as in cases of real property adverse possession, as long as there is privity between the possessors. n102

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LEXIS: adverse possess! w/50 personal property

§ 13.04(e) Transfers to Finders.

The "ownership" rights of those who find and take possession of lost goods is a favorite introductory subject for first-year law students studying property law. The precise source and nature of this pedagogic appeal are somewhat enigmatic, but they are probably related to the fact that finders' rights have traditionally been creatures of judicial decision, that the decisions and their underlying policy motivations are often in profound conflict, and that they derive directly from experiences in everyday life. Thus for generations new law students have struggled with the seemingly irreconcilable inconsistencies of the classic finders' cases, learning useful skills of case analysis, but left unenlightened as the prevailing rules of law to ultimate solutions.

§ 13.04(e)(1) The Basic Rules of Finders' Rights.

The fundamental premises of finders' rights are the essence of simplicity and clarity: one who finds and takes possession of a lost item n103 has a form of ownership thereof that is superior to the rights of all others but the true owners. Indeed, if the finder should lose the item and then find it again in the possession of a second finder, the first finder may re-claim possession.

However, deep conflict has persisted over just who should be identified as or credited with the rights of the "finder" in certain situations, when the finder is the agent of another, and when the finder is on the property of another. A helpful summary of the confused case law was expressed by the leading authority as follows:

> In respect to those who find lost articles while in the employ of another the courts have been lenient, usually awarding the find to the servant and not to the master, in the absence of proof that it was part of the latter's duties to turn over lost goods to the employer.
>
> ... A sharp conflict exists over the answer to the question whether, in the case of goods found on or in the property of another, the award should be to the one who discovers their presence, or to him who is the owner of the property in or on which the goods are discovered. If the finder is a trespasser, the authorities favor the owner of the place where they are discovered. But if the finder is in some sense an invitee or licensee on the land, the authorities are quite divided. Those who award the goods to the finder adopt without much consideration a popular conception of the "finder" as the one who discovers or brings to knowledge the lost article, and then proceed to declare that the title of the finder is good as against the whole world but the true owner, regardless of the place where found. This is apparently the weight of authority in the United States. Those courts which hold on behalf of the owner of the locus in quo proceed upon the hypothesis that the lost articles belong to the first possessor, and therefore the owner of the property within the compass of which the goods are found, since he possesses such encompassing property and excludes the general public therefrom, must necessarily also possess whatever may be found therein, even though unaware of its presence. This is the view of the English courts and has found favor with the commentators. Both lines of authority, however, frequently draw distinctions between goods found in private, or in public or semipublic places, on the ground that if the

> place is private, for example a private house, then the owner of the locus in quo has the intent to possess the place and whatever may be located therein, whereas if the place is public or semipublic, for example the lobby of a bank, then no such intent can be found. The distinction is a difficult one to make... Whether the place be private or so-called semipublic, servants, invitees and licensees are permitted there only for special limited purposes, and the owner waives his right to the control thereof only to the extent of his license. That the license extends so far as to include the right to appropriate lost articles found therein seems doubtful if the courts are endeavoring to discover an actual intent on the part of the owner... Where also goods, not treasure trove, are found under the soil, instead of on the surface or in buildings or some receptacle, the courts customarily grant the find to the owner of the soil on the basis that the possession of the soil carries with it whatever is imbedded therein. If the found goods are treasure trove, the result may be otherwise;... Or a result favoring the owner of the soil may be based on the argument that the goods are "misplaced" or "mislaid" rather than lost... n104

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LEXIS: right w/20 find! w/20 personal property

§ 13.04(e)(2) Exceptions for Misplaced Items.

Additional controversy has also existed over whether particular items taken by finders were really lost. If an item was intentionally placed in the location where it was eventually found, either for concealment or for convenience or some other purpose of the item's owner, it does not become susceptible to the rights of a "finder." Two categories of goods are sometimes treated in this fashion: items of "treasure trove," and so-called misplaced items.

From the very early days of English law it was recognized that valuable gold and silver goods had been concealed by wealthy owners fleeing unrest or other threat, and in many circumstances the owners had never been able to return and reclaim their treasures. According to the early common law, one who found such a cache of gold or silver, apparently intentionally concealed and the owner unknown, was entitled to retain possession as finder. However, this proposition was soon superseded by claims of royal prerogative, so that treasure trove discoveries went to the crown, eventually to the national government. However, if it could be shown that the treasure trove had actually been abandoned by its true owner, who thereafter did not have an intention of returning and reclaiming the items, then the finder could claim ownership.

By contrast,

> In the United States the state has never claimed title to lost property by virtue of its character as treasure trove, and it has been stated that the law relating thereto is merged with that of lost goods generally, although there is authority for the proposition that while treasure trove in the United States belongs to the finder, found goods not of that character go to the owner of the locus in quo. n105

A more important category of goods not treated as "lost" is represented by the so-called mislaid or misplaced item. If it can be discerned that an item was not unintentionally lost, but rather placed by the owner somewhere for the owner's convenience or safekeeping, a finder of such an item will often not be awarded custody; instead the owner or the property where the item was originally placed and then found will be accorded possession, often on the theory that the property owner was considered a bailee by the owner of the found item. n106 This approach has been much criticized for its artificiality: it is too problematic to discern the true owner's intent regarding the missing item merely from the circumstances of finding; some forms of intentional placement, such as concealing, do not readily suggest a true owner's intent to make the property owner a bailee; and the assumption that placing the item in the custody of the property increases the likelihood of returning it to the true owner is of little practical importance. What this approach may suggest instead is a persistently strong judicial impulse to favor the property owner over the finder when awarding

custody of found goods, an impulse that may ultimately be the more sensible approach to all dispositions of items found on private land.

COMPUTER-ASSISTED RESEARCH

LEXIS: find! w/50 misplace! or mislaid
find! w/50 treasure trove

§ 13.04(e)(3) Statutory Modifications of the Judicial Rules.

In many statutes legislation has been adopted governing the disposition of found property. These often complex provisions typically require the finder to deposit the item with law enforcement or other authorities for a period of time, and to provide or pay for notice to possible owners, and then enable the finder to reclaim custody and even obtain ownership if the true owner does not appear. A vast variety exists in state statutory approaches to finders' duties and rights; by contrast, the large majority of states have adopted the related Uniform Unclaimed Property Act and the Uniform Disposition of Unclaimed Property Act, n107 which legislation, however, does not address the ordinary finders' problems. The following sampling of state finders' statutes illustrates the diversity of legislative approaches.

§ 13.04(e)(3)(i) Florida.

In Florida a finder must report the description and location of the lost property to any law enforcement officer:

705.102 Reporting lost or abandoned property

(1) Whenever any person finds any lost or abandoned property, such person shall report the description and location of the property to a law enforcement officer.

(2) The law enforcement officer taking the report shall ascertain whether the person reporting the property wishes to make a claim to it if the rightful owner cannot be identified or located. If the person does wish to make such claim, he shall deposit with the law enforcement agency a reasonable sum sufficient to cover the agency's cost for transportation, storage, and publication of notice. This sum shall be reimbursed to the finder by the rightful owner should he identify and reclaim the property.

(3) It is unlawful for any person who finds any lost or abandoned property to appropriate the same to his own use or to refuse to deliver the same when required.

(4) Any person who unlawfully appropriates such lost or abandoned property to his own use or refuses to deliver such property when required commits theft as defined in s. 812.014, punishable as provided in s. 775.082, s. 775.083, or s. 775.084.

705.104. Title to lost or abandoned property

(1) Title to lost or abandoned property is hereby vested in the finder upon the expiration of the 90-day custodial time period specified in s. 705.103(2)(b), provided the notice requirements of s. 705.103 have been met, unless the rightful owner or a lienholder claims the property within that time.

(2) Employees of any state, county, or municipal agency shall be deemed agents of such governmental entity, and lost or abandoned property found by them during the course of their official duties shall be turned in to the proper person or department designated to receive such property by the governmental entity. Such property shall be subject to the provisions of this chapter, after which, if unclaimed by the rightful owner, the title to such property shall be vested in the state, county, or municipality and not in the employee.

(3) Employees of public transportation systems shall be deemed agents of such transportation systems, and lost or abandoned property found on public conveyances, in depots, or in garages or a transportation system shall be turned in to the proper person or department designated to receive such property by the transportation systems. Such property shall be subject to the provisions of this section, after which, if unclaimed by the rightful owner, the title to such property shall be vested in the transportation system and not in the employee. n108

For illustrative purposes, Florida's very detailed procedures for handling lost property found on public premises is set forth below:

705.103. Procedure for abandoned or lost property

(1) Whenever a law enforcement officer ascertains that an article of lost or abandoned property is present on public property and is of such nature that it can be easily removed, the officer shall take such article into custody and shall make a reasonable attempt to ascertain the rightful owner or lienholder pursuant to the provisions of this section.

(2) Whenever a law enforcement officer ascertains that an article of lost or abandoned property is present on public property and is of such nature that it cannot be easily removed, the officer shall cause a notice to be placed upon such article in substantially the following form:

NOTICE TO THE OWNER AND ALL PERSONS INTERESTED IN THE ATTACHED PROPERTY. This property, to wit: (setting forth brief description) is unlawfully upon public property known as (setting forth brief description of location) and must be removed within 5 days; otherwise, it will be removed and disposed of pursuant to chapter 705, Florida Statutes. The owner will be liable for the costs of removal, storage, and publication of notice. Dated this: (setting forth the date of posting of notice), signed: (setting forth name, title, address, and telephone number of law enforcement officer).

Such notice shall be not less than 8 inches by 10 inches and shall be sufficiently weatherproof to withstand normal exposure to the elements. In addition to posting, the law enforcement officer shall make a reasonable effort to ascertain the name and address of the owner. If such is reasonably available to the officer, he shall mail a copy of such notice to the owner on or before the date of posting. If the property is a motor vehicle as defined in s. 320.01(1) or a vessel as defined in s. 327.02(27), the law enforcement agency shall contact the Department of Highway Safety and Motor Vehicles or the Department of Natural Resources, respectively, in order to determine the name and address of the owner and any person who has filed a lien on the vehicle or vessel as provided in s. 319.27(2) or (3) or s. 328.15(1). On receipt of this information, the law enforcement agency shall mail a copy of the notice by certified mail, return receipt requested, to the owner and to the lienholder, if any. If, at the end of 5 days after posting the notice and mailing such notice, if required, the owner or any person interested in the lost or abandoned article or articles described has not removed the article or articles from public property or shown reasonable cause for failure to do so, the following shall apply:

(a) For abandoned property, the law enforcement agency may retain any or all of the property for its own use or for use by the state or unit of local government, trade such property to another unit of local government or state agency, donate the property to a charitable organization, sell the property, or notify the appropriate refuse removal service.

(b) For lost property, the officer shall take custody and the agency shall retain custody of the property for 90 days. The agency shall publish notice of the intended disposition of the property, as provided in this section, during the first 45 days of this time period.

(1) If the agency elects to retain the property for use by the unit of government, donate the property to a charitable organization, surrender such property to the finder, sell the property, or trade the property to another unit of local government or state agency, notice of such election shall be given by an advertisement published once a week for 2 consecutive weeks in a newspaper of general circulation in the county where the property was found.

(2) If the agency elects to sell the property, it must do so at public sale by competitive bidding. Notice of the time and place of the sale shall be given by an advertisement of the sale published once a week for 2 consecutive weeks in a newspaper of general circulation in the county where the sale is to be held. The notice shall include a statement that the sale shall be subject to any and all liens. The sale must be held at the nearest suitable place to that where the lost or abandoned property is held or stored. The advertisement must include a description of the goods and the time and place of the sale. The sale may take place no earlier than 10 days after the final publication. If there is no newspaper of general circulation in the county where the sale is to be held, the advertisement shall be posted at the door of the courthouse and at three other public places in the county at least 10 days prior to sale. Notice of the agency's intended disposition shall describe the property in a manner reasonably adequate to permit the rightful owner of the property to identify it.

(3) If the property is sold at public sale pursuant to subparagraph (2)(b)2., the agency shall deduct from the proceeds the costs of transportation, storage, and publication of notice, and any balance of proceeds shall be deposited into an interest-bearing account not later than 30 days after the date of the sale and held there for 1 year. The agency shall provide a bill of sale clearly stating that the sale is subject to any and all liens. The rightful owner of the property may claim the balance of the proceeds within 1 year from the date of the above stated deposit by making application to the agency. If no rightful owner comes forward with a claim to the property within the designated year, the balance of the proceeds shall be deposited into the state school fund.

(4) The owner of any abandoned or lost property who, after notice as provided in this section, does not remove such property within the specified period shall be liable to the law enforcement agency for all costs of removal, storage, and destruction of such property, less any salvage value obtained by disposal of the property. Upon final disposition of the property, the law enforcement officer shall notify the owner, if known, of the amount owed. In the case of an abandoned boat or motor vehicle, any person who neglects or refuses to pay such amount is not entitled to be issued a certificate of registration for such boat or motor vehicle, or any other boat or motor vehicle, until such costs have been paid. The law enforcement officer shall supply the Department of Natural Resources with a list of persons whose boat registration

privileges have been revoked under this subsection and the Department of Motor Vehicles with a list of persons whose motor vehicle privileges have been revoked. Neither department nor any other person acting as agent thereof shall issue a certificate of registration to a person whose boat or motor vehicle registration privileges have been revoked, as provided by this subsection, until such costs have been paid.

(5) Whoever opposes, obstructs, or resists any law enforcement officer or any person authorized by the law enforcement officer in the discharge of his duties as provided in this section upon conviction is guilty of a misdemeanor of the second degree, punishable as provided in s. 775.082 or s. 775.083.

(6) Any law enforcement officer or any person authorized by the law enforcement officer is immune from prosecution, civil or criminal, for reasonable, good faith trespass upon real property while in the discharge of duties imposed by this section.

(7) The rightful owner shall be liable for the law enforcement agency's costs for transportation and storage of lost or abandoned property and the agency's cost for publication of notice of disposition of lost property. If the rightful owner does not pay such costs within 30 days of making claim to the property, title to the property shall vest in the law enforcement agency. n109

§ 13.04(e)(3)(ii) Hawaii.

Hawaii requires finders to deliver found property to the county chief of police, and gives separate instructions to the chief of police.

[§ 52D-14] Duty and right of finders.

(a) Except as provided in section 261-17.7, all money or property found shall be reported or delivered by the finder to the chief of police of the county. When so delivered, it shall be held by the chief of police for forty-five days or until claimed by some person who establishes title or right of custody thereto to the satisfaction of the chief of police. If title or right of custody is established, the money or property shall be delivered to the claimant by the chief of police.

(b) If no claim is made or no such right is established within the forty-five days, the money or property shall be returned to the person who delivered it to the chief of police; provided that if the person who delivered it to the chief of police fails to claim the money or property within thirty days after being notified by the chief of police that the person is entitled to possession, the chief of police shall dispose of the money or property in accordance with the procedures established in section 52D-10. For the purpose of this section, notice by regular mail to the person's last known address shall be sufficient.

[§ 52D-10] Disposition of found, stolen, or unclaimed property.

Each chief of police, on the first Monday in January and the first Monday in July, shall give the county director of finance a sworn statement listing all moneys (except money found), goods, wares, and merchandise in the chief's custody which have been unclaimed for a period of not less than ninety days. At least annually, the chief of police shall give notice to the public, once a week for four successive weeks in a newspaper of general circulation in the county (and

may also give notice by posting in conspicuous places), that, unless claimed by an owner with satisfactory proof of ownership, the goods, wares, and merchandise listed will be sold at public auction to the highest bidder. On the day and at the place specified in the notice, all property still unclaimed, except money and found property, shall be sold by auction by or under the direction of the chief of police. Any unclaimed goods, wares, or merchandise of a perishable nature or which are unreasonably expensive to keep or safeguard, may be sold at public auction or by any commercially reasonable manner, at such time and after such notice as the chief of police deems proper and reasonable under the circumstances. The chief of police, immediately after the sale of any property in accordance with this section, shall pay to the director of finance of the county all moneys remaining unclaimed and all moneys received upon the sale. n110

§ 13.04(e)(3)(iii) Illinois.

In Illinois the finder who cannot locate the owner must file an affidavit in circuit court:

1020/27. Lost goods, money, etc. -- Information to owner -- Affidavit -- Record in estray book -- Records of county clerk -- Sale of perishable goods

§ 27. If any person or persons find any lost goods, money, bank notes, or other choses in action, of any description whatever, such person or persons shall inform the owner thereof, if known, and shall make restitution of the same, without any compensation whatever, except such compensation as shall be voluntarily given on the part of the owner. If the owner is unknown and if such property found is of the value of $100 or upwards, the finder or finders shall, within 5 days after such finding file in the circuit court of the county, an affidavit of the description thereof, the time and place when and where the same was found, that no alteration has been made in the appearance thereof since the finding of the same, that the owner thereof is unknown to the affiant and that the affiant has not secreted, withheld or disposed of any part thereof. The court shall enter an order stating the value of the property found as near as the court can ascertain. A certified copy of such order and the affidavit of the finder shall, within 10 days after the order was entered, be transmitted to the county clerk to be recorded in his estray book, and filed in the office of the county clerk.

If any property found consists of perishable goods, the court shall, at the time the finder presents the affidavit, order that the property be sold at public auction to the highest bidder. The court in the order shall provide for the giving of reasonable notice of the time and place of such sale. The court shall conduct or supervise such sale, and shall enter in the order the amount received from the sale which entry shall be included in the certified copy to be transmitted to the county clerk. The proceeds of the sale, after deducting costs and other expenses shall be turned over to the finder. The finder shall hold such proceeds in lieu of the goods for the owner of the goods sold and shall give such proceeds, after deducting his expenses, to such owner, if the owner claims the same within the time provided by Section 28.

1020/28. Advertisement -- Ownership to vest in finder where money or goods not reclaimed

§ 28. In all cases where such lost goods, money, bank notes or other choses in action shall not exceed the sum of $100 in value and the owner thereof is unknown, the finder shall advertise the same at the court house, and if the owner does not claim such money, goods, bank notes or other choses in action within 6 months from the time of such advertisement, the ownership of such property shall vest in the finder and the court shall enter an order to that effect.

If the value thereof exceeds the sum of $100, the county clerk, within 20 days after receiving the certified copy of the court's order shall cause a notice thereof to be published for 3 weeks successively in some public newspaper printed in this county and if the owner of such goods, money, bank notes, or other choses in action does not claim the same and pay the finder's charges and expenses within one year after the advertisement thereof as aforesaid, the ownership of such property shall vest in the finder and the court shall enter an order to that effect.

1020/30. Costs

§ 30. Except as is otherwise provided by this Act, all costs of proceedings in the matter of an estray or other property taken up or property found, shall be paid by the taker-up or finder in the first instance, and if the owner of the property claims it within the time limited by this Act the owner shall repay the finder or taker-up the amount of such costs before the finder or taker-up shall be required to surrender the property to such owner.

1020/34. Penalty against taker-up

§ 34. If any person taking up any estray or other property, or finding any property, fails to comply with the provisions of this Act, such person shall, for every such offense, pay to the informer the sum of $10, with costs, recoverable in the circuit court of the county where such offense was committed; one-half to the use of the county, and the other half to the use of the person suing for the same.

1020/35. Penalty for selling, etc., estray, etc.

§ 35. Except as otherwise provided in this Act, whoever sells, trades, destroys, or in any way disposes of any estray or other property taken up or any property found, or takes or sends the same out of this state, for any purpose whatever, before the time limited by this Act for the vesting of ownership in the finder or taker-up, shall pay double the value of such property, to be recovered in the circuit court in the name of the owner. n111

§ 13.04(e)(3)(iv) Iowa.

Under Iowa law, the finder must seek the owner and, if unsuccessful must present an affidavit to the county auditor:

644.6 Lost goods or money

If any person shall find any lost goods, money, bank notes, or other things of any description whatever, of the value of five dollars and over, such person shall inform the owner thereof, if known, and make restitution thereof.

644.7 When owner unknown

If the owner be unknown, such person shall, within five days after such finding, take such money, bank notes, and a description of any other property before the county auditor of the county where the property was found, and make affidavit of the description thereof, the time when and place where the same was found, and that no alteration has been made in the appearance thereof since the finding; whereupon the county auditor shall enter a description of the property and the value thereof, as nearly as he can determine it, in his estray book, together with the affidavit of the finder.

644.8 Advertisement

The finder of such lost goods, money, bank notes, or other things, shall forthwith give written notice of the finding of such property. Such notice shall contain an accurate description of the property and a statement as to the time when and place where the same was found, and the post-office address of the finder. Said notice shall:

1. Be posted at the door of the courthouse in the county in which the property was found and in three other of the most public places in the said county; and

2. In case the property found shall exceed ten dollars in value, the notice shall be published once each week for three

consecutive weeks in some newspaper published in and having general circulation in said county.

644.9 Record of publication

Proof of publication of said notice and of the posting thereof shall be made by affidavits of the publisher and the person posting said notices, and said affidavits shall be filed in the office of the county auditor of said county.

644.10 Additional publication

The affidavits provided for in section 644.9 shall be entered by the auditor in the proceedings of the board of supervisors and the same shall be published with the proceedings of said board.

644.11 Vesting of title

If no person appears to claim and prove ownership to said goods, money, bank notes, or other things within twelve months of the date when proof of said publication and posting is filed in the office of the county auditor, the right to such property shall irrevocably vest in said finder.

644.12 Ownership settled

In any case where a claim is made to property found or taken up, and the ownership of the property cannot be agreed upon by the finder and claimant, they may make a case before any district judge, associate district judge, or judicial magistrate in the county, who may hear and adjudicate it, and if either of them refuses to make such case the other may make an affidavit of the facts which have previously occurred, and the claimant shall also verify the claim by the claimant's affidavit, and the district judge, associate district judge, or judicial magistrate may take cognizance of and try the matter on the other party having one day's notice, but there shall be no appeal from the decision. This section does not bar any other remedy given by law.

644.13 Compensation

As a reward for the taking up of boats and other vessels, and for finding lost goods, money, bank notes, and other things, before restitution of the property or proceeds thereof shall be made, the finder shall be entitled to ten percent upon the value thereof, and for taking up any logs or lumber, as hereinbefore described, twenty-five cents for each log not exceeding ten, twenty cents for each exceeding ten and not exceeding fifty, fifteen cents for each exceeding fifty, and fifty cents per thousand feet for sawed lumber.

644.14. Costs, charges and care -- assessment

The owner shall also be required to pay the finder all such costs and charges as may have been paid by him for services rendered as aforesaid, including the cost of publication, together with reasonable charges for keeping and taking care of such property, which last mentioned charge, in case the finder and the owner cannot agree, shall be assessed by two disinterested householders of the neighborhood, to be appointed by some magistrate judge of the proper county, whose decision, when made, shall be binding and conclusive on all parties.

644.15. Proceeds -- forfeiture

The net proceeds of sales made by the sheriff, and money or bank notes paid over to the county treasurer, as directed in this chapter, shall remain in the hands of the county treasurer in trust for the owner, if the owner applies within one year from the time the proceeds, moneys, or bank notes would have been paid over. However, if no owner appears within that time, the proceeds, moneys, or bank notes shall be forfeited, and the claim of the owner is forever barred, in which

event the money shall be paid to the treasurer of state for deposit in the general fund of the state.

644.16 Responsibility of taker-up

If the taker-up of any watercraft, logs, or lumber, or finder of lost goods, bank notes, or other things, shall take reasonable care of the same, and any unavoidable accident happens thereto without the fault or neglect of the finder or taker-up before the owner shall have an opportunity of reclaiming the same, such taker-up or finder shall not be accountable therefore, if in cases of accident as aforesaid he within ten days thereafter shall certify the same to the county auditor, who will make an entry thereof in his estray book.

644.17 Penalty for selling

If any person shall trade, sell, loan, or take out of the limits of this state any such property taken up or found as aforesaid, before he shall be vested with the right to the same according to the foregoing provisions, he shall forfeit and pay double the value thereof, to be recovered by any person in an action, one half of which shall go to the plaintiff and the other half to the county.

644.18 Failure to comply

If any person shall take up any boat or vessel, or any logs or lumber, or shall find any goods, money, bank notes, or other things, and shall fail to comply with the requirements of this chapter, he shall forfeit and pay the sum of twenty dollars, to be recovered in an action by any person who will sue for the same, one half for the use of the person suing and the other half to be deposited in the county treasury for the use of the common schools; but nothing herein contained shall prevent the owner from having and maintaining his action for the recovery of any damage he may sustain. n112

§ 13.04(e)(3)(v) Michigan.

In Michigan a finder must post a notice of the finding in two public places and give written notice to the township clerk:

434.1 Lost money or goods; notice of finding

Sec. 1. When any person shall find any lost money, or lost goods, if the owner thereof be known, he shall immediately give notice thereof to such owner; if the owner thereof be unknown, and such money or goods be of the value of 3 dollars or more, the finder shall, within 2 days, cause notice thereof to be posted in 2 public places within the township where the same were found; and shall also, within 7 days, give notice thereof in writing to the township clerk of such township, and pay him 25 cents for making an entry thereof in a book to be kept for that purpose.

434.2 Same; notice by publication

Sec. 2. If the money or goods so found be of the value of 10 dollars or more, and the owner thereof be unknown, the finder thereof shall also, within 1 month after such finding, cause notice thereof to be advertised in some newspaper in the same county, if one be published there, and if not, then in some newspaper published in an adjoining county, and continued therein, for 6 successive weeks.

434.6 Appraisal of lost goods or stray animals; filing, fees

Sec. 6. Every finder of lost goods or stray animals, of the value of 10 dollars or more, shall, within 3 months, and before any use shall be made thereof, procure an appraisal of the same to be made and certified by a justice of the peace of his township, which appraisal he shall within said 3 months, cause to be filed with the township clerk; and he shall pay to

such justice 50 cents for such appraisal and certificate, and 6 cents for each mile necessarily traveled by him in such service, and to the clerk 6 cents for filing the certificate.

434.7 Lost money or goods; restitution to owner

Sec. 7. If the owner or person entitled to the possession of any such money or goods, other than stray animals, shall appear at any time within 1 year after such entry with the township clerk, and shall make out his rights thereto, he shall have restitution of the same, or of the value thereof, upon his paying all the costs and charges aforesaid, together with a reasonable compensation to the finder for keeping and taking care of the same, and for his necessary travel and expenses in the case; which charges shall, in case of disagreement between the owner and finder, be determined by some justice of the peace of the township, who shall certify the same.

434.8 Same; remaining in finder; township entitled to one-half of value

Sec. 8. If no owner or person entitled to the possession of the same shall appear within 1 year, then such lost money or goods shall remain to the finder, he paying 1/2 of the value thereof to the treasurer of the township, according to said appraisement, after deducting from such value all the fees and charges aforesaid, to be determined and certified by a justice of the peace as aforesaid; and upon the neglect or refusal to pay the said 1/2 of the value, the same shall be recovered by the township treasurer, in an action of debt or on the case.

434.12 Finder; preclusion from certain benefits; willful neglect to comply, penalty

Sec. 12. If the finder of any lost money, goods, or stray beasts, shall neglect to cause the same to be entered, advertised, or notice thereof to be posted, as directed in this chapter, he shall be precluded from all the benefits of this chapter, and from all claim for keeping such goods or animals, or on account of any charges in relation thereto; and if any party shall willfully and with fraudulent intent to convert the same to his own use, neglect to make such entry, or to cause the same to be advertised as hereinbefore provided, for 30 days, he shall be deemed guilty of a misdemeanor, and on conviction thereof shall be fined not less than 10, nor more than 50 dollars, and in the default of the payment thereof, be imprisoned in the county jail for a period not exceeding 90 days. n113

§ 13.04(e)(3)(vi) Montana.

Montana makes a finder who takes possession a depositary and imposes liability in damages payable to the owner if the finder does not diligently seek out the owner:

70-5-102. Finder not bound to take charge--status as depositary.

One who finds a thing lost is not bound to take charge of it, but if he does so, he is thenceforth a depositary for the owner, with the rights and obligations of a depositary for hire.

70-5-103. Duty to inform owner when known.

If any person finds any money, goods, things in action, or other personal property or saves any domestic animal from drowning or starvation when the property is of a value of $10 or more and he knows or suspects who the owner is, he must use reasonable diligence to inform the owner thereof and make restitution without compensation, further than a reasonable charge for saving and taking care thereof. If he fails to do so, he is liable in damages to the owner and has no claim to any reward offered by the owner for the recovery of the thing or to any compensation for his trouble or expenses.

70-5-104. Right of finder to require proof of claimant's ownership.

The finder of a thing may in good faith before giving it up require reasonable proof of ownership from any person claiming it.

70-5-105. Compensation of finder.

The finder of a thing is entitled to compensation for all expenses necessarily incurred by him in its preservation and for any other service necessarily performed by him about it and to a reasonable reward for keeping it.

70-5-106. Exoneration of finder of storage of thing found.

The finder of a thing may exonerate himself from liability at any time by placing it on storage with any responsible person of good character at a reasonable expense.

70-5-107. Exoneration of owner by surrender of thing to finder.

The owner of a thing found may exonerate himself from the claims of the finder by surrendering it to him in satisfaction thereof.

70-5-201. When finder may sell thing found.

The finder of a thing may sell it, if it is a thing which is commonly the subject of sale, when the owner cannot with reasonable diligence be found or being found refuses upon demand to pay the lawful charges of the finder, in the following cases:

(1) when the thing is in danger of perishing or of losing the greater part of its value; or

(2) when the lawful charges of the finder amount to two-thirds of its value.

70-5-203. Finder to make affidavit when owner not known.

If the owner is not known to the party saving or finding such property, he must, within 5 days, make an affidavit before some justice of the peace of the county stating when and where he found or saved such property, particularly describing it and, if the property was saved, particularly from what and how he saved the same, stating therein whether the owner of the property is known to him and that he has not secreted, withheld, or disposed of any part of such property.

70-5-204. Justice to appoint appraisers -- duty of appraisers.

The justice must then summon three disinterested householders to appraise the same. The appraisers or any two of them must make two lists of the valuation and description of such property and sign and make oath to the same and deliver one of the lists to the finder and the other to the justice of the peace.

70-5-205. Recording and posting of valuation and description.

The justice must file such list, and the finder must transmit a copy of the same to the county clerk and recorder, who must record the same in a book known as the "Estray and Lost Property Book" within 15 days, and the finder must at

once set up at the courthouse door and four other public places in the township or city a copy of such valuation and a description of property.

70-5-206. When property vests in finder -- publication.

If no owner appears and proves the property within 6 months and the value thereof does not exceed $20, the same vests in the finder; but if the value exceeds $20, the finder must, within 30 days after setting up the list mentioned in 70-5-205, cause a copy of the description to be inserted in some newspaper printed in the county if there be one and if not, in some newspaper printed in the state for 3 weeks. If no owner prove the property within 1 year after such publication, it vests in the finder.

70-5-207. When finder to restore property.

If within 1 year an owner appears and proves the property and pays all reasonable charges, including fees of officers, the finder must restore the same to him. On failure to make restoration of such property or the appraised value thereof, on being tendered such charges and fees, the owner may recover the same or the value thereof by civil action in any court having jurisdiction.

70-5-209. Finder failing to make discovery -- double recovery.

If any person find any money, property, or other valuable thing and fail to make discovery of the same as required by this chapter, he forfeits to the owner double the value thereof. n114

§ 13.04(e)(3)(vii) New Hampshire.

New Hampshire requires a notice to the town clerk:

471:1 Notice to Clerk.

The person finding money or goods, or finding and taking up a stray beast, the owner of which is unknown, shall give to the town clerk a notice in writing, describing the money, goods or beast, within 6 days after so finding or taking up the same.

471:2 Record.

The town clerk shall record such notice in a book to be kept by him for that purpose.

471:3 Notice.

The finder of such property shall, within 6 days after finding or taking up the same, post a notice, describing the money, goods or beast, at 2 public places in the town where the same was found, and, if the value thereof exceeds $5, at some public place in each of 2 adjoining towns, or cause a copy of such notice to be published.

471:4 Application for Appraisal.

If no owner appears within one month after notice given as aforesaid, the finder shall apply to a justice, who shall appoint 3 persons to appraise the property, unless the same is money.

471:5 Procedure.

The appraisers shall be sworn by the justice to the faithful discharge of their duty, shall appraise the property and make a return of their appraisal to the justice.

471:6 Unclaimed Property.

If the owner of the property or beast does not appear and claim the same within one year after notice given to the town clerk, the person finding or taking up the same may keep the property for his own use, upon paying to the town treasurer the residue of such money, or of the appraised value of such property or beast, after deducting the fees and expenses incurred.

471:7 Payment or Tender of Charges and Fees.

The owner, within one year, upon paying or tendering to the finder a reasonable sum for the keeping, charges and fees incurred, shall be entitled to his property.

471:8. Determination of Fees and Charges.

Any justice shall adjust and determine the amount of the fees and charges of the finder, clerk, appraisers and justice, and the expense of keeping, on application of any person interested.

471:10. Neglect of Finder.

Any person finding any property or taking up any stray beast, and neglecting to give notice to the town clerk, or to post notices as aforesaid, or to cause such appraisal to be made, shall receive nothing for his services or expense, and shall forfeit a sum equal to double the value of the property found or beast taken up. n115

§ 13.04(e)(3)(viii) New York.

In New York, governing boards of municipal corporations are authorized to regulate the administration of lost and found property according to provisions of the state personal property law:

§ 250. Lost and found property

The governing boards of municipal corporations may by resolution enact rules and regulations for administering the provisions of article seven-b of the personal property law and may provide the following:

(a) the designation of a public officer to accept and keep custody of found property and found instruments;

(b) procedures for determining the value and for estimating the net sum likely to be realized by sale at public auction of lost property as defined in article seven-b of the personal property law;

(c) a procedure for the disposition of derelict automobiles and other property having no value or salvage value only;

(d) longer or shorter periods of time for the report and deposit of found property and instruments by specified classes of persons having possession thereof or for either such report or such deposit, provided, however, that such rules and regulations so enacted by a county or town shall not supersede rules and regulations so enacted by a county or town shall not supersede rules and regulations with respect to time for report and deposit, or for either report or deposit, so enacted by any municipal corporation within its limits, except to such extent as may be provided by an agreement pursuant to section two hundred fifty-one of this chapter;

(e) provisions for notices, reports, storage, and sales of found property not inconsistent with the provisions of article seven-b of the personal property law;

(f) the payment of proceeds from the sale of lost property as defined in article seven-b of the personal property law into a public fund other than the treasury of the municipal corporation. n116

§ 13.04(e)(3)(ix) Oklahoma.

Oklahoma makes the finder who takes possession of the item a bailee who must make diligent effort to give notice to the owner:

§ 511. Finder a bailee, when

One who finds a thing lost is not bound to take charge of it; but if he does so, he is thenceforward a bailee for the owner, with the rights and obligations of a bailee for hire.

§ 512. Finder must notify owner if known

If the finder of a thing knows or suspects who the owner is, he must, with reasonable diligence, give him notice of the finding; and if he fails to do so, he is liable in damages to the owner, and has no claim to any reward offered by him for the recovery of the thing, or to any compensation for his trouble or expenses.

§ 513. Claimant must prove ownership

The finder of a thing may, in good faith, before giving it up, require reasonable proof of ownership from any person claiming it.

§ 514. Compensation and reward for service

The finder of a thing is entitled to compensation for all expenses necessarily incurred by him in its preservation, and for any other service necessarily performed by him about it, and to a reasonable reward for keeping it.

§ 515. Exoneration of finder from liability by storing with another

The finder of a thing may exonerate himself from liability at any time, by placing it on storage with any responsible person of good character, at a reasonable expense.

§ 516. Finder may sell, when

The finder of a thing may sell it, if it is a thing which is commonly the subject of sale, when the owner cannot with reasonable diligence be found; or, being found, refuses upon demand to pay the lawful charges of the finder, in the following cases:

(1) When the thing is in danger of perishing, or losing the greater part of its value; or,

(2) When the lawful charges of the finder amount to two-thirds of its value.

§ 517. Manner of sale

A sale under the provisions of the last section [§ 516] must be made in the same manner as the sale of a thing pledged.

§ 518. Surrender of thing to finder

The owner of a thing found may exonerate himself from the claims of the finder by surrendering it to him in satisfaction thereof. n117

§ 13.04(e)(3)(x) Oregon.

Oregon finders must give notice to the county clerk and then publish a notice of the finding:

98.005 Rights and duties of finder of money or goods.

(1) If any person finds money or goods valued at $100 or more, and if the owner of the money or goods is unknown, such person, within 10 days after the date of the finding, shall give notice of the finding in writing to the county clerk of the county in which the money or goods was found. Within 20 days after the date of the finding, the finder of the money or goods shall cause to be published in a newspaper of general circulation in the county a notice of the finding once each week for two consecutive weeks. Each such notice shall state the general description of the money or goods found, the name and address of the finder and final date before which such goods may be claimed.

(2) If no person appears and establishes ownership of the money or goods prior to the expiration of three months after the date of the notice to the county clerk under subsection (1) of this section, the finder shall be the owner of the money or goods.

98.015 Liability of non-complying finder; forfeiture to county of unreclaimed money or goods.

If any person who finds money or goods valued at $100 or more fails to comply with ORS 98.005, the person shall be liable, upon conviction for violation of ORS 164.065, to the county for the money or goods or the full value of the money or goods. The county treasurer shall hold the money or goods or their value for the owner thereof and shall publish notice of the finding of the money or goods in the manner provided in ORS 98.005. If the owner has not reclaimed such money or goods within three months after the date of the first publication of notice by the county treasurer, the owner shall forfeit the rights of the owner to the value of such money or goods and the value of such money or goods shall be placed in the general fund of the county to be used for the payment of the general operating expenses of the county.

98.025 Rights of owner.

If an owner of money or goods found by another person appears and establishes a claim to such money or goods within the time period prescribed by ORS 98.005 or 98.015, whichever applies, the owner shall have restitution of such money or goods or their value upon payment of all costs and charges incurred in the finding, giving of notice, care and custody of such money or goods. n118

§ 13.04(e)(3)(xi) Vermont.

The finder in Vermont must post a notice in two public places and, for more valuable property, also publish a notice in a local newspaper:

§ 1101. Finder to give notice

A person who finds money or goods, to the value of $3.00 or more, or takes up a stray beast, the owner of which is not known, shall, within six days thereafter, make two notices, describing such money, goods or beast, with the natural or artificial marks, with the time and place of finding or taking up the same, and post them in two public places in town in which such property was found.

§ 1102. Penalty for destroying notices

A person who wilfully takes down or destroys such a notice within sixty days from the time of posting the same shall be fined $7.00, unless the owner has appeared and claimed such property.

§ 1103. Publication of notice in newspaper

If the value of such property exceeds $10.00, the person finding it shall immediately cause a copy of the notice to be published three weeks successively in some newspaper circulating in such town.

§ 1104. Recording copy of notice

If the owner of such property does not appear and claim it within twenty days from the date of such notice, the person so finding it shall cause a copy of the notice to be recorded in the office of the clerk of such town.

§ 1105. Sale of property; disposition of proceeds

If the owner of the property does not appear and prove his title within ninety days from the time of posting the first notice, the person finding the property may sell it at public auction. The avails of the sale, after paying the expenses of keeping the property, and of the proceedings relating to the same, shall be paid to the town treasurer, at the time of paying the avails of the sale.

§ 1106. Accounting for proceeds

The account of the expenses shall be examined and allowed by a district judge of the county, and deposited with such treasurer, at the time of paying the avails of the sale.

§ 1107. Owner may have property before sale

If, previous to the sale, the owner appears and proves his title to the property, he shall be entitled to the same on paying the expenses of keeping, and of the proceedings required by this chapter.

§ 1108. Failure of finder to comply with chapter

If a person finds money or goods, or takes up a stray beast and does not thus advertise or perform the duties required of him by this chapter, he shall not receive pay for keeping, or for other proceedings relating to such property, and shall forfeit to the use of the town in which the same is found, the value of such money, goods or stray beast, to be recovered in an action on this statute. n119

§ 13.04(e)(3)(xii) Washington.

Washington state requires finders to obtain a written statement of appraisal within seven days of the finding:

63.21.010. Procedure where finder wishes to claim found property -- Appraisal -- Surrender of property -- Notice of intent to claim -- Publication

Any person who finds property that is not unlawful to possess, the owner of which is unknown, and who wishes to claim the found property, shall:

(1) Within seven days of the finding acquire a signed statement setting forth an appraisal of the current market value of the property prepared by a qualified person engaged in buying or selling like items or by a district court judge;

(2) Within seven days report the find of property and surrender, if requested, the property and a copy of the evidence of the value of the property to the chief law enforcement officer, or his or her designated representative, of the governmental entity where the property was found, and serve written notice upon the officer of the finder's intent to claim the property if the owner does not make out his or her right to it under this chapter; and

(3) Within thirty days of the finding cause notice of the finding to be published at least once a week for two successive weeks in a newspaper of general circulation in the county where the property was found.

63.21.020. Circumstances extinguishing finder's claim to property

The finder's claim to the property shall be extinguished:

(1) If the owner satisfactorily establishes, within sixty days after the find was reported to the appropriate officer, the owner's right to possession of the property; or

(2) If the chief law enforcement officer determines and so informs the finder that the property is illegal for the finder to possess.

63.21.030. Release of property to finder -- Limitations -- Payment to governmental entity of portion of appraised value -- Expiration of finder's claim

(1) The found property shall be released to the finder and become the property of the finder sixty days after the find was reported to the appropriate officer if no owner has been found, or sixty days after the final disposition of any judicial or other official proceeding involving the property, whichever is later. The property shall be released only after the finder has presented evidence of:

(a) Compliance with the publication requirement of this chapter, and

(b) If the property is valued at more than twenty-five dollars, payment to the treasurer of the governmental entity handling the found property, the amount of five dollars, or ten percent of the appraised value of the property, whichever is greater, which amount shall be deposited in the general fund of the governmental entity.

(2) When ninety days have passed after the found property was reported to the appropriate officer, or ninety days after the final disposition of a judicial or other proceeding involving the found property, and the finder has not completed the requirements of this chapter, the finder's claim shall be deemed to have expired and the found property may be disposed of as unclaimed property under chapter 63.32 or 63.40 RCW. Such laws shall also apply whenever a finder states in writing that he or she has no intention of claiming the found property.

63.21.040. Failure to comply with chapter -- Forfeiture of right to property

Any finder of property who fails to discharge the duties imposed by this chapter shall forfeit all right to the property and shall be liable for the full value of the property to its owner.

63.21.050. Duties of chief law enforcement officer receiving found property

The chief law enforcement officer or his or her designated representative to whom a finder surrenders property, shall:

(1) Advise the finder if the found property is illegal for him or her to possess;

(2) Advise the finder if the found property is to be held as evidence in judicial or other official proceedings;

(3) Advise the finder in writing of the procedures to be followed in claiming the found property;

(4) If the property is valued at twenty-five dollars or less, allow the finder to retain the property if it is determined there is no reason for the officer to retain the property;

(5) If the property exceeds twenty-five dollars in value and has been requested to be surrendered to the law enforcement agency, retain the property for sixty days before it can be claimed by the finder under this chapter, unless the owner shall have recovered the property;

(6) If the property is held as evidence in judicial or other official proceedings, retain the property for sixty days after the final disposition of the judicial or other official proceeding, before it can be claimed by the finder or owner under the provisions of this chapter;

(7) After the required number of days have passed, and if no owner has been found, surrender the property to the finder according to the requirements of this chapter; or

(8) If neither the finder nor the owner claim the property retained by the officer within thirty days of the time when the claim can be made, the property shall be disposed of as unclaimed property under chapter 63.32 or 63.40 RCW. n120

§ 13.04(e)(3)(xiii) The Uniform Unclaimed Property Act and the Uniform Disposition of Unclaimed Property Act.

As mentioned before, the Uniform Unclaimed Property Act and the Uniform Disposition of Unclaimed Property Act do not really deal with the legal questions pertaining to ordinary finders, but their subject matter is so closely related that a brief description of those acts in this context is warranted. The Uniform Disposition of Unclaimed Property Act was promulgated in 1954 and revised in 1966. It has been one of the more widely adopted uniform acts and is currently in force in fourteen states and the District of Columbia. n121

At the peak of its popularity, the 1966 Act had been adopted by thirty-one states and the District of Columbia, but some of its provisions needed reworking after a 1965 U.S. Supreme Court decision. Thus in 1981 the Uniform Unclaimed Property Act was promulgated and superseded the 1966 Uniform Disposition of Unclaimed Property Act. This later Act has now been adopted by twenty-eight states, although five of those states have mixed provisions from the 1966 and 1981 acts and are usually counted among the adopting states for both acts. n122 Altogether, forty-two states and the District of Columbia have adopted a form of uniform legislation on this subject.

The principal objective of these uniform acts is to bring unclaimed and ostensibly abandoned *intangible* property into the treasury of the state in a way that is not unfair to potential private claimants:

> Uniform and comprehensive state legislation dealing with the disposition of unclaimed property should fill a very real need. Present statutory provisions on the subject are exceedingly diverse in character and are often not well formulated. Most states already have statutes dealing with the disposition of unclaimed tangible personal property, the abandonment of which is more or less obvious fact. In addition, a considerable number of states have statutes dealing with the disposition of unclaimed bank deposits.
>
> ... The Uniform Act is custodial in nature -- that is to say, it does not result in the loss of the owner's property rights. The state takes custody and remains the custodian in perpetuity. Although the actual possibility of his presenting a claim in the distant future is not great, the owner retains his right of presenting his claim at any time, no matter how remote. State records will have to be kept on a

> permanent basis. In this respect the measure differs from the escheat type of statute, pursuant to which the right of the owner is foreclosed and the title to the property passes to the state.
>
> ... The Uniform Disposition of Unclaimed Property Act, if adopted by the states, will serve to protect the interests of owners, to relieve the holders from annoyance, expense and liability, to preclude multiple liability, and to give the adopting state the use of some considerable sums of money that otherwise would, in effect, become a windfall to the holders thereof. n123

The 1981 Uniform Unclaimed Property Act introduced changes to clarify and conform to court rulings the guidelines for determining which of several claimant states should have priority in taking custody of unclaimed property.

The principal operative provision of the 1981 act deals only with intangible property:

§ 2. [Property Presumed Abandoned; General Rule]

(a) Except as otherwise provided by the Act, all intangible property, including any income or increment derived therefrom, less any lawful charges, that is held, issued, or owing in the ordinary course of a holders' business and has remained unclaimed by the owner for more than 5 years after it becomes payable or distributable is presumed abandoned.

(b) Property is payable or distributable for the purpose of this Act notwithstanding the owner's failure to make demand or to present any instrument or document required to received payment. n124

Intangible property is defined as:

> (i) monies, checks, drafts, deposits, interest, dividends, and income;
>
> (ii) credit balances, customer overpayments, gift certificates, security deposits, refunds, credit memos, unpaid wages, unused airline tickets, and unidentified remittances;
>
> (iii) stocks and other intangible ownership interests in business associations;
>
> (iv) monies deposited to redeem stocks, bonds, coupons, and other securities, or to make distributions;
>
> (v) amounts due and payable under the terms of insurance policies; and
>
> (vi) amounts distributable from a trust or custodial fund established under a plan to provide health, welfare, pension, vacation, severance, retirement, death, stock purchase, profit sharing, employee savings, supplemental unemployment insurance, or similar benefits. n125

§ 13.04(f) Transfers to Judgment Creditors.

In a strictly technical sense, one who obtains the benefit of a judgment in a legal action concerning ownership of personal property does not thereby acquire title to that personalty by means of transfer; the judgment in most instances simply declares the ownership of the personalty as it already existed when the legal action began. However, if, as the result of a judgment, a judgment creditor executes upon property of the judgment debtor that was not the subject of the legal action, and either obtains the property outright or the value of the property after judicial sale, then a transfer of property ownership has taken place, indirectly at least as a result of the judgment. This latter process is discussed in detail in § 13.08, Liens, *infra*.

In several other senses, however, it may be said that judgments effect transfers of personal property ownership. An erroneous judgment as to ownership of property, once final and not subject to collateral or other attack, still determines the title to the property, even if conferred on the wrong party; the error is effectively a transfer of title. Judgments are binding not only on the parties themselves, but on their successors in interest and on those who could have participated in but did not participate in the litigation. n126

An indirect transfer of title occurs when an owner of property sues another for conversion, seeking the value of the converted property. Upon succeeding in obtaining that value by means of a satisfied judgment, the plaintiff effectively surrenders ownership of the thing itself, which then reposes in and has in effect been transferred to the defendant. If the judgment cannot be satisfied, some courts hold that no transfer of ownership has yet occurred, so that the plaintiff could still recover the property itself by self-help or replevin; n127 other courts, perhaps the majority in American jurisdictions, hold that the judgment creditor is precluded by the doctrine of election of remedies from seeking the property itself. n128 Somewhat inconsistently, if the judgment debtor who has not satisfied the judgment for the value of the property then transfers the property to another, the judgment creditor may pursue a new judgment for either the property itself or the value against the transferee. n129 When title has been obtained by means of conversion and a satisfied judgment, the converter's title relates back to the time of conversion. n130 Consistent with this view, any accessions to the property, occurring after the conversion, belong to the converter who has satisfied the owner's judgment for the original property value. The larger questions of accessions are covered in the next section.

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LEXIS: personal w/5 property w/50 transfer! w/20 judgment
w/5 creditor

§ 13.04(g) Transfer by Accession.

§ 13.04(g)(1) General Principles of Accession.

It is helpful to state the basic principles of accession law in their simplest, idealized form before discussing the intricacies of individual issues. Accession occurs if one takes personal property of another and adds significant value to it or incorporates it into the taker's own valuable property, so that it would be unjust to require the taker to return the improperly taken item to its owner. In this context, the word accession connotes adding to or supplementing. Thus "accession" is an accurate description of what occurs when an item of property is greatly added to by the labor of one not the owner, or is incorporated into another's property of much greater value. By operation of law, the title to the property affected by accession is transferred from the property's original owner to the party that enhanced the property's value or incorporated the property into other, more valuable property.

A person who loses title to property by accession is almost always entitled to recover the value of that property in money damages; the main disadvantage is that the time, and even the very choice, of converting the property to money are taken from the discretion of the owner and in some circumstances may not work to the owner's advantage. On the other hand, if the owner successfully defeats a claim of accession and wins back the property, usually in a condition of enhanced value, ordinarily the owner will not be required to reimburse the unsuccessful accessioner for the value added to the returned property; conversely, if the property comes back in a less valuable condition, the owner may obtain reimbursement up to the property's original value.

In determining whether improperly taken goods have been lost to another by accession, three issues must be resolved: (1) no accession can occur if the taking and mixing with other goods or property was wilful, fraudulent or wrongful in some other way; (2) no accession occurs if the property taken can be identified in more or less its original form and separated and returned without undue hardship or damage; and (3) no accession occurs unless there has been a

significant enhancement in value to the taken property by the accessioner.

§ 13.04(g)(2) No Accession After Wrongful Taking.

Accession is usually denied if the taking of the property was willful (in the sense that the taker knew that the taking was wrongful), fraudulent or wrongful in some other way. In such a case, the property's owner will be entitled to return of the property, even if its identity has changed and significant value has been added, with no offset for the value added by the taker. This principle was established early, as in the old case in which one who knowingly took another's corn to make whiskey was required to surrender the whiskey itself to the owner, without offset for the substantial enhancement in the corn's value. n131 Other similar cases still arise in more modern times, usually over improper takings of timber or minerals. n132

A more difficult situation is presented when the taking was not explicitly willful, but only negligent. The decisions range from not taking the negligence into account (and awarding the owner the property with its full enhancement of value) to awarding the owner the property with its enhanced value but offset by the taker's expenses (which, in effect, returns to the owner the property with original value plus the profit from the accession, but not the cost of the accession itself). n133 Courts have devised various formulas for reimbursing the owner when the taker was innocent but to some degree at fault through negligence. n134

COMPUTER-ASSISTED RESEARCH

LEXIS: accession and taking w/20 wrongful

§ 13.04(g)(3) No Accession if the Property's Identity Is Not Lost.

If the circumstances of the taking do not preclude a finding of accession, it must then be determined if the property taken has retained its identity. In the leading case, axles and wheels added to a wagon were required to be returned to their owner. n135 This is seldom a straightforward judgment. Timber cut into boards supposedly retains its identity, but grapes made into wine or clay into bricks do not. n136

Since the conclusion that identity has not changed usually means the owner is entitled to the return of the property with its enhanced value, inconsistency in the decisions has been troubling. For example, timber turned into a boat frame has been held to have retained its identity, while timber turned into a canoe has not. n137 Clay made into bricks has supposedly lost its identity, n138 but wood made into charcoal has not. n139 Most troubling would be requiring the return of some raw material that was innocently taken and transformed into a work of art, even though the material itself was readily identifiable; theoretically the owner would be entitled to the return of the raw material with its artistic enhancement and vastly increased value.

A subset of these questions has become almost a litigation specialty.

COMPUTER-ASSISTED RESEARCH

LEXIS: accession and identity w/50 transform! or chang!

§ 13.04(g)(4) No Accession if No Significant Value Is Added.

The final major issue to be resolved before determining whether accession has occurred is whether significant value has been added to the property taken, and most accession cases are concerned with this issue. The easiest cases are those in which a very large increase in value has been added to the taken property, and the next easiest are those in which little or no value has been added. In between are the large majority of cases, which collectively give little guidance about

how much enhancement in value is enough to qualify for accession. In one case considered a leading case, the transformation of lumber into barrel hoops increased the value of the wood by 28 times, and that was sufficient to justify a finding of accession. n140 In these judgments considerable inconsistency could be expected, and in one extreme comparative example, a three-fold increase was held sufficient for accession, but a six-fold increase was not. n141

A variant of this enhanced value analysis arises when the taker incorporates the goods of the owner into other goods belonging to the taker. The principal item, or the item of dominant value, determines which party is awarded possession, although decisions on this point are also not always consistent.

Another variant of these questions draws into some doubt the rule that goods retaining their separate identity cannot be subjects of accession. In these cases various goods, such as tires and batteries, are incorporated into automobiles as accessories and are sometimes considered part of the automobile by means of accession, even though they are still separately identifiable and could be severed and removed without damage. One rationale favoring accession in such cases is that the goods added by accession are essential to the functioning of the vehicle. n142 However, usually no accession is found, as described in the A.L.R. annotation introduction:

> The typical situation presented by the cases herein arises when one having possession of an automobile or truck under a title-retaining instrument attaches accessories to the vehicle, which accessories may themselves have been purchased under a title-retaining instrument. The controversy ordinarily is between the seller of the car and the seller of the accessories to determine ownership of the accessories when the car is repossessed upon the conditional buyer's default.
>
> A material consideration in the law of accession is whether the lesser property has become so united with the greater as to be incapable of detachment without harm to either the principal article or the thing attached. Generally, with respect to the detachability of the accessory or equipment from the automobile, it may be said that the courts are less likely to apply the doctrine of accession if the items in question can be removed expediently and with little or no damage to themselves or the automobile...
>
> ... The bulk of the cases support the conclusion that where title has not passed from the conditional seller of the accessories at the time the car is repossessed, there is no accession. n143

The cases holding otherwise, that title to property has passed by accession, have emphasized that the parts, though possibly severable, were integral parts of the vehicle necessary to its proper working. n144 In recent cases, tires purchased by a wife for an automobile that was community property merged with the automobile by accession and ceased to be her separate property; n145 and a winch installed on a truck was deemed attached by accession, because it was securely affixed to the truck's undercarriage and integrated into the truck's electrical system. n146

COMPUTER-ASSISTED RESEARCH

LEXIS: accession and value w/50 enhanc! or add!

§ 13.04(g)(5) The Impact of Accession on Security Interests in the Goods.

When either or both of the items involved in an accession situation are subject to security interests held by others, their respective priorities are now governed by § 9-314 of the Uniform Commercial Code. In general, the Code requires that one with a pre-accession security interest in goods retains priority as to those goods even when they are attached to other goods by accession; however, if the security interest holder chooses to remove the added goods, sometimes compensation for removal damage must be paid:

§ 9-314. Accessions.

(1) A security interest in goods which attaches before they are installed in or affixed to other goods takes priority as to the goods installed or affixed (called in this section "accessions") over the claims of all persons to the whole except as stated in subsection (3) and subject to Section 9-315(1).

(2) A security interest which attaches to goods after they become part of a whole is valid against all persons subsequently acquiring interests in the whole except as stated in subsection (3) but is invalid against any person with an interest in the whole at the time the security interest attaches to the goods who has not in writing consented to the security interest or disclaimed an interest in the goods as part of the whole.

(3) The security interests described in subsections (1) and (2) do not take priority over

(a) a subsequent purchaser for value of any interest in the whole, or

(b) a creditor with a lien on the whole subsequently obtained by judicial proceedings; or

(c) a creditor with a prior perfected security interest in the whole to the extent that he makes subsequent advances if the subsequent purchase is made, the lien by judicial proceedings obtained or the subsequent advance under the prior perfected security interest is made or contracted for without knowledge of the security interest and before it is perfected. A purchaser of the whole at a foreclosure sale other than the holder of a perfected security interest purchasing at his own foreclosure sale is a subsequent purchaser within this section.

(4) When under subsections (1) or (2) and (3) a secured party has an interest in accessions which has priority over the claims of all persons who have interests in the whole, he may on default subject to the provisions of Part 5 remove his collateral from the whole, but he must reimburse any encumbrancer or owner of the whole who is not the debtor and who has not otherwise agreed for the cost of the repair of any physical injury but not for any diminution in value of the whole caused by the absence of goods removed or by any necessity for replacing them. A person entitled to reimbursement may refuse permission to remove until the secured party gives adequate security for the performance of this obligation. n147

§ 13.04(g)(6) Accession of Personalty to Realty.

When personal property is joined to real property by accession, the personalty is either so integrated into the realty as to lose its separate identity or, even though still identifiable, is so affixed as to become a fixture and thus be considered part of the realty. Here the traditional operation of accession doctrine favors the owner of the realty, even if a windfall results. A house mistakenly built on the land of another may be retained by the landowner; if a landowner improperly moved a house belonging to another to the owner's land, the house owner lost the right to reclaim the house. More recent cases have permitted recovery of the accessioned personalty n148 or at least its value. n149

COMPUTER-ASSISTED RESEARCH

LEXIS: accession and real! w/50 personal!

§ 13.04(g)(7) Rules for Relief by Recovery of Damages Rather than the Property Itself.

One whose goods have been taken and then transformed or incorporated into a much more valuable item may choose to sue for money damages rather than for the return of the enhanced personal property. If the taking was willful (knowingly wrongful), the plaintiff may often recover the value of the taken goods in their enhanced form. n150 In many of these cases involving wrongful taking of timber or minerals, double or treble damages may be statutorily imposed for such activities; however, that approach is most likely related to the state's waste jurisprudence. n151

Where the defendant taker acted not willfully, but perhaps negligently or even inadvertently, the court may award the enhanced value of the item, offset by the actual or reasonable expenses of the defendant in improving the item. n152 Alternatively, in an action for damages it is possible for the court to award merely the original value of the taken item, n153 which the court may do if the taker was entirely innocent.

If one who takes and improperly enhances the value of an item and subsequently sells the improved item to another, the owner has several possibilities in an action to recover damages. Besides an action against the wrongful, negligent, or innocent taker as described in the immediately preceding paragraphs, the owner may proceed against the purchaser. By traditional common law rule, such a purchaser is liable for the value of the goods at the time of the purchase. n154 In other cases, the purchaser is considered to stand in the place of the vendor (the original accessioner) and to face liability as would the accessioner, varying according to the innocence of the accessioner. n155 All of these holdings may be modified in jurisdictions that accord protection to bona fide purchasers in accession situations, as discussed in § 13.04(c), *supra*.

One other difficult problem arises with uncommon frequency: what relief is available to one who builds a house on the wrong land? If the builder is aware of the error during the time of construction, no relief is given, n156 and even if the mistake is innocent, often no relief is available. n157 Other courts may require reimbursement from the landowner, n158 especially if the landowner's conduct in some way induced the mistake. n159

COMPUTER-ASSISTED RESEARCH

LEXIS: accession and damages

§ 13.04(h) Transfers Under the Doctrine of Confusion.

Confusion, as a legal term of art, occurs when the goods of one become so mixed with the goods of another or of others, that ownership can no longer be determined:

> Confusion frequently occurs in connection with so-called fungible goods, such as grain, oil, and the different mineral ores, which, since one unit of the common mass is the same in quality and value as any other unit, are customarily sold by weight or measure. It may, however, exist when goods of any nature belonging to different owners are so intermingled that they cannot be identified and separated and returned to their respective owners. Thus timber, cattle, and stocks of package merchandise are often so intermixed as to constitute confusion of goods in the legal sense. n160

If the confused goods are of the same kind and each party's respective quantity is known, then each owner is entitled to a corresponding share of the common mass; intermingled money is also treated in this fashion. n161 Occasionally, if a party has intentionally caused the confusion, a court may prohibit that party from any portion of the common mass.

n162 This was the rule at common law, as expressed by Blackstone:

> But if one wilfully intermixes his money, corn, or hay, with that of another man without his approbation or knowledge, or casts gold in like manner into another's melting pot or crucible, the civil law, although it gives the sole property of the whole to him who has not interfered in the mixture, yet allows a satisfaction to the other for what he has so improvidently lost. But our law, to guard against fraud, gives the entire property without any account, to him whose original dominion is invaded, and endeavored to be rendered uncertain without his own consent. n163

If goods of different kind become confused, with no party at fault, the owners are considered tenants in common of the common mass, and their undivided fractional shares are equal unless a different proportion of contribution is proved. n164

In such a case -- confusion of goods of different kind -- where the confusion was wrongfully caused by one of the parties, the wrongdoer may be held to have no rights in the common mass, as with confusion of like goods. n165 This situation has frequently occurred when persons join to defraud creditors by mixing the property of several debtors:

> [W]here there is evidence of a common design between several persons to defraud the creditors of one of them, and in carrying out the purpose there is an intentional intermixture of the goods of the debtor with the goods of those acting in collusion with him, so that separation is practically impossible, all the inconvenience of the confusion is cast upon him who permitted it, and it is for him to distinguish his own property satisfactorily or lose it, for the law will not distinguish it for him. n166

COMPUTER-ASSISTED RESEARCH

LEXIS: confusion w/20 goods

FOOTNOTES:

(n1)Footnote 31. The leading common law case for this proposition is *Cochrane v. Moore, LR 25 QBD 57 (1890)* (the fourth part of a horse given by oral expression was held not to be a gift because no delivery occurred).

(n2)Footnote 32. Ray Andrews Brown, The Law of Personal Property 79 (3d ed., Walter B. Raushenbush ed. 1975).

(n3)Footnote 33. *Coleman v. Parker, 114 Mass. 30 (1873).*

(n4)Footnote 34. *Lee v. Lee, 5 F.2d 767 (D.C. Cir. 1925).*

(n5)Footnote 35. *In re Osborne's Estate, 178 N.E.2d 406 (Ill. App. 1962)* (conservator's action to recover time deposits that were not intended to be given to ward's brother-in-law).

(n6)Footnote 36. Ray Andrews Brown, The Law of Personal Property 83 (3d ed., Walter B. Raushenbush ed. 1975).

(n7)Footnote 37. *Hudson v. Tucker, 361 P.2d 878 (Kan. 1961)* (action to recover personal property from decedent's step-daughter, who received the property from the decedent and they returned it for safekeeping).

(n8)Footnote 38. *Nolen v. Harden, 43 Ark. 307 (Ark. 1884)* (dying father made gift to infant daughter by delivery to a trustee).

(n9)Footnote 39. *Grissom v. Sternberger, 10 F.2d 764 (4th Cir. 1926)* (delivery was complete when a father delivered stock to a son with a letter of assignment to other children).

(n10)Footnote 40. *Hillebrant v. Brewer, 6 Tex. 45 (1851)* (a father branded certain cattle with a special brand recorded in the son's name).

(n11)Footnote 41. Ray Andrews Brown, The Law of Personal Property 92 (3d ed., Walter B. Raushenbush ed. 1975).

(n12)Footnote 42. *See, e.g., Newman v. Bost, 29 S.E. 848 (N.C. 1898).*

(n13)Footnote 43. *Bauernschmidt v. Bauernschmidt, 54 A. 637 (Md. 1903)* (jointly held safe deposit box, with both husband and wife keeping a key).

(n14)Footnote 44. *Rule v. Fleming, 152 N.E. 181 (Ind. App. 1926)* (decedent, anticipating death from an operation, rented a safe deposit in joint names and gave a duplicate key to the other named holder).

(n15)Footnote 45. *Waite v. Grubbe, 73 P. 206 (Ore. 1903).* However, reaching the opposite conclusion was the court in *Shankle v. Spahr, 93 S.E. 605 (Va. 1917).*

(n16)Footnote 46. Denying that a gift occurred were the courts in *Gerry v. Howe, 130 Mass. 350 (1881),* and in *Picot v. Sanderson, 12 N.C. 309 (1827).* The court in *Simmonds v. Simmonds' Adm'r, 118 S.W. 304 (Ky. 1909),* found a valid gift, holding that a bailee could not be allowed wrongfully to obstruct the donation.

(n17)Footnote 47. *In re Detjen's Estate, 148 N.W.2d 745 (Wis. 1967)* (decedent intended to make a gift of a savings account fund to his daughter-in-law, to whom he was very close).

(n18)Footnote 48. *Fletcher v. Fletcher, 55 Vt. 325 (1883)* (carriage given by father to daughter).

(n19)Footnote 49. *Hackworth v. Barham, 210 So. 2d 407 (La. App. 1968)* (car sold to another remained in seller's possession and control until seller's death).

(n20)Footnote 50. *In re Dodge, 216 A.2d 757 (N.J. Super. 1966), rev'd on other grounds, 234 A.2d 65 (N.J. 1966).*

(n21)Footnote 51. *See, e.g., Speelman v. Pascal, 178 N.E.2d 723 (N.Y. 1961)* (gift of share in profits from theatrical production).

(n22)Footnote 52. *See, e.g., First Nat'l Bank of Lockhaven v. Fitzpatrick, 289 N.Y.S.2d 314 (1968)* donor informed donees of the gift, but the gift remained in donor's possession).

(n23)Footnote 53. *See, e.g., In re Solot's Estate, 50 N.Y.S.2d 401 (1944), aff'd, 55 N.Y.S.2d 125 (1945)* (delivery occurred when donor endorsed envelopes containing cash and other valuables).

(n24)Footnote 54. Ray Andrews Brown, The Law of Personal Property 112-113 (3d ed., Walter B. Raushenbush ed. 1975).

(n25)Footnote 55. *See, e.g., McPherson v. Minier, 137 N.W.2d 719 (Neb. 1965)* (use of fraud and undue influence to induce a 90-year-old man to give property away).

(n26)Footnote 56. *Register of Wills for Somerset County v. Sterling, 287 A.2d 771 (Md. 1972)* (stocks delivered, but donor retained right to receive dividends); *Innes v. Potter, 153 N.W. 604 (Minn. 1915)* (shares of stock assigned to decedent's daughter but given to decedent's business partner, with instructions to deliver upon decedent's death); *Schollmier v. Schoendelen, 43 N.W. 282 (Iowa 1889)* (decedent's signed instruction to deliver saving account upon decedent's death was given to one of the donees).

(n27)Footnote 57. *Howard v. Hobbs, 94 A. 318 (Md. 1915)* (mortgagor accepted ownership of forfeited land in

return for agreement to remain on the land and pay interest until mortgagor's death); *Candee v. Connecticut Sav. Bank, 71 A. 551 (Conn. 1908)* (savings account given subject to donor's right to use for life).

(n28)Footnote 58. *Parry v. Parry, 191 A.2d 439 (Md. 1963)* (shares of stock to change ownership automatically at holder's death).

(n29)Footnote 59. Ray Andrews Brown, The Law of Personal Property 121 (3d ed., Walter B. Raushenbush ed. 1975).

(n30)Footnote 60. *See, e.g., Daigle v. Fournet, 141 So. 2d 406 (La. App. 1962)* (donee called off the engagement, but sought to retain the ring).

(n31)Footnote 61. *See, e.g., Lewis v. Permut, 320 N.Y.S.2d 408 (1971)* (donor broke the engagement, and donee kept the ring).

(n32)Footnote 62. *Devine v. Stepanek, 176 Ill. App. 61 (1912)* (attempted conditional gift of certificates of deposit).

(n33)Footnote 63. *Blanchard v. Sheldon, 43 Vt. 512 (1871)* (gift if money, if not used by donor before donor's death).

(n34)Footnote 64. *See, e.g., Gottstein v. Hedges, 228 N.W. 93 (Iowa 1929)* (refusal to accept an annuity).

(n35)Footnote 65. *See, e.g., Halisey v. Howard, 172 A.2d 379 (Conn. 1961)* (donee did not learn of gift until donor's death).

(n36)Footnote 66. *See, e.g., McKinnon v. First Nat'l Bank of Pensacola, 82 So. 748 (Fla. 1919)* (deposits by father into children's accounts).

(n37)Footnote 67. *See, e.g., Pohl v. Fulton, 119 P. 716 (Kan. 1911)* (donor held gift in trust for incompetent donee).

(n38)Footnote 68. The peril of the expected death must be a reasonably present one. *Lawrence v. Hartford Nat'l Bank & Trust Co., 193 A.2d 506 (Conn. Super. Ct. 1963).* Somewhat inconsistently, courts have liberally accepted the imminence of death from physical malady in sustaining gifts *causa mortis,* but have been reluctant to similarly view imminent death from outside causes, such as the possibility of assassination. *See, e.g., Dickeschied v. Exchange Bank, 28 W. Va. 340 (1886).* Also, some courts have held that a gift in contemplation of suicide is void as against public policy. *See, e.g., Pikeville Nat'l Bank & Trust Co. v. Shirley. 135 S.W.2d 426 (Ky. 1939).*

(n39)Footnote 69. *Hatcher v. Buford, 29 S.W. 641 (Ark. 1895)* (presumption of gift *causa mortis* rebutted).

(n40)Footnote 70. *See, e.g., In re Wilson's Estate, 206 N.Y.S.2d 323 (1960)* (decedent said words of clear intent to make a gift).

(n41)Footnote 71. *See, e.g., Drew v. Haggerty, 17 A. 63 (Md. 1889).* Holding to the contrary, *see, e.g., In re Schreihart's Estate, 270 N.W. 71 (Wis. 1936).*

(n42)Footnote 72. *See, e.g., McMahon v. Newton Sav. Bank, 34 A. 709 (Conn. 1895)* (expressed donative intent, but no delivery).

(n43)Footnote 73. "It is admitted by all that a gift *causa mortis* is not complete unless the donor die as feared, and it is often said that he must die of the very peril apprehended." Ray Andrews Brown, The Law of Personal Property 133 (3d ed., Walter B. Raushenbush ed. 1975).

(n44)Footnote 74. *In re Simms' Estate, 423 S.W.2d 758 (Mo. 1968)* (action to determine title to a bank account); *Hart v. Ketchum, 53 P. 931 (Cal. 1898)* (savings account bank books delivered to donee).

(n45)Footnote 75. *Hatcher v. Buford, 29 S.W. 641 (Ark. 1895)* (presumption of gift *causa mortis* rebutted).

(n46)Footnote 76. Ray Andrews Brown, The Law of Personal Property 135 (3d ed., Walter B. Raushenbush ed. 1975).

(n47)Footnote 77. *Weston v. Hight, 17 Me. 287 (1840)* (recovery from illness and subsequent death from same illness).

(n48)Footnote 78. *Parker v. Marston, 27 Me. 196 (1847)* (decedent delivered promissory note to two different parties).

(n49)Footnote 79. *Nicholas v. Adams, 2 Whart. 17 (Pa. 1836)* (consecutive gifts *causa mortis* and inter vivos of same items).

(n50)Footnote 80. *Hatch v. Atkinson, 56 Me. 324 (1868).*

(n51)Footnote 81. *Baker v. Baker, 150 N.E. 284 (Ill. 1925)* (specific legacies permitted to be recovered first).

(n52)Footnote 82. *Peatross v. Gray, 27 S.E.2d 203 (Va. 1943)* (action by lienholder).

(n53)Footnote 83. Beginning with the decedent, this method traces both ascending and descending kin, counting a degree for each generation.

(n54)Footnote 84. Second cousins are frequently defined in the same way as first cousins once removed, that is, as children of first cousins. An alternative definition is to consider as second cousins those persons who are related to each other by descent from the same great-grandparent. Certainly on such a point it is necessary to determine specific state law. The confusion is further highlighted by an older American authority:

> The decedent is the first cousin once removed of the child of the great-uncle, but quaere, does usage permit us to speak of the latter as the first cousin once removed of the decedent? Sometimes the first cousin once removed is called the second cousin and so on... It will be observed that the first cousin once removed is in the same degree of relationship to the deceased as the second cousin according to the canon law rule but not according to the civil law rule. Thomas E. Atkinson, Handbook of the Law of Wills 31, n.47 (1937).

(n55)Footnote 85. Under the common law, or canon law, method, the degree of relationship is determined by number of generations between the decedent and the heirs' nearest common ancestor.

(n56)Footnote 86. Thomas E. Atkinson, Handbook of the Law of Wills 45-46 (2d ed. 1953).

(n57)Footnote 87. *Id.*

(n58)Footnote 88. The statutory provisions for succession rights of children born out of wedlock sometimes apply only to succession from decedent mothers.

(n59)Footnote 89. *Trimble v. Gordon, 430 U.S. 762 (1976). See also Reed v. Campbell, 476 U.S. 852 (1986), reh'g denied, 478 U.S. 1031 (1986).*

(n60)Footnote 90. The states that have adopted the Uniform Probate Code include Alaska, Arizona, Colorado,

Florida, Hawaii, Idaho, Maine, Michigan, Minnesota, Montana, Nebraska, New Mexico, North Dakota, South Carolina, and Utah.

(n61)Footnote 91. U.C.C. § 2A-102.

(n62)Footnote 92. As stated in Article 2A:

§ 2A-103. Definitions and Index of Definitions.

(1) In this Article unless the context otherwise requires: ...

(j) "Lease" means a transfer of the right to possession and use of goods for a term in return for consideration, but a sale, including a sale on approval or a sale or return, or retention or creation of a security interest is not a lease. Unless the context clearly indicates otherwise, the term includes a sublease.

(n63)Footnote 93. Official Comment to U.C.C. § 2-101.

(n64)Footnote 94. James J. White & Robert S. Summers, Uniform Commercial Code 27-28 (3d ed. 1988).

(n65)Footnote 95. 5 21 Jam. 1, c. 16, § 3 (1623).

(n66)Footnote 96. *See, e.g.*, Utah Code Ann. § 78-12-26(2).

(n67)Footnote 97. *Guaranty Title & Trust Corp. v. United States, 264 U.S. 200 (1924).*

(n68)Footnote 98. Ray Andrews Brown, The Law of Personal Property 35-37 (3d ed., Walter B. Raushenbush, ed. 1975).

(n69)Footnote 99. *O'Keeffe v. Snyder, 416 A.2d 862 (N.J. 1980).*

(n70)Footnote 100. Utah Code Ann. § 78-12-26(2).

(n71)Footnote 101. *See, e.g., Alexander v. Brunet, 39 S.C.L. 189 (1851); Norment v. Smith, 20 Tenn. 46 (1839).*

(n72)Footnote 102. *See, e.g., Joseph v. Lesnevich, 153 A.2d 349 (N.J. Super. 1959)* (successive ownership of bonds).

(n73)Footnote 103. As stated by one authority:

> To become a finder in the eyes of the law, it is not only necessary that one discover the whereabouts of the goods in question but that he take them into his possession...

Ray Andrews Brown, The Law of Personal Property 24 (3d ed., Walter B. Raushenbush ed. 1975).

(n74)Footnote 104. *Id.* at 26.

(n75)Footnote 105. *Id.* at 28. Examples of cases in which treasure trove has been treated as lost goods and awarded to the finder include *Zornes v. Bowen, 274 N.W. 877 (Iowa 1937); Danielson v. Roberts, 74 P. 913 (Or. 1904).*

(n76)Footnote 106. *Schley v. Couch, 284 S.W.2d 333 (Tex. 1955); Jackson v. Steinnberg, 200 P.2d 376 (Ore. 1948); McAvoy v. Medina, 11 Allen (Mass.) 548 (1866).*

(n77)Footnote 107. *See* the brief discussion of the Uniform Unclaimed Property Act and the Uniform Disposition of Unclaimed Property Act in § 13.04(e)(3)(xiii), *infra*.

(n78)Footnote 108. Fla. Stat. Ann. §§ 705.102, 705.104.

(n79)Footnote 109. Fla. Stat. Ann. § 705.103.

(n80)Footnote 110. Haw. Rev. Stat. §§ 52D-10, 52D-14.

(n81)Footnote 111. Ill. Comp. Stat. ch. 765, §§ 1020/27, 1020/28, 1020/30, 1020/34, 1020/35.

(n82)Footnote 112. Iowa Code §§ 644.6 to 644.18.

(n83)Footnote 113. Mich. Comp. Laws §§ 434.1, 434.2, 434.6-434.8, 434.12.

(n84)Footnote 114. Mont. Code Ann. §§ 70-5-102 to 70-5-107; 70-5-201 to 70-5-207, 70-5-209.

(n85)Footnote 115. N.H. Rev. Stat. Ann. §§ 471:1-471:4, 471:6-471:8, 471:10

(n86)Footnote 116. N.Y. Gen. Mun. Law § 250.

(n87)Footnote 117. Okla. Stat. tit. 15, §§ 511-518.

(n88)Footnote 118. Ore. Rev. Stat. §§ 98.005, 98.015, 98.025.

(n89)Footnote 119. Vt. Stat. Ann. tit. 27, §§ 1101-1108.

(n90)Footnote 120. Wash. Rev. Code §§ 63.21.010-63.21.050.

(n91)Footnote 121. The jurisdictions in which the Uniform Disposition of Unclaimed Property Act is currently in force include Alabama, Arkansas, District of Columbia, Illinois, Indiana, Iowa, Kansas, Minnesota, Mississippi, Missouri, Nebraska, Nevada, Oregon, South Dakota, and Tennessee. Five of these states -- Iowa, Minnesota, Nevada, Oregon, and Tennessee -- have legislation combining provisions of this act and provisions of the newer Uniform Unclaimed Property Act of 1981.

(n92)Footnote 122. The jurisdictions in which the Uniform Unclaimed Property Act is currently in force include Alaska, Arizona, Colorado, Florida, Georgia, Hawaii, Idaho, Iowa, Louisiana, Maine, Maryland, Minnesota, Montana, Nevada, New Hampshire, New Jersey, New Mexico, North Dakota, Oklahoma, Oregon, Rhode Island, South Carolina, Tennessee, Utah, Vermont, Virginia, Washington, and Wisconsin. Five of these states -- Iowa, Minnesota, Nevada, Oregon, and Tennessee -- have legislation combining provisions of this act and provisions of the older 1966 Uniform Disposition of Unclaimed Property Act. Two of these states -- Maryland and Vermont -- have legislation combining provisions of the 1981 Act with provisions of the original 1954 Uniform Disposition of Unclaimed Property Act.

(n93)Footnote 123. Prefatory Note, Unif. Disposition of Unclaimed Property Act (Revised 1966), 8A U.L.A. 135-137 (1983).

(n94)Footnote 124. Unif. Unclaimed Property Act § 2, 8A U.L.A. 630 (1983).

(n95)Footnote 125. Unif. Unclaimed Property Act §§ 1(10)(i)-1(10)(vi), 8A U.L.A. 628 (1983).

(n96)Footnote 126. *See, e.g., Pikeville Oil & Tire Co. v. Deavors, 320 S.W.2d 782 (Ky. 1959)* (judgment binding on after-born remaindermen).

(n97)Footnote 127. The leading case is the English case of *Ex parte Drake, 5 Ch. D. 866 (1877).*

(n98)Footnote 128. *See, e.g., Dietz v. Field, 41 N.Y.S. 1087 (1896).*

(n99)Footnote 129. *See Hodur v. Cutting, 248 Ill. App. 145 (1928).*

(n100)Footnote 130. *Backus v. West, 205 P. 533 (Ore. 1922).*

(n101)Footnote 131. *Silsbury v. McCoon, 3 N.Y. 379 (1850).*

(n102)Footnote 132. *See, e.g., Pine River Logging & Imp. Co. v. United States, 186 U.S. 279 (1902); Knoll v. Delta Dev. Co., 218 So. 2d 109 (La. App. 1969); State v. Shevlin-Carpenter Co., 64 N.W. 81 (Minn. 1895); Withers v. Tyler County Lumber Co., 326 S.W.2d 173 (Tex. Civ. App. 1959); Barnes v. Moore, 98 S.E.2d 683 (Va. 1957).*

(n103)Footnote 133. *Minerals & Chems. Philipp Corp. v. Milwhite, 414 F.2d 428 (5th Cir. 1969); Frusha v. Jackson, 228 So. 2d 197 (La. App. 1969).*

(n104)Footnote 134. *See* Ray Andrews Brown, The Law of Personal Property § 6.5, nn. 6-13, pp. 56-58 (3d ed., Walter B. Raushenbush ed. 1975).

(n105)Footnote 135. *Clark v. Wells, 45 Vt. 4 (1872).*

(n106)Footnote 136. *See Baker v. Mersch, 45 N.W. 685 (Neb. 1890); Lampton's Ex'rs v. Preston's Ex'rs, 24 Ky. (1 J.J. Marsh) 454 (1829).*

(n107)Footnote 137. *Burris v. Johnson, 24 Ky. (1 J.J. Marsh) 196 (1829)* (boat); *Potter v. Mardre, 74 N.C. 36 (1876).*

(n108)Footnote 138. *Baker v. Mersch, 45 N.W. 685 (Neb. 1890).*

(n109)Footnote 139. *Riddle v. Driver, 12 Ala. 590 (1847).*

(n110)Footnote 140. *Wetherbee v. Green, 22 Mich. 311 (1871).*

(n111)Footnote 141. *Louis Werner Stave Co. v. Pickering, 119 S.W. 333 (Tex. Civ. App. 1909).*

(n112)Footnote 142. *See* Annotation, *Accession to Motor Vehicle, 43 A.L.R.2d 813 (1955),* and *Mossler Acceptance Co. v. Norton Tire Co., 70 So. 2d 360 (Fla. 1954).*

(n113)Footnote 143. *See* Annotation, *Accession to Motor Vehicle, 43 A.L.R.2d 813, 814 (1955).*

(n114)Footnote 144. *Id. at 825-826.*

(n115)Footnote 145. *McVay v. McVay, 318 So. 2d 660 (La. App. 1975).*

(n116)Footnote 146. *Zandbergen v. Burch, 576 P.2d 812 (Ore. App. 1978).*

(n117)Footnote 147. U.C.C. § 9-314.

(n118)Footnote 148. *See, e.g., Burpee v. Athens Prod. Credit Ass'n, 15 S.E.2d 526 (Ga. App. 1941).*

(n119)Footnote 149. *Reese v. Jared, 15 Ind. 142 (1860)* (in the conversion and sale of a house by a trespasser, the value of the house, not the house itself, should be restored to the true owner).

(n120)Footnote 150. *Pine River Logging & Imp. Co. v. United States, 186 U.S. 279 (1902)* (unlawful logging); *Knoll v. Delta Dev. Co., 218 So. 2d 109 (La. App. 1969)* (willful trespassers not entitled to value of improvements).

(n121)Footnote 151. *See* ch. 70, "Waste," *infra*.

(n122)Footnote 152. *Whittaker v. Otto, 56 Cal. Rptr. 836 (1967)* (trespass on mining claim and conversion of ore).

(n123)Footnote 153. *Minerals & Chems. Philipp Corp. v. Milwhite Co., 414 F.2d 428 (5th Cir. 1969)* (owner remained silent while innocent trespasser removed clay from the land).

(n124)Footnote 154. *Wing v. Milliken, 40 A. 138 (Me. 1898)* (action to recover value of sawed lumber).

(n125)Footnote 155. *Elk Horn Coal Corp. v. Allegheny Coal Sales, Inc., 391 F.2d 253 (6th Cir. 1968)* (innocent trespasser sold coal to innocent buyer); *Smith v. Shiflett, 403 P.2d 364 (Wash. 1965)* (attempt to avoid imposition of treble damages by claiming trespass was innocent).

(n126)Footnote 156. *Mid-State Homes, Inc. v. Anderton, 283 So. 2d 426 (Ala. 1973)* (trespassing builder ignored survey stakes and owner's warning).

(n127)Footnote 157. *Hughes v. Monnahan, 165 N.W.2d 231 (Minn. 1969)* (owner not subject to mechanic's lien).

(n128)Footnote 158. *Stevens v. Crowder, 273 So. 2d 793 (Fla. App. 1973)* (innocent trespassing builder reimbursed for costs of permanent improvements).

(n129)Footnote 159. *Billerman v. Basiak, 220 A.2d 105 (N.J. 1966)* (easement obtained by trespasser in view of owner's silence).

(n130)Footnote 160. Ray Andrews Brown, The Law of Personal Property 62 (3d ed., Walter B. Raushenbush ed. 1975).

(n131)Footnote 161. *St. Paul Boom Co. v. Kemp, 103 N.W. 259 (Wis. 1905)* (commingled money, gold coins, deeds, bonds, notes, receipts and insurance policies).

(n132)Footnote 162. *Stephensen v. Little, 10 Mich. 433 (1862)* (fraudulent mixing of saw logs).

(n133)Footnote 163. 2 William Blackstone, Commentaries 405.

(n134)Footnote 164. *Bergen v. Van Liew, 36 N.J. Eq. 637 (1883).*

(n135)Footnote 165. *Ontario Livestock Comm'n Co. v. Flynn, 126 N.W.2d 362 (Iowa 1964)* (alleged conversion of cattle).

(n136)Footnote 166. *Brainard v. Cohn, 8 F.2d 13 (9th Cir. 1925).*

Thompson on Real Property, Thomas Editions

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CHAPTER 13 THE AMERICAN LAW OF PERSONAL PROPERTY

2-13 Thompson on Real Property, Thomas Editions § 13.05

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§ 13.05 Personal Property Issues Pertaining to Fixtures.

[Go To Supp]

§ 13.05(a) Rights Following Actual and Constructive Severance.

A fixture is an item of personal property that becomes so attached to realty that it is considered to be part of the realty. n167 Conversely, if a fixture that was once an item of personal property is severed from the realty, where the severance is authorized, purposeful, and permanent, the fixture once again becomes personal property. n168 A severance that falls short of those conditions will leave the item still considered realty, even though it has been separated. n169 When a building was destroyed by a storm and the building materials were left lying loose upon the land, those materials were still considered part of the realty until the landowner decreed otherwise. n170

Just as an item of personal property may become a fixture by "constructive" annexation, that is by intent of the parties but without being physically affixed, so also may "constructive" severance occur. A fixture such as a building or some other item of personal property may be sold separately from the land by giving a bill of sale; n171 or when the land is sold, the fixture may be reserved to the grantor by a provision in the deed. n172 In all such transactions, it is essential that the severance reflect the intent of the parties.

Provision for constructive severance by separate sale of goods on the land appears in the Uniform Commercial Code. If the seller is to perform the severance, the transaction for sale of minerals or a structure is treated as a sale of goods; sales of other fixtures on the land are treated as contracts for the sale of goods whether the severance is performed by the buyer or the seller:

§ 2-107. Goods to Be Severed From Realty: Recording.

(1) A contract for the sale of minerals or the like (including oil and gas) or a structure or its materials to be removed from realty is a contract for the sale of goods within this Article if they are to be severed by the seller but until severance a purported present sale thereof which is not effective as a transfer of an interest in land is effective only as a contract to sell.

(2) A contract for the sale apart from the land of growing crops or other things attached to realty and capable of severance without material harm thereto but not described in subsection (1) or of timber to be cut is a contract for the sale of goods within this Article whether the subject matter is to be severed by the buyer or by the seller even though it forms part of the realty at the time of contracting, and the parties can by identification effect a present sale before severance.

(3) The provisions of this section are subject to any third party rights provided by the law relating to realty records, and the contract for sale may be executed and recorded as a document transferring an interest in the land and shall then constitute notice to third parties of the buyer's rights under the contract for sale. n173

If a constructive severance occurs, then usually an actual severance must follow; when the constructive severance is in the context of a sale of the severed fixture, the buyer obtains an implied license to enter the realty and effect the severance within a reasonable time after the sale. n174 Also, once constructive severance has occurred, creditors of the buyer can reach the severed item in satisfaction of debt just as they could other personalty assets of the buyer. n175 A few jurisdictions, however, take the position that the effect of constructive severance is limited to the actual parties to the transaction. n176

COMPUTER-ASSISTED RESEARCH

LEXIS: sever! w/50 fixture

§ 13.05(b) Rights of Mortgagees and Other Lienors of the Real Property.

A mortgagor of real property who attaches fixtures to the realty subjects those fixtures to the lien of the mortgagee, whether the fixtures were attached before or after the creation of the mortgage. n177 Indeed, even one who purchases mortgaged land under contract and makes improvements while the contract is still executory subjects the improvements to the lien of the mortgagee; if the buyer fails to complete the contract, such fixtures remain part of the seller's land and subject to the mortgage lien. n178 If fixtures are wrongfully severed from mortgaged land, the mortgagee's rights in them continue after severance. n179

COMPUTER-ASSISTED RESEARCH

LEXIS: mortgag! or lien! and fixture

§ 13.05(c) Rights to Fixtures Attached by a Tenant.

As discussed in the following subsections, certain items that would ordinarily be considered fixtures when affixed to realty, are, as a matter of law, treated differently when affixed to rental premises by tenants. Of course, tenants and landlords may vary these rules by agreement, and such agreements need not be in writing. n180 Also, successors in interest or others claiming under the tenant have rights in tenant fixtures identical to their tenant's rights. n181

In many circumstances, tenants may remove such items when they vacate the rental premises. If such removals are proper, they must take place during or at the end of the tenancy or other proper occupancy by the tenant. n182 It has also been held, however, that even a tenant's post-occupancy removal is not prohibited, but the tenant might be forced to commit a trespass in effecting the removal. n183 When a tenant in breach is evicted, the courts differ on whether a right of removal persists after the eviction; n184 also some courts have followed the dubious doctrine that tenants who enter into new leases after expiration of the old have lost their rights of removal. n185 When a tenancy for an indefinite term

is suddenly terminated, the tenant usually has a reasonable time thereafter to effect removals. n186 A departure from this rule, however, occurs when a tenant of a life tenant is still in occupancy upon the life tenant's death; most courts do not permit post-termination removals, but hold the remainderman or reversioner entitled to the tenant fixtures. n187

Although some courts do not accord personal property status to fixtures until they are severed, usually tenant fixtures subject to the tenant's right of removal are considered the tenant's personal property even during the tenancy and before removal; n188 in the event of the tenant's bankruptcy, such fixtures pass to the trustee in bankruptcy. n189 Similarly, even unremoved tenant fixtures are subject to an execution against the tenant. n190

In the preceding paragraph, the tenant fixture subject to the right of removal is considered personal property of the tenant. In other situations, such a fixture is considered a part of the tenant's leasehold interest. Thus, when a tenant transfers the tenant's rights in the tenancy, the tenant's rights in the fixtures are also transferred. n191 A taking in eminent domain requires that compensation be paid to the tenant for tenant fixtures that the tenant had a right to remove. n192 If one asserts a mechanic's lien for having provided or installed a tenant fixture, the lien may be asserted against the tenant's leasehold interest, including the fixture as part of that interest. Absent a governing tax statute or regulation, there is much inconsistency in the courts over whether removable tenant fixtures are taxed to the tenant as personal property or as real property.

The following subsections describe general rules for determining which tenants' fixtures are subject to the tenant's right of removal.

§ 13.05(c)(1) Residential Tenants' Fixtures.

Residential tenants often attach items to their dwellings, usually referred to in legal writing as "ornamental fixtures." The right of a tenant to remove such fixtures upon terminating the tenancy relies on a legal and factual distinction that is much easier to describe than to apply. Tenant fixtures attached for the special wishes or requirements of the tenant, and intended to be temporary, may be removed and kept by the tenant upon termination; fixtures that are considered to be for the permanent improvement of the underlying estate may not be so removed. n193 The right of removal may be denied if the fixture is added for the ordinary, rather than the idiosyncratic, needs of the tenant and can effectively serve the needs of successor tenants. n194 Statutes in some states give a more precise definition of fixtures that can be removed by tenants, often broadening the scope of judicially defined removal rights. n195

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LEXIS: tenan! w/20 residen! w/50 fixture

§ 13.05(c)(2) Tenants' Agricultural and Trade Fixtures.

§ 13.05(c)(2)(i) Trade Fixtures.

It has long been the rule that a tenant who attaches to the premises fixtures used in the tenant's trade or business may remove those so-called "trade fixtures" when the tenant vacates the premises. n196 Therefore, the somewhat mislabeled "trade fixtures" are, under law, treated precisely as if they were not fixtures. These rules are now generally applied to life tenants as well as to tenants for terms less than life. n197

Not all fixtures installed by a tenant and used in the tenant's trade or business are considered trade fixtures, however. Only those fixtures that are specifically suited to the tenant's individual needs are trade fixtures; other fixtures that are considered for the permanent improvement of the premises must remain in place. n198 The wide range for potential disagreement over these matters is usually resolved by attempting to discern the parties' intent in attaching the fixtures. n199 Another factor -- and perhaps a factor which helps define the parties' otherwise unexpressed intent -- is whether

the fixture can be removed without great damage to the premises; the item that can be removed only with serious damage is considered permanently annexed to the realty. n200

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LEXIS: fixture w/20 trade or business and tenan!

§ 13.05(c)(2)(ii) Agricultural Fixtures.

Despite a contrary English rule emanating from an 1802 case, n201 American courts generally treat fixtures used by a tenant for agricultural purposes as they would tenants' trade fixtures:

> It is believed that the holding in a leading Wisconsin case that "there is, in our opinion, no sound reason for applying one rule to tenants engaged in trade or manufacture and another to tenants engaged in agriculture" represents the law in this country today. n202

COMPUTER-ASSISTED RESEARCH

LEXIS: fixture w/20 agricultur! or farm and tenan!

§ 13.05(d) Third Parties', Trespassers', Cotenants', and Licensees' Rights in Fixtures.

A mortgagee may claim rights in fixtures installed by the mortgagor, but usually not in those installed by a tenant of the mortgagor. n203 But one who becomes a mortgagee after the fixture is installed, without notice of any outside interest in the fixture, usually has the superior claim to the fixture. n204 If the one who installed and claims rights to the fixtures is a tenant in possession, that occupancy usually suffices to give notice to a subsequent mortgagee. n205

In general, items of personal property affixed to land by a trespasser become the property of the landowner. n206

A cotenant who installs a fixture that is necessary for preservation of the existing estate does so for the benefit of all the cotenants, is entitled to pro rata reimbursement, and may not assert an individual right of removal; but the cotenants may agree otherwise, especially by giving consent for one cotenant to install a removable fixture. n207 When an item installed by a cotenant remains the property of that cotenant, then upon partition that cotenant should receive the land upon which the item is installed or should receive credit for the improvement when the proceeds of sale are divided. n208

When a mere licensee installs a personal property improvement on the land of another, that improvement remains the personal property of the licensee unless the parties agree otherwise. n209 This personal property is not forfeited even if removal does not take place immediately upon revocation of the license.

COMPUTER-ASSISTED RESEARCH

LEXIS: fixture w/50 third party
fixture w/50 trespass!
fixture w/50 cotenant
fixture w/50 license

§ 13.05(e) Rights to Fixtures Attached by Someone Other than the Chattel Owner.

§ 13.05(e)(1) Items Wrongfully Taken from Owner.

According to the prevailing rule, if an item of personal property is wrongfully taken from its owner and then attached to another's realty as a fixture, the personalty owner may recover the item, even from a landowner who is a bona fide purchaser; removal is permitted, however, only if it can be accomplished without substantial damage to the realty. n210 A minority of courts have insisted that, once attached, even the wrongfully taken chattel becomes part of the realty, and deny removal rights of the chattel owner. n211

COMPUTER-ASSISTED RESEARCH

LEXIS: fixture w/100 wrongful! w/20 take!

§ 13.05(e)(2) Items Taken from Owner with Consent.

In those rare cases where the owner of an item of personal property has consented to its incorporation as a fixture in another's realty, the item remains the personal property of its owner even after it becomes a fixture, at least as to the parties to the transaction and as to others with notice of the transaction. n212 This rule usually holds true even against the claim of one holding a prior security interest in the realty, but not against one who obtains a subsequent security interest in the realty.

COMPUTER-ASSISTED RESEARCH

LEXIS: fixture w/50 take! w/20 consen!

§ 13.05(f) Prior and Subsequent Security Interests in Fixtures.

The occasionally complex issues surrounding priority of security interests in items of personal property that become attached to realty as fixtures are now governed almost exclusively by § 9-313 of the Uniform Commercial Code:

§ 9-313. Priority of Security Interests in Fixtures.

(1) In this section and in the provisions of Part 4 of this Article referring to fixture filing, unless the context otherwise requires

(a) goods are "fixtures" when they become so related to particular real estate that an interest in them arises under real estate law

(b) a "fixture filing" is the filing in the office where a mortgage on the real estate would be filed or recorded of a financing statement covering goods which are or are to become fixtures and conforming to the requirements of subsection (5) of Section 9-402

(c) a mortgage is a "construction mortgage" to the extent that it secures an obligation incurred for the construction of an improvement on land including the acquisition cost of the land, if the recorded writing so indicates.

(2) A security interest under this Article may be created in goods which are fixtures or may continue in goods which

become fixtures, but no security interest exists under this Article in ordinary building materials incorporated into an improvement on land.

(3) This Article does not prevent creation of an encumbrance upon fixtures pursuant to real estate law.

(4) A perfected security interest in fixtures has priority over the conflicting interest of an encumbrancer or owner of the real estate where

(a) the security interest is a purchase money security interest, the interest of the encumbrancer or owner arises before the goods become fixtures, the security interest is perfected by a fixture filing before the goods become fixtures or within ten days thereafter, and the debtor has an interest of record in the real estate or is in possession of the real estate; or

(b) the security interest is perfected by a fixture filing before the interest of the encumbrancer or owner is of record, the security interest has priority over any conflicting interest of a predecessor in title of the encumbrancer or owner, and the debtor has an interest of record in the real estate or is in possession of the real estate; or

(c) the fixtures are readily removable factory or office machines or readily removable replacements of domestic appliances which are consumer goods, and before the goods become fixtures the security interest is perfected by any method permitted by this Article; or

(d) the conflicting interest is a lien on the real estate obtained by legal or equitable proceedings after the security interest was perfected by any method permitted by this Article.

(5) A security interest in fixtures, whether or not perfected, has priority over the conflicting interest of an encumbrancer or owner of the real estate where

(a) the encumbrancer or owner has consented in writing to the security interest or has disclaimed an interest in the goods as fixtures; or

(b) the debtor has a right to remove the goods as against the encumbrancer or owner. If the debtor's right terminates, the priority of the security interest continues for a reasonable time.

(6) Notwithstanding paragraph (a) of subsection (4) but otherwise subject to subsections (4) and (5), a security interest in fixtures is subordinate to a construction mortgage recorded before the goods become fixtures if the goods become fixtures before the completion of the construction. To the extent that it is given to refinance a construction mortgage, a mortgage has this priority to the same extent as the construction mortgage.

(7) In cases not within the preceding subsections, a security interest in fixtures is subordinate to the conflicting interest of an encumbrancer or owner of the related real estate who is not the debtor.

(8) When the secured party has priority over all owners and encumbrancers of the real estate, he may, on default, subject to the provisions of Part 5, remove his collateral from the real estate but he must reimburse any encumbrancer or owner of the real estate who is not the debtor and who has not otherwise agreed for the cost of repair of any physical injury, but not for any diminution in value of the real estate caused by the absence of the goods removed or by any necessity of replacing them. A person entitled to reimbursement may refuse permission to remove until the secured party gives adequate security for the performance of this obligation.

As usual under the Code provisions, perfecting the security interest in a fixture is essential to establishing priority over interests in the land. And even without perfecting, a security interest in the fixture prevails where holders of interests in the land have consented to the security interest or have agreed that the fixture owner has a continuing right of removal.

COMPUTER-ASSISTED RESEARCH

LEXIS: fixture and secur! w/20 interest

FOOTNOTES:
(n1)Footnote 167. *See* § 13.02(b), *supra*.

(n2)Footnote 168. *Everitt v. Higgins, 838 P.2d 311 (Idaho 1992)* (decorative wood stove was detached from realty before sale of realty).

(n3)Footnote 169. *Lafleur v. Sylvester, 135 So. 2d 92 (La. App. 1961)* (manure spreader, which was designated as immovable, did not become personal property by occasional use on other property).

(n4)Footnote 170. *Rogers v. Gilinger, 30 Pa. 185 (1858).*

(n5)Footnote 171. *Pope v. McMillan, 101 S.E.2d 55 (S.C. 1957)* (sale of gas station).

(n6)Footnote 172. *Esbjornsson v. Buffalo Ins. Co., 89 N.W.2d 893 (Minn. 1958)* (conveyance of land with deeds excepting buildings located on the land).

(n7)Footnote 173. U.C.C. § 2-107.

(n8)Footnote 174. *Barry v. Woodbury, 91 N.E. 902 (Mass. 1910)* (sale of boiler and engine that were attached to realty).

(n9)Footnote 175. *Burton v. Jurgensen, 244 N.Y.S. 320 (1930)* (removal of building from property).

(n10)Footnote 176. *C.I.T. Fin. Servs. v. Premier Corp., 747 P.2d 934 (Okla. 1987)* (two creditors claimed lien

against mobile home).

(n11)Footnote 177. *Winslow v. Merchants' Ins. Co., 45 Mass. (4 Met.) 306 (1842)* (improvements on the realty are to enhance the value of the estate and not merely for personal enjoyment; therefore, they are added to the security of a mortgage on the premises).

(n12)Footnote 178. *Horizon Bank, N.A. v. Sigrist, 579 N.Y.S.2d 279 (1992)* (purchaser built home on lot without bankruptcy court approval or a release of the lien).

(n13)Footnote 179. *Margolis v. Superior Ct. in and for San Mateo County, 311 P.2d 167 (Cal. App. 1957)* (conversion of dry cleaning equipment).

(n14)Footnote 180. *Lee-Moore Oil Co. v. Cleary, 245 S.E.2d 720 (N.C. 1978)* (oral agreement between gasoline supplier and store owners that the gas pumps would remain supplier's personal property but could be used by store owner as long as store owner purchased gas from supplier).

(n15)Footnote 181. *Goldie v. Bauchet Props., 540 P.2d 1 (Cal. 1975)* (creditor, claiming a perfected security interest in a machine located on the premises leased to the debtor, brought action against another creditor).

(n16)Footnote 182. *Cabana, Inc. v. Eastern Air Control, Inc., 487 A.2d 1209 (Md. App. 1985), cert. denied, 490 A.2d 718 (Md. 1985)* (lessee's failure to pay rent was a breach that cause lessee to forfeit the right to remove fixtures).

(n17)Footnote 183. *Lewis v. Ocean Nav. & Pier Co., 26 N.E. 301 (N.Y. 1891)* (tenant who build restaurant and saloon on property had right to remove them).

(n18)Footnote 184. *Simpson v. Emery, 183 A. 842 (Me. 1936)* (tenant who built building on lot but later defaulted in rent payments forfeited rights to the building). Other cases: Fixtures, key § 14. *But see Towne v. Sautter, 326 N.W.2d 694 (N.D. 1982)* (farm tenant who forfeited leasehold rights did not lose right to remove improvements).

(n19)Footnote 185. *Roberts v. Mills, 205 P. 872 (Cal. App. 1922)* (oral agreement permitted removal of building).

(n20)Footnote 186. *Garr-Woolley v. Martin, 579 P.2d 206 (Okla. App. 1978)* (six years after leaving the property, the plaintiff attempted to remove old drilling equipment pursuant to contract terms).

(n21)Footnote 187. *Haywood v. Briggs, 41 S.E.2d 289 (N.C. 1947)* (contract with life estate owner that warehouse was personal property).

(n22)Footnote 188. *In re Horton's Estate, 606 S.W.2d 792 (Mo. App. 1980)* (mobile home on leased property belonged to decedent's estate, not to the lessor).

(n23)Footnote 189. *City of Philadelphia v. Straub, 106 F.2d 172 (3d Cir. 1939)* (entitlement to equipment and machinery installed by bankrupt lessee).

(n24)Footnote 190. *Tolman v. Carleton, 85 A. 390 (Me. 1912)* (industrial machinery attached to to leasehold property).

(n25)Footnote 191. *San Francisco Breweries v. Schurtz, 38 P. 92 (Cal. 1894)* (fixtures and leasehold mortgaged by tenant).

(n26)Footnote 192. *Arlow v. Vinyl Masters, Inc., 402 N.Y.S.2d 649 (1978)* (dispute between lessor and lessee over division of condemnation award).

(n27)Footnote 193. *Empire Bldg. Corp. v. Orput & Assocs., 336 N.E.2d 82 (Ill. App. 1975)* (part of condemnation

award given to lessee for fixtures).

(n28)Footnote 194. *In re Marla Jean, Inc., 25 B.R. 282 (Bankr. W.D. Mo. 1982)* (compensation for trade fixtures).

(n29)Footnote 195. *See, e.g.,* Wis. Stat. § 704.05(4).

(n30)Footnote 196. Poole's Case, 1 Salk (KB) 368 (1703).

(n31)Footnote 197. *Chabon v. Lazarus, 87 A.2d 435 (N.J. Super. 1952)* (removal of summer cottages).

(n32)Footnote 198. *Empire Bldg. Corp. v. Orput & Assocs., 336 N.E.2d 82 (Ill. App. 1975)* (part of condemnation award given to lessee for fixtures).

(n33)Footnote 199. *First Trust & Sav. Bank of Moville, Iowa v. Guthridge, 445 N.W.2d 401 (Iowa App. 1989)* (bank sought recovery of fence-line feed bunks).

(n34)Footnote 200. *J.K.S.P. Restaurant, Inc. v. Nassau County, 513 N.Y.S.2d 716 (1987)* (tenant sued to recover prefabricated dining car).

(n35)Footnote 201. Elwes v. Maw, 3 East (KB) 38 (1802) (tenant for years liable in waste for removal of certain barns, sheds and fences installed by the tenant).

(n36)Footnote 202. Ray Andrews Brown, The Law of Personal Property 551 (3d ed., Walter B. Raushenbush ed. 1975), *citing Old Line Life Ins. Co. of Am. v. Hawn, 275 N.W. 542 (Wis. 1937).*

(n37)Footnote 203. *Standard Oil Co. v. La Crosse Super Auto Serv., 258 N.W.2d 791 (Wis. 1935)* (tenant could remove fixtures when lessor/mortgagor defaulted on mortgage payments and mortgagee took possession of premises).

(n38)Footnote 204. *Kerman v. Swafford, 680 P.2d 622 (N.M. App. 1984), cert. denied, 679 P.2d 1287 (N.M. 1984)* (purchaser of ranch at foreclosure sale sought to recover possession of ranch house and portable houses).

(n39)Footnote 205. *Serafin v. Wolff, 69 A.2d 347 (N.J. Super. 1949)* (installation and removal of oil burner by tenant).

(n40)Footnote 206. *Buswell v. Hadfield, 149 S.W.2d 555 (Ark. 1941)* (ejected trespasser sought reimbursement for improvements).

(n41)Footnote 207. *Fair v. Fair, 121 Mass. 589 (1877)* (where one tenant in common gave consent to the other to build a house, the builder received the house upon partition of the property).

(n42)Footnote 208. *Bouquet v. Belk, 376 S.W.2d 361 (Tex. Civ. App. 1964), aff'd, 404 S.W.2d 862 (Tex. Civ. App. 1966)* (upon partition, the owner of a one-sixth interest obtained partition in kind and the land upon which she had made improvements with consent of other owners).

(n43)Footnote 209. *Laramie County Sch. Dist. No. 11 v. Donahue, 97 P.2d 663 (Wyo. 1940)* (school district, licensee on defendant's property, was allowed to remove a school building).

(n44)Footnote 210. *Burpee v. Athens Prod. Credit Ass'n, 15 S.E.2d 526 (Ga. App. 1941)* (furnace and other appliances were wrongfully removed and attached to other land).

(n45)Footnote 211. *Pierce v. Goddard, 39 Mass. 559 (1839)* (mortgagor removed house from mortgaged land and used material to build another house, which mortgagor subsequently sold).

(n46)Footnote 212. *Lee-Moore Oil Co. v. Cleary, 245 S.E.2d 720 (N.C. 1978)* (oral agreement between gasoline

supplier and store owners that the gas pumps would remain supplier's personal property but could be used by store owner as long as store owner purchased gas from supplier).

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CHAPTER 13 THE AMERICAN LAW OF PERSONAL PROPERTY

2-13 Thompson on Real Property, Thomas Editions § 13.06

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§ 13.06 Personal Property Issues Pertaining to Crops.

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Competing claims to crops may be asserted in a variety of situations, the most important of which are discussed in the following subsections. Those disputes could be easily resolved by simply labeling the crops as personalty or realty in the situation at hand, and letting the label suffice for analysis. Instead, courts usually engage in an analysis of the underlying values and then attach the labels, leading to lingering inconsistencies in the labels. Much of the law in this area now derives from the Uniform Commercial Code, which for purposes of sales n213 and secured transactions n214 treats growing crops as goods.

§ 13.06(a) Competing Claims of Grantor and Grantee of the Land.

In the ordinary conveyance between grantor and grantee, the growing crops are considered part of and conveyed along with the realty. n215 The grantor may include in the deed a reservation of rights to the crops, but a reservation outside the deed itself may n216 or may not be upheld, n217 depending on the operation of the parol evidence rule. When the landowner has previously granted a security interest in the crops and then sells the land to another, the buyer's interest is subject to the security interest in the crops if the buyer had notice of that interest; otherwise, the buyer's interest may prevail over the security interest in the crops. n218

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LEXIS: crop w/50 convey w/50 real!

§ 13.06(b) Competing Claims of Buyer and Seller of the Crops.

When a landowner agrees to sell crops from the land, the sale is treated as a sale of goods, even if severance of the crop has not yet occurred. If the landowner later sells the land, the crop buyer may be protected by a real estate recording of the contract for sale of the crop. Timber, on the other hand, remains part of the realty until actual severance, even if it is the subject of a prior contract of sale. All of these matters are now governed by § 2-107 of the Uniform Commercial Code:

§ 2-107. Goods to Be Severed From Realty: Recording.

(1) A contract for the sale of minerals or the like (including oil and gas) or a structure or its materials to be removed from realty is a contract for the sale of goods within this Article if they are to be severed by the seller but until severance a purported present sale thereof which is not effective as a transfer of an interest in land is effective only as a contract to sell.

(2) A contract for the sale apart from the land of growing crops or other things attached to realty and capable of severance without material harm thereto but not described in subsection (1) or of timber to be cut is a contract for the sale of goods within this Article whether the subject matter is to be severed by the buyer or by the seller even though it forms part of the realty at the time of contracting, and the parties can by identification effect a present sale before severance.

(3) The provisions of this section are subject to any third party rights provided by the law relating to realty records, and the contract for sale may be executed and recorded as a document transferring an interest in land and shall then constitute notice to third parties of the buyer's rights under the contract for sale.

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LEXIS: crop w/50 buy! or sell! w/50 claim!

§ 13.06(c) Competing Claims of Owner and Adverse Possessor of the Land.

If an owner of land recovers possession of the land from an adverse possessor, the owner also recovers crops that are still on the land, even if those crops were planted and cultivated by the adverse possessor. n219 However, if the true owner also recovers a money judgment for profits based on land use during the period of adverse possession, then the adverse possessor is entitled to even an unsevered crop, so that the landowner does not obtain a double recovery. n220 This also means that the adverse possessor is entitled to keep crops previously planted, cultivated and severed before the ejectment. n221 Courts are divided on whether an adverse possessor's crop, severed but still left on the land at the time of ejectment, belongs to the adverse possessor or to the true owner. n222

COMPUTER-ASSISTED RESEARCH

LEXIS: crop w/50 adverse! w/5 possess!

§ 13.06(d) Competing Claims When the Landowner Dies.

Under the common law, the growing crops on the land of an intestate decedent were considered realty if they were crops that grew naturally, n223 but were considered personalty if they were crops that had to be planted and cultivated. n224 Some state statutes, including the Uniform Probate Code in § 1-201, have abolished the distinction between real and personal property in this context:

§ 1-201. General Definitions.

(33) "Property" includes both real and personal property or any interest therein and means anything that may be the subject of ownership.

If the decedent was testate, a will provision for devise of the realty is rebuttably presumed to pass all unsevered crops. n225

COMPUTER-ASSISTED RESEARCH

LEXIS: crop and decedent

§ 13.06(e) Competing Claims of Landowner and Security Interest Holder.

The priority of a security interest in crops relative to the interest of the landowner are now mostly governed by Article 9 of the Uniform Commercial Code. A successful security interest in crops would be one formed by a security agreement and perfected by the filing of a financing statement, which should also describe the relevant realty. n226

Although, as to unperfected security interests in chattels, most buyers of goods in the ordinary course of business are protected from the claims of the secured party, this does not apply to those who buy farm products from farmers. n227

COMPUTER-ASSISTED RESEARCH

LEXIS: crop and secur! w/20 interest

FOOTNOTES:
(n1)Footnote 213. U.C.C. § 2-105(1).

(n2)Footnote 214. U.C.C. § 9-105(h).

(n3)Footnote 215. *Womach v. Thomas, 486 A.2d 15 (Del. Ch. 1984)* (crops ready to be harvested pass with the realty).

(n4)Footnote 216. *Smith v. Baker, 214 P.2d 94 (Cal. App. 1950)* (the purchase agreement but not the deed reserved the right to a crop).

(n5)Footnote 217. *Transcontinental Gas Pipe Line Corp. v. Myrick, 51 So. 2d 475 (Miss. 1951)* (despite oral reservation, the right to use the land passed an easement to lay a gas pipeline was granted).

(n6)Footnote 218. *Groth v. Stillson, 174 N.W.2d 596 (Mich. App. 1969)* (action to reform deed to include reservation of Christmas trees grantor has already sold to a third party; purchaser had notice of sale).

(n7)Footnote 219. *Dent v. Dent, 166 S.W.2d 582 (Mo. 1942)* (crops wrongfully removed from mortgaged property).

(n8)Footnote 220. *Wright v. Vickaryous, 598 P.2d 490 (Alaska 1979)* (farm tenants who held over were allowed to deduct the amount of the hay crop from the damages awarded to the landlord).

(n9)Footnote 221. *Whitney v. Bails, 560 P.2d 1344 (Mont. 1977)* (purchaser planted and harvested a crop before court ordered ejectment after default on purchase contract).

(n10)Footnote 222. *John Hancock Mut. Life Ins. Co. v. Dameron, 131 S.W.2d 122 (Tex. Civ. App. 1959)* (action to recover value of oat crop converted by insurance company).

(n11)Footnote 223. *Evans v. Hardy, 76 Ind. 527 (1881)* (action to recover value paid to administrator of decedent's estate under mistake of fact).

(n12)Footnote 224. *McGee v. Walker, 64 N.W. 482 (Mich. 1895)* (action to enjoin administrator of decedent's estate from controlling wheat growing on land).

(n13)Footnote 225. *In re Rahfeldt's Estate, 112 N.W.2d 858 (Iowa 1962)* (devisee of life estate held to be owner of unmatured corn).

(n14)Footnote 226. U.C.C. §§ 9-203, 9-301, 9-302.

(n15)Footnote 227. U.C.C. 9-307.

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CHAPTER 13 THE AMERICAN LAW OF PERSONAL PROPERTY

2-13 Thompson on Real Property, Thomas Editions § 13.07

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§ 13.07 Bailments.

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§ 13.07(a) Elements of Bailments.

Although bailments frequently include an element of contract by which a thing is delivered to one not the owner for some particular purpose, many bailments -- whether actual or implied -- do not rest upon any contractual relationship between the bailor and bailee. One factor present in all bailments is that the bailee has possession of the property, and that such possession consists of physical control coupled with intent to possess or to exercise that control. Bailees typically hold the property for eventual return to the bailor, but in some situations -- notably fungible goods commingled with the common mass, such as grain -- the bailor is not necessarily entitled to return of the identical goods, but only the identical quantity from the common mass; bailors of such fungible goods hold ownership as tenants in common, as directed by the Uniform Commercial Code:

§ 7-207. Goods Must Be Kept Separate; Fungible Goods.

(1) Unless the warehouse receipt otherwise provides, a warehouseman must keep separate the goods covered by each receipt so as to permit at all times identification and delivery of those goods except that different lots of fungible goods may be commingled.

(2) Fungible goods so commingled are owned in common by the persons entitled thereto and the warehousemen is severally liable to each owner for that owner's share. Where because of overissue a mass of fungible goods is insufficient to meet all the receipts which the warehouseman has issued against it, the persons entitled include all holders to whom overissued receipts have been duly negotiated. n228

§ 13.07(b) Degree of Care Required of Bailees.

American legal scholars in the 19th century divided bailees into three categories -- bailees holding for the sole benefit of the bailor, bailees holding for the mutual benefit of bailor and bailee, and bailees holding for the sole benefit of the

bailee -- and ascribed an increasingly rigorous duty of care to the bailees in those categories. A bailment for the sole benefit of the bailor required only slight diligence of the bailee, while a bailment for the sole benefit of the bailee required great diligence or care by the bailee. The difficulties inherent in any classification scheme have raised discontents with this one, but its general acceptance in American courts persists:

> It would be more understandable and easier to administer if, regardless of the nature of the bailment, the bailee were held to a standard of "ordinary care under the circumstances" which could be considered in judging whether the bailee's conduct met the standard. Some courts have so held.
>
> Nonetheless, most courts still accord at least formal agreement to the division of bailments into the three classes... Likewise, the majority still give lip service to the three degrees of care or of negligence applicable to these three types of bailments. In the case of the bailment for the benefit of both parties the bailee is held to the standard of ordinary care and is liable for ordinary negligence. In the case of the bailment for the benefit of the bailee, the bailee is held to the standard of great diligence and is liable for a slight neglect. In the case of the bailment for the benefit of the bailor, the bailee is bound to use only slight care and is held liable only when he is guilty of what is termed "gross negligence." n229

It need hardly be said that great confusion and inconsistency have emerged from courts' attempts to discern differing degrees of care in the contexts of innumerable sets of circumstances. In reality, in many cases a single standard is applied in all situations: the trier of fact must determine whether the bailee met the standard of ordinary care called for by the circumstances. Thus a gratuitous bailee would be in circumstances where ordinary care would be less rigorous than ordinary care would be for a bailee being well-paid for bailment services.

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LEXIS: bail! and degree or standard w/5 care

§ 13.07(c) Limiting or Extending the Bailee's Standard of Care.

It is possible for bailee and bailor to alter whatever standard of care might be imposed by rule of law. A bailee such as an automobile parking lot operator may seek to limit liability (in effect lowering the standard of care), although this must be done consensually rather than unilaterally. Here the problems are whether the posted notice or printed message on a claim check adequately caught the attention of the bailor so that failure to object or negotiate could be treated as acceptance of the limitation.

If there are limitations on the degree of care the bailee is able to or wont to give, and the bailor is aware of those limitations, in some cases the bailee may be excused from liability for loss caused by circumstances beyond those limitations. n230

Sometimes bailees even agree to extended liability, such as agreeing to insure the bailed goods against damage, even if the damage was not caused by the bailee. Courts will not construe the bailee's usual obligation to return the goods as a further commitment to return the goods free of damage, even from sources beyond the bailee's control; therefore, if the goods are destroyed by fire without fault of the bailee, the bailor must bear the loss if the parties have not otherwise agreed upon extended bailee liability. n231 These cases turn very much upon their particular facts rather than on holdings from other, similar cases. Typically, the class of bailees known as common carriers is under extended liability which in effect makes the bailee-common carrier an insurer of the goods to be shipped, n232 except for damage by act of God n233 or a common enemy, n234 by valid legal process, n235 by some act of the bailor, or by the inherent nature of the bailed goods (such as perishable fruit). n236

In another example of expanded liability, an innkeeper's duty as bailee extends not only to the goods expressly delivered

to it by the guest for safekeeping, but also to the guest's property in the room. n237 And many American jurisdictions also impose on innkeepers the liability of insurer, n238 although in some cases the innkeeper has escaped liability by offering evidence that due care was exercised. n239 Statutes in most states have now modified and mitigated the more extreme aspects of innkeeper liability for guests' goods. A typical statute will relieve the innkeeper of extraordinary liability if a safe is made available in which guests may store valuable items. n240

COMPUTER-ASSISTED RESEARCH

LEXIS: bail! and limit! or expand! or extend! w/5 liab!

§ 13.07(d) The Bailee's Duty to Redeliver.

The bailee's duty to redeliver is breached if a misdelivery to the wrong party occurs; for this breach, even without negligence, the bailee will be liable for the value of the goods. n241 Where delivery to a third party not the bailor is validly compelled by law, the bailee has no liability to the bailor, if the bailee has first made a reasonable effort to give notice and opportunity to the bailor to present an opposing claim. n242 The duty to deliver is also breached if the bailee wrongfully refuses to redeliver to the bailor. n243

Because of these duties, a bailor who has brought legal action against a bailee for failure to deliver has made out a prima facie case for recovery merely by showing delivery to the bailee and a failure to redeliver on demand. n244 The burden then shifts to the defendant bailee to show circumstances validly excusing redelivery.

COMPUTER-ASSISTED RESEARCH

LEXIS: bail! w/50 redeliver!

§ 13.07(e) Bailee's Use of the Bailed Goods.

A bailee may be explicitly authorized to use the bailed goods, or an inference of such authorization may arise from the circumstances of the bailment. A typical example from earlier times would be the right and even necessity for a bailee of a cow to milk the cow and use the milk. In other instances, the bailee's use of the bailed property may constitute some or all of the bailee's compensation for bailee services. Ordinarily, of course, the bailee's compensation, if any, is determined by the explicit or implicit agreement of the parties.

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LEXIS: bail! w/50 use w/20 goods

§ 13.07(f) Bailee Actions Against Third Parties.

If bailed goods are wrongfully taken from the bailee by a third party, the bailee has a right of action against the third party. n245 This right of action is independent of any possible liability the bailee may have to the bailor over the wrongfully taken goods. n246 If, in recovering from a third party the value of wrongfully taken goods, the bailee obtains a sum greater than the value of the bailee's own possessory interest in the goods, the excess is held by the bailee in trust for the bailor. n247

COMPUTER-ASSISTED RESEARCH

LEXIS: bailee and action and third party

§ 13.07(g) Implied Bailments.

Bailments may sometimes arise without the explicit consent of the parties, such as when a finder takes custody of lost goods or a landlord resumes possession of an apartment with some of the former tenant's chattels left behind. Various terms have been used to describe these situations:

> In all these situations involving possession by one of another's goods without mutual consent but without initial wrongdoing on the possessor's part, courts have placed great importance on how the relationship is labelled or characterized. Sometimes the term used is "constructive bailment," which usually connotes a recognition that the relationship really is not a bailment together with a determination that the law of bailments shall be applied nonetheless. Perhaps more common is "involuntary bailment," which suggests a somewhat different sort of situation from consensual bailment and leaves uncertainty as to whether usual bailment rules will be applied. "Quasi-bailment" may be encountered too, most frequently in the cases involving finders of lost goods. The labels are imprecise; they do not solve the underlying problems; indeed they may impede recognition and frank discussion of the problems. n248

If an "involuntary bailee" has taken custody of the goods, or had custody imposed, courts exhibit much uncertainty about the degree or derivation of a duty of care on such a bailee while holding possession of the goods. However, it is settled that even the involuntary bailee has a duty to deliver the goods to the true owner upon demand; n249 liability for misdelivery is imposed only for negligence, rather than absolutely. n250 When involuntarily bailed goods are returned to their true owner, the bailee may be entitled to reimbursement of expenses and compensation for services, n251 although some courts disagree. n252

COMPUTER-ASSISTED RESEARCH

LEXIS: bail! w/5 constructive or involuntary or quasi or
implied

FOOTNOTES:
(n1)Footnote 228. U.C.C. § 7-207.

(n2)Footnote 229. Ray Andrews Brown, The Law of Personal Property 256-257 (3d ed., Walter B. Raushenbush ed. 1975).

(n3)Footnote 230. *Parker v. Union Ice & Salt Co., 54 P. 672 (Kan. 1898)* (spoilage of items in cold storage warehouse).

(n4)Footnote 231. *Aberson v. Sa Hong, 788 P.2d 972 (Okla. App. 1990)* (bailor's car was broken into and a stereo was stolen while the car was at the bailee's body shop).

(n5)Footnote 232. *Bricks v. Metro Ambulance Serv., 338 S.E.2d 438 (Ga. App. 1985).* The common carrier is a carrier that "undertakes for hire or reward to transport the goods of such as choose to employ him, from place to place." *Ace-High Dresses v. J. C. Trucking Co., 191 A. 536 (Conn. 1937).*

(n6)Footnote 233. *Southern Pac. Co. v. Loden, 508 P.2d 347 (Ariz. App. 1973)* (carrier failed to ship goods within reasonable time; good discussion of act of God affirmative defense).

(n7)Footnote 234. *David Crystal Inc. v. Ehrlich-Newmark Trucking Co., 314 N.Y.S.2d 559 (1970)* (carrier hijackers held not to be public enemy).

(n8)Footnote 235. *Moor v. Southern Pac. Co., 132 S.E. 920 (Ga. App. 1926)* (destruction of diseased fruit trees).

(n9)Footnote 236. *Missouri Pac. R.R. v. Elmore & Stahl, 368 S.W.2d 99 (Tex. 1963), cert. granted, 375 U.S. 811*

(1963), aff'd, 377 U.S. 134 (1964), reh'g denied, 377 U.S. 984 (1964) (melon spoilage with no identifiable natural cause).

(n10)Footnote 237. *Cook v. Columbia Sussex Corp., 807 S.W.2d 567 (Tenn. App. 1990)* (hotel guest action against hotel for damages from theft of goods from guest room).

(n11)Footnote 238. *Mobile Battle House, Inc. v. Wolf, 126 So. 2d 486 (Ala. 1961)* (guest lost sample case and goods in a hotel); *Hulett v. Swift, 33 N.Y. 571 (1865)* (fire in stable next to hotel destroyed goods in hotel).

(n12)Footnote 239. *Peters v. Holiday Inns, Inc., 278 N.W.2d 208 (Wis. 1979)* (action against hotel by guest who was assaulted and robbed in hotel room).

(n13)Footnote 240. *See, e.g.*, N.Y. Gen. Bus. Law § 200.

(n14)Footnote 241. *Dispeker v. New S. Hotel Co., 373 S.W.2d 904 (Tenn. 1963)* (hotel misdelivered automobile to off-duty busboy, who wrecked it).

(n15)Footnote 242. *William Fitzgerald Milk Prods. Corp. v. Kimbro Serv. Warehouse, Inc., 145 S.E.2d 630 (Ga. App. 1965)* (bags of dry milk confiscated from bailee as a result of court proceedings of which bailor had notice).

(n16)Footnote 243. *Glass v. Allied Van Lines, Inc., 450 S.W.2d 217 (Mo. App. 1970)* (plaintiff claimed right to property derived from bailor).

(n17)Footnote 244. *Kirshner v. Johnson, 521 So. 2d 697 (La. App. 1988)* (automobile stolen from repair shop yard).

(n18)Footnote 245. *Martin v. Luckie & Forney, Inc., 549 So. 2d 18 (Ala. 1989)* (lending of photographic transparencies).

(n19)Footnote 246. *Varney v. Curtis, 100 N.E. 650 (Mass. 1913)* (bond certificates used by depositary for personal expenses).

(n20)Footnote 247. *Ebel v. Collins, 198 N.E.2d 552 (Ill. App. 1964)* (accident caused by son driving father's car, with permission, but not as agent).

(n21)Footnote 248. Ray Andrews Brown, The Law of Personal Property 320 (3d ed., Walter B. Rausenbush ed. 1975).

(n22)Footnote 249. *Capezzaro v. Winfrey, 379 A.2d 493 (N.J. Super. 1977)* (victim of alleged robbery brought action against city after police returned money to robbery suspect).

(n23)Footnote 250. *Mickey v. Sears, Roebuck & Co., 76 A.2d 350 (Md. 1950)* (customer's briefcase left on loading dock).

(n24)Footnote 251. *Cristopher v. Jerdee, 139 N.W. 1132 (Wis. 1913)* (after a third party placed hay in plaintiff's barn, plaintiff charged storage fee when defendant did not remove the hay).

(n25)Footnote 252. *In re Cunningham, 33 B.R. 286 (Bankr. D.N.M. 1983)* (request for relief from automatic stay by debtor's landlord).

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CHAPTER 13 THE AMERICAN LAW OF PERSONAL PROPERTY

2-13 Thompson on Real Property, Thomas Editions § 13.08

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§ 13.08 Possessory Liens.

[Go To Supp]

The common law possessory lien has been defined as "a right to the custody of the property of another and a right to hold or retain the same against the general owner as indemnity, or for security of some debt or obligation." n253 In every jurisdiction the common law possessory liens have been modified by statute, at least for various groups of artisans or service providers who most frequently have occasion to invoke such liens.

Even though such possessory liens are a type of security interest and would seemingly come within the coverage of Article 9 of the Uniform Commercial Code, definitions and other provisions of the Code limit its scope to consensual liens, leaving statutory liens and other liens arising by law outside the Code. n254 Also to be distinguished from common law possessory liens are the so-called "mechanics' liens" created by state statute, for the benefit of those providing materials or labor for real estate improvements; these "mechanics' liens" are attached to real property rather than to personal property.

Common law possessory liens are classed as either general liens or specific liens. The specific liens arise out of debt for services rendered to the specific item of personal property held in the possession of the creditor. The general lien covers not only the specific indebtedness related to the property held, but also the overall indebtedness owed by the debtor to the creditor.

§ 13.08(a) "Specific" Common Law Possessory Liens.

The most important requirement for assertion of the specific possessory lien is that the creditor actually have possession of the item of personal property to be held as security. If the services are rendered on the item while it remains in the custody of the owner/debtor, the lien never arises. n255 The possession must be exclusive possession, for if the owner has the right to reclaim possession at any time, then no common law lien arises. n256 Statutes often modify this rule to confer a lien on auto mechanics and others who under this exclusive possession rule would ordinarily have no common law possessory lien.

In addition to resting on possession, the common law possessory liens also require that the holder of the lien have

performed some service on or added some value to the item against which the possessory lien is asserted; exceptions have emerged for innkeepers, common carriers, and those who operate warehouses and wharves. n257 When services are to be performed on several items but all under one contract, a possessory lien arises as to all the items, even though the unrequited services pertained to less than all. n258

§ 13.08(b) "General" Common Law Possessory Liens.

The "general" common law possessory lien is based on not only the debt arising from services performed on a specific chattel, but on the overall indebtedness arising from the trade between debtor and creditor. n259 Usually, the general possessory lien is created by agreement of the parties or by statute, or simply arises by the custom in that particular type of enterprise, especially among bankers, factors, innkeepers, and lawyers; or it may be imposed by common law. n260

§ 13.08(c) The Element of Consent in Lien Creation.

Not only can parties modify and even nullify the terms of common law possessory liens by their agreements, n261 but the lien itself will not even come into existence unless some authority or consent therefor has been given by the owner of the item that is the subject of the lien. n262 Several situations can occur in which one not the owner of an item submits the item for repair, and therefore no lien arises against the owner. For instance, if one who has borrowed an item submits it for repair, no lien for repair services arises against the owner unless it can be shown that the owner consented to or authorized the repair. n263 Or, if the repairing party engages another to assist with the repair, no lien arises in favor of the assistant, unless the owner consented to the subcontracting. n264 The owner's consent or authorization may be inferred after the fact by notice and acquiescence. n265

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LEXIS: lien w/5 possess! w/50 consent

§ 13.08(d) Priority Between Liens and Other Security Interests.

Article 9 of the Uniform Commercial Code now directly governs issues of priority between holders of common law possessory liens and holders of prior security interests in the same goods:

§ 9-310. Priority of Certain Liens Arising by Operation of Law.

When a person in the ordinary course of his business furnishes services or materials with respect to goods subject to a security interest, a lien upon goods in the possession of such person given by statute or rule of law for such materials or services takes priority over a perfected security interest unless the lien is statutory and the statute expressly provides otherwise.

Even under this rule some priority issues will linger, especially if it is not clear whether a statutory lien expressly provides "otherwise" as to priority of another security interest. It is also possible for the holder of a prior perfected security interest to consent to the imposition of a superior common law possessory lien on the secured item. n266

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LEXIS: lien w/5 possess! w/50 prior!

§ 13.08(e) Liens for Specific Classes of Claimants.

§ 13.08(e)(1) Bankers.

The nature of a bank's general lien on deposited securities has been succinctly described as follows:

> By mercantile custom incorporated into and made a part of the law merchant and the common law, a banker has a general lien on the securities deposited with him by his customers in the regular course of his banking business for the balance of the account due from such customers, unless the circumstances of the deposit are such as to indicate an agreement consistent with the banker's right of lien. "The theory of the law is that the bank extends credit and accommodations to its customers in reliance upon the expectation that such paper will from time to time come into its possession and become available to it as a security or set-off." Such lien attaches, however, only to commercial paper deposited with the bank in the regular course of its banking business. n267

This common law lien is frequently compromised by the specific terms of the bank's arrangement with its customer. If the bank agrees merely to take possession of certain items of commercial paper and then remit them to the customer, presumably the limits of the bank's function preclude the emergence of the common law lien. n268 Or, if securities are deposited for a specific account or obligation, the bank may not hold them for application to other obligations or for the general account of the bank customer, n269 unless by agreement with the customer the bank has obtained permission to do so. n270

Article 4 of the Uniform Commercial Code also gives a bank a specific lien or security interest as to certain deposited items:

§ 4-210. Security Interest of Collecting Bank in Items, Accompanying Documents and Proceeds.

(a) A collecting bank has a security interest in an item and any accompanying documents or the proceeds of either:

(1) in case of an item deposited in an account, to the extent to which credit given for the item has been withdrawn or applied;

(2) in case of an item for which it has given credit available for withdrawal as of right, to the extent of the credit given, whether or not the credit is drawn upon or there is a right of charge-back; or

(3) if it makes an advance on or against the item.

(b) If credit given for several items received at one time or pursuant to a single agreement is withdrawn or applied in part, the security interest remains upon all the items, any accompanying documents or the proceeds of either. For the purpose of this section, credits first given are first withdrawn.

(c) Receipt by a collecting bank of a final settlement for an item is a realization on its security interest in the item, accompanying documents, and proceeds. So long as the bank does not receive final settlement for the item or give up possession of the item or accompanying documents for purposes other than collection, the security interest continues to that extent and is subject to Article 9, but:

(1) no security agreement is necessary to make the security interest enforceable (Section 9-203(1)(a));

(2) no filing is required to perfect the security interest; and

(3) the security interest has priority over conflicting perfected security interests in the item, accompanying documents, or proceeds.

§ 4-211. When Bank Gives Value for Purposes of Holder in Due Course.

For purposes of determining its status as a holder in due course, a bank has given value to the extent it has a security interest in an item, if the bank otherwise complies with the requirements of Section 3-302 on what constitutes a holder in due course.

A bank also has the right of set-off to apply a customer's deposits to the customer's debt to the bank. n271 A joint deposit account may not be so applied unless the joint account is in reality the debtor's own account. n272

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LEXIS: lien w/5 banker

§ 13.08(e)(2) Carriers.

Carriers, both common and private, enjoy a specific lien created by the Uniform Commercial Code:

§ 7-307. Lien of Carrier.

(1) A carrier has a lien on the goods covered by a bill of lading for charges subsequent to the date of its receipt of the goods for storage or transportation (including demurrage and terminal charges) and for expenses necessary for preservation of the goods incident to their transportation or reasonably incurred in their sale pursuant to law. But against a purchaser for value of a negotiable bill of lading a carrier's lien is limited to charges stated in the bill or the applicable tariffs, or if no charges are stated then to a reasonable charge.

(2) A lien for charges and expenses under subsection (1) on goods which the carrier was required by law to receive for transportation is effective against the consignor or any person entitled to the goods unless the carrier had notice that the consignor lacked authority to subject the goods to such charges and expenses. Any other lien under subsection (1) is effective against the consignor and any person who permitted the bailor to have control or possession of the goods unless the carrier had notice that the bailor lacked such authority.

(3) A carrier loses his lien on any goods which he voluntarily delivers or which he unjustifiably refuses to deliver.

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LEXIS: lien w/5 possess! and carrier

§ 13.08(e)(3) Innkeepers.

Innkeepers have liens on their guests' goods n273 for the obligations of the guests to the customers, even though those obligations are not directly related to the goods on which the possessory liens are imposed. n274 The broad scope of this lien reflects the broad obligation of the innkeeper to take in virtually all customers and to be an insurer of the goods brought into the inn. Common law accorded this lien only for transient guests, but state statutes now often extend the lien to longer term boarders. If the longer term resident is considered a tenant, it must be remembered that a landlord has no common law lien for rent on the tenant's personal property until the landlord has actually re-taken possession of rented premises.

COMPUTER-ASSISTED RESEARCH

LEXIS: lien w/5 possess! and innkeeper

§ 13.08(e)(4) Lawyers.

Attorneys have two types of common law possessory liens. The general lien gives the attorney the right to retain possession of client papers and documents against the payment of the client's overall account. n275 Any money received from the client by the attorney in a professional capacity may also be applied as a set-off against the client's overall debt. n276 Even if the attorney is discharged, the papers may be retained until the attorney is paid. n277

The specific lien is the right to retain any judgment awarded and paid until the client has paid obligations pertaining specifically to the services rendered in obtaining that judgment. This lien is recognized even though it applies to a chose in action and even though the attorney technically does not usually have possession of the judgment recovered:

> The lien, as thus established, is not strictly like any other lien known to the law, because it may exist although the attorney has not and cannot, in any proper sense, have possession of the judgment recovered. It is a peculiar lien, to be enforced by peculiar methods. It was a device invented by the courts for the protection of attorneys against the knavery of their clients, by disabling clients from receiving the fruits of recoveries without paying for the valuable services by which the recoveries were obtained. The lien was never enforced like other liens. If the fund recovered was in possession or under the control of the court, it would not allow the client to obtain it until he had paid his attorney, and in administering the fund it would see that the attorney was protected. If the thing recovered was in a judgment, and notice of the attorney's claim had been given, the court would not allow the judgment to be paid to the prejudice of the attorney. n278

This lien, to be applied, must be asserted and notice of it must be given to the client. n279 If a judgment is wrongfully paid directly to the judgment creditor and the attorney is left unpaid, the attorney may request the court to have any satisfaction filed with the court set aside and then may proceed against the client/judgment debtor. n280 While an attorney has no non-contractual right to force a client to continue with a cause of action so the attorney can eventually win and collect a fee, a settlement and accompanying dismissal intended to deprive the attorney of a promised fee may be set aside and the attorney may continue to prosecute the action. n281 This remedy is not available if the cause of action is so personal to the client as to be unassignable. n282 This lien prevails over a claim of one who has obtained an assignment of the judgment. n283

COMPUTER-ASSISTED RESEARCH

LEXIS: lien w/5 possess! w/50 attorney

FOOTNOTES:
(n1)Footnote 253. *Summer v. Hamlet, 12 Pick. (Mass.) 76 (1831).*

(n2)Footnote 254. U.C.C. § 9-102:

§ 9-102. Policy and Subject Matter of Article.

(1) Except as otherwise provided in Section 9-104 on excluded transactions, this Article applies:

(a) to any transaction (regardless of its form) which is intended to create a security interest in personal property or fixtures including goods, documents, instruments, general intangibles, chattel paper or accounts; and also

(b) to any sale of accounts or chattel paper.

(2) This Article applies to security interests created by contract including, pledge, assignment, chattel mortgage, chattel trust, trust deed, factor's lien, equipment trust, conditional sale, trust receipt, other lien or title retention contract and lease or consignment intended as security. This Article does not apply to statutory liens except as provided in Section 9-310.

(3) The application of this Article to a security interest in a secured obligation is not affected by the fact that the obligation is itself secured by a transaction or interest to which this Article does not apply.

U.C.C. § 9-104(c):

This Article does not apply ...

(c) to a lien given by statute or other rule of law for services or materials except as provided in Section 9-310 on priority of such liens ...

U.C.C. § 9-310:

§ 9-310. Priority of Certain Liens Arising by Operation of Law.

When a person in the ordinary course of his business furnishes services or materials with respect to goods subject to a security interest, a lien upon goods in the possession of such person given by statute or rule of law for such materials or services takes priority over a perfected security interest unless the lien is statutory and the statute expressly provides otherwise.

(n3)Footnote 255. *Murray v. Eisenberg, 627 P.2d 146 (Wash. App. 1981), review denied, 95 Wash. 2d 1032 (1981)* (mechanic who repaired airplane lost possessory lien when possession of airplane was surrendered).

(n4)Footnote 256. *Forth v. Simpson, 13 Q.B. 680 (1849)* (race horse delivered for training purposes only).

(n5)Footnote 257. *Luther Moving & Storage, Inc. v. Roberts, 526 S.W.2d 557 (Tex. Civ. App. 1975)* (shipping company retained household goods until shipping charges were paid).

(n6)Footnote 258. *Moynihan Assocs. v. Hanisch, 201 N.W.2d 534 (Wis. 1972)* (editor of film returned part of the film, but retained a lien on the entire batch of film).

(n7)Footnote 259. *W. C. Caye & Co. v. Milledgeville Banking Co., 86 S.E.2d 717 (Ga. App. 1955)* (bank had right to offset amounts due on promissory notes with the amounts deposited by promisor).

(n8)Footnote 260. *Republic Underwriters Ins. Co. v. Duncan, 713 P.2d 568 (Okla. 1986)* (discharged attorney had general possessory lien).

(n9)Footnote 261. *Berlet v. Lehigh Val Silk Mills, 287 F. 769 (3d Cir. 1923)* (lien waived by contract).

(n10)Footnote 262. *Parker v. West, 505 P.2d 94 (Mont. 1973)* (bank lien was superior to repairman's lien).

(n11)Footnote 263. *Iacomini v. Liberty Mut. Ins. Co., 497 A.2d 854 (N.H. 1985)* (repairman's action to recover from owner the repair and storage costs for automobile, which was stolen).

(n12)Footnote 264. *Skjod v. Hofstede, 402 N.W.2d 839 (Minn. App. 1987)* (action by subcontractor against property owners).

(n13)Footnote 265. *Huntley v. Drummond, 85 So. 2d 188 (Miss. 1956)* (action to enforce repairman's lien against automobile mistakenly repaired for a different customer). Some courts may hold that mere acquiescence justifies enforcing the lien.

(n14)Footnote 266. *Pittman v. Max H. Smith Farms, Inc., 506 N.E.2d 1139 (Ind. App. 1987)* (vendors with senior lien waived priority by allowing land, for consideration, to be used as security for mortgage).

(n15)Footnote 267. Ray Andrews Brown, The Law of Personal Property 439-440 (3d ed., Walter B. Raushenbush ed. 1975).

(n16)Footnote 268. *American Bank & Trust Co. v. Shouse & Burrus, 648 S.W.2d 540 (Ky. App. 1983)* (lien claim against proceeds from stock sale).

(n17)Footnote 269. *Hall v. Duncan Sav. & Loan Ass'n, 820 P.2d 1360 (Okla. App. 1991)* (debtor's action to recover IRA funds used for setoff by savings and loan association).

(n18)Footnote 270. *Bank IV Topeka, N.A. v. Topeka Bank & Trust Co., 807 P.2d 686 (Kan. App. 1991)* (hypothecation agreement signed by decedent).

(n19)Footnote 271. *Creech v. First Bank of Baldwin County, 539 So. 2d 267 (Ala. Civ. App. 1988)* (common law lien of bank arising when customer cashed check at bank).

(n20)Footnote 272. *Symanski v. First Nat'l Bank of Danville, 609 N.E.2d 989 (Ill. App. 1993)* (bank sought to apply assets of joint account held by four persons to loan taken by two of the persons).

(n21)Footnote 273. Guests' goods also includes items belonging to others, which items have been lawfully brought onto the innkeeper's premises.

(n22)Footnote 274. *L. E. Lines Music Co. v. Holt, 60 S.W.2d 32 (Mo. 1933)* (innkeeper's lien on another's property

borrowed and left behind by nonpaying guest).

(n23)Footnote 275. *Wintter v. Fabber, 618 So. 2d 375 (Fla. App. 1993)* (attorney not required to deliver all papers to former client while attorney held retaining lien).

(n24)Footnote 276. *Daniel Mones, P.A. v. Smith, 486 So. 2d 559 (Fla. 1986)* (attorney action to collect fees).

(n25)Footnote 277. *Lai Ling Cheng v. Modansky Leasing Co., 541 N.Y.S.2d 742 (1989)* (dispute between old and new attorneys over division of fee).

(n26)Footnote 278. *Goodrich v. McDonald, 19 N.E. 649 (N.Y. 1889).*

(n27)Footnote 279. *Newton v. Kiefer, 547 So. 2d 727 (Fla. App. 1989)* (attorney properly asserted charging lien by serving notice of lien upon client and attorney for opposing party).

(n28)Footnote 280. *Siciliano v. Fireman's Fund Ins. Co., 133 Cal. Rptr. 376 (1976)* (insurance company made settlement of personal injury claim with plaintiff after attorney for plaintiff had been discharged).

(n29)Footnote 281. *Brown v. Vermont Mut. Ins. Co., 614 So. 2d 574 (Fla. App. 1993)* (attorney who represented client against insurer had a charging lien and was entitled to a portion of attorney's fees from insurer, even though attorney had been fired).

(n30)Footnote 282. *Barnes v. Collins, 423 S.E.2d 308 (Ga. App. 1992)* (trespasser on property interfered with enjoyment of real and personal property, which is a personal injury not transferable to another).

(n31)Footnote 283. *Todd v. Mutual Factors, Inc., 149 N.E.2d 94 (N.Y. 1958)* (attorney's statutory lien attached both to decision in favor of client and to proceeds which client assigned).

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CHAPTER 13 THE AMERICAN LAW OF PERSONAL PROPERTY

2-13 Thompson on Real Property, Thomas Editions § 13.09

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§ 13.09 Pledges or Pawns.

In its simplest form, a pledge is a bailment of personal property that is made to secure the bailor's debt; in this section it is considered synonymous with pawn, which is something given as security for a loan. Pledges are now governed by the Uniform Commercial Code, which, in its Article 9, declares that "This Article applies to security interests created by contract including pledge...." n284 By contrast to the possessory lien, which arises by operation of law, a pledge is explicitly entered into by the parties to secure an obligation -- past, present, or future n285 -- either of one of the parties or of a third person. n286

In virtually all cases, a valid pledge requires delivery of the pledged item to the pledgee. n287 Many of the same delivery issues that enliven the area of donative transfers apply with equal vigor to the area of pledges. An actual, manual delivery may not be necessary if the pledged property is already in the possession of the pledgee, or already in the possession of a bailee who can be instructed to hold for the pledgee. n288 A delivery of documents of title may suffice for delivery of the pledged item itself. Pledges of choses in action represented by negotiable instruments require the delivery and possession of the instrument, as described in the Uniform Commercial Code:

§ 3-201. Negotiation.

(a) "Negotiation" means a transfer of possession, whether voluntary or involuntary, of an instrument by a person other than the issuer to a person who thereby becomes its holder.

(b) Except for negotiation by a remitter, if an instrument is payable to an identified person, negotiation requires transfer of possession of the instrument and its indorsement by the holder. If an instrument is payable to bearer, it may be negotiated by transfer of possession alone.

§ 9-304. Perfection of Security Interest in Instruments, Documents, and Goods Covered by Documents; Perfection by Permissive Filing; Temporary Perfection Without Filing or Transfer of Possession.

(1) A security interest in chattel paper or negotiable documents may be perfected by filing. A security interest in money or instruments (other than instruments which constitute part of chattel paper) can be perfected only by the secured party's taking possession, except as provided in subsections (4) and (5) of this section and subsections (2) and (3) of Section 9-306 on proceeds.

(2) During the period that goods are in the possession of the issuer of a negotiable document therefor, a security interest in the goods is perfected by perfecting a security interest in the document, and any security interest in the goods otherwise perfected during such period is subject thereto.

(3) A security interest in goods in the possession of a bailee other than one who has issued a negotiable document therefor is perfected by issuance of a document in the name of the secured party or by the bailee's receipt of notification of the secured party's interest or by filing as to the goods.

(4) A security interest in instruments or negotiable documents is perfected without filing or the taking of possession for a period of 21 days from the time it attaches to the extent that it arises for new value given under a written security agreement.

(5) A security interest remains perfected for a period of 21 days without filing where a secured party having a perfected security interest in an instrument, a negotiable document or goods in possession of a bailee other than one who has issued a negotiable document therefor;

(a) makes available to the debtor the goods or documents representing the goods for the purpose of ultimate sale or exchange or for the purpose of loading, unloading, storing, shipping, transshipping, manufacturing, processing or otherwise dealing with them in a manner preliminary to their sale or exchange, [; or] but priority between conflicting security interests in the goods is subject to subsection (3) of Section 9-312; or

(b) delivers the instrument to the debtor for the purpose of ultimate sale or exchange or of presentation, collection, renewal or registration of transfer.

(6) After the 21 day period in subsections (4) and (5) perfection depends upon compliance with applicable provisions of this Article.

§ 9-305. When Possession by Secured Party Perfects Security Interest Without Filing.

A security interest in letters of credit and advices of credit (subsection (2)(a) of Section 5-116), goods, instruments, money, negotiable documents or chattel paper may be perfected by the secured party's taking possession of the collateral. If such collateral other than goods covered by a negotiable document is held by a bailee, the secured party is

deemed to have possession from the time the bailee receives notification of the secured party's interest. A security interest is perfected by possession from the time possession is taken without relation back and continues only so long as possession is retained, unless otherwise specified in this Article. The security interest may be otherwise perfected as provided in this Article before or after the period of possession by the secured party.

COMPUTER-ASSISTED RESEARCH

LEXIS: pledge or pawn w/50 personal w/5 property

FOOTNOTES:
(n1)Footnote 284. U.C.C. § 9-102(2).

(n2)Footnote 285. *Arco Petr. Prods. Co. v. R & D Automotive, Inc., 455 N.E.2d 227 (Ill. App. 1983)* (certificate of deposit pledged as collateral for indebtedness under a security agreement).

(n3)Footnote 286. *Aruba Bonaire Curacao Trust Co. v. United Cal. Bank, 107 Cal. Rptr. 924 (1973)* (guarantor of third-party loan was not entitled to money that was pledged to secure a guaranty).

(n4)Footnote 287. *Bank of Coushatta v. Patrick, 503 So. 2d 1061 (La. App. 1987)* ("Collateral Pledge Agreement" did not authorize bank to apply funds to third party's debt).

(n5)Footnote 288. U.C.C. 9-305(1).

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CHAPTER 13 THE AMERICAN LAW OF PERSONAL PROPERTY

2-13 Thompson on Real Property, Thomas Editions § 13.10

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§ 13.10 Joint Bank Accounts.

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§ 13.10(a) True Joint Tenancies.

Joint bank accounts are held by Americans in truly massive numbers, but there is no unified approach to their legal consequences. If the owners of a joint bank account held in a true joint tenancy, as if real property were so held, then while they both were alive each would have a right to enjoy the whole property, and upon the death of one joint tenant the survivor or survivors would succeed to the ownership of the entire interest, with no share paid to the decedent's heirs. Many joint bank accounts are in fact true joint tenancies and are administered according to the usual rules of survivorship and concurrent possessory rights.

However, it has long been recognized that not all joint bank accounts are intended as true joint tenancies, and courts have faced difficult decisions, with diverse results, about how far to treat these aberrational arrangements as true joint tenancies. In one typical scenario, a person deposits funds in a bank account owned by the depositor and another, both of whom appear to have equal and full access to the account and are signatories on the account. In the agreement signed with the bank authorizing the opening and administration of the account, the account is denominated as joint or in joint tenancy. If the depositor intends to make a gift to the other joint account holder, then the joint bank account should be treated as a true joint tenancy. This arrangement may be defeated if, when the account is contested, a court finds that no completed gift occurred, and such a finding could be based on the notion that the donor's ability to withdraw all the funds at any time meant that the gift was not yet complete. n289 But courts have also found that, despite retained access by the donor, the complete access accorded the donee is sufficient to constitute a gift. n290 In some jurisdictions, the withdrawal of all joint account funds by only one of the account holders is treated as a severance of the joint tenancy. n291

Because it is so common that both parties to a joint checking account will actively withdraw and deposit funds in the account, it is routinely assumed that the survivor will take over the entire remaining account. n292

COMPUTER-ASSISTED RESEARCH

LEXIS: tenan! w/5 joint w/50 bank account and property

interest

§ 13.10(b) Survivorship Accounts.

Another typical scenario commences with the deposit by one person into an ostensibly joint account, but in fact it is not intended that the other account holder will exercise any control or ownership rights over the account funds while all the account holders are alive. Occasionally, the non-donor account holder may conduct transactions, but usually they would be exclusively for the benefit of the donor account holder. In such accounts, the only vestige of joint tenancy is the parties' intention that the surviving account holder, usually the non-donor, take the balance left in the account upon the death of the other. These so-called "survivorship" accounts are usually upheld, from which one may infer that a present gift of at least the survivorship rights occurred when the account was formed. n293

COMPUTER-ASSISTED RESEARCH

LEXIS: account w/20 survivorship

§ 13.10(c) Convenience Accounts.

In a third typical scenario, a joint account is opened, but the donor does not intend any sort of a gift, the other account holder being named simply for the convenience of the donor and perhaps to conduct some transactions for the benefit of and under the direction of the donor. In these arrangements, it is usually held that no gift has occurred and no right of survivorship has been created in the erstwhile donee. n294

COMPUTER-ASSISTED RESEARCH

LEXIS: account and convenience and gift

FOOTNOTES:
(n1)Footnote 289. *Goemmer v. Hartman, 791 P.2d 1238 (Colo. App. 1990)* (no gift occurred when the decedent deposited funds into an account from which he and the other owner could withdraw funds from the account without restriction).

(n2)Footnote 290. *In re Bunn's Estate, 198 A.2d 518 (Pa. 1964)* (decedent's son claimed an inter vivos gift from mother).

(n3)Footnote 291. *Cambell v. Black, 844 P.2d 759 (Kan. 1993)* (joint tenancy was destroyed when conservatee had all joint accounts which she had converted changed to reflect her as the sole owner).

(n4)Footnote 292. *Herren v. Cochran, 697 S.W.2d 149 (Ky. App. 1985)* (antenuptial agreement dispute upon administering husband's estate; no ambiguity in the agreement).

(n5)Footnote 293. *Malek v. Patten, 678 P.2d 201 (Mont. 1984)* (depositor established intent to make a gift of the certificates of deposits and checking account by signing signature cards for joint tenancy, even though cotenant was not informed).

(n6)Footnote 294. *Lawrence v. Lawrence, 437 S.W.2d 457 (Ark. 1969)* (decedent had a joint bank account with one of his sons but court ruled that he did not intend to create a gift).

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CHAPTER 13 THE AMERICAN LAW OF PERSONAL PROPERTY

2-13 Thompson on Real Property, Thomas Editions § 13.11

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§ 13.11 Stolen Goods.

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It is one of the more firm principles of American jurisprudence that an owner does not lose title to goods merely because the goods are stolen. n295 The true owner of stolen property may pursue and reclaim the property from whomever has possession of the property, even if the possessor is an innocent purchaser, n296 even if the purchase occurred in the ordinary course of business n297 and even if the goods have been altered since the time of the theft. n298 However, one who obtains stolen money in good faith, even though directly from the thief, also obtains title to the money even as against the true owner. n299 If by some circumstance, the possibility of retrieving the goods themselves is no longer open to the true owner, the true owner may recover the value of the goods from a former possessor of the goods. n300

If a true owner of stolen goods attempts to recover the goods from an innocent possessor, it is not necessary to first establish the stolen character of the goods in a prior criminal proceeding. That fact may be established in the civil proceeding to recover the goods. n301

COMPUTER-ASSISTED RESEARCH

LEXIS: stolen w/50 property and right or interest w/20
owner

FOOTNOTES:
(n1)Footnote 295. *O'Keeffe v. Snyder, 416 A.2d 862 (N.J. 1980)* (stolen paintings in possession of defendant who claimed ownership by adverse possession).

(n2)Footnote 296. *Solomon R. Guggenheim Found. v. Lubell, 569 N.E.2d 426 (N.Y. 1991)* (museum brought action against innocent purchaser of allegedly stolen painting).

(n3)Footnote 297. *Farm Bureau Mut. Auto. Ins. Co. v. Moseley, 90 A.2d 485 (Del. Super. 1952)* (automobile insurance company sued to recover a stolen automobile from a good faith purchaser).

(n4)Footnote 298. *National Retailers Mut. Ins. Co. v. Gambino, 64 A.2d 927 (N.J. Super. 1948)* (thief improved stolen car by putting a new motor in it; court granted possession to owner).

(n5)Footnote 299. *City of Portland v. Berry, 739 P.2d 1041 (Or. App. 1987)* (thief deposited money into a bank and was given valuable consideration in good faith; under the "money rule," bank had right to money superior to right of original owner).

(n6)Footnote 300. *Creach v. Ralph Nichols Co., 267 S.W.2d 132 (Tenn. App. 1953)* (court held that innocent purchaser of stolen automobile was liable to rightful owner for the money received when vehicle was resold).

(n7)Footnote 301. *Senfeld v. Bank of Nova Scotia Trust Co. (Cayman) Ltd., 450 So. 2d 1157 (Fla. App. 1984)* (corporation president was sued by a trust company for conversion, pursuant to a theft statute).

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CHAPTER 13 THE AMERICAN LAW OF PERSONAL PROPERTY

2-13 Thompson on Real Property, Thomas Editions § 13.12

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§ 13.12 Personal Property Subject to Special Regulation.

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§ 13.12(a) Treasure.

Treasure trove as a special form of personal property emerged because of the unusual circumstances producing the troves of treasure. It is believed that as the Romano-British society of the first four decades A.D., began to break down, particularly in the face of Anglo-Saxon aggressions, wealthy landowners temporarily vacated their villas, often burying their most precious possessions somewhere on the grounds. Many of these owners never returned and their buried caches of treasure would not come to light until decades or even centuries later. Thus treasure trove came to be considered any gold or silver in the form of coin, plate or bullion, concealed in the earth or in some other private place, whose owner was unknown. n302 Treasure trove is distinguished from other forms of lost property in the assumption that it was intentionally placed by its owner or owners and that they expected eventually to return and reclaim possession of the property. It is assumed that those who deposited treasure trove in its hiding place intended to return and that treasure trove may therefore not be considered the same as abandoned property. Nevertheless, in the very early English law, the finder of treasure trove was accorded the same rights as a finder of lost property, that is, the right to retain possession of the found items against all but the true owner. Inexorably, however, the crown asserted claims to treasure trove, n303 thus requiring that it be distinguished from ordinary lost property. Today, both the American rule and the modern English rule accord possessory rights to the finder. n304 These common law rights may be altered by legislation.

COMPUTER-ASSISTED RESEARCH

LEXIS: treasure trove

§ 13.12(b) Salvage.

"Salvage" is not itself a species of personal property, but is the reward or compensation granted to a person who performs salvage services. A salvage service is a service voluntarily rendered to a vessel or its goods to save it from being lost in the sea or other navigable waters. Technically speaking, the law of salvage is not concerned with title, because it is assumed that the property being recovered belongs to another and that the salvor, at most, will obtain a

reward for salvage services. However, when what is being salvaged is the contents of an old or ancient shipwreck, then the salvor is in much the same position as a finder of very valuable items who does not expect the true owner to ever return. With respect to ancient shipwrecks, there is considerable disagreement over whether the law of salvage or the law of finders should be applied. n305

If the vessel being salvaged is a derelict, the salvor who successfully recovers it may keep it as property, unless there is some valid governmental claim to it. n306 Under these circumstances, the law of finders appears more applicable to the salvage of ancient and long lost shipwrecks.

COMPUTER-ASSISTED RESEARCH

LEXIS: salvage w/100 shipwreck

§ 13.12(c) Cultural Property.

Under the general heading "Cultural Property" are found two types of personal property subject to special regulation. One of these types consists of the various objects of art or other items that are transported from one country to another, usually for the purpose of becoming part of a public or a private collection, and whose provenance is often suspect and whose movement is often contrary to the laws of one jurisdiction or another. The other type of cultural property is strictly domestic, and usually consists of the artifacts or remains of ancient peoples, which items are often to be found in public or private collections. Among both types of cultural property, much legal activity is aimed at diminishing the property rights of private collectors and re-establishing property rights in the countries of origin or in the descendants or successors or modern representatives of ancient peoples whose remains and relics are at issue.

The international aspects of cultural property were addressed in November 1970, when a UNESCO convention concerning the means of prohibiting and preventing the elicit import, export, and transfer of ownership of cultural property was adopted. The United States Senate consented to this UNESCO Convention in 1972 with the specific proviso that the UNESCO Convention was not to be self-executing, but would require implementing legislation.

> This implementing legislation ran a complex and tortuous path in the decade after the Senate ratified the convention.
>
> The final version, now referred to as the Convention on Cultural Property Act (act), reflects compromises between the aspirations of congressmen, senators, museum directors, archaeologists, anthropologists, academics, and administrative agencies. The act also illustrates the realities of a well-established and often secret international art and antiquities trade, the needs of smaller, less wealthy museums and like institutions, the views of still other museum directors and academics, and the livelihoods of thousands of dealers in art and antiquities. With the exception of Canada, no other major western art-importing nation joined or ratified the UNESCO Convention in the decade between U.S. ratification and implementation. n307

The purpose of the Convention and of the implementing national legislation was primarily prevention of pillage, rather than regulation of the numerous cultural artifacts already in international commerce. Under this legislation, which has had little impact in this country, a country fearing pillage of its cultural artifacts may call upon the United States to seize such of those artifacts as have made their way into the United States, for eventual return to the country of origin. n308

The domestic aspect of cultural property protection has received more attention. The Antiquities Act of 1906 prohibited and punished the activities of "any person who [without permission] shall appropriate, excavate, injure, or destroy any historic or prehistoric ruin or monument or any object of antiquity" found on federal lands. n309 In the National Historic Preservation Act of 1966, n310 Congress undertook to "administer federally owned, administered, or controlled

prehistoric and historic sources in a spirit of stewardship for the inspiration and benefit of present and future generations." In 1979 Congress enacted the Archaeological Resources Protection Act, n311 which attempted to regulate the exploration and exposure of archaeological sites. Substantial finds and imprisonment penalties were enacted for those who remove archaeological objects in violation of this statute. In addition to these and other federal enactments, numerous state enactments dealing with cemeteries and dead bodies, archaeology and historic preservation, and Native American protections have also been enacted. n312 In general, all of this federal and state legislation has not only regulated the archaeological and commercial activity affecting objects significant for cultural heritage, but has attempted to contain and punish illicit possession of cultural property items. In some instances, even a good faith purchaser of such an item may not ultimately have property rights in the item, if it can be established that the item was illicitly removed from a protected site or under some other set of prohibited circumstances. Thus the property rights in cultural property are increasingly coming under some form of international, national or state legal regulation.

A recent example of such legislation is the Native American Graves Protection and Repatriation Act of 1991, n313 which makes some provision for return of human remains and associated funerary objects to their tribes of origin while also making them available for scientific study.

COMPUTER-ASSISTED RESEARCH

LEXIS: cultural property

FOOTNOTES:

(n1)Footnote 302. *Zech v. Accola, 33 N.W.2d 232 (Wis. 1948)* (plaintiff found money and argued that it was treasure-trove, excluding applicability of the lost property statute).

(n2)Footnote 303. *Campbell v. Cochran, 416 A.2d 211 (Del. Super. Ct. 1980)* (money found and turned over to state police).

(n3)Footnote 304. *Hendle v. Stevens, 586 N.E.2d 826 (Ill. App. 1992)* (minors found currency on private property).

(n4)Footnote 305. *Columbus-America Discovery Group v. Atlantic Mut. Ins. Co., 974 F.2d 450 (4th Cir. 1992), cert. denied,* _____ U.S. _____, *113 S. Ct. 1625, 123 L. Ed. 2d 183 (1993)* (insurance underwriters filed claims to gold found in an 1857 shipwreck).

(n5)Footnote 306. *Cobb Coin Co., Inc. v. Unidentified, Wrecked & Abandoned Sailing Vessel, 525 F. Supp. 186 (S.D. Fla. 1981)* (salvor requested preliminary injunction against Florida's salvage regulations that interfered with salvage operations).

(n6)Footnote 307. Jeremy Sugerman, *A New Cultural Property Repose Act, 22 Geo. Wash. J. Int'l L. & Econ. 671, 675-677 (1989).*

(n7)Footnote 308. *19 U.S.C. § 2601 et seq*.

(n8)Footnote 309. *16 U.S.C. § 433.*

(n9)Footnote 310. *16 U.S.C. § 470.*

(n10)Footnote 311. *16 U.S.C. § 470aa et seq*.

(n11)Footnote 312. *See* Thomas H. Boyd, *Disputes Regarding the Possession of Native American Religious and Cultural Objects and Human Remains: A Discussion of the Applicable Law and Proposed Legislation, 55 Mo. L. Rev. 883 (1990).*

(n12)Footnote 313. *25 U.S.C. § 3001 et seq*.

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Annotation, What Are Fixtures Within Provision of Property Insurance Policy Expressly Extending Coverage to Fixtures. A.L.R.3d Vol. 17 1381.

Annotation, What Constitutes Improvements, Alterations or Additions Within Provisions of Lease Permitting or Prohibiting Tenant's Removal Thereof at Termination of Lease. A.L.R.3d Vol. 30 998.

Thompson on Real Property, Thomas Editions

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Supp. To CHAPTER 13 THE AMERICAN LAW OF PERSONAL PROPERTY

2-13 Thompson on Real Property, Thomas Editions Supp. to § 13.02

Supp. to § 13.02 Definition and Characteristics of Personal Property

[Go To Main]

§ 13.02(a) Missing [Go To Main]

§ 13.02(a)(3) Personal Property as Movable Rather than Immovable Property

After the first sentence of this section, insert footnote 1.1: n1.1

§ 13.02(a)(4) Intangible Forms of Personal Property

add:

See also Snider v. Midfirst Bank, 211 P.3d 179 (Kan. App. 2009) (In Kansas, all choses in action, other than torts, are assignable).

§ 13.02(a)(5) Examples of the Uncertain Distinction between Personal and Real Property

After the citation "United States v. Murray..." add:

aff'd, 217 F.3d 59 (1st Cir. 2000) .

§ 13.02(b) Fixtures as Personal Property. [Go To Main]

Add:

Polston, Ronald W., "The Fixutures Doctrine: Was It Ever Really the Law?" *16 Whittier L. Rev. 455 (1995);* Searles, Sidney Z., "The Role of Fixtures in Enhancing Values in Eminent Domain," *66 N.Y. St. B.J. 14 (1994).*

add:

See also Lazor v. Board of Assessment Appeals of Armstrong County, 986 A.2d 219 (Pa. Cmwlth., 2009) (Because the mobile home was permanently attached to the property, it was taxable as realty).

After the first sentence of the 2nd paragraph that reads "In some circumstances, if something less than a permanent..." insert footnote 11.1: n11.1

Change Leathers to Pledger

After the citation "Long Island Onwer's Ass'n Inc. v. Davidson ... " add:

see also, In re Boehmer, 240 B.R. 837, (Bankr. E.D.Pa. 1999) (acknowledging the confusion among the in determining what constitutes "additional property"); *In re McCarron, 242 B.R. 479 (Bankr. W.D. Mo. 2000)* .

Add

Chapman v. Katz, 862 N.E.2d 735 (Mass. 2007) (whether an ATM kiosk was a structure or a fixture was a question for the jury).

§ 13.02(c) Crops as Personal Property. [Go To Main]

Add:

"Trust Decisions: Farm Crops That Are Fully Matured But Not Harvested at the Time of Testator's Death Are Considered Personalty and Pass Under the Will as Such. In *In re Estate of Hughs, 506 N.W.2d 810 (Iowa Ct. App. 1993)* ," *111 Banking L.J. 325 (1993).*

Add:

Slappey v. Slappey, 296 Ga. App. 773 (Ga. Ct. App. 2009) (laborer's lien asserted against crop).

Schweickert v. AG Services of America, Inc., 823 N.E.2d 213 (Ill. App. 2005) (statutory landlord lien for crops had priority over perfected security interest of tenant's creditor).

§ 13.02(d) Choses in Action as Person Property [Go To Main]

add:

See Snider v. Midfirst Bank, 211 P.3d 179 (Kan. App. 2009) (In Kansas, all choses in action, other than torts, are assignable personal property).

FOOTNOTES:
(n1)Footnote 1.1. *Gullatt v. Newell Industries, Inc., 688 So. 2d 1191 (La. Ct. App. 1996)* (In Louisiana, immovables are presumed to belong to the owner of the underlying real property, unless other ownership is shown by instrument).

(n2)Footnote 11.1. *In re Steslow, 225 B.R. 883 (Bankr. E.D. Pa. 1998)* (Fixtures may be either personal property or real property in Pennsylvania).

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Supp. To CHAPTER 13 THE AMERICAN LAW OF PERSONAL PROPERTY

2-13 Thompson on Real Property, Thomas Editions Supp. to § 13.03

Supp. to § 13.03 How Ownership of Personal Property Is Orginally Acquired

[Go To Main]

§ 13.03(b) Original and Successive Acquisition of Possession [Go To Main]

After the citation to "Hays v. Montague ... " add:

see also, Ray v. State, 2000 Tenn. App. LEXIS 250 (Tenn. Ct. App. 2000) .

§ 13.03(c) Personal Property Rights in Wild Animals. [Go To Main]

Add:

Hollywood Park Humane Soc'y v. Town of Hollywood Park, 2004 U.S. Dist LEXIS 784 (No. SA-03-CA-1313-XR, W.D. Tex., Jan 23, 2004) (Plantiffs claimed city wildlife officials violated their rights in regard to quiet enjoyment of wild animals which they were attempting to domesticate).

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Supp. To CHAPTER 13 THE AMERICAN LAW OF PERSONAL PROPERTY

2-13 Thompson on Real Property, Thomas Editions Supp. to § 13.04

Supp. to § 13.04 How Ownership of Personal Property Is Transferred.

[Go To Main]

§ 13.04(a) Transfers by Gift [Go To Main]

§ 13.04(a)(2) Types of Gifts

§ 13.04(a)(2)(i) Delivery

Add:

see also In re Estate of Eastman, 760 A.2d 16 (Pa. Super. Ct. 2000) (Mere handling of a bank book, even when accompanied by words of intent to give the bank account is not enough to constitute delivery).

Add "donee" after "and"

Add:

rev'd on other grounds, 960 P.2d 1031 (Cal. 1998) .

Add:

Howell v. Herald, 2003 Ky. App. LEXIS 123 (Ky. Ct. App. May 23, 2003) (Lawyer who prepared deeds for the decedent remained the decedent's agent and could not act as the agent for decedent's niece; the lawyer did not complete an inter vivos gift of property to the niece because the delivery occurred after the death of the client).

Add:

Trott v. Jones, 2004 Ark. App. LEXIS 273 (No. 03-584, April 7, 2004) (Court declared that bare intent on the part of a decedent to create trust in his bank account was not enough; there was no transfer of title); *Ardrey v. Ardrey, 2004 Ohio App. LEXIS 2193* (No. 14-03-41, May 17, 2004) (Court found that husband had made a gift to the wife of property which he had owned previous to the marriage, by putting the house which was built on the property in both of their names).

Last line, add "donee" at the end of the line.

Add:

Embury v. Embury, 854 N.Y.S.2d 502 (2008) (wife proved that real property was given to her during the marriage as separate property).

Add "box" after "deposit"

Change (N.J. 1966) to (N.J. 1967)

Add:

Circuit City Stores, Inc. v. Comm'r of Revenue, 790 N.E.2d 636 (Mass. 2003) (Court declared that a retailer performed its obligations as to delivery of purchased goods at the time of sale, even though purchaser was picking up goods at stores in other states).

§ 13.04(a)(2)(ii) Intent

Add:

Lebitz-Freeman v. Lebitz, 803 A.2d 156 (N.J. Super. 2002) (no intent to make a gift of securities); *Honarvar v. Kangarloo, 57 Va. Cir. 494 (2000)* (gift considered complete even after donor harassed donee into leaving gifted property).

Add:

Armstrong v. Armstrong, 266 F. Supp.2d 385 (D. Virgin Islands, 2003) (In a divorce action, the Court found that treatment and use of a home took it outside of the definition of a marital homestead).

Add:

See also Nicholson v. Johnston, 855 A.2d 97 (Pa. Super. 2004) (holding that former fiance is entitled to reimbursement for his payments on mortgage of home the couple purchased in anticipation of marriage that never materialized).

Change the citation to "Rowe v. Rowe ... " to read:

Rowe v. Rowe, 480 S.E.2d 760 (Va. Ct. App. 1997) .

§ 13.04(a)(3) Gifts Causa Mortis

Change Haggerty to Hagerty

Change Newton to Newtown

Add:

Mycoo v. O'Leary, 2003 Conn. Super. LEXIS 150 (No. CV010181894, Jan. 29, 2003) (there was a question of fact as to whether there had been a sufficient delivery of a promised gift of money to satisfy a prerequisite of a gift cause mortis from a deceased to his home health aide); *Davis v. Davis, 2004 Ohio App. LEXIS 764* (No. 2003CA00243, Feb. 23, 2004) (because a transaction benefited a family member, it was presumed that the transaction was intended as a gift; the burden of proof was on the executor to show that the transaction was in fact, a loan).

Osborn v. Osborn, 2004 Ohio App. LEXIS 5889 (Ohio Ct. App. 2004) (court found that couple's joint ownership deed evidenced a gift).

§ 13.04(b)(1)(i) General Rules

Change "Baker v. Baker" to "Barker v. Baker"

Change "Writz" to "Wirtz"

Change the parenthetical after "Writz v. Switzer" to read:

(proceeds of an estate were used to pay windfall taxes, an action was brought against the accountant for negligence requesting that the accountant reimburse the estate). Implied overruling recognized by *Adams v. U.S. Homecrafters, Inc., 744 So. 2d 736 (1999)* .

Add:

Estate of Dye, 92 Cal. App.l 4th 966 (2001) (both adopted in and adopted out children are entitled to their shares of the decedent's estate).

Add:

Fazilat v. Feldstein, 2004 N.J. LEXIS 554 (No. A-49 September Term 2003, May 27, 2004) (Court found it in the best interest of child to declare contested paternity).

Kau Agribusiness Co. v. Heirs or Assigns of Kahananui, 95 P.3d 613 (Haw. 2004) (the trial court erred by not applying the *Trimble* decision retroactively).

§ 13.04(b)(1)(ii) Uniform Probate Code Provisions for Intestate Succession

Insert the following as paragraph § 2-112:

§ 2-112 [Dower and Curtesy Abolished.]

The estates of dower and curtesy are abolished.

The paragraph entitled "[Individuals Related to Decedent Through Two Lines]" should be renumbered as § 2-113

The paragraph entitled "[Parent Child Relationships]" should be renumbered as § 2-114

§ 13.04(b)(2) Testamentary Transfers

Change the title of "§ 2-503 Writings Intended as Wills etc." to read:

§ 2-503 [Harmless Error.]

§ 13.04(d) Transfers to Adverse Possessors [Go To Main]

Add:

Walden v. Jones, 252 Ga. App. 692 (2001) (adverse possession of abandoned personal property).

Add:

Miller, Jason, "Hostility May Not Be Impaired in an Action for Adverse Possession When There Is Disproving Evidence: Distinction Made from Cases Where All Other Elements Are Met." *25 Lawyers J. 3* (Dec. 14, 2001).

Rosa v. Obar, 2004 Conn. Super. LEXIS 65 (No. CV000156932, Jan. 9 2004) (Landlord failed to show exclusive adverse possession of a disputed parcel); *Markowicz v. Bowen, 11 LCR 117 (Mass. 2003)* (Beekeeping and gardening not sufficient activities to be considered "cultivation" for adverse possession purposes); *Martinez v. Martinez, 83 P.3d 298 (N.M. App. 2004)* (Noting that a cotenant has a heightened standard for showing adverse possession against another cotenant).

Change Brunet to Burnet

After the citation "Joseph v. Lesnevich ... " add:

rev'd O'Keeffe v. Snyder, 416 A.2d 862 (N.J. 1980)

Change the citation "Estate of Billings v. Deadwood ... " to:

506 N.W.2d 138 (S.D. 1993) (congregation failed to carry the burden of proving "tacking" and therefore, of establishing adverse possession).

§ 13.04(e) Transfers to Finders. [Go To Main]

Change "as the" to "as to the"

§ 13.04(e)(1) The Basic Rules of Finders' Rights.

Add:

Kurjatko, Adina, "Are Finders Keepers? The Need for Uniform Law Governing the Rights of Original Owners and Good Faith Purchasers of Stolen Art," *5 U.C. Davis J. Int'l L. & Pol'y 59 (1999).*

§ 13.04(e)(2) Exceptions for Misplaced Items

Add:

Corliss v. Wenner, 34 P.3d 1100 (Ida. App. 2001) (the treasure trove doctrine is not part of Idaho common law).

In re Oakley, 344 F.3d 709 (7th Cir., 2003) (Court notes that the U.S. does not lay claim to treasure trove under the old English system).

Add:

Terry v. Lock, 343 Ark. 452 (Ark. 2001) (mislaid property).

§ 13.04(e)(3)(iv) Iowa

Iowa Code § 556F.17 has been amended to read as follows: If any person shall trade, sell, loan, or take out of the limits of this state any such property taken up or found as provided in this chapter, before the person shall be vested with the right to the property, the person shall forfeit and pay double the value thereof, to be recovered by any person in an action, one half of which shall go to the plaintiff and the other half to the county.

§ 13.04(e)(3)(v) Michigan

The Michigan statute has been revised. Delete all of the text after this heading and replace it with the following text:

In Michigan, lost property is immediately classified as outlined in the statute on lost property. Each category of lost property is subject to different rules regarding its ultimate disposition.

434.21. Definitions

Sec. 1. As used in this act:

(a) "Collectible currency" means a medium of exchange including coins, bank notes, government notes, and paper money that has a value greater than face value.

(b) "Contraband" means any property that is prohibited by any law to be owned, carried, concealed, or possessed.

(c) "Currency" means a medium of exchange including coins, bank notes, government notes, and paper money that has a value not greater than face value.

(d) "Evidence" means any property that furnishes or tends to furnish proof in a legal matter.

(e) "Hazardous material" means explosives, pyrotechnics, flammable gas, flammable compressed gas, nonflammable compressed gas, flammable liquid, oxidizing material, poisonous gas, poisonous liquid, irritating material, etiologic material, radioactive material, corrosive material, or liquefied petroleum gas.

(f) "Junk" means any property that does not have any fair market value or worth.

(g) "Legal owner" means any individual, organization, partnership, company, corporation, or governmental agency who had care, custody, or control over the property and can establish ownership to the satisfaction of the law enforcement agency by description, title, sales receipt, bill of goods, or other means. Any person who represents the legal owner or an organization, partnership, company, corporation, governmental agency by affidavit, power of attorney, bill of goods, or title may be considered the legal owner for purposes of recovering the property.

(h) "Perishable property" means any property subject to quick deterioration or spoilage except when maintained under proper conditions.

(i) "Property" means anything which is the subject of ownership and is corporeal, tangible, visible, or personal, or that has an exchange value.

(j) "Property of major value" means any property that is not collectible currency, contraband, currency, evidence, hazardous material, junk, perishable property, or property of minor value.

(k) "Property of minor value" means any property whose fair market value is less than the total cost of preparing a property report, plus the costs of storage and disposition, and which is not collectible currency, contraband, currency, evidence, hazardous material, junk, perishable property, or property of major value.

434.22. Finding of lost property; report or delivery to law enforcement agency; classifications, criteria; storage

Sec. 2. (1) A person who finds lost property shall report the finding or deliver the property to a law enforcement agency in the jurisdiction where the property is found. This shall include all property found in an abandoned vehicle. If the person wishes to receive the property if it is not claimed by the legal owner as provided in this act, the person shall provide his or her name and current address to the law enforcement agency and shall inform the agency of any change in his or her address.

(2) The property described under subsection (1) shall be inspected by the law enforcement agency to determine the type of property that has been found. The property shall be classified into 1 of the following categories:

(a) Collectible currency.

(b) Contraband.

(c) Currency.

(d) Evidence.

(e) Hazardous material.

(f) Junk.

(g) Perishable property.

(h) Property of major value.

(i) Property of minor value.

(3) The law enforcement agency shall use the following method to determine the classification of property under

subsection (2):

(a) Currency may be appraised to determine whether the currency, because of age, origin, metal content, or value as a collector's item, has a value other than its face value. Currency may be inspected by a person who has the expertise to determine if the currency is collectible currency.

(b) Property that is suspected of being contraband may be subjected to scientific evaluation or inspected by a qualified person.

(c) Property shall be considered evidence if the property is reasonably believed by the law enforcement agency or a governmental attorney to be evidence that could be used in a legal action.

(d) Whether property is hazardous material shall be determined by a qualified person who has expertise regarding hazardous material.

(e) Property that may be junk may be inspected to determine if it has any fair market value or worth.

(f) Perishable property may be inspected to determine if the property requires special storage.

(g) Whether property is of major or minor value shall be determined by a person who has expertise regarding the valuation of the property.

(4) Property that is reported or delivered pursuant to subsection (1) shall be stored in a location as determined by the law enforcement agency.

434.23. Reports on certain lost property; making description available to public; storage of property with minor value

Sec. 3. (1) Within 48 hours of a report or delivery under section 2(1), the following reports shall be completed on property of major value, collectible currency found in 1 location for the total value, currency found in 1 location for the total value, hazardous material, and perishable property that has a major value:

(a) A general description of the property to provide a person who may be the legal owner with enough information to aid in determining ownership. This information shall be kept in a public building in a location that is open to the public during normal business hours.

(b) A detailed description of the property to provide the law enforcement agency with information to determine ownership. The description shall also include the total value of the property found in 1 location. The information required by this subdivision is exempt from disclosure under the freedom of information act, Act No. 442 of the Public Acts of 1976, being *sections 15.231 to 15.246 of the Michigan Compiled Laws*, and shall not be available to the public or any person claiming ownership.

(2) Property that is determined under section 2(3) to be of minor value may be kept by the law enforcement agency in a safe location and may be inspected by the public upon request during normal business hours.

434.24. Disposition of property

Sec. 4. (1) Except as otherwise provided in subsection (2), collectible currency and currency shall be returned to the legal owner when the law enforcement agency is reasonably satisfied of that ownership. Pursuant to section 5, if the legal owner cannot be located or established, the property shall be disposed of pursuant to this act.

(2) All contraband that is or may be evidence and any other found property that is or may be evidence in a criminal or civil action instituted by a governmental attorney shall be kept in a place of safekeeping until the governmental attorney releases the evidence. All contraband shall be disposed of in a manner prescribed by law. Any found property that is evidence that is not contraband shall be returned to the legal owner unless prohibited by law.

If the legal owner cannot be located, the property shall be classified as prescribed in section 2(2) and shall be disposed of pursuant to this act.

(3) When the legal owner of the hazardous material cannot be located or established or the hazardous material may pose an imminent danger to life or other property, then the hazardous material may be released to any governmental agency, private industry, institution, business, or person that can safely keep or dispose of the hazardous material and the container.

(4) Found property that is determined to be junk may be disposed of in any manner by the law enforcement agency.

(5) Upon the conclusion of a criminal or civil action instituted by a governmental attorney, evidence may be returned to the legal owner unless prohibited by law or the evidence is required in another court action. If the legal owner cannot be located, the law enforcement agency shall classify the property as prescribed in section 2(2) and dispose of it pursuant to this act.

(6) Perishable property shall be released to the legal owner of the property. Pursuant to section 5, if the legal owner cannot be located or established, the property shall be disposed of pursuant to this act.

(7) All property of major value shall be returned to the legal owner when the law enforcement agency is reasonably satisfied of that ownership. If the legal owner is not located and after 6 months from the date of the notice as prescribed in section 5, the property shall be disposed of pursuant to this act.

(8) All property of minor value shall be returned to the legal owner when the law enforcement agency is reasonably satisfied of that ownership. If after 3 months the property has not been claimed by the legal owner, the property may be disposed of in any manner by the law enforcement agency.

434.25. Notice to known legal owners, contents

Sec. 5. (1) The law enforcement agency shall send a notice by first class mail to any known legal owner of collectible currency, currency, evidence, perishable property, or property of major value to the last known address of record. The notice shall contain the following information:

(a) The date the property was found.

(b) The type of property found.

(c) The address where the property is located.

(d) The cost of storage per day, if any.

(e) A statement that the property must be claimed within 6 months of the date of the letter or the property shall be considered abandoned and disposed of under the provisions of this act.

(f) The name of the law enforcement agency, the address, and the telephone number where the legal owner can obtain the property.

(2) Property described in subsection (1) not claimed within 6 months after the date of the notice may be disposed of pursuant to section 6.

§ 13.04(e)(3)(vi) Montana

Sections 70-5-203 through 70-5-209 have been repealed and should be deleted from the text.

Montana Code §§ 70-5-102 through 70-5-202 has been amended to conform with gender-neutral standards and now reads as follows:

70-5-102. Finder not bound to take charge--status as depositary.

A person who finds a thing lost is not bound to take charge of it, but if the person does, the person is a depositary for the owner, with the rights and obligations of a depositary for hire.

70-5-103. Duty to inform owner when known.

If a person finds money, goods, things in action, or other personal property or saves a domestic animal from drowning or starvation when the property is of a value of $10 or more and the person knows or suspects who the owner is, the person shall use reasonable diligence to inform the owner and make restitution without compensation, further than a reasonable charge for saving and taking care of the property. If the person fails to do so, the person is liable in damages to the owner and does not have a claim to any reward offered by the owner for the recovery of the thing or to any compensation for the person's trouble or expenses.

70-5-104. Right of finder to require proof of claimant's ownership.

The finder of a thing may in good faith before giving it up require reasonable proof of ownership from any person claiming it.

70-5-105. Compensation of finder.

The finder of a thing is entitled to compensation for all expenses necessarily incurred by the finder in its preservation and for any other service necessarily performed by the finder about it and to a reasonable reward for keeping it.

70-5-106. Exoneration of finder by storage of thing found.

The finder of a thing may be exonerated from liability at any time by placing it in storage with any responsible person of good character at a reasonable expense.

70-5-107. Exoneration of owner by surrender of thing to finder.

The owner of a thing found may be exonerated from the claims of the finder by surrendering it to the finder in satisfaction of the claims.

70-5-201. When finder may sell thing found.

The finder of a thing may sell it, if it is a thing which is commonly the subject of sale, when the owner cannot with reasonable diligence be found or being found refuses upon demand to pay the lawful charges of the finder, in the following cases:

(1) when the thing is in danger of perishing or of losing the greater part of its value; or

(2) when the lawful charges of the finder amount to two-thirds of its value.

70-5-202. How sale conducted.

A sale under the provisions of § 70-5-201 must be made in the same manner as the sale of a thing pledged

§ 13.04(e)(3)(vii) New Hampshire.

N.H. Rev. Stat. T. XLVI, Ch. 471 has been repealed and should be deleted from the text.

§ 13.04(e)(3)(xi) Vermont.

Second to last line, add "the" before "town."

§ 13.04(e)(3)(xiii) The Uniform Unclaimed Property Act and the Uniform Disposition of Unclaimed Property Act

add:

The states wherein the Uniform Unclaimed Property Act 1995 has been adopted include: Alabama, Arizona, Arkansas, Hawaii, Indiana, Kansas, Louisiana, Maine, Montana, Nevada, New Mexico, North Carolina, Vermont, Virgin Islands, and West Virginia.

At the end of this section insert the following text:

The 1995 act expanded the scope of § 2 by creating categories of unclaimed property and defining time limits at the end of which the unclaimed property would be considered abandoned property.

2. [Presumptions of Abandonment.]

(a) Property is presumed abandoned if it is unclaimed by the apparent owner during the time set forth below for the particular property:

(1) traveler's check, 15 years after issuance;

(2) money order, seven years after issuance;

(3) stock or other equity interest in a business association or financial organization, including a security entitlement under [[Go To Main]], five years after the earlier of (i) the date of the most recent dividend, stock split, or other distribution unclaimed by the apparent owner, or (ii) the date of the second mailing of a statement of account or other notification or communication that was returned as undeliverable or after the holder discontinued mailings, notifications, or communications to the apparent owner;

(4) debt of a business association or financial organization, other than a bearer bond or an original issue discount bond, five years after the date of the most recent interest payment unclaimed by the apparent owner;

(5) a demand, savings, or time deposit, including a deposit that is automatically renewable, five years after the earlier of maturity or the date of the last indication by the owner of interest in the property; but a deposit that is automatically renewable is deemed matured for purposes of this section upon its initial date of maturity, unless the owner has consented to a renewal at or about the time of the renewal and the consent is in writing or is evidenced by a memorandum or other record on file with the holder;

(6) money or credits owed to a customer as a result of a retail business transaction, three years after the obligation accrued;

(7) gift certificate, three years after December 31 of the year in which the certificate was sold, but if redeemable in merchandise only, the amount abandoned is deemed to be [60] percent of the certificate's face value;

(8) amount owed by an insurer on a life or endowment insurance policy or an annuity that has matured or terminated, three years after the obligation to pay arose or, in the case of a policy or annuity payable upon proof of death, three years after the insured has attained, or would have attained if living, the limiting age under the mortality table on which the reserve is based;

(9) property distributable by a business association or financial organization in a course of dissolution, one year after the property becomes distributable;

(10) property received by a court as proceeds of a class action, and not distributed pursuant to the judgment, one year after the distribution date;

(11) property held by a court, government, governmental subdivision, agency, or instrumentality, one year after the property becomes distributable;

(12) wages or other compensation for personal services, one year after the compensation becomes payable;

(13) deposit or refund owed to a subscriber by a utility, one year after the deposit or refund becomes payable;

(14) property in an individual retirement account, defined benefit plan, or other account or plan that is qualified for tax deferral under the income tax laws of the United States, three years after the earliest of the date of the distribution or attempted distribution of the property, the date of the required distribution as stated in the plan or trust agreement governing the plan, or the date, if determinable by the holder, specified in the income tax laws of the United States by which distribution of the property must begin in order to avoid a tax penalty; and

(15) all other property, five years after the owner's right to demand the property or after the obligation to pay or distribute the property arises, whichever first occurs.

(b) At the time that an interest is presumed abandoned under subsection (a), any other property right accrued or accruing to the owner as a result of the interest, and not previously presumed abandoned, is also presumed abandoned.

(c) Property is unclaimed if, for the applicable period set forth in subsection (a), the apparent owner has not communicated in writing or by other means reflected in a contemporaneous record prepared by or on behalf of the holder, with the holder concerning the property or the account in which the property is held, and has not otherwise indicated an interest in the property. A communication with an owner by a person other than the holder or its representative who has not in writing identified the property to the owner is not an indication of interest in the property by the owner.

(d) An indication of an owner's interest in property includes:

(i) the presentment of a check or other instrument of payment of a dividend or other distribution made with respect to an account or underlying stock or other interest in a business association or financial organization or, in the case of a distribution made by electronic or similar means, evidence that the distribution has been received;

(ii) owner-directed activity in the account in which the property is held, including a direction by the owner to increase, decrease, or change the amount or type of property held in the account;

(iii) the making of a deposit to or withdrawal from a bank account; and

(iv) the payment of a premium with respect to a property interest in an insurance policy; but the application of an automatic premium loan provision or other nonforfeiture provision contained in an insurance policy does not prevent a policy from maturing or terminating if the insured has died or the insured or the beneficiary of the policy has otherwise become entitled to the proceeds before the depletion of the cash surrender value of a policy by the application of those provisions.

(e) Property is payable or distributable for purposes of this [Act] notwithstanding the owner's failure to make demand or present an instrument or document otherwise required to obtain payment.[129.1]

The official comment to the 1995 Act discusses where intangible property falls under updated statute:

> Section 2 continues the general proposition that all intangible property is within the coverage of this Act. It provides in a single section for all the various periods of abandonment that were separately stated in several sections of the 1981 Act. With limited exceptions this reorganization does not alter the bases for presuming abandonment of the property from that established in the 1981 Act, but merely restates those standards in a unified section, more easily applied, with less repetition... . Intangible property held by a utility other than subscribers' deposits and refunds are subject to the five year rule of subsection (a)(14).[129.2]

n129.2

Add:

Freedman v. Campbell, 72 P.3d 425 (Colo. App. 2003) (a deed transferring property to a trust did not comply with the statutory reqirements; therefore the property was transferred to a decedent and her husband as tenants in common).

Add:

ATC P'ship v. Town of Windam, 845 A.2d 389 (Conn. 2004) (Because property was properly determined to be a fixture of the real estate, the property was not goods or chattel that could be subject to a replevin action).

Add:

Somers v. Chan, 2004 Conn. Super. LEXIS 479 (No. CV020818041, March 3, 2004) (Court denied creditor's motion for a turnover order to debtor's husband).

§ 13.04(f) Transfers to Judgment Creditors. [Go To Main]

add:

Ho v. Hsieh, *105 Cal. Rptr. 3d 17 (Cal. App. 2d Dist. 2010)* (held that the trial court erred in transferring worthless stock to the judgment creditor without reduction in outstanding money judgment).

add:

Thompson v. Hanson, 219 P.3d 659 (Wash. 2009) (transferee may be liable to judgment creditor up to the value of the transferred asset or the value of judgment, whichever is less, even if transferee accepted transfer in good faith).

§ 13.04(g)(1) General Principles of Accession.

Add:

McBride v. Commonwealth, 2003 Va. App. LEXIS 428 (No. 1947-02-4, Aug. 5, 2003) (Evidence supported defendant's conviction for embezzlement, as the air compressor that he sold from the garage he leased was personal property, not real property).

Third to last line, change "§ 9-314" to "new § 9-335"

Delete § 9-314 and the following text, and replace it with the following:

§ 9-335. Accessions.

(a) [Creation of security interest in accession.] A security interest may be created in an accession and continues in collateral that becomes an accession.

(b) [Perfection of security interest.] If a security interest is perfected when the collateral becomes an accession, the security interest remains perfected in the collateral.

(c) [Priority of security interest.] Except as otherwise provided in subsection (d), the other provisions of this part determine the priority of a security interest in an accession.

(d) [Compliance with certificate-of-title statute.] A security interest in an accession i subordinate to a security interest in the whole which is perfected by compliance with the requirements of a certificate-of-title statute under Section 9-311(b).

(e) [Removal of accession after default.] After default, subject to Part 6, a secured party may remove an accession from other goods if the security interest in the accession has priority over the claims of every person having an interest in the whole.

(f) [Reimbursement following removal.] A secured party that removes an accession from other goods under subsection (e) shall promptly reimburse any holder of a security interest or othre lien on, or owner of, the whole or of other goods, other than the debtor, for the cost of repair of any physical injury to the whole or the other goods. The secured party need not reimburse the holder or owner for any diminution in value of the whole or the other goods caused by the absence of the accession removed or by any necessity for replacing it. A person entitled to reimbursement may refuse permission to remove until the secured party give adequate assurance for the performance of the obligation to reimburse.

§ 13.04(g)(6) Accession of Personalty to Realty.

Add:

Comm'r of Transp. v. Burkhart, 2003 Conn. Super. LEXIS 3166 (No. CV020087554, Nov. 7, 2003) (A billboard on condemned property was found to be personal property, and accordingly the billboard owner who leased the property space had no right to compensation); *Comm'r of Transp. v. F.T.C. Realty, 2003 Conn. Super. LEXIS 227* (No. CV0201705505, Jan. 14, 2003) (because several items could be considered personal property rather than fixtures, a lessee was entitled to a portion of a condemnation award).

Add:

Supervisor of Assessments v. Hartage Yacht Yard, Inc., 842 A.2d 732 (Md. 2004) (Lessee's buoys were taxable as personal property); *Fisher v. Baronti, 761 N.Y.S.2d 820 (2003)* (Items, though removable, were found to be fixtures since system they were a part of could not operate without them).

§ 13.04(g)(7) Rules for Relief by Recovery of Damages Rather than the property itself

Add:

but see Levine v. Fieni McFarlane, Inc., 690 So. 2d 712 (Fla. Dist. Ct. App. 1997) .

Change "Stephensen" to "Stephenson"

FOOTNOTES:
(n3)Footnote 129.2. Unif. Unclaimed Property Act § 2 cmt. (1995).

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2-13 Thompson on Real Property, Thomas Editions Supp. to § 13.05

Supp. to § 13.05 Personal Property Issues Pertaining to Fixtures

[Go To Main]

§ 13.05(a) Rights Following Actual and Constructive Severance [Go To Main]

Add:

Copple Constr., L.L.C. v. Columbia Nat'l Ins. Co., 776 N.W.2d 503 (Neb. 2009) (held that a tarp intended to be used with permanence as a lagoon cover was a fixture); *Sycamore Management Group, LLC, v. Coosa Cable Co., Inc., 2010 WL 245582* (Ala., January 22, 2010) (held that cables installed and used for cable television/internet services are fixtures but not trade fixtures). *In re Coleman, 373 B.R. 907 (W.D. Mo. 2007)* (mobile home resting on bricks and tied down to the land was not real property). *In re Steslow, 225 B.R. 883 (Bankr. E.D. Pa. 1998)* (Fixtures may be either personal property or real property in Pennsylvania).

Change 135 So. 2d 1* to *135 So. 2d 91

Add:

Carjow, LLC v. Simmons, 349 S.C. 514 (2002) (severance of a fixture may not change it into personal property); *Arizona Dept. of Revenue v. Arizona Outdoor Advertisers, Inc., 41 P.3d 631 (Ariz. App. 2002)* (test for billboards as personalty).

§ 13.05(c) Rights to Fixtures Attached by a Tenant [Go To Main]

add:

Cammack the Cook, L.L.C. v. Eastburn, 296 S.W.3d 884 (Tex. App. Texarkana 2009) (lease agreement allowed for removal of fixtures within five days of lease termination if tenant was not in default).

add:

Matter of West Bushwick Urban Renewal Area, Phase 2., *888 N.Y.S.2d 525 (2009)* (An owner of property is entitled to the value of fixtures taken by eminent domain.)

§ 13.05(c)(2) Types of Gifts

§ 13.05(c)(2)(i) Trade Fixtures.

Add:

S.S. Air, Inc. v. City of Vidalia, 278 Ga. App. 149 ; *628 S.E.2d 117* (No. A05A1647, Ga. App., Feb. 22, 2006) (hangar was a trade fixture).

Lafarge Bldg. Materials, Inc. v. Stribling, 2003 Ala. LEXIS 422 (No. 1020623, Oct. 17, 2003) (Court denied landlord's motion for cleanup costs for tenant's removal of trade fixtures).

Chapman v. Katz, 844 N.E.2d 270 (Mass. App. 2006) (automated teller machine kiosk was a trade fixture).

add:

Sycamore Management Group, LLC, v. Coosa Cable Co., Inc., 2010 WL 245582 (Ala. January, 22, 2010) (held that cable/internet cables installed in apartment complex are not trade fixtures because there was no landlord-tenant relationship).

add:

C.W. 100 Louis Henna, Ltd. v. El Chico Rests. of Tex., L.P., 295 S.W.3d 748 (Tex. App. Austin 2009) (held that air conditioning units installed by restaurant were trade fixtures).

§ 13.05(c)(2)(ii) Agricultural Fixtures.

Add:

But see Freeman v. Barrs, 237 S.W.3d 285 (Mo. App. 2007) (cattle scale treated as fixture and therefore included in the sale of the property on which the scale was situated).

§ 13.05(d) Third Parties', Trespasser', Cotenants', and Licensees' Rights in Fixtures [Go To Main]

Change 589 to 559

Change Pierce to Peirce

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Supp. to § 13.06 Personal Property Issues Pertaining to Crops

[Go To Main]

§ 13.06(a) Competing Claims of Grantor and Grantee of the Land. [Go To Main]

add:

Cranpark, Inc. v. Rogers Group, Inc., (N.D. Ohio June 2, 2010) (crops and unborn animals are considered goods in accordance with UCC); *Executone of Columbus, Inc. v. Inter-Tel, Inc., 665 F. Supp. 2d 899 (S.D. Ohio 2009)* (crops and unborn animals are considered goods in accordance with UCC).

Change Steffans to Steffens

§ 13.06(c) Competing Claims of Owner and Adverse Possessor [Go To Main]

add:

but see Chenega Corp. v. Exxon Corp., 991 P.2d 769 (Alaska 1999) (discussing *Alaska Stat. 09.17.070* which outlines when double recovery is allowed under the collateral benefits doctrine).

§ 13.06(d) Competing Claims When the Landowner Dies [Go To Main]

Add:

In re Estate of Sauder, 156 P.3d 1204 (Kan. 2005) (Sharecrop tenant's estate asserted claim to crops planted by tenant and harvested by landlord; landlord later planted additional crops).

add:

Riceland Foods, Inc. v. Pearson, 2009 WL 3486034 (Ark. October 29, 2009) (held that a purchaser of corps has a duty to make reasonable inquiry as to whether the crops are subject to a landowner's lien).

§ 13.06(e) Competing Claims of Landowner and Security Interest Holder. [Go To Main]

Add:

Meyhoeffer v. Wallace, 792 So. 2d 851 (La. App. 2002) (perfected security interest is superior to lessor's claim to rent payments).

Stockman Bank of Montana v. AGSCO, Inc., 728 N.W.2d 142 (N.D. 2007) (bank sought priority of its perfected security interest in crops over supplier's lien and financing company lien).

Add:

Burgess v. Sikes, 438 F.3d 493 (5th Cir. 2006) (crop loss was not part of bankruptcy estate).

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2-13 Thompson on Real Property, Thomas Editions Supp. to § 13.07

Supp. to § 13.07 Bailments

[Go To Main]

Add new footnote 233.1 n233.1

§ 13.07(b) Degree of Care Required of Bailees. [Go To Main]

At end of first sentence, add new footnote 234.1: n234.1

Dickerson, A. Darby, "Bailor Beware: Limitations and Exclusions of Liability in Commercial Bailments." *41 Vand. L. Rev. 129 (1998);* Kirn, Walter N., "The Use of Common Law Bailments in Connection with the Licensing of Living Organisms," PLI Order No. G4-3799, 235 PLI/Pat 289 (Jan. 1, 1987).

Bobb Chevrolet, Inc. v. Jack's Used Cars, 772 N.E.2d 171 (Ohio App. 2002) (bailee not required to remove cars to safer location during hurricane conditions); *Croskey v. Leach, 2002 Ohio App. LEXIS 5589* (in mutual benefit bailment, bailee was liable for theft in cars left in bailee's lot).

Garris v. Thomasville-Thomas County Humane Society, Inc., 941 So. 2d 540 (Fla. App. 2006) (breach of bailment alleged by claim of assault and battery in connection with euthanization of dogs left at animal shelter); *Atkins Machinery, Inc. v. C. H. Powell Company, Inc., 455 F. Supp. 2d 461 (D. S.C. 2006)* (breach of bailment action against stevedore for damage to equipment being loaded onto a ship).

Add:

Falvey Cargo Underwriting v. Metro Freezer & Storage, 2002 Mass. Super. LEXIS 444 (standard of care defined in language of receipt).

§ 13.07(c) Limiting or Extending the Bailee's Standard of Care [Go To Main]

After the citation "Bricks v. Metro Abulance Serv ... ." add:

see also Effort Enterprises, Inc. v. Crosta, 391 S.E.2d 477 (Ga. App. 1990) (discussing the duty of care that common carriers owe to clients).

Note Subsequent History:

Universal Underwriters Ins. Co. v. Kneeland, 599 N.W.2d 519 (Mich. App. 1999) ; *aff'd, 628 N.W.2d 491 (Mich. 2001)* .

§ 13.07(d) The Bailee's Duty to Redeliver [Go To Main]

Add:

Yao v. Chapman, 705 N.W.2d 272 (Wis. App. 2005) (gratuitous bailment regarding a cell line).

Palafrugell Holdings, Inc. v. Cassel, 940 So. 2d 492 (Fla. App. 2006) (negligent bailment alleged when attorney disbursed corporate funds without corporation's approval).

Add:

LaPlace v. Briere, 962 A.2d 1139 (N.Y. App.Div. 2009) (held that no breach of duty in bailment arrangement occurred upon the death of owner's horse while being held at the bailee's stable unless there is evidence of negligence or conversion).

Varel Mfg. Co. v. Acetylene Oxygen Co., 990 S.W.2d 486 (Tx. Ct. App. 1999) (a bailee is not liable for conversion until the bailor has demanded the goods and the bailee refused to redeliver, since the bailee lawfully acquired the property).

Koch Petroleum Group, L.P. v. Alliant Energy Indus. Servs., 280 F. Supp. 2d 628 (S.D. Tex. 2003) (Seller shifted to being a bailor when it accidentally yielded possession of oil along with the tanks; buyer converted when it rejected demand to return the oil).

See also Walters v. Northcutt, 2005 Tex. App. LEXIS 1048 (Tex App. 2005) .

add:

Johnson v. Liberty Mut. Fire Ins. Co., 653 F. Supp. 2d 1133 (D. Colo. 2009) (failure to deliver creates a presumption of negligence, and it is up to bailee to present contrary evidence); *Masek v. Wichelman, 2009 Conn. Super. LEXIS 282* (Conn. Super. Ct. Jan. 27, 2009) (failure to deliver creates a presumption of negligence).

§ 13.07(f) Bailee Actions Against Third Parties. Ark. Code Ann. § 18-12

add:

Carpenter v. Turrell, 227 P.3d 575 (Idaho 2010) (held that bailor had no right of action against the estate of a bailee who had wrongfully sold the bailed property).

§ 13.07(g) Implied Bailments. [Go To Main]

add:

Bank of N.Y. v. Sumter County, 691 S.E.2d 473 (S.C. 2010) (constructive bailment occurs when one has lawfully acquired the goods of another and is under a duty to redeliver the goods and keep them safe); *Sirpal v. Univ. of Miami, 684 F. Supp. 2d 1349 (S. D. Fla. 2010)* (held that bailor had no cause of action because he was not the true owner of the property); *N. Marine Underwriters, Ltd. v. FBI Exp., Inc. 2009 WL 6067053* (S. D. Tex. November 13, 2009) (both delivery and acceptance are necessary for the existence of a bailment); *Morgan Stanley & Co. v. JP Morgan Chase Bank, N.A., 645 F. Supp. 2d 248 (S.D. N.Y. 2009)* (held that a bank operating lockbox facility created a bailment); *In re Martin, 596 F. Supp. 2d 142 (D. Mass. 2008)* (held that no bailment existed because alleged bailee did not have exclusive possession of property).

FOOTNOTES:
(n4)Footnote 233.1. *LaPlace v. Briere, 962 A.2d 1139 (N.J. Super. 2009)* (horse was left in a bailment arrangement with a stable); In the *Matter of the Complaint of Martin, 596 F. Supp. 2d 142 (D. Mass. 2009)* (yacht club did not have a bailment relationship with its members).

(n5)Footnote 234.1. *Rational Software Corp. v. Sterling Corp., 393 F.3d 276 (1st Cir. 2005)* (court enforced the contractual limitations of agreement based on prior course of dealing between the two parties).

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Supp. to § 13.08 Possessory Liens

[Go To Main]

§ 13.08(a) "Specific" Common Law Possessory Liens. [Go To Main]

Change Summer to Sumner

Insert note 260.1 after the first sentence of the last paragraph in this section which begins "Common law possessory liens are classed as either ... ": n260.1

add:

Armin Tool & Mfg. v. Continental Dispensing Co. (In re Continental Dispensing Co.), 416 B.R. 661 (Bankr. E.D. Mo. 2009) (Surrendering the collateral eliminates a possessory lien.)

add:

Slappey v. Slappey, 296 Ga. App. 773 (Ga. Ct. App. 2009) (No. A08A1633, March 20, 2009, Ga. App.) (laborer's lien asserted against crop).

§ 13.08(c) The Element of Consent in Lien Creation. Kan. Stat. Ann. § 58

Change Val to Valley

§ 13.08(e)(1) Bankers.

add:

In re Lifestyle Furnishings, LLC, 418 B.R. 382 (Bankr. D. Idaho 2009) (held that the bank lost its banker's lien upon delivering debtor's funds to the bankruptcy trustee)

Add:

But see McFarland v. Brier, 850 A.2d 965 (R.I. 2004) (adopting different reasoning than *Topeka, N.A. v. Topeka Bank & Trust Co.*).

§ 13.08(e)(4) Lawyers.

Add:

Leubsdorf, John, "Against Lawyer Retaining Liens," *72 Fordham L. Rev. 849 (2004); see also Bok v. Werner, 9 A.D.3d 318 (N.Y. App. Div. 2004)* ; *Ferraioli v. Ferraioli, 8 A.D.3d 163 (N.Y. App. Div. 2004)* ; *Law Office of Allan Khoshbin v. Law Office of Michael Ruiz, 2005 NY Slip Op 50226U (N.Y. Civ. Ct. 2005)* ; *Tunick v. Shaw, 2004 N.Y. Misc. LEXIS 2954 (N.Y. Misc. 2004)* ; *Vento v. City of New York, 2004 N.Y. Misc. LEXIS 1335 (N.Y. Misc. 2004)* (following the *Lai Ling Cheng* decision on dispute between former and current attorneys); *see also Universal Acupuncture Pain Servs., P.C. v. Quandrino & Schwartz, P.C., 370 F.3d 259 (2d Cir. N.Y. 2004)* .

Add:

Schneider *et al v. City of New York, 2002 N.Y. App. Div. LEXIS 12853* (fees awarded to discharged attorneys).

add:

Chicago Title Trust Co. v. Chicago H&S Property, LLC, 419 B.R. 797 (N.D. Ill. 2009) (In order to enforce attorney's lien, notice must be served upon client.)

Add:

Pangborn Plumbing Corp. v. Carruthers & Skiffington, 97 Cal. App. 4th 1039, 119 Cal. Rptr. 2d 416 (2002) (law firm lien had priority over creditor lien).

Add:

Carragher v. Potts, 686 S.E.2d 348 (Ga. Ct. App. 2009) (held that the settlement and dismissal of the underlying action to recover client's home did not extinguish the attorney's lien on the home); *Edwards v. Doe, 331 Fed. Appx. 563 (10th Cir. 2009)* (held that a fee agreement interpreted to require attorney's services through "final determination" and a transfer of the case to another attorney after verdict but prior to receipt of judgment extinguished original attorney's lien). Brown v. Superior Court, *9 Cal. Rptr. 3d 912 (Cal. Ct. App. 2004)* (noting that judgment lien statutes "relate only to liens of judgment creditors, and do not apply to contractually created attorneys' fees liens"); *Zaldivar v. Okeelanta Corp., 877 So. 2d 927 (Fla. Dist. Ct. App. 2004)* (employer, claimant, and claimant's new attorney each had notice of former attorney's charging lien at the time of the settlement and had an affirmative duty to notify the former attorney of the settlement and to protect his lien interest in the settlement proceeds).

FOOTNOTES:
(n6)Footnote 260.1. *Conseco Loan Fin. Co. v. Boswell, 687 N.W.2d 646 (Minn. App. 2004)* (declaring that this case fell under UCC provisions rather than rules for possessory liens).

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Supp. to § 13.10 Joint Bank Accounts

[Go To Main]

§ 13.10(a) Joint Accounts [Go To Main]

Add:

Nicholas v. Nicholas, 83 P.3d 214 (Kan. 2004) (discussing the ineffective efforts of one spouse to sever joint tenancy).

Add:

Russell's AmericInn, LLC v. Eagle Gen. Contrs., LLC, 772 N.W.2d 81 (Minn. Ct. App. 2009) (Without evidence of contrary intent, a party does not own funds contributed by joint tenant.)

Cassling, Donald R. "Buyer of Farm Crops Did Not Take Crops Free of Secured Creditor's Interest In the Crops Where Exception to Food Security Act Applied," *Banking Law Journal* (January, 2006) Banking Brief.

Churchill, Martha A., "Joint Bank Accounts: One Size Doesn't Fit All," *78 Mich. B.J. 292 (1999);* Laurino, Paul, "Whose Money Is It Anyway? A Bank's Right to Setoff Against Joint Accounts," *1996 Colum. Bus. L. Rev. 61 (1996);* Ray, Nancy, "Joint Accounts, Setoff, and Distribution of Marital Property in North Carolina," *4 N.C. Banking Inst. 475 (2000).*

§ 13.10(b) Survivorship Accounts [Go To Main]

Change Cambell to Campbell

After the citation "Malek v. Patten ... " add:

but see In re Estate of Silver, 1 P.3d 358, (Mont. 2000) .

add:

Estate of Anderson, 988 A.2d 977 (Me. 2010) (held that decedent's will could not extinguish the survivorship rights of joint account holder in a joint bank account with right of survivorship)

§ 13.10(c) Convenience Accounts. [Go To Main]

Add:

Storozynski v. Storozynski, 874 N.Y.S.2d 575 (2009) (Although there is a presumption that joint account holders are entitled to equal shares of the account, this presumption can be rebutted with evidence of intent that the account was merely a convenience account.)

Radigan, C. Raymond, "Joint Bank Accounts vs. Convenience Accounts," 68-APR N.Y. St. B.J. 54 (1996).

Porter v. Porter, 2002 Cal. App. Unpub. LEXIS 9950 (tax refund was separate property, even though taxes were paid from a joint tenancy account).

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Supp. to § 13.11 Stolen Goods

[Go To Main]

Add:

Greenstein, Seth, " 'Is Software 'Goods?' Intangibility Revisited Under the UCC and the National Stolen Property Act," 8 No. 4 Computer Law. 30 (1991).

Add:

but see SongByrd, Inc. v. Estate of Grossman, 206 F.3d 172 (2d Cir. 2000) .

See also Rochester Equip. & Maintenance v. Roxbury Mtn. Serv., Inc., 891 N.Y.S.2d 781 (2009) (buyer of stolen truck granted judgment against seller for breach of contract). *Sanchez v. Univ. of Pa. Museum of Archaeology & Anthropology, 2004 U.S. Dist. LEXIS 13555* (S.D.N.Y. July 19, 2004) ; Anglim, Jennifer M., "Crossroads in the Great Race: Moving Beyond the International Race to Judgment in Disputes over Artwork and Other Chattels," *45 Harv. Int'l L.J. 239 (2004).*

Add:

but see Armbrister v. Roland Intern. Corp., 667 F. Supp. 802 (M.D. Fla. 1987) .

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Supp. to § 13.12 Personal Property Subject to Special Regulation

[Go To Main]

§ 13.12(a) Treasure. [Go To Main]

Add:

Martin v. Moore, 109 S.W.3d 305 (Tenn. Ct. App. 2003) (because the owner of the "treasure" is known, the "treasure" is not considered treasure trove).

Add:

Berns, Philip A., "A Sovereign's Perspective On Treasure Salvage," *30 J. Mar. L. & Com. 269 (1999);* Bradley, Lawrence D. Jr., "U.S. Treasure Trove Law," 10 Experience 24 (Spring 2000); Cassling, Donald R. "Buyer of Farm Crops Did Not Take Crops Free of Secured Creditor's Interest in the Crops Where Exception to Food Security Act Applied," Banking Law J. (Jan, 2006) Banking Brief. Hess, Peter E., "The Trouble with Treasure: Ethical Dilemmas for the Salvage Attorney," *30 J. Mar. L. & Com. 253 (1999);* Horan, Edward W., "Organizing, Manning, and Financing a Treasure Salvage Expedition." *30 J. Mar. L. & Com. 235 (1999);* Jones, John Paul, "The United States Supreme Court and Treasure Salvage: Issues Remaining After Brother Jonathan," *30 J. Mar. L. & Com. 205 (1999);* Steele, Chauncey D. IV, "The Morgantina Treasure: Italy's Quest for Repatriation of Looted Artifacts," *23 Suffolk Transnat'l L. Rev. 667 (2000).*

§ 13.12(b) Salvage. Ariz. Rev. Stat. Ann. § 33

Add:

but see Dluhos v. Floating and Abandoned Vessel, Known as New York, 162 F.3d 63, (2nd Cir. 1998) ; *Fairport Intern. Exploration, Inc. v. Shipwrecked Vessel, Captain Lawrence, 177 F.3d 491 (6th Cir. 1999)* ; *Columbus-America Discovery Group v. Atlantic Mut. Ins. Co., 203 F.3d 291 (4th Cir. 2000)* ; *Dluhos v. The "New York", 162 F.3d 63 (2d Cir. 1999)* (admiralty law does not recognize finders of vessels, because vessels cannot be abandoned as a matter of law); *Autocephalous Greek-Orthodox Church of Cyprus v. Goldberg, 917 F.2d 278 (7th Cir. 1990)* (recovery of art works removed during war time).

§ 13.12(c) Cultural Property. [Go To Main]

Add:

United States v. Eighteenth Century Peruvian Oil, 597 F. Supp. 2d 618 (E.D. Va. 2009) (held that a colonial period painting imported from Bolivia could be seized and returned to Peru according to Cultural Property Implementation Act).

Strahilevitz, Lior Jacob, "The Right to Destroy," *114 Yale L.J. 781 (2005);* Dutra, Michael L, "Sir, How Much is that Ming Vase in the Window?: Protecting Cultural Relics in the People's Republic of China," *5 Asian-Pacific L. & Pol'y J. 62 (2004);* Cunning, Andrea, "U.S. Policy On The Enforcement of Foreign Exports Restrictions on Cultural Property & Destructive Aspects of Retention Schemes," 26 Hous. J. Int'l L. 449 (2004); Matlon, Amina Para, "Safeguarding Native American Sacred Art by Partnering Tribal Law and Equity: An Exploratory Case Study Applying the Bulun Bulun Equity to Navajo Sandpainting," *27 Colum. J.L. & Arts 211 (2004).*

Add:

Abtahi, Hirad, "The Protection of Cultural Property in Times of Armed Conflict: The Practice of the International Criminal Tribunal for the Former Yuguslavia," *14 Harv. Hum. Rts. J. 1 (2001);* Coggins, Clemency, "Cultural Property and Ownership: Antiquities," *16 Conn. J. Int'l L. 183 (2001);* Cuno, James, "Art Museums and Cultural Property," *16 Conn. J. Int'l L. 189 (2001);* Doyal, Stephanie, "Implementing the Unidroit Convention on Cultural Property Into Domestic law: The Case of Italy," *39 Colum. J. Transnat'l L. 657 (2001);* Murphy, Sean D., "Trafficking in Stolen Cultural Property," *94 Am. J. Int'l L. 544 (2000);* Paterson, Robert K.,"Claiming Possession of the Material Cultural Property of Indigenous Peoples," *16 Conn. J. Int'l L. 283 (2001);* "Reports from the Front Lines of the Art and Cultural Property Wars," Symposium, *19 Cardozo Arts & Ent. L.J. 1 (2001);* Roussin, Lucille, "Cultural Property," *35 Int'l Law. 649 (2000);* Rudenstine, David, "Cultural Property: The Hard Question of Repatriation: The Rightness and Utility of Voluntary Repatriation," *19 Cardozo Arts & Ent. L.J. 69 (2001);* Scafidi, Susan, "Intellectual Property and Cultural Products," *81 B.U. L. Rev. 793 (2001);* Stephenson, David J. Jr., "The Nexus Between Intellectual Property Piracy, International Law, the Internet, and Cultural Values," *14 St. Thomas L. Rev. 315 (2001);* Wilf, Steven,"What Is Property's Fourth Estate? Cultural Property and the Fiduciary Ideal," *16 Conn. J. Int'l L. 177 (2001);* Wilkes, Nicole B., "Public Responsibilities of Private Owners of Cultural Property: Toward a National Art Preservation Statute," *24 Colum.-VLA J.L. & Arts 177 (2001);* Wilkie, Nancy C., "Public Opinion Regarding Cultural Property Policy," *19 Cardozo Arts & Ent. L.J. 97 (2001).*

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Supp. to § 13.13 Bibliography.

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CHAPTER 14 THE NATURE AND KINDS OF PROPERTY +

2-14 Thompson on Real Property, Thomas Editions 14.syn

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§ 14.syn Synopsis to Chapter 14: THE NATURE AND KINDS OF PROPERTY +

Ind. Code Ann. § 30-1-2-33Introduction to the Chapter.

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§ 14.04(d) Property Rights Associated with Future Interests.

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CHAPTER 14 THE NATURE AND KINDS OF PROPERTY +

2-14 Thompson on Real Property, Thomas Editions § 14.01

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§ 14.01 Introduction to the Chapter.

This chapter describes the American law that defines the nature, kinds and basic characteristics of property. Ownership as an essential element of property is described, property is comprehensively defined, real and personal property are distinguished, various kinds of real property are identified, possessory rights related to real property are explained.

+ This chapter is based in part on Chapter 1 of George W. Thompson, Commentaries on The Modern Law of Real Property (John S. Grimes, ed. *1979),* which made a significant contribution toward preserving the American common law governing basic property definitions and characteristics.

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CHAPTER 14 THE NATURE AND KINDS OF PROPERTY +

2-14 Thompson on Real Property, Thomas Editions § 14.02

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§ 14.02 Ownership as an Element of Property.

§ 14.02(a) The Meaning of Ownership.

One who is the "owner" of property possess the fullest extent of rights and privileges regarding that property as recognized by the owner's jurisdiction. It has long been in Anglo-American jurisdictions that no person can be an absolute owner of lands, but can hold only a type of ownership called an estate. n1 Courts recognize that an owner has title only to a "bundle of privileges." n2 The extent to which the "owner" may exercise these privileges is defined by the jurisdiction's prevailing political philosophy or theory at any given time. In an anarchical society no limitations are placed on the owner's use. Conversely, as a society progresses in the direction of a totalitarian state the controlling government withdraws from the owner more and more "privileges." In common-law jurisdictions, the rule of ownership is somewhere between those extremes, with broad rights of ownership limited by reason and by needs of the sovereign; an example of this blend is the typical rule that ownership of the space above the surface extends only so far as is necessary to the enjoyment of the use of the surface without interference. n3 The common-law sovereign normally reserves at least three sticks out of the bundle: the powers to tax, to police and to condemn. In addition, the United States Constitution has unfettered the federal government in other areas, such as war and commerce, which may enable the federal government to take away other ownership rights. n4

The word "own" is a term embracing several gradations of title dependent upon circumstances and commonly means to possess, to have or hold, as property. n5 It necessarily involves a right, either present or in the future, to exercise some degree of dominion over the property. n6 The common law of property generally gives free use of property to the property's owner. n7 Hence, a grant of property carries with it an implication that the grantee shall have all that is necessary to the enjoyment of the grant, so far as the grantor has power to give. n8 An owner's right to exclude others from the use of the land is an incident of complete ownership of the land. n9

The power or assertion of exclusive ownership is manifested by boundaries, fences and walls encircling land, and the dominion of the individual is permitted and defended by the state as a pure matter of convention and policy. Nevertheless, land is indestructible in character, limited in extent and incapable of increase, and cannot be regarded as a true subject of permanent individual appropriation. Regardless of how important it is that the tenure of land be secure, the paramount dominion of the state over every part of its territory is demonstrated by laws prohibiting the entailment of

estates in land, abolishing primogeniture, and imposing succession, taxes, among other measures.

So the essence of ownership is legal control over a thing; it is the right by which a thing belongs to a person or entity individual, to the exclusion of all other persons and entities. The limits of this right are elastic and are subject to being narrowed or enlarged. Others may have rights in a thing which limit the control of the owner. These rights of another may be so extensive that there may remain to the owner only an ultimate right of reversion. When, for any reason, the rights of such others are lost, then the right of ownership is automatically restored in its full extent.

"Ownership" has been defined as "the right by which a thing belongs to some one in particular, to the exclusion of all others." n10 It does not always mean absolute ownership, n11 but it has the meaning when used alone, n12 without any qualifiying words. n13 As used in the *Restatement of Property*, the word "owner" means "the person who has one or more interests." n14 It has been defined to include one who has the use, control and occupation of the land with a claim of ownership, whether the interest be an absolute fee or a lesser estate. n15 When used without restriction the term includes both general and special owners. n16 Although a person holds only the equitable title to property, one may be considered an owner of the property. n17

Title to real estate is the means whereby the owner has the just possession of the property. n18 The constituent elements of "ownership" of property are the right to its possession, use and enjoyment and to sell or otherwise dispose of it according to the will of the owner. n19 The owner is entitled to the undisturbed occupation and enjoyment of the property. n20 Title to real estate must at all times be vested in someone. n21 The equitable ownership of realty is regarded by equity as the real ownership. n22 Land must always have an owner, and when the previous owner dies without alienation the law transfers the land for the decedent. n23 Perfect title requires a union of actual possession, right of possession and right of property. n24

The right to dispose of property is a badge of ownership. n25 Assessment of property and liability for the payment of taxes on the property is evidence of ownership. n26 The assessment of real estate by the taxing authorities as the property of a named person justifies a presumption of ownership, either in the person, or, in case of the person's death, in the person's heirs at law. n27 Also, the right to lease property is an incident of ownership. n28 Ownership of real estate is in fact a tenancy, whose continuance is contingent on legally recognized rights of tenure, transfer and succession in use and occupancy. n29 Ownership of the legal n30 or record title to land carries with it a presumption of possession, n31 but too great reliance must not be placed in a record title since the record does not always disclose rights that may be held by others in real property. n32 A record title may be defeated by proof of adverse possession for the required period of time. n33 Nevertheless, a record title to land is the highest evidence of ownership n34 and is not easily defeated. n35 Possession of land may give rise to a presumption of ownership. n36

The ownership of realty carries with it as an incident thereto the prima facie presumption of the ownership of both the natural products of the land, such as grass and trees, and the emblements or annual crops grown thereon, but such presumption is not conclusive and may be rebutted. n37

While proof of possession creates a presumption of ownership, such presumption is rebuttable and may be controverted. n38 In an action for injuries to real property, proof of possession by the plaintiff at the time the cause of action accrued is sufficient to show prima facie ownership. n39 It is also presumed that a party owning land will in some way assert the owner's rights. n40 The burden of establishing title is on the party making claim thereto. n41 Title to land cannot be acquired merely by placing doors or gates so that they open onto it, even though the owner gives consent thereto, since nothing more than a mere license is thereby granted. n42

The scope and import of the term "owner" are often controlled by the context and purpose of statutes relating to real property. When used in a statute the nature and purpose of the statute may indicate the meaning of the term. n43 Thus, a vendee in possession under a land contract that obligates the vendee *to* pay the purchase price is generally held to be the owner within the contemplation of certain statutes. n44 It has been held that for some purposes a tenant for years, or for

a lesser period, is the owner of the demised property, n45 but for other purposes such tenant has been held not the owner. n46 It has been held that a mortgagee is, for the purposes of some statutes, the owner of the real estate covered by the mortgage, n47 while in construing other statutes a different view has been taken. n48

The term "owner," as used in the statutes, has no technical meaning. n49 "The term 'owner,' when employed in statutes relating to eminent domain to designate the persons who are to be made parties to the proceeding, refers, as is the rule in respect of those entitled to compensation, to all those who have any lawful interest in the property to be condemned." n50

Ownership of real property, once established, is not presumed to be lost. n51 Possession of real estate is prima facie evidence of ownership as against one who is not in possession but claims adversely. n52

The doctrine of *de minimus non curat lex* (the law is not concerned with trifles) has no application to controversies involving real estate. n53

A landowner is entitled to the control of the air space above the land, subject to the dominion of the sovereign, n54 and likewise owns the space beneath the surface. Conceivably, the earth being a sphere, the ownership of the air space and the subsurface are cone shaped with the former right truncated, the surface being the base. In the latter case, the center of the earth is the point of the cone.

§ 14.02(b) Ownership Entities.

Units of ownership. Throughout the development of the property law entities recognized as qualified to own property included the sovereign, the Celtic "tuath" or clan, the commons, the corporation and the individual. Corporate ownership entities in common law regimes could be the corporation sole, the bishop, the religious corporation and the public corporation. The private corporation is a later development and purely a creature of statute. Ownership of land at common law was, except in the case of the public corporation, affected by the mortmain statutes, n55 which were intended to prevent accumulation of property by lay or ecclesiastical corporations. There is much misunderstanding among the courts today as to whether private corporations were affected by mortmain or whether mortmain ever became part of the common law.

Except for the interests of certain Indian tribes recognized by Congress, n56 the tuath or clan ownership of realty is not recognized in the United States today, nor is the right of community holding except in a limited degree. n57

Ownership therefore may be in the individuals, in various forms of corporations and other organization entities, and in the sovereign. The sovereign may own in a proprietary sense or as trustee for the public interest.

The only exceptions to this are in the case of partnership under the Uniform Partnership Act, the "condominium" with its commons and the communitization of fugitive minerals.

Laches is applicable where the sovereign is operating in a proprietary not a governmental capacity. n58

The Celtic social unit seems to have been the clan, the Irish "Tuath." This was supplanted in England by the Roman sense of individual ownership which seems to have become increasingly manorial toward the close of the Roman rule. The Germanic invaders probably introduced the "comitatus" or tribal loyalty idea. n59 This expanded into the state under the later Anglo-Saxon and later the Danish rule. Land ownership during this period was partly family in the commune and partly individualistic. Under the Norman king and "le estate est moi," the state, as epitomized in the king, was the owner of all land. All individuals held of the king. Throughout the centuries following the Conquest the ownership of land passed more and more to the individual. As this movement reached its peak, however, a new trend, the consciousness of the needs of society as opposed to the individual, arose. The individualistic impression reached its

height during the early Victorian period. It promptly began to erode through the development of the "nuisance" doctrine, eminent domain, zoning and land use laws, water control and control over consumption of profits. In other countries this trend moved to a total suppression of all property rights in real estate, even in the issues of realty. n60 How far this movement will progress among peoples with the background of the common law remains to be seen.

Property, with regard to the nature of its ownership and use, may be held either privately, by corporate or other entities, or by the public. The terms "private" and "corporate," when applied to property, are employed in contradistinction to "public." Private property is that which is one's own, something that belongs to or inheres exclusively in an individual person. n61 The term includes all kinds of private property, everything that can be held or owned by private persons. n62

"Private property," in its nature and purpose, is a monopoly. The very essence thereof is that the owner may do with the property as the owner sees fit, provided always that the owner does not interfere with the legal rights of others. n63 The term "private property," in a constitutional restriction that private property shall not be taken for a public use without due compensation, applies to such property as belongs absolutely to an individual, and of which the owner has the exclusive right of disposition; property of a fixed, specific, and tangible nature, capable of being had in possession and transmitted to another, such as houses, lands, and chattels. n64 The fact that private property is used exclusively for a public purpose does not convert it into public property or change its nature or title as private property. n65 The power to take private property for a public use applies, with certain limitations, to private property already devoted to one public use. n66 All property and property rights are held subject to the fair exercise of the police power of a municipality. n67

Ownership by the federal or state governments or their subsidiaries may be held either in a capacity of a public trust or in a proprietary sense. n68 The term "public property" embraces only such property as is owned by the state or some political division thereof, and title to which is vested directly in the state or one of its subordinate political divisions, or in some person holding exclusively for the benefit of the state of a subordinate public corporation. n69 Hence, property owned by a private person or corporation and from which such owner derives an income is not public property, although it be used for a public purpose. n70 Property used by a city for the benefit of all inhabitants thereof is public property. n71

On the edge of these classifications are the associations, so-called common- law corporations, as the joint stock company, and the real estate or Massachusetts business trust. Each of these requires special treatment.

Control by the sovereign of individual use of property through the police power is steadily developing. In the early phases of this expansion statutes were enacted limiting use, such as oil proration n72 and communitization, n73 soil conservation, n74 water pollution, and general land control, n75 as well as those imposing an affirmative duty, such as weed cutting, and sealing of abandoned wells. The Texas legislature has also upheld communitization of interests in the same oil field. n76

The sovereign, in the forms of the United States Government, the several states, counties, municipalities or similar political bodies is capable of owning and holding land either as a proprietor or in trust for the public. n77

§ 14.02(c) Limitations on Exercise of Ownership Rights.

Limitations on the exercise of the rights of "ownership." If the correct concept of land ownership in America was ever truly "allodial," then each "owner" could make use of the own land without regard to the needs or desires neighbors or of the scrutiny of the sovereign. Such an unlimited right is anarchic and impossible in an organized society. As the growing importance of the community expands, individual rights increasingly yield to the best interests of society. Therefore, increasing density of population, scientific development and diminution of natural resources all induce a sharing of individual property rights with the community. As changes in political thinking tend to increase the importance of the state over the individual, so are the limitations on the use of his property tightened.

At common law the rigidity of the property rules protected the individual from raids by others on the exercise of individual property rights. In America this protection is extended by the provisions of the state and federal constitutions. Federal encroachments must therefore be justified under one of the great powers, commerce or war, as the courts expand such powers. State encroachments depend on the "police power." It must be remembered, however, that even under American jurisprudence the taking of private property rights by the sovereign is not absolutely prohibited, and private property ownership has never been purely allodial.

Within the limits of the law, an owner of property may do with the property as the owner pleases, n78 including disposing of the property in any manner desired, in the absence of a showing of a lack of mental capacity, fraud or undue influence. n79 Two streams of legal thought, the *sic utere* doctrine (that land must not be used to harm others) and the public policy rule, have been steadily eroding the notion of nearly absolute property rights, both above and below the surface. To these conflicting philosophies there must be added a third, the extent that the interest of the sovereign people transcends private rights. So land use control by zoning and other land use regulation has become very important. n80 The main limitation upon a property owner's right to use the property as desired is the police power. n81 In this area one is required to find the dividing line between the common-law principle of nearly absolute ownership, including above and below the surface, and the maxim *sic utere tuo ut alienum non laedas,* so make use of your own that you do not injure others.

Each landowner has four basic rights as against neighbors: first, freedom from from interference with possession, as for example against trespass; second, freedom from injury to land by neighbors, including lateral and subjacent support and exercise of due care not to injure; third, the right that a nuisance shall not be committed on the land of a neighbor which will interfere with use and enjoyment; and fourth, that the land will not be subject to permanent physical damage by a condition on the neighbor's land. The sovereign has the power to prevent a landowner from using the land in a manner that injures the public. n82

So it must be borne in mind that all property within a state is held on the implied condition or obligation that the owner will use it so as not to interfere with the rights of others, n83 and this rule applies whether the particular property is used by the owner or is dedicated to the public. n84 The principle has been stated that "property in land must be considered, for many purposes, not as an absolute, unrestricted dominion, but as an aggregation of qualified privileges, the limits of which are prescribed by the equality of rights, and the correlation of rights and obligations necessary for the highest enjoyment of land by the entire community of proprietors." n85 So, an owner is entitled to be secured in the full beneficial use of the property and complete dominion over it so long as the use and dominion do not invade the corresponding legal rights of others. n86

The sovereign has the power to prevent a landowner from using the land in a manner which injures the public. n87 The owner may enjoy the property as desired, unless the use interferes with the neighbors' similar rights or infringes the rights of the public. n88 This right will not be curtailed unless an intent to curtail is clearly made to appear. n89 This principle, embodied in the maxim *sic utere tuo ut alienum non laedas,* enjoins that every one in the use of one's own property should avoid injury to one's neighbor as much as possible. n90 Inasmuch as the doctrine of reasonableness in the enjoyment of one's property has generally become the test in determining the question of liability for damages, it follows that an owner is liable only for injury resulting from unreasonable use, and this must be determined as a question of fact under all the attendant circumstances. n91 The right to devote one's property to any legitimate use is within the protection of the federal constitution. n92 However, while the owner of land has a right to make any reasonable use of the property, and when employing it for such use may on occasion rightfully injure another, it does not follow that by its use for a wholly wrongful purpose the owner may also rightfully injure another. n93

The cases are divided as to whether property used in compliance with zoning ordinances may constitute a nuisance per se. n94 The Supreme Court of the United States has determined that the basis of the Fourth Amendment is human rights, not protection of property. n95

Anything which annoys or disturbs one in the free use, possession or enjoyment of one's property or which renders its ordinary use or occupation physically uncomfortable may be a "nuisance" and may be restrained. n96 The dust arising from an asphalt mixing plant might constitute a nuisance in one locality where it would not in another locality. The mere showing that neighboring property owners were "inconvenienced" by the dust is insufficient to grant an injunction. n97

A landowner has the right to use the land in a lawful manner, even though damage to others may result. But the landowner has a duty to abate a nuisance, even though arising from a lawful use. n98

Of course one who generates on one's own land a condition that spreads to another's land can so commit a trespass for which the originator is liable. n99

Underground vibrations, such as shock waves caused by blasting are actionable if injury results to other landowners. n100 One driving piles assumes responsibility for injury to neighboring buildings. n101 Opinions vary, however, as to whether such underground trespasses create an absolute liability or whether due care is the test. n102

In the absence of sufficient evidence to invoke the attractive nuisance doctrine, a landowner owes no different or greater duty to an infant trespasser than to an adult trespasser. n103 Where a city does not create the condition resulting in a nuisance on private realty, its failure to exercise its power by statute to abate the nuisance does not render it liable for injuries sustained thereon. The attractive nuisance doctrine is based on the negligence of the proprietors. n104

While some courts still hold that as respects children there must be something on the premises to lure them, in order for attractive nuisance liability to arise, n105 other courts find liability where the owner of the premises could have foreseen the possibility of harm. n106

As a general rule, the owner of real estate in fee simple has the right to use it for any lawful purpose. n107 His use of his property is limited only by the proper exercise of the police power. n108 Thus, property is also held subject to the police power of the state so to regulate its use in a proper case as to secure the safety, health, morals, good order and general welfare of the community. n109 The government may, in the legitimate exercise of the police power, enact laws requiring owners of property to use the same so as not unnecessarily to injure others. n110 The police power of the state is not without its limitations, however. An unreasonable invasion of private rights or impairment of the rights of the property guaranteed by the constitution, under the guise of a police regulation, will not be sustained. n111

Ordinances restricting the use of property must be uniform in their operation and not discriminatory as to property of the same class. n112 Property is also subject to the power of eminent domain, n113 and the owner's title thereto may be wholly extinguished by condemnation proceedings. n114 Whether a building was, under statute, subject to destruction as a firetrap, is a justiciable question for a court, and if it is so established, the building may be condemned without compensation. n115

Control by the sovereign, through use of the police power, of individual use of property is steadily developing. n116 Statutes have been enacted limiting use, such as oil proration n117 and communitization, n118 soil conservation, n119 stream pollution, water conservation n120 and general land control, n121 as well as those imposing an affirmative duty, such as weed cutting, and sealing of abandoned wells. State legislatures have upheld communitization of interests in the same oil field. n122 A proration statute was upheld n123 as a proper limitation on use and so were statutes requiring sealing of abandoned wells. n124

Government policy does not force courts to give extraterritorial effect to confiscation decrees of foreign governments. n125 Statutes sometimes require the establishment of boundary fences and impose a liability for injury to adjoining landowners where this requirement is not met. n126 It is within the power of Congress to consider aesthetic values as

well as public health in enacting redevelopment legislation for the District of Columbia regardless of the Fifth Amendment. n127 A property owner who has heavily invested in land cannot lose the interest in land through the enforcement of a subsequent zoning ordinance based upon an arbitrary and unreasonable use of police power. n128

§ 14.02(d) Variance in Ownership Rights According to Controlling Law.

Many elements of property law vary between the jurisdictions. It is a basic principle of law that the law of the jurisdiction controls as to the real property located in that jurisdiction, while the law of the owner's domicile applies to personal property. Title to and the disposition of real property, whether by deed, a will or otherwise, is governed exclusively by the law of the place where the property is situated. n129 It follows that all questions relating to the transfer of title to real estate are governed by the law of the place where the land is situated. n130 Trusts of land are governed by the of the jurisdiction where the trust land is located. n131

Every state has authority to prescribe rules for the disposition and arrangement of all property within its borders, and may impress on that property any character which it may see fit. Hence it follows that the law of the place where the property is situated must be looked to in determining its character as real or personal. n132 This rule conforms to the rule laid down in the *Restatement (First) of Property. n133* The incidents of ownership of immovable property are dependent on the law of the situs. *n134* The rules of descent and the right to devise property, as well as the method of conveying and the manner of creating estates, are purely statutory. n135

The courts of one state cannot create an interest in real estate situated in another state, nor can they adjudicate the title or control the devolution of real estate situated in a foreign state. *n136* The nature of an interest in land is controlled by the law of the situs. n137

Since the law of the jurisdiction where the property is located will change on the removal of the property from one state to another, it follows that the character of the same property, whether real or personal, may vary according to the place where it is situated. n138 When certain property is classified by the law of the jursidiction where the property is located, that classification is not subject to question in another jurisdiction. n139 This principle that the law of the jurisdiction where the property is located governs is subject to an exception as to obligations which, although related to real property, do not directly affect the title to or interest in the property itself. n140

Personal property held in cotenancy retains the characteristics imposed by the law where it was originally acquired, even if the parties move to a different jurisdiction having other characteristics. n141 The interest of one spouse in movables acquired by the other during the marriage are determined by the law of the domicil of the parties when the movables are acquired. n142

It is generally held that the situs of personal property follows the domicil of the person of the owner. n143 This is not an inflexible rule of law, but a legal rule adopted for convenience and to prevent injustice. n144 Whether property is a part of the real estate is to be determined by the law of the state in which the real estate is situated. n145

FOOTNOTES:

(n1)Footnote 1. "No man is in law the absolute owner of lands. He can only hold an estate in them." J oshua Williams, Principles of The Law of Real Property, 17 (1926).

(n2)Footnote 2. *Pennsylvania R. Co. v, Kearns, 48 N.E.2d 1012 (Ohio App. 1943).*

(n3)Footnote 3. *Dlugos v. United Air Lines, 53 Pa. D.&C. 402 (1944). See infra* Chapter 51, *Private Property Right in Airspace.* Michael A. Heller, *The Boundaries of Private Property.* 108 Yale L, J. 1163 (1999).

(n4)Footnote 4. *See* Morton J. Horwitz, *The Transformation in the Conception of Property in American Law, 1780-1860. 40 U. Chi. L. Rev. 248 (1973);* Donald W. Large, *This Land is Whose Land? Changing Concepts of Land As*

Property, 1973 WIS. L. Rev. 1039. See infra Chapter 72, *Sources of Government Police Power;* Chapter 81, *Regulatory Takings.*

(n5)Footnote 5. *Bird v, Wilmington Soc. of Fine Arts, 43 A.2d 476 (Del. 1945).*

At common law the right to receive income from land was ownership. *United States v, Dresser Industries, Inc., 324 F.2d 56 (5th Cir. 1963).*

(n6)Footnote 6. *Geenty v. Phoenix Mut, Life Ins. Co., 14 A.2d 720 (Conn. 1940).*

(n7)Footnote 7. *Zadworny v. Chicago, 44 N.E.2d 426 (Ill. 1942); State v. Malone, 168 S.W.2d 292 (Tex. App. 1943).*

(n8)Footnote 8. *Commonwealth v. Richardson, 48 N.E.2d 678 (Mass. 1943).*

(n9)Footnote 9. *Phillips v. Washington Legal Foundation, 524 U.S. 156 (1998)* (property consists of a group of rights, which the so-called owner exercises in exercising dominion over the physical thing, such as right to possess, use, and dispose of it); *East Rochester v. Rochester Gas & Elec. Corp.. 46 N.E.2d 334 (N.Y. 1943).*

(n10)Footnote 10. *Mason v. Rosewell, 438 N.E.2d 653, 656 (Ill. App. 1982)* (contract purchaser or assignee, who has control or occupation of land, or rights to enjoy enefits, is an owner; the word "owner" is broad and flexile, applying not only to legal title holders, but also to others having control or enjoyment of property); *Royal Ins. Co. v. Drury, 132 A. 635 (Md. 1926); East Rochester v. Rochester Gas & Elec. Corp., 46 N.E.2d 334 (N.Y. 1943). See Automobile Underwriters v. Tite, 85 N.E.2d 365 (Ind. App. 1949); Ziegler v. Sutphin, 62 A.2d 750 (N.J. Supp. 1948).*

(n11)Footnote 11. *State v. McKinnon, 133 A.2d 885 (Me. 1957)* (a fee owner was held guilty of violating state game laws in hunting on his own land which had been set aside as a state game preserve); Edwards *& McCullock Lumber Co. v. Mosher, 60 N.W. 264 (Wis. 1894). See also Schott v. Harvey, 105 Pa. 222 (1884).* Thomas A. Merrill, *Property and the Right to Exclude. 77 Neb. L. Rev. 730 (1998).*

(n12)Footnote 12. *McFeters v. Pierson, 24 P. 1076 (Colo. 1890).*

(n13)Footnote 13. *Warren v. Lower Salt Creek Drainage Dist., 147 N.E. 248 (Ill. 1925).*

(n14)Footnote 14. Restatement of Property § 10.

(n15)Footnote 15. *Marcus v. Board of Street Comm'rs, 147 N.E. 866 (Mass. 1925); Judd v. Landin, 1 N.W.2d 861 (Minn. 1942); Graf v. State, 225 N.W, 466 (Neb. 1929): Tobin v. Gartiez, 191 P. 1063 (Nev. 1920); Schram v. Manary, 260 P. 214, 262 P.263 (Or. 1927); United States Nat'l Bank v. Lake Superior Terminal & Transfer Ry. Co., 174 N.W. 923 (Wis. 1919).* When applied to real estate, without any qualifying words, the term "owner," in common as well as legal parlance, has been said to mean owner in fee simple. *Warren v. Lower Salt Creek Drainage Dist., 147 N.E. 248 (Ill. 1925).* When the term "property owner" is used without restriction, it includes both general and special owners. *People ex rel. Hart v. Lombard, 149 N.E. 584 (Ill. 1925).*

(n16)Footnote 16. *People ex rel. Hart v. Lombard, 149 N.E. 584 (Ill. 1925); Sheridan v. Bean, 49 Mass. 284 (1844); Hartford v. Brady, 114 Mass. 466 (1874).*

One's ownership of real property is sufficiently alleged by an averment that one is "seised and possessed" thereof. Gilb v. O'Neill, *142 S. 397 (Ala. 1932).*

(n17)Footnote 17. *Reinhold v. Fee Trunk Sewer, Inc., 664 S.W.2d 599, 603 (Mo. App. 1984)* (equitable title is the right in a party to whom such title belongs to have legal title transformed upon performance of specified condition);

Hough v. City Fire Ins. Co., 29 Conn. 10 (1860); State ex rel. St. Louis v. Baumann. 153 S.W.2d 31 (Mo. 1941); Graf v. State, 225 N.W. 466 (Neb. 1929); Imperial Fire Ins. Co. v. Dunham, 12 A. 668 (Pa. 1888).

(n18)Footnote 18. *K.C. 1986 Ltd. Partnership v. Reade Mfg., 33 F. Supp. 2d 820, 833 (W.D. Mo 1998)* (under Missouri law, equitable title passes to the prospective purchaser of real property once the right to redeem title is vested in the prospective purchaser); *See also IMM Acceptance Corp. v. First Nat'l Bank & Trust Co. of Evaston. 499 N.E.2d 192 (Ill. App. 1986)* (title to property does not necessarily involve ownership of property; "title" refers only to legal relationship to land, while "ownership" is comparale to control; key elements of ownership are control and the right to enjoy enefits of property); *Heiferman v. Scholder, 119 N.Y.S. 520 (1909).*

See Peter M. Folger, *Earthquake: A Fault in the Law of Real Property*, 6 U. San Francisco L. Rev. 386 (1972); Morton J. Horwitz, *The Transformation in the Conception of Property in American Law*, 1780-1860, *40 U. CHI. L. Rev. 248 (1973).*

(n19)Footnote 19. *United States v. D.K.G. Appaloosas, Inc., 630 F. Supp. 1540, 1560 (E.D. Tex. 1986)* (right to sell property is one of several indicia of ownership); *Deoer v. Oakrook Home Ass'n, 359 N.W.2d 768, 771 (Ne. 1984)* (purchasers acquired title to property when they entered into a contract to purchase land, the legal title remaining in the vendor only as a security for payment); *In re Eckert's Estate, 128 P.2d 656 (Wash. 1942).*

(n20)Footnote 20. *Energy Oils, Inc. v. Montana Power Co., 626 F.2d 731 (9th Cir. 1980)* (ownership is a collection of rights to use and enjoy property, including the right to sell and transmit); *Cuneo v. Chicago, 41 N.E.2d 473 (Ill. 1942).*

(n21)Footnote 21. *Hardin v. Sherley, 166 S.W.2d 425 (Ky. 1942); Comelison v. Yelton, 177 S.W.2d 879 (Ky. 1944).*

(n22)Footnote 22. *Illinois Nat'l Bank v. Gwinn. 61 N.E.2d 249 (Ill. 1945).*

(n23)Footnote 23. *Scott v. Powell, 182 F.2d 75 (D.C. Cir. 1950); Hallas v. Evans, 207 P.2d 985 (Ariz. 1949). modified 208 P.2d 1153 (Ariz. 1949).*

(n24)Footnote 24. *Evans v. Francis, 101 N.Y.S.2d 716 (1951).*

(n25)Footnote 25. *Mullin v. Trolinger, 179 S.W.2d 484 (Mo. App. 1944); White v. While, 150 S.E. 531,* (W. Va. 1929).

(n26)Footnote 26. *Slagle v. Callaway. 64 S.W.2d 923 (Mo. 1933). But see Wheaton College v. Department of Revenue, 508 N.E.2d 1136 (Ill. App. 1987)* (apartment building leased by college and used for student housing was not exempt from property taxation; even though the lease gave college several incidents of ownership, including the rights to remove existing structures and sublease the property, the college was not "owner" of the building within a meaning of tax exemption statute); *Coles- Cumberland Professional Development Corp. v. Department of Revenue of State of Ill., 672 N.E.2d 391.* 394 (Ill. App.1996) (ownership of property is separate from title in determining whether property does not qualify for tax exemption ecause intent of owner is to use property for profit).

(n27)Footnote 27. *State ex rel. Mitchell v. McDonald, 145 So. 508 (Miss. 1933); Wild v. Cahill, 113 A. 257 (N.J. 1921). See infra* Chapter 88, *Testamentary Transfers of Real Property;* Chapter 89. *Intestate Succession.*

(n28)Footnote 28. *Norwest Bank Arizona v. Superior Court In and For County of Maricopa, 963 P.2d 319, 323 (Ariz. 1998)* (right to rent under a lease of real property is an incorporeal hereditament that is an incident to an estate in land); *Magnolia Petroleum Co. v. Carter, 2 So. 2d 680* (La. App, 1941); *Assessors of West Springfield v. Eastern States Exposition. 93 N.E.2d 462 (Mass. 1950); Attorney General v. Pere Marquette Ry. Co., 248 N.W. 860 (Mich. 1933). See infra* Chapter 39, *Leasehold Estates;* Chapter 40, *Rights and Duties of Landlords and Tenants.*

(n29)Footnote 29. *Chicago Patrolmen's Ass'n v. Department of Revenue, 664 N.E.2d 52, 57 (Ill. 1996)* (legal title alone is not a decisive factor; rather, concern is with realities of ownership and, under the test, key elements are control or right to enjoy benefits of property); *In re O'Connor's Estate. 252 N.W. 826 (Neb. 1934).*

(n30)Footnote 30. *Liberty Oil Co. v. Condon Nat'l Bank, 291 F. 293 (8th Cir. 1923); Moyle v. Campbell, 119 S.E. 186 (S.C. 1923).*

(n31)Footnote 31. *City of Milwaukee v. Greenberg, 471 N.W.2d 33, 36 (Wis. 1991)* (land contract vendor is not a "property owner" for purposes of imposing liability for payment of costs incurred by city in razing building on property; under equitable conversion, "ownership" under a land contract does not necessarily follow retention of bare title by a land contract vendor--the vendee may become the equitable owner of the property even though the vendor retains legal title); *Houghton County v. Massie, 184 N.W. 446 (Mich. 1921).* Where land is covered by two patents held by different persons and not in actual possession of any one of those persons, constructive possession is in the holder of the title under the senior patent. *Elliott v. Hensley, 222 S.W. 507 (Ky. 1920).* This principle applies to wild and unenclosed lands. *Constant v. Almus, 281 S.W. 26 (Mo. 1926).*

(n32)Footnote 32. *Hemme v. Stein, 218 P. 853 (Okla. 1923).*

(n33)Footnote 33. *Rush Creek Land and Live Stock Co. v. Chain, 586 N.W.2d 284, 290 (Neb. 1998)* (title cannot be acquired through adverse possession without simultaneous and continuous existence of each element of adverse possession for the required period); *Stump v. Whico, 715 A.2d 1006 (N.J. Super. 1998)* (periodic or sporadic acts of ownership are not sufficient to constitute adverse possession); *Rapp v. Harrold, 154 N.E. 679 (Ind. 1926). See infra* Chapter 87, *Adverse Possession.*

(n34)Footnote 34. *Id. See infra Chapter* 91, *Title and Marketable Title.*

(n35)Footnote 35. *McCarty v. Sheets, 423 N.E.2d 297, 300 (Ind. 1981)* (recorded title is the highest evidence of ownership, and is not easily defeated; while recorded title may be defeated by adverse possession, mere possession is the lowest evidence of ownership). *See also Estate of Mark v. H.H. Smith Co.. 547 N.E.2d 796, 799 (Ind. 1989)* and *Ritz v. Indiana and Ohio R.R., Inc., 632 N.E.2d 769, 772 (Ind. 1994); Philbin v. Carr, 129 N.E. 19 (Ind. App. 1920).*

(n36)Footnote 36. *Murphy v. Suir, 16 F.2d 269 (5th Cir. 1926); Kurrle v. Helvering, 126 F.2d 723 (8th Cir. 1942); Brewer v. Avinger, 94 So. 590 (Ala. 1922); Corona Coal Co. v. Thomas, 101 So. 673 (Ala. 1924); Schuman v. Venard, 136 P.2d 289 (Colo. 1943); Hicks v. Hicks, 18 S.E.2d 763 (Ga. 1942); Bush v. Stumpe, 222 S.W. 1006 (Mo. 1920). Foley v. Brown, 204 P. 267 (Okla. 1922); Wilson v. Douglass, 220 P. 887 (Okla. 1923); Downing v. Thornton, 220 P. 592 (Okla. 1923); Butler v. Borroum, 218 S.W. 1115 (Tex. App. 1919); East Canyon Land & Stock Co. v. Davis & Weber Counties Canal Co., 238 P. 280 (Utah 1925); Smith v. Bailey, 127 S.E. 89 (Va. 1925).*

Possession alone, with claim of ownership of the land, has been termed a title of a low degree. *Abel v. Love, 143 N.E. 515 (Ind. App. 1924).* One in possession of land for nine years, making a good faith claim of ownership under a deed signed by certain heirs, is prima facie the owner of the land as against every person other than the true owner, although all the heirs did not sign the deed. *Hunter v. Weil, 222 S.W. 472 (Mo. 1920).* The rents and profits of land are incident to its possession, and belong to the person rightfully in possession personally or by tenants. *Grafeman Dairy Co. v. Mercantile Club, 241 S.W. 923 (Mo. 1922).* Possession by a devisee is prima facie evidence of ownership of the fee. *Schick v. Wolf, 202 N.Y.S. 601 (1924).* One in peaceable possession of real estate has good title as against all the world for every purpose until superior title is shown, and such possession is prima facie evidence of title against a mere intruder. *Chism v. Majors, 217 P. 465 (Okla. 1923).*

(n37)Footnote 37. *Leigh v. Lynch, 493 N.E.2d 1040, 1044 (Ill. 1986)* (owner of land has a right to undistured occupation and enjoyment of the property, and any interpretation of doctrine of emblements must take this right into consideration); *Merchants State Bank v. Sawyer Farmers' Co-op. Ass'n, 182 N.W. 263 (N.D. 1921).*

(n38)Footnote 38. *Thorne v. McKinley Bros., 56 P.2d 204 (Cal. 1936); Ward v. Smith, 25 S.E.2d 463 (N.C. 1943).*

(n39)Footnote 39. *Sloss-Sheffield Steel & Iron Co. v. Wilkes, 165 So. 764 (Ala. 1936) (overruled* by *Henderson v. Wade Sand and Gravel Co., 388 So. 2d 900 (Ala. 1980)* on somewhat different grounds).

(n40)Footnote 40. *Massie v. Hutcheson, 296 S.W. 939 (Tex. App. 1927).*

(n41)Footnote 41. *Loeffler v. King, 228 S.W.2d 201 (Tex. App. 1950), rev'd 236 S.W.2d 772 (Tex. 1951)* (but deeds *to* be construed against grantor); *English-Ott Lumber Co. v. Waddle, 135 S.E. 886 (Va. 1926).*

(n42)Footnote 42. *Wally v. Wally, 133 A. 627 (Pa. 1926). See infra* Chapter 64, *Licenses.*

(n43)Footnote 43. *Warren v. Lower Salt Creek Drainage Dist., 147 N.E. 248 (Ill. 1925); Marcus v. Board of Street Comm'rs, 147 N.E. 866 (Mass. 1925); Animal Rescue League v. Bourne's Assessors, 37 N.E.2d 1019 (Mass. 1941); Schram v. Manary, 262 P. 263 (Or. 1927); United States Nat'l Bank v. Lake Superior Terminal & Transfer R. Co., 174 N.W. 923 (Wis. 1919).*

Where the owner of certificates of purchase had defaulted and the state land office had canceled the certificates, due process required that the owner of a mineral interest be given notice of the cancellation, and, therefore, the court construed the statute requiring notice of cancellation to the "record owner" to include the owner of a mineral interest recorded with the city clerk. *Magnolia Petroleum Co. v. Carter Oil Co., 218 F.2d 1 (10th Cir. 1954).*

(n44)Footnote 44. *Sims v. Taylor. 135 So. 580 (Ala. 1931);* Knapp v. *Baldwin, 238* N.W. 542 (Iowa 1931); *White Chapel Memorial Ass'n v. Willson. 244 N.W. 460 (Mich. 1932); Freidenbloom v. Pecos Valley Lumber Co., 290 P. 797 (N.M. 1930); Kerfoot v. Salyer, 293 P. 1033 (Okla. 1930); Randolph v. Christensen. 265 P. 797 (Or. 1928); Biddle Concrete Co. v. McOlvin. 111 S.E. 843 (W. Va. 1922); Ritchie v. Green Bay, 254 N.W. 113 (Wis. 1934). See infra* Chapter 99. *Real Estate Contracts.*

(n45)Footnote 45. *Fouts v. Mason, 592 N.W. 2d 33, 38 (1999)* (a landlord who retains control or jointly controls leased premises is liable to one who has been injured after being invited by the tenant); *Hacken v. Isenberg, 124 N.E. 306 (Ill. 1919); Sims v. Fletcher Sav. & Trust Co., 142 N.E. 121 (Ind. 1922); Miller v. Bankers Mtg. Co., 287 P. 618 (Kan. 1930);* E. Corey *& Co. v. H.P. Cummings Constr. Co., 105 A. 405 (Me. 1919); Rogers Foundry Co. v. Squires, 297 S.W. 470 (Mo. App. 1927); Tobin v. Gartiez, 191 P. 1063 (Nev. 1920); In re Water Front, 220 N.Y.S. 23 (1927); Ft. Worth & D.S.P. Ry. Co. v. Judd, 4 S.W.2d 1032 (Tex. App. 1928).*

(n46)Footnote 46. *Kadera v. Superior Court in and for County of Maricopa, 931 P.2d 1067, 1073 (Ariz. 1996)* (shareholders in cooperative corporation had interest in real property, rather than a tenant's interest, even though legal title was in the corporation--since shareholders had advantages of home ownership, it was not necessary for the title to pass); *Goldwyn Distributing Corp. v. Carroll, 276 F. 63 (App. Div. 1921); People ex rel. Swanson v. Heitler, 257 Ill. App. 141 (1930); Silkman v. Schwartz, 193 N.Y.S. 793 (1922).*

(n47)Footnote 47. Burrill Nat'l Bank v. Edminister, Ill A. 423 (Me. 1920); *Lindholm v. Hamilton, 198 N.W. 289 (Minn. 1924).*

(n48)Footnote 48. *Huebner v. Lashley, 214 N.W. 107 (Mich. 1927); First Nat'l Bank v. Mohall State Bank, 206 N.W. 411 (N.D. 1925); Peters v. Bossman, 199 N.W. 65 (Wis. 1924).*

(n49)Footnote 49. *Pinkerton v. Pritchard, 223 P.2d 933 (Ariz. 1950).*

(n50)Footnote 50. *Allendorf v. Campbell, 29 N.E.2d 435 (Ohio App. 1940).*

(n51)Footnote 51. *First Church of Christ. Scientist v. Revell, 2 N.W.2d 674 (S.D. 1942).*

(n52)Footnote 52. *Michelsen v. Leskowicz, 55 N.Y.S.2d 831 (1945); Grays v. Harrison, 179 S.W.2d 1020 (Tex. App. 1944).*

(n53)Footnote 53. *Beaty v. Gordon, 364 S.W. 2d 311 (Ark. 1963). See State v. Anderson, 19 N.W.2d 70 (Minn. 1945).*

(n54)Footnote 54. *Miami v. Claughton Hotels, Inc., 157 So. 2d 196 (Fla. 1963). See infra* Chapter 51. *Private Property Rights in Airspace.*

(n55)Footnote 55. 23 Henry 8, ch. 10; 17 Car, 2, ch. 3. *See infra* Chapter 1, *Property Concepts Among Primitive Cultures;* Chapter 2, *Landholding in Ancient Britain;* Chapter 3, *Property Rights in Anglo-Saxon England;* Chapter 4, *The Growth of the English Common Law of Real Property;* Chapter 5, *English Property Law After the Middle Ages;* Chapter 6, *Development of Property Law In England's American Colonies;* Chapter 7, *Development of American Property Law After Independence.*

(n56)Footnote 56. Indian treaty fishing rights are subject to reasonable state regulation. *Department of Game v. Puyallup Tribe Inc., 422 P.2d 754 (Wash. 1967). See* Yasu Kawashima, *Legal Origins of the Indian Reservation in Colonial Massachusetts, 13 Am. J. Legal Hist. 42 (1969). See infra* Chapter 57, *Indian Land.*

(n57)Footnote 57. *See* Toxey H. Sewell, *The Government as a Proprietor of Land, 35 Tenn. L. Rev. 287 (1968).*

(n58)Footnote 58. *Pendleton v. Holman, 164 P.2d 434 (Or. 1945).*

(n59)Footnote 59. It has long been held that the ancient German village held land in a socialistic or community system as a "mark," I William Stubbs, The Constitutional History of England in Its Origin and Development 149 (1903).

(n60)Footnote 60. *New Legislation: Agrarian Reform in Colombia, 16 Am. J. COMP. L. 438 (1968);* M.B. Hooker, *The Interaction of Legislation and Customary Law in a Malay State, 16 AM. J. Comp. L. 415(1968).*

(n61)Footnote 61. *Scranton v. Wheeler. 179 U.S. 141 (1900). See* Sewell, *The Government as a Proprietor of Land, 35 Tenn. L. Rev. 287.*

(n62)Footnote 62. *British-American Oil Producing Co. v. McClain, 126 P.2d 530 (1942);* Lycoming Gas & *Water Co. v. Moyer, 99 Pa. 615 (1882).*

(n63)Footnote 63. *Champie v. Castle Hot Springs Co., 233 P. 1107 (1925). See Helvering v. Elias, 122 F.2d 171 (2d Cir. 1941).*

(n64)Footnote 64. *Homochitto River Comm'rs v. Withers, 29 Miss, 21 (1855).*

(n65)Footnote 65. *Gate City Guard v. Atlanta, 39 S.E. 394 (Ga. 1901).*

(n66)Footnote 66. *Norton v. Lowden, 84 F.2d 663 (10th Cir. 1936). See infra* Chapter 74, *An Overview of Land Use Regulations;* Chapter 81, *Regulatory Takings.*

(n67)Footnote 67. Mitchell v. Roswell, Ill P.2d 41. (N.M. 1941). *See infra* Chapter 72, *Sources of Government Police Power.*

(n68)Footnote 68. *See* Toxey H. Sewell, *The Government as a Proprietor of Land,* 35 TENN, L. Rev. 287. *See infra* Chapter 55, *Public Lands.*

(n69)Footnote 69. *Gate City Guard v. Atlanta, 39 S.E. 394 (Ga. 1901).*

(n70)Footnote 70. *State v. Cooley, 64 N.W. 379 (Minn. 1895).* Land held by an irrigation district held private property. *Beaumont v. Beaumont Irr. Dist.. 46 Cal. Rptr. 465 (1965).*

(n71)Footnote 71. *Owensboro v. Commonwealth, 49 S.W. 320 (Ky. 1899).*

(n72)Footnote 72. *Hunter v. Justice's Court, 223 P.2d 465 (Cal. 1950).*

(n73)Footnote 73. *Palmer Oil Corp. v. Phillips Petroleum Co., 231 P.2d 997 (Okla. 1951).*

(n74)Footnote 74. *See* Karl F. Milde, *Legal Principles and Policies of Soil Conservation, 20 Fordham L. Rev. 45(1951)*166.

(n75)Footnote 75. *See Land Value and Land Planning; British Legislation and American Prospects, 60 Yale L.J. 112(1951).*

(n76)Footnote 76. Joseph C. Hutcheson, Jr., *The Natural Law and the Right to Property, 26 Notre Dame Law. 640(1951).*

(n77)Footnote 77. Where land was conveyed to a municipality upon consideration that it be used for a public purpose and there was no forfeiture clause, the municipality could sell land for private purpose if not needed for any public purpose. *Achor v. Village of Blanchester, 269 N.E.2d 439 (Ohio 1970).*

(n78)Footnote 78. *Nollan v. California Coastal Comm'n, 483 U.S. 825, 831 (1987)* (the government's conditioning of the property owner's rebuilding permit on the owner's granting an easement can be allowed for land use regulation if condition substantially furthers government purposes that justify or deny permit); *Ruckelhaus v. Monsanto Co., 467 U.S. 986, 1000 (1984)* (property interests are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law); *Moxley v. Title Ins. & Trust Co., 165 P.2d 15 (Cal. 1945).* As to the influence of social forces on property law, *see* E.F. Roberts, *The Demise of Property Law,* 57 Cornell L. Rev. I (1971).

(n79)Footnote 79. *Smith v. Smith, 191 S.W.2d 956 (Ark. 1946); Myers v. Myers, 44 A.2d 455 (Md. 1945).*

(n80)Footnote 80. *Manchester v. Phillips, 180 N.E.2d 333 (1962)* (zoning embraces not merely health and safety but also conserves value of property, encourages more appropriate use of land and preserves and increases amenities). *See Preservation of Open Spaces Through Scenic Easements and Greenbelt Zoning,* 12 STAN, L. REV. 638 (1960); William W. West, *Validity of Zoning Undeveloped Areas, 29 Rocky Mt. L. Rev. 202 (1957);* Henry W. Hardy, *Zoning: Non- Conforming Uses, Accessory Uses and Variances, 46 Mass. L. Q. 4 (1961);* Roger A. Cunningham, *Control of Land Use in New Jersey Under the 1953 Planning Statutes. 15 Rutgers L. Rev. 1 (1960);* G. Graham Waite, *Nonresident Urban Renewal in New York, 10 BUFFALO L. Rev. 265 (1961);* Robert M. Anderson, *Architectural Controls, 12 Syracuse L. Rev. 26 (1960);* Robert L. Wood, *Subdivision Control Requirement for Park Land, 12 Syracuse L. Rev. 224 (1961);* James B. Sales, *Applicability of Zoning Ordinances to Governmental Land Use, 39 Texas L. Rev. 316 (1961);* Arval Morris, *Toward Effective Municipal Zoning, 35 Wash. L. Rev, 534 (1960);* E.F. Roberts, *The Demise of Property Law, 57 Cornell L. REV. 1;* Cook, *The Battle Against Blight, 43 MARQ. L. Rev. 444 (1960).* The "Sic utere tuo" rule is applicable if properties are so situated as to be interdependent and correlative. *Lee v. Florida Public Utilities Co., 145 So. 2d 299 (Fla. 1962). See infra* Chapter 74, *An Overview of Land Use Regulations.*

(n81)Footnote 81. *Pioneer Trust & Savings Bank v. McHenry County, 241 N.E.2d 454 (Ill. 1967).*

(n82)Footnote 82. *Atchison, T. & S.F. Ry. Co. v. Public Utilities Comm'n, 346 U.S. 346 (1953). See infra* Chapter 67. *The Property Law Aspects of Private Nuisance.*

(n83)Footnote 83. *Grentner v. LeJeune Auto Theater, Inc., 85 So. 2d 238 (Fla. 1956)* (enjoining unreasonable use

of light which resulted in a breach of a covenant not to make use of the property which would be objectionable to adjacent property); *Schiller Piano Co. v. Illinois Northern Utilities Co., 123 N.E. 631 (Ill. 1919): Fitzpatrick v. Penfield, 109 A. 653 (Pa. 1920)* (wall left standing after fire subsequently collapsed and caused personal injury); *In re Perrin's Appeal, 156 A. 305 (Pa. 1931)* (operation of property may constitute a nuisance, even though the property is in a proper zone for the operation); *Kornoff v. Kingsburg Cotton Oil Co., 288 P.2d 507 (Cal. 1955)* (allowing a makeshift diving board to project over an abandoned sand pit filled with water constituted an attractive nuisance); *Smith v. Evans, 284 P.2d 1065 (Kan. 1955)* (Louisiana statute imposes a servitude on adjoining landowners not to use their lands so as to damage a neighbor's land or deprive neighbors of the liberty of enjoying their estates); *Fontenot v. Magnolia Petroleum Co., 80 So. 2d 845 (La. 1955)* (piles of lumber did not constitute an attractive nuisance and the child was not an express or implied invitee to whom a higher standard of duty was owed than to a mere trespasser or licensee); *Morris v. Lewis Mfg. Co. (Mich. 1951) (dance halls are not nuisances per se) People v. Harding, 72 N.W.2d 33 (Mich. 1955); Gordon v. State. 289 P.2d 396 (Okla. 1955)* (the right to use property as the owner chooses, so long as no one is harmed thereby, is a natural right to which the police power of the state is subordinate); *Fitzhugh v. Jackson, 97 So. 190 (Miss. 1923)* (attracting of geese to one's land causing fowl to destroy crops of adjoining property owner was held to constitute a nuisance, restraining order granted); *Andrews v. Andrews, 88 S.E.2d 88 (N.C. 1955)* (an automobile tourist camp is not a nuisance as a matter of law but must be shown to be a nuisance in fact); *Menger v. Pass, 80 A.2d 702 (Pa. 1951)* (where a landowner owns an unfenced, unguarded lot in a heavily populated area, near a city highway, with an excavation and sandbank thereon, and children were killed in a sudden landslide, the court held that liability rested upon sound legal principles with respect to the duties of a landowner, under facts alleged, toward a child of tender years who was a trespasser and not an express invitee or the equivalent); *Plante v. Lorraine Mfg. Co., 82 A.2d 893* (R.I, 1951) (creation and operation of a used car lot in exclusively residential area upheld as a nuisance justifying issuance of permanent injunction decree); *Martin v. Williams, 93 S.E.2d 835. See A General Survey of the Rights and Duties of Adjoining Landowners in New England, 39 B.U. L. REV. 228; Landowner's Liability to Infant Trespassers: Status of the Law in New York, 25 Fordham L. Rev. 290; The Attractive Nuisance Doctrine, 32 Ind. L. J. 75;* Dix W. Noel, *The Attractive Nuisance Doctrine in Tennessee, 21 TENN. L. Rev. 658.*

(n84)Footnote 84. *Raleigh Court Corp. v. Faucett, 124 S.E. 433 (Va. 1924)* (the Supreme Court of the United States has held that it is unconstitutional for a legislature to change the boundaries of a town so as to disenfranchise African-American residents); *Gomillion v. Lightfoot, 81 S. Ct. 125 (1960).*

(n85)Footnote 85. *Thompson v. Androscoggin River Imp. Co.. 54 N.H. 545 (1874): St. Regis Paper Co. v. New Hampshire Water Resources Board, 26 A.2d 832 (N.H. 1942). See Hibbard v. Halliday, 158 P. 1158 (Okla. 1916)* (slum clearance is a sufficient public purpose to permit condemnation of private property for resale to other private owners); *Redevelopment Agency v. Hayes, 266 P.2d 105 (Cal. 1954); Gohld Realty Co. v. Hartford, 104 A.2d 365 (Conn. 1954); Grubstein v. Urban Renewal Agency, Fla. 115 So. 2d 745 (Fla. 1959)* (majority rule); *Crommet v. Portland, 150 Me. 217(1954).*

(n86)Footnote 86. *Munn v. Illinois, 94 U.S. 113 (1876); Patterson v. Kentucky, 97 U.S. 501 (1878); Romano v. Birmingham Ry., Light & Power Co., 62 So. 677 (Ala. 1913); Moore v. Berlin Mills Co., 67 A. 578 (N.H. 1907); Sullivan v. Dunham, 55 N.E. 923 (N.Y. 1900); State v. Yopp, 2 S.E. 458 (N.C. 1887); Canada v. Shawnee, 64 P.2d 694 (Okla. 1936); Jowett v. Pennsylvania Power Co., 118 A.2d 452 (Pa. 1955)* (holder of an easement for power lines has no duty to warn owner of servient tenement of the danger); *Railroad Commission v. Rowan Oil Co., 259 S.W.2d 173 (Tex. 1952)* (but the courts display a tendency to prevent absolute control by the state of the interests of adjoining landowners for the protection of their neighbors). A property owner's association formed as a result of language in the plot of a subdivision had the right to enforce restrictive covenants contained in the subdivision. *Merrionette Manor Homes Imp. Ass'n v. Heda, 136 N.E.2d 556* (Ill, App. 1956); *Neponsit Property Owners Ass'n v. Emigrant Industrial Sav. Bank, 15 N.E.2d 793 (N.Y. 1937). See* Dix W. Noel, *Nuisances from Land in its Natural Condition, 56 Harv. L. Rev. 772 (1943).* As respects buildings on adjoining land the only duty is due care. *Coward v. Fleming, 102 N.E.2d 850 (Ohio App. 1951).*

(n87)Footnote 87. *Atchison. T. & S.F. Ry. v. Public Utilities Comm'n, 346 U.S. 346 (1953). See, e.g.,* Chapter 75,

The Impact of Environmental Regulation of Real Property.

(n88)Footnote 88. *Mary Jane Stevens Co. v. First Nat'l Bldg. Co., 57 P.2d 1099 (Utah 1936); Spartan Drilling Co. v. Bull, 252 S.W.2d 408 (Ark. 1952)* (indicated that a nuisance might not be abated if the cost would be excessive or prohibitive). *See* W. Bryan Bolich, *Acts Barring Property Rights, 40 N.C. L. Rev. 175(1962).*

(n89)Footnote 89. *Jones v. Trawick, 75 So. 2d 785 (Fla. 1954)* (cemetery in residential area as nuisance); *Johnson v. Colter, 297 N.Y.S. 345 (1937)* (an action for damages or for injunction will lie even in a public nuisance by one who suffers injury greater in extent than that of the general public); *Graceland Corp. v. Consolidated Laundries Corp., 180 N.Y.S.2d 644 (1958).*

(n90)Footnote 90. *Hibbard v. Halliday, 158 P. 1158 (Okla. 1916); Muskatell v. Seattle, 116 P.2d 363 (Wash. 1941); Wilson v. Phoenix Powder Mfg. Co., 21 S.E. 1035 (W. Va. 1895). See Tillman v. Public Belt R.R. Comm., 42 So. 2d 888 (La. App. 1949);* Restatement, Law of Torts. 337. An owner has liability for negligent crop dusting: *Lundberg v. Bolon, 194 P.2d 454 (Ariz. 1948); Heeb v. Prysock, 245 S.W.2d 577 (Ark. 1952); Miles v. A. Arena & Co., 73 P.2d 1260 (Cal. App. 1937): Burke v. Thomas, 313 P.2d 1082 (Okla. 1957).* Resting foreseeability of harm in attractive nuisance cases on notice: *Gardner v. Stonestown Corp., 302 P.2d 674 (Cal. App. 1956)* (lumber piles held an attractive nuisance); *Kahn v. James Burton Co., 126 N.E.2d 836 (Ill. 1955)* (sand and gravel pits are attractive nuisances); *Smith v. Evans, 284 P.2d 1065 (Kan. 1955)* (an adjoining landowner is entitled to damages arising from explosions occurring in geophysical explorations); *Fontenot v. Magnolia Petroleum Co., 80 So. 2d 845 (La. 1955)* (strict liability rule); *Gotreaux v. Gary, 94 So. 2d 293 (La. App. 1955)* (an owner owes a duty to a social guest to ascertain that the premises are safe); *Alexander v. General Acc. Fire & Life Assur. Corp., 98 So. 2d 730* (dictum) (La. App. 1957).

Attractive nuisance doctrine rejected: *Lewis v. Mains, 104 A.2d 432 (Me. 1954); Urban v. Central Massachusetts Elec, Co., 17 N.E.2d 718 (Mass. 1938); Frost v. Eastern R.R., 9 A. 790 (N.H. 1887); Morse v. Buffalo Tank Corp., 19 N.E.2d 981 (N.Y. 1938); Hannan v. Ehrlich, 131 N.E. 504 (Ohio 1921); Previte v. Wanskuck Co., 90 A.2d 769 (R.I. 1952); Trudo v. Lazarus. 73 A.2d 306 (Va. 1950).*

A nuisance will usually not arise for aesthetic reasons solely: *Feldstein v. Kammauf, 121 A.2d 716 (Md. 1956).*

Adopting Restatement, Law of Torts, § 339 with respect to attractive nuisances: *Patterson v. Gibson, 287 S.W.2d 853 (Mo. 1956); Angelier v. Red Star Yeast & Products Co., 254 N.W. 351 (Wis. 1934); Massino v. Smaglick, 89 N.W.2d 223 (Wis. 1958).*

Adjoining landowner held to strict liability for damage caused by blasting: *Thigpen v. Skousen, 327 P.2d 802 (N.M. 1958).*

Tenant in apartment house restrained from making noise annoying to others: *Ryan v. Steele. 163 N.Y.S.2d 471 (1957).*

Baiting pond to attract wild geese held nuisance to adjoining landowner where crop damage resulted: *Andrews v. Andrews, 88 S.E.2d 88 (N.C. 1955).*

See Waste of Oil and Gas as Between Adjacent Landowners. 44 Ky. L.J. 118 (1956); Laurence H. Eldridge, *Tort Liability to Trespassers, 12 Temple L.Q. 32 (1938);* Richard Glen Greenwood, *Current Attractive Nuisance Cases in Wisconsin and Other Jurisdictions, 42 MARQ. L. REV. 64 (1958); Adjoining Landowners-- Right to Light and Air-- Injunction, 34 Tulane L. Rev. 599 (1960). See* David G. Warren, *Nuisance Law as an Environmental Tool, 7 Wake Forest L. Rev. 211 (1971). See also* Dennis Kastan, *Noise Pollution: Public Needs v. Individual Rights,* 1 Western St. U. L. Rev. 185 (1973).

(n91)Footnote 91. *Moore v. Berlin Mills Co., 67 A. 578 (N.H. 1902).*

(n92)Footnote 92. *In re Perrin's Appeal, 156 A. 305 (Pa. 1931).*

(n93)Footnote 93. *Hibbard v. Halliday, 158 P. 1158 (Okla. 1916); Costello v. Wheeling, 117 S.E.2d 513 (W. Va. 1960)* (paving of a sidewalk in violation of a municipal ordinance made the paver liable in tort to a pedestrian). Landowner has duty to exercise reasonable care in maintaining premises so as not to be a hazard to firemen: *Dini v. Naiditch, 170 N.E.2d 881 (Ill. 1960).* Louisiana has a statutory *sic utere* servitude: *Divicent v. Sanderson, 117 So. 2d 907 (La. 1960).* To be subject to a permanent injunction the injury created by a nuisance must be of such a character as to materially diminish the value of adjoining property as a dwelling and to interfere with the ordinary comfort and enjoyment of it: *Feldstein v. Kammauf, 121 A.2d 716 (Md. 1956).* Diminution of adjoining property values and creation of physical discomfort in neighborhood justified enjoining fertilizer plant as nuisance: *Bishop Processing Co. v. Davis, 132 A.2d 445 (Md. 1957). See* Richard T. Drukker, *Spite Fences and Spite Walls, 26 CAL. L. Rev. 691 (1938);* W.T.S. Stallybrass, *Dangerous Things and the Non- Natural User of Land, 3 Cambridge L. J. 376 (1929); Landowner's Liability to Infant Trespassers: Status of the Law in New York, 25 FORDHAM L. Rev. 290 (1956);* Hughes, *Duties to Trespassers, 68 Yale L. J. 633 (1959).* Emission of smoke and dust must be reasonable; *Sprague v. Sampson, 114 A. 305 (Me. 1921).* The common-law rule gave no liability except for negligence, *Booth v. Rome, W. & O.T.R. Co., 35 N.E. 592 (N.Y. 1892),* but showing a prima facie case of negligence, *Schlansky v. Augustus Riegel, Inc., 215 N.Y.S.2d 52 (1960).* Adjoining landowners entitled to relief from blasting damage as a trespass, though no negligence (majority rule): *Muskogee v. Hancock, 158 P. 622 (Okla. 1916).*

(n94)Footnote 94. Affirmative: *State ex rel. Gardner v. Sailboat Key, Inc., 295 So. 2d 658 (Fla. App. 1974).*

(n95)Footnote 95. *Warden, Maryland Penitentiary v. Hayden, 387 US 294 (1966). See infra* Chapter 66, *Constitutional Impacts on Real Property.*

(n96)Footnote 96. *Jones v. Trawick, 75 So. 2d 785 (Fla. 1954)* (establishment of cemetery enjoined). A nuisance is something which is offensive physically to the senses and by such offensiveness makes life uncomfortable: *Bauman v. Piser Undertakes Co., 180 N.E.2d 705 (Ill. App. 1962),* Noel, *Nuisances from Land in Its Natural Condition, 56 Harv. L. Rev. 772. Arvidson v. Reynolds Metals Co., 125 F. Supp. 481 (W.D. Wash 1954), aff'd, 236 F.2d 224 (9th Cir. 1956)* (intrusion of flouride particles through the air not a trespass and recovery denied); *Fairview Farms, Inc. v. Reynolds Metals Co., 176 F. Supp. 178 (D. Or. 1959)* (flourides drifting onto another's land was trespass); *Gallin v. Poulou, 295 P.2d 958 (Cal. App. 1956)* (vibrations from a jackhammer are not an intentional trespass); *Wiser Oil Co. v. Conley, 346 S.W.2d 718 (Ky. 1960)* (oil lessee liable to lessor for water flooding operations which damaged coal deposits and surface); B *&* R *Luncheonette, Inc. v. Fairmont Theatre Corp., 103 N.Y.S.2d 747 (1951)* (spray from a cooling tower is a trespass). *See* Maxine Kurtz, *The Effect of Land Use Legislation on the Common Law of Nuisance in Urban Areas, 36 Dicta 414 (1959);* Ronald Sorenson, *Law of Nuisance in Iowa, 12 Drake L. Rev. 107 (Dec. 1962).*

(n97)Footnote 97. *Hofstetter v. George M. Myers, Inc., 228 P.2d 522 (Kan. 1951)* (a mobile home is not a nuisance per se); *Ott v. Johnson, 307 N.E.2d 523 (Ind. App. 1974)* (for there to be trespass there must be an invasion by physical matter); *Jennemann v. Hertel, 264 S.W.2d 911 (Mo. App. 1954); Amphitheaters, Inc. v. Portland Meadows, 198 P.2d 847 (Or. 1948); Waschak v. Moffat, 109 A.2d 310 (Pa. 1954)* (gas). *See Change of Neighborhood in Nuisance Cases,* 13 Clev. Marshall L. Rev. 340.

(n98)Footnote 98. *Commonwealth v. Wyeth Laboratories, Divison of Amercian Home Products Corp., 315 A.2d 648(Pa. 1974).*

(n99)Footnote 99. Absolute liability for debris thrown by blasting: *Wright v. Compton, 53 Ind. 337 (1876).* Blasting vibrations result in liability without fault: *Enos Coal Min. Co. v. Schuchart, 188 N.E.2d 406 (Ind. 1962); Galbreath v. Engineering Constr. Corp., 273 N.E.2d 121 (Ind. 1971). See 37 Mo. L. Rev. 561.* No liability without fault in blasting vibrations: *Madsen v. East Jordan Irr. Co., 125 P.2d 794 (Utah 1942). See infra* Chapter 68, *Trespass on Land.*

(n100)Footnote 100. Injury to subterranean water by explosion was actionable: *Western Geophysical Co. of Amercia v. Mason, 402 S.W.2d 657 (Ark. 1966).*

(n101)Footnote 101. *Holland v. Keaveney, 306 So. 2d 838 (La. App. 1975).*

(n102)Footnote 102. *Livingston v. Davis, 50 N.W.2d 592 (Iowa 1951)* 27.

(n103)Footnote 103. *Lake v. Ferrer. 293 P.2d 104 (Cal. App. 1956).*

(n104)Footnote 104. *Pickens v. Southern R. Co., 177 F. Supp. 553 (E.D. Tenn. 1959)* (unused turntable held an attractive nuisance); *Galleher v. Wichita, 296 P.2d 1062 (Kan. 1956)* (attractive nuisance consists of an offending condition, circumstance or appliance so enticing, alluring and calculated to excite the curiosity of children as to induce them to approach it and such inherent attractiveness amounts to an implied invitation to such children); *Commercial Union Fire Ins. Co. v. Blocker, 86 So. 2d 760 (La. App. 1956).* A private nuisance is one that interferes with the enjoyment of the lands, tenements or hereditaments of others): *Wallace v. Horn, 506 S.W.2d 325 (Tex. App. 1974).*

(n105)Footnote 105. *Harris v. Mentes-Williams Co., 95 A.2d 388 (N.J. 1953): Angelier v. Red Star Yeast & Products Co., 254 N.W. 351 (Wis. 1934); Massino v. Smaglick, 89 N.W.2d 223 (Wis. 1958).*

(n106)Footnote 106. *Menneti v. Evans Constr. Co., 259 F.2d 367 (3d Cir. 1958); Simmel v. New Jersey Coop. Co., 136 A.2d 301 (N.J. 1957)* (attractive nuisance doctrine applied to infants burned in fires while trespassing); *Previte v. Wanskuck Co., 80 R.I. 1, 90 A.2d 769 (R.I. 1952). See Petrak v. Cooke Contr'g Co., 46 N.W.2d 574 (Mich. 1951).* Even though California did not consider a swimming pool an attractive nuisance, it still allowed recovery under § 339 of the Restatement OF TORTS: *Reynolds v. Willson, 331 P.2d 48 (Cal. App. 1958).* The owner of real estate was liable for the wrongful death of a child fatally poisoned, after having used cyanide to kill rats, knowing that children were accustomed to playing in the area: *Shank v. Peabody Coop. Equity Exch., 352 P.2d 41 (Kan. 1960).* A landowner may not be liable to an infant trespasser in absence of actual knowledge of a dangerous condition: *Simmel v. New Jersey Coop. Co., 143 A.2d 521 (N.J. 1958). See* Errol Tyler, *Liability of Landowners Resultant from Their Employment of Independent Contractors, 13 Hastings L. J. 147 (1961).*

(n107)Footnote 107. *England v. Atkinson, 26 S.E.2d 431 (Ga. 1943).*

(n108)Footnote 108. *Lee v. Chicago, 61 N.E.2d 367 (Ill. 1945).* The state may order cedars destroyed to preserve apple orchards. *Miller v. Schoene, 276 U.S. 272 (1928). See* Keith S. Rosenn, *Puerto Rican Land Reform: The History of An Instructive Experiment, 73 Yale L. J. 334 (1963). See also* Robert H. Freilich, *Missouri Law of Land Use Controls: With National Perspectives, 42 U.M.K.C. L. Rev. 1 (1973);* Roger C. Adams, *The Land Use Policy and Planning Assistance Act of 1973: Legislating a National Land Use Policy, 41 Geo. Wash. L. Rev. 604 (1973);* Richard F. Babcock & Duane A. Feurer, *Land as a Commodity Affected with a Public Interest, 52 Wash. L. Rev. 289.* (1977). *See infra* Chapter 72, *Sources of Government Police Power.*

(n109)Footnote 109. *Nebbia v. New York, 291 U.S. 502 (1934); Neisel v. Moran, 85 So. 346 (Fla. 1919); Ehinger v. State ex rel. Gottesman, 2 So. 2d 357 (Fla. 1941); Miami Beach v. Ocean & Inland Co., 3 So. 2d 364 (Fla. 1941); Davis v. Miller, 96 S.E.2d 498 (Ga. 1957)* (filling station is not a nuisance per se); *Schiller Piano Co. v. Illinois Northern Utilities Co., 123 N.E. 631 (Ill. 1919); Lee v. Chicago, 61 N.E.2d 367 (Ill. 1945); Jezowski v. Reno, 26 P.2d 257 (Nev. 1933)* (city dump is not a nuisance per se); *People ex rel. Werner v. Walsh, 209 N.Y.S. 454 (1925)* (zoning ordinance); *Seventy-Eighth Street & Broadway Co. v. Rosenbaum, 182 N.Y.S. 505 (1920)* (statute granting relief from oppressive rents upheld); *In re Perrin's Appeal, 156 A. 305 (Pa. 1931); Reid v. Brodsky, 156 A2d 334 (Pa. 1959)* (business may operate as a nuisance though permitted by zoning laws); *State v. Dexter, 202 P.2d 906 (Wash. 1949)* (holding constitutional a statute requiring logging operations to restock or leave seed trees).

See Harry M. Cross. *The Diminishing Fee,* 20 Law & Contemporary Prob. 517 (1955); R.O. Kellam, *A Century of Correlative Rights, 12* Baylor L. Rev. I (1960), as to the development of the law of controls over waste of natural

resources; Paul S. Taylor, *The Excess Land Law: Pressure vs. Principle, 47 Cal. L. Rev. 499; Controlling Farm Tenant Conservation Practices Through the Judicial Process, 34 Ind. L. J. 296 (1959).*

Ordinance requiring adjacent landowner to remove snow and ice created no tort liability: *Johnson v. J.S. Bell, Jr. & Co., 117 S.E.2d 85 (Va. 1960).*

(n110)Footnote 110. *Slaughter-House Cases, 83 U.S. 36 (1872); Munn v. Illinois, 94 U.S. 113 (1876); Nebbia v. New York, 291 U.S. 502 (1934); Tulare Irr. Dist. v. Lindsay-Strathmore Irr. Dist., 45 P.2d 972 (Cal. 1935)* (water control); *People v. Commonwealth Edison Co., 32 N.E.2d 902 (Ill. 1941); Ellicott v. Mayor & City Council, 23 A.2d 649 (Md. 1942); Ross v. Mayor & Council, 184 A. 810 (N.J. 1936); State v. Yopp, 2 S.E. 458 (N.C. 1887); Allen v. Shaker Heights Sav. Ass'n, 39 N.E.2d 747 (Ohio App. 1941); In re Perrin's Appeal, 156 A. 305 (Pa. 1931); Campbell v. State, 122 P.2d 458 (Wash. 1942); State v. Dexter, 202 P.2d 906 (Wash. 1949); aff'd 338 U.S. 863* (reseeding of trees in cut-over lands). *See* Edgar R. Casper, *Discordant Land Use Regulation, 61 DICK. L. REV. 163 (1957).* A filling station in a residential area is not a nuisance per se: *Phillips v. Adams. 309 S.W.2d 205 (Ark. 1950).* The purpose of the Pennsylvania land conservation act is to protect the public welfare and any benefit to the landowner is purely coincidental: *Windber Constr. Co. v. Coleman, 139 A.2d 675 (Pa. 1958).*

(n111)Footnote 111. *Buch v. Harton, 33 F. Supp. 1014 (M.D. Tenn. 1940); Pacific Palisades Ass'n v. Huntington Beach, 237 P. 538 (Cal. 1925)* (zoning ordinance, oil wells); *Papaioanu v. Commissioners of Rehoboth, 20 A.2d 447 (Del. 1941); Schiller Piano Co. v. Illinois Northern Utilities Co., 123 N.E. 631 (Ill. 1919); Reimer v. Dallas, 129 A, 390 (N.J. 1923)* (zoning ordinance); *In re White's Appeal, 134 A. 409 (Pa. 1926)* (zoning ordinance held invalid). A mere aesthetic purpose was an improper exercise of the police power: *People v. Dickenson, 343 P.2d 809 (Cal. 1959).* Requirement of off-street parking facilities as a condition to use of purposes otherwise permitted by zoning was unconstitutional: *Denver v. Denver Buick, Inc., 347 P.2d 919 (Colo. 1959).*

A city ordinance which prohibited erection of fences in front yards was unconstitutional since it was solely for aesthetic purposes and could not be sustained under the police power: *Norris v. Bradford, 321 S.W.2d 543 (Tenn. 1958).*

(n112)Footnote 112. *Clinton v. Standard Oil Co., 137 S.E. 183 (N.C. 1927).* A city ordinance regulating height of buildings and trees as well as the use of land in the vicinity of an airport was a taking of private property: *Rice v. Newark, 40 A.2d 561 (N.J. 1945); Ackerman v. Seattle, 348 P.2d 664 (Wash. 1960).*

(n113)Footnote 113. *Stratford Irr. Dist. v. Empire Water Co., 111 P.2d 957 (Cal. App. 1941); Raleigh Court Corp. v. Faucett, 124 S.E. 433 (Va. 1924); Christensen v. Mann, 204 N.W. 499 (Wis. 1925).*

(n114)Footnote 114. *United States v. 243.22 Acres of Land, 43 F. Supp. 561 (E.D.N.Y. 1941); United States v. A Certain Tract or Parcel of Land, 44 F. Supp. 712 (S.D. Ga. 1942); Sanitary Dist. v. Manasse, 42 N.E.2d 543 (Ill. 1942); Collector of Taxes v. Revere Bldg., 177 N.E. 577 (Mass. 1931); Blackman v. Cincinnati, 42 N.E.2d 158 (Ohio 1940).*

(n115)Footnote 115. *Houston v. Lurie, 224 S.W.2d 871 (Tex. 1949).*

(n116)Footnote 116. *Miller v. Schoene, 276 U.S. 272 (1928)* (police power to destroy cedar trees to prevent communication of a plant disease to nearby apple orchards was upheld); *Commonwealth v. Tewksbury, 52 Mass. 55 (1846)* (state regulation of stone, gravel and sand from the seashore).

See The Property Rights Exception to Civil rights Jurisdiction-- Confusion Compounded, 43 New York U. L. Rev. 1208 (1968); G. Graham Waite, *Governmental Power and Private Property, 16 Cath. U. L. Rev. 283 (1967). See infra* Chapter 48. *Mines and Minerals;* Chapter 49, *Petroleum and Pipelines;* Chapter 50, *Water Rights;* Chapter 74, *An Overview of Land Use Regulations;* Chapter 75, *The Impact of Environmental Regulation on Real Property*.

(n117)Footnote 117. *Champlin Ref. Co. v. Corporation Comm'n of Oklahoma, 286 U.S. 210 (1932)* (proration

statute upheld); *Hunter v. Justice Court, 223 P.2d 465 (Cal. 1950).*

(n118)Footnote 118. *Palmer Oil Corp. v. Phillips Petroleum Co., 231 P.2d 997 (Okla. 1951).*

(n119)Footnote 119. *See* Karl F. Milde, *Legal Principles and Policies of Soil Conservation, 20 F Ordham L. Rev. 45 (1951);* Edwin E. Ferguson. *Nation-Wide Erosion Control; Soil Conservation Districts and the Power of Land Use Regulations, 34 Iowa L. Rev. 166 (1949).*

(n120)Footnote 120. *Southwest Engineering Co. v. Ernst, 291 P.2d 764 (Ariz. 1955)* (police power enabled state to prohibit future drilling of wells for irrigation).

(n121)Footnote 121. *See Land Value and Land Planning; British Legislation and American Prospects, 60 Yale L.J. 112(1951).*

(n122)Footnote 122. *See* Joseph C. Hutcheson, Jr., *The Natural Law and the Right to Property, 26 NOTRE Dame L. REV. 640 (1951).*

(n123)Footnote 123. *Hunter v. Justice Court, 223 P.2d 465 (Cal. 1950).*

(n124)Footnote 124. ARK. Code Ann, §§ 15-22-401 et. seq.

(n125)Footnote 125. *Awack v. Kraus Bros. & Co., 133 F. Supp. 929 (S.D.N.Y. 1955).* Rent control law held constitutional; *Lincoln Bldg. Associates v. Jame, 203 N.Y.S.2d 86 (1960). See Judicial Review of Urban Redevelopment Agency Determinations, 69 Yale L. J. 321.*

(n126)Footnote 126. *Eichel v. Dudley, 179 N.E.2d 812 (Ohio 1961).*

(n127)Footnote 127. *Berman v. Parker, 348 U.S. 26 (1954).*

(n128)Footnote 128. *Somers v. Camarco, 127 N.E.2d 327 (N.Y. 1953).*

(n129)Footnote 129. *Brown v. Comm. Int. Rev., 180 F.2d 946 (5th Cir. 1950); Amaya v. Stanolind Oil & Gas Co., 62 F. Supp. 181 (S.D. Tex. 1945); Bell v. Wadley (Ga. 1948), 177 S.W.2d 403 (Ark. 1944); King v. King, 48 S.E.2d 465 (Ga. 1948); Gross Income Tax Division v. Bartlett, 93 N.E.2d 174 (Ind. 1950); Duckwall v. Lease, 20 N.E.2d 204 (Ind. App. 1939); Bish v. Bish, 31 A.2d 348 (Md. 1943); Guardian Life Ins. Co. v. Rita Realty Co., 5 A.2d 45 (N.J. 1939);* Rosenbaum v. Consolidated Products Co., N.Y.S.2d 571 (1948); *In re Smythe's Estate, 36 N.Y.S.2d 605; In re Drexel's Will, 231 N.Y.S.2d 574 (1962): Mashunkashey v. Mashunkashey, 134 P.2d 976 (Okla. 1942); Guarture v. C. P. Mayer Brick Co., 69 A. 2d 422 (Pa. 1950); Colden v. Alexander, 171 S.W.2d 328 (Tex. 1943).* The law of the location of the property controls wills of realty: *In re Strauss' Estate, 347 N.Y.S.2d 840 (1973): Estabrook v. Wise. 506 S.W.2d 248 (Tex. App. 1974).*

(n130)Footnote 130. *Irving Trust Co. v. Maryland Casualty Co., 83 F.2d 121 (6th Cir. 1936); In re Parkwood, Inc., 461 F.2d 158 (D.C. Cir. 1971): Stockton v. Ortiz, 111 Cal. Rptr. 617 (1973); People ex rel. Kunstman v. Shinsaku Nagano, 59 N.E.2d 96; Applegate v. Brown. 344 S.W.2d 13 (Mo. 1961)* (lex loci of the realty determines whether there has been an equitable conversion); *In re Drexel's Will, 231 N.Y.S.2d 574 (1962); Wolfe v. Lewisburg Trust & Safe Deposit Co., 158 A. 567 (Pa. 1931); Roswurm v. Sinclair Prairie Oil Co., 181 S.W.2d 736* (Tex. 1944 App.); *Hardesty v. Fairmont Supply Co., 14 S.E.2d 436 (W. Va. 1941).* The state court could determine possessory rights as against third persons but not against the United States: *Duguid v. Best, 291 F.2d 235 (9th Cir. 1961).*

(n131)Footnote 131. *DeLashmutt v. Teetor, 169 S.W. 34 (Mo. 1914).*

(n132)Footnote 132. *Sims v. Jones, 123 S.E. 614 (Ga. 1924); In re Schneider's Estate, 96 N.Y.S.2d 652 (1950): Roswurm v. Sinclair Prairie Oil Co., 181 S.W.2d 736 (Tex. App. 1944).*

(n133)Footnote 133. *See* Restatement, Conflict of Laws, § 208.

(n134)Footnote 134. *Moscow Fire Ins. Co. v. Bank of New York & Trust Co., 20 N.E.2d 758 (N.Y. 1939).*

(n135)Footnote 135. *Classen v. Heath, 58 N.E.2d 889 (Ill. 1945).* The law of the situs of the realty determines the right of an adopted child to inherit: *In re Sendona's Estate, 381 P.2d 752 (Wash. 1963). See infra* Chapter 88, *Testamentary Transfers of Real Property;* Chapter 89, *Intestate Succession.*

(n136)Footnote 136. *Meents v. Comstock 296 N.W. 721 (Iowa 1941).* A court determination of jurisdiction over land situated in another state may be collaterally attacked in the latter state: *Duke v. Durfee, 308 F.2d 209 (8th Cir. 1962).* Under the 1943 Iowa-Nebraska Boundary Compact, Nebraska courts have jurisdiction over land west of the line: *Schroeder v. 171.74 Acres of Land, 318 F.2d 311 (8th Cir. 1963).*

(n137)Footnote 137. *In re Knickel's Will, 185 N.E.2d 93 (Ohio 1961).*

(n138)Footnote 138. *Minor v. Cardwell, 37 Mo. 350 (1866).* Trespass to realty is a local action to be brought only at the situs of the realty: *Reasor-Hill Corp. v. Harrison, 249 S.W.2d 994 (Ark. 1952).*

(n139)Footnote 139. *Sims v. Jones, 123 S.E. 614 (Ga. 1924).*

(n140)Footnote 140. *Jorgensen v. Crandell, 277 N.W. 785 (Neb. 1938).* In *Polson v. Stewart, 45 N.E. 737 (Mass. 1897),* Justice Holmes, in a case where the agreement was made in North Carolina, said: "But it said that the laws of the parties' domicile could not authorize a contract between them as to lands in Massachusetts. Obviously, this is not true. It is true that the laws of other states cannot render valid conveyances of property within our borders which our laws say are void, for the plain reason that we have exclusive power over the res ... But the same reason inverted establishes that the lex rei sitae cannot control personal convenants not purporting to be conveyances, between persons outside the jurisdiction, although concerning a thing within it."

(n141)Footnote 141. *McClain v. Holder, 279 S.W.2d 105 (Tex. App. 1955). See infra* Chapter 31, *Joint Tenancies;* Chapter 32, *Tenancies in Common;* Chapter 33. *Tenancies by the Entirety;* Chapter 34, *Tenancy in Partnership,* Chapter 35, *Tenancy in Coparcenary;* Chapter 37, *Marital Property.*

(n142)Footnote 142. J. Thomas Oldham, *Conflict of Laws and Marital Property Rights, 39 Baylor L.Rev. 1255 (1987). Bruton v. Villoria, 292 P.2d. 638 (Cal. App. 1956). See infra* Chapter 37, *Marital Property.*

(n143)Footnote 143. *George v. Widemire, 7 So. 2d 269 (Ala. 1942); In re Rowley's Estate, 35 P.2d 34 (Wash. 1934).* As to intangibles, *see Edwards v. Sullivan, 102 N.Y.S.2d 951 (1949).*

(n144)Footnote 144. *First Nat'l Bank v. Commissioner of Internal Revenue. 63 F.2d 685 (1st Cir. 1933); In re Fidelity Assur. Ass'n, 42 F. Supp. 973 (S.D.W.Va. 1941).*

(n145)Footnote 145. *Willis v. Beeler, 90 F.2d 538 (6th Cir. 1937). See* Peter Herzog, *Conflict of Laws in Land Transactions: The Borderland Between Contract and Property Matter - A Comparative View, 8 Syracuse L. Rev. 191 (1957).* Where a contract was made in Michigan to be there performed, and involved a rule of property as to real estate situated in Michigan, the law in that state was held to control in determining whether chattels had become part of the real estate: *In re Johns-Manville Sales Corp's Petition, 88 F.2d 520 (6th Cir. 1937).* An action can be maintained in Arkansas for damages caused by negligent trespass to land in another state. In so deciding, the court said: "The majority rule has no basis in logic or equity and rests solely upon English cases that were decided before America was discovered and in circumstances that are not even comparable to those existing in our Union." *Reasor-Hill Corp. v. Harrison, 249 S.W.2d 994 (Ark. 1952).*

+ This chapter is based in part on Chapter 1 of George W. Thompson, Commentaries on The Modern Law of Real

Property (John S. Grimes, ed. *1979),* which made a significant contribution toward preserving the American common law governing basic property definitions and characteristics.

Thompson on Real Property, Thomas Editions

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CHAPTER 14 THE NATURE AND KINDS OF PROPERTY +

2-14 Thompson on Real Property, Thomas Editions § 14.03

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§ 14.03 The Nature of Property.

§ 14.03(a) Property Defined.

What is property. It is impossible to arrive at a comprehensive definition of "property" that will satisfy all of the situations and tests to which such a definition will be subjected. Property is a term of broad significance, embracing everything that has exchangeable value, and every interest or estate which the law regards as being of sufficient value for judicial recognition. n146 The word may be properly used to signify any valuable right or interest protected by law. n147 The American Law Institute uses "property" to denote legal relations between persons with respect to a thing. n148 When not limited by the context of an instrument in which it is used, the term "property" includes everything which is the subject of ownership. n149

The term, in its most general sense, includes everything that has an exchangeable value. n150 In the full sense it denotes a right in point of user, unrestricted in point of disposition, and unlimited in point of duration over a determinate thing, and it may be applied to a right indefinite in point of user but limited in time, as a life interest in real estate. n151

Property, in a legal sense, consists in the domination which is rightfully and lawfully obtained over a material thing, with the right to its use, enjoyment and disposition. n152 The term extends to every species of valuable right and interest, including real and personal property, easements, franchises and other incorporeal hereditaments. n153 The recipient of a validly issued building permit acquires a property right. n154 "Property" includes an equitable as well as a legal interest. n155

A water right is a property right. n156 Deprivation of priority rights in water is deprivation of a valuable property right. n157 The right of a corporation to create a lien on its property to secure the payment of a loan is property. n158

The right to sue for damages for personal injuries is a chose in action and therefore property. n159 The right to work is a property right subject to legal protection. n160 A business or a profession is property, n161 but the right to have punitive damages assessed is not property, n162 nor are tort claims. n163 "Property" covers anything capable of ownership n164 and protected by law. n165 So the right to follow a chosen occupation is a qualified property right. n166

Property is anything of value which may be acquired and held by the holder in perpetuity or so long as may be desirable. n167 It is the sum of all the rights and powers incident to ownership. n168 The rights to property include not only the right to acquire it but the right to possess it as well. n169 Property consists not only of ownership and possession but of the unrestricted right of use, enjoyment and disposal. n170 The common law, however, could not conceive of anything as being property which could not be capable of possession. n171

The term property is used "to denote legal relations between persons with respect to a thing," n172 and, in the legal sense, is not employed as indicative of the thing in regard to which the interest exists. n173 The word is often used to indicate the subject of the property or the thing owned, such as a chattel or a tract of land. These things, although the subjects of property, are, when coupled with possession, but the visible manifestations of invisible rights, the evidence of things not seen. n174 The term "property" is applicable to the exclusive right of the owner with respect to the use, control and disposition of something which is capable of ownership, n175 but in its more general and popular sense it is applicable to the thing itself. n176 The general result of various definitions of the term "property" is that it is the exclusive right of any person to freely use, enjoy and dispose of any determinate object, whether real or personal. n177

The modern conception of the meaning of property is the dominion over or right of user and disposition which one may lawfully exercise over particular things or subjects generally to the exclusion of all others, something which one owns to the exclusion of every other person. But the word has been employed by law writers and jurists in many different senses. Thus, the term is often used to denote anything which is the subject of ownership, any external object over which the right of property may be exercised. In this sense it has a very wide significance and includes every class of acquisition which one can own or have an interest in. This is the sense in which the word is used in the treatment of estates in real property. The property, or subject matter of ownership, is to be thought of as one thing, and the interest or estate therein, as another. So, in another sense, the term is employed to indicate the interest which can be acquired in external objects or things. This is its appropriate meaning, although it is not infrequently used to indicate the thing, rather than the right, and much of the uncertainty and confusion observable in the decisions of our courts have arisen from overlooking this distinction. n178

The term has a very broad meaing, and when used without qualification, either express or implied, it may reasonably be construed to include obligations, rights and other intangibles as well as personal things. n179 Thus, it is held that valid contracts are property, and as such are not subject to be taken without just compensation, whether the obligor be an individual, a municipality, state or the United States. n180 It has been said that there are no property rights, that all rights are individual, and that a person's right to possession, control, use and disposition of property is as personal as the right and not a natural right. n181 The right of property is a legal right and not a natural right and must be measured by reference to the rights of others and of the public. n182 Indeed this right has been declared of a higher rank than any constitutional sanction. n183 Constitutional guarantees of the right to acquire and possess property cease to operate at the death of the possessor. The right to control or dispose of property after death is not secured to the owner by state or federal constitutions, nor do these instruments secure to anyone the right to take by inheritance. n184 The right to acquire and own property and to deal with it and use it as the owner chooses, so long as such use harms no one, is a natural right which does not owe its origin to constitutions. n185

Property in its legal sense, as well as in its philosophical meaning, is not the thing itself, but certain rights in and over the thing, those rights being principally (1) use, (2) exclusion, and (3) disposition. n186 When a property right is created, every right necessary for its enjoyment is included by implication. n187 Property rights in land include the right to use, lease and dispose of it for lawful purposes, n188 and the constitution protects these essential attributes of property. n189 The use of a given object is the most essential and beneficial quality or attribute of property. Without it all other elements which go to make up property would be of no effect. n190 This right to use a thing or object as property includes the right or power to exclude others from the use thereof. n191 Ordinarily this right to enjoyment may not be coupled with the ability to keep it from claims of creditors and others. n192

A property right includes every right necessary for its enjoyment. n193 Where one has the exclusive right of possession, enjoyment and disposition of a thing, it follows that one also has the use thereof, and the exclusive right of user follows as a natural sequence from the admission of the right itself. The most absolute land title is a perpetual right of exclusive occupation and perpetual right of use. The word "exclusive," when used in this connection, means a right or privilege which may be exercised and enjoyed only by the person authorized, while all others are forbidden to interfere. There can be no definition of "property" which does not include the power of disposition and sale, as well as the right of private use and enjoyment. n194 The right of disposing is an incident of the ownership of property, n195 and realty is as much the subject of sale or exchange as any other kind of property, n196 so long as the intended disposition is not contrary to public policy or some positive rule of law n197 and does not interfere with the existing rights of others. n198 The free alienation of property is an inherent right of the owner, subject only to restraint if it is against the interest of the public. n199 However, a state may make some forms of property alienable or inalienable, and it has plenary power to regulate the tenure of property ownership within its borders. n200 The right of disposition is not title, but a mere power, which may or may not be exercised. n201 The owner may devote the property to any legitimate use, and the right to so use it is within the protection of the federal constitution. n202

Some authorities hold that absolute ownership of property implies the right of arbitrary disposition of it by will, n203 yet the great weight of authority is that the right to make a testamentary disposition of one's property is not a property right or a natural right, but is said to be a right by the grace of the law. n204

The meaning of the word "property" may often be disclosed by the context of the instrument or statute in which it is used, n205 or from the intention of the parties shown by the language used or the circumstances attending the transaction. n206 Within the limits of the law, one who owns property may do as one pleases with it; n207 one may dispose of it in any manner that one desires, in the absence of a showing of a lack of mental capacity, fraud or undue influence. n208 Also, rights acquired by a judgment are held to be property rights which cannot be taken without due process of law. n209 Instruments passing title to real estate are property and belong to the person in whom the title is thereby vested. n210 Authorities have been in conflict over whether a restrictive covenant is "property" protected by the constitution. n211 Intangible goodwill is property. n212 The right to free games won on a pinball machine is property. n213

§ 14.03(b) Classifications of Property.

Classifications of Property. All property may be grouped into movable and immovable, tangible and intangible, or corporeal and incorporeal. "Real estate" consists of incorporeal rights attached to or growing out of the soil as well as the soil itself. n214 Minerals and standing timber are corporeal hereditaments and as such recoverable in ejectment. n215

In the early development of the common law, tangible objects were referred to as things movable and things immovable, the same as under the Roman law. Later under the common law things immovable were considered of greater dignity than movables. The method of holding and enjoying the soil, and the things attached to the soil which could not ordinarily be carried from place to place, gave emphasis and durability to this classification. Upon the introduction of the feudal system in England, all absolute ownership in immovable things by private persons ceased. It is evident that this system could have no application to articles of a temporary or movable character, and so they became subject to absolute ownership. Thus, tangible and movable property came to be designated as goods and chattels. Immovable things, being held by tenure, soon became spoken of as tenements, n216 and as hereditaments, because of their inheritable quality. n217 "Tangible property" has been defined as that which may be felt or touched. So it must necessarily be corporeal and may be either real or personal. n218 "Lands," though less comprehensive than either tenements or hereditaments, was a term also used to designate those things of a tangible and immovable character. So at common law, property was divided into goods and chattels on the one hand, and lands, tenements, and hereditaments on the other. A more recent division of property was into real property and personal property.

Property is sometimes classified as corporeal and incorporeal. Corporeal property is that which may be apprehended by the senses, such as lands, goods, animals, and is either movable or immovable. Movables are those which can move naturally by themselves or be moved, and immovables are those which can neither move naturally themselves nor be moved. Corporeal property may be real, personal or mixed. n219 Under the broad general definition of property as a right, the idea of corporeal property is excluded, because the right to use, enjoy, control and dispose of anything is not capable of being touched or handled and is not of a material nature. n220 As generally understood, corporeal property consists of such subjects as are palpable; the common-law term relating to property of this character signified property in possession. n221 Corporeal property refers to and is property in corporeal things. The right to possess, occupy, enjoy and use corporeal things and take the profit thereof is what the law regards as corporeal property. n222

Incorporeal property consists of things which cannot be apprehended by the material senses, but consists in legal rights such as choses in action, rights-of- way, other types of easements and the like. n223 Patent rights, copyrights, trademarks, trade names and franchises to be a corporation are examples of incorporeal property rights. n224 Incorporeal property is a legal right which one person has, not to the property of another but in it; for example, as, in the case of a right-of-way, the land is owned and in possession of one as corporeal property, while another has the single right of passing over it, which is incorporeal property. This right may be acquired by agreement or it may be created by operation of law. When one sells a parcel of land in the center of one's own premises, the buyer by operation of law acquires a right-of-way over the grantor's other surrounding land. It is a right issuing out of, concerning, annexed to or exercisable within, a thing corporeal. n225 Hence, the right is not the thing corporeal itself, but something collateral to it, as a rent issuing out of lands or tenements. n226 It has no corporeal tangible substance. n227 It has been said that an incorporeal hereditament is what is known in law as a servitude, imposed upon land for the benefit of the person or persons owning the rights, irrespective of the ownership of the land. n228

Some rights may be exercised in connection with corporeal property but without any actual ownership, possession, control or power of disposition over the corporeal property. Examples of this type of rights are easements of light and air and lateral support. n229 Both corporeal and incorporeal property are valuable property rights and owners are entitled to judicial protection in their enjoyment of those rights.

Several areas of conflict which arise in connection with the legal concepts of property. One will divide the physical element into strata which will result in divisions into the surface area, the area above the surface, and the area below the surface. Another results from the conflict between those claiming a right to or interest in the property and those claiming rights or interests in adjacent property. A third involves parties claiming concurrent interests in the same property. A fourth concerns those who claim immediate possessory interests as against those whose claimed interests do not entitle them to present possession. A fifth arises from a claim of division of rights arising from present possession. A sixth springs from claims which could lead, if successful, to interest in the property but are initially only charges against it. A seventh deals with parts of the property which are fixed in place as compared with other things which are capable of movement, of which certain fixtures may be examples.

§ 14.03(c) Differences Between Real Property and Personal Property.

§ 14.03(c)(1) In General.

Differentiation of realty and personalty. Both the civil and the common law recognize that by the nature of their physical properties the same rules cannot be applicable to both realty and personalty. So in many areas of property law it becomes necessary to distinguish between real and personal property. The difference is deeply involved in history. Primitive people recognized a property right in weapons, tools, pottery, clothing and livestock long before they contemplated realty as an object of ownership. Even places of shelter such as caves were probably the object of communal or family rather than individual ownership. The growth of the feudal doctrine of seisin, of necessity, placed realty in a different legal position from personalty in certain fields. The development of the feudal system widened the gap between realty and property law. The concept of seisin was applicable only to realty, and the idea of the sovereign

being the basic owner of land under seisin was never applied to personalty. Bracton's ideas, brought back from his civil law training at Bologna, were applied to personalty. Thus, his treatment of personalty was colored by the civil law or the developing law merchant. He left the real estate law largely untouched. Attempts of judges like Mansfield to attune the real estate law to the law merchant n230 were rebuffed.

After the enactment of the statute 12 Car. 2, ch. 24, the statute abolishing tenures in 1660, property became classified on a new scheme, in that actions for the recovery of land were called real actions and actions respecting chattels were called actions in personam. The distinction was between rights in rem which had for their subject things real--or land and all that was permanently affixed to the land--and rights in personam, which had for their subject things personal or movable.

While most of the burdensome incidents of feudal tenure were taken away in 1660 by the statute abolishing tenures, the theory of the system remained operative. This statute, however, had the effect of breaking down the chief distinction between the different kinds of property, to which distinction the feudal system had given emphasis. Though the statute had the effect of changing knight service into socage, it did not abolish the concept of tenure, and the maxim still obtained that "all lands are holden," except those belonging to the Crown. After the enactment of that statute, property naturally came under a different classification. Long before the use of the word "real as to property, actions for the recovery of land had been called real actions, because, the land being immovable and indestructible, the identical land, the very thing, or the res as it was called, could be recovered. The action to recover a chattel was not called real, because the action was for damages, and not for the thing itself. Indeed, except in the action of replevin, there was no way at common law to compel the defendant to restore the very thing if the defendant chose to withhold it. Hence, the action was in personam, to obtain in damages a useful vindication, and not in rem, to recover the specific res or thing. It followed that, though lands and chattels were equally real, land was called real, because the action to recover it was in rem, and chattels were called personal, because the action as to them was in personam.

In special areas such as probate law the parliamentary treatment of realty, like the Mortmain acts, caused personalty to be channeled into the ecclesiastical or civil law instead of following the common-law course of realty.

The statute abolishing feudal service operated as a confirmation of title in the heir, but creditors were not allowed to subject lands in the hands of heirs to the satisfaction of their claims against the ancestor. Consequently executors and administrators, whose principal function is to pay creditors out of the estate, had no interest nor duties with reference to such lands. It is very important, for the purpose of ascertaining the scope and meaning of the numerous rules, statutory enactments and judicial decisions bearing upon the distinction between real and personal property, to keep in mind that they are traceable to conditions no longer existing in England, and which never had any existence in this country.

While the essential difference between the two kinds of property is well understood and uniformly recognized, the distinction is in some cases difficult in its application. At common law, real estate or real property comprehended everything included in the terms--lands, tenements, and hereditaments--that is, the surface of the earth and everything attached thereto. On the other hand the term "personal property," when applied to objects or things, has reference to things temporary and perishable as to time and movable as to space. Great difficulty in determining whether a piece of property, where movable, and yet attached, is real or personal property, will often arise n231 since the same thing is at different times classed as one or the other according to its situation, use or accidental qualities.

With reference to the devolution of property on the death of the owner the common-law distinction between real and personal property is still recognized in most of the American states, and with it the doctrine that real property descends to the heirs, and personal property to the executor or administrator. Also, the difference between movable and immovable property gives rise to important distinctions between the formalities necessary to constitute a valid testamentary disposition and the law that may govern the descent. Inheritance of immovable property must be determined by the law of the place where it is situated, but movables generally descend according to the law of the owner's domicile.

It is thought by some writers that goods and chattels were called personal because they were capable of attending the owner's person wherever the owner might go, but the better explanation seems that based on the type of judicial relief available for the different kinds of property. n232 Generally speaking the words "personal property" include everything except real estate. n233

The statutory requirements of a conveyance do not determine the classification of the property conveyed as to whether it is real or personal. n234 Property may undergo certain physical changes which will convert realty into personalty or bring about the reverse. Thus, under one legal theory growing crops may be realty, but when matured, though unsevered, may be personalty. n235 Property severed from the soil and thus becoming personalty may, over the course of years, revert to the soil. n236 On the other hand physical changes, though material, may leave the legal nature of the property unchanged. Thus, the proceeds of a fire or windstorm insurance policy may take the place of the destroyed realty. Severed timber or crops may remain realty. Under one theory "trade fixtures" remain personalty even though physically annexed to the realty. Certain principles of law may be applied in the absence of physical changes to convert one into the other. Thus, the doctrine of equitable conversion converts realty into personalty in the eyes of the law, even though there has been no actual physical change. Under the "institutional doctrine," unattached chattels can become realty. n237

No single test can be applied to distinguish realty from personalty. The nature of the property may be determinative in the case of solid minerals and the location of the property may be determinative in the case of fugitive minerals. In some states, the relation of the property to the realty, the extent of injury to the realty or to the property on removal, the intent of the parties, all are operative factors in determining its nature as realty or personalty. Considerable difficulty has been experienced by the courts in determining whether electric appliances are real or personal property. Each particular case is governed largely by its own facts and not by a general rule. n238 It has been held that an electric power line located on a highway is personal property and that a mortgage thereof is a chattel mortgage. n239 Some courts draw a distinction between public utilities and other owners of real property and hold that what would be real property when held by one owner is personal property when owned and used by a public utility. n240 In some situations such as compensation in condemnation cases the doctrine of constructive annexation has been greatly widened. n241 The status of property, whether real or personal, is to be determined as of the date of its acquisition n242 The rule that the status of property, whether real or personal, becomes fixed as of the date of its acquisition refers particularly to the legal title and not directly to interests founded upon equitable considerations to which the legal title may be subject. n243

The term "property," when used in its most comprehensive sense, will include both real and personal property, unless restricted in its meaning by the context. n244 The words denote intangible as well as tangible personal property. n245

The mobility of personalty necessarily causes a different practical approach of the law to personalty than to realty. So the treatment of alienation and the creation of liens on personalty must be other than on realty. "Personal property" may be used as having reference to everything which is the subject of ownership except lands and interests in lands, or as embracing only goods and chattels to the exclusion of money, notes and choses in action. n246 Land does not pass as an appurtenance to land. n247

The beneficial interest under a land trust is personal property. n248 Realty can become personalty through severance and personalty can be converted into realty under the "fixtures" doctrine, and through legal fiction immovables may become personalty. An article may as between the vendor and vendee remain a chattel but become real property as between a mortgagor and mortgagee. n249

§ 14.03(c)(2) Examples of Real Property and Personal Property.

Examples of realty and personalty. While all property must fall into one of the classifications of realty, personalty or chattels real, the jurisdictions are by no means in harmony as to the category in which particular property or property

interests fall. n250 Real estate itself may under certain circumstances be treated in the eyes of the law as personalty, and lots offered for sale by a real estate partnership may be treated as personalty for purposes of partnership law. n251

There is disagreement as to the extent that a shareholder or member's interest in a real estate corporation is realty or personalty. n252

While Congress has authorized the taxation of real property owned by the United States but leased to private citizens, n253 such property can be taxed only as personalty, and not as real estate, n254 and matters usually personalty may become realty. n255 Ordinarily, n256 a building becomes a part of the land upon which it stands, but it may be treated as personalty as between persons who deal with it as such. n257 Under the law of Illinois, a building permanently connected with the soil is considered real property. n258 As to fixtures, no absolute rule can be stated since the maxim "whatever is affixed to the soil, belongs to the soil," has always had exceptions, and they increase with the ever-varying necessities and exigencies of society. n259

Royalty interests in mineral rights are personal property, but where the mineral interest in land and the surface rights are owned separately each interest is regarded as realty. n260 So a contract for sale and removal of a fixture was held a contract for sale of goods. n261 An easement in gross, being a personal right, is an interest in real property but is not personal property, there being no dominant tenement. n262 Where a sales contract provided for access to a pool but the deed omitted reference to that access, only a personal license resulted. n263

Leasehold estates and estates for years are for some purposes treated at common law as personal property. n264 Upon the death of the lessee the unexpired term of the lease becomes an asset in the hands of the executor or administrator. n265 While oil and gas leases are, in many respects, dissimilar to ordinary leases, some cases treat them essentially as personalty. n266 But it has been held that an oil lease is an interest in realty and is governed by the same rule as that which governs property rights. n267

Under one rule it would seem the grant of an exclusive privilege to go upon land for the purpose of exploring for oil or gas, the grantor to receive part of the oil or gas mined, does not vest in the grantee any estate in the land or oil or gas, but is merely a license or grant. Such a lease creates an incorporeal hereditament only, and the lessee has no right or title to the oil or gas lying under the surface of the land. n268 Whether a conveyance creates a fee in the minerals under the surface of the land or an incorporeal hereditament entitling the grantee to mine and remove minerals, giving no right in them until mined, is to be determined by the intention of the parties as disclosed by the instrument read in the light of the surrounding circumstances rather than from the instrument itself. n269 It is sometimes held that oil rights or leases are incorporeal hereditaments, profits a prendre, resting in grant and not in livery and are incapable of possession. n270 So a gross products tax on production of oil and gas is a tax on personalty. n271

Interests in fugitive minerals in place are treated as realty for purposes of the Statute of Frauds, n272 recording acts, n273 venue, n274 homestead laws, n275 rights of cotenants, n276 measure of damages to realty n277 and taxation. n278 A royalty interest in the grantor of a mineral lease passes with the sale of the land, but not if there is a community lease. In the latter case the royalty is an incorporeal hereditament in gross. n279 An overriding royalty in oil and gas leases is an interest in realty within the Statute of Frauds. n280

Immovability is not of itself a final test as between realty and personalty. n281 Reservations of oil royalties are personalty. *n282* A condominium unit's characteristics are those of personalty, not realty. n283

As between the parties, property may be treated as realty or personalty. n284 Growing trees are usually realty, n285 but under some circumstances, such as in the case of nurseries, they may be personalty; n286 on the other hand, they may remain realty after severance. A grant of perpetual rights to manufacture turpentine from timber growing on land is valid. n287 Where a first refusal has been executed, an oil, gas and mineral lease is a sale of interest in the land for the purpose of such refusal. n288 Crude turpentine in turpentine boxes in pine trees in a state to be dipped up is personalty.

n289 The courts divide as to whether matured but unharvested crops are personalty or whether they are realty and pass with a sale of land. n290

As is seen elsewhere herein, trade fixtures are held by some courts to be chattels while others treat them as having become realty, severable under certain conditions. n291 The interest of a beneficiary in a land trust is personalty. n292

Railroad tracks are realty or personalty depending on the "benefit of the land" test. n293 While the property in a church pew is considered as partaking of the character of real estate, n294 it is in some jurisdictions a mere usufructuary right, n295 an easement or privilege in the freehold of another. n296

The vendor's interests under an executory real estate contract are personal property. n297 Under the doctrine of equitable conversion, when a land sales contract becomes binding, the seller's interest is considered personalty and the buyer's interest realty. The same rule has been applied in contracts to devise and in directions in wills to the executor to sell realty. Thus, upon the doctrine that courts of equity consider that done which should have been done, money is sometimes treated as real estate. Under the doctrine of equitable conversion, money directed to be employed in the purchase of land is considered as land. n298 When land is converted into money, such as when a trustee under a trust with power to sell, unless there is an intent manifested by the settlor of the trust that by its disposition its nature shall be thereby changed, the fund takes the place of the land which.yielded it and is to be applied and disposed of in the same manner, until the object of the trust is accomplished. n299 Where the trustee sells the land as directed by the instrument creating the trust, the proceeds of the sale will be treated as real estate and distributed accordingly. n300 A fund derived from a payment by the city for lands taken for school purposes for the benefit of unknown owners must be treated as real estate. n301 Also, insurance money realized from the destruction of buildings on devised real estate will be treated as real property. n302 Upon a conveyance of land by the executor of a testator in pursuance of an option given by the testator during the testator's lifetime, the proceeds of the sale pass as real estate. n303 The proceeds of the sale of real estate, made by decree of court in a partition suit, retain the character of real estate for the purposes of distribution. n304 Likewise, where there is a compulsory conversion of real estate, such as in the exercise of the power of eminent domain, and without the consent or against the will of the owner of the fee, the compensation awarded will be treated as real estate until the owner accepts it as personal property. n305 Also, where the real estate of a deceased testator is taken under the power of eminent domain, the rights of beneficiaries previously determined by law are not affected, and the damages awarded for the land are distributable as realty. n306 Where real estate is purchased with stolen money, the owner of the money does not become the owner of the land. n307

An equitable conversion of real estate into money is accomplished under a will if there is a positive direction to sell, an absolute necessity to sell in order to carry out the provisions of the will, or such a blending of realty and personalty by the testator in the will as to clearly show an intention to create a fund out of all of the property and to bequeath it as money. It has been held that real estate purchased by a guardian with the ward's money descends as personalty upon the ward's death. n308

Where real estate of a decedent is converted into money for the payment of debts, whatever surplus remains after a proper application of the funds for that purpose retains the character of real estate for the purpose of succession or distribution. n309

The owner of a tax certificate has an equitable right in the property with a right to call in the legal title by producing the certificate of purchase in case there has been no redemption. n310 It has been held that a tax certificate is real property and upon the death of the purchaser, passes to the heirs at law. n311

A house may be personalty and not a fixture as against a prior mortgagee, if not for agricultural purposes, and if the owner and the licensee who built the house so intended. n312 An interest of a partner in the partnership was held personalty, even though the partnership owned realty. n313

There is a growing tendency to treat the creation of a lease as the "sale" of space, thus invoking covenants of warranty that accompany sales of personalty. Fixed minerals after extraction become personalty. n314

There is a disagreement as to the extent that a shareholder or member's interest in a real estate corporation is realty or personalty. n315

An article may, as between the vendor and vendee remain a chattel, but become real property as between a mortgagor and mortgagee. n316

§ 14.03(c)(3) Graves.

One who purchases a cemetery lot for a valuable consideration obtains a property right--denominated as an easement, a license, or a privilege--which is cognizable as a matter of equity. This property right is entitled to protection from invasion by a trespasser or by the inappropriate acts of cemetery corporation, and the right is not revocable at the will of the cemetery corporation. n317 The grantee of the lot does not acquire a fee simple title but acquires only the lot limited to its intended burial purposes. The grantee is not the ordinary owner of an easement, and the right to have drives, walks and approaches kept in good repair does not depend on the law of easements. n318

§ 14.03(c)(4) Wild Animals.

Animals as real property. The basic legal proposition applicable to ferae naturae, wild animals, is that they initially belong to no one. The one who first reduces them to possession by capture acquires title to the animal. n319 One places title in the sovereign. n320 Another places title in the sovereign in trust for the public to be devoted to the public good. n321

According to the second positioin, wild birds and wild quadrupeds are owned by the state in its sovereign capacity as distinguished from its proprietary capacity, and are held by the state as trustee for the use and common benefit of people in the state. n322 This sovereign ownership originally vested in the colonial governments and was passed to the states or the United States, n323 Congress has the exclusive power to protect and regulate wildlife on public lands. n324

The third position recognizes no title until capture. n325 These rules are applicable where the animal is captured on public-owned grounds. Blackstone n326 gives title to the owner of the realty if the animal is started and killed on the owner's land, but to the captor if the animal is started on the land of a third person. There are differing positions, however, as to the rights of one who is the owner or legal possessor of the real estate on which the animal is found. Some cases seem to recognize some interest in the owner or possessor of the land where the animal is taken. n327 The cases are not in accord as to whether, when ferae naturae have been reduced to possession and later escape, the captor may pursue them on another's land. n328

Regarding the right to fish, the leading rule is that the right to navigate carries with it the right to fish. n329 In such cases the title to the aquatic life is in the state but is generally considered to be held in trust for the public, so that the state cannot give an exclusive right to take fish but may regulate its taking for the benefit of all citizens. n330 It has been held, however, that this trusteeship is for the benefit of citizens of the particular state, not for all persons. n331 In this the concept differs from the position that the king owned fish and game on state lands and could make individual grants to hunt and fish. n332

The right to fish in navigable streams does not carry with it the right to trespass on privately owned land to reach the water. n333 In England where the concept of navigability was synonymous with tidal waters, the king's right in the tide lands was a right that could be granted to personss, n334 but the right of fishing and navigation was a public right n335 and could not be abridged by the king, at least.

In England title to nontidal waters and the rights of fishing therein are in the riparian owners subject to a public easement of navigation. n336 After the American Revolution the royal ownership of tidal waters in the newly independent colonies passed to the states. n337 At common law the piscatory and navigation rights were separate. n338 This is the rule in some states today. n339 Other states give the public the right to fish as coincidental with the right of navigation, n340 even though title to the bed is in private hands. n341 But with respect to fish in a nonnavigable stream or in a navigable stream where title to the bed is in private hands, the cases divide as to whether it is trespass for the public to fish therein. n342

Where private property is inundated by navigable waters the owner of the soil has an exclusive right to fish even where there is a public right of fishing in navigable waters. n343 California has ruled otherwise, however. n344 At common law, fish and game could be the subject of private ownership, and where so owned and confined, though still alive and uncaptured, were realty. n345 This is probably the leading rule today. n346 According to one theory, however, public policy gives the sovereign the right to regulate the taking n347 and even the possession and confinement of wild animals. Thus the sovereign--state n348 or federal--may by statute place a particular species in the public domain. n349

The ferae naturae theory has been applied to inanimate objects. Where the owner of a chattel has parted with possession thereof voluntarily or involuntarily and the object goes to rest on the real estate of another, the owner does not lose title thereto unless the owner has voluntarily abandoned it. n350 Abandonment, however, requires the combination of a discarding of possession and an intent to abandon. If the article so placed on realty which is in the possession of another is discovered by another, title is not lost, n351 but a legal question arises as to whether possession of the article is in the finder or in the possessor of the realty. Whoever does have such possession has title as against all of the world except the true owner. In solving the question of the rights of the finder versus the possessor of the land where the item is found, three rules were developed by the courts: lost property, mislaid property and treasure trove.

The early common law gave possession of lost property to the finder, n352 even though the finder was a trespasser. n353 Exceptions were made where the finder was an employee whose duty it was to look for such lost objects n354 or where the object was found in a closely confined and controlled place. n355 A more modern trend developed giving possession to the possessor of the land where the item was found. n356 Each theory has as its aim the restoration of the property to the true owner. The finder theory has it that the finder will be more likely to make the discovery known if the finder may keep the item unless the owner is found. n357 Proponents of the other theory assert that the owner is most likely to search for the property where it was lost. If the property was merely deposited by the owner with intent to pick it up later, and then forgotten, it is "mislaid" property and possession is in the owner of the land where the item was left, not the person who discovers it. n358

Treasure trove is property, usually gold, silver or jewels, found under conditions such as lead to the conclusion that it was deliberately placed there so long ago that the owner has been forever lost. n359 Treasure trove under n360 the English law belongs to the Crown. The leading American rule gives it to the finder. n361 But treasure trove and lost property are often confused and in some instances go with the realty. n362 The cases are in dispute in the case of lost goods whether the licensee-finder or the owner of the land is entitled to the possession of goods found on the premises by the licensee.

Underground water is often considered ferae naturae as were oil and gas in the early days.

§ 14.03(c)(5) Chattels Real.

Chattels real. The common law recognized certain interests in land which stood midway between realty and personalty, partaking partially of the attributes of both. n363 At common law an estate less than a freehold, such as estates for years, at will and by sufferance, was personal property and passed primarily, on the death of the owner, to the executor or administrator. These interests were termed "chattels real." n364

Land, as the object of rights, is described as a thing real or as real property. The rights or estate which the owner in fee or for life has in land are also described as real property, but those rights which the owner of a leasehold interest has in and to the land or real property are not real property or real estate, but a chattel real, which is personalty. n365 Thus, it is held that a mining lease with easement rights creates an interest in land but is not real property. n366

It is said that while a chattel real is considered for most purposes as being personal property, it is also recognized as constituting an interest in real estate. n367 This seems to be the rule in the absence of a statute changing it. n368 A lease for years is generally considered personal property, even though the statute calls it a "chattel real." n369 Where this rule obtains, the lease may be orally assigned. n370 A ninety-nine-year lease, renewable forever, has been held real property and subject to dower rights. n371

Chattels real are to be distinguished, on the one hand, from things which have no concern with the land, such as mere movables and rights connected with them, which are chattels personal, and, on the other band, from a freehold, which is realty. n372 While a chattel real is an interest which is annexed to or concerns real estate, it is personal property and not real estate, unless so declared by statute. n373 Many courts have held that leaseholds are not real property within the meaning of dower statutes. n374 Under some statutes chattels real, such as leaseholds, are considered real estate for certain purposes. n375 Thus, they have been declared real estate for purposes of conveyance n376 and levy and sale on execution. n377

The common-law rule that a leasehold interest in land is considered personal property and governed generally by rules applicable to such property remains in force in all cases where not changed by statute. n378 Under a statute defining the term "real property" as including real, estate, lands, tenements and hereditaments, corporeal and incorporeal, it has been held that a chattel real is not included. n379

A major difficulty with the chattel real concept, particularly with respect *to* leaseholds, is that, while its existence is recognized in all jurisdictions, there is much disagreement as to whether in particular instances it takes on the flavor of realty or personalty. A chattel real is universally recognized as personalty for probate purposes. But whether it is realty or personalty for purposes of alienation, n380 Statutes of Fraud, recordation, taxation and taking by eminent domain depends on the particular jurisdiction.

FOOTNOTES:

(n1)Footnote 146. *York v. Stone, 34 P.2d 911 (Wash. 1934). See Washington Fruit & Produce Co. v. Yakima, 100 P.2d 8 (Wash. 1940). See* Edward Kent, *Property, Power, and Authority, 41 BROOKLYN L. Rev. 541(1975).*

(n2)Footnote 147. *Franklin v. Franklin, 155 P.2d 637 (Cal. App. 1945); Barcellos v. Wolfsen, Inc. v. Westlands Water Dist., 849 F. Supp. 717 (E.D. Cal. 1993); Floyd v. Title Exch. & Pawn of Aniston, Inc., 620 So. 2d 576 (Ala. 1993); Lopiano v. Lopiano, 247 Conn. 356 (1998); Texas v. Public Util. Comm'n, 883 S.W.2d 190 (Tex. 1994);* Nuzzaci v. Nuzzaci, 1995 Del. Earn. Ct. LEXIS 30 (Del. Fam. Ct. 1995).

(n3)Footnote 148. Restatement, Law of Property 3. A public officeholder has no property right in the office: *Lanza v. Wagner, 229 N.Y.S.2d 380 (1962).*

(n4)Footnote 149. *Presbrey v. Simpson, 290 F. 333 (App. D.C. 1923); Wayne v. Hartridge. 92 S.E. 937 (Ga. 1917); Johnson v. Mansfield, 195 S.W. 453 (Ky. 1917); Ellet v. McCord, 41 S.W.2d 110 (Tex. App. 1931). Temple Hoyne Buell Found. v. Holland & Hart, 851 P.2d 192 (Colo. App. 1992); In re Estate of Thompson, 511 N.W.2d 374 (Iowa 1994)* (referring to definition of personal property); *In re Estate of Russell, 888 P.2d 489 (N.M. App. 1994)* (referring to definition of personal property).

(n5)Footnote 150. *Associated Press v. International News Service, 245 F. 244 (2d Cir. 1917): Yuba River Power Co. v. Nevada Irr. Dist., 279 P. 128 (Cal. 1929): Connelly v. Special Road & Bridg Dist. No. 5, 126 So. 794; Kansas City Life Ins. Co. v. Hammett, 149 So. 525 (La. 1933); United States v. Hemmen, 51 F.3d 883 (9th Cir. 1995); In re*

Albion Disposal, Inc., 152 B.R. 794 (Bankr. W.D.N.Y. 1993); Kuro, Inc. v. Florida, 713 So. 2d 1021 (Fla. Ct. App. 1998); Holtz v. Board of Comm'rs of Elkhart Cty., 560 N.E.2d 645 (Ind. 1990); Dodds v. Shamer, 663 A.2d 1318 (Md. App. 1995); Ohio Edison Co. v. PUC of Ohio, 678 N.E.2d 922 (Ohio 1977); Railroad Comm'n of Texas v. Waste Mgt. of Texas, 880 S.W.2d 835 (Tex. App. 1994); Harrington v. Harrington, 935 P.2d 1357 (Wash. App. 1997).

(n6)Footnote 151. *Shedd v. Patterson, 144 N.E. 5 (Ill. 1924).*

(n7)Footnote 152. *Downing v. Municipal Court, 198 P.2d 923 (Cal. App. 1948); Tatum Bros. Real Estate & Inv. Co. v. Watson, 109 So. 623 (Fla. 1926); Shedd v. Patterson, 144 N.E. 5 (Ill. 1924); Howlett v. McGarvey, 79 N.E.2d 864 (Ill. App. 1948); Cleveland v. Cuyahoga, 79 N.E.2d 576 (Ohio 1946).* A person may recover for the use of a literary creation even if the creation is uncopyrightable, if it was disclosed under contract: *Desny v. Wilder, 299 P.2d 257 (Cal. 1956). Exchange Nat'l Bank of Chicago v. American Nat'l Bank of Libertyville, 1991 U.S. Dist. LEXIS 16819 (N.D. Ill. 1991).*

(n8)Footnote 153. *Hoyd v. Citizens Bank of Albany Co., 89 F.2d 105 (6th Cir. 1937); Wapsie Power & Light Co. v. Tipton, 193 N.W. 643 (Iowa 1923); State v. Cowen, 3 N.W.2d 176 (Iowa 1942); Clark v. Lucas County Board of Review, 44 N.W.2d 748 (Iowa 1950); Titus v. Terkelsen, 18 N.E.2d 444 (Mass. 1939); McAlister v. Pritchard, 230 S.W. 66 (Mo. 1921); Gibbes v. National Hosp. Service, 24 S.E. 2d 513 (S.C. 1943).* When an idea, though not patentable or subject to copyright is reduced to concrete detailed form and is more than a mere abstraction, it becomes a property right: *Belt v. Hamilton Nat'l Bank, 108 F. Supp. 689 (D.D.C. 1952); Liggett & Myers Tobacco Co. v. Meyer, 194 N.E. 206 (Ind. App. 1935). But see Grombach Productions, Inc. v. Waring. 59 N.E.2d 425 (N.Y. 1944).* Otherwise an idea is not a property right: *Rodriquez v. Western Union Tel. Co., 18 N.Y.S.2d 759 (1940). In re Kerwin, 996 F.2d 552 (2d Cir. 1993); Armstrong v. United States, Jefferson Nat'l Bank, 7 F. Supp. 758 (W.D. Va. 1998): In re Gomes, 219 B.R. 286 (Bankr. D. Or. 1998); In re Whyte, 164 B.R. 976 (Bankr. N.D. Ind. 1993).*

(n9)Footnote 154. *Yocum v. Power, 157 A.2d 368 (Pa. 1960).*

(n10)Footnote 155. *State ex rel. St. Louis v. Baumann, 153 S.W.2d 31 (Mo. 1941).* "Where a right is subject to ownership or transfer and may be brought within the dominion and control of the court through some recognized process, it is property." *Investment & Securities Co. v. Robbins, 49 F. Supp. 620 (E.D. Wash. 1943). NHG Minn. IX v. County of Wright, 1996 Minn. Tax LEXIS 21 (Minn. 1996).*

(n11)Footnote 156. *Paloma Inv. Ltd. Partnership v. Jenkins, 978 P.2d 110, 115 (Ariz. App. Div. 1998)* (water rights are property rights; transfer of water rights is a conveyance); *Lindsey v. McClure, 136 F.2d 65 (10th Cir. 1943). See infra* Chapter 50, *Water Rights. In re Smith, 924 P.2d 155 (Colo. 1996); In re General Adjudication of Rights to the Use of Water From the Snake River Basin Water Sys., 832 P.2d 289 (Idaho 1992).*

(n12)Footnote 157. *Whitmore v. Murray, 154 P.2d 748 (Utah 1944).*

(n13)Footnote 158. *Feest v. Hillcrest Cemetery, 19 N.W.2d 246 (Wis. 1945).*

(n14)Footnote 159. *Franklin v. Franklin, 155 P.2d 637 (Cal. App. 1945); Finley v. Winkler, 222 P.2d 345 (Cal. 1950); Royal Oak Tp. v. Berkley, 16 N.W.2d 83 (Mich. 1944).*

(n15)Footnote 160. *Cook v. John H. Mathis Co., 61 A.2d 585 (N.J. 1948).*

(n16)Footnote 161. *Scriven v. Scriven, 45 N.W.2d 760 (Neb. 1951); Howarth v. Gilman, 65 A.2d 691 (Pa. 1949).*

(n17)Footnote 162. *Ross v. Gore, 48 So. 2d 412 (Fla. 1950); Gordon v. Florida, 608 So. 2d 800 (Fla. 1992).*

(n18)Footnote 163. *In re Bonza's Estate, 51 Lack. Jur. 129 (Pa. Orph. 1950).*

(n19)Footnote 164. *Bogan v. Wiley, 202 P.2d 824 (Cal. App. 1948).* Every right to land is "title": *Shingleton v.*

State, 133 S.E.2d 183 (N.C. 1963). A contingent remainder is property regardless of how improbable the contingency: *In re Marriage of Brown, 126 Cal. Rptr. 633 (1976).*

(n20)Footnote 165. *Fields v. Michael, 205 P.2d 402 (Cal. App. 1949).*

(n21)Footnote 166. *Howarth v. Gilman, 65 A.2d 691 (Pa. 1949).*

(n22)Footnote 167. *Thomison v. Hillcrest Athletic Ass'n, 5 A.2d 236 (Del. 1939).*

(n23)Footnote 168. *Nashville, C.& St. L.R. Co. v. Wallace, 288 U.S. 249 (1933); Liddick v. Council Bluffs, 5 N.W.2d 361 (Iowa 1942); Todeva v. Oliver Iron Min. Co., 45 N.W.2d 782 (Minn. 1951).*

(n24)Footnote 169. *Woolf v. Fuller, 174 A. 193 (N.H. 1934).*

(n25)Footnote 170. The above definition was given in a case holding a city zoning ordinance unconstitutional, the court saying: "Anything which destroys any of these elements of property, to the extent destroys the property itself. The substantial value of property lies in its use. If the right of use be denied, the value of the property is annihilated and ownership is rendered a barren right. Therefore a law which forbids the use of a certain kind of property, strips it of an essential attribute and in actual result proscribes its ownership." *Spann v. Dallas, 235 S.W. 513 (Tex. 1921).* To the same effect see *Dallas v. Mitchell, 245 S.W. 944 (Tex. App. 1922); General Tire & Rubber Co. v. Texas Pacific Coal & Oil Co., 102 S.W.2d 1086 (Tex. App. 1937). See also Helvering v. Elias, 122 F.2d 171 (2d Cir. 1941); O'Connor v. Moscow, 202 P.2d 401 (Idaho 1949), 9 A.L.R. 2d 1031; Transcontinental Oil Co. v. Emmerson, 131 N.E. 645 (Ill. 1921); Winchester v. Ring, 144 N.E. 333 (Ill. 1924); O'Brien v. Stoneman, 288 N.W. 447 (Iowa 1939); State v. Wiley, 3 N.W.2d 620 (Iowa 1942); State ex rel. St. Louis v. Baumann, 153 S.W.2d 31 (Mo. 1941); Hildebrand v. Southern Bell Tel. & Tel. Co., 14 S.E.2d 252 (N.C. 1941); Ralston Steel Car Co. v. Ralston, 147 N.E. 513 (Ohio 1925); Squire v. Guardian Trust Co., 84 N.E.2d 99 (Ohio 1945), aff'd 68 N.E.2d 312 (Ohio 1946).*

(n26)Footnote 171. Under the common law there could be no property rights in fire, light, air and water since they were not capable of possession: 2 Blackstone's Commentaries 395.

(n27)Footnote 172. Restatement, Law of Property, Ch. 1, *Introductory Note.*

(n28)Footnote 173. *Howlett v. Doglio, 83 N.E.2d 708 (Ill. 1949). See* Restatement, Conflict of Laws, Ch. 7, *Introductory Note.*

(n29)Footnote 174. *Tatum Bros. Real Estate & Inv. Co. v. Watson, 109 So. 623 (Fla. 1926); Transcontinental Oil Co. v. Emmerson, 131 N.E. 645 (Ill. 1921); Sachs v. Cluett, Peabody & Co., 39 N.Y.S.2d 853 (1943).* The term "property" does not mean the physical object itself but certain rights over the object, and is the right to possession, use. and disposition of a thing in such manner as is not inconsistent with law: *In re Forsstrom. 38 P.2d 878 (Ariz. 1934); Meek v. State, 185 N.E. 899 (Ind. 1933).* The word "property" as used in a constitutional provision that mechanics and materialmen shall have a lien, refers to the structure, and not simply to the interest in the property of the one by whom the improvement was made: *English v. Olympic Auditorium, 20 P.2d 946 (Cal. 1933).*

(n30)Footnote 175. *Eliasberg Bros. Merc. Co. v. Grimes, 86 So. 56 (Ala. 1920); State Street Furn. Co. v. Armour & Co., 177 N.E. 702 (Ill. 1931); Great Northern R. Co. v. Washington Elec. Co., 86 P.2d 208 (Wash. 1939).*

(n31)Footnote 176. *Eliasberg Bros. Merc. Co. v. Grimes, 86 So. 56 (Ala. 1920); Spann v. Dallas, 235 S.W. 513 (Tex. 1921).*

(n32)Footnote 177. *In re Blalock, 31 F.2d 612 (N.D. Ga. 1929); Stevens v. State, 2 Ark. 291 (1840): McKeon v. Bisbee. 9 Cal. 137 (1858); Tatum Bros. Real Estate & Inv. Co. v. Watson, 109 So. 623 (Fla. 1926); Chicago & W.I. R. Co. v. Englewood Connecting R. Co., 4 N.E. 246 (Ill. 1886); Winchester v. Ring, 144 N.E. 333 (Ill. 1924); State Street*

Furn. Co. v. Armour & Co., 177 N.E, 702 (Ill. 1931). Department of Financial Institutions v. General Finance Corp., 86 N.E.2d 444 (Ind. 1949); St. Louis v. Hill, 22 S.W. 861 (Mo. 1893); Low v. Rees Printing Co., 59 N.W. 362 (Neb. 1894); Jaynes v. Omaha Street R. Co., 74 N.W. 67 (Neb. 1898); Eaton v. Boston, C. & M R. Co., 51 N.H. 504 (1872; *Springfield Fire & Marine Ins. Co. v. Allen, 43 N.Y. 389 (1871): Brooklyn City R. Co. v. Kings County Trust Co., 212 N.Y.S. 343 (1925); In re Murphy's Will, 189 N.W. 497 (N.D. 1922); Ralston Steel Car Co. v. Ralston, 147 N.E. 513 (Ohio 1925); Waters v. Wolf. 29 A. 646 (Pa. 1894); Griffith v. Charlotte, C. & A. R. Co., 23 S.C. 25 (1885); In re Gunderderson's Will, 211 N.W. 791 (Wis. 1927). See Metropolitan Trust Co. v. Jones. 51 N.E.2d 256(Ill. 1943); State v. Cowen. 3 N.W. 2d 176 (Iowa 1942); Titus v. Terkelsen, 18 N.E.2d 444 (Mass. 1939); Womack v. Womack. 172 S.W.2d 307 (Tex. 1943).* Real or personal property commonly denotes property of all kinds: *McFadden v. Murray, 257 P. 999 (N.M. 1927), See also* Peter Herzog, *Conflict of Laws in Land Transactions: The Borderland Between Contract and Property Matters--A Comparative Law, 8 Syracuse L. Rev. 191.*

(n33)Footnote 178. *Chattanooga Foundry & Pipe Works v. Atlanta. 203 U.S. 390 (1906); People v, Hibernia Sav. & Loan Soc., 51 Cal. 243 (1876);* Illinois Cent. R. Co. v. Chicago, 41 N.E.45 (Ill. 1894); *Vaughan v. Murfreesborough, 2 S.E. 676 (N.C. 1887); Waters v. Wolf, 29 A, 646 (Pa. 1894).*

(n34)Footnote 179. *Fidelity & Deposit Co. of Maryland v. Arenz, 290 U.S. 66 (1933); Citizens State Bank v, Vidal, 114 F.2d 380 (10th Cir. 1940); Hildebrand v. Southern Bell Tel. & Tel. Co., 14 S.E.2d 252 (N.C. 1941).* Mineral rights are real estate in Alabama: *Locke v. Locke, 280 So. 2d 773 (Ala 1973).*

(n35)Footnote 180. *Lynch v. United States, 292 U.S. 571 (1934).*

(n36)Footnote 181. *Flake v. Greensboro News Co., 195 S.E. 55 (N.C. 1938).*

(n37)Footnote 182. *Nourse v. Russellville, 78 S.W.2d 761 (Ky. 1935).*

(n38)Footnote 183. *Young v. Gurdon, 275 S.W. 890 (Ark. 1925).*

(n39)Footnote 184. *In re Emerson's Estate, 183 N.W. 327 (Iowa 1921); In re Hagar's Estate, 126 A. 507 (Vt. 1924).*

(n40)Footnote 185. *Spann v. Dallas, 235 S.W. 513 (Tex. 1921). See also Reimer v. Dallas, 129 A. 390 (N.J. 1925).*

(n41)Footnote 186. *Citizens State Bank v. Vidal, 114 F.2d 380* (10th Cir. 1940); *Dixon v. People, 48 N.E. 108 (Ill. 1897); Hildebrand v. Southern Bell Tel. & Tel. Co., 14 S.E.2d 252 (N.C. 1941). See Chicago & W.I. R. Co. v. Englewood Connecting R. Co., 4 N.E. 246 (Ill. 1886); St. Louis v. Hill, 22 S.W. 861 (Mo. 1893); Eaton v. Boston, C. & M. R. Co., 51 N.H. 504 (1872); McCown v. Fraser, 192 A. 674 (Pa. 1977).* The equitable estate is the substance and the legal estate the shadow: *Hendrickson v. Cubage, 309 S.W.2d 306 (Ark. 1958).*

(n42)Footnote 187. *Cuneo v. Chicago, 41 N.E.2d 473 (Ill. 1942);*Guillet v. Livernois. 8N.E.2d 921 (Mass. 1937).

(n43)Footnote 188. *Terrace v. Thompson, 263 U.S. 197 (1923).*

(n44)Footnote 189. *Terrace v. Thompson, 263 U.S. 197 (1923); Seigal v. Warrick, 214 S.W.2d 883 (Tex. App. 1948).* The right of persons to use their property for lawful purposes is guaranteed to them: *Clinton v. Standard Oil Co., 137 S.E. 183 (N.C. 1927).*

(n45)Footnote 190. *St. Louis v. Hill, 22 S.W. 861 (Mo. 1893); Eaton v. Boston, C. & M. R. Co., 51 N.H. 504 (1872); Waters v. Wolf, 29 A. 646 (Pa. 1894).*

(n46)Footnote 191. *McKeon v. Bisbee, 9 Cal. 137 (1858); Jaynes v. Omaha Street R. Co., 74 N.W. 67 (Neb. 1898).*

(n47)Footnote 192. *In re Rosenberg's Will. 199 N.E. 206 (N.Y. 1935).*

(n48)Footnote 193. *Ampagoomian v. Atamian, 81 N.E.2d 843 (Mass. 1948)* (a lien is a property right).

(n49)Footnote 194. *United States v. Eleven Certain Parcels of Land, 45 F. Supp. 289 (S.D. Cal. 1942); Buehman v. Bechtel, 114 P.2d 227 (Ariz. 1941); Chicago & W.I. R. Co. v. Englewood Connecting R. Co., 4 N.E. 246 (Ill. 1886): Bartkowiak v. Bartkowiak, 283 N.W. 49 (Mich. 1938); St. Louis v. Hill, 22 S.W. 861 (Mo. 1893); Freeland v. Burdick, 204 S.W. 1123 (Mo. App. 1918); Eaton v. Boston, C. & M. R. Co., (51 N.H. 504 1872); Wynehamer v. People, 13 N.Y. 378 (1856).*

(n50)Footnote 195. *Osage Oil & Ref. Co. v. Chandler, 287 F. 848 (2d Cir. 1923); State ex inf. Brummall ex rel. Powell v. Gromer, 252 S.W. 705 (Mo. 1923); Grenz v. Anders, 241 P. 46 (Or. 1925);* Mason v. Finley. S.E. 780 (S.C. 1924).

(n51)Footnote 196. *Jacobsen v. Chee Lbr. Co., 223 P. 12 (Wash. 1924).* The method of alienation of real property is governed by statute: *In re Water Fronton Upper New York Bay, 157 N.E. 911 (N.Y. 1927).*

(n52)Footnote 197. *Wilson Bros. v. Branham, 109 S.E. 189 (Va. 1921).*

(n53)Footnote 198. *O'Connor v. Patton, 286 S.W. 822 (Ark. 1926).*

(n54)Footnote 199. *Northern Pennsylvania Power Co. v. Pennsylvania Public Utility Comm'n., 5 A.2d 133 (Pa. 1939).* The right of alienation is inseparable from a fee simple: *Williams v. McCann, 385 P.2d 788(Okla. 1963).*

(n55)Footnote 200. *Sand v. Beach. 200 N.E. 821 (N.Y. 1936).*

(n56)Footnote 201. *Burns v. Nolette, 144 A. 848 (N.H. 1929); Barbin v. Moore, 159 A. 409 (N.H. 1932).*

(n57)Footnote 202. *State of Washington ex rel. Seattle Title Trust Co. v. Roberge, 278 U.S. 116 (1928); In re Perrins' Appeal, 156 A. 305 (Pa. 1931).* A landowner is not liable to an infant trespasser in the absence of actual knowledge of the dangerous condition: *Simmel v. New Jersey Coop. Co., 143 A.2d 521 (N.J. 1958).* In New York a private person has a private remedy against a public nuisance if the person has suffered special damage: *Graceland Corp. v. Consolidated Laundries Corp., 180 N.Y.S.2d 644 (1958).* The owner of premises owes no duty to warn persons renting camping sites of the dangerous natural conditions: *Hersch v, Anderson Acres, Inc., 146 N.E.2d 648 (Ohio 1957). See Validity of Zoning Undeveloped Areas, 29 Rocky. Mt. L. Rev. 202;* Fleming James Jr., *Tort Liability of Occupiers of Land: Duties Owed to Trespassers, 63 Yale L. J. 144 (1953).*

(n58)Footnote 203. *Hayes v. Hayes. 145 S.W. 1155 (Mo. 1912).*

(n59)Footnote 204. *Carnahan v. Hamilton, 107 N.E. 210 (Ill. 1914); In re Tiemen's Estate, 277 P. 385 (Wash. 1929).*

(n60)Footnote 205. *Chattanooga Foundry & Pipe Works v. Atlanta, 203 U.S. 390 (1906); Franklin v. Franklin, 155 P.2d 637 (Cal. App. 1945); Chicago v. Hulbert, 8 N.E. 812* (Ill, 1886). *Vaughan v. Murfreesborough, 2 S.E. 676 (N.C. 1887).*

(n61)Footnote 206. *Springfield Fire & Marine Ins. Co. v. Allen, 43 N.Y. 389 (1871).*

(n62)Footnote 207. *Moxley v. Title Ins. & Trust Co., 165 P.2d 15 (Cal. 1946).*

(n63)Footnote 208. *Smith v. Smith, 191 S.W.2d 956 (Ark. 1946); Myers v. Myers, 44 A.2d 455 (Md. 1945).*

(n64)Footnote 209. *Collins v. Welsh, 75 F.2d 894 (9th Cir. 1935).*

(n65)Footnote 210. *Cook v. Rigney. 126 P.2d 325 (Mont. 1942).*

(n66)Footnote 211. Held to be property: *Stamford v. Vuono, 143 A. 245 (Conn. 1928); Ashland-Boyd City- County Health Dep't. v. Riggs. 252 S.W.2d 922 (Ky. 1952); Ladd v. Boston, 24 N.E. 858 (Mass. 1890); Allen v. Detroit, 433 N.W. 317 (Mich. 1911): Burger v. St. Paul. 64 N.W.2d 73 (Minn. 1954); Peters v. Buckner, 232 S.W. 1024 (Mo. 1921); Hayes v. Waverly & P. R. Co., 27 A. 648 (N.J. 1893); Flynn v. New York, W. & B.R. Co., 112 N.E. 913 (N.Y. 1916): Raleigh v. Edwards, 71 S.E.2d 396 (N.C. 1952); Meagher v. Appalachian Elec. Power Co., 77 S.E.2d 461 (Va. 1953).* Held to not be property: *Friesen v. Glendale, 288 P. 1080 (Cal. 1930).*

(n67)Footnote 212. *Jones v. Corbyn 186 F.2d 450 (10th Cir. 1950).*

(n68)Footnote 213. *State v. Sandfer, 226 P.2d 438* (Okla, App. 1951).

(n69)Footnote 214. *Jilek v. Chicago, Wilmington & Franklin Coal Co., 47 N.E.2d 96 (Ill. 1943).*

(n70)Footnote 215. *Williams v. Kitchens, 74 So, 2d 457 (Ala. 1954).*

(n71)Footnote 216. Kenelm Edward Digby, An Introduction To The History of Law of Real Property (5th ed.) p. 72, n. 5.

(n72)Footnote 217. 2 Frederick Pollock and Frederic William Maitland, The History of English Law Before the Time of Edward 1 181 (2d ed. 1968).

(n73)Footnote 218. In re McKinnon's Estate, 20 Erie C.L.J. 87 (Pa. 1937).

(n74)Footnote 219. *Anne Arundel County v. City of Annapolis, 721 A.2d 217, 221 (Md. 1998)* ("land" refers to waters as well as dry or fast land; "real property" means land in its broadest sense, including air space, the surface, the subsurface, and waters); *Penniman v. French, 34 Mass. 404 (1835).*

(n75)Footnote 220. *Transcontinental Oil Co. v. Emmerson, 131 N.E. 645 (Ill. 1921).*

(n76)Footnote 221. *Id.*

(n77)Footnote 222. *Id.*

(n78)Footnote 223. *Patterson v. Kentucky. 97 U.S. 501 (1878); Rogers v. Biddeford & Saco Coal Co., 16 A.2d 131 (Me. 1940).*

(n79)Footnote 224. *Transcontinental Oil Co. v. Emmerson, 131 N.E. 645 (Ill. 1921).*

(n80)Footnote 225. *National Tel. News Co. v. Western Union Tel. Co., 119 F. 294 (7th Cir. 1902); Reynolds v. Cook, 3 S.E. 710 (Va. 1887); United Fuel Gas Co. v. Moles, 11 S.E.2d 369 (W. Va. 1940).*

(n81)Footnote 226. *State v. Royal Mineral Ass'n, 156 N.W. 128 (Minn. 1916); Union Fails Power Co. v. Marinette County, 298 N.W. 598* (Wis. 1 941).

(n82)Footnote 227. *Patterson v. Kentucky, 97 U.S. 501 (1878).*

(n83)Footnote 228. *Mendez v. Bowie, 118 F.2d 435 (1st Cir. 1941); Callahan v. Martin, 43 P.2d 788 (Cal. 1935). See Sain v. Montana Power Co., 20 F. Supp. 843 (D. Mont. 1937). See infra* Chapter 60, *The Law of Easements: Rights in the Property of Another.*

(n84)Footnote 229. *Transcontinental Oil Co. v. Emmerson, 131 N.E. 645 (Ill. 1921).*

(n85)Footnote 230. FEARNE ON Contingent Remainders was written as a result of Mansfield's attempt to rationalize the Rule in Shelley's Case under the law merchant.

(n86)Footnote 231. *Puerto Rico R. Light & Power Co. v. United States, 131 F.2d 491 (1st Cir. 1942)* (holding rolling stock and equipment used by the plaintiff in operating a tramway under an easement did not constitute immovables as defined by statute); *Bemis v. First Nat'l Bank, 40 S.W. 127 (Ark. 1897); Hinton v. Carney, 250 S.W.2d 364 (Tenn. 1952)* (stock in a wholly-owned real estate corporation passes as personalty, not realty). *See* Hoing v. River Valley Gas Co., S.W.2d 513 (Ark. 1938) (there is no difference between realty and personalty except so far as such difference is created by particular statutes). Railroad tracks are immovables and pass to the vendee of the realty in the absence of recorded claims. *American Creosote Co. v. Springer, 241 So. 2d 510 (La. 1970).*

(n87)Footnote 232. *See* 3 U.S. Holdsworth, A History OF English Law 2, 22 (1922).

(n88)Footnote 233. *Blakeman v. Harwell, 31 S.E.2d 50 (Ga. 1944); In re McGlathery's Estate, 166 A. 886 (Pa. 1933). See Erwin v. Steele, 228 S.W.2d 882 (Tex. App. 1950). See Chapter 4, supra, The Growth of the English Common Law of Real Property.*

(n89)Footnote 234. *Myers v. Arthur, 238 P. 899 (Wash. 1925).*

(n90)Footnote 235. Manure produced from products of the land is realty, being a replenishment of the land; otherwise, it is personalty as between vendor and vendee. *Gomez v. Dykes, 359 P.2d 760 (Ariz. 1961).*

(n91)Footnote 236. Blocks of stone from an abandoned quarry dumped as waste and embedded in the soil for many years were held to have reverted to the land as realty: *Preston v. Stover Leslie Flying Service, Inc., 190 N.E.2d 446 (Ohio App. 1962).* Limestone severed from realty did not become personalty until it reached the crusher: *Linwood Stone Prods. Co. v. State Dep't. of Revenue, 175 N.W.2d 393 (Iowa 1970).* Severed earth materials such as top soil or fill are personal property: *Toffolon v. Town of Avon, 378 A.2d 580 (Conn. 1977).* Coal processed through a washer is personalty. *Milford v. Tennessee River Pulp & Paper Co., 355 A.2d 687 (Ala. 1978).* Hydrocarbons that are reduced to possession are personalty: *Carpenter v. Shaw, 272 P. 393 (Okla. 1928).*

(n92)Footnote 237. Railroad tracks were held realty: Morgan's La. & Tex. R.R. *& S.S. Co. v. Himalaya Planting & Mfg. Co., 78 So. 735 (La. 1918), reinstated by American Creosote Co. v. Springer. 241 So. 2d 510* (La. 19), *overruling Caldwell v. Laurel Grove Co., 144 So. 718 (La. 1932),* which had overruled the Morgan case.

(n93)Footnote 238. *St. Paul Elec. Co. v. Baldwin Engineering Co., 199 NW. 9 (Minn. 1924).* Under the Uniform Partnership Act the interest of each partner in real estate owned by the firm is "personal property": *Vlamis v. De Weese. 140 A.2d 665 (Md. 1958).* An automobile trailer is under the New York law taxable as realty to the owner of the property on which it is situated: *New York Mobile Homes Ass'n v. Steckel, 176 N.Y.S.2d 482 (1958).* Cash and securities are not included in "personal property" in a will: *Wachovia Bank & Trust Co. v. Wolfe. 96 S.E.2d 690 (N.C. 1957).* Mortgage on leasehold is a real estate not a chattel mortgage: *Abraham v. Fioramonte, 107 N.E.2d 321 (Ohio 1952).*

(n94)Footnote 239. *St. Paul Elec. Co. v. Baldwin Engineering Co., 199 N.W. 9 (Minn. 1924).*

(n95)Footnote 240. Wisconsin Trac., Light, Heat *& Power Co. v. Green Bay & Mississippi Canal Co., 205 N.W. 551 (Wis. 1925).*

(n96)Footnote 241. Chemical solutions and molten metal in tanks were held constructively annexed to the realty and so a part of the realty in condemnation compensation: *In re Slum Clearance, 52 N.W.2d 195 (Mich. 1952).*

(n97)Footnote 242. *Adams v. Chamberlin, 188 S.E. 550 (Ga. App. 1936)* (where by statute buildings were realty they could not be erected under an agreement that they would remain personalty); *In re Witte's Estate, 150 P.2d 595 (Wash. 1944).*

(n98)Footnote 243. *Conley v. Moe, 110 P.2d 172 (Wash. 1941).*

(n99)Footnote 244. *Fosdick v. Hempstead, 8 N.Y.S. 772 (1890).*

(n100)Footnote 245. *Royal Oak Tp. v. Berkley, 16 N.W.2d 83 (Mich. 1944).*

(n101)Footnote 246. *Blakeman v. Harwell, 31 S.E.2d 50 (Ga. 1944).* A beneficial interest in an Illinois land trust is personalty: *Levine v. Pascal. 236 N.E.2d 425 (Ill. App. 1968).*

(n102)Footnote 247. *Brickell v. Trammell, 82 So. 221 (Fla. 1919).* At common law land need not be fixed, so one could have a fee simple in 13 acres out of an 80-acre meadow owned in common with others with the 13 acres being apportioned every year. Coke on Littleton, § 4a (Coke treated "land" as including all castles, houses and other buildings). *See* John C. Blackman, *Artificial Accession to Immovables, 28 La. L. Rev. 584 (1968).*

(n103)Footnote 248. *Shefner v. University Nat'l Bank, 353 N.E.2d 126 (Ill. App. 1976).*

(n104)Footnote 249. *Merritt-Chapman & Scott Corp. v. Mauro, 368 A.2d 44 (Conn. 1976).*

(n105)Footnote 250. Under the New York concept some chattels have such a "determinate character" as movables that they remain personal property after their annexation as realty, independent of any agreement which so prevails: *Alf Holding Corp. v. American Stove Co., 171 N.E. 703 (N.Y. 1930).* Shares of stock are personalty: *Moreland v. Rucker Pharmacal Co., 59 F.R.D. 537 (W.D. La. 1973).* Severed minerals become personalty: *Milford v. Tennessee River Pulp & Paper Co., 355 So. 2d 687 (Ala. 1978).* Oil lease was held an interest in realty: *Straughn v. Sun Oil Co. (Delaware), 345 So. 2d 1062 (Fla. 1977).*

(n106)Footnote 251. *Harmon v. Martin, 71 N.E.2d 74 (Ill. 1947).* A beneficiary's interest in a land trust is personalty: *Ferraro v. Parker, 229 So. 2d 621 (Fla. App. 1969).* In Illinois, a beneficial interest in a land trust is a "general intangible" under the Uniform Commercial Code, art. 9: *Levine v. Pascal, 236 N.E.2d 425 (Ill. App. 1968).* A beneficial interest in an unincorporated land trust was an incorporeal immovable: *St. Charles Land Trust, Achille Guibet v. St. Amant, 217 So. 2d 385* (La. (1968). Vendor's interest under executory real estate contract is personal property: *Committee of Protesting Citizens, Thorndyke Area v. Val Vue Sewer Dist., 545 P.2d 42 (Wash. App. 1976).*

(n107)Footnote 252. Shares of stock invested wholly in realty are still personalty: *Stockton v. Lucas, 482 F.2d 979 (U.S. App. 1973).* Shares of stock in a cooperative apartment are personalty, not realty, in a will: *In re Miller's Estate, 130 N.Y.S.2d 295 (1954); In re Turner's Estate, 233 N.Y.S.2d 108 (1962). See Legal Characterization of the Individual's Interest in a Cooperative Apartment: Realty or Personalty?, 73 COLUM. L. Rev. 250 (1973).*

(n108)Footnote 253. *10 U.S.C. § 2667*(e).

(n109)Footnote 254. *Fort Hamilton Manor, Inc. v. Boyland. 149 N.E.2d 856 (N.Y. 1958).*

(n110)Footnote 255. 2 Kent's Commentaries 340. Shares in a corporation owning realty have themselves sometimes been held realty: *Welles v. Cowles, 2 Conn. 567 (1818); Price v. Price, 36 Ky. 107 (1938).* However, usually such shares are considered personalty: *Arnold v. Ruggles, 1 R.I. 165 (1851).*

(n111)Footnote 256. An earthen reservoir for use of livestock on a range was realty: *George v. Gist, 263 P. 10 (Ariz. 1928).*

(n112)Footnote 257. *Bowman v. Union Trust Co., 106 P.2d 913 (Cal. App. 1940); Burbridge v. Ferrell, 148 So. 204 (Fla. 1933): Isham v. Cudlip, 179 N.E.2d 25 (Ill. App. 1962); James v. Singer, 63 Pa. D. & C. 538 (Pa. 1948).* Once a mobile home is used as such, it cannot be converted into a permanent residence regardless of the owner's intent: *Brownfield Subdivision, Inc. v. McKee, 334 N.E.2d 131 (Ill. 1975).* The builder of house on land of another may rightfully sell the house to a third person: *Flowers v. Patton, 230 So. 2d 654 (La. App. 1970).* A landowner may enter into an agreement with another that the property attached to the real estate shall remain personalty, but such agreement

has no effect as against third parties without notice whose rights have intervened: *Leawood Nat'l Bank of Kansas City v. City Nat'l Bank & Trust Co. of Kansas City. 474 S.W.2d 641 (Mo. App. 1971).*

(n113)Footnote 258. *United States v. 19.86 Acres of Land, 141 F.2d 344 (7th Cir. 1944).* Soil bank was created when soil, gravel and rocks were excavated and deposited along the bank of a channel; an Illinois court found that the soil bank material was realty: *Metropolitan Sanitary Dist. v. Reick, 232 N.E.2d 182 (Ill. App. 1967).* Railroad trackage owned by one other than landowner is an immovable: *American Creosote Co. v. Springer, 232 So. 2d 532 (La. App. 1969).*

(n114)Footnote 259. New York O. *& W.R. Co. v. Livingston, 144 N.E. 589 (N.Y. 1924).* Gas mains and compressor machinery were held realty: *Transcontinental Gas Pipe Line Corp. v. Prince William County, 172 S.E.2d 757 (Va. 1970).* Air conditioning and heating units which are incorporated into the structure with the intention that they are permanent are realty: *Houk Air Conditioning, Inc. v. Mortgage & Trust. 517 S.W.2d 593 (Tex. App. 1974).* Mobile home with wheels removed and on concrete base was still a mobile home: *Brownfield Subdivision, Inc. v. McKee, 334 N.E.2d 131 (Ill. 1975).*

(n115)Footnote 260. *Rathbun v. Williams, 121 P.2d 243 (Kan. 1942).* Mineral rights to real estate, other than the homestead are realty: *Locke v. Locke. 280 So. 2d 773 (Ala. 1973).* Accrued oil royalties are personal property: *Walsh v. Union Oil Co. of Cal., 291 N.E.2d 644 (Ill. 1972).* A mortgage or assignment of an oil and gas leasehold is a real estate mortgage not subject to the Uniform Commercial Code and is recorded in the real estate records: *Ingram v. Ingram, 521 P.2d 254 (Kan. 1974).* By products of mining abandoned as waste are treated as having reverted to the land: *In re Appropriation of Easements for Highway Purposes, 191 N.E.2d 832 (Ohio 1963).* Execution of an oil and gas lease was a sale of an interest in land and so violated a first refusal right held by another: *Sanchez v. Dickinson, 551 S.W.2d 481 (Tex. App. 1977).* Removing the wheels or running gear of a mobile home and placing it on a permanent foundation does not convert the home into a permanent structure: *Brownfield Subdivision, Inc. v. McKee, 334 N.E.2d 131 (Ill. 1975).* Gasoline is personal property after severance: *Harvey v. Pedigo Oil Co., 557 S.W.2d 167 (Tex. App. 1977).* Oil and gas royalties are realty: *McGinnis v. McGinnis, 391 P.2d 927 (Wyo. 1964).*

(n116)Footnote 261. *Stiles v. Gordon Land Co., 44 So. 2d 417 (Fla. 1950).* Culm or refuse, under Pennsylvania law, severed from its original place becomes personal property and may be abandoned: *Gilbertson Contr. Co. v. Hook, 255 F. Supp. 687 (E.D. Pa. 1966).* House sold with a right of removal treated as personalty: *Rogers v. Cox, 96 Ind. 157 (1884).* A lease of specified airspace superjacent to property is an interest in real property subject to taxation: *Macht v. Department of Assessments of Baltimore City, 296 A.2d 162 (Md. 1972).* Clay mined and stockpiled became personalty: *Lone Star Min. Co. v. Texeramics, 363 S.W.2d 868 (Tex. App. 1962). See Taxation-- Valuation-- Income-Producing Lease of Undeveloped Airspace Is Real Property Interest That May Be Assessed Separately for Taxation, 26 VAND. L. Rev. 643 (1973).*

(n117)Footnote 262. *Balestra v. Button, 128 P.2d 816 (Cal. App. 1942).* Condominium units are realty: *Lefebue v. Astendorf, 275 N.W.2d 154 (Wis. App. 1979).*

(n118)Footnote 263. *Bunn v. O'Flutt, 222 S.E.2d 522 (Va. 1976).*

(n119)Footnote 264. A proprietary lease and corporate apartment stock were goods under the Uniform Commercial Code: *Silverman v. Alcoa Plaza Associates, 323 N.Y.S.2d 39 (1971).* Shares of stock in a cooperative apartment are personalty, not realty, in a will: *In re Miller's Estate, 130 N.Y.S.2d 295 (1954); In re Turner's Estate, 233 N.Y.S.2d 108 (1962).* A leasehold interest for a term less than life is personal property, not subject to a real estate mortgage: *National Bank of Commerce v. Fountain, 514 P.2d 194 (Wash. App. 1973).* Stock in a cooperative apartment was held to be personalty with respect to a judgment lien: *State Tax Comm'rs v. Shor, 385 N.Y.S.2d 290 (1976). See Property-- Sale of Stock and Proprietary Lease in Cooperative Apartment Held as Sale of Personalty, 21 Buffalo L. Rev. 555 (1972).*

(n120)Footnote 265. *Jeffers v. Easton, Eldridge & Co., 45 P. 680 (Cal. 1896); Thornton v. Mehring, 25 N.E. 958*

(Ill. 1885); Cunningham v. Baxley, 96 Ind. 367 (1884); Faler v. McRae, 56 Miss. 227 (1878); Standard Oil Co. v. Idaho Community Oil Co., 37 P.2d 660 (Mont. 1934); McCormick v. Stephany, 41 A. 840 (N.J. Ch. 1898). In Kansas an oil and gas lease is personal property, merely a license to explore, and is an incorporeal hereditament. It is a profit a prendre, and is not an interest in land: *Connell v. Kanwa Oil, Inc., 170 P.2d 631 (Kan. 1946).*

(n121)Footnote 266. *Brown v. Becker, 15 A. 608 (Pa. 1888).* Rights in oil and gas are severable by grant or reservation, although they are incapable of absolute ownership in place: *Davis v. Mann, 234 F.2d 553 (10th Cir. 1956).* This lease, under these decisions, does not have the effect of placing the title of the oil and gas that is under the surface of the land in controversy in the lessee but to grant to the lessee the privilege of exploring for the oil and gas: *First Nat'l Bank of Kansas City v. Nee. 92 F. Supp. 328 (W.D. Mo. 1950); Frank Oil Co. v, Belleview Gas & Oil Co., 119 P. 260 (Okla. 1911).* Oil when severed from the soil becomes personalty: *Pasteur v. Niswanger, 290 S.W.2d 852 (Ark. 1956).* Oil and gas, while in the earth, unlike solid minerals, are not the subject of ownership distinct from the soil, and the grant of the oil and gas, therefore, is a grant, not of the oil that is in the ground, but of such a part as the grantee may find, and passes nothing than can be the subject of an ejectment or other real action: *Kolachny v. Galbreath, 110 P. 902 (Okla. 1910). See* Western Oil *& Ref. Co. v. Venago Oil Corp., 24 P.2d 971 (Cal. 1933); Prairie Oil & Gas Co. v. State, 231 S.W. 1088 (Tex. App. 1919).* Gasoline is personal property after severance: *Harvey v. Pedigo Oil Co., 557 S.W.2d 167 (Tex. App. 1977). See infra* Chapter 48, *Mines and Minerals;* Chapter 49, *Petroleum and Pipelines.*

(n122)Footnote 267. *Coastal Club v. Shell Oil Co., 56 F. Supp. 641 (W.D. La. 1944).* As to the construction of a Louisiana statute making mineral leases real rights and incorporeal immovable property, *see Arnold v. Sun Oil Co., 48 So. 2d 369 (La. 1949).* Oil casing is not realty: *Moore v. Casey Bros. Oil Co., 269 S.W. 75 (Tex. App. 1925).*

(n123)Footnote 268. *Cowling v. Deep Vein Coal Co., 183 F.2d 652 (7th Cir. 1950); Duff v. Keaton, 124 P. 291 (Okla. 1912). See Lake v. Sealy, 165 So. 399 (Ala. 1936).* Mineral rights are real estate in Alabama; *Locke v. Locke, 280 So. 2d 773 (Ala. 1973).* Oil and gas lease is an interest in realty: *Rock Island Oil & Ref. Co. v. Simmons, 386 P.2d 239 (N.M. 1963).* In Oklahoma it is not clear whether the right to explore for, discover and produce minerals is real property: *see* Don Emery, *Real Property Mineral Interests in Oklahoma, 24 Okla. L. Rev. 337 (1971).* Stockpiled sand and gravel were held personalty: *Shinley v. National Applicables of California, 566 P.2d 322 (Ariz. App. 1977).*

(n124)Footnote 269. *Miller v. State, 183 A. 17 (Conn. 1936).* "Water-right" is real property: *King v. White, 499 P.2d 585 (Wyo. 1972).*

(n125)Footnote 270. *Mexican Gulf Oil Co. v. Compania Transcontinental de Petroleao S.A., 281 F. 148 (S.D.N.Y. 1922); Montana Sunburst Oil & Gas Co. v. Chase v. Trimble, 158 P.2d 247 (Cal. App.1945); Bacon v. Wahrhaftig, 218 P.2d 144 (Cal. App. 1950); Halbert v. Hendrix, 95 N.E.2d 221 (Ind. App. 1950).* An oil payment is an interest in property. *Commissioner of Internal Revenue v. Hawn, 231 F.2d 340 (5th Cir. 1956).* A contract selling oil and gas in place, or for sale of land reserving them, conveys or reserves an incorporeal right, a real right or servitude: *Exchange Nat'l Bank v. Head, 99 So. 272 (La. 1924).* In the case of *American Nat'l Bank v. Reclamation Oil Producing Ass'n, 101 So. 10 (La. 1924),* an oil lease or oil well is denominated real property. In Oklahoma oil and gas leasehold interests are real property and so entitle the vendor to the vendor's lien for unpaid purchase price. The Uniform Commercial Code is not applicable to oil and gas leasehold interests: *Casper v. Neubert, 489 F.2d 543 (10th Cir. 1973).*

(n126)Footnote 271. *Oregon Basin Oil & Gas Co. v. Ohio Oil Co., 248 P.2d 198 (Wyo. 1952).*

(n127)Footnote 272. In Texas, oil and gas in place are realty and become personalty when severed from the land: *Phillips Petroleum Co. v. Adams, 513 F.2d 355 (5th Cir. 1975).* Limited partnership interests in oil and gas rights are not real property under the Uniform Partnership Act: *Pyle v. Wolf Corp., 354 F. Supp. 346 (D. Or. 1972). Allen v. Thompson. 273 S.W. 396 (Ark. 1925)* (royalty interest). Intangibles are not included in the term "personal property" in a will: *In re Estate of Home, 171 So. 2d 14 (Fla. App. 1965). Illinois Prout v. Hoy Oil Co., 105 N.E. 26 (Ill. 1914); Heller v. Dailey, 63 N.E. 490 (Ind. App. 1902)* (lease). Horses are personal property but a cashier's check is not tangible personal property: *Pagliarulo v. National Shawmut Bank, 233 N.E.2d 213 (Mass. 1968); Sunburst Oil & Gas Co. v.*

Neville, 257 P. 1016 (Mont. 1927); Woodworth v. Franklin, 204 P. 452 (Okla. 1921); Montana & Wyoming Oil Co. v. Gibson, 113 P. 784 (Wyo. 1911).

(n128)Footnote 273. *Callahan v. Martin, 43 P.2d 788 (Cal. 1935); Derby Oil Co. v. Bell, 7 P.2d 39 (Kan. 1932); Davis v. Lewis, 100 P.2d 994 (Okla. 1940).* Oklahoma treated gasoline which had escaped underground as ferae naturae subject to capture by the owner of the land to which it escaped: *Frost v. Ponca City. 541 P.2d 1321(Okla. 1975). See* Roger R. Scott, *Underground Storage of Natural Gas: A Study of Legal Problems, 19 Okla. L. Rev. 47 (1966).* In Texas oil and gas in place are part of the realty and subject to ownership and severance. This includes royalties: *Extraction Resources, Inc. v. Freeman, 555 S.W.2d 156 (Tex. App. 1977).*

(n129)Footnote 274. *McCully v. McCully, 86 P.2d 786 (Okla. 1939).*

(n130)Footnote 275. *Miles v. Jerry. 250 S.W. 34 (Ark. 1923); Bruner v. Hicks, 82 N.E. 888 (Ill. 1907); Franklin Land Co. v. Wea Gas, Coal & Oil Co., 23 P. 630 (Kan. 1890): Carter Oil Co. v. Popp, 174 P. 747 (Okla. 1918).* Execution of an oil and gas lease was a sale of an interest in land and so violated a first refusal right held by another: *Sanchez v. Dickinson, 551 S.W.2d 481 (Tex. App. 1977).* Perpetual reservation of royalties is a property right but if limited in time royalties are personalty: *Extraction Resources, Inc. v. Freeman, 555 S.W.2d 156 (Tex. App. 1977).*

Assignments of working interests in oil and gas leases are subject to the Statute of Frauds as realty; *Owen v. Dayson. 562 S.W.2d 647 (Ky. App. 1977).* In New Mexico an oil and gas lease is an interest in realty: *O'Kane v. Walker, 561 F.2d 207 (10th Cir. 1977).* Oklahoma treated gasoline which had escaped underground as ferae naturae subject to capture by the owner of the land to which it escaped: *Frost v. Ponca City, Okla, 541 P.2d 1321 (Okla. 1975).* In Texas contracts for conveyance of mineral rights are subject to the statute of frauds: *Barrett Hill v. Marshall Exploration, Inc., 420 F. Supp. 198 (W.D. La. 1976).* Removable modular homes held personalty: U.C.C. § 9-107b. *Roskosi v. General Electric Credit Corp., 397 N.Y.S.2d 416 (1977). See* Roger R. Scott, *Underground Storage of Natural Gas: A Study of Legal Problems, 19 Okla. L. Rev. 47 (1966).*

(n131)Footnote 276. *Callahan v. Martin, 43 P.2d 788 (Cal. 1935); Marias River Syndicate v. Big West Oil Co., 38 P.2d 599 (Mont. 1934).* Stock and lease of cooperative apartment held personalty for taxation: *State Tax Comm'n. v. Shor, 371 N.E.2d 523 (N.Y. 1977).*

(n132)Footnote 277. *Nicholson Corp. v. Ferguson, 243 P. 195 (Okla. 1925).*

(n133)Footnote 278. *Sheffield v. Hogg, 77 S.W.2d 1021 (Tex. 1934).* Fractional interest in oil and gas leases is a "security": *Caldwell v. Trans-Gulf Petroleum Corp., 322 So. 2d 171 (La. 1975).*

Severed minerals may become personalty: *Milford v. Tennessee River Pulp & Paper Co., 355 So. 2d 687 (Ala. 1978).*

(n134)Footnote 279. *Agajanian v. Cuccio, 297 P.2d 755 (Cal. App. 1956).* In *Onyx Ref. Co. v. Evans Production Corp., 182 F. Supp. 253 (N.D. Tex. 1959),* the court held that a lessee's interest in an oil lease was an interest in land so that a lien thereon did not extend to the oil when extracted. Oil royalty payments are a real property interest: *Beshara v. Goldberg, 34 Cal. Rptr. 501 (Cal. App. 1963).* An overriding royalty from an oil and gas lease is realty: *Halbert v. Hendrix, 95 N.E.2d 221 (Ind. App. 1950).* The right to take water is an interest in realty subject to alienation: *Kelly v. Alpstetten Ass'n, 303 A.2d 136 (Vt. 1973).* "Water right" is real property: *King v. White, 499 P.2d 585 (Wyo. 1972).* In Texas oil and gas in place are part of the realty and subject to ownership and severance. This includes royalties: *Extraction Resources, Inc. v. Freeman, 555 S.W.2d 156 (Tex. App. 1977).*

(n135)Footnote 280. *Consolidated Gas & Equip. Co. v. Thompson, 405 S.W.2d 333 (Tex. 1966).*

(n136)Footnote 281. House trailers may be taxed as realty though owned separately from the ground on which they rest: *New York Mobile Homes Ass'n v. Steckel, 215 N.Y.S.2d 487, 175 N.E.2d 151 (N.Y. 1961).* Contra result and denying application of "assembled industrial plant" doctrine to a trailer park: *Streyle v. Board of Property Assessment,*

98 A.2d 410 (Pa. 1953). House held movable personal property for purposes of fire damage compensation where the owner of the land did not own the house: *Columbia Gas of Kentucky, Inc. v, Maynard, 532 S.W.2d 3 (Ky. 1975).*

(n137)Footnote 282. *Logue v. Marsh, 365 N.E.2d 1159 (Ill. App. 1977).*

(n138)Footnote 283. Denying specific performance in a contract of sale of a unit: *Centex Homes Corp, v. Boag, 320 A.2d 194 (N.J. 1974).*

(n139)Footnote 284. *Hill v. Salmon, 236 P.2d 518 (Wyo. 1951).* Developer's leasehold interest from the apartment house project was personal property and not real property and not subject to judgment lien: *Arnett v. Peterson, 92 Cal. Rptr. 913* (Cal. App, 1971), Real estate of partnership is personalty for purposes of distribution after dissolution: *Andrulis v. First Nat'l Bank of Lake Forest, 281 N.E.2d 417 (Ill. App. 1972).* Railroad tracks were realty: *Morgan's Louisiana & T.R.R. & S.S. Co. v. Himalaya Planting & Mfg. Co., 78 So. 735 (La. 1918), reinstated* by *American Creosote Co, v. Springer, 241 So. 2d 510 (La. 1970), overruling Caldwell v. Laurel Grove Co., 144 So. 718 (La. 1932),* which had *overruled* the *Morgan* case. Stockpiled sand and gravel were personalty: *Shinley v. National Applicables of California, Inc., 566 P.2d 322 (Ariz. App. 1977).*

(n140)Footnote 285. *Walters v. Sheffield, 78 So. 539 (Fla. 1918).* Contract giving right to occupy land for sufficient time to remove merchantable timber is not an interest in land: *Bay View Land Co. v. Ferguson, 101 P. 1093 (Wash. 1909).* Timber is real estate until severed from the land: *South Mississippi Elec. Power Ass'n v. J.F. Miller Timber Co., 314 So. 2d 346 (Miss. 1975).* Grant of temporary rights to cut timber was an interest in land: *Layman v. Ledgett, 558 P.2d 1378 (Wash. App. 1977).*

(n141)Footnote 286. A profit has been treated as personalty: *Shields v. Fink, 372 P.2d 252 (Kan. 1962).*

(n142)Footnote 287. *Fletcher v. Moriarty, 56 So. 437 (Fla. 1911).* Execution of an oil and gas lease was a sale of an interest in land and so violated a first refusal right held by another: *Sanchez v. Dickinson, 551 S.W.2d 481 (Tex. App. 1977).*

(n143)Footnote 288. *Sanchez v. Dickinson, 551 S.W.2d 481 (Tex. App. 1977).*

(n144)Footnote 289. *Richbourg v. Rose, 44 So. 69 (Fla. 1907).* Coal processed through a washer is personalty: *Milford v. Tennessee River Pulp & Paper Co., 355 So. 2d 687 (Ala. 1978).*

(n145)Footnote 290. Held to be personalty: *Wood v. Wood, 193 P.2d 889 (Colo. 1947): Goldstein v. Mundon, 210 N.W. 444 (Ia. 1926); Hajny v. Robinson Milling Co., 134 P.2d 398 (Kan. 1943); Porche v. Bodin, 28 La. Ann. 761 (1876); Kettering v. Barber. 159 N.W. 133 (S.D. 1916).* Held to be realty passing with the land: *In re Bunting, 60 F.2d 605 (E.D. Ill. 1932); Simmons v. Williford, 53 So. 452 (Fla. 1910)* (whether fructus industriales or fructus naturales); *Peer v. Wilson. 210 So. 2d 495 (Fla. App. 1968)* (immature orange crop on trees passes as real property on the death of life tenant); *Williams v. Mitchem. 106 S.E. 284 (Ga. 1921); Firebaugh v. Divan, 69 N.E. 924 (Ill. 1904); Tripp v. Hasceig, 20 Mich. 254 (1870); Karnmrath v. Kidd, 95 N.W. 213 (Minn. 1903); Hayward v. Poindexter, 229 S.W. 256 (Mo. App. 1921); Dixon v. Pugh, 178 P. 880 (Okla. 1918); Smith v. Bankhead, 106 S.E. 469 (S.C. 1921); Langford v. Hudson, 241 S.W. 393 (Tenn. 1922); McNulty v. Dean, 281 P. 9 (Wash. 1929).* In Louisiana, standing crops are regarded as movables in their relationship between landlord and tenant but immovables so far as third persons are concerned, but separate ownership of standing crops may be asserted against a third-person tortfeasor, regardless of whether the lease has been recorded: *Andrepont v. Acadia Drilling Co., 231 So. 2d 347 (La. 1969).* Growing crops are part of the realty until they are severed and tenant cannot replevin them: *Wright v. McGinley, 351 So. 2d 1151 (Fla. App. 1977).*

(n146)Footnote 291. *Stolp v. Reiter, 251 N.W. 903 (Minn. 1933)* (hotel furniture is personalty). Laundry machinery and equipment held to be realty under the "assembled industrial plant doctrine" and as such not subject to an ad valorem tax on personalty: *United Laundries, Inc. v. Board of Property Assessment, 58 A.2d 833 (Pa. 1948).*

(n147)Footnote 292. *Robinson v. Chicago Nat'l Bank, 176 N.E.2d 659 (Ill. App. 1961): Chicago Federal Sav, & Loan Ass'n v. Cacciatore, 185 N.E.2d 670 (Ill. 1962),* Beneficial interest in a land trust is personalty: *Shefner v. University Nat'l Bank, 353 N.E.2d 126 (Ill. App. 1976).*

(n148)Footnote 293. Railroad tracks which were used for the benefit of steel making held personal property: *Armco Steel Corp. v. Butler County Bd. of Revision, 325 N.E.2d 893 (Ohio 1975).* Railroad trackage is an immovable by nature and passes along with the sale of the land on which it lies: *American Creosote Co. v. Springer, 232 So. 2d 532 (La. App. 1970). See infra* Chapter 54, *Railroad Lands.*

(n149)Footnote 294. *Kellogg v. Dickinson, 18 Vt. 266 (1846); Barnard v. Whipple, 29 Vt. 401 (1857).*

(n150)Footnote 295. *In re Kincaid's Appeal, 66 Pa. 411 (1870).*

(n151)Footnote 296. *First Baptist Soc. v. Grant, 59 Me. 245 (1871); Shaw v. Beveridge, 3 Hill 26 (N.Y. 1842).* "Nothing is better established than this principle, that money directed to be employed in the purchase of land, and land directed to be sold and turned into money, are to be considered as that species of property into which they are directed to be converted, and this, in whatever manner the direction is given. The owner of the fund or the contracting parlies, may make land money, or money land. The cases establish this universally": *Craig v. Leslie, 16 U.S. 563, 4 L.Ed. 460 (1818); Meekins v. Branning Mfg. Co., 224 F. 202 (D.N.C. 1915);* Kansas City St. L. *& C.R. Co. v. Alton R. Co., 124 F.2d 780 (7th Cir. 1941); Trotter v. Van Pelt, 198 So. 215 (Fla. 1940); Illinois, Smith v. Kelley, 56 N.E.2d 360 (Ill. 1944); In re Jackson's Estate, 252 N.W. 775 (Ia. 1934); In re Schwertley's Estate, 293 N.W. 445 (Ia. 1940); National Bank v. Saia, 121 P.2d 251 (Kan. 1942); Griffith v. Witten, 161 S.W. 708 (Mo. 1913); Coman v. Lakey, 80 N.Y. 345 (N.Y. App. 1880); Christy v. Christy, 44 N.Y.S.2d 579;* In re McCleary's Estate, 54 York (Pa. Orph. 1940) 30; *Gaboriault v. Gaboniault, 32 A.2d 623 (R.I. 1943).*

(n152)Footnote 297. *Committee of Protesting Citizens, Thorndyke Area v. Val Vue Sewer Dist., 545 P.2d 42 (Wash. App. 1976).*

(n153)Footnote 298. *United States v. Ben-Hur, 20 F.3d 313, 317 (7th Cir. 1994)* (under Wisconsin law, the equitable conversion doctrine provides that ownership under land contract does not necessarily follow retention of or legal title by land contract vendor, and vendees may become equitable owners of property even though vendor retains legal title in trust security for any portion of the purchase price not yet paid); *Connecticut College for Women v. Groton. 193 A. 873 (Conn. 1937).* Certificates of purchase at tax sale of realty are personal property: *In re County Treasurer of Cook County, 304 N.E.2d 9 (Ill. App. 1973).* Under equitable conversion, the vendor's security interest is treated as personalty: *Heider v. Dietz, 380 P.2d 619 (Or. 1963).*

(n154)Footnote 299. *Hovey v. Dary, 27 N.E. 659 (Mass. 1891); Simmons v. O'Connor, 149 S.W.2d 1107 (Tex. App. 1941).* A beneficial interest in an Illinois land trust is personalty and subject to the U.C.C.: *Levine v. Pascal, 236 N.E.2d 425 (Ill. App. 1968).* The Uniform Partnership Act converts partnership realty into personalty for all purposes: *Perkins v. Oklahoma Tax Comm'n., 428 P.2d 328 (Okla. 1967).* A beneficial interest in land trust is personal property: *Hulter v. Lake View Trust & Savings Bank, 370 N.E.2d 47 (Ill. App. 1977).*

(n155)Footnote 300. *Wattjes v. Faeth, 40 N.E.2d 521 (Ill. 1942); In re Tienken's Estate, 32 N.Y.S.2d 637 (N.Y. 1941); Rhode Island Hosp. Trust Co. v. Harris, 39 A. 750 (R.I. 1898).* Certificates of purchase at tax sale of realty are personal property: *In re County Treasurer of Cook County, 304 N.E.2d 9 (Ill. App. 1973).*

(n156)Footnote 301. *In re Field, 169 N.Y.S. 677 (N.Y.A.D. 1918).*

(n157)Footnote 302. *Horton v. Upham, 43 A. 492 (Conn. 1899).* Proceeds of fire insurance *on* realty are personalty: *Hawthorne v. Hawthorne. 242 N.Y.S.2d 50 (1963).*

(n158)Footnote 303. *Adams v. Peabody Coal Co., 82 N.E. 645 (Ill. 1907).*

(n159)Footnote 304. *Geldhauser v. Schulz, 116 A. 791 (N.J. App. 1922).*

(n160)Footnote 305. *Wetherill v. Hough. 29 A. 592 (N.J. 1894). See also Citizens Bank v. Buford, 108 S.W.2d 1062 (Mo. App. 1937).*

(n161)Footnote 306. *In re Tatham's Estate, 95 A. 520 (Pa. 1915).*

(n162)Footnote 307. *Scurto v. Le Blanc. 184 So. 567 (La. 1938).*

(n163)Footnote 308. *Kirk v. Sumner County Bank & Trust Co., 153 S.W.2d 139 (Tenn. App. 1941).*

(n164)Footnote 309. *In re Claus' Estate. 147 S.W.2d 199 (Mo. App. 1941).*

(n165)Footnote 310. *State ex rel. and to Use of Baumann v. Marburger, 182 S.W.2d 163 (Mo. 1944).*

(n166)Footnote 311. *Madler v. Kersten, 175 N.W. 779 (Wis. 1920).* "The certificate of purchase does not convey a legal title, but it is evidence of an equitable title to the land, and enables the purchaser to call in the legal title. And it savors so strongly of the realty that in our opinion it descends to their heirs, and is not assets in the hands of the executor. The act provides that such certificates shall be assignable in law, and vest in the assignee, or his legal representative, all the right and title of the original purchaser. The words 'legal representative,' used, as they are, in connection with the certificate of purchase, or evidence of realty, we construe to be the heir, to whom the realty descends. It follows, then, that the heir only can legally transfer the certificate of purchase." *Rice's Lessee v. White, 8 Ohio 216 (1837).*

(n167)Footnote 312. *Gilbert v. Easterling, 60 S.E.2d 595 (S.C. 1950).* A mobile home may become immovable and thus a fixture, resulting in destruction of vendor's lien: *In re Ken Boatman, Inc., 504 F.2d 924 (5th Cir. 1974).* Chicken broiler house held movable: *Flowers v. Patton, 230 So. 2d 654 (La. App. 1970).*

Mobile home, after the wheels are removed, is no longer personal property but becomes a fixture even though removable: *Hussey v. Ray, 462 S.W.2d 45 (Tex. App. 1970). See* Christian Ness, Comment, *Mobile Homes in North Carolina: Residence or Vehicle?, 50 N.C.L. REV. 612 (1972).* Where the owner of the real estate disclaimed any ownership interest in the building, the building must be considered as movable personal property: *Columbia Gas of Kentucky. Inc. v. Maynard, 532 S.W.2d 3 (Ky. 1975).* Removing wheels and running gear of a mobile home did not convert it into a permanent structure: *Brownfield Subdivision, Inc. v. McKee, 334 N.E.2d 131(Ill. 1975).* House held movable personal property for purposes of fire damage compensation where the owner of the land did not own the house: *Columbia Gas of Kentucky, Inc. v. Maynard. Ky., 532 S.W.2d 3 (Ky. 1975).* Where a hydraulic lift had been installed and was an immovable, a purchaser of the real estate was entitled to the lift as against the seller of the lift where the sales agreement of the lift had not been recorded: *Benoit v. Acadia Fuel & Oil Distribs, Inc., 315 So. 2d 842 (La. App. 1975).* Stock and lease in a cooperative apartment held personalty: *State Tax Comm'n. v. Shor, 400 N.Y.S.2d 805 (1977).*

(n168)Footnote 313. *Blodgett v. Silberman, 277 U.S. 1 (1928)* (under New York law). Deceased partner's interest in realty is personalty and the executor cannot partition. Real estate of a partnership is deemed personal property so far as the rights of the individual partners are concerned among themselves and for the purpose of distribution after dissolution and winding up affairs of the partnership: *Andrulis v. First Nat'l Bank of Lake Forest, 281 N.E.2d 417 (Ill. App. 1972).* The beneficial interest in an Illinois land trust was treated as personal property, and on the death of the beneficiary the interest passes to his personal representative: *In re Romano, 426 F. Supp. 1123* (N.D. Ill, 1977). Stock and a proprietary lease in a cooperative apartment are personal rather than real property: *State Tax Comm'n. v. Shor, 84 Misc. 161, 378 N.Y.S.2d 222 (N.Y. Supp. 1975).* Beneficial interest in an Illinois land trust is personal property.

(n169)Footnote 314. Stockpiles and removal sand and gravel became personalty: *Shirley v. National Applicators of California, Inc., 566 P.2d 322 (Ariz. App. 1977).*

(n170)Footnote 315. Shares of stock invested wholly in realty are still personalty: *Stockton v. Lucas, 482 F.2d 979 (U.S. App. 1973).* Shares of stock in a cooperative apartment held personalty not realty, in a will where the testator was referring to real estate in the usually accepted sense: *In re Miller's Estate, 130 N.Y.S.2d 295 (N.Y. Sup. 1954); In re Turner's Estate, 233 N.Y.S.2d 108 (N.Y. Sup. 1962).* Stock and lease in a cooperative apartment held to be personalty: *State Tax Comm'n. v. Shor, 371 N.E.2d 523 (N.Y. 1977).*

(n171)Footnote 316. *Merritt-Chapman & Scott Corp. v. Mauro, 368 A.2d 44 (Conn. 1976).*

(n172)Footnote 317. *Hornblower v. Masonic Cemetery Ass'n, 214 P. 978 (Cal. 1923). See* Note, *The Cemetery Lot, Rights and Restrictions, 109 U. Pa. L. Rev. 378 (1961);* Note, *Moving Cemeteries to Build Low Income Housing--Violation of the 'Right to Rest in Peace?' 6 Val. U. L. Rev. 96 (1971). See infra* Chapter 53. *Real Property Aspects of Graves and Cemeteries.*

(n173)Footnote 318. *Oak Park Cemetery, Inc. v. Donaldson, 148 S.W.2d 994 (Tex. App. 1940).* A burial right or right of sepulcher is not a fee interest, but rather a right of burial which is transferable, and the rights of holders are property rights which are legally enforceable: *Spencer v. Flint Memorial Park Ass'n, 144 N.W.2d 622 (Mich. App. 1966). See infra* Chapter 55. *Public Lands.*

(n174)Footnote 319. *Dapson v. Daly, 153 N.E. 454 (Mass. 1926); Pierson v. Post, 3 Cai. R. 175 (N.Y. Sup. 1805); Liesner v. Wanie, 145 N.W. 374 (Wis. 1914). See* Earl C. Arnold, *The Law of Possession Goverining the Acquisition of Animals Ferae Naturae, 55 Am. L. Rev. 393 (1921). See also* Thomas A. Lund, *Early American Wildlife Law, 51 N.Y.U.L. Rev. 703 (1976).*

(n175)Footnote 320. Magna Carta, ch. 16(b), prevented the king from giving one the right of free fishery, that is, the exclusive right to take fish in a public stream. The state is not liable for damage caused by beavers: *Crisafulli v. State. 323 N.Y.S.2d 320 (N.Y.A.D. 1971).* The state is not liable as owner of wildlife and is not responsible for destruction of crop by wild deer: *Leger v. Louisiana Dep't of Wildlife & Fisheries, 306 So. 2d 391 (La. App. 1975).* In Louisiana wildlife is held by the state in a sovereign trust capacity rather than a proprietary capacity: *Leger v. Louisiana Dep't of Wildlife & Fisheries, 306 So. 2d 391 (La. App. 1975).* All wildlife belongs to the state until one has taken possession of the wildlife in compliance with law: *Department of Natural Resources v. Keating, 234 S.E.2d 519 (Ga. 1977).*

(n176)Footnote 321. *People v. Monterey Fish Prods. Co., 234 P. 398 (Cal. 1925); Dapson v. Daly, 153 N.E. 454 (Mass. 1926).*

(n177)Footnote 322. In such capacity, the state is not responsible for damage caused by wild animals to crops: *Leger v. Louisiana Dep't. of Wildlife & Fisheries, 306 So. 2d 391 (La. App. 1975).* Fish in public waters are the property of the state: *LaBauve v. Louisiana Wildlife Fisheries Comm'n, 444 F. Supp. 1370 (E.D. La. 1978).*

(n178)Footnote 323. *State of New Mexico v. Morton, 406 F. Supp. 1237 (D.N.M. 1975).*

(n179)Footnote 324. All wildlife belongs to the state and until one has taken possession in compliance with law: *Department of Natural Resources v. Keating, 234 S.E.2d 519 (Ga. 1977).* Title to animals ferae naturae is in the state: *State Dep't. of Fisheries v. Public Util. Dist. No. 1 of Chelan County, 588 P.2d 1146 (Wash. 1979).*

(n180)Footnote 325. *Liesner v. Wanie, 145 N.W. 374 (Wis. 1914).* The taking of the honey of wild bees from a bee tree on the land of another is not larceny. "This must depend on the honey being the property of the owner of the land. If the bees are his property, honey is: for it is the manufacture of his hive ... Bees not reclaimed from their wild nature and domesticated, are not the subject of property, any more than wild fowl, or wild beasts." *Wallis v. Mease, 3 Binn. 546* (Pa, 1811): *People v. Hutchinson, 9 N.Y.S.2d 656 (N.Y. Co. Ct. 1938).*

(n181)Footnote 326. 2 Blackstone's Commentaries 419.

(n182)Footnote 327. Keeble v. Hickeringell, 103 Engl. Rep. 1127. In Louisiana wildlife is held by the state merely in a sovereign capacity rather than ownership: *Leger v. Louisiana Dep't. Wildlife & Fisheries, 306 So. 2d 391 (La. App. 1975)* (state not liable for damage caused by deer).

(n183)Footnote 328. Right of pursuit. 2 Blackstone's Commentaries 419; *Blake v. Jerome, 14 Johns 406 (N.Y. 1817).*

(n184)Footnote 329. *Bohn v. Albertson. 238 P.2d 128 (Cal. App. 1951).* Fish in public waters are the property of *LaBauve v. Louisiana Wildlife & Fisheries Comm'n, 444 F. Supp. 1370 (E.D. La. 1978).*

(n185)Footnote 330. Absolute ownership of oysters is in the state in its territorial limits: *McCready v. Virginia, 94 U.S. 391, 24 L.Ed. 248 (1876).* State owns water and fish and aquatic life in trust for people: *Goldsmith & Powell v. Texas State, 159 S.W.2d 534 (Tex. App. 1942). See Shellfish Regulation: Conservation and Discrimination, 29 ME. L. Rev. 360 (1978).*

(n186)Footnote 331. State statute denied to others than citizens of the state the right to take oysters from tide waters where the beds were owned by the state: *McCready v. Virginia, 94 U.S. 391 (1876).*

(n187)Footnote 332. Coke on Littleton, § 4b (a profit of fishery could be granted at common law); 2 Blackstone's Commentaries 417 (the king could give one. the grantee, an exclusive power to take game inferior to deer).

(n188)Footnote 333. *Diversion Lake Club v. Heath, 86 S.W.2d 441 (Tex. 1935); People v. Kraemer, 164 N.Y.S.2d 423 (N.Y. Police Ct. 1957).* When ownership of the water overflowing land is separated from the soil the owner of the easement has the exclusive right to fish: *Hill v. Davis, 130 So. 2d 39 (Ala. 1961).*

(n189)Footnote 334. *Shively v. Bowlby. 152 U.S. 1 (1894).*

(n190)Footnote 335. *Smith v. Andrews, [1891] 2 Ch. 678.*

(n191)Footnote 336. *Id.*

(n192)Footnote 337. *People v. New York & S.I. Ferry Co., 68 N.Y. 71 (N.Y. 1877).*

(n193)Footnote 338. *Holyoke Water-Power Co. v. Lyman, 82 U.S. 500 (1872).*

(n194)Footnote 339. The right to hunt and fish is an incident of land ownership exclusive in the riparian owner: *Holyoke Water-Power Co. v. Lyman, 82 U.S. 500 (1872); Clement v. Watson, 58 So. 25 (Fla. 1912): Schulte v. Warren. 75 N.E. 783 (Ill. 1905); State v. West Tennessee Land Co., 158 S.W. 746 (Tenn. 1913); Fisher v. Barber. 21 S.W.2d 569 (Tex. App. 1929): Knudson v. Hull, 148 P. 1070 (Utah 1915).*

(n195)Footnote 340. *Hume v. Rogue River Packing Co., 92 P. 1065 (Or. 1907). See* John J. McLoone, Comment, *Indian Hunting and Fishing Rights, 10 Ariz. L. Rev. 725 (1968).*

(n196)Footnote 341. *Forestier v. Johnson, 127 P. 156 (Cal. 1912); Collins v. Gerhardt, 211 N.W. 115 (Mich. 1926); Winous Point Shooting Club v. Slaughterbeck, 17 N.E. 162 (Ohio 1917); Willow River Club v. Wade, 76 N.W. 273 (Wis. 1898); Diana Shooting Club v. Husting, 145 N.W. 816 (Wis. 1914).*

(n197)Footnote 342. In California the public has a right to fish in a stream though it is nonnavigable: *Bohn v. Albertson, 238 P.2d 128 (Cal. App. 1951).* A statute giving the public the right to fish in any stream in the state was unconstitutional: *Hartman v. Tresise, 84 P. 685 (Colo. 1905).* Fishing and hunting are not an incident of navigation: *Schulte v. Warren, 75 N.E. 783 (Ill. 1905); Sewers v. Hacklander, 188 N.W. 547 (Mich. 1922).* Michigan allows fishing in navigable waters if the beds are privately owned: *Morgan v. Kloss, 221 N.W. 113 (Mich. 1928); Collins v. Gerhardt, 211 N.W. 115 (Mich. 1926).* The public had a right to fish in a navigable stream although the plaintiff owned the bed:

Collins v. Gerhardt, 211 N.W. 115 (Mich. 1926); Rushton ex rel. Hoffmaster v. Taggart, 11 N.W.2d 193 (Mich. 1943). The privilege of hunting and trapping does not extend to such waters: *Johnson v. Burghorn, 179 N.W. 225 (Mich. 1920); Sewers v. Hacklander, 188 N.W. 547 (Mich. 1922); St. Helen Shooting Club v. Carter, 227 N.W. 746 (Mich. 1929).* A stranger fishing in bed of nonnavigable stream was a trespasser: *Herrin v. Sutherland, 241 P. 328 (Mont. 1925); State v. Theriault, 41 A. 1030 (Vt. 1898).* In New Mexico the public has the right to fish in any unappropriated water, although title to the bed is in private hands: *State ex rel. State Game Comm'n. v. Red River Valley Co., 182 P.2d 421 (N.M. 1945).* One who owns the soil in a fresh water river has the right of fishing prima facie, and if one owns the soil on both banks one has the sole and exclusive right even though the river is navigable: *Hooker v. Cummings, 20 Johns. 90 (N.Y. 1822).* The public has the privilege of fishing in such navigable waters though the beds were in private ownership; *Willow River Club v. Wade, 76 N.W. 273 (Wis. 1898);* also the privilege of hunting: *Diana Shooting Club v. Husting, 145 N.W. 816 (Wis. 1914).* Hunting and fishing rights are property rights which may be acquired as other property rights by prescription: *Harvat v. Clear Creek Drainage Dist., 249 N.W.2d 209 (Neb. 1977)* (dictum).

(n198)Footnote 343. *Sterling v. Jackson, 37 N.W. 845 (Mich. 1888).*

(n199)Footnote 344. Where a river suddenly overflowed a tract of land in private hands and continued to flood it, this was an avulsion and title to the soil was not lost. But, since the flooded land was navigable, the public had the right to fish: *Bohn v. Albertson, 238 P.2d 128 (Cal. App. 1951).*

(n200)Footnote 345. Coke on Littleton, § 8a (fish in a pond and deer in a park passed with the land to the heir).

(n201)Footnote 346. *Herrin v. Sutherland, 241 P. 328 (Mont. 1925).*

(n202)Footnote 347. *J.H. Miles & Co. v. McLean Contracting Co., 180 F.2d 789 (4th Cir. 1950).* Police powers as to regulation of fish and game: *Bittenhaus v. Johnston, 66 N.W. 805 (Wis. 1896);* Timber. State *ex rel. Owen v. Donald, 151 N.W. 331 (Wis. 1915).* Trapping and raising of fur-bearing animals: *Geer v. Connecticut, 161 U.S. 519 (1896); State v. Nergaard, 102 N.W. 899 (Wis. 1905).* Legislature has power to protect and reserve fish and game: *Commissioner of Natural Resources v. S. Volpe & Co., 206 N.E.2d 666 (Mass. 1965).* Individual rights as to wild game are limited and subject to the police power: *Salasnek Fisheries, Inc. v. Cashner, 224 N.E.2d 162 (Oh. App. 1967). See* Charles A. Hobbs, *Indian Hunting and Fishing Rights, 32 GEO. Wash. L. Rev. 504 (1964);* Tom Simmons, Highways, *Hunters, and Section Lines: Tensions Between Public Access and Private Rights, 2 Great Plains Nat. Resources J. 240 (1997).*

(n203)Footnote 348. *Clark v. Todd, 64 A.2d 547 (Md. 1949).* Wild animals and migratory birds are owned by the state in trust for the public to the extent they are capable of ownership: *State v. Herwig, 117 N.W.2d 335 (Wis. 1962).*

(n204)Footnote 349. *Miles v. Veatch, 221 P.2d 905 (Or. 1950).*

(n205)Footnote 350. Gardner v. Ninety-Nine Gold Coins, Ill F. 552 (D. Mass. 1899).

(n206)Footnote 351. *Barker v. Bates. 30 Mass. 255 (1832).*

(n207)Footnote 352. *Armory v. Delamirie, 1 Strange 505 (K.B. 1722).*

(n208)Footnote 353. *Weeks v. Hackett, 71 A. 858 (Me. 1908).*

(n209)Footnote 354. *Hamaker v. Blanchard, 90 Pa. 377 (1879).*

(n210)Footnote 355. *Silcott v. Louisville Trust Co., 265 S.W. 612 (Ky. 1924).*

(n211)Footnote 356. *South Staffordshire Water Co. v. Sharmon, 2 QB 44.* Held that the treasure trove is not reduced to undisputed possession in the meaning of the treasury regulations until the treasure is discovered even though the discoverer had possession in the container for a long period of time: *Cesarini v. United States. 296 F. Supp. 3 (N.D. Ohio 1969).* Holding that the owner of the locus in quo not a finder invitee was entitled to money found: *Hurley v.*

Niagara Falls, 280 N.Y.S.2d 182 (N.Y. 1967).

(n212)Footnote 357. A.L. Goodhart, *Three Cases on Possession. 3 Cambridge L. J. 195 (1928).*

(n213)Footnote 358. *McAvrey v. Medina, 93 Mass. 548 (1866).*

(n214)Footnote 359. *Sovern v. Yoran, 20 P. 100 (Or. 1888).*

(n215)Footnote 360. Bracton, Ch 3.

(n216)Footnote 361. *Danielson v. Roberts, 74 P. 913 (Or. 1904).*

(n217)Footnote 362. *Oregon Iron Co. v. Hughes, 81 P. 572 (Or. 1905).*

(n218)Footnote 363. Coke on Littleton, §§ lb, 6a, refer to things real, personal and mixed. *See* § 13.02(a)(2) *supra.*

(n219)Footnote 364. *Lycoming Fire Ins. Co. V. Haven, 95 U.S. 242 (1877): Hyatt v. Vincennes Nat'l Bank, 113 U.S. 408 (1885); Thornton v. Mehring, 25 N.E. 958 (Ill. 1885); Cunningham v. Baxley, 96 Ind. 367 (1884); Kline v. Indiana Trust Co., 137 N.E. 555 (Ind. App. 1922); Dyer v. Owens, 263 S.W. 663 (Ky. 1924); Faler v. McRae, 56 Miss. 227 (1878); Missouri Sutter v. Lackmann, 39 Mo. 91 (1866); McCormick v. Stephany, 41 A. 840 (N.J. 1898): Rodack v. New Moon Theatre, 200 N.Y.S. 237 (1923); Becker v. Walworth, 12 N.E. 1 (Ohio 1887); Rickard v. Dana, 52 A. 113 (Vt. 1902); Myers v. Arthur, 238 P. 899 (Wash. 1925). See also* First Nat'l Bank v.*Dunlap. 254 P. 729 (Okla. 1927)* (an oil and gas lease did not create such an interest in realty as constituted "real estate" within the judgment of the Oklahoma judgment lien statute).

(n220)Footnote 365. *Callahan v. Martin, 43 P.2d 788 (Cal. 1935); Hellwig v. Bachman, 26 Ill. App. 165 (Ill. App. 1888);* Application for Awarding of Process of Subpoena Pursuant to R. S. 54:4-16, *34 A.2d 239 (N.J. 1943); First Nat'l Bank v. Dunlap. 254 P. 729 (Okla. 1927); Sheaffer v. Baeringer, 29 A.2d 697(Pa. 1943).*

(n221)Footnote 366. *Quality Coal Co. v, Guthrie. 157 S.W.2d 756 (Ark. 1941).*

(n222)Footnote 367. *Lincoln Nat'l Bank & Trust Co. v. Nathan, 19 N.E.2d 243 (Ind. 1939).* A mortgage or assignment of an oil and gas leasehold is a real estate mortgage not subject to the Uniform Commercial Code and is recorded in the real estate records: *Ingram v. Ingram, 521 P.2d 254 (Kan. 1974).*

(n223)Footnote 368. *Coastal Club, Inc. v. Shell Oil Co., 45 F. Supp. 859 (W.D. La. 1942); Standard Oil. Co. of California v. Idaho Community Oil Co., 37 P.2d 660 (Mont. 1934).*

(n224)Footnote 369. *Ellison v. Ellison, 146 P.2d 173 (N.M. 1944); Rodack v. New Moon Theatre. 200 N.Y.S. 237 (1923).* It is said, however, in *Chicago Auditorium Ass'n v. Cramer. 8 F.2d 998 (N.D. Ill. 1925),* that a lease for a term of years is a chattel real and conveys an interest in land and while it has some of the attributes of personalty, it is treated in many respects as real estate.

(n225)Footnote 370. *Dyer v. Owens, 263 S.W. 663 (Ky. 1924).*

(n226)Footnote 371. *Ralston Steel Car Co. v. Ralston, 147 N.E. 513 (Ohio 1925). Contra, Brown v. Havens, 85 A.2d 812 (N.J. 1952)* (holding 99-year lease renewable forever is personalty).

(n227)Footnote 372. *Dyer v. Owens, 263 S.W. 663 (Ky. 1924); Orchard v. Wright-Dalton-Bell-Anchor Store Co., 125 S.W. 486 (Mo. 1909).*

(n228)Footnote 373. *Buhl v. Kenyon, 11 Mich. 249 (1893); New York v. Mabie, 13 N.Y. 151 (1855): Janura v. Fencl, 52 N.W.2d 144 (Wis. 1952).* In New York a leasehold can be taxed as realty only if the lessee has an enforceable

option to purchase: *Grumman Aircraft Engineering Corp. v. Board of Assessors, 141 N.E.2d 794 (N.Y. 1957).*

(n229)Footnote 374. *Lenow v. Fones, 4 S.W. 56 (Ark. 1887); Goodwin v. Goodwin, 33 Conn. 314 (1866); Fortunato v. Shenango Limestone Co., 123 A. 482 (Pa. 1924).*

(n230)Footnote 375. *Hogan v. Manners, 23 Kan. 551 (1880); Allender v. Sussan, 33 Md. 11*. (1870).

(n231)Footnote 376. *Willoughby v. Lawrence, 4 N.E. 356 (Ill. 1886); Orchard v. Wright-Dalton-Bell-Anchor Store Co., 125 S.W. 486 (Mo. 1909).*

(n232)Footnote 377. *Hyatt v. Vincennes Nat'l Bank, 113 U.S. 408 (1885).*

(n233)Footnote 378. *Standard Oil Co. of California v. Idaho Community Oil Co., 37 P.2d 660 (Mont. 1934).*

(n234)Footnote 379. *First Trust & Deposit Co. v. Syrdelco, Inc., 292 N.Y.S. 206 (N.Y.A.D. 1936).*

(n235)Footnote 380. *Lincoln Nat'l Bank & Trust Co. v. Nathan, 19 N.E.2d 243 (Ind. 1939)* (held realty for purpose of conveyancing, mortgaging and recording).

+ This chapter is based in part on Chapter 1 of George W. Thompson, Commentaries on The Modern Law of Real Property (John S. Grimes, ed. *1979),* which made a significant contribution toward preserving the American common law governing basic property definitions and characteristics.

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Thompson on Real Property, Thomas Editions

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CHAPTER 14 THE NATURE AND KINDS OF PROPERTY +

2-14 Thompson on Real Property, Thomas Editions § 14.04

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§ 14.04 Real Property.

§ 14.04(a) Classifications of Real Property.

"Real estate" and its classifications. The term "real estate" includes lands, tenements and hereditaments whether the latter be corporeal or incorporeal. n381 The word "lands" is not so comprehensive as "real estate" or "tenements and hereditaments," as it would not include incorporeal hereditaments. n382 Real estate consists of incorporeal rights attached to or growing out of the soil as well as the soil itself. n383 At common law the term "real estate" signified the surface of the earth and that which belonged to the earth, whether above or beneath, and embraced all rights and profits arising from or annexed to land which were of a permanent or immovable nature.

The statutes of some states define the term, but, with very few exceptions, these definitions do not change the doctrine of the common law. It is probable that the decisions of some courts with reference to what constitutes real estate may be governed by the statutory definition, but, as a general rule, in the absence of any statute or contract, whatever underlies or forms a part of the surface of the earth, voluntarily grows on the earth or is permanently attached to the earth and essential to the use or enjoyment of the earth, will be held to constitute real estate. A mining claim is considered real estate. n384 Property constituting an industrial plant has been held real estate under the law of Pennsylvania. n385

Whenever it is intended to describe the whole interest or estate, the defined term "real estate" is generally employed, but whenever less than the whole is intended, different language is used. n386 The term "real estate" includes petroleum as it is found in the cavities of the rock, n387 mining claims, n388 unmined coal, n389 water percolating through the earth n390 and sand or gravel while in its original bed. n391

"Real estate" consists of incorporeal rights attached to or growing out of the soil as well as the soil itself. n392 As used in the *Restatement of the Law* the term means such interests as estates in fee simple, estates in fee simple absolute, estates in fee simple defeasible, estates in fee simple conditional and estates in fee tail, estates for life, estates for years, estates from period to period, estates at will, estates at sufferance, special limitations, conditions subsequent, executory limitations and estates postponed as to possession. n393 While the feudal system was in active operation, the property with which it dealt was constantly referred to as embracing lands, tenements and hereditaments, and these terms are still used at common law, but they are not so generally employed in this country, as the term "real property" is almost

universally held to embrace all three of them.

At common law "real property" was deemed coextensive with lands, tenements and hereditaments, corporeal and incorporeal. n394 In this country, both by statute and common law, the term is generally used for the phrase "lands, tenements and hereditaments," n395 but "real estate" and "real property" are not strictly interchangeable terms. In its restricted and technical sense, real estate signifies every estate or interest one may have in land except a mere chattel interest. n396 Where the term is used in acts relating to crimes and punishments, it has been held that it includes every estate, interest, and right in lands, tenements and hereditaments. n397

"Real property" consists of incorporeal rights attached to or growing out of the soil as well as the soil itself. n398 The term includes all interest held or claimed in land in fee for life or for years and is co-extensive with lands, tenements and hereditaments and includes any interest in land. n399 The term "real property" comes from the old division of actions given a person deprived of property into "real actions" and "personal actions." When the remedy could result in a judgment for the return or recovery of the real thing, it was denominated a real action, and all things which could be recovered in real actions were real property, n400 Thus, the subject matter of "real actions" naturally came to be designated as "real property," after the overshadowing influence of the feudal system had been removed. While at common law an estate for years, whether for one or one hundred years, was a chattel real and was denominated personal property, modern courts and legislatures frequently treat it as real property. n401 In a number of jurisdictions a leasehold interest is held to be real property within the tax law, under statutes defining "real property" for the purpose of taxation. n402

The comprehensive term "realty" may be classified into the groups of lands, tenements and hereditaments. Lands, tenements and hereditaments include property which is not annexed to the person or cannot be moved from the place in which it subsists. n403 During the vigorous sway of the feudal system, the property with which it dealt was referred to as embracing "lands, tenements, and hereditaments" and this division of real property still retains its hold upon the common law. These are not properly divisions of real property, but are different points of view of the subject of real property. Where a statute defined the term "real property" as including real estate, lands, tenements and hereditaments, it was held not to include a chattel real. n404

The word "lands" soon obtained a well-settled meaning in law, and included the surface of the ground, together with everything that was on it and under it, but it did not comprehend incorporeal hereditaments. The term "land" is sometimes defined in statutes and constitutions n405 to include lands, tenements and hereditaments n406 and all rights thereto and interest therein, equitable as well as legal. n407 Some statutes, following the common-law rule, make a distinction between real property and land, one of the elements of real property. Where the statute does not define the word "land," but merely speaks of lands, tenements and hereditaments, it must be understood to refer to them in the sense imported to them at common law. n408

"Land," says Lord Coke, "terra in the legal signification, comprehendeth any ground, soil, or earth whatsoever; as meadows, pastures, woods, moores, waters... . It legally includeth also all castles, houses, and other buildings; for castles, houses, etc., consist of two things, namely land or ground, and the foundation or structure thereupon; so, as passing the land or ground, the structure or building thereupon passeth." n409 Land is nomen generalissimum, and includes everything above and below. n410

The term "lands" is not as broad in its application as property, n411 but it is an established principle that ownership of the land includes not only the surface of the earth but everything under it or over it. n412 Under modern conditions, especially in cities, superjacent rights may be more valuable than any other right connected with the ownership of land, since the value of the property consists almost exclusively in the right of the owner to erect business and industrial structures on it. n413 "Land" comprehends grounds, soil, earth, pastures, woods, springs, wells, lakes, ponds and all things which have become fixed parts of the soil. n414 It includes every form of real estate, n415 and the term is often used as practically synonymous with realty, but it includes such realty only as has corporeal existence. n416 In a more

restricted sense, land means the soil of the earth, the water upon it and the minerals and fossils imbedded in it. n417 Oil and gas are a part of the land itself, as much as timber, coal, iron and salt. n418 The term "land" embraces both its soil and minerals, and a conveyance of land without more includes the surface and all minerals beneath or imbedded in the soil. n419 The term "premises" is used to indicate lands or real estate. n420

A non-legal definition of land would distinguish between land and water, so that, when the word "land" is used, it cannot be so construed as to include water. n421

The title of the owner of land presumptively extends upward indefinitely and downward to the earth's center, embracing everything upon the surface and everything beneath it. n422 This general rule will be found to be subject to many qualifications when actually applied. Many things upon the surface of the land are not regarded as part of it, but as personal property, the title to which is not in the owner of the land. It will also be found that the surface of the land may be separated in ownership from the mines or quarries beneath it, and that there may be as many different owners as there are strata of minerals. n423

The surface owner may not own all that lies beneath it, n424 An estate in lands may be divided by the owner and separate estates carved out of different elements which go to make up the lands. One person may be the owner of the surface of the land, another the owner of the trees standing upon it, and another the owner of the minerals under the surface, and all of them be the owners of lands. n425

It has been held that waste slate, accumulating during quarry operations, is real estate when thrown upon the ground, and to pass title to the slate as personalty it must again be severed from the ground. n426 It is presumed that the soil of a right- of-way between two properties belongs to the owners of the property, and this presumption is not affected by the fact that the way leads to a third close and is used only by the owner of that parcel. n427

The most comprehensive words of description applicable to real estate are "tenements" and "hereditaments," as they include every species of real property, corporeal as well as incorporeal. n428 While the word "tenement," in its plain and ordinary meaning, signifies a house, yet in a larger sense it means a thing which is the subject of tenure and includes not only corporeal hereditaments which are or may be held, but also all inheritances issuing out of any of those inheritances or concerning or annexed to or exercisable within the same, though they lie not in tenure. n429 It includes everything of a permanent nature which may be holden. n430 In this country the word "tenement" is applied exclusively to land or what is usually denominated real property. n431 To amount to a tenement the estate or interest should be a freehold and not merely a term of years. n432 It is evident that the word "tenement" is derived from the Latin word which signifies "to hold," but in modern times it is used in a sense much broader than this technical sense. It is of broader meaning and extent than the word "land," since it includes not only land, but rents, commons and other rights and interests issuing out of or concerning land. In the early history of the common law the word was generally used in the mere sense of a holding of land without any reference to the nature of the tenant's interest therein, but later the word came to be employed in a special sense as referring to a freehold estate in lands. At present nothing is considered as a tenement which is not of a permanent nature. A hereditament comprehends anything which may be inherited, whether corporeal or incorporeal, and includes both lands and tenements. n433 The term, though including some rights unconnected with land, is generally used as the widest expression for real property of all kinds. n434

In construing a statute giving jurisdiction to a justice of the peace to try questions concerning the unlawful detention of lands or tenements, it was held that a house, built upon land to which the owner had no title, but in which the owner claimed and enjoyed the right of peaceable possession, was a tenement. n435 A franchise, though sometimes included under the term "tenement" for certain purposes, has been held not such a tenement as may be recovered in a proceeding for unlawful detention. n436

The word "hereditaments" embraces everything that may be inherited, be it corporeal or incorporeal. Hereditaments are technical and can be better understood by persons having a knowledge of the feudal system. For practical purposes, the

word "hereditament" means an appurtenance. n437 The term is almost as comprehensive as the word "property," since it means anything capable of being inherited. n438 A term for less than a freehold does not come within the meaning of the word n439 but if the estate or interest be greater than a term of years it may be either corporeal n440 or incorporeal. n441 Incorporeal hereditaments in gross are a species of estate in real property. n442 Under the common law an incorporeal hereditament could only n443 be created or transferred by grant. As a general rule, rents falling due at a future date are deemed a part of the land, in the nature of an incorporeal hereditament, and, hence, are in the nature of real property. n444 So "hereditament" is by far the largest and most comprehensive word in the expression "lands, tenements and hereditaments"; for standing by itself it includes not only lands and tenements, but whatever may be inherited, be it corporeal or incorporeal, real, personal or mixed.

§ 14.04(b) Corporeal and Incorporeal Hereditaments.

Corporeal and incorporeal hereditaments. The semantics of the common law divided things real, as distinguished from things personal, into lands, tenements and hereditament; n445 The term "hereditament" comprehends anything which may be inherited whether corporeal or incorporeal, and includes both lands and tenements. n446 At common law, hereditaments were of two kinds, corporeal and incorporeal. n447 Corporeal hereditaments were physical objects, comprehended under the term "land." Blackstone n448 described corporeal hereditaments as those things which affect the senses "as may be seen and handled by the bode. n449 So a deed of coal, oil and gas and the right to move and remove created a corporeal right. n450 Similarly, a deed to timber conveys a corporeal right. n451 Corporeal hereditaments are substance always and can always be seen, always handled n452 and are confined to realty. n453

An appropriative water right has been held to be a corporeal hereditament. n454 Water in an impounded area is a corporeal hereditament. n455 Corporeal property is capable of manual transfer. Incorporeal property can only pass by a writing. n456 But even when property in unsevered minerals is a corporeal hereditament, n457 a distinction has been made between property in unsevered minerals and mere rights to work minerals which are incorporeal hereditaments. n458 A corporeal hereditament cannot be abandoned, but it may be lost by adverse possession. An incorporeal hereditament may be abandoned n459 in most states. n460 In some states a sale absolute of minerals in place passes a separate taxable estate in fee simple which is a corporeal hereditament. n461

Incorporeal real property is a right issuing out of or annexed to a thing corporeal, and consists of the right to have some part only of the produce or benefit of the corporeal property or to exercise a right or have an easement, privilege or advantage over or out of it. n462 An incorporeal hereditament may be defined as a certain inheritable right issuing out of, concerning, annexed to or exercisable within, a thing corporeal. n463 Incorporeal hereditaments are not the subject of sensation, can neither be seen nor handled, are only creatures of the mind and exist only in contemplation. n464 An incorporeal hereditament is a right issuing out of a thing corporate whether real or personal or concerning or annexed to or exercisable within it. It is a creature of the mind and exists only in contemplation. n465 It is an invisible and intangible right merely collateral to land. n466 Fishing and boating rights are incorporeal hereditaments. n467 Unaccrued rents are incorporeal hereditaments; n468 accrued rents are choses n469 in action. Unaccrued oil and gas royalties are like rent, an incorporeal hereditament. n470

Rights in and to land embraced within this definition constitute a limited interest or estate in land, and, where such interest is to endure in perpetuity or for life, it is a freehold interest and is real property or real estate; where it is for years, although an interest in land or in real estate, it is not real estate itself but a chattel real. n471

The right is not the thing corporate itself, but something collateral thereto, such as unaccrued rents issuing out of lands or tenements, n472 rights in a patent, n473 properties built on franchises, on government grants, on good will or on trade names, and the like. n474 It is held that fishing rights are incorporeal hereditaments, since they issue out of, are concerned with, or are annexed to things corporeal. n475 One must distinguish between the profits produced and the thing or hereditament which produced them. Under this distinction, a statute declaring that no bargain sale of houses or lands shall be good, unless properly acknowledged, does not extend to a right-of-way, which is an incorporeal

hereditament. n476 A rent is an incorporeal hereditament, because it is a right against the realty to receive from it some compensation or return for the use of the leased property. The compensation which the tenant pays is merely the proceeds, profits or returns which the rent produces. n477

At common law, incorporeal hereditaments were said to "lie in grant"; that is, could in general be created and transferred only by deed, known as a grant, and could not be created or transferred, as lands could be, by livery of seisin. n478 The grant of incorporeal hereditaments is a form of contract which was probably required to be in writing even before the Statute of Frauds was enacted. Under the Statute of Frauds, a lease creating an incorporeal hereditament must be in writing. n479

At common law, adverse user of certain incorporeal property, if continued immemorially, gave rise to what is known as a title by prescription. n480 However, prescription presumed a grant, which by lapse of time had been lost or destroyed. n481 It is now almost universally conceded that the prescriptive period is drawn from analogy to the period contained in the traditional statute of limitations, which in most states of this country and in England was twenty years. n482 The doctrine that a lost grant is the basis of prescription has been severely criticized, though it is the prevailing doctrine in this country. n483 Thus it is said that, if, from all the facts and circumstances, it is more reasonably probable that a grant was executed than that it was not, then the tribunal trying the case would be warranted in presuming in favor of the claimed existence of the grant and find accordingly. n484 When the doctrine cannot be applied, as where the right claimed could not have arisen from a grant at all, prescription may be based upon analogy to the statute of limitations. n485 Nevertheless, every prescriptive claim may be good, supposing it to be accompanied by honest, uninterrupted, adverse and immemorial possession, wherever it might by possibility have had a lawful commencement. n486

Blackstone enumerates ten varieties of incorporeal hereditaments, nearly all now vanished: advowsons, tithes, commons, ways, offices, dignities, franchises, corodies, annuities and rents. n487 Of these, tithes, advowsons, offices, dignities and corodies, as understood in England, are not recognized by our law as things on which an estate can be predicated, *n488* and they are important only from an historical point of view. Commons was not recognized in the United States except in early New England. A phase of the commons has been revised in the modern cooperative apartment and the condominium.

Tithes are the rights of the rector of a parish to one-tenth of the annual income or increase arising either from lands, stock on lands or from the personal industry of the inhabitants. Advowsons are rights of appointment to a church or ecclesiastical benefice. Offices are rights of appointment to either a public or private office. Dignities are titles of nobility. Corodies were rights to receive sustenance at a monastery. Commons, as applied to England, were rights which the lord of the manor granted to his tenants to take certain profits from the wastelands. They were of four kinds namely, common of pasture, common of turbary, common of estovers, and common of piscary. The word "commons" is a general term for a profit a prendre. Annuities are very similar in their nature to corodies, and are sometimes classed as incorporeal hereditaments. n489 An annuity is a right to claim a certain yearly or periodical sum of money in fee simple, for life or for years and chargeable only on the person of the grantor. n490 Formerly they were regarded as in the nature of rents, from which they differ in that the latter must issue out of lands or tenements. n491 However, they gradually became recognized as merely contractual rights of a personal n492 nature. If an annuity is expressly limited to a person and the person's heirs, it will descend to the heirs, and not to the personal representative; n493 however, for other purposes it is regarded as personal property and is not a proper subject for consideration in a work on real property. The more important incorporeal hereditaments are profits a prendre, rents, franchises, easements and licenses. n494 The right to kill and take game is an incorporeal hereditament. n495

Rights to be exercised in connection with corporeal things, but without any ownership, possession, control or power of disposition of the thing in connection with which the power may be exercised, and without any profit therein, such as a right to pass over another's land, to have an unobstructed passage of light and air over another's land, to have the soil in its natural state supported by another's land, and to have a building restriction on another's land observed are incorporeal property rights. n496 Where a grantor has the right under a perpetual lease to receive the rents forever, it amounts to an

incorporeal hereditament. n497

Courts are often confused about the extent to which rights concerning minerals in place--both fixed and so-called fugacious minerals--are corporeal or incorporeal hereditaments. The common-law concept was that as corporeal hereditaments can only lie in livery, it would be impossible to transfer as corporeal hereditaments minerals in place. But it is sometimes said that an exclusive right to remove minerals is a corporeal hereditament, but an incorporeal hereditament exists if the right is not exclusive. n498 As a general rule, oil in place is considered an incorporeal hereditament. An oil and gas lease conveys a mere right to explore, that is, an incorporeal hereditament. n499 The same has been held true of ore mineral leases and unaccrued rents thereunder. n500 There are cases, however, holding that a conveyance of a right to operate for oil and gas is a conveyance of an interest in land, a corporeal and not an incorporeal hereditament n501

A thing is said to be "appendant" when it has been immemoriably connected with another thing. n502 Nothing can be properly appendant or appurtenant to anything unless the principal or superior thing be of perpetual subsistence and continuance. n503 At common law, the most usual instance of an incorporeal hereditament appendant was a right existing in favor of each holder of arable land in a manor, to pasture the "commonable" cattle on the wasteland of the lord. Such a right could not be created after the Statute of Quia Emptores, since a grant by the lord of the manor thereafter took the land granted out of the manor as regards tenure. On the other hand, a common appurtenant does not necessarily arise from any connection of tenure, but must be claimed by grant or prescription and may be annexed to any kind of land whether arable or not. n504 The thing appurtenant need not be one of necessity; it may be one of convenience only, but it must be connected in use with the principal. n505 Personal property can become an appurtenance to land without attachment or annexation. n506 Rights appurtenant and rights appendant agree with each other in the nature and qualities of their properties, but differ in that the commencement of the former is known, while the latter has belonged to the thing more worthy beyond the memory of man. n507 Incorporeal hereditaments appendant or appurtenant to corporeal hereditaments are regarded as so intimately and inseparably connected with the tangible property of the estate upon which they are created that they will pass by a conveyance of such estate without the necessity of their being specially mentioned. They are regarded as mere incidents of such estates. n508 One may have certain rights in the property of another, not appurtenant to any land, but simply belonging to one as an individual; that is to say, there is no dominant tenement, the right being attached to the person and not to any land whatever. As distinguished from rights appendant and appurtenant, these rights may properly be termed rights in gross. n509 Hence, incorporeal hereditaments in gross are a species of estate in real property. n510 Insofar as duration is concerned, a right in gross may be perpetual and inheritable, and transferable. n511

The right to take oil and gas from land, like other profits a prendre, is usually considered an incorporeal hereditament. n512 The right to enter and dig for ores is an incorporeal hereditament which is an interest in land created only by deed. n513 Grants of rights-of-way are incorporeal hereditaments. n514 Riparian rights are appurtenances in the nature of incorporeal hereditaments. n515 Incorporeal hereditaments are sometimes called personalty, n516 but are otherwise treated as interests in land. n517 Other cases treat incorporeal hereditaments which run for years as chattels real, but if permanent as realty. n518

§ 14.04(c) Possession of Realty.

§ 14.04(c)(1) In General.

Possession of realty. Ownership has been likened to a bundle of sticks. Each stick represents one of the total number of possible interests in sum of rights, powers, privileges, immunities and liabilities. Absolute ownership, which never exists except in an anarchical economy, consists of all of the sticks tied together.

If one conceives of property as likened thus to a bundle of rights, privileges, immunities and liabilities adaptable to any physical thing, the fee simple absolute is the largest segment thereof that the political philosophy of the time and place

permits any private individual to obtain. n519 The extent to which the sovereign may withhold part of the "bundle" determines in what position between totalitarianism and anarchy the law of the jurisdiction rests. A primitive society finds it impossible to separate from the "bundle" the concept of possession. In the absence of legal principles, possession is title. Even under the later legal concept of seisin, possession was the equivalent of title to realty. One who lost possession through disseisin, lost title, and the English law through a slow tortuous process of development of units of right and of possession gradually recognized the separation of possession and title. Possession is today a legal ideal created by a wedding of the legal intent to take possession, and sufficient manucaption or control over the property, determined by its nature and position to constitute dominion.

As contrasted with title, possession may (a) embrace the conception of title with respect to certain types of property, such as wild animals, fungible goods, negotiable instruments and, perhaps, newly discovered realty; (b) give to the possessor all or a portion of the incidents of title belonging to third parties, such as in the case of lost property, bailments, life tenancies and adverse possession; (c) give to the possessor the fruits and proceeds of the property, but not the right to take any portion of the freehold; (d) permit the possessor to defend possession against third parties and if the possession is lawful against the holder of the title concept; (e) place upon the shoulders of the possessor the liabilities as to third persons which arise out of ownership; n520 and (f) permit possession to ripen into title in the case of adverse use, adverse possession and prescription.

Constructive possession is a legal presumption which follows title to land and endures so long as title does, unless overcome in some way. n521 Constructive possession follows title and can only be defeated by actual possession adverse thereto. n522 Such possession is a legal presumption which follows title to the land and endures so long as title endures, unless overcome in some way. n523 Title draws to it seisin and possession, and actual entry is not necessary to give a more perfect title. n524 Where title is shown to have been in one at a certain time there is a presumption that it so remained until a change in title is shown. n525 Exclusive possession and control over real property raises a presumption of ownership in the possessor, and anyone else claiming the property has the burden of proof. n526 However, mere possession is insufficient to establish ownership. n527

Possession by one under a bona fide claim of ownership is evidence of ownership against all the world except the true owner. n528 A person in possession of land under a contract to purchase it may be the owner within the contemplation of certain statutes. n529 Ownership implies the right to possession and control. n530 Without possession no right in property can be maintained. n531

Possession, though the lowest type of title, is good against anyone not having a better one. n532 Any possession which is lacking in the right of free enjoyment and free disposition and the quality of indefinite duration of time is called in law a restricted, limited or qualified ownership.

When one goes into possession one is presumed to be entitled to remain in possession until the contrary is proven. n533 Possession of real estate is prima facie evidence of ownership as against one who is not in possession but claims adversely. n534

Interference with the use and enjoyment of land is a nuisance and substantial damage must be shown to create liability. Interference with possession is a trespass with absolute liability. n535

§ 14.04(c)(2) Incidents of Possession.

Incidents of the concept of possession. n536 "Possession" is of itself a legal fiction creating a concept recognized in the law and thus giving rise to definite legal consequences. Under the common-law rule where one in possession under an unregistered deed made improvements, one lost such improvements upon ouster. n537 The civil-law rule gave one the benefit of the improvements if one was in possession under a bona fide belief in title. n538 Later, the common-law rule was modified in equity to permit the possessor to deduct the value of the improvements from a judgment for mesne

profits. n539 Even under the betterment statutes, however, there are limitations as against third parties. n540 The betterment statutes give the good faith possessor the value of the improvements. n541

It is widely stated that possession itself is a form of title. Actually, in a society without legal restraints prossession is the only title.

§ 14.04(c)(3) Possessory Rights in Chattels.

Possessory rights as to chattels. A problem similar to that of crops arises with respect to chattels found on land. This concerns the respective rights of the landowner and the owner or possessor of the *locus in quo.* Three different categories of personalty are recognized by the courts in this area: lost property, mislaid property and "treasure trove." Of course the rights of both the finder and the possessor of the land are subordinate to those of the true owner. n542 The stream of public policy which guides all decisions, whether in favor of the finder or the possessor of land, is to choose that method which is most likely to restore the property to the owner. Can this best be done by inducing the finder to make known finding and avoid concealment by giving the property to the finder until the owner appears or should the courts rely upon the theory that the owner is most likely to look for the property where it has been lost?

If the finder is a trespasser the cases usually hold in favor of the possessor of the *locus in quo.* n543 Distinction has also been made between goods found in a public or semipublic place and a private place with the owner of the *locus in quo* taking in the latter instance. n544 There is disagreement as to the rights of the finder versus a public utility. n545 Where the finder is the servant of the possessor of the realty the courts have usually found for the latter. n546

There is further controversy on lost property as to the comparative rights of the person entitled to possession of the realty as against the owner of the fee. n547 In the mislaid category the property is almost always given to the owner of the *locus in quo* as against the finder. n548 The difference between mislaid property and lost property is that in the first instance the owner deliberately placed it in a particular spot intending to pick it up later. But in the case of lost property the owner's giving up possession was unintended. The distinction is one of facts depending on the place where found, the nature of the article and the position in which found. There is a fourth category recognized as "abandoned goods." In this case a third element enters the controversy as between the finder and the owner or possessor of the *locus in quo,* the rights of the sovereign under statutes.

"Mislaid" property is that property deliberately placed in the location where found but forgotten by the owner. Because the law seeks to find that solution which is most likely to cause the return of the property to its true owner, and the owner would most likely return to the locus in quo to search for that property deliberately placed there, the cases often leave "mislaid" property with the owner of the place, not with the stranger who discovered it.

Lost property is that with which the owner did not want to lose possession. Here the division of the cases is over the question of how best to secure its return to the owner. One theory favors award to the finder to increase the likelihood that the finder will make the find known. The other theory is that the owner is most likely to search for it where it was lost.

"Treasure trove" is property deposited at such an early time that its original owners are presumed lost. n549 "Treasure trove" has been held to go to the finder as against the owner of the *locus in quo.* n550 In some cases "treasure trove" is treated as lost property, n551 in others a distinction is made. n552 More recent English cases, however, award the property to the possession of the owner of the *locus in quo,* n553 and this also has substantial American support. n554 The classic English case gave possession of the lost chattel to the finder as against the person entitled to possession of the realty. n555 This has substantial following in America. n556

§ 14.04(c)(4) Limitations on Rights Arising from Possession.

Limitations on possessory rights. Even the holder of a fee simple absolute has certain restraints on the free use of property. n557 These restraints fall into the categories of trespass, nuisance, police power, zoning, defeasible title and covenants.

One who actively or passively creates a situation on one's own land which causes injury to a neighbor or to neighboring land commits an actionable nuisance. n558 The essential feature of a private nuisance is interference with the use or the enjoyment of land. n559 The owner is not entitled to use property in such a manner as to cause it to injure adjoining properties or persons outside the boundary. This is the doctrine of nuisance. n560 Generally, the law of property gives the owner free use of property, n561 but private enterprise must utilize its private property in ways that are not inconsistent with public welfare. n562 One may not on one's own land set in motion forces that will travel beyond the boundaries and adversely affect others. These offensive forces may be discharged through the air n563 or underground n564 either in the form of discharge of matter n565 or of vibrations. n566

It has been held that when the owner of land knows or should know of an unreasonable hazard arising on the own land, the owner is liable to parties injured on adjacent land. This liability continues if the owner conveys the property. In such instances the courts are not in harmony as to whether there is an absolute liability or whether the doctrine of reasonableness applies. n567

A nuisance may be either public (so extensive as to affect a sufficient number of people to invoke state civil or criminal action) n568 or private (which merely gives a cause of action to another). n569

The question of whether a business, lawful in itself, or a particular use of property constitutes a nuisance turns on the reasonableness of conducting the business or the use of the property in a particular locality and in the manner and the circumstances of the case. n570 In the case of an abatable nuisance, there is continuing injury so that the statute of limitations does not commence on the date of the first injury. n571

An owner is not required to abate a nuisance caused by others over whom the owner has no control. It has been held that where a building threatens ruin, an adjoining landowner has the right of action to compel the owners of the building to have it demolished or repaired, and if there is danger of fall, the adjoining landowner may order the necessary work, for which the owner shall be reimbursed. So a defective building falls in the category of a servient estate for services. This, however, is not a duty on the part of the adjoining landowner. So, if the adjoining landowner fails to have the building torn down and the building collapses with injuries to the adjoining land, the owner of the building is liable. n572 Ice and snow may create a nuisance. n573

Another restraint or limitation on possession is the attractive nuisance doctrine. An attractive nuisance is the creation on one's own property of a situation that is not only dangerous but is also of a nature as to lure onto the premises those who, while trespassers, are not sufficiently mature to be able to recognize the nature or extent of the danger.

Police power constitutes yet another limitation on possession of property. The sovereign may by use of the police power restrain an owner from making such use of property as will endanger the health, safety or general welfare of others. This can be done through zoning or metropolitan planning. Also, the owner may voluntarily, through the giving of conditions or covenants, limit the extent of property use. n574

In addition to nuisance and land use restraints, trespass actions may be another restraint on possession of property. The discharge of particles through the air n575 or the creating of vibrations through the air n576 or underground n577 are actionable trespasses if they damage other properties. An adjoining landowner may maintain damages caused by crop spraying. n578 Underground vibrations, such as shock waves caused by blasting, are actionable if injury results to other landowners. n579 The cases differ as to whether the liability is absolute or whether negligence is the factor. n580

§ 14.04(c)(5) Possible Liabilities Arising from Possession of Land.

Liabilities attendant upon possession of land. A major example of the changing positions of the property law lies in the area of the extent of liability of a possessor of land for injury occurring to others which results from dangerous conditions existing on the property. Traditionally, the law has classified such third parties as either trespassers, n581 licensees or invitees, n582 with invitees sometimes separated into social n583 and business invitees.

One who intentionally lures another onto his land makes the other the licensee rather than a trespasser. n584 Licensees are those who are on the land with the occupier's consent. n585 The leading rule as to trespassers n586 or mere licensees n587 holds that the occupier of land is liable only for wilful or wanton acts and imposes no duty on the occupier to keep the premises in a safe condition. However, some cases impose a greater degree of liability in the case of a licensee who does not know or should not know of the risk involved in entry. n588

Generally, the law of property gives the owner free use of the property, n589 but private enterprise must utilize its private property in ways that are not inconsistent with the public welfare. n590

A possessor of land is subject to the possibility of liability for injury to the person or property of other persons who come upon the property. The nature and extent of this liability depends largely on which classification pertains to the stranger, the nature of the cause of the injury and the occupier's knowledge of the condition.

Persons coming onto land occupied by another are classified by the law as invitees n591 if they come at the invitation of the occupier for reasons mutually beneficial. n592 A business visitor who has business with the occupier and those who have social dealings with him fall in this class. n593 Quarrymen and strip mine operators are liable to invitees or business invitees for injuries received by them while on the premises where such injury is due to the operator's negligence or when due to dangerous conditions not as obvious to the visitor as to the operator. n594 An employee of a contractor is an invitee while on the premises being repaired and must be warned of latent dangers. n595

Where the lessor has retained control over entrances, the lessor's duty toward third parties who are invitees of the lessee does not go beyond maintaining the property in the same state as it was at the time of the lease. n596

Once the occupier owed no duty to trespassers. This was modified in two respects n597 The occupier could not create a situation known to be dangerous, i.e., the "spring gun" cases. n598 The other exception is the attractive nuisance doctrine, where the occupier creates or permits to arise or continue conditions which are dangerous. If trespassers who have not sufficient mental ability to comprehend the danger are lured onto the premises by the attractive nature of the situation, the occupier becomes liable for the resultant injury. n599

The older rule limited the occupier's liability to invitees to conditions which the occupier knew or should have known to be dangerous. n600 The later tendency is to increase the degree of liability. For a landowner to be liable for injuries to a passerby from a falling limb from a tree on the owner's property it must be shown that the owner was aware of the deterioration of the tree. n601 One phase of this is to separate social invitees from business invitees and to increase the responsibility as to those who come onto the premises for business purposes, such as patrons of supermarkets or filling stations. n602 Social guests are licensees and not invitees, so that they are required to take the premises as they find them and are not entitled to more protection against defects than those taken by the owner for his own family. n603 There is a tendency to extend the occupier's liability to governmental agents, such as firemen and policemen. n604

The law once distinguished between trespassers, invitees and licensees with respect to degree of liability. There was no liability to trespassers except in the case of deliberately created hazards--the "spring gun" cases, and the "attractive nuisance" doctrine relating particularly to minors. The extent of liability to invitees and licensees varies in the jurisdictions, but most rely on the reasonable person doctrine. n605 As noted, the possessor may be liable to certain trespassers under the attractive nuisance doctrine. n606 Under one theory the attractive nuisance base is allurement n607 and under another the justification is negligence of the landowner. n608 The attractive nuisance requirements are: (1)

The condition creating the harm must be an artificial one created, constructed or maintained by the possessor of the land. (2) The injured person must be a young child, (3) who is excluded for some reason from the principle that the possessor of land owes no duty as to the condition of the premises to trespassers, except for deliberately setting traps for trespassers. (4) The risk must be one which was not apparent or was attractive to the child. (5) Reasonable precautions were available to minimize or eliminate the risk without reducing the utility of the land and the possessor had failed to take such precautions. n609 The attractive nuisance doctrine has been extended to animals. n610 While some courts still hold that with respect to children there must be something on the premises to lure them to create Liability for attractive nuisance, n611 other courts find liability where the owner of the premises could have foreseen the possibility of harm. n612 The owner of an artificial body of water is liable on the theory of attractive nuisance if it is a trap or there is an unusual element of danger about it. n613 A landowner is liable for an attractive nuisance existing on his land which is known to exist even though created by another. n614

The modern rule with respect to invitees is that the occupier must use reasonable care to protect the invitee against dangers of which the occupier is aware or should by reasonable diligence discover. n615 The same is true as to licensees. n616

At common law policemen and firemen entering upon private premises in the discharge of their duties were mere licensees. n617 Some cases have held firemen to be in a separate class and allow action for landowner's negligent storage of dangerous materials. n618 There is a growing doctrine, however, that ascribes to the owner of the premises in such cases a higher duty of safe conditions than in the case of a mere licensee. n619 The tendency of the law is to limit the common-law distinction between trespassers, invitees and licensees. n620 Reasonable care is due only in the case of an invitee. The owner must have actual or constructive notice of a dangerous condition. n621

Members of a tenant's family are not guests or invitees with respect to the lessor's liability. The lessor's liability to them is the same as to the tenant. n622

An employee of a contractor is an invitee while on the premises being repaired and must be warned of latent dangers. n623

Under the older concept the lessor upon surrender of possession to the lessee had no responsibility for the condition of the premises either to the lessee or to third persons who came onto the property. But this concept is rapidly changing to increase the lessor's responsibility both as to the lessee and as to third parties on the leased premises.

The owner is liable to outsiders: (a) for injuries due to building defects where the property is in possession of a tenant n624 if the property is in such a bad state of repair that it will necessarily become a nuisance or has become so; n625 (b) the nuisance created by the tenant arose as a consequence of the use created by the parties; n626 (c) if the owner has retained control of the premises or the dangerous portion thereof; n627 (d) the owner covenants to repair; n628 or (e) the landlord reserves the right to make repairs and the injury is to persons outside the premises. n629

The basic rule is that a vendor of real property after parting with title and possession is not liable for injuries suffered by the vendee or third parties caused by dangerous conditions on the premises. n630 When the vendor surrenders possession to the vendee under a sales contract, the vendor is no longer liable for dangerous conditions on the premises, n631 unless the vendor has knowledge of the dangerous condition and conceals it or fails to disclose it to the vendee, and the vendee did not know of it and the vendor believed the vendee would not discover the condition or realize the risk. n632

The sovereign and its agencies are not liable in tort for dangerous conditions on the premises to which the public has access unless the operations conducted thereon are a proprietary function. n633

As respects licensees, as in the case of trespassers, the earlier law merely held the possessor liable for wilful or wanton

acts and imposed no duty on the occupier to keep the premises in a safe condition. Some cases impose, however, a greater degree of liability in the case of a licensee, who does not know or should not know of the risk involved in entry. n634 The possessor does not have, as against third parties invited on the premises by the licensee the same degree of protection that a lessor is afforded. There is a strong tendency to abolish the difference in liability as to trespassers, licensees and invitees and equate all on a reasonable person basis. n635

If the relationship between the owner and the third person solely benefits the third person, the third person is at most a licensee. If the relationship is of mutual benefit to the parties, the third person is an invitee. n636 Courts vary considerably on the extent to which a possessor may be liable for injuries to invitees or licensees for criminal actions of third persons. n637 Operators of mobile home parks incur tort liability for the premises under limited circumstances. n638

§ 14.04(d) Property Rights Associated with Future Interests.

Future interests. The law recognizes interests in land that do not carry with them rights of present possession, but which may certainly or upon a contingency become possessory in the future. These are "future interests" and are limited to commence in possession or enjoyment in the future. n639 Such estates or interests may be created in the alternative. n640 Whether vested or contingent, such estates or interests are divisible, assignable, and transmissible by descent. n641 So where under a will to the widow for life, with power to sell realty and with a limitation over of remainder to another, the widow sold the property and bequeathed the proceeds to a third party, the court held the proceeds to have remained realty and to be the property of the remainderman under the first will. n642 A mere possibility of reverter is incapable of alienation or devise. n643 such an interest not being sufficient to constitute an estate. n644 An estate may be created by deed to commence in the future without any intervening estate to support it. n645 Conveyances creating future estates or interests are usually in the form of a deed of bargain and sale, with a provision postponing the grantee's enjoyment and occupancy until the grantor's death or to some other specified time. n646

FOOTNOTES:

(n1)Footnote 381. *Gillett v. Gaffney, 3 Colo. 351 (1877).* The term "land" may be used not only to designate the ground itself, but frequently to designate only a certain interest therein: *In re Appropriation of Easement for Highway Purposes. 195 N.E.2d 364 (Ohio App. 1963).*

(n2)Footnote 382. *In re Handley's Estate, 57 A. 755 (Pa. 1904).*

(n3)Footnote 383. *Jilek v. Chicago, Wilmington & Franklin Coal Co., 47 N.E.2d 96 (Ill. 1943).*

(n4)Footnote 384. *Jones v. Peck, 218 P. 1030 (Cal. App. 1923).*

(n5)Footnote 385. *Miners Sav. Bank v. Joyce, 97 F.2d 973 (Pa. 1938).*

(n6)Footnote 386. *First Nat'l Bank v. Holland, 39 S.E. 126 (Va. 1901).*

(n7)Footnote 387. *Lavenson v. Standard Soap Co., 22 P. 184 (Cal. 1889); Federal Land Bank v. Mulhern, 157 So. 370 (La. 1934); White v. McVey, 31 P.2d 850 (Okla. 1934); Wilson v. Youst, 28 S.E. 781 (W. Va. 1897).*

(n8)Footnote 388. *Stowers v. Huntington Dev. & Gas Co., 72 F.2d 969 (4th Cir. 1934); Lavagnino v. Uhlig, 71 P. 1046 (Utah 1903).*

(n9)Footnote 389. *Consolidated Coal Co. v. Baker, 26 N.E. 651 (Ill. 1891); Hirth v. Graham, 33 N.E. 90 (Ohio 1893).*

(n10)Footnote 390. *Metcalf v. Nelson, 65 N.W. 911 (S.D. 1895).*

(n11)Footnote 391. *Glencoe Sand & Gravel Co. v. Hudson Bros. Comm. Co., 40 S.W. 93 (Mo. 1897).*

(n12)Footnote 392. *Jilek v. Chicago, Wilmington & Franklin Coal Co., 47 N.E.2d 96 (Ill. 1943).*

(n13)Footnote 393. Restatement, Law of Property. § 8.

(n14)Footnote 394. *Alabama Fretwell v. McLemore, 52 Ala. 124 (1875); Martinovich v. Marsicano, 70 P. 459 (Cal. 1902); Gillett v. Gaffney, 3 Colo. 351 (1877); Field v. Higgins, 35 Me. 339 (1853): Nellis v. Munson, 15 N.E. 739 (N.Y. 1888); Ehrsam v. Utica, 55 N.Y.S. 942 (N.Y.A.D. 1899); Scogin v. Perry, 32 Texas 21 (1869).*

(n15)Footnote 395. *Murphy v. Superior Court, 70 P. 1070 (Cal. 1902); Guy v. Brennan, 213 P. 265 (Cal. App. 1923); Orchard v. Wright-Dalton-Bell-Anchor Store Co., 125 S.W. 486 (Mo. 1909)* ("land" comprehends ground, soil, or earth, pastures, woods, springs, wells, lakes, ponds, and all things which have become fixed parts of soil); *Rodack v. New Moon Theatre, 200 N.Y.S. 237 (1923); Woodworth v. Franklin, 204 P. 452 (Okla. 1921). See* National Bank of America v. Barritt. 18p.2d 552 (Kan. 1933).

(n16)Footnote 396. *Guy v. Brennan, 213 P. 265 (Cal. App. 1923); Jones v. State, 70 N.E. 952 (Ohio 1904); Knight v. Thomas, 101 P. 383 (Utah 1909)* (authority of city to grant "real property" to aid railroad authorized conveyance of street or interest therein for 100 years, the fee being in the city).

(n17)Footnote 397. *Kiser v. Sawyer, 4 Kan. 503 (1868); Bodwell v. Heaton, 18 P. 901 (Kan. 1888); Slattery v. Jones, 8 S.W. 554 (Mo. 1888); State v. Barr, 28 Mo. App. 84 (1887).* "There are two modes in which the subject matter of a deed may be described, both of the thing itself, as of land by metes and bounds, or by a known name, and the other is by a designation of its usufruct, or of the dominion over it. Thus a grant of the rents, issues, and profits of a tract of land is uniformly held to be a grant of the land itself." Coke on Littleton, § 4b. *Caldwell v. Fulton, 31 Pa. 475 (1858).*

(n18)Footnote 398. *Jilek v. Chicago, Wilmington & Franklin Coal Co., 47 N.E.2d 96 (Ill. 1943).*

(n19)Footnote 399. *Sanitary Dist. v. Manasse, 42 N.E.2d 543 (Ill. 1942).*

(n20)Footnote 400. Coke on Littleton, § 121a; Butler & H. n. 1.

(n21)Footnote 401. *Fidelity Trust Co. v. Wayne County, 221 N.W. 111* (Mich, 1928); *United States Nat'l Bank v. Miller, 258 P. 205 (Or. 1927).*

(n22)Footnote 402. *Jetton v. University of the South, 208 U.S. 489 (U.S. Tenn. 1908); Chicago v. University of Chicago, 134 N.E. 723 (Ill. 1922): Fidelity Trust Co. v. Wayne County. 221 N.W. 111 (Mich. 1928).*

(n23)Footnote 403. *Ralston Steel Car Co. v. Ralston, 147 N.E. 513 (Ohio 1925). See The Creation of an Estate by Implication, 11 S.C. L. Q. 352.*

(n24)Footnote 404. *First Trust & Deposit Co. v. Syrdelco, Inc., 292 N.Y.S. 206 (N.Y.A.D. 1936).* In Louisiana there can be no other land tenure than perfect and imperfect ownership: *Starr Davis Oil Co. v. Webber, 48 So. 2d 906 (La. 1950).*

(n25)Footnote 405. *Hyatt v. Vincennes Nat'l Bank, 113 U.S. 408 (1885); Mt. Carmel Fruit Co. v. Webster, 73 P. 826 (Cal. 1903); Missouri K. & T.R. Co. v. Miami County, 73 P. 103 (Kan. 1903); People ex rel. Dunkirk & F. R. Co. v. Cassity, 46 N.Y. 46 (1871); People ex rel. Panama R. Co. v. New York Tax Comm'rs, 10 N.E. 437 (N.Y. 1887); Edwards & McCulloch Lbr. Co. v. Mosher, 60 N.W. 264 (Wis. 1894).*

(n26)Footnote 406. *Hyatt v. Vincennes Nat'l Bank, 113 U.S. 408 (1885); New York v. Mabie, 13 N.Y. 151 (1855); Conant v. Deep Creek & Curlew Val. Irr. Co., 66 P. 188 (Utah 1901).*

(n27)Footnote 407. *Hogan v. Manners, 23 Kan. 551 (1880).*

(n28)Footnote 408. *Harrell v. Miller, 35 Miss. 700 (1858).*

(n29)Footnote 409. 1 COKE First Inst., § 4a; *Isharn v. Morgan, 9 Conn. 374 (1832). See Real Rights in Louisiana, 21 La. L. Rev. 462.*

(n30)Footnote 410. *Toth v. Bigelow, 64 A.2d 62 (N.J. 1949).*

(n31)Footnote 411. *Garnsey Coal Co. v. Mudd, 281 F. 183 (N.D. Ala. 1922). See In re Coe's Estate, 202 P.2d 1022 (Cal. 1949).*

(n32)Footnote 412. *Garnsey Coal Co. v. Mudd, 281 F. 183 (N.D. Ala. 1922)* (condemnation of right-of-way through seam of coal); *Risley v. Rumble, 144 N.E. 568 (Ind. App. 1924); Gas Products Co. v. Rankin, 207 P. 993 (Mont. 1922); Herrin v. Sutherland. 241 P. 328 (Mont. 1925); Horne v. Utah Oil Ref. Co., 202 P. 815 (Utah 1921); Gostina v. Ryland, 199 P. 298 (Wash. 1921); Christensen v. Mann, 204 N.W. 499 (Wis. 1925).* The building of fences, walls or other structures, or making excavations on his own land, ordinarily is within the absolute right of the owner of the fee, without reference to the incidental injury which may thereby be caused to his neighbor: *Jubilee Yacht Club v. Gulf Ref. Co., 140 N.E. 280 (Mass. 1923).*

(n33)Footnote 413. *Piper v. Ekern, 194 N.W. 159 (Wis. 1923).*

(n34)Footnote 414. *Bowman v. Union Trust Co., 106 P.2d 913 (Cal. App. 1940); Orchard v. Wright-Dalton-Bell-Anchor Store Co., 125 S.W. 486 (Mo. 1909). See 2* Blackstone's Commentaries 17; 4 Kent's Commentaries 468.

(n35)Footnote 415. *Clay v. Bogie, 119 S.W. 737 (Ky. 1909).*

(n36)Footnote 416. *Orchard v. Wright-Dalton-Bell-Anchor Store Co., 125 S.W. 486 (Mo. 1909); In re Metropolitan Elec. R. Co., 2 N.Y.S. 278 (N.Y. 1888). See Lincoln Nat'l Bank & Trust Co. v. Nathan, 19 N.E.2d 243 (Ind. 1939).*

(n37)Footnote 417. 2 Blackstone's Commentaries 17; *Lenfers v. Henke, 73 Ill. 405 (1874); State v. Pottmeyer, 33 Ind. 402 (1870); Owens v. Lewis. 46 Ind. 488 (1874); Goddard v. Winchell, 52 N.W. 1124 (Iowa 1892); Coombs v. Jordan, 3 Bland. 284 (Md. 1831); Seager v. McCabe, 52 N.W. 299 (Mich. 1892); Johnson v. Richardson, 33 Miss. 462 (Miss. 1857); Orchard v. Wright-Dalton- Bell-Anchor Store Co., 125 S.W. 486 (Mo. 1909); Ferguson v. Ray, 77 P. 600 (Or. 1904): Oregon Iron Co. v. Hughes, 81 P. 572 (Or. 1905); Eggborn v. Smith. 77 S.E. 593 (Va. 1913); Williamson v. Jones, 19 S.E. 436 (W. Va. 1894).*

(n38)Footnote 418. *Federal Land Bank v. Mulhern, 157 So. 370 (La. 1934). But see Champlin Ref. Co. v. Corporation Comm'n., 286 U.S. 210 (U.S. Okla. 1932)* (holding owner of land has no absolute title to gas and oil that may permeate below the surface).

(n39)Footnote 419. *Whelan v. Johnston, 6 So. 2d 300 (Miss. 1942).*

(n40)Footnote 420. *Schreiner v. Witte. 8 N.W.2d 831 (Neb. 1943).*

(n41)Footnote 421. *Illinois Cent. R. Co. v. Chicago, 50 N.E. 1104 (Ill. 1898).*

(n42)Footnote 422. *Romano v. Birmingham Ry., Light & Power Co., 62 So. 677 (Ala. 1913): Isham v. Morgan. 9 Conn. 374 (1832); Smith v. Atlanta, 17 S.E. 981 (Ga. 1893); Lenfers v. Henke, 73 Ill. 405 (1874); Field v. Barling, 37 N.E. 850 (Ill. 1894); State v. Pottmeyer, 33 Ind, 402 (1870); Owens v. Lewis. 46 Ind. 448 (1874); Peoples Gas Co. v. Tyner, 31 N.E. 59 (Ind. 1892); Seager v. McCabe, 52 N.W. 299 (Mich. 1892): Weems v. Mayfield, 22 So. 892 (Miss. 1898):* Barnett v. Johnson, 15 N.J. Ch.48l (1863); *Newhoff v. Mayo, 23 A. 265 (N.J. 1891); United States Pipe-Line Co.*

v. Delaware L. & W.R. Co., 41 A. 759 (N.J. 1898): Aiken v. Benedict, 39 Barb. 400 (N.Y. Gem. 1863): Sherry v. Frecking, 4 Duer 452, 11 N.Y.S.Ct. 452 (1855); Hilton *& Dodge Lbr, Co. v. Murray, 62 N.Y.S. 35 (N.Y.A.D. 1900); Delaware & Hudson Canal Co. v. Hughes, 38 A. 568 (Pa. 1897); Murphy v. Bolger, 15 A. 365 (Vt. 1888); Crews v. Pendleton, 1 Leigh 297 (Va. 1829); Stuart v. Pennis, 22 S.E. 509 (Va. 1895).*

(n43)Footnote 423. *Lillibridge v. Lackawanna Coal Co., 22 A. 1035 (Pa. 1891).*

(n44)Footnote 424. *Cox v. Colossal Cavern Co., 276 S.W. 540 (Ky. 1925).*

(n45)Footnote 425. *Uphoff v. Tufts College, 184 N.E. 213 (Ill. 1932); Gabbard v. Sheffield, 200 S.W. 940 (Ky. 1918); Huss v. Jacobs, 59 A. 991 (Pa. 1904).*

(n46)Footnote 426. *Mathews Slate Co. v. Advance Industrial Supply Co., 172 N.Y.S. 830 (N.Y.A.D. 1918).*

(n47)Footnote 427. *Auburn & S. Elec. R. Co. v. Hoadley, 195 N.Y.S. 517 (N.Y. 1922).*

(n48)Footnote 428. *In re Handley's Estate, 57 A. 755 (Pa. 1904).*

(n49)Footnote 429. *Orchard v. Wright-Dalton-Bell-Anchor Store Co., 125 S.W. 486 (Mo. 1909).*

(n50)Footnote 430. *Lenfers v. Henke, 73 Ill. 405 (1874); Oskaloosa Water Co. v. Board of Equalization, 51 N.W. 18 (Iowa 1892).*

(n51)Footnote 431. *Gibson v. Brockway, 8 N.H. 465 (1837).*

(n52)Footnote 432. *Orchard v. Wright-Dalton-Bell-Anchor Store Co., 125 S.W. 486 (Mo. 1909); New York v. Mabie, 13 N.Y. 151 (1855).*

(n53)Footnote 433. *Ralston Steel Car Co. v. Ralston. 147 N.E. 513 (Ohio 1925).*

(n54)Footnote 434. *Orchard v. Wright-Dalton-Bell-Anchor Store Co., 125 S.W. 486 (Mo. 1909).*

(n55)Footnote 435. *Polson v. Parsons, 104 P. 336 (Okla. 1909).*

(n56)Footnote 436. *Gibbs v. Drew, 16 Fla. 147 (1877).*

(n57)Footnote 437. *Rickey Land & Cattle Co. v. Miller & Lux, 152 F. 11 (9th Cir. 1907)* (holding that the right of an appropriator of water, for irrigation, to have it flow in the stream to the head of the ditch, is an incorporeal hereditament appurtenant to the ditch); *Bemis v. First Nat'l Bank,40 S.W. 127 (Ark. 1897); O'Sullivan v. Griffith, 96 P. 323 (Cal. 1908)* (holding that a franchise to operate a street railway is an incorporeal hereditament); *East Haven v. Hemingway, 7 Conn. 186 (1828).*

(n58)Footnote 438. *Owens v. Lewis, 46 Ind. 488 (1874); Oskaloosa Water Co. v. Board of Equalization, 51 N.W. 18 (Iowa 1892).*

(n59)Footnote 439. *Orchard v. Wright-Dalton-Bell-Anchor Store Co., 125 S.W. 486 (Mo. 1909); New York v. Mabie, 13 N.Y. 151 (1855).*

(n60)Footnote 440. *Gibbs v. Drew, 16 Fla. 147 (1877).*

(n61)Footnote 441. *Id. Crawford Co. v. Hathaway, 93 N.W. 781 (Neb. 1903).*

A water right and its exercise are hereditaments, corporeal and incorporeal, and are real property: *Sain v. Montana Power Co., 20 F. Supp. 843 (D. Mont. 1937).*

(n62)Footnote 442. *Callahan v. Martin, 43 P.2d 788 (Cal. 1935).*

(n63)Footnote 443. *Woodworth v. Franklin. 204 P. 452 (Okla. 1921).*

(n64)Footnote 444. *State v. Royal Mineral Ass'n, 156 N.W. 128 (Minn. 1916).*

(n65)Footnote 445. 2 Blackstone's Commentaries 17: Coke on Littleton. §§ 4a-6b; *Van Rensselaer v. Poucher, 5 Denio 35 (N.Y. 1847).*

Coke on Littleton, § lb, speaks of hereditaments as applying to real, personal and "mixt." Bracton, at 7, recognized the difference between things corporeal and incorporeal.

(n66)Footnote 446. *Ralston Steel Car Co. v. Ralston, 147 N.E. 513 (Ohio 1925).*

(n67)Footnote 447. *National Supply Co. v. McLeod, 227 P. 350 (Kan. 1924).*

(n68)Footnote 448. *See* Simpson. An Introduction to The History of The Land Law (Oxford University Press 1961) Ch. 5, *An Analysis of Incorporeal Rights.*

(n69)Footnote 449. They are not the object of sensation, can neither be seen nor handled, are creatures of the mind, and exist only incontemplation. 2 Blackstone's Commentaries 17. *See Hegan v. Pendennis Club, 64 S.W. 464 (Ky. 1901).* Their existence is merely in idea and abstracted contemplation, though their effects and profits may be frequently objects of our bodily senses. 2 Blackstone's Commentaries 19. *See Whitlock v. Greacen, 21 A. 944 (N.J. 1891).*

(n70)Footnote 450. *Chicago, Wilmington & Franklin Coal Co. v. Minier, 40 F. Supp. 316 (E.D. Ill. 1941).*

(n71)Footnote 451. *United States v. Wheeler, 161 F. Supp. 193 (W.D. Ark. 1958).*

(n72)Footnote 452. 2 Blackstone's Commentaries 19.

(n73)Footnote 453. 3 Kent's Commentaries 402: *Whitlock v. Greacen, 21 A. 944 (N.J. 1891).*

(n74)Footnote 454. *Wright v. Best, 121 P.2d 702 (Cal. 1942).*

(n75)Footnote 455. *Akron Canal & Hydraulic Co. v. Fontaine, 50 N.E.2d 897 (Oh. App. 1943).*

(n76)Footnote 456. Williams, Real Property 11: Thus, corporeal hereditaments "lie in livery" while incorporeal hereditaments "lie in grant."

(n77)Footnote 457. *Federal Oil Co. v. Western Oil Co., 112 F. 373 (1902).* A profit as an incorporeal hereditament has, however, been treated as personalty: *Shields v. Fink, 372 P.2d 252 (Kan. 1962).*

(n78)Footnote 458. *Castillero v. United States, 67 U.S. 17 (U.S. Cal. 1862).*

(n79)Footnote 459. *Aggregate Supply Co. v. Sewell, 122 S.E.2d 580 (Ga. 1961); Hummel v. McFadden, 150 A.2d 856(Pa. 1959).*

(n80)Footnote 460. *See United States v. Wheeler, 161 F. Supp. 193 (W.D. Ark. 1958)* (an incorporeal hereditament cannot be abandoned).

(n81)Footnote 461. *Central Standard Life Ins. Co. v. Gardner, 154 N.E.2d 316 (Ill. App. 1958); Schuster v. Pennsylvania Tpk. Comm'n 149 A.2d 447 (Pa. 1959).* A determinable fee in Mississippi and Kansas: *Dougherty v. Green, 67 So. 2d 297 (Miss. 1953); Wilson v. Holm, 188 P.2d 899 (Kan. 1948).*

(n82)Footnote 462. *Transcontinental Oil Co. v. Emmerson, 131 N.E. 645 (Ill. 1921)* (incorporeal property consists of choses in action and easements, as a right-of-way, and the like); *Saratoga State Waters Corp. v. Pratt, 125 N.E. 834 (N.Y. 1920). Ross v. Franko, 41 N.E.2d 417 (Oh. App. 1941); Steelhammer v. Clackamas County, 135 P.2d 292 (Or. 1943); Manwiller v. Ludwig, 35 Berks 231 (Pa. 1943); Denver Joint Stock Land Bank v. Dixon, 122 P.2d 842 (Wyo. 1942)* (holding that the right to take oil and gas from land is of the nature of an incorporeal hereditament).

(n83)Footnote 463. *See Reynolds v. Cook, 3 S.E. 710 (Va. 1887); Walker v. Daly, 49 N.W. 812 (Wis. 1891).*

(n84)Footnote 464. *Denver Joint Stock Land Bank v. Dixon, 122 P.2d 842 (Wyo. 1942).*

(n85)Footnote 465. *Radke v. Union Pac. R. Co., 334 P.2d 1077 (Colo. 1959); Hegan v. Pendennis Club, 64 S.W. 464 (Ky. 1901).*

(n86)Footnote 466. *In re Leonard's Estate, 22 A.2d 676 (Pa. 1941)* (the privilege of interment in certain defined space in a mausoleum is not a fee simple but an incorporeal hereditament, though the privilege was both perpetual and exclusive).

(n87)Footnote 467. *Miller v. Miller, 179 A. 248 (Pa. 1935).* Riparian right to flow of water is an incorporeal hereditament: *Midgett v. North Carolina State Hwy Comm'n 132 S.E.2d 599 (N.C. 1963).*

(n88)Footnote 468. *Tiger v. Sellers, 145 F.2d 920 (10th Cir. 1944); Schmid v. Baum's Home of Flowers, 37 S.W.2d 105 (Tenn. 1931).*

(n89)Footnote 469. *Tanner v. Title Ins. & Trust Co., 129 P.2d 383 (Cal. 1942); Baker v. Vanderpool, 178 S.W.2d 189 (Ky. 1944); Mark v. Bradford. 23 N.W.2d 201 (Mich. 1946); Bishop v. Sanford, 35 S.W.2d 800 (Tex. App. 1931).*

(n90)Footnote 470. *First & Citizens Nat'l Bank v. Sawyer, 10 S.E.2d 656 (N.C. 1940).*

(n91)Footnote 471. *Callahan v. Martin, 43 P.2d 788 (Cal. 1935).* Incorporeal hereditaments "comprise certain inheritable rights, which are not, strictly speaking, of a corporeal nature or land, although they are, by their own nature or use, annexed to corporeal inheritances, and are rights issuing out of them or concerning them." Kent's Commentaries 402. *See Patterson v. Kentucky. 97 U.S. 501 (1878).*

(n92)Footnote 472. *Pollock v. Farmers Loan & Trust Co., 158 U.S. 601 (1895); State v. Royal Mineral Ass'n, 156 N.W. 128 (Minn. 1916); People ex rel. Cohn v. Graves, 3 N.E.2d 508 (N.Y. 1936). See Reynolds v. Cook, 3 S.E. 710 (Va. 1887); Walker v. Daly, 49 N.W. 812 (Wis. 1891).*

(n93)Footnote 473. *Patterson v. Kentucky, 97 U.S. 501 (1878); United States v. Dubilier Condenser Corp., 289 U.S. 178(1933).*

(n94)Footnote 474. *National Tel. News Co. v. Western Union Tel. Co., 119 F. 294 (7th Cir. 1902); Gibbs v. Drew, 16 Fla. 147(1877).*

(n95)Footnote 475. *Miller v. Miller, 179 A. 248 (Pa. 1935). See* John C. Karjanis, Notes & Comments, *Public Fishing Rights, 12 WYO. L. Rev. 167 (1958).*

(n96)Footnote 476. *Stone v. Stone, 1 R.I. 425 (1851).*

(n97)Footnote 477. *Pollock v. Farmers Loan & Trust Co., 157 U.S. 429 (1895); Pollock v. Farmers Loan & Trust Co., 158 U.S. 601 (1895); Van Rensselaer v. Read, 26 N.Y. 558 (1863). See Priester v. Hohloch, 75 N.Y.S. 405 (App. Div. 1902).*

(n98)Footnote 478. 2 Blackstone's Commentaries 316. *Branan v. Wimsatt, 298 F. 833 (App. D.C. 1924); Lang v.*

Dupuis. 46 N.E.2d 21 (Ill. 1943); Dyer v. Sanford, 50 Mass. 395 (1845); Morse v. Copeland, 68 Mass. 302 (1854); Fuhr v. Dean, 26 Mo. 116 (1857); Veghte v. Raritan Water Power Co., 19 N.J. Ch. 142 (1868); *Thompson v. Gregory, 4 Johns 81 (N.Y. 1809): Cagle v. Parker, 2 S.E. 76 (N.C. 1887): Woodworth v. Franklin, 204 P. 452 (Okla. 1921); Huff v. McCauley, 53 Pa. 206 (1866).* The remedy for the protection of incorporeal rights is in equity. Ejectment will not lie: *Brooks v. Wheeler. 152 N.E. 454 (N.Y. 1926). See also Ewert v. Robinson, 289 F. 740 (8th Cir. 1923)* (remedy of ejectment in case of lease for purpose of prospecting for oil. gas. and mineral). As livery of seisin could not be had of incorporeal hereditaments, the transfer of them was always made by writing in order to give them a notoriety which was produced in the transfer of corporeal hereditaments by the delivery of possession: *French v. French, 3 N.H. 234 (1825).*

(n99)Footnote 479. *Woodworth v. Franklin, 204 P. 452 (Okla. 1921).*

(n100)Footnote 480. 33 Blackstone's Commentaries 262; Coke on Littleton, § 198; *Kent v. Waite, 27 Mass. 138 (1830): Melvin v. Whiting, 27 Mass. 295 (1830).*

(n101)Footnote 481. *Coolidge v. Learned, 25 Mass. 504 (1829).*

(n102)Footnote 482. *See Melton v. Donnell, 114 S.W.2d 49 (Tenn. 1938).*

(n103)Footnote 483. *Powell v. Bagg. 74 Mass. 441 (1857): Carrig v. Dee. 80 Mass. 583 (1860): Stearns v. Janes. 94 Mass. 582 (1866); Claflin v. Boston & A.R. Co., 32 N.E. 659 (Mass. 1892); Spottiswoode v. Morris & E.R. Co., 40 A. 505 (N.J. 1898); Miller v. Lutheran Conference & Camp Ass'n, 200 A. 646 (Pa. 1938). See Mecke v. Heist 54 Montg. 275 (Pa. 1938).*

(n104)Footnote 484. *Masterson v. Harris County Houston Ship Channel Nav. Dist., 15 S.W.2d 1011 (Tex. App. 1929).*

(n105)Footnote 485. *Pflueger v. Hopple, 156 P.2d 316 (Idaho 1945); Attorney-General v. Revere Copper Co., 25 N.E. 605 (Mass. 1890).*

(n106)Footnote 486. *Coolidge v. Learned, 25 Mass. 504 (1928); Lehigh Valley R. Co. v. McFarlan, 43 N.J. 605 (1881); Lamb v. Crosland, 38 S.C. 536 (1851); Tracy v. Atherton, 36 Vt. 503 (1864).*

(n107)Footnote 487. 2 Blackstone's Commentaries, Ch. 3; *Central Pipe Line Co. v. Hutson, 82 N.E.2d 624 (Ill. 1948).*

(n108)Footnote 488. *See Thomas v. Marshfield, 27 Mass. 364 (1830).*

(n109)Footnote 489. 2 Blackstone's Commentaries; *Ne-Bo-Shone Ass'n v. Hogarth, 7 F. Supp. 885 (W.D. Mich. 1934).*

(n110)Footnote 490. Coke on Littleton, § 449: *Dulaney v. Dulaney, 54 S.E. 40 (Va. 1906).*

(n111)Footnote 491. Coke on Littleton, § 142a; *Eastham v. Anderson, 119 Mass. 526 (1876). See Nelms v. Turner, 139 N.E. 900 (1869).*

(n112)Footnote 492. *Lippencott v. Allander, 27 Iowa 460.*

(n113)Footnote 493. Coke on Littleton. § 2a.

(n114)Footnote 494. *See In re Brown, 21 F. Supp. 935 (S.D. Iowa 1938).*

(n115)Footnote 495. *St. Helen Shooting Club v. Mogle, 207 N.W. 915 (Mich. 1926); Council v. Sanderlin, 111 S.E. 365 (N.C. 1922).*

(n116)Footnote 496. *Transcontinental Oil Co. v. Emmerson, 131 N.E. 645 (Ill. 1921).*

(n117)Footnote 497. *Ralston Steel Car Co. v. Ralston, 147 N.E. 513 (Ohio 1925).*

(n118)Footnote 498. *United States v. 12.75 Acres of Land, 95 F. Supp. 988 (Tenn. 1951); Hummel v. McFadden. 150 A.2d 856 (Pa. 1959).* An oil and gas lease is an incorporeal hereditament: *Phillips Petroleum Co. v. Jones, 176 F.2d 737 (10th Cir. 1949).*

(n119)Footnote 499. *Ewert v. Robinson, 289 F. 740 (8th Cir. 1923); Marrs v. Oxford, 24 F.2d 541 (Kan. 1928); Phillips Petroleum Co. v. Jones, 176 F.2d 737 (10th Cir. 1949); Cowling v. Deep Vein Coal Co., 183 F.2d 652 (7th Cir. 1950); United States v. 12.75 Acres of Land, 95 F. Supp. 998 (Tenn. 1951); Davis v. Collins, 245 S.W.2d 571 (Ark. 1952); Bacon v. Wahrhaftig, 218 P.2d 144 (Cal. App. 1950); Heeter v. Hardy, 76 N.E.2d 590 (Ind. App. 1948); National Supply Co. v. McLeod, 227 P. 350 (Kan. 1924); Connell v. Kanwa Oil, 170 P.2d 631 (Kan. 1946); Exchange Nat'l Bank v. Head, 99 So. 272 (La. 1924); Dixon v. American Liberty Oil Co., 77 So. 2d 533 (La. 1954); Woodworth v. Franklin, 204 P. 452 (Okla. 1921).*

(n120)Footnote 500. *Saginaw v. Second Nat'l Bank, 182 N.W. 88 (Mich. 1921); In re Rust's Estate, 182 N.W. 82 (Mich. 1921); Thacker v. Flottman, 244 S.W.2d 1020 (Mo. 1952); Picard v. Richards, 366 P.2d 119 (Wyo. 1961). See* however, *Ewert v. Robinson, 289 F. 740 (C.C.A.8 1923)* (in which it is stated that on this question the authorities are in irreconcilable, conflict and that the nature and wording of the instrument controls.).

(n121)Footnote 501. *Transcontinental Oil Co. v. Emmerson, 131 N.E. 645* (Ill. 1921; *Wolfe County v. Beckett, 105 S.W. 447 (Ky. 1907); Brown v. Fowler, 63 N.E. 76 (Ohio 1902); Barnsdall v. Bradford Gas Co., 225 Pa 338 (Pa. 1909); Murray v. Allard, 43 S.W. 355 (Tenn. 1897).*

(n122)Footnote 502. *New Ipswich W. L. Factory v. Batchelder, 3 N.H. 190 (1825).*

(n123)Footnote 503. *Humphreys v. McKissock, 140 U.S. 304 (1891): Meek v. Breckenridge. 29 Ohio St. 642 (1876).* An appendant is a thing used with and related to or dependent upon another thing more worthy, and agreeing in its nature and quality with the thing whereunto it is appendant or appurtenant: *Lucas v. Bishop, 83 Tenn. 165 (1885). See Leonard v. White, 7 Mass. 6 (Mass. 1810); Meek v. Breckenridge, 29 Ohio St. 642 (1876).*

(n124)Footnote 504. *Van Rensselaer v. Radcliff, 10 Wend. 639 (N.Y. 1833).*

(n125)Footnote 505. *Humphreys v. McKissock, 140 U.S. 304 (1891); Wilson v. Beckwith, 22 S.W. 639 (Mo. 1893): Woodhull v. Rosenthal, 61 N.Y. 382 (N.Y. 1875): Meek v. Breckenridge. 29 Ohio St. 642 (1876).*

(n126)Footnote 506. *Yellowstone Valley Co. v. Associated Mtg. Investors, 290 P. 255 (Mont. 1930).*

(n127)Footnote 507. *Leonard v. White. 7 Mass. 6 (Mass. 1810).*

(n128)Footnote 508. Coke On Littleton, § 121b. *Huston v. Cox, 172 P. 992 (Kan. 1918).*

(n129)Footnote 509. *See Crippen v. Morss, 49 N.Y. 63 (N.Y. 1872); Valentine v. Schreiber, 38 N.Y.S. 417 (N.Y. 1896): Metcalf v. Crystal Brook Park Ass'n, 71 N.Y.S. 537 (N.Y. 1901).*

(n130)Footnote 510. *Callahan v. Martin, 43 P.2d 788 (Cal. 1935).* It is a rule, in accordance with natural justice and reason, that, where one sells a house or a farm, every right will pass to the purchaser which is necessary to complete use and enjoyment of the property, unless expressly reserved: *Tucker v. Jones, 19 P. 571 (Mont. Terr. 1888),* and quoted in *Yellowstone Valley Co. v. Associated Mtg. Investors, 290 P. 255 (Mont. 1930). See Plaza Amusement Co. v. Rothenberg, 131 So. 350 (Miss. 1930).*

(n131)Footnote 511. *Atlantic Mills v. New York Cent. R. Co., 214 N.Y.S. 123 (N.Y. 1926).*

(n132)Footnote 512. *Rowan v. Harburney Oil Co., 91 F.2d 122 (10th Cir. 1937); United States v. Stanolind Crude Oil Purchasing Co., 113 F.2d 194: Lake v. Sealy, 165 So. 399 (Ala. 1936); Romero v. Brewer. 137 P.2d 872 (Cal. App. 1943); Heller v. Dailey, 63 N.E. 490 (Ind. App. 1902); Huston v. Cox, 172 P. 992 (Kan. 1918); Rich v. Doneghey, 177 P. 86 (Okla. 1918): Boatman v. Andre, 12 P.2d 370 (Wyo. 1932); Denver Joint Stock Land Bank v. Dixon, 122 P.2d 842 (Wyo. 1942).*

(n133)Footnote 513. *Desloge v. Pearce, 38 Mo. 588 (1866).*

(n134)Footnote 514. *Tallman v. Eastern Illinois & Peoria R. Co., 41 N.E.2d 537 (Ill. 1942); Boyle v. Coleraine Colliery Co,, 785 A. 838 (Pa. 1936).*

(n135)Footnote 515. *Rickey Land & Cattle Co. v. Miller & Lux, 152 F. 11* (9th Cir. 1907); *Akron Canal & Hydraulic Co. v. Fontaine, 50 N.E.2d 897 (Oh. App. 1943); Zavala County Water Imp. Dist. No. 3 v. Rogers, 145 S.W.2d 919 (Tex. App. 1940); Willey v. Dicker, 73 P. 210 (Wyo. 1903).* A right of flowage over another's land is an incorporeal hereditament; *Snowden v. Wilas, 19 Ind. 10(1862).*

(n136)Footnote 516. *Chicago, Wilmington & Franklin Coal Co. v. Jilek, 42 F. Supp. 200 (E.D. Ill. 1942); Thacker v. Flottmann, 244 S.W.2d 1020 (Mo. 1952); Shields v. Fink, 372 P.2d 252 (Kan. 1962).*

(n137)Footnote 517. *Mark v. Bradford, 23 N.W.2d 201 (Mich. 1946); Schmid v. Baum's Home of Flowers, 37 S.W.2d 105(Tenn. 1931).*

(n138)Footnote 518. *Schiffman v. Richfield Oil Co., 64 P.2d 1081 (Cal. 1937).*

(n139)Footnote 519. *See* F.S. Ruddy, *Res Nullius and Occupation in Roman and International Law. 36 U.M.K.C. L. Rev. 274 (1968);* Gerald Korngold, *Comparing the Concepts of "Property" and "Value" in Real Estate Law and Real Property Taxation,* 25 Real Est. L.J. 7 (1996).

(n140)Footnote 520. *See Dan B. Dobbs, Trespass to Land in North Carolina - Part 1,* 47 U. N.C. L. Rev. 334 (1969).

(n141)Footnote 521. *Skaggs v. Ohio Valley Rock Asphalt Co., 166 S.W.2d 1005 (Ky. 1942).*

(n142)Footnote 522. *Anthony v. International Paper Co., 180 S.W.2d 828 (Ark. 1944).*

(n143)Footnote 523. *Skaggs v. Ohio Valley Rock Asphalt Co., 166 S.W.2d 1005 (Ky. 1942).*

(n144)Footnote 524. *Acosta v. Nunez, 5 So. 2d 574 (La. App. 1942); Hall v. Edwards, 222 S.W. 167 (Tex. Com. App. 1920).* Possession is presumed to extend to and cover all land included within the boundaries of a deed under which possession is held: *Green v. Rountree, 116 S.E. 116 (Ga. 1923).*

(n145)Footnote 525. *Moore v. California-Michigan Land & Water Co., 203 P. 139 (Cal. App. 1921); Jones v. Peck, 218 P. 1030 (Cal. App. 1923); Ealahan v. Ealahan, 119 A. 349 (Conn. 1922); Haas & Howell v. Godby, 125 S.E. 897 (Ga. App. 1924); Kirk v. Kirk, 156 N.E. 294 (Ill. 1927); Spencer v. Bouchard, 121 A. 164 (Me. 1923); H. B. McCray Lumber Co. v. Standard Constr. Co., 285 S.W. 104 (Mo. App. 1926); Ownbey v. Parkway Properties, 21 S.E.2d 900 (N.C. 1942).*

(n146)Footnote 526. *Ross v. Pendergast, 182 S.W.2d 307 (Mo. 1944).*

(n147)Footnote 527. *Goodman v. Nichols, 188 S.W.2d 666 (Mo. App. 1945).*

(n148)Footnote 528. *Bush v. Stumpe, Mo, 222 S.W. 1006 (Mo. 1920). See Allen v. Vineyard, 212 S.W. 266 (Tex. App. 1919): Lindley v. Mowell, 232 S.W.2d 256 (Tex. App. 1950).* A willful trespasser is liable to the owner of realty for

the value of the property converted at its enhanced value at the time of suit: *Barnes v. Moore, 98 S.E.2d 683 (Va. 1957).* Purchaser from willful trespasser not liable for value which he adds to the property converted: *E.E. Bolles Wooden-Ware Co. v. United States, 106 U.S. 432 (1882).*

(n149)Footnote 529. *Ritchie v. Green Bay, 254 N.W. 113 (Wis. 1934).* One in possession under claim of ownership may bring trespass as against all but a higher title: *Sumpter v. J.E. Sieben Constr. Co., 492 S.W.2d 150 (Mo. App. 1973).*

(n150)Footnote 530. *Judson v. Bee Hive Auto Service Co., 294 P. 588 (Or. 1930).* Title ran to center of earth; *Shell Oil Co. v. Stansbury, 401 S.W.2d 623 (Tex. App. 1966).*

(n151)Footnote 531. *Hinman, v. Pacific Air Lines Transport Corp., 84 F.2d 755 (9th Cir. 1936). See* Dan B. Dobbs. *Trespass to Land in North Carolina-- Part /,* 47 U. No. Car. L. Rev 31 (1969).

(n152)Footnote 532. *Garlock v. Fulton County, 176 A. 38 (Pa. 1935).*

(n153)Footnote 533. *Isham v. Cudlip, 179 N.E.2d 25 (Ill. App. 1962).*

(n154)Footnote 534. *Michelsen v. Leskowicz, 55 N.Y.S.2d 831 (1945): Grays v. Harrison, 179 S.W.2d 1020 (Tex. App. 1944).* Mere possession raises a rebuttable presumption of ownership: *Implement Dealers Mut. Ins. Co. v. Castleberry, 368 S.W.2d 249 (Tex. App. 1963).*

(n155)Footnote 535. *Pottaock v. Continental Can Co., 211 A.2d 622 (Del. 1965).*

(n156)Footnote 536. Coke on Littleton, § 4b (one who had a right of possession had an action quare clausum fregit at common law). Damages for trespass are cost of restoring the property to a reasonable approximation of its former condition: *Thatcher v. Lane Constr. Co., 254 N.E.2d 703 (Oh. App. 1970).*

(n157)Footnote 537. *Williams v. Vanderbilt, 34 N.E. 476 (Ill. 1893); Seymour v. Watson, 5 Blackf. 555 (Ind. 1841); Kingsley v. McFarland, 19 A. 442 (Me. 1889): Hall v. Boatright, 36 S.E. 1001 (S.C. 1900).*

(n158)Footnote 538. *Valle v. Fleming's Heir, 29 Mo. 152 (1859).*

(n159)Footnote 539. *Davis v. Smith, 5 Ga. 274 (Ga. 1848); Williams v. Vanderbilt, 34 N.E. 476 (Ill. 1893); Whitledge v. Wait's Heir, 2 Ky. 335 (Ky. 1804); Thomas v. Evans, 12 N.E. 571 (N.Y. 1887); Bomberger v. Turner, 13 Ohio St. 263 (Ohio 1862).*

(n160)Footnote 540. Under a statute making unregistered deeds invalid as against judgment creditors, one in possession under such a deed could not claim credit for improvements: *Eaton v. Daub, 128 S.E. 494 (N.C. 1925).* Municipal inspector may not enter a dwelling house for inspection purposes without a search warrant: *Camara v. San Francisco Municipal Court, 387 U.S. 523 (1967). See* Schwartz, *A Landholder's Right to Possession of Property Versus a Citizen '$ Right of Free Speech: Tort Law as a Resource for Conflict Resolution, 45 U. CIN. L. Rev. 1.*

(n161)Footnote 541. *Harmon v. Scott, 133 N.E. 141 (Ind. App. 1921).*

(n162)Footnote 542. A.L. Goodhart, *Three Cases on Possesion, 3 Cambridge L.J. 195 (1929);* Joseph F. Francis, *Three Cases on Possession-- Some Further Observations, 14 St. LOUIS U. L. J. 11;* David Riesman. *Possession and the Law of Finders. 52 Harv. L. Rev. 1105 (1939);* Burke Shartel, *Meanings of Possession, 16 Minn. L. Rev. 611* (1.932); Edward R. Cohen, *The Finders Cases Revisited, 48 TEXAS L. REV. 1001 (1970). See supra* § 13.04(e).

(n163)Footnote 543. Trespasser not entitled: *Barker v. Bates. 30 Mass. 255 (1832): Proctor v. Adams, 113 Mass. 376(1873); Mitchell v. Oklahoma Cotton Grower's Ass'n, 235 P. 597 (Okta. 1925); Oregon Iron Co. v. Hughes, 81 P. 572 (Or. 1905).* Trespasser entitled: *Groover v. Tippins, 179 S.E. 634 (Ga. App. 1935).* Where the right to possession of discovered property is in dispute between the discoverer and owner as respects abandoned, mislaid, lost or treasure

trove, if the premises are private, this property is mislaid, and if the property is discovered by trespassers, the finders have no right to things found: *Bishop v. Ellsworth, 234 N.E.2d 49 (Ill. App. 1968).*

(n164)Footnote 544. *Silcott v. Louisville Trust Co., 265 S.W. 612 (Ky. 1924); Kincaid v. Eaton, 98 Mass. 139 (1867); Foster v. Fidelity Safe Deposit Co., 145 S.W. 139 (Mo. App. 1912). See* Roy Moreland, *Does the Place Where a Lost Article Is Found Determine the Rights of the Finder, 15 Ky. L. J. 225 (1927);* W. Lewis Roberts, *The Right of a Finder Depends on the Locus in Quo, 16 Ky. L. J 51 (1928);* Roy Moreland, *The Rights of Finders of Lost Property, 16 KY. L. J. 3 (1928).*

(n165)Footnote 545. *Foulke v. New York Consol. R. Co., 228 N.Y. 269 (1920)* (property found in a public utility was "mislaid"). *Contra, Cleveland Ry. Co. v. Durschuk, 166 N.E. 909 (Ohio App. 1928).*

(n166)Footnote 546. *Erickson v. Sinykin, 26 N.W.2d 172 (Minn. 1947); Flax v. Monticello Realty Co., 39 S.E.2d 308 (Va. 1946). Contra, Bowen v. Sullivan, 62 Ind. 281 (1878); Hamaker v. Blanchard, 90 Pa. 377(1879).*

(n167)Footnote 547. Property abandoned by previous lessees belongs to the later lessee as a finder and is not the property of the lessor: *Goss v. Bisset, Ky, 411 S.W.2d 50 (Ky. 1967).*

(n168)Footnote 548. *Allred v. Biegel. 219 S.W.2d 665 (Mo. App. 1949).* "The possession of the land carries with it in general, by our law, possession of everything which is attached to or under that land, and, in the absence of a better title elsewhere, the right to possess it also. And it makes no difference that the possessor is not aware of the thing's existence." Pollock & Wright, Possession in The Common Law 41, also quoted with approval by this court in *Ferguson v. Ray. 77 P. 600 (Or. 1904).*

(n169)Footnote 549. Coke's definition of treasure trove is as follows: "Treasure trove is when any gold or silver, in coin, plate, or bullion hath been of ancient time hidden, wheresoever it be found, whereof no person can prove any property." 3 Inst 132. *Danielson v. Roberts, 74 P. 913 (Or. 1904); Roberson v. Ellis, 114 P. 100 (Or. 1911). See Abandoned Property: Title to Treasure Recovered in Florida's Territorial Waters, 21 U. FLA. L. REV. 360.*

(n170)Footnote 550. *Weeks v. Hackett, 71 A. 858 (Me. 1908); Allred v. Biegel, 219 S.W.2d 665 (Mo. App. 1949): Danielson v. Roberts. 74 P. 913 (Or. 1904); Roberson v. Ellis, 1 14 P. 100 (Or. 1911).*

(n171)Footnote 551. *Weeks v. Hackett, 71 A. 858 (Me. 1908): Danielson v. Roberts, 74 P. 913 (Or. 1904), See* Cecil S. Emden, *The Law of Treasure Trove, Past and Present, 42 L. Q. Rev. 368 (1926):* Dobie, *The Law of Treasure Trove,* 43 JURID. REV. 300.

(n172)Footnote 552. *Sovern v. Yoran, 20 P. 100 (Or. 1888); Zech v. Accola, 33 N.W.2d 232 (Wis. 1948).*

(n173)Footnote 553. A.L. Goodhart. *Three Cases on Possession, 3 Cambridge L. J. 195* (1.929). *See* Joseph F. Francis. *Three Cases on Possession-- Some Further Observations, 14 St. Louis U. L. J. 11 521 (1929).*

(n174)Footnote 554. *Groover v. Tippins, 179 S.E. 634 (Ga. App. 1935); Zornes v. Bowen, 274 N.W. 877 (Iowa 1937); French v. McNabb, 184 A. 233 (Md. 1936); Kuykendall v. Fisher. 56 S.E. 4(W. Va. 1906).*

(n175)Footnote 555. *Hamaker v. Blanchard, 90 Pa. 377 (1879).* Property found by repairman belonged to him, not to the owner of the property: *Hurley v. City of Niagara Falls. 25 N. Y.2d 687 (1968).*

(n176)Footnote 556. 1 BLACKSTONE'S Commentaries 295 (that found on the surface belonged to the finder, but that below the surface belonged to the king). *Clark v. Maloney, 3 Del. 68 (Del. Super. 1840); Bowen v. Sullivan, 62 Ind. 281 (1878); Vickery v. Hardin, 133 N.E. 922 (Ind. App. 1922); Goddard v. Winchell, 52 N.W. 1124 (Iowa 1892); Lawrence v. Buck, 62 Me. 275 (1874); Deaderick v. Oulds, 5 S.W. 487 (Tenn. 1887).*

(n177)Footnote 557. A landowner may rightfully use his own estate whether or not such use diminishes the value

of an adjoining estate, *Gerrish v. Union Wharf, 26 Me. 384 (1847);* but such use must be reasonable, *Sprague v. Sampson, 114 A. 305 (Me. 1921).* Owner's right of use of property is subject to reasonable regulations on use: *Commonwealth v. Fisher, 350 A.2d 428 (Pa. 1976); State ex rel. Pitts v. Bd. of Zoning Adjustments, 327 So. 2d 140 (La. App. 1976): Dean v. Hercules, 328 So. 2d 69 (La. 1976).* Homeowner has no absolute right to change the essential natural character of his land so as to use it for purposes for which it is unsuited in its natural state and which use injures the rights of others: *Sibson v. State, 336 A.2d 239 (N.H. 1975). See* John M. Fowler, *Federal Historic Preservation Law: National Historic Preservation Act, Executive Order 11593, and Other Recent Developments in Federal Law, 12 Wake FOREST L. Rev. 31 (1976); Land Occupiers" Liability in Washington, 43 Wash. Law Rev. 867 (1968).*

(n178)Footnote 558. A nuisance arises out of the wrongful interference with the privilege to which the owner of an easement is entitled by making his use less convenient and beneficial than before: *Hunter v. McDonald, 254 N.W.2d 282 (Wis. 1977).* A funeral home is not a nuisance per se but may become such where property values decline as the result of the home: *Elston v. Paal, 550 S.W.2d 771 (Ark. 1977).*

(n179)Footnote 559. *Copart Indus., Inc. v. Consolidated Edison Co., 362 NE2d 968 (N.Y. App. 1977).*

(n180)Footnote 560. *Sic utere* doctrine. *Reymond v. State Dep't. of Highways. 231 So. 2d 375 (La. 1970). See infra* Chapter 67, *The Property Law Aspects of Private Nuisance.*

(n181)Footnote 561. *Zadworny v. Chicago, 44 N.E.2d 426 (Ill. 1942).*

(n182)Footnote 562. *Clinic & Hospital, Inc. v. McConnell, 236 S.W.2d 384 (Mo. App. 1951).*

(n183)Footnote 563. Injury to subterranean water by explosion was actionable: *Western Geophysical Co. of America v. Mason, 402 S.W.2d 657 (Ark. 1966).*

(n184)Footnote 564. Indiana does not subscribe to the theory that a "reasonable use" by a business will exonerate liability for explosive vibration damage: *Enos Coal Min. Co. v. Schuchart, 188 N.E.2d 406 (Ind. 1962).* Absolute liability for blasting damage by debris or concussion waves: *Galbreath v. Engineering Constr. Corp., 273 N.E.2d 121 (Ind. App. 1971); Brewer v. Sheco Constr. Co., 327 F. Supp. 1017 (Ky. 1971).* Absolute liability for damages resulting to property from use of explosives: *Walczesky v. Horvitz Co., 269 N.E.2d 844 (Ohio 1971).* No liability without fault in blasting vibrations: *Madsen v. East Jordan Irr. Co., 125 P.2d 794 (Utah 1942).* Pile driving operation actionable: *Caporale v. C. W. Blakeslee & Son, 175 A.2d 561 (Conn. 1961); Ted's Master Service, Inc. v. Farina Bros. Co., 178 N.E.2d 268 (Mass. 1961).* Liability from vibration from rocket engine: *Berg v. Reaction Motors Div. Thiokol Chem. Corp., 181 A.2d 487 (N.J. 1962).*

(n185)Footnote 565. Owner of a building is not liable for defamatory graffiti written thereon by third parties on the exterior: *Scott v. Hull, 259 N.E.2d 160 (Oh. App. 1970).* But he would be liable if defamatory matter were inside the building. Obscene films shown in an outdoor theatre and visible from adjoining land constituted a nuisance: *Cactus Corp. v. State ex rel. Murphy, 480 P.2d 375 (Ariz. App. 1971).* Tree falling on another's land and causing damage held actionable: *Barker v. Brown, 340 A.2d 566 (Pa. 1975). Contra:* Casting of light on another's property may be a nuisance: *Lynn Open Air Theatre v. Sea Crest Cadillac-Pontiac, 294 N.E.2d 473 (Mass. App. 1973).* Where the damage occasioned by invasion and trespass of material used as a landfill was known, even though slight, the statute of limitations began to run from the time of the knowledge: *Adler v. Farmers Branch, 526 S.W.2d 238 (Tex. App. 1975).*

Fumes, unpleasant odors and vibrations from a laundry constituted a nuisance: *Proulx v. Basbanes, 238 N.E.2d 531 (Mass. 1968).* Underground flooding: *United States v. Kansas City Life Ins. Co., 339 U.S. 799 (1948); Pumpelly v. Green Bay Co. & Mississippi Canal Co., 80 U.S. 166, 20 L.Ed. 557 (1871).* Holding liable for seepage of crude oil contaminating a neighboring water supply even though no negligence: *Mowrer v. Ashland Oil & Refining Co., 518 F.2d 659 (7th Cir. 1975).* Permitting sewage to drain onto another's property is a trespass: *Lehan v. Dept. of Transp., 349 A.2d 492 (Pa. 1975). See* David F. Palmerlee, *The Availability and Limitations of the Private Nuisance Doctrine in*

Wyoming, 7 Land & Water L. REV. 545 (1972).

(n186)Footnote 566. Damage caused by vibration noise and fumes from expressway is not a taking of contiguous land: *Northcutt v. State Road Dept., 209 So. 2d 710 (Fla. App. 1968).* Florida statute requires trespass before there can be a damage for adjacent landowners: *Weir v. Palm Beach County, Fla., 85 So. 2d 865 (Fla. 1956).* Liability for damage resulting from vibration: *Murray Realty Inc. v. Berke Moore Co., 175 N.E.2d 366 (Mass. 1961); Ohio Cas. Ins. Co. v. Davey Tree Expert Co., 173 N.E.2d 412 (Ohio 1959).* Property owner recovered damages for injury to well due to blasting operations on an adjoining property; *Piorkowski v. Liberty Mut. Ins. Co., 228 N.W.2d 695 (Wis. 1975).* Injury to subterranean water by explosion was actionable: *Western Geophysical Co. of America v. Mason, 402 S.W.2d 657 (Ark. 1966).*

(n187)Footnote 567. The state through exercise of the police powers may impose by statute an absolute liability for damage by fire started on the owner's premises: *State v. Boston & M. R.R., 105 A.2d 751 (N.H. 1954); State v. Anacortes Veneer, 360 P.2d 341 (Wash. 1961).* Blasting operations may give rise to trespass actions: *Steiger v. Nowakowski, 227 N.W.2d 104 (Wis. 1975).* No liability without fault in blasting vibrations: *Madsen v. East Jordan Irr. Co., 125 P.2d 794 (Utah 1942).* Absolute liability for debris thrown by blasting: *Wright v. Compton, 53 Ind. 337 (1876). Contra,* blasting vibrations result in liability without fault: *Enos Coal Min. v. Schuchart. 188 N.E.2d 406 (Ind. 1962); Galbreath v. Engineering Constr. Corp., 273 N.E.2d 121 (Ind. App. 1971). See* Howard C. Gosnell Jr., *Torts-Blasting --- Imposition of Liability Without Regard to Fault, 37 Mo. L. Rev. 561 (1972).* Indiana refuses to relieve liability from underground vibrations caused by mining operations under the theory that necessary activities to encourage business permits "reasonable use": *Enos Coal Min. Co. v. Schuchart, 188 N.E.2d 406 (Ind. 1962).* Due care duty in vibrations: *Trull v. Carolina- Virginia Well, 142 S.E.2d 622 (N.C. 1965).* Absolute liability for blasting: *Galbreath v. Engineering Constr. Corp., 273 N.E.2d 121 (Ind. 1971). Contra* and to effect that the danger could be normally anticipated is the reason for absolute liability being inapplicable: Restatement (Second) of Torts, 519; *Foster v. Preston Mill Co., 268 P.2d 645 (Wash. 1954); Bumbarger v. Walker, 164 A.2d 144 (Pa. 1960).*

(n188)Footnote 568. *Goforth v. Smith, 991 S.W.2d 579, 587 (Ark. 1999)* (nuisance is a conduct by one landowner that unreasonably interferes with use and enjoyment of lands of another and includes conduct on property that disturbs peaceful, quiet, and undistured use and enjoyment of nearby property). *See also Southeast Arkansas Landfill, Inc. v. State, 858 S.W.2d 665, 667 (Ark. 1993); Commerce Oil Ref. Corp. v. Miner, 281 F.2d 465 (1st Cir. 1960)* (oil refinery held a nuisance even though not violating a zoning ordinance). Common-law nuisance requires some present harm or at least an immediate threat of harm: *Reserve Min. Co. v. Environmental Protection Agency, 514 F.2d 492 (8th Cir. 1975).* The National Environmental Policy Act of 1969 *(42 U.S.C. §§ 4321-*4347) justified an action for airport nuisance for noise and air pollution from an adjoining airport though there were no overflights: *State of Ill. ex rel. Scott v. Butterfield, 396 F. Supp. 632 (N.D. 1975).* Operation of a funeral home is not a nuisance per se: *Rigsby v. Burton. 305 So. 2d 366 (Ala. 1974).* Cemetery as a private nuisance: *Jones v. Trawick, 75 So. 2d 785 (Fla. 1954).* Aesthetic nuisance recognized: *Merritt v. Peters, 65 So. 2d 861 (Fla. 1953). See* Note, *Aesthetic Nuisances in Florida, 14 U. Fla. L. Rev. 54.* Holding that evidence justified finding that a city's incinerator was both a public and private nuisance: *Miami v. Coral Gables, 233 So. 2d 7 (Fla. App. 1970).* Zoos are not a nuisance per se: *Louisville v. Munro, 475 S.W.2d 479* Ky. 1971). *Borsvold v. United Dairies, 81 N.W.2d 378 (Mich. 1957)* (parking lot may become nuisance). Storage tanks for gas or gasoline may be a nuisance per se: *Hilliard v. Shuff. 256 So. 2d 127 (La. 1971).* Motorcycle race track was held a nuisance: *Baker v. Odom, 529 S.W.2d 138 (Ark. 1975).* Pigs were not held a nuisance per se: *Meinecke v. Stallsworth, 483 S.W.2d 633 (Mo. App. 1972).* Piggery was held a nuisance: *Schrupp v. Hanson. 235 N.W.2d 822 (Minn. 1975); City of Lyons v. Betts, 171 N.W.2d 792 (Neb. 1969); Monroe City v. Arnold, 452 P.2d 321 (Utah 1969): Yeager & Sullivan. Inc. v. O'Neill. 324 N.E.2d 846 (Ind. App. 1975); Bower v. Hog Builders. 461 S.W.2d 784 (Mo. 1970).* Quarry blasting was held a public nuisance: *Commonwealth Dep't Envt'l Resources v. Glasgow Quarry, 351 A.2d 689 (Pa. Cmwlth. 1976). See Absolute Liability in Mississippi Under the Theory of Nuisance, 42 MISS. L. J. 488; Nuisance--*A *Feed Lot Which Will Interfere with a Future Use of Another's Land Will Justify the Recovery of Permanent Damages, 4 TEX. Tech. L. REV. 444;* James J. Brennan, *Premises Liability: A Critical Survey of Indiana Law. 7 Ind. L. Rev. 1001.* (1974): Michael D. Hashim Jr., *Private Nuisance Law: Protection of the Individual's Environmental Rights, 8 Suffolk U. L.*

REV. 1162 (1974); Samuel Silverstone, *Visual Pollution: Unaesthetic Use of Land as a Nuisance, 12 Alberta L. Rev. 542 (1974).*

(n189)Footnote 569. Governmental tort immunity does not preclude a nuisance action against a municipal airport: *Nestle v. City of Santa Monica, 101 Cal. Rptr. 568 (1971).* A developer was required to pay the costs of moving a business that had become a public nuisance as the result of the development: *Spur Indus., Inc. v. Del E. Webb Dev. Co., 494 P.2d 700 (Ariz. 1972).* A right to maintain a public nuisance cannot be obtained by prescription: *People v. Perez. 561 P.2d 7 (Colo. 1977).* On the question of balancing of conveniences or social interests in nuisance, *see Boomer v. Atlantic Cement Co., 26 N.Y.2d 219 (1970). See* Richard F. Babcock & Duane A. Fuerer, *Land as a Commodity Affected with a Public Interest, 52 Wayne L. Rev. 289 (1977).*

(n190)Footnote 570. *Mahoney v. Walter, 205 S.E.2d 692 (W. Va. 1974).* Construction, maintenance and operation of a pipeline is not a nuisance per se: *Hero Lands v. Texaco, 296 So. 2d 345 (La. App. 1974).* Motorbus terminal found nuisance: *Koeber v. Apex-Albuq Phoenix Express. 380 P.2d 14 (N.M. 1963).* Funeral home was not a nuisance per se but may become such where property values decline: *Elston v. Paal, 550 S.W.2d 771 (Ark. 1977).* The condition itself must be fraught with danger to constitute a nuisance: *Dean v. Bays Mountain Park Ass'n, 551 S.W.2d 702 (Tenn. App. 1977).*

(n191)Footnote 571. *Hilton v. Duke Power, 254 F.2d 118 (4th Cir. 1958).* Storage tanks for gas or gasoline may be a nuisance per se: *Hilliard v. Shuff, 256 So. 2d 127 (La. 1971).* The structure erected on one's own land is not a nuisance merely because it obstructs passage of light and air to the adjoining property or obstructs the view of the neighboring property: *Venuto v. Owens-Corning Fiberglass, 99 Cal. Rptr. 350 (Cal. App. 1971).* The owner of realty may change the surface structure: *In re Duswald's Estate, 180 N.E.2d 307 (Ohio 1960).* A developer was required to pay the costs of moving a business that had become a public nuisance as the result of the development: *Spur Indus.,Inc. v. Del E. Webb Dev. Co., 494 P.2d 700 (Ariz. 1972).* Right of action for water seepage accrues when the property is first affected by the seepage: *Green v. Green Acres Constr., 543 P.2d 108 (Colo. App. 1975).* A right to maintain a public nuisance cannot be obtained by prescription: *People v. Perez, 561 P.2d 7 (Colo. 1977).*

(n192)Footnote 572. *Glorioso v. Chandler, 337 So. 2d 269 (La. App. 1976). See also* James H. Brun, *Abandoned Buildings: Rights and Remedies of Adjoining Landowners,* 44 U. Ct N. L. Rev. 778 (1975).

(n193)Footnote 573. *Clinic & Hospital v. McConnell, 236 S.W.2d 384 (Mo. App. 1951).*

(n194)Footnote 574. *Wade v. Campbell, 19 Cal. Rptr. 173 (Cal. App. 1962)* (dairy held a nuisance). *See infra* Chapter 72, *Sources of Government Police Power.*

(n195)Footnote 575. Casting of light on another's property may be a nuisance: *Lynn Open Air Theatre, Inc. v. Sea Crest Cadillac-Pontiac, 294 N.E.2d 473 (Mass. App. 1973). See infra* Chapter 68, *Trespass on Land.*

(n196)Footnote 576. Fumes, unpleasant odors and vibrations from a laundry constituted a nuisance: *Proulx v. Basbanes. 238 N.E.2d 531 (Mass. 1968). See* David F. Palmerlee, Note, *The Availability and Limitations of the Private Nuisance Doctrine in Wyoming, 7 Land & Water L. Rev. 545 (1972):* Michael E. Winck. Note, *Environmental Law--The Nuances of Nuisance in a Private Action to Control Air Pollution, 80 W. Va. L. Rev. 48 (1978).*

(n197)Footnote 577. Pile driving operation vibrations actionable: *Caporale v. C. W. Blakeslee & Son, 175 A.2d 561 (Conn. 1961); Selle v. Kleamenakis, 142 So. 2d 50 (La. App. 1962):* but requiring a showing of negligence and foreseeable injury: *Ted's Master Service, Inc. v. Farina Bros. Co., 178 N.E.2d 268 (Mass. 1961).* Liability from vibration from rocket engine: *Berg v. Reaction Motors Div. Thiokol Chem. Corp., 181 A.2d 487 (N.J. 1962).* Property owner recovered damages for injury to well due to blasting operations on an adjoining property: *Piorkowski v. Liberty Mut. Ins. Co., 228 N.W.2d 695 (Wis. 1975).* Absolute liability for blasting: *Galbreath v. Engineering Constr. Corp., 273 N.E.2d 121 (Ind. App. 1971). Contra* and to effect that the danger could be normally anticipated is the reason for absolute liability being inapplicable: Restatement (Second) of Torts 519; *Foster v. Preston Mill Co., 268 P.2d 645*

(Wash. 1954); Bumbarger v. Walker, 164 A.2d 144 (Pa. 1960). Blasting operations may give rise to trespass actions: *Steiger v. Nowakowski, 227 N.W.2d 104 (Wis. 1975).* Action for trespass for water seepage occurs when the property is first visibly affected by the seepage: *Green v. Green Acres Constr. Co., 543 P.2d 108 (Colo. App. 1975).*

(n198)Footnote 578. *Faire v. Burke, 252 S.W.2d 289 (Mo. 1952).*

(n199)Footnote 579. Injury to subterranean water by explosion was actionable: *Western Geophysical Co. of America v. Mason. 402 S.W.2d 657 (Ark. 1966).*

(n200)Footnote 580. No liability without fault in blasting vibrations: *Madsen v. East Jordan Irr. Co., 125 P.2d 794 (Utah 1942).* Absolute liability for debris thrown by blasting: *Wright v. Compton. 53 Ind. 337 (1876). Contra,* blasting virbrations result in liability without fault: *Enos Coal Min. Co. v. Schuchart, 188 N.E.2d 406 (Ind. App. 1962); Galbreath v. Engineering Constr. Corp., 273 N.E.2d 121 (Ind. App. 1971). See 37 Mo. L. Rev. 561.* Indiana refuses to relieve liability from underground vibrations caused by mining operations under one theory that necessary activities to encourage business permits "reasonable use": *Enos Coal Min. Co. v. Schuchart, 188 N.E.2d 406 (Ind. 1962).* Due care duty in vibrations: *Trull v. Carolina-Virginia Well Co., 142 S.E.2d 622 (N.C. 1965).* Quarry blasting held a public nuisance: *Commonwealth v. Glassco Quarry, Inc., 351 A.2d 689 (Pa. 1976).*

(n201)Footnote 581. *Zadworny v. Chicago, 44 N.E.2d 426 (Ill. 1942): Gosey v. Kansas City Southern R. Co., 100 So. 2d 311 (La. App. 1958); Clinic & Hospital, Inc. v. McConnell. 236 S.W.2d 384 (Mo. App. 1951); Alexander v. General Acc. Fire & Life Assur. Corp., 98 So. 2d 730 (La. App. 1957).* Ownership does not always mean absolute dominion. The more the owner, for the owner's advantage, opens up the property for use by the public in general, the more do the owner's rights become circumscribed with the statutory and constitutional rights of those that use it: *Marsh v. Alabama, 326 U.S. 501 (1946).* Junkyard was held common-law nuisance: *Town of Clayton v. Mayfield. 485 P.2d 352 (N.M. 1971).* The owner of the premises has a duty to warn employees of an independent contractor working on the premises of a hidden condition known to the owner: *Gulf Oil Corp. v. Bivins, 276 F.2d 753 (5th Cir. 1960).* Owner of business liable to customer for dangerous condition: *Kroger Co. v. Thomas. 277 F.2d 854 (6th Cir. 1960).* Duty of proprietor of place of business to protect patrons against known or discoverable conditions: *M. G. A. Theaters, Inc. v. Montgomery, 321 P.2d 1009 (Ariz. 1958).* Swimming pool held attractive nuisance; *McWilliams v. Guzinski, 237 N.W.2d 437 (Wis. 1976): Samson v. O'Hara. 239 So. 2d 151 (Fla. App. 1970); Johnson v. Harris, 530 P.2d 1136 (Ariz. App. 1975); Mitchell v. Akers, 401 S.W.2d 907 (Tex. App. 1966).* Funeral home was held liable for due care to invitee: *Terrell Investment Co. v. Dunn, 176 So. 2d 291 (Miss. 1965).* Store owner not liable for injury to customer attacked in parking lot where there was no previous history of such attacks: *Shipes v. Piggly Wiggly St. Andrews, Inc., 238 S.E.2d 167 (S.C. 1977).* Ezra Ripley Thayer, *Liability Without Fault., 29 Harv. L. Rev. 801 (1916):* Thomas B. Brand, *Rylands v. Fletcher in Oregon, 1 Willamette L. J. 344 (1960);* Richard F. May, *Adjoining and Abutting Landowners: Liability for Injuries to Persons or Property, I* WILLAMETTE L. J. 423 (1960); *The Duty Owed by Land Occupiers in Iowa, 20 DRAKE L. Rev. 159 (1969);* Charles B. Garabedian, *Liability of Owners and Occupiers of Real Estate in Massachusetts, 5 Suffolk U. L. Rev. 426 (1971);* James J. Brennan, Note, *Premises Liability: A Critical Survey of Indiana Law, 7 Ind. L. Rev. 1001 (1974);* John E. Donaldson, *Regulation of Conduct in Relation to Land-- The Need to Purge Natural Law Constraints from the Fourteenth Amendment,* 16 WM. E. Mary L. REV. 187 (1974); James H. Brun, *Abandoned Buildings: Rights and Remedies of Adjoining Landowners, 44 U. CIN. L. Rev. 778 (1975); Land Occupier Liability in Washington, 43 Wash. L. Rev. 867 (1968);* Myron Fink, *Private Nuisance in New Mexico, 4 N.M. L. Rev. 127 (1973);* Samuel Alston Beatty, *Alabama Property Offenses-- Past, Present, Future, 15 Ala. L. Rev. 405 (1963);* Page Keeton, *Trespass, Nuisance and Strict Liability, 59 Colum. L. Rev. 457 (1959):* Francis H. Bohlen, *The Rule in Rylands v. Fletcher, 59 U. Pa. L. Rev. 298 (1910);* Dawn D. Bennett. *Case Development, Torts - The Changing Standard of Care Owed Licensees, Invitees and Trespassers, 18 How. L. J. 220 (1973);* Victor E. Schwartz. *A Landowner's Right to Possession of Pioperty versus A Citizen's Right of Free Speech: Tort Law as a Resource for Conflict Resolution, 45 U. CIN. L. Rev. 1 (1976);* Jon G. Anderson, *The Rylands v. Fletcher Doctrine in America: Abnormally Dangerous, Ultrahazardous or Absolute Nuisance, 1978 ARIZ. ST. L. J. 99 (1978):* Robert Lee Collins, Comment, *Premises Liability: A Critical Survey of North Carolina Law, 14 Wake Forest L. Rev. 797 (1978);* Fleming James Jr., *Tort Liability of Occupiers Land: Duties Owed to Licensees and Invitees, 63 YALE L. J. 605 (1954);* Robert Lee Collins,

Comment, *Premises Liability: A Critical Survey of North Carolina Law, 14 Wake Forest L. Rev. 797 (1978);* Russell L. Weaver, *Law of Private Nuisance in Missouri. 44 Mo. L. Rev. 20 (1979). See also,* Mark A. Peterson, Note, *Liability of Owners and Occupiers of Land, 58 Marq. L. Rev. 609 (1975),* as to the trend toward abolishing the distinction of landowners' liability between trespassers, licensees and invitees.

(n202)Footnote 582. Guest of club member held business invitee: *Collyer v. Yonkers Yacht Club, Inc., 234 N.Y.S.2d 259 (N.Y. 1962).* Ordinary care owed to business invitee together with duty to warn as to unsafe conditions: *Haitheock v. Chimney Rock Co., 179 S.E.2d 865 (NC. App. 1971).* Possessor's duty to invitee is one of ordinary care in light of all circumstances and not an insurer of safety: *Anderson v. Chicago & N. W. Ry., 241 N.W. 516 (S.D. 1932).* Duty to warn employees of independent contractor working on the land of known dangerous conditions: *Delhi-Taylor Oil Corp. v. Henry, 416 S.W.2d 390 (Tex. 1967).* Business invitees entitled only to reasonable care or maintenance of premises: *White v. Northwestern Bank Bldg. Co., 160 N.W.2d 545 (Minn. 1968).* A prospective tenant or purchaser may be an invitee: *Trimble v. Irwin, 441 S.W.2d 818 (Tenn. App. 1968).* Held no liability on facts: *Massey v. Hilton Heights Park, Inc., 173 S.E.2d 396 (Ga. App. 1970). See* Rex B. Stratton Ill, *The Slip and Fall Case in Montana and the Doctrine of Constructive Notice as Applied in Accidents in Supermarkets. 31 MONT. L. REV. 220 (1970); Land Occupiers Liability to Business Invitees for Slip and Fall Injuries: Recent Developments in Iowa Law, 54 Iowa L. Rev. 659.*

(n203)Footnote 583. The proper test of the duty of a possessor of land for the safety of social guests is whether the possessor acted as a reasonable person in the management of the property in view of the possibility of injury to others. The classification of trespasser, licensee or invitee is not alone determinative of the standard of care: *Rowland v. Christian. 70 Cal. Rptr. 97 (1968).* Landowner liable to invitees if landowner had actual knowledge of dangerous condition: *Wells v. Goforth, 443 S.W.2d 155 (Mo. 1969).* Owner liable for icy condition on porch if known: *Wells v. Goforth, 443 S.W.2d 155 (Mo. 1969).* Liability for invitee stepping into hole in dock: *Russo v. Burch, 36 Cal. Rptr. 682 (1964).* Reasonable liability of owner to invitees and licensees: *O'Leary v. Coenen, 251 N.W.2d 746 (N.D. 1977). See Landowner Owes Invitee No Duty to Provide Police Protection Against Criminal Attack, Goldberg v. Housing Authority of Newark, 186 A.2d 291 (N.J. 1962).*

(n204)Footnote 584. *Ramstead v. Hauge, 437 P.2d 402 (Wash. 1968).*

(n205)Footnote 585. *Ansin v. Thurston, 98 So, 2d 87 (Fla. 1957).* A social guest is not an invitee but a licensee to whom the possessor owes no duty of inspection and care to make the premises safe: *Krause v. Alper. 176 N.Y.S.2d 349 (1958); Bernal v. Baptist Fresh Air Home Soc'y,. 87 N.Y.S.2d 458 (1949)* (as long as there are no known concealed defects); *Wilder v. Ayers, 156 N.Y.S.2d 85 (1956)* (even if the guest is an infant). Baseball is such a well-known game that the risks are known, and if one chooses not to sit behind a screen, one assumes the risk: *Ivory v. Cincinnati Baseball Club Co., 24 N.E.2d 837 (Oh. App. 1939). See* Ronald Argue, Note, *Recent Cases on Occupier's Liability, 19 Mcgill L. J. 99 (1973);* Richard Glen Greenwood, Comment, *Current Attractive Nuisance Cases in Wisconsin and Other Jurisdictions, 42 MARQ. L. REV. 64 (1958).*

(n206)Footnote 586. *Curtis v. Tenino Stone Quarries, Inc., 79 P. 955 (Wash. 1905); Simmel v. New Jersey Coop. Co., 136 A.2d 301 (N.J. 1957).* The difference between a trespasser and one who is on the land pursuant to an incomplete privilege is that the latter is entitled to be on the land, and therefore, the possessor is under a duty to permit that person to come and remain there and is not privileged to resist: *Rossi v. DelDuca, 181 N.E.2d 591 (Mass. 1962).* Some states have repudiated the attractive nuisance doctrine: *Ryan v. Towar, 87 N.W. 644 (Mich. 1901).* The only duty to an adult trespasser is not to mortally injure the person: *Mail v. Smith Lumber & Shingle Co., 287 P.2d 877 (Wash. 1955); Adkisson v. Seattle. 258 P.2d 461 (Wash. 1953).* Distinguishing between trespassers and licensees and invitees and finding no liability to a trespasser for injuries received from a vicious watchdog: *Bramble v. Thompson, 287 A.2d 265 (Md. 1972).* Refusing to distinguish between inadvertent and intentional trespassers in denying damage for injuries inflicted by watchdog on premises: *Bramble v. Thompson, 287 A.2d 265 (Md. 1972). See* Francis H. Bohlen, *Incomplete Privileges to Inflict Intentional Invasions of Interest of Property and Personalty, 39 Harv. L. Rev. 337(1926).*

(n207)Footnote 587. *Norris v. Hugh Nawn Contr. Co., 91 N.E. 886 (Mass. 1910): Bartell v. Serio, 180 So. 460 (La. App. 1938).* A property owner is not liable to a gratuitous licensee for a trap unless the danger is not visible: *Parker's Hamburger No. One v. Fitzgerald, 356 P.2d 25 (Ariz. 1960).* A developer was required to pay the costs of moving a business that had become a public nuisance as the result of the development: *Spur Indus., Inc. v. Del E. Webb Dev. Co., 494 P.2d 700 (Ariz. 1972). See* Restatement of Torts, §§ 332, 340-342.

(n208)Footnote 588. *Daugert v. Scranton Contr. Co., 26 A.2d 298 (Pa. 1942); Gottlieb v. Andrus, 104 S.E.2d 743 (Va. 1958)* (invitee must be warned of latent dangers): *Midwest Oil Co., Inc. v. Storey, 178 N.E.2d 468 (Ind. App. 1961)* (owner of the premises is under a duty not to perform a positive act which will increase the licensee's hazard; if such an act does occur, the licensee must be notified); *Mills v. Heidingsfield, 192 So. 786 (La. App. 1939); Terrell Investment Co. v. Dunn, 176 So. 2d 291 (Miss. 1965).*

(n209)Footnote 589. *Buford v. Houtz, 133 U.S. 320 (1890); Logan v. Gedney, 38 Cal. 579 (1869); Studwell v. Ritch, 14 Conn. 292 (1841); Zadworny v. Chicago, 44 N.E.2d 426 (Ill. 1942); Wagner v. Bissell, 3 Iowa 396; Delaney v. Errickson. 6 N.W. 600 (Neb. 1880).*

(n210)Footnote 590. *Clinic & Hospital, Inc. v. McConnell, 236 S.W.2d 384 (Mo. App. 1951).* Swimming pool held an attractive nuisance: *Mitchell v. Akers, 401 S.W.2d 907 (Tex. App. 1966).*

(n211)Footnote 591. *Gosey v. Kansas City Southern Ry. Co., 100 So. 2d 311 (La. App. 1958).*

(n212)Footnote 592. Restatement of Torts, § 332.

(n213)Footnote 593. *Alexander v. General Acc. Fire & Life Assur. Corp., 98 So. 2d 730 (La. App. 1957).*

(n214)Footnote 594. *Birmingham Ore & Min. Co. v. Grover. 48 So. 682 (Ala. 1909); Enos Coal Min. Co. v. Schuchart, 180 N.E.2d 129 (Ind. App. 1962)* (negligence necessary): *Leslie Four Coal Co. v. Simpson, 333 S.W.2d 498 (Ky. 1960); Reynolds v. W.H. Hinman Co., 75 A.2d 802 (Me. 1950)* (negligence necessary); *Miller v. Twiname, 114 N.Y.S. 151 (1908); Chamberlin v. Penn-Rich Contr. Go., 162 A.2d 658 (Pa. 1960).*

(n215)Footnote 595. *Kalopodes v. Federal Reserve Bank, 367 F.2d 47 (4th Cir. 1966).*

(n216)Footnote 596. *Isenberg v. Lushan, 178 N.E.2d 502 (Mass. 1961).*

(n217)Footnote 597. No duty to warn trespassers except as to wilful injury or knowledge of peril to the trespasser. *McNulty v. Hurley. 97 So. 2d 185 (Fla. 1957).*

(n218)Footnote 598. "Spring gun" rule was upheld: *Allison v. Fiscus. 100 N.E. 2d 237 (Ohio 1951). See Katko v. Briney, 183 N.W.2d 657 (Iowa 1971).* An occupier of land has no duty to trespassing children for dangerous natural conditions on the land: *Loney v. McPhillips, 521 P.2d 340 (Or. 1974).* Landowner owes no duty to trespasser other than to refrain from wilfully inflicting injury upon him: *Schlueter v. Summit County Town of Kamas, 480 P.2d 140 (Utah 1971).* Retaining the traditional invitee, licensee and trespasser: *Welder v. Chase Resorts, Inc., 543 S.W.2d 527 (Mo. App. 1976).*

(n219)Footnote 599. *Bartels v. Continental Oil Co., 384 S.W.2d 667 (Mo. 1964); Preshno v. J.M. McDonald Co., 151 N.W.2d 451 (Neb. 1967); Nicholas v. Tri-State Fair & Sales Ass'n. 148 N.W.2d 183 (S.D. 1967).*

(n220)Footnote 600. Restatement of Torts, § 339: *Sioux City & P. R. Co. v. Stout, 84 U.S. 657 (1873).* Even though California does not consider a swimming pool an attractive nuisance, it still allows recovery under Restatement of Torts, § 339: *Reynolds v. Willson, 331 P.2d 48 (Cal. 1958).* Planted shrubs are not an attractive nuisance: *Norton v. Black, 469 P.2d 101 (Ariz. App. 1970).* A high hedge was held not an attractive nuisance: *Norton v. Black, 469 P.2d 101 (Ariz. App. 1970).* Natural objects are not an attractive nuisance: *Mullens v. Pinnell, 266 So. 2d 862 (Ala. 1972).* Trees

and shrubs are not an attractive nuisance: *Higginbotham v. Winborn, 218 S.E.2d 917 (Ga. App. 1975).*

(n221)Footnote 601. *Hensley v. Montgomery County, 334 A.2d 54 (Md. App. 1975).*

(n222)Footnote 602. *Keffe v. Milwaukee & St. P. R. Co., 21 Minn. 207 (1875).* A landowner is not liable to an infant trespasser in absence of an actual knowledge of a dangerous condition: *Simmel v. New Jersey Coop. Co., 143 A.2d 521 (N.J. 1958).* To be an attractive nuisance, the danger cannot be common and obvious: *Staley v. Security Athletic Ass'n, 380 P.2d 53 (Colo. 1963).* Swimming pool in apartment complex held an attractive nuisance: *Kopera v. Moschella, 400 F. Supp. 131 (S.D. Miss. 1975).* Reasonable liability of owner to invitees and licensees: *O'Leary v. Coenen, 251 N.W.2d 746 (N.D. 1977). See* William L. Prosser, *Trespassing Children, 47 Cal. L. Rev. 428 (1959);* C. Clifford Fulford, *Tort Liability of Possessors of Property to Trespassing Children in Alabama, 11 Ala. L. Rev. 1 (1958).*

(n223)Footnote 603. Restatement (Second) of Torts, § 330 (1965); *Gross v. Bloom, 411 S.W.2d 326 (Ky. 1967); Greger v. Fisher, 244 N.E.2d 848 (Ill. App. 1968); Harrison v. Ulicki, 193 N.W.2d 533 (Iowa 1972): Jensen v. Myers, 441 P.2d 604 (Or. 1968). Contra* result where landlord had promised to repair: *Carter v. Brannan, 178 S.E.2d 755 (Ga. App. 1970).*

(n224)Footnote 604. *See* Kenneth D. Stern, *Firemen's Recovery from Negligent Landowner,* 16 Clev. Marshall L. Rev. 231 (1967).

(n225)Footnote 605. Funeral home liable for due care to invitee: *Terrell Investment Co. v. Dunn, 176 So. 2d 291 (Miss. 1965). See* Howard Daigle, Jr., Note, *Land Occupiers Liability: The Duty of Reasonable Care for All, 37 La. L. Rev. 1174 (1971);* John M. Payne, *From the Courts: Landowner's Tort Liability-- Trespasser-Licensee-Invitee Distinction Abolished in New York,* 6 Real Est. L. J. 145 (1987). *See also* Mark A. Peterson, *Liability of Owners and Occupiers of Land, 58 Marq. L. Rev. 609 (1975),* as to the trend toward abolishing the distinction of landowners' liability between trespassers, licensees and invitees.

(n226)Footnote 606. One contracting for work to be done on the premises gives license to those performing the work to go upon the land: *Harrison v. Rapach, 271 N.E.2d 399 (Ill. App. 1971).*

Equitable owner in possession is subject to attractive nuisance doctrine: *Gordon v. Strawther Enterprises, Inc., 78 Cal. Rptr. 417 (Cal. App. 1969).* Abandoned strip mine held an attractive nuisance under the foreseeable injury doctrine: *Hendricks v. Peabody Coal Co., 253 N.E.2d 56 (Ill. App. 1969).* Store owner held not liable for injury to customer attacked in parking lot where there was no previous history of such attacks: *Shipes v. Piggly Wiggly St. Andrews, Inc., 238 S.E.2d 167 (S.C. 1977).* Swimming pool held an attractive nuisance: *Mitchell v. Akers, 401 S.W.2d 907 (Tex. App. 1966). See* James K. Prewitt, *Attractive Nuisance Doctrine in Missouri, 29 Mo. L. REV. 24 (1965);* Russell L. Weaver, *Law of Private Nuisance in Missouri, 44 Mo. L. Rev. 20 (1979); Torts-- Attractive Nuisance Doctrine-- Smudge Pots Are Not So Inherently Dangerous as to Require Application of Attractive Nuisance Doctrine, 44 MISS. L. J. 805 (1973). See also Jackson v. City of Biloxi. 272 So. 2d 654 (Miss. 1973).*

(n227)Footnote 607. *See* Wm. P. Roscoe. III, Note, *Montana's Law of Attractive Nuisance,* 30 MONT, L. Rev. 61 (1968); *Torts: Landowner Liability and Attractive Nuisance-- Kansas Rejects the Modem Trend, 18 Washburn L. J. 190 (1978).*

(n228)Footnote 608. *Keffe v. Milwaukee & St. P.R. Co., 21 Minn. 207 (1875).* Abandoned strip mine is attractive nuisance under foreseeable injury ordinance. *Hendricks v. Peabody Coal Co., 253 N.E.2d 56 (Ill. App. 1969). See* William L. Prosser. *Trespassing Children, 47 Cal. L. REV. 427 (1958).*

(n229)Footnote 609. Harper & James. Torts. 273. *See* William L. Prosser, *Trespassing Children, 47 Cal. L. Rev. 427 (1958).* Attractive nuisance must be based on allurement to the child: *Concrete Constr., Inc. v. Petterson, 216 So. 2d 221 (Fla. 1968).* Volatile substance created liability under attractive nuisance doctrine: *Patterson v. Proctor Paint & Varnish Co., 288 N.Y.S.2d 622 (1968).* Attractive nuisance to children: *Herndon v. Paschal. 410 P.2d 549 (Okla. 1966).*

Reasonable care adapted with respect to child trespasser: *Crain v. Sestak. 68 Cal. Rptr. 849 (Cal. App. 1968).* Landowner not liable to child trespasser where injury is caused by natural conditions (wave sweeping into cove and drowning child): *Loney v. McPhillips, 521 P.2d 340 (Or. 1974).* Private swimming pool held not a nuisance: *Slaird v. Klewers, 271 A.2d 345 (Md. 1970).*

(n230)Footnote 610. *Crafton v. Hannibal & St. J. R. Co., 55 Mo. 580 (1874)* (cattle lured, to railroad right-of- way by feed left on track).

(n231)Footnote 611. *Harris v. Mentes-Williams Co., 95 A.2d 388 (N. J. 1953); Angelier v. Red Star Yeast & Products Co., 254 N.W. 351 (Wis. 1934): Massino v. Smaglick. 89 N.W.2d 223 (Wis. 1958).* Illinois has adopted the attractive nuisance doctrine with respect to minor children, requiring the landowner to foresee the possibility of harm to a child trespasser: *Kahn v. James Burton Co,, 126 N.E.2d 836 (Ill. 1955),* departing from its former rule in *Jones v. Schmidt, 110 N.E.2d 688 (Ill. App. 1953),* which held that liability was not merely due to a trespasser or licensee to refrain from wilful or wanton injury. Presence of a diving board in a constructed swimming pool where in a place expressly provided for swimming and diving activities is an invitation to use it and a representation that it may be used in ordinary manner with safety: *Pleasant v. Blue Mound Swim Club, 262 N.E.2d 107 (Ill. App. 1970).* Railroad is liable for a mentally incompetent trespasser to the same extent that it is for children trespassers in matters of attractive nuisance: *Barnes v. Washington, 281 N.E.2d 380 (Ill. App. 1972).* A residential swimming pool is not necessarily a nuisance: *Slaird v. Klewers, 271 A.2d 345 (Md. 1970).* Treehouses held attractive nuisance: *Salanski v. Enright, 452 S.W.2d 143 (Mo. 1970).* Landowner's knowledge of use of his land for sledding purposes did not create an attractive nuisance: *Scheffer v. Braverman, 215 A.2d 378 (N.J. 1965); Dougherty v. Graham, 287 A.2d 382 (Conn. 1971).*

(n232)Footnote 612. *Menneti v. Evans Constr. Co., 259 F.2d 367 (3rd Cir. 1958); Simmel v. New Jersey Coop. Co., 136 A.2d 301 (N.J. 1957)* (attractive nuisance doctrine applied to infants burned in fires while trespassing); *Previte v. Wanskuck Co., 90 A.2d 769 (R.I. 1952). See Petrak v. Cooke Contr'g. Co., 46 N.W.2d 574 (Mich. 1951).* As respects nuisance, statute of limitations begins to run when it becomes obvious that a permanent injury has been suffered: *Springdale v. Weathers, 410 S.W.2d 754 (Ark. 1967).*

Statute of limitations on a private nuisance does not commence until the act becomes harmful to the injured party: *Schmidt v. Village of Mapleview, 196 N.W.2d 626 (Minn. 1972).* Treehouse as attractive nuisance: *Salanski v. Enright, 452 S.W.2d 143 (Mo. 1970).* Abandoned strip mine held an attractive nuisance under the foreseeable injury doctrine: *Hendricks v. Peabody Coal Co., 253 N.E.2d 56 (Ill. App. 1969).*

(n233)Footnote 613. *Ansin v. Thurston, 98 So. 2d 87 (Fla. 1957). See* David F. Palmelee, *The Availability and Limitations of the Private Nuisance Doctrine in Wyoming, 7 Land & Water L. Rev. 545 (1972).*

(n234)Footnote 614. *Simmel v. New Jersey Coop. Co., 136 A.2d 301 (N.J. 1957).* Trees and shrubs are not an attractive nuisance: *Higginbotham v. Winborn. 218 S.E.2d 917 (Ga. App. 1975). See* Franklin Gevurtz, Comment, *Obstruction of Sunlight as a Private Nuisance. 65 Cal. L. Rev. 94 (1977).*

(n235)Footnote 615. RESTATEMENT OF TORTS. § 332; New York Central R. *Co. v. Wyatt, 184 N.E.2d 657 (Ind. App. 1962); Bartell v. Serio, 180 So. 460 (La. App. 1938).* Hockey patron may recover in absence of actual knowledge of the dangers of the game: *Shanney v. Boston Madison Square Garden Corp., 5 N.E.2d 1 (Mass. 1936): James v. Rhode Island Auditorium, Inc., 199 A. 293 (R.I. 1938).* A licensee to whom the landowner owes no duty except to refrain from wantonly or wilfully injuring him and an invitee distinguished: *Ramsey v. Piketon, 184 N.E.2d 482 (Oh. App. 1961).* Owner liable to public invitee for injury due to defective premises caused by owner's negligence: *Lunney v. Post, 248 So. 2d 504 (Fla. App. 1971).* Holding liability for dangerous conditions to an invitee but not mere licensee: *DuMond v. Mattoon, 207 N.E.2d 320 (Ill. App. 1965).* Liable to licensee for negligence in failing to warn of known dangers: *Cupp v. Montgomery, 408 S.W.2d 353 (Mo. App. 1966).* There is no duty upon the owners or operators of a shopping center whose mode of operation does not attract or provide a climate for crime to guard against the criminal

acts of a third party unless they know or have reason to know that acts are occurring or about to occur on the premises that pose imminent probability of harm to an invitee whereby a duty of reasonable care to protect against such act arises: *Cornpropst v. Sloan. 528 S.W.2d 188 (Tenn. 1975).* No liability of filling station for injury caused by falling on natural accumulation of snow: *Foster v. George J. Cyrus & Co., 276 N.E.2d 38 (Ill. App. 1971).* Access to archdiocese office held not generally accessible and open to the public so as to give an indication that public in general was invited or encouraged to use the area in question: *City of Chicago v. Rosser, 264 N.E.2d 158 (Ill. 1970).* Private club is liable only for negligence in injury or death of visitors: *McKeever v. Phoenix Jewish Community Center, 374 P.2d 875 (Ariz. 1962).* Adopting the rule of the Restatement (Second) of Torts governing invitees: *O'Keefe v. South End Rowing Club, 51 Cal. Rptr. 534 (1966).* California is thus freed from the idea that, to be an invitee, the visitor must come upon the land for a business purpose. *See* William L. Prosser, *Business Visitors and Invitees, 26 MINN. L. REV. 573 (1942).* A church conducting a bingo game removed itself from the protection of tort liability which it could otherwise claim as a religious institution: *Blankenship v. Alter, 167 N.E.2d 922 (Ohio 1960).* Liability for icy area in car wash: *Marsten v. Auto Laundries, Inc., 255 N.E.2d 730 (Mass. 1970).* Child as business invitee held to have cause of action when injured playing with children's playground equipment: *Orr v. First Nat'l Stores, 280 A.2d 785 (Me. 1971).* A developer was required to pay the costs of moving of a business that had become a public nuisance as the result of the development: *Spur Indus., Inc. v. Del E. Webb Dev. Co., 494 P.2d 700 (Ariz. 1972).* Funeral home was not a nuisance per se but may become such where property values decline: *Elston v. Paal, 550 S.W.2d 771 (Ark. 1977).* A right to maintain a public nuisance cannot be obtained by prescription: *People v. Perez, 561 P.2d 7 (Colo. 1977).* Unreasonable and intentional invasion of the use and enjoyment of another's land is a nuisance: *Copart Indus., Inc. v. Consolidated Edison Co., 362 N.E.2d 968 (N.Y. App. 1977).*

A nuisance is whether the gravity of the harm outweighs the social usefulness of the defendant's activity: *Little Joseph Realty, Inc. v. Town of Babylon, 395 N.Y.S.2d 428 (1977).* Landowner may cut off encroaching tree limbs: *Rose v. Oliveira, 342 A.2d 601 (R.I. 1975).* The condition itself must be fraught with danger to constitute a nuisance: *Dean v. Bays Mountain Park Ass'n, 551 S.W.2d 702 (Tenn. App. 1977). See* Larry R. Patton, Comment, *Premises Liability-- The Texas Rule of Liability of Owners and Occupiers of Land for Injuries Sustained by Business Invitees on the Premises-- Revisited and Reconsidered, 5 St. Mary's L. J. 800 (1974);* William A. Wiseman, Comment, *Strict Liability of the Bailor, Lessor and Licensor, 57 Marq. L. Rev. 111 (1973);* Michael *M.* Gibson, Note, *Occupant's Duty to Warn Employee of Independent Contractor Discharged by Warning of the Independent Contractor, 22 S.W. L. J. 510 (1968).* As to the differences between trespassers, licensees and invitees, *see* Peter J. Horner, *A Re-Examination of the Land Possessor's Duty to Trespassers, Licensees and Invitees, 14 S.D. L. Rev. 332 (1969);* Robert W. Loewen, *Nuisance Damages as an Alternative to Compensation of Land Use Restrictions in Eminent Domain, 47 SO. Cal. L. Rev. 998 (1974).*

(n236)Footnote 616. Widow visiting home of daughter and son-in-law as a gratuitous licensee: *Hilseher v. Ickinger, 166 A.2d 678 (Pa. 1960).* Liability for ice and snow on entranceway to business invitee: *Dawson v. Payless for Drugs, 433 P.2d 1019 (Or. 1967).* Liability to ordinary licensees is limited to warning of hidden dangers: *Preshno v. J.M. McDonald Co., 151 N.W.2d 451 (Neb. 1967).* Landowner-inviter does not owe a duty to business invitee to clear a parking lot of ice and snow: *Hammond v. Allegretti, 311 N.E.2d 821 (Ind. 1974).* Possessor must warn licensees, including social guests, if possessor knows of the fact likely to cause harm and if the possessor expects that they would not discover the danger or would fail to protect themselves: *Durden v. Dranetz, 99 So. 2d 716 (Fla. App. 1958).* Liability on licensee to warn of dangerous conditions of building: *Blackburn v. Colvin, 380 P.2d 432 (Kan. 1963).* Foreseeability and risk rule in the case of invitee: *Nicholas v. Tri-State Fair & Sales Ass'n, 148 N.W.2d 183 (S.D. 1967).* Child as business invitee held to have cause of action when injured while playing on children's playground equipment: *Orr v. First Nat'l Stores, 280 A.2d 785 (Me. 1971). See* Kenneth D. Stern, *Firemen's Recovery from Negligent Landowners,* 16 Clev. Marshall L. Rev. 231. (1967); McKay, *Merchant's Liability in South Carolina for Injuries on the Premises-- An Anachronism. 23 S.C. L. Rev. 709;* Gareau. *Landlord's Liability for Ice and Snow, 1967 Ins. L. J. 661;* Beckett, *Owners Are Not Deprived of Liability to Entrance on Property in Missouri, 41 Mo. L. Rev. 236.*

(n237)Footnote 617. Policeman entering premises on lawful business is a mere licensee: *Scheurer v. Trustees of*

Open Bible Church, 192 N.E.2d 38 (Ohio 1963). Landowner owes duty of due care to fireman: *Dini v. Naiditch, 170 N.E.2d 881 (Ill. 1960).* Fireman fighting a fire held licensee: *Aravanis v. Eisenberg, 206 A.2d 148 (Md. 1965).* Treating a fireman as an invitee not a mere licensee: *Dini v. Naiditch, 170 N.E.2d 881 (Ill. 1960).* The existence of a hidden danger known to the owner, and a subsequent failure to warn a fireman in the performance of duty, creates a liability: *Bartels v. Continental Oil Co., 384 S.W.2d 667 (Mo. 1964).* Store owner was held liable for failure to provide light where patrol officer was killed by a burglar: *Fancil v. Q.S.E. Foods, Inc., 311 N.E.2d 745 (Ill. App. 1974).* No liability on basis of negligence of landowner to fireman fighting fire *on* premises; *Washington v. Atlantic-Richfield Co., 341 N.E.2d 282 (Ill. 1976). See* Kenneth D. Stern. *Firemen's Recovery from Negligent Landowners,* 16Clev. Marshall L. Rev. 231 (1967).

(n238)Footnote 618. *Meiers v. Fred Koch Brewery, 167 N.Y.S. 740 (1917); Aravanes v. Eisenberg. 206 A.2d 148 (Md. 1965). Contra* and imposing liability only where landowner had a common-law duty to warn fireman of a known hidden danger: *Drake v. Fenton, 85 A. 14 (Pa. 1912). See Dini v. Narditch, 170 N.E.2d 887 (Ill. 1960).*

(n239)Footnote 619. Concealed trap rule as to licensees: *Olson v. Kushner, 211 N.E.2d 620 (Ind. App. 1965); Scheurer v. Trustees of Open Bible Church, 192 N.E.2d 38 (Ohio 1963).*

(n240)Footnote 620. Florida requires reasonable care to "licensees by invitation," either express or implied, of the property owner: *Wood v. Camp, 284 So. 2d 691 (Fla. 1973).* Holding that an owner has a duty to exercise reasonable care to avoid or aggravate injury to a trespasser: *Pridgen v. Boston Housing Authority, 308 N.E.2d 467 (Mass. 1974).* Retaining the traditional invitee, licensee and trespasser categories: *Welder v. Chase Resorts, Inc., 543 S.W.2d 527 (Mo. App. 1976).* New York has abolished the trespasser, licensee and invitee distinctions: *Basso v. Miller, 386 N.Y.S.2d 564 (1976); Scurti v. City of New York, 387 N.Y.S.2d 55 (1976). See* John M. Payne. *From the Courts: Landoviner's Tort Liability-- Trespasser-Licensee-Invitee Distinction Abolished in New York,* 6 Real EST. L. J. 145 (1977): Graham Hughes, *Duties to Trespassers: A Comparative Survey and Reevaluation, 68 Yale L. J. 633 (1959).*

(n241)Footnote 621. *Blakeney v. Associated Subdivisions, Inc., 195 A.2d 234 (R.I. 1963).*

(n242)Footnote 622. *Deen v. Holderfield, 155 So. 2d 314 (Ala. 1963).*

(n243)Footnote 623. *Kalopodes v. Federal Reserve Bank of Richmond, 367 F.2d 47 (4th Cir. 1966).*

(n244)Footnote 624. No liability where injury caused by appliance installed by tenant. *Sunde v. Tollett, 469 P.2d 212 (Wash. App. 1970).*

(n245)Footnote 625. *Dennis v. Orange, 293 P. 865 (Cal. App. 1930); Calway v. William Schaal & Son, 555 A. 813 (Conn. 1931); Hass v. Booth, 148 N.W. 337 (Mich. 1914): Shindlebeck v. Moon. 32 Ohio 264 (1877).* Lessor not in possession not liable for injuries to third persons through tenant's negligence: *Richardson v. Bulk Petroleum Corp., 297 N.E.2d 405 (Ill. App. 1973).*

(n246)Footnote 626. *Haggart v. Stehlin. 35 N.E. 997 (Ind. 1893); Maloney v. Hayes, 91 N.E. 911 (Mass. 1910); Louisville & N. Terminal Co. v. Jacobs, 72 S.W. 954 (Tenn. 1903).*

(n247)Footnote 627. *Young v. Talcott, 159 A. 881 (Conn. 1932); Gilland v. Maynes, 104 N.E. 555 (Mass. 1914); O'Connor v. Andrews, 16 S.W. 628 (Tex. 1891); Munger v. Union Sav. & Loan Ass'n, 27 P.2d 709 (Wash. 1933).*

(n248)Footnote 628. *Boyce v. Tallerman, 55 N.E. 703 (Ill. 1899); Smith v. Preston, 71 A. 653 (Me. 1908).* Distinguishing between "trespasser" and "invitee": *Pedone v. Fountainebleau Corp., 322 So. 2d 78 (Fla. App. 1975).*

(n249)Footnote 629. *Appel v. Muller, 262 N.Y. 278 (1933).* An abutting property owner is not responsible for injuries to municipal employees, unless the owner has an element of control over the area where the injury occurs: *Walden v. Weinstein, 284 A.2d 1 (Md. 1971). See infra* Chapter 40, *Rights and Duties of Landlords and Tenants;*

Chapter 43, *Statutory Modifications of Landlord and Tenant Law;" Chapter 44, "Commercial Leasing.*

(n250)Footnote 630. *Palmire v. Morris, 37 A. 995 (Pa. 1897). See* 2 Harper & James, Torts 1518.

(n251)Footnote 631. The vendor is not liable for defects on the premises resulting in injury though the defect existed at the time of the contract and the vendee had not had time to repair: *Anderson v. Cosmopolitan Nat'l Bank of Chicago, 301 N.E.2d 296 (Ill. 1973); Porter v. Miller. 164 N.E.2d 601 (Ill. App. 1960).*

(n252)Footnote 632. Restatement of Torts, § 353; *United States v. Inman, 205 F.2d 681 (5th Cir. 1953); Derby v. Public Service Co., 119 A.2d 335 (N.H. 1955); Kilmer v. White, 254 N.Y. 64 (1930). Contra, McIntosh v. Goodwin, 292 S.W.2d 242 (Tenn. App. 1954).*

(n253)Footnote 633. An inviter has a reasonable time after a storm to remove ice and snow: *Mattson v. St. Luke's Hospital, 89 N.W.2d 743 (Minn. 1958).* No liability to invitee for injury by the falling of dead trees: *Walls v. Lueking, 332 S.W.2d 692 (Tenn. App. 1959).* Operation of a swimming pool was proprietary: *Hack v. Salem, 189 N.E.2d 857 (Ohio 1963).* Public housing authority held not to exempt itself from liability for negligence because of public policy: *Thomas v. Housing Authority, 426 P.2d 836 (Wash. 1967).*

(n254)Footnote 634. A clause excepting the lessee from liability for fire did not apply to fire deliberately set by the sublessee: *Bishop v. Associated Transport, Inc., 332 S.W.2d 696 (Tenn. App. 1959).*

(n255)Footnote 635. *Smith v. Arbaugh's Restaurant, Inc., 469 F.2d 97 (D.C. Cir. 1972); Rowland v. Christian. 70 Cal. Rptr. 97 (1968). See 121 U. Pa. L. Rev. 378.* The Restatement of Torts. § 343 makes a landowner liable to business visitors if the landowner knows or should know of a danger which involves unreasonable risk to them and has no reason to believe they will discover the danger or realize the risk. Abolishing distinction in tort between trespasser, licensee and invitee: *Smith v. Arbaugh's Restaurant, Inc., 469 F.2d 97 (D.C. Cir. 1972). See* Kenneth L. Greer Jr., Note, *Negligence-- The Traditional Common Law Duty Distinction Between Social Guests and Invitees of Landowners Has Been Eliminated, 5 Tex. TECH. L. Rev. 892 (1974).* Social guests of tenant are invitees when using common area: *Toole v. Levitt, 492 S.W.2d 230 (Tenn. App. 1972). See* R.P.W. Jr., Note, *Torts--Landowner's Duty to Entrant upon Land, 41 Tenn. L. Rev. 190 (1973).* An owner has a duty to exercise reasonable care to avoid or aggravate injury to a trespasser: *Pridgen v. Boston Housing Authority, 308 N.E.2d 467 (Mass. 1974). See* Charles P. Dribben, Comments, *The Outmoded Distinction Between Licensees and Invitees, 22 Mo. L. Rev. 186 (1957);* W.S.G., Comment, *Torts-- Landowner's Liability-- Traditional Distinctions Between Trespassers, Licensees and Invitees Abolished As Determinative of the Standard of Care Owed a Visitor, 25 Ala. L. Rev. 401 (1973);* Howard Daigle Jr., *Land Occupier's Liability: The Duty of Reasonable Care for All, 37 La. L. Rev. 1174 (1977). See also* William L. Prosser, *Business Visitors and Invitees, 26 Minn. L. Rev. 573 (1943);* Graham Hughes, *Duties To Trespassers: A Comparative Survey and Revaluation, 68 Yale L. J. 633 (1959);* Robert Lee Collins, Comment, *Premises Liability: A Critical Survey of North Carolina Law, 14 Wake Forest L. Rev. 797 (1978).*

(n256)Footnote 636. *Chatam v. Larkins, 216 S.E.2d 677 (Ga. App. 1975)* (holding that duty of ordinary care owed to an invitee).

(n257)Footnote 637. Shopping center held not liable for criminal acts against invitee on the premises even though there had been previous acts, since there was no eminent probability of harm shown: *Cornpropst v. Sloan, 528 S.W.2d 188 (Tenn. 1975).* Employee of lessee in a shopping center was a business invitee and the owner of the shopping center was liable where the employee was assaulted on the parking lot premises: *Morgan v. Bucks Associates, 428 F. Supp. 546 (E.D. Pa. 1977).* Store owner not liable for injury to customer attacked in parking lot where there was no previous history of such attacks: *Shipes v. Piggly Wiggly St. Andrews, Inc., 238 S.E.2d 167 (S.C. 1977).*

(n258)Footnote 638. It has been held that an owner has a special relationship to an invitee, among others, giving rise to a duty of protection from criminal attack: *Totten v. More Oakland Residential Housing, Inc., 134 Cal. Rptr. 29 (Cal. App. 1976). See* Victor E. Schwartz, *A Landholder's Right to Possession of Property vs. A Citizen's Right of Free*

Speech: Tort Law as a Resource for Conflict Resolution, 45 U. Cin.L. REV. 1 (1976).

(n259)Footnote 639. *Boon v. Castle, 115 N.Y.S. 583 (1908)* (holding a deed testamentary and not a present grant of a future estate); *In re Adelman's Will, 119 N.W. 929 (Wis. 1909)* (holding that where, after the death of four beneficiaries, the property was to be sold and the proceeds divided among the children of such beneficiaries and the testator's half-brothers surviving at that time, the remaindermen's interests were future estates). *See infra* Chapter 22, *Reversions:* Chapter 23, *Remainders:* Chapter 24. *Possibilities of Reverter;* Chapter 25, *Rights of Entry;* Chapter 26, *Executory Interests;* Chapter 28, *Rules Against Perpetuities:* Chapter 29, *Restraints on Alienation;* Chapter 30, *Special Legal Rules Relating to Future Interest.*

(n260)Footnote 640. *Green v. Head, 104 N.Y.S. 383 (1901).*

(n261)Footnote 641. *Adams v. Merrill, 87 N.E. 36 (Ind. App. 1909)* (holding that where a person, who was to take if a life tenant died without heirs of the body, died before the life tenant, who subsequently died without heirs of the body, his interest passed to his heirs); *Fisher v. Wagner. 71 A. 999 (Md. 1909)* (holding contingent estates of inheritance as well as springing and executory uses and possibilities coupled with an interest, are transmissible by descent, devisable and assignable, where the person to take is certain); *Bergmann v. Lord, 86 N.E. 828 (N.Y. 1909)* (holding vested remainders in a trust fund are transferable and reachable by the remaindermen's creditors).

(n262)Footnote 642. *Hollerich v. Gronbach, 96 N.E.2d 354 (Ill. App. 1950).*

(n263)Footnote 643. *North v. Graham, 85 N.E. 267 (Ill. 1908)* (holding that an interest based on the possibility that the land should cease to be used for church purposes did not pass by quitclaim deed).

(n264)Footnote 644. *Vaughan v. Langford, 62 S.E. 316 (S.C. 1908).*

(n265)Footnote 645. *Buxton v. Kroeger, 117 S.W. 1147 (Mo. 1909).*

(n266)Footnote 646. *Abbott v. Holway, 72 Me. 298 (1881).*

+ This chapter is based in part on Chapter 1 of George W. Thompson, Commentaries on The Modern Law of Real Property (John S. Grimes, ed. *1979),* which made a significant contribution toward preserving the American common law governing basic property definitions and characteristics.

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Supp. To CHAPTER 14 THE NATURE AND KINDS OF PROPERTY

2-14 Thompson on Real Property, Thomas Editions Supp. to § 14.02

Supp. to § 14.02 Missing

Minn. Stat. Ann. § 500.3

§ 14.02(a) The Meaning of Ownership. [Go To Main]

Add:

See Abraham Bell and Gideon Parchamovsky, "A Theory of Property," *90 Cornell L. Rev. 531* (March, 2005).

Add

See Jedediah Purdy, "History, Human Nature, and Property Regimes: Filling in the Civilizing Argument," *50 St. Louis U. L.J. 735 (Spring 2006).*

add:

Joseph Z. Fleming, "Materials for Discussion Relating to the Representation of Artises, the Visual Artists Rights Act and the 'Property' Issues Raised by Lawrence Lessig, in the Future of Ideas and Free Culture by Harry Potter: An Update for 2009, ALI-ABA Entertainment, Arts, and Sports Law, SP016 ALI-ABA 887 (January 15-17 2009).

Add

See, Chip Ward, "Coming Home: Instilling a Connection to the Land," *26 J. Land Resources & Envtl. L. 63 (2005).*

Add:

Mossoff, Adam. "What Is Property? Putting The Pieces Back Together." *45 Ariz. L. Rev. 371* (Summer, 2003) (article explores the definition of property and advocates the use of the integrated theory of property).

Add:

Savnik v. Hall, 88 Cal. Rptr. 2d 417 (Cal. Ct. App. 1999) (stating that an "owner" is one who possesses the "incidents of ownership" such as; right, interest, control, and dominion).

Add:

Chalet Liquors, Inc. v. Supervalu, Inc., 2004 Minn. App. LEXIS 416 (No. A03-507, Apr. 21, 2004) (beneficiary of covenant may be considered the owner of property).

See, Henry E. Smith, "Self-Help and the Nature of Property," *1 J.L. Econ. & Pol'y 69* (Winter, 2005) .

add:

Welch v. Crow, 206 P.3d 599 (Okla. 2009) (holding that the right to dispose of property is an inalienable right).

Add:

Nye v. Fire Group P'ship, 657 N.W.2d 220 (Neb. 2003) (adverse possession claims defeat recorded titles as long as each element for adverse possession is fulfilled); *Wilke v. McDermott, 2003 Neb. App. Lexis 91 (Neb. 2003)* (adverse possession does not defeat recorded title if actual occupancy is minimal).

Add:

King v. Wiley, 785 N.E.2d 1102 (Ind. App. 2003) (state statutes must be carefully followed in order to establish adverse possession).

§ 14.02(b) Ownership Entities [Go To Main]

Add:

Central Puget Sound Regional Transit Authority v. Miller, 128 P.3d 588 (Wash. 2006) (property subject to eminent domain right of the sovereign).

After the citation to "Department of Game v. Puyallup Tribe Inc." add:

rev'd in part, 414 U.S. 44 (1973) , vacated and remanded, 433 U.S. 165 (1977) .

Add:

Myrl L. Duncan, "Reconceiving the Bundle of Sticks: Land As a Community-Based Resource," *32 Envtl. L. 773 (Fall 2002).*

add:

Handy v. U.S. Bank, Nat. Ass'n, 177 P.3d 80 (Utah 2008) .

§ 14.02(c) Limitations on the Exercise of Ownership Rights. [Go To Main]

Add:

Henry E. Smith, "Self-Help and the Nature of Property," *1 J.L. Econ. & Pol'y 69* (Winter, 2005) .

Add:

CSX Transp., Inc. v. Delaware, 2003 U.S. Dist. LEXIS 22395 (D. Del., No. 03-756-KAJ, Dec. 12, 2003) (the state has the authority to require railroad companies to repair bridges).

Add:

Broadston v. Parsons, 2003 Ark. App. LEXIS 257 (No. CA02-598, Apr. 2, 2003) (property owners are entitled to use land even if land use creates a slight nuisance).

After the citation to "Kahn v. James Burton Co ... ." add:

but see Nichols v. Sitko 157 Ill. App. 3d 950, 109 Ill. Dec. 903, 510 N.E.2d 971 (Ill. App. Ct. 1987) .

After the citation "Previte v. Wanskuck Co ... ." add:

overruling recognized, Cain v. Johnson, 755 A.2d 156, (R.I. 2000) .

Add:

Anderson v. State, 674 N.W.2d 748 (Minn. App. 2004) (state not liable to nearby beekeepers for spraying pesticide on state property).

After the citation "Dini v. Naiditch ..." add:

but see Stephens v. Trinity Medical Center 685 N.E.2d 403 (Ill. App. Ct. 1997) .

Add:

Hoery v. United States, 324 F.3d 1220 (10th Cir. 2003) (toxic chemicals flowing into property constitute a nuisance and continuing trespass).

After the citation "Ott v. Johnson ... " add:

superseded, 319 N.E.2d 622 (Ind. 1974) .

After the citation "Galbreath v. Engineering Cosnt. Corp ... " add:

but see Straley v. Kimberly, 687 N.E.2d 360 (Ind. Ct. App. 1997) .

After the citation "Simmel v. New Jersey Coop. Co ... " add:

reversed, 143 A.2d 521 (N.J. 1958) .

Add:

Walsh, Charles R., Jr. "Sovereign Ownership of Private Property in the Name of Preservation: A Contradiction in Terms and of the Constitution," *46 N.Y.L. Sch. L. Rev. 899* (2002-2003).

After the citation "Denver v. Denver Buick Inc ... " add:

overruled in part, Stroud v. City of Aspen, 532 P.2d 720 (Colo. 1975) ; *see also City of Aspen v. Marshall, 912 P.2d 56 (Colo. 1996)* .

See Sherry F. Colb, "A World Without Privacy: Why Property Does Not Define the Limits of the Right Against Unreasonable Searchs and Seizures," *102 Mich. L. Rev. 889* (March, 2004).

After the citation "Ackerman v. Seattle ... " add:

reversed, Highline School Dist. v. Port of Seattle, 87 Wn.2d 6, 548 P.2d 1085 (Wash. 1976) , see also Manufactured Housing Communities v. State, 142 Wn.2d 347, 13 P.3d 183 (Wash. 2000) .

Add:

Hopkins, Jeremy P. "Separation of Powers: A Forgotten Protection in the Context of Eminent Domain and the Natural Gas Act." *16 Regent U.L. Rev. 371* (2003/2004) (the Federal Government's power regarding eminent domain is overreaching because it can claim property under eminent domain without trial); United States v. 12,367. 47 *Acres of Land, 2003 U.S. Dist. LEXIS 6259* (D. Mass., No. 98-11665-DPW, Apr. 9, 2003) (a town's tax lien was extinguished at the time of taking; therefore, the town did not have an interest in the property and former conveyances are void).

Change the name of the case from "Awack v. Kraus Bros ... " to "Zwack v. Kraus Bros ... "

Add:

P. Scott, "Another view of the public right to fish--and the question of regulation or ownership: Are there limitations on fishing methods that may damage the benthic fauna or flora?" 19 *J. Water Law* 37 (Winter 2009); John Meyer, "The Concept of Private Property and the Limits of the Environmental Imagination," 37 *Political Theory* 99 (2009). *Hickory Grove Golf Club v. Hedrick, 2003 Ohio App. LEXIS 3587* (No. 2002-A-0031, Jul. 25, 2003) (landowner liable for failure to maintain statutorily mandated boundary fence).

Add:

Norton v. Town of Islip, 239 F. Supp. 2d 264 (E.D. N.Y. 2003) (zoning ordinances cannot unreasonably deny interest in land).

§ 14.02(d) Variance in Ownership Rights According to Controlling Law. N.J. Stat. Ann. § 46

After the citation "Estabrook v. Wise ... " add:

vacated, 519 S.W.2d 632 (Tex. 1974) .

For the case Rosenbaum v. Consolidated Products Co., the correct citation is *81 N.Y.S.2d 571 (N.Y. Misc. 1948).*

Add:

Greenpeace, Inc. v. Exxon Mobil Corp., 2004 Tex. App. LEXIS 3043 (No. 05-03-01620-CV, Apr. 5, 2004) (local courts have the authority to impose injunctions prohibiting activist groups from committing tortious acts against corporations in all jurisdictions when the injunction does not concern issues of local real estate law).

After the citation "Stockton v. Ortiz ... " add:

vacated, 120 Cal. Rptr. 456 (Cal. Ct. App. 1975) .

Change the citation "Kunstman v. Shinsaku Nagano ... " to read:

Kunstman v. Shinsaku, 59 N.E.2d 96 (Ill. 1945) .

After the citation "McClain v. Holder ... " insert the following citation:

Lurie v. Sheriff of Gallatin County, 999 P.2d 342 (Mont. 2000) (the situs of personal property or the domicile of the owner could determine governing law).

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Supp. To CHAPTER 14 THE NATURE AND KINDS OF PROPERTY

2-14 Thompson on Real Property, Thomas Editions Supp. to § 14.03

Supp. to § 14.03 The Nature of Property.

[Go To Main]

§ 14.03(a) Property Defined. [Go To Main]

Add:

Beckerman-Rodau, Andrew, "Are Ideas Within the Traditional Definition of Property?: A Jurisprudential Analysis," *47 Ark. L. Rev. 603 (1994);* Samuelson, Pamela, "Some New Kinds of Authorship Made Possible by Computers and Some Intellectual Property Questions They Raise," *53 U. Pitt. L. Rev. 685 (1992);* Scott, Ridgeley A., "Like Kind Replacement Property: Animal, Vegetable, or Mineral," *23 San Diego L. Rev. 1067 (1986).*

Moringiello, Juliet M. "Seizing Domain Names to Enforce Judgments: Looking Back to Look to the Future." *72 U. Cin. L. Rev. 95* (Fall, 2003) (article explores whether domain names are property).

Add:

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Change the citation "Armstrong v. United States ... " to read:

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After the citation "State Tax Comm'n v. Shor ... " add:

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Add:

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Add:

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Add:

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After the citation "Grumman Aircraft Engineering Corp. v. Board of Assessors ... " add:

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Supp. To CHAPTER 14 THE NATURE AND KINDS OF PROPERTY

2-14 Thompson on Real Property, Thomas Editions Supp. to § 14.04

Supp. to § 14.04 Real Property.

[Go To Main]

§ 14.04(b) Corporeal and Incorporeal Hereditaments. [Go To Main]

After the citation "Shields v. Fink ... " add:

overruled, Ingram v. Ingram, 521 P.2d 254 (Kan. 1974) .

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add:

K. K. Duvivier, "Animal, Vegetable, Mineral-Wind? The Severed Wind Power Rights Conondrum," *49 Washburn L.J. 69 (Fall 2009).*

add:

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§ 14.04(c) Possession of Realty. [Go To Main]

§ 14.04(c)(2) Incidents of Possession.

After the citation "Camara v. San Francisco Municipal Court ... " add:

but see Tobin v. City of Peoria, Ill., 939 F. Supp. 628 (C.D. Ill. 1996) .

§ 14.04(c)(3) Possessory Rights in Chattels.

§ 14.04(c)(4) Limitations on Rights Arising from Possession.

add new footnote 549.1 at the end of the third full sentence on the page: n549.1

After the citation "Sibson v. State ... " add:

overruled, Burrows v. City of Keene, 432 A.2d 15 (N.H. 1981) .

After the citation "Galbreath v. Engineering Cosnt. Corp ... " add:

but see Straley v. Kimberly, 687 N.E.2d 360 (Ind. Ct. App. 1997) .

After the citation "Galbreath v. Engineering Cosnt. Corp ... " add:

but see Straley v. Kimberly, 687 N.E.2d 360 (Ind. Ct. App. 1997) .

the citation "Galbreath v. Engineering Cosnt. Corp ... " appears twice in this note. Delete one of the citations.

After the citation "Galbreath v. Engineering Cosnt. Corp ... " add:

but see Straley v. Kimberly, 687 N.E.2d 360 (Ind. Ct. App. 1997) .

After the citation "Galbreath v. Engineering Cosnt. Corp ... " add:

but see Straley v. Kimberly, 687 N.E.2d 360 (Ind. Ct. App. 1997) .

§ 14.04(c)(5) Possible Liabilities Arising from the Possession of Land.

After both citations to "Wells v. Goforth ... " add:

overruled, Rowe v. Farmers Ins. Co., Inc., 699 S.W.2d 423 (Mo. 1985) .

After the citation "Simmel v. New Jersey Coop. Co ... " add:

reversed, 143 A.2d 521 (N.J. 1958) .

After the citation "Enos Coal Min. Co. v. Schuchart ... " add:

superceded, 188 N.E.2d 406 (Ind. 1963) .

Add:

overruled in part, Post v. Lunney, 261 So. 2d 146 (Fla. 1972) .

After the citation "Preshno v. J.M. McDonald Co ... ." add:

abrogated, Heins v. Webster County, 552 N.W.2d 51 (Neb. 1996) .

change the citation of "Hensley v. Montgomery County ... " from "*334 A.2d 54* ... " to

334 A.2d 542

After the citation "Staley v. Security Athletic Ass'n ... " add:

rev'd in part, Mile High Fence Co. v. Radovich, 489 P.2d 308 (Colo. 1971) .

After the citation "Barnes v. Washington ... " add:

reversed, 305 N.E.2d 535 (Ill. 1973) .

After the citation "Simmel v. New Jersey Coop. Co ... " add:

reversed, 143 A.2d 521 (N.J. 1958) .

After the citation "Previte v. Wanskuck Co ... ." add:

overruled in part, Haddad v. First Nat. Stores, Inc., 280 A.2d 93 (R.I. 1971) ; *Mariorenzi v. Joseph DiPonte, Inc., 333 A.2d 127 (R.I. 1975)* .

After the citation "Simmel v. New Jersey Coop. Co ... " add:

reversed, 143 A.2d 521 (N.J. 1958) .

After both times the citation "Cornpost v. Sloan ... " appears in this footnote add:

abrogated, McClung v. Delta Square Ltd. Partnership, 937 S.W.2d 891 (Tenn. 1996) .

After the citation "Dawson v. Payless for Drugs ... " add:

superceded by statute as recognized, Woolston v. Wells, 687 P.2d 144 (Or. 1984) .

After the citation "Preshno v. J.M. McDonald Co ... ." add:

abrogated, Heins v. Webster County, 552 N.W.2d 51 (Neb. 1996) .

After the citation "Fancil v. Q.S.E. Foods Inc ... " add:

rev'd, Fancil v. Q. S. E. Foods, Inc., 328 N.E.2d 538 (Ill. 1975) .

change the citation of "Washington v. Atlantic Richfield Co ... " from "*341 N.E.2d 282* ... " to:

361 N.E.2d 282 (Ill. 1976) .

change the citation of "Dini v. Narditch ... " from "*170 N.E.2d 887* ... " to

170 N.E.2d 881 (Ill. 1960) .

After the citation "Olson v. Kushner ... " add:

overruled in part, Fort Wayne Nat. Bank v. Doctor, 272 N.E.2d 876 (Ind. Ct. App. 1971) .

After the citation "Mattson v. St. Luke's Hospital ... " add:

see also, Frykman v. University of Minnesota-Duluth, 611 N.W.2d 379 (Minn. Ct. App. 2000) .

After the citation "Cornpost v. Sloan ... " add:

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FOOTNOTES:
(n1)Footnote 549.1. Lior Jacob Strahilevitz. "The Right to Abandon," *158 U. Pa. L. Rev. 355, 372 (January 2010)* (definition of and difference between mislaid and lost); Joseph J. Simeone. "'Finders Keepers, Losers Weepers': The

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CHAPTER 15 THE EMERGENCE OF PROPERTY RIGHTS FOR WOMEN

2-15 Thompson on Real Property, Thomas Editions 15.syn

AUTHOR: 17 Professor David A. Thomas J. Reuben Clark Law School Brigham Young University

§ 15.syn Synopsis to Chapter 15: THE EMERGENCE OF PROPERTY RIGHTS FOR WOMEN

Utah Code Ann. § 78-41-1Introduction.

§ 15.02 Subordination of Women in Western Civilization.

§ 15.03 The Elusive Neutrality of Married Women's Property Acts.

§ 15.04 Some Current Issues in Women's Property Rights.

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CHAPTER 15 THE EMERGENCE OF PROPERTY RIGHTS FOR WOMEN

2-15 Thompson on Real Property, Thomas Editions § 15.01

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§ 15.01 Introduction.

This brief chapter is intended only to summarize some of the past events in what is a continuing saga, the emergence of women as fully-privileged citizens before the law. Property law has been only one of many battlefields, although it has traditionally been an area of some of the most conspicuous suppressions of women's rights and, more recently, some of the more important advances. Details on developments in specific areas of property law are available in appropriate chapters elsewhere in this work. In this chapter is a more succinct overview, with the intention that changes in the legal order may be seen as interconnected with changes in the social order.

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CHAPTER 15 THE EMERGENCE OF PROPERTY RIGHTS FOR WOMEN

2-15 Thompson on Real Property, Thomas Editions § 15.02

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§ 15.02 Subordination of Women in Western Civilization.n1

The status of women in the tradition of western civilization has been characterized by two conditions: one is subordination of women to men, and the other is misogyny, or the hatred of women (by men). Understandably, one would seek for the roots of subordination in the primitive societies of prehistory, but no archaeological or other evidence illuminates the question of how or why women became subordinated to men. It seems clear that in warrior societies the greater size and strength of men would push men into dominant societal roles, but there is no evidence that early societies were universally warlike.

Some psychologists and anthropologists have hypothesized that early men feared and envied women because of women's child-bearing and other abilities, that various taboos and disabilities were then created and rationalized, and that these in turn made an artificial custom of female inferiority seem traditional and natural. Thus menstrual taboos appeared and childbirth was treated as a handicapping experience. It became expected that men would be active and aggressive and that women would be weak, passive and obedient.

By the time western culture emerged in history, traditions of female subordination were well-established and considered natural by men and most women alike. The earliest writings of the Greeks, Romans, and Hebrews, which became the matrix of European culture, all described warrior cultures in which women were subordinated to men.

Some historians have pointed out that, while early writings transmit a tradition of female subordination, there is little or no tradition of misogyny, and there is certainly no indication of hatred of women on a broad scale. In time, however, according to some evidence, prolonged subordinate status could lead rather naturally to women being stigmatized as innately evil. Indications of this trend may be found in the Greek poetry of Hesiod and Semonides in the 7th and 6th centuries, B.C., in the Jewish and Christian interpretations of the Old Testament during the 2nd century, B.C., to the 3rd century, A.D., and in imperial Roman poetry of the 1st century, A.D. Rather typical was the statement by the Jewish (but Romanized) historian Josephus that before the Jewish law women were in all things inferior to men. In Jewish law, this inferiority meant incapacity, so that women, children and slaves were classed together with respect to many legal activities; women were forbidden to testify, because they were considered to have light or flighty minds.

Laws and customs of early societies institutionalized female subordination, excluding women from activities of power

and influence, such as warfare, government, philosophy, science, law and sometimes even religion. Women's principal activities were centered on the family. In classical Greece, women were identified with nature, emotion and chaos; men were identified with civilization, reason, and order.

Even within the family women often had little more authority than a child. In most cultures, a woman and her property, if any, were subject to the authority of her husband or closest male relative. For most, marriage meant only the transfer of this male custodial or wardship authority. Thus, some laws seemed paternal and protective of women; however, other laws delivered harsh reprisals for misconduct, such as sexual infidelity, and thus forced women to accept and conform to male standards and ideals of conduct. Women who obtained roles of power and influence in early societies were always exceptions and somewhat isolated; indeed, the lives of powerful women were sometimes subsequently used to point out the dangers of permitting women to exceed their customary restraints.

The vast majority of women accepted without question the ideal -- transmitted powerfully into European culture -- of a cherished wife, secure in an orderly home, loyal, prolific, diligent and devoted to housekeeping and family. Without wide availability of literacy, education, leisure, and wealth, only a few women were able to explore other roles. Considering how few women were actually able to obtain education and training in arts, letters and sciences, their presence and record of accomplishment in science, art, philosophy and literature is rather surprising and impressive. Most women active in these areas were born into families who were traditionally active in these pursuits. Also, women who had the chance showed themselves able to manage their finances and thus create some of their own opportunities for expanded life roles.

With the advent of Christianity, a startling new vision of women was introduced. Feminist historians are able to point to convincing evidence that Christian doctrine in its earliest forms rejected traditional depictions of women as inferior and deserving of subordination. Although the later Christian church would become one of the most powerful influences in the renewed oppression of women, the teachings of Jesus Christ, as seen through the eyes of writers of feminist history, were free of those prejudices:

> The life and teachings of Jesus of Nazareth, later institutionalized as the beliefs and practices of the Christian Church, added both to traditions that empowered women and those that subordinated them. Initially, Jesus' words and action included women in ways that were new and surprising in the Roman-dominated Palestine of the 1st century, A.D. He made little distinction in his teachings between women and men, despite the occasional consternation this may have caused his male followers; when he talked at length with a Samaritan woman, his disciples "marveled that he was talking with a woman." To some of his contemporaries, Jesus appeared to reject traditional ideas of status, of free and slave, subordinate and inferior. He saw no special flaws in woman's nature. He included women in his preaching and allowed them life and a role outside the family and their relationship to a man. He used his authority to call for a reversal of contemporary and traditional values and attitudes. In his Sermon on the Mount, he favored "the meek, for they shall inherit the earth," and those "who are persecuted for righteousness' sake, for theirs is the kingdom of heaven." He encouraged rich and poor -- both women and men -- to leave their families and follow him, promising they would find a new Christian family. He promised the "kingdom of heaven" -- a life after death -- to all who embraced his teachings, regardless of status or gender.
>
> Jesus thus rejected much that earlier cultures had taken for granted. Most significant for future generations of European women, he preached the equality of all believers in his doctrine. By his actions and his words, he rejected the traditional descriptions of females as inferior and undermined the ancient justifications for their subordination. He consistently saw women as created in God's image just like men... The act of baptism cleansed women equally with men from the taint of sin. Women's piety, just like men's, would determine their life after death and enable their bodies to rise into heaven.

Jesus gave equal value to women in other ways. In his parables, he used women as well as men to illustrate the values of faith, humility, and charity that he favored. "Harlots" who believed in him would know salvation before priests who denied him. The poor widow's gift was worth more than that of the rich, for "they all contributed out of their abundance; but she out of her poverty has put in everything she had, her whole living." When he compared faith to "a grain of mustard seed which a man took and sowed in his field," he immediately followed it with an example which would mean more to women: "The kingdom of heaven is like leaven which a woman took and hid in three measures of flour, till it was all leavened." "Five wise maidens" who filled their lamps with oil and were prepared to "meet the bridegroom" exemplified the true believers ready to receive God's blessing. He used the metaphor of birth to describe his mission and promised that his followers would feel the joy of a woman who has given birth. When a bleeding woman sought his help and touched his gown, he not only did not condemn her, but comforted and healed her. He saved the life of one of the most despised figures in Jewish society, the adulteress, also an outcast in many contemporary cultures. Hebrew law called for her to be stoned to death, Jesus said, "Let him who is without sin among you be the first to throw a stone at her," and when no one did, he told her, "Neither do I condemn you, go, and do not sin again."

Most unusual of all his actions with regard to women, Jesus spoke directly to them of his doctrines and accepted women as his special followers along with men. In Roman-dominated Hebrew Palestine, women hardly ever figured as subjects of Jewish rabbinical or Talmudic teachings, let alone as students. In contrast, Jesus first declared his divinity to a Samaritan woman, in a culture in which women were subordinate and Samaritans outcasts. He stated his mission to Martha of Bethany: "I am the resurrection and the life, he who believes in me, though he shall die, yet shall he live, and whoever lives and believes in me shall never die." He raised her brother Lazarus from the dead as proof. Mary of Bethany, Martha's sister, even "sat at the Lord's feet and listened to his teaching." When Martha complained that Mary was not helping her serve the meal, Jesus replied that "Mary has chosen the good portion, which shall not be taken from her." Christian women in the European centuries to come repeatedly cited this affirmation of women's right to learn and preach to justify their studies...

Jesus' favoring of women and his encouragement of their untraditional behavior continued throughout his life. Women rather than men played the key roles in the events surrounding his death and resurrection. In describing the crucifixion, the four Gospels report that all the apostles had fled except John, but that the women remained to pray at the foot of the cross and witness his death. The women made plans to prepare his body for burial. Mary Magdalene first returned to the tomb and discovered his body gone. She, "from whom he had cast out seven demons," not one of his male followers, first witnessed his resurrection, the ultimate proof to the faithful of Jesus' divinity. Mark and Luke reported that the male disciples did not believe Mary Magdalene and that Jesus later rebuked them for their lack of faith.

... As Christianity became accepted and institutionalized, the equality granted women in its first centuries was disavowed ...

... By the 5th century, the male leaders and theologians of Christianity had accepted and restated the most denigrating traditional views of women. All that was inferior or evil they associated with the female, all that was good and superior with the male... This misogynist fear and hatred echoed older images of women's seductive power. It took on new dimensions in the theological treatises of the Church Fathers and passed into both secular and religious European culture as a tradition inherited by women. n2

During the Dark Ages women clung tenaciously to the possibility of gaining education and conducting study in the various religious foundations, but by the 12th and 13th centuries these opportunities passed to the universities, which were highly restrictive, limiting their students to ordained males.

In secular respects, women's fortunes varied. Among the aristocracy, women occasionally gained access to land and power, especially in the absence of male heirs. A few women even exercised the prerogatives of lords and monarchs. In far more numerous instances, however, widows were forced into new marriages or otherwise taken advantage of, and court records show women protecting themselves through the legal system, which, however, was still predominantly a man's world. During these centuries it has been accurately stated that

> even the most privileged European women would continue to live in a world in which they acquired power through accident of circumstance, not by equal right or design, where they held that power only because it suited the needs of the male warrior and landed elite. n3

Even when economic prosperity opened many new opportunities in the later Middle Ages, women continued to be kept under the "protection" of men who strengthened their role as "providers." Women remained deprived of access to many rights of citizenship, to legal personality outside of their family, to specialized vocational or professional training and rights of entry. Men controlled and usually excluded women from the guilds, the academies, the universities, patronage and licensing. Women were not readmitted to the arts and medicine until the 19th century.

Even when education became more widely available for women, a girls' curriculum distinct from boys' schooling tended to reinforce women in their traditional roles and to affirm the customary negative attitudes about women's nature.

Maintenance of women's traditional status was threatened by new attitudes beginning with the Age of Enlightenment and with the advent of more general prosperity thereafter. During this period, law became a vehicle for continuing the gender repression. Restrictive laws, expressed in the rubric of protection, confirmed women as legal minors, under the guardianship of fathers and husbands. A wife's wages, inheritance and property typically belonged to her husband. The maintenance of those protective laws for the measure of economic security they may ensure to women had been debated among women: the laws seemed patronizing to some, while to others they were a crucial "safety net" for working-class women.

The possibility of entry into the professions, the right to vote, and civil equality for women were measures mostly delayed until the 20th century. However, entry into the modern labor force, hastened during wartimes, was inhibited or thrust backward by lower pay scales for the same work, and by widespread admonitions for women to return to their home environments once the crisis times were past and the men returned to the civilian work force. Meanwhile, women made progress in obtaining the formal rights to control of property, public education, and child custody.

FOOTNOTES:

(n1)Footnote 1. The general outline and documentation for this summary may be found in Bonnie S. Anderson & Judith P. Zinsser, A History of Their Own 2 vols. (New York: Harper & Row 1988, 1989).

(n2)Footnote 2. Bonnie S. Anderson & Judith P. Zinsser, A History of Their Own 67-69, 77-79. (New York: Harper & Row 1988)

(n3)Footnote 3. *Id.* at 331.

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CHAPTER 15 THE EMERGENCE OF PROPERTY RIGHTS FOR WOMEN

2-15 Thompson on Real Property, Thomas Editions § 15.03

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§ 15.03 The Elusive Neutrality of Married Women's Property Acts.

Under the early common law, a married woman's identity was submerged in her husband's identity, and he became the absolute owner of her personal property and the effective owner of her real property. The husband, in return, was required to assume full responsibility for support of his wife, and to be fully liable for her debts and misconduct, before and during the marriage. If the husband predeceased his wife, her property rights were defined by and limited to the dower rights.

Under the Married Women's Property Acts enacted by most American states during the 19th century, women obtained the right to own their own property as well as full legal control over the property. This theoretical parity with their husbands was often compromised by the tradition that husbands formally held title to and controlled most marital property, anyway. Even the laws establishing ownership and control of property in that spouse who obtained or earned it had little effect in the majority of households, where the husband was the principal income provider.

A fairly typical older statutory scheme for ensuring women's property rights, attempting to be both neutral and protective, is as follows:

§ 30-2-1 Wife's rights in property -- Liability for husband's debts.

Real and personal estate of every female acquired before marriage, and all property to which she may afterwards become entitled by purchase, gift, grant, inheritance, bequest or devise, shall be and remain the estate and property of such female, and shall not be liable for the debts, obligations or engagements of her husband, and may be conveyed, devised or bequeathed by her as if she were unmarried.

§ 30-2-2 Wife's right to contract, sue or be sued.

Contracts may be made by a wife, and liabilities incurred and enforced by or against her, to the same extent and in the same manner as if she were unmarried.

§ 30-2-3 Conveyances between husband and wife.

A conveyance, transfer or lien executed by either husband or wife to or in favor of the other shall be valid to the same extent as between other persons.

§ 30-2-4 Wife's right to wages -- Actions for personal injury.

A wife may receive the wages for her personal labor, maintain an action therefor in her own name and hold the same in her own right, any may prosecute and defend all actions for the preservation and protection of her rights and property as if unmarried. There shall be no right of recovery by the husband on account of personal injury or wrong to his wife, or for expenses connected therewith, but the wife may recover against a third person for such injury or wrong as if unmarried, and such recovery shall include expenses of medical treatment and other expenses paid or assumed by the husband.

§ 30-2-5 Separate debts.

(1) Neither spouse is personally liable for the separate debts, obligations, or liabilities of the other:

(a) contracted or incurred before marriage;

(b) contracted or incurred before marriage, except family expenses as provided in § 30-2-9;

(c) contracted or incurred after divorce or an order for separate maintenance under this title; or

(d) ordered by the court to be paid by the other spouse under § 30-3-5 or 30-4-3 and not in conflict with § 15-4-6.5.

(2) The wages, earnings, property, rents, or other income of one spouse may not be reached by a creditor of the other spouse to satisfy a debt, obligation, or liability of the other spouse, as described under Subsection (1).

§ 30-2-6 Actions based on property rights.

Should the husband or wife obtain possession or control of property belonging to the other before or after marriage, the owner of the property may maintain an action therefor, or for any right growing out of the same, in the same manner and to the same extent as if they were unmarried.

§ 30-2-7 Husband's liability for wife's torts.

For civil injuries committed by a married woman damages may be recovered from her alone, and her husband shall not be liable therefore, except in cases where he would be jointly liable with her if the marriage did not exist.

§ 30-2-8 Agency between husband and wife.

A husband or wife may constitute the other his or her attorney in fact to control and dispose of his or her property for their mutual benefit or otherwise, and may revoke the appointment the same as other persons.

§ 30-2-9 Family expenses -- Joint and several liability.

The expenses of the family and the education of the children are chargeable upon the property of both husband and wife or of either of them, and in relation thereto they may be sued jointly.

§ 30-2-10 Homestead rights -- Custody of children.

Neither the husband nor wife can remove the other or their children from the homestead without the consent of the other, unless the owner of the property shall in good faith provide another homestead suitable to the condition in life of the family; and if a husband or wife abandons his or her spouse, that spouse is entitled to the custody of the minor children, unless a court of competent jurisdiction shall otherwise direct. n4

FOOTNOTES:
(n1)Footnote 4. Utah Code Ann. §§ 30-2-1 to 30-2-10.

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CHAPTER 15 THE EMERGENCE OF PROPERTY RIGHTS FOR WOMEN

2-15 Thompson on Real Property, Thomas Editions § 15.04

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§ 15.04 Some Current Issues in Women's Property Rights.

With some of the major barriers removed from women's property rights, more attention has been paid to achieving full equality in a number of individual areas where progress has been restrained by traditions of subordination and misogyny. A mere sampling of such issues shows that many relate directly to property rights:

Liberalized divorce laws combined with uneven progress toward equal distribution of marital assets upon divorce have left a hugely disproportionate number of poverty-stricken families headed by single women.

In addition to the limitations of lower income, women remain excluded from decent housing in far too many situations, usually because they encounter discrimination on account of being women or single parents, or in applications for credit.

Succession laws, especially the rights of widows to inherit deceased husbands' property, have developed unevenly.

Married women's property rights, even while both partners are still living, have not reached full parity. Issues still exist in matters of management and control of property, vulnerability to spouses' creditors, and other matters.

Some have theorized that forms of discourse favored by women, such as a cooperative style in negotiation, leave them at a disadvantage in situations dominated by or arbitrarily favoring a more aggressive male ethic.

Abolition of common law marriage may ultimately work to the disadvantage of women involved in such unions.

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Supp. To CHAPTER 15 THE EMERGENCE OF PROPERTY RIGHTS FOR WOMEN

2-15 Thompson on Real Property, Thomas Editions Supp. to § 15.05

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CHAPTER 16 PROPERTY RIGHTS FROM THE PERSPECTIVE OF CRITICAL LEGAL STUDIES

2-16 Thompson on Real Property, Thomas Editions 16.syn

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§ 16.syn Synopsis to Chapter 16: PROPERTY RIGHTS FROM THE PERSPECTIVE OF CRITICAL LEGAL STUDIES

§ 16.01 Introduction.

§ 16.02 Identifying Contradictions in Liberal Legal Thought.

S.C. Code Ann. §§ 27-5Pervasiveness of Those Contradictions in Legal Controversy.

§ 16.04 Showing of a Privileged Term in the Contradictory Impulses.

§ 16.05 Showing that the Privileged Choices Describe a Right-wing, Quasi-libertarian Order.

Utah Code Ann. § 78-41-1Critical Legal Studies Principles that May Impact on Property Law.

§ 16.06(a) Indeterminacy.

§ 16.06(b) Contradiction.

§ 16.06(c) Antiformalism.

§ 16.06(d) Marginality

§ 16.06(e) Rights.

§ 16.06(f) Deviation.

§ 16.07 Property Law Examples of Critical Legal Studies Method.

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CHAPTER 16 PROPERTY RIGHTS FROM THE PERSPECTIVE OF CRITICAL LEGAL STUDIES

2-16 Thompson on Real Property, Thomas Editions § 16.01

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§ 16.01 Introduction.

The rather limited objective of this small chapter is to describe unique perspectives on property rights found in the Critical Legal Studies philosophy or movement (C.L.S.), and to provide that description in a form that taxes neither the comprehension nor the patience of the ordinary reader. This objective cannot really be accomplished, however, because there is probably no coherent and comprehensive description of the C.L.S. views on property rights. What must suffice here, then, is to describe C.L.S. method and basic tenets in a way that may illuminate their application to property issues. Given those constraints, this chapter is therefore brief and decidedly tilted toward the descriptive, rather than the analytical. This chapter is also dominated by text quoted from leading C.L.S. writers, rather than paraphrases, as such a text reveals the difficulties associated with C.L.S. writings generally.

Another severe limitation on a chapter of this nature is the fact that the dialogue over C.L.S. tenets has been carried on at a highly abstract and intellectual level, with only scant attention given to the impact of these matters on the affairs of the workaday legal profession. The dialogue is further clouded by being frequently carried on in tones of anger and contempt for opponents, with competing points of view given summary dismissals rather than truly thoughtful critique. In the words of one of the combatants:

> In the recent wave of commentary, unfortunately, hostile gut reactions have replaced guarded respectful responses; passionate political and cultural evaluations have supplanted balanced intellectual assessments. n1

Almost all of the participants are guilty of practicing that certain type of arrogance which assumes the truthfulness of their own underlying philosophies and necessarily, the errors of their opponents' own starting positions.

The result of all of this is that critiques and counter-critiques of property law doctrines or their underlying policies and philosophies are virtually non-existent in the C.L.S.-related literature, and can be derived only incidentally from the more general critiques of societal norms and structures. n2 Indeed, it has been aptly stated that, "One must wait and see whether the theory evolves an adequate interpretation of the world which is capable of shaping a new social reality." n3

Implicit in the term "critical legal studies" is the announcement of a method, and indeed C.L.S. embodies an

idiosyncratic method of identifying and analyzing issues its adherents deem important. The following somewhat lengthy description of C.L.S. methodology is probably still the most concise version available.

FOOTNOTES:

(n1)Footnote 1. Cornel West, *CLS and a Liberal Critic, 97 Yale L.J. 757-758 (1988).*

(n2)Footnote 2. Occasionally, a specific debate will break out over property-related philosophical positions, such as the C.L.S condemnation of Richard A. Epstein, Takings: Private Property and the Power of Eminent Domain Cambridge MA: Harvard University Press (1985), reviewed by Mark Kelman in *Taking Takings Seriously: An Essay for Centrists, 74 Calif. L. Rev. 1829 (1986).*

(n3)Footnote 3. S. E. Salako, *A Critical Legal Study of Property in Land*, 13 Liverpool L. Rev. 3 (1991).

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CHAPTER 16 PROPERTY RIGHTS FROM THE PERSPECTIVE OF CRITICAL LEGAL STUDIES

2-16 Thompson on Real Property, Thomas Editions § 16.02

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§ 16.02 Identifying Contradictions in Liberal Legal Thought.

First, the Critics attempted to identify a contradiction in liberal legal thought, a set of paired rhetorical arguments that both resolve cases in opposite, incompatible ways and correspond to distinct visions of human nature and human fulfillment... [T]hree central contradictions in liberal thought have been identified in the C.L.S. writing: (1) the contradiction between a commitment to mechanically applicable rules as the appropriate form for resolving disputes (thought to be associated in complex ways with the political tradition of self-reliance and individualism) and a commitment to situation-sensitive, ad hoc standards (thought to correspond to a commitment to sharing and altruism); (2) the contradiction between a commitment to the traditional liberal notion that values or desires are arbitrary, subjective, individual, and individuating while facts or reasons are objective and universal *and* a commitment to the ideal that we can "know" social and ethical truths objectively (through objective knowledge of true human nature) or to the hope that one can transcend the usual distinction between subjective and objective in seeking moral truth; and (3) the contradiction between a commitment to an intentionalistic discourse, in which human action is seen as the product of a self-determining individual will, and deterministic discourse, in which the activity of nominal subjects merits neither respect nor condemnation because it is simply deemed the expected outcome of existing structures.

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2-16 Thompson on Real Property, Thomas Editions § 16.03

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§ 16.03 Pervasiveness of Those Contradictions in Legal Controversy.

Second, the Critics tried to demonstrate that each of the contradictions is utterly pervasive in legal controversy, even in cases where practice is so settled that we nearly invariably forget that the repressed contradictory impulse *could* govern the decision at issue. These impulses are ready to destabilize settled practice should we ever be forced to articulate or ground that practice. There are, in short, no easy cases, though there may be ones whose outcomes are perfectly predictable.

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2-16 Thompson on Real Property, Thomas Editions § 16.04

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§ 16.04 Showing of a Privileged Term in the Contradictory Impulses.

Third, Critics have attempted to show that mainstream thought invariably treats one term in each set of contradictory impulses as *privileged* in three distinct senses. The privileged term is presumptively entitled as a normative matter to govern disputes; it is simply assumed, as a descriptive matter, to govern the bulk of situations; and most subtly, but perhaps most significantly, departures from the purportedly dominant norm, even if they are obviously frequent, are treated as *exceptional*, in need of special justification, a bit chaotic. In essence, [it is argued] that liberal legal discourse most strongly purports to be committed to and to exceptionalize departures from both individualism and the Rule of Law. It is also committed to the ideal that subjective value choices are the only arbiter of the good, at least in the abstract sense that the general theory of law and the state is one in which the state seeks not to further particular life plans but to facilitate people's fulfilling diverse plans (although it would be misleading to believe that all liberal thinkers *presume* that the correct answer to a legal problem is the one consistent with the notion that values are subjective, in the same way they presume that the rule form should govern). Liberalism also privileges an intentionalist discourse that both presumes to be able to explain why we can legitimately reward and blame in the vast bulk of cases and purports to provide a reasonable description of the so-called private world (that governed by contract rather than state action beyond enforcement of contract), which is presumptively deemed to reflect the uncoerced intentions of individuals. Finally, liberalism privileges an uncritical respect for the announced choices of subjects -- uncritical both in the sense that the subject is viewed as unambivalent enough that we need not scrutinize particular choices for consistency with a broader life plan and in the sense that pure paternalism, the possibility that the subject has simply chosen badly, is ruled out.

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CHAPTER 16 PROPERTY RIGHTS FROM THE PERSPECTIVE OF CRITICAL LEGAL STUDIES

2-16 Thompson on Real Property, Thomas Editions § 16.05

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§ 16.05 Showing that the Privileged Choices Describe a Right-wing, Quasi-libertarian Order.

> Fourth, the Critics note that, closely examined, the "privileged" impulses describe the program of a remarkably right-wing, quasi-libertarian order... Another implication ... is that one of the foremost, if unintentional, political accomplishments of C.L.S. has been to arm left liberals against more politically conservative ones; by resuscitating the un-privileged positions, by noting the degree to which they remain pervasive in the face of complex efforts to repress their presence, C.L.S. adherents may demonstrate that the left liberal's instincts are better grounded in the cultural tradition of liberalism in which they operate than they sometimes seem aware of themselves. n4

FOOTNOTES:
(n1)Footnote 4. Mark Kelman, A Guide to Critical Legal Studies 3-6 (Cambridge, MA: Harvard University Press 1987).

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CHAPTER 16 PROPERTY RIGHTS FROM THE PERSPECTIVE OF CRITICAL LEGAL STUDIES

2-16 Thompson on Real Property, Thomas Editions § 16.06

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§ 16.06 Critical Legal Studies Principles that May Impact on Property Law.

Several principles announced in the fundamental C.L.S. literature n5 could be seen as having potential impact on the law of property. These have been best articulated for a British legal audience, but are applicable to the American legal system as well.

§ 16.06(a) Indeterminacy.

[The principle of indeterminacy is] that authoritative legal materials such as statutes, cases and legal ideas do not "embody and sustain a defensible scheme of human association"; that whereas legal liberalism presupposes impersonal purposes, policies and principles founded on a moral and practical order, the legal materials themselves are the reflex of the foundational politics which is responsible for choosing the social type, that is market economy. n6

§ 16.06(b) Contradiction.

[T]he principle of contradiction ... rejects the view that legal doctrine or legal analysis contains a single, coherent and justifiable view of human relations. For Unger, our society is "shot through with irreconcilable ideological commitments." A critical analysis of the law of property in land reveals principles and counterprinciples. On the one hand, the first principle is the right to enter or refuse to enter into a contract; in short, freedom of contract. The principles of privilege ... and assignability represent, according to Unger, the disharmony within the first principle. On the other hand, there are counterprinciples such as promissory estoppel, the doctrine which affirms an obligation to answer for another's justified reliance on one's own promises -- the juridical basis for the decision on estoppel licence; restitution for unjust benefit or quasi-contract ...; and agreements of domestic nature or those binding in honour only which are not contractual "lest by doing so it destroy their particular communal quality." Pursuing this theme further, Unger notes that, while family bargains are disfavoured, family gifts may be encouraged but he is quick to notice the hostility towards donative transactions undermining family duties (for example, a married man's gift to his mistress and mother of his child by way of a secret trust) and to contrast this with the solicitude that may be shown towards interfamilial donation such as a gift by a father to his child. Two main principles -- free-enterprise and communitarianism -- have dominated legal liberalism as Unger in his characteristic bluntness succinctly puts it:

Just as classical contract theory depicts the bargain as the beneficial creature of anticommunal self-interest, it sees the gift as an instrument of either community-preserving generosity or community-destroying circumvention of the law. n7

§ 16.06(c) Antiformalism.

The third principle is the principle of antiformalism which rejects the view that there is a distinct form of legal reasoning which can be applied to legal materials by neutral specialists. In Dworkin's jurisprudence, there is only "one right answer" which stems from the sociological premise that there is a shared set of value commitments in any political community -- a view strenuously rejected by critical legal scholars who argue that rights are not merely controversial but rather exemplify the irreconcilable ideological commitments. n8

§ 16.06(d) Marginality

The fourth principle is the principle of marginality which states there is no reason to believe that law is often or frequently a decisive factor in human behavior. According to Unger:

All contemporary versions of democratic ideal, however, share a minimal core: the state must not fall permanently hostage to a faction, however broadly in terms faction may be defined, so as to include social classes, segments of the workforce, parties of opinion, or any other stable collective category... The established forms of economic and political organization enable relatively small groups of people to control the basic terms of collective prosperity by making the crucial investment decisions. Moreover, even the most distant threat of reform can be met by immediate response of disinvestment and capital flight, with their signal of economic crisis and electoral unpopularity. n9

§ 16.06(e) Rights.

The fifth principle is the principle of rights. Unlike Hohfeld, Unger regards a right not as absolute, that is, implying a correlative duty, but as relative:

a loaded gun that the rightholder may shoot at will in his corner of town. Outside that corner the other licensed gunmen may shoot him down.

This principle is not only a tool of legal theorising but also a counsel of prudence... Unger's principle of right depends on a system of rights, namely, immunity rights (establishing absolute claim of the individual to security against another individual, the state or other organisation), destabilisation rights (claims "to the disruption of established institutions and forms of social practice that have contributed to the very kind of crystallised plan of social hierarchy"), market rights representing claims to divisible portions of social capital and solidarity rights giving "legal force to many of the expectations that arise from the relations of mutual reliance and vulnerability that have neither been fully articulated by the will nor unilaterally constructed by the state." n10

§ 16.06(f) Deviation.

Finally, we must consider Unger's deviationist doctrine or the sixth principle (and the most controversial) which is to be applied whenever there are conflicts between principles and counterprinciples in a substantive law. According to him, the disharmonies must be explored to disclose "broader contests among prescriptive conceptions of society." n11

FOOTNOTES:

(n1)Footnote 5. *See especially*, Roberto Mangabeira Unger, *The Critical Legal Studies Movement, 96 Harv. L. Rev. 563 (1983).*

(n2)Footnote 6. S. E. Salako, *A Critical Legal Study of Property in Land*, 13 Liverpool L. Rev. 4 (1991).

(n3)Footnote 7. *Id.* at 4-5.

(n4)Footnote 8. *Id.* at 5-6.

(n5)Footnote 9. *Id.* at 6.

(n6)Footnote 10. *Id.* at 6-7.

(n7)Footnote 11. *Id.* at 7.

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CHAPTER 16 PROPERTY RIGHTS FROM THE PERSPECTIVE OF CRITICAL LEGAL STUDIES

2-16 Thompson on Real Property, Thomas Editions § 16.07

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§ 16.07 Property Law Examples of Critical Legal Studies Method.

Although no systematic or comprehensive criticism of property law has been formulated by C.L.S. writers, occasionally property law examples are used to illustrate some point of C.L.S. method or thought. For instance, the following discussion was used to illuminate the distinctions between a legal regime based on rules and that which is more "situationally sensitive":

> Often the pervasiveness of the rules-standards dilemma in property law is obscured for a reason that may seem formalistic, historically quirky: the rule position is associated with the traditional common law domain, the standards position with the traditional equity domain. To the extent that we believe that we are dealing with distinct doctrines rather than doctrines that address the same underlying factual disputes, we may not see the dilemma ... In property, the legal tradition is to use rules to promote full-blown, unfettered alienability of each generation's holding, even when a paternalistic settlor wanted to restrict the grantee's control. Attempts to limit full-scale alienability of property were simply struck down regardless of reasonableness or of the probability that alienability would actually be seriously impaired. The mechanical imposition of the rule against restraints on alienation, the Rule against Perpetuities, or the doctrine of the destructibility of contingent remainders all result in ensuring that someone will hold fully and freely alienable fee property as soon as possible ...
>
> ... Take the series of disputes that engrossed the Supreme Court for over a decade on the degree to which shopping center owners could exclude non-disruptive political pickets and speakers. In a sense, the dispute can most profitably be seen as an ongoing battle between those who unconsciously argued that the *property ownership* category should be rulelike, general, and abstract rather than situationally sensitive and those who unconsciously argued that the *speech rights* category must be rulelike. On the one hand, proponents of the right to exclude analogize the shopping center owner to the homeowner, thus implicitly analogizing kicking out a picket to throwing a door-to-door missionary out of one's living room, without detailed inquiry into the situational distinctions between the cases. Ownership is ownership; a rule is a rule. On the other hand, proponents of access often seemed to treat the ban on speaking as if it were invariably a total ban on effective communication, with relatively little regard to alternative outlets (at least until they were forced to defend a shrinking core of shopping center speech once the Court's majority had accepted some clear property-owner rights to ban speech). Bans on

> speaking are bans on speaking; rules are rules. In a sense, any politically charged issued on ownership rights covertly but significantly shares some of this formal dimension; anytime one defends an owner's right to close or move a particular business, refuse to deal with a would-be buyer or worker for no reason or for "suspect" reasons, or make political contributions on the basis of an "analogy" with some other owner whose discretion to take such actions we want to protect, one is covertly arguing for the more rulelike form, *against* the possibility of increasingly situationally sensitive judgment. n12

Another comment shows how C.L.S. adherent view the interrelationship of property law and other areas of law:

> As the protection of property was extended during the century from the protection of a person's dominion over things to the protection of interests in value, it became clearer that property was simply a social creation, that since ownership was a "conclusion" rather than a premise to ground further argument, the distinction between (legitimate) distributive and (illegitimate) redistributive law was unsustainable. It may sound at least vaguely tenable to speak of protecting one's ownership of a thing without regard to the distributive consequences of that decision; but to speak of "protecting" some interest in a particular distributive share without acknowledging that as a distributive decision came to look infinitely harder. Likewise, the insuperable difficulty of defending the distinction between the domain of tort and the domain of *damnum absque injuria* (injury without remedy), as well as the difficulty of sustaining a belief that we had solved the causation problem (that is, we knew with scientific objectivity when and how much ostensible tortfeasors harmed victims), called into serious question the ideal of a non-distributive legal system in which all transfers were a function of private-sphere volition, either in mutual gain seeking (contract) or rectification of wrongdoing (tort). If we readily expand or contract the area of uncompensated damage causing within a formally identical system, in accord with our ever-shifting commitments to either self-reliance or sharing, and/or our shifting beliefs about encouraging each of us to protect himself versus the need to induce people to avoid damaging others, we have hardly *routinized* legal practice. n13

As will be readily noted from even a first reading, these comments are neither intended to be, nor do they function as an orderly description of C.L.S. views on property. Indeed, it is uncertain whether they are an orderly description of anything. However, that is not to say that the C.L.S. approach is inapplicable to ordinary cases in the legal system. A C.L.S. criticism of steel plant closings in Ohio, and a recommended alternative approach grounded in the C.L.S. view of property rights have been expounded. n14

However, the notion of the indeterminacy of legal principles as advanced in C.L.S. thinking works against any systematic exposition of property law according to C.L.S.. Even in the leading American property law casebook, the authors note that a comment to the effect that "property is inescapably relational" merely suggests a C.L.S. perspective on property, but can be no more specific because of vagueness within C.L.S. itself:

> Commonly called a movement, C.L.S. is nevertheless extraordinarily heterogeneous in terms of the points of view represented by its affiliates. If there is a common denominator, it is leftist disenchantment with existing social and legal institutions, with liberal "legalism," and with the idea that law transcends politics and is or can be objective or politically neutral. Most Critics essentially regard as empty the distinction between the "public" realm of coercive sovereign authority vested in government and the "private" realm of individual autonomy and voluntary transactions. They reject the notion that legal principles can be neutral and argue that all legal principles are indeterminate, such that the choices of legal decisionmakers can never truly be based on them. Choices are mere exercises of power and ideology, justified in terms that invariably beg central questions. n15

In conclusion, it is perhaps inherent in the C.L.S. movement that more energy is given to a critique of the present state of affairs than to promotion of a new, improved model:

C.L.S. is thus the form that modernism takes in legal thought. Like modernism in philosophy and sociology, it displaces settled understandings, insisting that whatever we have is something we create and recreate daily. As a form of modernism, C.L.S. argues that our lives are structured by institutions that we create and sustain, and that our lives have no meaning outside those institutions and the processes by which we create them -- and create ourselves. So, in part, the C.L.S. program is justified in the way all modernist programs are: The program consists of shattering congealed forms of life by showing that they have no particular integrity. And whatever makes that demonstration effective -- utopian yearnings, close analysis of legal texts, concrete proposals -- is part of the program. n16

FOOTNOTES:

(n1)Footnote 12. Mark Kelman, A Guide to Critical Legal Studies 38-40 (Cambridge, MA: Harvard University Press 1987).

(n2)Footnote 13. *Id.* at 259-260.

(n3)Footnote 14. **14.** Joseph William Singer, *The Reliance Interest in Property*," *40 Stanford L. Rev. 614 (1988).*

(n4)Footnote 15. Jesse Dukeminier & James E. Krier, Property 18 (3d ed. Boston: Little, Brown & Co. 1993).

(n5)Footnote 16. Mark Tushnet, *Critical Legal Studies: An Introduction to its Origins and Underpinnings*, 36 J. of Legal Education 505, 517 (1986).

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CHAPTER 17 FEE SIMPLE ABSOLUTE *

2-17 Thompson on Real Property, Thomas Editions 17.syn

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§ 17.syn Synopsis to Chapter 17: FEE SIMPLE ABSOLUTE *

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§ 17.01(b) The Concept of Seisin.

§ 17.01(c) Categories of Estates.

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§ 17.07 The Modern Fee Simple Absolute.

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CHAPTER 17 FEE SIMPLE ABSOLUTE *

2-17 Thompson on Real Property, Thomas Editions § 17.01

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§ 17.01 Overview of Modern Fee Simple Absolute.n1

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The estate that never ends but continues into infinity is the fee simple absolute. It is the highest form of ownership a person can have in real property because it has no restrictions on its use or enjoyment except those restrictions imposed by public policy for the common good.

The estate in fee simple absolute is transferred from one owner to another by any words that indicate the grantor's intent to make such a transfer. In times past, the phrase "and his heirs" was mandatory for a conveyance of an estate in fee simple absolute, as illustrated by the conveyance of property "to Arthur and his heirs." The words "and his heirs" gave no interest to Arthur's heirs; n2 they functioned simply as words of limitation to qualify or describe the estate. The words "to Arthur" gave the interest to Arthur and functioned as words of purchase, indicating the party actually holding the estate. Although words of limitation are still sometimes used in deeds conveying estates in fee simple absolute, n3 they are no longer necessary in most jurisdictions. n4 Where no words of limitation are used to define the estate, the nature of the estate devised may be determined by "the intention of the testator as manifested by the language of the will viewed in its entirety in the light of the circumstances surrounding the testator." n5

In *Dennen v. Searle* n6 the court deliberated over the common law rule (assumed to be in existence in Connecticut at the time) that "a deed running to a grantee without the use of the word "heirs" conveys only a life estate in the grantee." The court rejected this rule and held that "the mere omission of the word "heirs" in a grant in a deed is not sufficient to defeat an otherwise clearly expressed intent to create a fee, nor arbitrarily to reduce it to a life estate." The use of the word "absolutely" was found sufficient to show the intent for a fee simple interest.

On the other hand, "where an estate is given to a person generally, or indefinitely, with a power of disposition, it carries a fee," n7 and any limitation over is void as being repugnant to the rights of the first taker. This rule of repugnancy is a technical rule of construction that operates against the intent of the grantor. It has been seriously criticized and, in some jurisdictions, has been abrogated by statute. n8

In *Fox v. Snow* n9 the testatrix bequeathed to her husband "all of the money which I have on deposit at the [bank],

however, any money which is in the said account at the time of my said husband's death, the said sum shall be held by my niece, Catherine King Fox, absolutely and forever." The court held that the gift over to Catherine was void because the bequest to the husband "was in general terms with an absolute power of disposal." The dissent opposed this holding on the ground that it defeated the plain intent of the testatrix in favor of "a technical rule of testamentary construction which gained seeming but altogether undeserved immortality from the opinion of Chancellor Kent in Jackson v. Robins."

§ 17.01(a) Brief History of the Fee Simple Absolute. n10

The use of the words "and his heirs" as words of limitation to define the fee simple estate finds its origin in feudal times. After William the Conqueror became king of England in 1066, he rewarded his Norman knights by seizing land from uncooperative Anglo-Saxons and parceling it out to his men as tenants-in-chief. In return, these tenants-in-chief provided fealty and services to the king. By 1086, there were around 1500 tenants-in-chief in England n11 whose holdings were all under the rules of feudal tenure. This development shaped the course of history in the area of estates and future interests.

Feudal services to the king might include defense of the king's castle, carrying the king's sword at coronation, providing a sword or a glove for the king for court ceremonies, holding masses, praying for his soul, or a fixed payment in money, kind, or labor, but the most important service to the king in the beginning was the provision of knights to help defend the land and engage in foreign wars. In order to provide as many knights as were agreed upon, the tenants-in-chief apportioned a part of their land through a process of subinfeudation to lesser tenants in exchange for services, such as the provision of men who would become knights in the king's service. These lesser tenants, in turn, subinfeudated smaller and smaller portions of their holdings to lesser and lesser tenants. The tenants at the bottom of the ladder, or tenants-in-demesne, n12 were usually the farmers. The tenants between these and the king were the mesne lords, each of whom had a lord above them and tenants below them.

The relationship between lord and tenant was cemented by a personal bond of fealty, and rights and duties depended more on status than on contract. The tenant who had a right to possession did not actually own the land held but had use of the holding for the duration of the tenant's life. The lord who granted the right to possession determined whether the estate in the holding would be passed on to an heir of the tenant. Since it was vitally important to maintain the expected services to the lord or king, the ability to provide a continuation of these expected services figured largely into the decision whether an heir would continue to have use of the land. In exchange for a continuation of services and an oath of fealty, the heir was granted the continued use of the holding for the duration of the heir's life.

By the 13th century, the heir was given an automatic right to inherit a tenancy if the heir paid a tax called a relief, and if the donor of the tenancy indicated the intent that the donee's land automatically would descend. This intent was specified in the conveyance by words "to [the donee] and his heirs." These words recognized the inheritability of the tenant's estate by the tenant's heirs without the approval of the lord. Tenants also were given the power to alienate their land by substituting other tenants, provided that they paid a fine for the alienation. (In such a case the heirs of the first tenant took no interest after the substitution of the second tenant.) These estates which were alienable and inheritable were called fees. Finally, in 1290 the statute Quia Emptores firmly established the principle of free alienation by eliminating subinfeudation of fees and permitting only the substitution of tenants without paying fines to the lord.

Estates thus became both alienable and inheritable if the proper words were used. To convey a fee rather than a life estate, the words "and his heirs" were absolutely essential in an inter vivos conveyance. Otherwise, it was construed that the grantor had conveyed only a life estate in the land and had not cut off his heir's interest in the property. This requirement did not exist in wills, however, since a fee simple could be devised by the mere manifestation of intent to give it in the will. Today, as noted earlier, the words "and his heirs" are no longer necessary to create a fee simple even in an inter vivos conveyance.

The English tenure system was transported to the American colonies and continued after the Revolution with the state as sovereign in place of the king. It all but vanished in later years as legislation was passed in most states abolishing tenure and declaring lands to be owned allodially. n13 However, during its slow decline, tenure has left an indelible mark on the more modern law of real property that has risen to take its place. Complexities that appear to have no explanation within modern law can probably be traced to a feudal motivation, and these complexities continue to haunt us today.

§ 17.01(b) The Concept of Seisin.

Seisin is an archaic concept distinct from the notion of title or ownership. It existed in feudal England to describe a tenant's possession: "The man who is seized is the man who is sitting on the land; when he was put in seisin he was set there and made to sit there." n14 This concept of seisin has little use today as a concept distinct from ownership, but continued references to this word justify a short explanation of its history.

In the 13th century, the concept of seisin was generally applied in connection with a real and actual possession. n15 By the 14th century, seisin came to signify a possession protected by an action of assize available in the secular courts to protect the freeholder. The holder of a chattel, such as a term of years or personal property, however, was required to pursue other remedies through the ecclesiastical courts. n16 An action in ejectment was available for leaseholds and an action in replevin for chattels personal. n17 By the beginning of the 15th century, the concept of seisin disappeared in actions concerning chattels. n18 Counts in replevin no longer contained the words *uncore seisi* after 1426; they began to employ the words *uncore detient* in 1443. n19 It was also wrong to speak of the termor as seised after the end of the 14th century, although Maitland cites one precedent in the Year Book of 1413 which contained the phrase. While seisin continued to develop as a unique product of English feudal land law in the common law courts, the concept of possession defined under the influence of the Roman civil law came to be applied in the ecclesiastical courts and the Court of Chancery. The area of testamentary gifts was originally within the jurisdiction of the ecclesiastical courts and was the setting for the development of the law relating to chattels personal. In this area, Chancery assumed not only the jurisdiction but also the doctrines which had been developed under the influence of the canon or civil law. n20 The separation of the two concepts, seisin and possession, was one of the first major steps in the direction of distinguishing executory interests from present interests with possession postponed, as will be discussed in a later chapter. In most cases when the term seisin is used today it may be treated as synonymous with present ownership of a freehold.

§ 17.01(c) Categories of Estates.

Each of the three freehold estates may be created to terminate naturally or to be cut short by a condition subsequent. If there is no condition subsequent, the estates are called "fee simple absolute," "life estate," and "fee tail." If there is a condition subsequent, each of these three estates may fall into three different subcategories called "determinable," "subject to condition subsequent," and "subject to executory limitation." Thus, for example, if a fee simple estate is cut short by a condition subsequent in favor of another person, as in a conveyance "to A until A gets married, then to B," that fee simple in A is called a "fee simple subject to executory limitation."

§ 17.01(c)(1) Determinable Estates.

The three subcategories are distinguished by the form of the condition and by the type of person taking the future interest that follows the happening of the condition subsequent. An estate determinable is cut short by a condition subsequent that is durational and which cuts short the estate in favor of the grantor who created the estate. Thus, a conveyance by O "to A for as long as A remains unmarried, then to O," is a fee simple determinable; a conveyance by O "to A for life or until A gets married, then to O," is a life estate determinable. A condition is considered durational in form when it uses such words as "during," "until," "so long as," "as long as," and "while." Also, if the grantor otherwise shows the intent to create an estate determinable, the condition will be considered durational.

§ 17.01(c)(2) Estates Subject to Condition Subsequent.

An estate subject to condition subsequent is cut short in favor of the grantor who created the estate by two events: (1) The happening of a condition subsequent that is conditional and (2) re-entry by the grantor (or the grantor's successor in interest). n21 The right of re-entry or power of termination may be exercised by physical entry, but such entry is not necessary:

> The interest subject to such a power is terminated by any appropriate manifestation, upon the part of the person in whose favor the condition exists, of his intent thereby to terminate the interest in question." n22

In *Mountain Brow Lodge No. 82, I.O.O.F. v. Toscano* n23 a conveyance by James and Maria Toscano to Mountain Brow Lodge No. 82 of property "restricted for the use and benefit of the second party, only; and in the event the same fails to be used by the second party..., the same is to revert to the first parties herein, their successors, heirs or assigns" was interpreted by the court to create "a fee subject to a condition subsequent with title to revert to the grantors, their successors or assigns if the land ceases to be used for lodge, fraternal or similar purposes for which the [Lodge] was formed."

A conveyance by O "to A and the heirs of his body, but if A gets married, then to O" is a fee tail subject to condition subsequent (assuming that there is no state statute that transforms the fee tail into another estate or estates). A condition is considered conditional in form when it uses such words as "provided that," "on condition that," "if," "but if," and "provided, however." n24

In *Howson v. Crombie Street Congregational Church* n25 the grantor conveyed a parcel of land to a church as a Parsonage and Parish House "and if said grantee should ever cease to carry on the adjoining property as a church for its own use or if said premises herein described should ever cease to be used by said church as a Parsonage or Parish House or for other religious purposes, then said premises shall revert to me...." The court found that despite the use of the word "revert," the grant created a fee simple subject to condition subsequent in the church and a right of reentry in the grantor.

Also, if the grantor otherwise shows intent to create an estate subject to condition subsequent, the condition will be considered conditional. n26

A lien or mortgage that is placed on an estate subject to condition subsequent attaches only to that interest and does not encumber the estate of the grantor in the right of reentry.

In *Mayor of Rockville v. Walker* n27 a lender took a mortgage on property that the mortgagor owned in fee simple subject to condition subsequent. The condition subsequent occurred and the grantor reentered and took possession. Although the mortgage was in place before the grantor exercised its right of reentry, the court rejected the argument that the grantor retained only a remedial contractual right of reentry allowing the mortgage to attach to the whole fee simple absolute. The exercise of reentry by the grantor terminated the mortgage.

COMPUTER-ASSISTED RESEARCH

LEXIS: estate! or free simple w/2 subject w/2 condition w/1 subsequent

§ 17.01(c)(3) Estates Subject to Executory Limitation.

An estate subject to executory limitation is cut short by a condition subsequent that may be either durational or conditional and which cuts short the estate in favor of a person other than the grantor who created the estate. Thus, a conveyance by O "to A and his heirs, but if A gets married, then to B" is a fee simple subject to executory limitation; a

conveyance by O "to A for life, but if A gets married, then to B" is a life estate subject to executory limitation.

In *Pells v. Brown* n28 the testator devised to "Thomas his son and his heirs forever, paying to his brother Richard twenty pounds at the age of twenty-one years; and if Thomas died without issue, living William his brother, that then William his brother should have those lands to him, and his heirs and assigns forever, paying the said sum as Thomas should have paid." Thomas entered the property, suffered a common recovery (an action to recover lands so as to vest a fee simple in the recoverer), and died, devising the property to the wife of Edward Pells. Thomas died without issue and William was still living. The court found that the recovery was no bar, and that Thomas had a fee simple that could be terminated by the contingency of the death of Thomas without issue (definite failure of issue construction) and with William still living, and that William had an executory interest.

In *Lee v. Oates* n29 the grant created an executory interest to divest a prior remainder and a series of executory interests, each to cut short the preceding one. The grant (with editorial explanations in brackets) conveyed in trust to

> Elizabeth Jane Lee during her life [present interest in a life estate], ..., and after her death to ... Anna B. Lee and B. Rush Lee [vested remainder in fee simple subject to executory limitation], ..., and in the event of the death of either ... without issue, then to ... the survivor [executory interest in fee simple subject to executory limitation] ..., and in the event of the death of both ... without issue then to ... Lillian A. Smith and W. Bernard Smith [executory interest in fee simple subject to executory limitation] ..., and in the event of the death of either the said Lillian A. or W. Bernard Smith without issue then to ... the survivor of them [executory interest in fee simple subject to executory limitation] ..., and in the event of the death of them both in the lifetime of their father then to ... Mrs. Carrie E. Smith during her life and ... widowhood [executory interest in a life estate], with remainder to the right heirs of the parties of the first part [executory interest in fee simple absolute].

COMPUTER-ASSISTED RESEARCH

LEXIS: estate! or fee simple or interest! w/2 subject w/2 executory w/1 limit!

§ 17.01(d) Ambiguity and the Presumption Against Forfeitures.

"Forfeitures are not favored in the law.' n30 Therefore, if the grantor's intent in creating a reversionary interest is ambiguous, courts have tended to prefer the estate subject to condition subsequent over the estate determinable. n31 The presumption is in favor of the owner of the estate, because an estate determinable is forfeited automatically upon the happening of the condition subsequent, whereas the estate subject to condition subsequent is lost only when both the condition subsequent occurs and the owner of the future interest chooses to reenter. One explanation for this presumption is that it "promotes the interests of current owners in controlling property in their possession, giving them greater freedom to change land uses as economic conditions and social values change; it also promotes social interests in deregulating economic activity to allow property owners the freedom to shift property to more valuable and desired uses." n32

In *Oldfield v. Stoeco Homes* n33 a deed required the filling of lots to certain grades within one year and stated that "[a] failure to comply with the covenants and conditions ... will automatically cause title to all lands to revert to the City of Ocean City." Despite this language of automatic reverter in the deed, the court considered the presumption against forfeitures and then proceeded to find that the repeated use of the word "condition" and another provision in the deed, reserving the right to alter the arrangement in the clauses, were sufficient to cast a reasonable doubt on what was intended. The court then considered the surrounding circumstances and determined that a fee simple subject to condition subsequent, not a fee simple determinable, was created. Therefore, the City was allowed to extend the time for performance without an automatic reverter.

A similar approach to forfeitures is taken in the case of a leasehold.

In *Jamaica Bldrs. Supply Corp. v. Buttelman* n34 a lease contained a provision which stated:

> that in the event of the breach of any condition or covenant herein [such as the failure to pay rent], ... the Landlord ... may terminate the lease by giving to the Tenant five days written notice ..., and the term of this lease shall in that event run to, and expire upon the date therein mentioned." The Tenant failed to pay rent and notice was served, but the Tenant remained in the apartment. When the Landlord sought to remove the Tenant on grounds that the lease was automatically terminated, the court dismissed the petition. Mindful of the presumption against forfeitures, it found that other typewritten language in the lease referring to "the next month's rent" after failure to pay the previous month's rent was sufficient evidence of the parties' intent to create a lease subject to condition subsequent rather than a lease determinable. n35

COMPUTER-ASSISTED RESEARCH

LEXIS: ambigu! w/15 grantor! w/5 intent! w/30 presum! w/5 forfeit!

§ 17.01(e) Eminent Domain.

If an eminent domain taking occurs against land held by the prior owner of a fee simple determinable, which has been destroyed by the occurrence of the condition subsequent, and this prior owner has not yet been removed by any action to recover, the owner of the possibility of reverter, now transformed into a present interest, nevertheless is entitled to the whole award. n36 There should be no difference for a fee simple subject to executory limitation.

If an eminent domain taking occurs against land held by the owner of a fee simple subject to condition subsequent, against which reentry is possible because the condition subsequent has occurred, and this owner has not yet been removed by an action to recover, this owner may be entitled to the whole award, n37 although the Restatement states otherwise. n38

If an eminent domain taking occurs against land held by the owner of a fee simple determinable or a fee simple subject to condition subsequent, and the condition subsequent has not yet occurred, the majority of courts give the present owner the whole award. n39 Several decisions contain dicta supporting the division of the award according to the proportional interests of the present interest owner and the reversionary interest owner, if the occurrence of the condition subsequent is imminent. n40 There is also some authority to support such a division of the award even if the occurrence of the condition subsequent is not imminent. n41

If the eminent domain proceeding occurs against land held by the owner of a fee simple subject to executory limitation, and the condition subsequent has not yet occurred, there is also authority to support an award to the owner of the executory interest. n42

Valuation of the present and future interests in an eminent domain proceeding is difficult. One court has defined the value of the future interest as the difference between the value of the land for any use and the value of the land for the use restricted by the condition subsequent. n43 However, this formula does not take into consideration the possibility that the sum of the parts may not equal the whole, nor the probability of occurrence of the condition subsequent.

Another court offered the following formula:

> Opinions [of experts] as to the value of the fee simple determinable ... will depend in part on the likelihood of continued use of the realty by the owner of the fee simple defeasible for the purpose

specified in the instrument of conveyance and in part on the reasonable market value of the real estate, as improved, for the purposes to which it is devoted. If this value is *equal to or greater than* the market value of the realty if used for other practicable purposes, the owner of the fee simple determinable is entitled to the full amount of the award less some nominal amount -- 1 percent of the sum awarded, for example -- to be allocated to the owner of the possibility of reverter. If the value so fixed, in cases where abandonment of the use is imminent or where the realty would have a greater market value if devoted to some other practicable purpose, is *less* than the totality of the value, the owner of the possibility of reverter shall be entitled to a proportion of the condemnation award expressed by a fraction the denominator of which is the market value of the realty when devoted to its best practicable use and the numerator of which is the difference between such value and the value of the realty applied to the uses to which it is restricted by the terms of the deed for such period of time as such use is reasonably to be anticipated. n44

COMPUTER-ASSISTED RESEARCH

LEXIS: eminent domain w/30 fee simple w/20 determinable or subject w/2 (executory limit! or condition subsequent)

FOOTNOTES:

(n1)Footnote 1. Section 17.01 written by Dean John Makdisi, University of Tulsa School of Law.

(n2)Footnote 2. 2 Henry de Bracton, De Legibus et Consuetudinibus Angliae [Concerning English Laws and Customs] 66 (George E. Woodbine ed. 1922).

(n3)Footnote 3. See Restatement of the Law of Property § 305 (1944).

(n4)Footnote 4. *Cf.* 1 Restatement of the Law of Property § 27, 39-41 (1936). For exceptions to the prevailing modern view that no words of inheritance are necessary, see Cornelius J. Moynihan, Introduction to the Law of Real Property 29 & nn.3-4 (2d ed. 1988). Words such as "and her heirs on her father's side" are ineffective to restrict descent and create only a fee simple absolute. *Id*. at 31-32.

(n5)Footnote 5. Moynihan, *supra* note 4, at 31.

(n6)Footnote 6. *176 A.2d 561 (Conn. 1961).*

(n7)Footnote 7. *Jackson v. Robins, 16 Johns. 537, 588 (N.Y. App. 1819)* (Chancellor Kent).

(n8)Footnote 8. Moynihan, *supra* note 4, at 31 & n.10.

(n9)Footnote 9. *76 A.2d 877 (N.J. 1950).*

(n10)Footnote 10. For a more detailed history of the era of feudalism in which the fee simple estate evolved, *see* A.W.B. Simpson, A History of the Land Law (2d ed. 1986), and Moynihan, *supra* note 4.

(n11)Footnote 11. By William's order, a great survey of England was made in 1086 called the Domesday Book. *See* Frederic W. Maitland, Domesday Book and Beyond (1921).

(n12)Footnote 12. Tenants throughout this hierarchy were considered free and had the right to bring real actions in the central royal courts. Peasants, or villeins, were unfree men and women who possessed lands of a lord in a state of unfree tenure. Their recourse for the settlement of disputes was to the manorial court of their lord. It was in the central royal courts, however, that the common law developed.

(n13)Footnote 13. Moynihan, *supra* note 4, at 23.

(n14)Footnote 14. 2 Sir Frederick Pollock & Frederic W. Maitland, The History of English Law Before the Time of Edward I, at 30 (2d ed. 1968).

(n15)Footnote 15. F.W. Maitland, *The Seisin of Chattels, 1 Law Q. Rev. 324, 334-335 (1885)* [hereinafter *Seisin of Chattels*].

(n16)Footnote 16. *Id. at 327-28;* O. W. Holmes, Jr., *Early English Equity, 1 Law Q. Rev. 162, 168 (1885).*

(n17)Footnote 17. *Seisin of Chattels, supra* note 15, at 329.

(n18)Footnote 18. *Id*. at 331, 333.

(n19)Footnote 19. *Id*. at 330-31, *Uncore seisi* is translated "still seised." *Id*. at 329. *Uncore detient* may be translated "still possessing." *See id*. at 330-333. Detinue is a "possessory action for the recovery of personal chattels." Black's Law Dictionary 450 (6th ed. 1990).

(n20)Footnote 20. *See* Percy Bordwell, *Interests in Chattels Real and Personal, 1 Mo. L. Rev. 119, 128 (1936).*

(n21)Footnote 21. See Moynihan, *supra* note 4, at 33, 112-115.

(n22)Footnote 22. Restatement of the Law of Property § 24 cmt. b (1936). *See Emrick v. Bethlehem Twp., 485 A.2d 736, 740 (Pa. 1984)* (quoting and applying this provision of the Restatement).

(n23)Footnote 23. *64 Cal. Rptr. 816 (Cal. App. 1967)* (distinguishing an estate subject to condition subsequent from an absolute restraint against alienation).

(n24)Footnote 24. Sometimes words of reentry are required to indicate the estate. Moynihan, *supra* note 3, at 114 & n.2.

(n25)Footnote 25. *590 N.E.2d 687 (Mass. 1992),* citing *Dyer v. Siano, 11 N.E.2d 451, 453 (Mass. 1937)* (holding that use of the word "revert" without "so long as," "during," or "until" did "not of itself show an intention that the fee granted shall terminate and the lands 'revert' without entry or action").

(n26)Footnote 26. An ambiguity may be clarified by looking to the circumstances of the transaction. *See* Moynihan, *supra* note 4, at 108 & n.1, 109.

(n27)Footnote 27. *587 A.2d 1179 (Md. 1991).*

(n28)Footnote 28. Cro. Jac. 590 (K.B. 1620).

(n29)Footnote 29. *88 S.E. 889 (N.C. 1916).*

(n30)Footnote 30. *Roberts v. Rhodes, 643 P.2d 116, 118 (Kan. 1982).*

(n31)Footnote 31. For a discussion of this presumption as it is applied in the Texas courts, *see generally* Howard R. Williams, *Restrictions on the Use of Land: Conditions Subsequent and Determinable Fees, 27 Tex. L. Rev. 158 (1948).*

(n32)Footnote 32. Joseph W. Singer, Property Law: Rules, Policies, and Practices 532 (1993).

(n33)Footnote 33. *139 A.2d 291 (N.J. 1958).*

(n34)Footnote 34. *205 N.Y.S.2d 303 (1960).*

(n35)Footnote 35. The terminology used by the court for the condition in a lease subject to condition subsequent is "condition," and for the condition in a lease determinable is "conditional limitation."

(n36)Footnote 36. *Proprietors of Locks and Canals on Merrimack River v. Commonwealth, 171 N.E.2d 146 (Mass. 1961).*

(n37)Footnote 37. *City of Santa Monica v. Jones, 232 P.2d 55 (Cal. App. 1951)* (dictum); *City of New York v. Cortelyou, 50 N.E.2d 645 (N.Y. 1943).*

(n38)Footnote 38. 1 Restatement of the Law of Property § 53 cmt. d (1936).

(n39)Footnote 39. For a fee simple subject to condition subsequent, *see People v. City of Los Angeles, 4 Cal. Rptr. 531 (Dist. Ct. App. 1960),* appeal dismissed *sub nom. Griffith v. California, 364 U.S. 476 (1960)* (lack of substantial federal question). For a fee simple determinable, *see Land Clearance for Redev. Auth. of the City of St. Joseph v. City of St. Joseph, 560 S.W.2d 285 (Mo. App. 1977). See generally* Comment, *The Effect of Condemnation Proceedings by Eminent Domain upon a Possibility of Reverter or Power of Termination, 19 Vill. L. Rev. 137 (1973)* [hereinafter *Effect of Condemnation Proceedings*].

(n40)Footnote 40. *See, e.g., People ex rel. Dep't of Pub. Works v. City of Fresno, 26 Cal. Rptr. 853 (1962).* These cases support 1 Restatement of the Law of Property § 53 cmt. c (1936).

(n41)Footnote 41. *Ink v. City of Canton, 212 N.E.2d 574 (Ohio 1965); Leeco Gas & Oil Co. v. County of Nueces, 736 S.W.2d 629 (Tex. 1987).*

(n42)Footnote 42. *Hemphill v. Mississippi State Hwy. Comm'n, 145 So. 2d 455 (Miss. 1962)* (will giving realty to son, and codicil providing that if the son died before his wife and the wife remarried or died, what had been left to the son should go to two named grandchildren).

(n43)Footnote 43. *Ink, 212 N.E.2d 574 (Ohio 1965).*

(n44)Footnote 44. *State v. Independent Sch. Dist., 123 N.W.2d 121, at 129-130 (Minn. 1963).* For a critique and suggested modification of this formula, *see Effect of Condemnation Proceedings, supra* note 39, at 164-165.

* This chapter is based in part on Ch. 30, George W. Thompson, Commentaries on the Modern Law of Real Property (John S. Grimes ed. 1979), which made a significant contribution toward preserving the American common law governing the fee simple absolute.

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CHAPTER 17 FEE SIMPLE ABSOLUTE *

2-17 Thompson on Real Property, Thomas Editions § 17.02

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§ 17.02 Concept of the Fee Simple.

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The fee simple has definite characteristics: (a) it is a present estate in land that is of indefinite duration as will be seen hereafter; n45 (b) it is freely alienable by deed inter vivos, by will post-mortem and involuntarily by execution or judicial sale; (c) it carries with it the right of possession; (d) the holder may make use of any portion of the freehold without being beholden to any person except to the extent that the sovereign has not limited such right of use. n46 It is capable of inheritance not merely through taking by representation. n47

The words "fee simple" mean an absolute title or estate in lands wholly unqualified by any reversion, reservation, condition or limitation, or possibility of any such thing present or future, or precedent or subsequent. n48

A post-mortem transfer of real estate is not effective unless made in the statutory manner governing the execution of wills. Therefore, if a grantor uses ambiguous language or exercises doubtful acts in connection with the effective time of a deed, either the instrument will be void as an invalid testamentary disposition or it takes effect as the immediate grant of a reversion with the retention of a life estate. n49

A release to the ancestor, by an heir, of the expectancy as heir, operates not as a contract or as a transfer or conveyance either to the ancestor or to other heirs, but an extinguishment of the right to take any estate by descent. n50

The term "fee simple" includes estates subject to conditions subsequent, executory limitations, special limitations or any combination of these to make the estate defeasible. n51 An "estate in fee simple" arises where one has an estate in lands or tenements to one and one's heirs forever, and such an estate is not inconsistent with a restriction on alienation. n52 It is the most extensive interest which one may possess in real property. n53 An estate subject to an option is not in fee. n54

One of the essential qualities of a fee-simple estate is that it is one of inheritance, which passes upon the death of the ancestor, to all the heirs generally and not to a particular heir or set of heirs. n55 A "fee-simple estate" n56 is an estate of inheritance which is unconditional, indefeasible, and absolute, n57 and which descends to the owner's heirs generally

n58 and not to merely a particular class of the owner's heirs, as in the case of a fee tail. n59

It must either vest or not vest, but once vested it is indefeasible, n60 and it is an estate unlimited as to duration, disposition, and descendibility. n61

> Prior to Blackstone's time the allodial title was ordinarily called an 'absolute title' and was superior to a 'fee-simple title,' the latter being encumbered with feudal clogs which were laid upon the first feudatory when it was granted, making it possible for the holder of a fee-simple title to lose his land in the event he failed to observe his feudatory oath. The allodial title was not so encumbered. Later the term 'fee simple,' however, rose to the dignity of the allodium or absolute estate, and since the days of Blackstone the words 'absolute estate' and 'fee simple' seem to have been generally used interchangeably; in fact, he [Blackstone] so uses them. n62

It is the entire and absolute interest and property in land, n63 and carries with it everything within or belonging to it. n64 Such an estate may be either legal or equitable, or it may be had either in corporeal or incorporeal hereditaments, or in minerals beneath the surface of the ground separate and apart from the surface. n65

The grantor's reservation of all minerals and rights in relation thereto does not prevent the grantee from taking a fee-simple estate in the land, n66 nor does a fee-simple title cease to be such by the giving of a mortgage on the property. n67

The words "fee simple" are used in two senses. It sometimes means the sum total of all rights in land that any individual may exercise. n68 The word "fee" signifies an estate of inheritance, and the words "fee simple" signify an absolute inheritance, clear of any condition, limitation, or restriction to particular heirs, n69 such as heirs of the body, or the like. n70 So, too, the word "fee" and the words "fee simple" are frequently used as convertible terms, n71 since the word "simple" adds nothing whatever to the meaning of the word "fee" standing by itself. n72 The word "simple," however, does serve to exclude the idea that the "fee" is of an entailed or of a conditional kind. n73

"Fee simple" is a common law term and sometimes corresponds to what in the civil law is a "perfect title." At other times it also embraces defeasible fees.

In this broad sense the word "absolute" added does not impart anything to the legal effect of the term "fee" or "fee simple." n74 From the fee-simple estate all others are derived, and, whenever they shall fail whether by lapse of time, surrender, or merger, they ultimately resolve themselves into this estate. n75 "Absolute" or "absolutely" may, however, be used to distinguish a fee simple absolute from a fee simple defeasible.

Where language is ambiguous, it will be construed to confer on grantee the highest estate permissible under the instrument. n76

Presumption deed carries a fee simple estate. n77

So in another sense the fee simple does not embrace the entire interest in land but merely the four concepts set forth above. So a fee simple may be also determinable at some time indefinite, may be subject to a condition subsequent or to a conditional limitation. n78

A fee cannot be created that will terminate at a given time. n79 A fee must endure indefinitely. n80

In such events there may be a legal right in a third person of such a nature that the interest of the holder of a fee simple may terminate and the right of such third person itself ripen into a fee simple. The owner in fee cannot be compelled to sell or dispose of it, except by assertion of the right of eminent domain. n81 An estate in fee is subject to curtesy and

dower. n82

An estate by curtesy is analogous to the estate of dower, n83 and the surviving spouse in either case was entitled, at common law, to such estate only in lands of which the deceased spouse had a freehold of inheritance, that is, a fee simple or a fee tail. n84

An estate of inheritance, legal or equitable, is essential to the widow's right of dower. n85 It has been held, however, that the husband's right to curtesy applies as well to qualified or conditional estates, as to absolute fee-simple estates. n86 Where the husband owns a defeasible fee in realty, his widow, on his death, has the same dower interest therein as if her husband had had an estate in fee simple absolute therein. n87 It has been held that a widow was entitled to dower in lands held by her deceased husband under a lease for ninety-nine years, renewable forever, such estate being one of inheritance within the meaning of a statutory provision that the widow shall take dower in such property. n88 A defeasible fee in the husband is subject to his widow's right of dower. n89 Property held by a deceased husband in trust is held not an "estate of inheritance" and his surviving widow has no right to dower therein, but if the estate is one of inheritance the widow is entitled to dower. n90 It has been held that a widow does not take dower in a ground rent lease. n91

FOOTNOTES:

(n1)Footnote 45. *Pacific Southwest Realty Co. v. County of Los Angeles, 2 Cal. Rptr. 2d 536 (1991).*

(n2)Footnote 46. *Sterner v. Nelson, 314 N.W.2d 263 (Neb. 1982).*

(n3)Footnote 47. *Park County Rod and Gun Club v. Department of Highways, 517 P.2d 352 (Mont. 1973).*

(n4)Footnote 48. *Wray v. Wymer, 601 N.E.2d 503 (Ohio App. 1991).*

(n5)Footnote 49. *Wright v. Pritchett, 102 S.E.2d 602 (Ga. 1958).*

(n6)Footnote 50. *McCarthy v. McCarthy, 133 N.E.2d 763 (Ill. App. 1956).*

(n7)Footnote 51. *Wichelman v. Messner, 83 N.W.2d 800 (Minn. 1957).*

(n8)Footnote 52. *Shaw v. Wertz, 369 S.W.2d 215 (Mo. 1963).*

(n9)Footnote 53. *Wray v. Wymer, 601 N.E.2d 503 (Ohio App. 1991).*

(n10)Footnote 54. *In re Sullivan's Estate, 218 P.2d 1064 (Colo. 1950).*

(n11)Footnote 55. *Guida v. Thompson, 160 N.E.2d 153 (Ohio Com. Pl. 1957); Bartlett v. Bartlett, 48 P.2d 560 (Wash. 1935).*

(n12)Footnote 56. *Long v. Kyle, 340 S.W.2d 623 (Mo. 1960).*

(n13)Footnote 57. *Guida v. Thompson, 160 N.E.2d 153 (Ohio Com. Pl. 1957); Imbrice v. Hartrampf, 198 P. 521 (Or. 1921).*

(n14)Footnote 58. *Fehringer v. Fehringer, 439 S.W.2d 258 (Tenn. 1969).*

(n15)Footnote 59. *Sterner v. Nelson, 314 N.W.2d 263 (Neb. 1982).*

(n16)Footnote 60. *Farrar v. Bingham, 93 F.2d 252 (D.C. Cir. 1937); Vaughan v. Compton, 235 S.W.2d 328 (Mo. 1950).*

(n17)Footnote 61. *Sterner v. Nelson, 314 N.W.2d 263 (Neb. 1982).*

(n18)Footnote 62. *Redevelopment Agency v. Norwalk Alum. Foundry Corp., 233 A.2d 1 (Conn. 1967).*

(n19)Footnote 63. *Bradford v. Martin, 201 N.W. 574 (Iowa 1925); In re Waltz, 240 P. 19 (Cal. 1925).*

(n20)Footnote 64. *Wray v. Wymer, 601 N.E.2d 503 (Ohio App. 1991); Masheter v. Diver, 253 N.E.2d 780 (Ohio 1969).*

(n21)Footnote 65. *Brooks v. Shepard, 157 F. Supp. 379 (S.D. Ala. 1957).*

(n22)Footnote 66. *In re Forsstrom, 38 P.2d 878 (Ariz. 1934).*

(n23)Footnote 67. *Slack v. Magee Heirs, 252 S.W.2d 274 (Tex. Civ. App. 1952), aff'd, 258 S.W.2d 797 (Tex. 1953).*

(n24)Footnote 68. *In re Van Duzer, 213 N.W.2d 167 (Mich. 1973).*

(n25)Footnote 69. *Wray v. Wymer, 601 N.E.2d 503 (Ohio App. 1991).*

(n26)Footnote 70. *Long v. Kyle, 340 S.W.2d 623 (Mo. 1960); Coleman v. Shoemaker, 78 P.2d 905 (Kan. 1938).*

(n27)Footnote 71. *Hays' Estate v. Commissioner of Internal Revenue, 181 F.2d 169 (5th Cir. 1950).*

(n28)Footnote 72. *Chance v. Weston, 190 P. 155 (Or. 1920).*

(n29)Footnote 73. *In re Waltz, 240 P. 19 (Cal. 1925).*

(n30)Footnote 74. *Vaubel v. Lang, 140 N.E. 69 (Ind. App. 1923).*

(n31)Footnote 75. *Clark v. Baker, 14 Cal. 612 (1860).*

(n32)Footnote 76. *Seifert v. Sanders, 358 S.E.2d 775 (W. Va. 1987).*

(n33)Footnote 77. *Vestal v. Vestal, 271 S.E.2d 306 (N.C. App. 1980); First Nat'l Bank of Oregon v. Townsend, 555 P.2d 477 (Or. App. 1976).* "Grant, bargain and sell" imply a fee simple title. *Love v. Missouri Union Presbytery, 534 S.W.2d 511 (Mo. 1976).*

(n34)Footnote 78. *Wichelman v. Messner, 83 N.W.2d 800 (Minn. 1957).*

(n35)Footnote 79. *Ewering v. Ewering, 251 S.W. 645 (Ky. 1923).*

(n36)Footnote 80. *Moore v. McKinley, 69 N.W.2d 73 (Iowa 1955); Goin v. Absher, 53 S.E.2d 50 (Va. 1949).*

(n37)Footnote 81. *Pugh v. Whittle, 199 So. 851 (Ala. 1941).*

(n38)Footnote 82. *Carter v. King, 353 S.E.2d 738 (Va. 1987).*

(n39)Footnote 83. *Beck v. Merritt, 657 S.W.2d 549 (Ark. 1983).*

(n40)Footnote 84. *Ford v. Yost, 190 S.W.2d 21 (Ky. 1945); Kilpatrick v. Kilpatrick, 162 S.W.2d 897 (Ark. 1942).*

(n41)Footnote 85. *Worley v. Worley, 388 So. 2d 502 (Ala. 1980).*

(n42)Footnote 86. *Wells v. Thompson, 13 Ala. 793 (1848).*

(n43)Footnote 87. *Landers v. Landers, 151 S.W. 386 (Ky. 1912).*

(n44)Footnote 88. *Ralston Steel Car Co. v. Ralston, 147 N.E. 513 (Ohio 1925).*

(n45)Footnote 89. *Landers v. Landers, 151 S.W. 386 (Ky. 1912).*

(n46)Footnote 90. *Harlan Nat'l Bank v. Brown, 317 S.W.2d 903 (Ky. 1958).*

(n47)Footnote 91. *Buehrer v. Gates, 411 S.W.2d 676 (Ky. 1967); Jones v. Magruder, 42 F. Supp. 193 (D. Md. 1941).*

* This chapter is based in part on Ch. 30, George W. Thompson, Commentaries on the Modern Law of Real Property (John S. Grimes ed. 1979), which made a significant contribution toward preserving the American common law governing the fee simple absolute.

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CHAPTER 17 FEE SIMPLE ABSOLUTE *

2-17 Thompson on Real Property, Thomas Editions § 17.03

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§ 17.03 Development of the Fee Simple.

[Go To Supp]

It has been commented that the basis of English land law is the ownership of all realty by the sovereign. From the crown all titles flow. n92 There is basis for the belief that William's early grants to his followers were not merely in reward for past services rendered but were in expectation of future activities on behalf of the crown, principally military. Such grants, being based on personal services, terminated with the death of the grantee. The king retained a reversion and the heirs took nothing except the hope that the grant would be renewed. n93

It is understandable that such grants amounting to mere life estates terminating at the death of the grantee would not be to the complete satisfaction of the grantee whether he was a tenant *in capite*, that is a grantee of the king, or the grant was by way of a further subinfeudation. All heads of families would be interested in seeing their estates pass to their issue by right, not merely by grace of the overlord. The perils of medieval tenure arising from the dangers of attainder for treason as well as claims of creditors and the dangers of disseisin made desirable the Celtish and Anglo-Saxon concept of ownership by the family rather than by the individual tenant. So it is not surprising that as the bargaining power of the feoffee increased after the conquest estates developed of superior quality than a life tenancy. Initially the grant to a man and his heirs gave the heir a substantial interest in the land by direct gift from the grantor. The grantee could not alien without the grantee's heir confirming the grant after the grantee's death. n94

Thus at an early time royal grants and subsequent infeudations begin to reveal that the feoffee is not an individual solely but also "et hereditibus suis" or to a named person "and his heirs" thus placing the title in the family unit and limiting the control or liability of the immediate possessor. So the right to the property did not return to the crown or to the feoffor but passed immediately on the tenant's death to his heirs by right of ownership not of descent. n95 Such early grants were thus entailments, and were presumably exacted through the increasing bargaining power of nobles with the crown.

Subinfeudations were of a similar nature supposedly. The heir was required to obtain a new grant from the lord. Such grants would not entirely satisfy the grantee's desires. In the turbulence of English politics: that prevailed during the reigns that succeeded William, attainder for treason was a terrible sword of Damocles over the head of every landowner.

It meant the utter impoverishment of the family of every political loser. But if title to realty were in the family not the individual even an exile would have some hope of financial relief and the uncertainty of the political atmosphere and the subsequent disorder of society placed even greater emphasis on the family rather than the law as security. n96

This is an explanation of the somewhat ambiguous passage in the seventh chapter of Glanvil to the effect that the ancestor could not alienate one-half of the estate without the heir's consent. Actually therefore the limitation to one and one's heirs created an entailment to the family line. Without such an entailment only a life estate existed, and through the passage of time the property lawyers developed the use of the words "and to his heirs" into a legal fetish without which a fee could not be created.

There were counter pressures, however, seeking to expand the individual powers of ownership. The exoneration of an entailed estate from the penalties of attainder could not have been satisfactory to the crown. And there were heavy demands on the tenant for the raising of ready money. Certain of the feudal dues, ransom of the lord, knighting of the lord's eldest son, marriage of the lord's eldest daughter contemplated the raising of money payments. The equipping of a military force such for example, as was contemplated by the Crusaders also demanded money. And the expansion of commerce that followed the Crusades themselves created a desire for goods that could not be satisfied out of entailed land. The limitation to one and his heirs became words of law and no other language no matter how clearly showing the grantor's intent could create a fee. n97

Such words were, however, not merely words of "limitation" showing that the feoffor had "limited" a fee to the feoffee but were words of purchase, i.e., the fee was limited to the family of the feoffee not to him alone. n98 Thus there began a long struggle to develop the free alienation of the fee simple, to convert it into a fee simple "absolute." The first step came somewhere in about the middle of the 13th century with the development of the right of alienation inter vivos in the immediate tenant, without the necessity of the consent of the family. Littleton n99 ascribes this change to the practice of the tenant aliening land together with a warranty purporting to bind not merely the feoffees but also his heirs, thus creating a lineal and collateral warranty that had the effect of preventing the heirs of the feoffor from claiming against the feoffee. n100 More modern thinking n101 is that the alienation of the fee simple was a concession given for the development of the right of primogeniture in the fee tail. n102

Involuntary alienation inter vivos came more gradually. As soon as free alienation could be effected the common law mortgage and the Jewish mortgage permitted the giving of land as security for debt. The Statute Acton Burnell de Mercatoribus n103 subjected land in the hands of merchants to execution and sale that cut off the rights of heirs. The Statute De Stapulis n104 and finally the Writ of Elegit, coming out of the Statute of Westminster II, n105 permitted the creditor to realize upon the debtor's lands even after the debtor's death.

None of these statutes, however, became part of the common law and so universally today in the United States the liability of land for sale on execution to pay debts depends on local statutes. The operation of the common law with reference to the extent of debts of a deceased upon his lands was even more restricted. Title to a fee simple passed immediately upon death to the heirs. Such title could not be divested to pay debts except debts of the crown and staples. n106 So again special legislation is necessary to divest the heir's title to pay the ancestor's debts. Lacking procedure following the language of such statutes no court has jurisdiction over the subject matter of the land to divest the heir's title.

Nor except by statute can the owner of a "fee simple" divest his heirs of their expectancy by a postmortem alienation. The earlier postmortem alienation died with feudalism which required livery of seizin. n107

The history of the development of the law of wills is elsewhere herein traced. But though it is commonly stated that heirs have a mere "expectancy" which is not an estate in land or even a right, n108 yet upon the death of the owner of a fee simple title to the real estate passes by law to his "heirs" unless the deceased has transferred it to another by a will complying with all of the statutory requirements. There is no such thing as a "common law" or even a "substantially

correctly executed" will. n109

At the very beginning the estate created by the words "et hereditibus suis" was comparable in modern parlance to a "determinable fee tail." It was entailed in the sense that the words "and his heirs" were words of purchase as well as of limitation, creating a present interest in the family in the fee. It ceased to be entailed or rather the entail could be broken when the warranty was developed as mentioned above. And since the consideration for the feoffment was the furnishing of feudal dues and reliefs the feoffee held of the feoffor subject to such performance. It was therefore a base fee and remained so until the Statute Quia Emptores Terrorium n110 converted it into a fee simple. n111

Where a base fee existed the feoffee did not take the entire estate. Instead, there remained in the feoffor a future right to the real estate arising whenever the feoffee or his successors failed to comply with the terms of the enfeoffment, or whenever the feoffee died without heirs. The base fee and the feoffor's remaining right were comparable to the modern determinable fee. Although initially the base fee operated for the benefit of the lord, through the passage of years it became a device for defeating the feoffor's rights. The feoffee could subinfeudate, creating a subbase fee under terms whereby the subfeoffee could avoid the harshness of some of the feudal reliefs such as wardship of the vassal's minor son. The compromise with the barons that led to the succession of Edward I resulted in the Statute Quia Emptores Terrorium "whereby the buyers of land," etc., n112 abolishing all future infeudations except to tenants *in capite* and thus preventing the creation of future base fees. Under this statute a feoffee no longer held of his feoffor, the feof did not terminate and thus the feoffor no longer retained a reversionary interest. In effect, the statute was the creator of the fee simple absolute since the feoffee acquired the feoffor's entire interest by way of substitution.

In England the statute probably put an end for centuries to the determinable fee. While the statute became part of the common law in most American jurisdictions, n113 it did not in this country prevent the creation of a determinable fee with its resultant possibility of reverter. Where it is recognized, it prevents the creation of any permanent charge upon or limitation over after a fee simple absolute in a third person. n114

Thus, while the statement is commonly made that the heir has no right or interest in land owned in fee simple, but a mere expectancy such is not an accurate concept. Rather, it is better to say, that the "owner" has the power to alienate inter vivos by a conveyance of a type recognized by the law of the jurisdiction, his creditors may levy upon the property to pay the "owner's" debts and have the land sold in the statutory manner or after death the creditors may realize upon the land again in a statutory manner, or the owner may by complying with the statute transfer the land by a postmortem instrument, but if the interest of the heirs are not cut off in such manners so contemplated by statute the heirs take title by operation of law and they cannot divest themselves of such title except, again, in a statutory manner. n115

FOOTNOTES:

(n1)Footnote 92. *People ex rel. Kuntsman v. Shinsaku Naguno, 59 N.E.2d 96 (Ill. 1945); Bill v. Town of Wells, 510 A.2d 509 (Me. 1986);* Arizona Center for Law in *Public Interest v. Hassell, 837 P.2d 158 (Ariz. App. 1991).*

(n2)Footnote 93. *See* Kenelm Edward Digby, An Introduction to the History of Real Property, 58, n.162, 165, n.11, (5th ed. 1897) citing 2 Bracton, c. 6, f. 17.

The Spanish crown in its early grants in "New Spain" followed this principle of limiting the duration of the fief to the life of the feoffee and his son with reversion to the crown. Wolf, Sons of the Shaking Earth, p. 191.

Later as the crown began to make inheritable grants, Spanish America swung into the feudal orbit epitomized by the hacienda system.

(n3)Footnote 94. Joshua Williams, Principles of the Law of Real Property (24th ed. 1933), 73; Bordwell, Common Law Scheme of Estates and the Remainder, *34 Iowa L. Rev. 401 (1949);* Percy Bordwell, Common Law Scheme of Estates and the "English Justinian," *33 Iowa L. Rev. 447 (1948).*

(n4)Footnote 95. Stephen Martin Leake, An Elementary Digest of the Law of Property in Land (2d ed. 1909), 22.

Williams, *Supra* note 93, at 156. This necessity of using the word heirs to mark out or limit an estate in fee seems to have been derived from the times before the alienation of land was freely permitted, when the tenant's heir was the only person who could succeed to his estate. As we have seen, a gift of land would then confer no fee, unless an intention were expressed that the donee's heir should succeed him. And though tenants in fee simple were afterwards enabled to dispose of their lands so as to defeat the expectation of their heirs, the liberty so gained was treated as incident to their estates. So that what remained essential, on the gift of a fee simple, was to use apt words to confer an hereditary estate, to which the law would annex the power of alienation. But it was not necessary, after the Statute of Quia Emptores, expressly to confer an assignable estate. And though in later times it became a common form to convey land to a purchaser to hold to him, his heirs and assigns forever, yet the word heirs alone gave him a fee simple, of which the law enabled him to dispose; and the remaining words and assigns forever had no conveyancing virtue at all; but were merely declaratory of that power of alienation which the purchaser would have possessed without them.

2 Bracton, c. 35, f. 81, indicates that the tenant could substitute another in his place of owing homage by transferring the inheritance. Another passage, c. 6, f. 17, gives rise to the possibility that additional words were necessary in the grant than "et hereditibus suis" before the donee could alienate, or at least before the donor's warranty was binding.

Digby, *Supra* note 93, however, felt in c. 3, § 11, 15, that by Bracton's time the donee could alienate freely without restraint of the heirs.

(n5)Footnote 96. 2 Blackstone, Commentaries, c. 1. *See* Sir Anthony Mildmay's Case. 6 Coke 41 and 2 Blackstone, Commentaries 116, to the effect that the factors of attainder for treason, liability for debts of ancestors and for alienation by ancestors originated as well as preserved De Donis.

(n6)Footnote 97. Littleton, Tenures, § I. Tenant in fee simple is he which hath lands or tenements to hold to him and his heirs forever. And it is called in Latin, feodum simplex, for feodum is the same that inheritance is and simplex is as much as to say, lawful or pure. And so feodum simplex signifies a lawful or pure inheritance. For if a man would purchase lands or tenements in fee simple it behooveth him to have these words in his purchase, To have and to hold to him and to his heirs: for these words (his heirs) make the estate of inheritance. For if a man purchase lands by these words, To have and to hold to him forever: or by these words, To have and to hold to him and his assigns forever: in these two cases he hath but an estate for term of life, for that there lack these words (his heirs), which words only make an estate of inheritance in all feoffments and grants.

Co. Litt., § 8b. Here Littleton treateth of purchases by natural persons, and not of bodies politic or corporate; for if lands be given to a sole body politic or corporate (as to a bishop, parson, vicar, master of an hospital, &c.), there to give to him an estate of inheritance in his politic or corporate capacity, he must have these words, To have and to hold to him and his successors' for without these words successors, in those cases there passeth no inheritance; for as the heir doth inherit to the ancestor, so the successor doth succeed to the predecessor, and the executor to the testator. But it appeareth here by Littleton, that if a man at this day give lands to I. S. and his successors, this createth no fee simple in him; for Littleton speaking of natural persons saith that these words (his heirs) make an estate of inheritance in all feoffments and grants, whereby he excludeth these words (his successors).

A made a deed to B for life, "and at her death the said plantation is to become the absolute property of my grandson." Held: the grandson took only an estate for life. *Gowdy v. Kelley, 194 S.E. 156 (S.C. 1937).*

(n7)Footnote 98. Littleton, Tenures, § 12 said: "Purchase is called the possession of lands or tenements that a man hath by his deed or agreement, unto which possession he commeth not by title of descent from any of his ancestors, or of his cousins, but by his owne deed." Coke, commenting on this section said (Co. Litt., § 8b) "A purchase is always intended by title, and most properly by some kind of conveyance either for money or some other consideration, or freely

of gift; for that is in law also a purchase. But a descent, because it commeth merely by act of law, is not said to be a purchase....And so it is of an escheate or the like, because the inheritance is cast upon, or a title vested in the lord by act in law, and not by his own deed or agreement, as our author here saith. Like law of the state of tenant by the curtesie, tenant in dower, or the like. But such as attaine to lands by meere injury or wrong, as by disseisin, intrusion, abatement, usurpation &c. cannot be said to come in by purchase, no more than robbery, burglarie, pyracy, or the like, can justly be termed purchase."

(n8)Footnote 99. Littleton, Tenures, § 697.

D'Arundel's Case, Bracton N. B. 1054, 1225. Radulf the son of Roger sought against William of Arundel five acres of land in Trelley, three acres in Treberned, two acres in Tredeiset and one acre in Hendrie and their appurtenances of which Roger his father was seized in law and in feudal services in the time of Lord Henry the King, and which descended from Roger by the law of the land to this same Radulf as his son and heir.

And William came and defended his right, and said that the same Roger, the father, conveyed with quiet enjoyment all the land and its appurtenances to William, the father of William, in the King's Court all his right and inheritance therein; to William and his heirs solely and free from himself and his heirs forever, and offered a deed of Roger by which these things were attested.

And Radulf came and admitted the deed of his father and covenant of quiet enjoyment, but asked judgment whether his father could convey all the land which he held by military tenure, retaining no service to himself and his heirs.

And since Radulf admitted his father's deed and it was attested by the deed that his father Roger conveyed all his land and warranted quiet enjoyment from him and his heirs, it was adjudged that William should go in peace and Radulf be in mercy.

(n9)Footnote 100. D'Arundel's case, Bracton N. B. 1054, 1225, is the first known instance of alienation of a fee free from the heir's consent. *See* Jacob J. Rabenowitz, *The Origin of the Common Law Warranty of Real Property and of the Inchoate Right of Dower, 30 Cornell L. Q. 77 (1944).*

(n10)Footnote 101. Theodore F. T. Plucknett, Concise History of Common Law (5th ed.), 528, 529. *See* S.J. Bailey, Warranties of Land in the Thirteenth Century, *8 Camb. L.J. 274 (1944).*

2 Bracton, c. 6, f. 17 indicates that alienation was known at that time. "Habendum et tenendum tali et hereditibus suis vel cui terram illam dare vel assignare voluerit" in permitting the feoffor to make a warranty which ran to the advantage of the donee as well as to his heirs.

The right of alienation was confirmed but not created by Quia Emptores, 18 Edw. I, c. 1 since De Donis, 13 Edw. I, c. 1 by its preamble shows that De Donis was intended to restrict the free use of alienation. Magna Charta itself contained language which can be interpreted as restraining alienation.

(n11)Footnote 102. 3 William S. Holdsworth, A History of English Law, 75, and 2 Pollock & Maitland, *Supra*, note 14 at 307, felt that the power of the heir to prevent alienation passed out of existence in the thirteenth century in the wake of primogeniture. *See* § 1846.

(n12)Footnote 103. *11 Edw. 1*, followed by 13 Edw. I, stat. 3.

(n13)Footnote 104. 27 Edw. III, c. 2. By statute of 13 Edw. I, c. 1 8, one-half of a man's lands could be taken to satisfy his debts. Even a staple was not a charge upon devised land.

(n14)Footnote 105. 13 Edw. I, c. 18. Westminster II, c. 18. See Plucknett, *Supra*, note 101 at 148 and Ind. Code,

34-1-39-1, requiring that on an execution sale of lands, the rents, issues and profits for seven years be first offered before the fee can be sold.

The concept of the Writ of Elegit was preserved in the Pennsylvania Code and in the Northwest Territory ordinance.

(n15)Footnote 106. The heir was liable for the ancestor's debts at early common law though the land could not be taken in execution. Co. Litt. 2 Bullers Notes, § 19bn.(A).

By the time of Edward I the heir of a tenant in fee simple was liable to satisfy specialty debts of the ancestor to the extent of the ancestor's property. Williams (17th ed.), 87.

In London and in many ancient boroughs there were local customs which permitted lands to be devised. Challis, Real Property (3rd ed.), 226.

(n16)Footnote 107. There is a record of a devise of land as late as 1241. 2 Pollock & Maitland, 27.

(n17)Footnote 108. As to the power of the legislature to alter an "expectancy." *See* Vol. 5, § 2406.

At common law an expectancy not being a right could not be alienated voluntarily or involuntarily. This concept is, however, changing, *see* Vol. 5, § 2406.

(n18)Footnote 109. Under the statute of wills following the idea of the power of appointment by means of a use (Vol. 5A. § 2405) the will was a muniment of title like a deed and was not probated as was a testament of personalty, but was proven in a law suit. In some states today, however, a will does not pass a title to realty or personalty until probated, *see* Ind. Code. 29-1-7-24. Model Probate Code § 85. In such instances the heir takes title until such title is divested through the timely probate of a valid will.

(n19)Footnote 110. 18 Edw. I, c. 1, St. Westm. III (1920). Forasmuch as purchasers of lands and tenements of the fees of great men and other lords have many times heretofore entered into their fees, to the prejudice of the lords, to whom the freeholders of such great men have sold their lands and tenements to be holden in fee of their feoffors and not of the chief lords of the fees, whereby the same chief lords have many times lost their escheats, marriages, and wardships of lands and tenements belonging to their fees, which thing seems very hard and extreme unto those lords and other great men, and moreover in this case manifest disheritance, our lord the king in his Parliament at Westminster after Easter, the eighteenth year of his reign, that is to wit in the quinzine of Saint John Baptist, at the instance of the great men of the realm granted, provided, and ordained, that from henceforth it shall be lawful to every freeman to sell at his own pleasure his lands and tenements or part of them, so that the feoffee shall hold the same lands or tenements of the chief lord of the same fee, by such service and customs as his feoffor held before.

Ch. 2. And if he sell any part of such lands or tenements to any, the feoffee shall immediately hold it of the chief lord, and shall be forthwith charged with the services for so much as pertaineth or ought to pertain to the said chief lord, for the same parcel, according to the quantity of the land or tenement so sold; and so in this case the same part of the service shall remain to the lord, to be taken by the hands of the feoffee, for the which he ought to be attendant and answerable to the same chief lord according to the quantity of the land or tenement sold for the parcel of the service so due.

Ch. 3. And it is to be understood that by the said sales or purchases of lands or tenements, or any parcel of them, such lands or tenements shall in no wise come into mortmain, either in part or in whole, neither by policy nor craft, contrary to the form of the statute made thereupon of late. And it is to wit that this statute extendeth but only to lands holden in fee simple and that it extendeth to the time coming. And it shall begin to take effect at the Feast of Saint Andrew the Apostle next coming.

The charter of Charles II to William Penn made Quia Emptores inoperative in Pennsylvania so far as it would affect any grants made by Penn. *See* Francis Newton Thorpe, Federal and State Constitutions, Colonial Charters and Other Organic Laws (1909), 3042.

The court in *Wallace v. Harmstad, 44 Pa. 492 (1863),* held that the American Revolution had abolished tenure in Pennsylvania. Despite this case which has never been overruled, "ground rent," which is a perpetual rent service, exists in Pennsylvania if created before 1885. Pa. Stat. Ann., tit. 65, § 161, 162.

(n20)Footnote 111. Digby, *Supra* note 93, at 234. It seems that before the passing of this Statute, where A held land in fee simple of B, A might have granted to C the whole of those lands to be held of B; and such a grant would operate to create a tenancy between C and B. This relation, however, could not at the common law (that is, independently of the Statute presently to be mentioned) have been effected by a grant by A to C of part of the lands held by A. At common law, a feoffment made by A to C of a portion of his lands would in every case have created anew the relation of lord and tenant, with all the incidents attaching to that relation, as between A and C. In this case there would be no immediate relation of lord and tenant between the chief lord and C. The advantageous rights of the lord over the land would consequently be diminished. The land thus aliened would not escheat to the chief lord on the failure of the heirs of the alienee, nor would the lord be the guardian of the lands or of the body of the heir.

To preserve these rights it was in the eighteenth year of Edward I enacted that every alienation in fee simple, whether of the whole or of a part of the land, should have the effect of substituting the alienee for the alienor in relation to the chief lord; the alienee simply stepping into the place of the alienor, and being subject to all the duties and obligations under which he held the land of his lord. The primary object of this enactment was to prevent the loss arising to the lords of manors from subinfeudation, or subdivision of the tenements held of them. Consequently, whenever at the present day a freehold tenant in fee simple holds of a mesne lord, the separation of the freehold from the domain must have occurred at a date anterior to the eighteenth year of Edward I. From this time forward every alienation of land in fee simple presents the characteristics of a complete out and out transfer, the transferee stepping for all purposes into the place of the transferor.

(n21)Footnote 112. 18 Edward I.

1. Forasmuch as purchasers of lands and tenements of the fees of great men and other lords have many times heretofore entered into their fees, to the prejudice of the lords, to whom the freeholders of such great men have sold their lands and tenements to be holden in fee of their feoffors and not the chief lords of the fees, whereby the same chief lords have many times lost their escheats, marriages, and wardships of lands and tenements belonging to their fees, which thing seems very hard and extreme unto those lords and other great men, and moreover in this case manifest disheritance, our lord the king in his parliament at Westminster after Easter the eighteenth year of his reign, that is to wit in the quinzine of Saint John the Baptist, at the instance of the great men of the realm granted, provided, and ordained, that from henceforth it should be lawful to every freeman to sell at his own pleasure his lands and tenements or part of them, so that the feoffee shall hold the same lands or tenements of the chief lord of the same fee, by such service and customs as his feoffor held before.

2. And if he sell any part of such lands or tenements to any, the feoffee shall immediately hold it of the chief lord, and shall be forthwith charged with the services for so much as pertaineth or ought to pertain to the said chief lord, for the same parcel, according to the quantity of the land or tenement so sold; and so in this case the same part of the service shall remain to the lord, to be taken by the hands of the feoffee, for that which he ought to be attendant and answerable to the same chief lord according to the quantity of the land or tenement sold for the parcel of the service so due.

3. And it is to be understood that by the said sales or purchases of lands or tenements, or any parcel of them, such lands or tenements shall in no wise come into mortmain, either in part or in whole, neither by policy nor craft, contrary to the form of the statute made thereupon of late. And it is to wit that this statute extendeth but only to lands holden in

fee simple, and that it extendeth to the time coming. And it shall begin to take effect at the Feast of Saint Andrew the Apostle next coming.

(n22)Footnote 113. Carma Developers (California) Inc. v. Marathon Development Quia Emptores became part of the American common law. *Van Rensselaer v. Hays, 19 N.Y. 68 (1859), 75 Am. Dec. 278.*

Pennsylvania, South Carolina and Nebraska have held contra. But; Nebraska has reached the same result by abolishing tenure statute. *In re O'Connor's Estate, 252 N.W. 826 (Neb. 1934). California, Inc., 6 Cal. Rptr. 2d 467 (1992).*

(n23)Footnote 114. Estate upon condition of paying annual rents. Digby, c. 5, § 3(2). 2 Blackstone, Commentaries 154.

(n24)Footnote 115. Williams *Supra* note 94, 66 Laurengen, Only God Can Make an Heir.

"Heirs" is a word of limitation, not of purchase. *Estate of Sykes, 383 A.2d 920 (Pa. 1978).*

* This chapter is based in part on Ch. 30, George W. Thompson, Commentaries on the Modern Law of Real Property (John S. Grimes ed. 1979), which made a significant contribution toward preserving the American common law governing the fee simple absolute.

Thompson on Real Property, Thomas Editions

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CHAPTER 17 FEE SIMPLE ABSOLUTE *

2-17 Thompson on Real Property, Thomas Editions § 17.04

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§ 17.04 The Power of Disposition as Essential to Fee Simple.

[Go To Supp]

Where there is a grant or devise of an interest in land coupled with a power of disposition with or without a limitation over, two general types of problems arise. First, what weight should be given to the indication that by the gift of the power it was intended that the first taker should have a fee? And, second, is the power of disposition or alienation so integral a part of a fee simple absolute that the limitation over is void for repugnancy? n116 A test whether a fee passes under a devise is to ascertain from the will whether there is provided an unlimited power of disposal. n117

Where the power of disposition is coupled with ambiguous dispositive language the result may be either (a) a life estate with remainder over, contingent or vested subject to divesting, (b) a fee simple defeasible n118 with an executory limitation over, or (c) a fee simple absolute with the purported limitation over, void for repugnancy. n119

The mere existence of a limitation over if a power of disposition is not exercised or if all of the estate is not consumed will not of itself reduce to a life estate what otherwise would be a fee. n120 An indefinite or general power of disposition of real estate generally carries with it a fee unless the donee by express words is given a life estate only. n121 Although an express power of disposition is not necessary to give a fee in a devise. n122 It has been held that where a devise to a person generally or indefinitely has been given, with a power of disposition, it carries a fee except where the testator gives to the first taker an estate for life only, by certain and express words, and annexes to it a power of disposal. n123

It would seem that where the power of disposition is limited, a fee does not vest. n124 If the life tenant with power of disposition does not exercise the power, both the life estate and the remainder over are unaffected by the power. n125 It is held that a devise of the full use and control of land passes a fee, so that a provision against disposition, unless it becomes necessary for support, is ineffective. n126

Even an implied limitation on a power of disposition given to a life tenant will prevent such power from operating to enlarge the life estate into a fee. n127 In some states, it is held that a life tenant to whom there is given a power of absolute disposition takes a fee, although there is a devise to others of the residue of the property not consumed. n128

Under the statute of Alabama, it is held that a fee simple does not pass to the grantee under a deed giving the grantee a life estate with power to sell and convey while living. n129 A power of sale in a mortgage without words of inheritance does not operate to give the mortgagee an estate in fee, at least before the power is executed. n130 The mere fact that the permanent and exclusive use of land is essential to the enjoyment of a right granted therein is not sufficient to operate as a conveyance in fee. n131

By a devise to a person generally, or indefinitely, with a power of disposition, the fee ordinarily passes to the devisee, n132 and a deed to a person without words of limitation, but with an unlimited power of disposal, vests an absolute fee. n133 A devise in general terms, clothing the devisee with absolute power of disposition, and with no subsequent limitation over of what remains at the devisee's death to other persons, is a devise in fee. n134

A devise to an executor to dispose of property as he sees fit is an absolute gift, not a mere general power of disposition. n135

In some jurisdictions, it is held that even "an absolute power of disposal is not inconsistent with an estate for life only. The gift of such power will not enlarge the life estate previously given, but confers authority in addition thereto. One may have a life estate and yet be empowered to convey an estate in fee simple." n136 A devise of life estate with power of distribution does not create a fee simple. n137 A life estate coupled with a power given the devisee to dispose of the property by will does not enlarge the life estate into a fee. n138 The reason for the rule is that the right of testamentary disposition is a mere power, and nothing passes under the clause of the will conferring the power unless it is exercised. n139 Devise of life estate with power of distribution does not create a fee simple. n140

In Texas a gift with power of disposition with limitation over gives the first taker a "conditional fee" n141 and the limitation over is valid as to property not disposed of at date of death.

Under the weight of authority a fee coupled with an absolute power of disposition is a fee simple absolute n142 and any attempted limitation over is void for repugnancy. n143 Where an estate is given to a person generally or indefinitely, with a power of disposition, it carries a fee, and any limitation over is void for repugnancy. n144 When real estate is given absolutely to one person, with a gift over to another of such portion as may remain undisposed of by the first taker at death, the gift over is void, as repugnant to the absolute estate first given, n145 and it is also established law that, where an estate is given to a person generally or indefinitely, with a power of disposition, it carries a fee, and any limitation over is void for repugnancy. n146 Devise to wife and daughter and their descendants did not create a future interest in the descendants. n147

COMPUTER-ASSISTED RESEARCH

LEXIS: power w/2 disposition w/30 life estate or fee simple defeasible or fee simple absolute

FOOTNOTES:

(n1)Footnote 116. *Randall v. Estes, 218 S.W.2d 338 (Tex. Civ. App. 1949); Noe v. Moseley, 36 N.E.2d 240 (Ill. 1941).*

(n2)Footnote 117. *Leonard v. Dillard, 359 S.E.2d 497 (N.C. App. 1987); Collings v. Collings' Ex'rs, 260 S.W.2d 935 (Ky. 1953).*

(n3)Footnote 118. *Snider v. Wood, 531 So. 2d 864 (Ala. 1988).*

(n4)Footnote 119. *Loehr v. Kincannon, 834 S.W.2d 445 (Tex. App. 1992).*

(n5)Footnote 120. *Langille v. Norton, 628 A.2d 669 (Me. 1993).*

(n6)Footnote 121. *Sterner v. Nelson, 314 N.W.2d 263 (Neb. 1982).* "Subject to life estate in grantor" conveyed fee simple in remainder. *Saltzman v. Ahern, 306 So. 2d 537 (Fla. App. 1975).*

(n7)Footnote 122. *Sterner v. Nelson, 314 N.W.2d 263 (Neb. 1982).*

(n8)Footnote 123. *Mangum v. Wilson, 70 S.E.2d 19 (N.C. 1952).*

(n9)Footnote 124. *Smith v. Smith, 62 S.E.2d 347 (W. Va. 1950).*

(n10)Footnote 125. *Gaylord v. Goldblatt, 423 So. 2d 203 (Ala. 1982).*

(n11)Footnote 126. *Schwren v. Falls, 87 S.E. 49 (N.C. 1915).*

(n12)Footnote 127. *Walker v. Sturgis, 198 N.E.2d 131 (Ill. App. 1964).*

(n13)Footnote 128. *Snider v. Wood, 531 So. 2d 864 (Ala. 1988).*

(n14)Footnote 129. *Gentle v. Frederick, 174 So. 606 (Ala. 1937).*

(n15)Footnote 130. *Sedgwick v. Laflin, 10 Allen (92 Mass.) 430 (1865).*

(n16)Footnote 131. *Munro v. Meech, 54 N.W. 290 (Mich. 1893).*

(n17)Footnote 132. *State v. Akron Exchange State Bank, 49 N.E.2d 344 (Ind. 1943); Poindexter v. Wachovia Bank and Trust Co., 128 S.E.2d 867 (N.C. 1963).*

(n18)Footnote 133. *Seifert v. Sanders, 358 S.E.2d 775 (W. Va. 1987); Weiss v. Broadway Nat'l Bank, 322 S.W.2d 427 (Tenn. 1959).*

(n19)Footnote 134. *Disabled Am. Vet. v. Mullin, 773 S.W.2d 408 (Tex. App. 1989).*

(n20)Footnote 135. *Weiss v. Broadway Nat'l Bank, 322 S.W.2d 427 (Tenn. 1959).*

(n21)Footnote 136. *Tax Comm'n v. Oswald, 141 N.E. 678 (Ohio 1923).*

(n22)Footnote 137. *Keener v. Korn, 264 S.E.2d 829* (N.C. App.), *rev. denied, 301 N.C. 92 (1980).*

(n23)Footnote 138. *Thomason v. Hellams, 103 S.E.2d 324 (S.C. 1958).*

(n24)Footnote 139. *Brant v. Virginia Coal and Iron Co., 93 U.S. 326 (1876); DeCharette v. St. Matthews Bank and Trust Co., 283 S.W. 410 (Ky. 1926).*

(n25)Footnote 140. *Keener v. Korn, 264 S.E.2d 829* (N.C. App.), *rev. denied, 301 N.C. 92 (1980).*

(n26)Footnote 141. *McClure v. Bailey, 209 S.W.2d 671 (Tex. Civ. App. 1948).*

(n27)Footnote 142. *Voigt v. Selander, 58 S.E.2d 25 (Va. 1950).*

(n28)Footnote 143. *Sterner v. Nelson, 314 N.W.2d 263 (Neb. 1982).*

(n29)Footnote 144. *Id.*

(n30)Footnote 145. *Mulvane v. Rude, 45 N.E. 659 (Ind. 1896).*

(n31)Footnote 146. *Sterner v. Nelson, 314 N.W.2d 263 (Neb. 1982).*

(n32)Footnote 147. *Bradford v. Federal Land Bank of New Orleans, 338 So. 2d 388 (Miss. 1976).*

* This chapter is based in part on Ch. 30, George W. Thompson, Commentaries on the Modern Law of Real Property (John S. Grimes ed. 1979), which made a significant contribution toward preserving the American common law governing the fee simple absolute.

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CHAPTER 17 FEE SIMPLE ABSOLUTE *

2-17 Thompson on Real Property, Thomas Editions § 17.05

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§ 17.05 Restrictions Against "Debasing a Fee."

[Go To Supp]

Whenever an instrument of transfer of an interest in property contains language indicating the reason for the transfer, a question always arises as to whether the grantor intended a defeasible fee, a mere easement or a fee simple absolute with a covenant, or whether the language was merely surplusage. Where one desires to transfer property or an interest therein to another but to limit the use thereof, one may do so by establishing one of several legal situations. In the instrument of transfer, deed or will, if the creator transfers a fee simple absolute, he may merely express a wish as to the proper use. Such precatory language has no legal effect on the transferee. Its persuasiveness is purely of a moral nature. n148 Or the transferor may create a covenant which upon acceptance by the transferee, creates a contract between him and the transferor, bringing damages for breach and invoking the aid of equity through injunctions or specific performance. n149 Or by the proper language the transferor may create a fee simple determinable in the transferee, the fee determining when the intended use ceases. n150 The transferor may also effect a fee upon condition subsequent or a fee subject to a conditional limitation; or the effect of the language used may be to create a right-of-way, n151 an easement, n152 or a mere license rather than a fee, or in some cases a life estate. Or the language may give rise to a trust, a lien or a charge upon the land.

So a deed to a city which provided that the land was always to be used as public property was held a conveyance in trust for a public purpose, and not a condition subsequent. n153

A gift in fee simple may be cut down by subsequent language which reduces the quantum of the estate granted. n154

A provision in a deed that it is made upon a money consideration, and a further consideration that the grantee shall do certain things, or that certain use shall be made of the property does not impose a condition and does not create an estate upon condition subsequent. n155

If the deed or will creates a fee, a mere statement of the purpose of the grant or devise is not sufficient to reduce the fee simple absolute to a determinable fee, n156 an easement, n157 nor to a fee upon condition subsequent. n158 A statement of purpose will not alone "debase" a fee. n159

When the purpose is public and general and does not inure especially to the benefit of the grantor, no condition is created, though such in form, in the absence of an express reservation of a right to re-enter on a failure of the grantee to use the land in the manner provided. n160 The language will not be implied to raise a condition if the instrument does not indicate an intent that the grant is to be void if the declared purpose is not fulfilled, particularly if it indicates that a trust should be caused instead. n161 Thus, a conveyance of land for a valuable consideration, in trust for the use of the inhabitants of a county, to accommodate the public service of the county, was held not to be defeated on a sale and conveyance by the vendees, whereby the use for the public service ceased. n162 So, where a conveyance was made to a county in fee simple, for the purpose of erecting thereon a courthouse, jail and county offices, and the county was subsequently divided, the seat of justice moved therefrom, the land sold and used for other purposes, and the proceeds thereof divided between the two counties, it was held that the title did not revert to the heirs of the original owners. n163 It is generally held that a deed which limits the use to which the land conveyed may be put does not, without more, create a conditional fee or work a forfeiture if put to another use. n164 Where a deed to real property recites a particular use to which the property is to be put without words of forfeiture, no condition subsequent is thereby created, but the provision creates a covenant. n165 Minuteness of direction concerning the administration of property conveyed to a public use is insufficient to take the case out of the rule that the mere expression of a purpose or particular use to which property is to be appropriated will not make the estate a conditional one. n166 However, every owner of property has the legal right to dispose of the estate, either absolutely or conditionally, or to regulate the manner in which the estate shall be used and occupied as the owner may deem best and proper, and if the conditions and restrictions imposed are not subversive of public interest they will be enforced. n167 As said in the Duke of Norfolk's Case, n168 words "eo intentione" do not make a condition, but a confidence and trust. As creating a trust or covenant they may, if properly expressed, be enforced, but not as creating a condition. Thus, the words expressing the purpose of a grant to be "for a burying-place forever" may be sufficient to raise a trust for that purpose, but they are too equivocal to create a condition subsequent. Such a condition will not be raised by inference or implication merely. n169 A deed of land to be used for certain purposes only, which also provides that, if it is used for other purposes, a stipulated sum shall be paid the grantor in addition to the original consideration, creates a condition which is discharged by payment or tender of such sum. n170

A deed for public purposes was held a covenant and not a condition, there being no words for defeasance. n171 Where lands are conveyed to a county or city for municipal purposes, the absolute title thereto passes, though the deed recites that it is to be used for a specified public purpose. n172 Thus, where the land was deeded to a city to be used as a burying ground and there was no intention shown that the title should revert to the grantor in case any other use was made thereof, there was no condition subsequent. n173 Where, however, the declared purpose for which the property shall be used is a matter that will inure specially to the benefit of the grantor, the courts are more inclined to treat the conveyance as conditional than when the use is for the benefit of the public at large. n174 A deed conveying land to a village may prescribe the terms on which the village shall hold the property, and a breach of the terms may give rise to a right of re-entry by the grantor or his heirs. n175

Where, however, an estate is conveyed in fee for a specified purpose and no other, the fee is a base fee, determinable upon the cessation of the use of the property for that purpose. n176 A gift for church purposes only was held to be a fee simple upon condition subsequent. n177 And, of course, the specific provision that the transferee shall hold title as long as a certain use is continued or until a use is discontinued or started or on condition that a certain use be or not be instituted or with a limitation over upon cessation or beginning of a stated use will give rise to a fee simple determinable upon condition subsequent or subject to a conditional limitation respectively. n178

A different rule applies as to devises for purposes declared, for it is held that the testator's words expressing intention in making the devise or the purpose for which the testator makes it may create a conditional estate. The same words used by a grantor in a deed would not make a condition unless the grant is purely voluntary, and there is no other consideration moving the grantor or donor besides the purpose for which the estate is declared to be created. n179 Thus, a devise by a testator to his wife for her life with remainder over to another, provided that such other live with his wife

until her death, was held to create a remainder on condition precedent. n180

It has been held that where the declared purpose for which the property shall be used is a matter that will inure to the special benefit of the grantor the conveyance is conditional. n181 If the declared purpose of a conveyance, be such that it will inure especially to the benefit of the grantor, the grant may be void if the declared purpose is not fulfilled. n182

If the purpose for which a conveyance is made, or the land conveyed is to be used, is declared in the form of an express condition, especially if a provision for a reverter in case it is not so used is added, the property will revert upon breach of the condition, as where the proviso was that a schoolhouse should be erected upon the land; n183 or where a grant was made to trustees to build a house of worship, to hold as long as they should so use it and no longer; n184 or that the land should be used as a site for a courthouse; n185 that the grantee's husband should accept the conveyance and live upon the land conveyed, making it a home for his family; n186 that a grantee for life shall occupy the granted land; n187 that a railroad station should be permanently located upon the land; n188 that the land should be used as a burial ground; n189 that it should be for certain specified uses of a religious society, and for no other use whatever; n190 or that a building for municipal purposes should be erected within a time specified. n191

Statements of purpose in a conveyance to railroad companies, however, may limit the deed to an easement only. n192 The limitation of the use of the property may indicate an easement rather than a condition. Thus, a conveyance to a plank-road company, "for the use of a plank road," was held to create an easement, and the principal reasons assigned for so holding were that the land conveyed was a strip through the grantor's entire farm, that the grantee was already in occupation of the premises, that the only possible use to which it could put the premises was for its road, and that the consideration expressed in the deed was grossly inadequate for a grant in fee. n193 A deed conveying, for a stated consideration, "strip of land for road purposes," and "excepting and reserving the use and possession thereof so long as the grantor shall live, then full possession shall pass to the grantee; and the said grantor hereby warrants the title to said premises against the lawful claims of all persons whomsoever," was held to convey an easement only and not the fee. n194 An easement was clearly created where the conveyance expressly declared, not only that the land was deeded for use as an alley, but also that the grant should be null and void whenever the premises ceased to be kept for this purpose. n195 An easement is also created by a conveyance of a right-of-way to a railroad company for a nominal consideration, although the grant is expressed to be upon condition that the land shall be used for railroad purposes only, and that, if it shall cease to be used for such purposes, it shall revert to the grantor. n196 Words describing the purpose for which a conveyance is made are frequently limitations upon the use that is to be made of the property and not conditions upon which it is to be held, unless there are apt words of condition or an express provision for a reverter. n197 A provision in a deed, expressed as a condition, that the grantee and his heirs shall allow the grantor and his heirs free access with teams to and from the waters of Hempstead harbor by the road now and heretofore used through his land, does not constitute a condition subsequent, but annexes the right-of-way as an easement to the land of the grantor, and is an exception or reservation in his favor. n198 Where one, for a nominal consideration, conveyed land to a city "to be forever held and used as a public park," it was held that the city acquired a qualified and not an absolute fee in the land, and could be restrained from using the land for any other purpose. n199 A provision in a deed that the grantee should convey to the grantor the same right-of-way over a certain conveyed lot as the grantor had over another lot created a right-of-way for the benefit of the grantor's land enforceable in equity, and not a condition subsequent. n200

Where a deed, after conveying a tract of land, described a narrow strip of land which was also conveyed, "for a road to and from said premises first above described," the question was whether, in view of this clause, the deed conveyed an absolute fee, a conditional fee or a mere easement in the strip of land described. This had to be determined from the language of the deed itself, unaided by anything else. The deed in terms conveyed, not an easement in the land, but the land itself, with an attempted restriction upon its use, if it be considered such, which is entirely consistent with the passing of the fee. There was nothing in the deed reserving to the grantor any use of, or dominion over, the land. The court held that these words of themselves were not sufficient either to limit the grant of the second tract to an easement or to create a condition subsequent. n201

Where there is no apparent motive for a condition, or no such interest exists in the grantor as demands the reservation of a condition, a clause which imports into the instrument a restriction or condition will be deemed as merely descriptive. n202

Where there is a condition as to use of land, a forfeiture does not arise where it is used for another purpose consistent with the stated purpose. n203 There must be such neglect to maintain a stated use as to indicate an intention not to comply with the terms of the condition as to institute a breach thereof. n204 Some courts, however, favor statements of purpose as showing mere rights-of-way. n205

COMPUTER-ASSISTED RESEARCH

LEXIS: restrict! or limit! or reduc! or purpose! w/30 debas! w/2 fee!

FOOTNOTES:
(n1)Footnote 148. *In re Farrington's Trust Estate, 42 Hawaii 640 (1958)* ("desire," "each," "request" and similar language are merely precatory); *Grover v. Wood, 60 N.W.2d 316 (Mich. 1953)* (desire that devisee devise to others did not debase the fee); *In re Moore's Will, 177 N.Y.S.2d 367 (1958)* (designation of purpose was merely precatory); *In re Krantz' Will, 178 N.Y.S.2d 537 (1958); Comford v. Cantrell, 151 S.W.2d 1076 (Tenn. 1941).*

Devise to A in fee subject to a trust in A for life gave A a fee simple which he could devise. *Barth v. Citizens Fidelity Bank & Trust Co., 368 S.W.2d 339 (Ky. 1963).*

Subsequent language does not reduce an absolute gift unless the intent is clear. *Boutelle v. Boutelle, 188 A.2d 559 (Md. 1963).*

Words adding a power to convey to words which create a fee do not debase the fee. *Shaw v. Wertz, 369 S.W.2d 215 (Mo. 1963).*

No defeasible estate arose upon language disposing of land for a stated purpose where the characteristic words of limitation or condition are missing and there is no provision for reacquisition. *Matter of Reiger's Estate, 400 N.Y.S.2d 881 (A.D. 1977).*

See Fratcher, Bequests for Purposes, *56 Iowa L. Rev. 773 (1971).*

(n2)Footnote 149. *Fordyce v. Woman's Christian Nat'l Library Ass'n, 96 S.W. 155 (Ark. 1906) 7 L.R.A. (N.S.) 485* (mere statement of purpose does not create condition); *Davis v. St. Joe School Dist., 284 S.W.2d 635 (Ark. 1955)* ("for school purposes only" was a covenant and did not create a determinable fee); *Allen v. Trustees of Great Neck Free Church, 193 N.E. 324 (N.Y. 1934)* (mere statement of purpose does not create condition). *See* Vol. 6 herein, on covenants for use of deeds.

(n3)Footnote 150. A deed providing that the land conveyed shall revert to the donor whenever it ceases to be used or occupied for a specified purpose creates a "determinable or qualified fee." *Connecticut Junior Republic Ass'n v. Litchfield, 174 A. 304 (Conn. 1934),* 95 A.L.R. 56; *North v. Graham, 85 N.E. 267 (Ill. 1909), 18 L.R.A. (N.S.) 624; Slegel v. Herbine, 23 A. 996 (Pa. 1892).*

In re Pruner's Estate, 162 A.2d 626 (Pa. 1960) (bequest for a particular purpose creates a determinable fee ending when the purpose terminates).

(n4)Footnote 151. Warranty deed "to be used for road purposes" gave only an easement. *Magnolia Petr. Co. v. West, 30 N.E.2d 24 (Ill. 1940). See* Vol. 2 herein.

See Comment, The Real Property Interest Created in a Railroad upon Acquisition of Its Right-of-Way, *27 Rocky Mt. L. Rev. 73 (1954).*

(n5)Footnote 152. Conveyance of a strip of land "to be used for road purposes" conveyed only an easement. *Magnolia Petr. Co. v. West, 30 N.E.2d 24 (Ill. 1940).*

A reference to a grant as a "right-of-way" conveyed only an easement. *Lillard v. Southern Ry., 330 S.W.2d 335 (Tenn. 1959).*

(n6)Footnote 153. *United States v. Certain Land in Cape Girardeau, 79 F. Supp. 558 (D. Mo. 1947).*

(n7)Footnote 154. *Farkas v. Calamia, 373 S.W.2d 1 (Mo. 1963).*

(n8)Footnote 155. *Majerus v. Santo, 10 N.W.2d 608 (Neb. 1943).*

Statement of purpose or motive is not a condition. *Rowell v. Gulf, M. & O.R.R., 28 So. 2d 209 (Ala. 1946); Gray v. Harriet Lane Home for Invalid Children, 64 A.2d 12 (Md. 1949); Shaw Univ. v. Durham Life Ins. Co., 53 S.E.2d 656 (N.C. 1949); Ange v. Ange, 71 S.E.2d 19 (N.C. 1952).*

(n9)Footnote 156. *Stuart v. Easton, 170 U.S. 383 (1898); Boylan v. Lillard, 174 F.2d 572 (10th Cir. 1949); Rowell v. Gulf, M. & O.R.R., 28 So. 2d 209 (Ala. 1946); Lynch v. Cypert, 302 S.W.2d 284 (Ark. 1957); Fitzgerald v. County of Modoc, 129 P. 794 (Cal. 1913); Boone Biblical College v. Forrest, 275 N.W. 132 (Iowa 1937),* 116 A.L.R. 67; *Light v. Third-Woodland Presbyterian Church, 311 S.W.2d 386 (Ky. 1958); Quinn v. Pere Marquette Ry., 239 N.W. 376 (Mich. 1931); Fuchs v. Reorganized Sch. Dist. 2, 251 S.W.2d 677 (Mo. 1952); Allen v. Trustees of Great Neck Free Church, 269 N.Y.S. 341 (1934); In re Krantz' Will, 178 N.Y.S.2d 537 (1958); Phillips Gas & Oil Co. v. Lingenfelter, 105 A. 888 (Pa. 1919), Abel v. Girard Trust Co., 73 A.2d 682 (Pa. 1950); Furman Univ. v. Glover, 83 S.E.2d 559 (S.C. 1954); Cf. Slegel v. Herbine, 23 A. 996 (Pa. 1892),* where a conveyance which was declared to be for a stated purpose, "and no other," was held to create a determinable fee. But if the conveyance declares not only the purpose, but also that there shall be a reverter in case such purpose is no longer being carried out, a determinable fee may be found. *North v. Graham, 85 N.E. 267 (Ill. 1908),* 624, *126 Am. St. 189; May v. Board of Educ., 12 Ohio App. 456 (1920).* As to Ohio law, *see further Matter of Copps Chapel Methodist Episcopal Church, 166 N.E. 218 (Ohio 1929), Schurch Harraman, 191 N.E. 907 (Ohio App. 1933).*

Prior expression of purpose does not of itself suffice to limit the estate conveyed. *Choctaw & Chickasaw Nations v. Board of Cty. Comm'rs, 361 F.2d 932 (10th Cir. 1966).*

Mere statement in deed of intended use did not create a fee simple determinable. *Selectmen of Town of Nahant v. United States, 293 F. Supp. 1076 (D. Mass. 1968).*

A provision in a deed stating "Subject to the restriction that the... real property shall be operated and maintained solely for park, recreational and public accommodation, and convenience purposes" was not sufficient to create a defeasible fee, but instead was a fee simple absolute. *City of Tempe v. Baseball Facilities, Inc., 534 P.2d 1056 (Ariz. App. 1975).*

(n10)Footnote 157. *Jackson v. Rogers, 54 S.E.2d 132 (Ga. 1949); Texas Elec. R. v. Neale, 252 S.W.2d 451 (Tex. 1952).*

(n11)Footnote 158. Thus a grant of land "for a burying-place forever" will not be construed as a grant on a condition subsequent where there are no words indicating an intent that the grant shall be void if the declared purpose is not fulfilled. *Rawson v. School Dist. No. 5, 7 Allen (89 Mass.) 125, 83 Am. Dec. 670 (1863).*

See the following cases: *Avery v. United States, 104 F. 711 (6th Cir. 1900); American Dirigold Corp. v. Dirigold Metals Corp., 125 F.2d 446 (6th Cir. 1942); Rowell v. Gulf, M. & O.R.R., 28 So. 2d 209 (Ala. 1946); Gramer v. Sacramento, 41 P.2d 543 (Cal. 1935); Scovill v. McMahon, 26 A. 479 (Conn. 1892), 21 L.R.A. 58; Adams v. Logan, 11 Ill. 336 (1849); Downen v. Rayburn, 73 N.E. 364 (Ill. 1905); Rockford Trust Co. v. Moon, 18 N.E.2d 447 (Ill. 1938); Noyes v. St. Louis, A. & T. H. R. Co., 21 N.E. 487 (Ill. 1889); Indianapolis, P. & C. R. v. Hood, 66 Ind. 580 (1879); Cleveland, C., C. & I. R. v. Coburn, 91 Ind. 557 (1883); Sumner v. Darnell, 27 N.E. 162 (1891), 13 L.R.A. 173; Ruggles v. Clare, 26 P. 25 (Kan. 1891); Louisville, H. & St. Louis R. Co. v. Baskett, 104 S.W. 695 (Ky. 1907); Kilpatrick v. Baltimore, 31 A. 805 (Md. 1895), 27 L.R.A. 643; Faith v. Bowles, 37 A. 711 (Md. 1897);* Stearns v. Palmer, 10 Met. (51 Mass.) 32 (1845); *Rawson v. School Dist. No. 5, 7 Allen (89 Mass.) 125 (1863); Episcopal City Mission v. Appleton, 117 Mass. 326 (1875); Farnham v. Thompson, 26 N.W. 9 (Minn. 1885); Miller v. Tunica, 7 So. 429 (Miss. 1890); Hand v. St. Louis, 59 S.W. 92 (Mo. 1900); Majerus v. Santo, 10 N.W.2d 608 (Neb. 1943); Newark v. Watson, 29 A. 487 (N.J. 1894); Lyon v. Hersey, 8 N.E. 518 (N.Y. 1886); Bigelow v. Barr, 4 Ohio 358 (1831); Miller v. Brookville, 89 N.E.2d 85 (Ohio 1949); Board of County Comm'rs v. Unknown Heirs, 87 N.E.2d 592 (Ohio Cem. Pl. 1947); Mickleson v. Gypsy Oil Co., 238 P. 194 (Okla. 1925); Keaton v. Oklahoma City, 102 P.2d 938 (Okla. 1940); Oklahoma City v. Local Fed. Sav. & Loan Ass'n, 134 P.2d 565 (Okla. 1943); Raley v. Umatilla County, 13 P. 890 (Or. 1887); Coffin v. Portland, 17 P. 580 (Or. 1888); Portland v. Terwilliger, 19 P. 90 (Or. 1888); Cook v. Trimble, 9 Watts (Pa.) 15 (1839); Union Canal Co. v. Young, 1 Whart. (Pa.) 410 (1836); Kirk v. King, 3 Pa. 436 (1846); Scheetz v. Fitzwater, 5 Pa. 126 (1847); Perry v. Scott, 51 Pa. 119 (1865); First M. E. Church v. Old Columbia Public Ground Co., 103 Pa. 608 (1883); Sapper v. Mathers, 133 A. 565 (Pa. 1926); Commonwealth ex rel. Bard v. Delaware Div. Canal Co., 1 A.2d 672 (Pa. 1938); Abel v. Girard Trust Co., 73 A.2d 682 (Pa. 1950); Loechel v. Columbia Borough School Dist., 85 A.2d 81 (Pa. 1952); Greene v. O'Connor, 25 A. 692 (R.I. 1892); Ecroyd v. Coggeshall, 41 A. 260 (R.I. 1898); Furman University v. Glover, 83 S.E.2d 59 (S.C. 1954); Huron v. Wilcox, 98 N.W. 88 (S.D. 1904); Nashville, C. & St. Louis R. v. Bell, 39 S.W.2d 1026 (Tenn. 1931); Gabert v. Olcott, 23 S.W. 985 (Tex. 1893); Hughes v. Gladewater County Line Ind. Sch. Dist., 76 S.W.2d 471 (Tex. 1934); Texas Elec. R. Co. v. Neale, 252 S.W.2d 451 (Tex. 1952); Boles v. Red, 227 S.W.2d 310 (Tex. Civ. App. 1950); Roadcap v. County School Board, 72 S.E.2d 250 (Va. 1952); Brown v. Caldwell, 23 W. Va. 187,* (1883); *Killgore v. Cabell County Court, 92 S.E. 562 (W. Va. 1917); Horner v. Chicago, M. & St. Paul R. Co., 38 Wis. 165 (1875); Polebitzke v. John Week Lumber Co., 147 N.W. 703 (Wis. 1914).*

See Restatement of the Law of Property, § 44, Comment, stating that "when a limitation merely states the purpose for which the land is conveyed, such limitation usually does not indicate an intent to create an estate in fee simple which is to expire automatically upon the cessation of use for the purpose named."

(n12)Footnote 159. *Ruch v. Rock Island, 97 U.S. 693 (1878); Rostell v. Arkansas & Ozarks R. Corp., 323 S.W.2d 539 (Ark. 1959)* (statements of purpose do not make a fee simple absolute defeasible); *Fitzgerald v. County of Modoc, 129 P. 794 (Cal. 1913), Basin Oil Co. v. Inglewood, 271 P.2d 73 (Cal. App. 1954); D. C. Burns Realty & Trust Co. v. City & County of Denver, 354 P.2d 150 (Colo. 1960); Warner v. Bennett, 31 Conn. 468 (1863); Thomson v. Hart, 66 S.E. 270 (Ga. 1909); Weihe v. Lorenz, 98 N.E. 268 (Ill. 1912)* (conveyance of strip of land "for alley purposes" conveys a fee); *Higbee v. Rodeman, 28 N.E. 442 (Ind. 1891); Fayette County Board of Education v. Bryan, 91 S.W.2d 990 (Ky. 1936); Hooper v. Cummings, 45 Me. 359 (1921); Phinney v. Gardner, 115 A. 523 (Me. 1921); Kilpatrick v. Baltimore, 31 A. 805 (Md. 1895)* 27 A.L.R. 643; *Faith v. Bowles, 37 A. 711 (Md. 1897); Hill v. Towson Realty, Inc., 157 A.2d 796 (Md. 1960); Rice v. Boston & W. R. Corp., 12 Allen (94 Mass.) 141 (1866); Chouteau v. St. Louis, 55 S.W.2d 299 (Mo. 1932); Fuchs v. Reorganized School Dist. No. 2, 251 S.W.2d 677 (Mo. 1952); Nicoll v. New York & E. R. Co., 12 N.Y. 121 (1854); In re Saulpaugh's Will, 180 N.Y.S.2d 623 (1958); Braddy v. Elliott, 60 S.E. 507,* (N.C. 1908); *Sapper v. Mathers, 133 A. 565 (Pa. 1926); Abel v. Girard Trust Co., 73 A.2d 682 (Pa. 1950); Peters v. East Penn Twp. School Dist., 126 A.2d 802 (Pa. 1956); Boles v. Red, 227 S.W.2d 310 (Tex. Civ. App. 1950); King County v. Hanson Inv. Co., 208 P.2d 113 (Wash. 1949); Killgore v. Cabell County Ct., 92 S.E. 562 (W. Va. 1917).*

Permitting subsequent words in a will to reduce a fee simple given by prior words. *In re Wraught's Estate, 32 A.2d 8 (Pa. 1943).*

(n13)Footnote 160. Thus, where land was conveyed to a city "on condition that it shall be forever kept open and used as a public highway, and for no other purpose," it was held that this clause merely declared the purpose of the conveyance, and was not a condition subsequent. "Such a declaration does not create an estate on condition, but merely imposes a confidence or trust on the land, or raises an implied agreement on the part of the grantee to use the land for the purpose specified. It matters not that the statement of the purpose for which the land was conveyed is in the form of a condition. The employment of apt words to create a condition does not necessarily and invariably have that effect, for these may give way to the intent of the party as ascertained by a construction of the instrument." *Greene v. O'Connor, 25 A. 692 (R.I. 1892).*

See the following cases: *Atlanta v. Jones, 69 S.E. 571 (Ga. 1910); Kilpatrick v. Baltimore, 31 A. 805 (Md. 1895); Soukup v. Topka, 55 N.W. 824 (Minn. 1893); Nicholson v. Myres, 154 So. 282 (Miss. 1934); Smith v. Incorporated Village of Patchogue, 129 N.Y.S.2d 422 (1954).*

Holding that the deed providing that the property should only be used for school purposes did not create a fee simple determinable lacking a specific reversion in language of the deed. *Cummings v. United States, 409 F. Supp. 1064 (M.D.N.C. 1976).*

(n14)Footnote 161. *Allen v. Macy, 10 N.E. 578 (Ind. 1887); Higbee v. Rodeman, 28 N.E. 442 (Ind. 1891); Board of Educ. v. Mill Creek Methodist Church South, 45 S.W.2d 1026 (Ky. 1932); Rawson v. School Dist. No. 5, 7 Allen (89 Mass.) 125 (1863); Ayer v. Emery, 14 Allen (96 Mass.) 67 (1867); Sohier v. Trinity Church, 109 Mass. 1 (1871); Episcopal City Mission v. Appleton, 117 Mass. 326 (1875); Holekamp Lumber Co. v. State Hwy. Comm'n, 173 S.W.2d 938 (Mo. 1943); Coffin v. Portland, 17 P. 580 (Or. 1888); Wilkes-Barre v. Wyoming Historical & Geological Soc'y, 19 A. 809 (Pa. 1890); Field v. Providence, 24 A. 143 (R.I. 1887); Greene v. O'Connor, 25 A. 692 (R.I. 1892); Horner v. Chicago, M. & St. Paul R. Co., 38 Wis. 165 (1875);* Where a devise was made to a religious society, "to be and to remain to the use and benefit of said society and their successors forever,... provided that said real estate be not hereafter sold or disposed of, but the same may be leased or let, and the annual rents or profits applied to the use and benefit of the society," the Supreme Court held that the estate was not a conditional one, and that the supposed conditions were to be regarded as mere "limitations in trust." *Stanley v. Colt, 5 Wall (72 U.S.) 119 (1867).*

A grant of land for religious purposes, or church purposes only, does not create a condition. *Baldwin v. Atwood, 23 Conn. 367 (1854); Downen v. Rayburn, 73 N.E. 364 (Ill. 1905); Schipper v. St. Palais, 37 Ind. 505 (1871); Carter v. Branson, 79 Ind. 14 (1881); Cook v. Leggett, 88 Ind. 211 (1882); Packard v. Ames, 16 Gray (82 Mass.) 327 (1860); Farnham v. Thompson, 26 N.W. 9 (Minn. 1885); Taylor v. Binford, 37 Ohio 262 (1881); Griffitts v. Cope, 17 Pa. 96 (1851); Brendle v. German Reformed Congregation, 33 Pa. 415 (1859); Strong v. Doty, 32 Wis. 381 (1873).*

A grant of land for a public square, or other public purpose, without an express condition. *Thornton v. Trammell, 39 Ga. 202 (1869); Scantlin v. Garvin, 46 Ind. 262 (1874); Warren v. Lyons, 22 Iowa 351 (1867); Wellington v. Wellington, 26 P. 415 (Kan. 1891); Flaten v. Moorhead, 53 N.W. 807 (Minn. 1892),* (provision was enforced as a restriction); *Wilkes-Barre v. Wyoming Historical & Geological Soc., 19 A. 809 (Pa. 1890).*

A grant for a railroad depot or station, or other specified purpose of the road. *Thornton v. Trammell, 39 Ga. 202 (1869); Noyes v. St. Louis A. & T. H. R. Co., 21 N.E. 487 (Ill. 1889); Morrill v. Wabash, St. L. & P. R. Co., 9 S.W. 657 (Mo. 1888).*

A grant of land to a county, upon the sole consideration that the county seat had been established in the town where the land was situated, does not create a condition upon which the land will revert to the grantor upon a removal of the county seat. *Adams v. Logan, 11 Ill. 336 (1849); Harris v. Shaw, 13 Ill. 457 (1851); Warren v. Patterson, 56 Ill. 111 (1870); Sumner v. Darnell, 27 N.E. 162 (Ind. 1891), Gadberry v. Sheppard, 27 Miss. 203 (1854); Poitevent v. Hancock, 58 Miss. 810 (1881); Miller v. Tunica, 7 So. 429 (1890); Kerlin v. Campbell, 15 Pa. 500 (1850); Gilmore v. Hayworth, 26 Tex. 89 (1861).*

A grant for a school, college, or a like institution, and for no other purpose, does not create a condition. *Heaston v. Randolph, 20 Ind. 398 (1863); Higbee v. Rodeman, 28 N.E. 442 (Ind. 1891); Curtis v. Board of Educ., 23 P. 98 (Kan. 1890); Newbold v. Glenn, 10 A. 242 (Md. 1887); Faith v. Bowles, 37 A. 711 (Md. 1897); Barker v. Barrows, 138 Mass. 578 (1885); Chouteau v. St. Louis, 55 S.W.2d 299 (Mo. 1932); Chapin v. School Dist. No. 2, 35 N.H. 445 (1857); Raley v. Umatilla County, 13 P. 890 (Or. 1887); Kirk v. King, 3 Pa. 436 (1846); Wilkes-Barre v. Wyoming Historical & Geological Soc'y, 19 A. 809 (Pa. 1890); Lawe v. Hyde, 39 Wis. 345 (1876).*

In *Newpoint Lodge v. Newpoint, 37 N.E. 650 (Ind. 1894),* it was held that a deed which "conveys and warrants" a parcel of land to a town "for the use of the common schools" passes the fee free from condition.

A grant of land to a city "as and for a street, to be kept as a public highway," does not create a condition subsequent so as to work a forfeiture in case the property is not maintained as a public street. *Kilpatrick v. Baltimore, 31 A. 805 (Md. 1895).*

A deed to the trustees of a church "in trust for said church, and for the sole use and behoof of the congregation" organized to build thereon and worship in said building, gives the grantor no right to object to a sale of the lot by the church to pay off a mortgage on a lot thereafter acquired for a church edifice. *In re United Presbyterian Church, 30 A. 1012 (Pa. 1895).*

A deed to the bishop of a Roman Catholic Church for the benefit of the church vests the complete legal title in the bishop. *Gabert v. Olcott, 23 S.W. 985 (Tex. 1893).*

Statement of purpose created merely a trust so that on condemnation the grantee and not the grantor took the award. Conditions subsequent are not favored. *United States v. Certain Land in Cape Girardeau, 79 F. Supp. 558 (D. Mo. 1947).*

(n15)Footnote 162. *Kerlin v. Campbell, 15 Pa. 500 (1889).*

Chief Justice Mercur said: "No restraint was imposed on an alienation of the land... No clause provided for a forfeiture or termination of the estate in case the land ceased to be used as a reservoir. No right of re-entry was reserved by the grantor on any contingency. No technical word to create a condition was used. No other words were used equivalent thereto, or proper to create a condition. The authorities show that the recital of the consideration, and a statement of the purpose for which the land is to be used, are wholly insufficient to create a conditional estate." *First M. E. Church v. Old Columbia Public Ground Co., 103 Pa. 608 (1883).*

(n16)Footnote 163. A deed of land for the sole use of a water company as a reservoir passes a title in fee simple, not determinable on the cessation of the use of the land for that purpose. *Seebold v. Shitler, 34 Pa. 133 (1859).* The Pennsylvania court has always adhered to the rule that "the mere expression of a purpose will not, of and by itself, debase a fee."

Nicholson v. Woodard, 114 S.E.2d 10 (Ga. 1960) (where the deed specified the use of the property for church and cemetery purposes the fact that it was used for cemetery purposes only did not cause the fee to terminate).

(n17)Footnote 164. *Fuchs v. Reorganized School Dist. No. 2, 251 S.W.2d 677 (Mo. 1952); Ange v. Ange, 71 S.E.2d 19 (N.C. 1952); Sapper v. Mathers, 133 A. 565 (Pa. 1926),* (rule applied in case of land conveyed for burial purposes only. The deed was considered as creating at most a limitation on the use of the property, but not on the title. The deed contained no forfeiture clause); *Furman University v. Glover, 83 S.E.2d 559 (S.C. 1954).*

(n18)Footnote 165. *Faust v. Little Rock School Dist., 276 S.W.2d 59 (Ark. 1955); Davis v. St. Joe School Dist., 284 S.W.2d 635 (Ark. 1955); Priddy v. School Dist. No. 78, 219 P. 141 (Okla. 1923).*

(n19)Footnote 166. *Mahoning v. Young, 59 F. 96 (6th Cir. 1893),* per Lurton, J.

(n20)Footnote 167. *Natural Prods. Co. v. Dolese & Shepard Co., 140 N.E. 840 (Ill. 1923)* (deeds containing restriction against quarrying stone).

The grantor may create a valid and enforceable condition subsequent by a voluntary conveyance of real estate for no consideration other than for the erection of a building thereon to be maintained for certain specified purposes and with a prohibition against the sale of intoxicating liquors in the building or upon the premises and providing for a forfeiture in case of breach of the conditions. *Ralston v. Hatfield, 143 N.E. 887 (Ind. App. 1924).*

A warranty deed to a county of a block of ground, reciting a consideration of $1.00, conditioned on the erection of a county courthouse on the block, and containing no express right of reverter, was held to impose a condition subsequent. *Brooks v. Kimball County, 256 N.W. 501 (Neb. 1934).*

In Pennsylvania the cases are not in accord as to whether the limitation of the use to the stated purpose creates a determinable fee. Determinable fee created. *Scheetz v. Fitzwater, 5 Pa. 126 (1847); Slegel v. Herbine, 23 A. 996 (Pa. 1892).* Fee simple absolute unless other determining words used. *Abel v. Girard Trust Co., 73 A.2d 682 (Pa. 1950).*

(n21)Footnote 168. Dyer 138b (1681).

(n22)Footnote 169. *Thornton v. Natchez, 129 F. 84 (5th Cir. 1904); Davis v. Jernigan, 76 S.W. 554 (Ark. 1903); First Presbyterian Church v. Bailey, 97 A. 583 (Del. 1916); Downen v. Rayburn, 73 N.E. 364 (Ill. 1905); Heaston v. Randolph, 20 Ind. 398 (1863); Hughes v. Miller, 175 S.W. 631 (Ky. 1915); Neely v. Hoskins, 24 A. 882 (Me. 1892); Kilpatrick v. Baltimore, 31 A. 805 (Md. 1895), Packard v. Ames, 16 Gray (82 Mass.) 327 (1860); Rawson v. School Dist. No. 5, 7 Allen (89 Mass.) 125,* (1863); *Thornton v. Natchez, 41 So. 498 (Miss. 1906); Bigelow v. Barr, 4 Ohio. 358 (1831); Wilkes-Barre v. Wyoming Historical & Geological Society, 19 A. 809 (Pa. 1890); Ecroyd v. Coggeshall, 41 A. 260 (R.I. 1898); Huron v. Wilcox, 98 N.W. 88 (S.D. 1904); Polebitzke v. John Week Lumber Co., 147 N.W. 703 (Wis. 1914).*

(n23)Footnote 170. *Board of Educ. v. First Baptist Church, 63 Ill. 204 (1872).*

(n24)Footnote 171. *Gordon v. Whittle, 57 S.E.2d 169 (Ga. 1950).*

(n25)Footnote 172. *Soria v. Harrison, 50 So. 443 (Miss. 1909); Ashuelot Nat'l Bank v. Keene, 65 A. 826 (N.H. 1907),* 758; *Freer v. Glen Springs Sanitarium Co., 115 N.Y.S 734 (1909); Ecroyd v. Coggeshall, 41 A. 260 (R.I. 1898); Huron v. Wilcox, 98 N.W. 88 (S.D. 1904).*

(n26)Footnote 173. *Thornton v. Natchez, 129 F. 84 (5th Cir. 1904); Gordon v. Whittle, 57 S.E.2d 169 (Ga. 1950).*

(n27)Footnote 174. *Downen v. Rayburn, 73 N.E. 364 (Ill. 1905).*

(n28)Footnote 175. *Scarborough Props. Corp. v. Briarcliff Manor, 16 N.E.2d 369 (N.Y. 1938).*

(n29)Footnote 176. *Hollins v. White, 287 S.W.2d 431 (Ky. 1956).*

(n30)Footnote 177. *Board of Trustees of Columbia Road Methodist Episcopal Church of Bogalusa v. Richardson, 44 So. 2d 321 (La. 1949).*

Contra, *Light v. Third-Woodland Presbyterian Church, 311 S.W.2d 386 (Ky. 1958)* ("for stated purposes and no other" do not affect fee simple absolute).

(n31)Footnote 178. *Indianapolis, P. & C. R. Co. v. Hood, 66 Ind. 580 (1879); Cleveland, C. C. & I. R. v. Coburn,*

91 Ind. 557 (1883); Horner v. Chicago, M. & St. Paul R. Co., 38 Wis. 165 (1875).

Where there is a statement of exclusive use as a purpose in a deed the question of whether full consideration was paid is determinative as to whether it created a fee simple determinable or fee simple absolute. *Davis v. St. Joe School Dist., 284 S.W.2d 635 (Ark. 1955).*

(n32)Footnote 179. *Laberee v. Carleton, 53 Me. 211 (1891); Bray v. Hussey, 22 A. 220 (Me. 1891); Rawson v. School Dist. No. 5, 89 Mass. (7 Allen) 125 (1863);* Portington's Case, 10 Coke 42a (1863); *In re Merritt's Estate, 46 N.Y.S.2d 497 (1944);* Duke of Norfolk's Case, Dyer 138b (1681).

(n33)Footnote 180. *Adams v. Johnson, 76 A. 174 (Pa. 1910). See Hill v. Purdy, 46 App. D.C. 495 (1917); Garrison v. Hill, 28 A. 1062 (Md. 1894).*

(n34)Footnote 181. *Downen v. Rayburn, 73 N.E. 364 (Ill. 1905); Gabert v. Olcott, 23 S.W. 985 (Tex. 1893).*

(n35)Footnote 182. Thus, where a strip of land adjoining the county jail was conveyed to a county in fee, to and for the uses and purposes following, to be and remain forever unbuilt upon, in order to prevent the escape of prisoners, the grantor reserved to himself "the free use of the premises so granted for an open yard, garden, or grass plot, with the rents, issues and profits." The object was to secure an open space adjoining the prison walls. This object was accomplished by a conveyance which, though it vested the fee, yet was so specific in defining the purpose for which the fee was conveyed, and so clear in reserving to the grantor the use of the premises subject to the space being kept open, that, although the deed contained no express clause of re-entry upon abandonment by the grantee, yet it was clear that the fee was a base or determinable one. It was accordingly held that the estate was determined on the removal of the prison to another site and the sale of the land, so that it ceased to be used for the purpose of a county jail. *Slegel v. Herbine, 23 A. 996 (Pa. 1892),* stated and approved by Lurton, J., in *Mahoning v. Young, 59 F. 96 (6th Cir. 1893):* "The case is authority only for the proposition that technical words importing an estate determinable upon a condition subsequent are not always essential, if the clear intent of the parties is shown by the whole scope of the instrument to be that the estate shall determine upon the cessation of the use defined." He also quotes Chief Justice Bigelow, in *Rawson v. School Dist. No. 5, 89 Mass. (7 Allen) 125 (1863),* who said: "We believe there is no authoritative sanction for the doctrine that a deed is to be construed as a grant on a condition subsequent solely for the reason that it contains a clause declaring the purpose for which it is intended the granted premises shall be used, where such purpose will not inure specially to the benefit of the grantor and his assigns, but is in its nature general and public, and where there are no other words indicating an intent that the grant is to be void if the declared purpose is not fulfilled." To like effect see *Gabert v. Olcott, 23 S.W. 985 (Tex. 1893),* Gaines, J., delivering the opinion, said: "When the declared purpose for which the property shall be used is a matter that will inure to the special benefit of the grantor, the courts are more inclined to treat the conveyance as conditional than when, as in this case, the use is for the benefit of a special class of persons, or of the public at large. In this case it does not appear that the maintenance of a church upon the lots was a matter specially advantageous to the railway company, who made the grant."

(n36)Footnote 183. *United States v. 2,086 Acres of Land, 46 F. Supp. 411 (W.D.S.C. 1942); Rosecrans v. Pacific Elec. R. Co., 134 P.2d 245 (Cal. 1943).*

Mott v. Danville Seminary, 21 N.E. 927 (Ill. 1889); Sherman v. Jefferson, 113 N.E. 624 (Ill. 1916); Price v. Virginia Iron, Coal & Coke Co., 188 S.W. 658 (Ky. 1916); Hayden v. Stoughton, 22 Mass. (5 Pick.) 528 (1827); Rowe v. Minneapolis, 51 N.W. 907 (Minn. 1892); Clarke v. Brookfield, 81 Mo. 503, (1884); *St. Joseph Lead Co. v. Fuhrmeister, 182 S.W.2d 273 (Mo. 1944); Wood v. Cheshire, 32 N.H. 421 (1855); Duester v. Alvin, 145 P. 660 (Or. 1915); Smith v. Glen Alden Coal Co., 32 A.2d 227 (Pa. 1943); Carpenter v. Graber, 1 S.W. 178 (Tex. 1886); Pepin Co. v. Prindle, 21 N.W. 254 (Wis. 1884).*

See Restatement of the Law of Property, § 45 Comment f, illustration 5, ss.

(n37)Footnote 184. *Grissom v. Hill, 17 Ark. 483 (1856); Spies v. Rome, W. & O. R. R., 15 N.Y.S. 348 (1891); Henderson v. Hunter, 59 Pa. 335 (1869).*

(n38)Footnote 185. *Brooks v. Kimball County, 256 N.W. 501 (Neb. 1934); Spies v. Rome, W. & O.R.R., 15 N.Y.S. 348,* (1891); *Pepin Co. v. Prindle, 21 N.W. 254 (Wis. 1884).*

(n39)Footnote 186. *Odell v. Cannon, 4 S.E. 558 (Ga. 1887).*

(n40)Footnote 187. *Lewis v. Lewis, 57 A. 735 (Conn. 1904).*

(n41)Footnote 188. *Cleveland, C., C. & I.R. Co. v. Coburn, 91 Ind. 557 (1883).*

A deed conveying "a strip of land" to a railroad company in the absence of any limitation in the deed conveys fee simple title to the strip of land. *Keen v. Cleveland, C., & St. Louis R. Co., 64 N.E.2d 499 (Ill. 1945).*

(n42)Footnote 189. *Scovill v. McMahon, 26 A. 479 (Conn. 1892).*

(n43)Footnote 190. *Reed v. Stouffer, 56 Md. 236 (1881); Second Universalist Soc. v. Dugan, 5 A. 415 (Md. 1886).*

(n44)Footnote 191. *Clarke v. Brookfield, 81 Mo. 503 (1884).*

(n45)Footnote 192. *Barlow v. Chicago, R.I. & P.R. Co., 29 Iowa 276 (1886); Norton v. Duluth Transfer R. Co., 151 N.W. 907 (Minn. 1915); Blakely v. Chicago, K. & N. R. Co., 64 N.W. 972 (Neb. 1895).*

(n46)Footnote 193. *Robinson v. Missisquoi R. Co., 10 A. 522 (Vt. 1887).*

(n47)Footnote 194. *Maxwell v. McCall, 124 N.W. 760 (Iowa 1910).*

(n48)Footnote 195. *Sanborn v. Minneapolis, 29 N.W. 126 (Minn. 1886).*

(n49)Footnote 196. *Lake Erie & W. R. Co. v. Ziebarth, 33 N.E. 256 (Ind. App. 1893).*

See the following cases: *Ingalls v. Byers, 94 Ind. 134 (1883); Douglass v. Thomas, 2 N.E. 562 (Ind. 1885); Nichols v. New England Furn. Co., 59 N.W. 155 (Mich. 1894); Soukup v. Topka, 55 N.W. 824 (Minn. 1893); Williams v. Patterson, 21 So. 2d 477 (Miss. 1945); Broderick v. Tyer, 187 S.W.2d 476 (Mo. App. 1945); Robinson v. Missisquoi R. Co., 10 A. 522 (Vt. 1887).*

(n50)Footnote 197. *Curtis v. Board of Educ., 23 P. 98 (Kan. 1890).*

(n51)Footnote 198. *Baker v. Mott, 28 N.Y.S. 968,* (1894).

(n52)Footnote 199. *Flaten v. Moorhead, 53 N.W. 807 (Minn. 1892), aff'd, 46 N.E. 1144 (N.Y. 1897).*

In *Soukup v. Topka, 55 N.W. 824 (Minn. 1893),* Mitchell, J., commenting upon this case, said: "While we do not decide whether this conveyed a conditional fee or a mere easement, the controlling considerations, aside from the language of the deed, which led us to hold that it did not convey an absolute fee, were that the grantee was a municipal corporation, and the consideration named in the deed merely nominal."

(n53)Footnote 200. *Boston Consol. Gas Co. v. Oakes, 181 N.E. 225 (Mass. 1932).*

(n54)Footnote 201. *Soukup v. Topka, 55 N.W. 824 (Minn. 1893).*

(n55)Footnote 202. *See Downen v. Rayburn, 73 N.E. 364 (Ill. 1905); Spaulding v. Woodward, 53 N.H. 573 (1873);*

Post v. Weil, 22 N.E. 145 (N.Y. 1889) Greene v. O'Connor, 25 A. 692 (R.I. 1892).

In *Flajole v. Gallaher, 93 N.W.2d 249 (Mich. 1958),* court construed a provision in a deed that the land was to be used for the erection of a kiln and not used for such purposes to revert to the grantor merely required the erection and not maintenance of the kiln, so that the deed became a fee simple absolute upon erection of the kiln.

(n56)Footnote 203. *Gordon v. Woodruff County, 232 S.W.2d 832 (Ark. 1950); Board of Supvrs. v. Newell, 56 So. 2d 689 (Miss. 1952); Hart v. Northeastern N. Mex. Fair Ass'n, 265 P.2d 341 (N.M. 1953).*

(n57)Footnote 204. *Etheridge v. Dallas, 246 S.W.2d 692 (Tex. Civ. App. 1952)* (constructing road through grounds conveyed for park purposes only was breach of condition subsequent); *St. Clara College v. Madison, 27 N.W.2d 745 (Wis. 1947); Koonz v. Joint Sch. Dist. No. 4, 41 N.W.2d 616 (Wis. 1950).*

(n58)Footnote 205. *Parks v. Gates, 199 P. 40 (Cal. 1921); Forgeus v. Santa Cruz, 140 P. 1092 (Cal. App. 1914).*

Contra, result based on presumption of fee simple. *Cooper v. Selig, 191 P. 983 (Cal. App. 1920).*

* This chapter is based in part on Ch. 30, George W. Thompson, Commentaries on the Modern Law of Real Property (John S. Grimes ed. 1979), which made a significant contribution toward preserving the American common law governing the fee simple absolute.

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CHAPTER 17 FEE SIMPLE ABSOLUTE *

2-17 Thompson on Real Property, Thomas Editions § 17.06

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§ 17.06 The Use of Words of Limitation to Create a Fee Simple.n206

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§ 17.06(a) At Common Law.

At common law unless the words "and his heirs" were used in grants of realty no fee simple or fee tail could arise no matter how clear the grantor's intent. The expansion of the early life estate into the fee through the use of the words "et hereditibus suis" "and his heirs" in making an enfeoffment has already been noticed. n207 The common law through its years of development religiously held to this principle, with but very few exceptions, that such words of limitation were a sine qua non in conveyancing to create a fee. Regardless of the intention of the parties, the grantee only received a life estate if these magic "words of art" were not used, n208 except under certain limited circumstances. n209

In order to create an estate in fee simple by deed at common law, it was essential that the limitation shall be to the grantee "and his heirs," or some equivalent expression. n210 At common law a deed made to one "and his heirs," this much and nothing more, conveyed to the grantee an estate in fee simple. n211

> If a man would purchase lands or tenements in fee simple, it behooveth him to have these words in his purchase, 'to have and to hold to him and his heirs'; for these words 'his heirs' make the estate of inheritance. For if a man purchase lands by these words, 'to have and to hold to him forever,' or by these words, 'to have and to hold to him and his assigns forever' -- in these two cases he hath but an estate for term of life, for that there lack these words, 'his heirs,' which words only make an estate of inheritance in all feoffments and grants. n212

An estate in fee cannot be created by describing it as such, as "to have and to hold to him in fee simple," or by the use of a word synonymous with "heirs." n213 It does not avail to say that the grantee is to have and to hold to him forever, n214 nor to his "issue," n215 children, n216 "representatives" n217 or "assigns." n218 The use of the word "tenement," when used alone, without other circumstances, will not be construed to pass a fee. n219 Conversely, "heirs" are ordinarily words of limitation creating a fee simple, not words of purpose creating a present estate in those who would be the named person's legal heirs if he were dead. n220

"Children" is ordinarily taken as a word of purchase creating an estate in those so described and is not a word of

limitation. n221 A devise to wife and daughter and their descendants did not create a future interest in the descendants. n222 In some cases "to A and his issue" have been held to be words of limitation creating a fee tail. Other cases treat "issue" as meaning children, definite factors of issue and thus as words of purchase. The use of the word "forever" or to the grantee and his assigns forever vested a life estate only in the grantee. n223 No legal construction would obviate the necessity of the use of the word "heirs." n224 No matter how plainly it was declared that the grantee was to have an estate in fee simple or in perpetuity, the deed without the word "heirs" conveyed to him only a life estate. n225 A few authorities held in later years, however, that the use of the word is not essential where it clearly appears on the face of the deed and the circumstances attending the transaction that the intention was to create a fee. n226 Where the words of grant clearly import an estate in fee simple, such estate is not to be cut down except by some other provision equally certain. n227 The use of technical words of inheritance is strongly indicative of an intention to convey an estate in fee. n228

While there is a presumption that the use of the words "and his heirs" in a will merely described the estate and did not express an intent that the heirs by named beneficiary could take the devise in the event of the beneficiary predeceasing the testator, this is not conclusive and the contrary may be determined from the four corners of the will. n229

Thus a deed conveying real estate to a named person, to her sole and separate use and benefit during her natural life and to her heirs at her death, was held to pass a fee to the grantee, in the absence of a showing that the grantor did not use the words "her heirs" in a technical sense. n230 Also, a deed conveying land to a named grantee during her natural life and after her death to the heirs of her body only, to hold forever, after the birth of issue of the grantee, was held to convey a fee-simple estate entitling the heirs to take by inheritance and not as purchasers. n231 In an action to reform such an instrument, technical words may be inserted and given full effect, n232 but not as against the rights of a bona fide purchaser. n233

When the estate is created by deed the limitation must be to the heirs with the disjunctive "and" and not to one "or" one's heirs, as such a grant conveys a life estate only. n234 However, the rule enunciated in *Restatement of the Law of Property* is that a conveyance to the grantee "or his heirs" passes a fee simple absolute to the grantee. n235 The word "or" is often used in instruments of conveyance in place of the word "and," and is generally construed to mean "and" where that meaning is apparent from the context. n236 So where "or" was used in a deed stipulating that the grantor "or" heirs should have the privilege of a way, the word "or" was construed as "and." n237

Coke declared that the word "heirs" must be used in the plural number. "For," he observes, n238 "if a man give land to a man and to his heir in the singular number, he hath but an estate for life, for his heir cannot take a fee simple by descent, because he is but one, and therefore in that case his heirs shall take nothing." But Coke's opinion has been denied by later authorities, n239 and it is doubtful if it should be followed at the present day. The word "heir" would doubtless be regarded as nomen collectivum, or a clerical mistake, for "heirs." n240 The word "heir," though singular in form, may have been used in the plural sense, in which case it will be given its technical meaning as a word of limitation. n241

The word "heirs" must be accompanied by a pronoun which shows its application. n242 Unless there appear in the deed the word "heirs," unqualified except by a possessive pronoun, it is not a fee-simple estate which the deed conveys. n243 So the words "his, or her, heirs" are absolutely essential to the creation of an estate in fee simple. No other words and no description of the estate is sufficient. "These words only make an estate of inheritance in all feoffments and grants." n244 If the "heirs" referred to in the habendum are not the heirs of the grantee, the words are of purchase. n245 In Ohio words of inheritance were necessary for the forfeitees, on breach of a condition subsequent, to take a fee simple. n246

It is not universally true that a limitation to one and one's heirs creates a fee-simple estate. Reference must always be made to the nature and extent of the grantor's interest, the qualifying words, if any, as well as to the interest which is granted. A conveyance by a life tenant, though it purports to convey a fee, passes only the life estate to the grantee. n247 A grant to one and one's heirs for the life of another does not pass a fee simple, as the words "for the life of another" qualify and limit the duration of the grant to a life estate and, though the word "heirs" be used, an estate for

years or at will may be created. n248 Notwithstanding a statutory provision that the words "convey and warrant" shall convey a fee simple to the grantee, the grantor may use these words and yet actually convey in the deed, after the description of the land, a less estate than one of inheritance to the first taker, which will be given effect. n249 In a few areas the necessity of the use of words of limitation to create a fee has not been recognized even in the absence of statute. n250

Even at common law the requirement of the use of words of inheritance to create a fee was not so rigid in the case of wills as it was in deeds. In wills, it was a rule of intent, not of law. n251

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LEXIS: word! w/2 limit! w/15 creat! w/15 fee simple

§ 17.06(b) Common Law Exceptions to Required Use of Words of Limitation.

The common law developed a number of isolated exceptions to the rule that a fee simple could not be created without the use of words of limitation. The principal of these exceptions was in the case of wills.

We have had some evidence to the effect that by the early common law a devise of lands, without the use of technical words of limitation, passed a life estate only to the devisee. n252 This rule was soon changed so as to allow a fee to pass without the use of technical words, n253 and the fact that a devise does not contain technical words of inheritance does not prevent the devisee from taking the fee. n254 "Children" has, however, been taken to be a word of limitation in a will. n255 Some of the courts have found another exception in the necessity of use of words of limitation at common law in a grant of an absolute gift of all rents and profits, holding that this creates a fee simple absolute. n256

It is also a rule of the common law that a devise of land generally, without words indicating the character of the estate devised, passes to the devisee a life estate only. Even this rule gives way to the testator's expressed intention that the devisee take the fee. n257 Wills are construed with more liberality than deeds, and courts are less inclined to depart from the technical meaning of the word "heirs" in the one case than in the other. n258 So the presumption that the word "heirs" is used in its technical sense is much more difficult to overcome in the case of deeds than of wills. n259

The reason assigned for relaxing the rule in the case of devises is that the testator is supposed to be without that professional assistance of which one may avail oneself in making a deed. The law, therefore, regards the intention of the testator more than the legal import of the words used in attempting to express his meaning. If, by the terms of the whole will as applied to the subject matter and read in the light of the surrounding circumstances, it can be reasonably inferred that he intended to pass a fee, such estate will pass in the absence of technical words of limitation. n260 Unless such intention can be discovered, the devisee will take a life estate only. n261 In determining the nature of an estate created by will, the will itself is to be first consulted to ascertain the intention of the testator, and after this has been determined, the statute is to be consulted in order to ascertain how far the estate intended to be created by the testator is affected, limited or inhibited by law. n262 The devise will be deemed one in fee if a lesser estate is not clearly shown. n263

The general rule is that a bequest of personal property in general terms will give the legatee an absolute title to such property, and where a general devise of real property is coupled with a general bequest of personal property, such fact is ordinarily sufficient to indicate the intention on the part of the testator to devise the real property in fee. n264 On the other hand, the mere fact that a testator devises his real property to the first devisee "in fee simple" is not conclusive in the absence of statute that such devisee takes a fee-simple estate, provided other provisions of the will indicate unmistakably that the testator intended the "fee simple" devisee to have a lesser estate only. n265 An unrestricted devise of real estate passes a fee thereto to the devisee. n266 If land was intended to be devised, a fee-simple title passed notwithstanding the absence of words of limitation, where there were no words from which a contrary intention appeared. n267 Generally, a devise of realty "absolutely" or as "absolute property," without more passes a fee-simple

title to the devisee. n268 Where there is an evenly balanced doubt as to the character of the estate intended to be devised, the doubt will be resolved in favor of a fee rather than a lesser interest. n269

An English court will make a very liberal construction of a will, to carry real estate without words of freehold. n270 So, in creating estates by will, no technical words of inheritance or procreation were necessary to establish a fee tail, but any expressions in the will denoting an intention to give the devisee an estate of inheritance descendible to all or some of his lineal but not collateral heirs was sufficient. n271 Thus the word "heirs" in a will devising land to the testator's widow and her heirs is a word of limitation vesting a fee, unless a contrary intention is manifested from the will or deducible from the circumstances of the parties. n272

Under an unrestricted devise of the testator's "estate," the devisee will take the fee if the testator was the owner thereof, n273 but, if the word "estate" is used simply to describe the property, without reference to the estate created, the fee does not pass by such use alone. n274 A testamentary provision that "I give, devise, and bequeath to my beloved wife the remainder and residue of my estate" will, when standing alone, pass a fee simple. n275 The use of the word "estate" in a devise is held sufficient to pass a fee to the devisee, n276 unless there are other words expressing a different intention. n277 Likewise, a devisee of "all" one's "estate" passes a fee to the devisee. n278 In the absence of other words in the will controlling or restraining its operation, the word "estate" means the quantity of interest which the testator has as well as merely the lands. n279

A release by one of several joint tenants seised in fee simple may be made without words of inheritance. n280 Conveyances between tenants in common cannot operate by way of release, and must contain the word "heirs" to pass a fee. n281 A deed of release conveys a fee to the original grantor, although it contains no words of inheritance. n282 The release is regarded as simply extinguishing the right or interest of the releasor, leaving the others as sole owners.

The absence of a devise over indicates the devise of a fee. n283 The fixing of a charge on a devise is an indication that the devisee was given a fee simple. n284

As in a grant at common law, so in a reservation, to create an estate in fee, the necessary words of inheritance must be used, and in general their place cannot be supplied by any other words of perpetuity. n285 A reservation by the grantor to the grantor or the grantor's heirs may be construed to be a reservation to the grantor and heirs, n286 but a permanent easement in favor of the grantor's other land may be created without words of limitation. n287

An exception need not be made with words of limitation, because the estate or rights excepted remain the grantor's property, and inure to the benefit of his heirs and assigns, just as any of the grantor's property does. n288

This rule conforms with the rule stated in the *Restatement of the Law of Property* . n289

A sale by an officer of the law under an order of court may operate to pass an estate in fee without the use of the word "heirs" as where a sheriff, on an execution sale of real estate owned by the judgment debtor in fee, executes to the purchaser at such sale a deed of "all the estate, title, and interest" which the judgment debtor had in such land, the deed passes a fee in the land, though the word "heirs" is omitted. The sheriff had no authority to sell less than the debtor's entire estate, which was an estate in fee. n290

There is an exception to the common-law rule requiring the use of the word "heirs" to create an estate in fee in case of a grant to a corporation sole:

> for if lands be given to a sole body politic or corporate, as to a bishop, vicar, master of a hospital, etc., there, to give him an estate of inheritance in his politic or corporate capacity, he must have these words, 'to have and to hold to him and his successors;' for without these words... there passeth no inheritance; for, as the heir doth inherit to the ancestor, so the successor doth succeed to the predecessor.

n291

Words of qualification or limitation need not be used in order to vest a fee in a corporation. n292 A deed to a corporation aggregate conveys a fee-simple estate, although it does not contain words of limitation or succession. n293 This rule conforms with the rule laid down in the *Restatement of the Law of Property* as applied to corporations sole, n294 as well as to corporations aggregate. n295 The use of the words "its successors and assigns, forever," passes an estate in fee simple at common law. n296

Under a deed to a named bishop of the Roman Catholic Church "and his successors in office and assigns forever," a fee-simple estate passed to such bishop and his successors in their corporate capacity. n297

The common-law rule that the word "heirs," or its equivalent, was necessary in a deed in order to convey a fee, had no application when the grant was to the crown. While the individual representing the sovereignty might change, the sovereign itself was immortal by perpetual succession. On principle, a life estate to an ideal being having a perpetual and uninterrupted existence must be coextensive with a fee or perpetuity, and, hence, words of succession cannot extend it. So a deed to the government does not require words of succession or inheritance in order to pass a fee. n298

There is considerable disagreement as to whether a fee could arise at common law out of a grant of a power of disposition and use. The weight of authority today is that such a power even though unfettered is not sufficient to convert a life estate into a fee, n299 but that such a power if sufficient in extent will transform a defeasible fee into a fee simple absolute.

In case a deed contains a reference to some other instrument which contains a limitation to heirs, and conveys the same estate as therein, the deed may pass a fee simple without the use of the word "heirs" in express terms. "Words of direct and immediate reference will suffice. The word 'heirs' or 'successors' need not be in the identical deed of grant, or other mode of assurance by which the estate is granted or conveyed. Thus, when one to whom lands have been granted in fee, after reciting the grant, or without any recital, grants the land to another as fully as they are granted to the grantee, or where one grants two acres to A and B, to hold one acre to A and A's heirs, and the other acre to B, in form aforesaid," n300 the fee will pass. A deed which, after referring to the conveyance to the grantor, conveyed "all the grantor's estate, right, title, interest, term of years to come, property, claim, and demand both in law and in equity," conveys the property as fully as it was conveyed to the grantor, and as the conveyance to the grantor gave the estate in fee, the grantor's conveyance vests the fee, even though the word "heirs" does not appear in the deed. n301 The *Restatement of the Law of Property* lays down the principle that an estate in fee simple may be created in a natural person by reference to another conveyance containing words of inheritance, but takes no position as to whether such estate is created where the instrument to which reference is made does itself contain words of inheritance. n302 A fee-simple estate has been considered as having been passed where an assignment on the back of a deed made reference to the deed, even though the assignment contained no words of inheritance. n303

One of the common-law exceptions to this almost universal requirement was the rule in *Shelley's Case.* There, although words of limitation were not used in the grant to the immediate taker, there being no intention to create a fee, the limitation over to the taker's heirs after death created a fee just as though words of limitation had been, in the first instance used. The difference in modern treatment that the courts and statutes have given "words of limitation" and "Shelley's case" necessitate, however, the maintenance of a clear distinction between these two legal property rules.

Thus though sometimes it is said there is no difference in effect between a conveyance to "A and his heirs" and a limitation to "A for life, remainder to his heirs" since they both pass an estate in fee simple, the former by the use of the word "heirs" and the latter by operation of the rule in Shelley's case, n304 such a statement does not accurately reflect the situation and leads to possible erroneous results. And in the case of an executory contract to sell and convey land the words of limitation were not necessary to create an equitable fee in the vendee. Equity supplied the words of inheritance.

If a personal charge of the payment of a certain sum is imposed upon the devisee, such as the payment of debts of the testator or legacies or a gross sum, the presumption is that the devisee takes a fee. n305

An intention to pass a fee to the devisee is indicated from such condition or charge. n306 Where there is an express limitation of the estate or interest devised, a direction that the devisee shall pay pecuniary legacies does not make the interest a fee simple. n307 Where the devise is indefinite and the testator's intention is in doubt, such charge will have the effect of making the devise one in fee simple. n308 If the legacies are made a personal charge on the devisee, an acceptance of the devise imposes a personal liability on the devisee, who will take the estate devised as a purchaser in fee, unless the estate is limited. If the legacies are charged on the estate devised, the devisee does not take as a purchaser but as a beneficial devisee. n309 The rule that a devise of land without words of limitation passes a life estate only does not apply where the devisee's estate is not defined and the devisee is directed to pay certain debts or legacies. n310 If the payment is to be made out of the rents and profits of the estate devised and is not a personal charge upon the devisee, the devisee takes a life estate only. n311 A devise upon condition the devisee make payments to other persons within a stated time after the will is admitted to probate created a fee simple subject to charge rather than a condition. n312

A devise burdened with a charge might not prove a beneficial interest, unless given in fee. n313 A devisee may take a life estate only even though legacies are charged against the devise, when it appears that such was the intention of the testator. n314

An unqualified and unlimited gift of "rents," "income" or "profits" of real estate, if there be no disposition of the property itself, passes the absolute interest in the property to the beneficiary, for the reason that the value of the property lies in the rents, income and profits thereof. n315 A bequest of the income from certain described real estate, coupled with a direction to the executor to take charge of the real estate, collect the rents, keep the property in repair, pay the taxes, and pay the balance of the income therefrom to the testator's son, does not convey the fee but creates a trust for life. Thus a direction in a will to divide the entire income of the residuary estate among five named children, there being no disposition of the corpus, was held to constitute a devise of the property itself. n316 Also, a gift of the "use," n317 "rents" and "profits" of land for life is a gift of the land itself for life, n318 and a gift of a part of the rents is a gift of a corresponding part of the land. n319 It has been held that the rule is rebutted in a will devising the income to the testator's wife by other provisions limiting the time to the wife's life. n320 A gift of "rents and profits" has been held to pass real estate which was purchased with the proceeds of such rent. n321 The rule is not applicable where the testator has expressly or by implication disposed of the corpus in some other way. Thus a gift of the "profits and benefits" of certain real estate, followed by a provision for the sale of such real estate at a fixed time, was held not to pass the fee. n322 A gift of income without limit of time is an absolute vested interest. n323

While a gift of the use or the use and occupation of land will carry the fee, yet if the gift be to a trustee to permit the beneficiary to occupy without rent, the interest passing will amount to a license only. n324 If the use be restricted to life, during minority, during widowhood or during widowhood until marriage, until a certain age, and the like, only an estate or interest commensurate with the limitation prescribed will pass. n325

A release does not require the use of words of limitation since it is not an alienation but a mere discharge of claims of one to the other arising out of the original limitation. n326

Deeds to corporations create fee simples though no words of limitation are used. n327 A conveyance to the trustees of a corporation without naming them conveys a fee-simple title to the corporation. n328 Where there are no limitations over, the words "successors and assigns" are not necessary in a devise to an institution. At common law on dissolution of a corporation, real estate belonging to it reverted to the original grantor, n329 unless it has been conveyed prior to dissolution. n330 So in the absence of statute today when a corporation owning realty is dissolved the real estate will revert to the original grantor instead of passing as an asset in kind to the shareholders if owned by the corporation at the

time of dissolution.

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LEXIS: common law w/5 exception! w/30 word! w/2 limit! w/15 fee simple

§ 17.06(c) Use of Words of Limitation in Trusts and Equitable Estates.

While at common law there appears to have been no exception to the requirement that the words of limitation were required to vest a fee in a feoffee to uses as well as to a feoffee for the feoffee's own use, the same is not always true with respect to the cestui que use. The common-law rule as to the use of the word "heirs" was the same in the conveyance of an equitable estate in fee as in a legal estate in fee to one other than a trustee; n331 but an equitable estate may have the character of inheritability though the word "heirs" is not used in the instrument creating it, provided it appears in the context that such was the clear intention of the grantor.

This is an instance where courts of chancery do not adopt the same rules of construction that prevail in courts of law. If the meaning of the grantor is clear that the grantor intended for the beneficiary to have an estate in fee, the beneficiary will take such an estate, though technical terms of the common law used in the limitation of such an estate have been disregarded. So the beneficiary may have an equitable fee without the word "heirs," and an equitable entail without the words "heirs of the body." n332 The word "heirs" was not necessary, even at common law, in order for a deed to convey an equitable fee. n333 Ordinarily, an equitable estate in fee is subject to the same incidents which attach to a legal estate in fee, and, generally speaking, these include the right to dispose of the estate by alienation as well as by devise. n334 If a deed in trust declares the trust to be for a person named "and his heirs," the beneficiary takes an equitable estate in fee simple which he may devise, the word "heirs" being a word of limitation. n335 An equitable estate created by the premises cannot be enlarged to an estate in fee by a limitation to heirs in the habendum. n336

Another exception to the common-law rule requiring the use of the word "heirs" to create a fee is in case of a trust. n337 Where, upon the face of the deed, it appears that the conveyance is in trust for a use, the full performance of which requires or may possibly require the vesting of a fee in the trustee, the grantee is held to take an estate in fee simple without the use of the word "heirs" as a word of limitation upon the estate conveyed. n338 A conveyance to a trustee will give a legal estate in fee if the trust limited upon it be to the *cestui que* trust and his heirs. Although the words of inheritance in such case are connected with the estate of the *cestui que* trust, they will be held to relate to the legal estate of the trustee, in order to give effect to the intention of the parties. n339 A trustee takes exactly that quantity of interest which the purposes of the trust require. n340 A trustee will have a fee-simple estate if the trust gives power to sell n341 or if a fee is necessary in order to carry out the purposes of the trust, though the word "heirs" is not used. n342 If the complete execution of the trust does not require the trustee to hold an estate in fee, the use of the word "heirs" does not necessarily carry such estate. n343 A deed which is in effect a covenant to stand seised need not contain words of inheritance in order for it to carry the fee to the remainderman. n344

If the trust can be administered only through the ownership of a fee-simple title, such title will be deemed granted, even though the limitations of the deed may not clearly show that a fee simple was transferred. n345

Where a gift is made to a person in a trust character, the person may not assert title to it as an individual but must take it subject to the discharge of the trust obligation to use it for the benefit of others. n346 A conveyance to a trustee transfers no more of title to the property than is necessary for the proper execution of the trust. n347

A trustee's title to property in a testamentary trust comes from the will. n348 In a devise in trust, a fee-simple estate in the trustee will be implied if such interest is necessary for the proper execution of the terms and conditions of the trust. n349 Thus a devise to a trustee, coupled with a direction to pay debts, gives the devisee a fee. n350 A devise of realty to a trustee in trust to sell and convert it into money, with discretionary power to postpone the sale and to invest the

proceeds for the benefit of the *cestui que* trust, has been held to pass a fee simple to the trustee. n351 Authority conferred by will upon a trustee to whom the property is devised to manage, sell and transfer the estate during the life of the beneficiary vests in him the fee-simple title, subject to the provisions of the will. n352 If the subject of a trust be a legal interest in property, and capable of legal transfer, the trust is not perfectly created unless the trustee be vested with a legal interest. n353 Where a will contains no words expressly creating a trust or devising the legal title to the executor or trustees, such devise may be implied, where the powers conferred and duties imposed on the executors are of such a character that a legal title is necessary to their proper exercise or performance. n354 Courts are inclined to presume an intention on the part of the testator to create a fee-simple estate, but it must not be forgotten that at common law a general devise of real estate, without defining the interest to be taken by the devisee, gave only a life estate unless something appeared in the will showing an intention to create a greater estate. n355 Where a will, devising a life estate in land, directs the executor to sell the land on the life tenant's death and turn over the proceeds to a designated party for a charitable use, the executor does not take the fee by implication, the fee not being necessary to the effective exercise of the power to sell. n356

COMPUTER-ASSISTED RESEARCH

LEXIS: word! w/2 limit! w/30 trust! or equitable w/1 (estate! or fee! or entail!)

§ 17.06(d) Statutory Abolition of Required Use of Words of Limitation.

The common-law requirement that words of limitation were necessary to create a fee simple has been done away with in every state today except South Carolina, n357 Connecticut n358 and Hawaii. n359

These statutes vary, however, in their application, their timing and their result. n360 In general, the effect of the application of such a statute is either to cause a fee simple to arise where there is a grant or devise where no words of limitation were used, unless the creator of the estate provided otherwise, or to raise a presumption that the creator intended a fee simple instead of a lesser estate. n361

Such statutes do not, however, affect an interest which has already vested. n362 Thus, not having a retroactive effect they do not apply to fully executed deeds but do apply to wills where the testator is alive on the effective date of the statute. Instances are found, however, where the statute has referred only to "conveyances" and has not thus had an effect on wills. n363

An estate created by will is held to be an estate in fee simple, if the context of the instrument does not clearly indicate that a lesser estate was intended. n364 Even in jurisdictions where words of inheritance are not required to create an absolute estate, in the absence of such words descriptive of the quantity of interest given, the testator's intent must be determined by construction. n365

The use of words of limitation does, however, today have the effect of presuming a fee though their legal necessity is no longer the law. n366 But this presumption yields to a clear evidence of other intent. n367 Where a statute does away with the necessity of using the word "heirs," this does not change the rule that a fee-simple estate is one of inheritance. n368 Where the statute has made the use of words of limitation unnecessary such use adds nothing to a deed and will not prevent subsequent language from limiting the estate granted. n369

The mode of conveying real property:

> and the character and quality of the estates... created [by deeds] are matters which are entirely within the control of the legislature. This control is not circumscribed by any constitutional limitations, and there is nothing sacred about the rules of conveyancing which obtained at common law. The legislature may alter or annul any of those common-law rules at pleasure. n370

Under most statutes any expression showing the grantor's intention to create a fee simple will be given effect. n371 This is in accord with the rule laid down in the *Restatement of the Law of Property* . n372 Under the law of Illinois, a court will, where it can do so without violating a settled rule of law, refuse to tie up real estate, and will, therefore, in case of doubt, adopt a construction of a deed which will give an estate of inheritance to the first taker. n373 Such intention may appear from any part of the instrument. n374 Where a less estate is expressly limited in the deed, a fee will not pass. n375

The statutes merely establish rules of construction and no not prevent an interpretation that only a life estate was intended. n376 Under a Massachusetts deed to realty no particular words are necessary to pass a fee simple. n377 Under the statutes, the word "forever" is now generally held to pass a fee-simple estate without the use of the word "heirs." n378 It has been held, also, that where it is apparent from the instrument that the word "children" is used in the sense of "heirs," as where they are used interchangeably, the term "children" will be read as meaning "heirs" and construed as a word of limitation and not of purchase. n379 Where there is an evenly balanced doubt regarding the character of the estate intended to be conveyed by a writing purporting to transfer title to real estate, it will be resolved in favor of a fee rather than a lesser interest. n380

Some states have never adopted the common-law requirement of words of limitation. n381

As will be subsequently seen, n382 where words have been used other than "heirs of the body" to create a fee tail and the statute abolishes the necessity of words of limitation, a problem arises as to whether such words have not been converted into words of purchase so as to create a cotenancy or a future interest in those who answer the description of the immediate descendants of the first taker. The reservation of an easement is not, however, inconsistent with the grant of a fee. n383 The courts of Illinois have held that a conveyance to "A and his heirs" both at common law and under the statute conveys a fee simple. n384

Where the statute has made the use of words of limitation unnecessary a problem arises where such language is used in a conveyance or a devise. Are they to be treated as surplusage or as words of purpose? The cases indicate that "heirs" or "heirs and assigns" remain words of limitation and hence are treated as surplusage. n385 So the word "heirs" is a technical word, and is always construed to be a word of limitation and not of purchase. n386 Generally, although the statutes obviate the necessity for the use of words of limitation, such words are not converted into words of purchase. n387

A conveyance to one, and in the event the grantee be dead to the grantee's heirs, created a fee simple, the language being words of limitation, and not purchase. n388 Likewise, "to A and his children forever" were words of limitation. n389 In some states, however, despite the statutes a right in fee cannot be reserved without words of limitation in the deed. n390

COMPUTER-ASSISTED RESEARCH

LEXIS: fee simple w/2 absolute! w/015 right! or presum!

FOOTNOTES:

(n1)Footnote 206. *See* David H. Means, *Words of Inheritance in Deeds of Land in South Carolina: A Title Examiner's Guide, 5 S.C. L. Rev. 313 (1953).*

(n2)Footnote 207. *See* S. E. Thorne, *English Feudalism and Estates in Land, 1959 Cambridge L.J. 193.*

(n3)Footnote 208. *Ivey v. Peacock, 47 So. 481 (Fla. 1908).*

Massachusetts did not adopt the necessity of words of limitation until 1651 and then by statute. *Sedgwick v. Laflin, 92 Mass. (10 Allen) 430 (1865).*

New Hampshire on separating from Massachusetts did not adopt the statute. *Cole v. Lake Co., 54 N.H. 242 (1874).*

"Heirs" is a word of limitation and not a word of purchase. *In re Overlock's Estate, 530 P.2d 376 (Ariz. App. 1975).*

Words of inheritance are required in the granting or the habendum clause; appearance in the warranty clause does not convey the fee simple. *McLaurin v. McLaurin, 217 S.E.2d 51 (S.C. 1975).*

(n4)Footnote 209. Words of limitation were not required in releases. *Rector v. Waugh, 17 Mo. 13 (1852).*

If words of inheritance are required in the granting or habendum clause, an appearance in the warranty clause does not convey the fee simple. *McLaurin v. McLaurin, 217 S.E.2d 41 (S.C. 1975).*

(n5)Footnote 210. *Woodward v. Thissell, 218 F. 810 (6th Cir. 1914); United States v. Five Acres of Land in Suffolk County, 56 F. Supp. 628 (D. Mass. 1944); Loomis v. Heublein, 99 A. 483 (Conn. 1916); Penienskice v. Short, 194 A. 409 (Del. 1937); Ivey v. Peacock, 47 So. 481 (Fla. 1908); Guess v. Morgan, 26 S.E.2d 424 (Ga. 1943)* (holding that an absolute fee passed by a deed granting to a person and the heirs of his body, or his heirs by a particular person, or his issue); *Dick v. Ricker, 78 N.E. 823 (Ill. 1906); Coogan v. Jones, 115 N.E. 877 (Ill. 1917); Henry v. Metz, 46 N.E.2d 945 (Ill. 1942); Sauls v. Cox, 67 N.E.2d 187 (Ill. 1946); Cahill v. Cahill, 84 N.E.2d 380 (Ill. 1949); Fountain County Coal & Min. Co. v. Beckleheimer, 1 N.E. 202 (Ind. 1885); Baker v. Kenney, 124 N.W. 901 (Iowa 1910); Calmes v. Buck, 7 Ky. (4 Bibb) 453 (1816); Brown v. Dickey, 75 A. 382 (Me. 1909); Hall v. Hall, 76 A. 705 (Me. 1910); Gould v. Lamb, 52 Mass. (11 Met.) 84,* (1846); *Bean v. French, 3 N.E. 206 (Mass. 1884). Sanborn v. Loud, 113 N.W. 309 (Mich. 1907); Ewing v. Ewing, 22 So. 2d 225 (Miss. 1945); Loitensdorfer v. Delphy, 15 Mo. 160 (1851); Rector v. Waugh, 17 Mo. 13, 57 Am. Dec. 251 (1852); Garrett v. Wiltse, 161 S.W. 694 (Mo. 1913); Triplett v. Triplett, 60 S.W.2d 13 (Mo. 1933); Melick v. Pidcock, 15 A. 3 (N.J. Eq. 1888);* Jackson *ex dem. Henderson v. Davenport, 20 Johns. (N.Y.) 537 (1821); Richmond Cedar Works v. John L. Roper Lab. Co., 84 S.E. 521 (N.C. 1915); Brown v. First Nat'l Bank, 6 N.E. 648 (Ohio St. 1886); Laymon v. Bennett, 61 N.E.2d 624 (Ohio App. 1944); Union Canal Co. v. Young, 1 Pa. (Whart.) 410 (1836); Berridge v. Glassey, 3 A. 583 (Pa. 1886); Lemon v. Graham, 19 A. 48 (Pa. 1890); Jordan v. Neese, 15 S.E. 202 (S.C. 1892); Gowdy v. Kelley, 194 S.E. 156 (S.C. 1937).*

South Carolina still requires words of inheritance to convey a fee, *see* David H. Means, *Words of Inheritance in Deeds of Land in South Carolina: A. Title Examiner's Guide, 5 S.C. L. Rev. 313 (1953).*

(n6)Footnote 211. *Millard v. Millard, 180 N.W. 429 (Mich. 1920); Antley v. Antley, 128 S.E. 31 (S.C. 1925); Creswell v. Bank of Greenwood, 41 S.E.2d 393 (S.C. 1947).*

Coke indicates that a grant to A and B and the heirs of B gave B the fee simple subject to the joint life estates of A. and B. Co. Litt., § 405.

Words of inheritance in granting or habendum clause necessary to create fee. *Grainger v. Hamilton, 90 S.E.2d 209 (S.C. 1955).*

(n7)Footnote 212. Littleton, Tenures, § 1; Co. Litt., § 6a.

(n8)Footnote 213. *Melick v. Pidcock, 15 A. 3 (N.J. Eq. 1888); Adams v. Ross, 30 N.J.L. 505 (1860); Smith v. Proctor, 51 S.E. 889 (N.C. 1905).*

Coke indicates that a grant to A and B and the heirs of B gave B the fee simple subject in the joint life estates of A. and B. Co. Litt., § 405.

Words of limitation must appear in granting or hahendum clause or only a life estate is given. *Grainger v. Hamilton, 90 S.E.2d 209 (S.C. 1955).* Except where a covenant to stand seized. *Bank of Prosperity v. Dominick, 107 S.E. 914 (S.C. 1921).* And the deed may be reformed to add words of limitation as against the grantee's heirs. *Groce v. Benson, 167 S.E. 151 (S.C. 1932).*

(n9)Footnote 214. *Dennis v. Wilson, 107 Mass. 591 (1871); Windham v. Howell, 59 S.E. 852 (S.C. 1907); McMillan v. Hughes, 70 S.E. 804 (S.C. 1911); Teague v. Sowder, 114 S.W. 484 (Tenn. 1908).*

(n10)Footnote 215. *McIlhinny v. McIlhinny, 37 N.E. 147 (Ind. 1894); Jordan v. McClure, 85 Pa. 495 (1877).*

In *Gray v. Stillman, 365 P.2d 369 (Okla. 1961),* the court held that in a deed to one and his "blood heirs" were words of limitation.

(n11)Footnote 216. *Nelson v. Davis, 35 Ind. 474 (1871); Cullens v. Cullens, 77 S.E. 228 (N.C. 1913); Talley v. Ferguson, 62 S.E. 456 (W. Va. 1908)* ("children" is a word of purchase).

Under deed conveying land to named son and his "children," and in view of the other provisions, quoted word was used as word of limitation and not of purchase, so that the deed vested life estate in the named grantee with remainder in fee simple to all his children and did not convey the land to named grantee and all his children as tenants in common. *Wilkins v. Wilkins, 206 S.W.2d 26 (Ark. 1947).*

(n12)Footnote 217. *Brown v. Mattocks, 103 Pa. 16 (1883).*

(n13)Footnote 218. *Watson v. Wolff-Goldman Realty Co., 128 S.W. 581 (Ark. 1910); Grant v. Carpenter, 8 R.I. 36 (1864); McMichael v. McMichael, 29 S.E. 403 (S.C. 1898).*

(n14)Footnote 219. *Kirschler v. Albanesius, 178 A. 568 (N.J. Misc. 1935).*

(n15)Footnote 220. *In re Lay's Estate, 110 N.Y.S.2d 494 (1952); In re Miller's Estate, 45 Pa. (Berks.) 213 (1813); Wates v. Fairfield Forest Prods. Co., 42 S.E.2d 529 (S.C. 1947); Dow v. Bailey, 77 A.2d 567 (Me. 1950)* ("heirs" word of limitation).

"Heirs" is a word of limitation not of purchase. *Estate of Sykes, 383 A.2d 920 (Pa. 1978).*

When language is used to identify certain persons, "heirs" become words of purchase. *Kritser v. First Nat'l Bank of Amarillo, 463 S.W.2d 751 (Tex. Civ. App. 1971).*

(n16)Footnote 221. *Bowman v. Weer, 104 A.2d 620 (Md. 1954); Talley v. Ferguson, 62 S.E. 456 (W. Va. 1908).*

Hough v. Farmers Bank & Trust Co., 60 A.2d 11 (Pa. 1948) ("children" found to be used as word of limitation, not purchase).

"Heirs of the body" construed as children. *White v. Alexander, 224 S.E.2d 617 (N.C. 1974).*

"Children born to his body" were held to be words of purchase. *Tindol v. McCoy, 535 S.W.2d 745 (Tex. Civ. App. 1976).*

"Heirs of the body" were held to be words of limitation. *Fletcher v. Hurdle, 536 S.W.2d 109 (Ark. 1976).*

"Lawful issue" held in will as words of purchase rather than words of limitation. *In re Moulton's Estate, 133 Cal.*

Rptr. 500 (1976).

(n17)Footnote 222. *Bradford v. Federal Land Bank of New Orleans, 338 So. 2d 388 (Miss. 1976).*

(n18)Footnote 223. *Baker v. Kenney, 124 N.W. 901 (Iowa 1910); Van Horn v. Harrison 1 U.S. (1 Dall.) 137 (1785); Slegel v. Herbine, 23 A. 996 (Pa. 1892); Jordan v. Neese, 15 S.E. 202 (S.C. 1892).*

(n19)Footnote 224. *Melick v. Pidcock, 15 A. 3 (N.J. Eq. 1888); Adams v. Ross, 30 N.J.L. 505 (1860); Smith v. Proctor, 51 S.E. 889 (N.C. 1905).*

(n20)Footnote 225. *Prall v. Burckhartt, 132 N.E. 280 (Ill. 1921); Engel v. Ayer, 27 A. 352 (Me. 1893); Hofsass v. Mann, 22 A. 65 (Md. 1891); Curtis v. Gardner, 54 Mass. (13 Met.) 457 (1847); Bolton v. Bowne, 18 N.J.L. 210 (1841)* (to the devisee "to hold and enjoy forever" sufficient devise of a fee); *Fox v. Phelps, 17 N.Y. (Wend.) 393 (1837), aff'd, 20 N.Y. (Wend.) 437* (devise to an "heir in lieu of his birthright" expresses intent that other devisees take in fee so as to exclude such heir); *Wheaton v. Andress, 23 N.Y. (Wend.) 452 (1840)* (words expressing affirmatively intent to devise a fee must appear); *Embleton v. McMechen, 143 N.E. 177 (Ohio St. 1924); Clayton v. Clayton, 3 Pa. (Binn.) 476 (1811).*

Except where a covenant to stand seized to uses exists. *First Carolinas Joint Stock Land Bank v. Ford, 180 S.E. 562 (S.C. 1935).*

(n21)Footnote 226. *See* in general: *Merritt v. Disney, 48 Md. 344 (1878); Ipswich Grammar Sch. v. Andrews, 49 Mass. (8 Met.) 584 (1844); Weller v. Rolason, 17 N.J. Eq. 13 (1864); Ryder v. Oates, 92 S.E. 508 (N.C. 1917); Stamford v. King, 144 S.W.2d 923 (Tex. Civ. App. 1940); Lott v. Braham, 116 S.E. 513 (W. Va. 1922).*

(n22)Footnote 227. *Gentle v. Frederick, 174 So. 606 (Ala. 1937); Noble v. Noble, 235 P.2d 670 (Okla. 1951).*

(n23)Footnote 228. *Blair v. Kenaston, 273 N.W. 184 (Iowa 1937).*

The words "and his heirs" in a will were held words of limitation. *In re Newby's Estate, 361 P.2d 622 (Colo. 1961).*

The word "heirs" in a deed is a word of limitation and not of purchase. *Arnold v. Baker, 185 N.E.2d 844 (Ill. 1962).*

But "and his heirs" as used in a will were words of limitation and not words of purchase, so that the estate lapsed upon death of the devisee prior to the testator. *Matter of Griffen's Estate, 543 P.2d 245 (Wash. 1975).*

"Heirs and assigns" used in a deed are merely descriptive of the fee simple and carry no interest. *Gardner v. Gardner, 335 A.2d 157 (Md. App. 1975).*

(n24)Footnote 229. *Matter of Griffen's Estate, 543 P.2d 245 (Wash. 1975).*

(n25)Footnote 230. *Kentland Coal & Coke Co. v. Blankenship, 300 S.W.2d 570 (Ky. 1957); Fawver v. First Tex. Joint Stock Land Bank, 115 S.W.2d 1217 (Tex. Civ. App. 1938).*

"Heirs and assigns" was not necessary at common law to convey to a corporation. *Moody v. Moody Nat'l Bank of Galveston, 522 S.W.2d 710 (Tex. Civ. App. 1975).*

(n26)Footnote 231. *Lytle v. Hulen, 275 P. 45 (Or. 1929).*

(n27)Footnote 232. *Brady v. Evans, 28 A. 1061 (Md. 1894); Mercier v. Missouri River, Ft. S. & G. R. Co., 54 Mo. 506 (1874); Lemon v. Graham, 19 A. 48 (Pa. 1890) 6 L.R.A. 663.*

A voluntary deed may be reformed to include the missing words. *Groce v. Benson, 167 S.E. 151 (S.C. 1932).*

(n28)Footnote 233. *Nicholson v. Caress, 59 Ind. 39 (1877).*

(n29)Footnote 234. 1 Minor, Inst 9 (b); *Brownell v. Leutz, 149 F. Supp. 98 (D.N.D. 1956)* ("or her heirs" were words of purchase).

In re Powers' Estate, 171 N.E.2d 464 (N.Y. 1960) (in a will the words "her heirs, legal representatives, and assigns, absolutely and forever" are words of limitation and not words for substitution, and created no interest in the children of the beneficiary).

(n30)Footnote 235. *See* Restatement, Property, § 27, Comment d.

(n31)Footnote 236. *East Hampton v. Vail, 45 N.E. 1030 (N.Y. 1897).*

To the same effect, *see* Restatement, Property, § 27, Comment d.

(n32)Footnote 237. *White v. Crawford, 10 Mass. 183 (1813).*

"Or his heirs" are words of substitution not limitation and create an alternate gift to the heirs in case the named beneficiary predeceases the testator. *In re Hornby's Estate, 272 P.2d 1017 (Idaho 1954).*

(n33)Footnote 238. Coke on Littleton, § 8b.

(n34)Footnote 239. Coke on Littleton, § 8b; *Manwaring v. Tabor, 1 Conn. (Root) 79 (1780); Hall v. Vandegrift, 3 Pa. (Binn.) 374 (1811); Whiting v. Wilkins, 1 Buls. 219; Dubber v. Trollop, 8 Vin. Abr. 233, p. 13,* per Eyre, C.J., who says that the opinion of Coke is not warranted by anything in Littleton.

(n35)Footnote 240. *Huntington v. Lyman, 138 Mass. 205 (1884).*

(n36)Footnote 241. *White v. Crawford, 10 Mass. 183 (1813); Wright v. Wright, 1 Ves. Sr. 409 (1749).*

(n37)Footnote 242. *Johnson v. Barden, 83 A. 721 (Vt. 1912).*

Where no words of inheritance are used in the granting clause, later language in a deed may reduce the estate to a fee upon condition subsequent. *Byars v. Cherokee County, 118 S.E.2d 324 (S.C. 1961);* but *see Stylecraft, Inc. v. Thomas, 159 S.E.2d 46 (S.C. 1968),* reaching a different result.

(n38)Footnote 243. *Prall v. Burckhartt, 132 N.E. 280 (Ill. 1921); Whichard v. Whitehurst, 106 S.E. 463 (N.C. 1921).*

(n39)Footnote 244. William Sheppard, The Touchstone of Common Assurance, 106 (1826).

Patterson v. Moore, 15 Ark. 222 (1854); Edwardsville R. Co. v. Sawyer, 92 Ill. 377 (1879); Hofsass v. Mann, 22 A. 65 (Md. 1891); Bowman v. Weer, 104 A.2d 620 (Md. 1954) ("children" word of purchase); *Ashcroft v. Eastern R. Co., 126 Mass. 196 (1878). Hogan v. Welcker, 14 Mo. 177 (1851); Truesdell v. Lehman, 20 A. 391 (N.J. Eq. 1890).* Jackson *ex dem. Ludlow v. Myers, 3 Johns. (N.Y.) 388 (1808); In re Kelling's Estate, 137 N.Y.S.2d 868 (1954)* (Two A & B "and their issue" were words of limitation); *Stell v. Barham, 87 N.C. 62 (1882); Lemon v. Graham, 19 A. 48 (Pa. 1890) 6 L.R.A. 663. Bradford v. Griffin, 19 S.E. 76 (S.C. 1894); Bridgewater v. Bolton, 6 Mod. 106* (N.D.).

(n40)Footnote 245. *Tucker v. Tucker, 78 Ky. 503 (1880).*

(n41)Footnote 246. *Embleton v. McMechen, 143 N.E. 177 (Ohio St. 1924)* 34 A.L.R. 689.

(n42)Footnote 247. *McMichael v. Craig, 16 So. 883 (Ala. 1894); Hall v. Condon, 51 So. 20 (Ala. 1909); Mills v.*

Woods, 57 S.E.2d 713 (W. Va. 1950).

(n43)Footnote 248. Littleton, Tenures, § 740.

(n44)Footnote 249. *Adams v. Merrill, 85 N.E. 114 (1908), reh'g denied, 87 N.E. 36 (Ind. App. 1909); Franklin v. Jones, 191 S.W.2d 835 (Tenn. App. 1945).*

While Connecticut still requires the use of words of limitation to convey a fee simple, *Chappell v. New York, New Haven & Hartford R. Co., 24 A. 997 (Conn. 1892); Cole v. Steinlauf, 136 A.2d 744 (Conn. 1957),* a deed may be reformed to vest a fee in the grantee if the parties so intended though the word heirs be omitted. *Chamberlain v. Thompson, 10 Conn. 243 (1834).*

(n45)Footnote 250. *Branca v. Makuakane, 13 Haw. 499 (1901); Cole v. Winnipisseogee Lake Cotton & Woolen Mfg. Co., 54 N.H. 242 (1874); Rackley v. Chestnutt, 14 S.E. 750 (N.C. 1892); Whichard v. Whitehurst, 106 S.E. 463 (N.C. 1921); Brown v. First Nat'l Bank, 6 N.E. 648 (Ohio St. 1886)* (a mortgage was held to pass a fee, though the word "heirs" was not used); *Johnson v. Barden, 83 A. 721 (Vt. 1912).*

The omission of words of inheritance in a will are still a factor in Connecticut to be taken into consideration to show an intent to give a lesser estate. *McFarland v. Chase Manhattan Bank, N.A., 337 A.2d 1 (Conn. Super. 1973), aff'd, 362 A.2d 834 (Conn. 1975).*

(n46)Footnote 251. Absence of words of inheritance in a will should be taken into consideration to show that the testator's intention was to give an estate less than a fee. *McFarland v. Chase Manhattan Bank, N.A., 337 A.2d 1 (Conn. Super. 1973), aff'd, 362 A.2d 834 (Conn. 1975).*

(n47)Footnote 252. *Lambert v. Paine, 7 U.S. (3 Cranch) 96 (1805); King v. Ackerman, 67 U.S. (2 Black) 408 (1863).*

(n48)Footnote 253. *Barber v. Pittsburgh, Ft. W. & C. R. Co., 166 U.S. 83 (1897); McLaughlin v. Collins, 125 P.2d 633 (Colo. 1942); Duncan v. Higgins, 26 A.2d 849 (Conn. 1942); Robinson v. Randolph, 21 Fla. 629 (1885); Ellis v. Ellis, 158 S.W.2d 976 (Ky. 1942); Melick v. Pidcock, 15 A. 3 (N.J. Eq. 1888);* Jackson *ex dem. Decker v. Merrill, 6 N.Y. (Johns.) 185 (1810); Baker v. Wright, 157 S.W.2d 470 (Tex. Civ. App. 1941); In re Richter's Will, 254 N.W. 103 (Wis. 1934);* Co. Litt., § 9b; 2 Bl. Comm. 108; *Holdfast v. Marten, 1 Term. R. 411 (1786).*

Words of limitation unnecessary in a will. *McFarland v. Chase Manhattan Bank, 337 A.2d 1 (Conn. Super. 1973).*

(n49)Footnote 254. *Burr v. Tierney, 122 A. 454 (Conn. 1923); Reaney v. Wall, 60 A.2d 505 (Conn. 1948); Drager v. McIntosh, 147 N.E. 433 (Ill. 1925); Winn v. William, 165 S.W.2d 961 (Ky. 1942); Rolland v. Hamilton, 49 N.E.2d 436 (Mass. 1943); Morris v. Smith, 23 N.E.2d 212 (Mass. 1954); In re Raworth's Estate, 52 So. 2d 661 (Miss. 1951); Galante v. Silverstein, 129 A. 865 (N.J. Eq. 1925); In re Knapp's Will, 6 N.Y.S.2d 100 (1938); Whichard v. Whitehurst, 106 S.E. 463 (N.C. 1921); Phillips v. Smith, 133 A. 661 (R.I. 1926); Buffington v. Work, 200 A. 541 (R.I. 1938); Briggs v. Briggs, 45 N.W.2d 62 (S.D. 1950); Bradshaw v. Bangley, 75 S.E.2d 609 (Va. 1953).*

(n50)Footnote 255. *Boggs v. Baxter, 261 S.W.2d 684 (Ky. 1953).*

(n51)Footnote 256. *Miller v. Citizens Nat'l Bank, 60 S.E.2d 868 (Va. 1950); Davis v. Hardman, 133 S.E.2d 77 (W. Va. 1963).*

(n52)Footnote 257. *Coil v. Schetter, 152 N.E. 870 (Ind. App. 1926). See* Restatement, Property, § 37.

(n53)Footnote 258. *Ramseur v. Belding, 175 S.W.2d 977 (Ark. 1943); Ickes v. Ickes, 53 N.E.2d 585 (Ill. 1944); Cleveland v. Spilman, 25 Ind. 95 (1865); Shimer v. Mann, 99 Ind. 190 (1884); Ridgeway v. Lanphear, 99 Ind. 251*

(1884); Fountain County Coal & Min. Co. v. Beckleheimer, 1 N.E. 202 (Ind. 1885); Martin v. Raff, 52 N.E.2d 839 (Ind. App. 1944); Creel v. Hammans, 13 N.W.2d 305 (Iowa 1944); Rolland v. Hamilton, 49 N.E.2d 436 (Mass. 1943); Krumm v. Cuneo, 26 Ohio 453, aff'd, 47 N.E.2d 1003 (Ohio 1943).

(n54)Footnote 259. *Lytle v. Hulen, 275 P. 45 (Or. 1929).*

Remainder to "my said residuary legatees... and to their heirs" vested in the residuary legatees even if they predeceased the life tenant and not in "their heirs." *In re Overlock's Estate, 530 P.2d 376 (Ariz. App. 1975).*

(n55)Footnote 260. *Roberts v. Lewis, 153 U.S. 367 (1894); Wallace v. R. E. Stone Co., 76 F.2d 269 (3d Cir. 1935); Dickson v. Alexandria Hosp., 177 F.2d 876 (4th Cir. 1949)* (plaintiff's intent prevails, unless violates law, or contra to public policy); *White v. Crenshaw, 5 D.C. (Mackey) 113 (1886); Cooper v. Mitchell Inv. Co., 66 S.E. 1090 (Ga. 1910); Rigdon v. Cooper, 47 S.E.2d 633 (Ga. 1948)* (it is to be gathered from the will, rather than particular clause); *Bowlin v. White, 91 N.E. 658 (Ill. 1910); McIlhinny v. McIlhinny, 37 N.E. 147 (Ind. 1894); Richardson v. Noyes, 2 Mass. 56 (1806); Godfrey v. Humphrey, 35 Mass. (18 Pick.) 537, 29 Am. Dec. 621 (1837); Defreese v. Lake, 67 N.W. 505 (Mich. 1896); First & American Nat'l Bank v. Higgins, 293 N.W. 585 (Minn. 1940)* (a statute providing that every devise of land shall convey all the estate of the testator therein, unless it appears by the will that he intended to convey a less estate, has the effect of reversing the common law rule by providing that a fee shall pass without words of inheritance or an equivalent expression of intention); *Melick v. Pidcock, 15 A. 3 (N.J. Eq. 1888); Second Nat'l Bank & Trust Co. v. Borden, 167 A. 224 (N.J. Eq. 1933);* Jackson *ex dem. Decker v. Merrill, 6 N.Y. (Johns.) 185 (1810); Smith v. Proctor, 51 S.E. 889 (N.C. 1905); Jolley v. Humphries, 169 S.E. 417 (N.C. 1933); Jones v. Jones, 192 N.E. 811 (Ohio App. 1933); Phillips v. Swank, 13 A. 712 (Pa. 1888).*

(n56)Footnote 261. *Churchill v. Fleming, 193 N.E. 497 (Ill. 1934); Hawley v. Northampton, 8 Mass. 3 (1811); Bramley v. White, 183 N.E. 761 (1933); In re Oertle's Will, 24 N.W. 924 (Minn. 1885).*

(n57)Footnote 262. *In re Prasser's Will, 121 N.W. 643 (Wis. 1909).*

(n58)Footnote 263. *Hill v. Gianelli, 77 N.E. 458 (Ill. 1906); Bell County v. Alexander, 22 Tex. 350 (1858).*

(n59)Footnote 264. *Greiner v. Heins, 131 N.E. 20 (Ind. App. 1921). See Nichols v. Alexander, 152 N.E. 863 (Ind. App. 1926).*

(n60)Footnote 265. *Fernandez v. Martin, 225 S.W. 27 (Ky. 1920); Sorenson v. Booram, 297 S.W. 70 (Mo. 1927); Shoemaker v. Coats, 10 S.E.2d 810 (N.C. 1940).*

(n61)Footnote 266. *Hambright v. Carroll, 168 S.E. 817 (N.C. 1933).*

(n62)Footnote 267. *Brand v. Faries, 178 A. 583 (Del. Ch. 1935); Vaughan v. Compton, 235 S.W.2d 328 (Mo. 1950); In re Forde's Will, 36 N.E.2d 79 (N.Y. 1941); In re Cryan's Estate, 152 A. 675 (Pa. 1930); Lyon v. Alexander, 156 A. 84 (Pa. 1931).*

(n63)Footnote 268. *Weller v. Searcy, 111 S.W.2d 206 (Mo. App. 1937).*

(n64)Footnote 269. *Simons v. Bowers, 81 S.W.2d 604 (Ky. 1935); Clay v. McNabb, 151 S.W.2d 1027 (Ky. 1941); Honaker v. Hutchison, 205 S.W.2d 683 (Ky. 1947); Gearheart v. Little, 230 S.W.2d 472 (Ky. 1950). See Sater v. Sater, 46 N.W.2d 433 (Mich. 1951); Williams v. Williams, 65 S.W.2d 561 (Tenn. 1933).*

(n65)Footnote 270. *See In re Young, 2 All. E.R. 1245* (N.D.).

(n66)Footnote 271. *Gardner v. Grossman, 57 N.E.2d 440 (Ind. App. 1944).*

(n67)Footnote 272. *Bell v. Holdbrook, 187 S.W.2d 433 (Ky. 1945).*

(n68)Footnote 273. *In re McGovern's Estate, 250 P. 812 (Mont. 1926); In re Seif's Will, 209 N.Y.S. 341 (1925).*

(n69)Footnote 274. *Lambert v. Paine, 7 U.S. (3 Cranch) 97 (1805); Leland v. Adams, 75 Mass. (9 Gray) 171 (1857).*

(n70)Footnote 275. *Hampton v. West, 193 S.E. 290 (N.C. 1937).*

(n71)Footnote 276. *In re McGovern's Estate, 250 P. 812 (Mont. 1926);* Jackson *ex dem. Decker v. Merrill, 6 N.Y. (Johns.) 185 (1810); Shoemaker v. Coats, 10 S.E.2d 810 (N.C. 1940); Zimmerman v. Anders, 6 Pa. (Watts & Serg.) 218, 40 Am. Dec. 552 (1843).*

(n72)Footnote 277. *Ramseur v. Belding, 175 S.W.2d 977 (Ark. 1943).*

(n73)Footnote 278. Jackson *ex dem. Decker v. Merrill, 6 N.Y. (Johns.) 185 (1810); Zimmerman v. Anders, 6 Pa. (Watts & Serg.) 218 (1843).*

(n74)Footnote 279. *Piersol v. Hays, 47 N.E.2d 838 (Ind. App. 1943); Godfrey v. Humphrey, 35 Mass. (18 Pick.) 537 (1837).*

(n75)Footnote 280. Co. Litt., § 9b. *Rector v. Waugh, 17 Mo. 13 (1852).*

(n76)Footnote 281. *Rector v. Waugh, 17 Mo. 13 (1852).*

(n77)Footnote 282. *Charter Oak Life Ins. Co. v. Chatillion, 11 F. 818 (C.C.D. Mo. 1882).*

(n78)Footnote 283. *Kautz v. Kautz, 76 A.2d 398 (Pa. 1950); Banks v. Banks, 229 S.W.2d 99 (Tex. Civ. App. 1950).*

(n79)Footnote 284. *Cahill v. Cahill, 84 N.E.2d 380 (Ill. 1949).* But *cf. City Bank & Trust Co. v. Morrissey, 454 N.E.2d 1195 (Ill. App. 1983).*

(n80)Footnote 285. *Field v. Morris, 114 S.W. 206 (Ark. 1908); Chappell v. New York, N.H. & H.R. Co., 24 A. 997 (Conn. 1892); Koelle v. Knecht, 99 Ill. 396 (1881); Stone v. Stone, 119 N.W. 712 (Iowa 1909); Engel v. Ayer, 27 A. 352 (Me. 1893); Hall v. Hall, 76 A. 705 (Me. 1910); McIntire v. Lauckner, 81 A. 784 (Me. 1911); Worcester v. Smith, 103 A. 65 (Me. 1918); Curtis v. Gardner, 54 Mass. (13 Met.) 457 (1847); Ashcroft v. Eastern R. Co., 126 Mass. 196 (1878); Bean v. French, 3 N.E. 206 (Mass. 1884); Bailey v. Agawam Nat'l Bank, 76 N.E. 449 (Mass. 1906); Negaunee Iron Co. v. Iron Cliffs Co., 96 N.W. 468 (Mich. 1903), writ of error dismissed, 197 U.S. 463; Whitaker v. Brown, 46 Pa. 197 (1863); Mandle v. Gharing, 100 A. 535 (Pa. 1917).*

(n81)Footnote 286. *White v. Crawford, 10 Mass. 183 (1813).*

(n82)Footnote 287. *Randall v. Latham, 36 Conn. 48 (1869); Chappell v. New York, N.H. & H.R. Co., 24 A. 997 (Conn. 1892).*

In *Whitson v. Goudeseune, 290 P.2d 590 (Cal. 1955),* a deed "to present owners of lot 3 and their successors" was a sufficient designation of grantees of an easement.

(n83)Footnote 288. *Hall v. Hall, 76 A. 705 (Me. 1910); Emerson v. Mooney, 50 N.H. 315 (1870); Mandle v. Gharing, 100 A. 535 (Pa. 1917).*

(n84)Footnote 289. *See* Restatement of the Law of Property, § 27, Comment.

(n85)Footnote 290. *Carolina Sav. Bank v. McMahon, 16 S.E. 31 (S.C. 1892).*

(n86)Footnote 291. Coke on Littleton, §§ 8b, 94b. *See Overseers of Poor v. Sears, 39 Mass. (22 Pick.) 122 (1839); Gould v. Lamb, 52 Mass. (77 Met.) 84 (1846); Brattle Square Church v. Grant, 69 Mass. (3 Gray) 142 (1855); Wilcox v. Wheeler, 47 N.H. 488 (1867); Gabert v. Olcott, 23 S.W. 985 (Tex. 1893).*

> Coke on Littleton, § 8b: Here Littleton treateth of purchases by natural persons, and not of bodies politic or corporate; for if lands be given to a sole body politic or corporate (as to a bishop, parson, vicar, master of an hospital, &c.), there to give him an estate of inheritance in his politic or corporate capacity, he must have these words, 'To have and to hold to him and his successors;' for without these words successors, in those cases there passeth no inheritance; for as the heir doth inherit to the ancestor, so the successor doth succeed to the predecessor, and the executor to the testator. But it appeareth here by Littleton, that if a man at this day give lands to I. S. and his successors, this createth no fee simple in him; for Littleton speaking of natural persons saith that these words (his heirs) make an estate of inheritance in all feoffments and grants, whereby he excludeth these words (his successors).
>
> Coke on Littleton, § 9b: And here it is to be observed (that I may speak once for all) that every period of our author in all his three books contains matter of excellent learning, necessarily to be collected by implications, or consequence. For example he saith here, that these words (his heirs) make an estate of inheritance in all feoffments and grants. He expressing feoffments and grants, necessarily implieth, that this rule extendeth not--
>
> First, to last wills and testaments; for thereby, as he himself after saith, an estate of inheritance may pass without these words (his heirs). As if a man devise twenty acres to another, and that he shall pay to his executors for the same ten pound, hereby the devisee hath a fee simple by the intent of the devisor, albeit it be not to the value of the land. So it is if a man devise lands to a man in perpetuum, or to give and to sell, or in feodo simplici, or to him and to his assigns forever. In these cases a fee simple doth pass by the intent of the devisor. But if the devise be to a man and his assigns without saying (forever), the devisee hath but an estate for life.

Words of succession were necessary to convey a fee to a corporation. *Chancellor v. Bell, 17 A. 684 (N.J. Eq. 1889).*

(n87)Footnote 292. *Hamlin v. Perticuler Baptist Meeting House, 69 A. 315 (Me. 1907).*

(n88)Footnote 293. *Wilcox v. Wheeler, 47 N.H. 488 (1867); Chancellor v. Bell, 17 A. 684 (N.J. Eq. 1889); Schurch v. Harraman, 191 N.E. 907 (Ohio App. 1933); Wilkes-Barre v. Wyoming Historical & Geological Soc., 19 A. 809 (Pa. 1890); Halifax Congregational Soc'y v. Stark, 34 Vt. 243 (1861).*

(n89)Footnote 294. Restatement, Property, § 33 .

(n90)Footnote 295. Restatement, Property, § 34 .

(n91)Footnote 296. *Barker v. Barrows, 138 Mass. 578 (1885); United States Pipe-Line Co. v. Delaware, L. & W. R. Co., 41 A. 759 (N.J.L. 1898); Union Canal Co. v. Young, 1 Pa. (Whart.) 410.*

"In strictness, while a corporation sole has successors, a corporation aggregate has none, for it continues to exist, one and the same, as the river retains its identity while the currents of water that form it are continually flowing in and passing out. There is a succession among the constituent members, but none in the corporation itself." *Sons of Temperance v. Aston, 92 N.C. 578 (1885). See Dyer v. Siano, 11 N.E.2d 451 (Mass. 1937).*

(n92)Footnote 297. *Reid v. Barry, 112 So. 846 (Fla. 1927).*

(n93)Footnote 298. *United States v. Five Acres of Land in Suffolk County, 56 F. Supp. 628 (Mass. 1944); Dyer v.*

Siano, 11 N.E.2d 451 (Mass. 1937); Sylvester v. State, 91 P. 15 (Wash. 1907) (although a deed to the Territory of Washington contained no clause granting the property to the "heirs" or "successors" of the territory, a transmissible title was granted and the property did not revert to the grantor when the territory was changed into a state). *See* Restatement of The Law of Property, § 35.

(n94)Footnote 299. *Shevlin v. Colony Lutheran Church, 88 S.E.2d 674 (S.C. 1955).*

(n95)Footnote 300. 2 Preston, Estates 2; Co. Litt., § 9b; *Hofsass v. Mann, 22 A. 65 (Md. 1891); Mercier v. Missouri River, Ft. S. & G.R. R., 54 Mo. 506 (1874); Lemon v. Graham, 19 A. 48 (Pa. 1890).*

(n96)Footnote 301. *Brady v. Evans, 28 A. 1061 (Md. 1894).*

(n97)Footnote 302. *See* Restatement, Property, § 28.

(n98)Footnote 303. *Lemon v. Graham, 19 A. 48 (Pa. 1890).*

(n99)Footnote 304. *Whitley v. Arenson, 12 S.E.2d 906 (N.C. 1941); Hamby v. Northcut, 149 S.W.2d 484 (Tenn. App. 1940).*

(n100)Footnote 305. *King v. Ackerman, 67 U.S. (2 Black) 408 (1862); Howell v. Deady, 48 F. Supp. 104 (D. Or. 1939); Kidd v. Borum, 61 So. 100 (Ala. 1913); Hughes v. Strickland, 295 S.W. 722 (Ark. 1927); Churchill v. Fleming, 193 N.E. 497 (Ill. 1934); Hall v. Curd, 181 N.E. 168 (Ind. App. 1932); Porter v. Jackson, 95 Ind. 210 (1883); Donohue v. Donohue, 37 P. 998 (Kan. 1894); Lindsay v. McCormack, 9 Ky. (2 A.K. Marsh.) 229 (1820); Medcalf v. Whitely, 160 S.W.2d 348 (Ky. 1942); Bell v. Scammon, 15 N.H. 381, 41 Am. Dec. 706 (1844); In re Sliter, 36 N.E.2d 75 (N.Y. 1941); In re Van Winkle's Will, 86 N.Y.S.2d 597 (1949); In re Vigliotti's Estate, 96 N.Y.S.2d 840 (1950); Shoemaker v. Coats, 10 S.E.2d 810 (N.C. 1940); Case v. Hall, 38 N.E. 618 (Ohio St. 1894).*

(n101)Footnote 306. *Haight v. Royce, 113 N.E. 71 (Ill. 1916); Wise v. Crandall, 215 S.W. 245 (Mo. 1919).*

(n102)Footnote 307. *In re Hinkle's Appeal, 9 A. 938 (Pa. 1887).*

(n103)Footnote 308. *Fidelity Trust Co. v. Bobloski, 76 A. 720 (Pa. 1910).*

(n104)Footnote 309. *Zimmer v. Sennott, 25 N.E. 774 (Ill. 1890).*

(n105)Footnote 310. *McCaffrey v. Manogue, 196 U.S. 563 (1905); Fidelity Trust Co. v. Bobloski, 76 A. 720 (Pa. 1910).*

(n106)Footnote 311. *Funk v. Eggleston, 92 Ill. 515 (1879); Snyder v. Nesbitt, 26 A. 1006 (Md. 1893);* Jackson *ex dem. Townsend v. Bull, 10 N.Y. (Johns.) 148 (1813).*

(n107)Footnote 312. *Miller v. Miller, 247 N.W.2d 445 (Neb. 1976).*

(n108)Footnote 313. *Cahill v. Cahill, 84 N.E.2d 380 (Ill. 1949).*

(n109)Footnote 314. *Hughes v. Strickland, 295 S.W. 722 (Ark. 1927).*

(n110)Footnote 315. *Watters v. First Nat'l Bank, 171 So. 280 (Ala. 1936); In re Franck's Estate, 210 P. 417 (Cal. 1922); Angus v. Noble, 46 A. 278 (Conn. 1900); Van Olinda v. Carpenter, 19 N.E. 868 (Ill. 1889); Drake v. Steele, 89 N.E. 1018 (Ill. 1909); Mettler v. Warner, 90 N.E. 1099 (Ill. 1910); McCoy v. Houck, 99 N.E. 97 (Ind. 1912); Ames v. Conry, 165 N.E. 435 (Ind. App. 1927)* (devise of rents and profits for life); *Lachmund v. Moore, 181 N.W. 4 (Iowa 1921); Nisbet v. Dozier, 263 S.W. 736 (Ky. 1924); Dixon v. Dixon, 124 A. 198 (Me. 1924); Torian v. Sanders, 172 So. 142 (Miss. 1937); In re Feldhus' Estate, 300 N.Y.S. 799 (1937); Potter v. Pike, 183 N.Y.S. 842 (1920); Perry v.*

Hackney, 55 S.E. 289 (N.C. 1906); Halliburton v. Phifer, 117 S.E. 296 (N.C. 1923); Stigers v. Dinsmore, 44 A. 550 (Pa. 1899); Beilstein v. Beilstein, 45 A. 73 (Pa. 1899); Goffe v. Goffe, 94 A. 2 (R.I. 1915); Johnson v. Johnson, 23 S.W. 114 (Tenn. 1893); Russell v. Jackson, 113 S.W.2d 76 (Tenn. App. 1893); Frazier v. Hanion Gasoline Co., 29 S.W.2d 461 (Tex. Civ. App. 1930); Miller v. Citizens Nat'l Bank, 60 S.E.2d 868 (Va. 1950).

See also Ryder v. Ryder, 41 A.2d 278 (N.J. Eq. 1945); Burney v. Holloway, 36 S.E.2d 5 (N.C. 1945); Loose v. Loose, 30 Ohio 333 (1958).

Under the English Conveyancing Act of 1881, 44 & 45 Victoria, ch. 41, § 65, terms of years of original length of 300 years or more, which had not less than 200 years to run, could be converted into fees by a declaration made by any interested person.

(n111)Footnote 316. *In re Franze's Estate, 296 N.Y.S. 687 (1937).*

(n112)Footnote 317. *Lawrence v. Lawrence, 283 S.W.2d 697 (Ark. 1955); Kutzleb v. Zipper, 282 S.W.2d 344 (Ky. 1955); Ellis v. Bruce, 286 S.W.2d 645 (Tex. Civ. App. 1956).*

(n113)Footnote 318. *Mather v. Mather, 103 Ill. 607 (1882); Sampson v. Randall, 72 Me. 109 (1881); Brombacher v. Berking, 39 A. 134 (N.J. Eq. 1897); Wright v. Laird, 112 A. 63 (Pa. 1920); Mays v. Beech, 86 S.W. 713 (Tenn. 1905).*

(n114)Footnote 319. *Morrison v. Schorr, 64 N.E. 545 (Ill. 1882); Durfee v. Pomeroy, 49 N.E. 132 (N.Y. 1898); Ladies Benevolent Soc'y v. Orrell, 142 S.E. 493 (N.C. 1928)* (in case only Part of the income is given, title to the corpus of the property does not pass).

(n115)Footnote 320. *Johnson v. Muller, 86 P.2d 569 (Kan. 1939).*

(n116)Footnote 321. *Roe v. Vingut, 22 N.E. 933 (N.Y. 1889).*

(n117)Footnote 322. *Collier v. Grimesey, 36 Ohio St. 17 (1880).*

(n118)Footnote 323. *In re Emmerich's Estate, 32 A.2d 400* (Pa.). *See also In re Aye's Will, 124 P.2d 482 (Kan. 1942).*

(n119)Footnote 324. *LeBreton v. Cook, 40 P. 552 (Cal. 1895); Shindler v. Robinson, 135 N.Y.S. 1056 (1912); Schuldt v. Reading Trust Co., 113 A. 545 (Pa. 1921)* (ordinarily to warrant the implication of a fee from a devise of income, there must be a gift of the gross rent); *In re Eichelberger's Estate, 118 A. 555 (Pa. 1922); Jackson v. Jackson, 33 S.E. 749 (S.C. 1899).*

(n120)Footnote 325. *Lewis v. Harrower, 64 N.E. 374 (Ill. 1902); Fogler v. Titcomb, 42 A. 360 (Me. 1898).*

(n121)Footnote 326. *Rector v. Waugh, 17 Mo. 13 (1852).*

(n122)Footnote 327. 2 Bl. Comm. 108, *Chancellor v. Bell, 17 A. 684 (N.J. Eq. 1889); Nicoll v. New York & E.R.R. Co., 12 N.Y. 121 (1854).*

(n123)Footnote 328. *Missouri Wesleyan College v. Shulte, 142 S.W.2d 644 (Mo. 1940).*

(n124)Footnote 329. 2 Kent's Comm. 282.

(n125)Footnote 330. *Nicoll v. New York & E.R.R., 12 N.Y. 121 (1854).*

(n126)Footnote 331. *McElroy v. McElroy, 113 Mass. 509 (1873).*

(n127)Footnote 332. Lewin, Trusts and Trustees (9th ed.) 44; *Holmes v. Holmes, 86 N.C. 205 (1882). See* Restatement of the Law of Property § 36.

(n128)Footnote 333. *Whichard v. Whitehurst, 106 S.E. 463 (N.C. 1921).*

(n129)Footnote 334. *Gunn v. Brown, 23 A. 462 (Md. 1892); Ropes v. Upton, 125 Mass. 258 (1892); Hughes v. Millers Mut. Fire Ins. Co., 246 S.W. 23 (Tenn. 1922).*

(n130)Footnote 335. *Knowlden v. Leavitt, 121 Mass. 307 (1876).*

(n131)Footnote 336. *Chapin v. First Universalist Soc'y, 74 Mass. (8 Gray) 580 (1857); Hastings v. Merriam, 117 Mass. 245 (1875).*

(n132)Footnote 337. *Newhall v. Wheeler, 7 Mass. 189 (1810)* (trustee takes a legal estate commensurate with the *cestui que* trust's equitable estate).

(n133)Footnote 338. *Doe v. Considine, 73 U.S. (6 Wall.) 458 (1868); Young v. Mahoning County Comm'rs, 53 F. 895 (C. C. Ohio 1892); Kirkland v. Cox, 94 Ill. 400 (1879); Preachers' Aid Soc'y v. England, 106 Ill. 125 (1883); De Haven v. Sherman, 22 N.E. 711 (Ill. 1888); North v. Philbrook, 34 Me. 532 (1852); Hawkins v. Chapman, 36 Md. 83 (1872); Merritt v. Disney, 48 Md. 344 (1878); Newhall v. Wheeler, 7 Mass. 189 (1810); Paton v. Langley, 15 N.W. 537 (Mich. 1883); First & American Nat'l Bank v. Higgins, 293 N.W. 585 (Minn. 1940); Ewing v. Shannahan, 20 S.W. 1065 (Mo. 1892); Wilcox v. Wheeler, 47 N.H. 488 (1867); Smith v. Proctor, 51 S.E. 889 (N.C. 1905); Mitchell v. Allen, 61 S.E. 1087, reh'g denied, 62 S.E. 399 (S.C. 1908); McMillan v. Hughes, 70 S.E. 804 (S.C. 1911); Cathcart v. Nelson, 40 A. 826 (Vt. 1898).*

See Restatement of the Law of Property, § 32.

(n134)Footnote 339. *Stearns v. Palmer, 51 Mass. (10 Met.) 32 (1845); Melick v. Pidcock, 15 A. 3 (N.J. Eq. 1888).*

(n135)Footnote 340. *Magevney v. Karsch, 65 S.W.2d 562 (Tenn. 1933).*

(n136)Footnote 341. *Neilson v. Lagow, 53 U.S. (12 How.) 98 (1869).*

(n137)Footnote 342. *Doe v. Considine, 73 U.S. (6 Wall.) 458 (1869); Young v. Bradley, 101 U.S. 782 (1879); Potter v. Couch, 141 U.S. 296 (1891); Chamberlain v. Thompson, 10 Conn. 243 (1834); Christopher v. Mungen, 55 So. 273 (Fla. 1911); Defrees v. Brydon, 114 N.E. 336 (Ill. 1916); Ewing v. Jones, 29 N.E. 1057 (Ind. 1892); Gould v. Lamb, 52 Mass. (11 Met.) 84, 45 Am. Dec. 187 (1846); Melick v. Pidcock, 15 A. 3 (N.J. Eq. 1888); Smith v. Proctor, 51 S.E. 889 (N.C. 1905); Montgomery v. Trueheart, 146 S.W. 284 (Tex. Civ. App. 1912).*

(n138)Footnote 343. *Ellis v. Fisher, 35 Tenn. (3 Sneed) 231 (1855); Temple v. Ferguson, 72 S.W. 455 (Tenn. 1903).*

(n139)Footnote 344. *Bank of Prosperity v. Dominick, 107 S.E. 914 (S.C. 1921).*

(n140)Footnote 345. *McFall v. Kirkpatrick, 86 N.E. 139 (Ill. 1908).*

(n141)Footnote 346. *In re Beaumont's Estate, 54 N.Y.S.2d 581 (1945).*

(n142)Footnote 347. *Illinois Nat'l Bank v. Gwinn, 61 N.E.2d 249 (Ill. 1945).*

(n143)Footnote 348. *McGookey v. Winter, 46 N.E.2d 84 (Ill. 1943); In re Risher's Will, 277 N.W. 160 (Wis. 1943).*

Where testator devised property to trustees to provide for testator's widow during her life and conferred power of

appointment upon the widow, testator conveyed full title to trustees and upon the widow's failure to exercise the power, property was reinvested in testator's estate by virtue of resulting trust, and should be distributed to testator's heirs as of the time of the widow's death. *Butler v. Citizens & S. Nat'l Bank, 86 S.E.2d 520 (Ga. 1955).*

(n144)Footnote 349. *Manufacturers Trust Co. v. Kelby, 125 F.2d 650 (2d Cir. 1942); Model Land Co. v. Crawford, 20 So. 2d 122 (Fla. 1944); Ickes v. Ickes, 53 N.E.2d 585 (Ill. 1944); Mock v. B. F. Goodrich Corp., 38 N.E.2d 900 (Ind. App. 1942); Morton v. Barrett, 22 Me. 257 (1843); Adams v. Dugan, 163 P.2d 227 (Okla. 1945); In re Koenig's Appeal, 57 Pa. 252 (1868); Magevney v. Karsch, 65 S.W.2d 562 (Tenn. 1933). In re Greene's Will, 3 N.W.2d 704 (Wis. 1942).*

(n145)Footnote 350. *Marshall v. Gingell, L.R. 21 Ch. Div. 790* (N.D.).

(n146)Footnote 351. *Smith v. Rizzuto, 276 N.W. 406 (Neb. 1937).*

(n147)Footnote 352. *Foreman Trust & Sav. Bank v. Seelenfreund, 161 N.E. 88 (Ill. 1928).*

(n148)Footnote 353. *Chicago, M. & St. P.R.R. v. Des Moines Union R.R., 254 U.S. 196 (1920).*

(n149)Footnote 354. *Hale v. Hale, 33 N.E. 858 (Ill. 1893).*

(n150)Footnote 355. *Mulvane v. Rude, 45 N.E. 659 (Ind. 1896).*

(n151)Footnote 356. *Wyatt v. Stillman Institute, 260 S.W. 73 (Mo. 1923).*

(n152)Footnote 357. *Grainger v. Hamilton, 90 S.E.2d 209 (S.C. 1955). See* David H. Means, *Words of Inheritance in Deed of Land in South Carolina, 5 S.C. L.Q. 313 (1953).* Words of inheritance are still necessary to convey a fee in *South Carolina. McLaurin v. McLaurin, 217 S.E.2d 41 (S.C. 1975).*

(n153)Footnote 358. *Cole v. Steinlauf, 136 A.2d 744 (Conn. 1957)* ("and assigns forever" created only a life estate).

(n154)Footnote 359. Still used in Hawaii but may be found in the habendum clause. *De Freitas v. Coke, 380 P.2d 762 (Haw. 1963).*

(n155)Footnote 360. *Roberta v. Lewis, 153 U.S. 367 (1894); Demorest v. City Bank Farmers Trust Co., 321 U.S. 36 (1944); Wallace v. R.E. Stone Co., 76 F.2d 269 (3d Cir. 1935); Simmons v. Rosemond, 223 F. Supp. 61 (D.D.C. 1963); Herron v. Rozelle, 480 F.2d 282 (10th Cir. 1973)* ("heirs" not necessary in reservation of a permanent timber estate); *Parker v. Robertson, 88 So. 418 (Ala. 1921); Brand v. Faries, 178 A. 583 (Del. Ch. 1935); Taylor v. Payne, 17 So. 2d 615 (Fla. 1944); Daniel v. Stewart, 110 S.E. 178 (Ga. 1921); Melies v. Beatty, 145 N.E. 146 (Ill. 1906); Spangler v. Bell, 60 N.E.2d 864 (Ill. 1924); Cahill v. Cahill, 84 N.E.2d 380 (Ill. 1949); In re Trusteeship of Creech, 159 N.E.2d 291 (Ind. App. 1959); In re Heller's Estate, 11 N.W.2d 586 (Iowa 1943); In re Brown, 239 P. 747 (Kan. 1925); Lindsay v. McCormack, 9 Ky. (2 A.K. Marsh.) 229 (1820); Weller v. Dinwiddie, 248 S.W. 874 (Ky. 1923); Simons v. Bowers, 81 S.W.2d 604 (Ky. 1935); Methodist Church v. Fairbanks, 126 A. 823 (Me. 1924); Harrison v. Prentice, 38 A.2d 101 (Md. 1944); Knibbs v. Knibbs, 127 N.E. 885 (Mass. 1920); Merchants Nat'l Bank of Boston v. Merchants Nat'l Bank of Boston, 62 N.E.2d 831 (Mass. 1945); In re Thayer's Estate, 15 N.W.2d 712 (Mich. 1944); In re Crosby's Estate, 15 N.W.2d 501 (Minn. 1944); Juden v. Southeast Missouri Tel. Co., 235 S.W.2d 360 (Mo. 1950); Sorenson v. Booram, 297 S.W. 70 (Mo. 1927); In re Barrett's Estate, 123 N.W. 299 (Neb. 1909); Tzeses v. Tenez Constr. Co., 128 A. 388 (N.J. Eq. 1925); In re Wells, 21 N.E. 137 (N.Y. 1889); In re Seif's Will, 209 N.Y.S. 341 (1925); Barbee v. Thompson, 139 S.E. 838 (N.C. 1927); Friswold v. United States Nat'l Bank, 257 P. 818 (Or. 1927); Cassell v. Cooke, 8 Pa. (Serg. & Rawle) 268 (1822); Snyder v. Baer, 22 A. 897 (Pa. 1891); Reiff v. Pepo, 139 A. 144 (Pa. 1927); Phillips v. Smith, 133 A. 661 (R.I. 1926); Goffe v. Karanyianopoulos, 166 A. 547 (R.I. 1933); Anderson v. Anderson, 16 N.W.2d 43 (S.D. 1944); Totten v. Dawson, 139 S.E. 858 (W. Va. 1927); In re Baird's Will, 177 N.W. 23 (Wis. 1920); In re Richter's Will, 254 N.W. 103*

(Wis. 1934).

See Restatement of the Law of Property, § 37, Cmt. a.

(n156)Footnote 361. *See* Restatement of the Law of Property, § 39.

See the following cases:

Hay's Estate v. Internal Revenue Comm'r, 181 F.2d 169 (5th Cir. 1950); United States v. Five Acres of Land in Suffolk County, 56 F. Supp. 628 (Mass. 1944); Graves v. Wheeler, 61 So. 341 (Ala. 1913); Long v. Holden, 112 So. 444 (Ala. 1927); Oglesby v. Thomas, 16 So. 2d 320 (Ala. 1944); Heartsill v. Thompson, 16 So. 2d 507 (Ala. 1944); Henry v. White, 60 So. 2d 149 (Ala. 1952); Mt. Olive Stave Co. v. Handford, 166 S.W. 532 (Ark. 1914); Van Slyke v. Arrowhead Reservoir & Power Co., 102 P. 816 (Cal. 1909); Daniel v. Stewart, 110 S.E. 178 (Ga. 1921); Palmer v. Cook, 42 N.E. 796 (Ill. 1896); Stoller v. Doyle, 100 N.E. 959 (Ill. 1913); Prall v. Burckhartt, 132 N.E. 280 (Ill. 1921); Jilek v. Chicago, Wilmington & Franklin Coal Co., 47 N.E.2d 96 (Ill. 1943); In re Trusteeship of Creech, 159 N.E.2d 291 (Ind. App. 1959); Baker v. Kenney, 124 N.W. 901 (Iowa 1910); Yeager v. Farnsworth, 145 N.W. 87 (Iowa 1914); Miller v. Campbell, 180 S.W. 372 (Ky. 1915); Weller v. Dinwiddie, 248 S.W. 874 (Ky. 1923); Gearheart v. Little, 230 S.W.2d 472 (Ky. 1950); Kaufman v. Federal Nat'l Bank, 191 N.E. 422 (Mass. 1934); First & American Nat'l Bank v. Higgins, 293 N.W. 585 (Minn. 1940); Tygard v. Hartwell, 102 S.W. 989 (Mo. 1907); Byrd v. Allen, 171 S.W.2d 691 (Mo. 1942); Juden v. Southeast Missouri Tel. Co., 235 S.W.2d 360 (Mo. 1950); Rupert v. Penner, 53 N.W. 598 (Neb. 1892); Smith v. Furbish, 44 A. 398 (N.H. 1894); Wilson v. Ford, 102 N.E. 614 (N.Y. 1913); Sprinkle v. Spainhour, 62 S.E. 910 (N.C. 1908); Holloway v. Green, 83 S.E. 243 (N.C. 1914); Morris v. Morris, 98 S.E.2d 298 (N.C. 1957) (statute changed rule as to words of limitation in wills); *Ford v. Oregon Elec. R. Co., 117 P. 809 (Or. 1911); Palmateer v. Reid, 254 P. 359 (Or. 1927); Beck v. Lane County, 18 P.2d 594 (Or. 1933); Manwiller v. Ludwig, Pa. Com. Pl., 35 Berks 231 (Pa. Com. Pl. 1943); Evenson v. Webster, 53 N.W. 747 (S.D. 1892); Teague v. Sowder, 114 S.W. 484 (Tenn. 1908); Lockett v. Thomas, 165 S.W.2d 375 (Tenn. 1942); Arms v. Burt, 1 Vt. 303 (1828); Flanary v. Kane, 46 S.E. 312, 681 (Va. 1904); Pioneer Sand & Gravel Co. v. Seattle Constr. & Dry Dock Co., 173 P. 508 (Wash. 1918); Williamson v. Jones, 19 S.E. 436 (W. Va. 1894).*

Under such a statute the word "heirs" if used is mere surplusage and not a word of purchase. *Bronstein v. Bronstein, 83 So. 2d 699 (Fla. 1955).*

But though by statute use in granting clause of words of inheritance is rendered unnecessary, neither use of such words nor fact that fee might pass to grantee under statute will render subsequent clauses limiting estate void for repugnance. *Richardson v. Richardson, 98 N.E.2d 190 (Ind. App. 1951).*

The ancient law imputed a thaumaturgical magic to language. The universal touchstone today is the intention of the parties to the instrument creating the interest in land. *Oldfield v. Stoeco Homes, Inc., 139 A.2d 291 (N.J. 1958).*

Lack of words of inheritance held of no effect and created no inference of intent. *Burcky v. Knowles, 413 A.2d 585 (N.H. 1980).*

(n157)Footnote 362. Statute dispensing with necessity of words of limitation is only prospective in operation. *Ivey v. Peacock, 47 So. 481 (Fla. 1908).*

(n158)Footnote 363. Thus in Indiana the Statute in 1852 abolished the necessity for the use of words of limitation in conveyances. 1 R. S. 1852, ch. 23, § 14; Ind. Code 32-1-2-14. But it was not until 1953 that a devise to an individual without words of limitation clearly carried a fee simple unless there were express words in the will to the contrary. Acts 1953, ch. 112, § 601; Ind. Code 29-1-6-1(b).

(n159)Footnote 364. *Hill v. Gianelli, 77 N.E. 458 (Ill. 1906); Ickes v. Ickes, 53 N.E.2d 585 (Ill. 1944); Bell v.*

Alexander, 22 Tex. 350 (1858); Wicker v. Rowntree, 185 S.W.2d 150 (Tex. Civ. App. 1945).

Deed to "X and to its survivor and to such survivor's heirs and assigns" created a fee simple in *X. Faiola v. Faiola, 238 A.2d 405 (Conn. 1968).*

(n160)Footnote 365. *Bramley v. White, 183 N.E. 761 (Mass. 1933).*

Words "and his children" in will devising real property to testator's wife, and in event of her remarriage, to testator's son and his children, were words of limitation rather than words of devise, and absolute fee to real property vested in son upon death of wife, and son could convey marketable title to real property after death of testator's wife. *Boggs v. Baxter, 261 S.W.2d 684 (Ky. 1953).*

As used in clause giving testatrix residuary estate to her named grandchildren, "their heirs, legal representatives and assigns" absolutely and forever, quoted words were words of limitation and not of substitution, and such residuary clause bequeathed absolute gifts to those of the named legatees who survive the testatrix. *In re Ley's Estate, 110 N.Y.S.2d 494 (1952).*

A pecuniary bequest payable out of the proceeds of the sale of certain real estate, to a named legatee, his heirs or assigns, was held not to lapse upon the death of the legatee before the teststor and the heirs or assigns of the legatee should be substituted as legatees. The words "heirs and assigns" are words of limitation, which define the quality of the estate of the legatee; however the words "heirs or assigns," are words of substitution, implying that the heirs shall be substituted for the legatee in the event of his nonexistence at the time of the taking. *In re Harper's Estate, 103 Pa. L.J. 215 (1955).*

Where the testatrix gave all her estate to her husband, and will provided that husband should enjoy possession and benefits of the estate during the remainder of his life, and that residue of estate after husband's death should be equally divided between their children and the children's "heirs," testatrix' children acquired an estate in remainder in fee, the word "heirs" being construed in its technical sense as a word of limitation. *Wates v. Fairfield Forest Prods. Co., 42 S.E.2d 529 (S.C. 1947).*

(n161)Footnote 366. *Kentland Coal & Coke Co. v. Blankenship, 300 S.W.2d 570 (Ky. 1957)* ("and her heirs and assigns" in granting clause and habendum clause prevailed over limiting language later in the deed).

(n162)Footnote 367. *Brookbank v. Benedum-Trees Oil Co., 131 A.2d 103 (Pa. 1957).*

Use of "heirs" in a deed is presumed a word of limitation. *Anne Arundel County v. Litz, 412 A.2d 1256 (Md. App. 1980).*

(n163)Footnote 368. *Cragin v. Frost Nat'l Bank, 164 S.W.2d 24 (Tex. Civ. App. 1942).*

Use of "heirs" after necessity has been released by statute does not create an interest in the heirs, the words still being words of limitation, not of purchase. *In re Newby's Estate, 361 P.2d 622 (Colo. 1961).*

(n164)Footnote 369. *Richardson v. Richardson, 98 N.E.2d 190 (Ind. App. 1951).*

(n165)Footnote 370. *Prall v. Burekhartt, 132 N.E. 280 (Ill. 1921).*

(n166)Footnote 371. *Woodward v. Thissell, 218 F. 810 (6th Cir. 1914); Slaughter v. Hall, 77 So. 738 (Ala. 1918); Buck v. Garber, 103 N.E. 1059 (Ill. 1913); Husted v. Rollins, 137 N.W. 462 (Iowa 1912);* 378; *Garrett v. Wiltse, 161 S.W. 694 (Mo. 1913); Triplett v. Williams, 63 S.E. 79 (N.C. 1908); 24 L.R.A. (NS) 514. Teague v. Sowder, 114 S.W. 484 (Tenn. 1908); Rose v. Rose, 60 S.E.2d 45 (Va. 1950); Weekley v. Weekley, 83 S.E. 1005 (W. Va. 1914).*

(n167)Footnote 372. Restatement of the Law of Property, § 40.

(n168)Footnote 373. *See Henry v. Metz, 46 N.E.2d 945 (Ill. 1942); Law v. Kane, 52 N.E.2d 212 (Ill. 1943).*

Transfer of "all interest" creates a fee simple absolute. *McGlothlin v. McElvain, 95 N.E.2d 68 (Ill. 1950).*

(n169)Footnote 374. *McDill v. Meyer, 128 S.W. 364 (Ark. 1910); Bauman v. Stoller, 85 N.E. 657 (Ill. 1908); Adams v. Merrill, 85 N.E. 114, reh'g denied, 87 N.E. 36 (Ind. App. 1908); Taylor v. Dedman, 179 S.W. 216 (Ky. 1915). See Gibbs v. Bates, 222 S.W.2d 805 (Ark. 1949).*

(n170)Footnote 375. *Graves v. Wheeler, 61 So. 341 (Ala. 1913); Radebaugh v. Radebaugh, 107 N.E. 197 (Ill. 1914); Adams v. Merrill, 85 N.E. 114, reh'g denied, 87 N.E. 36 (Ind. App. 1908); Hall v. Wright, 87 S.W. 1129 (Ky. 1905).*

(n171)Footnote 376. *Tague v. Tague, 85 N.W.2d 22 (Iowa. 1957).*

(n172)Footnote 377. *Richard T. Green Co. v. Chelsea, 149 F.2d 927 (1st Cir. 1945).*

(n173)Footnote 378. *Gearheart v. Little, 230 S.W.2d 472 (Ky. 1950)* ("children forever" were words of limitation); *Riggs v. New Castle, 78 A. 1037 (Pa. 1911); Gowdy v. Kelley, 194 S.E. 156 (S.C. 1937)* (statute dispensing with the necessity of words of limitation applies to wills not deeds).

(n174)Footnote 379. *Kelly v. Parsons, 127 S.W. 792 (Ky. 1910); Gearheart v. Little, 230 S.W.2d 472 (Ky. 1950)* (to "children forever" created fee).

(n175)Footnote 380. *Simons v. Bowers, 81 S.W.2d 604 (Ky. 1935); Mississippi Cent. R. Co. v. Ratcliff, 59 So. 2d 311 (Miss. 1952).*

(n176)Footnote 381. *Branca v. Makuakane, 13 Haw. 499 (1901); Cole v. Winnipisseogee Lake Cotton & Woolen Mfg. Co., 54 N.H. 242 (1874); Rackley v. Chestnutt, 14 S.E. 750 (N.C. 1892).*

(n177)Footnote 382. *Bronstein v. Bronstein, 83 So. 2d 699 (Fla. 1955).*

(n178)Footnote 383. *Los Angeles v. Savage, 331 P.2d 211 (Cal. App. 1958).*

Lease to daughter and descendants under Uniform Property Act gave a life estate with a contingent remainder to the descendants as a class, not a fee tail as at common law. *Ellingrod v. Trombla, 95 N.W.2d 635 (Neb. 1959).*

(n179)Footnote 384. *Henry v. Metz, 46 N.E.2d 945 (Ill. 1942).*

(n180)Footnote 385. *Bronstein v. Bronstein, 83 So. 2d 699 (Fla. 1955); In re Traub's Estate, 92 N.W.2d 480 (Mich. 1958); In re Woodcock's Estate, 186 N.Y.S.2d 452 (1959); Pilley v. Smith, 51 S.E.2d 923 (N.C. 1949); Maxwell v. Saylor, 58 A.2d 355 (Pa. 1948).*

(n181)Footnote 386. *Hamby v. Northcut, 149 S.W.2d 484 (Tenn. App. 1940).*

(n182)Footnote 387. *Rice v. Vierson, 288 P.2d 416 (Okla. 1955).*

(n183)Footnote 388. *Hay's Estate v. Internal Revenue Comm'r, 181 F.2d 169 (5th Cir. 1950).*

(n184)Footnote 389. *Gearheart v. Little, 230 S.W.2d 472 (Ky. 1950).*

(n185)Footnote 390. *Karmullen v. Krotz, 18 Iowa 352 (1865); Ross v. McGee, 56 A. 1128 (Md. 1904); Ruhnke v.*

Aubert, 113 P. 38 (Or. 1911).

Words of inheritance unnecessary to create easement by grant or reservation. Maryland Laws 1947, Act 21 .

* This chapter is based in part on Ch. 30, George W. Thompson, Commentaries on the Modern Law of Real Property (John S. Grimes ed. 1979), which made a significant contribution toward preserving the American common law governing the fee simple absolute.

Thompson on Real Property, Thomas Editions

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CHAPTER 17 FEE SIMPLE ABSOLUTE *

2-17 Thompson on Real Property, Thomas Editions § 17.07

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§ 17.07 The Modern Fee Simple Absolute.

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The modern fee simple absolute represents the highest concentration of rights and privileges in the hands of an individual that can arise in a particular stage of the political economy. In a fee simple absolute all possible rights and privileges with respect to land are either in the control of the individual owner or of the sovereign. There is no participation by third parties. n391 This recognition of the individual has come about slowly over the years and in many states still today, the fee simple "absolute" in its purest sense has not yet been realized.

The "absolute" in the fee simple implies the right of the owner to have uncontrolled use and disposition of all of the legal and physical properties thereof. It contemplates the untrammelled power of alienation. Such alienation may be inter vivos or post mortem. It may be voluntary or involuntary. If any restrictions exist upon these rights then the fee is not absolute and remnants of the family ownership concept still exist so that despite the efforts of the holder of the immediate estate there remain in the title threads of family rights which he cannot cut. Thus the holder of the fee simple absolute may: (a) freely alienate inter vivos and create any estate in the grantee recognized by law; n392 (b) he may devise the property by exercising the legal method authorized by the jurisdiction and so may cut off without condition any prospective heir; (c) subject the property or any portion thereof to sale for payment of debts; (d) treat the property in any manner without anyone being legally able to object to "waste" so long as the holder does not transgress public policy. n393

The sum of the rights which the holder of a fee simple absolute may exercise with respect to his property is, however, subject to consistent diminution as the population growth, scientific development, and political consciousness change. The extent to which the "owner" n394 may exploit minerals, air and water depends upon the increasing scarcity and the greatest public use thereof, and increasingly the individual's right to make use of one's own soil is made subject not merely to public restrictions, but also to individual liabilities.

There is a very strong presumption in favor of the creating of a fee simple absolute as against a lesser estate. n395 The presumption is that a deed carries a fee-simple estate. n396 In some jurisdictions it is held that where an estate in land is granted by express words or by fair construction, a fee-simple estate is favored. n397 In construing instruments the

courts presume that the grantor or testator intended to transfer the greatest estate that the terms of the instrument will permit. n398 Unless a conditional estate is created by the express language of a deed or will, the grantor or testator will be conclusively presumed to have intended a fee simple. n399 In the case of irreconcilable conflict, the granting clause prevails. n400

The fee is not subject to any future interests that constitute "rights" in the property. n401 *Quia emptores* has been avoided by retaining an equitable charge in favor of the grantor. n402 It may be subject to liens, charges or inchoate claims against it, but otherwise there can exist only the expectancies of heirs, no rights in land held by third parties. An attempted limitation over is repugnant to the grant of an absolute fee but an easement is not. n403 If an absolute devise is made of property any subsequent language in the will must be clear evidence of the testator's intent to reduce the fee thus granted. n404 This philosophy is, however, sometimes modified by the cliche "the first deed and the last will govern." n405

The often expressed rule that the last will governs yields to another rule to the effect that if a fee simple absolute is given in the clause of the will it will not be reduced by subsequent language unless such language manifests a clear and unmistakable intent of the testator that the devisee shall not take a fee simple absolute. n406 And this rule also prevails over the other expression that various parts of the will are to be construed in harmony with each other. n407 If a deed excludes an interest in the granting clause but there is no reference to a reservation by the grantor or a limitation over, the grantee takes all of the grantor's interest. n408

An estate given in clear and decisive terms will not be taken away or cut down by a subsequent clause unless the subsequent clause is as positive as the words giving the estate. n409

An attempted gift of devise over after a gift of fee simple absolute is null and void. n410

Under a will devising the residue of testator's estate to devisees equally and in fee simple and "absolute right," it was held that the quoted words were surplusage and added nothing to the estate theretofore created. n411 It has been held that the use of the word "absolute" includes the whole title and embraces any and all estates that may be carved therefrom or are included therein. n412 A grant of an absolute fee cannot be curtailed by a subsequent doubtful or repugnant provision in the deed. n413

Where in a will the testator makes a devise in fee and in a later clause seeks to reduce it, there are three conflicting approaches. n414

An absolute title to real estate in fee simple and a limited right or title therein cannot be conveyed or devised at the same time in the same deed or will. n415

The conveyance of a building carries with it the freehold estate of the land in which it sets and is necessary to its enjoyment. n416 Mere precatory language will not debase a fee. n417 A statement of the reason for making the gift is treated as precatory and not as a limitation on the gift. n418 When directed to the executor, language of desire is expressed as a command but when the language is addressed to the legatee in a will it is merely precatory, not creating a limitation in the gift. n419 In order to create a limitation n420 or a trust, n421 the language must be clearly expressed.

In the case of wills, there is a strong presumption that the testator intended to devise an absolute fee simple, n422 and the doctrine of the later clause in a will as controlling over a preceding one will not operate to cut down a fee once given except by clear and unambiguous language. n423 But this rule will yield to the expressed intention of the testator. n424 It is superior, however, to the rule that every part of the will is to be given effect if possible. n425 This presumption is supported by statute in some states. n426

A limitation in a deed of the use to which the land could be put did not reduce a fee to a life estate. n427 This is in

accordance with the general rule that an expression of purpose for a reversion or forfeiture will not debase a fee. n428 In the absence of language of possibility of reverter or right of re-entry, consideration is conclusive evidence of grantor's intent to create a fee simple absolute. n429

FOOTNOTES:
(n1)Footnote 391. *In re Sullivan's Estate, 218 P.2d 1064 (Colo. 1950).*

A fee simple is the highest right, title and interest that one can have in land. *Masheter v. Diver, 253 N.E.2d 780 (Ohio 1969).*

(n2)Footnote 392. 2 William Blackstone, Commentaries. 289, 290.

(n3)Footnote 393. It was formerly thought that a tenant in fee simple, whose estate is liable to be defeated by an executory limitation, stood in equity in no better position, as regards the right to commit waste, than a tenant for life punishable for waste. (*Robinson v. Litton, 3 Atk. 209; Stansfield v. Habergham, 10 Ves. 273.* But it has more recently been decided that, in the absence of express provision, he is practically in the same position as a tenant for life without impeachment of waste. (Turner v. Wright, 2 De. G.F. & J. 234; *see* p. 246.) Such a tenant in fee simple may be made punishable for waste by an express provision contained in the instrument under which his estate arises. (Blake v. Peters, 1 De. G.J. & S. 345.)

Since the liability to defeasance by executory limitation follows the estate into the hands of an assignee or devisee, it implies a disability to alienate for an unincumbered fee simple. Chaffin, Real Property (3d ed.), 218.

Owner of fee has the right to use it for any lawful purpose. *Reid v. Standard Oil Co. of Kentucky, 130 S.E.2d 777 (Ga. App. 1963); Reutner v. Vouga, 367 S.W.2d 34 (Ga. App. 1963); Clark v. Clark, 191 A.2d 417 (Pa. 1963).*

(n4)Footnote 394. *Woolcock v. Temporary State Hous. Rent Comm'n, 148 N.Y.S.2d 846 (1956).*

(n5)Footnote 395. *Honaker v. Hutchinson, 205 S.W.2d 683 (Ky. 1947); Gearheart v. Little, 230 S.W.2d 472 (Ky. 1950); Mississippi Cent. R. Co. v. Ratcliff, 59 So. 2d 311 (Miss. 1952); Alabama & Vicksburg R. Co. v. Mashburn, 109 So. 2d 533 (Miss. 1959)* (conveying and granting clauses prevail over subsequent language reducing fee); *Board of Educ. v. French, 166 N.Y.S.2d 181 (1957)* (express language must be used to create base fees or fees upon condition subsequent); *Pilley v. Smith, 51 S.E.2d 923 (N.C. 1949); Whitman v. Harrison, 327 P.2d 680 (Okla. 1958); Waters v. Ellis, 312 S.W.2d 231 (Tex. 1958).*

Presumption that grantor intended to convey his entire estate even though there was a limitation upon warranty. *First Nat'l Bank v. Allard, 506 P.2d 405 (Colo. App. 1972).*

Railroad right-of-way is equivalent to a fee. *Kansas City Southern R.R. v. City of DeRidder, 206 So. 2d 562 (La. App. 1968).*

Construction against fee simple determinable and fees upon conditions subsequent. *Hagaman v. Board of Educ. of Woodbridge Twp., 285 A.2d 63 (N.J. Super. 1971).*

The words "fee simple" would ordinarily mean the fee simple absolute. *Babb v. Rand, 345 A.2d 496 (Me. 1975).*

(n6)Footnote 396. *First Nat'l Bank of Or. v. Towsend, 555 P.2d 477 (Or. App. 1976).*

Presumption that the deed carries a fee simple unless there is language creating a different estate. *Department of Transp. v. Knight, 232 S.E.2d 72 (Ga. 1977).*

(n7)Footnote 397. *Heusner v. Fleck, 323 P.2d 155 (Cal. App. 1958)* (fee simple taken in absence of restrictive clause); *Stevens v. Vinita, 315 P.2d 776 (Okla. 1957)* (in absence of restrictive clause fee simple taken); *Briggs v. Briggs, 45 N.W.2d 62 (S.D. 1950)* ("I will" was devise of fee simple absolute); *Stamford v. King, 144 S.W.2d 923 (Tex. Civ. App. 1940).*

A limitation over on absolute devise in fee may be valid in New Jersey. Stat. Ann., § 3B:3-40. *See Greene v. Schmurak, 111 A.2d 520 (N.J. Super. 1955), aff'd, 121 A.2d 35 (N.J. Super. 1956).*

"Grant, bargain and sell" import the vesting of a fee simple title by deed. *Love v. Missouri Union Presbytery, 534 S.W.2d 511 (Mo. App. 1976).*

(n8)Footnote 398. *Hudgins v. Lincoln Nat'l Life Ins. Co., 144 F. Supp. 192 (E.D. Tex. 1956); Hale v. Ziegler, 303 P.2d 190 (Kan. 1956).*

(n9)Footnote 399. *Bough v. King, 167 F. Supp. 191 (D.V.I. 1958); Sheldon v. Lewis, 158 N.E.2d 919 (Ohio Com. Pl. 1959)* (devise of all my real and personal property created fee simple absolute); *Furman Univ. v. Glover, 83 S.E.2d 559 (S.C. 1954)* (statement of purpose does not effect a fee simple absolute); *Templeton v. Stong, 188 S.W.2d 560 (Tenn. 1945).*

Granting of full power of sale does not negate fee simple. *Wenzel v. Menchaca, 354 S.W.2d 635 (Tex. Civ. App. 1962).*

Failure to reserve a reversionary interest indicates fee simple absolute, not a fee simple determinable. *City of Tempe v. Baseball Facs. Inc., 534 P.2d 1056 (Ariz. App. 1975).*

(n10)Footnote 400. *First Nat'l Bank of Or. v. Townsend, 555 P.2d 477 (Or. App. 1976).*

(n11)Footnote 401. *La Rosa v. McVicker, 137 A.2d 861 (Pa. 1958).*

Louisiana has the "prohibited substitution" rule that the donor may not vest property in one person and at his death in another so that the latter takes direct from the testator. In such a case, the entire gift is void. *Crichton v. Gredler, 235 So. 2d 411 (La. 1970).*

Donation *omnium bonorum* is void where gratuitous disposition does not reserve funds sufficient for donor's subsistence. *Magee v. Stacey, 223 So. 2d 194 (La. App. 1969).*

Donating where usufruct is reserved to the donor is void. *Taylor v. Spencer, 225 So. 2d 98 (La. App. 1969).*

(n12)Footnote 402. Deed subject to grantor's right to receive one-half of rent or one-half of proceeds of sale created an equitable charge in favor of grantor. *Gadekar v. Phillips, 375 A.2d 248 (Md. App. 1977).*

(n13)Footnote 403. *Los Angeles v. Savage, 331 P.2d 211 (Cal. App. 1958).*

(n14)Footnote 404. "To A and over to B if A died without heirs of the body begotten" was held to create a fee tail with remainder over which by the statute became a fee simple subject to a contingent limitation. *Eldred v. Shaw, 70 N.W. 545 (Mich. 1897).*

McClure v. Bailey, 209 S.W.2d 671 (Tex. Civ. App. 1948) (subsequent clause limiting a prior devise in fee simple construed as creating a fee with a limitation over on death without disposing of the property).

(n15)Footnote 405. *LaRosa v. McVicker, 137 A.2d 861 (Pa. Super. 1958)* (later language in a will may reduce a fee simple absolute earlier devised).

(n16)Footnote 406. *McDonald v. Suarez, 93 S.E.2d 16 (Ga. 1956); In re Butler's Will, 151 N.Y.S.2d 866 (1956); In re Anderson's Will, 151 N.Y.S.2d 707 (1956).*

Gift of fee not reduced to a life estate in a will by later gift over of what remained after death of first devisee. *Ahrens v. McNutt, 467 S.W.2d 721 (Ark. 1971).*

Subsequent clause limiting a prior fee simple devise held to create a life estate with power of disposition and a remainder of what is left. *Hanks v. McDaniel, 210 S.W.2d 784 (Ky. 1948); Glidewell v. Glidewell, 230 S.W.2d 752 (Mo. 1950).*

An estate devised in fee cannot by subsequent limitation be stripped of its legal incidents and where apparent intent was to give absolute estate subsequent language inconsistent therewith held ineffective. *Shevlin v. Colony Lutheran Church, 88 S.E.2d 674 (S.C. 1955).*

Estate in fee simple absolute with right of re-entry reserved for violation of restriction did not reduce the fee once granted. *Easterly v. Hall, 182 S.E.2d 671 (S.C. 1971).*

Clear fee simple in one paragraph of will not reduced by ambiguous language in later paragraph. *Killough v. Shafer, 358 S.W.2d 748 (Tex. Civ. App. 1962).*

(n17)Footnote 407. *Young v. Griffin, 292 S.W.2d 376 (Tex. Civ. App. 1956).*

Collie v. Tucker, 317 S.W.2d 137 (Ark. 1958) (a subsequent clause in a will purporting to limit an earlier devise in fee simple is void because of repugnancy).

(n18)Footnote 408. *Whitman v. Harrison, 327 P.2d 680 (Okla. 1958); Palmer v. Campbell, 333 P.2d 957 (Okla. 1958).*

But permitting subsequent words in a win to reduce a fee simple given by prior words. *In re Wraught's Estate, 32 A.2d 8 (Pa. 1943).*

(n19)Footnote 409. *Noble v. Noble, 235 P.2d 670 (Okla. 1951).*

Gift of a fee was not cut down in a will by later provision providing for limitation over on death of the survivor's husband and wife. *Cockrell v. Jones, 275 So. 2d 105 (Miss. 1973).*

Deed to X with language just before the description indicating that a life estate only was intended gave *X a fee. Oxendine v. Lewis, 114 S.E.2d 706 (N.C. 1960).*

Absolute gift of fee simple prevails over subsequent attempted gift over in a well. *Koval v. Koval, 221 N.E.2d 490 (Ohio 1966).*

Words of limitation following gift of fee simple reduced the estate given in a will. *Wallace v. Magie, 522 P.2d 989 (Kan. 1974).*

Fee simple granting clause prevailed over habendum which created a reverter. *Corley v. Parson, 213 S.E.2d 693 (Ga. 1975).*

Habendum clause prevailed over granting clause where there was a specific independent covenant to reserve a life estate and to reconvey on demand. *Baden v. Castle, 344 A.2d 171 (Md. App. 1975).*

Reverter clause appearing at end of description in a deed held invalid. *Whetsell v. Jernigan, 223 S.E.2d 397 (N.C. App. 1976).*

An estate devised absolutely in fee will not be reduced by subsequent limitations unless the content is clearly manifest. *Johnson v. Johnson, 239 S.E.2d 346 (Ga. 1977).*

A fee simple given in a devise was not limited by provision that if the devisee died without bodily heirs the property would pass to another. *Smith v. Bynum, 558 S.W.2d 99 (Tex. Civ. App. 1977).* Granting clause in fee simple was not cut down by subsequent language. *Stylecraft, Inc. v. Thomas, 159 S.E.2d 46 (S.C. 1968).*

(n20)Footnote 410. *Gery v. Koval, 219 N.E.2d 853 (Ohio 1966).*

An estate devised absolutely in fee will not be reduced by subsequent limitations unless the content is clearly manifest. *Johnson v. Johnson, 239 S.E.2d 346 (Ga. 1977).*

An intent to place the limitation on alienation in a will which does not provide for a limitation over on alienation does not affect the fee simple given. *Stanton v. Dickson, 239 S.E.2d 741 (Ga. 1977); White v. Brown, 559 S.W.2d 938 (Tenn. 1977).*

A fee simple given in a devise was not limited by provision that if the devisee died without bodily heirs the property would pass to another. *Smith v. Bynum, 558 S.W.2d 99 (Tex. Civ. App. 1977).*

(n21)Footnote 411. *Wilham v. Ferrell, 151 S.W.2d 1029 (Ky. 1941).*

An estate in lands created by will is presumed to be in fee simple. *In re Newby's Estate, 361 P.2d 622 (Colo. 1951).*

The construction in wills is favored which will vest a fee simple absolute in the first taker. *Vaughan v. Compton, 235 S.W.2d 328 (Mo. 1950).*

(n22)Footnote 412. *United States v. Sunset Cemetery Co., 132 F.2d 163 (7th Cir. 1942); Gamester v. Massey, 158 N.E.2d 805 (Ind. App. 1959)* (devise "absolutely" means a fee simple absolute and a limitation over is void); *In re Lewis' Estate, 80 N.W.2d 347 (Iowa 1957)* ("forever" in a deed implies a fee simple absolute); *Schmidt v. Claus, 93 N.W.2d 592 (Iowa 1958)* ("absolutely" means fee simple); *Smith v. Hornkohl, 90 N.W.2d 347 (Neb. 1958)* ("fee simple" contemplates an absolute estate). Gifts over after absolute gifts held void. *In re Ferdun's Estate, 205 P.2d 456 (Cal. App. 1949)* (language of gift over held precatory only).

Edgar County Children's Home v. Beltranena, 84 N.E.2d 363 (Ill. 1949), distinguishing *Keiser v. Jensen, 25 N.E.2d 819 (Ill. 1940)* on language used. *Timmons v. Graham, 312 S.W.2d 357 (Ky. 1958)* (devise to wife absolutely, but in the event of her death, then any property not disposed of to go over created a life estate with remainder which accelerated on death of wife before testator). *Vaughan v. Compton, 235 S.W.2d 328 (Mo. 1950)* (devise to one "absolutely" creates a fee simple). *Cree v. Kennedy, 82 A.2d 222 (N.J. Super. 1951).* The rule of *Fox v. Snow, 76 A.2d 877 (N.J. 1950)* was changed by statute. New Jersey Laws 1951, ch. 325. *Gill v. Leach, 80 N.E.2d 256 (Ohio App. 1947).*

See Robert N. Swenson, *Construction of Wills -- the Iowa Repugnancy Rule in Testamentary Disposition, 36 U. Det. L.J. 632, 1959 41 Ia. L. Rev. 601 (1956);* W.L. Matthews, Jr., *Remnant Gifts Over in Kentucky, 44 Ky. L.J. 397 (1956).*

(n23)Footnote 413. *Roberts v. Randleman, 180 S.W.2d 674 (Mo. 1944).*

When a fee simple absolute is devised in a will an attempt to create a limitation over on what remains on the devisee's death is void. *Koval v. Koval, 221 N.E.2d 490 (Ohio 1966).*

In Ohio a fee tail vests the estate in the grantee for life and with remainder to the issue. *Eisemann v. Eisemann, 370 N.E.2d 788 (Ohio Misc. 1976).*

(n24)Footnote 414. Where one clause in a will purports to grant a fee simple and a following clause purports to limit the estate, the latter is void for repugnancy holding void a limitation over what remained on the death of the first beneficiary. *Collie v. Tucker, 317 S.W.2d 137 (Ark. 1958)* (treated as a rule of property).

A life estate created in the first beneficiary with a remainder over of what if anything is left. *Glidewell v. Glidewell, 230 S.W.2d 752 (Mo. 1950).*

Such a limitation creates a fee defeasible on death of the first beneficiary without disposing of the property. *McClure v. Bailey, 209 S.W.2d 671 (Tex. Civ. App. 1948).*

(n25)Footnote 415. *Watson v. Dalton, 18 N.W.2d 658, Op. Modified 20 N.W.2d 610 (Neb. 1945).*

(n26)Footnote 416. *Carpenter v. Sickles, 181 N.Y.S.2d 665 (1958).*

(n27)Footnote 417. *Fidelity Title & Trust Co. v. Clyde, 121 A.2d 625 (Conn. 1956); Wright v. Pritchett, 102 S.E.2d 602 (Ga. 1958); Swango v. Swango's Adm'r, 232 S.W.2d 347 (Ky. 1950); Boutelle v. Boutelle, 188 A.2d 559 (Md. 1963)* (devise to wife "to be held for benefit for herself and our children" held a fee simple in wife). *In re Wilson's Estate, 116 N.W.2d 215 (Mich. 1962)* (devise to sister and on her death "it is my desire that the property be divided equally among my brothers then living" gave an absolute interest to sister); *Thompson v. Smith, 300 S.W.2d 404 (Mo. 1957); Housman v. Lewellen, 240 S.W.2d 143 (Mo. App. 1951), rev'd, 244 S.W.2d 21 (Mo. 1951)* ("request and direct" were words of devise not merely precatory); *Thompson v. Smith, 300 S.W.2d 404 (Mo. 1957),* (precatory words will not diminish a devised fee). *In re Douglas' Will, 89 N.Y.S.2d 498 (1949)* ("my wish is" were words of limitation not precatory); *In re Kroog's Will, 116 N.Y.S.2d 392 (1952); In re Kaplan's Will, 181 N.Y.S.2d 246 (1958)* (devise with the proviso "I exhort the devisee to care for my son" was precatory only); *Taylor v. Taylor, 45 S.E.2d 368 (N.C. 1947); Humphrey v. Faison, 100 S.E.2d 524 (N.C. 1957)* ("desired" property to go to nephews and nieces on devisee's death was merely precatory). *In re Cunningham's Estate, 16 A.2d 712 (Pa. 1940)* (expressions as to the support and maintenance of the beneficiary and his children are considered explanatory and do not vest any interest in the children); *Banks v. Banks, 262 S.W.2d 119 (Tex. Civ. App. 1953)* (request that widow be permitted to live in dwelling house devised to son was merely precatory); *Carson v. Simmons, 96 S.E.2d 800 (Va. 1957)* (precatory language does not give rise to a trust).

(n28)Footnote 418. *In re Zoller's Estate, 96 A.2d 321 (Pa. 1953).*

(n29)Footnote 419. *In re McGivern's Estate, 180 P.2d 32 (Cal. App. 1947); Edgar County Children's Home v. Beltranena, 84 N.E.2d 363 (Ill. 1949); Grover v. Wood, 60 N.W.2d 316 (Mich. 1953); Wheeler v. Williams, 108 So. 2d 578 (Miss. 1959).*

(n30)Footnote 420. *Knisely v. Simpson, 74 N.E.2d 695 (1947).*

Devise to H and W and to their heirs, "heirs" were words of limitation not substituting words of purchase so devise lapsed. *In re Hubbs' Estate, 365 P.2d 543 (Colo. 1961).*

(n31)Footnote 421. *Fidelity Title & Trust Co. v. Clyde, 121 A.2d 625 (Conn. 1956); Smith v. Trustees of the Baptist Orphanage, 75 S.E.2d 491 (Va. 1953).*

An estate in fee simple absolute is an estate in fee simple and not subject to any special limitation or condition subsequent or executory limitation. *Floyd v. Hoover, 234 S.E.2d 89 (Ga. App. 1977).*

(n32)Footnote 422. *Smith v. Nelson, 29 So. 2d 335 (Ala. 1947); Johnson v. Hicks, 108 N.E.2d 129 (Ind. 1952)* (so

under statute); *Meredith v. Meredith, 227 S.W.2d 984 (Ky. 1950); Citizens Fid. Bank & Trust Co v. Schellberg, 238 S.W.2d 142 (Ky. 1951); Woodard v. Clark, 66 S.E.2d 888 (N.C. 1951); Taylor v. First Nat'l Bank, 207 S.W.2d 428 (Tex. Civ. App. 1948); Phillips v. Currie, 246 S.W.2d 257 (Tex. Civ. App. 1952); Benson v. Greenville Nat'l Exch. Bank, 253 S.W.2d 918 (Tex. Civ. App. 1952).*

Intention in will to give only a life estate must be clearly stated. *Spicer v. United States, 217 F. Supp. 44 (D. Kan. 1963).*

Joint will devising all to the survivor and devising "remainder" to others was held to have been devise of fee simple estates so limitation of remainder over was void. *In re Logan's Estate, 115 N.W.2d 701 (Iowa 1962).*

(n33)Footnote 423. *Bookwalter v. Lamar, 323 F.2d 664 (8th Cir. 1963). Bell v. Killian, 93 So. 2d 769 (Ala. 1957); Los Angeles v. Savage, 331 P.2d 211 (Cal. App. 1958)* (subsequent clause in deed may limit estate given in granting clause); *Schmidt v. Claus, 93 N.W.2d 592 (Iowa 1958)* (subsequent language in will reducing remainder in fee to defeasible held void); *In re Cribb's Estate, 308 P.2d 111 (Kan. 1957); Magnusson v. Colorado Oil & Gas Corp., 331 P.2d 577 (Kan. 1958)* (granting clause is of paramount importance). *Barnard v. Linekin, 118 A.2d 327 (Me. 1955); Thompson v. Smith, 300 S.W.2d 404 (Mo. 1957)* (only clear words in will cut down a fee earlier granted); *In re Gross' Will, 161 N.Y.S.2d 698 (1957)* (a fee granted earlier only cut down by clear words); *Speidel v. Haller, 69 N.E.2d 81 (Ohio L.A. 1943); Danneburg v. Danneburg, 271 P.2d 345 (Okla. 1953); Schomp v. Brown, 335 P.2d 847, reh'g denied, 337 P.2d 358 (Or. 1959)* (void if language doubtful); *In re Call's Estate, 386 P.2d 125 (Utah 1963); Weiss v. Soto, 98 S.E.2d 727 (W. Va. 1957)* (only clear words in will cut down a fee earlier granted).

(n34)Footnote 424. *Knisely v. Simpson, 74 N.E.2d 695 (Ill. 1947); In re Week's Will, 100 N.Y.S.2d 333 (1950).*

(n35)Footnote 425. *Taylor v. First Nat'l Bank, 207 S.W.2d 428 (Tex. Civ. App. 1948).*

"To my said wife and daughter and their descendants" created a defeasible fee in the wife and daughter rather than a life estate with remainder to their descendants. *Bradford v. Federal Land Bank of New Orleans, 338 So. 2d 388 (Miss. 1976).*

(n36)Footnote 426. *Smith v. Nelson, 29 So. 2d 335 (Ala. 1947); Morris v. Smith, 123 N.E.2d 212 (Mass. 1954); Langston v. Wooten, 59 S.E.2d 605 (N.C. 1950).*

(n37)Footnote 427. *Boylan v. Lillard, 174 F.2d 572 (10th Cir. 1949); Cobb v. Morton, 42 So. 2d 450 (Ala. 1949); Johnson v. Gaines, 55 S.E.2d 191 (N.C. 1949).*

(n38)Footnote 428. *Abel v. Girard Trust Co., 73 A.2d 682 (Pa. 1950); Boles v. Red, 227 S.W.2d 310 (Tex. Civ. App. 1950).*

Devise which is not limited in enjoyment and which carries an absolute power to sell, use and dispose of is a fee simple. *Shaw v. Wertz, 369 S.W.2d 215 (Mo. 1963).*

See William F. Fratcher, *Bequests for Purposes, 56 Ia. L. Rev. 773 (1971).*

(n39)Footnote 429. *Smith v. School Dist. No. 14, 94 S.W.2d 706 (Ark. 1936); Ashland v. Greiner, 50 N.E. 99 (Ohio 1898); Ecroyd v. Coggeshall, 41 A. 260 (R.I. 1898).*

Statement of purpose insufficient to create a condition. *Fordyce v. Woman's Christian Nat'l. Library Ass'n, 96 S.W. 155 (Ark. 1906); Allen v. Trustees of Great Neck Free Church, 193 N.E. 324 (N.Y. 1934).*

Creation of trust during lifetime of devisee is not inconsistent with a fee simple. *Barth v. Citizens Fid. Bank & Trust*

Co., 368 S.W.2d 339 (Ky. 1963).

Words of inheritance in habendum clause converted a life estate conveyed by the grantors into a fee simple. *Wayburn v. Smith, 239 S.E.2d 890 (S.C. 1977).*

* This chapter is based in part on Ch. 30, George W. Thompson, Commentaries on the Modern Law of Real Property (John S. Grimes ed. 1979), which made a significant contribution toward preserving the American common law governing the fee simple absolute.

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Supp. To CHAPTER 17 FEE SIMPLE ABSOLUTE

2-17 Thompson on Real Property, Thomas Editions Supp. to § 17.01

Supp. to § 17.01 Overview of Modern Fee Simple Absolute.

[Go To Main]

§ 17.01(b) The Concept of Seisin. [Go To Main]

for Guffey v. Creutzinger, change citation from "*1998 Tenn. App. LEXIS 388 (1998)*" to

" *984 S.W.2d 219 (Tenn. Ct. App. 1998)* "

for IP Timberlands Operating Co. v. Denmiss Corp., change citation from "*1998 Miss. LEXIS 124 (1998)*" to

" *726 So. 2d 96 (Miss. 1998)* "

§ 17.01(c) Categories of Estates [Go To Main]

Add:

Station Associates, Inc. v. Dare County, 350 N.C. 367, 513 S.E.2d 789 (N.C. 1999) (where deed to U.S. government was devoid of any language of reversion or termination, court held that grantor conveyed "fee simple absolute" rather than "fee simple determinable").

§ 17.01(c)(1) Determinable Estates.

Add:

Jacobs v. CNG Transmission Corp., 332 F. Supp. 2d 759, 773 (W.D. Pa. 2004) (compares fee simple determinable and fee simple subject to condition subsequent and discusses the language to be used by the grantor to create fee simple determinable).

Add:

Swanberg v. City of Tybee Island, 271 Ga. 23, 518 S.E.2d 114 (Ga. 1999) (property conveyed to county in fee simple absolute was not subject to a reversionary interest in the grantor if its use as a county road ceased).

For Bluffs Park Protection Ass'n v. Racich, the name "Racich" should be changed to

"Radich"

For Bluffs Park Protection Ass'n v. Radich, remove the comma between "91" and "Wash."

§ 17.01(c)(2) Estates Subject to Conditions Subsequent.

add:

Swaby n. *Northern Hills Regional R.R. Authority, 769 N.W.2d 798 (S.D. 2009)* (deed to railroad created an easement).

After the block quote ending "interest in question" add new paragraph and new note 28.1:

However, re-conveyance of property by the grantor to a new grantee after the condition subsequent has occurred does not constitute a re-entry "for purposes of terminating a fee simple subject to condition subsequent."[28.1]

LEXIS Search: " ... w/2 subject or upon w/2 ... ."

Correction:

LEXIS Search: change "free simple" to "fee simple."

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Supp. to § 17.02 Concept of the Fee Simple.

[Go To Main]

for Pacific Southwest Realty Co. v. County of Los Angeles, before "*2 Cal. Rptr. 2d 536 (1991)*" insert the following citation:

"*820 P.2d 1046* "

Add

In re Estate of Rider, 711 A.2d 1018 (Pa. Super. 1998) ("fee simple absolute" is a form of ownership in which a party has unlimited power to sell, transfer, alienate, or bequeath the property in any lawful manner).

After "(West Publishing Company, 2d ed. 1993)" add

"distinguished by *In re Jones, 201 B.R. 371 (Bankr. D.N.J. 1996)* ."

Add:

Angel v. McKeehan, 63 S.W.3d 185 (Ky. App. 2001) (An estate is not held in fee simple if the devisee does not have the absolute power of disposition; otherwise, it is simply held as a life estate).

Add:

Redevelopment Agency of City of Norwalk v. Norwalk Aluminum Foundry Corp., 155 Conn. 397, 233 A.2d 1 (Conn. 1967) .

Delete this note. See note 69 above.

The following notes need to be renumbered:

change note 71 to 70; note 72 to 71; note 73 to 72; note 74 to 73; note 75 to 74.

change note 76 to 75; note 77 to 76; note 78 to 77; note 79 to 78; note 80 to 79; note 81 to 80; note 82 to 81; note 83 to 82.

Add:

Moss v. Williams, 822 So. 2d 392 (Ala. 2001) (An Alabama statute stated that every estate was to be taken as a fee simple by default. A claim that has a question in the interest is resolved in favor of a fee simple); *In re Estate of Rosenbaum, 624 N.W.2d 821 (S.D. 2001)* (Court should presume that a grant of property is in fee simple unless another lesser interest is intended by the grantor).

After *First Nat'l Bank of Or. v. Townsend, 555 P.2d 477 (Or. App. 1976),* add

"; *Love v. Missouri Union Presbytery, 534 S.W.2d 511 (Mo. App. 1976)* ("grant, bargain and sell" imply a fee simple title)."

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Supp. to § 17.03 Development of the Fee Simple.

[Go To Main]

change case name from "California, Inc." to

"Carma Developers, Inc. v. Marathon Development California, Inc."

for Carma Developers, Inc. v. Marathon Development California, Inc., before "*6 Cal. Rptr. 2d 467 (1992)*" insert the following citation:

" *826 P.2d 710* "

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Supp. To CHAPTER 17 FEE SIMPLE ABSOLUTE

2-17 Thompson on Real Property, Thomas Editions Supp. to § 17.04

Supp. to § 17.04 The Power of Disposition as Essential to Fee Simple

[Go To Main]

Add:

Angel v. McKeehan, 63 S.W.3d 185 (Ky. App. 2001) (If the devisee is given the power of disposition, then the interest is in fee simple).

Add:

Statham v. Kelly, 584 S.E.2d 246 (Ga. 2003) (holding that a limitation on a gift in fee simple that required the grantees to use the premises for their own personal residence was incompatible with the rule against absolute restrictions of alienation on fee simple property).

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Supp. to § 17.05 Restrictions Against "Debasing a Fee."

[Go To Main]

Add:

C & G, Inc. v. Rule, 25 P.3d 76 (Ida. 2001) (deeds conveyed fee simple interests despite "Right of Way" caption on the cover sheets); *Schmitt v. United States, 203 F.R.D. 387 (S.D. Ind. 2001)* (landowners held fee simple interests in a right of way a railroad had acquired by adverse possession or condemnation).

Add:

Faulkenberry v. Norfolk Southern Railway Co., 2002 S.C. LEXIS 69 (Apr. 29, 2002) (railroad's interest was an easement, not a fee simple estate).

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Supp. to § 17.06 The Use of Words of Limitation to Create a Fee Simple

[Go To Main]

§ 17.06(a) At Common Law [Go To Main]

Add:

Schroeder v. Buchholz, 622 N.W.2d 202 (N.D. 2001) (Constructive trust was not created because it would have given full title to the life tenants where there was only life estate conveyed).

Add:

Fleming v. First Union Nat. Bank, 555 S.E.2d 728 (Ga. 2001) (The presumption in a case that involves an absence of anything relating to intent is that the ancestor intended the property go where the law dictates it to go, which is supposed to be natural descendents).

§ 17.06(b) Common Law Exceptions to Required Use of Words of Limitation. [Go To Main]

Add:

In re Young, 738 N.Y.S.2d 100 (N.Y.A.D. 2001) (Clear and ambiguous language in a will is given effect as writte).

Add:

Johnson v. Ramsay, 67 S.W.Sd 598 (Ark. App. 2002) (No formal words are required to create an easement but some operative words expressing the fact of sale or transfer of the interest).

§ 17.06(c) The Use of Words of Limitation in Trusts and Equitable Estates [Go To Main]

Add:

U.S. v. 2. 24 *Acres of Land, 43 Fed. Appx. 888* ; *2002 U.S. App. LEXIS 16228 (C.A.6.Ky 2002)* (Deed conveyed to a trustee for the benefit of the grantor's minor son passed onto the son's surviving heir and not the trustee's wife).

Correction:

LEXIS Search: change "w/015" to "w/15"

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Supp. to § 17.07 The Modern Fee Simple Absolute.

[Go To Main]

Add:

Walker v. Sapelo Island Heritage Auth., 285 Ga. 194 (Ga. 2009) (fee simple interest is subject to divestment by adverse possession).

Stecklein v. City of Cascade, 693 N.W.2d 335 (Iowa 2005) (city had fee simple title to streets that were dedicated to the city). *Holoubek v. Romshek, 749 N.W.2d 901 (Neb. App. 2008)* (a contract to convey in fee simple implies conveyance of a marketable title); *Olde Severna Park Improvement Assn, Inc. v. Gunby, 936 A.2d 365 (Md. App. 2007)* (a fee simple conveyance included both land and riparian rights).

Add:

Louisa County Conservation Board v. Malone, 778 N.W.2d 204 (Iowa App. 2009) (acquisition of abandoned railroad right of way was in fee simple absolute). *Hoke v. O'Bryen, 281 S.W.3d 457 (Tex. App. 2007)* (will held to devise a fee simple absolute rather than a fee simple determinable); *Barnett v. Estate of Anderson, 966 So. 2d 915 (Ala. 2007)* (will held to devise a life estate, rather than a fee simple, despite containing no specific language referring to a life estate).

add:

Timberlake, Inc. v. O'Brien, 902 N.E.2d 843 (Ind. App. 2009) (deed to railroad conveyed only an easement).

Add:

C & G, Inc. v. Rule, 25 P.3d 76 (Ida. 2001) (deeds conveyed fee simple interests despite "Right of Way" caption on the cover sheets); *Schmitt v. United States, 203 F.R.D. 387 (S.D. Ind. 2001)* (landowners held fee simple interests in a right of way a railroad had acquired by adverse possession or condemnation); *Faulkenberry v. Norfolk Southern Railway Company, 2002 S.C. LEXIS 69* (Apr. 29, 2002) (railroad's interest was an easement, not a fee simple estate); *Lowcountry Open Land Trust v. State, 552 S.E.2d 778 (S.C. App. 2001)* (landowner established fee simple ownership of tidelands); *City of Orange Beach v. Benjamin, 2001 Ala. LEXIS 409* (Nov. 9, 2001) (street dedication deemed to convey a fee simple interest).

Imerys Marble Co. v. J. M. Huber Corp., 276 Ga. 401 (Ga. 2003) (holding that a grant in a will should be construed consistent with the presumption in favor of fee simple); *Kimberling North, Inc., v. Pope, 100 S.W.3d 863 (Mo. Ct. App. 2003)* (holding that an easement granted in a 40-foot strip of land used as a roadway did not grant a fee simple interest).

Add:

Apel v. Katz, 83 Ohio St.3d 11, 697 N.E.2d 600 (Ohio 1998) (statute governing words necessary to create fee simple estate principally provides that failure to include language of inheritance or succession, typically the phrase "heirs and assigns," is not automatically fatal to creation of such an estate). However, many conveyances of railroad lands are construed as easements. *See* Chapter 54. *See, e.g., Blendu v. United States, 79 Fed. Cl. 500 (2007)* .

Add:

Bockelman v. MCI Worldcom, Inc., 403 F.3d 528 (8th Cir. 2005) (payment of money for conveyance of a strip of land for railroad purposes constituted "valuable consideration" supporting a finding that a fee simple absolute had been conveyed); *Stonybrook Condominium v. Jocelyn Properties, Inc., 862 A.2d 721 (Pa. Comm. 2004)* (use of the words "grant and convey" in the deed indicated a transfer of a fee simple absolute interest).

for Cadle Co. v. Caamano, change citation / parenthetical to:

No. 14-95-00145-*CV, 1996 Tex. App. LEXIS 3472* (Tex.App.--Hous. 1996) (quitclaim deed grants a fee simple absolute, if that is what the grantor possesses), *vacated on other grounds, 930 S.W.2d 917 (Tex. App. 1996)*

Add:

Green Tree Servicing, LLC v. Williams, 659 S.E.2d 193 (S.C. App. 2008) (a fee simple determinable reverts back to the grantor as a fee simple interest).

Add:

Gillie v. Genesee County Treasurer, 745 N.W.2d 137 (Mich. App. 2007) (the tax sale deed conferred a fee simple title).

Add

Hash v. United States, 454 F. Supp. 2d 1066 (D. Idaho 2006) (a deed granting "real estate" in the granting clause and "right of way" in the habendum clause conveyed a fee simple absolute); *King Associates, LLP v. Bechtler Development Corporation, 632 S.E.2d 243 (N.C. App. 2006)* (a deed granting to a railroad a right of way "in, over and upon" the land was held to convey a fee simple absolute).

Add

Johnson v. Kansas South Southern Railway Company, 208 Fed. Appx. 292 (5th Cir. 2006) (a deed with the words "released, relinquished, and sold" conveyed a fee simple title to a railroad).

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[Go To Main]

Add to Articles:

Allee, Benjamin. "Drawing the Line in Regulatory Takings Law: How a Benefits Fraction Supports the Fee Simple Approach to the Denominatory Problem," *70 Fordham L. Rev. 1957* (April, 2002).

Hall, Megan B. "Abraham Lincoln and the Evolution of a Fee Simple Deed," *36 N. Ky. L. Rev. 333 (2009).*

Pierson, Brian. "Resolving a Perilous Uncertainty: "The Right of Tribes to Convey Fee Simple Lands," 57 *Fed. Law.* 49 (March/April, 2010).

Wendel, Peter T. A. Protecting Newly Discovered Antiquities: Thinking Outside the A "Fee Simple" Box," *76 Fordham L. Rev. 1015* (November, 2007).

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CHAPTER 18 FEE TAIL *

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AUTHOR: by Professor David A. Thomas J. Reuben Clark Law School Brigham Young University

§ 18.syn Synopsis to Chapter 18: FEE TAIL *

§ 18.01 Overview of Fee Simple Conditional and Fee Tail.

§ 18.02 The Development and Nature of the Fee Tail.

§ 18.03 Language Creating a Fee Tail.

§ 18.04 The Estate Tail.

§ 18.05 The Conditional Fee.

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CHAPTER 18 FEE TAIL *

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§ 18.01 Overview of Fee Simple Conditional and Fee Tail.n1

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The predecessor of the fee tail estate is the fee simple conditional. The development of the fee simple conditional eventually induced the enactment of the Statute De DonisConditionalibus, n2 which created the fee tail estate. Although the fee simple conditional is relatively unimportant in the United States today, three states -- Iowa, n3 South Carolina n4 and Oregon n5 -- still recognize the fee simple conditional.

The fee simple conditional estate is created by the words "to A and the heirs of his body." n6 It terminates upon the death of the donee who never had issue and the property reverts to the donor (who until then has a possibility of reverter), even if the donee has conveyed the estate to another. n7 It also terminates and the property reverts upon the death of the donee who had issue that predeceased the donee, if the donee has not conveyed the estate to another. n8 if the donee has issue and then conveys the estate to another, the estate becomes a fee simple estate in the grantee,whether or not the issue predecease the donee. n9 Iowa has extended this proposition by adding that if the donee has issue and then devises the estate to another, the estate becomes a fee simple estate in the conveyee. n10 if the donee conveys the estate to another and then has issue, the estate terminates and the property reverts either upon the death of the donee, if the issue predecease the donee, or upon the death of the issue if the donee predeceases them. n11 if the donee dies with issue and has not conveyed the estate to another, the estate descends to the issue as a fee simple conditional, n12 although South Carolina has determined that the issue has a right to convey a fee simple without their issue being born, since the parent has already satisfied the condition of having issue. n13

One other related interest that may be carved out of a fee simple interest is the fee tail, and the fee tail has been altered by statute in most jurisdictions. Originally authorized by the Statute De Donis Conditionalibus n14 in England in 1285, it was an estate that lasted for the life of the grantee plus the lives of all the issue of the grantee. The Statute provided "that the will of the giver according to the form in the deed of gift manifestly expressed shall be from henceforth observed, so that they to whom the land was given under such condition shall have no power to alien the land so given, but that it shall remain unto the issue of them to whom it was given after their death, or shall revert unto the giver or his heirs if issue fail...." After the fifteenth century it became possible to convert the fee tail into a fee simple by a process called docking or barring the entail. n15 Today state statutes govern the treatment of the feetail.

The fee tail estate passes automatically by inheritance to the issue of the grantee upon the grantee's death, and to the issue of those issue upon their death, and so on down the line until the line is extinguished. The estate is created by the words "and the heirs of his body" or "and his issue" or "and hisdescendants." n16 Thus, a conveyance "to Arthur and the heirs of his body" will last until Authur's line of issue runs out. If Arthur has a son and daughter and then dies, Arthur's son and daughter will take the estate as tenants in common. If Arthur's son dies with a son and a grandson by a deceased daughter of Arthur's son, they will take Authur's son's estate as tenants in common. The issue will take their ancestor's estate upon the ancestor's death regardless of the fact that the estate may be owned by one other than their ancestor at that time. Arthur could have sold Fred the property in which he had a fee tail, but the property would still have passed upon his death by inheritance to his son and daughter. Likewise, Arthur's son could have given his property interest to another, but upon his death it would have passed by inheritance to his son and grandson. In effect the holder of a fee tail interest may only transfer that interest for the span of his or her lifetime.

The line of issue in a fee tail may be restricted to male or female heirs, called an estate in tail male and an estate in tail female. The line of issue also may be restricted to the issue of the grantee by one spouse, called a fee tail special as opposed to a fee tail general.

The statutory modifications which have changed the fee tail estate in most jurisdictions fall within four maincategories. n17 The most frequent statutory modification to the common law fee tail converts it to a fee simple held by the first grantee ordevisee. n18 About half the states with statutes of this type also provide that any remainder to follow the fee tail shall be construed as an executory interest in fee simple to become possessory if the first taker dies without lineal descendants. n19

The next most popular method of converting the fee tail estate is to make it a life estate in the first grantee with a remainder in fee simple absolute to that person's lineal descendants. n20 A third legislative approach gives the first taker a fee tail with all its limitations, but surviving descendants inherit a fee simple absolute in the property. n21 Finally, a small group of states permit a tenant in tail to destroy the fee tail estate by conveying it by deed as an estate in fee simple absolute. A creditor may also attack the fee tail estate; however, the tenant in tail may not devise the property by will. n22

FOOTNOTES:

(n1)Footnote 1. § 18.01 was written by Dean John Makdisi.

(n2)Footnote 2. Statute of Westminister II, c. 1 (1285).

(n3)Footnote 3. *Prichard v. Department of Revenue, 164 N.W.2d (Iowa) 113 (1969).*

(n4)Footnote 4. *See Scarborough v. Scarborough, 154 S.E.2d 110 (S.C. 1967); Scarborough v. Scarborough, 142 S.E.2d 706 (S.C. 1965).*

(n5)Footnote 5. *Lytle v. Hulen, 275 P. 45 (S.C. 1929).*

(n6)Footnote 6. *Prichard v. Department of Revenue, 164 N.W.2d 128 (Iowa 1969); Scarborough v. Scarborough, 142 S.E.2d 706 (Ore. 1965); Lytle v. Hulen, 275 P. 45 (Ore. 1929).*

(n7)Footnote 7. *Prichard v. Department of Revenue, 164 N.W.2d 113 (Iowa 1969); Lytle v. Hulen, 275 P. 45 (Or. 1929);* Thomas F. Bergin & Paul G. Haskell, Preface to Estates in Land and Future Interests (2d ed. 1984) at 29.

(n8)Footnote 8. Bergin & Haskell, *supra* note 7, at 29; Cornelius J. Moynihan, Introduction to the Law of Real Property (2d ed. 1988) at 34.

(n9)Footnote 9. *Prichard v. Department of Revenue, 164 N.W.2d 113 (Iowa 1969); Lytle v. Hulen, 275 P. 45 (Or. 1929);* Howard K. Williams, Cases and Materials on Future Interests 20 (1970); Bergin & Haskell, *supra* note 7, at 29.

(n10)Footnote 10. *Prichard v. Department of Revenue, 164 N.W.2d 113 (Iowa 1969). But see Scarborough v. Scarborough, 142 S.E.2d 706 (S.C. 1965);* Bergin & Haskell, *supra* note 7, at 29.

(n11)Footnote 11. *Prichard v. Department of Revenue, 164 N.W.2d 113 (Iowa 1969);* Williams, *supra* note 9, at 20.

(n12)Footnote 12. *Scarborough v. Scarborough, 154 S.E.2d 110 (S.C. 1967);* Bergin & Haskell, *supra* note 7, at 29.

(n13)Footnote 13. *Scarborough v. Scarborough, 154 S.E.2d 110 (S.C. 1967).*

(n14)Footnote 14. *Statute of Westminster II, 13 Edw. 1,* c. 1 (1285).

(n15)Footnote 15. Moynihan, *supra* note 8, at 36.

(n16)Footnote 16. Williams, *supra* note 9, at 156-157.

(n17)Footnote 17. *See* 1 Restatement of the Law of Property § 59, 68-106 (1936); Moynihan, *supra* note 8, at 37-39; Bergin & Haskell, *supra* note 3, at 32-33. For the classification of a future interest following a fee tail changed by statute, *see* Moynihan, *supra* note 8, at 123-124, n.4. Where the fee tail estate is recognized, it may be disentailed by a simple deed by the tenant in tail in possession. *See* Bergin & Haskell, *supra* note 7, at 32-34.

(n18)Footnote 18. Jurisdictions in this category include Alabama, Arizona, California, Georgia, Indiana, Kentucky, Maryland, Michigan, Minnesota, Mississippi, Montana, Nebraska, New Jersey, New York, North Carolina, North Dakota, Oklahoma, Pennsylvania, South Dakota, Tennessee, Vermont, Virginia, West Virginia, Wisconsin, Wyoming, and sometimes Texas. Roger A. Cunningham, William B. Stoebuck, and Dale A. Whitman, The Law of Property, 60 & n.3 (2d ed. 1993).

(n19)Footnote 19. Jurisdictions in this category include, California, Indiana, Kentucky, Michigan, Montana, Nebraska, New York, North Dakota, Oklahoma, South Dakota, Virginia, West Virginia. *Id.* at 60 & n.4.

(n20)Footnote 20. Jurisdictions in this category include Arkansas, Colorado, Florida, Georgia, Illinois, Kansas, Missouri, New Mexico, and Vermont. *Id.* at 60 & n.5.

(n21)Footnote 21. Jurisdictions in this category include Connecticut and Ohio. In addition, Rhode Island's statute has been interpreted to permit a tenant in tail to convert his estate into a fee simple by deed. It also permitted the estate to be attacked by creditors, unlike the cases in Connecticut and Ohio. *Id.* at 61 & n.7.

(n22)Footnote 22. Jurisdictions in this category include Delaware, Maine, Massachusetts and Rhode Island. *Id.* at 61 & nn.8-10.

* This chapter is based in part on Ch. 30, George W. Thompson, Commentaries on the Moon Law of Real Property (John S. Grimes ed. 1979), which made a significant contribution toward preserving the American common law governing the fee tail.

Thompson on Real Property, Thomas Editions

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CHAPTER 18 FEE TAIL *

2-18 Thompson on Real Property, Thomas Editions § 18.02

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§ 18.02 The Development and Nature of the Fee Tail.

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An estate tail is an estate of inheritance limited, not to the grantee's heirs in general, but to the heirs of the grantee's bodybegotten. n23 It has been seen heretofore that we have cause to believe that the early effect of adding the words "and his heirs" to a conveyance was to enlarge a life estate into an estate in the family line, that is to create an entailment. This fee became alienable, however, either through the scheme of the warranty binding heirs according to Littleton or by giving way to primogeniture as the later writers think.

The legal drafters interested in tying up property so as to prevent its alienation being thus defeated in their ideal scheme then resorted to the scheme of making conveyances to one and the heirs of one's body thus limiting the succession to lineal heirs and not collaterals. This scheme was, according to Blackstone, n24 in turn defeated by the courts interpreting the words "and heirs ofhis body" to create an alienable fee simple in the first taker conditioned, however, on the fee returning to the donor if the donee had no heirs of the body. n25 The effect of this judicial determination was to permit the donee to alien so as to bar both the issue and the grantor, to make the property subject to attainder for treason and to encumber the property to the despair of the heirs.

Then as part of the great legislative program of Edward I there was adopted the Statute De DonisConditionalibus. n26 The effect of this statute was to restore the intent of the donor n27 so that a grant to A and the heirs of A's body created a fee tail n28 that could not be defeated by an alienation of A during A's lifetime n29 and which reverted to the donor when the line of A's issue expired. n30 An alienation by the tenant before issue barred the issue but not the donor if the donor died without issue. n31 At common law the fee simple conditional was limited to particular heirs to the exclusion of others and if there was birth of issue the fee became absolute in the grantee with reversion to the grantor if the grantee had never had issue answering the description. The courts made a major inroad into the statute with *Taltarum's Case* n32 permitting a tenant in tail to cut off both the rights of issue and also the reversion. n33

Meanwhile the fee tail had been much eroded by statute. The Statute of Fines had permitted the barring of those claiming under the in tail but not the reversion. n34 Another statute permitted the tenant in tail to make a long term lease, n35 another charged the land with debts owed by the tenant in tail to the crown. n36 Still another held the land

liable for debts of a bankrupt tenant in tail, n37 and a tenant in tail could appoint to a charitable use. n38

Estates tail are first classified with reference to the terms of their creation into (1) estates tail general, and (2) estates tail special. Estates tail general are subdivided into (a) estates general male, and (b) estates general female. Also estates tail special are subdivided into (a) estates tail special male, and (b) estates tail special female. n39 An estate tail general is where the grant is to one and the heirs of one's body generally, so that the issue in general, by each and all marriages, are capable of taking per formam doni. n40 Thus a conveyance to a grantee and to his "bodily heirs" and assigns creates an estate in fee tail general as common law. n41 In such estates the privilege to take by inheritance is limited to the descendants of the first taker. n42 The estate tail general is the greatest of the estates tail. It includes all one's descendants, all one's issue, regardless of the number of marriages from which they come. The technical words are "heirs of the body," and these words or other words of the same meaning must be used. The words issue, descendants, offspring, seed, children, and the like, may be used in devises but must have the significance of "heirs of the body," n43 but no synonyms for "heirs" will suffice to create an estate tail general by deed. n44 The phrase "heirs of his flesh," may be substituted for "heirs of his body" in creating such estate by deed. n45 The words "of his body," and "of his flesh" are words of procreation, and their omission gives the donee a fee simple where "heirs" alone is used, n46 but the use of such words of procreation without the use of words of inheritance in connection therewith creates a life estate only in the donee. n47 Where the word "heirs" is used in connection with words restricting the grant to the heirs of the body a fee tail will becreated. n48 In Kentucky, a deed to the grantee and the "offsprings" of her body has been held to create a fee tail. n49 An estate tail special is where the gift or grant is restricted to certain heirs, or class of heirs, of the donee's body. n50

When both the parents from whose bodies the heirs must be derived are specified, as where the grant is to one and the heirs of his body by a woman named, the estate is a tail special, but it has been held that the second parent need not be named with particularity, as a designation as of a class is sufficient. n51 A conveyance to a married woman and her lawful heirs by her named husband creates an estate tail special. n52 A limitation to A and the heirs of his body by his present wife or by a future wife, designating her, is general in the sense that it may include all descendants tracing their descent from the first taker and the specially designated wife or husband, but is special because all subsequent takers must trace their lineage back to the specially designated husband and wife. Again, an estate tail special may be made more special or restricted by confining the inheritance to issue of a certain sex, as male or female. Thus the limitation may be to A and the "heirs male of his body," or to A and the "heirs female of his body." The former being designated an "estate tail male," and the latter an "estate tail female." The incidents of an estate tail at common law were the same as those in fee simple, n53 except that a tenant in tail could not alienate the estate except for his own lifetime. n54

After the Statute of Westminster, the tenant in tail could commit waste by pulling down buildings, cutting timber, or change the character or use of the estate, and not be answerable to any person therefor. n55

This estate was subject to the wife's dowerrights, n56 and the husband's curtesy. n57 It might be encumbered, at least so long as the first taker lived, the first taker creating the encumbrance. It was liable for his debts during his lifetime, even to sale by assignees in insolvency or trustees in bankruptcy of the tenant. n58 A tenant in tail is not bound to pay off the outstanding encumbrance against the estate when he becomes tenant. Nor can the reversioner or remainderman compel him to pay the interest on such encumbrance, as they might a tenant for life. n59 The courts hold that a feetail estate will not merge into a fee simple though both estates are owned by the same person. n60 A tenant in tail may lease the entailed property for gas and oil purposes for any term within his own tenure. n61 In the absence of statute, a conveyance in fee by the tenant in tail can affect his interest only and does not bar the issue in tail or affect the remainder expectant on the estate tail. n62 Unlike the owner in fee, the tenant in tail cannot dispose of the estate by will. n63

An estate tail under the statute de donis was inalienable. The tenant in tail could convey no interest greater than a life estate, and after that the estate descended to "the heirs of his body," or to other lineal heirs described in the deed of the donor. Before the enactment of this statute, an estate granted to one "and the heirs of his body" was a conditional fee,

and the grantee, upon the birth of issue who could inherit, could convey the land absolutely into fee simple, and thus bar not only one's own issue, but also the donor's right of reverter. So the effect of the statute de donis was to render the estate inalienable, and descendible only to the issue named in the grant. The grantee could convey a title good only to the extent of the grantee's own interest, that is, an estate for life determinable by the entry of the heir, if such there should be, or, in default of such issue, by entry of the donor. The estate of such grantee was designated an estate tail, feudum talliatum, being a portion of an estate cut off from the fee. After the restriction upon the fee alienation of estates had continued for two hundred years, it was finally in a great part broken down by the courts, first by the process of "levying a fine," and afterwards by the more effectual means of a "common recovery," which came into use after the famous *Taltarum's Case* in 1472. n64 In England, from this time until 1834, the common mode of barring an entail and making a conveyance of the estate in fee simple was "to suffer a recovery." After the latter date the tenant in tail might convey the estate absolutely in fee simple by deed. Barring entails or alienating estates tail by fine and recovery was practiced in the colonies and in the older American states, n65 but subsequent statutes made such estates alienable by deed, and such conveyance is just as effective as fines and recoveries, to bar the entail and convey a fee-simple estate. n66 Common recovery was a fictitious suit brought by a third party against the holder of the estate in tail, with the ultimate object of barring both the estate in tail as well as the remainderman. The third person then, either paid the tenant in tail for the land as a purchaser or conveyed it back in fee simple. n67

When the grantee's lineal descendants ceased to exist, the property reverted to the grantor regardless of the length of time after the creation of the fee tail, unless at the time of the creation of the fee the grantor had limited a remainder over to a third person, in which event the remainder vested in possession. n68 And the doctrine of merger did not apply to fee tails. n69

The statute de donis used the word "tenements" in referring to the kinds of property which came within its purview. This word issaid by Coke to include all corporeal and incorporeal inheritable property which savor of the realty or issue out of corporeal real property, or which concern or is annexed to, or may be exercised therewith, and he gives as examples of incorporeal hereditaments, rents, estovers, commons, and the like. All such property may be entailed, and all other incorporeal property. As a general rule, copyhold estates, life estates, and leasehold interests may not be entailed. n70 Annuities charged upon the land may be entailed, but not so if a mere personal charge against the tenant. Estates tail do not extend to personalty, n71 except, perhaps for a limited period. n72 Words which will create an estate tail when applied to real property will create an estate absolute when applied to personalproperty. n73 An estate tail in personal property will operate as an outright grant to the first taker. n74

Properly speaking, an estate tail does not "descend" from one tenant in tail to the successor, but instead the issue of a tenant in tail take *per formam doni* from the creator of theestate. n75 An estate tail passes only to the heirs of the prescribed kind who issue from the body of the person to whom the estate is first granted, and it ceases when such heirs are extinct. The estate "lasts so long as there exists issue of the prescribed class; so long as there is, as it were, a stream flowing from the fountain." n76 On the failure of such issue the estate reverts to the original donor or the donor's heirs, unless the entail has been barred in the manner provided by statute or by a recovery at common law. While in theory an entail secures a succession in perpetuity to the oldest son, and to the oldest son of the oldest son, n77 in effect there is no such succession.

The fee in an estate tail is vested by the grant or devise in the first taker and passes at death by operation of law to the immediate heirs of the body. n78 In some jurisdictions, an estate tail generally passes to the eldest son, and a special tail passes only in the restrictedway, n79 while in other states it would seem that a general entail would go to the heirs under the existing law of descent, and a special tail estate would pass to the common-law heir of the body of the nameddonee. n80 An estate tail passes to the donee's lawful issue in direct line as long as such donee's posterity endures in regular course of descent, n81 and terminates on the extinction of such issue. n82 Since an estate tail is an estate of inheritance, it passes to particular heirs, and hence it is to be distinguished from a life estate with remainder. n83

This statute had the effect to convert what before its enactment had been a fee simple estate into an estate in fee tail,

under which a limitation to one and the heirs of one's body was inalienable by the tenant under any circumstances. n84 This restraint upon the power of alienation fettered inheritances and created perpetuities. The name "fee tail" was borrowed from the feudists, amongst whom it signified mutilated or truncated inheritance from which the heirs general were cut off, or, as some say, because ownership of the subject was cut in two parts, one going to the donee and the heirs of the donee's body and the other remaining as a reversion in the donor. n85

An estate tail is a freehold estate n86 of inheritance n87 as to which there is a fixed line of inheritable succession, limited to the issue of the body of the grantee or devisee and as to which the succession of heirs at law in general does not prevail. n88 An "entail" is a fee abridged or limited to the issue or to certain classes of the issue of a grantee or devisee and not descending to all of the latter's heirs indiscriminately. n89

A tenant in fee tail is not liable for waste n90 nor to diminish encumbrances or pay interest therein. n91 But a reversion existed after a fee tail and when the fee fell for want of the blood line the reversioner succeeded. n92

COMPUTER-ASSISTED RESEARCH

LEXIS: fee tail! w/30 alienat! or inalienable
or
entail! w/30 fee w/2 abridge! or limit!
or
estate! tail! w/5 general or special
or
estate! tail! w/5 male or female

FOOTNOTES:
(n1)Footnote 23. **23.** *Butler v. Huestis, 68 Ill. 594(1873); Allen v. Craft, 9 N.E. 919 (Ind. 1887); Gardner v. Grossman, 57 N.E.2d 440 (Ind. 1944); Morehead v. Goellert, 164 P.2d 110 (Kan. 1945); Millard v. Millard, 180 N.W. 429* Mich. 1920); *Davidson v. Davidson, 167 S.W.2d 641 (Mo. 1943); Byrd v. Allen, 171 S.W.2d 691 (Mo. 1942); Miller v. Miller, 83 N.E.2d 254 (Ohio 1948); Anders v. Gerhard, 21 A. 253 (Pa. 1891); Simms v. Buist, 30 S.E. 400 (S.C. 1898).* Britton treated a limitation to A & B and their heirs lawfully begotten as a condition precedent. 2 Coke, Inst. 333, disputes this and claims it to be a conditional fee.

(n2)Footnote 24. 2 William Blackstone, Commentaries 110.

(n3)Footnote 25. *Colhoun v. Snider, 6 Bin. (Pa.) 135 (1813); Willion v. Berkley, Plowd. 233, 75 Eng. Rep. 339* (use of word "heirs" made fee simple conditional).

Fee simple conditional before de donis. Littleton, Tenures, § 13.

Bracton's Note Book, Book 2, ch. 6, fol. 17, shows two types of "conditionalis" gifts one to N and the heirs of his body begotten on his lawful wedded wife and the other to have and to hold to the donee and his heirs if he has heirs begotten of his body. The first type reverted when the line ran out. The second became absolute on birth of issue.

In Kenneth Edward Droby, An Introduction to the History of the Law of Real Property (2d ed. 1876), ch. 4, § 3, it is said that before Edward I the two had become confused and that each gave a fee simple alienable on breach of issue. This conclusion does not necessarily follow. The lords would have desired de donis even though they held a reversion on extinction of the family line.

Brown, J., in Willion v. Berkley, Plowd. 223, 245, said:

> And at the common law there was no estate of inheritance but what was fee simple. But these estates in fee simple were of two sorts, the one absolute, and the other conditional, as hath been said. And the fee simple conditional was, where land was given to a man and to the heirs of his body begotten, and herein the abuse was after issue had rather than before issue had... But after issue had such donee at the common law had power to alien, and thereby to bar the issues and the donor, for by having issue the condition was performed, and his inheritance was made more full.

(n4)Footnote 26. Statute De Donis Conditionalibus ; *Statute of Westminster II (13 Edw., 1285),* ch. 1. First, concerning lands that many times are given upon condition, that is, to wit, where any giveth his land to any man and his wife, and to the heirs begotten of the bodies of the same man and his wife, with such condition expressed that if the same man and his wife die without heir of their bodies between them begotten, the land so given shall revert to the giver or his heir; in case also where one giveth lands in free marriage, which gift hath a condition annexed, though it be not expressed in the deed of gift, which is this, that if the husband and wife die without heir of their bodies begotten, the land so given shall revert to the giver or his heir; in case also where one giveth land to another and the heirs of his body issuing, it seemed very hard and yet seemeth to the givers and their heirs, that their will being expressed in the gift was not heretofore nor yet is observed. In all the cases aforesaid after issue begotten and born between them, to whom the lands were given under such condition, heretofore such feoffees had power to aliene the land so given, and to disinherit their issue of the land, contrary to the minds of the givers, and contrary to the form expressed in the gift; and further, when the issue of such feoffee is failing, the land so given ought to return to the giver or his heir by form of gift expressed in the deed, though the issue, if any were, had died; yet by the deed and feoffment of them, to whom land was so given upon condition, the donors have heretofore been barred of their reversion of the same tenements which was directly repugnant to the form of the gift wherefore our lord the king, perceiving how necessary and expedient it should be to provide remedy in the aforesaid cases, hath ordained, that the will of the giver according to the form in the deed of gift manifestly expressed shall be from henceforth observed, so that they to whom the land was given under such condition shall have no power to aliene the land so given, but that it shall remain unto the issue of them to whom it was given after their death, or shall revert unto the giver or his heirs if issue fail, either by reason that there is no issue at all, or if any issue be, it fail by death, the heir of such issue failing. Neither shall the second husband of any such woman from henceforth have anything in the land so given upon condition after the death of his wife, by the law of England, nor the issue of the second husband and wife shall succeed in the inheritance, but immediately after the death of the husband and wife, to whom the land was so given, it shall come to their issue or return unto the giver or his heir as before is said. And forasmuch as in a new case new remedy must be provided, this manner of writ shall be granted to the party that will purchase it: "Command A. that justly, &c., he render to B. the manor of F. with its appurtenances, which C. gave to such a man, and such a woman, and to the heirs of the said man and woman issuing"; or, "which C. gave to such a man in free marriage with such a woman, and which, after the death of the aforesaid man and woman, to the aforesaid B., son of the aforesaid man and woman, ought to descend, by the form of the gift aforesaid, as he saith"; or, "which C. gave to such a one and the heirs of his body issuing, and which after the death of the said such a one, to the aforesaid B., son of the aforesaid such a one, ought to descend, by the form, &c." The writ whereby the giver shall recover when issue faileth is common enough in the Chancery. And it is to wit that this statute shall hold place touching alienation of land contrary to the form of gift hereafter to be made, and shall not extend to gifts made before. And if a fine be levied hereafter upon such lands it shall be void in the law, neither shall the heirs or such as the reversion belongeth unto, though they be of full age, within England, and out of prison, need to make their claim.

See, as to the development of the fee tail, S.F.C. Milson, *Formedon Before De Donis, 72 L.Q. Rev. 391 (1956).*

(n5)Footnote 27. *See Kepler v. Larson, 108 N.W. 1033 (Iowa 1906). See also* Restatement, Property, § 68, 78.

(n6)Footnote 28. *Idle v. Cooke, Ld. Raym. 1148, 1 P. Wms. 70* (the term "fee tail" antedated de donis). Feodum talliatum from taliare to cut off, the heirs general cut off.

(n7)Footnote 29. Plucknett has shown legislation of Edw., ch. 5, that as first interpreted limitation on the grant

expired in the fourth degree, *Y.B. 11 Edw. 2* (Selden Society) 176-177, whereupon it became a fee simple and that only gradually, through court decisions, did the entailment become perpetual.

(n8)Footnote 30. Estates tail were not forfeited for high treason except during the life of the tenant in tail until the time of *Henry VIII (26 Hen. 8,* ch. 13, § 5; 4 & *5 Edw. 6,* ch. 11, § 9). 2 Blackstone, *supra* note 24, at 118; Joshua Williams, Principles of the Law of Real Property (18th ed. 1896) 104, 119. *See Moore v. Reddel, 102 N.E. 257 (Ill. 1913).*

At early common law the estate created by a conveyance to a donee and the heirs of his body was called a "fee simple conditional" since it was in fact a fee simple conditional on issue being born to the donee. *Sconce v. Neece, 268 P.2d 1102 (Colo. 1954).*

(n9)Footnote 31. Coke on Littleton, at § 19b.

(n10)Footnote 32. *Y.B. 14 Edw. 4, 19.*

(n11)Footnote 33. A common recovery was a fictitious and prearranged suit in the form of a writ of right started by the person to whom the property was to be conveyed in fee simple. He would allege (of course falsely) that he was the owner of the property in fee simple by a title superior to the defendant's; that the defendant had no title to the land, having come into possession of it after the complainant had been wrongfully ousted therefrom by some third person named. The defendant, tenant in tail, would then appear, making no denial of the complainant's allegations, but calling upon one X, alleged to be the man who had conveyed the land to him in tail with warranty, to appear and defend the title which he had warranted. X would then appear and defend the title, but afterwards would default, and thereupon judgment would be given to the complainant that he recover the land in fee simple, and to the tenant in tail that he recover from X lands of equal value in recompense for the lands alleged to have been conveyed by X with warranty to the tenant in tail. X, the vouchee, selected to take this pretended part because judgment proof, was usually the court crier, and came to be called the common vouchee because used so frequently in this capacity. He had never any interest in the property. The judgment against him for an equal amount of land in favor of the tenant in tail and the heirs of his body was regarded as sufficient recompense for the loss of the entail by such heirs; so that the recovery suffered by the tenant in tail was binding as against them, the complainant taking by virtue of the judgment an estate in fee simple which cut off the entail in favor of the heirs of the body of the tenant in tail, and also the reversion of the original donor, it having been judicially determined that the complainant's title in fee simple was superior to the title of the tenant and his donor. The complainant would then convey the land in fee to the tenant in tail, or convey to another at the tenant's direction, or pay the tenant the purchase-price agreed upon in case an actual sale to him was intended.

(n12)Footnote 34. *32 Hen. 8,* ch. 38.

(n13)Footnote 35. *32 Hen. 8,* ch. 28.

(n14)Footnote 36. *33 Hen. 8,* ch. 39, § 75.

(n15)Footnote 37. 21 Jam., ch. 19.

(n16)Footnote 38. *Attorney General v. Warick, 2 Vern. 453, 23 Eng. Rep. 890 (1703).*

(n17)Footnote 39. *See Allen v. Craft, 9 N.E. 919 (Ind. 1887); Outland v. Bowen, 17 N.E. 281 (Ind. 1888); Pennington v. Pennington, 17 A. 329 (Md. 1889).*

(n18)Footnote 40. 2 Blackstone, *supra* note 24, at 113. *Lehndorf v. Cope, 13 N.E. 505 (Ill. 1887); Millard v. Millard, 180 N.W. 429 (Mich. 1920). See* Restatement, Property, § 78, cmt. b.

(n19)Footnote 41. *Turner v. Hause, 65 N.E. 445 (Ill. 1902).*

(n20)Footnote 42. *See* Restatement, Property, § 78, cmt. b.

(n21)Footnote 43. Richard Preston, An Elementary Treatise on Estates (1820).

(n22)Footnote 44. Coke on Littleton, at § 20a; 2 Blackstone, *supra* note 24. *Rudkin v. Rand, 91 A. 198 (Conn. 1914); Wheeler v. Duke, 1 Cr. & M. 210.*

(n23)Footnote 45. Coke on Littleton, at § 20b.

(n24)Footnote 46. 2 Blackstone, *supra* note 24, 115; Coke on Littleton, at § 27a; *Doe v. Smeddle, 2 Barn. & Ald. 126.*

(n25)Footnote 47. Coke on Littleton, at § 20b; 2 William Blackstone, *supra* note 24, at 115; *Lehndorf v. Cope, 13 N.E. 505 (Ill. 1887); Ford v. Johnson, 41 Ohio St. 366 (1884).*

(n26)Footnote 48. *Rudkin v. Rand, 91 A. 198 (Conn. 1914); Dick v. Ricker, 78 N.E. 823 (Ill. 1906); Coogan v. Jones, 115 N.E. 877 (Ill. 1917); Lamb v. Medsker, 74 N.E. 1012 (Ind. App. 1905); Howe v. Howe, 145 P. 873 (Kan. 1915); Gould v. Leadbetter, 150 A. 375 (Me. 1930); Buxton v. Uxbridge, 51 Mass. (10 Met.) 87 (1845); Brown v. Addison Gilbert Hosp., 29 N.E. 625 (Mass. 1892); Millard v. Millard, 180 N.W. 429 (Mich. 1920); Tygard v. Hartwell, 102 S.W. 989 (Mo. 1907); Johnson v. Calvert, 169 S.W. 78 (Mo. 1914); Holcomb v. Lake, 24 N.J.L. 686 (1855); Pollock v. Speidel, 17 Ohio St. 439 (1867).*

(n27)Footnote 49. *Massingale v. Parker, 236 S.W. 959 (Ky. 1922).*

The words "bodily issue" are words of limitation and not words of purchase as are "children of her body." *Antley v. Antley, 128 S.E. 31 (S.C. 1925).*

(n28)Footnote 50. Blackstone, *supra* note 24, at 113; 4 James Kent, Commentaries on American Law (12th ed. 1873) 11. *Lehndorf v. Cope, 13 N.E. 505 (Ill. 1887). See* Restatement, Property, § 78, cmt. d.

(n29)Footnote 51. Pelham-Clinton v. Newcastle, App. Cas. 111 (1903); Magee v. Martin, 1 L.R. 367, C.A.

(n30)Footnote 52. *Kane v. Roath, 276 S.W. 39 (Mo. 1925).*

(n31)Footnote 53. *Partridge v. Dorsey, 3 Harr. & J. 302 (Md. 1813); Buxton v. Uxbridge, 51 Mass. (10 Met.) 87 (1845).*

In the case of a fee conditional, "the grantee ... takes with the following rights and subject to the following limitations: (1) Until issue born after execution and delivery of the deed, the grantee takes only a life estate, with reversion to the grantor... (2) Upon birth of lawful issue, the reversion is barred, and the grantee may convey in fee simple. ... (3) But the grantee under a fee conditional deed cannot devise the land... (4) If the fee conditional estate is not alienated during the lifetime of the grantee, after birth of issue, then the estate descends, not to the heirs general, but to the bodily issue of the grantee in accordance with the statute of distribution, subject, however, to the debts of the grantee." *Antley v. Antley, 128 S.E. 31 (S.C. 1925).*

(n32)Footnote 54. *Croxall v. Shererd, 72 U.S. (5 Wall) 268 (1866); Williams v. McCall, 12 Conn. 328 (1837); Frazer v. Peoria, 74 Ill. 282 (1874); Outland v. Bowen, 17 N.E. 281 (Ind. 1888).*

(n33)Footnote 55. 2 Blackstone, *supra* note 24, at 116; 4 Kent, *supra* note 50; *Pollock v. Speidel, 17 Ohio St. 439 (1867).*

(n34)Footnote 56. *Kennedy v. Kennedy, 29 N.J.L. 185 (1861); In re Jones' Estate, 64 N.E.2d 609 (Ohio 1861); In re Smith's Appeal, 23 Pa. 9 (1853). See* Restatement, Property, § 84.

On death of one having an estate tail under deed, heirs of his body took entire estate by reason of direction of the deed creating interest and not under laws of descent and distribution, and dower statute barred the widow of the one having the estate tail, of any dower interest in the premises. *Miller v. Miller, 83 N.E.2d 254 (Ohio 1948).*

See Louis J. Schneider, Jr., *Rights of a Surviving Spouse in a Fee Tail Estate in Ohio, 18 U. Cin. L. Rev. 332 (1949).*

(n35)Footnote 57. *Pollock v. Speidel, 17 Ohio St. 439 (1867); Voller v. Carter, 4 El. & Bl. 173 (1854).*

(n36)Footnote 58. Coke on Littleton, at § 224a; *Wharton v. Wharton, 2 Vern. 3 (1686).*

(n37)Footnote 59. 4 Kent, *supra* note 50, at 18.*Amesbury v. Brown, 1 Ves. Sr. 477 (1750); Chaplin v. Chaplin, 3 P. Wms. 235 (1733).*

Where land was conveyed in tail, remainderman could not enter land during lifetime of life tenant, as against contention that life tenant's failure to pay taxes was waste giving right to entry, and hence remaindermen were not guilty of laches in failing to prevent such waste so as to preclude them from asserting rights as against third persons claiming by virtue of tax deed, mortgage foreclosure and adverse possession. *Beasley v. Beasley, 88 N.E.2d 435 (Ill. 1949).*

(n38)Footnote 60. *Pool v. Morris, 29 Ga. 374 (1859); Corbin v. Healy, 37 Mass. (20 Pick.) 514 (1838).*

(n39)Footnote 61. *Davis v. Davis, 246 P. 982 (Kan. 1926).*

(n40)Footnote 62. *Whiting v. Whiting, 4 Conn. 179 (1822); Williams v. McCall, 12 Conn. 328 (1837); Frazer v. Peoria, 74 Ill. 282 (1869); Waters v. Margerum, 60 Pa. 39 (1869); Orndoff v. Turman, 2 Leigh 200 (Va. 1830).*

(n41)Footnote 63. Laidler v. Young, *2 H. & J. 59 (Md. 1806); Theological Sem. v. Wall, 44 Pa. 353 (1863).*

(n42)Footnote 64. *See Orndoff v. Turman, 2 Leigh 200 (Va. 1830).*

(n43)Footnote 65. *Hawley v. Northampton, 8 Mass. 3 (1811); Roseboom v. Van Vechten, 5 Denio 414 (N.Y. 1848);* Lyle v. Richards, 9 Serg. & Rawle 322 (Pa. 1823).

A fee tail was barred pursuant to statute by conveying away the land by deed purporting to convey a fee simple interest and having the land conveyed back to the grantor, whereupon she was seized of a fee simple interest in the land. *Caccamo v. Banning, 75 A.2d 222 (Del. 1950).*

(n44)Footnote 66. *Croxall v. Shererd, 72 U.S. (5 Wall) 268 (1866);* Howard v. Moale, *2 H. & J. 218 (Md. 1806); Collamore v. Collamore, 32 N.E. 1034 (Mass. 1893);Lawrence v. Lawrence, 105 Pa. 335 (1884); Jillson v. Wilcox, 7 R.I. 515 (1863).*

Where deed conveyed a fee tail estate under common law, a period of adverse possession prior to death of life tenant could not be included to set up statutes of limitations as to bar remaindermen. *Beasley v. Beasley, 88 N.E.2d 435 (Ill. 1949).*

Where there is an estate tail, the line of succession continues from generation to generation until line is broken by conveyance or failure of issue. *Wood River Oil & Ref. Co. v. Madden, 220 P.2d 154 (Kan. 1950).*

An act or event which destroys the entail necessarily destroys the remainder expectant on the estate tail. *Krieger v. Stauffer, 67 N.E.2d 449 (Ohio 1946).*

Forfeiture clause of tenant in tail attempted to bar the entail held void. Mildmay's Case, 6 Coke 40a, 41a, *77 Eng. Rep.*

311; Mary Portington's Case, 10 Coke 35a, 35b, *77 Eng. Rep. 976. See* Corbet's Case, 1 Coke 83b, *76 Eng. Rep. 187 (1599).*

(n45)Footnote 67. *Ewing v. Nesbitt, 129 P. 1131 (Kan. 1913)* (the effect of a common recovery was a conveyance of record, under our law an ordinary deed); *Dutton v. Donahue, 8 P.2d 90,* (Wyo. 1932) 79 A.L.R. 1355.

(n46)Footnote 68. 2 Blackstone, *supra* note 24, at 175.

(n47)Footnote 69. *Id.* at 177.

(n48)Footnote 70. Coke on Littleton, at § 20a, 120; John Chipman Gray, The Rule Against Perpetuities (3d ed. 1915) § 647, note.

(n49)Footnote 71. *Kinney v. Oahu Sugar Co., 255 F. 732 (9th Cir. 1919), cert. denied, 249 U.S. 616 (1919); Hertz v. Abrahams, 36 S.E. 409 (Ga. 1919).*

(n50)Footnote 72. *See* Coke on Littleton, at § 20a, 120.

(n51)Footnote 73. *Maulding v. Scott, 13 Ark. 88 (1852); Appeal of Simmons, 115 A. 765 (Me. 1852); Cleveland v. Havens, 13 N.J. Eq. 101 (1860); Hartwell v. Tefft, 35 A. 882 (R.I. 1896), 34 L.R.A. 500; Rhode Island Hosp. Trust Co. v. Bridgham, 106 A. 149 (R.I. 1919). See Swain v. Rascoe, 25 N.C. 200 (1842)* (in which an exception to the rule stated in the text is shown).

(n52)Footnote 74. *Gardner v. Anderson, 227 P. 743 (Kan. 1923).*

(n53)Footnote 75. *Miller v. Miller, 83 N.E.2d 254 (Ohio 1948).*

(n54)Footnote 76. Louis Arthur Goodeve, Goodeve's Modern Law of Personal Property (5th ed. 1912).

(n55)Footnote 77. *Conover v. Cade, 112 N.E. 7 (Ind. 1916); Wright v. Thayer, 67 Mass. (1 Gray) 284 (1854).*

In *Price v. Taylor, 28 Pa. 95 (1857),* Lowrie, J., said:

> If it was an error to admit the eldest son as the heir to an estate tail general, under our law, it was perhaps an inevitable one for inheriting all our forms of wills and conveyances, and of legal practice, from England, we could not, if we would, at once build up a perfectly consistent system of legal principles founded on our new circumstances... The reason why estates tail descended to the eldest son under our old laws of descent was, because the descent of such estates was not provided for under our old statutes, and therefore the old common law alone furnished the rule for them... The judicial adoption of the English law of primogeniture in estates tail has entirely ceased to have any support in our laws and customs, and is now plainly incompatible with them all. Therefore we can no longer presume, from general words of entailment, that a lineal descent according to the English law is intended.

(n56)Footnote 78. *In re Jones' Estate, 64 N.E.2d 609 (Ohio 1943).*

(n57)Footnote 79. *Hileman v. Bouslaugh, 13 Pa. 344 (1850); In re Guthrie's Appeal, 37 Pa. 9 (1860).*

(n58)Footnote 80. *Riggs v. Sally, 15 Me. 408 (1839); Collamore v. Collamore, 32 N.E. 1034 (Mass. 1893);Byrd v. Allen, 171 S.W.2d 691 (Mo. 1942).*

One characteristic of an estate tail is that it continues through bodily heirs for succeeding generations. Steele v.*Pedroja, 289 P.2d 738 (Kan. 1955).*

(n59)Footnote 81. *Inlow v. Herren, 267 S.W. 893 (Mo. 1924); Harwell v. Harwell, 271 S.W. 353 (Tenn. 1925).*

An "estate tail" is a freehold estate in which there is a fixed line of inheritable succession limited to the issue of the body of the grantee or devisee which cuts off other heirs at law.*Miller v. Miller, 83 N.E.2d 254 (Ohio 1948).*

(n60)Footnote 82. **82.** *Inlow v. Herren, 267 S.W. 893 (Mo. 1924); Harwell v. Harwell, 271 S.W. 353 (Tenn. 1925). See* Restatement, Property, § 94.

(n61)Footnote 83. *Bodine v. Arthur, 14 S.W. 904 (Ky. 1890); O'Brien v. Sedalia Trust Co., 5 S.W.2d 74 (Mo. 1928); Miller v. Miller, 83 N.E.2d 254 (Ohio1948).*

(n62)Footnote 84. Digby, *supra,* note 25, 224. The effect of this statute was to create a new species of estates of inheritance, which, except under certain special circumstances, could not be alienated so as to defeat the expectant interest of the issue specified in the gift, or postpone the reversion of the lord. There was, it is true, no direct provision restraining the grant in fee simple of such estates. No forfeiture or other immediate penalty would be incurred either by feoffor or feoffee. But inasmuch as the feoffor could only give a title valid against himself and not as against his issue or his lord after his own decease, the fee simple which he would convey to the feoffee would be insecure and precarious and liable to be defeated by the issue of the feoffor, or after failure of the issue, by the lord or original donor. An estate in fee which was thus liable to be defeated was called in later times a base fee.

Dyer, C. J., in Willion v. Berkley, Plowd. 223, 251 (1562), said: "By the implication of the act, the estate which was a fee-simple conditional is divided, and the fee continues always in the donor, and the donee has an estate tail. And therefore the estate of the donee is altered for before the statute the issue should have had an Assize of Mortdancestor, but now he shall not; and before it should have escheated for felony after issue had, but now it shall not; and before the donee should forfeit it for treason, and now, as appears in *7 H., 4,* he shall not; and before the donee might charge the land, and the issue should have held it charged, but now he cannot, for it is not the same estate that it was before, nor in the same degree."

(n63)Footnote 85. *Gannon v. Albright, 81 S.W. 1162 (Mo. 1904).*

(n64)Footnote 86. *Gardner v. Anderson, 227 P. 743 (Kan. 1923).*

(n65)Footnote 87. *Id.*; *Wood River Oil & Ref. Co. v. Madden, 220 P.2d 154 (Kan. 1950); Smith v. Federal Land Bank, 243 P.2d 1027 (Kan. 1952); Cox v. Fink, 254 S.W. 757 (Ky. 1923); Riggs v. Sally, 15 Me. 408 (1839); Millard v. Millard, 180 N.W. 429 (Mich. 1920); Inlow v. Herren, 267 S.W. 893 (Mo. 1924); Harwell v. Harwell, 271 S.W. 353 (Tenn. 1925).*

(n66)Footnote 88. McArthur v. Allen, F. Cas. No.8659; *Mercantile Trust Co. v. Adams, 129 S.W. 1101 (Ark. 1910); Bowlin v. White, 91 N.E. 658 (Ill. 1910); Gardner v. Anderson, 227 P. 743 (Kan. 1923); Jones v. Jones, 109 P.2d 211 (Kan. 1940); Smith v. Federal Land Bank, 243 P.2d 1027 (Kan. 1952); Cox v. Fink, 254 S.W. 757 (Ky. 1923); Corbin v. Healy, 37 Mass. (20 Pick.) 514 (1838); Boxley v. Jackson, 2 So. 2d 160 (Miss. 1941); Harwell v. Harwell, 271 S.W. 353 (Tenn. 1925).*

"Estates tail" are estates of inheritance which instead of descending to heirs generally, go to the heirs of donee's body, which means his lawful issue, and through them to his grandchildren in a direct line so long as his posterity endures in a regular order and course of descent, and on the extinction of such issue the estate determines. *Ballance v. Garner, 168 P.2d 533 (Kan. 1946).*

(n67)Footnote 89. *Toney v. Toney, 236 S.W.2d 716 (Ark. 1951); Stearns v. Curry, 137 N.E. 471 (Ill. 1922).*

(n68)Footnote 90. 2 Blackstone, *supra* note 24 115.

(n69)Footnote 91. 4 Kent, *supra* note 50, at 18.

(n70)Footnote 92. The remedy of a reversioner after a fee tail was the writ of formedon in the reverter, but after a life estate was a writ of intrusion. 2 Frederick Pollard & Frederic William Maitland, The History of English Law Before the Time of Edward I (2d ed. 1898) 23, n.2, 28, 29; Abraham Stearns, A Summary of the Law and Practice of Real Actions (1900) 143, 335-338. *See Formedon, Before De Donis,* 72 L.O. Rev. 391 (1956).

* This chapter is based in part on Ch. 30, George W. Thompson, Commentaries on the Moon Law of Real Property (John S. Grimes ed. 1979), which made a significant contribution toward preserving the American common law governing the fee tail.

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CHAPTER 18 FEE TAIL *

2-18 Thompson on Real Property, Thomas Editions § 18.03

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§ 18.03 Language Creating a Fee Tail.

[Go To Supp]

The common-law rule that words of limitation were necessary to the creation of a fee was applicable to a fee tail. As a fee-tail estate is derived from a fee, it was necessary to use the word, together with its complement, "of the body" in order to create this limited estate. n93 Consequently, in a grant, if the limitation were to A and the "issue of his body," or to him and "his seed," or to him and "his children," the grantee would take a life estate only at common law, as the technical words of inheritance were lacking. n94 "Heirs of his (or her) body" are the technical words which create a fee tail. A deed, if it is to create such an estate, must have used the word "heirs," n95 and either the word "body" or some other word or words of procreation. n96

The modern statutes dispensing with the necessity of the use of words of limitation are applicable to fee tails as well as to fee simples. So today the words "heirs of her body," "heirs lawfully begotten of the body," and other similar expressions, are appropriate words of limitation and must be construed as creating an estate tail, unless from the entire instrument it reasonably appears that they are not used in their technical sense, but in the popular sense of "children." n97 It is not absolutely necessary to use the exact words "of the body," as other words of procreation may be used which restrain the meaning of the word heirs to the lineal descendants of thegrantee. n98

Technical words of limitation are not necessary to create a fee-tail estate by will, as any words showing an intent to pass the estate to lineal descendants will be given this effect. n99 A fee tail is created by a devise to "A or the heirs of his body," n100 or to "A and his heirs lawfully begotten," n101 or to "A and his male heirs" or "heirs male." n102 But words must be used which make the estates descendible to lineal but not collateral heirs. n103 And the words of limitation must be general, notrestricted. n104 But it has been held that the rule in *Wild's Case* gives use to a fee tail if the grantee had no children on the effective date of the instrument. n105

However, when an estate tail is created by will, it is such by positive rule of law and not because of some mere rule of interpretation, and the legal consequences of its creation are not affected by the testator's intention. Thus, a devise to the testator's daughter for life, remainder to her issue not then in being, the property, on the death of the daughter should she die without issue, to revert to the testator's estate, vests in the daughter an estate tail even though the testator clearly

intended her to have no more than a life estate. n106

The term "heirs of the body" may, however, be used to designate the children of the grantee, and in such case the children will take as purchasers, either in common with the parent or in remainder after a life estate in the parent, in accordance with the intention of the grantor. n107

A devise of testator's real estate to his wife, by name, "to her and her heirs by me" was held to create a fee tail specialwhich was by statute converted into a fee-simpleestate. n108

The word "issue" in connection with words pointing out the body from whom the heirs inheritable are to issue or descend has been held to create a fee-tail estate. n109 The word "issue," when used in its technical sense, is held to be equivalent to "heirs of the body," and a devise to A and his issue will be construed as giving A a fee-tail estate. n110 Where the limitation over is not postponed until an indefinite failure of issue, but on failure of children only, or on failure of issue within a given time, the cases generally hold that the estate will not belong to the class known as estates tail. n111 Should the context show that the word "issue" is used with reference to the issue of a certain degree only and does not include the whole posterity of the devisee, it will be construed as a word of purchase designating particular beneficiaries. n112 Some cases hold that if there be issue at the death of the testator a joint estate is created, as a devise to "one and his children." n113 At common law, a limitation in a deed "to one and his issue," creates a joint estate in the first taker and the issue living at the date of the deed, or in some jurisdictions, a remainder to the issue after a life estate in the grantee. n114 However, if there are no issue living at the date of the deed, the grantee, at common law, takes a life estate and issue born afterwards take nothing. n115

An estate tail, so far as it depends upon the words "of his body," may be created by implication. n116 Thus, a grant to one and one's heirs, and if one die without issue or without heirs of the body, then over to another, creates an estate tail. The use of the word "issue" limits the generality of the term "heirs" to the heirs of the body of the grantee. Estates tail by implication are frequent in devises. n117 The only difference between an express estate tail and an estate tail by implication, both being dependent upon a limitation over upon an indefinite failure of issue, is that in the former there is an express devise to the issue, and in the latter such devise is necessarily implied from the ulterior devise being postponed until after a failure of issue generally of the first taker. n118 The character of an estate tail is not changed by its descent through any number of generations. It is particularly distinguished as being measured by the continuance of issue of the body of the donee, and its existence determined only on the failure of such issue and its descent to lineal, and not to collateral, heirs. On the other hand, where the limitation over is not postponed until an indefinite failure of issue, but on failure of children merely or on failure of issue within a definite time, no estate tail is created. n119

Devises are sometimes made to one or to one "and his heirs," with a devise over to some other person if the devisee "dies without issue" or on "failure of issue." The question arises as to what estate does the devisee take under such will. This question can only be answered by first determining what the testator meant by "without issue" or "failure of issue." Either limitation in a will, especially under modern statutes, will give the devisee a fee unless the context shows a different intent. The tendency of some modern courts is to construe such expressions as meaning definite failure of issue, that is, want of issue at the death of the first taker, and this is the rule of presumption in some states. n120 "Dying without issue" or "failure of issue" may mean such failure as may occur at any time in the future and not before testator's death nor at the death of the devisee. This is termed an "indefinite failure of issue," and in the majority of jurisdictions the presumption is that this is the meaning of theexpression. n121 The doctrine of an implied fee tail in the case of a gift with a provision over if the donee dies without issue surviving does not apply where the provision over is effective only if the donee dies without issue surviving a third person. n122 Where real property was given to the devisee "to have and to hold to her, her heirs and assigns forever" but it was provided that, if the devisee "shall die without leaving lawful issue," the property should go to other designated persons, it was held that the devisee took an estate in fee tail, there being nothing in the will which disclosed that the words last quoted meant other than an indefinite failure of issue. n123

Any words which especially show that the testator intended that the issue of the first taker should take by inheritance in a direct line, and in regular order and course of descent, so long as his posterity should endure, and an estate in fee or in tail is given in remainder upon an indefinite failure of issue, then the estate first created will be construed to be an estate tail. n124 But on the other hand it is well settled that, if it appears fromthe context that the limitation over was not postponed until an indefinite failure of issue, but on a failure of children only, or on failure of issue within a given time, the estate will not belong to the class known as estates tail. n125

The indefinite failure of issue which is an essential ingredient of a fee-tail estate means a failure of issue which may occur at any time rather than at any fixed time. n126 At common law and still n127 in some jurisdictions, a limitation to one, but if one die without issue then over, has reference to indefinite failure of issue so as to create a fee tail in the first taker.

A conveyance to a woman for life, and after her death to be equally divided between the heirs of her body, does not create an estate tail, but a life estate in the woman with remainder to her children. The language indicates a division, and an equal division, and when this is made the operation of the deed is exhausted. This is incompatible with an estate tail. n128 If there was no language to indicate a division of the remainder she would take a fee. n129 Where it has been "ascertained from other language of the instrument that such was the intention of the maker, the phrases 'bodily heirs' and 'heirs of the body' have frequently been held [in Kentucky] as synonymous with the word 'children,' and therefore construed as words of purchase, giving to the first grantee a life estate, with remainder to the children, or creating a joint estate in them as the case may be." n130 In stating that it accords "full authority to the line of cases wherein 'heirs of the body' have been read to mean children, so as to let in children living at the time of the grant as tenants in common, or to take in remainder as the case may be," the Supreme Court of Alabama has also said that "such construction must always find support in other terms or provisions of the deed or will. Unskillfulness in the draftsman disclosing a lack of knowledge of the meaning of legal phrases is to be considered in connection with the language of the entire instrument to ascertain the intent... But such rule is not applied where the instrument furnishes no means of interpretation other than the legal meaning of itsterms." n131

The rule in *Shelley's Case* applied to fee tails as well as fee simples. n132 Statutes changing the effect of fee tails operate in the same manner as the statute of uses. That is, they do not act as though the fee tail never existed. Instead they permit the fee tail to arise and then change its result. Thus, even where there are statutes dispensing with the necessity of using words of limitation, such statutes are themselves to be read in connection with fee-tail acts and the effect is not to make the words of limitation surplusage but to evidence their operative effect. Thus in a deed or devise to "A and his heirs" the words "and his heirs" have no longer legal significance being unnecessary to create a fee simple. But if the language is to "A and the heirs of his body" these words of limitation create a fee tail upon which the fee-tail statute operates to give a changed legal significance.

An even greater problem arises where the language is such as implies a fee tail. Thus a gift to "A and his issue" will create a fee tail if "issue" means indefinite failure of issue, and the fee-tail statute will in turn operate upon this language. If "issue" means definite failure of issue, then a number of possible consequences may follow: (a) to A and his "issue" may mean *Wild's Case*, (b) a class gift may arise, (c) A and his children may take as joint tenants or tenants in common, or (d) A may take a life estate with remainder to his children.

COMPUTER-ASSISTED RESEARCH

LEXIS: fee or estate! w/1 tail! w/30 word! w/5 limit!
or
fee or estate! w/1 tail! w/15 (heirs w/1 body) or seed or children or issue

FOOTNOTES:
(n1)Footnote 93. *Rudkin v. Rand, 91 A. 198 (Conn. 1914); Butler v. Huestis, 68 Ill. 594 (1873);Dick v. Ricker, 78 N.E.*

823 (Ill. 1906); Coogan v. Jones, 115 N.E. 877 (Ill. 1917); Stearns v. Curry, 137 N.E. 471 (Ill. 1922); Lamb v. Medsker, 74 N.E. 1012 (Ind. App. 1905); Howe v. Howe, 145 P. 873 (Kan. 1915); Gould v. Leadbetter, 150 A. 375 (Me. 1930); Millard v. Millard, 180 N.W. 429 (Mich. 1920); Tygard v. Hartwell, 102 S.W. 989 (Mo. 1907); Johnson v. Calvert, 169 S.W. 78 (Mo. 1914); Adams v. Ross, 30 N.J.L. 505 (1860); Doty v. Teller, 23 A. 944 (N.J. 1892); Leathers v. Gray, 7 S.E. 657 (N.C. 1888).

See Restatement, Property, § 59, cmt. d on clause (a).

To create an estate tail at common law there were required to be words of procreation indicating the body out of which the heirs were to issue, or by whom they were to be begotten. *Bibo v. Bibo, 74 N.E.2d 808 (Ill. 1947).*

(n2)Footnote 94. *Rudkin v. Rand, 91 A. 198 (Conn. 1914); Adams v. Ross, 30 N.J.L. 505 (1860);Cullens v. Cullens, 77 S.E. 228 (N.C. 1913); Rose v. Rose, 60 S.E.2d 45 (Va. 1950).*

(n3)Footnote 95. *Stearns v. Curry, 137 N.E. 471 (Ill. 1922); Wise v. Potomac Nat'l Bank, 65 N.E.2d 767 (Ill. 1946); Millard v. Millard, 180 N.W. 429 (Mich. 1920).*

In Kentucky, a deed to the grantee and the "offsprings" of her body has been held to create a fee tail. *Massingale v. Parker, 236 S.W. 959 (Ky. 1922).*

In South Carolina, "the term 'bodily issue' creates a fee conditional estate in the same manner as the words 'bodily heirs.'" *Antley v. Antley, 128 S.E. 31 (S.C. 1925).*

"To B and her heirs and over on failure of heirs" construed to mean "heirs of the body" so as to create a fee tail with remainder over. *Goodell v. Hibbard, 32 Mich. 47 (1875).*

(n4)Footnote 96. *Stearns v. Curry, 137 N.E. 471 (Ill. 1922); Bibo v. Bibo, 74 N.E.2d 808 (Ill. 1947); Gardner v. Anderson, 227 P. 743 (Kan. 1923);Millard v. Millard, 180 N.W. 429 (Mich. 1920).*

"To X and the children of his body begotten, and their heirs and assigns forever" created a fee tail. *Long v. Long, 343 N.E.2d 100 (Ohio 1976).*

(n5)Footnote 97. *Bonnycastle v. Lilly, 156 S.W. 874 (Ky. 1913); Combs v. Combs, 171 S.W.2d 13 (Ky. 1943); Miller v. Miller, 83 N.E.2d 254 (Ohio 1948)* (created an estate tail in remainder).

"Heirs of the body" in a devise are words of limitation not of purchase. *Buchan v. Buchan, 118 N.W.2d 611 (Iowa 1962).*

(n6)Footnote 98. Hollingsworth v. McDonald, *2 H. & J. 197 (Md. 1806); Bundy v. Bundy, 38 N.Y. 410 (1868).*

"Words of procreation are not indispensable in establishing an estate tail. If the unmistakable implication limits the heirs to particular bodies, that is sufficient." *Hall v. Hankey, 174 F. 139 (1909). See Lehndorf v. Cope, 13 N.E. 505 (Ill. 1887); Atherton v. Roche, 61 N.E. 357 (Ill. 1901).*

Devise to a named legatee and her descendants created a fee tail which the statute converted into fee simple. *Reilly v. Huff, 335 S.W.2d 275 (Tex. Civ. App. 1960).*

(n7)Footnote 99. 2 Blackstone, *supra* note 24, at 115. *Smith v. Pendell, 19 Conn. 107 (1848); Butler v. Huestis, 68 Ill. 594 (1873); Scearce v. King, 217 S.W. 366 (Ky. 1920); Doty v. Teller, 23 A. 944 (N.J.L. 1892); Taylor v. Taylor, 63 Pa. 481 (1870);Hill v. Hill, 74 Pa. 173 (1873); Rhode Island Hosp. Trust Co. v. Bridgham, 106 A. 149 (R.I. 1919).*

(n8)Footnote 100. 1 Stephen Martin Leake, An Elementary Digest of The Law of Property in Land (2d ed. 1909) 175.

To A for life then to the heirs of his body created a fee tail. *Hoppes v. American Nat'l Red Cross, 128 N.E.2d 851 (Ohio 1955).*

Deed to daughter "and offspring or heirs" gave daughter a fee tail converted by statute into a fee simple. *Armstrong v. Smith, 251 So. 2d 216 (Ala. 1971).*

(n9)Footnote 101. *Spicer v. Moss, 100 N.E.2d 761 (Ill. 1951); Hall v. Vandegrift, 3 Binn. 374 (Pa. 1811).*

(n10)Footnote 102. *Cooper v. Cooper, 6 R.I. 261(1859).*

(n11)Footnote 103. *Toney v. Toney, 236 S.W.2d 716 (Ark. 1951); Carter v. Taylor, 250 S.W.2d 122 (Ark. 1952)* ("entale" was not sufficient to create a fee tail).

(n12)Footnote 104. *Collis v. Citizens Fid. Bank & Trust Co., 234 S.W.2d 164 (Ky. 1950).*

(n13)Footnote 105. *Davis v. Brown, 84 S.E.2d 334 (N.C. 1954).*

"An estate tail may be created by a will without the formal language usually employed for that purpose, and any expression showing an intention to devise a fee descendible to lineal heirs is sufficient to create a fee tail by the rules of the common law... There is no special efficacy in any particular form of words used. All that is necessary is that in addition to the limitation to heirs it should appear that the heirs were to be the issue of a particular person." *Stearns v. Curry, 137 N.E. 471 (Ill. 1922). See Gardner v. Anderson, 227 P. 743 (Kan. 1923).*

(n14)Footnote 106. *Gardner v. Anderson, 227 P. 743 (Kan. 1923).*

A limitation to "A and his heirs" with a limitation over if "A" dies without heirs gives a fee simple to "A." *Horton v. McCall, 82 A. 472 (Pa. 1912).*

(n15)Footnote 107.

> When it appears from the context that the words 'heirs' or 'heirs of the body' are intended to have a broader or more popular meaning than is accorded to them in technical usage, courts will lay hold of any expressions in the instrument indicative of such intention, and will give to the words the meaning which it appears they were intended to convey. Thus, where the phrases 'heirs of the body' and 'children' are used as synonymous, and it is clear that the technical phrase is not used for the purpose of limitation, but as a description of a class of persons, the ascertained intention of the maker of the instrument will prevail, the two phrases will be heldto mean the same thing, and the words 'heirs of the body' will be given effect as words of purchase.

Slayton v. Blount, 9 So. 241 (Ala. 1891).

See Garth v. Arnold, 115 F. 468 (8th Cir. 1902); Darden v. Burns, 6 Ala. 362 (1844); Williams v. Graves, 17 Ala. 62 (1849); Wikle v. McGraw, 8 So. 341 (Ala. 1890); Le Sieur v. Spikes, 175 S.W. 413 (Ark. 1915); Coogan v. Jones, 115 N.E. 877 (Ill. 1917); Peters v. Gebhardt, 129 N.E.2d 731 (Ill. 1955); Adams v. Merrill, 85 N.E. 114, (Ind. App. 1908); reg'h denied, *Wood River Oil & Ref. Co. v. Madden, 220 P.2d 154 (Kan. 1950)* (fee tail not presumed unless intent is clear); *American Nat'l Bank v. Madison, 137 S.W. 1076 (Ky. 1911); Duncan v. Medley, 170 S.W. 31 (Ky. 1914); Scott v. Scott, 190 S.W. 143 (Ky. 1916); Williams v. Ohio Valley Banking & Trust Co., 266 S.W. 670 (Ky. 1924); Ware v. Richardson, 3 Md. 505 (1853);Elsea v. Smith, 202 S.W. 1071 (Mo. 1918); In re Urich's Appeal, 86 Pa. 386 (1878); Warn v. Brown, 102 Pa. 347 (1883); Rembert v. Evans, 68 S.E. 659 (S.C. 1910); Branyan v. Tribble, 95 S.E. 137*

(S.C.1918).

> Whenever the words 'children' and 'heirs of the body' are indiscriminately used to designate remaindermen, they have been regarded as words of purchase designating a class of persons who were to take on the expiration of the particular estate, -- not from the tenant of that estate, but from the donor, -- a different intention not being clearly indicated.

Dunn v. Davis, 12 Ala. 135 (1847); Williams v. McConico, 36 Ala. 22 (1860); Robertson v. Johnston, 36 Ala. 197 (1860); Twelves v. Nevill, 39 Ala. 175 (1863); May v. Ritchie, 65 Ala. 602 (1880), per Bricknell, C. J., *citing Shepherd v. Nabors, 6 Ala. 631 (1844); Warn v. Brown, 102 Pa. 347 (1883). See Greer v. Pate, 11 S.E. 869 (Ga. 1890).*

Thus, where a father, "in consideration of my affections, and the further consideration of the support and well-being of my daughter and her children," made a deed to her "and to her bodily heirs, to have and to hold to her and her bodily heirs for their use and benefit forever, "it was held that the deed vested the title in common in the daughter and her children. *Wikle v. McGraw, 8 So. 341 (Ala. 1890),* McClellan, J., delivering the judgment, said:

> The considerations for the present deed are declared to be the grantor's 'affections' for and 'the support and well-being of' his daughter and her children. It is not reasonable to suppose that the grantor, moved solely by his affections for his daughter and her children, and evidencing, in his declaration of the motives which actuated him, his purpose to provide for her and their support and well-being, and no other purpose whatever, should nevertheless in the body of the deed not only have failed to make provision for the present support and well-being of his grandchildren but, instead, undertook to make provision for distant generations of their descendants -- a purpose in no wise foreshadowed in the premises of the instrument.

Citing Fellows Wadsworth & Co. v. Tann, 9 Ala. 999 (1846); Powell v. Glenn, 21 Ala. 458 (1852); Williams v. McConico, 36 Ala. 22 (1860); Robertson v. Johnston, 36 Ala. 197 (1860); May v. Ritchie, 65 Ala. 602 (1880).

Where a deed to the grantor's children "and the heirs of their bodies" contained the further statement, "Meaning and intending by this conveyance to convey to my said children the use and control of said real estate during their natural lives, and at their death to go to their children," it was held that this statement clearly showed that the word "heirs" was not used in its legal sense as a word of limitation, but as meaning children who would take the remainder, after the life estates, in fee. *Griswold v. Hicks, 24 N.E. 63 (Ill. 1890).*

If words "bodily heirs" in a deed conveying realty to grantee and his "bodily heirs" were to be construed as words of limitation, then at common law an estate was created in the grantee's bodily heirs, which would have continued in direct line so long as his posterity endured, and in regular order and course of descent and until there was an extinction of such issue, but, if the words were words of purchase then the grant as to such a class was a nullity where there were no bodily heirs of the grantee in existence when the conveyances were made. *Bibo v. Bibo, 74 N.E.2d 808 (Ill. 1947).*

Under a will devising real estate to three daughters of the testator, naming them, during their natural lives and providing that the share of each of the daughters should, upon her death, go to her children and their heirs absolutely, the use of the word "children" following the life estate did not create a fee simple estate or a fee tail estate which would be converted by the statute into a fee simple estate since the word "children" was a word of purchase. *Moore v. Baker, 29 S.E.2d 452 (N.C. 1944).*

Deed to parents with remainder to children who survived them did not create a fee tail. *Strickland v. Jackson, 130 S.E.2d 22 (N.C. 1963).*

In *Bauer v. Bauer, 360 P.2d 852 (Kan. 1961),* a deed to "B and his bodily heirs," B to have it during his lifetime and then to go to his heir, gave B a life estate not a fee tail.

(n16)Footnote 108. *Sharpe v. Isley, 14 S.E.2d 814 (N.C. 1941).*

(n17)Footnote 109. *Bradley Lumber Co. v. Burbridge, 210 S.W.2d 284 (Ark. 1848); Dick v. Ricker, 78 N.E. 823 (Ill. 1906); Brisbin v. Huntington, 103 N.W. 144 (Iowa 1905);* Hollingsworth v. McDonald, *2 H. & J. 197 (Md. 1806);* Lyles v. Digges, *6 H. & J. 299 (Md. 1823); Pearce v. Rickard, 26 A. 38 (R.I. 1893).*

(n18)Footnote 110. *Bradley Lumber Co. v. Burbridge, 210 S.W.2d 284 (Ark. 1948); Allen v. Craft, 9 N.E. 919 (Ind. 1887); Brisbin v. Huntington, 103 N.W. 144 (Iowa 1905); Bonnycastle v. Lilly, 156 S.W. 874 (Ky. 1913); Thomas v. Higgins, 47 Md. 439 (1878); Drake v. Drake, 32 N.E. 114 (N.Y. 1892); Taylor v. Taylor, 63 Pa. 481 (1870);Parkhurst v. Harrower, 21 A. 826 (Pa. 1891);Stayman v. Paxson, 70 A. 803 (Pa. 1908).*

(n19)Footnote 111. *Hertz v. Abrahams, 36 S.E. 409 (Ga. 1900); Conover v. Cade, 112 N.E. 7 (Ind. 1916); Bodine v. Arthur, 14 S.W. 904 (Ky. 1890); Parkhurst v. Harrower, 21 A. 826 (Pa. 1891).*

(n20)Footnote 112. *King v. Savage, 121 Mass. 303 (1876); Palmer v. Horn, 84 N.Y. 516 (1881);Drake v. Drake, 32 N.E. 114 (N.Y. 1892); Hill v. Hill, 74 Pa. 173 (1873); Carroll v. Burns, 108 Pa. 386 (1885); McCann v. McCann, 47 A. 743 (1901).*

(n21)Footnote 113. *Nimmo v. Stewart, 21 Ala. 682 (1852); Biggs v. McCarty, 86 Ind. 352 (1882).*

(n22)Footnote 114. *McIlhinny v. McIlhinny, 37 N.E. 147 (Ind. 1894); Thomas v. Higgins, 47 Md. 439 (1878); Price v. Sisson, 13 N.J. Eq. 168 (1860).* See *Wilkins v. Wilkins, 206 S.W.2d 26 (Ark. 1947)* (using for this purpose "children" in the sense of "issue").

(n23)Footnote 115. *Bradford v. Griffin, 19 S.E. 76 (S.C. 1894).*

(n24)Footnote 116. Coke on Littleton, § 21a. *Smith v. Pendell, 19 Conn. 106 (1848); Outland v. Bowen, 17 N.E. 281 (Ind. 1888); Farmers State Bank v. Howlett, 270 P. 605 (1928); Burnsworth v. Fellerman, 289 P. 433 (Kan. 1930); Scearce v. King, 217 S.W. 366 (Ky. 1920);* Hollingsworth v. McDonald, *2 H. & J. (Md.) 197 (1806); Handy v. McKim, 4 A. 125 (Md. 1886); Richardson v. Noyes, 2 Mass. 56 (1806); Hawley v. Northampton, 8 Mass. 3 (1811); Farrar v. Christy, 24 Mo. 453 (1857); Clarkson v. Clarkson, 28 S.W. 446 (Mo. 1894); Havens v. Seashore Land Co., 20 A. 497 (N.J. Eq. 1890); Den ex dem. Harris v. Taylor, 5 N.J.L. 413 (1819); Moore v. Rake, 26 N.J.L. 574 (1858); Price v. Taylor, 28 Pa. 95 (1857); Parkhurst v. Harrower, 21 A. 826 (Pa. 1891); Beilstein v. Beilstein, 45 A. 73 (Pa. 1899); Rhode Island Hosp. Trust Co. v. Bridgham, 106 A. 149 (R.I. 1919); Larew v. Larew, 135 S.E. 819 (Va. 1926); Fisher v. Wigg, 1 P. Wms. 14 (1700).*

At common law to A and if he died without issue to B created a fee tail in A and a remainder in *B. Chadock v. Cowley, Cro. Jac. 695, 79 Eng. Rep. 604.*

(n25)Footnote 117. *Shutt v. Rambo, 57 Pa. 149 (1868); Fahrney Holsinger, 65 Pa. 388 (1870).*

(n26)Footnote 118. *Hertz v. Abrahams, 36 S.E. 409 (Ga. 1900); Conover v. Cade, 112 N.E. 7 (Ind. 1916); Berthoud v. McCune, 287 P. 904 (Ind. 1930).*

(n27)Footnote 119. *Hertz v. Abrahams, 36 S.E. 409 (Ga. 1900); Outland v. Bowen, 17 N.E. 281 (Ind. 1888); Conover v. Cade, 112 N.E. 7 (Ind. 1916); Ballance v. Garner, 168 P.2d 533 (Kan. 1946);Bodine v. Arthur, 14 S.W. 904 (Ky. 1890); Price v. Taylor, 28 Pa. 95 (1857); Hill v. Hill, 74 Pa. 173 (1891); Parkhurst v. Harrower, 21 A. 826 (Pa.1891).*

(n28)Footnote 120. *St. John v. Dann, 34 A. 110 (Conn. 1895); Steele v. Pedroja, 289 P.2d 738 (Kan.1955); Sale v. Crutchfield, 71 Ky. (8 Bush) 636 (1871); Hayes v. Hammond, 143 N.E.2d 693 (Mass. 1957); Parish v. Ferris, 6 Ohio St. 563 (1856).*

(n29)Footnote 121. *Barber v. Pittsburgh, Ft. W. & C.R.R., 166 U.S. 83 (1947); United States v. 0.20 Acre of Land, 71 F. Supp. 576 (1947); Turrill v. Northrop, 51 Conn. 33 (1883); Caccamo v. Banning, 75 A.2d 222 (Del.1950); Goldberger v. Goldberger, 102 A.2d 338 (Del. 1954); Scearce v. King, 217 S.W. 366 (Ky. 1920); Riggs v. Sally, 15 Me. 408 (1839); Allen v. Ashley School Fund, 102 Mass. 262 (1869); Moorehouse v. Cotheal, 21 N.J.L 335 (1848); Ness v. Ramsay, 26 A. 770.* (Pa. 1893).

In a deed to A for life and on her death to her "children and heirs of her body" did not include adopted children. *Adams v. Merrill, 85 N.E. 114, 87 N.E. 36 (Ind. App. 1909).*

(n30)Footnote 122. *Mahoney v. Mahoney, 120 A. 342 (Conn. 1923).*

(n31)Footnote 123. *McCarthy v. Walsh, 122 A. 406 (Me. 1923).*

(n32)Footnote 124. *Smith v. Pendell, 19 Conn. 107 (1848); In re Reeves, 92 A. 246 (Del. Ch. 1914); Hertz v. Abrahams, 36 S.E. 409 (Ga. 1900); Outland v. Bowen, 17 N.E. 281 (Ind. 1888); Scearce v. King, 217 S.W. 366 (Ky. 1920); Skolfield v. Litchfield, 102 A. 240 (Me. 1917); Davis v. Brown, 84 S.E.2d 334 (N.C. 1954)* (took a fee tail converted into a fee simple by statute); *Beilstein v. Beilstein, 45 A. 73 (Pa. 1899); Rhode Island Hosp. Trust Co. v. Bridgham, 106 A. 149 (R.I. 1919).*

(n33)Footnote 125. *Mahoney v. Mahoney, 120 A. 342 (Conn. 1923); Hertz v. Abrahams, 36 S.E. 409 (Ga. 1900); Conover v. Cade, 112 N.E. 7 (Ind. 1916); Steele v. Pedroja, 289 P.2d 738 (Kan. 1955); Bodine v. Arthur, 14 S.W. 904 (Ky. 1890); Doe ex dem. Allender v. Sussan, 33 Md. 11 (1870); Parkhurst v. Harrower, 21 A. 826 (Pa. 1891).*

(n34)Footnote 126. *Gardner v. Grossman, 57 N.E.2d 440 (Ind. App. 1944); Delp v. George, 150 P.2d 334 (Kan. 1944).*

(n35)Footnote 127. This is, however, a rule of construction.*Caccamo v. Banning, 75 A.2d 222 (Del. 1950); Adams v. Vidal, 60 So. 2d 545 (Fla. 1952).*

(n36)Footnote 128. *Herring v. Rogers, 30 Ga. 615(1860); Jonas v. Jones, 109 P.2d 211 (Kan. 1940); Boxley v. Jackson, 2 So. 2d 160 (Miss. 1941).*

(n37)Footnote 129. *See Denson v. Thompson, 19 Ark. 66 (1857); Waters v. Lyon, 40 N.E. 662 (Ind. 1895); Daniels v. Dingman, 118 N.W. 373 (Iowa 1908).*

(n38)Footnote 130. *Williams v. Ohio Valley Banking & Trust Co., 266 S.W. 670 (Ky. 1924).*

(n39)Footnote 131. *Clark v. Cammack, 113 So. 270 (Ala. 1927).*

(n40)Footnote 132. Shelley's Case, 1 Co. Rep. 93b, *76 Eng. Rep. 206 (1579)* was itself a fee tail.

So a deed to A and B for life only, then to the bodily heirs of B, created a fee tail converted by statute into a fee simple. *Edgerton v. Harrison, 52 S.E.2d 357 (N.C. 1949); Hoppes v. American Nat'l Red Cross, 128 N.E.2d 851 (Ohio 1955).*

* This chapter is based in part on Ch. 30, George W. Thompson, Commentaries on the Moon Law of Real Property (John S. Grimes ed. 1979), which made a significant contribution toward preserving the American common law governing the fee tail.

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CHAPTER 18 FEE TAIL *

2-18 Thompson on Real Property, Thomas Editions § 18.04

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§ 18.04 The Estate Tail.

[Go To Supp]

The estate tail came into the United States with the English law. n133 In most states de donis became part of the common law. n134 In four states, n135 de donis did not so become part of the common law. In Indiana, while the initial existence of a fee tail was recognized, some kind of a conditional fee could also exist. The fee tail never existed in Louisiana, Texas, Hawaii n136 or South Carolina, n137 and does not today exist in Florida. n138 In early days the common recovery was much resorted to. n139 The existence of the fee tail was recognized inDelaware, n140 Kansas, n141 Maine, n142 Massachusetts, n143 Rhode Island (in deeds), n144 Colorado n145 and Wyoming. n146

Alaska, Idaho, Nevada, Utah and Washington have not considered the fee tail either judicially or by legislative act. Whether it exists in those states is conjectural. In all other states the legal situation which gives rise to the fee tail is recognized, but the fee tail thus created is by statute converted into another type of estate. n147 In some of these states the fee tail becomes a fee simple. n148 In part of this group, limitations over after the fee tail are specifically preserved by statute so that the estate becomes a fee simple subject to a conditional limitation. n149

In Ohio a fee tail is created by the words, "to A and the heirs of his body." It is followed by a reversion in the hands of a grantor. On the death of the tenant in tail, however, the fee tail becomes a fee simple in the issue of the tenant intail. n150

In other states the first taker only takes a life estate with either a remainder estate in fee simple absolute to the next taker n151 or to the first taker's children. n152 In the third group the first taker takes a fee tail for his lifetime only and the second taker takes a fee simple absolute. n153 Doubt exists in the first group where a limitation over is not preserved by statute as to whether the first taker takes a fee simple absolute cutting off the remainder after the fee tail or whether a limitation over is impliedly preserved. n154

A tenancy in tail now exists in Delaware, Kansas, Maine, Massachusetts and Rhode Island. In Rhode Island it can only be created by deed. The states of Idaho, Nevada, Oregon, Utah and Louisiana have never considered the question either by statute or judicial decision.

The other states fall into four categories: n155

> (1) A limitation formerly sufficient to create an estate in fee tail now creates either a fee simple absolute in the first taker, or a fee simple in the first taker subject to reverting back to the grantor if the first taker dies unsurvived by descendants. Alabama, Arizona, California, District of Columbia, Georgia, Kentucky, Maryland, Michigan, Minnesota, Mississippi, Montana, New Hampshire, New Jersey, New York, North Carolina, North Dakota, Oklahoma, Pennsylvania, South Dakota, Tennessee, Virginia, West Virginia and Wisconsin are in this class. n156
>
> (2) A limitation formerly sufficient to create an estate in fee tail now confers a life estate on the first taker the heir of the first taker receiving a fee simple absolute. Arkansas, Colorado, Georgia (limited to certain types of conveyance), Illinois, Missouri, New Mexico and Vermont are in this group.
>
> (3) A limitation formerly sufficient to create an estate in fee tail now creates an estate in fee tail for the lifetime of the first taker, the heir of such first taker receiving an estate in fee simple absolute. This group is composed of three states: Connecticut, Ohio and Rhode Island. n157
>
> (4) Limitations formerly sufficient to create a fee tail now create a fee simple but preserve limitations over to third parties as conditional limitations upon fee simple defeasible rather than contingent remainders after fee tails. Indiana is in thisgroup. n158

The statutes of some states where the fee tail can exist enable the tenant in tail to bar the entail by a conveyance in feesimple. n159 The disentailing deed may be either a conveyance to a purchaser or to a person to hold to the use of the tenant himself and his heirs as tenants in fee simple. Such deed may be either a warranty deed or a quitclaim. The estate may be taken for the debts of the tenant in tail in possession, either upon execution during the tenant's life or sale by license of court after death. n160 In the second group, limitations over to third persons are preserved and in the event the life tenant has no children a reversion remains in the grantor. n161

Constructional problems arise in states which have statutes affecting the legal effect of language which would have at common law created a fee tail and also have statutes dispensing with the necessity of words of limitation to create fees. In such states, where language is used which would have at common law been considered words of limitation creating a fee tail, is such language now considered surplusage, or does it create a fee tail now converted by statute into another type of estate, or are they now words of purchase giving an immediate estate to the grantees? Thus does a grant or devise to A and the heirs of A's body create merely (1) a fee simple absolute in A, (2) a life estate in A and remainder over, or (3) a cotenancy in A and A's children? n162 The problem is even more aggravated in those cases where the fee tail would have arisen inferentially as "to A for life and then to the heirs of his body" or "to A and his issue" or "to A, but if he dies without issue then to B." n163

In those states where by statute estates tail are declared to be estates in fee simple, there is a disposition to construe the words of limitation as meaning children. Although the language appears to create an estate tail, yet, if any other construction can be adopted without distorting the meaning of the words, the grantor will not be deemed to have intended to create such an estate. n164 Thus a deed to a married woman, "and to the heirs of her body by" her husband named, will be held to create either a joint estate in the mother and her children or a life estate in the mother with remainder to her children. A voluntary deed by a husband of substantially all his property to his wife, having children by himself and a former husband, to hold to her "and the heirs of her body by myself as husband," especially excluding rights of inheritance of her heirs by any other person, does not create an estate tail, the children of his body being purchasers. n165

Where the statute has converted a fee tail to a life estate in the first taker with remainder over and the first taker dies

without bodily heirs, the estate reverts to the creator n166 and the remainder to the children is contingent upon survival of the life tenant. n167

In those states in which statutes in terms convert estates tail into estates in fee simple, the words of procreation used in deeds, which without the statute would have created estates tail,are held to be wholly disregarded, leaving the limitation simply to the heirs of the grantee and creating in the grantee a feesimple. n168 Thus a statute providing that the word "heirs," or other words of inheritance, shall not be necessary to create an estate in fee simple, and that any conveyance of any real estate passes all the estate of the grantor, unless the intent to pass a lesser estate shall appear by express terms of the grant, impliedly repeals the statute de donis conditionalibus and fee-tail estates areabolished. n169 But where the limitation to heirs of the body is by way of remainder no fee tail arises if the rule in *Shelley's Case* is not operative. n170

Under these statutes while the testator cannot accomplish a fee tail result the testator can use the fee tail language to achieve statutory significance. n171 The statutes operate upon equitable estate tails as well as legal estate tails. n172 The rule that a grant to A and to the heirs of her body operates to vest the fee-simple title in A has been held not to apply where a lesser estate has been carved out and the term "heirs of her body" is used in connection with the limitation over inremainder. n173 The alienation of an estate tail in expectancy during the lifetime of the first donee in tail has no legal effect. n174 In England, a will is liberally construed to bar an entail as permitted in section 176, Laws of Property Act1925. n175

Such statutes operate, however, only upon a fee tail as when created. So no interest by way of remainder arose in a gift to A and the heirs of her body when A refused to accept thedeed. n176 Where fee tails exist, partition of joint estates tail does not affect the entailment. n177 The barring of an entail by fines or common recovery is not recognized in some states. n178

Where the word "issue" is used as in a gift to "A and his issue," the earlier law, still followed in some states today, presumed an indefinite failure of issue, thus construing the language as reading to "A and the heirs of his body" rather than "to A and his children." Under this presumption to "A and his issue" created a fee tail. n179

This presumption of indefinite failure of issue applies also to limitations over on failure of issue so that to "A but if he die without issue then to B" created a fee tail in A, not a fee simple, with remainder over to B.

Some statutes abolishing the fee tail also abolish the presumption against indefinite failure of issue in limitations over on death sans issue. n180

Under the statute of Ohio, the issue of a donee in tail during the life of such donee has no estate or interest in the landsentailed that the issue can convey prior to the death of the donee in tail. n181

In Oregon, it is held that the conveyance of a fee-tail estate passes an estate in fee simple. n182

COMPUTER-ASSISTED RESEARCH

LEXIS: estate! tail! w/15 statut!
or
tenancy w/1 tail! w/15 statut!

FOOTNOTES:
(n1)Footnote 133. In England today under the Law of Property Act 1926, § 130(2), "to A and his issue," which would have created a fee tail before 1925, creates a fee simple in A jointly with his issue, unless the words were intended as words of limitation in which case A takes a fee simple himself. *See* R.E. Megarry, *To A and His Issue, 9 Camb. L.J. 46*

(1945).

(n2)Footnote 134. *Allin v. Bunce, 1 Root 96 (Conn. 1785).*

(n3)Footnote 135. *Pierson v. Lane, 14 N.W. 90 (Iowa 1882); Kepler v. Larson, 108 N.W. 1033 (Iowa 1906); Sagers v. Sagers, 138 N.W. 911 (Iowa 1912).*

The statute de donis is not recognized as part of the law of Nebraska, and in that state a limitation over to "the heirs begotten of the body" of the grantee creates a conditional fee only, so that the grantee, after issue born, is able to bar both the inheritance and the reversion by a deed. *Yates v. Yates, 178 N.W. 262 (Neb. 1920); Myers v. Myers, 190 N.W. 491 (Neb. 1922)* (at least to the extent of recognizing the conditional fee).

Lytle v. Hulen, 275 P. 45 (Or. 1929) recognizing the conditional fee. *Archer v. Ellison, 5 S.E. 713 (S.C. 1888); Owings v. Hunt, 31 S.E. 237 (S.C. 1898); Clark v. Neves, 57 S.E. 614 (S.C. 1907); Holley v. Still, 74 S.E. 1065 (S.C.1912); Branyan v. Tribble, 95 S.E. 137 (S.C.1918); Strother v. Folk, 115 S.E. 605 (S.C. 1922); Davis v. Strauss, 174 S.E. 908 (S.C. 1934); Purvis v. McElveen, 106 S.E.2d 913 (S.C. 1959).*

In the United States the statute de donis was recognized in the colonies and original states as being in force, except in South Carolina, where the fee conditional as at common law existed from the first. There the heirs of the body take per formam doni, but subject to the debts of the first taker. *Burnett v. Burnett, 17 S.C. 545 (1882).*

In South Carolina, the grantee in a deed to one for life and then to his bodily issue will take a fee conditional and not merely a life estate with remainder over. *Antley v. Antley, 128 S.E. 31 (S.C. 1925); Ewing v. Nesbitt, 129 P. 1131 (Kan. 1913); Corbin v. Healy, 37 Mass. (20 Pick.) 514 (1838); Pollock v. Speidel, 17 Ohio St. 439(1867); Hall v. Vandegrift, 3 Binn. 374 (Pa.1811); Giddings v. Smith, 15 Vt. 344 (1843).*

The states which, before January 1, 1936, had declared theestates tail an existent estate were Delaware, Kansas, Maine, Massachusetts, Rhode Island (as to deeds only) and Wyoming. In Delaware this recognition was evidenced by a statute conferring upon the owner of a possessory estate in fee tail the power to convey an estate in fee simple absolute (Del. Rev. Code § 3235) and by a considerable number of decisions, *see Schneer v. Greenbaum, 86 A. 107 (Del. 1913); Hazzard v. Hazzard, 94 A. 905 (Del. 1915); In re Reeves, 92 A. 246 (Del. 1914).*

Kansas had no statute giving recognition to estates in fee tail but this recognition has been extended unequivocally by a substantial body of judicial authority, *see Ewing v. Nesbitt, 129 P. 1131 (Kan. 1913); Gardner v. Anderson, 227 P. 743 (Kan. 1923); Allen v. Pedder, 241 P. 696 (Kan. 1925); Davis v. Davis, 246 P. 982 (Kan. 1926); Wright v. Jenks, 261 P. 840 (Kan. 1927); Lisman v. Marks, 267 P. 963 (Kan. 1928). See now* Kan. Stat. Ann. § 58-502.

In Maine this recognition was evidenced by statutes dealing with the power of the owner of an estate in fee tail to convey an estate in fee simple (Me. Rev. Stat. ch. 87, § 10) and with the subjection of this type of estate to the satisfaction of the creditors of its owner (Me. Rev. Stat. ch. 90, § 6, 8) and by a substantial body of judicial authority, *see* Me. Rev. Stat. Ann. 33, § 156. *Webster v. Cooper, 55 U.S. (14 How.) 488 (1852); Riggs v. Sally, 15 Me. 408 (1839); Fisk v. Keene, 35 Me. 349 (1853); Willey v. Haley, 60 Me. 176 (1872); Richardson v. Richardson, 16 A. 250 (Me. 1888); Laughlin v. Page, 80 A. 753 (Me. 1911); Skolfield v. Litchfield, 102 A. 240 (Me. 1917); McCarthy v. Walsh, 122 A. 406 (Me. 1923).*

Massachusetts extended recognition by statutes of the same types as those of Maine (Mass. Gen. L. ch. 183, § 45 and ch. 184, § 4) *see now* Mass. Gen. Laws Ann. ch. 183, § 45-48, and by many decisions, as typical of these, *see Brown v. Addison Gilbert Hosp., 29 N.E. 625 (Mass. 1892); Collamore v. Collamore, 32 N.E. 1034 (Mass. 1893); Gilkie v. Marsh, 71 N.E. 703 (Mass. 1904).*

In Rhode Island seven distinct statutes, *see now* R.I. Gen. Laws § 34-4-14 - 34-4-18, dealt with estates tail, *see* R.I. Gen. Laws § 4247, powers of creditor of owner of estate in fee tail; § 4256-4258, power of owner to convey an estate in fee simple; § 4287, dispensing somewhat with formalism requisite to the creation of an estate in fee tail; § 4298, restricting lapse where one has devised an estate in fee tail, and § 4300, restricting the creation of estates in fee tail by devise. Since 1798 it has been the law of Rhode Island that an estate tail, created by devise, becomes an estate in fee simple at the end of a single lifetime. The statutes of Rhode Island as to estates in fee tail have been frequently construed, *see Manchester v. Durfee, 5 R.I. 549 (1858);Jillson v. Wilcox, 7 R.I. 515 (1863); Sutton v. Miles, 10 R.I. 348 (1872); Wilcox v. Heywood, 12 R.I. 196 (1878); Paine v. Sackett, 61 A. 753 (1905);Green v. Edwards, 77 A. 188 (R.I. 1910); Sackett v. Paine, 128 A. 209 (R.I. 1925).*

The State of Wyoming had two statutes recognizing the existence of estates in fee tail. (Now abolished, *see* Wyo. Stat. § 34-1-137.) One of these authorizes the owner of an estate in fee tail to maintain an action to secure a sale of an estate in fee simple absolute and provides that such sale shall be ordered if the court is satisfied that "no substantial injury to the heirs in tail" will be caused thereby (Wyo. Stat. § 89-3922). The other explicitly directs that the proceeds of such sale be substituted for the land sold and be subject to the limitations originally made relative to the land so sold (Wyo. Stat. § 89-3927).

At earlier periods of time estates in fee tail existed in Maryland, New Jersey, New York, North Carolina, Pennsylvania and Virginia.

The effect of Ohio statute of disentailment, Ohio Gen. Code § 11925, and the statute entails, Ohio Gen. Code § 10512-8 has been to recognize that de donis exists in Ohio. *See* Ohio Rev. Code Ann. § 2131.08. *Pollock v. Speidel, 17 Ohio St. 439 (1867). See* Louis J., Jr. Schneider, *Rights of Surviving Spouse in a Fee Tail Estate in Ohio, 18 U. Cin. L. Rev. 332 (1949),* objecting to the decision of *Miller v. Miller, 83 N.E.2d 254 (Ohio 1948),* which held that there was no dower in a fee tail converted into a life estate with remainder to children by the statute.

See also William F. Fratcher, *Fee Tail in Michigan 4 U. Det. L.J. 19 (1940),* for a discussion of the question of whether de donis conditionalibus was ever part of the law in Michigan.

A grant of a fee tail leaves in the grantor a reversion which is descendible, devisable and alienable. *Long v. Long, 343 N.E.2d 100 (Ohio 1976).*

(n4)Footnote 136. *Rooke v. Queen's Hosp., 12 Haw. 375 (1900)* (neither estates tail nor conditional have ever existed); *Nahaolelua v. Heen, 20 Haw. 372 (1911)* (an instrument to E and the heirs of her body create a life estate in E and remainder to her children); *Kinney v. Oahu Sugar Co., 23 Haw. 747 (1919), aff'd, 255 F. 732 (9th Cir. 1919); Rosenblet v. Wodehouse, 25 Haw. 561 (1920).*

(n5)Footnote 137. *Creswell v. Bank of Greenwood, 41 S.E.2d 393 (S.C. 1947).*

Fee simple determinable or conditional in South Carolina, possibility of reverter was not alienable by estoppel under warranty deed. *Purvis v. McElveen, 106 S.E.2d 913 (S.C. 1959).*

(n6)Footnote 138. Florida Comp. Stat. § 5481. *See now* Fla. Stat. Ann. § 689.14.

(n7)Footnote 139. *Hawley v. Northampton, 8 Mass. 3 (1811); Den ex dem. Mason v. Smith, 10 N.J.L. 39 (1828); Jackson ex dem. Hicks v. Van Zandt, 12 Johns. 169 (N.Y. 1815);*Lyle v. Richards, 9 Serg. & Rawle 322 (Pa. 1823).

(n8)Footnote 140. *Schneer v. Greenbaum, 86 A. 107 (Del. 1913).*

(n9)Footnote 141. *Ewing v. Nesbitt, 129 P. 1131 (Kan. 1913); Gardner v. Anderson, 227 P. 743 (Kan.1923); Lisman v. Marks, 267 P. 963 (Kan. 1928).*

Although Kansas had no statute on the subject, it recognizes true estates tail but permits the tenant in tail to break the entailment by a conveyance. *Allen v. Pedder, 241 P. 696 (Kan. 1925)* now Kan. Stat. Ann. § 58-502. *See also Davis v. Davis, 246 P. 982 (Kan. 1926).*

(n10)Footnote 142. *Webster v. Cooper, 14 How (55 U.S.) 488 (1852); Riggs v. Sally, 15 Me. 408(1839); McCarthy v. Walsh, 122 A. 406 (1923).*

Fee tail may be barred by conveyance in fee simple. Me. Rev. Stat. Ann. tit. 33 § 156; *Spencer v. Chick, 76 Me. 347 (1884).*

(n11)Footnote 143. *Brown v. Addison Gilbert Hosp., 29 N.E. 625 (Mass. 1892); Gilkie v. Marsh, 71 N.E. 703 (Mass. 1904).*

(n12)Footnote 144. *Manchester v. Durfee, 5 R.I. 549 (1858); Green v. Edwards, 77 A. 188 (R.I. 1910); Sackett v. Paine, 128 A. 209 (R.I. 1925).*

(n13)Footnote 145. *Sconce v. Neece, 268 P.2d 1102 (Colo. 1954).*

(n14)Footnote 146. Fee tails become fee simples, limitations over are preserved. Wyo. Stat. § 34-1-137.

(n15)Footnote 147. Coke on Littleton, § 27; *Johnson v. Whiton, 34 N.E. 542 (Mass. 1893)* (will to "granddaughter and her heirs on her father's side" created fee simple absolute in granddaughter).

No one is heir to the living. The expectation of the heir presumptive to an entailed estate, must therefore be subject to the same legislative control as in other cases. *Gilpin v. Williams, 25 Ohio St. 283 (1874).*

The grantor and issue of the heirs of the body of grantee have no vested interest in a fee tail which could not be changed by statute. *Jensen v. Jensen, 89 P.2d 1085 (Wyo. 1939).*

(n16)Footnote 148. *Deady, 48 F. Supp. 104 (D. Or. 1939);Martin v. McRee, 30 Ala. 116 (1857); Sullivan v. McLaughlin, 11 So. 447 (Ala. 1892); Carter v. Couch, 47 So. 1006 (Ala. 1908); English v. McCreary, 48 So. 113 (Ala. 1908); Wallace v. Hodges, 49 So. 312 (Ala. 1909); Dallas Compress Co. v. Smith, 67 So. 289 (Ala. 1914); Gamble v. Gamble, 75 So. 924 (Ala. 1917); Gilchrist v. Butler, 107 So. 838 (Ala.1926); Clark v. Cammack, 113 So. 270 (Ala. 1927); Caffee v. Thompson, 81 S.2d 358 (1955),* (by statute, common law of primogeniture is abolished; all considerations of tracing descent from blood of first purchaser is excluded so that kindred of half blood inherit in same degree as those of whole blood); *Dempsey v. Davis, 136 S.W. 975 (Ark. 1911); Eubanks v. McDonald, 283 S.W.2d 166 (Ark. 1955); Anderson v. Webb, 406 S.W.2d 871 (Ark. 1966)* (under Arkansas law a fee tail may be dissolved by the grantor, the life tenant and remaindermen); *Barnett v. Barnett, 37 P. 1049 (Cal. 1894); Whately v. Barker, 4 S.E. 387 (Ga. 1887),* except where the term "heirs of the body" is used as a limitation over after the death of the first taker; *Wilkerson v. Clark, 7 S.E. 319 (Ga. 1888); Ewing v. Shropshire, 7 S.E. 554 (Ga. 1888); Durant v. Muller, 14 S.E. 612 (Ga. 1892); Hertz v. Abrahams, 36 S.E. 409 (Ga. 1900); Stamey v. McGinniss, 88 S.E. 935 (Ga. 1916); Singer v. First Nat'l Bank & Trust Co., 24 S.E.2d 47 (Ga. 1943); Lewis v. Fry, 26 S.E.2d 122 (Ga. 1943); Sikes v. Moxley, 38 S.E.2d 671 (Ga. 1946); Allen v. Craft, 9 N.E. 919 (Ind.1887); McIlhinny v. McIlhinny, 37 N.E. 147 (Ind. 1894); Quilliam v. Union Trust Co., 142 N.E. 214 (Ind. 1924); Chamberlain v. Runkle, 63 N.E. 486 (Ind. 1902); Lamb v. Medsker, 74 N.E. 1012 (Ind. App. 1905); Short v. Terry, 22 S.W. 841 (Ky. 1893); McGennis v. McGennis, 29 S.W. 333 (Ky.1895); Davis v. Davis, 65 S.W. 122 (Ky. 1901); Handy v. Harris, 105 S.W. 378 (Ky. 1907); Lawson v. Todd, 110 S.W. 412 (Ky. 1908); Manteuffel v. Grieb, 119 S.W. 739 (Ky. 1909); Eggner v. Hovekamp, 119 S.W. 818 (Ky. 1909); Taggart v. Taggart, 121 S.W. 693 (Ky. 1909); Bonnycastle v. Lilly, 156 S.W. 874 (Ky. 1913); Belcher v. Ramey, 191 S.W. 520 (Ky. 1917); Wilson v. Woodward, 227 S.W. 446 (Ky. 1921); Massingale v. Parker, 236 S.W. 959 (Ky. 1922); Payne v. Fiscal Court, 252 S.W. 127 (Ky. 1923); Cox v. Fink, 254 S.W. 757 (Ky. 1923);Jett v. Cheek, 257 S.W. 1026 (Ky. 1924); Martin*

v. Martin, 262 S.W. 1091 (Ky. 1924); Wilson v. Morrill, 265 S.W. 774 (Ky. 1924); Williams v. Ohio Valley Banking & Trust Co., 266 S.W. 670 (Ky. 1924); Barrett v. Ray, 268 S.W. 534 (Ky. 1925); McGinnis v. Hood, 159 S.W.2d 1018 (Ky. 1942); Rhodes v. Bouldrey, 101 N.W. 206 (Mich. 1904); Millard v. Millard, 180 N.W. 429 (Mich. 1920); Jordan v. Roach, 32 Miss. 481 (1856);Stigler v. Shurlds, 95 So. 635 (Miss. 1923); Bolton v. Barnett, 95 So. 721 (Miss. 1923); Magee v. Magee's Estate, 111 So. 2d 394 (Miss. 1959); Fanning v. Doan, 30 S.W. 1032 (Mo. 1895); Summet v. City Realty & Brokerage Co., 106 S.W. 614 (Mo. 1907); Charles v. White, 112 S.W. 545 (Mo. 1908); Leeper v. Leeper, 147 S.W.2d 660 (Mo. 1941); Bullock v. People's Bank of Holcomb, 173 S.W.2d 753 (Mo. 1943);Ellingrod v. Trombla, 95 N.W.2d 635 (Neb. 1959);Jewell v. Warner, 35 N.H. 176 (N.H. 1857); Dennett v. Dennett, 40 N.H. 498, 43 N.H. 499 (1862); Wendell v. Crandall, 1 N.Y. 491 (1848); Nellis v. Nellis, 3 N.E. 59 (N.Y. 1885); Leathers v. Gray, 7 S.E. 657 (N.C. 1888); Marsh v. Griffin, 48 S.E. 735 (N.C. 1904); Jones v. Ragsdale, 53 S.E. 842 (N.C. 1906); Perrett v. Bird, 67 S.E. 507 (N.C. 1906); Revis v. Murphy, 90 S.E. 573 (N.C. 1916); Blake v. Shields, 90 S.E. 764(N.C. 1916); Cole v. Thornton, 104 S.E. 74 (N.C. 1920); Willis v. Mutual Loan & Trust Co., 111 S.E. 163 (N.C. 1922); Vinson v. Gardner, 116 S.E. 412 (N.C. 1923); Harward v. Edwards, 116 S.E. 1 (N.C. 1923); Merchants Nat'l Bank v. Dortch, 120 S.E. 60 (N.C. 1923); Boyd v. Campbell, 135 S.E. 121 (N.C. 1926); Whitley v. Arenson, 12 S.E.2d 906 (N.C. 1941); Bank of Pilot Mtn. v. Snow, 18 S.E.2d 711 (N.C. 1942); Edgerton v. Harrison, 52 S.E.2d 357 (N.C. 1949); Hawkins v. Jerman, 35 P.2d 248 (Or. 1934); Price v. Taylor, 28 Pa. 95 (1857); Nicholson v. Bettle, 57 Pa. 384 (1868); Beilstein v. Beilstein, 45 A. 73 (1899);Schrecongost v. West, 59 A. 269 (Pa. 1904); Wilson v. Heilman, 68 A. 674 (Pa. 1908); Kimmel v. Shaffer, 68 A. 1017 (Pa. 1908); Stayman v. Paxson, 70 A. 803 (Pa. 1908); Sechler v. Eshleman, 70 A. 910 (Pa. 1908); Schwem v. Calloway, 75 A. 22 (Pa. 1909); Breinig v. Smith, 110 A. 285 (Pa. 1920); Green v. Edwards, 77 A. 188 (R.I. 1910); Sackett v. Paine, 128 A. 209 (R.I. 1925); Kirk v. Furgerson, 46 Ten. (6 Cold.) 479 (1869); Speight v. Askins, 102 S.W. 74 (Tenn.1907); Harwell v. Harwell, 271 S.W. 353 (Tenn. 1925); Hill v. Maloney, 108 S.W.2d 791 (Tenn. App. 1937); Calder v. Davidson, 59 S.W. 300 (Tex.1900); Reilly v. Huff, 335 S.W.2d 275 (Tex. Civ. App. 1960); Watts v. Cole, 2 Leigh (Va.) 653 (1830); Turner v. Monteiro, 103 S.E. 572 (Va. 1920); Larew v. Larew, 135 S.E. 819 (Va. 1926); Maddy v. Maddy, 105 S.E. 803 (W. Va. 1921); Bartlett v. Petty, 117 S.E. 551 (W. Va. 1923); Wise v. Hinegardner, 125 S.E. 579 (W. Va. 1924); National Bank of Commerce v. Wehrle, 20 S.E.2d 112 (W. Va. 1942).

Colo. Stat. § 815 (similar to Arkansas). *See now* Colo. Rev. Stat. § 38-30-106; Mo. Ann. Stat. § 442.470 (similar to Arkansas); N.M. Ann. Stat. § 117-107, *see now* N.M. Stat. § 47-1-18, (translation into Spanish and back into English have caused deviations in language from the Illinois statute upon which it seems to have been modelled originally). Whenever a conveyance or bequest is made wherein the conveyor or testator shall hold possession of property, be it lands or tenements, in law or equity, as under the English statute of Edward the First, styled the entail statute, and said property is to be perpetuated in the family, each one of said conveyances or bequests shall only invest the conveyors or testators with possession during their lifetime, who shall possess and hold the right and title to said premises, and no others, the same as a tenant for life is recognized by law; and at the death of said conveyor or testator said lands and tenements shall descend to the children of said conveyor or testator, to beequally divided among them as absolute tenants in common; and if there should be but one child, it shall descend absolutely to it; and if any child should die, the part which he or she should have received shall be given to his or her successor, and if there should be no such successor, then it shall descend to his or her legal heirs; Vt. Stat. Ann. tit. 27 § 1 (similar to Arkansas).

(n17)Footnote 149. *See in general: Aetna Life Ins. Co. v. Hoppin, 214 F. 928 (7th Cir. 1914); Dickson v. Neal, 2 F.2d 533 (8th Cir. 1924); Hawkins v. Reeves, 166 S.W. 562 (Ark.1914); Rogers v. Ogburn, 172 S.W. 867 (Ark. 1915); Maynard v. Henderson, 173 S.W. 831 (Ark. 1915); Le Sieur v. Spikes, 175 S.W. 413 (Ark. 1915); Gaines v. Arkansas Nat'l Bank, 280 S.W. 993 (Ark. 1926); Pletner v. Southern Lumber Co., 292 S.W. 370 (Ark. 1927); Bradley Lumber Co. v. Burbridge, 210 S.W.2d 284 (Ark. 1948); Lehndorf v. Cope, 13 N.E. 505 (Ill. 1887); Griswold v. Hicks, 24 N.E. 63 (Ill. 1890); Spencer v. Spruell, 63 N.E. 621 (Ill. 1902); Duffield v. Duffield, 108 N.E. 673 (Ill. 1915); Richardson v. Van Gundy, 111 N.E. 494 (Ill. 1916); Coogan v. Jones, 115 N.E. 877 (Ill. 1917); Stearns v. Curry, 137 N.E. 471 (Ill. 1922); Pearson v. Olson, 141 N.E. 736 (Ill. 1923); Danberg v. Langman, 149 N.E. 245 (Ill. 1925); Roof v. Rule, 180 N.E. 807 (Ill. 1932); Henry v. Metz, 46 N.E.2d 945 (Ill. 1942); Barker v. Walker, 85 N.E.2d 748 (Ill.1949); Beasley v. Beasley, 88 N.E.2d 435 (Ill. 1949); Waite v. Schmidt, 245 P.2d 975 (Kan. 1952)* (deed created fee tail, converted into life estate with remainder over, rather than fee simple absolute); *Reetz v. Sims, 276 P.2d 368 (Kan. 1954)* (construing Kans. Gen. Stat.

§ 58-502); *Sims v. Pierce, 31 N.E. 718 (Mass. 1892); Farrar v. Christy, 24 Mo. 453(1857); Phillips v. La Forge, 1 S.W. 220 (Mo.1886); Wood v. Kice, 15 S.W. 623 (Mo. 1891);Emmerson v. Hughes, 19 S.W. 979 (Mo. 1892); Godman v. Simmons, 20 S.W. 972 (Mo. 1892); Bone v. Tyrrell, 20 S.W. 796 (Mo. 1892); Reed v. Lane, 26 S.W. 957 (Mo. 1894); Clarkson v. Clarkson, 28 S.W. 446 (Mo.1894); Hunter v. Patterson, 44 S.W. 250 (Mo.1898); Frame v. Humphreys, 64 S.W. 116 (Mo. 1901); Charles v. White, 112 S.W. 545 (Mo. 1908); Elsea v. Smith, 202 S.W. 1071 (Mo. 1918);Welch v. Wagner, 232 S.W. 146 (Mo. 1921); Schee v. Boone, 243 S.W. 882 (Mo. 1922); Owen v. Trail, 258 S.W. 699 (Mo. 1924); Inlow v. Herren, 267 S.W. 893 (Mo. 1924); Kane v. Roath, 276 S.W. 39 (Mo. 1925); Bank of Brumley v. Windes, 282 S.W. 696 (Mo. 1926);Hyde v. Hopkins, 296 S.W. 382 (Mo. 1927); Davidson v. Davidson, 167 S.W.2d 641 (Mo. 1943); Mattingly v. Washburn, 196 S.W.2d 624 (Mo. 1946)* (to effect that such remainders are contingent, conditioned upon survival of the life tenant); *Grimes v. Rush, 197 S.W.2d 310 (Mo. 1946);Tapley v. Dill, 217 S.W.2d 369 (Mo. 1949); Tucker v. Holder, 225 S.W.2d 123 (Mo. 1949); Pixlee v. Petty, 274 S.W.2d 257 (Mo. 1955)* (fee tail converted into life estate with remainder to issue); *Bullock v. Porter, 284 S.W.2d 598 (Mo. 1955)* (to A and B and bodily heirs created life estates by the entireties with remainders over); *Callison v. Wabash R. Co., 275 S.W. 965 (Mo. App. 1925); Havens v. Seashore Land Co., 20 A. 497 (N.J. 1890); Doty v. Teller, 23 A. 944 (N.J. 1892).* In New Jersey the fee tail now becomes a fee simple instead of a life estate. N.J. Stat. Ann. § 46:3-15; *Pollock v. Speidel, 17 Ohio St. 439 (1867); Mays v. Mays, 42 N.E.2d 446 (Ohio 1942); Williamson v. Jones, 19 S.E. 436 (W. Va. 1894).*

(n18)Footnote 150. *Long v. Long, 343 N.E.2d 100 (Ohio 1976).*

In Ohio a fee tail vests the estate in the grantee for life and with remainder to the issue. *Eisenmann v. Eisenmann, 370 N.E.2d 788 (Ohio 1976).*

(n19)Footnote 151. *Weatherly v. Purcell, 234 S.W.2d 32 (Ark. 1950); Sauls v. Cox, 67 N.E.2d 187 (Ill. 1946); Barker v. Walker, 85 N.E.2d 748 (Ill. 1949);Beasley v. Beasley, 88 N.E.2d 435 (Ill. 1949)* (the remainder is vested in children then living, subject to opening up to let in afterborn); *Pixlee v. Petty, 274 S.W.2d 257 (Mo. 1955).*

The Ohio fee tail statute Ohio Rev. Code Ann. § 2131.08 does not limit the estate to one for life in the first taker but merely restricts the entailment to the immediate issue of the first taker. *Long v. Long, 343 N.E.2d 100 (Ohio 1976).*

(n20)Footnote 152. Conn. Gen. Stat. § 5001. *See now* Conn. Gen. Stat. § 47.3. Each estate given in fee tail shall be an absolute estate in fee simple to the issue of the first donee in tail. (Connecticut judges have said that this statute is declaratory of the common law of that state.)

Ohio Rev. Code § 2131.08 ... All estates given in tail, by deed or will, in lands or tenements lying within this state, shall be and remain in absolute estate in fee simple to the issue of the first donee in tail...

R.I. Gen. Laws § 33-610 ... shall not vest a fee tail estate in the first devisee but an estate for life only, and the remainder shall on his decease vest in his children or issue generally agreeably to the direction of such will.

To A and her heirs by her present husband created life estate with remainder vested subject to opening up with the children being heirs and the class closing on husband's death under statute converting fee tail into life estate with remainder over. *Steele v. Robinson, 251 S.W.2d 1001 (Ark. 1952).*

(n21)Footnote 153. In 1936, the states thus determining the consequences of a limitation formerly sufficient to create an estate tail were twenty-four. In twenty-two states this result was the result of statutes, all explicit, but varying extensively in wording and somewhat in operation. In the remaining two states (Maryland and New Hampshire) the result was inferred from statutes not explicitly dealing with this problem. The authorities upon which this classification is made are given below, with details as to the major variations in the significant statutes.

Ala. Code § 35-4-3. Every estate in real or personal property in fee tail, now or hereafter created, becomes an estate in fee simple, and the person in whom such a conditional fee vests has the same power over the estate as in case of pure

and absolute fees.

Ariz. Rev. Stat. § 33-224. When any person becomes seized in fee tail of an estate of inheritance, such person, instead of becoming seized thereof in fee tail, shall be deemed seized thereof in fee simple. Where estates of inheritance heretofore have been devised, granted or conveyed by a tenant in tail such devise, grantor conveyance, shall be deemed a devise, grant or conveyance in fee simple.

Cal. Civ. Code § 763 - 764.

§ 763. Estates tail are abolished, and every estate which would be at common law adjudged to be a fee-tail is a fee-simple; and if no valid remainder is limited thereon, is a fee-simple absolute.

§ 764. Where a remainder in fee is limited upon any estate, which would by the common law be adjudged a fee-tail, such remainder is valid as a contingent limitation upon a fee, and vests in possession on the death of the first taker, without issue living at the time of his death.

Ind. Code § 32-1-2-33. Estates tail are abolished; and any estate which, according to the common law, would be adjudged a fee tail, shall hereafter be adjudged a fee simple; and if no valid remainder shall be limited thereon, shall be a fee simple absolute.

Ky. Rev. Stat. § 381.070. All estates heretofore or hereafter created, which, in former times, would have been deemed estates entailed, shall henceforth be held to be estates in fee simple; and every limitation on such an estate shall be held valid, if the same would be valid when limited upon an estate in fee simple.

Md. Real Prop. Code § 2-102 dealing with the power of the owner of an estate in fee tail to convey an estate in fee simple absolute; and Art. 46, § 1 dealing with the law of descent of an estate in fee tail. These two statutes have been construed to make that which before was an estate in fee tail into an estate in fee simple absolute. *Newton v. Griffith, 1 H. & G. 77 (Md. 1827).*

Mich. Stat. Ann., § 26.3 similar to California.

Minn. Stat. §§ 500.03 - 500.04. similar to Arizona.

Miss. Code § 89-1-15. Estates in fee tail are prohibited; and every estate which, but for this statute, would be an estate in fee tail, shall be an estate in fee simple; but any person may make a conveyance or a devise of lands to a succession of donees then living, and upon the death of the last of said successors to any person or any heir.

N. H. Jewell v. Warner, 35 N.H. 176 (1857);Dennett v. Dennett, 40 N.H. 498 (1860); Merrill v. American Baptist Missionary Union, 62 A. 647 (N.H. 1905).

N.J. Stat. Ann. § 46:3-15. Whenever any conveyance, will or instrument in writing shall hereafter be made, whereby any grantee, devisee or other person shall become seized in law or in equity of such estate in any real estate, as under the Statute of the Thirteenth of Edward I (called the Statute of Entails), would have been held an estate in fee tail of any type or character, such conveyance, will or instrument shall vest an estate in fee simple in such grantee, devisee or other person.

N.Y. Est. Powers & Trusts Laws § 6-1.2, similar to California.

N.C. Gen. Stat. § 41-1. Every person seized of an estate in tail shall be deemed to be seized of the same in fee simple; and all sales and conveyances, made bona fide and for valuable consideration, since the first day of January, one

thousand seven hundred and seventy-seven, by any tenant in tail in actual possession of any real estate where such estate has been conveyed in fee simple, shall be good and effectual in law to bar any tenant in tail and in remainder of and from all claim, action, and right of entry whatsoever, of, in, and to such entailed estate, against any purchaser, his heirs, or assigns, now in actual possession of such estate, in the same manner as if such tenant in tail had possessed the same in fee simple.

N.D. Cent. Code, § 47-04-05 (similar to California).

Okla. Stat. tit. 60, § 24 (similar to California).

Pa. Stat. 20, §§ 2516, 6116.

Tit. 20, § 225. Whenever by any devise an estate in fee tail would be created, according to the common law of this State, such devise shall be taken and construed to pass an estate in fee simple, and as such shall be inheritable and freely alienable.

Tit. 68, § 124. Whenever hereafter by any gift, conveyance or devise, an estate in fee tail would be created according to the existing laws of this State, it shall be taken and construed to be an estate in fee simple, and as such shall be inheritable and freely alienable. [The provision of this section as to devises was repealed by P.L. 403, § 27, which enacted, in the place of the part repealed, tit. 20, § 225, given *supra*.]

Tenn. Code Ann, § 64-102. Any person seized or possessed of an estate in general or special tail, whether by purchase or descent, shall be held and deemed to be seized and possessed of the same in fee simple, fully and absolutely, without any condition or limitation whatsoever, to him, his heirs and assigns, forever, and shall have full power and authority to sell or devise the same as he thinks proper; and such estate shall descend under the same rules as other estates in fee simple.

Va. Code 1950, § 55-12 (similar to Kentucky).

W. Va. Code, § 36-1-12 (similar to Kentucky).

Wis. Stat. § 700.08 (similar to Arizona).

Remainder to A and her bodily heirs or words having the meaning of bodily heirs creates remainder in fee to A as a rule of law.*Dempsey v. Davis, 136 S.W. 975 (Ark. 1911); Eubanks v. McDonald, 283 S.W.2d 166 (Ark. 1955).*

Under the Ohio statute the creation of a fee tail vests the entire estate in tail in the first taker. But when he dies his immediate heirs of the body take a fee simple absolute. This right of the heirs is a new possibility but the tenant in tail cannot defeat it and if he dies without issue the property reverts to the donor. *Pollock v. Speidel, 17 Ohio St. 439 (1867); Dungan v. Kline, 90 N.E. 938 (Ohio 1910); Cook v. Hardin County Bank, 63 N.E.2d 686 (Ohio 1945)* (judgment against tenant in tail does not affect issue).

The Ohio fee tail statute, Ohio Rev. Code § 2131.08, does not connect the estate to one for life in the first taker but merely restricts the entailment to the immediate issue of the donee. *Long v. Long, 343 N.E.2d 100 (Ohio 1976).*

Fee tail in Wyoming for a single lifetime was repealed. Wyo. Laws ch. 93, § 1. *See now* Wyo. Stat. Ann. § 34-1-137.

(n22)Footnote 154. *Lytle v. Hulen, 275 P. 45 (Or. 1929).*

(n23)Footnote 155. William F. Fratcher, *Fee Tail in Michigan, 4 U. Det. L. J. 19 (1940).*

(n24)Footnote 156. In Oklahoma fee tails are converted into fee simples but remainders over after fee tails are valid as conditional limitations over after fee simple vesting on death of the first taker without issue living at his death. Okla. Stat. tit. 60, §§ 24 - 25, 41.

In Oregon, effective June 15, 1971, fee simple conditional or fee tail became a fee simple absolute and limitations thereover created a limitation upon fee simple absolute. Ore. Rev. Stat. § 93.250.

Will construed as creating life estate and remainder to heirs of the body. *In re Wilson's Will, 133 S.E.2d 189 (N.C.1963).*

Virginia converts fee tail into fee simple. Va. Code § 55-12.

(n25)Footnote 157. Conn. Stat. § 46-3; Ohio Rev. Code § 2131.08; R. I. Gen. Laws § 33-6-10 (deeds only).

Holding that a reversion arises after a fee tail and that the reversion is a vested estate capable of alienation, inter vivos, descent, and passing by will. *Long v. Long, 343 N.E.2d 100 (Ohio 1976).*

The Ohio statute which converts an estate tail into a fee simple in the hands of the issue of the first donee in tail does not change the nature of the estate entailed in the donee from an inheritable estate to an estate for life merely but simply restricts entailment to the immediate issue of the donee. *Long v. Long, 343 N.E.2d 100 (Ohio 1976).*

(n26)Footnote 158. Ind. Code § 32-1-2-33.

In Kansas while the fee tail also becomes a life estate with remainder over, Kans. Gen. Stat. § 58-502, the remainder is vested in the children living at the time of the deed. *Waite v. Schmidt, 245 P.2d 975 (Kan. 1952).*

In Missouri a fee tail is converted into a life estate with remainder over. Mo. Rev. Stat. § 442.470. But the remainder over, though alienable, is contingent. *Grimes v. Rush, 197 S.W.2d 310 (Mo. 1946).*

Fee tail converted into a life estate with contingent remainder. *Moore v. Moore, 329 S.W.2d 742 (Mo. 1959).*

In Kentucky fee tails are now fee simples but limitations on fee are preserved. Ky. Rev. Stat., § 381.070.

(n27)Footnote 159. *In re Reeves, 94 A. 511 (Del.1915); Caccamo v. Banning, 75 A.2d 222 (Del.1950); Willey v. Haley, 60 Me. 176 (1872);*Laidler v. Young, *2 H. & J. 59 (Md. 1804);Wheelwright v. Wheelwright, 2 Mass. 447 (1807); Williams v. Hichborn, 4 Mass. 189 (1808); Whittaker v. Whittaker, 99 Mass. 364 (1868); Gilkie v. Marsh, 71 N.E. 703 (Mass. 1904); Cooper v. Cooper, 6 R.I. 261 (1859); Lippitt v. Huston, 8 R.I. 415 (1867); Paine v. Sackett, 61 A. 753 (R.I. 1905).*

(n28)Footnote 160. *Willey v. Haley, 60 Me. 176(1872); Williams v. Hichborn, 4 Mass. 189 (1808); Cuffee v. Milk, 51 Mass. (10 Met.) 366 (1845);Allen v. Ashley School Fund, 102 Mass. 262 (1869);Coombs v. Anderson, 138 Mass. 376 (1885).*

(n29)Footnote 161. *Sconce v. Neece, 268 P.2d 1102 (Colo. 1954); Wise v. Potomac Nat'l Bank, 65 N.E.2d 767 (Ill. 1946); Spicer v. Moss, 100 N.E.2d 761 (Ill. 1951); Sloan v. Beatty, 116 N.E.2d 375 (Ill. 1953);Mattingly v. Washburn, 196 S.W.2d 624 (Mo. 1946);Welsh v. Weyrich, 123 N.E.2d 661 (Ohio 1952).*

(n30)Footnote 162. In a gift to "A and the heirs of his body," "heirs" did not mean children and A took a fee tail converted by statute into a life estate with remainder to heirs of the body.*Spicer v. Moss, 100 N.E.2d 761 (Ill. 1951).*

See Edgerton v. Harrison, 52 S.E.2d 357 (N.C.1949), to the effect that "heirs of the body" will not be *descriptio*

personarum under the statute unless the creator's intent to do so in the first instance was clear.

(n31)Footnote 163. To A and on her death to her children and their issue did not create a fee tail converted into a fee simple.*Thoma v. Coats, 240 P.2d 736 (Okla. 1952).*

In *Rose v. Rose, 60 S.E.2d 45 (Va. 1950)* a deed to A and his children and children's children did not create a fee tail, the language was of purchase, not limitation.

(n32)Footnote 164. The estate will not be construed to be a fee tail unless the intent is clearly intended. *Wood River Oil & Ref. Co. v. Madden, 220 P.2d 154 (Kan. 1950).*

Tucker v. Tucker, 78 Ky. 503 (1880) (where the deed was to a married woman and "the heirs of" her husband);*Brann v. Elzey, 83 Ky. 440 (1885), 7 Ky. L 539;Fletcher v. Tyler, 17 S.W. 282 (Ky. 1891)* (where the word "heirs" was declared to be used in the sense of "children");*Belcher v. Ramey, 191 S.W. 520 (Ky. 1917); Hodges v. Fleetwood, 9 S.E. 640 (N.C. 1889)* (where a deed to a married woman for life, "then to descend to her heirs, the children of" her husband, habendum to the "party of the second part and their heirs," was held to create a life estate only in the woman, with a contingent remainder to the children described).

(n33)Footnote 165.

> The language in the deed, 'heirs of her body by myself as husband,' unrestricted by any other terms of the deed, and in the absence of living children of the wife by the grantor, would create an estate tail special at the common law, upon which our statute would operate. But it being evident that the word 'heirs' is used as the equivalent of 'children,' and there being living children of the grantor by his wife, at the time the deed was executed, the terms employed in the deed and quoted above must be construed, not as words of limitation and inheritance, but as a description of a class of persons to take under the deed as purchasers, and the language is sufficiently definite and certain to be operative for that purpose.

Sullivan v. McLaughlin, 11 So. 447 (Ala. 1892), per Thornton, J. *See Darden v. Burns, 6 Ala. 362 (1844); Williams v. Graves, 17 Ala. 62 (1849); Williams v. McConico, 36 Ala. 22 (1860); Robertson v. Johnston, 36 Ala. 197 (1860); May v. Ritchie, 65 Ala. 602(1880); Wikle v. McGraw, 8 So. 341 (Ala. 1890); Slayton v. Blount, 9 So. 241 (Ala. 1891).*

In *Dungan v. Kline, 90 N.E. 938 (Ohio 1910),* land was devised to "Elizabeth Wilson and the heirs of her body." An Ohio statute provided that "all estates given in tail shall be and remain an absolute estate in fee simple to the issue of the first donee in tail." During the lifetime of Elizabeth, two of her seven children, William and George, purported to convey their interests by deed to Dungan. William and George then died during the lifetime of their mother, Elizabeth, each survived by a child, Adolph, and Etta. On the death of Elizabeth a controversy arose, between Dungan on one side and Adolph and Etta on the other, as to the ownership of the two sevenths interest which William and George had purported to convey to Dungan. The court decided in favor of Adolph and Etta, saying in part: "During the life of Elizabeth Wilson, first donee in tail, her children William T. and George H. Wilson had no estate or interest in the premises devised to her which they of right could alien or convey."

(n34)Footnote 166. *Bibo v. Bibo, 74 N.E.2d 808 (Ill. 1947).*

(n35)Footnote 167. *Grimes v. Rush, 197 S.W.2d 310 (Mo. 1946).*

(n36)Footnote 168. *Tipton v. La Rose, 27 Ind. 484 (1867); Andrews v. Spurlin, 35 Ind. 262 (1871); Nunn v. Wright, 197 S.W.2d 439 (Ky. 1946); Combs v. Slone, 208 S.W.2d 304 (Ky. 1948); Kirk v. Furgerson, 46 Tenn. (6 Cold.) 479 (1869); Singletary v. Hill, 43 Tex. 588 (1875).*

(n37)Footnote 169. *Lytle v. Hulen, 275 P. 45 (Or. 1929).*

Statute prescribing that every person seized of an estate in tail shall be deemed to be seized of the same in fee simple absolute enlarges the fee tail estate into a fee simple absolute. *Pittman v. Stanley, 56 S.E.2d 657 (N.C. 1949).*

(n38)Footnote 170. *Hill v. Lang, 86 S.E.2d 498 (Ga. 1955).*

(n39)Footnote 171. *Pixlee v. Petty, 274 S.W.2d 257 (Mo. 1955).*

(n40)Footnote 172. *Tapley v. Dill, 217 S.W.2d 369 (Mo. 1949).*

(n41)Footnote 173. *Singer v. First Nat'l Bank & Trust Co., 24 S.E.2d 47 (Ga. 1943); Lewis v. Fry, 26 S.E.2d 122 (Ga. App. 1943).*

(n42)Footnote 174. *Cook v. Hardin County Bank Co., 63 N.E.2d 686 (Ohio App. 1945).*

(n43)Footnote 175. *In re Manor Farm, 2 All E.R. 572.*

(n44)Footnote 176. *Spencer v. Spruell, 63 N.E. 621 (Ill. 1902).*

(n45)Footnote 177. *Hayes v. Hammond, 143 N.E.2d 693 (Mass. 1957).*

(n46)Footnote 178. *Guida v. Thompson, 160 N.E.2d 153 (Ohio 1957)* (where statute converted fee tail into a fee tail in the first taker with a remainder in fee simple absolute to the children of the first taker, the grantee could not defeat the children's interest by conveying during his lifetime).

(n47)Footnote 179. *Caccamo v. Banning, 75 A.2d 222 (Del. 1950)* (in Delaware a limitation over on death without issue after a fee simple absolute creates a fee tail in the first taker).

A gift in general terms not showing what estate is intended, followed by a gift over on indefinite failure of issue creates a fee tail. *Monroe v. Leckey, 142 N.E.2d 314 (Ohio 1956).*

(n48)Footnote 180. *Summers v. Smith, 21 N.E. 191 (Ill. 1889).*

Under a statute converting a fee tail into a life estate with remainder to his bodily heirs the testator or grantor retains a reversion vesting in possession if the life tenant dies without issue. *Bedford v. Bedford, 274 S.W.2d 528 (Tenn. App. 1954).*

(n49)Footnote 181. *Mays v. Mays, 42 N.E.2d 446 (Ohio 1942).*

(n50)Footnote 182. *Howell v. Deady, 48 F. Supp. 104 (D. Or. 1939).*

* This chapter is based in part on Ch. 30, George W. Thompson, Commentaries on the Moon Law of Real Property (John S. Grimes ed. 1979), which made a significant contribution toward preserving the American common law governing the fee tail.

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CHAPTER 18 FEE TAIL *

2-18 Thompson on Real Property, Thomas Editions § 18.05

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§ 18.05 The Conditional Fee.

In those jurisdictions n183 where the concept of the fee tail is not recognized, as distinguished from those states where de donis n184 became part of the common law, but where the legal consequences of a fee tail have been changed by statute, the use of language which would have otherwise created a fee tail could have one of four consequences: (a) creating a fee simple, (b) creating a conditional fee, (c) creating a tenancy in common, or (d) creating a life estate with remainder over.

During the period immediately prior to the passage of the statute de donis conditionalibus, in a conveyance to "A and the heirs of his body" the words "heirs of his body" were words of limitation not of purchase. That is, no immediate estate was thereby given to A's issue. Instead what A received was a fee simple conditioned upon his having issue. If there were no issue born then the estate reverted to the donor. But upon the birth of issue A's estate ripened into a fee simple absolute. The conditional fee was, to all effects, destroyed by de donis at a period before the nature of the future interest reserved to the donor was ascertained. Was it a reversion, a possibility of reverter, or was it something in the nature of a mere right of re-entry? n185

The conditional fee died in England with de donis but its existence has been revived in several of the states which do not recognize de donis and in one state n186 it appears to exist contemporaneously with a fee tail.

At common law the fee simple conditional was limited to particular heirs to the exclusion of others and if there was birth of issue the fee became absolute in the grantee with reversion to the grantor if the grantee had never had issue answering the description. n187

Since the fee simple conditional ceased to exist before any serious amount of legal writing appeared in English jurisprudence, we have no classical background of knowledge as to its characteristics and there has been very little case law in this country outside of South Carolina. Hence the qualities of the fee simple conditional must remain largely conjectural. n188

Thus doubt exists as to the nature of the conditional fee. There is authority to the effect that it was in effect a fee simple upon the condition subsequent that if the donee died without heirs it would revert to the donor. n189 Blackstone

considered that the estate became absolute on the birth of issue. n190 Coke, n191 however, insisted that it lacked these characteristics of a fee simple absolute: The donor had a "reverter" if the donee died without issue and if his issue died without issue then it still reverted. Coke admits these fee-simple characteristics, however, (1) to alien, (2) to forfeit for treason, greater or lesser, and (3) to charge with rent or common recovery.

The Restatement n192 takes the position that a fee simple conditional has the same characteristics of a fee simple absolute except:

(1) The tenant has no power to devise any interest in the land. n193

(2) On death of the tenant the land passes: (a) to the specified issue or to the person entitled under an executory interest limited as an alternative to the interest of the specified issue; or (b) if there is no such issue and no person having such an executory interest, to the person entitled under the possibility of reverter or to the person entitled under an executory interest limited as an alternative to the possibility of reverter. n194 Such heirs take a fee-simple conditional, but the heirs have during the tenants' lifetime a mere expectancy. Thus the heir takes subject to the reversion.

(3) Dower and curtesy are subject to the reversionary interest in the grantor (called a possibility of reverter or power of termination). n195

(4) After birth of issue the tenant can transfer a fee simple absolute or any other interest in land, n196 and

(5) the tenant's interest is subject to claims of creditors as is any other fee simple absolute. n197

(6) Before birth of issue the tenant can alien subject to the grantor's interest and to limitation over, n198 and the creditor's rights are limited accordingly. n199

(7) The tenant is liable for waste before birth of issue but not after. n200

(8) The estate can be partitioned. n201

The Restatement's position thus conflicts with Blackstone who felt that the fee became absolute on birth of issue, n202 but is supported by Chitty. n203

The common-law conditional fee was not, however, a fee simple since a gift over could be limited upon it just as a remainder could after de donis be limited on a fee tail. n204 A fee simple could not be limited after a fee simple.

The words "conditional fee" are, however, often used by the courts in speaking of what is more properly termed a fee upon a condition subsequent or a fee subject to a conditionallimitation. n205

The Restatement n206 says that in those states where statutes or judicial decisions have abolished the fee tail outright without providing an alternative language which would have created a condition fee at common law or a fee tail under de donis, there is now created a fee simple absolute unless the manifested purposes of the conveyor are more nearly attained by creating an estate for life in favor of the first taker and a remainder in fee simple in favor of the issue of the first taker.

As at early common law, the conditional fee ripens into a fee simple absolute upon birth of issue. n207

Birth of issue merely gives the holder of a conditional fee the power of alienation. It does not convert into a fee simple absolute. n208

The fee simple conditional exists in this country clearly inthe states of Indiana, n209 Iowa, n210 Oregon, n211 and South Carolina. n212 It probably also exists in Nebraska. n213 It may also exist in other states which have not by judicial decision or by statute admitted the existence of de donis and which have no statutes controlling the legal effect of the language which gives rise to a fee tail. n214

COMPUTER-ASSISTED RESEARCH

LEXIS: conditional fee! or fee simple conditional

FOOTNOTES:
(n1)Footnote 183. The fee tail is not recognized in the states of Iowa, Nebraska, Oregon and South Carolina. Florida, Hawaii and Texas have said that the fee tail is socially undesirable and therefore is abolished. The result here, however, is to create either a fee simple absolute or a fee simple subject to a conditional limitation.

Fee simple conditional. *Scarborough v. Scarborough, 142 S.E.2d 706 (S.C. 1965).*

(n2)Footnote 184. Colorado does not recognize a fee simple conditional. *Sconce v. Neece, 268 P.2d 1102 (Colo. 1954).*

Fee simple conditional recognized by virtue of a statute construed as repealing *de donis. Rowland v. Warren, 10 Or. 129 (1882).*

(n3)Footnote 185. Littleton, Tenures, § 19; 1 Coke on Littleton, § 22b. A remainder could not be limited on a conditional fee. 4 Kent's Comm. 11 *supra* note 50. Possibility of reverter followed a conditional fee before de donis.

(n4)Footnote 186. The estate of fee conditional exists in South Carolina as a result of the refusal to accept the English statute *de donis. Creswell v. Bank of Greenwood, 41 S.E.2d 393 (S.C. 1947).*

Where a deed dated December 21, 1911, prior to the enactment of a statute abolishing the rule in Shelley's Case, provided "to have and to hold all and singular the said premises before mentioned unto the said 'grantee' until her death and then to her bodily issue and heirs and assigns forever, "grantee subsequently having issue, acquired a fee conditional estate which immediately ripened into a fee simple absolute." *Smith v. Hanna, 56 S.E.2d 339 (S.C. 1949).*

Britton, treated a limitation to A and B and their heirs lawfully be gotten as a condition precedent.

2 Coke on Littleton, at 333, disputes this and claims it to be a conditional fee.

To A and the heirs of her body creates a fee simple conditional -- A's surviving children took no more than a fee conditional title which could not be passed by the will of the child who died subsequent to *A's death. Scarborough v. Scarborough, 142 S.E.2d 706 (S.C. 1965).*

South Carolina has now limited its fee simple conditional while holding that where the first taker dies leaving issue this is fulfilled and issue can have fee simple absolute without having bodily heirs. *Scarborough v. Scarborough, 154 S.E.2d 110 (S.C. 1967).*

(n5)Footnote 187. *Purvis v. McElveen, 106 S.E.2d 913 (S.C. 1959).*

(n6)Footnote 188. A "conditional fee" may be created though the condition is that the heirs of the grantee shall never take so that the property will revert unless the first taker aliens or devises. *Cragin v. Frost Nat'l Bank, 164 S.W.2d 24 (Tex. Civ. App. 1942).*

(n7)Footnote 189. *Willion v. Berkley, Plowd. 233, 75 Eng. Rep. 339.* Thus a writ of formedon in reverter would lie to the donor hut not a writ of formedon in remainder. *Ford v. Flint, 40 Vt. 382 (1867).*

Britton felt that the condition was precedent so that the grantee in a grant to one and his heirs had but a life estate with the fee in the issue. But 2 Coke on Littleton, at 333 insisted that this was a conditional fee.

(n8)Footnote 190. 2 Blackstone, *supra* note 24, at 110, 111. *Williams, supra* note 9 (17th ed.) 103, states that after birth of issue upon alienation both the grantor's reversion and any limitation over were destroyed.

(n9)Footnote 191. Coke on Littleton, at § 19. 2 Coke on Littleton, at 233, 234. 356 Paine's Case, 8 Coke 35; *Willion v. Berkley, Plowd. 233, 75 Eng. Rep. 339.*

(n10)Footnote 192. Restatement, Property, § 77.

(n11)Footnote 193. Restatement, Property, § 71.

(n12)Footnote 194. Restatement, Property, § 76.

(n13)Footnote 195. Restatement, Property § 75.

11 Bracton, ch. 6, f. 17, recognized two types of conditional fees. "To A and his heirs if he have heirs begotten of his body" which was a life estate with reversion to the grantor if the condition was not met but a fee absolute if issue were born. And "to A to have and to hold to him and his heirs begotten on his lawfully wedded wife" in this case there was a life estate with reversion until heirs were born and as long as there were heirs. But it passed into an estate for life wherever there ceased to be heirs. The donee could, however, enfeoff with warranty binding the issue. Bracton admits, however, that this last was disputed. Hence even at this time the controversy which led to the de donis had arisen and that there was a contention that "heirs of the body" enfeoffed the heirs together with their parents.

(n14)Footnote 196. Restatement, Property, § 69.

A deed to the daughter and the heirs of his body created a conditional fee which became a fee simple absolute on the birth of issue. *Prichard v. Department of Revenue, 164 N.W.2d 113 (Iowa 1969).*

(n15)Footnote 197. Restatement, Property, § 74.

(n16)Footnote 198. Restatement, Property, § 70.

(n17)Footnote 199. Restatement, Property, § 74.

(n18)Footnote 200. Restatement, Property, § 73.

(n19)Footnote 201. Restatement, Property, § 72.

(n20)Footnote 202. 2 Blackstone, *supra* note 24 110, 111. *King v. Rea, 56 Ind. 1 (1877); Jewell v. Warner, 35 N.H. 176 (1877); Orndoff v. Turman, 2 Leigh 200 (Va. 1857).*

(n21)Footnote 203. Joseph Chitty, The Practice of Law in All Its Departments (2d ed. 1830) §§ 242, 245.

(n22)Footnote 204. 2 Bracton, ch. 6, f. 17.

(n23)Footnote 205. *Church of God v. Glann, 114 N.E.2d 98 (Ohio App. 1952); Dingess v. Drake, 64 S.E.2d 601 (W. Va. 1951).*

(n24)Footnote 206. *Church of God v. Glann, supra* note 205; *Dingess v. Drake, supra* note205.

(n25)Footnote 207. *Crawford v. Masters, 82 S.E. 793 (S.C. 1914).*

(n26)Footnote 208. To A and the heirs of her body created a fee simple conditional. If issue is from J it may alienate but if she does not alienate the property passes in the descending line until one does alienate. *Scarborough v. Scarborough, 154 S.E.2d 110 (S.C. 1967).*

(n27)Footnote 209. *Taylor v. Stephens, 74 N.E. 980 (Ind. 1905).* This is true even though Indiana recognized de donis.

(n28)Footnote 210. *Pierson v. Lane, 14 N.W. 90 (Iowa 1882); Kepler v. Larson, 108 N.W. 1033 (Iowa 1906); Sagers v. Sagers, 138 N.W. 911 (Iowa 1912); Shope v. Unknown Claimants, 156 N.W. 850 (Iowa 1916).*

(n29)Footnote 211. *Lytle v. Hulen, 275 P. 45 (Or. 1929).*

(n30)Footnote 212. *Creswell v. Bank of Greenwood, 41 S.E.2d 393 (S.C. 1947); Smith v. Hanna, 56 S.E.2d 339 (S.C. 1949).*

In limitation over to life tenants "issue" meant heirs of the body creating a conditional fee. *Woodle v. Tilghman, 107 S.E.2d 4 (S.C. 1959).*

(n31)Footnote 213. *Yates v. Yates, 178 N.W. 262 (Neb. 1920); Myers v. Myers, 190 N.W. 491 (Neb. 1922).*

(n32)Footnote 214. Alaska, Idaho, Louisiana, Nevada, Utah and Washington. *See* Introductory Note to Restatement, Property, ch. 5.

* This chapter is based in part on Ch. 30, George W. Thompson, Commentaries on the Moon Law of Real Property (John S. Grimes ed. 1979), which made a significant contribution toward preserving the American common law governing the fee tail.

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Supp. To CHAPTER 18 FEE TAIL

2-18 Thompson on Real Property, Thomas Editions Supp. to § 18.01

Supp. to § 18.01 Overview of Fee Simple Conditional and Fee Tail.

[Go To Main]

Add new note 2.1 after "in the United States today": n2.1

Change Scarborough cite to: *142 S.E.2d 706 (S.C. 1965).*

Add:

But see Brown v. Johnson, 97 S.W.3d 924, 926-28 (Ark. Ct. App. 2003) (holding that the specific language of the deed was intended to include natural children only, and discussing the exclusion of adopted issue following the Arkansas adoption statute).

Add:

Hess v. Proffer, 87 S.W.3d 432 (Mo. App. 2002) (Missouri abolished fee tails long before 1937. A devise using the language of fee tails creates: 1) a life estate in the named devisee; 2) a remainder in the heirs of the body of the named devisee; and 3) a reversion to the devisor).

Dempsey v. Dempsey, 795 N.E.2d 996 (Ill. App. Ct. 2003) (stating that when "an ownership interest would have been a fee tail at common law, the estate is statutorily converted into a life estate in the grantee, with the remainder in fee to the grantee's children").

add

It is fair to say that the fee tail today has virtually no active role in real estate transactions, but occurs only as incidental language in various state constitutional or statutory provisions. *See, e.g., Elkins v. Sears, 2008 U.S. Dist. LEXIS 47118* (S.D. Tex. June 17, 2008) ; *Investors Group, Inc. v. Annunziata (In re Annunziata), 2008 Bankr. LEXIS 383* (Bankr. D. Mass. Feb. 12, 2008) .

FOOTNOTES:
(n1)Footnote 2.1. *See* Max Gibbons, *Of Windfalls and Property Rights: Palazzolo and the Regulatory Takings Notice Debate, 50 UCLA L. Rev. 1259, 1275-76 (2003)* (discussing the common law trend towards unrestrained real property transfer, and the gradual demise of the fee tail instrument in England and the United States).

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Supp. To CHAPTER 18 FEE TAIL

2-18 Thompson on Real Property, Thomas Editions Supp. to § 18.02

Supp. to § 18.02 The Development and Nature of the Fee Tail.

[Go To Main]

Add:

Dempsey v. Dempsey, 795 N.E.2d 996 (Ill. App. Ct. 2003) .

Add:

John G. Shively, *78 Wash. U. L.Q. 371 2000* note, *The Death of the Life in Being--the Required Federal Response to State Abolition of the Rule Against Perpetuities,* n. 28:

> The fee tail estate would last as long as there were lineal descendants of the original donee and prevented the original donee from conveying the property and thereby eliminating the property interest of the heirs or reversioner. The fee tail progressed to allow very specific descriptions of who would take after the life tenant. A donor could create a fee tail male or female, so that only male or female descendants, respectively, could take. He could make the fee tail special or general so that the descendants to take could only be from a specified wife or from any wife.

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Supp. To CHAPTER 18 FEE TAIL

2-18 Thompson on Real Property, Thomas Editions Supp. to § 18.03

Supp. to § 18.03 Language Creating a Fee Tail

[Go To Main]

Add:

Rutherford County v. Wilson, 2002 Tenn. App. LEXIS 145 (Feb. 28, 2002) (Tennessee courts have adopted presumptive meanings of technical terms such as "heirs of the body." Absent language to the contrary, "heirs of the body" means lineal descendents and may include generations after children as well as children).

Add:

Dempsey v. Dempsey, 795 N.E.2d 996, 999 (Ill. App. Ct. 2003) (holding that the words "in fee simple" at the end of the devise precluded the possibility of creating a fee tail).

Add:

Rutherford County v. Wilson, No. M2000-01382-COA-R3-CV, 2002 Tenn. App. LEXIS 145 (Feb. 28, 2002) , *affirmed in part and reversed in part by, 2003 Tenn. LEXIS 368* (Tenn., May 6, 2003) (Where a remainder is limited to the heirs of the body of a person, to whom a life estate in the same premises is given, the persons who, on the termination of the life estate, are heirs of body of such tenant, shall take as purchasers, by virtue of the remainder so limited to them).

Add:

Dempsey v. Dempsey, 795 N.E.2d 996 (Ill. App. Ct. 2003) (discussing the inapplicability of the Illinois Conveyances Act in the case, as a result of the failure to create a fee tail by devise).

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Supp. To CHAPTER 18 FEE TAIL

2-18 Thompson on Real Property, Thomas Editions Supp. to § 18.04

Supp. to § 18.04 The Estate Tail.

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after "Texas" in line 3, add new note 138.1: n138.1

Change the text in the footnote to read as follows:

"Kansas adopted a statute in 1937 changing the effect of language that would have created a fee tail. Such language now creates a life estate in the first taker and a fee simple absolute in the next taker."

Add:

Colorado has now by statute changed the effect of language that formerly created a fee tail: instead of creating a fee tail in the first taker, such language creates a fee simple in the first taker. *Colo. Rev. Stat. Ann. § 38-30-106*.

Add:

Marianne M. Jennings, *Real Property Could Use Some Updating*, 24 Real Est. L.J. 103, 109:

In the remainder of the states, you're still going to have a joker here and there who will create a fee tail in a will. Then the judges are left with a large group of relatives strategically placed throughout the court room screaming things such as, "I'm a bodily heir and you're not," or "Hey, you're nothing but a collateral heir." The nonlineal heirs, of course, respond maturely with things such as, "He never liked you. He just never understood real property. He thought it was a fee simple subject to a condition subsequent." So, the judges or legislatures, are left to enter the fray and make a decision. The states judges are not consistent.

Some states turn a fee tail into a life estate. [*see Alaska Stat. § 34.27.020* (1990); *Ark. Code Ann. § 18-12-* 301 (Michie 1987); *Conn. Gen. Stat. Ann. § 52-500*; (West 1986); [Go To Main] (West 1969 & Supp. 1994); *Idaho Code § 55-206* (1988); *Ill. Ann. Stat. ch. 765 P 5*/6 (Smith-Hurd 1993); *Kan. Stat. Ann. § 58-* 502 (1983 & Supp. 1993); *Mo. Ann. Stat. § 474.470* (Vernon 1992); *Nev. Rev. Stat. § 111.101* (1991); *N.M. Stat. Ann. § 47-1-18* (Michie 1991); *N.D. Cent. Code § 47-04.05* (1974); *Ohio Rev. Code Ann. § 2107.49* (Baldwin 1987 & Supp. 1993); *Wash. Rev. Code Ann. § 11.12.180* (West 1992).]

So, in "To A and his bodily heirs," A gets a life estate and A's heirs (issue) have a remainder.

The majority of states give A a fee simple of some kind. [See *Ala. Code § 35-4-3* (1991); *Ariz. Rev. Stat. Ann. § 33-* 324 (1990); *Cal. Civ. Code § 763* (West 1982 & Supp. 1993); *Colo. Rev. Stat. § 38-30-106* (1982 & Supp. 1993); *Ga. Code Ann. § 44-6-24* (Harrison Co. 1990); *Ind. Code Ann. § 30-1-2-33* (Burns 1980 & Supp. 1993); *Ky. Rev. Stat. Ann. § 381.060* (Baldwin 1979); *Md. Est. & Trusts Code Ann. § 2-102* (1991); *Mich. Comp. Laws Ann. § 26-3* (Callaghan 1992); *Minn. Stat. Ann. § 500.3* (West 1990); *Miss. Code Ann. § 89-1-15* (1972); *Mont. Code Ann. § 70-15-204* (1993); *Neb. Rev. Stat. § 76-110* (1990); *N.J. Stat. Ann. § 46*: 3-15 (West 1989); *N.Y. Est. Powers & Trusts Law § 6-1.2* (McKinney 1992); *N.C. Gen. Stat. § 41-1* (Supp. 1993); *Okla. Stat. Ann. tit. 60, § 24* (West 1971); *Or. Rev. Stat. § 93.250* (1993); *20 Pa. Cons. Stat. Ann. § 2516* (1975); *Tenn. Code Ann. § 66-1-102* (1993); *Tex. Prop. Code Ann. § 5.001* (West 1984); *Utah Code Ann. § 78-41-1* (1994); *Vt. Stat. Ann. tit. 27, § 1* (1989); *Va. Code Ann. § 55-12* (Michie 1986); *W. Va. Code § 36-1-12* (1985); *Wis. Stat. Ann. § 700.08* (West 1981 & Supp. 1993); *Wyo. Stat. § 34-1-137* (1989).]

These are the radical, left-wing states that throw caution to the wind and abandon property laws from the eleventh century. However, even these states split on the type of fee simple. One-half give A a fee simple absolute, but the other half will give up the fee tail if it's left to someone else: "To A and the heirs of his body, but if he leaves no issue, to B." B's interest is a goner if A has issue. South Carolina and Iowa give A a fee simple conditional. If a child is not born, A loses all at death--it's back to the grantor. [*See Iowa Code Ann. § 557.2* (West 1992); *S.C. Code Ann. §§ 27-5-* 20,-30 (Law. Co-op. 1976).]

But disentailment is permitted in all states that allow a fee tail. Let's do the world and all first-year law students a favor and make the creation of a fee tail a felony."

First full paragraph:

Delete the first sentence.

Change the first sentence to read:

In most states the legal situation which gives rise to the fee tail is recognized, but the estate thus created is converted into a different type of estate. FN 150

Add:

Idaho Code § 55-206

Nev. Rev. Stat. § 111.101

Utah Code Ann. § 78-41-1

Wash. Rev. Code § 11.12.180

Change the citation to the *Caffee* case to:

81 So.2d 358 (Ala. 1955) .

Delete the following portion of FN 151:

Dempsey v. David, 98 Ark. 570, 136 S.W. 975 (Ark. 1911) ; *Eubanks v. McDonald, 283 S.W.2d 166 (Ark. 1955)* ; *Anderson v. Webb, 406 S.W.2d 871 (Ark. 1966)* (under Arkansas law a fee tail may be dissolved by the grantor, the life tenant or the remainderman).

Delete the following portion of FN 151:

Fanning v. Doan, 30 S.W. 1032 (Mo. 1895) ; *Summet v. City Realty and Brokerage Co., 106 S.W. 614 (Mo.1907)* ; *Charles v. White, 112 S.W. 545 (Mo. 1908)* ; *Leeper v. Leeper, 147 S.W.2d 660 (Mo. 1941)* ; *Bullock v. People's Bank of*

Holcomb, 173 S.W.2d 753 (Mo. 1943) .

Delete the following portion of FN 151:

Colo. Stat. § 815 (similar to Arkansas). See now *Col. Rev. Stat. § 38-30-106*; *Mo. Ann. Stat. § 442, 470* (similar to Arkansas);

Delete the parenthetical following the Vermont statutory citation at the end of FN 151.

Add:

Hess v. Proffer, 87 S.W.3d 432 (Mo. App. 2002) (fee tail converted to life estate with remainder to "bodily heirs" and reversion to devisor).

The content of this note should be in note 155.

Add:

Dempsey v. Dempsey, 795 N.E.2d 996 (Ill. App. Ct. 2003) .

Add:

Alaska St. § 34.27.020

Dempsey v. David, 98 Ark. 570, 136 S.W. 975 (Ark. 1911) ; *Eubanks v. McDonald, 283 S.W.2d 166 (Ark. 1955)* ; *Anderson v. Webb, 406 S.W.2d 871 (Ark. 1966)* (under Arkansas law a fee tail may be dissolved by the grantor, the life tenant or the remainderman).

Fanning v. Doan, 30 S.W. 1032 (Mo. 1895) ; *Summet v. City Realty and Brokerage Co., 106 S.W. 614 (Mo.1907)* ; *Charles v. White, 112 S.W. 545 (Mo. 1908)* ; *Leeper v. Leeper, 147 S.W.2d 660 (Mo. 1941)* ; *Bullock v. People's Bank of Holcomb, 173 S.W.2d 753 (Mo. 1943)*

The first three paragraphs of this note should be removed from this note and inserted in note 156.

The content of note 152 should be inserted at the beginning of note 155.

The statutory citations currently printed in note 156 should be deleted from note 156 and inserted in note 152.

Delete Kansas from the first sentence of the first full paragraph.

The third sentence of the first full paragraph should read: Louisiana has never considered the question either by statute or by judicial decision.

Add to Paragraph (1):

Colorado, Indiana, Nebraska, Oregon, Vermont

Add:

Colo. Rev. Stat. Ann. § 38-30-106; *Ind. Code § 32-17-1-3*; *Neb. Rev. Stat. § 76-110*; *Or. Rev. Stat. § 93.250*; Vt. Stan. Ann. tit. 27, § 1.

Add to Paragraph (2):

Alaska, Florida, Idaho, Kansas, Nevada, Ohio.

Delete:

Vermont.

Add new note 159.1:

Alaska St. § 34.27.020; *Fla. Stat. Ann. § 689.14*; *Idaho Code § 55-206*; Kan. Sta. Ann. § 58-502; *Nev. Rev. Stat. Ann. § 111.101*; *Ohio Rev. Code Ann. § 2107.49* (but see also *Ohio Rev. Code Ann. § 2131.08*).

see

Paragraph (3)

Delete:

Rhode Island

Add:

Washington

Add new note 159.1 at the end of the first subparagraph: n159.1

Add:

Wash. Rev. Code Ann. § 11.12.180.

Delete: R.I. Gen. Laws § 33-6-10.

Change the Connecticut citation to:

§ 47-3.

Change the Indiana citation to:

32-17-1-3.

Add:

William A. Reppy, Jr., *73 Notre Dame L. Rev. 83, 94* November, 1997, *Judicial Overkill in Applying the Rule in Shelley's Case:*

> "In the third example of a court making an unnatural construction so that Shelley's Rule could apply, the remainder was to the male life tenant's "male heirs, equally ... ; and for want of heirs male, then to go in equal shares to his daughters." [*Cooper v. Cooper, 6 R.I. 261 (1859)* .]
>
> The Rule in Shelley's Case applies when the remainder is in fee tail as well as in fee simple. Hoping he had a fee tail male due to Shelley's Rule, the person named as life tenant purported to disentail under the Rhode Island procedure for doing so. In order to validate the attempt to disentail, the court, in an 1859 opinion, construed "heirs" as "heirs of the body," words which would enable Shelley's Rule to create a fee tail. [*Fraser v. Chene, 2 Mich. 81 (1851)* .]
>
> Whatever the preference for fee tail may have been in England 500 years earlier, by the mid-nineteenth century, the word "heirs" certainly was used in this country to include collaterals under "ordinary rules of construction."

FOOTNOTES:
(n2)Footnote 138.1. Victoria Mikesell Mather, *31 S. Tex. L. Rev. 223, 226-227,* Feb. 1990 *The Magic Circle: Inclusion of Adopted Children in Testamentary Class Gifts:*

> Other courts, including those in Texas, appear to draw a distinction between class gifts to children and class gifts to bodily heirs, issue, or lineal descendants [*Compare Vaughn v. Gunter, 458 S.W.2d 523,*

527 (Tex. Civ. App.--Dallas) (allowing adopted child to share in conveyance to children), *aff'd, 461 S.W.2d 599 (Tex. 1970)* with *Sharp v. Broadway Nat'l Bank, 761 S.W.2d 141, 143-44* (Tex. App.--San Antonio 1988, no writ) (adopted children did not share in gift to lineal descendants) and *Diemer v. Diemer, 717 S.W.2d 160, 162* (Tex. App.--Houston [14th Dist.] 1986, writ ref'd n.r.e.) (adopted children not included in gift to issue).] by including adopted persons in a class gift to children, but excluding them when the class is described by a term with blood or biological connotations. [*See* Rein, *Relatives by Blood, Adoption, and Association: Who Should Get What and Why, 37 Vand. L. Rev. 711, 734 (1984); see also* Halbach, *The Rights of Adopted Children Under Class Gifts, 50 Iowa L. Rev. 971, 980 (1965).]*

At common law, the words issue or heirs of the body could operate to create a fee tail, an estate that could only pass to the lineal, bodily descendants of the original grantee. [*See* J. Cribbet & C. Johnson, Principles of the Law of Property 47-51 (3d ed. 1989).]

... [A]lthough many states are rejecting the stranger to the adoption rule, adopted children are by no means universally accepted as full family members for purposes of class gifts."

(n3)Footnote 159.1. *In re Estate of Roller, 880 N.E.2d 549 (Ill. App. 2007)* (use of term "heirs of the body" in a trust agreement did not overcome the statutory presumption the adopted children were excluded from benefitting from the trust.

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Supp. To CHAPTER 18 FEE TAIL

2-18 Thompson on Real Property, Thomas Editions Supp. to § 18.06

Supp. to § 18.06 Bibliography

[Go To Main]

Add to Articles:

Appel, Peter A. "The Embarrassing Rule Against Perpetuities." J. Legal Educ. Vol. 54 (2004) 264 (noting that the rule against perpetuities never applied to the fee tail).

Gibbons, Max "Of Windfalls and Property Rights: Palazzolo and the Regulatory Takings Notice Debate." *UCLA L. Rev.* Vol. 50 (2003) 1259.

Hart, John F. "A Less Proportion of Idle Proprietors': Madison, Property Rights, and the Abolition of Fee Tail," *58 Wash. & Lee L. Rev. 167* (Winter, 2001).

John G. Shively, *78 Wash. U. L.Q. 371 2000* note, *The Death of the Life in Being--the Required Federal Response to State Abolition of the Rule Against Perpetuities*, n. 28.

William A. Reppy, Jr., *73 Notre Dame L. Rev. 83, 94* Nov. 1997, *Judicial Overkill in Applying the Rule in Shelley's Case*.

Marianne M. Jennings, "Real Property Could Use Some Updating," 24 Real Est. L.J. 103, 109.

Victoria Mikesell Mather, *31 S. Tex. L. Rev. 223, 226-227*, Feb. 1990, *The Magic Circle: Inclusion of Adopted Children in Testamentary Class Gifts.*

Raymond C. O'Brien, 10 Geo. Mason U. L. Rev. 383, 412, n.113, Spring, 1988 *Analytical Principle: a Guide for Lapse, Survivorship, Death Without Issue, and the Rule.*

Uriel H. Crocker and David H. Fishman, *42 Md. L. Rev. 496, 500-501, 1983 The History of a Maryland Title: a*

Conveyancer's Romance Renewed.

Stake, Jeffrey Evans. "Evolution of Rules in a Common Law System: Differential Litigation of the Fee Tail and Other Perpetuities," *32 Fla. St. U. L. Rev. 401* (Winter, 2005).

Add to Annotations

Annotation, *Construction of Will Provision for Gift Over if First Taker Dies Without Issue and if Some Other Contingency Occurs, Where There is Death Without Issue but the Other Contingency Does Not Occur, 73 A.L.R.2d 466* .

Annotation, *Descent and Distribution: Rights of Inheritance as Between Kindred of Whole and Half Blood, 47 A.L.R.4th 561* .

Annotation, *Estate Created by Deed to One and His "Blood Heirs" or "Blooded Heirs," 89 A.L.R.2d 1222* .

Annotation, *Fee Simple Conditional*, 114 A.L.R. 602 .

Annotation, *Time To Which Condition of Remainderman's Death Refers, Under Gift or Grant to One for Life or Term of Years and Then to Remainderman, But If Remainderman Dies Without Issue, Then Over to Another, 26 A.L.R.3d 47* .

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CHAPTER 19 LIFE ESTATE *

2-19 Thompson on Real Property, Thomas Editions 19.syn

AUTHOR: Professor David A. Thomas J. Reuben Clark Law School Brigham Young University

§ 19.syn Synopsis to Chapter 19: LIFE ESTATE *

§ 19.01 Overview of Life Estate.

§ 19.02 Life Estates, Their Nature and Classification.

§ 19.03 Creation of Conventional Life Estates.

§ 19.04 The Relationship Between the Life Tenant and the Reversioner or the Remainderman.

§ 19.05 The Life Tenant's Right to Transfer the Life Estate.

§ 19.06 Duration of Life Estates.

§ 19.07 Extent of the Life Tenant's Right of Possession of the Freehold.

§ 19.08 Extent of the Life Tenant's Right to Make Use of the Freehold.

§ 19.09 Life Tenant's Obligation to Repair.

§ 19.10 The Life Tenant's Duties Relating to Discharge of Encumbrances on the Property.

§ 19.11 The Life Tenant's Duty to Insure the Premises.

§ 19.12 The Life Tenant's Duty to Pay Taxes.

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CHAPTER 19 LIFE ESTATE *

2-19 Thompson on Real Property, Thomas Editions § 19.01

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§ 19.01 Overview of Life Estate.n1

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One of the lesser estates that can be carved out of a fee simple absolute is a life estate. The life estate lasts for the life of a person and then terminates automatically. Thus, a conveyance "to Arthur for life" gives Arthur an estate that will last until his death, barring unusual circumstances. A conveyance "to Arthur for the life of Becky" gives Arthur an estate that will last for the life of Becky. This latter life estate is called a life estate pur autre vie (for the life of another). If Becky dies before Arthur, Arthur's estate ends at that time. If Becky dies after Arthur, Arthur's estate continues beyond his death until the death of Becky. In this latter case Arthur's estate passes to his heirs, if Arthur has not transferred the estate by sale, gift or will.

A life estate is transferred by words that indicate an estate for life, such as "to Arthur for life" or "to Arthur as long as he lives" or "to Arthur until his death" or "to Arthur, and when he dies, to Charlotte." If the donor owns a life estate and transfers "to Arthur for life," Arthur will have a life estate that will end on the death of the donor or the death of Arthur, whichever is sooner.

When property is given to a class of people for their lives, the question arises whether their estates are measured by their joint lives (termination upon the death of the first person in the class), by their individual lives (termination of each estate individually upon the death of each person in the class), by their individual lives with right of survivorship (termination of each estate individually upon the death of each person in the class with right of survivorship by the remaining class members), or by the life of the survivor (termination upon the death of the last person to survive in the class). Although the first consideration is the intent of the donor, the rule of construction where intent is ambiguous appears to be the third definition: estates measured by individual lives of the members of the class with right of survivorship in the remaining class members.

In *Hannah v. Clark,* n2 the testatrix devised a remainder of the income of the residue of her estate to her grandchildren apparently for their lives, and, in the event her son should have any other child, then that grandchild should participate on the same basis.

On the death of one of the two grandchildren after they were receiving their income shares, the court determined that the other took the class gift by way of survivorship, and the heirs of the deceased grandchild took nothing.

In *Dewire v. Haveles* n3 the testator devised the income of his estate in trust to his widow for life, then to his son, his son's widow and his son's children. The will also provided for the trust's termination twenty-one years after the death of the last surviving child of his son, when the trust property should be equally divided among the lineal descendants of his grandchildren. (This last gift violated the rule against perpetuities.) The court stated that "[b]ecause there is a gift over at the end of the class gift, the testator intended the class gift to his grandchildren only to be a gift of a life interest in the income of the trust." The court also stated that "[t]he general rule is that, in the absence of a contrary intent expressed in the will or a controlling statute stating otherwise, members of a class are joint tenants with rights of survivorship." However, the court found that the will manifested an intent contrary to a class gift with rights of survivorship and gave the interest of one of the grandchildren, when that grandchild died, to his issue by right of representation.

Life estates are also created by operation of law, such as by dower and by the conversion of a fee tail into a life estate by statute.

The owner of a life estate, also called a life tenant (to be distinguished from the common conception of a leasehold tenant who is holder of a non-freehold estate), has a right to possession of the property. This right includes the right to enjoyment, including the right "to take reasonable estovers from the land, that is, wood for fuel, fences, agricultural erections, and other necessary improvements and repairs." n4 It also includes the right to recover possession from a trespasser or one not rightfully in possession, and the right to recover damages for harm caused to the property. There is, however, a difference of opinion among the jurisdictions as to the measure of damages that can be recovered by the life tenant -- the amount of damage to the life estate or the amount of damage to all the interests in the property.

In *Zimmerman v. Shreeve* n5 the owner of a life estate brought an action in trespass for injury to her possession by one who had cut and carried away wood from her property. The court stated that the damages must be measured according to the interest of the plaintiff; "otherwise the plaintiff might get extravagant recompense for the injury to the land, when his interest therein was limited, or upon the eve of expiring, and the defendant might be made liable for the same damages to different persons." The court held that the life tenant would only be entitled to recover for injury she may have sustained in respect of the right of estovers.

In *Rogers v. Atlantic Gulf & Pac. Co.* n6 the court's opinion, concurred in by Justice Cardozo among several others, affirmed a judgment for a life tenant "for all the damages, both to the life estate and to the inheritance, caused by a fire set by the defendant." The court refused to limit the damages to those of the life estate alone, stating,

> it should not be open to the [wrongdoer] to escape liability by asserting the rights of a third party under whom he does not claim... A bailee, though not liable to the bailor, may recover for the wrongful act of a third party resulting in the loss of, or injury to, the subject of the bailment. If the bailee recovers, he holds the recovery as trustee for the bailor.

The court concluded that when the life tenant recovers all the damages, "such a recovery will bar an action by the remaindermen" against the wrongdoer and that the court should "make proper provision for the protection of the rights of remaindermen" against the life tenant such as by requiring security from the life tenant for the principal.

Although the *Restatement of Property* n7 adopts what Moynihan n8 states is the prevailing view that the life tenant can only recover damages sustained as to the life estate and not the full damages to the fee, the better view is to allow full recovery. Since a prior possessor may be entitled to recover the full measure of damages to the property in possession against a trespasser, even though the prior possessor is also a trespasser against another, n9 all the more should a life tenant be entitled to a full recovery.

These rights are subject to those of the other future interest holders of property. Therefore, if damages are collected for harm affecting another's future interest in the property, the life tenant will owe an appropriate share to the future interest holder. Likewise, the life tenant owes a duty to the future interest holders to pay the taxes, exercise care in the use of the property, avoid interference with the rights of future interest holders, such as in the cutting of timber on the property, and prevent waste, such as in the repair of defects that could lead to deterioration of the property. In some jurisdictions severe waste of the property by a life tenant may result in forfeiture of the life estate. There is some difference of opinion, however, on the right of contingent remaindermen to a legal remedy, given the tenuous nature of their interests. n10

In *Zauner v. Brewer* n11 a life tenant leased her estate to a third party and allowed the property to fall into disrepair. The court stated that the life tenant had an obligation to the future interest holder to keep the land and structures in good repair, not excepting ordinary and natural wear and tear:

> The obligation to make ordinary repairs is twofold. The tenant not only has the duty to make the ordinary repairs required to remedy a presently existing condition of substantial disrepair that may have injured the property substantially or permanently, but also has the duty to make any ordinary repairs necessary to prevent the property from progressively declining to the point where its deterioration, and the resultant injury to the inheritance, is substantial and permanent.

Since the plaintiff owned an indefeasibly vested future interest in the property in fee simple absolute, the defendant life tenant owed the plaintiff a duty to make ordinary repairs. By statute the plaintiff not only had a right to equitable relief (injunction to enjoin threatened acts of waste) but also to damages for either voluntary or permissive waste before the termination of the life tenancy.

In *Pedro v. January* n12 parents who died in 1936 and 1939 devised to each of their three daughters an undivided one-third interest in a life estate, and then to the children of each daughter as should survive her an undivided one-third interest, the descendants to take by right of representation, but if any of the daughters should die without issue surviving her, then the property devised to such issue should descent to the other grandchildren by right of representation. In 1964 one-third of the property with standing timber on it was partitioned from the rest for Mary, one of the daughters, and her children. In that same year Mary and her children entered into an agreement to sell the timber standing on the property. After a substantial amount of timber was logged, one of Mary's children, Joseph, died. Joseph's widow and his son by a former wife claimed Joseph's rights, and the son also requested restraint of the cutting of the timber. The court found that Joseph's son had a contingent remainder in the property, Joseph's widow had no interest, and the cutting of timber did constitute waste by the life tenant Mary. The court found that, although damages are not ordinarily given to contingent remaindermen, if the contingency is fairly certain, the court may assess the damages and impound the proceeds to await the outcome of the contingencies. The court stated that the net value of the timber removed was sufficient evidence upon which to award damages and remanded the case with directions to enter a decree directing those who had received proceeds from the timber to disgorge those proceeds which represented Joseph's son's one-ninth contingent interest in the same proportion in which they received them. "Such sums are to be invested by the court and paid to [Joseph's son] should he survive his grandmother, Mary January, or, if [he] predeceases Mary, to such of his lineal descendants, if any, by right of representation as should survive her."

When an adverse possessor enters on property held by a life tenant and satisfies the elements and statutory period to establish title by adverse possession, the title is for a life estate for the life of the original owner. When the original owner dies, the title is terminated, and the adverse possessor is no longer entitled to the property. Adverse possession must begin all over again against the reversioner or the remainderman.

FOOTNOTES:
(n1)Footnote 1. § 19.01 written by Dean John Makdisi.

(n2)Footnote 2. *529 P.2d 154 (Kan. 1974).*

(n3)Footnote 3. *534 N.E.2d 782 (Mass. 1989).*

(n4)Footnote 4. *Zimmerman v. Shreeve, 59 Md. 357, 363 (1882).*

(n5)Footnote 5. *59 Md. 357 (1882).*

(n6)Footnote 6. *107 N.E. 661 (N.Y. 1915).*

(n7)Footnote 7. Restatement of the Law of Property § 118 (1936).

(n8)Footnote 8. Comrlius Moynihan, Introduction To The Law Of Property at 52 n. 1 (2d ed. 1988).

(n9)Footnote 9. *See Illinois & St. Louis R.R. & Coal Co. v. Cobb, 94 Ill. 55 (1879)* (Cobb, a trespasser against owners of the Illinois shore, took possession of an island and fenced in a part of it for pasturage. The railroad company broke down the fence, laid a switch and track across the land, and began to remove sand and soil. Rejecting the *jus tertii* defense by the railroad, the court found that Cobb was entitled to full damages from the railroad for trespass.).

(n10)Footnote 10. Equitable remedies are preferred over monetary relief by some courts. *See, e.g., Sermon v. Sullivan, 640 S.W.2d 486-488 (Mo. App. 1982).*

(n11)Footnote 11. *596 A.2d 388 (Conn. 1991).*

(n12)Footnote 12. *494 P.2d 868 (Or. 1972).*

* This chapter is based in part on Ch. 30, George W. Thompson, Commentaries on The Modern Law of Real Property (John S. Grimes ed. 1979), which made a significant contribution toward preserving the American common law of life estates.

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CHAPTER 19 LIFE ESTATE *

2-19 Thompson on Real Property, Thomas Editions § 19.02

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§ 19.02 Life Estates, Their Nature and Classification.

[Go To Supp]

The legal relation of the ownership of land limited to the owner's lifetime is of ancient origin. n13 It was logical for the sovereign to allot land to followers, their tenure to be dependent upon their loyalty and their rendition of military service. These were probably fees determined upon the tenant's death. It seems probable that such a type of tenure was recognized, if not prevalent immediately after the Norman conquest. n14

These were not life estates as they are recognized today, however. Apparently, the tenant was the absolute owner during life and was not beholden to the sovereign as the holder of the reversion nor to remaindermen for waste. A similar legal relationship may have been intended in the original feoffment to "A and the heirs of his body" n15 before the courts converted this phraseology into a conditional fee, and *de bonis* in turn into a fee tail. Such a property concept would envisage the tenant holding for his lifetime or good behavior all of the rights in the property that could be exercised by one holding in fee simple absolute except the power of inter vivos, or post mortem alienation or of descent to heirs. It is indeed likely that the addition of the words et hereditibus suis were initially intended to convey a series of similar life estates to the heirs of the first grantee, tenure requiring continuing good behavior and loyalty, and possibly a new feoffment to the lord upon the death of the previous terre tenant.

Indeed the long surviving feudal relief of wardship indicates that the original basis of inheritance was the continuing rendition by the heir of the services required of the ancestor. Since the infant heir was not physically and mentally capable of performing these duties, there was a temporary reversion to the lord until the heir became able to carry out the terms of the original feoffment. As the fee simple and the fee tail developed either out of the warranty as Littleton thought, or as a compromise with primogeniture, n16 so did the modern life estate. n17 But the new life estate was not the same as the original feoffment for life.

The history of the development of the life estate as distinguished from what may have early been a fee for the lifetime of the tenant has never been properly traced. Perhaps the life estate as we know it today separated from the former fee for life when the words "et hereditibus suis" became recognized as creating an estate of inheritance, not a mere series of fees determinable on death.

Thus, a conveyance to one without using words of inheritance creates a mere estate in land, not the grant of the land itself. And the feoffor retains an interest in the land, the reversion, rather than a mere right of escheat upon death of the tenant, in the case of the early fee terminable on death or upon the expiration of the family line where the words sibi et hereditibus suis were used.

As the courts came to realize that the reversioner, later the remainderman as well, has an interest in the land which is entitled to protection, the former fee for duration of life sinks with the growth of the doctrine of waste until it reaches the level it was in Littleton's time, a tenancy classed with leases for years. Later, for reasons unknown, the tenancy for a term descends below the freehold level, but this does not elevate the life estate to its one-time status. The liability for waste increases rather than recedes.

The life estate, though a freehold interest, differs from the fee, in addition to its lack of hereditability, in that the tenant has only the right to enjoy the fruits of the property, not the property itself. n18 Thus, he is liable to the reversioner on the remainderman for waste. No such liability exists with respect to a tenant in fee, though the fee be in tail or be defeasible.

Of course, a lessee is also subject to liability for waste virtually to the same degree as is a life tenant. But the life tenant, being a freeholder, stands in a higher degree of relationship with respect to the realty than the lessee. In some states the protective right, and to a considerable extent the protective duty of the life tenant with respect to the realty, is greater than that of the tenant for years. And while the life tenant is not exactly a stranger with respect to the holder of the future interest, n19 yet the life tenant does not owe to the reversioner the fiduciary duty that is owed by the tenant for years to the reversioner, to the extent that the life tenant may not deny the reversioner's title or hold adversely. The life tenant, however, is a fiduciary for the reversioner or remainderman in that the life tenant may not benefit by breach of duty that the life tenant owes with respect to the real estate.

The fiduciary relationship of the life tenant and the remainderman or reversioner runs further to the care and preservation of the property which is in the possession of the life tenant. In this capacity the life tenant has sometimes been ineptly designated a trustee. While it is said that the life tenant has the same interest in the land during the existence of his estate the remainderman has in it after it comes into the latter's possession, n20 this is not accurate. Actually the rights of the life tenant are inferior to those the remainderman or reversioner will possess when they come into possession. n21 Again, rather inaccurately it is stated he has the same interest in the land during the existence of his estate that the remainderman has in it after it comes into the latter's possession, except that the life tenant may not commit waste. n22 This is not correct since the life tenant does not have, in most states, the protective rights with respect to the realty that a fee owner does. Estates *per autre vie* descend to life tenant's heirs. n23

A life estate is an interest in real property, the duration of which is limited by the life of some person. n24 Such person may be the party creating the estate, the tenant himself, or some other person or persons. It may be for an indefinite period which may last for a life. It is of no consequence how uncertain the duration of the estate may be. If it can or may continue during a life, it is a freehold or life estate. It outranks an estate for hundreds of years, because it is said that no one knows how long a man may live. The principal distinction between a tenancy for life and such tenancies as at will, from year to year, and at sufferance is that a tenancy for life confers a freehold upon the tenant, whereas in the other tenancies mentioned the tenant has a chattel interest only. n25 By its very nature a life estate is not an estate of inheritance. n26 But it is primarily a right of possession during life. n27

A life estate is a freehold estate, n28 irrespective of whether it is for the tenant's own life or for the life of another person, n29 but it is not an estate of inheritance. n30 Its longest possible duration is limited by the life or lives of one or more designated persons. n31 Such an estate may be made to depend upon a contingency, upon the happening of which the estate may be defeated before the death of the grantee. n32

It is held that a life estate in land is "real property," enabling the owner to sell or encumber it, and, if it be non-exempt property, it may be attached for the owner's debts or levied upon by execution and sold. n33 "A 'life estate' is a freehold estate not of inheritance, which is held by a tenant for his own life or the life or lives of one or more other persons, or for an indefinite period, which may endure for the life or lives of persons in being, and not beyond the period of the life." n34 It is a freehold, not a chattel interest, within statutes requiring a construction of the words "real estate," and land in statutes as meaning any interest in land other than a chattel interest and prohibiting a conveyance of a freehold estate in realty except by deed or will. n35

Life estates *per autre vie* were originally treated as chattels real, n36 but later became freeholds. n37 In England after the death of the grantee it went to the heir as a special occupant if not devised, and not to the personal representatives of the deceased. n38 In some states by statute it is created as a chattel real after death of the donee. n39

At common law there were two classes of life estates: first, conventional life estates or those which were created by contract, and second, those which came into existence by operation of law, termed legal life estates. n40 The first class, or conventional life estates, is subdivided into four groups as: (1) estates for one's own life; (2) estates for the life of another; (3) determinable life estates as estates for an uncertain period which may last for life; and (4) estates tail after possibility of issue extinct. The second class, or legal life estates, is subdivided into four groups as: (1) the husband's estate during coverture; (2) curtesy; (3) dower; and (4) homesteads.

A life estate can be created in personal property as well as in real estate. n41 A devise to X directing him to share the income with Y for her lifetime merely creates a charge in favor of Y and not a lease, a lien or a trust. n42 A life estate is a recognized legal category, and from the fact of its existence, established legal consequences flow. n43 A life estate measured on the life of the life tenant passes nothing to the life tenant's heirs on death. n44

FOOTNOTES:

(n1)Footnote 13. For an example of such holding, *see* Godfrey Rolles Driver & John Charles Miles, The Assyrian Laws, 293 (1935).

(n2)Footnote 14. 2 William Searle Holdsworth, History of English Law, 120 (3rd ed. 1938).

(n3)Footnote 15. *See* S. J. Bailey, *Warranties of Land in the Thirteenth Century, 8 Camb. L.J. 274 (1944).*

(n4)Footnote 16. Theodore F. T. Plucknett, A. Concise History of the Common Law 528 (5th ed. 1956).

(n5)Footnote 17. Littleton devotes but two short paragraphs to life estates, § 56, 57, indicating that they were then of but little importance.

Littleton, Tenures, § 56:

> Tenant for term of life is, where a man letteth lands or tenements to another for terme of the life of the lessee, or for terme of the life of another man. In this case the lessee is tenant for terme of life. But by common speech he which holdeth for terme of his owne life, is called tenant for terme of his life, and he which holdeth for terme of another's life, is called tenant for terme of another man's life (tenant pur terme d'auter vie).

Coke on Littleton, § 42a:

> If a man grant an estate to a woman dum sola fuit, or durante viduitate, or quamdiu se bene gesserit, or to a man and a woman during the coverture, or as long as the grantee dwell in such a house, or so long as he pay XL, &c. or until the grantee be promoted to a benefice, or for any like incertaine time, which

> time, as Bracton saith, is tempus indeterminatum: in all these cases, if it be of lands or tenements, the lessee hath in judgment of law an estate for life determinable.

See 2 Holdsworth, *supra* note 14 at 120; 3 Holdsworth 120-121; 2 Frederick Pollock & Frederic William Maitland, A History of English Law Before the Time of Ewdard I 307.

(n6)Footnote 18. *Medlin v. Medlin, 203 S.W.2d 635 (Tex. Civ. App. 1947).*

The existence of a life estate is as effective to insure exclusive control and possession as is title in fee. *South Miss. Elec. Power Ass'n v. J. F. Miller Timber Co., Inc., 314 So. 2d 346 (Miss. 1975).*

Life estate being a freehold interest is subject to sale or mortgage. *Michie v. National Bank of Caruthersville, 558 S.W.2d 270 (Mo. App. 1977).*

(n7)Footnote 19. So the life tenant may hold adversely to the reversioner or remainderman, but only after due notice.

(n8)Footnote 20. *English v. Carter, 189 S.W.2d 839 (Ky. 1945).*

(n9)Footnote 21. *Mitchell v. Mitchell, 235 S.W.2d 744 (Tex. Civ. App. 1950), rev'd, 244 S.W.2d 803 (Tex. 1951).*

(n10)Footnote 22. *English v. Carter, 189 S.W.2d 839 (Ky. 1945).*

(n11)Footnote 23. *Collins v. Held, 369 N.E.2d 641 (Ind. App. 1977).*

(n12)Footnote 24. *In re Smythe's Estate, 282 P.2d 141 (Cal. App. 1955).*

Life estate in personal property. *In re Tognotti's Estate, 262 N.E.2d 803 (Ill. App. 1970).*

Devise in fee providing others use of the property for their lifetimes created valid life estates. *Babb v. Rand, 345 A.2d 496 (Me. 1975).*

(n13)Footnote 25. *Thompson v. Baxter, 119 N.W. 797 (Minn. 1909); Disley v. Disley, 75 A. 481 (R.I. 1910).*

(n14)Footnote 26. *Hampton v. Hampton Holding Co., 111 A.2d 761 (N.J. 1955).*

(n15)Footnote 27. *Kanawha Banking & Trust Co. v. Alderson, 40 S.E.2d 881 (W. Va. 1946).*

Such military life estates are found in Ptolemaic times in the deruch holdings. Rafal Taubenschlag, The Law of Greco-Roman Egypt in the Light of the Papyri 236 (1944).

Later, by making their sons as cotenants and naming them successors by will the estates gradually became descendible, and it is possible that the house of David held Jerusalem in such a military fief. If so, the story of David and Saul becomes the revolt of a feudal baron against his king, an event common enough in the Orient as well as in the West. *See* Gibbon, Decline and Fall of the Roman Empire, and Diehl, Byzantium, Greatness and Decline.

(n16)Footnote 28. *Randolph v. Wilkinson, 128 N.E. 525 (Ill. 1920); Beeman v. Stilwell, 189 N.W. 969 (Iowa 1922); Brandenburg v. Petroleum Exploration, 291 S.W. 757 (Ky. 1927); Hampton v. Glass, 116 S.W. 243 (Ky. 1909)* (a life estate is a freehold and not a chattel interest); *Cannon v. Carr, 168 S.W.2d 21 (Ky. 1943); English v. Carter, 189 S.W.2d 839 (Ky. 1945); Reece v. Van Gilder, 272 S.W.2d 177 (Mo. 1954); McFarland v. State, 160 N.Y.S.2d 247 (1957); Harwell v. Harwell, 271 S.W. 353 (Tenn. 1925).*

See Restatement, Property, Div. II, intro. note.

Right to make "a home" on the premises created a mere right of occupancy, not a life estate where words "use and occupancy" were not used. *Rizzo v. Mataranglo, 135 N.Y.S.2d 92 (1953).*

A direction that property be kept as a home for certain children by the devisee created an easement, not an estate in land. *Baldesberger v. Baldesberger, 105 A.2d 713 (Pa. 1954).*

Grant of permission to remain on land for an indefinite period rent-free was not a life estate. *Sands v. Union Camp Corp., 235 S.E.2d 605 (Ga. App. 1977).*

Life estate being a freehold interest is subject to sale or mortgage. *Michie v. National Bank of Caruthersville, 558 S.W.2d 270 (Mo. App. 1977).*

In New York a life estate is assignable and subject to claim to creditors if legal. *In re Seidman's Will, 389 N.Y.S.2d 729 (1976).*

(n17)Footnote 29. *Jeffers v. Easton, Eldridge & Co., 45 P. 680 (Cal. 1952); Stoffels v. Stoffels, 86 A.2d 806 (N.J. Super. 1952); In re Atkinson's Will, 91 N.Y.S.2d 631 (1949).*

(n18)Footnote 30. *Harwell v. Harwell, 271 S.W. 353 (Tenn. 1925). See* Restatement, Property, § 18.

(n19)Footnote 31. *Roberts v. Roberts, 29 N.E. 886 (Ill. 1892); Gilmore v. Hamilton, 83 Ind. 196 (1882); Beeman v. Stilwell, 189 N.W. 969 (Iowa 1922); Hurd v. Cushing, 24 Mass. (7 Pick.) 169 (1882); Miller v. Gilbert, 38 N.E. 979 (N.Y. 1894); Warner v. Tanner, 38 Ohio St. 118 (1882); In re Brotzman's Estate, 19 A. 564 (Pa. 1890).*

See Brandenburg v. Petroleum Exploration, 291 S.W. 757 (Ky. 1927); In re Cochrane's Estate, 190 N.Y.S. 895 (1921); Harwell v. Harwell, 271 S.W. 353 (Tenn. 1925). See also Restatement, Property, § 18, cmt. b.

Direction in devise that one be given a home on the property created a privilege, not an estate, and privilege was abandoned on departure. *Baldesberger v. Baldesberger, 105 A.2d 713 (Pa. 1954).*

(n20)Footnote 32. *Tallent v. Tallent, 267 Ill. App. 334 (1932). See* Restatement, Property, § 18, cmt. b. "As long as she remains my widow" interest terminated on remarriage. *Rhodus v. Proctor, 433 S.W.2d 625 (Ky. 1968).*

(n21)Footnote 33. *Alexander v. Goellert, 109 P.2d 146 (Kan. 1941).*

(n22)Footnote 34. *Weekley v. Weekley, 27 S.E.2d 591 (W. Va. 1943).*

(n23)Footnote 35. *Cannon v. Carr, 168 S.W.2d 21 (Ky. 1943); Laflamme v. Hoffman, 95 A.2d 802 (Me. 1953).*

See Robert T. Milner, *Evaluating Life Estates and other Calculations, 7 Ala. Law 5 (1946);* Note. *Valuation of a Widow's Life Estate for Election Purposes, 11 Wyo. L.J. 113 (1957).*

Under the arbitrary English rule, now abolished, a life estate was one-third the value of the remainder. *Keniston v. Gorrell, 64 A. 1101 (N.H. 1906).*

(n24)Footnote 36. Bracton, ff. 13b, 27, 263; Fleta, 193, 289.

(n25)Footnote 37. 2 Pollock & Maitland, *supra,* note 17, 81.

(n26)Footnote 38. Atkinson v. Baker, 4 Term 229, *100 Eng. Rep. 989.*

(n27)Footnote 39. New York Real Property Law, § 34. Hence it is subject to the donee's debts.

The Statute of Frauds, 29 Car. 2, ch. 3 permitted an estate per autre vie to pass to the deceased owner's administrator.

(n28)Footnote 40. *Swayne v. Lone Acre Oil Co., 86 S.W. 740 (Tex. 1905). See In re DuPuy's Estate, 29 A.2d 689 (Pa. 1943). See also Breaux v. Breaux, 51 S.2d 73 (La. 1950),* as to difference between "substition" and "fider commissira."

Life estates defined. *Ackerman v. State, 102 N.Y.S.2d 536 (1951); Briggs v. Briggs, 45 N.W.2d 62 (S.D. 1950).*

(n29)Footnote 41. *Heintz v. Parsons, 9 N.W.2d 355 (Iowa 1943); In re Thompson's Will, 43 N.Y.S.2d 392 (1943); In re Shailer's Estate, 266 P.2d 613 (Okla. 1954).*

(n30)Footnote 42. *Ogle v. Durley, 77 So. 2d 688 (Miss. 1955).*

(n31)Footnote 43. *Hartman v. Drake, 87 N.W.2d 895 (Neb. 1958)*(life estate is a freehold).

Tenancy *per autre vie* was not a freehold estate. 1 Emory Washburn, Real Property (5th ed. 1887), 123.

A life estate is a freehold interest in land and is of a duration which is confined to the life or lives of some particular person or persons or to the happening or not happening of some uncertain event. *Long v. Horton, 133 N.E.2d 568 (Ind. App. 1956).*

(n32)Footnote 44. *Overpeck v. Dowd, 364 N.E.2d 1043 (Ind. App. 1956).*

* This chapter is based in part on Ch. 30, George W. Thompson, Commentaries on The Modern Law of Real Property (John S. Grimes ed. 1979), which made a significant contribution toward preserving the American common law of life estates.

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CHAPTER 19 LIFE ESTATE *

2-19 Thompson on Real Property, Thomas Editions § 19.03

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§ 19.03 Creation of Conventional Life Estates.

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Conventional life estates, those arising through execution of instruments, have four methods of creation: (a) by failure to use words of inheritance; (b) by reservation in an instrument transferring a remainder; (c) by language giving the donee rights which are the equivalent of a life estate; n45 and (d) by expressly limiting the donee's interest to his lifetime. Under the common-law rule, a devise to one generally, without words of inheritance, passed an estate for life only, unless the context showed an intention to create a greater interest. n46

Virtually all of the states have, by statute avoided the common law rule that a conveyance to a named individual or individuals, without the use of words of limitation, created only a life estate. Under the statutes of most states the word "heirs," or its equivalent, is not necessary to create an absolute estate. Every conveyance, properly executed, will be construed to convey the fee, unless a lesser estate is mentioned and limited in it. If a lesser estate is expressly limited, the courts will not, by construction, increase such estate into a fee simple, but, disregarding the technical rules of the common law, will give effect to the intention of the maker of the instrument, if such intent can be gathered from its contents. n47

In a few states, however, these statutes refer only to conveyances, thus leaving the common-law presumption intact in the case of wills. In these states, if there is a devise to A, there is a rebuttable presumption that A took only a life estate. n48

Under the early common law, the same formalities were required in creating a life estate as were required to create a fee. There had to be livery of seisin, and as life estates were for a long time the only estates held by tenants, these feudal rites and ceremonies originated with the creation of such estates. Now that these rites are no longer practiced, a simple conveyance or devise to one for life gives him such estate and the right to possession and enjoyment thereof, if the grantor or devisor had such immediate right. At common law, a grant or devise to A without words of inheritance gave an estate for A's own life. n49 The use of the word "heirs" was necessary to convey a fee simple, and if the word "heirs" was absent the estate created was construed to be a life estate, because that was the largest estate that could be granted without proper words of inheritance. n50

The word "issue" is ambiguous and requires parol explanation as to the testator's intent. n51

As a general principle, estates which are terminable at the will of the grantee alone are life estates, if they may last for a lifetime. n52 If it is terminable at the will of the grantor it is but a tenancy at will. n53 But if it is terminable by mutual agreement the courts are not in accord as to whether it is a tenancy at will or a life estate. n54 One line of authority holds that a grant of the premises as long as the grantee desires to inhabit creates a life estate; n55 other cases treat this as a tenancy at the will of the lessee. n56

Where there is a question as to whether the grantee or devisee took a life estate or a fee, the courts favor the greater estate. n57 But if the issue is between a life estate and a lien, charge, easement or license the life estate finds favor. n58 The cases are divided as to whether a limitation to one during widowhood or "as long as she remains my widow" or similar language creates a determinable life estate or a determinable fee. n59

A life estate may be implied if the will, construed as a whole, discloses such to have been the intention of the testator, though apt operative terms were used. n60 The construction of a will so as to carry out the testator's intention may require recognition of a life estate even though such estate is not created in definite terms. In other words, the provisions of the will may be such as to give rise to a life estate by implication. n61 Thus, a life estate is implied from a devise over after the death of a person named. n62

At common law, a devise to A on the death of B implied no life estate in B unless A was the heir of the testator. n63 Now the rule gives B a life estate only if the remainder is to the whole body of the testator's heirs. n64

Under a statute making the use of words "heirs and assigns" unnecessary to create an estate in fee simple, the use of such words does not defeat a testator's intention to devise an estate for life, where he makes a devise over to another other than the life tenant. n65 An intention to convey a life estate, expressly or clearly implied, will be upheld though words of inheritance be not used. n66

Where the estate devised is not defined in terms, a limitation over on the devisee's death will be construed as indicating that the testator intended to give the devisee a life estate. n67 The rule of the common law operated in favor of the heir, and usually defeated the intention of the testator. This rule has been modified by statutory enactment in many states, n68 so the rule now generally prevailing is to the effect that an unqualified devise without words of inheritance carries a fee or a lesser estate if the testator has such lesser estate only in the property devised. n69 In some states, however, the common law rule seems to obtain. n70

A life estate may be created by a deed, lease or devise, either with or without a stipulation for the payment of rent, n71 and it may arise either by express words of the instrument n72 or by implication. n73 No particular words are essential in the creation of a life estate, as any language which manifests an intention that the estate created shall be of such a character is sufficient for the purpose. n74 The duration of the created estate is not determined by specific words, provided the ending of the lives may be ascertained without unreasonable difficulty. n75 Such an estate may be created subject to a special limitation, a condition subsequent, an executory limitation or a combination of such restrictions. n76 Any language in a conveyance which sufficiently shows the grantor's intention will be sufficient to create such estate. n77 Though a will does not, in terms, devise a life estate to the first taker, if from the entire will a reasonable inference is that the devisee's estate was intended to be restricted to a life estate, it will be so construed, and the limitation over will be given effect. n78 A devise of use and occupancy for life was a life estate. n79

A life estate subject to be determined by the happening of a named event is created by a grant made in general terms without limitation in point of time. n80 Life estates may be implied for federal estate tax purposes in retention of possessory interests by the grantor. n81

Frequently, devises are made to a named beneficiary after the death of another, as a devise "to my children after the death of their mother." If the testator had died intestate, his children or some one of them would have inherited the estate as heirs immediately on testator's death; but the will seems to postpone their rights, at least as to possession and enjoyment, until their mother's death. So the mother is by construction or implication made a tenant for life, and the children are regarded as remaindermen. n82 However, if the devise had been to a stranger after the death of some person named, this stranger has no right to enter on testator's death, no estate is vested by implication, and, until the death of the person named, the heirs have the right of possession and enjoyment. n83

Where a life estate is created in one part of a will in clear and unmistakable language, such estate will not be cut down to a lesser estate by vague and doubtful language in another part of the will. n84 "Where there is a devise to one in general terms only, expressing neither fee nor life estate, and a subsequent limitation over of what remains at the taker's marriage, and if there is also given to the taker an express power of disposition, which is not absolute, but is limited as to its exercise, the devise is construed to pass a life estate only." n85 Gifts of successive life estates have been sustained. n86

A life estate only will be given in the absence of a remainder over where the terms of the will clearly show that a life estate was intended. n87 A devise to his wife of all the testator's property, to have the use and control thereof in her own right, as long as she remained the testator's widow, granted to the widow a life estate only subject to her remarriage. n88 When the life estate is terminated the remainder, not otherwise disposed of by the will, reverts to the testator's estate as intestate property to be distributed to the testator's heirs at law. n89

At common law, words of inheritance were necessary to create a fee, and the omission of such words rendered the conveyance one for life merely. If the grantor in such case was the owner in fee at the time of the conveyance, an estate for the life of the grantee passed. n90 Where words of inheritance are not used in a conveyance by a tenant by curtesy initiate, it will pass an estate for the life of the grantor. n91 The common-law rule has been modified by statute and judicial construction, so that the rule now prevailing is that a grantee takes all the interest of the grantor or testator, unless a different intention is clearly expressed. Where words of inheritance are not used, the entire context of the instrument may be considered, and every word used, wherever found, must, if possible, be given weight in determining the estate granted. n92

Although words of inheritance are not necessary to create a life estate, in the absence of words descriptive of the quantity of an estate given, the testator's intent must be determined by construction. n93 Although words of inheritance may be used in a deed, the circumstances may be such that a life estate only will pass. Thus, where it is clear from the context of the instrument that the grantor used the word "heirs" or "bodily heirs," in the sense of children, it will be so construed. n94 Where the granting clause in deed conveyed lands to the grantee and his heirs, and the habendum clause limited the grant to a life estate, it was held that the grantor intended to convey a life estate only to the grantee, with remainder to the grantee's widow and children. n95 Thus, in a deed from parents to their daughter "and her bodily heirs," the words "bodily heirs" were held synonymous with "children," and it was held that a life estate only passed to the daughter and the remainder to her children. n96 It has been held that a deed which contains no habendum clause and in which the word "heirs" is omitted from the granting clause and used only in the warranty conveyed only a life estate. n97

Under the operation of some modern statutes, a deed which would have conveyed an estate tail at common law will pass a life estate only to the first taker. n98

So the rule generally prevails that a conveyance, with words of inheritance, to a woman and her children will pass a life estate to her, with remainder to her children, if any other construction would defeat the apparent intention of the grantor. n99 A grantee will take a life estate only, even though the deed contains words of inheritance, if it appears from the deed that such was the grantor's intention. n100 A deed granting real estate to a named person and at her death to her four named children, with habendum and warranty clauses running to "grantees," was held to have conveyed to the

first-named person a life estate, with remainder to her four named children. n101 Under a deed conveying in terms a life estate to the grantor's daughter and at the latter's death the property was to become "the absolute property of my grandson," it was held that the grandson took a life estate only, as there was no limitation to heirs. n102 In states where the rule in *Shelley's Case* is a part of the law, if an estate for life is granted by an instrument and the remainder is limited by the same instrument, either mediately or immediately, to the heirs of the life tenant, the life tenant takes the remainder as well as the life estate. n103

A will devising real estate to testator's daughter, and providing that at her death the realty should be sold and the proceeds divided equally between the testator's two sons, the daughter took a life estate with remainder in fee to the sons. n104

Where *Shelley's Case* is the law, when an estate is devised to one for life with remainder to his heirs, the law, by arbitrary rule, vests the whole estate in the ancestor. n105 By statute in some jurisdictions such a devise will not enlarge the first taker's estate into a fee. n106 Before a court can conclude that a testator who made a devise to his daughter for life and after her death "to her lawful heirs" employed the word heirs in a sense different from that assigned to it by the law, there must be something in the context manifesting a clear intention to have employed the word as one of purchase, and not of limitation. n107

Likewise in states where *Wild's Case* is not followed, a grant to "A and his children," or to "A and his heirs" where heirs is used in the sense of children, either gives A and one's children a cotenancy or creates a life estate in A with remainder over. So, where a deed conveyed property to one and his children, the grantee takes only a life estate with remainder to the children, unless it appears from the entire deed that the grantor used the word "children" in the technical sense of the word "heirs." n108 Where a deed conveys a fee-simple title a life estate cannot be reserved. n109

Where a will bequeathed certain property to a woman for life, with remainder to her legal heirs, it was held that the rule that where a party would take by descent the same estate that a devise purported to give him, he would take the land by descent, and not by devise, did not apply, since such heirs did not take the same estate under the will as they would take by descent, and, hence, the estate did not vest in the woman and her heirs, so as to convert her life estate into a fee. n110 The word "issue," in a devise to one for life with remainder to his issue will be construed as a word of purchase or of limitation as will best carry out the manifest intention of the testator. n111

Although an Indiana court has said that "in the absence of explanatory words showing that the word 'issue,' when used in a devise, was used in a restrictive sense, it will be construed as a word of limitation" but that "if ... the language of the will in which the word 'issue' is used shows that it is to be applied only to children or descendants of a particular class, it will be construed as a word of purchase, and not of limitation, in order to effectuate the intention of the testator." n112

According to the Supreme Court of Pennsylvania, "while 'issue,' when used in a devise, has been held time and again to mean the same as 'heirs of the body,' yet such construction was adopted only on the theory that the word was probably so intended by the testator, and not with the idea that the term 'issue,' of and in itself, is the equivalent of the technical phrase, 'heirs of the body.'" n113

In a devise to one for life with remainder to one's "children," the first taker will have a life estate in the absence of anything in the context indicating that the testator intended the word "children" in the sense of "heirs." n114 In Pennsylvania it is consistently held that a devise to A and A's children gives a life estate to A with remainder to A's children. n115 A devise to testator's wife and two daughters for the life of the wife, with remainder to the two daughters and their children, was held to pass a one-half interest for her life to the wife, an undivided one-half interest for life to each daughter, with remainder in each share to the children of that daughter, the daughters taking severally, and that no cross remainders could arise by implication. n116 In its technical sense, the word "children" is presumptively a word of purchase and not of limitation and, generally speaking, such word will not be regarded as a word of limitation unless the will's other language shows it to have been used in the sense of "issue" or as standing for the whole line of direct

succession. n117

The reservation of a life estate in land granting the fee is not void as repugnant to the grant. n118 Deeds retaining an interest in the grantor may also be challenged as being intended to be testamentary dispositions. n119 Thus, a reservation of a life estate to the grantor in a deed of realty was held to operate to seize the grantor of a life estate and vest the remainder in the grantee by operation of law. n120 Though the language used by the grantor in the reservation be "all the right, title, and interest in and unto the above-named land and buildings for and during my natural life," no inference can be drawn that anything more than a life estate was intended to be reserved. n121 The reservation may be to the wife of the grantor, n122 to himself and his wife or the survivor, n123 or he may reserve a power to create a life estate for the benefit of another in the land conveyed. n124 As a general rule, the reservation must be in favor of the grantor and not of a stranger, but there are cases holding that the reservation may be in favor of a stranger. n125 Even a declaration that the deed shall not go into effect until the death of the grantor is generally construed as a present conveyance of the fee to the grantee who is subject to a life estate in the grantor. n126 A deed conveying a fee simple subject to a life estate in the grantor, reserving to the grantor the right to mortgage, sell or otherwise dispose of the property, is void. n127

A provision in a deed specifically reserving a life estate, title to vest in the grantee at the grantor's death, was held not to postpone the vesting until the grantor's death, but passed an immediate interest or right, with enjoyment thereof postponed. n128 A deed conveying land to a named person and his children, their heirs and assigns, with a reservation to the grantor of the use and control of the land so long as he lived, was held to create a life estate to the named grantee, with remainder in fee to his three children, though only one of them was in being at the time the deed was executed. n129 The provision in a deed that the grantor reserved unto himself the use of the premises during his lifetime effectively reserved to the grantor a life estate which in itself did not prevent the passing of the fee to the grantee. n130

Where a deed conveyed real estate to the grantor's son and his heirs, but provided that the grantor should have, hold and control the property until his death and that it should revert to the grantor and his heirs in the event the grantee died without issue, it was held that the grantor could not convey a fee simple title to the grantee, but only a life interest to take effect on the grantor's death, with reversion to the grantor's estate if the grantee died without issue. n131 A deed which purported to convey real estate to two named persons during their lives, "then to their heirs and assigns," was held to create a life estate in the persons named and a remainder over to such children as were in being at the time of the vesting of the estate. n132

Under the more modern rule an estate per autre vie descends to a life tenant's heirs. n133 Under the common law a life estate could not descend nor be devised.

COMPUTER-ASSISTED RESEARCH

LEXIS: creat! w/15 life estate!

FOOTNOTES:
(n1)Footnote 45. *Johnston v. Gibson, 334 P.2d 348 (Kan. 1959)*(grant of a "home" on the premises requires physical occupation during balance of life); *Cook v. Daniels, 306 S.W.2d 573 (Mo. 1957)*(grantor can reserve a life estate); *Anders v. Anderson, 97 S.E.2d 415 (N.C. 1957)*(gift of estate subject to husband having a home as long as he wishes to live there was a life estate with remainder); *Cassina v. Jones, 340 P.2d 482 (Okla. 1959)*(life estate may arise only by deed, will, lease or written contract).

Gift of income for life was a life estate. *Fort v. Fort, 156 S.E.2d 23 (Ga. 1967).*

"Reserving ... the use of our home to my husband ... for and during his natural life, or as long as he shall have need of the same" in a devise in a will gave the husband a life estate not a mere privilege. *La Rosa v. McVicker, 137 A.2d 861*

(Pa. Super. 1958).

(n2)Footnote 46. *Lambert v. Paine, 7 U.S. (3 Cranch) 96 (1805); Wright v. Den ex dem. Paige, 23 U.S. (10 Wheat) 204 (1825); King v. Ackerman, 67 U.S. (2 Black) 408 (1863); Meins v. Meins, 123 N.E. 554 (Ill. 1919); Oliphant v. Pumphrey, 141 N.E. 517 (Ind. 1923); In re Oertle's Will, 24 N.W. 924 (Minn. 1885); Lummus v. Mitchell, 34 N.H. 39 (1856); Kleaver v. Jacobs, 152 A. 919 (N.J. 1930); Burr v. Sim, 1 Whart. 252 (Pa. 1836).*

See Thompson G. Marsh, *When Is a Life Estate Not a Life Estate in Colorado, 43 Denver L.J. 173 (1966).*

(n3)Footnote 47. *Cooper v. Mitchell Inv. Co., 66 S.E. 1090 (Ga. 1910); Rupert v. Penner, 53 N.W. 598 (Neb. 1892); Loosing v. Loosing, 122 N.W. 707 (Neb. 1909); Smith v. Proctor, 51 S.E. 889 (N.C. 1905); Triplett v. Williams, 63 S.E. 79 (N.C. 1908).*

A desire expressed in a will that testator's servants be permitted to live in their quarters as long as they wished did not create a life estate. *Lewis v. Atkins, 105 N.E.2d 183 (Ind. App. 1952).*

"To be kept as a home" created a privilege not an estate and privilege was abandoned on departure. *Baldesberger v. Baldesberger, 105 A.2d 713 (Pa. 1954).*

"Continue to live in my home" held a right of occupancy and not a life estate. *Cruse v. Reinhard, 208 S.W.2d 598 (Tex. Civ. App. 1948).*

(n4)Footnote 48. Limitation over on death of first taker gives only a life estate. *Miller v. O'Neal, 361 N.E.2d 1165 (Ill. 1977).*

(n5)Footnote 49. 2 William Blackstone, Commentaries 120, 121. *McAleer v. Schneider, 2 App. D.C. 461 (1894); Randolph v. Wilkinson, 128 N.E. 525 (Ill. 1920); Truesdell v. Lehman, 20 A. 391 (N.J. 1890); Jackson ex dem. Ludlow v. Myers, 3 Johns. 388 (N.Y. 1808); Jackson ex dem. Newkirk v. Embler, 14 Johns. 198 (N.Y. 1817); Jordon v. Neese, 15 S.E. 202 (S.C. 1892); Holliday v. Overton, 15 Beav. 480, 21 L.J. Ch. 769, 10 Eng.Rul.Cas. 836.*

(n6)Footnote 50. *Penienskice v. Short, 194 A. 409 (Del. 1937).*

(n7)Footnote 51. *Holter v. First Nat'l Bank & Trust Co. of Helena, 336 P.2d 701 (Mont. 1959).*

"Issue" means actual physical offspring, not adopted children. *In re Kay's Estate, 260 P.2d 391 (Mont. 1953); In re Miller's Trust, 323 P.2d 885 (Mont. 1958).*

(n8)Footnote 52. *Sweetser v. McKenney, 65 Me. 225 (1875); Ely v. Randall, 70 N.W. 980 (Minn. 1897); Disley v. Disley, 75 A. 481 (R.I. 1910).*

Will to widow to hold estate intact and use for benefit of herself and children, and after her death to the children with power to sell or dispose of property and use for benefit of children, gave widow a life estate and remainder to children, wife holding in trust for the children. *Lawrence v. Lawrence, 283 S.W.2d 697 (Ark. 1955).*

Defeasible life estates may be created. *Mid-State Homes, Inc. v. Johnson, 128 S.E.2d 197 (Ga. 1962),* and is an estate of freehold. *Tobias v. State Tax Comm'n, 378 P.2d 628 (Idaho 1963).*

An estate measured by the life of a tenant is a life estate, though subject to earlier defeasance. *Tobias v. State Tax Comm'n, 378 P.2d 628 (Idaho 1963).*

"To my grandson and at his death to his heirs, and if he die without heirs then to my other grandchildren" gave the

grandchild only a life estate, not a fee. *Cheuvront v. Haley, 444 S.W.2d 734 (Ky. 1969).*

Devise to X, and after she was through with it to Y, gave X only a life estate. *In re Knickell's Will, 185 N.E.2d 93 (Ohio 1961).*

Reservation of the use of a home during life or as long as needed therefor is a life estate and not merely personal privilege. *La Rosa v. McVicker, 137 A.2d 861 (Pa. Super. 1958).*

Devise of residence to one for life or as long "as she may desire to reside therein" did not create a life estate. In re Spencer's Estate, 30 D. & C. 2d 68 (Pa. 1962).

(n9)Footnote 53. *Conley v. Gaylock, 108 S.E.2d 675 (W. Va. 1959),* where a lease was to be terminated only by the tenants' inability to pay the monthly rental, or a decision to move to another location, and the tenant built on the property, court held there was created a freehold estate approximating a tenancy for life, the lease did not violate the rule against remoteness and was not a tenancy at will, since the lessee had a present subsisting interest based on adequate consideration.

To brother to use as he sees fit and at his death the residue to another created only a life estate. *Walker v. Clements, 221 S.E.2d 138 (Va. 1976).*

(n10)Footnote 54. *Lepsch v. Lepsch, 90 N.Y.S.2d 157 (1949)*(tenancy at will); *Disley v. Disley, 75 A. 481 (R.I. 1910)*(life estate); *Richardson v. Langridge, 4 Taunt. 128, 128 Eng. Rep. 277 (1811)*(tenancy at will).

(n11)Footnote 55. Foster v. Joice, F. Cas. No. 4, 974 (Cir. Ct. D. N.J. 1819)(so long as the waters of the Delaware shall run); *Hurd v. Cushing, 24 Mass. (7 Pick.) 169 (1828)*(so long as the salt works continue in operation); *Ely v. Randall, 70 N.W. 980 (Minn. 1897); Thompson v. Baxter, 119 N.W. 797 (Minn. 1909); Thomas v. Thomas, 17 N.J. Eq. 356 (1866)*(may desire to occupy the same as a drug store); *People ex rel. Norton v. Gillis, 24 Wend. 201 (N.Y. 1840); Roseboom v. Van Vechton, 5 Denio 414 (N.Y. 1848); Warner v. Tanner, 38 Ohio St. 118 (1882); Bowman v. Brown, 149 A.2d 56 (Pa. 1959)*(to wife as long as she sees fit to remain on the premises); Mickie v. Lawrence, 5 Rand 571 (Va. 1827) (so long as tenant should pay the stipulated rent); *Robinson v. Caldwell, 105 S.E.2d 852 (Va. 1958)* (devise to Y and "at her death" to X gave a life estate in Y with remainder to X and not a fee in Y).

An estate terminable at the will of the grantee is a life estate, *Sweetser v. McKenney, 65 Me. 225 (1875),* as is an estate terminable by mutual agreement, *Disley v. Disley, 75 A. 481 (R.I. 1910).* But an estate to continue only so long as both parties mutually agree is a tenancy at will. *Lepsch v. Lepsch, 90 N.Y.S.2d 157 (1949).*

Bequest to the property "to use as he sees fit" created only a life estate. *Walker v. Clements, 221 S.E.2d 138 (Va. 1976).*

(n12)Footnote 56. *Foley v. Gamester, 170 N.E. 799 (Mass. 1930); Thompson v. Baxter, 119 N.W. 797 (Minn. 1909).*

Promise to a will contestant to allow one to live on property as long as she wanted was a license not a life estate. *Day v. Tribble, 210 S.E.2d 764 (Ga. 1974).*

(n13)Footnote 57. *Allen v. McKee, 148 N.E.2d 343 (Ind. App. 1958); Martin v. Eslick, 90 So. 2d 635,* (Miss. 1956).

Parol evidence to show testator intended to create a life estate instead of a fee. *Barth v. Citizens Fid. Bank & Trust Co., 368 S.W.2d 339 (Ky. 1963).*

(n14)Footnote 58. *La Rosa v. McVicker, 137 A.2d 861 (Pa. Super. 1958); Spicely v. Jones, 101 S.E.2d 567 (Va.*

1958).

A warranty deed to grantee and his wife with full power of alienation but if the grantee survived he was to take the entire estate and if the wife survived she was only to take a life estate, the remainder to the grantee's heirs gave a life estate in the wife despite a power of alienation. *Leach v. Dick, 326 S.W.2d 438 (Tenn. 1959).*

A lease which provides that the lessee shall continue in possession until the lease is terminated by the lessee created a life estate. *Shanahan v. Collins, 539 P.2d 1261 (Colo. 1975).*

(n15)Footnote 59. 2 William Blackstone, Commentaries 121. "Durante viduitate" created a determinable life estate. Determinable life estate.

Dickson v. Alexandria Hosp., 177 F.2d 876 (4th Cir. 1949); McCray v. Caves, 88 S.E.2d 373 (Ga. 1955); Kratz v. Kratz, 59 N.E. 519 (Ill. 1901); Phelps v. Seeley, 119 N.E.2d 923 (Ill. 1954); Quaas v. Quaas, 92 S.W.2d 427 (Iowa 1958); White v. Hogge, 291 S.W.2d 22 (Ky. 1956); Metcalf v. First Parish in Framingham, 128 Mass. 370 (1880); In re Yulee's Will, 99 N.Y.S.2d 14 (1950); Blackwood v. Blackwood, 76 S.E.2d 122 (N.C. 1953); In re Doersch's Estate, 72 N.E.2d 806 (Ohio 1947); Banks v. Banks, 229 S.W.2d 99 (Tex. Civ. App. 1950).

Defeasible fee.

Raulerson v. Saffold, 61 So. 2d 926 (Fla. 1952); McDonald v. Suarez, 93 S.E.2d 16 (Ga. 1956); Points v. Points, 227 S.W.2d 913 (Ky. 1950); Taylor v. Farrow, 239 S.W.2d 73 (Ky. 1951); Ramsey v. Holder, 291 S.W.2d 556 (Ky. 1956); Kautz v. Kautz, 31 W. 319 (Pa. 1949); *Rogers v. Nixon, 275 S.W.2d 197 (Tex. Civ. App. 1955).*

Testator devised real estate "to my unmarried children to be maintained for and by said unmarried children as long as any should remain so." It was held that the will devised the use and occupancy, not the fee, to the unmarried children. Remainder interest was awarded to all children, including married children, as intestate property. *In re Lyter's Estate, 87 D. & C. 14 (Pa. 1954).* So to daughter as long as she remains single. *Thomas v. Stafford, 204 S.W.2d 940 (Ky. 1947).*

Devise of property to wife for life "as long as she remains single" were words of limitation and not of condition, and thus the wife obtained a determinable life estate rather than a determinable fee. *Buschmeyer v. Eikermann, 378 S.W.2d 468 (Mo. 1964).*

A gift in the deed to be held by the grantee as long as she was married, and when the marriage relationship ceases, to go to the children of the grantor, or if any children died leaving children of their own, such children to take the interest of the deceased children was held to create a contingent remainder. "A deed to the party of the second part" to hold during the relationship of husband and wife between the grantor and the grantee was held to be an estate similar to a life estate. *Beatty v. Miley, 233 P.2d 269 (Okla. 1951).*

(n16)Footnote 60. *Colburn v. Burlingame, 214 P. 226 (Cal. 1923); Holbrook v. Bentley, 32 Conn. 502 (1865); Palmer v. Jones, 132 N.E. 567 (Ill. 1921); Iowa City State Bank v. Pritchard, 202 N.W. 512 (Iowa 1925); In re Vail's Estate, 273 N.W. 107 (Iowa 1937); Garland v. Garland, 73 Me. 97 (1881); Wilmarth v. Bridges, 113 Mass. 407 (1873); Wetzel v. Hecht, 220 S.W. 888 (Mo. 1920); In re Leonard, 113 N.E. 491 (N.Y. 1916); Dodson v. Polk, 214 S.W. 871 (Tenn. 1919); Stewart v. Lane, 181 S.E. 389* Beechley (Va. 1935).

The words "The princapel [sic] reason for this will is to protect my wife Antonia from harm and want when I am gone" created a life estate in the wife. *In re Hetland's Estate, 531 P.2d 367 (Mont. 1975).*

Remainder "to heirs at law" held under circumstances not to include life tenant. *In re Evans' Estate, 334 N.E.2d 850 (Ill. App. 1975).*

(n17)Footnote 61. *Holbrook v. Bentley, 32 Conn. 502 (1865); Garland v. Garland, 73 Me. 97 (1881); Wilmarth v. Bridges, 113 Mass. 407 (1873); Wetzel v. Hecht, 220 S.W. 888 (Mo. 1920); Blumer v. Gillespie, 93 S.W.2d 939 (Mo. 1936); Bishop v. Bishop, 177 N.E. 302 (N.Y. 1931).*

Limitation over after death of husband implied a gift of life estate in husband. *Norris v. Methodist Home, 464 S.W.2d 677 (Tex. Civ. App. 1971).*

(n18)Footnote 62. *Bingham v. Sumner, 89 So. 479 (Ala. 1921).*

(n19)Footnote 63. *See* 2 Thomas Jarman, A Treaties on Wills 532 (5th Am. ed. 1881).

(n20)Footnote 64. *Equitable Trust Co. v. Johnson, 36 A.2d 257 (Del. 1944).*

(n21)Footnote 65. *West Jersey Trust Co. v. Hayday, 199 A. 407 (N.J. Eq. 1938).*

(n22)Footnote 66. *Wallace v. Wallace, 100 S.W.2d 809 (Ky. 1936); Stuart v. Walker, 72 Me. 145 (1881); Johnson v. Battelle, 125 Mass. 453 (1878); In re Oertle's Will, 24 N.W. 924 (Minn. 1885); Jackson ex dem. Livingston v. Robins, 16 Johns. 537 (N.Y. 1819); In re Keehn's Will, 281 N.Y.S. 591 (1935).*

It has been said, however, that an estate, such for instance as one for life "will not be created by implication unless it be absolutely necessary to carry out the intention of the testator as gathered from the entire will." *Reynolds v. Dolvin, 114 S.E. 879 (Ga. 1922).*

Reservation of right of occupancy to grantor for life did not create a life estate but merely a right of occupancy with such implied incidents as are necessary and proper. *Bartholomew v. Horan, 322 N.Y.S.2d 401 (1971).*

(n23)Footnote 67. *Norris v. Johnson, 235 S.W. 804 (Ark. 1921).*

(n24)Footnote 68. *King v. Ackerman, 67 U.S. (2 Black) 408 (1862).*

(n25)Footnote 69. *Anderson v. Messinger, 146 F. 929 (6th Cir. 1906); Mansfield v. Shelton, 35 A. 271 (Conn. 1896); Hill v. Gianelli, 77 N.E. 458 (Ill. 1906); Smith v. Proctor, 51 S.E. 889 (N.C. 1905).*

(n26)Footnote 70. *Pate v. Bushong, 69 N.E. 291 (Ind. 1903).*

(n27)Footnote 71. *Pete v. Henderson, 318 P.2d 720 (Cal. App. 1957); Thompson v. Baxter, 119 N.W. 797,* (Minn. 1909).

(n28)Footnote 72. 2 William Blackstone, Commentaries 121; 4 James Kent, Commentaries on American Law 25 (Rev. ed. 1895).

(n29)Footnote 73. *Haskins v. Tate, 25 Pa. 249 (1855); Nicholson v. Drennan, 14 S.E. 719 (S.C. 1892); Barry v. Shelby, 5 Tenn. (4 Hayw.) 229 (1817).*

A deed subject to an annual charge in favor of grantor created a life estate in grantor. *Lambert v. Lambert, 182 F.2d 858 (8th Cir. 1950).*

A deed is not invalid by reserving a life estate, though not executed with formalities of a will. *In re Bright's Estate, 215 N.W.2d 253 (Iowa 1974).*

"Lease" of cooperative living organization created life estate in tenant. *Westbrook v. Masonic Manor, 178 N.W.2d 280 (Neb. 1970).*

Devise to "only wife" to have and to hold during the full term of her natural life was only a life estate, since the first sentence did not create an absolute estate. *Skovron v. Third Nat'l Bank in Nashville, 509 S.W.2d 497 (Tenn. App. 1973).*

A lease which provides that the lessee shall continue in possession until the lease is terminated by the lessee created a life estate. *Shanahan v. Collins, 539 P.2d 1261 (Colo. 1975).*

Devise of farm to use as devisee "sees fit" created only a life estate. *Walker v. Clements, 221 S.E.2d 138 (Va. 1976).*

(n30)Footnote 74. *Trager v. Chapman, 130 S.E. 660 (W. Va. 1925).*

As involving generally the question of the creation of life estates, *see City Nat'l Bank v. Slocum, 272 F. 11 (6th Cir. 1921); Hughes v. Strickland, 295 S.W. 722 (Ark. 1927); Shelton v. Byrom, 177 S.W.2d 421 (Ark. 1944); In re Shaw's Estate, 246 P. 48 (Cal. 1926); Steeve v. Yaeger, 302 P.2d 704 (Cal. App. 1956); Patellis v. Tanner, 29 S.E.2d 419 (Ga. 1944); Whittaker v. Porter, 151 N.E. 905 (Ill. 1926); Law v. Kane, 52 N.E.2d 212 (Ill. 1943); Bearss v. Corbett, 152 N.E. 866 (Ind. App. 1927), aff'd, 177 N.E. 59 (Ind. 1931); Gardner v. Grossman, 57 N.E.2d 440 (Ind. App. 1944); Hiller v. Herrick, 179 N.W. 113 (Iowa 1920); Thurmond v. Thurmond, 228 S.W. 29 (Ky. 1921); Wright v. Singleton, 228 S.W. 38 (Ky. 1920); Baker v. Baker, 230 S.W. 293 (Ky. 1921); Covington v. Covington, 245 S.W. 275 (Ky. 1922); Young v. Monroe, 251 S.W. 662 (Ky. 1923); Harrington v. Layton, 255 S.W. 271 (Ky. 1923); Shirley v. Graham, 256 S.W. 718 (Ky. 1923); Coleman v. Griffin, 261 S.W. 890 (Ky. 1924); Spragens v. Phillips, 263 S.W. 771 (Ky. 1924); Union Gas & Oil Co. v. Wiedeman Oil Co., 277 S.W. 323 (Ky. 1924); De Charette v. St. Matthews Bank & Trust Co., 283 S.W. 410 (Ky. 1926); Cox v. Glass, 283 S.W. 943 (Ky. 1926); Robertson v. Robertson, 284 S.W. 109 (Ky. 1926); Conn v. Hardin, 284 S.W. 1077 (Ky. 1926); Cannon v. Carr, 168 S.W.2d 21 (Ky. 1943); Head v. Head, 169 S.W.2d 25 (Ky. 1943); New Cathedral Cem. v. Browning, 138 A. 258 (Md. 1927); Hess v. Haas, 203 N.W. 471 (Mich. 1925); Beliveau v. Beliveau, 14 N.W.2d 360 (Minn. 1944); Watson v. Hardwick, 231 S.W. 964 (Mo. 1921); Nations v. Spence, 235 S.W. 1064 (Mo. 1921); Petty v. Griffith, 165 S.W.2d 412 (Mo. 1942); Roberts v. Randleman, 180 S.W.2d 674 (Mo. 1944); F. H. Stoltze Land Co. v. Westburg, 206 P. 407 (Mont. 1922); Battin v. Battin, 120 A. 519, 521 (N.J. 1922); Savings Inv. & Trust Co. v. Little, 39 A.2d 392 (N.J. Eq. 1944); Kavanaugh v. Cohoes Power & Light Corp., 187 N.Y.S. 216 (1921); Krites v. Plott, 24 S.E.2d 531 (N.C. 1943); Connertin v. Concannon, 259 P. 290 (Or. 1927); Bechtel v. Fetter, 111 A. 50 (Pa. 1920); In re Beck's Estate, 122 A. 173 (Pa. 1923); Orphan's Home and Asylum v. Womens Pa. Soc'y, 124 A. 86 (Pa. 1924); In re Deeter's Estate, 124 A. 416 (Pa. 1924); Stanton v. Guest, 132 A. 529 (Pa. 1926); In re Dommell's Estate, 134 A. 379 (Pa. 1926); In re Hay's Estate, 134 A. 402 (Pa. 1926); In re Rumsey's Estate, 135 A. 119 (Pa. 1926); Cheroka v. Tobolski, 30 A.2d 152 (Pa. Super. 1943); In re Kern's Estate, 12 Som. 113 (Pa. 1944); La Rosa v. McVicker, 137 A.2d 861 (Pa. Super. 1958)*(deed reserving a home to the husband for and during his natural life, or for so long as he shall have need for same, created a life estate in the husband); *McMichael v. McMichael, 29 S.E. 403 (S.C. 1898)* (insertion of words of inheritance in the warranty clause will not raise a life estate to a fee); *White v. White, 31 S.E.2d 558 (Va. 1944); Robinson v. Caldwell, 105 S.E.2d 852 (Va. 1958)*(limitation over "at his death" of first taker gave such first taker only a life estate).

Gift of a comfortable living from the land during lifetime was only a life estate. *Lowe v. Adams, 419 P.2d 764 (N.M. 1966).*

Lett v. Braham, 116 S.E. 513 (W. Va. 1922).

Holding that conveyance to a "trustee" to be held for the benefit of named beneficiaries subject to a life estate in another was no trust but instead a conveyance of a life estate with remainders over. *Clark v. Wisdom, 403 S.W.2d 877 (Tex. Civ. App. 1966).*

(n31)Footnote 75. *See* Restatement, Property, § 108.

(n32)Footnote 76. *Dormer v. Walker, 69 P.2d 1049 (Colo. 1937).*

(n33)Footnote 77. *Weekley v. Weekley, 27 S.E.2d 591 (W. Va. 1943).*

Devise providing that the property was not to be sold at the devisee's death but was to go to the bodily heirs of the devisee created a life estate. *Brooks v. Williams, 178 S.E.2d 880 (Ga. 1970).*

(n34)Footnote 78. *Scott v. Smith, 151 S.W.2d 770 (Ky. 1941); In re Wilson's Will, 133 S.E.2d 189 (N.C. 1963).*

Devise over after death of first named taker creates only a life estate in the first taker. *Miller v. O'Neal, 361 N.E.2d 1165 (Ill. App. 1977).*

Codicil limited to a life estate fee simple devise given in a fee.

(n35)Footnote 79. *In re Sisk's Will, 96 N.Y.S.2d 237 (1950).*

Gift of entire income for life created life estate. *In re Jackman's Estate, 122 N.W.2d 910 (Iowa 1963).*

Request of the right to use the rents, interest, issues and profits from the property and so much of the principal as the devisee might desire from time to time for her support, maintenance and pleasure gave a life estate. *In re Perkins' Estate, 182 N.W.2d 881 (Minn. 1970).*

Limitation over a death of first taker gives only a life estate. *Miller v. O'Neal, 361 N.E.2d 1165 (Ill. 1977).*

(n36)Footnote 80. *Giles v. Little, 104 U.S. 291 (1881); Green v. Hewitt, 97 Ill. 113 (1880); Rose v. Hale, 56 N.E. 1073 (Ill. 1900); Thompson v. Baxter, 119 N.W. 797 (Minn. 1909); Long v. Paul, 17 A. 988 (Pa. 1889); Snelling v. Lamar, 10 S.E. 825 (S.C. 1890).*

(n37)Footnote 81. Where by oral agreement the grantor in a voluntary conveyance retained the rents until he died, the realty was included in the grantor's estate. *McNichol v. Commissioner of Internal Revenue, 265 F.2d 667 (3d Cir. 1959); Greene v. United States, 237 F.2d 848 (7th Cir. 1956); Harter v. United States, 55-1 U.S.T.C. 55, 397 (1954).*

Possibility of reverter devised to the widow "as long as she sees fit to remain on the premises and keep said premises in repair and pay taxes on same, held to be a life estate even though there was no limitation over, not a fee, on the presumption the testator presumed that the result would not disinherit his own flesh and blood in favor of in-laws. *Bowman v. Brown, 149 A.2d 56 (Pa. 1959).*

A lease providing that it run until terminated by the lessees created life estate in the lessees. *Shanahan v. Collins, 539 P.2d 1261 (Colo. 1975).*

(n38)Footnote 82. *See Salyer v. Johnson, 107 S.W. 210 (Ky. App. 1908); Leavy v. McDermott, 90 A.2d 116 (N.J. Super. 1952); McAllister v. Long, 246 P.2d 352 (Okla. 1952).*

(n39)Footnote 83. 1 Jarman *supra*, note 63 (6th Am. ed.), 466, 467 (1893).

(n40)Footnote 84. *Wechsler v. Drey, 197 N.Y.S. 453 (1922); Eager v. McCoy, 228 S.W. 709 (Tenn. 1921).*

Holding that a reservation of a "comfortable use of the property" in a deed from father to son was not a reservation of a life estate which would have benefitted second wife. *Grieves v. Grieves, 352 N.E.2d 601 (Ohio App. 1973).*

(n41)Footnote 85. *Graff v. Graff, 286 N.W. 788 (Neb. 1939).*

Devise to widow for life or remarriage and then to children and their heirs but realty not to be sold until children were dead, "heirs" was word of purchase meaning descendants so that children took only life estates with remainders in fee to their descendants. *Bogie v. Britton, 262 S.W.2d 364 (Ky. 1953).*

(n42)Footnote 86. *Henderson v. Richardson, 211 S.W.2d 436 (Ark. 1948).*

Life estate cannot be limited on terms for years except to a living person. Okla. Stat. Ann., § 60-39.

(n43)Footnote 87. *Roberts v. Cleveland, 132 So. 314 (Ala. 1931); In re Stephan's Estate, 194 So. 343 (Fla. 1940); Railsback v. Gordon, 62 N.E. 99 (Ind. App. 1901); Jones v. Clyman, 188 N.W. 954 (Iowa 1922); Pattison v. Farley, 100 A. 634 (Md. 1917); Cavan v. Woodbury, 133 N.E. 95 (Mass. 1921); In re McCullough's Estate, 116 A. 477 (Pa. 1922).*

Promise to a will contestant to be allowed to live in a house as long as she wanted was a license not a life estate. *Day v. Tribble, 210 S.E.2d 764 (Ga. 1974).*

(n44)Footnote 88. *Anderson v. Gifft, 294 N.W. 721 (Iowa 1933).*

(n45)Footnote 89. *Wilder v. Loehr, 101 So. 591 (Ala. 1924); In re Stephan's Estate, 194 So. 343 (Fla. 1940); Horak v. Stanley, 249 N.W. 166 (Iowa 1933); Wright v. Singleton, 228 S.W. 38 (Ky. 1920); Pattison v. Farley, 100 A. 634 (Md. 1917); Bragg v. Litchfield, 98 N.E. 673 (Mass. 1912).*

(n46)Footnote 90. Coke on Littleton § 42a. *Morrison v. Schorr, 64 N.E. 545 (Ill. 1902); Henderson v. Western Carolina Power Co., 157 S.E. 425 (N.C. 1931); In re Sunderland's Estate, 52 A. 167 (Pa. 1902).*

(n47)Footnote 91. *Reaume v. Chambers, 22 Mo. 36 (1855).*

(n48)Footnote 92. *Bear v. Milliken Trust Co., 168 N.E. 349 (Ill. 1929).*

Grant of permission to remain on land for an indefinite period rent free was not a life estate. *Sands v. Union Camp Corp., 235 S.E.2d 605 (Ga. App. 1977).*

(n49)Footnote 93. *Rolland v. Hamilton, 49 N.E.2d 436 (Mass. 1943).*

(n50)Footnote 94. *Deck v. Deck, 20 S.E.2d 1 (Ga. 1942); Griswold v. Hicks, 24 N.E. 63 (Ill. 1890); American Nat'l Bank v. Madison, 137 S.W. 1076 (Ky. 1911). See Kimble v. Newark, 102 A. 637 (N.J.L. 1917).*

(n51)Footnote 95. *Woods v. Cook, 58 S.W.2d 404 (Ky. 1933).*

(n52)Footnote 96. *Bishop v. Jones, 149 So. 72 (Ala. 1933); Landers v. Peoples Bldg. & Loan Ass'n, 81 S.W.2d 917 (Ark. 1935); American Nat'l Bank v. Madison, 137 S.W. 1076 (Ky. 1911); Thomas v. Combs, 82 S.W.2d 188 (Ky. 1935). See Campbell v. Williams, 172 S.E. 142 (S.C. 1933).*

A deed conveying realty to grantor's daughter "and issue of her body" in fee, begotten by her then husband, vested in daughter a life estate with remainder in fee simple being vested in such issue of her body begotten by her then husband as should survive her and did not vest in daughter and her child then living an estate of tenancy in common, with estate opening upon birth of each succeeding child to daughter, so as to permit each child to take an equal estate as tenant in common. *Bradley Lumber Co. v. Burbridge, 210 S.W.2d 284 (Ark. 1948).*

In Arkansas, "to A and his bodily heirs" becomes under statute a life estate in A and remainder to issue, but to B for life and then to A and his bodily heirs gives A a fee simple in remainder. *Eubanks v. McDonald, 283 S.W.2d 166 (Ark. 1955). See* Comment, *The Effect of Stare Decisis Upon Fee Tail in Arkansas, 10 Ark. L. Rev. 181 (1956).*

Where deed runs to grantee "and unto his bodily heirs and assigns forever," during lifetime of grantee and his daughter and her child, the child is only a contingent remainderman. *Walker v. Blaney, 286 S.W.2d 479 (Ark. 1956).*

Where introductory clause of deed designated named person and his bodily heirs as parties of second part, and granting clause conveyed to parties of second part, their heirs and assigns, certain described property, and habendum clause gave all the estate right and title of first parties with all appurtenances, and stated that first party was seized of an indefeasible estate in fee simple which first party would warrant and defend in quiet and peaceable possession of parties of second part, their heirs and assigns forever, the estate conveyed was a life estate to the named party of the second part, with a vested remainder to the children of named party at the time of execution and delivery of deed. *Waite v. Schmidt, 245 P.2d 975 (Kan. 1952).*

To "A and her bodily heirs" with a limitation over on death without bodily heirs held to mean indefinite failure of issue so as to create a life estate with remainder over. *Steele v. Pedroja, 289 P.2d 738 (Kan. 1955).*

Conveyances to one and his or her bodily heirs carve out of grantor's fee-simple estate a life estate in first taker, and contingent remainder in those qualifying as "bodily heirs" on death of first taker, while fee or reversion remains in grantor, his assigns, heirs or devisees pending determination under original grant of its vesting or falling in for want of takers as "bodily heirs" of grantee for life. *Mattingly v. Washburn, 196 S.W.2d 624 (Mo. 1946); Tucker v. Holder, 225 S.W.2d 123 (Mo. 1949).*

Under deed reciting that grantor conveyed described realty to grantor's son and to lawful children of grantor's son, and declaring intent to provide for grantor's son and his lawful children after him, and reciting that conveyed realty was subject to homestead and dower of wife of grantor's son so long as she remained widow of grantor's son and that realty should revert to legal bodily heirs of grantor's son and that all homestead and dower should cease if she should remarry, grantor's son was given life estate for life and son's children were given a vested remainder interest, and grantor's son was not given a fee simple title. *Hutchison v. Board, 250 S.W.2d 82 (Tenn. 1952).*

Provision in deed that upon the grantee's death the property is to be divided as share and share alike among the grantor's children created only a life estate. *Johnson v. Maddox, 229 S.E.2d 141 (Ga. App. 1976).*

(n53)Footnote 97. *Holt v. Miller, 14 N.E.2d 409 (Ohio 1938); Austin v. Hunter, 67 S.E. 734 (S.C. 1910).*

(n54)Footnote 98. *Atherton v. Roche, 61 N.E. 357 (Ill. 1901). See Gehlbach v. Briegel, 194 N.E. 591 (Ill. 1934).*

In a deed to two persons, "to them and the survivor of them, and to their heirs and assigns forever," it was held that the use of the word "heirs" did not have the effect to pass a fee to such persons, but made them joint tenants for life with a contingent remainder in fee to the survivor. *Finch v. Haynes, 107 N.W. 910 (Mich. 1906). See Erwin Nat'l Bank v. Riddle, 79 S.W.2d 1032 (Tenn. App. 1934).*

(n55)Footnote 99. *Shelton v. Byrom, 177 S.W.2d 421 (Ark. 1944); Fletcher v. Tyler, 17 S.W. 282 (Ky. 1891); Combs v. Combs, 171 S.W.2d 13 (Ky. 1943); Reeves v. Harris, 227 S.W.2d 198 (Ky. 1950); Hague v. Hague, 29 A. 261 (Pa. 1894).*

(n56)Footnote 100. *Simpson v. Brown, 134 S.E. 161 (Ga. 1926); Banks v. Morgan, 136 S.E. 434 (Ga. 1927); English v. Davis, 23 S.E.2d 394 (Ga. 1942); Elward v. Biggs, 230 P. 808 (Kan. 1924); Grainger v. Edwards, 227 S.W. 561 (Ky. 1921); Ramey v. Ramey, 243 S.W. 934 (Ky. 1922); Hicks v. Jewett, 258 S.W. 934 (Ky. 1924); Sower v. Lillard, 269 S.W. 330 (Ky. 1925); Mathews v. O'Donnell, 233 S.W. 451 (Mo. 1921); Trager v. Chapman, 130 S.E. 660 (W. Va. 1925).*

(n57)Footnote 101. *Ward v. Ward, 169 S.E. 120 (Ga. 1935); Wilson v. Humble Oil & Ref. Co., 82 S.W.2d 1095 (Tex. Civ. App. 1935).*

(n58)Footnote 102. *Gowdy v. Kelley, 194 S.E. 156 (S.C. 1937).*

(n59)Footnote 103. *Thompson v. Thompson, 46 N.W.2d 437 (Mich. 1951); Fowler v. Lanpher, 75 P.2d 132 (Wash. 1938).*

(n60)Footnote 104. *Rolland v. Hamilton, 49 N.E.2d 436 (Mass. 1943).*

(n61)Footnote 105. *Conger v. Lowe, 24 N.E. 889 (Ind. 1890). See Jones v. Rees, 69 A. 785 (Pa. 1908); Lancaster v. Lancaster, 58 N.E. 462 (Ill. 1900); Wescott v. Binford, 74 N.W. 18 (Iowa 1898); Simonton v. White, 53 S.W. 339 (Tex. 1899).*

(n62)Footnote 106. *Trumbull v. Trumbull, 21 N.E. 366 (Mass. 1889); Defreese v. Lake, 67 N.W. 505 (Mich. 1896); Hall v. Hall, 78 A. 971 (Vt. 1911).*

(n63)Footnote 107. *Perkins v. McConnell, 36 N.E. 121 (Ind. 1894).*

(n64)Footnote 108. *Combs v. Combs, 171 S.W.2d 13 (Ky. 1943).*

Deed reserved life estate in the grantor. *Witherspoon v. Witherspoon, 402 S.W.2d 699 (Ky. 1965).*

(n65)Footnote 109. *Burns v. Crump, 95 S.E.2d 906 (N.C. 1957).*

(n66)Footnote 110. *Waller v. Martin, 61 S.W. 73 (Tenn. 1901).*

(n67)Footnote 111. *Daniel v. Whartenby, 84 U.S. (17 Wall) 639 (1873); Trumbull v. Trumbull, 21 N.E. 366 (Mass. 1889); Mee v. Gordon, 80 N.E. 353 (N.Y. 1907); Parkhurst v. Harrower, 21 A. 826 (Pa. 1891).*

(n68)Footnote 112. *Edwards v. Bates, 139 N.E. 192 (Ind. App. 1923).*

(n69)Footnote 113. *In re English's Estate, 112 A. 913 (Pa. 1921).*

(n70)Footnote 114. *Giles v. Little, 104 U.S. 291 (1881); Glore v. Scroggins, 53 S.E. 690 (Ga. 1906); Cooper v. Mitchell Inv. Co., 66 S.E. 1090 (Ga. 1910); Mefford v. Dougherty, 11 S.W. 716 (Ky. 1889); Sims v. Skinner, 81 S.W. 703 (Ky. 1904); Kuhn v. Kuhn, 68 S.W. 16 (Ky. App. 1902); Salyer v. Johnson, 107 S.W. 210 (Ky. L. 1908); Whittemore v. Russell, 14 A. 197 (Me. 1888); Rogers v. Rogers, 3 Wend. 503 (N.Y. 1829); Cipperly v. Cipperly, 40 How. Pr. 269 (N.Y. 1870); Millsaps v. Estes, 50 S.E. 227 (N.C. 1905); Oyster v. Knull, 20 A. 624 (Pa. 1890); Hall v. Hall, 78 A. 971 (Vt. 1911); Newman v. Newman, 55 S.E. 377 (W. Va. 1906); Knox v. Knox, 18 N.W. 155 (Wis. 1884).*

(n71)Footnote 115. *Reiff v. Pepo, 139 A. 144 (Pa. 1927).*

To daughter for life and then to her heirs on their majorities and if no heirs, to sister and brother and their heirs. "And their heirs" were held to be words of purchase meaning "as their heirs" as a gift in the alternative. *In re Yeater's Trust Estate, 295 S.W.2d 581 (Mo. App. 1956).*

(n72)Footnote 116. *Eskridge v. Deweese, 203 S.W. 197 (Ky. 1918).*

(n73)Footnote 117. *Reiff v. Pepo, 139 A. 144 (Pa. 1927). See Edwards v. Bates, 139 N.E. 192 (Ind. App. 1923).*

(n74)Footnote 118. *Keeter v. Bank of Ellijay, 9 S.E.2d 761 (Ga. 1940); Hurd v. Hurd, 20 N.W. 740 (Iowa 1884); Wyman v. Brown, 50 Me. 139 (1863); Drown v. Smith, 52 Me. 141 (1862); Watson v. Cressey, 10 A. 59 (Me. 1887); Achorn v. Jackson, 29 A. 989 (Me. 1894); McDaniel v. Johns, 45 Miss. 632 (1871); In re Warden Trust, 115 A.2d 159 (Pa. 1955); American Nat'l Bank v. Taylor, 70 S.E. 534 (Va. 1911); Koen v. Bartlett, 23 S.E. 664 (W. Va. 1895); McDonald v. Jarvis, 60 S.E. 990 (W. Va. 1908).*

(n75)Footnote 119. Deed retaining life estate in the grantor held valid as against contention that language intended the deed to be effective only upon the grantor's dying thereafter without having changed his mind. *Stephens v. Stephens, 193 So. 2d 755 (Ala. 1966).*

(n76)Footnote 120. *Frawley v. Forest, 38 N.E.2d 631 (Mass. 1941).*

Life estate was created by typing in the granting clause in a printed deed although in conflict with the habendum clause which would indicate tenancy by the entireties. *Bennett v. Langham, 383 S.W.2d 16 (Tenn. 1964).*

(n77)Footnote 121. *Graves v. Atwood, 52 Conn. 512 (1885); Cates v. Cates, 34 N.E. 957 (Ind. 1893); Webster v. Webster, 33 N.H. 18 (1856); Colby v. Colby, 28 Vt. 10 (1855); Crosby v. Montgomery, 38 Vt. 238 (1865).*

(n78)Footnote 122. *American Nat'l Bank v. Taylor, 70 S.E. 534 (Va. 1911).*

(n79)Footnote 123. *Derham v. Hovey, 161 N.W. 883 (Mich. 1917); Glasgow v. Glasgow, 70 S.E.2d 432 (S.C. 1952).*

(n80)Footnote 124. *Towler v. Towler, 36 N.E. 869 (N.Y. 1894).*

(n81)Footnote 125. *Roberts v. Dazey, 119 N.E. 910 (Ill. 1918); La Rosa v. McVicker, 137 A.2d 861 (Pa. Super. 1958).*

California now permits reservation of an interest in property to a stranger. *Willard v. First Church of Christ, Scientist, Pacifica, 498 P.2d 987 (Cal. 1972). See Townsend v. Cable, 378 S.W.2d 806 (1964)*(not consistently followed); *Garza v. Grayson, 467 P.2d 960 (Or. 1970). See* also Note, *Real Property Common Law Rule Against Reserving an Interest in Property to a Stranger to Title Overruled, 13 Santa Clara Law 344 (1972).*

(n82)Footnote 126. *Bunch v. Nicks, 7 S.W. 563 (Ark. 1888); Shackelton v. Sebree, 86 Ill. 616 (1877); Owen v. Williams, 15 N.E. 678 (Ind. 1888); Browne v. Johnson, 255 N.W. 862 (Iowa 1934); Phillips v. Thomas Lumber Co., 22 S.W. 652 (Ky. 1893); Wyman v. Brown, 50 Me. 139 (1863); Wall v. Wall, 30 Miss. 91 (1855); Waugh v. Waugh, 84 Pa. 350 (1877); Merck v. Merck, 65 S.E. 347 (S.C. 1909); Couch v. Hoover, 79 S.W.2d 807 (Tenn. App. 1934).*

(n83)Footnote 127. *Newell v. McMillan, 30 P.2d 126 (Kan. 1934). Contra, St. Louis County Nat'l Bank v. Fielder, 260 S.W.2d 483 (Mo. 1953), overruling Goins v. Melton, 121 S.W.2d 821 (Mo. 1938).*

(n84)Footnote 128. *Watts v. Watts, 22 So. 2d 625 (Miss. 1945).*

Deed held to be a conveyance of fee with reservation of a life estate. *Black v. Poole, 196 S.E.2d 20 (Ga. 1973). Contra,* void where no intention that interest presently pass. *Gardner v. Thames, 154 S.E.2d 926 (Ga. 1967).*

Where a deed conveyed land subject to a life estate in the father of one of the grantors, the person designated as trustee in trust for the benefit of named persons with authority in trustee to lease premises for production of oil and gas and crops, there was no trust created but rather a life estate and a vested remainder in the remainderman. So the property did not revert to the grantors on the death of the life tenant and was not held in trust for them. *Clark v. Wisdom, 403 S.W.2d 877 (Tex. Civ. App. 1966).*

(n85)Footnote 129. *Rummerfield v. Mason, 179 S.W.2d 732 (Mo. 1944).*

(n86)Footnote 130. *Watson v. Dalton, 18 N.W.2d 658, op. modified, 20 N.W.2d 610 (Neb. 1945).*

(n87)Footnote 131. *Grim v. Grim, 161 S.W.2d 918 (Ky. 1942).*

(n88)Footnote 132. *Patellis v. Tanner, 29 S.E.2d 419 (Ga. 1944).*

(n89)Footnote 133. *Collins v. Held, 369 N.E.2d 641 (Ind. App. 1977).*

* This chapter is based in part on Ch. 30, George W. Thompson, Commentaries on The Modern Law of Real Property (John S. Grimes ed. 1979), which made a significant contribution toward preserving the American common law of life estates.

Thompson on Real Property, Thomas Editions

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CHAPTER 19 LIFE ESTATE *

2-19 Thompson on Real Property, Thomas Editions § 19.04

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§ 19.04 The Relationship Between the Life Tenant and the Reversioner or the Remainderman.

[Go To Supp]

The relationship between the life tenant and the holder of the succeeding future interest covers the basic areas of waste and fiduciary responsibilities. There is no tenure between a life tenant and the remainderman or reversioner. The estate of each stems from an independent source, the creator of the two estates. This is true even where the owner of the fee has reserved in himself a life estate or has conveyed a life estate retaining the reversion. This does not, however, mean that the life tenant and the reversioner or remainderman have no relationship between themselves. There is such privity between them that the reversioner or remainderman can tack to the period of possession of the life tenant for the purpose of the running of adverse possession. n134 There is, however, no privity of contract between the life tenant and the reversioner or remainderman. n135

There are two positions on the situation where the life tenant acquires an outstanding interest in or claim against the property:

One is that the life tenant holds the interest so acquired in trust for the remainderman, but has a lien for the cost of acquisition.

The other is that the life tenant acquires title to the outstanding interest or lien, but has a duty to afford the remainderman the right to acquire the interest by contribution. n136

Some courts consider the relationship of the life tenant and the remainderman to be that of debtor-creditor to the extent of the value of the property. n137 But this may become at least a quasi trust where there is a power to consume. n138

A degree of fiduciary relationship exists between the life tenant and the remainderman. The life tenant may hold adversely to the remainderman, but only after notice of such adverse claim is brought home to the remainderman. n139 The extent of the degree of such fiduciary relationship has not, however, been as clearly outlined by the courts as it has been in the case of landlord and tenant or cotenant. So, it has been held that if a life tenant purchases at a foreclosure sale he does so for the protection of the remainderman as well as himself. n140

On the other hand, there is nothing to prevent the holder of the future interest from holding adversely to the life tenant, according to another rule. Some authorities hold that either the life tenant or the holder of the future interest may acquire outstanding interests without being obligated to make such acquired interest available to the other as a cotenant n141 or a tenant for years is required to do.

Where, however, the life tenant is required to perform a duty with respect to the land such as pay taxes or make repairs or pay mortgage interest, he cannot default in such duty and then acquire from a third party the outstanding interest that arises from such default and then assert such interest against the reversioner or remainderman. More properly, however, a life tenant is not a "trustee" for the remainderman except in the broad sense that he cannot injure the property. n142

Even the cases that speak of the life tenant as a trustee or quasi trustee do not seem to go beyond charging the life tenant with permissive waste. n143 Only a few cases extend the relationship to require the life tenant to acquire outstanding interests for the benefit of all. n144 The cases are divided as to whether a life tenant with power to consume is a debtor or a trustee. n145 A life tenant must give notice to the remainderman that the life tenant is claiming adversely before adverse possession starts to run. n146

So a life tenant is a trustee for the remainderman in the broad sense that the life tenant cannot do injury to or dispose of the property, but may use the property only for the life tenant's exclusive benefit and take income on profits therefrom. n147

The cases are divided as to the effect upon the remainderman of a conveyance by the life tenant which purports to carry the entire fee. Under one theory, the transferee becomes an adverse possessor as against the remainderman. n148 Under other decisions, the adverseness of the transferee's holding must be brought home to the remainderman. And some cases say the remainderman obtains constructive notice of this adverse holding if the transferee records the deed. n149

Life tenants hold their estates from their grantors or devisors in such a relation that their mere possession is not deemed adverse to the one who has the reversion. n150 There cannot be a disseisin of the reversioner by a life tenant claiming to hold the estate adversely, only by positive acts of disclaimer of the remainderman's interest brought home to him by the life tenant. n151 They are bound by whatever reservations are contained in the instrument giving them the estate, and in the absence of express reservation, they owe to the party creating the estate what the feudal lord termed "fealty." n152 Where the life tenant's possession is based on a claim of absolute ownership, and the evidence of his title has become a matter of record, his possession is hostile and adverse to all, including the remainderman. n153 The remainderman may recover seisin from the disseisor at any time after the death of the life tenant within the period limited by statute for instituting such action. The statute of limitations begins to run against the remainderman at the death of the life tenant. n154 Even the grant of a fee by the life tenant is not considered a disseisin, so far as it requires the remainderman to institute an action to recover the property during the life of the tenant, even though the grantee has held for a period beyond the usual period which bars action. n155 Nor by the weight of authority will failure of the life tenant to take possession bar the remainderman even if a third party takes possession and holds it during the tenant's life and any time short of the statutory period thereafter. n156 Contingent remaindermen have such an interest in land as a court of equity will protect, and title cannot be acquired against them by adverse possession prior to the termination of the life estate. n157

The weight of authority is that prescription would not ripen into title as against the remaindermen during the life of the life tenant during which time the remaindermen would have no right to sue. n158 Under what are sometimes called "betterment," or "occupying tenants" acts, it is generally held that possession of property under a mistaken claim of title in fee, by virtue of a conveyance from one who had only a life estate, even during the life estate, is under color of title and is adverse to the remainderman. n159 In the sense that one in possession is required to use reasonable precaution to preserve the property without injury or diminution, the life tenant holds the corpus of the estate in trust for the owner of the remainder. n160

A life tenant is a trustee only in the sense that the life tenant cannot injure or dispose of the remainder to the injury of the remainderman. n161

With respect to inheritance taxes, there are two views as to the effect of life estates with absolute power to convey: the property rule n162 and the beneficial interest view. n163

The life tenant has the same interest in the property during the period of his tenancy as has the remainderman after such tenancy's termination. He, in effect, "owns the land during the term of the life estate, but has not the right to remove or destroy any part of the corpus, to the damage of the inheritance." n164 As between the life tenant and the remainderman, the former has the exclusive right to possession of the property during the continuance of the life estate. n165 The remainderman has no right to possession until the death of the life tenant, nor is he bound to enter until then. n166 While the life tenant and the remainderman are not tenants in common, and privity neither of contract nor of estate exists between them, n167 yet, as a general rule, the possession of the life tenant or the possession before the termination of the life estate of one claiming under or in right of the life tenant, is, from a legal standpoint, possession by the remainderman, n168 at least as against third persons. n169 The possession of the life tenant cannot be adverse to the remainderman n170 unless the life tenant has openly repudiated the status as such, n171 and has, in a clear and convincing manner, brought home to the remainderman notice of intent to claim title adversely to the latter. n172

While it has been held that the executing and recording of a deed, made by the life tenant, which reserved the use and control of the property to the grantor for life and conveyed the remainder in fee, would constitute notice to the remainderman that the life tenant was claiming adversely, n173 it has also been held that a mere statement by the life tenant that the property belongs to the life tenant will not be sufficient ground for the bringing of a suit by the remainderman to determine the title. n174 Undoubtedly, the general rule is that the statute of limitations, applicable to actions to recover the possession of real property, will not begin to run against the remainderman prior to the termination of the life estate, n175 least where there is no special equity requiring assertion rights at an earlier date. n176

In some jurisdictions, the life tenant may bring an action against a tort-feasor for injury to the freehold, as well as for the life tenant's possessory interest and recover the entire damage and give a quittance to the tort-feasor. In such an instance, the life tenant becomes a trustee for the reversioner or remainderman to the extent of the recovery for the damage to the freehold. n177 The granting of additional powers to a life tenant does not operate to impose upon him fiduciary responsibilities, equivalent to a trustee having similar powers. n178

Some courts impose on the life tenant the responsibilities of a trustee to take action for the protection of the corpus for the benefit of the remainderman. n179 Others decline even to apply the doctrine of neglect as permissive waste. n180 The courts have been ready to require bond of a life tenant in possession of personal property, for the possession of the remainderman, n181 and the same principle has been applied where the life tenant has the power or right of sale of the realty or of some portion thereof. n182 The life tenant must pay the costs of management of the estate. n183

At common law the relation between a life tenant with power to consume and the remainderman was that of debtor and creditor. The life tenant was liable to the remainderman for the value of the estate at the time it was received less the amount expended under the power. The life tenant thus assumed the burden or benefit of losses or gains. n184

Life tenant or one claiming under the life tenant cannot claim reimbursements for improvements. n185

COMPUTER-ASSISTED RESEARCH

LEXIS: life tenant! w/30 reversioner! or remainderman!

FOOTNOTES:

(n1)Footnote 134. *See* A.N. Yiannoupoulos, *Obligations of the Usufructuary: Louisiana and Comparative Law, 42 Tulane L. Rev. 1 (1967);* Allison Dunham, *Valuing Life Estates and Remainders,* 107 Trusts and Estates 13 (1968); *Leazenby v. Clinton County Bank & Trust Co., 355 N.E.2d 861 (Ind. App. 1976).*

(n2)Footnote 135. *Holzhauser v. Iowa State Tax Comm'n., 62 N.W.2d 229 (Iowa 1953).*

Where one person holds a life estate and also a partial interest in remainder, she is not a tenant in common with the other remaindermen since the element of possession is lacking. *Statler v. Watson, 68 N.W.2d 604 (Neb. 1955); Sparks v. Robertson, 203 S.W.2d 622 (Tex. Civ. App. 1947).*

(n3)Footnote 136. A life tenant, as a quasi-fiduciary to the remainderman when purchasing at a foreclosure sale, must permit the remainderman to pay his proportionate share of the redemption price, but can take title if the remainderman refuses to contribute. *Thompson v. Watkins, 207 S.E.2d 740 (N.C. 1974).*

(n4)Footnote 137. *In re Reiff's Appeal, 16 A. 636 (Pa. 1889).*

Life tenant is a quasi trustee only to the extent that he must not injure the remainderman's rights. *Barnes v. Barnes, 148 S.E.2d 789 (Va. 1966).*

(n5)Footnote 138. *In re Metz' Estate, 185 A. 740 (Pa. 1936). Contra, In re Powell's Estate, 17 A.2d 391 (Pa. 1941).*

See Note, *A Debtor Who Consumes His Own Debt, 99 U. Pa. L. Rev. 873 (1951).*

(n6)Footnote 139. *Allen v. Wiseman, 224 S.W.2d 1010 (Mo. 1949).* No adverse possession as against remainderman or reversioners. *Monte v. Montalbano, 145 So. 2d 197 (Ala. 1962).*

A life tenant is, to a limited extent, a fiduciary in relation to the remainderman to preserve the property with ultimate transmission to the remainderman subject to the life tenant's right to invade as conferred by the instrument. *Magruder v. Magruder, 525 S.W.2d 400 (Mo. App. 1975).*

Life tenant cannot acquire title from remainderman by adverse possession. *Duncan v. Johnson, 338 So. 2d 1243 (Ala. 1976).*

(n7)Footnote 140. *Wheeler v. Kazee, 253 S.W.2d 378 (Ky. 1952).*

Life tenant held a "qualified trustee" or fiduciary of the property for the remainderman. *Windscheffel v. Wright, 360 P.2d 178 (Kan. 1961).*

In Pennsylvania the relationship of a life tenant to the remainder is that of debtor and creditor. *In re Kirkpatrick's Estate, 131 A. 361 (Pa. 1925).* The heirs of a life tenant are entitled to all accretions if coupled with the power to consume. *In re Hays' Estate, 55 A.2d 763 (Pa. 1947).*

Life tenant as a quasi trustee for the remainderman does not hold adversely, absent a direct notice of hostile claim of title. *Young v. Young, 349 S.W.2d 545 (Tenn. App. 1961).*

Mutual wills held to create life estates in the respective testators with remainder over to mutual beneficiary.

(n8)Footnote 141. *Fleming v. Brunner, 166 A.2d 901 (Md. 1961).*

Life tenant need only pay interest, not principal, of a mortgage, but if he pays the principal, he is entitled to contribution from the remaindermen. *King v. Rainbolt, 515 P.2d 228 (Okla. 1973).*

Life tenant in trust may purchase at a mortgage foreclosure sale. *Flowers v. Oakdale Realty & Water Corp., 183 S.E.2d 513 (S.C. 1971).*

(n9)Footnote 142. *Linenthal v. Birmingham Trust & Sav. Co., 32 So. 2d 368 (Ala. 1947); Holzhauser v. Iowa State Tax Comm'n, 62 N.W.2d 229 (Iowa 1953); Windscheffel v. Wright, 360 P.2d 178 (Kan. 1961)*(life tenant's power of sale did not give right to give away, waste or devise since life tenant becomes trustee for remainderman); *In re Pew's Trust Estate, 158 A.2d 552 (Pa. 1960)*(the Pennsylvania rule of apportionment of income has been largely abrogated today); *in Thomason v. Hellams, 103 S.E.2d 324 (S.C. 1958),* the life tenant with power to sell was not subject to an action by the remainderman to enforce a trust on the sale of proceeds.

No confidential relationship between life tenant and remainderman. *Barnes v. Barnes, 148 S.E.2d 789 (Va. 1966).*

(n10)Footnote 143. *Attebery v. Prentice, 65 N.W.2d 138 (Neb. 1954); In re Roth's Estate, 52 A.2d 811 (N.J. Eq. 1947); Reams v. Henney, 97 N.E.2d 37 (Ohio App. 1950); In re Barnes Estate, 108 N.E.2d 88 (Ohio Com. Pl. 1950), aff'd, 108 N.E.2d 101 (Ohio App. 1952).*

Life tenant as trustee for remainderman allowed to recover full amount of damage to freehold. *Rogers v. Atlantic, Gulf & Pac. Co., 107 N.E. 661 (N.Y. 1915).*

The relation of a life tenant to a remainderman is that of a quasi trustee so that the statute of limitation with respect to real estate does not begin to run until the remainderman knows that life tenant has attempted to devise a fee simple estate or should know that someone is in possession. *Graff v. Graff, 138 N.W.2d 644 (Neb. 1965).*

Contra, a life tenant is a quasi trustee for remainderman. *Skovron v. Third Nat'l Bank, 509 S.W.2d 497 (Tenn. App. 1973).*

(n11)Footnote 144. *Wheeler v. Kazee, 253 S.W.2d 378 (Ky. 1952); Matlock v. Mize, 230 P.2d 246 (N.M. 1950).*

(n12)Footnote 145. *Trustee. Burlington County Nat'l Bank v. Braddock, 94 A.2d 868 (N.J. Super. 1953).*

Debtor. In re Emig's Estate, 60 York 193 (Pa. 1947); *Randall v. Estes, 218 S.W.2d 338 (Tex. Civ. App. 1949).*

Where a trustee has been given invasionary powers, the general rule that the trustee must diminish the trust by the remainder interest as well as the interest of the life tenant and cannot slight one interest for the benefit of the other is no longer operative. *National Bank of Commerce of San Antonio v. United States, 369 F. Supp. 990 (W.D. Tex. 1973), aff'd, 491 F.2d 1271 (5th Cir. 1974).*

(n13)Footnote 146. *Myers v. Grant, 95 S.E.2d 9 (Ga. 1956); Jones v. Bilderbock, 290 S.W.2d 580 (Tex. Civ. App. 1956).*

(n14)Footnote 147. Holding no damages allowed. *City San. Dist. v. Averel, 47 P.2d 786 (Cal. App. 1935); Duncan v. Johnson, 338 So. 2d 1243 (Ala. 1976).*

(n15)Footnote 148. Life tenant's breach of his duty to return the land for taxation in his name, after the testator's death, does not prejudice remainderman's right to possession at the death of the life tenant. *Stamper v. Avant, 104 S.E.2d 565 (S.C. 1958).*

Tax sale during the life tenancy does not affect the right of remainderman, even though part of the taxes incurred were

assessed during the life of the creator of the two estates. *Taylor v. Jennings, 106 S.E.2d 391 (S.C. 1958).* Devisees of life tenant held adversely to remainderman from date of life tenant's death. *Rutledge v. Rutledge, 132 S.E.2d 469 (Va. 1963).*

(n16)Footnote 149. *Cotney v. Eason, 113 So. 2d 512 (Ala. 1959)*(adverse possession does not run against the future interest by virtue of an unrecorded deed from the life tenant under an unrecorded deed in fee simple where reversioner or remainderman had no notice).

(n17)Footnote 150. *Gindrat v. Western R. of Ala., 11 So. 372 (Ala. 1892); Gibbs v. Bates, 222 S.W.2d 805 (Ark. 1949); Pryor v. Winter, 82 P. 202 (Cal. 1905); Bryan v. Atwater, 5 Day 181 (Conn. 1823); Smith v. McWhorter, 51 S.E. 474 (Ga. 1905); Gurr v. Gurr, 32 S.E.2d 507 (Ga. 1944); Biggers v. Gladin, 50 S.E.2d 585 (Ga. 1948); Orthwein v. Thomas, 21 N.E. 430 (Ill. 1889); Haskett v. Maxey, 33 N.E. 358 (Ind. 1893); Beechley v. Beechley, 108 N.W. 762 (Iowa 1906); Creel v. Hammans, 13 N.W.2d 305 (Iowa 1944); Withroder v. Weideroder, 134 P.2d 381 (Kan. 1943); Salyer v. Keeton, 283 S.W. 1015 (Ky. 1926); Howard v. Mitchell, 105 S.W.2d 128 (Ky. 1936); Trimble v. Gordon, 109 S.W.2d 1217 (Ky. 1937); Slack v. Barrett, 160 S.W.2d 595 (Ky. 1942); Kelly v. Kelly, 183 S.W.2d 805 (Ky. 1944); Wheeler v. Kazee, 253 S.W.2d 378 (Ky. 1952); Lumley v. Haggerty, 68 N.W. 243 (Mich. 1896); Lowry v. Lyle, 198 N.W. 245 (Mich. 1924); Hanson v. Ingwaldson, 80 N.W. 702 (Minn. 1899); Charles v. Pickens, 112 S.W. 551 (Mo. 1908); Weller v. Searcy, 123 S.W.2d 73 (Mo. 1938); Maurer v. Reifschneider, 132 N.W. 197 (Neb. 1911); Baker v. Oakwood, 25 N.E. 312 (N.Y. 1890); Smith v. Proctor, 51 S.E. 889 (N.C. 1905); Eason v. Spence, 61 S.E.2d 717 (N.C. 1950); Stein v. White, 143 N.E. 124 (Ohio St. 1924); Beatty v. Miley, 233 P.2d 269 (Okla. 1951); A. D. Graham & Co. v. Pennsylvania Tpk. Comm'n, 33 A.2d 22 (Pa. 1943); Kirton v. Howard, 134 S.E. 859* (S.C. 926); *Republic Prod. Co. v. Lee, 121 S.W.2d 973 (Tex. 1938).*

Possession by one claiming under the life tenant is not adverse to remainderman until death of life tenant. *Meadows v. Hardcastle, 242 S.W.2d 710 (Ark. 1951); Fitzgerald v. Fitzgerald, 76 S.E.2d 204 (Va. 1953).*

(n18)Footnote 151. *White v. Inman, 54 So. 2d 375 (Miss. 1951).*

(n19)Footnote 152. William Cruise, A Digest of the Law of Real Property, tit. III, § 9 (2d ed. 1857). *Harrison v. Lee, 45 So. 2d 705 (Ala. 1950).*

(n20)Footnote 153. *Combs v. Haley Coal Co., 276 F. 342 (6th Cir. 1921); Ray v. Farrow, 100 So. 868 (Ala. 1924); Cessna v. Carroll, 290 P.2d 803 (1955); Commonwealth v. Clark, 83 S.W. 100 (Ky. 1904); Johnson v. Moore, 143 S.W.2d 254 (Mo. 1940).*

See also Munro v. Whitlow, 201 P. 964 (Cal. App. 1921); Hunott v. Critehlow, 285 S.W.2d 594 (Mo. 1955).

Cf., as contra, Nussbaum v. Nussbaum, 292 S.W. 189 (Tex. Civ. App. 1927).

Grantee from life tenant does not hold adversely to remainderman though holding under a fee simple deed. *Quarles v. Arthur, 231 S.W.2d 589 (Tenn. App. 1950).*

(n21)Footnote 154. *Kirksey v. Cole, 1 S.W. 778 (Ark. 1886); Meadows v. Hardcastle, 242 S.W.2d 110 (Ark. 1951); Frazier v. Hanes, 249 S.W.2d 842 (Ark. 1952); Biggers v. Gladin, 50 S.E.2d 585 (Ga. 1948); Beasley v. Beasley, 88 N.E.2d 435 (1949); Wheeler v. Kazee, 253 S.W.2d 378 (Ky. 1952); Wells v. Prince, 9 Mass. 508 (1813); Bohrer v. Davis, 143 N.W. 209, 430 (Neb. 1913), aff'd, 148 N.W. 320 (Neb. 1914); Lotspeich v. Dean, 211 P.2d 979 (N.M. 1949); Moore v. Luce, 29 Pa. 260 (1857); Hutchison v. Board, 250 S.W.2d 82 (Tenn. 1952); Bryson v. Connecticut Gen. Life Ins. Co., 211 S.W.2d 304 (Tex. Civ. App. 1948), rev'd, 219 S.W.2d 799 (Tex. 1949); Fitzgerald v. Fitzgerald, 76 S.E.2d 204 (Va. 1953); Stealey v. Lyons, 37 S.E.2d 569 (W. Va. 1946).*

Cutting of timber, execution of oil and mineral leases and other acts of waste are not alone enough to start adverse

possession running in favor of the life tenant. *Mills v. Pennington, 209 S.W.2d 281 (Ark. 1948).*

A remainderman does not have a right to sue for wrongful possession of real estate until death of life tenant. *Futch v. Jarrard, 45 S.E.2d 420 (Ga. 1947).*

Unless future interest was created by an owner of an interest against whom statute had already commenced or unless future interest was or is barred by entailment or there is a landlord and tenant relationship the statutory period does not commence to run before such estate becomes a present interest. *Lotspeich v. Dean, 211 P.2d 979 (N.M. 1949).*

Adverse possession does not run against remainderman until after death of life tenant. *Heustess v. Oswalt, 488 S.W.2d 707 (Ark. 1973).*

Statute of limitations does not run against remainderman until death of life tenant. *Zambrano v. Olivas, 490 S.W.2d 218 (Tex. Civ. App. 1973).*

(n22)Footnote 155. *Buder v. Fiske, 174 F.2d 260 (8th Cir. 1949)*(quasi trustee); *Pryor v. Winter, 82 P. 202 (Cal. 1905); Smith v. McWhorter, 51 S.E. 474 (Ga. 1905); Folds v. Hartry, 41 S.E.2d 142 (Ga. 1947); Miller v. Trigg County Farmers Bank, 227 S.W.2d 429 (Ky. 1950); Bohrer v. Davis, 143 N.W. 209 (Neb. 1913), aff'd, 148 N.W. 320 (Neb. 1914); Moore v. Luce, 29 Pa. 260 (1857); In re Schulz' Estate, 98 A.2d 176 (Pa. 1953); West v. Moore, 246 S.W.2d 74 (Tenn. 1952)*(indicating, however, that grantee of life tenant is holding adversely); *Quarles v. Arthur, 231 S.W.2d 589 (Tenn. App. 1950); Strong v. Garrett, 218 S.W.2d 873 (Tex. Civ. App. 1949), rev'd, 224 S.W.2d 471 (Tex. 1949).*

Right of deceased's children, as remainders, to sue for possession did not arise until life estate by curtesy terminated, even though life tenant by curtesy attempted to convey and grantee claimed a fee. *Allen v. Wiseman, 224 S.W.2d 1010 (Mo. 1949).*

(n23)Footnote 156. *Wells v. Prince, 9 Mass. 508 (1813).*

Open mine doctrine applies to oil and gas lease entered into before the life estate was created though the wells were drilled after the life estate came into being. *Youngman v. Shular, 288 S.W.2d 495 (Tex. 1956).*

Restricting open mine doctrine to cases where there is actual production or an existing lease at beginning of life estate. *Bergendahl v. Blanco Oil Co., 440 S.W.2d 81 (Tex. Civ. App. 1969).*

(n24)Footnote 157. *Lane v. Travelers Ins. Co. of Hartford, Conn., 299 N.W. 553 (Iowa 1941).*

(n25)Footnote 158. *Gurr v. Gurr, 32 S.E.2d 507 (Ga. 1944).*

Adverse possession does not start to run where life tenant purports to convey the fee by reason of the deed alone. *McDonald v. Burke, 288 S.W.2d 363 (Ky. 1955).*

(n26)Footnote 159. *Bloom v. Strauss, 69 S.W. 548 (Ark. 1902); Harper v. Durden, 170 S.E. 45 (Ga. 1933); Folsom v. Clark, 72 Me. 44 (1881); Plimpton v. Plimpton, 66 Mass. (12 Cush.) 458 (1853); Stump v. Hornbeck, 15 Mo. App. 367 (1884); Beardsley v. Chapman, 1 Ohio St. 118 (1853); Whitney v. Richardson, 31 Vt. 300 (1851).*

Adverse possession as against remainderman during life estate as affected by fact that a conveyance by the life tenant purported to cover the fee, *see Content v. Dalton, 194 A. 286 (N.J. Eq. 1937).*

(n27)Footnote 160. *Linenthal v. Birmingham Trust & Sav. Co., 32 So. 2d 368 (Ala. 1947); Williams v. Morrison, 48 N.W.2d 666 (Iowa 1951); Miracle v. Miracle, 86 S.W.2d 536 (Ky. 1935),* 102 A.L.R. 964; *Revare v. Lee, 257 S.W.2d 676 (Mo. 1953); Attebery v. Prentice, 65 N.W.2d 138 (Neb. 1954)*(quasi trustee); *Burlington County Nat'l Bank v.*

Braddock, 94 A.2d 868 (N.J. Super. 1953); Morrow v. Person, 259 S.W.2d 665 (Tenn. 1953)(quasi trustee).

Laches run against remainderman to terminate life estate when he waited seven years after his sister made valuable improvements. *Hadden v. Thompson, 42 S.E.2d 125 (Ga. 1947).*

Life tenant as quasi trustee though power to dispose is attached. *Trute v. Skeede, 75 N.W.2d 672 (Neb. 1956), but see Dutch v. Scribner, 118 A.2d 887 (Me. 1955),* as denying existence of confidential relationship between life tenant and remainderman.

Owner of land abutting street gets title when dedicated street is abandoned as against reversioner even though owner's title is by adverse possession. *Skrmetta v. Moore, 30 So. 2d 53 (Miss. 1947).*

A life tenant with or without power of disposal incurs obligations of a trustee for remainderman. *Laval v. Osterhout, 65 A.2d 866 (N.J. Super. 1949).*

A gift for life with right to consume creates relationship of debtor-creditor (not trustee) and life tenant is responsible to remainderman for value of estate at time of distribution, not for any increase thereafter. *In re Hay's Estate, 55 A.2d 763 (Pa. 1947).*

In the case of personalty, however, if the life tenant has the power to consume his relationship with the remainderman when the relationship is that of debtor-creditor. *In re Layman's Estate, 69 D. & C. 491 (Pa. 1950);* In re Emig's Estate, 60 York 193 (Pa. 1947).

Life tenant with full power of disposal is not a trustee for remainderman, but must protect property for remainderman only when remaindermen have clear vested indefeasible interest in property. *Randall v. Estes, 218 S.W.2d 338 (Tex. Civ. App. 1949).*

Denying to contingent remainderman the right to damages against the owner of the present estate for conduct decreasing the value of the future interest. *Sargent Lake Ass'n v. Dane, 351 A.2d 54 (N.H. 1976).*

A life tenant may, upon closing of an estate, be required to post reasonable security to protect the remainderman. *In re Estate of Rorem, 66 N.W.2d 292 (Iowa 1954).*

Income not used by life tenant belongs to remainderman. *Skovron v. Third Nat'l Bank, 509 S.W.2d 497 (Tenn. App. 1973).*

(n28)Footnote 161. *Amator v. Amator, 560 P.2d 410 (Ariz. 1977).*

(n29)Footnote 162. Life estate with absolute power of sale, mortgage or disposal did not create a fee for inheritance tax purposes. *In re Bishir's Estate, 18 P.2d 576 (Mont. 1957).*

Contra, Gibson v. Gibson, 181 N.W. 41 (Mich. 1921); but see Quarton v. Barton, 229 N.W. 465 (Mich. 1930); Vandeventer v. Mullen, 11 S.W.2d 867 (Tenn. 1928); Ogden v. Maxwell, 140 S.E. 554 (W. Va. 1927).

(n30)Footnote 163. *Central Union Trust Co. v. State, 202 P. 853 (Kan. 1921); In re Rogers' Estate, 149 N.Y.S. 462 (1914).*

(n31)Footnote 164. *Brandenburg v. Petroleum Exploration, 291 S.W. 757 (Ky. 1927); English v. Carter, 189 S.W.2d 839 (Ky. 1945).*

Life tenant treated as "owner." *Croasdale v. Butell, 280 P.2d 593 (Kan. 1955),* but a long-term lessee is not. *Bloom v.*

Wides, 128 N.E.2d 31 (Ohio St. 1955).

(n32)Footnote 165. *Mathis v. Melton, 238 S.W. 806 (Mo. 1922).*

Income in the hands of the trustee available for distribution at the death of the life tenant goes to the latter's estate. *First Nat'l Bank of Colorado Springs v. McGuire, 184 F.2d 620 (7th Cir. 1950); St. Mary's Hosp. v. Long, 17 N.E.2d 833 (Ind. 1938).*

(n33)Footnote 166. *Daley v. Daley, 14 N.E.2d 113 (Mass. 1938).*

A life tenant may also be a remainderman. *Hendrick v. Mitchell, 69 N.E.2d 466 (Mass. 1946).*

There is a presumption that the holder of the preceding estate is not a member of the class in remainder. *White v. Inman, 54 So. 2d 375 (Miss. 1951).*

One may be a life tenant and also a co-owner of the remainder. *Statler v. Watson, 68 N.W.2d 604 (Neb. 1955).*

(n34)Footnote 167. *Lazenby v. Ware, 173 S.E. 86 (Ga. 1934); Miracle v. Miracle, 86 S.W.2d 536 (Ky. 1935); McLean v. McLean, 199 N.W. 459 (Wis. 1924).*

Fiduciary duty of life tenant to remainderman is not an interest in land but a duty in equity to preserve and protect remainderman. *Matlock v. Mize, 230 P.2d 246 (N.M. 1950).*

Where a trespass affects both the life and remainder estates, the life tenant and the remainderman may sue separately, but not jointly, for damages. *Shaw v. Monongahela Ry., 130 S.E. 461 (W. Va. 1925).*

(n35)Footnote 168. *Cross v. Janes, 158 N.E. 694 (Ill. 1927); Lowry v. Lyle, 198 N.W. 245 (Mich. 1924).*

(n36)Footnote 169. *Falvey v. Hicks, 286 S.W. 385 (Mo. 1926).*

Life tenant in cutting timber above 12 inches was legally engaged in "tree farming." *Reynolds v. Jones, 145 So. 2d 437 (Ala. 1962).*

Life tenant may not cut timber except to preserve and protect property. *McClure v. Chastain, 128 S.E.2d 721 (Ga. 1962).*

(n37)Footnote 170. *Wise v. Helms, 40 So. 2d 700 (Ala. 1949)*(nor is a defense of laches available to the life tenant).

Contra, and to effect remainderman barred by laches as respects others. *Merrill v. Merrill, 71 So. 2d 44 (Ala. 1954).*

Gibbs v. Bates, 222 S.W.2d 805 (Ark. 1949); Frazier v. Hanes, 249 S.W.2d 842 (Ark. 1952); McDaniel v. Bagby, 51 S.E.2d 805 (Ga. 1949); O'Kelley v. Jackson, 81 S.E. 454 (Ga. 1954); Russell v. Tipton, 235 S.W. 763 (Ky. 1921); Kelly v. Kelly, 183 S.W.2d 805 (Ky. 1944); Spencer v. Bouchard, 121 A. 164 (Me. 1923); Lowry v. Lyle, 198 N.W. 245 (Mich. 1924); Wells v. Egger, 259 S.W. 437 (Mo. 1924); Braue v. Fleck, 127 A.2d 1 (N.J. 1956); Howell v. Shaw, 112 S.E. 38 (N.C. 1922); Eason v. Spence, 61 S.E.2d 717 (N.C. 1950); Sprinkle v. Reidsville, 69 S.E.2d 179 (N.C. 1952); Lovett v. Stone, 79 S.E.2d 479 (N.C. 1954); Youmans v. Youmans, 105 S.E. 31 (S.C. 1920); Nussbaum v. Nussbaum, 292 S.W. 189 (Tex. Civ. App. 1927).

See also Newport v. Hatton, 231 P. 987 (Cal. 1924).

(n38)Footnote 171. *Commercial Bldg. Co. v. Parslow, 112 So. 378 (Fla. 1927).*

One claiming under life tenant and adverse to remainderman must prove, unequivocally, ouster to remainder's interest. *White v. Inman, 54 So. 2d 375 (Miss. 1951).*

Life tenant is not a fiduciary and may acquire an outstanding interest as against the remainderman. *Flowers v. Oakdale Realty & Water Corp., 183 S.E.2d 513 (S.C. 1971).*

(n39)Footnote 172. *Manier v. Hodges, 230 S.W.2d 960 (Ark. 1950)*(adverse possession begins at life tenant's death); *Smith v. Kappler, 245 S.W.2d 809 (Ark. 1952); Russell v. Tipton, 235 S.W. 763 (Ky. 1921).*

(n40)Footnote 173. *Webb v. Webb, 255 S.W. 137 (Ky. 1923).*

See, however, Ashbaugh v. Wright, 188 N.W. 157 (Minn. 1922), in which it is said that "the rule is well established that a deed by a life tenant conveys merely the life estate, although it purports to be a conveyance of the fee, and the grantee acquires thereunder no interest against the remainderman... Where a life tenant attempts to convey the premises in fee, the possession of the grantee is not adverse to the remainderman until the termination of the life estate, for the reason that the latter has no right of possession until the particular estate is terminated, and he can have no right of action which depends upon the right of possession, until he is entitled to the possession. ... Nor will the statute of limitation commence its operation until that time." *See also Willis v. Robinson, 237 S.W. 1030 (Mo. 1922).*

See also West v. Moore, 246 S.W.2d 74 (Tenn. 1952)(life tenant devising a fee); *Connecticut Gen. Life Ins. Co. v. Bryson, 219 S.W.2d 799 (Tex. 1949), rev'g, 211 S.W.2d 304 (Tex. Civ. App. 1948).*

During continuance of life estate one holding in remainder is not bound to take notice of possession taken and continued by virtue of a conveyance from the life tenant. *In re Schulz Estate, 98 A.2d 176 (Pa. 1953).*

Life tenants' possession does not become adverse to remainderman by acquisition of a superior title claim. *Edwards v. Puckett, 268 S.W.2d 582 (Tenn. 1954). But see Tillotson v. Foster, 141 N.E. 412 (Ill. 1923).*

Evidence held insufficient notice of life tenants' adverse claim. *Collett v. Collett, 217 S.W.2d 60 (Tex. Civ. App. 1948).*

Deed by life tenant purporting to convey a fee simple estate conveys only a life estate. *Zambrano v. Olivas, 490 S.W.2d 218 (Tex. Civ. App. 1973).*

(n41)Footnote 174. *Quarles v. Arthur, 231 S.W.2d 589 (Tenn. App. 1950).*

(n42)Footnote 175. *Vann v. Carter, 71 So. 2d 811 (Ala. 1954)*(mere silence and inactivity on part of remainderman does not bar him); *Bryant v. Jones, 71 So. 2d 831 (Ala. 1954); Hamilton v. Farmer, 292 S.W. 683 (Ark. 1927); Cross v. Janes, 158 N.E. 694 (Ill. 1927); Beasley v. Beasley, 88 N.E.2d 435 (Ill. 1949); Manning v. McGinnis, 279 S.W. 668 (Ky. 1926); Spearman v. Hussey, 50 So. 2d 610 (Miss. 1951)*(adverse possession ran against life tenant but not remainderman); *Wells v. Egger, 259 S.W. 437 (Mo. 1924); Revare v. Lee, 257 S.W.2d 676 (Mo. 1953); Wallhauser v. Rummel, 96 A.2d 289 (N.J. Super. 1953); Sprinkle v. Reidsville, 69 S.E.2d 179 (N.C. 1952); Walston v. W. H. Applewhite & Co., 75 S.E.2d 138 (N.C. 1953)*(dictum); *Stein v. White, 143 N.E. 124 (Ohio St. 1924); Beatty v. Miley, 233 P.2d 269 (Okla. 1951); Floyd v. Page, 124 S.E. 1 (S.C. 1924); Crotwell v. Whitney, 92 S.E.2d 473 (S.C. 1956); Johnson v. Covington, 251 S.W. 893 (Tenn. 1923); Edwards v. Puckett, 268 S.W.2d 582 (Tenn. 1954); Matthews v. W. T. Freeman & Co., 60 S.E.2d 909 (Va. 1950); Stealey v. Lyons, 37 S.E.2d 569 (W. Va. 1946); In re Larson's Estate, 52 N.W.2d 141 (Wis. 1952).*

See also Wilder v. Scott, 89 So. 2d 682 (Ala. 1956); Tennison v. Carroll, 243 S.W.2d 944 (Ark. 1951); McDonald v. Burke, 288 S.W.2d 363 (Ky. 1955).

But see Williams v. Kitchens, 74 So. 2d 457 (Ala. 1954)(denying right to establish an equitable remainder after 20 years); *Futch v. Jarrard, 45 S.E.2d 420 (Ga. 1947); Brittenum v. Cunningham, 220 S.W.2d 100 (Ky. 1949)*(holding that after adverse possession by a third party has run against the life tenant, it then begins to run against the remainderman).

Where the statute of limitations begins to run before a life estate is carved out, it will continue to run thereafter against the whole estate; but where adverse possession begins after the life estate is created it will run, during the continuance of such estate, only against the life tenant and not against the remainderman. *Wells v. Egger, 259 S.W. 437 (Mo. 1924).*

(n43)Footnote 176. *St. Clair Springs Hotel Co. v. Balcomb, 108 So. 858 (Ala. 1926).*

> The general rule is that [neither] laches estoppel, nor the statute of limitations will run against a remainderman prior to the termination of the life tenancy. This rule is, however, predicated on an uninterrupted continuation of the conduct of the life tenant consistent with his duty as such to the remainderman. This rule may not apply where it is shown that the remainderman had actual knowledge of the repudiation or abandonment by the life tenant of his status as such, and of the holding by him of the property under a different and adverse right, or where the life tenant, in good faith and to the knowledge of the remainderman, claims title, not as a life tenant, but through some other source, or where there has been ouster and disseisin by the life tenant or by one claiming by, through or under him, and this under claim of right or color of title followed by adverse possession for the statutory period, or when there is some special independent equity in favor of the purchaser who claims under a conveyance from the life tenant.

Commercial Bldg. Co. v. Parslow, 112 So. 378 (Fla. 1927).

Or unless the adverse possession had already commenced to run against the owner at the time of creation of the remainder. *Lotspeich v. Dean, 211 P.2d 979 (N.M. 1949).*

(n44)Footnote 177. *Warfield v. Bixby, 51 F.2d 210 (8th Cir. 1931); Seymour v. National Biscuit Co., 107 F.2d 58 (3d Cir. 1939); Cooke v. United States, 115 F. Supp. 830 (D. Haw. 1953) aff'd, 228 F.2d 667 (9th Cir. 1955); Wheeler v. Kazee, 253 S.W.2d 379 (Ky. 1952)*(fiduciary relationship exists); *Dutch v. Scribner, 118 A.2d 887 (Me. 1955)*(no confidential relationship arises out of existence of a life tenancy); *Attebery v. Prentice, 65 N.W.2d 138 (Neb. 1954); Trute v. Skeede, 75 N.W.2d 672 (Neb. 1956); Laval v. Osterhout, 65 A. 866 (N.J. Super. 1907); Burlington County Trust Co. v. Kingsland, 86 A.2d 815 (N.J. Super. 1952); Burlington County Nat'l Bank v. Braddock, 94 A.2d 868 (N.J. Super. 1953); Peck v. Smith, 125 N.E. 91 (N.Y. 1919); In re Reckford's Will, 120 N.E.2d 696 (N.Y. 1954); In re Erdman's Estate, 42 A.2d 546 (Pa. 1945); Morrow v. Person, 259 S.W.2d 665 (Tenn. 1952); In re Larson's Estate, 52 N.W.2d 141 (Wis. 1952).*

Life tenant may not have partition as against remainderman. *Dixon v. Dixon, 202 N.W.2d 180 (Neb. 1972).*

(n45)Footnote 178. *Cooke v. United States, 115 F. Supp. 830 (D. Haw. 1953), aff'd 228 F.2d 667 (9th Cir. 1955).*

(n46)Footnote 179. *Herbst v. Treinen, 88 N.W.2d 820 (Iowa 1958).*

Life tenant must preserve property to the extent an ordinary person would treat his own. *Bliss v. Security-First Nat'l Bank, 183 P.2d 312 (Cal. App. 1947).* Life tenant has duty to impart to remainderman his knowledge of facts existing which may affect the remainderman. *Osborn v. Osborn, 256 P.2d 653 (Cal. App. 1953), op. vacated, 267 P.2d 333 (Cal. 1954).* Liable for permissive waste. *Reams v. Henney, 97 N.E.2d 37 (Ohio App. 1950).*

Koplon v. Koplon, 148 So. 2d 245 (Ala. 1962) (the court required the life tenant with power to sell to turn the proceeds over to a trustee to reinvest); *Windscheffel v. Wright, 360 P.2d 178 (Kan. 1961)*(life tenant with power to consume is a

trustee for remainderman); *Robb v. Berryman, 137 A.2d 135 (Md. 1957)*(a life tenant with power to consume for own benefit could not accumulate income, support herself from the corpus and bequeath the accumulated income); In re Rarick's Estate, 13 Fiduciary 271 (Pa. 1963)(a gift of "everything left" to remainderman gave life tenant a power of disposition and excused the giving of security); *Caine v. Griffin, 103 S.E.2d 37 (S.C. 1958)*(permitting virtual representation of unborn remaindermen).

See Osborn v. Morrison, 132 S.E.2d 58 (Ga. 1963).

Life tenant need only pay interest, not principal, of a mortgage, but if he pays the principal, he is entitled to contribution from the remaindermen. *King v. Rainholt, 515 P.2d 228 (Okla. 1973).*

(n47)Footnote 180. *Wright v. Conner, 37 S.E.2d 353 (Ga. 1946). But see Conner v. Bowdoin, 57 S.E.2d 344 (Ga. App. 1950),* considering lack of ordinary care as waste.

(n48)Footnote 181. *In re Helmer's Will, 77 N.Y.S.2d 5 (1947); In re Hays' Estate, 55 A.2d 763 (Pa. 1947).*

See In re Morris' Estate, 29 D. & C. 2d 370, 13 Fiduciary 142 (Pa. 1963).

Life tenant may be required to give security to the remainderman but has no duty to account for use of the property. *Holley v. Marks, 535 S.W.2d 861 (Tenn. 1976).*

Where there was a life estate with power to dispose or consume, it is improper to require the life tenant to make an annual accounting of transactions involving the remainder interest. *Lehner v. Lehner's Estate, 547 P.2d 365 (Kan. 1976).*

(n49)Footnote 182. *Dillard v. Gill, 47 So. 2d 203 (Ala. 1950); Wigal v. Hensley, 216 S.W.2d 792 (Ark. 1949).*

(n50)Footnote 183. *See Worden's Appeal, 42 A. 650 (Conn. 1899).*

(n51)Footnote 184. *In re Hays' Estate, 55 A.2d 763 (Pa. 1947),* now changed in Pennsylvania by statute, Estates Act 1947, § 13, whereby the relationship between life tenant and remainderman becomes trustee and beneficiary.

(n52)Footnote 185. *Lowe v. Adams, 419 P.2d 764 (N.M. 1966).*

* This chapter is based in part on Ch. 30, George W. Thompson, Commentaries on The Modern Law of Real Property (John S. Grimes ed. 1979), which made a significant contribution toward preserving the American common law of life estates.

Thompson on Real Property, Thomas Editions

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CHAPTER 19 LIFE ESTATE *

2-19 Thompson on Real Property, Thomas Editions § 19.05

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§ 19.05 The Life Tenant's Right to Transfer the Life Estate.

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Since a life tenancy is an estate in freehold it is normally freely alienable, n186 may be mortgaged, and the life tenant may transfer the possessory right by leasing to another.

Particularly in the case of trusts there is much controversy among the courts as to the division of extraordinary income such as stock dividends or condemnation proceeds as between the life tenant and the remaindermen. n187 The problem becomes even more acute where the trustee has the power to invade corpus for the benefit of the life tenant. n188

At common law, after the right to alienate was established, a conveyance by a life tenant of a greater estate than held had, if made by feoffment, the effect of forfeiting the entire interest, on the theory that such an assertion of ownership broke the feudal connection between the tenant and lord, and the reversioner or remainderman was thereby considered as disseised by the wrongful transfer and might at once enter to regain the original right. Such a transfer was regarded as putting an end to the entire estate. He was or might be in possession without right as against the reversioner or remainderman and could be ousted without such ceremony. n189 If the conveyance was by bargain and sale, lease and release or a form recognized by the statute of uses, it did not have the effect of forfeiting the tenant's estate, but transferred to the grantee such estate as the tenant had, and it was not considered as disrupting the feudal connection, though it purported to convey a fee.

While it was true that an attempted feoffment of a greater interest than the feoffor had terminated the estate prior to the Statute of 7 & 8 Victoria, ch. 100, §§ 7 and 8 & 9 Victoria, ch. 106, § 4, this rule was not applicable to deeds operating under the statute of uses since such deeds passed only the estate of the grantor. n190 In such conveyances there is no transmutation of the possession, livery of seisin, and disturbance of the seisin. n191 Now, a life tenant may alienate his entire interest or he may create any number of smaller estates so long as they do not altogether exceed his estate. n192 Though his conveyance purports to convey a fee, it passes only a life estate to the grantee. n193 Ordinarily, he cannot dispose of nor diminish the corpus of the estate, and in so doing deprive the remaindermen of what may ultimately develop into a valuable interest. n194

Under the modern rule the attempt, deliberate or otherwise, of the grantor to transmit an estate greater than the life estate held n195 will not destroy the estate n196 nor will it in any way affect the immediate rights of the reversioner or remainderman. n197 Such a deed will, however, in some jurisdictions give color of title for the purposes of prescription or adverse possession and in some states constitutes such a repudiation of the rights of the holder of the future interest as to start adverse possession running. There is much contrary authority, however. n198

The life tenant and remaindermen may sell their respective interests or join in conveying their entire interest in the property. n199

A surrender of a life estate to the future interest may be accomplished in writing or by operation of law. n200

For merger to operate, the greater and lesser estate must be in the same person at the same time and in the same right. n201

A conveyance by the life tenant and the remaindermen in esse does not automatically extinguish the remainder interest of unborn children, but such conveyance is subject to the interests of the unborn children. n202 Under the common law, however, if the life tenant and the vested remainderman or the reversioner conveyed their interests to the same person a merger took place destroying the contingent remainders. n203

The power of alienation is not a necessary incident to an equitable life estate, n204 and the weight of authority seems to be that the common law rule against restraints on alienation applied to fee simples and not to life estates. n205 There are contrary cases, however, which prohibit absolute restraints on alienation of life estate. n206 So where the life tenant is a married woman, and there is a provision in the instrument creating the estate in restraint of alienation, she cannot convey her interest. n207

A lease for a term of years by a life tenant is not necessarily terminated by death where the possession of the premises for the full term is guaranteed by covenants made binding upon executors, administrators, and assigns and assented to in writing by the remainderman. n208 An under-tenant remaining in possession of the premises after the death of the life tenant, becomes a tenant at sufferance and is liable to the remainderman for the value of the use and occupation during the time the under-tenant so remains in possession. n209 Whether an instrument called a "lease" was a lease or an assignment of the life tenant's interest was held to depend on the intention of the parties. n210

In the absence of a statute or express agreement to the contrary, a life tenant has the power to make and underlease for any lesser term. The same rights and privileges extend to the under-tenant which belong to the life tenant. n211 If a life tenant has no power to alienate, the lease for years is invalid, because it is an encumbrance. n212 Where the life tenant has power to lease, the terms of such lease in no way bind the remainderman, n213 and the lease terminates with the termination of the life estate, n214 unless by statute the lease is made to continue until the end of the current year, n215 or unless the creator of such estate provided otherwise. n216 A lease given by the life tenant will ordinarily expire coincidently with the life estate, n217 at lease, where neither ratification nor estoppel can be validly urged against the remainderman. n218 The right of the life tenant to "lease" does not apply to mineral leases which are actually sales of a profit and not transfers of a mere right of possession. n219

Every kind of interest in real estate subject to sale and assignment may be mortgaged. This of course includes the interest of a life tenant, but such mortgage will not prejudice the rights of the remainderman. n220 One to whom a life estate in land is conveyed cannot bind the remainderman by a mortgage given for the purchase price, as the remainderman is not a party to the mortgage. n221 A mortgage of the fee given by one who only had a life estate, though one had held the property under a will for thirty years supposing one took a fee simple, is a mortgage of a life interest only, and a foreclosure of it after the death of the mortgagor passes no title to the purchaser. n222 The inheritance is not subject to such encumbrance even though the money borrowed on the mortgage was used in making valuable and permanent improvements on the premises. n223 Where a widow, to whom real estate is devised for her

own use and benefit during her natural life, with a gift to another of whatever remained at the time of her death, may execute a binding mortgage on the premises for moneys used in making improvements thereon by means of which she secured her support from the property. n224 The life tenant has the power to mortgage the life estate, n225 at least when the creator of such estate does not provide to the contrary, n226 and also the power of mortgaging the fee itself when the person creating the life estate so provides. n227 The intention to grant this latter power to the life tenant must, however, be clear. n228 The devisee of a life estate cannot mortgage the property when the devise expressly prohibits the devisee from selling it. n229 Where the grantor gives to the grantee of a life estate the power to sell and convey the property but denies the power to mortgage it, a conveyance by the life tenant, made for the sole purpose of having the grantee place a mortgage on the property, will constitute a direct violation of the prohibition contained in the original grantor's deed and will not pass title to the fee nor in any manner affect the remainderman's estate. n230

Whether a power to authorize a sale and conveyance includes the power to authorize the giving of a mortgage or deed of trust to secure funds with which to erect improvements for the benefit of the life tenant and remainderman is a matter for the court to decide. n231 It has been held that a court of equity has inherent power to order a mortgage of realty conveyed to a life tenant with remainder over if the exercise of such power is necessary to the preservation of the property and to prevent loss to both the life tenant and the remainderman. n232 Rents must be devoted to payment of all taxes before mortgagee is entitled to anything. n233

Tenants in common of a life estate may have partition, n234 and one cotenant may have partition regardless of whether the other tenants hold their shares for life or in fee simple. n235 A life tenant who has no vested or other interest in the remainder cannot have the entire estate in the land sold for partition. n236 Some cases hold, however, that where the property cannot be partitioned without prejudice to the owners, it may be sold and the proceeds divided. n237 A suit in equity for partition may be brought by or against a tenant for life and a decree made which will be binding upon the persons in remainder, and contingent remaindermen not in esse may be represented in the litigation by the life tenant. n238 A life tenant is a trustee for remaindermen only in the limited sense that the life tenant cannot injure or destroy the property to the detriment of the remaindermen. n239 It is held that one of several remaindermen in land after a life estate cannot have partition during the continuance of the life estate, even though that one has acquired that life estate, unless such life estate is waived. n240

The life tenant cannot lease beyond the life tenant's own life. n241 At common law if a life tenant died between rent days the remainderman took the entire rent. n242 England adopted a statute of apportionment n243 and some states also have apportionment statutes. In at least one state the English statute became part of the common law. n244

It has been held that the holder of an alienable life estate holding a power to devise the fee, could convey the fee by warranty deed. n245 But under the English rule with American following, the fee is not subject to the claims of the life tenant's creditors though the life tenant has the power to appoint by will. n246

Even at common law an attempted conveyance by a life tenant of a greater estate than that held forfeited the estate only if its acquisition was by livery of seisin amounting to a disseisin. The life estate was not forfeited if the attempted conveyance was by bargain and sale. n247

COMPUTER-ASSISTED RESEARCH

LEXIS: life tenant! w/5 right! w/5 transfer! w/15 life estate!

FOOTNOTES:

(n1)Footnote 186. *Security Sav. Bank v. Williams, 176 N.W. 971 (Iowa 1920); Brittain v. Campbell, 122 S.W.2d 740 (Ky. 1938); Kirton v. Howard, 134 S.E. 859 (S.C. 1926).*

Life estate is freehold and alienable. *Root v. Mackey, 486 S.W.2d 449 (Mo. 1972).*

Life tenant cannot lease beyond life. *Wood v. Trenchard, 550 P.2d 490 (Wyo. 1976).*

In New York a life estate is assignable and subject to claim of creditors if legal. *In re Seidman's Will, 389 N.Y.S.2d 729 (1976).*

(n2)Footnote 187. *Millikin Trust Co. v. Jarvis, 180 N.E.2d 759 (Ill. App. 1962)*(leases were treated as principal during administrations under the Principal and Income Act, § 10); *Tait v. Peck, 194 N.E.2d 707 (Mass. 1963)*(capital gains distributions go to the principal, not to income); *Trute v. Skeede, 75 N.W.2d 672 (Neb. 1956)*(an increase in value of realty belongs to the life tenant); *In re Catherwood's Trust, 173 A.2d 86 (Pa. 1961); Cothran v. South Carolina Nat'l Bank, 130 S.E.2d 177 (S.C. 1963)*(noting the difference between the Massachusetts rule, the Pennsylvania rule and the Kentucky rule as to stock dividends and applying the Pennsylvania rule, that the source of the income, not its form, determines apportionment).

Adoption of Uniform Principal and Income Act applies to existing trusts. *In re Catherwood's Trust, 173 A.2d 86 (Pa. 1961), overruling In re Crawford's Estate, 67 A.2d 124 (Pa. 1949).*

See In re Allis' Will, 94 N.W.2d 226 (Wis. 1959); George G. Bogert, *Revised Uniform Principal and Income Act, 38 Notre Dame Law 50 (1962);* George C. Barclay, *Pennsylvania Rule of Apportionment Abolished*, 100 Trusts & Estates 818 (1961).

(n3)Footnote 188. New York has divided on whether the other resources of the beneficiary must be considered before the trustee invades the principal.

Must be considered. *In re Messer's Will, 231 N.Y.S.2d 201 (1962).*

Contra, In re Scott's Will, 221 N.Y.S.2d 750 (1955); In re Cranwell's Will, 223 N.Y.S.2d 601 (1961); In re Connors' Will, 225 N.Y.S.2d 949 (1962); In re Stern's Will, 228 N.Y.S.2d 90 (1962).

Power to invade the principal of the trust for "best interests" of beneficiary does not include the power to terminate the trust to avoid a tax burden. *Kemp v. Paterson, 159 N.E.2d 661 (N.Y. 1959).*

See Halbach, *Problems of Discretion in Discretionary Trusts, 61 Colum. L. Rev. 1425.*

(n4)Footnote 189. 2 Blackstone, Commentaries 274. *Jackson ex dem. McCrea v. Mancius, 2 Wend. 357 (N.Y. 1829); Stump v. Findlay, 2 Rawle 168 (Pa. 1828); Faber v. Police, 10 S.C. 376 (1877).*

(n5)Footnote 190. Geoffray Gilbert, A Treatise of Tenures, 119 (2d ed. 1738).

(n6)Footnote 191. *Stevens v. Winship, 18 Mass. (1 Pick.) 318 (1823).*

A life tenant has no power to convey a fee. *Miller v. O'Neal, 361 N.E.2d 1165 (Ill. App. 1977).*

(n7)Footnote 192. *Smith v. McWhorter, 51 S.E. 474 (Ga. 1905); Alexander v. Goellert, 109 P.2d 146 (Kan. 1941); Stewart v. Clark, 54 Mass. (13 Met.) 79 (1847); Daley v. Daley, 32 N.E.2d 286 (Mass. 1941); Hayward v. Kinney, 48 N.W. 170 (Mich. 1891); Heilwig v. Nybeck, 146 N.W. 141 (Mich. 1914); Acord v. Beaty, 148 S.W. 901 (Mo. 1912); Miles v. Miles, 32 N.H. 147 (1855); Howell v. Howell, 172 N.E. 528 (Ohio St. 1930); Green v. Votaw, 134 P.2d 367 (Okla. 1943); Criswell v. Grumbling, 107 Pa. 408 (1884); Evans v. Graves, 166 S.W.2d 955 (Tex. Civ. App. 1943).*

(n8)Footnote 193. *Hall v. Condon, 51 So. 20 (Ala. 1909); Rittenhouse v. Porter, 128 S.W. 288 (Ky. 1910); Franklin v. Jones, 191 S.W.2d 835 (Tenn. App. 1945).*

Power of life tenant to sell or lease for support did not justify leasing for oil and gas. *Johnson v. Messer, 437 S.W.2d 643 (Tex. Civ. App. 1969).*

Conveyances of greater estate than owned do not forfeit. Wyo. Stat. § 34-1-111.

Life tenant cannot lease beyond life. *Wood v. Trenchard, 550 P.2d 490 (Wyo. 1976).*

(n9)Footnote 194. *Alexander v. Goellert, 109 P.2d 146 (Kan. 1941); In re Grubb's Estate, 33 Berks. 53 (Pa. 1891).*

(n10)Footnote 195. *Ashbaugh v. Wright, 188 N.W. 157 (Minn. 1922); Content v. Dalton, 190 A. 328 (N.J. 1937); Green v. Votaw, 134 P.2d 367 (Okla. 1943); Phillips v. Wells, 133 S.E. 581 (Va. 1926). See Vidmer v. Lloyd, 69 So. 480 (Ala. 1915); Kidd v. Borum, 61 So. 100 (Ala. 1913); Westcott v. Meeker, 122 N.W. 964 (Iowa 1909).*

(n11)Footnote 196. *Smith v. Maberry, 229 S.W. 718 (Ark. 1921); Farkas v. Farkas, 38 S.E.2d 924 (Ga. 1946)*(where the grant of the life estate provides a remainder over on attempted alienation, the attempt terminates the life estate); *Conner v. Wright, 41 S.E.2d 158 (Ga. 1947); McDaniel v. Bagby, 51 S.E.2d 805 (Ga. 1949).*

(n12)Footnote 197. *Ashbaugh v. Wright, 188 N.W. 157 (Minn. 1922).*

(n13)Footnote 198. Possession of grantee from life tenant under deed purporting to convey fee is adverse. *Rutledge v. Rutledge, 132 S.E.2d 469 (Va. 1963).*

(n14)Footnote 199. *Williams v. J. M. High Co., 36 S.E.2d 667 (Ga. 1946).*

Holding that where a life tenant with power to convey grants by deed containing no reference to the power he is presumed to convey only the life estate. *Antel v. Chase, 77 Ind. 74 (1881).*

(n15)Footnote 200. *Mid-State Homes, Inc. v. Johnson, 128 S.E.2d 197 (Ga. 1962).*

(n16)Footnote 201. *Jemzura v. Jemzura, 330 N.E.2d 414 (N.Y. 1975).*

(n17)Footnote 202. *United States v. 122,000 Acres of Land, 57 F. Supp. 421 (N.D Tex. 1944).*

(n18)Footnote 203. 2 Blackstone, Commentaries 171.

(n19)Footnote 204. *Albergotti v. Summers, 26 S.E.2d 395 (S.C. 1943).*

Power of alienation is not a legal incidence of a life estate. *Wheeling Dollars Sav. & Trust Co. v. Leedy, 216 S.E.2d 560 (W. Va. 1975).*

A life tenant is in a sense a trustee for a remainderman so that he cannot endanger or dispose of the property. This is the difference from the true trustee in that he uses the property for his exclusive benefit and takes income and profits therefrom. *Duncan v. Johnson, 338 So. 2d 1243 (Ala. 1976).*

(n20)Footnote 205. It has been held in Mississippi to be competent for a testator devising a life estate to his wife to prohibit alienation of the property during her life. *Crawford v. Solomon, 95 So. 686 (Mass. 1923); Bennett v. Humphreys, 155 P.2d 431 (Kan. 1945)*(upholding forfeiture restraint on life estates).

(n21)Footnote 206. The rule in Virginia is that alienability is an incident of a life estate and that general restraints on the alienation of such an estate will be void. *Rowley v. American Trust Co., 132 S.E. 347 (Va. 1926).*

(n22)Footnote 207. *Simonton v. White, 53 S.W. 339 (Tex. 1899).*

Life tenant is quasi trustee for remainderman. *Skovron v. Third Nat'l Bank, 509 S.W.2d 497 (Tenn. App. 1973).*

(n23)Footnote 208. *Haywood v. Briggs, 41 S.E.2d 289 (N.C. 1947)*(life tenant cannot agree that his tenant may remove his improvements after death of life tenant); *Lake Erie Gas, Coal & Coke Co. v. Patterson, 39 A. 68 (Pa. 1898).*

Lessee from life tenant's rights cease on death of life tenant except right to remove implements. *In re Luke's Estate, 184 N.W.2d 42 (Iowa 1971).*

(n24)Footnote 209. *Hoagland v. Crum, 113 Ill. 365 (1885); Watson v. Penn, 8 N.E. 636 (Ind. 1886); Guthmann v. Vallery, 71 N.W. 734 (Neb. 1897); Shufflin v. House, 31 S.E. 974 (W. Va. 1898).*

(n25)Footnote 210. *Staples v. Pearson, 159 So. 488 (Ala. 1935).*

(n26)Footnote 211. 4 Kent's Commentaries *supra*, note 72, 73. *Palman v. Reynolds, 16 N.W.2d 657 (Mich. 1944); Miles v. Miles, 32 N.H. 147 (1855); Wiggin v. Wiggin, 43 N.H. 561 (1862).*

(n27)Footnote 212. *La Rue v. Parmele, 103 N.W. 304 (Neb. 1905).*

(n28)Footnote 213. *Ray v. Young, 142 N.W. 393 (Iowa 1913); Cassady v. Cain, 223 S.W.2d 744 (Ky. 1949).*

On question of lessee's (of life tenant) removal of building from land after death of life tenant it is immaterial whether lessees understood extent of their lessor's title for they had nothing more than he had. *Chabon v. Lazarus, 87 A.2d 435 (N.J. Super. 1952).*

(n29)Footnote 214. *Williams v. Durham, 50 S.E.2d 373 (Ga. App. 1948); Hoagland v. Crum, 113 Ill. 365 (1885); Waldron v. Wahl, 133 A. 252 (Pa. 1926); First Presbyterian Church v. York Depository, 27 S.E.2d 573 (S.C. 1943); Ray v. Frick Co., 57 S.E.2d 890 (W. Va. 1950).*

(n30)Footnote 215. *Holden v. Boring, 43 S.E. 86 (W. Va. 1903).*

(n31)Footnote 216. *Holland v. Bogardus-Hill Drug Co., 284 S.W. 121 (Mo. 1926).*

(n32)Footnote 217. *Armstrong v. Rodemacher, 203 N.W. 23 (Iowa 1925); In re O'Donnell, 147 N.E. 541 (N.Y. 1925).*

(n33)Footnote 218. *Ray v. Young, 142 N.W. 393 (Iowa 1913); Armstrong v. Rodemacher, 203 N.W. 23 (Iowa 1925); Guthmann v. Vallery, 71 N.W. 734 (Neb. 1897); In re Hunt's Estate, 197 N.Y.S. 633 (1923); Jones v. Shufflin, 31 S.E. 975 (W. Va. 1898); Shufflin v. House, 31 S.E. 974 (W. Va. 1898).*

(n34)Footnote 219. The statutes of Illinois prohibit a life tenant from granting a lease for the removal of oil from the premises, and prohibit the remainderman as against the life tenant from entering the premises and removing oil. *Carter Oil Co. v. McQuigg, 27 F. Supp. 182 (E.D. Ill. 1939).*

Life tenant may be given power to execute mineral leases. *Glass v. Skelly Oil Co., 469 S.W.2d 237 (Tex. Civ. App. 1971).*

(n35)Footnote 220. *Holloway v. Bank of Atkins, 169 S.W.2d 868 (Ark. 1943); Arighi v. Rule & Sons, 107 P.2d 970 (Cal. App. 1940); New South Bldg. & Loan Ass'n v. Gann, 29 S.E. 15 (Ga. 1897); Mid-State Homes, Inc. v. Johnson, 128 S.E.2d 197 (Ga. 1962)*(mortgage given by life tenant ended when life estate terminated); *Hosmer v. Carter, 68 Ill. 98 (1873); Alexander v. Goellert, 109 P.2d 146 (Kan. 1941); Spearman v. Hussey, 50 So. 2d 610 (Miss 1951); Rupert v. Penner, 53 N.W. 598 (Neb. 1892); E. A. Beall Co. v. Weston, 65 S.E. 823 (S.C. 1909); Chickamauga Trust Co. v. Lonas,*

201 S.W. 777 (Tenn. 1918).

(n36)Footnote 221. *McDonald v. Woodward, 36 S.E. 918 (S.C. 1900)*

(n37)Footnote 222. *Mixter v. Woodcock, 28 N.E. 907 (Mass. 1891). See New South Bldg. & Loan Ass'n v. Gann, 29 S.E. 15 (Ga. 1897); Peoples Loan & Exch. Bank v. Garlington, 32 S.E. 513 (S.C. 1899).*

(n38)Footnote 223. *Missouri Cent. Bldg. & Loan Ass'n v. Eveler, 141 S.W. 877 (Mo. 1911).*

(n39)Footnote 224. *Swarthout v. Ranier, 38 N.E. 726 (N.Y. 1894); In re Jenks, 43 A. 871 (R.I. 1899).*

(n40)Footnote 225. *Reeside v. Annex Bldg. Ass'n, 167 A. 72 (Md. 1933).*

"A life tenant may mortgage his interest, and his estate may be sold under foreclosure proceedings without affecting the interest of the remainderman, nor will the procedure give the mortgagee any legal or equitable rights against him." *Ashbaugh v. Wright, 188 N.W. 157 (Minn. 1922).*

See Restatement, Property § 124, cmt. b.

Life estate subject to levy and execution. *Shrout v. Seale, 250 So. 2d 592 (Ala. 1971).*

(n41)Footnote 226. *Security Sav. Bank v. Williams, 176 N.W. 971 (Iowa 1920).*

(n42)Footnote 227. *Id.*

Life tenant having power to consume does not have power to make gifts. *Alexander v. Alexander, 561 S.W.2d 59 (Ark. 1978).*

(n43)Footnote 228. *Security Sav. Bank v. Williams, 176 N.W. 971 (Iowa 1920).*

(n44)Footnote 229. *Covington v. Covington, 245 S.W. 275 (Ky. 1922).*

(n45)Footnote 230. *Ashbaugh v. Wright, 188 N.W. 157 (Minn. 1922).*

(n46)Footnote 231. *Murrell v. Stock Growers Nat'l Bank, 74 F.2d 827 (10th Cir. 1934); Brunton v. Easthampton Sav. Bank, 145 N.E.2d 696 (Mass. 1957)*(life tenant's power to sell does not include power to mortgage).

Income not used by life tenant belongs to remainderman. *Skovron v. Third Nat'l Bank, 509 S.W.2d 497 (Tenn. App. 1973).*

(n47)Footnote 232. *John Hancock Mut. Life Ins. Co. v. Dower, 271 N.W. 193 (Iowa 1937).*

(n48)Footnote 233. *Security Inv. Co. v. Golz, 36 N.W.2d 862 (Neb. 1949).*

(n49)Footnote 234. *Hawkins v. McDougal, 25 N.E. 807 (Ind. 1890); Eversole v. Combs, 112 S.W. 1132 (Ky. 1908); Windham v. Howell, 47 S.E. 715 (S.C. 1904).*

See the following cases:

Chapman v. York, 94 So. 90 (Ala. 1922); Cottingham v. Love, 99 So. 907 (Ala. 1924); Chapman v. York, 103 So. 567 (Ala. 1925); Wells v. Dalies, 149 N.E. 279 (Ill. 1925); Whittaker v. Porter, 151 N.E. 905 (Ill. 1926); Traversy v. Bell, 193 N.W. 439 (Iowa 1923); Nitz v. Widman, 184 N.W. 172 (Neb. 1921); Freeland v. Andersen, 211 N.W. 167 (Neb. 1926); Buchis v. Townsend, 136 A. 432 (N.J. Eq. 1927); In re Frutchey, 183 N.Y.S. 786 (1920); Jordan v. Jordan, 239

S.W. 423 (Tenn. 1922).

(n50)Footnote 235. *Acord v. Beaty, 148 S.W. 901 (Mo. 1912); Jordan v. Neese, 15 S.E. 202 (S.C. 1892); Piano Mfg. Co. v. Kindschi, 111 N.W. 680 (Wis. 1907).*

(n51)Footnote 236. *Ganus v. Sullivan, 99 So. 2d 204 (Ga. 1957); Phelps v. Domville, 303 S.W.2d 601 (Mo. 1957); McKnight v. McKnight, 115 S.W. 134 (Tenn. 1908); Piano Mfg. Co. v. Kindschi, 111 N.W. 680 (Wis. 1907).*

Nor in the absence of statute even if the life tenant owns an undivided interest in remainder. *Mizell v. Walley, 44 So. 2d 764 (Ala. 1915).*

Life tenant could, under statute, have partition and sale of entire property. *Williams v. Colleran, 195 S.E.2d 413 (Ga. 1973).*

(n52)Footnote 237. *Acord v. Beaty, 148 S.W. 901 (Mo. 1912); Ridley v. Halliday, 61 S.W. 1025 (Tenn. 1901).*

(n53)Footnote 238. *Whitten v. Whitten, 219 P.2d 228 (Okla. 1950); Ridley v. Halliday, 61 S.W. 1025 (Tenn. 1901).*

Life tenant cannot acquire title from remainderman by adverse possession. *Duncan v. Johnson, 338 So. 2d 1243 (Ala. 1976).*

(n54)Footnote 239. *Amator v. Amator, 560 P.2d 410 (Ariz. 1977).*

A life tenant is in a sense a trustee for a remainderman so that he cannot endanger or dispose of the property. This is a difference from the true trustee in that he uses the property for his exclusive benefit and takes all income and profits therefrom. *Duncan v. Johnson, 338 So. 2d 1243 (Ala. 1976).*

(n55)Footnote 240. *Brown v. Brown, 67 S.E. 596 (W. Va. 1910).*

(n56)Footnote 241. *Williams v. Alt, 123 N.E. 499 (N.Y. 1919).*

(n57)Footnote 242. *Marshall v. Moseley, 21 N.Y. 280 (1860).*

(n58)Footnote 243. *11 Geo. 2,* ch. 17, § 15; *4 Wm. 4,* ch. 22.

(n59)Footnote 244. *Peery v. Fletcher, 182 P. 143 (Or. 1919).*

(n60)Footnote 245. *Hume v. Randall, 36 N.E. 402 (N.Y. 1894).*

(n61)Footnote 246. *Cutting v. Cutting, 86 N.Y. 522 (1881).*

(n62)Footnote 247. 1 Washburn on Real Property, *supra*, note 43 ch. 1, § 1 14, 15. *Koltenbrock v. Cracraft, 36 Ohio St. 584 (1881).* (No forfeiture today.)

* This chapter is based in part on Ch. 30, George W. Thompson, Commentaries on The Modern Law of Real Property (John S. Grimes ed. 1979), which made a significant contribution toward preserving the American common law of life estates.

Thompson on Real Property, Thomas Editions

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CHAPTER 19 LIFE ESTATE *

2-19 Thompson on Real Property, Thomas Editions § 19.06

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§ 19.06 Duration of Life Estates.

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The basic identifying factor of a life estate is that the tenant's interest may not extend beyond the existence of the life of a stated person or persons in existence at the time of the beginning of the estate. Thus, speaking of duration, there may be four types of life estates: (a) those for the life of the tenant; (b) those to continue during the life or lives of another or others than the tenant; (c) an estate which will not endure beyond the life or lives of stated persons but may terminate earlier upon the happening of an uncertain event; n248 and (d) life estates convertible into estates inheritable.

An estate of freehold in lands or tenements, limited to a person for life, is the highest of all interests or estates not of inheritance, and when the language of the instrument creating the estate is equivocal, the construction will favor the grantee, and his life will be the measure of duration of the estate if the estate of the grantor is sufficient to create an estate of such duration. n249 In a grant to "A for life," it is not clear as to whose life is meant as the measure of duration. If the grantor is the owner of the fee, the grantee takes the estate for the grantee's own life, as this is more valuable than an estate for the life of the grantor. n250 If the grantor had a life estate only, and conveyed to another for life without designating whose life, the grantee will take such estate as the grantor had, as no presumption obtains that the grantor intended to convey more than the grantor had. n251

At common law, in a tenancy *pur autre vie*, if the tenant died before the *cestui que vie*, the estate did not terminate, but continued until the death of the *cestui que vie*. During the interval between the two deaths there might be a period of vacancy when there would be no tenant. This condition the law always abhors. The feudal lord, very jealous of the right to the services of the tenants, naturally wanted someone in possession capable of rendering such services. The policy of the common and modern law encourages the possession and fruitful increase from lands. Something must be done with the estate during this period. It could not go to the grantee's heirs, because it was not inheritable. It could not go to his personal representatives, for it is a freehold interest in real property and they have no right to it. It could not go back to the grantor, for the grantor had parted with the grantor right to it so long as the *cestui que vie* lives. Neither could it escheat, as only inheritable estates escheat. So the common law authorized any person to take possession, and the first to do so became what was known as a general occupant. n252 This general occupant had the right to the possession and enjoyment until the death of the *cestui que vie*, if the occupant lived so long and was protected in such right as any other

owner. This seeming injustice had its beneficial effects, and resulted in the limitation of estates *pur autre vie* to the grantee and the grantee's heirs.

Such limitation did not make the estate inheritable, though the word "heirs" was used, but it showed the intention of the parties that those standing in the relation of heirs to the tenant should have the estate after the tenant's death so long as the *cestui que vie* lived. This was termed "naming a special occupant." On the tenant's death their rights were superior to all others, but before the tenant's death they had no rights. They could only claim what remained after the tenant's death. They were not purchasers, but the tenant could not bar them by a devise of the estate. Persons other than the tenant's heirs might be made special occupants by being named in the limitation to the tenant. It is said that a tenant at will of the tenant *pur autre vie* had a claim superior to one claiming as special occupant and who was also an heir of the occupant. n253 These peculiar rules of the common law have been superseded in England, as well as practically all the American states, by statutes. In some of the states this estate, *pur autre vie*, at the tenant's death is made to descend to the heirs like inheritable estates proper, while in other states it is treated as personalty and passes to the personal representatives as assets for the payment of debts and distribution.

An estate for the life of another, an estate "pur autre vie," is the lowest freehold estate. n254 Accordingly, in case of doubt as to whether it is an estate for the life of the tenant or an estate *pur autre vie*, it will be construed as an estate for the life of the tenant. n255 The person whose life is the measure of duration is called the *cestui que vie*. n256 It matters not how many persons are designated, whose lives are to measure the estate. It resolves itself into the measure of a single life, the survivor of all those named. So long as the number is such that the survivor can easily be ascertained the number is immaterial. By statute in some states, however, if the number of lives exceeds two, the remainder takes effect on the death of the two first named. Where the estate is for the lives of the tenant himself and of another person or persons, the tenant has a freehold to continue until the death of the survivor, but, if such person or persons survive the tenant, the estate becomes one on condition or special limitation in the nature of an estate *pur autre vie.* n257 The most usual estate *pur autre vie* is that created by a life tenant transferring the interest to another. The transferee's estate is not measured by the own life but by that of the transferor. n258 While an estate for the life of the transferee's another will pass upon the death of its owner to the heirs, such estate is not an estate of inheritance in the strict sense of that term. n259

The next class of conventional life estates is one that is limited upon an uncertain event or contingency that may not happen during the tenant's life and is thus termed a life estate. This class of life estates resembles an estate in fee upon a special limitation in that there is a collateral limitation annexed to the general limitation for life, which is the unnatural termination of a life estate in the determinable fee and cuts short the estate while the tenant may be living. Thus, an estate to a woman while unmarried, during widowhood, during coverture or as long as she shall live in a certain place, are all illustrations of such estates. n260 It will be observed from the above illustrations that the event or contingency which is to terminate the estate is largely under the control of the tenant, but this fact is not necessary to the creation of such estate. So. a devise to one until he can pay the devisor's debts out of the rents and profits is a life estate, as the rents and profits may not be a sufficient amount to pay the debts during the grantee's life but not so if there is a devise to executors to pay the debts of the testator. n261 If such gift to the executors is by deed, then they will be held to have a life estate. n262

An estate made determinable only on the death of the person to whom it is limited will terminate with the death of such person. If made determinable upon the happening of an event, it terminates with the happening of the event prior to the tenant's death. n263 Where the estate is for the life of another, it is terminated by the death of the *cestui que vie.* n264 A conveyance of a life estate to the remainderman has the effect to terminate the life estate, which becomes merged in the fee, n265 but such termination will not be sanctioned if the rights or interests of third persons will be prejudiced thereby. n266 However, there is no merger where the life tenant takes the remainder by another title because of the invalidity of the remainder over. n267 A tenant for life may convey the entire interest in such life estate to another, and such conveyance creates in such other a life estate *pur autre vie*. n268 A sale of the life tenant's interest under a mortgage foreclosure will terminate the estate. n269 Where the life tenant's title is a matter of record, no conveyance

which the remainderman may make will lessen or affect the life estate. n270 A life estate reserved by deed may, however, be terminated by a later deed of the grantor to the same grantee which conveys the property in fee without reservation or condition of any kind. n271 Where the principal estate is taken by condemnation the life estate is not destroyed and the life tenant is entitled to compensation. n272 In such case, the life tenant is usually given the interest on the proceeds. n273 But it has also been held that if the property is taken by eminent domain, the compensation is divided between the life tenant and the remainderman. n274

In conformity with the rule that, where greater and lesser estates coincide and meet in one and the same person, without any intermediate estate, the lesser is merged into the greater, if an estate *pur autre vie* and a subsequent estate for one's own life come together in one person, the former, being the lesser estate, will be merged in the latter. n275 However, where a limitation is made to a tenant for his own life and the life or lives of others, does such tenant have an estate *pur autre vie* or an estate for the tenant's own life? If there is a merger of the two life estates, then should the tenant die while the others named are living, there is a shortening of the duration intended by the grantor. Notwithstanding the general rule that merges a lesser into a greater estate when both are the property of one person, there will be no merger in the case mentioned, but the tenant will have what is considered a cumulative estate, which does not terminate until all the persons named are dead. If the tenant dies first then there is an estate *pur autre vie* for a general occupant at common law, for descent to heirs or as assets for personal representatives, according to the law of the jurisdiction in which the property is situated. n276

At common law, a life tenant who attempted to convey a greater estate forfeited the life estate. n277 Today the rule generally, by statute or court decision, is that such a deed merely transfers the life estate so as to create a life estate *pur autre vie* in the transferee. n278 A life estate may also terminate for causes other than those expressed in the instrument creating it. At common law, such a termination could take place either through forfeiture for waste, n279 through merger or through forfeiture through attempted transfer of a fee. And where the life estate and the reversion or remainder come into the same hands a merger takes place and the life estate is swallowed up on the future interest, a present fee resulting. n280

Whenever the ancestor takes an estate of freehold, whether for the ancestor's own life or the life of another, or whether it be of such a nature that it may determine in the ancestor's lifetime, or not, and there is afterwards, in the same conveyance, a limitation to the ancestor's heirs, such limitation vests immediately, by way of merger, in the ancestor. n281 The life estate may also be subject to determining upon the happening of a certain event, such as remarriage so as to become a determinable life estate or it may be subject to a condition subsequent, or a limitation over or breach of condition such as alienation. n282

A provision in a will that, if the life tenant fails to pay taxes and a sale of the land is had the life tenant shall forfeit the interest to the person next entitled to the land in remainder or reversion, the life estate is terminated by failure to comply with the provision. n283 Where a will, either expressly or by implication from its language, permits a distribution of a life estate prior to the death of the life tenant, a termination may occur. n284 At all events, the tenants interest in the property ceases upon the termination of the life upon which the estate was limited. n285

Some states have established statutory methods of recording transmission of joint tenancy and life estates on death. n286

COMPUTER-ASSISTED RESEARCH

LEXIS: duration w/15 life estate!

FOOTNOTES:
(n1)Footnote 248. *Chamberland v. Goldberg, 152 A.2d 219 (R.I. 1959).*

(n2)Footnote 249. 2 William Blackstone, Commentaries 121.

(n3)Footnote 250. Coke on Littleton, § 42a; *English v. Carter, 189 S.W.2d 839 (Ky. 1945); Shaner v. Wilson, 56 A. 1086 (Pa. 1904).*

(n4)Footnote 251. 2 William Blackstone, Commentaries 121; Herbent Broom, A Selection of Legal Maxims, 458 (10th ed. 1939); *Rogers v. Moore, 11 Conn. 553 (1836); Bell v. Twilight, 22 N.H. 500 (1851).*

(n5)Footnote 252. Coke on Littleton, § 41b; 2 William Blackstone, Commentaries 259; 4 Kent's Commentaries *supra*, note 72, 26.

(n6)Footnote 253. Coke on Littleton, § 41b, n. 232.

Tenant of the owner of a life estate has an absolute right to reenter the land and harvest his crops which matured after the death of the landlord life tenant. *Richardson v. Scroggham, 307 N.E.2d 80 (Ind. App. 1974).*

(n7)Footnote 254. 4 Kent's Commentaries *supra*, note 72, 26; *Madison v. Larmon, 48 N.E. 556 (Ill. 1897).*

(n8)Footnote 255. Coke on Littleton, § 42a; 2 Blackstone, Commentaries 121.

(n9)Footnote 256. 2 Blackstone, Commentaries 258; Coke on Littleton, § 41b.

(n10)Footnote 257. Coke on Littleton, § 42a; 2 Blackstone, Commentaries 121; *McArthur v. Scott, 113 U.S. 340 (1885); Hayward v. Kinney, 48 N.W. 170 (Mich. 1891); Mattocks v. Stearns, 9 Vt. 326 (1837); Smith v. Smith, 62 S.E.2d 347 (W. Va. 1950).*

(n11)Footnote 258. *Ross v. First Presbyterian Church, 197 S.W. 561 (Mo. 1917); Morris v. Eddins, 44 S.W. 203 (Tex. Civ. App. 1898).*

(n12)Footnote 259. *Folwell v. Folwell, 56 A. 117 (N.J. Eq. 1903), aff'd, 63 A. 1118 (N.J. 1904); Hopewell v. Patterson, 36 S.W. 319 (Tex. Civ. App. 1896).*

(n13)Footnote 260. Coke on Littleton, § 42n.

Berry v. Kimbrough, 92 So. 2d 20 (Ala. 1957) ("during her natural life while single" was a life estate); *Fields v. Kline, 256 S.W. 355 (Ark. 1923); McCray v. Caves, 88 S.E.2d 373 (1955)*(to wife for life or remarriage creates a determinable life estate); *McDonald v. Suarez, 93 S.E.2d 16 (Ga. 1956)*(but a devise in fee with limitation over on remarriage creates a fee subject to an executory limitation); *Roberts v. Roberts, 29 N.E. 886 (Ill. 1892); Wiltfang v. Dirksen, 129 N.E. 159 (Ill. 1920); Lydick v. Tate, 44 N.E.2d 583 (Ill. 1942).*

Where testator devised property to his wife "for herself and our three sons so long as she shall remain my widow" and directed that after death or remarriage of wife property should go to their sons and if either of the sons should die before coming into possession, the survivors should take in equal parts, the sons take a vested remainder subject to being divested if they do not survive death or remarriage of life tenant. *Phelps v. Seeley, 119 N.E.2d 923 (Ill. 1954).*

Taylor v. Farrow, 239 S.W.2d 73 (Ky. 1951)(a devise to widow so long as she remains a widow created a defeasible fee); *Ijams v. Schapiro, 113 A. 343 (Md. 1921); Hurd v. Cushing, 24 Mass. (7 Pick.) 169 (1828); In re Lee's Estate, 10 So. 2d 844 (Miss. 1942); Tillerson v. Taylor, 220 S.W. 950 (Mo. 1920);* Baldwin v. *Baldwin, 2* N.W.2d 23 (Neb. 1942); *Jackson ex dem. Ludlow v. Myers, 3 N.Y. (Johns.) 388 (1808); Hatfield v. Sneden, 54 N.Y. 280 (1873); Miller v. Gilbert, 38 N.E. 979 (N.Y. 1894); In re Clickman's Will, 190 N.Y.S. 762 (1921); Vincent v. Rix, 217 N.Y.S. 393 (1926); In re Morton's Estate, 32 N.Y.S.2d 17 (1941); Roberts v. Saunders, 134 S.E. 451 (N.C. 1926); Fletcher v. Rynd, 18 Ohio App. 136 (1920); Gray v. Gray, 286 P.2d 138 (Or. 1955)* (a contingency may arise to defeat or terminate a life estate prior to

the death of the person by whose life the full term of the tenancy is to be measured, but this contingency does not prevent grant from being construed as a life estate); *Appeal of Brotzman, 19 A. 564 (1890); Schaper v. Pittsburgh Coal Co., 109 A. 762 (Pa. 1920); Bowman v. Brown, 149 A.2d 56 (Pa. 1959)*("so long as she remains my widow" created determinable life estate); *Harrison v. Foote, 30 S.W. 838 (Tex. Civ. App. 1895); Smith v. Smith, 62 S.E.2d 347 (W. Va. 1950); In re Ritchie's Will, 208 N.W. 880 (Wis. 1926).*

See Restatement, Property § 112.

(n14)Footnote 261. Coke on Littleton, § 42a; *Carter v. Barnardiston, 1 P. Wms. 505.*

(n15)Footnote 262. Cordal's Case, Cro. Eliz. 316.

(n16)Footnote 263. *Thompson v. Baxter, 119 N.W. 797 (Minn. 1909).*

(n17)Footnote 264. *Walker v. Fenner, 20 Ala. 192 (1852); Livingston v. Tanner, 14 N.Y. 64 (1856).*

(n18)Footnote 265. *Field v. Peoples, 54 N.E. 304 (Ill. 1899); Bond v. Moore, 86 N.E. 386 (Ill. 1908); McCreary v. Coggeshall, 53 S.E. 978 (S.C. 1906).*

(n19)Footnote 266. *Baker v. Oakwood, 25 N.E. 312 (N.Y. 1890); Moore v. Luce, 29 Pa. 260 (1857).*

(n20)Footnote 267. *In re Warren's Estate, 182 A. 396 (Pa. 1936).*

(n21)Footnote 268. *Howell v. Howell, 172 N.E. 528 (Oh. St. 1930).*

(n22)Footnote 269. *Holmes v. Wintler, 47 F. 257 (C.C.D. Wash. 1891); Fidelity Ins., Trust & Safe-Deposit Co. v. Dietz, 18 A. 1090 (Pa. 1890).*

(n23)Footnote 270. *O'Neill v. Sullivan, 152 N.E. 341 (Mass. 1926).*

(n24)Footnote 271. *Butler v. Bell, 106 S.E. 217 (N.C. 1921).*

(n25)Footnote 272. *Foster v. Augusta, 223 P.2d 730 (Kan. 1950).*

(n26)Footnote 273. *In re New York City, 72 N.Y.S.2d 580 (1947); Ackerman v. State, 102 N.Y.S.2d 536 (1951).*

(n27)Footnote 274. *Foster v. Augusta, 223 P.2d 730 (Kan. 1950); Bacorn v. State, 88 N.Y.S.2d 628 (1949); Ackerman v. State, 102 N.Y.S.2d 536, 103 N.Y.S.2d 632 (1951)*(holder of life estate is entitled to be heard on all appropriation offers, etc., since he is more than a mere encumbrancer).

(n28)Footnote 275. 1 Stephen Martin Leake, An Elementary Digest of the Law of Property 190 (1874); *Boykin v. Ancrum, 6 S.E. 305 (S.C. 1888).*

For doctrine of merger to be applicable, the greater and lesser estate must be in one and the same person, at one and the same time, and in one and the same right. *Jemzura v. Jemzura, 330 N.E.2d 414 (N.Y. 1975).*

(n29)Footnote 276. Coke on Littleton, § 41b; *Mudd v. Mullican, 12 S.W. 263 (Ky. 1889).*

(n30)Footnote 277. 1 Washburn on Real Property *supra*, note 43 (5th ed.), 125; Lyle v. Richards, 9 Serg. & Rawle 322 (Pa. 1823).

(n31)Footnote 278. 2 William Blackstone, Commentaries 153; *Bradley Lumber Co. v. Burbridge, 210 S.W.2d 284 (Ark. 1948); McDaniel v. Bagby, 51 S.E.2d 805 (Ga. 1949).*

(n32)Footnote 279. *Bradley Lumber Co. v. Burbridge, 210 S.W.2d 284 (Ark. 1948)*(failure to pay taxes).

Annotation, 16 A.L.R.3d 1344 (1967).

(n33)Footnote 280. Merger of estates is not permitted where rights of third parties are impaired. *State Sav. & Loan Ass'n v. Kauaian Dev. Co., 445 P.2d 109 (Haw. 1968).*

(n34)Footnote 281. *Lydick v. Tate, 44 N.E.2d 583 (Ill. 1942).*

(n35)Footnote 282. 2 William Blackstone, Commentaries 121; *Farkas v. Farkas, 38 S.E.2d 924 (Ga. 1946).*

Mere nonuse of premises does not cause a surrender of a life estate. *Fabianski v. Boutin, 371 A.2d 1166 (N.H. 1977).*

(n36)Footnote 283. *Leatherman v. Maytham, 33 N.E.2d 1022 (Ohio App. 1940).*

(n37)Footnote 284. *Breidenbach v. Breidenbach, 17 A.2d 596 (N.J. Ch. 1941), aff'd, 21 A.2d 805* (N.J. Err. & App. 1941).

(n38)Footnote 285. *Kany v. Beeks, 85 So. 2d 843 (Fla. 1956)*(confinement in a state hospital is not death); *Haywood v. Briggs, 41 S.E.2d 289 (N.C. 1947)*(lease by life tenant ended when life tenant died); *In re Buss' Estate, 26 N.W.2d 700 (S.D. 1947).*

See Allen J. Saunders, *Testamentary Disposition and the Usufruct of the Surviving Spouse, 18 Loyola L. Rev. 335 (1972).*

(n39)Footnote 286. Kan. Stat Ann. § 59-2286; Utah Code Ann. § 78-41-1; Iowa Code Ann. § 588; Okla. Stat. § 58-191; Wis. Stat. Ann. § 867.045.

Somewhat similar statutes are found in Mich. Comp. Laws § 700.224; S.D. Comp. Laws § 21-44-2; Wis. Stat. Ann. § 867.04.

* This chapter is based in part on Ch. 30, George W. Thompson, Commentaries on The Modern Law of Real Property (John S. Grimes ed. 1979), which made a significant contribution toward preserving the American common law of life estates.

Thompson on Real Property, Thomas Editions

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CHAPTER 19 LIFE ESTATE *

2-19 Thompson on Real Property, Thomas Editions § 19.07

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§ 19.07 Extent of the Life Tenant's Right of Possession of the Freehold.

[Go To Supp]

The life tenant may be described as being the absolute owner of the income of the property during the life tenant's lifetime. But the life tenant cannot take any of the freehold itself. Where ends the right of use of the land, and where begins the injury to the freehold, is a twilight zone that is a fruitful source of litigation. Basically, a life tenant has the right to all the ordinary uses to which the land is accustomed to be put, the only restriction being that the life tenant shall not commit waste. n287

The leading rule holds that both crops harvested and those being harvested at the time of death of the owner belong to the life tenant, not to the remainderman. n288 The life tenant is also entitled to the profits resulting from such use. n289 The life tenant cannot change the use so as to alter the character of the estate, but there is nothing to prevent such tenant from improving the fertility and productiveness of the land by improved methods of culture and management unless such management results in a permanent injury to the inheritance. The life tenant may do what is required for the proper enjoyment of his estate to the extent that his acts and management are sanctioned by good husbandry in the locality in which the land is situated. n290 The life tenant is entitled to the full use and enjoyment of the property, provided in such use the life tenant exercises the ordinary care of a prudent person for its preservation and protection. n291 The duty in this regard may be likened to that of a quasi-trustee for the remainderman. n292

The life tenant under a will is, unless it appears from the will that the testator intended otherwise, entitled to the possession and control of the property during the continuance of the estate, always subject, however, to the property's legal liability to creditors. n293 The life tenant may use the property for the life tenant's own benefit and may appropriate the proceeds arising from its use, but at the same time holds it in trust for the remainderman in the sense that the life tenant must exercise reasonable precautions to preserve it for transmission to the remainderman intact on the termination of the life tenancy. n294 The life tenant cannot injure or dispose of the property to the injury of the remainderman. n295

Generally speaking, the life tenant has neither title nor claim to any part of the corpus of the estate and is entitled only to the rents, issues, and profits thereof. n296 Where, however, a will, either in express language or by implication,

authorizes the subjection of the corpus of the estate to the support of the life tenant, the right thus given cannot be denied, but unless conferred by the will, such right is nonexistent. n297 The only difference between such trustee and a trustee of a pure trust being that the life tenant may use the property for exclusive benefit and take all the income and profits therefrom. n298

Generally, a life tenant can do nothing during the continuance of the estate to impair the estate in remainder and must use reasonable precaution to preserve the property intact without injury or diminution. n299 Some courts have treated the life tenant as a trustee n300 or at least a quasi-trustee n301 for the remainderman with respect to the corpus of the property.

Certainly a life tenant is a fiduciary with respect to the remainderman to the extent that the latter receives all increase in value of the estate. n302 In some jurisdictions, the life tenant with power to consume is treated as a debtor to the remainderman or the trust estate for the principal less the amount consumed so that any enhancement of the value of the principal belongs to the life tenant. n303 A life tenant is entitled to the same protection in possession as a fee owner. n304 Of course the life tenant is entitled to the crops and emblements generally. n305 As a general rule, the life tenant is entitled during the continuance of his estate to the entire income from the property, n306 unless there is a direction to the contrary in the instrument creating such tenancy. n307 However, under the rule that rent follows the reversion, the life tenant is not entitled to rents after the termination of the estate. n308 A bonus paid for the extension of a lease during the continuance of the estate was held to belong to the life tenant, n309 but rent not falling due until after the termination of the estate went to the remainderman even though the lease was made by the life tenant. n310 The death of the life tenant terminates the right in the land and the administrator has no right to appropriate rents accruing after such termination. n311 At common law, rents for a period which began before the life estate was created, but became due and payable during the existence of such estate, belonged to the life tenant. n312 As a general rule, the rents, n313 income, n314 revenues, and benefits n315 of the property, accruing during the continuance of the life estate, belong to the life tenant and not to the remainderman.

A life tenant under a will, though entitled to the income from property from the death of the testator, is entitled only to the income on the residue of the estate after the payment of debts and legacies. n316 The life tenant is entitled to receive payment of the current income and any accumulation, provided such payment does not reduce intact the value of the corpus of the estate. n317 The common law rule against apportionment of annuities does not apply to rents as between the life tenant and the remainderman. n318

In equitable apportionment cases, a distinction must be made between the inception of the right to apportionment and the actual application of apportionment. n319 Where the will creates a trust for life and part of the property is used to pay the testator's debts, there are three rules as to the income on the portion so taken. Under the older Massachusetts rule, all income goes to the life tenant. n320 Under the older New York rule, the total income is applied on principal. n321 Under the English rule the amount of principal and income thereon necessary is used to retire debts and the balance of the income goes to the life tenant.

The question often arises as to whether stock dividends belong to the remainderman or the life tenant. Cash dividends, of course, belong to the life tenant when they represent distribution of current earnings. Liquidating dividends belong to the remainderman or at most they should be distributed between the life tenant and remainderman upon an actuarial basis determined on the life tenant's life or held in trust with the income only returned to the life tenant. n322 But modern day corporate practice favors pretention of substantial segments of annual earnings as surplus. Thus, the earnings of the shares which would have gone to the life tenant had they been distributed as the testator probably thought they would, do not reach the life tenant and his income is correspondingly diminished. When the surplus is transferred to capital and stock issued against the increase in capital, the life tenant will forever lose the retained income if the life tenant does not get at least a share of the stock dividend. In view of the fact that there is little today a stockholder can do to prevent reasonable retention of income by the corporation, the equities of situation would seem to favor the life tenant but the trend of the decisions is against the life tenant. n323

There are three rules as to the application of extraordinary dividends received by trusts: (a) all dividends go to the person presently entitled to receive income; n324 (b) the respective rights of the life tenant and remainderman depend on the substance and intent of the corporation that issued them; (c) the dividends must be apportioned so as to keep the book value of the security as it existed at the time of the trust intent. n325

The provisions of the Uniform Principal and Income Act are applicable to life estates arising after its adoption though the instruments were executed before the adoption. n326 A life tenant or her estate is entitled to all income accumulated by the trustees unless the trust is clearly to the contrary. n327 The reversioner becomes entitled to all rentals falling due after the death of the life tenant.

On the death of a life tenant, the representatives have a right to the growing crops upon which the tenant has bestowed labor. n328 While the life tenant cannot lease beyond the life estate, the life tenant could lease where the renewal term was binding if the renewal rental was to be fixed by future agreement between the landlord and the tenant. n329 To entitle the personal representative to such crop it must appear to have been planted by the life tenant or by someone under the life tenants direction and authority during the tenant's life. The fact that the seed was sown after the termination of the estate defeats the representative's claim to the crop. n330 Those entitled to emblements have a right, after the life estate has terminated, to enter and cultivate the crops and harvest same without incurring any liability for rent during occupancy for this purpose, n331 although some cases hold they must pay rents. n332 The right of such persons is limited to such egress and occupancy as is reasonably necessary to properly care for the crops. n333 It may be stated as a general rule that such products of the soil as are embraced in the term "fructus naturales" are not emblements in the sense that the personal representative of a life tenant may claim them, but they are regarded as a part of the land and pass to the heirs. n334 The right to emblements arises only in case the tenancy is terminated by the death of the tenant or upon the happening of the particular event upon which it is made determinable. If the tenant abandons the estate or does some act which terminates it, the tenant loses the right to the emblements; n335 but this rule does not apply to an under tenant who planted the crop before the commission of the act terminating the life estate. n336 The lessee of a deceased life tenant of agricultural land is entitled to the annual crops sowed prior to the life tenant's death and to go upon and occupy the leased land for the purpose of cultivating, harvesting, and securing such crops. n337 It is held that the doctrine of "emblements" is not limited to situations arising out of a landlord and tenant relationship, but applies to other situations, such as the termination of a life tenancy when there are then growing annual crops which have been planted by a subtenant with rent payable to the life tenant in the form of a share of the crop. n338

In the absence of an express restriction to the contrary, a life tenant is entitled, by virtue of the tenancy and of common right, to cut from off the land such timber as may be necessary for fuel, fences, agriculture, erections, improvements and repairs. n339 The use of timber must not be to the extent of committing waste or making a sale thereof. n340 The life tenant may cut wood to the same extent as the owner of the fee, provided the life tenant does not cut trees planted for ornament or shelter, commit equitable waste, or cut wilfully or maliciously. n341 The Norman French term for such timber is "estovers." Under the old Saxon law, wood necessary for repairs to buildings and for fuel was termed "house-bote," that for the manufacture and repair of implements of husbandry was called "plough-bote," and that used for the construction and repair of fences and sheds was termed "hay-bote." The right to use these was given the tenant as a compensation for keeping the premises in repair, which duty the common law imposed upon the life tenant. n342

The tenant cannot, under the pretense of taking estovers, destroy timber to the extent of injuring the inheritance. n343 In addition to the tenant's right to take estovers, the tenant was permitted to cut timber for purposes required in the reasonable cultivation of the soil. n344 Timber cut by the tenant for fuel or for any other purpose must be used on the land, and cannot be removed by the tenant or any one else to be used off the premises. n345 The real test is whether the timber cut for estovers is a material injury to the value of the reversion, and each case must depend on its particular circumstances. n346 Where it appears from the will which devised a life estate that the testator intended that the life tenant should use the property to whatever extent, not amounting to waste, would be necessary to the reasonable enjoyment of the life estate, the life tenant may cut all timber necessary for firewood and fences and for repairs to the

buildings on the land. n347

If a lessor has but a life estate and an undivided estate in remainder, the lessee's tenancy continues in the remainder interest after the lessor's death. n348

COMPUTER-ASSISTED RESEARCH

LEXIS: life tenant! w/5 right! w/2 possess! w/5 freehold

FOOTNOTES:
(n1)Footnote 287. *Cherokee Constr. Co. v. Harris, 122 S.W. 485 (Ark. 1909); Roby v. Newton, 49 S.E. 694 (Ga. 1905); In re Jones' Estate, 64 N.E.2d 609 (Ohio 1943). See Bliss v. Security-First Nat'l Bank, 183 P.2d 312 (Cal. 1947); Holzhauzer v. Iowa State Tax Comm'n, 62 N.W.2d 229 (Iowa 1953).*

Life estate forfeited for waste. *Offermann v. Dickinson, 175 N.W.2d 423 (Iowa 1970).*

Forfeiture for waste being the Statute of Gloucester is not part of the common law. *Worthington Motors v. Crouse, 390 P.2d 229 (Nev. 1964).*

A life tenant may make the same use of property as when it was created. *Durrence v. Durrence, 238 S.E.2d 377 (Ga. 1977).*

See A.J. Licensee or Tenant for Life, 30 Convey 256 (1966).

(n2)Footnote 288. *Estate of Luke, 184 N.W.2d 42 (Iowa 1971).*

(n3)Footnote 289. *Hite v. Hite, 20 S.W. 778 (Ky. 1892); Drier v. Gracey, 169 N.W. 835 (Mich. 1918).*

A life tenant devisee can lease without consent of the executors. Title vests in devisee immediately subject to divestment to pay creditors. *Kerns v. Pickett, 306 P.2d 1112 (Wash. 1957).*

(n4)Footnote 290. *Marshall v. Hewett, 21 So. 2d 201 (Fla. 1945); Pynchon v. Stearns, 52 Mass. (11 Met.) 304 (1846); Proffitt v. Henderson, 29 Mo. 325 (1860); McGregor v. Brown, 10 N.Y. 114 (1854); King v. Miller, 6 S.E. 660 (N.C. 1888); Thomas v. Thomas, 82 S.E. 1032 (N.C. 1914); Sayers v. Hoskinson, 1 A. 308 (Pa. 1885); Keeler v. Eastman, 11 Vt. 293 (1839).*

(n5)Footnote 291. *Roby v. Newton, 49 S.E. 694 (Ga. 1905); Ryder v. Ryder, 41 A.2d 278 (N.J. 1945). See Bliss v. Security-First Nat'l Bank, 183 P.2d 312 (Cal. 1947).*

(n6)Footnote 292. *Fiske v. Buder, 125 F.2d 841 (8th Cir. 1942); Hardy v. Mayhew, 110 P. 113 (Cal. 1910); Farmers' Mut. Fire & Lightning Ins. Co. v. Crowley, 190 S.W.2d 250 (Mo. 1945); Green v. Green, 27 S.E. 952 (S.C. 1897); C.C. Young Mem. Home for Aged Women v. Nelms, 223 S.W.2d 302 (Tex. Civ. App. 1949).* A life tenant is a trustee in sense that he cannot injure or dispose of property to injury of rights of remaindermen, but he differs from a pure trustee in that he may use property for his exclusive benefit and take all income and profits. *Burlington County Trust Co. v. Kingsland, 86 A.2d 815 (N.J. Super. 1952); In re Larson's Estate, 52 N.W.2d 141 (Wis. 1952).*

(n7)Footnote 293. *Burwell v. Raleigh Banking & Trust Co., 118 S.E. 881 (N.C. 1923).*

(n8)Footnote 294. *Warrington v. Hignutt, 31 A.2d 480 (Del. 1943); Kepert v. Kepert, 134 N.E. 297 (Ind. App. 1922).*

(n9)Footnote 295. *Durden v. Neighbors, 168 So. 887 (Ala. 1936); Sallee v. Daneri, 121 P.2d 781 (Cal. 1942).*

(n10)Footnote 296. *Lane v. Tarver, 113 S.E. 452 (Ga. 1922); Drier v. Gracey, 169 N.W. 835 (Mich. 1918).*

(n11)Footnote 297. *Ward v. Wright, 246 S.W. 123 (Ky. 1922).*

(n12)Footnote 298. *Amos v. Toolen, 168 So. 687 (Ala. 1936).*

Life tenant is quasi-trustee of remainderman. *Salvation Army of Wichita v. Pryor's Estate, 570 P.2d 1380 (Kan. App. 1977).*

(n13)Footnote 299. *White v. Blackman, 168 S.W.2d 531 (Tex. Civ. App. 1942).*

(n14)Footnote 300. *Bliss v. Security-First Nat'l Bank, 183 P.2d 312 (Cal. App. 1947); Williams v. Morrison, 48 N.W.2d 666 (Iowa 1951); Burlington County Trust Co. v. Kingsland, 86 A.2d 815 (N.J. Super. 1952); Burlington County Nat'l Bank v. Braddock, 94 A.2d 868 (N.J. Super. 1953); In re Johnson's Estate, 158 N.Y.S.2d 933 (1956)*(personalty).

Under a statute, the probate court was given discretion to require a bond of the life tenant in favor of the remainderman even before any devastavit was shown. *In re Kyle's Estate, 155 N.E.2d 498 (Ohio App. 1958).*

(n15)Footnote 301. *Attebery v. Prentice, 65 N.W.2d 138 (Neb. 1954); Trute v. Skeede, 75 N.W.2d 672 (Neb. 1956); In re Barnes, 108 N.E.2d 88 (Ohio Com. Pl. 1950), aff'd 108 N.E.2d 101 (Ohio App. 1952); Edwards v. Puckett, 268 S.W.2d 582 (Tenn. 1954).*

One holding a life tenancy and also an interest in remainder was not a cotenant with the other remainderman. *Statler v. Watson, 68 N.W.2d 604 (Neb. 1955).*

(n16)Footnote 302. *Trute v. Skeede, 75 N.W.2d 672 (Neb. 1956).*

(n17)Footnote 303. *In re Malone's Trust, 53 Lanc. Rev. 101* (Pa.).

(n18)Footnote 304. *Wright v. Sullivan, 42 So. 2d 185 (Miss. 1949); Williams v. Sarnowski, 50 Lack. Jur. 235* (Pa.).

When a life tenant lessor died during the growing season the landlord's share of the crops when harvested belonged to the remainderman, not to the life tenant's estate. *In re North's Estate, 320 S.W.2d 597 (Mo. App. 1959).*

Contra, In re Mischke's Estate, 287 N.W. 760 (Neb. 1939).

The crops were given to the life tenant's lessee where the lease consideration was a cash rent. *Strand v. Boll, 183 N.W. 284 (S.D. 1921).*

See Annotation. *Rights and Duties of Life Tenant and Remainderman (income & corpus) with* Respect to Repairs and Improvements, 128 A.L.R. 199, 280, 286 (1940).

(n19)Footnote 305. 2 Blackstone, Commentaries 123, personal representative of deceased life tenant to the growing crops. See discussion as to emblements generally in Vol. 1 herein.

Free farming is a crop with the proceeds going to the life tenant. *First Nat'l Bank v. Wefel, 40 So. 2d 434 (Ala. 1949); Lee & Bradshaw v. Rogers, 108 S.E. 371 (Ga. 1921); Bartlett v. Pickering, 92 A. 1008 (Me. 1915); Poole v. Union Trust Co., 157 N.W. 430 (Mich. 1916).*

(n20)Footnote 306. *BakerBoyer Nat'l Bank v. Henricksen, 46 F. Supp. 831 (W.D. Wash 1942), aff'd, 139 F.2d 877 (9th Cir. 1944); Marshall v. Hewett, 21 So. 2d 201 (Fla. 1945); Letcher v. German Nat'l Bank, 119 S.W. 236 (Ky. 1909); Bramell v. Cole, 37 S.W. 924 (Mo. 1896); In re Depew's Estate, 41 N.Y.S.2d 19 (1943); McDonald v. Jarvis, 60 S.E. 990 (W. Va. 1908).*

(n21)Footnote 307. *Bramell v. Cole, 37 S.W. 924 (Mo. 1896); In re Depew's Estate, 41 N.Y.S.2d 19 (1943).*

(n22)Footnote 308. *Pierce v. Fulmer, 51 So. 728 (Ala. 1910); Edwards v. Griffin, 310 S.W.2d 798 (Ark. 1958).*

(n23)Footnote 309. *In re Archambault's Estate, 81 A. 314 (Pa. 1911).*

(n24)Footnote 310. *Osborne v. Osborne, 138 S.W. 1062 (Tex. Civ. App. 1911).*

(n25)Footnote 311. *Pierce v. Fulmer, 51 So. 728 (Ala. 1910). See Magee v. Holmes, 70 So. 2d 60 (Miss. 1954). Winegard v. Levy, 199 N.Y.S. 209 (1923).*

The estate of one who holds both a life tenancy and an interest in remainder is entitled to have a right of possession after the life tenant's death as to the portion owned in remainder. *Statler v. Watson, 68 N.W.2d 604 (Neb. 1955).*

(n26)Footnote 312. *Dexter v. Phillips, 121 Mass. 178 (1876).*

(n27)Footnote 313. *Underwood v. Underwood, 50 So. 305 (Ala. 1909); Drier v. Gracey, 169 N.W. 835 (Mich. 1918); Wiggin v. Wiggin, 43 N.H. 561 (1862); Noble v. Tyler, 56 N.E. 191 (Ohio 1900); In re Archambault's Estate, 81 A. 314 (Pa. 1911).*

(n28)Footnote 314. *Cushenberry v. Neely, 287 S.W. 975 (Ky. 1926); In re Chipman's Estate, 209 N.W. 67 (Mich. 1926); In re Nirdlinger's Estate, 139 A. 200 (Pa. 1911); Rhode Island Hosp. Trust Co. v. Tucker, 155 A. 661 (R.I. 1931); Richardson v. McCloskey, 276 S.W. 680 (Tex. Comm. App. 1924).*

As a general rule, undisbursed income remaining at the life tenant's death belongs to the remaindermen in a trust. *Rhode Island Hosp. Trust Co. v. Otis, 75 A.2d 210 (R.I. 1950).*

(n29)Footnote 315. *Richardson v. McCloskey, 261 S.W. 801 (Tex. Civ. App. 1924).*

See Comment. *Apportionment of Extraordinary Dividends Between Life Tenant and Remainderman, 12 Ohio St. L.J. 588 (1951);* C. Alexander *Reserves Against the Depreciation of Real Property Held by a Trustee, 12 Ohio St. L.J. 565 (1951).*

California gives all capital gains to the remainderman. *Estate of Traung, 185 P.2d 801 (Cal. 1947).*

A life tenant is entitled to the entire fruits and income of the life estate, and if the same is consumed in the use intended to be made of it, the rights of remaindermen are defeated, and they are entitled to nothing. *Croasdale v. Butell, 280 P.2d 593 (Kan. 1955); Guthrie v. Crews, 229 S.W. 182 (Mo. 1920); Perigo v. Perigo, 64 N.W.2d 789 (Neb. 1954).*

(n30)Footnote 316. *York v. Maryland Trust Co., 133 A. 128 (Md. 1926).*

On the question of allocation to income or principal, a testator is presumed to have known and made the will with reference to law in effect at the time. Where a trustee was empowered by terms of the will "to determine what is income and what is principal." The discretion of the trustee is not uncontrolled, but was subject to a rule of reasonable exercise in accord with sound judgment, the law, and the intent of the testator. *In re Heard's Estate, 236 P.2d 810 (Cal. App. 1951).*

(n31)Footnote 317. *In re Sternberger's Estate, 182 A. 723 (Pa. Super. 1936).*

In a will bequeathing the life net income from property, the capital gains and losses belong to the remaindermen. *Hirsch v. Hirsch, 116 S.E.2d 611 (Ga. 1960).*

(n32)Footnote 318. *Frazer v. First Nat'l Bank, 178 So. 441 (Ala. 1938).*

(n33)Footnote 319. *In re Miller's Estate, 43 Pa. D. & C. 565 (1941).*

(n34)Footnote 320. *Old Colony Trust Co. v. Smith, 165 N.E. 657 (Mass. 1929).*

(n35)Footnote 321. N.Y. Pers. Prop. Law, § 17-b. Any accretion, capital increment or increase in the principal of the legacy for life belongs to the remaindermen. *In re Argersinger's Will, 348 N.Y.S.2d 304 (1974).*

(n36)Footnote 322. All extraordinary dividends are paid to the remainderman, such as stock dividends, only ordinary dividends go to the life tenant. *Bowles v. Stilley's Ex'r., 267 S.W.2d 707 (Ky. 1954), rev'g Hite v. Hite, 20 S.W. 778 (Ky. 1892); Minot v. Paine, 99 Mass. 101 (1868).*

Federal capital gains tax is chargeable to the principal even under the Massachusetts rule where cash dividends go to the life tenant as income. *Third Nat'l Bank & Trust Co. v. Campbell, 145 N.E.2d 703 (Mass. 1957).*

If the gift of income is unconditional any accumulated but unpaid at the donee's death goes to his estate. *Langdell v. Dodge, 122 A.2d 529 (N.H. 1956); In re Kenny's Estate, 141 A.2d 839 (Pa. 1958).*

Stock dividends belong to remainderman unless optional to accept in cash in which case they are income. *Stipe v. First Nat'l Bank, 301 P.2d 175 (Or. 1956).*

Pennsylvania gives all dividends, if earned before the life estate, to the remainderman, if earned after opening life estate to the life tenant. *In re Earp's Appeal, 28 Pa. 368 (1857).*

Stock dividends are corpus not income. *Bergin v. Bergin, 315 S.W.2d 943 (Tex. 1958).*

(n37)Footnote 323. Stock dividends go to remainderman, not the life tenant. *Langdell v. Dodge, 122 A.2d 529 (N.H. 1956),* abandoning the rule of *Holbrook v. Holbrook, 66 A. 124 (N.H. 1907).*

(n38)Footnote 324. *Cox v. Gaulbert's Trustee, 147 S.W. 25 (Ky. 1912). Repudiated, Bowles v. Stilley's Ex'r, 267 S.W.2d 707 (Ky. 1954).*

(n39)Footnote 325. *In re Earp's Appeal, 28 Pa. 368 (1857).*

(n40)Footnote 326. *Linenthal v. Birmingham Trust & Sav. Co., 32 So. 2d 368 (Ala. 1947).* The Uniform Principal and Income Act cannot apply to existing trusts. *In re Warden's Trust, 115 A.2d 159 (Pa. 1955).*

(n41)Footnote 327. *Demorest v. City Bank Farmers Trust Co., 321 U.S. 36 (1944)*(under New York statute life tenants are entitled to a fixed yield on trust investments that are subject to salvage operations); *Langdell v. Dodge, 122 A.2d 529 (N.H. 1956)*(unconditional gift of income accumulated but unpaid at donee's death goes to his estate); *In re Strome's Estate, 327 P.2d 414 (Or. 1958); In re Warden's Trust, 115 A.2d 159 (Pa. 1955)*(the interest of a life tenant vests when a trust is created); *In re Kenny's Estate, 141 A.2d 839 (Pa. 1958)*(if the gift of income is unconditional any accumulated but unpaid at the donee's death goes to his estate); *Kershaw v. Kershaw, 125 A.2d 126 (R.I. 1956)*(where a life tenant is given a fixed annual income any arrearage is a charge upon the principal); *Miller v. Miller, 315 S.W.2d 101 (Tenn. 1958).*

Where trust property was condemned, the court held the fund intact and refused to apportion between the life tenant and remainderman or allow the life tenant reimbursement for taxes paid out of income, under theory that the trustee was not under the "duty to sell" given by Restatement on Trusts 241 (1935)as the grounds for apportionment. *In re Hostetter's Estate, 131 A.2d 360 (Pa. 1957).*

(n42)Footnote 328. *Story v. Butt, 58 S.E. 388 (Ga. App. 1907); Keays v. Blinn, 137 Ill. App. 474 (1907); Vawter v. Frame, 96 N.E. 35 (Ind. App. 1911); Lilly v. Connely, 266 S.W.2d 102 (Ky. 1954); Hays v. Wrenn, 83 S.E. 356 (N.C. 1914); Noble v. Tyler, 56 N.E. 191 (Ohio 1900); In re Kenny's Estate, 141 A.2d 839 (Pa. 1958); In re Rankin's Appeal, 16 A. 82 (Pa. 1888).*

Under statute the personal representative of a life tenant may recover for rent maturing during the life of the life tenant. *In re North's Estate, 320 S.W.2d 597 (Mo. App. 1959).*

Where a life tenant has leased land on a crop-share basis and dies while the crop is growing, title to the crop reserved and the rent passes to the executor of the estate of tenant for life as assets of his estate. *Ruwe's Estate v. Ruwe, 211 N.W.2d 610 (Neb. 1973).*

Holding that both crops harvested and those being harvested at time of death of owner belong to the life tenant, not to the remainderman. *Estate of Luke, 184 N.W.2d 42 (Iowa 1971).*

(n43)Footnote 329. *Drees Farming Ass'n v. Thompson, 246 N.W.2d 883 (N.D. 1976).*

(n44)Footnote 330. *Price v. Pickett, 21 Ala. 741 (1852); Stewart v. Doughty, 9 N.Y. (Johns.) 108 (1812).*

(n45)Footnote 331. *McClellan v. Krall, 23 P. 100 (Kan. 1890).*

(n46)Footnote 332. *See* Edward Vaughan Williams, A Treatise on the Laws of Executors and Administrators, 605 (9th ed. 1893).

(n47)Footnote 333. *Humphries v. Humphries, 25 N.C. (3 Ired.) 362 (1843); Forsythe v. Price, 8 Pa. (Watts) 282 (1839).*

(n48)Footnote 334. 2 William Blackstone, Commentaries 123. *See* the following cases:

State v. Gemmill, 6 Del. (1 Houst.) 9 (1855); Evans v. Hardy, 76 Ind. 527 (1881); Sparrow v. Pond, 52 N.W. 36 (Minn. 1892); Rogers v. Elliott, 59 N.H. 201 (1879); In re Chamberlain, 35 N.E. 602 (N.Y. 1893); Kimball v. Sattley, 55 Vt. 285 (1883).

(n49)Footnote 335. *Rowell v. Klein, 44 Ind. 290 (1873); Chesley v. Welch, 37 Me. 106 (1854); Chandler v. Thurston, 27 Mass. (10 Pick.) 205 (1830); Hawkins v. Skegg, 29 Tenn. (10 Humph.) 31 (1848); McLean v. Bovee, 24 Wis. 295 (1869).*

(n50)Footnote 336. *Mayo v. Fletcher, 31 Mass. (14 Pick.) 525 (1833); Wallace v. Cherry, 32 Mo. App. 436 (1888); Lane v. King, 8 Wend. 584 (N.Y. 1832).*

(n51)Footnote 337. *McCraw v. Simpson, 141 F.2d 789 (10th Cir. 1944); Bradley v. Bailey, 15 A. 746 (Conn. 1888), 1 L.R.A. 427; Miller's Ex'x v. Miller, 221 S.W.2d 654 (Ky. 1949); Statler v. Watson, 68 N.W.2d 604 (Neb. 1955); Noble v. Tyler, 56 N.E. 191 (Ohio St. 1900); Strand v. Boll, 183 N.W. 284 (S.D. 1921).*

Crop sown by life tenant passes to his personal representative on his death. *Reivert v. Whittington, 571 P.2d 58 (Kan. App. 1977).*

(n52)Footnote 338. *Rosenstein v. Williams County, 15 N.W.2d 378 (N.D. 1944).*

Crops planted by life tenant belong to his estate. *Sprick v. Beach, 362 P.2d 24 (Kan. 1961).*

(n53)Footnote 339. *Guest v. Guest, 176 So. 289 (Ala. 1937); Ussery v. Sweet, 208 S.W. 600 (Ark. 1919); Chapman v. W. F. Epperson Circled Heading Co., 101 Ill. App. 161 (1901); Brugh v. Denman, 78 N.E. 349 (Ind. App. 1906); Calvert v. Rice, 16 S.W. 351 (Ky. 1891); Stonebraker v. Zollickoffer, 52 Md. 154 (1879); Clark v. Holden, 73 Mass. (7 Gray) 8 (1856); Learned v. Ogden, 32 So. 278 (Miss. 1902); Miles v. Miles, 32 N.H. 147 (1855); Jackson ex dem. Church v. Brownson, 7 N.Y. (Johns.) 227 (1810); Dodd v. Watson, 57 N.C. 48 (1858); Thomas v. Thomas, 82 S.E. 1032 (N.C. 1914); Fleming v. Sexton, 90 S.E. 247 (N.C. 1916); In re Rankin's Appeal, 16 A. 82 (Pa. 1888); Johnson v. Johnson, 2 Hill Ch. 277 (S.C. 1835); Martin v. Grogan-Cochran Lumber Co., 176 S.W.2d 780 (Tex. Civ. App. 1943); Findlay v. Smith, 6 Munf. 134 (Va. 1818); Hawpe v. Bumgardner, 48 S.E. 554 (Va. 1904).*

(n54)Footnote 340. *Bell v. Burkhalter, 57 So. 460 (Ala. 1912).*

(n55)Footnote 341. *In re Paine's Estate, 174 So. 430 (Fla. 1937).*

(n56)Footnote 342. Coke on Littleton, § 416; 2 William Blackstone, Commentaries 35.

(n57)Footnote 343. *Bell v. Burkhalter, 57 So. 460 (Ala. 1912); Calvert v. Rice, 16 S.W. 351 (Ky. 1891); McCoy v. Ferguson, 175 S.W. 23 (Ky. 1915); Clark v. Holden, 73 Mass. (7 Gray) 8 (1856); Miles v. Miles, 32 N.H. 147 (1855); Jackson ex dem. Church v. Brownson, 7 Johns. 227 (N.Y. 1810); Johnson v. Johnson, 2 Hill Ch. 277 (S.C. 1835).*

(n58)Footnote 344. *Russell v. Pagan, 267 S.W. 573 (Ark. 1925); In re Lynn's Appeal, 31 Pa. 44 (1857).*

> By the common law, the life tenant was narrowly restricted in the taking of timber to estovers of fuel and repairs, save where ... the custom of the estate was otherwise. In America, because of the abundance of wooded land and the comparative scarcity of arable land, the common law rules were relaxed, and it has been the general rule to allow the life tenant to cut timber for the purpose of clearing the land, provided the part cleared, with that under cultivation, does not, as compared with the remainder of the tract, exceed the proportion of cleared to wooded land allowed by good husbandry; and provided, further, that the value of the inheritance is not thereby materially lessened. The latter consideration is the great criterion... And the right to the proceeds of sales obviously follows the right to cut the timber.

Poole v. Union Trust Co., 157 N.W. 430 (Mich. 1916).

(n59)Footnote 345. *Cook v. Cook, 77 Mass. (11 Gray) 123 (1858); Phillips v. Allen, 89 Mass. (7 Allen) 115 (1863); Webster v. Webster, 33 N.H. 18 (1856); Gardiner v. Derring, 1 Paige 573 (N.Y. 1837); Dalton v. Dalton, 42 N.C. (7 Ired. Eq.) 197 (1851).*

(n60)Footnote 346. *Morehouse v. Cotheal, 22 N.J.L. 521 (1850); Jackson ex dem. Church v. Brownson, 7 Johns. 227 (N.Y. 1810); Crockett v. Crockett, 2 Ohio St. 180 (1853); McCullough v. Irvine, 13 Pa. 437 (1850).*

(n61)Footnote 347. *Fleenor v. Sproles, 139 S.E. 286 (Va. 1927).*

(n62)Footnote 348. *Statler v. Watson, 68 N.W.2d 604 (Neb. 1955).*

* This chapter is based in part on Ch. 30, George W. Thompson, Commentaries on The Modern Law of Real Property (John S. Grimes ed. 1979), which made a significant contribution toward preserving the American common law of life estates.

Thompson on Real Property, Thomas Editions

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CHAPTER 19 LIFE ESTATE *

2-19 Thompson on Real Property, Thomas Editions § 19.08

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§ 19.08 Extent of the Life Tenant's Right to Make Use of the Freehold.

[Go To Supp]

Since the "ownership" concept of the freehold rests in the holder of the reversion or the remainder, and the life tenant merely has the right of possession and use, the life tenant cannot remove and divert to the life tenant's own ends any materials or property that composes part of the freehold. n349 Indeed, as the common law developed, the tenant had no power to alter the freehold in any manner. Any change, even though it benefitted or increased the material value of the freehold, was waste. The modern doctrine of ameliorating waste was unknown at common law.

A life tenant is not permitted to mine, dig, work or sell the minerals, ores, coal, oil, gas or other deposits found on or within the land, n350 unless it has been the custom of previous owners to use the land in these ways. He has no right to open any new mines or wells or lease the lands to others for that purpose. n351 A life tenant may not lease for minerals. n352 It is waste for a life tenant to drill and operate new wells for oil and gas, n353 open and operate quarries on land held as such tenant n354 or dig clay and make brick for sale. n355

The life tenant has no right to develop oil and gas property to the deprivation of the remainderman, where development was not begun or authorized before the commencement of the life estate. n356 This rule is also applicable to an under tenant of the life tenant. n357 Such opening and operation would be a permanent injury to the inheritance. It will constitute waste for a life tenant to open up and renew operation of a mine that had been definitely closed prior to the creation of the life tenancy, but the life tenant may work such mines as have been temporarily closed. Where a mine was opened and worked for a certain purpose before the life estate began, its operation by the life tenant must be confined to the same purpose. n358 Moreover, mining by the life tenant is permissible if the former owner of the fee impressed a mining character on the land by executing an enforceable mining lease before the commencement of the life estate even though, prior thereto, no mine actually was opened under such lease, provided, of course, that the will which devised the life estate contains nothing to the contrary. n359 Even where the land was not impressed with a mining character at the time of the commencement of the life estate, the life tenant and the remainderman may jointly lease the land for mining purposes, n360 although neither the former nor the latter may singly and individually do so. n361

One exception, in the case of the life estate, to the rule of liability for waste is in the "open mine" doctrine. Under this

theory, if minerals were being worked at the time the life estate vested in possession, the life tenant could continue working them and keep the proceeds or royalties without being liable for waste. n362 But if the mine had not been opened, the life tenant could not work it. n363 The "open mine" doctrine is applicable to a purchaser in possession. n364 A homestead is a life estate within the "open mine" doctrine. n365 The "open mine" doctrine applies alike to conventional and legal life estates. n366 It applies where the oil lease was given in the lifetime of the testator though development did not take place until after his death. n367 The "open mine" doctrine applies to royalties from leases renewed by trustee where the lease was effective on the testator's death, but not from renewals of leases which had terminated and had not been renewed during testator's lifetime. n368 The "open mine" doctrine is applicable even though work had ceased at the time the life estate arose. n369

A life tenant may open and operate new mines when reasonably necessary for the repair and maintenance of the property or for the specific purpose for which the lease was made or where the right is expressly included in the lease. n370 In Michigan it has been held that the common-law rule that a life tenant cannot open new mines does not prevail. n371 The opening of a new mine on land by a life tenant amounts to waste, n372 and this rule applies to oil wells, as oil is a mineral and part of the realty. n373 A life tenant has no right to lease the land for exploration for gas or oil where it has not previously been so used, nor the right to explore it. n374 Where an oil lease is entered into during the life tenancy, the life tenant is only entitled to the interest on the royalties not to the royalties themselves. n375

Such mines as have previously been opened and worked, though long abandoned before the tenant's estate arose, may be reopened and the tenant may even sink new shafts in pursuit of an old vein of coal, when the mine had been opened before the tenant's estate arose. n376 But where mines were open when the tenancy began, the tenant may continue to work the same, even to exhaustion. n377 If, at the time of the creation of a life estate either by grant or reservation, there is an open mine on the property the life tenant is entitled to the rents and royalties derived therefrom during life. n378

Where the owner of an estate of inheritance prior to death authorizes a mine or well to be opened or drilled on land, and such mine or well is not opened or drilled until after death, the mine or well will be deemed an open mine or well as of the date of such owner's death, and a life tenant is entitled to receive the royalties as issues and profits of the land. n379 It has been held that a life tenant of lands subject to a gas and oil lease, providing for a stipulated acreage rental, is entitled to such rental during the continuance of the estate, and is entitled to royalties accruing during such continuance on account of wells drilled on the land. n380 Also, a reservation of a life estate in land conveyed is held to entitle the grantor to a royalty on an oil and gas lease as an incident of the estate reserved. n381

A remainderman cannot lease for oil and gas without the life tenant's consent. If both join in the lease in the absence of agreement the life tenant is entitled only to the interest on the royalties not to the royalties themselves. n382 Unless a division of the royalties paid under a mining lease, executed by the life tenant and the remainderman jointly, is made a matter of agreement, the life tenant is not entitled to any part of the corpus of such royalties but only to the income therefrom, the corpus thereof belonging to the remainderman. n383 There is a contrary rule in an oil lease, where the life tenant was entitled to regular income therefrom. n384 Where a life tenant recognizes that the production of oil from adjacent lands may diminish reserves which normally would come into the possession of the remainderman, the life tenant may execute a lease in order to conserve the contingent estate. n385

The law involving the life tenant's right to cut standing timber is most interesting in that in this country it has made almost a full circle. In England, by the time of the settlement of America, virtually all the wild land except that held in shooting preserves and privately owned forests was gone. Lumber had become a valuable asset, and standing timber enhanced land. Hence the cutting of standing timber and the taking of any wood except for estovers by anyone other than the owner of the fee was waste. Nearly all of North America, however, east of the Mississippi was heavily forested. Land had to be cleared for cultivation. There was little or no market for timber. Hence the English waste concept was economically not feasible.

In early American history, where land was required to be cleared for cultivation, timber was a nuisance and clearing did

not constitute waste. To this extent the rigidity of the English law against ameliorating waste was not applicable. So. we find the weight of authority under the older cases holding that the life tenant can cut timber for the purpose of clearing the land, provided the part cleared, with that already under cultivation, as compared to the remainder of the tract, does not exceed the proportion of cleared to wooded land usually employed in good husbandry, and provided, also, that such cutting does not materially lessen the value of the inheritance. n386 One who has a life estate in wild uncultivated land may cut the timber therefrom preparatory to putting the land in a state of cultivation, n387 and the tenant may sell and appropriate to his own use the proceeds from the timber cut in clearing such land. n388

Here the question of what cutting of timber constitutes waste depends very much upon the purpose of the cutting and its effect upon the value of the inheritance. Thus, if the tenant cuts away timber in order to clear the land for cultivation it is not generally considered waste, as rendering the land less valuable, but as increasing its value instead. n389 If the cutting of timber decreases rather than enhances the value of the land, then such cutting is waste. n390 The tenant may only clear timber land for farming to the extent that the part cleared and that already in cultivation, as compared with the remainder, does not exceed the proportion of cleared to wooded land usual in good husbandry. n391 Such cutting of timber must be made in good faith to clear up the land and not for sale or profit. n392

But even under this rule neither a life tenant nor a grantee has a right to remove commercial timber from the land. n393 For the life tenant, either actively or permissively, to make merchandise of standing timber, except as it is done in the course of the clearing of land for the purpose of cultivation, will constitute waste and be ground for an accounting. n394 Timber such as the life tenant is without authority to cut becomes, on its actually being cut either by the life tenant or by a third person, the property of the remainderman. n395

Almost everywhere today, however, timber has become so valuable that the cutting of standing timber by the life tenant is waste. Under the common law and the great weight today, the cutting of timber other than for estovers by a life tenant is waste, n396 unless there is some specific leave or license to do so; n397 but where the life tenant is required to make repairs to the buildings on the land, he may cut timber for such repairs. n398 Where the only income available from the estate is from the sale of timber, such cutting is not waste. n399 If the cutting of timber would not be in accord with good husbandry, the act would be waste. n400 A life tenant cannot cut timber to sell for profit or authorize another to do so, n401 but is entitled to the timber or the proceeds thereof, which the life tenant, in good faith, cuts for the purpose of clearing the land and fitting it for cultivation. n402

A tenant for life who cuts standing timber for the purpose of sale, and not merely for necessary estovers or for reasonable clearing for cultivation, is guilty of waste. n403 Under this rule, a life tenant who felled timber, lopped it off, or did anything which caused it to decay was guilty of committing waste. n404 Even where the life tenant had a right to cut trees for repairs, if the life tenant cut and sold and with the proceeds purchased other lumber, or even bought back the same lumber and used it in making repairs, this was deemed waste at common law. n405

A court ordering standing timber sold on petition of life tenant and the majority of the remaindermen, required bond to protect the balance of the remaindermen before distributing proceeds. n406 Where an owner of property conveys it by a warranty deed reserving an ordinary life estate, the owner cannot thereafter execute a lease of timber on the land conveyed to other parties. n407

A life tenant cannot give a long-term timber deed merely as a commercial venture. n408 The devisee of a life estate may, however, work pine trees, growing on the land, for turpentine purposes where the testator had worked such trees for the same purposes. n409

Although a will in terms gave the life tenant the right to sell timber for his support and for putting improvements on the land, the remainderman is entitled to the proceeds of a timber sale not used for either of such purposes and found, on the life tenant's death, on deposit in a bank. n410

As the English law of waste is applied to buildings, as it was in America for a long time, it is waste for a tenant for life to tear down a building, although the estate, without the building, is more valuable intrinsically than it was at the beginning of the life estate, because of a general rise in values. n411 A mere intention to erect a better structure will not prevent the tearing down of a building from being waste. n412 A tenant for life cannot pull down buildings or do other acts which tend to the disherison of the remainderman and justify them on the ground of having acted in good faith, without any purpose of permanently injuring the inheritance. Such acts, in law, constitute waste for which the tenant for life is liable, however innocent or honest may have been the purpose with which they were done. n413 It is held that the removal of buildings from property insufficient in value to pay delinquent taxes against the property constitutes waste. n414 Where a life tenant erects a structure but does not annex it to the freehold, the removal thereof does not constitute waste. n415

At common law, any change in the character of the buildings made or suffered to be made by the life tenant, regardless of whether it resulted in a benefit to the inheritance, was considered waste. n416 Thus, the removal of wainscoting or floors or things affixed to the land or to buildings was waste, if done by a life tenant who was not exempt from such liability either as a tenant in tail after possibility of issue extinct or as expressly made unimpeachable for waste. If a tenant tore down a building or unroofed it or changed it from one kind to another, as a flour mill to some other manufactory, or changed a dwelling into a store, removed partitions making one room where there were formerly two or more, or put in partitions and increased the number of rooms, many acts beneficial to the estate, nevertheless the common law pronounced it waste. n417 Opening new doors or windows, removing a building from one place to another on the land, converting one kind of a mill into another, converting a dwelling into a warehouse or any other act which changed the appearance of the buildings and rendered them no longer recognizable, was considered as destructive of the evidence of title and constituted waste. n418 The strict rule of the common law with reference to changes and alterations of buildings has been greatly modified, and the foundation of waste at the present time is actual damage to the inheritance. n419 Thus, it was held that a tenant for life was not liable for waste for changing a dwelling house that had become undesirable as such into a business property, useful for business purposes. n420

This doctrine of ameliorating waste is making great strides in the United States where the vast transitional changes that have followed the two World Wars have in many instances reduced the old rigid English rule to ridiculous levels.

COMPUTER-ASSISTED RESEARCH

LEXIS: life tenant! w/5 right! w/2 use! w/5 freehold

FOOTNOTES:

(n1)Footnote 349. Gift of "use" for life with "remainder" over gave life tenant power to dispose of and consume realty for maintenance. *Dennis v. Trustees of Choateville Christian Church, 290 S.W.2d 601 (Ky. 1956).*

A lessee, leasing for a term from a life tenant, could not remove fixtures after death of the life tenant, though the lease specifically gave the power to remove fixtures, since the lease ended with the life tenant's death. *Haywood v. Briggs, 41 S.E.2d 289 (N.C. 1947); Haflick v. Stober, 11 Ohio St. 482 (1860).*

(n2)Footnote 350. *Eide v. Tveter, 143 F. Supp. 665 (D.N.D. 1956); Ohio Oil Co. v. Daughetee, 88 N.E. 818 (Ill. 1909); Rupel v. Ohio Oil Co., 95 N.E. 225 (Ind. 1911); Hook v. Garfield Coal Co., 83 N.W. 963 (Iowa 1900); Gerkins v. Kentucky Salt Co., 39 S.W. 444 (Ky. 1897); Barnes v. Keys, 127 P. 261 (Okla 1912); Marshall v. Mellon, 36 A. 201 (Pa. 1897); Swayne v. Lone Acre Oil Co., 86 S.W. 740 (Tex. 1905); Gage v. Curtner, 215 S.W.2d 411 (Tex. Civ. App. 1948); Williamson v. Jones, 19 S.E. 436 (W. Va. 1894); Wilson v. Youst, 28 S.E. 781 (W. Va. 1897); Kremer v. Rule, 244 N.W. 596 (Wis. 1932).*

Oklahoma by statute, Okla. Stat. 1971, tit. 60, §§ 71-73, permits oil and gas leasing where there is a life tenant and contingent remainderman. *Amarex, Inc. v. Sell, 566 P.2d 456 (Okla. 1977).*

(n3)Footnote 351. *Eide v. Tveter, 143 F. Supp. 665 (D.N.D. 1956), aff'd, 170 F. 529 (8th Cir. 1909); Ohio Oil Co. v. Daughetee, 88 N.E. 818 (Ill. 1909); Sewell v. Sewell, 1 N.E.2d 492 (Ill. 1936); Rupel v. Ohio Oil Co., 95 N.E. 225 (Ind. 1911); Gerkins v. Kentucky Salt Co., 39 S.W. 444 (Ky. 1897); Steele v. Cross, 366 S.W.2d 434 (Mo. 1963); Barnes v. Keys, 127 P. 261 (Okla. 1912); Marshall v. Mellon, 36 A. 201 (Pa. 1897); Swayne v. Lone Acre Oil Co., 86 S.W. 740 (Tex. 1905), 69 L.R.A. 986; Williamson v. Jones, 19 S.E. 436 (W. Va. 1894); Wilson v. Youst, 28 S.E. 781 (W. Va. 1897).*

It was held in Montana that where one held possession of the premises under a life estate with power to use as he might deem fit and receive the income and profits during his lifetime he could open a gravel pit. *Danielson v. Danielson, 560 P.2d 893 (Mont. 1977).*

(n4)Footnote 352. *Lowe v. Adams, 419 P.2d 764 (N.M. 1966).*

(n5)Footnote 353. *Ohio Oil Co. v. Daughetee, 88 N.E. 818 (Ill. 1909); Rupel v. Ohio Oil Co., 95 N.E. 225 (Ind. 1911); Compton v. Peoples Gas Co., 89 P. 1039 (Kan. 1907); Burden v. Gypsy Oil Co., 40 P.2d 463 (Kan. 1935); Cosgriff v. Dewey, 58 N.E. 1 (N.Y. 1900); Westmoreland & Cambria Nat. Gas Co. v. DeWitt, 18 A. 724 (Pa. 1889); Swayne v. Lone Acre Oil Co., 86 S.W. 740 (Tex. 1905); Gage v. Curtner, 215 S.W.2d 411 (Tex. Civ. App. 1948); Williamson v. Jones, 27 S.E. 411 (W. Va. 1897). See* Restatement, Property, § 138, cmt. d.

Life tenant is liable to remaindermen for waste. *Moore v. Vines, 474 S.W.2d 437 (Tex. 1971).*

(n6)Footnote 354. *Kremer v. Rule, 244 N.W. 596 (Wis. 1932). See United States v. Bostwick, 94 U.S. 53 (1876); Cosgriff v. Dewey, 58 N.E. 1 (N.Y. 1900).*

(n7)Footnote 355. *Waldorf v. Elkhart & W. R. Co., 41 N.E. 396 (Ind. App. 1895); Russell v. Merchants Bank, 50 N.W. 228 (Minn. 1891).*

In *Danielson v. Danielson, 560 P.2d 893 (Mont. 1977),* it was held that where the life tenant was given the right to use the premises as he sees fit and receive the income and profits during his lifetime he could open a gravel pit.

(n8)Footnote 356. *Burden v. Gypsy Oil Co., 40 P.2d 463 (Kan. 1935); Barton v. Warner, 142 S.W.2d 303 (Tex. Civ. App. 1940).*

(n9)Footnote 357. *Marshall v. Mellon, 36 A. 201 (Pa. 1897).*

(n10)Footnote 358. *Mills v. Taylor, 268 S.W.2d 412 (Ky. 1954); Franklin Coal Co. v. McMillan, 49 Md. 549 (1878); In re Shailer's Estate, 266 P.2d 613 (Okla. 1954)*(life tenant is entitled to all income and profits from gas and oil leases existing at testator's death although actual drilling, etc., did not commence until after life estate commenced); *Barrera v. Barrera, 294 S.W.2d 865 (Tex. Civ. App. 1956)*(but a life tenant is not responsible for damages due to flood).

(n11)Footnote 359. *Goosling v. Pinson, 248 S.W. 248 (Ky. 1923).*

(n12)Footnote 360. *Brandenburg v. Petroleum Exploration, 291 S.W. 757 (Ky. 1927). See also Union Gas & Oil Co. v. Wiedeman Oil Co., 277 S.W. 323 (Ky. 1924).*

Where grantor conveyed a fee title to grantee reserving a life estate, and the grantor thereafter joined with the grantee in executing an oil lease covering the conveyed land, the grantee's widow and children, rather than the grantor, were entitled to the proceeds received from the royalty reserved in the lease, but such proceeds were to be invested and the income therefrom paid to the grantor during her life, and the grantor was not entitled to the total royalty paid during her lifetime on the theory that she was a conventional life tenant. *Davis v. Bond, 158 S.W.2d 297 (Tex. 1942).*

(n13)Footnote 361. *Burden v. Gypsy Oil Co., 40 P.2d 463 (Kan. 1935); Meredith v. Meredith, 235 S.W. 757 (Ky. 1921). See also Meredith v. Meredith, 264 S.W. 1109 (Ky. 1924); Union Gas & Oil Co. v. Wiedemann Oil Co., 277 S.W.*

323 (Ky. 1924); Whitaker v. Surtees, 248 S.W. 432 (Tex. Civ. App. 1923).

(n14)Footnote 362. *Ohio Oil Co. v. Daughetee, 88 N.E. 818 (Ill. 1909); Rupel v. Ohio Oil Co., 95 N.E. 225 (Ind. 1911); Thompson v. Thompson, 236 S.W.2d 779 (Tex. 1951)*(doweress entitled to share in royalties of oil lease in which she and deceased husband joined); *Astray v. Ballard, 2 Mod. 193 (1676).*

Where the owner of a property executed an oil and gas lease but there had been no production prior to his death, and his will gave his wife a life estate in the property with remainder to other children, and oil production was secured during the life of the life tenant, the life tenant took all of the oil payments as income. *Kimbark Exploration Co. v. Von Lintel, 391 P.2d 55 (Kan. 1964).*

Even under the "open mine" doctrine, any oil royalties must be held as corpus with only the income therefrom accruing to the life tenant. *Youngman v. Shular, 288 S.W.2d 495 (Tex. 1956).*

Open mine doctrine applied to oil wells. *Clyde v. Hamilton, 414 S.W.2d 434 (Tex. 1956).*

Life tenant is entitled only to the interest on mineral royalties and bonuses except where the "open mine" doctrine is applicable. *Moore v. Vines, 474 S.W.2d 437 (Tex. 1971).*

Opening a new pit separate from the old excavation was not an "open mine" and was waste. *Spangler v. Carlisle, 245 N.W.2d 720 (Mich. App. 1976).*

Where it was necessary to remove ten feet of topsoil, the open mine doctrine was not applicable. *Spangler v. Carlisle, 245 N.W.2d 720 (Mich. App. 1976).*

See Comment. *Open Mine Doctrine in Mississippi, 35 Miss. L.J. 436.*

(n15)Footnote 363. *Cross v. Hendry, 79 N.E. 531 (Ind. App. 1906); Daniels v. Charles, 189 S.W. 192 (Ky. 1916)*(widow opening mine was waste); *Davis v. Bond, 158 S.W.2d 297 (Tex. 1942)*(only entitled to interest on royalties during lifetime).

See B. Patrick Shaw, *The Open Mine Doctrine -- Halt!, 24 Baylor L. Rev. 142 (1972); The Open Mine Doctrine, 8 Houston L. Rev. 753 (1971).*

It was held in Montana that where one held possession of the premises under a life estate with power to use as he might deem fit and receive the income and profits during his lifetime he could open a gravel pit. *Danielson v. Danielson, 560 P.2d 893 (Mont. 1977).*

(n16)Footnote 364. *Spangler v. Carlisle, 245 N.W.2d 720 (Mich. App. 1976).*

(n17)Footnote 365. *Youngman v. Shular, 288 S.W.2d 495 (Tex. 1956).*

(n18)Footnote 366. *Youngman v. Shular, 288 S.W.2d 495 (Tex. 1956).*

(n19)Footnote 367. *Kimbark Exploration Co. v. Von Lintel, 391 P.2d 55 (Kan. 1964)*(Uniform Principal and Income Act does not change this will).

(n20)Footnote 368. *Mitchell v. Mitchell, 303 S.W.2d 352 (Tex. 1957)*(the open mine rule application to a devise depends on the testator's intention).

Where it was necessary to remove ten feet of topsoil the open mine doctrine was not applicable. *Spangler v. Carlisle,*

245 N.W.2d 720 (Mich. App. 1976).

(n21)Footnote 369. *Gaines v. Green Pond Iron Min. Co., 33 N.J. Eq. 603 (1881); Neel v. Neel, 19 Pa. (7 Harris) 323 (1852).*

If there is an existing lease at the time of the birth of the life estate, the life tenant may drill for oil and gas. But the life tenant cannot execute a new lease when the old one expires. *Moore v. Vines, 474 S.W.2d 437 (Tex. 1971), rev'g 461 S.W.2d 642 (Tex. Civ. App. 1971).*

(n22)Footnote 370. *Kremer v. Rule, 244 N.W. 596 (Wis. 1932).*

(n23)Footnote 371. *Poole v. Union Trust Co., 157 N.W. 430 (Mich. 1916).*

(n24)Footnote 372. *Hendrix v. McBeth, 61 Ind. 473 (1878); Appeal of Westmoreland Coal Co., 85 Pa. 344 (1877).*

(n25)Footnote 373. *Ohio Oil Co. v. Daughetee, 88 N.E. 818 (Ill. 1909); Whitaker v. Surtees, 248 S.W. 432 (Tex. Civ. App. 1923).*

(n26)Footnote 374. *Marshall v. Mellon, 36 A. 201 (Pa. 1897).*

(n27)Footnote 375. *Martin v. Eslick, 90 So. 2d 635 (Miss. 1956), 92 So. 2d 244 (Miss. 1957).*

(n28)Footnote 376. *Higgins Oil & Fuel Co. v. Snow, 113 F. 433 (5th Cir. 1902)*(in Texas the life tenant gets only interest on one-third of the royalties for life).

> It is ... generally held that where, before a life estate is created, the land has been impressed with the character of mining lands, and there is a mine already opened upon the land, the life tenant may work or lease such mines as were already in existence when his estate was created, and that he is not guilty of waste in so doing... Even where the mine has not been in operation for a number of years when the life estate is created, if in fact there was no final abandonment of it as mining property, with an executed intention to devote the property to a different use, this fact would not prevent the life tenant from resuming operations.

Cypress Creek Coal Co. v. Booneville Min. Co., 142 N.E. 645 (Ind. 1924).

The life tenant of:

> lands upon which there has not been opened wells or mines during the life of the previous holder of the fee simple estate may not open or sink such mines or wells or pits, and if he does so, he commits waste as against the remainder estate, and may be restrained. But if during the life of the previous holder there has been opened by him or under his authority wells or mines or pits, and the same have been operated [and their operation has not been permanently abandoned] during his lifetime and [they] are in operation at the time of the creation of the particular estate, then the holder of the life estate [or his lessee] may continue their operation during such holding even to the exhaustion of the mineral substance found therein, unless there be in the instrument creating the life estate some restraint upon or restriction of such right.

Tomlinson v. Humpich, 248 S.W. 1016 (Ky. 1923); Mills v. Taylor, 268 S.W.2d 412 (Ky. 1954); Thompson v. Thompson, 236 S.W.2d 779 (Tex. 1951). See also Waldron v. Wahl, 133 A. 252 (Pa. 1926).

"It has ... long been the law that where mines were opened or the leases executed before the life estate commenced, the owner of the life estate might, in the absence of restraining words, work the mines, even to the point of exhaustion, and take the profits." *Poole v. Union Trust Co., 157 N.W. 430 (Mich. 1916).*

Where the open mine doctrine prevails the life tenant is entitled to all royalties and may increase production. *In re Shailer's Estate, 266 P.2d 613 (1954).*

See M.K. Woodward, *The Open Mine Doctrine in Oil and Gas Cases, 35 Tex. L. Rev. 538 (1957);* M.K. Woodward, *Oil Co. Law -- Extension of Open Well Doctrine Is Interesting Trend, 19 Tex. B.J. 528 (1956).*

(n29)Footnote 377. *Goosling v. Pinson, 248 S.W. 248 (Ky. 1923); Barnes v. Keys, 127 P. 261 (Okla. 1912); Appeal of Lynn, 31 Pa. 44 (1857); In re McFadden's Estate, 73 A. 927 (Pa. 1857); Swayne v. Lone Acre Oil Co., 86 S.W. 740 (Tex. 1905); Youngman v. Shular, 281 S.W.2d 373 (Tex. Civ. App. 1956), aff'd 288 S.W.2d 495 (Tex. 1956); Williamson v. Jones, 19 S.E. 436 (W. Va. 1894); Koen v. Bartlett, 23 S.E. 664 (W. Va. 1895).*

(n30)Footnote 378. *Weekley v. Weekley, 27 S.E.2d 591 (W. Va. 1943). Amarex, Inc. v. Sell, 566 P.2d 456 (Okla. 1977).*

(n31)Footnote 379. *Mairs v. Central Trust Co., 34 S.E.2d 742 (W. Va. 1945).*

In *Danielson v. Danielson, 560 P.2d 893 (Mont. 1977),* it was held that where the life tenant was given the right to use the premises as he sees fit and to receive the income and profits during his lifetime, he could open a gravel pit.

(n32)Footnote 380. *Fairbanks v. Warrum, 104 N.E. 983 (Ind. App. 1914), modified, 104 N.E. 1141 (Ind. 1914).*

(n33)Footnote 381. *Eide v. Tveter, 143 F. Supp. 665 (D.N.D. 1956); Koen v. Bartlett, 23 S.E. 664 (W. Va. 1895).*

(n34)Footnote 382. *Welborn v. Tidewater Associated Oil Co., 217 F.2d 509 (10th Cir. 1954).*

(n35)Footnote 383. *Brandenburg v. Petroleum Exploration, 291 S.W. 757 (Ky. 1927).*

(n36)Footnote 384. *Thompson v. Thompson, 236 S.W.2d 779 (Tex. 1951).*

(n37)Footnote 385. *Love v. McDonald, 148 S.W.2d 170 (Ark. 1941).*

(n38)Footnote 386. *Alexander v. Fisher, 7 Ala. 514 (1845); Rutherford v. Wilson, 129 S.W. 534 (Ark. 1910); Woodward v. Gates, 38 Ga. 205 (1868); Poole v. Union Trust Co., 157 N.W. 430 (Mich. 1916); Hill v. Ground, 89 S.W. 343 (Mo. App. 1905); Disher v. Disher, 63 N.W. 368 (Neb. 1895); Norris v. Laws, 64 S.E. 499 (N.C. 1909); Morris v. Knight, 14 Pa. Super. 324 (1900); Keeler v. Eastman, 11 Vt. 293 (1839); Wilkinson v. Wilkinson, 18 N.W. 527 (Wis. 1884).*

(n39)Footnote 387. *Woodward v. Gates, 38 Ga. 205 (1868); Poole v. Union Trust Co., 157 N.W. 430 (Mich. 1916); Morehouse v. Cotheal, 22 N.J.L. 521 (1850); Jackson ex dem. Church v. Brownson, 7 Johns. 227 (N.Y. 1810); Davis v. Gilliam, 40 N.C. (5 Ired. Eq.) 308 (1848); McCullough v. Irvine, 13 Pa. 438 (1850).*

(n40)Footnote 388. *Sallee v. Daneri, 121 P.2d 781 (Cal. App. 1942); Crockett v. Crockett, 2 Ohio St. 180 (1853).*

(n41)Footnote 389. *Sutton v. Bennett, 110 S.E.2d 650 (Ga. 1959)*(life tenant entitled to cut timber where this was the only possible income from the property); *Dawson v. Coffman, 28 Ind. 220 (1867); Pynchon v. Stearns, 52 Mass. (11 Met.) 304 (1846); Poole v. Union Trust Co., 157 N.W. 430 (Mich. 1916); Cannon v. Barry, 59 Miss. 289 (1889); King v. Miller, 6 S.E. 660 (N.C. 1888); Sayers v. Hoskinson, 1 A. 308 (Pa. 1885); Owen v. Hyde, 14 Tenn. (6 Yer.) 334 (1834);* Life tenant may cut timber from timber land for thinning purposes in accordance with approved forestry practices.

Sutton v. Bennett, 110 S.E.2d 650 (Ga. 1959).

Life tenant may clear land by cutting timber for cultivation or for preserving the property and may keep the timber so cut. *Campion v. McLeod, 132 S.E.2d 848 (Ga. App. 1963); Thompson v. Thompson, 332 S.W.2d 221 (Tenn. 1960).*

(n42)Footnote 390. *Conner v. Bowdoin, 57 S.E.2d 344 (Ga. App. 1950); Adams v. Bates, 231 S.W. 238 (Ky. 1921); Proffitt v. Henderson, 29 Mo. 325 (1860); Disher v. Disher, 63 N.W. 368 (Neb. 1895); Jackson ex dem. Church v. Brownson, 7 Johns. 227 (N.Y. 1810); Fleenor v. Sproles, 139 S.E. 286 (Va. 1927).*

(n43)Footnote 391. *McLeod v. Dial, 37 S.W. 306 (Ark. 1896); Rutherford v. Wilson, 129 S.W. 534 (Ark. 1910); Roby v. Newton, 49 S.E. 694 (Ga. 1905); Davis v. Clark, 40 Mo. App. 515 (1890); Miles v. Miles, 32 N.H. 147 (1855); Jackson ex dem. Church v. Brownson, 7 Johns. 227 (N.Y. 1810); Ward v. Sheppard, 3 N.C. 283 (1803); Gause v. Perkins, 56 N.C. 177 (1837); Norris v. Laws, 64 S.E. 499 (N.C. 1909); Thomas v. Thomas, 82 S.E. 1032 (N.C. 1914); Appeal of Lynn, 31 Pa. 44 (1857); Owen v. Hyde, 14 Tenn. (6 Yer.) 334 (1834).*

See Clark v. Holden, 73 Mass. (7 Gra.) 8 (1856).

(n44)Footnote 392. *Kidd v. Dennison, 6 Barb. 9 (N.Y. 1849); Davis v. Gilliam, 40 N.C. (5 Ired. Eq.) 308 (1848).*

(n45)Footnote 393. *Stepp v. Lowe, 181 S.W. 351 (Ky. 1916); Heliker v. Heliker, 151 N.W. 757 (Mich. 1915).*

(n46)Footnote 394. *Westmoreland v. Birmingham Trust & Sav. Bank, 108 So. 536 (Ala. 1926).* Life tenant may not cut timber for sale. *Wilder v. Scott, 89 So. 2d 682 (Ala. 1956); In re Campbell's Estate, 382 P.2d 920 (Haw. 1963).*

(n47)Footnote 395. *Jones v. Sandlin, 87 So. 850 (Ala. 1920).*

Proceeds of sales of improvements and timber go to the remainderman. *In re Campbell's Estate, 382 P.2d 920 (Haw. 1963).*

(n48)Footnote 396. *Bell v. Burkhalter, 57 So. 460 (Ala. 1912); Wilder v. Scott, 89 So. 2d 682 (Ala. 1956); Campion v. McLeod, 132 S.E.2d 848 (Ga. App. 1963); Smith v. Harris, 124 S.W.2d 786 (Ky. 1939); Learned v. Ogden, 32 So. 278 (Miss. 1902); Webster v. Webster, 33 N.H. 18 (1856); McCartney v. Titsworth, 126 N.Y.S. 905 (1911); Clemence v. Steere, 1 R.I. 272 (1850).*

(n49)Footnote 397. *Anderson v. Anderson, 97 S.W.2d 513 (Tex. Civ. App. 1936).*

(n50)Footnote 398. *Alexander v. Fisher, 7 Ala. 514 (1845); Calvert v. Rice, 16 S.W. 351 (Ky. 1891); McCoy v. Ferguson, 175 S.W. 23 (Ky. 1915); Thomas v. Thomas, 82 S.E. 1032 (N.C. 1914);* Atherton v. Cantner, 3 Lebanon 175 (Pa. 1951); *McClure v. Chastain, 128 S.E.2d 721 (Ga. 1962); Adams v. Adams, 371 S.W.2d 637 (Ky. 1963).*

Life tenant may take timber for firewood or making repairs. *Campion v. McLeod, 132 S.E.2d 848 (Ga. App. 1963); Adams v. Adams, 371 S.W.2d 637 (Ky. 1963).*

(n51)Footnote 399. *Sutton v. Bennett, 110 S.E.2d 650 (Ga. 1959).*

(n52)Footnote 400. *Alexander v. Fisher, 7 Ala. 514 (1845); Rutherford v. Wilson, 129 S.W. 534 (Ark. 1910); Higgins v. State, 199 S.E. 160 (Ga. App. 1938); Davis v. Clark, 40 Mo. App. 515 (1890); Chase v. Hazelton, 7 N.H. 171 (1834); Crockett v. Crockett, 2 Ohio St. 180 (1853); Sayers v. Hoskinson, 1 A. 308 (Pa. 1885).*

(n53)Footnote 401. *Jones v. Sandlin, 87 So. 850 (Ala. 1920); McCarroll v. Falls, 195 S.W. 387 (Ark. 1917); Chapman v. W. F. Epperson Circled Heading Co., 101 Ill. App. 161 (1901); Modlin v. Kennedy, 53 Ind. 267 (1876); Hunt v. Hardin, 189 S.W. 713 (Ky. 1916); Zimmerman v. Shreeve, 59 Md. 357 (1883); Heliker v. Heliker, 151 N.W. 757*

(Mich. 1915); Learned v. Ogden, 32 So. 278 (Miss. 1902); Davis v. Clark, 40 Mo. App. 515 (1890); McCartney v. Titsworth, 126 N.Y.S. 905 (1911); Norris v. Laws, 64 S.E. 499 (N.C. 1909); In re Grubb's Estate, 33 Berks 53 (Pa. 1936); Lester v. Young, 14 R.I. 579 (1884); McKee v. Dail, 1 Tenn. Ch. App. 689 (1901); Hawpe v. Bumgardner, 48 S.E. 554 (Va. 1904).

The life tenant as trustee for the remainderman can, however, maintain trespass for cutting of timber against a third party. *Beck v. Lynch, 209 S.W.2d 58 (Ky. 1947).*

(n54)Footnote 402. *Warren v. Gans, 31 So. 539 (Miss. 1901); Disher v. Disher, 63 N.W. 368 (Neb. 1895); Davis v. Gilliam, 40 N.C. 308 (1848); Wilkinson v. Wilkinson, 18 N.W. 527 (Wis. 1884).*

(n55)Footnote 403. *Cherokee Constr. Co. v. Harris, 122 S.W. 485 (Ark. 1909); Rutherford v. Wilson, 129 S.W. 534 (Ark. 1910); Loudon v. Warfield, 28 Ky. (5 J.J. Marsh) 196 (1830); Conner v. Shepherd, 15 Mass. 164 (1818); Learned v. Ogden, 32 So. 278 (Miss. 1902); Proffitt v. Henderson, 29 Mo. 325 (1860); Webster v. Webster, 33 N.H. 18 (1856); Davis v. Gilliam, 40 N.C. (5 Ired. Eq.) 308 (1848); In re Grubb's Estate, 33 Berks 53 (Pa. 1936)*(the life tenant may not strip the land by cutting timber for commercial purposes, but will be confined to prudent cutting to avoid overcrowding); *Clemence v. Steere, 1 R.I. 272 (1850); Johnson v. Johnson, 2 Hill Eq. 277 (S.C. 1825).*

See Poole v. Union Trust Co., 157 N.W. 430 (Mich. 1916).

(n56)Footnote 404. 2 William Blackstone, Commentaries 281.

(n57)Footnote 405. Coke on Littleton, § 53a.

(n58)Footnote 406. *Wigal v. Hensley, 216 S.W.2d 792 (Ark. 1949).*

(n59)Footnote 407. *Smith v. Thomas, 34 S.E.2d 278 (Ga. 1945).*

(n60)Footnote 408. *Russell v. Pagan, 267 S.W. 573 (Ark. 1925).*

(n61)Footnote 409. *Lee & Bradshaw v. Rogers, 108 S.E. 371 (Ga. 1945).*

> Where, before the commencement of the life estate, the land has been cultivated for the produce of salable timber, the life tenant may continue the cultivation for his own profit. This is so even in England, where the law is strictest in favor of the owner of the inheritance, the right being analogous to the right of the life tenant to work mines that were being operated at the commencement of his estate.

Poole v. Union Trust Co., 157 N.W. 430 (Mich. 1916).

(n62)Footnote 410. *Williams v. Floyd, 112 A. 377 (Del. 1920).*

(n63)Footnote 411. *Stephenson v. National Bank, 109 So. 424 (Fla. 1926); McCullough v. Irvine, 13 Pa. 438 (1850). See* Restatement, Property, § 138, cmt. c.

(n64)Footnote 412. *Dooley v. Stringham, 7 P. 405 (Utah 1885).*

"Where a tenant in possession destroys any of the ... houses, on the land, the remainderman may maintain an action therefor." *Fleenor v. Sproles, 139 S.E. 286 (Va. 1927).*

Opening a new pit separate from the old excavation was not an "open mine" and was waste. *Spangler v. Carlisle, 245 N.W.2d 720 (Mich. App. 1976).*

(n65)Footnote 413. *Clark v. Holden, 73 Mass. (7 Gray) 8 (1856); Allred v. Biegel, 219 S.W.2d 665 (Mo. App. 1949)*(things which are part of the land but are wrongfully removed by life tenant become personal property but belong to remainderman and not life tenant).

(n66)Footnote 414. *State ex rel. Tillman v. District Ct. 53 P.2d 107 (Mont. 1936).*

(n67)Footnote 415. *Clemence v. Steere, 1 R.I. 272 (1850).*

Life tenant cannot burden property by adding permanent improvements. *Sparks v. Robertson, 203 S.W.2d 622 (Tex. Civ. App. 1947).*

(n68)Footnote 416. *Crowe v. Wilson, 5 A. 427 (Md. 1886).*

See Frank C. Homan, *Alterations by a Life Tenant for Years as Waste, 16 Clev.-Mar. L. Rev. 220 (1967).*

(n69)Footnote 417. *Wall v. Hinds, 70 Mass. (4 Gray) 256 (1855).*

(n70)Footnote 418. *Maddox v. White, 4 Md. 72 (1853).*

Life tenant cannot remove improvements made by him. *Bradley v. Bradley, 5 So. 2d 655 (Miss. 1966).*

(n71)Footnote 419. *Crowe v. Wilson, 5 A. 427 (Md. 1886); Delano v. Smith, 92 N.E. 500 (Mass. 1910); Rogers v. Atlantic, Gulf & Pac. Co., 107 N.E. 661 (N.Y. 1915). See In re Edgar's Will, 282 N.Y.S. 795 (1935).*

(n72)Footnote 420. *Melms v. Pabst Brew. Co., 79 N.W. 738 (Wis. 1899).*

* This chapter is based in part on Ch. 30, George W. Thompson, Commentaries on The Modern Law of Real Property (John S. Grimes ed. 1979), which made a significant contribution toward preserving the American common law of life estates.

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CHAPTER 19 LIFE ESTATE *

2-19 Thompson on Real Property, Thomas Editions § 19.09

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§ 19.09 Life Tenant's Obligation to Repair.n421

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The life tenant as a part of the fiduciary responsibility to the remainderman or reversioner goes beyond a mere duty not to commit waste. It has four positive responsibilities: (a) to keep the premises in repair, n422 (b) to pay taxes, (c) to pay interest on encumbrances, and (d) to keep the premises insured. n423 Sometimes these obligations are considered in the category of waste. More properly, however, they represent separate duties of the life tenant whose obligation in these respects remains even though the jurisdiction does not charge the life tenant with permissive waste. As concerns repairs, the courts distinguished between temporary repairs and permanent improvements. Where the income from the property is sufficient, the life tenant is required to make ordinary repairs as well as pay taxes. n424

There is much controversy over what is income belonging to the life tenant and what is corpus belonging to the remainderman. Basically, any yield which is not part of the freehold belongs to the life tenant but anything which is an augmentation of or comes from the freehold belongs to the holder of the future interests. Any rent which has accrued during the previous estate but has not been paid belongs to that estate not to the succeeding life tenant. n425

As a general rule, where the creator of the life estate did not provide otherwise, n426 ordinary repairs, incident to the life tenancy and necessary to the property's preservation, n427 must be made by the life tenant and at the life tenant's own expense. n428 The liability of a legal life tenant for waste and for failure to repair did not exist at common law n429 but arose under the Statute of Marlborough. n430

The life tenant is bound to keep the premises in as good repair as they were when the life tenant took them, not excepting ordinary or natural wear and tear. n431 The life tenant has duty to pay carrying charges out of income. n432 Only a few American courts n433 follow the rule of *Howe v. Dartmouth*, n434 that a trustee is required to build up for the remainderman out of income otherwise payable to the life tenant, a depreciation or depletion reserve of the principal which consists of wasting or consumable assets. n435 Most of the courts limit the liability for repairs to protection against waste. n436

It is the duty of the life tenant if in possession to make "such ordinary repairs as are necessary to preserve the property.

The life tenant receives the rents and profits derived from the use of the property and may not suffer it to go to decay for want of necessary repairs, and may not impair its value by acts of voluntary waste." n437 For the "life tenant, who by the exercise of ordinary care could keep the premises 'from falling into decay and who has the ability to do so' both from the rents and profits of the estate and otherwise, from some motive unfriendly to the remainderman," to wilfully refuse to keep the property in reasonable repair will constitute voluntary and wilful waste. n438 It is the duty of the life tenant to keep buildings and fences in a reasonably good state of repair, and failure to do so constitutes waste. n439 Where a life tenant suffers the property to go to decay or waste for want of repairs, the life tenant is liable therefor, n440 and it is no defense that there was no timber on the premises with which to make repairs. n441 The life tenant must preserve the property so long as the estate subsists and make repairs to prevent waste to the property. n442 It is not waste to refuse or neglect to repair a useless or undesirable building. n443 Neglect to replace broken window panes or to replace a roof blown off by a storm, thereby allowing the building to decay, is waste. n444

As far as the remainderman is concerned, this rule applies also to a purchaser from the life tenant of the latter's interest in the property. n445 Any acts or omissions on the purchaser's part, such as a failure to make needed repairs which are prejudicial to the interest of the remainderman, constitute waste, which may be permissive as well as aggressive. n446 The life tenant cannot make repairs and charge the cost thereof to the remainderman. n447 The receipt of income from the property is the basis of the rule requiring the life tenant to make repairs. n448 A tenant for life is required to keep the building in which is held a life estate from going into decay by using ordinary care, but is not required to expend any extraordinary sums. n449 The life tenant has no duty to repair where realty is unproductive. n450 The life tenant is not required to make repairs beyond the extent of income from the property. n451

A life tenant has no legal claim to compensation for improvements, is not bound to make improvements, and if the life tenant does so voluntarily he has no claim therefor against those who are to take the remainder. n452 The life tenant cannot charge the corpus of the estate with improvements, and is not entitled to compensation for enhancement of the property by reason thereof. n453 The obligations of an equitable tenant for life as to keeping buildings in repair are substantially the same as those of a legal life tenant, n454 but, although they are imposed upon the life tenant, yet the equitable life tenant cannot make improvements at the expense of the remainderman, whether necessary or not. n455 A life tenant is not bound to make extraordinary repairs, such, for instance, as to rebuild in whole or in part old structures in a state of dilapidation when he became tenant. n456 Such buildings and fences as are on the premises at the time the life tenant takes possession are to be kept in repair at the expense of such tenant, but the life tenant is not required to rebuild structures destroyed by the elements, nor can the life tenant take timber from the estate to rebuild structures so destroyed. n457 Where the buildings are slightly damaged by fire, the life tenant may repair the damage, and is entitled to be reimbursed out of any insurance money collected. n458

As between the life tenant and remaindermen, the remaindermen must bear any loss due to depreciation and obsolescence, and the life tenant is bound to repair only to the extent of preventing permissive or actual waste. n459 Improvements by a life tenant are generally deemed to have been made for the life tenant's own benefit and enjoyment, and on the termination of the tenancy by the death such improvements pass to the remainderman without liability to recompense the tenant's estate. n460

Where the party creating the life estate had begun and partly erected a building on the premises, the life tenant may lawfully proceed with its completion at the expense of the estate. n461 In some states there are statutes called "betterment acts" or "occupying claimant's acts," which authorize a recovery for improvements made by occupying claimants, but these acts do not change the rule as above stated with reference to the right of life tenants to claim compensation for improvements. n462 The life tenant has no lien on the property for improvements voluntarily placed thereon by him, even though such improvements are permanent in character, n463 nor, in this respect, is one who acquires the life tenant's interest and thereafter makes improvements on the property in any better position than the life tenant would be. n464 Where the life tenant is an infant, and the income of the property is invested by order of the court in permanent improvements, it is held that the corpus of the estate may be charged with improvements. n465 Likewise it is held that where permanent improvements are for the best interest of the remainderman, as well as the tenant, and do

not contravene the terms of the instrument creating the estate, the cost thereof should be paid from the corpus of the estate or apportioned between the life tenant and the remainderman. n466 In Kentucky, at least, it is held that the general rule applies, even though the life tenant or the purchaser of the interest believes in good faith to be actually the owner of the fee. n467 The courts in some of the other states, however, take a contrary position concerning the matter, n468 probably because of the betterment statutes which are in force in such states. In some cases, it has been held that the cost of permanent improvements which enhance the value of the estate of the remainderman as well as that of the life tenant may be apportioned between the owners of the two estates. n469 In any event the amount of the life tenant's claim for improvements is not to be measured by the cost of such improvements, but only by the amount to which the improvements have added to the actual and permanent value of the property. n470 The mere fact that the remainderman has knowledge of the improvements being made is not sufficient to charge him with the costs thereof. n471

A life tenant, making substantial and permanent improvements under circumstances affording a well grounded and reasonable belief that the life tenant owned the fee therein, can recover for betterments thus made under the betterments statute. n472 This the life tenant cannot do, however, unless the life tenant has had in good faith a "color of title" to the fee rather than a clear life estate. n473

New York has modified this permanent improvement rule to the extent that where buildings have become untenantable or improvements are necessary by reason of changed conditions and such improvements will profit both the remainderman and the life tenant the cost of improvements will be assessed to corpus or apportioned between the life tenant and the remainderman. n474 The cost of extraordinary repairs or permanent improvements must be apportioned between the life tenant and the remainderman. n475

The improvements made by a life tenant or lessees are not removable after death; n476 only trade fixtures may be removed. n477

COMPUTER-ASSISTED RESEARCH

LEXIS: life tenant! w/15 obligat! w/5 repair!

FOOTNOTES:

(n1)Footnote 421. Nevada does not have the Statute of Gloucester as part of the common law. *Worthington Motors v. Crouse, 390 P.2d 229 (Nev. 1964).*

See Allison Dunham, *Valuing Life Estates and Remainders, 107 Trusts & Est. 13 (1968);* Frank C. Homan, *Alterations by a Life Tenant or Tenant for Years as Waste, 16 Clev.-Mar. L. Rev. 220 (1967).*

(n2)Footnote 422. Life tenant is liable for permissive waste. *Kory v. Less, 22 S.W.2d 25 (Ark. 1929); Hooker v. Goodwin, 99 A. 1059 (Conn. 1917); Kline v. Dowling, 96 N.E. 579 (Ind. 1911); Prescott v. Grimes, 136 S.W. 206 (Ky. 1911).*

Life tenant is required to exercise ordinary care for the preservation and protection of the property. *Stevens v. Citizens & S. Nat'l Bank, 212 S.E.2d 792 (Ga. 1975).*

(n3)Footnote 423. *In re Lindhardt's Estate, 320 P.2d 357 (Mont. 1958)*(life tenant must pay taxes, make ordinary repairs and pay share of extraordinary assessments); *Adams v. Adams, 371 S.W.2d 637 (Ky. 1963).*

Life tenant has duty of preservation and protection. *Stevens v. Citizens & S. Nat'l Bank, 212 S.E.2d 792 (Ga. 1975).*

(n4)Footnote 424. The statement is frequently found that the life tenant must keep the premises in as good repair as they were when the life tenancy began. Without explanation, this language would be somewhat misleading. It refers

only to the ordinary repairs which are necessary to be made to preserve the property. It does not mean, for example, that if the roof has an expected durability of twenty years when the life tenant takes possession, and she occupies the premises nineteen years, during which time reroofing is not necessitated, the remainderman is entitled to charge back to her estate nineteen-twentieths of the cost of reroofing, if he has to make such repair soon after the termination of the life tenancy. She is not expected to make repairs until the necessity of doing so arises, and the remainderman may not collect from her estate the cost of repairs made after the termination of her life tenancy which were not, in the usual course of such matters, necessitated during her occupancy. *In re Stout's Estate, 50 P.2d 768 (Or. 1935).*

(n5)Footnote 425. Remainderman, not life tenant, entitled to increase in value and income from securities accruing subsequent to life tenant's death. *Gay v. Kernan Hosp. for Crippled Children, 184 A.2d 707 (Md. 1962).*

(n6)Footnote 426. *In re Victorian, 219 N.Y.S. 619 (1927); In re Mills' Estate, 266 N.Y.S. 478 (1933).*

(n7)Footnote 427. *Kelley v. Acker, 228 S.W.2d 49 (Ark. 1950); Kline v. Dowling, 96 N.E. 579 (Ind. 1911); Hamilton v. Hamilton, 115 N.W. 1012 (Iowa 1908);* Jones v. Harsha, *reh'g denied, 196 N.W. 624 (Mich. 1923); Weller v. Searcy, 123 S.W.2d 73 (Mo. 1938); Burlington County Trust Co. v. Kingsland, 86 A.2d 815 (N.J. Super. 1952); In re Edgar's Estate, 282 N.Y.S. 795 (1935); Middleton v. Rigsbee, 102 S.E. 780 (N.C. 1920); In re Stout's Estate, 50 P.2d 768 (Or. 1935).*

(n8)Footnote 428. *Callwood v. Virgin Islands Nat'l Bank, 121 F. Supp. 379 (D.V.I. 1954); Staples v. Pearson, 159 So. 488 (Ala. 1935); Love v. McDonald, 148 S.W.2d 170 (Ark. 1941); Frazier v. Hanes, 249 S.W.2d 842 (Ark. 1952); Coppens v. Coppens, 70 N.E.2d 54 (Ill. 1946); Thelen v. Hupe, 72 N.E.2d 735 (Ill. 1947); Sullivan v. Bland, 284 S.W. 410 (Ky. 1926); German v. Frey Planing Mill Co., 77 S.W.2d 414 (Ky. 1934); Cannon v. Carr, 168 S.W.2d 21 (Ky. 1943); Stewart v. Stewart's Estate, 94 A.2d 912 (Me. 1953); Rendahl v. Hall, 200 N.W. 744 (Minn. 1924);* Beliveau v. Beliveau, 14 N.W. 2d (Minn. 1944); *Browning v. Browning, 76 N.W.2d 100 (Minn. 1956); Brown v. Jones, 50 So. 2d 227 (Miss. 1951); Martin v. Eslick, 90 So. 2d 635 (Miss. 1956), corrected, 92 So. 2d 244 (Miss. 1957); Witcher v. Hanley, 253 S.W. 1002 (Mo. 1923); Tichenor v. Mechanics & Metals Nat'l Bank, 125 A. 323 (N.J. Eq. 1924); Savings Inv. & Trust Co. v. Little, 39 A.2d 392 (N.J. Eq. 1944); Kruse v. Meissner, 40 A.2d 777 (N.J. Eq. 1945); Peerless Candy Co. v. Kessler, 205 N.Y.S. 884 (1924); In re Merritt's Estate, 46 N.Y.S.2d 497 (1944); In re Bowers' Will, 48 N.Y.S.2d 934 (1950); In re Ramsey's Estate, 98 N.Y.S.2d 918 (1947); In re John's Will, 75 N.Y.S.2d 693 (1947); In re Stout's Estate, 50 P.2d 768 (Or. 1935); McDavid v. McDavid, 197 S.E. 204 (S.C. 1938); Richardson v. McCloskey, 276 S.W. 680 (Tex. Comm. App. 1925); Sargeant v. Sargeant, 15 S.W.2d 589 (Tex. 1929); In re Brook's Estate, 265 P.2d 833 (Wash. 1954); Nixon v. Nixon, 199 N.W. 50 (Wis. 1924).*

But see Enslein v. Enslein, 82 N.E.2d 555 (Ohio 1948), denying to a remainderman recompense against life tenant for payment of bills incurred by life tenant for repairs, to the extent that the freehold was benefitted by the repairs.

(n9)Footnote 429. *Lansdowne v. Lansdowne, 1 Jac. & W. 522, 37 Eng. Rep. 467 (1820).*

(n10)Footnote 430. 52 Henry 3, ch. 24.

(n11)Footnote 431. *Callwood v. Virgin Islands Nat'l Bank, 221 F.2d 770 (3d Cir. 1955); In re Daily's Estate, 159 P.2d 327 (Mont. 1945).*

(n12)Footnote 432. *In re Stein's Will, 91 N.Y.S.2d 158 (1949); In re Furry's Will, 92 N.Y.S.2d 349 (1949); Collett v. Collett, 217 S.W.2d 60 (Tex. Civ. App. 1948).*

(n13)Footnote 433. *Commissioner of Internal Revenue v. Saltonstall, 124 F.2d 110 (1st Cir. 1941); In re Kaplan's Will, 88 N.Y.S.2d 851 (1949).*

(n14)Footnote 434. *7 Ves. 137, 32 Eng. Rep. 56 (1802).*

(n15)Footnote 435. No depreciation reserve for buildings. *Nelligan v. Long, 70 N.E.2d 175 (Mass. 1946); In re Lee's Estate, 9 N.W.2d 245 (Minn. 1943); In re Roth's Estate, 52 A.2d 811 (N.J. Eq. 1947); In re Edgar's Estate, 282 N.Y.S. 795 (1935); In re McCullough's Will, 154 N.Y.S.2d 517 (1956).*

(n16)Footnote 436. *Kelley v. Acker, 228 S.W.2d 49 (Ark. 1950).*

(n17)Footnote 437. *Dillard v. Gill, 47 So. 2d 203 (Ala. 1950); Cannon v. Carr, 168 S.W.2d 21 (Ky. 1943); Rendahl v. Hall, 200 N.W. 744 (Minn. 1924); In re Roth's Estate, 52 A.2d 811 (N.J. Eq. 1947); In re Ramsey's Estate, 98 N.Y.S.2d 918 (1950).*

(n18)Footnote 438. *Grimm v. Grimm, 113 S.E. 91 (Ga. 1922); Reams v. Henney, 97 N.E.2d 37 (Ohio App. 1950).*

(n19)Footnote 439. *In re Dolch's Estate, 24 N.W.2d 447 (Iowa 1946); Prescott v. Grimes, 136 S.W. 206 (Ky. 1911); Beliveau v. Beliveau, 14 N.W.2d 360 (Minn. 1944); Clemence v. Steere, 1 R.I. 272 (1850); Greene v. Greene, 35 A. 1042 (R.I. 1896).*

(n20)Footnote 440. *Callwood v. Virgin Islands Nat'l Bank, 121 F. Supp. 379 (D.V.I. 1954); Prescott v. Grimes, 136 S.W. 206 (Ky. 1911); R.C. Bowen Estate v. Continental Trailways, 256 S.W.2d 71 (Tex. 1953).*

(n21)Footnote 441. *Wall v. Hinds, 70 Mass. (4 Gray) 256 (1855); Miles v. Miles, 32 N.H. 147 (1855); Kearney v. Kearney, 17 N.J. Eq. 504 (1864); Harder v. Harder, 26 Barb. 409 (N.Y. 1858); Harvey v. Harvey, 41 Vt. 373 (1868); Brough v. Higgins, 2 Gratt. 408 (Va. 1846).*

(n22)Footnote 442. *In re Ringle's Estate, 242 N.W. 908 (Mich. 1932); In re Matthews' Estate, 245 N.W. 122 (Wis. 1933).*

(n23)Footnote 443. *Sherrill v. Connor, 12 S.E. 588 (N.C. 1890).*

(n24)Footnote 444. *Pollard v. Shaaffer, 1 U.S. (1 Dall.) 210 (1787).*

(n25)Footnote 445. *Peerless Candy Co. v. Kessler, 205 N.Y.S. 884 (1924); Rippel v. Rippel, 82 N.E.2d 140 (Ohio 1948).*

(n26)Footnote 446. *Dillard v. Gill, 47 So. 2d 203 (Ala. 1950); Hanley v. Wadleigh, 186 A. 505 (N.H. 1936).*

(n27)Footnote 447. *Troy v. Protestant Episcopal Church, 56 So. 982 (Ala. 1911); Wilson v. White, 33 N.E. 361 (Ind. 1893); Kline v. Dowling, 96 N.E. 579 (Ind. 1911); Prescott v. Grimes, 136 S.W. 206 (Ky. 1911); St. Paul Trust Co. v. Mintzer, 67 N.W. 657 (Minn. 1896); Fuller v. Devolld, 128 S.W. 1011 (Mo. App. 1910); Jacobs v. Steinbrink, 149 N.Y.S. 337 (1914); Greene v. Greene, 35 A. 1042 (R.I. 1896); In re Niland's Estate, 143 N.W. 170 (Wis. 1913).*

(n28)Footnote 448. *Brown v. Jones, 50 So. 2d 227 (Miss. 1951)*(life tenant has duty to repair, where there is sufficient income after paying taxes); *In re Stout's Estate, 50 P.2d 768 (Or. 1935).*

(n29)Footnote 449. 2 William Blackstone, Commentaries 281; Coke on Littleton, §§ 53a, 53b.

Kelley v. Acker, 228 S.W.2d 49 (Ark. 1950); Hooker v. Goodwin, 99 A. 1059 (Conn. 1917); Miller v. Shields, 55 Ind. 71 (1876); Parish v. Camplin, 37 N.E. 607 (Ind. 1894); Wilson v. Edmonds, 24 N.H. 517 (1852); Carter v. Youngs, 42 N.Y. Sup. Ct. 418; In re Williams' Estate, 266 N.Y.S. 422 (1933); Old Nat'l Bank v. Swearingen, 72 S.W.2d 545 (Tenn. 1934); Nixon v. Nixon, 199 N.W. 50 (Wis. 1924).

(n30)Footnote 450. *Enslein v. Enslein, 82 N.E.2d 555 (Ohio 1948).*

(n31)Footnote 451. *Callwood v. Virgin Islands Nat'l Bank, 221 F.2d 770 (3d Cir. 1955).*

(n32)Footnote 452. *Van Bibber v. Williamson, 37 F. 756 (C.C. Ohio 1889); Grant v. Rose, 24 F.2d 115 (D.C. Ga. 1928); Sumner v. Bingham, 98 So. 294 (Ala. 1923); Smith & Shoptaw v. Stanton, 60 S.W.2d 183 (Ark. 1933); Dickey v. Stevens, 184 S.W.2d 955 (Ark 1945); Frazier v. Hanes, 249 S.W.2d 842 (Ark. 1952); Ingram v. Seaman, 267 S.W.2d 6 (Ark. 1954); Taylor v. Kemp, 12 S.E. 296 (Ga. 1890); Mid-state Homes, Inc. v. Johnson, 128 S.E.2d 197 (Ga. 1962); Kline v. Dowling, 96 N.E. 579 (Ind. 1911); Merrell v. Garver, 101 N.E. 152 (Ind. App. 1913); Shelangowski v. Schrack, 143 N.W. 1081 (Iowa 1913); Sparks v. Ball, 16 S.W. 272 (Ky. 1891); Henry v. Brown, 34 S.W. 710 (Ky. 1896); Frederick v. Frederick, 102 S.W. 858 (Ky. 1907); Bigstaff v. Bigstaff, 176 S.W. 1003 (Ky. 1915); Porter v. Osmun, 97 N.W. 756, 98 N.W. 859 (1904); Rendahl v. Hall, 200 N.W. 744, 940 (Minn. 1924); McDowell v. Arnold, 75 So. 2d 276 (Miss. 1954); Missouri Central Bldg. & Loan Ass'n v. Eveler, 141 S.W. 877 (Mo. 1911); Annable v. Ricedorff, 299 N.W. 373 (Neb. 1941); Chabon v. Lazarus, 87 A.2d 435 (N.J. Super. 1952)*(an agreement between the life tenant and his lessee that articles affixed to the land shall remain personalty, they not being trade fixtures, is not binding on the remainderman); *In re Jackson's Will, 239 N.Y.S. 362 (1929); Sands v. Kissane, 121 N.Y.S.2d 634 (1953); Pritchard v. Williams, 101 S.E. 85 (N.C. 1919); Harriett v. Harriett, 106 S.E. 221 (N.C. 1921); Hall v. Hall, 15 S.E.2d 273 (N.C. 1941); Burns v. Parker, 137 S.W. 705 (Tex. Civ. App. 1911); Richmond v. Sims, 144 S.W. 1142 (Tex. Civ. App. 1912); Richardson v. McCloskey, 261 S.W. 801 (Tex. Civ. App. 1924); Collett v. Collett, 217 S.W.2d 60 (Tex. Civ. App. 1948); Stahl v. Schwarz, 142 P. 651 (Wash. 1914); In re Brooks' Estate, 265 P.2d 833 (Wash. 1954)*(a grantee or devisee who accepts benefits of life estate must assume burden or expense of repairs and cannot recover from remainderman for permanent improvements); *Jones v. Shufflin, 31 S.E. 975 (W. Va. 1898).*

(n33)Footnote 453. *Kelley v. Acker, 228 S.W.2d 49 (Ark. 1950); Gray v. Gray, 139 S.W. 838 (Ky. 1911); Missouri Cent. Bldg. & Loan Ass'n v. Eveler, 141 S.W. 877 (Mo. 1911); Johnson v. Hendrickson, 24 N.W.2d 914 (S.D. 1946); In re Brooks' Estate, 265 P.2d 833 (Wash. 1954).*

But it has been held that one determined to have only a life estate *per autre vie* be allowed compensation for permanent improvements under the betterment act. *Hutchison v. Sheppard, 290 S.W.2d 843 (Ark. 1956).*

> There are two important reasons for this rule, first, to prevent the life tenant from consuming the interest of the remainderman by making improvements that the remainderman could not pay, or that he did not desire; second, the improvements are made for the immediate benefit of the life tenant and he usually makes them without reference to the wishes of the remainderman.

Caldwell v. Jacob, 22 S.W. 436, modified, 27 S.W. 86 (Ky. 1893); Rippel v. Rippel, 82 N.E.2d 140 (Ohio. 1948). See also *Gray v. Clement, 246 S.W. 940 (Mo. 1922).*

(n34)Footnote 454. *Combes v. Cadmus, 36 N.J. Eq. 382 (1883); Schulting v. Schulting, 3 A. 526 (N.J. 1886); In re Hale's Estate, 18 P.2d 808 (Or. 1933).*

(n35)Footnote 455. *Parish v. Camplin, 37 N.E. 607 (Ind. 1894).*

(n36)Footnote 456. *Suydam v. Jackson, 54 N.Y. 450 (1873).*

(n37)Footnote 457. *Miller v. Shields, 55 Ind. 71 (1876); Kearney v. Kearney, 17 N.J. Eq. 59, 504 (1864); Rogers v. Atlantic, Gulf & Pac. Co., 107 N.E. 661 (N.Y. 1915); Sampson v. Grogan, 42 A. 712 (R.I. 1899).*

(n38)Footnote 458. *Brough v. Higgins, 2 Gratt. (Va.) 408 (1846).*

(n39)Footnote 459. *In re Roth's Estate, 52 A.2d 811 (N.J. 1947).*

Life tenant's fire insurance covers only his own interest, not that of remainderman. *Honeyman v. Heins, 268 N.E.2d 907 (Ill. App. 1971).*

(n40)Footnote 460. *Belfield v. Findlay, 60 N.E.2d 403 (Ill. 1945); McDowell v. Arnold, 75 So. 2d 276 (Miss. 1954); Burnett v. Quell, 202 S.W.2d 97 (Mo. App. 1947); In re Daily's Estate, 159 P.2d 327 (Mont. 1945).*

(n41)Footnote 461. *Jacobs v. Steinbrink, 149 N.Y.S. 337 (1914).*

(n42)Footnote 462. *Hagan v. Varney, 35 N.E. 219 (Ill. 1893); Sparks v. Ball, 16 S.W. 272 (Ky. 1891); Smalley v. Isaacson, 42 N.W. 352 (Minn. 1889); Pritchard v. Williams, 101 S.E. 85 (N.C. 1919); Harriett v. Harriett, 106 S.E. 221 (N.C. 1921); Falck v. Marsh, 61 N.W. 287 (Wis. 1894).*

(n43)Footnote 463. *Hamilton v. Kinnebrew, 131 S.E. 470 (Ga. 1926); Leininger v. Reichle, 148 N.E. 384 (Ill. 1925); Jones v. Harsha, 196 N.W. 624 (Mich. 1923); Rendahl v. Hall, 200 N.W. 744 (Minn. 1924); O'Donnell v. Mathews, 284 S.W. 204 (Mo. App. 1926); Peerless Candy Co. v. Kessler, 205 N.Y.S. 884 (1924); Enslein v. Enslein, 82 N.E.2d 555 (Ohio App. 1948); Cagle v. Schaefer, 104 S.E. 321 (1920); Ely v. Moore, 297 S.W. 795 (Tex. 1927), modified, 11 S.W.2d 294 (1928).*

(n44)Footnote 464. *Peerless Candy Co. v. Kessler, 205 N.Y.S. 884 (1924).*

(n45)Footnote 465. *Gray v. Gray, 139 S.W. 838 (Ky. 1911); Harriett v. Harriett, 106 S.E. 221 (N.C. 1921).*

(n46)Footnote 466. *Estey v. Commerce Trust Co., 64 S.W.2d 608 (Mo. 1933); In re Whitney, 136 N.Y.S. 633 (1912).*

Annotation *Duty as between life tenant and remainderman as respects payments of improvement assessments, 10 A.L.R.3d 1309 (1966).*

(n47)Footnote 467. *Leonard v. Williams, 295 S.W. 408 (Ky. 1927).*

A life tenant's false assumption that the remainder interest of his subsequently deceased son was a vested one, whereas in fact it was only a contingent one which eventually failed, cannot avail to create a claim in favor of the life tenant against the reversion for new and original improvements made by the life tenant for the benefit of his son. *Sumner v. Bingham, 98 So. 294 (Ala. 1923).*

A joint owner of land who improves it believing it all to belong to him, will, where the property is indivisible, and a sale must be made for division, be adjudged out of the price the amount which his improvements added to the price of the property. *Ratterman v. Apperson, 133 S.W. 1005 (Ky. 1911).*

> It is the rule in this state that a life tenant, even though he may believe in good faith that he is the owner of the fee, is not entitled to a lien as against the remaindermen for the enhancement of the property by reason of his improvements, and even a purchaser from the life tenant, though honestly believing he acquired the fee, is entitled to no greater rights than the life tenant had.

Hager v. Connolly, 263 S.W. 723 (Ky. 1924).

(n48)Footnote 468. *Harper v. Durden, 170 S.E. 45 (Ga. 1933); O'Donnell v. Mathews, 284 S.W. 204 (Mo. App. 1926); Harriett v. Harriett, 106 S.E. 221 (1921); Barrett v. Stradl, 41 N.W. 439 (1889).*

(n49)Footnote 469. *Peerless Candy Co. v. Kessler, 205 N.Y.S. 883 (1924); Middleton v. Rigsbee, 102 S.E. 780 (N.C. 1920).*

(n50)Footnote 470. *Cagle v. Schaefer, 104 S.E. 321 (S.C. 1920).*

(n51)Footnote 471. *Smith v. Richey, 215 S.W. 429 (Ky. 1919); Pritchard v. Williams, 96 S.E. 733 (N.C. 1918), reh'g denied, 101 S.E. 85 (N.C. 1919); Harriett v. Harriett, 106 S.E. 221 (N.C. 1921).*

(n52)Footnote 472. *Frazier v. Hanes, 249 S.W.2d 842 (Ark. 1952); Hall v. Hall, 15 S.E.2d 273 (N.C. 1941).*

(n53)Footnote 473. *Ingram v. Seaman, 267 S.W.2d 6 (Ark. 1954); Perry v. Rye, 267 S.W.2d 507 (Ark. 1954); Lovett v. Stone, 79 S.E.2d 479 (N.C. 1954).*

(n54)Footnote 474. *In re Collins' Will, 61 N.Y.S.2d 488 (1946).* To the same effect, see *In re Oberly's Estate, 39 Berks 207* (Pa.).

(n55)Footnote 475. *In re Buckley's Estate, 150 N.Y.S.2d 337 (1956).*

(n56)Footnote 476. *Haywood v. Briggs, 41 S.E.2d 289 (N.C. 1947).*

Contra, Ray v. Young, 142 N.W. 393 (Iowa 1913).

(n57)Footnote 477. *Stewart v. Matheny, 5 So. 387 (Miss. 1888); Jones v. Shufflin, 31 S.E. 975 (W. Va. 1898).*

* This chapter is based in part on Ch. 30, George W. Thompson, Commentaries on The Modern Law of Real Property (John S. Grimes ed. 1979), which made a significant contribution toward preserving the American common law of life estates.

Thompson on Real Property, Thomas Editions

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CHAPTER 19 LIFE ESTATE *

2-19 Thompson on Real Property, Thomas Editions § 19.10

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§ 19.10 The Life Tenant's Duties Relating to Discharge of Encumbrances on the Property.

The general rule with respect to encumbrances is that the life tenant must pay the interest but not the principal of liens created by others against the real estate. n478 The life tenant must make ordinary repairs which a prudent person would make under the circumstances. n479

The concept of the life tenant as a fiduciary for the reversioner or remainderman in discharging an encumbrance has not crystallized as it has in the case of cotenants. Numerous cases indicate the existence of some sort of such relationship by considering that the discharge of a lien by the life tenant creates a problem of contribution.

A life tenant is under no obligation to pay off encumbrances existing against the property at the time the life estate is created, but is bound to pay the interest on encumbrances during the continuance of his estate, n480 at least so far as the income yielded by the property is sufficient to meet such interest. n481 Generally, a life tenant in possession and enjoying the fruits of the property subject to the encumbrance is, within the limit of produced revenue, obligated to pay the interest. n482 The encumbrancer cannot maintain an action against the life tenant to recover such interest, as it is not a personal debt, but one that the tenant must pay to save the estate for the life tenant's own enjoyment. n483

So the life tenant who discharges the encumbrance against the fee in order to preserve the estate is entitled to reimbursement or contribution from the reversioner or remainderman at least to the extent of the value of the interest of such reversioner or remainderman. n484 The life tenant is entitled to contribution from the remainderman in an amount equal to the mortgage lien less the present worth of the liability to pay interest during life expectancy. n485 The proportionate amount of encumbrance to be paid by the life tenant and the remainderman is ascertained by taking the probable length of life of the tenant as shown by the mortuary table, then the present value of the amount of interest on the encumbrance he would probably have paid during the rest of the life, if the encumbrance had continued so long. The difference between the present value of such interest payment and the amount of the encumbrance would be the share to be paid by the remainderman. n486 Both the life estate and the reversion are proportionately liable for the payment of the encumbrance, and, as between themselves, neither the life tenant nor the reversioner has a right to throw the whole burden upon the other. The tenant for life is to contribute in proportion to the benefit derived from the liquidation of the debt and the consequent cessation of annual payments of interest, taxes, etc., during life, which of course will depend upon age and the computation of the value of life estate. n487 Where the principal is apportioned, the life tenant is

bound to pay according to the life tenants interest so long as the estate continues. n488

The question of apportionment of the amount, paid by the life tenant or remainderman to discharge liens arises only when the liens are created by persons other than the life tenant or remainderman. n489 Where the principal of such encumbrance or any part thereof falls due and is paid by the remainderman, the life tenant is liable "to have his estate subjected to a lien for his proportionate part of the sum so paid." n490 Remaindermen who permit a foreclosure of a mortgage discharged by the life tenant without asserting their right to contribute their share of the cost of purchasing the encumbrance waive their right to do so. n491

Where the life tenant's failure to pay the interest on a mortgage debt results in a foreclosure of the mortgage and a sale of the premises and he purchases at such sale, the life tenant occupies to the remainderman the relation that would have been occupied if the interest had been paid, and the same is true where the mortgagee purchased at the sale and then conveyed the property to the life tenant, although there was no agreement between them for such conveyance. n492

If the life tenant pays off the encumbrance, the life tenant is prima facie a creditor of the estate for the amount paid less interest the life tenant would have had to pay during the continuance of the estate. n493 By paying off the encumbrance the life tenant is subrogated to the rights of the encumbrancer or acquires a lien on the reversionary interest. n494 The principal of such an encumbrance, however, is not a debt with payment of which the remainderman can charge the life tenant. n495

Either the life tenant or the remainderman may redeem from a prior encumbrance and, their equities being equal, each is entitled to exoneration from the other in proportion to the value of their respective interests. n496 As far as the mortgage of the entire property is concerned, both the estate for life and the estate in remainder are affected equally by foreclosure.

Any surplus remaining after payment of the mortgage debt is proratable between the life tenant and the remaindermen in proportion to their respective interests in the property and payable, in accordance with their agreement in the matter, either on a principal and interest basis or in lump sums. n497 The life tenant does not acquire a paramount title, adverse to the remainderman, by purchasing at a mortgage foreclosure sale, made as a result of the life tenant's own default in the payment of interest, n498 even though the life tenant may, when acting in good faith, acquire such a title by purchasing at a mortgage foreclosure sale made as a result of the remainderman's default in the payment of principal. n499 The title acquired by the life tenant in consequence of the purchase at a sale made to satisfy an encumbrance inures to the benefit of the life tenant and of the remainderman jointly, provided the latter within a reasonable time makes contribution to the amount of the purchase price paid by the life tenant. n500

Disseisin of the life tenant and the remainderman under lien foreclosure proceedings will go for naught when the life tenant subsequently procures a deed from the purchaser at the foreclosure sale, since the life tenant by so doing will restore both the life estate and the estate in remainder. n501 Where the life tenant has power to sell the remainder, the grantee can convey a life estate to one person and the remainder to another, but cannot be rid of the liens of the judgment creditors on the life estate except by paying the judgment debts. n502

It has been held that a life tenant is liable for interest on a lien debt on the corpus of an estate in remainder. n503 Other cases consider that the life tenant in paying off a lien for which the life tenant alone is not primarily liable is presumed to have done so for the life tenant's own benefit and may preserve and enforce the lien to the extent not liable for the principal payment thereof. n504 The life tenant is chargeable with the proportionate part of any improvements made by the executor. n505

COMPUTER-ASSISTED RESEARCH

LEXIS: life tenant! w/15 dut! w/15 encumberance!

FOOTNOTES:

(n1)Footnote 478. *Garrett v. Snowden, 145 So. 493 (Ala. 1933); Barker v. Barker, 31 So. 2d 357 (Ala. 1947); In re Lee, 213 N.W. 736 (Minn. 1927); Browning v. Browning, 76 N.W.2d 100 (Minn. 1956).*

If the mortgage exists at the creation of the life estate and does not fall due until after its termination, the life tenant pays interest only. *Kelley v. Acker, 228 S.W.2d 49 (Ark. 1950); Oldham v. Noble, 66 N.E.2d 614 (Ind. App. 1946); In re Myers' Estate, 12 N.W.2d 211 (Iowa 1943).*

Life tenant need only pay interest, not principal, on a prior mortgage, but if he pays the principal, he is entitled to proper contribution from the remaindermen. *King v. Rainbolt, 515 P.2d 228 (Okla. 1973).*

(n2)Footnote 479. *Ferguson v. Rochford, 79 A. 177 (Conn. 1911); Hooker v. Goodwin, 99 A. 1059 (Conn. 1917); Holzhauser v. Iowa State Tax Comm'n, 62 N.W.2d 229 (Iowa 1953); Woolston v. Pullen, 102 A. 461 (N.J. Eq. 1917); Asmus v. Asmus, 194 A. 884 (N.J. Eq. 1937); Hancox v. Meeker, 95 N.Y. 528 (1884); In re Stout's Estate, 50 P.2d 768 (Or. 1935).*

(n3)Footnote 480. *Abney v. Abney, 62 So. 64 (Ala. 1913); Kelley v. Acker, 228 S.W.2d 49 (Ark. 1950); Robinson v. Tubbs, 344 P.2d 1080 (Colo. 1959)* (life tenant's interest is subject to liens, taxes and encumbrances); *Wilson v. White, 33 N.E. 361 (Ind. 1893); Oldham v. Noble, 66 N.E.2d 614 (Ind. App. 1946); Hager v. Connolly, 263 S.W. 723 (Ky. 1924); Stavros v. Bradley, 232 S.W.2d 1004 (Ky. 1950); Porter v. Porter, 128 N.E. 795 (Mass. 1950); Damm v. Damm, 67 N.W. 984 (Mich. 1896); Bowen v. Brogan, 77 N.W. 942 (Mich. 1899); Stroh v. O'Hearn, 142 N.W. 865 (Mich. 1913); Upton v. Merriman, 133 N.W. 977 (Minn. 1911); In re Lee, 213 N.W. 736 (Minn. 1927); Faulkenburg v. Windorf, 259 N.W. 802 (Minn. 1955); Witcher v. Hanley, 253 S.W. 1002 (Mo. 1923); Fuller v. Devolld, 128 S.W. 1011 (Mo. App. 1910); Tindall v. Peterson, 98 N.W. 688, modified, 99 N.W. 659 (Neb. 1904); Draper v. Clayton, 127 N.W. 369 (Neb. 1910); Reeves v. Huckins, 117 A. 263 (N.H. 1922); Hanley v. Wadleigh, 186 A. 505 (N.H. 1936); Mosely v. Marshall, 27 Barb. 42 (N.Y. 1858); Bonhoff v. Wiehorst, 108 N.Y.S. 437 (1908); Pfaff v. Kehrer, 200 N.Y.S. 113 (1923); In re Britz' Estate, 82 N.Y.S.2d 792 (1948); Smith v. Barham, 17 N.C. 420 (1833); Mendenhall v. Jackson, 110 A. 799 (Pa. 1920); Stroud v. McDowell, 179 A. 772 (Pa. Super. Ct. 1935); Doane v. Doane, 46 Vt. 485 (1874); Livesay v. Boyd, 180 S.E. 158 (Va. 1935).*

Cf., Dorn v. Fidelity & Columbia Trust Co., 263 S.W. 681 (Ky. 1924).

But holding that it is the responsibility of the life tenant to pay mortgage falling due during the lifetime. *Northern Trust Co. v. Winston, 336 N.E.2d 543 (Ill. App. 1975).*

See Restatement, Property, § 129.

(n4)Footnote 481. *Coughlin v. Kennedy, 28 A.2d 417 (N.J. Eq. 1942); Miller v. Marriner, 121 S.E. 770 (N.C. 1924). See Penrose v. United States, 18 F. Supp. 413 (E.D. Pa. 1937).*

(n5)Footnote 482. *In re Myers' Estate, 12 N.W.2d 211 (Iowa 1943); Beliveau v. Beliveau, 14 N.W.2d 360 (Minn. 1944); Johnston v. Dickerson, 127 S.W.2d 64 (Mo. App. 1939); In re Merritt's Estate, 46 N.Y.S.2d 497 (1944).*

Life tenant's duty as to mortgage payments limited to profit or rental value of the land. *In re Britz' Estate, 82 N.Y.S.2d 792 (1948); Tyler v. Bier, 172 P. 112 (Or. 1918).*

(n6)Footnote 483. *Plympton v. Boston Dispensary, 106 Mass. 544 (1871).*

(n7)Footnote 484. *Troy v. Protestant Episcopal Church, 56 So. 982 (Ala. 1911); Rushton v. McLaughlin, 104 So. 824 (Ala. 1925); Huston v. Tribbetts, 49 N.E. 711 (Ill. 1898); Boue v. Kelsey, 53 Ill. App 295 (1894); Coppens v. Coppens, 70 N.E.2d 54 (Ill. 1946); Todd v. First Nat'l Bank, 190 S.W. 468 (Ky. 1917).*

Liability for assessment improvements must be apportioned between life tenant and remainderman. *Gaugh v. Gatewood, 380 S.W.2d 84 (Ky. 1964); Defreese v. Lake, 67 N.W. 505 (Mich. 1896); Detroit & Northern Mich. Bldg. & Loan Ass'n v. Oram, 167 N.W. 50 (Mich. 1918); Whitney v. Salter, 30 N.W. 755 (Minn. 1886); In re Lee, 213 N.W. 736 (Minn. 1927); Downing v. Hartshorn, 95 N.W. 801 (Neb. 1903); Tindall v. Peterson, 98 N.W. 688, modified, 99 N.W. 659 (Neb. 1904); Draper v. Clayton, 127 N.W. 369 (Neb. 1910)29 L.R.A. (NS) 153; Krause v. Naiman, 167 N.W. 207 (Neb. 1918); Bartels v. Seefus, 273 N.W. 485 (Neb. 1937); Elmora & West End Bldg. & Loan Ass'n v. Dancy, 155 A. 796 (N.J. 1931); Brown v. Jennings, 124 S.E. 150 (N.C. 1924); Tyler v. Bier, 172 P. 112 (Or. 1918).*

See Boggs v. Boggs, 147 P.2d 116 (Cal. App. 1944); Ryder v. Ryder, 41 A. 2d 278 (N.J. 1945).

Apportionment of the principal of the mortgage that falls due during the life estate. *Murphy v. May, 8 So. 2d 442 (Ala. 1942); Engel v. Swenson, 254 N.W. 2 (Minn. 1934).*

(n8)Footnote 485. *Engel v. Swenson, 254 N.W. 2 (Minn. 1934).*

(n9)Footnote 486. *Murphy v. May, 8 So. 2d 442 (Ala. 1942); Snyder v. Snyder, 6 Mich. 470 (1859); Bell v. New York, 10 Paige Ch. 49 (N.Y. 1933). See Garrett v. Snowden, 145 So. 493 (Ala. 1933).*

Mode of computing proportionate liability, *see Dorn v. Fidelity & Columbia Trust Co., 263 S.W. 681 (Ky. 1924); In re Lee, 213 N.W. 736 (Minn. 1924); Reeves v. Huckins, 117 A. 263 (N.H. 1922).*

"The payment of the life tenant of the present worth of an annuity equal to the annual interest running during his expectancy of life represents his individual indebtedness, and the balance, after subtracting that sum from the mortgage debt, is the share which the remainderman should contribute." *Draper v. Clayton, 127 N.W. 369 (Neb. 1910). See Damm v. Damm, 67 N.W. 984 (Mich. 1896); Tindall v. Peterson, 98 N.W. 688, modified, 99 N.W. 659 (1904).*

(n10)Footnote 487. *Daviess v. Myers, 52 Ky. (13 B. Mon.) 511 (1852); Barnes v. Boardman, 25 N.E. 623 (Mass. 1890); Phelan v. Boyian, 25 Wis. 679 (1870).*

(n11)Footnote 488. *Parrish v. Ross, 44 S.W. 134 (Ky. 1898).*

(n12)Footnote 489. *Souders v. Kitchens, 124 S.W.2d 1137 (Mo. 1939).*

(n13)Footnote 490. *Morrison v. Launtzhiser, 271 P.2d 301 (Kan. 1954). See* Restatement, Property § 132.

(n14)Footnote 491. *Abney v. Abney, 62 So. 64 (Ala. 1913).*

(n15)Footnote 492. *Wheeler v. Kazee, 253 S.W.2d 378 (Ky. 1952); McCall v. McCall, 123 N.W. 550 (Mich. 1909); Edwards v. Puckett, 268 S.W.2d 582 (Tenn. 1954)*(so as to spouse of life tenant).

(n16)Footnote 493. *Fuller v. Devolld, 128 S.W. 1011 (Mo. App. 1910).*

(n17)Footnote 494. *Abney v. Abney, 62 So. 64 (Ala. 1913); Murphy v. May, 8 So. 2d 442 (Ala. 1942); McDaniel v. Conlan, 204 S.W. 850 (Ark. 1918); Hawaiian Trust Co. v. Cohen, 35 Haw. 795 (1941); Jones v. Gilbert, 25 N.E. 566 (Ill. 1890); Todd v. First Nat'l Bank, 190 S.W. 468 (Ky. 1917); Stroh v. O'Hearn, 142 N.W. 865 (Mich. 1913); Whitney v. Salter, 30 N.W. 755 (Minn. 1886); Gates v. Rice, 8 S.W.2d 614 (Mo. 1928); Downing v. Hartshorn, 95 N.W. 801 (Neb. 1903); Tindall v. Peterson, 98 N.W. 688, modified, 99 N.W. 659 (Neb. 1904); Elmora & West End Bldg. & Loan Ass'n v. Dancy, 155 A. 796 (N.J. 1931); Coughlin v. Kennedy, 28 A.2d 417 (N.J. 1942); Bonhoff v. Wiehorst, 108 N.Y.S. 437 (1908); Warner v. York, 1 Ohio C.C. (N.S.) 73 (1918); Tyler v. Bier, 172 P. 112 (Or. 1918); Wilder v. Wilder, 53 A. 1072 (Vt. 1903).*

(n18)Footnote 495. *Kreuscher v. Roth, 188 N.W. 996 (Minn. 1922); Collins v. McKenna, 189 N.Y.S. 433 (1921); Miller v. Marriner, 121 S.E. 770 (N.C. 1924). See Boggs v. Boggs, 147 P.2d 116 (Cal. App. 1944).*

"A tenant for life, paying a charge on an estate, is prima facie a creditor, ... and the burden of proof is on those who assert that in paying off the charge he intended to exonerate the estate." *In re Marshall's Estate, 122 A. 289 (Pa. 1923).*

(n19)Footnote 496. *Draper v. Sewell, 82 So. 2d 303 (Ala. 1955); Kelley v. Acker, 228 S.W.2d 49 (Ark. 1950); Brown v. Jennings, 124 S.E. 150 (N.C. 1924).*

A life tenant who discharges an encumbrance on the property for the purpose of preventing the property's sale is entitled to be substituted to the encumbrancer's lien and to enforce the lien by sale of the property. *Lindenberger v. Cornell, 229 S.W. 54 (Ky. 1921).*

(n20)Footnote 497. *First Nat'l Bank v. Holbrook, 217 S.W.2d 787 (Ky. 1949); Masher v. Wright, 111 N.Y.S.2d 669 (1951)*(proceeds of sale remaining after paying off mortgage debt invested with life tenant getting only the interest); *Brown v. Jennings, 124 S.E. 150 (N.C. 1924)*(the surplus may be paid into court, as provided by statute, when its disposition has not been determined by agreement).

(n21)Footnote 498. *Kreuscher v. Roth, 188 N.W. 996 (Minn. 1922).*

(n22)Footnote 499. *Miller v. Marriner, 121 S.E. 770 (N.C. 1924).*

(n23)Footnote 500. *Ruston v. McLaughlin, 104 So. 824 (Ala. 1935); Hager v. Connolly, 263 S.W. 723 (Ky. 1924); In re Lee, 213 N.W. 736 (Minn. 1927); Witcher v. Hanley, 253 S.W. 1002 (Mo. 1923); Payne v. Foster, 135 N.Y.S.2d 819 (1954)*(remainderman tendering the amount of the payment to the life tenant is entitled to an assignment, not a discharge of the mortgage).

(n24)Footnote 501. *Lowry v. Lyle, 198 N.W. 245 (Mich. 1924).*

(n25)Footnote 502. *Roby v. Arterburn, 108 S.W.2d 873 (Ky. 1957).*

(n26)Footnote 503. *Mairs v. Central Trust Co., 34 S.E.2d 742 (W. Va. 1945).*

(n27)Footnote 504. *Marmet v. Marmet, 70 N.W.2d 301 (Neb. 1955). See Stavros v. Bradley, 232 S.W.2d 1004 (Ky. 1950),* holding that a life tenant paying off mortgage being foreclosed could not collect the interest from the remainderman but the latter could not pay off the lien and force the property to be sold to satisfy the lien.

(n28)Footnote 505. *In re Lindhardt's Estate, 320 P.2d 357 (Mont. 1958).*

* This chapter is based in part on Ch. 30, George W. Thompson, Commentaries on The Modern Law of Real Property (John S. Grimes ed. 1979), which made a significant contribution toward preserving the American common law of life estates.

Thompson on Real Property, Thomas Editions

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CHAPTER 19 LIFE ESTATE *

2-19 Thompson on Real Property, Thomas Editions § 19.11

AUTHOR: Professor David A. Thomas J. Reuben Clark Law School Brigham Young University

§ 19.11 The Life Tenant's Duty to Insure the Premises.

[Go To Supp]

New York charges the life tenant with the obligation of insuring the buildings. n506 But generally the life tenant is not bound to keep the buildings on the premises insured for the benefit of the remainderman unless the life tenant had agreed to do so, or unless the instrument creating the estate expressly so provides. n507 But as a general rule, the cost of insurance on buildings forming a part of the life estate should be apportioned between the life tenant and the remainderman. n508

Ordinarily, the life tenant would insure the life interest, and the remainderman would insure the remainder interest. n509 As a general rule, the life tenant and the remainderman pay insurance for their respective interests, but under some circumstances the insurance is chargeable to the life tenant. n510

It seems that the neglect of the life tenant to insure is not to be regarded as in the nature of a voluntary waste. n511 Some courts hold that where a fire insurance policy issued to a life tenant covers only the latter's interest in the building insured, the life tenant is entitled to all the proceeds in case of loss, n512 where the life tenant stands in no fiduciary relationship to the remainderman. n513 Other courts hold that if the sum collected for a loss by fire exceeds the value of the life estate, such excess should be used in rebuilding or should be paid to the remainderman. n514

Either the life tenant or the remainderman may insure the property for one's own benefit. n515 Where the property comes to the life tenant encumbered by a mortgage, the life tenant is entitled to the entire income, out of which the life tenant must pay fire insurance premiums. n516

COMPUTER-ASSISTED RESEARCH

LEXIS: life tenant! w/15 dut! w/15 insur!

FOOTNOTES:
(n1)Footnote 506. *In re John's Will, 75 N.Y.S.2d 693 (1947).*

(n2)Footnote 507. *Corder v. McDougall, 16 P.2d 740 (Cal. 1932); Almeida v. Price, 236 P.2d 823 (Cal. App. 1951); Clark v. Leverett, 126 S.E. 258 (Ga. 1924); Pool v. Pool, 283 S.W. 111 (Ky. 1926); Harrison v. Pepper, 44 N.E. 222 (Mass. 1896); Converse v. Boston Safe Deposit & Trust Co., 53 N.E.2d 841 (Mass. 1944); Appeal of Smith, 122 N.W. 564 (Mich. 1909); Rendahl v. Hall, 200 N.W. 744 (Minn. 1924); Grace v. Reed, 108 So. 799 (Miss. 1926); Farmers' Mut. Fire & Lightning Ins. Co. v. Crowley, 190 S.W.2d 250 (Mo. App. 1945); In re Williams' Estate, 266 N.Y.S. 422 (1933); In re Laemmle's Estate, 50 N.Y.S.2d 899 (1944); Richardson v. McCloskey, 276 S.W. 680 (Tex. Comm. App. 1925); Kincheloe v. Gibson, 78 S.E. 603 (Va. 1913); Thompson v. Gearheart, 119 S.E. 67 (Va. 1923); Lynch v. Johnson, 84 S.E.2d 419 (Va. 1954).*

Contra, Commercial Nat'l Bank & Trust Co. v. Erwin, 100 N.Y.S.2d 200 (1950).

(n3)Footnote 508. *In re Daily's Estate, 159 P.2d 327 (Mont. 1945); In re Phelps' Estate, 195 N.Y.S. 840 (1937).*

If the life tenant insures the entire fee against fire he must rebuild or account to the remainderman since he takes only a life estate in the proceeds. *Clark v. Leverett, 126 S.E. 258 (Ga. 1924); Welsh v. London Assur. Corp., 25 A. 142 (Pa. 1892); Sampson v. Grogan, 42 A. 712 (R.I. 1899); Green v. Green, 27 S.E. 952 (S.C. 1897).* But the life tenant may insure for himself alone. *Miller v. Gold Beach Packing Co., 282 P. 764 (Or. 1929); In re Gorman's Estate, 184 A. 86 (Pa. 1936).*

(n4)Footnote 509. *Legge v. Canty, 4 A.2d 465 (Md. 1939); Converse v. Boston Safe Deposit & Trust Co., 53 N.E.2d 841 (Mass. 1944).*

Where a life tenant is required to insure, failure so to do does not forfeit the life tenancy but does make the tenant liable to the remainderman for the loss. *Ramsey v. Cooper, 553 F.2d 237 (1st Cir. 1977).*

(n5)Footnote 510. *Rogers v. Genung, 76 A. 233 (N.J. 1910); In re Warfel's Estate, 22 Erie 190* (Pa.). *See In re Mills' Estate, 266 N.Y.S. 478 (1933); Adams v. Adams, 371 S.W.2d 637 (Ky. 1963).*

(n6)Footnote 511. *Harrison v. Pepper, 44 N.E. 222 (Mass. 1896).*

(n7)Footnote 512. *Jackson v. Jackson, 201 S.W.2d 218 (Ark. 1967); Corder v. McDougall, 16 P.2d 740 (Cal. 1932); Spalding v. Miller, 45 S.W. 462 (Ky. 1898); Blanchard v. Kingston, 193 N.W. 241 (Mich. 1923); Sampson v. Grogan, 42 A. 712 (R.I. 1899); Thompson v. Gearheart, 119 S.E. 67 (Va. 1923); Lynch v. Johnson, 84 S.E.2d 419 (Va. 1954).*

(n8)Footnote 513. *In re Gorman's Estate, 184 A. 86 (Pa. 1936).*

(n9)Footnote 514. *Crisp County Lumber Co. v. Bridges, 200 S.E. 777 (Ga. 1939); Green v. Green, 27 S.E. 952 (S.C. 1897). See Clark v. Leverett, 126 S.E. 258 (Ga. 1924).*

But see In re Gorman's Estate, 184 A. 86 (Pa. 1936)(fact that the life tenant's insurance represents the full value of the property is not generally regarded as sufficient, of itself, to create an interest in the remainderman).

(n10)Footnote 515. *Clark v. Leverett, 126 S.E. 258 (Ga. 1924); Citizens Ins. Co. v. Railey, 77 S.W.2d 420 (Ky. 1934); Getchell v. Mercantile & Mfrs. Mut. Fire Ins. Co., 83 A. 801 (Me. 1912); Blanchard v. Kingston, 193 N.W. 241 (Mich. 1923); McLevis v. St. Paul Fire & Marine Ins. Co., 206 N.W. 940 (Minn. 1926); King v. King, 143 So. 422 (Miss. 1932); Millard v. Beaumont, 185 S.W. 547 (Mo. 1916); Houck v. American Eagle Fire Ins. Co., 151 S.E. 628 (N.C. 1930); Crook v. Hartford Fire Ins. Co., 178 S.E. 254 (S.C. 1935).*

(n11)Footnote 516. *Livesay v. Boyd, 180 S.E. 158 (Va. 1935). But see Kelley v. Acker, 228 S.W.2d 49 (Ark. 1950)*(holding a remainderman not entitled to reimbursement from life tenant for insurance premiums and taxes paid as part of mortgage payments, being a gift to life tenant).

* This chapter is based in part on Ch. 30, George W. Thompson, Commentaries on The Modern Law of Real Property (John S. Grimes ed. 1979), which made a significant contribution toward preserving the American common law of life estates.

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CHAPTER 19 LIFE ESTATE *

2-19 Thompson on Real Property, Thomas Editions § 19.12

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§ 19.12 The Life Tenant's Duty to Pay Taxes.

It is a commonly accepted obligation of the life tenant to pay taxes assessed against the real estate during the duration of the life estate. n517 Even though in most states, for the purpose of the state's right to proceed against the property, the payment of taxes is as much the duty of the remainderman as it is the duty of the life tenant, n518 as between the life tenant and the remainderman, the payment of ordinary annual taxes is, as a general rule which is sometimes given statutory utterance, n519 and obligation which rests on the life tenant, n520 unless the remainderman is entitled to present possession of the property, n521 at least, when the creator of the life estate did not provide otherwise. n522 The duty of the life tenant to preserve the property for the remainderman includes the duty to redeem from a tax sale, even though the taxes were charged against the land prior to the creation of the life tenancy, n523 when there is no contract between the life tenant and the remainderman to the contrary, n524 when the property is productive, n525 and when the taxes can be met by applying income which the property yields. n526 In the light of this rule, a valid tax title to the property cannot be acquired adversely to the remainderman, either by the life tenant, n527 one acting for the life tenant, n528 one claiming under the life tenant n529 or one becoming the purchaser of the life tenant's rights at a forced sale. n530 The holder of a particular estate charged with the duty of paying taxes redeems from a tax sale for the benefit of remaindermen. n531 A life tenant under obligation to pay taxes is precluded from buying in a tax title for the life tenant's own advantage. n532

So in jurisdictions where the statute makes it the duty of the life tenant to pay taxes, a tax deed procured by the life tenant inures to the benefit of the remainderman. n533 A remainderman who pays the taxes upon the life tenant's failure to do so is entitled to a lien on the life estate for reimbursement n534 or to the appointment of a receiver to collect the rents, issues and profits and apply them to taxes in arrears, to taxes to become due and to the debt owing the remainderman by the life tenant as a result of the former's actual payment of taxes. n535 The life tenant's liability for taxes, however, does not extend to taxes which, although assessed prior to death, do not become due and payable until subsequently thereto. n536

The obligation of the life tenant to pay delinquent taxes and all special assessments thereon applies only to taxes accruing during the term of possession. n537 However, this general rule has been held not to apply where the real estate in question was the result of a foreclosure of a mortgage which produced no income and was not a part of the estate of the testator which was left to the life tenant. n538 It would seem that generally the life tenant is liable only for a

proportionate share of special assessments for streets, sidewalks or sewers, and other improvements of a permanent character. n539 However, if the improvement for which the estate is taxed will probably not outlast the tenant's life, the life tenant is liable for the whole tax thereof. n540 The life tenant's right to rent income and duty to pay taxes ends on the day of death. n541 In Georgia, the life tenant is not entitled to contribution from the remainderman on account of the payment by the former of assessments for street improvements. n542

Where the land is not productive of any income during the life tenancy, the life tenant is not bound to pay any of the ordinary taxes or any special assessments for betterments, but the remainderman or remaindermen must pay them. n543 Drainage assessments as benefiting both the life tenant and the remainderman are apportioned between them, n544 but a life tenant owes no duty to pay assessments levied before the tenancy arose. n545

In a few states the payment of taxes is the exclusive duty of the life tenant, not the remainderman. n546 In the case of special assessments, the cost must be apportioned between the life tenant, and the remainderman. n547

Under the majority rule, the life tenant has the duty to pay ordinary taxes only to the extent that the property is productive of rents and profits. n548 The minority rule requires the life tenant to pay such taxes on unproductive property. n549

COMPUTER-ASSISTED RESEARCH

LEXIS: life tenant! w/15 dut! w/15 tax!

FOOTNOTES:

(n1)Footnote 517. *Littlepage v. Hart, 250 F.2d 774 (D.C. Cir. 1957); Mills v. Pennington, 209 S.W.2d 281 (Ark. 1948).*

Tenant who may remove improvements must pay increase in taxes caused by improvements. *Lawrence v. F.W. Woolworth Co., 403 P.2d 396 (Cal. 1965).*

Fonda v. Miller, 103 N.E.2d 98 (Ill. 1951); Browning v. Browning, 76 N.W.2d 100 (Minn. 1956); Tillman v. Richton Tie & Timber Co., 80 So. 2d 745 (Miss. 1955); Martin v. Eslick, 90 So. 2d 635 (1956), corrected, 92 So. 2d 244 (Miss. 1957); In re Ramsey's Estate, 98 N.Y.S.2d 918 (1950); In re Frenz' Will, 108 N.Y.S.2d 446 (1951); Cooper v. Cooper, 17 S.E.2d 655 (N.C. 1941); McGee v. Carter, 212 S.W.2d 902 (Tenn. App. 1948); Brattleboro v. Smith, 94 A.2d 407 (Vt. 1953); Richmond v. McKenny, 73 S.E.2d 414 (Va. 1952).

Defeasible life tenant liable for taxes while in possession. *Martin v. Heard, 238 S.E.2d 899 (Ga. 1977).*

(n2)Footnote 518. *Mathis v. Melton, 238 S.W. 806 (Mo. 1922); In re Bommer's Estate, 288 N.Y.S. 419 (1936).*

A remainderman must assert his right against life tenant for waste where life tenant fails to pay taxes, otherwise laches may preclude remainderman from asserting his rights against holder of tax deed. *Beasley v. Beasley, 88 N.E.2d 435 (Ill. 1949).*

Only the life tenant's interest could be sold to satisfy delinquent taxes. *Taylor v. Jennings, 106 S.E.2d 391 (S.C. 1958).*

(n3)Footnote 519. California statute, *see Newport v. Hatton, 231 P. 987 (Cal. 1924).* Montana statute, *see Anderson v. McClenathan, 205 P. 230 (Mont. 1922).* Oklahoma statute, see *Riley v. Collier, 238 P. 491 (Okla. 1924).*

(n4)Footnote 520. *Lone Pine Lawn Corp. v. Helvering, 121 F.2d 935 (2d Cir. 1941); Board of County Comm'rs v. Seber, 130 F.2d 663 (10th Cir. 1942); Troy v. Protestant Episcopal Church, 56 So. 982 (Ala. 1911); Jones v. Fowler, 285 S.W. 363 (Ark. 1926); Higginbotham v. Harper, 174 S.W.2d 668 (Ark. 1943); Dormer v. Walker, 69 P.2d 1049*

(Colo. 1937); Hamilton v. Kinnebrew, 131 S.E. 470 (Ga. 1926); Wilson v. Linder, 123 P. 487 (Idaho 1912); Hagan v. Varney, 35 N.E. 219 (Ill. 1893); Nelson v. Davidson, 43 N.E. 361 (Ill. 1895); Huston v. Tribbetts, 49 N.E. 711 (Ill. 1898); Guhl v. Guhl, 33 N.E.2d 185 (Ill. 1941); Wilson v. White, 33 N.E. 361 (Ind. 1893); Schofield v. Green, 56 N.E.2d 506 (Ind. App. 1944); Crawford v. Meis, 99 N.W. 186 (Iowa 1904); Cedar Rapids First Congregational Church v. Terry, 107 N.W. 305 (Iowa 1906); Williams v. Williams, 202 N.W. 434 (Iowa 1925); Hucke v. Dinkel, 275 N.W. 61 (Iowa 1937); Jinkiaway v. Ford, 145 P. 885 (Kan. 1915); Prescott v. Grimes, 136 S.W. 206 (Ky. 1911); Sullivan v. Bland, 284 S.W. 410 (Ky. 1926); Atkin v. McCoy, 120 S.W.2d 1019 (Ky. 1938); Cannon v. Carr, 168 S.W.2d 21 (Ky. 1943); Gaulbaugh v. Rouse, 104 S.W. 959 (Ky. 1907); Roche v. Waters, 19 A. 535 (Md. 1890); Spring v. Hollander, 158 N.E. 791 (Mass. 1927); Jenks v. Horton, 55 N.W. 372 (Mich. 1893); Defreese v. Lake, 67 N.W. 505 (Mich. 1896); Heilwig v. Nybeck, 146 N.W. 141 (Mich. 1914); Myers v. Myers, 152 N.W. 934 (Mich. 1915); St. Paul Trust Co. v. Mintzer, 67 N.W. 657 (Minn. 1896); Kreuscher v. Roth, 188 N.W. 996 (Minn. 1922); Turner v. Edwards, 292 N.W. 257 (Minn. 1940); Beliveau v. Beliveau, 14 N.W.2d 360 (Minn. 1944); Federal Land Bank v. Newsom, 166 So. 346 (Miss. 1936); Reyburn v. Wallace, 3 S.W. 482 (Mo. 1887); Bradley v. Goff, 147 S.W. 1012 (Mo. 1912); Falvey v. Hicks, 286 S.W. 385 (Mo. 1926); Rist v. Toole County, 159 P.2d 340 (Mont. 1945); Criswell v. McKnight, 232 N.W. 586 (Neb. 1930); Annable v. Ricedorff, 299 N.W. 373 (Neb. 1941); Reeves v. Huckins, 117 A. 263 (N.H. 1922); Hanley v. Wadleigh, 186 A. 505 (N.H. 1936); Robbins v. Ducey, 27 A.2d 106 (N.H. 1942); Rogers v. Genung, 74 A. 473 (N.J. Eq. 1909); Tichenor v. Mechanics & Metals Nat'l Bank, 125 A. 323 (N.J. Eq. 1924); Asmus v. Asmus, 194 A. 884 (N.J. Eq. 1937); Rutherford Nat'l Bank v. Black, 32 A.2d 86 (N.J. Eq. 1943), holding rule does not apply where the real estate was acquired by the executors through foreclosure of a nonproductive mortgage and the property so acquired was not a part of the testator's estate at the time of his death; *Matlock v. Mize, 230 P.2d 246 (N.M. 1950)*(the fiduciary duty of a life tenant to remainderman is not an interest in land, but a duty equity imposes upon life tenant to preserve and protect remainderman and this duty remains an ever present obligation unaltered and undivested by issuance of a tax deed); *Wise v. Wedlake, 216 N.Y.S. 699 (1926); In re Lott's Will, 296 N.Y.S. 43 (1937); In re McCarty's Estate, 285 N.Y.S. 641 (1936); In re Wells' Will, 26 N.Y.S.2d 604 (1941); In re Laemmle's Estate, 50 N.Y.S.2d 899 (1944); In re Merritt's Estate, 46 N.Y.S.2d 497 (1944); In re Stein's Will, 91 N.Y.S.2d 158 (1949); In re Kontir's Estate, 101 N.Y.S.2d 879 (1950); Foulks v. Talbott, 58 N.E.2d 790 (Ohio App. 1943); Jones v. Jackson, 246 P.2d 546 (Or. 1952); Abernathy v. Orton, 71 P. 327 (Or. 1903); Greene v. Greene, 35 A. 1042 (R.I. 1896); Industrial Trust Co. v. Wilson, 192 A. 821 (R.I. 1937); Roberts v. Roberts, 150 S.W.2d 236 (Tex. 1941); Richardson v. McCloskey, 276 S.W. 680 (Tex. Comm. App. 1925); Sheppick v. Sheppick, 138 P. 1169 (Utah 1914); Richmond v. McKenny, 73 S.E.2d 414 (Va. 1952); In re Lueft, 109 N.W. 652 (Wis. 1906); Niland v. Niland, 143 N.W. 170 (Wis. 1913); Nixon v. Nixon, 199 N.W. 50 (Wis. 1924).*

Failure of life tenant to pay ordinary taxes, the interest on mortgages and on special assessments and to repair for ordinary wear and tear is waste. *Holzhauser v. Iowa State Tax Comm., 62 N.W.2d 229 (Iowa 1953).*

See Restatement, Property § 129; Note. *Duties of Legal Life Tenants to Remaindermen in Iowa, 25 Iowa L. Rev. 113 (1939).*

(n5)Footnote 521. *Kelley v. Acker, 228 S.W.2d 49 (Ark. 1950); Cloves v. Cloves, 239 S.W. 145 (Mo. 1922).*

(n6)Footnote 522. *In re Victorian, 219 N.Y.S. 619 (1927).*

(n7)Footnote 523. *Matlock v. Mize, 230 P.2d 246 (N.M. 1950).*

If life tenants fail in their duty to pay taxes only their life estates are sold at tax sale. *Taylor v. Jennings, 106 S.E.2d 391 (S.C. 1958).*

(n8)Footnote 524. *Reddish v. John, 179 N.W. 951 (Iowa 1920); Hucke v. Dinkel, 275 N.W. 61 (Iowa 1937).*

(n9)Footnote 525. *Pike v. Gilbert, 198 N.W. 923 (Mich. 1924).*

In Texas, the nonproductiveness of the property does not relieve the life tenant from the obligation to pay taxes.

Richardson v. McCloskey, 276 S.W. 680 (Tex. Comm. App. 1925).

(n10)Footnote 526. *Miller v. Marriner, 121 S.E. 770 (N.C. 1924); Jones v. Jackson, 246 P.2d 546 (Or. 1952).*

(n11)Footnote 527. *Wilson v. Linder, 123 P. 487 (Idaho 1912); Zaring v. Lomax, 206 P.2d 706 (N.M. 1949); Miller v. Marriner, 121 S.E. 770 (N.C. 1924); Connecticut General Life Ins. Co. v. Bryson, 219 S.W.2d 799 (Tex. 1949); Wheeler v. Harris, 339 S.W.2d 99 (Ark. 1960)*(a life tenant under duty to pay taxes and special assessments who purchases a tax title acquires only a right of redemption as against the remainderman).

(n12)Footnote 528. *Newport v. Hatton, 231 P. 987 (Cal. 1924).*

(n13)Footnote 529. *Harris v. Evans, 195 N.W. 178 (Iowa 1923); Spearman v. Hussey, 50 So. 2d 610 (Miss. 1951).*

(n14)Footnote 530. *Mathews v. O'Donnell, 233 S.W. 451 (Mo. 1921).*

(n15)Footnote 531. *Hutchison v. Sheppard, 279 S.W.2d 33 (Ark. 1955); Tillman v. Richton Tie & Timber Co., 80 So. 2d 745 (Miss. 1955); Matlock v. Mize, 230 P.2d 246 (N.M. 1950); Morrow v. Person, 259 S.W.2d 665 (Tenn. 1953); Connecticut Gen. Life Ins. Co. v. Bryson, 219 S.W.2d 799 (Tex. 1949).*

(n16)Footnote 532. *Brown v. Warner, 107 N.W.2d 1 (S.D. 1961).*

(n17)Footnote 533. *Myers v. Grant, 95 S.E.2d 9 (Ga. 1956)*(tax title no basis for adverse possession by life tenant); *In re Lindhardt's Estate, 320 P.2d 357 (Mont. 1958)* (remainderman must pay insurance premiums taken out by executor); *Waldon v. Baker, 88 P.2d 352 (Okla. 1939).*

Life tenant purchasing from purchaser at tax sale holds for remainderman. *Matlock v. Mize, 230 P.2d 246 (N.M. 1950).*

(n18)Footnote 534. *Helm v. Belvin, 232 P. 382 (Okla. 1924).*

(n19)Footnote 535. *Pruitt v. Holly, 73 Ala. 369 (1882); Keeley v. Clark, 211 N.Y.S. 391 (1925); In re Hedges' Estate, 62 N.E.2d 643 (Ohio App. 1943).*

(n20)Footnote 536. *O'Donnell v. Mathews, 284 S.W. 204 (Mo. App. 1926); In re Stein's Will, 91 N.Y.S.2d 158 (1949)*(similar as to assessments levied before tenant's death).

If life tenant fails to pay real estate taxes only his interest can be sold at tax sale. *Taylor v. Jennings, 106 S.E.2d 391 (S.C. 1958).*

(n21)Footnote 537. *Bullock v. Peoples Bank of Holcomb, 173 S.W.2d 753 (Mo. 1943).*

Liability for assessment improvements must be apportioned between life tenant and remainderman. *Gough v. Gatewood, 380 S.W.2d 84 (Ky. 1964).*

(n22)Footnote 538. *Rutherford Nat'l Bank v. Black, 32 A.2d 86 (N.J. 1943).*

(n23)Footnote 539. *Troy v. Protestant Episcopal Church, 56 So. 982 (Ala. 1911); Crowell v. Seelbinder, 49 S.W.2d 389 (Ark. 1932); Appeal of Wordin, 42 A. 659 (Conn. 1899); Warren v. Lower Salt Creek Drainage Dist, 147 N.E. 248 (Ill. 1925); Kline v. Dowling, 96 N.E. 579 (Ind. 1911); Cooper v. Barton, 226 N.W. 70 (Iowa 1929); Hackworth v. Louisville Artificial Stone Co., 50 S.W. 33 (Ky. 1899); In re Miner's Estate, 166 N.W. 882 (Mich. 1917); William R. Bush Constr. Co. v. Withnell, 175 S.W. 260 (Mo. App. 1915), rev'd on other grounds, 243 U.S. 633 (1917); Outcalt v. Appleby, 36 N.J. Eq. 73 (1882). Brown v. Brown, 65 A. 739 (N.J. 1907); Thomas v. Evans, 12 N.E. 571 (N.Y. 1887); Kirchner v. Kirchner, 127 N.Y.S. 399 (1911); Moore v. Simonson, 39 P. 1105 (Or. 1895); Chambers v. Chambers, 39 A.*

243 (R.I. 1898); Sheffield v. Cooke, 98 A. 161 (R.I. 1916); Stahl v. Schwarz, 142 P. 651 (Wash. 1914).

(n24)Footnote 540. *Appeal of Wordin, 42 A. 659 (Conn. 1899); Hitner v. Ege, 23 Pa. 305 (1854).*

(n25)Footnote 541. *Gates v. Wirth, 163 N.W. 215 (Iowa 1917)*(so also as to a tenant *per autre vie*).

(n26)Footnote 542. *Hamilton v. Kinnebrew, 131 S.E. 470 (Ga. 1926).*

In Illinois it is held that "an assessment for the betterment of lands is not a tax ... but it is an encumbrance, the discharge of which must be apportioned ratably between the life tenant and the remainderman." *Warren v. Lower Salt Creek Drainage Dist., 147 N.E. 248 (Ill. 1925).*

(n27)Footnote 543. *In re Frenz' Will, 108 N.Y.S.2d 446 (1951); Calcagni v. Cirino, 14 A.2d 803 (R.I. 1940).*

(n28)Footnote 544. *Morrow v. Person, 259 S.W.2d 665 (Tenn. 1953).*

(n29)Footnote 545. *In re Stein's Will, 91 N.Y.S.2d 158 (1949).*

(n30)Footnote 546. *Crotwell v. Whitney, 92 S.E.2d 473 (S.C. 1956)*(purchaser at tax sale acquires only a life estate where life tenant had failed to pay taxes); *Stamper v. Avant, 104 S.E.2d 565 (S.C. 1958)*(so statute of limitations in favor of purchaser at tax sale did not begin to run until death of life tenant).

Robinson v. Tubbs, 344 P.2d 1080 (Colo. 1959)(a life tenant's interest is subject to the burdens of liens, taxes and encumbrances in the absence of anything expressly to the contrary in the context of the will); *Moore v. Moore, 329 S.W.2d 742 (Mo. 1959)*(collusive failure of life tenant to pay taxes so as to permit another to acquire title created a trust in favor of contingent remainderman).

(n31)Footnote 547. *Peck v. Sherwood, 56 N.Y.S. 615 (1914); Cooper v. Barton, 226 N.W. 70 (Iowa 1929); Bobb v. Wolff, 54 Mo. App. 515 (1929).*

The rule, it is believed, to be extracted from the authorities, is that contribution must be confined to cases of assessments for improvements, which, in their nature, are permanent, and do not require renewals from time to time. This rule will include benefits for opening and widening streets, and assessments for grading streets, and the construction of permanent sewers. But in the present case, the tax bills were, and will be, issued for improving the surface of the streets, that part of them which is subject to constant wear and tear, and in the nature of things the pavements must require repairs and renewals. Doubtless, the granite pavement is more lasting than the asphalt, but we do not think either comes within the rule before stated. In this particular case it is conceded the plaintiff is only twenty-eight years of age, and according to the tables adopted in the life-insurance law of this state his expectation of life is thirty-six years and over. It can hardly be hoped that these pavements will last that long without renewal. It is true the taxes are large, but we cannot make the amount of them the criterion. *Reyburn v. Wallace, 3 S.W.2d 482 (Mo. 1887).*

Failure of life tenant to pay ordinary taxes, the interest on special assessments and on mortgages and to keep the place in repair from ordinary wear and tear is waste. *Holzhauser v. Iowa State Tax Comm., 62 N.W.2d 229 (Iowa 1953)*(*dictum*).

See Note. *Duties of Legal Life Tenants to Remaindermen in Iowa, 45 Iowa L. Rev. 113 (1959).*

(n32)Footnote 548. *Clark v. Middlesworth, 82 Ind. 240 (1882); Nation v. Green, 123 N.E. 163 (Ind. 1919); Murch v. J.O. Smith Mfg. Co., 20 A. 213 (N.J. 1890).*

See James R. Wilson, *The Life Tenant and Unproductive Property, 10 Temp. L.Q. 376 (1936).*

(n33)Footnote 549. *Bryson v. Connecticut Gen. Life Ins. Co., 196 S.W.2d 532 (Tex. Civ. App. 1946).*

* This chapter is based in part on Ch. 30, George W. Thompson, Commentaries on The Modern Law of Real Property (John S. Grimes ed. 1979), which made a significant contribution toward preserving the American common law of life estates.

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Supp. To CHAPTER 19 LIFE ESTATE

2-19 Thompson on Real Property, Thomas Editions Supp. to § 19.01

Supp. to § 19.01 Overview of Life Estate.

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Add:

compare with, Ehrenclou v. MacDonald, *12 Cal.Rptr.3d 411, 415 (Cal.App. 2004)* (the law and public policy to be considered when a will provision must be interpreted is that which was in effect when the will was executed, not the law and public policy in effect at the time the construed words will take effect.)

add

In re Hilsen, 2009 Bankr. LEXIS 669 (Bankr. E.D.N.Y. Mar. 17, 2009) (Bkrtcy. E.D. N.Y.) (a conditional right to use property is not a life estate).

Change the dash between 486 and 488 to a comma:

Sermon v. Sullivan, 640 S.W.2d 486, 488 (Mo. App. 1982) .

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Supp. To CHAPTER 19 LIFE ESTATE

2-19 Thompson on Real Property, Thomas Editions Supp. to § 19.02

Supp. to § 19.02 Life Estates, Their Nature and Classification.

[Go To Main]

Add:

Compare with, In re Estate of Moore, 714 N.E.2d 675 (Ind. Ct. App. 1999) .

After the citation Gladden v. Jolly add:

see also, Krieg v. Hieber, 802 N.E.2d 938, 945 (Ind.App. 2004) (holding that the phrase "right of residency" for life is equivalent language to express a life estate).

After the citation Michie v. National Bank of Caruthersville add:

but see, Williams v. Kimes, 996 S.W.2d 43 (Mo. 1999) .

After the citation Preseault v. United States add:

Swisher v. United States, 189 F.R.D. 638 (D. Kan. 1999) .

Add

Irvine v. Anderson, 147 P.3d 486 (Utah App. 2006) (one person was permitted simultaneously to hold a life estate and a one-third undivided joint tenancy interest in the same land).

Add:

Estate of Rhea, 257 S.W.3d 787 (Tex. App. 2008) (discussing a life estate in a wedding ring).

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Supp. To CHAPTER 19 LIFE ESTATE

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Supp. to § 19.03 Creation of Conventional Life Estates.

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Add:

Barnett v. Estate of Anderson, 2007 Ala. LEXIS 50 (Nos. 1051676 and 1051829, Mar. 16, 2007) (a will was held to devise a life estate rather than fee simple absolute, despite absence of language specifically referring to a life estate); *In re Jan Reynolds 1995 Revocable Living Trust, 820 N.Y.S.2d 430 (2006)* ("right of occupancy" construed as a life estate).

Braunstein v. Hajjar, 385 B.R. 482 (D. Mass. 2008) (life estate created quit claim conveying the grantor's entire interest); *Collier v. Kincheloe, 180 P.3d 1157 (Mont. 2008)* (a tax deed to the county for the life tenant's failure to pay taxes extinguished both the life estate and the remainder, resulting in conveyance of a fee simple absolute to the county).

Fadalla v. Fadalla, 929 So. 2d 429 (No. 1030695 and 1030696, Ala., Nov. 18, 2005) (grantees conveyed concurrent life estates with cross-contingent remainders in fee, rather than joint tenancy with right of survivorship).

In re Estate of Hodgkins, 807 A.2d 626 (Me. 2002) (Testator's will, stating that his roommate had the right to live in his house as long as she wished, did not create a determinable life estate but a simple life estate; the statement was not clear and unequivocal language providing that roommate's interest would be subject to forfeiture should she leave the premises).

McCarley v. Smith, 105 S.W.3d 387 (Ark App. 2003) (holding that for the trial court to impose a constructive trust and grant relief in the form of a life estate, there had to be clear and convincing evidence that the land was deeded with the intention that the grantor would be allowed to live on the land for the rest of her life.)

Add:

In re Estate of Craigen, (No. 09-09-00285-CV, Jan. 21, 2010, Tex. App.) (the terms of the will manifested the testator's intent to grant the property in fee simple absolute rather than to create a life estate). *Barnett v. Estate of Anderson, 966 So. 2d 915 (Ala. 2007)* (will held to devise a life estate, rather than a fee simple, despite containing no specific language referring to a life estate).

After citation Newman v. Wells Fargo Bank add:

Ehrenclou v. MacDonald, *12 Cal.Rptr.3d 411, 415 (Cal.App. 2004)* (the law and public policy to be considered when a will provision must be interpreted is that which was in effect when the will was executed, not the law and public policy in effect at the time the construed words will take effect.)

After the citation Barker v. Rosenthal add:

but see Cannon v. Bangs, 502 S.E.2d 224 (Ga. 1998) (An estate was given expressly for life, with an unlimited power of disposal. The addition of the power of disposal did not change the estate from a life estate into a fee estate). *See also Parker v. Parker, 971 S.W.2d 878 (Mo. Ct. App. 1998)* .

Add:

Cain v. Finnie, 337 Ill. App. 3d 318 ; *785 N.E.2d 1039* ; *2003 Ill. App. LEXIS 248 (Ill. App. Dist. 5 2003)* (Held that the phrase "so long as she remains my widow" creates a determinable life estate).

After citation In re Estate of Campbell add:

Bay v. Estate of Bay, 105 P.3d 434, 438 (Wash.App. 2005) (Drawing a distinction between the intent of the "decedent" and the "testator." Since the testator was not married to the plaintiff when he executed the will, making his intent ambiguous, the premise stated in Estate of Campbell is inapplicable in this particular circumstance.)

Add:

Fluke v. Westerman, 609 S.E.2d 744, 748 (Ga.App. 2005) (clear and convincing evidence of a contrary intent must be provided to rebut a statutory presumption.)

Add:

Lusk v. Broyles, 694 So. 2d 4 (Ala. Civ. App. 1997) (recognizing a deed can concurrently create a life estate and remainder interests).

Add:

Brown v. Brown, 2005 Ohio 1838 (Ohio Ct. App. 2005) (No. 04CA000018, Ohio App., Apr. 14, 2005) (life estate was created by verbal agreement and was outside the statute of frauds).

In connection with Fox v. Washburn, insert:

Tidwell v. Bassett, 611 S.E.2d 123 (Ga.App. 2005) (The subsequent conduct of the parties to an agreement may be considered as evidence of a mutual mistake.)

add:

In re Estate of Craigen, (No. 09-09-00285-CV, Jan. 21, 2010, Tex. App.) (the terms of the will manifested the testator's intent to grant the property in fee simple absolute rather than to create a life estate).

Add:

Unsel v. Meier, 972 S.W.2d 466 (Mo. Ct. App. 1998)

After the citation In re Wardens Trust add:

but see Estate of Pew, 655 A.2d 521 (Pa. Super. Ct. 1994) .

After the citation Nelson v. Parker add:

vacated, Nelson v. Parker, 687 N.E.2d 187 (Ind. 1997) .

add:

Allen v. Schultheiss, 981 A.2d 610 (D.C. App. 2009) (a life estate can be held as a tenancy by the entirety.)

Add:

compare with, In re Estate of Moore, 714 N.E.2d 675 (Ind. Ct. App. 1999) .

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Supp. To CHAPTER 19 LIFE ESTATE

2-19 Thompson on Real Property, Thomas Editions Supp. to § 19.04

Supp. to § 19.04 The Relationship Between the Life Tenant and the Reversioner or the Remainderman.

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After the citation Leazenby v. Clinton County Bank & Trust Coy". add:

compare with Walker v. Lawson, 526 N.E.2d 968 (Ind. 1988) .

Add:

Carrol & Assocs. v. Galindo, 864 So.2d 24 (Fla. Dist. Ct. App. 2003) (holding that where life tenants had the right to purchase the mortgage, they still could not foreclose to the prejudice of the remaindermen, especially when they appeared to have unclean hands).

Add:

Cannon v. Bangs, 502 S.E.2d 224 (Ga. 1998) .

Add:

In re Estate of Moore, 714 N.E.2d 675 (Ind. Ct. App. 1999) (life tenant was still entitled to her share of the proceeds when she and the remaindermen sold the property).

Add:

Adametz v. Adametz, Not reported in A.2d (Conn. Super. 2002).

Add:

Cannon v. Bangs, 502 S.E.2d 224 (Ga. 1998) (An estate was given expressly for life, with an unlimited power of disposal. The addition of the power of disposal did not change the estate from a life estate into a fee estate). *See also, Parker v. Parker, 971 S.W.2d 878 (Mo. Ct. App. 1998)* .

change the citation O'Kelly v. Jackson to read:

O'Kelly v. Jackson, 81 S.E.2d 454 (Ga. 1954) .

After citation Zambrano v. Olivas add:

Williams v. Walker, 2004 Tex. App. LEXIS 3034 (Tex.App. 2004) .

Add:

Ebersol v. Mishler, 775 N.E.2d 373 (Ind. App. 2002) (the statute of limitations does not run against a remainderman until the termination of the intervening life estate).

add:

York v. Steyaert, 856 N.Y.S.2d 760 (2008) (personal injury action brought against holder of life estate).

Add:

but see, United States v. De Bonchamps, 278 F.2d 127, (9th Cir. 1960) .

Add:

Reniere v. Gerlach, 752 A.2d 480 (R.I. 2000) (life estate holder did not forfeit her life estate even though she allowed permissive waste to occur; such as, failing to pay real estate taxes, failing to make repairs etc.).

In Computer Assisted Research, change LEXIS: life tenant! w/30 reversioner! or remainderman! to:

LEXIS: life tenant! w/30 reversioner! or remainderm!

(this change allows the search to catch "remaindermen")

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Supp. To CHAPTER 19 LIFE ESTATE

2-19 Thompson on Real Property, Thomas Editions Supp. to § 19.05

Supp. to § 19.05 The Life Tenant's Right to Transfer the Life Estate.

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Change the citation of Williams v. Kimes as follows:

Williams v. Kimes, 996 S.W.2d 43 (Mo. 1999) (contingent remaindermen are owners and are entitled to receive notice of foreclosure during the life of the life tenant).

Change the citation Procek v. Hudak to read:

Procek v. Hudak, 727 A.2d 841 (Del. 1999) (General presumption that a person buying property but titling the property in another's name intends to retain a beneficial interest. However, the presumption is reversed when considering transactions between a natural object of the purchaser's bounty, such as a child. In the case of a child, it is presumed the purchaser intended to make a gift). *See also, Procek v. Hudak, 2000 Del. Ch. LEXIS 62* , C.A. No. 15276 (Del. Ch. Apr. 20, 2000).

But see Quill v. Malizia, 2005 Del. Ch. LEXIS 37 (Del. Ch. Mar. 4, 2005) (Holding that a resulting trust is often used when one party provides the money to purchase property that, for some incidental reason, is held in the name of another.)

Add:

In re Estate of Moore, 714 N.E.2d 675 (Ind. Ct. App. 1999) (life tenant was still entitled to her share of the proceeds when she and the remaindermen sold the property).

Add:

In re Estate of Duncan, 50 P.3d 175 (N.M. App. 2002) rev'd on other grounds, 70 P.3d 1260 (N.M. 2003) .

Add:

Englehart v. Larson, 608 N.W.2d 673 (S.D. 2000) (A life estate holder entered into a farm lease of his life estate. The tenant was entitled to harvest the crops planted before the death of the life estate holder even though the death of the life estate holder marked the end of the farm tenancy. However, the tenant was required to pay rent for the time spent on the land after the death of the life estate holder.).

Add:

but see, In re Felker, 211 B.R. 165 (Bankr. M.D. Pa. 1997) .

After citation Ogle v. Ogle insert:

Hargis v. Fuller, 2005 Tenn. App. LEXIS 81 (Tenn. Ct. App. Feb. 7, 2005) (No. M2003-02691-COA-R3-CV, Feb. 7, 2005) (The following language is sufficient to denote the creation of an unlimited power of disposition: "to my wife ... to have and to hold for and during the full term of her natural life, with right to use and employ, all of said property ... for her use and benefit ... and upon her death, such of said property as may remain, shall go to ... my brother," (quoting *Skovron v. Third National Bank in Nashville, 509 S.W.2d 497, 507))* .

Add:

In re Estate of Sauer, 753 N.Y.S.2d 318 (N.Y. Sur. 2002) (the holder of a life estate can force the sale of real property and collect the value of his life estate over the objections of the remaindermen, if he was granted the power to sale).

Add:

Beach v. Beach, 2002 Colo. App. LEXIS 106 (Jan. 31, 2002) (right to partition life estate interest not waived), *rev'd 74 P.3d 1 (Colo. 2003)* .

Add:

Beach v. Beach, 56 P.3d 1125 (Colo. App. 2002) (a life tenant may demand partition of his/her interest in a life estate from the remainderman in certain circumstances).

Add:

Dwyer v. McCoy, 512 S.E.2d 70 (Ga. Ct. App. 1999) (Lessor gave a 10-year lease of property to lessee. The lessee did not have knowledge that lessor only held a life estate in the property. Lessor died 3 years into the term of the lease and the property passed to the remaindermen. Lessee was allowed to sue lessor's estate for damages, since lessee was not deemed to have constructive knowledge of the life estate based on the recorded deed).

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Supp. to § 19.06 Duration of Life Estates.

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Add:

But see Roach v. Gwinnett County, 545 S.E.2d 912 (Ga. 2001) (according to the terms of the conveyance, the life estate terminated when the county commenced condemnation proceedings).

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Supp. to § 19.07 Extent of the Life Tenant's Right of Possession of the Freehold.

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After citation In re Matter of Thomson insert:

In re Strohe, 2004 N.Y. Misc. LEXIS 2615 (No. 331708, Dec. 13, 2004) (Failure to occupy the premises and failure to pay the expenses of the property, taken together, do not renounce an interest in the property.)

Add:

Forty-One Associates, LLC v. Bluefield Associates, L.P., 809 N.E.2d 422 (Ind. App. 2004) (an owner of an estate for life may commit waste by failing to repair).

Brizendine v. Conrad, 71 S.W.3d 587 (Mo. 2002) .

Add:

Jackson v. Jackson, 669 S.E.2d 496 (Ga. App. 2008) (action by life estate holder to enjoin use of the property by the remainderman).

Add:

McCorkle v. Loumiss Timber Co., 760 So. 2d 845 (Miss. Ct. App. 2000) (A life estate holder does not need to account to the remaindermen for profits and losses on crops. No waste to the estate occurs by growing crops on the land).

Add:

Robinson v. Hunter, 562 S.E.2d 189 (Ga. App. 2002) (Harvesting lumber can be considered good husbandry and the proceeds go to the life tenant).

Add:

Ebersol v. Mishler, 775 N.E.2d 373 (Ind. App. 2002) (life tenant has a duty to preserve and protect the property for future enjoyment of the remaindermen).

Add:

In re Succession of Becker, 739 So. 2d 925 (La. Ct. App. 1999) (proceeds received by a life estate holder from the early cancellation of a tenant's contract deemed to be similar to rents and belong to the life estate, not the remaindermen).

Add:

In re Estate of Van Den Boom, 590 N.W.2d 350 (Minn. Ct. App. 2000) (surviving spouse who inherited a life estate could not sell a portion of the life estate to pay administrative debts of the decedent spouse's estate, since it would hinder the remaindermen's interest). *But see, In re Hollander, No. C8- 99-1085, 2000 Minn. App. LEXIS 60 (Minn. Ct. App. 2000)* .

After the citation In re Wardens Trust add:

overruled, In re Catherwood's Trust, 173 A.2d 86 (Pa. 1961) , see also, Estate of Pew, 655 A.2d 521(Pa. Super. Ct. 1994) .

After the citation In re Wardens Trust add:

overruled, In re Catherwood's Trust, 173 A.2d 86 (Pa. 1961) , see also, Estate of Pew, 655 A.2d 521(Pa. Super. Ct. 1994) .

Add:

see also, Heinold v. Siecke, 598 N.W.2d 58 (Neb. 1999) .

Add:

Chapman v. Thornhill, 802 So. 2d 149 (Miss. App. 2001) (life tenant's right to estovers did not include the right to harvest timber to meet monthly debts or otherwise increase his standard of living).

After the citation Eide v. Tveter delete the words:

aff'd, 170 F. 529 (8th Cir. 1909) .

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Supp. to § 19.08 Extent of Life Tenant's Right to Make use of the Freehold

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Add:

see also Riley v. Riley, 972 S.W.2d 149 (Tex. Ct. App. 1998) .

After citation Moore v. Vines add:

Phillips v. Ivy, 2004 Tex. App. LEXIS 7530 (No. 10-02-00265-CV, Aug. 18, 2004) (As a general rule subject to exceptions, a life tenant may not dispose of the corpus of the estate; oil and gas royalties and bonuses are generally considered corpus.)

Add:

Robinson v. Hunter, 562 S.E.2d 189 (Ga. App. 2002) .

Add:

Englehart v. Larson, 608 N.W.2d 673 (S.D. 2000) (A life estate holder entered into a farm lease of his life estate. The tenant was entitled to harvest the crops planted before the death of the life estate holder even though the death of the life estate holder marked the end of the farm tenancy. However, the tenant was required to pay rent for the time spent on the land after the death of the life estate holder.).

Add:

White v. Watts, 812 So. 2d 328 (Ala. 2001) (life tenant had right to cut timber); *Robinson v. Hunter, 562 S.E.2d 189 (Ga. App. 2002)* (life tenant entitled to retain proceeds from sale of timber cut from life tenant's land).

Add:

Williams v. Burgett, 2002 Ala. LEXIS 97 (Mar. 22, 2002) (proceeds from life tenant's sale of timber belonged to the remainder beneficiaries).

Add:

McCorkle v. Loumiss Timber Co., 760 So. 2d 845 (Miss. Ct. App. 2000) (a life tenant is allowed to harvest the timber over the remaindermen's object if it is necessary to raise money to pay the taxes due on the property, or to make repairs to fences or other parts of the property.).

Add:

Robinson v. Hunter, 562 S.E.2d 189 (Ga. App. 2002) .

change the citation Bradley v. Bradley to read:

Bradley v. Bradley, 185 So. 2d 655 (Miss. 1966) .

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Supp. to § 19.09 Life Tenant's Obligation to Repair.

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After citation In re Matter of Estate of Fisher include:

In re Strohe, 2004 N.Y. Misc. LEXIS 2615 (No. 331708, Dec. 13, 2004).

Add:

McLeod Realty Trust v. Roberts, 2002 Conn. Super. LEXIS 2298 (CV00631335, July 10, 2002).

After the citation Callwood v. Virgin Islands Natl Bank add:

vacated, Callwood v. Virgin Islands National Bank, 221 F.2d 770 (3rd Cir. 1955) .

After the citation Callwood v. Virgin Islands Natl Bank add:

vacated, Callwood v. Virgin Islands National Bank, 221 F.2d 770 (3rd Cir. 1955) .

After the citation Callwood v. Virgin Islands Natl Bank add:

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After citation Ellerbusch v. Myers add:

cf. Krieg v. Hieber, 802 N.E.2d 938 (Ind.App. 2004) (Purchaser was required to insure farmhouse for benefit of vendor, and thus vendor was entitled to receive value of his reserved life estate from fire insurance proceeds received by purchaser.)

Add:

Acord v. Acord, 19 S.W.3d 644 (Ark. Ct. App. 2000) .

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Supp. To CHAPTER 19 LIFE ESTATE

2-19 Thompson on Real Property, Thomas Editions Supp. to § 19.11

Supp. to § 19.11 The Life Tenant's Duty to Insure the Premises.

[Go To Main]

After the citation Lynch v. Johnson add:

but see, Network Solutions, Inc. v. Umbro Intern., Inc., 529 S.E.2d 80 (Va. 2000) .

After citation Ellerbusch v. Myers add:

cf. Krieg v. Hieber, 802 N.E.2d 938 (Ind.App. 2004) (Purchaser was required to insure farmhouse for benefit of vendor, and thus vendor was entitled to receive value of his reserved life estate from fire insurance proceeds received by purchaser.)

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Add:

But see, Collier v. Kincheloe, 180 P.3d 1157 (Mont. 2008) (upon failure of the life tenant to redeem the property, resulting in a tax deed to the county, the deed extinguished the life estate and conveyed a fee simple title.

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Supp. To CHAPTER 19 LIFE ESTATE

2-19 Thompson on Real Property, Thomas Editions Supp. to § 19.13

Supp. to § 19.13 Bibliography.

[Go To Main]

Add to Articles:

"Life Estates: Right to Partition," 30 Real Est. L. Rep. 2 (July, 2000).

Baskies, Jeffrey A. *The New Homestead Trap: Surviving Spouses Are Trapped by Life Estates They No Longer Want and Can No Longer Afford, 81 Fla. B.J. 69* (June, 2007).

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Salzberg, Kenneth. "Zombie Life Estates, Ghost Value Transfers, and Phantom Takings: Confusions of Title and Value in Property Law Legislation," 22 *Quinnipiac Prob. L.J.* 363 (2009).

Vincent, Scott, E. "Residence Includible in Estate Because of Decedent's Retained Life Estate," *62 J. Mo. B. 91* (March-April, 2006).

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CHAPTER 20 DEFEASIBLE FEES *

2-20 Thompson on Real Property, Thomas Editions 20.syn

AUTHOR: Professor David A. Thomas J. Reuben Clark Law School Brigham Young University

§ 20.syn Synopsis to Chapter 20: DEFEASIBLE FEES *

§ 20.01 The Defeasible Fee.

§ 20.02 Fee Simple Determinable.

§ 20.03 Fees Subject to Executory or Conditional Limitations.

§ 20.04 Fees Subject to Conditions.

§ 20.05 The Fee upon Condition Subsequent.

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§ 20.17 Judicial Reluctance to Declare Breach of Condition.

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§ 20.20 Time for Performance of Condition.

§ 20.21 Substantial Compliance with Conditions.

§ 20.22 Impossibility of Performance of Conditions.

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CHAPTER 20 DEFEASIBLE FEES *

2-20 Thompson on Real Property, Thomas Editions § 20.01

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§ 20.01 The Defeasible Fee.n1

[Go To Supp]

A fee simple absolute theoretically endures forever. At early common law a fee was subject to forfeiture for failure to pay the feudal dues or when the holder became guilty of lesser treason, i.e., committed a felony. But after the statute *quia emptores terrorum* n2 put an end to subinfeudation such terminable fees faded out gradually, finally ending with the statute of wardship and liveries. Under modern theory, today the fee simple absolute never dies unless perchance the entire tract returns to the bosom of mother sovereign through eminent domain.

Some fees, however, are not of unlimited duration but will terminate either through expiration of a limitation set forth at the time of their creation, through the happening of a condition subsequent also specified at the time of creation, n3 or by being cut off by the development of a new fee, the coming into being of which was anticipated at the time of the creation of the fee so cut off. n4

The first type is spoken of as an estate upon limitation or a determinable fee simple, the second as a fee upon condition subsequent and the third as a fee subject to a conditional limitation or a springing use or devise. The use of all of these terms is somewhat arbitrary, and the courts are by no means unanimous in observing them. A devise of real estate is proper, although made conditional. n5

The distinctions therefore are more noticeable in the legal results arising from the three classes than in their nomenclature. Technically these results are legally partible. But often the difficulty of dropping a certain state of facts into one of these distinct categories leads to a confusion of the legal results. n6 All such classes are alike in this, however, that, as distinct from the fee simple absolute the estate ends and a new estate arises, not merely a new owner of the same estate. With the death of the estate, there also terminate all rights of third parties which have arisen out of the acts of the owners of the estate while it was in existence, such as liens and encumbrances (other than those imposed against the land in rem, such as tax liens), equitable interests, easements, mineral severances and profits.

At common law since a fee could not be limited as a fee except a fee tail, when a defeasance arose the fee returned to the creator. After the statute of uses n7 and the statute of wills n8 an interest could be limited over to another at the time

of the creation of such a defeasible fee to ripen into a fee when the prior estate terminated. Such limitation over took its life, however, from the original grant not from the fee so defeated. n9 Such estate may be determined whenever the qualification annexed to it is at an end. n10 A deed in fee simple, with a later will by grantor devising the land on condition, creates a defeasible estate. n11

Today an estate in real property may be restricted by or be dependent upon some condition or qualification or it may have a limitation annexed thereto. n12

Where an estate is determined by an event not certain to occur, it is a fee simple defeasible and not a life estate. n13

When an estate in real property is restricted by or dependent upon some condition or qualification, it may properly be termed a "conditional or qualified estate." Such estates have imposed upon them certain conditions or modifications, by force of which they may be determinable upon the happening or not happening of a specified event. Ownership of such estate is not absolute. The estate may be modified or destroyed by the happening of an event which may or may not occur. The quantity of the owner's interest, however, is not affected by the condition, nor is his power to use the land or convey and encumber it curtailed. n14 A deed by the owner of such an estate made subsequent to the termination of the estate passes nothing. n15 Likewise, a termination of the estate by the happening of the contingency on which it depends will defeat any alienation or encumbrance previously made. n16 Estates of fee simple defeasible are simply estates which may last forever, and yet in themselves contain elements by which the estate may be terminated. n17 Qualified estates are those interests which are not absolute and unconditional, including the fee tail, estates on condition, estates on limitation and estates on conditional limitation. n18

A defeasible fee gives a complete right of ownership to the grantee or devisee until the condition under which the fee is broken arises. n19 An estate on a condition precedent may be said to be a contingent estate, since it can not become a present estate except by the fulfillment of such condition other than the determination of the preceding freehold. n20 A residuary devise made defeasible on the death of the devisee without issue has been held to create a defeasible fee. n21

The common law recognized a still further type of defeasible fee that arose out of disseisin. When A disseised B of Blackacre, A acquired the title, B lost it. n22 A's title, however, though in fee simple was defeasible on B's re-entry, at early law by vi et armis n23 later through writs of right or of possession. n24 This concept continued until late in the nineteenth century. n25 A's title was alienable. B had a mere right of re-entry which was inalienable. n26 Today an adverse possessor does not acquire title until after the statutory period has run.

Limitation may be annexed not only to estates in fee simple but in fee tail, conventional life estates, and in leasehold estates. Where the limitation is annexed to a fee-simple estate, there is formed what is sometimes termed "modified fees," variously known as "qualified," "conditional," "base," or "determinable fees." Where an estate tail contained a provision that, in case the donee in tail alienate the land or bar or destroy the entail, the donor should re-enter, a breach of the condition terminated the estate of the donee. n27 According to the *Restatement of the Law of Property* , the types of estates most commonly made subject to a special limitation are estates in fee simple, estates for life, and estates for years. n28 Where an estate is limited to persons named with a condition that "if they shall continue to reside on the land, but, if either of them shall remove from the land or absent themselves from it for the space of two years, he or she shall forfeit all interest in this request," it was held that this created an estate on limitation, and upon a breach of the condition by removal from the premises, the parties so named forfeited their estate. n29 A contingent limitation of a term of years is valid and enforceable. Whatever the term, it may be subject to a condition which is a qualification annexed to the estate by the grantor n30 or the lessor, n31 whereby the estate or term granted may, among other things, be defeated or terminated. n32

The estate upon limitation is not an absolute estate or an estate upon condition. However, it resembles an estate upon condition subsequent in that it defeats the estate previously limited. In addition to its natural limitation or duration, it has a special limitation. It is a fee-simple estate because all heirs, collateral as well as lineal, may inherit it, and in this

respect it is precisely like an absolute fee. It differs, however, from an absolute fee in that it carries a particular event or contingency, the happening of which may determine the estate notwithstanding the taker thereof is living and capable of enjoying it. Estates upon limitation terminate naturally and absolutely as soon as the designated event occurs, no entry being necessary as in case of an estate upon condition, and the next subsequent estate, which depends upon such determination, takes effect in immediate possession. n33 Because the estate thus limited may last forever it is a fee and because it may terminate on the happening of the event specified it is called a determinable or qualified fee. n34 A fee on limitation is terminated by the happening of the event or breach of limitation. Re-entry before title divests may not be necessary. n35 A condition determines an estate after breach, upon entry or claim by the grantor or his heirs, while a limitation marks the period which determines the estate without any act on the part of the person who has the next expectant interest. n36 A limitation determines an estate upon the happening of the event itself, without the necessity of doing any act to regain the estate, such as re-entry. It is in this respect that it differs from an estate upon condition. n37

Various terms have been employed to designate estates upon limitation or defeasible fees. Thus they have been called "special limitations," "determinable limitations," "conditional limitations," "collateral limitations," a limitation with a "proviso for a cesser," or a "clause of cesser." When the words of direct limitation create a fee it is sometimes called a "determinable fee." The qualification annexed has been called "a condition in law." n38 When such an estate is in fee, it has been called "a fee simple, limited and qualified," n39 But the term "estates upon limitation" is used by many authorities as accurately designating the particular class of qualified estates we are now considering. n40

Although an estate in fee simple is devised, it may be limited by a provision that it shall terminate by the happening of a certain contingency, and so long as the contingency does not happen, it remains a fee. n41 Examples of estates upon limitation are: first, an estate to A until she marries; n42 second, an estate to a widow so long as she remains unmarried; n43 and third, an estate to A so long as he continues to reside thereon. n44 When the event which is to terminate the estate or render it terminable has not occurred it is immaterial whether the provision in the deed is in the nature of a condition subsequent so that re-entry or affirmative action of some sort on the part of the grantor or his heirs is necessary to terminate the estate or right granted, or whether it is in the nature of a conditional limitation which ipso facto terminates the estate without affirmative action on the part of the grantor or his heirs. n45 An estate in fee simple which is made subject to a special limitation is known as a determinable or qualified fee. An estate limited to the grantee and his heirs until the happening of some future event which possibly may never happen at all is such an estate. n46 The right of a grantor of an estate subject to a special limitation is, until the event happens which terminates the estate, a mere naked possibility of reverter, and, in the absence of a statute, the right is not assignable, since it is neither an estate nor an interest in land. n47

It is sometimes difficult to determine whether the words used are words of condition, making the estate voidable, or words of limitation, making the estate to cease. If the words inserted are for the benefit of the grantor, giving him the power, on default of performance, to destroy the estate if he will and revest the estate in himself or his heirs the words are words of condition. If the words used are conclusive of the time of continuance and of the extent of the estate granted, the words are words of limitation. Conditions in a grant render the estate granted voidable by entry. Limitations render it void without entry. n48 A condition does not defeat the estate, when broken, until it is avoided by the act of the grantor, but a limitation marks the period which is to determine the estate, without entry or claim. n49 Words of limitation mark the period which is to determine the estate. They specify the utmost time of continuance, while a condition marks some event which, if it takes place, renders the estate subject to be defeated at the election of the grantor or his heirs. n50 The basic difference between estates upon "conditions subsequent" and those upon "conditional limitation" is ascertained by the fact that, in the former case, the entire estate has passed to another, but can be returned to the grantor upon the subsequent happening of the described event, while in the case of a conditional limitation the estate passes to another under a limitation for its return to the grantor without re-entry. n51

In determining whether an estate upon limitation is created, courts will not be governed by the use or absence of particular words, n52 but they are bound to consider the language and terms of the whole instrument to determine what was in the minds of the parties to it. n53 An estate upon limitation is created by the use of such expressions as "until,"

"as long as," "while," "if whilst," "during," and the like. n54 The words "so long as the same shall be used for the purposes hereinbefore mentioned" are sufficient for the creation of a limitation. The added words "and no longer" remove all possibility of doubt touching the quality of the estate granted. n55 The words "so long as," or "during the time that," the property is used for a designated purpose, usually create an estate subject to determination upon the cessation of that use, rather than a fee with condition subsequent. n56

The term "limitation," when used alone, may signify simply the creating of an estate but primarily, it means the marking out of the bounds or limits of the estate created n57 or, as stated in the *Restatement of the Law of Property*, "the word 'limitation' normally denotes the complete language of a conveyance delimiting the duration and character of a created interest." n58 When used in the habendum clause of a deed, the word "limitation" declares the nature and extent of the estate granted, and the use for which the grant is made. n59 An entry for breach of a condition destroys both the immediate estate and a limitation over. n60

A condition in a deed is a qualification of the estate granted. It does not indicate nor alter the character of the estate to which it may be annexed; that is, it does not determine whether the estate is a freehold or less than a freehold. It may be annexed to any particular estate, a fee, a life estate, or a term of years. n61 Since conditions may be annexed to every species of estate or interest in real property, they are more properly viewed as qualifications of other estates than as being a distinct species of themselves. n62 Estates upon condition are either upon condition implied by law or upon condition expressed. n63 An implied condition is one arising by operation of law and runs with certain estates as an invariable incident. n64 At common law, a tenant for life or for years took his estate with the implied condition not to create a fee. A breach of such condition exposed his estate to be forfeited. A corporation holds a franchise under the implied condition that it will fulfil its duties to the public, and a violation of its duties by non-user or misuse will work a forfeiture of the estate. An estate on condition expressed in the grant or devise itself, is, where the estate granted has a qualification annexed, whereby the estate shall commence, be enlarged, or defeated, upon performance or breach of such qualification or condition. n65 A condition will not be raised by implication from the mere declaration in the deed that the conveyance is made for a special and particular purpose without being coupled with words appropriate to make such a condition. n66 Where an estate is granted in fee simple or otherwise, with an express qualification annexed, whereby the estate shall commence, be enlarged, or defeated upon performance or breach of such qualification or condition, it is an estate upon condition expressed. n67 Estates upon condition expressed are either upon condition precedent or condition subsequent

If the estate is to arise or be enlarged upon the performance of the condition, then the condition is said to be precedent. If it is to terminate or be lost by the non-performance of the condition, then it is called a condition subsequent. In other words, the condition is precedent when it must be performed before the estate can commence, and it is subsequent when it is to be performed after the estate has vested in the grantee. n68 The former fixes the beginning, the latter the ending of the estate. n69 A condition precedent is one which must be performed before the estate can vest. n70 Conditions subsequent are such as, when they happen or are performed or are not performed, as the case may be, divest, curtail, or abridge an estate already vested. n71 An estate in fee simple with a condition subsequent is an estate in fee simple which the creator or his successor in interest has the privilege and power of terminating if and when the event specified in creating the conveyance occurs. n72 Conditions subsequent are those which in terms operate on an estate conveyed and render it liable to be defeated for a breach of the condition. n73 Estates on condition subsequent, when created and until defeated by re-entry, have the same qualities and incidents as though no conditions were annexed thereto. n74 The whole title is vested in the grantee until the revesting of the estate through re-entrance for condition broken. n75 A conveyance upon a condition subsequent passes a qualified fee to the grantee until the happening of the condition subsequent, giving to the grantee the same right and privileges as though the estate were in fee simple. n76 The same technical words of condition are appropriate to create either a condition precedent or a condition subsequent. Whether the condition be one or the other is a question of intention to be gathered from the whole instrument. n77

Where the language of a deed plainly shows an intention to make the grant on a condition subsequent, the use of the word "condition" is unnecessary. n78 As where the thing required to be done does not necessarily precede the vesting of

the estate in the grantee, but may accompany it or follow it and may as well be done after as before the vesting of the estate; or if, from the nature of the act to be performed and the time required for its performance, it is evidently the intention of the parties that the estate shall vest, and the grantee perform the act after taking possession, -- the condition is subsequent. n79 Whether a condition is to be construed to be precedent or subsequent is always a question of intent, and it is immaterial where the clause creating the condition is placed in the deed. The question, without regard to locality, always being whether the thing is to happen before or after the estate is to vest. n80 As declared in the Code of Georgia, n81 "The law favors conditions to be subsequent rather than precedent and to be remediable by damages rather than by forfeiture." Courts generally place the same construction on conditions in deeds. n82

Where there is a limitation over after death of the first taker, the problem arises as to whether there is a gift of a defeasible fee in the first taker or merely a life estate. n83 Where there is a failure of a limitation over after a fee upon condition subsequent, the fee becomes absolute, but if after a determinable fee the possibility of reverter remains. n84 Limitation over a will on death without issue created a defeasible fee rather than a life estate. n85 A limitation over in a will on death without issue created a defeasible fee rather than a life estate. n86 Devise to my wife and daughter and their descendants created a defeasible fee rather than a life estate with remainders. n87

FOOTNOTES:

(n1)Footnote 1. *See* W.W. Ferrier, Jr. *Determinable Fees and Fees Upon Condition Subsequent in California, 24 Cal. L. Rev. 512 (1936);* William H. Agnor, *Creation of Defeasible Fees, 15 Ga. B.J. 20 (1952);* Olin L. Browder, Jr. *Defeasible Fee Estates in Oklahoma, 4 Okla. L. Rev. 141 (1951);* Howard R. Williams, *Restrictions on the Use of Land -- Conditions Subsequent and Determinable Fees, 27 Tex. L. Rev. 157 (1948).*

See Chas P. Lippert, Jr. *Problems Incident to Conveyance of a Fee Simple Defeasible, 5 U. Det. L. Rev. 48 (1942).*

(n2)Footnote 2. 18 Edward I, ch. 1.

McDonald v. Suarez, 93 S.E.2d 16 (Ga. 1956); Moore v. Wells, 93 S.E.2d 731 (Ga. 1956); Ramsey v. Holder, 291 S.W.2d 556 (Ky. 1956); Fannin's Adm'r v. Segraves, 198 S.W.2d 802 (Ky. 1946).

(n3)Footnote 3. *Moore v. Wells, 93 S.E.2d 731 (Ga. 1956).*

A deed purportedly in fee simple referring to the fact that it was subject to an agreement made contemporaneously which contained a reverter clause, a defeasible fee rather than a fee simple absolute was intended under the rule that where there are two contradictory clauses in contemporaneous instruments the first must prevail. *Hardman v. Dahlonega-Lumpkin County Chamber of Commerce, 233 S.E.2d 753 (Ga. 1977).*

(n4)Footnote 4. *Trumbo v. Sanford, 203 S.W.2d 22 (Ky. 1947)*(their heirs but if any die leaving no lineal descendants at their death then over created individual defeasible fees); *Wallhauser v. Rummel, 96 A.2d 289 (N.J. Super. 1953)*(limitation over, if first taker in fee simple absolute died intestate because of testamentary incapacity, created fee simple defeasible).

PCK Props., Inc. v. Cuyahoga Falls, 176 N.E.2d 441 (Ohio 1960)(distinguishing between fee upon condition subsequent and determinable fee).

Language using fee simple determinable, possibility of reverter, fee upon condition subsequent, and right of re-entry is interchangeable. *Polette v. Williams, 456 S.W.2d 328 (Mo. 1970).*

(n5)Footnote 5. *In re Apsey's Estate, 1 N.E.2d 558 (Ill. App. 1936); Rodenburg v. Rodenburg, 74 N.W.2d 241 (Iowa 1956); In re Donald's Estate, 267 N.Y.S. 505 (1933).*

Distinguishing between determinable fee and a fee upon condition subsequent. *Prince v. Charles Ilfeld Co., 383 P.2d*

827 (N.M. 1963); Dilbeck v. Bill Gaynier, Inc., 368 S.W.2d 804 (Tex. Civ. App. 1963).

(n6)Footnote 6. *See* Frederick B. McCall, *Estates on Condition and on Special Limitation in North Carolina, 19 N.C. L. Rev. 334 (1941).*

(n7)Footnote 7. 27 Henry VIII, ch. 10.

(n8)Footnote 8. 32 Henry VIII, ch. 1, explained by 34 Henry VIII, ch. 5.

(n9)Footnote 9. *Weinberg v. Werft, 218 S.W.2d 398 (Ky. 1949)*(devise to three children but if any die without issue to the survivors created defeasible fees with "remainders" over to the others).

(n10)Footnote 10. *Rumble v. Strange, 114 S.E. 881 (Ga. 1922); McIntyre v. Dietrich, 128 N.E. 321 (Ill. 1920); Henderson v. Western Carolina Power Co., 157 S.E. 425 (N.C. 1931); Stubbs v. Abel, 233 P. 852, reg'h denied, 236 P. 505 (Or. 1925).*

(n11)Footnote 11. *Jenkens v. Shuften, 57 S.E.2d 283 (Ga. 1950).*

Haven v. Wallace, 160 S.W.2d 619 (Ky. 1942); Magness v. Kerr, 254 P. 1012 (Or. 1927); In re Gohn's Estate, 188 A. 144 (Pa. 1936); Yarbrough v. Yarbrough, 269 S.W. 36 (Tenn. 1925). See William F. Fratcher, *Defeasance As a Restrictive Device In Michigan, 52 Mich. L. Rev. 505 (1954); Boyett v. Mathews, 370 S.W.2d 916 (Tex. Civ. App. 1963).*

(n12)Footnote 12. *Alexander v. Morris & Co., 270 S.W. 88 (Ark. 1925); Kautz v. Kautz, 76 A.2d 398 (Pa. 1950)*(as long as she remains my widow).

Reverter clause is enforceable in creating a defeasible fee, if not an unreasonable restraint on alienation. *Falls City v. Missouri Pac. R. Co., 453 F.2d 771 (8th Cir. 1971).*

(n13)Footnote 13. *Bradford v. Federal Land Bank of New Orleans, 338 So. 2d 388 (Miss. 1976).*

(n14)Footnote 14. *Hill v. Purdy, 46 App. D.C. 495 (1917); Taylor v. Sutton, 15 Ga. 103 (1854); Chapman v. Pingree, 67 Me. 198 (1877); Garrison v. Hill, 28 A. 1062 (Md. 1894); Safe Deposit & Trust Co. v. Bouse, 29 A.2d 906 (Md. 1943); Shattuck v. Hastings, 99 Mass. 23 (1868); Halvorsen v. Pacific County, 156 P.2d 907 (Wash. 1945).*

(n15)Footnote 15. *Slegel v. Herbine, 23 A. 996 (Pa. 1892); Bartlett v. Bartlett, 48 P.2d 560 (Wash. 1935).*

(n16)Footnote 16. *Gray v. Blanchard, 52 Mass. (8 Pick.)284 (1829).*

"The holder of such an estate has all the rights in respect to it of a fee simple owner until the condition subsequent has happened. Title is not divested automatically upon the happening of the event or condition, but some affirmative action on the part of the grantor or his successors is necessary to bring about a forfeiture or reversion of the estate, and this is true even though the conveyance expressly provides for a reversion." *Halvorsen v. Pacific County, 156 P.2d 907 (Wash. 1945)* (citing Thompson on Real Property).

(n17)Footnote 17. *Lynch v. Bunting, 29 A.2d 155 (Del. 1942).*

(n18)Footnote 18. *Carpender v. New Brunswick, 39 A.2d 40 (N.J. 1944).*

In Iowa a "defeasible or qualified estate" was defined as "a fee which has a qualification subjoined thereto, and which must be determined whenever the qualification annexed to it is at an end. The estate is a fee, because by a possibility it may endure forever in a man and his heirs; yet, as that duration depends upon the concurrence of collateral circumstances, which qualify and debase the purity of the donation, it is therefore a qualified or base fee. During its

continuance such a fee has all the incidents of a fee simple. The owner of such a fee cannot alone convey a perfect title to the property, and if he conveys in fee the determinable quality of the estate follows the transfer." *Staack v. Detterding, 161 N.W. 44 (Iowa 1917).*

(n19)Footnote 19. *Frazier v. Wood, 255 N.W. 647, modified, 257 N.W. 768 (Iowa 1934); Mills v. Tyus, 23 S.E.2d 259 (Ga. 1942).*

The common law fee simple conditional was abolished by the statute *de donis. Sconce v. Neece, 268 P.2d 1102 (Colo. 1954).*

If the limitation on alienation is so interwoven with the deed as to be part thereof, the deed is treated as defeasible estate and upon alienation the estate terminates. *Floyd v. Hoover, 234 S.E.2d 89 (Ga. App. 1977).*

(n20)Footnote 20. *Story v. First Nat'l Bank & Trust Co., 156 So. 101 (1934).*

(n21)Footnote 21. *Henderson v. Western Carolina Power Co., 157 S.E. 425 (N.C. 1931).*

(n22)Footnote 22. CoLitt, § 58.

So if a disseisor died, his heirs inherited the land and the entry of the disseisee was tolled and he was required to sue a writ of entrie sur disseisin against disseisor's heir to recover the land. Littleton, Tenures, § 385.

(n23)Footnote 23. Digby, History of Real Property, ch. 2, § 9.

Where a deed provided that the grant was subject to an agreement and the habendum required the deed was in fee simple and the agreement contained a reverter clause the deed was held to incorporate the condition of the contract so that a defeasible fee was created. *Hardman v. Dahlonega-Lumpkin County Chamber of Commerce, 233 S.E.2d 753 (Ga. 1977).*

(n24)Footnote 24. Assize of Mort d'Ancestor and Novel Disseisin, Assizes of Northampton 1176 and Assize of Clarendon 1166. *See* 1 Pollock and Maitland, History of English Law, 124.

(n25)Footnote 25. William F. Fratcher, *Defeasance as a Restrictive Device in Michigan, 32 Mich. L. Rev. 505 (1954).*

(n26)Footnote 26. 2 Bl. Comm. 198, maintained, however, that the disseisor obtained a mere naked right of possession, the disseisee retaining both the right of possession and right of property.

(n27)Footnote 27. Portington's Case, 10 Coke 35a. *See Murdock v. Deal, 182 S.E. 466 (N.C. 1935).*

(n28)Footnote 28. *See* Restatement, Property, § 23, Comment d.

(n29)Footnote 29. *Harrison v. Foote, 30 S.W. 838 (Tex. Civ. App. 1895).*

A like result attended the violation of a condition annexed to a life estate where the condition recited "To have and to hold the above rented premises unto the said party of the second part, his heirs, executors, administrators, and assigns, for the full term of while he shall wish to live in Albert Lea, from and after the 1st day of December, 1904." *Thompson v. Baxter, 119 N.W. 797 (Minn. 1909). See Tallent v. Tallent, 267 Ill. App. 334 (1932); Kirchhof v. Ramsey, 271 N.Y.S. 40 (1934).*

Devise in fee with limitation over a death without issue created defeasible fee with executory interest. *Jernigan v. Lee, 182 S.E.2d 351 (N.C. 1971).*

The difference between an estate on a limitation and an estate on condition is that the estate on limitation terminates at once whereas the estate upon condition does not end until the grantor takes advantage of the breach of condition. *Pfeffer v. Lebanon Land Dev. Corp, 360 N.E.2d 1115 (Ill. App. 1977).*

(n30)Footnote 30. *Sperry v. Pond, 5 Ohio 387 (1832).*

(n31)Footnote 31. *Folts v. Huntley, 7 N.Y. (Wend.) 210 (1831).*

(n32)Footnote 32. *Warner v. Tanner, 38 Ohio St. 118 (1882). See Jenkins v. Clyde Coal Co., 48 N.W. 970 (Iowa 1891); Brown v. Fowler, 63 N.E. 76 (Ohio 1902); Hooks v. Forst, 30 A. 846 (Pa. 1895).*

(n33)Footnote 33. *Mann v. Jackson, 24 A. 886 (Me. 1892); Thompson v. Thompson, 175 S.W.2d 885 (Mo. 1943); Cumberland v. Buck, 82 A. 418 (N.J. 1912); Findley v. Conneaut, 27 Ohio Op. 46, 12 Ohio Supp. 161 (1943); Franklin v. Margay Oil Corp., 153 P.2d 486 (Okla. 1944).*

(n34)Footnote 34. *See* in general: *Phelps v. Bates, 5 A. 301 (Conn. 1886); Loomis v. G. F. Heublein & Bro., 99 A. 483 (Conn. 1916); Coquillard v. Coquillard, 113 N.E. 474 (Ind. App. 1916); Staack v. Detterding, 161 N.W. 44 (Iowa 1917); Murphy v. Murphy, 207 S.W. 491 (Ky. 1919); Zubler v. Porter, 120 A. 194 (N.J. 1923); Henderson v. Western Carolina Power Co., 157 S.E. 425 (N.C. 1931); Stephens County v. Mid-Kansas Oil & Gas Co., 254 S.W. 290 (Tex. 1923).*

Reverter clause appearing at end of description in a deed held invalid. *Whetsell v. Jernigan, 223 S.E.2d 397 (N.C. 1976).*

(n35)Footnote 35. *Allen v. Great Neck Free Church, 269 N.Y.S. 341 (1934).*

(n36)Footnote 36. Church in *Brattle Square v. Grant, 69 Mass. (3 Gray)142 (1855).*

(n37)Footnote 37. *Pure Oil Co. v. Miller-McFarland Drilling Co., 34 N.E.2d 854 (Ill. 1941); Stearns v. Godfrey, 16 Me. 158 (1839); Ashley v. Warner, 77 Mass. (11 Gray)43 (1858); Hoselton v. Hoselton, 65 S.W. 1005 (Mo. 1901); Miller v. Levi, 44 N.Y. 489 (1871); Williams v. Jones, 60 N.E. 240 (N.Y. 1901); Scheetz v. Fitzwater, 5 Pa. 126 (1847); Henderson v. Hunter, 59 Pa. 335 (1869).*

See Connecticut Junior Republic Ass'n v. Litchfield, 174 A. 304 (Conn. 1934).

Accord: Restatement, Property, § 23, Comment b.

The distinction between an estate upon condition, and the limitation by which an estate is determined upon the happenings of some event, is, that in the latter case the estate reverts to the grantor, or passes to the person to whom it is granted by limitation over, upon the mere happening of the event upon which it is limited, without any entry or other act, while in the former, the reservation can only be made to the grantor or his heirs and an entry upon breach of the condition is requisite to revest the estate. The provision for re-entry is therefore the distinctive characteristic of an estate upon condition; and when it is found that by any form of expression the grantor has reserved the right upon the happening of any event, to re-enter, and thereby revest in himself his former estate, it may be construed as such. *Attorney General v. Merrimack Mfg. Co., 80 Mass. (14 Gray)586 (1860).*

Estates on limitation end when the contingency happens. Estates upon condition subsequent continue until those entitled thereto take advantage of the breach. *Pfeffer v. Lebanon Land Dev. Corp., 360 N.E.2d 1115 (Ill. App. 1977).*

(n38)Footnote 38. Littleton, Tenures, § 380.

(n39)Footnote 39. Seymour's Case, 10 Coke 95b.

(n40)Footnote 40. *Stuart v. Easton, 170 U.S. 383 (1898); First Universalist Soc'y v. Boland, 29 N.E. 524 (Mass. 1892).*

(n41)Footnote 41. *Hopson v. Hopson, 138 S.W.2d 365 (Ky. 1940).*

(n42)Footnote 42. *Mann v. Jackson, 24 A. 886 (Me. 1892).*

So long as she remain single but if she remarry then over created a valid determinable fee. *Lewis v. Searles, 452 S.W.2d 153 (Mo. 1970).*

"So long as she remains single" created a defeasible fee. *Lewis v. Searles, 452 S.W.2d 153 (Mo. 1970).*

(n43)Footnote 43. *Harmon v. Brown, 58 Ind. 207 (1877); Staack v. Detterding, 161 N.W. 44 (Iowa 1917); Maddox v. Yoe, 88 A. 225 (Md. 1913)Leonard v. Burr, 18 N.Y. 96 (1858); Warner v. Tanner, 38 Ohio St. 118 (1882).*

(n44)Footnote 44. *Stilwell v. Melrose, 15 N.Y. (Hun.) 378 (1878); Dodge v. Stevens, 94 N.Y. 209 (1883). See Loomis v. G. F. Heublein & Bro., 99 A. 483 (Conn. 1916).* For further examples of estates upon limitation, *see Trosper v. Shoemaker, 227 S.W.2d 176 (Ky. 1949); Hinton v. Bowen, 230 S.W.2d 965 (Tenn. 1950).*

(n45)Footnote 45. *Steenerson v. Swenson, 199 N.W. 745 (Minn. 1924).*

The words "so long as the foregoing land is used for a public school" creates an estate in fee which determines when the grantee ceases to use the land for the designated purpose and, in the absence of words creating a limitation over to a third person, reverts to the grantor. *Malone v. Kitchen, 137 N.E. 562 (Ind. App. 1922).*

(n46)Footnote 46. *Yarbrough v. Yarbrough, 269 S.W. 36 (Tenn. 1925).*

Where the language of a deed is sufficient to convey an estate in fee simple, it must be construed to convey such estate unless a less estate is limited by express words or appears to have been granted by construction or operation of law. The estate cannot be cut down by inference from language of an ambiguous character. *Hubbard v. Buddemeier, 159 N.E. 229 (Ill. 1927). See Libby v. Winston, 93 So. 631 (Ala. 1922).*

Under a limitation over to a brother of the grantee on the grantee dying without issue the heirs of the brother take under the grantor and not under the grantee. *Stevens v. Wooten, 130 S.E. 13 (N.C. 1925).*

(n47)Footnote 47. *Magness v. Kerr, 254 P. 1012 (Or. 1927).*

(n48)Footnote 48. *Hoselton v. Hoselton, 65 S.W. 1005 (Mo. 1901); Smith v. Smith, 23 Wis. 176 (1868).*

(n49)Footnote 49. *Stearns v. Godfrey, 16 Me. 158 (1839); Smith v. White, 5 Neb. 405 (1877).*

(n50)Footnote 50. *See Alexander v. Morris, 270 S.W. 88 (Ark. 1925); Lonas v. Silver, 195 N.Y.S. 214 (N.Y. App. 1922); First Reformed Dutch Church v. Croswell, 206 N.Y.S. 132 (N.Y. App. 1924); Wilder v. Kress, 194 N.Y.S. 204 (1922); Community of Priests v. Byrne, 255 S.W. 601 (Tex. Com. App. 1923).*

A condition is to be carefully distinguished from a limitation. It is the character and quality of the estate granted, and not the terms used in their creation, that distinguish them. The latter requires no entry to determine the estate, but terminates it ipso facto by the happening of the event referred to, while the former is determined only by the re-entry of the grantor or his heirs for the condition broken. *Bryan v. Spires, 3 Pa. (Brewst) 580 (1869).*

(n51)Footnote 51. *Storke v. Penn Mut. Life Ins. Co., 61 N.E.2d 552 (Ill. 1945).*

To make a defeasible fee in a grant of a public park, the deed must expressly reserve the right of re-entry in the case of a fee upon a condition subsequent or a provision for automatic termination in the case of a determinable fee. *PCK Props., Inc. v. Cuyahoga Falls, 176 N.E.2d 441 (Ohio App. 1960).*

(n52)Footnote 52. *Wheeler v. Walker, 2 Conn. 196 (1817); Stearns v. Godfrey, 16 Me. 158 (1839), Chapin v. Harris, 90 Mass. (8 Allen) 594 (1864); Owen v. Field, 102 Mass. 90 (1869); Camp v. Cleary, 76 Va. 140 (1882).*

Confusing determinable fee and fee upon condition subsequent. *Stewart v. Mobley, 500 S.W.2d 246 (Tex. Civ. App. 1973).*

(n53)Footnote 53. *Loomis v. G.F. Heublein & Bro., 99 A. 483 (Conn. 1916);* Portington's Case, 10 Coke 35a.

(n54)Footnote 54. *Loomis v. G.F. Heublein & Bro., 99 A. 483.* (Conn. 1916); *Hutchinson's Estate v. Arnt, 1 N.E.2d 585, reg'h denied, 4 N.E.2d 202 (Ind. 1936); Holekamp Lab. Co. v. State Hwy. Comm'n, 173 S.W.2d 938 (Mo. 1943); Vanatta v. Brewer, 32 N.J. Eq. 268 (1880); Porter v. Porter, 222 P. 971 (Okla. 1923); Bennett v. Robinson, 10 Pa. (Watts) 348 (1840); Henderson v. Hunter, 59 Pa. 335 (1869); In re Machu, L.R. 21 Ch. Div. 838.*

(n55)Footnote 55. *First Universalist Soc'y v. Boland, 29 N.E. 524 (Mass. 1892); Cumberland v. Buck, 82 A. 418 (N.J. 1912); Slegel v. Herbine, 23 A. 996 (1892).*

(n56)Footnote 56. *Loomis v. G.F. Heublein & Bro., 99 A. 483 (Conn. 1916); First Universalist Soc'y v. Boland, 29 N.E. 524 (Mass. 1892); Sperry v. Pond, 5 Ohio 387 (1832).*

Holding mere surplusage and without effect, a clause at the end of a deed providing that if the land was not occupied for a church of three years it would revert back to the legal grantors. *Whetsell v. Jernigan, 229 S.E.2d 183 (N.C. 1976).*

(n57)Footnote 57. *Starnes v. Hill, 16 S.E. 1011 (N.C. 1893).*

(n58)Footnote 58. Restatement, Property, § 23, Comment a.

A limitation marks the period which determines the estate, without any act on the part of him who has the next expectant interest. On the happening of the prescribed contingency, the estate first limited comes at once to an end, and the subsequent estate arises. Church in *Brattle Square v. Grant, 69 Mass. (3 Gray) 142 (1855). Accord*: Restatement, Property, § 23.

(n59)Footnote 59. *Mills v. Davison, 35 A. 1072 (N.J. 1896).*

(n60)Footnote 60. *Knowles v. South County Hosp., 140 A.2d 499 (R.I. 1958).*

(n61)Footnote 61. *Ludlow v. New York & H.R. Co., 12 N.Y. (Barb.) 440 (1852).*

Conditions may be annexed to estates generally, as for years, for life, or in fee. *Stewart v. Workman, 102 S.E. 474 (W. Va. 1920).*

(n62)Footnote 62. *Tallent v. Tallent, 267 Ill. App. 334 (1932).*

(n63)Footnote 63. 2 Bl. Comm. 152. *Michigan State Bank v. Hastings, 1 Mich. (Doug.) 225 (1844); Raley v. Umatilla County, 13 P. 890 (Or. 1887); Saltonstall v. Little, 90 Pa. 422 (1879).*

(n64)Footnote 64. *Vanhorne v. Dorrance, 2 U.S. (Dall) 304 (1795).*

(n65)Footnote 65. *Wheeler v. Walker, 2 Conn. 196 (1817).*

(n66)Footnote 66. *Devine v. Isham, 145 S.W.2d 529 (Ky. 1940); Faith v. Bowles, 37 A. 711 (Md. 1897).*

(n67)Footnote 67. Co. Litt., § 201; 2 Bl. Comm. 154; 4 Kent's Comm. 125. *Heartsill v. Thompson, 16 So. 2d 507 (Ala. 1944); Wheeler v. Walker, 2 Conn. 196 (1817); Warner v. Bennett, 31 Conn. 468 (1863).*

(n68)Footnote 68. *Wheeler v. Walker, 2 Conn. 196 (1817); Federal Land Bank v. Luckenbill, 13 N.E.2d 531 (Ind. 1938); Nickerson v. Hoover, 115 N.E. 588 (Ind. App. 1917); Michigan State Bank v. Hastings, 1 Mich. (Doug.) 225 (1844); L'Etourneau v. Henquenet, 50 N.W. 1077 (Mich. 1891); Kerens v. St. Louis Union Trust Co., 223 S.W. 645 (Mo. 1920).*

(n69)Footnote 69. *Bethea v. McCullough, 70 So. 680 (Ala. 1915); Mitchell v. Cheney Slough Irrig. Co., 134 P.2d 34 (Cal. App. 1943); Brown v. State, 5 Colo. 496 (1881); Phillips v. Gannon, 92 N.E. 616 (Ill. 1910); Nowak v. Dombrowski, 107 N.E. 807 (Ill. 1915); Storke v. Penn Mut. Life Ins. Co., 61 N.E.2d 552 (Ill. 1945); Cunningham v. New York Cent. R. Co., 48 N.E.2d 176 (Ind. App. 1943); Sands v. Church of Ascension and Prince of Peace, 30 A.2d 771 (Md. 1943); Hibbing v. Commissioner of Taxation, 14 N.W.2d 923 (Minn. 1944); Memphis & C.R. Co. v. Neighbors, 51 Miss. 412 (1875); Watson v. Dalton, 18 N.W.2d 658 (Neb. 1945); Carpender v. New Brunswick, 39 A.2d 40 (N.J. 1944); Birdsall v. Grant, 57 N.Y.S. 705 (1899); Helms v. Helms, 49 S.E. 110 (N.C. 1904); Templeton v. Stong, 188 S.W.2d 560 (Tenn. 1945); Miller v. Yorkshire Ins. Co., 297 N.W. 377 (Wis. 1941).*

(n70)Footnote 70. *Borst v. Simpson, 7 So. 814 (Ala. 1890); First Nat'l Bank v. McIntosh, 79 So. 121 (Ala. 1918); Lucas v. Lucas, 156 S.E. 680 (Ga. 1931); Phillips v. Gannon, 92 N.E. 616 (Ill. 1910); Richards v. Richards, 136 N.E. 417 (Ill. 1922); Dunne v. Minsor, 143 N.E. 842 (Ill. 1924); Department of Public Works v. Porter, 158 N.E. 366 (Ill. 1927); Mercer-Lincoln Pine Knob Oil Co. v. Pruitt, 229 S.W. 374 (Ky. 1921); Frank v. Costigan, 118 A. 114 (Md. 1922); In re Baechler's Will, 202 N.Y.S. 485 (1923); Bullard v. Albion, 217 N.Y.S. 849 (1926); In re Scott's Will, 204 N.Y.S. 478 (1924); Fraley v. Wilkinson, 191 P. 156 (Okla. 1920); Spinks v. First Christian Church, 273 S.W. 815 (Tex. Com. App. 1925). See Dallas v. Etheridge, 253 S.W.2d 640 (Tex. 1952)*(to effect construction of condition as subsequent is preferred over condition as precedent).

When a condition precedent embraces several requirements, the estate does not vest until all of them have been fulfilled. *Maguire v. Macomb, 127 N.E. 682 (Ill. 1920).*

Strict performance is usually required. *Jackson v. Knapp, 130 N.E. 524 (Ill. 1921); Cronin v. Cronin, 145 N.E. 619 (Ill. 1924).*

If the condition is never performed title never vests. *Pomerleau v. Pomerleau, 124 A. 243 (Me. 1924); Spinks v. First Christian Church, 273 S.W. 815 (Tex. Com. App. 1925).*

(n71)Footnote 71. *In re Baechler's Will, 202 N.Y.S. 485 (1923)*(stating that generally a condition subsequent is created where a condition is annexed requiring continuous action); *In re Scott's Will, 204 N.Y.S. 478 (1924).*

See the following cases: *Sherill v. Sherill, 99 So. 838 (Ala. 1924); Schornick v. Schornick, 220 P. 397 (Ariz. 1923); Goodwin v. Tyson, 268 S.W. 15 (Ark. 1925); Bou v. Willits, 214 P. 519 (Cal. App. 1923); Dean v. Wall, 115 S.E. 78 (Ga. 1922); Richards v. Richards, 136 N.E. 417 (Ill. 1922); Dunne v. Minsor, 143 N.E. 842 (Ill. 1924); Mercer-Lincoln Pineknob Oil Co. v. Pruitt, 229 S.W. 374 (Ky. 1921); Halpin v. Rural Agr. Sch. Dist. No. 9, 194 N.W. 1005 (Mich. 1923); Kent v. Stevenson, 90 So. 241 (Miss. 1922); Hall v. Quinn, 130 S.E. 18 (N.C. 1925); Fraley v. Wilkinson, 191 P. 156 (Okla. 1920); Priddy v. School Dist. No. 78, 219 P. 141 (Okla. 1923); Drace v. Klinedinst, 118 A. 907 (Pa. 1922); Community of Priests v. Byrne, 255 S.W. 601 (Tex. Com. App. 1923).*

In construing a clause creating a condition that construction which makes of it a condition subsequent is preferred.

Power v. Power, 130 N.E. 313 (Ill. 1921); Jackson v. Knapp, 130 N.E. 524 (Ill. 1921); Department of Pub. Works & Bldgs. v. Porter, 158 N.E. 366 (Ill. 1927); Bullard v. Albion, 217 N.Y.S. 849 (1926); In re Scott's Will, 204 N.Y.S. 478 (1924), instead of a condition precedent, but conditions subsequent themselves are not favored. *Libby v. Winston, 93 So. 631 (Ala. 1922); Bou v. Willits, 214 P. 519 (Cal. App. 1923); Kent v. Stevenson, 90 So. 241 (Miss. 1921); Van De Bogert v. Reformed Dutch Church, 220 N.Y.S. 58 (1927); Hall v. Quinn, 130 S.E. 18 (N.C. 1925); Providence v. Payne, 134 A. 276 (R.I. 1926).*

(n72)Footnote 72. *Allen v. Trustees of Great Neck Free Church, 269 N.Y.S. 341 (1934); Queen City Park Ass'n v. Gale, 3 A.2d 529 (Vt. 1938).*

See Restatement, Property, § 24, defining a condition subsequent" as denoting "that part of the language of a conveyance, by virtue of which upon the occurrence of a stated event the conveyor, or his successor in interest, has the power to terminate the interest which has been created subject to the condition subsequent, but which will continue until this power is exercised."

(n73)Footnote 73. *Federal Land Bank v. Luckenbill, 13 N.E.2d 531 (Ind. 1938); Texas Rural Communities v. Avary, 113 S.W.2d 597 (Tex. Civ. App. 1938).*

(n74)Footnote 74. *Cobban v. Northern Wis. Fair Ass'n, 248 N.W. 463 (Wis. 1933).*

(n75)Footnote 75. *Blackburn v. White, 147 S.W.2d 7 (Ark. 1941); New York v. Coney Island Fire Dep't, 10 N.Y.S.2d 164 (1939). See* Restatement, Property, § 57.

(n76)Footnote 76. *Union Colony Co. v. Gallie, 88 P.2d 120 (Colo. 1939).*

(n77)Footnote 77. *Van Horne v. Dorrance, 2 U.S. (2 Dall.) 304 (1795); Finlay v. King's Lessee, 28 U.S. (3 Pet.) 346 (1830); Rannels v. Rowe, 145 F. 296 (8th Cir. 1906); Seaboard Air Line R. Co. v. Anniston Mfg. Co., 65 So. 187 (Ala. 1914); First Nat'l Bank v. McIntosh, 79 So. 121 (Ala. 1918); Sheppard v. Thomas, 26 Ark. 617 (1871); Terry v. Taylor, 220 S.W. 42 (Ark. 1920); Mesick v. Sunderland, 6 Cal. 297 (1856); Brannan v. Mesick, 10 Cal. 95 (1858); Gramer v. Sacramento, 41 P.2d 543 (Cal. 1935); Rosecrans v. Pacific Elec. R. Co., 134 P.2d 245 (Cal. 1943); Mayer v. American Security & Trust Co., 33 App. D.C. 391 (1909); Lucas v. Lucas, 156 S.E. 680 (Ga. 1931); Phillips v. Gannon, 92 N.E. 616 (Ill. 1910); Nowak v. Dombrowski, 107 N.E. 807 (Ill. 1915); Hawkins v. Hansen, 139 P. 1022 (Kan. 1914); Robbins v. Gleason, 47 Me. 259 (1859); Osgood v. Abbott, 58 Me. 73 (1870); Chapin v. School Dist. No. 2, 35 N.H. 445 (1857); Shinn v. Roberts, 20 N.J.L. 435 (1845); Martin v. Ballou, 13 N.Y. (Barb.) 119 (1852); Blacksmith v. Fellows, 7 N.Y. 401 (1852); Simms v. Folts Mission Inst., 276 N.Y.S. 145 (1934); Paraffine Oil Co. v. Cruce, 162 P. 716 (Okla. 1916); Stinson v. Oklahoma R. Co., 126 P.2d 260 (Okla. 1942); Raley v. Umatilla County, 13 P. 890 (Or. 1887); Jones v. Chesapeake & Ohio R. Co., 14 W. Va. 514 (1878); Rogan v. Walker, 1 Wis. 527 (1853).*

(n78)Footnote 78. *Jancovech v. Christensen, 195 N.E. 287 (Ind. App. 1935).*

(n79)Footnote 79. *Finlay v. King's Lessee, 28 U.S. (3 Pet.) 346 (1830); Godding v. Hall, 140 P. 165 (Colo. 1914); Platt v. Platt, 42 Conn. 330 (1875); Phillips v. Gannon, 92 N.E. 616 (Ill. 1910); Tallman v. Snow, 35 Me. 342 (1853); Parker v. Nichols, 24 Mass. (7 Pick.) 111 (1828); Burnett v. Strong, 26 Miss. 116 (1853); Underhill v. Saratoga & W. R. Co., 20 N.Y. (Barb.) 455 (1855),* per Allen, J.; *New Edgewood Lake Corp. v. Kingston Trust Co., 285 N.Y.S. 130 (1936); Huntley v. McBrayer, 85 S.E. 213 (N.C. 1915); Bell County v. Alexander, 22 Tex. 350 (1858).*

(n80)Footnote 80. *Hawkins v. Hansen, 139 P. 1022 (Kan. 1914); Earle v. Dawes, 3 Md. Ch. 230 (1849),* per Johnson, Ch.; *Shinn v. Roberts, 20 N.J.L. 435 (1845).*

(n81)Footnote 81. Ga. Code Ann. § 44-6-41 (1991).

(n82)Footnote 82. *American Emigrant Co. v. Adams, 100 U.S. 61 (1879); Seaboard Air Line R. Co. v. Anniston*

Mfg. Co., 65 So. 187 (Ala. 1914); Kampman v. Kampman, 135 S.W. 905 (Ark. 1911); Weller v. Brown, 117 P. 517 (Cal. 1911); Lewis v. Lewis, 51 A. 854 (Conn. 1902); Self v. Billings, 77 S.E. 562 (Ga. 1913); Bald v. Nuernberger, 108 N.E. 724 (Ill. 1915); Patterson v. Patterson, 122 S.W. 169 (Ky. 1909); Frenchville v. Gagnon, 91 A. 951 (Me. 1914); Butterhof v. Butterhof, 86 A. 394 (N.J. 1913); Post v. Weil, 22 N.E. 145 (N.Y. 1889).

(n83)Footnote 83. *Reaney v. Wall, 60 A.2d 505 (Conn. 1948)*(to son but if he died without children "to revert" to sisters created a defeasible fee); *Goldberger v. Goldberger, 102 A.2d 338 (Del. 1954)*(to A. and her heirs but if she die without heirs created fee simple defeasible); *Trimble v. Fairbanks, 76 S.E.2d 16 (Ga. 1953); Kellogg v. Meadows, 215 S.W.2d 951 (Ky. 1948)*(devise to two persons and to survivor created a defeasible fee in each); *Olson v. Lisco, 30 N.W.2d 910 (Neb. 1948)*(devise in trust until 30 "and in case of death" over created a fee defeasible on death before 30 not a life estate).

(n84)Footnote 84. Church in *Brattle Square v. Grant, 69 Mass. (3 Gray) 142 (1855); First Universalist Soc'y v. Boland, 29 N.E. 524 (Mass. 1892). See* Milton I. Goldstein, *Possibilities of Reverter as Devises to Restrict the Use of Land, 54 Harv. L. Rev. 248 (1940).*

Where a deed provided that the grant was subject to an agreement and the addendum required the deed to be in fee simple and the agreement contained a reverter clause the deed was held to incorporate the condition of the contract so that a defeasible fee was created. *Hardman v. Dahlonega-Lumpkin County Chamber of Commerce, 233 S.E.2d 753 (Ga. 1977).*

(n85)Footnote 85. *Bradford v. Federal Land Bank of New Orleans, 338 So. 2d 388 (1976).*

(n86)Footnote 86. *Id.*

(n87)Footnote 87. *Id.*

* This chapter is based in part on Ch. 30, George W. Thompson, Commentaries on the Modern Law of Real Property (John S. Grimes ed. 1979), which made a significant contribution toward preserving the American common law governing defeasible fees.

Thompson on Real Property, Thomas Editions

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CHAPTER 20 DEFEASIBLE FEES *

2-20 Thompson on Real Property, Thomas Editions § 20.02

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§ 20.02 Fee Simple Determinable.n88

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While the use of the words "et hereditibus suis" in a feoffment created an estate capable of descending and thus a fee, it did not give rise to a perpetual estate. The consideration of the feoffment was in future, the rendition of the feudal dues, not immediate. When the payment of such future consideration ceased the reason for the existence of the estate ended and the estate itself ceased to exist or "determined." Thus the fee was not perpetual. Such an estate was known as a "base fee." n89

Littleton does not seem to have distinguished between estates upon limitations and estates upon condition. n90 Coke, however, noticed that durante, diem donec, quosque, usque ad tambieu and ubicunque were words of limitation rather than of condition. n91 Prior to quia emptores Bracton had recognized a determinable fee. n92

Digby n93 pointed out that Bracton n94 had indicated that prior to quia emptores a tenant could grant away the whole of his estate. Magna Charta, n95 however, prohibited a freeman from selling his land except that the residue bear the feudal service. It would appear, however, that escheats, marriages and wardships, three of the most onerous of the feudal burdens were being avoided by the practice of B the feoffee of A subinfeudating to C. C not being the tenant of A, escheat and wardship were lost to A on the death of C.

To avoid this situation the dominant lords during the reign of Edward I caused the passage of the Statute Quia Emptores Terrarum. n96 This statute had the effect of causing all such subinfeudees to hold immediately of the feoffer not the feoffee. The transferee thus stepped into the transferor's shoes, and every alienation was thenceforth, except at the level of the tenant in capite, a complete alienation. The relation of lord and tenant as to tenancies remaining, gradually weakened and was finally destroyed completely by the statute of Charles II. n97 Sometimes by statute, lapse of time converts fee simple determinables into fee simple absolutes. n98 Quia emptores therefore had the exact opposite effect for which it was intended. It destroyed the feudal system.

Under the concept of the base fee, the terre tenant while he held a fee which was alienable so as to cut off the heirs was still subject to termination at a time uncertain upon such termination the property returned to the grantor. Thus the

grantor retained at all times a future interest in the property in the nature of a reversion. Quia emptores prevented the creation of such reversions in the future. Thus it became impossible to create a fee simple in England and at the same time reserve an interest in the grantor. n99 In most of the states in this country, quia emptores terrorum became a part of the common law.

Gray in his landmark work on perpetuities maintained n100 that after quia emptores no fee could be created which would be of indefinite duration terminating of its own weight with the estate reverting to the feoffer. n101

Blackstone, n102 however, mentions an example of a grant to A and his heirs, tenants of the manor of Dale. And Sheppard n103 refers to one and his heirs "so long as J. S. shall have heirs of his body" ("and this is a determinable fee and not a fee tail; but it should seem a devise to A, B and his heirs so long as he shall have heirs of his body is an estate tail").

In this country, however, from early times n104 the determinable fee has been recognized. n105 When one creates a determinable fee he does not transfer all that he has. What he retains is a future interest in land usually referred to as a possibility of reverter. n106

A determinable fee is one in which a person is invested with a fee simple title subject to be divested upon the happening of some contingency in a will as by death before the time fixed for the taking effect of the devise. n107 A "determinable fee" has been defined as a fee-simple estate to a person and his heirs, with a qualification annexed providing that it must terminate whenever the qualification is at an end. n108 On the happening of the contingency the estate is at an end without any further act on the part of the grantor or his heirs. n109 In a determinable estate, the condition is incorporated into, and forms a part of, the limitation or grant. n110 They are sometimes termed modified fees and include what is generally designated "base fees." Such estates are recognized in some states and are descendible. n111 They are fees because they may last forever. n112

The terms "base fee," "qualified fee," and "determinable fee" have been used promiscuously n113 as descriptive of estates, which have a qualification subjoined thereto, and which may be determined whenever the qualifications annexed are at an end. n114 A "base fee" has been defined as an estate or fee which has a qualification subjoined thereto and which must be determined whenever the qualification annexed to it is at an end. n115 It is a type of estate designated in the *Restatement of the Law of Property* as an "estate in fee simple defeasible." n116 A qualification annexed to a base, qualified or determinable fee may be a qualification attaching itself to the use of the land or concerning the happening of a more strictly collateral event. n117 A determinable or qualified fee has all the attributes of a fee simple, n118 except that it is subject to be defeated by the happening of the condition, n119 the grantor retains at most a mere possibility of reverter. n120 One who is seised of a determinable fee may convey his estate, but his grantee will ordinarily take it subject to the same conditions or imperfections which adhered to it originally. n121 Any limitation in a fee simple which provides that the estate shall terminate automatically upon the happening of a stated event creates a determinable fee. n122

A gift of a fee with a limitation over on death of the first taker before the second creates a determinable fee subject to a conditional limitation. n123 A base or determinable fee arises upon a devise to one and upon the happening of a stated contingency then over to another. n124

An estate which is to continue until the happening of a certain event is not upon a condition subsequent, because upon the happening of that event the estate ceases by its own limitation without a re-entry by the grantor. Such an estate is a fee, because it may last forever. It is determinable, because it may end by the happening of the event named. n125 Under a will directing the division of the testor's estate between his children on the death or remarriage of his widow, and providing that if either or both children die before such event an interest is vested in the testator's grandchild, the children take a base fee subject to termination by death before arrival of the time for distribution. n126

A gift of a fee with a limitation over on death of the first taker before the second creates a determinable fee subject to conveyance of land to a school district, subject to a covenant that the land should be used for school purposes, and that when such use should cease the property should revert to the grantor, vests in the grantee a qualified fee. Until the happening of such event the grantor is not vested with any title or interest in the land or in the reversion, for the contingency upon which the land is to revert may never happen. Under the older law he has nothing to convey, and his deed in expectancy of a reverter vests no interest in the grantee, but is wholly without legal force or effect. n127

Where a deed to a church provided that the title would revert to the grantor whenever the property should cease to be occupied for a church, the estate passing to the church was a determinable or qualified fee, n128 but a deed containing a provision that if the lands conveyed should cease to be used for railroad and station purposes, they should revert to the grantor, followed by the habendum clause which was not only unqualified, but ended with the words "to their use and behoof forever," was held not to convey a determinable fee. n129 A grant to a religious society to hold so long as the society shall support certain specified doctrines, the deed reciting that when the land is devoted to other purposes "then the title of said society or its assigns shall forever cease" created a determinable fee. The grant in such case is not upon a condition subsequent, and no re-entry is necessary because by the terms of the grant the estate is to continue so long as the real estate shall be devoted to the specified uses, and when it shall no longer be so devoted, then the estate will cease and determine by its own limitation. n130

A base or determinable fee may be created to continue so long as the land is devoted to a particular use, n131 such as a conveyance of particularly described real estate "to be used for railroad purposes only," n132 or for church purposes. n133 The estate may be made to terminate upon the accomplishment of a particular purpose, such as the cutting and removal of the timber from the land. n134

Upon the birth of a determinable fee the creator retains an interest generally referred to as a possibility of reverter. n135 Because of the minimal quality of the possibility of a reverter, however, the holder of the determinable fee for some purposes is considered the sole owner of the fee. n136 A remainder cannot be created to follow a determinable fee, but such determinable fee is sometimes followed by an executory limitation shifting the estate to a person other than the immediate devisee or grantee upon the happening of the event terminating the defeasible estate. n137 The holder of the determinable fee is not liable for waste. He may thus mine or lease the profits or create a mineral severance. But all of such interests are subject to the ultimate defeasance where the fee determines.

The determinable fee has all of the rights of a fee simple absolute as long as the event which terminates it does not occur. n138 So the present owner has the right of use and control of the property. n139

The majority rule does not require an express reservation of a possibility of reverter in order to create a determinable fee. n140

While the retention of a reverter clause is sometimes found to be necessary in a fee upon condition subsequent its presence in a fee simple determinable may indicate a limitation over instead of a possibility of reverter. n141

Where a deed provided that the grantee should not sell or dispose of the land conveyed without first obtaining the consent of the grantor, a base or qualified fee was held created. n142 The holder of a determinable or qualified fee has the same rights and privileges respecting the property as the owner in fee simple, except the former has not the same right of alienation as the latter. n143 If the owner of such fee make conveyance in fee, the determinable quantity of the estate follows the transfer. n144 A determinable estate is one of inheritance, but the heirs of a person dying seised of such estate take it burdened with the limitations fixing its character, and this continues until title is divested by the happening of the specific contingency or the estate is released therefrom by such happening becoming impossible. n145 The proper words for the creation of such an estate are "until," "during," "so long as," and the like. n146

Stock in trust for twenty-one years, and then to be divided, and if any death, then to heirs or children, was held a

determinable fee, and, on death before twenty-one years passed to children and not under beneficiary's will. n147 Where grant of school lands contained reverter clause, school, on abandonment, could sell buildings and allow land to revert under the 1857 statutes. n148

The major difference between a determinable fee and a fee upon condition subsequent is whether the estate terminates automatically on the occurrence of a stated event which is a fee simple determinable or whether the conveyor has the power to terminate it if he desires to do so in which event it is a fee upon a condition subsequent. n149

Determinable fees may also bear close resemblance to leases, to easements or to life estates. Since at common law all chattels real except tenancies at will were of necessity for a stated period, any gift for an indefinite time created a determinable fee. n150 There is no such legal distinction separating determinable fees and easements. The legal result must depend on the language used and the parties' intent. n151 The consequences of the existence of one or the other are quite different however. n152

In Texas and Mississippi the grantee of a customary "lease" for oil and gas purposes obtains a determinable fee. n153 Where the granting clause refers only to a "right," an easement, not a determinable fee is conveyed, unless the entire instrument shows a contrary intent. If the granting clause conveys "land" the deed transfers a fee. n154 The holder of a determinable fee may drill for oil, n155 but the holder of an easement may not. n156 The transfer of land subject to an easement carries the fee free from the easement when it terminates. n157

The cases are divided as to whether to "A as long as she remains my widow" creates a fee simple determinable or a determinable life estate. n158 A will devising "all my realty after all my just debts are paid" to my wife "so long as she remains my widow" shows an intention on the part of the testator to create a defeasible fee and not a defeasible life estate. n159 The holders of limitations over after a determinable fee cannot charge the tenant with waste during the duration of the fee. n160

A determinable fee terminates upon the happening of an event named in the instrument creating the estate. No forfeiture occurs when the estate terminates and no notice of termination is required. n161 Thus, where land is conveyed for educational, religious or public purposes, and it appears to be the intention of the parties that the estate shall end when it ceases to be used for such purpose, entry by the grantor is not necessary to terminate the estate. n162

In some areas, as will be seen hereafter, the determinable fee is not considered to ripen into a fee simple absolute if a limitation over is void for remoteness. In some states the doctrine of substantial compliance of conditions subsequent has been applied to fee simples determinable as well. n163 The cases are divided as to whether buildings placed on a determinable fee revert with the land. n164

The holder of a determinable fee cannot convey a good title n165 and is not entitled to specific performance of a contract to convey. n166 A defeasible or determinable fee is freely alienable subject to the divesting of the grantee's estate upon the happening of the event. n167 Where a determinable fee is created out of a portion of a tract, a conveyance of the entire tract causes the possibility of reverter even though the deed to the larger tract excepts the earlier deed. n168 But when the fee determines the weight of authority gives the improvements to the holder of the possibility of reverter. n169 A fixture passed to the holder of a possibility of reverter when a determinable fee ended. n170 The courts have taken diverse positions with respect to construction of ambiguous language as creating a determinable fee. Ordinarily the power of forfeitures which operates against construction of fees upon conditions subsequent does not apply to determinable fees. n171 Some courts, however, favor construction of fees upon condition subsequent over determinable fees, n172 and fee simple absolutes are always preferred over either. Some courts have adopted the strict construction rule favoring fee simple absolutes over determinable fees. n173

A few cases are to be found where the substantial compliance doctrine applicable to fees upon condition subsequent n174 is used in the case of determinable fees. n175 Marketable title statutes and limitation of actions statutes have been

used to convert determinable fees into fee simple absolutes. n176 Some cases have likened fee simples determinable to fees upon condition subsequent in finding that the absence of an express possibility of reverter indicates a fee simple absolute. n177

Since a fee simple determinable title ends of itself, the holder of the defeated fee does not reacquire title until adverse possession has run, whereas a shorter period of statutory limitation of actions may bar a fee upon condition subsequent. n178 A determinable conditional fee may be conveyed, but the grantee takes title subject to the conditions with which it is impressed. n179

Where by statute the necessity for the use of words of limitation has been obviated, a problem not infrequently arises as to whether language creates a determinable fee or a determinable life estate. This is especially true where an estate is given during widowhood. The cases are divided as to whether a determinable fee or a determinable life estate arises. n180

The termination of a determinable fee automatically happens upon the occurrence of the event, n181 and this cannot be waived or avoided by the acquiescence of the grantor or grantee since it occurs independent of their will. n182 So held that a fixture passed to the holder of a possibility of reverter when a determinable fee ended. n183 In Texas the lessee under an oil and gas lease acquires title to the oil and gas in place, as his interest is a determinable fee. n184

FOOTNOTES:

(n1)Footnote 88. Ferrier, *Determinable Fees and Fees Upon Condition in California, 24 Cal. L. Rev. 512;* Powell, *Determinable Fees, 23 Colum. L. Rev. 207;* Blake, *Fees Simple Defeasible,* 27 Ky. J. 424; Pope, *Construction of Determinable Fees by the North Carolina Court,* 8 Duke B.A.J. 100; McCall, *Estates on Condition and on Special Limitation in North Carolina, 19 N.C. L. Rev. 334;* O'Connell, *Estates on Condition Subsequent and Estates on Special Limitation in Oregon, 18 Or. L. Rev. 63; Vance, Rights of Reverter and the Statute Quia Emptores, 36 Yale L.J. 593.*

Fee simple determinable or conditional in *South Carolina. Purvis v. McElveen, 106 S.E.2d 913 (S.C. 1959).*

Kentucky has abolished the fee simple determinable and possibility of reverter and has converted this into a "fee simple subject to a right of entry for condition broken." Ky. Rev. Stat., § 381.218.

The right of entry dies after 30 years from the effective date of the instrument. Ky. Rev. Stat., § 381.219.

Limitations over after defeasible fees are valid for 30 years after breach regardless of the rule against perpetuities. Ky. Rev. Stat., § 381.219.

See Joe O. Sams, Jr., *Application of the Doctrine of Shelley v. Kraemer to the Determinable Fee, 33 Miss. L.J. 200 (1962);* Comment, *Abandonment of School Sites in Fee Simple Determinable Estates, 25 Mo. L. Rev. 446 (1960);* Howard R. Williams, *Restrictions on the Use of Land: Conditions Subsequent and Determinable Fees, 27 Tex. L. Rev. 158 (1948).*

Devise to wife and daughter and their descendants with interest of each to pass to the other if died without issue, created a defeasible fee and not a mere life estate. *Bradford v. Federal Land Bank of New Orleans, 338 So. 2d 388 (Miss. 1976).*

(n2)Footnote 89. Richard B. Powell, *Determinable Fees, 23 Colum. L. Rev. 207 (1923).*

(n3)Footnote 90. Littleton, Tenures, § 380.

(n4)Footnote 91. Co. Litt., § 235a. *See* 2 Bl. Comm. 155 and 1 Coke Inst. 234, 10 Coke 41.

(n5)Footnote 92. 4 Bracton, ch. 28, f. 207, recognized that a freehold could be held for an indefinite period until an event happens or does not happen, i.e., the modern fee simple determinable.

(n6)Footnote 93. Digby, History of Real Property, ch. 3, §§ 11, 14.

(n7)Footnote 94. 2 Bracton, ch. 19, f. 45.

(n8)Footnote 95. (1217), ch. 39.

(n9)Footnote 96. 18 Edward I, ch. I, Statute of Westminster III.

The statute provided in part: "Et sciendum quod estud statutum locom tenet de -- terris venditis tenendis in feodo simpliciter tantum; et quod se extendit ad tempus futurum." Hence applied only to fee simple not fee tail which had come into being five years before under de donis. *See* Challis, Real Property, 22, also § 1848.

8 Holdsworth 193 ascribed the statute, however, to Bracton's views against restrictions on alienation. It is possible that the abuse of the feudal concept of wardship avoided by the subinfeudation and restored by quia emptores promoted the scheme of the use which developed during the next two centuries.

(n10)Footnote 97. 12 Carl. II, ch. 24.

(n11)Footnote 98. Fee simple determinable became fee simple absolute after 30 years. Mass. 184A-7.

(n12)Footnote 99. 3 Holdsworth 165.

(n13)Footnote 100. *See* Gray, Perpetuities (4th ed.) §§ 31-40, where the question is discussed and authorities are cited. Mr. Challis, in his Law of Real Property (2d ed.), Appendix iv. p. 398, in answer to "the learned and ingenious arguments" of Professor Gray against the validity of determinable fees, who declares that Sanders was the first author to distinctly state that the statute put an end to qualified fees, among other things, said: "That a cardinal result of the statute quia emptores should be left to be discovered by Sanders, in the nineteenth century, seems to me, I confess, what Chillingworth calls 'extremely improbable, and even cousingerman to impossible.' That Lord Coke, Plowden, Croke, Sir Henry Finch, Lord Nottingham, the author of the Touchstone, Sergeant Maynard, Vaughan, Treby, Powell, Lord Hardwicke, Preston, Fearne, Butler, Watkins (to put together at random the names of a few men who have believed with unquestioning faith in the existence of determinable fees since the statute), should have passed their lives in intimate familiarity with the statute without any one of them lighting or stumbling upon what, if it were true, would be a fairly obvious truth, is not a hypothesis to be accepted, unless no other rational explanation of the language of the statute can be found." For further discussion of this subject, *see Lyford v. Laconia, 72 A. 1085 (N.H. 1909).*

Fee simple determinable or upon condition subsequent becomes fee simple absolute after 30 years except in case of public or charitable or interests. Maine Rev. Stat. 1964, § 33-103.

(n14)Footnote 101. 1 Saunders, Uses (5th ed.), 208 and Gray, The Rule Against Perpetuities (3rd ed.), §§ 20-42, both feel that quia emptores had done away with the determinable fee. But in Walsingham's case, *2 Plowd 577,* "as long as the church of St. Paul shall stand" was good.

(n15)Footnote 102. 2 Bl. Comm. 109, 154, 155.

2 Bl. Comm. 109. "A base, or qualified fee, is such a one as hath a qualification subjoined thereto, and which must be determined whenever the qualification annexed to it is at an end. As, in the case of a grant to A. and his heirs, tenants of the manor of Dale; in this instance, whenever the heirs of A. cease to be tenants of that manor, the grant is entirely defeated. So, when Henry VI granted to John Talbot, lord of the manor of Kingston-Lisle in Berks, that he and his heirs, lords of the said manor, should be peers of the realm, by the title of barons of Lisle; here John Talbot had a base or

qualified fee in that dignity, and the instant he or his heirs quitted the seigniory of this manor the dignity was at an end. This estate is a fee, because by possibility it may endure forever in a man and his heirs; yet as that duration depends upon the concurrence of collateral circumstances, which qualify and debase the purity of the donation, it is therefore a qualified or base fee."

4 Bracton, ch. 28, f. 207, recognized a type of freehold for an indefinite period. "Item ut liberum tenementum sicut ad vitam, tantum vel eodim modo ad tempus indeterminatum absque aliqua certa temporis praefinitione scilicit donec quid feat vel non feat ut si dicatur do tali donec ei providero." (Land is also held as freehold when it is held only for life or for an indefinite period without any fixed limit of time as for instance until such a thing happens or does not happen as if it be said, "I give to such a one until I provide for him.")

(n16)Footnote 103. Touchstone of Common Assurances, 477. *See also* 101. And *see Walsingham's Case, 2 Plowd 557,* "as long as the Church of St. Paul shall stand."

See the following cases: *Roberds v. Markham, 81 F. Supp. 38 (D.D.C. 1948)*(determinable fees were recognized both at common law and in the District of Columbia); *Carr v. Georgia R. Co., 74 Ga. 73 (1884); Wiggins Ferry Co. v. Ohio & M. R. Co., 94 Ill. 83 (1879); Fifty Associates v. Howland, 52 Mass. (11 Met.) 99 (1846); Brattle Square Church v. Grant, 69 Mass. (3 Gray) 142 (1855); Easterbrooks v. Tillinghast, 71 Mass. (5 Gray) 17 (1855); Ashley v. Warner, 77 Mass. (11 Gray) 43 (1858); Attorney General v. Merrimack Mfg. Co., 80 Mass. (13 Gray) 586 (1860); Jamaica Pond Aqueduct v. Chandler, 91 Mass. (9 Allen) 159 (1864); Owen v. Field, 102 Mass. 90 (1869); State v. Brown, 27 N.J.L. (3 Dutch) 13 (1858); Leonard v. Burr, 18 N.Y. 96 (1858); Gillespie v. Broas, 23 N.Y. (Barb.) 370 (1856); Henderson v. Hunter, 59 Pa. 335 (1869).*

(n17)Footnote 104. *Denver & Santa Fe R. Co. v. School Dist. No. 22, 23 P. 978 (Colo. 1890); North v. Graham, 85 N.E. 267 (Ill. 1908); Mendenhall v. First New Church Soc'y, 98 N.E. 57 (Ind. 1912); Staack v. Detterding, 161 N.W. 44 (Iowa 1917); Institution for Sav. v. Roxbury Home for Aged Women, 139 N.E. 301 (Mass. 1923); School Dist. No. 5 v. Everett, 17 N.W. 926 (Mich. 1883); In re Douglass' Estate, 143 N.W. 299 (Neb. 1913); Lyford v. Laconia, 72 A. 1085 (N.H. 1909); Jordan v. Goldman, 34 P. 371 (Okla. 1891); Congregational Soc'y v. Stark, 34 Vt. 243 (1861).*

See Gray on Perpetuities (4th ed.), 15-47; John Maxey Zane *Determinable Fees in American Jurisdictions, 17 Harv. L. Rev. 297 (1904);* Richard R.B. Powell *Determinable Fees, 23 Colum. L. Rev. 207 (1923);* William R. Vance *The Quest for Tenure,* 33 Yale U. 248 (1923); W.R. Vance *Rights of Reverter and Statute Quia Emptores, 36 Yale L. J. 593 (1927);* Charles A. Graves *Estates upon Condition, 5 Va. L. Rev. 373 (1918);* W. W. Jr. *Determinable Fees and Fees upon Condition, 24 Cal. L. Rev. 512 (1936);* 27 Halsbury Laws of England (2d ed.), 665.

(n18)Footnote 105. *Scott County Bd. of Educ. v. Pepper, 311 S.W.2d 189 (Ky. 1958); Ohm v. Clear Creek Drainage Dist., 45 N.W.2d 117 (Neb. 1950); Oldfield v. Stoeco Homes, Inc., 139 A.2d 291 (N.J. 1958); Betts v. Snyder, 19 A.2d 82 (Pa. 1941). See* F.E. Farrer, *Reverter to Donor on a Determinable Fee, 50 L. Q. Rev. 33 (1934).*

Duke v. Sun Oil Co., 320 F.2d 853 (5th Cir. 1963); Etheridge v. United States, 218 F. Supp. 809 (E.D.N.C. 1963); Craig v. Unknown Heirs, 358 P.2d 835 (Okla. 1961); Fremont Lab. Co. v. Starrell Petr. Co., 364 P.2d 773 (Or. 1961); Purvis v. McElveen, 106 S.E.2d 913 (S.C. 1959).

Determinable fee. School Dist. No. 6 v. Russell, 396 P.2d 929 (Colo. 1964).

Fee simple determinable recognized. *Idaho Springs v. Golden Sav. & Loan Ass'n, 480 P.2d 847 (Colo. App. 1970).*

Recognizing determinable fee. *Mayor and City Council of Ocean City v. Taber, 367 A.2d 1233 (Md. 1977).*

(n19)Footnote 106. *McMahon v. Consistory of St. Paul's Reformed Church, 75 A.2d 122 (Md. 1950)*(a possibility of reverter follows upon the creation of a determinable fee).

Where there has been a conveyance of a lot to a school with the retention of a reverter when ceased to be used for school purposes and the grantors later conveyed the property to others but excepted the reversionary interest the title vested in the heirs of the original grantors when the school ceased. *Shifton v. Shearaton, 531 S.W.2d 291 (Mo. 1975).*

(n20)Footnote 107. *Gray v. Gray, 188 S.W.2d 440 (Ky. 1945).*

Fee simple determinable arising out of deed conveying land for park purposes and providing for a reversion if not so used. *Charlotte v. Charlotte Park & Rec. Comm'n, 178 S.E.2d 601 (N.C. 1971).*

(n21)Footnote 108. *Brown v. Independent Baptist Church, 91 N.E.2d 922 (Mass. 1950); University of Vt. & State Agrl. College v. Ward, 158 A. 773 (Vt. 1932); Queen City Park Ass'n v. Gale, 3 A.2d 529 (Vt. 1938).*

(n22)Footnote 109. *Henck v. Lake Hemet Water Co., 69 P.2d 849 (Cal. 1937); University of Vt. & State Agrl. College v. Ward, 158 A. 773 (Vt. 1932)*(fee simple determinable dies of itself).

A determinable fee terminates ipso facto. People *ex rel. Dep't of Pub. Works v. City of Fresno, 26 Cal. Rptr. 853 (1962).*

(n23)Footnote 110. *Chouteau v. St. Louis, 55 S.W.2d 299 (Mo. 1932); Donehue v. Nilges, 266 S.W.2d 553 (Mo. 1954).*

(n24)Footnote 111. *Watson v. Tracy, 133 N.E. 411 (Ind. App. 1921); Moulton v. Trafton, 64 Me. 218 (1874); Farnsworth v. Perry, 22 A. 373 (Me. 1891); Pond v. Douglass, 75 A. 320 (Me. 1909); First Universalist Soc'y v. Boland, 29 N.E. 524 (Mass. 1892).*

(n25)Footnote 112. *Brown v. Independent Baptist Church, 91 N.E.2d 922 (Mass. 1950).*

(n26)Footnote 113. *Williams v. McKenzie, 262 S.W. 598 (Ky. 1924); Union Missionary Baptist Church v. Fyke, 64 P.2d 1203 (Okla. 1937); Stubbs v. Abel, 233 P. 852 (Or. 1925); Young v. Lewis, 76 S.E.2d 276 (W. Va. 1953)*(Devise for life, remainder to devisee's children, if any, and if none to testator's heirs. Testator's heirs as of testator's death took "base fee" subject to divesting on birth of children).

See Allison Dunham, *Possibility of Reverter and Powers of Termination--Fraternal or Identical Twins, 20 U. Chi. L. Rev. 215 (1953).*

(n27)Footnote 114. *Magnolia Petr. Co. v. Suits, 31 F.2d 205 (D.C. Okla. 1928); Rumble v. Strange, 114 S.E. 881 (Ga. 1922); Dean v. Wall, 115 S.E. 78 (Ga. 1922); McIntyre v. Dietrich, 128 N.E. 321 (Ill. 1920); Weppler v. Hoffine, 29 N.E.2d 204 (Ind. 1940), reh'g denied, 30 N.E.2d 549 (Ind. 1942); Scobey v. Beckman, 41 N.E.2d 847 (Ind. App. 1942); Staack v. Detterding, 161 N.W. 44 (Iowa 1917); Reichard v. Chicago, B. & Q. R. Co., 1 N.W.2d 721 (Iowa 1942); Williams v. McKenzie, 262 S.W. 598 (Ky. 1924); Kirchen v. Remenga, 288 N.W. 344 (Mich. 1939); Lyford v. Laconia, 72 A. 1085 (N.H. 1909); Carpenter v. New Brunswick, 39 A.2d 40 (N.J. 1944); Henderson v. Western Carolina Power Co., 157 S.E. 425 (N.C. 1931); Stubbs v. Abel, 233 P. 852 (Or. 1925); Fremont Lab. Co. v. Starrell Petr. Co., 364 P.2d 773 (Or. 1961); Cragin v. Frost Nat'l Bank, 164 S.W.2d 24 (Tex. Civ. App. 1942); University of Vt. & State Agrl. College v. Ward, 158 A. 773 (Vt. 1932).*

Where the estate conveyed is a "base fee" determinable upon the cessation of the use of the property for a purpose specified in the deed, the possibility of reverter is capable of transmission to the grantees of the owner of the reversion and will pass to them under a conveyance of the reversion. *Calhoun v. Hays, 39 A.2d 307 (Pa. 1944).*

(n28)Footnote 115. *Montgomery v. Montgomery, 181 So. 92 (Ala. 1938).*

"Grant, bargain, sold, released and conveyed." with no habendum ettenendum and warranty clauses conveyed only a base or conditional fee in absence of statute. *Brookbank v. Benedum-Trees Oil Co., 131 A.2d 103 (Pa. 1957).*

(n29)Footnote 116. See Restatement, Property, § 16.

(n30)Footnote 117. *Union Missionary Baptist Church v. Fyke, 64 P.2d 1203 (Okla. 1937).*

(n31)Footnote 118. *Fall Creek School Twp. v. Shuman, 103 N.E. 677 (Ind. App. 1913)*("as long as" created a determinable fee); *University Scholarship Corp. v. Parduhn, 70 P.2d 84 (Okla. 1937); Mountain City Missionary Baptist Church v. Wagner, 249 S.W.2d 875 (Tenn. 1952).*

But a fee simple determinable was chargeable with equitable waste in *Board v. Nevada Sch. Dist., 251 S.W.2d 20 (Mo. 1952).*

(n32)Footnote 119. *Boye v. Boye, 133 N.E. 382 (Ill. 1921)*(estate may be possessed, encumbered, sold, and conveyed in the same manner as a fee simple, but the executory interest created by the happening of the condition which terminates such estate cannot be defeated); *Goodman v. Heinen, 9 N.E.2d 348 (Ill. App. 1937); Stephenson v. Cavendish, 59 S.E.2d 459 (W. Va. 1950).*

(n33)Footnote 120. *Connecticut Junior Republic Ass'n v. Litchfield, 174 A. 304 (Conn. 1934).*

(n34)Footnote 121. *Dunkel v. Homindustries, 9 N.E.2d 949 (N.Y. 1937); In re Voorhee's Will, 106 N.Y.S.2d 699 (1951); Stephenson v. Cavendish, 59 S.E.2d 459 (W. Va. 1950). See Hite v. Barber, 145 S.W.2d 1057 (Ky. 1940).*

(n35)Footnote 122. *Board v. Nevada Sch. Dist., 251 S.W.2d 20 (Mo. 1952); Sebastian Indep. Sch. Dist. v. Ballenger, 297 S.W.2d 238 (Tex. Civ. App. 1956)*("As long as shall be used for floodway" created determinable fee).

Railroad grants prior to 1871 probably created determinable fees. *Denver & R.G. R. Co. v. Mills, 222 F. 481 (8th Cir. 1915).* After 1871 they created only easements. *Great N. R. Co. v. United States, 315 U.S. 262 (1942)*overruling *Union Pac. R. Co. v. Snow, 231 U.S. 204 (1913); St. Onge v. Day, 18 P. 278 (Colo. 1888).*

Determinable fee arising out of provision that if property should cease to be used for religious purposes it should revert to the grantor. *Roberds v. Markham, 81 F. Supp. 38 (D.D.C. 1948).*

Conveyance for use as a parsonage with a reverter clause on cessation of use held a determinable fee. *Moore v. Second Congregational Church, 175 P.2d 90 (Colo. 1946).*

In Ohio a determinable fee does not arise where there is a reverter clause which follows an absolute grant and which does not contain words of inheritance, *i.e.,* to the grantor and his heirs. *First New Jerusalem Church v. Singer, 34 N.E.2d 1007 (Ohio App. 1941).*

(n36)Footnote 123. *Johnson v. Speer, 279 S.W.2d 711 (Tenn. App. 1954); Pure Oil Co. v. Miller-McFarland Drilling Co., 34 N.E.2d 854 (Ill. 1941)*(as long as it shall be used as a church and to revert back to the original owner created a "conditional termination" with a "naked possibility of reverter" in the grantor).

Determinable fee is not converted into a fee simple absolute because of failure of void executory interests. *Woman's Club of St. Albans v. James, 213 S.E.2d 469 (W. Va. 1975).*

Maryland recognizes a fee simple determinable. *Mayor & City Council of Ocean City v. Tabor, 367 A.2d 1233 (Md. 1977).*

(n37)Footnote 124. *Carr v. Herrmann, 158 N.E.2d 770 (Ill. 1959).*

A bequest to trustees in "fee simple" in trust for life of wife then to five nieces and nephews or their heirs gave the trustees a determinable fee with an executory devise to the nephews and nieces. *Kanawha Valley Bank v. Hornbeck, 151 S.E.2d 694 (W. Va. 1966).*

"As long as" or "until" denotes the determinable fee "upon condition that" or "in the event that" denotes a fee upon condition. *Bennett v. Charles Corp., 226 S.E.2d 559 (W. Va. 1976).*

(n38)Footnote 125. *Phelps v. Bates, 5 A. 301 (Conn. 1886); Loomis v. G. F. Heublein & Bros., 99 A. 483 (Conn. 1916); Lynch v. Bunting, 29 A.2d 155 (Del. 1942),* a deed which read: "and the parties of the first part have deeded this land to parties of the second part for the purpose of school and no other purpose and shall be good so long as there is a school house kept on it and a school kept there at the customary time of teaching." The habendum of the deed read as follows: "to have and to hold the lands and premises hereby bargained and sold or intended so to be with the appurtenances thereunto to the said parties of the second part, their heirs and assigns and for the only proper use, benefit and behoof of the said parties of the second part, their heirs and assigns forever, "created a determinable fee; *Coquillard v. Coquillard, 113 N.E. 474 (Ind. App. 1916); Staack v. Detterding, 161 N.W. 44 (Iowa 1917); Murphy v. Murphy, 207 S.W. 491 (Ky. 1919); Williams v. McKenzie, 262 S.W. 598 (Ky. 1924); Brown v. Independent Baptist Church, 91 N.E.2d 922 (Mass. 1950); Board v. Nevada Sch. Dist., 251 S.W.2d 20 (Mo. 1952); Zubler v. Porter, 120 A. 194 (N.J.L. 1923); Henderson v. Western Carolina Power Co., 157 S.E. 425 (N.C. 1931). See Elmore v. Austin, 59 S.E.2d 205 (N.C. 1950). Peters v. East Penn Twp. Sch. Dist., 126 A.2d 802 (Pa. Super. 1956)*(so long as used for school purposes created a determinable fee though there was no express reverter clause, not a mere statement of purpose); *Mountain City Missionary Baptist Church v. Wagner, 249 S.W.2d 875 (Tenn. 1952)*(whenever property ceased to be used as a church it would revert created a determinable fee); *Stephens County v. Mid-Kansas Oil & Gas Co., 254 S.W. 290 (Tex. 1923).*

Provision that land would revert to grantor if grantee predeceased grantor created a fee simple upon a limitation and not upon a condition subsequent. *Corley v. Parson, 213 S.E.2d 693 (Ga. 1975).*

In *McGiboney v. Board of Educ., 387 S.W.2d 869 (Ky. 1965),* the court held that a provision that if the intended purpose failed the property should revert to the grantor upon payment of a stated sum created a contract of repurchase not a determinable fee.

Determinable fee ceases automatically while a fee upon condition requires re-entry. *Department of Transp. v. Knight, 232 S.E.2d 72 (Ga. 1977).*

(n39)Footnote 126. *Foreman Trust & Sav. Bank v. Seelenfreund, 161 N.E. 88 (Ill. 1928); Charlotte Park & Rec. Comm'n v. Barringer, 88 S.E.2d 114 (N.C. 1955)*(fee simple determinable as long as used by white race only is valid).

A limitation to one and his heirs but if he died without heirs then over created a determinable fee. *Stephenson v. Kuntz, 49 S.E.2d 235 (W. Va. 1948).* Similar where "death without issue." *Turpin v. Jarrett, 37 S.E.2d 124 (N.C. 1946).*

Where the husband conveyed property to his wife, reserving to himself a life estate in a one-half interest and providing that if wife predeceased him, all the property would revert to and vest in him, the wife received a base fee defeasible on her dying before her husband, and disposition by the wife is subject to this contingency. *Moore v. Moore, 201 S.E.2d 133 (Ga. 1973).*

A trust to daughter for life and then to her living children, if any, or, if none, to the settlor's successors created a life estate with alternative contingent remainders with a reversion in the settlor which passed under the terms of his will, not a fee simple determinable. *In re Bentley's Estate, 303 N.E.2d 166 (Ill. App. 1973).*

(n40)Footnote 127. *See* in general: *Dick v. Darden, 85 So. 369 (Ala. 1920); Denver & S.F.R. Co. v. School Dist.*

No. 22, 23 P. 978 (Colo. 1890); Lynch v. Bunting, 29 A.2d 155 (Del. 1942); Wiggins Ferry Co. v. Ohio & M. R. Co., 94 Ill. 83 (1879); Jamaica Pond Aqueduct Co. v. Chandler, 91 Mass. (9 Allen) 159 (1864); Gillespie v. Broas, 23 N.Y. (Barb.) 370 (1856); Leonard v. Burr, 18 N.Y. 96 (1858); Henderson v. Hunter, 59 Pa. 335 (1869); Washburn, Real Property (6th ed.), §§ 955, 970, 971, 1640; 4 Kent's Comm. 9, 10, 129. *See also* English works, in addition to citations above, Sheppard-Touchstone, Common Assurance, 101; 2 Bl. Comm. 109, 154, 155; 1 Greenleaf-Cruise, Real Property, tit. 4, §§ 72-76; 2 Flint, Real Property, §§ 136-138; Preston, Estates, 431, 441; Challis, Real Property, 197-208.

Base, qualified or determinable fees are recognized in *Indiana. Watson v. Tracy, 133 N.E. 411 (Ind. App. 1921).*

Language "will revert" indicated a determinable fee rather than a fee upon condition subsequent. *Pfeffer v. Lebanon Land Dev. Corp., 360 N.E.2d 1115 (Ill. App. 1977).*

The Statute Quia Emptores is not considered as having done away with qualified or determinable fees in *Massachusetts. Institution for Sav. v. Roxbury Home for Aged Women, 139 N.E. 301 (Mass. 1923).*

(n41)Footnote 128. *North v. Graham, 85 N.E. 267 (Ill. 1908); Brown v. Trustees of Schools of Twp. No. 5, 85 N.E.2d 747 (Ill. 1949).*

(n42)Footnote 129. *Dyer v. Siano, 11 N.E.2d 451 (Mass. 1937).*

(n43)Footnote 130. Sheppard-Touchstone, 121, 125. *First Universalist Soc'y v. Boland, 29 N.E. 524 (Mass. 1892). See Fifty Assocs. v. Howland, 52 Mass. (11 Met.) 99 (1846);* Church in *Brattle Square v. Grant, 69 Mass. (3 Gray) 142 (1855); Easterbrooks v. Tillinghast, 71 Mass. (5 Gray) 17 (1855); Ashley v. Warner, 77 Mass. (11 Gray) 43 (1858); Attorney General v. Merrimack Mfg. Co., 80 Mass. (13 Gray) 586 (1860); Owen v. Field, 102 Mass. 90 (1869); Markey v. Smith, 16 N.E.2d 20 (Mass. 1938); Brown v. Independent Baptist Church, 91 N.E.2d 922 (Mass. 1950); Elmore v. Austin, 59 S.E.2d 205 (N.C. 1950).*

So long as the same was used for school purposes created a determinate fee. No reservation of a possibility of reverter. *Bailey v. Eagle Mountain Tel. Co., 303 S.W.2d 726 (Tenn. 1957).*

A fee simple determinable automatically expires upon a failure of grantees to comply with the limitations of the deed. *Stolarick v. Stolarick, 363 A.2d 793 (Pa. Super. 1976).*

(n44)Footnote 131. *McIntyre v. Dietrich, 128 N.E. 321 (Ill. 1920).*

See the following cases: *Carter v. Couch, 47 So. 1006 (Ala. 1908).* Fee simple determinable ended where the city in a grant was required to improve the property for park purposes within five years and had not done so within nine years. *Owenby v. City of Quincy, 95 So. 2d 426 (Fla. 1957); Mendenhall v. First New Church Soc'y, 98 N.E. 57 (Ind. 1912); Watson v. Tracy, 133 N.E. 411 (1912); Pond v. Douglass, 75 A. 320 (Me. 1909); Institution for Sav. v. Roxbury Home for Aged Women, 139 N.E. 301 (Mass. 1923)*(in a conveyance to a banking institution for its use with a gift over in case the banking institution should cease to exist, the gift over was held void but this did not defeat the possibility of reverter; qualified or determinable fees are recognized in Massachusetts). Even where the statute gave the municipality a fee simple determinable and land was dedicated to streets by the filing of a platted map, the title ended when the city vacated the street. *Dell v. Lincoln, 102 N.W.2d 62 (Neb. 1960). Lyford v. Laconia, 72 A. 1085 (N.H. 1909); Paul v. Willoughby, 169 S.E. 226 (N.C. 1933); Stubbs v. Abel, 233 P. 852 (Or. 1925); Citizens Elec. Co. v. Susquehana Boom Co., 113 A. 559 (Pa. 1921).*

A bequest for a particular purpose created in the beneficiary a determinable fee which terminated if the stated purpose failed. *In re Pruner's Estate, 162 A.2d 626 (Pa. 1960). See Comment, Abandonment of School Sites in Fee Simple Determinable Estates, 25 Mo. L. Rev. 446 (1960).*

Stephens County v. Mid-Kansas Oil & Gas Co., 254 S.W. 290 (Tex. 1923)(terminable fee created in oil and gas). *See* Comment, *Abandonment of School Sites in Fee Simple Determinable Estates, 25 Mo. L. Rev. 446 (1960).*

Reverter clause on failure of grantee to keep up mortgage payments created a fee simple determinable. *Lovlie v. Plum, 250 N.W.2d 56 (Iowa 1977).*

(n45)Footnote 132. *Epworth Assembly v. Ludington & N.R. Co., 211 N.W. 99 (Mich. 1926).*

Provision that land sold for the public park should never be used for industrial purposes did not create a base fee. *Conveyance of Land Belonging to City of DuBois, 335 A.2d 352 (Pa. 1975).*

(n46)Footnote 133. *Roberds v. Markham, 81 F. Supp. 38 (D.D.C. 1948); Yarbrough v. Yarbrough, 269 S.W. 36 (Tenn. 1925).*

Language "will revert" indicated a determinable fee rather than a fee upon condition subsequent. *Pfeffer v. Lebanon Land Dev. Corp., 360 N.E.2d 1115 (Ill. App. 1977).*

(n47)Footnote 134. *Alexander v. Morris & Co., 270 S.W. 88 (Ark. 1925). See Stephens County v. Mid-Kansas Oil & Gas Co., 254 S.W. 290 (Tex. 1923).*

Reverter clause on failure of grantee to keep up mortgage payments created a fee simple determinable. *Lovlie v. Plum, 250 N.W.2d 56 (Iowa 1977).*

(n48)Footnote 135. A municipality is subject to the possibility of reverter in a conveyance to it in fee simple determinable. *Metropolitan Dade County v. Leslie Enters., 257 So. 2d 29 (Fla. 1971).*

(n49)Footnote 136. Upon condemnation, entire award of determinable fee or fee upon condition subsequent belongs to holder of the immediate estate. *State v. Cooper, 131 A.2d 756 (N.J. 1957), cert. den., 355 U.S. 829 (1957); but see In re Cook's Will, 277 N.Y.S. 26, aff'd, 198 N.E. 404 (1935).*

(n50)Footnote 137. *Guess v. Morgan, 26 S.E.2d 424 (Ga. 1943).*

Deed "upon the express condition and limitation" that on cessation for use for school purposes the property revert to the grantor conveyed a determinable fee. *Moore v. Wells, 93 S.E.2d 731 (Ga. 1956).*

(n51)Footnote 138. *Kellogg v. Meadows, 215 S.W.2d 951 (Ky. 1948); State v. Cheyenne County, 60 N.W.2d 593 (Neb. 1953); In re Platman's Estate, 72 N.Y.S.2d 28 (1947); Hinton v. Bowen, 230 S.W.2d 965 (Tenn. 1950); Mountain City Missionary Baptist Church v. Wagner, 249 S.W.2d 875 (Tenn. 1952); Loose v. Locke, 171 P.2d 849 (Wash. 1946); King County v. Hanson Inv. Co., 208 P.2d 113 (Wash. 1949).*

Base or qualified fee is alienable by deed or will. *Dingess v. Drake, 64 S.E.2d 601 (W. Va. 1951); Young v. Lewis, 76 S.E.2d 276 (W. Va. 1953).*

(n52)Footnote 139. *Bunting v. Cobb, 66 S.E.2d 661 (N.C. 1951).*

(n53)Footnote 140. Deed, "to have and to hold for school purposes, so long as it is used for that purpose," created a fee simple determinable. *Bailey v. Eagle Mtn. Tel. Co., 303 S.W.2d 726 (Tenn. 1957).*

(n54)Footnote 141. Deed to a city of land for park purposes, but if not so used to revert to grantor's heirs, did not create a fee simple determinable nor a fee upon condition subsequent but an executory interest in the heirs void for remoteness. *Standard Knitting Mills, Inc. v. Allen, 424 S.W.2d 796 (Tenn. 1967).*

(n55)Footnote 142. *Keller v. Keller, 92 S.W.2d 157 (Mo. 1936).*

(n56)Footnote 143. *Connecticut Junior Republic Ass'n v. Litchfield, 174 A. 304 (Conn. 1934); Landers v. Landers, 151 S.W. 386 (Ky. 1912); Fox v. Van Fleet, 170 S.W. 185 (Ky. 1914).*

(n57)Footnote 144. *Staack v. Detterding, 161 N.W. 44 (Iowa 1917).*

(n58)Footnote 145. *Watson v. Tracy, 133 N.E. 411 (Ind. App. 1921). See Warrington v. Chester, 128 N.E. 549 (Ill. 1920); Brill v. Lynn, 270 S.W. 20 (Ky. 1925).*

The interest of an easement may be a base, qualified, or determinable fee. *Eastman v. Piper, 229 P. 1002 (Cal. App. 1924).*

A perpetual lease upon condition conveys to the lessee a determinable or base fee. *Piper v. Meredith, 139 A. 294 (N.H. 1927).*

(n59)Footnote 146. *Davis v. St. Joe Sch. Dist., 284 S.W.2d 635 (Ark. 1955); Loomis v. G. F. Heublein & Bro., 99 A. 483 (Conn. 1916); Markey v. Smith, 16 N.E.2d 20 (Mass. 1938); Parkhurst v. Jonsberg, 84 N.E.2d 538 (Mass. 1949)*(until created a determinable fee); *Brown v. Independent Baptist Church, 91 N.E.2d 922 (Mass. 1950)*("as long as" created a determinable fee); *Consolidated Sch. Dist. No. 102 v. Walter, 66 N.W.2d 881 (Minn. 1954); North Hampton Sch. Dist. v. North Hampton Congregational Soc'y, 84 A.2d 833 (N.H. 1951); Cooper v. Milikovsky, 112 A.2d 616 (Pa. 1955).*

"As long as" creates fee simple determinable, not fee upon condition subsequent. *Lindsay v. Wigal, 250 N.E.2d 755 (Ind. App. 1969).*

Words of duration such as "while," "during," "as long as," standing alone without resort to purpose of instrument are not creative of fee simple determinable. *Hagaman v. Board of Educ. of Woodbridge Twp., 285 A.2d 63 (N.J. 1971).*

"In case the property herein described is abandoned the same shall revert" created a determinable fee, with an alienable possibility of reverter, not an inalienable right of reentry. *Fennell v. Foskey, 225 S.E.2d 231 (Ga. 1976).*

"As long as" or "until" denotes the determinable fee; "upon condition that" or "in the event that" denotes a fee upon condition. *Bennett v. Charles Corp., 226 S.E.2d 559 (W. Va. 1976).*

Determinable fee was designated by the words "until," "while," or "so long as." *Matter of Reiger's Estate, 400 N.Y.S.2d 881 (1977).*

(n60)Footnote 147. *Storkan v. Zisha, 94 N.E.2d 185 (Ill. 1950).*

(n61)Footnote 148. *Low v. Blakeney, 85 N.E.2d 741 (Ill. 1949).*

(n62)Footnote 149. *Richardson v. Holman, 33 So. 2d 641 (Fla. 1948); Pure Oil Co. v. Miller-McFarland Drilling Co., 34 N.E.2d 854 (Ill. 1941)*(a conditional limitation not a condition subsequent); *Burkholder v. Burkholder, 107 N.E.2d 729 (Ill. 1952); Consolidated Sch. Dist. No. 102 v. Walter, 66 N.W.2d 881 (Minn. 1954); Hart v. Lake, 112 N.E. 286 (Ill. 1916)*(determinable fee and fee upon condition subsequent used interchangeably).

Wherever a fee simple is created to automatically expire upon the occurrence of stated event it is a fee simple determinable. *McDougall v. Palo Alto Unified Sch. Dist., 28 Cal. Rptr. 37 (1963).*

Where the fee is subject to a possibility of reverter, the reversion to the grantor is effective automatically upon the

occurrence of the stated event without an act of the grantor or his heirs. *Lake View Mem. Hosp. v. Vermilion County, 318 N.E.2d 752 (Ill. 1974).*

Provision in a deed that the property should revert to the grantor if the grantee should predecease the grantor provided the grantee to hold the property in fee simple only so long as he lived, created a fee simple upon a limitation, not upon a condition subsequent. *Corley v. Parson, 213 S.E.2d 693 (Ga. 1975).*

Fee simple determines automatically while fee on condition subsequent requires the grantor to terminate the estate. *Babb v. Rand, 345 A.2d 496 (Me. 1975).*

Determinable fee ends automatically. Fee upon condition subsequent requires reentry. *Mayor & City Council of Ocean City v. Thaer, 37 A.2d 1233 (Md. 1977).*

(n63)Footnote 150. In *Foley v. Gamester, 170 N.E. 799 (Mass. 1930),* the plaintiff's assignor leased premises to the defendant "for as many years as desired by the party of the second part" (the defendant), at a yearly rent of $400. The court said: "In this Commonwealth ... we consider it to be settled that where the lessee is not bound for any definite period and is at liberty at any time to terminate the tenancy, the estate is not a term of certain duration, and as a lessee is not bound to remain for any definite period, the landlord is not prevented from ending the relation...

"In the case at bar the defendant could remain according to the language of the instrument 'for as many years as desired' -- the term was not fixed, it could be determined at any time by him -- its duration was at his will, and therefore the essential element of a term for years was lacking. The tenancy had no certain duration as to the defendant and therefore there could be no certain duration as to the plaintiff. It was in fact a tenancy at will."

In *First New Jerusalem Church v. Singer, 34 N.E.2d 1007 (Ohio 1941),* the defendants in an action to quiet title claimed a reversionary interest as heirs of a grantor under an 1849 deed, which said: "... The above tract is granted to... trustees of aforesaid New Church Society... and their heirs forever, to be held by them in trust forever... Now the conditions of this grant... is that the above named meeting house is to be used for New Church purposes. Provided that should it ever cease to be used for said purposes that then the land is to return to its original owners." The court held that the grant created a fee simple absolute, saying that the reverter clause was not of sufficient force to make the grantee's estate of a determinable fee in the absence of words of inheritance used with the reversionary interests. *In re Wyatt's Claim, 141 N.E.2d 308 (1955)* (confusing determinable fee and right-of-way).

In *St. Louis-San Francisco R. Co. v. White, 132 S.W.2d 807 (Ark. 1939),* the words "as long as used for railroad purposes" was held to create an easement, not a determinable fee based on the grantor's intent. *But see Williams v. Kirby Sch. Dist. No. 32, 181 S.W.2d 488 (Ark. 1944); Milner v. New Edinburg Sch. Dist., 200 S.W.2d 319 (Ark. 1947),* where similar language was held to create determinable fees.

(n64)Footnote 151. Grant of land for railway purposes conveys only an easement even though deed purports to be in fee. *Abercrombie v. Simmons, 81 P. 208* (Kan. 538).

Contra and creating a determinable fee. *Lipetz v. Papish, 125 N.E.2d 432 (N.Y. 1955); Lacy v. Montgomery, 124 A.2d 492 (Pa. 1956)*(base fee under abandoned railroad reverts to owners, their heirs or assigns at time of condemnation).

(n65)Footnote 152. *Rutten v. Wood, 57 N.W.2d 112 (N.D. 1953).*

Provision for sale of the property and payment of a sum to the grantor upon the happening of an event was a lien instead of a determinable fee. *Churches Home For Business Girls, Inc. v. Manget Found., Inc., 139 S.E.2d 138 (Ga. 1964), aff'd, 140 S.E.2d 848 (Ga. 1965).*

(n66)Footnote 153. *Dougherty v. Greene, 67 So. 2d 297 (Miss. 1953). See Lewis G. Nosburg Jr., Oil and Gas and*

the Defeasible Fee, 12 Okla. L. Rev. 233 (1959).

(n67)Footnote 154. *Hinman v. Barnes, 66 N.E.2d 911 (Ohio 1946).*

(n68)Footnote 155. *Brightwell v. International-Great N. R. Co., 49 S.W.2d 437 (Tex. 1932).*

(n69)Footnote 156. *Sherman v. Petroleum Exploration, 132 S.W.2d 768 (Ky. 1939).*

(n70)Footnote 157. *Cincinnati, H. & D. R. Co. v. Wachter, 70 N.E. 974 (Ohio 1904)*(an easement is the right to use land for a special purpose); *In re Wyatt's Claim, 141 N.E.2d 308 (Ohio 1955).*

(n71)Footnote 158. Coke on Littleton, § 56. 2 Bl. Comm. 121; *Dickson v. Alexandria Hosp., 177 F.2d 876 (4th Cir. 1949)*(a defeasible fee only upon remarriage becoming fee simple absolute on death without remarriage); *In re Reinhardt, 16 P. 13 (Cal. 1887)*(life estate determinable); *Raulerson v. Saffold, 61 So. 2d 926 (Fla. 1952)*(fee simple determinable); *McDonald v. Suarez, 93 S.E.2d 16 (Ga. 1956)*(supported by other language gift absolute with limitation over on remarriage); *Cowman v. Glos, 99 N.E. 586 (Ill. 1912)*(life estate determinable); *Brunk v. Brunk, 137 N.W. 1065 (Iowa 1912); Jones v. Clyman, 188 N.W. 954 (Iowa 1922)*(determinable life estate); *Johnson County Nat'l Bank & Trust Co. v. Bach, 369 P.2d 231 (Kan. 1962); Taylor v. Farrow, 239 S.W.2d 73 (Ky. 1951)*(determinable fee); *Ramsey v. Holder, 291 S.W.2d 556 (Ky. 1956)*(determinable fee); *Fannin v. Segraves, 198 S.W.2d 802 (Ky. 1946)*(determinable life estate); *Cuddy v. McIntyre, 229 S.W.2d 315 (Ky. 1950)* (determinable fee); *Shaw v. Hussey, 41 Me. 495 (1856)* (determinable fee); *Pate v. Evans, 97 So. 2d 737 (Miss. 1957)*(determinable life estate); *Anderson v. Anderson, 229 N.W. 124 (Neb. 1930)*(fee simple determinable); *Wetzel v. Besecker, 64 N.E.2d 602 (Ohio App. 1945)*(determinable life estate); *Rohrbach v. Sanders, 62 A. 27 (Pa. 1905)*(determinable fee); *Kautz v. Kautz, 76 A.2d 398 (Pa. 1950)*(defeasible becoming fee simple absolute on death without remarriage); *In re Burpee's Estate, 80 A.2d 721 (Pa. 1951)*(defeasible fee); *Hinton v. Bowen, 230 S.W.2d 965 (Tenn. 1950)* (determinable fee); *Banks v. Banks, 229 S.W.2d 99 (Tex. Civ. App. 1950)*(determinable life estate); *Pythian Home for Orphans v. Barrow, 346 S.W.2d 426 (Tex. Civ. App. 1961)*(determinable fee); *In re Mattison's Estate, 177 A.2d 230 (Vt. 1962); In re Baird's Will, 177 N.W. 23 (Wis. 1920)*(fee simple determinable).

(n72)Footnote 159. *Hopson v. Hopson, 138 S.W.2d 365 (Ky. 1940).*

Devise to wife and daughter and their descendants with interest of each to pass to the other if died without issue, created a defeasible fee and not a mere life estate. *Bradford v. Federal Land Bank of New Orleans, 338 So. 2d 388 (Miss. 1976).*

(n73)Footnote 160. *In re Voorhee's Will, 106 N.Y.S.2d 699 (1951)*(devisee subject to limitations over on death without issue could invade principal).

(n74)Footnote 161. *Renner v. Huntington-Hawthorne Oil & Gas Co., 244 P.2d 895 (Cal. 1952).*

Power of sale given to holder of a fee determinable upon marriage permitted passing a good title. *Raulerson v. Saffold, 61 So. 2d 926 (Fla. 1952).*

Similar in case of life tenant. *Long v. Wood, 253 S.W.2d 731 (Tenn. 1952).*

(n75)Footnote 162. *Gillespie v. Broas, 23 N.Y. (Barb.) 370 (1856);* Board of Educ. v. Van Wert; *Betts v. Snyder, 19 A.2d 82 (Pa. 1941); McDougall v. Palo Alto Unified Sch. Dist., 28 Cal. Rptr. 37 (1963).*

See Comment, *Abandonment of School Sites in Fee Simple Determinable Estates, 25 Mo. L. Rev. 446 (1960).*

(n76)Footnote 163. Determinable fee fails though limitation over is too remote. *Leonard v. Burr, 18 N.Y. 96 (1858); Yarbrough v. Yarbrough, 269 S.W. 36 (Tenn. 1925).*

"As long as" created a "fee upon condition subsequent" which ripened into a fee simple absolute after long use. *Bernard v. Bowen, 198 S.E. 584 (N.C. 1938).*

Right of reverter is not lost though continued use of the property for the stated purpose becomes legally impossible. *Fleming County Bd. of Educ. v. Hall, 380 S.W.2d 273 (Ky. 1964).*

(n77)Footnote 164. Buildings revert. *Williams v. Kirby Sch. Dist. No. 32, 181 S.W.2d 488 (Ark. 1944); Webster County Bd. of Educ. v. Gentry, 24 S.W.2d 910 (1930); Miller v. Common Sch. Dist. No. 99, 43 N.W.2d 102 (Minn. 1950); New Hebron Consol. Sch. Dist. v. Sutton, 118 So. 303 (Miss. 1928).*

Buildings on determinable fee do not revert when the fee determines. *Low v. Blakeney, 403 Ill. 156 (1949); Rose v. Board of Dirs., Sch. Dist. No. 94, 179 P.2d 181 (Kan. 1947); Schwing v. McClure, 166 N.E. 230 (Ohio 1929); May v. Board of Educ., 12 Ohio App. 456 (1920)*(held trade fixture).

(n78)Footnote 165. *McCulloch's Estate v. Conrad, 52 N.W.2d 67 (Iowa 1952); Voss v. Voss, 129 N.E.2d 322 (Ohio 1955).*

Determinable fee designated by the words "until," "while," or "so long as." *Matter of Reigers Estate, 400 N.Y.S.2d 881 (1977).*

(n79)Footnote 166. *Kelley v. North Morris Realty Co., 59 A.2d 811 (N.J. 1948), aff'd, 64 A.2d 73 (N.J. 1949).*

(n80)Footnote 167. *Weinberg v. Werft, 218 S.W.2d 398 (Ky. 1949).*

(n81)Footnote 168. *Hall v. Turner, 14 S.E. 791 (N.C. 1892), overruling School Committee v. Kesler, 67 N.C. 443 (1872)*("as long as" held a "base fee") which could not be created in North Carolina; *Lacy v. Montgomery, 124 A.2d 492 (Pa. 1956).*

Determinable fee ceases automatically while a fee upon condition requires re-entry. *Department of Transp. v. Knight, 232 S.E.2d 72 (Ga. 1977).*

(n82)Footnote 169. *Raleigh County v. Winding Gulf Collieries, 152 F.2d 382 (4th Cir. 1945), cert. denied, 382 U.S. 844 (1946); Taylor v. School Dist. No. 45, 216 S.W.2d 789 (Ark. 1949); Richey v. Corralitors Union Sch. Dist., 228 P. 348 (1924); Mosca Town Co. v. Wellington, 89 P. 783 (Colo. 1907); Rustin v. Butler, 24 S.E.2d 318 (Ga. 1943); Malone v. Kitchen, 137 N.E. 562 (Ind. App. 1922); Miller v. Common Sch. Dist. No. 99, 43 N.W.2d 102 (Minn. 1950)(1951).*

Contra, Rumford Falls Power Co. v. Waishwill, 147 A. 343 (Me. 1929); Schwing v. McClure, 166 N.E. 230 (Ohio 1929); Pennsylvania R. Co. v. Parke, 42 Pa. 31 (1862).

(n83)Footnote 170. *Miller v. Common Sch. Dist. No. 99, 43 N.W.2d 102 (Minn. 1950).*

Contra, Sewell v. Reinhardt, 219 P.2d 996 (Okla. 1950)(school house on determinable fee).

(n84)Footnote 171. *Burdette v. Jones, 72 N.E.2d 152 (Ohio 1947)*(so express reservation of reverter is not necessary to create determinable fee).

(n85)Footnote 172. *Noyes v. St. Louis, A. & T. H. R. Co., 21 N.E. 487 (Ill. 1889)*(courts disfavor determinable fees as tending to defeat vested interests and leave the title in doubt).

Kentucky has, by statute, (K.R.S. 381.218) converted a determinable fee into a fee upon condition subsequent, making

the fee simple absolute if the event does not happen within thirty years after the interest is created.

Fees upon condition subsequent are favored over fee simples determinables in order to avoid a forfeiture wherever possible. *Hardman v. Dahlonega-Lumpkin Cty. Chamber of Commerce, 233 S.E.2d 753 (Ga. App. 1977).*

(n86)Footnote 173. Reverter clause necessary to create a defeasible fee. *Gordon v. Whittle, 57 S.E.2d 169 (Ga. 1950); Gray v. Harriet Lane Home for Invalid Children, 64 A.2d 102 (Md. 1949); Gahagan v. Texas & Pac. R. Co., 231 S.W.2d 762 (Tex. Civ. App. 1950).*

Contra holding, *Gray v. Blanchard, 25 Mass. (8 Pick.) 284 (1829).*

Absence of words of inheritance in reverter clause caused deed to be construed as passing a fee simple absolute with a covenant and not a determinable fee. *First New Jerusalem Church v. Singer, 34 N.E.2d 1007 (Ohio 1941).*

Absence of language of reversion prevented a statement of purpose from being a determinable fee. *Cummings v. United States, 409 F. Supp 1064 (M.D.N.C. 1976).*

(n87)Footnote 174. *See* § 1918.

(n88)Footnote 175. *Savanna Sch. Dist. v. McLeod, 290 P.2d 593 (Cal. App. 1955).*

Change of conditions did not ripen fee simple determinable into a fee simple absolute. *Williamson v. Grizzard, 387 S.W.2d 807 (Tenn. 1965).*

(n89)Footnote 176. *See* § 1864.

(n90)Footnote 177. *Miller v. Brookville, 89 N.E.2d 85 (Ohio 1949).*

Kentucky has abolished the determinable fee and the possibility of a reverter by statute, making such an estate to be fee simple subject to conditions subsequent and right of re-entry. Ky. Acts 1960, ch. 167, §§ 4-7.

(n91)Footnote 178. An agreement to reconvey a royalty interest within 6 months upon failure to drill created a fee upon condition subsequent, not a determinable fee, and a statute of limitations as to actions barred the right of re-entry. *Preas v. Phebus, 272 P.2d 159 (Utah 1954)*(if the fee had determined adverse possession, would have been required to pass title).

(n92)Footnote 179. *Weppler v. Hoffine, 29 N.E.2d 204, reh'g denied, 30 N.E.2d 549 (Ind. 1940).*

(n93)Footnote 180. "As long as she remains my widow" is a determinable life estate. *Dickson v. Alexandria Hosp., 177 F.2d 876 (4th Cir. 1949); Anderson v. Anderson, 46 P.2d 98 (Or. 1935).*

"As long as she remains my widow" creates a determinable fee in Pennsylvania by statute reversing the common law. *Kautz v. Kautz, 76 A.2d 398 (Pa. 1950).*

(n94)Footnote 181. *Miller v. Common Sch. Dist. No. 99, 43 N.W.2d 102 (Minn. 1950); Preas v. Phebus, 272 P.2d 159 (Utah 1954).*

So long as used for school purposes created a determinable fee, though there was no express reverter clause, not a mere statement of purpose. *Peters v. East Penn. Twp. Sch. Dist., 126 A.2d 802 (Pa. 1956).*

After fee determines former fee, owner is not entitled to improvements made by him. *Paris v. Clay, 158 S.E.2d 377 (Ga. 1967).*

(n95)Footnote 182. *Colby v. Sun Oil Co., 288 S.W.2d 221 (Tex. Civ. App. 1956).*

(n96)Footnote 183. *Miller v. Common Sch. Dist. No. 99, Lyon County, 43 N.W.2d 102 (Minn. 1950).*

Contra, under similar circumstances, *Sewell v. Reinhardt, 219 P.2d 996 (Okla. 1950)*(school house on determinable fee). *See Stephens v. Stephens, 287 P.2d 902 (Okla. 1955),* to effect that fixtures did not revert to the holder of a possibility of reverter when determinable fee ended.

Where the owner of land donated it to a school district with a provision in the deed that it would revert to the donor in the event that the land ceased to be used for school purposes, it was held that the buildings erected by the school district became part of the realty and belonged to the owner when title to the land reverted. *Williams v. Kirby Sch. Dist. No. 32, 181 S.W.2d 488 (Ark. 1944).*

Where grant of school lands contained reverter clause, school board on abandonment could sell buildings and allow land to revert under 1857 statute. *Brown v. Trustees of Schs. of Twp. No. 5, 85 N.E.2d 747 (Ill. 1949); Low v. Blakeney, 85 N.E.2d 741 (Ill. 1949).*

Holding that improvements made by the owner of a fee simple determinable does not lose the improvements when the land reverts because of the determination of the fee. *Ball v. Hall, 274 A.2d 516 (Vt. 1971).*

(n97)Footnote 184. *Big Lake Oil Co. v. Reagan Co., 217 S.W.2d 17 (Tex. Civ. App. 1948).*

* This chapter is based in part on Ch. 30, George W. Thompson, Commentaries on the Modern Law of Real Property (John S. Grimes ed. 1979), which made a significant contribution toward preserving the American common law governing defeasible fees.

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CHAPTER 20 DEFEASIBLE FEES *

2-20 Thompson on Real Property, Thomas Editions § 20.03

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§ 20.03 Fees Subject to Executory or Conditional Limitations.n185

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According to the classic theory, n186 no present consideration passed upon a feoffment. The quid pro quo received by the feoffor was contemplated future benefit, the rendition of feudal dues and reliefs by the feoffee. The estate thus created was at first a life estate, later a base fee determining when the feoffee failed to pay the consideration as it fell due.

It was therefore essential that there be at the beginning, and that there continue at all times, someone whose duty it was to be responsible for the condition of the feudal services. Thus it was not conceivable to the mind of the feudal draftsman that there be any period of time when a fee could exist without the coexistence of one charged with the feudal responsibilities, hence the common law rule that a contingent remainder must at all times depend upon a preceding estate in freehold. If the remainder were so limited that it could not vest until after the termination of the preceding estate in freehold, then it was void ab initio. And if a contingent remainder was created after a life estate or a fee tail, if the contingency had not come to pass upon the termination of the preceding estate the remainder died with the end of the particular estate since at that moment there was no one to render the requisite feudal services. It is presumed that from this situation stemmed the common law concept that had become a rule of law that a contingent remainder could not continue to exist as contingent after the preceding estate in freehold in which it had been limited, terminated either by reason of its natural expiration or for some artificial reason it prematurely expired.

Seisin at common law was a blend of actual possession, title and a mystic tie of loyalties to the lord. In order to create this bond between lord and man a personal relationship was required that sprang into being between feoffor and feoffee through a personal transfer of the land, actual "livery of seisin" requiring the presence of both the feoffor and feoffee to deliver possession. Therefore a fee which thus involved an immediate transfer of possession could not be created in futuro. A could not enfeoff B and his heirs to be effective five years in the future.

This necessity of livery of seisin further prevented a fee from being created upon a fee. A could not enfeoff B and his heirs "until the oak tree falls and then to C and his heirs" because there was no one to make livery of seisin involving delivery of possession to C after the oak tree fell. n187 Nor could A enfeoff "B and his heirs but if C pays A ten pounds

then to C and his heirs" for this would require a livery of seisin from B to C something which B might be reluctant to give.

These factors lead to three basic property rules that graced the common law: A contingent remainder could only be limited upon a freehold estate, a fee could not be limited upon a fee and a remainder could not be so limited as to abridge a fee. It was thus impossible to create at common law a fee that could be cut off or destroyed by a limitation over to a third party.

This was changed by the passage of the Statute of Uses. n188 After the statute and later after the Statute of Wills n189 it became possible to create by way of springing use or executory devise that could operate to cut short the preceding estate though in fee. n190 Thus today a fee may be created subject to an executory limitation over to a third party which will operate to transfer title to the third party upon the happening of a contingency. n191 A conditional limitation which cuts down the preceding estate was not valid at common law but now is good in a will as an executory devise. n192 If, however, the contingency is too remote, the limitation over will be void and thus the fee subject to the invalid executory limitation will become a fee simple absolute.

The Statute of Uses n193 then produced the "springing use" which has the effect of itself terminating an existing fee. Such a fee which is ended, not by the completion of an indefinite term or by a condition subsequent, but by the development of a springing use or an executory devise is a fee subject to a conditional limitation. The statute of uses also produced the "shifting use." This like the "springing use" was an interest limited at the time of the creation of a defeasible fee over to a third party to take effect upon the happening of the defeasance. The springing use and the shifting use were substitutes for the possibility of reverter and right of re-entry which remained in the grantor after the creation by him of a determinable fee or a fee upon condition subsequent.

After the Statute of Wills n194 limitations over after defeasible fees could be created in wills. These are called "executory devises" and springing and shifting uses and "executory devises" are all classified together as "conditional limitations." n195

The term "conditional limitation" is not used in the *Restatement of the Law of Property*, preferring to treat this type of estates under the designation of "Fee Simple Defeasible." n196 If an estate be granted to one on condition that within two years he return from Rome, and on failure thereof then to another and his heirs, this is a limitation and not a condition. So, an estate upon conditional limitation may be defined as a future limitation depending upon a prior special limitation terminating a fee-simple estate by the happening of an event or the performance of some act which constitutes the special limitation. There must first be an estate upon a special limitation, and then another estate to take effect upon the termination of the first, and is thus substituted for or takes the place of the first estate and in derogation thereof.

Under these statutes conditional limitations are recognized and have become well established and are lawful if kept within the limits of the rule against perpetuities. n197 The estate granted may be limited to the time that the grantee shall remain single, notwithstanding the rule that a condition subsequent to the same effect would be void, n198 but the limitation over must be to a stranger and not to the heirs of the grantor. n199 It has been held, however, that a provision in a deed that if the grantee should die after the grantor's demise, without issue and without having disposed of the property conveyed, the property should go to the grantor's children, created a valid conditional limitation binding on the grantee. n200 The effect of a conditional limitation is to cut short an estate previously created and substitute another in its stead. n201 Thus, where a testator devised land to A, for life and on her death to her heirs, upon the condition that A shall continue to reside upon said lands for the period of her natural life and should she remove permanently from said lands during the period of her lifetime then the same shall become the absolute property of T, it was held that the estate was not based upon a condition subsequent, but was subject to a conditional limitation and that upon the removal of A from the land during her lifetime the property vested in T at once without entry or suit to establish title. n202

Thus a deed to land in 1886 for a valuable consideration to the trustees of a named church "as long as used for church

purposes," containing a like habendum clause running to such church, but with no stipulation for forfeiture or reversion, was held to pass a fee determinable upon the abandonment of such use with an immediate right of entry to the grantor's heirs, since the clauses were limitations and not conditions subsequent. n203 A devise in fee with provision that if not sold during lifetime over to others was held a defeasible fee, and the limitation was valid. n204

The term "conditional limitation" may be applied both where, upon the happening of a certain event the estate goes to a third person, and where a determinable or base fee is granted to the first taker followed by a possibility of reverter upon the happening of a contingency. n205 Estates upon conditional limitation are included in the term "qualified estates," meaning those interests in real property which are not absolute and unconditional. n206

In case of a conditional limitation, no right of re-entry remains in the grantor. If a condition subsequent be followed by a limitation over, in case the condition is not complied with, it is termed a "conditional limitation," and takes effect without any entry or claim, and no act is necessary to vest the estate in the party to whom it is limited. n207 If an estate be granted to one on condition that within two years he return from Rome, and on failure thereof then to another and his heirs, this is a limitation and not a condition. n208 There are important distinctions between an estate upon condition and an estate on a conditional limitation, the most important of which is that in case of the former, the grantor has remaining a right of reverter and re-entry, while in the case of the latter, he has no such right. n209 A deed will not be construed to create an estate on condition or limitation unless the language imports a condition or limitation or the intent to create a conditional estate is clearly indicated. n210

In the case of limitations over after conditions subsequent and possibly also after determinable fees, if the limitation fails for remoteness the defeasible fee ripens into a fee simple absolute. n211 The fee upon condition subsequent remains after breach as before except that the creator has the right to secure revesting of the former estate. Where there is a limitation over a fee upon conditional limitation not a determinable fee or fee upon condition subsequent is created in some states. n212

FOOTNOTES:

(n1)Footnote 185. *See* Kenneth J. O'Connell, *Estates on Condition Subsequent and Estates on Special Limitation in Oregon, 18 Or. L. Rev. 63 (1939).*

(n2)Footnote 186. There are indications that a present consideration was paid for feoffs even at an early date. But the classic idea was probably the principal consideration for the first grants of William the Conqueror, that is, the rendition of military service by the feoffee. And as long as there was no standing army such services would constitute a major consideration.

(n3)Footnote 187. Yet A could enfeoff B and the heirs of his body and then to C and his heirs so that C had a remainder after fee tail. Just why no livery of seisin was required to C in such a case is not clear.

(n4)Footnote 188. 27 Henry VIII, ch. 10 (1536). For a discussion of the development of a "use," *see* § 1857.

(n5)Footnote 189. 32 Henry VIII, ch. 1 (1540).

(n6)Footnote 190. Brooks Abridgment, 33b, 50, cites a case in 30 Henry VIII where A covenanted with B that when A was enfeoffed by B of a certain tract then A, his heirs and assigns seised of another tract should be seised of it to the use of B and his heirs then though A enfeoff another of his tract and such feoffee or his subsequent transferees have no notice of the covenant between A and B, when B does so enfeoff A, the owner of the second tract though an innocent purchaser will hold it to the use of B since the covenant between A and B had created a springing use in the second tract in B.

(n7)Footnote 191. *See* Frederick B. McCall, *Estates on Condition and on Special Limitation in North Carolina, 19 N.C. L. Rev. 334 (1941);* Note, *Fee Simple Cut Down by Executory Devise, 14 Temp. L.Q. 518 (1940).*

To widow, she not to dispose of it during her lifetime, and then to be equally divided among testator's brothers created a defeasible fee in the widow subject to an executory limitation. *Jenkins v. Shuften, 57 S.E.2d 283 (Ga. 1950).*

A defeasible fee subject to an executory limitation over arises upon a devise to one in fee with a later proviso that if an event happens the estate will go over. *McDonald v. Suarez, 93 S.E.2d 16 (Ga. 1956).*

A fee simple estate may be subject to an executory limitation. *Lantz v. Pence, 142 N.E.2d 456 (Ind. App. 1957).*

Executory limitation in deed over after fee simple is valid. *Selman v. Robertson, 24 S.E. 187 (S.C. 1896); Smith v. Clinkscales, 85 S.E. 1064 (S.C. 1915); Dukes v. Shuler, 194 S.E. 817 (S.C. 1938); McDaniel v. Connor, 33 S.E.2d 75 (S.C. 1945); Knowles v. South County Hosp., 140 A.2d 499, 141 A.2d 263 (R.I. 1958).*

(n8)Footnote 192. *Knowles v. South County Hosp., 140 A.2d 499, 141 A.2d 263 (R.I. 1958).*

(n9)Footnote 193. 2 Bl. Comm. 173. 1 Greenleaf-Cruise, Real Property, 702; *Horton v. Sledge, 29 Ala. 478 (1856); Outland v. Bowen, 17 N.E. 281 (Ind. 1888); Smith v. Smith, 23 Wis. 176 (1868).*

(n10)Footnote 194. 32 Henry VIII, ch. 1 (1640).

(n11)Footnote 195. *Hinsdale v. Chicago City Missionary Soc'y, 30 N.E.2d 657 (Ill. 1940); McWilliams v. Havely, 283 S.W. 103 (Ky. 1926).*

A provision in a deed that the land conveyed "shall be used for railroad purposes only, and, ceasing to be used for such purposes, shall revert to" the grantors, their heirs and assigns, was held to create a fee subject to divestment by re-entry for breach of condition, rather than a fee upon a conditional limitation. *Dolby v. Dillman, 278 N.W. 694 (Mich. 1938).*

A conditional limitation is of a mixed nature, partaking both of a condition and of a limitation; of a condition, because it defeats the estate previously limited; and of a limitation, because, upon the happening of the contingency, the estate passes to the person having the next expectant interest, without entry or claim. *Yarbrough v. Yarbrough, 269 S.W. 36 (Tenn. 1925).*

A conditional limitation exists where the estate is limited until the happening of a certain event, and when the thing happens the estate is terminated and reverts eo instante. *Community of Priests v. Byrne, 255 S.W. 601 (Tex. Com. App. 1923).*

See Porter v. Porter, 222 P. 971 (Okla. 1923).

In *Standard Knitting Mills, Inc. v. Allen, 424 S.W.2d 796 (Tenn. 1967),* a gift of land to be used as a park with the limitation over in the event it ever ceased to be used as a park to the heirs of the grantor, "heirs" were "words of purchase" creating the limitation over rather than a fee simple upon condition subsequent, and the limitation over was void for remoteness, giving the first taker a fee simple absolute.

(n12)Footnote 196. *See* Restatement, Property, ch. 4, special note to Introductory Note.

(n13)Footnote 197. 4 Kent's Comm. 267; 1 Jarman, Wills (6th Am. ed.), 221; *Tabor v. Gilmer County, 53 S.E.2d 915 (Ga. 1949); Nightingale v. Burrell, 32 Mass. (15 Pick.) 104 (1833).*

(n14)Footnote 198. *Randall v. Marble, 69 Me. 310 (1879); Arthur v. Cole, 56 Md. 100 (1881).*

(n15)Footnote 199. *Randall v. Marble, 69 Me. 310 (1879).*

(n16)Footnote 200. *Warlicke v. Davis, 89 S.W.2d 845 (Tex. Civ. App. 1935); Aiken v. Clark, 92 A.2d 620 (Vt. 1952).*

(n17)Footnote 201. *Andrews v. Sargent, 44 A. 341 (Vt. 1899).*

(n18)Footnote 202. *Taylor v. McCowen, 99 P. 351 (Cal. 1908).*

Limitation over on death of devisee without children created a fee defeasible with an executory limitation. *Johnson v. Johnson, 99 S.E.2d 827 (Ga. 1957).*

"A condition followed by a limitation over to a third person, in case the condition is not fulfilled, or there be a breach of it, is termed a conditional limitation. A conditional limitation is therefore of a mixed nature, partaking both of a condition and of a limitation; of a condition, because it defeats the estate previously limited; and of a limitation, because, upon the happening of the contingency, the estate passes to the person having the next expectant interest, without entry or claim." Church in *Brattle Square v. Grant, 69 Mass. (3 Gray) 142 (Mass. 1855).*

(n19)Footnote 203. *Schurch v. Harraman, 191 N.E. 907 (Ohio App. 1933). See Queen City Park Ass'n v. Gale, 3 A.2d 529 (Vt. 1938).*

(n20)Footnote 204. *Jenkins v. Shuften, 57 S.E.2d 283 (Ga. 1950).*

A devise to wife but if wife predeceased testator or if "any property be remaining at wife's death" then over to H, "but if it dies, then to her heirs" gave H a remainder subject to defeasance on sale by wife or on H's death before wife, with a limitation over to *H's heirs. Jones v. Walter, 436 S.W.2d 130 (Tex. 1968).*

(n21)Footnote 205. *Storke v. Penn Mut. Life Ins. Co., 61 N.E.2d 552 (Ill. 1945).*

To "A but if she die without children then to B" created a defeasible fee subject to a shifting executory interest. *Reynolds v. Rackley, 157 S.E.2d 283 (Ga. 1967).*

(n22)Footnote 206. *Carpender v. New Brunswick, 39 A.2d 40 (N.J. 1944).*

(n23)Footnote 207. *American Dirigold Corp. v. Dirigold Metals Corp., 125 F.2d 446 (6th Cir. 1942); Pure Oil Co. v. Miller-McFarland Drilling Co., 34 N.E.2d 854 (Ill. 1941); Stearns v. Godfrey, 16 Me. 158 (1839);* Church in *Brattle Square v. Grant, 69 Mass. (3 Gray) 142 (1855); Ashley v. Warner, 77 Mass. (11 Gray) 43 (1858); Attorney-General v. Merrimack Mfg. Co., 80 Mass. (13 Gray) 586 (1860). See Miller v. Levi, 44 N.Y. 489 (1871); Allen v. Trustees of Great Neck Free Church, 269 N.Y.S. 341 (1934).*

(n24)Footnote 208. 2 Bl. Comm. 155.

After gift in fee, a limitation over of what remains on the devisee's death is void. *Morgan v. Merchants & Planters Nat'l Bank, 147 S.E.2d 702 (S.C. 1966).*

(n25)Footnote 209. "Where an estate in fee is created on condition, the entire interest does not pass out of the grantor by the same instrument or conveyance. All that remains, after the gift or grant takes effect, continues in the grantor and goes to his heirs. This is the right of entry, as we have already seen, which, from the nature of the grant, is reserved to the grantor and his heirs only, and which gives them the right to enter, as of their old estate, upon breach of the condition. This possibility of reverter, as it is termed, arises in the grantor or devisor immediately on the creation of the conditional estate. It is otherwise where the estate in fee is limited over to a third person in case of a breach of the condition. Then the entire estate by the same instrument passes out of the grantor or devisor... The right or possibility of

reverter, which, on the creation of an estate in fee on condition merely, would remain in him, is given over by the limitation, which is to take effect on the breach of the condition." Church in *Brattle Square v. Grant, 69 Mass. (3 Gray) 142 (1855),* per Bigelow, J. *See Outland v. Bowen, 17 N.E. 281 (Ind. 1888); Wagner v. Wallowa County, 148 P. 1140 (Or. 1915).* And *see* note in Annotation Deed in Consideration of Support of Grantor as Creating an Estate Upon Condition or a Conditional Limitation, 76 A.L.R. 742 (1932).

(n26)Footnote 210. *Gladewater Cty. Line Indep. Sch. Dist. v. Hughes, 59 S.W.2d 351 (Tex. Civ. App. 1933).*

Limitation over after a fee in first taker is void. *Collie v. Tucker, 317 S.W.2d 137 (Ark. 1958); Gamester v. Massey, 158 N.E.2d 805 (Ind. App. 1959).*

(n27)Footnote 211. *In re Stemmler's Will, 129 N.Y.S.2d 395 (1954).*

In *Everett v. Adams, 444 S.W.2d 789 (Tex. Civ. App. 1969),* the court permitted the holder of a fee subject to a conditional limitation over in the minerals to destroy the limitation over by conveying the fee.

(n28)Footnote 212. *Bennett v. Packer, 39 A. 739 (Conn. 1898); Snider v. Newsom, 24 Ga. 139 (1858); Eastham v. Eastham, 231 S.W. 221 (Ky. 1921); In re Miller's Will, 74 S.E. 888;* (N.C. 1912); *Yarbrough v. Yarbrough, 269 S.W. 36 (Tenn. 1925). Contra,* limitation over on remarriage creates a determinable fee. *Overton v. Lea, 68 S.W. 250 (Tenn. 1902),* or a fee upon condition subsequent. *Hinton v. Bowen, 230 S.W.2d 965 (Tenn. 1950); Erskine v. Board of Regents, 104 N.W.2d 285 (Neb. 1960)*(fee subject to a conditional limitation was also subject to doctrine of substantial compliance).

* This chapter is based in part on Ch. 30, George W. Thompson, Commentaries on the Modern Law of Real Property (John S. Grimes ed. 1979), which made a significant contribution toward preserving the American common law governing defeasible fees.

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CHAPTER 20 DEFEASIBLE FEES *

2-20 Thompson on Real Property, Thomas Editions § 20.04

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§ 20.04 Fees Subject to Conditions.

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The idea that the existence of a fee could depend upon a condition either precedent to its creation or subsequent ending its life arose early in the English Property Law.

Bracton n213 indicates that what had by the time of Edward I become the "conditional fee" was in his period a condition precedent to converting a life estate into either a fee upon a condition subsequent or a fee simple absolute to the extent that a fee simple absolute could then exist under the feudal system. Littleton devotes 118 sections to what he terms "Estates upon Condition" which embrace a number of different modern property concepts.

A testator may devise his real property so that if specified things are not done or that if certain things occur the devise will revert and such clauses will be enforced if clearly intended, and it is possible to do so. n214 One who claims under a deed must claim under the whole deed. He cannot take one clause and desire the court to shut their eyes as to the rest. n215 Whether a condition is precedent or subsequent depends on the intent of the parties not by technical language. n216 An estate upon condition is not to be construed except where the language is so clear that there is no other construction. n217 If the time for the performance of a condition is expressly fixed or limited by a will, the condition is precedent rather than a condition subsequent. n218

In determining whether the condition is precedent or subsequent if the act does not necessarily precede the vesting of the estate but may accompany or follow it, if it appears to be collected from the whole instrument, and if there have been other considerations performed or paid, and the act in question is not the sole consideration for the grantor or if the grantee is entitled to possession and use of the property a condition subsequent is impacted. A condition subsequent is favored over a condition precedent. n219

An estate upon condition is an interest in real property made to begin, to be enlarged or be defeated upon the happening or not happening of some particular event. n220 "The condition is annexed to the estate; it doth always attend and wait upon the estate; it is knit to it." n221 The grantor retains a vested right or present interest, transmissible to his heirs. In this respect it differs from a conditional limitation, which passes the whole interest of the grantor at once, and creates an

estate to arise and vest in a third person on a contingency at a future and uncertain period of time. n222 In an estate on condition, the performance of the condition inures to the benefit of the grantor and his heirs only. They may waive or enforce performance at their election, and, unless there is a re-entry or claim by the grantor or his heirs, the estate continues to exist the same as if the condition had been complied with. n223 Where the estate is expressly limited to the happening of an event which determines it, upon the happening of that event, it is ipso facto terminated by operation of law without the doing of any act by any person whomsoever and in such case re-entry or claim is not essential to its termination. n224 Where words of condition are used, in connection with a devise, and there is another or subsequent devise of the same premises on the failure of the first or preceding devise, the words of condition have not the force and operation of words of condition, and are called "words of limitation." n225

A condition differs from a covenant in that a breach of the covenant gives rise to a cause of action for damages, while the consequence of a non-fulfilment of a condition operates as a forfeiture of the estate. n226 If it is doubtful whether a clause in a deed is a covenant or a condition, the courts will incline against the latter construction. n227 A grantee's agreement to support the grantor, when recited as the consideration for the deed, will be treated as a covenant rather than a condition unless the deed clearly and explicitly makes the agreement a condition. n228 Although covenants and conditions may be created by the use of the same words, forfeitures are not favored, since conditions of defeasance of an estate granted are odious. n229 A fee may be limited on a fee not only in a will by executory devise but by shifting uses in a deed in any form, which may take effect by virtue of the statute of uses. n230 A fee upon condition resembles a determinable fee in that it exhausts the whole estate, but may return to the grantor by breach of a condition subsequent to which it was granted, but it does not return until there has been an entry by the person having that right. n231

Another type of fee defeasible upon a condition subsequent was the common law mortgage n232 which still exists in somewhat modified form in some jurisdictions. This estate was treated by Littleton as one of several kinds of estates upon condition in deed, as distinguished from condition in law which was the payment of the feudal dues. n233 Such conditions were precedent or subsequent. They involved either the payment of the consideration for the feoffment or the payment of annual rental. n234

A grant upon a condition precedent passes the estate only upon the performance of the condition. n235 A condition that the estate shall not vest, until or unless the grantee shall pay a specified sum before a day named, is a condition precedent to the vesting of any estate, and time is an essential part of the contract. n236 No estate vests in the grantee until or unless the condition is performed, and this is true even though performance becomes impossible, n237 and without any blame on the part of the grantee or devisee. n238 Where a will imposes conditions precedent to the beneficiary's right to take, there can be no valid gift until such conditions have been satisfied and strictly performed. n239 If the condition precedent is void, the estate which depends upon the condition is also void and the estate never vests. n240 A deed recited that the grantor was anxious to secure to the grantee his undivided interest in certain land upon condition that, during the life of the grantor, he was to retain and exercise full and complete control over the property; and in consideration of the premises thus recited, and of natural love and affection, the grantor conveyed the property to the grantee, upon condition, nevertheless, that he, the grantor, died before the grantee, and not otherwise, with habendum to the grantee and his heirs, subject to such condition. The grantor survived the grantee. It was held that this was clearly a condition precedent, and, not being fulfilled, nothing passed by the deed. n241

Where one conditionally gave a tract of land to his son by an instrument which reserved to the donor not only the rents, issues, and profits of the land while he lived, but which also reserved to him the right to dispose of the land during his lifetime, it was competent for him thereafter to bequeath to another the use of the land, and the rents and profits of the same, for a period of time extending two years after his death. The transfer to his son was not to be effective till the donor's death, and not then if he made other disposition of the property during his lifetime. n242 A condition which prevents the full beneficiary title from vesting in the grantee until its performance does not necessarily render it a condition precedent. Thus a condition that after the grantor's death the grantee shall pay a third person a certain sum of money is construed to be a condition subsequent and not a condition precedent. n243 Such an estate affects an interest already vested, either diminishing or eradicating such interest. n244

A condition precedent must be literally performed and even in equity an estate will not vest where, by reason of a condition precedent unperformed, it will not vest at law. n245 Where the conditions broken are conditions precedent the law will not relieve the one violating the same, especially where the grantor, by reason thereof, has regained possession of the property. n246 Where the owner of land which had been used for some years for a cemetery conveyed it to a city for a nominal consideration, provided the city should obtain authority from the legislature and remove the dead within a certain time, and use the land for an ornamental square or for the erection of public buildings, it was held that the removal of the bodies and the abandonment of the land for cemetery purposes were conditions precedent to the vesting of the title. n247

Where a day is appointed for the payment of money for a thing to be done, if such day is fixed beyond the time when the act is to be done, the performance of the thing which is the consideration for the payment is a condition precedent to the payment of the money. n248 Stipulations to do certain things within a given time, in consideration of the payment of money, will not be construed as conditions precedent unless the express language of the contract requires such construction. n249 A condition that, if the purchaser failed to pay for the property in instalments as provided, it should be delivered back and disposed of to pay the price, was held not to be a condition precedent, but that the property passed immediately with a trust in the nature of a vendor's lien for the payment of the price. n250 Where a deed containing conditions precedent provides that "when these conditions are fully complied with, then this deed is to be in full force and virtue in law, and otherwise null and void," title does not pass to the grantee until the conditions are performed. n251

FOOTNOTES:
(n1)Footnote 213. 11 Bracton, Ch 6, f 17.

(n2)Footnote 214. *Thompson v. Thompson, 175 S.W.2d 885 (Mo. 1943); Hedick v. Lone Star Steel Co., 277 S.W.2d 925 (Tex. Civ. App. 1955)*(condition subsequent is less objectionable than special limitation).

A common disaster clause in a will was applied as a condition precedent. *In re Brew's Will, 183 N.Y.S.2d 321 (1959),* though the beneficiary survived the testator 41 days.

(n3)Footnote 215. *Wilson v. Townshend, 2 Ves. 693, 30 Eng. Rep. 846.*

(n4)Footnote 216. *Midwest-Radiant Corp. v. Hentze, 171 F.2d 635 (7th Cir. 1948), cert. denied, 336 U.S. 952 (1949); Carpender v. New Brunswick, 39 A.2d 40 (N.J. 1944).*

(n5)Footnote 217. *Miller v. Miller, 247 N.W.2d 445 (Neb. 1976).*

(n6)Footnote 218. *Kelly v. Snider, 46 N.E.2d 811 (Ohio 1942).*

(n7)Footnote 219. *Railroad Comm'n v. American Trading & Prod. Corp., 323 S.W.2d 474 (Tex. Civ. App. 1959).*

A devise of a house with the provision that the sons of the testatrix should share in the proceeds in the event of the sale of the house conveyed to the sons an interest which was alienable before the sale was made. *Parker v. Blackmon, 553 S.W.2d 623 (Tex. 1977).*

A devise in fee simple giving others the right of use during their lifetimes was a valid condition not repugnant to the fee. *Babb v. Rand, 345 A.2d 496 (Me. 1975).*

(n8)Footnote 220. *Warner v. Bennett, 31 Conn. 468 (1863); Thornton v. Trammell, 39 Ga. 202 (1869); Heaston v. Randolph, 20 Ind. 398 (1863); Michigan State Bank v. Hastings, 1 Mich. (Doug.) 225 (1844); Langley v. Ross, 20 N.W. 886 (Mich. 1884); Detroit Union R. Depot & Station Co. v. Fort Street Union Depot Co., 87 N.W. 214 (Mich. 1901);*

Smith v. White, 5 Neb. 405 (1877); Munro v. Syracuse, L. & N.R. Co., 93 N.E. 516 (N.Y. 1908); Raley v. Umatilla County, 13 P. 890 (Or. 1887)3 Am. St. 142; Johnson v. Gurley, 52 Tex. 222 (1879).

See Olin L. Browder, Jr., *Defeasible Fee Estates in Oklahoma, 4 Okla. L. Rev. 141 (1951), 6 Okla. L. Rev. 482 (1953).*

(n9)Footnote 221. Littleton, Tenures, § 325.

(n10)Footnote 222. *Williams v. Kirby Sch. Dist. No. 32, 181 S.W.2d 488 (Ark. 1944); Storke v. Penn Mut. Life Ins. Co., 61 N.E.2d 552 (Ill. 1945);* Church in *Brattle Square v. Grant, 69 Mass. (3 Gray) 142 (1855); Clark v. Jones, 144 P.2d 498 (Or. 1944).*

(n11)Footnote 223. *Magness v. Kerr, 254 P. 1012 (Or. 1927). See Hall v. Quinn, 130 S.E. 18 (N.C. 1925); Yarbrough v. Yarbrough, 269 S.W. 36 (Tenn. 1925); Atkins v. Gillespie, 299 S.W. 776 (Tenn. 1927).*

(n12)Footnote 224. *McIntyre v. Dietrich, 128 N.E. 321 (Ill. 1920)*(defining date of the determinable fee and discussing methods of creation); *Malone v. Kitchen, 137 N.E. 562 (Ind. App. 1922); Magness v. Kerr, 254 P. 1012 (Or. 1927); Atkins v. Gillespie, 299 S.W. 776 (Tenn. 1927).*

The possibility of reverter is not assignable, even by the grantor. *Magness v. Kerr, 254 P. 1012 (Or. 1927); Atkins v. Gillespie, 299 S.W. 776 (Tenn. 1927).*

(n13)Footnote 225. A condition requires a re-entry to terminate the estate, a limitation does not. Co. Litt., § 214b. Cogan v. Cogan, Cro. Eliz. 360 (=hr2). So a stranger can take advantage of an estate upon limitation terminating but he cannot take advantage of an estate upon condition. Sheppard-Touchstone (4th ed.) 118.

Thus, where a testator devised land to A for life and on her death to her heirs, upon the condition that A shall continue to reside upon said lands for the period of her natural life and should she remove permanently from said lands during the period of her lifetime then the same shall become the absolute property of T, it was held that the estate was not based upon a condition subsequent, but was subject to a conditional limitation and that upon the removal of A from the land during her lifetime the property vested in T at once without entry or suit to establish title. *Taylor v. McCowen, 99 P. 351 (Cal. 1908).*

See the following cases: *Burlington & C.R. Co. v. Colorado E. R. Co., 88 P. 154 (Colo. 1986); Koch v. Streuter, 83 N.E. 1072 (Ill. 1908); Fall Creek Sch. Twp. v. Shuman, 103 N.E. 677 (Ind. App. 1913); Hess v. Kernen Bros., 149 N.W. 847 (Iowa 1914); Coppage v. Alexander, 41 Ky. (2 B. Mon.) 313 (1842); Stearns v. Godfrey, 16 Me. 158 (1839); Miller v. Levi, 44 N.Y. 489 (1871); Oklahoma City v. Local Fed. Sav. & Loan Ass'n, 134 P.2d 565 (Okla. 1943); Daggett v. Ft. Worth, 177 S.W. 222 (Tex. Civ. App. 1915); Smith v. Smith, 23 Wis. 176 (1868).*

(n14)Footnote 226. *Rosecrans v. Pacific Elec. R. Co., 134 P.2d 245 (Cal. 1943); Rooks Creek Evangelical Lutheran Church v. First Lutheran Church, 124 N.E. 793 (Ill. 1919); Langley v. Ross, 20 N.W. 886 (Mich. 1884); Edwards v. Collins, 199 S.W. 580 (Mo. App. 1917); Guthrie v. Hartman, 226 S.W. 593 (Mo. App. 1920); Hooper v. Hooper, 20 N.C. 150 (1838); Lima Oil & Gas Co. v. Pritchard, 218 P. 863 (Okla. 1923); Mickleson v. Gypsy Oil Co., 238 P. 194 (Okla. 1925); Stinson v. Oklahoma R. Co., 126 P.2d 260 (Okla. 1942); Weiss v. Claborn, 219 S.W. 884 (Tex. Civ. App. 1920); Hickernell v. Gregory, 224 S.W. 691 (Tex. Civ. App. 1920); Turner v. Biscoe, 164 S.W.2d 70 (Tex. Civ. App. 1942); Killgore v. Cabell Cty. Ct., 92 S.E. 562 (S.E. 1917).*

(n15)Footnote 227. *Wichita Falls v. Bruner, 165 S.W.2d 480 (Tex. Civ. App. 1942); Queen City Park Ass'n v. Gale, 3 A.2d 529 (Vt. 1938). See* Commonwealth *ex rel. Bard v. Delaware Div. Canal Co., 1 A.2d 672 (Pa. 1938).*

(n16)Footnote 228. *Hall v. Barrett, 126 S.W.2d 1045 (Tex. Civ. App. 1939).*

(n17)Footnote 229. *In re Gaffers' Estate, 5 N.Y.S.2d 671 (1938).*

(n18)Footnote 230. *Harder v. Matthews, 141 N.E. 442 (Ill. 1923).*

An estate upon condition subsequent has, until defeated by breach and entry, the same qualities and incidents as an absolute estate. *Sherill v. Sherill, 99 So. 838 (Ala. 1924).* If it is conveyed or devised it passes subject to the condition.

(n19)Footnote 231. *Queen City Park Ass'n v. Gale, 3 A.2d 529 (Vt. 1938).*

(n20)Footnote 232. *See* Vol. 12, § 101.01 et seq.

(n21)Footnote 233. Butler's notes to Co. Litt., § 201a.

(n22)Footnote 234. Apparently *quia emptores* had not yet been interpreted to prohibit a fee reserving an annual rent. Littleton, Tenures, § 341.

The statute of merchants, 13 Edward I, *de mercatoribus* and of staple, 27 Edward III, ch. 9. gave use of another type of fee upon condition subsequent. This developed when the creditor levied upon the debtor's lands. The creditor was entitled to hold title thereto until the debt was satisfied.

Likewise where lands were seised by a court of elegit under the statute of Westminster II, 13 Edward I, ch. 32, the creditor held as tenant by elegit a fee upon condition subsequent defeasible when the debt was paid.

(n23)Footnote 235. *Borst v. Simpson, 7 So. 814 (Ala. 1890); First Nat'l Bank v. McIntosh, 79 So. 121 (Ala. 1918); Lucas v. Lucas, 156 S.E. 680 (Ga. 1931); Phillips v. Gannon, 92 N.E. 616 (Ill. 1910); Nowak v. Dombrowski, 107 N.E. 807 (Ill. 1915); Bennett v. Culver, 97 N.Y. 250 (1884); Helms v. Helms, 49 S.E. 110 (N.C. 1904); Paraffine Oil Co. v. Cruce, 162 P. 716 (Okla. 1916); Haynie v. Bennett, 115 N.W. 515 (S.D. 1908).*

In Idaho, however, it is provided that an instrument purporting to be a grant of real property, to take effect upon condition precedent, does not pass the estate upon the performance of the condition. Such instrument is an executory contract for the conveyance of the property. Upon compliance with the condition, the grantee is entitled to a grant or conveyance from the grantor or his successors for the property duly acknowledged for record. Idaho Code 1932, § 55-609.

Conditions subsequent are preferred to conditions precedent. *Railroad Comm'n v. American Trading & Prod. Corp., 323 S.W.2d 474 (Tex. Civ. App. 1959).*

A bequest on condition that legatee marry in the Jewish faith was valid. *Shapira v. Union Nat'l Bank, 315 N.E.2d 825 (Ohio 1974).*

(n24)Footnote 236. *Borst v. Simpson, 7 So. 814 (Ala. 1890).*

See the following cases: Tennessee & *C. R. Co. v. East Ala. R. Co., 73 Ala. 426 (1882); Rutland v. Chesson, 13 So. 606 (Ala. 1893); Talbert v. Hopper, 42 Cal. 399 (1871); Wilson v. Galt, 18 Ill. 431 (1857); Mackey v. Kerwin, 78 N.E. 817 (1906); Winnepiseogee Paper Co. v. Eaton, 18 A. 171 (N.H. 1889); Caldwell v. Fraim, 32 Tex. 310 (1869).*

(n25)Footnote 237. *Halsey v. Goddard, 86 F. 25 (C.C.R.I. 1898); Carter v. Carter, 39 Ala. 579 (1898); Anderson v. Broadwell, 6 P.2d 260 (Cal. App. 1931); Robbins v. Hoover, 115 P. 526 (Colo. 1911); Hobart v. Kehoe, 126 N.W. 66 (Minn. 1910).*

(n26)Footnote 238. *Stark v. Conde, 76 N.W. 600 (Wis. 1898).*

(n27)Footnote 239. *In re Whitman's Estate, 198 A. 161 (Pa. 1938).*

(n28)Footnote 240. *Jackson v. Knapp, 130 N.E. 524 (Ill. 1921).*

The payment of the consideration is not always a condition precedent to the vesting of title. *Myrick v. Lewis, 138 S.E. 198 (S.C. 1927).*

(n29)Footnote 241. *Earle v. Dawes, 3 Md. Ch. 230 (1849).*

(n30)Footnote 242. *Pennell v. Felch, 39 P. 1023 (Kan. 1895).*

(n31)Footnote 243. *Weinreich v. Weinreich, 18 Mo. App. 364 (1885).*

(n32)Footnote 244. *Carpender v. New Brunswick, 39 A.2d 40 (N.J. 1944).*

(n33)Footnote 245. 4 Kent's Comm. 125; *Borst v. Simpson, 7 So. 814 (Ala. 1890); Rankin v. Dean, 47 So. 1015 (Ala. 1908); Carloss v. Oxford, 80 S.W. 144 (Ark. 1904); Jackson v. Knapp, 130 N.E. 524 (Ill. 1921); Cronin v. Cronin, 145 N.E. 619 (Ill. 1924); City Bank of Baltimore v. Smith, 3 Md. (G. & J.) 265 (1831); Earle v. Dawes, 3 Md. Ch. 230 (1849); Emery v. Dana, 84 A. 976 (N.H. 1912); Paraffine Oil Co. v. Cruce, 162 P. 716 (Okla. 1916); Watzman v. Unatin, 131 S.E. 874 (W. Va. 1926).*

See Keller v. Keller, 92 S.W.2d 157 (Mo. 1936).

(n34)Footnote 246. *Watzman v. Unatin, 131 S.E. 874 (W. Va. 1926).*

(n35)Footnote 247. *Stockton v. Weber, 33 P. 332 (Cal. 1893).*

(n36)Footnote 248. *Houston v. Spruance, 4 Del. (Harr.) 117 (1844).*

(n37)Footnote 249. *Front Street M. & O. R. Co. v. Butler, 50 Cal. 574 (1875); Tipton v. Feitener, 20 N.Y. 423 (1859).*

(n38)Footnote 250. *Cayton v. Walker, 10 Cal. 450 (1858).*

(n39)Footnote 251. *Oakman v. Walker, 38 A. 63 (Vt. 1897).*

See Walter M. Strine, Jr., *Use of Condition in Land-Use Control, 67 Dick. L. Rev. 109 (1963).*

* This chapter is based in part on Ch. 30, George W. Thompson, Commentaries on the Modern Law of Real Property (John S. Grimes ed. 1979), which made a significant contribution toward preserving the American common law governing defeasible fees.

Thompson on Real Property, Thomas Editions

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CHAPTER 20 DEFEASIBLE FEES *

2-20 Thompson on Real Property, Thomas Editions § 20.05

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§ 20.05 The Fee upon Condition Subsequent.

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That a fee may be created that is absolute in nature except that it is subject to termination if the grantee or his successors in title breaches a condition expressed in the instrument creating the fee has long been recognized. n252 The courts have had difficulty in distinguishing between fee simples determinable and fees upon condition subsequent. n253 One of the most important considerations in determining whether a clause is a condition subsequent or something else is the presence or absence of a clause providing for re-entry by the grantor or his heirs or forfeiture of the estate for a breach. n254

While the entailment feature still remained in the occasion of a feoffment to "A and his heirs" the feoffee could not encumber his estate so as to defeat the interest of the heirs of the feoffee or of his own feoffor. When King John admitted the Jews into England they brought with them the Jewish mortgage. This concept approached the modern lien theory. After Edward I expelled the Jews the lawyers for the creditor classes evolved the idea of a fee upon condition subsequent as a security devise. n255

One who grants property to another may impose a condition the non-performance of which will cause a forfeiture of the estate. n256 On failure of condition subsequent the property returns to the grantor. n257 Such a forfeiture is not, however, an automatic termination of the fee as in the case of a fee simple determinable. The fee simple determinable is a candle guttering out. The fee upon condition subsequent must be snuffed out by the action of the holder of the right of re-entry. n258 The fee upon condition subsequent remains after breach as before except that the creator has the right to secure revesting of the former estate. n259

The title under a deed creating a condition subsequent vests in the grantee, and remains in him until it is divested by the entry of the grantor. n260 In a condition precedent the title does not vest until the act which is made the condition is performed. n261 In the one case the title vests before the condition is performed, and in the other it does not vest at all unless the condition is first performed. n262 Conditions precedent intervene and prevent the vesting until the condition is complied with, n263 while a subsequent condition is one which operates upon an estate already created and vested, and renders it liable to be defeated. n264

The breach of a condition subsequent in a deed does not ipso facto operate to revest the grantor with title, but he must take appropriate action to have himself reinvested with title. n265 Where a conveyance is made and accepted upon this express condition, that the grantor reserves the right to live on the land until his death, and provides that his minor children shall be supported out of the proceeds thereof until each shall have received a certain sum, that the grantee shall pay to each of the minor children a certain sum on certain dates, that, when the grantee shall have performed the conditions expressed, the legal title to the land shall vest in him absolutely, a condition subsequent is created. n266 A conveyance of a farm from parents to a daughter, "not to become absolute until the decease" of both grantors, "and then only on this condition," that the grantee "shall deliver to the grantors or either of them annually, during their or either of their natural lives, one-third of the product" of said land, is a conveyance upon a condition subsequent, for the language implies that an estate is to pass by the conveyance. Otherwise it seems inconsistent to say that the conveyance shall not become absolute until the condition shall be performed. n267

The law has long been fixed that an estate upon condition subsequent can arise upon a deed poll as well as by indenture. n268 A purchaser of a deed which imposes a duty upon him by condition assumes the performance of it by his acceptance of the deed. n269 Thus, where a lot of land is sold subject to the condition that the grantee shall permit the proprietor of each adjoining lot who may build to erect one-half of the thickness of the division wall on such lot, and that the grantor, his heirs or assigns shall pay to the said proprietor so erecting such wall a proportionate part of the cost thereof for such part of the wall as the grantee, his heirs or assigns, may use or occupy, the grantee having the same right to place half the thickness of his wall on each adjoining lot, the grantee or any subsequent purchaser from him becomes bound by the acceptance of his deed to pay for such part of a division wall so built as he may use to the owner of the adjoining lot. Such purchaser is not liable as for a breach of covenant, because he did not sign and seal the deed, but the law implies a promise to perform the condition or stipulation from his acceptance of the deed, on which an action may be maintained. n270 The acceptance of a deed containing a condition binds the grantee to the performance of the conditions. n271

There is authority for the proposition that an option to purchase creates a fee upon condition subsequent with a right of re-entry in the grantor. n272

The holder of an estate in fee simple subject to a condition subsequent has all the rights in respect to it of a fee simple owner until the condition subsequent has happened. n273 If, however, the grantor remains in possession after conveying a fee upon condition subsequent the fee automatically returns to him on breach, no re-entry being necessary. n274 A provision to the effect that a deed is given and accepted on the express agreement of the grantee, to do certain things, imports a personal covenant rather than a condition. n275

Some cases prefer a construction of a fee upon condition subsequent over a fee simple determinable upon the theory that since forfeitures are abhorred, an optional determination is preferable to an absolute determination. n276 The holder of the fee, not the holder of the right of re-entry, is entitled to the proceeds of condemnation though the condition was the use of the property for a stated purpose only. n277

Until forfeiture is enforced, the grantee may convey or devise the estate, and upon his death it descends like an estate not subject to condition. The condition may be enforced against the property, whoever may be the owner of it. "The condition doth always attend and wait upon the estate or thing whereunto it is annexed; so that although the same do pass through the hands of an hundred men, yet it is subject to the condition still." n278 The grantor can convey no better title than he has and no condition would be worth anything if the grantee could avoid its operation and effect by the simple expedient of alienation before a breach of the condition. n279 Such a condition, however, defeats the estate to which it is annexed only at the election of him who has a right to enforce it. The grantee may mortgage his interest, and until his estate is defeated by the person entitled to defeat it, the mortgagee has the right to enforce his security to the same extent as if the condition were not contained in the deed. n280

On re-entry of the grantor after breach of condition of a deed conveying land in consideration of support, title to the land revests in the grantor free from liens and encumbrances created by a contract of support in favor of a third person, notwithstanding the grantor's acceptance of a reconveyance by the grantee after the breach. n281 Unless the condition is personal it may he performed by anyone to whom the title may have passed by conveyance, devise, or descent or by anyone who has an interest in it. n282 Conditions are sometimes said to run with the land and bind the heirs and assigns of the grantee although they may be merely personal. n283 The mere sale and conveyance by the grantee of the land, which is subject to a condition that the same shall be used for certain purposes only, is not a breach of the condition, in the absence of a showing that the grantee has diverted the land to other purposes. n284

The courts vary as to the necessity of express language as to the right of re-entry to create a condition subsequent. Some cases indicate such necessity. n285 Others permit a condition to arise in the absence of a right of re-entry. n286 Still others use the absence of an expressed right of re-entry to create an ambiguity which enables the courts to construe the instrument, usually, against the condition. n287

FOOTNOTES:
(n1)Footnote 252. Littleton, Tenures, ch. 5, L. 3.

See Walter M. Strine, Jr., *Use of Condition in Land-Use Control, 67 Dick. L. Rev. 109 (1963);* Kenneth J. O'Connell, *Estates on Condition Subsequent and Estates on Special Limitation in Oregon, 18 Or. L. Rev. 63 (1939).*

Upholding fee upon condition subsequent with the right of re-entry. *Olivas v. Zambrano, 543 S.W.2d 180 (Tex. Civ. App. 1976).*

(n2)Footnote 253. A deed "upon the express condition and limitation" that on cessation for use for school purposes the property revert to the grantor conveyed a determinable fee. *Moore v. Wells, 93 S.E.2d 731 (Ga. 1956).*

Distinction between fees simple determinable and fees upon condition subsequent are now abolished in Oklahoma, both being conditional limitations. *Kassner v. Alexander Drug Co., 147 P.2d 979 (Okla. 1943).*

Contra, Frensly v. White, 254 P.2d 982 (Okla. 1953).

Confusing fee simple determinable and fee upon condition subsequent. *Hinton v. Bowen, 230 S.W.2d 965 (Tenn. 1950).*

In a fee upon condition subsequent, the fee is voidable on the election of the person in whose favor the condition is imposed. The transferee there from has no right. On a conditional limitation, the present estate is void on occurrence of the event and right of possession vests in the grantor or next succeeding person having a right to possession without re-entry or criminal act. *Conger v. Conger, 494 P.2d 1081 (Kan. 1972).*

Words of forfeiture create a fee upon condition subsequent. *Floyd v. Hoover, 234 S.E.2d 89 (Ga. App. 1977).*

(n3)Footnote 254. *Newton v. Glen Ellyn, 27 N.E.2d 821 (Ill. 1940).*

"Provided" there is language of condition rather than a limitation. *Pfeffer v. Lebanon Land Dev. Co., 360 N.E.2d 1115 (Ill. App. 1977).*

Condition found only in description clause and not in habendum or granting clause did not create a fee upon condition subsequent. *Waters v. North Carolina Phosphate Corp., 232 S.E.2d 275 (N.C. App. 1977).* (Now under G.S. 39-1.1, a later statute, North Carolina has the four corners rule.)

A devise "in fee simple" with a proviso that he should never deny access or occupation to the several heirs "hereinafter named" during their lifetime created a fee subject to a condition subsequent. *Babb v. Rand, 345 A.2d 496 (Me. 1975).*

Devise to the city to be used as a park and, if otherwise, to be given to Humane Society was a devise on a condition subsequent. *Austin v. Austin Nat'l Bank, 503 S.W.2d 759 (Tex. 1973).*

(n4)Footnote 255. 1 Pollock & Maitland 457, felt that the writ of elegit had been borrowed from the Jewish mortgage.

The first application by a common law mortgagor to chancery for relief against forfeiture is shown in 1456. Select Cases in Chancery (SS), 137-139, 3 Holdsworth 130.

The common-law mortgage while in form a fee upon condition subsequent was in part security for money lent, 3 Eyre of Kent (SS) 85.

(n5)Footnote 256. *Wampler v. Harrington, 261 S.W.2d 883 (1953).*

Devise to the city to be used as a park and, if otherwise, to be given to Humane Society was a devise on a condition subsequent. *Austin v. Austin Nat'l Bank, 503 S.W.2d 759 (Tex. 1973).*

(n6)Footnote 257. *Olabass v. Zambrano, 543 S.W.2d 180 (Tex. Civ. App. 1976).*

(n7)Footnote 258. *Farmer's High Sch. Consol. Dist. No. 3 v. Parker, 203 S.W.2d 516 (Mo. App. 1947).*

In a conditional estate the happening of the event upon which the estate may be defeated does not, in itself, operate to defeat the estate; some act must yet be done (such as, at common law, making an entry) to defeat the estate; the grantor may never elect to defeat the estate; in such an estate there is no reverter arising wholly from the happening of the event upon which the estate may be defeated. In a limitation the estate determines, ipso facto, upon the happening of the event which marks its boundary as to time, and the estate thereupon goes over at once to the grantor by reverter, or to the person to whom it is limited upon the happening of such contingency, if it be limited over. The ordinary technical words by which a limitation is expressed relate to time, the technical words given in 2 Bac. Abr. tit. "Conditions" (H), 117, being "dum, dummodo, quandiu, donec, quosque, ubicunque, usque ad, tamdiu"; the words by which conditions are created are "sub conditione, ita quod, si contingat, proviso." *Board of Chosen Freeholders v. Buck, 82 A. 418 (N.J. 1912).*

(n8)Footnote 259. *Preas v. Phebus, 272 P.2d 159 (Utah 1954).*

A fee upon condition subsequent is terminated only by entry by the grantor for breach of the condition. *Lake View Mem. Hosp. v. Vermilion County, 318 N.E.2d 752 (Ill. App. 1974).*

Fees upon condition subsequent does not terminate until affirmative action is taken. *Cummings v. United States, 409 F. Supp. 1064 (M.D.N.C. 1976).*

(n9)Footnote 260. *American Dirigold Corp. v. Dirigold Metals Corp., 125 F.2d 446 (6th Cir. 1942); Hawkins v. Third, 14 So. 2d 513 (Ala. 1943); Schornick v. Schornick, 220 P. 397 (Ariz. 1923); Front Street M. & O. R. Co. v. Butler, 50 Cal. 574 (1875); Spect v. Gregg, 51 Cal. 198 (1875); Storke v. Penn Mut. Life Ins. Co., 61 N.E.2d 552 (Ill. 1945); Spofford v. True, 33 Me. 283 (1851); Shattuck v. Hastings, 99 Mass. 23 (1868); Memphis & C.R. Co. v. Neighbors, 51 Miss. 412 (1878); University City v. Chicago, R.I. & P.R. Co., 149 S.W.2d 321 (Mo. 1941); Majerus v. Santo, 10 N.W.2d 608 (Neb. 1943); Ludlow v. New York & H.R. Co., 12 N.Y. (Barb.) 440 (1852); Priddy v. School Dist. No. 78, 219 P. 141 (Okla. 1923); Oklahoma City v. Local Fed. Sav. & Loan Ass'n, 134 P.2d 565 (Okla. 1943); Gulf, C.*

& S.F.R. Co. v. Dunman, 11 S.W. 1094 (Tex. 1889).

It is not divested by the grantee's breach of the condition, but continues until the grantor or his heirs take advantage of such breach and make an entry or a claim of title in order to avoid the estate. *Sherill v. Sherill, 99 So. 838 (Ala. 1924); Texas Co. v. Davis, 254 S.W. 304 (Tex. 1923).*

Condition subsequent divests estate. *Hart v. Gould, 259 P.2d 49 (Cal. App. 1953); Dallas v. Etheridge, 253 S.W.2d 640 (Tex. 1952).*

Grantee of fee upon condition subsequent takes oil, gas and mineral rights. *In re Hart's Estate, 311 P.2d 605 (Cal. App. 1957).*

Re-entry necessary to terminate fee upon condition subsequent. *Preston v. Bosworth, 55 N.E. 224 (Ind. 1899).* In the case of conditions subsequent the title vests in the grantee or devisee and remains in him until it is divested or cut down by the happening, performance, or non-performance of the condition and entry by the grantor. *Wilder v. Kress, 194 N.Y.S. 204 (1922); Gypsy Oil Co. v. Escoe, 258 P. 906 (Okla. 1927).*

(n10)Footnote 261. *Stewart v. Colvin, 214 P.2d 229 (Okla. 1949); Allen v. Sharp, 233 S.W.2d 485 (Tex. Civ. App. 1950).*

(n11)Footnote 262. *Finlay v. King's Lessee, 28 U.S. (3 Pet.) 346 (1830); Rannels v. Rowe, 145 F. 296 (8th Cir. 1906); First Nat'l Bank v. McIntosh, 79 So. 121 (Ala. 1918); Hawkins v. Hansen, 142 P. 280 (Kan. 1914); Chute v. Washburn, 46 N.W. 555 (Minn. 1890); Munro v. Syracuse L. & N. R. Co., 93 N.E. 516 (N.Y. 1910); Jones v. Chesapeake & Ohio R. Co., 14 W. Va. 514 (1878); Miller v. Yorkshire Ins. Co., 297 N.W. 377 (Wis. 1941).*

In a condition precedent the title does not vest prior to the performance of the condition. *Jackson v. Knapp, 130 N.E. 524 (Ill. 1921); Gypsy Oil Co. v. Escoe, 258 P. 906 (Okla. 1927).*

If the condition precedent never happens the estate never vests. *Jackson v. Knapp, 130 N.E. 524 (Ill. 1921).*

A fee simple upon a condition subsequent does not terminate automatically upon the happening of the stated event and the holder of the future interest must take affirmative action to terminate the estate. *Cummings v. United States, 409 F. Supp. 1064 (M.D.N.C. 1976).*

(n12)Footnote 263. *Downen v. Rayburn, 73 N.E. 364 (Ill. 1905); Koch v. Streuter, 83 N.E. 1072 (Ill. 1908); Memphis & C. R. Co. v. Neighbors, 51 Miss. 412 (1875),* citing *Warner v. Bennett, 31 Conn. 468 (1863); Nicoll v. New York & E. R. Co., 12 N.Y. 121 (1854)*(It being determined that a condition subsequent was raised by apt and sufficient words, it follows that the estate conveyed remains defeasible until the condition be performed, destroyed, or barred by the statute of limitations, or by estoppel); *Kerens v. St. Louis Union Trust Co., 223 S.W. 645 (Mo. 1920); Raley v. Umatilla County, 13 P. 890 (Or. 1887); Frank v. Stratford-Handcock, 77 P. 134 (Wyo. 1904).*

(n13)Footnote 264. *Downen v. Rayburn, 73 N.E. 364 (Ill. 1905); Spofford v. True, 33 Me. 283 (1851); Vail v. Long Island R. Co., 12 N.E. 607 (N.Y. 1887); Munro v. Syracuse, L. & N. R. Co., 93 N.E. 516 (N.Y. 1910); Evenson v. Webster, 53 N.W. 747 (S.D. 1892).*

When a subsequent law makes performance of a condition subsequent impossible the condition becomes a nullity. *Goldberg v. Callender Bros., 113 A. 170 (Conn. 1921)* (premises rented for saloon purposes, use made unlawful by prohibition law).

If the condition subsequent is impossible to be complied with at the time of its creation or afterwards becomes so by the act of God or for any other reason not resulting from the act of the grantee or devisee the condition is nugatory and

the estate granted or devised is absolute as though no condition had ever attached. *Jackson v. Knapp, 130 N.E. 524 (Ill. 1921). See Eastham v. Eastham, 231 S.W. 221 (Ky. 1921); Salamanca Trust Co. v. Crouse, 222 N.Y.S. 83 (1927)* (act of God excuses performance unless parties covenant otherwise).

(n14)Footnote 265. People *ex rel. Dep't of Pub. Works v. City of Fresno, 26 Cal. Rptr. 853 (1962); Scott County Bd. of Educ. v. Pepper, 311 S.W.2d 189 (Ky. 1958); Donehue v. Nilges, 266 S.W.2d 553 (Mo. 1954); Buffalo v. Day, 162 N.Y.S.2d 817 (1957); Nichols v. Haehn, 171 N.Y.S.2d 734 (1957). See Oswego v. Montcalm Dock Co., 283 N.Y.S. 121 (1935).* This is in accord with Restatement of the Law of Property, § 24, comment b. *Smith v. Glen Alden Coal Co., 32 A.2d 227 (Pa. 1943);* In re Condemnation of Land, Borough of Pringle, Pa. Com. Pl., 38 Luz. L. Reg. Rep. 325; *East Tenn. & W. N. C. R. Co. v. Gouge, 203 S.W.2d 170 (Tenn. App. 1947); Neal v. State-Planters Bank & Trust Co., 184 S.E. 203 (Va. 1936); Sanford v. Sims, 66 S.E.2d 495 (Va. 1951)*(fee does not terminate until right of re-entry is exercised).

Right of re-entry must be asserted within a reasonable time after breach. *Zambrano v. Olivas, 490 S.W.2d 218 (Tex. Civ. App. 1973).*

(n15)Footnote 266. The California court said: "In this reservation we see nothing to indicate that they intended to retain the title in themselves during their lives. On the contrary, it would seem from the language used that they intended to pass the title at once to the grantee, subject to the conditions named." *Bank of Suisun v. Stark, 39 P. 531 (Cal. 1895),* citing *Hihn v. Peck, 30 Cal. 281 (1866).*

(n16)Footnote 267. Drew v. *Baldwin, 4* N.W. 576 (Wis. 1880).

A condition subsequent is to be preferred by way of construction over a limitation as being less onerous on the grantee. *Lawyers Trust Co. v. Houston, 359 S.W.2d 887 (Tex. 1962).*

Conditions subsequent in deed are preferred over conditional limitation. *Field v. Shaw, 535 S.W.2d 3 (Tex. Civ. App. 1976).*

(n17)Footnote 268. Littleton, Tenures, ch. 5, L. 3. *Moore v. Wells, 93 S.E.2d 731 (Ga. 1956).*

(n18)Footnote 269. "Where a grantee accepts a deed, and goes into possession of the premises under it, he is bound by the conditions contained in the deed as effectually as if he had signed and sealed the instrument. Although not executing the instrument, he should be deemed to have entered into an express undertaking to do what the deed says he is to do; and such undertaking or obligation imposed upon and assumed by the grantee, if not technically a covenant running with the land, is nevertheless an agreement of the grantee, evidenced by his acceptance of the deed, which might bind him and his personal representatives, and, by express words, his heirs and assigns." *Hickey v. Lake Shore & M. S. R. Co., 36 N.E. 672 (Ohio 1894); Douglas v. Douglas, 56 P.2d 362 (Okla. 1936).*

(n19)Footnote 270. *Maine v. Cumston, 98 Mass. 317 (1867).*

See the following cases: *Druecker v. McLaughlin, 85 N.E. 647 (Ill. 1908); Leach v. Rains, 48 N.E. 858 (Ind. 1897); Agne v. Seitsinger, 52 N.W. 228 (Iowa 1892); Dyer v. Sanford, 50 Mass. (9 Metc.) 395 (1845); Bredell v. Kerr, 147 S.W. 105 (Mo. 1912); Coykendall v. Kellogg, 198 N.W. 472 (N.D. 1924); Barnes v. Crockett, 68 S.E. 983 (1910); Matheny v. Ferguson, 47 S.E. 886 (W. Va. 1904); Gross v. Arians, 141 N.W. 224 (Wis. 1913).*

The acceptance of the deed may show an acceptance of the condition attached thereto. *Buszozak v. Wolo, 211 N.Y.S. 557 (1925).*

(n20)Footnote 271. *Durgin v. Allen, 85 N.E.2d 208 (Mass. 1949); Westrick v. Unterbrink, 105 N.E.2d 885 (Ohio App. 1950).*

(n21)Footnote 272. *Rountree v. Richardson, 108 So. 2d 152 (Ala. 1959).*

(n22)Footnote 273. *Halvorsen v. Pacific County, 156 P.2d 907 (Wash. 1945).*

(n23)Footnote 274. *Akasu v. Power, 91 N.E.2d 224 (Mass. 1950).*

Right of re-entry after a condition of limitation required to be exercised within the period of statute of limitations for recovery of land. *Field v. Shaw, 535 S.W.2d 3 (Tex. Civ. App. 1976).*

A devise "in fee simple" with a proviso that he should never deny access or occupation to the several heirs "hereinafter named" during their lifetime created a fee subject to a condition subsequent. *Babb v. Rand, 345 A.2d 496 (Me. 1975).*

(n24)Footnote 275. *Bou v. Willits, 214 P. 519 (Cal. App. 1923).*

A mere statement in a deed of the purpose of the conveyance or a clause limiting the use to be made of the premises conveyed creates neither a covenant nor a condition, and the nonfulfilment of the purpose or a violation of the restriction will not of itself defeat the estate granted. *Van De Bogert v. Reformed Dutch Church, 220 N.Y.S. 50 (1926). See Columbia Bldg. Co. v. Cemetery of Holy Cross, 141 A. 525 (Md. 1928).*

(n25)Footnote 276. *Oldfield v. Stoeco Homes, Inc., 139 A.2d 291 (N.J. 1958),* following the Restatement of the Law of Property, § 45, comment m.

In *Markey v. Smith, 16 N.E.2d 20 (Mass. 1938),* a provision for re-entry if a lessee failed to operate the premises for thirty days was held to create a fee upon condition subsequent which did not cease until the owner re-entered, not a determinable fee.

Express provisions for reverter actually creates a right of re-entry unless magic words necessary to create a determinable fee are used. *Alexander Bldg. Corp. v. Carteret, 155 A.2d 263 (N.J. 1959).*

Fee upon condition subsequent preferred over fee simple determinable. *Hagaman v. Board of Educ. of Woodbridge Twp., 285 A.2d 63 (N.J. 1970).*

Provision that the grantee would reconvey under certain conditions created a fee upon condition subsequent not a fee simple determinable. *Kanarado Mining & Dev. Co. v. Sutton, 539 P.2d 1325 (Colo. 1975).*

(n26)Footnote 277. *Carter v. New York Cent. R. Co., 73 NYS2d 610 (1947).*

Fees upon condition subsequent are presumed over fee simple determinables to avoid a forfeiture. *Hardman v. Dahlonega-Lumpkin County Chamber of Commerce, 233 S.E.2d 753 (Ga. 1977).*

Provision limiting use and providing for reverter if use violated held a condition subsequent not a fee simple determinable. *Field v. Shaw, 535 S.W.2d 3 (Tex. Civ. App. 1976).* Fee upon condition subsequent is less burdensome to the grantee than a conditional limitation.

(n27)Footnote 278. Sheppard-Touchstone, Common Assurance, 119; *Taylor v. Sutton, 15 Ga. 103 (1854); O'Brien v. Wetherell, 14 Kan. 616 (1875); Louisville & N.R. Co. v. Covington, 65 Ky. (2 Bush) 526 (1866). Wilson v. Wilson, 38 Me. 18 (1854); Langley v. Chapin, 134 Mass. 82 (1883);* Jackson *ex dem. Reeves v. Topping, 1 N.Y. (Wend.) 388; Upington v. Corrigan, 45 N.E. 359 (1896).*

(n28)Footnote 279. *Sherill v. Sherill, 99 So. 838 (Ala. 1924). See Stewart v. Workman, 102 S.E. 474 (W. Va. 1920).*

(n29)Footnote 280. *Hayward v. Kinney, 48 N.W. 170 (Mich. 1891).*

(n30)Footnote 281. *Kroening v. Kroening, 269 N.W. 536 (Wis. 1939).*

(n31)Footnote 282. *Vermont v. Society for Propagation of the Gospel, 28 F. Cas. 545,* 2 Paine 545 (C.C.D. Vt. 1827); *Louisville & N.R. Co. v. Covington, 65 Ky. (2 Bush) 526 (1866); Wilson v. Wilson, 38 Me. 18 (1854); Joslyn v. Parlin, 54 Vt. 670 (1881); Marks v. Marks, 10 Mod. 419.*

(n32)Footnote 283. *Barker v. Cobb, 36 N.H. 344 (1858); Emerson v. Simpson, 43 N.H. 475 (1862).*

(n33)Footnote 284. *Taylor v. Binford, 37 Ohio St. 262 (1881).*

(n34)Footnote 285. *Libby v. Winston, 93 So. 631 (Ala. 1922); Smith v. School Dist. No. 14, 94 S.W.2d 706 (Ark. 1936); Hawley v. Kafitz, 83 P. 248 (Cal. 1905); Fitzgerald v. County of Modoc, 129 P. 794 (Cal. 1913); Hasman v. Elk Grove Union High Sch., 245 P. 464 (Cal. App. 1926); First Presbyterian Church v. Bailey, 97 A. 583 (Del. 1916); Rooks Creek Evangelical Lutheran Church v. First Lutheran Church, 124 N.E. 793 (Ill. 1919); Dunne v. Minsor, 143 N.E. 842 (Ill. 1924); First Lutheran Church of Pontiac v. Rooks Creek Evangelical Lutheran Church, 147 N.E. 53 (Ill. 1925); Kilpatrick v. Baltimore, 31 A. 805 (Md. 1895); Cassidy v. Mason, 50 N.E. 1027 (Mass. 1898); Chouteau v. St. Louis, 55 S.W.2d 299 (Mo. 1932); Nichols v. Haehn, 171 N.Y.S.2d 734 (1957); In re Board of Educ., 184 N.Y.S.2d 735 (1959); Braddy v. Elliott, 60 S.E. 507 (N.C. 1908); First Presbyterian Church v. Sinclair Ref. Co., 157 S.E. 438 (N.C. 1931); Washington City Bd. of Educ. v. Edgerton, 94 S.E.2d 661 (N.C. 1956); Ashland v. Greiner, 50 N.E. 99 (Ohio 1898); Ball v. Milliken, 76 A. 789 (R.I. 1910); Gahagan v. Texas & P. R. Co., 231 S.W.2d 762 (Tex. Civ. App. 1950); King v. Norfolk & W. R. Co., 39 S.E. 701 (Va. 1901).*

The presence of a repurchase clause in a deed by the grantor was evidence of a fee upon condition subsequent. *Floyd v. Hoover, 234 S.E.2d 89 (Ga. App. 1977).*

(n35)Footnote 286. *Ruch v. Rock Island, 97 U.S. 693 (1878); Adams v. Ore Knob Copper Co., 7 F. 634 (C.C.N.C. 1880); Union Pac. R. Co. v. Cook, 98 F. 281 (1899); Hanners v. Hanners, 77 So. 2d 484 (Ala. 1955); Ritchie v. Kansas, N. & D. R. Co., 39 P. 718 (Kan. 1895); Little Falls Water Power Co. v. Belin, 72 N.W. 69 (Minn. 1897); Ellis v. Kyger, 3 S.W. 23 (Mo. 1887); Bouvier v. Baltimore & N. Y. R. Co., 51 A. 781 (N.J. 1902); Plumb v. Tubbs, 41 N.Y. 442 (1869); Union College v. New York, 65 N.E. 853 (N.Y. 1903); Gulf, C. & S. F. R. Co. v. Dunman, 11 S.W. 1094 (Tex. 1889); Hearne v. Bradshaw, 305 S.W.2d 618 (Tex. Civ. App. 1957)*(failure to provide for re-entry on breach created covenant not condition with an action for damages not forfeiture).

(n36)Footnote 287. *Clark v. Grand Rapids, 55 N.W.2d 137 (Mich. 1952); Frederic v. Merchants & Marine Bank, 28 So. 2d 843 (Miss. 1947).*

In the case of *Loats Female Orphan Asylum v. Essom, 150 A.2d 742 (Md. 1959),* the testator had devised property for the express purpose of use as an orphan asylum. It was held that there being no express reservation of right of reverter or of re-entry the trustees of the asylum could convey a fee simple title to the property, modern philosophy preferring caring for orphans in private homes.

The Ohio rule is that a mere statement of duration or of condition does not create a fee simple determinable or upon condition subsequent unless there is an express reservation of a possibility of reverter or right of re-entry. *PCK Props., Inc. v. Cuyahoga Falls, 176 N.E.2d 441 (Ohio 1960).*

* This chapter is based in part on Ch. 30, George W. Thompson, Commentaries on the Modern Law of Real Property (John S. Grimes ed. 1979), which made a significant contribution toward preserving the American common law governing defeasible fees.

Thompson on Real Property, Thomas Editions

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CHAPTER 20 DEFEASIBLE FEES *

2-20 Thompson on Real Property, Thomas Editions § 20.06

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§ 20.06 Language Giving Rise to Conditions.

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In view of the widely expressed antipathy of the courts against "forfeitures," it is the position usually taken that the existence of a condition must be clearly expressed and will not be presumed. n288 There is a line of authority to the effect that where the granting of a fee is absolute and the habendum clause does not limit it any additional clause repugnant to the grant which is not incorporated in the body of the deed is mere surplusage. n289 A deed will not be construed to create an estate upon condition, unless the language of the deed, according to the rules of law, or *proprio vigore*, imports a condition or the intent of the grantor to make a conditional estate is otherwise clearly and unequivocally indicated. n290 After an absolute deed the grantor cannot by subsequent deed impose conditions, for there is then no estate in the grantor upon which the conditions can take effect. n291 As a general rule, a condition cannot be established by implication, as, for instance, by a declaration of the purpose for which the conveyance is made. n292

While the courts are slow to imply a construction of dubious language that will create a condition subsequent, such conditions are legal and will be enforced if it is clear that the parties did intend a condition and not a covenant or other legal result. It is not, however, necessary to use any of the usual words of condition to create an estate upon condition. If it clearly appears from the terms used that the parties intended to create an estate upon condition, such intention will control. n293 The word "provided" may be used in a deed to create a condition subsequent, but its use does not necessarily result in the creation of such condition. n294 Conditions subsequent must be so created as to leave no doubt regarding the grantor's intention. n295

If the intention of the grantor as manifested by the whole deed was merely to create a restriction, effect will be given to the provision in this way, although it be expressed to be upon condition. If, on the other hand, the intention as gathered from the whole instrument was to create a condition, the instrument will be construed as creating a condition, though none of the ordinary words to make a condition are used. n296

When any conditions annexed to a grant or conveyance of lands are merely nominal, and evince no intention of actual or substantial benefit to the party to whom or in whose favor they are to be performed, they may be wholly disregarded,

and a failure to perform the same shall in no case operate as a forfeiture of the lands conveyed subject thereto. Such are the statutes in Michigan, n297 and Minnesota. n298 Sometimes conditions are confused with trusts. n299

A limitation to a corporation to be formed within twenty years after the testator's death created an executory devise with an interim reversion to the testator's heirs. n300 The reservation expressly of a right of re-entry is not essential to the creation of a fee upon condition subsequent. But where a re-entry is not reserved in so many words the courts have the task of determining whether a condition or a covenant exists and are inclined to the latter viewpoint. While a condition subsequent may be implied the implication must be clear. n301 It has been held that unless there is an express right of reentry reserved and ambiguity arises which the courts usually resolve against the condition. n302 So a condition subsequent, attached to a testamentary gift, is not effective, in the absence of a provision for reversion or gift over in the event of a failure to perform the condition. n303 A life estate with remainder over can be created subject to a condition subsequent and right of re-entry in the grantor. n304 "The primary purpose of the construction of a deed is to ascertain the intention of the parties, to be gathered from the instrument as a whole, giving effect to every word and rejecting none as meaningless or repugnant, if this can be done without violating a positive rule of law." n305 If the parties intended the estate to vest and the grantee to perform the acts or to refrain from certain acts after taking possession, there is a condition subsequent. n306

If the language used imports a condition only and it is clear that the parties intended that the legal consequences of a breach of a condition should follow a violation of the terms of the provision, this cannot be treated as a covenant, but must be treated as a condition. n307 An intention to impose a condition upon a grant must be plainly and clearly expressed in the instrument. n308 Where the language used is so clear as to leave no doubt that a condition was intended, the estate created is one upon condition. n309 Where the language used is unambiguous, and the words are generally recognized as apt and appropriate for the creation of an estate upon condition, it is not enforceable as a covenant. n310 Where the expression "on condition" is used, with right of re-entry for failure to keep and perform the condition expressed, a condition is clearly created. n311 A condition is not a covenant. The court cannot disregard the distinction between them. "Upon covenants, the legal responsibility of their non-fulfillment is, that the party violating them must respond in damages. The consequence of the non-fulfillment of a condition is a forfeiture of the estate. The grantor may re-enter at his will and possess himself of his former estate." n312

If, however, such a clause is inserted in the form of an express condition or it is declared that a breach of the stipulation shall work a forfeiture, the conveyance will be construed as creating a condition subsequent. n313 A condition that the grantee shall erect upon the land conveyed a cotton factory, within two years from the date of the conveyance, is a condition and not a covenant. It has been held not necessary that the deed contain a provision that upon the non-compliance with the condition specified the title shall revert to the grantor if it is clear from the language used by the parties in the deed as a whole that it was their intention and purpose that the title should revert to the grantor upon a failure to use the land for a particular purpose or upon the failure to perform a specified condition. n314 In determining whether a clause in a deed must be construed as a covenant or a condition, the surrounding circumstances must be considered where part of the deed indicates a covenant and part indicates a condition. n315

Under the common law there were certain words which made an estate conditional. Thus, a deed to certain lands "upon condition" that the grantee do some act, or "provided always" that the grantee do or cause some act to be done, or "so that" the grantee shall do or cause some act to be done, gave the grantee an estate upon condition without any other words being added, because these words in themselves contained a condition that the grantor and his heirs re-enter, if the grantee failed to perform the condition. The words, "if it happen" that a thing reserved is not paid or performed, will make an estate conditional when used in a grant from the state or when used in a will, but, when used in a deed of an individual, these words do not make the title in the lands conditional. n316

The use of the words "conditions precedent" in a deed by the grantor does not necessarily make the conditions precedent. n317 On the other hand, the use of such words as "upon condition," and the like, is not absolutely necessary. Any words conveying the same meaning are sufficient to create a condition. n318

Apt words "of condition" will not create an estate "upon condition" if the intention of the grantor, as manifested by the whole deed, is otherwise.

A mere declaration in a deed that the grant is made for a special and particular purpose creates no implied condition unless coupled with words appropriate to make such a condition. n319 The nature and purpose of the deed and the circumstances of the transaction may control the use and meaning of words of condition so that they will not have the effect of limiting the estate conveyed. Thus, "the word 'proviso' is an appropriate one to constitute a common-law condition in a deed or will, but this is not the fixed and invariable meaning attached to it by the law in these instruments. On the contrary, it gives way to the intent of the parties as gathered from an examination of the whole instrument, and has frequently been thus explained and applied as expressing simply a covenant or limitation in trust. n320

The words "option to repurchase" contained in a deed create a condition subsequent. n321

In a deed to a railroad company, a condition that the company should erect a private crossing under the railroad track may properly be construed as a reservation of a mere easement to the grantor, if there is nothing further in the deed which indicates an intention to make the compliance with such provision a condition subsequent. The provision for the right-of-way was treated as part of the consideration for the conveyance. It was accordingly held that the grantor could maintain an action for damages against the railroad for closing the crossing. n322 A deed "upon this further condition" that the grantee should permit the grantor to have access through the land to the waters of a harbor by a road heretofore used, was held not to constitute a condition subsequent. There was in the deed no clearly expressed intention importing that the estate was to depend upon a contingency provided for. The legal effect of the condition was to annex a right-of-way to the land conveyed. It was a reservation in favor of the grantee. n323 Where a devise was made "upon the express condition" that the devisee should pay all legacies within twelve months, but added, "and I feel confident that he will comply with my wish, it being my particular desire that all the above legacies shall be paid, and I do hereby charge and make chargeable all my said real and personal estate with the payment of the aforesaid legacies," it was held that there was no condition for which an entry could be made, but only a trust. n324

The absence of words showing an intention to create an estate on condition is significant. n325 Some cases require that conditions be created by express words. n326 Others permit conditions to be implied if the implication is clear. n327 The condition cannot be established by parol evidence except upon a proper allegation of fraud, accident or mistake and upon clear and satisfactory evidence. n328 A condition expressed is presumed to be the only condition, n329 unless its terms fairly imply a further condition. n330

The condition must appear in the deed of the lands to which the condition is annexed or in a writing executed by the grantee referring to such deed or in some way made a part of it. n331 If duly executed the condition may be created by a writing on the back of a deed. n332 A court is not warranted in mutilating a deed by rejecting conditions attached to the grant. n333 The circumstances surrounding the parties may be shown, in order to aid the court in the construction of the condition. n334

A condition may be created by a deed which refers to a condition contained in another paper and is made subject to it. The two instruments are read together and are of the same effect as if the condition were incorporated in the deed itself. n335 So if, in pursuance of the contract in virtue of which the deed is made, the parties at the time of executing the deed also execute an agreement expressing the condition upon which the property is conveyed, the conveyance is upon the condition so expressed. Thus where, at the time of receiving a deed, the grantee executed an unsealed instrument, declaring that the deed was made on condition that the grantee should support the grantor during his lifetime, the deed and such instrument should be read together in determining the grantee's title under the deed. In such case, when the grantee at the time of receiving the deed executed and delivered the condition, he thereby agreed with the grantor that he accepted the deed upon the condition written, and that the title to the property described in the deed should not become vested in him until he had furnished the support specified in the condition. n336 A condition contained in a prior

agreement between the parties, in pursuance of which the deed is made, but not expressed or refereed to in the deed, does not bind the grantee. n337 A condition when written upon the back of a deed poll is effectual, for, although the grantee did not sign the condition, by accepting the deed with the condition upon it he accepted it as a deed made upon the condition so declared. n338 A condition may be expressed and a re-entry reserved in an instrument collateral to the deed. n339

"Divers words there be, which by virtue of themselves make estates upon condition." n340 To make an estate conditional, the words must clearly show such intent. n341 Conditions are imposed only by the express terms of the instrument, or by necessary implication from the language used. n342 A mere statement of the consideration for or the purpose of the conveyance does not, of itself, render an estate conditional. n343 The question is usually one of construction. n344 No precise or technical words are required to create either a condition precedent or a condition subsequent. n345 A condition is created by the use of appropriate words, such as "on condition," "provided," "so as," "so that," "if it happen," or the like, which import, *ex vi termini*, that the vesting or continuance of the estate is to depend upon the observance of the provision named. n346 "To every good condition is required an external form"; n347 but apt words, even, do not always create a conditional grant, when the intent of the grantor, as shown by the whole deed, is otherwise. n348 The words of condition should be a part of the habendum or come directly after it, n349 controlling but not contradicting the generality of the words in the premises. The words must not only be such as to themselves import a condition, but they must be so connected with the grant in the deed as to qualify or restrain it. n350

As a general rule the estate granted by the granting clause in a deed cannot, by subsequent recitals in the deed that are not a part of the granting clause, be cut down, amended, modified, restricted, or annulled, n351 but such rule has no application to a deed containing conditions in the granting clause itself. n352 If the words of condition do not introduce a new clause qualifying the grant itself, but are used by way of limitation or qualification of a former clause, they do not import a condition. n353 Where the granting clause of a deed conveyed an absolute fee, a provision in the habendum clause limiting the use to a specified purpose was held not to lessen the effect of the granting clause and the repugnancy must be resolved in favor of the granting clause in the absence of words creating a base fee or fee on condition subsequent. n354 It is not absolutely essential that a strict condition should be a part of the habendum, but if it is found in any other part of the deed, as for instance, in the premises or following the covenants, its unusual place in the deed may influence its construction. n355 Where a deed contained apt words to convey a fee conditional in the granting clause, the language of the habendum clause allegedly indicating an intention to give the grantee a life estate only was held not to be considered, since the estate granted cannot be cut down by a subsequent provision of the same instrument. n356 Where the trustees of a city adopted a resolution providing that certain lands should be granted upon the condition that the lands should be occupied and improved within a specified time from the date of the certificate, and if within a limited time thereafter improvements of a certain amount were not made, the lands should revert to the city. The deed to the defendant's grantor recited a sale made to him that day on the conditions of the resolution, and an agreement on his part to make the improvements. These recitals preceded the granting clause, which together with the habendum, in consideration of the full receipt of the purchase money by the city, purported to vest in the grantee the full title of the city in fee simple, without condition. It was held that the grant was absolute. n357 Where the short form statutory deed is used, in which the habendum is absent, about the only place in the usual printed form for the insertion of a condition is just after the description of the property, and this appears to be the place where the condition is inserted when this form of deed is used. n358

FOOTNOTES:

(n1)Footnote 288. *Lassiter v. Oxford, 234 F.2d 217 (4th Cir. 1956); Stewart v. Weaver, 87 So. 2d 548 (Ala. 1956); Coffill v. Bach, 323 P.2d 873 (Cal. App. 1958); Gordon v. Whittle, 57 S.E.2d 169 (Ga. 1950); Nogaj v. Nogaj, 89 N.W.2d 513 (Mich. 1958); Waring v. Rogers, 286 S.W.2d 374 (Mo. App. 1956); Edward John Noble Hosp. v. Board of Foreign Missions, 176 N.Y.S.2d 157 (1958); Ange v. Ange, 71 S.E.2d 19 (N.C. 1952); Stevens v. Vinita, 315 P.2d 776 (Okla. 1957); Gange v. Hayes, 237 P.2d 196 (Or. 1951); Cooper v. Milikovsky, 112 A.2d 616 (Pa. 1955); Bristol v. Nolan, 53 A.2d 466 (R.I. 1947); Joseph Mann Library Ass'n v. Two Rivers, 76 N.W.2d 388 (Wis. 1956); J. M. Carey & Bro. v. Casper, 213 P.2d 263 (Wyo. 1950).*

"Conditions are not favored in law as they tend to destroy estates; but conditions may be created if such an intention appears from an examination of the whole deed. There are certain words which are considered appropriate to create a condition; but when these apt words are used the provision is not always construed as a condition, and without these words conditions have been found to exist when such appears to be the intention of the parties." *Ball v. Milliken, 76 A. 789 (R.I. 1910),* citing *Clapp v. Wilder, 57 N.E. 692 (Mass. 1900).*

Intention to create a fee simple subject to condition subsequent must be clearly expressed. *Schaefers v. Apel, 328 So. 2d 274 (Ala. 1976).*

(n2)Footnote 289. *Whetsell v. Jernigan, 223 S.E.2d 397 (N.C. 1976)*(reverter clause followed the description).

(n3)Footnote 290. *Dozier v. Troy Drive-In-Theaters, 89 So. 2d 537 (Ala. 1956)*(reservation of a right to repurchase upon a contingency created an option not a condition subsequent); *Augusta Land Co. v. Augusta R. & Elec. Co., 79 S.E. 138 (Ga. 1913),* citing *Thomson v. Hart, 66 S.E. 270 (Ga. 1909); Gearhart v. West Lumber Co., 90 S.E.2d 10 (Ga. 1955)*(option created); *Clark v. Grand Rapids, 55 N.W.2d 137 (Mich. 1952)*("condition" alone does not create fee upon condition subsequent); *Washington City Bd. of Educ. v. Edgerton, 94 S.E.2d 661 (N.C. 1956)*(gift "upon condition" that the grantee should hold and possess it "only so long as" used for school purposes was a mere statement of purpose in a fee simple absolute); *Bristol v. Nolan, 53 A.2d 466 (R.I. 1947)*(condition of reverter must be clearly expressed).

Determinable fee ends automatically. (Fee upon condition subsequent requires re-entry.) *Mayor & City Council of Ocean City v. Tabor, 367 A.2d 1233 (Md. 1977).*

(n4)Footnote 291. *Alemany v. Daly, 36 Cal. 90 (1868).*

A condition in a deed in fee that others might use the property during their lifetimes was held valid. *Babb v. Rand, 345 A.2d 496 (Me. 1975).*

(n5)Footnote 292. *Rawson v. School Dist. No. 5, 89 Mass. (7 Allen) 125 (1863); In re Board of Educ. of Utica City Sch. Dist., 184 N.Y.S.2d 735 (1959)*(power of termination will not be implied).

It is stated in a North Carolina case that "when the condition is relied upon to work a forfeiture, it must appear plainly in the deed or arise by clear implication." *Braddy v. Elliott, 60 S.E. 507 (N.C. 1908).*

Condition found only in description clause and not in habendum or granting clause did not create a fee upon condition subsequent. *Waters v. North Carolina Phosphate Corp., 232 S.E.2d 275 (N.C. App. 1977).* (Now under G.S. 39-1.1, a later statute, North Carolina has the four corners rule.)

(n6)Footnote 293. *Seaboard Air Line R. Co. v. Anniston Mfg. Co., 65 So. 187 (Ala. 1914); Murphy v. Schuster Springs Lab. Co., 111 So. 427 (Ala. 1926); McDougall v. Palo Alto Unified Sch. Dist., 28 Cal. Rptr. 37 (1963); Bacon v. Huntington, 14 Conn. 92 (1840); Southern Colonization Co. v. Derfler, 75 So. 790 (Fla. 1917); Jackson v. Knapp, 130 N.E. 524 (Ill. 1921); Stilwell v. Knapper, 69 Ind. 558 (1880); Wilson v. Wilson, 86 Ind. 472 (1882); Richter v. Richter, 12 N.E. 698 (Ind. 1887); Sumner v. Darnell, 27 N.E. 162 (Ind. 1891); Kilpatrick v. Baltimore, 31 A. 805 (Md. 1895); Hapgood v. Houghton, 39 Mass. (22 Pick.) 480 (1839); Stilwell v. St. Louis & H. R. Co., 39 Mo. App. 221 (1890); Hamilton v. Kneeland, 1 Nev. 40 (1865); Underhill v. Saratoga & W. Co., 20 N.Y. (Barb.) 455 (1855); Gibert v. Peteler, 38 N.Y. 165 (1868); Walker v. Marcellus & O. L. R. Co., 166 N.Y.S. 354 (N.Y. App. 1917); Worman v. Teagarden, 2 Ohio St. 380 (1853); Paraffine Oil Co. v. Cruce, 162 P. 716 (Okla. 1916)*14 A.L.R. 952; *Watters v. Bredin, 70 Pa. 235 (1872); Ball v. Milliken, 76 A. 789 (R.I. 1910); Nolfe v. Bryne, 219 S.W. 1 (Tenn. 1920); Jeffery v. Graham, 61 Tex. 481 (1887); Berryman v. Schumacher, 3 S.W. 46 (Tex. 1887); Glocke v. Glocke, 89 N.W. 118 (Wis. 1902)57 L.R.A. 458.*

"If, from the nature of the acts to be performed by the grantee and the time required for their performance, it is evidently the intention of the parties that the estate shall be held and enjoyed on condition that the grantee perform the acts specified, then the estate is upon condition. This is expressly so when the grantor has reserved no other effectual remedy for the enforcement of performance on the part of the grantee. In such a case a condition subsequent arises by clear implication." *Richter v. Richter, 12 N.E. 698 (Ind. 1887),* per Mitchell, J.

Devise in fee simple with the provision that the devisee should never deny access or occupation to the heirs named in the will during their lifetime, created a fee simple subject to condition subsequent which continued until the death of the last designated heir. *Babb v. Rand, 345 A.2d 496 (Me. 1975).*

(n7)Footnote 294. *Boston Consol. Gas Co. v. Oakes, 181 N.E. 225 (Mass. 1932).*

"Provided" is a word of condition, not of limitation. *Pfeffer v. Lebanon Land Dev. Corp., 360 N.E.2d 1115 (Ill. App. 1977).*

(n8)Footnote 295. *Mickleson v. Gypsy Oil Co., 238 P. 194 (Okla. 1925).*

(n9)Footnote 296. *Lassiter v. Oxford, 234 F.2d 217 (4th Cir. 1956); Elyton Land Co. v. South & N. Ala. R. Co., 14 So. 207 (Ala. 1893); Seaboard Air Line R. Co. v. Anniston Mfg. Co., 65 So. 187 (Ala. 1914); Beran v. Harris, 205 P.2d 107 (Cal. App. 1949)*("upon the express condition" creates condition subsequent); *Southern Colonization Co. v. Derfler, 75 So. 790 (Fla. 1917); Walker v. Marcellus & O. L. R. Co., 166 N.Y.S. 354 (1917); Karchner v. Hoy, 25 A. 20 (Pa. 1892); Ball v. Milliken, 76 A. 789 (R.I. 1910); Glocke v. Glocke, 89 N.W. 118 (Wis. 1902).*

(n10)Footnote 297. *Barrie v. Smith, 10 N.W. 168 (Mich. 1881).*

(n11)Footnote 298. *See Sioux City & St. Paul R. Co. v. Singer, 51 N.W. 905 (Minn. 1892)*saying: "It may be apparent, from the very nature of the condition, that it was not intended to confer or reserve any real benefit to the grantor or to any other person. Such, for instance, would be a condition, annexed to the granting of a fee, that the grantee should yearly deliver an ear of corn to the grantor, or render any specified but unsubstantial service. To such a case the statute would apply again, a condition may be such that proof beyond the deed itself would be necessary to disclose the fact whether the expressed condition was or was not substantially beneficial. We will suppose that the owner of a lot conveys it with the express condition that no building shall be erected on it for a period of ten years. It cannot be said from its terms that this condition was not reasonably intended to be, or that it was not, actually beneficial to the grantor. To such a case, no more being shown, the statute is not applicable. The court cannot declare the condition to be 'merely nominal,' and to 'evince no intention of actual or substantial benefit.' It requires that the court be further informed as to facts not disclosed by the deed before it can declare the condition, to which the parties have solemnly agreed, to be of no legal effect. If the grantor should be found to own adjoining lands, which were so improved that the erection of a building upon the granted lot would seriously impair their value and usefulness, the condition would, without doubt, be valid. On the other hand, the grantee, to defeat the condition, might show that the grantor had no actual or prospective interests in the adjoining premises, was in no manner concerned in them or in their use, and that they were unimproved. He might thus show himself entitled to the benefit of the statute, if, indeed, the statute confers any benefit beyond what the common law would give." The case holds that a condition that intoxicating liquor shall not be sold on the granted land cannot be declared to be "merely nominal" in the absence of any proof that the plaintiff had no special interest in the observance of the condition. The court dissent from the case of *Barrie v. Smith, 10 N.W. 168 (Mich. 1881).*

(n12)Footnote 299. A conveyance was made of a parcel of land with a church edifice thereon, for a consideration not extremely inadequate under the circumstances for the interest actually conveyed, "upon the condition that the property shall be forever held for the use of the Protestant Episcopal Church in Old Town." The church after a time abandoned the property and allowed it to fall into decay. It was held that the conveyance was not upon a condition that could be the foundation for a forfeiture to the grantor or his heirs, but merely created a trust for the benefit of the church

and enforceable in equity only in its behalf. *Neely v. Hoskins, 24 A. 882 (Me. 1892).*

"It is perfectly well settled that an estate on condition cannot be created by deed, except when the terms of the grant will admit of no other reasonable interpretation." *Ayer v. Emery, 96 Mass. (14 Allen) 67 (1867).*

(n13)Footnote 300. *Loats Female Orphan Asylum v. Essom, 150 A.2d 742 (Md. 1959).*

(n14)Footnote 301. *United States v. Certain Land in Cape Girardeau, 79 F. Supp. 558 (D. Mo. 1947), aff'd, Carmack v. United States, 177 F.2d 463 (8th Cir. 1949); Gordon v. Whittle, 57 S.E.2d 169 (Ga. 1950); King County v. Hanson Inv. Co., 208 P.2d 113 (Wash. 1949).*

(n15)Footnote 302. No condition subsequent where no right of re-entry was reserved. *Standard Knitting Mills, Inc. v. Allen, 424 S.W.2d 796 (Tenn. 1967).*

(n16)Footnote 303. *In re Allen's Estate, 45 N.Y.S.2d 699 (1943).*

(n17)Footnote 304. *Knowles v. South County Hosp., 140 A.2d 499 (R.I. 1958).*

(n18)Footnote 305. *Magnolia Petroleum Co. v. West, 30 N.E.2d 24 (Ill. 1940).*

(n19)Footnote 306. *Faust v. Little Rock Sch. Dist., 276 S.W.2d 59 (Ark. 1955); Storke v. Penn Mut. Life Ins. Co., 61 N.E.2d 552 (Ill. 1945).*

Words of forfeiture are construed to convey a fee upon condition subsequent. *Floyd v. Hoover, 234 S.E.2d 89 (Ga. App. 1977).*

(n20)Footnote 307. *Sanitary Dist. of Chicago v. Chicago Title & Trust Co., 116 N.E. 161 (Ill. 1917); Rooks Creek Evangelical Lutheran Church v. First Lutheran Church, 124 N.E. 793 (Ill. 1919); Northwestern Univ. v. Wesley Mem. Hosp., 125 N.E. 13 (Ill. 1919); Gray v. Blanchard, 25 Mass. (8 Pick.) 284 (1829); Langley v. Chapin, 134 Mass. 82 (1833); Hamel v. Minneapolis, St. P. & S. S. M. R. Co., 107 N.W. 139 (Minn. 1906); Studdard v. Wells, 25 S.W. 201 (Mo. 1894); Woodruff v. Trenton Water Power Co., 10 N.J. Eq. 489 (1856); Cornelius v. Ivins, 26 N.J.L. 376 (1857); Union College v. New York City, 65 N.E. 853 (N.Y. 1903); Sharon Iron Co. v. Erie, 41 Pa. 341 (1861); Palairet v. Snyder, 106 Pa. 227 (1884); Hammond v. Port Royal & A. R. Co., 15 S.C. 10 (1881); Jeffery v. Graham, 61 Tex. 481 (1884); Hudson v. Caffey, 179 S.W.2d 1017 (Tex. Civ. App. 1944); Pence v. Tidewater Townsite Corp., 103 S.E. 694 (Va. 1920); Killgore v. Cabell County Ct., 92 S.E. 562 (W. Va. 1917).*

See William F. Walsh, *Conditional Estates and Covenants Running with the Land, 14 N.Y.U.L. Rev. 162 (1936),* deploring this result when conditions have changed, or the condition imposed is of no practical benefit to the grantor.

(n21)Footnote 308. *Watson v. Dalton, 20 N.W.2d 610 (Neb. 1945); Cowden v. Broderick, 114 S.W.2d 1166 (Tex. 1960).*

(n22)Footnote 309. *Firth v. Los Angeles Pac. Land Co., 152 P. 935 (Cal. App. 1915); Dunne v. Minsor, 143 N.E. 842 (Ill. 1924); St. Charles College v. Carroll, 88 A. 277 (Md. 1913); Munro v. Syracuse, L. & N. R. Co., 93 N.E. 516 (N.Y. 1910).*

Deeds on condition that the grantee shall improve the property conveyed by erection of a specified building thereon, have been held to be on condition subsequent, and enforceable as such. *Hooper v. Cummings, 45 Me. 359 (1858); Hayden v. Stoughton, 22 Mass. (5 Pick.) 528 (1827); Upington v. Corrigan, 45 N.E. 359 (N.Y. 1896).*

Mere words, though they be the strongest of words, do not work a forfeiture of an estate, unless it appears that this was the distinct intention of the grantor, and the necessary understanding of the parties to the instrument. *Mickleson v.*

Gypsy Oil Co., 238 P. 194 (Okla. 1925). See also Frankfort v. Capital Hotel Co., 224 S.W. 197 (Ky. 1920); New Edgewood Lake Corp. v. Kingston Trust Co., 285 N.Y.S. 130 (1936); Van De Bogert v. Reformed Dutch Church, 220 N.Y.S. 50 (1926), aff'd, 220 N.Y.S. 58 (1927).

Condition subsequent enforced. *Mitchell v. Cheney Slough Irrig. Co., 134 P.2d 34 (Cal. App. 1943).*

"Provided" is a word of condition, not of limitation. *Pfeffer v. Lebanon Land Dev. Corp., 360 N.E.2d 1115 (Ill. App. 1977).*

Condition subsequent enforced. *Mitchell v. Cheney Slough Irrig. Co., 134 P.2d 34 (Cal. App. 1943).*

(n23)Footnote 310. *Hoyt v. Ketcham, 5 A. 606 (Conn. 1866); Munro v. Syracuse, L. & N. R. Co., 93 N.E. 516 (N.Y. 1910); Brown v. Tilley, 57 A. 380 (R.I. 1904).*

(n24)Footnote 311. *Munro v. Syracuse, L. & N. R. Co., 93 N.E. 516 (N.Y. 1910).*

Right of re-entry must be specifically retained. *City of Tempe v. Baseball Facs., Inc., 534 P.2d 1056 (Ariz. App. 1975).*

(n25)Footnote 312. *Warner v. Bennett, 31 Conn. 468 (1863); Hoyt v. Ketcham, 5 A. 606 (Conn. 1886); Odell v. Cannon, 4 S.E. 558 (Ga. 1887); Blanchard v. Detroit, L. & L. M. R. Co., 31 Mich. 43 (1875); Woodruff v. Trenton Water Power Co., 10 N.J. Eq. 489 (1856); Underhill v. Saratoga & W. R. Co., 20 N.Y. (Barb.) 455 (1855); Perkins v. Kirby, 85 A. 648 (R.I. 1913); Hammond v. Port Royal & A. R. Co., 15 S.C. 10 (1881); Carpenter v. Graber, 1 S.W. 178 (Tex. 1886); Pepin Co. v. Prindle, 21 N.W. 254 (Wis. 1884).*

A clause in a conveyance that it is made "upon the express stipulation that a dwelling house should be moved or erected on the ground within three years, "at a cost not less than a certain sum, does not constitute a condition. *Federal Land Bank v. Luckenbill, 13 N.E.2d 531 (1938); Stone v. Houghton, 31 N.E. 719 (Mass. 1885).*

For other cases holding certain provisions did not create a condition subsequent, *see Star Brewery Co. v. Primas, 45 N.E. 145 (Ill. 1896); Koch v. Streuter, 83 N.E. 1072 (Ill. 1908); O'Neil v. Caples, 101 N.E. 50 (Ill. 1914); Frenchville v. Gagnon, 91 A. 951 (Me. 1914); St. Peters Church v. Bragaw, 56 S.E. 688 (N.C. 1907); Closner v. Chapin, 168 S.W. 370 (Tex. Civ. App. 1914); Burgson v. Jacobson, 102 N.W. 563 (Wis. 1905).*

In *United States v. Certain Land in Cape Girardeau, 79 F. Supp. 558 (D. Mo. 1947),* a provision that the land should always remain public property was held to create a trust, not a condition subsequent.

(n26)Footnote 313. *Clarke v. Brookfield, 81 Mo. 503 (1884); O'Brien v. Wagner, 7 S.W. 19 (Mo. 1888). See Schulman v. Ellenville Elec. Co., 273 N.Y.S. 530 (1934).*

Langley v. Chapin, 134 Mass. 82 (1832).

(n27)Footnote 314. *See Rooks Creek Evangelical Lutheran Church v. First Lutheran Church, 124 N.E. 793 (Ill. 1919); Killgore v. Cabell County Ct., 92 S.E. 562 (W. Va. 1917).*

(n28)Footnote 315. *Carruthers v. Spaulding, 275 N.Y.S. 37 (1934).*

(n29)Footnote 316. *Stanley v. Colt, 72 U.S. (5 Wall) 119 (1867); Dunlap v. Mobley, 71 Ala. 102 (1881); Walker v. W. T. Smith Lab. Co., 145 So. 572 (Ala. 1933); Williams v. Kirby Sch. Dist. No. 32, 181 S.W.2d 488 (Ark. 1944); Beran v. Harris, 205 P.2d 107 (Cal. App. 1949)*("upon the express condition" creates a condition subsequent); *Bacon v. Huntington, 14 Conn. 92 (1840); Rooks Creek Evangelical Lutheran Church v. First Lutheran Church, 124 N.E. 793*

(Ill. 1919); Newton v. Glen Ellyn, 27 N.E.2d 821 (Ill. 1940); Stilwell v. Knapper, 69 Ind. 558 (1880); Wilson v. Wilson, 86 Ind. 472 (1882); Sheets v. Vandalia R. Co., 127 N.E. 609 (Ind. App. 1920); Laberee v. Carleton, 53 Me. 211 (1865); Sohier v. Trinity Church, 109 Mass. 1 (1871); Episcopal City Mission v. Appleton, 117 Mass. 326 (1875); Farnham v. Thompson, 26 N.W. 9 (Minn. 1885); Koehler v. Rowland, 205 S.W. 217 (Mo. 1918); Watson v. Dalton, 18 N.W.2d 658, op. modified, *20 N.W.2d 610 (Neb. 1945); Hunt v. Wright, 47 N.H. 396 (1867); Hoyt v. Kimball, 49 N.H. 322 (1870); Avery v. New York Cent. & H. R. R. Co., 12 N.E. 619 (N.Y. 1887); Post v. Weil, 22 N.E. 145 (N.Y. 1889); Graves v. Deterling, 24 N.E. 655 (N.Y. 1890); Worman v. Teagarden, 2 Ohio St. 380 (1853). Paschall v. Passmore, 15 Pa. 295 (1850); Watters v. Bredin, 70 Pa. 235 (1872); Sisk v. Randon, 70 S.W.2d 689 (Tex. 1934); Halvorsen v. Pacific County, 156 P.2d 907 (Wash. 1945); Sturm v. Crowley, 48 S.E.2d 350 (W. Va. 1948)*("condition" and "defeasance" have similar effect to destroy the estate).

See Mickleson v. Gypsy Oil Co., 238 P. 194 (Okla. 1925).

While the words "provided nevertheless" and "upon the following conditions" are appropriate words to create a condition, they do not of necessity create such an estate. They, and similar words, will give way when the intention of the grantor, as manifested by the whole deed, is otherwise, and they have frequently been explained and applied as expressing simply a covenant or a limitation in trust. *Stanley v. Colt, 72 U.S. (5 Wall.)119 (1866); Hawley v. Kafitz, 83 P. 248 (Cal. 1905); Woodruff v. Woodruff, 16 A. 4 (1888); Episcopal City Mission v. Appleton, 117 Mass. 326 (1875); Sohier v. Trinity Church, 109 Mass. 1 (1871); Queen City Park Ass'n v. Gale, 3 A.2d 529 (Vt. 1938).* "The strongest words of condition will not work a forfeiture of the estate, unless they were so intended to operate. The absence of a clause "for re-entry may signify that no condition was intended, when its presence may make such intent plain." *Bragdon v. Blaisdell, 39 A. 1036 (Me. 1898); Episcopal City Mission v. Appleton, 117 Mass. 326 (1875); Hoyt v. Kimball, 49 N.H. 322 (1870); Avery v. New York Cent. & H. R. R. Co., 12 N.E. 619 (N.Y. 1887); Clement v. Burtis, 24 N.E. 1013 (N.Y. 1890); Post v. Weil, 22 N.E. 145 (N.Y. 1889).*

(n30)Footnote 317. *Department of Pub. Works & Bldgs. v. Porter, 158 N.E. 366 (Ill. 1927).*

Such words as "upon express condition" may not give rise to a condition subsequent when considered in connection with the whole of the provision in which such words are found. *Mickleson v. Gypsy Oil Co., 238 P. 194 (Okla. 1925)*(authorities reviewed in cases where words importing a condition were used). To same effect, *see Providence v. Payne, 134 A. 276 (R.I. 1926).*

(n31)Footnote 318. *Sheets v. Vandalia R. Co., 127 N.E. 609 (Ind. App. 1920); Jancovech v. Christensen, 195 N.E. 287 (Ind. App. 1935); Frankfort v. Capital Hotel Co., 224 S.W. 197 (Ky. 1920).*

As to distinction between "limitation" and "condition," *see* note to Annotation, Deed in Consideration of Support of Grantor as Creating an Estate Upon Condition or a Conditional Limitation.

(n32)Footnote 319. *Downen v. Rayburn, 73 N.E. 364 (Ill. 1905); Sumner v. Darnell, 27 N.E. 162 (Ind. 1891); Williams v. Johnson, 143 S.W.2d 738 (Ky. 1940); Kilpatrick v. Baltimore, 31 A. 805 (Md. 1895); Quinn v. Pere Marquette R. Co., 239 N.W. 376 (Mich. 1931); Farnham v. Thompson, 26 N.W. 9 (Minn. 1885); Holekamp Lab. Co. v. State Hwy. Comm'n, 173 S.W.2d 938 (Mo. 1943); Nashville, C. & St. Louis R. Co. v. Bell, 39 S.W.2d 1026 (Tenn. 1931); Texas & P. R. Co. v. Martin, 71 S.W.2d 867 (Tex. 1934); Killgore v. Cabell County Ct., 92 S.E. 562 (W. Va. 1917); Polebitzke v. John Week Lumber Co., 147 N.W. 703 (Wis. 1914).*

Desecration of exclusive use in deed did not create a fee upon condition subsequent. *Gearhart v. West Lumber Co., 90 S.E.2d 10 (Ga. 1955).*

(n33)Footnote 320. *Stanley v. Colt, 72 U.S. (5 Wall.) 119 (1867),* per Nelson, J. (testator devised land to a religious society for its use and benefit, "Provided that said real estate be not hereafter sold or disposed of, "and in connection and continuation added numerous minute directions in the nature of regulations for the guidance of trustees whom he

appointed to manage it, and with a view to the greatest advantage of the society. It was held that these provisions constituted a limitation in trust, and not a common-law condition).

"Where the grantor reserved the right to use a portion of the premises upon stated conditions the grantee received a fee subject to an interest in the grantor which interest was lost when the grantor breached the conditions. *Monawa Tribe No. 352, I.O.R.M. v. Wiley, 142 N.E.2d 488 (Ind. App. 1957).*

"Very little if any stress can properly be laid upon the words 'intent and purpose' and 'upon condition' in the will as proof of the testator's intention to create either a trust or a condition. Cases are to be found in which, in gifts of this sort, a condition has been held to be created by the word 'intent,' and it was not unusual formerly in charitable dispositions to impose trusts in the form of condition." *Attorney-General v. Wax Chandlers Co., L.R. 6 H.L. 1 (1873).*

(n34)Footnote 321. *Wilkins v. Ferguson, 310 So. 2d 879 (Ala. 1975).*

(n35)Footnote 322. In *Stilwell v. St. Louis & H. R. Co., 39 Mo. App. 221 (1890),* the court by Biggs, J., said: "It is quite evident that neither party intended or expected to make the title to the easement granted depend upon the maintenance of the private road. Such a contract would have been against the interests of the company; and its enforcement, in case of violation, would by no means have restored to Ford his property in its original condition. The construction contended for by the defendant is unreasonable and clearly against the evident intention of both parties, and as the deed by its terms does not necessarily create a conditional estate, and as it does not so appear by clear implication, we are of the opinion that no such estate was created." Rombauer, P. J., dissented on the ground that the deed in express terms created a condition, and the court could not say there was no condition. He cited *Hubbard v. Kansas City, St. J. & C. B. R. Co., 63 Mo. 68 (1876),* which is in direct conflict.

(n36)Footnote 323. *Baker v. Mott, 28 N.Y.S. 968 (1894); Lyon v. Hersey, 8 N.E. 518 (N.Y. 1886).*

(n37)Footnote 324. *Kuhn v. Kuhn, 123 N.E.2d 916 (Ind. App. 1955)*(word "condition" not essential); In *Wright v. Wilkin,* Crompton, J., said: "I think that the rule is well laid down by Lord St. Leonards with regard to estates upon condition, 'that what by the old law was deemed a devise upon condition would now perhaps, in almost every case, be construed a devise in fee upon trust.'" *See Attorney-General v. Southmolton, 14 Beav 357* (=hr2); *Merchant Tailors Co. v. Attorney-General, L.R. 11 Eq. 35 (1870).*

(n38)Footnote 325. *Ebenezer's Old People's Home of Evangelical Ass'n v. South Bend Old People's Home, 48 N.E.2d 851 (Ind. App. 1943).*

(n39)Footnote 326. *Calumet Council Bldg. Corp. v. Standard Oil Co. of Ind., 167 F.2d 539 (7th Cir. 1948); Lipton v. Bruce, 136 N.E.2d 900 (N.Y. 1948); In re Board of Educ. of Utica City Sch. Dist., 184 N.Y.S.2d 735 (1959).*

(n40)Footnote 327. *United States v. Certain Land in Cape Girardeau, 79 F. Supp. 558 (D. Mo. 1947), aff'd, 177 F.2d 463 (8th Cir. 1949).*

A grant of land in consideration of agreement on the part of grantee to perform certain services in the absence of a stipulation to the contrary can create in the grantee an estate on condition subsequent. *Dowell v. Jolly, 159 N.E.2d 590 (Ind. App. 1959).*

(n41)Footnote 328. *Rogers v. Sebastian, 21 Ark. 440 (1860); Chapman v. Gordon, 29 Ga. 250 (1859); Marshall County High Sch. Co. v. Iowa Evangelical Synod, 28 Iowa 360 (1869); Moser v. Miller, 7 Pa. (Watts) 156 (1893); Long v. Miller, 28 A. 233 (Pa. 1893); Hammond v. Port Royal & A.R. Co., 15 S.C. 10 (1881); East Line & Red River R. Co. v. Garrett, 52 Tex. 133 (1879).*

It is the general rule in New York, with respect to every instrument excepting a deed, and possibly, but not so clearly,

with respect to any specialty, that oral testimony may be offered to show a condition precedent but not a condition subsequent. *Buszozak v. Wolo, 211 N.Y.S. 557 (1925).*

But in a Colorado case the court said: "An oral stipulation may always be shown that the instrument was not to become of binding force unless some condition precedent was previously fulfilled." *Bourke v. Van Keuren, 36 P. 882 (Colo. 1894).*

Covenant is preferred over condition subsequent unless the words are clear that a conditional estate was meant. *Zapata v. Torres, 464 S.W.2d 926 (Tex. Civ. App. 1971).*

(n42)Footnote 329. *Dunbar v. Stickler, 45 Iowa 384 (1877); Jennings v. O'Brien, 47 Iowa 392 (1877).*

A condition in a conveyance to a railroad company that the company shall continue to maintain and operate their railroad, and that the grant shall "cease with the nonuse of the same for such purpose, "is not a condition that the road shall be built over the entire charter route of the company. No such condition is expressed or implied, but only that the property conveyed shall be used for the construction and operation of the railroad thereon. *Morrill v. Wabash, St. L. & P. R. Co., 9 S.W. 657 (Mo. 1888). See St. Louis v. Wiggins Ferry Co., 15 Mo. App. 227 (1884).*

A condition in a conveyance to a railroad company that the land should be used only for a passenger and freight depot is not violated by the company's extending its road beyond the point of its terminus, which, when the deed was given, was upon the granted land, and thereby making it a place of transit and not merely a depot. There was no such restriction within the terms of the deed or in the contemplation of the parties. *Southard v. Central R. Co., 26 N.J.L. 13 (1856).*

However, a condition in a deed to a railroad company that the company will erect a station on the land conveyed and forever maintain it as a regular stopping-place for two trains daily in each direction, is not complied with by erecting a station upon other land, distant about a thousand feet from such land, at which many more trains stop. *See Louisville & N. R. Co. v. Covington, 65 Ky. (2 Bush) 526 (1866).*

Where a conveyance was made to a railroad company in consideration that the land should be used for a depot and other railroad purposes, with a condition that if the company should discontinue to use the same for a depot the grantor might resume possession, it was held that the railroad company could not remove its depot and retain possession of the land for other railroad purposes. *Owensboro & N. R. Co. v. Griffith, 17 S.W. 277 (Ky. 1891).*

As between a railroad company and third persons the forfeiture by the company of its rights as such does not terminate its title to its right-of-way. *Holt v. Pennsylvania Co., 113 A. 745 (1921)*(action to condemn portion of right-of-way).

Where a grant to a railroad company upon condition that the land should revert to the grantor upon "the failure or abandonment of the enterprise by the grantee or its successors, "it was held that a deflection of a few feet on some part of the line of road did not operate to work a forfeiture of the grant. *Dickson v. St. Louis & K.R. Co., 67 S.W. 642 (Mo. 1902).*

A deed to a railroad company containing a condition "for the construction of a double track of railway" is not forfeited by a cessation of use for the purpose specified, as such clause is declaratory of the purpose to which the land is to be applied, and does not create a condition subsequent. *Killgore v. Cabell County Court, 92 S.E. 562 (W. Va. 1917).*

A condition to erect a freight depot on land conveyed to a railroad company, and to continuously keep in use such depot, was held not breached, so as to effect a reverter, because the great bulk of the freight went through another depot, leaving a small amount passing through the depot in question. *Jackson v. Alabama & V. R. Co., 160 So. 602 (Miss.*

1935).

(n43)Footnote 330. *Louisville & N. R. Co. v. Covington, 65 Ky. (2 Bush) 526 (1866).*

"Where a deed has been executed and accepted as performance of an executory contract to convey real estate, the contract is functus officio, and the rights of the parties rest thereafter solely on the deed." *Slocum v. Bracy, 56 N.W. 826 (Minn. 1893).*

(n44)Footnote 331. *Thompson v. Thompson, 9 Ind. 323 (1857); Scantlin v. Garvin, 46 Ind. 262 (1874); Marshall County High Sch. Co. v. Iowa Evangelical Synod, 28 Iowa 360 (1869); Gadberry v. Sheppard, 27 Miss. 203 (1854); Moser v. Miller, 7 Watts 156 (Pa. 1838); Galveston, H. & S. A. R. Co. v. Pfeuffer & Ireland, 56 Tex. 66 (1881); Schwalbach v. Chicago, M. & St. Paul R. Co., 40 N.W. 579 (Wis. 1888); Miller v. Yorkshire Ins. Co., 297 N.W. 377 (Wis. 1941).*

A deed of general warranty in the usual form, conveying lands for the express consideration of the sum of one dollar and other good and valuable considerations, and a written contract executed at the same time, by which the grantee, in consideration of the deed, agrees to do certain acts, and provides that, in case of failure to perform such contract, the deed shall become void, and the lands conveyed revert to the grantor, both instruments being acknowledged and recorded at the same time, are to be treated as one, and construed together. *Ritchie v. Kansas, N. & D.R. Co., 39 P. 718 (Kan. 1895).*

(n45)Footnote 332. *Barker v. Cobb, 36 N.H. 344 (1858).*

(n46)Footnote 333. *Keller v. Keller, 92 S.W.2d 157 (Mo. 1936).*

(n47)Footnote 334. *Knoxville, C. G. & L. R. Co. v. Beeler, 18 S.W. 391 (Tenn. 1891).*

(n48)Footnote 335. *Merritt v. Harris, 102 Mass. 326 (1869); Bear v. Whisler, 7 Watts 144 (Pa. 1838).*

Where a husband and wife holding real estate by the entirety were incorrectly advised that the property might be confiscated for the violation of the federal prohibition act and to escape such confiscation executed and recorded a deed to another and then wrote the grantee a letter requesting him to execute a deed of reconveyance, if it can be considered that there was a delivery of the deed and an acceptance by the grantee the latter will be considered as having accepted the condition also and to have promised impliedly to reconvey and on breach of this promise specific performance may be had. *Buszozak v. Wolo, 211 N.Y.S. 557 (1925).*

(n49)Footnote 336. *Norton v. Perkins, 31 A. 148 (Vt. 1894),* per Ross, C. J.

(n50)Footnote 337. *Moser v. Miller, 7 Watts 156 (Pa. 1838).*

(n51)Footnote 338. *Whitney v. French, 25 Vt. 663 (1853); Graham v. Stevens, 80 Am. Dec. 675 (Vt. 1858). See Barker v. Cobb, 36 N.H. 344 (1858),* where the condition on the back of the deed was signed by the grantee.

(n52)Footnote 339. *Biescar v. Czechoslovak-Patronat, 302 P.2d 104 (Cal. App. 1956).*

(n53)Footnote 340. Littleton, Tenures, § 328; Co. Litt., § 203a.

Unconditional specific independent covenant in the habendum clause prevailed over provision in the granting clause given in estate in fee simple. *Baden v. Castle, 344 A.2d 171 (Md. App. 1975).*

(n54)Footnote 341. *Rustin v. Butler, 24 S.E.2d 318 (Ga. 1943); Trustees of Lone Oak Graded Sch. Dist. v. Gentry, 295 S.W. 1063 (Ky. 1927); In re Allen's Estate, 45 N.Y.S.2d 699 (1943); Sapper v. Mathers, 133 A. 565 (Pa. 1926);*

Commonwealth ex rel. Bard v. Delaware Division Canal Co., 1 A.2d 672 (Pa. 1938).

(n55)Footnote 342. *Columbia R. Gas & Elec. Co. v. South Carolina, 261 U.S. 236 (1923); Trustees of Lone Oak Graded Sch. Dist. v. Gentry, 295 S.W. 1063 (Ky. 1927); Carr v. Miller, 181 N.W. 557 (Neb. 1921); Mickleson v. Gypsy Oil Co., 238 P. 194 (Okla. 1925); Waco Dev. Co. v. McNeese, 209 S.W. 464 (Tex. Civ. App. 1919); Hudson v. Caffey, 179 S.W.2d 1017 (Tex. Civ. App. 1944).*

(n56)Footnote 343. *Rockford Trust Co. v. Moon, 18 N.E.2d 447 (Ill. 1938).*

(n57)Footnote 344. *Bullard v. Albion, 217 N.Y.S. 849 (1926); Nalley v. First Nat'l Bank, 293 P. 721 (Or. 1930); Wenner v. George, 106 S.E. 365 (Va. 1921).*

Use of "on condition that" or "provided that" coupled with right of re-entry creates a fee upon condition subsequent. *Hagaman v. Board of Educ. of Woodbridge Twp., 285 A.2d 63 (N.J. Super. 1970).*

"Provided" is a word of condition not of limitation. *Pfeffer v. Lebanon Land Dev. Corp., 360 N.E.2d 1115 (Ill. App. 1977).*

"Provided" as used in a deed is a word of condition rather than a special limitation. *Pfeffer v. Lebanon Land Dev. Corp., 360 N.E.2d 1115 (Ill. App. 1977).*

(n58)Footnote 345. *Murphy v. Schuster Springs Lumber Co., 111 So. 427 (Ala. 1926); Lucas v. Lucas, 156 S.E. 680 (Ga. 1943); Rustin v. Butler, 24 S.E.2d 318 (Ga. 1943); Jackson v. Knapp, 130 N.E. 524 (Ill. 1921); Dyer v. Siano, 11 N.E.2d 451 (Mass. 1937); In re Scott's Will, 204 N.Y.S. 478 (1924); In re Baechler's Will, 202 N.Y.S. 485 (1923); Paraffine Oil Co. v. Cruce, 162 P. 716 (Okla. 1916); Nolfe v. Byrne, 219 S.W. 1 (Tenn. 1920). See Sapper v. Mathers, 133 A. 565 (Pa. 1926).*

A recital in a deed that the grantee has agreed to erect, keep upon, maintain, and carry on a schoolhouse on the granted premises does not create a condition when the terms of the grant are free from condition. *Board of Pub. Educ. v. St. Patrick Roman Catholic Church, 136 A. 833 (Del. 1927). See Walker v. Shelby County Sch. Bd., 263 S.W. 792* (Tenn. =hr2).

A condition may be construed as subsequent although designated as precedent. *Smith v. Kuttawa, 1 S.W.2d 979 (Ky. 1928).*

Words may create a condition precedent or subsequent in a will which would not have that effect if used in deed. *Nolfe v. Byrne, 219 S.W. 1 (Tenn. 1920).*

See Restatement of the Law of Property, § 45.

(n59)Footnote 346. *Stanley v. Colt, 72 U.S. (5 Wall.) 119 (1867); Mahoning v. Young, 59 F. 96 (6th Cir. 1893); Elyton Land Co. v. South & N. Ala. R. Co., 14 So. 207 (Ala. 1893); Rosecrans v. Pacific Elec. R. Co., 134 P.2d 245 (Cal. 1943); Girard v. Miller, 29 Cal. Rptr. 359 (1963); Wheeler v. Walker, 2 Conn. 196,* (1817); *Warner v. Bennett, 31 Conn. 468 (1863); Koch v. Streuter, 83 N.E. 1072 (Ill. 1908); Mitchell v. Snyder, 83 N.E.2d 680 (Ill. 1949)*(to A and "in case of his death" to B created a condition precedent of surviving testator); *Rodenburg v. Rodenburg, 74 N.W.2d 241 (Iowa 1956)*(gift "subject to contingency hereafter set forth" created condition subsequent); *Williams v. Johnson, 143 S.W.2d 738 (Ky. 1940); Hooper v. Cummings, 45 Me. 359 (1858); Gray v. Blanchard, 8 Mass. (Pick.) 284 (1829); Rawson v. Sch. Dist. No. 5, 89 Mass. (7 Allen) 125 (1863); Markey v. Smith, 16 N.E.2d 20 (Mass. 1938); Stilwell v. St. Louis & H.R. Co., 39 Mo. App. 221 (1890); Chapin v. Sch. Dist. No. 2, 35 N.H. 445 (1857); Hoyt v. Kimball, 49 N.H. 322 (1870); Gibert v. Peteler, 38 N.Y. 165 (1868); St. Stephen's Protestant Episcopal Church v. Church of Transfiguration, 114 N.Y.S. 623 (A.D. 1908); Raley v. Umatilla County, 13 P. 890 (Or. 1887); Paschall v. Passmore, 15*

Pa. 295 (1850); Karchner v. Hoy, 25 A. 20 (Pa. 1892); South Memphis Land Co. v. Memphis Interurban Co., 186 S.W. 454 (Tenn. 1916); Harris v. Rather, 134 S.W. 754 (Tex. Civ. App. 1911); Brown v. Caldwell, 23 W. Va. 187 (1883); Deepwater R. Co. v. Honaker, 66 S.E. 104 (W. Va. 1909).

Sheppard-Touchstone, Common Assurance, 121, says:

> Know therefore that, for the most part, conditions have conditional words for their frontispiece and do begin therewith; and that amongst these words there are three words that are most proper, which in and of their own nature and efficacy, without any addition of other words of re-entry in the conclusion of the condition, do make the estate conditional, as, proviso, ita quod, and sub conditione... But there are other words, as si, si contingat, and the like, that will make an estate conditional also; but then they must have other words joined with them, and added to them in the close of the condition; as that the grantor shall re-enter, or that the estate shall be void, or the like.

He further says, p. 125: "If the words in the close or conclusion of a condition be thus, That the land shall return to the feoffor, etc., or that he shall take it again, and turn it to his own profit, or that the land shall revert, or that the feoffor shall recipere the land -- these are either of them good words in a condition to give a re-entry, as good as the word 're-enter;' and by these words the estate will be made conditional." *Fitzgerald v. County of Modoc, 129 P. 794 (Cal. 1913).*

See The Law of Property, § 45, Comment j.

(n60)Footnote 347. Sheppard-Touchstone of Common Assurance, 126.

(n61)Footnote 348. *Union Stockyards Co. v. Nashville Packing Co., 140 F. 701 (6th Cir. 1905); Faust v. Little Rock Sch. Dist., 276 S.W.2d 59 (Ark. 1955); Maguire v. Macomb, 127 N.E. 682 (Ill. 1920); Dunne v. Minsor, 143 N.E. 842 (Ill. 1924); Mercer-Lincoln Pine Knob Oil Co. v. Pruitt, 229 S.W. 374 (Ky. 1921); Bray v. Hussey, 22 A. 220 (Me. 1891); Rawson v. School Dist. No. 5, 89 Mass. (7 Allen) 125 (1863); Sohier v. Trinity Church, 109 Mass. 1 (1871); Episcopal City Mission v. Appleton, 117 Mass. 326 (1875); Stilwell v. St. Louis & H.R. Co., 39 Mo. App. 221 (1890); Stoutimore v. Quincy, O. & K.C.R. Co., 256 S.W. 121 (Mo. App. 1923)*(easement in under grade crossing); *Post v. Weil, 22 N.E. 145 (N.Y. 1889); Gladewater County Line Indep. Sch. Dist v. Hughes, 59 S.W.2d 351 (Tex. Civ. App. 1933).*

It is true that the words "on condition that" are apt and appropriate words, both in their technical and popular sense, to create a condition, and it appears to be the generally accepted doctrine that, as the words "on condition" are the precise and technical terms by which an estate or condition is created, such a phrase is sufficient to create a conditional estate, unless there is something else in the deed indicating the contrary. *Victoria Hosp. Ass'n v. All Persons, 147 P. 124 (Cal. 1915).*

(n62)Footnote 349. *Elyton Land Co. v. South & N.A.R. Co., 14 So. 207 (Ala. 1893); Warner v. Bennett, 31 Conn. 468 (1863).*

(n63)Footnote 350. *Laberee v. Carleton, 53 Me. 211 (1865); Packard v. Ames, 16 Mass. (Gray) 327 (1860); Watters v. Bredin, 70 Pa. 235 (1872); First Methodist Episcopal Church v. Old Columbia Pub. Ground Co., 103 Pa. 608 (1883).*

(n64)Footnote 351. *Department of Pub. Works & Bldgs. v. Porter, 158 N.E. 366 (Ill. 1927). See Board of Pub. Educ. v. St. Patrick Roman Catholic Church, 136 A. 833 (Del. 1927)*(holding that where both the granting clause of a deed and its habendum clause give in turn an absolute conveyance, the same is not necessarily changed into an estate on condition by a recital in the commencement of the deed).

(n65)Footnote 352. *Henry v. White, 60 So. 2d 149 (Ala. 1952)*(or where the granting clause is silent); *Shultz v. Peters, 273 N.W. 134 (Iowa 1937).*

(n66)Footnote 353. *Chapin v. Harris, 90 Mass. (Allen) 594 (1864),* per Gray, J.:

> A good illustration of this is thus reported in Leonard: "A made a lease to B for life, and further grants unto him that it shall be lawful for him to take fuel upon the premises; proviso, that he do not cut any great trees. It was holden by the court that, if the lessee cutteth any great trees, that he shall be punished in waste; but in such case the lessor shall not reenter, because that proviso is not a condition, but only a declaration and exposition of the extent of the grant of the lessor in that behalf." *3 Leon 16.*

(n67)Footnote 354. *Green v. Jones, 60 So. 2d 857 (Ala. 1952); Allen v. Trustees of Great Neck Free Church, 269 N.Y.S. 341 (1934).*

(n68)Footnote 355. *Graves v. Deterling, 24 N.E. 655 (N.Y. 1890),* Vann, J., saying: "While this is by no means controlling, it has a significance not to be overlooked, as the instrument was evidently drawn by a skilful conveyancer, who was well acquainted with both the forms and technical terms in common use by experienced draughtsmen of deeds."

(n69)Footnote 356. *Hewitt v. Hewitt, 196 S.E. 541 (S.C. 1938).*

(n70)Footnote 357. *Cullen v. Sprigg, 23 P. 222 (Cal. 1890).*

(n71)Footnote 358. *Preston v. Bosworth, 55 N.E. 224 (Ind. 1899).*

* This chapter is based in part on Ch. 30, George W. Thompson, Commentaries on the Modern Law of Real Property (John S. Grimes ed. 1979), which made a significant contribution toward preserving the American common law governing defeasible fees.

Thompson on Real Property, Thomas Editions

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CHAPTER 20 DEFEASIBLE FEES *

2-20 Thompson on Real Property, Thomas Editions § 20.07

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§ 20.07 Abhorrence of Conditions.

[Go To Supp]

The hardships which arose from the enforcement of feudal dues and reliefs was a part of the common law concept of seizin. Littleton in his extensive discussion of estates upon condition n359 gives no indication of legal limitations upon enforcement of conditions imposed in conveyances or devises. Nor would we expect Coke with his reverence of the common law to do so.

The tendency of tenants to avoid forfeitures has been noticed earlier and lead to much of the development of the law of estates in land. Unless a conditional or qualified fee is created by express language of a deed or will, the grantor or testator will be conclusively presumed to have intended a fee simple absolute. n360

There has been traced also elsewhere the procedure by which equity intervened to prevent forfeitures in the case of the common law mortgage which was a fee upon condition subsequent. Out of this equitable doctrine of preventing forfeitures there sprung a companion doctrine of construction that the law abhors forfeitures and consequently dislikes the creation of conditions the breach of which will lead to forfeitures. n361

The law does not supply a forfeiture clause in a deed or contract where none exists. n362 The courts have made two general exceptances to the general rule of abhorrence of forfeitures in the cases of oil and gas leases n363 and in conveyances on condition of support of the grantor or others. n364 Even if the condition would otherwise be valid it is ineffectual unless clearly expressed. n365 Construction in favor of fee simple estate is also the rule in wills. n366 The use of the word "provided" preceding language limiting the use for which the land is conveyed is generally held to create a condition unless a different intent appears from the instrument. n367

In construing deeds, conditions are not favored by law, and, hence, they must be clearly expressed. n368 A condition, when relied upon to work a forfeiture, is construed with great strictness. n369 The grantor must stand on his legal rights, and any ambiguity in his deed or defect in the evidence offered to show a breach will be taken most strongly against him and in favor of the grantee. n370 These principles apply to conditions subsequent. n371 The rule applies more particularly in ascertaining the purpose and intent of the parties, and whether the language employed by them, construed

in connection with the whole instrument, amounts to a condition subsequent or a mere covenant. With the intent of the parties clear and beyond doubt, their rights and liabilities are determined precisely as in other contracts. n372 In construing the language of a stipulation in a deed, the court will, by preference, construe it as creating a covenant, a trust, or an equitable charge, rather than a condition. n373 So clause will not be construed as a condition subsequent unless it expresses in appropriate language the party's intention to that effect, and a mere statement of the purpose is not sufficient to create such condition. n374

Thus conditions subsequent are not favored in law, n375 and are to be strictly construed, n376 because they tend to destroy estates n377 and generally all doubts are resolved against restrictions on the use of property by the grantee or devisee. n378 The fact that a conveyance was a gift and not for a valuable consideration does not render the rule inapplicable, n379 but courts are not warranted in mutilating a deed by rejecting conditions attached to the grant. n380 When the terms of the grant admit of any other reasonable interpretation, they will not be held to create an estate on condition. n381 The intention to create an estate subject to a condition subsequent must be definitely and clearly shown n382 by the use of apt and sufficient words. n383 Such words must not be inconsistent with other terms in the conveyance, and the conditions must not be rendered impossible of performance by inevitable accident or by the subsequent conduct of the grantor. n384 Even the use of apt words, such as the word "condition" or similar language, will not create a condition subsequent where the whole instrument shows a contrary intent. n385 The mere fact that deed contains the word "conditions" or uses language "upon the following terms" does not create a conclusive presumption that a fee simple upon condition subsequent was intended. n386

A mere statement of the purpose for which the property is to be used is not sufficient to create such a condition. n387 The law inclines to construe conditions so as to render a breach remediable by damages rather than by forfeiture. n388 If no words of condition are used, and no words indicating an intention that under any circumstances the estate may be forfeited or may revert to the grantor or his heirs or that he or they may re-enter and hold the land, and there is nothing in the nature of the acts to be done by the grantee indicating that the estate is to be held upon condition, the deed will be held to convey an estate to the grantee and his heirs forever. The deed will not be held to create an estate upon condition, unless the language to that effect is so clear as to leave no room for any other construction. n389 Thus, where parents conveyed land to their son, reserving to themselves a life estate, and stating in the deed that such son "is to pay the taxes on said land, and has to support the grantors during their natural lifetime, and at their death the son shall have possession," the land was not conveyed upon a condition subsequent, because no words of condition were used, and there was no clause of reverter or re-entry, and no intention to create a strict condition can be gathered from the whole instrument. n390 It has been held that a conveyance founded on love and affection or support and maintenance may be annulled for failure to comply with its conditions, since equity looks with favor on the protection of the grantor conveying property to a trusted person in consideration of a promise of support and maintenance during his declining years. n391

Devise upon condition the devisee make payments to other persons within a stated time after the will is admitted to probate created a fee simple subject to a charge rather than a condition. n392 A devise on condition of support is a gift upon condition subsequent the condition being waived on failure of performance not due to fault of devisee. n393

Mere words, though they be the strongest words of condition, will not entail a forfeiture of the estate, unless it appears that this was the distinct intention of the grantor and a necessary understanding of the parties to the instrument. The intention of the parties as gathered from the whole deed and from the surrounding circumstances, rather than technical words of condition, controls the interpretation of the deed. n394 Where an express re-entry is reserved in the *Restatement of Property* it is said that "such a conveyance more commonly manifests an intent to create an estate in fee simple subject to a condition subsequent. n395 Where there is a clear intent to attach an element of defeasibility and such intent is expressed in unambiguous language such intent will be enforced. n396 Where the words used show an unmistakable intention on the part of the grantor to create a condition subsequent, it will be upheld. n397

In one case, n398 the objections of the law writers n399 to defeasible estates was epitomized in the court's decision that

the language should be interpreted to create a fee upon condition subsequent rather than a fee simple determined so that equity could prevent a forfeiture. It has been held that equity will not enforce a forfeiture. n400 But, notwithstanding its abhorrence of forfeitures, a court of equity will take jurisdiction, not to declare a forfeiture, but to quiet a title already forfeited for non-performance of a condition subsequent, when the plain language of the instrument shows that it was the purpose of the parties to declare that a breach should operate as a forfeiture. n401

The courts in their abhorrence of conditions take two approaches, one is to construe the instrument as not creating a condition, the other is to avoid the forfeiture if a condition is found to exist.

FOOTNOTES:
(n1)Footnote 359. Littleton, Tenures, §§ 325-327.

(n2)Footnote 360. *Templeton v. Stong, 188 S.W.2d 560 (Tenn. 1945).*

Conditions which restrict fee simple estates are not favored by law and are strictly construed. *Cummings v. United States, 409 F. Supp. 1064 (E.D.Wis. 1976).*

(n3)Footnote 361. *Lassiter v. Oxford, 129 F. Supp. 228 (E.D.N.C. 1955); Beran v. Harris, 205 P.2d 107 (Cal. App. 1949); Savanna Sch. Dist. v. McLeod, 290 P.2d 593 (Cal. App. 1955); Honaker v. Hutchison, 205 S.W.2d 683 (Ky. 1947); Clark v. Grand Rapids, 55 N.W.2d 137 (Mich. 1952); Church of God v. Glann, 114 N.E.2d 98 (Ohio App. 1952).*

(n4)Footnote 362. *Bagby v. Missouri-Kansas-Texas R. Co., 171 S.W.2d 673 (Mo. 1943).*

(n5)Footnote 363. *See* Vol. 10A, § 5333.

(n6)Footnote 364. *See* § 1874, 1875.

(n7)Footnote 365. *Knight v. Chicago Corp., 183 S.W.2d 666 (Tex. Civ. App. 1944).*

(n8)Footnote 366. *Meredith v. Meredith, 227 S.W.2d 984 (Ky. 1950); Lawrence v. Lawrence, 229 S.W.2d 219 (Tex. Civ. App. 1950).*

Forfeiture provisions construed against grantor. *Garry v. Atchison, T. & S. F. Ry. Co., 378 P.2d 609 (N.M. 1963).*

(n9)Footnote 367. *Newton v. Glen Ellyn, 27 N.E.2d 821 (Ill. 1940); Sheets v. Vandalia R. Co., 127 N.E. 609 (Ind. App. 1920); Williams v. Johnson, 143 S.W.2d 738 (Ky. 1940); Markey v. Smith, 16 N.E.2d 20 (Mass. 1938); Board of Chosen Freeholders v. Buck, 82 A. 418 (N.J. Eq. 1912); Trustees of Union College v. New York, 73 N.Y.S. 51 (A.D. 1901).*

(n10)Footnote 368. *Majerus v. Santo, 10 N.W.2d 608 (Neb. 1943); Allen v. Trustees of Great Neck Free Church, 269 N.Y.S. 341 (A.D. 1934).*

Conditions subsequent are to be strictly construed so as to prevent forfeiture if possible. *Calumet Council Bldg. Corp. v. Standard Oil Co. of Ind., 167 F.2d 539 (7th Cir. 1948); Riverton Country Club v. Thomas, 58 A.2d 89 (N.J. Eq. 1948); Cooper v. Milikovsky, 112 A.2d 616 (Pa. 1955).*

Fees upon conditions subsequent are not favored. *Cummings v. United States, 409 F. Supp. 1064 (M.D.N.C. 1976).*

(n11)Footnote 369. *Los Angeles Univ. v. Swarth, 107 F. 798 (9th Cir. 1901); Wilmore Coal Co. v. Brown, 147 F. 931 (1906); C. W. Zimmerman Mfg. Co. v. Daffin, 42 So. 858,* (Ala. 1906); *Seaboard Air Line R. Co. v. Anniston Mfg. Co., 65 So. 187 (Ala. 1914); Walker v. W. T. Smith Lab. Co., 145 So. 572 (Ala. 1933); Los Angeles Cemetery Ass'n v. Los Angeles, 30 P. 523 (Cal. 1892); Reclamation Dist. No. 551 v. Van Loben Sels, 78 P. 638 (Cal. 1904); Hawley v.*

Kafitz, 83 P. 248 (Cal. 1905); Firth v. Marovich, 116 P. 729 (Cal. 1911); Mitchell v. Cheney Slough Irrig. Co., 134 P.2d 34 (Cal. App. 1943); Scovill v. McMahon, 26 A. 479 (Conn. 1892); First Presbyterian Church v. Bailey, 97 A. 583 (Del. 1916); Jenkins v. Merritt, 17 Fla. 304 (1879); Kolb v. Levy, 110 So. 2d 25 (Fla. 1959); Taylor v. Sutton, 15 Ga. 103 (1854); Thomson v. Hart, 66 S.E. 270 (Ga. 1909); Wilson v. Galt, 18 Ill. 431 (1857); Voris v. Renshaw, 49 Ill. 425 (1867); Boone v. Clark, 21 N.E. 850 (Ill. 1889); Thompson v. Thompson, 9 Ind. 323 (1857); Hunt v. Beeson, 18 Ind. 380 (1862); Federal Land Bank v. Luckenbill, 13 N.E.2d 531 (Ind. 1938); Van Horn v. Mercer, 64 N.E. 531 (Ind. App. 1902); Taylor v. Campbell, 98 N.E. 657 (Ind. App. 1912); Cunningham v. New York Cent. R. Co., 48 N.E.2d 176 (Ind. App. 1943); Peden v. Chicago, R. I. & P. R. Co. 35 N.W. 424 (Iowa 1887); Ritchie v. Kansas, N. & D. R. Co., 39 P. 718 (Kan. 1895); Lone Oak Graded Sch. Dist. v. Gentry, 295 S.W. 1063 (Ky. 1927); Hooper v. Cummings, 45 Me. 359 (1858); Laberee v. Carleton, 53 Me. 211 (1865); Osgood v. Abbott 58 Me. 73 (1870); Glenn v. Davis, 6 Am. Rep. 389 (Md. 1872); Kilpatrick v. Baltimore, 31 A. 805 (Md. 1895); Faith v. Bowles, 37 A. 711 (Md. 1897); Columbia Bldg. Co. v. Cemetery of Holy Cross, 141 A. 525 (Md. 1928); Bradstreet v. Clark, 21 Mass. (Pick.) 389 (1838); Merrifield v. Cobleigh, 4 Mass. (Cush.) 178 (1849); Hadley v. Hadley Mfg. Co., 4 Mass. (Gray) 140 (1855); Rawson v. Sch. Dist. No. 5, 89 Mass. (7 Allen) 125 (1863); Crane v. Hyde Park, 135 Mass. 147 (1883); Barrie v. Smith, 10 N.W. 168 (Mich. 1881); Waldron v. Toledo, A. A. & G. T. R. Co., 21 N.W. 870 (Mich. 1885); Central Land Co. v. Grand Rapids, 4 N.W.2d 485 (Mich. 1942); Farnham v. Thompson, 26 N.W. 9 (Minn. 1885); Minneapolis Threshing Mach. Co. v. Hanson, 112 N.W. 217 (Minn. 1907); Gadberry v. Sheppard, 27 Miss. 203 (1854); Koch v. Norton, 261 S.W. 125 (Mo. App. 1924)(condition precedent construed to avoid forfeiture if it can be reasonably done); *Commerce Trust Co. v. Weed, Mo., 318 S.W.2d 289 (Mo. 1958)*(not subject to strained construction); *Chapin v. Sch. Dist. No. 2, 35 N.H. 445 (1857); Emerson v. Simpson, 43 N.H. 475 (1862); Page v. Palmer, 48 N.H. 385 (1869); Hoyt v. Kimball, 49 N.H. 322 (1870); Spaulding v. Woodward, 53 N.H. 573 (1873); Woodruff v. Woodruff, 16 A. 4 (N.J. Eq. 1889); Southard v. New Jersey Cent. R. Co., 26 N.J.L. 13 (1856); McKelway v. Seymour, 29 N.J.L. 321 (1862); Ludlow v. New York & H. R. Co., 12 N.Y. (Barb.) 440 (1852); Lynde v. Hough, 27 N.Y. (Barb.) 415 (1857); Craig v. Wells, 11 N.Y. 315 (1854); Woodworth v. Payne, 74 N.Y. 196 (1878); Rose v. Hawley, 23 N.E. 904,* (N.Y. 1890); *Rose v. Yonkers, 31 N.E. 236 (N.Y. 1892); Munro v. Syracuse L. & N. R. Co., 93 N.E. 516 (N.Y. 1910); In re Neumann's Estate, 184 N.Y.S.2d 38 (1959); Huntley v. McBrayer, 90 S.E. 754 (N.C. 1969); Priddy v. Sch. Dist. No. 78, 219 P. 141 (Okla. 1923); Raley v. Umatilla County, 13 P. 890 (Or. 1887); Clark v. Jones, 144 P.2d 498 (Or. 1944); Newman v. Rutter, 8 Pa. (Watts) 51 (1839); Sharon Iron Co. v. Erie, 41 Pa. 341 (1861); Lehigh Coal & Nav. Co. v. Early, 29 A. 736 (Pa. 1894); Pennsylvania Horticultural Soc'y v. Craig, 87 A. 678 (Pa. 1913); Sapper v. Mathers, 133 A. 565 (Pa. 1926); Commonwealth ex rel. Bard v. Delaware Division Canal Co., 1 A.2d 672 (Pa. 1938); Greene v. O'Connor, 25 A. 692 (R.I. 1892); Ball v. Milliken, 76 A. 789 (R.I. 1910); Huron v. Wilcox, 98 N.W. 88 (S.D. 1904); Walker v. Shelby County Sch. Bd., 263 S.W. 792 (Tenn. 1924); Davis v. Skipper, 83 S.W.2d 318 (Tex. 1934); W. F. White Land Co. v. Christenson, 14 S.W.2d 369 (Tex. Civ. App. 1928); Knight v. Chicago Corp., 183 S.W.2d 666 (Tex. Civ. App. 1944); Peoples Pleasure Park Co. v. Rohleder, 61 S.E. 794 (Va. 1908), aff'd 63 S.E. 981 (Va. 1909); Brown v. Caldwell, 23 W. Va. 187 (1883); Deepwater R. Co. v. Honaker, 66 S.E. 104 (W. Va. 1909); Sands v. Holbert, 117 S.E. 896 (W. Va. 1923); Mills v. Evansville Seminary, 15 N.W. 133 (Wis. 1883); Burgson v. Jacobson, 102 N.W. 563 (Wis. 1905); Frank v. Stratford-Handcock, 77 P. 134 (Wyo. 1904); Parker v. Meadows, 122 P. 586 (Wyo. 1912); Radford v. Willis, L.R. 7 Ch. 7* (English).

(n12)Footnote 370. *See* in general: *Fitzgerald v. County of Modoc, 129 P. 794 (Cal. 1913); Mitchell v. Cheney Slough Irrig. Co., 134 P.2d 34 (Cal. App. 1943); Ralston v. Hatfield, 143 N.E. 887 (Ind. App. 1924); Hooper v. Cummings, 45 Me. 359 (1858); McCue v. Barrett, 109 N.W. 594 (Minn. 1906); Yazoo & M.V.R. Co. v. Lakeview Traction Co., 56 So. 393 (Miss. 1911); Carolina & N.W.R. Co. v. Carpenter, 81 S.E. 682 (N.C. 1914); Hitz v. Flower, 135 N.E. 450 (Ohio 1922); Potomac Power Co. v. Burchell, 64 S.E. 982 (Va. 1909); Central Christian Church v. Lennon, 109 P. 1027 (Wash. 1910); Burrows v. Madison Park & Pleasure Drive Ass'n, 189 N.W. 535 (Wis. 1922).*

(n13)Footnote 371. *Columbia R. Gas & Elec. Co. v. South Carolina, 261 U.S. 236 (1923); Newport v. J.R. Holden Land & Lumber Co., 231 S.W. 895 (Ark. 1921); Hasman v. Elk Grove Union High Sch., 245 P. 464 (Cal. App. 1926); Price v. Hart, 134 N.E. 672 (Ind. App. 1922); Lone Oak Graded Sch. Dist. v. Gentry, 295 S.W. 1063 (Ky. 1927); Furst v. Lacher, 182 N.W. 720 (Minn. 1921); Kent v. Stevenson, 90 So. 241 (Miss. 1922); In re Young Women's Christian*

Ass'n, 126 A. 610 (N.J. Eq. 1924); Berger v. Santa Fe College, 215 P. 825 (N.M. 1923); Calvary Presbyterian Church v. Putnam, 224 N.Y.S. 651 (A.D. 1927); Shields v. Harris, 130 S.E. 189 (N.C. 1925); Cole v. Seamonds, 104 S.E. 747 (W. Va. 1920); Peerless Carbon Black Co. v. Gillespie, 105 S.E. 517 (W. Va. 1920); Sands v. Holbert, 117 S.E. 896 (W. Va. 1923); Hunter v. Norfolk & W. R. Co., 128 S.E. 137 (W. Va. 1925).

(n14)Footnote 372. *Gramer v. Sacramento, 41 P.2d 543 (Cal. 1935); Hamel v. Minneapolis, St. P. & S. S. M. R. Co., 107 N.W. 129 (Minn. 1906); Hoadley v. Hoadley, 39 A.2d 769 (Vt. 1944).*

(n15)Footnote 373. *Coffill v. Bach. 323 P.2d 873 (Cal. App. 1958); Board of Pub. Educ. v. St. Patrick Roman Catholic Church, 136 A. 833 (Del. Ch. 1927); Thornton v. Trammell, 39 Ga. 202 (1869); Mathis v. Mathis, 83 N.E.2d 270 (Ill. 1948); Peck v. Drennan, 103 N.E.2d 63 (Ill. 1951); Kilpatrick v. Baltimore, 31 A. 805 (Md. 1895); Nogaj v. Nogaj, 89 N.W.2d 513 (Mich. 1958); Minor v. Minor, 62 S.E.2d 60 (N.C. 1950); Wayne Lakes Park v. Warner, 147 N.E.2d 269 (Ohio App. 1957); Bailey v. Mullens, 313 S.W.2d 99 (Tex. Civ. App. 1958); King County v. Hanson Inv. Co., 208 P.2d 113 (Wash. 1949); Asbury v. Burford, 177 S.E. 780 (W. Va. 1934); J. M. Carey & Bro. v. Casper, 213 P.2d 263 (Wyo. 1950).*

The acts of the parties may be considered in applying a condition, such as a building line restriction, and when the restriction has not been abandoned altogether and a material and beneficial part remains which has uninformly been observed, it will be protected. *Oliver v. Williams, 191 N.W. 34 (Mich. 1922).*

While it is the undoubted rule that conditions of this character, which involve the forfeiture of an estate, are stricti juris, and to be construed strictly, they nevertheless must be interpreted in the light of the circumstances surrounding the grant and the clear and reasonable meaning of the language employed by the parties to manifest their intent. *Oxford Bd. of Trade v. Oxford Iron & Steel Co., 80 A. 324 (N.J.L. 1911).*

Covenant is preferred over condition subsequent unless the words are clear that a conditional estate was meant. *Zapata v. Torres, 464 S.W.2d 926 (Tex. Civ. App. 1971).*

Provision in the deed that the grantee would care for the grantor for the balance of his life, held to be a covenant rather than a condition subsequent. *Dickerson v. Keller, 521 S.W.2d 288 (Tex. Civ. App. 1975).*

Gift of property on condition that devisee make payments to other persons one year after the will was admitted to probate was a fee simple and breach of condition did not work forfeitures. Instead the payment was charged upon the land. *Miller v. Miller, 247 N.W.2d 445 (Neb. 1976).*

(n16)Footnote 374. *Oxford Orphanage v. Kittrell, 27 S.E.2d 133 (N.C. 1943).*

Absence of re-entry clause indicates there is not a fee upon condition subsequent. *Floyd v. Hoover, 234 S.E.2d 89 (Ga. App. 1977).*

(n17)Footnote 375. *Libby v. Winston, 93 So. 631 (Ala. 1922); Bou v. Willits, 214 P. 519 (Cal. App. 1923); Wedum-Aldahl Co. v. Miller, 64 P.2d 762 (Cal. App. 1937); Mitchell v. Cheney Slough Irrig. Co., 134 P.2d 34 (Cal. App. 1943); Barnesville v. Stafford, 131 S.E. 487 (Ga. 1926); Federal Land Bank v. Luckenbill, 13 N.E.2d 531 (Ind. 1938); Cunningham v. New York Cent. R. Co., 48 N.E.2d 176 (Ind. App. 1943); Columbia Bldg. Co. v. Cemetery of Holy Cross, 141 A. 525 (Md. 1928); Sands v. Church of Ascension & Prince of Peace, 30 A.2d 771 (Md. 1943); Kent v. Stevenson, 90 So. 241 (Miss. 1922); University City v. Chicago, R. I. & P. R. Co., 149 S.W.2d 321 (Mo. 1941); Bagby v. Missouri-Kansas-Texas R. Co., 171 S.W.2d 673 (Mo. 1943); Majerus v. Santo, 10 N.W.2d 608 (Neb. 1943); Watson v. Dalton, 18 N.W.2d 658, op. modified 20 N.W.2d 610 (Neb. 1945);Van De Bogert v. Reformed Dutch Church, 220 N.Y.S. 58 (1927); Hinton v. Vinson, 104 S.E. 897 (N.C. 1920); Hall v. Quinn, 130 S.E. 18 (N.C. 1925); Second Church of Christ, Scientist v. LePrevost, 35 N.E.2d 1015 (Ohio App. 1941); Priddy v. School Dist. No. 78, 219 P. 141 (Okla. 1923); Stinson v. Oklahoma R. Co., 126 P.2d 260 (Okla. 1942); Sapper v. Mathers, 133 A. 565 (Pa. 1926); W. F. White*

Land Co. v. Christenson, 14 S.W.2d 369 (Tex. Civ. App. 1928).

(n18)Footnote 376. This is in accord with Restatement, Property, § 45, Comment i.

Columbia R., Gas & Elec. Co. v. South Carolina, 261 U.S. 236 (1923); Mitchell v. Cheney Slough Irrig. Co., 134 P.2d 34 (Cal. App. 1943); Berger v. Santa Fe College, 215 P. 825 (N.M. 1923); Clark v. Jones, 144 P.2d 498 (Or. 1944); Skipper v. Davis, 59 S.W.2d 454 (Tex. Com. App. 1932).

No fee upon condition subsequent unless forfeiture clearly and unequivocally provided therefor. *Harris v. Georgia Military Academy, 146 S.E.2d 913 (Ga. 1966).*

(n19)Footnote 377. *Federal Land Bank v. Luckenbill, 13 N.E.2d 531 (Ind. 1938); University City v. Chicago, R. I. & P. R. Co., 149 S.W.2d 321 (Mo. 1941).*

It is an elementary proposition of law that conditions subsequent are not favored by the law, because on the breach of such conditions there is a forfeiture, and the law is adverse to forfeitures. 4 Kent's Comm. 130; *Stanley v. Colt, 72 U.S. (5 Wall.) 119 (1867); Kilpatrick v. Baltimore, 31 A. 805 (Md. 1895).* Hence a condition will not be raised by implication from a mere declaration in the deed that the grant is made for a special and particular purpose, without being coupled with words appropriate to make such condition. *Packard v. Ames, 16 Mass. (Gray) 327 (1860). In re Copps Chapel Methodist Church, 166 N.E. 218 (Ohio St. 1929),* rejecting the theory of a fee upon condition subsequent because there was no express reservation of a right of re-entry.

(n20)Footnote 378. *Mathis v. Mathis, 83 N.E.2d 270 (Ill. 1948); Peck v. Drennan, 103 N.E.2d 63 (Ill. 1951); Mathews Real Estate Co. v. National Printing & Engraving Co., 48 S.W.2d 911 (Mo. 1932); Gardner v. Maffitt, 74 S.W.2d 604 (Mo. 1934).*

Deed upon condition that property should be held by the grantee only so long as used for school purposes conveyed a fee simple absolute since there was no right of re-entry reserved. *Washington City Bd. of Educ. v. Edgerton, 94 S.E.2d 661 (N.C. 1956).*

(n21)Footnote 379. Gift of property on condition that devisee make payments to other persons one year after the will was admitted to probate was a fee simple, and breach of condition did not work forfeitures. *Miller v. Miller, 247 N.W.2d 445 (Neb. 1976).* Instead, the payment was charged upon the land.

(n22)Footnote 380. *Keller v. Keller, 92 S.W.2d 157 (Mo. 1936).*

(n23)Footnote 381. *Stanley v. Colt, 72 U.S. (5 Wall.) 119 (1867); Elyton Land Co. v. South & N. Ala. R. Co., 14 So. 207 (Ala. 1893); Lowery v. May, 104 So. 5 (Ala. 1925); Bain v. Parker, 90 S.W. 1000 (Ark. 1905); Terry v. Taylor, 220 S.W. 42 (Ark. 1920); Cullen v. Sprigg, 23 P. 222 (Cal. 1890); Victoria Hosp. Ass'n v. All Persons, 147 P. 124 (Cal. 1915); Bou v. Willits, 214 P. 519 (Cal. App. 1923); Scovill v. McMahon, 26 A. 479 (Conn. 1892); Taylor v. Sutton, 15 Ga. 103 (1854); Voris v. Renshaw, 49 Ill. 425 (1867); Gallaher v. Herbert, 7 N.E. 511 (Ill. 1886); Noyes v. St. Louis, A. & T. H. R. Co., 21 N.E. 487 (Ill. 1889); Boone v. Clark, 21 N.E. 850 (Ill. 1889); Nowak v. Dombrowski, 107 N.E. 807 (Ill. 1915); Dunne v. Minsor, 143 N.E. 842 (Ill. 1924); Thompson v. Thompson, 9 Ind. 323 (1857); Sumner v. Darnell, 27 N.E. 162 (Ind. 1891); Peden v. Chicago, R. I. & P. R. Co., 35 N.W. 424 (Iowa 1887); Curtis v. Board of Educ., 23 P. 98 (Kan. 1890); Ruggles v. Clare, 26 P. 25 (Kan. 1891); Hooper v. Cummings, 45 Me. 359 (1858); Laberee v. Carleton, 53 Me. 211 (1865); Bray v. Hussey, 22 A. 220 (Me. 1891); Frenchville v. Gagnon, 91 A. 951 (Me. 1914); Glenn v. Davis, 6 Am. Rep. 389 (Md. 1872); Kilpatrick v. Baltimore, 31 A. 805 (Md. 1895); Columbia Bldg. Co. v. Cemetery of Holy Cross, 141 A. 525 (Md. 1928); Merrifield v. Cobleigh, 4 Mass. (Cush.) 178 (1849); Hadley v. Hadley Mfg. Co., 4 Mass. (Gray) 140 (1855); Packard v. Ames, 16 Mass. (Gray) 327 (1860); Chapin v. Harris, 8 Mass. (Allen) 594 (1864); Ayer v. Emery, 14 Mass. (Allen) 67 (1867); Sohier v. Trinity Church, 109 Mass. 1 (1871); Stone v. Houghton, 31 N.E. 719 (Mass. 1885); Blanchard v. Detroit, L. & L. M. R. Co., 31 Mich. 43 (1875); Farnham v. Thompson, 26 N.W. 9,*

(Minn. 1885); *Chute v. Washburn, 46 N.W. 555 (Minn. 1890); Gadberry v. Sheppard, 27 Miss. 203 (1854); Morrill v. Wabash, St. Louis & P. R. Co., 9 S.W. 657 (Mo. 1888); Roanoke Inv. Co. v. Kansas City & S. E. R., 17 S.W. 1000 (Mo. 1891); Studdard v. Wells, 25 S.W. 201 (Mo. 1894); Haydon v. St. Louis & S. F. R. Co., 121 S.W. 15 (Mo. 1909); Catron v. Scarritt Collegiate Inst., 175 S.W. 571 (1915); Weinreich v. Weinreich, 18 Mo. App. 364 (1885); Stilwell v. St. Louis & H. R. Co., 39 Mo. App. 221 (1890); Stoutimore v. Quincy, O. & K. C. R. Co., 256 S.W. 121 (Mo. App. 1923); Chapin v. Sch. Dist. No. 2, 35 N.H. 445 (1857); Emerson v. Simpson, 43 N.H. 475 (N.H. 1862); Page v. Palmer, 48 N.H. 385 (1869); Hoyt v. Kimball, 49 N.H. 322 (1870); Woodruff v. Trenton Water Power Co., 10 N.J. Eq. 489 (1856); Woodruff v. Woodruff, 16 A. 4 (N.J. Eq. 1888); Southard v. Central R. Co., 26 N.J.L. 13 (1856); Baker v. Mott, 28 N.Y.S. 968 (1894); Craig v Wells, 11 N.Y. 315 (1854); Woodworth v. Payne, 30 Am. Rep. 298 (N.Y. 1878); Duryee v. New York, 96 N.Y. 477 (1884); Lyon v. Hersey, 8 N.E. 518 (N.Y. 1886); Post v. Weil, 22 N.E. 145 (N.Y. 1889); Graves v. Deterling, 24 N.E. 655 (N.Y. 1890); Van De Bogert v. Reformed Dutch Church, 220 N.Y.S. 58 (1927); Hinton v. Vinson, 104 S.E. 897 (N.C. 1920); Hall v. Quinn, 130 S.E. 18 (N.C. 1925); Raley v. Umatilla County, 13 P. 890 (Or. 1887); Coffin v. Portland, 17 P. 580 (Or. 1888); Portland v. Terwilliger, 19 P. 90 (Or. 1888); Greene v. O'Connor, 25 A. 692 (R.I. 1892); Hammond v. Port Royal & A. R. Co., 15 S.C. 10 (1881); Huron v. Wilcox, 98 N.W. 88 (S.D. 1904); Jeffery v. Graham, 61 Tex. 481 (1884); Norris v. Coffman, 95 S.W. 1088 (Tex. Civ. App. 1906); Hudson v. Caffey, 179 S.W.2d 1017 (Tex. Civ. App. 1944); Waterman v. Clark, 2 A. 578 (Vt. 1886); Palmer v. Ryan, 22 A. 574 (Vt. 1891); Lowman v. Crawford, 40 S.E. 17 (Va. 1901); Lawe v. Hyde, 39 Wis. 345 (1876); Weir v. Simmons, 13 N.W. 873 (Wis. 1882); Mills v. Evansville Seminary, 15 N.W. 133 (Wis. 1883); Burgson v. Jacobson, 102 N.W. 563 (Wis. 1905).*

(n24)Footnote 382. *Columbia R. Gas & Electric Co. v. South Carolina, 261 U.S. 236 (1923); Libby v. Winston, 93 So. 631 (Ala. 1922); Lowery v. May, 104 So. 5 (Ala. 1925); Cooper v. Selig, 191 P. 983 (Cal. App. 1920); Gramer v. Sacramento, 41 P.2d 543 (Cal. 1935); Johnson v. Tullis, 109 S.E. 659 (Ga. 1921); Gearhart v. West Lab. Co., 90 S.E.2d 10 (Ga. 1955); Dunne v. Minsor, 143 N.E. 842 (Ill. 1924); Citizens Tel. Co. v. Newport, 224 S.W. 187 (Ky. 1920); Columbia Bldg. Co. v. Cemetery of Holy Cross, 141 A. 525 (Md. 1928); Halpin v. Rural Agrl. Sch. Dist. No. 9, 194 N.W. 1005 (Mich. 1923); Central Land Co. v. Grand Rapids, 4 N.W.2d 485,* (Mich. 1942); *Clark v. Grand Rapids, 55 N.W.2d 137 (Mich. 1952); Kent v. Stevenson, 90 So. 241 (Miss. 1922); Pixlee v. Petty, 274 S.W.2d 257 (Mo. 1955); Carr v. Miller, 181 N.W. 557 (Neb. 1921); Van De Bogert v. Reformed Dutch Church, 220 N.Y.S. 50 (1926); Hinton v. Vinson, 104 S.E. 897 (N.C. 1920); Hall v. Quinn, 130 S.E. 18 (N.C. 1925); Priddy v. Sch. Dist. No. 78, 219 P. 141 (Okla. 1923); Sapper v. Mathers, 133 A. 565 (Pa. 1926); Hoadley v. Hoadley, 39 A.2d 769 (Vt. 1944); Peerless Carbon Black Co. v. Gillespie, 105 S.E. 517 (W. Va. 1920). See* Restatement, Property, § 45, Comment i.

(n25)Footnote 383. *Board of Councilmen v. Capital Hotel Co., 224 S.W. 197 (Ky. 1920); Whitmore v. Church of Holy Cross, 117 A. 469 (Me. 1922); Vaughan v. Compton, 235 S.W.2d 328 (Mo. 1950); Carr v. Miller, 181 N.W. 557 (Neb. 1921); Hinton v. Vinson, 104 S.E. 897 (N.C. 1920); Shields v. Harris, 130 S.E. 189 (N.C. 1925); Stinson v. Oklahoma R. Co., 126 P.2d 260 (Okla. 1942). See* Restatement, Property, § 45, Comment j.

Construction against the estate upon condition. *Miller v. Miller, 247 N.W.2d 445 (Neb. 1976).*

(n26)Footnote 384. *Turner v. Turner, 197 S.E. 771 (Ga. 1938).*

(n27)Footnote 385. *Van De Bogert v. Reformed Dutch Church, 220 N.Y.S. 50 (1926).*

"Made a condition for the conveyance" held to create a covenant not a condition. *Dilbeck v. Bill Gaynier, Inc., 368 S.W.2d 804 (Tex. Civ. App. 1963).*

See Note, *Deeds: Covenants and Conditions, 16 Baylor L. Rev. 147 (1964).*

(n28)Footnote 386. *Stillwell v. Morley, 272 N.Y.S.2d 187 (1965).*

(n29)Footnote 387. *Van De Bogert v. Reformed Dutch Church, 220 N.Y.S. 58 (A.D. 1927); Hall v. Quinn, 130 S.E. 18 (N.C. 1925).*

This is in conformity with Restatement, Property, § 45, Comment o. *See* § 1859.

(n30)Footnote 388. *Lucas v. Lucas, 156 S.E. 680 (Ga. 1931).*

(n31)Footnote 389. *Cullen v. Sprigg, 23 P. 222 (Cal. 1890); Townsend v. Allen, 250 P.2d 292 (Cal. App. 1952)*(if language creates a condition which is not unlawful or unreasonable it will be enforced on breach); *Augusta Land Co. v. Augusta R. & Elec. Co., 79 S.E. 138 (Ga. 1913); Boone v. Clark, 21 N.E. 850 (Ill. 1889); Curtis v. Board of Educ., 23 P. 98 (Kan. 1890); Ruggles v. Clare, 26 P. 25 (Kan. 1891); Young v. Clement, 17 A. 707 (Me. 1889); Glenn v. Davis, 35 Md. 208 (1872); Ayer v. Emery, 14 Mass. (Allen) 67 (1867); Studdard v. Wells, 25 S.W. 201 (Mo. 1894); Baker v. Mott, 28 N.Y.S. 968 (1894); Lyon v. Hersey, 8 N.E. 518 (N.Y. 1886); Flagg v. Eames, 40 Vt. 16 (1867); Blanchard v. Morey, 56 Vt. 170 (1883).*

In order for fee simple subject to condition subsequent to be created there must be specific language of reverter. *Cummings v. United States, 409 F. Supp. 1064 (M.D.N.C. 1976).*

(n32)Footnote 390. "To say the stipulation in the deed to pay the taxes and support the grantors is a condition subsequent, the nonperformance of which will defeat the estate granted, is to make a stipulation for the parties which they did not see fit to make for themselves." *Studdard v. Wells, 25 S.W. 201 (Mo. 1894).*

(n33)Footnote 391. *Lewis v. Owen, 165 So. 229 (Ala. 1935).*

Provision in the deed that the grantee would care for the grantor for the balance of his life, held to be a covenant rather than a condition subsequent. *Dickerson v. Keller, 521 S.W.2d 288 (Tex. Civ. App. 1975).*

(n34)Footnote 392. *Miller v. Miller, 247 N.W.2d 445 (Neb. 1976).*

(n35)Footnote 393. *In re Estate of Wockstettler, 216 A.2d 66 (Pa. 1966).*

(n36)Footnote 394. *See Union Stockyards Co. v. Nashville Packing Co., 140 F. 701 (6th Cir. 1905); Jancovech v. Christensen, 195 N.E. 287 (Ind. App. 1935); New Edgewood Lake Corp. v. Kingston Trust Co., 285 N.Y.S. 130 (1936); Perkins v. Kirby, 85 A. 648 (R.I. 1913).*

> If the only reason for construing a clause is in the technical words which have been used, the court may disregard them in performing the office of interpretation. If we can construe this cause as an obligation to abstain from doing the thing described, which by acceptance of the deed, became binding upon the grantee as an agreement, enforceable in behalf of any interest entitled to invoke its protection, I think we are in conscience bound to give that construction, and thereby place ourselves in accord with that inclination of the law which regards with disfavor conditions involving forfeiture of estates. In this connection it may be noted that there is no clause in the deed giving the right to re-enter for conditions broken. While the presence of such a clause is not essential to the creation of a condition subsequent, by which an estate may be defeated at the exercise of an election by the grantor or his heirs to re-enter, yet its absence, to that extent, frees still more the case from the difficulty of giving a more benignant construction to the proviso clause. The presence of a re-entry clause might make certain that which, in its absence, is left open to construction. The absence of such a clause may have its significance in connection with the circumstances of the case and the intent to be fairly presumed therefrom.

Post v. Weil, 22 N.E. 145 (N.Y. 1889).

In this case the owner of two adjoining estates, occupied by him as farms, contracted to sell one of them "upon special condition that no part of the land or buildings thereon should be used or occupied as a tavern." Some years afterwards

the owner, being financially embarrassed, conveyed both estates to trustees subject to this agreement, and the trustees shortly afterwards made a deed in fulfilment of this agreement with the "express condition that the aforesaid premises shall not, nor shall any part thereof, be at any time hereafter used or occupied as a tavern, or public house of any kind." Subsequently, the trustees sold the remaining estate without inserting any such condition. The former owner then had no interest in either estate other than obtaining from them all that they would bring, and the trustees had no other interest. Neither the owner nor the trustees had any interest that the restrictive clause should operate as a condition subsequent. "There was no interest," said the court, "which was not adequately met by the creation of a covenant or limitation in trust that the property should not be used for the one certain purpose mentioned." The two estates were subsequently united in one owner, and when, upon a sale of a portion of the estate which was affected by the provision under consideration, the purchaser objected that it was subject to a common-law forfeiture and declined to complete his purchase, it was held that his objection was untenable; that the provision was simply a covenant running with the land for the benefit of the adjoining estate; and that it was extinguished by the union of both estates in the same owner.

The court cited and relies upon *Avery v. New York Cent. & H. R. R. Co., 12 N.E. 619 (N.Y. 1887),* where the railroad company held lands under a deed containing an "express condition" that the company should at all times maintain an opening to a hotel adjacent to the premises. A lessee of the hotel sought to enjoin the company from maintaining a fence upon the land, which blocked up a passageway between the railroad property and the hotel. The company contended that the provision created a condition subsequent, which could only be taken advantage of by the grantors and their heirs. The court, however, decided against the contention of the railroad company, saying:

> The fact that the deed uses the language 'upon condition,' when referring to the conveyance by the grantors, is not conclusive that the intention was to create an estate strictly upon condition... Construction may frequently be aided by reference to all the circumstances surrounding the parties at the time of the execution of the deeds, because the court is thus enabled to be placed exactly in their situation, and to view the case in the light of such surroundings.

After referring to the facts, he writes: "All these facts would lead one to the unhesitating conclusion that the language used in those deeds in 1857 was for the benefit of the hotel property, and was not meant to create a condition subsequent."

In confirmation of the views given in the above decisions, *see Clement v. Burtis, 24 N.E. 1013 (N.Y. 1890)*(where a clause in a deed of land, reciting that the grant is on the "express condition" that the grantee, his heirs or assigns, shall not thereafter maintain a nuisance on the premises, does not create a condition subsequent, but is a covenant running with the land; and a purchaser at a foreclosure sale of the granted premises cannot refuse to complete his purchase on the ground of a defect in the title, as the covenant does not bind him any further than he would be bound by law in the absence of any covenant); *See also Stanley v. Colt, 72 U.S. (5 Wall.) 119 (1867); Episcopal City Mission v. Appleton, 117 Mass. 326 (1875); Hoyt v. Kimball, 49 N.H. 322 (1870); Countryman v. Deck, 13 N.Y. (Abb. N. Cas.) 110 (1883).*

(n37)Footnote 395. *See* Restatement, Property, § 45, Comment m.

(n38)Footnote 396. *Grove v. Payne, 288 P.2d 242 (Wash. 1955); Birnbaum v. Rollerama, Inc., 232 N.Y.S.2d 188 (Sup. Ct. 1962).*

(n39)Footnote 397. *Rosecrans v. Pacific Elec. R. Co., 134 P.2d 245 (Cal. 1943).*

Construction favors condition subsequent as against limitation. *Lawyers Trust Co. v. Houston, 359 S.W.2d 887 (Tex. 1962).*

(n40)Footnote 398. *Oldfield v. Stoeco Homes, Inc., 139 A.2d 291 (N.J. 1958).*

Construction against the estate upon condition. *Miller v. Miller, 247 N.W.2d 445 (Neb. 1976).*

(n41)Footnote 399. Myres Smith McDougal & David Haber, Property, Wealth, Land (1948); 286 Dunham, Possibility of Reverter and Power of Termination -- Fraternal or Identical Twins, *20 U. Chi. L. Rev. 215 (1953).*

(n42)Footnote 400. *Warner v. Bennett, 31 Conn. 468 (1863); Mickens v. Ebbo, 237 N.W. 377 (Mich. 1931).*

(n43)Footnote 401. *Shannon v. Long, 60 So. 273 (Ala. 1912); Latham v. Illinois Cent. R. Co., 97 N.E. 254 (Ill. 1911); Hartman v. Wells, 100 N.E. 500 (Ill. 1912); Ross v. Sanderson, 162 P. 709 (Okla. 1917); Lowrey v. Finkleston, 134 N.W. 344 (Wis. 1912); Glocke v. Glocke, 89 N.W. 118 (Wis. 1902).*

* This chapter is based in part on Ch. 30, George W. Thompson, Commentaries on the Modern Law of Real Property (John S. Grimes ed. 1979), which made a significant contribution toward preserving the American common law governing defeasible fees.

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CHAPTER 20 DEFEASIBLE FEES *

2-20 Thompson on Real Property, Thomas Editions § 20.08

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§ 20.08 Meaning of "Death Without Issue."

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The cases are in considerable confusion as to the effect of a grant or devise to one with a limitation over if he "die without issue" or similar phraseology. The early English position was that this meant indefinite failure of issue that is when the last descendant of the first grantee died. n402 The effect of this interpretation was to give the first taker a fee tail with a limitation over on extinction of the line. n403 The rule does not seem to have been one of law, however, or at least there was disagreement among the courts. n404

Some of the American courts today still follow the common law rule. n405 In these states the fee tail is then subject to the applicable fee tail statutes. In these states the limitation over is valid provided it is preserved by statute n406 and is not too remote. In other states, however, the definite failure of issue rule is favored, n407 and in some thirty states this interpretation has become statutory. n408 Under this rule the time of determination is the death of the first taker or earlier, not the expiration of the family line. In some states this is a presumption, the instrument being open to other construction. n409

Where definite failure of issue is favored the first taker gets either a fee upon condition subsequent, n410 a determinable fee n411 or only a life estate, n412 depending upon the position of the particular jurisdiction. The weight of authority is that a gift with a limitation over on death without issue is a defeasible fee, not a life estate. n413 Most cases hold death without issue means issue surviving devisee, not merely issue born who predeceased devisee. n414

There is a line of authority, however, that "death" means, presumptively at least, death in the lifetime of the testator in the case of wills so that the devisee takes absolutely if he survives the testator n415 or the life tenant if the gift is in remainder. n416 This rule is frequently followed where the limitation over is a mere death of the first taker as "to A but if he be dead then to B." n417 Where, however, the limitation over is a death without "heirs," if heirs is used in the general sense and not as children the first devisee takes a fee simple absolute and the limitation over is void. n418

In a few states the language is interpreted to mean death without ever having had issue so as to vest the gift absolutely if children are born and not to require issue living at death. n419 If the limitation the first takes is but a life estate with a

remainder over on death sans issue the courts often imply a prior gift in remainder to children if born. n420

Where the gift is to a group but if any die without issue then to the survivors, some courts imply a fee simple absolute in the last survivor. n421 Where the gift to the first taker is a determinable fee or fee upon condition subsequent the limitation over may be void for remoteness. n422

"Death" has been equated to divorce on limitations over on death. n423

COMPUTER-ASSISTED RESEARCH

LEXIS: die! or death! w/2 without issue or children w/15 fee w/2 tail or condition! or determinable

FOOTNOTES:
(n1)Footnote 402. *Hayes v. Hammond, 143 N.E.2d 693 (Mass. 1957)*("death without issue" means indefinite failure of issue creating a fee tail); *Green v. Rod, Fitz. 68, 94 Eng. Rep. 656; Wyld v. Lewis, 1 Atk. 432, 26 Eng. Rep. 276; Beauclerk v. Dormer, 2 Atk. 308, 26 Eng. Rep. 588.* As to personal property definite failure of issue was favored. *Forth v. Chapman, 1 P. Wms. 663, 24 Eng. Rep. 604.*

(n2)Footnote 403. *Hayes v. Hammond, 143 N.E.2d 693 (Mass. 1957).*

(n3)Footnote 404. *Contrast Pello v. Brown, Cro. Jac. 590, 79 Eng. Rep. 504,* where to A and his heirs and if A died without issue leaving B then to B and his heirs created a fee upon a condition subsequent with an indestructible limitation over to *B, and Chadock v. Cowley, Cro. Jac. 695, 79 Eng. Rep. 604,* where similar language created a fee tail.

See Philip Werner Amram, *Pennsylvania Rules for Construction of the Words "Die Without Issue," 79 U. Pa. L. Rev. 15 (1930).*

(n4)Footnote 405. *McCulloch's Estate v. Conrad, 52 N.W.2d 67 (Iowa 1952)*(limitation over on death without heirs created "conditional fee"). Iowa does not recognize a fee tail. *See* § 1868.

See also Joseph Warren, *Gifts Over on Death Without Issue, 39 Yale L.J. 332 (1930).*

(n5)Footnote 406. For the rule in various states, *see* Note, *Construction of the Words "Die Without Issue" under Ohio Law, 18 U. Cinn. L. Rev. 311 (1949);* Philip Werner Amram, *Pennsylvania Rules for Construction of the Words "Die Without Issue," 79 U. Pa. L. Rev. 15 (1930);* Comment, *Construction of "Die Without Issue" in Devises of Realty, 20 Tex. L. Rev. 212 (1941);* Henry A. Shinn, *Limitations Over on Death Without Issue and the Abolishing of Estates Tail, 21 Va. L. Rev. 286 (1934).*

In New York where there is limitation on death without issue the adoption of a child does not make the adopted child the issue so as to defeat the remainderman. *In re Park's Estate, 207 N.E.2d 859 (N.Y. 1965).*

(n6)Footnote 407. *Steele v. Pedroja, 289 P.2d 738 (Kan. 1955).*

(n7)Footnote 408. *See* Restatement, Property, § 266 (1948 Supp.).

Massachusetts General Laws 1932, ch. 184, § 6. In a limitation of real or personal property by deed, will or other instrument in writing, executed after April thirtieth, eighteen hundred and eighty-eight, the words "die without issue," or "die without leaving issue," or "have no issue," or "die without heirs of the body," or other words importing either a want or failure of issue of any person in his lifetime or at the time of his death, or an indefinite failure of his issue, shall, unless a contrary intention clearly appears by the instrument creating such limitation, mean a want or failure of issue in the lifetime or at the time of the death of such person and not an indefinite failure of his issue.

New York Estates, Powers and Trust Law, § 6-56. Where a remainder shall be limited to take effect on the death of any person without heirs, or heirs of his body, or without issue, the words "heirs" or "issue" shall be construed to mean heirs or issue living at the death of the person named as ancestor.

Limitations on dying without issue are definite failure of issue. Virginia Code 1960, § 55-13.

Kansas by statute in 1976 decided not to recognize indefinite failure of issue.

(n8)Footnote 409. *Monroe v. Leckey, 142 N.E.2d 314* (Oh. Com. Pl.), *aff'd, 143 N.E.2d 168 (Ohio 1956).*

(n9)Footnote 410. *Trimble v. Fairbanks, 76 S.E.2d 16 (Ga. 1953); Stagg v. Phenix, 81 N.E.2d 565 (Ill. 1948); Hays v. Cole, 73 So. 2d 258 (Miss. 1954); Kelley v. North Morris Realty Co., 59 A.2d 811 (N.J. Eq. 1948), aff'd, 64 A.2d 73 (N.J. 1949); In re Voorhees, 106 N.Y.S.2d 699 (Sur. Ct. 1951); Conrad v. Goss, 42 S.E.2d 609 (N.C. 1947); Stanley v. Foster, 92 S.E.2d 925 (N.C. 1956); Love v. Roper, 93 S.E.2d 282 (Va. 1956).*

Vaughn v. Dickes, 20 Pa. St. 509 (1853):

> The series of cases in the English law have been uniform, from the time of the year-books down to the present day, in the recognition of the rule of law, that a devise in fee with a remainder over, if the devisee dies without issue or heirs of the body, is a fee cut down to an estate tail, and the limitation over is void by way of executory devise, as being too remote, and founded in an indefinite failure of issue.
>
> This may not be according to the actual intent of the testator. Doubtless he did not intend to create an estate tail, but when a testator uses words, without explanation or qualification in the context, which, according to a settled rule of law, import an estate tail, the legal meaning of the will is to prevail over the actual intention of the testator. Artificial rules being founded in considerations of public policy, must often frustrate the intentions of testators, and it is well they should, for the law is wiser than any one man.

Johnson v. Currin, 10 Pa. 498 (1849).

(n10)Footnote 411. *Scranton Lockawanna Trust Co. v. Bruen, 59 S.E.2d 397 (Ga. 1950); Carter v. Sunray Mid-Continent Oil Co., 94 So. 2d 624 (Miss. 1957); Elmore v. Austin, 59 S.E.2d 205 (N.C. 1950).*

(n11)Footnote 412. *Steele v. Pedroja, 289 P.2d 738 (Kan. 1955).*

(n12)Footnote 413. *Hall v. Spencer, 227 S.W.2d 196 (Ky. 1950).*

(n13)Footnote 414. *Hays v. Cole, 73 So. 2d 258 (Miss. 1954); Kindred v. Anderson, 209 S.W.2d 912 (Mo. 1948); Simmons v. Rosemond, 223 F. Supp. 61 (D.D.C. 1963).*

(n14)Footnote 415. *Davant v. Shaw, 59 S.E.2d 500 (Ga. 1950)*(referred to testator's death); *Kindred v. Anderson, 209 S.W.2d 912 (Mo. 1948)*(means predeceasing testator); *Rogers v. Baily, 73 A. 243 (N.J. 1909)* (distinguishing between death in testator's lifetime and death subsequent to the testator); *Elmore v. Austin, 59 S.E.2d 205 (N.C. 1950)*(issue living at death); *Steinbrenner v. Dreher, 43 N.E.2d 283 (Ohio St. 1942)* (repudiating rule of death in testator's lifetime); *In re Mickley's Appeal, 92 Pa. 514 (1880)*(death in testator's lifetime); *contra, Crump v. Phelps, 43 So. 2d 105 (Miss. 1949).*

In limitation over on death without heirs meant death in testator's lifetime if personalty involved. *Ireland v. Cooper, 277 S.W. 483 (Ky. 1925),* but means death at any time if realty is concerned. *Harvey v. Bell, 81 S.W. 671 (Ky. 1904).*

But these are rules of construction to be defeated by the testator's manifest intent. *Howard v. Reynolds, 261 S.W.2d 815 (Ky. 1953).*

Devise to widow for life and then to son but if he dies without any heirs then to another son meant death before life tenant. *In re Creekmore's Estate, 423 S.W.2d 548 (Ark. 1968).*

Death in testator's lifetime. *Lones v. Winzer, 486 S.W.2d 758 (Tenn. App. 1971).*

To A for life then to A's children but if any be dead then to others meant death in A's lifetime. *Harrison v. Brown, 416 S.W.2d 613 (Tex. Civ. App. 1967).*

In a limitation in a will, over on death without issue, death means death of the beneficiary before the testator. *Martin v. Taylor, 521 S.W.2d 581 (Tenn. 1975).*

(n15)Footnote 416. *Pence v. Ferris, 196 S.W.2d 970 (Ky. 1946).*

As to effect of death without issue on remainders, *see* § 1994.

(n16)Footnote 417. *In re Raworth's Estate, 52 So. 2d 661 (Miss. 1951).*

(n17)Footnote 418. *Smith v. Nelson, 29 So. 2d 335 (Ala. 1947).*

(n18)Footnote 419. *Kendall v. Taylor, 92 N.E. 562 (Ill. 1910).*

(n19)Footnote 420. *Ball v. Phelan, 49 So. 956 (Miss. 1908).*

(n20)Footnote 421. *Sullivan v. Garesche, 129 S.W. 949 (Mo. 1910); Drummond v. Drummond, 26 N.J. Eq. 234 (1875); Michael v. Minchen, 101 A. 283 (N.J. L. 1917); McGlothlin v. McElvain, 95 N.E.2d 68 (Ill. 1950); Armstrong v. Thomas, 72 So. 1006 (Miss. 1916).*

(n21)Footnote 422. *See Vaughn v. Dickes, 20 Pa. 509 (1853),* to the effect that the limitation over is too remote if after a fee tail. Also *see* § 2020.

(n22)Footnote 423. In the case of a bequest to a spouse with the limitation over on death if she predeceased him, the limitation over took effect when the spouse divorced the testator. *In re Frederick's Estate, 311 So. 2d 376 (Fla. 1975).*

* This chapter is based in part on Ch. 30, George W. Thompson, Commentaries on the Modern Law of Real Property (John S. Grimes ed. 1979), which made a significant contribution toward preserving the American common law governing defeasible fees.

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CHAPTER 20 DEFEASIBLE FEES *

2-20 Thompson on Real Property, Thomas Editions § 20.09

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§ 20.09 Covenants and Conditions Distinguished.

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Very often phraseology is used in an instrument of transfer of title or contract therefor, which could be capable of construction either as a condition subsequent or as a covenant. In such cases the different legal consequences arising from the forfeiture of estate upon breach of the condition or an action for damages for breach of covenant require a careful distinction between the two legal situations.

Since forfeitures are not favored n424 when it is doubtful, whether a provision in a deed should be construed to be a covenant or a condition, the words used not being in form either the one or the other, the courts will construe it to be a covenant, so as to avoid a forfeiture. n425 The construction must not, however, be a strained or unreasonable one or one that was plainly not contemplated by the parties. n426 Language in a deed, "it being expressly understood by the parties that the said tract or parcel of land is not to be put to any other use than that of a depot square," was held that these were words of covenant, and not words of condition, and that the remedy for a breach was an action for damages, and not a forfeiture of the estate for condition broken. n427 Where a right-of-way was conveyed to a railroad company, "provided, however, that any other railroad running into or through the city shall have the right to run a parallel track along upon the same right-of-way," this provision was construed to be a covenant or limitation, rather than a condition subsequent, no right of entry being reserved for a breach of it. The court regarded it as more consonant with equity and the general spirit and purpose of the conveyance to construe the proviso as a covenant or limitation upon the use of the way granted than as a strict condition. n428

In determining whether a provision in a deed is a covenant or a condition subsequent, the parties' intention is a controlling factor. n429 The question whether a clause in a deed is a condition subsequent or a covenant is one of intent to be gathered from the whole instrument by following out the object and the spirit of the deed. n430 It is the province of the court, and not of the jury, to construe the terms of a deed offered in evidence, to determine whether it purports to convey the whole or any lesser estate in the land, n431 or whether a covenant or a condition subsequent is created. n432 Whether the language used constitutes a condition is a question of law for the court, with which the jury has nothing to do. n433 The intent is to be gathered from the whole instrument by following out the object and spirit of the deed or contract. n434

The responsibility for a breach of a covenant ordinarily is the payment of damages, while the consequence of a failure to fulfill the terms of a condition is intended to be a forfeiture of the estate. n435 A proviso in a deed that the grantee shall erect and maintain at his own expense all division fences is not a condition subsequent, but an implied covenant. The proviso does not suggest that the parties intended or understood that a failure to comply with it should work a forfeiture of the land. n436 In a deed of a right-of-way to a railroad company, a condition that it will build, immediately after the road is finished, two bridges across a cut in the grantor's land is not a condition which will authorize a forfeiture of the grant upon a failure to perform it. n437 Where the intention of the parties to a deed clearly shows that the enjoyment of the estate created by the deed was intended to depend upon the performance of an agreement therein, the agreement is a condition and not a covenant, notwithstanding conditions are not favored. n438

A condition cannot be enforced as an agreement where the language used imports a condition only and there are no words importing an agreement, but the only remedy is through a forfeiture. n439 If there are no promissory words or words which can be construed as such, the condition does not create a personal liability. n440 A provision that the property shall not be sold, leased, or rented to colored persons, and that in the event of such transfer shall revert to the grantor, was held a condition. n441 However, the deed may contain a condition upon breach of which the grantor might enforce a forfeiture, and also a covenant on the part of the grantee upon a breach of which the grantor may in equity compel a specific performance or maintain an action for damages, and in such case the grantor has his election of remedies. n442 If the language and intent of the deed clearly fix the legal import of the instrument as creating a condition, it is no consequence that the provision is elsewhere in the deed referred to as being a covenant. n443

If the parties themselves expressly call the provision a covenant instead of a condition, their language is significant of their intention. n444 The mere use of the words "on condition" is not conclusive of the character of the provision. n445 The same provision cannot be both a condition and a covenant. The grantor cannot claim a forfeiture and also damages for a breach of covenant. n446 The use of the word "covenant" will not defeat the plain intention to create a condition subsequent by apt words expressly creating such condition. n447

Where the deed contains no terms of reverter in the event the property is diverted from the uses specified, the deed will not be construed to create an estate on condition but to contain a covenant only. n448 If the technical words of condition are not used, and there is no clause providing that the grantor may re-enter, the deed will generally be construed as creating a covenant rather than a condition. n449 Other words used in connection with technical words of condition may serve to show that no forfeiture for a breach of the provision was intended as in case some other remedy than a forfeiture is provided. n450

A condition will not be raised from a mere declaration in the deed that the grant is made for special and particular purposes, without being coupled with words appropriate to make such condition, but such recitals are usually construed as giving rise, at most, to an implied covenant that the grantee will use the property conveyed only for special purposes. n451 Language will not, however, be construed as covenants where the clear intent of the maker was to create a condition. n452 But where the language creating a condition is clear and specific, it will be enforced. n453 The courts have even resorted to collateral evidence to construe language as a covenant, not a condition. n454

A mortgage executed by grantees is prior to a covenant in the deed to care for the grantor but would be junior to a condition subsequent in the deed. n455

COMPUTER-ASSISTED RESEARCH

LEXIS: consideration w/15 transfer! w/30 fee w/5 condition! subsequent or precedent

FOOTNOTES:
(n1)Footnote 424. *McBride v. Freeman, 215 P. 678 (Cal. 1923); Hinton v. Vinson, 104 S.E. 897 (N.C. 1920).*

Demand must be made before forfeiture for breach of implied covenant. *Robinson v. Continental Oil Co., 255 F. Supp. 61 (D. Kansas 1966).*

Forfeiture on breach not favored. *Zapata v. Torres, 464 S.W.2d 926 (Tex. Civ. App. Dallas 1971).*

(n2)Footnote 425. *American Emigrant Co. v. Adams, 100 U.S. 61 (1879); Columbia R., Gas & Elec. Co. v. South Carolina, 261 U.S. 236 (1923); Los Angeles Univ. v. Swarth, 107 F. 798 (9th Cir. 1901); C. W. Zimmerman Mfg. Co. v. Daffin, 42 So. 858 (Ala. 1906); Seaboard Air Line R. Co. v. Anniston Mfg. Co., 65 So. 187 (Ala. 1914); Libby v. Winston, 93 So. 631 (Ala. 1922); Lowery v. May, 104 So. 5 (Ala. 1925); Murphy v. Schuster Springs Lbr. Co., 11 So. 427 (Ala. 1926); Hanners v. Hanners, 77 So. 2d 484 (Ala. 1955); Kampman v. Kampman, 135 S.W. 905 (Ark. 1911); Weller v. Brown, 117 P. 517 (Cal. 1911); McBride v. Freeman, 215 P. 678 (Cal. 1923); Rosecrans v. Pacific Elec. R. Co., 134 P.2d 245 (Cal. 1943); Savanna Sch. Dist. v. McLeod, 290 P.2d 593 (Cal. App. 1955); Scovill v. McMahon, 26 A. 479 (Conn. 1892); Thornton v. Trammell, 39 Ga. 202 (1869); Self v. Billings, 77 S.E. 562 (Ga. 1913); Gordon v. Whittle, 57 S.E.2d 169 (Ga. 1950); Board of Educ. v. First Baptist Church, 63 Ill. 204 (1872); Gallaher v. Herbert, 7 N.E. 511 (Ill. 1886); Boone v. Clark, 21 N.E. 850 (Ill. 1889); Downen v. Rayburn, 73 N.E. 364 (Ill. 1905); Bald v. Nuernberger, 108 N.E. 724 (Ill. 1915); Rooks Creek Evangelical Lutheran Church v. First Lutheran Church, 124 N.E. 793 (Ill. 1919); Dunne v. Minsor, 143 N.E. 842 (Ill. 1924); Mathis v. Mathis, 83 N.E.2d 270 (Ill. 1949); Glendening v. Federal Land Bank of Louisville, 44 N.E.2d 251 (Ind. App. 1942); Peden v. Chicago, R. I. & P. R. Co., 35 N.W. 424 (Iowa 1887); Boone Biblical College v. Forrest, 275 N.W. 132 (Iowa 1937); Wright v. Board of Educ., 152 S.W. 543 (Ky. 1913); Frankfort v. Capital Hotel Co., 224 S.W. 197 (Ky. 1920); National Fin. Corp. v. Robinson, 237 S.W. 418 (Ky. 1922); Hoskins v. Walker, 255 S.W.2d 480 (Ky. 1953); Kilpatrick v. Baltimore, 31 A. 805 (Md. 1895); Earle v. Dawes, 3 Md. Ch. 230 (1849); Wheeler v. Dascomb, 3 Mass. (Cush.) 285 (1849); Merrifield v. Cobleigh, 4 Mass. (Cush.) 178 (1849); Rawson v. School Dist. No. 5, 89 Mass. (7 Allen) 125 (1863); Smith v. Barrie, 22 N.W. 816 (Mich. 1885); Detroit Union R. Depot & Station Co. v. Fort St. Union Depot Co., 87 N.W. 214 (Mich. 1901); Clark v. Grand Rapids, 55 N.W.2d 137 (Mich. 1952); St. Louis v. Wiggins Ferry Co., 88 Mo. 615 (1886); Studdard v. Wells, 25 S.W. 201 (Mo. 1894); Reynolds v. Reynolds, 136 S.W. 411 (Mo. 1911); Koehler v. Rowland, 205 S.W. 217 (1918); Chapin v. School Dist. No. 2, 35 N.H. 445 (1857); Hoyt v. Kimball, 49 N.H. 322 (1870); Spaulding v. Woodward, 53 N.H. 573 (1873); Nichols v. Fernald, 131 A. 836 (N.H. 1926); Woodruff v. Woodruff, 16 A. 4 (N.J. Eq. 1888); Riverton Country Club v. Thomas, 58 A.2d 89 (N.J. Eq. 1948); Butterhof v. Butterhof, 86 A. 394 (N.J. 1913); Oldfield v. Stoeco Homes, Inc., 139 A.2d 291 (N.J. 1958)*(to the contrary is in error); *Parmelee v. Oswego & S. R. Co., 6 N.Y. 74 (1851); Craig v. Wells, 11 N.Y. 315 (1854); Post v. Weil, 22 N.E. 145 (N.Y. 1889); Graves v. Deterling, 24 N.E. 655 (N.Y. 1890); Munro v. Syracuse, L. & N. R. Co., 93 N.E. 516 (N.Y. 1910); Van De Bogert v. Reformed Dutch Church, 220 N.Y.S. 50 (1926); Hinton v. Vinson, 104 S.E. 897 (N.C. 1920); Second Church of Christ, Scientist v. LePrevost, 35 N.E.2d 1015 (Ohio App. 1941); Wayne Lakes Park v. Warner, 147 N.E.2d 269 (Ohio App. 1957); Fraley v. Wilkinson, 191 P. 156 (Okla. 1920); Priddy v. School Dist. No. 78, 219 P. 141 (Okla. 1923); Gypsy Oil Co. v. Escoe, 258 P. 906 (Okla. 1927); Gange v. Hayes, 237 P.2d 196 (Or. 1951)* (option to repurchase preferred to a condition subsequent); *Paschall v. Passmore, 15 Pa. 295 (1850); McKnight v. Kreutz, 51 Pa. 232 (1866); Howell v. Sewickley Twp., 43 A.2d 121 (Pa. 1945); Greene v. O'Connor, 25 A. 692 (R.I. 1892); Texas Elec. R. Co. v. Neale, 252 S.W.2d 451 (Tex. 1952); Beckham v. Ward County Irrig. Dist. No. 1, 278 S.W. 316 (Tex. Civ. App. 1925)*(agreement to construct and maintain flume held covenant and not condition); *Wichita Falls v. Bruner, 165 S.W.2d 480 (Tex. Civ. App. 1942); Scaling v. Sutton, 167 S.W.2d 275 (Tex. Civ. App. 1942); Knight v. Chicago Corp., 183 S.W.2d 666 (Tex. Civ. App. 1933); Coleman v. Layman, 252 P.2d 244 (Wash. 1953).*

In *Rawson v. School Dist. No. 5, 89 Mass. (7 Allen) 125 (1863),* elaborate and able opinion delivered by Bigelow, C. J., the court said: "If it be doubtful whether a clause in a deed be a covenant or condition, courts of law will always incline against the latter construction. Conditions are not to be raised readily by inference or argument."

In *Scovill v. McMahon, 26 A. 479 (Conn. 1892),* Hall, J., said: "Courts will always construe clauses in deeds as covenants, rather than conditions, if they can reasonably do so." *See also,* as illustrating the subject, *Stanley v. Colt, 72*

U.S. 119 (1867).

Conditions subsequent are abhorred. *Port Authority of Allegheny County v. Flaherty, 293 A.2d 152 (Pa. Cmwlth. 1972).*

Agreement to care and support the grantor held a covenant and not a condition subsequent. *Dickerson v. Keller, 521 S.W.2d 288 (Tex. Civ. App. 1975).*

(n3)Footnote 426. *Wilson v. Wilson, 86 Ind. 472 (1882); Taylor v. Cedar Rapids & St. Paul R. Co., 25 Iowa 371 (1868); Smith v. Barrie, 22 N.W. 816 (Mich. 1885).*

(n4)Footnote 427. *Thornton v. Trammell, 39 Ga. 202 (1869). See* Restatement, Property, § 45, Comment n.

(n5)Footnote 428. *Elyton Land Co. v. South & N. A. R. Co., 14 So. 207 (Ala. 1893).*

(n6)Footnote 429. *Williams v. Johnson, 143 S.W.2d 738 (Ky. 1940).*

(n7)Footnote 430. *Holekamp Lab. Co. v. State Hwy. Comm'n, 173 S.W.2d 938 (Mo. 1943).*

(n8)Footnote 431. *Sudduth v. Sumeral, 39 S.E. 534 (S.C. 1901).*

(n9)Footnote 432. *Lima Oil & Gas Co. v. Pritchard, 218 P. 863 (Okla. 1923); Hickernell v. Gregory, 224 S.W. 691 (Tex. Civ. App. 1920).*

(n10)Footnote 433. *Laberee v. Carleton, 53 Me. 211 (1865); Cox v. Freedley, 33 Pa. 124 (1859); Hammond v. Port Royal & A. R. Co., 15 S.C. 10 (1881).*

> The character of the fee conveyed must be ascertained by a construction of the words of that deed. If the conveyance is less than an absolute fee simple, it must be because the deed has so limited and qualified the fee conveyed as to make it dependent upon conditions either precedent or subsequent. To determine this, we may look to the whole deed, and search its four corners, to ascertain the intent of the grantor.

Board of Comm'rs v. Young, 59 F. 96 (6th Cir. Ohio 1893), per Lurton, J.

(n11)Footnote 434. *Thomson v. Hart, 66 S.E. 270 (Ga. 1909); St. Louis v. Wiggins Ferry Co., 88 Mo. 615 (1886); Studdard v. Wells, 25 S.W. 201 (Mo. 1894).*

(n12)Footnote 435. *Carpender v. New Brunswick, 39 A.2d 40 (N.J. Eq. 1944).*

(n13)Footnote 436. *Palmer v. Ryan, 22 A. 574 (Vt. 1891).*

(n14)Footnote 437. *Roanoke Inv. Co. v. Kansas City & S. E. R., 17 S.W. 1000 (Mo. 1891).*

(n15)Footnote 438. *Williams v. Johnson, 143 S.W.2d 738 (Ky. 1940); New Edgewood Lake Corp. v. Kingston Trust Co., 285 N.Y.S. 130 (A.D. 1936).*

(n16)Footnote 439. *Sanitary Dist. of Chicago v. Chicago Title & Trust Co., 116 N.E. 161 (Ill. 1917); Williams v. Johnson, 143 S.W.2d 738 (Ky. 1940); Woodruff v. Trenton Water Power Co., 10 N.J. Eq. 489 (1856); Jackson v. Florence, 16 N.Y. (Johns) 47 (1819); Parsons v. Miller, 15 N.Y. (Wend.) 561 (1836); Sharon Iron Co. v. Erie, 41 Pa. 341 (1862).*

In *Palmer v. Fort Plain & C. Plank Rd. Co., 11 N.Y. 376 (1854),* the court said:

> It by no means follows, because a grantee consents to take an estate subject to a condition, that he also consents to obligate himself personally for the performance of the condition. Many cases might be imagined in which one would be willing to risk the forfeiture of the estate, while he would be altogether unwilling to incur the hazard of a personal responsibility in addition.

(n17)Footnote 440. *Blanchard v. Detroit, L. & L. M. R. Co., 31 Mich. 43 (1875); Parsons v. Miller, 15 N.Y. (Wend.) 561 (1836).*

(n18)Footnote 441. *Koehler v. Rowland, 205 S.W. 217 (Mo. 1918).*

(n19)Footnote 442. *Stuyvesant v. New York, 11 N.Y. (Paige) 414 (1845). See Boston Consol. Gas Co. v. Oakes, 181 N.E. 225 (Mass. 1932).*

(n20)Footnote 443. *Blanchard v. Detroit, L. & L. M. R. Co., 31 Mich. 43 (1875),* Graves, C. J., said:

> When an instrument or provision is clearly and distinctly so drawn and consummated that the law at once attaches, and determines that it possesses a specific legal nature, and exclusively belongs to a given class of transactions, the parties cannot by arbitrarily assigning a name to it wholly foreign to its true character, succeed in transforming it, and so cause it to stand and operate in a manner wholly alien to it... In such a case the law attaches to the act, and ascribes to it a definite significance, and the parties cannot be heard to say, where there is no imposition, no fraud, no mistake, that, although they deliberately made a condition, and nothing but a condition, they yet meant that it should be exactly as a covenant.

See Hickernell v. Gregory, 224 S.W. 691 (Tex. Civ. App. 1920).

(n21)Footnote 444. This alone, however, would not make it a covenant, as that which is termed a 'covenant' may be a condition, and that which is termed a 'condition' may be a covenant. But it has an important bearing upon the intention of the parties, because technical terms in a conveyance are presumed to have been used with their accustomed meaning, unless the circumstances and context indicate a different intent. *Graves v. Deterling, 24 N.E. 655 (N.Y. 1890),* per Vann, J.

(n22)Footnote 445. *Rooks Creek Evangelical Lutheran Church v. First Lutheran Church, 124 N.E. 793 (Ill. 1919); Greene v. White, 153 S.W.2d 575 (Tex. 1941). See Nashville, C. & St. Louis R. v. Bell, 39 S.W.2d 1026 (Tenn. 1931); Engel v. South Penn. Oil Co., 146 S.E. 385 (W. Va. 1928).*

(n23)Footnote 446. *Underhill v. Saratoga & W. R. Co., 20 N.Y. (Barb.) 455 (1855).*

(n24)Footnote 447. *Blanchard v. Detroit, L. & L. M. R. Co., 31 Mich. 43 (1875); O'Brien v. Wagner, 7 S.W. 19 (Mo. 1888).*

(n25)Footnote 448. *Boone Biblical College v. Forrest, 275 N.W. 132 (Iowa 1937); Board of Educ. v. Mill Creek Methodist Church South, 45 S.W.2d 1026 (Ky. 1932); Carruthers v. Spaulding, 275 N.Y.S. 37 (A.D. 1934). See* Restatement, Property, § 45, Comment o.

Lacking a limitation over, a devisor takes free of a condition subsequent. *Dubrowsky v. Benedict, 324 N.Y.S.2d 208 (1971).*

The existence or nonexistence of a re-entry clause is of importance in determining whether there is a fee upon

condition subsequent. *Floyd v. Hoover, 234 S.E.2d 89 (Ga. App. 1977).*

(n26)Footnote 449. *Weller v. Brown, 117 P. 517 (Cal. 1911); Scovill v. McMahon, 26 A. 479 (Conn. 1892); Self v. Billings, 77 S.E. 562 (Ga. 1913); Gallaher v. Herbert, 7 N.E. 511 (Ill. 1886); Risley v. McNiece, 71 Ind. 434 (1880); Curtis v. Board of Educ., 23 P. 98 (Kan. 1890); Ruggles v. Clare, 26 P. 25 (Kan. 1891); Packard v. Ames, 16 Mass. (Gray) 327 (1860); Clark v. Grand Rapids, 55 N.W.2d 137 (Mich. 1952); Studdard v. Wells, 25 S.W. 201 (Mo. 1894); Chapin v. School Dist. No. 2, 35 N.H. 445 (1857); Hoyt v. Kimball, 49 N.H. 322 (1879); Butterhof v. Butterhof, 86 A. 394 (N.J. 1913); Graves v. Deterling, 3 N.Y.S. 128 (1854); Craig v. Wells, 11 N.Y. 315 (1854); Gibert v. Peteler, 38 N.Y. 165 (1868); Lyon v. Hersey, 8 N.E. 518 (N.Y. 1886); Graves v. Deterling, 24 N.E. 655 (N.Y. 1890); Harris v. Rather, 134 S.W. 754 (Tex. Civ. App. 1911); Strong v. Doty, 32 Wis. 381 (1873). See* Restatement, Property, § 45, Comment n.

(n27)Footnote 450. Thus, where it was provided that in case of breach of the condition the grantors "by their agent, servant, or assigns, may enter and abate the same without being liable to any action of trespass therefor," it was considered that this stipulation, which would be unnecessary if it were intended that there should be a forfeiture by operation of law, and which is also inconsistent with the idea of forfeiture, excluded the remedy by forfeiture. *Hoyt v. Kimball, 49 N.H. 322 (1879).*

"Words seemingly appropriate to a condition only may introduce a covenant, a condition or a declaration of trust, and the whole of the clause submitted to investigation must, in form and scope, be considered, in order to determine within which clause it should fall." *MacKenzie Presbytery, 61 A. 1027 (N.J. Eq. 1905).*

(n28)Footnote 451. *Williams v. Johnson, 143 S.W.2d 738 (Ky. 1940).*

(n29)Footnote 452. *Biescar v. Czechoslovak-Patronat, 302 P.2d 104 (Cal. App. 1956).*

(n30)Footnote 453. *Hudson v. Caffey, 179 S.W.2d 1017 (Tex. Civ. App. 1944).*

(n31)Footnote 454. *Second Church of Christ, Scientist v. LePrevost, 35 N.E.2d 1015 (Ohio App. 1941).*

(n32)Footnote 455. *Brunner v. Terman, 275 N.E.2d 553 (Ind. App. 1971).*

* This chapter is based in part on Ch. 30, George W. Thompson, Commentaries on the Modern Law of Real Property (John S. Grimes ed. 1979), which made a significant contribution toward preserving the American common law governing defeasible fees.

Thompson on Real Property, Thomas Editions

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CHAPTER 20 DEFEASIBLE FEES *

2-20 Thompson on Real Property, Thomas Editions § 20.10

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§ 20.10 Statements of Consideration as Implying Conditions.

[Go To Supp]

Where the deed recites the consideration for which the transfer is made, the consequences may be that such language will either (a) be a mere recital of the terms of the conveyance (b) a reservation of a vendor's lien n456 or (c) create a fee upon condition subsequent. The consideration named for a grant does not ordinarily imply a condition, so that upon a failure of the consideration a forfeiture may be declared. n457 The rule is that recitals which are merely an expression of the consideration for the conveyance can create an estate on condition only by express reservation of the right of the grantor to re-enter upon failure of the grantee to perform the agreement. n458 Any exception there may be to this rule "is confined to cases where the subject matter of the grant is in its nature executory, as of an annuity to be paid for services to be rendered or a privilege to be enjoyed." n459

A warranty deed of an undivided half of a tract of land "in consideration of clearing the whole of all taxes now due, and tax claims of all kinds for which the land has been sold, or is now subject to sale," is an absolute conveyance, and on its delivery vests title in the grantee and is not a deed upon condition precedent or subsequent. n460 Even where a grantee holding an estate upon condition transferred it to another, in consideration that the latter should perform the condition, the second grantee does not hold the estate upon condition, but is merely under a personal obligation to perform the condition. n461

Where land was conveyed upon consideration that a railroad company is to "locate, erect, and maintain" upon the land its depot, and in pursuance of the conveyance the depot was erected and maintained for eleven years and then was removed, the land did not revert. n462

A condition for the payment of money to third persons by the grantee within a fixed time will be construed to be merely a charge upon the land, unless a different intent is apparent or the language of the condition is so clear as to leave no room for construction or doubt. n463 A deed showing a consideration of a nominal sum, and accompanied by a contemporaneous agreement in which the grantee assumes and agrees to pay all the debts connected with or arising out of the property, both instruments construed together, as they must be, show a covenant and not a condition, and a breach thereof does not work a forfeiture. n464

A conveyance on condition that the grantee pay a third person a specified sum of money and the acceptance of such conveyance creates a lien on the property conveyed in favor of the third person. n465 An agreement by the grantee to pay a certain sum at a fixed time with the proviso that the grantor could re-enter and take possession on failure to make such payment was held to be a covenant coupled with a condition subsequent and not a collateral limitation, and, hence, title did not revert to the grantor on the grantee's failure to make the required payment but the grantor had an option to enforce payment or to retake the property. n466 A conveyance "subject to the purchase money," and to an agreement concerning the same, creates an equitable lien upon the land conveyed. n467 A provision in a deed making the conveyance of a part of a tract subject to an agreement obligating the grantee and his heirs and assigns to pay taxes and assessments on the remaining part is neither a legal condition of continuance of the fee in the grantee, nor a legal covenant running with the land. n468

A provision in a deed that the grantee shall assume and pay a mortgage upon the land conveyed does not constitute a condition upon the breach of which the title revests in the grantor, n469 but the payment of a mortgage upon the land may be made an express condition, and when so intended it will be enforced by forfeiture. n470 Such assumption clause is generally considered no part of the grant, but a collateral undertaking, personal in its nature, and not relating to the land. n471 In that case, there is a breach of the condition in case the grantee suffers the mortgage to remain undischarged for several years after its maturity. Such a condition requires the grantee to relieve the property of the encumbrance within a reasonable time. n472 A conveyance "subject to" certain mortgages, "to be assumed and paid by the grantee, his heirs and assigns, the same making part of the consideration," and "on condition" that the grantor and his representatives shall be forever indemnified and saved harmless from the payment of them, is a grant on condition, and forfeited by a breach thereof and is not in the nature of a mortgage from the grantee to the grantor. Such condition is not extinguished by the grantor's taking back a mortgage for a part of the consideration subject to the mortgages assumed with covenants to save the grantor harmless against them, and his entry upon the land for breach of the condition of the deed is not affected by an assignment of the mortgage before or after such entry. n473

A reservation or provision in a deed poll that the grantee shall perform a certain service for the grantor, such as to build and maintain a certain fence, is made binding upon the grantee by his acceptance of the deed. n474 Such a provision is not a reservation out of the estate granted, a condition upon which the estate is to be held, or even a covenant running with the land, or otherwise. It is usually merely a personal agreement of the grantee, made as part of the consideration of the grant, which binds him and his legal representatives and it is not an encumbrance upon the land. n475 If, from the nature of the acts to be performed by the grantee, and the time required for their performance, it is evidently the intention of the parties that the estate shall be held and enjoyed on condition that the grantee perform the acts specified, then the estate is upon condition. This is especially so when the grantor has reserved no other effectual remedy for the enforcement of performance on the part of the grantee. n476 Where the deed clearly shows an intention that the enjoyment of the estate created was to depend upon the performance of the agreement therein, such agreement is a condition and not a covenant. n477

Where a deed of land contained a reservation of pasturage for two cows during the lifetime of the grantor or, in lieu thereof, the grantee's personal obligation to cut her yearly fuel for the stove, a stipulation in aid of the reservation, that the grantee "is not" to encumber or convey the land meantime, does not create an estate on condition. n478

A clause in a deed poll, to the effect that the grantee agrees for himself, and for his heirs and assigns, that he and they will make and forever maintain a fence all around the granted premises, is of the same effect as an express covenant signed and sealed by the grantee. It runs with the land and creates an encumbrance upon the land. By implication it recognizes that a subsequent grantee would be liable to the original grantor, in an action of assumpsit, for non-performance of the stipulation. n479

A provision in the form of an express condition in a deed for land within a city to be used as a cemetery that "the grantee, his successors and assigns, shall at all times maintain a good and sufficient fence around the premises," was

construed as a covenant, and not as creating a condition subsequent, where it was evident that the grantor, who owned lands on both sides, sought to impose a duty on the grantee to build all the fence inclosing the cemetery. n480 A deed of land for full consideration to a cemetery corporation, which has power to use the land for burial purposes only, conveys a fee, although the deed limits the use to such purposes, if there is no interest reserved to the grantor and the deed contains no provision for reverter. n481 But statements as to consideration may be considered in determining as to the grantor's intent to create a condition. n482

A condition in a deed that the vendee reconvey to the vendor in event of vendee's marriage is valid if the dominant motive was to provide support until marriage. n483

COMPUTER-ASSISTED RESEARCH

LEXIS: service! or support! w/5 consideration w/30 condition! subsequent or precedent

FOOTNOTES:
(n1)Footnote 456. *See* Vol. 10, §§ 5242, 5243.

Litigation over a deed did not toll a time limitation of a condition subsequent that required a payment within a time certain. *Smith v. Smith, 168 S.E.2d 878 (Ga. App. 1969).*

(n2)Footnote 457. *Berkley v. Union Pac. R. Co., 33 F. 794 (C.C.D. Colo. 1888); Avery v. United States, 104 F. 711 (6th Cir. 1900); Hawley v. Kafitz, 83 P. 248 (Cal. 1905); Risley v. McNiece, 71 Ind. 434 (1880); Ruggles v. Clare, 26 P. 25 (Kan. 1891); Fuquay v. Hopkins Academy, 58 S.W. 814 (Ky. 1900); Louisville, H. & St. Louis R. Co. v. Baskett, 104 S.W. 695 (Ky. 1907); Laberee v. Carlton, 53 Me. 211 (1865); Ayer v. Emery, 14 Mass. (Allen) 67 (1867); Martin v. Martin, 131 Mass. 547 (1881); Morrill v. Wabash, St. Louis & P. R. Co., 9 S.W. 657 (Mo. 1888); McAnaw v. Tiffin, 45 S.W. 656 (Mo. 1897); Hand v. St. Louis, 59 S.W. 92 (Mo. 1900); Upington v. Corrigan, 45 N.E. 359 (N.Y. 1896); Portland v. Terwilliger, 19 P. 90 (Or. 1888); Rainey v. Chambers, 56 Tex. 17 (1935); Davis v. Skipper, 83 S.W.2d 318 (Tex. 1935). See Nicholson v. Myres, 154 So. 282 (Miss. 1934).*

"Where the condition involves only the payment of money, equity will regard the condition as mere security for the payment of the money and relieve against the forfeiture upon the grantee's payment of the principal sum with interest and damages if any." *Tibbetts v. Cate, 22 A. 559 (N.H. 1891),* and where the breach is due to the innocent mistake of the grantee. *Dodsworth v. Dodsworth, 98 N.E. 279 (Ill. 1912)* (innocent failure to pay taxes before delinquent).

(n3)Footnote 458. *Braddy v. Elliott, 60 S.E. 507 (N.C. 1908); Waco Dev. Co. v. McNeese, 209 S.W. 464 (Tex. Civ. App. 1919).*

There are many authorities to the effect that a recital in a deed of conveyance that it is made upon a money consideration, and a further consideration that the grantee shall do certain things, or that only a certain use shall be made of the property, does not impose a condition and does not create an estate upon a condition subsequent. *Davis v. Skipper, 83 S.W.2d 318 (Tex. 1935),* citing 8 RCL 1101, 18 CJ 353, 354; *Board of Councilmen v. Capital Hotel Co., 224 S.W. 197 (Ky. 1920); Adams v. First Baptist Church, 111 N.W. 757 (Mich. 1907); Fraley v. Wilkinson, 191 P. 156 (Okla. 1920).*

(n4)Footnote 459. *Rawson v. School Dist. No. 5, 89 Mass. (7 Allen) 125 (1863),* per Bigelow, C. J. *See Wilson v. Wilson, 86 Ind. 472 (1882); Brown v. Caldwell, 23 W. Va. 187 (1883).*

Inadequate consideration as evidence of intent not to create fee simple absolute. *Coston v. McClelland, 127 So. 176 (Ala. 1929); Fitzgerald v. County of Modoc, 129 P. 794 (Cal. 1913); Faith v. Bowles, 37 A. 711 (Md. 1897).*

A grant "made upon the consideration that" the grantee, his heirs, executors, and administrators, "should fulfill certain agreements for the support of the grantor and his wife, was held not to be a grant upon a condition subsequent."

> There are no apt words in the deed to create a condition; there is no clause of re-entry or forfeiture; it is not provided that the deed shall be void in a certain contingency; nor was the conveyance made solely in consideration of certain acts to be done, or for the accomplishment of a specific purpose, on the fulfillment of which the estate granted is made to depend. The grantor has not only omitted to use any words which can be properly held to create an estate on condition according to the technical rules of law, but he has also failed to indicate any clear intent to cause the estate to be defeated by reason of any act or omission of the grantee.

Ayer v. Emery, 14 Allen 67 (Mass. 1867).

(n5)Footnote 460. *Ruggles v. Clare, 26 P. 25 (Kan. 1891).*

(n6)Footnote 461. *Norris v. Laberee, 58 Me. 260 (1870).*

(n7)Footnote 462. "The erection and maintenance of the depot is stated to be a consideration, a consideration perhaps in the nature of a condition subsequent; but the conveyance does not purport to be one upon condition that the grantee will perform, but it is a conveyance in consideration of its promise to erect and maintain. That consideration it has partially performed... Under those circumstances, where there is a part performance, -- a part payment, -- the title does not revert. There may be a cause of action for damages, but the title does not revert upon a mere partial failure of the consideration." *Berkley v. Union Pac. R. Co., 33 F. 794 (C.C.D. Colo. 1888)*, per Brewer, J. *See Close v. Burlington, C. R. & N. R. Co., 19 N.W. 886 (Iowa 1884).*

A warranty deed to a county of a block of ground, reciting a consideration of one dollar, and conditional on the erection and maintenance of a county courthouse thereon, and containing no express right of reverter, imposed a condition subsequent. *Brooks v. Kimball County, 256 N.W. 501 (Neb. 1934).*

(n8)Footnote 463. *Doyle v. Paul, 86 N.E.2d 98 (Ind. App. 1949), 87 N.E.2d 885 (Ind. App. 1949); Sick v. Rock, 37 N.W.2d 305 (Iowa 1949); Bugbee v. Sargent, 23 Me. 269 (1843); Pendleton v. Meade, 177 S.E. 198 (Va. 1934); Powers v. Powers, 28 Wis. 659 (1871); Weir v. Simmons, 13 N.W. 873 (Wis. 1882).*

(n9)Footnote 464. *Closner v. Chapin, 168 S.W. 370 (Tex. Civ. App. 1914).*

(n10)Footnote 465. *Menge v. Radtke, 269 N.W. 13 (Wis. 1936).*

(n11)Footnote 466. *Neal v. State-Planters Bank & Trust Co., 184 S.E. 203 (Va. 1936).*

(n12)Footnote 467. *Hiester v. Green, 48 Pa. 96 (1864).*

(n13)Footnote 468. *Child v. C. H. Winans Co., 183 A. 300 (N.J. Eq. 1936).*

(n14)Footnote 469. *Dunlap v. Mobley, 71 Ala. 102 (1881); Martin v. Splivalo, 11 P. 484 (Cal. 1886); Pelser Gingold, 8 N.W.2d 36 (Minn. 1943); Cook v. Trimble, 9 Watts 15 (Pa. 1839); In re Moore's Appeal, 88 Pa. 450 (1879); Schnyder v. Orr, 24 A. 306 (Pa. 1892)*(that the grantor may bring ejectment on such a clause, as being a condition is clearly bad law).

(n15)Footnote 470. *Fisk v. Chandler, 30 Me. 79 (1849); Ross v. Tremain, 2 Mass. (Metc.) 495 (1841).*

(n16)Footnote 471. *Fishback v. J.C. Forkner Fig Gardens, 30 P.2d 586 (Cal. App. 1934); Union Trust Co. v. Allen, 268 N.Y.S. 437 (A.D. 1934). See Nutter v. Mroczka, 21 N.E.2d 979 (Mass. 1839).*

(n17)Footnote 472. *Rowell v. Jewett, 69 Me. 293 (1879); Ross v. Tremain, 2 Mass. (Metc.) 495 (1841).*

(n18)Footnote 473. *Hancock v. Carlton, 6 Mass. (Gray) 39 (1856).*

(n19)Footnote 474. *Newell v. Hill, 2 Mass. (Metc.) 180 (1840); Rogers v. Eagle Fire Co., 9 N.Y. (Wend.) 611 (1932); Trotter v. Hughes, 12 N.Y. 74 (1854); Atlantic Dock Co. v. Leavitt, 54 N.Y. 35 (1873); Hornback v. Cincinnati & Z. R. Co., 20 Ohio St. 81 (1870); Palmer v. Ryan, 22 A. 574 (Vt. 1891); Roberts v. Coleman, 16 S.E. 482 (W. Va. 1892); Hartung v. Witte, 18 N.W. 175 (Wis. 1884).*

(n20)Footnote 475. *Plymouth v. Carver, 16 Mass. (Pick.) 183 (1834); Parish v. Whitney, 3 Mass. (Gray) 516 (1855).*

(n21)Footnote 476. *Downing v. Rademacher, 65 P. 385 (Cal. 1901); Richter v. Richter, 12 N.E. 698 (Ind. 1887).*

(n22)Footnote 477. *New Edgewood Lake Corp. v. Kingston Trust Co., 285 N.Y.S. 130 (A.D. 1936).*

(n23)Footnote 478. *Bray v. Hussey, 22 A. 220 (Me. 1891).*

(n24)Footnote 479. *Burbank v. Pillsbury, 48 N.H. 475 (1869); Kellogg v. Robinson, 6 Vt. 276 (1834).*

(n25)Footnote 480. *Scovill v. McMahon, 26 A. 479 (Conn. 1892).*

(n26)Footnote 481. *Sapper v. Mathers, 133 A. 565 (Pa. 1926).*

A grantor in a deed to a railroad company, in consideration of a sum of money and of its building its railroad, conveyed to a company, its successors or assigns, forever, in fee simple, the right-of-way through his land, and added in the deed the words: "It is hereby agreed and understood a depot and station is to be located and given to said grantor on the land or strip above conveyed, to be permanently located for the benefit of said grantor and his assigns, and to be used for the general purposes of the railroad company." It was held that the grantee, by accepting such deed, entered into a covenant to comply with its terms, and this covenant ran with the land, and became obligatory upon any second company which became the purchaser, under proper legal direction, of the rights, privileges, franchises, and property of the former. *Georgia So. R. Co. v. Reeves, 64 Ga. 492 (1880).*

(n27)Footnote 482. In determining whether a condition subsequent with a power of termination in the grantor is created, importance is frequently attached to whether consideration apart from the term under investigation has been given or not. *Rooks Creek Evangelical Lutheran Church v. First Lutheran Church, 124 N.E. 793 (Ill. 1919); Ashland v. Greiner, 50 N.E. 99 (Ohio 1898); King v. Norfolk & Western Ry., 39 S.E. 701 (Va. 1901).*

(n28)Footnote 483. *Winters v. Miller, 261 N.E.2d 205 (Ohio 1970).*

* This chapter is based in part on Ch. 30, George W. Thompson, Commentaries on the Modern Law of Real Property (John S. Grimes ed. 1979), which made a significant contribution toward preserving the American common law governing defeasible fees.

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CHAPTER 20 DEFEASIBLE FEES *

2-20 Thompson on Real Property, Thomas Editions § 20.11

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§ 20.11 Provisions for Support or Rendition of Service as Creating Conditions.

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Where the consideration for the conveyance is the support of the grantor or another by the grantee, the courts have evinced a tenderer consideration for the grantor's interests than is usual in statements of consideration generally. n484 A conveyance made in consideration of support, even though absolute in form, has been held to constitute a species of equitable condition subsequent entitling the grantor to cancel the conveyance upon breach of the contract by the grantee. n485

In equity, an absolute conveyance in consideration of a promise to support is sometimes treated as a conveyance on a condition subsequent. n486 A conveyance in consideration of support to be furnished the grantor or another person does not create a condition, unless apt words of condition are used n487 and even then it will not be held to create a condition unless it is apparent from the whole instrument that a strict condition was intended. An agreement by the grantee to care for the grantor during the latter's life has been held a covenant, not a condition, notwithstanding the habendum clause was followed by the phrase "subject to the terms and conditions hereinafter provided." n488 Courts of equity, it is declared, will freely rescind conveyances by parents to sons upon the breach of agreements to support n489 but they will not enforce a forfeiture in such cases on slight grounds when the circumstances are such that it would be grossly inequitable to do so. n490 Conveyances of property by aged persons, in consideration of promised support and maintenance, are peculiar in their character and incident. They are contracts for the performance of personal services and equity will intervene to cancel such a conveyance when the grantee fails or refuses to perform his obligation without fault of the grantor. n491

Where the clause stating a nominal consideration of one dollar is followed by another reciting, "and the further consideration of the support during" the life of the grantor, it was held not a condition, but a matter of consideration or at most a covenant. n492 Where a parent conveys land to his son in consideration of the son's agreement to support the parent during the latter's life, the parent may, for a breach of the agreement in a proper action, have the deed canceled or the amount due under the agreement made a charge or lien against the land. n493 If the deed contains no apt words to create a condition, a breach of which would render the estate defeasible at the grantor's election, there is no forfeiture for a failure to furnish such support, but merely a right of action for breach of covenant or in equity in the grantor to

rescind the contract if the grantee is insolvent. n494 If, however, it is apparent that the parties intended to make the furnishing of support a condition, this will be enforced by forfeiture. n495

A deed executed by parents to their son and a contract entered into by the parties in connection therewith requiring the son to make small annual payments in cash to the parents during their lives and the survivor of them and providing for cancelation and repossession by the parents on breach of the agreement by the son, create a condition subsequent, authorizing forfeiture for default in making the annual payment. n496 It is held that a conveyance made in consideration of support, even though the conveyance be absolute in form, constitutes a species of equitable condition subsequent. n497

Where the consideration for the deed is support of the grantor, it is treated as a covenant instead of a condition unless: (1) there is a meeting of minds of the grantor and grantee; (2) the grantor must expect and have belief that the grantee will so care for the grantor; (3) the grantee must take the deed knowing "full well" that he is obligated to furnish the support for a specified time or until a specific occurrence; (4) the language must not be ambiguous; and (5) the deed must be in good faith and without coercion and duress. n498

If the condition be to furnish support or to pay a certain sum secured by mortgage, the grantee may perform either alternative. When he has once made his election he is bound by it, and cannot afterwards choose the other alternative. n499 A condition for support may be performed by another person than the grantee, unless the deed expressly provides that he shall personally furnish it. n500 The support need not be given or received upon the granted premises, unless there is an express provision therefor. It may be demanded or given at any reasonable place. n501

In construing a clause in a deed providing for support and maintenance, the legal effect of such clause must be determined by a construction of the instrument as a whole. n502 Thus, where land was conveyed to the grantee, his heirs and assigns forever, upon condition that the grantee should forever maintain at his own expense a fence on the line conveyed, it was held that the condition bound the grantee alone and not his heirs and assigns, because they were not specially named in the condition. n503 A condition subsequent arises when it appears from the nature of the act to be performed, and the time required for its performance, that the estate is intended to vest and that the grantee is to perform after taking possession. n504 The condition, therefore, cannot be broken after the death of the grantee. His heirs are under no obligation to do anything in consequence of the condition. n505

A service to be performed by the grantee may be imposed as a condition, in which case a forfeiture may follow a breach of it. Whether the grantee alone is bound to perform the service or whether his heirs and assigns are also bound depends upon the terms of the condition. n506

FOOTNOTES:

(n1)Footnote 484. Impossibility of assessing damages, for breach justifies treating language in deed for support of grantor as a constructive trust which would be imposed, to the extent of the value of the property or other property obtained by the grantees on an exchange for the property originally deeded. *Mruk v. Mruk, 41 N.E.2d 490 (Ill. 1942).*

(n2)Footnote 485. *Villafranca v. Cotitia, 3 So. 2d 397 (Fla. 1941)*(subject to grantee's lien for support actually furnished); *Kuhn v. Kuhn, 123 N.E.2d 916 (Ind. App. 1957); Tibbetts v. Krall, 145 N.E.2d 577 (Ind. App. 1955)*(grantees entitled to recompense for support furnished where contract was later abandoned); *Nadler v. Nadler, 8 N.W.2d 306 (Wis. 1943).*

Deed conveying property in consideration of support and maintenance was set aside by refusal of grantee to perform, his fraudulent intent in the first instance being implied. *Boyle v. Harvill, 276 N.E.2d 799 (Ill. App. 1971); Owens v. Downs, 98 N.E.2d 914 (Ind. App. 1951); Thomas v. Record, 47 Me. 500 (1859); Buckles v. Smith, 156 P.2d 1019 (Okla. 1945); Watters v. Bredin, 70 Pa. 235 (1872); Kroening v. Kroening, 269 N.W. 536 (Wis. 1936).*

(n3)Footnote 486. *Owens v. Downs, 98 N.E.2d 914 (Ind. App. 1951); Thomas v. Record, 47 Me. 500 (1859); Buckles v. Smith, 156 P.2d 1019 (Okla. 1945); Watters v. Bredin, 70 Pa. 235 (1872); Kroening v. Kroening, 269 N.W. 536 (Wis. 1936).*

(n4)Footnote 487. *Gallaher v. Herbert, 7 N.E. 511 (Ill. 1886).*

See Owens v. Downs, 95 N.E.2d 914 (Ind. 1951); Studdard v. Wells, 25 S.W. 201 (Mo. 1894); Weeks v. Boynton, 37 Vt. 297 (1864); Joslyn v. Parlin, 54 Vt. 667 (1881); Ralphsnyder v. Ralphsnyder, 17 W. Va. 28 (1880).

So, a recital in a deed by a father to his son that the son had promised to remain with the grantor, and after the grantor's death to support his widow, does not constitute a condition. *Perry v. Scott, 51 Pa. 119 (Pa. 1865). See Harris v. Shaw, 13 Ill. 457 (Ill. 1851).*

(n5)Footnote 488. *Sisk v. Randon, 70 S.W. 689 (Tex. 1934).*

(n6)Footnote 489. *Anders v. Anders, 197 So. 451 (Fla. 1940); Hensan v. Cooksey, 86 N.E. 1107 (Ill. 1908); Gillen v. Gillen, 87 N.E. 388 (Ill. 1909); Bogie v. Bogie, 41 Wis. 209 (1876); Bresnahan v. Bresnahan, 1 N.W. 39 (Wis. 1879); Blake v. Blake, 14 N.W. 173 (Wis. 1882); Delong v. Delong, 14 N.W. 591 (Wis. 1883); Knutson v. Anderson, 255 N.W. 907 (Wis. 1934).*

(n7)Footnote 490. *Shade v. Oldroyd, 18 P. 198 (Kan. 1888).*

(n8)Footnote 491. *Mooney v. Mooney, 94 So. 131 (Ala. 1922); Hannah v. Culpepper, 104 So. 751 (Ala. 1925)*(equity will declare and enforce a forfeiture of an estate conveyed if the condition has been substantially breached and such breach has not been waived); *Lewis v. Owen, 165 So. 229 (Ala. 1925); Miller v. Rhea, 292 S.W. 128 (Ark. 1927); Jancovech v. Christensen, 195 N.E. 287 (Ind. App. 1935); Lowman v. Lowman, 12 N.E.2d 961 (Ind. App. 1938); Timberman v. Timberman, 295 N.W. 158 (Iowa 1940). See De Atley v. Streit, 263 P. 967 (Mont. 1928)*(breach of the agreement to support may give the grantors ground for relief on the basis of fraud or because of breach of condition subsequent).

The use in a conveyance of such words as "take care of," "support," "clothe," "maintain," or "look after" require the grantee to furnish the grantor such necessities as are required by the latter's condition, degree and circumstances in life. *Ballenger v. Ballenger, 94 So. 127 (Ala. 1922).*

A grantor may condone a breach of the agreement to support. *Thompson v. Lee, 113 So. 313 (Ala. 1927). See Hannah v. Culpepper, 104 So. 751 (Ala. 1925).*

A conveyance by warranty deed to a named grantee under the express consideration and condition that the grantee should "maintain, feed, clothe, and nurse," the grantor and his wife during sickness "and care for them with all necessary food and rainment that is needed, as well as with fuel, ... during the life" of the grantor and his wife followed by a provision that if "this consideration is not carried out as set forth in this deed, then it is null and void and of no effect" creates a condition subsequent, and where the grantee voluntarily failed or refused to comply with such conditions in the deed, the grantor had a right of re-entry for condition broken. *Plemmons v. Sharp, 119 S.E. 532 (Ga. 1923).* To same effect, *see Kramer v. Mericle, 192 N.W. 257 (Iowa 1923)*(in such cases equity takes jurisdiction, not to forfeit a title, but to quiet a title already forfeited for nonperformance of a condition subsequent).

Breaches of the agreement to support which are not substantial in character are insufficient to warrant a cancelation of the deed. *Hatfield v. Harris, 247 S.W. 729 (Ky. 1924)*(notwithstanding the grantors reserved unto themselves a life estate in the land conveyed, grantees contracting to care for the grantors were entitled to joint possession of the land).

In Maine a deed given on condition that the grantee named shall maintain and support the grantor during his natural

life creates a personal obligation on the grantee which can be performed by no one else than the grantee himself, without the grantor's consent. *Pomerleau v. Pomerleau, 124 A. 243 (Me. 1924)* (death of grantee wife seeking to hold under deed).

A provision for maintenance incorporated in a deed by the grantor constitutes a charge upon the interest described in the deed and is enforceable not only against the immediate grantee but against the subsequent purchasers who acquire title with actual or constructive notice of the charge. *Fleming v. Motz, 122 S.E. 369 (N.C. 1924).*

(n9)Footnote 492. *Helms v. Helms, 47 S.E. 415 (N.C. 1904); Carney v. Carney, 200 S.W. 517 (Tenn. 1918); Turner v. Biscoe, 164 S.W.2d 70 (Tex. Civ. App. 1942).*

(n10)Footnote 493. *Bruer v. Bruer, 123 N.W. 813 (Minn. 1909); Asbury v. Burford, 177 S.E. 780 (W. Va. 1934).*

(n11)Footnote 494. *Camperi v. Chiechi, 286 P.2d 399 (Cal. App. 1955); Jones v. Reid, 193 S.E. 235 (Ga. 1937); Minor v. Minor, 62 S.E.2d 60 (N.C. 1950).*

(n12)Footnote 495. *First Nat'l Bank v. McIntosh, 79 So. 121 (Ala. 1918); Jones v. Williams, 64 S.E. 1081 (Ga. 1909); Leach v. Leach, 4 Ind. 628 (1853); Cree v. Sherfy, 37 N.E. 787 (Ind. 1894); Huffman v. Rickets, 111 N.E. 322 (Ind. App. 1916); Thomas v. Record, 47 Me. 500 (1859); Rowell v. Jewett, 69 Me. 293 (Me. 1879); Hitchcock v. Simpkins, 58 N.W. 47 (Mich. 1894); De Conick v. De Conick, 117 N.W. 570 (Mich. 1908); Reynolds v. Reynolds, 136 S.W. 411 (Mo. 1911); Spaulding v. Hallenbeck, 39 Barb 79 (N.Y. 1862);* Jackson *ex dem. Reeves v. Topping, 1 N.Y. (Wend.) 38 (1828); Brittain v. Taylor, 84 S.E. 280 (N.C. 1915); Ford v. Ford, 43 N.E.2d 756 (Ohio App. 1942); Watters v. Bredin, 70 Pa. 235 (1872); Stanton v. Allen, 10 S.E. 878 (S.C. 1890); Berryman v. Schumacher, 3 S.W. 46 (Tex. 1887); Alford v. Alford, 21 S.W. 283 (Tex. Civ. App. 1892); Thrall v. Spear, 22 A. 414 (Vt. 1891); Shum v. Claghorn, 37 A. 236 (Vt. 1896); Epperson v. Epperson, 62 S.E. 344 (Va. 1908); Gall v. Gall, 105 N.W. 953 (Wis. 1905).*

(n13)Footnote 496. *Sovell v. First Nat'l Bank, 209 N.W. 22 (Minn. 1926).*

An agreement to support the grantor is a covenant in the absence of language making it a condition, in which case the remedy, in the event of a breach, is the ascertainment of the value of the promised support and enforcement of the judgment therefor as a lien on the land. *Rosek v. Kotzur, 267 S.W. 759 (Tex. Civ. App. 1924). See Wyatt v. Nailer, 111 S.E. 419 (Ga. 1922).*

(n14)Footnote 497. *Nadler v. Nadler, 8 N.W.2d 306 (Wis. 1943).*

The mere fact that developer-vendors had sold the property benefited by restrictions which gave right of re-entry did not destroy the right to re-entry. *Sandey v. Stimmler, 230 N.W.2d 599 (Minn. 1975).*

(n15)Footnote 498. *Brunner v. Terman, 275 N.E.2d 553 (Ind. App. 1971).*

(n16)Footnote 499. *Bryant v. Erskine, 55 Me. 153 (1867).*

(n17)Footnote 500. *Wilson v. Wilson, 38 Me. 18 (1854); Henry v. Tupper, 29 Vt. 357 (1857); Joslyn v. Parlin, 54 Vt. 667 (1881).*

Consideration of support in a deed is personal to the grantee and cannot be assigned. Death of grantee before grantor authorized cancelation of deed for failure of consideration. *Whitney v. Combe, 37 N.W.2d 613 (Neb. 1949).*

(n18)Footnote 501. *Wilder v. Whittemore, 15 Mass. 261 (1818); Thayer v. Richards, 19 Mass. (Pick.) 398 (1837); Pettee v. Case, 2 Mass. (Allen) 546 (1861).*

(n19)Footnote 502. *Higgins v. Higgins, 27 S.E.2d 128 (N.C. 1943).*

(n20)Footnote 503. *Emerson v. Simpson, 43 N.H. 475 (1862); Page v. Palmer, 48 N.H. 385 (1862).*

(n21)Footnote 504. *New Edgewood Lake Corp. v. Kingston Trust Co., 285 N.Y.S. 130 (A.D. 1936). See White v. Hendley, 169 P. 710 (Cal. App. 1917); Rawson v. School Dist. No. 5, 89 Mass. (7 Allen) 125 (1863); Brown v. Caldwell, 23 W. Va. 187 (1883).*

(n22)Footnote 505. *Hickey v. Lake Shore & M. S. R. Co., 36 N.E. 672 (Ohio 1984).*

A railway company made a deed poll of land lying along its right-of-way, "subject to the condition that the said grantee, his heirs and assigns, shall make and maintain good and sufficient fences on each side of the right-of-way of the railway as now located, ... which condition and obligation shall be perpetually binding on the owners of the land." It was held that the undertaking to perform the condition ran with the land, and bound subsequent purchasers from the grantor so long as they remained the owners, but that the railroad company would not have any right of action against its grantee for a nonperformance of the condition after he had conveyed the land in fee to others. The court said:

> The meaning of the condition, we think, was to place upon the [grantee] an obligation to make and maintain the fences only during the time he was the owner of the land. At his death, his heirs, upon succeeding to the ownership, would be held to make and maintain the fences while their ownership lasted. If he or his heirs or devisees should sell the land, the assignees would likewise be held while they continued to be owners, the obligation thus running with the land. Manifestly, it was not [the grantee's] intention to assume an obligation in perpetuam, and, after having sold and conveyed the premises in fee, to remain bound for life, and his heirs to be bound after his death, to build and keep up the fences between the right-of-way and the land sold; and in getting at the intention of the railway company the obvious inference would be that the company would naturally provide for a recourse to those who might own the land at the time the fences needed repairing or rebuilding, rather than to its grantee and his heirs, who might, perhaps, at the time be dead, or unable to be found. We cannot but conclude that the company intended, when the land was conveyed, to trust to the land and its owners for a performance of the condition contained in the deed, and not to its grantee after he had ceased to be the owner. The fact that the company imposed the condition that the grantee and "his assigns" should make and maintain the fences, and added thereto that the condition or obligation should be perpetually binding on "the owners of the land," would indicate an intention to make ownership the test as to who should be bound to perform the condition in the deed.

Hickey v. Lake Shore & M. S. R. Co., 36 N.E. 672 (Ohio 1894).

(n23)Footnote 506. *Dowell v. Jolly, 159 N.E.2d 590 (Ind. App. 1959).*

* This chapter is based in part on Ch. 30, George W. Thompson, Commentaries on the Modern Law of Real Property (John S. Grimes ed. 1979), which made a significant contribution toward preserving the American common law governing defeasible fees.

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CHAPTER 20 DEFEASIBLE FEES *

2-20 Thompson on Real Property, Thomas Editions § 20.12

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§ 20.12 Validity of Conditions.

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The parties may impose any condition in a grant or a devise which is not repugnant to the basic terms of the transfer n507 or is not void for reasons of public policy. n508 A condition subsequent which forfeits the title to the grantor in the event of a breach is not of itself repugnant to the granting clause, n509 but where the restriction is destructive of the estate granted it is void. n510

A fee contemplated by the granting clause will not be cut down by a modifying or limiting clause which is of doubtful import. n511 A condition that the land conveyed or so much of it as the grantee has not sold and conveyed, shall upon his decease revert to the grantor, is repugnant to the grant, which was in fee simple and is therefore void. n512 In a conveyance in fee by a husband to a trustee for the use of his wife and children, a condition that if he should survive his wife the whole property should revert to him free from the trust is valid, and may be enforced. n513 A condition that the conveyance shall be void upon the failure of the grantee to pay the purchase money is not void as being repugnant to the grant. n514

The rule that a vested estate will not be forfeited for a breach of a condition subsequent because performance has become impossible by operation of law is not limited in its operation to conditions which, properly speaking, are limitations imposed on the grantee by the grantor, but extend to mutual covenants annexed to a conveyance of title to real estate. n515 A condition to abstain from doing an act which is perfectly proper and legal in itself is not for this reason invalid. n516 The grantor may restrict the use of the land as it may seem to be for his advantage. He may make it a condition that the land shall not be used for a schoolhouse, distillery, blast furnace, livery stable, machine-shop, hospital or cemetery. n517

A condition is valid though its benefit will inure to other property. Thus a condition not to place windows in a wall adjoining lands of a neighbor is valid. n518 Upon the same principle, it has been held that a condition that the grantee will not obstruct the view of a person not a party to the deed by erecting any structure on the granted land that will shut off the view of such person, is a valid condition. n519 The purpose of such restriction may be to benefit a third person occupying adjoining land, as well as the grantor. n520

A condition that the property conveyed shall not be occupied by others than those of the Caucasian race once valid n521 is now unenforceable as against public policy. n522 If a condition is void, the grantee takes free of the condition. n523

FOOTNOTES:

(n1)Footnote 507. As to restraints on alienation, *see* § 1882. As to the doctrine of priority of granting clause over the habendum clause, *see* Vol. 3, ch. 47. As to the rule of a later clause in a will reducing a fee given in earlier language, *see* Vol. 5A, § 2623.

(n2)Footnote 508. *Storke v. Penn Mut. Life Ins. Co., 61 N.E.2d 552 (Ill. 1945). See* § 1882.

(n3)Footnote 509. *Firth v. Marovich, 116 P. 729 (Cal. 1911); Childs v. Newfield, 28 P.2d 924 (Cal. App. 1934); Barnesville v. Stafford, 131 S.E. 487 (Ga. 1926); Arnold v. Scharff, 210 S.W. 326 (Tex. Civ. App. 1918); Babb v. Miller, 259 S.W. 177 (Tex. Civ. App. 1923).*

(n4)Footnote 510. *Fender v. Rogers, 46 S.W.2d 804 (Ark. 1932); Taylor v. Sutton, 15 Ga. 103 (1854); Pynchon v. Stearns, 11 Mass. (Metc.) 312 (1846); Canal Bridge v. Methodist Religious Soc'y, 13 Mass. (Metc.) 335 (1847); Bassett v. Budlong, 43 N.W. 984 (Mich. 1889); Croucher v. Wooster, 260 N.W. 739 (Mich. 1935); Gadberry v. Sheppard, 27 Miss. 203 (1854); In re Reynolds, 163 N.Y.S. 803 (1916); Littlefield v. Mott, 14 R.I. 288 (1885); Arnold v. Scharff, 210 S.W. 326 (Tex. Civ. App. 1918); Babb v. Miller, 259 S.W. 177 (Tex. Civ. App. 1923); Brandon v. Robinson, 18 Ves. 429, 433,* per Lord Ch. Eldon; *Bradley v. Peixoto, 3 Ves. Jr. 324.*

(n5)Footnote 511. *Litten v. Warren, 54 P.2d 39 (Cal. App. 1936).*

"A condition annexed to an estate given is a divided clause from the grant, and therefore cannot frustrate the grant preceding, neither in anything expressed nor in anything implied which is of its nature incident and inseparable from the thing granted." Stukeley v. Butler, Hob. 168. *See Pawlet v. Clark, 13 U.S. (9 Cranch) 292 (1815).*

(n6)Footnote 512. *Case v. Dwire, 15 N.W. 265 (Iowa 1883); Ide v. Ide, 5 Mass. 500 (1809); Second Reformed Presbyterian Church v. Disbrow, 52 Pa. 219 (1866).*

(n7)Footnote 513. *Woods v. Woods, 13 S.E. 692 (Ga. 1891).*

(n8)Footnote 514. *Taylor v. Sutton, 15 Ga. 103 (1854).*

(n9)Footnote 515. *Goldberg v. Callender Bros., 113 A. 170 (Conn. 1921).*

(n10)Footnote 516. "Indeed, the acts against which conditions are aimed are commonly legal acts, the performance of which could not be restrained otherwise than by some form of contract; and the right to stipulate for the purpose is limited only by considerations of public policy." *Smith v. Barrie, 22 N.W. 816 (Mich. 1885),* per Cooley, C. J.

See the following cases: *Fusha v. Dacono Town Site Co., 153 P. 226 (Colo. 1915); St. Louis, J. & C. R. Co. v. Mathers, 71 Ill. 592 (1874); Owsley v. Owsley, 78 Ky. 257 (1880); Hinton v. Vinson, 104 S.E. 897 (N.C. 1920); Sperry v. Pond, 5 Ohio 387 (1832); Seeck v. Jakel, 141 P. 211 (Or. 1914); White v. White, 150 S.E. 531 (W. Va. 1929); Brown v. Wisconsin-Minnesota Light & Power Co., 174 N.W. 903 (Wis. 1919).*

(n11)Footnote 517. *Craig v. Wells, 11 N.Y. 315 (1854); Plumb v. Tubbs, 41 N.Y. 442 (1869). See Gibert v. Peteler, 38 N.Y. 165 (1868); Sperry v. Pond, 5 Ohio 387 (1832); Duester v. Alvin, 145 P. 660 (Or. 1915).*

Condition that property should not be used in competition with the grantor is valid. *Calumet Council Bldg. Corp. v. Standard Oil Co., 167 F.2d 539 (7th Cir. 1948).*

Condition to revert to grantor if abandoned for use by county is valid. *Jeffries v. State for Use of Woodruff County, 205 S.W.2d 194 (Ark. 1947).*

"There are many things which may be provided for as conditions in a deed, which, though of small consideration in the view of a stranger, may be thought of great importance by the grantor." *Gray v. Blanchard, 8 Mass. (Pick.) 284 (1829).*

(n12)Footnote 518. "It is not necessary, in order to make a condition valid, that the party creating it should have any beneficial interest in any other estate which may be usefully affected by the condition. He may have conveyed an adjoining estate for the benefit of which this condition was created. He may have received a greater price for that estate on account of this condition, and justice to others may require that he should exact its performance... It seems to us that there are many things which may be provided for as conditions in a deed, which, though of small consideration in the view of a stranger, may be thought of great importance by the grantor. A man has a vacant lot in front of his dwelling house which somebody is desirous to buy, and he is willing to sell, if thereby his light and air shall not be too much obstructed. May he not sell it under a condition that no building shall be erected beyond a certain height, or within a certain distance from his house, or that the land shall not be used for the purpose of a tavern, or for any particular business which is likely to be noisy or troublesome, at least for a limited number of years? Who is prejudiced by such a condition? The purchaser and all who may claim under him have notice of the restriction, and, if it diminishes the value of the land, they get their compensation in the price." *Gray v. Blanchard, 8 Mass. (Pick.) 284 (1829).*

(n13)Footnote 519. *Gibert v. Peteler, 38 N.Y. 165 (1868).*

(n14)Footnote 520. *Harris v. Roraback, 100 N.W. 391 (Mich. 1904).*

(n15)Footnote 521. *Los Angeles Inv. Co. v. Gary, 186 P. 596 (Cal. 1919).*

(n16)Footnote 522. *Shelley v. Kraemer, 334 U.S. 1 (1948).*

This position is taken here since a fee upon a condition subsequent does not, like a determinable fee, terminate of its own accord, but requires the exercise of a right of re-entry, now by court action. Under the doctrine of Shelley v. Kraemer, the court relief could not be obtained.

(n17)Footnote 523. *Dills v. Deavors, 266 S.W.2d 788 (Ky. 1953).*

* This chapter is based in part on Ch. 30, George W. Thompson, Commentaries on the Modern Law of Real Property (John S. Grimes ed. 1979), which made a significant contribution toward preserving the American common law governing defeasible fees.

Thompson on Real Property, Thomas Editions

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CHAPTER 20 DEFEASIBLE FEES *

2-20 Thompson on Real Property, Thomas Editions § 20.13

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§ 20.13 Conditions That Are Void as Against Public Policy.

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The right of a grantor to annex a condition to his grant results from the power of alienation incident to the right of property. n524 A grantor may impose any burden upon the enjoyment and use of the granted property provided such burden does not contravene any rule of law or public policy. n525 Where a grant has been made upon a condition subsequent and the public policy of the jurisdiction is adverse to the condition, the grantee takes a fee simple absolute free of the condition. n526 So a condition requiring the grantee to perform an illegal act is void. Conditions in conflict with public policy, or inhibiting the performance of acts which the public has an interest in having performed, are void. n527 Thus a testator has the right to impose any legal conditions or restrictions which he may desire on a devise made by will, n528 so long as no question of public policy or illegality is involved. n529 Where a condition is an unlawful restraint of trade, it is invalid, n530 but where the restraint is partial only, the condition is valid. n531

Conditions in general restraint of marriage are void and inoperative as against public policy, n532 and a subsequent marriage in violation of such condition does not defeat the donee's title to the gift, though most courts hold that such a condition will be upheld when there is a valid gift or limitation over it. n533 A conveyance to a person until marriage is clearly void, for in such case there is nothing to carry the gift beyond the marriage. n534 A condition of reverter in the event of marriage will be disregarded and marriage will have no effect on the title. n535

A limitation over upon the remarriage of a widow who is not the spouse of the testator is valid. n536 A condition in restraint of marriage is invalid when imposed as a condition subsequent, although it is valid if made as a conditional limitation. n537 It is quite generally recognized that a condition against remarriage imposed upon a widow is valid. n538 Thus, in a deed to the wife of the grantor for life, and over for life to the grantor's sister, and after the latter's death to the grantor's daughter, provided the daughter was not married at the time of said sister's death, and in case she was so married, then equally to all the grantor's children, the proviso is valid. n539 Consequently, a gift or devise to a wife with limitation over in case of remarriage is considered as vesting in her a defeasible fee in and to the real estate described subject to be defeated by her remarriage and is considered valid. n540 In some jurisdictions there must be a gift over to render such condition valid, n541 and an intention to impose a penalty in terrorem must be manifest and unequivocal. n542

A clause in special restraint of marriage, such as a prohibition of marriage to a person outside of a particular faith, or a designated person, n543 or that the donee may not marry without the consent of a guardian or trustee, n544 is ordinarily considered valid. A condition that a daughter shall not marry until she arrives at the age of twenty-one is lawful. This is a proper and reasonable provision, and its violation may well work a forfeiture of the estate. n545 A condition that a legatee, if under twenty-one years, shall marry with the consent of her mother is valid. n546 Conditions in partial restraint of marriage which merely impose reasonable restrictions on marriage are not against public policy. n547 In a deed of gift by a father to his daughter, a provision that the gift should stand if she remained single, otherwise the land should be divided among his three children, the grantee to have fifty dollars more than the others, is a condition in restraint of marriage in general and void and the limitation over is void, for the land would go to the heirs in case of a forfeiture, whether there was a limitation or not. n548 A condition in a gift to a daughter that, if she should marry, the estate should go to another is void. n549

A testamentary gift based upon separation of spouses is void as against public policy. n550 Any testamentary provision tending to disturb or destroy an existing marriage is contrary to public policy and void. n551 Provision that the beneficiary of a trust should take absolutely on dissolution of marriage was against public policy and the beneficiary took all outright. n552

A condition that land conveyed shall not be subject to the grantee's debts is in restraint of alienation and void. Notwithstanding such condition, the land is subject to levy on execution, and passes to an assignee in bankruptcy. n553 Liability for debts is an incident of property just as the right to convey it is. n554 However, a testator may accomplish his desire to prevent the sale or disposition of his property after death: first, by the insertion of a provision that the estate is to become void on the bankruptcy of the devisee or any attempt by his creditors to reach the property; n555 and second by making the devise to trustees with power to apply the corpus or income to the use of the devisee according to their discretion. n556

A condition that intoxicating liquors shall not be manufactured or sold upon the granted lands is valid, for it is not subversive of the estate conveyed. n557 It leaves the estate alienable and inheritable, and free to be subjected to other uses. Such a condition may be enforced by forfeiture if advantage be promptly taken of any breach of it. Such a condition is not void as being in restraint of trade, so far as the grantor has in his own business an interest in enforcing it, n558 nor is the condition opposed to public policy as tending to create a monopoly. n559 Where the intention of the grantor in making such condition was to aid the social and moral welfare of the community, the condition is valid. n560

In some states conditions imposed in devises and bequests that to beneficiary shall not contest the will are held to be against public policy and so void. Most states, however, permit such conditions. n561 Conditions against alienating or encumbering realty are discussed elsewhere. n562

A condition in a conveyance to a county, city or town that a public building shall be erected and maintained upon the land is not contrary to public policy. n563 Such a condition is not in the nature of a bribe to the voters. The location of a public building, such as a courthouse, is purely one of convenience and material advantages and does not tend to influence the courts or officers in the discharge of any public duty. Where land is acquired by a town upon the express condition that it shall erect a building upon it within a limited time, a failure to fulfil the condition is not excused for the reason that the town is not possessed of sufficient means with which to build the proposed structure. n564 Where a condition contravenes public policy, but contains no stipulation either malum in se or malum prohibitum, and the advantage to the public by holding the condition valid is uncertain and not substantial, the condition, if made in good faith will not be held against public policy. n565 Where the intention of the grantor in annexing a condition to his conveyance is to lessen his tax burden or to gain an advantage by the transfer of his property, his deed, if otherwise valid, will be upheld. n566 If, however, a municipal corporation be prohibited by statute from taking a conveyance upon condition, such a condition would be illegal and void. n567 In case of changed circumstances, due to the natural growth of a city or of the present use of the whole neighborhood, so that the purpose of a condition in a deed no longer can be

accomplished, and it would be oppressive to give it effect, the courts will not enforce it. n568 An estate in fee simple on condition subsequent will not be defeated if the condition be declared void, but the estate in fee will stand free from the condition. n569

COMPUTER-ASSISTED RESEARCH

LEXIS condition! subsequent or precedent w/15 void! or valid!

FOOTNOTES:
(n1)Footnote 524. *Edwards v. West Woodridge Theater Co., 55 F.2d 524 (App. D.C. 1931); Childs v. Newfield, 28 P.2d 924 (Cal. App. 1934); Fusha v. Dacono Town Site Co., 153 P. 226 (Colo. 1915); Porter v. Porter, 45 N.E.2d 635 (Ill. 1942).*

See Joseph I. Swietlik, *Law of Restrictions on Land in Wisconsin, 41 Marq. L. Rev. 227* (1957-58); Howard R. Williams, *Restrictions on the Use of Land; Conditions Subsequent and Determinable Fees, 27 Tex. L. Rev. 158, 419 (1948).*

Devises to terminate if devisee should be subject to confiscatory tax in county of residence was not against public policy. *In re Neumann's Estate, 184 N.Y.S.2d 38 (1959).*

(n2)Footnote 525. *Haven v. Wallace, 160 S.W.2d 619 (Ky. 1942).*

(n3)Footnote 526. *Letteau v. Ellis, 10 P.2d 496 (Cal. App. 1932); Wedum-Aldahl Co. v. Miller, 64 P.2d 762 (Cal. App. 1937); Capitol Fed. Sav. & Loan Ass'n v. Smith, 316 P.2d 252 (Colo. 1957); Zdanowich v. Sherwood, 110 A.2d 290 (Conn. Super. 1954); Wills v. Pierce, 67 S.E.2d 239 (Ga. 1951); Thompson v. Thompson, 175 S.W.2d 885 (Mo. 1943).*

To B. provided he survive the grantor is testamentary. *Chaplin v. Chaplin, 184 P. 984 (Kan. 1919); Young v. O'Donnell, 224 P. 682 (Wash. 1924).*

Contra, Abbott v. Holway, 72 Me. 298 (1881); Jones v. Caird, 141 N.W. 228 (Wis. 1913).

No notice to quit necessary before bringing action to recover property on breach of condition subsequent. *Udgaard v. Schindler, 31 N.W.2d 776 (N.D. 1948).*

(n4)Footnote 527. *Patterson v. Donner, 48 Cal. 369 (1874)*(where the condition was that the grantee should procure two witnesses to testify to a certain state of facts); *Eastham v. Eastham, 231 S.W. 221 (Ky. 1921)*(if the condition is void, grantee takes the estate freed of condition); *Child v. C. H. Winans Co., 183 A. 300 (N.J. 1936); In re Scott's Will, 204 N.Y.S. 478 (1924)*(a court will not enforce conditions considered contrary to public policy or good morals); *Creswell v. Bank of Greenwood, 41 S.E.2d 393 (S.C. 1947)*(a purported condition against liability of property for debts is void); *Wheeler v. Moody, 9 Tex. 372 (1853)*(where the condition was for support of a state religion, where such a religion had become illegal through a change in the policy of the law); *Montgomery v. Ebony Hills Inv. Co., 229 S.W.2d 830 (Tex. Civ. App. 1950)*(a condition removing the subject matter of a conveyance is void).

Also, a condition in a deed that the property conveyed shall not be occupied by a person other than of the Caucasian race has been held valid, since such restriction is not a restraint on alienation but on the use of property, which is permissible when not against public policy. *Los Angeles Inv. Co. v. Gary, 186 P. 596 (Cal. 1919).* Such a condition is now unenforceable as against public policy. *Shelley v. Kraemer, 334 U.S. 1 (1948).*

When the conditions in a will, applied to the concrete facts of case, are against public policy, they are void; if, when

so applied, they are not against public policy, they are valid. *In re Keenan's Will, 205 N.W. 1001 (Wis. 1925). See Dunne v. Minsor, 143 N.E. 842 (Ill. 1924); In re Baughman's Estate, 126 A. 58 (Pa. 1924). See also Jackson v. Knapp, 130 N.E. 524 (Ill. 1921); Randall v. Marble, 69 Me. 310 (1879); Ruhland v. King, 143 N.W. 681 (Wis. 1913).*

(n5)Footnote 528. *Budlong v. Los Angeles Bible Institute, 16 N.E.2d 810 (Ill. App. 1938).*

(n6)Footnote 529. *Clemenson v. Rebsamen, 168 S.W.2d 195 (Ark. 1943); Reynolds v. Nicks, 172 S.W.2d 239 (Ark. 1943); Latorraca v. Latorraca, 31 A.2d 819 (N.J. 1943); In re Beckett's Estate, 8 N.Y.S.2d 24 (1938).*

(n7)Footnote 530. *Ruhland v. King, 143 N.W. 681 (Wis. 1913).*

A condition not to sell or permit the sale of intoxicating liquors on the granted premises is valid though the sale of liquor is tolerated by the state; at least if the grantor has any special and substantial interest in the enforcement of the condition.

Cowell v. Colorado Springs Co., 3 Colo. 82 (1876), aff'd, 100 U.S. 55; Fusha v. Dacono Town Site Co., 153 P. 226 (Colo. 1915); Collins Mfg. Co. v. Marcy, 25 Conn. 242 (1856); Carbon Block Coal Co. v. Murphy, 101 Ind. 115 (1885); O'Brien v. Wetherell, 14 Kan. 616 (1875); Barre v. Smith, 10 N.W. 168 (Mich. 1881); Smith v. Barrie, 22 N.W. 816 (Mich. 1885); Whealkate Mining Co. v. Mulari, 116 N.W. 360 (Mich. 1908); Sioux City & St. Paul R. Co. v. Singer, 51 N.W. 905 (Minn. 1892); St. Joseph Lead Co. v. Fuhrmeister, 182 S.W.2d 273 (Mo. 1944); Jetter v. Lyon, 97 N.W. 596 (Neb. 1903); Riverton Country Club v. Thomas, 58 A.2d 89 (N.J. 1948), aff'd, 64 A.2d 347; Post v. Weil, 22 N.E. 145 (N.Y. 1889); Plumb v. Tubbs, 41 N.Y. 442 (1869); Jeffery v. Graham, 61 Tex. 481 (1884).

(n8)Footnote 531. *Duester v. Alvin, 145 P. 660 (Or. 1915).*

(n9)Footnote 532. *Ward v. Torian, 112 So. 815 (Ala. 1927); In re Alexander's Estate, 85 P. 308 (Cal. 1906); Wilmington Trust Co. v. Houlehan, 131 A. 529 (Del. 1925); Jenkins v. Merritt, 17 Fla. 304 (1879); Wakefield v. Van Tassell, 66 N.E. 830 (Ill. 1903); Glass v. Johnson, 130 N.E. 473 (Ill. 1921); Anderson v. Crawford, 207 N.W. 571 (Iowa 1926); Randall v. Marble, 69 Me. 310 (1879); Arthur v. Cole, 56 Md. 100 (1881); Fleishman v. Bregel, 197 A. 593 (Md. 1938); Smith v. Barrie, 22 N.W. 816 (Mich. 1885); Dusbiber v. Melville, 146 N.W. 208 (Mich. 1914); In re Liberman, 18 N.E.2d 658 (N.Y. 1939); In re Weil's Estate, 209 N.Y.S. 779 (1925); In re Kempf's Estate, 289 N.Y.S. 74 (1936); In re Agnew's Estate, 174 N.Y.S.2d 1008 (1957); Munroe v. Hall, 1 S.E. 651 (N.C. 1887); Gard v. Mason, 86 S.E. 302 (1915).*

A provision making the separation of a husband and wife a condition precedent to the vesting of a devise or legacy is void. *Brizendine v. American Trust & Sav. Bank, 101 So. 618 (Ala. 1924); Williams v. Hund, 258 S.W. 703 (Mo. 1924).*

A provision making the separation of a husband and wife a condition precedent to the vesting of a devise or legacy may be valid if intended to take effect in case of a separation or a divorce. *Williams v. Hund, 258 S.W. 703 (Mo. 1924).*

(n10)Footnote 533. *Parsons v. Winslow, 6 Mass. 169 (1810).*

Devise to wife defeasible upon remarriage became absolute on wife's death unmarried and passed to her heirs. *Saunders v. Saunders, 490 P.2d 1260 (Or. 1971).*

(n11)Footnote 534. *Randall v. Marble, 69 Me. 310 (1879),* per Peters, J., said:

> Judge Story gives, as a reason why the condition is treated as ineffectual in case of not giving the estate over, that the testator is deemed to use the condition in terrorem only, or he would make some other disposition of the bequest provided the condition is not kept. Other reasons are also assigned by other writers. One reason is that courts cannot relieve against the forfeiture in such case without doing an injury to the person to whom the estate is limited over.

Pringle v. Dunkley, 22 Miss. (14 S. & M.) 16 (1850); Morley v. Rennoldson, 2 Hare 570.

(n12)Footnote 535. *Gard v. Mason, 86 S.E. 302 (N.C. 1915).*

(n13)Footnote 536. *Anderson v. Crawford, 207 N.W. 571 (Iowa 1926)*(devise to daughter-in-law); *Baker v. Hickman, 273 P. 480 (Kan. 1929).*

(n14)Footnote 537. *Gard v. Mason, 86 S.E. 302 (N.C. 1915).*

(n15)Footnote 538. *Wilmington Trust Co. v. Houlehan, 131 A. 529 (Del. 1925); Anderson v. Crawford, 207 N.W. 571 (Iowa 1926); Knost v. Knost, 129 S.W. 665 (Mo. 1910); Nations v. Spence, 235 S.W. 1064 (Mo. 1921)* (restriction contained in a deed).

Limitation over on remarriage created a fee upon condition subsequent. *Hinton v. Bowen, 230 S.W.2d 965 (Tenn. 1950).*

(n16)Footnote 539. *Graham v. McRae, 92 S.E. 871 (Ga. 1917).*

(n17)Footnote 540. *Glass v. Johnson, 130 N.E. 473 (Ill. 1921)*(in case widow conveys, the estate taken by the grantee is liable to be cut down by the remarriage of the widow); *Thornton v. Louch, 130 N.E. 467 (Ill. 1921); Phelps Mtg. Co. v. Thomas, 190 N.W. 399 (Iowa 1922); Mann v. Freze, 263 S.W. 21 (Ky. 1924); Walton v. Jones, 287 S.W. 710 (Ky. 1926); In re Taylor v. Farrow, 239 S.W.2d 73 (Ky. 1954); Ijams v. Schapiro, 113 A. 343 (Md. 1921); In re Dehncke's Will, 116 N.Y.S.2d 871 (1952); Hinton v. Bowen, 230 S.W.2d 965 (Tenn. 1950).*

Called a determinable fee, becoming absolute on death without remarriage. *Dickson v. Alexandria Hosp., Inc., 177 F.2d 876 (4th Cir. 1949); Cuddy v. McIntyre, 229 S.W.2d 315 (Ky. 1950).*

The creation of a fee defeasible by marriage is not necessarily in restraint of marriage because the beneficiary is submitted to an election between the acceptance of the gift and remarriage, should he prefer to remarry. *Logan v. Hammond, 117 S.E. 428 (Ga. 1923)*(intention to impose a penalty for remarriage must be manifest and exclusive).

Where the will provides for a reduction of income in case of remarriage, the subsequent annulment of the marriage restores the right to the full amount of the income. *In re Morten's Estate, 224 N.Y.S. 75 (1927).*

(n18)Footnote 541. *Chapin v. Cooke, 46 A. 282 (Conn. 1900); Anderson v. Crawford, 207 N.W. 571 (Iowa 1926); Parsons v. Winslow, 6 Mass. 169 (1810); In re Hotz's Estate, 38 Pa. 422 (1861).*

(n19)Footnote 542. *Logan v. Hammond, 117 S.E. 428 (Ga. 1923).*

(n20)Footnote 543. *Finlay v. King's Lessee, 28 U.S. (Pet.) 346 (1830); Turner v. Evans, 106 A. 617 (Md. 1919); In re Weil's Estate, 209 N.Y.S. 779 (1925); Phillips v. Ferguson, 8 S.E. 241 (Va. 1888).*

A bequest on condition that legatee marry in the Jewish faith was valid. *Shapira v. Union Nat'l Bank, 315 N.E.2d 825 (Ohio 1974).*

(n21)Footnote 544. *United States Trust Co. v. Baes, 207 N.Y.S. 19 (1924).*

(n22)Footnote 545. *Shackelford v. Hall, 19 Ill. 212 (1857).*

(n23)Footnote 546. Scott v. Tyler, 2 *Bro. CC 432.*

(n24)Footnote 547. *In re Liberman, 18 N.E.2d 658 (N.Y. 1939).*

(n25)Footnote 548. *Randall v. Marble, 69 Me. 310 (1879).*

(n26)Footnote 549. *Williams v. Cowden, 13 Mo. 211 (1850).*

(n27)Footnote 550. *Sisson v. Tenafly Trust Co., 33 A.2d 298 (N.J. 1943).*

Gifts for support of females are an exception to the rule that bequests conditioned on divorce or separation are void. *Alexander v. Hicks, 488 S.W.2d 336 (Ky. 1972).*

(n28)Footnote 551. *Winterland v. Winterland, 59 N.E.2d 661 (Ill. 1945); Sisson v. Tenafly Trust Co., 33 A.2d 298 (N.J. 1943).*

(n29)Footnote 552. *In re Agnew's Estate, 174 N.Y.S.2d 1008 (1957).*

(n30)Footnote 553. *McCleary v. Ellis, 6 N.W. 571 (Iowa 1880); Kessner v. Phillips, 88 S.W. 66 (Mo. 1905); Mebane v. Mebane, 39 N.C. (4 Ired. Eq.) 131 (1845); Ricks v. Pope, 39 S.E. 638 (N.C. 1901); Tillinghast v. Bradford, 5 R.I. 205 (1858),* Ames, C. J., said: "Certainly no man should have an estate to live on, but not an estate to pay his debts with. Certainly property available for the purposes of pleasure or profit should be also amenable to the demands of justice."; *Van Osdell v. Champion, 62 N.W. 539 (Wis. 1895); Graves v. Dolphin, 1 Sim 66; Snowdon v. Dales, 6 Sim 524.*

(n31)Footnote 554. *Mebane v. Mebane, 39 N.C. (4 Ired. Eq.) 131 (1845),* per Ruffin, C.J. *See Guarantee Title & Trust Co. v. Siedhoff, 58 P.2d 66 (Kan. 1936).*

(n32)Footnote 555. *Nichols v. Eaton, 91 U.S. 716 (1875); Bull v. Kentucky Nat'l Bank, 14 S.W. 425 (Ky. 1890); Weller v. Noffsinger, 77 N.W. 1075 (Neb. 1899); Emery v. Van Syckel, 17 N.J. Eq. 564 (1867); Bramhall v. Ferris, 14 N.Y. 41 (1856); Camp v. Cleary, 76 Va. 140 (1882); In re Luscombe's Will, 85 N.W. 341 (Wis. 1901).*

In Kansas it is declared that no rule of law or public policy is violated by a testator's providing that property devised by him shall not be subject to attachment for the compulsory satisfaction of debts of the devisee, nor by providing for a devise over in the event that such inhibition against involuntary alienation should be judicially declared to be invalid. *Hinshaw v. Wright, 262 P. 601 (Kan. 1928).*

(n33)Footnote 556. *Brooks v. Raynolds, 59 F. 923 (6th Cir. 1893); Seymour v. McAvoy, 53 P. 946 (Cal. 1898); Sinnott v. Moore, 39 S.E. 415 (Ga. 1901); Meek v. Briggs, 54 N.W. 456 (Ia. 1893); Guy v. Mayes, 138 S.W. 510 (Mo. 1911).*

(n34)Footnote 557. *Cowell v. Colorado Springs Co., 100 U.S. 55 (1879); Wedum-Aldahl Co. v. Miller, 64 P.2d 762 (Cal. App. 1937); Judd v. Robinson, 92 P. 724 (Colo. 1907); Fusha v. Dacono Town Site Co., 153 P. 226 (Colo. 1915); Collins Mfg. Co. v. Marcy, 25 Conn. 242 (1856); O'Brien v. Wetherell, 14 Kan. 616 (1875); Smith v. Barrie, 22 N.W. 816 (Mich. 1885); Watrous v. Allen, 24 N.W. 104 (Mich. 1885); Jenks v. Pawloski, 56 N.W. 1105 (Mich. 1893); Sioux City & St. Paul R. Co. v. Davis, 51 N.W. 907 (Minn. 1892); Northwestern Imp. Co. v. Lowry, 66 P.2d 792 (Mont. 1937); Alamogordo Imp. Co. v. Hennessee, 56 P.2d 1127 (N.M. 1936); Plumb v. Tubbs, 41 N.Y. 442 (1869); Atlantic Dock Co. v. Leavitt, 54 N.Y. 35 (1873); Jeffery v. Graham, 61 Tex. 481 (1884); Odessa Imp. & Irrig. Co. v. Dawson, 24 S.W. 576 (Tex. Civ. App. 1893).*

A condition that "no part of said premises shall ever or at any time be used for the purpose of buying, selling, or handling intoxicating liquors and that for the breach of such condition the premises shall revert to the grantor, his successors and assigns" is not void. *In re Bangle, 201 P. 968 (Cal. App. 1921).*

(n35)Footnote 558. *Watrous v. Allen, 24 N.W. 104 (Mich. 1885).*

(n36)Footnote 559. It is not the policy of the state that every one should sell intoxicating drinks who pleases. On the contrary, heavy taxes are levied and onerous conditions imposed by the state for the express purpose of limiting the number of those who shall sell, and the condition in question is directly in the line of that policy, instead of being opposed to it. *Watrous v. Allen, 24 N.W. 104 (Mich. 1885),* per Cooley, C. J.

See the following cases: *Burdell v. Grandi, 92 P. 1022 (Cal. 1907); Fusha v. Dacono Town Site Co., 153 P. 226 (Colo. 1915); Hall v. Solomon, 23 A. 876 (Conn. 1892); Wakefield v. Van Tassell, 66 N.E. 830 (Ill. 1903); Smith v. Barrie, 22 N.W. 816 (Mich. 1885); Chippewa Lab. Co. v. Tremper, 42 N.W. 532 (Mich. 1889).*

(n37)Footnote 560. *Burdell v. Grandi, 92 P. 1022 (Cal. 1907).*

A condition that intoxicating liquors shall not be sold as a beverage upon the land conveyed cannot be regarded as a merely nominal condition. *Baxter v. Ogooshevitz, 171 N.W. 385 (Mich. 1919); Sioux City & St. Paul R. Co. v. Singer, 51 N.W. 905 (Minn. 1892).*

Whether such a condition would be deemed void, upon grounds of public policy, if it should appear that the grantor had no such interest, we do not decide. Upon the face of the deed nothing appears which could render void the express condition upon which the conveyance is made and accepted. A. grantor may, at least under some circumstances, effectually impose such a condition upon a conveyance of the estate; and it is not necessary, in order to make prima facie valid the condition expressed in the deed, that the deed shall set forth or recite the peculiar facts which may legally justify the grantor in annexing the condition to the grant. On its face the condition is effectual. It attends and qualifies the grant. The estate is conveyed and accepted in terms subject to it. If this condition is to be avoided, because in the particular case the circumstances of the grantor were not such as to authorize him to thus restrict or qualify the conveyance of his estate, it can be only upon affirmative proof of the fact relied upon for that purpose. If not thus avoided, the deed must have effect according to its terms, to which the parties have assented. *Sioux City & St. P. R. Co. v. Singer, 51 N.W. 905 (Minn. 1892).*

(n38)Footnote 561. *Kentucky Trust Co. v. Sweeney, 163 F. Supp. 450 (W.D. Ky. 1958)*(construing a will is not a contest forfeiting the devise); *Commerce Trust Co. v. Weed, 318 S.W.2d 289 (Mo. 1958)*(filing of claim and action for declaratory relief was not a contest of the will); *Cox v. Fisher, 322 S.W.2d 910 (Mo. 1958)*(no contest provision enforced).

(n39)Footnote 562. *See* §§ 2015-2017.

(n40)Footnote 563. *Adams v. Logan, 11 Ill. 336 (1849); Harris v. Shaw, 13 Ill. 456 (1851); Twiford v. Alamakee Co., 4 Iowa (Greene) 60 (1851); Dishon v. Smith, 10 Iowa 212 (1859); State v. Elting, 29 Kan. 397 (1883); Hall v. Marshall, 80 Ky. 552 (1882); Lucas v. Hunt, 5 Ohio St. 488 (1856); State v. Portage, 24 Wis. 49 (1869); State v. Purdy, 36 Wis. 213 (1874); Pepin Co. v. Prindle, 21 N.W. 254 (Wis. 1884).*

(n41)Footnote 564. *Clarke v. Brookfield, 81 Mo. 503 (1884),* per Martin, C., said:

> The question, as to whether municipal corporations have the right to accept gifts or acquire property burdened with conditions which require them to do reasonable things germane to the objects of their existence, or return the gift or acquisition to the grantor or his heirs, is hardly to be considered an open question in this country, where so much property is constantly being received and held in this manner.

(n42)Footnote 565. *Fusha v. Dacono Town Site Co., 153 P. 226 (Colo. 1915); Wakefield v. Van Tassell, 66 N.E. 830 (Ill. 1903).*

(n43)Footnote 566. *Wolf River v. Wisconsin Mich. Power Co., 259 N.W. 710 (Wis. 1935).*

(n44)Footnote 567. *Rogers v. Sebastian, 21 Ark. 440 (1860).*

(n45)Footnote 568. *Hurd v. Albert, 3 P.2d 545 (Cal. 1931); Koehler v. Rowland, 205 S.W. 217 (Mo. 1918).*

(n46)Footnote 569. *Parmentier v. Pennsylvania Co. for Ins., 192 A. 62 (N.J. 1937).*

* This chapter is based in part on Ch. 30, George W. Thompson, Commentaries on the Modern Law of Real Property (John S. Grimes ed. 1979), which made a significant contribution toward preserving the American common law governing defeasible fees.

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CHAPTER 20 DEFEASIBLE FEES *

2-20 Thompson on Real Property, Thomas Editions § 20.14

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§ 20.14 Breach of Condition Not Caused by Grantee or Successors.

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It is a general rule that if the breach of the condition is caused by act of law or an act of God n570 and not by fault of the grantee or his successors, the breach is excused. n571 The tenant is not to be penalized for something he cannot avoid. n572

A condition that the granted land shall be used for a place of burial and for no other purpose is destroyed when the state, in the proper and reasonable exercise of its police power, prohibits further interments in the land, and the title thereupon vests absolutely in the grantee. n573 Where a city or town holds land under a grant for a burial ground, and to be appropriated for no other use or purpose whatsoever, the title reverts to the grantors when the land can no longer be used for such purpose by reason of an ordinance of the municipality and an act of the legislature prohibiting the use of such land for burial purposes. n574 However, the performance of such a condition is not excused or dispensed with for the reason that the person who is bound for its performance is under a disability, such, for example, as infancy or marriage of the party. n575

FOOTNOTES:
(n1)Footnote 570. *Gillock v. Williams, 250 S.W. 836 (Ky. 1923).*

(n2)Footnote 571. *Turner v. Turner, 197 S.E. 771 (Ga. 1938); Craig v. Beach, 198 S.W.2d 220 (Ky. 1946); Leach v. Pratt, 205 S.W.2d 970 (Tenn. App. 1947).*

(n3)Footnote 572. A devise on condition that devisee remain in testator's employment until death was not defeated where husband of testator discharged employee to prevent condition from taking effect. *In re Mollard's Estate, 98 So. 2d 814 (Fla. 1957).*

In a leading English case, land was demised to trustees for the benefit of the poor of a parish, the trustees covenanting to build a workhouse thereon, and to use, occupy, possess, and enjoy the premises for the sole use, maintenance, and support of the poor of Rugeley, and not to convert the building or the land, or employ the profits thereof, to any other use, intent, or purpose whatever. There was a provision for re-entry on breach of the covenant. The house was built, and

the land was used for many years as required by the deed. Afterwards an act of Parliament was passed, and the parish incorporated with others, and a union poorhouse provided, to which the act required all paupers should be removed. The heirs of the grantor brought suit in ejectment, claiming the right of re-entry for breach of the condition. The court held that, "even if the condition was not performed, it appears to us that the nonperformance would in this case be excused, as being by act of law, and involuntary on the part of the lessees." *Doe d. Anglesea v. Rugeley, L.R. 6 Q.B. 107.* The court *cited* Bacon, Abridgment, tit. "Condition"; Comyns, Digest, tit. "Condition"; and the case of Brewster v. Kitchell, 1 Salk 198, *1 Ld. Raym. 317. See Doe d. Lord Grantley v. Butcher, L.R. 6 Q.B. 115,* to the same effect. The above case is stated, in the language of Mr. Justice Lurton, in *Mahoning v. Young, 59 F. 96 (6th Cir. 1893),* which case supports the same principle.

See also the following cases: *Scovill v. McMahon, 26 A. 479 (Conn. 1892); Goldberg v. Callender Bros., 113 A. 170 (Conn. 1921); Trustees of Eureka College v. Bondurant, 124 N.E. 652 (Ill. 1919); First Lutheran Church v. Rooks Creek Evangelical Lutheran Church, 147 N.E. 53 (Ill. 1925); Dunn v. Heasley, 30 N.E.2d 628 (Ill. 1940); Portland v. Terwilliger, 19 P. 90 (Or. 1888); Seebold v. Shitler, 34 Pa. 133 (1859); Mitchel v. Reynolds, 1 P. Wms. 181.*

So, where land had been conveyed for use as burial ground, with apt words creating a condition subsequent that the property should revert to the grantor if the grantee failed to use it for that purpose, and the land was used for such purpose until it became a public nuisance, and the state, by legislative act, forbade further interment therein, the condition of the deed was held to be destroyed, and the title vested absolutely in the grantee. The court said: "It is clear that the performance of the condition of the deed has been prevented by act of law." *Raymond v. Fish, 51 Conn. 80 1883; Dunham v. New Britain, 11 A. 354 (Conn. 1887); State v. Wordin, 14 A. 801 (Conn. 1887); Woodruff v. New York & N. E. R. Co., 20 A. 17 (Conn. 1890); Scovill v. McMahon, 26 A. 479 (Conn. 1892).*

(n4)Footnote 573. *Scovill v. McMahon, 26 A. 479 (Conn. 1892),* Hall, J., said:

> If it should be said that the plaintiff's interests in this property had been taken from them by the state or by the city of Waterbury by right of eminent domain, we should reach the same conclusion upon the question of whether the condition of the deed had been broken. If the city of Waterbury, by taking this land for a public park, under the valid act of the legislature, has prevented its use as a burial place, it is clear that the performance of the condition of the deed has been prevented by act of law; and we know of no principle or authority by which the taking of the property under the right of eminent domain would work a forfeiture which would require payment both to the plaintiffs of the value of the land and to the defendant of the value of the estate forfeited.

See Portland v. Terwilliger, 19 P. 90 (Or. 1888).

(n5)Footnote 574. *Newark v. Watson, 29 A. 487 (N.J. 1894).*

(n6)Footnote 575. *Barker v. Cobb, 36 N.H. 344 (1858); Garrett v. Scouten, 3 N.Y. (Denio) 334 (1846).*

* This chapter is based in part on Ch. 30, George W. Thompson, Commentaries on the Modern Law of Real Property (John S. Grimes ed. 1979), which made a significant contribution toward preserving the American common law governing defeasible fees.

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CHAPTER 20 DEFEASIBLE FEES *

2-20 Thompson on Real Property, Thomas Editions § 20.15

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§ 20.15 Breach of Condition of Particular Use.

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A declaration of the purpose for which land is conveyed does not generally limit the estate granted or render it liable to divestiture on a departure from the use specified. n576 Forfeiture is not incurred, under a condition that land shall be used for a particular purpose, by the use of it also for another purpose consistent with the purpose specified, in the absence of any positive restriction against such use. A conveyance to a county for "courthouse purposes," with a condition that the land shall revert if it shall cease to be so used, is not broken by any incidental or collateral use, to which the land may be temporarily devoted, which does not conflict with its continued use for courthouse purposes, as, by failure to inclose it entirely with a fence, and allowing hitching posts for public use to be erected on the uninclosed portion or a temporary structure for posting bills. n577

Where land is conveyed upon condition that it shall be used for a certain purpose, it is no ground for forfeiture if it is used for other purposes, provided it is also used for the purpose for which it was conveyed. n578 In the absence of a declaration of forfeiture in the instrument conveying land for a certain purpose, an additional use of the property, if it should constitute a wrong, cannot be made the basis for an implied forfeiture, because the deed may happen to provide for a forfeiture for some other act. n579

When property is conveyed upon condition that it be continuously used and kept in condition for use for a particular purpose and the condition named in the deed is the only consideration for the conveyance, the grantee must comply strictly with the condition which constitutes the consideration, and, where there is a reverter clause, his failure so to do gives rise to the right of forfeiture. n580

Whether a forfeiture is incurred, by the abandonment of the use specified in a condition, depends upon the terms and general purpose of the condition. If, by a condition that certain buildings or a certain structure shall be permanently located upon the granted land, it is meant simply that this land shall in good faith be selected as the site of such buildings or structure, and that the same shall be erected upon the granted land, the condition is fulfilled by the erection of the buildings or structure upon the land, and the use of it for a time for the purpose intended, though the use of it for this purpose is subsequently abandoned. n581 Where the property is used for a long period of time in accordance with

the use specified in the condition and then such use is discontinued, there is no forfeiture. n582 It must be understood, however, that if the deed contains words of forfeiture or re-entry a discontinuance of the use specified in the condition will work a forfeiture. n583

A condition in a conveyance to trustees that they shall build thereon a house of worship when they think fit and permit certain persons to preach in said church, and that they should permit the building to be used "for such other purposes as should be deemed appropriate and necessary to further the cause of Christ," is fulfilled by erecting a church within a reasonable time and using the church as long as it is fit for use. The trustees might then sell the land, and invest the proceeds in a parsonage for the same congregation in connection with a new church on a different lot, there being nothing in the deed in the nature of a covenant to rebuild or words indicating a desire on the part of the grantor that the land should revert upon a failure of the trustees to maintain the church. n584

Where land with buildings was conveyed for a nominal sum, in consideration that the grantee, his heirs and assigns, would for twenty years use the same exclusively for hotel purposes, and it was provided that the destruction of the buildings by fire should not in any wise affect or weaken the force of the condition, it was held that, upon the destruction of the buildings by fire within that time, the grantee was bound to rebuild, and that, the grantee having shown no intention to rebuild for a year afterwards, the grantor was entitled to enter for a breach of condition. n585 However, a condition in a deed requiring the land conveyed to be used for the purpose of maintaining thereon a high school, coupled with a provision for reversion does not require that the school shall be kept up perpetually. n586

It is generally held that a mere temporary cessation of use, there being an intention to resume is not breach of a condition requiring a particular use. n587 Where temporary conditions made compliance with condition subsequent uneconomical, the breach was merely technical. n588

There is no implication, in a deed of land to a church society of a particular denomination for church purposes, that the use of the land is limited to that particular denomination. n589 A deed of land to an individual in trust for the use of the members of the Methodist Episcopal Church in a certain town, on condition that in no case is the general conference of that church to have any right in the premises or take any control or direction of the same, creates a condition which is violated by a union of this church with an annual conference subordinate to the general conference. n590 A condition that the land conveyed is not to be sold or used for any other purpose than as a church for the benefit of a certain church is violated by a sale to, or use by, a church other than the one specified. n591 A restriction in a deed conveying land to a country church, providing that the title would revert to the grantor if the land was used for a purpose other than a church, was held not substantially breached where the church building was used for strictly devotional purposes except on rare occasions when the programs were not materially different from those of an ordinary country church were given by organizations which divided the proceeds with the church. n592

A condition that the land shall be devoted to the purposes of an academy or public school, and that it shall revert when it ceases for two years together to be used for such purposes, does not mean that there shall be a forfeiture when two years have passed without a school, no other use being made of the property. There having been no abandonment of the property for the use prescribed, the mere non-use of it for such time would not defeat the grant. n593 So, where a conveyance of land was made "for the purpose of building a schoolhouse thereon, and to be improved for the benefit of schools, and for no other purpose, with a provision that, if the grantee shall cease for two years in succession to improve the land for such purpose, the estate shall be forfeited, and it appeared that a schoolhouse was built on the land and maintained for many years, when the school was discontinued, and no school had been kept there for nearly ten years, when the grantor's heirs brought their writ of entry, but the town had not abandoned the property or used it for any other purpose, it was held that there had been no forfeiture of the estate. n594 So, when the condition was that the land should be used as a site for a seminary, and it was so used for several years, and then for several years was not so used, and during this time the acts and declarations of the trustees managing the seminary evinced an intention to abandon the property for seminary purposes, but the school was again reopened, it was held that there had been no breach of the condition which worked a forfeiture. In neither of these cases was there a complete abandonment of the property by the

grantee. n595

A conveyance on condition that the grantee was "to have and to hold the same unto the school directors and their successors in office for the purposes and uses aforesaid, viz., building a schoolhouse and church, to be used for that purpose only; and whenever the said lot of ground is abandoned for the purposes of school and church, then the title is to revert back to me, and this shall not be any title to any other person for other purposes whatever," was held not forfeited by a cessation of use for school purposes, its use for church purposes continuing. n596

Under a condition in a deed of a meetinghouse lot that it should revert unless it should be improved for that purpose, no forfeiture is incurred by allowing the house to get out of repair, and by omitting to hold religious services in it for several years, if such services were afterwards resumed. n597 A deed to a church providing that when the grantee ceased as an order of the Christian Church the property should revert to the grantor, the property did not revert to the grantor when the services were discontinued temporarily because of financial difficulties and sickness among the congregation. n598 A deed of land to a church for church purposes contained a condition that if the seats of the church erected on the premises shall be "rented or sold," the land should revert to the grantor. It was held that a sale of the church to an individual under an order of court, for the purpose of paying the debts of the church society, by a deed containing the same condition, was not a breach of the condition. A conveyance of the property was not a renting or sale of the pews within the meaning of the condition, as an interest in a pew was separate from the fee of the land. n599 A deed by way of gift was made to the trustees of a church of a lot of land adjoining the church building, "to be used as a parsonage lot or church purpose and no other, and when not so used to revert back" to the donor. No parsonage was built. The lot remained unenclosed, but was used by persons attending the church services to hitch their horses upon. This was held to be a church purpose, and any church purpose will meet the requirement of the grant. n600 So, a conveyance of land to a religious society, "to hold so long as needed for meeting purposes," and then to revert, is not broken by the removal of the church building from the granted land to an adjacent lot, if the land is still used and needed for any purpose connected with the meetings of the society. n601 Where a grant of land was made on condition that it should be held for the support of any minister who might be settled by a certain religious society to preach in a meetinghouse standing or to be built on the granted land, and the society afterwards took down the meetinghouse and erected a new one on a different site, it was held that after the lot had remained vacant for three and a half years there was a breach of the condition, and that the breach of the condition was not saved by a vote of the society that the meetinghouse lot should be reserved for the erection of a meetinghouse at some future period when they might deem it expedient. n602 A condition that a church building shall be erected upon the land, and thereafter used as a place of worship, is broken by a sale of the property and its conversion to business purposes. n603 A forfeiture of title to property by the breach of a restriction limiting its use must be established by evidence showing an essential diversion of the property to a purpose not authorized, as distinguished from a mere infrequent and temporary use for such purpose at irregular intervals. n604

Non-user for a limited time, not inconsistent with the purpose and spirit of the limitation in the deed, will not terminate the estate. n605 When forfeiture does occur, all the improvements revert with the land. n606

COMPUTER-ASSISTED RESEARCH

LEXIS: breach! w/15 use! or purpose! w/30 condition! subsequent or precedent

FOOTNOTES:

(n1)Footnote 576. *Fayette County Bd. of Educ. v. Bryan, 91 S.W.2d 990 (Ky. 1936). See Low v. Ruhlman, 155 P.2d 671 (Cal. App. 1945).*

(n2)Footnote 577. *Henry v. Etowah, 77 Ala. 538 (1884); Howe v. Lowell, 51 N.E. 536 (Mass. 1898); Poitevent v. Hancock Bd. of Supvrs., 58 Miss. 810 (1881); Southard v. New Jersey Cent. R. Co., 26 N.J. L. 13 (1856); Rose v. Hawley, 36 N.E. 335 (N.Y. 1894); Clark v. Jones, 144 P.2d 498 (Or. 1944).*

Where land is conveyed, for a valuable consideration, "for the purpose of erecting and maintaining a public school for white children only" the condition is not breached by the holding of preaching services in the schoolhouse when not required for public school purposes. The word "only" does not refer to the use of the building as a public school but refers to white children. *Harmon v. Driggers, 107 S.E. 923 (S.C. 1921).*

(n3)Footnote 578. *Regular Predestinarian Baptist Church v. Parker, 27 N.E.2d 522 (Ill. 1940); Bailey v. Wells, 47 N.W. 988 (Iowa 1891); Williams v. McKenzie, 262 S.W. 598 (Ky. 1924); McKissick v. Pickle, 16 Pa. 140 (1851); Davis v. Skipper, 83 S.W.2d 318 (Tex. 1935).*

(n4)Footnote 579. *Priddy v. School Dist. No. 78, 219 P. 141 (Okla. 1923).*

(n5)Footnote 580. *Ralston v. Hatfield, 143 N.E. 887 (Ind. App. 1924)*(ordinarily, a substantial compliance with the conditions in the deed is all that is required). *See Waddell v. Sch. Dist. No. 3, 257 P. 278 (Mont. 1927)* (right of re-entry and repossession on breach of conditions subsequent may be transferred); *Magness v. Kerr, 254 P. 1012 (Or. 1927)*(reversionary right is not assignable).

(n6)Footnote 581. Mead v. Ballard, 7 U.S. (Wall.) (1868); *Berkley v. Union Pac. R. Co., 33 F. 794 (C.C.D. Colo. 1888); Hunt v. Beeson, 18 Ind. 380 (1862); Jeffersonville, M. & I. R. Co. v. Barbour, 89 Ind. 375 (1883); Sumner v. Darnell, 27 N.E. 162 (Ind. 1891); Higbee v. Rodeman, 28 N.E. 442 (Ind. 1891); Poitevent v. Hancock, 58 Miss. 810 (1881); Miller v. Tunica County, 7 So. 429 (Miss. 1890); Maddox v. Adair, 66 S.W. 811 (Tex. Civ. App. 1901); Harkey v. Harkey, 60 S.W.2d 834 (Tex. Civ. App. 1933).*

(n7)Footnote 582. *Higbee v. Rodeman, 28 N.E. 442 (Ind. 1891).*

(n8)Footnote 583. *Taylor v. Campbell, 98 N.E. 657 (Ind. App. 1912); Murphy v. Metz, 85 S.W. 1097 (Ky. 1905).*

(n9)Footnote 584. *Hardy v. Wiley, 12 S.E. 233 (Va. 1890).*

(n10)Footnote 585. *Allen v. Howe, 105 Mass. 241 (1870). See Reed v. Hatch, 55 N.H. 327 (1975).*

(n11)Footnote 586. *Hasman v. Elk Grove Union High Sch., 245 P. 464 (Cal. App. 1926)*(condition of deed was satisfied when high school district, in good faith and without any intention at time of changing location of school, erected buildings on property and conducted a high school therein for 29 years, and until conditions required a change of location). *See Calvary Presbyterian Church v. Putnam, 221 N.Y.S. 692 (1927), aff'd, 224 N.Y.S. 651, aff'd, 162 N.E. 601 (N.Y. 1928)*(in the case of a grant upon conditions subsequent, nothing remains in the grantor or his heirs, except the right to take advantage of a breach of the condition, a mere possibility of a reverter, which is neither an estate nor an interest in real property, nor assignable nor a devisable chose in action, nor a possibility coupled with an interest, but a bare possibility alone).

(n12)Footnote 587. "Mere lapse of time, mere failure to use the premises, is not, in most cases, conclusive evidence of abandonment or of an intention to abandon. But mere lapse of time, mere failure to use, may be of more significance in one case than in another." *Estes v. Muskegon County Agrl. & Driving Park Ass'n, 147 N.W. 553 (Mich. 1914).*

(n13)Footnote 588. *Koonz v. Joint Sch. Dist. No. 4, Gresham, Shawano County, 41 N.W.2d 616 (Wis. 1950).*

(n14)Footnote 589. *Woodworth v. Payne, 74 N.Y. 196 (1878).*

Where a testator devised real estate to a designated church, and prior to the death of the testator such church and another church consolidated and the consolidated church took another name, the devisee church became extinct and the devise to it lapsed and did not pass to the consolidated church, notwithstanding each of the constituent churches

conveyed its real estate and personalty to the consolidated church. *Presbyterian Church v. Katsianis, 134 N.E. 684 (Ind. App. 1922).*

(n15)Footnote 590. *Guild v. Richards, 16 Mass. (Gray) 309 (1860). See Congregational Soc'y v. Stark, 34 Vt. 243 (1861).*

(n16)Footnote 591. *Grissom v. Hill, 17 Ark. 483 (1856).*

(n17)Footnote 592. *Williams v. Box Church Baptist Church, 75 S.W.2d 134 (Tex. Civ. App. 1934).*

(n18)Footnote 593. *Gage v. Sch. Dist. No. 7, 9 A. 387 (N.H. 1887). See Rowe v. Minneapolis, 51 N.W. 907 (Minn. 1892).*

(n19)Footnote 594. *Crane v. Hyde Park, 135 Mass. 147 (1883).*

(n20)Footnote 595. *Mills v. Evansville Seminary, 15 N.W. 133 (Wis. 1883). See Rowe v. Minneapolis, 51 N.W. 907 (Minn. 1892).*

(n21)Footnote 596. *Board of Educ. v. Baker, 134 S.W. 863 (Tenn. 1911).*

(n22)Footnote 597. *Osgood v. Abbott, 58 Me. 73 (1870).*

See the following cases: *Evans v. Cropp, 133 S.W. 221 (Ky. 1911); East Greenwich v. Gimmons, 84 A. 1008 (R.I. 1912); White v. Britton, 56 S.E. 232 (S.C. 1906); Daggett v. Ft. Worth, 177 S.W. 222 (Tex. Civ. App. 1915).*

(n23)Footnote 598. *Sargent v. Christian Church, 66 S.W.2d 5 (Ky. 1933).*

(n24)Footnote 599. *Woodworth v. Payne, 74 N.Y. 196 (1878).*

(n25)Footnote 600. *Bailey v. Wells, 47 N.W. 988 (Iowa 1891).*

(n26)Footnote 601. *Carter v. Branson, 79 Ind. 14 (1881).*

(n27)Footnote 602. *Austin v. Cambridgeport, 21 Mass. (Pick.) 215 (1838).*

(n28)Footnote 603. *Scott v. Stipe, 12 Ind. 74 (1859).*

(n29)Footnote 604. *Williams v. Box Church Baptist Church, 75 S.W.2d 134 (Tex. Civ. App. 1934).*

(n30)Footnote 605. *Clark v. Jones, 144 P.2d 498 (Or. 1944).*

(n31)Footnote 606. *Koonz v. Joint Sch. Dist. No. 4, Gresham, Shawano County, 41 N.W.2d 616 (Wis. 1950).*

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CHAPTER 20 DEFEASIBLE FEES *

2-20 Thompson on Real Property, Thomas Editions § 20.16

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§ 20.16 Alternative Remedies on Breach of Condition.

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The exercise of a right of re-entry is not the only remedy available to the grantor on breach of a condition subsequent. The grantor may prefer some other remedy than a forfeiture for a breach of condition. He may prefer, by a proceeding in equity, to enjoin the grantee from doing something in violation of the terms of the condition, n607 or to restrain the grantee from using the property beyond the limitation expressed in the deed. n608

He may maintain a bill for the specific performance of the terms of a condition or he may maintain an action for damages sustained by reason of a breach of the condition, n609 but it has been held that the grantor in a deed to a railroad company containing a condition respecting railroad use is not entitled to specific performance. n610 Since an estate granted on condition subsequent is not terminated until there is a re-entry, an action for cancellation of the deed is not a proper remedy, but a breach of the condition may be enforced by ejectment. n611 It is held, however, that a conveyance made in consideration of support, being treated in equity as a conveyance upon condition subsequent, a court of equity will quiet the title of the grantor and cancel the deed upon his election to avoid the conveyance by making re-entry. n612 Where a deed contains a covenant coupled with a condition subsequent, the grantor has an election to proceed on the covenant or on the condition. n613 No entry or demand for possession is necessary before bringing an action in ejectment for breach of condition. n614

FOOTNOTES:

(n1)Footnote 607. *St. Paul, M. & M. R. Co. v. St. Paul Union Depot Co., 46 N.W. 566 (Minn. 1890).*

(n2)Footnote 608. *Seaboard Air Line R. Co. v. Anniston Mfg. Co., 65 So. 187 (Ala. 1914); Watrous v. Allen, 24 N.W. 104 (Mich. 1885).*

(n3)Footnote 609. *New Edgewood Lake Corp. v. Kingston Trust Co., 285 N.Y.S. 130 (A.D. 1936).*

(n4)Footnote 610. *Close v. Burlington, C. R. & N. R. Co., 19 N.W. 886 (Iowa 1884).*

(n5)Footnote 611. *Carruthers v. Spaulding, 275 N.Y.S. 37 (A.D. 1934).*

(n6)Footnote 612. *Knutson v. Anderson, 255 N.W. 907 (Wis. 1934). See Thornton v. Middletown Educ. Corp., 70 P.2d 234 (Cal. App. 1937).*

(n7)Footnote 613. *Neal v. State-Planters Bank & Trust Co., 184 S.E. 203 (Va. 1936).*

(n8)Footnote 614. *Cowell v. Colorado Springs Co., 100 U.S. (10 Otto) 55 (1879); Austin v. Cambridgeport Parish, 21 Mass. (Pick.) 215 (1838); Ellis v. Kyger, 3 S.W. 23 (Mo. 1887); Plumb v. Tubbs, 41 N.Y. 442 (1869). See Pence v. Tidewater Townsite Corp., 103 S.E. 694 (Va. 1920).*

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CHAPTER 20 DEFEASIBLE FEES *

2-20 Thompson on Real Property, Thomas Editions § 20.17

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§ 20.17 Judicial Reluctance to Declare Breach of Condition.

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The general abhorrence to the condition subsequent with its threat of forfeiture extends to forfeiture itself. Thus the courts are inclined not to construe a state of facts as constituting a breach of a condition subsequent unless such a situation clearly exists. n615

Considerable effort is therefore exerted by the courts to avoid forfeiture even where a breach of a valid condition has occurred. In this direction the courts have relied on waiver of the breach by the grantor, upon the doctrine of substantial compliance with the condition and upon changed conditions as releasing the condition. n616

A condition will not be extended beyond its express terms by construction. The grantor must bring himself within these terms to entitle him to a forfeiture. n617 Thus a condition that the grantee shall not convey the property prior to a day named, which was about ten years after the date of the conveyance, except by a lease for years, was not broken by a lease for ninety-nine years, though the grantee at the same time gave the lessee a bond for a conveyance in fee, to be executed after the period of limitation. Neither the bond nor the lease was a conveyance of the property. Since both instruments together do not constitute a conveyance, they cannot be made the ground for a forfeiture. n618 A court cannot change a contract by reading into a deed a restriction on use while it is operative or a limitation of time on the duration of a condition. n619 The rule is well established that the intention of the parties to a deed must, if possible, be gathered from the language used in the instrument submitted for construction, and that, when it can in this way be ascertained, arbitrary rules are not to be resorted to. n620

It must be shown that the spirit and purpose of the condition have been wilfully disregarded by the grantee to establish a breach of it which will authorize a re-entry by the grantor. He is required to establish something more than a technical breach through the action of a stranger without the grantee's permission. A fee on a condition subsequent is not terminated by a mere breach of a condition in the deed. n621 It is only where defendant has wilfully disregarded the condition that a breach thereof will be declared. n622 Equity will not relieve from forfeiture where the petitioner's own conduct caused the situation which rendered the performance of the condition of use impossible. n623

FOOTNOTES:

(n1)Footnote 615. *Rowell v. Gulf, M. & O. R. R., 28 So. 2d 209 (Ala. 1946); Wakefield v. Attorney General, 138 N.E.2d 197 (Mass. 1956).*

Technical breach will not cause forfeiture. *Lowe v. Ruhlman, 155 P.2d 671 (Cal. App. 1945); Rose v. Hawley, 23 N.E. 904 (N.Y. 1890); Williams v. Downing, 95 P.2d 612 (Okla. 1939).*

O & W Lines, Inc. v. St. John, 231 N.Y.S.2d 72 (1962); Hocker v. Heins, 231 N.Y.S.2d 481 (1962); Dilbeck v. Bill Gaynier, Inc., 368 S.W.2d 804 (Tex. Civ. App. 1963).

Forfeiture on breach not favored. *Zapata v. Torres, 464 S.W.2d 926 (Tex. Civ. App. 1971).*

(n2)Footnote 616. *Letteau v. Ellis, 10 P.2d 496 (Cal. App. 1932); Forman v. Hancock, 39 P.2d 249 (Cal. App. 1934).*

(n3)Footnote 617. *Reclamation Dist. No. 551 v. Van Loben Sels, 78 P. 638 (Cal. 1904); Firth v. Marovich, 116 P. 729 (Cal. 1911); Mitchell v. Cheney Slough Irrig. Co., 134 P.2d 34 (Cal. App. 1943); Wadley Lab. Co. v. Lott, 60 S.E. 836 (Ga. 1908); Voris v. Renshaw, 49 Ill. 425 (1867); Hutchinson v. Ulrich, 34 N.E. 556 (Ill. 1893); Ewertsen v. Gerstenberg, 57 N.E. 1051 (Ill. 1900); Downen v. Rayburn, 73 N.E. 364 (Ill. 1905); Elkhart Car-Works Co. v. Ellis, 15 N.E. 249 (Ind. 1888); Wier v. St. Louis, Ft. S. & W. R. Co., 19 P. 316 (Kan. 1888); Ritchie v. Kansas, N. & D. R. Co., 39 P. 718 (Kan. 1895); Hadley v. Hadley Mfg. Co., 4 Mass. (Gray) 140 (1855); Dorr v. Harrahan, 101 Mass. 531 (1869); Clapp v. Wilder, 57 N.E. 692 (Mass. 1900); Minneapolis Threshing Mach. Co. v. Hanson, 112 N.W. 217 (Minn. 1907); Gadberry v. Sheppard, 27 Miss. 203 (1854); Lackland v. Hadley, 169 S.W. 275 (Mo. 1914); Emerson v. Simpson, 43 N.H. 475 (1862); Atlantic City v. Young & McShea Amusement Co., 53 A. 168 (N.J. Eq. 1902); Lynde v. Hough, 27 N.Y. (Barb.) 415 (1857); Higgins v. Higgins, 27 S.E.2d 128 (N.C. 1943); Gladewater County Line Indep. Sch. Dist. v. Hughes, 59 S.W.2d 351 (Tex. Civ. App. 1933).*

(n4)Footnote 618. *Voris v. Renshaw, 49 Ill. 425 (1867).*

(n5)Footnote 619. *Rhines v. Consumers Power Co., 242 N.W. 898 (Mich. 1932).*

Under a conveyance of land to a county for "county purposes," a courthouse and jail were erected upon it, but subsequently the county town was removed to another place. There was nothing in the deed requiring the county to devote the land to any special county purpose, and therefore, it was held that the mere removal of the county town was no evidence of an intention to abandon the property, or to devote it to any other than county purposes. *Poitevent v. Hancock Bd. of Supvrs., 58 Miss. 810 (1881); Miller v. Tunica County, 7 So. 429 (Miss. 1890).*

(n6)Footnote 620. *Dickson v. Van Hoose, 47 So. 718 (Ala. 1908).*

A conveyance of real estate to school trustees "for the purpose of maintaining thereon a high school" does not necessarily mean that the school must be kept up perpetually. The deed must be construed so as to avoid a forfeiture if it can be reasonably so interpreted. *Hasman v. Elk Grove Union High School, 245 P. 464 (Cal. 1926).*

Remedies for violation of restrictive building clauses. *Joyce v. Krupp, 57 P. 124 (Cal. App. 1927).*

Where misuser of the premises is specified as a ground of forfeiture and reverter, the mere nonuser of the premises furnishes no basis for forfeiture. *Berger v. Santa Fe College, 215 P. 825 (N.M. 1923).*

Restrictive covenants run with the land and bind subsequent purchasers. *McCain Realty Co. v. Aylesworth, 219 N.Y.S. 59 (1926).*

A conveyance was made to the town of Yonkers "upon the express condition that the strip of land forming part of the premises above described, and being twelve feet and six inches in width, and extending all along said Academy Street, shall forever hereafter be and remain a part of said Academy Street, and shall never be used for any other purpose whatsoever. And also that all the residue of said land hereby conveyed shall forever hereafter be and remain public and open as a public highway, and that no house, building, or other erection whatsoever, except a public monument, shall ever be built or erected or permitted upon the said land, or upon any part thereof". The owner of adjoining land erected a building which encroached upon the highway at one end sixteen inches, and at the other two inches, and he also excavated an area under the sidewalk which was covered with gratings. The grantor claimed a breach of the condition and a right of re-entry. It was held that the town had not done or knowingly permitted anything which amounted to a breach of the condition within any fair and reasonable construction of it. As to the area under the sidewalk, the court said:

> The purpose of the condition was to preserve the land conveyed for public purposes, and it was not violated by permitting the soil or space under the sidewalk to be used in such a manner as is usual and common in cities and villages, as such use is in no sense inconsistent with that of the public for the purpose of a sidewalk for persons passing along the street.

As to the encroachment of the wall of the building upon the highway, the court said:

> If it be admitted that this small strip of land was included in the plaintiff's grant to the municipality for public purposes, and that it has by an honest mistake been appropriated to a private purpose in the manner disclosed by the record, the breach of the condition, if any, would be purely technical, and of such an unsubstantial character as to warrant the conclusion that it was not within the purpose or intention of the parties to the conveyance.

Rose v. Hawley, 36 N.E. 335 (N.Y. 1894).

(n7)Footnote 621. *Allen v. Trustees of Great Neck Free Church, 269 N.Y.S. 341 (A.D. 1934).*

(n8)Footnote 622. *Bonniwell v. Madison, 77 N.W. 530 (Iowa 1898); Crane v. Hyde Park, 135 Mass. 147 (1883).*

(n9)Footnote 623. *Biescar v. Czechoslovak-Patronat, 302 P.2d 104 (Cal. App. 1956).*

* This chapter is based in part on Ch. 30, George W. Thompson, Commentaries on the Modern Law of Real Property (John S. Grimes ed. 1979), which made a significant contribution toward preserving the American common law governing defeasible fees.

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CHAPTER 20 DEFEASIBLE FEES *

2-20 Thompson on Real Property, Thomas Editions § 20.18

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§ 20.18 Waiver of Breach of Condition.

[Go To Supp]

Where a fee upon condition subsequent is not followed by a limitation over to a third party, the grantor can waive his right of re-entry and thus avoid the termination of the fee. The grantor may expressly waive the breach or he may waive the remedy of a right to re-enter. n624 A violation of a condition subsequent may be waived by the grantor, n625 as by acceptance of final payment and the delivery of a deed to the premises with knowledge that the grantee has already breached the condition. n626 The waiver may be either express or implied from the circumstances. n627 A condition subsequent can be enforced only at the instance of one who has not waived his right. n628

A condition which is personal to the grantor or for the benefit of the residue of his estate is waived by a conveyance of such residue to the purchaser of the part to which the condition was attached. Thus, where the owner of a tract of land conveyed a small parcel of it with a condition that the grantee should support a fence around the land conveyed, and subsequently conveyed the residue to one who had become the owner of the small parcel, and this owner removed the fence, it was held that his removal of the fence was an extinguishment or waiver of the condition. The residue or part last conveyed was afterwards reconveyed to the original grantor who entered upon the small parcel, claiming a forfeiture. However, it was held that the condition, once having been waived or extinguished, was not revived by the reconveyance. n629

A grantor waives breach of condition by failure to enforce within a reasonable time. n630 Where the grantee breaches a condition, the grantor may expressly waive the breach or may waive his remedy of a right to re-enter. n631

A waiver or estoppel arises when the grantor does some act inconsistent with his right of forfeiture, which makes it unjust for him thereafter to insist upon a forfeiture. n632 If the grantor permits the property to be used in violation of the condition, and especially if he stands by and allows valuable improvements to be made thereon, he will not be allowed to insist upon a forfeiture and thus acquire the improvements made upon the strength of his acquiescence. n633 Thus, where the condition was that no liquor should be sold on the property, but the grantee made such use of the land for eleven years, with the grantor's knowledge and without objection by him and made improvements adapted to such use, equity will not permit a forfeiture of the estate, but will leave the grantor to his other remedies. n634

Where land was granted to a railroad company upon condition that the road should be completed by a certain time, and, after the company's failure to do this, the grantor suffered the company to go on and incur further expense in constructing the road without making objections, it was held that he had waived the condition and forfeiture. n635 Any acts on the part of the grantor which are inconsistent with a claim of forfeiture are evidence of his waiver of the condition. n636 Mere indulgence, acquiescence or inaction is not ordinarily considered sufficient to constitute a waiver of a forfeiture for breach of condition subsequent. n637

A condition for the payment of money at a certain time is waived by the acceptance of the money after a breach. n638 If the condition is one for the payment of money at stated times, and preceding payments have been made without much regard to the precise time of their maturity, equity will not allow a forfeiture for a payment not made on the precise day it was due, but tendered a few days afterwards, when under the circumstances it would be grossly inequitable to allow a forfeiture. n639 Where the condition was for the payment of an annuity, and the grantor subsequently accepted the rents in lieu of the annuity, the condition for the payment of the annuity was discharged as to each year in which such rent was accepted, n640 but where payment is accepted in ignorance of a violation of the condition there is no waiver. n641 A breach of a condition to furnish support to the grantor is waived by his returning to the grantee after an absence and accepting support from him. n642 Other courts have been more rigorous in their enforcement of covenants to support particularly where the grantee has not acted in an equitable manner.

A mere silent acquiescence, indulgence n643 or inaction after the performance or non-performance of an act which constitutes a breach of a condition does not amount to a waiver by the grantor of such breach. n644 Thus, where the condition was that intoxicating liquor should not be sold on the premises, the mere sale of a glass of liquor to a third person in the presence of the grantor does not necessarily constitute a breach of the condition.

The bodily presence of the grantor might under some circumstances be evidence of his assent to the sale, and under other circumstances it would not. At most, it would be evidence to be submitted to the jury on the question of his assent. n645 While mere silence is not sufficient to waive a forfeiture, silence on one side and conduct in good faith relying thereon on the other, whereby such other is placed in such a situation that he will be greatly damaged if the apparent attitude of his conditional grantor be changed effectively, will bind such grantor as a waiver of the benefit of the condition. n646

An unauthorized sale by a third person, without the knowledge or fault of the grantee, would not work a forfeiture, n647 but open and public sales on the premises by the grantee's tenant, with the assent or with the knowledge of the grantee and without reasonable diligence on his part to prevent it, will work a forfeiture. n648 If the grantee, as soon as he discovers that his tenant is selling spirituous liquors on the premises, procures his removal, he will save a forfeiture. It is not negligence on his part to make a lease without a condition that it should be void in case the lessee should sell intoxicating liquor, especially if the lease contains an agreement on the part of the lessee that he would not sell any article the sale of which would injure the grantee's title. n649 If the grantor stands by and allows the grantee to incur expense and make improvements with a view to conducting a business or doing acts which are a breach of the condition, the grantor's inaction may have the effect of a waiver of the condition. n650 A devise on condition of support is a gift upon condition subsequent being waived on failure of performance not due to fault of devisee. n651

A condition subsequent may be waived or forfeiture saved, not only by express agreement, but also by acts showing an intention to continue the estate in the grantee or to voluntarily forego the benefit of the condition, especially where the grantor's declarations, conduct or failure to act, when he ought to have acted, have been at variance or inconsistent with his right to enforce a forfeiture or have so continued for a long period of time. n652 A waiver of a condition, whether precedent or subsequent, is implied if the grantor prevents its fulfillment or absolutely refuses performance on his part. Such refusal, to amount to a waiver, must be absolute and must be acted upon as such by the grantee. If the grantor, in a conveyance under which the vesting of the title is made to depend upon the grantee's paying a specified sum on or before a day named, notifies the grantee that he considers the deed as conferring an option only, and that he withdraws

the option, this does not justify the grantee in failing to make or tender payment as provided, if he wishes to assert any right under the deed. n653 A condition in a deed from a parent to a child stipulating that as a consideration for the conveyance the child should care for the parent during life is impliedly waived where it was through the parent's fault that the child failed to furnish such care. n654

Exacting or acquiescing in the further performance of a condition is a legal waiver of any acts then known to the grantor which otherwise might work a forfeiture. Even treating the condition as still subsisting and obligatory after an alleged breach of it is a sufficient waiver. n655 A breach of a condition to support is waived by continuing to accept it for a time afterwards. n656 A condition relied on for forfeiture is waived by declarations or expressions of satisfaction with the performance, although such performance be not in strict compliance with the condition. n657

The grantor may lose his right to claim forfeiture for breach of a condition subsequent by failing to assert it within a reasonable time, n658 especially if such failure is accompanied by acts or conduct indicating an intention to abandon the right to forfeit. n659 A waiver of a breach of a condition may be presumed after a reasonable lapse of time has occurred without any assertion of right by the grantor under the condition, but it is incumbent upon the grantee to allege and prove such a lapse of time. n660 Waiver is a question of fact for the jury, and any evidence which shows an intention on the part of the grantor to waive his right to claim a forfeiture is admissible upon this question. Whether in any particular case there is a waiver is a matter of intention on the part of the grantor, to be ascertained from his acts and all the attendant circumstances of the case. n661 Where the condition was that the grantee should fence the land and keep the fence in repair, and the land remained unfenced for fifty years, with the grantor's full knowledge of the breach of the condition and without any complaint or entry by him, it was held that he had waived the condition. n662

A condition in an instrument under seal may be waived by parol. n663 Where a condition is altered by a verbal agreement, but the grantee fails to perform the condition, either as originally expressed or as altered, the grantor is not precluded from claiming a forfeiture, as his consent to the change was conditional upon a compliance with the altered condition. The parol agreement for a change in the condition was not obligatory, but the grantor would be estopped to insist upon a forfeiture for a breach of a condition he had agreed to dispense with. His agreement, however, for a change of the condition, is not inconsistent with his right to insist upon a forfeiture when the grantee failed to comply with the condition in either form. Whether there was a waiver is a question of intention, and it was clear that the grantor did not intend to waive the original condition, except in case the grantee should comply with the changed condition. n664 Where a city made a deed to a corporation for a nominal consideration upon condition that the corporation should do two things, one of which is performed but failed to perform the other, the city agreed that the corporation might do something else instead and extended the time for performance. Upon its failure to perform the substituted service, the city brought ejectment. It was held that the city could not recover, because the original condition had been waived and was gone forever as a condition, and as if it had never been made a part of the deed. n665

A vendor who stands by and watches a vendee making a construction violating a condition in the deed is estopped and barred by laches from exercising the condition. n666

After release by the grantor the condition has no existence for any purpose and is not available to anyone else. n667 A third person who is beneficially interested in the condition has no power to waive or release it, if the condition is such that the grantor may be supposed to have an interest in its performance, though such person in whose favor the condition is made is willing to waive its performance. n668 Only the grantor or his heirs having the legal estate can dispense with such a condition. A grantor who has conveyed land on condition that he and his wife should be allowed to reside thereon during their respective lives and receive support from the grantee may waive a breach of the condition both as to himself and as to his wife, and his waiver is sufficient without any waiver by his wife, she having joined in the deed merely to release dower. n669 It has been held that after the death of the grantor his widow may make a valid release to the grantee of such condition. n670 The *Restatement of the Law of Property* states: "Conduct otherwise sufficient to constitute a breach of the condition fails to constitute such breach when such conduct has been licensed by the owner of the power of termination." n671

The earlier law considered that if a breach of a condition subsequent was once waived, such waiver also waived all subsequent breaches. n672 Under this theory a condition once waived is wholly gone. The estate becomes absolute in the grantee and cannot be divested by any future breach. n673

A release of condition in part may operate as a waiver in whole, n674 but such a release does not have this effect in equity, where a specific performance of the unreleased part of the condition is sought. n675 In a Georgia case it is held that a waiver of a forfeiture resulting from the breach of a condition in favor of a named person and for a stated purpose is limited to the terms of the waiver and does not destroy the condition altogether. n676 So, the waiver of one breach of a continuing condition, such as a condition for the payment of rent or for making repairs, does not destroy the condition, but it may be enforced for a subsequent breach. n677 There is some conflict of opinion as to whether a waiver of past breaches of condition will operate as a waiver of all rights to future performance. In one case it was held that a suit for damages brought by the grantor for past conditions broken did not preclude the grantor from bringing an action to rescind the contract for subsequent breaches. n678 In another case, the court took a view directly to the contrary. n679

In some states a lapse of time alone will create a waiver of right of re-entry, n680 others require the full running of the statute of limitations. n681 Mere indulgence by the grantor is not a waiver. n682 Other cases invoke the equitable doctrine of laches where the grantor with knowledge of the breach has delayed. n683 The statute of limitations begins to run from the time of breach just as it does on a determinable fee. n684 But mere indulgence by the grantor or his silent acquiescence is not a waiver. n685 A condition may be waived by parol. n686

The majority rule is that a mere lapse of time short of the statute of limitation is not a waiver of the right to exercise a right of re-entry. n687 But by silence and by reliance therein by the particular tenant the exercise of the right may be prevented through estoppel. n688 Some of the courts have on the other hand started the statute of limitations to run on breach of the condition. n689 Others have given the creator a reasonable time even beyond the statute of limitations after breach to re-enter n690 and the doctrine of laches has been invoked even short of the statute of limitations. n691 And at least one court has refused forfeiture where money damages would suffice. n692

COMPUTER-ASSISTED RESEARCH

LEXIS: waive! w/15 breach or remedy! w/15 condition! subsequent or precedent

FOOTNOTES:

(n1)Footnote 624. *Buckles v. Smith, 156 P.2d 1019 (Okla. 1945).*

Waiver of breach of condition may he presumed after reasonable lapse of time. *Lawyers Trust Co. v. Houston, 359 S.W.2d 887 (Tex. 1962).*

Any slight acquiesence in a breach in a fee upon condition subsequent was treated as a waiver of forfeiture. *Chertkov v. Southland Corp., 371 A.2d 124 (Md. App. 1977).*

(n2)Footnote 625. *Terry v. Taylor, 220 S.W. 42 (Ark. 1920); Barnesville v. Stafford, 131 S.E. 487 (Ga. 1926); Tucker v. Immanuel Baptist Church, 237 P. 654 (Kan. 1925); Buckles v. Smith, 156 P.2d 1019 (Okla. 1945); Stewart v. Workman, 102 S.E. 474 (W. Va. 1920).*

(n3)Footnote 626. *Los Angeles & Ariz. Land Co. v. Marr, 200 P. 1051 (Cal. 1921).*

(n4)Footnote 627. *Bernstein v. Minney, 274 P. 614 (Cal. App. 1929)*(sale of other lots for business purposes waived restriction against use for business purposes); *Barnesville v. Stafford, 131 S.E. 487 (Ga. 1926).*

Repeated waiver of conditions requires notice of subsequent forfeiture. *Tancredi v. Garrett, 27 Cal. Rptr. 52 (1962); McBride v. Griffith, 185 N.E.2d 22 (Ind. App. 1962).*

(n5)Footnote 628. *Los Angeles & Ariz. Land Co. v. Marr, 200 P. 1051 (Cal. 1921).*

(n6)Footnote 629. *Merrifield v. Cobleigh, 4 Mass. (Cush.) 178 (1849); Robinson v. Cannon, 145 S.W.2d 146 (Mo. 1940); Cales v. Ford, 28 S.E.2d 429 (W. Va. 1943).*

(n7)Footnote 630. *Santa Monica v. Jones, 232 P.2d 55 (Cal. 1951); Sanford v. Sims, 66 S.E.2d 495 (Va. 1951), see* Note, Deeds -- Where Deed contains condition subsquent, right of re-entry accures at time of breach thereof and statute of limitations then commence running *38 Va. L. Rev. 266 (1952)* (statute of limitations commences to run on date of breach of condition subsequent).

(n8)Footnote 631. *Buckles v. Smith, 156 P.2d 1019 (Okla. 1945).*

(n9)Footnote 632. *Bain v. Parker, 90 S.W. 1000 (Ark. 1905); Brown v. Wrightman, 90 P. 467 (Cal. App. 1907); Jones v. Williams, 64 S.E. 1081 (Ga. 1909); Barnesville v. Stafford, 131 S.E. 487 (Ga. 1926); Turner v. Turner, 197 S.E. 771 (Ga. 1938); Sanitary Dist. of Chicago v. Chicago Title & Trust Co., 116 N.E. 161 (Ill. 1917); Carbon Block Coal Co. v. Murphy, 101 Ind. 115 (1884); Halvorsen v. Pacific County, 156 P.2d 907 (Wash. 1945).*

See the following cases: *Tucker v. Immanuel Baptist Church, 237 P. 654 (Kan. 1925); Francis v. Big Sandy Co., 188 S.W. 345 (Ky. 1916); Guild v. Richards, 16 Mass. (Gray) 309 (1860); Barrie v. Smith, 10 N.W. 168 (Mich. 1881); Chippewa Lab. Co. v. Tremper, 42 N.W. 532 (Mich. 1889); McCue v. Barrett, 109 N.W. 594 (Minn. 1906); O'Connor v. Saratoga Springs, 262 N.Y.S. 809 (1933); Huntley v. McBrayer, 90 S.E. 754 (N.C. 1916); Sanderson v. Dee, 168 P. 1001 (Okla. 1917); Sharon Iron Co. v. Erie, 41 Pa. 341 (1861); First Presbyterian Church v. Elliott, 43 S.E. 674 (S.C. 1903); Williams v. Box Church Baptist Church, 75 S.W.2d 134 (Tex. Civ. App. 1934).*

The waiver may be either express or implied from the circumstances. *Hannah v. Culpepper, 104 So. 751 (Ala. 1925); Sanderson v. Davis, 215 P. 603 (Okla. 1923).*

Possibility of reverter may be released by instrument under seal. *Sharpe v. North Carolina R. Co., 129 S.E. 826 (N.C. 1925).*

(n10)Footnote 633. *Kenner v. American Contract Co., 9 Ky. (Bush) 202 (1872); Barrie v. Smith, 10 N.W. 168 (Mich. 1881); Bredell v. Kerr, 147 S.W. 105 (Mo. 1912); Hammond v. Port Royal & A. R. Co., 15 S.C. 10 (1902); First Presbyterian Church v. Elliott, 43 S.E. 674 (S.C. 1903).*

(n11)Footnote 634. *Brown v. Wrightman, 90 P. 467 (Cal. App. 1907); Lehigh Coal & Nav. Co. v. Early, 29 A. 736 (Pa. 1894).*

(n12)Footnote 635. *Ludlow v. New York & H. R. Co., 12 N.Y. (Barb.) 440 (1852). See Jones v. Bramblett, 2 Ill. 276 (1836); Sharon Iron Co. v. Erie, 41 Pa. 341 (1861).*

(n13)Footnote 636. *American Dirigold Corp. v. Dirigold Metals Corp., 125 F.2d 446 (6th Cir. 1942); Baskett Lab. & Mfg. Co. v. Gravlee, 73 So. 291 (Ala. App. 1916); Sanitary Dist. of Chicago v. Chicago Title & Trust Co., 116 N.E. 161 (Ill. 1917); Frost v. Butler, 7 Me. 225 (1831); Andrews v. Senter, 32 Me. 394 (1851); Hubbard v. Hubbard, 97 Mass. 188 (1867); Bredell v. Kerr, 147 S.W. 105 (Mo. 1912); Spaulding v. Hallenbeck, 39 N.Y. (Barb.) 79 (1862); Maddox v. Adair, 66 S.W. 811 (Tex. Civ. App. 1901).*

(n14)Footnote 637. *Barnesville v. Stafford, 131 S.E. 487 (Ga. 1926); New York v. Coney Island Fire Dep't, 10 N.Y.S.2d 164 (1939). See also St. Joseph Lead Co. v. Fuhrmeister, 182 S.W.2d 273 (Mo. 1944).*

Where a grantor's delay in entering to enforce a forfeiture is not aggravated by any element of estoppel, a delay of less than the period of limitation will not, at law, bar his right of entry. *Hannah v. Culpepper, 104 So. 751 (Ala. 1925).*

A clause declaring that upon a breach of any or either of a number of restrictive provisions in the deed the title of the grantee should cease and revert to the grantor, but that a re-entry by reason of such breach or breaches, should not defeat or render invalid the lien of any mortgage or trust deed made in good faith for value as to the land conveyed and the improvements thereon is valid. *In re Bangle, 201 P. 968 (Cal. App. 1921).*

(n15)Footnote 638. *Chalker v. Chalker, 1 Conn. 79 (1814); Dougal v. Fryer, 3 Mo. 40 (1831); Hurley v. McCallister, 103 N.W. 644 (S.D. 1905).*

The acceptance of final payment for the land conveyed and the delivery of a deed to the grantee, with knowledge of a breach of the condition, constitutes a waiver and estops the grantor and those claiming under him from seeking to enforce any forfeiture of title by reason of such breach. *Los Angeles & Ariz. Land Co. v. Marr, 200 P. 1051 (Cal. 1921). See Plummer v. Worthington, 152 N.E. 133 (Ill. 1926).*

(n16)Footnote 639. *National Land Co. v. Perry, 23 Kan. 140 (1879); Shade v. Oldroyd, 18 P. 198 (Kan. 1888).*

(n17)Footnote 640. *Denham v. Walker, 21 S.E. 102 (Ga. 1893).*

(n18)Footnote 641. *Southern Pac. R. Co. v. Blaisdell, 164 P. 804 (Ga. App. 1917).*

(n19)Footnote 642. "The person to whom such support is due always has the right to elect whether he will waive or insist upon a partial or full failure, for a brief time, to perform such a condition, as putting an end to the contract, and his right to support. The failure to perform, which will defeat the vesting of the title, should be a failure in substance, rather than of the letter of the contract. Otherwise, after years of faithful performance, one might lose or be divested of his estate by a technical or partial failure. Where both parties are living on the estate, and in some sense in possession, so that a re-entry is not required to terminate the conditional estate, it is more imperative that the grantor should by some unmistakable act indicate his intention to put an end to the contract for the vesting of the estate upon a failure to perform the condition. Exacting, or acquiescing thereafter in the performance of the condition is evidence for the jury, from which they would be warranted in inferring and finding that he did not insist upon ending of the contract for such non-performance, but that he still treated it as subsisting." *Norton v. Perkins, 31 A. 148 (Vt. 1894)Dunklee v. Hooper, 37 A. 225* (Vt.).

Where the grantor received the support provided for in the deed for a number of years after a breach of condition for such support, it was held this amounted to a recognition of the grantee's title. *Robinson v. Ingram, 35 S.E. 612* (N.C.).

(n20)Footnote 643. *Ralston v. Hatfield, 143 N.E. 887 (Ind. App. 1924).*

(n21)Footnote 644. *Lowrey v. Hawaii, 215 U.S. 554 (1910); Adams v. Ore Knob Copper Co., 7 F. 634 (C.C.N.C. 1880); Barnesville v. Stafford, 131 S.E. 487 (Ga. 1926)*(parol assent also stated not to constitute waiver of a breach of condition); *Sherman v. Jefferson, 113 N.E. 624 (Ill. 1916); Lindsey v. Lindsey, 45 Ind. 552 (1974); Carbon Block Coal Co. v. Murphy, 101 Ind. 115 (1884); Frost v. Butler, 7 Me. 225 (1831); Rowell v. Jewett, 69 Me. 293 (1879); Gray v. Blanchard, 8 Pick. 284 (Mass. 1829); McCue v. Barrett, 109 N.W. 594 (Minn. 1906); Rose v. Hawley, 23 N.E. 904 (N.Y. 1890); Ross v. Sanderson, 162 P. 709 (Okla. 1917); Clark v. Martin, 49 Pa. 289 (1865); Maginnis v. Knickerbocker Ice Co., 88 N.W. 300 (Wis. 1901).*

See and compare Hannah v. Culpepper, 104 So. 751 (Ala. 1925).

(n22)Footnote 645. *Plumb v. Tubbs, 41 N.Y. 442 (1869).*

(n23)Footnote 646. *Maginnis v. Knickerbocker Ice Co., 88 N.W. 300 (Wis. 1901).*

(n24)Footnote 647. *Collins Mfg. Co. v. Marcy, 25 Conn. 242 (1856).*

(n25)Footnote 648. *Id.*; *Lehigh Coal & Nav. Co. v. Early, 29 A. 736 (Pa. 1894).*

(n26)Footnote 649. *Collins Mfg. Co. v. Marcy, 25 Conn. 242 (1856).*

(n27)Footnote 650. *Kenner v. American Contr'g Co., 9 Ky. (Bush) 202 (1872); Hooper v. Cummings, 45 Me. 359 (1858); Barrie v. Smith, 10 N.W. 168 (Mich. 1881); Ludlow v. New York & H. R. Co., 12 N.Y. (Barb.) 440 (1852); Lehigh Coal & Nav. Co. v. Early, 29 A. 736 (Pa. 1894).*

(n28)Footnote 651. *In re Estate of Wackstetter, 216 A.2d 66 (Pa. 1966).*

(n29)Footnote 652. *Brown v. Wrightman, 90 P. 467 (Cal. App. 1907); Wedum-Aldahl Co. v. Miller, 64 P.2d 762 (Cal. 1937); Townsend v. Allen, 250 P.2d 292 (Cal. 1952); Sanderson v. Davis, 215 P. 603 (Okla. 1923).*

To same effect, *see Hannah v. Culpepper, 104 So. 751 (Ala. 1925); Avery v. Consumers Power Co., 253 N.W. 189 (Ala. 1934); O'Connor v. Saratoga Springs, 262 N.Y.S. 809 (1933); Williams v. Box Church Baptist Church, 75 S.W.2d 134 (Tex. Civ. App. 1934).*

(n30)Footnote 653. *Brooklyn Life Ins. Co. v. Bledsoe, 52 Ala. 538 (1875); Borst v. Simpson, 7 So. 814 (Ala. 1890).*

(n31)Footnote 654. *Jones v. Williams, 64 S.E. 1081 (Ga. 1909).*

(n32)Footnote 655. *Hubbard v. Hubbard, 97 Mass. 188 (1867).*

(n33)Footnote 656. *Id.*

(n34)Footnote 657. *Spaulding v. Hallenbeck, 39 N.Y. (Barb.) 79 (1862); Gleghorn v. Smith, 62 S.W. 1096 (Tex. Civ. App. 1901).*

(n35)Footnote 658. *Hale v. Elkhorn Coal Corp., 268 S.W. 304 (Ky. 1925); First Christian Church v. Spinks, 260 S.W. 1073 (Tex. Civ. App. 1924).*

(n36)Footnote 659. *Stauffer v. Kessler, 130 N.E. 651 (Ind. App. 1921); Hale v. Elkhorn Coal Corp., 268 S.W. 304 (Ky. 1925)*(deed which gave rise to right to declare a forfeiture recognized as valid for 16 years); *First Christian Church v. Spinks, 260 S.W. 1073 (Tex. Civ. App. 1924). See Hannah v. Culpepper, 104 So. 751 (Ala. 1925); Barnesville v. Stafford, 131 S.E. 487 (Ga. 1926).*

(n37)Footnote 660. *Hurto v. Grant, 57 N.W. 899 (Iowa 1894); Kenner v. American Contract Co., 9 Ky. (Bush) 202 (1872); Andrews v. Senter, 32 Me. 394 (1851); Hooper v. Cummings, 45 Me. 359 (1858); Barrie v. Smith, 10 N.W. 168* (Mich. (1881); *Willard v. Henry, 2 N.H. 120 (1819); Ludlow v. New York & H. R. Co., 12 N.Y. (Barb.) 440 (N.Y. 1852); Huntington v. Titus, 64 N.Y.S. 58 (A.D. 1900); Duryee v. New York, 96 N.Y. 477 (1884); Lehigh Coal & Nav. Co. v. Early, 29 A. 736 (Pa. 1894); Berryman v. Schumacher, 3 S.W. 46 (Tex. 1887).*

(n38)Footnote 661. *Kampman v. Kampman, 135 S.W. 905 (Ark. 1911); Merrifield v. Cobleigh, 4 Mass. (Cush.) 178 (1849); Plumb v. Tubbs, 41 N.Y. 442 (1869); Sanderson v. Dee, 168 P. 1001 (Okla. 1917); Hammond v. Port Royal & A. R. Co., 15 S.C. 10 (1881).*

(n39)Footnote 662. *Scovill v. McMahon, 26 A. 479 (Conn. 1892); Hooper v. Cummings, 45 Me. 359 (1858).*

(n40)Footnote 663. *Sanitary Dist. of Chicago v. Chicago Title & Trust Co., 116 N.E. 161 (Ill. 1917). Cf., Butterfield v. Lane, 95 A. 233 (Me. 1915).*

(n41)Footnote 664. *Ragsdale v. Vicksburg & M. R. Co., 62 Miss. 480 (1885).*

(n42)Footnote 665. *Sharon Iron Co. v. Erie, 41 Pa. 341 (1862).*

(n43)Footnote 666. *Western Motor Rebuilders, Inc. v. Carlson, 335 P.2d 272 (Colo. 1950).*

(n44)Footnote 667. *Schulman v. Ellenville Elec. Co., 273 N.Y.S. 530 (1934), aff'd, 289 N.Y.S. 816 (1936).*

(n45)Footnote 668. *Rowell v. Jewett, 69 Me. 293 (1879); Gray v. Blanchard, 8 Mass. (Pick.) 284 (1829). Contra, Jones v. Bramblett, 2 Ill. 276 (1836); Boone v. Tipton, 15 Ind. 270 (1860).*

(n46)Footnote 669. *Hubbard v. Hubbard, 97 Mass. 188 (1867).*

(n47)Footnote 670. *Tanner v. Van Bibber, 2 Ky. (Duv.) 550 (1866).*

The heirs of the grantor may waive or release a condition subsequent. *Calvary Presbyterian Church v. Putnam, 221 N.Y.S. 692, aff'd, 224 N.Y.S. 651 (1927), aff'd, 162 N.E. 601 (N.Y. 1928). See also Barnesville v. Stafford, 131 S.E. 487 (Ga. 1926)*(in this case neither the grantor nor his executors were considered as having waived the condition).

(n48)Footnote 671. Restatement, Property, § 57, Comment c.

(n49)Footnote 672. *Buckles v. Smith, 156 P.2d 1019 (Okla. 1945).*

(n50)Footnote 673. *Wilkes v. Groover, 75 S.E. 353 (Ga. 1912); Sanitary Dist. of Chicago v. Chicago Title & Trust Co., 116 N.E. 161 (Ill. 1917); Merrifield v. Cobleigh, 4 Mass. (Cush.) 178 (1849); Guild v. Richards, 16 Mass. (Gray) 309 (1860); Dyer v. Siano, 11 N.E.2d 451 (Mass. 1937); Barrie v. Smith, 10 N.W. 168 (Mich. 1881); McCue v. Barrett, 109 N.W. 594 (Minn. 1906); Ludlow v. New York & H. R. Co., 12 N.Y. (Barb.) 440 (1852); Williams v. Dakin, 22 N.Y. (Wend.) 201 (1839); Hebrew Orphan Asylum v. New York, 270 N.Y.S. 310 (1934); Schulman v. Ellenville Elec. Co., 273 N.Y.S. 530 (1934), aff'd, 288 N.Y.S. 11 (1936); Dickey v. M'Cullough, 2 Pa. (Watts & Serg.) 88 (1841); Sharon Iron Co. v. Erie, 41 Pa. 341 (1862); Hammond v. Port Royal & A. R. Co., 15 S.C. 10 (1881);* Dumpor's Case, 4 Coke 119b, 1 *Smiths' Lead Cas. 95.*

See Restatement, Property, § 57, Comment c. And *See* Restatement, Property, § 49, Comment d, on what amounts to waste after breach of condition is waived.

"The right of re-entry is at the election of him who has the right to enforce it, and, if he once dispense with it, he cannot afterwards enter for the subsequent breach of the condition." *Board of Educ. v. Baker, 134 S.W. 863 (Tenn. 1911).*

(n51)Footnote 674. *Dakin v. Williams, 17 N.Y. (Wend.) 447 (1837).*

(n52)Footnote 675. *Clark v. Martin, 49 Pa. 289 (1865).*

(n53)Footnote 676. *Moss v. Chappell, 54 S.E. 968 (Ga. 1906).*

(n54)Footnote 677. *McKildoe v. Darracott, 13 Va. (Gratt.) 278 (1856);* 1 *Smith's Lead Cas. 95, 98,* note.

(n55)Footnote 678. *Gall v. Gall, 105 N.W. 953 (Wis. 1905).*

(n56)Footnote 679. *McWhorter v. Hetzell, 24 N.E. 743 (Ind. 1890).*

(n57)Footnote 680. *Tough v. Netsch, 142 A. 702 (N.H. 1928).*

(n58)Footnote 681. *Barnesville v. Stafford, 131 S.E. 487 (Ga. 1926); Sherman v. Jefferson, 113 N.E. 624 (Ill. 1916); Carbon Block Coal Co. v. Murphy, 101 Ind. 115 (1885); Gray v. Blanchard, 8 Mass. (Pick.) 284 (1829); Union College v. New York, 73 N.Y.S. 51 (A.D. 1901), aff'd, 65 N.E. 853 (1903); Maginnis v. Knickerbocker Ice Co., 88 N.W. 300 (Wis. 1901).*

(n59)Footnote 682. *Lowrey v. Hawaii, 215 U.S. 554 (1910).*

(n60)Footnote 683. *Drace v. Klinedinst, 118 A. 907 (Pa. 1922).*

(n61)Footnote 684. *Hannah v. Culpepper, 104 So. 751 (Ala. 1925); Jeffries v. State for Use of Woodruff County, 226 S.W.2d 810 (Ark. 1950); Sanford v. Sims, 66 S.E.2d 495 (Va. 1951).*

(n62)Footnote 685. *Lake Bluff v. Dalitsch, 114 N.E.2d 654 (Ill. 1953).*

(n63)Footnote 686. *Stewart v. Colvin, 214 P.2d 229 (Okla. 1949).*

(n64)Footnote 687. *Barnesville v. Stafford, 131 S.E. 487 (Ga. 1926); Sherman v. Jefferson, 113 N.E. 624 (Ill. 1916); Carbon Block Coal Co. v. Murphy, 101 Ind. 115 (1885); Gray v. Blanchard, 8 Mass. (Pick.) 284 (1829); Union College v. New York, 73 N.Y.S. 51 (A.D. 1901), aff'd, 65 N.E. 653 (1903); Maginnis v. Knickerbocker Ice Co., 88 N.W. 300 (Wis. 1901).*

Contra, Tough v. Netsch, 142 A. 702 (N.H. 1928); First Christian Church v. Spinks, 260 S.W. 1073 (Tex. Civ. App.), *rev'd, 273 S.W. 815 (1925).*

(n65)Footnote 688. *Bernstein v. Minney, 274 P. 614 (Cal. App. 1929)*(making improvements created estoppel)); *Hale v. Elkhorn Coal Corp., 268 S.W. 304 (Ky. 1925); Weber v. Ford Motor Co., 222 N.W. 198 (Mich. 1928); Bredell v. Kerr, 147 S.W. 105 (Mo. 1912); Cook v. St. Paul's Church, 67 N.Y. 594 (1876).*

(n66)Footnote 689. *Hannah v. Culpepper, 104 So. 751 (Ala. 1925); Jeffries v. State for Use of Woodruff County, 226 S.W.2d 810 (Ark. 1950); Sanford v. Sims, 66 S.E.2d 495 (Va. 1951).*

(n67)Footnote 690. *Terry v. Taylor, 220 S.W. 42 (Ark. 1920); Wedum-Aldahl Co. v. Miller, 64 P.2d 762 (Cal. App. 1937); Scovill v. McMahon, 26 A. 479 (Conn. 1892); Robinson v. Cannon, 145 S.W.2d 146 (Mo. 1940).*

(n68)Footnote 691. *Hale v. Elkhorn Coal Corp., 268 S.W. 304 (Ky. 1925); McCue v. Barrett, 109 N.W. 594 (Minn. 1906); Lehigh Coal & Nav. Co. v. Early, 29 A. 736 (Pa. 1894); Drace v. Klinedinst, 118 A. 907 (Pa. 1922). But see Barnesville v. Stafford, 131 S.E. 487 (Ga. 1926).*

(n69)Footnote 692. *Maginnis v. Knickerbocker Ice Co., 88 N.W. 300 (Wis. 1901).*

* This chapter is based in part on Ch. 30, George W. Thompson, Commentaries on the Modern Law of Real Property (John S. Grimes ed. 1979), which made a significant contribution toward preserving the American common law governing defeasible fees.

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CHAPTER 20 DEFEASIBLE FEES *

2-20 Thompson on Real Property, Thomas Editions § 20.19

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§ 20.19 Breach of Personal Conditions.

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A condition affecting the realty survives the maker's death, one that is personal to him does not. A condition that is personal to the grantee, as where it is in terms confined to him without mentioning his heirs or assigns, must be performed in its lifetime. Upon his death the condition is discharged, and the estate becomes absolute in his heirs or devisees. n693 A provision that the grantee is to do the thing, which is the subject of the condition, "forever," does not necessarily make the performance of it binding upon his heirs. n694 On the other hand, a condition is not personal merely because the grantee bears a personal relation to the grantor, as where the condition is for the support of a parent or other near relative, for such a condition may be performed by another, unless the personal service of the grantee is expressly stipulated for. n695 A condition for the support of the grantor has, however, sometimes been considered a personal condition. n696 Where an aged parent deeds property to his child on condition that the child will support him for life, there is a presumption that the child must furnish the support in person, n697 although it has been held that the agreement may be assigned to another. n698 A breach by the grantee of a collateral agreement to support the grantor, made in consideration of the conveyance, has been held not to divest the grantee's title. n699

Where the condition applies to the property itself and not in terms to the grantee, the condition is not personal, though it does not include the heirs and assigns of the grantee. Thus, in a grant of land, an inserted condition that the property shall not be used for the sale of intoxicating liquors, may be enforced by forfeiture for a breach of the condition against a subsequent purchaser of the land, although the condition does not in terms include the heirs and assigns of the grantee. The condition applies to the use of the property, and runs with the land. n700

A deed granting a right-of-way and binding the grantee to construct, on the land conveyed, an undergrade crossing of its railroad for livestock for the use and convenience of the grantor creates a covenant running with the land notwithstanding the failure of the instrument granting the right to the undergrade crossing to refer to the heirs of the grantor. n701 So, where the condition was that the land should be used for the purpose of a street only, the condition was held to apply to the purchaser from the grantee; n702 and where the condition was to build a church within a reasonable time, it was held that the condition was annexed to the estate, and would follow it after the death of the grantee, into the hands of any person to whom it might come. n703

A condition to "erect upon the said premises a cotton factory within two years" is a condition annexed to the estate conveyed, and not a personal covenant of the grantee. n704 When the condition applies to the property, and is not personal to the grantee, it may be performed by a subsequent purchaser from the grantee or by anyone interested in the land or in the performance of the condition. n705 Where the condition is, by a natural interpretation of the words used, attached to the estate, heirs and assigns will be bound by it although not mentioned, n706 but heirs and assigns were held not bound to perform a condition subsequent to build a fence unless they were expressly mentioned. n707

COMPUTED-ASSISTED RESEARCH

LEXIS: breach! w/15 personal w/5 condition! subsequent or precedent

FOOTNOTES:
(n1)Footnote 693. *Emerson v. Simpson, 43 N.H. 475 (1862); Page v. Palmer, 48 N.H. 385 (1869).*

(n2)Footnote 694. *Emerson v. Simpson, 43 N.H. 475 (1862).*

(n3)Footnote 695. *Wilson v. Wilson, 38 Me. 18 (1854); Henry v. Tupper, 29 Vt. 358 (1857); Joslyn v. Parlin, 54 Vt. 670 (1881).*

(n4)Footnote 696. *Barker v. Cobb, 36 N.H. 344 (1858); Rollins v. Riley, 44 N.H. 9 (1862).*

(n5)Footnote 697. *Thomas v. Thomas, 33 P. 565 (Or. 1893); Glocke v. Glocke, 89 N.W. 118 (Wis. 1902).*

(n6)Footnote 698. *Hurley v. McCallister, 103 N.W. 644 (S.D. 1905).*

(n7)Footnote 699. *Hanover Fire Ins. Co. v. Nash, 67 S.W.2d 452 (Tex. Civ. App. 1934).*

(n8)Footnote 700. *O'Brien v. Wetherell, 14 Kan. 616 (1875); Jetter v. Lyon, 97 N.W. 596 (Neb. 1900); Odessa Imp. & Irrig. Co. v. Dawson, 24 S.W. 576 (Tex. Civ. App. 1893); Verplanck v. Wright, 23 N.Y. (Wend.) 506 (1840).*

(n9)Footnote 701. *Stoutimore v. Quincy, O. & K. C. R. Co., 256 S.W. 121 (Mo. App. 1923).*

The right to enforce building restrictions by a landowner depends upon the existence of privity of estate or contract between himself and the defaulting owner. *Joyce v. Krupp, 257 P. 124 (Cal. App. 1927).*

(n10)Footnote 702. *Carpenter v. Graber, 1 S.W. 178 (Tex. 1886). See Collins Mfg. Co. v. Marcy, 25 Conn. 242 (1856)*(where the condition was enforced against a lessee of the grantee, although the point was not directly raised in the case); *Pugh v. Mays, 60 Tex. 191 (1883); Berryman v. Schumacher, 3 S.W. 46 (Tex. 1887); Eddy v. Hinnant, 18 S.E. 562 (Tex. 1891)*(as to liability of the purchaser of a railroad under a condition in a deed to the original company to furnish the grantor a free passage over the railroad at all times).

(n11)Footnote 703. *Upington v. Corrigan, 23 N.Y.S. 451 (1893). See Ashland v. Greiner, 50 N.E. 99 (Ohio 1898).*

(n12)Footnote 704. *Langley v. Chapin, 134 Mass. 82 (1883).*

(n13)Footnote 705. *Vermont v. Society for Propagation of the Gospel, 28 F. Cas. 545,* 2 Paine 545 (C.C.D. Vt. 1827); *Louisville & N. R. Co. v. Covington, 2 Bush 526 (Ky. 1866).*

(n14)Footnote 706. *Langley v. Chapin, 134 Mass. 82 (1883).*

(n15)Footnote 707. *Page v. Palmer, 48 N.H. 385 (1869).*

In a deed of a right-of-way to a railroad company, a condition that the grantor and his family shall have free passage over the road "so long as the land and appurtenances herein before described shall be used as a railroad, or for railroad purposes, under the charter of said corporation," was but a limitation of the grant, and did not perpetuate the right to the descendants of the grantor. By the charter of the company the state reserved the right at any time within twenty years to purchase its property and franchises.

> The words 'under the charter of the corporation' were therefore necessary to limit the agreement to carry to the time the corporation might have the power to use the land for railroad purposes. So, too, the words 'used for railroad purposes' were a necessary and proper limitation of the contract to carry. If the location of the road were changed, and the land conveyed by the grantor should revert to him, the parties would naturally provide that the contract to carry should be at an end. Other contingencies might also happen. The charter of the corporation could be repealed at the pleasure of the legislature; its franchise might be forfeited for misuser or nonuser, or it might be surrendered. A court did not extend the word 'family' so as to include the descendants of the grantor to the remotest generation.

Dodge v. Boston & P. R. Co., 28 N.E. 243 (Mass. 1891), per Lathrop, J.

Where a railroad company entered into an agreement with a landowner whereby he conveyed a right-of-way to the company and, in part consideration therefor, the railroad company agreed to issue an annual pass to the landowner and his wife for life, if the railroad was engaged in interstate commerce, the contract for the pass was invalid under the United States statutes and, if the railroad was engaged in intrastate commerce, the issuance of the pass was prohibited by the state law and therefore the agreement was invalid in either event. *Payne v. Elliott, 133 N.E. 751 (Ind. App. 1922).*

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CHAPTER 20 DEFEASIBLE FEES *

2-20 Thompson on Real Property, Thomas Editions § 20.20

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§ 20.20 Time for Performance of Condition.

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Where there is no express deadline for the performance of the condition, the rule of reasonableness is applied. A condition must be performed within a reasonable time when no time is specified within which it is to be performed. n708 Thus a condition to pay a mortgage upon the property conveyed must be performed within a reasonable time after the mortgage becomes due. A condition to pay marriage portions to the grantor's daughters must be performed within a reasonable time after receiving notice of their marriages. n709 Where there was a neglect of performance for a period of twenty-five years, and no reasonable excuse was shown for such neglect, the court held that performance was not within a reasonable time. n710 A condition which expressly provides for performance within a reasonable time is construed in the same manner as a condition which implies a performance within a reasonable time. Where the condition was that the grantee should within a reasonable time build a church upon the land, the court took judicial notice of the fact that an unexplained delay of twenty-nine years within which to commence to build a church is unreasonable. n711 A condition to be performed at the convenience of the grantee should be performed within a reasonable time. n712 What constitutes a reasonable time within which to perform acts contemplated by a conveyance depends upon the subject matter, the nature of the act to be performed, and the situation of the parties. n713

If land is granted upon a condition for the performance of which no time is limited, either in express terms or from the nature of the condition itself, it is a general rule that the grantee has his lifetime for performance. n714 In such case the time for performance is held to be a matter for the grantee to determine, n715 but if it appears that a prompt performance was contemplated by the parties or is necessary to give the grantor the benefits he was reasonably entitled to receive from the provision, the grantee has only a reasonable time for its performance. n716 If performance of a condition required by an instrument is by the terms thereof to extend over a period of time, the condition is treated as a condition subsequent. n717 Where no time for the performance of a condition subsequent is mentioned, the grantee is entitled to a reasonable time for the performance of the condition, according to the nature of the condition, and the question of what is a reasonable time is one for the jury to determine. n718 What constitutes a reasonable time within which to perform the acts contemplated by a conveyance depends upon the subject matter, the nature of the act to be performed, and the situation of the parties. n719

Where a specified time is set for performance of a condition precedent or subsequent to when the problem arises, as it does in contracts, n720 as to whether or not time is of the essence. If time is of the essence then if the time for the performance of the condition is strictly limited, forfeiture is incurred by non-performance within that time. In all cases where a time is set for the doing or performance of the matter contained in the condition, be it to pay money, make an estate or the like, it must be done at the time agreed upon and set down in the condition. In cases where it is to be done before a certain time, it must be done before that time or else the condition is broken. n721 If a time within which a condition must be performed is specified, performance may take place at any time within the period mentioned. n722 If the condition be that a building shall be erected on the granted land within five years, for municipal purposes, a failure to erect the building within the time named is a breach of the condition, for which a forfeiture may be enforced. n723 A condition that a courthouse shall be erected upon the granted land, and maintained for a certain number of years, is broken by the removal of the county seat to another village within that time. The condition was not satisfied by keeping and maintaining the building upon the premises after the county seat had been removed. n724

Where a grantor reserved a life estate in his deed which provided that the grantee's failure to pay all taxes, assessments or liens against the property would cause the title to revert immediately to the grantor in fee simple, it was held that time was of the essence of the contract and a failure during the grantor's life to pay municipal taxes on the realty when due constituted such a breach of the condition as to entitle the grantor to reclaim title to the remainder interest conveyed. n725

A condition that a railroad company shall construct its road or use the granted land for certain purposes within a limited time will not be enforced by forfeiture unless there is a clear and absolute breach of the condition. If the condition is indefinite in regard to the use of the land, the court will regard the use and occupation of the land by the railroad company for some of the purposes demanded by the terms of the deed, though slight, as a compliance with the condition. n726

Where performance within the time specified is prevented by circumstances over which the grantee has no control, this may constitute a valid excuse for non-performance. n727 Thus, a railroad company will be relieved from a forfeiture on account of a breach of condition to complete its road within the time specified where it appears that the road was so completed within a few months after the time expired and that the delay was occasioned in procuring materials and not by its negligence. n728 Where no time of performance is mentioned, and the railroad company has taken possession of the land in good faith, the grantor cannot declare a forfeiture and recover the land from the company without previous notice of his intention to claim a forfeiture specifying the particular breach relied upon and giving it time to remedy such breach. n729 Where the period of time within which the company is to construct, equip and operate the road is specified, this condition is held to be for the sole benefit of the grantor, and he may, at his election, declare a forfeiture for a failure to comply with such condition. n730 The grantee has a reasonable time for performance of the condition. n731

A condition to save the grantor harmless from the payment of a certain debt is not broken until the grantor has been damnified by being compelled to pay it. n732 Where the condition is to save the grantor harmless from the payment of a debt, and a forfeiture has accrued by a breach of the condition, equity will relieve from the forfeiture on payment of the debt, interest and costs, unless the complainant has debarred himself by his own conduct. n733 A mortgagor who voluntarily pays the mortgage debt cannot, prior to a foreclosure and determination of deficiency, have judgment for breach of condition against his grantee who assumed and agreed to pay the mortgage debt. n734

In most states mere lapse of time will not waive forfeiture. n735 The holder of the right of re-entry by remaining silent may, however, create an estoppel to re-enter where the fee holder relies on the silence to change his position, n736 and the right to re-enter may be barred by the statute of limitations after breach, n737 or by laches. n738

COMPUTER-ASSISTED RESEARCH

LEXIS: reasonable! w/5 time! w/15 perform! w/15 condition! subsequent or precedent

FOOTNOTES:
(n1)Footnote 708. Sheppard-Touchstone, Common Assurance, 134; *Union Stockyards Co. v. Nashville Packing Co., 140 F. 701 (6th Cir. 1905); McKee v. Club-View Heights, 162 So. 671 (Ala. 1935); Fisk v. Chandler, 30 Me. 79 (1849); Rowell v. Jewett, 69 Me. 293 (1879), 71 Me. 408 (1880); Hayden v. Stoughton, 5 Mass. (Pick.) 528 (1827); Allen v. Howe, 105 Mass. 241 (1870); Soderberg v. Crockett, 30 P. 826 (Nev. 1883); Reed v. Hatch, 55 N.H. 327 (1875); Emery v. Dana, 84 A. 976 (N.H. 1912); Stuyvesant v. New York, 11 N.Y. (Paige) 414 (1845); Norton v. Valentine, 135 N.Y.S. 1084 (A.D. 1912); Lawrey v. Hanna, 115 P. 975 (Or. 1911); Hamilton v. Elliott, 5 Pa. (Serg. & Rawle) 375 (1819); Dickey v. McCullough, 2 Pa. (Watts & Serg.) 88 (1841); Citizens Water Co. v. McGinley, 175 S.W. 457 (Tex. Civ. App. 1915).*

And *see Klapka v. Shrauger, 281 N.W. 612 (Neb. 1938).*

Forfeiture must be exercised within a reasonable time. *Field v. Shaw, 535 S.W.2d 3 (Tex. Civ. App. 1976).*

(n2)Footnote 709. *Rowell v. Jewett, 69 Me. 293 (1879); Ross v. Tremain, 2 Mass. (Metc.) 495 (1841).*

(n3)Footnote 710. *Union College v. New York, 73 N.Y.S. 51 (A.D. 1901).*

(n4)Footnote 711. *Upington v. Corrigan, 23 N.Y.S. 451 (1893).*

(n5)Footnote 712. *Adams v. Ore Knob Copper Co. 7 F. 634 (W.D.N.C. 1880).*

(n6)Footnote 713. *McKee v. Club-View Heights, 162 So. 671 (Ala. 1935).*

(n7)Footnote 714. *Finlay v. King's Lessee, 28 U.S. (3 Pet.) 346 (1830),* per Marshall, C.J.; *Hamilton v. Elliott, 5 Pa. (Serg. & Rawles) 375 (1819).*

(n8)Footnote 715. *Brown v. State, 5 Colo. 496 (1881).*

(n9)Footnote 716. *Carpender v. New Brunswick, 39 A.2d 40 (N.J. Eq. 1944); Hamilton v. Elliott, 5 Pa. (Serg. & Rawles) 375 (1819); Salt Lake City v. State, 125 P.2d 790 (Utah 1942).*

In Massachusetts it is provided by statute that when the title or use of real estate is affected by conditions or restrictions unlimited as to time, such conditions or restrictions are construed as being limited to the term of 30 years from the date of the deed or other instrument, or the date of the probating of the will creating such conditions or restrictions, except only in cases of gifts or devises for public, charitable, or religious purposes. This act does not apply to existing conditions or restrictions, or to such as may be contained in a deed, gift, or grant of the Commonwealth, nor does it operate in any case to defeat restrictions for a term of years certain. Mass. Gen. Laws 1932, ch. 184, § 23.

(n10)Footnote 717. *Lane v. Lane, 120 S.W.2d 993 (Tenn. App. 1938).*

(n11)Footnote 718. *Bouvier v. Baltimore & N. Y. R. Co., 47 A. 772 (N.J. 1900).*

(n12)Footnote 719. *McKee v. Club-View Heights, 162 So. 671 (Ala. 1935).*

(n13)Footnote 720. *See* Williston on Contracts.

(n14)Footnote 721. Sheppard-Touchstone, Common Assurance, 134.

(n15)Footnote 722. *Nye-Schneider-Fowler Grain Co. v. Hopkins, 155 N.W. 1097 (Neb. 1916); Thompson v. Lyon, 20 S.E. 812 (W. Va. 1894).*

(n16)Footnote 723. *Clarke v. Brookfield, 81 Mo. 503 (1884).*

(n17)Footnote 724. *Pepin Co. v. Prindle, 21 N.W. 254 (Wis. 1884).*

Where a deed to a city provided in a clause before the granting clause that the city agreed to accept the premises for a park for the exclusive use and benefit of its white citizens, and to put the park in a reasonably good condition for such use, and to keep it so, and that, "when said park is neglected for a longer time than twelve months, or ceases to be used as a park," said land "reverts to the" grantor, "or his estate, or his heirs," and the habendum clause contained a provision that the city is to hold the "premises with the conditions named, "an estate upon a condition subsequent was held created, upon the breach of which the land reverted to the grantor or his heirs. *Barnesville v. Stafford, 131 S.E. 487 (Ga. 1926).*

(n18)Footnote 725. *Evans v. Brown, 27 S.E.2d 300 (Ga. 1943).*

(n19)Footnote 726. *Chute v. Washburn, 46 N.W. 555 (Minn. 1890).*

So, where land was conveyed to a railroad company "for the erection and maintenance thereon of freight-houses, ... sidetracks, turnouts, switches, and buildings, and for such other general railroad purposes as may be necessary and expedient," and it appears that a freight-house was built, which was afterwards sold to the grantor, and the land has been continually used for railroad purposes, there was no breach of the condition. *Noyes v. St. Louis, A. & T.H.R. Co., 21 N.E. 487 (Ill. 1889).*

Where a conveyance to a railroad company of a right-of-way through the grantor's land was made in consideration that the company should construct its road upon such land, and on condition that if it did not so construct its road the conveyance should be void, though it did not construct the road through this land for more than thirteen years, but during this time it was constructing its road over other parts of its chartered route, it was held that the grantor could not declare a forfeiture after the road was completed. *Yancey v. Savannah & W.R. Co., 13 So. 311 (Ala. 1893). See Knight v. Alabama Midland R. Co., 13 So. 260 (Ala. 1893).*

A conveyance was made to a railroad corporation of land "to be used by it for railroad purposes, upon condition that, "if work is not commenced on said road in two years, then said property is to revert to" the grantor. The name of the grantee was at the time of the delivery of the deed borne by a railway company formed by the consolidation of three different companies, and also that previously borne by one of the companies entering into such consolidation. The line of the consolidated company extended from a point in North Carolina to Atlanta in the state of Georgia. It was held that the construction and operating of a portion of its line of railway in the state of North Carolina, within the time specified in the deed, was sufficient to prevent a reversion to the grantor. *Lester v. Georgia, C. & N.R. Co., 17 S.E. 113 (Ga. 1893).*

(n20)Footnote 727. *Vicksburg & M. R. Co. v. Ragsdale, 54 Miss. 200 (1876).*

(n21)Footnote 728. *Springfield & N.E. Trac. Co. v. Warrick, 94 N.E. 933 (Ill. 1911).*

(n22)Footnote 729. *Treat v. Detroit United R. Co., 122 N.W. 93 (Mich. 1909).*

(n23)Footnote 730. *Polk v. Givens, 90 N.E. 19 (Ind. App. 1909).*

(n24)Footnote 731. *Nearing v. Bridgeport, 75 A.2d 505 (Conn. 1950); Board of Supvrs. v. Newell, 56 So. 2d 689 (Miss. 1952).*

(n25)Footnote 732. *Sanborn v. Woodman, 5 Mass. (Cush.) 36 (1849); Michigan State Bank v. Hastings, 1 Doug. 225 (Mich. 1844); Michigan State Bank v. Hammond, 1 Doug. 527 (Mich. 1845).*

(n26)Footnote 733. *Dodsworth v. Dodsworth, 98 N.E. 279 (Ill. 1912).*

(n27)Footnote 734. *Lewis v. Hunt, 24 P.2d 557 (Cal. App. 1933).*

(n28)Footnote 735. *Barnesville v. Stafford, 131 S.E. 487 (Ga. 1926); Sherman v. Jefferson, 113 N.E. 624 (Ill. 1916); Carbon Block Coal Co. v. Murphy, 101 Ind. 115 (1884); Gray v. Blanchard, 8 Mass. (Pick.) 284 (1829); Union College v. New York, 73 N.Y.S. 51 (A.D. 1901); Maginnis v. Knickerbocker Ice Co., 88 N.W. 300 (Wis. 1901).*

Contra, lapse of time waives. *Tough v. Netsch, 142 A. 702 (N.H. 1928).*

Waiver by failure to re-enter. *Wedum-Aldahl Co. v. Miller, 64 P.2d 762 (Cal. App. 1937); Scovill v. McMahon, 26 A. 479 (Conn. 1892); Robinson v. Cannon, 145 S.W.2d 146 (Mo. 1940).*

(n29)Footnote 736. *Hale v. Elkhorn Coal Corp., 268 S.W. 304 (Ky. 1925); Weber v. Ford Motor Co., 222 N.W. 198 (Mich. 1928); Bredell v. Kerr, 147 S.W. 105 (Mo. 1912); Cook v. St. Paul's Church, 67 N.Y. 594 (1876).*

(n30)Footnote 737. *Hannah v. Culpepper, 104 So. 751 (Ala. 1925); Jeffries v. State for Use of Woodruff County, 226 S.W.2d 810 (Ark. 1950); Sanford v. Sims, 66 S.E.2d 495 (Va. 1951).*

(n31)Footnote 738. *Hale v. Elkhorn Coal Corp., 268 S.W. 304 (Ky. 1925); McCue v. Barrett, 109 N.W. 594 (Minn. 1906); Lehigh Coal & Nav. Co. v. Early, 29 A. 736 (Pa. 1894).*

* This chapter is based in part on Ch. 30, George W. Thompson, Commentaries on the Modern Law of Real Property (John S. Grimes ed. 1979), which made a significant contribution toward preserving the American common law governing defeasible fees.

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CHAPTER 20 DEFEASIBLE FEES *

2-20 Thompson on Real Property, Thomas Editions § 20.21

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§ 20.21 Substantial Compliance with Conditions.

[Go To Supp]

The courts have further ameliorated the harshness of forfeiture for breach of conditions subsequent through the medium of the doctrine of substantial compliance with conditions subsequent. Under this philosophy, if the grantee has met the conditions imposed in the grant over a sufficient number of years a final breach will not forfeit the estate because the condition has been substantially met, the fee upon condition has ripened into a fee simple absolute and the right of re-entry forever lost. n739

Where the performance of the condition was part of the consideration for the conveyance, a performance for a sufficient period of time will vest a fee simple absolute. n740

A substantial performance of the condition discharges it, and it is for the jury to say whether the condition has been in substance performed. n741 Where there has been a substantial performance of the condition extending over a long period of time there is no breach of condition. n742 Thus, where property was conveyed for purpose of a road, the deed providing for reverter if the land be not so used, it was held that there was no reverter after thirty-two years use as a road. n743 Also, a warranty deed to a county, conditioned on the erection and maintenance of a county courthouse on the land, and containing no express right of reverter, vested a fee-simple title in the county upon the erection of a courthouse on the land and maintenance thereof for thirty-five years, without possibility of reverter upon the subsequent erection of a new courthouse on a different site and a destruction of the old courthouse. n744 It was held that a provision to keep a house "in good repair" does not contemplate making the house like new or modernizing it, but only making it safe and comfortable for ordinary use. n745 In the case of an agreement to support and maintain in consideration of the conveyance a court of equity will take into consideration the relation of the parties and that a self-imposed duty created in this manner is to be performed in a reasonable and acceptable manner. n746 In such case the grantee has the burden to show full performance of the agreement. n747

The courts have further expressed their reluctance to enforce forfeiture in the doctrine of changed conditions as waiving breach. This is commonly to be found in conditions requiring a limited use of property to conform to a then existing neighborhood. Where the character of the area changes over the years the condition loses its force and will not be

enforced. n748

COMPUTER-ASSISTED RESEARCH

LEXIS: substantial! w/2 compli! w/15 condition! subsequent or precedent

FOOTNOTES:
(n1)Footnote 739. *Mead v. Ballard, 74 U.S. (7 Wall.) 290 (1868); Board of Comm'rs v. Russell, 174 F.2d 778 (10th Cir. 1949); Little Rock & Ft. S. R. Co. v. Birnie, 26 S.W. 528 (Ark. 1894); Jeffries v. State ex rel. Woodruff County, 226 S.W.2d 810 (Ark. 1950)*(holding rights of re-entry subject to waiver and to bar by the statute of limitations); *Hasman v. Elk Grove Union High School, 245 P. 464 (Cal. App. 1926); Sconce v. Neece, 268 P.2d 1102 (Colo. 1954)*(statute converting fee tail into life estate with remainder held to apply by implication to conditional fee); *Jeffersonville, M. & I.R. Co. v. Barbour, 89 Ind. 375 (1883); Rodenburg v. Rodenburg, 74 N.W.2d 241 (Iowa 1956)*(conditional fee becomes fee simple absolute on birth of children); *Brooks v. Kimball County, 256 N.W. 501 (Neb. 1934); Erskine v. Board of Regents, 104 N.W.2d 285 (Neb. 1960)*(a fee subject to a conditional limitation unaffected by the doctrine of substantial compliance); *Cox v. Hinshaw, 40 S.E.2d 358 (N.C. 1946); Maddox v. Adair, 66 S.W. 811 (Tex. Civ. App. 1901); St. Clara College v. Madison, 27 N.W.2d 745 (Wis. 1947); Carey v. Casper, 213 P.2d 263 (Wyo. 1950).*

Contra, Ralston v. Hatfield, 143 N.E. 887 (Ind. App. 1924).

(n2)Footnote 740. *Little Rock & Ft. S.R. Co. v. Birnie, 26 S.W. 528 (Ark. 1894); Stansbery v. First N. E. Church, 154 P. 887 (Or. 1916).*

Devise on condition precedent of support held substantially performed when health conditions prevented further support through no fault of devisee. *In re Lipiec's Will, 236 N.Y.S.2d 199 (1962).*

If the literal performance of a condition subsequent in a will is impossible by reason of circumstances over which the devisee has no control and through no fault on the part of the devisee, the condition is deemed satisfied by performance. *In re Gagliano's Will, 349 N.Y.S.2d 619 (1973).*

(n3)Footnote 741. *Board of Commr's v. Russell, 174 F.2d 778 (10th Cir. 1949); Wilson v. Galt, 18 Ill. 431 (1857); Yazoo & M.V.R. Co. v. Lakeview Traction Co., 56 So. 393 (Miss. 1911); Chapin v. Sch. Dist. No. 2, 35 N.H. 445 (1857); Southard v. New Jersey Cent. R. Co., 26 N.J.L. 13 (1856); Spaulding v. Hallenbeck, 39 N.Y. (Barb.) 79 (1862); Avery v. New York Cent. & H. R. Co., 24 N.E. 20 (N.Y. 1890); Plummer v. Neile, 6 Pa. (Watts & Serg.) 91 (Pa. 1843).*

Mere technical deviation is not breach. *Lowe v. Ruhlman, 155 P.2d 671 (Cal. App. 1945); Rose v. Hawley, 23 N.E. 904 (N.Y. 1890); Williams v. Downing, 95 P.2d 612 (Okla. 1939).*

(n4)Footnote 742. *Higbee v. Rodeman, 28 N.E. 442 (Ind. 1891).*

(n5)Footnote 743. Support for 12 years was held sufficient compliance with condition, as to make a reconveyance to grantor on failure to support, a conveyance in fraud of creditors of original grantee. *Farmer v. Fruehauf Trailer Co., 76 N.W.2d 859 (Mich. 1956).*

(n6)Footnote 744. *Brooks v. Kimball County, 256 N.W. 501 (Neb. 1934).*

(n7)Footnote 745. *Simpson v. Simpson, 141 So. 50 (La. 1932).*

Where the condition was for the payment of a certain annuity by the grantee to the grantor on a given day in each year during the life of the grantor, the condition was not broken so long as the annuity was not in arrears.

> The annuity, although payable in money, could be discharged by payment otherwise, by mutual stipulation and consent; and if the grantor, after he had parted with the property, agreed to take, in lieu of the annuity stipulated in the deed, the rents and profits of the premises produced by his own management and superintendence of the property, and did in fact take charge of the property and receive the rents and profits in accordance with this agreement, this was a discharge of the annuity as to each year in which payment was received in this manner.

Parol evidence of such agreement is admissible. *Denham v. Walker, 21 S.E. 102 (Ga. 1893); Hylton v. Krueger, 294 N.W. 485 (Neb. 1940).*

(n8)Footnote 746. *Kramer v. Mericle, 192 N.W. 257 (Iowa 1923). See Gillock v. Williams, 250 S.W. 836 (Ky. 1923).*

In such cases if the condition has been substantially breached, equity will declare and enforce a forfeiture of the estate conveyed. *Hannah v. Culpepper, 104 So. 751 (Ala. 1925).*

A grantee who has complied with the conditions in the deed for almost 65 years is considered as having a complete fee, and the grantor, his successor, and representatives have no further reversionary rights. *Calvary Presbyterian Church v. Putnam, 221 N.Y.S. 692, aff'd, 224 N.Y.S. 651 (1927)*(all reason for requiring that the possibility of reverter should be kept longer in existence, or that the property should continue longer to be used for the purpose specified sixty-five years ago by the ancestor's grantor, are less important than that the absolute title should be somewhere).

(n9)Footnote 747. *Borys v. Halko, 188 A. 539 (Pa. Super. 1936).* A condition, in a deed to a railroad company of a right-of-way, that it shall erect a station for the convenient shipment of freight, the character of which is not specified, was complied with by erection of a board shed, without the placing of an agent there, it being in structure and in the mode of its management like most of the stations on the road. *Caldwell v. East Broad Top R. & Coal Co., 32 A. 85 (Pa. 1895).*

A grantor conveyed to a railroad company a strip of land between grantor's hotel and the company's depot property, which was south of the hotel. The deed contained a clause that the conveyance was "on condition that the said railroad company... shall at all times maintain an opening into the premises hereby conveyed, opposite the Exchange Hotel, so called, adjacent to the premises hereby conveyed, for the convenient access of passengers and their baggage to and from said premises." At the time of the conveyance, defendant's trains stopped opposite to the hotel, so that passengers would cross the strip conveyed in reaching the hotel. Afterwards defendant erected a depot on the west side of the hotel, closed up the opening in the strip and opened a gateway on the east side of the depot, leading directly into the hotel property, but not across the strip. It was held that, as the purpose of the clause was to secure to the hotel a direct communication with the depot, this was a substantial and sufficient compliance with it. *Avery v. New York Cent. & H.R. Co., 24 N.E. 20 (N.Y. 1888).*

A condition that a manufacturing company shall "transfer" its "works" to certain land does not require that the identical buildings and machinery be removed. *Hanna v. South St. Joseph Land Co., 28 S.W. 652 (Mo. 1894).*

Where a life estate was reserved to the grantor, provided he should at all times keep the property insured for the benefit of those owning the insurable interest, and by oversight the policy was written payable to the grantor alone, the life estate was held not to be forfeited, especially as the grantee failed for ten years to call attention to the form of the policy, and did not ask to have a proper one taken out, and as it appeared that the grantor in good faith attempted to comply with the conditions of the deed. *Hurto v. Grant, 57 N.W. 899 (Iowa 1894).*

(n10)Footnote 748. "Where there has been a change in the uses to which property in the neighborhood is being put, so that such property is no longer residence property, it would be oppressive and inequitable to give effect to restrictions

where the changed condition of the locality has resulted from other causes than their breach." *Miles v. Hollingsworth, 187 P. 167 (Cal. App. 1919); Downs v. Kroeger, 254 P. 1101 (Cal. 1927); Wilshire Oil Co. v. Star Petroleum Co., 269 P. 722 (Cal. App. 1928).*

It has been held that a deed to a railroad company containing a clause "for the construction of a double track of railway" is not subject to be defeated in case the company should cease to use the land for the purpose mentioned. *Killgore v. Cabell County Ct., 92 S.E. 562 (W. Va. 1917).*

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CHAPTER 20 DEFEASIBLE FEES *

2-20 Thompson on Real Property, Thomas Editions § 20.22

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§ 20.22 Impossibility of Performance of Conditions.

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The legal consequences of a condition becoming impossible of performance depends upon whether the condition is precedent or subsequent to the vesting of the estate. If a condition precedent becomes impossible, the grant fails because no estate vests in the grantee until the condition is performed. n749

Conditions subsequent impossible of performance are void. n750 "If they be impossible at the time of their creation, or afterwards become impossible by the act of God, or the act of the feoffor himself, or if they be contrary to law, or repugnant to the nature of the estate, they are void." The estate in such case becomes absolute in the grantee immediately upon the execution of the deed. "For he hath by the grant the estate vested in him, which shall not be defeated afterwards by a condition either impossible, illegal, or repugnant." n751 Where the performance of the condition has become impossible without any fault on the part of the devisee, the condition in the eye of the law is not broken, and there is no defeasance. n752 If the condition be not impossible of performance at the time of its creation, but is subsequently rendered impossible of performance by the act of the grantor, n753 or by an unavoidable accident or by act of God, n754 the estate will vest free of the condition. n755 However, a condition for the care and support of the grantor has been held finally and irremedially breached by the death of the grantee prior to the death of the grantor, and the latter may elect to declare a forfeiture by reason thereof. n756

If the performance of the condition, whether precedent or subsequent, is rendered impossible by the grantor's own act, he cannot complain of a breach of it and regain the estate by a re-entry. n757 The condition is no longer binding, and the estate is discharged therefrom. A grantor who enters before a breach of the condition prima facie prevents a performance of the condition. n758 A condition is void if it is stated so indefinitely that it is impossible to determine with certainty the event upon which the estate is to arise or be defeated. n759 There has also developed a doctrine that where the land situations which occasioned the making of the condition have so changed the condition would no longer be imposed, today the condition becomes void. n760

When the condition subsequent becomes impossible of performance a limitation over in breach fails and the fee simple becomes absolute. n761 When the event upon which the fee is to be defeased becomes impossible, the fee becomes a

fee simple absolute. n762

COMPUTER-ASSISTED RESEARCH

LEXIS: impossible w/15 perform! w/5 condition! subsequent or precedent

FOOTNOTES:
(n1)Footnote 749. *Stockton v. Weber, 33 P. 332 (Cal. 1893); Jones v. Bramblett, 2 Ill. 276 (1836); Blean v. Messenger, 33 N.J. L. 499 (1869); Martin v. Ballou, 13 N.Y. (Barb.) 119 (1852); In re Bottenwieser's Estate, 54 N.Y.S.2d 422 (1944); Cox v. Hinshaw, 40 S.E.2d 358 (N.C. 1946).*

"A right or interest in land which depends upon a condition precedent does not vest until or unless the condition is performed, although it is or becomes, for any reason, impossible of performance." *Hobart v. Kehoe, 126 N.W. 66 (Minn. 1910).*

In a sale and conveyance by a railroad company of its right-of-way, roadbed, and property in general to another railroad company, conditions that the deed should not become operative until the purchasing corporation should, among other things, complete the road within a given time and issue paid-up stock to the selling company, are conditions precedent, and, if the conditions are not complied with, upon the bankruptcy of the purchasing company, the conditions become impossible of performance, and the title remains, and must remain, in the selling company. Tennessee & *C.R. Co. v. East Ala. R. Co., 73 Ala. 426 (1882).*

(n2)Footnote 750. Sheppard-Touchstone, Common Assurance, 132; *Hughes v. Edwards, 22 U.S. (9 Wheat.) 489 (1824); Finlay v. King's Lessee, 28 U.S. (3 Pet.) 346 (1830); United States v. Arredondo, 31 U.S. (6 Pet.) 691 (1832); Davis v. Gray, 83 U.S. (16 Wall.) 203 (1872); Rogers v. Sebastian, 21 Ark. 440 (1860); Stockton v. Weber, 33 P. 332 (Cal. 1893); Taylor v. Sutton, 15 Ga. 103 (1854); Jones v. Walker, 13 Ky. (B. Mon.) 163 (1852); Ricketts v. Louisville, St. Louis & T.R. Co., 15 S.W. 182 (Ky. 1891); Scott v. Ratliff, 200 S.W. 462 (Ky. 1918); Randall v. Marble, 69 Me. 310 (1879); Morse v. Hayden, 19 A. 443 (Me. 1889); Merrill v. Emery, 10 Mass. (Pick.) 507 (1830); Parker v. Parker, 123 Mass. 584 (1878); Hamel v. Minneapolis, St. P. & S.S.M.R. Co., 107 N.W. 139 (Minn. 1906); Barksdale v. Elam, 30 Miss. 694 (1855); Clarke v. Brookfield, 81 Mo. 503 (1884); German Evangelical Protestant Congregation v. Schreiber, 209 S.W. 914 (Mo. 1918); Latorraca v. Latorraca, 26 A.2d 522 (N.J. Eq. 1942), aff'd, 31 A.2d 819 (N.J. Eq. 1943); Martin v. Ballou, 13 N.Y. (Barb.) 119 (1852); Plumb v. Tubbs, 41 N.Y. 442 (1869); In re Gimbel's Estate, 42 N.Y.S.2d 253 (1943); Raley v. Umatilla County, 13 P. 890 (Or. 1887); Lamb v. Miller, 18 Pa. 448 (1852); In re Culin's Appeal, 20 Pa. 243 (1853); Wheeler v. Moody, 9 Tex. 372 (1853); Blanchard v. Morey, 56 Vt. 170 (1883); Ordway v. Farrow, 64 A. 6 (Vt. 1906); Jones v. Chesapeake & O. R. Co., 14 W. Va. 514 (1878); Burnham v. Burnham, 48 N.W. 661 (Wis. 1891); Doe d. Anglesea v. Rugeley, L.R. 6 Q.B. 107.*

(n3)Footnote 751. 2 Bl. Comm. 156; *Parker v. Parker, 123 Mass. 584 (1878).*

(n4)Footnote 752. *Hammond v. Hammond, 55 Md. 575 (1880); Woods v. Woods, 44 N.C. 290 (1853); Lynch v. Melton, 64 S.E. 497 (N.C. 1909); Berry v. Cooley, 109 P.2d 1081 (Okla. 1940).*

Impossibility of performance creates fee simple absolute. *First Lutheran Church v. Rooks Creek Evangelical Lutheran Church, 147 N.E. 53 (Ill. 1925); Hoss v. Hoss, 39 N.E. 255 (Ind. 1894).*

(n5)Footnote 753. *Taylor v. Sutton, 15 Ga. 103 (1854); Ricketts v. Louisville, St. L. & T.R. Co., 15 S.W. 182 (Ky. 1891); Michigan State Bank v. Hastings, 1 Mich. (Doug.) 225 (1844); Ordway v. Farrow, 64 A. 1116 (Vt. 1906).*

(n6)Footnote 754. *Taylor v. Sutton, 15 Ga. 103 (1854); Gillock v. Williams, 250 S.W. 836 (Ky. 1923); Michigan State Bank v. Hastings, 1 Mich. (Doug.) 225 (1844); True v. Cook, 60 A.2d 138 (N.H. 1948).*

(n7)Footnote 755. *Jackson v. Knapp, 130 N.E. 524 (Ill. 1921); First Lutheran Church v. Rooks Creek Evangelical Lutheran Church, 147 N.E. 53 (Ill. 1925)*(same is true if performance is prevented by a subsequent law or if the condition is illegal, or if the impossibility of performance occurs because of the acts of the person for whose benefit the performance is to be made); *Vicksburg & M. R. Co. v. Ragsdale, 54 Miss. 200 (1876); Adams v. Lipscomb, 120 S.E. 590 (W. Va. 1923).* As to the effect of change of conditions on rights of re-entry and possibilities of reverter, *see* Comment, Future Interests Effect of Changes of Conditions on Rights of Entry and Possibilities of Reverter Created to Control the Use of Land, *53 Mich. L. Rev. 246 (1954).*

(n8)Footnote 756. *Hannah v. Culpepper, 104 So. 751 (Ala. 1925)*(delay in declaring forfeiture held not to defeat rights). *See Pomerleau v. Pomerleau, 124 A. 243 (Me. 1924).*

A devise to the widow as long as she remains single created a fee simple determinable. *Raulerson v. Saffold, 61 So. 2d 926 (Fla. 1952).*

(n9)Footnote 757. *United States v. Arredondo, 31 U.S. (6 Pet.) 691 (1832); Houghton v. Steele, 58 Cal. 421 (1881); Taylor v. Sutton, 15 Ga. 103 (1854); Jones v. Bramblett, 2 Ill. 276 (1836); Elkhart Car-Works Co. v. Ellis, 15 N.E. 249 (Ind. 1888); Leonard v. Smith, 45 N.W. 762 (Iowa 1890); Jones v. Walker, 52 Ky. 163 (1852); Ricketts v. Louisville, St. Louis & T. R. Co., 15 S.W. 182 (Ky. 1891); Gray v. Blanchard, 8 Mass. (Pick.) 284 (1829); Whitney v. Spencer, 4 N.Y. (Cow.) 39 (1825); Young v. Hunter, 6 N.Y. 203 (1852); Mizell v. Burnett, 49 N.C. (4 Jones) 249 (1857); Jones v. Chesapeake & O. R. Co., 14 W. Va. 514 (1878).*

"One who prevents the performance of a condition, or makes it impossible by his own act, will not be permitted to take advantage of the nonperformance." *Harwood v. Shoe, 53 S.E. 616 (N.C. 1906).*

(n10)Footnote 758. *Elkhart Car-Works Co. v. Ellis, 15 N.E. 249 (Ind. 1888).*

(n11)Footnote 759. Sheppard-Touchstone Common Assurance, 128. *Doe d. Wyndham v. Carew, L.R. 2 Q.B. 317;* Fillingham v. Bromley, Turn & Russ 530.

(n12)Footnote 760. *Letteau v. Ellis, 10 P.2d 496 (Cal. App. 1932); Tower v. Compton Hill Imp. Co., 91 S.W. 104 (Mo. 1905); Koehler v. Rowland, 205 S.W. 217 (Mo. 1918); Slegel v. Herbine, 23 A. 996 (Pa. 1892); Daggett v. Ft. Worth, 177 S.W. 222 (Tex. Civ. App. 1915); Koonz v. Joint Sch. Dist. No. 4, 41 N.W.2d 616 (Wis. 1950).*

Changed conditions justified a court of equity from enforcing a forfeiture of a condition subsequent. Note, Property: Right of Re-entry for condition Broken: Enforciability, *42 Cal. L. Rev. 194 (1954).*

(n13)Footnote 761. *In re Vail's Estate, 87 So. 2d 68 (Miss. 1956).*

(n14)Footnote 762. *Id.*; *Comford v. Cantrell, 151 S.W.2d 1076 (Tenn. 1941).*

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CHAPTER 20 DEFEASIBLE FEES *

2-20 Thompson on Real Property, Thomas Editions § 20.23

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§ 20.23 Equitable Relief Against Forfeiture.

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The extent to which the courts of equity went in the seventeenth and eighteenth centuries to prevent forfeiture in fees upon conditions subsequent has been elsewhere shown. While this tender regard for the holder of the fee has not been so clearly evidenced in other instances of fees upon condition subsequent, yet the general distaste of equity for a forfeiture is well recognized.

The tendency of the courts is to moderate the rigors of the common law, in respect to the breach of conditions, upon the principle that the court ought to relieve against all forfeitures and penalties, when compensation can be awarded. n763 A court of equity will grant relief against a forfeiture of land for a condition broken when the breach is not gross and wilful, the condition is for the payment of money or for doing something, the failure to do which is susceptible of a definite compensation in damages. n764 Where no real fault has been committed or the breach has been induced or waived by conduct, as well as when by accident or mistake there has been some breach of a collateral covenant, such as to repair or insure, and where the grantor may be placed in the same position as if the breach had not occurred, equity will relieve against forfeiture by an award of damages or otherwise. n765 The jurisdiction in equity to grant relief against forfeiture is confined to cases which admit of compensation in damages. n766

The courts are not in accord as to whether the terra tenant has the right, upon termination of a qualified fee, to remove the improvements made by him. n767

A court of equity will not ordinarily lend its aid to enforce a forfeiture because of the breach of a condition subsequent in a deed or contract conveying property, n768 nor will a court of equity enforce specific performance of that, in a deed, the non-performance of which works a forfeiture of the estate. n769 Thus, while equity has plenary jurisdiction in the administration of trust estates in the hands of trustees, such court has no jurisdiction of an action seeking to terminate the trust by the enforcement of a forfeiture clause in the deed and contract by reason of a breach of a condition subsequent therein. n770 A court of equity will not lend its aid to enforce a forfeiture for the breach of a condition subsequent where the forfeiture attempts to secure the performance of an obligation to pay a definite sum, readily compensable in an action at law. n771

A court of equity, when merely asked to enforce a condition as a covenant or agreement, may lend its aid to compel the party to abide by the covenant, and to this end may restrain a breach of a reasonable and legal condition by injunction. A court of equity will so interfere notwithstanding the fact that forfeiture is presented as the penalty of the breach. Thus, where a conveyance was made upon the express condition that intoxicating liquors should not be sold upon the granted land, with a provision that the property should revert to the grantor upon a breach of the condition, the condition was enforced by issuing a perpetual injunction against the carrying on of the business of dealing in intoxicating drinks on the land conveyed. n772 While, as a general rule, a court of equity will not declare a forfeiture, it will, when by reason of a breach of a condition subsequent the conscience of the situation demands it, declare that a forfeiture has occurred and cancel the instrument, especially if to uphold the instrument as valid after breach thereof would be inequitable and unjust. n773 Thus, a conveyance in consideration of support, although absolute in form, is treated by a court of equity as though expressly made on a condition subsequent, so that, on a breach, the grantor's heirs may make re-entry and bring an action to quiet title and cancel the deed. n774 Slight circumstances will be seized upon to prevent forfeiture. n775

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LEXIS: equit! w/2 relief w/5 forfeit! w/30 condition! subsequent or precedent

FOOTNOTES:
(n1)Footnote 763. *Sheets v. Vandalia R. Co., 127 N.E. 609 (Ind. App. 1920).*

(n2)Footnote 764. 2 Story, Eq. Jur. (13th ed.), §§ 1313-1323; Pomeroy, Equity Jurisprudence, § 381.

Marwick v. Andrews, 25 Me. 525 (1846); Rowell v. Jewett, 69 Me. 293 (1879); Sanborn v. Woodman, 5 Mass. (Cush.) 36 (1849); Hancock v. Carlton, 6 Mass. (Gray) 39 (1856); Takacs v. Takacs, 26 N.W.2d 712 (Mich. 1947); Bethlehem v. Annis, 40 N.H. 34 (1860); Spaulding v. Hallenbeck, 39 N.Y. (Barb.) 79 (1862); In re Wyatt's Claim, 141 N.E.2d 308 (Ohio App. 1955); Carpenter v. Westcott, 4 R.I. 225 (1856); Harkey v. Harkey, 60 S.W.2d 834 (Tex. Civ. App. 1933); Henry v. Tupper, 29 Vt. 358 (1857); Stevens v. Pillsbury, 57 Vt. 205 (1884); Rogan v. Walker, 1 Wis. 527 (1853).

In *Ritchie v. Kansas, N. & D.R. Co., 39 P. 718 (Kan. 1895),* Allen, J., said "While the law enforces the lawful contracts of parties, and even gives effect to forfeitures, equity gives relief against the hardships incident to such forfeitures in very many cases."

In some English cases relief in equity has been given only upon the ground of accident, fraud, or surprise. *Hill v. Barclay, 18 Ves 56, 16 Ves 402; Reynolds v. Pitt, 19 Ves 134.*

See Restatement, Property, § 57, Comment c; Comment, *Constitutional Problems Presented by the Retroactive Extinguishment of Forfeiture Restrictions on the Use of Land: Sections 345-349 of the New York Real Property Law, 27 Albany L. Rev. 267 (1963).*

(n3)Footnote 765. *See Kaplan v. Flynn, 150 N.E. 872 (Mass. 1926).*

(n4)Footnote 766. "The true ground of relief against penalties is from the original intent of the case, and the court gives the party all that he expected or desired; it is the recompense that gives the court a handle to grant relief." *Peachy v. Somerset, 1 Strange 447.*

(n5)Footnote 767. Allowing removal. *Low v. Blakeney, 85 N.E.2d 741 (Ill. 1949); Sewell v. Reinhardt, 219 P.2d 996 (Okla. 1950).*

Contra, Miller v. Common Sch. Dist. No. 99, 43 N.W.2d 102 (Minn. 1950).

Where a mother conveyed land to her son upon an express condition that he should provide for her maintenance during her natural life, and the son, having maintained his mother many years, died without making any express provision for her by will or otherwise, but leaving ample means for her maintenance, which his representatives offered to apply to that purpose, it was held that if there was any breach of the condition it was a proper case for equitable relief against a forfeiture. *Messersmith v. Messersmith, 22 Mo 369 (1856). See Wade v. Major, 162 N.W. 399 (N.D. 1917).*

Where land was conveyed to a railway company in consideration that it should erect and forever maintain on such tract a passenger depot and a freight depot, of a size and character suitable and sufficient for the transaction of its business and the accommodation of the public at that point, and to cause all passenger and freight trains to stop at such depots, respectively, so as to transact and perform all business that may be there offered, and it was expressly provided that upon a breach of the condition the land should revert to the grantors, it appeared that there was a substantial breach of the condition, for which a forfeiture was adjudged. It appeared also that the railway company took poosession of the land conveyed, constructed a line of railroads across it, built side-tracks, depot buildings, roundhouse, stockyards, water-tank, and other structures and conveniences for its accommodation thereon. The court, therefore, said that if the railway company elected to retain the land and improvements, they should be permitted to do so on payment of the value of the land, exclusive of improvements placed thereon by the company, measured as of the date of the commencement of this action, with interest from that date. *Ritchie v. Kansas, N. & D.R. Co., 39 P. 718 (Kan. 1895).*

> The estate granted was the bare land, and that estate, we think, reverts to the heirs of the grantor. The railroad tracks, roundhouse, depot buildings, etc., were not granted by the deed, but have been constructed by the grantee. The values of the various improvements made by the railroad company are not stated in the findings. The defendant, being a railway corporation, has a right to condemn these lands, or so much thereof as is necessary for its use, but, in case of such condemnation, would be required to make full payment therefor. In this case the defendants have not filed any pleading praying relief from the effects of the forfeiture; but as the plaintiffs alleged an equitable estate, and as the rules of pleading in actions of this kind under the Code are extremely liberal, we do not feel at liberty to direct a judgment to be entered on the special findings, which would be inequitable.

See Cohen v. St. Louis, Ft. S. & W. R. Co., 8 P. 138 (Kan. 1885).

(n6)Footnote 768. 2 Story, Eq. Jur. (13th ed.), § 1319.

Horsburg v. Baker, 26 U.S. (1 Pet.) 232 (1828); Kern River Co. v. United States, 257 U.S. 147 (1921); McDonough v. Saunders, 78 So. 160 (Ala. 1917); Montana v. Alabama Fishermens & Hunters Ass'n, 146 So. 805 (Ala. 1933); Kampman v. Kampman, 135 S.W. 905 (Ark. 1911); Warner v. Bennett, 31 Conn. 468 (1863); Barnesville v. Stafford, 131 S.E. 487 (Ga. 1926); Douglas v. Union Mut. Life Ins. Co., 20 N.E. 51 (Ill. 1889); Toledo, St. Louis & N. O. R. Co. v. St. Louis & O. R.R. Co., 70 N.E. 715 (Ill. 1904); Patterson v. Vermilion Academy, 144 N.E. 9 (Ill. 1924); Hooper v. Haas, 164 N.E. 23 (Ill. 1928); Strothers v. Woodcox, 121 N.W. 51 (Iowa 1909); Klasener v. Robinson, 100 S.W. 255 (Ky. 1907); Michigan State Bank v. Hastings, 1 Mich. (Doug.) 225 (1844); Michigan State Bank v. Hammond, 1 Mich. (Doug.) 527 (1844); Crane v. Dwyer, 9 Mich. 350 (1861); White v. Port Huron & M. R. Co., 13 Mich. 356 (1865); Wing v. Railey, 14 Mich. 83 (1866); Watrous v. Allen, 24 N.W. 104 (Mich. 1885); Chute v. Washburn, 46 N.W. 555 (Minn. 1890); Memphis & C.R. Co. v. Neighbors, 51 Miss. 412 (1875); Thornton v. Natchez, 41 So. 498 (Miss. 1906); Messersmith v. Messersmith, 22 Mo. 369 (1856); Towne v. Bowers, 81 Mo. 491 (1884); Lackland v. Hadley, 169 S.W. 275 (Mo. 1914); Donoghue v. Tonopah Oriental Min. Co., 198 P. 553 (Nev. 1921); Smith v. Jewett, 40 N.H. 530 (1860); Borchers v. Taylor, 145 A. 666 (N.H. 1929); Spaulding v. Hallenbeck, 39 N.Y. (Barb.) 79 (1862); Livingston v. Thompkins, 4 N.Y. (Johns Ch.) 415 (1820), per Chancellor Kent; *Livingston v. Stickles, 8 N.Y. (Paige) 398 (1840); Raley v. Umatilla County, 13 P. 890 (Or. 1887); Coffin v. Portland, 17 P. 580 (Or. 1888); Stevens v. Pillsbury, 57 Vt. 205 (1884); Spies v. Arvondale & C.R. Co., 55 S.E. 464 (W. Va. 1906).*

Conditions subsequent are not favored in equity, and in order to invoke a forfeiture some injury must be shown by a party seeking it. *In re Young Womens Christian Ass'n, 126 A. 610 (N.J. Eq. 1924); First Christian Church v. Spinks, 260 S.W. 1073 (Tex. Civ. App. 1924).*

(n7)Footnote 769. *Close v. Burlington, C.R. & N.R. Co., 19 N.W. 886 (Iowa 1884); Woodruff v. Trenton Water Power Co., 10 N.J. Eq. 489 (1856); Woodruff v. Woodruff, 16 A. 4 (N.J. Eq. 1888); Sharon Iron Co. v. Erie, 41 Pa. 341 (1861).*

(n8)Footnote 770. *Patterson v. Vermilion Academy, 144 N.E. 9 (Ill. 1924).*

The general rule is well settled that the equitable relief of rescission of a contract will not be granted for a mere breach thereof. The remedy in such case is ordinarily to be found in an action at law, which will afford an adequate remedy. Nevertheless, where there is a positive provision in the conveyance that noncompliance with its terms shall render it inoperative, a court of equity has jurisdiction to cancel it on such ground. *Cheek v. Metzer, 291 S.W. 860 (Tex. 1927).*

(n9)Footnote 771. *Embleton v. McMechen, 143 N.E. 177 (Ohio 1924).*

(n10)Footnote 772. *Seaboard Air Line R. Co. v. Anniston Mfg. Co., 65 So. 187 (Ala. 1914); Watrous v. Allen, 24 N.W. 104 (Mich. 1885). See Whitney v. Union R. Co., 11 Mass. (Gray) 359 (1858); Clark v. Martin, 49 Pa. 289 (1865).*

(n11)Footnote 773. *Shannon v. Long, 60 So. 273 (Ala. 1912).*

(n12)Footnote 774. *Menge v. Radtke, 269 N.W. 313 (Wis. 1936).*

(n13)Footnote 775. *Jeffries v. State for Use of Woodruff County, 226 S.W.2d 810 (Ark. 1950).*

* This chapter is based in part on Ch. 30, George W. Thompson, Commentaries on the Modern Law of Real Property (John S. Grimes ed. 1979), which made a significant contribution toward preserving the American common law governing defeasible fees.

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Supp. To CHAPTER 20 DEFEASIBLE FEES

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Supp. to § 20.01 The Defeasible Fee.

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Add:

Queler v. Skowron, 780 N.E.2d 71 (Mass. 2002) .

Cain et al. v. Finnie, 785 N.E.2d 1039 (Ill. App. Ct. 2003) (fee simple determinable is a fee simple with a condition attached and determined when the condition is at an end).

Add:

Utah Gospel Mission v. Salt Lake City Corp., 316 F. Supp. 2d 1201 (D. Utah 2004) (holding that the owner of a determinable fee is the only party with a present interest in the land, unless and until the violative condition is triggered).

Natural Gas Pipeline Co. of America v. Pool, 124 S.W.3d 188 (Tex. 2003) (the habendum clause for a Texas mineral lease conveys a fee simple determinable estate leaving the lessor with a possibility of reverter).

Add:

Piche v. Indep. Sch. Dist. No. 621, 634 N.W.2d 193 (Min. App. 2001) (the term "fee title" is unclear since it can either

refer to a fee simple absolute or a defeasible fee).

Add:

Rector v. Halliburton v. Ct. of Appeals of Tenn., at Nashville, 2003 Tenn. App. LEXIS 149 (No. M1999-02802-COA-R3-CV, Feb. 26, 2003) (there are generally two types of easements determinable: one being those that end upon happening of a condition and two being those that end if the grantee fails to comply with some condition).

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Supp. to § 20.02 Fee Simple Determinable.

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Hunt v. South Carolina Forestry Commission, 2004 S.C. App. LEXIS 85 (No. 3767, Mar. 8, 2004) (when a granting clause conveys fee simple absolute the estate may not be limited by subsequent words in the same instrument).

Add:

State v. Hess, 684 N.W.2d 414 (Minn. 2004) (holding that the state's Marketable Title Act extinguished the possibility of reverter for defunct railroad corridors).

Add:

McClure v. England, 2002 Iowa App. LEXIS 1066 (Oct. 16, 2002) (the reversionary language created a fee simple determinable interest in the right-of-way).

Add:

State v. Hess, 684 N.W.2d 414 (Minn. 2004) (a deed conveyed a fee simple determinable rather than an easement, but the state Marketable Title Act extinguished the possibility of reverter).

Add:

Utah Gospel Mission v. Salt Lake City Corp., 316 F. Supp. 2d 1201 (D. Utah 2004) (holding that the owner of a determinable fee has "exclusive right of possession").

Add:

Green Tree Servicing, LLC v. Williams, 659 S.E.2d 193 (S.C. App. 2008) (foreclosure of mortgages given by borrower holding fee simple determinable; mortgagee's interest subordinate to that of grantor to whom the fee simple title reverted).

Add:

Queler v. Skowron, 780 N.E.2d 71 (Mass. 2002) .

Add:

McClure v. England, 2002 Iowa App. LEXIS 1066 (Oct. 16, 2002) (the interest was held to be a fee simple determinable because it would automatically revert to the grantor if the railroad abandoned the right-of-way).

Add to second paragraph in footnote:

Williamson v. Williamson, 2002 Ky. App. LEXIS 1210 (June 14, 2002) (in construing wills the law favors fee simple over life estate).

change the citation "Relekahhodge v. Cavendish Library?" to:

Myrtle Rebekah Lodge v. Cavendish Library, 726 A.2d 86 (Vt. 1999) .

Washington State Grange v. Brandt, 148 P.3d 1069 (Wash. App. 2006) ("reverts back" language in the deed created a fee simple determinable).

Hash v. United States, 454 F. Supp. 2d 1066 (D. Idaho 2006) (deed to railroad construed as fee simple determinable).

Middlebrook Tech, LLC v. Moore, 2004 Md. App. LEXIS 82 (No. 1104, May 7, 2004) (when a limitation on a leasehold is for the benefit of one party alone it is not self-executing).

Ator v. Unknown Heirs, et al, 146 P.3d 821 (Okla. App. 2006) (fee simple determinable conveyed to school for exclusive use for the football program; the condition was violated when the land was used by youth football players in a private program).

Cain v. Finnie, 785 N.E.2d 1039 (Ill. App. 2003) (a fee simple determinable may last forever but may terminate because it is dependent on collateral circumstances that may qualify or debase it).

Add:

Faulkenberry v. Norfolk Southern Railway Co., 2002 S.C. LEXIS 69 (Apr. 29, 2002) (railroad's interest was not a fee simple determinable estate).

Add:

State v. Hess, 684 N.W.2d 414 (Minn. 2004) ("so long as" land used for railroad purposes).

Add:

Bryan v. Big Two Mile Gas Co., 2001 W. Va. LEXIS 190 (Dec. 11, 2001) (a habendum clause in an oil and gas lease, limiting the interest to so long as production in paying quantities continues, conveys a determinable interest).

Add:

Hash v. U.S., 454 F. Supp. 2d 1066 (D. Idaho 2006) (grants to railroad construed as granting fee simple determinable); *King Associates, LLP v. Bechtler Development Corp., 632 S.E.2d 243 (N.C. App. 2006)* (grants to railroad construed as

granting fee simple determinable).

Utah Gospel Mission v. Salt Lake City Corp., 316 F. Supp. 2d 1201 (D. Utah 2004) .

Add:

Green Tree Servicing, LLC v. Williams, 659 S.E.2d 193 (S.C. App. 2008) (grantee's fee simple determinable interest held superior to mortgagee's interest).

Add:

Cellco v. Shelby County, 2005 Tenn. App. LEX IS 9 (Jan. 12, 2005) (No specifically designated words are needed to create a fee simple determinable, only sufficiently clear manifestation of intent to create such).

Add:

see also Commerce Union Bank v. Warren County, 707 S.W.2d 854 (Tenn. 1986) .

Add:

but see Faulkenberry v. Norfolk S. Ry., 563 S.E.2d 644 (S.C. 2002) (despite the language "so long as," the instrument created an easement rather than a fee simple determinable).

Add:

State v. Hess, 684 N.W.2d 414 (Minn. 2004) ("so long as" land used for railroad purposes).

change the citation "Abercrombie v. Simmons?" to read:

Abercrombie v. Simmons, 81 P. 208 (Kan. 1905) .

Add:

Anadarko Petroleum Corp. v. Thompson, 2002 Tex. LEXIS 117 (July 3, 2002) (a mineral lease grants a fee simple determinable in Texas); *Guinn Invs. v. Ridge Oil Co., 73 S.W.3d 523 (Tex. App. 2d Dist. 2002)* (the oil and gas lease conveyed a fee simple determinable and "cessation of production during the secondary term automatically terminates the lease"); *Somont Oil Co. v. A & G Drilling, Inc., 49 P.3d 598 (Mont. 2002)* (oil and gases leases transfer a fee simple determinable to the lessee).

Natural Gas Pipeline Co. of America v. Pool, 124 S.W.3d 188 (Tex. 2003) (an oil/gas grantee's interest is determinable if upon occurrence of events the lease specifies the estate is terminated).

Add:

Jacobs v. CNG Transmission Corp., 332 F. Supp. 2d 759 (W.D. Pa. 2004) (similar to Texas, but lease for gas and oil only converts to determinable fee in lessee if production occurs); *Pace v. Chesapeake Panhandle, LP., 2004 U.S. Dist. LEXIS 9887 (N.D. Tex. 2004)* (In Texas, adverse possession of land after termination of lease, including possession of oil and gas production on the premises grants fee simple determinable interests in those minerals in the adverse possessor).

Add:

see also Snyder v. Monroe, 674 N.E.2d 741 (Ohio App. 1996) .

Add:

Cain v. Finnie, 785 N.E.2d 1039 (Ill. App. 2003) (a fee simple determinable may last forever but may terminate because it is dependent on collateral circumstances that may qualify or debase it).

Add:

Allen v. Hall, 148 P.3d 939 (Utah 2006) (former husband conveyed marital home to former wife on condition that it would revert to him if she moved more than 50 miles away, creating a valid fee simple determinable).

Add:

But see State v. Hess, 684 N.W.2d 414 (Minn. 2004) (holding that the state's Marketable Title Act extinguished the possibility of reverter for defunct railroad corridors).

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Supp. to § 20.03 Fees Subject to Executory or Conditional Limitations.

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Add:

Scott v. Brunson, 569 S.E.2d 385 (S.C. App. 2002) ; *See* Florence Wagman Roisman, *The Impact of the Civil Rights Act of 1866 on Racially Donative Transfers, 53 Ala. L. Rev. 463* (Winter, 2002) (a gift is subject to executory limitation when it is given to a third party upon breach of the restriction).

Add:

Rector v. Halliburton, 2003 Tenn. App. LEXIS 149 (No. M1999-02802-COA-R3-CV, Feb. 26, 2003) (an easement with subject to conditions subsequent continues until the owner of subservient estate exercises his holder's interest).

Add:

Maloof v. Prieskorn, 2004 N.M. App. LEXIS 114 (Aug. 4, 2004) ; *Ray v. King County, 86 P.3d 183* (Wash. App., Div. 1 2004) .

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Supp. to § 20.04 Fees Subject to Conditions.

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Add:

Webb v. City of Dallas, 2001 U.S. Dist. LEXIS 16054 (Tex. Oct. 4, 2001) (holding that the intent to create conditions in a deed must be interpreted using the entire instrument, together with surrounding circumstances). *But see Citizens for Squirrel Point v. Squirrel Point Assn., 2005 U.S. Dist. LEXIS 458* (D. Me. Jan. 13, 2005) (holding that where language in a deed is unambiguous, only the language of the deed is to be used in determining the parties' intent).

Page 855 insert new note 222.1 after sentence "In an estate on condition, the performance of the condition inures to the benefit of the grantor and his heirs only."

Add: n222.1

Add:

New Covenant Worship Ctr. v. Wright, 601 S.E.2d 245 (N.C. App. 2004) (holding that estate continues undisturbed

unless and until the right of re-entry is exercised).

change the citation "Burlington & C.R. Co. v. Colorado?" to read:

Burlington Co. v. Colorado E. R. Co., 88

Add:

Cf. 120 *Greenwich Dev. Assoc., LLC. v. Reliance Ins. Co., 2004 U.S. Dist. LEXIS 10514* (S.D.N.Y. Jun. 8, 2004) (in contract dispute court holds that express conditions must be literally performed).

FOOTNOTES:
(n1)Footnote 222.1. *New Covenant Worship Ctr. v. Wright, 601 S.E.2d 245 (N.C. App. 2004)* (holding that no one but the heirs of grantor may exercise the right of re-entry after breach of condition).

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Supp. to § 20.05 The Fee Upon Condition Subsequent

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Add:

Jacobs v. CNG Transmission Corp., 332 F. Supp. 2d 759 (W.D. Pa. 2004) .

Add:

Swaby v. Northern Hills Regional R.R. Authority, 769 N.W.2d 798 (S.D. 2009) (deed with certain habendum clauses created fee simple estates subject to condition subsequent, and the conditions were breached by abandonment). *City of Huntington Woods v. City of Detroit, 761 N.W.2d 127 (Mich. App. 2008)* (public golf course held in fee simple subject to condition subsequent).

Additionally, some jurisdictions hold that the inclusion of any language creating a condition subsequent implies a reasonable time to perform the required condition, even in the absence of express designation thereof. *Citizens for Squirrel Point v. Squirrel Point Assn., 2005 U.S. Dist. LEXIS 458* (D. Me. Jan. 13, 2005) .

Add:

Severns v. Union Pacific R.R. Co., 125 Cal. Rptr. 2d 100 (App. 2d Dist. 2002) (If the railroad did not use the property as a right-of-way for six months it could return to the grantor); *Emanuel Tractor Sales, Inc. v. Dept. of Transp., 571*

S.E.2d 150 (Ga. App. 4th Div. 2002) .

Add:

New Covenant Worship Ctr. v. Wright, 601 S.E.2d 245 (N.C. App. 2004) (holding that estate continues undisturbed unless and until the right of re-entry is exercised).

Remove citation below from note 263 and add it to note 264:

Nicoll v. New York & E.R. Co., 12 N.Y. 121 (1854) (It being determined that a condition subsequent was raised by apt and sufficient words, it follows that the estate conveyed remains Defeasible until the condition be performed, destroyed, or barred by the statute of limitations, or by estoppel)

After the citation "Nichols v. Haehn?" add:

rev'd Nichols v. Haehn, 8 A.D.2d 405 (N.Y. App. Div. 1959) .

Rector v. Halliburton, 2003 Tenn. App. LEXIS 149 (No. M1999-02802-COA-R3-CV, Feb. 26, 2003) (an easement subject to conditions subsequent continues until the owner of subservient estate exercises his holder's interest).

Add:

New Covenant Worship Ctr. v. Wright, 601 S.E.2d 245 (N.C. App. 2004) (holding that estate continues undisturbed unless and until the right of re-entry is exercised).

Add:

But see Fischer-Marsh v. Fischer, 822 N.E.2d 1055 (Ind. App. 2005) (holding that deeds containing "conditions subsequent" are to be construed strictly because such conditions tend to destroy estates).

Middlebrook Tech, LLC v. Moore, 157 Md. App. 40, 849 A.2d 63, 2004 Md. App. LEXIS 82 (2004) (when a limitation

on a leasehold is for the benefit of one party alone it is not self-executing).

Add:

Daughtry v. MPC Sys., Inc., 679 N.W.2d 808 (Wis. App. 2004) .

After the citation "Nichols v. Haehn?" add:

rev'd Nichols v. Haehn, 8 A.D.2d 405 (N.Y. App. Div. 1959) .

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Supp. to § 20.06 Language Giving Rise to Conditions.

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Add:

Estate of Hodgkins, 807 A.2d 626 (Me. 2002) .

Ray v. King County, 86 P.3d 183 (Wash. App. 2004) .

Add:

Hunt v. Forestry Commn., 595 S.E.2d 846 (S.C. App. 2004) .

Add:

New Covenant Worship Ctr. v. Wright, 601 S.E.2d 245 (N.C. App. 2004) (Court emphasizes that creation of condition subsequent must be made expressly).

Add new note 292.1 after sentence "While the courts are slow to imply a construction of dubious language that will create a condition subsequent, such conditions are legal and will be enforced if it is clear that the parties did intend a condition and not a covenant or other legal result."

Add new note 292.1: n292.1

Add:

But see Hunt v. S.C. Forestry Comm'n, 358 S.C. 564, 595 S.E.2d 846 (S.C. App. 2004) .

Alby v. Banc One Financial, 82 P.3d 675 (Wash. App. 2003) (possibility of reverter may be freely alienated by the grantor without affecting the grantee's interest).

Add:

see also, Commerce Union Bank v. Warren County, 707 S.W.2d 854 (Tenn. 1986) .

Rector v. Halliburton, 2003 Tenn. App. LEXIS 149 (No. M1999-02802-COA-R3-CV, Feb. 26, 2003) (an easement subject to conditions subsequent continues until the owner of subservient estate exercises his holder's interest).

Add:

But see Hunt v. S.C. Forestry Comm'n, 358 S.C. 564, 595 S.E.2d 846 (S.C. App. 2004) .

Add:

New Covenant Worship Ctr. v. Wright, 601 S.E.2d 245 (N.C. App. 2004) (Court emphasizes that creation of condition subsequent must be made expressly).

Dep't of Natural Res. v. Carmody-Lahti Real Estate, 2003 Mich. App. LEXIS 1330 (No. 240908, June 3, 2003) (a statement of use is not a reverter clause but is merely a declaration of the purpose of the conveyance).

Add:

Fischer-Marsh v. Fischer, 822 N.E.2d 1055 (Ind. App. 2005) (holding that oral agreements not otherwise memorialized in a deed is insufficient to attach a condition subsequent to the fee).

Add:

New Covenant Worship Ctr. v. Wright, 601 S.E.2d 245 (N.C. App. 2004) (Court emphasizes that creation of condition subsequent must be made expressly).

After the citation "Green v. Jones ... " add:

overruled in part, Hardee v. Hardee, 93 So. 2d 127 (Ala. 1956) .

Add:

But see Hunt v. S.C. Forestry Comm'n, 358 S.C. 564, 595 S.E.2d 846 (S.C. App. 2004) .

FOOTNOTES:
(n2)Footnote 292.1. Such is not the case in all jurisdictions, however. In South Carolina, for example, the general rule is that the language found in the granting clause of the deed is what controls what particular estate is conveyed by the instrument. Thus, a granting clause that does not explicitly convey a fee subject to condition subsequent will convey a fee simple absolute, and this true even when the grantor manifests intentions to the contrary elsewhere in the deed. *Hunt v. Forestry Commn., 595 S.E.2d 846 (S.C. App. 2004)* .

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Supp. to § 20.07 Abhorrence of Conditions.

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Add:

Ray v. King County, 86 P.3d 183 (Wash. App. 2004) (deed); *McGirt v. Nelson 599 S.E.2d 620 (S.C. App. 2004)* (will).

Add:

Fischer-Marsh v. Fischer, 822 N.E.2d 1055 (Ind. App. 2005) (holding that conditions subsequent are disfavored in the law because they destroy estates).

Add:

See Fischer-Marsh v. Fischer, 822 N.E.2d 1055 (Ind. App. 2005) .

Add:

Alby v. Banc One Financial, 82 P.3d 675 (Wash. App. 2003) .

Add:

Karam v. High Hampton Dev., Inc., 2003 Ohio App. LEXIS 2972 (No. 21265, June 25, 2003) (the goal of interpreting a restrictive covenant is to determine the intent of the parties).

Ray v. King County, 86 P.3d 183 (Wash. App. 2004) (grantor must succeed in quiet title action on own strength of claim, and cannot prevail based upon weakness of grantee's title).

Searle v. UDI Fishman, 2003 Cal. App. Unpub. LEXIS 7801 (No. H021719, August 14, 2003) (intent of parties may be shown by the facts and circumstances of the parties at the time of a conveyance).

Country Club Dist. Homes Assoc. v. Country Club Christian Church, 118 S.W.3d 185 (Mo. Ct. of Appeals, 2003) (restrictive covenants are "strictly construed" because the law favors free use of real property); *Jones v. Ladriere, 108 S.W.3d 736 (Mo. App. 2003)* (restrictions upon a fee will not be extended by implication to include anything not clearly expressed).

Searle v. UDI Fishman, 2003 Cal. App. Unpub. LEXIS 7801 (No. H021719, Aug. 14, 2003) (intent of parties may be shown by the facts and circumstances of the parties at the time of a conveyance).

Add:

rev'd, 26 A.D.2d 740, (N.Y. App. Div. 1966) .

Add:

See Fischer-Marsh v. Fischer, 822 N.E.2d 1055 (Ind. App. 2005) .

Add:

Alby v. Banc One Financial, 82 P.3d 675 (Wash. Ct. of Appeals 2003) (possibility of reverter may be freely alienated by the grantor without affecting the grantee's interest).

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Supp. to § 20.08 Meaning of "Death Without Issue."

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Add:

Peters v. Allison, 814 N.E.2d 568 (Ohio App. 2004) .

After the citation "Hays v. Cole ... " add:

but see Rainey v. Holland, 1999 Ark. App. LEXIS 292 (Ark. Ct. App. 1999) .

After the citation "Hays v. Cole ... " add:

but see Rainey v. Holland, 1999 Ark. App. LEXIS 292 (Ark. Ct. App. 1999) .

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Supp. to § 20.09 Covenants and Conditions Distinguished.

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Camenisch v. City of Stanford, 2003 Ky. App. LEXIS 211 (No. 2002-CA-000962-MR, Aug. 29, 2003) (a covenant rather than a condition subsequent occurs when property is granted for particular uses but without words of forfeiture); *Snyder v. Chester County Mut. Ins. Co., 264 F. Supp. 2d 332 (D. Md. 2003)* .

Add:

Dieckmeyer v. Redevelopment Agency of City of Huntington Beach, *24 Cal. Rptr. 3d 895 (Cal. App. 2005)* (holding that a court has a duty to interpret covenant language commensurate with purpose of contract).

Add:

Dieckmeyer v. Redevelopment Agency of City of Huntington Beach, *24 Cal. Rptr. 3d 895 (Cal. App. 2005)* (parties intent to be used to discern purpose of contract).

Rector v. Halliburton, 2003 Tenn. App. LEXIS 149 (No. M1999-02802-COA-R3-CV, Feb. 26, 2003) (an easement subject to conditions subsequent continues until the owner of subservient estate exercises his holder's interest).

Add:

O'Brien v. Bocchino, 13 A.D.3d 1055 (N.Y. App. Div. 2004) ; *Gilbert v. Beaver Dam Ass'n of Stratford Inc., 858 A.2d 860 (Conn. App. 2004)* ; *Dent v. Lovejoy, 857 A.2d 952 (Conn. App. 2004)* .

Camenisch v. City of Stanford, 2003 Ky. App. LEXIS 211 (No. 2002-CA-000962-MR, Aug. 29, 2003) (a covenant rather than a condition subsequent occurs when property is granted for particular uses but without words of forfeiture).

Add:

In re Ames Dept. Stores, Inc., 316 B.R. 772, 786 n. 55 (Bankr. S.D.N.Y. 2004) (footnote mentioning importance of language creating right of re-entry to create a condition).

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Supp. to § 20.10 Statements of Consideration as Implying Conditions.

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Add:

Cf Hunt v. S.C. Forestry Comm'n, 358 S.C. 564, 595 S.E.2d 846 (S.C. App. 2004) (holding that breach of condition to maintain fire towers did not cause land to revert to grantor's assignee of the reversionary interest).

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Supp. to § 20.11 Provisions for Support or Rendition of Service as Creating Conditions.

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After the citation "Tibbetts v. Krall ... " add:

but see Drudge v. Brandt, 698 N.E.2d 1245 (Ind. App. Ct. 1998) .

Fischer-Marsh v. Fischer, 822 N.E.2d 1055 (Ind. App. 2005) (recognizing that even though a separate oral agreement in this case was not enough to establish such, the law is well settled that an agreement to provide support as a condition of a land grant vests a type of fee simple subject to condition subsequent in the grantee so long as there is a meeting of the minds that the grantee knowingly takes the land subject to those conditions).

Add:

Dixon v. Dixon, 608 S.E. 2d 849 (S.C. 2005) (holding that mother-grantor failed to show sufficiently egregious breach of agreement to provide support by son-grantee, as to warrant rescission).

change the parenthetical after the first citation of "Hickey v. Lake Shore ... " to read:

(Ohio 1894).

Add:

see also, Drudge v. Brandt, 698 N.E.2d 1245 (Ind. App. Ct. 1998) .

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Supp. to § 20.12 Validity of Conditions.

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Add:

Siner v. Am. Gen. Fin., Inc., 2004 U.S. Dist. LEXIS 22196 (E.D. Pa. 2004) (holding that illegal loan made entire real estate transaction including transfer and mortgage void *ab initio*).

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Supp. to § 20.13 Conditions that are Void as Against Public Policy.

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Add:

Sadler v. Creekmur, 821 N.E.2d 340 (Ill. App. 2004) ; *One Dupont Centre, LLC v. Dupont Auburn, LLC, 819 N.E.2d 507 (Ind. App. 2004) . Cf. Riverside Park Condo. Unit Owners Assn v. Lucas, 2005 ND 26, 691 N.W.2d 862 (N.D. 2005)* (recognizing that restrictive covenants are enforceable if they comply with public policy). *But see Hunt v. S.C. Forestry Comm'n 358 S.C. 564, 595 S.E.2d 846 (S.C. App. 2004)* (holding that although deed construction requires giving effect as much as possible to intent of grantor, such intent will not be effectuated if it is against law or public policy).

Add:

Hunt v. S.C. Forestry Comm'n, 358 S.C. 564, 595 S.E.2d 846 (No. 3767, Mar. 29, 2004) (the grantor's intention may not be given effect if it contravenes a settled rule of law or public policy).

change the "aff'd" the citation to "Cowell v. Colorado Springs Co. to read:

aff'd., 100 U.S. 55 (1879) .

Add:

Statham v. Kelly, 584 S.E.2d 246 (Georgia 2003) (conditions that are impossible, illegal, or against public policy are void).

After the citation "Winterland v. Winterland ... " add:

overruled, In re Gerbing's Estate, 337 N.E.2d 29, (Ill. 1975) .

Add:

See Maloof v. Prieskorn, 101 P.3d 327 (N.M. App. 2004) (implicitly accepting the validity of restrictive condition that intoxicating liquors not be sold on the property).

After the citation "Commerce Trust Co. v. Weed ... " add:

but see Winningham v. Winningham, 966 S.W.2d 48 (Tenn. 1998) .

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Supp. to § 20.14 Breach of Condition Not Caused by Grantee or Successors.

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Add:

Bolz v. Hatfield, 41 S.W.3d 566 (Mo. App. 2001) (holding that a party must make good on performance of a condition unless rendered impossible by an act of God).

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Supp. to § 20.15 Breach of Condition of Particular Use.

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After the citation "Falula Farms Inc. v. Ludlow ... " add:

but see Nelson v. Provo City, 6 P.3d 567 (Utah Ct. App. 2000) .

Add:

Hunt v. S.C. Forestry Comm'n, 358 S.C. 564, 595 S.E.2d 846 (S.C. App. 2004) (holding that abandonment and subsequent destruction of fire towers, in breach of condition to maintain such, did not cause land to revert to grantor's assignee of the reversionary interest due in part to length of use); Cathedral of Incarnation in *Diocese of Long Island, Inc. v. Garden, 697 N.Y.S. 2d 56 (N.Y. App. Div. 1999)* (holding that absent any language in the deed itself providing for reversion of a church's estate if the land were no longer used for church purposes, the deed merely creates a right of reentry).

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Supp. to § 20.16 Alternative Remedies on Breach of Condition.

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Add:

Voice of Cornerstone Church Corp. v. Pizza Property Partners, 2005 Tex. App. LEXIS 1804 (No. 03-04-00173-CV, Tex. App., Mar. 10, 2005).

Add:

Perel v. Brannan, 594 S.E.2d 899 (Va. 2004) (manifesting preference for injunctive relief for breach of covenant concerning real property).

Add:

Jacobs v. CNG Transmission Corp., 332 F. Supp. 2d 759 (W.D. Pa. 2004) (holding that right of re-entry created through breach of condition subsequent must be perfected); *New Covenant Worship Center v. Wright, 601 S.E.2d 245 (N.C. App. 2004)* (holding additionally that grantor or grantor's heirs alone may eject under right of re-entry in event of breach).

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Add:

See Fischer-Marsh v. Fischer, 822 N.E.2d 1055 (Ind. App. 2005) (reaffirming doctrine of strictly construing conditions so as to avoid forfeiture); *Maloof v. Prieskorn, 101 P.3d 327 (N.M. App. 2004)* (same).

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Supp. to § 20.18 Waiver of Breach of Condition

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After the citation "Chertkov v. Southland Corp ... " add:

but see Nicholson Air Services, Inc. v. Allegany County, 706 A.2d 124 (Md. Ct. App. 1998) .

Add:

New Covenant Worship Center v. Wright, 601 S.E. 2d 245 (N.C. App. 2004) (holding that grantor's assigns cannot assert right of re-entry).

Add:

Kappa Sigma Fraternity, Inc. v. Kappa Sigma Fraternity, 587 S.E.2d 701 (Va. 2003) (if a legal demand be asserted in equity which is barred by statute, it is also barred in equity).

Cf. State v. Hess, 684 N.W.2d 414 (Minn. 2004) (concerning determinable fee, the state's Marketable Title Act extinguished the possibility of reverter for defunct railroad corridors).

Add:

Dixon v. Dixon, 608 S.E. 2d 849 (S.C. 2005) (mother-grantor waived any possible further future violation of condition to provide care when she changed locks on house and forbade son-grantee's entry).

Add:

Dixon v. Dixon, 608 S.E. 2d 849 (S.C. 2005) (holding that son-grantee held property in fee simple absolute after waiver of condition to provide care by mother-grantor).

Add:

Citizens for Squirrel Point v. Squirrel Point Assn., 2005 U.S. Dist. LEXIS 458 (D. Me. Jan. 13, 2005) (holding that presence of condition subsequent in deed implies a reasonable time in which to perform the condition).

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Supp. to § 20.19 Breach of Personal Conditions.

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Add:

See Fischer-Marsh v. Fischer, 822 N.E.2d 1055 (Ind. App. 2005) .

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Supp. to § 20.20 Time for Performance of Condition.

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Add:

Citizens for Squirrel Point v. Squirrel Point Assn., 2005 U.S. Dist. LEXIS 458 (D. Me. Jan. 13, 2005) (holding that presence of condition subsequent in deed implies a reasonable time in which to perform the condition); *Birkholz v. Hardy, 2004 Tenn. App. LEXIS 511* (Tenn. App. August 11, 2004) (same).

Rick v. Middle Tenn. Med. Ctr. et al., 2003 Tenn. App. LEXIS 267 (No. M2000-o01662-COA-R3-CV, Apr. 7, 2003) (law favors construing a condition as a condition subsequent rather than a condition precedent).

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Supp. to § 20.21 Substantial Compliance with Conditions.

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Add:

Dixon v. Dixon, 608 S.E. 2d 849 (S.C. 2005) (holding that son-grantee substantially complied with conditions prior to waiver by of further performance mother-grantor).

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Supp. to § 20.22 Impossibility of Performance of Conditions.

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Add:

Super Saver, Inc. v. Eastgate Assocs., 2002 Cal. Unpub. LEXIS 2481 (App. 2d. Dist., Mar. 29, 2002) ("performance of a condition precedent is excused when the other party prevents or makes impossible the performance of the condition precedent").

Add:

Dixon v. Dixon, 608 S.E. 2d 849 (S.C. 2005) (holding that son-grantee held property in fee simple absolute after mother-grantor made further performance of condition of support and care impossible by changing locks).

Add:

Dixon v. Dixon, 608 S.E. 2d 849 (S.C. 2005) .

Add:

Dixon v. Dixon, 608 S.E. 2d 849 (S.C. 2005) .

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Supp. to § 20.23 Equitable Relief Against Forfeiture.

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Add:

Bell et al. v. Nigro, 2003 Mass. Super. LEXIS 42 (No. 97-2590, Jan. 23, 2003) (forfeiture will not be declared because of a lack of repair that is not substantial).

DiBella v. Fiumara, 2004 Mass. App. Div. LEXIS 7 (Jan. 28, 2004) (equity protects against forfeiture where not real fault is committed and an award of damages or otherwise will place the lessor in the same position as if the breach had not occurred).

Add:

Maloof v. Prieskorn, 101 P.3d 327 (N.M. App. 2004) (proceeding in equity grants only partial forfeiture, holding that conditions, the breach of which will work a forfeiture, are strictly construed so as to avoid forfeiture if possible).

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Supp. to § 20.24 Bibliography.

[Go To Main]

Add to Articles:

John K. Eason, *Article: Private Motive and Perpetual Conditions in Charitable Naming Gifts: When Good Names Go Bad*, 38 U. Cal. Davis. L. Rev. 375 (2005).

Tanya D. Marsh, Student Author, *Survey: Property Law: "We Just Saw it From a Different Point of View": Recent Developments in Indiana Real Property Law, 37 Ind. L. Rev. 1307 (2004).*

Yvonne Mattson, Student Author, *Comment: Civil Regulatory Jurisdiction over Fee Simple Tribal Lands: Why Congress is Not Acting Trustworthy, 27 Seattle U. L. Rev. 1063 (2004).*

Meese, Leigh Ammons, "Court Defines Power of Release for Fee Simple Determinable," *46 S.C. L. Rev. 134* (Autumn, 1994).

Robin M. Wolpert, *Recent Developments in Minnesota Law: Preserving and Promoting Minnestoa's Recreational Trails: State v. Hess, 31 Wm. Mitchell L. Rev. 1133 (2005).*

Add to Annotations:

Annotation, *Application of Rule Against Perpetuities to Limitation Over on Discontinuance of Use For Which Premises are Given or Granted, or the Commencement of a Prohibited Use, 45 A.L.R.2d 1154 .*

Annotation, *Change in Character of Neighborhood as Affecting Validity or Enforceability of Restrictive Covenant, 76*

A.L.R.5th 337 .

Annotation, *Conflict Between Granting and Habendum Clauses as to Estate Conveyed, 58 A.L.R.2d 1374* .

Annotation, *Deed to Railroad Company as Conveying Fee or Easement, 6 A.L.R.3d 973* .

Annotation, *Devisability of Possibility of Reverter, or of Right of Re-Entry For Breach of Condition Subsequent, 16 A.L.R.2d 1246* .

Annotation, *Effect of Impossibility of Performance of Condition Precedent to Testamentary Gift, 40 A.L.R.4th 193* .

Annotation, *Effect on Validity and Character of Instrument in Form of Deed of Provision Therein Indication an Intention to Postpone or Limit the Rights of Grantee Until After the Death of Grantor, 31 A.L.R.2d 532* .

Annotation, *Executory limitation creating life estate or other interest less than a fee, as operating to defeat the entire fee of the precedent defeasible estate or as merely carving the particular estate therefrom,* 140 A.L.R. 941 .

Annotation, *Gift or Grant in Terms Sufficient to Carry the Whole Property Absolutely as so Operating Where Followed by a Purported Limitation Over of Property Not Disposed of by the First Taker, 17 A.L.R.2d 7* .

Annotation, *Gift Over by Implication After Estate During Life or Until Marriage, Where Property is Expressly Given Over at Death and First Taker Marries, or Vice Versa, 73 A.L.R.2d 484* .

Annotation, *Nature of Estate Conveyed by Deed for Park or Playground Purposes, 15 A.L.R.2d 975* .

Annotation, *Rights in Condemnation Award Where Land Taken was Subject to Possible Rights of Reverter or Re-Entry, 81 A.L.R.2d 568* .

Annotation, *Testamentary Devise or Bequest Conditioned Upon Beneficiary's Supporting or Rendering Services to Named Person as Providing for Condition Subsequent or Precedent, 25 A.L.R.3d 762* .

Annotation, *Validity and Effect of Transfer of Possibility of Reverter or Right of Re-entry, Following Conveyance of Determinable Fee or Fee Subject to Condition Subsequent,* 53 A.L.R. 224 .

Annotation, *Use or exploitation of property for a purpose other than, but not exclusive of, use specified by a deed creating a fee simple determinable or a fee simple subject to condition subsequent,* 137 A.L.R. 639 .

Annotation, *Validity of Restraint, Ending Not Later Than Expiration of a Life or Lives in Being, on Alienation of an Estate in Fee, 42 A.L.R.2d 1243* .

Annotation, *Waiver of, or Estoppel to Assert, Condition Subsequent or its Breach, 39 A.L.R.2d 1116* .

Annotation, *Wills: Term "Heirs" as Restricted to Meaning "Children", 37 A.L.R.3d 9* . Annotation, Gift or Other Voluntary Transfer by Husband as Fraud on Wife, *49 A.L.R.2d 521* Annotation, Power of either spouse, without consent of other, to make gift of community property or funds to third party, *17 A.L.R.2d 1118* , sec. 6 Annotation, Partner's Breach of Fiduciary Duty to CoPartner on Sale of Partnership Interest to Another Partner, *4 A.L.R.4th 1122* .

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CHAPTER 21 MARITAL AND HOMESTEAD INTERESTS

3-21 Thompson on Real Property, Thomas Editions 21.syn

AUTHOR: Professor David A. Thomas This chapter is based on Ch. 30 of George W. Thompson, Commentaries on the Modern Law of Real Property (John S. Grimes, ed. 1979), and describes the American common law on several subjects now largely governed by state statutes. J. Reuben Clark Law School Brigham Young University

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21.04(q) What Property Makes Up the Homestead

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Professor David A. Thomas n*

J. Reuben Clark Law School
Brigham Young University

FOOTNOTES:
(n1)Footnote *.
This chapter is based on Ch. 30 of George W. Thompson, Commentaries on the Modern Law of Real Property (John S. Grimes, ed. 1979), and describes the American common law on several subjects now largely governed by state statutes.

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3-21 Thompson on Real Property, Thomas Editions § 21.01

AUTHOR: Professor David A. Thomas This chapter is based on Ch. 30 of George W. Thompson, Commentaries on the Modern Law of Real Property (John S. Grimes, ed. 1979), and describes the American common law on several subjects now largely governed by state statutes. J. Reuben Clark Law School Brigham Young University

§ 21.01 Introduction to the Chapter

Dower and curtesy, which occupy the first two sections of this chapter, have almost disappeared from the American legal scene, yet they have a long and honored common-law history. This chapter reviews and preserves that history. Of more current importance is the law governing marital homestead rights, covered in the concluding section of this chapter.

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CHAPTER 21 MARITAL AND HOMESTEAD INTERESTS

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§ 21.02 Dower at Common Law

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21.02(a) The Meaning of "Dower"

The term "dower" is generally applied to the interest a widow takes in the estate of her deceased husband. Dower exists where a man seised of an estate of inheritance dies in the lifetime of his wife, in which case she was, at common law, endowed of a third of his estate for life. n1

> Tenant in dower is, where a man is seised of certain lands or tenements in fee simple, fee tail general, or as heir in special tail and taketh a wife, and dieth; the wife after the death of her husband shall be endowed of the third part of such lands and tenements as were her husband's at any time during the coverture to have and to hold to the same wife in severalty by metes and bounds for term of her life whether she have issue by her husband or not, and what age soever the wife be, so as she be past the age of nine years at the time of the death of her husband, otherwise she shall not be endowed. n2

At first dower was limited to lands held by the husband at the time of the marriage, but by Magna Carta it was extended to all lands of which the husband was seised during coverture. The statutes of many states declare that a widow shall be endowed of the third part of all the lands whereof her husband was seised of an estate of inheritance at any time during the marriage. n3

The word "dower," in its ordinary acceptation, has been used to designate the statutory right or interest of a widow in the lands of her deceased husband even where such interest was different from the common-law right of dower. n4 In some states, the husband's interest in his deceased wife's real estate is termed "dower." n5

One distinction between "dower" and "curtesy" is that the husband's right of curtesy depends on his having had issue that could have inherited the estate, while the wife's dower is not so dependent. n6

Dower is also sometimes applicable in statutes, wills or contracts to the share given the widow in her deceased

husband's personalty. n7

Stated briefly, dower is that estate in the real property of the husband which the law *ex proprio vigore* gives to the wife. n8

The wife takes the right not by virtue of contract, but by mandate of law. n9 It is an estate created by law rather than by descent. n10 The existence and extent of a common-law or statutory interest of a wife in the lands of her deceased husband are determined by the law of the state where the land is situated. n11

The widow was, however, entitled to have set off from each parcel of her husband's land a tract that would yield her one third of the total revenue of each tract. n12 Where the husband had aliened any tract the widow's share was taken by giving her, if possible, a greater parcel of lands owned by the husband at death; n13 but no such consideration was shown a devisee. n14 The widow could, however, make an agreement "against common right" with the heirs or devisees as to her allotted share. n15

The purpose of dower is to provide an assured means of support to the surviving wife. Just as the law imposes upon the husband the obligation to support his wife during their joint lives, so also the law demands that according to his ability and with the consideration of his children and creditors his estate shall continue to provide for her after his death. n16

Dower is merely an emanation from ownership by the husband and subject to all of its qualifications except his alienations or encumbrances during coverture without her consent, and is merely the interest of the wife as such in his lands, and is a portion of the deceased husband's estate set apart to the widow for her support. n17 It is not a mortgage or a lien, and is an encumbrance only in the sense that it encumbers a title. n18

Discrimination between sexes as to dower is not unconstitutional. n19

The right of the widow in the deceased husband's property may have three sources of recognition. First, it may be a partial return of the bride's dowry; second, it may be a recognition of the efforts of the wife in building the family estate during marriage; third, it may emanate from a public policy of charity for the widow, coupled with a desire to keep the poor rates down by requiring the heirs to support the widow instead of leaving her to be a public charge. Only the first and third considerations seem to find recognition in the English theory, n20 and it is the final proposition that forms the basis of the treatment of widows in much of the United States today.

The tracing of the trail of the historical development of the law of dower is indeed tortuous and devious. n21 The story of the changing picture of "dower" is set to the tune of the varying position of women in the social structure throughout the years. n22

In 1217 and 1224, English charters provided for dower and established the wife's portion at one third part of all the lands that the husband held during coverture, unless the wife had, previous to the marriage, accepted a smaller portion. n23 In Glanvill's time, about A.D. 1175, both the civil and ecclesiastical law required the husband, at the time of the marriage, either particularly to name the portion or, if he did not, the wife was entitled to her reasonable dower, one third of the husband's freehold lands and tenements. He could not endow her with more than one third, nor was she entitled to dower in his future acquisitions unless he so engaged before the priest, and these regulations appear to be precisely like those of the 101st chapter of the *Grand Coutumier De Normandie*. It is fair to presume that the Normans brought their laws and customs respecting dower into England when they established themselves there. n24 At any rate, we find dower a fixed institution in England as early as the 14th century.

The Visigoths, as they took their long journey from Scandinavia to the foothills of the Caucasus, and thence to the foothills of the Pyrenees, carried with them a concept of matriarchy that flowered in Spain and, thence, to Mexico and on to California, Texas, Arizona, New Mexico, Washington and, for a brief time, into other states. This is the "double

yoke" of Ferdinand and Isabella, the husband and wife pulling together as a team building up the family fortunes.

The Germanic peoples of the North German fens, however, took a much dimmer view of the importance of the wife in the household. "*Kitchen and Kinder*" was the woman's role, or at least was her place in English law. n25

It is true that there are glimpses of women playing a prominent role in Anglo-Saxon England. Early the man paid a price for his bride which payment came to be considered the property of the bride. n26 There seems also to have been free ownership and disposal of property by women including an early understanding of jointure.

The position of women deteriorated during the feudal period. Military service, the basic consideration for enfeoffment in the early days after the conquest, made the male of primary importance. n27 Females could not inherit if there were male heirs of equal rank. n28 The married woman was little more than a chattel of her husband. A spouse could never be an heir. At one time, the continental principles of legitime prevailed as to personalty, but these seem to have vanished in the 15th century. n29 From that time on, the spouse was not the next of kin and could not inherit personalty. The spouse not being an heir, none of the husband's realty could descend to her. n30

Gradually, however, "dower" developed. At first, it seems to have been only the return of at least a portion of the gift the husband received upon the marriage. Later, the widow was given the right to "sit by the fire," a home on the husband's lands for the rest of her life.

Blackstone ascribes the birth of common-law dower to a later growth of the feudal system. n31 It is clear that dower had been established by Glanvill's time. n32 Dower rights are established both by Magna Carta and its confirmations of 1216 and 1217.

Three facts are necessary to the existence of the right of dower: First, a lawful marriage; second, seisin of the husband, during the marriage, of an estate of inheritance in land; and third, death of the husband leaving the wife surviving. n33 It will thus be seen that the number of requisites for dower is smaller than those of the estate by curtesy. In the latter estate, as we have seen, there must be birth of issue alive capable of inheriting. n34

In states where the husband's interest in the wife's estate is called dower, as in Illinois for instance, his right is of the same nature as the wife's dower, and is in all respects co-extensive with her right, should she survive him. n35

The husband may validly dispose of his own lands without his wife's consent but, if he does, the grantee takes subject to potential dower if the wife outlives the husband. n36

"Common-law dower," as it flowered in the United States prior to statutory erosion, developed definite legal characteristics:

First: It was by nature inchoate, n37 being neither vested nor contingent. Therefore, during the life of the husband, the wife did not have such a property right as was subject to the protection of the United States Constitution, and state legislatures could abolish dower even as to existing marriages. n38

Second: Under the English concept, dower was merely a right to land, not an interest in land. n39 Thus, the widow had no life estate in any particular tract owned by her husband until the heir assigned dower after the husband's death, although she had a right of action to compel such assignment. n40 Dower is an estate of freehold but not of inheritance. n41 So, as to lands that her husband had alienated during her lifetime without her release of dower, the widow could not claim improvements made by the feoffee after the feoffment, but she could claim improvements on the value thereto made by the heir prior to assignment. n42

In the United States, however, dower became an interest in land, rather than a mere right to land, by statute in some

states. Thus, the widow's interest became automatically vested upon her husband's death, making her a tenant in common as to a one-third interest with the heirs, and dispensing with the necessity of assignment by the heir. n43

Third: Dower existed only in realty, not personalty or chattels real, n44 and only in realty of which the husband had been seised at any time during the marriage, n45 and of which any issue that the widow could have had of her husband would have been an heir. n46 Thus, there could be dower in property held as tenants in common n47 but not in property held in joint tenancy, because of the survivorship incident. n48 There was no dower in equitable estates but, by statute of 3 & 4 William IV, ch. 105, adopted by some states in the United States, the widow became entitled to dower in all equitable estates of which the husband died the owner.

There was dower in the partner's interest in partnership realty. This, however, was subject to claims of the partnership creditors.

There was no dower in transitory seisin, as where one took title for the purpose of reconveying. n49 But if one became truly seised, though but for a single instant, there was dower. n50

The widow, even though a second childless wife, took dower in a fee tail since her child, if she had had one, would have taken the fee. n51 The cases are divided as to whether there was dower in a fee simple determinable or in a fee upon a condition subsequent when the fee terminated at the husband's death. n52

There was no dower in a right of re-entry, as where the husband had been disseised. n53 The same rule was early applied to lands where someone held in adverse possession against the husband, but, in most states today, the adverse possessor does not acquire title until the entire possessory period has run, so the widow of the husband has dower when the adverse possessor is ousted. n54 The adverse possessor does, however, have sufficient title that his widow has dower as against the true owner. n55

Even under the common-law mortgage executed before marriage, the widow of the mortgagor had dower in the equity of redemption; n56 but her dower was subject to the vendor's mortgage lien even in the case of a purchase money mortgage executed after title passed to the vendee. n57

Fourth: Dower is not such an interest as can be aliened apart from the husband's estate, n58 but it can be released by the wife when the land is aliened by the husband, n59 or the wife may become estopped from asserting dower. n60

Fifth: The husband cannot alien the land during his lifetime n61 nor devise it upon his death n62 so as to cut off dower. Nor can an execution or judicial sale n63 to satisfy the obligation of the husband alone affect the widow's right to dower. Nor can the husband encumber the realty ahead of the dower right without the wife's consent. n64 Nor may the widow's interest be sold to satisfy the husband's debts after his death. n65

Sixth: The widow had dower only if there had been a valid marriage. n66

Divorce *a vinculo* terminated the dower right because the marriage must exist at the time of the husband's death. n67 Divorce *a mensa et thoro* did not defeat dower. n68 Adultery did not bar dower originally yet early by statute elopement with another man destroyed the dower right. n69 Attainder for treason or felony prevented dower. n70

Dower is recognized as a positive and definite institution of the state, and the courts are vigilant in guarding and preserving it. n71 Common-law dower is not successional. n72 Dower is highly favored in the law and the courts exercise an astute and vigilant attitude in protecting it when it exists. n73

21.02(b) The Nature of Inchoate Dower

While the marriage endures, the prospective right that the wife has in the real estate of which her husband has been at any time seised during the marriage is inchoate dower. n74

Upon the husband's death the dower becomes consummate. n75 The wife's right remains inchoate until the death of her husband, n76 even though the property has passed to a third person. n77 It is said that the right of dower is not merely a lien, but is an individual interest which vests at the time of the marriage or as to subsequently acquired property at the time of acquisition by the husband. n78

The wife's right, while inchoate, is not a possessory right, but is a present, subsisting right or interest of a legal character, that can only be extinguished by the voluntary release or act of the wife or by operation of law. n79 While it has been said that the inchoate right of dower is neither title, n80 property, n81 an estate in land, n82 nor a legal or equitable interest in real property, n83 that it is not a vested right, n84 and that it is only a contingent expectancy, n85 it has been said also that such right is not merely a bare possibility, n86 but that it is a right or interest of a legal, equitable and moral nature, n87 subsisting, n88 substantial, n89 possessing attributes of property, n90 favored by the law, n91 ranking in its sacredness next to life and liberty, n92 subject to the protection of equity, n93 has a present cash value capable of computation, n94 and constitutes, or at least resembles, a lien, encumbrance or burden on the husband's title. n95 It has some of the characteristics of an expectancy, which upon the death of the husband becomes a vested right to a life estate in the widow, as provided by statute, with the usual title, right and burdens incident to a life estate; n96 but it is superior to an expectancy in that, generally, the wife's inchoate right of dower is regarded as a right in the land created for her benefit, which attaches as soon as her husband is seised of it, although it is at the time and until his death only a contingent or possible one, like that of an heir before the death of the ancestor. n97 According to some authorities, it is not such an interest in land that, when the land is taken by eminent domain, she is entitled to have such interest provided for out of the proceeds, n98 nor is it such an interest as will prevent the legislature from modifying or repealing laws creating it. n99 Until the death of the husband, it is a mere intangible, inchoate, contingent expectancy. It is not an estate in land, and it does not even rise to the dignity of a vested right, n100 but the right is as much entitled to protection as the right when it is absolute. n101 Other states hold that while an inchoate right of dower is not an estate, but only a right of action, still it is in the nature of a lien on real estate and is considered an encumbrance to be protected. n102 Dower being inchoate may be abolished by the legislature. n103

The wife's interest during coverture is in the nature of a property right, and she cannot be divested of it by any act of her husband, whether done in good faith or in fraud. n104 As such, it is divested only if the wife pre-deceases the husband. n105

At common law, dower remained a personal right n106 even after the husband's death until the heir assigned a particular tract. As such, it was legally unassignable to a stranger, n107 though it might be released to an heir, n108 or the widow might join with the heir in a transfer to a stranger. n109 Under some state statutes, however, unassigned consummate dower is assignable. n110 In equity, however, where there has been a valuable consideration, the courts will enforce the widow's assignment as a contract.

Blackstone and Littleton wrote of four species of dower, which gradually evolved from the various customs as to dower prevailing in the different parts of England: First, by custom; second, at the church door; third, with the assent of the bridegroom's father; and fourth, by the common law. These have, from time to time, been dropped or abolished, except what is known as dower by the common law. n111 "Dower by custom" resulted when a widow was entitled to certain portions of her husband's lands in consequence of some local and peculiar custom which prevailed in the place where her husband's lands were situated. In cases of this kind the wife could not waive the provision made for her and claim dower at common law, because all customs are equally ancient with the common law. In the case of "dower at the door of the church," a man of full age, when he came to the door of the church, endowed his wife of his whole land, the half, or other smaller part thereof. It is claimed that this was the most ancient kind of dower, and was practiced in Europe during the 10th and 11th centuries. "Dower by assent of the bridegroom's father" resulted when the father was seised of tenements in fee, and his son and heir apparent upon his marriage endowed his wife at the church door of a parcel of his

father's lands and tenements with the assent of his father, and the father assigned the quantity or parcels.

The suggestion sometimes made that dower is vested in the widow by virtue of the contract of marriage and passes by such contract and not by law, cannot be sustained. The authorities are uniform against this position. n112 The right of dower is an interest or estate arising solely by operation of law and not by virtue of any contract, express or implied, between the parties, although a contract of marriage is one of the essentials to its existence. n113 The right accrues solely because of the marriage relation, and it is in addition to the share of her husband's estate to which she is entitled under the statute of descent. n114 The real basis of the existing law of dower is the common law of England as modified by statutes, ancient and modern. n115 The right of a widow to dower is determined by the law of the state in which the land is situated, regardless of the domicile of the parties and the place of marriage. n116 The law in force at the death of the husband governs the right, n117 while the measure of the right is determined by the law in force at the time of the husband's conveyance, where the wife did not relinquish her right. n118

Under the weight of authority, the dower right or the statutory substitution therefore, is taken independently of and adversely to any right of inheritance or succession. n119 The weight of authority, on the other hand, holds that where the widow elects under the will she takes by devise and is therefore subject to inheritance and succession taxes. n120 Inchoate dower is not assignable and can be released only to the heirs or the husband's grantee. n121 In the absence of statute, the heirs of the husband cannot have the property sold at judicial sale free of the widow's dower. n122

The courts have actually unanimously refused, even in equity, to substitute a money award for the widow's right in land. n123 A wife is entitled to enjoin waste by an alienee of the husband during the husband's lifetime. n124 Dower, being a favorite of the law will always be preserved in case of doubt. n125

It is not unconstitutional for standards to be more liberal with respect to surviving widows than surviving widowers. n126

21.02(c) The Necessity of a Valid Marriage

Whatever the historical basis for dower, it is today universally accepted that no dower rights exist unless there has been a marriage recognized by the law, n127 and proof of such marriage must be made by the woman claiming the right. n128 When she has shown the marriage, the law raises a strong presumption of its legality, and she need not prove the authority of the celebrant or capacity to enter the marriage relation. n129 The burden is then on the defendant to establish the defense that the marriage was void. n130

Under some statutes, a common-law wife is entitled to dower, and her husband's conveyance without her joining in the deed does not defeat her right. n131 If the evidence shows a course of conduct on the part of both parties toward each other and toward the world, so that people generally would consider them husband and wife, and they lived and dwelt together as such, it is sufficient evidence to support a marriage and entitle the wife to dower. n132 Where the statute provides that marriages shall be under a license and solemnized in the manner therein provided, it is held that a widow cannot claim dower in the lands of one deceased with whom she claimed a marriage without a license or celebration. n133 Of course, a void marriage will not support a claim for alimony. n134 Thus, where the marriage is entered into in violation of a penal statute, there can be no dower, n135 and the same is true where one of the parties was, at the time of the marriage, the husband or wife of another person. n136 However, a marriage voidable only, if not annulled during the life of the husband, does not deprive the wife of her dower. n137 If the marriage is valid in the state where solemnized, it will be valid in the state where the land is situated. n138 No dower right can arise under a marriage that was void because of the invalidity of the wife's previous divorce from a former husband. n139

A few states have recognized rights in an unmarried consort n140 where there was no common-law marriage.

Some states are now recognizing quasi-marriages, something between a void common-law marriage and a legal

ceremony. n141

21.02(d) The Necessity of the Death of the Husband

Although there have been a few statutory changes, n142 the common-law rule that dower never became consummate until after the death of the husband still prevails. n143 The death of the husband is a fundamental requisite to the wife's claim of dower. n144 Until his death, the wife's interest is contingent only, but she becomes vested if he dies before her. n145 Dower is not created by the death of the husband, but is only consummated thereby. The marriage raised the right of dower, and the death of the husband entitled the widow to its enjoyment. n146

In a few states a vested interest equivalent to dower may arise prior to the death of the husband, so it is sometimes said that a woman need not be a widow to be endowed with her husband's lands. n147 The interest may become vested from other causes, among which are absolute divorce of the parties without fault on the part of the wife, n148 upon assignment by the husband for the benefit of creditors, n149 and in some jurisdictions, upon a judicial sale of the husband's lands. n150 Nothing but the natural death of the husband will entitle the wife to dower n151 but, whatever may have been the rule elsewhere, in this country, at least, dower cannot be claimed by a wife while her husband is yet in the flesh, even though he be serving a life sentence in prison, unless such right be given by statute. n152 In some states the husband's absence for a period of 7 years, during all of which time nothing is heard from him, gives rise to a presumption of his death; especially is this true where it is known that he was subject to imminent peril. n153

The right of dower is inchoate n154 or "in expectancy" n155 during the lifetime of the husband, and becomes consummate n156 or absolute n157 only on the husband's death, and it becomes consummate then "by law, and not by succession or descent." n158

21.02(e) The Necessity of Seisin or Title in the Husband

Common-law dower existed only in lands of which the husband was seised at some time during marriage. n159 A seisin in law was, however, as effective as seisin in deed. n160 The widow's dower at common law included an interest in all the property in which her husband had a freehold estate at any time during coverture, regardless of his dying seised of the same, except when she had barred her dower right in some manner recognized by law. n161 It was essential that a husband should have been seised in possession of a freehold estate of inheritance during coverture in order to entitle his widow to dower in his lands, n162 and an outstanding freehold in another before marriage destroyed her claim. n163

Under some decisions the word "seised" means owned, and the owner of property is one in whom title is vested either absolutely or qualifiedly, so that it may be said that the wife of a deceased husband has an estate for life in one third of all the real estate that the husband owned for his use during coverture. n164 Likewise, dower in personalty relates only to such personal property as the husband owned at the time of his death. n165

Seisin of the husband n166 of an estate of inheritance n167 is essential to the wife's right to dower. This seisin must be one beneficial to the husband himself, and not a mere naked seisin for the benefit of another. n168 The word "seisin" as here used means a seisin accompanied by a beneficial interest. n169 Where the husband's holding was merely that of a trustee, he had no such interest as would entitle the wife to dower. n170 Likewise, where a husband purchased lands, giving his notes as security for the purchase price, but afterwards reconveyed the lands in satisfaction of his notes, it was held that the wife's right of dower did not attach. n171 Also, where a donee has possession of land under a bona fide gift before marriage, the wife of the donor cannot claim dower in the land. n172 Mere naked possession by the husband is not seisin in the sense that the wife can claim dower on account of it, n173 but if the husband has seisin in law, that is, a right to the immediate possession of a freehold, the wife may claim dower, though he never was actually in possession of the land. n174

A wife's inchoate right of dower attaches as an incident of her husband's seisin. n175 An estate of inheritance, legal or

equitable, is essential to the wife's right of dower; n176 so a mere equitable interest in realty, consisting of a mere right of possession under a writing, has been held not subject to a dower interest of the widow. n177 A widow cannot be endowed in lands of which her husband, at the time of his death, had only a vested remainder expectant on a life estate, since the husband had neither possession nor any present right of possession and, thus, could not have seisin of any sort. n178 It is held that a widow has no dower right in real estate conveyed by her husband before their marriage in fraud of creditors, upon the setting aside of such conveyance at the suit of a creditor, since he had no seisin during coverture. n179 In a New York case, where the husband never had title to the land, it was held that his widow was not entitled to dower therein, even though the husband had title taken in the name of another for the express purpose of defeating the wife's dower right. n180

Where the same act that gives the husband an estate conveys it out of him, the seisin is termed "instantaneous seisin," and the wife has no claim to dower. n181 If the husband sells land before buying it, his wife may not assert an inchoate interest therein. n182 Also, where the husband takes a conveyance in fee and at the same time mortgages the land to secure the purchase money in whole or in part to the grantor or some other person, his widow is not entitled to dower in the land. n183 If there be an interval of time, however, between the purchase and the making of the mortgage to secure the purchase money, the wife is not barred of her dower by reason of any recital made by the husband in the mortgage deed in which the wife does not join. n184 A wife has a right of dower in the equity of redemption in land mortgaged by a purchase money mortgage given by her husband at the time of a conveyance in fee to him of the land. n185 A release of the purchase money mortgage has the effect of carrying the husband's seisin back to the date of the deed conveying the land to him, and the wife has her right of dower therein. n186 At common law, a widow whose husband dies without redeeming a mortgage executed by him before marriage, is not dowable in the equity of redemption. n187 Where the husband is only the mere conduit for the passage of the title, the wife is not entitled to dower. n188 Some authority may be found for the proposition today that there is dower though another be seised to the use of the husband. n189

The cases have varied widely as to whether a widow on the grounds of fraud or as an "illusory" trust has dower in property transferred by the husband during the marriage without the widow's consent. n190

21.02(f) Assignment of Dower

Under the common-law theory, it is the assignment by the heir of particular lands as subject to dower that creates the estate of freehold in the widow. During the period of quarantine, limited as it was at common law, the real thing of value to her was the right to have her dower set off to her so that she might enter into possession and enjoyment of it. Until assignment, she is not yet considered as having an estate, but a right to have one. This right may be satisfied by the heir voluntarily setting off by metes and bounds the proportionate part of the husband's estate to which the right of dower extends, and this setting off and designating such interest is termed "assignment of dower." n191 The widow has no right to select land on which dower should be allotted. n192 She merely has a right to compel admeasurement or assignment, which right is a chose in action. n193 In point of title, her estate does not arise or take effect out of the ownership of the heir or other person making the assignment, but is considered a continuation of that of the husband. Although between the death of the husband and the assignment of dower a seisin of the heir or another person intervenes, yet upon the assignment she is in by relation from the death of the husband. n194 At common law, the parties by mutual agreement may waive a strict assignment of dower by the heirs according to the rules of law. n195 Her right to have assignment accrues immediately upon the death of the husband. n196

At common law, assignment of dower must be made by the tenant of the freehold, that is, by the heir, devisee or grantee of the husband. n197 Originally, it mattered not that such tenant was an infant n198 but, generally in this country, if the tenant be an infant or *non compos mentis*, the assignment is usually made by the guardian or next friend of the tenant. n199 No judicial proceedings were required at common law for the assignment of dower. n200 In some jurisdictions, a special process of assignment of the widow's dower is provided by application to some court of record for the appointment of commissioners to make the assignment and make report of their doings. The report becomes a binding

judgment upon confirmation by the court. n201 As a general rule, however, assignment is made by the probate court, as a part of its jurisdiction in the administration of the estates of deceased persons. n202 In some jurisdictions, statutory provisions for admeasurement of dower are not exclusive. n203

At common law, assignment of dower is either "of common right," or "against common right." By the former, the widow's interest was set off to her by metes and bounds. n204 This is the method that must be employed where the assignment is without the widow's consent, as by the tenant of the freehold or by the sheriff or other officer authorized by court to make it. n205 Statutes in a number of states provide for this method of assignment. n206 In assigning dower under this method where there are several tracts, it need not be assigned in each tract separately, but may be allotted in a body out of one or more of the tracts, when the same can be done without prejudice to the interests of others. n207

If the husband had sold portions of his estate, the wife not releasing her rights, dower must be set off to her in each of the portions sold, and not in one portion alone, n208 unless there is a statutory provision for the setting off of the whole dower in one tract. n209 It has been held that, where the husband conveyed land with warranty, his wife not releasing her dower, and he left sufficient other lands to satisfy the widow's dower, the purchaser may require that the widow's dower be assigned in the lands left by the husband at his death. n210

The person making the assignment according to common right has a large discretion and, if the circumstances and conditions warrant, he may assign dower in a single tract or in one kind of land to the exclusion of others. n211 So, the assignment must be by metes and bounds and without condition, if the property is capable of division, but if it is of such character that it cannot be measured off and particularly designated, then other methods of assignment may be employed. n212

Assignment against common right is where the widow receives some interest or share in lieu of her one third of the land. n213 Thus, where the property is not susceptible of division, dower will be assigned out of the rents and profits, n214 or sometimes by allowing the widow to use and occupy the land alternately with the tenants in freehold. n215 Where the property consists of mines, an oral agreement to divide the profits and give the widow one third thereof, will be a valid assignment of her dower, n216 or the value of this dower interest in mines may be set out in other property of which the widow is dowable, n217 or she may agree to accept a gross sum to be determined by certain mortality tables. n218

The widow and tenants of the freehold may agree upon a sum of money to her as and for her dower, and such authority is sometimes given by statute. n219 However, by the weight of authority, in the absence of agreement or statutory authority, payment of a gross sum will not constitute an assignment or satisfaction of the claim of dower, even though ordered by a court. n220 At common law, a strict assignment of dower by the heirs according to the rules of law is subject to waiver by the parties by mutual agreement. n221 Thus, the rule requiring the allotment of dower out of each of several parcels of land may be waived by agreement of the parties. n222 A widow has no vested interest in dower until assigned. n223

If the tenant of the freehold fails or refuses to assign the widow her dower, she must seek the aid of the courts. At common law, she could bring an action for a writ of dower to compel assignment. In such action she must allege that she is a doweress and, as such, has obtained no interest in her deceased husband's estate n224 or, if she has been endowed in part and now demands the remainder, she must have recourse to the writ of right of dower. n225 These common-law methods of procedure are retained in the laws of some of our states. n226 In the absence of a statute to the contrary, a proceeding to have dower assigned must be brought in the common-law court, and not the probate court. n227 In some states, it is held that the statutory remedy for the allotment of dower does not exclude courts of equity of their common-law jurisdiction to grant such relief. n228 She may bring an adversary proceeding, in which the court will see that she gets her equitable one-third of the real estate to which her right of dower has attached. n229 In code states, no distinction is made in the form of action, so the action for dower does not differ from any other action. In some states, application must be made to a court of record which appoints a commissioner to assign dower, and the court's

approval of his report becomes a binding judgment on all the parties concerned. n230 The assignment of dower in this country is usually by summary proceedings in the courts controlling the administration of decedent's estates. These are generally the county or probate courts. n231

A number of statutes require the action to enforce dower to be brought within a certain period after the husband's death, and a failure to comply with the law in this respect will bar the action. n232 In most states, it is held that the general statutes of limitation are applicable to the action to enforce assignment of dower, even though it be not expressly mentioned in such statute, and the statute begins to run immediately upon the husband's death. n233 This rule is denied in England and in some of the states. n234 In case there is a statute of limitations particularly referring to actions for dower, there can be no question that it controls the action. n235 The filing of a petition by the widow within the statutory period will save her dower from being barred although she may delay prosecution of her claim, provided there has been no act done, change of relations, or conditions making its enforcement inequitable. n236

At common law no demand is necessary to maintain an action for the recovery of dower, n237 unless damages are sought to be recovered for the detention of dower. n238 In some states, however, the statute makes a demand a condition precedent to the maintenance of an action to compel assignment. n239 Where by agreement with one of the heirs the widow remains in possession of real estate and collects the rent, no demand for her dower is necessary. n240 If a demand is necessary, it should be made on the person whose duty it is to assign dower, this being either the person seised of the freehold or the tenant in possession. n241 The demand for dower may be made verbally, in person or by agent, and verbal authority in the agent is sufficient. n242 If the demand is required to be made in writing, it should designate the property in which dower is claimed with reasonable certainty and it must show the nature of the claim. n243

21.02(g) Protection of Dower from Acts of the Husband

Even though dower is actually a result of public policy as an act of charity and does not arise out of contract, it cannot be impaired by an act of the husband without his wife's consent. n244 A husband may execute a valid conveyance of his lands without his wife joining in the deed, but the grantee takes subject to the wife's right of dower, and if she survives her husband she can have her dower assigned to her out of the land. n245 It follows that, as a general rule, the husband cannot do anything that will deprive his wife, against her wishes, of her right of dower n246 and he cannot defeat such right, without her consent, either by a fraudulent acquisition of property in the name of a third person n247 or by a disposition of his property by deed. n248 The right of dower and potential right of dower are so sacred to the wife that a prospective husband cannot convey his real estate to others for the purpose of taking such rights from his prospective wife. n249 Where the statute provides that the widow shall be dowable only of lands of which the husband died seised, his conveyance during coverture will effectually bar dower. n250 The husband cannot deed his property in Nebraska so as to defeat dower, unless his wife is a non-resident. n251 Abandonment of the homestead does not operate as a forfeiture of the wife's dower. n252

But the courts will protect a wife's inchoate right of dower from fraudulent destruction. n253 The wife's right of dower is entitled to protection as well before as after it has become vested, and no act of the husband can prejudice it. n254 A husband cannot lawfully devise his wife's statutory right of dower to others without her consent. n255 Where a mortgage existed against property before dower attached, its subsequent payment and satisfaction operated to fix the wife's dower to the entire property, and a mortgage could not be re-issued so as to cut off her dower without her consent. n256

Equity will grant the wife the same measure of protection as if she were a stranger as against a conveyance in fraud of creditors. n257 Where the conveyance is made before marriage, with the knowledge and consent of the intended wife, she cannot, as his widow, claim dower in the land, n258 but his conveyance made on the eve of the marriage, and without her knowledge, is a fraud upon her rights. n259 The intent to deprive her of her marital rights, which she would otherwise have acquired, is presumed from the circumstances. n260 Where the conveyance was made prior to any

agreement to marry, and without reference to any anticipated rights of the prospective wife, it is not fraudulent as to her. n261 If the intent was to defraud whomsoever the grantor might marry, his conveyance is void as to the woman who became his wife, even though he did not know her or was not engaged to her at the time of the conveyance. n262 Some courts, however, take a contrary view, especially if the provision for such child or children be reasonable. n263

If the conveyance is to a bona fide purchaser, however, he is protected as against the claim of dower of the intended wife. n264 In some cases, the general doctrine has been extended to include cases where the owner does not even know whom he intends to marry, if he has a general intention of depriving any future wife of dower. n265 Where the husband conveyed property to a nephew to defraud his wife, equity will not assist the husband to recover the property. n266

As a general rule, an antenuptial conveyance made by the husband for the purpose of defrauding his wife will not be permitted to defeat the latter's right of dower. n267 The rule, stated simply, is that a conveyance of land by the husband, executed in contemplation of marriage, without the knowledge of his intended wife, and intended to prevent her rights of dower and homestead from attaching to his lands, is a fraud upon the rights of the wife on marriage, against which a court of equity will grant relief. n268 It has been said, however, that "if a conveyance of property by a husband even in contemplation of marriage is bona fide, and no right is reserved to him, then, though made to defeat the claim of the wife, it will be good against her." n269 And, ordinarily, an antenuptial conveyance of real estate by the owner thereof will defeat the dower of a wife whom the owner thereof subsequently marries. n270

While, as a general rule, there is no dower in personalty in many states today, the wife has become a "forced heir" as to the husband's personalty. Under the "forced heir" concept, the requirements of commerce prohibit the wife from claiming a present charge upon the husband's personalty during the marriage. So, the husband can freely alienate any of his personalty during coverture without the wife's consent. But, when the husband dies, the wife becomes entitled to a statutory share in the personalty belonging to his estate. This is not a definite share in definite things but merely a percentage of the whole. This "forced heir" share is subject to claims of creditors. But, if the husband attempts to defeat it by will, the widow may elect against the will to take her statutory share.

In some states the "forced heir" concept has been extended so as to prevent the husband from giving away his personalty during his lifetime so as to defeat the wife's "forced heir" share on his death. n271 In other states, this has been modified so as to turn upon the "illusory transfer" or "illusory trust" rationale. So, if the husband has actually given away the property inter vivos beyond power to recall, then the wife can take no dower. But, if he has by a fraudulent instrument attempted to keep real control in himself until his death, the transfer or trust is illusory, and the wife may take her interest therein on his death. n272 Under the "illusory trust" theory, for dower purposes, a man's estate is what he controlled in his lifetime. n273 Where the statute stipulates the time within which the widow must elect against the will, she is estopped to claim against the will by delay in electing. n274

As the general rule, a voluntary conveyance by either party to a marriage contract made without the knowledge of the other, and on the eve of, or in contemplation of marriage, is a fraud upon the other's marital rights. n275 The courts require, however, that there be a voluntary conveyance, n276 that the prospective spouse have no knowledge of the transaction, n277 and that it be made in contemplation of marriage. n278 The conveyance is not in fraud of marital rights unless made just prior to marriage with intent to defeat the contemplated spouse. n279

A trust is not illusory though the settlor's intent was to deprive his wife of a share in his estate. n280

Where the common-law dower concept has become statutory and has been extended to make the wife a forced heir in personalty, n281 some cases extend the protection of the wife to inter vivos transfers by the husband of his personalty. n282

21.02(h) Property of the Husband in Which the Widow Takes Dower

The common-law rule was that the widow was entitled to dower in all property of which the husband was seised at any time during marriage. n283 Since seisin was a formalized feudal concept, dower could only exist in those types of property capable of being seised. At the common law, dower existed in favor of the wife in all the lands, tenements, and hereditaments of which her husband was seised of a freehold estate during coverture and in which she has not joined him in disposal. It attached to corporeal as well as to incorporeal real property. n284 A wife is dowable to every estate of inheritance of which her husband may be seised during coverture n285 including, under most cases today, equitable as well as legal estates. n286 A wife is also dowable in rents that are inheritable, n287 to rents and royalties from mining operations, n288 and to fishing privileges n289 or other *profits a prendre*. n290 Dower also attaches to crops planted by the husband and growing on the land at the time of his death. n291 The right of dower also attaches to growing trees n292 and timber not removed within the time specified for removal in a conveyance thereof. n293

At common law, the right of dower attached to all the lands of which the husband was seised and possessed during coverture, including wild and unimproved lands, n294 and this is the rule generally under the provisions of modern statutes. n295 An exception to this rule was announced in some of the early decisions, giving as a reason for holding that a widow was not dowable of such lands that no rents and profits could accrue therefrom without the doweress running the risk of being guilty of waste. n296 This exception, however, has always been coupled with the express provision that the disallowance of dower in wild or unimproved lands does not apply to such lands if used with a farm or dwelling house. n297 It was held that a husband's interest in a mining claim is not subject to dower; n298 but, where mines are open and operated under a lease from the husband during his lifetime, his wife after his death is entitled to dower in the royalties and profits due from such operation. n299

Oil and gas in place constitute real estate and are subject to dower. n300 This is true also of oil wells and mines which the deceased husband himself opened on his land or which others with whom he had made enforceable contracts for the purpose opened after his death. n301 Where an oil lease of a deceased husband's land is executed jointly by the widow and the remainderman, the widow has a dower interest in the royalty paid thereunder. n302

The question of whether a widow is entitled to take dower in interests arising under an oil and gas lease depends on whether the interests so created are real estate in the particular state, and the extent to which the statute has modified the common-law dower. n303 The widow has a one-third interest in all royalties paid on mineral leases, but only a one-third interest for life in royalties paid on mineral conveyances. n304

Dower can only be had in freehold estates of inheritance, or in equitable estates where the deceased was entitled to enforce or recover it at the time of his death; n305 so there is now dower in realty held as tenants by the entireties. n306 On the other hand, it has been held that there is no dower in an oil and gas lease since it is not a fee simple interest as statute required for dower, and lease did not transfer title to oil and gas. n307

Where the husband has exchanged lands, the widow is forced to an election between the tracts as to dower. n308 The general rule is that, where the husband exchanges lands of which he was seised during coverture for other lands, dower cannot be claimed in both parcels. n309 The widow is entitled to choose which parcel she shall have dower in; but the estates exchanged must be equal in quantity, not value, as fee simple for fee simple, a lease for 20 years for a lease for 20 years, and the like. It is not sufficient that the parties make ordinary deeds, for the deed must be one of exchange, and to that mode of conveyance the word "exchange" is essential. n310

There is a general rule to the effect that a voluntary conveyance by either party to a marriage contract without the knowledge of the other, and on the eve of or in contemplation of marriage, is a fraud upon the other party. n311 But the transfer is upheld if the intended spouse had knowledge. n312

At common law a widow was not entitled to dower in an equity of redemption. n313 She is now generally held dowable therein, the mortgage being a mere lien and the mortgagor the real owner, n314 although she has released such right by the mortgage that she signed, n315 or became the wife of the mortgagor after the execution of the mortgage. n316 This

is, of course, clearly true where the mortgagor has legal title. n317 Where a man, prior to marriage, gives a mortgage for purchase money, his widow has dower only in the surplus remaining after the executor has sold the land to pay the mortgage debt. n318 Although a wife joins her husband in a mortgage executed on his lands, she is still entitled to a right of dower in the husband's equity of redemption for, by her joinder, she releases merely her dower right in the estate or interest conveyed to the mortgagee. n319 The wife's inchoate dower interest is subject to a mortgage on land at the time the husband gets title and which he creates whether she joins him in the instrument or not. n320 After the husband's death, she is entitled to have her dower set off to her free from the mortgage, if the remainder of the property is sufficient to satisfy the mortgage debt n321 or, where the mortgage is not foreclosed, equity will permit her to redeem the mortgage and take her dower. n322 As a general rule, the widow is entitled to dower in the whole estate as against everyone but the mortgagee, but to redeem the land from him she must pay the whole amount due on the mortgage. n323

Even where the widow had joined in a mortgage of her husband's lands, she was entitled to her one-third dower in the whole to be taken proportionally out of the remaining lands, such a joining not being a release of dower as against the husband's heirs and devisees. n324 The widow of a mortgagor is entitled to dower in land, the legal title to which is held by another, as security for money advanced to the deceased husband. n325

Dower is taken subject to any outstanding equities to which it was subject in the husband's lifetime. n326 The courts give a widow dower in property fraudulently transferred by the husband to defraud creditors, if she is innocent, n327 but are divided if she is a party to the fraud. n328

If the wife executes a mortgage to secure the husband's debts and the mortgage is foreclosed, there are several views as to the result on dower. Under the majority rule, she takes dower only in the excess of the foreclosure sale after the mortgage is satisfied. n329 Other states give her one-third of the entire sale price payable out of the surplus, if there is one. n330 Under a third theory the wife is a surety and gets her one third in the entire sale out of the surplus, if any, and the balance, if any, as a creditor of the husband's estate. n331

A widow who, as wife, had joined her husband in a mortgage of land of which he was seised, is in equity entitled to dower in surplus money arising from a foreclosure sale of the property, after satisfying the mortgage debt. To the extent of the debt secured by the mortgage in which she released her right, her dower interest is extinguished, and she is dowable only in the surplus. n332 The surplus stands in the place of the equity of redemption and retains all the properties of realty and does not become personalty for the purpose of distribution among the next of kin. While, therefore, a widow may claim dower in the surplus, she cannot claim the surplus as personal property under a statutory exemption. n333 Likewise, the widow of a vendee of land is entitled to dower in the surplus of a sale of the land by the vendor for the unpaid balance of the purchase money. n334 Also, where land is sold under order in a partition suit, the wife has her dower in that part of the proceeds represented by her husband's interest in the land. n335 Where an assignee sells lands assigned by a husband without his wife joining in the deed of assignment, she may have her one-third interest in the land set off to her in partition proceedings, but she cannot claim this right and at the same time retain a share of the proceeds paid her. n336 Where the widow is entitled to both dower and a homestead estate, her dower is limited, on a sale of the land, to one-third of the remainder of the proceeds after deducting the value of the homestead. n337 Dower may be recovered, under the doctrine of equitable conversion, from the proceeds of the sale of real estate in which she had a dower interest. n338

The right of dower of the widow of a vendee is subordinate to the vendor's lien for purchase money, n339 even where the wife did not sign the contract. n340 Where a man dies intestate, leaving both personal property and land which were subject to a vendor's lien, the estate being insolvent, and the vendor satisfied his lien by a sale of the land which brought enough to leave a balance, it was held that the widow was entitled to dower, in such balance and further as against the general creditors was subrogated to the right of the lien creditor to have a percentage on his claim out of the personal property. n341 Where the owner of land entered into a contract of sale thereof prior to his marriage, the wife of such marriage acquired no right of dower in the land contracted to be sold as against the purchaser, even though she had no

knowledge of the contract of sale at the time of the marriage. n342

Even at common law the right of dower does not attach to real estate purchased by a partnership with the firm's funds, used as firm property and encumbered beyond its value with the firm's debts. n343 Such right attaches to the deceased partner's share of any real estate of the firm not required by the payment of the firm debts and the adjusting of equitable claims as between the partners themselves. Such right therein is paramount to those of the heirs of the deceased partner. n344 Where, however, the surplus is in the nature of personalty, as where the land was held for speculation, the above rule does not obtain. n345 Where partnership lands are held in the name of the surviving partner, the widow of a deceased partner has no dower therein. n346 Also, where one partner, as trustee authorized by the firm, sells land thereafter acquired, dower will extend at most to the proceeds of the sale, but the grantee's title will be free from any such claim. n347 If a partner who owns land and has a wife living transfers the land to his firm without the participation of the wife, her right of dower having attached is not defeated by the transfer. n348 The proceeds of a sale of a husband's interest in partnership land to his partner is also subject to the wife's dower. n349

The Uniform Partnership Act converts realty into personalty for the purpose of descent and distribution, unless agreement to contrary, thus changing majority common law. n350 Accordingly, dower does not exist in partnership property under the Uniform Partnership Act. n351

Disagreement exists as to the widow's right of dower in fees that become defeasible on the husband's death; n352 so it is held that, where an estate is limited to one and to a certain class of his heirs, it is an estate of inheritance and, therefore, it is subject to dower. n353 This is true even though the estate be at an end, by the failure of heirs, at the time of the husband's death. n354 In jurisdictions where estates tail are changed by statute to life estates with remainder over to the heirs of the body of the first taker, the wife is held not entitled to dower. n355 So, the issue of a donee in tail during the life of such donee has no estate or interest in the lands entailed which the issue can alienate and therefore he has no estate of inheritance subject to dower; n356 but under the common-law rule the widow of a donee in tail took dower. n357

If the husband's title is defeasible, dower is defeasible to the same extent. n358 If the husband's estate is subject to an executory limitation which creates a power of appointment, the exercise of the power in his lifetime, n359 or by will n360 defeats dower even though the husband himself exercises it. n361 If the husband's estate is defeated in his lifetime the dower falls also; but, if not, then dower should be given. n362 If the husband's estate would be defeated at his death, the cases are divided with the weight of authority giving the widow dower. n363 The widow has dower though the property escheats to the state for lack of heirs. n364

If the husband's seisin is dependent upon a condition precedent or subsequent, a failure to perform the condition which operates to consummate his estate operates as well to terminate the contingent and inchoate interest of the wife. n365 In all cases where the husband is seised of such an estate in land as that the issue of the wife may inherit, if any she have, as heir of the husband, the wife is entitled to dower, the estate of the husband being considered extended for that purpose. n366 There are cases, however, which hold to the contrary, giving as a reason for so holding that the estate of the husband expires with him, thus cutting off the inheritable quality thereof, and the title passes to another as purchaser by virtue of the limitation over, leaving nothing to which dower can attach. n367 A statute giving the widow a certain portion in value of the husband's legal or equitable interest in realty has reference only to such interests capable of inheritance, and not to interests which terminate upon his death, such as a life estate. n368

The wife may have a right of dower even though the husband's estate is a defeasible one. n369 Dower does not attach to a reversion in fee unless, by the death of the intermediate freeholder or by a surrender of the freehold to the husband, the inheritance becomes entire in the husband during coverture. n370 So, it has been held that a defeasible fee with executory devise over upon death without issue, although extinguished as to the owner and his heirs by his death, is nevertheless subject to dower, and the jointive statute is inapplicable where the widow is given the entire estate, since her dower is merged in the fee and there is no need for election between dower and the will. n371 An heir, upon the

ancestor's death, takes an estate to which dower attaches, though it be defeasible to pay ancestor's debts. n372

In order to entitle the wife to dower at common law, the husband was required to be seised of a legal estate in the land and not a mere equity. n373 This rule rendered it impossible to base dower on the equitable interest of a *cestui que* trust. n374 The early cases hold that, if the husband's title was sufficient in all other respects, the wife's dower attached, although the legal title rested in a third person. n375 By statute in many states, a wife is given dower in her husband's equitable estate. n376

Even where there is dower in the equitable estate, in some states the husband must own the equitable estate at death, and wife has no dower where he had contracted to convey the equitable estate. n377 So, assignment of the purchaser's interest in a contract of sale defeats dower n378 under one rule. Other courts attach dower to the extent of the purchaser's interest. n379 Where a contract for the sale of real estate is entered into by the owner prior to his marriage, a conveyance subsequent to marriage constitutes an equitable bar to the wife's right of dower. n380

The wife has dower in lands held by her husband in common with others, and a conveyance of the land in which all the co-tenants joined did not affect the dower right of the wife of the co-tenant where she did not join in the deed. n381 The widow of a tenant in common who has made permanent improvements is held not entitled to dower in her husband's interest in permanent improvements, such interest being a mere equity. n382 The rule is different, however, where the land is held in joint tenancy. n383 Where this tenancy is severed, and the husband remains solely seised of a part or all of the land, the wife has dower therein. n384 Where the statute has abolished the right of survivorship in joint estates, the widow of a joint tenant is entitled to dower. n385 Also, where the land is held jointly by husband and wife, her right of survivorship takes the place of dower. n386

Where the widow's election to take dower affects property specifically devised, some courts treat the matter as an ademption, and the devisee loses completely. n387 Others permit compensation to the devisee only out of property renounced by the widow. n388 The third rule allows the defeated devisee contribution from others of a like class, n389 and to defeat legatees of a lower class. n390

Dower could not be released prior to marriage, since a right could not be barred before it accrued. n391 Nor could a married woman have capacity to contract with her husband to release her dower to him. n392 Her interest could only be released to a third person by a fine or common recovery with her husband. n393 Under one theory, the wife's joining in her husband's conveyance terminates the dower finally. n394 But, by the other theory, the relinquishment is effective only by way of an estoppel created in favor of the person to whom the relinquishment was made. n395

Where specific performance is taken against a husband under his contract to sell in which his wife did not join, there are three results possible: (a) the vendee must pay the full price and run the risk of inchoate dower becoming vested; n396 (b) the value of the inchoate dower may be deducted from the purchase price; n397 (c) the vendee may recover the title but must post bond to indemnify the widow if she survives. n398

There are four rules in effect as to conveyance in fraud of dower: (a) Such conveyance is valid; n399 (b) any clandestine transfer is conclusively fraud; n400 (c) a clandestine transfer is prima facie fraudulent; n401 (d) fraud must be proved. n402

Where common-law dower still exists, the courts disagree as to whether the widow's dower in oil and gas royalties is merely the interest from the royalties paid or the royalties from her third of the land assigned under dower. n403 Dower attaches to all hereditaments. n404

At common law, there could be no dower in lands to which the husband had a remainder in fee, but which were held by the life tenant at the death of the remainderman. n405 If the husband had at no time during coverture any other estate than a reversion or remainder in fee, expectant upon the determination of an estate for life, his widow is without dower.

n406 Where the estate preceding that of the husband was not for the life of the holder but one for years only, the husband's interest was not technically a future interest, and his widow was dowable therein. n407 Where the remainderman dies before the life tenant, the remainderman's widow has no right of dower. n408 Where a husband who was one of five remaindermen pre-deceased the life tenant in rightful possession, it was held that his widow was not entitled to dower in the proceeds of the sale of the property. n409

At common law, personal property is not subject to dower. n410 While this common-law rule has been abrogated in Florida by statute, so that in that state the right of dower extends to personal property, n411 such rule has not been changed by the dower statutes of Illinois. n412 Since a tenant is not seised of an estate of inheritance in demised premises, his widow has no dower interest therein. n413 At common law, there could be no dower in a leasehold estate, however long the term. n414 It has been expressly decided that an estate in land for the term of 999 years, subject to the payment of an annual rent, is personal property, and that the widow of the tenant could not claim dower in it. n415 Under Ohio statutes, the right of dower exists in a permanent or perpetual leasehold created by a lease which is to run for 99 years and which is renewable forever. n416 Likewise, no dower attaches to an estate at will. n417

A widow is not dowable in lands of which the husband had only a life estate. n418 This rule applies to those cases in which the husband has a life estate with a power of appointment by will. n419 In Maryland, the widow of a lessee under a ground rent lease is held not to have an inchoate or consummate dower in leasehold estate. n420 But, in some states, the widow is also entitled to dower in the proceeds of the sale of a permanent leasehold estate. n421

In Florida, where dower in personal property is recognized, it was held that if a trust instrument reserved a beneficial title in bonds to the trustor, the bonds were the property of the trustor at his death, and his widow could claim dower therein, notwithstanding the delivery of the bonds to the trustee for purposes of the trust. n422

Under the statutes of Maryland, it has been held that a widow has a dower interest in land held by her husband by equitable or legal title at any time during coverture, whether held by him at the time of his death or not. n423

Real property held in trust by the husband is not an estate of inheritance, and his surviving widow has no right of dower therein, n424 but, if the estate is one of inheritance, the widow is entitled to dower. n425

A deed conveying realty to the sons of the grantor in fee simple, but in trust with power to manage, sell, mortgage, lease, and convey the trust property and reinvest the proceeds as they should deem best, was held to create a valid trust empowering the trustees to convey the lands in fee, without their wives joining in the conveyance, the wives having no right of dower in the trust property. n426

In Michigan, it is held "that the interest of the vendor in a land contract, upon his death, goes to his administrator as personalty, and does not descend as real estate to the heirs of the vendor, and therefore is not a subject of dower." n427 Similarly, a wife of a lessor is not entitled to dower as against a purchaser in a lease option executed before marriage. n428

A widow has no dower in lands owned by a corporation though the husband owned all the common stock. n429 But, where shares of stock were considered real property, a wife whose husband was a tenant in fee of such shares was held entitled to dower out of them on his death. n430

The wife of a trustee has no dower in the trust estate; nor does the wife of a mortgagee, nor the wife of one whose conveyance in fraud of creditors before marriage is set aside after marriage. n431

Pennsylvania has now determined that household goods are the equal property of the husband and wife though the husband is the sole wage earner. n432 Indiana has a similar statute. n433

Dower is subject to any infirmities in the husband's title, including mortgages or sales contracts existing at the time of marriage. n434

The doctrine of equitable conversion has, however, been used to defeat dower. n435

COMPUTER-ASSISTED RESEARCH

LEXIS:widow! w/5 dower w/15 husband! w/5 property or interest! or land!

21.02(i) Dower Consummate, Prior to Assignment

Common-law dower was not a future interest in real estate. It was merely an inchoate charge against the husband's lands. It did not ripen into a present estate in land upon the death of the husband ipso facto, but required the further act of assignment by the heir before it became an estate of freehold. The wife's inchoate right of dower becomes consummate and vested immediately upon the husband's death, although at common law she has as yet no estate in the land, for the law casts the estate on the heir immediately upon the ancestor's death. n436 Until assignment, the interest is a mere chose in action, n437 not an estate, n438 legal title, n439 seisin, right of entry, n440 or real property. n441 The widow is not a cotenant with the heirs, n442 or a tenant in common with them, n443 but she is a tenant in common with them to the extent of her interest. n444 The widow now has a right to the immediate assignment of her dower, n445 after which she then has an estate, a lifetime interest in real property. Before assignment, she does not know the particular portion of the land that she is to have, hence, she cannot enter, as she has not the right to choose the portion. n446 While consummate right of dower is a valuable property right, it confers no title until assignment is made and, before assignment, it is not subject to execution at law. n447

Until dower is assigned, the widow has no estate in the deceased husband's lands, n448 and so there can be no levy by the widow's creditors. n449 Dower consummate does not entitle the owner thereof to interest pending the assignment. n450

The widow is not entitled to rents and profits on the dower property between the time of death and of assignment of dower, unless the heirs have delayed the assignment or the property cannot be partitioned or assigned. n451

A wife's dower interest in the lands of her husband becomes consummate on his death by virtue of the marital relation, and she does not take as an heir. n452 In the absence of an authorizing statute, the widow has no right before assignment to enter and occupy any part of her deceased husband's estate, or to retain possession thereof as against the heirs or those claiming under them. n453 In some states, the widow has the right to possession of the mansion house and curtilage until after assignment n454 but, in other states, it is held that, where she is left in possession of land in which she has a dower right, she may maintain that position without having her dower assigned. n455 At the common law, however, the doweress had no right to remain upon the estate, even to live upon it until her interest was set off to her. The estate belonged to the heirs and, if she remained, she was a tenant at sufferance or at will of the heirs. n456 As against the heirs at law, the widow, before assignment of her dower, is seised of no legal estate in her deceased husband's lands that can by her deed be vested in a stranger, n457 but she may release her right to one in privity with the title under which she claims. n458 As a rule, such a conveyance confers on the grantee no rights capable of assertion in a court of law, but it is held valid and enforceable in equity. n459 In some states, it is held that a consummate right of dower, although still unmeasured, is a vested property interest which may be assigned or conveyed, n460 and the title of the assignee or grantee is unaffected by the fact that the probate court subsequently assigns the dower to the widow as she holds the bare legal title thus conferred in trust for her assignee or grantee. n461

Since she has no right of possession or entry, she is not entitled to bring an action in ejectment, n462 or constitute a defense to such an action brought by heirs. n463 She is not entitled to any particular part of her deceased husband's estate against his devisees or heirs until after the commissioners have set off her dower to her. n464 Until assignment of

her dower, the widow has no right to rents and profits. n465 Other courts hold that unassigned dower is not a subject of lease, transfer or sale, and can be released only to the owner of the fee. n466 Until her dower has been assigned to her, her lease of the land for oil and gas is invalid, and her lessee has no right to open new wells. n467 But, under the provisions of some statutes, she may alienate her consummate right of dower n468 and, in others, equity will enforce her transfer of unassigned dower. n469 Equity will, however, recognize a conveyance of unassigned dower as a contract to convey. n470

Under Illinois law, upon the death of the husband, substantial property rights are transferred to the wife, and she becomes entitled to a one-third life estate in the property -- an interest that is no longer an intangible contingent expectancy. n471 Dower assignment must be by metes and bounds. n472 Some statutes, where the property is not divisible, require an assignment of a share of the rents. n473

21.02(j) Release of Dower

A wife cannot alienate her dower during coverture separate from the estate of her husband, and the dower is not subject to the claims of creditors of the wife. A wife has no such interest in the land of her living husband as will entitle her to make a conveyance thereof to a stranger n474 or to her husband direct, n475 but if the wife unites with her husband in conveying his land, releasing her dower therein, her right is extinguished. n476 The wife's inchoate right of dower cannot be released directly to her husband or conveyed by a joint deed of husband and wife wherein the husband retains his interest. n477 Thus, a husband, making payment to his wife to secure her signature to a deed, could not deduct the amount as a sales expense. n478

As a general rule, only by her own voluntary act may a wife relinquish her right of dower. n479 The only thing that a husband or wife has in the other's property rights is an expectant interest. Each has a right in his or her lifetime to give away the property. n480 The release must be to one who has, or by the same instrument acquires, an independent interest in the property. n481 It is held that she cannot be divested of her right of dower except by express language or irresistible implication from the terms of the instrument attempting to accomplish that result. n482

If it is intended to convey the interest of the husband and to bar the wife's right of dower, she must join in the deed with her husband and, in so doing, the statutory mode of releasing dower must be strictly followed. n483 While in some jurisdictions the wife's release must be in the same deed with her husband's grant, n484 there are other cases holding that her release may be accomplished by her subsequent separate act. n485 Under the laws of some states, she must be examined by the officer taking the acknowledgment, separate and apart from her husband, to see that her uniting in the deed is her own free and voluntary act. n486 Where the statute expressly empowers a married woman to execute a power of attorney to convey, she may release her dower through her husband by virtue of a power of attorney authorizing the particular release. n487 Where the husband's authority is limited to the execution of conveyances generally, he cannot release her right of dower. n488 She can be deprived of her right of dower only by her own voluntary consent or act. n489 Her undelivered instrument purporting to waive all claims of dower or participation in her husband's estate is a nullity. n490 As a general rule, no valid release can be made for her by another. n491 Since in a number of jurisdictions the right of a married woman to contract as if she were a *feme sole* has been given by statute, reason and justice require that contracts releasing her dower should bind her, but the authorities, on this point, have not been in harmony. n492

Where the wife joins in a mortgage on her husband's lands, there are three positions as to her dower upon foreclosure: (a) she takes dower in one-third of the surplus only; n493 (b) one-third of the entire purchase price but payable out of surplus; n494 (c) one-third of the whole to come out of the surplus, if any, and then as a general creditor of the husband's estate. n495

If the husband has aliened the land without the wife's consent, the wife is not entitled to dower in the improvements subsequently made by the transferee or his successor in title, n496 nor can she claim damages for improvements

existing at the time of the transfer and removed by the transferee. n497

When the wife joins in a mortgage, she is barred from claiming dower as against the mortgagee, but her dower right is unimpaired as against all others. n498 A distinction has been made, however, where the wife becomes personally liable on the debt, holding the widow's distributive share to bear its proportionate share of the mortgage in the execution of which she joined. n499 Homesteads have been excepted from this latter rule. n500

Where the wife releases her inchoate right of dower in a mortgage executed by the husband, she cannot thereafter claim dower as against the mortgagee or those claiming under him. n501 A widow or a married woman who has joined in a mortgage in release of dower may redeem, for she is entitled to dower as against every person except the mortgagee and those claiming under him. n502 Even a wife having an inchoate right of dower may redeem land from a mortgage in which she has joined with her husband to release dower. n503 When it is not necessary to satisfy a mortgage in which the wife has released her dower, she is not bound to redeem on foreclosure to preserve her dower. If a wife joins in a mortgage with her husband, who then dies, and upon foreclosure a surplus above the mortgage debt is realized, she may have dower in such surplus, though the husband may have released the equity of redemption. n504 In Michigan, a wife's execution of the husband's mortgage does not bar her dower right but subjects the right to the lien, and the wife is a "mortgagor." n505

A mortgagee under a mortgage given by the mortgagor prior to his marriage and renewed after his marriage for an amount in excess of the original indebtedness without the wife's joinder or consent could foreclose the mortgage and bar dower of the wife to the extent of the indebtedness existing at the time of the marriage. n506

It is held that where the wife executed a note secured by a deed of trust as co-maker with her husband, she thereby relinquished her dower in the property, and her dower was extinguished by foreclosure. n507

A wife cannot bar her right of dower by signing and sealing her husband's deed without any words of conveyance or of release of her dower. n508 By usage, however, in some states a wife may, in fact, bar her dower by signing her husband's deed without any words of conveyance or release. n509 The words "in token of her free consent," used at the conclusion of a deed, do not sufficiently express her intention to bar her right of dower, n510 but if the deed contains a statement that she releases her dower, it will have this effect whether she is named as a grantor or not. n511 If a wife having an estate in fee executes a deed of it with her husband, both joining in the granting part of the deed, the fact that the wife also releases dower and homestead in the granted premises does not restrict her conveyance to these interests, but the deed passes the title of the wife in fee. n512 The consideration inuring to the husband is sufficient consideration for the wife's release of dower. n513

Some of the jurisdictions have established a doctrine that prohibits a spouse from so disposing of his property in his lifetime by way of direct gift n514 or by means of an "illusory trust," i.e., a trust over which the settlor retains power of control, n515 so as to defeat the surviving spouse's right of election. In some states the spouse may waive by a post-nuptial agreement her right to elect against the will. n516 The courts have shown great reluctance to so construe post-nuptial property settlements as to bar taking under the will, n517 but there is an increasing tendency to permit a post-nuptial release of dower if equitable. n518 A collateral attack may be made in an action contesting an election upon the validity of a marriage or divorce in another jurisdiction.

COMPUTER-ASSISTED RESEARCH

LEXIS:release! w/5 dower

21.02(k) Loss of Dower Without the Wife's Consent

Even under the common-law rule, however, it was possible for the wife's inchoate dower right to vanish without her

approval. Where lands are taken for a public use by condemnation proceedings during the husband's life, the wife's inchoate right of dower is thereby defeated. n519 Under statutes making the wife's inchoate right a mere possibility, she need not be made a party to such proceedings, nor is she entitled to a portion of the compensation paid. n520 Likewise, the husband's dedication of land for public use is generally held to have the effect of excluding the wife's dower, n521 but if the use be put to a purpose other than that of the public, or the public use is only incidental to a private use, the wife's dower is not destroyed. n522 As between the wife and the sovereign or its delegate exercising the power of eminent domain, she is divested of her interest when payment is made to the owner of the fee, though her right will be preserved except as to the sovereign or its delegate. n523 Eminent domain destroys dower. n524

It is sometimes held, however, that while, as between the public and the wife, the husband may dedicate his land for a public use, the wife's inchoate right of dower therein is preserved from destruction until such a time as the dower is either released by the wife, forfeited, or abolished by statutory provision. n525

The leading rule seems to be that lands owned by the husband as a tenant in common may be partitioned without the wife's consent, and the wife is not a necessary party to the partition action, nor can she claim part of the proceeds. n526

The destruction or termination of the husband's estate works a destruction or termination of the wife's right of dower. n527 Where a judgment was obtained on a claim superior to that of the wife's dower, a sale thereunder has the effect of barring any claim of the wife in the land sold. n528 Thus, it is held that a wife's inchoate right of dower in her husband's lands, held by him as tenant in common with others, is divested by a sale in partition proceedings to which she is not made a party. n529

Where the judgment is based on a claim which accrued subsequent to marriage and seisin of the husband, the wife's dower is not affected by a sale under the judgment. n530 Thus, a sale of the husband's real estate under execution, on a judgment against him alone, followed by a judicial confirmation and conveyance, does not extinguish the wife's inchoate dower right in such real estate. Upon the death of the husband, the wife is entitled to have her dower assigned out of such real estate. n531 This rule applies to a sale under attachment. n532 Except where barred by statute, the purchaser of land at a forced sale to satisfy a judgment against a married man acquires the same status, as to the wife's right to dower, that he would acquire if he were the husband's alienee by the latter's voluntary act. n533 A widow's right of dower is not affected by a sale of the real estate to pay the debts of a deceased husband, in the absence of any act on her part that would tend to lead the purchaser to believe that he would acquire a title free from dower. n534

The inchoate right of dower can be vested in the purchaser of realty from the husband by judicial decree, upon the making of stated provisions for the payment to the wife of the value of her dower right in case she survives her husband. n535 The law of estoppel is sometimes invoked to determine whether or not there has been a conveyance or forfeiture of dower on the part of the widow. n536 A married woman cannot estop herself from asserting dower by her act or declarations, except where, to permit her to assert, such claim will operate as a fraud, n537 nor can she be estopped from claiming dower by her contract which is invalid under an existing law, even though she received a benefit therefrom. n538 A widow who, for consideration, executed an instrument during her husband's lifetime that relinquished her dower, was estopped to assert dower right in her deceased husband's lands on the ground that the instrument was partly without consideration where the consideration was not returned. n539 Where a husband threatened to practice a fraud on his wife, and she believed he could and would do it, she was held not estopped from claiming what the law would give her, because, under fear that she might get nothing, she surrendered a large estate that the law would have cast upon her. n540 Where a widow files a pleading in a cause in which she disclaims any right of dower in her husband's land, she is estopped from claiming such right. n541 Property tax sales divest the wife's dower in some states. n542 Other states place dower rights superior to tax liens. n543

Where a divorced wife acquiesced in a decree directing the sale of the husband's property, the conveyance of the property to the purchaser in fee simple, and the division of the proceeds of the sale as provided in the decree, it was held that the wife was estopped from claiming her inchoate right of dower in the property. n544

A married woman may be estopped by a judgment in actions to which she is a proper party in the same manner as a person *sui juris*. n545 This is especially true where a married woman acquiesces in and accepts the benefits of the decree. n546 To conclude a wife from later claiming dower, it is essential that the question of dower shall have been passed upon in the former suit. n547 The authorities are not agreed on whether or not a wife is estopped from claiming dower by a former void judgment in which the question of her dower was passed upon. In one case, at least, it is held that she is not estopped by such judgment, n548 but in a well-considered New York case a contrary view is taken. n549 A widow who failed to assert any right as a party in the children's action to quiet title was held to have waived her right to recognition of dower. n550

Where a husband and wife contracted orally for the sale of land and consented to the purchaser's entry into possession and the making of improvements, they were estopped from asserting rights under the statute of frauds or homestead and dower rights. n551

A provision in a statute which denies to either husband or wife the power to contract with the other in regard to the dower interest which each has in the other's property does not prevent either of them from becoming estopped as against the grantee of the other to assert such dower interest, by reason of reliance upon joint deeds executed between them in violation of such statute. n552 The fact that a wife accepts a deed from her husband of certain lands does not estop her from claiming dower in other lands which her husband conveyed during coverture without her joining in the conveyance. n553 In most states a transfer of property, however great in extent, by the husband to the wife inter vivos does not bar dower in the remainder of the husband's property in the absence of an agreement to that effect. n554

A wife cannot be decreed to release her inchoate dower on a suit for specific performance of a contract of her husband to which she was not a party. n555 There is some diversity of opinion as to whether adverse possession bars a wife's dower. Some courts hold that dower is not extinguished by adverse possession of land during the life of the husband, n556 while others hold that, where a disseisor held possession adversely against the husband for the prescriptive period, the wife's dower is barred thereby. n557 There is a third position to the effect that the adverse possessor takes title as against the wife, but she is entitled to be compensated for her lost dower out of the remainder of the husband's estate. n558

In a state where a widow is entitled to dower in all the husband's lands of which he was seised during coverture, she is entitled to dower in such of his lands as she has not relinquished her right, regardless of the length of time such land has been held in adverse possession. n559 However, a widow's right of dower may be barred by an adverse possession of the land for the prescriptive period by one who does not claim under her husband. n560 If the period of adverse holding began and continued after the husband's death, the general rule is that the widow's right of dower is lost, n561 but there are some cases taking a contrary view. n562

Where a husband's cotenancy is, by either voluntary or involuntary partition, turned into an estate in severalty in a part only of the land, the wife is remitted to her inchoate right in her portion of the land which the husband takes in severalty by such partition. n563 The decisions disagree as to whether a wife is a necessary party to a partition sale of realty owned by her husband as a cotenant with others. n564 Some states are departing from the concept that dower is a present right in land and are reducing the wife to the status of an heir. n565

In some states a real estate owner's wife is entitled to share in the proceeds resulting from condemnation, by reason of her inchoate right of dower in the property condemned. n566 In those states, however, where the wife has been reduced to the status of a forced heir from that of a purchaser, the husband may pass good title to realty during his lifetime free of the wife's claim, even without her consent. n567

COMPUTER-ASSISTED RESEARCH

LEXIS:wife! w/5 consent! w/15 dower w/5 los* or vanish! or destroy! or release!

21.02(l) Separation, Abandonment, Divorce and Murder as Barring Dower

The common law had several instances of barring dower besides release by the wife. These have received varying treatment under the statutes of the several states. A divorce *a vinculo* terminates the marriage and so bars dower, n568 but divorce *a mensa et thoro* (bed and board) or a legal separation does not bar dower. n569 Although there are a few states holding to the contrary, n570 dower cannot survive a final termination of the marriage status. n571 In a majority of states the Statute of Westminster II has become a part of the common law, so that adultery and abandonment bars dower. n572

Some statutes provide that, if the husband be divorced from the wife for her fault or misconduct, she shall not be endowed, n573 while other statutes preserve the right of dower to a wife divorced by her husband's fault. n574 It is held that this extends to and includes the present statutory provisions for the wife, in lieu of dower in the lands of her deceased husband. n575 By still other statutes, a wife who obtains a divorce is not entitled to dower, n576 but the reverse of this is true in other states. n577 Where the decree of divorce particularly stipulates for alimony, this is held to bar dower. n578 In jurisdictions where dower is given only where the marriage subsists at the husband's death, a wife is held not dowable in lands conveyed by the husband while living apart from her and prior to their divorce. n579 The effect of a decree of divorce upon the right of dower is to be determined by the law of the state where the land is situated. n580

In a few states, upon divorce, the wife becomes vested with a one-third interest in the husband's lands. n581 At early common law, adultery had no effect on dower, but the rights of the outraged husband were saved by the Statute of Westminster II, n582 which denied dower to a woman who fled with the adulterer. n583 The courts are divided as to whether the Statute of Westminster II, barring dower for misconduct of the wife, has become part of the American common law. n584 The weight of authority, however, considers abandonment and adultery as barring dower even in the absence of statute. n585

Her adultery does not, however, bar her right to dower where she continues to live with her husband, n586 or where she has abandoned him on account of his having become an habitual drunkard after their marriage. n587 It is held that mere desertion of the husband by the wife, without adultery, will not forfeit her dower. n588 Such a statute does not apply, however, when the wife's separation from her husband is justifiable. n589 Where the wife's desertion or illicit relations with another have been condoned by the husband, her interest in his estate is not lost. n590 Where by statute a wife's adultery bars her right to dower, the husband's adultery prior to her offense does not excuse her acts, so as to entitle her to dower, n591 nor does the fact that the husband is confined in an insane asylum excuse her adulterous acts, so as to entitle her to dower. n592 Under a statute providing that a wife shall be barred of her dower if she willingly leaves her husband, goes away, and continues with her paramour, it was held that this does not bar the right of a wife who has been deserted by her husband to claim dower, where she made unsuccessful efforts to win him back before going to live in adultery. n593 If a wife's conduct indicates her intention not to live with her husband again, or if she marries under the mistaken impression that he is dead, she is not entitled to dower in his estate. n594 In some jurisdictions, however, dower is not waived by the wife's misconduct or abandonment of her husband. n595 The wife's abandonment of the homestead does not operate as a forfeiture of her dower. n596 Permanent, but not temporary, abandonment terminates dower, n597 except where the husband forced the separation. n598

Many states today have statutes which bar a murderess from taking dower in the estate of her victim-husband. These statutes generally follow the pattern of, or are a part of, laws prohibiting the killer from inheriting from the victim. n599 In Florida, however, it has been held that a statute barring a killer-heir from his inheritance did not prevent a wife who murdered her husband from taking dower. n600

COMPUTER-ASSISTED RESEARCH

LEXIS:bar! w/5 dower w/30 separat! or abandon! or divorce! or murder!

21.02(m) Dower as Against the Husband's Creditors

Whenever dower exists in the United States, it follows the common-law concept of protection from the husband's creditors, both during the husband's lifetime and after his death. Common-law dower was subject neither to the debts of the husband nor to the liens and encumbrances placed by him on the property without the wife's consent. The primary fund for the payment of debts is the personal estate, and the widow's claim is superior to that of a general creditor. n601 Her dower is taken free from the husband's debts. n602

As a general rule, the rights of a husband's creditors are subordinate to the widow's claim of dower, except on debts constituting a special charge on the land acquired before marriage or at the time of the acquisition of the land as part of the same transaction. n603 A wife is not entitled to dower in lands conveyed by her husband before marriage in fraud of creditors upon the setting aside of the conveyance at the suit of a creditor, since he had no seisin during coverture. n604

Any debt of the husband which has not become a lien upon the land in the lifetime of the husband is subordinate to the wife's right of dower. n605 The wife's inchoate right of dower is paramount to any claim based on a contract made by the husband and in which she did not release her right. n606

As a general rule, the wife's inchoate right to dower is not affected by the bankruptcy of her husband. n607 Where the wife of a bankrupt husband consents to the sale of land on the condition that she shall receive a gross sum, her dower is not barred, unless such sum is paid to her. n608

It is held that where the husband's land is sold at forced sale during his lifetime to satisfy a judgment against him, the purchaser acquires no greater right as against the wife's right of dower than if the conveyance had been made by the husband's voluntary act. n609 Where a husband's realty was sold on an execution under a judgment against him in an action to which the wife was not a party, her inchoate right of dower became vested on the issuance of the sheriff's deed conveying the husband's interest therein to the judgment creditor. n610

The wife's right of dower is subject to all liens or encumbrances at law or in equity, existing prior to the time it attaches. n611 Thus, dower is subject to a mortgage executed before marriage to secure the purchase money of land, although such right will attach to any surplus remaining after satisfaction of the mortgage debt. n612 She cannot claim the benefit of the appropriation of the personal estate to the removal of such encumbrance. n613

Where the wife has an inchoate interest by way of dower or its statutory equivalent, deeds by the husband alone may be set aside either as a fraud upon the wife, n614 or as "illusory," if the husband purported to retain an interest therein. In other states, such sole conveyances by the husband simply do not affect the wife's interest, which becomes vested if she survives the grantor.

A purchase money mortgage on real estate bars dower of the purchaser's wife even though she does not sign the mortgage. n615 Therefore, where the husband contracted to buy land under deed which was made to the husband and wife and where the wife's name was forged to a purchase money mortgage, the mortgagee had a valid first purchase money mortgage as against the wife. n616 As a general rule, a mere inchoate right of dower cannot be reached by a creditor's bill. n617 On the husband's request, equity will not order a sale of the husband's property free from the wife's dower without her consent. n618

A lien for purchase money created after marriage is paramount to a wife's claim of dower. n619 Also, a judgment entered prior to the marriage has priority over a widow's claim of dower, n620 but when the right of dower attaches to land, it is paramount to the right of any other person claiming under any subsequent act of the husband. This rule is held

to include taxes that are assessed after its inception, as well as the right of homestead. n621 It has also been held that the wife's dower cannot be affected by a mechanic's lien, n622 especially if it accrues after the marriage and before the death of the husband. n623 Although a wife joins her husband in a mortgage executed on his lands, she is still entitled to a right of dower in the husband's equity of redemption, for by her joinder she releases merely her dower right in the estate or interest conveyed to the mortgagee. n624 It is held, however, that a widow who joined with her husband in a mortgage on his real estate to secure his debt is not entitled, upon his dying insolvent, to have his personalty applied ratably to the payment of the mortgage debt, thereby increasing the value of the equity of redemption and of her dower right therein, at the expense of the husband's general creditors. n625

COMPUTER-ASSISTED RESEARCH

LEXIS:dower w/30 husband! w/5 creditor!

21.02(n) Election to Take Under Husband's Will as Barring Dower

The concept of common-law dower had become fixed in the English law by Littleton's time, n626 long before the statute of wills, and was therefore not affected by this statute. The courts have, therefore, recognized that the husband cannot, without the wife's consent, bar her dower by will. n627 The acceptance by the widow of the provisions of her husband's will bars her right to claim dower, n628 although where the will does not expressly or by clear intention show that the provision in the will is in lieu of dower, her acceptance thereof does not bar her dower. n629 The wife's dower or statutory interest in her husband's estate must be inconsistent with the provision of the will made in lieu thereof, in order that her acceptance thereof may operate as a bar to dower or statutory interest. n630

The rights of a spouse renouncing against the will are to be determined by the law governing the descent of real property where it is located. n631

At common law, the widow took under the will and also her dower in the absence of a clearly expressed contrary intention in the will, n632 but if the will so stated, the widow was required to elect. n633

The general rule is that where the will expressly declares that the provision made for the wife is in lieu of dower, she must elect which one she will take, n634 and she must so elect where the provision is necessarily inconsistent with dower. n635 If she elects to take under the law, the whole estate is open, so far as she is concerned, and she is let into the enjoyment of all her rights thereto in as ample a manner as if her husband had died intestate. n636 Some cases hold that, where the will does not clearly show that the provision for the wife is in lieu of dower, she may take both, n637 but if the other provisions of the will would be defeated in case she elected to take both, she will be confined to the one or the other, the election of which shall be upon her. n638 A widow is not bound by a choice to take under the will. She may later reject the will, but once having rejected it, she is bound. n639 If the provision made in the will appears from circumstances to be intended in lieu of dower, the widow must make her election, for she cannot take both. n640 Under such circumstances she may elect to take dower or homestead, but she is not entitled to both. n641 The widow's election in this matter is personal to her and cannot be exercised by her representatives after her death. n642 The guardian of an insane widow cannot elect for her without an order of court or by authority conferred by statute. n643

Where the widow is incompetent, the courts are inclined to authorize the guardian or committee of the incompetent to elect against the will, if such election is to the best advantage or welfare of the incompetent person. n644

In some cases, the wife is not permitted to repudiate her election to take under the provisions of her husband's will and will elect to take under the law instead. n645 Other cases hold that she may retract her election to take under the will, provided she returns what she received under her election. n646 The widow's election must be made with full knowledge of the facts. If she is ignorant of her rights at the time of making the election, it is not binding on her, n647 or if she formally makes an election when no necessity therefor exists, the supposed election is ineffectual. n648

Likewise, an election procured by fraud or undue influence may be rescinded by her. n649 The right of a widow to take dower against a will does not survive her death. n650

As to other legatees and devisees under the will, the will should be forced as nearly in accordance with the intention of the testator as it can be, regardless of the widow's election. n651 A widow who has renounced her husband's will by the exercise of her statutory right of election, and has elected to take under the law, cannot appeal from the order of the court probating the will, although her husband left real estate in other states. n652 The widow does not lose her dower by an election to take under a provision made in lieu thereof in her husband's will, where the will is subsequently declared invalid. n653 Where a widow for whom provision has been made in her husband's will in lieu of dower is required to elect between her dower and the provisions of the will, what she must do to make such election is determined by the law of the state where the land is situated. n654

The widow, by her renunciation of the provision made for her in her deceased husband's will, rejects such provision and, in effect, obliterates it from the will. The remaining provisions of the will are left to operate upon the part of the estate not included within her statutory share or interest. n655

By statute in many states, a testamentary provision for the wife is presumed to be in lieu of dower, unless the will shows a different intention. If she fails to elect which she will take, within the time prescribed by statute for such election, she will be presumed to have elected to take by the will, and there will be no relief in equity against this presumption. n656 If the widow should die during the time limited by statute for making the election without having done so, there is a presumption that she would have elected to take the most beneficial of the two provisions. n657 It is held that a widow's election to take under her husband's will is established by her filing a report, as executrix, to the effect that she was entitled to her husband's land under the will and asking that she be discharged as such executrix. n658 The wife's attempt to take under the will and the right inconsistent with the will do not constitute an election. n659 Where the widow takes possession of and occupies as her own the property devised to her by will, she is held to have elected to take the provision so made for her, and she cannot claim dower or a statutory interest. n660

The cases are not in accord as to the right of a widow to elect against a will in instances where the law of the testator's domicile differs from the *lex situ* of the realty. n661

Sometimes the position is taken that where there is no inconsistency, the widow will take the provision made for her under the will as well as her dower, or it may be considered that the widow is presumed to elect against the will unless she takes a positive act to elect to take by will. A third position is that the widow is presumed to take under the will in absence of election, unless she was completely excluded under the will, and some statutes require her to elect against the will even though no provision is made for her therein. In some states, the widow electing against the will takes her share only out of the net estate after payment of debts. n662

Some courts have undertaken to remake a will upon an election by the spouse, so as to avoid inequities. n663 Where the spouse elects against the life estate given in the will, the limitation over will fail if it is intended as a continuation of the scheme of the life estate. n664

Where the widow has been given a life estate under the will and elects against the will, the problem of acceleration of future interests arises, as does the question of disposition of the interest given the wife. n665

Equitable estoppel prevents a spouse from electing against a will in one jurisdiction and enjoying its benefits in another. n666

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21.02(o) Valuation of Dower

The value of a wife's dower at common law depends wholly upon the death of her husband, n667 but it is generally held that her inchoate interest is a property right having a substantial and ascertainable value. n668 The inchoate right of dower is a valuable right or interest, n669 and has a money value n670 which is capable of ascertainment, n671 if not with exactness, n672 at least to the extent of approximation. n673

The value of the wife's inchoate interest is ascertained by reference to mortality tables indicating the expectation of life at different ages, together with a consideration of the condition of the health of both husband and wife. n674

Under the majority rule, where the husband has conveyed realty without the wife's consent, dower is figured at the value as of the time of transfer, not at the time of the husband's death. n675

Some courts hold that such interest is not susceptible of computation by any definite rule. n676 The present value of an inchoate right of dower is held to be the difference between the present value of an annuity to the wife during her natural life and the value of a similar annuity depending upon the joint lives of her and her husband. n677

The value of dower consummate depends upon the value of the land involved, as well as upon the age, life expectancy, habits, constitution, and health of the widow, while the value of her inchoate right depends not only upon these as they affect the wife, but as they affect the husband also. n678 The extent of the property to be assigned to the widow as dower is determined from its productive value, and it must be sufficient to produce one-third of the rents and profits that all the husband's freehold estate, in which she is dowable, will produce. n679 In the United States, the productive value of such freehold is ascertained, as between the widow and the heirs, at the time of assignment, n680 unless the delay of assignment was due to her own fault. n681 Some authorities hold that if the property has been aliened during coverture without the wife joining, and the alienee has enhanced its value by improvements, the widow is entitled to the benefit of such increase in value by making the productive value at the time of the husband's death the basis for ascertaining the amount of dower, n682 while others hold that the value at the time of assignment is the proper basis for ascertaining the amount. n683 If, after the husband's death, the land has increased in value from natural causes or has been improved by the heir and thus increased in value, the widow is entitled to her proportion of such enhanced value. n684 Other courts, however, take the value at the time of alienation as the basis for calculating the dower interest, the improvements being excluded from the computation. n685 On the other hand, if the land depreciates in value from natural causes, the widow may claim only dower in the productive value as of the time of assignment. n686

Dower exists only in the equity above a mortgage. n687

The present value of contingent dower can be computed by ascertaining the present value of an annuity equal to an interest in one third of the proceeds of the estate and then by deducting from this the value of a similar annuity depending on the joint lives of the wife and her husband. This difference is the value of a contingent right of dower. n688

Statutory mortality tables are merely evidentiary, and the cash value of inchoate dower depends on the health and habits of the parties and all other circumstances. n689 Dower is measured on the entire value of the mortgaged property but, as against the mortgagee, can be paid only out of the surplus above the mortgage. n690

Rents and profits payable to a widow in land which she held by way of dower, and she held a life estate, passed to her estate upon her death, where the payments had not been made during her lifetime. n691

21.02(p) Quarantine

At one stage in the development of the dower concept, the widow's right was merely to "sit by the fire," i.e., a home on

the premises. The subsequent reissues of Magna Carta gave the widow a right to remain in possession of the principal dwelling house of her deceased husband for 40 days following his death, provided she did not remarry within that time. n692 This right was termed "the widow's quarantine," and it is very generally recognized in this country and varies in its duration and extent in the different states. n693

In some jurisdictions, the widow's right of quarantine is regarded as a freehold interest, on the ground that she might die within the period, and is, thus, an interest that might last for life, but the weight of authority is in accord with the rule of the common law to the effect that she has a sort of tenancy at will, for, immediately on assignment, the heir is entitled to the beneficial enjoyment of all the estate except the dower portion. n694 It is held to be a mere personal right, not subject to execution. n695 This fact, however, does not deprive her from occupying the quarantine property as a tenant during the period. n696

Most American courts give the widow "quarantine," the right to occupy the mansion house and adjoining property until dower is assigned. n697 The widow holding under quarantine is not required to pay rent, taxes, n698 or interest on encumbrances. n699 Rights of quarantine are not alienable in law or equity. n700 It is not such a right that the widow may alienate. n701 Being an incident of dower, her death before assignment of dower terminates both rights. n702

In Texas, a homestead occupied by a married couple cannot be mortgaged directly or indirectly except as security for purchase money or improvements. n703 At common law the widow had a right of quarantine for 40 days. n704

21.02(q) Statutory Modification and Abolition of Dower

In virtually all of the states today, the question of the widow's rights has been settled by statute. n705 Florida has abolished dower and curtesy. n706 This is proper since dower is not the result of contract, but is the creature of positive law founded on reasons of public policy and subject, while it remains inchoate, to such modifications and qualifications as legislation, for like reasons of public policy, may see proper to impose. n707

These statutes have two approaches: some specifically abolish common-law dower and substitute a new statutory concept; n708 others preserve in a modified form the common-law dower image. In addition, in nearly all states, the wife has become an heir, n709 often a specified heir with relation to the deceased husband's other realty and personalty.

Two factors have influenced these changes: first, the increasing role of women in modern affairs, as evidenced by the Married Women's Property Acts and second, a desire to release real estate from the fetters on alienation imposed by common-law dower. With the decreasing emphasis on realty as a form of income-producing wealth, emphasis on protection of the widow as a matter of public policy has been shifting towards making her a forced or specific heir of both realty or personalty. n710 Thus, a widow who was not entitled to claim dower because the husband had died before his estate became vested, was still allowed to take as an heir. n711

Statutes ordinarily merely extend and recognize dower rather than repeal it. n712 To the extent that a statute does not cover the subject of dower completely, the common law still controls. n713

Before the death of the husband, and while the right of the dower is inchoate, it is subject to legislative control and it may be enlarged, diminished, altered, or abolished. n714 It is held that a statute abolishing dower and providing that the act shall not affect any such estate or interest which may have become vested exempts from the act all dower rights or interests which existed prior to the taking effect of the act, whether such rights or interests are inchoate or consummate. n715 A statute providing that "any woman residing out of the state shall be entitled to dower of the lands of her deceased husband, lying in this state, of which her husband died seised," does not give her dower in lands which her husband conveyed by separate deed while she was a non-resident, as he did not die seised of the land. n716 It is held that the wife's inchoate right of dower is not a vested right within the constitutional provision against impairing vested rights. n717 This is true even where the statute alters the common-law right of dower. n718 In jurisdictions where the

interest of the wife after seisin by the husband is deemed an interest in land which cannot be impaired, the legislature cannot diminish or abolish it after the right has attached. n719

This right or estate of dower exists in all of the states where it has not been modified or abolished by statute. Statutes in abolishing the right usually give the wife a specific part of her husband's estate in fee simple in place of dower, n720 or give the widow a distributive status and a right of election to take against a will. n721 It is held that the legislature may describe the interests of the surviving husband or wife in the estate of the other with respect to both real and personal property, by the use of the term "dower." n722 The wife has, by virtue of the statute, one-third interest in the lands of her husband, n723 but in some states the wife's one-third has been changed to one-third in fee, n724 and in others it has been changed to one-half in fee, n725 and still other states give the widow, in lieu of her common-law dower, a life estate in one-half of the husband's realty. n726

In many states, Married Women's Property Acts have placed the wife on an equality with her husband in property rights; n727 in other states she is still in subordination to him in this respect, except where the incidents of the common-law estate have been altered by statutes. n728 In Illinois, the right of dower is derived from the common law and not the statute, although the statute in relation to dower has recognized the right and extended it to the surviving husband. n729 The burden of proof rests upon those asserting that the statute has abolished dower, since the intention of making innovations in a long-established rule is not imputed to the legislature in the absence of a clear manifestation of such intention. n730 In New York, the wife has been reduced to the status of a statutory heir. n731 In Pennsylvania, a widow is entitled to dower only to what remains of her husband's estate after the payment of his debts, whether of record or not. n732

In Maryland, common-law dower when by purchase still exists, n733 until the husband's death his wife has merely a contingent right or interest in her husband's real estate, and she has no estate prior to his death, legally or equitably, which is liable to levy and execution. n734

Arizona did not adopt §2-113 of the Uniform Probate Code, providing for the abolition of dower and curtesy; nor §2-201, the spouse's elective share; nor §2-202, the spouse's augmented estate; nor §2-203, the spouse's personal election; nor §2-205, the time limit for election; nor §2-206, the effect of election; nor §2-207, charging the spouse with gifts received and for contribution. n735

In Montana, individual property may be conveyed by the spouse so as to cut off dower or curtesy. n736 The same is true in Indiana. n737 New York has made the spouse a mere heir with right of election against the will.

21.02(r) Pre-nuptial Agreements and Jointures as Barring Dower n738

The jointure, as used at common law, n739 could bar dower if it had certain characteristics.

The common-law jointure required the five elements of (a) the estate must commence immediately upon the husband's death, (b) the interest must be at least for the wife's life, n740 (c) the interest must be in the wife's name and not merely in trust for her, (d) the conveyance must be made and expressed to be in satisfaction of her whole dower, n741 and (e) the conveyance must be before marriage. n742 Equity, however, would enforce jointure as a contract even if some of the common-law requirements were lacking. n743

An antenuptial agreement may have the effect of determining conclusively the wife's right in the husband's property, n744 but to have this effect the contract must be clearly understood by her, be just and reasonable, free from concealment n745 and fairly performed. n746 Thus the contract is not enforceable if she is ignorant and without the aid of independent advice, but was induced to sign the instrument through fraudulent representations made by her intended husband. n747 Marriage is a valuable consideration and will support an antenuptial agreement whereby the husband contracts to make provision for the intended wife. n748 Consequently, the settlement of lands, although made by the

settlor with the design to defraud his creditors, will not be set aside in the absence of clearest proof of his intended wife's participation in the fraud. n749 In such case, the wife is deemed a purchaser for value of the property settled on her in consideration of the marriage, and she is entitled to hold it against the world. n750 By such agreement, she may waive her right to dower. n751 If such a contract is fairly and equitably made between the parties, it, and not the law, furnishes the measure of their respective rights, nor will a mistake as to the law, of itself, be sufficient ground on which to set aside a contract waiving dower rights. n752 Under a statute authorizing a woman before marriage to enter into a contract for a jointure with her intended husband, it was held that an agreement whereby "neither of said contracting parties shall by reason of such marriage have or claim any right, title or interest in any real estate of the other" did not provide the wife with any property from the husband's estate, and, therefore, it did not bar her right of dower. n753

Unless authorized by statute, a married woman cannot bar her right of dower by any release made to her husband during coverture. n754 Under modern statutes generally, she may, by a written agreement with her husband, based on a valuable consideration, release to him her right of dower, n755 and this, though they are living apart, on the date of the agreement. n756

A property settlement waiving dower in contemplation of divorce is void if the husband dies before the divorce. n757 Before upholding such agreements, courts will insist on knowing that the wife was not under duress in making the agreement, and that no advantage was taken of her by the husband in procuring her consent. n758 The burden is on the husband or his personal representative to show the fairness of the transaction. n759 The validity of the release is not affected where the agreement is one of separation, n760 if it be otherwise valid and binding between the parties. n761

Where the husband and wife freely and voluntarily enter into a contract by which the wife, uninfluenced by fraud or deceit, in consideration of certain property conveyed or devised to her by the husband, agrees to relinquish her dowable and distributable share in his estate under the statute, it will be binding upon the wife. n762 Where the agreement releasing dower for a valuable consideration, with the understanding that she should not contest a divorce suit by the husband, such release is invalid since it is contrary to public policy. n763 A post-nuptial agreement by the wife to release her prospective distributive share in his estate, based on his promise to make a will giving her much less than she would be entitled to in the absence of a will, was held without consideration and not binding on her after his death. n764 In the absence of an express release of dower in a separation agreement, the wife does not bar her right to claim dower. n765 A husband and wife may settle all property rights growing out of the marital relation, including the wife's right of dower, by a valid contract in contemplation of separation and divorce. n766 In some jurisdictions, it is held that a post-nuptial agreement whereby the wife relinquishes her right of dower is valid and binding, n767 provided such agreement is made in recognition of an existing marital separation, n768 or at least is one of a separation nature. n769

A valid separation agreement may be abrogated and annulled by subsequent inconsistent conduct on the part of the husband and wife. n770

A widow is bound by an antenuptial agreement not to claim any part of her husband's estate except the amount given her by will, notwithstanding the husband's failure to execute a will. n771 In a post-nuptial agreement under seal, the consideration can be shown but not for the purpose of defeating the contract. n772 In Virginia, post-nuptial agreements are held valid in equity. n773 An antenuptial agreement, though favored by the law, was void where husband had fraudulently failed to make full disclosure of assets. n774

The courts require that for an antenuptial settlement to be effective to bar dower: (a) it must show an intent clearly expressed to bar the dower n775 and (b) it must be fair and upon a full disclosure of the facts. n776 Under an antenuptial agreement a wife may become a creditor of the estate so as to avoid succession taxes. n777 An antenuptial agreement does not preclude the surviving spouse from claiming additional benefits given under the decedent's will. n778 In the absence of express provisions antenuptial agreements do not create trusts or third-party beneficiary relationships for the children so the parties to the agreement can later abrogate or amend the agreement directly or by will except as the rights of the parties themselves are concerned. n779 The power to enforce antenuptial agreements is

in the spouse. Her children have no rights therein. n780

21.02(s) Jointure Defined

Since dower lay only as to legal rights, but not to uses, the widow was unprotected where the husband's realty was held by way of use. In such instances, it became customary at the time of the marriage to provide by special contract that the wife should have a right in her husband's property held by way of use n781 after his death, similar to common-law clauses. This was called a "jointure." It was originally an estate for life jointly with the husband, but it also came to mean a sole life interest.

The effect of the statute of uses, converting uses into legal estates, would have been to give wives holding jointures a double interest in the land had it not been for a provision in the statute that a jointure barred dower. The substance of the English statute of uses respecting jointure has been reenacted in a few states of this country. n782 A majority of the states have made radical changes, some have put the matter on the basis of contract, n783 by giving the wife a right to elect between the provision intended as jointure and her dower right, if she had not consented to the provision before marriage. n784 After electing to take a jointure conveyed to her the widow cannot also receive the interest in her deceased husband's estate given her by law. This is true regardless of the value of the property conveyed n785 to her by the jointure. n786

The statutes generally require the wife's assent to the provision made for her or, in case she does not so assent, she may, upon the husband's death, elect between such provision and dower. n787 Under a statute providing that the widow has one year after the death of her husband in which she may elect whether she will take land conveyed to her as a jointure, or the interest given her by law in the lands of her deceased husband, her election to take such jointure within the time bars her right to receive the interest in her husband's estate which the law gives her. n788

"Jointure" is a competent livelihood of freehold for the wife of lands and tenements, to take effect in profit or possession presently after the death of the husband, for the life of the wife at least, if she herself be not the cause of its termination. n789 Most of the statutes give a similar definition. n790 The English courts determined that a jointure was not a contract between the husband and wife but a gratuity established by the husband for the benefit of the wife and, therefore, the woman need not be a party to the deed which secures her jointure. n791

At common law, immediately upon marriage, the wife acquired a right in her husband's real estate, which was very difficult to get rid of. The husband could not convey his land either in contemplation of marriage, with the intent to prevent the right attaching, nor after marriage, with the intent to destroy the right. Neither could she release such right before marriage, for she did not then possess it, nor yet after marriage for she was by that law not *sui juris*. So, her release in either case was void. By the same law, no estate limited to her during the marriage could bar her right of dower, because no collateral satisfaction can destroy a right or title to a freehold estate. n792 Every woman, no matter how extensive her own estate might be, thus became entitled immediately upon marriage to one-third of all her husband's real estate. This inequality, and the difficulties attending attempts to detach her right after marriage, were reasons why so much of England's lands were conveyed to uses as, by common law, a wife could not be endowed in a use. n793 The injustice now appeared to be against the wife, and with all her husband's lands conveyed to uses, she might be, and too often was, left at his death without means of support. The relatives or friends of the intended wife began to insist upon provisions being made for her, and it was usual to have the intended husband take back from his feoffees to use a reasonable portion of the lands, and to settle the same on himself and wife during their joint lives, in joint tenancy or jointure. From this the word "jointure" arose.

When the Statute of Uses was enacted, which declared the legal title to be in those who had the use of any lands and tenements, all women who were then married became dowable as at common law in all their husband's real estate. Again the fancied inequality arose that they could then claim both dower and jointure. So in 27 Henry VIII, a clause was inserted in the statute which limited a wife's claim to her estate in jointure, where jointure had been made or was

afterward made or if no jointure was made, she might claim dower as at common law. n794 "Jointure" is a vested interest in land, and the wife takes it as a purchaser. n795 This statute also made provision for dower in other lands of the husband if she were lawfully evicted from her jointure or any part thereof, and these two sections of the statute are the basis of modern jointure.

Where the deed contains no statement that the land was conveyed as a jointure, the wife's interest in other lands of her husband is not released thereby. n796 An antenuptial conveyance of land to an intended wife, reciting that she is "to have and to hold the said lot and parcel of land as aforesaid, as jointure, and in lieu and full satisfaction of her whole dower in his estate," precludes her from claiming dower in the lands of her husband, including lands acquired during marriage. n797 An antenuptial jointure, duly accepted in writing, under some statutes bars the wife from any further claims, as widow, against the lands of the husband. n798 An antenuptial contract and an estate in jointure are not the same thing under the statutes of most states.

Jointures are either legal or equitable. For convenience of treatment, legal jointures may be divided into (a) legal jointures before marriage, and (b) legal jointures after marriage; and equitable jointures may likewise be divided into (a) equitable jointures before marriage, and (b) equitable jointures after marriage. Antenuptial agreements are favored by the courts. n799

In states where statutes creating jointure exist, it is generally held that an antenuptial contract, entered into in good faith by competent parties, which is fair and equitable in its terms, will be upheld and enforced by the courts. If the settlement or jointure be made before marriage, and all the other requisites mentioned in the preceding section be complied with, it effectually bars the widow's dower, n800 except in those instances in which the female contemplating marriage is an infant and the agreement is to make a grant in the future. n801

An antenuptial agreement for the husband's payment of money to the wife after his death is not a jointure constituting a bar to her dower. n802 If, on the other hand, the settlement be made during coverture, and she agrees to it, she will not be bound to accept it upon the death of her husband, but may elect to take dower instead. n803

It has been held that a statute providing that, if any conveyance, assurance, agreement or contract for jointure be made after marriage, or be made before marriage and during the infancy of the wife, the widow may at her election renounce her jointure and have dower, does not apply in the case of an antenuptial contract with a woman not an infant. n804 So, a jointure is not always effected by a post-nuptial agreement. n805 The covenant of a married woman to release her dower must be clear, positive, and express. n806 A conveyance to a married woman is not deemed a jointure, unless the intention to make it such is expressed in the deed or may be clearly implied from the contents thereof. n807 If, during coverture, the wife releases her husband's lands from the right of dower for a consideration in money paid her by the husband, she will be estopped from claiming dower in his lands. n808

As a general rule, an engagement to marry creates a confidential relation between the contracting parties, and an antenuptial contract entered into after the engagement and during its pendency must be attended by the utmost good faith. If the provision for the prospective wife is, in the light of the surrounding circumstances, wholly disproportionate to the means of her future husband and to what she would receive under the law, the burden rests on those claiming the validity of the contract to show that there was a full disclosure of the nature, extent and value of the intended husband's property or that she had full knowledge thereof without such disclosure, and that she, with this knowledge, voluntarily entered into the antenuptial settlement. n809 A valid antenuptial agreement operates to extinguish the homestead right of either spouse in the property of the other. n810

It is not absolutely necessary that the property conveyed in jointure shall come from the intended husband or even be his property. If it is expressly stated to be in lieu of dower, it will be a jointure and effectively bar dower, even though made by a stranger. n811 It may come from the father of the intended husband, or from anyone to whom the intended husband stands in the relation as heir apparent or as an intended beneficiary. n812 While in its original meaning it gave the idea

of a joint estate in the husband and wife with the idea of survivorship between them, in reality it is a sole interest in the wife generally for her life, but it may be of greater duration, may be made after coverture as well as before, and may be given to the parties jointly. n813 Property conveyed by a deed to a wife by one who acquired title from her husband, by a deed in which she did not join, has been held, in the absence of other evidence showing such intention, not to be a jointure in lieu of dower. n814

The widow has full power of disposal of the jointure if the estate is limited to her in fee, but English statutes prohibited her from alienating it if the estate was in fee tail, and she was also prohibited from discontinuing the entail by feoffment, fines or recovery. n815 Unless prohibited by statute, a jointress has such powers of disposition of her life estate as other life tenants, has the same rights to estovers and emblements and is under the same restrictions as to waste, if there is no deficiency in her jointure. n816 She is not entitled to crops growing on the land at the time of her husband's death, as she is in dower. The reason for this is that jointure is not, like dower, a continuance of the husband's estate. Nor are her personal representatives entitled to emblements as is the representative of a doweress. n817 If the lands settled in jointure be under lease from the husband for a term of years and the term has not expired at his death, the jointress may have a decree in equity setting the lease aside, on the ground that she is a purchaser for value of a fixed interest, beneficial immediately on the death of her husband, of which interest he could not deprive her without her consent.

As jointure is a substitute for dower, it should be as beneficial. The dower right is consummate on the husband's death, and the widow is entitled at once to assignment thereof. To make the jointure as beneficial as dower, it should commence in enjoyment immediately upon the death of the husband. n818 In order that a jointure may bar dower, it must be made to pass to the widow presently after the death of her husband. n819 The interposition of any other interest between the husband's death and the wife's right to enjoyment is fatal to the estate in jointure and the widow may claim dower. Thus, where a life estate be expressly or impliedly interposed between the husband's death and the widow's right to enjoyment, there is no jointure such as will bar her dower. n820

A jointure agreement, entered into while the husband and wife were sojourning in a foreign state, is governed by the laws of their domicil, where the husband's property is situated. n821 The wife's right of dower may be barred by settling upon her an allowance previous to the marriage, to be accepted by her in lieu thereof. This is termed a "jointure." n822 So, a "jointure" may be defined as a competent livelihood of freehold for the wife of lands and tenements, to take effect in profit and possession presently after the death of the husband. n823

21.02(t) Requisites of Jointure

As has been previously noted, legal jointure came into being with the provisions of the Statute of Uses to the effect that jointures could bar dower. Legal jointures had their origin in what is sometimes termed the statute of jointures, which comprises the 4th, 5th, and 7th sections of the Statute of Uses. n824 The 4th section of said statute provided that a wife upon whom a jointure had been properly settled before marriage as required by law, was deprived of dower in the husband's remaining land. Sections 5 and 7 of the statute provided that in case the settlement was made during coverture, she might elect between it and dower. n825 The absolute requisites to a legal jointure are: first, it must be created before marriage; second, it must be made to the wife, and not in trust for her; third, it must be made and stated to be in satisfaction of dower; fourth, it must commence in enjoyment on the death of the husband; and fifth, it must be limited for at least during the life of the wife. n826 Where all these requisites are fulfilled in making a settlement or jointure, it has the effect of barring the widow's dower or of putting her upon her election, according to whether the settlement be made before or after coverture. n827 It may be noted here that only real property can be the subject matter of a legal jointure. n828 The validity of an antenuptial agreement is determined by the law of the place where it is made. n829

Another requisite for jointure is that the estate must be limited to the wife herself and not to any other person in trust for her. n830 This was the rule at common law, but equity has always regarded a trust for the wife, and even an agreement

to settle, as a good equitable jointure and holds it a complete substitute for dower. n831 The statutes of a number of states require the intended wife, if of legal age, to assent to such arrangement by her signature indorsed upon the deed or instrument creating the estate, and if she is a minor, her parents or guardian must assent in like manner. This assent must state that it is in lieu of or a substitute for all claims or right in her husband's lands at his death. n832

The first statute in England (27 Henry VIII, ch. 10, §6), which made jointure a satisfaction at law for the claim of dower, did not require that a provision for the wife must be expressed to be for jointure in order to bar her dower. n833 Under subsequent enactments and modern statutes, generally, it is essential in both legal and equitable jointure that it be given and expressly stated to be given in lieu of, or as a substitute for, the whole of the dower right and not a part thereof. n834 A conveyance to a married woman is not deemed a jointure, unless such intention is expressed in the deed or appears by necessary implication from its contents. n835 If the property be transferred to her without any intention or purpose that it shall be in satisfaction of and in lieu of her whole dowry, it does not operate to bar her claim. n836 The reason for such rule is apparent from the uncertainty that would obtain if the jointure was to be in lieu of part dower. The particular part of dower for which the jointure was to be or not to be a substitute would be practically unascertainable, and uncertainty and confusion would result if the rule were otherwise. So, if lands are conveyed to a woman before marriage as part of her jointure, and after marriage more land is conveyed to her for her whole dower, on the death of her husband she may waive the claim to the land conveyed after marriage and have her jointure in that conveyed before marriage, and her dower in all the residue. n837 In one case, it is held that a conveyance made in lieu of dower need not specifically so state, but it will be sufficient if such an intention can be clearly collected from the instrument. n838

The common-law jointure, like dower, is a life estate. The duration is measured by the wife's life and not the life of another. There is nothing to prevent the husband from creating a fee simple or fee tail estate for his intended wife, but the estate must not be less than for the life of the woman. Thus it would not be a jointure, or bar dower, even though it is limited for the life or lives of several persons who in all probability have by mortality tables a much greater expectation of life than the intended wife. The same result would obtain if the estate were limited to her for a thousand years, a term to the end of which no man, so far as human experience has shown, has or can live in the flesh. n839 Statutes in a number of states provide that any pecuniary provision for the intended wife in lieu of dower, will, if assented to by her or by her parents or guardian, if she be a minor, be a complete substitute for dower. n840 Any reasonable provision, or contract therefor, will, in equity, be a good jointure if so assented to. n841

An estate in jointure may be limited to an intended wife, and the intended husband may attach a condition to the estate, the breach of which might terminate her estate, and if she accepts the estate on his death, she will be bound by the condition. n842 Also, an estate in jointure may be limited to a woman in special limitation, and be a complete bar to dower if she accepts same on the death of her husband. n843

COMPUTER-ASSISTED RESEARCH

LEXIS:requir! w/15 jointure w/30 bar! w/5 dower

21.02(u) Loss of Jointure

Since jointure under the more modern theory does not arise by way of contract, but at least creates present interests in the wife, it is not inchoate as dower and, therefore, is not lost in the same fashion as dower. Being a vested and not a mere inchoate right, a divorce, even *a vinculo*, granted to the husband for the fault of the wife, does not divest the title. n844 By statute in some states, jointure is forfeited for the same causes as dower.

If, by the assertion of a paramount title, the jointress is evicted, she may claim her dower as if no jointure had been made, at least to the extent of the value of the lost jointure. n845 Under some statutes, such deprivation of jointure entitles her to indemnity out of her husband's estate, n846 but she is not entitled to dower in lands conveyed by her

husband to a stranger. n847 It is held that a jointure cannot be affected by a post-nuptial agreement. n848

If all the requisites for legal dower are not complied with, but the real essentials are present, and the intended wife assents before marriage to the provision made for her, this is called equitable jointure and is recognized and enforced in equity on the ground that it rests on a contract by the wife to relinquish dower, in this respect differing from legal jointure. n849 Where the wife, not being influenced by fraud or deceit, upon a sufficient consideration, freely and voluntarily agrees to accept a conveyance of property in lieu of her dower and distributable share of her husband's estate, and the husband conveys to her accordingly, she cannot, after his death, voluntarily set aside her contract by merely observing the form of relinquishment provided by the statute. n850 In equitable jointure, if the wife is an infant at the time the estate is created, and the provision is reasonable and certain, it is necessary that either her father, mother, or guardian assent for her. n851 Property other than real estate may be the subject matter of an equitable jointure. Thus any reasonable provision, such as money or personal property, n852 or contract for her provision, n853 is a good jointure, if assented to by the wife. n854 It is held that if the attempted settlement was only an agreement to convey in the future, it was nothing more than an antenuptial agreement and did not bar dower. n855 An equitable jointure made during coverture gives the wife, upon the death of the husband, an election to take either dower or jointure. n856

FOOTNOTES:
(n1)Footnote 1. Ind. Code §§29-1-2-3.1, 31-1-9-2.

(n2)Footnote 2. *Mayburry v. Brien, 40 U.S. 21 (1841); United States v. Certain Parcels of Land, 46 F. Supp. 441 (D. Md. 1942); Schoellkopf v. DeVry, 7 N.E.2d 757 (Ill. 1937); Wilson v. Hilligoss, 278 Ill. App. 564 (1935); Griswold v. McGee, 112 N.W. 1020, aff'd, 113 N.W. 382 (Minn. 1907); Mathews v. Marsden, 230 P. 775 (Mont. 1924); Pridgen v. Pridgen, 129 S.E. 419 (N.C. 1925);* Thompson v. Morrow, 5 Serg. & Rawle 289 (Pa. 1819); *Cancilla v. Bondy, 44 A.2d 586 (Pa. 1945); Combs v. Young, 12 Tenn. (4 Yer.) 218 (1833); Shackelford v. Shackelford, 27 S.E.2d 354 (Va. 1943).*

Contract -- Annotation, *Dower or curtesy in property subject at time of marriage to contract for disposition by sale or will, 8 A.L.R.3d 569 (1966). Miles B. Amend, Jr., The Surviving Spouse and the Estates, Powers and Trusts Law, 33 Brooklyn L. Rev. 530* (1966-1967); George L. Haskins, *The Development of Common Law Dower, 62 Harv. L. Rev. 42; Comment, Testamentary Dispositions and the Usufruct of the Surviving Spouse, 18 Loyola L. Rev. 335; State v. Jones, 290 S.W. 244 (Tex. Civ. App. 1926)* (defining dower as wife's interest in husband's realty).

(n3)Footnote 3. Littleton, Tenures, §36.

2 William Blackstone, Commentaries 129. "Tenant in dower is where the husband of a woman is seised of an estate of inheritance, and dies; in this case, the wife shall have the third part of all the lands and tenements whereof he was seised at any time during the coverture, to hold to herself for the term of her natural life.

"In treating of this estate, let us, first, consider who may be endowed; secondly, of what she may be endowed; thirdly, the manner how she shall be endowed; and fourthly, how dower may be barred or prevented.

"1.Who may be endowed. She must be the actual wife of the party at the time of his decease. If she be divorced a vinculo matrimonii, she shall not be endowed; for ubi nullum matrimonium, ibi nulla dos. But a divorce a mensa et thoro only, doth not destroy the dower; no, not even for adultery itself by the common law. Yet now by the statute West. 2, if a woman voluntarily leaves (which the law calls eloping from) her husband, and lives with an adulterer, she shall lose her dower, unless her husband be voluntarily reconciled to her.

"2.We are next to enquire, of what a wife may be endowed. And she is now by law entitled to be endowed of all lands and tenements, of which her husband was seised in fee-simple or fee-tail, at any time during the coverture; and of which any issue, which she might have had, might by possibility have been heir. Therefore, if a man seised in fee-simple, hath a son by his first wife, and after marries a second wife, she shall be endowed of his lands; for her issue might by

possibility have been heir, on the death of the son by the former wife. But if there be a donee in special tail who holds lands to him and the heirs of his body begotten on Jane his wife; though Jane may be endowed of these lands, yet if Jane dies, and he marries a second wife, that second wife shall never be endowed of the lands entailed; for no issue that she could have, could by any possibility inherit them. A seisin in law of the husband will be as effectual as a seisin in deed, in order to render the wife dowable; for it is not in the wife's power to bring the husband's title to an actual seisin, as it is in the husband's power to do with regard to the wife's lands: which is one reason why he shall not be tenant by the curtesy but of such lands whereof the wife, or he himself in her right, was actually seised in deed. The seisin of the husband, for a transitory instant only, when the same act that gives him the estate conveys it also out of him again (as where, by a fine, land is granted to a man, and he immediately renders it back by the same fine), such a seisin will not entitle the wife to dower: for the land was merely in transitu, and never rested in the husband, the grant and render being one continued act. But, if the land abides in him for the interval of but a single moment, it seems that the wife shall be endowed thereof ... where dower is allowable, it matters not though the husband aliene the lands during the coverture; for he alienes them liable to dower.

"3. Next, as to the manner in which a woman is to be endowed ...

"The particular lands, to be held in dower, must be assigned by the heir of the husband, or his guardian; not only for the sake of notoriety, but also to entitle the lord of the fee to demand his services of the heir, in respect of the lands so holden. For the heir by this entry becomes tenant thereof to the lord, and the widow is immediate tenant to the heir, by a kind of subinfeudation, or under-tenancy completed by this investiture or assignment; which tenure may still be created, notwithstanding the statute of quia emptores, because the heir parts not with the fee-simple, but only with an estate for life. If the heir or his guardian do not assign her dower within the term of quarantine, or do assign it unfairly, she has her remedy at law and the sheriff is appointed to assign it.

"4.How dower may be barred or prevented. A widow may be barred of her dower by elopement, divorce, being an alien, the treason of her husband. A woman also may be barred of her dower, by levying a fine, or suffering a recovery of the lands, during her coverture. But the most usual method of barring dowers is by jointures ..."

(n4)Footnote 4. *Underground Elec. Rys. v. Owsley, 196 F. 278 (2d Cir. 1911); Arbaugh v. West, 192 S.W. 171 (Ark. 1917); Bush v. Bush, 5 Del. Ch. 144 (1877); Adams v. Adams, 2 So. 2d 855 (Fla. 1941);* Sisk v. Smith, 1 Gilm. (6 Ill.) 503 (1844); *Verry v. Robinson, 25 Ind. 14 (1865); Butler v. Cheatham, 71 Ky. (8 Bush) 594 (1871); Johnson v. Goss, 132 Mass. 274 (1882); Grady v. McCorkle, 57 Mo. 172 (1874); Davison v. Davison, 106 S.W. 1 (Mo. 1907); Orchard v. Wright-Dalton-Bell-Anchor Store Co., 125 S.W. 486 (Mo. 1909); Butler v. Fitzgerald, 61 N.W. 640 (Neb. 1895); Woodford v. Woodford, 14 A. 273 (N.J. 1888); Riddle v. Cella, 15 A.2d 59 (N.J. 1940); House v. Jackson, 50 N.Y. 161 (1872); Redding v. Vogt, 53 S.E. 337 (N.C. 1906); Greene v. Greene, 1 Ohio 535 (1824); Gray v. McCune, 23 Pa. 447 (1854); Sprague v. Stevens, 79 A. 972 (R.I. 1911); Combs v. Young, 12 Tenn. (4 Yer.) 218 (1833); Couch v. Eastham, 73 S.E. 314 (W. Va. 1911).*

(n5)Footnote 5. *McGuire v. Cook, 135 S.W. 840 (Ark. 1911); In re Ginsburg's Estate, 50 So. 2d 539 (Fla. 1951)* (as used in a will "dower" may be intended to include personalty); *Sturgis v. Ewing, 18 Ill. 176 (1856); Noel v. Ewing, 9 Ind. 37 (1857); Wild v. Toms, 99 N.W. 700 (Iowa 1904); Fowler v. Chadima, 111 N.W. 808 (Iowa 1907); McAllister v. Dexter & P. R. Co., 76 A. 891 (Me. 1910); Griswold v. McGee, 112 N.W. 1020 (Minn. 1907); Application of Manhattan Sav. Bank, 43 N.Y.S.2d 386 (1943); Hoy v. Varner, 42 S.E. 690 (Va. 1902).*

By Littleton's time dower had become fixed at one-third of all the estate of inheritance of which the husband was seised. Littleton, Tenures, §37.

(n6)Footnote 6. *Heisen v. Heisen, 34 N.E. 597 (Ill. 1893); Dayton v. Corser, 53 N.W. 717 (Minn. 1892).*

(n7)Footnote 7. *Heisen v. Heisen, 34 N.E. 597 (Ill. 1893); Dayton v. Corser, 53 N.W. 717 (Minn. 1892); Sheffield v. Cooke, 98 A. 161 (R.I. 1916).*

See Cook, *American Land Law Reform: Legal Co-ownership, Dower and Curtesy, 1960 Duke L.J. 485.*

(n8)Footnote 8. *Hatcher v. Buford, 29 S.W. 641 (Ark. 1895); Stull v. Graham, 31 S.W. 46 (Ark. 1895); Woodberry v. Matherson, 19 Fla. 778 (1883); Ditson v. Ditson, 52 N.W. 203 (Iowa 1892); Cameron v. Cameron, 18 Miss. (10 Smedes & M) 394 (1848); Howard v. Strode, 146 S.W. 792 (Mo. 1912); Adamson v. Ayres, 5 N.J. Eq. 349 (1950); Katz v. Farber, 72 A.2d 862* (N.J.); *Burdett v. Burdett, 109 P. 922 (Okla. 1910).*

(n9)Footnote 9. *Harber v. Harber, 108 S.E. 520 (Ga. 1921); Knapp v. Knapp, 135 N.E. 732 (Ill. 1922); Schoellkopf v. DeVry, 7 N.E.2d 757 (Ill. 1937); Wigginton v. Leech, 149 S.W.2d 531 (Ky. 1941); Gluc v. Klein, 197 N.W. 691 (Mich. 1924); Mathews v. Marsden, 230 P. 775 (Mont. 1924); Pridgen v. Pridgen, 129 S.E. 419 (N.C. 1925); Swift v. Reasonover, 77 S.W.2d 809 (Tenn. 1935); State v. Jones, 290 S.W. 244 (Tex. Civ. App. 1926); Harmon v. Peery, 134 S.E. 701 (Va. 1926).*

(n10)Footnote 10. *Stone v. Stone, 67 S.W.2d 189 (Ark. 1934); Pawley v. Pawley, 46 So. 2d 464 (Fla. 1950); Opinion of the Justices, 151 N.E.2d 475 (Mass. 1958).*

(n11)Footnote 11. *Schoellkopf v. DeVry, 7 N.E.2d 757 (Ill. 1937); Classen v. Heath, 58 N.E.2d 889 (Ill. 1945).*

(n12)Footnote 12. §248 (1); *Internal Revenue Comm'r v. Chase Manhattan Bank, 259 F.2d 231 (5th Cir. 1958), cert. denied, 359 U.S. 913 (1959)* (no dower in Texas); *Hedden v. Hedden, 312 S.W.2d 891 (Ky. 1958)* (Kentucky now has dower in fee instead of a life estate, Ky. Rev. Stat., §392.080).

(n13)Footnote 13. *Sanders v. McMillan, 11 So. 750 (Ala. 1892); O'Ferrall v. Simplot, 4 Iowa 381 (1857).*

(n14)Footnote 14. *Lawson v. Morton, 36 Ky. (6 Dana) 471 (1838); Wood v. Keyes, 6 Paige (N.Y.) 478.*

(n15)Footnote 15. *Schnebly v. Schnebly, 26 Ill. 116 (1861); O'Ferrall v. Simplot, 4 Iowa 381 (1857).*

(n16)Footnote 16. *Corriell v. Bronson, 6 Iowa 471 (1858); French v. Pratt, 27 Me. 381 (1847); French v. Peters, 33 Me. 396 (1851).*

(n17)Footnote 17. *Borders v. Niemoeller 239 S.W.2d 555 (Mo. App. 1951).*

The statutory marital right is a mere expectancy, but it cannot be defeated by will or by a gift causa mortis. *Tomon v. Svoboda, 349 N.E.2d 668 (Ill. 1976).*

(n18)Footnote 18. *Application of Manhattan Sav. Bank, 43 N.Y.S.2d 386 (1943).*

(n19)Footnote 19. *Wides v. Wides' Ex'r, 184 S.W.2d 579 (Ky. 1944); Application of Manhattan Sav. Bank, 43 N.Y.S.2d 386 (1943); Beck v. Merritt, 657 S.W. 2d 549 (Ark. 1983)* (holding "a dower statute not gender biased since wife's dower claim is the equivalent to husband's curtesy rights").

(n20)Footnote 20. *In re Ricon's Estate, 327 So. 2d 224 (Fla. 1976); In re Estate of Kyiath, 545 P.2d 662 (Mont. 1976).*

(n21)Footnote 21. *Harris v. Powers, 58 S.E. 1038 (Ga. 1907); Pridgen v. Pridgen, 129 S.E. 419 (N.C. 1925); Griffin v. Griffin, 131 S.E. 585 (N.C. 1926).*

(n22)Footnote 22. George L. Hoskins, *Development of Common Law Dower, 62 Harv. L. Rev. 42 (1948).*

(n23)Footnote 23. Under the Roman law the "dos" was the contribution of the wife's family toward the expenses of the household. Only the revenue belonged to the husband. Henry s. Maine, Lectures on The Early History of Institutions

319 (1888). *See* Kagan, *The Nature of Dowery in Roman Law -- Rights of Husband and Wife, 20 Tul. L. Rev. 557 (1946).*

(n24)Footnote 24. William Cruise & Simon Greenleaf, A Digest of The Law of Real Property 130 (2d ed. 1856-57).

(n25)Footnote 25. Martin Wright, Introduction to The Law of Tenures (4th ed. 1792) Wright, Tenures, §192n; 1 Greenleaf-Cruise, Real Property, 127.

(n26)Footnote 26. Jacob J. Rabinawitz, *The Origin of the Common Law Warranty of Real Property and of the Inchoate Right of Dower, 30 Cornell L.Q. 77 (1944),* ascribes dower to the Hebrew "Kethuba."

(n27)Footnote 27. Noting the similarity of common-law dowery to *Anglo-Saxon law. Henze v. Mitchell, 140 N.W. 149 (Neb. 1913); Corporation Comm'n v. Dunn, 94 S.E. 481 (N.C. 1917); Crenshaw v. Moore, 137 S.W. 924 (Tenn. 1911).*

Joshua Williams, Principles of The Law of Real Property, ch. 2, §7, and ch. 3, §1, calls attention to the dual custom of the Germans of the bride's family making a gift to the husband and the latter making a marriage gift or under other circumstances a "morning gift" to the bride.

The Anglo-Saxons had also the "Morgen-gifu-pretium virginitates" or "morning gift" which the husband gave to his bride on the morning following the wedding. Kenelm Edward Digby, An Introduction to The History of The Law of Real Property. ch. 3, §184 (2d ed. 1876).

(n28)Footnote 28. 6 Glanvill, ch. 2. *See* 2 William Blackstone, Commentaries 134.

(n29)Footnote 29. There was early a distinction between "dower" and "free bench." In "free bench" in copyhold estates the widow took an estate in only such lands as the husband died seised of. *Godwin v. Winsmore, 2 Atk. 526, 26 Eng. Rep. 716 (1742);* Geoffrey Gilbert, The Law of Tenures (5th ed. 1824).

(n30)Footnote 30. At one time distinction was made between dower which was a one-third interest for life in all of the lands of which the husband was at any time seised during marriage, and a similar interest in the lands of which the husband died seised.

It was customary for the early Anglo-Saxon husband to make provision for his wife at the time of marriage, and when the right to alienate lands became established, it was found necessary to limit the husband's power to alienate so as to leave the wife destitute. No doubt the custom alluded to above became a fixed rule of law, and, when the husband's power of alienation became limited in order to preserve the interest of the wife, the right of the wife became a contingent interest during coverture and consummate upon his death.

The quantity of property that the husband was accustomed to allot to his wife varied from one tenth to one fourth of his estate.

(n31)Footnote 31. Blackstone said that "dower was introduced into Denmark by Swein, the father of Canute, out of gratitude to the Danish ladies, who sold all their jewels to ransom him when taken prisoner by the Vandals." 2 William Blackstone, Commentaries 129.

In Scotland the wife was entitled to one third of the husband's goods on termination of the marriage. *See* A. E. Anton, *Effect of Marriage Upon Property in Scots Law, 19 Mod. L. Rev. 653 (1956).*

(n32)Footnote 32. *See* 3 William Searle Holdsworth, A History of English Law 189-197.

(n33)Footnote 33. *Loughran v. Loughran, 292 U.S. 216 (1933); Whiting v. Nicholl, 46 Ill. 230 (1867); McCraney v. McCraney, 5 Iowa 232 (1857); Dennis v. Harris, 153 N.W. 343 (Iowa 1915); Stevens v. Smith, 27 Ky. (4 J.J. Marsh.) 64 (1830); Cummings v. Schreur, 214 N.W. 199 (Mich. 1927); State v. Probate Court, 163 N.W. 285 (Minn. 1917); Murray v. Scully, 167 S.W. 1017 (Mo. 1914); Moore v. New York, 8 N.Y. 110 (1853); Rumsey v. Sullivan, 150 N.Y.S. 287 (1914); Boggiano v. Boggiano, 38 N.Y.S.2d 355 (1942); In re Brown's Estate, 14 P.2d 1107 (Or. 1932); Appeal of Shea, 15 A. 629 (Pa. 1888); McCulley v. Hardeman, 223 S.W. 146 (Tenn. 1920); Shackelford v. Shackelford, 27 S.E.2d 354 (Va. 1943).*

(n34)Footnote 34. *Sheffield v. Cooke, 98 A. 161 (R.I. 1916).*

(n35)Footnote 35. *Crum v. O'Rear, 24 N.E. 956 (Ill. 1890).*

(n36)Footnote 36. *Petta v. Host, 115 N.E.2d 881 (Ill. 1953); Kreamer v. Hitchcock, 115 A.2d 55 (Md. 1955); Borders v. Niemoeller, 239 S.W.2d 555 (Mo. App. 1951); Smigell v. Brod, 79 A.2d 411 (Pa. 1951); In re Madsen's Estate, 259 P.2d 595 (Utah 1953).*

(n37)Footnote 37. Tacitus, Germania, ch. 18, speaks of the high place of women among the early Germans. We have no knowledge of the particular tribe to which he had reference. If it was the Suebi of whom Caesar spoke and who later commingled, to some extent, with the Visigoths, perhaps the community property philosophy had its beginning here.

Dower is inchoate until death of husband. *Brenkworth v. Lanier, 132 S.E.2d 623 (N.C. 1963).*

(n38)Footnote 38. *Leib v. Wilson, 51 Ind. 550 (1875).*

(n39)Footnote 39. *In re Central Park Extension, 16 Abb. Prac. 56 (N.Y. 1863).*

(n40)Footnote 40. Coke on Littleton, §§34, 35.

(n41)Footnote 41. *Lamar v. Scott, 3 Strob. 562 (S.C. 1849).*

(n42)Footnote 42. Coke on Littleton, §32a.

(n43)Footnote 43. *Crouse v. Crouse, 259 N.W. 443 (Iowa 1935); Knolls v. Barnhart, 71 N.Y. 474 (1877); In re Johnson's Estate, 185 N.W. 180 (Wis. 1921).*

(n44)Footnote 44. *West v. Miller, 78 F.2d 479* (7th Cir.), *cert. denied, 296 U.S. 633 (1935); Clark v. Hanson, 151 N.E. 369 (Ill. 1926).*

(n45)Footnote 45. 2 William Blackstone, Commentaries 131.

(n46)Footnote 46. Littleton, Tenures, §36.

(n47)Footnote 47. Coke on Littleton, §185a.

(n48)Footnote 48. Littleton, Tenures, §45. Coke on Littleton, §37, "jus accrescendi praefertur oneribus," (the right of survivorship is preferable to all burdens).

(n49)Footnote 49. Coke on Littleton, §31.

(n50)Footnote 50. A father seised of lands and his son were hanged together. The son continued to kick longer than the father. The son's widow took dower as against father's heirs. *Broughton v. Randall, 78 Eng. Rep. 752* (n.d.).

(n51)Footnote 51. Littleton, Tenures, §36.

(n52)Footnote 52. Widow entitled to dower. *Allen v. Saunders, 119 S.E. 486 (N.C. 1923); Bodkin v. Wright, 100 S.W.2d 824 (Ky. 1937).*

Widow not entitled to dower. *Smith v. Shepard, 19 N.E.2d 368 (Ill. 1939); Hopper v. Hopper, 190 A. 841 (Md. 1937); Sheffield v. Cooke, 98 A. 161 (R.I. 1916).*

But dower is cut off if the estate determines in the husband's lifetime. *Beardslee v. Beardslee, 5 Barb 324 (N.Y. 1849).*

(n53)Footnote 53. *Thompson v. Thompson, 46 N.C. 430 (1854).*

(n54)Footnote 54. *See* Percy Bordwell, *Deseisin and Adverse Possession 31 Yale L.J. 1.*

(n55)Footnote 55. *Hawkins v. Page, 20 Ky. (4 T.B. Mon.) 136 (1826).*

(n56)Footnote 56. *Fish v. Fish, 1 Conn. 559 (1816); Stanton v. Boatright, 302 S.W.2d 347 (Tenn. 1957)* (dower only in the equity above the mortgage debt).

(n57)Footnote 57. *Hamm v. Butler, 112 So. 141 (Ala. 1927); Munro v. McAllister, 203 P. 286 (Idaho 1921); Temple v. Harrington, 176 P. 430 (Or. 1918).*

(n58)Footnote 58. *Chavers v. Mayo, 202 Ala. 128 (1918); Patterson v. Durand Farmers Mut. Fire Ins. Co., 24 N.E.2d 740 (Ill. 1940); Weidler v. Floran, 13 N.E.2d 330 (Ind. 1938); Roth v. Roth, 125 A. 400 (Md. 1924).*

(n59)Footnote 59. *Wilson v. Robinson, 83 F.2d 397 (2d Cir. 1936); Weidler v. Floran, 13 N.E.2d 330 (Ind. 1938).*

(n60)Footnote 60. *LaMar v. Lechlider, 187 So. 913 (Fla. 1939); Krueger v. Groth, 209 N.W. 772 (Wis. 1926).*

In Oklahoma a husband and wife have a species of common ownership during marriage so that a transfer from husband to wife on divorce creates no taxable gain when the property has appreciated. *Collins v. Commissioner Internal Revenue, 412 F.2d 211 (10th Cir. 1969).* But vesting occurs at the time of the divorce, not during marriage. *Sanditen v. Sanditen, 496 P.2d 365 (Okla. 1972).*

In Colorado a transfer of property between husband and wife on divorce is a recognition of common ownership and not taxable. In re Questions Submitted by U.S. Dist. Court, *517 P.2d 1331 (Colo. 1974).*

(n61)Footnote 61. *Hamm v. Butler, 112 So. 141 (Ala. 1927); In re Lamonica's Estate, 141 A. 315 (Del. Ch. 1928); Ratzman v. Ratzman, 165 N.E. 172 (Ill. 1929).*

(n62)Footnote 62. The widow may be forced to an election, however.

(n63)Footnote 63. *Chambers v. Davis, 54 Ky. (15 B. Mon.) 522 (1954).*

Wife's inchoate dower not barred by execution sale on judgment against husband. *Walters v. Anderson, 361 S.W.2d 31 (Ky. 1962).*

(n64)Footnote 64. *Hanes v. Marshall, 43 F.2d 703 (2d Cir. 1930); Gerhardt v. Sullivan, 152 A. 663 (N.J. Eq. 1930).*

(n65)Footnote 65. *Tucker v. Tucker, 13 S.E. 5 (N.C. 1891).*

(n66)Footnote 66. *Loughran v. Loughran, 292 U.S. 216 (1934); Schoellkopf v. DeVry, 7 N.E.2d 757 (Ill. 1937).*

(n67)Footnote 67. *Whitsell v. Mills, 6 Ind. 229 (1855); Littlefield v. Paul, 69 Me. 527 (1879); Wait v. Wait, 4 N.Y. 95 (1850).*

(n68)Footnote 68. Coke on Littleton, §32.

(n69)Footnote 69. 13 Edw. I, ch. 34.

See Comment, *Oregon Marital Property Laws: Can Both Separation and Equality Be Achieved? 57 Or. L. Rev. 152 (1978).*

(n70)Footnote 70. Britton, ch. 110. This rule, changed by 1 Edw. VI, ch. 12, was later renewed. 5 & 6 Edw. VI.

(n71)Footnote 71. *Harley v. Orvin, 14 S.E.2d 701 (S.C. 1941).*

Dower is determined by the lex situ of the realty. *In re Johnson's Estate, 240 So. 2d 840 (Fla. 1970).*

(n72)Footnote 72. *Pope v. Bain, 68 A.2d 569 (N.J. 1949).*

(n73)Footnote 73. *United States v. Certain Parcels of Land, 46 F. Supp. 441 (D. Md. 1942); Resch v. Rowland, 257 S.W.2d 621 (Mo. 1953); Murawski v. Murawski, 209 S.W.2d 262 (Mo. App. 1948); In re Madsen's Estate, 259 P.2d 595 (Utah 1953).*

See Joseph L. Lewis, *It's Time to Abolish Dower and Curtesy in Virginia, 3 U. Rich. L. Rev. 299 (1969).*

(n74)Footnote 74. *Salvemini v. Giblin, 130 A.2d 842 (N.J. 1957); American Blower Co. v. MacKenzie, 147 S.E. 829 (N.C. 1929); In re Booth's Estate, 349 P.2d 840 (Or. 1960).*

See George L. Haskins, *The Estate by the Marital Right, 97 U. Pa. L. Rev. 345 (1948);* Allen D. Altman, *Florida Dower -- Does It Qualify for the Marital Deduction?, 22 U. Miami L. Rev. 686 (1968);* Margaret H. Amsler, *New Married Woman's Statutes: Meaning and Effect, 15 Baylor L. Rev. 145 (1963);* Joseph H. Vahlsing & William E. Hudson, *Inchoate Dower -- An Idea Whose Time Is Past, 60 Ky. L.J. 671 (1972).*

See also Charles P. Sacher, *Florida Dower, 43 Fla. B.J. 266 (1969).*

(n75)Footnote 75. *Underground Elec. Rys. Co. v. Owsley, 196 F. 278 (2d Cir. 1912); Cole v. Cole, 126 N.E. 752 (Ill. 1920); Magee v. Young, 40 Miss. 164 (1866).*

See J. T. Stovall, *Dower and Distributive Share, 4 Ala. Law 264 (1943);* H. Claude Horack, *Specific Performance and Dower Rights, 11 Iowa L. Rev. 97 (1926).*

The right of dower arises on death subject to debts, so a widow was entitled to dower in realty owned by husband's father who died while the husband's estate was pending. *Pfaff v. Heizman, 235 S.W.2d 551 (Ark. 1951).*

(n76)Footnote 76. *Barfoot v. Barfoot, 18 So. 2d 465 (Ala. 1944); Cieslikowski v. Radecki, 135 N.E.2d 433 (Ohio 1956)* (no right of possession under inchoate dower).

The statutory marital right is a mere expectancy but cannot be defeated by will or by a gift causa mortis. *Tomon v. Svoboda, 349 N.E.2d 668 (Ill. 1976). Webber v. Webber, 962 S.W.2d 345, 348 (Ark. 1998)* (holding that "[a] widow's right of dower, even in real property, remains only an inchoate right until the husband's death," which right applies even to crops growing at time of death).

(n77)Footnote 77. *Knox v. Knox, 25 N.W.2d 225 (Minn. 1946).*

(n78)Footnote 78. *Wigginton v. Leech, 149 S.W.2d 531 (Ky. 1941).*

(n79)Footnote 79. *United States v. Crosby, 257 F.2d 515 (5th Cir. 1958)* (in Alabama inchoate dower is not a property right but only a chose in action and is not alienable); *Wigginton v. Leech, 149 S.W.2d 531 (Ky. 1941); Butler v. Fitzgerald, 61 N.W. 640 (Neb. 1895); David Adler & Sons Clothing Co. v. Hellman, 75 N.W. 877 (Neb. 1893) See Tuller v. Detroit Trust Co., 244 N.W. 197 (Mich. 1932).*

In Kansas a wife has no vested co-ownership in the husband's property during marriage but is entitled to a one-half interest in property of her deceased husband which he sold during marriage and in which sale she did not join. There is no such co-ownership during marriage. *Wiles v. Commissioner, 499 F.2d 255 (10th Cir. 1974).* An easement on land may be conveyed without losing dower rights. In fact, a release of dower rights implies a fee simple conveyance, rather than an easement. *Meadows v. Belknap, 483 S.E.2d 826 (W. Va. 1997)* (holding that a wife can obtain the full use of, and a life estate in, all of her husband's real property when she relinquishes her inchoate dower right by joining him in conveying the property subject to the life estates); *Elton Schmidt & Sons Farm Co. v. Kneib, 507 N.W.2d 305 (Neb. App. 1993)* (holding that an easement does not invalidate dower rights and that an instrument releasing dower rights implies a fee simple conveyance, rather than an easement). *Matter of Lorenzo's Estate, 602 P.2d 521 (Hawaii 1979)* (holding that desertion must "be a physical separation, without consent and against will of the other spouse, and without justification" in order to defeat a wife's dower interest).

(n80)Footnote 80. *Thomas v. Blair, 93 So. 704 (Ala. 1922); Western States Fin. Co. v. Ruff, 215 P. 501 (Or. 1923).*

(n81)Footnote 81. *Good v. Crist, 156 N.E. 146 (Ohio 1926).*

(n82)Footnote 82. *Mayer v. Reinecke, 130 F.2d 350 (7th Cir. 1942); Bateman v. Donovan, 131 F.2d 759 (9th Cir. 1942); Gore v. General Props. Corp., 6 So. 2d 837 (Fla. 1942); Bennett v. Bennett, 149 N.E. 292 (Ill. 1925); Weidler v. Floran, 13 N.E.2d 330 (Ind. 1938); In re Cropsey Ave., 197 N.E. 189 (N.Y. 1935); Auerbach v. Chase Nat'l Bank, 296 N.Y.S. 487 (1937); Western States Fin. Co. v. Ruff, 215 P. 501 (Or. 1923); Najarian v. Boyajian, 136 A. 767 (R.I. 1927) See Hay v. Meyers, 173 A. 775 (Pa. 1934).*

Contra Simar v. Canaday, 53 N.Y. 298 (1873) (inchoate dower is an estate in land).

In Kansas a wife has no vested co-ownership in the husband's property during marriage but is entitled to a one-half interest in property of her deceased husband which he sold during marriage and in which sale she did not join. There is no such co-ownership during marriage. *Wiles v. Commissioner Int. Rev., 499 F.2d 255 (10th Cir. 1974).*

(n83)Footnote 83. *Good v. Crist, 156 N.E. 146 (Ohio App. 1926).*

A consideration paid for a subsequent release of dower by the wife to the husband's vendee was income taxable to the husband, even though the husband and wife had a contract whereby she was to receive one-third of the proceeds for releasing dower. *Le Croy v. Cook, 204 S.W.2d 173 (Ark. 1947).*

(n84)Footnote 84. *Bennett v. Bennett, 149 N.E. 292 (Ill. 1925); Corporation Comm'n v. Dunn, 94 S.E. 481 (N.C. 1917).*

(n85)Footnote 85. *Thomas v. Blair, 93 So. 704 (Ala. 1922); Bennett v. Bennett, 149 N.E. 292 (Ill. 1925); Classen v. Heath, 58 N.E.2d 889 (Ill. 1945); Cummings v. Schreur, 214 N.W. 199 (Mich. 1927).*

Wife was not entitled to compensation for ordinary household duties but was entitled to compensation for the management of a citrus grove. *Estate of Nelson v. Commissioner, 232 F.2d 720 (5th Cir. 1956).*

(n86)Footnote 86. *Firebaugh v. Wittenberg, 141 N.E. 379 (Ill. 1923).*

(n87)Footnote 87. *Stokes v. Stokes, 222 S.W.2d 108 (Mo. 1949); In re Barnes, 181 N.Y.S. 73 (1920). Kentucky Bank & Trust Co. v. Ashland Oil & Transp. Co., 310 S.W.2d 287 (Ky. 1958)* (holding that inchoate dower is a substantial right that arises at marriage or subsequent acquisition of realty by husband).

(n88)Footnote 88. *Dure v. Sharpe, 114 A. 207 (Del. Ch. 1910); Stokes v. Stokes, 196 N.Y.S. 184 (1922).*

(n89)Footnote 89. *Dure v. Sharpe, 114 A. 207 (Del. Ch. 1910); Ladshaw v. Drake, 191 S.E. 713 (S.C. 1937).*

(n90)Footnote 90. *Dure v. Sharpe, 114 A. 207 (Del. Ch. 1910); American Blower Co. v. MacKenzie, 147 S.E. 829 (N.C. 1929).*

Inchoate dower is a substantial property right. *Clifford v. Kampfe, 42 N.E. 1 (N.Y. 1895); McCreery v. Davis, 22 S.E. 178 (S.C. 1895).* So where the state requires words of grant to convey a real interest, wife's mere signature on a deed without words of grant does not bar her dower. *Cox v. Wells, 7 Blackf. 410 (Ind. 1845); Lothrop v. Foster, 51 Me. 367 (1863); Catlin v. Ware, 9 Mass. 218 (1812); Agar v. Streeter, 150 N.W. 160 (Mich. 1914).*

(n91)Footnote 91. *Tatum v. Tatum, 295 S.W. 720 (Ark. 1927)* 53 A.L.R. 306; *In re Cropsey Ave., 197 N.E. 189 (N.Y. 1935); In re Barnes, 181 N.Y.S. 73 (1920); Rook v. Horton, 129 S.E. 450 (N.C. 1925); Turner v. Washington Realty Co., 126 S.E. 137 (S.C. 1925); Shelton v. Shelton, 83 S.E.2d 176 (S.C. 1954); Share v. Trickle, 197 N.W. 329 (Wis. 1924).*

(n92)Footnote 92. *Stanton v. Boatright, 302 S.W.2d 347 (Tenn. 1957).*

The law favors three things, life, liberty and dower. Bacon, Uses, 37. *See Moore v. Price, 123 So. 768 (Fla. 1929).* From the earliest times, the right of dower has always been highly esteemed in the law. *See* in general: *Tatum v. Tatum, 295 S.W. 720 (Ark. 1927); Swartz v. Smole, 5 P.2d 566 (Mont. 1931); In re Barnes, 181 N.Y.S. 73 (1920); Pridgen v. Pridgen, 129 S.E. 419 (N.C. 1925); Tuten v. Almeda Farms, 192 S.E. 153 (S.C. 1937); Williamson v. Williamson First Nat'l Bank, 164 S.E. 777 (W. Va. 1931); Share v. Trickle, 197 N.W. 329 (Wis. 1924).*

See Ralph E. Thomas, *Should Marital Rights Be Protected by Statute?, 19 Wyo. L.J. 14 (1964).*

(n93)Footnote 93. *Hamm v. Butler, 112 So. 141 (Ala. 1927); Tatum v. Tatum, 295 S.W. 720 (Ark. 1927); Stokes v. Stokes, 196 N.Y.S. 184 (1922). Hampton v. Hampton Holding Co., 111 A.2d 761 (N.J. 1955)* (holding that inchoate dower is a property interest under protection of equity).

(n94)Footnote 94. *American Blower Co. v. MacKenzie, 147 S.E. 829 (N.C. 1929)* 64 A.L.R. 1047. *See Reiff v. Horst, 55 Md. 42 (1880).*

(n95)Footnote 95. *Louisa County v. Grimm, 212 N.W. 324 (Iowa 1927); Rosenow v. Miller, 207 P. 618 (Mont. 1922); Western States Fin. Co. v. Ruff, 215 P. 501 (Or. 1923); Najarian v. Boyajian, 136 A. 767 (R.I. 1927).*

Contra, Nelson v. Dunn, 284 S.W. 1084 (Ky. 1926); Hay v. Meyers, 173 A. 775 (Pa. 1934).

(n96)Footnote 96. *Citizens Bank & Trust Co. v. Watkins, 1 S.E.2d 853 (N.C. 1939).*

(n97)Footnote 97. *Randall v. Krieger, 90 U.S. (23 Wall.) 137 (1874); Hopkins v. Magruder, 34 F. Supp. 381 (D. Md. 1940); Hatcher v. Buford, 29 S.W. 641 (Ark. 1895); Hawkes v. Mobley, 163 S.E. 494 (Ga. 1932); McNeer v. McNeer, 32 N.E. 681 (Ill. 1892); Thompson v. McCorkle, 34 N.E. 813 (Ind. 1893); Williams v. Williams, 12 S.W. 760 (Ky. 1889); Stitt v. Smith, 113 N.W. 632 (Minn. 1907); Magee v. Young, 40 Miss. 164,* (1866); *Moore v. New York, 8 N.Y. 110,* (1853); *Corporation Comm'n v. Dunn, 94 S.E. 481 (N.C. 1917); Weaver v. Gregg, 6 Ohio St. 547 (1856); Briegel v. Briegel, 160 A. 581 (Pa. 1931).*

(n98)Footnote 98. *United States v. Certain Parcels of Land, 46 F. Supp. 441 (D. Md. 1942); Flynn v. Flynn, 50 N.E. 650 (Mass. 1898); In re Cropsey Ave., 197 N.E. 189 (N.Y. 1935)* (need not be a party to condemnation action); *Long v. Long, 124 N.E. 161 (Ohio 1919); Shelton v. Shelton, 83 S.E.2d 176 (S.C. 1954).*

Contra, Wheeler v. Kirtland, 27 N.J. Eq. 534 (1875); In re New York & Brooklyn Bridge, 27 N.Y.S. 597 (1894). Liberty Folder Co. v. Anderson, 90 N.E.2d 409 (Ohio App. 1949) (interpreting code section dealing with abolishment of dower).

(n99)Footnote 99. *Ferry v. Spokane, P. & S. R. Co., 258 U.S. 314 (1922); Fletcher v. Felker, 97 F. Supp. 755 (W.D. Ark. 1951); Chapman v. Chapman, 29 P. 1071 (Kan. 1892); Hamblin v. Marchant, 175 P. 678 (Kan. 1918); Opinion of the Justices, 151 N.E.2d 475 (Mass. 1958),* citing Thompson on Real property; *Moore v. New York, 8 N.Y. 110,* (1853); *Long v. Long, 124 N.E. 161 (Ohio 1919); Goodman v. Gerstle, 109 N.E.2d 489 (Ohio St. 1952); Wilson v. Wilson, 81 S.E.2d 605 (Va. 1954).*

"In questions relating to dower, the widow is not to be considered a creditor or purchaser for value." *Rook v. Horton, 129 S.E. 450 (N.C. 1925).*

(n100)Footnote 100. *Goodkind v. Bartlett, 26 N.E. 387 (Ill. 1891); Corporation Comm'n v. Dunn, 94 S.E. 481 (N.C. 1917).*

Although dower and curtesy, though inchoate, have been referred to as "vested remainders," *Doremus v. Patterson, 57 A. 548 (N.J. 1904)* such a statement is incorrect. They are not transferable separate from the fee. *Bucci v. Popovich, 115 A. 95 (N.J. Eq. 1921).*

(n101)Footnote 101. *Tatum v. Tatum, 295 S.W. 720 (Ark. 1927); Bowles v. Hoard, 39 N.W. 24 (Mich. 1888); Vreeland v. Jacobus, 19 N.J. Eq. 231 (1868); Denton v. Nanny, 8 Barb. (N.Y.) 618 (1850).*

(n102)Footnote 102. *Pawley v. Pawley, 46 So. 2d 464, 28 A.L.R.2d 1358 cert. denied, 340 U.S. 866 (Fla. 1950); Vaughan v. Dowden, 26 N.E. 74 (Ind. 1891); Peddicord v. Peddicord, 47 N.W.2d 264 (Iowa 1951); Frisbee v. Frisbee, 29 A. 1115 (Me. 1894); Fitcher v. Griffiths, 103 N.E. 471 (Mass. 1913); Smith v. Hall, 30 A. 409 (N.H. 1892); Campbell v. Ellwanger, 30 N.Y.S. 792 (1943); Application of Manhattan Sav. Bank, 43 N.Y.S.2d 386 (1943); Atwood v. Arnold, 51 A. 216 (R.I. 1902); Gatewood v. Gatewood, 75 Va. 407 (1881).*

(n103)Footnote 103. *Reinheimer v. Rhedans, 327 S.W.2d 823 (Mo. 1959).*

(n104)Footnote 104. *O'steen v. O'steen, 85 So. 547 (Ala. 1920); Wagar v. Marshburn, 1 So. 2d 303 (Ala. 1941); Warner v. Norwegian Cemetery Ass'n, 117 N.W. 39 (Iowa 1908); McKelvey v. McKelvey, 89 P. 663 (Kan. 1907); Hamblin v. Marchant, 175 P. 678 (Kan. 1918)* 6 A.L.R. 1403; *Truitt v. Truitt, 162 S.W.2d 31 (Ky. 1942)* 140 A.L.R. 1127 (holding the inchoate right of dower a "vested right" defeasible only by prior death); *Hart v. Parrish, 244 S.W.2d 105 (Mo. 1951)* (fraudulent sheriff's deed did not affect dower); *Grundstein v. Suburban Motor Freight, 107 N.E.2d 366 (Ohio App. 1951).*

See Harry H. Schneider & Bertram M. Landesman, *"Life, Liberty and Dower" Disherison of the Spouse in New York, 19 N.Y.U. L.Q. 343 (1942).*

(n105)Footnote 105. *Hampton v. Hampton Holding Co., 111 A.2d 761 (N.J. 1955).*

(n106)Footnote 106. *Mullan v. Bank of Pasco County, 133 So. 323 (Fla. 1931); Grubbs v. Leyendecker, 53 N.E. 940 (Ind. 1899); Burk v. Moore, 272 S.W. 38 (Ky. 1925).*

Widow's death before dower was perfected did not affect right to dower. *In re Hiley's Estate, 262 So. 2d 476 (Fla.*

App. 1972).

Prior to assignment a widow does not become vested in the estate in dower of the land. Her interest is a mere chose in action to have the assignment made. *In re Booth's Estate, 349 P.2d 840 (Or. 1960),* repudiating *Leonard v. Grant, 8 Or. 276 (1880).*

(n107)Footnote 107. *Pacific Bank v. Hannah, 90 F. 72 (9th Cir. 1898); Landers v. Hayes, 72 So. 106 (Ala. 1916)* (grantee acquires no legal interest); *Bowen v. Black, 279 S.W. 782 (Ark. 1926)* (no legal interest acquired by grantee); *Lewis v. King, 54 N.E. 330 (Ill. 1899); Wilson v. Hilligoss, 278 Ill. App. 564 (1935); Hurt's Guardian v. Crawford Coal Co., 1 S.W.2d 995 (Ky. 1927); Fuchs v. Christie, 74 A. 129 (N.J. 1909); Byrne v. Kernals, 155 P. 587 (Okla. 1916); Ritt v. Dodge, 37 A. 810 (R.I. 1897).*

(n108)Footnote 108. *Preston v. Second Nat'l Bank of Paintsville, 63 S.W.2d 774 (Ky. 1933); Bruce v. McCormick, 72 N.E.2d 333 (Ill. 1947); Jones v. Jones, 72 N.E. 695 (Ill. 1904)* (holding that there is no fraud where the father conveyed property to child, leaving enough to satisfy wife's inchoate dower).

(n109)Footnote 109. *Beauchamp v. Bertig, 119 S.W. 75 (Ark. 1909); Campbell v. Wilson, 63 N.E. 103 (Ill. 1902); Consolidation Coal Co. v. Grayson, 216 S.W. 848 (Ky. 1919); Dailey v. Benn, 198 P. 323 (Okla. 1921); Callan v. Western Inv. & Holding Co., 72 P.2d 48 (Or. 1937).*

(n110)Footnote 110. *Dobberstein v. Murphy, 66 N.W. 204 (Minn. 1896); Serry v. Curry, 42 N.W. 97 (Neb. 1889); Tucker v. Tucker, 45 S.W. 344 (Tenn. 1898).*

(n111)Footnote 111. *Wilson v. Roebuck, 60 So. 870 (Ala. 1913); Flowers v. Flowers, 106 S.W. 949 (Ark. 1907); Tandy v. Smith, 293 S.W. 735 (Ark. 1927); Morris v. Glaser, 151 A. 766 (N.J. 1930).*

(n112)Footnote 112. 1 William Cruise, Real Property, 132. *See Randall v. Kreiger, 90 U.S. (23 Wall.) 137 (1874); Ferry v. Spokane, P. & S. R. Co., 268 F. 117* (9th Cir.), *aff'd, 258 U.S. 314 (1920); Corporation Comm'n v. Dunn, 94 S.E. 481 (N.C. 1917).*

(n113)Footnote 113. *Gluc v. Klein, 197 N.W. 691 (Mich. 1924); Bonert v. Bonert, 184 N.Y.S. 274 (1920); Corporation Comm'n v. Dunn, 94 S.E. 481 (N.C. 1917); Rook v. Horton, 129 S.E. 450 (N.C. 1925); Watson v. Cox, 108 S.E. 168 (S.C. 1921).*

See Max Rheinstein, *The Need for Research in Family Law, 16 U. Chi. L. Rev. 691 (1949).*

"Dower is not the result of the marriage contract, but is a provision which the law makes, founded on public policy, for the benefit of the wife as an incident to the marriage relation, and contingent on the seisin and death of the husband before the right of dower becomes fixed and consummate by death." *Morrison v. Rice, 29 N.W. 168 (Minn. 1886).*

See Gluc v. Klein, 197 N.W. 691 (Mich. 1924); Bonert v. Bonert, 184 N.Y.S. 274 (1920); Pridgen v. Pridgen, 129 S.E. 419 (N.C. 1925).

(n114)Footnote 114. *Randall v. Kreiger, 90 U.S. (23 Wall.) 137 (1874); Martin v. Martin, 22 Ala. 86 (1853); Stitt v. Smith, 113 N.W. 632 (Minn. 1907); Butler v. Fitzgerald, 61 N.W. 640 (Neb. 1895); Kursheedt v. Union Dime Sav. Inst., 23 N.E. 473 (N.Y. 1890); Weaver v. Gregg, 6 Ohio St. 547 (1856); Appeal of Melizet, 17 Pa. 449 (1851).*

It has been held that a wife's inchoate right of dower is not such a legal title or right which disqualifies her to act as a witness in the execution of a deed by a third person to her husband. *Green v. Henderson, 59 N.E.2d 765* (Ohio) rev'g *52 N.E.2d 532 (1942).*

(n115)Footnote 115. *Schoellkopf v. DeVry, 7 N.E.2d 757 (Ill. 1937); Singer v. Singer, 49 D. & C. 392, 54 Dauph.*

353 (Pa. 1943).

(n116)Footnote 116. *Bryon v. Bryon, 119 N.Y.S. 41 (1909); Bonert v. Bonert, 184 N.Y.S. 274 (1920); Corporation Comm'n v. Dunn, 94 S.E. 481 (N.C. 1917); Rook v. Horton, 129 S.E. 450 (N.C. 1925); Long v. Long, 124 N.E. 161 (Ohio 1924); Good v. Crist, 156 N.E. 146 (Ohio App. 1926).*

(n117)Footnote 117. *Thorpe v. Lyones, 142 N.W. 82 (Iowa 1913); Ehler v. Ehler, 243 N.W. 591 (Iowa 1932); Whitman v. Huefner, 108 N.E. 1054 (Mass. 1915); Block v. P. & G. Realty Co., 124 A. 372 (N.J. 1924); Van Blaricum v. Larson, 130 N.Y.S. 925 (1911); Corporation Comm'n v. Dunn, 94 S.E. 481 (N.C. 1917); Long v. Long, 124 N.E. 161 (Ohio 1919).*

(n118)Footnote 118. *Ware v. Owens, 42 Ala. 212,* (1868); *Hatcher v. Buford, 29 S.W. 641 (Ark. 1895); Sanders v. Taylor, 104 S.W.2d 797 (Ark. 1937); Schoellkopf v. DeVry, 7 N.E.2d 757 (Ill. 1937); Classen v. Heath, 58 N.E.2d 889 (Ill. 1945); McAllister v. Dexter & P. R. Co., 76 A. 891 (Me. 1910); Griswold v. McGee, 112 N.W. 1020 (Minn. 1907); Magee v. Young, 40 Miss. 164 (1866); Corporation Comm'n v. Dunn, 94 S.E. 481 (N.C. 1917); In re Parks, 87 P. 900 (Utah 1906).*

The legislature cannot increase dower right as to existing marriages. *Gerhardt v. Sullivan, 152 A. 663 (N.J. 1930); Jenkins v. Jenkins, 82 N.C. 208 (1880).*

(n119)Footnote 119. *Hilton v. Thatcher, 88 P. 20 (Utah 1906).*

(n120)Footnote 120. *McDaniel v. Byrkett, 175 S.W. 491 (Ark. 1915)* 692; *Smith v. Hines, 10 Fla. 258 (1863); Crenshaw v. Moore, 137 S.W. 924 (Tenn. 1911); In re Bullen's Estate, 151 P. 533 (Utah 1915).*

Contra, and to effect that dower is taken under inheritance laws. *Billings v. People, 59 N.E. 798 (Ill. 1901) aff'd, 188 U.S. 97; State ex rel. Pettit v. Probate Court, 163 N.W. 285 (Minn. 1917); Corporation Comm'n v. Dunn, 94 S.E. 481 (N.C. 1917).*

(n121)Footnote 121. *Title Guarantee & Trust Co. v. Edwards, 290 F. 617 (S.D.N.Y. 1922); Schuette v. Bowers, 40 F.2d 208 (2d Cir. 1930); Carter v. United States, 3 F. Supp. 782 (E.D. Mo. 1932); State v. Lane, 203 S.W. 17 (Ark. 1918); Matter of Riemann, 87 N.Y.S. 648 (1904); In re Osgood's Estate, 173 P. 152 (Utah 1918).*

Contra, Mayer v. Reinecke, 28 F. Supp. 334 (N.D. Ill. 1939); In re Sanford's Estate, 137 N.W. 864 (Neb. 1912). An easement on land may be conveyed without losing dower rights. In fact, a release of dower rights implies a fee simple conveyance, rather than an easement. *Meadows v. Belknap, 483 S.E.2d 826 (W. Va. 1997)* (holding that a wife can obtain the full use of, and a life estate in, all of her husband's real property when she relinquishes her inchoate dower right by joining him in conveying the property subject to the life estates); *Elton Schmidt & Sons Farm Co. v. Kneib, 507 N.W.2d 305 (Neb. App. 1993)* (holding that an easement does not invalidate dower rights and that an instrument releasing dower rights implies a fee simple conveyance, rather than an easement). *LeCroy v. Cook, 204 S.W.2d 173 (Ark. 1947)* (wife's right of dower is contingent on husband's death and can't be deprived her except to his grantee).

(n122)Footnote 122. *Brown v. Brown, 93 N.Y.S.2d 63 (1948).*

(n123)Footnote 123. *Gradler v. Johnson, 22 N.E.2d 946 (Ill. 1939).*

(n124)Footnote 124. *Moore v. Price, 123 So. 768 (Fla. 1929); Ellguth v. Ellguth, 95 N.E. 169 (Ill. 1911); Lavery v. Hutchinson, 139 Ill. App. 61 (1908).*

(n125)Footnote 125. *Brown v. Brown, 78 S.E. 447 (S.C. 1913)* (waste permitted up to value of loan).

Contra, Rumsey v. Sullivan, 150 N.Y.S. 287 (1914) (wife could not enjoin ameliorating waste).

(n126)Footnote 126. *Tuten v. Almeda Farms, 192 S.E. 153 (S.C. 1937). See Dower and Curtesy: Arkansas Statutes Allowing a Widow but not a Widower to Elect against a Will and Receive Dower Interests, Statutory Allowances and Homestead Rights Violate Equal Protection, 35 Ark. L. Rev. at 185, 187 (Fall 1981).*

(n127)Footnote 127. *Porter v. Mosley, 517 S.W.2d 524 (Tenn. 1974); Rhodes v. McAfee, 45 S.W.2d 522 (Tenn. 1998)* (holding that wife was not entitled to dower rights because her marriage to her stepfather was contrary to the law as being both invalid and criminal).

(n128)Footnote 128. Coke on Littleton, §33a; *Loughran v. Loughran, 292 U.S. 216 (1934); Jones v. Jones, 28 Ark. 19 (1872); State v. Probate Court, 163 N.W. 285 (Minn. 1917); Higgins v. Breen, 9 Mo. 497 (1845); Staehle v. Mercantile Trust Co., 327 S.W.2d 220 (Mo. 1959)* (allowing a mistress compensation for her services in maintaining the household). Holding that a religious ceremony without a marriage license was not a marriage entitling the woman to dower. *In re Litzky's Estate, 296 So. 2d 638 (Fla. App. 1974).*

See Joseph W. Diehl, *Domestic Relations: Rights and Remedies of the Putative Spouse, 37 Cal. L. Rev. 671 (1949); Effect of Invalid Marriages on Property Rights, 20 Wash. & Lee L. Rev. 91 (1963).*

(n129)Footnote 129. *Schneider v. Schneider, 191 P. 533 (Cal. 1920); State v. Probate Court, 163 N.W. 285 (Minn. 1917); Hilton v. Snyder, 108 P. 698 (Utah 1910); Williams v. Williams, 1 N.W. 98 (Wis. 1879).*

(n130)Footnote 130. *McGaugh v. Mathis, 198 S.W. 1147 (Ark. 1917); Murchison v. Green, 57 S.E. 709 (Ga. 1907); Schmisseur v. Beatrie, 35 N.E. 525 (Ill. 1893); Potter v. Clapp, 68 N.E. 81 (Ill. 1903); Franklin v. Lee, 62 N.E. 78 (Ind. 1901); Smith v. Fuller, 115 N.W. 912 (Iowa 1908).*

(n131)Footnote 131. *Goset v. Goset, 164 S.W. 759 (Ark. 1914); Sellman v. Bowen, 8 G. & J. (Md.) 50 (1836); People v. Schoonmaker, 75 N.W. 439 (Mich. 1898); Williams v. Williams, 23 N.W. 110 (Wis. 1885).*

California now recognizes a putative spouse, one who has duly solemnized a matrimonial union innocent that the other spouse is married, has equal rights with the legal spouse. Cal. Civ. Code, §4452; *Estate of Vargas, 36 Cal. App. 3d 714,* (1974); *In re Estate of Atherley, 44 Cal. App. 3d 758,* (1975); *Hafner v. Miller, 252 S.W. 722 (Mo. 1923)* (holding that "a wife by reason of common law marriage has her right of inchoate dower rest upon establishment of marriage").

(n132)Footnote 132. *Budd v. J. Y. Gooch Co., 27 So. 2d 72 (Fla. 1946); Lavery v. Hutchinson, 94 N.E. 6,* (Ill. 1911); *DeMilio v. New York State Thruway Auth., 235 N.Y.S.2d 642 (1912); In re Horton's Estate, 52 A.2d 895 (Pa. 1947).*

Recognizing a common-law marriage entered into in a state where valid. *Old Republic Ins. Co. v. Christian, 389 F. Supp. 335 (E.D. Tenn. 1975).*

Common-law marriage held valid. *Beck v. Beck, 246 So. 2d 420 (Ala. 1971).*

The public policy of New York is against common-law marriages. *People v. Allen, 261 N.E.2d 637 (N.Y. 1970).*

Common-law marriage is recognized. *In re Hammonds' Estate, 315 N.E.2d 843 (Ohio 1973).*

Omer v. Omer, 523 P.2d 957 (Wash. App. 1974), awarding half interest to a woman in a man's property when acquired while living in meretricious relationship; *Estate of Thornton, 541 P.2d 1243 (Wash. 1975) 15 J. Fam. L. 350,* but holding that unless the parties held themselves out as husband and wife there was not a sufficient, long, stable meretricious relationship to give rise to a constructive trust in the man's property. *Humphries v. Riveland, 407 P.2d 967 (Wash. 1965).*

(n133)Footnote 133. *Smith v. Fuller, 115 N.W. 912 (Iowa 1908); Sellman v. Bowen, 8 G. & J. (Md.) 50 (1836); O'Malley v. O'Malley, 129 P. 501 (Mont. 1913).*

(n134)Footnote 134. *Offield v. Davis, 40 S.E. 910 (Va. 1902).*

(n135)Footnote 135. *Fornshill v. Murray, 1 Bland. Ch. 479 (Md. 1828); Gathings v. Williams, 27 N.C. 487 (1845); Rhodes v. McAfee, 45 S.W.2d 522 (Tenn. 1998)* (holding that wife was not entitled to dower rights because her marriage to her stepfather was contrary to the law as being both invalid and criminal).

No dower in void marriage. *Rhodes v. McAfee, 457 S.W.2d 522 (Tenn. 1970).*

(n136)Footnote 136. *Mcllvain v. Scheibley, 59 S.W. 498 (Ky. 1900).*

First cousin's marriage void *ad initio*. *Ex parte Bowen, 247 S.W.2d 379 (Ky. 1952).*

(n137)Footnote 137. *Connecticut. Tyler v. Aspinwall, 47 A. 755 (Conn. 1901); Potter v. Clapp, 68 N.E. 81 (Ill. 1903); Johnson v. Johnson, 30 Mo. 72, 77 Am. Dec. 598 (1860); Gathings v. Williams, 27 N.C. 487 (1845); Raleigh v. Wells, 81 P. 908 (Utah 1905); Williams v. Williams, 23 N.W. 110 (Wis. 1885).*

(n138)Footnote 138. Coke on Littleton, §33a; *Bonham v. Badgley, 7 Ill. (2 Gilm.) 622 (1845); Tomppert v. Tomppert, 76 Ky. (13 Bush) 326,* (1877); *Jenkins v. Jenkins, 32 Ky. (2 Dana) 102 (1834); Fornshill v. Murray, 1 Bland. Ch. 479 (Md. 1828).*

(n139)Footnote 139. *Putnam v. Putnam, 25 Mass. (8 Pick.) 433 (1829); Smith v. Smith, 19 A. 255 (N.J.L. 1890); Dickson v. Dickson, 9 Tenn. (1 Yer.) 110,* (1922).

(n140)Footnote 140. *Bell v. Little, 789 N.Y.S. 935, modified on other grounds, 197 N.Y.S. 674, aff'd, 143 N.E. 726 (N.Y. 1922).*

(n141)Footnote 141. Recognizing a "de facto" spouse. *Lopez v. Santiago, 294 A.2d 272 (N.J. 1972).*

Community property exists in putative marriages. *Dean v. Goldwire, 480 S.W.2d 494 (Tex. Civ. App. 1972).*

See Florence J. & Charles W. Luther, *Support and Property Rights of the Putative Spouse, 24 Hastings L.J. 311 (1972); Russell L. Schetroma, Pennsylvania Paramours: Seisin and the Other Woman, 76 Dick. L. Rev. 304 (1971).*

(n142)Footnote 142. Texas Family Code of 1971, tit. 1, §1.91, permits among other things in subchapter "E" proof of certain informal marriages.

(n143)Footnote 143. *Young v. Tarbell, 37 Me. 509 (1854); State v. Probate Court, 163 N.W. 285 (Minn. 1917); Long v. Long, 124 N.E. 161 (Ohio 1919).*

(n144)Footnote 144. *Loughran v. Loughran, 292 U.S. 216 (1947); Le Croy v. Cook, 204 S.W.2d 173 (Ark. 1947); Bowler v. Bowler, 31 So. 2d 751 (Fla. 1947); State v. Probate Ct., 163 N.W. 285 (Minn. 1917); Higdon v. Higdon, 173 S.E. 273 (N.C. 1934); Long v. Long, 124 N.E. 161 (Ohio 1919); Bonfey v. Bayne, 58 N.W. 620 (Mich. 1894)* (holding that dower is contingent estate that vests at the death of the husband).

(n145)Footnote 145. *Truett v. Funderburk, 20 S.E. 260 (Ga. 1894); Oades v. Standard Sav. & Loan Ass'n, 241 N.W. 262 (Mich. 1932); Sutliff v. Forgey, 1 Cow. 89* (N.Y.).

(n146)Footnote 146. *Bundy v. Solon, 51 N.E.2d 183 (Ill. 1943).*

(n147)Footnote 147. *Boggiano v. Boggiano, 38 N.Y.S.2d 462 (1942).*

(n148)Footnote 148. *Harding v. Alden, 9 Me. 140,* (1832); *Davol v. Howland, 14 Mass. 219 (1817); Percival v. Percival, 22 N.W. 807 (Mich. 1885); Tatro v. Tatro, 25 N.W. 571 (Neb. 1885).*

In the absence of a statutory provision requiring the wife's dower to be assigned to her upon the decree of divorce, her interest does not become vested until her husband's death. *Dennis v. Harris, 153 N.W. 343 (Iowa 1915); Hunt v. Thompson, 61 Mo. 148 (1875).*

(n149)Footnote 149. *Wright v. Gelvin, 85 Ind. 128 (1882).*

(n150)Footnote 150. *Lawson v. De Bolt, 78 Ind. 563 (1881).*

(n151)Footnote 151. 1 Minor, Inst. 53 (b). *See* the following cases: *Shoot v. Galbreath, 21 N.E. 217 (Ill. 1889); Strong v. Bragg, 7 Ind. (Blackf.) 62 (1843); Wooldridge v. Lucas, 46 Ky. (7 B. Mon.) 49 (1846); Pollitt v. Kerr, 22 A. 800 (N.J. 1891); Witthaus v. Schack, 11 N.E. 649 (N.Y. 1887).*

(n152)Footnote 152. *Avery v. Everett, 18 N.E. 148 (N.Y. 1888); Davis v. Laning, 19 S.W. 846 (Tex. 1892).*

(n153)Footnote 153. 1 Minor, Inst. 133a; *Davie v. Briggs, 97 U.S. 628 (1878); Sherod v. Ewell, 73 N.W. 493 (Iowa 1897).*

(n154)Footnote 154. *Kilgore v. Kilgore, 149 N.E. 754 (Ill. 1925); Gluc v. Klein, 197 N.W. 691 (Mich. 1924).*

(n155)Footnote 155. *Gluc v. Klein, 197 N.W. 691 (Mich. 1924); Wilson v. Wilson, 81 S.E.2d 605 (Va. 1954)* (before but not after it becomes consummate, the right of dower can be taken away by statute).

(n156)Footnote 156. *Mathews v. Marsden, 230 P. 775 (Mont. 1924); Minner v. Minner, 100 S.E. 509 (W. Va. 1919)* (stating that a widow's dower is inchoate until death of husband and consummate upon the death of a husband).

(n157)Footnote 157. *In re Lakner, 211 N.Y.S. 174 (1925).*

(n158)Footnote 158. *Cummings v. Schreur, 214 N.W. 199 (Mich. 1927).*

In Oklahoma, however, "the wife's interest in her husband's property, both personal and real, is by inheritance." *York v. Trigg, 209 P. 417 (Okla. 1922),* quoted in *In re Whitson, 212 P. 752 (Okla. 1923).*

Legislature can alter dower and curtesy, but it cannot transfer a property right existing before marriage to other spouse without violating due process. *Willcox v. Penn Mut. Life Ins. Co., 55 A.2d 521 (Pa. 1947).*

(n159)Footnote 159. 2 William Blackstone, Commentaries 131; *Maloney v. McCullough, 221 S.W.2d 770 (Ark. 1949).*

(n160)Footnote 160. *Day v. Solomon, 40 Ga. 32 (1869);* 2 William Blackstone, Commentaries 131 (this contrasted with curtesy); Coke on Littleton, §31.

(n161)Footnote 161. *Downey v. King, 87 N.E. 468 (Mass. 1909).*

See Perry V. Whitmore *Requirement of Seisin as Basis for Dower,* 4 Ark. L.J. 246 (1950).

(n162)Footnote 162. *McGuire v. Cook, 135 S.W. 840 (Ark. 1911); Maloney v. McCullough, 221 S.W.2d 770 (Ark. 1949); Cobb v. Oldfield, 38 N.E. 142 (Ill. 1894); Haller v. Hawkins, 92 N.E. 299 (Ill. 1910); Smith v. Shepard, 19 N.E.2d 368 (Ill. 1939); Waters v. Gooch, 29 Ky. (6 J.J. Marsh.) 586 (1831); Stitt v. Smith, 113 N.W. 632 (Minn. 1907); Phelps v. Phelps, 38 N.E. 280 (N.Y. 1894); Redding v. Vogt, 53 S.E. 337 (N.C. 1906); Pledger v. Ellerbe, 6 S.C. (Rich.) 266,* (1853).

So the widow of a deceased son could not take dower in lands held at the time of the son's death by the son's widowed mother as her own dower since the son was not seised. *Carr v. Hart, 22 S.W.2d 432 (Ky. 1929). Cummings v. Schreur, 214 N.W. 199 (Mich. 1926)* (holding that "wife's inchoate right of dower fastens at marriage on property of which husband then seized").

(n163)Footnote 163. *McGuire v. Cook, 135 S.W. 840 (Ark. 1911); Shriver v. Shriver, 96 A. 615 (Md. 1906); Bartkowiak v. Bartkowiak, 283 N.W. 49 (Mich. 1938); Ballard v. Ballard, 55 S.E.2d 316 (N.C. 1949).*

Contra result, *Greene v. Huntington, 46 A. 883 (Conn. 1900).*

(n164)Footnote 164. *Chalk v. Chalk, 165 S.W.2d 534 (Ky. 1942).*

(n165)Footnote 165. *Farrington v. Richardson, 16 So. 2d 158 (Fla. 1944).*

(n166)Footnote 166. *Loughran v. Loughran, 292 U.S. 216,* (1934); *Cook v. First Nat'l Bank, 122 S.E. 686 (Ga. 1924); Cole v. Cole, 126 N.E. 752 (Ill. 1920); Resch v. Rowland, 252 S.W.2d 621 (Mo. 1952); Sampson v. Sampson, 124 A. 708 (N.J. 1924); Jaffe v. Zilinski, 97 A.2d 518 (N.J. 1953).*

(n167)Footnote 167. *Cummings v. Schreur, 214 N.W. 199 (Mich. 1927); Gabler v. Gabler, 193 N.Y.S. 500 (1922); Pridgen v. Pridgen, 129 S.E. 419 (N.C. 1925); Good v. Crist, 156 N.E. 146 (Ohio App. 1926).*

(n168)Footnote 168. *Chalk v. Chalk, 165 S.W.2d 534 (Ky. 1942)* (holding that under the statute of Kentucky the use therein of the word "seised" means "owned," and the owner of property is one in whom title is vested either absolute or qualified); *Pridgen v. Pridgen, 129 S.E. 419 (N.C. 1925).*

(n169)Footnote 169. *McMahan v. Kimball, 3 Ind. (Blackf.) 1 (1832); Sheffield v. Cooke, 98 A. 161 (R.I. 1916).*

(n170)Footnote 170. *Sullivan v. Sullivan, 117 N.W. 1086 (Iowa 1908); Stevens v. Smith, 27 Ky. (4 J.J. Marsh.) 64 (1830); Hendren v. Hendren, 69 S.E. 506 (N.C. 1910); Greene v. Greene, 1 Ohio 535 (1824); Thompson v. Perry, 2 S.C. (Hill Eq.) 204 (1835).*

Wife of resulting trustee has no dower. *In re Clemens, 472 F.2d 939 (6th Cir. 1972).*

Where the husband had transferred title to property in an inter vivos trust, his surviving spouse had no interest in the assets so as to satisfy her distributive share. *Leazenby v. Clinton County Bank & Trust Co., 355 N.E.2d 861 (Ind. App. 1976).*

(n171)Footnote 171. *Illinois. Hugunin v. Cochrane, 51 Ill. 302 (1869); Britt v. Gordon, 108 N.W. 319 (Iowa 1906); Sagendorph v. Lutz, 281 N.W. 553 (Mich. 1938); Melton v. Lane, 118 P. 141 (Okla. 1911); Gigliotto v. Albergo, 115 P.2d 791 (Utah 1941)* (where a husband transfers or abandons a contract for the sale of realty to him, before he is able to compel the vendor to make conveyance to himself by virtue of full performance of the contract on his part, the widow is not entitled to dower); *Chapman v. Chapman, 24 S.E. 225 (Va. 1896); Burdine v. Burdine, 36 S.E. 992 (Va. 1900).*

(n172)Footnote 172. *Gaines v. Gaines, 48 Ky. (9 B. Mon.) 295 (1848).*

(n173)Footnote 173. *Redding v. Vogt, 53 S.E. 337 (N.C. 1906).*

(n174)Footnote 174. *Putney v. Vinton, 108 N.W. 655 (Mich. 1906).*

(n175)Footnote 175. *Weidler v. Floran, 13 N.E.2d 330 (Ind. App. 1938).*

(n176)Footnote 176. *Bodkin v. Wright, 100 S.W.2d 824 (Ky. 1937).*

Where the husband had transferred title to property in an inter vivos trust, his surviving spouse had no interest in the assets so as to satisfy her distributive share. *Leazenby v. Clinton County Bank & Trust Co., 355 N.E.2d 861 (Ind. App. 1976).*

(n177)Footnote 177. *In re Oberwalder, 291 N.Y.S. 1004 (1936).*

(n178)Footnote 178. *Heldhauser v. Schulz, 116 A. 791 (N.J. 1922)* 21 A.L.R. 1070.

(n179)Footnote 179. *McLawhorn v. Smith, 191 S.E. 35 (N.C. 1937)* 110 A.L.R. 980.

(n180)Footnote 180. *In re Fox's Will, 293 N.Y.S. 468 (1937).*

(n181)Footnote 181. *Mayburry v. Brien, 40 U.S. (15 Pet.) 21 (1841); McCauley v. Grimes, 2 G. & J. (Md.) 318 (1830); Holbrook v. Finney, 4 Mass. 566 (1808). Hamm v. Butler, 112 So. 141 (Ala. 1927)* (holding that "no general rule, in strictness, states that wife shall or shall not be entitled to dower in cases of instantaneous seisin").

(n182)Footnote 182. *Mishawaka St. Joseph Loan & Trust Co. v. Neu, 196 N.E. 85 (Ind. 1935)* 105 A.L.R. 881.

(n183)Footnote 183. *Mayburry v. Brien, 40 U.S. (15 Pet.) 21 (1841); Underground Elec. Rys. v. Owsley, 196 F. 278 (2d Cir. 1912); Jones v. Davis, 25 So. 789 (Ala. 1899); Birnie v. Main, 29 Ark. 591 (1874); Brack v. Coburn, 196 S.W.2d 230 (Ark. 1946)* (possession through a tenant was "seisin"); *Frederick v. Emig, 57 N.E. 883 (Ill. 1900); Harrow v. Grogan, 76 N.E. 350 (Ill. 1905); Walters v. Walters, 73 Ind. 425 (1881); Thomas v. Hanson, 44 Iowa 651 (1876); Hinds v. Ballou, 44 N.H. 619 (1863); Griggs v. Smith, 12 N.J.L. 22 (1830); Mills v. VanVoorhies, 20 N.Y. 412 (1859); Roush v. Miller, 20 S.E. 663 (W. Va. 1894); Commercial Banking & Trust Co. v. Dudley, 86 S.E. 307 (W. Va. 1915)* 12 A.L.R. 1334; *Thompson v. Lyman, 28 Wis. 266 (1871).*

See however, *Rawlings v. Lowndes, 34 Md. 639 (1871),* where the wife was given dower, 16 days having elapsed between delivery of the deed and the execution of the purchase money mortgage and the husband had during this period a beneficial and not merely an instantaneous seisin.

(n184)Footnote 184. *Tibbetts v. Langley Mfg. Co., 12 S.C. 465 (1879).*

(n185)Footnote 185. *Mayburry v. Brien, 40 U.S. (15 Pet.) 21 (1841); Cf., Lohmeyer v. Durbin, 69 N.E. 523 (Ill. 1903).*

(n186)Footnote 186. *Smith v. Stanley, 37 Me. 11 (1854).*

(n187)Footnote 187. *Stelle v. Carroll, 37 U.S. (12 Pet.) 201 (1838).*

(n188)Footnote 188. *Hamm v. Butler, 112 So. 141 (Ala. 1927); Hicks v. Fletcher, 226 S.W. 524 (Ark. 1921).*

(n189)Footnote 189. *Hamm v. Butler, 215 Ala. 572, 112 So. 141 (1927).*

Seisin is necessary under Arkansas law, so where a child died leaving a widow, while the child's mother was in possession under her dower right, child's widow took no dower. *Maloney v. McCullough, 221 S.W.2d 770 (Ark. 1949).*

> "There is no general rule in strictness that, in cases of instantaneous seisin, the wife shall or shall not be entitled to dower; this must depend as well upon the character of the seisin as its duration. When the husband has the seisin of the estate, though for an instant beneficially for his own use, the wife's inchoate right of dower attaches. If the effect of the transaction is merely to make the husband a conduit for passing the title, such as a conveyance to him and a concurrent conveyance back to a vendor by mortgage

for the purchase price, the right of dower does not attach as against the rights of such mortgagee... The reason of this rule is found in the necessity and equity of protecting the vendor -- the original owner of the fee -- in securing full payment for the property, as against the right of dower, and relates to the estate conveyed by the mortgage executed to secure the purchase money, not the equity of redemption which vests in the mortgagor under the deed... The satisfaction of the purchase money mortgage has the effect to carry the husband's seisin back to the date of the deed conveying the lands to him, and the wife's right of dower attaches to the estate thus vested." *Weaver v. Patterson, 111 A. 506 (N.J. 1920).*

(n190)Footnote 190. An inter vivos trust is not illusory as against widow's dower merely because settlor retains broad powers to amend or revoke. *In re Herron's Estate, 237 So. 2d 563 (Fla. App. 1970).*

(n191)Footnote 191. *Boyers v. Newbanks, 2 Ind. 388 (1850); Shattuck v. Gragg, 40 Mass. (23 Pick.) 88 (1839); Meserve v. Meserve, 19 N.H. 240 (1848); In re Gorham, 98 S.E. 717 (N.C. 1919); Austin v. Austin, 50 Me. 74 (Me. 1862)* (holding that where wife's dower was assigned by metes and bounds by commissioners who made no "return of their doings," dower is ineffectual; but, holding that dower effectual where widow entered into possession on premises without objection of heirs for more than 20 years).

Assigned dower is an estate in land. *Brenkworth v. Lanier, 132 S.E.2d 623 (N.C. 1963).*

(n192)Footnote 192. *Vannoy v. Green, 173 S.E. 277 (N.C. 1934).*

(n193)Footnote 193. *Magruder v. Magruder, 141 F.2d 537 (D.C. 1944); Morris v. Glaser, 160 A. 578 (N.J. 1935).*

(n194)Footnote 194. *In re Gorham, 98 S.E. 717 (N.C. 1919).*

(n195)Footnote 195. *Connole v. Connole, 113 A. 467 (R.I. 1921).*

(n196)Footnote 196. *Austell v. Swann, 74 Ga. 278 (1885); Potter v. Worley, 7 N.W. 685, 10 N.W. 298 (Iowa 1880); Tenbrook v. Jessup, 46 A. 516 (N.J. 1900).*

(n197)Footnote 197. *Hill v. Mitchell, 5 Ark. 608 (1844); Wallace v. King, 170 S.W.2d 377 (Ark. 1943); Pearce v. Pearce, 56 N.E. 311 (Ill. 1900); McCormick v. Taylor, 2 Ind. 336 (1850); Swartz v. Smole, 5 P.2d 566 (Mont. 1931); Drost v. Hall, 28 A. 81 (N.J. 1893); Hopper v. Hopper, 22 N.J.L. 715 (1850); In re Gorham, 98 S.E. 717 (N.C. 1919).*

(n198)Footnote 198. *Curtis v. Hobart, 41 Me. 230 (1856); Jones v. Brewer, 18 Mass. (1 Pick.) 314 (1823).*

(n199)Footnote 199. *Boyers v. Newbanks, 2 Ind. 388 (1850); Robinson v. Miller, 40 Ky. (1 B. Mon.) 88 (1854); Young v. Tarbell, 37 Me. 509 (1854); Jones v. Brewer, 18 Mass. (1 Pick.) 314 (1823); Curtis v. Hobart, 41 Me. 230 (Me. 1856)* (holding that a parol assignment of dower by guardian acceptable).

(n200)Footnote 200. *Lenfers v. Henke, 73 Ill. 405 (1874); Boyers v. Newbanks, 2 Ind. 388 (1850); Shattuck v. Gragg, 40 Mass. (23 Pick.) 88 (1839); Den ex dem. Miller v. Miller, 4 N.J.L. 321 (1816); Aikman v. Harsell, 98 N.Y. 186 (1885).*

(n201)Footnote 201. *Loyd v. Malone, 23 Ill. 41 (1859); First Nat'l Bank v. Cook, 74 S.W.2d 846 (Mo. App. 1934); Brickhouse v. Sutton, 5 S.E. 380 (N.C. 1888); Poindexter v. Call, 179 S.E. 335 (N.C. 1935).*

(n202)Footnote 202. *Hamby v. Hamby, 51 So. 732 (Ala. 1910); Falls v. Wright, 18 S.W. 1044 (Ark. 1892); In re Andrews' Estate, 34 A.2d 700 (Del. 1943); Fosdick v. Gooding, 1 Greenl. 30 (Me. 1820).*

(n203)Footnote 203. *Ehler v. Ehler, 243 N.W. 591 (Iowa 1932).*

(n204)Footnote 204. *Sanders v. McMillian, 11 So. 750 (Ala. 1892); Schnebly v. Schnebly, 26 Ill. 116 (1861); Stevens v. Stevens, 33 Ky. (3 Dana) 371 (1835); French v. Pratt, 27 Me. 381 (1847).*

(n205)Footnote 205. *Jackson v. Rowell, 6 So. 95 (Ala. 1888); Pierce v. Williams, 3 N.J.L. 709 (1810); Johnson v. Nyce, 17 Ohio 66 (1848); James v. Fields, 52 Tenn. (5 Heisk.) 394 (1871).*

(n206)Footnote 206. *Sanders v. McMillian, 11 So. 750 (Ala. 1892); Moore v. Dick, 24 N.E. 768 (Ill. 1890); Gourley v. Kinley, 66 Pa. 270 (1870).*

(n207)Footnote 207. *Lavery v. Hutchinson, 94 N.E. 6 (Ill. 1911).*

(n208)Footnote 208. *Coulter v. Holland, 2 Harr. (Del.) 330 (1838); Fosdick v. Gooding, 1 Greenl. 30 (Me. 1820); Cook v. Fisk, 1 Miss. (1 Walker) 423 (1831).* An easement on land may be conveyed without losing dower rights. In fact, a release of dower rights implies a fee simple conveyance, rather than an easement. *Elton Schmidt & Sons Farm Co. v. Kneib, 507 N.W.2d 305 (Neb. App. 1993)* (holding that an easement does not invalidate dower rights and that an instrument releasing dower rights implies a fee simple conveyance, rather than an easement).

(n209)Footnote 209. *See Lavery v. Hutchinson, 94 N.E. 6 (Ill. 1911); Rice v. Rice, 125 N.W. 826 (Iowa 1910); Harrington v. Harrington, 55 S.E. 409 (N.C. 1906); Le Fevre v. Le Fevre, 153 S.E. 918 (W. Va. 1930).*

(n210)Footnote 210. *Lavery v. Hutchinson, 94 N.E. 6 (Ill. 1911); Rice v. Rice, 125 N.W. 826 (Iowa 1910); Harmon v. Peery, 134 S.E. 701 (Va. 1926).*

(n211)Footnote 211. *Magruder v. Magruder, 141 F.2d 537 (1944); Hardin v. Lawrence, 40 N.J. Eq. 154 (1885); White v. Story, 2 Hill 543 (N.Y. 1845).*

(n212)Footnote 212. *Pierce v. Williams, 3 N.J.L. 709 (1810).*

(n213)Footnote 213. *First Nat'l Bank v. Andrews, 28 A.2d 676 (Del. 1942); Moore v. Price, 123 So. 768 (Fla. 1929); French v. Pratt, 27 Me. 381 (1847); French v. Peters, 33 Me. 396 (1851); Marshall v. McPherson, 8 G. & J. 333 (Md. 1836); Welch v. Anderson, 28 Mo. 293 (1859); Hale v. James, 6 Johns. Ch. 258 (N.Y. 1822).*

Texas has no dower rights. *Internal Revenue Comm'r v. Chase Manhattan Bank, 259 F.2d 231 (5th Cir. 1958).*

In Kentucky the widow takes one third in fee if the husband dies intestate, but only one third for life if she elects against the will. *Hedden v. Hedden, 312 S.W.2d 891 (Ky. 1958).*

(n214)Footnote 214. *Kepcha v. Lowman, 94 N.E. 102 (Ill. 1911); Burton v. Mellis, 72 A. 13 (N.J. 1909); Aldridge v. Houston Oil Co., 244 P. 782 (Okla. 1926); Shupe v. Rainey, 100 A. 138 (Pa. 1917); Webber v. Webber, 962 S.W.2d 345 (Ark. 1998)* (upholding lower court's order that land was not divisible in kind, and therefore, the court's ordering the sale of land was appropriate).

(n215)Footnote 215. *Sanders v. McMillian, 11 So. 750 (Ala. 1892); Stevens v. Stevens, 33 Ky. (3 Dana) 371 (1835); Rockwell v. Morgan, 13 N.J. Eq. 384 (1861).*

(n216)Footnote 216. *Lenfers v. Henke, 73 Ill. 405 (1874); Billings v. Taylor, 27 Mass. (10 Pick.) 460 (1830).*

(n217)Footnote 217. *Coates v. Cheever, 1 Cow. (N.Y.) 460 (1823).*

(n218)Footnote 218. *Sims v. Yerkes, 87 A. 56 (Pa. 1913).*

(n219)Footnote 219. *Beavers v. Smith, 11 Ala. 20 (1847); Atkin v. Merrell, 39 Ill. 62 (1865); Harrison v. Payne, 32 Gratt. 387 (Va. 1879).*

(n220)Footnote 220. *Herbert v. Wren, 11 U.S. (7 Cranch) 370 (1813); Shupe v. Rainey, 100 A. 138 (Pa. 1917).*

(n221)Footnote 221. *Swartz v. Smole, 5 P.2d 566 (Mont. 1931); Connole v. Connole, 113 A. 467 (R.I. 1921).*

(n222)Footnote 222. *Floyd v. Page, 124 S.E. 1 (S.C. 1924).*

(n223)Footnote 223. *Springfield v. Stamper, 214 S.W.2d 345 (Tenn. App. 1948).*

Widow's death before dower was perfected did not affect right to dower. *In re Hiley's Estate, 262 So. 2d 476 (Fla. App. 1972).*

Quarantine may not be assigned. *Love v. Ward, 5 S.E.2d 411 (W. Va. 1939).*

(n224)Footnote 224. *Waters v. Gooch, 29 Ky. (6 J.J. Marsh.) 586 (1831); In re Gorham, 98 S.E. 717 (N.C. 1919).*

(n225)Footnote 225. *Williams v. Thomas, L.R. 1 Ch. 713, 78 L.J. Ch. 473, 100 L.T.N.S. 630* (n. d.).

(n226)Footnote 226. *Carnall v. Wilson, 21 Ark. 62 (1860); Loyd v. Malone, 23 Ill. 43, 76 (1859); Waters v. Gooch, 29 Ky. (6 J.J. Marsh.) 586 (1831).*

(n227)Footnote 227. *Swobe v. Marsh, 102 N.W. 619 (Neb. 1905).*

(n228)Footnote 228. *Johnson v. Johnson, 105 S.W. 869 (Ark. 1907); Moore v. Price, 123 So. 768 (Fla. 1929).*

(n229)Footnote 229. *Owen v. Slatter, 26 Ala. 547 (1855); Bank of Hartselle v. Brindley, 104 So. 803 (Ala. 1925); Maxwell v. Awtrey, 235 S.W. 384 (Ark. 1921); Strong v. Clem, 12 Ind. 37 (1859); Town v. Town, 212 N.W. 471 (Iowa 1926); Waters v. Gooch, 29 Ky. (6 J.J. Marsh.) 586 (1831); Cummings v. Schreur, 211 N.W. 25, aff'd, 214 N.W. 199 (Mich. 1927); Palmer v. Casperson, 17 N.J. Eq. 204 (1864); Swaine v. Perine, 5 Johns. Ch. 482 (N.Y. Ch. 1821).*

(n230)Footnote 230. *Loyd v. Malone, 23 Ill. 43 (1859); Brickhouse v. Sutton, 5 S.E. 380 (N.C. 1888).*

(n231)Footnote 231. *Farmer v. Ray, 42 Ala. 125 (1868); Hamby v. Hamby, 51 So. 732 (Ala. 1910); Carnall v. Wilson, 21 Ark. 62 (1860); Falls v. Wright, 18 S.W. 1044 (Ark. 1892); Fosdick v. Gooding, 1 Greenl. 30 (Me. 1820); In re Brock's Will, 50 S.E.2d 555 (N.C. 1948).*

(n232)Footnote 232. *Elyton Land Co. v. Denny, 11 So. 218 (Ala. 1892); Hastings v. Mace, 32 N.E. 668 (Mass. 1892).*

The renouncing widow is not entitled to claim all of the property as her husband's sole heir. *Salvation Army, Inc. v. Hart, 154 N.E.2d 487 (Ind. 1958).*

Consent to will waives widow's right to statutory allowance. *In re Snyder's Estate, 357 P.2d 778 (Kan. 1960).*

Where the widow as residuary legatee elects against the will no intestacy arises and the widow takes only her statutory share. *In re Robert's Estate, 338 P.2d 719 (Mont. 1959).*

Widow of common-law marriage could elect against the will. *In re Wagner's Estate, 159 A.2d 495 (Pa. 1960).*

(n233)Footnote 233. *Choteau v. Harvey, 36 F. 541 (C.C.D. Mo. 1888); Livingston v. Cochran, 33 Ark. 294 (1878); Pingree v. De Haven, 105 So. 147 (Fla. 1925); Owen v. Peacock, 38 Ill. 33 (1865); Britt v. Gordon, 108 N.W. 319 (Iowa 1906); Poole v. French, 111 P. 488 (Kan. 1910); Kinsolving v. Pierce, 57 Ky. (18 B. Mon.) 782 (1858); Durham v. Angier, 20 Me. 242 (1841); Rickwood v. Smith, 126 A. 79 (Md. 1924); Proctor v. Bigelow, 38 Mich. 282 (1878);*

Long v. Kansas City Stock Yards Co., 17 S.W. 656 (Mo. 1891); Joplin Brewing Co. v. Payne, 94 S.W. 896 (Mo. 1906); Falvey v. Hicks, 286 S.W. 385 (Mo. 1926); Beall v. McMenemy, 88 N.W. 134 (Neb. 1901); Conover v. Wright, 6 N.J. Eq. 613 (1848); Stephens v. George M. Craigen Co., 192 N.Y.S. 555 (1921); Ater v. Simpkins, 16 Ohio App. 461 (1922); Winters v. De Turk, 19 A. 354 (Pa. 1890).

(n234)Footnote 234. *Barksdale v. Garrett, 64 Ala. 277 (1879); Miller v. Pence, 23 N.E. 1030 (Ill. 1890); Parker v. Obear, 48 Mass. (7 Metc.) 24 (1843); Littleton v. Patterson, 32 Mo. 357 (1862); Barnard v. Edwards, 4 N.H. 107 (1827); Simonton v. Houston, 78 N.C. 408 (1878).*

(n235)Footnote 235. *Farmer v. Ray, 42 Ala. 125 (1868); Moore v. Hoffman, 39 S.W.2d 339 (Mo. 1931).*

(n236)Footnote 236. *Gridley v. Wood, 176 N.E. 356 (Ill. 1931).*

A spouse may maintain a separate action to protect dower. *Domby v. Domby, 97 N.E.2d 104 (Ohio 1951).*

(n237)Footnote 237. *Chiswell v. Morris, 14 N.J. Eq. 101 (1861); Hopper v. Hopper, 22 N.J.L. 715 (1850); Jackson v. Churchill, 7 Cow. 287 (N.Y. 1827); Ellicott v. Mosier, 7 N.Y. 201 (1852); Cowan v. Lindsay, 30 Wis. 586 (1872).*

(n238)Footnote 238. *Hopper v. Hopper, 22 N.J.L. 715 (1850); Sprague v. Stevens, 79 A. 972 (R.I. 1911); Cowan v. Lindsay, 30 Wis. 586 (1872).*

(n239)Footnote 239. *Warner v. Warner, 85 N.E. 630 (Ill. 1908); Merrill v. Shattuck, 55 Me. 370 (1868); McAllister v. Dexter & P. R. Co., 76 A. 891 (Me. 1910); Page v. Page, 60 Mass. (6 Cush.) 196 (1850); Davis v. Walker, 42 N.H. 482 (1861).*

(n240)Footnote 240. *Potter v. Clapp, 68 N.E. 81 (Ill. 1903).*

(n241)Footnote 241. *Hunt v. Hotchkiss, 64 Me. 241 (1874); Parker v. Murphy, 12 Mass. 485 (1815); Ellis v. Ellis, 4 R.I. 110 (1856).*

(n242)Footnote 242. *Lothrop v. Foster, 51 Me. 367 (1863); Page v. Page, 60 Mass. (6 Cush.) 196 (1850).*

(n243)Footnote 243. *McAllister v. Dexter & P. R. Co., 76 A. 891 (Me. 1910).*

(n244)Footnote 244. *Sykes v. Chadwick, 85 U.S. (18 Wall.) 141 (1874); Peoples Bank v. Barrow, 94 So. 600 (Ala. 1922); Thomas v. Thomas, 18 So. 2d 544 (Ala. 1944); Renn v. Renn, 179 S.W.2d 657 (Ark. 1944); Grattan v. Grattan, 18 Ill. 167 (1856); Nicoll v. Ogden, 29 Ill. 323 (1862); Blankenship v. Hall, 84 N.E. 192 (Ill. 1908); Dunshee v. Dunshee, 104 N.E. 1100 (Ill. 1914); McCann v. Daly, 168 Ill. App. 287 (1912); Verry v. Robinson, 25 Ind. 14 (1865); Sutton v. Jervis, 31 Ind. 265 (1869); Johnson v. Miller, 47 Ind. 376 (1874); Grissom v. Moore, 6 N.E. 629 (Ind. 1886); Wachstetter v. Johnson, 108 N.E. 624 (Ind. App. 1915); Hays v. Cretin, 62 A. 1028 (Md. 1906); Chase v. Angell, 108 N.W. 1105 (Mich. 1906); Blevins v. Smith, 16 S.W. 213 (Mo. 1891); Chrisman v. Linderman, 100 S.W. 1090 (Mo. 1907); Egger v. Egger, 123 S.W. 928 (Mo. 1909); Meixel v. Meixel, 146 N.Y.S. 587 (1914); Bray v. Lamb, 17 N.C. 372 (1833); In re Estate of Freeman, 31 Ohio Op. 232, 16 Ohio Supp. 6 (1944); Cancilla v. Bondy, 44 A.2d 586 (Pa. 1945); Whitmire v. Wright, 22 S.C. 446, 53 Am. Rep. 725 (1885); Evans v. Pegues, 86 S.E. 480 (S.C. 1915); Bomar v. Wilkins, 151 S.E. 110 (S.C. 1930); Crenshaw v. Moore, 137 S.W. 924 (Tenn. 1911); Higginbotham v. Cornwell, 8 Gratt. 83 (Va. 1851); Clinchfield Coal Co. v. Sutherland, 75 S.E. 765 (Va. 1912).*

In Indiana a married man may encumber or contract or deed realty that he owns without his wife joining. And such a conveyance bars the wife's marital interest. Ind. Code §29-1-2-3.1.

The spouse's action in disposing of property during marriage is presumed to be consistent with the best interests of the marital unit. *Anuszkiewicz v. Anuszkiewicz, 360 N.E.2d 230 (Ind. 1977).*

See Lewis M. Simes, *Protecting the Surviving Spouse by Restraints on the Dead Hand, 26 U. Cin. L. Rev. 1 (1957);* Henry T. Lowe, *Transfers in Fraud of Marital Rights, 26 Mo. L. Rev. 1 (1961);* Peter H. Stroh, *Preventing Spousal Disinheritance in Georgia, 19 Ga. L. Rev. 427 (1985);* Sheldon J. Plager, *The Spouse's Nonbarrable Share: a Problem in Search of a Solution, 33 U. Chi. L. Rev. 681 (1966).*

(n245)Footnote 245. *Petta v. Host, 115 N.E.2d 881 (Ill. 1953) See* cases cited in the preceding note.

Kansas has held that an attempted *inter vivos* trust which gave the settlor the income and benefits, including the right to revoke, was invalid as a fraud in the spouse's rights, and that the spouse took her statutory rights in the corpus on the settlor's death. *Ackers v. First Nat'l Bank, 387 P.2d 840, reh'g denied, 389 P.2d 1 (Kan. 1963) 13 Kan. L. Rev. 145, clarified* 1964 in *389 P.2d 1* and *192 Kan. 471, modified*.

(n246)Footnote 246. *Weyer v. Barwell, 158 N.E. 475 (Ill. 1927); McClean v. Denwood Realty Co., 207 N.Y.S. 226 (1924); Turner v. Washington Realty Co., 126 S.E. 137 (S.C. 1924).*

Testamentary spendthrift trust ineffective as against wife's rights. *Wife, J.B.G. v. Husband, P.J.G., 286 A.2d 256 (Del. 1971). Whiting v. Whiting 96 A. 500 (Me. 1916)* (holding that "a bill for injunction will lie to restrain a husband from transferring property in fraud of the legal rights of his wife").

(n247)Footnote 247. *Nash v. Kirschoff, 208 N.W. 193 (Minn. 1926); La Rue v. La Rue, 294 S.W. 723 (Mo. 1927) Cf., McClean v. Denwood Realty Co., 207 N.Y.S. 226 (1924).*

(n248)Footnote 248. *Peoples Bank v. Barrow, 94 So. 600 (Ala. 1922); Wagner v. Wagner, 211 N.W. 738 (Mich. 1927); In re Bernay's Estate, 126 S.W.2d 209 (Mo. 1939); Miller v. Miller, 198 N.Y.S. 454 (1922) .Cf., Sorrells v. Sorrells, 134 S.E. 767 (Ga. 1926); York v. Trigg, 209 P. 417 (Okla. 1922).*

See Melvin J. Sykes, *Inter Vivos Transfers in Violation of the Rights of Surviving Spouses, 10 Md. L. Rev. 1 (1949).*

(n249)Footnote 249. *Dorrough v. Grove, 60 So. 2d 342 (Ala. 1952); Buxton v. Hooker, 268 Ky. 217 (1958).*

In West Virginia, the husband may convey property or an interest therein subject only to his wife's inchoate dower interest. *Parrish v. Pancake, 215 S.E.2d 659 (W. Va. 1975).*

(n250)Footnote 250. *Flowers v. Flowers, 15 S.E. 834 (Ga. 1892); Putney v. Vinton, 108 N.W. 655 (Mich. 1906); Davidson v. Frew, 14 N.C. 3 (1831); Thayer v. Thayer, 14 Vt. 107 (1842).*

(n251)Footnote 251. *O'Malley v. Yost, 186 F.2d 603,* (8th Cir. *reh'g denied 189 F.2d 331 (1951).*

(n252)Footnote 252. *Thomas v. Thomas, 18 So. 2d 544 (Ala. 1944).*

(n253)Footnote 253. *Franceschi v. Franceschi, 62 N.E.2d 1 (Ill. App. 1945); In re Cropsey Ave., 278 N.Y.S. 815 (1935), rev'd 268 N.Y. Ct. App. 183.*

Proper acknowledgment is a necessary ingredient and "express assent" by a spouse sufficient to rebut the statutory presumption that all conveyances by married person are in fraud of marital right. *McCoy v. Northwest Elec. Power Coop., 297 S.W.2d 390 (Mo. 1957). Kober v. Kober, 23 S.W.2d 149 (Mo. 1929)* (holding that "wife may maintain an action for protection of inchoate dower, though right is contingent and uncertain").

(n254)Footnote 254. *Johnson v. Stephens, 199 So. 828 (Ala. 1941); Wagar v. Marshburn, 1 So. 2d 303 (Ala. 1941); Chalk v. Chalk, 165 S.W.2d 534 (Ky. 1942); Trotter v. Lewis, 45 A.2d 329 (Md. 1946); Oades v. Standard Sav. & Loan Ass'n, 241 N.W. 262 (Mich. 1932); Bartkowiak v. Bartkowiak, 283 N.W. 49 (Mich. 1938).*

(n255)Footnote 255. *In re O'Rourke's Estate, 175 A. 24 (Vt. 1934).*

The widow's claim to dower in lands conveyed by the decedent during his lifetime is defeated unless perfected during the decedent's lifetime. Ill. Rev. Stat. ch. 3 §171. *See Weyer v. Barwell, 158 N.E. 475 (Ill. 1927).*

In Illinois a bona fide purchaser from the heirs takes over the claim of the widow for her statutory interest unless the real estate records give notice of the widow's existence. *Petta v. Host, 115 N.E.2d 881 (Ill. 1953). See Krile v. Swiney, 109 N.E.2d 189 (Ill. 1952)* (widow takes fee interest).

(n256)Footnote 256. *Thorburn v. Wende, 257 N.Y.S. 186 (1932). Campbell v. Babcock, 27 Wis. 512 (Wis. 1871)* (holding that in "a mortgage made by husband and wife to secure the husband's note, the acts of the husband estop him from setting usury but do not estop wife with respect to her vested dower interest").

(n257)Footnote 257. *United States v. Certain Parcels of Land, 46 F. Supp. 441 (D. Md. 1942); Nelson v. Brown, 51 So. 360 (Ala. 1910); Thomas v. Thomas, 18 So. 2d 544 (Ala. 1944); Roberts v. Roberts, 198 S.W. 697 (Ark. 1917); Renn v. Renn, 179 S.W.2d 657 (Ark. 1944); Dunbar v. Dunbar, 98 N.E. 563 (Ill. 1912); Deke v. Huenkemeier, 102 N.E. 1059 (Ill. 1913); Mohr v. Sibthorp, 69 N.E.2d 487 (Ill. 1946); Bookout v. Bookout, 49 N.E. 824 (Ind. 1898); Buzick v. Buzick, 44 Iowa 259 (1876); Bell v. Dufur, 142 Iowa 701 (1909); Murray v. Murray, 13 S.W. 244 (Ky. 1890); Collins v. Collins, 57 A. 597 (Md. 1904); Cranson v. Cranson, 4 Mich. 230 (1856);Hach v. Rollins, 59 S.W. 232 (Mo. 1900); McGehee v. Garringer, 224 S.W. 828 (Mo. 1920); Loe v. Downing, 325 S.W.2d 479 (Mo. 1959)* (a deed with intent to defraud creditors is not made in fraud of the marital rights of the surviving spouse unless made just before marriage with intent to defraud the intended spouse); *Arnegaard v. Arnegaard, 75 N.W. 797 (N.D. 1898); Dick v. Bauman, 55 N.E.2d 137 (Ohio App. 1943). Blevins v. Smith, 165 S.W. 213 (Mo. 1889)* (ruling that "a sale under judgement for delinquent taxes does not bar a widow's right of dower where was not a party to the tax suit").

(n258)Footnote 258. *Givens v. Marbut, 168 S.W. 614 (Mo. 1914).*

(n259)Footnote 259. *Dorrough v. Grove, 60 So. 2d 342 (Ala. 1952); Barnett v. Barnett, 193 S.W.2d 319 (Ark. 1946); Dunbar v. Dunbar, 98 N.E. 563 (Ill. 1912); Granger v. Granger, 296 N.W. 288 (Mich. 1941); Breshears v. Breshears, 232 S.W.2d 460 (Mo. 1950); Wilson v. Wilson, 89 P. 643 (Utah 1907).*

But in *Pennsylvania, Overbeck v. McHale, 47 A.2d 142 (Pa. 1946),* and *North Carolina, Ballard v. Ballard, 55 S.E.2d 316 (N.C. 1949),* the conveyance is valid unless the wife can prove intended fraud.

An inter vivos transfer with the express purpose of defeating the spouse's right to take on his decease was a fraud upon the surviving spouse. *In re O'Connor's Estate, 23 P.2d 1031 (Cal. 1933),* applying the law of Indiana prior to 1954. *Littleton v. Littleton, 18 N.C. 327 (N.C. 1835)* (holding that "a conveyance by a man in contemplation of marriage with view of defeating dower is void").

(n260)Footnote 260. *Wallace v. Wallace, 114 N.W. 913 (Iowa 1908); Wanstrath v. Kappel, 201 S.W.2d 327 (Mo. 1947)* (Missouri will set aside gifts made by the husband to defeat the wife's share).

(n261)Footnote 261. *Nelson v. Brown, 51 So. 360 (Ala. 1910).*

(n262)Footnote 262. *Higgins v. Higgins, 76 N.E. 86 (Ill. 1905); Beechley v. Beechley, 108 N.W. 762 (Iowa 1906).*

(n263)Footnote 263. *Hamilton v. Smith, 10 N.W. 276 (Iowa 1881); Beechley v. Beechley, 108 N.W. 762 (Iowa 1907); Butler v. Butler, 21 Kan. 521 (1879); Fennessey v. Fennessey, 2 S.W. 158 (Ky. 1888); Dudley v. Dudley, 45 N.W. 602 (Wis. 1890).*

(n264)Footnote 264. *Borrough v. Grove, 60 So. 2d 342 (Ala. 1952).*

(n265)Footnote 265. *Higgins v. Higgins, 76 N.E. 86 (Ill. 1905); Beechley v. Beechley, 108 N.W. 762 (Iowa 1906).*

(n266)Footnote 266. *Bascombe v. Sargent, 90 N.Y.S.2d 113 (1949), aff'd*, 1950, *99 N.Y.S.2d 857.*

(n267)Footnote 267. *Dorrough v. Grove, 60 So. 2d 342 (Ala. 1952); Roberts v. Roberts, 198 S.W. 697 (Ark. 1917); Barnett v. Barnett, 193 S.W.2d 319 (Ark. 1946); Knights v. Knights, 133 N.E. 377 (Ill. 1921); In re Mann's Estate, 208 N.W. 310 (Iowa 1925); Anderson v. Anderson, 240 S.W. 1061 (Ky. 1922); Griffin v. Griffin, 196 N.W. 384 (Mich. 1923); Loe v. Downing, 325 S.W.2d 479 (Mo. 1959)* (a deed made to defeat creditors is not in fraud of marital rights); *Wildeman v. Wildeman, 130 A. 717 (N.J. 1925); Watson v. Cox, 108 S.E. 168 (S.C. 1921); Sederlund v. Sederlund, 187 N.W. 750 (Wis. 1922).*

(n268)Footnote 268. *Dorrough v. Grove, 60 So. 2d 342 (Ala. 1952); Kelly v. McGrath, 70 Ala. 75 (1881) See Harrison v. Harrison, 127 S.W.2d 270 (Ark. 1939).*

(n269)Footnote 269. *Stokes v. Stokes, 196 N.Y.S. 184 (1922). Byrnes v Owen, 153 N.E. 51 (N.Y. 1926)* (holding that "a conveyance where the husband conveyed to his sister property for money he gave her and without consideration of her own was void and merely an effort to defeat wife's dower").

(n270)Footnote 270. *Bartkowiak v. Bartkowiak, 283 N.W. 49 (Mich. 1938).*

(n271)Footnote 271. *Crawfordsville Trust Co. v. Ramsey, 100 N.E. 1049, 102 N.E. 282 (Ind. App. 1913), reh'g denied*.

See Melvin J. Sykes, *Inter Vivos Transfer in Violation of the Rights of Surviving Spouses, 10 Md. L. Rev. 1 (1949);* Edward N. Cahn, *Restraints on Disinheritance, 85 U. Pa. L. Rev. 139 (1936).*

(n272)Footnote 272. *See* John Cornelius Hayes, *Illinois Dower and the Illusory Trust: The New York Influence, 2 Depaul L. Rev. 1 (1952); Edward A. Smith, The Present Status of Illusory Trusts -- The Doctrine of Newman* v. *Dore Brought Down to Date, 44 Mich. L. Rev. 151 (1945). Griffith v. Griffith, 145 P. 270 (Or. 1915)* (holding that "where a husband purchased land to take title in the name of another, the wife may on his death before judgement in divorce suit by her, set aside the conveyance as fraudulent").

(n273)Footnote 273. *Smith v. Northern Trust Co., 322 Ill. App. 168, 54 N.E.2d 75 (1944); Leonard v. Leonard, 63 N.E. 1068 (Mass. 1902).*

So a mere reservation of a life estate or a shorter interest is effective against the wife. *But see Grover v. Grover, 169 P. 578 (Colo. 1917),* where the transfer was held illusory against the wife though a life estate was reserved.

Inter vivos trusts are not improper as against wives merely because settlor has retained substantial powers over the trust res. *In re Herron's Estate, 237 So. 2d 563 (Fla. 1970). See* Fla. Stat. 1971, §689.075.

Refusal to set aside trust as in fraud of wife's interests where motive was to provide for continuation of business after death. *Potter v. Winter, 280 S.W.2d 27 (Mo. 1955).*

Following Restatement (Second) of Trusts, and holding that reservation of right to amend or revoke does not make a trust testamentary.

(n274)Footnote 274. *Williams v. Williams, 474 S.W.2d 189 (Fla. 1934).*

Qualifying as executrix and receiving maintenance estopped widow from electing against the will. *Adams v. Adams, 120 S.E. 590 (W. Va. 1923).*

(n275)Footnote 275. *Davis v. Davis, 98 So. 2d 777 (Fla. 1957)* (recordation gave notice to the prospective bride); *Collins v. Collins, 57 A. 597 (Md. 1904).*

See note on *Prenuptial Transfers in Fraud of Dower, 11 U. Fla. L. Rev. 321 (1958).*

(n276)Footnote 276. So the urgent need of children by a former marriage, *Kinne v. Webb, 54 F. 34 (8th Cir. 1893),* or substantial contribution by a former wife, *Payne v. Tatem, 33 S.W.2d 2 (Ky. 1930),* or satisfaction of an obligation, *Dudley v. Dudley, 45 N.W. 602 (Wis. 1890),* keeps the transaction from being a "voluntary" conveyance.

(n277)Footnote 277. *Daniher v. Daniher, 66 N.E. 239 (Ill. 1903); Smiley v. Smiley, 16 N.E. 585 (Ind. 1888).*

(n278)Footnote 278. *Harrison v. Harrison, 127 S.W.2d 270 (Ark. 1939)* (eve of marriage).

(n279)Footnote 279. *Loe v. Downing, 325 S.W.2d 479 (Mo. 1959)*

See Henry T. Lowe, *Transfers in Fraud of Marital Rights, 26 Mo. L. Rev. 1 (1961).*

(n280)Footnote 280. *Freed v. Judith Realty & Farm Prods. Corp., 113 S.E.2d 850 (Va. 1960).*

In Pennsylvania by statute, Pa. Stat., tit. 20, §6112, a wife has the same elective rights against a revocable inter vivos trust as she has against a will. *In re Behan's Estate, 160 A.2d 209 (Pa. 1960).*

(n281)Footnote 281. *Ackers v. First Nat'l Bank, 387 P.2d 840 (Kan. 1963)* (transfer to a revocable *inter vivos* trust held a fraud on wife as to her dower).

But in Colorado the husband can transfer his property even though it has the effect of disinheriting the wife if the transaction is bona fide, not merely colorable. *Estate of Barnhart, 563 P.2d 972 (Colo. App. 1977).*

This is also true in Indiana. Ind. Code §29-1-2-2.

(n282)Footnote 282. The early dower was given at the church door, i.e., it consisted only of the lands the bridegroom then owned. But by Edward I it attached to lands he after acquired and in Britton it is pointed out that dower was given by law "although her husband say nothing."

"To entitle a wife to dower the husband must have been seised, either in fact or in law, of an estate of inheritance in the land at some time during the coverture. This rule is inflexible. If the husband have only a reversion or remainder after a freehold estate in another, the seisin is, properly speaking, in that other, and not in him, since he has never had either possession or any present right of possession, and he cannot be said to have had a seisin of any sort, either actual or legal, and consequently the wife is not entitled to dower, unless by the death of the intermediate free holder, or a surrender of his estate to the husband, the inheritance becomes entire in the husband during coverture. And if the husband conveys away his reversion or remainder, either personally or by operation of law, during the continuance of the particular estate for life, his wife thereby loses all claim to dower therein." *Geldhauser v. Schulz, 116 A. 791 (N.J. 1922).*

See Burns v. Turnbull, 62 N.E.2d 785 (N.Y. 1945) (or in fraud of the spouse).

Where one dies intestate, title to his realty vests immediately in his heirs and dower of the heirs' spouses attaches at the moment of the ancestor's death subject to being divested to pay the ancestor's debts. *Pfaff v. Heizman, 235 S.W.2d 551 (Ark. 1951).*

Holding a statute giving benefits to widows only was not unconstitutional. *Kahn v. Shevin, 416 U.S. 351 (1974).*

(n283)Footnote 283. *Childers v. Pollock, 13 S.W.2d 8 (Ark. 1929); Lenfers v. Henke, 73 Ill. 405 (1874); Hendrix v. McBeth, 61 Ind. 473 (1878); Downey v. King, 87 N.E. 468 (Mass. 1909); Whitehead v. Brownsville Bank, 61 S.W.2d 975 (Tenn. 1933).*

See James C. Blair, *Interest in Land Subject to Dower,* Ky. L.J. (1950); John MacPhail, *Situations in Which Pennsylvania Courts Have Been Reluctant to Enforce Wife's Statutory Dower Rights, 55 Dick. L. Rev. 67 (1950).*

Upon marriage the widow's marital property rights are taken subject to a previously existing contract to make a will. *Komarek's Estate v. Komarek, 282 P.2d 446 (Kan. 1955).*

Mere concealment or noncommunication of a premarital conveyance does not constitute a fraud upon the wife so as to give her dower in the realty so conveyed. *Hampton v. Hampton Holding Co., 111 A.2d 761 (N.J. 1955). Bee Branch Cattle Co. v. Koon, 44 So. 2d 684 (Fla. 1949)* (holding that a widow has a dower interest in all the property owned by her husband at the time of his death).

(n284)Footnote 284. *Deepwater Black Creek Coal Co. v. Long, 139 So. 236 (Ala. 1932); Henderson v. Usher, 170 So. 846 (Fla. 1936).*

No dower in an estate in remainder or reversion at common law. *Compton v. Cook, 66 So. 2d 176 (Ala. 1953),* but there is when preceding estate terminates. *Davis v. Davis, 243 S.W.2d 739 (Ark. 1951).*

A spouse cannot claim an interest in property of the other spouse transferred to another before marriage unless there was fraud in the transfer. *Kirk v. Kirk, 16 A.2d 47 (Pa. 1940).*

When the ancestor dies the heir immediately takes an interest in land that is subject to dower, though administration is not yet complete. *Pfaff v. Heizman, 235 S.W.2d 551 (Ark. 1951).*

Under present Florida law the widow has the dower on all property owned by the deceased husband, which dower interest is not subject to claims of husband's creditors. *In re Payne's Estate, 83 So. 2d 109 (Fla. 1955).*

In North Carolina there is no dower in a vested remainder in fee as long as a life estate is in existence. *In re Smith's Will, 107 S.E.2d 89 (N.C. 1959).*

In Florida there is dower in a remainder interest. *Creary v. Estate of Creary, 338 So. 2d 26 (Fla. App. 1976).*

(n285)Footnote 285. *Rowe v. Ratliff, 104 S.W.2d 437 (Ky. 1937); Ford v. Yost, 190 S.W.2d 21 (Ky. 1945).*

(n286)Footnote 286. 4 Kent's Comm. 401; *In re Chase's Case, 1 Bland 206 (Md. 1827); Campbell v. Lynch, 94 S.E. 739 (W. Va. 1917); Chaplin v. Chaplin, 3 P. Wms. 229, 24 Eng. Rep. 1040, 1047, 1103* (1733, 1734, 1735).

(n287)Footnote 287. *Priddy v. Griffith, 37 N.E. 999 (Ill. 1892); Crain v. West, 229 S.W. 51 (Ky. 1921); Pursifull's Adm'x v. Pursifull, 184 S.W.2d 967 (Ky. 1944); Clark v. Clark, 242 P.2d 992 (Mont. 1952)* (dower in unpatented mining claim); *Campbell v. Lynch, 94 S.E. 739 (W. Va. 1917).*

Contra, Van Camp v. Evans, 206 S.W.2d 38 (Ky. 1947) (no dower in lessee's interest in oil and gas lease); *Redman v. Shaw, 1 N.W.2d 555 (Mich. 1942)* (no dower in mineral lease).

(n288)Footnote 288. *Wyman v. Oliver, 75 Me. 421 (1884).*

Dowery in limestone quarry. *Moore v. Rollins, 45 Me. 493 (1858),* and in iron ore beds.

(n289)Footnote 289. Coke on Littletin, §32a.

(n290)Footnote 290. *Ralston v. Ralston, 3 Greene 533 (Iowa 1852); In re Mulholland, 26 A. 612 (Pa. 1893).*

(n291)Footnote 291. *Compton v. Cook, 66 So. 2d 176 (Ala. 1953); Delaney v. Manshum, 109 N.W. 1051 (Mich. 1906). Webber v. Webber, 962 S.W.2d 345, 348 (Ark. 1998)* (stating that "land is everything that lies below the surface or is attached thereto by the processes of nature or of artificial," and therefore, the court held that wife was entitled to one third share of net proceeds of the 1996 crop).

(n292)Footnote 292. *Midyette v. Grubbs, 58 S.E. 795 (N.C. 1907).*

(n293)Footnote 293. *Leavitt v. Tasker, 76 A. 953 (Me. 1910); Sheffield v. Cooke, 98 A. 161 (R.I. 1916).*

(n294)Footnote 294. *Harris v. Powers, 58 S.E. 1038 (Ga. 1907); Trimble v. Kentucky River Coal Corp., 31 S.W.2d 367 (Ky. 1930); Goodspeed v. Lawrence, 94 N.E. 395 (Mass. 1911); Byars v. Mixon, 299 So. 2d 262 (Ala. 1974)* (holding that under Alabama law and common law, a widow has a dower interest in each individual tract of land her husband owned).

(n295)Footnote 295. *Conner v. Shepherd, 15 Mass. 164 (1818); Webb v. Townsend, 18 Mass. (1 Pick.) 21, 11 (1822); Johnson v. Perley, 2 N.H. 56 (1819).*

(n296)Footnote 296. *Stevens v. Owen, 25 Me. 94 (1845); Brackett v. Persons Unknown, 53 Me. 238,* (1861); *Leavitt v. Tasker, 76 A. 953 (Me. 1910); White v. Willis, 24 Mass. (7 Pick.) 143 (1828).*

(n297)Footnote 297. *Black v. Elkhorn Mining Co., 163 U.S. 445,* (1896); *Bechtol v. Bechtol, 2 Alaska 397 (1905).*

Contra, Clark v. Clark, 242 P.2d 992 (Mont. 1952) (widow had dower in an unpatented mining claim).

(n298)Footnote 298. *Alabama Vermiculite Corp. v. Patterson, 149 F. Supp. 534 (W.D.S.C. 1955); Lenfers v. Henke, 73 Ill. 405 (1874); Priddy v. Griffith, 37 N.E. 999 (Ill. 1892); Hendrix v. McBeth, 61 Ind. 473 (1878); Whittaker v. Lindley, 3 S.W. 9 (Ky. 1887); Caudil v. Wagoner, 212 S.W. 422 (Ky. 1919); Williamson v. Williamson, 4 S.W.2d 392 (Ky. 1928); Pursifull's Adm'x v. Pursifull, 184 S.W.2d 967 (Ky. 1944); Billings v. Taylor, 27 Mass. (10 Pick.) 460 (1830);* Crouch v. Puryear, 1 Rand 258 (Va. 1822).

(n299)Footnote 299. *Osborn v. Arkansas Territorial Oil & Gas Co., 146 S.W. 122 (Ark. 1912); Terry v. Humphreys, 203 P. 539 (N.M. 1922)* (husband alone cannot lease for oil and gas in New Mexico); *Northwestern Ohio Nat'l Gas Co. v. Ullery, 67 N.E. 494 (Ohio 1903); Pierce Oil Corp. v. Schacht, 181 P. 731 (Okla. 1919); Manufacturers Light & Heat Co. v. Knapp, 135 S.E. 1 (W. Va. 1926).*

See W. Lewis Roberts, *Dower Rights Under Oil and Gas Leases, 13 Wash. & Lee L. Rev. 15 (1956).*

(n300)Footnote 300. *Crain v. West, 229 S.W. 51 (Ky. 1921); Bartlett v. Buckner, 54 S.W.2d 25 (Ky. 1932); Cook v. Cook's Adm'r, 88 S.W.2d 27 (Ky. 1935).*

See John Cornelius Hayes, *Illinois Dower and the "Illusory Trust": The New York Influence, 2 Depaul L. Rev. 1 (1952).*

(n301)Footnote 301. *Lemaster v. Hudson, 283 S.W. 439 (Ky. 1926); Van Camp v. Evans, 206 S.W.2d 38 (Ky. 1947)* (no dower in lessee's interest in oil and gas lease).

(n302)Footnote 302. *See* W. Lewis Roberts, *Dower Rights Under Oil and Gas Leases, 13 Wash. & Lee L. Rev. 15 (1956).*

(n303)Footnote 303. *Standard Oil Co. v. J.P. Mills Org., 43 P.2d 797 (Cal. 1935); Crain v. West, 229 S.W. 51 (Ky. 1921); Cook v. Cook's Adm'r, 88 S.W.2d 27 (Ky. 1935); Manufacturers Light & Heat Co. v. Knapp, 135 S.E. 1 (W. Va. 1926).*

(n304)Footnote 304. *Kathman v. Sheehan, 163 N.E. 692 (Ill. 1928).*

(n305)Footnote 305. *Murawski v. Murawski, 209 S.W.2d 262 (Mo. App. 1948).*

(n306)Footnote 306. *Van Camp v. Evans, 206 S.W.2d 38 (Ky. 1947).*

(n307)Footnote 307. *Stevenson v. Brasher, 13 S.W. 242 (Ky. 1890). Buehrer v. Gates, 411 S.W.2d 676 (Ky. 1967)* (holding that since an oil and gas leasehold was less than fee simple estate, it was not subject to dower).

(n308)Footnote 308. *Hartwell v. De Vault, 42 N.E. 789 (Ill. 1896); Stevens v. Smith, 27 Ky. (4 J.J. Marsh.) 64 (1830); Cass v. Thompson, 1 N.H. 65 (1817).*

(n309)Footnote 309. *Hartwell v. De Vault, 42 N.E. 789 (Ill. 1896); Mosher v. Mosher, 32 Me. 412 (1851); Cass v. Thompson, 1 N.H. 65 (1817).*

(n310)Footnote 310. *Davis v. Davis, 98 So. 2d 777 (Fla. 1957); Jarvis v. Jarvis, 122 N.E. 121 (Ill. 1919); Martin v. Martin, 138 S.W.2d 509 (Ky. 1940); Collins v. Collins, 57 A. 597 (Md. 1904).*

(n311)Footnote 311. *Davis v. Davis, 98 So. 2d 777 (Fla. 1957).*

(n312)Footnote 312. *Stelle v. Carroll, 37 U.S. (12 Pet.) 201 (1838); Mayburry v. Brien, 40 U.S. (15 Pet.) 21 (1841); Harris v. Powers, 58 S.E. 1038 (Ga. 1907).*

(n313)Footnote 313. *Mayburry v. Brien, 40 U.S. (15 Pet.) 21 (1841); Harris v. Powers, 58 S.E. 1038 (Ga. 1907); McCabe v. Bellows, 73 Mass. (7 Gray) 148 (1856); Davis v. Wetherell, 95 Mass. (13 Allen) 60 (1866); Collins v. Torry, 7 Johns (N.Y.) 278 (1811); Wheatley v. Calhoun, 12 Leigh (Va.) 264 (1841).*

(n314)Footnote 314. *King v. Chandler, 105 So. 184 (Ala. 1925); Hewitt v. Cox, 15 S.W. 1026 (Ark. 1891); Less v. Less, 227 S.W. 763 (Ark. 1921); Harris v. Powers, 58 S.E. 1038 (Ga. 1907); Cook v. First Nat'l Bank, 122 S.E. 686 (Ga. 1924); Munro v. McAllister, 203 P. 286 (Idaho 1921); Leary v. Shaffer, 79 Ind. 567 (1881); Louisa County v. Grimm, 212 N.W. 324 (Iowa 1927); Ross v. McGrath's Adm'r, 86 S.W. 555 (Ky. 1905)* (the wife of a mortgagee has no dower in the mortgaged premises); *Chalk v. Chalk, 165 S.W.2d 534 (Ky. 1942); Ellis v. Sullivan, 134 N.E. 695 (Mass. 1922); Filley v. Dickinson, 193 N.W. 914 (Neb. 1923); Wood v. Price, 81 A. 664 (N.J. 1910); Campbell v. Campbell, 53 A.2d 630 (N.J. 1947); Pyle v. Danczewski, 130 A. 452 (N.J. 1925); Byrnes v. Owen, 153 N.E. 51 (N.Y. 1926); Virginia-Carolina Chem. Co. v. Walston, 123 S.E. 196 (N.C. 1924); Riley v. Remington, 70 A. 552 (Pa. 1908); Turner v. Washington Realty Co., 126 S.E. 137 (S.C. 1925); Hunt v. Curry, 282 S.W. 201 (Tenn. 1926). See Whitehead v. Brownsville Bank, 61 S.W.2d 975 (Tenn. 1933).*

If dower is subject to a mortgage and the mortgage is foreclosed in the husband's lifetime the wife has dower in the surplus from the sale unless disposed of in the husband's lifetime. *Nelson v. Dunn, 284 S.W. 1084 (Ky. 1926).*

(n315)Footnote 315. *Snyder v. Richey, 130 N.W. 922 (Iowa 1911); Wait v. Savage, 15 A. 225 (N.J. 1888); Nichols v. French, 93 N.E. 897 (Ohio 1910).*

Contra, Detwiler v. Capone, 55 A.2d 380 (Pa. 1947).

In North Carolina the wife has dower in the equity of redemption of lands mortgaged by the husband prior to the marriage. *Gay v. J. Exum & Co., 67 S.E.2d 290 (N.C. 1951), 39 N.C. L. Rev. 310.*

(n316)Footnote 316. *Ward v. Tuttle, 102 N.E. 405 (Ind. 1913).*

(n317)Footnote 317. *Campbell v. Campbell, 53 A.2d 630 (N.J. 1947); Nichols v. French, 93 N.E. 897 (Ohio 1910).*

(n318)Footnote 318. *Bell v. Bell, 56 So. 926 (Ala. 1911).*

(n319)Footnote 319. *Jaffe v. Zilinski, 100 A.2d 887 (N.J. 1953); In re Chase Nat'l Bank's Petition, 25 N.Y.S.2d 592 (1941); Bridgeford v. Groh, 160 A. 451 (Pa. 1932).*

(n320)Footnote 320. *Haynes v. Rolstin, 145 N.W. 336 (Iowa 1914); Alt v. Kwiatek, 17 A.2d 161 (N.J. 1941); Stanton v. Boatright, 302 S.W.2d 347 (Tenn. 1957).*

(n321)Footnote 321. *Eaton v. Simonds, 31 Mass. (14 Pick.) 98 (1833).*

(n322)Footnote 322. *McMahon v. Russell, 17 Fla. 698 (1880); Graves v. Braden, 62 Ind. 93 (1878); McCabe v. Bellows, 73 Mass. (7 Gray) 148 (1856); Campbell v. Campbell, 30 N.J. Eq. 415 (1879); Mandel v. McClave, 22 N.E. 290 (Ohio 1889).*

(n323)Footnote 323. *French v. Peters, 33 Me. 396 (1851).*

(n324)Footnote 324. *Chalk v. Chalk, 165 S.W.2d 534 (Ky. 1942).*

(n325)Footnote 325. No dower where land is held by the husband in a resulting trust. *In re Clemens, 472 F.2d 939 (6th Cir. 1972).*

(n326)Footnote 326. *Bowers v. Lillis, 115 N.E. 930 (Ind. 1917); Buzick v. Buzick, 44 Iowa 259 (1876); Bonfoey v. Bonfoey, 58 N.W. 620 (Mich. 1894); Kober v. Kober, 23 S.W.2d 149 (Mo. 1929); Pope v. Bain, 78 A.2d 820 (N.J. 1951).*

(n327)Footnote 327. *Frederick v. Emig, 57 N.E. 883 (Ill. 1900); Matthews v. Thompson, 71 N.E. 93 (Mass. 1904); Swift & Co. v. First Nat'l Bank of Hightstown, 168 A. 827 (N.J. 1933); Malloney v. Horan, 49 N.Y. 111,* (1872).

(n328)Footnote 328. *In re Gish, 32 F.2d 322 (W.D. Ky. 1928); Trowbridge v. Sypher, 7 N.W. 567 (Iowa 1880); Bank of Commerce v. Owens, 31 Md. 320 (1869); Burrall v. Bender, 28 N.W. 731 (Mich. 1886); Hawley v. Bradford, 9 Paige (N.Y.) 200 (1841); Hoy v. Varner, 42 S.E. 690 (Va. 1902); Poteet v. International Harvester Co., 149 S.E. 512 (Va. 1929).*

(n329)Footnote 329. *Oades v. Standard Sav. & Loan Ass'n, 241 N.W. 262 (Mich. 1932); Turner v. Washington Realty Co., 126 S.E. 137 (S.C. 1925); Zion's Sav. Bank & Trust Co. v. State Tax Comm'n, 62 P.2d 270 (Utah 1936); Commercial Banking & Trust Co. v. Dudley, 86 S.E. 307 (W. Va. 1915).*

(n330)Footnote 330. *Creecy v. Pearce, 69 N.C. 67 (1873); Realty Purchase Corp. v. Hall, 4 S.E.2d 514 (N.C. 1939); Mandel v. McClave, 22 N.E. 290 (Ohio 1889).*

(n331)Footnote 331. *Hewitt v. Cox, 15 S.W. 1026 (Ark. 1891); Dillman v. Will County Nat'l Bank, 27 N.E. 1090 (Ill. 1891); Holden v. Dunn, 33 N.E. 413 (Ill. 1893); Leary v. Shaffer, 79 Ind. 567 (1881); Green v. Estabrook, 79 N.E. 373 (Ind. 1906); Bank of Commerce v. Owens, 31 Md. 320 (1869); Pickett v. Buckner, 45 Miss. 226 (1871); Hinchman v. Stiles, 9 N.J. Eq. 454 (1853); Hawley v. Bradford, 9 Paige (N.Y.) 200 (1841); Gore v. Townsend, 11 S.E. 160 (N.C. 1890); Mandel v. McClave, 22 N.E. 290 (Ohio 1889); Bridgeford v. Groh, 160 A. 451 (Pa. 1932); Sheffield v. Cooke, 98 A. 161 (R.I. 1916); Miller v. Farmers' Bank, 27 S.E. 514 (S.C. 1897); Ex parte Clark, 118 S.E. 27 (S.C. 1923); Wheatley v. Calhoun, 12 Leigh (Va.) 264 (1841); Bassell v. Caywood, 46 S.E. 159 (W. Va. 1903); John S. Naylor Co. v. Post, 20 S.E.2d 458 (W. Va. 1942).*

Wife may redeem from foreclosure sale of husband's land, *Dewberry v. Bank of Standing Rock, 150 So. 463 (Ala.*

1933), or may pay off the mortgage to avoid foreclosure, *Taylor v. Taylor, 92 So. 109 (Ala. 1922).*

No dower in the overplus remaining after mortgage foreclosure sale during husband's life. *Newhall v. Lynn Five Cents Sav. Bank, 101 Mass. 428 (1869).*

(n332)Footnote 332. *Beard v. Smith, 71 Ala. 568 (1882).*

(n333)Footnote 333. *Thompson v. Cochran, 26 Tenn. (7 Hum.) 72 (1846).*

(n334)Footnote 334. *Weaver v. Gregg, 6 Ohio St. 547 (1856); Turner v. Turner, 39 S.E.2d 299 (Va. 1946). Contra, Haggerty v. Wagner, 48 N.E. 366 (Ind. 1897).*

No dower in joint tenancy. *Jezo v. Jezo, 127 N.W.2d 246 (Wis. 1964).*

(n335)Footnote 335. *Evansville Imp. Co. v. Gardner, 128 N.E. 471 (Ind. 1920).*

(n336)Footnote 336. *Perkins v. Perkins, 122 Ill. App. 370 (1905).*

(n337)Footnote 337. *Citizens Bank & Trust Co. v. Watkins, 1 S.E.2d 853 (N.C. 1939); Shelton v. Shelton, 83 S.E.2d 176 (S.C. 1954)* (not however in property taken by eminent domain).

(n338)Footnote 338. *Frederick v. Emig, 57 N.E. 883 (Ill. 1900); Lohmeyer v. Durbin, 69 N.E. 523 (Ill. 1903); Whetstone v. Baker, 39 N.E. 868 (Ind. 1895); Helm v. Board, 70 S.W. 679 (Ky. 1902); Matney v. Williams, 89 S.W. 678 (Ky. 1905); Chalk v. Chalk, 165 S.W.2d 534 (Ky. 1942); Nortnass v. Pioneer Townsite Co., 117 N.W. 951 (Neb. 1908); Zieschang v. Helmke, 84 S.W. 436 (Tex. Civ. App. 1904); Building, Light & Water Co. v. Fray, 32 S.E. 58 (Va. 1899); Roush v. Miller, 20 S.E. 663 (W. Va. 1894).*

Only a tax lien, *Johnson v. Stephens, 199 So. 828 (Ala. 1941),* or a purchase money mortgage or vendor's lien, *King v. Chandler, 105 So. 184 (Ala. 1925),* takes precedence over dower.

(n339)Footnote 339. *Coon v. Henderson, 199 So. 704 (Ala. 1940).*

(n340)Footnote 340. *Whitmore v. Rascoe, 85 S.W. 860 (Tenn. 1905). See Sleeth v. Taylor, 95 S.E. 597 (W. Va. 1918).*

(n341)Footnote 341. *J.J. Newberry Co. v. Shannon, 167 N.E. 292 (Mass. 1929).*

(n342)Footnote 342. *In re Perlhefter, 177 F. 299 (D.N.Y. 1910); Andrews v. Brown, 21 Ala. 437 (1852); Lipscomb v. Aulenbacher, 272 S.W. 363 (Ark. 1925); Robinson Bank v. Miller, 38 N.E. 1078 (Ill. 1894); Grissom v. Moore, 6 N.E. 629 (Ind. 1886); Paige v. Paige, 32 N.W. 360 (Iowa 1887); Barton v. Wamsley, 190 N.W. 18 (Iowa 1922); Pearre v. Grossnickle, 114 A. 725 (Md. 1921); Willett v. Brown, 65 Mo. 138 (1877); In re Dumarest's Estate, 262 N.Y.S. 450 (1933); Sumner v. Hampson, 8 Ohio 328 (1838); Strickler v. Byrd, 198 S.E. 918 (Va. 1938); Sleeth v. Taylor, 95 S.E. 597 (W. Va. 1918).*

(n343)Footnote 343. *Holton v. Guinn, 65 F. 450 (C.C. Mo. 1895); Galbraith v. Tracy, 38 N.E. 937 (Ill. 1894); Bennett v. Bennett, 121 S.W. 495 (Ky. 1909); Davidson v. Richmond, 69 S.W. 794 (Ky. 1902); Shearer v. Shearer, 98 Mass. 107 (1867); Woodward-Holmes Co. v. Nudd, 59 N.W. 1010 (Minn. 1894); Uhler v. Semple, 20 N.J. Eq. 288 (1869); Campbell v. Campbell, 30 N.J. Eq. 415 (1879); Buchan v. Sumner, 2 Barb. Ch. 165 (N.Y. 1847); Darrow v. Calkins, 49 N.E. 61 (N.Y. 1897); Patton v. Patton, 60 N.C. 572 (1864); Summey v. Patton, 60 N.C. 601 (1864); Appeal of Foster, 74 Pa. 391 (1873).*

(n344)Footnote 344. *Nicoll v. Ogden, 29 Ill. 323 (1862); Mallory v. Russell, 32 N.W. 102 (Iowa 1887).*

(n345)Footnote 345. *Hadley v. Hadley, 144 P. 80 (Or. 1914).*

(n346)Footnote 346. *Woodward-Holmes Co. v. Nudd, 59 N.W. 1010 (Minn. 1894).*

(n347)Footnote 347. *Nicoll v. Ogden, 29 Ill. 323 (1862); Grissom v. Moore, 6 N.E. 629 (Ind. 1886); Chase v. Angell, 108 N.W. 1105 (Mich. 1906).*

(n348)Footnote 348. *Appeal of Foster, 74 Pa. 391 (1873).*

(n349)Footnote 349. *Cultra v. Cultra, 221 S.W.2d 533 (Tenn. 1949).*

(n350)Footnote 350. *State v. Elsbury, 175 P.2d 430 (Nev. 1946).*

(n351)Footnote 351. The widow's right being inchoate in nature terminates where the husband had merely a defeasible estate which terminated at his death (minority view). *Edwards v. Bibb, 54 Ala. 475 (1875); Daniel v. Daniel, 28 S.E. 167 (Ga. 1897); Smith v. Hankins, 27 Ohio St. 371 (1875).*

Contra, Snidow v. Snidow, S.E.2d 620 (Va. 1951); *Buckworth v. Thirkell, 4 Doug. 323, 99 Eng. Rep. 903 (1785); Moody v. King, 2 Bing. 447, 130 Eng. Rep. 378 (1825)* (relying upon Coke on Littleton, §53).

Dower is lost if the fee upon condition subsequent or determinable fee ends. *Beardslee v. Beardslee, 5 Barb. 324 (N.Y. 1849).* But though the estate be defeasible it attaches until defeasance. *House v. Jackson, 50 N.Y. 161 (1872).*

There was no common-law dower in property of which the husband did not die seised, i.e., where the husband predeceased his ancestor. *Maloney v. McCullough, 221 S.W.2d 770 (Ark. 1949).*

Dower in Florida is not subject to decedent's debts. *In re Payne's Estate, 83 So. 2d 109 (Fla. 1955).*

Revocable trust subject to dower. *Harris v. Harris, 72 N.E.2d 378 (Ohio St. 1947).*

See Kohn, *Limitations on Testamentary Power in Missouri -- Protection of the Spouse and Children of the Testator, 1954 Wash. U.L.Q. 364.*

(n352)Footnote 352. *In re Jones' Estate, 64 N.E.2d 609 (Ohio 1943); Appeal of Smith, 23 Pa. 9 (1853).*

See Rights of a Surviving Spouse in A Fee Tail Estate in Ohio, 18 U. Cinn. L. Rev. 332.

(n353)Footnote 353. *Northcut v. Whipp, 51 Ky. (12 B. Mon.) 65 (1851); Appeal of Smith, 23 Pa. 9 (1853); Moody v. King, 2 Bing. 447, 130 Eng. Rep. 378 (1825).*

Dower and curtesy in a fee tail, even though limited to the heirs of the grantee's body. 2 William Blackstone, Commentaries 116, 120; 4 Kent's Comm. 11, 13.

(n354)Footnote 354. *Trumbull v. Trumbull, 21 N.E. 366 (Mass. 1889).*

(n355)Footnote 355. *Miller v. Miller, 83 N.E.2d 254 (Ohio 1948); Mays v. Mays, 42 N.E.2d 446 (Ohio 1942).*

(n356)Footnote 356. *Holden v. Wells, 31 A. 265 (R.I. 1895).*

(n357)Footnote 357. *Kusch v. Kusch, 32 N.E. 267 (Ill. 1892); Snidow v. Snidow, 63 S.E.2d 620 (Va. 1951). See Buckworth v. Thirkell, 4 Doug. 323, 99 Eng. Rep. 903 (1785).*

(n358)Footnote 358. *Chinnubbee v. Nicks, 3 Port. (Ala.) 362 (1836); Ray v. Pung, 5 B. & Ald. 861, 106 Eng. Rep. 1296 (1822).*

(n359)Footnote 359. *Thompson v. Vance, 58 Ky. (1 Met.) 669 (1858).*

(n360)Footnote 360. *Ray v. Pung, 5 B. & Ald. 861, 106 Eng. Rep. 1296 (1822).*

(n361)Footnote 361. *Jackson v. Kip, 8 N.J.L. 241 (1826); Sheffield v. Cooke, 98 A. 161 (R.I. 1916).*

(n362)Footnote 362. *Barter v. Couch, 47 So. 1006 (Ala. 1908); Beaty v. Calliss, 128 N.E. 547 (Ill. 1920); Buschemeyer v. Klein, 129 S.W. 541 (Ky. 1910); Allen v. Saunders, 119 S.E. 486 (N.C. 1923).*

Contra Smith v. Hankins, 27 Ohio St. 371 (1875).

(n363)Footnote 363. Bracton De Legibus, fol. 297b; Burgess v. Wheate, 1 Eden 177, *28 Eng. Rep. 652* (n.d.). *See Pacific Bank v. Hannah, 90 F. 72 (9th Cir. 1898).*

(n364)Footnote 364. *Kusch v. Kusch, 32 N.E. 267 (Ill. 1892); Gannon v. Peterson, 62 N.E. 210 (Ill. 1901); Sullivan v. Sullivan, 117 N.W. 1086 (Iowa 1908); Northcut v. Whipp, 51 Ky. (12 B. Mon.) 65 (1851); Landers v. Landers, 151 S.W. 386 (Ky. 1912); Couch v. Eastham, 73 S.E. 314 (W. Va. 1911).*

Dower in a defeasible fee, *Daniel v. McNamana, 64 Ky. (1 Bush) 544 (1866),* if not determined in husband's life; *Northcut v. Whipp, 51 Ky. (12 B. Mon.) 65 (1851),* even though determined by death of son's issue. *Murphy v. Murphy, 207 S.W. 491 (Ky. 1919).*

A widow has dower in a fee simple estate of the husband though such estate be defeated by an executory limitation on his death. *Snidow v. Snidow, 63 S.E.2d 620 (Va. 1951).*

So *Buckworth v. Thirkell, 4 Doug. 323, 99 Eng. Rep. 903 (1785).* The rule was the same in estates in fee tail and fee simple conditional but there was no dower in estates subject to conditions or powers of appointment. *Ray v. Pung, 5 B. & Ald. 861, 106 Eng. Rep. 1296 (1822).*

(n365)Footnote 365. *Northcut v. Whipp, 51 Ky. (12 B. Mon.) 65 (1851); Rice v. Rice, 118 S.W. 270 (Ky. 1909); Fry v. Scott, 11 S.W. 426 (Ky. 1889); Chew v. Chew, 1 Md. 163 (1851); Kennedy v. Kennedy, 29 N.J.L. 185 (1861); Pollard v. Slaughter, 92 N.C. 72 (1885); Evans v. Evans, 9 Pa. 190 (1848); Medley v. Medley, 27 Gratt. 568 (Va. 1876); Tomlinson v. Nickell, 24 W. Va. 148 (1884).*

(n366)Footnote 366. *Edwards v. Bibb, 54 Ala. 475 (1875);* Myers v. Moore, 12 Ohio S. & C. P. Dec. 812 (1884).

(n367)Footnote 367. *Osborn v. Osborn, 172 P. 23 (Kan. 1918).*

(n368)Footnote 368. *Kuhn v. Kuhn, 123 N.E.2d 916 (Ind. App. 1955)* (no dower in fee upon condition subsequent breached in husband's lifetime); *Landers v. Landers, 151 S.W. 386 (Ky. 1912); American Yarn & Processing Co. v. Dewstoe, 133 S.E. 407 (N.C. 1926); Snidow v. Snidow, 63 S.E.2d 620 (Va. 1951).*

(n369)Footnote 369. *Heldhauser v. Schulz, 116 A. 791 (N.J. 1922).*

(n370)Footnote 370. *Snidow v. Snidow, 63 S.E.2d 620 (Va. 1951).*

(n371)Footnote 371. *Pfaff v. Heizman, 235 S.W.2d 551 (Ark. 1951).*

(n372)Footnote 372. *Mayburry v. Brien, 40 U.S. (15 Pet.) 21 (1841); Bowen v. Collins, 15 Ga. 100 (1854); Thomas v. Thomas, 32 N.C. (10 Ired.) 123 (1849); In re Brown's Estate, 14 P.2d 1107 (Or. 1932); Tipton v. Davis, 6*

Tenn. (5 Hayw.) 278 (1818); In re Steck's Estate, 77 N.W.2d 715 (Wis. 1956) (no dower in an inter vivos trust).

(n373)Footnote 373. *United Bldg. & Loan Ass'n v. Garrett, 64 F. Supp. 460 (W.D. Ark. 1946); Harris v. Powers, 58 S.E. 1038 (Ga. 1907); Whisler v. Hicks, 5 Blackf. (Ind.) 100 (1839); Stevens v. Smith, 27 Ky. (4 J.J. Marsh.) 64 (1830); Walter v. Horwitz, 60 N.Y.S.2d 327 (1946), aff'd, 65 N.Y.S. 2d 672 (N.Y. A.D. 1946); Phifer v. Phifer, 72 S.E. 1006 (N.C. 1911). See McNeil v. McNeil, 211 P. 988 (Utah 1922).*

(n374)Footnote 374. *Porter v. Robinson, 10 Ky. (3 A.K. Marsh.) 253 (1821); Pugh v. Bell, 18 Ky. (2 T.B. Mon.) 125 (1825); Bird v. Gardner, 10 Mass. 364 (1813).*

(n375)Footnote 375. *Fletcher v. Felker, 97 F. Supp. 755 (W.D. Ark. 1951); Spaulding v. Haley, 142 S.W. 172 (Ark. 1911); Spence v. Mathis, 73 S.E. 739 (Ga. 1912); Atkin v. Merrell, 39 Ill. 62 (1865); Bundy v. Solon, 51 N.E.2d 183 (Ill. 1943); Stroup v. Stroup, 39 N.E. 864 (Ind. 1895); Ford v. Yost, 190 S.W.2d 21 (Ky. 1945); Davis v. Green, 14 S.W. 876 (Mo. 1890); Telis v. Telis, 26 A.2d 249 (N.J. 1942); Pope v. Bain, 78 A.2d 820 (N.J. 1951); Jaffe v. Zilinski, 100 A.2d 887 (N.J. 1953); Hampton v. Hampton Holding Co., 111 A.2d 761 (N.J. 1955); Clark v. Clark, 42 N.E. 275 (N.Y. 1895); Phifer v. Phifer, 72 S.E. 1006 (N.C. 1911).*

See Perry v. Ritze, 193 N.W. 758 (Neb. 1923); Burhans v. Burhans, 121 A. 749 (N.J. 1923); Oram v. Oram, 132 A. 485 (N.J. 1926); McNeil v. McNeil, 211 P. 988 (Utah 1922).

Allowing wife dower in property in which husband was held to be a resulting trustee for another. *McMurray v. McMurray, 410 S.W.2d 139 (Ky. 1966)* (some courts refuse to give dower where the estate being voided does not come directly from the husband).

(n376)Footnote 376. *Fletcher v. Felker, 97 F. Supp. 755 (W.D. Ark. 1951).*

(n377)Footnote 377. *Smallridge v. Hazlett, 66 S.W. 1043 (Ky. 1902); McNeil v. McNeil, 211 P. 988 (Utah 1922)* (unless the entire purchase price has been paid).

(n378)Footnote 378. *Harrington v. Feddersen, 226 N.W. 110 (Iowa 1929); James v. Upton, 31 S.E. 255 (Va. 1898).*

(n379)Footnote 379. *Detwiler v. Capone, 55 A.2d 380 (Pa. 1947); Burdine v. Burdine, 36 S.E. 992 (Va. 1900); Harris v. Harris, 43 S.E.2d 225 (W. Va. 1947).*

(n380)Footnote 380. *United States v. Certain Parcels of Land, 46 F. Supp. 441 (D. Md. 1942); O'steen v. O'steen, 85 So. 547 (Ala. 1920); Harvill v. Holloway, 24 Ark. 19 (1862); Tennison v. Carroll, 243 S.W.2d 944 (Ark. 1951); Ross v. Wilson, 58 Ga. 249 (1877); Napper v. Mutual Life Ins. Co., 53 S.W. 28 (Ky. 1899); Cook v. Walker, 70 Me. 232 (1879); Rockwell v. Rockwell, 46 N.W. 8 (Mich. 1890); Lee v. Lindell, 22 Mo. 202 (1855); Whitney v. Whitney, 45 N.H. 311 (1864); Dudley v. Tyson, 82 S.E. 1025 (N.C. 1914); Smith v. Rymkus, 55 N.E.2d 676 (Ohio App. 1942),* appeal dismissed by *52 N.E.2d 864 (Ohio 1943); Enyard v. Enyard, 42 A. 526 (Pa. 1899); Turner v. Turner, 39 S.E.2d 299 (Va. 1946); Feamster v. Feamster, 15 S.E.2d 159 (W. Va. 1941).*

(n381)Footnote 381. *Helmken v. Meyer, 75 S.E. 586 (Ga. 1912).* No dower in joint tenancy. *Laterza v. Murray, 117 N.E.2d 779 (Ill. 1954); Poulson v. Poulson, 70 A.2d 868 (Me. 1950); Turner v. Turner, 39 S.E.2d 299 (Va. 1946).*

Abandonment, desertion, or refusal to support on part of surviving spouse as affecting marital rights in deceased spouse's estate.

(n382)Footnote 382. *Roulston v. Hall, 50 S.W. 690 (Ark. 1899); Johnson v. Muntz, 4 N.E.2d 826 (Ill. 1936); Herzog v. Ross, 213 S.W.2d 921 (Mo. 1948); O'Grady v. Deery, 45 A.2d 295 (N.H. 1946); Love v. Roper, 93 S.E.2d 282 (Va. 1956).*

No dower in joint tenancy. *Laterza v. Murray, 117 N.E.2d 779 (Ill. 1954); Poulson v. Poulson, 70 A.2d 868 (Me. 1950); Turner v. Turner, 39 S.E.2d 299 (Va. 1946).*

In Florida there is dower in a remainder interest. *Creary v. Estate of Creary, 338 So. 2d 26 (Fla. App. 1976).*

(n383)Footnote 383. *Mayburry v. Brien, 40 U.S. (15 Pet.) 21 (1841); Cockrill v. Armstrong, 31 Ark. 580 (1876); Murawski v. Murawski, 209 S.W.2d 262 (Mo. App. 1948)* (no dower in land held as tenants by entirety, where husband and wife were later divorced, since the estate was not inheritable); *Babbitt v. Day, 5 A. 275 (N.J. 1886).*

(n384)Footnote 384. *Davis v. Logan, 39 Ky. (9 Dana) 185 (1839); Holbrook v. Finney, 4 Mass. 566 (1808); Turner v. Turner, 39 S.E.2d 299 (Va. 1946)* (dower when survivorship has been abolished in joint tenancy).

(n385)Footnote 385. *Roulston v. Hall, 50 S.W. 690 (Ark. 1899); Hoeffner v. Hoeffner, 59 N.E.2d 684 (Ill. 1945).*

(n386)Footnote 386. *Gainer v. Gates, 34 N.W. 798 (Iowa 1887); Witherspoon v. Watts, 18 S.C. 396 (1882).*

(n387)Footnote 387. *Dunshee v. Dunshee, 104 N.E. 1100 (Ill. 1914).*

(n388)Footnote 388. *Henderson v. Green, 34 Iowa 437 (1872); In re Wishart, 267 N.Y.S. 391 (1933); Sandal's Appeal, 65 Pa. 314 (1870).*

(n389)Footnote 389. *Mercantile Trust Co. of Baltimore v. Schloss, 166 A. 599 (Md. 1933); Tehan v. Tehan, 31 N.Y.S. 961 (1894).*

(n390)Footnote 390. *Blackmon v. Blackmon, 16 Ala. 633 (1849); Contra, Culberson v. Culberson, 37 Ga. 296 (1867).*

(n391)Footnote 391. *In re Kreiser's Appeal, 69 Pa. 194 (1871).*

(n392)Footnote 392. *Flanagan v. Flanagan, 73 N.Y.S.2d 267 (1947), aff'd, 83 N.E.2d 473 (N.Y. 1948).*

(n393)Footnote 393. *Boorum v. Tucker, 26 A. 456,* aff'd, *33 A. 50 (N.J. Sup. 1894); Elmendorf v. Lockwood, 57 N.Y. 322 (1874).*

(n394)Footnote 394. *McMahon v. Russell, 17 Fla. 698 (1880); French v. Lord, 69 Me. 537 (1879).*

(n395)Footnote 395. *Indiana. Whisler v. Hicks, 5 Blackf. (Ind.) 100 (1839); Trotter v. Lewis, 45 A.2d 329 (Md. 1946); Bahl v. Menger, 129 A. 459 (Pa. 1925); Ford v. Street, 106 S.E. 379 (Va. 1921).*

(n396)Footnote 396. *Brookings v. Cooper, 152 N.E. 243 (Mass. 1926); Feldman v. Lisansky, 145 N.E. 746 (N.Y. 1924).*

(n397)Footnote 397. *Reed v. Phillips, 83 S.W.2d 554 (Ark. 1935); Newman v. Dore, 9 N.E.2d 966 (N.Y. 1937); Holly Hill Lumber Co. v. McCoy, 26 S.E.2d 175 (S.C. 1943).*

Dower of heir's widow is junior to debts of deceased ancestor of heir. *Pfaff v. Heizman, 235 S.W.2d 551 (Ark. 1951).*

Dower in cotenancy is subject to the paramount right of the cotenants to have partition. *Lee v. Lindell, 22 Mo. 202 (1855); Weaver v. Gregg, 6 Ohio St. 547 (1856); Holley v. Glover, 15 S.E. 605 (S.C. 1892).*

(n398)Footnote 398. *See Chandler v. Hollingsworth, 3 Del. Ch. 99 (1867)* (English rule).

(n399)Footnote 399. *Arnegaard v. Arnegaard, 75 N.W. 797 (N.D. 1898); Ward v. Ward, 57 N.E. 1095 (Ohio 1900).*

(n400)Footnote 400. *Dunbar v. Dunbar, 9 N.E. 563 (Ill. 1887); Bookout v. Bookout, 49 N.E. 824 (Ind. 1898); Wallace v. Wallace, 114 N.W. 913 (Iowa 1908).*

Wife may avoid transfers made by husband in contemplation of death, in fraud of her marital rights. But the wife cannot set aside completed gifts otherwise. *Wahl v. Wahl, 206 S.W.2d 334 (Mo. 1947).*

(n401)Footnote 401. *Noah v. Noah, 224 N.W. 611 (Mich. 1929); Dudley v. Dudley, 45 N.W. 602 (Wis. 1890).*

(n402)Footnote 402. *See* W. Lewis Roberts, *Dower Rights Under Oil and Gas Leases, 13 Miss. L. J. 342 (1941).*

Where the husband seven days before his marriage conveyed all of his property to his nephew, the conveyance was set aside in fraud of dower since (1) the conveyance was made without the wife's knowledge, (2) the consideration was inadequate, (3) the husband became penniless, (4) the wife believed she was marrying a man of means, (5) the husband reserved a life estate. *Granger v. Granger, 296 N.W. 288 (Mich. 1941).*

(n403)Footnote 403. 4 Kent's Comm. 401; Johnston v. Vandyke, 6 McLean 422, F. Cas. No. 7426 (1855) (courts have despaired of an attempt to properly define dower); *Blackmon v. Blackmon, 16 Ala. 633 (1849)* (dower could not be released prior to marriage); *Culberson v. Culberson, 37 Ga. 296 (1867)* (dower could be released prior to marriage); *Wyman v. Oliver, 75 Me. 421 (1883)* (dower in fishing privilege); *Billings v. Taylor, 27 Mass. (10 Pick.) 460 (1830)* (dower in limestone quarry); *Coates v. Cheever, 1 Cow. (N.Y.) 460 (1823)* (dower in iron ore beds).

Married woman could not contract with husband to release dower, *In re Kreiser's Appeal, 69 Pa. 194 (1871),* but can by estoppel, *Hill v. Boland, 93 A. 395 (Md. 1915),* or where wife accepted consideration in lieu of dower. *Dakin v. Dakin, 56 N.W. 562 (Mich. 1893); In re Leggett's Estate, 32 N.Y.S.2d 921 (1941).*

(n404)Footnote 404. *Ward v. Ward, 145 F. 1023 (2d Cir. 1906), cert. denied, 206 U.S. 564 (1907); McGuire v. Cook, 135 S.W. 840 (Ark. 1911); Talty v. Talty, 40 App. D.C. 587 (1913); Potter v. Clapp, 68 N.E. 81 (Ill. 1903); Dixon v. Harris, 105 S.W. 451 (Ky. 1907); Williams v. Williams, 12 S.W. 760 (Ky. 1889)* (widow has dower in land though husband has lost title by adverse possession where possession began after marriage); *Goodrum's Guardian v. Kelsey, 50 S.W.2d 932 (Ky. 1932)* (no dower in a future interest); *McLeery v. McLeery, 65 Me. 172 (1876); Leavitt v. Lamprey, 30 Mass. (13 Pick.) 382 (1832); Orchard v. Wright-Dalton-Bell-Anchor Store Co., 125 S.W. 486 (Mo. 1909); Weaver v. Patterson, 111 A. 506 (N.J. 1920); Safford v. Safford, 7 Paige (N.Y.) 259 (1838); Redding v. Vogt, 53 S.E. 337 (N.C. 1906); Thomas v. Bunch, 73 S.E. 899 (N.C. 1912); Mays v. Mays, 42 N.E.2d 446 (Ohio 1942).*

(n405)Footnote 405. *Bell v. Killian, 53 So. 2d 604 (Ala. 1951); Compton v. Cook, 66 So. 2d 176 (Ala. 1953); Davis v. Davis, 243 S.W.2d 739 (Ark. 1951); Sammis v. Sammis, 51 A. 105 (R.I. 1902).*

(n406)Footnote 406. *Boyd v. Hunter, 44 Ala. 705 (1870); Sykes v. Sykes, 49 Miss. 190 (1873); Weir v. Tate, 39 N.C. 264 (1846).*

(n407)Footnote 407. *Field v. Tyner, 261 S.W. 35 (Ark. 1924); Sampson v. Sampson, 124 A. 708 (N.J. 1924).*

So under a statute providing that if a deed were made in sole consideration of love and affection and the grantee died without issue the property should "revert" to the grantor, the wife of the grantee was entitled to her statutory one third in fee in lieu of dower. *Mitchell v. Parkhurst, 17 Ind. 146 (1861).*

(n408)Footnote 408. *Goodrum v. Kelsey, 50 S.W.2d 932 (Ky. 1932).*

(n409)Footnote 409. *United Bldg. & Loan Ass'n v. Garrett, 64 F. Supp. 460 (W.D. Ark. 1946); McKinney v.*

Caldwell, 250 S.W.2d 117 (Ark. 1952); Clark v. Hanson, 151 N.E. 369 (Ill. 1926).

Where during lifetime of husband, sovereign exercised right of eminent domain, wife was not entitled because of her inchoate dower, to have a portion of the land money paid to her directly or set aside for benefit until she survived her husband. *Shelton v. Shelton, 83 S.E.2d 176 (S.C. 1954).*

(n410)Footnote 410. *Serkissian v. Newman, 96 So. 378 (Fla. 1923).*

See William T. Swigert, *Some Problems of Dower in Florida, 17 U. Fla. L. Rev. 368 (1969).*

(n411)Footnote 411. *Clark v. Hanson, 151 N.E. 369 (Ill. 1926).*

(n412)Footnote 412. *Kilpatrick v. Kilpatrick, 162 S.W.2d 897 (Ark. 1942).*

(n413)Footnote 413. *Alabama Vermiculite Corp. v. Patterson, 149 F. Supp. 534 (W.D.S.C. 1955); Gray v. Whittemore, 78 N.E. 422 (Mass. 1906); Ware v. Washington, 14 Miss. (6 S. & M.) 737 (1846); Whitmire v. Wright, 22 S.C. 446 (1884).*

(n414)Footnote 414. *Goodwin v. Goodwin, 33 Conn. 314 (1866).*

(n415)Footnote 415. *Ralston Steel Car Co. v. Ralston, 147 N.E. 513 (Ohio St. 1925).*

(n416)Footnote 416. *Duncan v. Navassa Phosphate Co., 137 U.S. 647 (1891); Olsen v. Ortell, 59 N.W.2d 473 (Wis. 1953)* (no dower in a tenancy by sufferance).

(n417)Footnote 417. *Prall v. Prall, 166 S.W.2d 1028 (Ark. 1942); Baker v. Syfritt, 125 N.W. 998 (Iowa 1910); Thompson v. Vance, 58 Ky. (1 Met.) 669 (1858); Brady v. Brady, 165 S.W. 655 (Ky. 1914); Reeves v. Tomlin, 281 S.W. 522 (Ky. 1926); Bodkin v. Wright, 100 S.W.2d 824 (Ky. 1937); Harriot v. Harriot, 49 N.Y.S. 447 (1898); Gilmore v. Sellars, 59 S.E. 73 (N.C. 1907).*

But dower may be expressly given to grantee's wife though instrument only gives grantee a life estate. *Hutchison v. Board, 250 S.W.2d 82 (Tenn. 1952).*

(n418)Footnote 418. *Pope v. Safe Deposit & Trust Co., 161 A. 404 (Md. 1932).*

(n419)Footnote 419. *Jones v. Magruder, 42 F. Supp. 193 (D. Md. 1941).*

(n420)Footnote 420. *Brack v. Coburn, 196 S.W.2d 230 (Ark. 1946); Ralston Steel Car Co. v. Ralston, 147 N.E. 513 (Ohio 1825).*

No dower in addition to homestead in the same realty. *Shull v. Shull, 40 So. 2d 708 (Ala. 1949); Wilson v. Florida Nat'l Bank & Trust Co., 64 So. 2d 309 (Fla. 1953).*

(n421)Footnote 421. *Williams v. Collier, 158 So. 815 (Fla. 1935).*

(n422)Footnote 422. *United States v. Certain Parcels of Land, 46 F. Supp. 441 (D. Md. 1942).*

(n423)Footnote 423. *Fletcher v. Felker, 97 F. Supp. 755 (W.D. Ark. 1951)* (property acquired under a duty to immediately convey to another did not give rise to dower); *Spears v. James, 29 N.W.2d 829 (Mich. 1947)* (wife of a resulting trustee has no dower).

(n424)Footnote 424. *Dreckshage v. Dreckshage, 176 S.W.2d 7 (Mo. 1943); Yeo v. Mercereau, 18 N.J.L. 387 (1842)* (New Jersey gives dower in passive trusts only); *In re Halpern's Estate, 100 N.E.2d 120 (N.Y. 1951)* (in New

York the transfer is not subject to dower if a real revocable and controlling trust); *North v. North, 638 S.W.2d 711 (Ky. App. 1982)* (holding that a widow was not entitled to husband's property where he and his ex-wife contracted to convey property to their children and that property was subject to a constructive trust).

(n425)Footnote 425. *Lewis v. Belknap, 96 So. 2d 212 (Fla. 1957); Blades v. Norfolk Southern R. Co., 29 S.E.2d 148 (N.C. 1944).*

(n426)Footnote 426. *Detroit Trust Co. v. Baker, 203 N.W. 154 (Mich. 1925). See Gigliotto v. Albergo, 115 P.2d 791 (Utah 1941).*

(n427)Footnote 427. *Matlack v. Arend, 63 A.2d 812 (N.J. 1949).*

(n428)Footnote 428. *Frank v. Frank's, Inc., 87 A.2d 724 (N.J. 1952).*

Holding that the widow was entitled to full dower in real estate acquired by husband prior to marriage and any mortgage thereon should be paid out of general assets of his estate. *Bruns v. Lotz, 496 S.W.2d 376 (Ark. 1973).*

(n429)Footnote 429. *Buckeridge v. Ingram, 2 Ves. Jr. 652 (1952). But see Frank v. Frank's, Inc., 87 A.2d 724 (N.J. 1973)* (refusing to allow dower in stock of corporation wholly owned by deceased husband and to which he had transferred realty to prevent satisfaction of judgment debt).

(n430)Footnote 430. *Goddard v. Prentice, 17 Conn. 546 (1846); Pursifull's Adm'x. v. Pursifull, 184 S.W.2d 967 (Ky. 1944)* (holding that wife was assigned dower in husband's interest in oil and gas corporation).

(n431)Footnote 431. *Haynes v. Gwin, 209 S.W. 67 (Ark. 1919)* (he being a mere trustee for creditors).

Contra, in a transfer to defraud creditors the widow who was not involved could claim her dower but the heirs could take nothing since their rights are derivative and successional. *Pope v. Bain, 78 A.2d 820 (N.J. 1951). Stoxen v. Stoxen, 285 N.E.2d 198 (Ill. App. 1972)* (holding that a widow can not claim dower in land trust created by the dead husband).

(n432)Footnote 432. *DiFlorido v. DiFlorido, 331 A.2d 174 (Pa. 1975).*

(n433)Footnote 433. Ind. Code, §324-1.15.

(n434)Footnote 434. *Forte v. Caruso, 146 N.E.2d 501 (Mass. 1957).*

(n435)Footnote 435. No dower where husband and wife have contracted to convey before the husband's death. *In re Fischer's Estate, 126 N.W.2d 296 (Wis. 1964).*

(n436)Footnote 436. *Heisen v. Heisen, 34 N.E. 597 (Ill. 1893); Union Brew. Co. v. Meier, 45 N.E. 264 (Ill. 1896); Sears v. Sears, 121 Mass. 267 (1876); Rayner v. Lee, 20 Mich. 384 (1870); Aikman v. Harsell, 98 N.Y. 186 (1885); Sheppard v. Sykes, 44 S.E.2d 54 (N.C. 1947); Dahlhammer v. Schneider, 252 P.2d 807 (Or. 1953); Jones v. Hollopeter, 10 Pa. (Serg. & Rawle) 326 (1823); Lee v. Harris, 219 S.W.2d 892 (Tenn. 1949); Feder v. Flattau, 325 S.W.2d 555 (Tenn. 1959)* (widow has no dower until there is an assignment); *Lajoie v. Bellomy, 41 S.E.2d 349 (W. Va. 1947).*

(n437)Footnote 437. *Underground Elec. Rys. v. Owsley, 196 F. 278 (N.Y. 1912); Magruder v. Magruder, 141 F.2d 537 (D.C. Cir. 1944), cert. denied, 323 U.S. 711 (1944); Martin v. Evans, 50 So. 997 (Ala. 1909); Upshaw v. Upshaw, 60 So. 804 (Ala. 1912); Cone v. Barganier, 118 So. 342 (Ala. 1928); Burk v. Moore, 272 S.W. 38 (Ky. 1925); Munsey v. Hanly, 67 A. 217 (Me. 1907); Willoughby v. Brandes, 297 S.W. 54 (Mo. 1927); Mathews v. Marsden, 230 P. 775 (Mont. 1924); McLear v. Balmat, 186 N.Y.S. 180 (1921) aff'd, 132 N.E. 883 (N.Y. 1921); In re Stimpson's Will, 103 S.E.2d 352 (N.C. 1958); Smith v. Rymkus, 55 N.E.2d 676 (Ohio App. 1943), appeal dismissed, 52 N.E.2d 864 (Ohio 1943); Dailey v. Benn, 198 P. 323 (Okla. 1921); Najarian v. Boyajian, 136 A. 767 (R.I. 1927); Edwards v. Hawks, 222 S.W.2d 28*

(Tenn. 1949).

Unassigned dower is a personal right similar to a chose in action. *Burk v. Moore, 272 S.W. 38 (Ky. 1925); Mullan v. Bank of Pasco County, 133 So. 323 (Fla. 1931),* and cannot be assigned. *Pacific Bank v. Hannah, 90 F. 72 (9th Cir. 1898); Lewis v. King, 54 N.E. 330 (Ill. 1899); Hunt's Guardian v. Crawford Coal Co., 1 S.W.2d 955 (Ky. 1927); Love v. Ward, 5 S.E.2d 411 (W. Va. 1939).*

Contra, per statute. *Dobberstein v. Murphy, 66 N.W. 204 (Minn. 1896); Serry v. Curry, 42 N.W. 97 (Neb. 1889); Tucker v. Tucker, 45 S.W. 344 (Tenn. 1898).*

(n438)Footnote 438. *Martin v. Evans, 50 So. 997 (Ala. 1909); Dailey v. Benn, 198 P. 323 (Okla. 1921); Sunderland v. Girard, 109 A. 424 (R.I. 1920); First Nat'l Exch. Bank v. United States, 217 F. Supp. 604 (1963), aff'd, 335 F.2d 91 (4th Cir. 1964); Wilson v. Wilson, 356 S.E.2d 422 (S.C. Ct. App. 1987)* (holding that dower is not an estate in land or interest).

(n439)Footnote 439. *Upshaw v. Upshaw, 60 So. 804 (Ala. 1912); Sunderland v. Girard, 109 A. 424 (R.I. 1920).*

(n440)Footnote 440. *Johnson v. Johnson, 152 S.W. 1017 (Ark. 1912); Roe v. Doe ex dem. Moore, 93 A. 373 (Del. 1914).*

(n441)Footnote 441. *In re Maddux, 94 F. Supp. 134 (E.D. Tenn. 1949), aff'd, 185 F.2d 480 (6th Cir. 1950); Clelland v. Clelland, 235 S.W. 816 (Mo. 1921).*

(n442)Footnote 442. *Hamby v. Hamby, 51 So. 732 (Ala. 1910); Sheppard v. Sykes, 44 S.E.2d 54 (N.C. 1947).*

(n443)Footnote 443. *Grubbs v. Leyendecker, 53 N.E. 940 (Ind. 1899),* and cases cited.

(n444)Footnote 444. *Humphrey v. Gerard, 83 A. 210 (Conn. 1912); In re Johnson's Estate, 185 N.W. 180 (Wis. 1921).*

(n445)Footnote 445. *Barksdale v. Garrett, 64 Ala. 277 (1879); Moore v. Price, 123 So. 768 (Fla. 1929); Mullan v. Pasco County Bank, 133 So. 323 (Fla. 1931); Heisen v. Heisen, 34 N.E. 597 (Ill. 1893); Munsey v. Hanly, 67 A. 217 (Me. 1907); Harper v. Clayton, 35 A. 1083 (Md. 1896); Latta v. Brown, 34 S.W. 417 (Tenn. 1896).*

Alabama permits dower to be assigned to certain tracts rather than to the entire real estate. *Byars v. Mixon, 299 So. 2d 262 (Ala. 1974).*

Upon assignment, dower becomes an estate for life and subject to alienation. *Yarbro v. Easley, 525 S.W.2d 495 (Tenn. App. 1974).*

(n446)Footnote 446. *Evans v. Webb, 1 Yeates (Pa.) 424 (1795).*

(n447)Footnote 447. *North v. Puckett, 46 S.W.2d 73 (Tenn. 1932).*

Dower may be alienated after the death of husband even prior to assignment. *Love v. Ward, 5 S.E.2d 411 (W. Va. 1939).*

(n448)Footnote 448. *Smith v. Shaw, 22 N.E. 924 (Mass. 1889); State v. Wincroft, 76 N.C. 38 (1877).*

In Alabama dower is not a property interest until assignment. *United States v. Hiles, 318 F.2d 56 (5th Cir. 1963).*

In Virginia unassigned dower is merely a right to sue to compel dower to be set aside. It is not a right in land. *First*

Nat'l Exch. Bank v. United States, 217 F. Supp. 604 (W.D. Va. 1963), aff'd, 335 F.2d 91 (4th Cir. 1964); National Bank of Orange v. United States, 218 F. Supp. 907 (E.D. Va. 1963).

(n449)Footnote 449. *McMahon v. Gray, 22 N.E. 923 (Mass. 1889).*

(n450)Footnote 450. *Huffman v. Huffman, 11 N.E.2d 271 (Ohio 1937).*

(n451)Footnote 451. *Feder v. Flattau, 325 S.W.2d 555 (Tenn. 1959).*

(n452)Footnote 452. *Weidler v. Floran, 13 N.E.2d 330 (Ind. App. 1938).*

(n453)Footnote 453. *Hays v. Lemoine, 47 So. 97 (Ala. 1908); Brinkley v. Taylor, 163 S.W. 521 (Ark. 1914); Roe v. Doe ex dem. Moore, 93 A. 373 (Del. 1914); Raulerson v. Peeples, 84 So. 370 (Fla. 1920); Lewis v. King, 54 N.E. 330 (Ill. 1899); Tillotson v. Foster, 141 N.E. 412 (Ill. 1923); Hunter v. Sanitary Dist. of Chicago, 179 Ill. App. 172 (1912); Munsey v. Hanly, 67 A. 217 (Me. 1907); Sell v. McAnaw, 39 S.W. 779 (Mo. 1897); Carey v. West, 40 S.W. 661 (Mo. 1897); Bell v. Golding, 136 N.Y.S. 278 (1912), aff'd, 105 N.E. 1081 (N.Y. 1914); Lincoln Trust Co. v. Hutchinson, 120 N.Y.S. 811 (1910); Fishel v. Browning, 58 S.E. 759 (N.C. 1907); North v. Puckett, 46 S.W.2d 73 (Tenn. 1932); Lee v. Harris, 219 S.W.2d 892 (Tenn. 1949); Russell v. Tennant, 60 S.E. 609 (W. Va. 1908).*

(n454)Footnote 454. *Wallace v. King, 170 S.W.2d 377 (Ark. 1943); Raulerson v. Peeples, 84 So. 370 (Fla. 1920); Oster v. Ohlman, 219 S.W. 187 (Ky. 1920); Russell v. Tennant, 60 S.E. 609 (W. Va. 1908); Bruten v. Miller, 101 A.2d 24 (N.J. Super. 1953)* (holding that even though no dower assigned, widow was entitled to enjoy her husband's house until assignment made).

(n455)Footnote 455. *Harley v. Harley, 122 N.W. 761 (Wis. 1909).*

(n456)Footnote 456. *Jordan v. Sheridan, 149 S.W. 1028 (Ky. 1912).*

(n457)Footnote 457. *Hart v. Burch, 22 N.E. 831 (Ill. 1889); Walker v. Rand, 22 N.E. 1006 (Ill. 1889); Hill v. Boland, 93 A. 395 (Md. 1915); Fuchs v. Christie, 74 A. 129 (N.J. 1909).*

(n458)Footnote 458. *Carnall v. Wilson, 21 Ark. 62 (1860); Hart v. Burch, 22 N.E. 831 (Ill. 1889); Fletcher v. Shepherd, 51 N.E. 212 (Ill. 1898); Preston v. Second Nat'l Bank, 63 S.W.2d 774 (Ky. 1933); Cox v. Jagger, 2 Cow. 638 (N.Y. 1824).*

(n459)Footnote 459. *Barnett v. Meacham, 35 S.W. 533 (Ark. 1896); Flowers v. Flowers, 106 S.W. 949 (Ark. 1907); Herr v. Herr, 58 N.W. 897 (Iowa 1894); McMahon v. Gray, 22 N.E. 923 (Mass. 1889).*

(n460)Footnote 460. Unassigned dower may be alienated. *Tucker v. Tucker, 45 S.W. 344 (Tenn. 1898)* (by statute); *Love v. Ward, 5 S.E.2d 411 (W. Va. 1939).*

Contra, as to a stranger to the title. Pacific Bank v. Hannah, 90 F.72 (9th Cir. 1898); *Lewis v. King, 54 N.E. 330 (Ill. 1899); Ritt v. Dodge, 37 A. 810 (R.I. 1897).*

Treated as a valid contract to assign in equity. *Wilson v. Roebuck, 60 So. 870 (Ala. 1913); Flowers v. Flowers, 106 S.W. 949 (Ark. 1907); Potter v. Everitt, 42 N.C. 152 (1850).*

(n461)Footnote 461. *Prichard v. Anderson, 278 N.W. 348 (Iowa 1938); Dobberstein v. Murphy, 66 N.W. 204 (Minn. 1896); Tucker v. Tucker, 45 S.W. 344 (Tenn. 1898). See Prichard v. Anderson, 278 N.W. 348 (Iowa 1938).*

(n462)Footnote 462. *Stephens v. Bowen, 96 So. 331 (Ala. 1923).* But may be reached by the creditor through a bill in equity. *Edwards v. Hawks, 222 S.W.2d 28 (Tenn. 1949).*

(n463)Footnote 463. *Stephens v. Bowen, 96 So. 331 (Ala. 1923); Raulerson v. Peeples, 84 So. 370 (Fla. 1920).*

(n464)Footnote 464. *Roe v. Doe ex dem. Moore, 93 A. 373 (Del. 1914).*

(n465)Footnote 465. *Decker v. Decker, 44 So. 2d 435 (Ala.1950)* (may be released to heirs or terre tenant); *North v. Puckett, 46 S.W.2d 73 (Tenn. 1932).*

(n466)Footnote 466. *Wilson v. Hilligoss, 278 Ill. App. 564 (1935).*

(n467)Footnote 467. *Lee v. Straughan, 226 S.W. 171 (Ark. 1920).*

(n468)Footnote 468. *Cassity v. Pound, 67 S.W. 283 (Mo. 1902); Phillips v. Presson, 72 S.W. 501 (Mo. 1903).*

Conveyance of consummate but unassigned dower, *see: Tandy v. Smith, 293 S.W. 735 (Ark. 1927); Raulerson v. Peeples, 84 So. 370 (Fla. 1920); Burk v. Moore, 272 S.W. 38 (Ky. 1925); Dennis v. Gorman, 233 S.W. 50 (Mo. 1921); C. M. Smith Bros. Land & Inv. Co. v. Phillips, 233 S.W. 413 (Mo. 1921); Clelland v. Clelland, 235 S.W. 816 (Mo. 1921); Thoms v. Bissinger Candy Co., 67 N.E.2d 734 (Ohio App. 1946); Dailey v. Benn, 198 P. 323 (Okla. 1921); Tuten v. Almeda Farms, 192 S.E. 153 (S.C. 1937); Love v. Ward, 5 S.E.2d 411 (W. Va. 1939).*

(n469)Footnote 469. *Penney v. Long, 197 S.W.2d 470 (Ark. 1946); Walker v. Ellis, 207 S.W.2d 39 (Ark. 1947).*

(n470)Footnote 470. This, however, requires that the conveyance be just. *Wilson v. Roebuck, 60 So. 870 (Ala. 1913); Flowers v. Flowers, 106 S.W. 949 (Ark. 1907); Potter v. Everitt, 42 N.C. 152 (1850).*

(n471)Footnote 471. *Mayer v. Reinecke, 130 F.2d 350 (7th Cir. 1942), cert. denied, 317 U.S. 684 (1942).*

(n472)Footnote 472. *Sanders v. McMillian, 11 So. 750 (Ala. 1892); Shupe v. Rainey, 100 A. 138 (Pa. 1917).*

(n473)Footnote 473. *Moore v. Price, 123 So. 768 (Fla. 1929). See Bonner v. Peterson, 44 Ill. 253 (1867),* where the court questioned the power to give dower in bonds which were the proceeds of a condemnation action.

(n474)Footnote 474. *In re Lingafelter, 181 F. 24 (6th Cir. 1910); Morton v. Noble, 31 N.E. 790 (Ill. 1892); Davenport v. Gwilliams, 31 N.E. 790 (Ind. 1892); Hill v. Boland, 93 A. 395 (Md. 1915); Flynn v. Flynn, 50 N.E. 650 (Mass. 1898); Jackson ex dem. Clowes v. Vanderheyden, 17 Johns 167 (N.Y. 1819); Malloney v. Horan, 49 N.Y. 111 (1872).*

Wife may convey her inchoate dower to a party who has no interest in the land. *Bush v. Piersol, 81 S.W. 1224 (Mo. 1904). Sunderland v. Girava, 109 A. 424 (R.I. 1920)* (holding that widow has no right in husband's land with unassigned dower and can not convey the land since she has neither a title nor an estate).

(n475)Footnote 475. *Lively v. Paschal, 35 Ga. 218 (1866); Pinkham v. Pinkham, 49 A. 48 (Me. 1901); Hill. v. Boland, 93 A. 395 (Md. 1915); In re Smith's Estate, 276 N.Y.S. 646 (1935).*

(n476)Footnote 476. *Bruce v. McCormick, 72 N.E.2d 333 (Ill. 1947)* (dower consummate before perfected can be released but not assigned); White v. Graves (Mass. 1847); *Stephenson v. Osborne, 41 Miss. 119 (1866); H. T. & C. Co. v. Whitehouse, 154 P. 950 (Utah 1916).*

In New York dower is lost when the wife joins in a conveyance and does not reattach if the grantor later reacquires the property. *Gilson v. Lambert, 132 N.Y.S.2d 524 (1954).*

Wife may release dower to husband's vendee. Mass. Ann. Laws 1933, Ch. 189, §5.

Dower may be released without consideration. *Legge v. Albert A. Legge Land Co., 276 So. 2d 208 (Fla. App. 1973).* An easement on land may be conveyed without losing dower rights. In fact, a release of dower rights implies a fee simple conveyance, rather than an easement. *Meadows v. Belknap, 483 S.E.2d 826 (W. Va. 1997)* (holding that a wife can obtain the full use of, and a life estate in, all of her husband's real property when she relinquishes her inchoate dower right by joining him in conveying the property subject to the life estates); *Elton Schmidt & Sons Farm Co. v. Kneib, 507 N.W.2d 305 (Neb. App. 1993)* (holding that an easement does not invalidate dower rights and that an instrument which releases dower rights implies a fee simple conveyance, rather than an easement).

(n477)Footnote 477. *Weidler v. Floran, 13 N.E.2d 330 (Ind. App. 1938).*

Where the wife joined with her husband in a contract for sale of the husband's property, her relinquishment of dower was consideration for an agreement that the deferred purchase payments should be paid to the survivor. *Leibee v. Leibee, 349 P.2d 486 (Or. 1960).*

(n478)Footnote 478. *O'Malley v. Yost, 186 F.2d 603 (8th Cir. 1951).*

(n479)Footnote 479. *Mirza v. Mirza, 64 N.E.2d 201 (Ill. App. 1945); Jagla v. Krysiewicz, 186 N.Y.S.2d 819 (1959)* (annulment of the marriage for postnuptial insanity of the wife did not destroy dower).

See Henry T. Lowe, *Transfers in Fraud of Marital Rights, 26 Mo. L. Rev. 1 (1961).*

(n480)Footnote 480. *Moyer v. Dunseith, 46 N.Y.S.2d 360 (1943).*

(n481)Footnote 481. *In re Leggett's Estate, 32 N.Y.S.2d 921 (1941).*

(n482)Footnote 482. *Seaton v. Seaton, 34 S.E.2d 236 (Va. 1945).*

(n483)Footnote 483. *Hopkins v. Magruder, 34 F. Supp. 381 (D. Md. 1940); Du Pont v. Wilmington Trust Co., 45 A.2d 510 (Del. 1946); Gove v. Cather, 23 Ill. 634 (1860); Wilkinson v. Getty, 13 Iowa 157 (1862); Grove v. Todd, 41 Md. 633 (1875); Thomas v. Hesse, 34 Mo. 13 (1863);* Barnet v. Barnet, 15 Serg. & Rawle 72 (Pa. 1826); *Witman v. Webner, 41 A.2d 686 (Pa. 1945); Gainey v. Anderson, 68 S.E. 888 (S.C. 1910); Lewis v. Apperson, 49 S.E. 978 (Va. 1905); Phillips v. Smith, 107 So. 841 (Ala. 1926); Commercial Bldg. Co. v. Parslow, 112 So. 378 (Fla. 1927); Mishawaka St. Joseph Loan & Trust Co. v. Neu, 196 N.E. 85 (Ind. 1935); Louisa County v. Grimm, 212 N.W. 324 (Iowa 1927); Moore v. Hudson, 240 S.W. 383 (Ky. 1922); Roth v. Roth, 125 A. 400 (Md. 1924); Watkins v. Minor, 183 N.W. 186 (Mich. 1921); Gluc v. Klein, 197 N.W. 691 (Mich. 1924); Jefferson Land Co v. Kannowski, 206 N.W. 351 (Mich. 1925); Schefrin v. Wilensky, 111 A. 660 (N.J. Ch. 1920), aff'd, 114 A. 927 (N.J. 1921); Stokes v. Stokes, 196 N.Y.S. 184 (1922) aff'd, 200 N.Y.S. 951 (1923); Western Carolina Power Co. v. Moses, 133 S.E. 5 (N.C. 1926); Goodman v. Goodman, 152 N.E. 200 (Ohio App. 1926); Western States Fin. Co. v. Ruff, 215 P. 501, 216 P. 1020 (Or. 1923); Guaranty & Loan Co. v. Ruff, 253 P. 536 (Or. 1927); Ex parte Clark, 118 S.E. 27 (S.C. 1923); Turner v. Washington Realty Co., 126 S.E. 137 (S.C. 1925); Gee v. Baum, 199 P. 680 (Utah 1921).*

The former Florida requirement that contracts for sale of separate property of married woman or relinquishment of her dower required two witnesses, Stat., §708.07, was repealed by Laws 1970, ch. 70-4, §4.

(n484)Footnote 484. *Slocomb v. Ray, 31 S.E. 829 (N.C. 1898).*

(n485)Footnote 485. *Fowler v. Chadima, 111 N.W. 808 (Iowa 1907); Harley v. Orvin, 14 S.E.2d 701 (S.C. 1941).*

This separate examination of the wife dates back to the days of the fine. For a fine to be valid it was necessary that the wife be examined separately from the husband. Joshua Williams, Principles of The Law of Real Property 284. Kenelm, Edward Digby, An Introduction to The History of Real Property (5th Ed.), 404.

By an ordinance of the Massachusetts Bay Colony, a wife could consent to release of dower by separate instrument even after the husband's deed or mortgage had been executed without her joining, the consideration being the sale by the husband. *Fowler v. Shearer, 7 Mass. 14 (1810).*

In *In re Hiley's Estate, 262 So. 2d 476 (Fla. App. 1972),* where the spouses conveyed entireties property to the husband and the wife purported to waive her dower, the attempted waiver was void.

(n486)Footnote 486. *Eslava v. Lepretre, 21 Ala. 504 (1852).*

If the wife has not conveyed in accordance with the statute for waiver of dower, she takes dower in the property deeded by her husband and herself. *Mills Adm'x v. Mills, 5 S.W.2d 458 (Mo. App. 1954).*

Renunciation of dower held invalid where not made before a qualified notary public. *Tuten v. Almeda Farms, 192 S.E. 153 (S.C. 1937).*

Instruments affecting realty need not have the private examination of a married woman. N.C. Gen. Stat., §39-13.1.

(n487)Footnote 487. *Whitener v. Whitener, 304 S.W.2d 260 (Ark. 1957)* (wife could release only by valid deed). *Continental Nat'l Bank v. Gustin, 297 N.W. 214 (Mich. 1941); Wronkow v. Oakley, 31 N.E. 521 (N.Y. 1892).*

(n488)Footnote 488. *Security Sav. Bank v. Smith, 62 P. 794 (Or. 1900).*

(n489)Footnote 489. *Huxley v. Security Trust Co., 33 A.2d 679 (Del. 1943); Bomar v. Wilkins, 151 S.E. 110 (S.C. 1930).*

(n490)Footnote 490. *In re McGlone's Will, 2 N.Y.S.2d 888 (1938).*

(n491)Footnote 491. *Eslava v. Lepretre, 21 Ala. 504 (1852).*

(n492)Footnote 492. *Edwards v. Edwards, 107 N.E. 847 (Ill. 1915). See Watson v. Watson, 174 S.E. 33 (S.C. 1934).*

(n493)Footnote 493. *In re Gish, 32 F.2d 322 (D. Ky. 1928); Trowbridge v. Sypher, 7 N.W. 567 (Iowa 1880); McClain v. McClain, 151 S.W. 926 (Ky. 1912); Burrall v. Hurd, 28 N.W. 731 (Mich. 1886); Hoy v. Varner, 42 S.E. 690 (Va. 1902); Poteet v. International Harvester Co., 149 S.E. 512 (Va. 1929).*

Where the real estate is foreclosed by a mortgage which the widow had joined, the widow is a surety and becomes subrogated on death of the husband to the unsecured position of the mortgagee in the husband's remaining assets on his death. *Brown v. McLean, 8 S.E.2d 807 (N.C. 1940).*

(n494)Footnote 494. *Oades v. Standard Sav. & Loan Ass'n, 241 N.W. 262 (Mich. 1932); Turner v. Washington Realty Co., 126 S.E. 137 (S.C. 1925); In re Reynold's Estate, 62 P.2d 270 (Utah 1936); Commercial Banking & Trust Co. v. Dudley, 86 S.E. 307 (W. Va. 1915).*

(n495)Footnote 495. *Creecy v. Pearce, 69 N.C. 67 (1873); Barnes v. Crawford, 160 S.E. 464 (N.C. 1931); Mandel v. McClave, 22 N.E. 290 (Ohio 1889).*

(n496)Footnote 496. Coke on Littleton, §§32a, 36. Thompson v. Morrow, 5 Serg. & Rawle 289 (Pa. 1819); *Bridgeford v. Groh, 160 A. 451 (Pa. 1819).*

(n497)Footnote 497. *Sanders v. McMillian, 11 So. 750 (Ala. 1932); McClanahan v. Porter, 10 Mo. 746 (1892); Butler v. Fitzgerald, 61 N.W. 640 (Neb. 1895).*

(n498)Footnote 498. *Green v. Estabrook, 79 N.E. 373, 120 Am. St. 349 (Ind. 1906); Haynes v. Rolstin, 145 N.W. 336 (Iowa 1914)* (in Iowa the wife is entitled to set off her one-third dower interest free from purchase money indebtedness provided the rest of the estate is sufficient to pay the mortgage debt); *Mandel v. McClave, 22 N.E. 290 (Ohio 1889); In re Reynold's Estate, 62 P.2d 270 (Utah 1936).*

(n499)Footnote 499. In *Caylor's Estate, 227 N.W. 103 (Iowa 1929); VanVeen v. VanVeen, 236 N.W. 1, 238 N.W. 718 (Iowa 1931).*

(n500)Footnote 500. *Bissell v. Bissell, 94 N.W. 465 (Iowa 1903).*

(n501)Footnote 501. *Green v. Estabrook, 79 N.E. 373 (Ind. 1906); Mishawaka St. Joseph Loan & Trust Co. v. Neu, 196 N.E. 85 (Ind. 1935); John Hancock Mut. Life Ins. Co. v. Stowe, 245 N.W. 295 (Iowa 1932); Popkin v. Bumstead, 8 Mass. 491 (1812); Jones v. Bragg, 33 Mo. 337 (1863); Hawley v. Bradford, 9 Paige (N.Y.) 200 (1841); Mandel v. McClave, 22 N.E. 290 (Ohio 1889); Miller v. Farmers Bank, 27 S.E. 514 (S.C. 1897); Commercial Banking & Trust Co. v. Dudley, 86 S.E. 307 (W. Va. 1915); Gantt v. Jones, 272 F. 117 (4th Cir. 1832); Louisa County v. Grimm, 212 N.W. 324 (Iowa 1927); Nelson v. Dunn, 284 S.W. 1084 (Ky. 1926); Rosen v. Booth, 194 N.W. 976 (Mich. 1923); Virginia-Carolina Chemical Co. v. Walston, 123 S.E. 196 (N.C. 1924); Brown v. Jennings, 124 S.E. 150 (N.C. 1924); Ex parte Clark, 118 S.E. 27 (S.C. 1923); Turner v. Washington Realty Co., 126 S.E. 137 (S.C. 1925); Stanton v. Boatright, 302 S.W.2d 347 (Tenn. 1957).*

(n502)Footnote 502. *Johnson v. Smith, 67 So. 401 (Ala. 1914); Union Nat'l Bank v. McConaha, 42 N.E. 495 (Ind. App. 1895); Kerse v. Miller, 147 N.E. 504 (Mass. 1897); Fitcher v. Griffiths, 103 N.E. 471* (Mass.); *Roberts v. Meighen, 77 N.W. 139 (Minn. 1898); Smith v. Hall, 30 A. 409 (N.H. 1892); Merselis v. Van Riper, 38 A. 196 (N.J. 1897); Mackenna v. Fidelity Trust Co., 90 N.Y.S. 493 (1904), aff'd as modified, 77 N.E. 721 (N.Y. 1906); McArthur v. Franklin, 16 Ohio St. 193 (1865); Commercial Banking & Trust Co. v. Dudley, 86 S.E. 307 (W. Va. 1915); Phelan v. Fitzpatrick, 54 N.W. 614 (Wis. 1893); Trenholm v. Wilson, 13 S.C. 174 (1880).*

But see Gantt v. Jones, 272 F. 117 (4th Cir. S.C. 1932), holding that under the laws of South Carolina, a wife, renouncing dower on a mortgage executed by the husband, has no right of dower, either in the land or in the surplus proceeds of a sale to satisfy the mortgage.

(n503)Footnote 503. *Barr v. Vanalstine, 22 N.E. 965 (Ind. 1889); Mills v. Van Voorhies, 20 N.Y. 412, 10 Abb. Pr. 152 (1859); McKenna v. Fidelity Trust Co., 77 N.E. 721 (N.Y. 1906).*

(n504)Footnote 504. *Hewitt v. Cox, 15 S.W. 1026, modified on rehearing, 17 S.W. 873 (Ark. 1891); Holden v. Dunn, 33 N.E. 413 (Ill. 1893); Leary v. Shaffer, 79 Ind. 567 (1881); Pickett v. Buckner, Newman & Co., 45 Miss. 226 (1871); Bitzenburg v. Bitzenburg, 226 S.W.2d 1017 (Mo. 1950)* (where husband fraudulently induced his wife to sign a note and mortgage to his sister, the wife could set them aside); *Hinchman v. Stiles, 9 N.J. Eq. 454 (1853); Matthews v. Duryee, 45 Barb. 69, 17 Abb. Pr. 256 (N.Y. 1865); Unger v. Leiter, 32 Ohio St. 210 (1877); Tibbetts v. Langley Mfg. Co., 12 S.C. 465 (1879); Poteet v. International Harvester Co., 149 S.E. 512 (Va. 1929).*

(n505)Footnote 505. *Oades v. Standard Sav. & Loan Ass'n, 241 N.W. 262 (Mich. 1932).*

(n506)Footnote 506. *Harris v. Mosley, 111 S.W.2d 563 (Ark. 1937).*

(n507)Footnote 507. *Owens v. Owens, 146 S.W.2d 569 (Mo. 1940).*

(n508)Footnote 508. *Cox v. Wells, 7 Blackf. 410, 43 Am. Dec. 98 (Ind. 1845); Beverly v. Waller, 74 S.W. 264 (Ky. 1903); Hackney v. Smith, 273 S.W. 476 (Ky. 1925); Stevens v. Owen, 25 Me. 94 (1845); Lothrop v. Foster, 51 Me. 367 (1863); Catlin v. Ware, 9 Mass. 218 (1812); Lufkin v. Curtis, 13 Mass. 223 (1816); Leavitt v. Lamprey, 30 Mass. (13 Pick.) 382 (1832); Learned v. Cutler, 35 Mass. (18 Pick.) 9 (1836); McFarland v. Febiger, 7 Ohio 194 (1835).*

(n509)Footnote 509. *Clark v. Chapman, 239 N.W. 797 (Iowa 1931); Davis v. Jenkins, 20 S.W. 283 (Ky. 1892); Burge v. Smith, 27 N.H. 332 (1853).*

(n510)Footnote 510. *Stevens v. Owen, 25 Me. 94 (1845).*

(n511)Footnote 511. *Davis v. Jenkins, 20 S.W. 283 (Ky. 1892).*

(n512)Footnote 512. *Smith v. Carmody, 137 Mass. 126 (1884); Stone v. Montgomery, 35 Miss. 83 (1854).*

(n513)Footnote 513. *In re Madsen's Estate, 259 P.2d 595 (Utah 1953).*

(n514)Footnote 514. *Crawfordsville Trust Co. v. Ramsey, 100 N.E. 1049, 102 N.E. 282 (Ind. App. 1913).*

(n515)Footnote 515. *In re Halpern's Estate, 100 N.E.2d 120 (N.Y. 1951); Gillette v. Madden, 112 N.Y.S.2d 543 (1952); see* MacGregor v. Fox, N.Y.S.2d 286, *aff'd, 111 N.E.2d 445 (N.Y. 1953); In re Pengelly's Estate, 97 A.2d 844 (Pa. 1953).*

(n516)Footnote 516. Ind. Stat. Ann., §6-306; New York Decedent Estate Law, §18. *Dill v. Widman, 109 N.E.2d 765 (Ill. 1952); In re Gustsson's Estate, 250 P.2d 837 (Kan. 1952); In re Sturmer's Estate, 100 N.E.2d 155 (N.Y. 1951).*

Contra, Corgey v. McConnell, 260 S.W.2d 99, aff'd, 262 S.W.2d 944 (Tex. Civ. App. 1953).

(n517)Footnote 517. *In re Hadsell's Estate, 260 P.2d 1021 (Cal. App. 1953); In re Deffner's Estate, 119 N.Y.S.2d 443, aff'd, 113 N.E.2d 300 (N.Y. 1953).*

(n518)Footnote 518. Ind. Stat. Ann., §6-213; New Jersey Laws, ch. 352.

(n519)Footnote 519. *In re Giacomelos' Estate, 13 Cal. Rptr. 245 (1961)* (widow received income from award for life, not *pro rata* share of the award); *Haggerty v. Wagner, 48 N.E. 366 (Ind. 1897); Weidler v. Floran, 18 N.E.2d 330 (Ind. App. 1938); Caldwell v. Ottumwa, 200 N.W. 336 (Iowa 1924); French v. Lord, 69 Me. 537 (1879); Venable v. Wabash Western R.R., 20 S.W. 493 (Mo. 1892); Moore v. New York, 8 N.Y. 110 (1853); In re Cropsey Ave., 197 N.E. 189 (N.Y. 1935); Long v. Long, 124 N.E. 161 (Ohio 1919); Shelton v. Shelton, 83 S.E.2d 176 (S.C. 1954).*

Share of condemnation proceedings to the wife. *Vreeland v. Jacobus, 19 N.J. Eq. 231 (1868); New York & Brooklyn Bridge, 27 N.Y.S. 597, aff'd, 37 N.E. 823 (N.Y. 1894).*

(n520)Footnote 520. *Flynn v. Flynn, 50 N.E. 650 (Mass. 1898); Moore v. New York, 8 N.Y. 110, 59 Am. Dec. 473 (1853); Long v. Long, 124 N.E. 161 (Ohio 1919); Shelton v. Shelton, 83 S.E.2d 176 (S.C. 1954). Dal Brun v. West Palm Beach, 227 So. 2d 347 (Fla. App. 1969)* (holding that wife had no interest or right to any part of compensations paid to husband after land condemned under eminent domain).

(n521)Footnote 521. *Duncan v. Terre Haute, 85 Ind. 104 (1909); Benton v. St. Louis, 118 S.W. 418 (Mo. 1909); Gwynne v. Cincinnati, 30 Ohio 24.*

A dedication for a quasi public purpose barred the wife's dower. *Venable v. Wabash W. R. Co., 20 S.W. 493 (Mo. 1892); Baker v. Atchison, T. & S. F. R. Co., 30 S.W. 301 (Mo. 1894).* But a different view is taken in *Nye v. Taunton Branch R. Co., 113 Mass. 277 (1873).*

(n522)Footnote 522. *McAllister v. Dexter & P.R. Co., 76 A. 891 (Me. 1910).*

(n523)Footnote 523. *In re Cropsey Ave., 197 N.E. 189 (N.Y. 1935).*

"The doctrine is firmly established ... that the inchoate right of dower is suspended, or extinguished,

> in lands appropriated, according to the forms of law, to the uses of the public... And it makes no difference whether the public use arises by prescription, by dedication through a deed or acts in pais coupled with acceptance, by condemnation, or by a simple conveyance followed by an actual appropriation to such use... Where a fee in land is authorized to be taken, and is taken, under the power of eminent domain, the inchoate right of dower, therein, if a N.Y., is extinguished. Where merely an easement is taken, it ought to be held, on principle, that such right of dower is not abrogated but merely suspended during the period ob the servitude. And where a municipal or public service corporation secures a fee by deed, when under its charter it could acquire by condemnation only an easement, a right of inchoate dower in the land should not be a N.Y. more adversely affected thereby than had the use only been taken under the power of eminent domain. This, because the right of dower yields only to the extent necessary for the full exercise of the paramount public right; and the extent to which a given public use requires the extinguishment of an owner's title, and private rights incident thereto, is solely for the legislature to determine and its intention in that respect is to be deduced from the act authorizing condemnation."

Harris v. Kansas City, 239 S.W. 1077 (Mo. 1922).

(n524)Footnote 524. *Duncan v. Terre Haute, 85 Ind. 104 (1882); French v. Lord, 69 Me. 537 (1879); Flynn v. Flynn, 50 N.E. 650 (Mass. 1898); Venable v. Wabash W. R. Co., 20 S.W. 493 (Mo. 1892); Baker v. Atchison, T. & S. F. R. Co., 30 S.W. 301 (Mo. 1894); Summers v. Sullivan, 101 P. 166 (Mont. 1909); Gwynne v. Cincinnati, 30 Ohio 24; Justis v. Georgia Indus. Realty Co., 63 S.E. 1084 (Va. 1909).*

Dower was destroyed by eminent domain. *Dal Brun v. City of West Palm Beach, 227 So. 2d 347 (Fla. App. 1969).*

(n525)Footnote 525. *Haggerty v. Wagner, 48 N.E. 366 (Ind. 1897).*

(n526)Footnote 526. *In re Cropsey Ave., 197 N.E. 189 (N.Y. 1935).* In Illinois a widow's share in real property may be assigned in one or more tracts rather than in all tracts. *Westergard v. Klepper, 229 N.W.2d 286 (Iowa 1975).*

In Tennessee, property cannot be partitioned so as to require the widow to accept real estate in lieu of dower. *Cripps v. Cripps, 302 S.W.2d 340 (Tenn. 1957).*

(n527)Footnote 527. *Hopper v. Hopper, 190 A. 841 (Md. 1937).*

(n528)Footnote 528. *Humphreys v. McKnight, 152 S.W.2d 567 (Ark. 1941); Haggerty v. Wagner, 48 N.E. 366 (Ind. 1897); Shell v. Duncan, 10 S.E. 330 (S.C. 1889); Miller v. Farmers Bank, 27 S.E. 514 (S.C. 1889) See* the following cases: *Pingree v. De Haven, 105 So. 147 (Fla. 1925); Sullivan State Bank v. First Nat'l Bank, 146 N.E. 403 (Ind. App. 1925); Fulton v. Studabaker Bank, 151 N.E. 106 (Ind. App. 1926); Lientz v. Schotte, 243 S.W. 890 (Mo. 1922); Briegel v. Briegel, 160 A. 581 (Pa. 1931); Sheffield v. Cooke, 98 A. 161 (R.I. 1916); Harmon v. Peery, 119 S.E. 126, 134 S.E. 701 (Va. 1923).*

A widow is entitled to have the proceeds of other assets of the estate applied against mortgage and tax liens on the homestead. *In re Tucker's Estate, 85 P.2d 1025 (Or. 1938).*

(n529)Footnote 529. *Davis v. Lang, 38 N.E. 635 (Ill. 1894); Haggerty v. Wagner, 48 N.E. 366 (Ind. 1897); Coombs v. Coombs, 113 A. 20 (Me. 1921); Mitchell v. Farrish, 14 A. 712 (Md. 1888); Hinds v. Stevens, 45 Mo. 209 (1870); Weaver v. Gregg, 6 Ohio St. 547 (1856); Holley v. Glover, 15 S.E. 605 (S.C. 1892).*

Partition sales, *see Devlin v. Esher, 280 F. 1004 (D.C. 1922); Dure v. Sharpe, 114 A. 207 (Del. 1910); Cole v. Cole, 126 N.E. 752 (Ill. 1920); Youngs v. Goodman, 150 N.E. 533 (N.Y. 1925); Priest v. Williamson County Banking & Trust*

Co., 251 S.W. 904 (Tenn. 1923). Youngelson v. Youngelson's Estate, 114 So. 2d 642 (Fla. App. 1959) (holding that a widow was not entitled to dower where she entered into agreement with creditors to release her right of dower in exchange for cash).

(n530)Footnote 530. *Owen v. Slatter, 26 Ala. 547 (1855); Deepwater Black Creek Coal Co. v. Long, 139 So. 236 (Ala. 1932); Sutton v. Ford, 87 S.E. 799 (Ga. 1916); Verry v. Robinson, 25 Ind. 14 (1864); Moomey v. Maas, 22 Iowa 380, 92 Am. Dec. 395 (1867); Lucas v. Whitacre, 96 N.W. 776 (Iowa 1903); Trotter v. Lewis, 45 A.2d 329 (Md. 1946); Dayton v. Corser, 53 N.W. 717 (Minn. 1892); Butler v. Fitzgerald, 61 N.W. 640 (Neb. 1895); Rook v. Horton, 129 S.E. 450 (N.C. 1925)* (wife not being entitled to possession or even to defend her inchoate dower during husband's lifetime); *Winters v. DeTurk, 19 A. 354 (Pa. 1890); Cales v. Ford, 28 S.E.2d 429 (W. Va. 1943).*

(n531)Footnote 531. *Robinson v. Allison, 27 So. 461 (Ala. 1900); Callahan v. Nelson, 29 So. 555 (Ala. 1900); Mohr v. Sibthorp, 69 N.E.2d 487 (Ill. 1946); Walters v. Anderson, 361 S.W.2d 31 (Ky. 1962); Brune v. Rathbun, 204 S.W.2d 705 (Mo. 1947); Lynde v. Wakefield, 47 P. 5 (Mont. 1896); Butler v. Fitzgerald, 61 N.W. 640 (Neb. 1895).*

Contra, execution sale extinguishes dower. *In re Hester's Estate, 28 So. 2d 164 (Fla. 1946).*

(n532)Footnote 532. *Little v. Mundell, 109 N.E. 227 (Ind. App. 1915).*

(n533)Footnote 533. *Roan v. Holmes, 13 So. 339 (Fla. 1893).*

(n534)Footnote 534. *Whiteaker v. Belt, 36 P. 534 (Or. 1894).*

In Tennessee the widow's interest may be sold without her consent at the request of the remainderman. *Cripps v. Cripps, 302 S.W.2d 340 (Tenn. 1957).*

(n535)Footnote 535. *Holly Hill Lbr. Co. v. McCoy, 26 S.E.2d 175 (S.C. 1943).*

(n536)Footnote 536. *Dundas v. Hitchcock, 53 U.S. (12 How.) 256 (1851); Walls v. Phillips, 162 S.W.2d 59 (Ark. 1942); Dillard v. Kelley, 171 S.W.2d 53 (Ark. 1943); Adams v. Storey, 26 N.E. 582 (Ill. 1890); Heisen v. Heisen, 34 N.E. 597 (Ill. 1893); Moore v. Hudson, 240 S.W. 383 (Ky. 1922); Wilson v. Wills, 101 A. 694 (Md. 1917); Rosen v. Tackett, 193 N.W. 192 (Mich. 1923); Stephens v. George M. Craigen Co., 192 N.Y.S. 555 (1921); Waggoner v. Waggoner, 97 S.E.2d 887 (N.C. 1957); Krueger v. Groth, 209 N.W. 772 (Wis. 1926); Hainz v. Kurth, 278 N.W. 413 (Wis. 1938).*

(n537)Footnote 537. *Huxley v. Security Trust Co., 33 A.2d 679 (Del. 1943); Syck v. Hellier, 131 S.W. 30 (Ky. 1910); Morgan v. Sparks, 108 S.W. 233 (Ky. 1908); H.W. Wright Lbr. Co. v. McCord, 128 N.W. 873 (Wis. 1910).*

(n538)Footnote 538. *Redwine v. Redwine, 169 S.W. 864 (Ky. 1914); Gainey v. Anderson, 68 S.E. 888 (S.C. 1910); Lewis v. Apperson, 49 S.E. 978 (Va. 1905).*

(n539)Footnote 539. *Pippin v. Sams, 177 S.E. 659 (S.C. 1934).*

(n540)Footnote 540. *Redwine v. Redwine, 169 S.W. 864 (Ky. 1914).*

(n541)Footnote 541. *Myrick v. Hembree, 123 S.W. 668 (Ky. 1909).*

(n542)Footnote 542. *United States v. Ettelson, 67 F. Supp. 257 (E.D. Wis. 1946), rev'd, 159 F.2d 193 (7th Cir. 1947); People ex rel. McColgan v. Palmer, 41 N.Y.S. 760 (1896).*

(n543)Footnote 543. *Hart v. Parrish, 244 S.W.2d 105 (Mo. 1951); New Hanover County v. Holmes, 73 S.E.2d 480 (N.C. 1952).*

(n544)Footnote 544. *Franceschi v. Franceschi, 62 N.E.2d 1 (Ill. App. 1945).*

(n545)Footnote 545. *Blackburn v. Blackburn, 281 S.W. 391 (Ark. 1926); Fisher v. Leach, 258 P. 295 cert. denied, 276 U.S. 618 (Kan. 1928); Grantham v. Kennedy, 91 N.C. 148 (1884); Julier v. Julier, 56 N.E. 661 (Ohio 1900).*

(n546)Footnote 546. *Appeal of Bigham, 16 A. 613 (Pa. 1889).*

(n547)Footnote 547. *Cromwell v. Sac, 94 U.S. 351 (1876); Beverly v. Waller, 74 S.W. 264 (Ky. 1903); Motley v. Motley, 73 N.W. 738 (Neb. 1898); Walker v. Hall, 15 Ohio St. 355 (1864); Huntzicker v. Crocker, 115 N.W. 340 (Wis. 1908).*

(n548)Footnote 548. *McCreery v. Davis, 22 S.E. 178 (S.C. 1895).*

(n549)Footnote 549. *Starbuck v. Starbuck, 66 N.E. 193 (N.Y. 1903).*

(n550)Footnote 550. *Wanta v. Perszyk, 240 N.W. 183, 241 N.W. 377 (Wis. 1932).*

In Colorado the husband can transfer his property even though it has the effect of disinheriting the wife if the transaction is bona fide not merely colorable. *Estate of Barnhart, 563 P.2d 972 (Colo. App. 1977), aff'd, 574 P.2d 560 (Colo. 1978).*

(n551)Footnote 551. *Dillard v. Kelley, 171 S.W.2d 53 (Ark. 1943).*

(n552)Footnote 552. *Manatt v. Griffith, 124 N.W. 753 (Iowa 1910).*

(n553)Footnote 553. *Dowling v. DeWitt, 81 S.E. 173 (S.C. 1914).*

(n554)Footnote 554. *Inman v. Coburn, 249 S.W.2d 816 (Ky. 1952).*

In Louisiana the widow is entitled to the usufruct over the property inherited by the children of the marriage whenever the testator has not disposed of the property adversely to the marriage. *Winsberg v. Winsberg, 96 So. 2d 44 (La. 1957).*

(n555)Footnote 555. *Reilly v. Cullinane, 287 F. 994 (D.C. Cir. 1923); Williams v. Owens, 143 So. 2d 633 (Ala. 1962); Stein v. McKinney, 144 N.E. 795 (Ill. 1924); Venator v. Swenson, 69 N.W. 522 (Iowa 1896); Butler v. Butler, 132 N.W. 63 (Iowa 1911); Henderson v. Perkins, 21 S.W. 1035 (Ky. 1893); Solomon v. Shewitz, 152 N.W. 196 (Mich. 1915);* 3 A.L.R. 557; *Stromme v. Rieck, 119 N.W. 948 (Minn. 1909); McCormick v. Stephany, 41 A. 840 (N.J. 1898); Maas v. Morgenthaler, 120 N.Y.S. 1004 (1910); Woolsey v. Draper, 201 P. 730, 203 P. 582 (Or. 1922); Schwoerdfeger v. Kelly, 72 A. 1056 (Pa. 1909); Stenson v. Elfmann, 135 N.W. 694 (S.D. 1912); Kelsey v. Crowther, 27 P. 695 (Utah 1891), aff'd, 162 U.S. 404 (1896); Haden v. Falls, 80 S.E. 576 (Va. 1914). See* Gerald W. Pierce, *The Protection of the Surviving Spouse Against Disinheritance -- A Search for Georgia Reform, 9 Ga. L. Rev. 946 (1975).*

(n556)Footnote 556. *Lucas v. Whitacre, 96 N.W. 776 (Iowa 1903); Williams v. Williams, 12 S.W. 760 (Ky. 1889). Boling v. Clark, 50 N.W. 57 (Iowa 1891)* (holding that adverse possession does not bar a widow's right of dower).

(n557)Footnote 557. *In re Hester's Estate, 28 So. 2d 164 (Fla. 1946), overruling in effect Pingree v. De Haven, 105 So. 147 (Fla. 1925); Putney v. Vinton, 108 N.W. 655 (Mich. 1906); Cummings v. Schreur, 214 N.W. 199 (Mich. 1927); Rook v. Horton, 129 S.E. 450 (N.C. 1925);* Culler v. Motzer, 13 Serg. & Rawle 356, *15 Am. Dec. 604 (Pa. 1925); Winters v. DeTurk, 19 A. 354 (Pa. 1890).*

(n558)Footnote 558. *Gay v. J. Exum & Co., 67 S.E.2d 290 (N.C. 1951).*

(n559)Footnote 559. *Taylor v. Lawrence, 36 N.E. 74 (Ill. 1894); Williams v. Williams, 12 S.W. 760 (Ky. 1889); 11 Ky. L.J. 608, 6 L.R.A. 637.*

(n560)Footnote 560. *Brown v. Morisey, 32 S.E. 687 (N.C. 1899).*

(n561)Footnote 561. *Thompson v. McCorkle, 34 N.E. 813 (Ind. 1893); Wilson v. Wills, 101 A. 694 (Md. 1917); Joplin Brewing Co. v. Payne, 94 S.W. 896 (Mo. 1986).*

(n562)Footnote 562. *Barksdale v. Garrett, 64 Ala. 277 (1879); Barnard v. Edwards, 4 N.H. 107 (1827).*

(n563)Footnote 563. *Brady v. Paine, 63 N.E.2d 721 (Ill. 1945).*

(n564)Footnote 564. *Contra,* wife must be made party in partition. *Greiner v. Klein, 28 Mich. 12 (1873).*

(n565)Footnote 565. Under the New York law one who purchases from the husband by deed or at execution or judicial sale may by court action have the dower right valued and on payment of the value to the wife have it extinguished. New York Real Property Law, §190a, and see §1927.

(n566)Footnote 566. United States ex rel. Tennessee *Valley Auth. v. Spiceland, 52 F. Supp. 40 (D. Ky. 1943); Wheeler v. Kirtland, 27 N.J. Eq. 534 (1875)* (equity will protect this interest as against the husband); *In re Cropsey Ave., 197 N.E. 189 (N.Y. 1935)* (wife has dower in proceeds of condemnation action).

No dower in proceeds of condemnation. *Flynn v. Flynn, 50 N.E. 650 (Mass. 1898); Long v. Long, 124 N.E. 161 (Ohio 1919);* 5 A.L.R. 1343, *noted in 19 Colum. L. Rev. 492; Briegel v. Briegel, 160 A. 581, noted in 80 U. Pa. L. Rev. 799 (Pa. 1931); Salvatore v. Fuscellaro, 166 A. 26 (R.I. 1933) Cf. French v. Lord, 69 Me. 537 (1879); Borough of York v. Welsh, 11 A. 390 (Pa. 1887). See Benton v. St. Louis, 118 S.W. 418 (Mo. 1909); Harris v. Kansas City, 239 S.W. 1077 (Mo. 1922); Griswold v. McGee, 112 N.W. 1020, 113 N.W. 382 (Minn. 1907).*

In *Duncan v. Terre Haute, 85 Ind. 104 (1882),* a donation of land by a husband to a municipal corporation for use as a street was held to have barred the wife's inchoate dower.

(n567)Footnote 567. "Since the law gives the wife only an expectant interest in the property of her husband which becomes part of his estate, and since the law does not restrict transfers of property by the husband during his life, it would seem that the only sound test of the validity of a challenged transfer is whether it is real or illusory... The test has been formulated in different ways, but in most jurisdictions the test applied is essentially the test of whether the husband has in good faith divested himself of ownership of his property or has made an illusory transfer." *Newman v. Dore, 9 N.E.2d 966 (N.Y. 1937).*

In Indiana a married man may encumber or contract or deed realty which he owns without his wife joining. And such a conveyance bars the wife's marital interest. Ind. Code 29-1-2-3.1.

In Illinois either spouse may dispose of his property, both real or personal, so as to deprive the other spouse of possible inheritance unless the transaction is sham, illusory or can amount to a fraud. *Mertes v. Lincoln Park Fed. Sav. & Loan Ass'n of Chicago, 340 N.E.2d 25 (Ill. App. 1974).*

In Colorado a husband can convey good title without the wife's consent. *Estate of Barnhart, 563 P.2d 972 (Colo. App. 1977), aff'd, 574 P.2d 500 (Colo. 1978).*

Individual property may be conveyed by the spouse so as to cut off dower or curtesy. Mont. Rev. Code 1947, §36-111.

(n568)Footnote 568. *See* in general: *Carpenter v. Carpenter 93 F. Supp. 225 (S.D. Fla. 1950); Dawson v. Mays, 252 S.W. 33 (Ark. 1923); Biddle v. Biddle, 177 S.W.2d 32 (Ark. 1944); Busch v. Busch, 68 So. 2d 350 (Fla. 1953); Knapp v. Knapp, 135 N.E. 732 (Ill. 1922); Hayes v. Miniter, 139 N.E. 74 (Ill. 1923); Seuss v. Schukat, 192 N.E. 668 (Ill.*

1934); Franceschi v. Franceschi, 62 N.E.2d 1 (Ill. App. 1945); Nissen v. Nissen Trampoline Co., 39 N.W.2d 92 (Iowa 1949); Fischer v. Leach, 258 P. 295 (Kan. 1927), cert. denied, 276 U.S. 618 (1928); Sapp v. Sapp, 193 S.W.2d 443 (Ky. 1946); Rollins v. Gould, 138 N.E. 815 (Mass. 1923); Larsen v. Erickson, 222 Minn. 363 (1946); Arnold v. Arnold, 222 S.W. 996 (Mo. 1920); Block v. P. & G. Realty Co., 124 A. 372 (N.J. 1924); Peff v. Peff, 67 A.2d 161 (N.J. 1949); Ruckert v. Lasher, 205 N.Y.S. 552 (1924); Monroe County Sav. Bank v. Yeoman, 195 N.Y.S. 531 (1922); Brown v. O'Barn. 199 N.Y.S. 824 (1923); Western States Fin. Co. v. Ruff, 215 P. 501, 216 P. 1020 (Or. 1923); Guaranty & Loan Co. v. Ruff, 253 P. 536 (Or. 1927); Brown v. Brown, 138 A. 179 (R.I. 1927); Dawson v. Della Tore, 108 S.E. 101 (S.C. 1921); Shirley v. Parris, 113 S.E. 788 (S.C. 1922).

(n569)Footnote 569. *Adair v. Adair, 62 So. 2d 437 (Ala. 1952); Drake v. Drake, 80 So. 2d 268 (Ala. 1955); Rollins v. Gould, 138 N.E. 815 (Mass. 1923); Killackey v. Killackey, 120 N.W. 680 (Mich. 1909); In re Kehl's Estate, 254 N.W. 639 (Wis. 1934).*

Contra, Lavino v. Lavino, 125 A.2d 746 (N.J. Super. 1956). Gomes v. Gomes, 27 Haw. 230 (Haw. Terr. 1923) (holding that wife retains right of dower after divorce). *In re Clark's Estate, 213 S.W. 2d 645 (Mo. App. 1948)* (holding that a "mere showing" that husband and wife were separated for one year before death of either would not be sufficient to bar right of dower).

(n570)Footnote 570. *McAllister v. Dexter & P.R. Co., 76 A. 891 (Me. 1910)* (statute giving dower on divorce as though husband died on date of decree); *Ellis v. Williams, 312 S.W.2d 97 (Mo. 1958)* (if fault of the husband dower will be assigned if divorced wife survives the husband).

(n571)Footnote 571. *North v. Ringling, 7 So. 2d 476 (Fla. 1940); Collins v. Ako, 35 Haw. 440 (1940); Hamilton v. McNeill, 129 N.W. 480 (Iowa 1911); Nissen v. Nissen Trampoline Co., 39 N.W.2d 92 (Iowa 1949); O'Malley v. O'Malley, 129 P. 501 (Mont. 1913); Pullen v. Pullen, 28 A. 719 (N.J. 1894); Peff v. Peff, 67 A.2d 161 (N.J. 1949); Bryon v. Bryon, 119 N.Y.S. 41 (1909); Ball v. Ball, 192 N.E. 364 (Ohio App. 1933); Allen v. Austin, 43 A. 69 (R.I. 1899).*

(n572)Footnote 572. *Gaylor v. McHenry, 15 Ind. 383 (1860); Owen v. Owen, 57 Ind. 291 (1877); McQuinn v. McQuinn, 61 S.W. 358 (Ky. 1901); Sergent v. North Cumberland Mfg. Co., 66 S.W. 1036 (Ky. 1902); Schmeizl v. Schmeizl, 46 A.2d 619 (Md. 1949); Lyons v. Lyons, 74 S.W. 467 (Mo. App. 1903); Phillip v. Wiseman, 42 S.E. 861 (N.C. 1902); Keicher v. Mysinger, 198 S.W.2d 330 (Tenn. 1946); Davis v. Davis Exr., 167 N.W. 819 (Wis. 1918).* However, such statutes may be preempted when they delay the administration of ERISA benefits. *Moore v. Phillip Morris Co., Inc., 8 F.3d 335 (6th Cir. 1993)* (holding that ERISA preempts a Kentucky statute that eliminates spousal property rights for adultery, because the litigation over the state statute would delay the administration of ERISA benefits).

Desertion and adultery bars dower. *Henderson v. Chaires, 6 So. 164 (Fla. 1889); Walters v. Jordan, 35 N.C. 361 (1852); LeCompte v. Wash, 9 Mo. 551 (1845).* Unless the husband has first abandoned the wife. *Rawlins v. Buttel, 6 Del. (1 Houst.) 224 (1856); Shaffer v. Richardson's Adm'r, 27 Ind. 122 (1866); In re Appeal of Nye, 17 A. 618 (Pa. 1889).*

Contra, adultery does not bar dower. *Wax v. Wilson, 101 So. 2d 54 (Fla. 1958); Gordon v. Dickison, 23 N.E. 439 (Ill. 1890); Lakin v. Lakin, 84 Mass. (2 Allen) 45 (1861); LeCompte v. Wash, 9 Mo. 551 (1845); Cogswell v. Tibbetts, 3 N.H. 41 (1824); Davis v. Davis, 167 N.W. 819 (Wis. 1918).*

(n573)Footnote 573. *Busch v. Busch, 68 So. 2d 350 (Fla. 1953); Zimmerman v. Zimmerman, 90 N.E. 192 (Ill. 1909); Doyle v. Doyle, 108 N.E. 796 (Ill. 1915); Hatch v. Small, 59 P. 262 (Kan. 1899).*

(n574)Footnote 574. *Gordon v. Dickison, 23 N.E. 439 (Ill. 1890); Classen v. Heath, 58 N.E.2d 889 (Ill. 1945); McAllister v. Dexter & P. R. Co., 76 A. 891 (Me. 1910); North v. North, 100 S.W.2d 582 (Mo. 1936); Boggiano v. Boggiano, 38 N.Y.S.2d 355 (1942); Julier v. Julier, 56 N.E. 661 (Ohio 1900).*

(n575)Footnote 575. *Holmes v. Holmes, 56 N.W. 46 (Minn. 1893).*

(n576)Footnote 576. *Kendall v. Crenshaw, 173 S.W. 393 (Ark. 1915). McLaughlin v. McLaughlin, 79 So. 354 (Ala. 1918)* (holding that a wife has no dower interest when she obtained a foreign divorce decree).

(n577)Footnote 577. *Schnepfe v. Schnepfe, 92 A. 891 (Md. 1914); Murawski v. Murawski, 209 S.W.2d 262 (Mo. App. 1948).*

(n578)Footnote 578. *Adams v. Storey, 26 N.E. 582 (Ill. 1890); McKelvey v. McKelvey, 70 N.W. 582 (Mich. 1897).*

(n579)Footnote 579. *Kessinger v. Schrader, 98 P. 236 (Kan. 1908).*

(n580)Footnote 580. *Van Cleaf v. Burns, 30 N.E. 661 (N.Y. 1892), 15 L.R.A. 542; Van Blaricum v. Larson, 98 N.E. 488 (N.Y. 1912). See* Restatement, Conflict of Laws, §248(2); Fowler v. Harper, *Effect of Foreign Divorce Upon Dower, 26 Ill. L. Rev. 397 (1931).*

(n581)Footnote 581. *See Barrett v. Failing, 111 U.S. 523 (1884),* holding that such an Oregon law was not applicable to a foreign divorce.

(n582)Footnote 582. 13 Edw. ch. 34.

(n583)Footnote 583. II Blackstone 136.

(n584)Footnote 584. No bar since the husband could have divorced the wife. *LeCompte v. Wash, 9 Mo. 551 (1845); Bryan v. Batcheller, 6 R.I. 543 (1860); Davis v. Davis, 167 N.W. 819 (Wis. 1918).*

Statute held part of common law. *Jarnigan v. Jarnigan, 80 Tenn. 292 (1883); Keicher v. Mysinger, 198 S.W.2d 330 (Tenn. 1946), 20 Tenn. L. Rev. 273; Johnson v. Morgan, 198 S.W.2d 549 (Tenn. 1947).*

In West Virginia abandonment bars dower. *Thornburg v. Thornburg, 18 W. Va. 522 (1881).*

(n585)Footnote 585. *Loughran v. Loughran, 292 U.S. 216 (1934); Daniels v. Taylor, 145 F. 169 (8th Cir. 1906); Wood v. Wood, 27 S.W. 641 (Ark. 1894); Goss v. Froman, 12 S.W. 387 (Ky. 1889); Schmeizl v. Schmeizl, 42 A.2d 106 (Md. 1945); Payne v. Dotson, 81 Mo. 145 (1883); Chrisman v. Linderman, 100 S.W. 1090 (Mo. 1907); Walters v. Jordan, 35 N.C. 361 (1852); Reel v. Elder, 62 Pa. 308 (1869); Moore v. Robinson, 137 S.E. 697 (S.C. 1927); Keicher v. Mysinger, 198 S.W.2d 330 (Tenn. 1946); Harman v. Harman, 124 S.E. 273 (Va. 1924); Davis v. Davis, 167 N.W. 819 (Wis. 1918).*

(n586)Footnote 586. *Sergent v. North Cumberland Mfg. Co., 66 S.W. 1036 (Ky. 1902).*

(n587)Footnote 587. *Stuart v. Neely, 40 S.E. 441 (W. Va. 1901).*

(n588)Footnote 588. *Wiseman v. Wiseman, 73 Ind. 112 (1889); Appeal of Nye, 17 A. 618 (Pa. 1889); Thayer v. Thayer, 14 Vt. 107 (1842) See In re Archer's Estate, 70 A.2d 857 (Pa. 1950)* (contra under statute); *98 U. Pa. L. Rev. 927; 24 Tul. L. Rev. 151.*

(n589)Footnote 589. *Harman v. Harman, 124 S.E. 273 (Va. 1924). See Shriver v. Johnson, 132 S.E. 656 (W. Va. 1926).*

(n590)Footnote 590. *In re Drinkhouse's Estate, 24 A. 1086 (Pa. 1892).*

(n591)Footnote 591. *Morello v. Cantalupo, 111 A. 255 (N.J. 1920).*

(n592)Footnote 592. *McQuinn v. McQuinn, 61 S.W. 358 (Ky. 1901).*

(n593)Footnote 593. *Rawlins v. Buttel, 6 Del. (1 Houst.) 224 (1856); Shaffer v. Richardson, 27 Ind. 122 (1866); Reel v. Elder, 62 Pa. 308 (1869); Appeal of Nye, 17 A. 618 (Pa. 1889); Beaty v. Richardson, 34 S.E. 73 (S.C. 1899).*

(n594)Footnote 594. *Wilson v. Craig, 75 S.W. 419 (Mo. 1903).*

(n595)Footnote 595. *Swift v. Reasonover, 77 S.W.2d 809 (Tenn. 1935).*

Pennsylvania denies any rights in a deceased spouse's estate of a widower or widow who shall have deserted the deceased spouse for more than a year. *In re Watt's Estate, 185 A.2d 781 (Pa. 1962); In re Rudolph's Estate, 194 A. 311 (Pa. Super. 1937).*

(n596)Footnote 596. *Thomas v. Thomas, 18 So. 2d 544 (Ala. 1944).*

(n597)Footnote 597. *In re Clark's Estate, 213 S.W.2d 645 (Mo. App. 1948).*

(n598)Footnote 598. *Lambert v. Clark, 275 S.W.2d 240 (Mo. 1955).*

(n599)Footnote 599. *McMichael v. Proctor, 91 S.E.2d 231 (N.C. 1956).* Contra, *Owens v. Owens, 6 S.E. 794 (N.C. 1888)* (holding that a wife imprisoned as an accessory to her husband's murder was not barred from her right of dower).

(n600)Footnote 600. *Hill v. Morris, 85 So. 2d 847 (Fla. 1956).*

(n601)Footnote 601. *Whitmore v. Rascoe, 85 S.W. 860 (Tenn. 1905). Blanchard v. Blanchard's Estate, 199 A. 233 (Vt. 1938)* (holding that a wife's dower was superior to the claims of her husband's creditors).

(n602)Footnote 602. *Sutton v. Ford, 87 S.E. 799 (Ga. 1916); Brown v. Tucker, 117 S.W. 96 (Mo. App. 1909).*

See the following cases: *Marine Nat'l Bank v. Swigart, 262 F. 854 (6th Cir. 1920); Hopkins v. Magruder, 34 F. Supp. 381 (D. Md. 1940); United States v. Certain Parcels of Land, 46 F. Supp. 441 (D. Md. 1920); Evansville Imp. Co. v. Gardner, 128 N.E. 471 (Ind. App. 1926); Nelson v. Dunn, 284 S.W. 1054 (Ky. 1926); Wade v. Citizens' State Bank, 197 N.W. 277 (Minn. 1924); Essey v. Bushakra, 252 S.W. 459 (Mo. 1923); Eschmann v. Lord, 112 A. 488 (N.J. 1920); Virginia-Carolina Chem. Co. v. Walston, 123 S.E. 196 (N.C. 1924); Stokes v. Stokes, 173 S.E. 18 (N.C. 1934); Second Nat'l Bank v. Renick, 19 Ohio App. 278 (1924); Turner v. Washington Realty Co., 126 S.E. 137 (S.C. 1925); Share v. Trickle, 197 N.W. 329 (Wis. 1924).*

Dower is free of mortgage indebtedness as against the heirs. *Stanton v. Boatright, 302 S.W.2d 347 (Tenn. 1957).*

(n603)Footnote 603. *Swartz v. Smole, 5 P.2d 566 (Mont. 1931); Clark v. Clark, 242 P.2d 992 (Mont. 1952).*

(n604)Footnote 604. *McLawhorn v. Smith, 191 S.E. 35 (N.C. 1937).*

(n605)Footnote 605. *Combs v. Young, 12 Tenn. (4 Yer.) 2185 (1833).*

(n606)Footnote 606. *Pfaff v. Heizman, 235 S.W.2d 551 (Ark. 1951)* (dower attaches to property taken by heirs even though liable to be divested to pay ancestor's debts); *Gove v. Cather, 23 Ill. 634 (1860); Sloan v. Williams, 27 N.E. 531 (Ill. 1891); Solomon v. Shewitz, 152 N.W. 196 (Mich. 1915); Grady v. McCorkle, 57 Mo. 172 (1874); Butler v. Fitzgerald, 61 N.W. 640 (Neb. 1895); Lewis v. Smith, 9 N.Y. 502 (1854); Rodman v. Robinson, 47 S.E. 19 (N.C. 1904); Iowaege v. Bossieux, 15 Gratt. 83 (Va. 1859); Ficklin v. Rixey, 17 S.E. 325 (Va. 1893); Lewis v. Apperson, 49 S.E. 978 (Va. 1905). Mattingly v. Gentry, 419 S.W. 2d 745 (Ky. 1967)* (holding that a wife was entitled to one third of her husband's land where she never forfeited her right of dower and could not be deprived of her right by her husband's acts or those of his creditors).

(n607)Footnote 607. *Porter v. Lazear, 109 U.S. 84 (1883); Savage v. Savage, 141 F. 346 (4th Cir. 1905); In re Acretelli, 173 F. 121 (D. N.Y. 1909); Lazear v. Porter, 87 Pa. 513 (1878). But see Lucas v. White, 95 N.W. 209 (Iowa 1903); Williams v. Williams, 12 S.W. 760 (Ky. 1889).*

(n608)Footnote 608. *Carver v. Ward, 95 S.E. 528 (W. Va. 1918).*

Under the New York law today one who purchases from the husband by deed or at execution or judicial sale may by court action have the dower right valued and on payment of the right valued and on payment of the value to the wife have it extinguished. New York Real Property Law, §190a.

(n609)Footnote 609. *Roan v. Holmes, 13 So. 339 (Fla. 1893).*

(n610)Footnote 610. *Kozanjieff v. Petroff, 19 N.E.2d 563 (Ind. 1939).*

(n611)Footnote 611. *Dunbar v. Dunbar, 98 N.E. 563 (Ill. 1912); Sheffield v. Cooke, 98 A. 161 (R.I. 1916); Wilson v. Wilson, 89 P. 643 (Utah 1907); Harper v. Harper, 165 S.E. 490 (Va. 1932).*

(n612)Footnote 612. *Nichols v. French, 93 N.E. 897 (Ohio 1910).*

(n613)Footnote 613. *Salinger v. Black, 60 S.W. 229 (Ark. 1900).*

(n614)Footnote 614. Setting aside deed in fraud of surviving spouse. *Windsor v. Leonard, 475 F.2d 932 (D.C. Cir. 1973).*

Deed from husband to wife in fraud of creditors could be set aside except to extent of wife's interest. *Willingham v. Lee, 185 S.E.2d 553 (Ga. App. 1971).*

(n615)Footnote 615. *State ex rel. Place v. Bland, 183 S.W.2d 878 (Mo. 1944).*

(n616)Footnote 616. *Lipps v. Lipps, 87 N.E.2d 823 (Ohio 1949).*

(n617)Footnote 617. *Geiselman v. Wise, 28 N.E.2d 199 (Ohio 1940).*

Execution sale of husband's realty divests dower. *In re Hester's Estate, 28 So. 2d 164 (Fla. 1946); 1 U. Miami L. Rev. 46, rev'g*, in effect, *Pingree v. De Haven, 105 So. 147 (Fla. 1925).*

(n618)Footnote 618. *Trotter v. Lewis, 45 A.2d 329 (Md. 1940).*

(n619)Footnote 619. *Mayburry v. Brien, 40 U.S. (15 Pet.) 21 (1841); Bell v. Bell, 56 So. 926 (Ala. 1911); Chalk v. Chalk, 165 S.W.2d 534 (Ky. 1942).*

(n620)Footnote 620. *Robbins v. Robbins, 8 Blackf. 174 (Ind. 1846).*

(n621)Footnote 621. *Chalk v. Chalk, 165 S.W.2d 534 (Ky. 1942); Elder v. McIntosh, 70 S.E. 807 (S.C. 1911).*

(n622)Footnote 622. *Shaeffer v. Weed, 8 Ill. (3 Gilm.) 511 (1846); Gove v. Cather, 23 Ill. 634 (1860); Bishop v. Boyle, 9 Ind. 169 (1854); Van Vronker v. Eastman, 48 Mass. (7 Met.) 157 (1843); Iowaege v. Bossieux, 15 Gratt. 83 (Va. 1859).*

(n623)Footnote 623. *Pifer v. Ward, 8 Blackf. 252 (Ind. 1846).*

(n624)Footnote 624. *Bell v. Bell, 56 So. 926 (Ala. 1911).*

(n625)Footnote 625. *Poteet v. International Harvester Co., 149 S.E. 512 (Va. 1929).*

(n626)Footnote 626. Littleton, Tenures, L1, ch. 5.

(n627)Footnote 627. *Bomar v. Wilkins, 151 S.E. 110 (S.C. 1930).*

But a widow was entitled to elect only if she did not receive the minimum statutory share by contract, will or deed. *In re Connor's Estate, 168 S.E.2d 245 (N.C. App. 1969).*

(n628)Footnote 628. *Herbert v. Wren, 11 U.S. (7 Cranch) 370 (1813); Hilliard v. Binford's Heirs, 10 Ala. 977 (1847); Herzog v. Easton Trust Co., 64 So. 426 (Fla. 1914); Raines v. Corbin, 24 Ga. 185 (1858); Mettler v. Warner, 90 N.E. 1099 (Ill. 1910); Ostrander v. Spickard, 8 Blackf. 227 (Ind. 1846); Howard v. Watson, 41 N.W. 45 (Iowa 1888); In re Culbertson's Estate, 215 N.W. 761 (Iowa 1927); Compton v. Akers, 150 P. 219 (Kan. 1915); Bunker v. Bunker, 154 A. 73 (Me. 1931); In re Hall's Case, 1 Bland Ch. 203 (Md. 1827); Matthews v. Thompson, 71 N.E. 93 (Mass. 1904); Fairchild v. Marshall, 43 N.W. 563 (Minn. 1889); Van Orden v. Van Orden, 10 Johns. 30 (N.Y. 1813); Jackson v. Churchill, 7 Cow. 287 (N.Y. 1827); Lee v. Tower, 26 N.E. 943 (N.Y. 1891); In re Hill's Will, 191 N.E. 12 (N.Y. 1934).*

And *see Opp v. Frye, 161 P.2d 235 (Cal. App. 1945); Prichard v. Anderson, 278 N.W. 348 (Iowa 1938); Foster v. Allen, 152 P.2d 818 (Kan. 1944); Wrenne v. American Nat'l Bank, 191 S.W.2d 547 (Tenn. 1946).*

In Georgia a devise is in lieu of dower but a bequest is not. Ga. Code Ann., §31-103.

In Utah the widow takes her statutory share unless she elects under the will Utah Code Ann. 1953, §74-4-4.

In Vermont the widow takes both under the will and also dower unless the will indicates a contrary intent. *Phillips v. Northfield Trust Co., 179 A. 154 (Vt. 1935).*

See Ralph Gane Miller, Jr. & Philip P. Martin, Jr., *Voluntary Widow's Election: Nation-Wide Planning for the Million Dollar Estate, 1 Cal. W. L. Rev. 63 (1965).*

(n629)Footnote 629. *Herbert v. Wren, 11 U.S. (7 Cranch) 370 (1813); Hillard v. Binford's Heirs, 10 Ala. 977 (1847); Alling v. Chatfield, 42 Conn. 276 (1875); Voss v. Stortz, 197 S.W. 964 (Ky. 1917); White v. White, 16 N.J.L. 202 (1837); Adsit v. Adsit, 2 Johns. Ch. 448 (N.Y. 1817); Wood v. Wood, 5 Paige Ch. 596 (N.Y. 1836); Sumerel v. Sumerel, 12 S.E. 932 (S.C. 1891); Bomar v. Wilkins, 151 S.E. 110 (S.C. 1930); Higginbotham v. Cornwell, 8 Gratt. 83 (Va. 1851).*

(n630)Footnote 630. *Howe Lumber Co. v. Parker, 117 N.W. 518 (Minn. 1908).*

> To compel the widow to elect between the dower and a provision made for her in the will, where the testator had not in terms declared his intention on the subject, it was not sufficient that the will rendered it doubtful whether he intended that she should have her dower in addition to that provision; but that to deprive her of dower, the terms and provisions of the will must be totally inconsistent with her claim of dower in the property in which such dower was claimed; so that the intention of the testator in relation to some part of the property devised to others would be defeated, if such claim was allowed.

Church v. Bull, 2 Denio 430 (N.Y. 1845).

The surviving spouse in Pennsylvania has an absolute right of election as against testamentary assets or assets transferred inter vivos over which transferor retained a testamentary power of appointment, a power of consumption or a power of revocation. *In re Huested's Estate, 69 A.2d 57 (Pa. 1961).*

Laws treating widows differently than widowers in election are not unconstitutional. *In re Estate of Rincon, 327 So. 2d 224 (Fla. 1976); Matter of Estate of Kujath, 545 P.2d 662 (Mont. 1976); Estate of Parson, 344 N.E.2d 317 (Ind. App. 1976).* A widow may not exercise statutory elective shares against individual pieces of property, but rather must release her dower and homestead rights to take the statutory share. *Riverwood Commercial Properties, Inc. v. Cole, 639 A.2d 714 (N.H. 1994)* (holding that statutory elective shares taken in place of dower and homestead rights cannot be exercised against individual pieces of property, but rather the taker must release her dower and homestead rights in the individual pieces to take the statutory share).

(n631)Footnote 631. *Banks v. Junk, 264 So. 2d 387 (Miss. 1972).*

Election must be in conformance with the law where the land lies. *Estate of Miller, 541 P.2d 28 (Wyo. 1975).*

(n632)Footnote 632. *Brown v. Parry, 2 Dick. 685, 21 Eng. Rep. 438; Hitchin v. Hitchin, Pre. Ch. 133, 24 Eng. Rep. 64.*

A spouse's right of election is governed by the law of the domicile. *In re Clark's Estate, 36 N.E.2d 152 (N.Y. 1968).*

See Elbridge D. Phelps, *The Widow's Right of Election in the Estate of Her Husband, 37 Mich. L. Rev. 236, 401 (1938).*

(n633)Footnote 633. *Dillon v. Parker, 1 Cl. & Fin. 303, 36 Eng. Rep. 422.*

See Richard M. Waugh, *Wills -- Election by a Surviving Joint Tenant or Tenant by the Entirety, 38 Mo. L. Rev. 533 (1973).*

(n634)Footnote 634. *Garrett v. Snowden, 145 So. 493 (Ala. 1933); Warren v. Warren, 36 N.E. 611 (Ill. 1893); Pellizzarro v. Reppert, 50 N.W. 19 (Iowa 1891); In re Hill's Will, 191 N.E. 12 (N.Y. 1934); Bomar v. Wilkins, 151 S.E. 110 (S.C. 1930).*

See Boiling v. Boiling, 14 S.E. 67 (Va. 1891).

Under Va. Acts 1968 amending §113-903, Georgia now gives the widow of an intestate husband the child's part unless the shares exceed five in which case she gets one-fifth.

The widow is no longer required to elect against the will if she within 12 months after the death of the husband elects to take a dower. If she takes dower, she has no interest in the realty beyond dower rights but the election does not affect the rights with respect to personalty.

See Arnold D. Kahn & Jon J. Gallo, *The Widow's Election: A Return to Fundamentals, 24 Stan. L. Rev. 531.*

(n635)Footnote 635. *Tooke v. Hardeman, 7 Ga. 20 (1849); Cain v. Cain, 23 Iowa 31 (1867); Helme v. Strater, 30 A. 333 (N.J. 1894); Nelson v. Brown, 39 N.E. 355 (N.Y. 1895);* McCullough v. Allen, 3 Yates 10 (Pa. 1800); *Turner v. Oberhen, 61 N.W. 280 (Wis. 1894).*

In Illinois the widow may elect to take dower free of husband's creditors or one-third in fee of the remaining estate after the husband's debts are paid and dower is barred unless the election is made within 10 months after administration is opened and within the surviving spouse's lifetime. *Bruce v. McCormick, 72 N.E.2d 333 (Ill. 1947); 25 Chi-Kent L. Rev. 324.*

Once a spouse has elected against the Will, only the spouse can vacate the election. *Baker v. Hutyera, 267 N.E.2d 604*

(Ohio 1971).

Holding that time period for election is mandatory unless there has been actual fraud with a clear case of misrepresentation. *In re Di Marco's Estate, 257 A.2d 849 (Pa. 1939).*

See William Shakespeare Herrmann Jr., *Fiduciaries' Collateral Powers and Spouses' Right of Election, 30 Brooklyn L. Rev. 53.*

(n636)Footnote 636. *Cochran v. Garth, 40 S.W.2d 1023 (Tenn. 1931).*

In New York the right of the widow to elect against a will is limited, New York Decedents Estate Law, §18d. *In re Shupack's Will, 149 N.Y.S.2d 20, rev'd, 136 N.E.2d 513 (N.Y. 1956).*

Where a widow elects to take under the law she does not create an intestacy but merely elects to obtain her share of the intestate property. *In re Roberts' Estate, 338 P.2d 719 (Mont. 1959), cert. denied, 361 U.S. 825 (1959); 9 Kan. L. Rev. 356.*

(n637)Footnote 637. *Lord v. Lord, 23 Conn. 327 (1853); Nelson v. Pomeroy, 29 A. 534 (Conn. 1894); Tooke v. Hardeman, 7 Ga. 20 (1849); Carper v. Crowl, 36 N.E. 1040 (Ill. 1894); Richards v. Richards, 58 N.W. 926 (Iowa 1894);* McGowen v. *Baldwin, 49* N.W. 251 (Minn. 1891); *Hall v. Smith, 15 S.W. 621 (Mo. 1891); Schorr v. Etling, 27 S.W. 395 (Mo. 1894); Tobias v. Ketchum, 32 N.Y. 319 (1865); Sumerel v. Sumerel, 12 S.E. 932 (S.C. 1891).*

Widow must elect to take dower within nine months after first publication of notice to creditors and must, within three years after husband's death, file a notice with the clerk of the circuit court where the realty is located. Fla. Stat. 1971, §731.35(4).

(n638)Footnote 638. *In re Gotzian, 24 N.W. 920 (Minn. 1885); In re Gorden, 64 N.E. 753 (N.Y. 1902); Callaham v. Robinson, 9 S.E. 120 (S.C. 1889); 3 L.R.A. 497.*

(n639)Footnote 639. *Exchange Nat'l Bank of Winter Haven v. Smith, 4 So. 2d 675 (Fla. 1941); Williams v. Williams, 170 S.W. 490 (Ky. 1914)* (decided under statute); *Young v. Young, 27 A. 627 (N.J. 1893).*

In Florida dower rights and realty are barred unless the widow's written election is filed within nine months after the first publication of notice to creditors or three years after the date of the husband's death, whichever occurs first. Fla. Stat. Ann., §731.35(3). However, when division of property is inappropriate, a probate court does not have authority to value the property to establish the value of the dower right, rather, the court must either rent or sell the property. *In re Estate of Jones, 879 S.W.2d 433 (Ark. 1994)* (holding that a probate court has no authority to value property and order that dower be paid according to that value, but the court may order the property to be rented and divide the rents or order it sold and divide the proceeds).

(n640)Footnote 640. *Herbert v. Wren, 11 U.S. (7 Cranch) 370 (1813).*

See William E. Noding, *Dower Estoppel By Widow's Election Under the Will, 3 U. Fla. L. Rev. 214 (1950).*

(n641)Footnote 641. *Mastin v. Mastin, 50 S.W.2d 77 (Ky. 1932).*

Widow's consent to will waives statutory allowances. *In re Snyder's Estate, 357 P.2d 778 (Kan. 1960).*

(n642)Footnote 642. *Stone v. Vandermark, 34 N.E. 150 (Ill. 1893); Sherman v. Newton, 6 Gray (72 Mass.) 307 (1856); Flynn v. McDermott, 75 N.E. 931 (N.Y. 1905); Millkin v. Welliver, 37 Ohio St. 460 (1882); Appeal of Crozier, 90 Pa. 384 (1879); In re Woodburn's Estate, 21 A. 16 (Pa. 1891).*

Discretion of court as to whether incompetent widow can dissent from will. *Copeland v. Turner, 143 So. 2d 625 (Ala. 1962); 15 Ala. L. Rev. 338.*

Right to renounce will does not survive spouse's death. *Rock Island Bank & Trust Co. v. First Nat'l Bank, 185 N.E.2d 890 (Ill. 1962).*

(n643)Footnote 643. *Heavenridge v. Nelson, 56 Ind. 90 (1877); Clark v. Boston Safe Deposit & Trust Co., 102 A. 289 (Me. 1917); Kennedy v. Johnston, 65 Pa. 451 (1870); Dougherty v. Federal Nat'l Bank & Trust Co., 377 P.2d 963 (Okla. 1962).*

Probate court may not exercise election of widow who was incompetent. *In re Strauch's Estate, 229 N.E.2d 95 (Ohio App. 1967).*

See Joe W. Blankenship, *Election by Court for Incompetent Surviving Spouse, 17 Okla. L. Rev. 238 (1964).*

In New York the right of election of the spouse is personal except that it could be exercised by a guardian. *Estate of Charkowsky, 392 N.Y.S.2d 368 (1977).*

(n644)Footnote 644. *Kinnett v. Hood, 185 N.E.2d 888 (Ill. 1962).*

(n645)Footnote 645. *State v. Probate Ct., 152 N.W. 845 (Minn. 1915).*

(n646)Footnote 646. *Steele v. Steele, 64 Ala. 438 (1879); Dabney v. Bailey, 42 Ga. 521 (1871); Macknet v. Macknet, 29 N.J. Eq. 54 (1878).*

(n647)Footnote 647. *In re Woodburn's Estate, 21 A. 16 (Pa. 1891).*

(n648)Footnote 648. *La Tourette v. La Tourette, 137 P. 426 (Ariz. 1914).*

(n649)Footnote 649. *Whitesell v. Strickler, 78 N.E. 845 (Ind. 1906).*

(n650)Footnote 650. *In re Pearson's Estate, 192 So. 2d 89 (Fla. 1966).*

(n651)Footnote 651. *Pittman v. Pittman, 107 P. 235 (Kan. 1910).*

(n652)Footnote 652. *Thompson v. Thompson, 121 S.W. 641 (Ky. 1909).*

(n653)Footnote 653. *Truett v. Funderburk, 20 S.E. 260 (Ga. 1894).*

(n654)Footnote 654. *See* Restatement, Conflict of Laws, §253. *Colvin v. Hutchinson, 92 S.W.2d 667 (Mo. 1936).*

(n655)Footnote 655. *Schofield v. Sueske, 28 N.E.2d 138 (Ill. App. 1940).*

Chapter 168, Acts 1968, of New York, provides that the right of election by surviving spouse does not include a N.Y. realty of the decedent situated outside of New York.

(n656)Footnote 656. *Crenshaw v. Carpenter, 69 Ala. 572 (1881); In re Rogers' Estate, 171 So. 2d 428 (Fla. 1965)* (time of election of dower is of the essence); *Whitesell v. Strickler, 78 N.E. 845 (Ind. 1906); Mercer v. Smith, 107 S.W. 1196 (Ky. 1908); Bish v. Bish, 31 A.2d 348 (Md. 1943); In re Andrews' Estate, 52 N.W. 743 (Mich. 1892); White v. White, 16 N.J.L. 202 (1837); Flynn v. McDermott, 75 N.E. 931 (N.Y. 1905); Geiger v. Bitzer, 88 N.E. 134 (Ohio 1909); Borland v. Nichols, 12 Pa. 38 (1849); Appeal of Melizet, 17 Pa. 449 (1851); Kennedy v. Johnston, 65 Pa. 451 (1870).*

Court may elect for incompetent surviving spouse even after statutory time has elapsed. *Goldstein's Estate v. Commissioner Int. Rev., 479 F.2d 813 (10th Cir. 1973).*

Widow's election after statutory time had passed was a nullity. *Mainini v. Tilton, 308 N.E.2d 571 (Mass. 1974).*

A wife electing against a will takes an intestate share rather than inchoate dower and is subject to inheritance tax. *Stovall v. Department of Revenue, 527 P.2d 62 (Mont. 1974).*

See Eugene F. Scoles, *Conflict of Laws and Elections in Administration of Decedents' Estates, 30 Ind. L.J. 293 (1955).*

(n657)Footnote 657. *Merrill v. Emery, 27 Mass. (10 Pick.) 507 (1830).*

(n658)Footnote 658. *Mohn v. Mohn, 126 N.W. 1127 (Iowa 1910).*

(n659)Footnote 659. *Cobb v. MacFarland, 127 N.W. 377 (Neb. 1910).*

(n660)Footnote 660. *In re Smith's Estate, 40 P. 1037 (Cal. 1895); Wilson v. Wilson, 44 N.E. 665 (Ind. 1896); Hovey v. Hovey, 61 N.H. 599 (1882); Baxter v. Bowyer, 19 Ohio St. 490 (1869); Chace v. Gregg, 32 S.W. 520 (Tex. 1895).*

Widow was required to elect against a will, which purported to devise to another property held in joint tenancy. *In re Waters' Estate, 100 Cal. Rptr. 775 (1972). See 38 Mo. L. Rev. 533.*

Contra, Colclazier v. Colclazier, 89 So. 2d 261 (Fla. 1956); In re Grieco's Estate, 244 A.2d 27 (Pa. 1968).

(n661)Footnote 661. *Pfau v. Moseley, 222 N.E.2d 639 (Ohio 1966),* permitting widow's election under the lex situ.

Contrary in dictum denying right of election. *In re Clark's Will, 281 N.Y.S.2d 180 (1967).*

Denying decedent's right to transfer property by an inter vivos trust as being a fraud of the widow under the *Fraudulent Conveyance Act. Sherrill v. Mallicote, 417 S.W.2d 798 (Tenn. App. 1967). Contra* result. *Klosiewski v. Slovan Bldg. & Loan Ass'n, 230 A.2d 285 (Md. 1967).*

(n662)Footnote 662. In such cases the husband can defeat the wife's interest by executing notes and placing them in escrow. *See Potter Title & Trust Co. v. Braum, 140 A. 401 (Pa. 1928). But see Cancilla v. Bondy, 44 A.2d 586 (Pa. 1945).*

Widow's right of election is determined by the lex situ of the realty. *Succession of Martin, 147 So. 2d 53 (La. App. 1962).*

Holding that election against will did not defeat the widow's statutory allowance. *Sklor v. Estate of Sklor, 357 A.2d 900 (Conn. 1975).*

(n663)Footnote 663. *In re Dluhos' Estate, 70 N.W.2d 549 (Iowa 1955).*

Specific devisees were not entitled to restitution from residuary estate where widow renounced will and took dower in devised realty. *Gowling v. Gowling, 90 N.E.2d 188 (Ill. 1950).*

Where the widow elects against the will and there is also a pretermitted child the widow's share comes first and the shares of the pretermitted child and the other beneficiaries are reduced pro tanto. *In re Vicedomini's Estate, 91 N.Y.S.2d*

472 (1949).

Under the statutes of some states the widow in making the election takes by way of inheritance from the testator and not as a purchaser which would have happened had he died intestate. *Barlow v. Winters Nat'l Bank & Trust Co., 61 N.E.2d 603 (Ohio 1945) (1945).*

Contra, widow takes only statutory share and does not take as heir, property undisposed of by will. *In re Uihlein's Will, 59 N.W.2d 641 (Wis. 1953).*

Husband abandoning wife held not entitled to elect against the will under statute. *In re Estate of Banks, 189 A. 154 (Pa. 1963).*

(n664)Footnote 664. *Barksdale v. Morris, 235 S.W.2d 288 (Mo. 1950).*

(n665)Footnote 665. Widow's election against will is equivalent to her death. *Maine Nat'l Bank v. Petrlik, 283 A.2d 660 (Me. 1971).*

(n666)Footnote 666. *In re Plazza's Estate, 526 P.2d 155 (Colo. App. 1974).*

Spouse's right of election is governed by the law of the state where decedent was domiciled at the time of his death. *In re Duval's Estate, 332 A.2d 802 (Vt. 1975).*

(n667)Footnote 667. *Teckenbrock v. McLaughlin, 152 S.W. 38 (Mo. 1912).*

(n668)Footnote 668. *Gore v. Townsend, 11 S.E. 160 (N.C. 1890); Mandel v. McClave, 22 N.E. 290 (Ohio 1889), 5 L.R.A. 519; Briegel v. Briegel, 160 A. 581 (Pa. 1931).*

(n669)Footnote 669. *Hamm v. Butler, 112 So. 141 (Ala. 1927); Tatum v. Tatum, 295 S.W. 720 (Ark. 1927);* 53 A.L.R. 306; *Firebaugh v. Wittenberg, 141 N.E. 379 (Ill. 1923); Rosenow v. Miller, 207 P. 618 (Mont. 1922); Stokes v. Stokes, 196 N.Y.S. 184 (1922); Good v. Crist, 156 N.E. 146 (Ohio App. 1926); Share v. Trickle, 197 N.W. 329 (Wis. 1924);* 34 A.L.R. 1016.

(n670)Footnote 670. *Hamm v. Butler, 112 So. 141 (Ala. 1927).*

A voluntary conveyance by prospective bridegroom 22 months before marriage was held in fraud of future wife's marital rights. *Jarvis v. Jarvis, 122 N.E. 121 (Ill. 1919); Moore v. Moore, 154 N.E.2d 256 (Ill. 1958)* (10 months before marriage, recordation not being constructive notice to the prospective bride).

(n671)Footnote 671. *Dure v. Sharpe, 114 A. 207 (Del. 1910); Good v. Crist, 156 N.E. 146 (Ohio App. 1926).*

Dower and curtesy cannot be evaluated by a court in absence of statute. *In re Flasch, 143 A.2d 208 (N.J. Super. 1958), cert. denied, 144 A.2d 736 (N.J. 1958).*

(n672)Footnote 672. *Najarian v. Boyajian, 136 A. 767 (R.I. 1927).*

(n673)Footnote 673. The proper rule for computing the present value of the wife's contingent right of dower, during the life of the husband, is to ascertain the present value of an annuity for her life equal to the interest in the third of the proceeds of the estate to which her contingent right of dower attaches, and then to deduct from the present value of the annuity for her life, the value of a similar annuity depending upon the joint lives of herself and her husband; and the difference between these two sums will be the present value of her contingent right of dower.

Share v. Trickle, 197 N.W. 329 (Wis. 1924); 34 A.L.R. 1016, quoting *Jackson v. Edwards, 7 Paige 386 (N.Y. 1839).*

See Gordon, Rankin & Co. v. Tweedy, 74 Ala. 232 (1883); Shell v. Duncan, 10 S.E. 330 (S.C. 1889).

Where the wife's dower could not be compensated for with the husband's fee, no value could be placed on the wife's inchoate interest. *United States v. Certain Parcels of Land, 46 F. Supp. 441 (D. Md. 1942).*

In New York the value of dower is determined as the difference between the present value of an annuity equal to a one-third interest in the proceeds of the property payable during the expectancy of the wife and the present value of such an annuity payable during the joint lives of both husband and wife. *Jackson v. Edwards, 7 Paige 386 (N.Y. 1839).*

(n674)Footnote 674. *Gordon, Rankin & Co. v. Tweedy 74 Ala. 232 (1883); Johnson v. Moon, 10 S.E. 193 (Ga. 1888); Buzick v. Buzick, 44 Iowa 259 (1876); Alexander v. Bradley, 66 Ky. (3 Bush) 667 (1868); Simonton v. Gray, 34 Me. 50 (1852); Abercrombie v. Riddle, 3 Md. Ch. 320 (1850); Estabrook v. Hapgood, 10 Mass. 313 (1873); Nye v. Patterson, 35 Mich. 413 (1877); Henze v. Mitchell, 140 N.W. 149 (Neb. 1913); American Blower Co. v. MacKenzie, 147 S.E. 829 (N.C. 1929); Smith v. Smith, 27 S.E.2d 137 (N.C. 1843); Mandel v. McClave, 22 N.E. 290 (Ohio 1889).*

(n675)Footnote 675. *Coleman v. Davis, 120 So. 2d 56 (Fla. 1960).*

(n676)Footnote 676. *Blevins v. Smith, 16 S.W. 213 (Mo. 1891).*

(n677)Footnote 677. *Brown v. Brown, 78 S.E. 447 (S.C. 1913).*

(n678)Footnote 678. *Ladshaw v. Drake, 191 S.E. 713 (S.C. 1937).*

The present value of a contingent dower right (husband living) is computed by determining the present value of an annuity equal to the annual interest on one-third of the value of the realty and by subtracting therefrom the value of an annuity based on the joint lives of the wife and husband. *United States v. State, 87 S.E.2d 577 (S.C. 1955).*

See Francis X. Conway, *Surviving Spouse's Right of Election in New York Where Trust Income May be Diverted: The Need for Further Change, 34 Fordham L. Rev. 593 (1965).*

(n679)Footnote 679. *Boyd v. Carlton, 69 Me. 200 (1879); Conner v. Shepherd, 15 Mass. 164 (1818); Macknet v. Macknet, 24 N.J. Eq. 449 (1873); McDaniel v. McDaniel, 25 N.C. 61 (1842); Appeal of Heller, 8 A. 790 (Pa. 1887); Fuller v. Conrad, 26 S.E. 575 (Va. 1897); Feamster v. Feamster, 15 S.E.2d 159 (W. Va. 1941).*

(n680)Footnote 680. *Ware v. Owens, 42 Ala. 212 (1868); Sanders v. McMillian, 11 So. 750 (Ala. 1892); Butler v. Fitzgerald, 61 N.W. 640 (Neb. 1895).*

(n681)Footnote 681. *Price v. Hobbs, 47 Md. 359 (1877); McGehee v. McGehee, 42 Miss. 747 (1869); Larrowe v. Beam, 10 Ohio 498 (1841).*

(n682)Footnote 682. *Humphrey v. Phinney, 2 Johns 454 (N.Y. 1807); Shaw v. White, 13 Johns. 179 (N.Y. 1816); Campbell v. Murphy, 55 N.C. 357 (1856); Whitehead v. Brownsville Bank, 61 S.W.2d 975 (Tenn. 1933).*

(n683)Footnote 683. *Thornburn v. Doscher, 32 F. 810 (C.C.D. Or. 1887); Summers v. Babb, 13 Ill. 483 (1851); Throp v. Johnson, 3 Ind. 343 (1852); Fritz v. Tudor, 64 Ky. (1 Bush) 28 (1866); McClanahan v. Porter, 10 Mo. 746 (1847); Dunseth v. Bank of United States, 6 Ohio 76 (1833); Bridgeford v. Groh, 160 A. 451 (Pa. 1932).*

(n684)Footnote 684. *Sanders v. McMillian, 144 11 So. 750 (Ala. 1832); Ralston v. Ralston, 3 Greene 535 (Iowa 1852); Parker v. Parker, 34 Mass. (17 Pick.) 236 (1835); Hale v. James, 6 Johns. Ch. 258 (N.Y. 1822).*

(n685)Footnote 685. *Herson v. Mills, 221 F. Supp. 714 (D.D.C. 1963)* (widow takes statutory share after deduction for federal estate tax purposes); *Coleman v. Davis, 120 So. 2d 56 (Fla. 1960); Onstott v. Edel, 83 N.E. 506 (Ill. 1908);*

Mahoney v. Young, 33 Ky. (3 Dana) 588 (1835); Boyd v. Carlton, 69 Me. 200 (1879); Chase's Case, 1 Bland 206 (Md. 1828); Gore v. Brazier, 3 Mass. 523 (1807); Webb v. Townsend, 18 Mass. (1 Pick.) 21 (1822); Van Doren v. Van Doren, 3 N.J.L. 697 (1810).

(n686)Footnote 686. *Sanders v. McMillian, 11 So. 750 (Ala. 1832); Westcott v. Campbell, 11 R.I. 378 (1876); Hale v. James, 6 Johns. Ch. 258 (N.Y. 1822).*

(n687)Footnote 687. *Central Trust Co. v. Gilarili, 186 N.E.2d 771 (Ohio 1962).*

(n688)Footnote 688. *Ladshaw v. Drake, 191 S.E. 713 (S.C. 1937); United States v. State, 87 S.E.2d 577 (S.C. 1955).*

(n689)Footnote 689. *Waggoner v. Waggoner, 97 S.E.2d 887 (N.C. 1957).*

(n690)Footnote 690. *Grayson v. Grayson, 190 S.W. 930 (Mo. App. 1916); Gore v. Townsend, 11 S.E. 160 (N.C. 1890), 8 L.R.A. 443; Waggoner v. Waggoner, 97 S.E.2d 887 (N.C. 1957); Strayer v. Long, 10 S.E. 574 (Va. 1890); Share v. Trickle, 197 N.W. 329 (Wis. 1924).*

(n691)Footnote 691. *Floyd v. Barrineau, 216 S.E.2d 753 (S.C. 1975).*

(n692)Footnote 692. *Oakley v. Oakley, 30 Ala. 131 (1857); Harrison v. Boyd, 36 Ala. 203 (1860); Taylor v. McCrackin, 2 Blackf. 260 (Ind. 1929).*

(n693)Footnote 693. *Weaver v. Crenshaw, 6 Ala. 573 (1844); Grimes v. Wilson, 4 Blackf. 331 (Ind. 1837); Stewart v. Stewart, 26 Ky. (3 J.J. Marsh.) 48 (1829); McKaig v. McKaig, 25 A. 181 (N.J. 1892). See Moore v. Hoffman, 39 S.W.2d 339 (Mo. 1931);* 75 A.L.R. 135.

(n694)Footnote 694. 4 Kent's Commentaries. 62 *Weaver v. Crenshaw, 6 Ala. 873 (1844); Ackerman v. Shelp, 8 N.J.L. 125 (1825).*

Quarantine is a personal inalienable right, *Griffin v. Dunn, 96 S.W. 190 (Ark. 1906); Love v. Ward, 5 S.E.2d 411 (W. Va. 1939),* 126 A.L.R. 791, either at law, *Barber v. Willams, 74 Ala. 331 (1883),* or in equity, *Flowers v. Flowers, 106 S.W. 949 (Ark. 1907),* and alienable by statute. Ind. Stat. §6-401.

(n695)Footnote 695. *Cook v. Webb, 18 Ala. 810 (1851).*

(n696)Footnote 696. *Oakley v. Oakley, 30 Ala. 131 (1857);* White v. *Clarke, 23* Ky. (7 T.B. Mon.) 640 (1828); *Craige v. Morris, 25 N.J. Eq. 467 (1941); Alt v. Kwiatek, 17 A.2d 161 (N.J. Eq. 1941); Love v. Ward, 5 S.E.2d 411 (W. Va. 1939).*

Quarantine is lost when dower is assigned. *Hunott v. Critchlow, 285 S.W.2d 594 (Mo. 1955).*

(n697)Footnote 697. *Boyte v. Perkins, 99 So. 652 (Ala. 1924); Mullan v. Bank of Pasco County, 133 So. 323 (Fla. 1931); Wyly v. Kallenbach, 76 S.W.2d 34 (Ky. 1934); Moore v. Hoffman, 39 S.W.2d 339 (Mo. 1931).*

(n698)Footnote 698. *Mullan v. Bank of Pasco County, 133 So. 323 (Fla. 1931); Wyly v. Kallenbach, 76 S.W.2d 34 (Ky. 1934).*

(n699)Footnote 699. *Rains v. Moulder, 90 S.W.2d 81 (Mo. 1936); Krug v. Bremer 11 S.W.2d 1096 (Mo. App. 1928).*

(n700)Footnote 700. *Barber v. Williams, 74 Ala. 331 (1883); Griffin v. Dunn, 96 S.W. 190 (Ark. 1906); Phillips v. Williams, 113 S.W. 908 (Ky. 1908).*

Contra, Graham v. Stafford, 72 S.W. 507 (Mo. 1903).

Attempted alienation forfeits quarantine, *Griffin v. Dunn, 96 S.W. 190 (Ark. 1906)* (but not dower), but the widow may release quarantine. *Barber v. Williams, 74 Ala. 331 (1883).*

(n701)Footnote 701. *Griffin v. Dunn, 96 S.W. 190 (Ark. 1906); Phillips v. Williams, 113 S.W. 908 (Ky. 1908); Love v. Ward, 5 S.E.2d 411 (Ky. 1939).*

(n702)Footnote 702. *Hale v. Cox, 200 So. 772 (Ala. 1941).*

(n703)Footnote 703. *Burkhardt v. Lieberman, 159 S.W.2d 847 (Tex. 1942).*

(n704)Footnote 704. *In re Flasch, 143 A.2d 208 (N.J. Super. 1958)*

William James McKim, *Rights of the Surviving Spouse Under the Pennsylvania Wills and Estates Statutes, 9 Duquesne L. Rev. 230.*

(n705)Footnote 705. Joseph D. Sullivan, *The Passing of Dower and Curtesy, 19 Georgetown. L.J. 306 (1931).*

Florida has abolished inchoate dower and substituted an election by the surviving spouse of one-third realty and personalty. Fla. Stat. 1971, §732.01 *et seq.* as amended by Fla. Laws 1974, ch. 74-106.

Georgia repealed the right of dower in 1969.

In Indiana a married man may encumber or contract or deed realty which he owns without his wife joining. And such a conveyance bars the wife's marital interest. Ind. Code §29-1-2-3.1.

New Hampshire establishes statutory rights in lieu of dower and curtesy. N.H. Rev. Stat. 1955, §560:3.

Reinheimer v. Rhedans, 327 S.W.2d 823 (Mo. 1959) (dower abolished in Missouri as of Jan. 1, 1956).

South Dakota did not adopt §2-113 of the U.P.C. providing for the abolition of dower and curtesy.

Tenn. Code Ann. §31-202, abolished dower and curtesy and gives a distributive share if spouse not provided for.

(n706)Footnote 706. Fla. Stat. 1971, §732.111.

(n707)Footnote 707. *Ferry v. Spokane, P. & S.R. Co., 258 U.S. 314 (1922); Barfoot v. Barfoot, 18 So. 2d 465 (Ala. 1944); Wootton v. Keaton, 272 S.W. 569 (Ark. 1925); Henderson v. Usher, 170 So. 846 (Fla. 1936); Adams v. Adams, 2 So. 2d 855 (Fla. 1941); Weyer v. Barwell, 158 N.E. 475 (Ill. 1927); Schoellkopf v. DeVry, 7 N.E.2d 757 (Ill. 1937); Classen v. Heath, 58 N.E.2d 889 (Ill. 1945); Chamberlain v. Anderson, 190 N.W. 501 (Iowa 1922); Hamblin v. Marchant, 175 P. 678 (Kan. 1918); Moore v. New York, 8 N.Y. 110 (1853); Vannoy v. Green, 173 S.E. 277 (N.C. 1934); Long v. Long, 124 N.E. 161 (Ohio 1919); Goodman v. Gerstle, 109 N.E.2d 489 (Ohio 1952); Disher v. Disher, 35 N.E.2d 582 (Ohio 1936); In re Whitson, 212 P. 752 (Okla. 1923); Rieger v. Harrington, 203 P. 576 (Or. 1922); McCulley v. Hardeman, 223 S.W. 146 (Tenn. 1920).*

See M. P. Rapazy, *Progress of Property Law Relating to Married Women,* 11 U. K.C. L. Rev. 173 (1943).

See however, *Arnett v. Reade, 220 U.S. 311 (1911),* where Mr. Justice Holmes questioned the power of the legislation to abolish an inchoate right of dower or wife's interest in community property without compensation.

(n708)Footnote 708. The New York law though it has abolished dower still leaves the wife such an inchoate interest in the husband's realty that he cannot defeat her interest by an inter vivos conveyance to another. *Bodner v. Feit, 286 N.Y.S. 814 (1936),* similar in *Indiana. Fletcher v. Holmes, 32 Ind. 497 (1870).*

Dower was abolished in Missouri, Mo. Rev. Stat. 1959, §474.110, as of Jan. 1, 1956, excepting dower then vested. *Sando v. Phillips, 319 S.W.2d 648 (Mo. 1959).*

See Charles P. Dribb, *Dower, Homestead, Homestead Allowance and Release of Marital Rights Under the New Missouri Probate Code, 21 Mo. L. Rev. 151 (1956).*

See also G. Rodney Johnson, *The Abolition of Dower in Virginia: The Uniform Probate Code as an Alternative to Proposed Legislation, 7 U. Rich. L. Rev. 99 (1972);* Ann Ellen Acker, *The Abolition of Dower: An Occasion for Re-examining the Surviving Spouse's Rights in Illinois,* 3 Loyola U. L.J. 94 (1972).

(n709)Footnote 709. *Ness v. Lunde, 68 N.E.2d 458 (Ill. 1946)* (in Illinois dower is taken in addition to widow's statutory heir's rights).

(n710)Footnote 710. *See* William J. O'Shea, Jr., *Surviving Spouses in New York, 8 St. Johns L. Rev. 245.*

(n711)Footnote 711. *Barker v. Walker, 85 N.E.2d 748 (Ill. 1949).*

(n712)Footnote 712. *Clark v. Hanson, 151 N.E. 369 (Ill. 1926).*

A statute giving a surviving spouse the right of occupancy of the dwelling house until assignment of dower or curtesy gave no vested interest, merely a permissive possession. *Colbert v. Priester, 203 S.E.2d 134 (Va. 1974). See* Louis H. Hamel Jr., *Is Dower Back? A Consideration of Sullivan v. Burken,* 28 Boston Bar Journal 17, 24 (July-Aug. 1984).

(n713)Footnote 713. *Magruder v. Magruder, 141 F.2d 537 (D.C. Cir. 1944).*

(n714)Footnote 714. *Ferry v. Spokane, P. & S. R. Co., 258 U.S. 314 (1922); Barfoot v. Barfoot, 18 So. 2d 465 (Ala. 1944); Leffler v. Leffler, 10 So. 2d 799 (Fla. 1942); Schoellkopf v. DeVry, 7 N.E.2d 757 (Ill. 1937); Classen v. Heath, 58 N.E.2d 889 (Ill. 1945); Hatch v. Small, 59 P. 262 (Kan. 1899); Helm v. Board, 70 S.W. 679 (Ky. 1902); Rumsey v. Sullivan, 150 N.Y.S. 287 (1914); Corporation Comm'n v. Dunn, 94 S.E. 481 (N.C. 1917); Hilton v. Thatcher, 88 P. 20 (Utah 1906); Ruby v. Ruby, 163 S.E. 717 (W. Va. 1932).*

See Thomas v. Blair, 93 So. 704 (Ala. 1922); Chamberlain v. Anderson, 190 N.W. 501 (Iowa 1922); 26 A.L.R. 957.

See also Jonas P. Hill, *Reducing Estate Taxes By Taking Dower,* 23 Fla. L.J. 316.

Marriage is such a contract as is not protected by U.S. Const. art. 1, §10. *Maynard v. Hill, 125 U.S. 190 (1888).*

The right to dower is determined by law at husband's death and is not protected by due process. *Fletcher v. Felker, 97 F. Supp. 755 (D. Ark. 1951).*

Vito v. Vito, 272 F.2d 555 (D.C. Cir. 1959) (a statute abolishing dower or curtesy and substituting an intestate share in the other spouse's realty did not have a retrospective effect).

New York has in effect established a separate expanded probate estate for the surviving spouse. This includes gifts causa mortis, Totten Trusts, joint bank accounts, joint tenancies and inter vivos trusts subject to a power to revoke, consume or invade, but does not include United States bonds, life insurance proceeds, and pension and retirement funds. N.Y. Decedent Estate Law, §§18a, 18b.

(n715)Footnote 715. *Class v. Strack, 96 A. 405 (N.J. 1915).*

New York statute affects property acquired prior to Sept. 1, 1930. *In re Sealey's Will, 113 N.Y.S.2d 42 (1952); In re Fidler's Estate, 113 N.Y.S.2d 634 (1951).*

(n716)Footnote 716. *Ferry v. Spokane, P. & S.R. Co., 268 F. 117 (9th Cir. 1920), aff'd, 258 U.S. 314 (1922),* 1326; *Buffington v. Grosvenor, 27 P. 137 (Kan. 1891); Miner v. Morgan, 119 N.W. 781 (Neb. 1909); Bennett v. Harris, 8 N.W. 222 (Wis. 1881).*

(n717)Footnote 717. *Randall v. Krieger, 90 U.S. (23 Wall) 137 (1874); Bateman v. Donovan, 131 F.2d 759 (9th Cir. 1942); Boyd v. Harrison, 36 Ala. 533 (1860); State v. Boney, 245 S.W. 315 (Ark. 1922); McNeer v. McNeer, 142 Ill. 388, 32 N.E. 681 (Ill. 1892); Billings v. People, 59 N.E. 798 (Ill. 1901); Noel v. Ewing, 9 Ind. 37 (1857); Moore v. Kent, 37 Iowa 20 (1873); Chamberlain v. Anderson, 190 N.W. 501 (Iowa 1922); Hamblin v. Marchant, 175 P. 678 (Kan. 1918), aff'd, 180 P. 811 (Kan. 1918); Helm v. Board, 70 S.W. 679 (Ky. 1902); Barbour v. Barbour, 46 Me. 9 (1858); Griswold v. McGee, 112 N.W. 1020, 113 N.W. 382 (Minn. 1907); Magee v. Young, 40 Miss. 164 (1866); Gerhardt v. Sullivan, 152 A. 663 (N.J. 1930); Moore v. New York, 8 N.Y. 110 (1853); Weaver v. Gregg, 6 Ohio St. 547 (1856); Long v. Long, 124 N.E. 161 (Ohio 1919); Appeal of Melizet, 17 Pa. 449 (1851); Shell v. Duncan, 10 S.E. 330 (S.C. 1889); 5 L.R.A. 821.*

Statute providing for shares of spouses dissenting from the will is subject to amendment by the *General Assembly. Porter v. Mosely, 517 S.W.2d 524 (Tenn. 1974).*

(n718)Footnote 718. *Griswold v. McGee, 112 N.W. 1020, 113 N.W. 382 (Minn. 1907).*

(n719)Footnote 719. *In re Alexander, 30 A. 817 (N.J. 1894); Class v. Strack, 96 A. 405 (N.J. 1915).*

(n720)Footnote 720. *Pierce v. O'Brien, 29 F. 402 (C.C.N.D. Iowa 1886); Vito v. Vito, 272 F.2d 555 (D.C. Cir. 1959)* (in District of Columbia dower has been abolished and an intestate share in other spouse's realty has been substituted, but neither spouse can convey the realty free and clear of the other spouse's share). *Wadsworth v. Miller, 15 So. 520 (Ala. 1894).*

Arizona did not adopt §2-113 of the U.P.C. providing for the abolition of dower and curtesy: nor §2-201, the spouse's elective share; nor §2-202, the spouse's augmented estate; nor §2-203, the spouse's personal election; nor §2-205, take time limit for election; nor §2-206, the effect of election; nor §2-207, charging the spouse with gifts received and for contribution. *Graves v. Fligor, 38 N.E. 853 (Ind. 1894); Hatch v. Small, 59 P. 262 (Kan. 1899); Ellenstein v. Rider, 327 S.W.2d 945 (Ky. 1959)* (in Ky. Rev. Stat., §§392.020-392.080, the widow takes one-half of the realty in fee unless she elects against the will, in which case she takes one-third for life); *Leavitt v. Tasker, 76 A. 953 (Me. 1910); Cheney v. Cheney, 85 A. 387 (Me. 1912); Morrison v. Rice, 29 N.W. 168 (Minn. 1886).*

Individual property may be conveyed by the spouse so as to cut off dower or curtesy. Mont. Rev. Code 1947, §36-111 did not adopt §2-113 of the U.P.C. providing for the abolition of dower and curtesy.

See Paul L. Sayre, *Husband and Wife as Statutory Heirs, 42 Harv. L. Rev. 330 (1928).*

> "It seems clear, therefore, that the right of the widow, under the statute, to a third of the lands of her deceased husband, is not as dowress, but it rests in her, at his death as an heir by descent. The estate thus given is much larger than that of dower. It is a fee simple, and not merely an estate for life. It differs in many other respects from dower; it entitles the wife, without assignment, to immediate possession, as a tenant in common with the other heirs, and she may convey it at pleasure. On the other hand, it has some of the incidents of dower. The widow is made a favored heir, and the interest which descends to her is exempt from liability for the payment of the debts of the estate. And so, by §27, she is not only entitled

to a third of all the lands of which her husband may die seised in fee simple, and of all in which he has an equitable interest at the time of his death, but also of all of which he may have been seised in fee simple at any time during the coverture, in the conveyance of which she did not join in due form of law," etc. *Fletcher v. Holmes, 32 Ind. 497 (1870).*

(n721)Footnote 721. *In re Cote's Will, 87 N.Y.S.2d 555 (1949).*

Statutory right of husband to dissent from wife's will held unconstitutional under married woman's property provision in *North Carolina. Dudley v. Staton, 126 S.E.2d 590 (N.C. 1962); 1963 Duke L.J. 161.* A widow may not exercise statutory elective shares against individual pieces of property, but rather must release her dower and homestead rights to take the statutory share. *Riverwood Commercial Properties, Inc. v. Cole, 639 A.2d 714 (N.H. 1994)* (holding that statutory elective shares taken in place of dower and homestead rights cannot be exercised against individual pieces of property, but rather the taker must release her dower and homestead rights in the individual pieces to take the statutory share).

(n722)Footnote 722. *Geiger v. Merle, 196 N.E. 497 (Ill. 1935).*

In Ohio neither a husband nor a wife has a right in the other's real property, but neither can be excluded from the other's dwelling. Ohio Rev. Code, §3103.04. *See Slansky v. Slansky, 293 N.E.2d 302 (Ohio 1973).*

(n723)Footnote 723. *Consolidated Rendering Co. v. Martin, 145 A. 896 (Me. 1929).*

(n724)Footnote 724. *Grissom v. Moore, 6 N.E. 629 (Ind. 1886); Fowler v. Chadima, 111 N.W. 808 (Iowa 1907); In re Noble's Estate, 190 N.W. 511 (Iowa 1922); Consolidated Rendering Co. v. Martin, 145 A. 896 (Me. 1929); Keith v. Mellenthin, 100 N.W. 366 (Minn. 1904); In re Parks, 87 P. 900 (Utah 1906).*

(n725)Footnote 725. *Smith v. Smith, 46 P. 128 (Colo. 1896); Small v. Small, 42 P. 323 (Kan. 1895), 30 L.R.A. 243; Wash v. Wash, 87 S.W. 993 (Mo. 1905).*

(n726)Footnote 726. *Henderson v. United States, 18 F. Supp. 404 (Ct. Cl. 1937); McGuire v. Cook, 135 S.W. 840 (Ark. 1911); Blankenship v. Hall, 84 N.E. 192 (Ill. 1908); Magee v. Young, 40 Miss. 164 (1866); Davidson v. Richardson, 89 P. 742, 91 P. 1080 (Or. 1907).*

(n727)Footnote 727. *Mathewson v. Mathewson, 63 A. 285 (Conn. 1906); Harrington v. Lowe, 84 P. 570 (Kan. 1906); Flandermeyer v. Cooper, 98 N.E. 102 (Ohio 1912).*

Florida has extended statutory rights in lieu of dower to widowers, but permits either spouse to sell realty during lifetime. This is effective as of October 1, 1973. Fla. Stat. 1973, §§731.34 - 731.66.

Either spouse may make transfers of his or her property without the other spouse's consent as long as not a mere sham or only intangible because lacking essential donative intent. *Dzralaray's Estate v. Dzralaray, 368 N.E.2d 780 (Ill. App. 1977).*

(n728)Footnote 728. *Perkins v. Blethen, 78 A. 574 (Me. 1911); Frankel v. Frankel, 53 N.E. 398 (Mass. 1899); Schilling v. Darmody, 52 S.W. 291 (Tenn. 1899).*

(n729)Footnote 729. *Wilson v. Hilligoss, 278 Ill. App. 564 (1935); In re Judd's Estate, 11 N.E.2d 989 (Ill. App. 1937)* (Illinois law applies to both realty and personalty).

(n730)Footnote 730. *In re Bachmann's Estate, 272 N.Y.S. 467 (1934).*

(n731)Footnote 731. Under §18 of the New York Decedent's Estates Act a testator not survived by issue must leave 50% of his estate to his widow or set up a trust for her for life for that amount. *In re Niedelman's Estate, 175 N.Y.S.2d 694 (1958).*

In New York the statutory right of the wife is a sufficiently strong legal interest to permit her to set aside an illusory transfer in fraud of her statutory right. *See* Harry H. Schneider & Bertram M. Landesman, *Life, Liberty and Dower, 19 N.Y.U. L. Rev. 343 (1942).*

In Florida the surviving spouse inherits all if there are no lineal descendants. Fla. Stat. 1971, §781.23(2).

New Hampshire now has statutory rights in lieu of dower and curtesy. N.H. Rev. Stat. 1955, §560:3.

(n732)Footnote 732. *In re Sadowski's Estate 26 Erie 287* (Pa.).

(n733)Footnote 733. *Safe Deposit & Trust Co. v. Tait, 3 F. Supp. 51 (D. Md. 1933).*

(n734)Footnote 734. Florida chapter 71-25 bars widow's dower unless she files an instrument within three years after her husband's death claiming dower. Fla. Stat. 1969, §733.11.

(n735)Footnote 735. Nebraska did not adopt §2-113 of the U.P.C. providing for the abolition of dower and curtesy.

(n736)Footnote 736. Mont. Code §36-111.

(n737)Footnote 737. Ind. Code §29-1-2-1-2; Ind. Code §29-1-2-3.1.

(n738)Footnote 738. *See* Lavere C. Sertt, *Antenuptial Agreements in Pennsylvania, 55 Dick. L. Rev. 382 (1951).*

(n739)Footnote 739. William Blackstone, Commentries 137.

(n740)Footnote 740. *Fuller v. Virginia Trust Co., 33 S.E.2d 201 (Va. 1955).*

In Indiana a married man may encumber or contract or deed realty which he owns without his wife joining. And such a conveyance bars the wife's marital interest. Ind. Code §29-1-2-3.1.

(n741)Footnote 741. 2 William Blackstone, Commentaries 139.

(n742)Footnote 742. Coke on Littleton, §36b. 2 Bl. Comm. 137.

A conveyance by the husband to the wife for life with remainder over to himself or another is a jointure and bars dower. *Ramsey v. Yount, 120 N.E. 618 (Ind. App. 1918).*

(n743)Footnote 743. *O'Brien v. Elliott, 15 Me. 125 (1838); Stilley v. Folger, 14 Ohio 610 (1846);* Caruthers v. Caruthers, 4 *Bro. Ch. 500, 29 Eng. Rep. 1010 (1794).*

Parties to an antenuptial contract stand in a confidential relationship to each other. *Kline v. Kline, 57 Pa. 120 (1868).*

Althouse v. Althouse, 50 Del. Co. 182 (Pa.).

See Antenuptial Agreements: the Contractual Incapacity of Minors, 22 Loyola L. Rev. 1061 (1976).

(n744)Footnote 744. *Fahs v. Merrill, 142 F.2d 651 (5th Cir. 1944); Simpson v. Weatherman, 227 S.W.2d 148 (Ark. 1950); North v. Ringling, 7 So. 2d 476 (Fla. 1940); Parker v. Gray, 148 N.E. 323 (Ill. 1925); Lagow v. Snapp, 81*

N.E.2d 144 (Ill. 1948); Lefebure v. Lefebure, 121 N.W. 1025 (Iowa 1909); Veeder v. Veeder, 192 N.W. 409 (Iowa 1923); 29 A.L.R. 191;*Fischer v. Leach, 258 P. 295 (Kan. 1927); In re Garden's Estate, 148 P.2d 745 (Kan. 1944); Wellington v. Rugg, 136 N.E. 831 (Mass. 1922); French v. McAnarney, 195 N.E. 714 (Mass. 1935);* 98 A.L.R. 530; *Chapman v. Corbin, 316 S.W.2d 880 (Mo. App. 1958); Hampton v. Hampton Holding Co., 111 A.2d 761 (N.J. 1955); Hurwitz v. Hurwitz, 215 N.Y.S. 184 (1926); In re Saffer's Estate, 241 N.Y.S.2d 681 (1963); Speckman v. Speckman, 128 N.E.2d 761 (Ohio App. 1954); In re Fennell's Estate, 56 A. 875 (Pa. 1904); McCulley v. Hardeman, 223 S.W. 146 (Tenn. 1920).*

Premarital agreements are of a personal nature and do not descend to the heirs of a spouse. *Frey v. Estate of Sargent, 533 S.W.2d 142 (Tex. Civ. App. 1976).*

(n745)Footnote 745. *Jones v. McGonigle, 37 S.W.2d 892 (Mo. 1931); In re Gillen's Estate, 380 P.2d 357 (Kan. 1963).*

(n746)Footnote 746. *Whistler v. Allward, 12 N.E.2d 299 (Ohio App. 1936).*

(n747)Footnote 747. *Wlodarek v. Wlodarek, 175 A. 455 (Md. 1934)*

> The general rule deducible from the great weight of authority is that a marriage settlement, which was valid in its formation and which was not fraudulently induced in contemplation of the subsequent marital misconduct, is not abrogated by the divorce of the parties for marital misconduct arising after the marriage, unless the language of the instrument or contract contains an express provision against the conduct in question.

Crise v. Smith, 133 A. 110 (Md. 1920).

Failure of a husband to disclose an existing life interest in a trust giving him a substantial tax-free income made invalid antenuptial agreements with the wife, since the trust was not property over which the husband had a right of testamentary disposition and to which the wife could assert dower. *In re Perelman's Estate, 263 A.2d 375 (Pa. 1970).*

(n748)Footnote 748. *Lawrence v. Bartlett, 84 Mass. (2 Allen) 36 (1861); In re Appleby's Estate, 111 N.W. 305 (Minn. 1907).*

(n749)Footnote 749. *Prewit v. Wilson, 103 U.S. 22 (1880); Dova v. Hancock, 102 So. 646 (Fla. 1924); Braecklein v. McNamara, 127 A. 497 (Md. 1925).*

An antenuptial contract which purports to restrict the husband's property liability is void as against public policy, *Fricke v. Fricke, 42 N.W.2d 500 (Wis. 1950);* even where antenuptial contracts contemplating death are valid. *In re Appleby's Estate, 111 N.W. 305 (Minn. 1907).*

(n750)Footnote 750. Barrow v. Barrow, 2 Dickens 504, *21 Eng. Rep. 365 (1774).*

(n751)Footnote 751. *Appeal of Staub, 33 A. 615 (Conn. 1895); In re Cowles' Appeal, 49 A. 195 (Conn. 1901); McMahill v. McMahill, 113 Ill. 461 (1885); Dickason v. English, 112 N.E. 65 (Ill. 1916); Shaffer v. Matthews, 77 Ind. 83 (1881); McNutt v. McNutt, 19 N.E. 115 (Ind. 1888), 2 L.R.A. 372; Roush v. Hullinger, 86 N.E.2d 714 (Ind. App. 1949); Paine v. Hollister, 29 N.E. 541 (Mass. 1885); Desnoyer v. Jordan, 7 N.W. 140 (Minn. 1880); Tiernan v. Binns, 92 Pa. 248 (1879); In re Deller's Estate, 124 N.W. 278 (Wis. 1910).*

(n752)Footnote 752. *Robbins v. Robbins, 80 N.E. 326 (Ill. 1907); McFadden v. McFadden, 139 A.2d 774 (N.J. Super. 1958). See Hudnall v. Ham, 56 N.E. 172 (Ill. 1899).*

Transfer is merely prima facie fraudulent. *Dunbar v. Dunbar, 98 N.E. 563 (Ill. 1912); Bookout v. Bookout, 49 N.E. 824 (Ind. 1898).*

No presumption as to fraud. *Noah v. Noah, 224 N.W. 611 (Mich. 1929); Dudley v. Dudley, 45 N.W. 602 (Wis. 1890).*

Transfer on eve of marriage is fraudulent if clandestine as a matter of law. *Arnegaard v. Arnegaard, 75 N.W. 797 (N.D. 1898); Ward v. Ward, 57 N.E. 1095 (Ohio 1900).*

Dower can be barred by an antenuptial agreement only by a fair and reasonable provision for the wife or in absence thereof a full disclosure of the husband's wealth and independent advice with full knowledge of the woman's marital property rights. *Batleman v. Rubin, 98 S.E.2d 519 (Va. 1957).*

(n753)Footnote 753. *King v. King, 82 S.W. 101 (Mo. 1904); Luther v. Luther, 67 S.E.2d 345 (N.C. 1951)* (statute authorizing releasing of dower required written instrument).

(n754)Footnote 754. *Martin v. Martin, 22 Ala. 86 (1853); Robertson v. Robertson, 25 Iowa 350 (1868); McKee v. Reynolds, 26 Iowa 578 (1869); Paup v. Shelby County State Bank, 193 N.W. 529 (Iowa 1923)* (statutory provision); *Rowe v. Hamilton, 3 Greenl. 63 (Me. 1824); Johnson v. Marsh, 19 N.W.2d 366 (Neb. 1945); Focht v. Wakefield, 17 N.W.2d 627 (Neb. 1945); Carson v. Murray, 3 Paige 483 (N.Y. 1832); Martin v. Dwelly, 6 Wend. 9 (N.Y. 1830); McFarland v. Febiger, 7 Ohio 194 (1835); House v. Fowle, 25 P. 376 (Or. 1890);* in Oregon neither husband nor wife can contract with the other regarding any estate growing out of the marriage relation, and conveyances between married persons intended to cut off or relinquish such estates as curtesy or dower are entirely void. *Chance v. Weston, 190 P. 155 (Or. 1920); McMorris v. Webb, 17 S.C. 558 (1882); Land v. Shipp, 36 S.E. 391 (Va. 1900); Lewis v. Apperson, 49 S.E. 978 (Va. 1905); Powell v. Tilson, 170 S.E. 750 (Va. 1933).*

(n755)Footnote 755. *Mather v. Mather, 154 P.2d 684 (Cal. 1984); Stokes v. Stokes, 88 N.E. 829 (Ill. 1909); Edwards v. Edwards, 107 N.E. 847 (Ill. 1915); Bechtel v. Barton, 110 N.W. 935 (Mich. 1907); Hogg v. Lindridge, 135 N.Y.S. 928 (1912); In re Fennell's Estate, 56 A. 875 (Pa. 1904); In re Nickolay's Estate, 25 N.W.2d 451 (Wis. 1946)* (postnuptial contract will bar dower).

If spouses have previously executed a deed of separation authorizing the other to individually convey an interest in realty, a subsequent conveyance by the authorized spouse is valid. N. C. Gen. Stat., §39-13.4.

(n756)Footnote 756. *Pfifer v. First Nat'l Bank, 385 P.2d 1007 (Or. 1863).*

Property settlement entered into, contemplating divorce, did not prevent wife from electing against the will where testator died before divorce. *Crist v. Nesbit, 352 S.W.2d 53 (Mo. 1961).*

(n757)Footnote 757. *Stokes v. Stokes, 88 N.E. 829 (Ill. 1909).*

(n758)Footnote 758. *Williamson v. First Nat'l Bank, 164 S.E. 777 (W. Va. 1931).*

An antenuptial agreement can fix alimony in the event of ultimate separation or divorce of the parties but may be increased or decreased under changed conditions under the divorce statutes. Such agreement is not void as against public policy. *Posner v. Posner, 237 So. 2d 186 (Fla. App. 1970).*

In Virginia for an antenuptial contract to be valid there must be: (a) a full and fair disclosure of financial worth, (b) a fair and reasonable provision for the wife or adequate evidence that with full knowledge she had waived, and (c) if the wife's provision is not fair and reasonable the burden is on the husband to uphold the contract. *Batleman v. Rubin, 98 S.E.2d 519 (Va. 1957).*

(n759)Footnote 759. *Merchants Nat'l Bank v. Hubbard, 133 So. 723 (Ala. 1931).*

(n760)Footnote 760. *Bechtel v. Barton, 110 N.W. 935 (Mich. 1907).*

(n761)Footnote 761. *Hill v. Boland, 93 A. 395 (Md. 1915).*

(n762)Footnote 762. *Redwine v. Redwine, 169 S.W. 864 (Ky. 1914); Harley v. Orvin, 14 S.E.2d 701 (S.C. 1941); In re Cortte's Estate, 283 N.W. 336 (Wis. 1939). See Collier v. Tatum, 160 So. 530 (Ala. 1935)* (agreement held unenforceable because of coercion of husband).

(n763)Footnote 763. *In re Bell, 50 P. 615 (Utah 1905).*

(n764)Footnote 764. *Egger v. Egger, 123 S.W. 928 (Mo. 1909).*

(n765)Footnote 765. *In re McVay's Estate, 103 A. 505 (Pa. 1918).*

(n766)Footnote 766. *North v. North, 100 S.W.2d 582 (Mo. 1936); Davis v. Davis, 196 S.W.2d 447 (Mo. App. 1946); Meyer v. Meyer, 91 N.E.2d 892 (Ohio 1950). See Harris v. Internal Rev. Comm'r, 340 U.S. 106 (1950)* (postnuptial settlement in contemplation of divorce was not a taxable gift).

(n767)Footnote 767. *Simpson v. Weatherman, 227 S.W.2d 148 (Ark. 1950); Van Koten v. Van Koten, 154 N.E. 146 (Ill. 1926); Keller v. Keller, 247 P. 433 (Kan. 1926); Pearre v. Grossnickle, 114 A. 725 (Md. 1921); Smith v. Johnson, 14 N.W.2d 424 (Neb. 1944); Eschner v. Eschner, 131 S.E. 800 (Va. 1926); Welsh v. Welsh, 69 S.E.2d 34 (W. Va. 1952)* (intent to release dower must be clearly manifested); *In re Nickolay's Estate, 25 N.W.2d 451 (Wis. 1946).*

(n768)Footnote 768. *In re Berner, 187 N.W. 377 (Mich. 1922).*

(n769)Footnote 769. *Merchants Nat'l Bank v. Hubbard, 133 So. 723 (Ala. 1931); Rash v. Bogart, 146 So. 814 (Ala. 1933); Sherman v. Sherman, 252 S.W. 27 (Ark. 1923); Fischer v. Leach, 258 P. 295 (Kan. 1927); In re Schweizer, 199 N.Y.S. 948 (1923); Hoagland v. Hoagland, 148 N.E. 585 (Ohio 1925).*

Such an agreement will not be sustained when it is part of a collusive agreement to obtain a divorce. *Gurley v. Gorman, 102 So. 65 (Miss. 1924).*

If spouses have previously executed a deed of separation authorizing the other to individually convey an interest in realty, a subsequent conveyance by the authorized spouse is valid. N.C. Gen. Stat., §39-13.4.

(n770)Footnote 770. *Sherman v. Sherman, 252 S.W. 27 (Ark. 1923).*

(n771)Footnote 771. *In re Friese's Estate, 9 A.2d 401 (Pa. 1939).*

(n772)Footnote 772. *In re Cortte's Estate, 283 N.W. 336 (Wis. 1939).*

(n773)Footnote 773. *Harlan v. Weatherly, 31 S.E.2d 263 (Va. 1944).*

(n774)Footnote 774. *In re McClellan's Estate, 75 A.2d 595 (Pa. 1950).*

Dower can be barred by an antenuptial agreement only by a fair and reasonable provision for the wife or in absence thereof a full disclosure of the husband's wealth and independent advice with full knowledge of the woman's marital property rights. *Batleman v. Rubin, 98 S.E.2d 519 (Va. 1957).*

(n775)Footnote 775. *In re Welch's Estate, 223 P.2d 978 (Kan. 1950); In re Johnson's Estate, 224 P.2d 1032 (Kan. 1950); In re Sturmer's Estate, 100 N.E.2d 155 (N.Y. 1951).*

(n776)Footnote 776. Ind. Stat., §6-306. *In re McClellan's Estate, 75 A.2d 595 (Pa. 1950).*

(n777)Footnote 777. *In re Patterson's Will, 73 N.Y.S.2d 433 (1947).*

(n778)Footnote 778. *First Nat'l Bank v. Miley, 65 A.2d 553 (N.J. Super. 1949); In re Paulson's Will, 36 N.W.2d 95 (Wis. 1949).*

(n779)Footnote 779. *Bartle v. Bartle, 216 P.2d 649 (Colo. 1950).*

(n780)Footnote 780. *Id.*

(n781)Footnote 781. 2 William Blackstone, Commentaries, 137. A jointure was given the wife in lieu of dower where the husband had only a use, since there was no dower where the husband was not seised.

(n782)Footnote 782. *McGee v. McGee, 91 Ill. 548 (1879); Grider v. Eubanks, 75 Ky. (12 Bush) 510 (1877); Vance v. Vance, 21 Me. 364 (1842); Hastings v. Dickinson, 7 Mass. 153 (1810); Martien v. Norris, 3 S.W. 849 (Mo. 1887); Graham v. Graham, 22 N.Y.S. 299 (1893); Grogan v. Garrison, 27 Ohio St. 50 (1875).*

(n783)Footnote 783. *Vance v. Vance, 21 Me. 364 (1842).*

(n784)Footnote 784. *Culberson v. Culberson, 37 Ga. 296 (1867); Worrell v. Forsyth, 30 N.E. 673 (Ill. 1892); Jenkins v. Holt, 109 Mass. 261 (1872); Graham v. Graham, 22 N.Y.S. 299 (1893); Pierce v. Pierce, 71 N.Y. 154 (1877); Cauley v. Lawson, 58 N.C. 132 (1859); Stilley v. Folger, 14 Ohio 610 (1846); Hinkle v. Hinkle, 11 S.E. 993 (W. Va. 1890).*

Although void at law, postnuptial agreements between husband and wife for release of dower have been enforceable in equity if fair and equitable, and sustained by adequate consideration, and wife's consent has been given understandingly uninfluenced by fraud, deceit, oppression or duress. *Hampton v. Hampton Holding Co., 106 A.2d 20, aff'd, 111 A.2d 761 (N.J. Super. 1955).*

Even if corporation which held land subject to life estate in one of corporate owners was holding land "to the use of" husband, widow upon husband's decease was not entitled to dower interest in such property where she had had adequate compensation for release of her dower interest in property, upon signing of separation agreement. *Hampton v. Hampton Holding Co., 106 A.2d 20 (N.J. Super. 1954), aff'd, 111 A.2d 761 (N.J. Super. 1955).*

Where wife willingly, knowingly and understandingly executed a release of dower in certain realty, receiving therefor consideration which was not grossly inadequate, such release effectively conveyed wife's interest in such property and precluded her from subsequently recovering dower. *Hampton v. Hampton Holding Co., 106 A.2d 20 (N.J. Super. 1954), aff'd, 111 A.2d 761 (N.J. Super. 1955).*

(n785)Footnote 785. A conveyance by the husband to the wife for life, with remainder over to himself and another, is a jointure and bars dower. *Ramsey v. Yount, 120 N.E. 618 (Ind. App. 1918).*

(n786)Footnote 786. *Mannan v. Mannan, 55 N.E. 855 (Ind. 1900).*

(n787)Footnote 787. *Huff v. Wheeler, 59 N.Y.S. 716 (1899).*

(n788)Footnote 788. *Mannan v. Mannan, 55 N.E. 855 (Ind. 1900).*

(n789)Footnote 789. 1 Coke, Inst. 37(a). *See Bryan v. Bryan, 34 S.W. 260 (Ark. 1896); Comstock v. Comstock, 225 S.W. 621 (Ark. 1920); Grider v. Eubanks, 75 Ky. (12 Bush) 510 (1877); Vance v. Vance, 21 Me. 364 (1842); Saunders v. Saunders, 46 S.W. 428 (Mo. 1898).*

See Lavere C. Scott, *Antenuptial Contracts in Pennsylvania, 55 Dick. L. Rev. 382.*

(n790)Footnote 790. *Hannon v. Hannon, 127 P. 466 (Mont. 1912); Rowell v. Barber, 125 N.W. 937 (Wis. 1910).*

(n791)Footnote 791. Earl of Bucks v. Drury, 3 Bro. Parl. Ca. 492 *See* Jordan v. Savage, Bac. Ab. Vol. 3, 717.

(n792)Footnote 792. *Hastings v. Dickinson, 7 Mass. 153 (1810); Gibson v. Gibson, 15 Mass. 106 (1818); Sullings v. Richmond, 87 Mass. (5 Allen) 187 (1862); Hannon v. Hannon, 127 P. 466 (Mont. 1912); Gelzer v. Gelzer, 1 S.C. Eq. (Bail. Eq.) 387 (1831).*

(n793)Footnote 793. 2 William Blackstone, Commentaries 137.

(n794)Footnote 794. *Statute 27 Hen. 8,* ch. 10, §6.

(n795)Footnote 795. *Saunders v. Saunders, 46 S.W. 428 (Mo. 1898); Verplank v. Sterry, 12 Johns. 536 (N.Y. 1815); Appeal of Jones, 62 Pa. 324 (1869); Herring v. Wickham, 70 Va. (29 Gratt.) 628 (1878).*

(n796)Footnote 796. *Crump v. Crump, 107 S.W. 778 (Ky. 1908); Maynard v. Maynard, 146 S.W.2d 343 (Ky. 1940).*

(n797)Footnote 797. *Bryan v. Bryan, 34 S.W. 260 (Ark. 1896).*

(n798)Footnote 798. *Glase v. Davis, 21 N.E. 319 (Ind. 1889).*

(n799)Footnote 799. *Roush v. Hullinger, 86 N.E.2d 714 (Ind. App. 1949).*

(n800)Footnote 800. Coke on Littleton, §36b; 2 Blackstone, Commentaries 137; *Andrews v. Andrews, 8 Conn. 79 (1830); Culberson v. Culberson, 37 Ga. 296 (1867); Grider v. Eubanks, 75 Ky. (12 Bush) 510 (1870); Vance v. Vance, 21 Me. 364 (1842); Wentworth v. Wentworth, 69 Me. 247 (1879); Miller v. Goodwin, 74 Mass. (8 Gray) 542 (1857); Perry v. Perryman, 19 Mo. 469 (1854); McCartee v. Teller, 8 Wend 267 (N.Y. 1831); Graham v. Graham, 22 N.Y.S. 299 (1893); In re Phillips, 58 N.E.2d 504 (N.Y. 1944); Grogan v. Garrison, 27 Ohio St. 50 (1875); In re McCready's Estate, 175 A. 554 (Pa. 1934); Land v. Shipp, 36 S.E. 391 (Va. 1900);* Vernon's Case, 4 Coke 1; Drury v. Drury, 2 Eden 39.

(n801)Footnote 801. Shaw v. Boyd, 5 Serg. & Rawle 309 (Pa. 1819).

(n802)Footnote 802. *Broyles v. Magee, 71 S.W.2d 149 (Mo. App. 1934).*

(n803)Footnote 803. Coke on Littleton, §36b; *Butts v. Trice, 69 Ga. 74 (1882); Shane v. McNeill, 41 N.W. 166 (Iowa 1889); Newby v. Cox, 4 Ky. L. 744 (1883); Swaine v. Perine, 5 Johns. Ch. 482 (N.Y. Ch. 1821); Appeal of Hitner, 54 Pa. 110 (1867); Land v. Shipp, 36 S.E. 391 (Va. 1900);* Vernon's Case, 4 Coke 1.

Contra, Garbut v. Bowling, 81 Mo. 214 (1883).

(n804)Footnote 804. *Jones v. McGonigle, 37 S.W.2d 892 (Mo. 1931).*

(n805)Footnote 805. *McCaulley v. McCaulley, 30 A. 735 (Del. 1884).*

(n806)Footnote 806. *Pippin v. Sams, 177 S.E. 659 (S.C. 1934).*

(n807)Footnote 807. *Chase v. Alley, 19 A. 397 (Me. 1890).*

A conveyance to the wife during lifetime is not a jointure in lieu of dower, since a jointure takes effect on the

husband's death not *in praesenti*. *Fuller v. Virginia Trust Co., 33 S.E.2d 201 (Va. 1945).*

(n808)Footnote 808. *Watson v. Watson, 174 S.E. 33 (S.C. 1934).*

(n809)Footnote 809. *Juhasz v. Juhasz, 16 N.E.2d 328 (Ohio St. 1938).*

(n810)Footnote 810. *Finn v. Grant, 278 N.W. 225 (Iowa 1938).*

(n811)Footnote 811. 1 William Cruise & Simon Greenleaf, *A Digest of the Law of Real Property* (2d ed. 1856-57) 195.

(n812)Footnote 812. Ashton's Case, 2 Dyer 228a; *43 Eng. Rep. 504* (N.D.).

(n813)Footnote 813. *See* 1 R. S. Donnison Roper, *A Treatise on the Law of Property Arising from the Relation Between Husband and Wife* 465 (1824).

(n814)Footnote 814. *Huff v. Wheeler, 59 N.Y.S. 716 (1889).*

(n815)Footnote 815. *2 Hen. 7,* ch. 20.

(n816)Footnote 816. *Bassett v. Bassett, Finch. 189, 23 Eng. Rep. 104 (1674);* Cook v. Winford, 1 Ab. Eq. 221.

(n817)Footnote 817. *Fisher v. Forbes, 9 Vin. Ab. 373, 22 Eng. Rep. 334 (1734).*

(n818)Footnote 818. 1 Coke Inst. 36(b); *Vance v. Vance, 21 Me. 364 (1842); Hastings v. Dickinson, 7 Mass. 153 (1810); Crain v. Cavana, 36 Barb. (N.Y.) 410; McCartee v. Teller 8 Wend. 267 (N.Y. 1831); Grogan v. Garrison, 27 Ohio St. 50 (1875); Fuller v. Virginia Trust Co., 33 S.E.2d 201 (Va. 1945).*

(n819)Footnote 819. *Chaffee v. Chaffee, 40 A. 247 (Vt. 1897); Land v. Shipp, 36 S.E. 391 (Va. 1900).*

(n820)Footnote 820. Wood v. Shirley, Cro. Jac. 486; Caruthers v. Caruthers, 4 *Bro. Ch. 500.*

(n821)Footnote 821. *Redwine v. Redwine, 169 S.W. 864 (Ky. 1914).*

(n822)Footnote 822. *Vance v. Vance, 21 Me. 364 (1842); Schnepfe v. Schnepfe, 92 A. 891 (Md. 1914); Cunningham v. Cunningham, 148 A. 444 (Md. 1930); Jones v. McGonigle, 37 S.W.2d 892 (Mo. 1931); Grogan v. Garrison, 27 Ohio St. 50 (1875); Shackelford v. Shackelford, 27 S.E.2d 354 (Va. 1943).*

(n823)Footnote 823. *Comstock v. Comstock, 225 S.W. 621 (Ark. 1920); Maynard v. Maynard, 146 S.W.2d 343 (Ky. 1940) But see Eaton v. Eaton, 124 N.E. 37 (Mass. 1919).*

(n824)Footnote 824. 2 William Blackstone, Commentaries 137; Kenelm Edward Digby, An Introduction to The History of The Law of Real Property (2d ed. 1876); Digby, Hist. Law Real Prop. (5th ed.), 351.

(n825)Footnote 825. *27 Hen. 8,* ch. 10.

(n826)Footnote 826. Coke on Littleton, §36b; *Kennedy v. Kennedy, 50 N.E. 756 (Ind. 1898); Vance v. Vance, 21 Me. 364 (1842); Schnibbe v. Schnibbe, 179 N.Y.S. 54, aff'd, 182 N.Y.S. 949 (App. Div. 1920); Grogan v. Garrison, 27 Ohio St. 50 (1875).*

"But then these four requisites must be punctually observed:

> 1. The jointure must take effect immediately on the death of the husband. 2. It must be for her own life at least, and not *pur autre vie*, or for any term of years, or other smaller estate. 3. It must be made to

herself, and no other in trust for her. 4. It must be made, and so in the deed particularly expressed to be, in satisfaction of her whole dower, and not of any particular part of it. If the jointure be made to her after marriage, she has her election after husband's death, as in dower *ad ostium ecclesiae*, and may either accept it, or refuse it and betake herself to her dower at common law; for she was not capable of consenting to it during coverture. And if, by any fraud or accident, a jointure made before marriage proves to be on a bad title, and the jointress is evicted, or turned out of possession, she shall then (by the provisions of the same statute) have her dower *pro tanto* at the common law." 2 William Blackstone, Commentaries 138.

(n827)Footnote 827. *See Cowdrey v. Cowdrey, 67 A. 111 (N.J. Eq. 1907).*

(n828)Footnote 828. *Gelzer v. Gelzer, 1 S.C. 387 (1831).*

(n829)Footnote 829. *See* Restatement, Conflict of Laws, §332.

(n830)Footnote 830. If the estate be made to others in fee simple, or for her life, in trust, so that the estate remain in them, although it be for her benefit, and by her assent, yet it is no bar to dower. 1 Coke Inst. 36(b). *See Fraser v. Stokes, 71 S.E. 545 (Va. 1911).*

(n831)Footnote 831. *Craig v. Craig, 90 Ind. 215 (1883); Swaine v. Perine, 5 Johns. Ch. 482 (N.Y. Ch. 1821);* Barnet v. Barnet, 15 Serg. & Rawle 72 (Pa. 1826).

(n832)Footnote 832. Rev. Stat., §392.120; Gen. Laws 1955, ch. 189, §§7, 9; Comp. Laws 1948, §§558.14, 558.15, 558.20; Mckinney's Consol. Laws, Real Prop. Law, §§197, 199.

(n833)Footnote 833. *Perry v. Perryman, 19 Mo. 469 (1854); King v. King, 82 S.W. 101 (Mo. 1904).*

(n834)Footnote 834. *Perry v. Perryman, 19 Mo. 469 (1854); Rice v. Waddill, 67 S.W. 605 (Mo. 1902); King v. King, 82 S.W. 101 (Mo. 1904); Lowe v. Lowe, 146 S.W. 100 (Mo. App. 1912); Grogan v. Garrison, 27 Ohio St. 50 (1875); Fuller v. Virginia Trust Co., 33 S.E.2d 201 (Va. 1945).*

(n835)Footnote 835. *Chase v. Alley, 19 A. 397 (Me. 1890).*

(n836)Footnote 836. *Pepper v. Thomas, 4 S.W. 297 (Ky. 1887) See Pearre v. Grossnickle, 114 A. 725 (Md. 1921).*

(n837)Footnote 837. *Vernon's Case,* 4 Coke 1(a).

(n838)Footnote 838. *Morgan v. Sparks, 108 S.W. 233 (Ky. L. 1908).*

(n839)Footnote 839. *Case v. Collins, 76 N.E. 781 (Ind. App. 1906); Vance v. Vance, 21 Me. 364 (1842); Hastings v. Dickinson, 7 Mass. 153 (1810); In re Pulling's Estate, 52 N.W. 1116 (Mich. 1892); Gelzer v. Gelzer, 1 S.C. Eq. 387 (1831); Vernon's Case,* 4 Coke 1(a).

(n840)Footnote 840. *Dickason v. English, 112 N.E. 65 (Ill. 1916); Land v. Shipp, 36 S.E. 391 (Va. 1900).*

(n841)Footnote 841. *Connecticut. Andrews v. Andrews, 8 Conn. 79 (1830); Worrell v. Forsyth, 30 N.E. 673 (Ill. 1892); Logan v. Phillipps, 18 Mo. 22 (1853); Tisdale v. Jones, 38 Barb. 523 (N.Y. 1860); Grogan v. Garrison, 27 Ohio St. 50 (1875).*

(n842)Footnote 842. *Vernon's Case,* 4 Coke 1.

(n843)Footnote 843. *Id.*.

(n844)Footnote 844. *Richardson v. Richardson, 75 Me. 570 (1884); Saunders v. Saunders, 46 S.W. 428 (Mo. 1898). Contra Jordan v. Clark, 81 Ill. 465 (1876).*

(n845)Footnote 845. *Hastings v. Dickinson, 7 Mass. 153 (1810); Ambler v. Norton, 4 Hen. & M. 23 (Va. 1809).*

(n846)Footnote 846. *Tevis v. McCreary, 60 Ky. (3 Met.) 151 (1860); Grider v. Eubanks, 75 Ky. (12 Bush) 510 (1876).*

(n847)Footnote 847. *Grider v. Eubanks, 75 Ky. (12 Bush) 510 (1877).*

(n848)Footnote 848. *McCaulley v. McCaulley, 30 A. 735 (Del. 1884).*

(n849)Footnote 849. *Andrews v. Andrews, 8 Conn. 79 (1830); Logan v. Phillipps, 18 Mo. 22 (1853); Stilley v. Folger, 14 Ohio 610 (1846);* Caruthers v. Caruthers, 4 *Bro. Ch. 500, 29 Eng. Rep. 1010 (1794);* Drury v. Drury, 2 Eden 39, *28 Eng. Rep. 810 (1760).*

> "An antenuptial contract, by which it is attempted to regulate and control the interest which each of the parties to the marriage shall take in the property of the other, during coventure or after death, such as dower and the like, are favored by the courts, and will be enforced in equity according to the intention of the parties, whenever the contingency provided by the contract arises."

Kroell v. Kroell, 76 N.E. 63 (Ill. 1905). See Schnepfe v. Schnepfe, 92 A. 891 (Md. 1914).

(n850)Footnote 850. *Redwine v. Redwine, 169 S.W. 864 (Ky. 1914).*

(n851)Footnote 851. 4 Kent's Comm. 55; *Levering v. Heighe, 3 Md. Ch. 365 (1850), 29 Eng. Rep. 1010 (1794).*

(n852)Footnote 852. *Andrews v. Andrews, 8 Conn. 79 (1830); Hannon v. Hannon, 127 P. 466 (Mont. 1912); Grogan v. Garrison, 27 Ohio St. 50 (1875),* Shaw v. Boyd, 5 Serg. & Rawle 309 (Pa. 1819).

(n853)Footnote 853. *Vincent v. Spooner, 56 Mass. (2 Cush.) 467 (1848).*

(n854)Footnote 854. *Worrell v. Forsyth, 30 N.E. 673 (Ill. 1892); Logan v. Phillipps, 18 Mo. 22 (1853); Tisdale v. Jones, 38 Barb. 523 (N.Y. 1860).*

(n855)Footnote 855. Shaw v. Boyd, 5 Serg. & Rawle 309 (Pa. 1819).

(n856)Footnote 856. *Garrard v. Garrard, 70 Ky. (7 Bush) 436 (1870).*

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CHAPTER 21 MARITAL AND HOMESTEAD INTERESTS

3-21 Thompson on Real Property, Thomas Editions § 21.03

AUTHOR: Professor David A. Thomas This chapter is based on Ch. 30 of George W. Thompson, Commentaries on the Modern Law of Real Property (John S. Grimes, ed. 1979), and describes the American common law on several subjects now largely governed by state statutes. J. Reuben Clark Law School Brigham Young University

§ 21.03 Curtesy at Common Law

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21.03(a) Husband's Rights at Common Law During Coverture in Realty Belonging to the Wife n857

At common law the husband and wife were but one person. n858 The wife was merged in the husband. n859 Therefore, the husband during coverture was entitled to the possession and control of the real estate owned by his wife, and he was the absolute owner of the rents and profits of such real estate during the joint lives of himself and wife. n860 The husband's estate in his wife's lands was one of freehold. n861 The husband and the wife were jointly seised in fee of the lands of the wife. n862

Under the common-law rule, the property belonging to the wife could be sold for the duration of the marriage to satisfy the husband's debts. n863 The rule applied as well to estates where the wife was only a joint owner and not the sole owner of the property, n864 to life estates held by her, n865 to estates owned by the husband and wife by the entirety n866 and to real estate which came to her after marriage. n867 If she was the owner of chattels real, he had the same rights to them as to personalty proper, except that, if they were not disposed of in his lifetime, they belonged to her upon his death. n868 Inasmuch as the husband's interest in the wife's real estate continued during coverture, and this might last for life, such interest was a freehold. n869 So also was the right and title to the proceeds of a sale of the wife's real property, made with the husband's assent, vested in the husband unless it was otherwise provided by contract. n870

During coverture the husband could alienate n871 or lease n872 the wife's real estate, and the wife's real estate was subject to sale on execution for his debts, n873 although he could not make such disposition of it as would bind her after the coverture ceased whether by divorce or death. n874 At common law, even as modified by usage in this country, both the husband and wife were seised of her real estate, he of the freehold and she of the fee therein. A conveyance could only be made by both joining in the grant. n875 The husband's conveyance, without the wife joining in the deed, passed only his marital interest, although he attempted to convey a fee. n876 Under the common law a married woman could not own property. n877 The husband had a freehold estate in his wife's real property, n878 and such estate was transferable by deed. n879 The possessory right to the wife's real property, n880 and full title to the rents and profits thereof, were in the husband. n881

Owing to the evident hardship of the common-law rule permitting the husband, during coverture, to hold a freehold interest in the wife's real estate, as well as to the rents and profits thereof, courts of equity, at an early date, adopted the doctrine of a married woman's equitable separate estate, whereby her property was secured to her sole and separate use during coverture, free from the husband's control and exempt from his debts. n882 This equitable separate estate is to be distinguished from the separate estate of a married woman created by legislation. This is an estate which without legislation would not have been separate, but subject to the common-law marital rights of the husband. It was not an estate which, by the instrument creating it, is freed from those rights and is separate in contemplation of a court of equity. n883 Real estate purchased by a married woman with her own money is equitably her property, and it cannot be subjected to a judgment against her husband. n884

This "separate property," used with reference to land owned by a wife, means property that a wife owns in her individual right, as distinguished from lands in which she has some right or title growing out of the marital relation. n885 This separate interest of the wife originally required a trustee in whom was vested the legal title so the husband would have no control, but in recent years, if property is granted or devised for the wife's separate and exclusive use, a court of equity will enforce the gift against the husband and his creditors, and even declare him to be the trustee. n886 The wife may hold this separate estate without the intervention of a trustee. n887

In creating this equitable separate estate for the wife, no particular form of conveyance is required, but the intention that it shall be enjoyed by her free from his control must be clearly expressed. It is a safe practice to insert in the habendum clause the words "to her sole and separate use" or words of similar import. n888 However, the use of technical words is not necessary. n889 All that is necessary to create an equitable separate estate is the expression, in the conveyance, of a clear intention to vest in the wife the entire property and interest conveyed. n890 A conveyance directly by the husband to the wife creates in the wife a separate estate vesting in her the entire interest, without the use of the technical words necessary to create a separate estate in conveyance to her from persons other than the husband. n891 The husband's conveyance of land to his wife, or his payment of the consideration and procurement of the conveyance to her, creates a separate estate in the wife. n892 When a conveyance is from a third person to a married woman to hold to her sole and separate use, the common law gives to the husband a life interest in the land. n893

A conveyance by a married woman of her separate property in consideration of the satisfaction of her husband's debt has been held void. n894 Statutes in some states put a limitation on the right of a married woman to convey her realty without the written assent of her husband, and such statutes have been held constitutional. n895 As a further protection to the wife in her enjoyment of an equitable separate estate, some courts hold that she has no power to dispose of or convey the same during coverture unless such power is expressly conferred by the instrument creating the estate. n896 Unless restricted by statute, she generally has the right to sell or encumber such estate in like manner as if she were a *feme sole*, n897 especially where the instrument creating the estate expressly confers this power. n898 The more modern cases are at variance on the question of whether a restraint on the alienation by a married woman of her separate estate is to be considered valid under statutes removing her disabilities. n899

Such statutes are in derogation of the common law, inasmuch as they confer capacity to contract and convey upon persons who formerly had no capacity at all. Therefore, all requirements of the enabling statutes, whether in regard to execution or acknowledgment of the deed, must be strictly complied with. n900 The constitutional and statutory provisions respecting the rights of married women to hold property to their sole and separate use have the effect of abrogating the husband's common-law right in such property. n901 Apart from curtesy in the real estate of the wife, marriage does not give the husband any right in the wife's separate real estate. n902 Applying the rule of strict construction, it is held that the common-law right of the husband to an estate in the wife's land during coverture will not be disturbed, unless the statute in clear language so states. n903 Some courts, however, hold that such statutes, being obviously remedial, should not be construed strictly, but that they should be construed in the light of the intention of the legislature. n904 Such statutes are intended to create a statutory separate estate in a married woman and to define her rights and those of her husband, and not prejudicially to alter the general equitable principles regarding subsisting

equitable sole and separate estate in a married woman. n905

The course of modern legislation has constantly tended toward giving to married women full control over their property without the consent or concurrence of their husbands. n906 So, in all the states the husband's common-law rights in the property of his wife have been modified or abolished by statute or constitutional provisions, any property owned by her at the time of marriage or which she may thereafter acquire is not subject to her husband's disposal or liable for his debts, but it is her sole and separate property as if she were a *feme sole*. These statutes put the husband and wife on a basis of complete equality before the law in every respect. n907 The cumulative effect of such provisions is to declare her a legal individual, with the right to own and control her own property, including property held with her husband in common or as joint tenants. n908

The respective rights of husband and wife, or their privies, in the real property of each other, in the absence of an antenuptial agreement to the contrary, are determined by the law of the place where the property is situated, and neither the place where the marriage was celebrated nor the domicile of the parties has the effect to prevent the operation of this rule. n909 A married woman who owned land in North Carolina but was domiciled in South Carolina executed in the latter state a deed of the land. By the constitution and laws of South Carolina in force at the time the instrument was executed, a married woman could purchase and convey real property as if she were unmarried. It was held that the effect of the conveyance was governed by the laws of North Carolina, and, as by that law a married woman could not convey title to land, the deed was void and it did not create an estoppel. The fact that the grantor later allowed the grantee to take possession and make valuable improvements was held not to work an estoppel. n910 The husband's creditors could levy upon his right in his living wife's lands as well as his curtesy initiate. n911

21.03(b) The Nature of Curtesy

At common law, three types of life estates arose by operation of law; curtesy, dower, and tenancy in special tail after possibility of issue extinct. Blackstone traces curtesy to an ancient German origin. n912 He questions the statement in the Mirror of Justices that it was introduced by Henry I. n913

> Tenant by the curtesy of England is where a man marries a woman seised of an estate of inheritance, that is, of lands and tenements in fee simple or fee tail, and has by her issue born alive, which was capable of inheriting her estate. In this case, he shall, on the death of his wife, hold the lands for his life, as tejant by the curtesy of England. n914

So where a man marries a woman who is seised during marriage of an estate of inheritance, and has by her issue born alive capable of inheriting the estate, and the wife dies before the husband, he takes an estate for life, which estate is called an estate by the curtesy. n915 Curtesy at common law is the life estate which, by the birth alive of lawful issue capable of inheriting, the husband acquires in the lands and tenements of which his wife is, at any time during coverture, seised either in fee simple or fee tail. n916

Curtesy is a distinct estate, n917 and entitles the husband to a life interest, n918 absolute as to the remainderman, n919 in all lands of which the wife was seised during coverture. n920 To entitle a husband to curtesy initiate there must be marriage, seisin in the wife, and birth of issue alive. To render the tenancy consummate, the wife must pre-decease him. n921 This estate is not confined to the interest a husband acquires on the death of his wife, as it is sometimes said to be, n922 but certain rights accrue to the husband as tenant by the curtesy initiate. n923 Such rights, however, do not constitute an estate. n924 It is a creature of favor and not of right. n925 Upon the birth of a living child capable of inheriting, the husband becomes seised of a freehold estate in his own right which continues during his life whether his death occurs before or after the death of the wife. n926 If the husband having an estate by the curtesy initiate dies before the wife, she takes the estate again, but if no such estate existed in the husband, and she pre-deceased him, the estate would go to her heirs. Thus we see that the husband might become successively possessed of an estate during coverture by virtue of the marriage, an estate by the curtesy initiate, and an estate by the curtesy consummate. n927 By vesting

during the lifetime of the wife, an estate by the curtesy is not one acquired by descent. n928

The husband's right of curtesy is not acquired by him by reason of the intestate laws, but is a common-law right which during the lifetime of the wife was initiate, but which after her death became consummate, and his right to the same could not be questioned from the time that his wife was seised of the property and their child or children were born alive, unless, under the Married Women's Acts, she disposed of the same by deed or will. n929 The husband has the burden of showing the existence of facts giving him the right to curtesy. n930

It is said that the curtesy by the laws of England was given the husband, in part, for the purpose of aiding him in supporting and educating the issue of the marriage. That this was a minor consideration, however, is shown by the fact that continued existence of the issue after birth was not necessary to raise or to support the estate. The early writers on the common law disclose that a deeper reason lay in the feudal system which obtained in England in early times and which affected real property in so many ways. The husband, having been dignified by having an interest in lands, was bound to do homage to his superior lord. The estate being once vested in him, it was the policy of the feudal system not to suffer it to determine during the life of the husband, as otherwise the lord might lose the homage that was due from the land. n931

"The term 'curtesy' is derived from 'courtesie,' Latin '*curialitas*,' to signify suavity or urbanity, to denote that the custom sprung from favor to the husband, rather than from any right." By thus becoming the vassal or tenant of his superior lord, he was permitted, "by the curtesy of England," to attend his lord's court, and to do him homage, by reason of having become the husband of a wife who had died possessed of an estate in lands after issue born. Such seem to have been the reasons for the introduction of such a title to land into the laws of England. n932 The estate by the curtesy, possibly introduced into England from Normandy, failing to find a basis in natural or moral right for the reasons mentioned above, could not long stand in full virtue as a thing that harmonized with the principles of American democracy, so that, after a few generations of reverence for the ancient rule, the legislatures of this country began to abolish curtesy initiate entirely or to deprive that particular tenancy of some of its more rigorous features, until now it stands greatly and essentially modified, and has been abolished absolutely in many states. Curtesy does not arise out of contract but is a right given by the law for the purpose of encouraging marriage. n933

21.03(c) Essentials of Tenancy by Curtesy According to Blackstone Indicated

Four things are requisite to an estate of tenancy by the curtesy: (a) marriage; (b) seisin by wife; (c) birth of a child alive, capable of inheriting from the mother, though it may afterwards die; and (d) the death of the wife in the lifetime of the husband. n934 A valid marriage is a prerequisite to this estate, n935 and the marriage must be strictly legal, that is, between parties legally capable of contracting matrimony, n936 and if the marriage is absolutely void, as where one of the parties is an idiot, no such estate will arise. n937 If the marriage is voidable only and is not set aside during the life of the wife, and the other requisites are present, the husband will have the estate. n938 The law usually contemplates that the parties must first obtain a license to marry and that the marriage must be solemnized by some judicial officer or minister of the gospel, but, for the purpose of fixing the legal status of the parties, a marriage is valid if the parties, in the presence of witnesses, declare that they then and there take each other as husband and wife. A common-law marriage will, in Missouri, sustain a claim to statutory curtesy. n939 Under the common law, a legal marriage is essential to the husband's right to curtesy. n940 Actual seisin of the wife is essential to the husband's right to curtesy. n941

Seisin by the wife during coverture of a freehold estate in property is another indispensable requisite to the husband's right of curtesy. n942 Where a wife died seised in fee to certain real estate, her husband was held entitled to an estate by the curtesy during his life in such real estate. n943 At common law it was said to be absolutely necessary that the wife be seised in fact if the property was corporeal and she acquired it by descent, as entry was necessary to seisin in an acquisition by descent. n944

> If a man dieth seised in fee simple or fee tail general, and those lands descend to the daughter and before entry she taketh husband and hath issue and dieth, the husband hath no estate by curtesy, yet the wife was seised in law; but if she or her husband had entered in her lifetime, the husband would then have been tenant by curtesy. n945

In the case put by Lord Coke, the wife had seisin in law, and an immediate right of entry, but this did not satisfy the strict requirement of the common law. n946 Under the Statutes of Uses and Wills, actual seisin was not necessary, as these statutes did away with the necessity for an actual livery of seisin, and the constructive seisin given by the statutes was sufficient, making her title complete if there was no adverse possession, so that the husband would have an estate by curtesy. n947 This is the rule in many jurisdictions, n948 even where there is no adverse holding. n949 This is true in this country with respect to the husband's curtesy in the wife's wild lands, n950 but the contrary is held in one state owing to the uncertain character of the title to public lands in that state, the law making it the duty of the owner to promptly take possession. n951 Physical possession, however, is not invariably necessary to actual seisin. n952 However, if she is in receipt of the rents and profits of wild lands, this is sufficient actual seisin where that is required to give the husband curtesy in such lands. n953

A husband will be entitled to curtesy where a court of competent jurisdiction has made a decree settling the rights of the parties to the wife's lands, as this is held equivalent to actual possession. n954 Where the wife is a tenant in common, and one of her co-owners has possession, seisin or possession will be held for all and the husband will be entitled to curtesy. He will not be entitled to curtesy where the wife's interest is held jointly with others, as survivorship will exclude him from claiming curtesy, n955 and the same is true where the party in possession is a tenant for years or at sufferance under a lease from the wife. n956 This latter rule is denied by some courts which hold that possession by a tenant or agent of the wife will entitle the husband to curtesy. n957 If the wife's estate is a reversion, preceded by a freehold estate in another person, this person is the one actually seised, and the wife will have a constructive seisin which, at common law, is not sufficient to entitle the husband to curtesy, unless the freehold tenant dies in the lifetime of the wife. n958 It is immaterial at what period during coverture the wife became seised, whether before issue or after nor is it material whether the issue be living at the time of the seisin. n959 Seisin by the wife must exist at the time of her death. n960

The birth of issue alive is another essential to the creation of a husband's right to an estate by curtesy, n961 but it is immaterial whether such issue be living or dead at the time of the wife's seisin of the land or at the time of her death. n962 Prior to the birth of issue the husband has no vested curtesy interest in the wife's lands, but under the common law he had control over it and it was subject to his debts. It was an estate in him for the life of the wife only, unless before her death issue was born alive, whereupon he became tenant by the curtesy initiate and as such took an estate in the wife's lands in his own right. n963 The husband's right to curtesy at the common law was contingent upon there being issue of the marriage born alive capable of inheriting the mother's estate and, as he has no estate by curtesy at the wife's death unless such issue had been born, he could have had no interest prior to the birth of such issue. The husband's interest or estate by curtesy in the lands of his wife did not, like the wife's inchoate right of dower, attach upon marriage. n964

> "Alive," as used in defining an element of an estate by curtesy requiring that a child should be born alive, means that it should be alive and have an independent life of its own for some period after delivery. There is no legal presumption in such a case in favor of the separate life of a newly born child, and, while respiration or breath is evidence of such life and existence, proof of respiration from actual observation is not necessary to establish the fact. Other indications of life, such as the beating of the heart and the pulsation of the arteries after the separation of the child from the body of the mother, may be satisfactory evidence of it, because they show the fact that circulation has been established and is maintained and carried on in the body of the child independently of the mother, and proof of such facts sufficiently establish independent life of the child for the purposes of curtesy. n965

Delivery of a living child by a Caesarean operation, after the mother's death, is insufficient for this purpose. n966 Statutes in some states have removed the requirement of birth of issue. n967 Some courts hold that the legitimation of a bastard by subsequent marriage is sufficient to satisfy the requirement of issue, though there were no other children born during the marriage. n968 The husband has no curtesy because of the adoption of a child, there being no issue born alive to the marriage. n969 Under the common law, the husband had, prior to the birth of issue, a freehold estate in his wife's lands only during their joint lives but, after the birth of issue alive, such estate continued for the period of the husband's life. n970 A child may be born alive and be capable of inheriting, when it breathes and its heart beats, even though it does not cry. n971

As a further requirement of curtesy, the common law required the wife's estate to be such that the issue of the marriage might inherit as heirs of the wife. Thus, the wife's estate may be an estate tail female and she has only male children born to her, so the husband cannot claim an estate by the curtesy because the wife's estate was not inheritable by the issue of the marriage. n972 Again, the instrument giving the estate to the wife may be so worded as to make the issue of the wife purchasers instead of heirs, so far as the particular estate is concerned. If so, the husband will not have an estate by curtesy. n973 Thus, an estate is devised to A and her heirs, but if A dies leaving children, then to her children and their heirs. Here at first impression A has a fee simple estate because limited to her and her heirs, and of course her children, if she had any at the time of her death, would be her heirs. But the will expressly designated them to take the estate at their mother's death, so they take as purchasers from the devisor and not as heirs of A. So A's husband could not claim curtesy. n974 The same thing is true though the estate to the wife is a fee, and the estate is expressly given to the children "if she dies before her husband." n975 The intention of a grantor, in conveying property to a wife, to deprive the husband of curtesy will govern, regardless of subsequent statutes to the contrary, n976 but such a conveyance must be supported by a sufficient consideration. n977

For the period between the birth of issue alive and the death of the wife, the husband has an estate by the curtesy initiate. n978 Upon the death of the wife in such case, if he survive her, he has curtesy consummate. The curtesy consummate is not a new estate, but a prolongation of curtesy initiate. They both constitute one estate for the life of the husband. The death of the wife simply changes the estate from a mere status to a vested right in the husband. The cases generally hold that the death of the wife renders the estate consummate. n979 It is then said to be, in many respects, but a continuance of the estate of the wife, though regarded more in the nature of an estate by descent than by purchase. n980 Upon the death of the wife, the law adjudges the freehold to be in the husband immediately, as tenant by curtesy. n981 Under the common law, the husband, to be entitled to curtesy, must outlive his wife. n982

21.03(d) Property to Which Curtesy Attached

In order to enjoy curtesy it was necessary that the interest of the wife in land be of such a nature that it would descend to the wife's heirs. n983 The husband's marital rights attach only to property forming part of his wife's estate at the time of her death. n984

It must be an immediate estate of inheritance and not after an interposed freehold estate. n985 Accordingly, the husband has no curtesy in land in which the wife had only a life estate n986 or a mere possessory right therein. n987 Accordingly, where the wife took under a deed creating in her an estate tail at common law, which was converted into a life estate in the wife with remainder over in fee to her children by a statute abolishing fee tail estates, the husband was held not entitled to curtesy. n988

At common law there could be no curtesy in a leasehold estate, however long the term. n989 It has been expressly decided that an estate in land for the term of 999 years, subject to the payment of an annual rent, is personal property, and the widower of the tenant could not claim curtesy in it. n990

Curtesy cannot be claimed in a remainder or reversion where the wife dies before the termination of the particular estate. n991 Likewise a husband cannot claim an estate by curtesy in land held by his wife in trust for her children by a

former marriage. n992

While the husband's curtesy is conceded to him because of his duty to support the children of the marriage, yet it is not subject to diminution by the fact that the wife left children by a former marriage, and hence it will not be limited to a share of her estate proportionate to the ratio between the children of the two marriages. n993 A husband cannot claim curtesy in lands in which his deceased wife was not seised with the present right of possession. n994 Where property was purchased by a wife but conveyed to a trustee, and the trustee conveyed the land during the life of the wife, she had no beneficial interest at her death such as would entitle the husband to curtesy. n995 It is the character of the wife's title, and not the source thereof or the estate descending to the wife's heirs, which determines the husband's right to curtesy. n996

The husband is held entitled to an estate by curtesy in lands devised to the wife, though the devise was of a base or qualified fee subject to be defeated upon the happening of the contingency that she leave no issue surviving her, with an executory devise over, in that event, to the persons happening to be her heirs at law. n997 Curtesy existed in equitable estates belonging to the wife, n998 but only if she died possessed of the estate or intestate. n999 She could defeat the curtesy by disposing of the equitable estate by deed or will; n1000 and, today, curtesy attaches to the wife's equitable as well as to her legal estate of inheritance. n1001 Particularly is this true under the statutes prevailing in some of the states; n1002 but the husband is not deprived of such estate by the Married Women's Acts. n1003 Curtesy exists in a wife's equity of redemption. n1004 Thus, in case the wife has given a mortgagee in fee, and her equity of redemption has been barred by lapse of time, the husband's curtesy attaches to the estate. n1005 On the other hand, where the wife holds land as vendee under a contract of purchase, the husband is not entitled to curtesy in such land. n1006

The husband's estate by curtesy applies in the inheritable equitable separate estate of the wife unless the instrument creating her estate clearly shows a contrary intention or the circumstances are such that its inference is equally clear. n1007

To cut off the husband's marital rights beyond the death of his wife, the intention to do so must be clearly expressed in the instrument creating her estate. n1008 If the wife's equitable separate estate is created by the husband, with himself or another as trustee, he will not be entitled to curtesy, unless he has reserved the right to such estate. n1009 At common law a grant to a woman of an estate of inheritance could not preclude her husband of his right of curtesy, but in equity an estate may be so limited as to give the wife the inheritance, and by words clearly denoting that intention to exclude and deprive the husband of curtesy. n1010 Thus, where land is conveyed to a wife for her sole and separate use, "free and clear of any and all marital rights of her present or any husband she may have hereafter," it is held that the husband cannot claim an estate by curtesy in such land. n1011 The words of exclusion must clearly indicate an intention to so deprive the husband of this right. n1012

It is immaterial from whence or by what means the wife acquired her title in order for curtesy to attach. The husband has curtesy in lands which he has conveyed to her in fee simple. n1013 Lands acquired by a wife as a result of gifts or donations from third persons, intended for the benefit of the family, are subject to the husband's curtesy. n1014 A husband has an estate by the curtesy, after his wife's death, in land which he voluntarily settled on her, provided he did not relinquish his right thereto, either in express terms or by plain implication, in the deed of settlement. n1015 He has curtesy in lands to which she has gained title by adverse possession. n1016 Curtesy exists in lands acquired by the wife through inheritance. n1017 Thus a husband after the death of his wife who owned a part interest in land by virtue of being a child of the intestate owner, is entitled to curtesy in such land, n1018 but he has no curtesy in land sold by the wife before marriage by an executory contract, although conveyance was not made until after marriage. n1019

Where a will directed the sale of lands and distribution of the proceeds, the husband has no curtesy in such proceeds, they being personalty. n1020 An estate of inheritance vesting in the wife, but to pass on her death to another by executory devise, is subject to the husband's curtesy. n1021 The surviving husband has curtesy in lands held by his deceased wife in fee simple defeasible, n1022 in fee tail, n1023 but not in lands in which the wife had a life estate only.

n1024

Curtesy exists in things incorporeal as well as corporeal. So the husband has curtesy in the wife's rents. n1025 The proceeds of a sale made in antenuptial infancy proceedings may be subject to curtesy. n1026 Where money is bequeathed to a wife to be invested in lands, and she dies before the investment is made, her husband is entitled to curtesy in the fund so bequeathed. n1027 So also, the husband may have an estate by the curtesy in the proceeds of a partition sale. n1028 Where the wife is a joint tenant with another, the husband has no curtesy. n1029 A husband has curtesy in an estate devised to the wife by her father. n1030

The husband has curtesy in the proceeds of a sale of lands which came to the wife by devise, the sale being made by the executor of the will under authority given thereby. n1031 It is generally held that curtesy exists in a contingent use, n1032 a qualified or conditional estate, n1033 and a base or qualified fee, if the same be limited either by way of a springing use or executory devise which takes effect at the wife's death. n1034 Curtesy ceases when such estate is determined. n1035 If the wife's estate is one upon condition, and a forfeiture takes place for breach of condition during coverture, the husband will not have an estate by curtesy, since the effect of entry for breach of condition relates back to and destroys the estate from the beginning. n1036

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LEXIS:curtesy w/30 property or estate! or land! w/5 attach!

21.03(e) Rights and Duties of Tenant by Curtesy

Curtesy consists of three stages: (1) the prospect of curtesy which arises upon marriage, (2) curtesy initiate which developed on birth of issue, and (3) curtesy consummate on death of the wife with the husband surviving. Immediately upon the birth of issue the husband's right to claim curtesy is initiated, the nature of his interest in his wife's real property is changed, and he is then called "tenant by curtesy initiate." After birth of issue the husband takes an estate in the lands of his wife in his own right. n1037 Such issue need not survive and need not be of sound mind, but a monster was not such "issue" at common law. n1038

Curtesy was held to be an estate distinct from that of the wife, alienable by the husband and subject to execution for his debts, and giving him control of the profits of his wife's lands. n1039 The husband's denial of a claim to curtesy initiate did not defeat the right of creditors to have it applied to the payment of the husband's debts, even though he purported to make the denial in the interest of his wife and children. n1040

Curtesy is initiate from the time of seisin and birth of issue alive until the death of the wife. n1041 During such time it is merely a status, and not a vested right. n1042 Thus the interest of the husband of the owner of realty which has been sold on foreclosure of a trust deed was held to be merely an inchoate dower right which, prior to consummation by the death of the owner, was a mere intangible, contingent expectancy which did not constitute an estate in land or rise to the dignity of a vested right. n1043 His interest in her separate estate is prospective only and attaches to no real estate except that of which she dies seised of an estate of inheritance. n1044 When the husband became tenant by the curtesy initiate, he had such an interest in the wife's lands as required that he be made a party in an action concerning it. n1045 The husband has full power to sell and dispose of his estate by the curtesy initiate in any manner he may see fit. n1046

The common-law right of tenancy by the "curtesy consummate" was an estate for the life of the surviving husband in all of the wife's lands and arose upon the wife's death if there had been a child of the marriage born alive. n1047 Upon the death of a wife, having during coverture become seised of inheritable real property and having issue born alive to the marriage during such coverture, the husband's curtesy initiate becomes curtesy consummate, and he thereupon acquires a vested life estate in the property. The law gives him the estate. No conveyance, assignment or act of any person is necessary, nor can he disclaim it or otherwise prevent it from vesting in him. He becomes subject to all the duties and

liabilities of a freeholder with respect to the property. n1048 He takes the estate somewhat in the nature of acquisition by descent, and for this reason he cannot disclaim it. n1049

When, upon the death of the wife, curtesy becomes consummate, the husband's estate is similar in all respects to a life estate, and he may convey or mortgage the same without question. n1050 He has the exclusive right to possession, use, rents and profits of the land during his life; n1051 but such right does not obtain until dower has been set off or otherwise ascertained in a proper action. n1052 He has a right to assign or transfer his interest, and the assignee or transferee has a right to the use and possession thereof. n1053 The husband cannot be ousted of his right of possession of his interest, without his consent, by partition or sale for division. n1054

Possession by a tenant by curtesy is insufficient to enable him to acquire the fee by adverse possession, the possession of a life tenant not being adverse to the remainderman. n1055 A tenant by curtesy initiate is not entitled to rents and profits during coverture. n1056 Upon his death the growing crops go to his personal representatives. n1057 The tenant by curtesy is entitled to royalties due from the operation of mines opened prior to the death of his wife. n1058 The proceeds of a sale of an estate by curtesy belong to the owner of such estate and not to the owner of the fee, n1059 and he is entitled to the interest on the proceeds of such sale during his life. n1060 He may agree, however, to take a gross sum in the proceeds of the sale in lieu of his estate. n1061

A husband in possession of land as tenant by the curtesy consummate is entitled to the rents and profits of the land but has no right to make improvements thereon and charge their cost to the remainderman nor any "right to cut growing timber except to be used in maintaining the improvements on the place and for other necessary purposes in connection therewith." n1062 At common law the husband could, while holding by curtesy initiate, sue alone for the possession of the land, but under the doctrine that the husband controls the wife's property only by virtue of their joint seisin, and that if disseised they must sue jointly for possession. It has been held that without some showing or equity which would take the case out of this rule the husband cannot sue alone in ejectment, in his own name, to recover his wife's property or to recover damages for timber cut from the land or for rents and profits. n1063

Like other tenants for life, the tenant by curtesy is bound to keep the premises in repair n1064 and to pay taxes. n1065 A tenant by the curtesy, as an incident to his estate, may take reasonable estovers (right of one in possession to take wood or timber necessary for fuel or repairs) of all kinds, and he may cut timber to pay taxes or to improve the land, and when so cut it belongs to the tenant, and not to the reversioner. n1066 In one case, it was held that a tenant by curtesy cannot purchase a tax certificate and tax title in derogation of the rights of his deceased wife's children as remaindermen, and his acquisition of such tax title would operate merely to discharge a lien for taxes which it was his duty to pay. n1067 Like any other life tenant, he cannot sell and pass title to standing timber, n1068 or open and operate mines. n1069 The doctrine of stale demands may defeat the remainderman's right to an accounting for the value of growing timber wrongfully cut by the husband while in possession of the land as tenant by the curtesy consummate. n1070

Curtesy is now liable for the husband's debts in all jurisdictions, unless exempt by statute, n1071 and the husband has the unquestioned right to convey or encumber curtesy. n1072 The estate by the curtesy consummate begins on the death of the wife. n1073 Since curtesy initiate is abolished by Married Women's Property Acts, it would seem that during coverture the husband, under such acts, has no estate which may be seized and sold on execution for his debts. A sale by a husband of his curtesy interest, which becomes consummate after an attempted attachment, takes priority over a subsequent execution sale of the interest levied on in the attachment proceedings. n1074

It is generally held that a tenant by the curtesy at common law takes his estate free from the debts of his wife. n1075 This rule prevails in states where Married Women's Acts abolish curtesy initiate and not curtesy consummate. n1076 Where the statute expressly makes the estate of a decedent subject to the payment of the decedent's debts, the courts have held that the estate which the husband takes in the lands of the wife at the time of her death is subject to the wife's debts. n1077 The rule in some states is that the tenant by curtesy takes his estate subject to the payment of his wife's debts. n1078 Where he takes the fee of one third in value of the realty, he takes it subject to the payment of the wife's

debts. n1079 Of course the tenant by curtesy takes his estate subject to existing encumbrances; n1080 but his estate is superior to the claims of the wife's creditors which were not prior encumbrances. n1081

At common law a husband, after issue born, was seised in his own right of an estate for life in his wife's inheritable lands, and it was subject to sale for his debts, n1082 even during the wife's lifetime. n1083 His curtesy consummate, like all other life estates, is subject to seizure and sale on execution for his debts. n1084 Where a Married Women's Property Act has abolished curtesy initiate, the husband has no estate prior to his wife's death that can be sold for the payment of his debts. n1085 If the husband sells his curtesy consummate prior to an attachment levy, the sale takes priority over a subsequent sale on execution for the same debt. n1086 A judgment pending against a tenant by curtesy at the time his estate becomes consummate attaches as a lien against the same at the time his estate vests in him. n1087 Even though the inchoate right to curtesy consummate, which inchoate right is all that exists prior to the wife's death when there has been a statutory abolition of curtesy initiate, cannot be reached by the husband's creditors, n1088 his estate by the curtesy consummate is liable for his debts. n1089

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LEXIS:tenan! w/5 curtesy w/30 right! or dut! curtesy consummate

21.03(f) How Curtesy Is Defeated

The husband's rights of curtesy could be destroyed at common law by divorce, by waiver either before or after marriage n1090 and by disseisin. Today, in many states, adultery, murder and condemnation will also bar curtesy. n1091

As a general rule, a decree of divorce from bed and board, with perpetual separation, does not bar the curtesy of the husband against whom such decree is pronounced in lands belonging to the wife at the time of the decree n1092 but, upon lands thereafter acquired by her, it operates to bar his claim to curtesy therein. n1093

On the other hand, a valid divorce *a vinculo* will, regardless of which spouse was at fault, have the effect of cutting off the husband's tenancy by the curtesy, n1094 unless the right thereto is preserved, either expressly or impliedly, by the statutes of the state in which the property is situated. n1095 In a few jurisdictions the rule stated above has been held to apply only to cases where the divorce was granted the wife on account of the misconduct of the husband. n1096 A divorce granted to a husband for a cause which does not render the marriage void from the beginning does not terminate his estate by the curtesy initiate. n1097 Where a statute declares in effect that, in case of divorce, the guilty party shall forfeit all rights and claims under and by virtue of the marriage, a divorce obtained by the wife for the husband's fault operates to bar curtesy. n1098 It would seem from such statutes that the rights of the innocent are to be preserved, but that does not follow. A divorce necessarily destroys rights which the innocent party had during marriage, and those rights are surrendered or voluntarily sacrificed to obtain the divorce. So, even where such a statute exists, a husband defeats his right to curtesy by obtaining a divorce from his wife for her fault. n1099 In some states, curtesy or its statutory equivalent is also lost if the husband abandons the wife, n1100 but a mere living apart is not abandonment. n1101

In the absence of a statute authorizing a married woman to convey her property without the husband joining in the deed, she cannot defeat her husband's right of curtesy by her separate conveyance of her land; n1102 but title would pass to the grantee under such conveyance upon the death of the husband prior to his wife's death. n1103 A void deed by the wife and possession by the grantee thereunder, although signed by the husband, does not bar the husband's curtesy. n1104 A wife's deed to her lands, in which the husband was not made a party, was held not to convey the husband's right to curtesy, although the husband subscribed his name thereto. n1105 Where the wife has conveyed her land by a deed void because her husband does not join in it, and before her death the grantee has acquired title by adverse possession, she does not die seised of an estate of inheritance in such land so as to entitle her husband to curtesy therein. n1106 Where the land held by the wife is held by her subject to a power of sale, the husband's curtesy is defeated by the

execution of the power. n1107 In some states the right of curtesy can be destroyed by a conveyance of the property by the wife during her lifetime or by a devise of the land to take effect after her death. n1108 This is true only where the statute gives the husband curtesy only in lands of which the wife dies seised, and she has authority under the statute to convey without her husband joining her in the deed. n1109

Under other statutes a married woman may devise her real estate with the consent of her husband and thereby preclude him from claiming curtesy therein. n1110 The husband's consent to such devise is not required in some jurisdictions in order to bar the right of curtesy. n1111 A conveyance of land by husband and wife in trust for the wife does not operate to defeat the husband's curtesy where the wife died intestate as to such land. n1112

Under some statutes a testamentary disposition by a married woman of her separate property is not to be so construed as to defeat the husband's tenancy by the curtesy in such property. n1113 Children born after a will made by their mother, in which she devised her real estate to her husband, take the property by descent subject to the husband's curtesy. n1114 Some cases hold that the husband may be compelled to elect whether he will take under his wife's will or accept in lieu thereof his curtesy, while others hold that the provision made for him in the will does not preclude him from claiming curtesy. n1115 Any attempt to evade a spouse's marital rights in the other spouse's estate by conveyance thereof in advance, while preserving to the other spouse rights of complete ownership until death, may be defeated by the wronged spouse as fraud. n1116 In the case of equitable interests in land held by the wife, however, curtesy could be defeated if the wife assigned during her lifetime or devised by will. n1117

Transfer by the wife with intent to defeat the husband's marital rights as a forced heir were fraudulent. n1118 The Married Woman's Act, providing that the wife's real estate shall be her sole and separate property as though she were a single woman, does not defeat the husband's curtesy at the wife's death if she has not previously aliened her estate, but only protects her estate during her life and does not affect the law of succession at her death. n1119 Where real estate is held by husband and wife by the entireties, and they convey the property to themselves as tenants in common, relinquishing dower and curtesy, such relinquishment is held to be a binding contract only as to dower and curtesy. n1120

A husband may bar his right to claim curtesy in the lands of his wife by joining her in a deed or mortgage of her property, n1121 even though the instrument is inoperative to pass the wife's estate therein. n1122 The husband's oral release of curtesy has been held not to bar him from claiming curtesy after the death of his wife, n1123 and even an attempt to convey a fee has been held insufficient to bar his claim to curtesy in her lands, n1124 although there are cases taking a contrary view. n1125 Where a tenant by curtesy accepts a portion of the proceeds of a sale awarded to him in a partition proceeding to which he was not a party, he is estopped to claim curtesy thereafter. n1126 Where a wife executed a mortgage on her land in which her husband did not join, his execution of a mortgage on the same property after the wife's death operated to pass his life estate, but did not pass the remainder owned by the wife's son. n1127

A husband may waive his right to claim curtesy in his wife's land by an antenuptial agreement. n1128 This, in some of the states, is true also of a post-nuptial contract, n1129 at least, when such contract is a result of a marital separation, existing or contemplated. n1130 Marriage is a valuable consideration for such contract, and if fairly and equitably made between the parties, the antenuptial agreement, and not the law, furnishes the measure of their respective rights. A mistake as to the law will not of itself be sufficient ground on which to set aside a contract waiving either curtesy or dower rights. n1131

At common law a husband could not by a post-nuptial contract with his wife waive his claim to curtesy in her lands. n1132 A court of equity, however, will give effect to such a contract when it has been fully performed, and where it would be inequitable to permit the assertion of the right given by the common law. n1133 Such agreement must be established by clear and satisfactory evidence. n1134

A conveyance between husband and wife through a third person to settle a dispute between them, and wherein the

husband's right of curtesy is expressly waived, has been upheld. n1135 There are cases, however, denying the right of husband and wife to mutually agree to a release of curtesy and dower in each other's estate. n1136 A post-nuptial agreement reciting that the wife releases her rights in her husband's property because the husband would have no interest in her estate should he survive her, and because the wife had ample means in her own right, was held not to imply an agreement by the husband to release his rights in the wife's property. n1137

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LEXIS:defeat! w/15 curtesy w/30 divorce! or waive! or adultery! or murder! or condemn!

21.03(g) Statutory Changes in Common-Law Curtesy

Modern statutes have completely revised common-law concepts of the rights of husbands in and to their wives' property, including the right of curtesy. In nearly all of the states statutes have been passed enlarging the rights and powers of married women with respect to their real property. In many instances, this is done by prohibiting the sale by the husband of his wife's realty without her joining in the conveyance and by protecting the property from levy and sale under judgment or decree against the husband. The decisions are not entirely uniform in the several jurisdictions as to the effect of such a statute upon the common-law estate by the curtesy initiate. n1138

Prior to the birth of issue, tenancy by the curtesy being purely inchoate, the cases are uniform to the effect that it may at this stage be destroyed by a statute which applies to existing marriages. n1139 So at least until the husband's estate is enlarged into a tenancy by the curtesy initiate by the birth of a child capable of inheriting, he has no such vested right, but his right or interest is merely inchoate and subject to legislative control. n1140 There is, however, a sharp division of authority as to whether such statutes may constitutionally operate upon tenancy by the curtesy initiate.

Under one line of cases, the common-law estate by the curtesy initiate, being a vested estate, cannot be destroyed by any subsequent statutory enactment intended to abolish such estates. n1141 Some courts hold that while estates by the curtesy initiate are not abolished or wholly destroyed by such statutes they are so essentially modified and changed thereby that they have lost their vested nature and have become mere contingent rights or interests. n1142 Thus a statute expressly or impliedly abolishing curtesy initiate, and enacted prior to the birth of issue, has the effect of rendering the interest of the husband before his wife's death a mere expectancy, and any statute enacted prior to her death, the effect of which is to abolish the estate by curtesy, will defeat the husband's claim to curtesy. n1143

The majority of the cases hold that such statutes have the effect of destroying the husband's curtesy initiate, but that the curtesy consummate is not abolished by such legislation. n1144 Under this theory, where a marriage takes place before the date of the ratification of a constitution providing that the property of a female shall remain her separate estate and may be conveyed and devised by her as if sole, the husband acquired no vested right in lands acquired by the wife after such ratification. The husband's estate by the curtesy, unlike that which existed prior to the ratification of the constitution, only became consummate upon the death of the wife intestate. Until the wife's death intestate, the husband's interest is a mere expectancy, subject to be destroyed by legislation before it becomes consummate. n1145

Numerous courts have held that the saving clause in a Married Women's Act, as to the husband's right by the curtesy, refers to the tenancy by the curtesy consummate and not to tenancy by the curtesy initiate. n1146 A statute abolishing curtesy, enacted prior to the time the wife becomes seised of inheritable property, effectually destroys the husband's claim to curtesy in property acquired subsequent to the enactment of such statute. n1147 A statute abolishing curtesy impliedly repeals a statutory provision entitling the surviving husband to one half of the estate of the wife who dies without a child or other descendant capable of inheriting, so that the rights of both spouses are governed by sections governing the rights of a widow of a husband who dies without a child or other descendants capable of inheriting. n1148

Where the statutes give married women full control of their property during coverture, this in itself does not abolish the husband's estate by curtesy, but restricts it to such inheritable estates as she may have at her death. n1149 In some jurisdictions such statutes have the effect of abolishing curtesy initiate but not curtesy consummate. n1150 In the absence of Married Women's Acts or statutes abolishing curtesy in express terms, the common-law right of curtesy obtains. n1151 In many of the states, the surviving husband's estate in the real estate of a deceased wife is an estate by the curtesy as at common law. In some of the states, the tenancy differs in essential respects from the like tenancy at common law, such as where the estate is not dependent on the birth of an heir, or where the husband has no estate whatever until the death of the wife. A statute abolishing curtesy applies to lands owned by persons who were married before the enactment thereof. n1152

Many states have abolished dower and curtesy.

In Indiana, the deed of the wife alone, without the husband joining in, is still void. n1153 The husband cannot subject his wife's land to a mineral servitude without her authority. n1154 The husband may act as the agent for his wife with respect to the management of her property; n1155 but the mere existence of the marital relationship, n1156 nor mere knowledge that the husband is making improvements in the property, n1157 is sufficient to make him such her agent. Nor is there any presumption that he is her agent to sell her property, n1158 and creditors of the husband cannot establish liens on separate property of the wife. n1159 The wife can become liable, however, in *quantum meruit* for work and labor furnished at her husband's request and with her acquiescence. n1160

It has been held, however, that curtesy attaches when the wife becomes seised, and is not affected by subsequent statutes changing the law. n1161

A tenant by the curtesy is entitled to the royalties from an oil lease executed during the wife's lifetime. n1162 A tenant by curtesy is required to pay current taxes if the estate is sufficient and if curtesy has been assigned where assignment is required. n1163 A tenant by the curtesy is in such a fiduciary relationship with the remainderman that he cannot acquire a tax title adversely to their interests; n1164 but the tenant by curtesy is not a cotenant with the remainderman and can sue the remainderman in ejectment. n1165

The devisee n1166 or transferee n1167 of the wife (where such transfer is valid) takes subject to curtesy. Dower and curtesy both lie in coverture coupled with seisin, not coverture alone, and therefore are not merely contractual rights but also property rights. n1168 There can be no partition by or against a tenant by the curtesy, since he possesses the entire interest for his lifetime. Where the wife, having but a remainder interest, died before the life tenant, the husband had no curtesy when the life tenant died. n1169 Curtesy is an estate for the life of the husband and, as such, subject to levy of execution for his debts. n1170 The annulment of a marriage as void or voidable terminates dower and curtesy. n1171

In Indiana, both a husband and a wife can convey their own real estate without the consent of the other spouse; n1172 but if the realty is owned by the entireties, the signature of both spouses is required.

COMPUTER-ASSISTED RESEARCH

LEXIS:married women! act! w/30 curtesy

FOOTNOTES:

(n1)Footnote 857. *See* James W. Day, *Rights Accruing to a Husband upon Marriage with Respect to the Property of His Wife, 51 Mich. L. Rev. 863;* (1953) Joseph F. (1961) English, *Married Women and Their Property Rights: A Comparative View, 10 Cath. U. L. Rev. 75 (1961).*

(n2)Footnote 858. Littleton, Tenures, §168. *See Wife "Owned" Property Held by Estate of Husband,* 20 Taxation for Lawyers at 172 (Nov.-Dec. 1991).

(n3)Footnote 859. Joshua Williams, Principles of The Law of Real Property, 352 (17th ed. 1894).

(n4)Footnote 860. 1 Frederick Pollock & Frederic William Maitland, The History of English Law Before The Time of Edward I 403 (2d ed. 1898); 3 William Searle Holdsworth, A History of English Law 525 (4th ed. (1926-27)).

Bank of America v. Banks, 101 U.S. 240 (1879); Stull v. Harris, 11 S.W. 104 (Ark. 1889); Blood v. Hunt, 121 So. 886 (Fla. 1929); Merrill v. Adkins, 180 So. 41 (Fla. 1938); Haddock for Use of Wiggins v. Florida Motor Lines Corp., 9 So. 2d 98 (Fla. 1942); Flash Bonded Storage Co., Inc. v. Ades, 12 So. 2d 164 (Fla. 1943); McNeer v. McNeer, 32 N.E. 681 (Ill. 1892); Sharpe v. Baker, 96 N.E. 627 (Ind. App. 1911), 99 N.E. (1912); *Rose v. Rose, 46 S.W. 524 (Ky. 1898); Mutual Fire Ins. Co. v. Deale, 18 Md. 26 (1861); Franz v. Franz, 82 N.E.2d 205 (Mass. 1941); Flesh v. Lindsay, 21 S.W. 907 (Mo. 1893); Hubbard v. Keen, 247 S.W. 1000 (Mo. 1923); Jenkins v. Jenkins, 260 S.W. 111 (Mo. 1924); Schowe v. Kallmeyer, 20 S.W.2d 26 (Mo. 1929); Burleigh v. Coffin, 22 N.H. 118 (1850); In re Riva, 90 A. 669 (N.J. Eq. 1914); Hopper v. Gurtman, 18 A.2d 245 (N.J.L. 1941); Hoak v. Unger, 18 A.2d 105 (Pa. Super. 1941); Bishop v. Readsboro Chair Mfg. Co., 81 A. 454 (Vt. 1911); Breeding v. Davis, 77 Va. 639 (1883); Central Land Co. v. Laidley, 9 S.E. 61 (W. Va. 1889).*

By act of marriage the husband and wife became in law one person, and so continue during the coverture or marriage. The wife is as if merged in her husband. Accordingly the husband is entitled to the whole of the rents and profits which may arise from wife's lands and acquires a freehold estate therein during the continuance of the coverture; and in a like manner all the goods and personal chattels of the wife, the property, which passes by mere delivery of possession, belongs solely to her husband. Joshua Williams, Principles of The Law of Real Property, 205;
Littleton, Tenures, §168; 1 William Blackstone, Commentaries 442.

The Oregon Donation Act of 1850gave the husband an estate for the life of himself, and his wife in the wife's half of the donation claim. *Wytle v. Palmer, 3 Sawy. 412,* F. Cas. No. 18,120 (D. Or. 1875).

See Note, *Marital Property and Migratory Divorce, 3 Stan. L. Rev. 622;* Comment, *Property Rights of Meretricious Spouses: The Effect of the New No Punishment Policy Indicated by the Consenting Adults Bill, 16 Santa Clara L. Rev. 783.*

(n5)Footnote 861. *Robertson v. Norris, 11 Q.B. 917.*

(n6)Footnote 862. *Polyblank v. Hawkins, 1 Doug. 329.*

(n7)Footnote 863. *Montgomery v. Tate, 12 Ind. 615 (1859); Canby v. Porter, 12 Ohio 79 (1843); Hubbard v. Hubbard, 58 A. 969 (Vt. 1904).*

(n8)Footnote 864. *Johnson v. Leavitt, 125 S.E. 490 (N.C. 1924).*

(n9)Footnote 865. *Schowe v. Kallmeyer, 20 S.W.2d 26 (Mo. 1929).*

(n10)Footnote 866. *Sharpe v. Baker, 96 N.E. 627 (Ind. App. 1911).*

(n11)Footnote 867. *McNeer v. McNeer, 32 N.E. 681 (Ill. 1892); Burleigh v. Coffin, 22 N.H. 118 (1850).*

(n12)Footnote 868. *Cheek v. Waldrum, 25 Ala. 152 (1854); Boykin v. Rain, 28 Ala. 332 (1856); Butterfield v. Beall, 3 Ind. 203 (1851).*

(n13)Footnote 869. Coke on Littleton, §351a.

McNeer v. McNeer, 32 N.E. 681 (Ill. 1892); Babb v. Perley, 1 Greenl. 6 (Me. 1820); Melvin v. Locks & Canals, 33 Mass. (16 Pick.) 161 (1834); Nickerson v. Nickerson, 126 N.E. 834 (Mass. 1920); Mathis v. Melton, 238 S.W. 806 (Mo.

1922); Burleigh v. Coffin, 22 N.H. 118 (1850).

(n14)Footnote 870. *Fields v. Dale, 90 So. 798 (Ala. 1921).*

(n15)Footnote 871. *Gregg v. Sayre, 33 U.S. (8 Pet.) 244 (1834); Boykin v. Rain, 28 Ala. 332 (1856); Junction R. Co. v. Harris, 9 Ind. 184 (1857); Edrington v. Harper, 26 Ky. (3 J.J. Marsh) 353 (1830); Rose v. Rose, 46 S.W. 524 (Ky. 1898); Payne v. Parker, 10 Me. 178 (1833); Nickerson v. Nickerson, 126 N.E. 834 (Mass. 1920);* Evans v. Kingsberry, 2 Rand. (Va.) 120 (1823).

(n16)Footnote 872. *Eaton v. Whitaker, 18 Conn. 222 (1846).*

(n17)Footnote 873. *McGuire v. Cook, 135 S.W. 840 (Ark. 1911); Richardson v. Richardson, 64 S.E. 510 (N.C. 1909).*

(n18)Footnote 874. Coke on Littleton, §351a.

Butterfield v. Beall, 3 Ind. 203 (1851); Parsons v. Parsons, 9 N.H. 309 (1838); Schuyler v. Hoyle, 5 Johns Ch. (N.Y.) 196 (1821); Coleman v. Satterfield, 39 Tenn. (2 Head) 259 (1858); Burt v. Hurlburt, 16 Vt. 292 (1844).

(n19)Footnote 875. *Lithgow v. Kavenagh, 9 Mass. 161 (1812); Clark v. Clark, 18 P. 1 (Or. 1888); Glidden v. Strupler, 52 Pa. 400 (1866).*

(n20)Footnote 876. *Junction R. Co. v. Harris, 9 Ind. 184 (1857); Payne v. Parker, 10 Me. 178 (1833).*

(n21)Footnote 877. *Plotkin v. Plotkin, 125 A. 455 (Del. 1924).*

The presumption of law is that the husband owns all of the property, real as well as personal, of which the wife is in possession during coverture, particularly if the husband and wife are living together as such; but this presumption is not affected by the *Married Woman's Act. Harris v. Carver, 124 S.E. 206 (Va. 1924).*

(n22)Footnote 878. *Nickerson v. Nickerson, 126 N.E. 834 (Mass. 1920); Mathis v. Melton, 238 S.W. 806 (Mo. 1922).*

(n23)Footnote 879. *Nickerson v. Nickerson, 126 N.E. 834 (Mass. 1920).*

(n24)Footnote 880. *Mathis v. Melton, 238 S.W. 806 (Mo. 1922); Hubbard v. Keen, 247 S.W. 1000 (Mo. 1923).*

(n25)Footnote 881. *Nickerson v. Nickerson, 126 N.E. 834 (Mass. 1920); Wehoffer v. Wehoffer, 156 P.2d 830 (Or. 1945).*

(n26)Footnote 882. *Blood v. Hunt, 121 So. 886 (Fla. 1929); Salter v. Salter, 4 S.E. 391 (Ga. 1887); Townes v. Durbin, 60 Ky. (3 Met.) 352 (1861); Carroll v. Lee, 3 Gill. & J. (Md.) 504 (1832); Spencer v. St. Paul & S.C.R. Co., 22 Minn. 29 (1875); Hassfeldt v. Dill, 10 N.W. 781 (Minn. 1881)* (wife takes the rents, issues and products); *Sudbo v. Rusten, 68 N.W. 513 (Minn. 1896); Botts v. Gooch, 11 S.W. 42 (Mo. 1889); Kranjcec v. Belinak, 132 P.2d 150 (Mont. 1942); Perkins v. Elliott 23 N.J. Eq. 526 (1872); Hollander v. Abrams, 132 A. 224 (N.J. Eq. 1926), aff'd, 134 A. 742 (N.J. Eq. 1926); Peoples Sav. Bank v. Denig, 18 A. 1083 (Pa. 1890); Goldberg v. Goldberg, 51 Dauph. 16 (Pa. 1941);* In re Wolfgang's Estate, 15 Northumb. L.J. 367 (Pa. 1942); *Magnolia Petr. Co. v. Still, 163 S.W.2d 268 (Tex. Civ. App. 1942); Price v. Planters Nat'l Bank, 23 S.E. 887 (Va. 1896); Rowley v. American Trust Co., 132 S.E. 347 (Va. 1926).* A married woman may evict her husband from her own home. *Owens v. Owens, 149 A.2d 320 (Del. Ch. 1959).*

(n27)Footnote 883. *McMillan v. Peacock, 57 Ala. 127 (1876).*

(n28)Footnote 884. *Hartsfield Loan & Sav. Co. v. Garner, 191 S.E. 119 (Ga. 1937); Kranjcec v. Belinak, 132 P.2d*

150 (Mont. 1942).

(n29)Footnote 885. *Bride v. Walker, 176 S.W.2d 148 (Ark. 1943).*

(n30)Footnote 886. *Jones v. Clifton, 101 U.S. 225 (1879); Harkins v. Coalter, 2 Port. 463 (Ala. 1835); Meacham v. Bunting, 41 N.E. 175 (Ill. 1895); Armstrong v. Ross, 20 N.J. Eq. 109 (1869); Hamilton v. Bishop, 16 Tenn. (8 Yer.) 33 (1835).*

(n31)Footnote 887. *Robinson v. Randolph, 21 Fla. 629 (1885); Bressler v. Kent, 61 Ill. 426 (1871); Ware v. Richardson, 3 Md. 505 (1853); Richardson v. De Giverville, 17 S.W. 974 (Mo. 1891); Fox v. Jones, 1 W. Va. 205 (1866).*

The interest of one spouse in the property of another is recognized by Kansas law only in favor of Kansas residents. *McGill v. Kuhn, 348 P.2d 811 (Kan. 1960).*

See Joseph M. Snee, *The Canon Law of Marriage, an Outline, 35 U. Det. L. Rev. 309 (1957).*

(n32)Footnote 888. *Welch v. Welch, 14 Ala. 76 (1848); Fears v. Brooks, 12 Ga. 195 (1852); Tritt v. Colwell, 31 Pa. 228 (1858).*

(n33)Footnote 889. *Travis v. Sitz, 185 S.W. 1075 (Tenn. 1916).*

(n34)Footnote 890. *McMillan v. Peacock, 57 Ala. 127 (1876).*

(n35)Footnote 891. *Id.*; *Deming v. Williams, 26 Conn. 226 (1857); Small v. Field, 14 S.W. 815 (Mo. 1890); Pitts v. Sheriff, 18 S.W. 1071 (Mo. 1892).*

(n36)Footnote 892. *Robertson v. Wade, 68 S.W.2d 487 (Tenn. App. 1933).*

(n37)Footnote 893. "At the same time equity steps in and charges whatever legal ownership is vested in the husband with the trust to hold for the separate use of the wife." Joel Prentiss Bishop, Commentaries on The Law of Married Women (1871).

(n38)Footnote 894. *Turner v. Warren, 18 S.E.2d 865 (Ga. 1942).*

(n39)Footnote 895. *Buford v. Mochy, 29 S.E.2d 729 (N.C. 1944).*

Where a single woman contracts to sell real estate and subsequently marries before executing the deed, the husband and wife must join in the conveyance and the court will compel them so to do. *Lapida v. Goodman, 61 D. & C. (Pa.) 323 (1948).*

Deed from a wife to a straw man for reconveyance to the husband and wife is void, unless there is a finding that the conveyance is not unreasonable or injurious to the wife. *Brinson v. Kirby, 110 S.E.2d 482 (N.C. 1959).*

(n40)Footnote 896. *Cochran v. O'Hern, 4 Watts & S. (Pa.) 95 (1842); Thomas v. Folwell, 2 Whart. (Pa.) 11 (1836);* Ewing v. Smith, 3 Desaus. (S.C.) 417 (1811); Calhoun v. Calhoun, 2 Strobh. Eq. (S.C.) 231 (1848); *Marshall v. Stephens, 27 Tenn. (8 Humph.) 159 (1847); Williamson v. Beckham, 8 Leigh (Va.) 20 (1837).*

(n41)Footnote 897. *See* in general: *Van Sandt v. Weir, 19 So. 424 (Ala. 1896); Rypka v. Field, 115 P.2d 521 (Cal. App. 1941); Butler v. Buchingham, 5 Day (Conn.) 492 (1813); Williamson v. Yager, 15 S.W. 660 (Ky. 1891); Johnson v. Johnson, 166 S.W.2d 285 (Ky. 1942); Helms v. Franciscus, 2 Bland Ch. (Md.) 544 (1830); Burdeno v. Amperse, 14 Mich. 91 (1866); Turner v. Shaw, 8 S.W. 897 (Mo. 1888); Harris v. Harris, 42 N.C. 111 (1850); Kirk v. Kirk, 16 A.2d*

47 (Pa. 1940); In re Rynier's Estate, 32 A.2d 736 (Pa. 1943); Barnum v. Lemaster, 75 S.W. 1045 (Tenn. 1903); Magnolia Petr. Co. v. Still, 163 S.W.2d 268 (Tex. Civ. App. 1942); Christiansen v. Department of Social Sec., 131 P.2d 189 (Wash. 1942).

(n42)Footnote 898. *Bressler v. Kent, 61 Ill. 426 (1871); Essick v. Caple, 30 N.E. 900 (Ind. 1892)* ("die without having heirs born to her"); *Williamson v. Yager, 15 S.W. 660 (Ky. 1891); Clough v. Clough, 15 A. 127 (N.H. 1888)* ("if she should have living issue"); *Yale v. Dederer, 18 N.Y. 265 (1858); Walker v. Trollinger, 135 S.E. 871 (N.C. 1926)* ("without having children"); *Roberson v. Queen, 11 S.W. 38 (Tenn. 1889); Contra, Busby v. Rhodes, 58 Miss. 237 (1880).*

(n43)Footnote 899. *See Travis v. Sitz, 185 S.W. 1075 (Tenn. 1916).*

(n44)Footnote 900. *Elliott v. Peirsol, 26 U.S. (1 Pet.) 328 (1828); Good v. Zercher, 12 Ohio 364 (1843); Glidden v. Strupler, 52 Pa. 400 (1866).*

(n45)Footnote 901. *Goode v. Longmire, 35 Ala. 668 (1860); Smyley v. Reese, 53 Ala. 89 (1875); American Nat'l Bank & Trust Co. v. Powell, 178 So. 21 (Ala. 1937); Neely v. Lancaster, 1 S.W. 66 (Ark. 1886); Hampton v. Cook, 42 S.W. 535 (Ark. 1897); George v. Ransom, 15 Cal. 322 (1860); Lewis v. Johns, 24 Cal. 98 (1864); Evans v. Lobdale, 11 Del. (6 Houst.) 212 (1881); Moore v. Darby, 18 A. 768 (Del. Ch. 1889); Thompson v. Thompson, 35 S.E.2d 262 (Ga. 1945); McNeer v. McNeer, 32 N.E. 681 (Ill. 1892); Johnson v. Johnson, 90 S.W. 964 (Ky. 1906); Webster v. Webster, 58 Me. 139 (1870); Lynde v. McGregor, 13 Allen (95 Mass.) 182 (1866); Johnson v. Cummins, 16 N.J. Eq. 97; Breeding v. Davis, 77 Va. 639 (1883).*

(n46)Footnote 902. *Cary v. Cary, 80 P.2d 886 (Or. 1938) Mitchell v. Campbell, 13 So. 147 (Ala. 1893)* (holding that husband can not compel the sale of a jointly owned homestead).

(n47)Footnote 903. *Junction R. Co. v. Harris, 9 Ind. 184 (1833); Lawler v. Merritt, 48 N.Y.S.2d 843 (1944).*

(n48)Footnote 904. *Staples v. Barret, 108 So. 742 (Ala. 1926); Moore v. Darby, 18 A. 768 (Del. Ch. 1889); Chicago, B. & Q. R.R. v. Dunn, 52 Ill. 260 (1869); Appeal of Bergey, 60 Pa. 408 (1869); Alexander v. Alexander, 7 S.E. 335 (Va. 1888); Dayton v. Walsh, 2 N.W. 65 (Wis. 1879).*

(n49)Footnote 905. *Bishop v. Safe Deposit & Trust Co., 185 A. 335 (Md. 1936).*

See the following cases:

Wolkau v. Wolkau, 132 N.E. 507 (Ill. 1921); Hubbard v. Keen, 247 S.W. 1000 (Mo. 1923); Bucci v. Popovich, 115 A. 95 (N.J. Eq. 1921), aff'd, 116 A. 923 (N.J. Eq. 1922); Jefferson County Bank v. Hale, 280 S.W. 408 (Tenn. 1926); Humphreys v. Strong, 126 S.E. 194 (Va. 1925); Mattinson v. Mattinson, 222 P. 620 (Wash. 1924).

(n50)Footnote 906. *Bloomfield v. Brown, 25 A.2d 354 (R.I. 1942); see Breeding v. Davis, 77 Va. 639 (1883).*

See also Arthur E. Ryman, *A Comment on Family Property Rights and the Proposed 27th Amendment, 22 Drake L. Rev. 505 (1973).*

(n51)Footnote 907. *Hansen v. Cramer, 245 P.2d 1059 (Cal. 1952); Matthews v. Matthews, 148 S.W.2d 3 (Tenn. App. 1940); In re Cortte's Estate, 283 N.W. 336 (Wis. 1939); Jaeger v. Jaeger, 53 N.W.2d 740 (Wis. 1952); Pettis v. Johnston, 190 P. 681 (Okla. 1920)* (holding that the homestead interest is jointly vested in husband and wife and the joint right is paramount to the individual right).

In Tennessee, married woman may convey her realty without her husband joining. *Union Planters Nat'l Bank v. United States, 361 F.2d 662 (6th Cir. 1966)* So also in *Smith v. Martin, 186 So. 2d 16 (Fla. 1966).*

(n52)Footnote 908. *Scotvold v. Scotvold, 298 N.W. 266 (S.D. 1941).*

(n53)Footnote 909. *Black v. Internal Revenue Comm'r, 114 F.2d 355 (9th Cir. 1940); Helvering v. Campbell, 139 F.2d 865 (4th Cir. 1944); Nelson v. Goree, 34 Ala. 565 (1859); Ward v. Stallworth, 11 So. 2d 374 (Ala. 1942); Townes v. Durbin, 60 Ky. (3 Metc.) 352 (1861); Packwoods Succession, 12 Rob. (La.) 334 (1845); Bryan v. Moore, 11 Mart. (O.S.) (La.) 26 (1822); Cole v. His Executors, 7 Mart. (N.S.) (La.) 41 (1828); Dixon v. Dixon, 4 La. 188 (1832); Rush v. Landers, 32 So. 95 (La. 1902); Newcomer v. Orem, 2 Md. 297 (1852); Depas v. Mayo, 11 Mo. 314 (1848); In re Majot, 92 N.E. 402 (N.Y. 1910); McCollum v. Smith, 19 Tenn. (1 Meigs) 342 (1838); Kneeland v. Ensley, 19 Tenn. (Megis) 620 (1838); Morgan v. Bell, 28 P. 925 (Wash. 1892); La Selle v. Woolery, 44 P. 115 (Wash. 1896); Hitchcock Clinic, Inc. v. Mackie, 648 A.2d 817 (Vt. 1993)* (holding that Vermont law, rather than New Hampshire law, applied in an action between a hospital and a former patient's wife to recover debts incurred by the patient in New Hampshire, because the hospital wished to attach property located in Vermont, the matrimonial domicile was Vermont, and the wife resided in Vermont).

See Restatement of Conflict of Laws, §237.

(n54)Footnote 910. *Smith v. Ingram, 44 S.E. 643 (N.C. 1903).*

(n55)Footnote 911. *Nicholls v. O'Neill, 10 N.J. Eq. 88 (1854).*

(n56)Footnote 912. 2 William Blackstone, Commentaries 127.

(n57)Footnote 913. 2 William Blackstone, Commentaries 126.

See George L. Hoskins, *Curtesy at Common Law: Historical Development, 29 B.U. L. Rev. 228 (1949)* for the theory that tenancy by the curtesy arose from the husband's status as guardian for his children who were the deceased wife's heirs since by his curtesy he kept out the lord's wardship and escheat.

(n58)Footnote 914. 2 William Blackstone, Commentaries 126. *See* George L. Hoskins, *Curtesy at Common Law: Historical Development, 29 B.U. L. Rev. 228. See* C.M.A. McCauliff, *The Medieval Origin of the Doctrine of Estates in Land: Substantive Property Law, Family Considerations and the Interests of Women, 66 Tul.L. Rev. at 919, 1013 (Mar. 1992).*

(n59)Footnote 915. *Whiteman v. Taber, 83 So. 595 (Ala. 1919); Sadler v. Campbell, 236 S.W. 588 (Ark. 1921); Moore v. Darby, 18 A. 768 (Del. Ch. 1889); Decker v. Decker, 265 S.W. 483 (Ky. 1924); Donovan v. Griffith, 114 S.W. 621 (Mo. 1908); Shackleton v. Annabel, 206 N.Y.S. 446 (1924); Day v. Burgess, 202 S.W. 911 (Tenn. 1918).* Under the statutes of Oregon, a nonresident husband has no right of curtesy in lands of which his wife was not seized at the time of her death. *Rieger v. Harrington, 203 P. 576 (Or. 1922); Redus v. Hayden, 43 Miss. 614 (Miss. 1870)* (defining tenant by the curtesy).

(n60)Footnote 916. *Sadler v. Campbell, 236 S.W. 588 (Ark. 1921); Decker v. Decker, 265 S.W. 483 (Ky. 1924); Shackleton v. Annabel, 206 N.Y.S. 446 (1924).*

The husband upon marriage acquired an estate in his wife's land, which gave him possession, control, title to all rents and profits and the right to sell for his lifetime. *Perry v. Stancil, 75 S.E.2d 512 (N.C. 1953).*

(n61)Footnote 917. *Hope v. Shevill, 122 N.Y.S. 127 (1910), aff'd, 97 N.E. 1106 (N.Y. 1912).*

See Spies, *Property Rights of the Surviving Spouse, 46 Va. L. Rev. 157; Connolly v. Mahoney, 15 So. 903 (Ala. 1893)* (holding that a husband has a life estate in wife's property; wife dies intestate).

(n62)Footnote 918. *Hanneman v. Richter, 177 F. 563 (E.D.N.Y. Cir. 1910).*

A husband's tenancy by "curtesy consummate," which Married Woman's Act saved from impairment by wife's deed, contract or other act or by judgment or decree against her, is "vested life estate in remainder," for characteristic of "vested remainder" is present capacity to take effect in possession or enjoyment on certain determination of precedent particular estate, rather than certainty of enjoyment by remainderman. *Hopper v. Gurtman, 18 A.2d 245 (N.J.L. 1941).*

(n63)Footnote 919. *Deffenbaugh v. Hess, 74 A. 608 (Pa. 1909).*

(n64)Footnote 920. *In re Starbuck's Estate, 122 N.Y.S. 584 (1910), aff'd, 94 N.E. 1098 (N.Y. 1911).*

(n65)Footnote 921. *O'Brien v. Sedalia Trust Co., 5 S.W.2d 74 (Mo. 1928).*

"The husband, by the birth of the child, becomes tenant by the curtesy initiate, and may do many acts to charge the lands but his estate is not consummate till the death of the wife." 2 William Blackstone, Commentaries 128.

(n66)Footnote 922. *Jackson v. Jackson, 33 N.E. 51 (Ill. 1893); Donovan v. Griffith, 114 S.W. 621 (Mo. 1908); Collins v. Russell, 76 N.E. 731 (N.Y. 1906).*

(n67)Footnote 923. *Wells v. Thompson, 13 Ala. 793 (1848); Day v. Burgess, 202 S.W. 911 (Tenn. 1918)* (defining curtesy initiate).

(n68)Footnote 924. *See Restatement of Property* §153.

(n69)Footnote 925. *Havranek v. Dragoun, 65 A.2d 105 (N.J. Super. 1948); Day v. Burgess, 202 S.W. 911 (Tenn. 1918).*

(n70)Footnote 926. *Sill v. White, 26 A. 396 (Conn. 1892); Miller v. Proctor, 49 S.W.2d 84 (Mo. 1932); Anastasia v. Anastasia, 47 A.2d 879 (N.J. Eq. 1946).*

(n71)Footnote 927. *Evans v. Lobdale, 6 Houst. (Del.) 212 (1889); McNeer v. McNeer, 32 N.E. 681 (Ill. 1892).*

Curtesy was held superior to a lien of judgment against the deceased and husband for purpose of calculating the husband's right in proceeds of sale. *Quick v. Davidson, 545 S.W.2d 917 (Ark. 1977).*

(n72)Footnote 928. *Hampton v. Cook, 42 S.W. 535 (Ark. 1897); Waddle v. Frazier, 151 S.W. 87 (Mo. 1912); Reese v. Stires, 103 A. 679 (N.J. Eq. 1917).*

(n73)Footnote 929. *In re Starbuck's Estate, 122 N.Y.S. 584 (1910), aff'd, 94 N.E. 1098 (N.Y. 1911).*

(n74)Footnote 930. *Rieger v. Harrington, 203 P. 576 (Or. 1922).*

(n75)Footnote 931. "This estate has no moral foundation to support it." William Cruise & Simon Greenleaf, A Digest of The Law of Real Property (2d ed. 1856-57). Greenleaf-Cruise, Real Property, tit. 5, §3.

(n76)Footnote 932. *Billings v. Baker, 15 How. Prac. (N.Y.) 525 (1858).*

(n77)Footnote 933. *Pridgen v. Pridgen, 129 S.E. 419 (N.C. 1925).*

(n78)Footnote 934. *Faulkner v. Terrell, 287 S.W.2d 409 (Ky. 1956)* (birth of issue not required for curtesy). *In re Redmond's Will, 60 N.Y.S.2d 316 (1946)* (birth of issue required); *Day v. Burgess, 202 S.W. 911 (Tenn. 1918); Littell v. Jones, 19 S.W. 497 (Ark. 1892)* (holding that husband acquired no vested estate of curtesy in his wife's land until birth of issue); *Sewell v. Sewell, 1 N.E.2d 492 (Ill. 1936)* (holding that a husband had a right of curtesy to homestead of his wife subject only to wife's children during their minority).

(n79)Footnote 935. *Sadler v. Campbell, 236 S.W. 588 (Ark. 1921); Todd v. Oviatt, 20 A. 440 (Conn. 1889); McNeer v. McNeer, 32 N.E. 681 (Ill. 1892); Carr v. Givens, 72 Ky. (9 Bush) 679 (1873); Doyle v. Rolwing, 65 S.W. 315 (Mo. 1901); Donovan v. Griffith, 114 S.W. 621 (Mo. 1908); Register v. Elder, 132 S.W. 699 (Mo. 1910); Brook v. Barker, 228 S.W. 805 (Mo. 1921); Jackson v. Johnson, 5 Cow. (N.Y.) 74 (1825); Sanford v. Getman, 210 N.Y.S. 682 (1925) Richardson v. Richardson, 64 S.E. 510 (N.C. 1909); Burgess v. Muldoon, 29 A. 298 (R.I. 1894); Travis v. Sitz, 185 S.W. 1075 (Tenn. 1916); Day v. Burgess, 202 S.W. 911 (Tenn. 1918); Breeding v. Davis, 77 Va. 639 (1883); Peal v. Luther, 97 S.E.2d 668 (Va. 1957).*

(n80)Footnote 936. 2 William Blackstone, Commentaries 127.

(n81)Footnote 937. Turner v. Meyers, 1 Hagg. Consist. 414.

(n82)Footnote 938. *In re Murray Canal, 6 Ont. 685.*

(n83)Footnote 939. *Hafner v. Miller, 252 S.W. 722 (Mo. 1923).*

(n84)Footnote 940. *Sanford v. Getman, 210 N.Y.S. 682 (1925).*

(n85)Footnote 941. *Decker v. Decker, 265 S.W. 483 (Ky. 1924); Weaver v. Patterson, 111 A. 506 (N.J. Eq. 1920); Sanford v. Getman, 210 N.Y.S. 682 (1925).*

(n86)Footnote 942. *Mercer v. Selden, 42 U.S. (1 How.) 37 (1843); Jenkins v. Woodward Iron Co., 69 So. 646 (Ala. 1915); Bogy v. Roberts, 2 S.W. 186 (Ark. 1886); Todd v. Oviatt, 20 A. 440 (Conn. 1889); Moore v. Darby, 18 A. 768 (Del. Ch. 1889); McNeer v. McNeer, 32 N.E. 681 (Ill. 1892); Jackson v. Jackson, 33 N.E. 51 (Ill. 1893); Carr v. Givens, 72 Ky. (9 Bush) 679 (1873); Hunt v. Phillips, 105 S.W. 445 (Ky. L. 1907); Malone v. McLaurin, 40 Miss. 161 (1866); Cox v. Boyce, 54 S.W. 467 (Mo. 1899); Doyle v. Rolwing, 65 S.W. 315 (Mo. 1901); Dozier v. Toalson, 79 S.W. 420 (Mo. 1904); Donovan v. Griffith, 114 S.W. 621 (Mo. 1908); Weaver v. Patterson, 111 A. 506 (N.J. Eq. 1920); Brandmeier v. Pond Creek Coal Co., 67 A. 951 (Pa. 1907); Burgess v. Muldoon, 29 A. 298 (R.I. 1894); Travis v. Sitz, 185 S.W. 1075 (Tenn. 1916); Day v. Burgess, 202 S.W. 911 (Tenn. 1918); Breeding v. Davis, 77 Va. 639 (1883).*

(n87)Footnote 943. *Stockton v. Maney, 193 S.E. 137 (N.C. 1937).*

(n88)Footnote 944. *Wells v. Thompson, 13 Ala. 793 (1848); Carr v. Givens, 72 Ky. (9 Bush) 679 (1873); Malone v. McLaurin, 40 Miss. 161 (1866); Grandjean v. Beyl, 110 N.W. 1108 (Neb. 1907); Collins v. Russell, 76 N.E. 731 (N.Y. 1906).*

(n89)Footnote 945. Coke on Littleton, §559.

(n90)Footnote 946. *Carpenter v. Garrett, 75 Va. 129 (1880).*

(n91)Footnote 947. *Malone v. McLaurin, 40 Miss. 161 (1866); Hicks v. Estes, 214 S.W. 159 (Mo. 1919); McCoy v. King's Heirs, 3 Humph. (22 Tenn.) 267 (1842).*

(n92)Footnote 948. *Todd v. Oviatt, 20 A. 440 (Conn. 1889); Cox v. Boyce, 54 S.W. 467 (Mo. 1899); Majors v. Cryts, 144 S.W. 769 (Mo. 1912); Adair v. Lott, 3 Hill (N.Y.) 182 (1842); Jackson v. Johnson, 5 Cow. (N.Y.) 74 (1825); Merritt v. Horne, 5 Ohio 307 (1855); Appeal of Rankin, 16 A. 82 (Pa. 1888).*

(n93)Footnote 949. *Todd v. Oviatt, 20 A. 440 (Conn. 1889).*

(n94)Footnote 950. *Davis v. Mason, 26 U.S. 503 (1828); Wells v. Thompson, 13 Ala. 793 (1848); Guion v. Anderson, 8 Humph. (27 Tenn.) 298 (1847).*

(n95)Footnote 951. *Conner v. Downer, 4 Bush (67 Ky.) 631 (1868); Decker v. Decker, 265 S.W. 483 (Ky. 1924);*

See Weaver v. Patterson, 111 A. 506 (N.J. Eq. 1920); Sanford v. Getman, 210 N.Y.S. 682 (1925).

(n96)Footnote 952. *Shackleton v. Annabel, 206 N.Y.S. 446 (1924). See Tyndall v. Tyndall, 119 S.E. 354 (N.C. 1923),* wherein it is said that "at common law ... the wife's seizin must have been not a mere right or seizin in law, but actual possession or a seizin in deed." *Hess v. Hess, 91 P.2d 850 (Or.1939)* (holding that "seisin" as applied to land is a technical term and implies the actual possession of a freehold estate and is in fact the actual possession of the land).

(n97)Footnote 953. *Powell v. Gossom, 18 B. Mon. (57 Ky.) 179 (1857).*

(n98)Footnote 954. *Ellsworth v. Cook, 8 Paige (N.Y.) 643 (1841).*

(n99)Footnote 955. *De Grey v. Richardson, 3 Atk. 469; Rossiter v. Soper, 50 N.E.2d 701 (Ill. 1943); Carr v. Givens, 9 Bush (72 Ky.) 679 (1873).*

(n100)Footnote 956. *Green v. Liter, 12 U.S. 229 (1814); Powell v. Gossom, 18 B. Mon. (57 Ky.) 179 (1857); Jackson v. Johnson, 5 Cow. (N.Y.) 74 (1825).*

(n101)Footnote 957. *Carr v. Givens, 9 Bush (72 Ky.) 679 (1873); Dunscomb v. Dunscomb, 1 John. Ch. (N.Y.) 508 (1815).*

(n102)Footnote 958. *Planters Bank v. Davis, 31 Ala. 626 (1858); Planters Shores v. Carley, 8 Allen (90 Mass.) 425 (1864); Hitner v. Ege, 23 Pa. 305 (1854); Brandmeier v. Pond Creek Coal Co., 67 A. 951 (Pa. 1907).*

(n103)Footnote 959. *Donovan v. Griffith, 114 S.W. 621 (Mo. 1908); Jackson v. Johnson, 5 Cow. (N.Y.) 74 (1825).*

(n104)Footnote 960. *Whitehill v. Thiess, 158 A. 347 (Md. 1932).*

(n105)Footnote 961. *Todd v. Oviatt, 20 A. 440 (Conn. 1889); New York, N. H. & H. R.R. v. Russell, 78 A. 324 (Conn. 1910); Moore v. Darby, 18 A. 768 (Del. Ch. 1889); McNeer v. McNeer, 32 N.E. 681 (Ill. 1892); Jackson v. Jackson, 33 N.E. 51 (Ill. 1893); Carr v. Givens, 72 Ky. (9 Bush) 679 (1873); Shepard v. Browning, 160 S.W. 950 (Ky. 1913); Doyle v. Rolwing, 65 S.W. 315 (Mo. 1901); Dozier v. Toalson, 79 S.W. 420 (Mo. 1904); Brook v. Barker, 228 S.W. 805 (Mo. 1921); Lynch v. Jones, 247 S.W. 123 (Mo. 1922); Murdock v. Murdock, 65 A. 392 (N.H. 1906); Craig v. Smith, 95 A. 194 (N.J. Eq. 1915); Jackson v. Johnson, 5 Cow. (N.Y.) 74 (1825); Yung v. Blake, 148 N.Y.S. 557 (1914); Sanford v. Getman, 210 N.Y.S. 682 (1925) Richardson v. Richardson, 64 S.E. 510 (N.C. 1909); Norwood v. Totten, 82 S.E. 951 (N.C. 1914); Burgess v. Muldoon, 29 A. 298 (R.I. 1894); Travis v. Sitz, 185 S.W. 1075 (Tenn. 1916); Day v. Burgess, 202 S.W. 911 (Tenn. 1918); Breeding v. Davis, 77 Va. 639 (1883); Duggins v. Woodson, 84 S.E. 652 (Va. 1915).*

(n106)Footnote 962. *Donovan v. Griffith, 114 S.W. 621 (Mo. 1908); Jackson v. Johnson, 5 Cow. (N.Y.) 74 (1825).*

(n107)Footnote 963. *Evans v. Lobdale, 11 Del. (6 Houst.) 212 (1881); Doyle v. Rolwing, 65 S.W. 315 (Mo. 1901); Richardson v. Richardson, 64 S.E. 510 (N.C. 1909); Breeding v. Davis, 77 Va. 639 (1883).*

(n108)Footnote 964. *Turner v. Heinberg, 65 N.E. 294 (Ind. App. 1902); Garner v. Wills, 17 S.W. 1023 (Ky. 1891); Hopper v. Gurtman, 18 A.2d 245 (N.J.L. 1941).*

(n109)Footnote 965. *Cannon v. Killen, 5 Houst. (Del.) 14 (1875); Goff v. Anderson, 15 S.W. 866 (Ky. 1891); Fleming v. Sexton, 90 S.E. 247 (N.C. 1916).*

(n110)Footnote 966. *Marsellis v. Thalhimer, 2 Paige (N.Y.) 35 (1830).*

(n111)Footnote 967. *See Forbes v. Sweesy, 1 N.W. 571 (Neb. 1879); Grandjean v. Beyl, 110 N.W. 1108 (Neb. 1907); Bruner v. Briggs, 39 Ohio St. 478 (1883); Dubs v. Dubs, 31 Pa. 149 (1858); Rouse v. Directors of Poor, 32 A.*

541 (Pa. 1895).

(n112)Footnote 968. *Hunter v. Whitworth, 9 Ala. 965 (1846); In re Gossett's Estate, 129 P.2d 56 (N.M. 1942)* (holding that an nonmarital child acquires interest in mother's land equal to marital child).

(n113)Footnote 969. *Murdock v. Murdock, 65 A. 392 (N.H. 1906).*

(n114)Footnote 970. *Bucci v. Popovich, 115 A. 95 (N.J. Eq. 1921), aff'd, 116 A. 923 (N.J. 1922).*

Although a husband, whose wife has not borne him a child alive, has neither an estate by the curtesy initiate nor an inchoate right of curtesy, he does have a contingent estate in remainder, because, on issue's being born alive, he would have an inchoate right of curtesy, and on his surviving his wife, he would be entitled to an estate by the curtesy consummate; that is, a freehold estate in possession for the remainder of his life. *Riley v. Riley, 113 A. 777 (N.J. 1921).*

(n115)Footnote 971. *Sanford v. Getman, 206 N.Y.S. 865 (1924); Fleming v. Sexton, 90 S.E. 247 (N.C. 1916)* (defining birth).

(n116)Footnote 972. *Heath v. White, 5 Conn. 228 (1824); Grandjean v. Beyl, 110 N.W. 1108 (Neb. 1907); Mullany v. Mullany, 4 N.J. Eq. 16 (1837). See Sanford v. Getman, 210 N.Y.S. 682 (1925).*

(n117)Footnote 973. *Adams v. Beekman, 1 Paige (N.Y.) 631 (1829); Barker v. Barker, 2 Sim. 249.*

(n118)Footnote 974. *Adams v. Beekman, 1 Paige (N.Y.) 631 (1829); Sumner v. Partridge, 2 Atk. 37, 26 Eng. Rep. 425 (1740).*

(n119)Footnote 975. *Sumner v. Partridge, 2 Atk 37, 26 Eng. Rep. 425 (1740).*

(n120)Footnote 976. *Jamison v. Zausch, 126 S.W. 1023 (Mo. 1910).*

(n121)Footnote 977. *Manatt v. Griffith, 124 N.W. 753 (Iowa 1910).*

(n122)Footnote 978. *Bucci v. Popovich, 115 A. 95 (N.J. Eq. 1922).*

(n123)Footnote 979. *See generally: Wells v. Thompson, 13 Ala. 793 (1848); Sadler v. Campbell, 236 S.W. 588 (Ark. 1921); Todd v. Oviatt, 20 A. 440 (Conn. 1889); Moore v. Darby, 18 A. 768 (Del. Ch. 1889); Beach v. Miller, 51 Ill. 206 (1869); McNeer v. McNeer, 32 N.E. 681 (Ill. 1892); Carr v. Givens, 72 Ky. (9 Bush) 679 (1873); Nickerson v. Nickerson, 126 N.E. 834 (Mass. 1920); Doyle v. Rolwing, 65 S.W. 315 (Mo. 1901); Dozier v. Toalson, 79 S.W. 420 (Mo. 1904); Donovan v. Griffith, 114 S.W. 621 (Mo. 1908); Brook v. Barker, 228 S.W. 805 (Mo. 1921); Healey v. Tillberry, 183 S.W. 666 (Mo. App. 1916); Bucci v. Popovich, 115 A. 95 (N.J. Eq. 1921); Jackson v. Johnson, 5 Cow. (N.Y.) 74 (1825); Richardson v. Richardson, 64 S.E. 510 (N.C. 1909); Burgess v. Muldoon, 29 A. 298 (R.I. 1894); Travis v. Sitz, 185 S.W. 1075 (Tenn. 1916); Day v. Burgess, 202 S.W. 911 (Tenn. 1918); Breeding v. Davis, 77 Va. 639 (1883).*

(n124)Footnote 980. *Hampton v. Cook, 42 S.W. 535 (Ark. 1897); Watson v. Watson, 13 Conn. 83 (1839).*

(n125)Footnote 981. *In re Starbuck's Estate, 122 N.Y.S. 584 (1910).*

(n126)Footnote 982. *Howze v. Hutchens, 209 S.W.2d 286 (Ark. 1948)* (remainderman dying before life tenant); *Sanford v. Getman, 210 N.Y.S. 682 (1925).*

(n127)Footnote 983. *In re Grandjean's Estate, 110 N.W. 1108 (Neb. 1907); Mullany v. Mullany, 4 N.J. Eq. 16 (1837); Graves v. Trueblood, 1 S.E. 918 (N.C. 1887); Waller v. Martin, 61 S.W. 73 (Tenn. 1901); Muse v. Friedenwald, 77 Va. 57 (1883).*

(n128)Footnote 984. *Whitehill v. Thiess, 158 A. 347 (Md. 1932).*

(n129)Footnote 985. "It is well settled in respect to estates tail that though issue in tail fail by the death of the child or children in the lifetime of the wife, whereby her estate at her death is at an end, yet the husband takes curtesy, the same being a right incident to such an estate." *Hay v. Mayer, 8 Watts (Pa.) 203 (1839); Holden v. Wells, 31 A. 265 (R.I. 1895).*

Dower or curtesy in defeasible fees. *Snidow v. Snidow, 63 S.E.2d 620 (Va. 1951).*

(n130)Footnote 986. *Moore v. Darby, 18 A. 768 (Del. Ch. 1889).*

Curtesy allowed in defeasible fee defeated at wife's death.

See George L. Haskins, *The Defeasibility of Dower, 98 U. Pa. L. Rev. 826 (1950).*

(n131)Footnote 987. *Smith v. Bachus, 70 So. 261 (Ala. 1915); Whitehill v. Thiess, 158 A. 347 (Md. 1932); Gray v. Clement, 246 S.W. 940 (Mo. 1922); Winterbaum v. Deusel, 111 A. 9 (N.J. 1920); Bigley v. Watson, 39 S.W. 525 (Tenn. 1897); Waller v. Martin, 61 S.W. 73 (Tenn. 1901).*

(n132)Footnote 988. *Brown v. Watkins, 40 S.W. 480 (Tenn. 1897).*

(n133)Footnote 989. *Maynard v. Henderson, 173 S.W. 831 (Ark. 1915).*

(n134)Footnote 990. *Flannery v. Rohrmayer, 49 Conn. 27 (1881).*

(n135)Footnote 991. *Noreen v. Sparks, 103 F. Supp. 588 (D.D.C. 1952); Howze v. Hutchens, 209 S.W.2d 286 (Ark. 1948); Todd v. Oviatt, 20 A. 440 (Conn. 1889); In re Ward's Appeal, 54 A. 730 (Conn. 1903); Moore v. Darby, 18 A. 768 (Del. Ch. 1889); Hunt v. Phillips, 105 S.W. 445 (Ky. L. 1907); Maupin v. Maupin, 110 S.W. 840 (Ky. L. 1908); Faulkner v. Terrell, 287 S.W.2d 409 (Ky. 1956)* (but curtesy attaches if life tenant predeceases the remainderman); *Malone v. McLaurin, 40 Miss. 161 (1866); Martin v. Trail, 43 S.W. 655 (Mo. 1897); Cox v. Boyce, 54 S.W. 467 (Mo. 1899); Dozier v. Toalson, 79 S.W. 420 (Mo. 1904); Hicks v. Estes, 214 S.W. 159 (Mo. 1919); Collins v. Russell, 76 N.E. 731 (N.Y. 1906); Kohl v. Kepler, 110 A. 239 (Pa. 1920); Reed v. Reed, 3 Head. (40 Tenn.) 491 (1859).*

(n136)Footnote 992. *Norton v. McDevit, 30 S.E. 24 (N.C. 1898).*

(n137)Footnote 993. *Travis v. Sitz, 185 S.W. 1075 (Tenn. 1916).*

(n138)Footnote 994. *Verhine v. Ragsdale, 35 S.W. 556 (Tenn. 1896).*

(n139)Footnote 995. *Winterbaum v. Duesel, 106 A. 821 (N.J.L. 1919).*

(n140)Footnote 996. *Chance v. Weston, 190 P. 155 (Or. 1920).*

(n141)Footnote 997. *Carter v. Couch, 47 So. 1006 (Ala. 1908); Webb v. First Colored Baptist Church, 13 S.W. 362 (Ky. 1890).*

Contra, no dower in contingent remainders which failed on wife's death. *Noreen v. Sparks, 104 F. Supp. 675 (D.D.C. 1952).*

Under the Kentucky statute, the husband has a right of curtesy in a fee even though the latter is defeasible on, and is actually defeated by, a failure of issue. Cooper's Adm'r v. *Clarke, 240* S.W. 361 (Ky. 1921).

(n142)Footnote 998. Joshua Williams, Principles of The Law of Real Property, 358, 359, 362 (17th ed.).

(n143)Footnote 999. *Appleton v. Rowley, L.R. 8 Eq. 139; Eager v. Furnivall, 17 Ch. Div. 115.*

(n144)Footnote 1000. *Cooper v. McDonald, 7 Ch. Div. 288.*

(n145)Footnote 1001. *Armstrong v. Wood, 195 F. 137 (C.C.D. Okla. 1911); Ogden v. Ogden, 28 S.W. 796 (Ark. 1894); Jackson v. Becktold Printing & Book Mfg. Co., 112 S.W. 161 (Ark. 1908); Dugan v. Gittings, 3 Gill. (Md) 138 (Md. 1845); Chance v. Weston, 190 P. 155 (Or. 1920).*

(n146)Footnote 1002. *Baker v. Combs, 284 S.W. 101 (Ky. 1926); Tyndall v. Tyndall, 119 S.E. 354 (N.C. 1923).*

(n147)Footnote 1003. *Donovan v. Griffith, 114 S.W. 621 (Mo. 1908).*

(n148)Footnote 1004. *Davis v. Mason, 26 U.S., 503 (1908); Jackson v. Becktold Printing & Book Mfg. Co., 112 S.W. 161 (Ark. 1908).*

(n149)Footnote 1005. *Chaplin v. Chaplin, 3 P. Wms. 234.*

(n150)Footnote 1006. *In re Grandjean's Estate, 110 N.W. 1108 (Neb. 1907).*

(n151)Footnote 1007. *Ogden v. Ogden, 28 S.W. 796 (Ark. 1894); Luntz v. Greve, 26 N.E. 128 (Ind. 1885); McTigue v. McTigue, 22 S.W. 501 (Mo. 1893); Jamison v. Zausch, 126 S.W. 1023 (Mo. 1910); Cushing v. Blake, 29 N.J. Eq. 399 (1878); Ege v. Medlar, 82 Pa. 86 (1876); Carter v. Dale Ross & Co., 71 Tenn. (Lea.) 710 (1879); Watts v. Ball, 1 P. Wms. 108, 24 Eng. Rep. 315 (1708); Casborne v. Scarfe, 1 Atk. 603, 26 Eng. Rep. 377 (1737).*

(n152)Footnote 1008. *Travis v. Sitz, 185 S.W. 1075 (Tenn. 1916).*

(n153)Footnote 1009. *Rigler v. Cloud, 14 Pa. 361 (1850); Jones v. Jones, 32 S.E. 463 (Va. 1899).*

(n154)Footnote 1010. *Grimball v. Patton, 70 Ala. 626 (1881); Pool v. Blakie, 53 Ill. 495 (1870); McTigue v. McTigue, 22 S.W. 501 (Mo. 1893); McBreen v. McBreen, 55 S.W. 463 (Mo. 1910); Chance v. Weston, 190 P. 155 (Or. 1920); Rigler v. Cloud, 14 Pa. 361 (1850); Haight v. Hall, 42 N.W. 109 (Wis. 1889).*

(n155)Footnote 1011. *McBreen v. McBreen, 55 S.W. 463 (Mo. 1900).*

(n156)Footnote 1012. *Mullany v. Mullany, 4 N.J. Eq. 16 (1937); Dubs v. Dubs, 31 Pa. 149 (1858); Steadman v. Palling, 3 Atk. 423, 56 Eng. Rep. 951 (1820);* Morgan v. Morgan, 5 Madd. 408, *26 Eng. Rep. 1044 (1820).*

(n157)Footnote 1013. *Hughes v. Saffell, 119 S.W. 804 (Ky. 1909).*

(n158)Footnote 1014. *Coleman v. Coleman, 55 A.2d 471 (N.H. 1947); Chance v. Weston, 190 P. 155 (Or. 1920); Hess v. Hess, 91 P.2d 850 (Or. 1939).*

(n159)Footnote 1015. *First Nat'l Bank v. Godfrey, 117 S.E. 680 (W. Va. 1923),* quoting and expressly reaffirming *Depue v. Miller, 64 S.E. 740 (W. Va. 1909).*

(n160)Footnote 1016. *Vidmer v. Lloyd, 63 So. 943 (Ala. 1913); Smith v. Cross, 140 S.W. 1060 (Tenn. 1911).*

(n161)Footnote 1017. *Dakev Sewell, 39 So. 819 (Ala. 1905); Trice v. Miller, 229 S.W.2d 233 (Ark. 1950); Moore v. Newsom, 50 S.W.2d 945 (Ky. 1932); Nickerson v. Nickerson, 126 N.E. 834 (Mass. 1920).*

(n162)Footnote 1018. *Perkins v. Anderson, 198 N.E. 606 (Mass. 1935).*

(n163)Footnote 1019. *Lockhart v. Kentland Coal & Coke Co., 207 S.W. 18 (Ky. 1918).*

(n164)Footnote 1020. *In re Brogden, 104 S.E. 177 (N.C. 1920).*

(n165)Footnote 1021. *Beaty v. Calliss, 128 N.E. 547 (Ill. 1920).*

(n166)Footnote 1022. *Restatement of Property,* §54.

(n167)Footnote 1023. *Restatement of Property,* §84.

(n168)Footnote 1024. *Restatement of Property,* §128.

(n169)Footnote 1025. Coke on Littleton, §29; *Davis v. Mason, 26 U.S. 503 (1828); Chew v. Southwark, 5 Rawle (Pa.) 160 (1835).*

(n170)Footnote 1026. *In re Charbonneau, 221 N.Y.S. 449 (1927).*

(n171)Footnote 1027. *Id.*

(n172)Footnote 1028. *Herzog v. Ross, 213 S.W.2d 921 (Mo. 1948); In re Clark's Estate, 213 S.W.2d 645 (Mo. App. 1948); Riley v. Riley, 113 A. 777 (N.J. 1921); Mullen v. Mullen, 129 A. 749 (N.J. 1925); In re Charbonneau, 221 N.Y.S. 449 (1927).*

(n173)Footnote 1029. Littleton, Tenures, §35; *Harlan Nat'l Bank v. Brown, 317 S.W.2d 903 (Ky. 1958); Herzog v. Ross, 213 S.W.2d 921 (Mo. 1948); State v. Elsbury, 175 P.2d 430 (Nev. 1946).*

(n174)Footnote 1030. *Trice v. Miller, 229 S.W.2d 233 (Ark. 1950).*

(n175)Footnote 1031. *Dunscomb v. Dunscomb, 1 Johns Ch. (N.Y.) 508 (1815); In re Camp, 27 N.E. 799 (N.Y. 1891); Clepper v. Livergood, 5 Watts (Pa.) 113 (1836).*

(n176)Footnote 1032. *Davis v. Mason, 26 U.S. 503 (1828).*

(n177)Footnote 1033. *Wells v. Thompson, 13 Ala. 793 (1848); Carter v. Couch, 47 So. 1006 (Ala. 1908).*

(n178)Footnote 1034. *Carter v. Couch, 47 So. 1006 (Ala. 1908).*

(n179)Footnote 1035. *Northcut v. Whipp, 12 B. Mon. (51 Ky.) 65 (1851); Webb v. First Colored Baptist Church, 13 S.W. 362 (Ky. 1890); Hatfield v. Sneden, 54 N.Y. 280 (1873); Hay v. Mayer, 8 Watts (Pa.) 203 (1839); Thornton v. Krepps, 37 Pa. 391 (1860); Holden v. Wells, 31 A. 265 (R.I. 1895); Withers v. Jenkins, 14 S.C. 597 (1880); Odom v. Beverly, 10 S.E. 835 (S.C. 1893).*

(n180)Footnote 1036. *McMasters v. Negley, 25 A. 641 (Pa. 1893).*

(n181)Footnote 1037. *Evans v. Lobdale, 6 Houst. (Del.) 212 (1889); Doyle v. Rolwing, 65 S.W. 315 (Mo. 1901); Stabel v. Gertel, 165 A. 876 (N.J. 1933); Richardson v. Richardson, 64 S.E. 510 (N.C. 1909); Parham v. Henley, 30 S.E.2d 372 (N.C. 1944); Breeding v. Davis, 77 Va. 639 (1883).*

(n182)Footnote 1038. 2 William Blackstone, Commentaries 246.

(n183)Footnote 1039. *Gebbeken v. Growney, 205 S.W. 721 (Mo. 1918); Day v. Burgess, 202 S.W. 911 (Tenn. 1918).*

(n184)Footnote 1040. *McNeer v. McNeer, 32 N.E. 681 (Ill. 1892); Roberts v. Whiting, 16 Mass. 186 (1819); Van Duzer v. Van Duzer, 6 Paige 366 (N.Y. 1837); Richardson v. Richardson, 64 S.E. 510 (N.C. 1909); Hyde v. Barney, 17 Vt. 280 (1845); Breeding v. Davis, 77 Va. 639 (1883).*

(n185)Footnote 1041. *Sadler v. Campbell, 236 S.W. 588 (Ark. 1921); Bucci v. Popovich, 115 A. 95, aff'd, 116 A. 923 (N.J. Eq. 1921); In re Starbuck's Estate, 122 N.Y.S. 584, aff'd, 94 N.E. 1098 (N.Y. 1922); Day v. Burgess, 202 S.W. 911 (Tenn. 1910).*

(n186)Footnote 1042. *O'Brien v. Sedalia Trust Co., 5 S.W.2d 74 (Mo. 1928); Hope v. Seaman, 119 N.Y.S. 713 (1909), modified on other grounds, 122 N.Y.S. 127 (1910).*

(n187)Footnote 1043. *Klein v. Mangan, 17 N.E.2d 958 (Ill. 1938).*

(n188)Footnote 1044. *Spangler v. Vermillion, 92 S.E. 449 (W. Va. 1917).*

(n189)Footnote 1045. *McGlennery v. Miller, 90 N.C. 215 (1884).*

(n190)Footnote 1046. Coke on Littleton, §30a.

Hitz v. National Metro. Bank, 111 U.S. 722 (1884); Boykin v. Rain, 28 Ala. 332 (1856); Watson v. Watson, 13 Conn. 83 (1839); Shortall v. Hinckley, 31 Ill. 219 (1863); Gay v. Gay, 13 N.E. 813 (Ill. 1887); Jackson v. Jackson, 33 N.E. 51 (Ill. 1893); Perkins v. Anderson, 198 N.E. 606 (Mass. 1935); Stewart v. Ross, 50 Miss. 776 (1874); Moyer v. Dunseith, 46 N.Y.S.2d 360 (1943); Parham v. Henley, 30 S.E.2d 372 (N.C. 1944); Branstetter v. Poynter, 222 S.W.2d 214 (Tenn. App. 1949); Wyatt v. Smith, 25 W. Va. 813 (1885); Mills v. Woods, 57 S.E.2d 713 (W. Va. 1950) (purported conveyance of fee conveyed only tenancy by curtesy).

"A husband's right to curtesy initiate consists simply of a status, which is never a vested right, and is not separately alienable during the coverture. While merely initiate, it is not an estate, but simply a possibility or expectancy like that of an heir apparent. Either may be destroyed at will by the owner of the fee. As it is not coupled with any interest in the property, it cannot be made the subject of a mortgage or transfer." *Albany County Sav. Bank v. McCarty, 43 N.E. 427 (N.Y. 1896) See Evans v. Lobdale, 6 Houst. 212 (Del. 1889); Hope v. Seaman, 119 N.Y.S. 713 (1909); Bruce v. Nicholson, 13 S.E. 790 (N.C. 1891).*

(n191)Footnote 1047. *Wilmington Trust Co. v. Boden, 38 A.2d 168 (Del. Ch. 1944).*

In Alabama the husband may occupy the wife's realty for his lifetime after her death. *Beason v. Bowlin, 149 So. 2d 283 (Ala. 1962).*

(n192)Footnote 1048. *Wells v. Thompson, 13 Ala. 793 (1848).*

Watson v. Watson, 13 Conn. 83 (1839); Todd v. Oviatt, 20 A. 440 (Conn. 1889); Moore v. Darby, 18 A. 768 (Del. Ch. 1889); Beach v. Miller, 51 Ill. 206 (1869); McNeer v. McNeer, 32 N.E. 681 (Ill. 1892); Jackson v. Jackson, 33 N.E. 51 (Ill. 1893); Carr v. Givens, 72 Ky. 679 (1873); Childers v. Kennedy, 224 S.W. 651 (Ky. 1920); Whitehill v. Thiess, 158 A. 347 (Md. 1932); Nickerson v. Nickerson, 126 N.E. 834 (Mass. 1920); Doyle v. Rolwing, 65 S.W. 315 (Mo. 1901); Dozier v. Toalson, 79 S.W. 420 (Mo. 1904); Donovan v. Griffith, 114 S.W. 621 (Mo. 1908); Richardson v. Richardson, 64 S.E. 510 (N.C. 1909); Burgess v. Muldoon, 29 A. 298 (R.I. 1894); Travis v. Sitz, 185 S.W. 1075 (Tenn. 1916); Day v. Burgess, 202 S.W. 911 (Tenn. 1918); Breeding v. Davis, 77 Va. 639 (1883).

(n193)Footnote 1049. *Watson v. Watson, 13 Conn. 83 (1839).*

(n194)Footnote 1050. *Bozarth v. Largent, 21 N.E. 218 (Ill. 1889); Deming v. Miles, 53 N.W. 665 (Neb. 1892); Canby v. Porter, 12 Ohio 79 (1843); Branstetter v. Poynter, 222 S.W.2d 214 (Tenn. App. 1949).*

(n195)Footnote 1051. *Hart v. Chase, 46 Conn. 207 (1878); Orthwein v. Thomas, 21 N.E. 430 (Ill. 1889); Voss v. Stortz, 197 S.W. 964 (Ky. 1917); Matthews v. Copeland, 79 N.C. 493 (1878); Bubb v. Bubb, 50 A. 759 (Pa. 1902).*

(n196)Footnote 1052. *Huffman v. Huffman, 11 N.E.2d 271 (Ohio App. 1937).*

(n197)Footnote 1053. *Miles v. Miles, 175 P. 222 (Okla. 1918).*

(n198)Footnote 1054. *Helmick v. Wells, 102 S.W.2d 58 (Tenn. 1937).*

(n199)Footnote 1055. *Fish v. Fish, 212 S.W. 586 (Ky. 1919).*

(n200)Footnote 1056. *Woodward v. Woodward, 49 S.W. 1001 (Mo. 1899).*

(n201)Footnote 1057. *Moore v. Darby, 18 A. 768 (Del. Ch. 1889).*

(n202)Footnote 1058. *Caudil v. Wagoner, 212 S.W. 422 (Ky. 1919).*

(n203)Footnote 1059. *Wear-Boogher Dry Goods Co. v. Smith, 49 S.W. 493 (Ark. 1898).*

Curtesy held superior to lien of judgment against deceased and husband for purpose of calculating husband's right in proceeds of sale. *Quick v. Davidson, 545 S.W.2d 917 (Ark. 1977).*

(n204)Footnote 1060. *In re Camp, 27 N.E. 799 (N.Y. 1891).*

(n205)Footnote 1061. *Bond v. Godsey, 39 S.E. 216 (Va. 1901); Coleman v. Coleman, 99 S.W. 459 (Mo. App. 1907)* (holding that a tenant by curtesy is entitled to use of any estate and may accept gross sum of money in lieu thereof).

(n206)Footnote 1062. *Decker v. Decker, 265 S.W. 483 (Ky. 1924).*

(n207)Footnote 1063. *Bryant v. Freeman, 173 S.W. 863 (Tenn. 1915).*

(n208)Footnote 1064. *In re Steele, 19 N.J. Eq. 120 (1868); Dinges v. Dinges, 65 A.2d 107 (N.J. Super. 1948).*

(n209)Footnote 1065. *White v. Portland, 34 A. 1022 (Conn. 1896); Dinges v. Dinges, 65 A.2d 107 (N.J. Super. 1948); Jones v. Jackson, 246 P.2d 546 (Or. 1952); Perszyk v. Milwaukee Elec. R. & Light Co., 254 N.W. 753 (Wis. 1934); White v. Portland, 34 A. 1022 (Conn.1896)* (holding that a tenant by the curtesy must pay taxes upon the real estate owned by him).

(n210)Footnote 1066. *Learned v. Ogden, 32 So. 278 (Miss. 1902).*

(n211)Footnote 1067. *Perszyk v. Milwaukee Elec. R. & Light Co., 254 N.W. 753 (Wis. 1934).*

(n212)Footnote 1068. *Kentucky Stave Co. v. Page, 125 S.W. 170 (Ky. 1910).*

(n213)Footnote 1069. *Deffenbaugh v. Hess, 74 A. 608 (Pa. 1909).*

(n214)Footnote 1070. *Decker v. Decker, 265 S.W. 483 (Ky. 1924).*

(n215)Footnote 1071. *Stanley v. Bonham, 12 S.W. 706 (Ark. 1889); Bozarth v. Largent, 21 N.E. 218 (Ill. 1889); Gebbeken v. Growney, 205 S.W. 721 (Mo. 1918); Deming v. Miles, 53 N.W. 665 (Neb. 1892); Day v. Burgess, 202 S.W. 911 (Tenn. 1918).*

Curtesy held superior to lien of judgment against deceased and husband for purpose of calculating husband's right in proceeds of sale. *Quick v. Davidson, 545 S.W.2d 917 (Ark. 1977).*

(n216)Footnote 1072. *Adair v. Lott, 3 Hill 182 (N.Y. 1842); Hardemann v. Judge, 931 S.W.2d 716 (Tex. App. 1996)* (husband may elect to sell property to pay debts); *White Sewing Mach. Co. v. Wooster, 50 S.W. 1000 (Ark. 1899)*

(holding a surviving husband with right of homestead by curtesy can convey estate to children without interference from creditors).

(n217)Footnote 1073. *Sadler v. Campbell, 236 S.W. 588 (Ark. 1921); Brook v. Barker, 228 S.W. 805 (Mo. 1921); Wells v. Egger, 259 S.W. 437 (Mo. 1924); Bucci v. Popovich, 115 A. 95 (N.J. Eq. 1921); Travis v. Sitz, 185 S.W. 1075 (Tenn. 1922); Day v. Burgess, 202 S.W. 911 (Tenn. 1916).*

(n218)Footnote 1074. *Carroll v. Sanford, 83 A. 855 (R.I. 1912).*

(n219)Footnote 1075. *Hampton v. Cook, 42 S.W. 535 (Ark. 1897).*

(n220)Footnote 1076. *Id*.

(n221)Footnote 1077. *Johnson v. Minnesota L. & T. Co., 77 N.W. 421 (Minn. 1898); Miller v. Hanna, 131 N.W. 226 (Neb. 1911); Arrowsmith v. Arrowsmith, 8 Hun. 606 (N.Y. 1876); Bennett v. Camp, 54 Vt. 36 (1882); Gilkison v. Gore, 91 S.E. 395 (W. Va. 1917); Schmidt v. Raymond, 134 N.W. 362 (Wis. 1912).*

(n222)Footnote 1078. *Gilkison v. Gore, 91 S.E. 395 (W. Va. 1917).*

(n223)Footnote 1079. *Campbell v. Martin, 95 A. 494 (Vt. 1915).*

(n224)Footnote 1080. *Northwestern Mut. Life Ins. Co. v. Mallory, 141 N.W. 190 (Neb. 1913).*

(n225)Footnote 1081. *Wilmington Trust Co. v. Boden, 38 A.2d 168 (Del. Ch. 1944).*

(n226)Footnote 1082. *McNeer v. McNeer, 32 N.E. 681 (Ill. 1892); Turner v. Heinberg, 65 N.E. 294 (Ind. App. 1902); Roberts v. Whiting, 16 Mass. 186 (1819); Gebbeken v. Growney, 205 S.W. 721 (Mo. 1918); Wells v. Egger, 259 S.W. 437 (Mo. 1924); Hopper v. Gurtman, 18 A.2d 245 (N.J.L. 1941); Van Duzer v. Van Duzer, 6 Paige 366 (N.Y. 1837); Richardson v. Richardson, 64 S.E. 510 (N.C. 1909); Burd v. Dansdale, 2 Binn. 80 (Pa. 1809); Day v. Burgess, 202 S.W. 911 (Tenn. 1918); Mattocks v. Stearns, 9 Vt. 326 (1837); Hyde v. Barney, 17 Vt. 280 (1845); Breeding v. Davis, 77 Va. 639 (1883).*

(n227)Footnote 1083. *Teckenbrock v. McLaughlin, 152 S.W. 38 (Mo. 1912).*

(n228)Footnote 1084. *Deming v. Miles, 53 N.W. 665 (Neb. 1892).*

(n229)Footnote 1085. *Hitz v. National Metro. Bank, 111 U.S. 722 (1884); Sill v. White, 26 A. 396 (Conn. 1892); Carroll v. Sanford, 83 A. 855 (R.I. 1912); Breeding v. Davis, 77 Va. 639 (1883); Bankers Loan & Inv. Co. v. Blair, 39 S.E. 231 (Va. 1901).*

(n230)Footnote 1086. *Carroll v. Sanford, 83 A. 855 (R.I. 1912).*

(n231)Footnote 1087. *Shannon v. Ogletree, 76 So. 865 (Ala. 1917); Anderson v. Tydings, 8 Md. 427 (1855).*

(n232)Footnote 1088. *Bucci v. Popovich, 115 A. 95 (N.J. Eq. 1921).*

(n233)Footnote 1089. *First Nat'l Bank v. Godfrey, 117 S.E. 680 (W. Va. 1923).Schmidt v. Raymond, 134 N.W. 362 (Wis. 1912)* (holding that a husband's estate by the curtesy is subject to deceased wife's creditors' right to have their debts settled).

(n234)Footnote 1090. *Havranek v. Dragoun, 65 A.2d 105 (N.J. Super. 1948); Rochon v. Lecatt, 2 Stew. 429 (Ala. 1830)* (holding that a decree of divorce pronounced against a husband does not bar husband's right of curtesy); *Blankenship v. Blankenship, 66 S.E.2d 680 (N.C. 1951); In re Prudenzano's Will, 68 A.2d 704 (Vt. 1949); In re*

Nickolay's Estate, 25 N.W.2d 451 (Wis. 1946).

(n235)Footnote 1091. *Blankenship v. Blankenship, 66 S.E.2d 680 (N.C. 1951).* However, such statutes may be preempted when they delay the administration of ERISA benefits. *Moore v. Phillip Morris Co., Inc., 8 F.3d 335 (6th Cir. 1993)* (holding that ERISA preempts a Kentucky statute that eliminates spousal property rights for adultery, because the litigation over the state statute would delay the administration of ERISA benefits).

(n236)Footnote 1092. *Smoot v. Lecatt, 1 Stew. (Ala.) 590 (1828); Ellison v. Mobile, 53 Ala. 558 (1875); Clarke v. Lott, 11 Ill. 105 (1849); In re Prudenzano's Will, 68 A.2d 704 (Vt. 1949); Hartigan v. Hartigan, 64 S.E. 726 (W. Va. 1909).*

(n237)Footnote 1093. *Hartigan v. Hartigan, 64 S.E. 726 (W. Va. 1909).*

(n238)Footnote 1094. *Biddle v. Biddle, 177 S.W.2d 32 (Ark. 1944); Block v. P. & G. Realty Co., 124 A. 372 (N.J. Eq. 1924); Meade v. Mueller, 52 A.2d 157 (N.J. Eq. 1947); Eberle v. Somonek, 94 A.2d 535 (N.J. Super. 1953)*

"The possibility of the husband's acquiring any interest in his wife's property is as effectually extinguished by divorce as by death." *Hollander v. Abrams, 132 A. 224 (N.J. Eq. 1926).*

(n239)Footnote 1095. *Boykin v. Rain, 28 Ala. 332 (1856); Townsend v. Griffin, 4 Harr. 440 (Del. 1846); Seuss v. Schukat, 192 N.E. 668 (Ill. 1934); Durland v. Durland, 74 P. 274 (Kan. 1903); Hawkins v. Ragsdale, 80 Ky. 353 (1882); Wright v. Wright, 2 Md. 429 (1852); Barber v. Root, 10 Mass. 260 (1813); Clark v. Slaughter, 38 Miss. 64 (1859); Block v. P. & G. Realty Co., 124 A. 372 (N.J. Eq. 1924); Renwick v. Renwick, 10 Paige 420 (N.Y. 1843); Davis v. Davis, 68 N.C. 180 (1873); Burgess v. Muldoon, 29 A. 298 (R.I. 1894); Burt v. Hurlburt, 16 Vt. 292 (1844); Cralle v. Cralle, 79 Va. 182 (1884); Campbell v. Switzer, 82 S.E. 319 (W. Va. 1914).*

(n240)Footnote 1096. *See Starr v. Pease, 8 Conn. 541 (1831); Howey v. Goings, 13 Ill. 95 (1851).*

(n241)Footnote 1097. *Meacham v. Bunting, 41 N.E. 175 (Ill. 1895).*

(n242)Footnote 1098. *Schuster v. Schuster, 6 S.W. 259 (Mo. 1887).*

(n243)Footnote 1099. *Doyle v. Rolwing, 65 S.W. 315 (Mo. 1901); Porter v. Porter, 27 Gratt. 599 (Va. 1876);* Bruce v. Bruce, 285 P.30 (Okla.1930) (holding that a husband that divorces his wife for her fault defeats his right of curtesy in her property).

(n244)Footnote 1100. *See* Ind. Code, §29-1-2-15 *Edwards v. Cuthbert, 36 S.E.2d 1 (Va. 1945)* (holding that though constructive desertion would defeat a husband's estate by the curtesy, the husband had not deserted his wife).

(n245)Footnote 1101. *In re Clark's Estate, 213 S.W.2d 645 (Mo. App. 1948).*

(n246)Footnote 1102. *Pool v. Blakie, 53 Ill. 495 (1870); Clay v. Mayer, 46 S.W. 157 (Mo. 1898); Brook v. Barker, 228 S.W. 805 (Mo. 1921); Hollander v. Abrams, 132 A. 224 (N.J. Eq. 1926); Johnson v. Fritz, 44 Pa. 449 (1863).*

(n247)Footnote 1103. *Moseley v. Bogy, 198 S.W. 847 (Mo. 1917).*

(n248)Footnote 1104. *Powell v. Bowen, 214 S.W. 142 (Mo. 1919). See Farley v. Stacey, 197 S.W. 636 (Ky. 1917).*

(n249)Footnote 1105. *Wright v. Pell, 105 A. 20 (N.J. Eq. 1918).*

(n250)Footnote 1106. *Mercer v. Selden, 42 U.S. 37 (1843); Calvert v. Murphy, 81 S.E. 403 (W. Va. 1843).*

(n251)Footnote 1107. *Garner v. Wills, 17 S.W. 1023 (Ky. 1891); Harvey v. Brisbin, 38 N.E. 108 (N.Y. 1894).*

(n252)Footnote 1108. *Yung v. Blake, 148 N.Y.S. 557 (1914); Deese v. Deese, 97 S.E. 475 (N.C. 1918).*

(n253)Footnote 1109. *Neely v. Lancaster, 1 S.W. 66 (Ark. 1886); Tyler v. Wheeler, 35 N.E. 666 (Mass. 1893); Brook v. Barker, 228 S.W. 805 (Mo. 1921); Thurber v. Townsend, 22 N.Y. 517 (1860); Bertles v. Nunan, 92 N.Y. 152 (1883); Breeding v. Davis, 77 Va. 639 (1883); Alexander v. Alexander, 7 S.E. 335 (Va. 1888); Oatman v. Goodrich, 15 Wis. 589 (1862).*

(n254)Footnote 1110. *Garner v. Wills, 17 S.W. 1023 (Ky. 1891); Silsby v. Bullock, 92 Mass. (10 Allen) 94 (1865); In re McBride's Estate, 81 Pa. 303 (1876); Hutchings v. Commercial Bank, 20 S.E. 950 (Va. 1895).*

(n255)Footnote 1111. *Stewart v. Ross, 50 Miss. 776 (1874); Ex parte Watts, 41 S.E. 289 (N.C. 1902); Chapman v. Price, 11 S.E. 879 (Va. 1886).*

Contra, Middleton v. Steward, 20 A. 846 (N.J. Eq. 1890).

(n256)Footnote 1112. *Chance v. Weston, 190 P. 155 (Or. 1920).*

(n257)Footnote 1113. *Shoup v. Shoup, 149 N.E. 746 (Ill. 1925); Larkin v. Lightburne, 177 S.W. 1154 (Tenn. 1915); Schaffler v. Handwerker, 278 S.W. 967 (Tenn. 1926).*

(n258)Footnote 1114. *Cunningham v. Dunn, 100 S.E. 410 (W. Va. 1919).*

(n259)Footnote 1115. *Sill v. White, 26 A. 396 (Conn. 1892).*

Scheible v. Rinck, 63 N.E. 497 (Ill. 1902); Pearce v. Pearce, 118 N.E. 84 (Ill. 1917); Brightman v. Morgan, 82 N.W. 954 (Iowa 1900); George v. Bussing, 54 Ky. (15 B. Mon.) 558 (1855); Kerrigan v. Conelly, 46 A. 227 (N.J. Eq. 1900); In re Clarke's Appeal, 79 Pa. 376 (1875); Beirne v. Beirne, 11 S.E. 46 (W. Va. 1890).

(n260)Footnote 1116. *Whitehill v. Thiess, 158 A. 347 (Md. 1932).*

(n261)Footnote 1117. *Cooper v. McDonald, 7 Ch. Div. 288* (n.d.).

(n262)Footnote 1118. *Hastings v. Hudson, 224 S.W.2d 945 (Mo. 1949); Headington v. Woodward, 214 S.W. 963 (Mo. 1919)* (husband setting aside wife's conveyance, after marriage, of property as in fraud of his marital rights).

(n263)Footnote 1119. *Hopper v. Gurtman, 18 A.2d 245 (N.J. 1941).*

(n264)Footnote 1120. *In re Colaci's Estate, 42 N.E.2d 466 (N.Y. 1942).*

(n265)Footnote 1121. *Chambers v. Ringstaff, 69 Ala. 140 (1881); Evans v. Lobdale, 11 Del. (6 Houst.) 212 (1889); Clark v. Thompson, 47 Ill. 25 (1868); Wood v. Reamer, 82 S.W. 572 (Ky. 1904); Ketterer v. Nelson, 141 S.W. 409 (Ky. 1911); Decker v. Decker, 265 S.W. 483 (Ky. 1924); Hayden v. Peirce, 43 N.E. 119 (Mass. 1896); Baker v. Baker, 46 N.E. 391 (Mass. 1897); Stewart v. Ross, 50 Miss. 776 (1874); Haines v. Ellis, 24 Pa. 253 (1855); Day v. Burgess, 202 S.W. 911 (Tenn. 1918); Bankers Loan & Inv. Co. v. Blair, 39 S.E. 231 (Va. 1901); Boykin v. Boykin, 28 Ala. 332 (Ala. 1856)* (deciding that where a husband, during coverture and after issue born to wife, executes a mortgage of wife's land, the deed conveys his interest as tenancy by the curtesy initiate).

(n266)Footnote 1122. *Boykin v. Rain, 28 Ala. 332 (1856); Harrod v. Myers, 21 Ark. 592 (1860); Evans v. Lobdale, 11 Del. (6 Houst.) 212 (1889); Mettler v. Miller, 22 N.E. 529 (Ill. 1889); Central Bank v. Copeland, 18 Md. 305 (1862); Wells v. Egger, 259 S.W. 437 (Mo. 1924).*

(n267)Footnote 1123. *McCrary v. Biggers, 81 P. 356 (Or. 1905).*

(n268)Footnote 1124. *Wells v. Thompson, 13 Ala. 793 (1848); Evans v. Lobdale, 11 Del. (6 Houst.) 212 (1889); Meraman v. Caldwell, 47 Ky. (8 B. Mon.) 32 (1847).*

(n269)Footnote 1125. *French v. Rollins, 21 Me. 372 (1842); Reaume v. Chambers, 22 Mo. 36 (1855); Flagg v. Bean, 25 N.H. 49 (1852); Holtenbrock v. Cracraft, 36 Ohio St. 584 (1881).*

(n270)Footnote 1126. *Carson v. Hecke, 222 S.W. 850 (Mo. 1920).*

(n271)Footnote 1127. *Dirago v. Taylor, 150 So. 150 (Ala. 1933).*

(n272)Footnote 1128. *North v. Ringling, 7 So. 2d 476 (Fla. 1940); Kroell v. Kroell, 76 N.E. 63 (Ill. 1905); Slater v. Slater, 142 N.E. 177 (Ill. 1923); Henderson v. Henderson, 8 N.E.2d 545 (Ill. App. 1937); Finn v. Grant, 278 N.W. 225 (Iowa 1938); In re Appleby's Estate, 111 N.W. 305 (Minn. 1907); Munsell v. Munsell, 113 A. 521 (Vt. 1921); Charles v. Charles, 8 Gratt. 486 (Va. 1852); Bramer v. Bramer, 99 S.E. 329 (W. Va. 1919).*

(n273)Footnote 1129. *Keller v. Keller, 247 P. 433 (Kan. 1926).*

(n274)Footnote 1130. *Van Koten v. Van Koten, 154 N.E. 146 (Ill. 1926); Hoagland v. Hoagland, 148 N.E. 585 (Ohio 1925).*

(n275)Footnote 1131. *Robbins v. Robbins, 80 N.E. 326 (Ill. 1907); Megginson v. Megginson, 10 N.E.2d 815 (Ill. 1937); Juhasz v. Juhasz, 16 N.E.2d 328 (Ohio 1938).*

(n276)Footnote 1132. *McBreen v. McBreen, 55 S.W. 463 (Mo. 1900); Chance v. Weston, 190 P. 155 (Or. 1920).*

(n277)Footnote 1133. *McBreen v. McBreen, 55 S.W. 463 (Mo. 1900). See Luttrell v. Boggs, 48 N.E. 171 (Ill. 1897); Dooley v. Baynes, 10 S.E. 974 (Va. 1890).*

(n278)Footnote 1134. *In re Arnold's Estate, 94 A. 1076 (Pa. 1915).*

(n279)Footnote 1135. *Vanderveer v. Vanderveer, 1 N.Y.S. 898 (1888).*

(n280)Footnote 1136. *Pinkham v. Pinkham, 49 A. 48 (Me. 1901); McCrary v. Biggers, 81 P. 356 (Or. 1905); Chance v. Weston, 190 P. 155 (Or. 1920).*

(n281)Footnote 1137. *Powell v. Tilson, 170 S.E. 750 (Va. 1933).*

(n282)Footnote 1138. *Howze v. Hutchens, 209 S.W.2d 286 (Ark. 1948)* (the Arkansas statute merely changed but did not abolish common-law curtesy); *Wilmington Trust Co. v. Boden, 38 A.2d 168 (Del. Ch. 1944); Childers v. Kennedy, 224 S.W. 651 (Ky. 1920); Marsee v. Richmond, 241 S.W. 331 (Ky. 1922); Wells v. Egger, 259 S.W. 437 (Mo. 1924); Bucci v. Popovich, 115 A. 95 (N.J. Eq. 1921); Murphy v. Skelly, 135 A. 351 (N.J. Eq. 1926); In re Whitson, 212 P. 752 (Okla. 1923) aff'd*, 116A. 923; *Rieger v. Harrington, 203 P. 576 (Or. 1922); In re Bremer, 123 A. 857 (Pa. 1924); Jones v. Kirby, 135 S.E. 676 (Va. 1926). See* John H. Langbein & Lawrence W. Waggoner, *Redesigning the Spouse's Forced Share*, 22 Real Property, Probate and Trust Journal at 302, 328 (Summer 1987). *See* Lawrence W. Waggoner, *Marital Property Rights in Transition*, 18 Probate Lawyer 66 (1992).

Widower has no right of occupancy, as an individual of wife's separate property after her death. *In re Boston's Estate, 491 P.2d 1033 (Wash. 1971).*

Florida gives widowers the right of dower but limits dower to realty owned at death. Thus the owner can convey without the spouse joining. Fla. Stat. 1973, §731.34.

Illinois Public Acts 77-1676 abolishes the estates in dower and curtesy. Ill. Rev. Stat. 1971, ch. 3, §18.

Oregon has abolished dower and curtesy. Or. Laws 1969, ch. 591.

(n283)Footnote 1139. *Anderson v. Parker, 317 S.W.2d 721 (Ark. 1958)* (unnecessary that child be born to create curtesy); *Moore v. Darby, 18 A. 768 (Del. Ch. 1889); Phillips v. Farley, 66 S.W. 1006 (Ky. 1902); In re Smith's Will, 107 N.Y.S.2d 993 (1951)* (New York has abolished common-law curtesy); *Hallyburton v. Slagle, 44 S.E. 655 (N.C. 1903); Richardson v. Richardson, 64 S.E. 510 (N.C. 1909); Alexander v. Alexander, 7 S.E. 335 (Va. 1888).*

(n284)Footnote 1140. *Phillips v. Farley, 66 S.W. 1006 (Ky. 1902); Hallyburton v. Slagle, 44 S.E. 655 (N.C. 1903).*

(n285)Footnote 1141. *Shryock v. Cannon, 39 Ark. 434 (1882); Erwin v. Puryear, 7 S.W. 449 (Ark. 1888); Plumb v. Sawyer, 21 Conn. 351 (1851); Rose v. Sanderson, 38 Ill. 247 (1865); Noble v. McFarland, 51 Ill. 226 (1869); McNeer v. McNeer, 32 N.E. 681 (Ill. 1892); Jackson v. Jackson, 33 N.E. 51 (Ill. 1893); Strong v. Clem, 12 Ind. 37 (1859); Logan v. Walton, 12 Ind. 639 (1859); Frantz v. Harrow, 13 Ind. 507 (1859); Mitchell v. Violett, 47 S.W. 195 (Ky. 1898); Childers v. Kennedy, 224 S.W. 651 (Ky. 1920); Clay v. Mayer, 46 S.W. 157 (Mo. 1898); Withnell v. Withnell, 96 N.W. 221 (Neb. 1903); Appeal of Burson, 22 Pa. 164 (1853); Bachman v. Chrisman, 23 Pa. 162 (1854); Hull v. Hull, 202 S.W. 914 (Tenn. 1918); Hubbard v. Hubbard, 58 A. 969 (Vt. 1904); Wyatt v. Smith, 25 W. Va. 813 (1885).*

(n286)Footnote 1142. *McNeer v. McNeer, 32 N.E. 681 (Ill. 1892); Stewart v. Ross, 50 Miss. 776 (1874); Day v. Burgess, 202 S.W. 911 (Tenn. 1818). See O'Brien v. Sedalia Trust Co., 5 S.W.2d 74 (Mo. 1928).*

A husband's tenancy by "curtesy consummate" which Married Woman's Act saved from impairment by wife's deed, contract or other act or by judgment or decree against her, is "vested life estate in remainder," for a characteristic of "vested remainder" is present capacity to take effect in possession or enjoyment upon the certain determination of the precedent particular estate, rather than certainty of enjoyment by remainderman. *Hopper v. Gurtman, 15 A.2d 245 (N.J.L. 1941).*

(n287)Footnote 1143. *Hill v. Chambers, 30 Mich. 422 (1874); Brown v. Clark, 6 N.W. 679 (Mich. 1880); Brook v. Barker, 228 S.W. 805 (Mo. 1921); Thurber v. Townsend, 22 N.Y. 517 (1860); Hallyburton v. Slagle, 44 S.E. 655 (N.C. 1903); Alexander v. Alexander, 7 S.E. 335 (Va. 1888). Loyd v. Planters' Mut. Ins. Co. 97 S.W. 658 (Ark. 1906)* (stating that curtesy initiate does not exist since adoption of the Married Women's Act).

(n288)Footnote 1144. *Neely v. Lancaster, 1 S.W. 66 (Ark. 1886); Hampton v. Cook, 42 S.W. 535 (Ark. 1897); Evans v. Lobdale, 6 Houst. 212 (Del. 1889); Freeman v. Hartman, 45 Ill. 57 (1867); McNeer v. McNeer, 32 N.E. 681 (Ill. 1892); Johnson v. Cummins, 16 N.J. Eq. 97 (1863); Hopper v. Gurtman, 18 A.2d 245 (N.J. 1941); Carroll v. Sanford, 83 A. 855 (R.I. 1912); Day v. Burgess, 202 S.W. 911 (Tenn. 1918); Alexander v. Alexander, 7 S.E. 335 (Va. 1888).*

(n289)Footnote 1145. *Hill v. Chambers, 30 Mich. 422 (1874); Dolin v. Wachter, 288 P. 616 (Mont. 1930); Thurber v. Townsend, 22 N.Y. 517 (1860); Hallyburton v. Slagle, 44 S.E. 655 (N.C. 1903); Taylor v. Riggins, 263 P. 146 (Okla. 1928); Alexander v. Alexander, 7 S.E. 335 (Va. 1888).*

(n290)Footnote 1146. *Pattison v. Baker, 255 S.W. 710 (Tenn. 1923).*

(n291)Footnote 1147. *Allen v. Hanks, 136 U.S. 300 (1890); Hathon v. Lyon, 2 Mich. 93 (1851); Tong v. Marvin, 15 Mich. 60 (1866); Thurber v. Townsend, 22 N.Y. 517 (1860).*

(n292)Footnote 1148. *Garrett v. Damron, 110 S.W.2d 1112 (Mo. 1937).*

(n293)Footnote 1149. *Hanneman v. Richter, 177 F. 563 (C.C.D.N.Y. 1910).*

See the following cases: *Neely v. Lancaster, 1 S.W. 66 (Ark. 1886); Lloyd v. Planters Mut. Ins. Co., 97 S.W. 658 (Ark.*

1906); Moore v. Darby, 18 A. 768 (Del. Ch. 1889); Cole v. Van Riper, 44 Ill. 58 (1867); Dillon v. Dillon, 69 S.W. 1099 (Ky. 1902); Jones v. Magill, 1 Md. 177; Comer v. Chamberlain, 88 Mass. (6 Allen) 166 (1863); Stewart v. Ross, 50 Miss. 776 (1874); Donovan v. Griffith, 114 S.W. 621 (Mo. 1908); Allen v. Roush, 39 P. 459 (Mont. 1895); Shannon v. Watt, 101 A. 251 (N.J. Eq. 1917); Ex parte Watts, 41 S.E. 289 (N.C. 1902); Hershizer v. Florence, 39 Oh. St. 516 (1883); Rouse v. Directors of Poor, 32 A. 541 (Pa. 1895); Lewis v. Glass, 20 S.W. 571 (Tenn. 1892); Breeding v. Davis, 77 Va. 639 (1883); Alderson v. Alderson, 33 S.E. 228 (W. Va. 1889).

(n294)Footnote 1150. *Hampton v. Cook, 42 S.W. 535 (Ark. 1897); Moore v. Darby, 18 A. 768 (Del. Ch. 1889); Riggs v. Price, 210 S.W. 420 (Mo. 1919); Rabb v. Griffin, 26 Miss. 579 (1853); Hill v. Nash, 19 So. 707 (Miss. 1896); Porch v. Fries, 18 N.J. Eq. 204 (1867); Breeding v. Davis, 77 Va. 639 (1883); Guernsey v. Lazear, 41 S.E. 405 (W. Va. 1902); Oatman v. Goodrich, 15 Wis. 589 (1862).*

(n295)Footnote 1151. *Thompson v. Thompson, 18 So. 247 (Ala. 1895); Appeal of Ward, 54 A. 730 (Conn. 1903).*

(n296)Footnote 1152. *Ferguson v. Board of Drainage Comm'rs for Mayfield Creek Drainage Dist. No. 2, 186 S.W.2d 16 (Ky. 1945).*

(n297)Footnote 1153. In Florida dower and curtesy have been abolished. Fla. Stat. §732.111.

Tennessee has now abolished dower and curtesy; the surviving spouse may dissent from the decedent's will. Acts 1976, ch. 529.

Individual property may be conveyed by the spouse so as to cut off dower or curtesy. Mont. Code Ann. 1947, §36-111.

(n298)Footnote 1154. *Brown v. Brown, 135 N.E.2d 614 (Ind. 1956).*

A married woman may now convey realty owned by her without her husband's approval. Ind. Code §31-1-9-2.

(n299)Footnote 1155. *Ohio Oil Co. v. Ferguson, 34 So. 2d 746 (La. 1946).*

(n300)Footnote 1156. *Jackson v. Faver, 77 S.E.2d 728 (Ga. 1953); Alford v. Rodgers, 262 S.W.2d 676 (Ky. 1953); Moore v. Kirgan, 250 S.W.2d 759 (Tex. Civ. App. 1952).*

(n301)Footnote 1157. *Gordon v. O'Brien, 71 N.E.2d 221 (Mass. 1947).*

(n302)Footnote 1158. *Mead Co. v. Doerfler, 26 N.W.2d 393 (Neb. 1947).*

(n303)Footnote 1159. *Goldstein v. Siegel, 80 N.Y.S.2d 598 (1948); Hammond v. Herbert Hood Co., 221 S.W.2d 98 (Tenn. App. 1948).*

(n304)Footnote 1160. *Hansen v. Cramer, 245 P.2d 1059 (Cal. 1952); Van Wagner v. Kruse, 221 S.W.2d 787 (Tex. Civ. App. 1949).*

(n305)Footnote 1161. *Mead Co. v. Doerfler, 26 N.W.2d 393 (Neb. 1947).*

(n306)Footnote 1162. *Alt v. Kwiatek, 17 A.2d 161 (N.J. Eq. 1941); Dinges v. Dinges, 65 A.2d 107 (N.J. Super. 1948); Anastasia v. Anastasia, 47 A.2d 879 (N.J. Eq. 1946); Taylor v. Borgfeld, 50 A.2d 654 (N.J. Eq. 1947).*

But where survivorship has been abolished by statute there is dower and curtesy in a joint tenancy. *Grundstein v. Suburban Motor Freight, 107 N.E.2d 366 (Oh. App. 1951).*

(n307)Footnote 1163. *Warfield Nat'l Gas Co. v. Marcum, 193 S.W.2d 461 (Ky. 1946).*

(n308)Footnote 1164. *Dinges v. Dinges, 65 A.2d 107 (N.J. Super. 1948); Jones v. Jackson, 246 P.2d 546 (Or. 1952).*

(n309)Footnote 1165. *Dedmon v. Hawkins, 203 S.W.2d 183 (Ark. 1947).*

(n310)Footnote 1166. *Reynolds v. McGuire, 253 S.W.2d 386 (Ky. 1952).*

(n311)Footnote 1167. *Matthews v. W. T. Freeman Co., 60 S.E.2d 909 (Va. 1950).*

(n312)Footnote 1168. *Kreamer v. Hitchcock, 115 A.2d 255 (Md. 1955).*

(n313)Footnote 1169. *Skovborg v. Smith, 74 A.2d 910 (N.J. Super. 1950).*

(n314)Footnote 1170. 2 William Blackstone, Commentaries 128.

(n315)Footnote 1171. *Mattocks v. Stearns, 9 Vt. 326 (1837).*

(n316)Footnote 1172. *DeFrance v. Johnson, 26 F. 891 (C.C.D. Minn. 1886); Chase v. Chase, 55 Me. 21 (1867); Price v. Price, 27 N.E. 383 (N.Y. 1891); Dicke v. Wagner, 70 N.W. 159 (Wis. 1897).*

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CHAPTER 21 MARITAL AND HOMESTEAD INTERESTS

3-21 Thompson on Real Property, Thomas Editions § 21.04

AUTHOR: Professor David A. Thomas This chapter is based on Ch. 30 of George W. Thompson, Commentaries on the Modern Law of Real Property (John S. Grimes, ed. 1979), and describes the American common law on several subjects now largely governed by state statutes. J. Reuben Clark Law School Brigham Young University

§ 21.04 Homestead at Common Law

[Go To Main]

21.04(a) What Is a Homestead?

The purpose of a homestead exemption is protection against the third-party creditors. It is not an interest to be recognized between joint tenants or tenants in common. The term "homestead" has three general uses in the law: first, to describe the method of distribution of federal lands; second, to refer to certain rights given to widows by statutes in lieu of dower; and third, to rights given to families in realty to preserve the family as against its creditors. It is in the latter sense that homestead is herein treated. n1173

"Homestead" laws are an outgrowth of the great debtor revolution in American history that found its demigod in Andrew Jackson and "Jacksonian Democracy." The homestead had no place in early English law since only personalty was subject to debts. As the needs of commerce grew in England, so did the statutory right to subject a debtor's real estate to the payment of his debts. At the time of the settlement of America, England had such a prominent place in the commercial world that public policy protected primarily the creditor. Commerce and credit were the fountains of public policy. n1174

The opening up of a new land and the increase of free suffrage in the United States placed a different emphasis on credit. Suddenly man became more important than money, or at least it was not admitted that money was all. To be in debt ceased to be a crime, and a number of states showed their resentment of the eastern bankers by protecting the home and family against the rapacity of their creditors. n1175 This philosophy born in the new lands was nurtured as the tide of settlement and its attendant problems rolled westward. What the homestead laws actually do is to preserve the debtor's homeplace for himself and his family against the creditors. n1176 Homestead rights are therefore entirely statutory and had no role in the common law. n1177

Care must be taken to distinguish homesteads, which constitute estates in land, and debtors statutory exemptions, which are merely a relief from levy of executions. There are actually two types of exemption statutes; those which give a homestead, and those which give exemption from levy of execution in certain types of realty. The true homestead

statutes, in turn, either provide for a mere possessory right in the debtor and the debtor's family or something in the nature of a new interest in land.

The Federal Homestead Law exempts from debts lands homesteaded from the public domains until the issue of a patent therefor, while state homestead laws authorize the head of a family to designate property, owned or to be acquired as a homestead, to be exempt under the law from his future debts. Thus, we have two materially different forms of homestead legislation in this country.

In one sense, the word "homestead" means a home place: the place where home is; the house and adjoining lands; the place where the head of the family dwells; the home farm; n1178 the owner's residence or place where he lives. n1179 Under the constitution of some states, the word "homestead" means the family residence. n1180 This is the popular sense in which the term is used, and in this sense it includes the dwelling house in which the family resides, together with the outbuildings and lands used for the purposes of the homestead. n1181

The word "homestead" has acquired a legal or technical meaning in modern jurisprudence, and in this sense it consists not only of the property occupied as a home or place of residence, but also the right to have the same exempted from execution and sale to pay debts. n1182 In this sense, it means that tract of land which, being within the statutory limitations both as to quantity and value, is held, occupied, and claimed as a homestead, n1183 and includes as an indispensable part thereof the dwelling house or family residence. n1184 It is more than a mere right of occupancy exempt from levy and sale for debts. n1185 Except as modified by limitations of value and questions of intent, the legal use of the term may be said to be the same as the popular use thereof. n1186 A "homestead estate" is an estate which the law gives a right to live upon and enjoy certain real estate so long as the claimant is head of a family, which of course may be all his life, and at his death to pass to his widow for her life or to the children during their minority, whichever may last terminate. n1187 Homesteads are a family shield and cannot be employed by either husband or wife to the detriment of the other. n1188

The homestead right is a creature of the constitution and statutes and, although not an estate, is a special and peculiar interest in land belonging to the husband and wife jointly and individually. n1189 Under the laws of Nebraska, all definitions of "homestead" involve occupancy of the premises by the claimant at any critical date, and his status as the head of the family, and the continuity of the land protected. n1190 The tests of a homestead are the same whether raised by a creditor or an heir. n1191

Occupancy, and not title, is the essential consideration in determining the homestead. n1192

21.04(b) Nature of Homestead

As indicated in the preceding section, the "homestead" is purely a creature of statute. n1193 It is not to be found in the common law, unless it can be said to be a revival of the Celtic and, to some extent, early English, concept that the basic ownership of land was in the "*twath*," or in the family, rather than in the individual. The homestead right exists only by virtue of statutory or constitutional provisions, n1194 and the beneficiaries can take no more than what the statute or constitution expressly gives them, and upon the terms and conditions mentioned therein. n1195 The homestead right is a right which is unknown to the common law, and which exists only by virtue of a constitutional or statutory provision. n1196 Being a right, humane in character and policy, it is held as applying to all such cases as are within the equity and spirit of the law or the constitution establishing it. n1197 The legislature may increase or diminish the amount of homestead exemption within reasonable bounds. n1198 The broad purpose of homestead laws is to promote the security of the home, in the placing of homestead property beyond the use and consequences of a home owner's economic misfortune.

The homestead exemption, as declared in statutes and constitutions, is not for the benefit of the husband or wife alone, but for the family as a whole, of which they are but a part. n1199 So, a wife cannot allow another to share occupancy of

the homestead to the detriment of children. n1200 A married woman who was not the head of a family has been held entitled to claim a homestead exemption in her own property where her husband had not claimed any exemption or homestead rights for the protection of his own property. n1201

Homestead exemptions are granted in the interest of the general welfare. In such welfare, the state has an interest. Public policy is opposed to pauperized widows and children. n1202 Pursuant to such public policy, the state withdraws from creditors certain portions of the debtor's property. This is upon the theory that such laws better promote the welfare of all. The whole tenor and spirit of free government indorse such laws. While it is claimed that the state by such laws is conferring merely a favor or privilege on the debtor, it is to be considered that the state is benefitted thereby. These laws are sanctioned and supported by a citizenship interested in the state and tied to her soil, of independent home owners, and not of transient and uncertain tenants. n1203 The chief object of these laws is to shelter the family, n1204 and to maintain the stability and welfare of the state. n1205 They are based on a public policy n1206 which regards the debtor's duty to provide for his dependents as paramount to the duty to pay his debts. n1207 The purpose of constitutional and statutory provisions exempting the homestead from a forced sale for the payment of debts is to protect the homestead interest. n1208 Since the very purpose of the homestead law is to protect property from existing debts, the doctrine of fraudulent conveyances has no application to its creation. n1209 It has often been said that the protection of the family from dependence and want is the object of homestead laws, and that apart from the family the debtor is entitled to no consideration. The debtor, however, is to be considered only so far as he is entitled to have a home where his family may be sheltered, and live in security from the claims of creditors. n1210 The design of the statutes is to secure to the head of the family a home for himself and those dependent upon him, regardless of his financial condition, whether solvent or insolvent, n1211 and without regard to whether the property be owned by husband or wife, a part by one and a part by the other or by both jointly. n1212 The homestead, under our public policy and law, is the one sacred place where the strong arm of the law is stayed, and over which only by consent of both husband and wife can its power be exercised. The beneficent idea, undoubtedly, is to make and preserve for every family the shelter of a home; to be free, as long as husband and wife or a minor child shall live and occupy it, from the common vicissitudes of life. n1213

A homestead exemption, or an exemption in lieu of homestead, is not a personal privilege of the debtor, but is for the benefit of the debtor's family and the public at large. n1214 Homestead statutes are not enacted for the purpose of exonerating debtors from the payment of their just debts, but to protect their families, and the courts have consistently held that the statutes should be given a liberal construction. n1215

The purpose of a homestead exemption is the result of social attitude indicating a solicitude for a home for debtors and is not intended to create a shield for criminal activity. n1216

The purpose of a homestead right is to provide shelter and protection for a widow and minor children. Thus, the administrator of the estate of the deceased widow cannot make a claim for homestead against the estate of the deceased husband. n1217

The chief object of the homestead is to shelter a family. n1218

The statutes range widely as to the extent to which the homestead is merely a personal privilege or an absolute estate in land. In a number of states a "homestead right" is not a mere exemption, n1219 but an interest, n1220 title, n1221 or estate n1222 in the land itself. Other jurisdictions hold that it is not, in the strict sense, an estate in land, but a privilege of exemption from execution of such estate as the holder has, n1223 and, that while the homestead is usually accompanied by an estate or interest, there is no limitation to any particular estate either as to duration, quality or extent. n1224 The right is absolute and unqualified and can be defeated only by waiver, relinquishment, or conveyance. n1225

In Kentucky, at least, it is not even an interest in land, n1226 but merely a right to the use and occupancy thereof. n1227 This is also the Alabama rule. n1228 In Florida, it "is not limited to a mere holding of the legal title to the exempt

property "from forced sale"; it contemplates and includes the beneficial, peaceful, and uninterrupted use and enjoyment of such property." n1229 In Florida "homestead" is a matter of status, not of title to property. n1230 In Minnesota, "the homestead exemption ... is not only a privilege but an absolute right." n1231 In Alabama, the wife has no title to nor estate in the husband's homestead. n1232 In Texas, however, "a wife's right in the homestead is a vested right in the land itself, of which she cannot be deprived except as pointed out by the constitution and statutes." n1233 Where the right is supported by an estate in fee simple, it is said, in Oregon, to be a fee simple estate and, where supported by a life estate only, it is a life estate. n1234

The fee is left where it was before the right was created, the only change being that the right of occupancy shall not be disturbed while the homestead exists. n1235 The status of the homestead does not change the nature of the estate in the property owned by the head of the family, but merely exempts such property from such liability as he may have and limits his inherent powers of alienation. n1236 The homestead exemption is temporary, existing only so long as the conditions under which it is allowed prevail. n1237 The right is inchoate and conditional until set out in the specific property to which it may attach, and it is similar in its attributes to the wife's dowry in her husband's estate. n1238 When it is a purely statutory right, there is no greater estate therein than the one the statute creates. n1239 While it is held the right of homestead, as distinguished from the property, and the attendant exemption, is purely personal to the debtor and the beneficiaries of the right, n1240 but it may be lost by abandonment. n1241 Other states say it is not a mere privilege, but an absolute right, and the owner may do what he pleases with it, irrespective of claims of creditors. n1242

In Illinois an estate of homestead has no separate existence from the title which supports it n1243 and cannot be separated from this title n1244 nor be more extensive than such title. n1245 It has been enlarged into an estate by statute, and it can have no separate existence apart from the title on which it depends. n1246 In California, the homestead estate is in the nature of a joint tenancy, with the right of survivorship as between husband and wife. n1247 It is a mere personal privilege n1248 which cannot be conveyed to another, and is lost by neglect or refusal to claim or by abandoning it. n1249 Georgia has treated a homestead as a trust estate with the members of the family being the beneficiaries and the husband or wife, as the trustee. n1250

Homestead is a constitutional, and not a contract, right. n1251 The legal status of dower and homestead is somewhat similar, and what is said with respect to dower and its incidents is alike applicable to the homestead. n1252

21.04(c) The "Family"

The justification ordinarily advanced for the existence of the homestead is the protection of the family unit. Hence, usually, to give rise to a homestead, there must be a family, n1253 and this denotes a collective and communal body, not a single individual. n1254

To constitute a family there must be; (1) a social status, and (2) a head, who has the right, at least in a limited way, to direct and control those gathered into the household. n1255 The general rule is, "no family no homestead." The family embraces a collective body of persons, composed of parents and children, or other relatives, domestics, or servants, living together in one house or within the curtilage. n1256

No specific number of persons is required to constitute a family, just so that there are more than one. n1257 A husband and wife living together constitute a family under laws relating to homesteads. n1258 A debtor claiming exemption under the homestead laws must show that he is under a legal or moral obligation to support the other members of his household, and there must be a corresponding state of at least partial dependence of the other members for this support. n1259 Such status or relationship may be that of parent and minor child, husband and wife, guardian and ward or other similar relation. n1260 The absence of either a legal or moral obligation to support those living with the debtor will defeat his claim to exemption n1261 but, where a natural or moral obligation to support exists, this is sufficient without any legal duty. n1262

When taken in its ordinary sense, as it must be taken where the law does not define it, it is not essential that the term family should include husband and wife or parent and child; n1263 but in some jurisdictions it is held that in order to constitute a family within the meaning of the homestead exemption laws it is necessary that the relation of husband and wife or parent and child should exist, n1264 and persons living together without being so related or connected cannot be deemed a family. n1265 Where the family consists of the husband and wife only, the fact that their marriage was void may defeat the husband's claim of a homestead right. n1266 While usually importing a household including parents, children, and servants, it does not import that all the members thereof reside together in one house, n1267 but where such persons are permanently separated, they do not constitute a family. n1268

A man who controls, supervises, and manages affairs about the house is the head of the family, and such man need not necessarily be a husband or a father. Thus, a man living with his widowed sister and her children, and supporting them, while his sister keeps house for him, has been held to be the head of a family. n1269 It is in accordance with the spirit of the law, as well as public policy, that nonmarital children should be treated as members of their putative parent's family, and the fact that such parent lives in adultery with another does not debar such parent from claiming a homestead exemption. n1270 In Louisiana, however, minor children will entitle the father to the homestead exemption, even though such children are not merely nonmarital but are adulterous as well. n1271 The adoption of a minor child may create a family within the meaning of the homestead laws. n1272 A family may consist of unmarried daughters and their aged and infirm father whom they are caring for and furnishing with the necessities of life. n1273 So, also, a woman and her helpless invalid adult sister, whom the former supports from her earnings, may constitute a family. n1274 A widow or widower with children may acquire a homestead. n1275 And one living in adultery could not claim homestead on property occupied with a mistress and their children. n1276 In Illinois, the husband is the householder while living and residing with his wife on premises owned by them as joint tenants or tenants in common in which case the homestead estate is listed in the husband alone. n1277

The following general rules determine when the relation of family, as contemplated by law, exists: first, it is one of social status, not of mere contract; second, a legal or moral obligation on the head to support the other members; and third, a corresponding state of dependence on the part of the other members for this support. But, where a homestead once attaches it may continue to benefit the sole survivor of the family. n1278 Who is the "head of the family" must be determined from the facts of each case, since there is no rule or invariable test based solely upon dependence. n1279 A husband living apart from and not supporting his wife was entitled to homestead. n1280

In order to entitle one to a homestead exemption he must be the head of a family, n1281 and this person primarily is the husband or father n1282 who, as such head, is entitled to choose and establish the homestead. n1283 To constitute the "head of a family" within the constitution exempting the homestead from a sale under execution, there must be at least two persons who live together in the relation of one family, but one of them must be the head of that family, n1284 without being the husband or father. Thus a mother may become the head of a family upon the death of the husband, n1285 a minor child upon the death of both of its parents, n1286 or where the husband has absconded, deserting his wife and leaving her residing with children depending upon her, so as to permit her to avail herself of the beneficent provisions of the homestead laws. n1287 Contrary to this general rule it has been held that, under the provisions of some statutes, the wife cannot be the head of the family, n1288 while the statutes of some states, however, expressly provide that the head of the family may be either the husband or the wife. n1289

To entitle a person of either sex to claim a homestead exemption, such person is the head of a family whether married or single, the requirement being that there is dependence upon such person on the part of some one or more of those constituting the family. n1290 For the purpose of holding property exempt, a father whose widowed daughter and her minor children live with him is held to be the head of a family, n1291 also where he has living with him a part of the time his infant child, he being the sole support of such child, paying its board while not living with him. n1292 It follows that a widower with dependents is generally held to be the head of a family for the purpose of holding property exempt under homestead laws. n1293 Likewise, a widow with dependents living with her may rightfully claim to be the head of a family for such purpose. n1294 A grandparent and grandchildren living together, the latter being dependent

upon the former for support, entitles the grandparent to claim exemption as being the head of a family. n1295 A guardian of a minor child, having such child living with him, is entitled to a homestead exemption under some statutes. n1296 The fact that a person is unmarried does not affect his homestead right, if he has been married and has dependents living with him, n1297 but a bachelor, who is not the head of a family, cannot claim the benefit of the homestead laws. n1298 An adoptive parent may be the head of a family, and it is not essential that the adopted child be dependent upon such parent for its support and maintenance. n1299 It is held that one who has brought up and supported foster children was not entitled to a homestead exemption as the "head of a family." n1300 Where a divorce leaves one without a family of which he remains the head, he is not entitled to a homestead exemption. n1301 A man whose family relationship has been broken up by the death of his wife and the emancipation of his children is not entitled to a continuance of his homestead exemption from claims of creditors accorded by law to the head of a family, although an unmarried daughter of full age, but not dependent upon him for support, resides with him. n1302 But, the one with whom minor children remains is the head of the family. n1303 An un-divorced wife who was living with another man as the latter's common-law wife cannot claim a homestead property right in the property of the man with whom she was living at the time in such illegal relationship. n1304

Under liberal construction of the homestead laws, the head of a family is one in authority where the relationship of the family exists. n1305 One claiming the benefit of the homestead exemption law must not only be the head of a family, but must be a resident of the state under the laws of which he claims such right. n1306 However, an unmarried claimant does not need to be the head of family at the time the homestead exemption is claimed. n1307 Under some homestead theories the children acquire a remainder interest in the property which cannot be affected by the parents. n1308

Since there is no hard and fast rule for determining who is the head of the family in a particular case, the facts of the case will be the determining factor. n1309 When the relation of husband and wife or parent and child does not exist, the "head of a family" will not be recognized except where established and continuous personal authority and responsibility is shown to exist as between the parties. n1310 A surviving spouse not the head of a family cannot dedicate a homestead. n1311

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LEXIS:relation! or person! w/5 family w/15 homestead!

21.04(d) Interpretation of Homestead Laws

Homestead legislation, being remedial, is usually given a liberal interpretation by the courts to the extent necessary to carry out their beneficent purpose. n1312 Since the homestead exemption bespeaks public policy, it will be enforced, though it enables a dishonest debtor to defraud his creditors. n1313 A homestead is determined by the law in effect at the time of determination, not by a subsequent increase in amount. n1314 Further, it has been held that homestead laws do not violate the due process right or the equal protection right, and do not impair the obligations of contract protected by state and federal constitutions. n1315

When the right is favored by law, and there is a serious doubt as to whether property is a homestead, the right will be resolved in favor of the exemptionist. n1316 Evasive contracts should not be permitted to thwart the purpose of the organic law. n1317 Construction should not be so liberal as to depart from the plain and obvious meaning of the words used in the organic law or to dispense with the necessity of parties bringing themselves within the spirit of its provisions. n1318 Effect must also be given to other laws creating valid liens and to rights acquired thereunder. n1319 Such liberal construction cannot be made the means of defeating positive rules fully established by former judicial practice. n1320 While constitutional and statutory provisions relating to homestead exemptions will be liberally construed in the interest of the family home, they will not be applied so to make them an instrument of fraud. n1321 Some courts seem to hold that homestead laws are in derogation of the common law and should be strictly construed. n1322 Further, federal law may preempt state homestead provisions. n1323

A homestead law applies to and affects property acquired prior to its passage, n1324 but a homestead right is not affected by the provisions of a law enacted subsequent thereto. n1325 Homestead laws are sometimes conditioned against retroactive effect. n1326 Where the essential elements of a homestead right exist, the persons entitled to it cannot be divested by acts or influences beyond their volition. Thus the legislature has no power, by subsequent enactments, to destroy or diminish, as against debts then in existence, a right which has been conferred by a homestead law and acquired by residence and occupation in compliance therewith. n1327 Where the homestead right is guaranteed by the constitution, the legislature may enact laws for the purpose of carrying the constitution into effect, and may even extend the homestead right beyond that guaranteed by the constitution, so long as the extent of the homestead shall be in accordance with sound policy and humanity, but it cannot restrict the homestead right guaranteed by the constitution. n1328 A constitutional or statutory provision, granting or increasing a homestead exemption, is not operative as to debts and liabilities existing before its adoption. n1329 There are cases, however, which hold to the contrary. n1330 The homestead law in force when the debt is created governs proceedings to enforce a judgment rendered thereon. n1331 Probate homesteads are governed by the law in effect at the death of the owner. n1332

The chief object of a homestead is to shelter the family. n1333 The homestead right is governed by the law of the state where the property is located. n1334

21.04(e) Methods of Establishing the Homestead

As has been elsewhere noticed, the mode of acquiring a homestead in lands is generally prescribed by statute, and the mode thus prescribed must be observed. n1335 Thus where the statute requires that the debtor take affirmative action to claim homestead before levy of execution, failure to do so waives the homestead. n1336 The head of the family, who is usually the husband or father, has the right to choose the homestead. n1337 To entitle one to select a homestead he must have title in fee or for life and intend to claim the property as a homestead. n1338 After the title has passed from him by proper legal procedure, he cannot claim a homestead therein. n1339

In the absence of statutory provisions prescribing the mode of selecting the homestead, occupation n1340 of land with a bona fide intent to use it as a home, n1341 is sufficient to impress it with that character. n1342 In such cases there is no formula by which to decide the right of a claimant to his homestead, but each case must be determined according to the facts presented. n1343 A bona fide intention to acquire land for a homestead must be coupled with some overt act indicating a present intention to set aside a particular property as and for a homestead. n1344

But, in some states, a written declaration, describing the land and stating the value thereof, is required. n1345 These declarations must be made by the proper party and in the particular mode, if any, appropriate to the party claiming, and must state all facts required by the statute to entitle such claimant as distinguished from others. n1346 Defects in the execution of a declaration, which clearly manifest an intent to claim as a homestead lands which are thereafter occupied and used as such, will not defeat the homestead rights. n1347 The fact that the homestead declaration embraces land which the declarant does not own does not affect its validity as to land which he does own. n1348

Some authorities hold that the benefit of the homestead law is lost if the claim of exemption is not brought to the notice of the proper officer or person before execution or judicial sale, and that it is no excuse that the owner did not know of the levy upon his property. n1349 On the other hand, it is held that, where the area and value of a homestead do not exceed the limit allowed by law as exempt and are not a part or parcel of a larger portion of land, a selection is unnecessary, and that the law intervenes and attaches the right of exemption, without any act on the part of the exemptioner, as if the particular property were especially claimed and designated as exempt. n1350 In some states formal declaration of homestead is required. n1351 The party claiming the homestead exemption has the burden of proving the homestead character. n1352

A homestead is determined by the law in effect at the time of determination, not by a subsequent increase in amount.

n1353

21.04(f) Homestead in Undivided Interests

Considerable division of authority appears as to whether a homestead can be claimed in property where the head of the family holds only an undivided interest. The weight of older authority, at least, holds with the proposition that there can be no homestead in a cotenancy and that a homestead cannot be carved out of an undivided interest in real estate. n1354 While a cotenant may acquire homestead rights in the common property, his rights so acquired are not superior to the rights and remedies of his cotenants, and he can acquire no such rights as will prejudice or in any manner interfere with the rights of the other tenants in common. n1355

There are, however, numerous instances in which the courts have given exemptions on "homesteads" where the head of the house held only an undivided interest. n1356 Many of these are explainable upon the theory that the applicable statute does not create a homestead in the true sense, but merely gives the head of the family an exemption in his undivided interest from levy by creditors. n1357 But, some courts hold that, the primary object of homestead provisions being the protection of the family, the nature of the claimant's title becomes only a secondary consideration, and the fact that the title is in the husband and wife jointly or as tenants by the entireties, does not prevent either from claiming a homestead therein. n1358

An undivided interest in realty, accompanied by exclusive occupancy thereof by the owner and his family as a home, is thus held to support a homestead exemption. n1359 In these states, homestead may be had where the joint or common tenancy is that of husband and wife. n1360 Under a statute authorizing the selection of a homestead, though the land is held in joint tenancy, land held in joint tenancy by husband and wife may, at her instance, be impressed with a homestead without segregation or partition or delimitation of boundaries, for she may do so as to her own interest which is her separate property, and may do so as to her husband's interest. n1361 Where a wife consented to the taking of title to land purchased with community funds as joint tenants with the right of survivorship, the husband's estate in the land was coupled with the right of immediate possession and was his separate property, from which he could select a homestead without the wife's consent. n1362

The authorities are not in agreement on the question as to whether a homestead may be claimed out of partnership property at common law. In some states, a homestead cannot be carved out of partnership property, n1363 especially when the firm property is insufficient to meet the partnership debts. n1364 In some states, however, one member of a partnership is entitled as against the creditors of the firm to have a homestead in the partnership property. n1365 In others, the firm must be solvent in order to entitle one partner to designate his interest in the partnership realty as a part of his homestead. n1366 Payment of the firm's debts is generally held a prerequisite to a partner's claim of a homestead exemption in firm real estate, n1367 but one member of a firm cannot assert a homestead right in firm property to the detriment of the other members of the firm. n1368 So, it would seem that one partner cannot have a homestead in the real estate of the firm, especially as against a copartnership debt, without the consent of the other members of the firm. n1369 Where the uniform partnership act is in existence, however, there can be no homestead in partnership property, since the partner's interest in the partnership realty becomes a tenancy in copartnership. n1370

Where husband and wife own separate property as well as community property, the homestead may be claimed out of either. A husband may have a homestead in his wife's lands as against his creditors n1371 but, under some statutes, a homestead so set apart is invalid as against a judgment creditor of the wife. n1372 To impress the wife's separate land with the character of a homestead, it is held she must so impress it herself or give her consent thereto. n1373 In some jurisdictions, the wife may select the homestead from community property, n1374 and the husband will be bound by her selection. n1375 A homestead may be claimed partly from community property and partly from the separate property of the wife, provided she makes the claim. n1376 Under the statutes of some states, a homestead in either spouse may ordinarily attach to an estate in land in which both n1377 or either have an interest, n1378 though the other may have previously owned and disposed of the same land under a prior homestead therein. n1379 One spouse may not have a

homestead in lands to which neither have ever had legal or equitable title. n1380 Further in some states, the homestead interests of spouses cannot be split, so if one's interest cannot be executed, neither can the interests of the other. n1381

In some jurisdictions the widow can claim homestead in community property as against a mortgage given to secure community debt, even though she has no dependents. n1382 Where prior to a conveyance by a husband to his wife they were joint tenants of the realty, and the property was occupied by them as a residence, an estate of homestead was vested in the husband. n1383 Where a tract of land was owned by husband and wife as tenants in common, it was held that the husband had a right to claim the same as his homestead and to annex thereto another tract which he owned in severalty, if such tract was impressed with the character of a homestead by its use and occupation as such in connection with the tract on which the residence was located. n1384

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LEXIS:homestead! w/30 undivided w/2 interest!

21.04(g) Value of Homestead Taken

The statutes further vary as to the imposition of limitations on the extent of homestead. Where "homestead" is actually an exemption from execution, or is akin thereto, there is ordinarily a limit, usually unrealistic in light of modern conditions on the value of the homestead which can be taken. n1385

The amount, extent, and value of property that may be claimed for a homestead are limited by statutes and constitutions, which vary greatly. Generally a limitation is confined to the use and value alone, without regard to the quantity n1386 but, by some statutes, the extent of the homestead is measured by the area or quantity of land, and not its value, such quantity varying as between urban and city property. n1387 In some jurisdictions, the quantity and value of the property are treated as mere incidents and not as tests. n1388

By statute, in many states, a limitation as to value is placed upon the homestead exemption, n1389 and a correct interpretation of the language of such statutes would be to make the homestead the primary and sole object of the exemption, with a limitation as to value. n1390 Where the statute exempts a homestead to the extent in value of a designated amount in land and buildings thereon, and the whole tract be worth more than such amount, only the portion equal to such amount in value can be claimed, n1391 and the excess may be sold in satisfaction of debts. n1392 It has been held that a debtor's property including his homestead will not be ordered sold and the homestead right transferred to the proceeds, where it is not clear that there would be a substantial excess of value over the homestead exemption if a sale were made. n1393 Further, when a lien is secured by both exempt and nonexempt property, the debtor is entitled to have the nonexempt property foreclosed first. n1394

One cannot claim a homestead in lands where value exceeds a certain sum, without deducting encumbrances. The fact that an encumbrance on the land cuts down the net value of the same does not authorize the claim of a greater quantity of land than could otherwise be claimed if there were no encumbrance. n1395 The value of the homestead is to be determined as of the time of the original designation thereof, n1396 and the homestead is not affected by liens where the value of the property without the liens is less than that specified as an exempt homestead. n1397 In determining the value of the homestead, the value of the interest of other persons in the property must be excluded. n1398 The furniture of the claimant is not a part of the homestead. n1399

So, homestead is different from dower, since in dower value is unimportant. n1400 Under some statutes, the homestead rights must be measured both by value and by area. n1401 In Florida, a homestead within a city is limited to half of 1 acre of land with the buildings thereon. n1402 In determining whether the value of a claimed homestead exceeds that limited by the statute, any mortgage or encumbrance thereon must be deducted. n1403 Where the value of the property claimed as a homestead, exclusive of a mortgage against it, did not exceed the statutory limitation, no valid forced sale

could be made after the recording of the homestead claim. n1404

Generally, a homestead cannot be revalued and a new one set off, even to an execution debtor in his lifetime, in the absence of a plain statutory provision permitting the same. n1405 Where a statute provides for a homestead exemption not exceeding in value a certain amount, the owner cannot, after the laying off of the homestead, erect buildings thereon, increasing the value much beyond the limit, and claim the whole as exempt. Equity will decree that the amount above the specified limits shall be applied to the payment of his debts. n1406

The increase in value by improvements as mentioned above does not vitiate the homestead, but renders the excess above the value fixed by statute liable to the payment of debts. n1407 A homestead of less value than the maximum allowed by statute may be increased in value by the addition of other land, if the whole does not exceed the value allowed. n1408 When the boundaries of a homestead have once been fixed, they can neither be cut down on account of subsequent enhancement in value or be added to in case of depreciation. n1409 In some states where the homestead has been established, its subsequent appreciation in value resulting from the ordinary increase in realty values does not entitle a creditor to subject the excess over the statutory exemption to the payment of debts. n1410 In other states, the homestead right ceases as to so much of the homestead as is afterward enhanced in value over the statutory amount. n1411

21.04(h) Duration of the Homestead

In some states the homestead is an estate in fee, if the householder has such an estate in the lands claimed, but is limited to the extent of such an estate, and ceases when the estate, if one for life or for years, expires. n1412 The fact that a homestead has been taken in lands cannot enlarge the debtor's interest therein, beyond that which he held prior to taking homestead. n1413 But, once having acquired homestead status, realty continues to have this characteristic until abandoned or sold. n1414 A homestead may be abandoned n1415 or may be lost by sale. n1416 It may also be waived or relinquished. n1417

The separate property of one who is not the head of the family does not have homestead status and may be levied upon by creditors. n1418 The right can never rise any higher than the rights, title or interest that the claimant owns in the property attempted to be impressed with a homestead. n1419

Upon divorce, the husband ceases to be the head of the family for homestead purposes, though he may still be obligated to support the children. n1420 In some states a formal declaration of homestead is required. The holder of a household may substitute another without forfeiting his right. n1421

Removal from a probate homestead or renting of the premises is not abandonment. n1422 Probate homesteads are governed by the law in effect at the death of the owner. The validity of a waiver of homestead is governed by the law of the place where the homestead is held, not where the agreement of waiver is made. n1423 Widow's homestead need not be specifically set aside. n1424 Adultery does not bar homestead. n1425 Land becoming homestead is subject to contracts of sale and deeds of trust which become effective prior to the attacking of the homestead. The courts disagree whether constitutional homestead provisions set a maximum or minimum on homestead. n1426

If one spouse abandons the other, the homestead remains in the spouse who stays on the property. n1427

21.04(i) Income from the Homestead

In those states where the homestead is not a mere monetary exemption from execution, but is a home or at least a possessory right, the debtor is entitled to a living therefrom as well as a roof over his head. n1428 So long as the homestead character is maintained, the homestead, as well as the use thereof, is exempt. n1429 The owner of a homestead has a right to hold as exempt not only the homestead and its use but any money which he may derive from

its use. n1430

Some statutes provide that all rents, produce, or profits arising from the homestead shall be exempt. n1431 Rents accruing during a temporary absence of the head of the family from the homestead are exempt from execution; n1432 but where the head of the family voluntarily absents himself from the homestead, rents accruing during his absence are not exempt. n1433 Where a portion of a building occupied as a homestead is leased to other persons, the rent received therefor cannot be taken for the homesteader's debts. n1434 Generally, crops from a homestead are exempt from levy and sale under an execution, n1435 but such crops must be growing on the homestead and necessary to its beneficial use and enjoyment. n1436 This rule applies to crops matured but not yet severed from the soil. n1437 Grain harvested from the homestead lands is not, as such, exempt from execution. n1438 The products of a homestead are, however, sometimes subject to attachment to enforce payment of obligations contracted in the production of the same. n1439

A homestead right as the equivalent of a life estate gives the homestead occupant the benefit of full proceeds of minerals for life, even where the land is only under lease when the surviving spouse's occupancy begins. n1440 According to some authorities, the law confers a homestead right only in land, and not in the proceeds of the sale of land. n1441 There are other cases holding to the contrary. n1442

So, the proceeds of the homestead are sometimes entitled to the same exemption as the homestead itself, n1443 unless such exemption thereto is waived. n1444 To be so exempt, the property must have retained its homestead character until the time of sale. n1445 Thus, a person who owns a homestead may sell the same and reinvest the proceeds in another, which will be exempt to the same extent as was the homestead sold, n1446 but the debtor, to preserve the right to homestead in the new tract, must purchase and occupy the same as a homestead within a reasonable time, n1447 claiming an exemption on the ground that lands were purchased with the proceeds of a homestead has the burden of proving such purchase. n1448 One homestead may be exchanged for another, and the homestead privileges and rights attach to the new as they did to the old homestead. n1449 There are cases, however, which hold that the income, rents, and royalties from a homestead are not exempt from liability for the owner's debts. n1450

21.04(j) Fraud of the Debtor as Defeating the Homestead

As a general proposition, the courts will not permit a fraud to be perpetrated through the acquisition of a homestead. n1451 If money obtained by fraud is used to acquire a homestead, such homestead is subject to claims of creditors. n1452 But, this does not prevent an insolvent debtor from purchasing property then claimed as a homestead. n1453 In thus deciding between the public policy of perpetuating the family and the distaste for encouraging fraud, the courts are faced with the dilemma, "In avoiding the Scylla of oppression we must guard against the Charybdis of dishonesty." n1454 Exemption laws are grants of personal privileges to debtors that may be waived or forfeited. n1455 Homestead laws are enforced, though in so doing a dishonest debtor may wrongfully defraud his creditors. n1456

So the fact that a conveyance of homestead property is fraudulent as to creditors does not alone and of itself inevitably defeat the homestead right. n1457 A large majority of the cases hold that a homestead is not abandoned by a fraudulent conveyance thereof by the debtor. n1458 Thus, where a conveyance to the wife is made by the husband for the purpose of placing the home beyond the reach of creditors, the wife is not precluded thereby from claiming the homestead. n1459 This is true whether the wife participated in the fraud or not. n1460 An insolvent debtor purchased property and paid for it with funds that his creditors might otherwise have had applied in satisfaction of their claims, declaring the property so purchased as his homestead. In an action to have it applied in payment of debts, the court held the property homestead. n1461 It is held that a man's marrying in order to enable him to claim a homestead exemption, and thus defeat his creditors, whose money and property had been used to prepare the property as a homestead, does not lose the right to claim it as exempt. n1462 A conveyance of homestead realty cannot be set aside at the suit of a creditor. n1463 An owner of homestead property exempt from execution may convey it to anyone, including his wife, without having the conveyance overthrown as defrauding his creditors, if he makes a proper defense of exemption when the transaction is assailed. n1464

It is generally held that a wife's joining in a conveyance of her husband's real estate with the intent to assist him in defrauding his creditors does not bar her right to claim homestead or exemption. One reason for the rule is that the exemption privilege is given for the benefit not only of the husband and father but also for the wife and children, and it is held unjust that the latter should be prejudiced by the wrongful acts of the former. n1465 When the conveyance is void as to creditors, it stands as to them as though there had never been such a conveyance. If, then, the conveyance has not been made, the wife and children can assert the right against the creditors, the latter not being in a position to say after the conveyance has been set aside that it is not binding as against them, but is binding against the grantor so as to preclude him from asserting any claim to or in the property. n1466 Fraudulent conveyances do not enlarge the rights of creditors, but leave them just as if no conveyance had been made so far as enforcement is concerned. n1467 A creditor, under his execution, cannot sell a debtor's title and at the same time deny the debtor homestead on the ground that he has no title. n1468

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LEXIS:defeat! w/5 homestead! w/15 debtor! w/5 fraud!

21.04(k) Alienation of the Homestead

The right and power of the title holder to alienate land once set apart as a homestead depends largely on the extent to which the applicable state statute has gone towards making the homestead a separate estate in land, as distinguished from a mere exemption from levy by creditors. Even where it is a mere occupancy, and not a new type of interest in land, the right of alienation by the record owner, so as to defeat the possessory interests of the other members of the family, may be limited. n1469

In Illinois a homestead is alienable, but a lien of a judgment lies dormant while the homestead exists. n1470

Likewise, homestead may be mortgaged. n1471 A homestead is alienable. n1472 A lien of a judgment lies dormant while the homestead exists.

Where the statute imposes no restrictions on the power to alienate a homestead, the conveyance thereof passes the title as if no homestead existed. n1473

A homestead in the sole name of the head of the family cannot be alienated without consideration, n1474 but entireties property may be, if both spouses join, even though held in homestead. n1475

The homestead ceases upon conveyance. However, the statutes of many states seek to protect the widow and children against the improvidence of the husband, by providing for certain restrictions on the right to alienate the homestead, among which are that the instrument of conveyance shall expressly release the homestead right and be specially acknowledged by the wife. n1476 Thus, a contract lien on a homestead for street improvement is not created by an instrument not acknowledged by the owner. n1477 Hence, the homestead property cannot be conveyed by the husband without the wife's consent given in the manner provided by statute or constitutional provision. n1478 Title to a married woman's right in the homestead can pass only through a conveyance executed in the manner required by law. n1479 A provision in the statute exempting the homestead from forced sale does not necessarily prevent a private sale thereof. n1480

As the benefits of the exemption from debts are intended for the family, the statutes usually provide that the wife must join in a conveyance of the interest, and such conveyance passes a good title to the grantee free from the general debts of the grantor, if the mode prescribed by statute, if any, is followed. These statutes are as varying as the jurisdictions, and no attempt will be made here to give more than the salient features common to a number of them. Thus, in most

states, a conveyance executed by one spouse alone is void. n1481 The deed is not void, however, if it is to the wife alone, and she signs. n1482 An attempted conveyance by the husband of the homestead is void unless the wife joins. n1483

Such a provision, however, does not prevent the husband from conveying the homestead to secure a privileged debt, even when the wife does not join in such a conveyance. n1484 This is true also where the husband's conveyance is to secure an enforceable debt. n1485 As a general rule, both husband and wife must join in or at least consent to a conveyance of the homestead to a third person, n1486 unless the conveyance is made pursuant to a contract entered into prior to the marriage. n1487 The cases are divided as to whether one spouse can convey the homestead under power of attorney from the other spouse. n1488

Where a wife, having been abandoned by her husband, had acquired title to her husband's property by adverse possession, the wife was held to have a right to convey the property to her daughter. n1489 Likewise, where the husband sold the homestead on fraudulent representations that he was unmarried. n1490

A husband may convey without his wife joining, where the homestead has not been selected, n1491 or where it has been abandoned. n1492 Moreover, even though one of the spouses does not join in or consent to a conveyance of the homestead, the conveyance thereof actually made by the other spouse may become effective on the homestead's being subsequently abandoned. n1493

Whatever mode of alienation of the homestead is attempted, a strict compliance with the statutory requirements must be observed. n1494 Thus, where the statute so provides, the conveyance of the homestead by the husband must be signed and properly acknowledged by the wife, n1495 and supported by a sufficient consideration as to her release. n1496 Though the wife's name does not appear in the granting clause, her intent to convey may appear in the subsequent portions of the deed. n1497 The methods by which a homestead or an interest therein may be alienated are usually exclusive and, being also restrictions designed for the protection of all the beneficiaries of the exemption, they are as essential when the homestead is alienated to members of the family as to others. n1498 In Illinois, a specific release or waiver of the homestead is necessary to the validity of a conveyance of homestead property. n1499 A conveyance invalid as to a homestead, because it contains no release thereof, may nevertheless be valid as to the excess of value over the value allowed by law to be reserved as a homestead. n1500

Generally, an executory contract to convey a homestead not joined in by both husband and wife comes within statutes inhibiting the sale or alienation of a homestead by the husband alone, n1501 though it is sometimes held that such a contract may be valid without the wife's joinder therein. n1502 A contract to convey entered into by a single man prior to his marriage is binding upon his wife irrespective of whether or not she had notice of the contract previous to the marriage. n1503 It has been held that the husband is himself liable in an action for damages on a contract entered into by himself alone to convey the homestead without having obtained his wife's signature to such contract. n1504 A contrary view is held in some jurisdictions. n1505

Ordinarily, joinder by the wife in a contract to sell the homestead, or at least her consent to such contract, is essential to the contract's enforceability. n1506 In some states, a contract invalid as to the homestead is invalid in toto. n1507 In others such a contract may be valid as to the excess of value of the property over the value of the homestead allowed by law. n1508 Where the contract to convey and the deed of conveyance were parts of one and the same transaction, the conveyance is valid if the wife signs the deed only. n1509

Where the rule obtains that an absolute conveyance by the husband without the consent of the wife is void, it is generally held that he cannot mortgage the homestead without her joining in the manner prescribed by law. n1510 Both the husband and wife must ordinarily join in, or at least consent to, the execution of a mortgage on, or a deed of trust to, the homestead. n1511 Likewise, where a conveyance of the homestead by the husband alone operates to convey the right to the land after the homestead terminates, it is generally held that a mortgage of the premises without the wife

joining is a valid lien upon the land, subject to the homestead right while it lasts. n1512 If the statute provides that the wife shall acknowledge her deed releasing her homestead rights, a mortgage without her acknowledgment creates no lien upon the homestead. n1513 Under a statute which provides that the homestead release shall be by joint consent of husband and wife, if the husband executes a mortgage and signs his wife's name to it and procures a fraudulent acknowledgment of it in her name, the wife cannot subsequently ratify the mortgage by executing a separate release. n1514 The mere signature of a married woman to a mortgage by her husband is no evidence of a release or waiver by either him or her of the homestead exemption, unless it is affirmatively and substantially stated in the body of the instrument that she is a party to and unites in the conveyance. n1515 A mortgage given to secure the purchase price of a homestead need be signed only by the person taking title to the homestead. n1516 It is held that neither the wife nor her husband is estopped to assert the invalidity of a trust deed as to the husband's antecedent debt secured thereby. n1517

The power to make a testamentary disposition of a homestead depends on the statute creating the homestead, and such statutes usually exclude such power on the part of the owner, n1518 especially where the attempted devise is to persons not entitled to a homestead in the property. n1519 He has no right as against his creditors, to devise the homestead to persons other than those entitled to homestead rights therein. n1520 In some states, the owner may devise the homestead subject to the right of the surviving spouse to occupy the land for life. n1521 In most jurisdictions, a devise to a surviving spouse in lieu of the homestead, which is devised to another, puts such spouse to an election between the homestead and the provisions of the will, and such survivor cannot have both. n1522 In other jurisdictions such surviving spouse is not required to elect between the devise and the homestead, but may take both. n1523

In the absence of a statutory or constitutional prohibition, the owner is generally held to have power to dispose of the homestead by will, n1524 and in the absence of a clear intention expressed in the will to the contrary, a testator, leaving no widow, child, or issue of a deceased child, may dispose of his homestead to a devisee who takes same free from the testator's debts. n1525 Neither the fact that the homestead property is devised to the testator's descendants, nor the fact that it is directed to be converted into money for the purpose of division, affects its exemption from the testator's debts, where his descendants are given the same shares as they would have taken by descent. n1526 In Florida, the homestead may be devised by the owner's spouse if there is no minor child. n1527

An alienation of the homestead does not necessarily render the property liable for debts of the former homestead owner. n1528 In the absence of a statutory or constitutional prohibition, the parties have a right to voluntary sale or mortgage of the homestead lands, n1529 and the grantee or mortgagee holds them against the creditors of the grantor. n1530 This rule prevails in jurisdictions where judgments against the debtor are not liens upon his homestead, but in other jurisdictions such judgments are liens which remain in abeyance while the homestead right exists, in which case a sale of the homestead cannot be made, except subject to such judgment liens. n1531 The proceeds of a voluntary sale of a homestead were held exempt from execution for debt. n1532

The cases are divided as to whether a homestead is such an interest in land as to fall within the statute of frauds. n1533 The cases are divided as to whether the husband can transfer the interest to his wife without her executing the deed. n1534 Remarriage of a widow does not of itself terminate the homestead. n1535 In Nebraska, when the title holder dies his widow takes a life estate in the homestead and his children the remainder, even though they no longer occupy the property. n1536

The sale of the homestead and reinvestment of the proceeds in another home does not make the new property subject to debts. n1537 Homesteads may descend and can be devised. n1538

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LEXIS:right! or power! w/5 alienat! w/15 homestead!

21.04(l) Interest, Possession and Use Necessary to Create a Homestead

"Homestead" as distinguished from a mere exemption may be taken only in realty, not personalty, though some states, for this purpose, treat a chattel real as real property. n1539 Ordinarily, to support a homestead right there must be ownership, either legal or equitable. n1540 A homestead may be allotted in mortgaged real estate. n1541

The character of the estate necessary to support a homestead is usually defined by statute. In some states, nothing short of a fee in the claimant will suffice. n1542 So, one having a base or determinable fee in realty is held not to have a homestead interest therein. n1543 But, generally, a fee is not necessary to support a homestead, n1544 as any possessory interest in land, n1545 coupled with the requisite occupancy by the debtor and his family, n1546 such as one's right under a contract of purchase, is sufficient. n1547 Under the latter rule, any interest, sufficient that the creditors covet it, is enough to support homestead. n1548

Except as against the right of the vendor, one in possession of land under a contract of purchase may claim a homestead right. n1549 So, mere naked possession has been held sufficient. n1550 All that is necessary is that the exemptionist have an assignable interest in the land. n1551 Property in which the husband has only an equitable interest may be protected as a homestead, though the legal title is in his wife. n1552 Accordingly, the homestead right for an owner, wife, and family attaches as well to a life estate as to an estate in fee. n1553 An estate in remainder, whether vested or contingent, will not support a claim of homestead exemption until the termination of the prior estate. n1554 Future estates, whether vested or contingent, will not support a claim of homestead, until the particular estate is determined and the remainderman is entitled to immediate possession, at which time he may claim his homestead in the premises if the contingent interest has not been sold in the meantime by his creditors. n1555 The interest of a tenant by the curtesy is sufficient to support a homestead. n1556

Likewise, the right may be supported by a leasehold interest, where the lease gives him an estate in the premises, n1557 and some cases hold that a tenancy at will or at sufferance is sufficient to support a homestead. n1558 It is held that an obligation under an oil and gas lease to pay deferred rentals in the future, like a lessor's reversionary interest in the minerals, is subject to a wife's homestead rights. n1559 Homestead rights may attach where, subject to a life estate, there is a present vested fee title subject to the life tenant's right to collect rent. n1560 Also, there may be a homestead in property in which a husband and wife have an estate by entireties. n1561 A homestead may be acquired in property of tenants in common and joint tenants. n1562 To impress land with a homestead character, some real interest or ownership must exist, and a mere gratuitous grantee of one conveying to defraud his creditors does not acquire such interest or ownership. n1563 One entering into possession of land in subordination to and in recognition of another's title cannot acquire homestead rights superior to such owner's title. n1564

Occupancy of the property, actual or constructive or at the very least a bona fide intent manifested by overt acts presently to occupy the property is, as a general rule, essential to the acquisition of a homestead right. n1565 One may actually occupy a home through the agency of others, so long as it is maintained as a home and the control is not changed in character. n1566

Daily residence is not essential, nor is it disrupted by temporary absence with the intent to return. n1567 It is often said that occupancy is of the very essence of a homestead. n1568 The idea of a homestead always contemplates a place for the residence of a family, and its character, as exempt property, is derived only from the fact of such occupancy. n1569 A homestead may not be acquired by intention to use premises as a home in the future accompanied with preparations to make it suitable as a home. n1570 In most states, mere occupancy of the land is not sufficient to establish the homestead, n1571 unless such occupancy obtains at the time the question of exemption arises. n1572

A homestead character may be impressed upon premises without actual occupancy, where the claimant has a fixed intention to make a home thereon, manifested by overt acts of preparation of the premises for a home. Actual occupancy, or an attempt in good faith to occupy the premises, must follow the overt acts of preparation without unreasonable delay. n1573 Where the statute defines the head of a family as including, among others, every person

residing on the premises with him or her and under his or her care and maintenance, a child or certain other relatives, such statute does not operate to make a residence upon the land a requisite to its exemption as a homestead. n1574

The question of selection sufficient to impress a homestead character on property, without actual occupancy thereof as a home, depends on the circumstances of each particular case. n1575 In some states, the mere fact that the premises are occupied as a home is sufficient to constitute a selection of the homestead. n1576 When occupancy is coupled with residence, citizenship, and the status of being the head of a family, the right is perfect. n1577 In some states, actual residence upon the premises is not required to constitute a homestead. n1578 A mere intent to occupy the premises, n1579 unaccompanied by acts of preparation of the land for a home without unreasonable delay, is not sufficient to impress the land with a homestead character, n1580 but the intention to occupy property as a homestead, after proceeding with reasonable diligence to render the premises habitable, followed by actual occupancy within a reasonable time thereafter, is generally sufficient to establish a homestead. n1581 According to some cases, actual occupancy is not required, but constructive occupancy will answer, n1582 as where the property is temporarily in the possession of a tenant. n1583

A rural homestead is initiated by dedication and occupancy thereof by the head of the family as a place of residence and use for the support of the family, n1584 so a lessor of oil and gas did not have sufficient possession of the oil and gas to claim homestead therein. n1585 A homestead claimant may have a residence, and hence a homestead, even though he eats elsewhere and has many of his personal effects elsewhere. n1586 In most states, equitable interests will support a homestead. n1587 Oil and gas interest is an estate in land and was held to be subject to homestead. n1588 But the statutes vary as to whether there can be homestead in leased property. n1589

COMPUTER-ASSISTED RESEARCH

LEXIS:homestead! w/15 interest! or use! or possess!

21.04(m) Time Within Which the Homestead Must Be Claimed

The statutes are not in harmony as to whether a homestead is a positive right which must be recognized under all circumstances or whether it arises only if the debtor takes an affirmative step to claim it. Upon the question of the necessity of the debtor to claim his exemption or bring notice thereof to the officer levying an execution before the sale of the property, the decisions vary. In a number of jurisdictions, the right to homestead is not lost to the debtor by his failure to claim his exemption. n1590 In these jurisdictions, if the debtor's lands are sold on execution, and the purchaser sues for possession, the debtor has a complete defense in his claim of homestead even though he may have taken a lease from the purchaser. n1591 He may have partition if the homestead is sold together with excess which cannot be claimed as homestead. n1592

In some jurisdictions, the homestead is not lost by a refusal to claim it. The statutes impose upon the officer levying the execution the duty to set off the exemption or have it set off by his appointees. n1593 In some states, the debtor must claim the exemption either at the time of the service of the writ of execution or before the sale of the property. Failure to assert this claim at this time loses to him the right to do so, though this failure to claim is spoken of in some jurisdictions as a waiver of his rights. n1594 In other states the debtor loses all right and title to the land once the redemption period has expired. n1595 The officer serving the writ cannot know just what property is exempt, nor can he know if it will be claimed by the debtor, even though the law gives him the privilege. There is apparently no person more interested than the debtor himself in asserting his rights, and his failure to do so is held to be a waiver of the right to claim the property exempt. n1596 In a few states, it is held to be the duty of the officer to inform the debtor of his right to claim the exemption. n1597

Whether the debtor may agree to waive his right to homestead exemption is another question on which there is a diversity of opinion. Some statutes permit such waiver as regards particular debts, if the waiver is in writing and his

wife joins therein. n1598 In other states, however, the right to agree not to assert the claim is denied. n1599 The making of a will or a contract to make a will in consideration of care is held not to imply a surrender or waiver of the right to claim property exempt from execution and sale under a homestead law. n1600

21.04(n) Liability of the Homestead for the Debts and Obligations of the Title Holder

The basic purpose of the exemption right of possession or estate, whichever it may be, of "homestead," is the immunity of the property during the continuance of the homestead from levy of execution to satisfy debts of the holder of the legal title. The extent to which this immunity is carried depends on the particular statute. n1601

It may be stated as a general proposition that the homestead exemption relieves the owner thereof from the necessity of paying his debts to the extent of the value of such exemption, but it is not exempt as against all the owner's debts. As a rule, the claim to exemption can be made only against the contract debts of the claimant, and not those arising from tort, n1602 but in some jurisdictions a contrary rule prevails. n1603 The claim to exemption is ineffectual only against debts arising after the law is enacted under which the right is asserted. n1604 This claim to exemption is superior to debts contracted before the marriage of the claimant, especially if the debts so contracted did not constitute liens on the property at the time and before the marriage. n1605 So, the homestead claim is held to have precedence over a debt contracted by borrowing money with which to purchase the homestead, n1606 but this is denied elsewhere. n1607 Except as against the right of the vendor, one in possession of land under a contract of purchase may assert a homestead right. n1608 The establishment of a homestead interest cannot affect liens created prior thereto. n1609

In most states the grantee from a homestead debtor takes the realty free from judgment and execution liens. n1610

It is held that a homestead exemption may be asserted to property purchased with the proceeds of the husband's non-exempt property, the title being taken in the wife's name, where there are no peculiar equities in favor of existing creditors. n1611 In Michigan, the exemption may be claimed against any debt, but the debtor may waive this right if unmarried, or the husband and wife may waive it jointly. n1612 A lien, under a homestead exemption, securing original notes, is also invalid as to renewal notes. n1613

A homestead exemption does not guarantee absolute freedom from all debts. n1614 A homestead exemption cannot be claimed against debts and liens in existence prior to or at the time the exemption law takes effect. The allowance of the claim against such debts is in conflict with the provisions in the Constitution of the United States, and it is held to impair the obligation of contract, and is therefore void. n1615 When a homestead right is created it attaches to and protects the estate which the claimant then has or may acquire in the property, but it does not enlarge the claimant's interest, although it is subject to existing liens which may be enforced by levy and sale under execution. n1616 A homestead cannot be claimed against debts contracted prior to the acquisition of the homestead; n1617 but, in some jurisdictions, it may be claimed as well against debts existing prior to the time the homestead was acquired, as against those created subsequent thereto. n1618

As a general rule, a homestead exemption may not be claimed against a debt for the purchase price of the homestead. n1619 A different view is taken in some jurisdictions, if it is understood between the purchaser and lender that the money is to be used in purchasing the property, n1620 and the same rule obtains if the loan and purchase are considered as a single transaction. n1621

The right cannot be claimed against debts incurred for the improvement of property, n1622 liens existing prior to the time that the property became impressed with the character of homestead, n1623 a prior attachment lien previously levied, n1624 or a contract to convey land, made by a married man whose wife had not joined in the contract where the claimant subsequently set apart the land as a homestead and refused to convey on the ground that his wife refused to join in the conveyance. n1625 The validity of a mortgage lien depends on its creation prior to the time the homestead estate attached. n1626 The claim to exemption is not valid as against mechanic's, laborer's, or materialman's liens, on

the ground that such liens are on an equality with the lien for purchase money and are governed by the same principles. n1627 This is especially true where the claim was for materials furnished prior to the declaration of homestead. n1628 Also, funds spent for labor and improvement on the house occupied and claimed by one as his home may be satisfied by a sale of the property. n1629 In some jurisdictions, it is declared by constitutional provision that a homestead is not subject to a mechanic's lien. n1630

In the absence of a statutory provision to the contrary, it is generally held that a homestead is not exempt from sale for taxes or assessments levied against it, n1631 but there are cases to the contrary. n1632 In jurisdictions where there is a constitutional or statutory provision making the homestead liable for all liabilities incurred by public officers and fiduciaries, the homestead of a tax collector is subject to the lien of his official bond. n1633 In a Minnesota case, it was held that the Old Age Pension Act, which imposes a lien in favor of the state on all realty owned by a recipient of old age pension benefits, does not violate the homestead exemption provision of the constitution. n1634

The authorities are in conflict upon the question as to whether the lien of a judgment does or does not attach to the homestead of the debtor. The majority opinion seems to be that a judgment is not a lien against premises impressed with the homestead character and subject to the homestead use and that an attachment or execution attempted to be levied thereon is absolutely void. n1635 Other cases hold that the lien attaches, but it is dormant or in abeyance as long as the homestead continues. n1636 The reason for the rule that a judgment is not a lien against land claimed as a homestead, is based upon the theory that a judgment is not a lien upon that which cannot be sold on execution.

While both judgment liens and homestead exemptions are creatures of statute, the exemption, being the later expression of legislative intent and power, displaces the judgment lien, as both cannot stand together in their full extent. The reason given for the rule that the judgment attaches but remains dormant while the homestead exists, is based upon the theory that the homestead exemption is not an assignable estate, but it is a mere possessory right, which is personal to the claimant and does not run with the land. n1637 It can be readily seen that different consequences flow from these two lines of decisions. In the first class, the judgment debtor may sell the homestead and the purchaser will obtain a good title, free from encumbrance, so far as existing judgments for debt against the claimant of the homestead are concerned, unless homestead rights have been waived. n1638 On the other hand, while the property, so long as it is occupied as a homestead, is neither subject to a lien, levy, or sale when it ceases to be protected by the statute, it becomes liable to levy and sale under the first execution issued and levied, irrespective of whether the writ is issued on a senior or junior judgment. n1639 Where the second class of cases prevails, the debtor has no power to convey the homestead so long as judgments remain unsatisfied, except that he may convey subject to such judgments. n1640 In these jurisdictions, if the debtor removes to another place with a view of transferring his homestead from the old to the new place, the lien becomes active, and the premises may be sold in satisfaction thereof. n1641 A declaration of homestead may be filed effectively at any time before a judgment has become a lien upon the property. n1642

Homestead property is exempt from a deficiency judgment on a mortgage foreclosure. n1643 The foregoing rules would manifestly apply to those instances in which homestead rights existed in particular property at the time the judgment or lien was obtained. There is a conflict of authority as to the effect on an existing judgment lien of the creation of homestead rights in real estate affected by the lien. Some jurisdictions adhere to the rule that the subsequent creation of a homestead right does not affect an existing judgment lien. n1644 Others hold that the subsequent creation of a homestead right extinguishes or suspends the enforcement of an existing judgment lien. n1645

If the debtor owns the fee and claims a homestead for life, the creditor's liens attach to the reversion, even though the debtor conveys the entire fee to another. n1646 Land becoming homestead is subject to contracts of sale n1647 and deeds of trust n1648 which became effective prior to the attaching of the homestead.

Where property is purchased with both community and separate funds there is disagreement as to whether the community has a charge upon the property to the extent it contributed to the purchase price. n1649 It has been held that an attorney in a matrimonial matter cannot recover fees from the sale of a homestead since attorneys are general

creditors. n1650 A state homestead exemption does not preclude federal civil forfeiture of property used in criminal activity. n1651

COMPUTER-ASSISTED RESEARCH

LEXIS:homestead! w/30 liab! w/15 debt! or obligat! w/5 title

21.04(o) Abandonment as Terminating the Homestead

It is a general rule of law that title to real estate cannot be lost by abandonment as title to personalty can be. n1652 However, even in those states which treat a "homestead" as an estate in land, the cases are in accord that a homestead can be lost by abandonment. n1653 As occupancy is one of the essentials in establishing the homestead, ceasing to occupy, especially when clearly evident of an intention to no longer claim the property as one's place of residence, is universally considered as an abandonment thereof, and it is thus lost to the debtor. n1654

As in the case of easements and other rights in land, however, abandonment of a homestead requires a wedding of an intent to abandon plus acts constituting a giving up of the legal right of possession. n1655 Here, as in most other phases of the homestead exemptions, the authorities are again in conflict as to what is sufficient evidence of such abandonment. Once the fact of abandonment is established, all the cases agree that the exemption right is lost as against all claims against the property arising after the cessation of occupancy as a home. n1656

The homestead, once established, is not abandoned until there is a combination of an intent to abandon and actual abandonment. n1657 Intention is an important factor in determining whether a removal from, and a failure to continue to occupy, an established homestead, constitute an abandonment thereof. n1658 A move from a homestead to another home presumes abandonment of the homestead. n1659

As a general rule, the residence of the husband or father determines the place of residence of the wife and children, and a homestead is frequently lost by the husband and father moving elsewhere and compelling the family to go with him. n1660 In some states the husband, as the head of the family, has the right to abandon the homestead without the consent of the wife, n1661 provided he acts in good faith. n1662 Temporary absence will not deprive a homestead claimant of his right unless the intent of permanent abandonment is apparent. n1663

Where the husband has, in effect, deserted his family, the exemption is not lost to the family by his abandonment, at least until he acquires a home elsewhere, as the law presumes that his former home continues, though he may be a wanderer. n1664 Some authorities hold, however, that where the husband's abandonment is not concurred in by the wife, she does not lose her homestead right by her removal from the premises with her husband. This view is based on the ground that the statute prevents a conveyance of the homestead except by deed, in the execution of which both husband and wife have freely and voluntarily joined. n1665 It is also held that the husband's attempted abandonment of the homestead while his wife is residing on the premises, claiming them as her homestead, does not deprive the wife of her homestead right. n1666 As a general principle of law, there is a presumption that a homestead continues to be such, and the burden of proof is on the one seeking to prove abandonment. n1667

Where a wife is forced to leave her husband because of his cruelty to her, she does not abandon her homestead rights, and she can still claim a homestead exemption in her husband's property. n1668 In jurisdictions where married women's disabilities have been removed by statute, it is held that, by living apart from her husband with his acquiescence, the wife may acquire a domicil of her own. n1669 The rental of the homestead to another, on a month-to-month basis, was an abandonment for tax exemption purposes. n1670

The homestead character of land continues until the owner disposes of the land, or leaves it with the intention of not returning, or forms such intention after leaving. n1671 The actual removal from the premises, with no intent to return, is

a forfeiture of the right as against purchasers or creditors, even though a new homestead has not been gained. n1672 However, no general rule for determining the intent with which a claimant leaves the homestead can be laid down. Each case must depend on its own particular circumstances, and the question is one of fact rather than of law. n1673 A mere intention to abandon will not, without more, effect a legal abandonment; n1674 but it is otherwise when there is a concurrence of intention to abandon and actual voluntary non-occupancy, n1675 even though such intention was not formed until after the removal from the property. n1676 The acquisition of a permanent new home has been said to be both the best evidence n1677 and conclusive proof n1678 of the abandonment of the former homestead. Both the preliminary question of intention n1679 and the ultimate question of abandonment n1680 are ordinarily questions of fact to be determined according to the peculiar circumstances of the particular case. In some of the states, it is expressly provided by statute that a homestead can be abandoned only by a declaration of abandonment or by a grant or conveyance of the property, and under such statutes non-occupancy of the property will not constitute an abandonment of the homestead right. n1681

Where there exists a bona fide, definite, and persistent intention to reoccupy the property, a temporary absence therefrom will not defeat the homestead right. n1682 The right will not be lost when the absence is involuntary n1683 as, for example, by reason of imprisonment in the penitentiary, n1684 of an order made in the course of judicial proceedings, n1685 of the destruction of the residence by fire, n1686 of physical infirmities, n1687 or of financial reverses and the duties of public office, n1688 or for purposes of health, n1689 business n1690 or education. n1691 Absence may be temporary even though prolonged, "temporary" going more to the question of a consistent intention to return than to the matter of the length of the absence. So it is that, while the extended duration of the absence is a factor to be considered, it is not conclusive that the homestead has actually been abandoned, n1692 but a temporary absence with a design of permanent abandonment amounts to an abandonment of the homestead. n1693

The cases are more and more treating leases of homes as a sale of space, and thus subject to the equitable doctrines of contract, such as mutuality. n1694

Once the homestead is established, the rule of personal occupancy relaxes, and the premises may be occupied by a tenant, paying rent, during temporary absence of the claimant, and this will not constitute an abandonment of the claim to exemption. n1695 The possession of a tenant will not sustain the homestead claim, if the owners have removed with the intent not again to occupy it as their home. n1696 Even the renting or leasing of a part of the property will not, of itself, in every instance at least, forfeit the homestead right as a matter of law. n1697 The execution of an oil and gas lease was not abandonment of the homestead. n1698 It is the acquiring of a new homestead, and not of a new home that operates as an abandonment of the homestead rights. n1699

It would seem that there can be no such thing as an abandonment of a homestead exemption where, under an express provision of the statute or state constitution, an owner of land may claim such exemption in respect of an infinite number of parcels anywhere within the state up to the value specified in the statute. n1700 A continuous actual occupation of a homestead is not necessary, and a temporary absence therefrom, without any intent or design to abandon same, will not operate as a forfeiture of the homestead. n1701 If one spouse abandons the other the homestead remains in the spouse who stays on the property. n1702 Duration of the absence of an owner may sometimes be evidence of an intent to abandon a homestead, but it is generally true that time alone is rather untrustworthy evidence. How long an absence is sufficient to forfeit the right to claim exemption depends upon circumstances. n1703

One may abandon a part of the property as a homestead if he does so in good faith, even though the part claimed to be abandoned is contiguous to the part retained as a homestead. n1704 In Kansas, the widow's probate homestead cannot be affected by any purported antenuptial contract of waiver. n1705 And, in Oklahoma, minor children cannot waive or abandon their homestead right. n1706 But, in most states, the widow may abandon her homestead. n1707

A temporary non-use of a homestead, where caused by military service, n1708 business reasons, n1709 family causes, n1710 illness, n1711 or other reasons, n1712 will not defeat the homestead right. An owner forced from the homestead

by casualty may nevertheless be required to file notice of claim of homestead, as required by state law, to avoid a finding that the homestead was abandoned. n1713

COMPUTER-ASSISTED RESEARCH

LEXIS:abandon! w/15 terminat! w/15 homestead!

21.04(p) Effect of Dissolution of the Family Unit Upon the Homestead

Where the statutes merely give an exemption right to the head of a household, the loss of such a status terminates the right to such exemption. The rule is different, however, in the case of the true homestead. Some cases hold that, while it is essential to the creation of a homestead that the debtor have a family, such requirement is not essential to the continuance of the right. n1714 If the family consists of the husband and wife only, their death simultaneously will of necessity destroy the homestead right, as there is no one to claim it. n1715 "Although a homestead estate cannot be acquired except by a householder having a family, yet, when once acquired and still occupied by him, it is not defeated or lost by the death or absence of his wife and children. Any other construction would render a husband who has been deprived of his family by accident or disease, or by their desertion without any fault of his, liable to be turned out of his homestead by his creditors." n1716 It is not always, at least, that the dissolution of the family will terminate an established homestead right. n1717 Especially is it true that, when death is the cause of the family's disruption, the previously established homestead right frequently continues, in at least a qualified and limited form, for the benefit of one or more of the survivors or for the benefit of the sole survivor as the case may be. n1718

When the debtor dies leaving no family surviving him, and owning the property that was the subject of the homestead, it becomes subject to the claims of his creditors as against his collateral heirs. n1719 The homestead right is a derivative one, and the widow and minor children have the homestead which the husband could have claimed. n1720

Some statutes expressly save the right of homestead to the wife and children on the death of the husband and father. n1721 Others provide that the homestead, being a species of estate in joint tenancy between husband and wife, vests absolutely in the surviving spouse. n1722 In some states, a widow or widower, though without children, shall be deemed the head of the family while continuing to occupy the house used as such at the time of the death of the husband or wife. n1723 The character of the homestead is not altered by the death of one of the spouses, n1724 but continues in the surviving spouse, even where there is no surviving child and no family or dependents. n1725

As a general rule, the complete breaking up of the family for any cause does not operate to forfeit the homestead right of one who has acquired it and continues to use the property as a home. n1726 A husband does not forfeit his right to a homestead by abandoning his wife, unless the abandonment is wrongful. n1727 Where two persons reside together so as to constitute a legal family, a homestead is acquired, and if the family afterwards is broken up for any cause, it has been held that the homestead right is thereby extinguished and terminated, the right of a survivor to the homestead under the statute being extended only in the case of a family based on the relation of marriage. n1728 A number of cases hold that the wife's withdrawal, and even living in adultery with another, does not lose her the right to homestead on the husband's death. This rule is denied in a number of cases. n1729 Where the wife has left her husband because of his ill treatment toward her, and is living apart from him at the time of his death, she does not forfeit her homestead right. n1730 On the other hand, if she leaves him without just cause and without any intention of returning to him, she forfeits her right of homestead. n1731 Under a statute providing that the homestead on the death of the husband shall vest in the widow and children, and that the husband has no authority to alienate the same, the husband's abandonment of his wife without cause entitles the wife to remain on the homestead as against the husband's grantee. n1732

The mere fact that the spouses are separated does not terminate the homestead. n1733 But, separation of the spouses may prevent one claiming homestead rights in the other's property before n1734 or after death. n1735

In divorce proceedings, it is competent for the court to assign the homestead to the innocent party, either absolutely or for a limited period. Where the decree in the divorce proceedings is silent upon the question, the homestead will, upon the dissolution of the marriage, remain in possession of the party holding the legal title thereto, discharged of all homestead rights or claims of the other party. n1736 A divorce decree destroys the homestead rights where, after the divorce, the party claiming the homestead is not the head of a family. n1737 Where real estate sought to be partitioned was originally a homestead of a family consisting only of husband and wife, the homestead ceased to exist after divorce was decreed, n1738 and the property was subject to partition as community property. n1739

Where there is no statutory provision to the contrary, a wife has no homestead rights in the husband's property after divorce, unless rights are reserved to her by the decree, and it is immaterial which spouse was granted the divorce. n1740

An absolute divorce obtained by the wife has the effect of terminating the husband's homestead right in the wife's real estate which has become a homestead by their residence thereon. n1741 It is held that a husband who is liable for the support of his children does not lose his homestead right in his lands, even where the custody of the children is given to the wife. n1742 However, it has been held that a divorce court may place a lien on homestead property for spouse or child support. n1743 Of course, the court may set aside the homestead to either party in its decree of divorce, n1744 either for a limited period or absolutely, as in the exercise of its equitable power may seem just. n1745

In this connection, it may be stated that there is a conflict among the authorities as to whether a court has authority, in the absence of statutory authority, to vest in the wife, instead of the usual allowance in money, title to specific property of the husband by a decree for alimony, or in lieu of, or in addition to, alimony. Many courts hold such decree may be rendered n1746 while, in other jurisdictions, it is held that a court has power in a proper case to assign to the wife, as alimony, specific property of the husband. n1747

COMPUTER-ASSISTED RESEARCH

LEXIS:dissol! or death w/5 family w/30 homestead!

21.04(q) What Property Makes Up the Homestead

The prime purpose of the homestead statutes being to preserve the American home, it follows that the property selected for the purpose of "homestead" must be for use as a dwelling, n1748 except where the statute expressly permits "business homesteads." The homestead nature of property at the time of the owner's decease depends upon its use and his position as family head. Such use can be determined only from physical appearance, as distinguished from the title shown on records. A homestead, in the popular sense, signifies the family dwelling house and appurtenant land used in connection therewith, but, in a statutory sense, it means the land on which the owner's dwelling house is located. n1749

Besides the house or dwelling, the homestead may include whatever land or appurtenances are connected with the home and add to the convenience and enjoyment thereof. n1750 Thus, an interest in an irrigation system held in common with others is considered such an appurtenance as to be a part of the homestead. n1751 A homestead may include both a residence and a place of business, n1752 but to preserve a place of business which is separate from the home as part of the homestead, the head of the family must have a calling to which the property is adapted and reasonably necessary as such. n1753 Under a constitutional provision that a homestead exemption shall not extend to more improvements or buildings than the residence and business house of the owner, an apartment house for renting purposes is held not a business house of the owner. n1754 To constitute a tract of land detached from a block in an unincorporated town and occupied as the residence of the owner a part of the residence homestead, it must be used in connection with the block for the comfort and convenience of the home. n1755 Where property is occupied in good faith as a home, the fact that it is also used for a business to provide a livelihood for the owners will not prevent its being subject to homestead exemption. n1756 Where the statute limits the homestead to one dwelling house and appurtenances thereto, it cannot be

extended to a second dwelling house erected on the land embraced in the homestead. n1757 It has been held that the family homestead of an Indian includes both the tribal homestead allotment and the tribal surplus allotment. n1758

Where lands are used for the purposes of a home, or a place where the head of a family exercises his calling, and the value or area does not exceed that permitted by the statute, it is generally deemed a homestead, even though the land is composed of contiguous lots or tracts. n1759 In the case of urban homesteads, property of two classes may be included, to wit: that used for the purposes of a home, often called the "residential homestead," and that used as a place to exercise the calling or business of the head of the family, called the "business homestead." In the former class may be claimed disconnected properties, if they are used for the purposes of a home, but in the latter class only one place of business is to be claimed, even though several disconnected lots may have been so used. n1760 The idea of a "homestead" carries with it a place of residence, a domicil, and all property used in connection with the residence, such as a place of business, garden, garage, office or shop, and must be located at the place of residence. n1761

There can be but one homestead, which is a unit, but it may consist of a business homestead and a residential homestead, n1762 and contrariwise there cannot be two separate homestead estates in the same premises at the same time. n1763 A homestead may be in one or more parcels which are entirely disconnected from the tract upon which the dwelling house is located, n1764 but, speaking generally, a person can have only one homestead at a given time. n1765

Under the provisions of some statutes, the homestead may consist of more than one tract of land and may be owned either by the husband, the wife or by both jointly, or one tract may be owned by one and another tract owned by the other, so long as the aggregate number of acres occupied as the home shall not exceed in value or area that permitted by the statute. n1766 It has been held that two parcels of land, touching only at the corners, between which is a regular roadway, may constitute a homestead, though the residence and appurtenances are all located on one tract. n1767 A tract of land never cultivated or used, and not contiguous to the homestead land where the husband and wife lived, which had been rented out to tenants prior to marriage, was not part of the homestead. n1768

On the other hand, there are cases holding that two tracts of land touching only at a common corner are not contiguous. n1769 Some authorities hold that a tract of land detached from or not contiguous to the land claimed as a homestead is not a part of the homestead exemption, n1770 even though both tracts contribute to the enjoyment and support of the home. n1771 According to this rule, if the lot on which the person claiming an exemption lives is separated from a second tract by other land, the homestead exemption will not be allowed on the second tract. n1772 Another line of authorities hold that where a parcel of land is detached from the homestead proper, and the returns therefrom are directly appropriated to the support of the family, and the two tracts do not together exceed the acreage allowed the claimant, the detached tract is impressed with the character of a homestead, and is a part thereof. n1773 That a portion of land did not adjoin another portion, all of which did not exceed the amount allowed by law, was held not to destroy the homestead character of the property. n1774

A tract of land in the country forms no part of a homestead consisting of a block in an unincorporated town, but one residing in an unincorporated town may have a business homestead in a separate urban tract used for farming purposes, and unless other avocations operate to destroy such business, it is immaterial that the claimant engage therein. n1775 A rural homestead may be changed into an urban and, after the change has been accomplished, that portion of the rural homestead which is not situated within the town or which is not actually used for homestead purposes, loses its homestead character. n1776

As a general rule, the extension of the limits of a city so as to include a homestead does not diminish the rights of the owner thereof, where the homestead is continued to be used for agricultural purposes, is not platted and is surrounded by lands which, though platted, are rural in character. n1777 Where a rural homestead is brought within the corporate limits of a city by extending the city limits, and the owner subsequently dedicates streets, and plats his land into lots, he is entitled to claim only an urban homestead, n1778 consisting of one lot of the average size as platted. n1779 The extension of the corporate limits of a city, without the consent of the owner of a homestead, so as to include part of

several tracts embraced in the homestead, little or nothing being done to change the rural character of the property, will not affect the homestead. n1780

A person cannot have two homesteads at one and the same time. n1781 Nor can he have two places, either of which at his election he may claim as his homestead. n1782 When a man occupies one piece of land with his family and owns a distinct and separate tract, not adjoining, but uses it in connection with the one so occupied, he cannot hold both as a homestead. n1783 Where he has a residence on each tract, and both are levied upon, he may elect which tract he will claim as his homestead. n1784 The same family is not entitled to both a rural and an urban homestead exemption. n1785 He cannot, however, shift from one tract to another so as to defraud creditors. n1786 Having one homestead, he cannot acquire a second until the first has been abandoned or conveyed or contracted to be conveyed by an instrument legal and valid for the purpose. n1787

The abandonment of an existing homestead in actual use and occupancy is a condition precedent to the acquisition of another separate homestead, n1788 which can be accomplished only by removal from, and cessation of, the use of the existing homestead. n1789 In some states, a homestead may be claimed in only one piece of property n1790 which may, however, usually consist of several contiguous tracts, n1791 while in others it may be claimed in separate, disconnected properties. n1792

The homestead may be taken in property of either the husband or wife but, if living together, then each cannot claim a homestead at the same time, n1793 and if their home is owned by them as tenants in common, and is of the value of the homestead exemption, neither can claim other real estate as exempt from execution. n1794 Where a debtor is living with his family on land owned by his wife, it is held that this does not debar him from the right to claim a homestead exemption in lands of his own. n1795 Where land adjoining the homestead is purchased by the husband and used in connection with the realty on which the spouses live, a homestead right attaches to the purchased realty, except against the vendor. n1796 But, in some states, one who has several places of business may claim only one as a "business homestead." n1797

The use made of land may determine its character as to whether it is a homestead or not. n1798 It has been held, however, in Ohio, that the intention of owner, and not use or occupancy, is the criterion as to whether there is a homestead or not. n1799 And, where the principal use of the property is for a home or residence, the fact that it is incidentally used for other purposes does not affect its character as a homestead. n1800 Thus, a homestead may be claimed in premises used as a hotel or boardinghouse, if it is also used as the home or residence of the family. n1801 By the weight of authority, it is held that if an owner occupies as the family residence a part of a multiple dwelling house, such as a double or apartment house, the entire premises may properly be claimed as the homestead, even though a part of the building is leased to tenants for residential purposes. n1802 It has been held that a thirty-four foot motor boat on which the family resided could not be claimed under the homestead right provided by the Florida Constitution. n1803 It has also been held that motorhomes, travel trailers, and semitruck cabs may be claimed as homesteads under certain statutes. n1804

Hence, the general rule is that where property is bona fide occupied as a residence or home for the family, it will be protected against claims of creditors. n1805 The homestead is granted not only for residence purposes, but for purposes of general utility, and the object of the exemption is to secure to the debtor, not only a house to live in, but everything that goes to make the home more comfortable and enjoyable. n1806 If the homestead should also be used as a place of business, it will not for that reason alone cease to be a homestead, if the part so used would be necessary or convenient for the use of the family, independent of the business. n1807 One not in actual occupation of land, or in occupation of any other property as a homestead, cannot acquire a homestead in land which one cultivates. n1808

A rural homestead exemption comprehends a residence and business homestead exemption and, therefore, dedication of a "rural homestead" consists of the use of a part of a tract for a residence and the use of the balance for the support of the family. n1809 After the homestead has been established, the owner may convert part of it to trade purposes. n1810

There cannot be a homestead in an equitable interest. n1811 And the cases are not agreed as to the homestead interests in arising under land sales contract. n1812

COMPUTER-ASSISTED RESEARCH

LEXIS:property w/15 dwelling w/15 homestead! business homestead!

21.04(r) Effect of Death of Head of the Family

The statutes differ widely as to the effect of the death of a debtor, either before or after selecting homestead and leaving a widow or minor children. In those states where the homestead is a fee, it will descend to the debtor's heirs n1813 or to the surviving spouse. n1814 Other states merely continue the right of occupancy in the surviving spouse that had existed in the head of the household. n1815 A distinction has been made between solvent and insolvent estates, giving the widow a fee in the first instance, n1816 but only a life estate if the deceased was insolvent. n1817 In Florida, the homestead may be devised by the owner's spouse if there is no minor child. n1818

Generally, the husband and father, the debtor, may exercise the claim to a homestead exemption in order to preserve a home for his family. If the exemption should cease at the death of the common family head, then the real object of the statutes would be defeated. The chief feature of such laws is the protection they throw around a widow, and perhaps helpless children, in furnishing them a home place, a shelter, a place of refuge and comfort against the claims of those to whom the often improvident or unfortunate husband or parent had become obligated. Accordingly, practically all the homestead and exemption statutes, after creating and defining this reservation, make it transmissible on the death of the head of the family to the surviving members thereof, usually to the widow and children, in varying estates of quality or duration.

Some statutes expressly give the widow and children the absolute interest by descent. n1819 In some jurisdictions, the widow takes the homestead for life, and the child or children take during minority or the minority of the youngest child. n1820 In some jurisdictions, the widow's homestead for life is on the condition that she continue to occupy it, n1821 and permit the minor children, if any, to occupy it with her. n1822 In other jurisdictions, the widow holds the homestead until her death or remarriage, n1823 or so long as she continues to occupy such homestead. n1824 The widow's right was called a life estate. n1825

The widow's homestead generally continues during the minority of the children, n1826 though, in a few states, they are given a fee in the homestead, thus taking it away absolutely from the reach of creditors. n1827 In Arkansas, it was held that, where the husband on the day of his marriage secretly conveyed his land to a stranger but continued to live with his wife on the premises for ten years, the grantee took no title which would exclude the widow of her dower and homestead, or the children born of the marriage of their inheritance. n1828 The homestead right of the owner's son and wife attached to the property which they occupied with the owner until the latter's death, whereupon by inheritance the son acquired an interest in the property. n1829 By statute in Oklahoma, upon the death of either husband or wife, the survivor may continue to possess and occupy the homestead until it is otherwise disposed of according to law, whether title is in the deceased or the surviving spouse. n1830

Unless the statute expressly so provides, the widow and children have no general right to select a homestead on the death of the head of the family who had not established the homestead during his life. Instead, a number of states allow her what is termed a "homestead interest" in her deceased husband's property, and this is allotted by order of a court, usually with probate or equity jurisdiction and is generally designated a "probate homestead." n1831 There is much similarity in the allotment of the probate homestead and the assignment of dower by order of court. As the interest must be allotted out of land in which the husband had a beneficial interest at the time of his death which did not then expire. n1832 The surviving spouse may hold the family home for life. n1833 It may be allowed in his equitable estate or

interest, n1834 whether he was the owner in severalty or in common. n1835 The property must be of such a character that it could have been selected by the husband as a homestead during his lifetime. n1836

Some jurisdictions require the probate homestead to be allotted out of the residence property of the deceased husband, if he has such property. n1837 In a few states, the widow has no right to a probate homestead in lands in which the husband did not claim it. n1838 The rights of the widow and children in a probate homestead are usually joint and not several and, in most of the states, the widow can do no act, as by sale, abandonment, or otherwise, that will prejudice the minor children's rights, which continue until majority. n1839 A probate homestead is exempt from the debts of the deceased husband and the wife contracted prior to his death. n1840 It has been held that the wife's conveyance of all her interest in her husband's estate, even for a valuable consideration, does not bar her right to a probate homestead, as such right is not then considered an interest in land. n1841 The statute does not limit the value of the homestead to be set apart to her, as this is left to the discretion of the court, n1842 and this homestead cannot be partitioned until the youngest child reaches majority, unless the minor's interests so demand. n1843

The general rule that a probate homestead is not subject to sale for the payment of the decedent's debts is not applicable where the homestead right has been relinquished. n1844 The right to have set aside a probate homestead is purely statutory, and the law makes no provision for a homestead for the benefit of the surviving spouse to the exclusion of minor children, for the benefit of minor children to the exclusion of the surviving spouse, or for the benefit of some minor children to the exclusion of others. n1845

A homestead, like dower, is highly favored in law, n1846 and in respect to vesting at the husband's death, they both stand alike, n1847 although there is a marked distinction between dower and homestead. n1848 Dower may be, but homestead cannot be, defeated by the husband's sole deed. Dower, at the decease of the husband, vests in the widow; homestead, in her or the minor children or both. n1849 Under a statute authorizing a widow to hold the mansion house without charge until dower is assigned, a wife not joining in her husband's deed of assignment for the benefit of creditors may, after his death, claim her homestead and take dower in other lands. n1850

A widow accepted dower in the land of which her husband died seised and possessed. An application for homestead was made and granted to her and her minor children. It was held that she could not have partition as against her children of the homestead so set apart to her and them, as she was not an heir at law of the homestead lands. n1851 The widow cannot claim both dower and homestead. n1852

The probate homestead is not limited in value as are general homesteads. n1853

COMPUTER-ASSISTED RESEARCH

LEXIS:death w/5 head w/2 family w/30 homestead!

FOOTNOTES:

(n1)Footnote 1173. *Finerty v. First Nat'l Bank, 218 P. 859 (Okla. 1923); Northwestern Secs. Co. v. Nelson, 211 N.W. 798 (Wis. 1927). See Stokes v. Smith, 100 S.E.2d 85 (N.C. 1957),* for a review of the history of North Carolina homestead laws.

See Carl D. Friebolen, *Peculiar Nature of Homestead Exemptions, Their Disposition in Bankruptcy, 18 U. Cinn. L. Rev. 146 (1949); Homestead Exemption in North Carolina, 29 N.C. L. Rev. 143 (1948).*

Homesteads are determined by the law in force when claimed. *Cochran v. Cutler, 350 N.E.2d 59 (Ill. App. 1976).*

(n2)Footnote 1174. Texas never adopted an extensive homestead law, much of its available land was sold for school purposes. *See* McKitrick, *Public Land System of Texas, 1823-1910,* Bulletin No. 905, U. of Wis.

(n3)Footnote 1175. *Clark v. Davis, 226 P.2d 904 (Wash. 1951).*

(n4)Footnote 1176. *Walker v. Hayes, 28 So. 2d 413 (Ala. 1947); McFarland v. Pruitt, 210 P.2d 963 (Ariz. 1949); Johnson v. Brauner, 281 P.2d 50 (Cal. App. 1955); In re Wallace's Estate, 246 P.2d 894 (Colo. 1952); In re Noble's Estate, 73 So. 2d 873 (Fla. 1954).*

(n5)Footnote 1177. *In re Blodgett, 115 F. Supp. 33 (D. Wis. 1953).*

(n6)Footnote 1178. *J. H. Melville Lumber Co. v. Maroney, 16 N.W.2d 527 (Neb. 1944); Hoitt v. Webb, 36 N.H. 158 (1858).*

Homestead can only exist in realty. *Sterling Sav. & Loan Ass'n v. Schultz, 218 N.E.2d 53 (Ill. App. 1966).*

(n7)Footnote 1179. *Philleo v. Smalley, 23 Tex. 498 (1859) And see In re McKenzie's Estate, 287 N.W. 695 (Wis. 1939).*

California exempts from execution the dwelling house the same as a homestead. Deering's *Codes*, Civ. Code, §1237, as amended by Stat. 1973, ch. 281, §1 (1872).

(n8)Footnote 1180. *In re Wineland, 3 F. Supp. 796 (D. Okla. 1933); Kelly v. Kelly's Ex'r, 186 S.W.2d 902 (Ky. 1945).*

(n9)Footnote 1181. *Turner v. Turner, 18 So. 210 (Ala. 1895); Tumlinson v. Swinney, 22 Ark. 400 (1860); Gregg v. Bostwick, 33 Cal. 220 (1867); Ashton v. Ingle, 20 Kan. 670 (1878); Linn County Bank v. Hopkins, 28 P. 606 (Kan. 1892); Gallagher v. Smiley, 44 N.W. 187 (Neb. 1889); Anderson v. Sessions, 51 S.W. 874, 55 S.W. 1133 (Tex. 1900); Phelps v. Rooney, 9 Wis. 70 (1859); Knadle v. Estate of Knadle, 686 So. 2d 631 (Fla. App. 1996)* (a home lost its homestead character when the decedent's will directed the sale of the property and placement of the sale proceeds into the testator's estate).

(n10)Footnote 1182. *J. H. Melville Lumber Co. v. Maroney, 16 N.W.2d 527 (Neb. 1944); Roberts v. Greer, 40 P. 6 (Nev. 1895).*

(n11)Footnote 1183. *Johnson v. Muntz, 4 N.E.2d 826 (Ill. 1936); White v. Spencer, 117 S.W. 20 (Mo. 1909); Finerty v. First Nat'l Bank, 218 P. 859 (Okla. 1923).*

(n12)Footnote 1184. *Tillotson v. Millard, 7 Minn. 513 (1862); Phelps v. Rooney, 9 Wis. 70 (1860).*

(n13)Footnote 1185. *Fritts v. Fritts, 131 N.E. 584 (Ill. 1921); Ferguson v. Board of Drainage Comm'rs of Graves County for Mayfield Creek Drainage Dist. No. 2, 186 S.W.2d 16 (Ky. 1945).*

(n14)Footnote 1186. *McKeough v. McKeough, 37 A. 275 (Vt. 1895).*

(n15)Footnote 1187. *People's Bank of Red Level v. Barrow & Wiggins, 94 So. 600 (Ala. 1922); In re Gilmore, 22 P. 655 (Cal. 1889); Brooks v. Marquess, 139 P.2d 395 (Kan. 1943); Hargadene v. Whitfield, 9 S.W. 475 (Tex. 1888).*

See William W. Wilson, *The Widow's Homestead Exemption in Texas: Two Homesteads in One Family, 25 Baylor L. Rev. 346 (1973).*

(n16)Footnote 1188. *Felder v. Felder's Estate, 13 So. 2d 823 (Miss. 1943).*

(n17)Footnote 1189. *Jones v. Kemp, 144 F.2d 478 (10th Cir. 1944); Van Meter v. Field, 159 P.2d 546 (Okla. 1945).*

(n18)Footnote 1190. *United States v. Thurston County, 54 F. Supp. 201 (D. Neb. 1944).*

(n19)Footnote 1191. *Rich v. Ervin, 194 P.2d 809 (Cal. App. 1948); United States v. Lampien, 89 F.3d 1316 (7th Cir. 1996)* (a Wisconsin homestead exemption was void under the supremacy clause to the extent it prevented the federal government from enforcing a valid criminal restitution order).

(n20)Footnote 1192. *Wambeke v. Hopkin, 372 P.2d 470 (Wyo. 1962).*

Homesteads are determined by the law in force when claimed. *Cockran v. Cutler, 350 N.E.2d 59 (Ill. App. 1976); In re Streeper, 158 B.R. 783 (Bankr. N.D. Iowa 1993)* (holding that homestead right attaches by actual use and occupancy of land, not by acquiring title); *In re Donaldson, 156 B.R. 51 (Bankr. N.D. Cal. 1993)* (holding that homestead was available even though title was in dispute). Contra *SSG Corp. v. Cunningham, 875 P.2d 16 (Wash. App. 1994)* (holding that debtor was not owner of structures and so could not claim them as homestead even though he occupied them).

(n21)Footnote 1193. *Karbs v. Bouse, 154 P.2d 968 (Okla. 1945); In re Doody's Estate, 313 P.2d 444 (Or. 1957).*

See Tom R. Mason, *Probate Homestead in Oklahoma, 15 Okla. L. Rev. 130 (1962);* Angus S. McSwain, *Texas Business Homestead, 15 Baylor L. Rev. 39 (1963).*

See also Jack H. Garrett, *The Wife's Illusory Homestead Rights, 22 Baylor L. Rev. 178 (1970).*

See Chuck Adams, *California's New Homestead Law, 64 Cal. L. Rev. 180 (1976). See* David Cummins, *Texas Homestead Law: Past, Present, and Future,* 25 Real Estate Law Journal 172, 183 (Fall 1996).

(n22)Footnote 1194. *Jones v. Kemp, 144 F.2d 478 (10th Cir. 1944); United States v. Thurston County, 54 F. Supp. 201 (D. Neb. 1944); In re Blodgett, 115 F. Supp. 33 (D. Wis 1953); Cherokee Constr. Co. v. Harris, 122 S.W. 485 (Ark. 1909); Jernigan v. Harris, 62 S.W.2d 5 (Ark. 1933); Palen v. Palen, 83 P.2d 36 (Cal. App. 1938); Lehman v. Cottrell, 19 N.E.2d 111 (Ill. App. 1939); Breen v. Breen, 173 P. 2 (Kan. 1918); First Nat'l Bank v. Oliver, 150 S.W.2d 894 (Ky. 1941); Kennedy v. Duncan, 137 S.W. 299 (Mo. App. 1911); Oregon Mtg. Co. v. Dunbar, 289 P. 559 (Mont. 1930); In re Cook's Estate, 117 P. 27 (Nev. 1911); First State Bank v. Fischer, 272 N.W. 752 (N.D. 1937); Maloy v. Wm. Cameron & Co., 119 P. 587 (Okla. 1911); Karbs v. Bouse, 154 P.2d 968 (Okla. 1945); Hansen v. Jones, 109 P. 868 (Or. 1910); Standard Sav. & Loan Ass'n v. Davis, 85 S.W.2d 333 (Tex. Civ. App. 1935); Roberson v. Home Owners' Loan Corp., 147 S.W.2d 949 (Tex. Civ. App. 1941); Evans v. Jensen, 168 P. 762 (Utah 1917); Zuniga v. Evans, 48 P.2d 513 (Utah 1935); McElroy v. Bixby, 36 Vt. 254 (1863).*

See George L. Hoskins, *Homestead Exemptions, 63 Harv. L. Rev. 1289 (1949).*

(n23)Footnote 1195. *Witherington v. Mason, 5 So. 679 (Ala. 1889); Bishop v. Johnson, 7 So. 2d 281 (Ala. 1942); Thorn v. Thorn, 14 Iowa 49 (1862); Morgan v. Rountree, 55 N.W. 65 (Iowa 1893); Beatty v. Wardell, 105 N.W. 357 (Iowa 1905); Curtis v. Helton, 59 S.W. 745 (Ky. 1900); Jones v. Crawford, 84 S.W. 568 (Ky. 1905); Riggs v. Sterling, 27 N.W. 705 (Mich. 1886); State Bank of Eagle Grove v. Dougherty, 66 S.W. 932 (Mo. 1902); Bonner v. Minnier, 34 P. 30 (Mont. 1893); Holmes v. Holmes, 111 P. 220 (Okla. 1910); In re Doody's Estate, 313 P.2d 444 (Or. 1957)* (a homestead is personal, not an estate, and must be claimed to be effective); *Beaty v. Richardson, 34 S.E. 73 (S.C. 1899).*

(n24)Footnote 1196. *In re Falcone's Estate, 27 Cal. Rptr. 38 (Cal. App. 1962)* (homestead is a type of joint tenancy which cannot be destroyed except by concurrence of both spouses).

See Jack H. Garrett, *The Wife's Illusory Homestead Rights, 22 Baylor L. Rev. 178 (1970); First Nat'l Bank v. Phillips, 212 N.W. 678 (Iowa 1927); Brandenburg v. Petroleum Exploration, 291 S.W. 757 (Ky. 1927); Dennis v. Gorman, 233 S.W. 50 (Mo. 1921); In re Trepp's Estate, 227 P. 1005 (Mont. 1924); Barnett v. Sanders, 247 P. 55 (Okla. 1926); Gann v. Montgomery, 210 S.W.2d 255 (Tex. Civ. App. 1948); Zuniga v. Evans, 48 P.2d 513 (Utah 1935).*

(n25)Footnote 1197. *Watson v. Hurlburt, 170 P. 541 (Or. 1918); McElroy v. Bixby, 36 Vt. 254, 84 (1863)* (widow and minor children of a decedent were entitled to full homestead rights in lands held by decedent as a tenant in common).

(n26)Footnote 1198. *In re Swift, 96 F. Supp. 44 (W.D. Va. 1950); In re Wickesberg's Estate, 244 N.W. 561 (Wis. 1932).*

(n27)Footnote 1199. *Witherington v. Mason, 5 So. 679 (Ala. 1889); Kennedy v. First Nat'l Bank, 18 So. 396 (Ala. 1895); Montgomery v. Dane, 98 S.W. 715 (Ark. 1906); 11 Ann. Cas. 421; Hart v. Church, 58 P. 910 (Cal. 1900); Pritchett v. Davis, 28 S.E. 666 (Ga. 1897); Lockhart v. Sasser, 22 So. 2d 763 (Fla. 1945); Zachmann v. Zachmann, 66 N.E. 256 (Ill. 1903); Swisher v. Swisher, 137 N.W. 1076 (Iowa 1912); Davis v. Davis, 67 N.W.2d 566 (Iowa 1954); Withers v. Love, 83 P. 204 (Kan. 1905); In re Koehler's Estate, 172 P. 25 (Kan. 1918); Protection State Bank v. Baker, 53 P.2d 469 (Kan. 1936); Stults v. Sale, 17 S.W. 148 (Ky. 1891); Hammond State Bank & Trust Co. v. Broderick, 154 So. 739 (La. 1934); Lafayette Bldg. Ass'n v. Spofford, 59 So. 2d 880 (La. 1952); Allen v. Crane, 116 N.W. 392 (Mich. 1908); Keith v. Albrecht, 94 N.W. 677 (Minn. 1903); Murphy v. Renner, 109 N.W. 593 (Minn. 1906); Tomlinson v. Kandiyohi County Bank, 202 N.W. 494 (Minn. 1925); McDonald v. Sanford, 41 So. 369 (Miss. 1906); Van Doren v. Wiedeman, 94 N.W. 124 (Neb. 1903); Chitty v. Chitty, 24 S.E. 517 (N.C. 1896); Bremseth v. Olson, 112 N.W. 1056 (N.D. 1907); Dieter v. Fraine, 128 N.W. 684 (N.D. 1910); Mandan Merc. Co. v. Sexton, 151 N.W. 780 (N.D. 1915); Conlon v. Dickinson, 5 N.W.2d 411 (N.D. 1942); Mutual Bldg. & Inv. Co. v. Efros, 75 N.E.2d 75 (Ohio App. 1947); Gooch v. Gooch, 133 P. 242 (Okla. 1913); Pettis v. Johnston, 190 P. 681 (Okla. 1920); Williams v. Watkins, 219 P. 643 (Okla. 1923); State Nat'l Bank v. Lokey, 240 P. 101 (Okla. 1925); Van Meter v. Field, 159 P.2d 546 (Okla. 1945); Allison v. Shilling, 27 Tex. 450 (1864); Andrews v. Security Nat'l Bank, 50 S.W.2d 253 (Tex. 1932); Crowder v. Union Nat'l Bank, 261 S.W. 375 (Tex. 1924); Bunker v. Coons, 60 P. 549 (Utah 1900); Calhoun v. Williams, 32 Gratt 18 (Va. 1879); Minnesota Stoneware Co. v. McCrossen, 85 N.W. 1019 (Wis. 1901).*

In Louisiana it is the dependent members of the family who are the object of the homestead purpose. *Lafayette Bldg. Ass'n v. Spofford, 59 So. 2d 880 (La. 1952).*

"Indeed, the whole theory and policy of the homestead is founded upon the principle that there is a natural and moral obligation on the head of a family to provide for the support of his wife and children and other persons dependent on him, toward whom he stands almost *in loco parentis*, which is, if not paramount, equal to his obligation to pay his debts." *Calhoun v. Williams, 32 Gratt 18 (Va. 1879); State v. Ten Acres of Land, 877 P.2d 597 (Okla. 1994)* (holding that homestead provisions were created to protect the entire family and cannot be attached for the tort of one member); *Matthews v. Matthews, 961 P.2d 831, 835 (Okla. 1998)* (stating that homestead status in one's land is an interest attached by law for purpose of protecting entire family of its holder).

(n28)Footnote 1200. *Drennan v. McCarthy, 210 S.W.2d 791 (Ark. 1948).*

(n29)Footnote 1201. *Hallauer v. Lackey, 188 S.W.2d 30 (Mo. 1945).*

(n30)Footnote 1202. *Clark v. Davis, 226 P.2d 904 (Wash. 1951).*

See Jack H. Garrett, *The Wife's Illusory Homestead Rights, 22 Baylor L. Rev. 178 (1970).*

(n31)Footnote 1203. *In re Buie, 287 F. 896 (D. Tex. 1923); Union Oil Co. v. Norton Morgan Commercial Co., 202 P. 1077 (Ariz 1922); Hannon v. Southern Pac. R. Co., 107 P. 335 (Cal. App. 1909); Sherwood v. Cornfield, 31 Cal. Rptr. 264 (Cal. App. 1963); Hill v. First Nat'l Bank, 84 So. 190 (Fla. 1920); Collins v. Collins, 7 So. 2d 443 (Fla. 1942); Brandenburg v. Petroleum Exploration, 291 S.W. 757 (Ky. 1927); Riggs v. Sterling, 27 N.W. 705 (Mich. 1886); Bartold v. Lewandowska, 8 N.W.2d 133 (Mich. 1943); Bushnell v. Loomis, 137 S.W. 257 (Mo. 1911);* 36 L.R.S. (N.S.) 1029; *Japp v. Sapulpa State Bank, 215 P. 1059 (Okla. 1923); In re Banfield's Estate, 296 P. 1066, 298 P. 905 (Or. 1931); Ex parte Cothran, 121 S.E. 556 (S.C. 1924); Andrews v. Security Nat'l Bank, 50 S.W.2d 253 (Tex. 1932);*

Volker-Scowcroft Lumber Co. v. Vance, 88 P. 896 (Utah 1907).

(n32)Footnote 1204. *Lehman v. Cottrell, 19 N.E.2d 111 (Ill. App. 1939); Ramsey v. Lake County, 14 N.W.2d 125 (S.D. 1944); In re Glaze, 169 B.R. 956 (Bankr. D. Ariz. 1994)* (holding that the purpose of the Arizona homestead law is to protect families and guarantee them shelter); *In re Bartlett, 168 B.R. 488 (Bankr. D. N.H. 1994)* (holding that the homestead exemption ensures that families have shelter and that they are kept off welfare); *In re Peters, 168 B.R. 710 (Bankr. D. Idaho 1994)* (holding that the purpose of the homestead exemption is to ensure that the debtor can protect from creditors a place to live). *In re McKinney-Jones, 219 B.R. 619, 621 (Bankr. W.D. Okla. 1998)* (stating that purpose of Oklahoma's homestead exemption is to provide the family with a place to live); *In re Mueller, 215 B.R. 1018, 1023 (B.A.P. 8th Cir. 1998).*

(n33)Footnote 1205. *Troutman v. Eichar, 28 N.E.2d 953 (Ohio App. 1940); In re Banfield's Estate, 296 P. 1066, 298 P. 905 (Or. 1931); Andrews v. Security Nat'l Bank, 50 S.W.2d 253 (Tex. 1932). In re Bartlett, 168 B.R. 488 (Bankr. D. N.H. 1994)* (holding that the homestead exemption ensures that families have shelter and that they are kept off welfare); *In re McAtee, 154 B.R. 346 (Bankr. N.D. Fla. 1993)* (holding that the Florida homestead exemption promotes the stability and welfare of the state, encourages property ownership and independence, and preserves the home beyond the reach of economic misfortune); *Colwell v. Royal Interstate Trading Co., 226 B.R. 714, 718 (Bankr. S.D. Fla. 1998)* (Florida homestead exemption serves compelling public purpose of promoting stability and welfare of the state by securing to the householder a home, so that householder may live beyond reach of financial misfortune).

(n34)Footnote 1206. *Hill v. First Nat'l Bank, 84 So. 190 (Fla. 1920); Smith v. Richey, 215 S.W. 429 (Ky. 1919); Bartold v. Lewandowska, 8 N.W.2d 133 (Mich. 1943); Mandan Merc. Co. v. Sexton, 151 N.W. 780 (N.D. 1915); Union Trust Co. v. Cox, 155 P. 206 (Okla. 1916); Field v. Goat, 173 P. 364 (Okla. 1918); Evans v. Jensen, 168 P. 762 (Utah 1917).*

(n35)Footnote 1207. *Reymond v. Louisiana Trust & Sav. Bank, 148 So. 663 (La. 1933).*

(n36)Footnote 1208. *Brooks v. Butler, 87 P.2d 1092 (Okla. 1939).*

(n37)Footnote 1209. *Yager v. Yager, 60 P.2d 422 (Cal. 1936). Tassone v. Tovar, 28 Cal. App. 4th 765 (1994)* (holding that the law of fraudulent conveyances does not prohibit the debtor's homestead right, because the homestead is protected from creditors up to the value of the right); *In re Miller, 174 B.R. 279 (Bankr. N.D. Ill. 1994)* (holding that fraudulent conveyance of remainder interest did not preclude life estate interest from qualifying as homestead); *In re Lazin, 221 B.R. 982 (Bankr. M.D. Fla. 1998)* (holding that there is no homestead exemption if the homestead was acquired with fraudulently obtained funds).

(n38)Footnote 1210. *Hines v. Duncan, 79 Ala. 112 (1885); Cofer v. Scroggins, 13 So. 115 (Ala. 1893); Tumlinson v. Swinney, 22 Ark. 400 (1860); Merrill v. Harris, 46 S.W. 538 (Ark. 1898); Grimes v. Luster, 84 S.W. 223 (Ark. 1904); Montgomery v. Dane, 98 S.W. 715 (Ark. 1906); Keyes v. Cyrus, 34 P. 722 (Cal. 1893); Hoskins v. Litchfield, 31 Ill. 137 (1863); Ogden Bldg. & Loan Ass'n v. Mensch, 63 N.E. 1049 (Ill. 1902); Charless v. Lamberson, 1 Iowa 435 (1855); Parsons v. Livingston, 11 Iowa 104 (1855); Cross v. Benson, 75 P. 558 (Kan. 1904); Commonwealth v. Lay, 75 Ky. (12 Bush) 283 (1876); Jones v. Crawford, 84 S.W. 568 (Ky. 1905); Lyons v. Andry, 31 So. 38 (La. 1901); Bushnell v. Loomis, 137 S.W. 257 (Mo. 1911); Fogg v. Fogg, 40 N.H. 282 (1860); Weymouth v. Sanborn, 43 N.H. 171 (1861); Ness v. Jones, 88 N.W. 706 (N.D. 1901); Mandan Merc. Co. v. Sexton, 151 N.W. 780 (N.D. 1915); Thompson v. Marlin, 243 P. 950 (Okla. 1926); Linkenhoker v. Detrick, 81 Va. 44 (1885); Platto v. Cady, 12 Wis. 461 (1860); Warsco v. Oshkosh Sav. & Trust Co., 208 N.W. 886 (Wis. 1926); Schwitzke v. American Nat'l Bank, 8 N.W.2d 303 (Wis. 1943).*

(n39)Footnote 1211. *Woodward v. Peoples Nat'l Bank, 31 P. 184 (Colo. App. 1892); In re Wallace's Estate, 246 P.2d 894 (Colo. 1952); Hammond State Bank & Trust Co. v. Broderick, 154 So. 739 (La. 1934); Swift v. Reasonover, 77 S.W.2d 809 (Tenn. 1935); Clark v. Davis, 226 P.2d 904 (Wash. 1951).*

A wife is an indispensable party defendant by reason of her homestead rights in her husband's land in an action affecting title in *Texas. Wilson v. Mitchell, 299 S.W.2d 406 (Tex. Civ. App. 1957); People v. One Residence Located at 1403 East Parham Street, 621 N.E.2d 1026 (Ill. App. 1993)* (holding that the purpose of the homestead exemption is to provide a shelter beyond the reach of improvidence or financial misfortune); *In re Martin, 875 P.2d 417 (Okla. 1994)* (holding that the purpose of the homestead exemption is to protect the family from improvidence and the urgent demands of creditors); *Jackman v. Nance, 857 P.2d 7 (Nev. 1993)* (holding that the purpose of the homestead exemption is to protect the family home regardless of financial distress, insolvency, or calamitous circumstances and to strengthen the family and the state); *In re Meola, 158 B.R. 881 (Bankr. S.D. Fla. 1993)* (holding that the purpose of homestead provisions is to secure for the debtor a home for himself and his family, regardless of financial condition).

(n40)Footnote 1212. *Deere v. Chapman, 25 Ill. 610 (1861); Sears v. Hanks, 14 Ohio St. 298 (1863); Gooch v. Gooch, 133 P. 242 (Okla. 1913).*

(n41)Footnote 1213. *McPhee v. O'Rourke, 15 P. 420 (Colo. 1887); Grace v. Grace, 104 N.W. 969 (Minn. 1905); Felder v. Felder, 13 So. 2d 823 (Miss. 1943); Paxton v. Sutton, 73 N.W. 221 (Neb. 1897); Sams v. Sampson, 255 S.W.2d 626 (Ky. 1953)* (in Kentucky the husband is entitled to either curtesy or homestead but not both and is presumed to have taken homestead unless he elects to take curtesy).

(n42)Footnote 1214. *Troutman v. Eichar, 28 N.E.2d 953 (Ohio App. 1940).*

Texas has not determined whether the homestead exemption is an estate or a privilege. *See Survivor's Options When Homestead Tract Exceeds Constitutional Limits, 26 Baylor L. Rev. 671 (1974); State v. Ten Acres of Land, 877 P.2d 597 (Okla. 1994)* (holding that homestead provisions were created to protect the entire family and cannot be attached for the tort of one member).

(n43)Footnote 1215. *Cowen v. Wassman, 28 N.E.2d 201 (Ohio App. 1939).*

A homestead's value is determined by the equitable interests of the homesteader's premises, that is, a fair market value less outstanding encumbrances. *Dallas Ceramic Co. v. Morgan, 560 P.2d 197 (Okla. 1977); In re McKinney-Jones, 219 B.R. 619, 621 (Bankr. W.D. Okla. 1998)* (stating that purpose of Oklahoma's homestead exemption is to provide shelter from elements, not shelter from creditors).

(n44)Footnote 1216. 1018 3rd *Street v. State, 331 S.W.2d 450 (Tex. Civ. App. 1959).*

(n45)Footnote 1217. *Schubel v. Bonacker, 331 S.W.2d 552 (Mo. 1960).*

(n46)Footnote 1218. *Dixon v. Moore, 356 N.E.2d 599 (Ill. 1976).*

(n47)Footnote 1219. *Evans v. Mills, 67 F.2d 840 (5th Cir. 1933); Closson v. Closson, 215 P. 485 (Wyo. 1923).*

(n48)Footnote 1220. *Jones v. Kemp, 144 F.2d 478 (8th Cir. 1944); Barbo v. Jeru, 119 N.W. 580 (Mich. 1909); Williams v. Williams, 184 N.W. 114 (Neb. 1921); In re Poli's Estate, 179 P.2d 704 (Wash. 1947).*

(n49)Footnote 1221. *Evans v. Mills, 67 F.2d 840 (5th Cir. 1933)* (applying Texas law); *Cullers v. James, 1 S.W. 314 (Tex. 1886).*

In Massachusetts a homestead is a freehold estate defeasible only by deed with the wife joining or by acquiring a new homestead. *Abbott v. Abbott, 97 Mass. 136 (1902); Paul v. Paul, 136 Mass. 286 (1884);* also *Browning v. Harris, 99 Ill. 456 (1881), but see Black v. Curran, 81 U.S. (14 Wall.) 463 (1871),* construing the Illinois statute to create a mere right of occupancy and not a special type of estate in land. *See also Flatt v. Mack Stadler Co., 84 Tenn. (16 Lea) 371 (1886).*

(n50)Footnote 1222. *Cherokee Constr. Co. v. Harris, 122 S.W. 485 (Ark. 1909); Taylor v. Hargous, 4 Cal. 268*

(1854); Lubbock v. McMann, 22 P. 1145 (Cal. 1889); In re Wallace's Estate, 246 P.2d 894 (Colo. 1952) (in Colorado the surviving spouse may assert the homestead interest against the heirs as well as creditors and, thus, it is a special estate in land); *Browning v. Harris, 99 Ill. 456 (1881); Gillespie v. Fulton Oil & Gas Co., 86 N.E. 219 (Ill. 1908); Wiegand v. Wiegand, 103 N.E.2d 137 (Ill. 1951); Pratt v. Pratt, 37 N.E. 435 (Mass. 1894); Riggs v. Sterling, 27 N.W. 705 (Mich. 1886); Wyatt v. Bauer, 332 S.W.2d 301 (Mo. App. 1960)* (in Missouri the homestead allowance in real property is an estate in fee simple and may be partitioned); *Dorrington v. Meyers, 9 N.W. 555 (Neb. 1881); Williams v. Williams, 184 N.W. 114 (Neb. 1921); Poe v. Hardie, 65 N.C. 447 (1871); Abbott v. Cromartie, 72 N.C. 292 (1875); Woods v. Alvarado State Bank, 19 S.W.2d 35 (Tex. 1929); Andrews v. Security Nat'l Bank, 50 S.W.2d 253 (Tex. 1932); W. T. Rawleigh Co. v. Blackwell, 48 S.W.2d 754 (Tex. Civ. App. 1932); White v. Blackman, 168 S.W.2d 531 (Tex. Civ. App. 1942)* (holding the right a life estate created by operation of law); *Travelers Ins. Co. v. Nauert, 200 S.W.2d 661 (Tex. Civ. App. 1941); Closson v. Closson, 215 P. 485 (Wyo. 1923).*

The widows' homestead rights apply to royalties from mineral leases under the open mine doctrine. *Thompson v. Thompson, 236 S.W.2d 779 (Tex. 1951).*

See Woodward, *The Homestead Exemption: A Continuing Need for Constitutional Revision, 35 Tex. L. Rev. 1047. In re Miller, 174 B.R. 279 (Bankr. N.D. Ill. 1994)* (holding that the Illinois homestead right is an estate in the lot of ground and the buildings to which the right attaches).

(n51)Footnote 1223. *In re Gibson, 33 F. Supp. 838 (D. Ky. 1940); Holmes v. Grange Fraternal Fire Ins. Ass'n, 228 P.2d 889 (Cal. App. 1951); In re Noble's Estate, 73 So. 2d 873 (Fla. 1954)* (homestead is a matter of status not title to realty); *Postlethwaite v. Edson, 171 P. 769 (Kan. 1917); Turner v. Browning, 107 S.W. 318 (Ky. 1908); Demarest v. Allen, 224 S.W. 458 (Ky. 1920); Brandenburg v. Petroleum Exploration, 291 S.W. 757 (Ky. 1927); First Nat'l Bank v. Oliver, 150 S.W.2d 894 (Ky. 1941); Speyrer v. Miller, 32 So. 524 (La. 1902); Curriery v. Sutherland, 54 N.H. 475 (1874); Thompson v. Marlin, 243 P. 950 (Okla. 1926); Mercer v. McKeel, 108 P.2d 138 (Okla. 1940); In re Doody's Estate, 313 P.2d 444 (Or. 1957)* (in Oregon a homestead is a personal privilege, not an estate, and must be claimed to be effective). *Carey v. Carey, 43 S.W.2d 498 (Tenn. 1931); Roberson v. Home Owners' Loan Corp., 147 S.W.2d 949 (Tex. Civ. App. 1941); Radtke v. Radtke, 19 N.W.2d 169 (Wis. 1945).*

Homestead is a matter of status not title to realty. *Wakeman v. Noble, 73 So. 2d 873 (Fla. 1954).*

Homestead is not an estate but a mere privilege or exemption attached to such estate as the debtor has. *Bush v. Shepherd, 205 P.2d 842 (Or. 1949).*

In California a homestead right is not a fundamental vested constitutional right but one which exists only when the property owner files the required declaration; until he does so he has no vested right. *Taylor v. Madigan, 126 Cal. Rptr. 376 (1975).*

In Illinois a homestead holder is a possessor of freehold estate up to the statutory amount and he is not merely a holder of a mere personal right of occupancy. *Dickson v. Moller, 356 N.E.2d 599 (Ill. App. 1976).*

(n52)Footnote 1224. *Nolen v. East, 61 So. 261 (Ala. 1913). Estate of Kruegel, 545 N.W.2d 684 (Minn. App. 1996)* (noncontiguous woodlots were not part of the homestead).

(n53)Footnote 1225. *Rash v. Bogart, 146 So. 814 (Ala. 1933); Majors v. Killian, 162 So. 289 (Ala. 1935).*

(n54)Footnote 1226. *Demarest v. Allen, 224 S.W. 458 (Ky. 1920).*

(n55)Footnote 1227. *Demarest v. Allen, 224 S.W. 458 (Ky. 1920); Brandenburg v. Petroleum Exploration, 291 S.W. 757 (Ky. 1927). See also* Tennessee, *Hamilton Nat'l Bank v. Woods, 217 S.W.2d 14 (Tenn. App. 1948).*

(n56)Footnote 1228. *Bishop v. Johnson, 7 So. 2d 281 (Ala. 1942).*

(n57)Footnote 1229. *Hill v. First Nat'l Bank, 84 So. 190 (Fla. 1920);* 20 A.L.R. 270.

See J. Allen Maines and Donn Litman Maines, *Our Legal Champion Revisited: Florida's Homestead Exemption, 30 U. Fla. L. Rev. 227 (1978).*

(n58)Footnote 1230. *In re Noble's Estate, 73 So. 2d 873 (Fla. 1954).*

(n59)Footnote 1231. *Tomlinson v. Kandiyohi County Bank, 202 N.W. 494 (Minn. 1925).*

(n60)Footnote 1232. *Thomas v. Blair, 93 So. 704 (Ala. 1922).*

(n61)Footnote 1233. *Hibbs v. City Nat'l Bank, 293 S.W. 350 (Tex. Civ. App. 1927); Mikulenka v. Mikulenka, 168 S.W.2d 517 (Tex. Civ. App. 1943).*

A wife's homestead is a property and not a personal right and carries an interest in the minerals but may be abandoned by her. *Crews v. General Crude Oil Co., 287 S.W.2d 243 (Tex. Civ. App. 1955); Sparks v. Robertson, 203 S.W.2d 622 (Tex. Civ. App. 1947)* (life estate).

(n62)Footnote 1234. *In re Banfield's Estate, 296 P. 1066, 298 P. 905 (Or. 1931).*

Homesteads are not descendible, *see Stephens v. Campbell, 70 So. 2d 579 (Fla. 1954); DeJonge v. Wayne, 76 So. 2d 273 (Fla. 1954).*

(n63)Footnote 1235. *Black v. Curran, 81 U.S. (14 Wall.) 463 (1871); Bushnell v. Loomis, 137 S.W. 257 (Mo. 1911); Abbott v. Cromartie, 72 N.C. 292 (1875); Stern v. Lee, 20 S.E. 736 (N.C. 1894); Ex parte Ray, 20 S.C. 246 (1883).*

(n64)Footnote 1236. *Johns v. Bowden, 66 So. 155 (Fla. 1914).*

(n65)Footnote 1237. *Pizzolato v. Fontenot, 147 La. 601 (1920).*

(n66)Footnote 1238. *Perley v. Woodbury, 78 A. 1073 (N.H. 1911); Thompson v. Marlin, 243 P. 950 (Okla. 1926).*

Surviving spouse is entitled to a probate homestead if all children are adults. *Luria v. Zucker, 488 P.2d 1159 (Nev. 1971).*

A homestead's value is determined by the equitable interests of the homesteader's premises, that is, a fair market value less outstanding encumbrances. *Dallas Ceramic Co. v. Morgan, 560 P.2d 197 (Okla. 1977).*

(n67)Footnote 1239. *Mansfield v. Hill, 107 P. 471, 108 P. 1007 (Or. 1910).*

(n68)Footnote 1240. *Andrews v. Security Nat'l Bank, 50 S.W.2d 253 (Tex. 1932).*

(n69)Footnote 1241. *Postlethwaite v. Edson, 171 P. 769 (Kan. 1917).*

(n70)Footnote 1242. *Kleinert v. Lefkowitz, 259 N.W. 871 (Mich. 1935); Ryan v. Colburn, 241 N.W. 388 (Minn. 1932).*

(n71)Footnote 1243. *Kleinschmidt Laboratories v. Kleinschmidt, 100 N.E.2d 796 (Ill. App. 1951).*

Holding that noncontiguous lots may be exempt as a business homestead. *Ford v. Aetna Ins. Co., 424 S.W.2d 612*

(Tex. 1968).

(n72)Footnote 1244. *Morris Inv. Co. v. Sheldon, 78 N.E.2d 504 (Ill. 1948).*

(n73)Footnote 1245. *Watt v. Watt, 78 N.E.2d 224 (Ill. 1948).*

(n74)Footnote 1246. *De Martini v. De Martini, 52 N.E.2d 138 (Ill. 1943).*

(n75)Footnote 1247. *Tooley v. Commissioner of Internal Revenue, 121 F.2d 350 (9th Cir. 1941).*

(n76)Footnote 1248. *Holmes v. Grange Fraternal Fire Ins. Ass'n, 228 P.2d 889 (Cal. App. 1951).*

(n77)Footnote 1249. *Gledhill v. Walker, 55 N.E.2d 647 (Ohio St. 1944).*

(n78)Footnote 1250. *Wilson v. Rogers, 68 Ga. 549 (1882). See also Dewhurst v. Wright, 10 So. 682 (Fla. 1892).*

(n79)Footnote 1251. *Rich v. Ervin, 194 P.2d 809 (Cal. App. 1948).*

(n80)Footnote 1252. *Seaton v. Seaton, 34 S.E.2d 236 (Va. 1945).*

The homestead statute in effect on the decedent's death controls the estate of the survivors. *Mordecai v. Scott, 320 So. 2d 642 (Ala. 1975).*

(n81)Footnote 1253. *Floyd v. Wolfe, 117 N.W. 32 (Iowa 1908); Melton v. Beasley, 121 S.W. 574 (Tex. Civ App. 1909); Middleton v. Johnston, 110 S.W. 789 (Tex. Civ. App. 1908).*

(n82)Footnote 1254. *Rock v. Haas, 110 Ill. 528 (1884); De Martini v. De Martini, 52 N.E.2d 138 (Ill. 1943); Arnold v. Waltz, 6 N.W. 40 (Iowa 1880); Sheeby v. Scott, 104 N.W. 1139 (Iowa 1905); Weaver v. First Nat'l Bank, 94 P. 273 (Kan. 1907); Union Trust Co. v. Cox, 155 P. 206 (Okla. 1916); Greenshaw v. Brown, 219 P. 934 (Okla. 1923); Oklahoma State Bank v. Van Hassel, 114 P.2d 912 (Okla. 1941); Moyer v. Drummond, 10 S.E. 952 (S.C. 1890); Somers v. Somers, 131 N.W. 1091 (S.D. 1911).*

(n83)Footnote 1255. *Lobban v. Vander Vries Realty & Mtg. Co., 60 P.2d 933 (Ariz. 1936).*

In Florida the test: (a) a legal duty to maintain arising out of family relationship or (b) a continuing communal living by at least two individuals under such circumstances that one is regarded as the person in charge or both. *Brown v. Hutch, 156 So. 2d 683 (Fla. 1963).*

(n84)Footnote 1256. Where wife's dependent mother was living with her, a "new" family for homestead purposes arose on divorce. *Henry S. Miller Co. v. Shoaf, 434 S.W.2d 243 (Tex. Civ. App. 1968). In re Cate, 170 B.R. 582 (Bankr. N.D. Tex. 1994)* (holding that under Texas homestead law the debtors and one of their elderly fathers who lived across the street from them qualified as a "family"). *Border v. McDaniel, 70 F.3d 841 (5th Cir. 1995)* (a widower with no dependent children was a "family" under Texas homestead law).

(n85)Footnote 1257. *Moyer v. Drummond, 10 S.E. 952 (S.C. 1890).*

(n86)Footnote 1258. *Miller v. Finegan, 7 So. 140 (Fla. 1890); Bigelow v. Dunphe, 198 So. 13 (Fla. 1940); In re Roberts, 215 B.R. 197 (Bankr. D. Neb. 1997)* (holding that a homestead exemption is granted to a married person solely on the basis of the marital status without regard to having non-spouse dependents and that the intent to sell the homestead property does not constitute abandonment of the homestead); *In re Roberts, 219 B.R. 235 (B.A.P. 8th Cir. 1998)* (holding that marital status was sufficient despite fact that while they were married, they were also separated on petition date, had no children or other dependents living with them and neither qualified as "head of household," to claim Nebraska homestead exemption).

(n87)Footnote 1259. *Lobban v. Vander Vries Realty & Mtg. Co., 60 P.2d 933 (Ariz. 1936); Rock Island Bank & Trust Co. v. Lamont, 198 N.E. 430 (Ill. 1935); McGookey v. Winter, 46 N.E.2d 84 (Ill. 1943); Sheeby v. Scott, 104 N.W. 1139 (Iowa 1905); Bosquett v. Hall, 13 S.W. 244 (Ky. 1890); Drought & Co. v. Stallworth, 100 S.W. 188 (Tex. Civ. App. 1907); NCNB Tex. Nat'l Bank v. Carpenter, 849 S.W.2d 875 (Tex. App. 1993)* (holding that to establish a "family" for homestead purposes, the head of the family must have a legal or moral responsibility for the other members of the family and there must be a corresponding dependence of the others on the head of the family); *In re Finkel, 151 B.R. 779 (Bankr. W.D. Tex. 1993)* (holding that "family" under the homestead exemption laws requires the head of the family be morally or legally obligated to support one other member of the family and that there be a corresponding dependence in the supported member).

(n88)Footnote 1260. *Hinds v. Buck, 150 S.W.2d 1071 (Tenn. 1941); Calhoun v. Williams, 32 Gratt 18 (Va. 1879).*

(n89)Footnote 1261. *Bosquett v. Hall, 13 S.W. 244 (Ky. 1890); Galligar v. Payne, 34 La. Ann. 1057 (1882); Hill v. Franklin, 54 Miss. 632 (1877); Mullins v. Looke, 27 S.W. 926 (Tex. Civ. App. 1894).*

(n90)Footnote 1262. *Holloway v. Holloway, 12 S.E. 943 (Ga. 1891); Cross v. Benson, 75 P. 558 (Kan. 1904); Ross v. Sweeney, 15 S.W. 357 (Ky. 1891); Broyles v. Cox, 54 S.W. 488 (Mo. 1899); Moyer v. Drummond, 10 S.E. 952 (S.C. 1890).*

(n91)Footnote 1263. *Revalk v. Kraemer, 8 Cal. 66 (1857); Gee v. Moore, 14 Cal. 472 (1859); Linton v. Crosby, 9 N.W. 311 (Iowa 1881); Cross v. Benson, 75 P. 558 (Kan. 1904); Hallauer v. Lackey, 188 S.W.2d 30 (Mo. 1945); Moyer v. Drummond, 10 S.E. 952 (S.C. 1890).*

(n92)Footnote 1264. *Sallee v. Waters, 17 Ala. 482 (1850); Lockhart v. Sasser, 22 So. 2d 763 (Fla. 1945); Howard v. Marshall, 48 Tex. 471 (1878).*

(n93)Footnote 1265. *Howard v. Marshall, 48 Tex. 471 (1878); Whitehead v. Nickelson, 48 Tex. 517 (1878).*

(n94)Footnote 1266. *Clendenning v. Parker, 231 P. 765 (Cal. App. 1924); Dicke v. Wagner, 70 N.W. 159 (Wis. 1897)* (no homestead rights arise under putative marriage).

(n95)Footnote 1267. *State v. Finn, 8 Mo. App. 261 (1880); Putman v. Southern Pac. Co., 27 P. 1033 (Or. 1891); In re Cate, 170 B.R. 582 (Bankr. N.D. Tex. 1994)* (holding that under Texas homestead law the debtors and one of their elderly fathers who lived across the street from them qualified as a "family"); *In re Miller, 157 B.R. 621 (Bankr. N.D. Ohio 1993)* (holding under Ohio homestead law, a debtor can claim homestead in the residence where his dependents live, even though he does not live there himself).

(n96)Footnote 1268. *Rock v. Haas, 110 Ill. 528 (1884).*

(n97)Footnote 1269. *See Dendy v. Gamble, 64 Ga. 528 (1880).*

(n98)Footnote 1270. *Blue v. Blue, 38 Ill. 9 (1865); Bell v. Keach, 80 Ky. 42 (1882); Whitehead v. Tapp, 69 Mo. 415 (1879); Lane v. Phillips, 6 S.W. 610 (Tex. 1887).*

(n99)Footnote 1271. *Farmers Merc. Co. v. Guillory, 90 So. 222 (La. 1921).*

(n100)Footnote 1272. *Chesnut v. Specht, 272 S.W. 830 (Tex. Civ. App. 1925).*

(n101)Footnote 1273. *Hutchenrider v. Smith, 242 S.W. 204 (Tex. Civ. App. 1922). In re Finkel, 151 B.R. 779 (Bankr. W.D. Tex. 1993)* (holding that "family" under Texas homestead law includes relationships between adult children and their parents).

(n102)Footnote 1274. *Texas Bank & Trust Co. v. Teich, 287 S.W. 666 (Tex. Civ. App. 1926).*

(n103)Footnote 1275. *Yadon v. Yadon, 151 S.W.2d 969 (Ark. 1941); In re McClain's Estate, 262 N.W. 666 (Iowa 1935).*

(n104)Footnote 1276. *Senegar v. La Vaughan, 230 S.W.2d 311 (Tex. Civ. App. 1950).*

(n105)Footnote 1277. *Dixon v. Moore, 356 N.E.2d 599 (Ill. 1976).*

(n106)Footnote 1278. *Filtsch v. Curtis, 234 P.2d 377 (Okla. 1950).*

(n107)Footnote 1279. *Hillsborough Inv. Co. v. Wilcox, 13 So. 2d 448 (Fla. 1943).*

(n108)Footnote 1280. *Balcomb v. Vasquez, 241 S.W.2d 650 (Tex. Civ. App. 1951). Colwell v. Royal Interstate Trading Co., 226 B.R. 714 (Bankr. S.D. Fla. 1998)* (holding that estranged husband and wife could still claim homestead rights in their properties despite residing in separate homes).

(n109)Footnote 1281. *In re Beals, 1 F. Supp. 27 (D. Idaho 1932); McGookey v. Winter, 46 N.E.2d 84 (Ill. 1943); Hardin v. Howze, 18 S.C. 73 (1882).*

Unmarried persons entitled to homestead. *Monroe v. Monroe, 465 S.W.2d 347 (Ark. 1971).*

(n110)Footnote 1282. *In re Bordelon, 2 F.2d 164 (D. La. 1924), aff'd, 4 F.2d 285 (D. La. 1985)* (father of minor); *Gates v. Steele, 4 S.W. 53 (Ark. 1887); Fehd v. Oskaloosa, 117 N.W. 989 (Iowa 1908); Reymond v. Louisiana Trust & Sav. Bank, 148 So. 663 (La. 1933); Whitehead v. Tapp, 69 Mo. 415 (1879); Ness v. Jones, 88 N.W. 706 (N.D. 1901); Linander v. Longstaff, 63 N.W. 775 (S.D. 1895).*

(n111)Footnote 1283. *Pitman v. Moore, 43 Ill. 169 (1867); Holliman v. Smith, 39 Tex. 357 (1873).*

(n112)Footnote 1284. *Whidden v. Abbott, 168 So. 253 (Fla. 1936); Morehead v. Yongue, 183 So. 804 (Fla. 1938).*

(n113)Footnote 1285. *Whalen v. Cadman, 11 Iowa 226 (1860); Dorn v. Stidham, 137 S.E. 331 (S.C. 1927)* (female); *Collier v. Latimer, 67 Tenn. (8 Baxt.) 420 (1874); Oppenheim v. Myers, 39 S.E. 218 (Va. 1901); See Morley v. Morley, 230 P. 645 (Wash. 1924)* (widower without dependents); *Weitzner v. United States, 309 F.2d 45 (5th Cir. 1962)* (wife's rights in the homestead are marital rather than property); *Lambert v. Childs, 362 S.W.2d 10 (Ark. 1962)* (wife's right in the homestead is that of occupancy and of veto against alienation); *Anderson v. Anderson, 44 So. 2d 652 (Fla. 1950)* (for homestead purposes).

(n114)Footnote 1286. *Whitfield v. Peoples Union Bank & Trust Co., 73 S.W.2d 690 (Tenn 1934).*

(n115)Footnote 1287. *Jetton Lumber Co. v. Hall, 64 So. 440 (Fla. 1914); Green v. Simon, 46 N.E. 693 (Ind. App. 1897); Ginsberg v. Groner, 41 So. 569 Mennell v. Wells, 149 P. 954 (Mont. 1915); Frazier v. Syas, 4 N.W. 934 (Neb. 1880); Hamilton v. Fleming, 41 N.W. 1002 (Neb. 1889); First Nat'l Bank v. McClanahan, 120 N.W. 185 (Neb. 1909); Bonnel v. Dunn, 29 N.J.L. 435 (1860); Thompson v. Reynolds, 204 P. 516 (Utah 1922)* (deserted wife).

(n116)Footnote 1288. *Cordray v. Morgan, 95 P. 761 (Okla. 1908); Turner v. Argo, 14 S.W. 930 (Tenn. 1890).*

(n117)Footnote 1289. *Bigelow v. Dunphe, 198 So. 13 (Fla. 1940); Volker-Scowcroft Lumber Co. v. Vance, 88 P. 896 (Utah 1907).*

(n118)Footnote 1290. *Revalk v. Kraemer, 8 Cal. 66 (1857); Wike v. Garner, 53 N.E. 613 (Ill. 1899); Arnold v. Waltz, 6 N.W. 40 (Iowa 1880); Washington Bank & Trust Co. v. Carrier, 152 So. 560 (La. 1934)* (widower with adult son and daughter who had left his home and were self-supporting); *Broyles v. Cox, 54 S.W. 488 (Mo. 1899); Moyer v. Drummond, 10 S.E. 952 (S.C. 1890); Texas Bank & Trust Co. v. Teich, 287 S.W. 666 (Tex. Civ. App. 1926)* (woman supporting helpless invalid adult sister); *Bunker v. Coons, 60 P. 549 (Utah 1900). In re Finkel, 151 B.R. 779 (Bankr.*

W.D. Tex. 1993) (holding that "head of family" under Texas homestead law must be obligated to furnish moral or financial support, rather than receive it); *In re Bartlett, 153 B.R. 881 (Bankr. D. Neb. 1993)* (holding that under the Nebraska homestead exemption the "head of family" must have residing with him a family member who is under his care and maintenance).

(n119)Footnote 1291. *Blackwell v. Broughton, 56 Ga. 390 (1876).*

(n120)Footnote 1292. *McClelland v. Schmidt, 110 P. 901 (Okla. 1910).*

(n121)Footnote 1293. *In re Mussey, 179 F. 1007 (D. Tex. 1910); Roberts v. Thomas, 48 So. 408 (Miss. 1909); See Gammon v. McDowell, 298 S.W. 34 (Mo. 1927)* (widower without children or other dependents).

(n122)Footnote 1294. *McNichols v. McNichols, 132 N.E. 448 (Ill. 1921)* (widowed mother); *American Nat'l Bank v. Wetherell, 200 N.W. 221 (Iowa 1924)* (widowed mother); *Carle v. Bamberger, 158 P. 599 (Okla. 1916).*

(n123)Footnote 1295. *First Nat'l Bank v. Sokolski, 150 S.W. 312 (Tex. Civ. App. 1913).*

(n124)Footnote 1296. *Rountree v. Dennard, 59 Ga. 629 (1877).*

(n125)Footnote 1297. *In re Mussey, 179 F. 1007 (D. Tex. 1910).*

(n126)Footnote 1298. *Talamantes v. Flores, 290 S.W. 791 (Tex. Civ. App. 1926)* (bachelor). *In re Richard, 165 B.R. 641 (Bankr. W.D. Ark. 1994)* (holding that under Arkansas homestead law a debtor who was not married and had no dependents, could not claim a homestead); *In re Bartlett, 153 B.R. 881 (Bankr. D. Neb. 1993)* (holding that the Nebraska homestead exemption may only be claimed by a married individual or a head of family).

(n127)Footnote 1299. *Wagener v. Parrott, 29 S.E. 240 (S.C. 1898).*

(n128)Footnote 1300. *Prudential Ins. Co. v. Guillory, 145 So. 6 (La. 1932)*

Texas has extended the homestead exemption to single adults. *See* Lynda Beck Fenwick, *Effects of Extending the Homestead Exemption to Single Adults, 26 Baylor L. Rev. 658 (1974).*

(n129)Footnote 1301. *Tanton v. State Nat'l Bank, 43 S.W.2d 957 (Tex. Civ. App. 1931).*

(n130)Footnote 1302. *Zuniga v. Evans, 48 P.2d 513 (Utah 1935).*

A surviving husband is entitled to a homestead allowance from separate estate of the deceased wife even though he had sufficient property to prevent dependency on his part. *In re Boston's Estate, 491 P.2d 1033 (Wash. 1971).*

(n131)Footnote 1303. *In re Hawthorne, 45 F. Supp. 374 (D. Tex. 1942).*

(n132)Footnote 1304. *Jones v. Kemp, 144 F.2d 478 (10th Cir. 1944).*

The fact that widow was not living with homesteader at time of his death did not affect her possessory right. *Hammond v. Shipp, 289 So. 2d 802 (Ala. 1974).*

(n133)Footnote 1305. *Yadon v. Yadon, 151 S.W.2d 969 (Ark. 1941).*

(n134)Footnote 1306. *Lyons v. Adams, 99 S.W. 900 (Ky. 1907); Meyer Bros. Drug Co. v. Fly, 68 So. 227 (Miss. 1913); Prater v. Prater, 9 S.W. 361 (Tenn. 1888). In re Brink, 162 B.R. 355 (Bankr. M.D. Fla. 1993)* (holding that residents of North Carolina were entitled to North Carolina exemptions, not Florida exemptions); *In re Fromal, 151 B.R. 730 (Bankr. E.D. Va. 1993)* (holding that the Virginia homestead exemption is available to any resident of

Virginia, regardless of whether he is a wage earner). Contra *In re Coplan, 156 B.R. 88 (Bankr. M.D. Fla. 1993)* (holding that Florida residents could only claim Wisconsin homestead exemption when their residency in Florida was only an effort to maximize the Florida exemption).

(n135)Footnote 1307. *In re Bartlett, 153 B.R. 881 (Bankr. D. Neb. 1993)* (holding that although an unmarried debtor must be a head of family to claim a homestead exemption, he does not need to be a head of family at the time he claims the exemption).

(n136)Footnote 1308. *Florida Nat'l Bank v. Winn, 30 So. 2d 298 (Fla. 1947).*

(n137)Footnote 1309. *Hillsborough Inv. Co. v. Wilcox, 13 So. 2d 448 (Fla. 1943).*

(n138)Footnote 1310. *Shambow's Estate, 15 So. 2d 837 (Fla. 1943).*

(n139)Footnote 1311. *Ratliff v. Smith, 178 S.W.2d 138 (Tex. Civ. App. 1943).*

(n140)Footnote 1312. *In re Crum, 221 F. 729 (D. Ohio 1913); In re Hawthorne, 45 F. Supp. 374 (D. Tex. 1942); In re Tognetti, 57 F. Supp. 286 (N.D. Cal. 1944); In re Shelton, 102 F. Supp. 629 (W.D. Wash. 1952); In re Mapes, 120 F. Supp. 316 (S.D. Cal. 1954); Bank of Sun Prairie v. Hovig, 218 F. Supp. 769 (W.D. Ark. 1963); Boyte v. Perkins, 99 So. 652 (Ala. 1924); First Nat'l Bank v. Reeves, 234 P. 556 (Ariz. 1925); Yadon v. Yadon, 151 S.W.2d 969 (Ark. 1941); Thorsby v. Babcock, 222 P.2d 863 (Cal. 1950); Harlan v. Schulze, 94 P. 379 (Cal. App. 1908); Vincenzini v. Fiorentini, 38 P.2d 876 (Cal. App. 1934); Arighi v. Rule & Sons, 107 P.2d 970 (Cal. App. 1940); Parker v. Riddell, 108 P.2d 88 (Cal. App. 1940); Feintech v. Weaver, 122 P.2d 606 (Cal. App. 1942); Oktanski v. Burn, 291 P.2d 954 (Cal. App. 1956); Edson-Keith & Co. v. Bedwell, 122 P. 392 (Colo. 1912); Brooks v. Black, 123 P. 131 (Colo. App. 1912); Jones v. Carpenter, 106 So. 127 (Fla. 1925),* 43 A.L.R. 1409. *Hillsborough Inv. Co. v. Wilcox, 13 So. 2d 448 (Fla. 1943); Richards v. Byrnes, 15 So. 2d 610 (Fla. 1943); Marsh v. Hartley, 109 So. 2d 34 (Fla. 1959); Fardal v. Satre, 206 N.W. 22 (Iowa 1925); Hunt, Hill & Betts v. Moore, 258 N.W. 114 (Iowa 1934); Elliott v. Till, 259 N.W. 460 (Iowa 1935); In re McClain's Estate, 262 N.W. 666 (Iowa 1935); Millsap v. Faulkes, 20 N.W.2d 40 (Iowa 1945); Howell v. McCrie, 14 P. 257 (Kan. 1887); Anderson v. Shannon, 73 P.2d 5 (Kan. 1937); Hawkins v. State Social Welfare Board, 84 P.2d 930 (Kan. 1938); In re Dittemore's Estate, 106 P.2d 1056 (Kan. 1940); State ex rel. Apt v. Mitchell, 399 P.2d 556 (Kan. 1965)* (padlocking property under a common nuisance statute cannot be invoked against a homestead); *Richardson v. Richardson, 67 S.W.2d 7 (Ky. 1934); Reske v. Reske, 16 N.W. 895 (Mich. 1883); Bartold v. Lewandowska, 8 N.W.2d 133 (Mich. 1943); Jaenicke v. Fountain City Drill Co., 119 N.W. 60 (Minn. 1909); Mulroy v. Sioux Falls Trust & Sav. Bank, 206 N.W. 461 (Minn. 1925); Jensen v. Christensen, 11 N.W.2d 798 (Minn. 1943); Application of Hickman, 23 N.W.2d 593 (Minn. 1946); Gardner v. Cook, 158 So. 150 (Miss. 1934); Dogan v. Cooley, 185 So. 783 (Miss. 1939); Keeline v. Sealy, 165 S.W. 1088 (Mo. 1914); Dennis v. Gorman, 233 S.W. 50 (Mo. 1921); Hallauer v. Lackey, 188 S.W.2d 30 (Mo. 1945); In re Clute's Estate, 161 S.W.2d 705 (Mo. App. 1942); Oregon Mtg. Co. v. Dunbar, 289 P. 559 (Mont. 1930); First Nat'l Bank v. McClanahan, 120 N.W. 185 (Neb. 1909); J.H. Melville Lumber Co. v. Maroney, 16 N.W.2d 527 (Neb. 1944); Sanne v. Sanne, 94 N.W.2d 367 (Neb. 1959); McGill v. Lewis, 116 P.2d 581 (Nev. 1941); Kelly v. McLeod, 81 S.E. 455 (N.C. 1914); Conlon v. Dickinson, 5 N.W.2d 411 (N.D. 1942); Larson v. Cole, 33 N.W.2d 325 (N.D. 1948); Troutman v. Eichar, 28 N.E.2d 953 (Ohio App. 1940); New Martinsville Groc. Co. v. Hannibal Store Co., 29 N.E.2d 226 (Ohio App. 1940); First Nat'l Bank v. Burnett, 254 P. 95 (Okla. 1927); De Haven & Son Hdwe. Co. v. Schultz, 259 P. 778 (Or. 1927); In re Banfield's Estate, 296 P. 1066 (Or. 1931); In re Laughlin's Estate, 134 P.2d 961 (Or. 1943); Baker v. De Witt, 138 S.E. 626 (S.C. 1927); Jackson v. Shelton, 16 S.W. 142 (Tenn. 1890); Whiteman v. Burkey, 282 S.W. 788 (Tex. 1926); Woods v. Alvarado State Bank, 19 S.W.2d 35 (Tex. 1929); Cocke v. Conquest, 35 S.W.2d 673 (Tex. 1931); Andrews v. Security Nat'l Bank, 50 S.W.2d 253 (Tex. 1932); Goldburg Co. v. Slayer, 50 S.E.2d 272 (Va. 1948); Security Nat'l Bank v. Mason, 200 P. 1097 (Wash. 1921); Kelley v. Butler, 47 P.2d 664 (Wash. 1935); State ex rel. White v. Douglas, 107 P.2d 593 (Wash 1940); Northwestern Secs. Co. v. Nelson, 211 N.W. 798 (Wis. 1927); Sheldon v. Johnston, 8 N.W.2d 269 (Wis. 1943).*

Homestead statutes to be liberally construed in favor of the exemption. *In re Marriage of Turney, 263 N.W.2d 533*

(Iowa 1978).

See Chuck Adams, *California's New Homestead Law, 64 Cal. L. Rev. 180 (1976);* Leslie J. Gross & Melvin E. Weinstein, *Probate Code Impact on Homestead Real Property,* 49 Fl. B. J. 432 (1975). *In re Lloyd, 37 F.3d 271 (7th Cir. 1994)* (holding that the Wisconsin homestead statute is liberally construed in favor of debtors); *In re Jackson, 169 B.R. 742 (Bankr. N.D. Fla. 1994)* (holding that the Florida homestead exemption is liberally construed to protect the family home); *In re Hughes, 166 B.R. 957 (Bankr. E.D. Okla. 1994)* (holding that the Oklahoma homestead laws are liberally construed in harmony with the beneficent spirit by which they were enacted); *In re Martin, 875 P.2d 417 (Okla. 1994)* (holding that exemption laws, including the homestead exemption are liberally construed in harmony with the beneficent spirit of protecting the family home); *In re Major, 166 B.R. 457 (Bankr. M.D. Fla. 1994)* (holding that the Florida Constitution's homestead provision should be liberally construed to protect the family home); *In re Snape, 166 B.R. 184 (Bankr. M.D. Fla. 1994)* (holding that the Florida homestead exemption should be liberally construed in favor of those it benefits); *In re Peters, 168 B.R. 710 (Bankr. D. Idaho 1994)* (holding that the Idaho homestead exemption is liberally construed in favor of the debtor); *In re Garcia, 168 B.R. 403 (Bankr. D. Ariz. 1994)* (holding that the Arizona homestead exemption is liberally construed in favor of debtors); *In re Mirulla, 163 B.R. 910 (Bankr. D. N.H. 1994)* (holding that the New Hampshire homestead exemption is liberally construed); *In re Brink, 162 B.R. 355 (Bankr. M.D. Fla. 1993)* (holding that the homestead provision of the Florida Constitution is liberally construed in favor debtor and its purpose is to protect the family home); *In re Jefferson, 163 B.R. 204 (Bankr. D. N.M. 1993)* (holding that the homestead exemption is construed liberally in favor of the debtor); *In re Curry, 160 B.R. 813 (Bankr. D. Minn. 1993)* (holding that the Minnesota homestead exemption is construed liberally in favor of the debtor); *In re Dudeney, 159 B.R. 1003 (Bankr. S.D. Fla. 1993)* (holding that the Florida homestead exemption is broadly interpreted); *People v. One Residence Located at 1403 East Parham Street, 621 N.E.2d 1026 (Ill. App. 1993)* (holding that the homestead exemption is liberally construed to fulfill its remedial purpose); *Moore v. Krueger, 507 N.W.2d 155 (Wis. App. 1993)* (holding that the homestead exemption is interpreted liberally to protect debtors from judgment liens levied on their homes); *In re Mangano, 158 B.R. 532 (Bankr. S.D. Fla. 1993)* (holding that Florida homestead exemption is liberally construed in favor of the debtor); *In re Galvin, 158 B.R. 806 (Bankr. W.D. Mo. 1993)* (holding that the Missouri homestead exemption is construed with great liberality); *In re Donaldson, 156 B.R. 51 (Bankr. N.D. Cal. 1993)* (holding that the California homestead law should be interpreted in the broadest manner to accomplish its benevolent purpose); *In re Betancourt, 154 B.R. 90 (Bankr. S.D. Fla. 1993)* (holding that the Florida homestead exemption is liberally construed to protect the debtor); *In re Henderson, 168 B.R. 151 (Bankr. W.D. Tex. 1993)* (holding that the Texas homestead exemption is liberally interpreted); *In re Laube, 152 B.R. 260 (Bankr. W.D. Wis. 1993)* (holding that the Wisconsin homestead exemption enjoys liberal construction); *In re Koopal, 226 B.R. 888 (Bankr. D. Idaho 1998)* (homestead exemption statutes are to be liberally construed in favor of debtor); *In re Beebe, 224 B.R. 817 (Bankr. N.D. Fla. 1998). See also In re Trigonis, 224 B.R. 152 (Bankr. D. Nev. 1998); In re Lewis, 216 B.R. 644 (Bankr. N.D. Okla. 1998); In re Hankell, 223 B.R. 728 (Bankr. D. N.D. 1998); In re Lee, 223 B.R. 594 (Bankr. M.D. Fla. 1998).*

(n141)Footnote 1313. *Long Bell Lumber Co. v. Miller, 240 S.W.2d 405 (Tex. Civ. App. 1951).*

An executory agreement to waive a homestead exemption, in consideration of an indemnity agreement, is contrary to public policy. *Iowa Mut. Ins. Co. v. Parr, 370 P.2d 400 (Kan. 1962).*

(n142)Footnote 1314. *Cockran v. Cutler, 350 N.E.2d 59 (Ill. 1976).*

(n143)Footnote 1315. *In re Snape, 172 B.R. 361 (Bankr. M.D. Fla. 1994)* (holding that Florida homestead provision was not preempted by the federal Bankruptcy Code and that the provision did not deprive creditors of property without due process); *Cerny v. Salter, 429 S.E.2d 809 (S.C. 1993)* (holding that South Carolina homestead law did not violate creditors' due process or equal protection rights under the state or federal constitutions); *In re Hughes, 172 B.R. 205 (Bankr. N.D. Tex. 1993)* (holding that the retroactive application of the Texas business homestead exemption does not violate the due process right or impair the obligation of contract protected under the United States Constitution).

(n144)Footnote 1316. *Ramsey v. Lake County, 14 N.W.2d 125 (S.D. 1944). Miami Country Day Sch. v. Bakst, 641 So. 2d 467 (Fla. App. 1994)* (holding that homestead exemption are liberally construed in favor of the debtor); *In re Bartlett, 168 B.R. 488 (Bankr. D. N.H. 1994)* (holding that remedial laws, including increases in homestead exemption, should be construed in favor of the intended beneficiaries); *Jackman v. Nance, 857 P.2d 7 (Nev. 1993)* (holding that the homestead exemption is construed liberally in favor of those who were intended to benefit by its enactment).

(n145)Footnote 1317. *Andrews v. Security Nat'l Bank, 50 S.W.2d 253 (Tex. 1932). Jackman v. Nance, 857 P.2d 7 (Nev. 1993)* (holding that the homestead exemption is limited or extended by the provisions creating it).

(n146)Footnote 1318. *Horn v. Gates, 53 N.W.2d 84 (Neb. 1952); In re Banfield's Estate, 296 P. 1066, 298 P. 905 (Or. 1931). In re Nerios, 171 B.R. 224 (Bankr. N.D. Tex. 1994)* (holding that the Texas homestead exemption should be liberally construed, but could only protect property that was homestead); *In re Galvin, 158 B.R. 806 (Bankr. W.D. Mo. 1993)* (holding that the Missouri homestead exemption is construed with great liberality, but that the liberality cannot go beyond the spirit and purpose of the law and that parties must bring themselves under the exemption's protection); *In re Martin, 875 P.2d 417 (Okla. 1994)* (holding that forcible sale of homestead is prohibited except in specifically enumerated exceptions found in statute and constitution).

(n147)Footnote 1319. *First State Bank v. Fischer, 272 N.W. 752 (N.D. 1937).* Contra *People v. One Residence Located at 1403 East Parham Street, 621 N.E.2d 1026 (Ill. App. 1993)* (holding that the homestead exemption applies to forfeiture under the state's controlled substances act and to other involuntary takings); *State ex rel. Means v. Ten Acres of Land, 877 P.2d 597 (Okla. 1994)* (holding that homestead could not be forfeited under state's controlled substances act).

(n148)Footnote 1320. *Enosburg Falls Sav. Bank & Trust Co. v. McKinney, 44 P.2d 987 (Okla. 1935); In re Glaze, 169 B.R. 956 (Bankr. D. Ariz. 1994)* (holding that the Arizona homestead provision is not limitless and equitable principles may be considered in its application); *In re Wierschem, 152 B.R. 345 (Bankr. M.D. Fla. 1993)* (holding that the Florida homestead exemption is subject to equitable considerations).

(n149)Footnote 1321. *In re Rippa, 180 F. 603 (D. Fla. 1909); King v. Sweatt, 115 F. Supp. 215 (W.D. Ark. 1953); Milton v. Milton, 58 So. 718 (Fla. 1912); Jones v. Carpenter, 106 So. 127 (Fla. 1925); Hillsborough Inv. Co. v. Wilcox, 13 So. 2d 448 (Fla. 1943); Floyd County v. Wolfe, 117 N.W. 32 (Iowa 1908); Mounger v. Gandy, 69 So. 817 (Miss. 1915); Engholm v. Ekrem, 119 N.W. 35 (N.D. 1908); Baker v. De Witt, 138 S.E. 626 (S.C. 1927).*

See Truelsch v. Northwestern Mut. Life Ins. Co., 202 N.W. 352 (Wis. 1925). In re Brown, 165 B.R. 512 (Bankr. M.D. Fla. 1994) (holding that the Florida homestead exemption should be liberally construed, but should not become an instrument of fraud); *In re Meola, 158 B.R. 881 (Bankr. S.D. Fla. 1993)* (holding that homestead provisions should be liberally construed but should not become instruments of fraud, impositions on creditors, or the means to escape honest debts); *Palm Beach Savings & Loan Ass'n v. Fishbein, 619 So. 2d 267 (Fla. 1993)* (holding that the homestead exemption should be used as a shield, not a sword); *In re Thomas, 172 B.R. 673 (Bankr. M.D. Fla. 1994)* (holding that conversion of assets with the intent to defraud creditors is adequate ground to disallow homestead); *Bransom v. Standard Hardware, Inc., 874 S.W.2d 919 (Tex. App. 1994)* (holding that constitutional homestead exemption was never meant to protect stolen funds). However, the law of fraudulent conveyances does not generally prohibit a debtor's homestead right. *Tassone v. Tovar, 28 Cal. App. 4th 765 (1994)* (holding that the law of fraudulent conveyances does not prohibit the debtor's homestead right, because the homestead is protected from creditors up to the value of the right); *In re Beebe, 224 B.R. 817 (Bankr. N.D. Fla. 1998)* (stating that liberal application of homestead exemption statute is limited to prevent it from becoming an instrument of fraud).

(n150)Footnote 1322. *Davis v. Davis, 23 So. 2d 651 (La. App. 1945); see Beatty v. Wardell, 105 N.W. 357 (Iowa 1905).*

(n151)Footnote 1323. *United States v. Lot Five, Fox Grove, Alachua County, Fla., 23 F.3d 359 (11th Cir. 1994)*

(holding that federal civil forfeiture law preempted the Florida homestead provision); *In re Bedell, 173 B.R. 463 (Bankr. W.D.N.Y. 1994)* (holding that the federal Bankruptcy Code requires that the debtor receive the homestead exemption from the proceeds of a voluntary sale, even though New York law has no such provisions for voluntary sales); *United States v. One Single Family Residence, 13 F.3d 1493 (11th Cir. 1994)* (holding that federal gambling statute preempted Florida homestead exemption); *In re Mershman, 158 B.R. 698 (Bankr. N.D. Ohio 1993)* (holding that debtor under federal Bankruptcy Code could claim joint homestead exemption unauthorized by state statute). Contra *First Gibraltar Bank v. Morales, No. 93-8170, 1995 WL 2232 (5th Cir. 1995)* (holding that federal Home Owners' Loan Act, as amended, did not preempt the Texas homestead provision, making it effective within federal banking regulation); *In re Snape, 172 B.R. 361 (Bankr. M.D. Fla. 1994)* (holding that the Florida homestead provision was not preempted by the federal Bankruptcy Code); *Auclair v. Sher, 866 F. Supp. 322 (W.D. Tex. 1994)* (holding that even though federal criminal restitution statute attached to all property, even that exempted by states, crime victims could not enforce their judgment against defendant's homestead property).

(n152)Footnote 1324. *Cook v. McChristian, 4 Cal. 23 (1854); Moss v. Warner, 10 Cal. 296 (1858).*

(n153)Footnote 1325. *Gerson & Son v. Gayle, 34 La. Ann. 337 (1882). See Dyson Descendant Corp. v. Sonat Exploration Co., 861 S.W.2d 942 (Tex. App. 1993)* (holding that wife's failure to sign homestead deed did not invalidate it because in 1837 the law did not require the wife to sign).)

(n154)Footnote 1326. *See Brown v. Harding, 86 S.E. 1010, 89 S.E. 222 (N.C. 1915); In re Morzella, 171 B.R. 485 (Bankr. D. Conn. 1994)* (holding that Connecticut's homestead exemption applies to claims or obligations arising on or after the exemption's effective date); *Cerny v. Salter, 429 S.E.2d 809 (S.C. 1993)* (holding that South Carolina homestead law did not violate creditors' due process right under the state or federal constitutions, because it was not retroactive, since the legislature had only renumbered and made slight grammatical changes to the previous statute); *In re Toronto, 165 B.R. 746 (Bankr. D. Conn. 1994)* (holding that the plain language of the Connecticut homestead exemption supports prospective application only); *Boudreaux Civic Ass'n v. Cox, 882 S.W.2d 543 (Tex. App. 1994)* (holding that homestead exemption will not defeat rights existing before homestead declaration). *Contra In re Hughes, 172 B.R. 205 (Bankr. N.D. Tex. 1993)* (holding that the retroactive application of the Texas business homestead exemption does not violate the due process right protected under the United States Constitution).

(n155)Footnote 1327. *Gallagher v. Smiley, 44 N.W. 187 (Neb. 1889); Batcheder v. Fottler, 62 N.H. 445 (1883).*

(n156)Footnote 1328. *Towle v. Towle, 107 P. 228 (Kan. 1910).*

(n157)Footnote 1329. *Edwards v. Kearzey, 96 U.S. 595 (1877); Preiss v. Campbell, 59 Ala. 635 (1877); Long v. Brown, 89 So. 614 (Ala. 1921); Lindsay v. Norrill, 36 Ark. 545 (1880); In re Rauer's Collection Co., 196 P.2d 803 (Cal. App. 1948); Shipp v. Smith, 76 Ga. 1 (1885); Herrington v. Godbee, 121 S.E. 312 (Ga. 1924); Foster v. Byrne, 35 N.W. 513, 41 N.W. 22 (Iowa 1887); Root v. McGrew, 3 Kan. 215 (1865); Kibbey v. Jones, 70 Ky. (7 Bush) 243 (1870); Poole v. Cook, 34 La. Ann. 331 (1882); Wildes v. Van Voorhis, 81 Mass. (15 Gray) 139 (1860); Dunn v. Stevens, 64 N.W. 924, 65 N.W. 348 (Minn. 1895); Lessley v. Phipps, 49 Miss. 790 (1874); McCreight v. W. W. Scales & Co., 99 So. 257 (Miss. 1924); Shipman v. Fitzpatrick, 164 S.W.2d 912 (Mo. 1942); Leak v. Gay, 12 S.E. 312 (N.C. 1890); Kerr v. Garrison, 223 P. 609 (Okla. 1924); Norton v. Bradham, 21 S.C. 375 (1884); Leonard v. Mason, 69 Tenn. 1* Lea 384 (1878); *Wright v. Straub, 64 Tex. 64 (1885); In re Homestead Cases, 22 Gratt. 266 (Va. 1872); Morley v. Morley, 230 P. 645 (Wash. 1924).In re Morzella, 171 B.R. 485 (Bankr. D. Conn. 1994)* (holding that Connecticut's homestead exemption applies to claims or obligations arising on or after the exemption's effective date).

(n158)Footnote 1330. *Sneider v. Heidelberger, 45 Ala. 126 (1871); Hardeman v. Downer, 39 Ga. 425 (1869); Doughty v. Sheriff, 27 La. Ann. 355 (1875); Barrett v. Richardson, 76 N.C. 429 (1877); In re Kennedy, 2 S.C. 216 (1870); In re Bartlett, 168 B.R. 488 (Bankr. D. N.H. 1994)* (holding that the amended New Hampshire homestead statute, which increased the exemption amount, had retroactive effect, applying to cases filed after the enactment of the amendment, rather than only to debts incurred after the enactment); *In re Morgan, 157 B.R. 467 (Bankr. C.D. Cal.*

1993) (holding that amendment increasing the homestead exemption did not apply to liens obtained before the amendment's operative date).

(n159)Footnote 1331. *Horbach v. Smiley, 74 N.W. 623 (Neb. 1898); Trimmier v. Winsmith, 19 S.E. 283 (S.C. 1894); Stewart v. Blalock, 22 S.E. 774 (S.C. 1895); McClenaghan v. McEachern, 25 S.E. 296 (S.C. 1896); Moore v. Krueger, 507 N.W.2d 155 (Wis. App. 1993)* (holding that the availability of the homestead exemption from a judgment lien is determined at the time the judgment is docketed).

(n160)Footnote 1332. *Wilder v. Scott, 89 So. 2d 682 (Ala. 1956).*

(n161)Footnote 1333. *Dickson v. Moller, 356 N.E.2d 599 (Ill. App. 1976); In re Glaze, 169 B.R. 956 (Bankr. D. Ariz. 1994)* (holding that the purpose of the Arizona homestead law is to protect family and guarantee them shelter). *See* Jordan B. Cherrick, *The Homestead Act: An Independent Law to Protect the Family but a Law in Need of Reform, 65 Mass. L. Rev. 175, 182* (July-Oct. 1980).

(n162)Footnote 1334. *Rider v. Rider, 887 S.W.2d 255 (Tex. App. 1994)* (holding that property located in Mississippi could not be protected by the homestead provision of the Texas Constitution).

(n163)Footnote 1335. *See in general*: *In re Walicek, 4 F.2d 265 (D. Tex. 1925); McCrae v. Felder, 12 F.2d 554 (4th Cir. 1926); Motley v. Jones, 13 So. 782 (Ala. 1893); Claborne v. Nichols, 85 So. 415 (Ala. 1920); Davis v. Harris, 101 So. 458 (Ala. 1924); First Nat'l Bank v. Reeves, 234 P. 556 (Ariz. 1925); Keesee v. Bushart, 158 S.W.2d 915 (Ark. 1942); Security Loan & Trust Co. v. Kauffman, 41 P. 467 (Cal. 1895); Rosenthal v. Merced Bank, 42 P. 640 (Cal. 1895); Santa Barbara Lumber Co. v. Ross, 192 P. 436 (Cal. 1920); Michels v. Burkhard, 190 P. 370 (Cal. App. 1920); Olds v. Thorington, 190 P. 496 (Cal. App. 1920); Carey v. Douthitt, 35 P.2d 632 (Cal. App. 1934); Snyder v. Pine Grove Lumber Co., 105 P.2d 369 (Cal. App. 1940); Coca Cola Bottling Co. v. Feliciano, 114 P.2d 604 (1941); Crawford v. Felkey, 216 P. 520 (Colo. 1923); Smith v. St. Petersburg Novelty Works, 113 So. 769 (Fla. 1927); Byrd v. Olmstead, 105 S.E. 480 (Ga. 1921); Caraker v. Brown, 111 S.E. 51 (Ga. 1922); Powell v. Powell, 127 S.E. 117 (Ga. 1925); Rogers v. Kimsey, 135 S.E. 497 (Ga. 1926); Smith v. Exchange Bank, 103 S.E. 99 (Ga. App. 1920); Burbank v. Kirby, 55 P. 295 (Idaho 1898); Oylear v. Oylear, 208 P. 857 (Idaho 1922); Logue v. Von Almen, 40 N.E.2d 73 (Ill. 1941); Evans v. Evans, 210 N.W. 564 (Iowa 1926); Commercial Sav. Bank v. McLaughlin, 214 N.W. 542 (Iowa 1927); Sheehan v. First Nat'l Bank, 204 N.W. 38 (Minn. 1925); Chrismand v. Mauldin, 94 So. 1 (Miss. 1922); Bank of Cruger v. Hodge, 198 So. 26 (Miss. 1940); Crary v. Standard Inv. Co., 285 S.W. 459 (Mo. 1926); Palmer v. Omer, 295 S.W. 123 (Mo. 1927); McCarthy v. Kelley, 206 P. 782 (Mont. 1922); Wall v. Duggan, 245 P. 953 (Mont. 1926); Isom v. Larson, 255 P. 1049 (Mont. 1927); Avery v. Davis, 128 A. 332 (N.H. 1925); Johnson v. Johnston, 200 P. 204 (Okla. 1921); Williams v. Watkins, 219 P. 643 (Okla. 1923); Green v. West Texas Coal Mining & Dev. Co., 225 S.W. 548 (Tex. Civ. App. 1920); Connelly v. Johnson, 259 S.W. 634 (Tex. Civ. App. 1924); Cocke v. Espinoza, 265 S.W. 1103 (Tex. Civ. App. 1924); Merchants & Planters State Bank v. Nichols, 275 S.W. 84 (Tex. Civ. App. 1925); Reed v. Mahone, 281 S.W. 277 (Tex. Civ. App. 1926); Wootton v. Jones, 286 S.W. 680 (Tex. Civ. App. 1926); Hanes v. Hanes, 239 S.W. 190 (Tex. Com. App. 1922); Security Nat'l Bank v. Mason, 200 P. 1097 (Wash. 1921); First Nat'l Bank v. Galloway, 232 P. 270 (Wash. 1925); Canadian Bank v. Kellough, 253 P. 124 (Wash. 1927); Krueger v. Groth, 209 N.W. 772 (Wis. 1926); Sheldon v. Johnston, 8 N.W.2d 269 (Wis. 1943).*

In California either spouse may select a homestead. Cal. Civ. Code §1261 (Deering).

(n164)Footnote 1336. *Karsznia v. Kelsey, 262 S.W.2d 844 (Mo. 1953)* (possession is notice of claim of homestead).

Property set aside for widow and minor children for a year continues to be so used until widow dies and children become 21. *Tribble v. Knight, 231 S.E.2d 68 (Ga. 1976).*

(n165)Footnote 1337. *Ward v. Baker, 135 S.W. 620 (Tex. Civ. App. 1911); White v. Cowles, 155 S.W. 982 (Tex.*

Civ. App. 1913).

(n166)Footnote 1338. *Hillsborough Inv. Co. v. Wilcox, 13 So. 2d 448 (Fla. 1943); Kennedy v. Duncan, 137 S.W. 299 (Mo. App. 1911); Ray v. Metzger, 165 S.W.2d 207 (Tex. Civ. App. 1942).*

(n167)Footnote 1339. *Burbank v. Kirby, 55 P. 295 (Idaho 1898).*

(n168)Footnote 1340. *United States v. Thurston County, 54 F. Supp. 201 (D. Neb. 1944); Shell v. Young, 95 S.W. 798 (Ark. 1906); Standard Paving Co. v. Tolson, 86 S.W.2d 789 (Tex. Civ. App. 1935); Ratliff v. Smith, 178 S.W.2d 138 (Tex. Civ. App. 1943).*

(n169)Footnote 1341. *Gibbs v. Adams, 89 S.W. 1008 (Ark. 1905); Swift v. Kleckner, 109 N.W. 34 (Mich. 1906); Hensley v. Maxwell, 44 P.2d 60 (Okla. 1935); See In re Neilsen's Estate, 280 N.W. 246 (Neb. 1938); Barton v. Wood, 175 S.W.2d 437 (Tex. Civ. App. 1943).*

(n170)Footnote 1342. *Bank of Hoxie v. Graham, 44 S.W.2d 1099 (Ark. 1932); Ex parte Miley, 53 S.E. 535 (S.C. 1906). In re Austin, 172 B.R. 262 (Bankr. E.D. Ark. 1994)* (holding that the debtors' intention to treat certain property as homestead was manifested by residing on the property, treating it as their home, and concealing the ownership of other property during the litigation); *In re Bruton, 167 B.R. 923 (Bankr. S.D. Cal. 1994)* (holding that under California homestead law the factors to be considered in determining residency are physical occupancy and the intention to occupy); *In re Mayer, 167 B.R. 186 (Bankr. 9th Cir. 1994)* (holding that debtor fulfilled homestead requirement by living on the property on the date he filed bankruptcy). *Colwell v. Royal Interstate Trading Co., 226 B.R. 714 (Bankr. S.D. Fla. 1998)* (stating that a homestead is established when there is actual intent to live permanently in place, coupled with actual use and occupancy). *See also In re Hankell, 223 B.R. 728 (Bankr. D. N.D. 1998); In re Lee, 223 B.R. 594 (Bankr. M.D. Fla. 1998).*

(n171)Footnote 1343. *Phelps v. Loop, 148 P.2d 674 (Cal. App. 1944).*

(n172)Footnote 1344. *Stewart v. Adams, 171 S.W.2d 180 (Tex. Civ. App. 1943); Sheldon v. Johnston, 8 N.W.2d 269 (Wis. 1943); Schwitzke v. American Nat'l Bank, 8 N.W.2d 303 (Wis. 1943).*

(n173)Footnote 1345. *Jones v. Gunn, 87 P. 577 (Cal. 1906); White v. Rosenthal, 35 P.2d 154 (Cal. App. 1934); Feintech v. Weaver, 122 P.2d 606 (Cal. App. 1942); Brace & Hergert Mill Co. v. Burbank, 151 P. 803 (Wash 1915).*

(n174)Footnote 1346. *Hansen v. Union Sav. Bank, 82 P. 768 (Cal. 1905).*

(n175)Footnote 1347. *Rich v. Ervin, 194 P.2d 809 (Cal. App. 1948)* (if required acts are substantially performed); *McCaughey v. American Nat'l Bank, 92 S.W. 1003 (Tex. Civ. App. 1905).*

(n176)Footnote 1348. *Oregon Mtg. Co. v. Dunbar, 289 P. 559 (Mont. 1930).*

The homestead realty is first determined before rules of descent are applied on the husband's death. *Wilson v. Florida Nat'l Bank & Trust Co., 64 So. 2d 309 (Fla. 1953).*

(n177)Footnote 1349. *Gresham v. Walker, 10 Ala. 370 (1846); Simpson v. Simpson, 30 Ala. 225 (1857); Bell v. Davis, 42 Ala. 460 (1868).*

(n178)Footnote 1350. *Nance v. Nance, 4 So. 699,* (Ala. 1888); *Stephen Putney Shoe Co. v. White, 55 So. 503 (Ala. 1911); Riggs v. Sterling, 27 N.W. 705,* (Mich. 1886); *Larson v. Cole, 33 N.W.2d 325 (N.D. 1948); Schwitzke v. American Nat'l Bank, 8 N.W.2d 303 (Wis. 1942); Meeks Leasing Co. v. Young, 881 S.W.2d 232 (Mo. App. 1994)* (holding that the homestead exemption automatically attached to qualifying property).

(n179)Footnote 1351. *Goodwin v. Colorado Mtg. & Inv. Co., 110 U.S. 1 (1884); Finesty v. First Nat'l Bank, 218 P.*

859 (Okla. 1923); Coates v. Caldwell, 8 S.W. 922 (Tex. 1888); People v. Morse, 21 Cal. App. 4th 259 (1993) (defining the difference between a "homestead exemption" and a "declared homestead" under California homestead law); *In re Mayer, 156 B.R. 54 (Bankr. S.D. Cal. 1993)* (explaining the difference between "automatic homestead" and "declared homestead" under California law); *In re Wilson, 167 B.R. 599 (Bankr. N.D. Cal. 1994)* (holding that debtor is protected by automatic homestead exemption in forced sale, but must declare homestead in voluntary sale).

(n180)Footnote 1352. *In re Nerios, 171 B.R. 224 (Bankr. N.D. Tex. 1994)* (holding that claimant has burden to establish the homestead character of property); *In re Cate, 170 B.R. 582 (Bankr. N.D. Tex. 1994)* (holding that claimant has burden to establish the homestead character of property); *First Gibraltar Bank v. Morales, 19 F.3d 1032 (5th Cir. 1994)* (holding that the claimant has the burden of proving occupancy and intent of homestead); *NCNB Tex. Nat'l Bank v. Carpenter, 849 S.W.2d 875 (Tex. App. 1993)* (holding that the claimant has the burden of proving the homestead character of property). Contra *In re Finkel, 151 B.R. 779 (Bankr. W.D. Tex. 1993)* (holding that the burden is on the objecting creditor to disprove a business homestead).

(n181)Footnote 1353. *Valley Bank of Nevada v. Skeen, 401 F. Supp. 139 (N.D. Tex. 1975).*

(n182)Footnote 1354. Rufus Waples, A Treatise on Homestead and Exemption, 131 (1893); *Wolf v. Fleischacker, 5 Cal. 244 (1855); Bishop v. Hubbard, 23 Cal. 514 (1863); Payne v. Cummings, 80 P. 620 (Cal. 1905); United States Oil & Land Co. v. Bell, 96 P. 901 (Cal. 1908); Swam v. Walden, 103 P. 931 (Cal. 1909); Northern Assur. Co. v. Stout, 117 P. 617 (Cal. App. 1911); Cooley v. Shepherd, 225 P.2d 75 (Kan. 1950); J. I. Case Threshing-Mach. Co. v. Joyce, 16 S.W. 147 (Tenn. 1890)* (holding that a husband could mortgage his interest as a joint tenant without his wife's consent); *Mitchell v. Denny, 164 S.W. 1140 (Tenn. 1914); Scoggins v. Taylor, 248 S.W.2d 549 (Tex. Civ. App. 1952); 5 Baylor L. Rev. 189* (homestead cannot be claimed in partnership property unless the other partner consents).

In Illinois homestead exemption is not applicable as between joint tenants and tenants in common and cannot be asserted on partition. *Ball v. Ball, 326 N.E.2d 782 (Ill. App. 1975).*

After divorce neither spouse can claim homestead in a joint tenancy. *Berg v. Berg, 359 N.E.2d 892 (Ill. App. 1977). In re Brocato, 30 F.3d 641 (5th Cir. 1994)* (holding that under Louisiana law the debtor could not claim a homestead in property that she owned in division with another person who was not her spouse).

(n183)Footnote 1355. *Cole v. Coons, 167 P.2d 295 (Kan. 1946); Cooley v. Shepherd, 225 P.2d 75 (Kan. 1950); Sayers v. Pyland, 161 S.W.2d 769 (Tex. 1942).*

(n184)Footnote 1356. *Sieg v. Greene, 225 F. 955, 1006, aff'd, 227 F. 41 (1915); In re Sterling, 20 F. Supp. 924 (1937); Greer v. Altoona Warehouse Co., 20 So. 2d 513 (Ala. 1945); Elms v. Hall, 215 S.W.2d 1021 (Ark. 1948); Lucci v. United Credit & Collection Co., 31 P.2d 369 (Cal. 1934); In re Kachigian's Estate, 128 P.2d 865 (Cal. 1942); Walton v. Walton, 138 P.2d 54 (Cal. App. 1943); Hill v. First Nat'l Bank, 75 So. 614 (Fla. 1917); Wike v. Garner, 53 N.E. 306 (Ill. 1899); Lininger v. Helpenstell, 82 N.E. 306 (Ill. 1907); De Martini v. De Martini, 52 N.E.2d 138 (Ill. 1943); Thorn v. Thorn, 14 Iowa 49 (1862); Nelson v. Stocking, 121 P.2d 215 (Kan. 1942); Skinner v. Shannon, 6 N.W. 108 (Mich. 1880); King v. Welburn, 47 N.W. 106 (Mich. 1890); Grace v. Grace, 104 N.W. 969 (Minn. 1905); Lewis v. White, 13 So. 349 (Miss. 1891); Wood v. Bowles, 46 So. 414 (Miss. 1908); Kleiman v. Geiselman, 21 S.W. 796 (Mo. 1893); Wall v. Duggan, 245 P. 953 (Mont. 1926)* (undivided interest); *Giles v. Miller, 54 N.W. 551 (Neb. 1893); Valparaiso State Bank v. Schwartz, 138 N.W. 757 (Neb. 1912); Doman v. Fenton, 147 N.W. 209 (Neb. 1914); McLaughlin v. Collins, 78 A. 623 (N.H. 1910); Ohio Sav. & Trust Co. v. Schumacher, 172 N.E. 682 (Ohio App. 1929); New Martinsville Groc. Co. v. Hannibal Store Co., 29 N.E.2d 226 (Ohio App. 1940); Gooch v. Gooch, 133 P. 242 (Okla. 1913); Atlas Supply Co. v. Blake, 152 P. 601 (Okla. 1915); W. R. Thompson & Sons Lbr. Co. v. Clifton, 124 S.W.2d 106 (Tex. 1939); Griffin v. Harris, 88 S.W. 493 (Tex. Civ. App. 1905); Dillard v. Duke, 107 S.W.2d 414 (Tex. Civ. App. 1937); Powell v. Ott, 146 S.W. 1019 (Tex. Civ. App. 1912); J. R. Watkins Co. v. Dawson, 145 S.W.2d 901 (Tex. Civ. App. 1940); Hughes v. Groshart, 150 S.W.2d 827 (Tex. Civ. App. 1941); Travelers Ins. Co. v. Nauert, 200 S.W.2d 661 (Tex. Civ. App. 1941); Cheswick v. Freeman, 282 S.W.2d 315 (Tex. Civ. App. 1955), rev'd, 287 S.W.2d 171*

(Tex. 1966); McClary v. Bixby, 36 Vt. 254 (1863) Bartle v. Bartle, 112 N.W. 471 (Wis. 1907).

See the following cases: *Alabama Power Co. v. Cornelius, 100 So. 207 (Ala. 1925); Chambliss v. Derrick, 112 So. 330 (Ala. 1927); Johnson v. Johnson, 46 P. 296 (Cal. App. 1920); Arispe Bank v. Werner, 207 N.W. 578 (Iowa 1926); Banner v. Welch, 225 P. 98 (Kan. 1924); Blitz v. Metzger, 241 P. 259 (Kan. 1925); Eberhart v. National Citizens Bank of Mankato, 214 N.W. 793 (Minn. 1927); Baker v. Grayson, 207 P. 301 (Okla. 1922); Cooper v. Long, 220 P. 610 (Okla. 1923); Peets v. Wright, 109 S.E. 649 (S.C. 1921); Barron v. English, 121 S.E. 782 (S.C. 1924); Kellar v. Kellar, 221 S.W. 189 (Tenn. 1920); Leach v. Leach, 223 S.W. 287 (Tex. Civ. App. 1920); Tucker v. Dodson, 245 S.W. 728 (Tex. Civ. App. 1922); Gordon-Sewall & Co. v. Walker, 258 S.W. 233 (Tex. Civ. App. 1924); Medearis v. Buratti, 275 S.W. 617 (Tex. Civ. App. 1925); Nance v. Rucker, 294 S.W. 294 (Tex. Civ. App. 1927); Massillon Engine & Thresher Co. v. Barrow, 231 S.W. 368 (Tex. Comp. App. 1921). In re McCain, 160 B.R. 933 (Bankr. E.D. Tex. 1993)* (holding that undivided ownership does not hinder homestead claim).

(n185)Footnote 1357. Rufus Waples, A Treatment on Homestead and Exemption, 131 (1893).

(n186)Footnote 1358. *Cannon v. Moore, 104 S.W. 139 (Ark. 1907); Elms v. Hall, 215 S.W.2d 1021 (Ark. 1948); Vieth v. Klett, 198 P.2d 314 (Cal. App. 1948); Lininger v. Helpenstell, 82 N.E. 306 (Ill. 1907); Ahmann v. Kemper, 119 S.W.2d 256 (Mo. 1938); Jackson v. Shelton, 16 S.W. 142 (Tenn. 1890); Bennett v. Child, 19 Wis. 362 (1865). In re Conroy, 224 B.R. 282 (Bankr. D. Mass. 1998)* (holding that Chapter 7 debtor-husband was entitled to claim full Massachusetts homestead exemption in amount of $100,000, in property which he owns as tenant by entireties with his non-debtor wife); *See also In re Bryant, 221 B.R. 262 (Bankr. D. Colo. 1998).*

(n187)Footnote 1359. *J. H. Melville Lbr. Co. v. Maroney, 16 N.W.2d 527 (Neb. 1944).*

(n188)Footnote 1360. *Payne v. Cummings, 180 P. 620 (Cal. 1905); Sewell v. Price, 128 P. 407 (Cal. 1912); Parker v. Riddell, 108 P.2d 88 (Cal. App. 1940); In re Rauer's Collection Co., Inc., 196 P.2d 803 (Cal. App. 1948); Strangman v. Duke, 295 P.2d 12 (Cal. App. 1956)* (permitting either spouse to declare homestead in his undivided part without the other's consent); *La Placa v. La Placa, 126 N.E.2d 239 (Ill. 1955)* (permitting homestead to continue in each spouse's share after division of tenancy in common). *In re Cempellin, 175 B.R. 1 (Bankr. D. Mass. 1994)* (holding that homestead was available in property held by husband and wife in tenancy in common).

(n189)Footnote 1361. *Swan v. Walden, 103 P. 931 (Cal. 1909). But cf. Boissonnault v. Savage, 625 A.2d 454 (N.H. 1993)* (holding that wife's homestead right held in joint tenancy could be accommodated by partition). *In re Miller, 174 B.R. 279 (Bankr. N.D. Ill. 1994)* (holding debtor who had transferred his entire interest in the home to his wife could claim a homestead exemption on her life estate which under a trust agreement transferred the remainder to the children).

(n190)Footnote 1362. *Watson v. Peyton, 73 P.2d 906 (Cal. 1937).*

(n191)Footnote 1363. *Commercial & Sav. Banks v. Corbett, F. Cas. No. 3058, 5 Sawy. 543 (C.C. Nev. 1879); In re Pagel Elec. & Ice Co., 14 F. 2d 974 (1926); Short v. McGruder, 22 F. 46 (D.C. Tex. 1926)* (no homestead in partnership property as against creditors); *Bishop v. Hubbard, 23 Cal. 514 (1863); Michigan Trust Co. v. Chapin, 64 N.W. 334 (Mich. 1895); Eberhart v. National Citizens Bank, 214 N.W. 793 (Minn. 1927); Terry v. Berry, 13 Nev. 514 (1878); State v. Elsbury, 175 P.2d 430 (Nev. 1946); Gaylord, Son & Co. v. Imhoff & Co., 26 Ohio St. 317 (1875); Inman v. Inman, 80 S.W.2d 1103 (Tex. Civ. App. 1935).*

(n192)Footnote 1364. *Aultman v. Wilson, 44 N.E. 1092 (Ohio 1896); Regenstein v. Pearlstein, 11 S.E. 298 (S.C. 1890).*

(n193)Footnote 1365. *Ferguson v. Speith, 34 P. 1020 (Mont. 1893); Moyer v. Drummond, 10 S.E. 952 (S.C. 1890); Egan v. American State Bank, 67 S.W.2d 1081 (Tex. Civ. App. 1934); Cooper Co., Inc. v. Werner, 111 S.W.2d 823 (Tex. Civ. App. 1937); Scoggins v. Taylor, 248 S.W.2d 549 (Tex. Civ. App. 1952)* (with consent of other partners).

(n194)Footnote 1366. *Swearingen v. Bassett, 65 Tex. 267 (1886).*

(n195)Footnote 1367. *In re McCrary, 169 F. 485 (D.C. Ala. 1909); In re Deadwiler, 293 F. 762 (D.C. Ga. 1923); Kingsley v. Kingsley, 39 Cal. 665 (1870); Trowbridge v. Cross, 7 N.E. 347 (Ill. 1886); Drake v. Moore, 23 N.W. 263 (Iowa 1885); Hoyt v. Hoyt, 28 N.W. 500 (Iowa 1886); Michigan Trust Co. v. Chapin, 64 N.W. 334 (Mich. 1895); Eberhart v. National Citizens Bank, 214 N.W. 793 (Minn. 1927); Rhodes v. Williams, 12 Nev. 20 (1877); Chalfant, Cox & Co. v. Grant, 71 Tenn. (3 Lea) 118 (1879).*

Contra, Hewitt v. Rankin, 41 Iowa 35 (1875); McMillan v. Parker, 13 S.E. 764 (N.C. 19 1891); West v. Ward, 26 Wis. 579 (1870).

(n196)Footnote 1368. Banner v. Welch, 225 P.98 (Kan. 1924); *Ferguson v. Speith, 34 P. 1020 (Mont. 1893); Smith v. Chenault, 48 Tex 455 (1878).*

(n197)Footnote 1369. *Trowbridge v. Cross, 7 N.E. 347 (Ill. 1886); McMillan v. Parker, 13 S.E. 764 (N.C. 1891); Scoggins v. Taylor, 248 S.W.2d 549 (Tex. Civ. App. 1952).*

(n198)Footnote 1370. Uniform Partnership Act, §25; *Revalk v. Kraemer, 8 Cal. 66 (1857); Smith v. Smith, 12 Cal. 216 (1859); Arendt v. Mace, 18 P. 376 (Cal. 1888); Harrelson v. Webb, 50 So. 833 (La. 1909); Oklahoma. State Bank v. Van Hassel, 114 P.2d 912 (Okla. 1941); Gillespie v. Gillespie, 110 S.W.2d 89 (Tex. Civ. App. 1937); Logan v. Aiken, 123 S.W.2d 401 (Tex. Civ. App. 1938); Person v. Levenson, 143 S.W.2d 419 (Tex. Civ. App. 1940).*

See Crowder v. Union Nat'l Bank, 261 S.W. 375 (Tex. 1924); Luke v. Cook, 116 S.E. 37 (Ga. App. 1923); Rossing v. Larson, 162 Minn. 176, 202 N.W. 711 (Minn. 1925); First State Bank v. Zelesky, 262 S.W. 190 (Tex. Civ. App. 1924); Medearis v. Buratti, 275 S.W. 617 (Tex. Civ. App. 1925).

(n199)Footnote 1371. *Glover v. Bass, 50 So. 125 (Ala. 1909); Kendall v. Powers, 8 S.W. 793 (Mo. 1888); Rouse v. Caton, 67 S.W. 578 (Mo. 1902); Williams v. Williams, 184 N.W. 114 (Neb. 1921);* 21 A.L.R. 741; *Bremseth v. Olson, 112 N.W. 1056 (N.D. 1907).*

(n200)Footnote 1372. *Revalk v. Kraemer, 8 Cal. 66 (1857); Swan v. Walden, 103 P. 931 (Cal. 1909); Jackson v. Williams, 59 S.E. 776 (Ga. 1907).*

(n201)Footnote 1373. *Arendt v. Mace, 18 P. 376 (Cal. 1888); Bremseth v. Olson, 112 N.W. 1056 (N.D. 1907). See Luke v. Cook, 116 S.E. 37 (Ga. App. 1923). See In re Nielsen's Estate, 280 N.W. 246 (Neb. 1938).*

(n202)Footnote 1374. *Adams v. Baker, 51 P. 252 (Nev. 1897).*

(n203)Footnote 1375. *Alexander v. Jackson, 28 P. 593 (Cal. 1891).*

(n204)Footnote 1376. *In re Tognetti, 57 F. Supp. 286 (M.D. Cal. 1944); Arendt v. Mace, 18 P. 376 (Cal. 1888).*

(n205)Footnote 1377. *Swan v. Walden, 103 P. 931 (Cal. 1909); Kimberlin v. Gordon, 122 S.W. 1144 (Mo. App. 1909); First Nat'l Bank v. McClanahan, 120 N.W. 185 (Neb. 1909).*

(n206)Footnote 1378. *Glover v. Bass, 50 So. 125 (Ala. 1909)* (husband may have homestead interest in lands of his wife as against his creditors); *Walton v. Walton, 138 P.2d 54 (Cal. App. 1943); J. H. Melville Lbr. Co. v. Maroney, 16 N.W.2d 527 (Neb. 1944).*

(n207)Footnote 1379. *Powell v. Powell, 88 N.E. 993 (Ill. 1909).*

(n208)Footnote 1380. *Elam v. Carter, 119 S.W. 914 (Tex. Civ. App. 1909).*

Under the Utah homestead exemption statute the owner of a vested remainder subject to another life estate can claim the remainder in fee as exempt property. *Rich Coop. Ass'n v. Dustin, 385 P.2d 155 (Utah 1963).*

Other states have held that the homestead applies only to possessory estates. *In re Sale, 143 F. 310 (6th Cir. 1906); Brooks v. Goodwin, 186 S.W. 67 (Ark. 1916); Cross v. Fruehauf Trailer Co., 93 N.W.2d 233 (Mich. 1958).*

(n209)Footnote 1381. *In re Streeper, 158 B.R. 783 (Bankr. N.D. Iowa 1993)* (holding that the homestead interests of husband and wife cannot be split, so when the interests of one cannot be executed, neither can the interests of the other).

(n210)Footnote 1382. *Harrell v. Crow. 38 So. 2d 226 (La. 1948).*

(n211)Footnote 1383. *De Martini v. De Martini, 52 N.E.2d 138 (Ill. 1943).*

(n212)Footnote 1384. *Greer v. Altoona Warehouse Co., 20 So. 2d 513 (Ala. 1945).*

(n213)Footnote 1385. *Tassone v. Tovar, 28 Cal. App. 4th 765 (1994)* (holding the homestead exemption protects property up to the level of the exemption).

(n214)Footnote 1386. *Gregg v. Bostwick, 33 Cal. 220,* (1867); *Payne v. Cummings, 80 P. 620 (Cal. 1905); Ruddell v. Warne, 157 P.2d 428 (Cal. App. 1945); Oregon Mtg. Co. v. Dunbar, 289 P. 559 (Mont. 1930).*

Vermont homestead is $2500 in dwelling house, outbuildings and land. Vt. Stat. 1967, 27-101. *In re Bradshaw, 156 B.R. 239 (Bankr. S.D. Ind. 1993)* (holding that under Indiana law a debtor may exempt up to $7,500 worth of personal or real property used as a residence); *In re Hughes, 166 B.R. 957 (Bankr. E.D. Okla. 1994)* (holding that Oklahoma homestead law is limited by value, not by quantity); *Addison v. Reavis, 158 B.R. 53 (Bankr. E.D. Va. 1993)* (holding that debtor may not exempt upward if doing so would exceed the statutory limit).

(n215)Footnote 1387. *Oliver v. Snowden, 18 Fla. 823 (1882); Gowdy v. Johnson, 47 S.W. 624 (Ky. 1898); Gooch v. Gooch, 133 P. 242 (Okla. 1913); Finerty v. First Nat'l Bank, 218 P. 859 (Okla. 1923).*

See the following cases; *Brock Candy Co. v. Elson, 100 So. 94 (Ala. 1924); Starr v. City Nat'l Bank, 252 S.W. 356 (Ark. 1923); Succession of Harrington, 94 So. 447 (La. 1922); Kimbrough v. Powell, 108 So. 498 (Miss. 1926); Martin v. Martin, 285 S.W. 92 (Mo. 1926); Daniels v. Peck, 288 S.W. 84 (Mo. App. 1926); McCarthy v. Kelley, 206 P. 782 (Mont. 1922); Farmers State Bank v. Weisenhaus, 198 N.W. 673 (N.D. 1924); Finerty v. First Nat'l Bank, 218 P. 859 (Okla. 1923); Cooper v. Long, 220 P. 610 (Okla. 1923); In re Lucas Bank, 119 S.E. 18 (S.C. 1923); Harrison v. Caudle, 139 S.E. 842 (S.C. 1927); Simunek v. Millay, 195 N.W. 507 (S.D. 1923); Peck v. Peck, 212 N.W. 872 (S.D. 1927); Clement v. First Nat'l Bank, 282 S.W. 558 (Tex. 1926); Whiteman v. Burkey, 282 S.W. 788 (1926); Connelly v. Johnson, 259 S.W. 634 (Tex. Civ. App. 1924); Whiteman v. Burkey, 286 S.W. 350 (Tex. Civ. App. 1926); Northwestern Securities Co. v. Nelson, 211 N.W. 798 (Wis. 1927). In re Lloyd, 37 F.3d 271 (7th Cir. 1994)* (holding that limitation of homestead to three of 113 acres was not clearly erroneous); *In re Becker, 215 B.R. 585 (B.A.P. 8th Cir. 1998); Matter of Crowell, 138 F.3d 1031 (5th Cir. 1998).*

(n216)Footnote 1388. *Watson v. Hurlburt, 170 P. 541 (Or. 1918).In re Trigonis, 224 B.R. 152 (Bankr. D. Nev. 1998)* (Nevada homestead exemption extends to any quantity of land, regardless of use, as long as debtors actually reside on the premises and use it as their residence, including a homestead exemption in the entire four-unit apartment building, which they owned, but in which they occupied only one unit while leasing other three units).

(n217)Footnote 1389. *Gregg v. Bostwick, 33 Cal. 220 (1867); De Martini v. De Martini, 52 N.E.2d 138 (Ill. 1943); Gowdy v. Johnson, 47 S.W. 624 (Ky. 1898).*

The homestead exemption is now $6,000. Statutes, §1-498. *Tassone v. Tovar, 28 Cal. App. 4th 765 (1994)* (holding

that the law of fraudulent conveyances does not prohibit the debtor's homestead right, because the homestead is protected from creditors up to the value of the right); *In re Nguyen, 226 B.R. 547 (Bankr. E.D. Va. 1998)* (holding that Virginia homestead exemption permits debtor to exempt $5,000 of real or personal property by filing homestead deed in appropriate circuit clerk's office); *In re Sturgill, 217 B.R. 291 (Bankr. D. Or. 1998)* (holding that Oregon homestead exemption is limited to money value of exemption fixed by statute; it is the value which is exempt, not property in and of itself); *see also In re Holland, 151 F.3d 547 (6th Cir. 1998).*

(n218)Footnote 1390. *Gregg v. Bostwick, 33 Cal. 220 (1867).*

(n219)Footnote 1391. *Watson v. Doyle, 22 N.E. 613 (Ill. 1889).*

(n220)Footnote 1392. *Kerens Nat'l Bank v. Stockton, 40 S.W.2d 7 (Tex. 1931); In re Glaze, 169 B.R. 956 (Bankr. D. Ariz. 1994)* (holding that debtor is assured of receiving statutory amount protected by exemption and the excess is distributed to creditors).

(n221)Footnote 1393. *Brennecke v. Riemann, 102 S.W.2d 874 (Mo. 1937).*

See In re Kahan, 28 F.3d 79 (9th Cir. 1994) (holding that California law permits forced sale only when the value of the homestead exceeds the exemption limits plus encumbrances and the value of the homestead is determined by the actual sale, not by a schedule); *In re Jones, 166 B.R. 657 (Bankr. N.D. Ill. 1994)* (holding that creditor cannot force sale unless more than $7,500 is bid on the property); *Lincoln Lumber Co. v. Elston, 511 N.W.2d 162 (Neb. App. 1993)* (holding that the district court can prohibit the sale of a homestead if its value after deducting all the valid liens is less than the exemption); *In re Reda, 596 N.Y.S.2d 147 (N.Y. App. 1993)* (holding that creditor was entitled to a hearing on sale of homestead when prior liens and encumbrances exceeded value of homestead). *Contra In re Bernard, 40 F.3d 1028 (9th Cir. 1994)* (holding that creditor can force sale even if the debtor's valuation of the home suggests there is no equity, as long as there are bids above the minimum threshold); *Abbett Electric Corp. v. Storek, 22 Cal. App. 4th 1460 (1994)* (holding that trial court must order sale of homestead even when value is less than exemption plus encumbrances).

(n222)Footnote 1394. *In re Julian, 163 B.R. 478 (Bankr. N.D. Tex. 1994)* (holding that debtor was entitled to have the property unprotected by homestead foreclosed before the homestead property).

(n223)Footnote 1395. *Bennett v. Dempsey, 48 So. 901 (Miss. 1909).*

(n224)Footnote 1396. *Bente v. Sullivan, 454, 115 S.W. 350 (Tex. Civ. App. 1908); In re Hughes, 159 B.R. 197 (Bankr. N.D. Tex. 1993)* (holding that the date the homestead was acquired and occupied is the proper time frame for determining compliance with the statutory limitations).

(n225)Footnote 1397. *Bartold v. Lewandowska, 8 N.W.2d 133 (Mich. 1943); Pocoke v. Peterson, 165 S.W. 1017 (Mo. 1914); Hyde v. Copeland, 173 S.W.2d 684 (Mo. 1943).*

(n226)Footnote 1398. *First Nat'l Bank v. McClanahan, 120 N.W. 185 (Neb. 1909).*

(n227)Footnote 1399. *Thompson Ritchie & Co. v. Graves, 120 So. 634 (La. 1929).*

(n228)Footnote 1400. *In re Moore's Estate, 234 S.W.2d 847 (Tenn. App. 1949).*

(n229)Footnote 1401. *Boozer v. Boozer, 16 So. 2d 863 (Ala. 1944).*

Urban homestead valuation raised to $10,000. Tex. Const. Art. XVI, §51. *See In re Ozey, 171 B.R. 116 (Bankr. N.D. Okla. 1994)* (holding that homestead for residence purposes is measured by quantity and for business purposes is measured by value).

(n230)Footnote 1402. *Richards v. Byrnes, 15 So. 2d 610 (Fla. 1943).*

(n231)Footnote 1403. *Bartold v. Lewandowska, 8 N.W.2d 133 (Mich. 1943).*

(n232)Footnote 1404. *Seaney v. Molling, 153 P.2d 532 (Ariz. 1944).*

(n233)Footnote 1405. *Brewington v. Brewington, 109 S.W. 723 (Mo. 1908); Schwitzke v. American Nat'l Bank, 8 N.W.2d 303 (Wis. 1943). See Croker v. Croker, 7 F.2d 218 (D.C. Fla. 1925); Williams v. Watkins, 219 P. 643 (Okla. 1923).*

(n234)Footnote 1406. *Thomason v. Shaw, 67 F.2d 641 (5th Cir. 1933); Vanstory v. Thornton, 14 S.E. 637 (N.C. 1892).*

(n235)Footnote 1407. *Lubbock v. McMann, 22 P. 1145 (Cal. 1889); Lockhart v. Sasser, 22 So. 2d 763 (Fla. 1945). In re Nerios, 171 B.R. 224 (Bankr. N.D. Tex. 1994)* (holding that a separate house on an adjacent lot could not regarded as a mere improvement); *In re Cate, 170 B.R. 582 (Bankr. N.D. Tex. 1994)* (holding that house across the street from homestead where debtor's elderly father resided was not merely an improvement).

(n236)Footnote 1408. *Greer v. Altoona Warehouse Co., 20 So. 2d 513 (Ala. 1945); Campbell v. McManus, 32 Tex. 442 (1870).*

(n237)Footnote 1409. *Garwood v. Garwood, 91 N.E. 672 (Ill. 1910).*

(n238)Footnote 1410. *Morton v. Jones, 125 S.W. 247 (Ky. 1910); Graham v. Humm, 229 S.W. 80 (Ky. 1921); Schwitzke v. American Nat'l Bank, 8 N.W.2d 303 (Wis. 1943).*

(n239)Footnote 1411. *Chadbourn Sash, Door & Lbr. Co. v. Parker, 69 S.E. 1 (N.C. 1910).*

(n240)Footnote 1412. *Watt v. Watt, 78 N.E.2d 224 (Ill. 1948); Williams v. Johnson, 53 S.E.2d 277 (N.C. 1949); Long Bell Lbr. Co. v. Miller, 240 S.W.2d 405 (Tex. Civ. App. 1951).*

Death of widow terminates homestead. *Morris v. Wells, 381 P.2d 882 (Okla. 1963).*

(n241)Footnote 1413. *Kleinschmidt Laboratories v. Kleinschmidt, 100 N.E.2d 796 (Ill. App. 1951).*

(n242)Footnote 1414. *Coleman v. Williams, 200 So. 207 (Fla. 1941); Wilson v. Florida Nat'l Bank & Trust Co., 64 So. 2d 309 (Fla. 1953).*

Widow's petition to sell the homestead and appoint a receiver to invest the proceeds in revenue-producing property granted where the homestead had become uneconomical by reason of taxes. *Williamson v. Kelley, 444 S.W.2d 311 (Tex. Civ. App. 1969); 22 Baylor L. Rev. 409. In re Bartlett, 153 B.R. 881 (Bankr. D. Neb. 1993)* (holding that once a homestead interest has been established it continues until it is voluntarily sold or abandoned); *In re Miller, 157 B.R. 621 (Bankr. N.D. Ohio 1993)* (holding that once a homestead is established it continues until it is abandoned).

(n243)Footnote 1415. *Sims v. McFadden, 233 S.W.2d 375 (Ark. 1950).*

(n244)Footnote 1416. *In re Johnson, 97 F. Supp. 779 (S.D. Cal. 1951), rev'd, Gardner v. Johnson, 195 F.2d 717 (9th Cir. 1952). In re Roberts, 215 B.R. 197 (Bankr. D. Neb. 1997)* (holding that a homestead exemption is granted to a married person solely on the basis of the marital status without regard to having non-spouse dependents and that the intent to sell the homestead property does not constitute abandonment of the homestead).

(n245)Footnote 1417. *In re Brown's Estate, 183 P.2d 768 (Wash. 1947).*

(n246)Footnote 1418. *See Stephens v. Campbell, 70 So. 2d 579 (Fla. 1954); DeJonge v. Wayne, 76 So. 2d 273 (Fla. 1954).*

(n247)Footnote 1419. *Sayers v. Pyland, 161 S.W.2d 769 (Tex. 1942).*

(n248)Footnote 1420. *Anderson v. Anderson, 44 So. 2d 652 (Fla. 1950).*

(n249)Footnote 1421. *Thorsby v. Babcock, 222 P.2d 863 (Cal. 1950).*

Cannot convey whether power is general or special. *Gagliardo v. Dumont, 54 Cal. 496 (1880); Keeline v. Clark, 106 N.W. 257 (Iowa 1906); Wallace v. Travelers' Ins. Co., 38 P. 489 (Kan. 1894).*

Can convey. *Oregon Mtg. Co. v. Hersner, 45 P. 40 (Wash. 1896),* under special but not general power. *Menendez v. Rodriguez, 143 So. 223 (Fla. 1932).*

(n250)Footnote 1422. *Wilder v. Scott, 89 So. 2d 682 (Ala. 1956); Bengston v. Setterberg, 227 Minn. 337, 35 N.W.2d 623 (Minn. 1949)* (homestead is a part of the decedent's estate).

(n251)Footnote 1423. *Sherbill v. Miller Mfg. Co., 89 So. 2d 28 (Fla. 1956).*

(n252)Footnote 1424. *Wilder v. Scott, 89 So. 2d 682 (Ala. 1956)* (remarriage does not terminate homestead).

Surviving spouse may hold the family home for life. La. Acts 1976, No. 227.

(n253)Footnote 1425. *Lyons v. Lyons, 74 S.W. 467 (Mo. App. 1903).*

(n254)Footnote 1426. *Sherbill v. Miller Mfg. Co., 89 So. 2d 28 (Fla. 1956).*

Minimum so may be constitutionally increased. *Miller v. Marx, 55 Ala. 322 (1876); 5 Ala. L. Rev. 183.*

Maximum. Beecher v. Baldy, 7 Mich. 488 (1859).

(n255)Footnote 1427. *Anderson v. Anderson, 356 N.E.2d 788 (Ill. App. 1976).*

(n256)Footnote 1428. The homestead is granted not only for residence purposes, but for all purposes of general utility. The object of the exemption is to secure the debtor, not only a house to live in, but the means of making a livelihood.

Wilkins v. Fremaux, 36 So. 805 (La. 1904). See McGhee v. Wilson, 20 So. 619 (Ala. 1896); Morgan v. Rountree, 55 N.W. 65 (Iowa 1893); Green v. Richardson, 47 So. 682, (La. 1908); *Tillotson v. Millard, 7 Minn 513 (1862).*

> The exemption should not be construed as reserving merely a residence where a family may eat, drink, and sleep, but also a place where the head or members may pursue such business or avocation as may be necessary for the support and comfort of the family.

Pryor v. Stone, 19 Tex. 371, 70 Am. Dec. 341 (1857).

(n257)Footnote 1429. *Morgan v. Rountree, 55 N.W. 65 (Iowa 1918); Neblett v. Shackleton, 69 S.E. 946 (Va. 1911).*

(n258)Footnote 1430. *Hill v. First Nat'l Bank, 84 So. 190 (Fla. 1920);* (damages for unlawful invasion of homestead rights); *Olsen v. Lohman, 13 N.W.2d 332 (Iowa 1944); Booker v. First Nat'l Bank, 245 P. 881 (Okla. 1926)* (money due under insurance policy covering homestead improvements).

(n259)Footnote 1431. *Lairey v. Baker, 11 S.E. 800 (Ga. 1890); Bartold v. Lewandowska, 8 N.W.2d 133 (Mich. 1943).*

(n260)Footnote 1432. *Morgan v. Rountree, 55 N.W. 65 (Iowa 1893).*

(n261)Footnote 1433. *Wing v. Hayden, 73 Ky. (10 Bush) 276 (1874).*

(N262)Footnote 1434. *Winland v. Holcomb, 3 N.W. 341 (1879); Moore v. Mansfield, 286 S.W. 353 (Mo. 1926)* (rents and profits).

(n263)Footnote 1435. *C. C. Isely Lbr. Co. v. Kitch, 256 P. 133 (Kan. 1927)* (immature annual crops); *McCullough Hdw. Co. v. Call, 155 S.W. 718 (Tex. Civ. App. 1913); Neblett v. Shackleton, 69 S.E. 946 (Va. 1911).*

(n264)Footnote 1436. *Cox, Marshall & Co. v. Cook, 46 Ga. 301 (1872); Alexander v. Holt, 59 Tex. 205 (1883).*

(n265)Footnote 1437. *Jones v. First Nat'l Bank, 228 P. 992 (Okla. 1924)* (matured and severed crops); *Coates v. Caldwell, 8 S.W. 922 (Tex. 1888).*

(n266)Footnote 1438. *Horgan v. Amick, 62 Cal. 401 (1882).*

(n267)Footnote 1439. *Holladay v. Hodge, 65 S.E. 1019 (S.C. 1909).*

(n268)Footnote 1440. *Youngman v. Shular, 288 S.W.2d 495 (Tex. 1956), 3 U.C.L.A. L. Rev 601.*

(n269)Footnote 1441. *Giddens v. Williamson, 65 Ala. 439 (1880); Rose v. Crane Heating Co., 31 S.E.2d 717 (Ga. 1944); Casebolt v. Donaldson, 67 Mo. 308 (1878); Mann v. Kelsey, 12 S.W. 43 (Tex. 1888); Womack v. Stokes, 35 S.W. 82 (Tex. Civ. App. 1896).*

(n270)Footnote 1442. *Skinner v. Chadwell, 1 S.W. 437 (Ky. 1886); Utley v. Jones, 92 N.C. 261 (1885); Farmers State Bank v. Hess, 251 P. 73 (Okla. 1926)* (proceeds of sale of homestead); *Smith v. Hart, 207 N.W. 657 (S.D. 1926),* followed in *207 N.W. 659 (S.D. 1926)* (proceeds of sale of homestead); *Doane v. Doane, 46 Vt. 485 (1874).*

(n271)Footnote 1443. *In re Luby, 155 F. 659 (D.C. Ohio 1907); In re Eash, 157 F. 996 (D.C Iowa 1907); Mack v. Boots, 239 P. 794 (Ariz. 1925)* (automobile received in exchange for equity in homestead); *Tucker v. Stell, 272 S.W. 864 (Ark. 1925)* (proceeds of sale of homestead); *White v. Horton, 97 P. 70 (Cal. 1908); Fardal v. Satre, 206 N.W. 22 (Iowa 1925)* (proceeds of sale of homestead); *Brandenburg v. Petroleum Exploration, 291 S.W. 757 (Ky. 1927)* (oil produced by homestead land).

See Thompson-Ritchie & Co. v. Graves, *120 S. 634 (La. 1927)* (holding that the proceeds of a fire insurance policy on homestead were exempt); *Kimberlin v. Gordon, 122 S.W. 1144 (Mo. 1909); Kershaw v. Willey, 98 P. 908 (Okla. 1908). But see In re Pladson, 154 B.R. 305 (Bankr. N.D. Cal. 1993)* (holding that bankruptcy liquidation sale did not entitle debtor to homestead exemption in proceeds).

(n272)Footnote 1444. *In re Eash, 157 F. 996 (D.C. Iowa 1907). In re Mueller, 215 B.R. 1018 (B.A.P. 8th Cir. Minn. 1998)* (holding that homestead exemption ceases to apply when homestead has been abandoned by its owner).

(n273)Footnote 1445. *Charles City v. Security Trust & Sav. Bank, 120 N.W. 114 (Iowa 1909).*

(n274)Footnote 1446. *Faison v. Lanier, 139 S.E. 540 (Ga. 1927)* (land bought with proceeds of sale of homestead); *Turner v. Browning, 107 S.W. 318 (Ky. 1908); Clolinger v. Callahan, 263 S.W. 700 (Ky. 1924)* (new homestead purchased with proceeds of sale of old homestead) (19); *Baker v. Kash, 113 S.W. 820 (Ky. 1908); Brandenburgh v. Rose, 110 S.W. 376 (Ky. 1908); Schumann v. Davis, 183 N.W. 740 (Mich. 1921)* (new homestead purchased with proceeds of sale of old homestead); *Kopf v. Engelke, 1 N.W.2d 760, 2 N.W.2d 846 (Wis. 1942); Moore v. Krueger, 507*

N.W.2d 155 (Wis. App. 1993) (holding that even though the owners could not show that their absence from the home, before it was sold, was temporary, the proceeds of the sale were protected by the homestead exemption allowing the proceeds to be used to buy a new home).

(n275)Footnote 1447. *Baker v. Kash, 113 S.W. 820 (Ky. 1908); Filtsch v. Curtis, 234 P.2d 377 (Okla. 1950). In re Lewis, 216 B.R. 644 (Bankr. N.D. Okla. 1998)* (sale proceeds of homestead retain protection from creditors as long as there is good faith intent to reinvest proceeds in another homestead and reinvestment is made within reasonable time). *See Demura v. County of Volusia, 618 So. 2d 754 (Fla. App. 1993)* (holding that creditors could reach proceeds of homestead sale if the proceeds were not reinvested within a reasonable time).

(n276)Footnote 1448. *McGovern v. Taliaferro, 112 S.W. 814 (Tex. Civ. App. 1908).*

(n277)Footnote 1449. *See Andrews v. Security Nat'l Bank, 50 S.W.2d 253 (Tex. 1932). In re Streeper, 158 B.R. 783 (Bankr. N.D. Iowa 1993)* (holding that a second homestead is exempt to the same extent as the first homestead).

(n278)Footnote 1450. *Citizens Nat'l Bank v. Green, 78 N.C. 247 (1878); F.F. Collins Mfg. Co. v. Carr, 32 S.W. 366 (Tex. Civ. App. 1895); Hinzie v. Moody, 35 S.W. 832 (Tex. Civ. App. 1896); W. E. Thomas Lbr. Co. v. McClain, 294 S.W. 250 (Tex. Civ. App. 1927)* (rents); *West v. United States Fidelity & Guaranty Co., 298 S.W. 652 (Tex. Civ. App. 1927)* (proceeds of sale of crops).

(n279)Footnote 1451. Defendant purchased goods and immediately resold them to purchase land which he then claimed as homestead. *Pratt v. Burr, F. Cas. 11372, 5 Biss. 36 (C.C. Wis. 1857); Lee v. Welborne, 9 S.W. 471 (Tex. 1888). See Greenberg v. Fontaine, 618 So. 2d 299 (Fla. App. 1993)* (holding that when debtor has acted fraudulently, the court may place equitable liens on the homestead). *Marcucci v. Hardy, 65 F.3d 986 (1st Cir. 1995)* (constructive trust imposed on homestead proceeds which a daughter unsuccessfully attempted to apply to the mortgage on her own residence); *In re Beebe, 224 B.R. 817 (Bankr. N.D. Fla. 1998)* (stating that liberal application of homestead exemption statute is limited to prevent it from becoming an instrument of fraud).

(n280)Footnote 1452. *Pierce v. Holzer, 32 N.W. 431 (Mich. 1887). LaBelle v. LaBelle, 624 So. 2d 741 (Fla. App. 1993)* (holding that constructive trust on homestead was proper when it was purchased with fraudulently obtained, traceable funds); *In re Lazin, 221 B.R. 982 (Bankr. M.D. Fla. 1998)* (holding that there is no homestead exemption if the homestead was acquired with fraudulently obtained funds).

(n281)Footnote 1453. *Meigs v. Dibble, 40 N.W. 935 (Mich. 1888).*

(n282)Footnote 1454. *Walker v. Darst, 31 Tex. 681 (1869).*

(n283)Footnote 1455. *Pratt v. Burr, F. Cas. 11372, 5 Biss. 36 (C.C. Wis. 1857); Nichols v. Overacker, 16 Kan. 54 (1876); Hewes v. Parkman, 37 Mass. (20 Pick.) 90 (1838); Brackett v. Watkins, 21 Wend. 68 (N.Y. 1836); McKinney v. Reader, 6 Watts 34 (Pa. 1837).*

(n284)Footnote 1456. *Garrard v. Henderson, 209 S.W.2d 225 (Tex. Civ. App. 1948).*

(n285)Footnote 1457. *Wood v. Emig, 137 P.2d 875 (Cal. App. 1943); Union Bank & Trust Co. v. Ponder, 295 S.W. 140 (Ky. 1927); Pizzolato v. Fontenot, 85 So. 605 (La. 1920); Farmers' State Bank v. Weisenhaus, 198 N.W. 673 (N.D. 1924); Payson Exch. Sav. Bank v. Tietjen, 225 P. 598 (Utah 1924).*

(n286)Footnote 1458. *Fellows v. Lewis, 65 Ala. 343 (1880); Kennedy v. Tuscaloosa First Nat'l Bank, 107 Ala 170, 18 So. 396 (Ala. 1895); Cox v. Birmingham Dry Goods Co., 28 So. 456 (Ala. 1900); First Nat'l Bank v. Browne, 29 So. 552 (Ala. 1901); Bogan v. Cleveland, 12 S.W. 159 (Ark. 1889); Campbell v. Jones, 52 Ark 493, 12 S.W. 1016 (Ark. 1890); Davis v. Collums, 168 S.W.2d 1103 (Ark. 1943); Parker v. Riddell, 108 P.2d 88 (Cal. App. 1940); Wells v. Anderson, 66 N.W. 102 (Iowa 1896); Freeman v. Funk, 117 P. 1024 (Kan. 1911); Morrow v. Bailey, 59 S.W. 2 (Ky.*

1900); Nicholson v. Nicholson, 101 S.W. 985 (Ky. 1907); 31 Ky. L.J. 217; Rothwell v. Rothwell, 104 S.W. 276 (Ky. 1907); Daniels v. Coleman, 165 S.W.2d 804 (Ky. 1942); Pizzolato v. Fontenot, 85 So. 605 (La. 1920); Eagle v. Smylie, 85 N.W. 1111 (Mich. 1901); Allen v. Crane, 116 N.W. 392 (Mich. 1908); Keith v. Albrecht, 94 N.W. 677 (Minn. 1903); Dulion v. Harkness, 31 So. 416 (Miss. 1902); Bank of Versailles v. Guthrey, 29 S.W. 1004 (Mo. 1895); Seilert v. McAnally, 122 S.W. 1064 (Mo. 1909); Edwards v. Reid, 58 N.W. 202 (Neb. 1894); Roberts v. Robinson, 68 N.W. 1035 (Neb. 1896); Dortch v. Benton, 3 S.E. 638 (N.C. 1887); Olson v. O'Conner, 84 N.W. 359 (N.D. 1900); Sears v. Hanks, 14 Ohio St. 298 (1863); Kettleschlager v. Ferrick, 81 N.W. 889 (S.D. 1900); Hamby v. Lane, 64 S.W. 1067 (Tenn. 1901); McDannell v. Ragsdale, 8 S.W. 625 (Tex. 1888); Hughes v. Parmer, 164 S.W.2d 576 (Tex. Civ. App. 1942); Fiedler v. Howard, 75 N.W. 163 (Wis. 1898); Kopf v. Engelke, 1 N.W.2d 760, 2 N.W.2d 846 (Wis. 1942). Tassone v. Tovar, 28 Cal. App. 4th 765 (1994) (holding that the law of fraudulent conveyances does not prohibit the debtor's homestead right, because the homestead is protected from creditors up to the value of the right).

(n287)Footnote 1459. *Davis v. Collums, 168 S.W.2d 1103 (Ark. 1943); Tibbetts v. Terrill, 96 P. 978, 104 P. 605 (Colo. 1908); Wells v. Anderson, 66 N.W. 102 (Iowa 1896); Riggs v. Sterling, 27 N.W. 705 (Mich. 1886); Dortch v. Benton, 3 S.E. 638 (N.C. 1887); Olson v. O'Conner, 84 N.W. 359 (N.D. 1900).*

(n288)Footnote 1460. *Hamby v. Lane, 64 S.W. 1067 (Tenn. 1901).*

(n289)Footnote 1461. *Randall v. Buffington, 10 Cal. 491 (1858).* To same effect, *see Culver v. Rogers, 28 Cal. 520 (1865); Cipperly v. Rhodes, 53 Ill. 346 (1870); North v. Shearn, 15 Tex. 174 (1855). Contra, Riddell v. Shirley, 5 Cal. 488 (1855). Contra In re Thomas, 172 B.R. 673 (Bankr. M.D. Fla. 1994)* (holding that homestead is disallowed to the extent that proceeds from an automobile sale are used to pay down its mortgage); *In re Curry, 160 B.R. 813 (Bankr. D. Minn. 1993)* (holding that a debtor may be denied a homestead exemption because of fraud in attempting to conceal his ownership of property from the Internal Revenue Service).

(n290)Footnote 1462. *North v. Shearn, 15 Tex. 174 (1855).*

(n291)Footnote 1463. *Doerschuk v. Wiseman, 181 S.W.2d 789 (Mo. 1944).*

(n292)Footnote 1464. *Cardon v. Harper, 151 P.2d 99 (Utah 1944).*

(n293)Footnote 1465. *McFarland v. Goodman, F. Cas. 8789, 6 Biss. 111 (C.C. Wis. 1874); Phifer v. Miller, 45 N.W.2d 907 (Neb. 1951).*

(n294)Footnote 1466. *Fellows v. Lewis, 65 Ala 343 (Ala. 1880); Kennedy v. Tuscaloosa First Nat'l Bank, 18 So. 396 (Ala. 1895); Yates v. Adams, 24 So. 547 (Ala. 1898); Elliott v. Locklar, 46 S.W.2d 1105 (Ark. 1932); Wardlow v. McGhee, 63 S.W.2d 332 (Ark. 1933); Muller v. Inderreiden, 79 Ill. 382 (1875); Hugunin v. Dewey, 20 Iowa 368 (1866); Davis v. H. Feltman Co., 65 S.W. 615 (Ky. 1901); 23 Ky. L.J. 1510; Helton v. Vanderpool, 64 S.W.2d 883 (Ky. 1933); Fussell v. Burris Bros., 139 So. 767 (La. 1932); Castle v. Palmer, 88 Mass. (6 Allen) 401 (1863); Smith v. Rumsey, 33 Mich. 183 (1876); Vogler v. Montgomery, 54 Mo. 577 (1874); Crummen v. Bennet, 68 N.C. 494 (1873); Sears v. Hanks, 14 Ohio St. 298 (1863); Appeal of Huey, 29 Pa. 219 (1857); Wood v. Chambers, 20 Tex. 247 (1857); Pike v. Miles, 23 Wis. 164 (1868); Chambers v. Sallie, 29 Ark. 407 (1874); Getzler v. Saroni, 18 Ill. 511 (1857); Piper v. Johnston, 12 Minn. 60 (1866); Edmonson & Winn v. Meacham, 50 Miss. 34 (1874); Currier v. Sutherland, 54 N.H. 475 (1874).*

(n295)Footnote 1467. *Kuevan v. Specker, 74 Ky. (11 Bush) 1 (1874); Crummen v. Bennet, 68 N.C. 494 (1873).*

(n296)Footnote 1468. *Sears v. Hanks, 14 Ohio St. 298 (1863).*

(n297)Footnote 1469. "It will be noticed that exemption from liability for indebtedness, and inalienability without joint consent, go hand in hand in the matter of a homestead. That which secures the one guarantees the other. They coexist, or they do not exist at all." *Hogan v. Manners, 23 Kan. 551 (1880).*

Marsh v. Hartley, 109 So. 2d 34 (Fla. 1959) (homestead cannot be conveyed so as to defeat rights of children).

The wife who had transferred her homestead rights into a tenancy by the entireties could not claim a second homestead. *Campbell v. Geheb, 523 S.W.2d 185 (Ark. 1975).*

In Florida for specific performance to lie, agreements to convey entireties property, homestead, the wife's separate property, or dower, must be signed by both the husband and wife. *Zimmerman v. Diedrich, 97 So. 2d 120 (Fla. 1957); Petersen v. Brotman, Fla, 100 So. 2d 821 (Fla. 1958).*

Contracts of sale of homestead must have two witnesses as do deeds. *Radabaugh v. Ware, 241 So. 2d 738 (Fla. App. 1970)* (now doubtful authority because of repeal of Fla. Stat., §708.07 by Laws 1970, ch. 70-4, §4). But witnesses are not necessary in contracts for nonhomestead property. *Koplon v. Smith, 271 So. 2d 762 (Fla. 1972).*

Since January 1, 1968, a husband and wife may contract to convey a homestead. *Allen v. Monk, 505 S.W.2d 523 (Tex. 1974).*

In Wyoming homesteads, even where arising out of a decedent's estate, may be conveyed. *Goodson v. Smith, 243 P.2d 163, 244 P.2d 805 (Wyo. 1952).*

Specific performance of contract to sell homestead valid where both parties join. *Dobbs v. Huffstutler, 349 So. 2d 1124 (Ala. 1977);* overruling *Lyon v. Hardin, 29 So. 777 (Ala. 1901).*

See Marshall S. Shapo, *Restraints on Alienation and Devise of Homestead: Monsters Unfettered from Florida's Past, 19 U. Miami L. Rev. 72 (1964).*

See also Frederick M. Dahlmeier Our Legal Chameleon Is a Sacred Cow: Alienation of Homestead Under the 1968 Constitution, 24 U. Fla. L. Rev. 701 (1972).

(n298)Footnote 1470. *Dixon v. Moller, 356 N.E.2d 599 (Ill. App. 1976).*

(n299)Footnote 1471. *Martin v. Lewis, 244 S.W.2d 87 (Mo. 1951); Sidle v. Cheney, 56 N.W.2d 86 (S.D. 1954); First Nat'l Bank v. Tiffany, 242 P.2d 169 (Wash. 1952).*

Conveyance of homestead property held by the entireties to a third party and a subsequent reconveyance to the head of the family was shown to be a mortgage and release. *Kinney v. Mosher, 100 So. 2d 644 (Fla. 1958).*

In Texas a homestead right is not subject to a mortgage by the owner.

(n300)Footnote 1472. *Dixon v. Moller, 356 N.E.2d 599 (Ill. App. 1976). In re Cole, 205 B.R. 382 (Bankr. E.D. Tex. 1997)* (holding that a homestead was abandoned when the owners transferred title to a family partnership).

(n301)Footnote 1473. *Regero v. Daugherty, 69 So. 2d 178 (Fla. 1953); First Nat'l Bank v. Wilson, 47 N.W.2d 764 (Minn. 1951); Leyva v. Rodriquez, 195 S.W.2d 704 (Tex. Civ. App. 1946).*

Homestead may be alienated for a valuable consideration. *Reed v. Fain, 145 So. 2d 858 (Fla. 1961).*

Homestead owner may transfer title to an estate by the entirety. Fla. Const., art. X, §4(c), as amended. Prior to the amendment, an attempted conveyance by the husband to himself and his wife was void as to homestead property. *Moore v. Moore, 237 So. 2d 217 (Fla. App. 1970).*

(n302)Footnote 1474. *Bess v. Anderson, 136 So. 898 (Fla. 1931).*

(n303)Footnote 1475. *Denham v. Sexton, 48 So. 2d 416 (Fla. 1950).*

(n304)Footnote 1476. *Hayes v. Southern Home Bldg. & Loan Ass'n, 26 So. 527,* (Ala. 1899); *Jahn v. Purvis, 199 So. 340 (Fla. 1940); Wallace v. Traveler's Ins. Co., 38 P. 489 (Kan. 1894).*

In Florida once a homestead is established it cannot be alienated or devised until the family relationship is terminated. *Beck v. Wylie, 60 So. 2d 190 (Fla. 1952).*

A waiver of a homestead exemption to be acquired in the future is valid. *Miller v. Southeastern Finance Service, Inc., 122 So. 2d 877 (La. App. 1960).*

Both spouses required to alienate homestead. *Keel v. Jones, 413 P.2d 549 (Okla. 1966).* But husband can convey if wife adjudged insane. *Schmidt v. Schmidt, 403 S.W.2d 531 (Tex. Civ. App. 1966).*

Conveyance by sane husband of insane wife transferred homestead. *Fort Worth v. Brandt, 444 S.W.2d 210 (Tex. Civ. App. 1969).*

To the effect that the court may not sell the homestead and invest the proceeds in revenue-producing property and deliver the income to the widow if there are children even though the homestead should become an economic burden. *Williamson v. Kelley, 444 S.W.2d 311 (Tex. Civ. App. 1969).*

(n305)Footnote 1477. *Uvalde Rock Asphalt Co. v. Warren, 91 S.W.2d 321 (Tex. 1936).*

(n306)Footnote 1478. *Kaupe v. Kaupe, 280 P.2d 856 (Cal. App. 1955); Florida Nat'l Bank, 30 So. 2d 298 (Fla. 1947); Andrews v. Security Nat'l Bank, 50 S.W.2d 253 (Tex. 1932).*

(n307)Footnote 1479. *Thompson v. Crim, 126 S.W.2d 18 (Tex. 19 1939); Tide Water Oil Co. v. Ross, 123 S.W.2d 479 (Tex. Civ. App. 1938).*

Widow could give an oil and gas lease. *Heyser v. Frankfort Oil Co., 316 F.2d 441 (10th Cir. 1963).*

(n308)Footnote 1480. *Dawson v. Hayden, 67 Ill. 52 (1873); Dye v. Mann, 10 Mich. 291 (1862); Sampson v. Williamson, 6 Tex. 102, 55 Am. Dec. 762 (1851).*

(n309)Footnote 1481. *Myers v. Matley, 130 F.2d 775 (9th Cir. Nev. 1942); Jones v. Kemp, 144 F.2d 478 (10th Cir. Okla. 1944); Clark v. Bird, 48 So. 359 (Ala. 1908); Coon v. Henderson, 199 So. 704 (Ala. 1940); Freed v. Sallade, 17 So. 2d 868 (Ala. 1944); Pipkin v. Williams, 21 S.W. 433 (Ark. 1893); Ferrell v. Wood, 232 S.W. 577 (Ark. 1921); Swan v. Walden, 103 P. 931 (Cal. 1909); Wise v. Thomas, 188 P.2d 444 (Colo. 1947); Thomas v. Craft, 46 So. 594 (Fla. 1908); Estep v. Herring, 18 So. 2d 683 (Fla. 1944); Pritchett v. Davis, 28 S.E. 666 (Ga. 1897); Shields v. Bush, 59 N.E. 962 (Ill. 1901); Brod v. Brod, 61 N.E.2d 675 (Ill. 1945); Lessell v. Goodman, 66 N.W. 917 (Iowa 1896); Withers v. Love, 83 P. 204 (Kan. 1905); Postlethwaite v. Edson, 171 P. 769 (Kan. 1917); Woodbury v. Luddy, 96 Mass. (14 Allen) 1, 1 (1867); Hayes v. McAra, 131 N.W. 535 (Mich. 1911); Lucy v. Lucy, 120 N.W. 754 (Minn. 1909); Schroeder v. Gohde, 144 N.W. 152 (1913); McDonald v. Sanford, 41 So. 369 (Miss. 1906); Hughes v. Hahn, 46 So. 2d 587 (Miss. 1950); Bushnell v. Loomis, 137 S.W. 257 (Mo. 1911); Hall v. Hall, 145 S.W.2d 752 (Mo. 1940); Weatherington v. Smith, 109 N.W. 381 (Neb. 1906); Evans v. First Nat'l Bank, 297 N.W. 154 (Neb. 1940); Trowbridge v. Bisson, 44 N.W.2d 810 (Neb. 1950); Phifer v. Miller, 45 N.W.2d 907 (Neb. 1951); Martin v. Norris Public Power Dist., 124 N.W.2d 221 (Neb. 1963); Bremseth v. Olson, 112 N.W. 1056 (N.D. 1907); Mandan Merc. Co. v. Sexton, 151 N.W. 780 (N.D. 1915); Larson v. Cole, 83 N.W.2d 325 (N.D. 1948); St. Louis & S. F. R. Co. v. Dreyfus, 141 P. 773 (Okla. 1914), Billy v. LeFlore County Gas & Elec. Co., 120 P.2d 774 (Okla. 1941); Davis v. Milady, 92 S.C. 135, 75 S.E. 363 (S.C. 1912); Somers v. Somers, 131 N.W. 1091 (S.D. 1911); Hamby v. Lane, 64 S.W. 1067 (Tenn. 1901); Roach v. Francisco, 197 S.W. 1099 (Tenn. 1917); Brewer v. Wall, 23 Tex. 585 (1859); Cleveland v. Milner, 170 S.W.2d 472 (Tex. 1943);*

Behrens v. Behrens, 186 S.W.2d 697 (Tex. Civ. App. 1945); In re Cooke's Estate, 91 A.2d 683 (Vt. 1952); Jerdee v. Furbush, 91 N.W. 661 (Wis. 1902); Tupitza v. Tupitza, 29 N.W.2d 54 (Wis. 1947); Sheridan First Nat'l Bank v. Citizens State Bank, 70 P. 726 (Wyo. 1902); Closson v. Closson, 215 P. 485 (Wyo. 1923).

But see Watson v. Bethany, 26 So. 2d 12 (La. 1946).

In Alabama if the husband does convey without the wife joining, she may clear the title if the husband has on demand failed to do so or has abandoned the family. *Lee v. Lee, 90 So. 2d 775 (Ala. 1956).*

Husband alone may not convey a homestead. *Hammond v. Shipp, 289 So. 2d 802 (Ala. 1974).*

Homestead held by entireties statute permitting one spouse to convey to the other was unconstitutional as applied to homesteads.

(n310)Footnote 1482. *Ruffin v. Crowell, 46 So. 2d 218 (Ala. 1950).*

(n311)Footnote 1483. *In re Carother's Estate, 167 P.2d 899 (Okla. 1946).*

A deed by the husband to the wife is valid without her signature. *Williams v. Green, 91 So. 39 (1922).* But if the deed is to the wife and another it is void as to the third party without the wife's signature. *Smith v. Stanley, 132 So. 452 (Miss. 1931).*

In *Hughes v. Hahn, 209 Miss. 293, 46 So. 2d 587 (Miss. 1950),* where the husband deeded the homestead and then died without the wife's joining, the homestead passed to the deceased's heirs though the wife attempted to convey to the grantee after the husband's death.

In Texas the husband cannot dispose of the homestead, Tex. Const, art. 16, §50, nor encumber even by an improvement lien. *Uvalde Rock Asphalt Co. v. Hightower, 166 S.W.2d 681 (Tex. 1942),* nor waive homestead rights; *Cotton v. Morrison, 140 S.W. 114 (Tex. Civ. App. 1911),* without the wife's consent. But the husband has the power to renew, extend or adjust liens and encumbrances which are superior to the homestead if he acts in good faith and not in fraud of his wife's rights. *Dyess v. Hansen, 151 S.W.2d 904 (Tex. Civ. App. 1941),* even to the extent of agreeing to a foreclosure. *Uptmor v. Janes, 210 S.W.2d 235 (Tex. Civ. App. 1948).*

A divorced spouse cannot mortgage his half interest in former entireties property as long as it remains a homestead. *Daniels v. Katz, 237 So. 2d 58 (Fla. App. 1970).*

Executory contract to convey homestead is unenforceable against a surviving widow. *Cox v. Messer, 469 S.W.2d 611 (Tex. Civ. App. 1971).*

(n312)Footnote 1484. *Peterson v. Hornblower, 33 Cal. 266 (1867); Barnes v. Gay, 7 Iowa 26 (1858); Nichols v. Overacker, 16 Kan. 54 (1876); Amphlett v. Hibbard, 29 Mich. 298 (1874); Hopper v. Parkinson, 5 Nev. 233 (1869); Burgin v. Godwin, 167 S.W.2d 614 (Tex. Civ. App. 1943).*

(n313)Footnote 1485. *Van Sandt v. Alvis, 41 P. 1014 (Cal. 1895); Burnside v. Terry, 51 Ga. 186 (1874); Kimble v. Esworthy, 6 Ill. App. 517 (1880); Sheldon v. Pruessner, 35 P. 201 (Kan. 1894); Thacker v. Booth, 6 S.W. 460 (Ky. 1888); Clements v. Lacey, 51 Tex. 150 (1879); Mikulenka v. Mikulenka, 168 S.W.2d 517 (Tex. Civ. App. 1943).*

(n314)Footnote 1486. *Deramus v. Deramus, 85 So. 397 (Ala. 1920); Peoples Bank v. Barrow, 94 So. 600 (Ala. 1922); Phillips v. Smith, 107 So. 841 (Ala. 1926); Lee v. Lee, 90 So. 2d 775 (Ala. 1956); Ferrell v. Wood, 232 S.W. 577 (Ark. 1921); Williams v. Courton, 287 S.W. 745 (Ark. 1926); Hutchinson v. Stone, 84 So. 151 (Fla. 1920); Lightsey v. Butts, 104 So. 852 (Fla. 1925); Brunsdon v. Brunsdon, 200 N.W. 823 (Iowa 1924); Eakin v. Wykoff, 234 P. 63 (Kan.*

1925); La Londe v. Bloom, 188 N.W. 291 (Mich. 1922); Bacon v. Mirau, 181 N.W. 579 (Minn. 1921); St. Denis v. Mullen, 196 N.W. 258 (Minn. 1923); Kimbrough v. Powell, 108 So. 498 (Miss. 1926); Tyrrell v. Kelley, 178 N.W. 206 (Neb. 1920); Kelley v. Judson, 178 N.W. 208 (Neb. 1920); Alston v. Alston, 184 N.W. 82 (Neb. 1921); Shanks v. Norton, 191 P. 170 (Okla. 1920); Hawkins v. Corbit, 201 P. 649 (Okla. 1921); Thomas v. James, 202 P. 499 (Okla. 1921); Baker v. Grayson, 207 P. 301 (Okla. 1922); Fetterman v. Franklin, 211 P. 403 (Okla. 1922); Thomason v. Martin, 222 P. 511 (Okla. 1924); Barnett v. Sanders, 247 P. 55 (Okla. 1926); Ex parte Sams, 119 S.E. 798 (S.C. 1922); O'Neill v. Bennett, 207 N.W. 543 (S.D. 1926); Stephenson v. Mallett, 240 S.W. 633 (Tex. Civ. App. 1922); Hibbs v. City Nat'l Bank, 293 S.W. 350 (Tex. Civ. App. 1927); Russ v. King, 127 S.E. 100 (Va. 1925).

Cf., Pugh v. Hunter, 90 So. 646 (La. 1922); Clarke v. Oden, 99 So. 605 (La. 1924).

> The right of the husband to ... dispose of a homestead in the adjustment of valid liens against it has never been questioned by our [Texas] courts, where such adjustment is not made in fraud of the wife's rights.

Driscoll v. Morris, 275 S.W. 196 (Tex. Civ. App. 1925).

Husband may partition homestead land with another tenant in common as long as this is not in fraud of the wife. *Ellis v. Patrick, 93 S.W.2d 1201 (Tex. Civ. App. 1936).*

(n315)Footnote 1487. *Minor v. Interstate Gravel Co., 94 So. 3 (Miss. 1922).*

(n316)Footnote 1488. *Billingsley v. Niblett, 56 Miss. 537 (1879)* (purchase money mortgage of homestead by husband only is valid).

(n317)Footnote 1489. *Nichols v. York, 13 S.E.2d 565 (N.C. 1940).*

(n318)Footnote 1490. *Balcomb v. Vasquez, 241 S.W.2d 650 (Tex. Civ. App. 1951).*

(n319)Footnote 1491. *People v. Plumsted, 2 Mich. 465 (1853); Homestead Bldg. & Loan Ass'n v. Enslow, 7 S.C. 1 (1876).*

(n320)Footnote 1492. *Woodstock Iron Co. v. Richardson, 10 So. 144 (Ala. 1891); McKenzie v. Rumph, 286 S.W. 1022 (Ark. 1926); Guiod v. Guiod, 14 Cal. 506,* (Cal. 1860); *Brown v. Coon, 86 Ill. 243, 85 Am. Dec. 402 (1864); McDonald v. Crandall, 43 Ill. 231, 92 Am. Dec. 112 (1867); Vasey v. Township One, 59 Ill. 188 (1871); Fletcher v. Popejoy, 209 P. 746 (Okla. 1922); Wilson v. Clark, 223 P. 668 (Okla. 1924); Jordan v. Godman, 19 Tex. 273 (1857); Means v. Beauchamp, 241 S.W. 307 (Tex. Civ. App. 1922); Beranek v. Beranek, 89 N.W. 146 (Wis. 1902).*

(n321)Footnote 1493. *Southwestern Lbr. Co. v. Evans, 275 S.W. 1078 (Tex. Civ. App. 1925); McDonald v. Simons, 280 S.W. 571 (Tex. Comm. App. 1926).*

Cf., Shannon v. Potter, 200 P. 860 (Okla. 1921).

Since the husband's consent is necessary for a wife to convey the homestead, the husband's conveyance to the wife does not defeat his homestead right. *Williams v. Green, 91 So. 39 (Miss. 1922). Estate of Girard v. Laird, 621 A.2d 1265 (Vt. 1993)* (holding that conveyance of homestead failed when wife did not join it, but that she could not set the conveyance aside because she voluntarily relinquished her right in divorce).

(n322)Footnote 1494. *Jones v. Roper, 5 So. 459 (Ala. 1889); Thompson v. New England Mtg. Secur. Co., 18 So. 315 (Ala. 1895); Carey v. Hart, 94 So. 298 (Ala. 1922); Lubbock v. McMann, 22 P. 1145 (Cal. 1889); Perry v. Ross, 37 P. 757 (Cal. 1894); Thomas v. Craft, 46 So. 594 (Fla. 1908); Hutchinson v. Stone, 84 So. 151 (Fla. 1920); Nelson v.*

Hainlin, 104 So. 589 (Fla. 1925); Jones v. Carpenter, 106 So. 127 (Fla. 1925); 43 A.L.R. 1409; *Hoskins v. Litchfield, 31 Ill. 137,* (1863); *Pardee v. Lindley, 31 Ill. 174, 83 Am. Dec. 219 (1863); Ogden Bldg. & Loan Ass'n v. Mensch, 63 N.E. 1049 (Ill. 1902); Bruner v. Hicks, 82 N.E. 888,* (Ill. 1907); *Colbert v. Rings, 83 N.E. 274 (Ill. 1907); Sharp v. Bailey, 14 Iowa 387,* (1862); *Pagel v. Tietje, 186 N.W. 938 (Iowa 1922); Wallace v. Traveler's Ins. Co., 38 P. 489 (Kan. 1894); 26 L.R.A. 806; Karsznia v. Kelsey, 262 S.W.2d 844 (Mo. 1953); Weatherington v. Smith, 109 N.W. 381 (Neb. 1906); Anderson v. Cusack, 214 N.W. 73 (Neb. 1927); Shannon v. Potter, 200 P. 860 (Okla. 1921); Andrews v. Security Nat'l Bank, 50 S.W.2d 253 (Tex. 1930); Harborth v. Petermann, 291 S.W. 641 (Tex. Civ. App. 1926); Moran v. Clark, 4 S.E. 303 (W. Va. 1887); Minnesota Stoneware Co. v. McCrossen, 85 N.W. 1019 (Wis. 1901); Sheridan First Nat'l Bank v. Citizens State Bank, 70 P. 726 (Wyo. 1902).*

Homestead property may be alienated by a bona fide transaction based on a valuable consideration. *Morgan v. Riley, 239 So. 2d 524 (Fla. App. 1970).*

(n323)Footnote 1495. *Clark v. Bird, 48 So. 359 (Ala. 1908). Weber v. Weber, 501 N.W.2d 413 (Wis. 1993)* (holding that wife is presumed to reject alienation of homestead until she signs the conveyance).

(n324)Footnote 1496. *First Nat'l Bank v. Davis, 146 Ill. App. 462 (1909).*

(n325)Footnote 1497. *Gantt v. Hildreth, 118 S.W. 255 (Ark. 1909); Ward v. Stark Bros., 121 S.W. 382 (Ark. 1909).*

(n326)Footnote 1498. *Thomas v. Craft, 46 So. 594 (Fla. 1908).*

(n327)Footnote 1499. *Poe v. Ulrey, 84 N.E. 46 (Ill. 1908).*

(n328)Footnote 1500. *Gillespie v. Fulton Oil & Gas Co., 86 N.E. 219 (Ill. 1908).*

(n329)Footnote 1501. *Moses v. McClain, 2 So. 741 (Ala. 1887); Mellen v. McMannis, 75 P. 98 (Idaho 1904); Hostetler v. Eddy, 104 N.W. 485 (Iowa 1905); Thimes v. Stumpff, 5 P. 431 (Kan. 1885); Hall v. Loomis, 30 N.W. 374 (Mich. 1886); Weitzner v. Thingstad, 56 N.W. 817 (Minn. 1893); Watkins v. Youll, 96 N.W. 1042 (Neb. 1903); Larson v. Cole, 33 N.W.2d 325 (N.D. 1948); Cross v. Everts, 28 Tex. 523 (1866); Smith v. Prater, 161 S.W.2d 361 (Tex. Civ. App. 1942).*

Homestead owner may transfer title to an estate by the entirety. Fla. Const., art. X, §4(c), as amended. Prior to the amendment, an attempted conveyance by the husband to himself and his wife was void as to homestead property. *Moore v. Moore, 237 So. 2d 217 (Fla. 1970).*

In Texas specific performance may be had though the wife has not joined in the husband's contract to sell the homestead. *Allen v. Monk, 505 S.W.2d 523 (Tex. 1973).*

(n330)Footnote 1502. *White v. Bates, 84 N.E. 906 (Ill. 1908).*

(n331)Footnote 1503. *Parriss v. Hughes, 109 S.W. 1140 (Tex. Civ. App. 1908).*

(n332)Footnote 1504. *Ben Cheeseman Realty Co. v. Thompson, 112 So. 151 (Ala. 1927); Droppers v. Marshall, 168 N.W. 1001 (Mich. 1918).*

(n333)Footnote 1505. *Silander v. Gronna, 108 N.W. 544 (N.D. 1906).*

(n334)Footnote 1506. *Ferrell v. Wood, 232 S.W. 577 (Ark. 1921),* 16 A.L.R. 1033; *Tucker v. Finch, 188 P. 235 (Kan. 1920); Delisha v. Minneapolis, St. P. R. & D. Elec. Trac. Co., 126 N.W. 276 (Minn. 1910), 27 L.R.A. (NS) 963; Lussnig v. Investors Secur. Ass'n, 186 N.W. 574 (Minn. 1921); Glitzke v. Ginsberg, 258 S.W. 1004 (Mo. 1924); Storrs v. Bollinger, 196 N.W. 512 (Neb. 1923); Abbott v. Independent Torpedo Co., 224 P. 708 (Okla. 1924); Kyger v. Caudill,*

241 P. 814 (Okla. 1925); Rosenthal v. Pleck, 166 N.W. 445 (Wis. 1918); Helander v. Wogensen, 191 N.W. 964 (Wis. 1923); Papenthien v. Coerper, 198 N.W. 391 (Wis. 1924).

Cf., Pugh v. Hunter, 90 So. 646 (La. 1922); Clarke v. Oden, 99 So. 605 (La. 1924).

Mental incompetent's sale of his homestead is subject to rescission. *Hartnett v. Lotauro, 82 So. 2d 362 (Fla. 1955).*

(n335)Footnote 1507. *Mundy v. Shellaberger, 161 F. 503 (8th Cir. 1908).*

(n336)Footnote 1508. *White v. Bates, 84 N.E. 906 (Ill. 1908).*

(n337)Footnote 1509. *Smith v. Kibbe, 178 P. 427 (Kan. 1919).*

(n338)Footnote 1510. *Myers v. Matley, 130 F.2d 775 (9th Cir. 1942); Shook v. Southern Bldg. & Loan Ass'n, 37 So. 409 (Ala. 1904); Edwards v. Simms, 71 P. 902 (Ariz. 1903); Bluff City Lbr. Co. v. Bloom, 43 S.W. 503 (Ark. 1897); Powell v. Patison, 34 P. 677 (Cal. 1893); Wise v. Thomas, 188 P.2d 444 (Colo. 1947);* Ogden Bldg. & Loan Ass'n v. Mensch, 63 N.E. (Ill. 1902); *Way v. Scott, 91 N.W. 1034 (Iowa 1902); Warden v. Reser, 16 P. 60 (Kan. 1887); Rogers v. Day, 74 N.W. 190 (Mich. 1953); Irvine v. Irvine, 60 N.W.2d 298 (Mich. 1953); Weitzner v. Thingstad, 56 N.W. 817 (Minn. 1893); Hubbard v. Sage Land & Imp. Co., 33 So. 413 (Miss. 1903); Oatis v. Mingo, 26 So. 2d 453 (Miss. 1946)* (common-law marriage); *Watterson v. E. L. Bonner Co., 48 P. 1108,* (Mont. 1897); *Norbury v. Harper, 97 N.W. 438 (Neb. 1903); Karis v. Nichols, 28 N.W.2d 595 (Neb. 1947); Clark v. Shannon, 1 Nev. 568 (1865); Mandan Merc. Co. v. Sexton, 151 N.W. 780 (N.D. 1915); Hall v. Powell, 57 P. 168 (Okla. 1899); Billy v. LeFlore County Gas & Elec. Co., 120 P.2d 774 (Okla. 1941); Dever v. Selz, 87 S.W. 891 (Tex. Civ. App. 1905); Anderson v. Pioneer Bldg. & Loan Ass'n, 163 S.W.2d 421 (Tex. Civ. App. 1942); Home Improvement Loan Co. v. Johnson, 294 S.W.2d 418 (Tex. Civ. App. 1956); Proulx v. Parrow, 56 A.2d 623 (Vt. 1948); Anderson v. Stadlmann, 49 P. 1070 (Wash. 1897); Siegel v. Clemons, 63 N.W.2d 725 (Wis. 1954); Sheridan First Nat'l Bank v. Citizens State Bank, 70 P. 726 (11 Wyo. 1902).*

Contra, where wife was nonresident alien. *Duda v. Beben, 31 N.W.2d 603 (Wis. 1948).*

If the land is impressed in the name of the husband, the homestead cannot be mortgaged or alienated without the wife's consent. *Norman v. First Bank & Trust Co. of Bryan, 557 S.W.2d 797 (Tex. Civ. App. 1977).*

(n339)Footnote 1511. *Burgin v. Hodge, 93 So. 27 (Ala. 1922); Carey v. Hart, 94 So. 298 (Ala. 1922); Ferrell v. Wood, 232 S.W. 577 (Ark. 1921), Addington v. McKee, 170 S.W. 678 (Ark. 1926); Corey v. Matot, 190 P. 378 (Cal. 1920); Hutchinson v. Stone, 84 So. 151 (Fla. 1920); Harlow v. Larson, 213 N.W. 417 (Iowa 1927); Pugh v. Hunter, 90 So. 646 (La. 1922); Clarke v. Oden, 99 So. 605 (La. 1924); Bozich v. First State Bank, 184 N.W. 1021 (Minn. 1921); Fetterman v. Franklin, 211 P. 403 (Okla. 1922); First Nat'l Bank v. Good, 260 P. 473 (Okla. 1927); Ex parte Sams, 119 S.E. 798 (S.C. 1922); Thompson v. Reynolds, 204 P. 516 (Utah 1922); Stolldorf v. Stolldorf, 384 P.2d 969 (Wyo. 1963)* (husband could only sell homestead subject to wife's right to demand reimbursement of her interest from the purchaser).

Contracts of sale of homestead must have two witnesses as do deeds. *Radabaugh v. Ware, 241 So. 2d 738 (Fla. App. 1970)* (now doubtful authority because of repeal of Fla. Stat., §708.07 by Laws 1970, ch. 70-4, §4). But witnesses are not necessary in contracts for nonhomestead property. *Koplon v. Smith, 271 So. 2d 762 (Fla. 1972).*

(n340)Footnote 1512. *Johnson v. Fay, 82 Mass. (16 Gray) 144 (1860); Wilson v. Mills, 22 A. 455 (N.H. 1860); Bank of Cookville v. Brier, 43 S.W. 140 (Tenn. 1897).*

(n341)Footnote 1513. *Park v. Park, 72 S.W. 993 (Ark. 1903); Montana Nat'l Bank v. Schmidt, 13 P. 382 (Mont. 1887); American Sav. & Loan Ass'n v. Burghardt, 48 P. 391 (Mont. 1897); Phillips v. Bishop, 48 N.W. 1106 (Neb. 1891); Norwood v. Childress, 250 S.W.2d 927 (Tex. Civ. App. 1952).*

(n342)Footnote 1514. *Howell v. McCrie, 14 P. 257 (Kan. 1887).*

If the land is impressed in the name of the husband, the homestead cannot be mortgaged or alienated without the wife's consent *Norman v. First Bank & Trust Co. of Bryan, 557 S.W.2d 797 (Tex. Civ. App. 1887).*

(n343)Footnote 1515. *Hawkins v. Pugh, 16 S.W. 277 (Ky. 1891); But see Sledge & Norfleet Co. v. Craig, 112 S.W. 892 (Ark. 1908); Ward v. Stark Bros., 121 S.W. 382 (Ark. 1909); Long v. Branham, 99 S.W. 271 (Ky. 1907).*

(n344)Footnote 1516. *King v. Chandler, 105 So. 184 (Ala. 1925); Ratliff v. Anderson, 242 S.W. 35 (Ky. 1922); Jarvis v. Armstrong, 48 So. 1 (Miss. 1909); Stuart v. Kennedy & Co., 110 So. 847 (Miss. 1927); Hughes v. Hahn, 46 So. 2d 587 (Miss. 1950); Irwin v. Gay, 91 N.W. 197 (Neb. 1902); Prout v. Burke, 70 N.W. 512 (Neb. 1897); First Nat'l Bank v. Zook, 196 N.W. 507 (N.D. 1923).*

> The right of the husband to reencumber ... a homestead in the adjustment of valid liens against it has never been questioned by our [Texas] courts, where such adjustment is not made in fraud of the wife's rights.

Driscoll v. Morris, 275 S.W. 196 (Tex. Civ. App. 1925). See Wright v. Walker, 225 P. 75 (Wyo. 1924) (husband's mortgage to procure release of judgment on mechanic's lien).

(n345)Footnote 1517. *Andrews v. Security Nat'l Bank, 50 S.W.2d 253 (Tex. 1932).*

(n346)Footnote 1518. *Riley v. Doing, 77 F. Supp. 415 (S.D. Fla. 1948); Chamboredon v. Fayet, 57 So. 845 (Ala. 1912); Richter v. Richter, 60 So. 880 (Ala. 1913); Edmonds v. Cogsdill, 62 So. 691 (Ala. 1913); Williams v. Massie, 102 So. 611 (Ala. 1924); Sulzberger v. Sulzberger, 50 Cal. 385 (1875); Patchett v. Webber, 245 P. 422 (Cal. 1926); Griffith v. Griffith, 52 So. 609 (Fla. 1910); Johns v. Bowden, 66 So. 155 (Fla. 1914); Moseley v. Taylor, 67 So. 95 (Fla. 1914); Morgan v. Bailey, 105 So. 143 (Fla. 1925); Hamilton v. Morgan, 112 So. 80 (Fla. 1927); Nelson v. Franklin, 12 So. 2d 771 (Fla. 1943); Beck v. Wylie, 60 So. 2d 190 (Fla. 1952); Henson v. Moore, 104 Ill. 403 (1882); Stewart v. Brand, 23 Iowa 477 (1867); Jarboe v. Hayden, 117 S.W. 961 (Ky. 1909); Kiesewetter v. Kress, 70 S.W. 1065 (Ky. 1902); 24 Ky. L.J. 1239; Hunter's Succession, 13 La. Ann. 257 (1858); Pratt v. Pratt, 37 N.E. 435 (Mass. 1894); Eaton v. Robbins, 13 N.W. 143 (Minn. 1882); Kleiman v. Geiselman, 27 S.W. 796 (Mo. 1893); Bushnell v. Loomis, 137 S.W. 257 (Mo. 1893); Brichacek v. Brichacek, 106 N.W. 473 (Neb. 1906); Morgridge v. Converse, 81 N.E.2d 112 (Ohio 1948).* (In Ohio, a homestead is neither devisable nor inheritable.); *Bacus v. Burns, 149 P. 1115 (Okla. 1915); In re Cole's Estate, 205 P. 172 (Okla. 1922); Leet v. Barr, 202 P. 414, 206 P. 548 (Or. 1921); Ex parte Cothran, 121 S.E. 556 (S.C. 1924); McCrae v. McCrae, 54 S.W. 979 (Tenn. 1900); Reed v. Talley, 35 S.W. 805 (Tex. 1896); Kerens Nat'l Bank v. Stockton, 281 S.W. 580 (Tex. Civ. App. 1926); In re Little, 61 P. 899 (Utah 1900); In re O'Rourke's Estate, 175 A. 24 (Vt. 1934).*

On a forced sale of an urban homestead the claimant's value is determined by applying to the current value of the lot the ratio the exemption allowance at the time of designation bears to the value of the lot at the time of designation. *Hoffman v. Love, 494 S.W.2d 591 (Tex. Civ. App. 1973). See 5 Tex. Tech. L. Rev. 865.*

In Florida homestead property cannot be devised where it passes on death to the lineal descendants, subject to the life estate of the widow. *In re Endre's Estate, 345 So. 2d 793 (Fla. App. 1977);* E. S. A. 731.27.

(n347)Footnote 1519. *McLean v. Trabue, 135 S.W. 309 (Ky. 1911); Davis v. Milady, 75 S.E. 363 (S.C. 1912). See In re Bain's Estate, 31 P.2d 211 (Cal. App. 1934).*

(n348)Footnote 1520. *McLean v. Trabue, 135 S.W. 309 (Ky. 1911); Howard v. Marshall, 48 Tex. 471 (1878); Roots v. Robertson, 55 S.W. 308 (Tex. 1900). See O'Day v. O'Day, 292 N.W. 516 (Iowa 1940).*

(n349)Footnote 1521. *Gassin v. McJunkin, 48 P.2d 320 (Okla. 1935). Hubert v. Hubert, 622 So. 2d 1049 (Fla.*

App. 1993) (holding that homestead passed to heir for life with remainder to devisee who received interest exempt from creditor's claims).

(n350)Footnote 1522. *Cowdrey v. Hitchcock, 103 Ill. 262 (1882); Warren v. Warren, 36 N.E. 611 (Ill. 1893); Meyer v. Meyer, 23 Iowa 359; Hazelett v. Farthing, 22 S.W. 646 (Ky. 1893); Schnabel v. Schnabel, 56 S.W. 983, 22 (Ky. 1900);* Ky. L.J. 234.

(n351)Footnote 1523. *Kaes v. Gross, 3 S.W. 840 (Mo. 1887); Teske v. Dittberner, 98 N.W. 57 (Neb. 1903); Mason v. Jackson, 57 S.W. 217 (Tenn. 1900).*

(n352)Footnote 1524. *Martindale v. Smith, 1 P. 569 (Kan. 1884); Vining v. Willis, 20 P. 232 (Kan. 1889); Bostick v. Chovin, 33 S.E. 508 (S.C. 1889); Beaty v. Richardson, 34 S.E. 73 (S.C. 1889); 46 L.R.A. 517; In re Eyres' Estate, 34 P. 831 (Wash. 1893); In re Pugh's Estate, 139 P.2d 698 (Wash. 1943).*

Homestead may be devised to the spouse if there is no minor child. *In re McCartney's Estate, 299 So. 2d 5 (Fla. 1974).*

(n353)Footnote 1525. *In re Norseth's Estate, 140 N.W. 337 (Minn. 1913); Anderson v. Anderson, 16 N.W.2d 43 (S.D. 1944); Ft. Worth ex rel. West Texas Constr. Co. v. Wisehart, 33 S.W.2d 556 (Tex. Civ. App. 1930); Wicker v. Rowntree, 185 S.W.2d 150 (Tex. Civ. App. 1945). See In re Anderson's Estate, 279 N.W. 266 (Minn. 1913);* 116 A.L.R. 82. *Snyder v. Davis, 699 So. 2d 999 (Fla. 1997)* (holding that a deceased property owner's homestead exemption transfers to a family devisee in a will even though the devisee would not have inherited anything under intestate succession laws); *Jacobs v. Jacobs, 633 So. 2d 30 (Fla. App. 1994)* (holding that decedent may devise homestead when survived by no minor children and surviving spouse has waived the right).

(n354)Footnote 1526. *Luckenbill v. Bates, 263 N.W. 811 (Iowa 1935).*

(n355)Footnote 1527. *Estate of Murphy, 340 So. 2d 107 (Fla. 1976);* F.S.A. Const., art. 10 §4(c).

(n356)Footnote 1528. *In re Deadwiler, 293 F. 762 (D.C. Ga. 1923); Hart v. Gulf Fertilizer Co., 108 So. 886 (Fla. 1926); Sage v. Ijames, 233 P. 1013 (Kan. 1925); First Nat'l Bank v. Oliver, 150 S.W.2d 894 (Ky. 1941); Hess v. Eselin, 194 N.W. 469 (Neb. 1923); Japp v. Sapulpa State Bank, 215 P. 1059 (Okla. 1923); Hughes v. Groshart, 150 S.W.2d 827 (Tex. Civ. App. 1941).*

Act of platting a portion of the property exempted to the homestead does not destroy the homestead. *Falconer v. Farmers Union Oil Co., 260 N.W.2d 1 (N.D. 1977).*

See Leon L. Porter, Jr., *Conveyancing and the Necessity of the Other Spouse's Joinder Under Homestead Exemption Statutes, 22 Miss. L.J. 65 (1950).*

See George E. Bunnell, *Exempt Status of Proceeds from Conversions of the Homestead, 15 U. Fla. L. Rev. 410 (1963). United States v. Johnson, 160 F.3d 1061 (5th Cir. 1998)* (holding that a judgment lien, which creditor possessed prior to judgment debtor's conveyance of one-half interest in homestead property, did not attach to interest that grantee acquired, despite gap between grantee's purchase of property and recording of its deed).

(n357)Footnote 1529. *Poole v. Gerrard, 6 Cal. 71 (1856); Parrish v. Robbirds, 200 So. 925 (Fla. 1941); In re Younkin's Estate, 147 P.2d 726 (Kan. 1944); Kessler v. Tapp, 180 S.W.2d 552 (Ky. 1944); Gladney v. Sydnor, 72 S.W. 554 (Mo. 1903); Brunson v. Yount-Lee Oil Co., 56 S.W.2d 1073 (Tex. 1933); Bagwell v. Hunt, 65 S.W.2d 369 (Tex. Civ. App. 1933); Straus v. Brooks, 126 S.W.2d 542 (Tex. Civ. App. 1939); Moran v. Clark, 4 S.E. 303 (W. Va. 1887).*

(n358)Footnote 1530. *Hannon v. Sommer, 10 F. 601,* 3 McCrary 126 (C.C. Kan. 1881); *Weatherwax v. Heflin, 12 So. 2d 554 (Ala. 1943); Gee v. Moore, 14 Cal. 472 (1859); Green v. Marks, 25 Ill. 204 (1861); Fishback v. Lane, 36 Ill.*

437 (1865); Dawson v. Hayden, 67 Ill. 52 (1873); Lamb v. Shays, 14 Iowa 567 (1863); Soper v. Galloway, 105 N.W. 399 (Iowa 1905); Morris v. Ward, 5 Kan. 239 (1869); Drake v. Bissenger, 293 N.W. 729 (Mich. 1940); Sisco v. Paulson, 45 N.W.2d 385 (Minn. 1950); Billy v. LeFlore County Gas & Elec. Co., 120 P.2d 774 (Okla. 1941); C. Aultman & Co. v. Salinas, 22 S.E. 465 (S.C. 1895); Melton v. Beasley, 121 S.W. 574 (Tex. Civ. App. 1909).

(n359)Footnote 1531. *In re Johnson, 97 F. Supp. 779 (S.D. Cal. 1951), rev'd, Gardner v. Johnson, 195 F.2d 717 (9th Cir. 1952)* (a conveyance of homestead property to defeat creditors is not an abandonment of homestead); *Jackson v. Allen, 30 Ark. 110 (1875); Folsom v. Carli, 5 Minn. 333 (1861); Tillotson v. Millard, 7 Minn. 513 (1862); Hoyt v. Howe, 3 Wis. 752 (1854). United States v. Johnson, 160 F.3d 1061 (5th Cir. 1998)* (holding that a judgment lien, which creditor possessed prior to judgment debtor's conveyance of one-half interest in homestead property, did not attach to interest that grantee acquired, despite gap between grantee's purchase of property and recording of its deed).

(n360)Footnote 1532. *Thorsby v. Babcock, 222 P.2d 863 (Cal. 1950). Moore v. Krueger, 507 N.W.2d 155 (Wis. App. 1993)* (holding that even though the owners could not show that their absence from the home, before it was sold, was temporary, the proceeds of the sale were protected by the homestead exemption allowing the proceeds to be used to buy a new home); *In re Graziadei, 32 F.3d 1408 (9th Cir. 1994)* (holding that even though home was sold, debtor was entitled to homestead exemption from proceeds of sale).

(n361)Footnote 1533. Oral contract for sale of homestead enforceable. *Riley v. Riley, 33 N.W.2d 525 (Neb. 1948). Weber v. Weber, 501 N.W.2d 413 (Wis. 1993)* (holding that statute of frauds applies to homestead and must be affirmatively waived).

Parol contract to convey homestead is void. *Norwood v. Childress, 250 S.W.2d 927 (Tex. Civ. App. 1952).*

(n362)Footnote 1534. Such a conveyance is valid. *Ruffin v. Crowell, 46 So. 2d 218 (Ala. 1950); Lathrop v. Sandlin, 268 S.W.2d 606 (Ark. 1954).*

Invalid if third person also takes an interest. *Anderson v. Blixt, 72 N.W.2d 799 (N.D. 1955); Whitaker v. Whitaker, 167 P.2d 895 (Okla. 1946).*

(n363)Footnote 1535. *Tennison v. Carroll, 243 S.W.2d 944 (Ark. 1951).*

(n364)Footnote 1536. *Mainelli v. Neuhaus, 59 N.W.2d 607 (Neb. 1953).*

(n365)Footnote 1537. *Burns v. Ford, 283 S.W.2d 866 (Ark. 1955)* (but no homestead where household broken up); *Filtsch v. Curtis, 234 P.2d 377 (Okla. 1950).*

(n366)Footnote 1538. *In re Snyder's Estate, 48 N.W.2d 238 (S.D. 1951).*

Homestead descends and vests in the heirs of the first deceased spouse immediately on death free of any claims against the deceased spouse and is not chargeable with any of the debts with which community property is chargeable. *Vanni v. Cloutier, 124 A.2d 204 (N.H. 1956).*

(n367)Footnote 1539. *In re Ross, 210 B.R. 320 (Bankr. N.D. Ill. 1997)* (holding (1) that the Illinois homestead statute permits a boat used as a primary residence to be claimed as a homestead exemption and (2) that the homestead was not abandoned when the owner temporarily resided on land during the winter season, but had the intent to return).

(n368)Footnote 1540. *Kleinsorge v. Clark, 4 N.W.2d 433 (Iowa 1942).*

In Illinois to create a homestead (1) the claimant must be a householder, (2) he must have a family, (3) the premises must be occupied as a residence. *Rock Island Bank & Trust Co. v. Lamone, 198 N.E. 430 (Ill. 1935); Klebba v. Klebba, 246 N.E.2d 681 (Ill. App. 1969).*

(n369)Footnote 1541. *Cleve v. Adams, 22 S.E.2d 567 (N.C. 1942).*

(n370)Footnote 1542. *Brown v. Keller, 32 Ill. 151 (1863); Wright v. Flatterich, 281 N.W. 221 (Iowa 1938); Anderson v. Finley, 84 So. 2d 845 (La. App. 1956) See Thomas v. Craft, 46 So. 594 (Fla. 1908); Jackson v. Williams, 59 S.E. 776 (Ga. 1907)* And *see Brantley v. Pruitt, 144 So. 604 (La. 1932)* (one entitled to a homestead exemption must be a bona fide owner of the land).

The will devising real estate to two persons "to have the full use, possession, management, enjoyment and control of said land, rent and tax free, as long as they, or either of them, continue to occupy the same as their home" did not make the devisees "owners" entitled to homestead. *Johnston v. Gibson, 334 P.2d 348 (Kan. 1959).*

(n371)Footnote 1543. *Stombaugh v. Morey, 58 N.E.2d 545 (Ill. 1944).*

(n372)Footnote 1544. *Glover v. Bass, 50 So. 125 (Ala. 1909); Arighi v. Rule & Sons, 107 P.2d 970 (Cal. App. 1940); Wood v. Emig, 137 P.2d 875 (Cal. App. 1943); Wike v. Garner, 53 N.E. 613 (Ill. 1899); Howard v. Mitchell, 105 S.W.2d 128 (Ky. 1936); Giles v. Miller, 54 N.W. 551 (Neb. 1893); Hoy v. Anderson, 58 N.W. 125 (Neb. 1894); Fisher v. Kellogg, 258 N.W. 404 (Neb. 1935); Conlrav v. Morgan, 95 P. 761 (Okla. 1908); Mencer v. McKeel, 108 P.2d 138 (Okla. 1940); Moncur v. Jones, 31 N.W.2d 759 (S.D. 1948); Lewis v. Lindsley, 68 S.W.2d 548 (Tex. Civ. App. 1934); Resolution Trust Corp. v. Olivarez, 29 F.3d 201 (5th Cir. 1994)* (holding that under Texas law a homestead may be claimed even if the owner does not hold fee simple title).

(n373)Footnote 1545. *Glover v. Bass, 50 So. 125 (Ala. 1909); Morgan v. Bailey, 105 So. 143 (Fla. 1925)* (beneficial interest); *First Nat'l Bank v. Dismukes, 241 S.W. 199 (Tex. Civ. App. 1922)* (possessory interest); *Johnson v. Prosper State Bank, 125 S.W.2d 707 (Tex. Civ. App. 1939).*

In Texas a business and residence, even on separate lots, if taken together, may constitute only one homestead. *O'Neal v. Mack Trucks, Inc., 551 S.W.2d 32 (Tex. 1977).*

(n374)Footnote 1546. *Spencer v. Geissman, 37 Cal. 96 (1869); Alexander v. Jackson, 28 P. 593 (Cal. 1891); Pendleton v. Hooper, 13 S.E. 313 (Ga. 1891); Deere v. Chapman, 25 Ill. 610 (1880); Hogan v. Manners, 23 Kan. 551 (1880); Pilcher v. Atchison, T. & S.F.R. Co., 16 P. 945 (Kan. 1888); Giles v. Miller, 54 N.W. 551 (Neb. 1893); Hoy v. Anderson, 58 N.W. 125 (Neb. 1894).*

See In re Kachigian's Estate, 128 P.2d 865 (Cal. 1942) (showing 1929 amendment to the homestead statute of California).

(n375)Footnote 1547. *In re Maxson, 170 F. 356 (D. Iowa 1909); Northern Assur. Co. v. Stout, 117 P. 617 (Cal. App. 1911); Belieu v. Power, 201 P. 620 (Cal. App. 1921)* (equitable title under contract of purchase); *Brooks v. Black, 123 P. 131 (Colo. App. 1912); Utley v. Boone, 299 N.W. 437 (Iowa 1941); Southern v. Linville, 33 P.2d 123 (Kan. 1934); Kleinert v. Lefkowitz, 259 N.W. 871 (Mich. 1935); Lamb Lumber Co. v. Roberts, 121 N.W. 93 (S.D. 1909); Hughes v. Groshart, 150 S.W.2d 827 (Tex. Civ. App. 1941); Johnson v. Miller, 173 S.W.2d 280 (Tex. Civ. App. 1943); Desmond v. Shotwell, 252 P. 692 (Wash. 1927)* (possession under executory contract of sale); *In re Galvin, 158 B.R. 806 (Bankr. W.D. Mo. 1993)* (holding that the Missouri homestead exemption may be claimed on property held as a contract for deed); *In re Freytag, 155 B.R. 150 (Bankr. N.D. Tex. 1993)* (holding that property became homestead when debtor contracted for financing and construction of home).

(n376)Footnote 1548. *In re Foley, 97 F. Supp. 843 (D. Neb. 1951); Ferguson v. Roberts, 170 P.2d 855 (Ariz. 1946); Bessemer Props. v. Gamble, 27 So. 2d 832 (Fla. 1946).*

But must be of freehold. *Strongman v. Duke, 295 P.2d 12 (Cal. App. 1956).*

Georgia requires legal title. *McCoy v. Howard's Furn. Co., 222 F. Supp. 974 (N.D. Ga. 1963).*

(n377)Footnote 1549. *Walker v. Woods, 13 N.W.2d 193 (Mich. 1944); Stucki v. Ellis, 201 P.2d 486 (Utah 1949); In re Galvin, 158 B.R. 806 (Bankr. W.D. Mo. 1993)* (holding that a debtor could claim a homestead in property under a contract for deed).

(n378)Footnote 1550. *Application of Rauer's Collection Co., Inc., 196 P.2d 803 (Cal. App. 1948).*

(n379)Footnote 1551. *See Cates v. Greene, 114 S.W.2d 592 (Tex. Civ. App. 1938).*

(n380)Footnote 1552. *Riley v. Doing, 77 F. Supp. 415 (S.D. Fla. 1948); Trice v. Miller, 229 S.W.2d 233 (Ark. 1950)* (husband has no homestead in wife's ancestral property); *Solomon v. Davis, 100 So. 2d 177 (Fla. 1958)* (realty of the wife cannot be the subject of the homestead since she is not head of the household); *Kleinert v. Lefkowitz, 259 N.W. 871 (Mich. 1935); Hoyt v. First Nat'l Bank, 77 P.2d 538 (Okla. 1938).*

(n381)Footnote 1553. *Arighi v. Rule & Sons, 107 P.2d 970 (Cal. App. 1940); Myers v. Myers, 152 N.W. 934 (Mich. 1915); Downing v. Hartshorn, 95 N.W. 801 (Neb. 1903); In re Banfield's Estate, 296 P. 1066, 298 P. 905 (Or. 1931); Powell v. Ott, 146 S.W. 1019 (Tex. Civ. App. 1912); In re Miller, 174 B.R. 279 (Bankr. N.D. Ill. 1994)* (holding debtor could claim homestead right on her life estate in the home which under a trust agreement transferred the remainder to the children).

(n382)Footnote 1554. *Shambaugh v. Scofield, 132 F.2d 345 (5th Cir. 1942); Stombaugh v. Morey, 58 N.E.2d 545 (Ill. 1944); Fisher v. Kellogg, 258 N.W. 404 (Neb. 1935); Turner v. Miller, 255 S.W. 237 (Tex. Civ. App. 1923)* (vested remainder); *Greenawalt v. Cunningham, 107 S.W.2d 1099 (Tex. Civ. App. 1937).*

(n383)Footnote 1555. *Keesee v. Bushart, 158 S.W.2d 915 (Ark. 1942); Butler v. Parker, 293 S.W.2d 174 (Tenn. 1956); Greenawalt v. Cunningham, 107 S.W.2d 1099 (1937); Johnson v. Prosper State Bank, 125 S.W.2d 707 (1939).*

(n384)Footnote 1556. *White Sewing-Mach. Co. v. Wooster, 50 S.W. 1000 (Ark. 1899).*

(n385)Footnote 1557. *In re Irving, 220 F. 969 (D. Ariz. 1915); Ellis v. Bingham, 150 S.W. 602 (Tex. Civ. App. 1912); Sterling Nat'l Bank & Trust Co. v. Ellis, 75 S.W.2d 716 (Tex. Civ. App. 1934); Beckner v. Barrett, 81 S.W.2d 719 (Tex. Civ. App. 1935); Downey v. Wilber, 202 P. 256 (Wash. 1921)* (leasehold); *In re McAtee, 154 B.R. 346 (Bankr. N.D. Fla. 1993)* (holding that a debtor could claim a homestead exemption in a long term lease on public land).

(n386)Footnote 1558. *Application of Rauer's Collection Co., Inc., 196 P.2d 803 (Cal. App. 1948); Pendleton v. Hooper, 13 S.E. 313 (Ga. 1891); Grimes v. McCrary, 211 S.W.2d 1005 (Tex. Civ. App. 1948); Resolution Trust Corp. v. Olivarez, 29 F.3d 201 (5th Cir. 1994)* (holding that homestead exemption protected the vendors' right to remain on land at will of titleholder, but that the exemption did not protect beyond their at will interest).

(n387)Footnote 1559. *Cates v. Greene, 114 S.W.2d 592 (Tex. Civ. App. 1938).*

(n388)Footnote 1560. *Panagopulos v. Manning, 69 P.2d 614 (Utah 1937), petition for reh'g denied, 72 P.2d 456 (Utah 1937).*

(n389)Footnote 1561. *Oates v. New York Life Ins. Co., 152 So. 671 (Fla. 1934); Coleman v. Williams, 200 So. 207 (Fla. 1941); Waddy v. Waddy, 291 S.W.2d 581 (Tenn. 1956).*

(n390)Footnote 1562. *New Martinsville Groc. Co. v. Hannibal Store Co., 29 N.E.2d 226 (Ohio 1940); Hughes v. Groshart, 150 S.W.2d 827 (Tex. Civ. App. 1941).*

In Florida property held by the entireties may also qualify as a homestead for purposes of forced sale to pay debts. *Menendez v. Rodriguez, 143 So. 223 (Fla. 1932)* But such property so held may be conveyed by the tenants. *Denham v.*

Sexton, 48 So. 2d 416 (Fla. 1950); In re Cempellin, 175 B.R. 1 (Bankr. D. Mass. 1994) (holding that homestead was available in property held by husband and wife in tenancy in common).

(n391)Footnote 1563. *Kline v. Cowan, 115 P. 587 (Kan. 1911).*

Sale and resale with a homestead association resulted in an inter vivos donation of a one-half interest to the wife. *Succession of Daste, 223 So. 2d 848 (La. 1969), 16 Loyola L. Rev. 158.*

(n392)Footnote 1564. *Federal Land Bank v. King, 122 S.W.2d 1061 (Tex. 1939).*

(n393)Footnote 1565. *See* in general:

In re Barklow, 282 F. 892 (D. Or. 1922); Bryson v. Provident Nat'l Bank, 2 F.2d 831 (5th Cir. 1924); Bank of Sun Prairie v. Hovig, 218 F. Supp. 769 (W.D. Ark. 1963) (actual occupancy is required in Arkansas); *Beaty v. Washam, 87 So. 337 (Ala. 1920); Wildman v. Means, 94 So. 823 (Ala. 1922).*

In Alabama to be a homestead the land must be occupied by the decedent prior to his death. *Mordecai v. Scott, 320 So. 2d 642 (Ala. 1975).*

Chastain v. Arkansas Bank & Trust Co., 249 S.W. 1 (Ark. 1923); Freer v. Less, 252 S.W. 354 (Ark. 1923); Starr v. City Nat'l Bank, 267 S.W. 581 (Ark. 1925); Keesee v. Bushart, 158 S.W.2d 915 (Ark. 1942).

Santa Barbara Lumber Co. v. Ross, 192 P. 436 (Cal. 1920); Coca Cola Bottling Co. v. Feliciano, 114 P.2d 604 (Cal. App. 1941).

Semple v. Semple, 89 So. 638 (Fla. 1921); Hillsborough Inv. Co. v. Wilcox, 13 So. 2d 448 (Fla. 1943).

Logue v. Von Almen, 40 N.E.2d 73 (Ill. 1941).

Schaffer v. Campbell, 199 N.W. 334 (Iowa 1924); Dolan v. Newberry, 202 N.W. 545, 205 N.W. 205 (Iowa 1925); Fardal v. Satre, 206 N.W. 22 (Iowa 1925); Harris v. Carlson, 205 N.W. 202 (Iowa 1925).

Blitz v. Metzger, 241 P. 259 (Kan. 1925).

Evansville Coffin Co. v. Sumner, 226 S.W. 363 (Ky. 1920); Conway v. Reed, 235 S.W. 747 (Ky. 1921); Neel v. Compton, 255 S.W. 840 (Ky. 1923).

Succession of Veronie, 84 So. 439 (La. 1920); Bank of Erath v. Broussard, 109 So. 347 (La. 1926).

Chrismand v. Mauldin, 94 So. 1 (Miss. 1922).

Dent v. Dent, 166 S.W.2d 582 (Mo. 1942).

Tyrrell v. Kelley, 178 N.W. 206 (Neb. 1920); Kelley v. Judson, 178 N.W. 208 (Neb. 1920); Filley v. Dickinson, 193 N.W. 914 (Neb. 1923).

Avery v. Davis, 128 A. 332 (N.H. 1925).

Harris v. Cherokee State Bank, 198 P. 878 (Okla. 1921); Johnson v. Johnston, 200 P. 204 (Okla. 1921); Sharpe v. Wright, 211 P. 70 (Okla. 1922); Kerns v. Warden, 213 P. 70 (Okla. 1923); State ex rel. Freeling v. Brown, 218 P. 816

(Okla. 1923); Osmon v. Payton, 223 P. 382 (Okla. 1923); Storm v. Garnett, 227 P. 417 (Okla. 1924); Harris v. Watts, 226 P. 40 (Okla. 1924); City Nat'l Bank v. Bounds, 235 P. 168 (Okla. 1925); Foster v. Vickery, 239 P. 141 (Okla. 1925); Standard v. Eckert, 249 P. 278 (Okla. 1926); Barnett v. Sanders, 247 P. 55 (Okla. 1926); Interstate Mtg. Trust Co. v. Weber, 249 P. 150 (Okla. 1926); Greenwood v. Wilkinson, 256 P. 46 (Okla. 1927).

Eagle Feather v. McHenry, 190 N.W. 328 (S.D. 1922).

Ewing v. Riley, 246 S.W. 94 (Tex. Civ. App. 1923); Lilly v. Lewis, 249 S.W. 1095 (Tex. Civ. App. 1923); Vaden v. Collier, 253 S.W. 889 (Tex. Civ. App. 1923); Atkinson v. Jackson Bros., 259 S.W. 280 (Tex. Civ. App. 1923) modified 270 S.W.2d 848 (Tex. 1925); Cocke v. Espinoza, 265 S.W. 1103 (Tex. Civ. App. 1924); Third Nat'l Bank v. McClung, 281 S.W. 281 (Tex. Civ. App. 1926); Teller v. Fitch, 281 S.W. 893 (Tex. Civ. App. 1926); Hark-Rider-Keith-Cooke Co. v. Smith, 284 S.W. 612 (Tex. Civ. App. 1926); Alexander v. Waggoman, 287 S.W. 144 (Tex. Civ. App. 1926); Walker v. Dailey, 290 S.W. 813 (Tex. Civ. App. 1927); Gillette v. Davis, 296 S.W. 658 (Tex. Civ. App. 1927); Jolesch & Chaska Co. v. Hampton, 297 S.W. 271 (Tex. Civ. App. 1927); Vaughan v. Sterling Nat'l Bank & Trust Co., 124 S.W.2d 440 (Tex. Civ. App. 1938); Espinoza v. Cocke, 276 S.W. 1095 (Tex. Civ. App. 1925); Roberson v. Home Owners' Loan Corp., 147 S.W.2d 949 (Tex. Civ. App. 1941); Stewart v. Adams, 171 S.W.2d 180 (Tex. Civ. App. 1943) Canadian Bank v. Kellough, 253 P. 124 (Wash. 1927); Schwitzke v. American Nat'l Bank, 8 N.W.2d 303 (Wis. 1943); In re Bruton, 167 B.R. 923 (Bankr. S.D. Cal. 1994) (holding that under California homestead law the factors to be considered in determining residency are physical occupancy and the intention to occupy).

(n394)Footnote 1566. *Turner v. Board of County Tax Assessors, 31 S.E.2d 61 (Ga. App. 1944); In re Miller, 157 B.R. 621 (Bankr. N.D. Ohio 1993)* (holding that under Ohio homestead law, a debtor can claim homestead in the residence where his dependents live, even though he does not live there himself).

(n395)Footnote 1567. *Collins v. Collins, 7 So. 2d 443 (Fla. 1942).*

In Florida a homestead does not exist in a co-operative apartment. *In re Wartels' Estate, 338 So. 2d 48 (Fla. App. 1976); In re Ross, 210 B.R. 320 (Bankr. N.D. Ill. 1997)* (holding (1) that the Illinois homestead statute permits a boat used as a primary residence to be claimed as a homestead exemption and (2) that the homestead was not abandoned when the owner temporarily resided on land during the winter season, but had the intent to return); *In re Leonard, 194 B.R. 807 (Bankr. N. D. Tex. 1996)* (holding that property owners did not abandon their homestead when they moved to another home for three years, because they intended to return to the homestead); *In re Bruton, 167 B.R. 923 (Bankr. S.D. Cal. 1994)* (holding that debtor's temporary absence from condominium did not invalidate his homestead exemption under California law); *In re Brown, 165 B.R. 512 (Bankr. M.D. Fla. 1994)* (holding that debtor's involuntary absence from home to defend criminal and civil suits did not invalidate homestead right).

(n396)Footnote 1568. *Turner v. Turner, 18 So. 210 (Ala. 1895); Neel v. Compton, 255 S.W. 840 (Ky. 1923); Closson v. Closson, 215 P. 485 (Wyo. 1923).*

(n397)Footnote 1569. *Postlethwaite v. Edson, 171 P. 769 (Kan. 1917); Hall v. Casebolt, 188 S.W. 470 (Ky. 1916); Bartold v. Lewandowska, 8 N.W.2d 133 (Mich. 1943). In re Wierschem, 152 B.R. 345 (Bankr. M.D. Fla. 1993)* (holding that the Florida homestead exemption applies only to place of actual residence by either the debtor or his family).

(n398)Footnote 1570. *Tide Water Oil Co. v. Ross, 123 S.W.2d 479 (Tex. Civ. App. 1938).*

(n399)Footnote 1571. *Roberts v. Thomas, 48 So. 408 (Miss. 1946), see* cases in note; *Davis v. Davidor, 27 So. 2d 371 (Miss. 1946), citing* Thompson on Real Property (a gratuitous licensee or lodger cannot claim homestead interest).

(n400)Footnote 1572. *In re Buelow, 98 F. 86 (D. Wash. 1899); Villa v. Pico, 41 Cal. 469 (1871); Aucker v. McCoy, 56 Cal. 524 (1880); McCormick v. Wilcox, 25 Ill. 274 (1861); Reinbach v. Walter, 27 Ill. 393 (1862); Titman v. Moore, 43 Ill. 169 (1867); Fisher v. Cornell, 70 Ill. 216 (1873); Floyd County v. Wolfe, 117 N.W. 32 (Iowa 1908);*

Ingels v. Ingels, 32 P. 387 (Kan. 1893); Wisner v. Farnham, 2 Mich. 472 (1853); Kennedy's Adm'r v. Duncan, 137 S.W. 299 (Mo. 1911); Cook v. Newman, 8 How. Prac. (N.Y.) 523; In re Mayer, 167 B.R. 186 (Bankr. 9th Cir. 1994) (holding that debtor fulfilled homestead requirement by living on the property on the date he filed bankruptcy); *In re Marriage of Salchenberg, 868 P.2d 772 (Or. App. 1994)* (holding that debtor could not claim homestead in mobile home when daughter did not live in the home when the exemption was claimed); *In re Jefferson, 163 B.R. 204 (Bankr. D. N.M. 1993)* (holding that debtor could only claim homestead if land was occupied by him at the time of petition); *In re Morgan, 149 B.R. 147 (Bankr. 9th Cir. 1993)* (holding that the claimant or his spouse must reside in the dwelling at the time the creditor's lien attaches); *In re Mayer, 156 B.R. 54 (Bankr. S.D. Cal. 1993)* (holding that debtor or spouse must reside in home on the date the lien was recorded for homestead to attach); *In re Austin, 172 B.R. 262 (Bankr. E.D. Ark. 1994)* (holding that debtor could not claim homestead on property where he did not reside at the time the judgment lien attached).

(n401)Footnote 1573. *Lane v. Flowers, 48 P.2d 1076 (Okla. 1935); Chennault v. Glenn, 109 P.2d 811 (Okla. 1941); In re Brown, 165 B.R. 512 (Bankr. M.D. Fla. 1994)* (holding that moving into homestead with one small suitcase was sufficient to manifest intention of permanent residence when claimant lost his former home in a hurricane).

(n402)Footnote 1574. *Zuniga v. Evans, 48 P.2d 513 (Utah 1935).*

(n403)Footnote 1575. *Enosburg Falls Sav. Bank & Trust Co. v. McKinney, 44 P.2d 987 (Okla. 1935).*

In Florida a homestead does not exist in a co-operative apartment. *In re Wartels' Estate, 338 So. 2d 48 (Fla. App. 1976);* Fla. Const., Art. X, §4.

(n404)Footnote 1576. *Pollock v. McNeil, 13 So. 937 (Ala. 1893); Moss v. Warner, 10 Cal. 296 (1858); Evans v. Grand Rapids, L. & D. R. Co., 36 N.W. 687 (Mich. 1888); In re Wilson, 8 N.W. 830 (Minn. 1881); Coates v. Caldwell, 8 S.W. 922 (Tex. 1888).*

(n405)Footnote 1577. *Roberts v. Thomas, 48 So. 408 (Miss. 1909); Lamb Lumber Co. v. Roberts, 121 N.W. 93 (S.D. 1909); Melcher v. Super, 120 S.W. 569 (Tex. 1909); NCNB Tex. Nat'l Bank v. Carpenter, 849 S.W.2d 875 (Tex. App. 1993)* (holding that possession and use of land, ownership, and residency qualify land as homestead in law and fact).

(n406)Footnote 1578. *Philan v. Turner, 13 So. 2d 819 (Miss. 1943); Hinds v. Buck, 150 S.W.2d 1071 (Tenn. 1941); Switzerland Gen. Ins. Co., Ltd. v. Gulf Ins. Co., 213 S.W.2d 161 (Tex. Civ. App. 1948); Zuniga v. Evans, 48 P.2d 513 (Utah 1935).*

(n407)Footnote 1579. *Gregg v. Bostwick, 33 Cal. 220 (1867); Kitchel v. Burgwin, 21 Ill. 40 (1858); McMonagle v. Wilson, 61 N.W. 495 (Mich. 1894); Yates v. Home Bldg. & Loan Co., 103 S.W.2d 1081 (Tex. Civ. App. 1937); True v. Morrill, 28 Vt. 672 (1856).*

(n408)Footnote 1580. *Enosburg Falls Sav. Bank & Trust Co. v. McKinney, 44 P.2d 987 (Okla. 1935); Cobb v. Collins, 111 S.W. 760 (Tex. Civ. App. 1908), citing* Thompson on Real Property (a gratuitous licensee or lodger cannot claim homestead interest).

(n409)Footnote 1581. *Stephen Putney Shoe Co. v. White, 55 So. 503 (Ala. 1911); Tumlinson v. Swinney, 22 Ark. 400 (1860); Upton v. Coxen, 55 P. 284 (Kan. 1898); Delisha v. Minneapolis St. P. R. & D. Elec. Trac. Co., 126 N.W. 276 (Minn. 1910); Laurie v. Crouch, 139 P. 304 (Okla. 1914); Sharpe v. Wright, 211 P. 70 (Okla. 1922); Ketchin v. McCarley, 11 S.E. 1099 (S.C. 1886); Coates v. Caldwell, 8 S.W. 922 (Tex. 1888); Dinwiddie v. Tirns, 114 S.W. 400 (Tex. Civ. App. 1908); Colwell v. Royal Interstate Trading Co., 226 B.R. 714 (Bankr. S.D. Fla. 1998)* (stating that a homestead is established when there is actual intent to live permanently in place, coupled with actual use and occupancy); see also, *In re Hankell, 223 B.R. 728 (Bankr. D. N.D. 1998); In re Lee, 223 B.R. 594 (Bankr. M.D. Fla. 1998); Matter of Burns, 218 B.R. 897* (Bankr. N.D. Ind., 1998).

(n410)Footnote 1582. *Ashton v. Ingle, 20 Kan. 670 (1878).*

(n411)Footnote 1583. *Upton v. Coxen, 55 P. 284 (Kan. 1898).*

Cf., Yates v. Home Bldg. & Loan Co., 103 S.W.2d 1081 (Tex. Civ. App. 1937).

(n412)Footnote 1584. *Ratliff v. Smith, 178 S.W.2d 138 (Tex. Civ. App. 1943); In re Kretzinger, 103 F.3d 943 (10th Cir. 1996)* (holding that leasing part of a selected rural homestead to tenants for agricultural purposes is consistent with the required homestead use and thereby does not forfeit the leased property from the homestead exemption); *In re Wierschem, 152 B.R. 345 (Bankr. M.D. Fla. 1993)* (holding that the residency requirement applies to rural as well as urban homesteads). *Contra In re McCain, 160 B.R. 933 (Bankr. E.D. Tex. 1993)* (holding that use of rural property for shelter was sufficient to establish a homestead and that economic support from the property was not required); *Riley v. Riley, 972 S.W.2d 149 (Tex. App. 1998)* (holding that homestead claim in rural property is valid as long as the claimant resides on part of the property and the other parcels are used for the support of the family).

(n413)Footnote 1585. *Thompson v. Thompson, 230 S.W.2d 376 (Tex. Civ. App. 1950), modified* 236 S.W.2d (Tex. 1951).

(n414)Footnote 1586. *Turnbeaugh v. Santos, 146 F.2d 168 (9th Cir. 1944).*

(n415)Footnote 1587. *Cole v. Coons, 178 P.2d 997 (Kan. 1947). Contra In re de Kleinman, 172 B.R. 764 (Bankr. S.D.N.Y. 1994)* (holding that debtor could not claim a homestead in a condominium where she enjoyed a mere beneficial interest).

(n416)Footnote 1588. *First Nat'l Bank v. Anderson, 240 P.2d 1066 (Okla. 1952); Gilpatrick v. Hatter, 258 P.2d 1200 (Okla. 1953).*

(n417)Footnote 1589. Permitted in leasehold estates. *In re Foley, 97 F. Supp. 843 (D. Neb. 1951)* (but not in a tenancy at will); *Cole v. Coons, 178 P.2d 997 (Kan. 1947); Grimes v. McCrary, 211 S.W.2d 1005 (Tex. Civ. App. 1948),* but not in a tenancy at sufferance. *Kleinschmidt Labs. v. Kleinschmidt, 100 N.E.2d 796 (Ill. App. 1951); In re Julian, 163 B.R. 478 (Bankr. N.D. Tex. 1994)* (holding that debtor could not claim business homestead in lot that he leased to a third party commercially); *In re McAtee, 154 B.R. 346 (Bankr. N.D. Fla. 1993)* (holding that debtor could claim homestead in residence on public land subject to a ground lease).

(n418)Footnote 1590. *In re Grisanti, 58 F. Supp. 646 (W.D. Ky. 1945); Hensley v. Morgan, 237 S.W. 370 (Ky. 1922)* (failure to claim exemption at execution sale does not work estoppel); *Pinson v. Murphy, 295 S.W. 442 (Ky. 1927)* (claim of exemption before confirmation of execution sale or satisfaction of execution is timely); *First Nat'l Bank v. Oliver, 150 S.W.2d 894 (Ky. 1941); Castle v. Palmer, 88 Mass. (6 Allen) 401 (1863); Griffin v. Nichols, 17 N.W. 63 (Mich. 1883); Ferguson v. Kumler, 25 Minn. 183 (1878); Vogler v. Montgomery, 54 Mo. 577 (1874); Fletcher v. State Capital Bank, 37 N.H. 369 (1858); Barney v. Leeds, 51 N.H. 253 (1871); Philbrick v. Andrews, 35 P. 358 (Wash. 1894); Hoppe v. Goldberg, 53 N.W. 17 (Wis. 1892).*

See State Nat'l Bank v. Lokey, 240 P. 101 (Okla. 1925) (exemption may be claimed on motion to quash execution); *Morey v. James, 248 P. 594 (Okla. 1926)* (selection of homestead may be made at any time before levy); *Crim v. Thompson, 229 P. 916 (Or. 1924)* (exemption may be claimed at any time before execution sale); *Weitzman v. Lee, 262 S.W. 859 (Tex. Civ. App. 1924)* (exemption waived by nonassertion in pleading); *Payson Exch. Sav. Bank v. Tietjen, 225 P. 598 (Utah 1924)* (notice to officer holding execution or order of sale is sufficient); *In re Shells, 171 B.R. 816 (Bankr. S.D. Ohio 1994)* (holding that debtor did not waive right to claim homestead in bankruptcy action by failing to assert that right in the state foreclosure proceeding).

(n419)Footnote 1591. *Hughes v. Watt, 26 Ark. 228 (1870); Bank of Salem v. White, 171 S.W.2d 55 (Ark. 1943); Williams v. Young, 17 Cal. 403 (1861); Pardee v. Lindley, 31 Ill. 174 (1863); Abbott v. Cromartie, 72 N.C. 292 (1875).*

(n420)Footnote 1592. *Barney v. Leeds, 51 N.H. 253 (1871).*

(n421)Footnote 1593. *Miller v. Sherry, 69 U.S. (2 Wall.) 237 (1864); Rogers v. Lackland, 23 So. 489 (Ala. 1898); Jones v. Olson, 67 P. 349 (Colo. App. 1902); Ard v. Pratt, 60 P. 1048 (Kan. 1900); Livermore v. Boutelle, 77 Mass. (11 Gray) 27 (1858); Herschfeldt v. George, 6 Mich. 456 (1859); Vogler v. Montgomery, 54 Mo. 577 (1874); Sears v. Hanks, 14 Ohio St. 298 (1863); Meeks Leasing Co. v. Young, 881 S.W.2d 232 (Mo. App. 1994)* (holding that sheriff's failure to appraise homestead and determine its equity, before execution sale, voided the sale); *In re Jones, 166 B.R. 657 (Bankr. N.D. Ill. 1994)* (holding that a forced sale is void, if the homestead is not set off).

(n422)Footnote 1594. *Simpson v. Simpson, 30 Ala. 225 (1857); Cross v. Bank of Insley, 87 So. 843 (Ala. 1921)* (exemption may be claimed at any time before foreclosure sale); *Coleman v. Birmingham Fertilizer Co., 93 So. 904 (Ala. 1922)* (exemption waived by failure to claim it before sale); *First Nat'l Bank v. Reeves, 234 P. 556 (Ariz. 1925)* (exemption may be claimed at any time before execution sale); *Spurlock v. Gaikens, 225 S.W. 17 (Ark. 1920)* (exemption not required to be claimed until eviction is attempted); *McKee v. Waters, 265 S.W. 947 (Ark. 1924)* (failure to object to execution sale does not work estoppel); *Hillsborough Inv. Co. v. Wilcox, 13 So. 2d 448 (Fla. 1943); Hendrix v. Webb, 39 S.E. 461 (Ga. 1901); Rogers v. Kimsey, 135 S.E. 497 (Ga. 1926)* (notice at execution sale is sufficient); *Perkins v. Bragg, 29 Ind. 507 (1868); Moss v. Jenkins, 45 N.E. 789 (Ind. 1897); Andrews v. McCreary Lumber Co., 99 So. 579 (La. 1924)* (exemption is lost by failure to claim it before sale); *Orr v. Box, 22 Minn. 485 (1876); Curtis v. D.M. Osborne Co., 89 N.W. 420 (Neb. 1902); Baker v. Brintnall, 52 Barb. 188 (N.Y. 1868); Foogman v. Patterson, 83 N.W. 15 (N.D. 1900); Butt v. Green, 29 Ohio St. 667 (1876); Gedhill v. Walker, 55 N.E.2d 647 (Ohio 1944); Hansen v. Jones, 109 P. 868 (Or. 1910); Bair v. Steinman, 52 Pa. 423 (1866); Blair v. Guaranty Sav. Loan & Inv. Co., 118 S.W. 608 (Tex. Civ. App. 1909); Bryant v. Smith, 165 B.R. 176 (Bankr. W.D. Va. 1994)* (holding that debtors waived homestead right by failing to claim it). *See In re Braverman, 150 B.R. 681 (Bankr. S.D. Ohio 1993)* (holding that under Ohio law homestead is not available until there is a forced judicial sale of the property).

(n423)Footnote 1595. *Lake Region Credit Union v. Crystal Pure Water, Inc., 502 N.W.2d 524 (N.D. 1993)* (holding that the sheriff's sale of land did not violate the homestead rights of the debtor, because she lost all rights to the land once the redemption period had expired).

(n424)Footnote 1596. *Dains v. Prosser, 32 Barb. 290 (N.Y. 1860); United States v. Rode Corp., 996 F.2d 174 (7th Cir. 1993)* (holding that homestead was unavailable for corporate farmer who failed to apply before the deadline).

(n425)Footnote 1597. *McCluskey v. McNeeley, 8 Ill. (3 Gilm.) 578 (1846); State v. Barada, 57 Mo. 562 (1874); Pyett v. Rhea, 53 Tenn. (6 Heisk) 136 (1871).*

(n426)Footnote 1598. *Crum v. O'Rear, 24 N.E. 956 (Ill. 1890); Foley v. Cooper, 43 Iowa 376 (1876); First Nat'l Bank v. Phillips, 212 N.W. 678 (Iowa 1927)* (exemption waived by stipulation in note); *Schloss v. Unsell, 216 P. 1091 (Kan. 1923)* (exemption may be waived in order for goods); *Crout v. Sauter, 13 Bush (76 Ky.) 442 (1877); Dye v. Mann, 10 Mich. 291 (1862); Littlejohn v. Egerton, 76 N.C. 468 (1877); Schaf v. Corey, 196 N.W. 502 (N.D. 1923)* (wife's homestead rights cannot be waived or forfeited by husband); *In re Estate of Arbeitman, 886 S.W.2d 644 (Mo. App. 1994)* (holding that prenuptial agreement acted to waive the surviving wife's right to homestead exemption); *United States v. Warren Brown & Sons Farms, 868 F. Supp. 1129 (E.D. Ark. 1994)* (holding that debtor waived all state homestead rights when she executed a written waiver); *NCNB Tex. Nat'l Bank v. Carpenter, 849 S.W.2d 875 (Tex. App. 1993)* (holding that debtor is estopped from claiming homestead when his actions suggest that property is not homestead).

(n427)Footnote 1599. *Terrell v. Hurst, 76 Ala. 588 (1884); Tanner v. Mutual Benefit Bldg. Ass'n, 20 S.E. 499 (Ga. 1894); Maloney v. Newton, 85 Ind. 565 (1882); Doherty v. Ramsey, 27 N.E. 879 (Ind. App. 1891); In re Julian, 163 B.R. 478 (Bankr. N.D. Tex. 1994)* (holding that debtor was not estopped by prior designation or disclaimer deed of trust from asserting homestead right); *In re Hughes, 172 B.R. 205 (Bankr. N.D. Tex. 1993)* (holding that disclaiming homestead in affidavits and acknowledging liens in deed did not estop debtor from claiming business homestead).

(n428)Footnote 1600. *In re Dunlap's Estate, 87 P.2d 225 (Or. 1939).*

Surviving spouse may waive and abandon his or her homestead right and that upon such abandonment the homestead becomes subject to administration and the administrator may take possession of other property. *Meyer v. Security Nat'l Bank, 294 P.2d 572 (Okla. 1955).*

(n429)Footnote 1601. Where the homestead is a mere right of occupancy a bankruptcy court can sell the fee subject only to such right which does not descend to the bankrupt's heirs. *Morgridge v. Converse, 81 N.E.2d 112 (Ohio 1948).*

Washington homestead laws were intended to protect the family from loss of its homestead in case of economic stress and were not intended to protect single debtors without dependents. *In re Statham, 483 F.2d 436 (9th Cir. 1973).*

Regardless of claims of creditors. *Bank of Sun Prairie v. Hovig, 218 F. Supp. 769 (W.D. Ark. 1963).*

Judgment lien is junior to a prior homestead declaration. *Curtis v. Kern County, 37 113 Cal. Rptr. 41 (1974).*

Mortgages on homesteads are void under public policy unless for improvements or those subordinated thereto. *Hufstedler v. Glenn, 82 S.W.2d 733 (Tex. Civ. App. 1935). See Craig Lewis, Intentions, Mortgages and the Homestead Exemption: A Matter of Estoppel, 24 Baylor L. Rev. 187 (1972).*

Homestead not liable for deceased owner's debts. *In re Boston's Estate, 491 P.2d 1033 (Wash. 1971).*

Homestead of a family not more than 200 acres, if not in a municipality, for a single adult, in rural area, not more than 100 acres, for both in a city, not in excess of $10,000 in value, is exempt from attachment or execution in Texas. Vernon's Stat., Arts. 3833, 3835.

See Ronald W. Tweedel *The Effect of A Declaration of Homestead On A Pre-Existing Ordinary Debt, 28 La. L. Rev. 275 (1968).*

See also Fred Winkler *Creditors and the South Dakota Homestead Exemption, 17 S.D.L. Rev. 483 (1972);* Craig Lewis *Intentions, Mortgages and the Homestead Exemption: A Matter of Estoppel, 24 Baylor L. Rev. 187 (1972).*

Rental income from the leased portion of an exempt homestead is also exempt if not from a business homestead. *Schwarz v. Teper, 223 N.W.2d 896 (Wis. 1974).*

In *Kell v. Bella Vista Village Prop. Owners Ass'n, 528 S.W.2d 651 (Ark. 1975),* it was held that a homeowners association lien created by the association agreement was valid as against a claim of homestead.

In Florida, where the homestead is not charged with the decedent's debts or costs of administration, it may be devised to the owner's spouse if there are no minor children. But upon death of a husband intestate the widow takes a life estate with remainder to his children. *In re Estate of Murphy, 340 So. 2d 107 (Fla. 1976).*

Statutory paving lien is not binding on homestead property. *Amaya v. Texas Sec. Corp., 527 S.W.2d 218 (Tex. Civ. App. 1975); Boudreaux Civic Ass'n v. Cox, 882 S.W.2d 543 (Tex. App. 1994)* (holding that the foreclosure of a homestead is allowed only when specifically permitted by the Constitution). *Ergo v. State of Florida, 670 So. 2d 1079* (constitutional homestead guarantee preventing a lien from attaching to the homestead property).

(n430)Footnote 1602. *Meredith v. Holmes, 68 Ala. 190 (1880); Randolph v. Brown, 22 So. 524 (Ala. 1897); Gunn v. Hardy, 31 So. 443 (Ala. 1901); Davis v. Henson, 29 Ga. 345 (1859); Moody v. Barker, 222 S.W. 89 (Ky. 1920);*

Cassady v. Morris, 91 P. 888 (Okla. 1907); Hawkins v. Corbit, 201 P. 649 (Okla. 1921).

Statutory paving lien is not binding on homestead property. *Amaya v. Texas Sec. Corp., 527 S.W.2d 218 (Tex. Civ. App. 1975). State v. Ten Acres of Land, 877 P.2d 597 (Okla. 1994)* (holding that homestead provisions were created to protect the entire family and cannot be attached for the tort of one member).

(n431)Footnote 1603. *Mertz v. Berry, 59 N.W. 445 (Mich. 1894); Dellinger v. Tweed, 66 N.C. 206 (1872); Gill v. Edwards, 87 N.C. 76 (1882); Smith v. Omans, 17 Wis. 395 (1863); Davis v. Lammons, 151 So. 2d 907 (Miss. 1963).*

(n432)Footnote 1604. *McLaren v. Anderson, 8 So. 188 (Ala. 1886); Cohn v. Hoffman, 45 Ark. 376 (1885); Davis v. Henson, 29 Ga. 345 (1859); Nowling v. McIntosh, 89 Ind. 593 (1883); Dent v. Dent, 166 S.W.2d 582 (Mo. 1942); Long v. Walker, 10 S.E. 858 (N.C. 1890); Ramsey v. Lake County, 14 N.W.2d 125 (S.D. 1944); Wright v. Straub, 64 Tex. 64 (1885); Whiteman v. Burkey, 282 S.W. 788 (Tex. 1926); Colwick v. Wright, 275 S.W. 152 (Tex. Civ. App. 1925); Harris v. Cordella, 285 S.W. 268 (Tex. Com. App. 1926); McMurdie v. Chugg, 107 P.2d 163 (Utah 1940); Burton v. Mill, 78 Va. 468 (1884).*

Homestead of a family not more than 200 acres, if not in a municipality, for a single adult, in rural area, not more than 100 acres, for both in a city, not in excess of $10,000 in value, is exempt from attachment or execution in Tex. Stat., arts. 3833, 3835.

(n433)Footnote 1605. *King v. Goetz, 11 P. 656 (Cal. 1886); Gray v. Bybee, 141 P.2d 32 (Cal. App. 1943); Dye v. Cooke, 12 S.W. 631 (Tenn. 1889).*

(n434)Footnote 1606. *Perry v. Ross, 37 P. 757 (Cal. 1894); Eyster v. Hatheway, 50 Ill. 521 (1864); Dreese v. Myers, 34 P. 349 (Kan. 1893); Loftis v. Loftis, 28 S.W. 1091 (Tenn. 1895).*

(n435)Footnote 1607. *See McWilliams v. Bones, 10 S.E. 724 (Ga. 1890); Roy v. Clark, 12 S.W. 845 (Tex. 1889); Machicek v. Barcak, 170 S.W.2d 715 (Tex. 1943).*

(n436)Footnote 1608. *Walker v. Woods, 13 N.W.2d 193 (Mich. 1944).*

Grantee of a homestead takes property free and clear of creditor's judgment against grantor. *Smith v. Popham, 513 P.2d 1172 (Ore. 1973).*

(n437)Footnote 1609. *Shepler v. Kubina, 563 S.W.2d 382 (Tex. Civ. App. 1978).*

(n438)Footnote 1610. *Security Trust & Sav. Bank v. McClure, 241 P. 515 (Ariz. 1925); Martin v. Hildebrand, 212 P. 618 (Cal. 1923); Hutchinson Shoe Co. v. Turner, 130 So. 623 (Fla. 1930); Kilmer v. Garlick, 56 N.E. 1103 (Ill. 1900); Wernik v. Kolodziejczak, 215 N.W. 360 (Mich. 1927); Dreyfus v. Dickason, 56 P.2d 881 (Okla. 1936); Howard v. Mayher, 88 S.W. 409 (Tex. Civ. App. 1905).*

Contra, Hansen v. Jones, 109 P. 868 (Ore. 1910).

See Frank R. Lacy, *Homestead Exemption -- Oregon Law, a Postscript, 34 Or. L. Rev. 1 (1954).*

A judgment lien cannot attach to property which is subject to a prior homestead declaration. *Swearingen v. Byrne, 136 Cal. Rptr. 736 (1977).*

(n439)Footnote 1611. *Metz v. Williams, 88 P.2d 1093 (Kan. 1939).*

Homestead is free from owner's debts incurred after acquisition of the homestead. *In re Williams' Estate, 216 N.W.2d 568 (Iowa 1974); In re Thomas, 172 B.R. 673 (Bankr. M.D. Fla. 1994)* (holding that homestead is disallowed to the

extent that proceeds from an automobile sale are used to pay down its mortgage).

(n440)Footnote 1612. *Beecher v. Baldy, 7 Mich. 488 (1859).*

In Oregon homesteads are exempt from execution sale but not from liens. *See* Donald Ross Marshall, *Homestead Exemption, Oregon Law, 20 Or. L. Rev. 328 (1941).*

Waiver of homestead property is against public policy, even where waiver is executed in a foreign state and judgment is rendered in a foreign state. *Sherbill v. Miller Mfg. Co., 89 So. 2d 28 (Fla. 1956).*

(n441)Footnote 1613. *Andrews v. Security Nat'l Bank, 50 S.W.2d 253 (Tex. 1932).*

(n442)Footnote 1614. *See* in general: *Posey v. Dodson, 100 So. 488 (Ala. 1924); King v. Chandler, 105 So. 184 (Ala. 1925); Starr v. City Nat'l Bank, 252 S.W. 356 (Ark. 1923); Hinkel v. Crowson, 206 P. 58 (Cal. 1922); Priddel v. Shankie, 159 P.2d 438 (Cal. App. 1945); Jones v. Carpenter, 106 So. 127 (Fla. 1925); Rose v. Crane Heating Co., 31 S.E.2d 717 (Ga. 1944); Rewerts v. Johnson, 143 N.E. 437 (Ill. 1924); Szymanski v. Szymanski, 176 N.W. 806 (Iowa 1920); Brunsdon v. Brunsdon, 200 N.W. 823 (Iowa 1924); Sheakley v. Mechler, 203 N.W. 929 (Iowa 1925); Westerman v. Raid, 212 N.W. 134 (Iowa 1927); Farmers State Bank v. Pickering, 205 P. 1110 (Kan. 1922); Moody v. Barker, 222 S.W. 89 (Ky. 1920); Baker v. Davis, 262 S.W. 3 (Ky. 1924); Louisiana Red Cypress Co. v. Rabalais, 112 So. 647 (La. 1927); Lindell v. Lindell, 185 N.W. 929 (Minn. 1921); H. E. Westerman Lumber Co. v. Raschke, 208 N.W. 960 (Minn. 1926); Gibson v. Randsdell, 188 S.W.2d 35 (Mo. 1945); Seagle v. Pagni, 250 P. 991 (Nev. 1926); Anderson v. Anderson, 110 S.E. 863 (N.C. 1922); Holton v. Holton, 119 S.E. 751 (N.C. 1923); Virginia-Carolina Chem. Co. v. Walston, 123 S.E. 196 (N.C. 1924); In re Gardner's Estate, 250 P. 490 (Okla. 1926); Van Meter v. Field, 159 P.2d 546 (Okla. 1945); Tucker v. Peoples Bank, 137 S.E. 601 (S.C. 1927); Olson v. Colton Sav. Bank, 213 N.W. 364 (S.D. 1927); Harrison v. First Nat'l Bank, 224 S.W. 269 (Tex. Civ. App. 1920), modified 238 S.W. 209 (Tex. Com. App. 1922); Benavides v. Houston Ice & Brewing Ass'n, 224 S.W. 385 (Tex. Civ. App. 1920); Turbeville v. Book, 226 S.W. 814 (Tex. Civ. App. 1920); Glenn v. Shamburger, 240 S.W. 701 (Tex. Civ. App. 1922); Hammond v. Floyd, 255 S.W. 777 (Tex. Civ. App. 1923); Stephens v. Cox, 256 S.W. 643 (Tex. Civ. App. 1923); Smith v. Clark, 266 S.W. 518 (Tex. Civ. App. 1924); Gregory v. Ward, 285 S.W. 935 (Tex. Civ. App. 1926); Jones v. Moore, 289 S.W. 709 (Tex. Civ. App. 1926); Skinner v. Home Bldg. & Loan Ass'n, 292 S.W. 913 (Tex. Civ. App. 1927); Maxwell v. Schott, 295 S.W. 266 (Tex. Civ. App. 1927); Clem Lumber Co. v. Elliott Lumber Co., 254 S.W. 935* (Tex. Com. App. (1923); *Warsco v. Oshkosh Sav. & Trust Co., 208 N.W. 886 (Wis. 1926).*

To the effect that if there is a provision for future advances in a deed of trust one spouse may make the homestead liable. *Newton County Bank v. Jones, 299 So. 2d 215 (Miss. 1974).*

See David W. Knapp, *Homestead v. Mechanics' Lien,* 40 Denver L.C.J. 2 (1963). *In re Bernard, 40 F.3d 1028 (9th Cir. 1994)* (holding that the California homestead statute does not give the debtor an absolute right to retain the homestead itself).

(n443)Footnote 1615. *Gunn v. Barry, 82 U.S. (15 Wall.) 610 (1872); Edwards v. Kearzey, 96 U.S. 595 (1877); Tillotson v. Millard, 7 Minn. 513 (1862); Dye v. Cooke, 12 S.W. 631 (Tenn. 1889).*

Holding that one spouse alone may incur a debt on homestead property under a deed of trust securing future advance. *Newton County v. Jones, 299 So. 2d 215 (Miss. 1974). Contra In re Hughes, 172 B.R. 205 (Bankr. N.D. Tex. 1993)* (holding that the retroactive application of the Texas business homestead exemption does not violate the due process right or impair the obligation of contract protected under the United States Constitution). *Lowe v. Sandoval, 103 F.3d 20 (5th Cir. 1997)* (a debtor's right to homestead exemption was determined as of the date the Ch. 13 case was commenced, rather than as of the date the Ch. 13 case was converted to a Ch. 7 case); *Gruet v. Federal Deposit Ins. Corp., 879 F. Supp. 153 (D. Mass. 1995)* (a shareholder's obligation on a guaranty of a revolving line of credit became a "debt contracted" before the guarantor's filing of a declaration of homestead); *Gibson Group, Ltd. of Pinellas County v.*

Cooper, 197 B.R. 698 (M.D. Fla. 1996) (a debtor who already owned title to the property could avoid a judgment lien, even though the lien attached to the property before the homestead exemption was established); *Gernat v. Belford, 192 B.R. 601 (D. Conn. 1996)* (homestead exemption applied prospectively only); *Herndon v. Grilz, 920 P.2d 998 (Nev. 1996)* (when the right to claim a homestead and a judgment lien attach simultaneously to a piece of property, the homestead right prevails).

(n444)Footnote 1616. *First State Bank v. Fischer, 272 N.W. 752 (N.D. 1937) See In re Hogan's Estate, 282 N.W. 5 (Wis. 1938).*

(n445)Footnote 1617. *Bracey v. Gray, 121 P.2d 770 (Cal. App. 1942); Christy v. Dyer, 14 Iowa 438 (1862); Whinery v. McLeod, 102 N.W. 132 (Iowa 1905); Tuttle v. Howe, 14 Minn. 145 (1869); Shipman v. Fitzpatrick, 164 S.W.2d 912 (Mo. 1942); Vincent v. Vineyard, 61 P. 131 (Mont. 1900); Robinson v. Leach, 31 A. 32 (Vt. 1895).*

See Chastain v. Arkansas Bank & Trust Co., 249 S.W. 1 (Ark. 1923).

A pre-marital contract allegedly waiving the wife's right as surviving spouse to occupy the homestead and use of its property was unenforceable since homestead right in the survivor does not exist until the death of one of the spouses. *In re Streeper, 158 B.R. 783 (Bankr. N.D. Iowa 1993)* (holding that exemption does not apply to debts contracted prior to acquiring homestead).

(n446)Footnote 1618. *Paxton v. Sutton, 73 N.W. 221 (Neb. 1897); Dye v. Cooke, 12 S.W. 631 (Tenn. 1889).*

(n447)Footnote 1619. *Coon v. Henderson, 199 So. 704 (Ala. 1940); Brown v. Ennis, 61 S.W. 379 (Ark. 1901); Wilhelm v. Locklar, 35 So. 6 (Fla. 1903); Strohecker v. Irvine, 76 Ga. 639 (1886); Christy v. Dyer, 14 Iowa 438 (1862); Burnap v. Cook, 16 Iowa 149 (1864); Stevens v. Stevens, 92 Mass. (10 Allen) 146 (1865); Keith v. Albrecht, 94 N.W. 677 (Minn. 1903); Dortch v. Benton, 3 S.E. 638 (N.C. 1887); Mercer v. McKeel, 108 P.2d 138 (Okla. 1940); Andrews v. Security Nat'l Bank, 50 S.W.2d 253 (Tex. 1932); Machicek v. Barcak, 170 S.W.2d 715 (Tex. 1943); De Busk v. Jacksonville Bldg. & Loan Ass'n, 147 S.W.2d 537 (Tex. Civ. App. 1941); Federal Land Bank of Saint Paul v. Ziebarth, 520 N.W.2d 51 (N.D. 1994)* (holding that sale of homestead to satisfy mortgage is constitutional); *In re Onyan, 163 B.R. 21 (Bankr. N.D.N.Y. 1993)* (holding that homestead exemption does not defeat mortgages or mechanics' liens on the homestead and does not apply to judgments recovering the purchase price of the homestead); *In re Freytag, 155 B.R. 150 (Bankr. N.D. Tex. 1993)* (holding that homestead was not exempt from liens securing original construction notes). *See Ketcham v. First Nat'l Bank of New Boston, 875 S.W.2d 753 (Tex. App. 1994)* (holding that debtor may sell homestead to pay bank).

(n448)Footnote 1620. *Acruman v. Barnes, 51 S.W. 319 (Ark. 1899); White v. Wheelan, 71 Ga. 533 (1883); Nichols v. Overacker, 16 Kan. 54 (1876); Warhmund v. Merritt, 60 Tex. 24 (1883).*

(n449)Footnote 1621. *Austin v. Underwood, 37 Ill. 439 (1865); Dreese v. Myers, 34 P. 349 (Kan. 1893).*

Alimony of former wife is not a lien on homestead. *Bendl v. Bendl, 246 So. 2d 574 (Fla. App. 1971).*

(n450)Footnote 1622. *Richards v. Shear, 11 P. 607 (Cal. 1886); McWilliams v. Bones, 10 S.E. 724 (Ga. 1890); DePriest v. Ransom, 193 P.2d 191 (Kan. 1948); Butler v. Davis, 23 S.W. 220 (Ky. 1893); Brown v. Ingram's Ex'x., 168 S.W.2d 31 (Ky. 1943); Nickerson v. Crawford, 77 N.W. 292 (Minn. 1898); Miller v. Brown, 79 Tenn. (11 Lea) 155 (1883).*

A statutory paving lien is not binding on homestead property. *Amaya v. Texas Sec. Corp., 527 S.W.2d 218 (Tex. Civ. App. 1975); In re Streeper, 158 B.R. 783 (Bankr. N.D. Iowa 1993)* (holding that debts incurred for improvements for homestead were not subject to homestead exemption); *Colwell v. Royal Interstate Trading Co., 226 B.R. 714 (Bankr. S.D. Fla. 1998)* (holding that under the Florida homestead law a homestead exemption may not be used to shield

property from (1) payment of taxes and assessments thereon; (2) obligations contracted for the purchase, improvement, or repair thereof; or (3) obligations contracted for house, field, or other labor performed on realty); *Munn v. Thornton, 956 P.2d 1213 (Ala. 1998)* (holding that contractor's lien for pending labor and materials to construct home was paramount to owners' homestead exemption).

(n451)Footnote 1623. *Moore v. Granger, 30 Ark. 574 (1875); In re McCauley, 50 Cal. 544 (1875); Brooks v. State, 54 Ga. 36 (1875); Zander v. Scott, 46 N.E. 2 (Ill. 1897); Ryan v. Wessels, 15 Iowa 145 (1863); Meador v. Meador, 10 S.W. 651 (Ky. 1889); Brown v. Ingram's Ex'x, 168 S.W.2d 31 (Ky. 1943); Clements v. Lacey, 51 Tex. 150 (1879).*

See Andrews v. Security Nat'l Bank, 50 S.W.2d 253 (Tex. 1932) (effect of execution to lender of notes for an antecedent debt).

A homestead, when declared, takes priority over an earlier judgment as to property purchased after the judgment was rendered. *Northern State Bank v. Toal, 230 N.W.2d 153 (Wis. 1975).*

(n452)Footnote 1624. *Robinson v. Wilson, 15 Kan. 595 (1875); Kelly v. Dill, 23 Minn. 435 (1877) Contra, Letchford v. Cary, 52 Miss. 791 (1876).*

(n453)Footnote 1625. *Yost v. Devault, 3 Iowa 345 (1856); McMurdie v. Chugg, 107 P.2d 163 (Utah 1940).*

(n454)Footnote 1626. *Andrews v. Security Nat'l Bank, 50 S.W.2d 253 (Tex. 1932); In re Sheaffer, 159 B.R. 758 (Bankr. E.D. Va. 1993)* (holding that homestead is subject to consensual mortgage liens).

(n455)Footnote 1627. *Skinner v. Beatty, 16 Cal. 156 (1860); Burnap v. Cook, 16 Iowa 149 (1864); Lumber Prods., Inc. v. Crochet, 156 So. 2d 438 (La. 1963); Kansas City Granite & Monument Co. v. Jordan, 29 S.W. 763 (Mo. 1927); Merrigan v. English, 22 P. 454 (Mont. 1889); Bonner v. Minnier, 34 P. 30 (Mont. 1893); John L. Roper Lumber Co. v. Lawson, 143 S.E. 847 (N.C. 1928); Ralls v. Caylor Lumber Co., 171 P. 24 1053 (Okla. 1918); Stone v. Darnell, 20 Tex. 11 (1857); Andrews v. Security Nat'l Bank, 50 S.W.2d 253 (Tex. 1932); Farinholt v. Luckhard, 21 S.E. 817 (Va. 1886).In re Onyan, 163 B.R. 21 (Bankr. N.D.N.Y. 1993)* (holding that homestead exemption does not defeat mortgages or mechanics' liens on the homestead and does not apply to judgments recovering the purchase price of the homestead).

(n456)Footnote 1628. *Evans v. Jensen, 168 P. 762 (Utah 1917); Brace & Hergert Mill Co. v. Burbank, 151 P. 803 (Wash. 1915).*

Rental income from the leased portion of an exempt homestead is also exempt if not from a business homestead. *Schwanz v. Teper, 223 N.W.2d 896 (Wis. 1974).*

(n457)Footnote 1629. *Jones v. Carpenter, 106 So. 127 (Fla. 1925); Colwell v. Royal Interstate Trading Co., 226 B.R. 714 (Bankr. S.D. Fla. 1998)* (holding that under the Florida homestead law a homestead exemption may not be used to shield property from (1) payment of taxes and assessments thereon; (2) obligations contracted for the purchase, improvement, or repair thereof; or (3) obligations contracted for house, field, or other labor performed on realty).

(n458)Footnote 1630. *John Spry Lumber Co. v. Sault Sav. Bank, Loan & Trust Co., 43 N.W. 778 (Mich. 1889); Morgan v. Benthein, 75 N.W. 204 (S.D. 1898); Volker-Scowcroft Lumber Co. v. Vance, 88 P. 896 (Utah 1907) See Home Lumber Co. v. Heckel, 293 N.W. 549 (S.D. 1940).*

(n459)Footnote 1631. *Andrews v. Security Nat'l Bank, 50 S.W.2d 253 (Tex. 1932); Bank of Kansas v. Davison, 861 P.2d 806 (Kan. 1993)* (holding that government could sell homestead to satisfy tax liens); *Arred v. United States, 830 F. Supp. 212 (S.D.N.Y. 1993)* (holding that homestead exemption does not apply to taxation). *United States v. Pottorf, 898 F. Supp. 792 (D. Kans. 1995)* (a state homestead interest could not prevent forcing the sale of homestead property); *Benchmark Bank v. Crowder, 919 S.W.2d 657 (Tex. 1996)* (liens enforceable against a debtor's homestead were not also

valid against the debtor's nondelinquent spouse's interest in the homestead).

(n460)Footnote 1632. *Wichita Falls ex rel. L. E. Whitham & Co. v. Williams, 26 S.W.2d 910 (Tex. 1930).*

A statutory paving lien is not binding on homestead property. *Amaya v. Texas Sec. Corp., 527 S.W.2d 218 (Tex. Civ. App. 1975); In re Cunningham, 163 B.R. 593 (Bankr. W.D. Wash. 1994)* (holding that homestead is exempt from lien for real property taxes until state legislature creates exception); *Cornerstone Bank v. Randel, 869 S.W.2d. 580 (Tex. App. 1993)* (holding that inheritance tax could not be obtained from surviving spouse by foreclosing on homestead).

(n461)Footnote 1633. *See Arnold v. Stephens, 296 S.W. 24 (Ark. 1927).*

(n462)Footnote 1634. *Dimke v. Finke, 295 N.W. 75 (Minn. 1940).*

(n463)Footnote 1635. *Erlenbach v. Cox, 89 So. 465 (Ala. 1921); Peoples Bank v. Barrow, 94 So. 600 (Ala. 1922); Union Oil Co. v. Norton Morgan Commercial Co., 202 P. 1077 (Ariz. 1922); Security Trust & Sav. Bank v. McClure, 241 P. 515 (Ariz. 1925); Gray v. Patterson, 46 S.W. 730 (Ark. 1898); Ackley v. Chamberlain, 16 Cal. 181 (1860); McDonald v. Badger, 23 Cal. 393 (1863); Lubbock v. McMann, 22 P. 1145 (Cal. 1889); Sanders v. Russell, 24 P. 852 (Cal. 1890); Boggs v. Dunn, 116 P. 743 (Cal. 1911); Martin v. Hildebrand, 212 P. 618 (Cal. 1923); Kemp v. Enemark, 230 P. 441 (Cal. 1924); Stockton Sav. & Loan Bank v. Mello, 256 P. 202 (Cal. 1927); Hohn v. Pauly, 106 P. 266 (Cal. App. 1909); Coca Cola Bottling Co. v. Feliciano, 114 P.2d 604 (Cal. App. 1941); Schuler-Knox Co. v. Smith, 144 P.2d 47 (Cal. App. 1943); Clausseneus v. Anderson, 30 Cal. Rptr. 772 (1963); Whitlock v. Alliance Coal Co., 214 P. 546 (Colo. 1923); Sterling Nat'l Bank v. Francis, 240 P. 945 (Colo. 1925); Wilhelm v. Locklar, 35 So. 6 (Fla. 1903); Milton v. Milton, 58 So. 718 (Fla. 1912); Choquette v. Dodge, 86 So. 271 (Fla. 1920); Jones v. Carpenter, 106 So. 127 (Fla. 1925); Hart v. Gulf Fertilizer Co., 108 So. 886 (Fla. 1926); Coleman v. Williams, 200 So. 207 (Fla. 1941); Gober v. Richards, 128 S.E. 668 (Ga. 1925); Kirkpatrick Hardware Co. v. Rogers, 134 S.E. 806 (Ga. App. 1926); Campbell v. Largilliere Co., 256 P. 371 (Idaho 1927); Bliss v. Clark, 39 Ill. 590 (1864); McDonald v. Crandall, 43 Ill. 231 (1867); Mayne v. Drury, 129 N.E. 77 (Ill. 1920); Diets v. Hagler, 141 N.E. 194 (Ill. 1923); Lehman v. Cottrell, 19 N.E.2d 111 (Ill. App. 1939); Barnard v. Brown, 13 N.E. 401 (Ind. 1887); Marmon v. White, 51 N.E. 930 (Ind. 1898); Green v. Forney, 111 N.W. 976 (Iowa 1907); James v. Weisman, 143 N.W. 428 (Iowa 1913); Wadle v. Boston Market Co., 191 N.W. 528 (Iowa 1923); Hallam v. Finch, 195 N.W. 352 (Iowa 1923); Brunsdon v. Brunsdon, 200 N.W. 823 (Iowa 1924); McConnell v. Wolcott, 78 P. 848 (Kan. 1904); Randolph v. Wilhite, 96 P. 492 (Kan. 1908); Dean v. Evans, 188 P. 436 (Kan. 1920); Owens v. Wagers, 235 P. 589 (Kan. 1925); Anderson v. Anderson, 123 P.2d 315 (Kan. 1942); Nunn v. Page, 121 S.W. 442 (Ky. 1909); Evansville Coffin Co. v. Sumner, 226 S.W. 363 (Ky. 1920); Graham v. Humm, 229 S.W. 80 (Ky. 1921); Kinser v. Norvelle-Chambers Shoe Co., 235 S.W. 740 (Ky. 1921); Wells v. Dixon, 283 S.W. 434 (Ky. 1926); Schexnailder v. Fontenot, 85 So. 207 (La. 1920); Clarke v. Oden, 99 So. 605 (La. 1924); Rigdon v. Bogan, 107 So. 403 (La. 1926); Allen v. Crane, 116 N.W. 392 (Mich. 1908); Goswitz v. Jefferson, 143 N.W. 720 (Minn. 1913); H. E. Westerman Lumber Co. v. Raschke, 208 N.W. 960 (Minn. 1926); Gordon v. Emerson-Brantingham Implement Co., 210 N.W. 87 (Minn. 1926); Renville State Bank v. Lentz, 214 N.W. 467 (Minn. 1927); Willis v. Allen, 95 So. 435 (Miss. 1923); Macke v. Byrd, 33 S.W. 448 (Mo. 1895); White v. Spencer, 117 S.W. 20 (Mo. 1909); Ehlers v. Potter, 219 S.W. 915 (Mo. 1920); Kelley v. Parman, 282 S.W. 755* (Mo. App.); *Vincent v. Vineyard, 61 P. 131 (Mont. 1900); Giles v. Miller, 54 N.W. 551 (Neb. 1893); Hoy v. Anderson, 58 N.W. 125 (Neb. 1894); Roberts v. Robinson, 68 N.W. 1035 (Neb. 1896); Farmers Loan & Trust Co. v. Schwenk, 74 N.W. 1063 (Neb. 1898); Goble v. Brenneman, 106 N.W. 440 (Neb. 1905); Radbruck v. First Nat'l Bank, 145 N.W. 715 (Neb. 1914); Corn v. Hyde, 188 P. 1102 (N.M. 1920); Meyers Co. v. Mirabal, 202 P. 693 (N.M. 1921); Martin v. Meredith, 71 N.C. 214 (1874); Sugg v. Pollard, 115 S.E. 153 (N.C. 1922); Johnson v. Leavitt, 125 S.E. 490 (N.C. 1924) Gerlach Bank v. Allen, 152 P. 399 (Okla. 1915); Harris v. Cherokee State Bank, 198 P. 878 (Okla. 1921); Japp v. Sapulpa State Bank, 215 P. 1059 (Okla. 1923); Finerty v. First Nat'l Bank, 218 P. 859 (Okla. 1923); Holland v. Robbins, 219 P. 387 (Okla. 1923); Farmers Exch. Bank v. Cutler, 229 P. 186 (Okla. 1924); Kleindorfer v. Dascom-Daniels Lumber Co., 226 P. 354 (Okla. 1924); Booker v. First Nat'l Bank, 245 P. 881 (Okla. 1926); Kelough v. Neff, 382 P.2d 135 (Okla. 1963) Hansen v. Jones, 109 P. 868 (Or. 1910); De Haven & Son Hardware Co. v. Schultz, 259 P. 778 (Or. 1927); Ketchin v. McCarley, 11 S.E. 1099 (S.C. 1886); Harding v. Harding, 92 N.W. 1080 (S.D. 1902); Aisenbrey v. Hensley, 17 N.W.2d 267 (S.D. 1945); Freiberg v. Walzem, 20 S.W.*

60 (Tex. 1892); Higgins v. Bordages, 31 S.W. 52 (Tex. 1895); Savage v. Cowan, 113 S.W. 319 (Tex. Civ. App. 1908); Harrison v. First Nat'l Bank, 224 S.W. 269 (Tex. Civ. App. 1920); Advance-Rumely Thresher Co. v. Blevins, 248 S.W. 1086 (Tex. Civ. App. 1923); Gates v. Pitts, 291 S.W. 948 (Tex. Civ. App. 1927); Harrison v. First Nat'l Bank, 238 S.W. 209 (Tex. Comp. App. 1922); Hughes v. Groshart, 150 S.W.2d 827 (Tex. Civ. App. 1941); Harms v. Ehlers, 179 S.W.2d 582 (Tex. Civ. App. 1944); Banks v. Gumm, 360 S.W.2d 836 (Tex. Civ. App. 1962); Payson Exch. Sav. Bank v. Tietjen, 225 P. 598 (Utah 1924); Traders Nat'l Bank v. Schorr, 54 P. 543 (Wash. 1898); Meikle v. Cloquet, 87 P. 841 (Wash. 1906); Security Nat'l Bank v. Mason, 200 P. 1097 (Wash. 1921); Insley v. Webb, 209 P. 1093 (Wash. 1922); Lyon v. Herboth, 233 P. 24 (Wash. 1925); Brown v. Manos, 250 P. 36 (Wash. 1926); Stafford v. Stafford, 140 P.2d 545 (Wash. 1943); Lien v. Hoffman, 306 P.2d 240 (Wash. 1957) (where judgment has been taken against land which is later declared a homestead, the owner may sell the land to a third party free and clear of the judgment).

Seamans v. Carter, 15 Wis. 548 (1862); Stanley v. Sullivan, 37 N.W. 801 (Wis. 1888); Reburg v. Lang, 1 N.W.2d 759 (Wis. 1942) Altman v. District Ct. of Second Judicial Dist., 254 P. 691 (Wyo. 1927).

Homestead had priority over lien for personal property taxes not situated on the property. *Curtis v. Kern County, 113 Cal. Rptr. 41 (1974).*

A judgment lien cannot attach to property which is subject to a prior homestead declaration. *Swearingen v. Byrne, 136 Cal. Rptr. 736 (1977); Weber v. Weber, 501 N.W.2d 413 (Wis. 1993)* (holding that homestead is exempt from judgment lien, but not from mortgage foreclosure); *United States v. Johnson, 160 F.3d 1061 (5th Cir. 1998)* (holding that under Texas law, judgment liens normally are not valid on homestead property); *Prieto v. Eastern Nat'l Bank, 719 So. 2d 1264 (Fla. Dist. Ct. App. 1998).*

(n464)Footnote 1636. *Moore v. Granger, 30 Ark. 574 (1875); McKee v. Waters, 265 S.W. 947 (Ark. 1924); Arnold v. Stephens, 296 S.W. 24 (Ark. 1927).*

State Bank v. Carson, 4 Neb. 498 (1876); Kaley v. Eselin, 188 N.W. 254 (Neb. 1922); Smith v. Brackett, 36 Barb. (N.Y.) 571 (1862); Sample v. Jackson, 35 S.E.2d 236 (N.C. 1945); Appeal of Eberhart, 39 Pa. 509 (1861); Gray v. Stevens, 302 P.2d 273 (Utah 1956).

Homestead subject to execution for judgment rendered prior to time homestead was established. *Aetna Ins. Co. v. La Gasse, 223 So. 2d 727 (Fla. 1969).*

Judgment lien attaches to homestead property to extent its value exceeds the statute. *Shepard & Morse Lumber Co. v. Clawson, 486 P.2d 542 (Or. 1971); Tassone v. Tovar, 28 Cal. App. 4th 765 (1994)* (holding that judgment lien attaches to homestead in surplus over total of all liens and encumbrances); *In re Henderson, 18 F.3d 1305 (5th Cir. 1994)* (holding that judicial lien attaches to homestead, but property is exempt from its enforcement); *In re Marriage of Johnson, 872 P.2d 308 (Kan. App. 1994)* (holding that homestead exemption protects against forced sales for judgment liens for past due child support); *In re Harrison, 164 B.R. 611 (Bankr. N.D. Ill. 1994)* (holding that judgment lien attaches to homestead which exceeds the exemption limit); *In re Zupan, 172 B.R. 250 (Bankr. S.D. Ind. 1993)* (holding that judgment lien attaches to homestead which exceeds the exemption limit); *In re Ward, 157 B.R. 643 (Bankr. C.D. Ill. 1993)* (holding that judgment lien attaches to homestead which exceeds the exemption limit); *In re Chabot, 992 F.2d 891 (9th Cir. 1993)* (holding that judgment lien attaches to equity in property after subtracting prior liens and exemption); *In re Moler, 152 B.R. 561 (Bankr. S.D. Ill. 1993)* (holding that judgment lien attaches to appreciation of homestead value accumulating above exemption); *In re Richardson, 224 B.R. 804 (Bankr. N.D. Okla. 1998)* (holding that judgment liens attach to homestead property when the property no longer qualifies as debtor's homestead, judgment lien creditor may immediately execute and satisfy its judgment and, as another possible effect of amendment may establish priority over later consensual creditors); see also *In re McKinney-Jones, 219 B.R. 619, 621 (Bankr. W.D. Okla. 1998)* (stating that purpose of Oklahoma's homestead exemption is to provide shelter from elements, not shelter from creditors).

(n465)Footnote 1637. *See Green v. Marks, 25 Ill. 221 (1861); Alley v. Bay, 9 Iowa 509 (1859); Lamb v. Shays, 14 Iowa 567 (1863); Rector v. Rotton, 3 Neb. 171 (1874); Allen v. Cook, 26 Barb. (N.Y.) 374 (1858).*

(n466)Footnote 1638. *Lehman v. Cottrell, 19 N.E.2d 111 (Ill. App. 1939); Wilson v. Hayes-Lucas Lumber Co., 207 N.W. 155 (S.D. 1926) modified, 226 N.W.2d 343 (S.D. 1929).*

(n467)Footnote 1639. *Bliss v. Clark, 39 Ill. 590 (1864); Summers Hardware Co. v. Jones, 23 S.E.2d 883 (N.C. 1943); First State Bank v. Fischer, 272 N.W. 752 (N.D. 1937); In re Jones, 166 B.R. 657 (Bankr. N.D. Ill. 1994)* (holding that judicial liens are destroyed the day the homestead is sold and the proceeds are not sufficient to cover the exemption and all prior liens).

(n468)Footnote 1640. *Moore v. Granger, 30 Ark. 574 (1875); Hoyt v. Howe, 3 Wis. 752 (1854).*

(n469)Footnote 1641. *Tillotson v. Millard, 7 Minn. 513 (1862).*

(n470)Footnote 1642. *Yager v. Yager, 60 P.2d 422 (Cal. 1936).*

(n471)Footnote 1643. *Insley v. Webb, 209 P. 1093 (Wash. 1922).*

(n472)Footnote 1644. *Emrich v. Gilbert Mfg. Co., 35 So. 322 (Ala. 1903); White v. Rosenthal, 35 P.2d 154 (Cal. App. 1934); First Nat'l Bank v. Peel, 145 So. 177 (Fla. 1932); Smith v. Richards, 21 P. 419 (Idaho 1889); First Nat'l Bank v. Vest, 58 N.E. 229 (Ill. 1900); Elston v. Robinson, 21 Iowa 531 (1866); Reusch v. Shafer, 41 N.W.2d 651 (Iowa 1950); Marshall v. Mahorney, 63 S.W. 471 (Ky. 1901); Ellis v. J. Freyhan & Co., 49 So. 975 (La. 1909); Rusch v. Lagerman, 261 N.W. 186 (Minn. 1935); Bunn v. Lindsay, 7 S.W. 473 (Mo. 1888); Wall v. Duggan, 245 P. 953 (Mont. 1926); Paxton v. Sutton, 73 N.W. 221 (Neb. 1897) And see Welch v. Falk, 291 N.W. 488 (Neb. 1940); First State Bank v. Fischer, 272 N.W. 752 (N.D. 1937); Northwest Thresher Co. v. McCarroll, 118 P. 352 (Okla. 1911); Hansen v. Jones, 109 P. 868 (Ore. 1910); Gage v. Neblett, 57 Tex. 374 (1882); Freiberg v. Walzem, 20 S.W. 60 (Tex. 1892); Johnson v. Prosper State Bank, 125 S.W.2d 707 (Tex. Civ. App. 1939); Cabell v. Given, 5 S.E. 442 (W. Va. 1888); Bridge v. Ward, 35 Wis. 687 (1874); In re Hogan's Estate, 282 N.W. 5 (Wis. 1938).*

(n473)Footnote 1645. *Wheeler Perry Co. v. Mortgage Bond Co., 17 P.2d 331 (Ariz. 1932); Bean v. Eves, 20 P.2d 544 (Colo. 1933); White v. Hartman, 145 P. 716 (26 Colo. App. 1915); Kirkpatrick Hardware Co. v. Rogers, 134 S.E. 806 (Ga. App. 1926); Richie v. Duke, 12 So. 208 (Miss. 1892); Wood v. Bowles, 46 So. 414 (Miss. 1908); Barnes & Co. v. Buchanan, 67 So. 462 (Miss. 1915), suggestion of error denied, 68 So. 81; Wright v. Bond, 37 S.E. 65 (N.C. 1900); Wildermuth v. Koenig, 41 Oh. St. 180 (1884); Chafee & Co., v. Rainey, 21 S.C. 11 (1883) Compare Ex parte Morrow, 190 S.E. 506 (S.C. 1937); Blose v. Bear, 12 S.E. 294 (Va. 1890); Kenyon v. Erskine, 124 P. 392 (Wash. 1912); Brown v. Manos, 250 P. 36 (Wash. 1926) Compare, Pratt v. McInroe, 283 P. 1089 (Wash. 1930). See* Christian G. Steinmetz, *Judgment Lien Claimant's Rights against Homestead Exemption Interests: An Equitable Distribution of Mortgage Foreclosure Sale Proceeds, 1981 Wis. L. Rev. 697, 732* (July-Aug. 1981).

(n474)Footnote 1646. *Schaeffer v. Beldsmeier, 17 S.W. 797 (Mo. 1891).*

Rental income from the leased portion of an exempt homestead is also exempt if not from a business homestead. *Schwanz v. Teper, 223 N.W.2d 896 (Wis. 1974).*

(n475)Footnote 1647. *Minor v. Interstate Gravel Co., 94 So. 3 (Miss. 1922).*

If the sale by the owner of the homestead is voluntary, the proceeds are subject to claims of creditors but are not subject if the sale was forced and the proceeds are intended to be used to purchase another homestead. *Obenshain v. Obenshain, 480 S.W.2d 567 (Ark. 1972). In re Glaze, 169 B.R. 956 (Bankr. D. Ariz. 1994)* (holding that when the purchaser had a specific performance judgment enforcing a contract to sell land, the seller could not claim homestead in the proceeds of the sale without paying damages for the breach of contract).

(n476)Footnote 1648. *Meyers v. American Oil Co., 5 So. 2d 218 (Miss. 1941).*

(n477)Footnote 1649. Homestead was subject to homeowner's association contract liens. *Kell v. Bella Vista Village Prop. Owners Ass'n, 528 S.W.2d 651 (Ark. 1975).*

(n478)Footnote 1650. *In re Marriage of Banks, 887 S.W.2d 160 (Tex. App. 1994). See In re Graziadei, 32 F.3d 1408 (9th Cir. 1994)* (holding that homestead was exempt from debt to attorney because obligation was not for support of former spouse, but for attorney fees and costs).

(n479)Footnote 1651. *United States v. One Parcel of Property Located at Lot 85, Country Ridge, A Subdivision in the City of Lenexa, Johnson County, Kansas, 894 F. Supp. 397 (D. Kan. 1995).*

(n480)Footnote 1652. Temporary abandonment of income-producing portion of the homestead does not remove its homestead character so as to make the property liable to execution in satisfaction of judgment lien. *Olesky v. Nicholas, 82 So. 2d 510 (Fla. 1955).*

(n481)Footnote 1653. *Brown v. Turner, 207 P.2d 927 (Okla. 1949); In re Brown's Estate, 183 P.2d 768 (Wash. 1947); Moore v. Hunter, 13 So. 2d 909 (Fla. 1943)* (deed of homestead by husband to wife on separation); *In re Cole, 205 B.R. 382 (Bankr. E.D. Tex. 1997)* (holding that a homestead was abandoned when the owners transferred title to a family partnership); *In re Reitnauer, 223 B.R. 913 (Bankr. N.D. Tex. 1998); Colwell v. Royal Interstate Trading Co., 226 B.R. 714 (Bankr. S.D. Fla. 1998); In re Beebe, 224 B.R. 817 (Bankr. N.D. Fla. 1998).*

(n482)Footnote 1654. *In re Hawthorne, 45 F. Supp. 374 (D. Tex. 1942); Thomas v. Thomas, 18 So. 2d 544 (Ala. 1944); Jones v. Thompson, 166 S.W.2d 1036 (Ark. 1942); Edson-Keith & Co. v. Bedwell, 122 P. 392 (Colo. 1912); Rasmussen v. Rasmussen, 13 N.E.2d 166 (Ill. 1938); Postlethwaite v. Edson, 171 P. 768 (Kan. 1917); Klotz v. Rhodes, 144 S.W. 791 (Mo. 1912); Austin v. Stanley, 46 N.H. 51 (1865); Davis v. Low, 135 P. 314 (Or. 1913); Warner v. Hopkins, 176 N.W. 746 (S.D. 1920); Bell v. Schwarz, 37 Tex. 572* (1872-73); *Radtke v. Radtke, 19 N.W.2d 169 (Wis. 1945); In re Mackey, 158 B.R. 509 (Bankr. M.D. Fla. 1993)* (holding that under Florida homestead law, once property has homestead status, it maintains that status until it is abandoned).

(n483)Footnote 1655. *Phifer v. Miller, 45 N.W.2d 907 (Neb. 1951); In re Lewis, 216 B.R. 644 (Bankr. N.D. Okla. 1998)* (holding that "abandonment" is a term of art and its meaning goes beyond mere vacation of premises, and circumstances, among others, that indicate abandonment of homestead include purchase of new homestead, relinquishment of title to property, and declarations and actions of parties claiming homestead tending to indicate intent to return).

(n484)Footnote 1656. *Phillips v. Springfield, 39 Ill. 83 (1866).*

(n485)Footnote 1657. *McIntosh v. Borchers, 241 N.W.2d 534 (Neb. 1976) appeal after remand, 266 N.W.2d 200 (Neb. 1978); In re Walicek, 4 F.2d 265 (1925); In re Beebe, 224 B.R. 817 (Bankr. N.D. Fla. 1998); In re Roberts, 215 B.R. 197 (Bankr. D. Neb. 1997)* (holding that a homestead exemption is granted to a married person solely on the basis of the marital status without regard to having non-spouse dependents and that the intent to sell the homestead property does not constitute abandonment of the homestead); *In re Raymond, 987 F.2d 675 (10th Cir. 1993)* (holding that debtor had not abandoned her homestead when she intended to move in the immediate future).

(n486)Footnote 1658. *Mower v. Sharit, 85 So. 23 (Ala. 1920); Lucky v. Roberts, 100 So. 878 (Ala. 1924); Thomas v. Thomas, 18 So. 2d 544 (Ala. 1944); Long v. Hoffman, 148 S.W. 245 (Ark. 1912); Wooten v. Farmers & Merchants Bank, 249 S.W. 569 (Ark. 1912); Caldcleugh v. Caldcleugh, 250 S.W. 324 (Ark. 1923); Rasmussen v. Rasmussen, 13 N.E.2d 166 (Ill. 1938); Kawszewicz v. Kawszewicz, 53 N.E.2d 386 (Ill. 1944); Schaffer v. Campbell, 199 N.W. 334 (Iowa 1924); Butler v. Cleland, 202 N.W. 557 (Iowa 1925); Charter v. Thomas, 292 N.W. 842 (Iowa 1940); Conway v. Reed, 235 S.W. 747 (Ky. 1921); Smith v. Moss, 277 S.W. 245 (Ky. 1925); St. Mary Bank & Trust Co. v. Daigle, 55 So. 345 (La. 1911); First Nat'l Bank v. Brooks, 113 So. 853 (La. 1927); Corn v. Hyde, 188 P. 1102 (N.M. 1920); Japp v.*

Sapulpa State Bank, 215 P. 1059 (Ore. 1923); First Nat'l Bank v. Burnett, 254 P. 95 (Okla. 1927); De Haven & Son Hardware Co. v. Schultz, 259 P. 778 (Or. 1927); Yellow-Hair v. Pratt, 182 N.W. 702 (S.D. 1921); Randleman v. Cargile, 163 S.W. 350 (Tex. Civ. App. 1914); Hibbs v. City Nat'l Bank, 293 S.W. 350 (Tex. Civ. App. 1927); R.B. Spencer & Co. v. Green, 203 S.W.2d 957 (Tex. Civ. App. 1947); Funderburk v. Dofflemyer, 234 S.W.2d 889 (Tex. Civ. App. 1950); Chalk v. Daggett, 257 S.W. 228 (Tex. Com. App. 1924).

Homestead is abandoned only if left with no intention to return; continuous possession is not required. *Monroe v. Monroe, 465 S.W.2d 347 (Ark. 1971).*

If the homestead has once been acquired a mere temporary lease of the premises to another does not destroy the homestead. *Gonzales v. Guajardo de Gonzales, 541 S.W.2d 865 (Tex. Civ. App. 1976); In re Ross, 210 B.R. 320 (Bankr. N.D. Ill. 1997)* (holding (1) that the Illinois homestead statute permits a boat used as a primary residence to be claimed as a homestead exemption and (2) that the homestead was not abandoned when the owner temporarily resided on land during the winter season, but had the intent to return); *In re Sullivan, 200 B.R. 682 (Bankr. D. Nev. 1996)* (holding that property owners abandon their homestead when they move to a new residence and lease the old residence to a tenant, and they lacked sufficient intent to return; and that a declaration of abandonment was not required, even though a Nevada statute required declaration of abandonment); *In re Leonard, 194 B.R. 807 (Bankr. N. D. Tex. 1996)* (holding that property owners did not abandon their homestead when they moved to another home for three years, because they intended to return to the homestead); *Hardeman v. Judge, 931 S.W.2d 716 (Tex. App. 1996)* (a guardian may abandon ward's homestead when it is in the ward's best interest to do so).

(n487)Footnote 1659. *Musser v. Zurcher, 146 N.W.2d 559 (Neb. 1966); In re Brink, 162 B.R. 355 (Bankr. M.D. Fla. 1993)* (holding that Florida residents who moved to North Carolina effectively abandoned Florida homestead); *Moore v. Krueger, 507 N.W.2d 155 (Wis. App. 1993)* (holding that homestead was disqualified when debtors moved out of it with vague intention to reoccupy, if they could not sell it); *In re Mackey, 158 B.R. 509 (Bankr. M.D. Fla. 1993)* (holding that debtor abandoned homestead when she accepted a job and moved, listing the property for sale, even though her son lived in homestead and the debtor promised to return if the property did not sell or the job failed).

(n488)Footnote 1660. *Farmers Bldg. & Loan Ass'n v. Jones, 56 S.W. 1062 (Ark. 1900); Stewart v. Pritchard, 141 S.W. 505 (Ark. 1911); Guiod v. Guiod, 14 Cal. 506 (1860); Barson v. Fowler, 65 Ill. 146 (1872); Hand v. Winn, 52 Miss. 784 (1876); Foss v. Strachn, 42 N.H. 40 (1860); Jordan v. Godman, 19 Tex. 273 (1857); Contra, Dunn v. Tozer, 10 Cal. 167 (1858); Stolldorf v. Stolldorf, 384 P.2d 969 (Wyo. 1963)* (nonresident widow entitled to homestead as against purchaser who had bought homestead from husband).

(n489)Footnote 1661. *Croker v. Croker, 7 F.2d 218 (D.C. Fla. 1925); McKenzie v. Rumph, 286 S.W. 1022 (Ark. 1926); Nicholas v. Ward, 168 S.W.2d 1095 (Ark. 1943); Sims v. McFadden, 233 S.W.2d 375 (Ark. 1950); McArthur v. Bridges, 103 S.E. 795 (Ga. 1920); Krueger v. Groth, 209 N.W. 772 (Wis. 1926).*

Contra, Crawford v. Carter, 37 N.W.2d 241 (S.D. 1949).

(n490)Footnote 1662. *Pierce v. Gibson, 184 S.W. 502 (Tex. 1916); Bishop v. Williams, 223 S.W. 512 (Tex. Civ. App. 1920); Ritz v. First Nat'l Bank, 234 S.W. 425 (Tex. Civ. App. 1921).*

(n491)Footnote 1663. *L'Engle v. Forbes, 81 So. 2d 214 (Fla. 1955).*

Removal of one to a nursing home where he died a year later did not constitute abandonment of the homestead. *In re Gotthart's Estate, 202 N.W.2d 397 (Wis. 1972); Moore v. Krueger, 507 N.W.2d 155 (Wis. App. 1993)* (holding that even though the owners could not show that their absence from the home, before it was sold, was temporary, the proceeds of the sale were protected by the homestead exemption allowing them to be used to buy a new home).

(n492)Footnote 1664. *Gambette v. Brock, 41 Cal. 78 (1871); Dearing v. Thomas, 25 Ga. 223 (1858); White v.*

Clark, 36 Ill. 285 (1865).

In Illinois where one spouse separates from the other and abandons the premises, the homestead rights accrue to the other spouse. *Anderson v. Anderson, 356 N.E.2d 788 (Ill. App. 1976), appeal after remand, 378 N.E.2d 1079 (Ill. App. 1978).*

"Where the husband abandons his home and family, his act would not, of course, operate to estop his wife from insisting upon her homestead right, but where he still maintains the family relation and by deed or lease or by other act assumes to abandon the homestead, and the wife leaves the homestead to accompany her husband when he abandons it, she waives her right to object, and, if after so yielding her right she finds the change to have been unwise or unfortunate, she cannot withdraw her waiver to the prejudice of third parties," and this is so even though the statute invalidates "conveyances of a homestead where the husband and wife do not unite in executing the same joint instrument." *Shaffer v. Miller, 192 N.W. 868 (Iowa 1923).*

See Farmers Bldg. & Loan Ass'n v. Jones, 56 S.W. 1062 (Ark. 1900); Stewart v. Pritchard, 141 S.W. 505 (Ark. 1911).

(n493)Footnote 1665. *Cohn v. Litwin, 35 N.E.2d 410 (Ill. App. 1941); Williams v. Williams, 184 N.W. 114 (Neb. 1921).*

(n494)Footnote 1666. *Novotny v. Horecka, 206 N.W. 110 (Iowa 1925).*

(n495)Footnote 1667. *Kinney v. Patterson, 282 S.W.2d 809 (Ark. 1955)* (presumption of abandonment on establishing new home); *Smith v. Marino, 28 So. 2d 780 (La. App. 1947); Karls v. Nichols, 28 N.W.2d 595 (Neb. 1947); Williams v. Johnson, 53 S.E.2d 277 (N.C. 1949); Long Bell Lumber Co. v. Miller, 240 S.W.2d 405 (Tex. Civ. App. 1951).*

(n496)Footnote 1668. *O'Neal v. Miller, 196 So. 478 (Fla. 1940); Korn v. Korn, 15 S.W.2d 1017 (Tex. Com. App. 1929).*

(n497)Footnote 1669. *Younger v. Gianotti, 138 S.W.2d 448 (Tenn. 1940).*

(n498)Footnote 1670. *McCullough v. Forbes, 47 So. 2d 780 (Fla. 1950).*

Renting on crop shares was not abandonment. *In re Sueppel's Estate, 124 N.W.2d 154 (Iowa 1963).*

(n499)Footnote 1671. *Marathon Oil Co. v. Western Oil & Drilling Co., 89 P.2d 939 (Okla. 1939).*

Removal from a homestead and living in another place abandons the first and creates a new homestead. *Norman v. First Bank & Trust Co. of Bryan, 557 S.W.2d 797 (Tex. Civ. App. 1977); In re Leonard, 194 B.R. 807 (Bankr. N. D. Tex. 1996)* (holding that property owners did not abandon their homestead when they moved to another home for three years, because they intended to return to the homestead); *Coury v. Prot, 85 F.2d 244 (5th Cir. 1996)* (abandoned homestead exemption).

(n500)Footnote 1672. *Fyffe v. Beers, 18 Iowa 4, 85 Am. Dec. 577 (1864); Baker v. Estridge, 157 S.W. 1080 (Ky. 1913); Millett v. Pearson, 173 N.W. 411 (Minn. 1919); Smith v. Spafford, 112 N.W. 965 (N.D. 1907); Blatchley v. Dakota Land & Cattle Co., 145 N.W. 95 (N.D. 1914); Carter v. Pickett, 134 P. 440 (Okla. 1913).*

(n501)Footnote 1673. *Stewart v. Pritchard, 141 S.W. 505 (Ark. 1911); Brennan v. Wallace, 25 Cal. 108 (1864); Olesky v. Nicholas, 82 So. 2d 510 (Fla. 1955); Potts v. Davenport, 79 Ill. 455 (1875); Fyffe v. Beers, 18 Iowa 4 (1864); Shepherd v. Cassiday, 20 Tex. 24 (1857), aff'd, Weiner v. Zweib, 141 S.W. 771 (Tex. 1911); Wiener v. Zweib, 128 S.W. 699 (Tex. Civ. App. 1910); In re Gerrald, 151 B.R. 217 (Bankr. W.D. Ark. 1993)* (holding that abandonment of homestead is a question of fact and that the debtor is not entitled to homestead when the debtor clearly testifies about

intent to abandon it); *In re Beebe, 224 B.R. 817 (Bankr. N.D. Fla. 1998).*

(n502)Footnote 1674. *Millett v. Pearson, 173 N.W. 411 (Minn. 1919); Staten v. Harris, 239 S.W. 334 (Tex. Civ. App. 1922); Bayless v. Guthrie, 235 S.W. 843 (Tex. Com. App. 1921); Clem Lab. Co. v. Elliott Lab. Co., 254 S.W. 935 (Tex. Com. App. 1923).*

(n503)Footnote 1675. *In re Johnson, 294 F. 258* (5th Cir.); *Bratton v. Union Sawmill Co., 271 S.W. 32 (Ark. 1925); Shaffer v. Miller, 192 N.W. 868 (Iowa 1923); Gordon v. Emerson-Brantingham Implement Co., 210 N.W. 87 (Minn. 1926); Maupin v. Longacre, 288 S.W. 54 (Mo. 1926); Grotberg v. First Nat'l Bank, 210 N.W. 21 (N.D. 1926); Brattain v. Hite, 224 P. 501 (Okla. 1924); Greenwood v. Wilkinson, 256 P. 46 (Okla. 1927); Yellow-Hair v. Pratt, 182 N.W. 702 (S.D. 1921); Llewellyn v. First Nat'l Bank, 265 S.W. 222 (Tex. Civ. App. 1924); Bueno v. Bueno De Khawly, 643 So. 2d 1174 (Fla. App. 1994)* (holding that homestead status was lost when the owner voluntary abandoned the property without the intent to return).

(n504)Footnote 1676. *American State Bank v. Leforce, 218 P. 1073 (Okla. 1923); First Nat'l Bank v. Burnett, 254 P. 95 (Okla. 1927); Warner v. Hopkins, 176 N.W. 746 (S.D. 1920).*

(n505)Footnote 1677. *Walker v. Dailey, 290 S.W. 813 (Tex. Civ. App. 1927) See Corn v. Hyde, 188 P. 1102 (N.M. 1920).*

(n506)Footnote 1678. *Warner v. Hopkins, 176 N.W. 746 (S.D. 1920) See Krueger v. Groth, 209 N.W. 772 (Wis. 1926) Cf., In re Walicek, 4 F.2d 265 (1925); Brattain v. Hite, 224 P. 501 (Okla. 1924).*

(n507)Footnote 1679. *Mower v. Sharit, 85 So. 23 (Ala. 1920); Davis v. Neihardt, 181 N.W. 177 (Mich. 1921); Brattain v. Hite, 224 P. 501 (Okla. 1924); Hibbs v. City Nat'l Bank, 293 S.W. 350 (Tex. Civ. App. 1927).*

(n508)Footnote 1680. *Citizens State Bank v. Bird, 249 P. 593 (Kan. 1926); First Nat'l Bank v. Burnett, 254 P. 95 (Okla. 1927); Orr v. Wallace, 285 S.W. 650 (Tex. Civ. App. 1926), aff'd, Harrison v. Orr, 296 S.W. 871 (Tex. Com. App. 1927), modified, Harrison v. Orr, 10 S.W.2d 381 (Tex. Com. App. 1928); Cf., Nelson v. Hainlin, 104 So. 589 (Fla. 1925).*

(n509)Footnote 1681. *In re Teel's Estate, 210 P.2d 1 (Cal. 1949).* But both spouses must execute the agreement. *Johnson v. Brauner, 281 P.2d 50 (Cal. 1955); Campbell v. Largilliere Co., 256 P. 371 (Idaho 1927); Brown v. Manos, 250 P. 36 (Wash. 1926); In re Sullivan, 200 B.R. 682 (Bankr. D. Nev. 1996)* (holding that property owners abandon their homestead when they move to a new residence and lease the old residence to a tenant, and they lacked sufficient intent to return; and that a declaration of abandonment was not required, even though a Nevada statute required declaration of abandonment); *In re Thiesse, 170 B.R. 147 (Bankr. D. Minn. 1994)* (holding that Minnesota statute provides debtor with absolute right to leave homestead for six months even though when leaving there is no intention to return).

(n510)Footnote 1682. *In re Johnson, 294 F. 258 (5th Cir. 1923); In re Reagor, 294 F. 875 (5th Cir. 1923); Mower v. Sharit, 85 So. 23 (Ala. 1920); Caldcleugh v. Caldcleugh, 250 S.W. 324 (Ark. 1923); Gillis v. Gillis, 262 S.W. 307 (Ark. 1924); Read v. Leitner, 86 So. 425 (Fla. 1920); Illinois Oldsmobile Co. v. Miller, 202 N.W. 751 (Iowa 1925); Fardal v. Satre, 206 N.W. 22 (Iowa 1925); Koehler v. Gray, 172 P. 25 (Kan. 1918); Evansville Coffin Co. v. Sumner, 226 S.W. 363 (Ky. 1920); Conway v. Reed, 235 S.W. 747 (Ky. 1921); Smith v. Moss, 277 S.W. 245 (Ky. 1925); Rigdon v. Bogan, 107 So. 403 (La. 1926); Davis v. Neihardt, 181 N.W. 177 (Mich. 1921); Schaf v. Corey, 196 N.W. 502 (N.D. 1923); Grotberg v. First Nat'l Bank, 210 N.W. 21 (N.D. 1926); De Haven & Son Hardware Co. v. Schultz, 259 P. 778 (Or. 1927); Ritz v. First Nat'l Bank, 234 S.W. 425 (Tex. Civ. App. 1921); Good v. Good, 293 S.W. 621 (Tex. Civ. App. 1927); W.E. Thomas Lab. Co. v. McClain, 294 S.W. 250 (Tex. Civ. App. 1927).*

"While a party leaving a homestead must, in good faith, intend to return to it at some future date, such date need not be "fixed or definite as to time; neither need such intent be an intent to return regardless of all possible contingencies;

but, if there is an honest belief that at some time in the future the party will reoccupy the property as a home, and such party does no act inconsistent with such belief and intent, the homestead right is not forfeited." *Yellow-Hair v. Pratt, 182 N.W. 702 (S.D. 1921).*

Abandonment by the husband of his wife does not terminate the homestead. *Julian v. Andrews, 491 S.W.2d 721 (Tex. Civ. App. 1973).*

In Texas a homestead may be temporarily rented, if no new homestead has been acquired. *Gonzales v. Guajardo de Gonzales, 541 S.W.2d 865 (Tex. Civ. App. 1976); In re Ross, 210 B.R. 320 (Bankr. N.D. Ill. 1997)* (holding (1) that the Illinois homestead statute permits a boat used as a primary residence to be claimed as a homestead exemption and (2) that the homestead was not abandoned when the owner temporarily resided on land during the winter season, but had the intent to return); *In re Leonard, 194 B.R. 807 (Bankr. N. D. Tex. 1996)* (holding that property owners did not abandon their homestead when they moved to another home for three years, because they intended to return to the homestead); *In re Garcia, 168 B.R. 403 (D. Ariz. 1994)* (holding that temporary absence does not defeat homestead when debtor intends premises to be residence).

(n511)Footnote 1683. *Schaffer v. Campbell, 199 N.W. 334 (Iowa 1924); Novotny v. Horecka, 206 N.W. 110 (Iowa 1924); Rigdon v. Bogan, 107 So. 403 (La. 1926).*

(n512)Footnote 1684. *Clolinger v. Callahan, 263 S.W. 700 (Ky. 1924); Garner v. Freeman, 42 So. 767 (La. 1907); Millett v. Pearson, 173 N.W. 411 (Minn. 1919); Huffman v. Smyth, 84 P. 80 (Or. 1906); Bryant v. Freeman, 183 S.W. 731 (Tenn. 1916).*

(n513)Footnote 1685. *Novotny v. Horecka, 206 N.W. 110 (Iowa 1925).*

(n514)Footnote 1686. *Lyons v. Andry, 31 So. 38 (La. 1901); Rigdon v. Bogan, 107 So. 403 (La. 1926).*

(n515)Footnote 1687. *Weatherington v. Smith, 109 N.W. 381 (Neb. 1906); Dougherty v. White, 200 N.W. 884 (Neb. 1924); Meidinger v. Security State Bank, 213 N.W. 850 (N.D. 1927); Minnesota Stoneware Co. v. McCrossen, 85 N.W. 1019 (Wis. 1901).*

(n516)Footnote 1688. *First Nat'l Bank v. Brooks, 113 So. 853 (La. 1927).*

(n517)Footnote 1689. *McElwee v. McElwee, 219 S.W. 30 (Ark. 1920); Lanier v. Lanier, 116 So. 867 (Fla. 1928); Grotberg v. First Nat'l Bank, 210 N.W. 21 (N.D. 1926); Warner v. Hopkins, 176 N.W. 746 (S.D. 1920); Weitzman v. Lee, 262 S.W. 859 (Tex. Civ. App. 1924).*

(n518)Footnote 1690. *Read v. Leitner, 86 So. 425 (Fla. 1920); Dougherty v. White, 200 N.W. 884 (Neb. 1924); Corn v. Hyde, 188 P. 1102 (N.M. 1920); Japp v. Sapulpa State Bank, 215 P. 1059 (Okla. 1923); Tarleton v. Thompson, 118 S.E. 421 (S.C. 1923); Warner v. Hopkins, 176 N.W. 746 (S.D. 1920); In re Bruton, 167 B.R. 923 (Bankr. S.D. Cal. 1994)* (holding that automatic homestead exemption applied to condominium which debtor left temporarily empty for out-of-town employment).

(n519)Footnote 1691. *Read v. Leitner, 86 So. 425 (Fla. 1920); Schaffer v. Campbell, 199 N.W. 334 (Iowa 1924); Grotberg v. First Nat'l Bank, 210 N.W. 21 (N.D. 1921).*

(n520)Footnote 1692. *Mower v. Sharit, 85 So. 23 (Ala. 1920); Rigdon v. Bogan, 107 So. 403 (La. 1926); Larson v. Cole, 33 N.W.2d 325 (N.D. 1948); De Haven & Son Hardware Co. v. Schultz, 259 P. 778 (Or. 1927); Warner v. Hopkins, 176 N.W. 746 (S.D. 1920); Yellow-Hair v. Pratt, 182 N.W. 702 (S.D. 1921); Gerhart v. Quirk, 209 N.W. 544 (S.D. 1926); Knittel v. G. Sommers & Co., 28 N.W.2d 878 (S.D. 1947); In re Leonard, 194 B.R. 807 (Bankr. N. D. Tex. 1996)* (holding that property owners did not abandon their homestead when they moved to another home for three years, because they intended to return to the homestead).

(n521)Footnote 1693. *Hillsborough Inv. Co. v. Wilcox, 13 So. 2d 448 (Fla. 1943); Warner v. Hopkins, 176 N.W. 746 (S.D. 1920).*

(n522)Footnote 1694. Implied warranty of habitability in all leases of multiple-unit dwellings. *Jack Spring, Inc. v. Little, 280 N.E.2d 208 (Ill. 1972).*

(n523)Footnote 1695. *Dunn v. Tozer, 10 Cal. 167 (1858); Campbell v. Adair, 45 Miss. 170 (1871); Austin v. Stanley, 46 N.H. 51 (1865); Wetz v. Beard, 12 Oh. St. 431 (1861); Herrick v. Graves, 16 Wis. 157 (1862); In re Betancourt, 154 B.R. 90 (Bankr. S.D. Fla. 1993)* (holding that a debtor did not abandon his homestead merely because he rented the property to a third party in anticipation of an extended visit to relatives).

(n524)Footnote 1696. *Fisher v. Cornell, 70 Ill. 216 (1873); In re Phelan's Estate, 16 Wis. 76 (1862).*

If the homestead has once been acquired, a mere temporary lease of the premises to another does not destroy the homestead. *Gonzales v. Guajardo de Gonzales, 541 S.W.2d 865 (Tex. Civ. App. 1976); In re Sullivan, 200 B.R. 682 (Bankr. D. Nev. 1996)* (holding that property owners abandon their homestead when they move to a new residence and lease the old residence to a tenant, and they lacked sufficient intent to return; and that a declaration of abandonment was not required, even though a Nevada statute required declaration of abandonment).

(n525)Footnote 1697. *In re Walicek, 4 F.2d 265 (D. Tex. 1925); Taylor v. Gallaha, 103 So. 450 (Ala. 1925); McElwee v. McElwee, 219 S.W. 30 (Ark. 1920); Succession of Veronie, 84 So. 439 (La. 1920); Grotberg v. First Nat'l Bank, 210 N.W. 21 (N.D. 1926); Long v. Talley, 201 P. 990 (Okla. 1921); Bowman v. Bowman, 206 P.2d 582 (Okla. 1949); De Haven & Son Hardware Co. v. Schultz, 259 P. 778 (Or. 1927); Yellow-Hair v. Pratt, 182 N.W. 702 (S.D. 1921); Dunlap v. English, 230 S.W. 829 (Tex. Civ. App. 1921); Lewis v. Pitts, 275 S.W. 473 (Tex. Civ. App. 1925); Hibbs v. City Nat'l Bank, 293 S.W. 350 (Tex. Civ. App. 1927).*

Cf., Miles v. Miles, 99 So. 187 (Ala. 1924); Hollis v. American Wholesale Corp., 112 So. 204 (Ala. 1927); Harston v. Langston, 292 S.W. 648 (Tex. Civ. App. 1926); In re Kretzinger, 103 F.3d 943 (10th Cir. 1996) (holding that leasing part of a selected rural homestead to tenants for agricultural purposes is consistent with the required homestead use and thereby does not forfeit the leased property from the homestead exemption).

(n526)Footnote 1698. *Thompson v. Thompson, 236 S.W.2d 779 (Tex. 1951).*

(n527)Footnote 1699. *Rancho Oil Co. v. Powell, 175 S.W.2d 960 (Tex. 1943).*

(n528)Footnote 1700. *Zuniga v. Evans, 48 P.2d 513 (Utah 1935).*

As long as the spouse's homestead exists there can be no partition of the realty. *Biggs v. Roberts, 115 So. 2d 151 (Miss. 1959).*

(n529)Footnote 1701. *In re Hawthorne, 45 F. Supp. 374 (D. Tex. 1942); Gray v. Patterson, 46 S.W. 730, 1119 (Ark. 1898); Montgomery v. Dane, 98 S.W. 715 (Ark. 1906); Stewart v. Pritchard, 141 S.W. 505 (Ark. 1911); McDaniel v. Conlan, 204 S.W. 850 (Ark. 1918); Bradley v. Humphreys, 83 S.W.2d 828 (Ark. 1935); Keesee v. Bushart, 158 S.W.2d 915 (Ark. 1942); Guiod v. Guiod, 14 Cal. 506 (1860); Hillsborough Inv. Co. v. Wilcox, 13 So. 2d 448 (Fla. 1943); Wright v. Dunning, 46 Ill. 271 (1867); Lynn v. Sentel, 55 N.E. 838 (Ill. 1899); Fyffe v. Beers, 18 Iowa 4; Boot v. Brewster, 36 N.W. 649 (Iowa 1864); Boyer v. Dague, 134 N.W. 542 (Iowa 1912); Central Ky. Lunatic Asylum v. Craven, 32 S.W. 291 (Ky. 1895); Mount v. Fourth St. Bank, 161 S.W. 220 (Ky. 1913); First Nat'l Bank v. Oliver, 150 S.W.2d 894 (Ky. 1941); Lyons v. Andry, 31 So. 38 (La. 1901); Hardesty v. Warner, 58 So. 527 (La. 1912); Burkhardt v. Walker, 92 N.W. 778 (Mich. 1902); Jensen v. Christensen, 11 N.W.2d 798 (Minn. 1943); Bank of Cruger v. Hodge, 198 So. 26 (Miss. 1940); Edwards v. Reid, 58 N.W. 202 (Neb. 1894); De Haven & Son Hardware Co. v. Schultz, 259 P. 778 (Or. 1927); Warner v. Hopkins, 176 N.W. 746 (S.D. 1920); Gerhart v. Quirk, 209 N.W. 544 (S.D. 1926); Taylor v.*

Boulware, 17 Tex. 74 (1856); Franklin v. Coffee, 18 Tex. 413 (1857); Parker v. Schrimsher, 172 S.W. 165 (Tex. Civ. App. 1914); Hughes v. Palmer, 164 S.W.2d 576 (Tex. Civ. App. 1942); Bunker v. Coons, 60 P. 549 (Utah 1900); McDermott v. Kernan, 39 N.W. 537 (Wis. 1888).

(n530)Footnote 1702. *Anderson v. Anderson, 356 N.E.2d 788 (Ill. 1976).*

(n531)Footnote 1703. "If a man were to lock up his residence or rent it and go to Europe on a pleasure trip or for any other temporary purpose clearly intending to return and resume possession of the homestead, it seems clear that even five years' absence would not -- certainly as respects general creditors -- work a forfeiture of his homestead right by abandonment. Prolonged absence would ordinarily justify the conclusion of abandonment, but this may be rebutted and explained, especially where third persons have not been actually misled." *Fyffe v. Beers, 18 Iowa 4 (1864) See Dunton v. Woodbury, 24 Iowa 74 (1867).*

(n532)Footnote 1704. *Ray v. Metzger, 165 S.W.2d 207 (Tex. Civ. App. 1942) aff'd, 172 S.W.2d 480 (Tex. 1943).*

Act of platting a portion of the property exempted to the homestead does not destroy the homestead. *Falconer v. Farmers Union Oil Co., 260 N.W.2d 1 (N.D. 1977).*

(n533)Footnote 1705. *In re Place's Estate, 203 P.2d 132 (Kan. 1949); In re Neis' Estate, 225 P.2d 110 (Kan. 1950).*

(n534)Footnote 1706. *Yost v. Cassel, 255 P.2d 914 (Okla. 1953).*

(n535)Footnote 1707. *Smith v. Vanover, 264 S.W.2d 884 (Ky. 1954); Meyer v. Security Nat'l Bank, 294 P.2d 572 (Okla. 1955); In re Moore's Estate, 234 S.W.2d 847 (Tenn. App. 1949); Cook v. Young, 269 S.W.2d 457 (Tex. Civ. App. 1954); In re Brown's Estate, 183 P.2d 768 (Wash. 1947).*

(n536)Footnote 1708. *L'Engle v. Forbes, 81 So. 2d 214 (Fla. 1955).*

(n537)Footnote 1709. *Lanier v. Lanier, 116 So. 867 (Fla. 1928)* (dictum).

(n538)Footnote 1710. *Jacksonville v. Bailey, 30 So. 2d 529 (Fla. 1947)* (dictum).

(n539)Footnote 1711. *Nelson v. Hainlin, 104 So. 589 (Fla. 1925).*

(n540)Footnote 1712. *Collins v. Collins, 7 So. 2d 443 (Fla. 1942).*

(n541)Footnote 1713. *Steiner and Saffer v. Kasden, 186 B.R. 667 (D. Minn. 1995).*

(n542)Footnote 1714. *Eastern Ky. Asylum for Insane v. Cottle, 137 S.W. 235 (Ky. 1911); Rothwell v. Rothwell, 104 S.W. 276 (Ky. 1907).*

Contra, Dobson v. Butler, 17 Mo. 87 (1852); Cooper v. Cooper, 24 Oh. St. 488 (1874); Newland v. Holland, 45 Tex. 588 (1876).

(n543)Footnote 1715. *In re Ragan's Estate, 23 N.W.2d 521 (Iowa 1945)* (homestead terminates when survivor dies leaving no children); *Petty v. Barrett, 37 Tex. 84 (1872).*

In Missouri if the widow dies without receiving her homestead allowance, this is paid to unmarried minor children but if there are no such children, the homestead allowance is destroyed. *Schubel v. Bonacker, 331 S.W.2d 552 (Mo. 1960).*

(n544)Footnote 1716. *Doyle v. Coburn, 88 Mass. (6 Allen) 71 (1863).*

(n545)Footnote 1717. *Baccus v. Eads, 96 So. 757 (Ala. 1923)* (marital separation); *Jackson v. Blankenship, 105 So. 684 (Ala. 1925)* (wife abandoned by husband); *Jones v. Thompson, 166 S.W.2d 1036 (Ark. 1942); In re Henningsen's Estate, 247 P. 1082 (Cal. 1926)* (marital separation); *Maher v. Goff, 147 N.E. 427 (Ill. 1925)* (desertion of wife by husband); *Evansville Coffin Co. v. Sumner, 226 S.W. 363 (Ky. 1920)* (death of children and desertion of husband by wife); *Gillette v. McLaughlin, 180 N.W. 952 (S.D. 1921)* (marital separation); *Good v. Good, 293 S.W. 621 (Tex. Civ. App. 1927)* (marital separation).

Cf., Monte Vista Bank & Trust Co. v. Savage, 225 P. 219 (Colo. 1924).

In Illinois, when one spouse abandons the other and leaves the premises, the homestead right accrues to the remaining spouse. *Anderson v. Anderson, 356 N.E.2d 788 (Ill. App. 1976).*

(n546)Footnote 1718. *See* in general: *Mathews v. Goodenough, 89 So. 708 (Ala. 1921); Kyser v. McGlinn, 92 So. 13 (Ala. 1921); Peoples Bank v. Barrow & Wiggins, 94 So. 600 (Ala. 1922); Lucky v. Roberts, 100 So. 878 (Ala. 1924); Keenum v. Dodson, 102 So. 230 (Ala. 1924); Williams v. Massie, 102 So. 611 (Ala. 1925); Chambliss v. Derrick, 112 So. 330 (Ala. 1927); Brownfield v. Bookout, 228 S.W. 51 (Ark. 1921); Warren v. Martin, 272 S.W. 367 (Ark. 1925) In re Muntz's Estate, 231 P. 371 (Cal. App. 1924); Hutchinson v. Stone, 84 So. 151 (Fla. 1920); Rawlins v. Dade Lab. Co., 86 So. 334 (Fla. 1920); Oylear v. Oylear, 208 P. 857 (Idaho 1922); Wadle v. Boston Mkt. Co., 191 N.W. 528 (Iowa 1923); Fraizer v. Fraizer, 207 N.W. 772 (Iowa 1926); Myrick v. Bloomfield, 210 N.W. 428 (Iowa 1926); Solomon Nat'l Bank v. Birch, 246 P. 1007 (Kan. 1926); Demarest v. Allen, 224 S.W. 458 (Ky. 1920); Eastern State Hosp. v. Cottle, 256 S.W. 1101 (Ky. 1924); First Nat'l Bank v. Oliver, 150 S.W.2d 894 (Ky. 1941); H. G. Smith & Sons v. Jenkins, 85 So. 68 (La. 1917); Tomlinson v. Kandiyohi County Bank, 202 N.W. 494 (Minn. 1925); In re Lee, 213 N.W. 736 (Minn. 1927); Kohrt v. Mercer, 282 N.W. 129 (Minn. 1938); In re Boward's Estate, 231 S.W. 600 (Mo. 1921); Jennings v. Cherry, 257 S.W. 438 (Mo. 1923); Martin v. Martin, 285 S.W. 92 (Mo. 1926); Falvey v. Hicks, 286 S.W. 385 (Mo. 1926); Maupin v. Longacre, 288 S.W. 54 (Mo. 1926); Willoughby v. Brandes, 297 S.W. 54 (Mo. 1927); Wicoff v. Moore, 257 S.W. 474 (Mo. 1923); Moore v. Mansfield, 286 S.W. 353 (Mo. 1926); In re Costello's Estate, 178 N.W. 192 (Neb. 1920); Barnes v. Cherry, 130 S.E. 611 (N.C. 1925); O'Hare v. Bismarck Bank, 178 N.W. 1017 (N.D. 1920); Meidinger v. Security State Bank, 213 N.W. 850 (N.D. 1927); In re Cole's Estate, 205 P. 172 (Okla. 1922); Greenshaw v. Brown, 219 P. 934 (Okla. 1923); Lawley v. Richardson, 223 P. 156 (Okla. 1924); McGaffey v. Mulky, 241 P. 480 (Okla. 1925); In re Gardner's Estate, 250 P. 490 (Okla. 1926); Kimberlin v. Anthony, 254 P. 1 (Okla. 1926); In re Snider's Estate, 226 P.2d 429 (Okla. 1950)* (the homestead survives the wife's death); *In re Iltz, 202 P. 409, 206 P. 550 (Ariz. 1921); Ex parte Cothran, 121 S.E. 556 (S.C. 1924); Dorn v. Stidham, 137 S.E. 331 (S.C. 1927); Rettig v. West End Realty Co., 241 S.W. 614 (Tex. Civ. App. 1921), aff'd, 254 S.W. 765 (Tex. Com. App. 1921); Ruble v. Ruble, 264 S.W. 1018 (Tex. Civ. App. 1924); Good v. Good, 293 S.W. 621 (Tex. Civ. App. 1927); Lone Star Gas Co. v. Meyer, 296 S.W. 1110 (Tex. Civ. App. 1927).*

Cf., Monte Vista Bank & Trust Co. v. Savage, 225 P. 219 (Colo. 1929).

(n547)Footnote 1719. *In re Ragan's Estate, 23 N.W.2d 521 (Iowa 1945); Chisholm v. Mills, 250 S.W.2d 268 (Tex. Civ. App. 1952); Chandler v. Welborn, 282 S.W.2d 940 (Tex. Civ. App. 1956), aff'd, 294 S.W.2d 801 (Tex. 1956); In re Estate of Franzke, 634 So. 2d 117 (Miss. 1994)* (holding that when debtor died leaving no spouse, child, or grandchild the homestead exemption expired even though she devised it to her ex-spouse).

(n548)Footnote 1720. *Cole v. Sparks, 172 S.W.2d 20 (Ark. 1943).*

In Florida, upon death of the husband the life estate in his homestead vests in the widow with the remainder to the children. *Creary v. Creary's Estate, 338 So. 2d 26 (Fla. App. 1976).*

(n549)Footnote 1721. *Beall v. Pinckney, 150 F.2d 467 (5th Cir. 1945); Van Winkle v. Weston, 276 Ill. App. 66 (1934); Silloway v. Brown, 94 Mass. (12 Allen) 30 (1866); Hendrix v. Seaborn, 25 S.C. 481 (1886); French v. French, 188 S.W.2d 586 (Tex. Civ. App. 1945); Closson v. Closson, 215 P. 485 (Wyo. 1923).*

(n550)Footnote 1722. *Bull v. Coe, 18 P. 808 (Cal. 1888); Dickey v. Gibson, 45 P. 15 (Cal. 1896); Loomis v. Loomis, 82 P. 679 (Cal. 1905); Cordano v. Wright, 115 P. 227 (Cal. 1911); Breen v. Breen, 173 P. 2 (Kan. 1918).*

(n551)Footnote 1723. *Bradley v. Humphreys, 83 S.W.2d 828 (Ark. 1935); Dickey v. Gibson, 45 P. 15 (Cal. 1896); Stewart v. Brand, 23 Iowa 477 (1867); Biggs v. Roberts, 115 So. 2d 151 (Miss. 1959)* (husband entitled to hold wife's share of tenancy in common with husband as a probate homestead for his life after wife's death); *Ailey v. Burnett, 33 S.W. 1122, 35 S.W. 1137 (Mo. 1896); Spratt v. Early, 69 S.W. 13 (Mo. 1902); Melms v. Pabst Brewing Co., 66 N.W. 244 (Wis. 1896).*

Homestead descends and vests in the heirs of the first deceased spouse immediately on death free of any claims against the deceased spouse and is not chargeable with any of the debts with which community property is chargeable. *Vanni v. Cloutier, 124 A.2d 204 (N.H. 1956).*

(n552)Footnote 1724. *In re Ackerman, 22 P. 141 (Cal. 1889); Gillam v. Wright, 92 N.E. 906 (Ill. 1910); Nicholas v. Purczell, 21 Iowa 265 (1866); In re McClain's Estate, 262 N.W. 666 (Iowa 1935); Cross v. Benson, 75 P. 558 (Kan. 1904); Lyons v. Andry, 31 So. 38 (La. 1901); Roberts v. Greer, 40 P. 6 (1895); Pryor v. Stone, 19 Tex. 371, 70 Am. Dec. 341 (1857).*

(n553)Footnote 1725. *Cross v. Benson, 75 P. 558 (Kan. 1904); Weaver v. First Nat'l Bank, 94 P. 273 (Kan. 1907); Stults v. Sale, 17 S.W. 148 (Ky. 1891); Holmes v. Holmes, 111 P. 220 (Okla. 1910).*

(n554)Footnote 1726. *Cohn v. Litwin, 35 N.E.2d 410 (Ill. App. 1941); Cross v. Benson, 75 P. 558 (Kan. 1904); Weaver v. Chicago First Nat'l Bank, 94 P. 273 (Kan. 1907); Sawin v. Osborn, 126 P. 1074 (Kan. 1912); Stults v. Sale, 17 S.W. 148 (Ky. 1891); Davis v. H. Feltman Co., 65 S.W. 615 (Ky. 1901); Yager v. Bank of Kentucky, 100 S.W. 848 (Ky. 1907); Lyons v. Andry, 31 So. 38 (La. 1901); Palmer v. Sawyer, 103 N.W. 1088 (Neb. 1905); Meidinger v. Security State Bank, 213 N.W. 850 (N.D. 1927); Holmes v. Holmes, 111 P. 220 (Okla. 1910); Hinds v. Buck, 150 S.W.2d 1071 (Tenn. 1941); Hoffman v. Newhaus, 30 Tex. 633 (1868); Kessler v. Draub, 52 Tex. 575, 36 Am. Rep. 727 (1880); Woods v. Alvarado State Bank, 19 S.W.2d 35 (Tex. 1929); First State Bank of Hubbard v. Zeanon, 169 S.W.2d 735 (Tex. Civ. App. 1943); Wilkinson v. Merrill, 12 S.E. 1015 (Va. 1891).*

(n555)Footnote 1727. *Kawszewicz v. Kawszewicz, 53 N.E.2d 386 (Ill. 1944).*

(n556)Footnote 1728. *Union Trust Co. v. Cox, 155 P. 206 (Okla. 1916).*

(n557)Footnote 1729. *See Duffy v. Harris, 45 S.W. 545 (Ark. 1898); Swift v. Reasonover, 77 S.W.2d 809 (Tenn. 1935)* (holding a wife's wrongful abandonment and neglect of her husband until his death four years later forfeited her right to a homestead).

(n558)Footnote 1730. *Atkinson v. Atkinson, 37 N.H. 434 (1859); Meader v. Place, 43 N.H. 307 (1861); Herman v. Smith, 141 S.W. 1087 (Tex. Civ. App. 1911); In re Murphy, 90 P. 916 (Wash. 1907).*

(n559)Footnote 1731. *Newland v. Holland, 45 Tex. 588 (1876); Mabry v. Kennedy, 108 S.W. 176 (Tex. Civ. App. 1908).*

(n560)Footnote 1732. *Metz v. Schneider, 97 S.W. 187 (Mo. App. 1906).*

(n561)Footnote 1733. *Kaupe v. Kaupe, 280 P.2d 856 (Cal. 1955).*

Married spouse living apart from the other spouse because other spouse is guilty of act which constituted cause for divorce may by petition to the probate court convey real estate so as to bar rights of homestead therein. N. H. Rev. Stat. 1955, §46:8.

(n562)Footnote 1734. *Schmidt v. Humble Oil & Ref. Co., 219 F.2d 551 (5th Cir. Miss. 1955)* (wife's signature not necessary to oil lease where couple had been separated nine years); *Bydalek v. Bydalek, 71 N.E.2d 19 (Ill. 1947); Etheridge v. Webb, 50 So. 2d 603 (Miss. 1951); Siegel v. Clemons, 63 N.W.2d 725 (Wis. 1954).*

(n563)Footnote 1735. *In re Prudenzano's Will, 68 A.2d 704 (Vt. 1949).*

(n564)Footnote 1736. *Burkett v. Burkett, 20 P. 715 (Cal. 1889); Rosholt v. Mehus, 57 N.W. 783 (N.D. 1894); Goldsborough v. Hewitt, 99 P. 907 (Okla. 1909).*

See in general: *In re Hawthorne, 45 F. Supp. 374 (D. Tex. 1942); Hale v. Kinnaird, 87 So. 789 (Ala. 1921); Moore v. Warren, 255 S.W. 306 (Ark. 1923); Oliver v. Howie, 281 S.W. 17 (Ark. 1926); Jones v. Thompson, 166 S.W.2d 1036 (Ark. 1942); Lang v. Lang, 190 P. 181 (Cal. 1920); Remley v. Remley, 193 P. 604 (Cal. App. 1920); Maher v. Goff, 147 N.E. 427 (Ill. 1925); Luedecke v. Luedecke, 192 N.W. 515 (Iowa 1923); Gummison v. Johnson, 183 N.W. 515 (Minn. 1921); Dougherty v. White, 200 N.W. 884 (Neb. 1924); Trower v. Wetmore, 252 P. 48 (Okla. 1926); Guaranty State Bank v. Price, 258 P. 748 (Okla. 1927); Scripture v. Scripture, 231 S.W. 826 (Tex. Civ. App. 1921); Jeter v. Jeter, 281 S.W. 598 (Tex. Civ. App. 1926); Jackson v. Jackson, 283 S.W. 923 (Tex. Civ. App. 1926); Sakowitz Bros. v. McCord, 162 S.W.2d 437 (Tex. Civ. App. 1942).*

In divorce, *a mensa et thoro,* the wife retained her homestead rights. *Drake v. Drake, 80 So. 2d 268 (Ala. 1955).*

Lien of judgment for alimony, *see Luedecke v. Luedecke, 92 N.W. 515 (Iowa 1923); Haven v. Trammell, 193 P. 631 (Okla. 1920); Ashby v. Ashby, 183 N.W. 965 (Wis. 1921).*

That homestead cannot be subjected to payment of costs and attorney's fee, *see Jeter v. Jeter, 281 S.W. 598 (Tex. Civ. App. 1926).*

(n565)Footnote 1737. *Master Lubricants Co. v. Cook, 159 F.2d 679 (1947); Walton v. Walton, 138 P.2d 54 (Cal. App. 1943); Steitz v. Steitz, 262 S.W.2d 262 (Tex. Civ. App. 1953)* (in Texas only if the marriage was childless); *Cassas v. Cassas, 276 P.2d 456 (Wyo. 1954).*

See Homestead Rights Continue on Property Granted to a Husband in a Divorce Proceeding and Occupied by Him After the Divorce, 8 Kan. L. Rev. 498 (1960).

In Illinois homestead real property after divorce is subject to partition. *Tucker v. Tucker, 330 N.E.2d 274 (Ill. App. 1975).*

(n566)Footnote 1738. *Smith v. Smith, 187 S.W.2d 116 (Tex. Civ. App. 1945); Clack v. Williams, 189 S.W.2d 503 (Tex. Civ. App. 1945).*

(n567)Footnote 1739. *Mangum v. Mangum, 184 S.W.2d 338 (Tex. Civ. App. 1944).*

Under a statute providing that "in case of a divorce, the court granting the divorce may dispose of the homestead estate according to the equities of the case," the court awarded a gross sum as alimony to the wife and made the same a lien upon her husband's real estate, knowing that the real estate was the husband's homestead. It was held that the decree operated to divest the real estate of its homestead character and the lien could be enforced against it as other real estate. *Bobowski v. Bobowski, 90 N.E. 361 (Ill. 1909). See Lang v. Lang, 190 P. 181 (Cal. 1920).*

(n568)Footnote 1740. *Biddle v. Biddle, 177 S.W.2d 32 (Ark. 1944).*

(n569)Footnote 1741. *Kern v. Field, 71 N.W. 393 (Minn. 1897); Williams v. Williams, 184 N.W. 114 (Neb. 1921).*

(n570)Footnote 1742. *Dougherty v. White, 200 N.W. 884 (Neb. 1924); Speer & Goodnight v. Sykes, 119 S.W. 86 (Tex. 1909).*

(n571)Footnote 1743. *Gunn v. Gunn, 505 N.W.2d 772 (S.D. 1993)* (holding that a divorce court has power to levy a lien on homestead property for spouse or child support).

(n572)Footnote 1744. *Goldsborough v. Hewitt, 99 P. 907 (Okla. 1909).*

(n573)Footnote 1745. *Rosholt v. Mehus, 57 N.W. 783 (N.D. 1894); Kirkwood v. Domnan, 16 S.W. 428 (Tex. 1891); Cole v. Cole, 880 S.W.2d 477 (Tex. App. 1994)* (holding that in a divorce action, an equitable lien placed on the husband's homestead to secure the wife's note violated the homestead provisions, unless the amount secured was limited to the amount of homestead interest awarded to the wife); *Wiles v. Wiles, 871 P.2d 1026 (Utah App. 1994)* (holding that equitable distribution of property at divorce superseded homestead exemption).

(n574)Footnote 1746. *Donaldson v. Donaldson, 112 So. 836 (Ala. 1927); Tremper v. Tremper, 177 P. 868 (Cal. App. 1918); Radermacher v. Radermacher, 87 P.2d 461 (Idaho 1938); Landau v. Landau, 71 S.W.2d 49 (Mo. App. 1934); Davis v. Davis, 263 P. 914 (Or. 1934); Warne v. Warne, 156 N.W. 60 (S.D. 1916); Watson v. Mose, 183 S.E. 428 (Va. 1935); Games v. Games, 161 S.E. 560 (W. Va. 1931).*

(n575)Footnote 1747. *Bissett v. Bissett, 31 N.E.2d 955 (Ill. 1941); Caskey v. Caskey, 4 Ky. L. 811 (1883); Reeves v. Reeves, 76 N.W. 4 (Mich. 1898); Oberg v. Oberg, 4 P.2d 918 (N.M. 1931); Webster v. Webster, 25 N.W. 434 (Wis. 1885).*

(n576)Footnote 1748. "A homestead necessarily includes the idea of a house for residence, or mansion house. The dwelling may be a splendid mansion, a cabin, or tent. If there be either it is under the protection of the law; but there must be a home residence before it and the land on which it is situated can be claimed as a homestead." *Williams v. Dorris, 31 Ark. 466 (1876),* quoted with approval in *Tillar v. Bass, 21 S.W. 34 (Ark. 1876); Shell v. Young, 95 S.W. 798 (Ark. 1906); Flowers v. United States Fidelity & Guaranty Co., 117 S.W. 547 (Ark. 1909); Adams v. Evans, 72 N.W.2d 131 (Mich. 1955)* (homestead in vendee's rights in land sales contract). *See Iola Wholesale Groc. Co. v. Johnson, 216 P. 828 (Kan. 1923); First Nat'l Bank v. Labit, 109 So. 400 (La. 1926); Kerns v. Warden, 213 P. 70 (Okla. 1923); Morey v. James, 248 P. 594 (Okla. 1926); In re Sueppel's Estate, 124 N.W.2d 154 (Iowa 1963); In re Hughes, 166 B.R. 957 (Bankr. E.D. Okla. 1994)* (holding that the reception and payment of bills from the home was not a business purpose that would preclude the home from qualifying as a homestead).

(n577)Footnote 1749. *Kelly v. Kelly's Ex'r., 186 S.W.2d 902 (Ky. 1945).*

Homestead in community property. *Bradley v. Scully, 62 Cal. Rptr. 834 (1967).*

Tenancy in common supports homestead interest. *Barnes v. Detroit, 150 N.W.2d 740 (Mich. 1967).*

Mobile home held homestead. *Capitol Aggregates, Inc. v. Walker, 448 S.W.2d 830 (Tex. Civ. App. 1969); In re Ruggles, 210 B.R. 57 (Bankr. D. Vt. 1997)* (holding that a homestead exemption in a duplex does not appear to be forbidden by law when the owner lives in one unit and where under state law the property is indivisible).

(n578)Footnote 1750. *In re Stanger's Estate, 257 P.2d 593 (Ariz. 1953); Union Trust Co. v. Glunt, 85 So. 2d 877 (Fla. 1956); Daily v. Gulfport, 54 So. 2d 485 (Miss. 1951); Gann v. Montgomery, 210 S.W.2d 255 (Tex. Civ. App. 1948).*

Noncontiguous lots exempt as a business homestead where both were essential to the business. *Ford v. Aetna Ins. Co., 424 S.W.2d 612 (Tex. 1968).*

A statute denying a homestead where land is not marked off, platted and recorded or is not actually occupied by the owner was held unconstitutional. *Brodsky v. Maloney, 105 N.W.2d 911 (S.D. 1960).*

The homestead exemption applies to any interest or right the head of the family may hold in land. *Tullis v. Tullis, 342 So. 2d 88 (Fla. App. 1977); In re Miller, 174 B.R. 279 (Bankr. N.D. Ill. 1994)* (holding that the Illinois homestead right is an estate in the lot of ground and the buildings to which the right attaches); *In re Flatt, 160 B.R. 497 (Bankr. N.D.N.Y. 1993)* (holding that a homestead exemption is available for a lot containing garden, parking space, and storage area).

(n579)Footnote 1751. *Payne v. Cummings, 80 P. 620 (Cal. 1905). Contra In re Jackson, 169 B.R. 742 (Bankr. N.D. Fla. 1994)* (holding that improvements to homestead protected by exemption are limited to physical additions and not intangibles like the peanut allotment quota assigned to the land).

(n580)Footnote 1752. *Rock Island Plow Co. v. Alten, 116 S.W. 1144 (Tex. 1909).*

Union Trust Co. v. Glunt, 85 So. 2d 877 (Fla. 1956) (two-story garage apartment used for rental income where it appeared that the rooms concerned were being used as a means of making the owner's livelihood).

(n581)Footnote 1753. *Schmick v. Simmons, 107 S.W. 568 (Tex. Civ. App. 1908); McGovern v. Talliaferro, 112 S.W. 814 (Tex. Civ. App. 1908); First State Bank of Memphis v. Seago, 120 S.W.2d 951 (Tex. Civ. App. 1938); In re Finkel, 151 B.R. 779 (Bankr. W.D. Tex. 1993)* (holding that a business homestead requires the claimant to exercise the calling or business on the property).

(n582)Footnote 1754. *McEwen v. Larson, 185 So. 866 (Fla. App. 1939).*

(n583)Footnote 1755. *Dignowity v. Lindheim, 109 S.W. 966 (Tex. Civ. App. 1908); Vaughn v. Vaughn, 279 S.W.2d 427 (Tex. Civ. App. 1955).*

(n584)Footnote 1756. *McKay v. Gesford, 124 P. 1016 (Cal. 1912); Person v. Levenson, 143 S.W.2d 419 (Tex. Civ. App. 1940).*

(n585)Footnote 1757. *Jensen v. Griffin, 144 N.W. 119 (S.D. 1913).*

(n586)Footnote 1758. *Sperry Oil & Gas Co. v. Chisholm, 264 U.S. 488, 44 S. Ct. 372 (1924).*

(n587)Footnote 1759. *McDonald v. Badger, 23 Cal. 393 (1863); Payne v. Cummings, 80 P. 620 (Cal. 1905); Ashton v. Ingle, 20 Kan. 670 (1878); Meech v. Grigsby, 113 P.2d 1091 (Kan. 1941); King v. Welburn, 47 N.W. 106 (Mich. 1890); Oregon, Mtg. Co. v. Dunbar, 289 P. 559 (1930); Tindall v. Peterson, 98 N.W. 688, 99 N.W. 659 (1904); Gooch v. Gooch, 133 P. 242 (Okla. 1913); Watson v. Hurlburt, 170 P. 541 (Or. 1918); Edelman v. Scandrett, 293 N.W. 817 (S.D. 1940); Anderson v. Sessions, 51 S.W. 874, 55 S.W. 1133 (Tex. 1899); Harrington v. Mayo, 130 S.W. 650 (Tex. Civ. App. 1910).*

See in general: *In re Buie, 287 F. 896 (D.C. Tex. 1923), aff'd, 293 F. 1021; Croker v. Croker, 7 F.2d 218 (D.C. Fla. 1925); Hooker v. Head, 236 P. 714 (Ariz. 1925); Clark v. Cox, 85 So. 173 (Fla. 1920); Graham v. Humm, 229 S.W. 80 (Ky. 1921); Farmers Merc. Co. v. Guillory, 90 So. 222 (La. 1921); Haggard v. Haggard, 233 S.W. 18 (Mo. 1921); Davis v. Davis, 199 N.W. 113 (Neb. 1924); Cooper v. Long, 220 P. 610 (Okla. 1923); Morey v. James, 248 P. 594 (Okla. 1926); Cabler v. Alexander, 224 P. 1076 (Or. 1924); Johnson v. Russell, 220 S.W. 352 (Tex. Civ. App. 1920); Ewing v. Riley, 246 S.W. 94 (Tex. Civ. App. 1922); Vaden v. Collier, 253 S.W. 889 (Tex. Civ. App. 1923); Connelly v. Johnson, 259 S.W. 634 (Tex. Civ. App. 1924); White v. Blackman, 168 S.W.2d 531 (Tex. Civ. App. 1942).*

(n588)Footnote 1760. *Gulbransen Co. v. Couch, 61 F.2d 932 (5th Cir. Tex. 1932)* (construing Texas law); *In re Hughes, 172 B.R. 205 (Bankr. N.D. Tex. 1993)* (holding that only the principal business may be claimed as a business homestead, even though the business may consist of more than one lot).

(n589)Footnote 1761. *Rockett v. Williams, 78 S.W.2d 1077 (Tex. Civ. App. 1935); In re Wierschem, 152 B.R. 345 (Bankr. M.D. Fla. 1993)* (holding that the homestead exemption is limited to the portion of the property actually used as a residence); *In re Flatt, 160 B.R. 497 (Bankr. N.D.N.Y. 1993)* (holding that the homestead exemption only applies to property owned and actually occupied as the principal residence); *In re Nofsinger, 221 B.R. 1018 (Bankr. S.D. Fla. 1998)* (holding that under Florida law, homestead extends only to that portion of property which debtor uses as residence and cannot include any portion which is rented to and occupied by third party in his own business).

(n590)Footnote 1762. *Scarborough v. Home Owners' Loan Corp., 161 S.W.2d 886* (Tex. Civ. App. (1942); *In re Julian, 163 B.R. 478 (Bankr. N.D. Tex. 1994)* (holding that debtor established that the property where he lived was both a business and a residence homestead, because he added a second floor to his car business and lived there); *In re Filby, 225 B.R. 532 (Bankr. D. N.H. 1998)* (holding that chapter 7 debtor was entitled to homestead exemption only in that portion of duplex in which he resided, and not entitled to exemption in that portion which he rented to a third party and did not occupy himself).

(n591)Footnote 1763. *Morris Inv. Co. v. Skeldon, 78 N.E.2d 504 (Ill. 1948).*

(n592)Footnote 1764. *Rancho Oil Co. v. Powell, 175 S.W.2d 960 (Tex. 1943), aff'g, Powell v. Johnson, 170 S.W.2d 273 (Tex. Civ. App. 1943).*

(n593)Footnote 1765. *Horn v. Gates, 53 N.W.2d 84 (Neb. 1952); Davis v. Hawn Lab. Co., 193 S.W.2d 263 (Tex. Civ. App. 1946); In re Nerios, 171 B.R. 224 (Bankr. N.D. Tex. 1994)* (holding that the homestead exemption does not apply to two houses on adjoining lots); *In re Cate, 170 B.R. 582 (Bankr. N.D. Tex. 1994)* (holding that under Texas homestead law, debtors may have only one homestead at a time, which does not include two residences located on different lots).

(n594)Footnote 1766. *Boozer v. Boozer, 16 So. 2d 863 (Ala. 1944); Gooch v. Gooch, 133 P. 242 (Okla. 1913).*

Thus where two lots owned by a judgment debtor and his wife jointly were occupied as one parcel and a dwelling was on one lot, while the other was used in connection with the house, the exemption was extended to both lots, where their aggregate value was less than the statutory exemption. *Stocker v. Curtis, 106 N.E. 441 (Ill. 1914); In re Dudeney, 159 B.R. 1003 (Bankr. S.D. Fla. 1993)* (holding that two parcels, acquired separately and assessed distinctly for property tax purposes, qualified for the homestead exemption); *Riley v. Riley, 972 S.W.2d 149 (Tex. App. 1998)* (holding that homestead claim in rural property is valid as long as the claimant resides on part of the property and the other parcels are used for the support of the family).

(n595)Footnote 1767. *Clements v. Crawford County Bank, 40 S.W. 132 (Ark. 1897); Brixius v. Reimringer, 112 N.W. 273 (Minn. 1907); Oregon Mtg. Co. v. Dunbar, 289 P. 559* Mont. 1930); *Hainz v. Kurth, 278 N.W. 413 (Wis. 1938); In re Jackson, 169 B.R. 742 (Bankr. N.D. Fla. 1994)* (holding that a road dividing a farm did not prevent its use as a homestead or destroy its contiguous character).

(n596)Footnote 1768. *Vaughn v. Vaughn, 279 S.W.2d 427 (Tex. Civ. App. 1955).*

(n597)Footnote 1769. *Linn County Bank v. Hopkins, 28 P. 606 (Kan. 1892); Commercial Nat'l Bank v. Carnahan, 276 P. 57 (Kan. 1929); Kresin v. Mau, 15 Minn. 116 (1870).*

(n598)Footnote 1770. *Milton v. Milton, 58 So. 718 (Fla. 1912).*

(n599)Footnote 1771. *Brandies v. Perry, 22 So. 268 (Fla. 1897); Walters v. People, 18 Ill. 194, 65 Am. Dec. 730 (1856).*

(n600)Footnote 1772. *Tinney v. Vittur, 64 So. 407 (La. 1914); Lieber v. Lieber, 143 S.W. 458 (Mo. 1911).*

(n601)Footnote 1773. *Shubert v. Winston, 11 So. 200 (Ala. 1892); Pryor v. Stone, 19 Tex. 371 (1857); Autry v. Reasor, 108 S.W. 1162, 113 S.W. 748 (Tex. 1908); Panhandle Constr. Co. v. Flesher, 87 S.W.2d 273 (Tex. Civ. App. 1935); NCNB Tex. Nat'l Bank v. Carpenter, 849 S.W.2d 875 (Tex. App. 1993)* (holding that claimant must reside on property to claim it as homestead, but he is not required to reside on all parcels of the property, as long as all are used to support the family).

(n602)Footnote 1774. *Farmer v. Hampton, 156 S.W. 1041 (Ky. 1913); Anderson v. Sessions, 51 S.W. 874, 55 S.W. 1133 (Tex. 1899).*

Homestead may extend to two noncontiguous lots where used as a place of operation of a business for head of a family. *Ford v. Aetna Ins. Co., 424 S.W.2d 612 (Tex. 1967).*

(n603)Footnote 1775. *Pennington v. Bigbie, 260 P. 481 (Okla. 1927); Dignowity v. Lindheim, 109 S.W. 966 (Tex. Civ. App. 1908); Ewing v. Riley, 246 S.W. 94 (Tex. Civ. App. 1922); Rockett v. Williams, 78 S.W.2d 1077 (Tex. Civ. App. 1922). See In re Buie, 287 F. 896 (D.C. Tex. 1923), aff'd, 293 F. 1021* (5th Cir.); *Croker v. Croker, 7 F.2d 218 (D.C. Fla. 1925); Morgan v. Bailey, 105 So. 143 (Fla. 1925); Tittle v. Garrett, 232 P. 437 (Okla. 1925); O'Fiel v. Janes, 220 S.W. 371 (1920); Connelly v. Johnson, 259 S.W. 634 (Tex. Civ. App. 1920); Commerce Farm Credit Co. v. Sales, 288 S.W. 802 (Tex. Com. App. 1926).*

(n604)Footnote 1776. *Ayres v. Patton, 111 S.W. 1079 (Tex. Civ. App. 1908).*

(n605)Footnote 1777. *Finley v. Dietrick, 12 Iowa 516 (1861); Kiewert v. Anderson, 67 N.W. 1031 (Minn. 1896); Gallagher v. Smiley, 44 N.W. 187 (Neb. 1889); Taylor v. Boulware, 17 Tex. 74 (1856); Bassett v. Messner, 30 Tex. 604 (1868); Arnold v. Adams, 38 Tex. 425 (1873); In re Becker, 215 B.R. 585 (B.A.P. 8th Cir. 1998)* (holding that when homestead property is not conclusively rural or urban, the character or use of the homestead determines whether it receives a rural or an urban exemption).

(n606)Footnote 1778. *Waggener v. Haskell, 35 S.W. 711 (Tex. Civ. App. 1896); In re McCain, 160 B.R. 933 (Bankr. E.D. Tex. 1993)* (holding that the considerations in determining whether a residential subdivision may be claimed as a rural homestead are (1) the number of lots sold, (2) the acreage of each lot, (3) the proximity to the urban environment, and (4) the building restrictions on each lot); *Matter of Crowell, 138 F.3d 1031 (5th Cir. 1998)* (holding that forty-two acre tract that chapter 13 debtor claimed was exempt as rural homestead was urban homestead under Texas law; property was within city limits, city sewer and water services were available to property, city provided police and fire protection, surrounding property was developed residential area, and tract was zoned for residential use).

(n607)Footnote 1779. *Heidel v. Benedict, 63 N.W. 490 (Minn. 1895).*

(n608)Footnote 1780. *Neeley v. Case, 32 S.W. 785 (1895).*

(n609)Footnote 1781. *Grimes v. Luster, 84 S.W. 223 (Ark. 1904); Waggle v. Worthy, 15 P. 831 (Cal. 1887); Wright v. Dunning, 46 Ill. 271 (1867); Kloss v. Wylezalek, 69 N.E. 863 (Ill. 1904); Clay's Comm. v. Washington, 210 S.W. 484 (Ky. 1919); Crawford-Jenkins & Booth v. Rogers, 56 So. 904 (La. 1911); Davis v. Neihardt, 181 N.W. 177 (Mich. 1921); Kleinert v. Lefkowitz, 259 N.W. 871 (Mich. 1935); Bennett v. Dempsey, 48 So. 901 (Miss. 1909); Kaes v. Gross, 3 S.W. 840 (Mo. 1887); Rouse v. Caton, 67 S.W. 578 (Mo. 1902); Scheerer v. Scheerer, 229 S.W. 192 (Mo. 1921); Palmer v. Omer, 295 S.W. 123 (Mo. 1927); Irondale Bank v. Terrill, 116 S.W. 481 (Mo. App. 1909); Ness v. Jones, 88 N.W. 706 (N.D. 1901); Cooper v. Long, 220 P. 610 (Okla. 1923); Bell v. Franklin, 230 S.W. 181 (Tex. Civ. App. 1921); Spence v. State Nat'l Bank, 294 S.W. 618 (Tex. Civ. App. 1927)* (business homestead); *Ran v. City Nat'l Bank, 272 S.W. 510 (Tex. Civ. App. 1925); Evans v. Galbraith-Foxworth Lab. Co., 51 S.W.2d 831 (Tex. Civ. App 1932); Rockett v. Williams, 78 S.W.2d 1077 (Tex. Civ. App. 1935); Wallingford v. Bowen, 104 S.W.2d 188 (Tex. Civ. App. 1935); Scarborough v. Home Owners' Loan Corp., 161 S.W.2d 886 (Tex. Civ. App. 1942); Krueger v. Groth, 209 N.W. 772 (Wis. 1926).*

(n610)Footnote 1782. *Wright v. Dunning, 46 Ill. 271 (1867); Hair v. Davenport, 103 N.W. 1042 (Neb. 1905); Tide Water Oil Co. v. Ross, 123 S.W.2d 479 (Tex. Civ. App. 1938).*

(n611)Footnote 1783. *Meech v. Grigsby, 113 P.2d 1091 (Kan. 1941); Holder v. Holder, 87 S.W. 1100 (Ky. 1905).*

(n612)Footnote 1784. *Tumlinson v. Swinney, 22 Ark. 400 (1860).*

(n613)Footnote 1785. *Realty Trust Co. v. Koger, 70 S.W.2d 448 (Tex. Civ. App. 1934); In re Julian, 163 B.R. 478 (Bankr. N.D. Tex. 1994)* (holding that under Texas homestead law, a person may not claim both an urban and a rural homestead).

(n614)Footnote 1786. *Brantley v. Batson, 36 So. 524 (Miss. 1904); Berggren v. Bliss, 241 N.W. 544 (Neb. 1932).*

(n615)Footnote 1787. *Hair v. Davenport, 103 N.W. 1042 (Neb. 1905); Moore v. Krueger, 507 N.W.2d 155 (Wis. App. 1993)* (holding that establishing a new homestead while the original one is for sale causes abandonment of the original homestead and the proceeds from the sale of the original are not protected from creditors).

(n616)Footnote 1788. *Neece v. King, 73 S.W.2d 550 (Tex. Civ. App. 1934); Coyel v. Mortgage Bond Co., 124 S.W.2d 204 (Tex. Civ. App. 1939).*

(n617)Footnote 1789. *Yates v. Home Bldg. & Loan Co., 103 S.W.2d 1081 (Tex. Civ. App. 1937).*

(n618)Footnote 1790. *Bennett v. Dempsey, 48 So. 901 (Miss. 1909).*

Husband has no homestead on wife's realty. *Sterling Sav. & Loan Ass'n v. Schultz, 218 N.E.2d 53 (Ill. App. 1966).*

(n619)Footnote 1791. *Owens v. Jabine, 115 S.W. 383 (Ark. 1908); Watkins Land Co. v. Temple, 119 S.W. 728 (Tex. Civ. App. 1909).*

(n620)Footnote 1792. *Rock Island Plow Co. v. Alten, 116 S.W. 1144 (Tex. 1909).*

(n621)Footnote 1793. *Rouse v. Caton, 67 S.W. 578 (Mo. 1902).*

(n622)Footnote 1794. *Valparaiso State Bank v. Schwartz, 138 N.W. 757 (Neb. 1912).*

(n623)Footnote 1795. *In re Baker, 182 F. 392 (6th Cir. 1910).*

(n624)Footnote 1796. *Johnson v. Miller, 173 S.W.2d 280 (Tex. Civ. App. 1943).*

(n625)Footnote 1797. *Gulbransen Co. v. Couch, 61 F.2d 932* (C.C.A.*5 Tex. 1932).*

(n626)Footnote 1798. *Harris v. Matthews, 81 S.W. 1198 (Tex. Civ. App. 1904).*

(n627)Footnote 1799. *Vekoske v. Cleveland Trust Co., 79 N.E.2d 356 (Ohio App. 1948).*

(n628)Footnote 1800. *Klenk v. Knoble, 37 Ark. 298 (1881); Chastain v. Arkansas Bank & Trust Co., 249 S.W. 1 (Ark. 1923); Starr v. City Nat'l Bank, 252 S.W. 356 (Ark. 1923); Ackley v. Chamberlain, 16 Cal. 181 (1860); Bebb v. Crowe, 18 P. 223 (Kan. 1888); Kelly v. Baker, 10 Minn. 154 (1865); Orwig v. Cloud, 233 P. 1085 (Okla. 1925); Flannegan v. Stifel, 3 Tenn. 464 (1877); Blair v. Park Bank & Trust Co., 130 S.W. 718 (Tex. Civ. App. 1910); Walker v. Dailey, 290 S.W. 813 (Tex. Civ. App. 1927); Lasseter v. Blackwell, 227 S.W. 944 (Tex. Com. App. 1921); Massillon Engine & Thresher Co. v. Barrow, 231 S.W. 368 (Tex. Com. App. 1921); Phelps v. Rooney, 9 Wis. 70 (1859); In re Hughes, 166 B.R. 957 (Bankr. E.D. Okla. 1994)* (holding that the reception and payment of bills from the home was not a business purpose that would preclude the home from qualifying as a homestead); *In re Ozey, 171 B.R. 116 (Bankr.*

N.D. Okla. 1994) (holding that using one room of home as office to windup former business and look for new employment was not sufficient to disqualify the home as a homestead); *Jackman v. Nance, 857 P.2d 7 (Nev. 1993)* (holding that homestead may be claimed partly for business and partly for a residence, if it is truly the residence of the family).

(n629)Footnote 1801. *Gainus v. Cannon, 42 Ark. 503 (1884); Laughlin v. Wright, 63 Cal. 113 (1883); McKay v. Gesford, 124 P. 1016 (Cal. 1912); Hohn v. Pauly, 106 P. 266 (Cal. App. 1909); Kiesel v. Clemens, 56 P. 84 (Idaho 1899); Cass County Bank v. Weber, 48 N.W. 1067 (Iowa 1891); Lazell v. Lazell, 90 Mass. (8 Allen) 575 (1864); King v. Welburn, 47 N.W. 106 (Mich. 1890); Lamont v. La Fevre, 55 N.W. 687 (Mich. 1893); Fox v. Brannan, 290 N.W. 353 (1940); Hawley v. Arnold, 288 N.W. 823 (Neb. 1939); Harriman v. Queen Ins. Co., 5 N.W. 12 (Wis. 1880); Binzel v. Grogan, 29 N.W. 895 (Wis. 1886).*

Contra, Turner v. Turner, 18 So. 210 (Ala. 1895).In re Mirulla, 163 B.R. 910 (Bankr. D. N.H. 1994) (holding that the homestead exemption was only available in the five rooms of the hotel where the debtor actually resided).

(n630)Footnote 1802. *Fox v. Brannan, 290 N.W. 353 (Mich. 1940); Hawley v. Arnold, 288 N.W. 823 (Neb. 1939); Smith v. Kay, 54 P.2d 1160, 55 P.2d 794 (Or. 1936); Budde v. Drawhorn, 110 S.W.2d 929 (Tex. Civ. App. 1937); In re Ruggles, 210 B.R. 57 (Bankr. D. Vt. 1997)* (holding that a homestead exemption in a duplex does not appear to be forbidden by law when the owner lives in one unit and where under state law the property is indivisible); *In re Trigonis, 224 B.R. 152 (Bankr. D. Nev. 1998)* (Nevada homestead exemption extends to any quantity of land, regardless of use, as long as debtors actually reside on premises and use it as their residence, including a homestead exemption in the entire four-unit apartment building, which they owned, but only lived in one unit and leased other three units).

(n631)Footnote 1803. *In re Major, 166 B.R. 457 (Bankr. M.D. Fla. 1994)* (holding that a thirty-four foot motor boat on which the family resided could not be claimed under the homestead right provided by the Florida Constitution). *Contra Miami Country Day Sch. v. Bakst, 641 So. 2d 467 (Fla. App. 1994)* (holding that a houseboat qualifies as a dwelling house for the homestead exemption).

(n632)Footnote 1804. *In re Peters, 168 B.R. 710 (Bankr. D. Idaho 1994)* (holding that a thirty-three foot motor home qualified as a homestead under the Idaho homestead statute); *In re Mangano, 158 B.R. 532 (Bankr. S.D. Fla. 1993)* (holding that Florida homestead exemption applied to the debtor's motorhome because it was used as a residence); *In re Meola, 158 B.R. 881 (Bankr. S.D. Fla. 1993)* (holding that a travel trailer qualified for a homestead exemption under Florida law); *In re Laube, 152 B.R. 260 (Bankr. W.D. Wis. 1993)* (holding that a semitruck cab qualified for a homestead exemption under Wisconsin law); *In re Jefferson, 163 B.R. 204 (Bankr. D. N.M. 1993)* (holding that debtor could claim homestead in four of six lots on which he had placed multiple trailers). *See Miami Country Day Sch. v. Bakst, 641 So. 2d 467 (Fla. App. 1994)* (finding that the language of the statutory homestead in Florida includes mobile homes and modular homes); *In re Goad, 161 B.R. 161 (Bankr. W.D. Va. 1993)* (holding that a mobile home qualified as a homestead); *In re Kirby, 223 B.R. 825 (Bankr. M.D. Fla. 1998)* (holding that in order for a motor home to be eligible for homestead exemption it must be attached to fixed and permanent property interests in Florida); *In re Thompson, 217 B.R. 375 (B.A.P. 2d Cir. 1998)* (holding that homestead exemption in a mobile home does not reclassify the mobile home as real property).

(n633)Footnote 1805. *Turner v. Turner, 18 So. 210 (Ala. 1895); Buckels v. Tomer, 78 So. 2d 861 (Fla. 1955); Walters v. People, 18 Ill. 194 (1856); Logue v. Von Almen, 40 N.E.2d 73 (Ill. 1941); Ashton v. Ingle, 20 Kan. 670 (1878); Tromsdahl v. Nass, 146 N.W. 719 (N.D. 1914); Wilson v. Cochran, 31 Tex. 677 (1869).*

Property may become homestead prior to occupancy by the family. *Brodsky v. Maloney, 105 N.W.2d 911 (S.D. 1960).*

(n634)Footnote 1806. *Ashton v. Ingle, 27 Am. Rep. 197 (Kan. 1878).*

(n635)Footnote 1807. *Bank of Sun Prairie v. Hovig, 218 F. Supp. 769 (W.D. Ark. 1963)* (tourist court occupied in

part by family was held a homestead); *Jordan v. Jordan, 228 S.W.2d 636 (Ark. 1950); Gregg v. Bostwich, 33 Cal. 220 (1867); Phelps v. Loop, 148 P.2d 674 (Cal. App. 1944); Olsen v. Lohman, 13 N.W.2d 332 (Iowa 1944); Hogan v. Manners, 23 Kan. 551 (1880); Bebb v. Crowe, 18 P. 223 (Kan. 1888); King v. Welburn, 47 N.W. 106 (Mich. 1890); Phelps v. Rooney, 9 Wis. 70 (1859).*

(n636)Footnote 1808. *Hall v. Casebolt, 188 S.W. 470 (Ky. 1916).*

(n637)Footnote 1809. *J. R. Watkins Co. v. Dawson, 145 S.W.2d 901 (Tex. Civ. App. 1940). Contra In re McCain, 160 B.R. 933 (Bankr. E.D. Tex. 1993)* (holding that use of rural property for shelter was sufficient to establish a homestead and that economic support from the property was not required); *In re Kretzinger, 103 F.3d 943 (10th Cir. 1996)* (holding that leasing part of a selected rural homestead to tenants for agricultural purposes is consistent with the required homestead use and thereby does not forfeit the leased property from the homestead exemption)

(n638)Footnote 1810. *King v. Sweatt, 115 F. Supp. 215 (W.D. Ark. 1953).*

(n639)Footnote 1811. Beneficiary of land trust does not have property right supporting a homestead. *Sterling Sav. & Loan Ass'n v. Schultz, 218 N.E.2d 53 (Ill. App. 1966).*

(n640)Footnote 1812. Vendee's interest supports homestead. *Arko Enterprises, Inc. v. Wood, 185 So. 2d 734 (Fla. App. 1966).*

Vendee in sales contract if not presently entitled to possession does not have an interest supporting homestead. *Corn Belt Prods. Co. v. Mullins, 110 N.W.2d 845 (Neb. 1961). In re Freytag, 155 B.R. 150 (Bankr. N.D. Tex. 1993)* (holding that property became homestead when debtor contracted for financing and construction of home).

(n641)Footnote 1813. *Johnson v. Gaylord, 41 Iowa 362 (1875); Peeler v. Peeler, 8 So. 392 (Miss. 1890).*

Heir's interest in homestead does not vest until death of head of family. *Weitzner v. United States, 309 F.2d 45 (5th Cir. 1962).*

If a testator is a homestead owner, he may devise the homestead to his issue free from the debts to which it would have been exempt had he been alive. *In re Williams' Estate, 216 N.W.2d 568 (Iowa 1974).*

In Florida homestead property cannot be devised since it passes on death to the lineal descendants subject to the life estate in the widow. *In re Endre's Estate, 345 So. 2d 793 (Fla. App. 1977).*

(n642)Footnote 1814. *Estate of Croghan, 28 P. 570 (Cal. 1891); Gay v. Hanks, 81 Ky. 552 (1884)* (widower); *Eubank & Co. v. Landram, 59 Tex. 247 (1883).*

Homestead vests in surviving spouse if other spouse has not transferred prior to death. *In re Falcone's Estate, 27 Cal. Rptr. 38 (1962).*

In Washington (Wash. Rev. Code, §§6.12.080, 11.52.020), homestead goes to the surviving spouse. *In re Lyons' Estate, 515 P.2d 1293 (Wash. 1973).*

In Nebraska where a homestead is held in joint tenancy the survivor takes the entire interest. *David v. Tucker, 244 N.W.2d 197 (Neb. 1976).*

(n643)Footnote 1815. *Mahaffy v. Mahaffy, 63 Iowa 55 (1884); Chapman v. Tipton, 292 S.W.2d 25 (Tenn. 1956)* (homestead for one year to keep family together).

Under Public Acts, 227, Louisiana, 1976, Article 916.1 of the Civil Code, it is provided that where the predeceased spouse has not disposed of by will the share in the family home, the survivor holds the deceased's share of the family home in usufruct during the natural life.

In Texas, a homestead upon death of one spouse becomes a life estate in the other. *Norman v. First Bank & Trust Co. of Bryan, 557 S.W.2d 797 (Tex. Civ. App. 1977). In re Combs, 166 B.R. 417 (Bankr. N.D. Cal. 1994)* (holding that debtor's death did not effect his right to declare homestead, which was fixed when he filed bankruptcy petition).

(n644)Footnote 1816. *Singletary v. Hill, 43 Tex. 588 (1875).*

(n645)Footnote 1817. *Hoffman v. Neuhaus, 30 Tex. 633 (1868).*

(n646)Footnote 1818. *In re Estate of Murphy, 340 So. 2d 107 (Fla. 1976).*

(n647)Footnote 1819. *Miller v. Finegan, 7 So. 140 (Fla. 1890); Howe v. Adams, 28 Vt. 541 (1856); Jewett, Tibbett & Co. v. Brock, 32 Vt. 65 (1859); In re Cooke's Estate, 91 A.2d 683 (Vt. 1952).*

A pre-marital contract allegedly waiving the wife's right as surviving spouse to occupy the homestead and use of its property was unenforceable since homestead right in the survivor does not exist until the death of one of the spouses. *Williams v. Estate of Williams, 548 S.W.2d 492 (Tex. Civ. App. 1977).*

(n648)Footnote 1820. *O'Daniel v. Gaynor, 43 So. 205 (Ala. 1907); Hollis v. Watkins, 66 So. 29 (Ala. 1914); Roberson v. Tippie, 70 N.E. 584 (Ill. 1904); Schuyler v. Hanna, 47 N.W. 932 (Neb. 1891). Sigmund v. Elder, 631 So. 2d 329 (Fla. App. 1994)* (holding that wife received life estate in homestead, remainder to adult children, when deed executed by deceased husband was void); *King v. Ellison, 622 So. 2d 598 (Fla. App. 1993)* (holding that statute gave life estate in homestead to surviving spouse and remainder to lineal descendants which excluded stepchildren against testator's wishes).

(n649)Footnote 1821. *Miles v. Miles, 46 N.H. 261 (1865).*

(n650)Footnote 1822. *Cherokee Constr. Co. v. Harris, 122 S.W. 485 (Ark. 1909); Jones v. Crawford, 84 S.W. 568 (Ky. 1905);* Harrelson v. Webb, 50 So. (La. 1909).

(n651)Footnote 1823. *Sutton v. Rosser, 34 S.E. 346 (Ga. 1899);* Ohio similar: *Morgridge v. Converse, 81 N.E.2d 112 (Ohio 1948).*

After a judgment has been recorded the spouses may not purchase new land and add it to their homestead. *Quigley v. Kennedy & Ely Ins., Inc., 207 So. 2d 431 (Fla. 1968).*

(n652)Footnote 1824. *McBride v. Hawthorne, 109 N.E. 262 (1915).*

(n653)Footnote 1825. *In re Neis' Estate, 225 P.2d 110 (Kan. 1950); Thompson v. Thompson, 236 S.W.2d 779 (Tex. 1951).*

Miss. Code, §478 as amended 1950 Legislature, S.B. 73 gives widowers the same right as widows to enjoy exempt property of deceased spouse.

(n654)Footnote 1826. *Cherokee Constr. Co. v. Harris, 122 S.W. 485 (Ark. 1909); Jones v. Crawford, 84 S.W. 568 (Ky. 1905); Harrelson v. Webb, 50 So. 833 (La. 1909).*

(n655)Footnote 1827. *Miller v. Finegan, 7 So. 140 (Fla. 1890); Gresham v. Clark, 95 So. 2d 234 (Miss. 1957)* (widow has life estate and children the remainder).

In re Sueppel's Estate, 124 N.W.2d 154 (Iowa 1963).

(n656)Footnote 1828. *Harrison v. Harrison, 127 S.W.2d 270 (Ark. 1939).*

(n657)Footnote 1829. *Van Meter v. Field, 159 P.2d 546 (Okla. 1945).*

(n658)Footnote 1830. *Karbs v. Bouse, 154 P.2d 968 (Okla. 1945).*

(n659)Footnote 1831. *Keel v. Larkin, 72 Ala. 493 (1882); Sams v. Sams, 5 So. 2d 774 (Ala. 1942); Bishop v. Johnson, 7 So. 2d 281 (Ala. 1942); Saltsman v. Saltsman, 10 So. 2d 752 (Ala. 1942); In re Claussenius' Estate, 216 P.2d 485 (Cal. App. 1950); Barco v. Fennell, 5 So. 9 (Fla. 1888); Coughanour v. Hoffman, 13 P. 231 (Idaho 1887); Mercier v. Chace, 9 Allen (91 Mass.) 242 (1864); Ring v. Burt, 17 Mich. 465, 97 Am. Dec. 200 (1869); Atkinson v. Atkinson, 40 N.H. 249, 77 Am. Dec. 712 (1860); Iltz v. Krieger, 202 P. 409, 206 P. 550 (Or. 1921); In re Banfield's Estate, 296 P. 1066 (Or. 1931); Christopher v. Christopher, 21 S.W. 890 (Tenn. 1893).*

See in general: *McDonald v. McAlily, 89 So. 198 (Ala. 1921); Mathews v. Goodenough, 89 So. 708 (Ala. 1922); Jones v. Hubbard, 94 So. 167 (1922); Coker v. Coker, 94 So. 566 (Ala. 1922); Beck v. Karr, 95 So. 881 (Ala. 1923); Miller v. Thompson, 96 So. 481 (Ala. 1923); Berry v. Manning, 96 So. 762 (Ala. 1923); Glover v. Mitchell, 99 So. 905 (Ala. 1924); Frazier v. Frazier, 100 So. 118 (1924); Lucky v. Roberts, 100 So. 878 (Ala. 1924); Keenum v. Dodson, 102 So. 230 (Ala. 1924); Lester v. Stroud, 103 So. 692 (Ala. 1925); Cogburn v. Callier, 104 So. 330 (Ala. 1925); Evans v. Evans, 104 So. 515 (Ala. 1925); Bryant v. Perryman, 105 So. 561 (Ala. 1925); Hames v. Irwin, 108 So. 253 (Ala. 1926); Quick v. McDonald, 108 So. 529 (Ala. 1926); Pauley v. Hadlock, 188 P. 263 (Ariz. 1920); McElwee v. McElwee, 219 S.W. 30 (Ark. 1920); Hildebrand v. Graves, 275 S.W. 524 (Ark. 1925); In re Henningsen's Estate, 247 P. 1082 (Cal. 1926); In re Mason's Estate, 244 P. 629 (1926); In re Knight's Estate, 245 P. 454 (Cal. App. 1926); Dudley v. Griggs, 103 S.E. 89 (Ga. 1920); Griffin v. Griffin, 113 S.E. 161 (Ga. 1922); C. M. Smith Bros. Land & Inv. Co. v. Phillips, 233 S.W. 413 (Mo. 1921); Jennings v. Cherry, 257 S.W. 438 (Mo. 1923); In re Trepp's Estate, 227 P. 1005 (Mont. 1924); Farmers State Bank v. Bartley, 206 N.W. 414 (N.D. 1925); Iltz v. Krieger, 202 P. 409, 206 P. 550 (Or. 1921); Ferguson v. Holborn, 211 P. 953 (Or. 1923). Hunter v. NCNB Tex. Nat'l Bank, 857 S.W.2d 722 (Tex. App. 1993)* (holding that there are two types of homestead protections: the probate homestead and the protection of homestead from creditors; that under the probate homestead there is no protection until the owner of the homestead dies; and that placing the homestead in a revocable trust does not infringe on the probate homestead interest).

(n660)Footnote 1832. *Weber v. Short, 55 Ala. 311 (1876); Ogden v. Ogden, 28 S.W. 796 (Ark. 1894); Osborn v. Strachen, 3 P. 767 (Kan. 1884); Howell v. Jones, 19 S.W. 757 (Tenn. 1892).*

(n661)Footnote 1833. La. Public Acts 227 (1976).

(n662)Footnote 1834. *Norris v. Morrison, 45 N.H. 490 (1864); Munro v. Jeter, 24 S.C. 29 (1885).*

(n663)Footnote 1835. *Ward v. Mayfield, 41 Ark. 94 (1883); Capek v. Kropik, 21 N.E. 836 (Ill. 1889).*

(n664)Footnote 1836. *In re Noah, 15 P. 290 (Cal. 1887); In re Ackerman, 22 P. 141 (Cal. 1889); In re Levy, 75 P. 301 (Cal. 1904).*

(n665)Footnote 1837. *Gregory v. Ellis, 86 N.C. 579 (1882); Rogers v. Ragland, 42 Tex. 422 (1875).*

(n666)Footnote 1838. *Turner v. Turner, 18 So. 210 (Ala. 1895); King v. McCarthy, 55 N.W. 960 (Minn. 1893); Christopher v. Christopher, 21 S.W. 890 (Tenn. 1893).*

(n667)Footnote 1839. *Hunter v. Law, 68 Ala. 365 (1880); B. F. Goodrich Silvertown Stores v. Brown, 46 So. 2d 204 (Ala. 1950); Booth v. Goodwin, 29 Ark. 633 (1874); Hoppe v. Hoppe, 37 P. 894 (Cal. 1894); Neal v. Brockhan, 13*

S.E. 283 (Ga. 1891); Wolf v. Ogden, 66 Ill. 224 (1872); Quinn v. Kinyon, 13 S.W. 873 (Mo. 1890); Hinsdale v. Williams, 75 N.C. 430 (1876); In re Estate of Arbeitman, 886 S.W.2d 648 (Mo. App. 1994) (holding that surviving spouse's waiver of homestead exemption through prenuptial agreement did not infringe on minor child's exemption right).

(n668)Footnote 1840. *Keyes v. Cyrus, 34 P. 722 (Cal. 1893); Moore v. Hoffman, 57 P. 769 (Cal. 1899).*

(n669)Footnote 1841. *In re Vance, 34 P. 1087 (Cal. 1893).*

(n670)Footnote 1842. *Smith v. Smith, 34 P. 77 (Cal. 1893).*

(n671)Footnote 1843. *Hoppe v. Hoppe, 37 P. 894 (Cal. 1893).*

(n672)Footnote 1844. *In re Irwin's Estate, 136 P.2d 940 (Okla. 1943).*

Rental on crop share is not abandonment of homestead. *In re Sueppel's Estate, 124 N.W.2d 154 (Iowa 1963).*

(n673)Footnote 1845. *In re Branam's Estate, 152 P.2d 354 (Cal. App. 1944).*

In Florida, upon death of the husband the life estate in his homestead vests in the widow with the remainder to the children. *Creary v. Creary's Estate, 338 So. 2d 26 (Fla. App. 1976).*

(n674)Footnote 1846. *In re Hatch, 18 A. 814 (Vt. 1889).*

(n675)Footnote 1847. *Bushnell v. Loomis, 137 S.W. 257 (Mo. 1911). See Iltz v. Krieger, 202 P. 409, 206 P. 550 (Or. 1921).*

Testator's homestead devised under general residuary clause of will. *In re Estate of Murphy, 340 So. 2d 107 (Fla. 1976).*

(n676)Footnote 1848. *Peoples Bank v. Barrow & Wiggins, 94 So. 600 (Ala. 1922); Caldcleugh v. Caldcleugh, 250 S.W. 324 (Ark. 1923); Amish v. Amish, 195 N.W. 359 (Iowa 1923); Settle v. Simpson, 264 S.W. 1092 (Ky. 1924).*

See John Rouiller, *Homestead Interest of Widow in Proceeds of Homestead When Sold in Course of Administration, 32 Marq. L. Rev. 154 (1948).*

(n677)Footnote 1849. *In re Hatch, 18 A. 814 (Vt. 1889).*

(n678)Footnote 1850. *Potter v. Potter, 101 S.W. 905 (Ky. 1907).*

(n679)Footnote 1851. *Kennedy v. Kennedy, 54 S.E. 773 (S.C. 1906).*

(n680)Footnote 1852. *Shull v. Shull, 40 So. 2d 708 (Ala. 1949).*

(n681)Footnote 1853. *In re Moore's Estate, 190 P.2d 914 (Ariz. 1948); In re Kennedy's Estate, 211 P.2d 410 (Idaho 1949).*

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CHAPTER 21 MARITAL AND HOMESTEAD INTERESTS

3-21 Thompson on Real Property, Thomas Editions § 21.05

AUTHOR: Professor David A. Thomas This chapter is based on Ch. 30 of George W. Thompson, Commentaries on the Modern Law of Real Property (John S. Grimes, ed. 1979), and describes the American common law on several subjects now largely governed by state statutes. J. Reuben Clark Law School Brigham Young University

§ 21.05 Bibliography

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Annotation, Dower or Curtesy in Property Subject at Time of Marriage to Contract for Disposition by Sale or Will, *8 A.L.R. 3D 569.*

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Annotation, Real Estate Broker's Right to Compensation as Affected by Failure or Refusal of Principal's Spouse to Join in Contract of Sale, *10 A.L.R. 3D 665.*

Annotation, Recovery of Damages for Breach of Contract to Convey Homestead Where Only One Spouse Signed Contract, *5 A.L.R. 4TH 1310.*

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Supp. To CHAPTER 21 MARITAL AND HOMESTEAD INTERESTS

3-21 Thompson on Real Property, Thomas Editions Supp. to § 21.02

Supp. to § 21.02 Dower at Common Law.

[Go To Main]

§ 21.02(a) The Meaning of "Dower". [Go To Main]

Add:

In re Greenfield, 2002 U.S. Dist. LEXIS 2526 at *6 (E.D. Mich. 2002) .

At the end of the last sentence of the first paragraph, add new footnote:

Reynolds v. Reynolds, 837 So. 2d 847, 850-851 (Ala. Civ. App. 2002) .

Add:

United States v. Patej, 2003 U.S. Dist. LEXIS 2252 at *6 (E.D. Mich. 2003) .

§ 21.02(b) The Nature of Inchoate Dower. [Go To Main]

Add:

United States v. Patej, 2003 U.S. Dist. LEXIS 2252 at *6 (E.D. Mich. 2003) .

§ 21.02(c) The Necessity of a Valid Marriage. [Go To Main]

Add:

United States v. Patej, 2003 U.S. Dist. LEXIS 2252 at *6 (E.D. Mich. 2003) .

§ 21.02(d) The Necessity of the Death of the Husband. [Go To Main]

Add:

United States v. Patej, 2003 U.S. Dist. LEXIS 2252 at *6 (E.D. Mich. 2003) .

Add:

Pezza v. Pezza, 690 A.2d 345 (R.I. 1997) (holding a statute granting to the surviving spouse a life estate in property held in fee simple by deceased spouse created only an expectancy interest in surviving spouse).

§ 21.02(e) The Necessity of Seisin or Title in the Husband. [Go To Main]

Add:

United States v. Patej, 2003 U.S. Dist. LEXIS 2252 at *6 (E.D. Mich. 2003) .

§ 21.02(f) Assignment of Dower. [Go To Main]

Add:

In re Wheaton, 775 A.2d 166, 169-170 (N.J. Super. 2001) (widow's dower could be assigned by metes and bounds, apportionment of rents, or assignment of her interest through sale of property).

Add:

Weithman v. Weithman, 2002 Ohio App. LEXIS 3381 at *7 (June 28, 2002) .

§ 21.02(g) Protection of Dower from Acts of the Husband. [Go To Main]

Rice v. Rice, 2005 Mich. App. LEXIS 75 (Mich. Ct. App., 2005) (Holding that a wife had a dower interest in property that was originally deeded only to her husband during their marriage, and that the wife's dower interest was maintained even when the husband deeded the property away, because the wife did not convey her dower interest.)

Add:

Mathias v. Martin, 87 S.W.3d 859, 862 (Ky. 2002) .

Add:

See, Mathias v. Martin, 87 S.W.3d 859 (Ky. 2002) (where the wife had knowledge of the antenuptial conveyance, her dower rights were effectively defeated).

§ 21.02(h) Property of the Husband in Which the Widow Takes Dower. [Go To Main]

Add:

But see Pezza v. Pezza, 690 A.2d 345 (R.I. 1997) (discussing Rhode Island statute § 33-25-2, which gives to the widow a life estate in property owned by her husband in fee simple).

§ 21.02(j) Release of Dower. [Go To Main]

Add:

Lim v. Greenfield, 65 Fed. Appx. 549 (6th Cir. 2003) (holding that a wife cannot relinquish her dower right through a transfer of property, to her, of the same property in which she had a dower right).

Add:

State v. Hess, 684 N.W.2d 414 (Minn., 2004) (holding that a provision to release dower rights is evidence that the deed conveyed a fee interest and not an easement).

Add:

Mosley v. Mosley, 2004 Tenn. App. LEXIS 712 (Tenn. Ct. App., 2004) (a post-nuptial, marriage dissolution agreement can convert marital property into separate property, thereby eliminating any dower interest).

§ 21.02(k) Loss of Dower Without the Wife's consent. [Go To Main]

Add:

But see Sugar v. Blum, 2004 Ohio 1384 (Ohio Ct. App., 2004) (Specific performance to convey property could be ordered against a husband when the husband's contract to deliver a good and sufficient warranty deed for the property included a release of dower, even though the wife was not party to the contract; in this case the husband might be liable to the wife if she refuses to consent to the release of dower, but the specific performance can still be ordered).

§ 21.02(o) Valuation of Dower. [Go To Main]

Add:

Menninger v. Mortgage Elec. Registration Sys. (In re Bowling), 314 B.R. 127 (Bankr. D. Ohio, 2004) (dower interest is subject to valuation in bankruptcy proceedings).

§ 21.02(q) Statutory Modification and Abolition of Dower. [Go To Main]

Add:

See In re Est. of Gervais, 770 A.2d 877 (R.I. 2001) (statute leaving life estate to widow includes all of decedent spouse's real estate, both residential and nonresidential); *Pezza v. Pezza, 690 A.2d 345 (R.I. 1997)* (discussing Rhode Island statute which leaves widow with a life estate in any real property owned in fee simple by her deceased spouse).

Add:

In re Estate of Gervais, 770 A.2d 877 (R.I. 2001) .

§ 21.02(r) Pre-nuptial Agreements and Jointures as Barring Dower. [Go To Main]

Add:

In re Estate of Taris, 2005 Ohio 1516 (Ohio Ct. App., 2005) (an "all-inclusive" ante-nuptial agreement bars not only the wife's dower interest, but also her election to take).

Add:

Boetsma v. Boetsma, 768 N.E.2d 1016 (Ind. App. 2002) . See also, In re Marriage of Van Horn, 2002 Iowa App. LEXIS 705 (July 3, 2002) (full disclosure standard does not require precise valuations of assets)

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Supp. To CHAPTER 21 MARITAL AND HOMESTEAD INTERESTS

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Supp. to § 21.03 Curtesy at Common Law.

[Go To Main]

§ 21.03(a) Husband's Rights at Common Law During Coverture in Realty Belonging to the Wife. [Go To Main]

Add:

First Union Home Equity Bank, N.A. v. Bedford Loan and Deposit Bank, 111 S.W.3d 892 (Ky. App., 2003) (holding that where one statute [*KRS 392.040(1)*] provides an exception to curtesy rights in property that is sold to satisfy a mortgage, and where another statute [*KRS 404.030(1)*] provides that curtesy rights are not barred by the wife's encumbrance of her property, and that the husband has no curtesy interest in the property, then first statute supersedes the second).

§ 21.03(f) How Curtesy Is Defeated. [Go To Main]

Add:

Cantrell v. Cantrell, 2004 Tenn. App. LEXIS 888 (Tenn. Ct. App., 2004) (holding that an estranged husband had an interest in the property that his wife conveyed without his consent).

Add:

Mosley v. Mosley, 2004 Tenn. App. LEXIS 712 (Tenn. Ct. App., 2004) (a post-nuptial, marriage dissolution agreement can convert marital property into separate property, thereby eliminating any curtesy interest).

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Supp. To CHAPTER 21 MARITAL AND HOMESTEAD INTERESTS

3-21 Thompson on Real Property, Thomas Editions Supp. to § 21.04

Supp. to § 21.04 Homestead at Common Law.

[Go To Main]

§ 21.04(a) What Is a Homestead? [Go To Main]

Change "debtors" to "debtors' "

Add:

In re Ballato, 318 B.R. 205 (Bankr. D. Fla., 2004) (Purpose of Florida homestead exemption is to protect and preserve the family home).

Add:

Farstveet v. Rudolph ex rel. Eileen Rudolph Est., 630 N.W.2d 24 (N.D. 2001) (holding that homestead rights are a creature of statute).

Add:

Kipp v. Sweno, 629 N.W.2d 468 (Minn. App. 2001) (construing homestead to be that place where the debtor and his family live);

In re Drenttel, 302 B.R. 26 (D. Minn. 2003) (holding that property located outside of the state of Minnesota could not

be included in the homestead exemption of Minnesota).

Add:

In re Nelms, 2005 Bankr. LEXIS 138 (Bankr. D. Mich., 2005) (holding that property outside of Michigan [Louisiana] could not be exempt under Michigan law).

Add:

Besnilian v. Wilkinson, 25 P.3d 187 (Nev. 2001) (discussing Nevada constitution).

Add:

Blankenau v. Landess, 626 N.W.2d 588 (Neb. 2001) (the purpose of the homestead exemption is to protect the debtor and family in the family home from forced sale on execution or attachment).

Redmond v. Kester, 159 P.3d 1004 (Kan. 2007) (a Chapter 7 bankruptcy debtor can claim the Kansas homestead exemption for real property placed in a self-settled living revocable trust before bankruptcy); *Patel v. Amresco SBA Holdings, 867 N.E.2d 337 (Mass. App. 2007)* (the debtor's debt was contracted before homestead protection was recorded).

Add:

Duncan v. Zubrod, 294 B.R. 339 (10th Cir. 2003) (holding that debtor's spouse could not claim a homestead interest because she did not have ownership interest and because she was not a debtor).

Tolz v. Prestwood (In re Prestwood), 322 B.R. 463 (Bankr. D. Fla., 2005) (For homestead exemption, Florida Law requires not only the right to occupy, but actual occupation with intent to make the property a permanent home).

Add:

Rooms With a View, Inc. v. Private Natl. Mort. Assn., Inc., 7 S.W.3d 840 (Tex. App. Austin 1999) (homestead rights vest in both spouses regardless of whether property is owned by both spouses, by one spouse separately, or even by third party).

Add:

Perry v. Dearing, 345 F.3d 303 (5th Cir. 2003) (holding that a 59-acre parcel of land adjoining the 1.3 acre residence

of a debtor does not fall under the homestead exemption, but the 1.3-acre parcel does fall under the exemption).

§ 21.04(b) Nature of Homestead. [Go To Main]

Add:

Farstveet v. Rudolph ex rel. Eileen Rudolph Est., 630 N.W.2d 24 (N.D. 2001) (holding that homestead rights are a creature of statute).

Add:

Beck v. Lapsley, 593 N.W.2d 410 (S.D. 1999) (homestead right depends entirely upon the constitutional and statutory provisions that created it).

Add:

Havoco of Am., Ltd. v. Hill, 790 So. 2d 1018 (Fla. 2001) (liberally construing homestead exemption in the interest of protecting the family home).

Add:

In re Zibman, 268 F.3d 298, 300-301 (5th Cir. 2001) .

Add:

In re Clarke, 2002 U.S. App. LEXIS 4828 (4th Cir. 2002) ; *In re Brizida, 276 B.R. 316, 322 (Bankr. Mass. 2002)* .

Barry A. Nelson & Kevin E. Packman, "Real Property, Probate and Trust Law: Florida's Unlimited Homestead Exemption Does Have Some Limits: Part II," *77 Fla. Bar J. 38 (2003).*

See generally Middleton v. Lockhart, 43 S.W.3d 113 (Ark. 2001) ; *Besnilian v. Wilkinson, 25 P.3d 187 (Nev. 2001)* ; *Tri-St. Delta Chemicals, Inc. v. Wilkison, 55 S.W.3d 304 (Ark. App. 2001)* ; *Partridge v. Partridge, 790 So. 2d 1280 (Fla. App. 4th Dist. 2001)* ; *Homeside Lending, Inc. v. Miller, 31 P.3d 607 (Utah App. 2001)* ; *Est. of Paulman v. Pemberton, 633 N.W.2d 715 (Wis. App. 2001)* .

Add:

Sanchez v. Telles, 960 S.W.2d 762 (Tex. App. El Paso 1997)

Add:

Peterson v. Lenz, 2004 Minn. App. LEXIS 1352 (Minn. Ct. App., 2004) (holding that when homestead exemption waiver was not signed by both spouses, liens on the homestead were not enforceable).

§ 21.04(c) The "Family." [Go To Main]

Add:

Middleton v. Lockhart, 43 S.W.3d 113 (Ark. 2001) (family necessary for existence of homestead).

Add:

In re Warnock, 2005 Bankr. LEXIS 576 (Bankr. D. Ark., 2005) (debtor could claim a homestead exemption as a head of house because she undertook the care of her mother who lived with her); *In re Myers, 2005 Bankr. LEXIS 660* (Bankr. D.N.H., 2005) (debtors were able to claim a duplex under the homestead exemption even though they resided on one side of the duplex because debtor's mother occupied the other half of the duplex and was under the debtors' care).

Add:

In re Wiezorek, 2003 Bankr. LEXIS 1601 (D. Neb. 2003) (holding the purpose of the homestead exemption is to preserve the family, and that marriage and parental status trigger the exemption, and that marriage and parental status are easily ascertained; therefore an unmarried man who had relatives live with him temporarily cannot claim homestead exemption).

Add:

In re Ghanei, 2005 Bankr. LEXIS 566 (Bankr. D. Va., 2005) (debtor was able to claim homestead exemption, even though his children also lived with their mother and she claimed them as dependents for tax purposes, because he had shared custody of his children and he provided financial support for them); *In re Green, 319 B.R. 913* (Bankr. D. Ga., 2004) (debtor could claim a full homestead exemption in his property even though he and his wife had been separated for many years and she had never lived at the property with him).

Add:

But see In re Coldwell, 196 F.3d 1225 (11th Cir. 1999) (under Florida law, homestead exemption can be established for each of two people who, while married, are legitimately living apart in separate residences, if they otherwise meet requirements of exemption).

Add:

Tri-St. Delta Chemicals, Inc. v. Wilkison, 55 S.W.3d 304 (Ark. App. 2001) (no one can acquire a homestead unless the person is at the time married or the head of a family).

Add:

Tri-St. Delta Chemicals, Inc. v. Wilkison, 55 S.W.3d 304 (Ark. App. 2001) (if a married man or head of a family acquires a homestead, he does not lose his right to claim it as exempt because his wife dies or because he is divorced, even though he may have no family living with him).

Add:

In re Gray, 2003 Bankr. LEXIS 1522 (D. Neb. 2003) (holding that debtor could not claim homestead exemption for property in Kansas because she was a Nebraska resident); *In re Goodale, 298 B.R. 886 (W.D. Wash. 2003)* (holding that partners in a same-sex relationship do not qualify as spouses for the homestead exemption).

Add:

Tri-St. Delta Chemicals, Inc. v. Wilkison, 55 S.W.3d 304 (Ark. App. 2001) (holding that questions of homestead surround intention and must be determined by the facts in each case).

§ 21.04(d) Interpretation of Homestead Laws. [Go To Main]

Add:

See generally, Middleton v. Lockhart, 43 S.W.3d 113 (Ark. 2001) ; *Besnilian v. Wilkinson, 25 P.3d 187 (Nev. 2001)* ; *Tri-St. Delta Chemicals, Inc. v. Wilkison, 55 S.W.3d 304 (Ark. App. 2001)* ; *Partridge v. Partridge, 790 So. 2d 1280 (Fla. App. 4th Dist. 2001)* ; *Homeside Lending, Inc. v. Miller, 31 P.3d 607 (Utah App. 2001)* ; *Est. of Paulman v. Pemberton, 633 N.W.2d 715 (Wis. App. 2001)* .

Add:

In re Cassity, 281 B.R. 365 (Bankr. Ala. 2001) ; *In re Brizida, 276 B.R. 316, 322 (Bankr. Mass. 2002)* .

Add:

Taylor v. Maness, 941 So.2d 559 (Fla. App. 2006) (wife's successful declaration of marital homestead interest in the property meant that the husband's contract for the sale of the property could not be enforced).

In re John Richards Homes Bldg. Co., L.L.C., 298 B.R. 591, 603 (E.D. Mich. 2003) (holding that one who acts in bad faith by buying a house in another state and trying to gain the homestead exemption is not entitled to the protection offered by the homestead exemption); *Zubrod v. Duncan (In re Duncan), 329 F.3d 1195 (10th Cir. 2003)* (holding that debtor was not entitled to the homestead exemption because he acted fraudulently).

Add

Martin v. Martin, 720 N.W.2d 732 (Iowa, 2006) (deed invalidated under the terms of the homestead statute).

§ 21.04(e) Methods of Establishing the Homestead. [Go To Main]

Add:

Farstveet v. Rudolph ex rel. Eileen Rudolph Est., 630 N.W.2d 24 (N.D. 2001) (holding that homestead rights are a creature of statute).

Add:

In re Cumberbatch, 302 B.R. 675 (C.D. Calif. 2003) (homestead interests can arise automatically or the property owner can declare an exemption).

Add:

In re Estate of Mainolfi, 878 A.2d 287 (Vt. 2005) (a husband's conveyance to his wife, by quitclaim deed, of all right and title in the marital home did not convey the homestead interest held by the husband).

Snoddy v. Snoddy, 791 So. 2d 333 (Miss. App. 2001) (to constitute a homestead there must be actual occupation and use

of the premises as a home for the family).

Add:

State, Dept. of Revenue ex rel. Vickers v. Pelsey, 779 So. 2d 629 (Fla. App. 1st Dist. 2001) (requiring actual occupancy of home with intention to remain there and make it home of family, the place of their actual use and occupancy).

Add:

LPP Mortg., Ltd. v. Meurer, 2004 Iowa App. LEXIS 11 (Iowa Ct. App., 2004) (intent is sufficient to maintain a homestead, but something more is required to establish one).

§ 21.04(f) Homestead in Undivided Interests. [Go To Main]

Add:

In re Baker, 2003 Bankr. LEXIS 1176 (N.D. Tex. 2003) (holding that a woman could include her undivided one-third interest in a 161.5-acre tract in the homestead exemption).

Kipp v. Sweno, 683 N.W.2d 259 (Minn., 2004) (holding that a debtor was allowed to exercise a homestead exemption in his undivided one-half interest in the property owned in joint tenancy with his wife).

Add:

In re Brizida, 276 B.R. 316 (Bankr. Mass. 2002)

Add:

In re Dawson, 266 B.R. 355 (Bankr. N.D. Tex. 2001) (holding that under Texas law, a family's homestead may be the separate property of either the husband or the wife, or it may be community property, but the wife cannot have one homestead and the husband another).

§ 21.04(g) Value of Homestead Taken. [Go To Main]

Add:

Kipp v. Sweno, 683 N.W.2d 259 (Minn., 2004) (Minnesota law limits the value of a homestead exemption that can be taken).

Add:

Braswell v. Braswell, 890 So. 2d 379 (Fla. Dist. Ct. App., 2004) (homestead exemption in Florida is limited to one-half acre).

Add:

Wright v. Taylor (In re Taylor), 2005 Bankr. LEXIS 269 (Bankr. D. Ga., 2005) (debtor owned property in joint tenancy with her non-debtor husband and could, therefore, only qualify for half of the total allowable exemption); *In re Neary, 2004 Bankr. LEXIS 617* (Bankr. D. Ga., 2004) (debtor wife was limited to half of the full amount of homestead exemption because her husband, who was separated from her, was not exercising any exemption claim on the residence).

Add:

Cox v. Fokkena (In re Cox), 315 B.R. 850 (Bankr. Fed. App., 2004) (holding that a homestead exemption can not exceed the value of the equity in the property).

§ 21.04(h) Duration of the Homestead. [Go To Main]

Add:

In re Perry, 267 B.R. 759 (Bankr. W.D. Tex. 2001) (homestead terminated through death, abandonment or alienation).

Add:

In re Heretakis, 293 B.R. 82 (D.Mass. 2003) (holding that a wife can release her homestead rights in the same manner that she can release dower rights, by executing an instrument of conveyance).

§ 21.04(i) Income from the Homestead. [Go To Main]

Add:

In re Ruggles, 210 B.R. 57 (Bankr. D. Vt. 1997) (Vermont statute exempts all rents, issues, profits, and products arising from the homestead).

Add:

In re Simms, 243 B.R. 156 (Bankr. S.D. Fla. 2000) (under Florida law, homestead proceeds retain their exempt status only if the proceeds are rolled over into another homestead). *See also, McMillan v. Aru, 773 So. 2d 355 (Miss. App. 2000)* (exemption of proceeds from disposal of homestead property is not dependent on vendor's continuing to be a housekeeper, or on his intention to acquire another homestead, or on the intent with which he keeps the proceeds).

Add:

Homeside Lending, Inc. v. Miller, 31 P.3d 607 (Utah App. 2001) (one year)

§ 21.04(j) Fraud of the Debtor as Defeating the Homestead. [Go To Main]

Add:

In re Holmes, 403 B.R. 634 (D. Minn. 2009) (mortgage refinancing transaction by spouses, but with husband's signature forged, did not effectively convey any interest in the homestead property).

In re John Richards Homes Bldg. Co., L.L.C., 298 B.R. 591, 603 (E.D. Mich. 2003) (holding that one who acts in bad faith by buying a house in another state and trying to gain homestead exemption is not entitled to the protection offered by the homestead exemption); *Maki v. Chong, 75 P.3d 376* (Nev., 2003) (property purchased with money that was to be given to creditors cannot come under the homestead exemption); *Zubrod v. Duncan, 329 F.3d 1195 (10th Cir. 2003)* (holding that debtor was not entitled to the homestead exemption because he acted fraudulently).

First Nat'l Bank v. Thiede (In re Thiede), 2004 Bankr. LEXIS 1404 (Bankr. D. Kan., 2004) (debtors could not exempt property that was fraudulently transferred to them).

Add:

In re Hecker, 316 B.R. 375 (Bankr. D. Fla., 2004) (homestead exemption was denied because the property was purchased with money fraudulently obtained).

§ 21.04(k) Alienation of the Homestead. [Go To Main]

Add:

Smith v. James A. Merrill, Inc., 75 Cal. Rptr. 2d 108 (Cal. App. 4th Dist. 1998) (owner of declared homestead has right to encumber homestead).

add:

National City Bank v. Engler, 777 N.W.2d 762 (Minn. App. 2010) (spouse waived protection of homestead statute by waiving her homestead rights); *Gores v. Schultz, 777 N.W.2d 522 (Minn. App. 2009)* (mortgage on homestead property was void because the wife's signature on the documents was forged); *Szawicki v. Szawicki, 772 N.W.2d 110 (Neb. App. 2009)* (conveyance of homestead property by joint tenants to joint tenants and spouse as joint tenants with right of survivorship was valid even though the spouse did not sign or acknowledge the deed).

Add:

Besnilian v. Wilkinson, 25 P.3d 187 (Nev. 2001) (holding that husband could not, without wife's knowledge and consent, alienate his interest in homestead).

Add:

James v. Thaggard, 795 So. 2d 738 (Ala. Civ. App. 2001) (statute provides that conveyances of homestead executed by married persons are invalid without signature of other spouse).

Add:

In re Estate of Mainolfi, 878 A.2d 287 (Vt. 2005) (a husband's conveyance to his wife, by quitclaim deed, of all right and title in the marital home did not convey the homestead interest held by the husband).

Snoddy v. Snoddy, 791 So. 2d 333 (Miss. App. 2001) (invalid conveyance by husband because wife failed to sign).

Add:

Moss v. Est. of Moss, 777 So. 2d 1110 (Fla. App. 4th Dist. 2001) (holding the protections against creditors found in the homestead provision may be devised by will, as opposed to merely following the laws of intestacy).

§ 21.04(l) Interest, Possession and Use Necessary to Create a Homestead. [Go To Main]

Add:

Gillmor v. Blue Ledge Corporation, 217 P.3d 723 (Utah App. 2009) (previously granted mining patent rendered void a subsequent homestead patent). *Casey v. Casey, 2005 OK 13* (Okla., 2005) (where the decedent spouse held the property in joint tenancy, the property passed to the other tenants upon decedent's death, and decedent's widow had no homestead right, even though the widow had made the property her permanent home with the decedent for 14 years); *In re Takes, 2005 Bankr. LEXIS 339* (Bankr. D. Iowa, 20 05) (holding that when the nature of debtor's title changed upon receipt of a warranty deed, the homestead interest was unchanged); *Hoggarth Bros. v. Sec. State Bank of N.D. (In re Hoggarth Bros.), 2004 U.S. Dist. LEXIS 7198* (D.N.D., 2004) (wives did not have homestead interest in property that was originally owned by their husbands in partnership).

Add:

Painewebber, Inc. v. Murray, 260 B.R. 815 (E.D. Tex. 2001) (finding a Texas homestead claimant must show the intention to claim the land as a homestead).

Add:

In re Simmons, 2004 Bankr. LEXIS 507 (M.D. Ala. 2004) (holding that a man who divorced his wife cannot claim a homestead exemption in his former occupancy, even if his intent is to reconcile with his estranged spouse and re-occupy the house; his intent to re-occupy did not amount to occupancy in fact); *In re Marrama, 2004 Bankr. LEXIS 421 (D. Mass. 2004)* (holding that intent to return to occupancy of premises was enough to satisfy the requirements for a homestead exemption); *In re Carver, 2003 Bankr. LEXIS 70 (S.D. Ill. 2003)* (holding that a spouse whose name does not appear on the title to the property cannot also claim a homestead exemption because the spouse does not have ownership); *Snoddy v. Snoddy, 791 So. 2d 333 (Miss. App. 2001)* (to constitute a homestead there must be actual occupation and use of the premises as a home for the family).

Add:

But see, In re Mead, 255 B.R. 80 (S.D. Fla. 2000) (the court held that a boat could qualify as a homestead because it was the debtor's residence); *In re Christie, 2003 Bankr. LEXIS 26 (M.D. Fla. 2003)* (a boat could not qualify as a homestead even if it was the debtor's actual residence); *In re Irwin, 293 B.R. 28 (D. Ariz. 2003)* (holding that a motor home can qualify as a "homestead" because the debtors were bona fide residents of the state, the debtors lived in their motor home, it was the debtor's only place of residence, and there was no fraud in the debtors' claim to use the homestead exemption).

Add:

Painewebber, Inc. v. Murray, 260 B.R. 815 (E.D. Tex. 2001) (Texas homestead claimant must show both (1) overt acts

of homestead usage and (2) the intention on his part to claim the land as a homestead); *In re Hughes, 2004 Bankr. LEXIS 335 (M.D. Ala. 2004)* (holding that the leased land upon which a debtor's mobile home sat could be included in the homestead exemption because the use of the land was consistent with the character of a "homestead").

In re Simmons, 308 B.R. 559 (Bankr. D. Ala., 2004) (debtor could not get a homestead exemption in a house that he had previously lived in with his family, but which he no longer occupied after separating from his family, because occupancy was necessary to gain an exemption).

Add:

Middleton v. Lockhart, 43 S.W.3d 113 (Ark. 2001) (finding that once the homestead exemption is acquired, continuous occupancy is not required); *In re Brown, 299 B.R. 425 (N.D. Tex. 2003)* (holding that a timeshare cannot come under the homestead exemption).

Add:

Snoddy v. Snoddy, 791 So. 2d 333 (Miss. App. 2001) (to constitute a homestead there must be actual occupation and use of the premises as a home for the family).

Add:

In re Schissler, 250 B.R. 697 (W.D. Mo. 2000) (debtor may establish a valid homestead exemption claim if there is a bona fide intention of making the premises a homestead).

Add:

State, Dept. of Revenue ex rel. Vickers v. Pelsey, 779 So. 2d 629 (Fla. App. 1st Dist. 2001) (requiring actual occupancy of home with intention to remain there and make it home of family, the place of their actual use and occupancy).

§ 21.04(m) Time Within Which the Homestead Must Be Claimed. [Go To Main]

Add:

In re Gaudreault, 315 B.R. 1 (Bankr. D. Mass., 2004) (debtor's right to claim a homestead exemption was not lost, even after an involuntary petition was filed against him, as long as the exemption was claimed before an order for relief was entered).

§ 21.04(n) Liability of the Homestead for the Debts and Obligations of the Title Holder. [Go To Main]

Add:

Torgelson v. Real Property Known As 17138 880th Ave., Renville County, Minnesota, 749 N.W.2d 24 (Minn. 2008) (homestead property not subject to forfeiture under a drug-asset forfeiture statute).

Chambers v. Potter (In re Potter), 320 B.R. 753 (Bankr. D. Fla., 2005) (In Florida, a homestead is exempt from all creditor claims with three exceptions: (1) unpaid property tax on the homestead, (2) mortgages against the homestead, and (3) mechanic's liens for work done on the homestead property); *In re Tendal, 2005 Bankr. LEXIS 489* (Bankr. D. Iowa, 2005) (credit card debt is not an obligation for which the homestead can be liable).

add:

Fairfield Financial Group, Inc. v. Synnott, 300 S.W.3d 316 (Tex. App. 2009) (judgment liens cannot attach to a homestead while the property remains a homestead).

Add:

Deutsche Bank National Trust Company v. Rooney, 186 P.3d 820 (Kan. App. 2008) (judgment liens do not attach to homestead property); *In re Rand, 400 B.R. 749 (D. Ariz. 2008)* (judgment lien did not attach to homestead property).

Wilcox v. Marriott, 103 S.W.3d 469 (Tex. App., 2003) (holding that a third party buyer can claim that the seller's property was a "homestead" when the buyer bought the property; therefore the property is protected from the seller's creditors).

Add:

Chase Manhattan Mortg. Corp. v. Cook, 141 S.W.3d 709 (Tex. App., 2004) (holding that a deed of trust, which was a renewal note, could not create a lien against a homestead).

add:

Denmon v. Atlas Leasing, L.L.C., 285 S.W.3d 591 (Tex. App. 2009) (lack of homestead owner's signature on loan documents rendered mechanic's lien invalid).

Add:

Nichols v. Williams, 2005 La. App. LEXIS 892 (La. Ct. App., 2005) (Louisiana statute allows homestead property an exemption from taxes).

Add:

Cadle Co. v. Harvey, 46 S.W.3d 282 (Tex. App. Fort Worth 2001) (general creditors who have reduced their debts to judgment do not obtain a judgment lien against property claimed, occupied, and used by the debtor as a homestead); *Homeside Lending, Inc. v. Miller, 31 P.3d 607 (Utah App. 2001)* (judgment lienholder was entitled to receive from sheriff's sale only those proceeds that did not impair the debtors' homestead exemption).

In re Heeren, 2005 Bankr. LEXIS 604 (Bankr. D. Iowa, 2005) (debtor's homestead was exempt from a judicial lien); *In re Adell, 321 B.R. 573* (Bankr. D. Fla., 2005) (debtor was able to avoid judicial lien against his property because the lien impaired the enjoyment of his full constitutional property exemption); *In re Durban, 2004 Bankr. LEXIS 2032* (Bankr. D. Tex., 2004) (creditor's lien was avoided because the debtor's property qualified as exempt).

Add:

Equitable Bank, S.S.B. v. Chabron, 618 N.W.2d 262 (Wis. App. 2000) (homesteads are statutorily exempt from judgment liens, but not from mortgage foreclosures).

§ 21.04(o) Abandonment as Terminating the Homestead. [Go To Main]

Add:

Farstveet v. Rudolph ex rel. Eileen Rudolph Est., 630 N.W.2d 24 (N.D. 2001) (abandonment terminates the homestead); *Tri-St. Delta Chemicals, Inc. v. Wilkison, 55 S.W.3d 304 (Ark. App. 2001)* (holding that the only way the homestead exemption may be removed is by waiver or abandonment).

In re Hunter, 295 B.R. 882 (Bankr., 2003) (abandoned property cannot be claimed under homestead exemption).

Add:

In re MacFarlane, 325 B.R. 908 (M.D. Fla. 2005) (a husband required by court order to not live in the marital residence is not considered to have abandoned his homestead right).

In re Marrama, 2004 Bankr. LEXIS 421 (D. Mass. 2004) (holding that the owner's intent to return, and his continuing exercise of dominion and control, allowed him to exempt his property as under the homestead exemption); *In re Murphy, 292 B.R. 403 (D. N.D. 2003)* (declaration of intent to return to occupancy is sufficient to warrant an exemption under homestead statute).

Add:

In re Kelley, 285 B.R. 1, 2 (Bankr. Cal. 2002) (homestead can only be abandoned by recording a declaration of abandonment, recording a declaration of homestead on a different property, conveyance of homestead, or implicitly by establishing another residence as the principal dwelling).

Farstveet v. Rudolph ex rel. Eileen Rudolph Est., 630 N.W.2d 24 (N.D. 2001) (abandonment requires a ceasing of occupancy without the intention to return).

Add:

Farstveet v. Rudolph ex rel. Eileen Rudolph Est., 630 N.W.2d 24 (N.D. 2001) (abandonment requires a ceasing of occupancy without the intention to return).

Add:

Farstveet v. Rudolph ex rel. Eileen Rudolph Est., 630 N.W.2d 24 (N.D. 2001) (abandonment requires a ceasing of occupancy without the intention to return).

Add:

In re Dawson, 266 B.R. 355 (Bankr. N.D. Tex. 2001) (under Texas law, the owner or claimant of the property claimed as homestead, if married, may not abandon the homestead without the consent of the other spouse).

Add:

Farstveet v. Rudolph ex rel. Eileen Rudolph Est., 630 N.W.2d 24 (N.D. 2001) (abandonment requires a ceasing of occupancy without the intention to return).

Add:

In re Klaiber, 265 B.R. 290 (Bankr. M.D. Fla. 2001) (under Florida law, whether there has been an abandonment of property as homestead should be determined by considering all relevant facts and circumstances).

In re Simmons, 308 B.R. 559 (Bankr. D. Ala., 2004) (an undefined, floating intention to return to a homestead at some future period is not enough to preserve an exemption).

Add:

In re Maloney, 311 B.R. 525 (Bankr. D. Mo., 2004) (holding that removal from property for 17 years constituted abandonment, despite the fact that the owner's son resided on the property).

§ 21.04(p) Effect of Dissolution of the Family Unit Upon the Homestead. [Go To Main]

Add:

Middleton v. Lockhart, 43 S.W.3d 113 (Ark. 2001) (holding that spouses retain their homestead by marriage, even if, through no fault their own, they are deserted or their children leave).

Add:

Middleton v. Lockhart, 43 S.W.3d 113 (Ark. 2001) (holding that a homestead right is not terminated by death of a spouse or departure of children by reaching the age of majority).

Add:

But see, *In re Est. of Casida, 13 S.W.3d 519 (Tex. App. 2000)* (the mere existence of an unmarried adult child remaining with the family is sufficient to cause the homestead to descend free from the claims of creditors).

Add:

In re Est. of Martelle, 32 P.3d 758 (Mont. 2001) (under Montana statute, surviving spouse and minor children take the homestead with no qualification except that they survive the decedent by 120 hours).

Add:

Painewebber, Inc. v. Murray, 260 B.R. 815 (E.D. Tex. 2001) (when head of household dies, surviving spouse maintains the same homestead rights as both spouses had prior to the death of the other).

Coyle v. Kujaczynski, 759 N.W.2d 637 (Iowa App.) (a tenant's homestead interest in the property did not preclude partition by sale).

At the end of § 21.04(p), add the following text and new footnote 1741.1:

Where a person murders his or her spouse, any homestead rights that person enjoys personally by reason of the marriage to the murdered spouse are extinguished by the murder; the murder does not, however, affect any homestead rights arising from the murderer's status as head of household where such rights are necessary to provide the homestead protections to children or other dependents of the murderer.[1741.1]

§ 21.04(q) What Property Makes Up the Homestead. [Go To Main]

Add:

In re Kyllonen, 264 B.R. 17 (Bankr. D. Minn. 2001) (homestead property is "rural" or "urban" in character).

In re Moore, 269 B.R. 864, 868-69 (Bankr. Idaho 2001) (property must be intended or used as the principal home for the owner).

Perry v. Dearing, 345 F.3d 303 (5th Cir. 2003) (holding that a 59-acre parcel of land adjoining the 1.3-acre residence of a debtor does not fall under the homestead exemption, but the 1.3-acre parcel does fall under the exemption); *Rush Truck Ctrs. of Tex. L.P. v. Bouchie, 324 F.3d 780, 783 (5th Cir. 2003)* (homestead is rural or urban in character).

Add:

Jenkins v. Hodes (In re Hodes), 402 F.3d 1005 (10th Cir., 2005) (holding that a money deposit paid to a contractor for improvements to the property can be included in the homestead exemption); *Rubino, 2004 Bankr. LEXIS 1015* (Bankr. D. Iowa, 2004) (money owed by debtors for the installation of a pool on their property could not be exempt because a pool did not qualify for exemption under Iowa law); *In re Olsen, 322 B.R. 400* (Bankr. D. Wis., 2005) (homestead exemption did not extend to all parcels of a subdivided property that once made up a contiguous parcel of land because not all the parcels were reasonable and necessary for the use of the dwelling as a home).

Add:

In re Estate of Riggle, 654 N.W.2d 710 (Minn. App. 2002) (Minnesota law is clear that a homestead extends to farmland and business-use property).

Add:

But see Iowa State Bank & Trust Co. v. Michel, 683 N.W.2d 95 (Iowa, 2004) (In Iowa, even though agricultural land was not being used for agricultural purposes, the land qualified as agricultural land under Iowa statute).

Add:

In re Webb, 263 B.R. 788 (Bankr. W.D. Tex. 2001) (to be included in a Texas rural homestead, property separated from the tract where the residence is located must be used for home purposes).

Add:

In re Shell, 295 B.R. 129 (D. Alaska 2003) (holding that a property owner could include his tools in the homestead exemption, because the tools were necessary to the management and maintenance of the property owner's apartment complex, which was already included in the homestead exemption).

Add:

In re Estate of Riggle, 654 N.W.2d 710 (Minn. App. 2002) .

Add:

In re Arwood, 289 B.R. 889, 894 (E.D. Tenn. 2003) (holding that a debtor could not claim homestead exemption because the property was owned in tenancy by the entirety with his wife and she did not file to have the property exempted as a homestead).

In re Mead, 255 B.R. 80 (S.D. Fla. 2000) (the court held that a boat could qualify as a homestead because it was the debtor's residence); *In re Christie, 2003 Bankr. LEXIS 26 (M.D. Fla. 2003)* (a boat could not qualify as a homestead even if it was the debtor's actual residence); *In re Irwin, 293 B.R. 28 (D. Ariz. 2003)* (holding that a motor home can qualify as a "homestead" because the debtors were bona fide residents of the state, the debtors lived in their motor home, it was the debtor's only place of residence, and there was no fraud in the debtors' claim to use the homestead exemption).

Add:

In re Myers, 2005 Bankr. LEXIS 660 (Bankr. D.N.H., 2005) (debtors were able to claim a duplex under the homestead exemption even though they resided on one side of the duplex because debtor's mother occupied the other half of the duplex and was under the debtors' care).

Add:

Norris v. Thomas (In re Norris), 316 B.R. 246 (D. Tex., 2004) (a 68-foot houseboat, complete with bedrooms,

bathrooms, and a galley, which the owner testified was his full-time residence, did not qualify for a homestead exemption under Texas law; the court stated that the boat's mobility made it movable chattel and not permanent residence).

Add:

In re MacLeod, 295 B.R. 1 (D. Maine 2003) (mobile home did not qualify for homestead exception); *In re Irwin, 293 B.R. 28 (D. Ariz. 2003)* (holding that a motor home can qualify as a "homestead" because the debtors were bona fide residents of the state, the debtors lived in their motor home, it was the debtor's only place of residence, and there was no fraud in the debtors' claim to use the homestead exception); *In re Hughes, 2004 Bankr. LEXIS 335 (M.D. Ala. 2004)* (holding that the leased land upon which a debtor's mobile home sat could be included in the homestead exemption because the use of the land was consistent with the character of a "homestead"); *In re Brown, 299 B.R. 425 (N.D. Tex. 2003)* (holding that a timeshare cannot come under the homestead exception). *In re Yettaw, 316 B.R. 560* (Bankr. D. Fla., 2004) (holding that a motor home qualified as a homestead).

Add:

In re Emerald Outdoor Adver., L.L.C., 300 B.R. 775, 786 (E.D. Wash. 2003) (holding that lien holder's interests are inferior to homestead interests).

In re Upton, 6 P.3d 1231 (Wash. App. 1st Div. 2000) (homestead claimant's interest in property takes priority over the interests of creditors).

Add:

In re Rutland, 318 B.R. 588 (Bankr. D. Ala., 2004) (holding that pre-paid rent is eligible for a homestead exemption); *Sticka v. Casserino (In re Casserino), 379 F.3d 1069* (9th Cir., 2004) (both pre-paid rent and security deposit qualified for a homestead exemption).

§ 21.04(r) Effect of Death of Head of the Family. [Go To Main]

Add:

Traeger v. Credit First Nat'l Ass'n, 864 So. 2d 1188 (Fla. App., 2004) (holding that a stepson's share in the homestead of the decedent is preserved, even though the stepson is not the nearest heir in relation to the decedent); *Hardon v. Estate of Patek, 2003 Minn. App. LEXIS 467* (No. CX-02-1567, Apr. 22, 2003) (holding that an heir is entitled to homestead protection in her share of her mother's estate, even though her sister entered into a purchase agreement).

Add:

In re Est. of Martelle, 32 P.3d 758 (Mont. 2001) (under Montana statute, surviving spouse takes the homestead with no qualification except that he or she survives the decedent by 120 hours).

Add:

In re Estate of Ablan, 591 N.W.2d 725 (Minn. App. 1999) (title to homestead property rests in the heirs absolutely upon the death of the decedent and is not an estate asset for the purpose of administration).

Add:

Casey v. Casey, 2005 OK 13 (Okla., 2005) (where the decedent spouse held the property in joint tenancy, the widow had no homestead right because the property passed to the other tenants upon decedent's death).

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Supp. To CHAPTER 21 MARITAL AND HOMESTEAD INTERESTS

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Supp. to § 2l.05 Bibliography.

[Go To Main]

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Annotations

Annotation, *Dower or marital rights of husband or wife in respect of improvements made by spouse's alienee or his successor after death of spouse*, 74 A.L.R. 1168 .

Annotation, *Priority of surviving spouse who accepts provision of will in lieu of dower or other marital rights over other legatees and devisees and creditors, 2 A.L.R.2d 607* .

Annotation. *Priority of surviving spouse who accepts provisions of will in lieu of dower or other marital rights over other legatees and devisees and creditors, 2 A.L.R.2d 607* .

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CHAPTER 22 REVERSIONS

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AUTHOR: Professor David A. Thomas This chapter is based in part on ch. 30, George R. Thompson, Commentaries on the Modern law of Real Property (John S. Grimes, ed. 1979), which made an important contribution to preserving the American common law on reversions. J. Reuben Clark Law School Brigham Young University

§ 22.syn Synopsis to Chapter 22: REVERSIONS

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§ 22.07 Miscellaneous Rules Regarding Reversions

§ 22.08 Bibliography

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FOOTNOTES:
(n1)Footnote *.
This chapter is based in part on ch. 30, George R. Thompson, Commentaries on the Modern law of Real Property (John S. Grimes, ed. 1979), which made an important contribution to preserving the American common law on reversions.

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CHAPTER 22 REVERSIONS

3-22 Thompson on Real Property, Thomas Editions § 22.01

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§ 22.01 Introduction

This chapter reviews the American common law of reversions, including an overview of statutory changes to that common law. Definitions and incidents of reversions are explained, as are various ways for reversions to be created or to come into being. The chapter discusses extensively the impact of the doctrine of worthier title on reversions. Rights of reversioners with respect to waste, possession (including adverse possession), and transferability are reviewed.

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CHAPTER 22 REVERSIONS

3-22 Thompson on Real Property, Thomas Editions § 22.02

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§ 22.02 Definitions of Reversions

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§ 22.02(a) Several Definitions of Reversions

Whenever one owning an estate in lands grants a lesser estate to another, there remains in the grantor an interest which is in legal parlance "reversionary." n1 Blackstone defines the word "reversion" as "the residue of an estate left in the grantor, to commence in possession after the determination of some particular estate granted out by him." n2 "It is also described as the returning of land to the grantor, or his heirs, after the grant is over." n3 In the *Restatement of the Law of Property*, it is defined as "any reversionary interest which is not subject to a condition precedent." n4

§ 22.02(b) Defined as a Present, Vested Right

A reversion grows out of the legal maxim that whatever one does not dispose of remains to one and one's heirs. It has two significations: first, the one is an estate left which continues during a particular estate in being; and second, the other is the returning of the land after the particular estate is ended. n5 It is an actual estate *in praesenti* and is vested in the sense of a present fixed right of enjoyment in the future. n6 It is therefore freely alienable, devisable and descends to the grantor's heirs. n7

§ 22.02(c) Types of Reversionary Interests

The following types of reversionary interests are recognized: escheats, rights of re-entry (sometimes called "powers of termination"), possibilities of reverter and reversions. Where the owner in fee of land creates out of the fee a lesser estate of freehold, after the expiration of the lesser estate, such owner in fee has a fee which the owner has not wholly parted with, the lesser estate being called the "particular estate," and that left in the owner in fee during the continuance of the particular estate the "reversion." n8

§ 22.02(d) Types of Reversions

The term "reversion" is applied to four different residual interests remaining in the grantor: n9

(a) where the grantor grants a leasehold interest,

(b) where the grantor creates a life estate,

(c) upon the creation of a fee tail, n10 and

(d) upon a grant to a body corporate.

The legal rights of the reversioner in each of these situations are considerably different. n11

At one time a reversion after a lease was considered to be coupled with a right of re-entry upon breach of conditions set forth in the lease, and while the reversion could be assigned, the right of re-entry could not be taken advantage of by the assignee. The grantees of expropriated monastery lands were given the same rights as the lessor of such lands had, in effect merging the right of re-entry into the reversion so as to give the assignee of leased property the same rights as the assignor. The statute of covenants n12 is generally considered to have become part of the common law.

§ 22.02(e) Reversions and Remainders Distinguished

The words "reversion" and "remainder" mean different things as regards the manner of derivation of title. In certain instances, the omission to distinguish between them accurately might be material. n13 The reversion differs from a remainder in that the latter is created by deed or devise, while the former is created by operation of law. n14 It is the residue of an estate left by operation of law in the grantor or devisor or his successors, commencing in possession on the determination of a particular estate granted or devised. n15

FOOTNOTES:
(n1)Footnote 1. "That by way of use, or by devise the inheritance in the meantime, if not otherwise disposed of, remains in the grantor and his heirs, or in the heirs of the testator, until the contingency happens to take it out of them." Charles Fearne, An Essay on the Learning of Contingent Remainders and Executory Devices (10th ed. 1844), ch. 6, p. 357.

Reversion to land out of which life estate was created held valid. *Mid-State Homes, Inc. v. Johnson, 128 S.E.2d 197 (Ga. 1962). See also Fennell v. Foskey, 225 S.E.2d 231 (Ga. 1976).*

See Verner F. Chaffin, *Reverters, Rights of Entry, and Executory Interests: Semantic Confusion and the Tying Up of Land, 31 Fordham L. Rev. 303* (1962-1963); Olin L. Browder, Jr., *Future Interest Reform, 35 N.Y.U. L. Rev. 1255 (1960).*

See also David M. Becker, *Future Interests and the Myth of the Simple Will: An Approach to Estate Planning, 1972 Wash. U.L.Q. 607; 1973 Wash. U.L.Q. 1.*

(n2)Footnote 2. William Blackstone, Commentaries 175; *Miller v. Internal Revenue Comm'r, 147 F.2d 189 (6th Cir. 1945); Wilson v. Pharris, 158 S.W.2d 274 (Ark. 1942); Keogh v. Peck, 147 N.E. 266 (Ill. 1925). See also Nelson v. Department of Corrections, 816 P.2d 768, 769 n.1 (Wash. App. 1991)* (noting the state of Washington has defined reversion by statute).

An estate in reversion is the residue of an estate left in the grantor, to commence in possession after the determination of some particular estate granted out by him. Sir Edward Coke describes a reversion to be the returning of land to the grantor or his heirs after the grant is over. As, if there be a gift in tail, the reversion of the fee is, without any special

reservation, vested in the donor by act of law: and so also the reversion, after an estate for life, years, or at will, continues in the lessor. For the fee-simple of all lands must abide somewhere; and if he, who was before possessed of the whole, carves out of it any smaller estate, and grants it away, whatever is not so granted remains in him. A reversion is never therefore created by deed, or writing, but arises from construction of law; a remainder can never be limited, unless by either deed or devise. But both are equally transferable, when actually vested, being both estates *in praesenti*, though taking effect *in futuro*.

The doctrine of reversions is plainly derived from the feudal constitution. For when a feud was granted to a man for life, or to him and his issue male, rendering either rent or other services; then, on his death or the failure of issue male, the feud was determined, and resulted back to the lord or proprietor, to be again disposed of at his pleasure. And hence the usual incidents to reversions are said to be fealty and rent. When no rent is reserved on the particular estate, fealty however results of course, as an incident quite inseparable, and may be demanded as a badge of tenure, or acknowledgement of superiority; being frequently the only evidence that the lands are holden at all. Where rent is reserved, it is also incident, though not inseparably so, to the reversion. The rent may be granted away, reserving the reversion; and the reversion may be granted away, reserving the rent; by special words: but by a general grant of the reversion, the rent will pass with it, as incident thereunto; though by the grant of the rent generally, the reversion will not pass. The incident passes by the grant of the principal, but not if converse. 2 William Blackstone, Commentaries 175.

Reversion is the residue left in an estate after determination of a particular estate granted out. *In re Leasing Consultants, Inc., 351 F. Supp. 1390 (E.D.N.Y. 1972).*

(n3)Footnote 3. *Sorrells v. McNally, 105 So. 106 (Fla. 1925). See* the following cases: *Keogh v. Peck, 147 N.E. 266 (Ill. 1925); Reichard v. Chicago, B. & Q. R. Co., 1 N.W.2d 721 (Iowa 1942); Guess v. Morgan, 26 S.E.2d 424 (Ga. 1943); Duff v. Rodenkirchen, 182 N.Y.S. 35 (1920), aff'd, Duff v. Fox, 183 N.Y.S. 947 (1920); Brown v. Guthery, 130 S.E. 836 (N.C. 1925); Corley v. Hoyt, 107 S.E. 34 (S.C. 1921).*

(n4)Footnote 4. Restatement, Property, § 154, (2). *Miller v. Dierken, 33 A.2d 804 (Pa. Super. 1943).* Vested remainderman may devise. *Oliver v. Irvin, 125 S.E.2d 695 (Ga. App. 1962).* This same definition is retained in the Restatement (Second) of the Law of Property, Donative Transfers, § 1.4.

(n5)Footnote 5. 2 William Blackstone, Commentaries 175.

(n6)Footnote 6. *Todd v. Jackson, 26 N.J.L. 525 (1857); Barber v. Brundage, 63 N.Y.S. 347 (1900); Powell v. Dayton, S. & G. R.R., 16 P. 863 (Or. 1888), Staley-Wynne Oil Corp. v. International Shoe Co., 91 S.W.2d 877 (Tex. Civ. App. 1936). See also Long v. Crum, 267 N.W.2d 407, 410 (Iowa 1978).*

The grant of a partial or particular estate only, as an estate for life or an estate tail, created a relation of tenure between the tenant of the particular estate and the reversioner, to which fealty and services were incident according to law or the express reservation of the grant. The statute *quia emptores*, which abolished sub-infeudation, was expressly confined to alienations of the fee simple and did not affect this tenure of particular estates to the reversion, which may still be created. It has been called an imperfect tenure, as distinguished from the perfect tenure incident to the seignory of the fee, in which the rent and services are incident to the seignory; in the imperfect tenure they are incident to the reversion. A grant of a particular estate and at the same time a grant of the remainder in retaining no reversion is within the statute *quia emptores*; no new tenure is created and both the grantee of the particular estate and of the ultimate remainder hold immediately of the lord of whom the grantor held.

If tenant in fee simple convey the land to a person for a particular estate only as for an estate tail or for a term of life as of years there remains in him and his heirs an estate expectant as to the possession upon the determination of the particular estate. This estate is called the reversion, because the land then reverts or returns in possession to him or to his heirs... .

In like manner, if the tenant of a particular estate convey the land for a less estate, he has a reversion left in himself; -- thus tenant in tail, by a disentailing assurance, may dispose of the lands entailed in fee simple or for any less estate; and if he make a disposition for a less estate, the reversion remains in him and is subject to the entail, unless it be wholly barred by the same assurance. If tenant in tail lease for life or for years at common law, without a disentailing assurance or any other special or statutory power in that behalf, he has a reversion; but such lease is valid only during his life and is voidable at his death by the heir in tail.

So, tenant for life may make a lease for years, and, however long the term of years may be, as it is not coextensive with the freehold, there is a reversion in the lessor. But such lease, unless made under a special or statutory power, is valid only during the continuance of the lessor's estate, and is avoided by his death.

If tenant for term of years makes an underlease for a shorter term, by however small an interval of time, he has the reversion for that interval left in him. An underlease for a shorter term, "if the underlessee shall so long live," leaves a reversion expectant on the determination of the sub-term either by lapse of time or by the death of the underlessee. An underlease for the whole term, or for a greater estate, operates as an assignment and leaves no reversion; it carries with it all the rights and liabilities incident to the term and leaves none of the incidents of a reversion.

Upon attainder for treason of a tenant in tail the king took subject to the reversion. *Hargreaves notes* to Coke on Littletons, § 18a. Bluffs Div. II Park Protection Ass'n v. Radich, No. 21693-1-*II, 1998 Wash. App. LEXIS 983 (Wash. App. Div. 2 1998)* (words "subject to" or "but if").

(n7)Footnote 7. *United States v. Bransen, 142 F.2d 232 (9th Cir. 1944); Gilpin v. Williams, 25 Ohio St. 283 (1874); City of Carthage v. United Missouri Bank, 873 S.W.2d 610 (Mo. App. 1994)* (possibility of reverter is an interest in land which is alienable and devisable).

(n8)Footnote 8. *Carter v. Lewis, 4 N.E.2d 853 (Ill. 1936); Spicer v. Moss, 100 N.E.2d 761 (Ill. 1951).*

(n9)Footnote 9. This distinction between reversions was recognized by Coke, Co. Litt., § 239b, to the effect that if a disseisor who had leased for years died the disseisee lost the right of entry but if the disseisor had leased for life, the disseisee's right of entry was not lost. *Preseault v. United States, 100 F.3d 1525 (Fed. Cir. 1996)* (Property owner's retained interest following the creation of an easement as a "reversion" in fee.)

(n10)Footnote 10. Where a testator devised real estate to a son and the heirs of his own body, and the son neither had nor left "heirs of his own body," it was held that there was a reverter, at the death of the life tenant, to the heirs of the testator. The court denied the application of the rule in *Shelley's Case*, and held that the son took only a conditional fee. *Sagers v. Sagers, 138 N.W. 911 (Iowa 1912). See also In re Estate of Hendrickson, 736 A.2d 540 (N.J. Sup. Ct. Chanc. Div. 1999)* (reaching an identical conclusion under New Jersey statute).

See Baker v. Baker, 251 S.W.2d 31 (Mo. 1952) (the same result ensues whether the immediate estate is held to be a fee tail or a conditional estate unless by statute a fee tail is converted into a fee simple absolute in which case the reversion is barred).

In Nebraska, where the will bequeaths the owner a life estate, the testator dies intestate as to the fee. *Lowry v. Murren, 236 N.W.2d 627 (Neb. 1975).*

A grantor in a fee tail retains a reversion which is an estate, not a mere possibility of reverter or a right of re-entry which is not an estate or alienable. *Long v. Long, 343 N.E.2d 100 (Ohio 1976).*

(n11)Footnote 11. *Gilpin v. Williams, 25 Ohio St. 283 (1874); Pollock v. Speidel, 27 Ohio St. 86 (1875).*

(n12)Footnote 12. 32 Henry viii, c. 34 (1540).

(n13)Footnote 13. For distinction between remainder and reversion, *see Copenhaver v. Pendleton, 155 S.E. 802 (Va. 1930). See also Ludwig v. William K. Warren Foundation, 809 P.2d 660 (Okla. 1990).*

(n14)Footnote 14. *Wilson v. Pharris, 158 S.W.2d 274 (Ark. 1942); Glenn v. Holt, 229 S.W. 684 (Tex. Civ. App. 1921). See Kavanaugh v. Cohoes Power & Light Corp., 187 N.Y.S. 216 (1921).*

(n15)Footnote 15. *Davidson v. Davidson, 167 S.W.2d 641 (Mo. 1943); Fidelity-Philadelphia Trust Co. v. Harloff, 30 A.2d 57 (N.J. Eq. 1943); Nicoll v. New York & E. R. Co., 12 N.Y. 121 (1854); Staley-Wynne Oil Corp. v. International Shoe Co., 91 S.W.2d 877 (Tex. Civ. App. 1936).*

Where the grantor conveyed to X for life with remainder to Y and X forfeited her life estate for waste, there was a reversion in the grantor for the life of *X. Folden v. Folden, 188 N.E.2d 193 (Ohio 1962).*

A reversion is not subject to any restrictions or encumbrances created by the previous possessor. *Bobhic Assoc. Ltd. P'ship v. Carrabba OB-GYN Assoc., 692 A.2d 826, 829 (Conn. App. 1997)* ("the transfer of a reversion carries with it the rent due and accruing thereafter by the lease creating the term," quoting *Sagal v. Mann, 89 Conn. 576, 581-82; 95 A. 6 (1915)).*

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CHAPTER 22 REVERSIONS

3-22 Thompson on Real Property, Thomas Editions § 22.03

AUTHOR: Professor David A. Thomas This chapter is based in part on ch. 30, George R. Thompson, Commentaries on the Modern law of Real Property (John S. Grimes, ed. 1979), which made an important contribution to preserving the American common law on reversions. J. Reuben Clark Law School Brigham Young University

§ 22.03 Incidents of Reversions

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Fealty is said to be inseparable from the reversion, and rent is an incident to and accompanies the reversion unless separated by an express reservation. n16 An interest in reversion is, by its nature, intangible and impossible of actual possession. n17 A reversioner has neither actual nor constructive possession, nor the right to either, but the estate is simply an estate in expectancy, the particular estate intervening. n18 The estate amounts to a vested interest. n19 It is a present interest, but can only take effect in the future, and may be aliened and charged as an estate in possession. n20 Under most statutes, reversions are made descendible, devisable and alienable in the same manner as estates in possession. n21 At common law, a reversion could be conveyed by feoffment only where the particular estate was less than a freehold, n22 but a reversion, not being an estate in possession, would lie in grant and the ordinary mode of transfer would now be by deed, signed, sealed, and delivered. n23

Of all of these the grantor retains the highest interest when the leasehold is given, the slightest where there is a grant in fee simple to a corporate body. The exact nature of the reversion following a fee tail remains in considerable doubt.

All reversions are estates in land and all estates present or future are vested in interest. A reversion is always treated as vested n24 even though it may be defeated by the vesting of a contingent remainder, by a life estate with a power of disposal n25 or by a defeasible fee coupled with a power. n26

FOOTNOTES:
(n1)Footnote 16. *Johnston v. Smith, 3 Pa. 496* (Pen. & W. 1832).

(n2)Footnote 17. *Williams v. Swango, 7 N.E.2d 306 (Ill. 1937).*

(n3)Footnote 18. *Metcalfe v. Miller, 56 N.W. 16 (Mich. 1893); Copenhaver v. Pendleton, 155 S.E. 802 (Va. 1930). See also Beiger Heritage Corp. v. Kilbey, 676 N.E.2d 784 (Ind. Ct. App. 1997).*

Definition of reversions. *In re Leasing Consultants, Inc., 351 F. Supp. 1390 (E.D.N.Y. 1972).*

(n4)Footnote 19. *Fisher v. Easton, 132 N.E. 442 (Ill. 1921).*

(n5)Footnote 20. *Wingate v. James, 22 N.E. 735 (Ind. 1889). See Copenhaver v. Pendleton, 155 S.E. 802 (Va. 1930)* (remainder and reversion distinguished).

Reversion after fee tail descends. *Davis v. Davis, 243 S.W.2d 739 (Ark. 1951).*

(n6)Footnote 21. *Barber v. Brundage, 63 N.Y.S. 347 (1900), aff'd, 62 N.E. 417 (N.Y. 1902).*

(n7)Footnote 22. Co. Litt., § 48b. *See Copenhaver v. Pendleton, 155 S.E. 802 (Va. 1930).*

(n8)Footnote 23. *Patterson v. Patterson, 122 S.W. 169 (Ky. 1909).*

(n9)Footnote 24. *Brown v. Brown, 93 N.E. 357 (Ill. 1910).*

This is true even though it is destructible as a reversion after a fee tail where the tenant in tail may convey a fee simple absolute. *Gibson v. Neeley, 11 Ohio St. 131 (1860).*

It is also true where there is a contingent remainder in fee. The reversion exists *in nubibus* until the contingent remainder vests or fails. 2 Preston on Abstracts 100. Charles Fearne, An Essay on the Learning of Contingent Remainders and Executory Devices (10th ed. 1844), ch. 6, p. 361, however, considered the reversion as vested and active.

Held contingent *in Frazer v. Board of Supvrs. of Peoria County, 74 Ill. 282 (1874); King v. Wurts, 13 S.W.2d 1043 (Ky. 1929).*

A reversionary interest descends to grantor's heirs. *Nowlin v. Columbia Sch. Dist., 401 S.W.2d 394 (Mo. 1966).*

A reversion is a vested interest freely alienable. *Long v. Long, 343 N.E.2d 100 (Ohio 1976). Dennis v. Bird, 941 S.W.2d 486, 489 (Ky App. 1997).* (since reversions are vested at the time of creation, the rule against perpetuities does not apply).

(n10)Footnote 25. *McCready v. Lyon, 187 S.E. 442 (Va. 1936).*

(n11)Footnote 26. *Guess v. Morgon, 26 S.E.2d 424 (Ga. 1943).*

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CHAPTER 22 REVERSIONS

3-22 Thompson on Real Property, Thomas Editions § 22.04

AUTHOR: Professor David A. Thomas This chapter is based in part on ch. 30, George R. Thompson, Commentaries on the Modern law of Real Property (John S. Grimes, ed. 1979), which made an important contribution to preserving the American common law on reversions. J. Reuben Clark Law School Brigham Young University

§ 22.04 How Reversions Arise

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A reversion may come into existence (a) through a failure to grant or devise all of the creator's estate, (b) through an express reservation of the reversion, n27 (c) through the doctrine of the "worthier title," or (d) by operation of law. Whenever a deed, trust instrument or will creates a life estate, a fee subject to defeasance by a conditional limitation or a life estate followed by a remainder which is not vested absolutely, a reversion is retained by the creator. n28 A reversion is not usually created by deed, but it arises only by implication of law, n29 and remains vested in the sense of a present fixed right of enjoyment in the future. n30

> "A remainder chiefly differs from a reversion in this -- that between the owner of the particular estate and the owner of the remainder (called the remainderman) no tenure exists. They both derive their estates from the same source, the grant of the owner in fee simple; and each of them has no more right to be lord than the other... . The other point of difference between a reversion and a remainder ... namely, that a reversion arises necessarily from the grant of the particular estate being simply that part of the estate of the grantor which remains undisposed of, but a remainder is always itself created by an express grant." n31

Coke and Challis n32 both felt that there could be no reversion after a conditional fee. Plucknett n33 has disproved this. Prior to the time of *quia emptores*, A owning in fee simple upon conveying to B in fee simple retained in himself a right of escheat which was reversionary in nature. n34

§ 22.04(a) Grant

The most common method of creating a reversion is by merely granting a lesser estate. "A reversion merely arises incidentally in consequence of the grant of the particular estate. It is created simply by the law whilst a remainder springs from the act of the parties." n35 Where a grant is of a life estate with contingent remainder or remainders, the

reversion is in the grantor and descends to the grantor's heirs at law. n36

§ 22.04(b) Lapse

Where (1) there is a lapse n37 or in the event of a void devise n38 there is a reversion, where there is a renunciation of a devise n39 or (2) there is a grant or devise in a trust where the beneficiary is given less than absolute ownership of the equitable estate, the trustee takes only so much of the legal title as is necessary to carry out the trust and there is a reversion of the balance. n40

§ 22.04(c) Reservation

A reversion may also arise out of specific words of reservation in the instrument creating the immediate estate. n41 Language providing that the immediate estate shall terminate or that the property shall return to the creator of the immediate estate under certain circumstances may have the varying effects of (a) making the creator a mere forced heir of the holder of the immediate estate, n42 (b) giving the grantor, settlor or testator a reversion after a determinable life estate, n43 (c) giving the creator a possibility of reverter after a determinable fee, n44 (d) giving the creator a right of re-entry following a fee upon condition subsequent, or (e) imposing a trust upon the holder of the immediate estate.

Lawful restrictions in a deed with respect to the use of land and providing for a reversion may be enforced in accordance with the express language of the deed. n45 Whether a settlor in a trust deed intended to reserve a reversion or make a gift in remainder to distributees must be determined from the terms of the instrument. n46

§ 22.04(d) Implication

Most authorities consider that if the remainder over after a life estate, a fee tail or an executory limitation after a fee tail is contingent or even vested subject to divesting, there must be a reversion. n47 Thus, the reversioner is a necessary party to all actions affecting the realty. n48 Reversions also exist where there are succeeding contingent remainders as, to A "for life and then to A's children but if no children to B." n49 In such a case, since B will take only if A dies childless, a possibility exists that neither remainder would take if A's life estate should terminate prematurely and the remainder were destructible. Whether a reversion would exist where the doctrine of destructibility of remainders no longer prevails is questionable.

Where the remainders are alternative instead of successive, that is, to A for life and then to B if B be then alive but if for any reason B cannot take then to C, the remainder to C being in the alternative would not need a reversion to follow it. n50 If, however, the jurisdiction held to the doctrine of destructibility of contingent remainders and there was a premature termination of the life estate, conceivably a reversion would still exist at all times until one of the two remainders vested.

It seems that at one time the courts had so limited a concept of the right of reversion that, upon the death of the holder of the reversion, it passed like a possibility of reverter n51 by descent cast. But now reversions clearly descend to the testator's heirs.

So, where a will gave the residuary legatee only a life estate, the testator died intestate as to the reversion. n52 Reversions are devisable and alienable. n53 Under the older rule, however, a reversion, being an estate in land, did not pass under the residuary clause of the will but passed by intestacy unless specifically devised.

It has been held that upon the creation of a life estate the reversion may run to the land instead of the grantor. n54

§ 22.04(e) Upon Corporate Dissolution

The rule of the common law was that land belonging to a corporation, upon the dissolution thereof, reverted to the

grantor. n55 This doctrine has been applied to eleemosynary associations incorporated for charitable purposes and having no capital stock. n56 Contrary to the common-law doctrine that real estate conveyed to an eleemosynary corporation reverts to the grantor upon a dissolution of such corporation, it is now generally held that real estate conveyed for a valuable consideration to a corporation organized for social and benevolent purposes does not revert to the grantor upon the dissolution of such corporation. n57

FOOTNOTES:
(n1)Footnote 27. Kenelm Edward Digby, An Introduction to the History of the Law of Real Property 22 (5th ed. 1897), felt that no reversion arose in a grant of an estate tail unless expressly reserved.

In re Lawrence Sav. & Trust Co., 46 A.2d 494 (Pa. 1946) (the words "revert back" showed intent to reserve a reversion). *Washington City Bd. of Educ. v. Edgerton, 94 S.E.2d 661, 664 (N.C. 1956)* (refusing to recognize reversionary interests in deeds that do not contain express and unambiguous language of reversion or termination upon condition broken).

(n2)Footnote 28. Where trust for public park for white persons only became unenforceable, the property reverted to the heirs of the grantor. *Evans v. Abney, 396 U.S. 435 (1970).*

Where the grantor reserved the oil and gas for as long as there should be production in paying quantities, such an instrument created a reversion in the grantor, there being no limitation over, which reversion passed to the grantee under other language of the deed. *Brown v. Terra Bella Irrig. Dist., 330 P.2d 775 (Cal. 1958).*

See Stanley M. Johanson, *Reversions, Remainders, and the Doctrine of Worthier Title, 45 Tex. L. Rev. 1.*

In Ohio there is a reversion after a fee tail estate which is descendable, devisable and alienable, but if not disposed of, it passes to the heirs of the grantor by descent. *Long v. Long, 343 N.E.2d 100 (Ohio 1976). Beechler v. Beechler, 641 N.E.2d 1189 (Ohio App. 1994)* (court enforced ex-wife's reversionary interest in divorce decree where interest arose if ex-husband allowed particular person to occupy former marital residence overnight).

(n3)Footnote 29. 4 Kent's Comm. 354; *Alexander v. De Kerm, 81 Ky. 345 (1883).*

(n4)Footnote 30. *Norman v. Horton, 126 S.W.2d 187 (Mo. 1939).*

(n5)Footnote 31. Joshua Williams, Principles of the Law of Real Property, 231 (24th ed. 1933).

Where there was a devise to the testator's brothers and sisters for their lives and then to their children, the court held that where the remainderman would join in a conveyance and would predecease the life tenant and the life tenant then would die without issue, the heir of the remainderman would take directly from the testator and not as heir as the remainderman; therefore, such heir of the remainderman was not bound by the ancestor's deed. *Barnes v. Dortch, 95 S.E.2d 872 (N.C. 1957).*

(n6)Footnote 32. Henry William Challis, The Law of Real Property, 83 (3d ed. 1911).

(n7)Footnote 33. Theodore F.T. Plucknett, A Concise History of the Common Law (2d Ed.), 559 (2d ed. 1936).

(n8)Footnote 34. Digby, supra, note n.39 § 3, considered that an escheat followed the conditional fee and was a mere possibility of obtaining a right in land, not an alienable right itself. The statute *de donis*, however, converted this "escheat" into a reversion, an alienable interest in land.

(n9)Footnote 35. Where there is a valid limitation in a will to the wife "as long as she remains my widow" or "until she remarries," one line of cases gives the widow only a life estate determinable on remarriage with a reversion to the

grantor's estate. *Lydick v. Tate, 44 N.E.2d 583 (Ill. 1942);* the other creates a determinable fee. *Raulerson v. Saffold, 61 So. 2d 926 (Fla. 1952).*

(n10)Footnote 36. *Gehlbach v. Briegel, 194 N.E. 591 (Ill. 1934); Beatty v. Miley, 233 P.2d 269 (Okla. 1951).*

A reversion arises where the testator failed to create a future estate in the remainderman. *Matter of Newton's Estate, 389 N.Y.S.2d 420 (1976).*

(n11)Footnote 37. *Thomas v. Thomas, 9 N.E. 457 (Ind. 1886)* (even where testator attempted to disinherit his heirs); *Reikofski v. Bodwell, 529 N.W.2d 531 (Neb. 1995)* (when railroad ceased using right of way for railroad purposes, the land reverted to the grantor's successors); *Huff v. Langman, 646 N.E.2d 730 (Ind. App. 1995)* (reversion resulting from abandonment of railroad right of way).

(n12)Footnote 38. *Quinlan v. Wickman, 84 N.E. 38 (Ill. 1908).*

(n13)Footnote 39. *Trustees of Cumberland Univ. v. Caldwell, 84 So. 846 (Ala. 1919).*

(n14)Footnote 40. *Bourbon Agric. Bank & Trust Co. v. Miller, 265 S.W. 790 (Ky. 1924). See Garvey v. Union Trust Co., 52 N.Y.S. 260 (1898); In re Kenyon, 20 A. 294 (R.I. 1890).*

(n15)Footnote 41. *Shelton v. Lewis, 158 N.E.2d 919 (Ohio Com. Pl. 1959)* ("revert" creates a reversion in a will). *Sedlak v. City of Solon, 661 N.E.2d 265 (Ohio App. 1995)* (reversion language in instrument of conveyance was clear and unambiguous); *Washington City Bd. of Educ. v. Edgerton, 94 S.E.2d 661, 664 (N.C. 1956)* (refusing to recognize reversionary interests in deeds that do not contain express and unambiguous language of reversion or termination upon condition broken).

(n16)Footnote 42. So under a statute providing that if a deed were made in sole consideration of love and affection and the grantee died without issue the property should "revert" to the grantor, the wife of the grantee was entitled to her statutory one-third in fee in lieu of dower. *Mitchell v. Parkhurst, 17 Ind. 146 (1861).*

(n17)Footnote 43. Joshua Williams, Principles of the Law of Real Property, 386 (24th ed. 1933).

(n18)Footnote 44. Where the testator limits the gift to the widow "as long as she remains my widow" or "until she remarries" or deeds or devises are given "as long as the grantee remains unmarried," one line of cases gives a determinable fee in the donee with possibility of reverter in the grantor or testator, the fee ripening into a fee simple absolute if donee dies unmarried.

(n19)Footnote 45. *Mitchell v. Cheney Slough Irrig. Co., 134 P.2d 34 (Cal. App. 1943).*

(n20)Footnote 46. *City Bank Farmers Trust Co. v. Miller, 15 N.E.2d 553 (N.Y. 1938).*

The reservation of a reversion is not inconsistent with the creation of a trust to continue until the death of the reversioner (*Doane v. Mercantile Trust Co., 55 N.E. 296 (N.Y. 1899); Matter of Asch, 78 N.Y.S. 561 (1902)).* We do not say that the ancient rule survives as an absolute prohibition limiting the power of a grantor. At the outset, probably, like the rule in *Shelley's Case* (*Webb v. Sweet, 79 N.E. 1024 (N.Y. 1907)),* it was a rule, not of construction, but of property. But it was never applied in all its rigor to executory trusts (Sackville-West v. Holmesdale, L.R. 4, H.L. 543; *Cushing v. Blake, 30 N.J. Eq. 689 (1879); Locke v. Southwood, 1 My. & Cr. 411; Trevor v. Trevor, 1 P. Wms. 622, 631; S. C., 1 Eq. Cas. Abr. 387, 391, aff'd, 5 Bro. P.C. 122; 29 L.R.A. (NS) 1136;* Charles Watkins, An Essay Towards the Further Elucidation of the Law of Descents 145 (1794). Charles Fearne, An Essay on the Learning of Contingent Remainders and Executory Devices (10th ed. 1844), ch. 6, p. 145; which were "moulded by the court as best to answer the intent of the person creating them" (Watkins, *supra*). We may assume that this is the principle that would control the courts today. *Doctor v. Hughes, 122 N.E. 221 (N.Y. 1919).*

(n21)Footnote 47. *Armstrong Junior College Comm. v. Livesey, 7 S.E.2d 678 (Ga. 1940). Graham v. Patton, 202 S.E.2d 58,* (Ga. 1973); *Brown v. Kamerer, 114 N.E. 544 (Ill. 1916); Bender v. Bender, 127 N.E. 22 (Ill. 1920)* (reversion subject to contingent remainder must be paid for in eminent domain); *Carter v. Lewis, 4 N.E. 853 (Ill. 1936); Alsman v. Walters, 111 N.E. 921 (Ind. 1916); Baxter v. Bryan, 94 S.W. 633 (Ky. 1906); French v. Pierce, 208 S.W.2d 327 (Ky. 1948); Gilpin v. Williams, 25 Ohio St. 283 (1874); Osgood v. Thomas, 121 A. 122 (R.I. 1923); Tyson v. Weatherley, 52 S.E.2d 410 (S.C. 1949); Bigley v. Watson, 39 S.W. 525 (Tenn. 1897).*

(n22)Footnote 48. *Bender v. Bender, 127 N.E. 22 (Ill. 1920). But see Golick v. Lukus, 215 A.2d 551 (N.J. Sup. Ct. App. Div. 1965)* (noting that the reversioner is not a necessary party in an action to partition a life estate).

(n23)Footnote 49. Loddington v. Kime, 1 Salk. 224, *91 Eng. Rep. 198 (1795).*

(n24)Footnote 50. *First Nat'l Bank v. Pointer, 126 S.W.2d 335 (Tenn. 1939).*

(n25)Footnote 51. Heirs of holder of a reversion take per stirpes and per capita. *House v. White, 240 S.E.2d 489 (N.C. App. 1978),* N.C. Gen. Stat. § 29-1.

(n26)Footnote 52. *Brown v. Kamerer, 114 N.E. 544 (Ill. 1916); Spicely v. Jones, 101 S.E.2d 567 (Va. 1958).*

(n27)Footnote 53. William D. Sheppard's Touchstone of Common Assurances, 238 (1841).

Statute canceling reverter provision more than 21 years old was held unconstitutional as applying to existing interests. *Biltmore Village, Inc. v. Royal, 71 So. 2d 727 (Fla. 1954).*

(n28)Footnote 54. *Mid-State Homes, Inc. v. Johnson, 128 S.E.2d 197 (Ga. 1962).*

(n29)Footnote 55. Coke on Littleton, § 13b; 1 William Blackstone, Commentaries 484.

A gift in remainder to a corporation vests at the testator's death and is not lost if the corporation dissolves before the life tenant's death. *Tretbar v. Aged Ministers' Home, 299 P.2d 58 (Kan. 1956).*

(n30)Footnote 56. *Late Corp. of Church of Jesus Christ of Latter-Day Saints v. United States, 136 U.S. 1 (1890); Mott v. Danville Seminary, 21 N.E. 927 (Ill. 1889).*

(n31)Footnote 57. *McAlhany v. Murray, 71 S.E. 1025 (S.C. 1911),* citing *Diamond State Iron Co. v. Husbands, 68 A. 240 (Del. Ch. 1898); Hopkins v. Crossley, 101 N.W. 822 (Mich. 1904); Richards v. Northwestern Coal & Mining Co., 119 S.W. 953 (Mo. 1909); Shayne v. Evening Post Pub. Co., 61 N.E. 115 (N.Y. 1901); Wilson v. Leary, 26 S.E. 630 (N.C. 1897), L.R.A. 240, 58 Am. St. 778; Huber v. Martin, 105 N.W. 1031 (Wis. 1906).*

When a canal in Ohio was abandoned by the state, the interest did not revert to the grantor's successors, but remained in the state. *Circle Inv. Co. v. City of Toledo, 345 N.E.2d 442 (Ohio App. 1975).*

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CHAPTER 22 REVERSIONS

3-22 Thompson on Real Property, Thomas Editions § 22.05

AUTHOR: Professor David A. Thomas This chapter is based in part on ch. 30, George R. Thompson, Commentaries on the Modern law of Real Property (John S. Grimes, ed. 1979), which made an important contribution to preserving the American common law on reversions. J. Reuben Clark Law School Brigham Young University

§ 22.05 Reversions Under the Doctrine of Worthier Title

[Go To Supp]

Under the reasoning of the common law, if one enfeoffed another for life or in tail, remainder to the right heirs of the feoffor, the remainder was void "for the ancestor during his life beareth in his body (in judgment of law) all his heirs and therefore it is truly said that *haeres est pars antecessoris*." n58 The use returned to the feoffor who could devise it, there being want of consideration to raise the use to the heirs. n59 Where the remainder was to the next heir in the singular, however, the rule did not apply and the heir took by way of remainder. n60

A similar rule developed at a later date as to devises in wills to the heirs of the testator. Here, where the devisees took the same quantity and quality of estate by the devise as they would take by descent, they were said to take under the worthier, i.e., older title of descent rather than by devise. Thus, the heirs had an inherited reversion rather than a devised remainder. n61

This, being a common-law concept, has found considerable following in America. A grant or devise to one for life with "remainder" to the heirs of the grantor or devisor does not create an estate in remainder, for the grantor or devisor could have no heirs until after death. If the life estate should terminate before the grantor's or devisor's death the estate would revert to such grantor or devisor, or if the life estate should terminate after the death of the grantor or devisor, the reversion would pass by descent to the grantor's or devisor's heirs. n62

Under this doctrine of worthier title, if the grantees or legatees took the same estate in quantity and quality by way of grant or devise as they would have taken by way of inheritance they took by the "worthier title," i.e., a reversion rather than a remainder was created. n63

Worthier title is now largely in disrepute. n64 The grantor or devisor, having the reversion under this doctrine, might dispose of it by subsequent inter vivos conveyance to the exclusion of his heirs apparent, n65 and he may dispose of such interest by will. n66 The grantor has the power to alienate the reversion during his lifetime. n67

There is a corollary to the doctrine of worthier title, found in some jurisdictions, to the effect that if any devisee is given in a will the same quality and quantity of estate that he would have taken had the testator died intestate, the taking is by descent. So a devise of the same rights the devisee would take under the law has no effect. n68 In the absence of a clearly expressed intent to the contrary, a grant to the grantor's next of kin creates a reversion in the grantor and gives the next of kin nothing in remainder. n69

The worthier title doctrine is important where problems of abatement of the testator's estate for payment of debts arise. Under some statutes property passing by intestacy or under the residuary clause abates before even general devises or bequests, n70 and if the residuary beneficiaries are other than the testator's legal heirs then in those jurisdictions where a reversion passes under the residuary clause the heirs will lose out entirely by reason of the worthier title doctrine. n71

In a trust settlement, the settlor where the doctrine is in effect may join with a present beneficiary to terminate the trust even though there is a remainder to the settlor's heirs. n72 In the case of a deed, if there is a remainder to the grantor's heirs, the remainder will become part of the grantor's estate upon his death. A similar result may ensue in the case of insurance policies and person's or employee's trusts or profit-sharing plans if the employee makes his heirs generally the alternate payees upon his death, and the presence or absence of the doctrine is important where the rule against remoteness of vesting is raised. n73 If worthier title is not in effect, a limitation to the testator's heirs refers to those living at the testator's death. n74

In some cases the doctrine has been treated as a rule of law like Shelley's Case. n75 But if the testator intended by the word heirs to mean a limited group as "children" the rule does not apply. n76

One practical difference between the worthier title doctrine and the remainder theory arises in cases where the limitation to the grantor or testator's heirs follows a life estate. In some states "heirs" would be determined as of the time of the life tenant's death. n77

The reservation of a testamentary power of appointment indicates that the doctrine of "worthier title" is not applicable and that instead a remainder is created in the heirs. n78 New York leans to the use of the doctrine as a rule of construction not of law. n79

California has preserved the doctrine n80 though by statute it has abolished *Shelley's Case*.

Under the worthier title doctrine, a subsequent devisee or grantee of the grantor will take to the exclusion of the grantor's heirs. n81 One who takes by worthier title takes by "descent" under a statute differentiating between descent and purchase. n82 The worthier title rule does not apply if the devise is in trust. n83

In some states, however, particularly as to the wills branch of the doctrine, it has become a rule of intention of the testator, not a rule of law. n84 The doctrine has been abolished by statute in England, n85 and it has been repudiated either by statute n86 or by judicial decision in numerous states. n87 Statutes abolishing *Shelley's Case* do not apply to worthier title problems. n88 But California has held that such a statute causes "heirs" to become a word of purchase, giving a remainder to the heir. n89

In those states where the escheat concept is understood as causing the state to take a superior title, and not as an ultimate heir, the effect is as though with respect to the sovereign and the statute *quia emptores*. n90 Thus, the state has at all times a reversionary interest in a fee simple dependent upon the death of the holder of a fee simple absolute without heirs and intestate.

In wills, worthier title applies whenever the heir takes the same estate in quality as he would take by descent. n91 In deeds, the rule is applicable only where the limitation is to the grantor's heirs. n92 In wills, the doctrine is used whether

the gift is immediate or by way of future interest. n93 Where the doctrine of worthier title is not effective and there is a limitation inter vivos to the heirs of the settlor in remainder, those who are the heirs of the settlor are determined as of the effective date of the instrument, not at the death of the life tenant. n94

A reversion exists whenever the remainders are successive and not alternative, n95 and remainders that are vested in fee subject to divesting are followed by reversions. n96 Where a trust is created, any part of the fee not disposed of reverts to the creator. n97

FOOTNOTES:
(n1)Footnote 58. 27 Henry viii, c. 10 (1536). Co. Litt., § 22b, citing Fenwicke & Mitford, Tr. 31 Eliz., 1 *Leon 183, 74 Eng. Rep. 168.*

See Joseph W. Morris, *Wills Branch of the Worthier Title Doctrine, 54 Mich. L. Rev. 451 (1956).*

"Whensoever the ancestor takes any estate of freehold, whether for his own life or the life of another, or whether it be of such a nature that it may determine in his lifetime or not, and there is afterwards, in the same conveyance, a limitation to his right heirs or heirs in tail, (either immediately, without the intervention of any mean estate of freehold between his freehold and the subsequent limitation to his heirs, or mediately, that is, with the interposition of some such mean estate), there such subsequent limitation to the heirs or heirs in tail vests immediately in the ancestor and does not remain in contingency or abeyance, with this distinction: that where such subsequent limitation is immediate it then executes in the ancestor and becomes united to his particular freehold, forming therewith one estate of inheritance in possession; but where such limitation is mediate it is then a remainder vested in the ancestor who takes the freehold, not to be executed in possession till the determination of the preceding mean estate." Charles Fearne, An Essay on the Learning of Contingent Remainders and Executory Devices (10th ed. 1844), p. 25.

In re Bingham's Case, 2 Coke 91a, *76 Eng. Rep. 611.*

(n2)Footnote 59. Charles Butler & Francis Hargrave, Notes to Coke Littleton, § 22b (1832).

See Joseph W. Morris, *Inter Vivos Branch of the Worthier Title Doctrine, 2 Okla. L. Rev. 133 (1949).*

In re Bingham's Case, 2 Coke 91a, *76 Eng. Rep. 611.*

(n3)Footnote 60. Archer's Case, 1 Coke 66b; Bingham's Case, 2 Coke 91a; *Pibus v. Milford, 1 Vent. 372;* Read v. Erington, Cro. Eliz. 322; Cholmondesly v. Maxey, 12 E. Easte. 583.

Otherwise if the ancestor took only an estate for years, remainder to the heirs of his body, the remainder was valid. Butler, Notes to Co. Litt., § 22b.

(n4)Footnote 61. *Allen v. Heber, 1 W. Bl. 22, 96 Eng. Rep. 12 (1828); Chaplin v. Leroux, 5 Maule. & S. 14; 105 Eng. Rep. 957 (1816); Godolphin v. Abingdon, 2 Atk. 57, 26 Eng. Rep. 432 (1740). See* Fowler Vincent Harper & Frederick E. Heckel, *Doctrine of Worthier Title, 24 N.W. U.L. Rev. 627 (1930).*

Devise to N in fee simple and if she died without issue to the testator's heirs. Testator's heirs took since devisee took a defeasible fee (worthier title not discussed). *Scott v. Jackson, 127 S.E.2d 234 (N.C. 1962).*

Worthier title is a rule of law. *In re Brolasky's Estate, 153 A. 739 (Pa. 1931); Robinson v. Blankenship, 92 S.W. 854 (Tenn. 1906). Contra*, rule of construction, *In re Burchell's Estate, 87 N.E.2d 293 (N.Y. 1949); Braswell v. Braswell, 81 S.E.2d 560 (Va. 1954).*

Doctrine of worthier title was abolished in Illinois. 765 Ill. Comp. Stat. 350/1, 350/2. And in Indiana as to trusts only. Ind. Code § 30-4-2-7.

The doctrine of worthier title is abolished in North Carolina. N.C. Gen. Stat., § 28A-1-2.

(n5)Footnote 62. William Blackstone, Commentaries 176.

Bixby v. California Trust Co., 202 P.2d 1018 (Cal. 1949); Akers v. Clark, 56 N.E. 296 (Ill. 1900); Bails v. Davis, 89 N.E. 706 (Ill. 1909); Moore v. Stanfill, 313 S.W.2d 486 (Tenn. App. 1957); Braswell v. Braswell, 81 S.E.2d 560 (Va. 1954);

See the following cases: *West Tenn. Co. v. Townes, 52 F.2d 764 (D. Miss. 1931); Morsman v. Internal Revenue Comm'r, 90 F.2d 18 (8th Cir. 1937); Wilcoxen v. Owen, 185 So. 897 (Ala. 1938); Fletcher v. Ferrill, 227 S.W.2d 448 (Ark. 1950); Lathrop v. Sandlin, 268 S.W.2d 606 (Ark. 1954); Burton v. Boren, 139 N.E. 868 (Ill. 1923); Sutliff v. Aydelott, 27 N.E.2d 529 (Ill. 1940); Mills v. Mills, 87 S.W.2d 389 (Ky. 1935); Fidelity & Columbia Trust Co. v. Williams, 105 S.W.2d 814 (Ky. 1937); Powell v. Childers, 234 S.W.2d 158 (Ky. 1950); Perkins v. Iglehart, 39 A.2d 672 (Md. 1944); Norman v. Horton, 126 S.W.2d 187 (Mo. 1939); City Bank Farmers Trust Co. v. Miller, 15 N.E.2d 553 (N.Y. 1938); Davies v. City Bank Farmers Trust Co., 288 N.Y.S. 398 (1936); Richardson v. Richardson, 81 N.E.2d 54 (N.Y. 1948); Therrell v. Clanton, 186 S.E. 483 (N.C. 1936); Dunnett v. First Nat'l Bank & Trust Co., 85 P.2d 281 (Okla. 1938); In re Brolasky's Estate, 153 A. 739 (Pa. 1931); Wilson v. Poston, 123 S.E. 849 (S.C. 1924); Robinson v. Blankenship, 92 S.W. 854 (Tenn. 1906); Seguin State Bank & Trust Co. v. Locke, 102 S.W.2d 1050 (Tex. 1937); Glenn v. Holt, 229 S.W. 684 (Tex. Civ. App. 1921); Bottimore v. First & Merchants Nat'l Bank, 196 S.E. 593 (Va. 1938); McKenna v. Seattle-First Nat'l Bank, 214 P.2d 664 (Wash. 1950).*

"If a man make a gift in tail or a lease for life the remainder to his own right heirs, this remainder is void and he hath the reversion in him." Coke on Littleton, § 2b.

In the case of *Fletcher v. Ferrill, 227 S.W.2d 448 (Ark. 1950),* the grantor in his deed reserved a life estate in himself then to an orphanage so long as it should be so used and then to revert to the grantor's heirs. The court held that this created a possibility of reverter in the grantor and not an executory limitation to the heirs. *Wilson v. Pharris, 158 S.W.2d 274 (Ark. 1942).*

Where there is a limitation to several for their lives with a remainder in fee to the heirs of one of them, the estate in remainder vests at once in the ancestor to whose heirs it purports to be given. *Bullard v. Goffe, 37 Mass. (20 Pick.) 252 (1838).*

A limitation over to the settlor's heirs in default of testamentary appointment by the settlor was held not to be worthier title since the settlor had no power to deed away a reversion. *Sands v. Old Colony Trust Co., 81 N.E. 300 (Mass. 1907).*

See Fowler Vincent Harper & Frederick E. Heckel, *The Doctrine of Worthier Title,* 24 N.W. U.L. L. Rev. 627 (1930); Comment *Limitation to Heirs of a Settlor, 34 N.W. U.L. Rev. 835* (1939-1940); Joseph W. Morris, *The Inter-Vivos Branch of the Worthier Title Doctrine, 2 Okla. L. Rev. 133;* Edward H. Warren, *A Remainder to the Grantor's Heirs, 22 Tex. L. Rev. 22 (1943);* 1 Lewis F. Simes, *Future Interests c. 8* (1936); Note, *The Rule Favoring Title By Descent Over Title By Devise, 76 Harv. L. Rev. 993 (1933);* Note, *Trust -- Termination -- Effect Limitation in Form of Remainder, Cuako in Favor of This Entitled in Case of Intestacy, 17 Minn L. Rev. 346 (1933);* Note, *Deeds -- Reversions -- Conveyances to Heirs General of Grantor, 15 N.C.L. Rev 51 (1936);* Note, *Construction of Indent on Limitations to Grantor's Heirs, 17 U. Chi. L. Rev. 87 (1949).*

Doctrine of worthier title repudiated. *Hatch v. Riggs Nat'l Bank, 361 F.2d 559 (D.D.C. 1966).*

New York has now made worthier title a rule of property. *In re Dodge's Trust, 250 N.E.2d 849 (N.Y. 1969).*

New York has abolished the doctrine of worthier title for all purposes except that the settlor of an inter vivos trust could terminate the trust with the consent of adult living beneficiaries. New York Estates, Powers and Trusts Law, § 7-1.9. *Jamin v. Williamson, 381 S.E.2d 345 (N.C. App. 1989); Bean v. Boudreau, 504 N.E.2d 939 (Ill. App. 1987).*

(n6)Footnote 63. *In re Miller's Estate, 54 N.W.2d 433 (Iowa 1952); Beamer v. Ashby, 231 P.2d 668 (Okla. 1951)* (for worthier title estate must be identical with that which would have passed by descent); *Cochran v. Frierson, 258 S.W.2d 748 (Tenn. 1953).*

See Joseph W. Morris, *The Wills Branch of the Worthier Title Doctrine, 54 Mich. L. Rev. 451 (1956).*

In re Burchell's Estate, 87 N.E.2d 293 (N.Y. 1949) (rule of construction); *In re Brolasky's Estate, 153 A. 739 (Pa. 1931)* (rule of property); *McKenna v. Seattle-First Nat'l Bank, 214 P.2d 664 (Wash. 1950).*

In the case of *Morris v. Hardin, 295 So. 2d 755 (Miss. 1974),* under a provision that if the beneficiary in remainder should die prior to the life tenant the property should become that of the heirs at law of said beneficiary, no interest was given to the heirs.

"Next of kin" leads to worthier title. *Fidelity Union Trust Co. v. Egenolf Day Nursery Ass'n, 166 A.2d 402 (N.J. Super. 1960).*

Worthier title not followed; "heirs" being treated as a word of purchase, not of limitation. *Standard Knitting Mills, Inc. v. Allen, 424 S.W.2d 796 (Tenn. 1967).*

See Comment, *The Doctrine of Worthier Title in Arkansas, 21 Ark. L. Rev. 394 (1967).*

Gift to testator's issue created a contingent remainder in the issue and not worthier title. *In re Estate of Brown, 306 N.E.2d 781 (N.Y. 1973).*

North Carolina has abolished common-law worthier title. N.C. Gen. Stat. § 2844-1-2. *In re Estate of Grulke, 546 N.W.2d 626 (Iowa App. 1996)* (court applied the doctrine of worthier title); *Dennis v. Bird, 941 S.W.2d 486 (Ky. Ct. App. 1997)* (restricting application of the doctrine of worthier title to remainders, not reversions); All *Persons v. Buie, 386 So. 2d 1109 (Miss. 1980)* (recognizing the doctrine of worthier title as the law in Mississippi).

(n7)Footnote 64. Treating wills branch of worthier title as an inapplicable anachronism. *City Nat'l Bank of Birmingham v. Andrews, 355 So. 2d 341 (Ala. 1978).* Devise created a remainder which could be renounced, not a reversion.

Worthier title ignored. *Hanley v. Craven, 263 N.W.2d 79 (Neb. 1978).*

(n8)Footnote 65. *West Tenn. Co. v. Townes, 52 F.2d 764 (D. Miss. 1931); Wilcoxen v. Owen, 185 So. 897 (Ala. 1938); Whayne v. Davis, 66 S.W. 827 (Ky. App. 1902); Dooley v. Goodwin, 93 S.W. 47 (Ky. L. 1906); Wells v. Kuhn, 221 S.W. 19 (Mo. 1920); Therrell v. Clanton, 186 S.E. 483 (N.C. 1936); Conrad v. Funnell, 232 P. 950 (Okla. 1925); Robinson v. Blankenship, 92 S.W. 854 (Tenn. 1906); Glenn v. Holt, 229 S.W. 684 (Tex. Civ. App. 1921).*

(n9)Footnote 66. *Wilcoxen v. Owen, 185 So. 897 (Ala. 1938); Akers v. Clark, 56 N.E. 296 (Ill. 1900); City Bank Farmers Trust Co. v. Miller, 15 N.E.2d 553 (N.Y. 1938); Hammond v. Chemung Canal Trust Co., 252 N.Y.S. 259 (1931); In re Brolasky's Estate, 153 A. 739 (Pa. 1931).*

"The creator of a trust can do as he pleases with his property and the courts look at his words to guide them in

decisions. The directions come from the owner of the property and not from the law, unless there be some specific statute to be enforced. To determine, therefore, whether the settlor of the trust in this case simply created a life interest and nothing more, reserving to himself the balance of the interest in the property, we looked to his intention, as expressed in the instrument. If the trust deed had said that upon the death of the life beneficiary the net principal of the trust estate was to be paid over and delivered to the settlor or his next of kin in equal shares, the addition in this place of the words "next of kin," would not have been sufficient in all probability to create a remainder. Rather it would indicate that the settlor intended all above a life interest to remain with him as a reversion to be disposed of in any way he pleased. The words would indicate a limitation, not a gift." *Whittemore v. Equitable Trust Co., 165 N.E. 454 (N.Y. 1929).*

(n10)Footnote 67. *Wilson v. Pharris, 158 S.W.2d 274 (Ark. 1942).* All *Persons v. Buie, 386 So. 2d 1109 (Miss. 1980)* (allowing conveyance by grantor of the reversion).

(n11)Footnote 68. In the case of *Tennant v. Smith, 155 N.W. 267 (Iowa 1915),* where the wife devised to my husband such share of my estate as he is entitled to receive under the laws of the state of Iowa the worthier title doctrine was invoked when the husband predeceased the wife so that the husband took by descent not by will and the antilapse statute did not apply.

Devise to my wife such property as she will take by the laws of the state of Iowa, wife took as heir under the worthier title doctrine. Comment, *Wills -- Construction -- Use of the Doctrine of Worthier Title, 39 Iowa L. Rev. 199 (1953).*

"When a will is made the presumption is, that the testator intended that the estate should pass by devise and not by descent. This design, however, is sometimes frustrated by rules of law, which is sought to be done in the present case, by one for which there are not the same reasons under our laws as in England. This rule is as technical as the other. However, it exists, and we have no disposition to disregard it, but we think it does not apply in the present case, as the will does not pass the same estate in quality and quantity that the devisees would have taken as heirs at law." *Gilpin v. Hollingsworth, 3 Md. 190 (1852).*

"Where the same quantity and quality of estate is devised, that the devisee would have acquired by descent, the title passes by the worthier title -- by descent, and not by purchase." *7 Gill & Johns 70.* 2 Francis Hilliard, The American Law of Real Property, 528 (4th ed. 1869). *Matter of Estate of Grulke, 546 N.W.2d 626 (Iowa App. 1996).*

(n12)Footnote 69. *Akers v. Clark, 56 N.E. 296 (Ill. 1900), 75 Am. St. 152; Berlenbach v. Chemical Bank & Trust Co., 256 N.Y.S. 563 (1932).*

Worthier title is quite distinct from *Shelley's Case. Alexander v. Kermel, 81 Ky. 345 (1883).* The one applies only to the acts of an ancestor as between him and his own heirs. The other is confined to the limitation of an estate of inheritance to heirs of a person who has taken under the same instrument a prior estate of freehold. *Campbell v. Rawdon, 18 N.Y. 412 (1858).*

Where trust created a life estate with contingent remainder to the daughter's living children or the testator's representatives, the remainder interest paid to the representatives was an asset of the testator's estate and passed under the residuary clause of his will. *In re Bentley's Estate, 303 N.E.2d 166 (Ill. App. 1973).*

(n13)Footnote 70. Charles Butler & Francis Hargrave, Notes to Coke Littleton, § 12b (1832). *Mitchell v. Mitchell, 21 Md. 244 (1864); Ellis v. Page, 61 Mass. (7 Cush.) 161 (1857).*

Contra result, requiring the devisees to contribute to the disappointed heir. *Biederman v. Seymour, 3 Beav. 368, 48 Eng. Rep. 1071 (1839).*

(n14)Footnote 71. Where a devise was to the testator's only child for life, and, should he die without children, to

testator's next of kin, it was held that such child took a life estate, and that he was also entitled, by descent, to a legal reversion of the fee pending the event of his dying without children and the taking effect in possession, so that the life estate became merged in the fee and cut off contingent remainders limited upon the life estate. *Bond v. Moore, 86 N.E. 386 (Ill. 1908).*

Where there was a devise of a life estate, with the remainder to the children or more remote issue of the devisee or in the alternative to the brothers and their issue, it was held that where there were no such issue the life tenant could devise the property because the reversion had been created under the will to the life tenant as the heir of the testator, and the heir as of the date of the testator's death could inherit the reversion. *State v. Rogers, 344 P.2d 1073 (Colo. 1959).*

Indiana has abolished the doctrine of worthier title in trusts. Ind. Code § 30-4-2-7.

Massachusetts has abolished the doctrine of worthier title in wills and inter vivos trusts. Mass. Ann. Laws ch. 184, §§ 33A, 33B.

See Harold E. Verrall, *The Doctrine of Worthier Title: A Questionable Rule of Construction, 6 UCLA L. Rev. 371 (1959).*

(n15)Footnote 72. *Doctor v. Hughes, 122 N.E. 221 (N.Y. 1919).*

Parties to a marriage settlement, which provided that the property should go to the survivor for life and then to their heirs, could, under the worthier title doctrine terminate the settlement, since there was no remainder in the heirs. *King v. Dunham, 31 Ga. 743 (1861). In re Eble's Trust, 76 N.Y.S.2d 506 (N.Y. Sup. Ct. 1947).*

(n16)Footnote 73. *McMahon v. Consistory of St. Paul's Reformed Church, 75 A.2d 122 (Md. 1950)* (gift to testator's heirs after a fee upon condition subsequent was not a possibility of reverter but a limitation over and void for remoteness).

(n17)Footnote 74. *Young v. Lewis, 76 S.E.2d 276 (W. Va. 1953).*

(n18)Footnote 75. Francis Hargrave, A Collection of Tracts Relative to the Law of England, 571 (1787). *Miller v. Fleming, 18 D.C. (7 Mackey) 139 (1889); Stephens v. Moore, 249 S.W. 601 (Mo. 1923). See In re Brolasky's Estate, 153 A. 739 (Pa. 1931); Robinson v. Blankenship, 92 S.W. 854 (Tenn. 1906).*

2 William Blackstone, Commentaries 107. Richard Preston, An Essay in *a Course of Lectures on Abstracts of Title. Bohon v. Bohon, 78 Ky. 408 (1880),* however, treats the fee after a contingent remainder as being in abeyance, *in nubibus*, as long as the remainder is contingent.

Worthier title is a rule of property not of construction in *Illinois. May v. Marx, 20 N.E.2d 821 (Ill. App. 1939), but see Lawrence v. Lawrence, 54 N.E. 918 (Ill. 1899). Belton v. United States, 581 A.2d 1205 (D.C. Ct. App. 1990).*

(n19)Footnote 76. *Loring v. Eliot, 82 Mass. (16 Gray) 568 (1860); Boone v. Baird, 44 So. 929 (Miss. 1907); Thompson v. Batts, 84 S.E. 347 (N.C. 1915). See Stoller v. Doyle, 100 N.E. 959 (Ill. 1913).*

(n20)Footnote 77. *Dean v. Lancaster, 105 S.E.2d 675 (S.C. 1958)* Comment, A Revision and a Remainder Distinguished, *16 Wash. & Lee L. Rev. 275 (1959), 61 W. Va. L. Rev. 328* (1958-1959).

(n21)Footnote 78. *Hendrick v. Mitchell, 69 N.E.2d 466 (Mass. 1946); Bagley v. Kuhn, 77 N.E.2d 312 (Mass. 1948); Engel v. Guaranty Trust Co., 19 N.E.2d 673 (N.Y. 1939).*

(n22)Footnote 79. *Scholtz v. Central Hanover Bank & Trust Co., 68 N.E.2d 503 (N.Y. 1946); Richardson v.*

Richardson, 81 N.E.2d 54 (N.Y. 1948); In re Burchell's Estate, 87 N.E.2d 293 (N.Y. 1949).

Worthier title doctrine not applied. *Worm v. United States Trust Co., 86 N.Y.S.2d 632 (1949).*

Doctrine undetermined. *See* Note, *Future Interests -- Interstate Distributes Held to Create Remainder Despite Doctrine of Worthier Title, 62 Harv. L. Rev. 313 (1948).*

(n23)Footnote 80. *Bixby v. California Trust Co., 202 P.2d 1018 (Cal. 1949); Nelson v. California Trust Co., 202 P.2d 1021 (Cal. 1949).*

See Cal. Civ. Code § 779.

(n24)Footnote 81. *Bartlett v. United States, 146 F. Supp. 719 (Ct. Cl. 1956); Thurman v. Hudson, 280 S.W.2d 507 (Ky. 1955); Cochran v. Frierson, 258 S.W.2d 748 (Tenn. 1953); Braswell v. Braswell, 81 S.E.2d 560 (Va. 1954); McKenna v. Seattle-First Nat'l Bank, 214 P.2d 664 (Wash. 1950).*

California has abolished the worthier title doctrine. Cal. Civ. Code § 1073, and Cal. Prob. Code § 109.

See Note, *Statutory Abolition of the Doctrine of Worthier Title, 47 Cal. L. Rev. 740 (1959).*

See also Stanley M. Johanson, *Reversions, Remainders, and the Doctrine of Worthier Title, 45 Tex. L. Rev. 1 (1966).*

(n25)Footnote 82. *In re Meyer's Estate, 238 P.2d 597 (Cal. App. 1951).*

Cordon v. Gregg, 97 P.2d 732, reh'g, *101 P.2d 414 (Or. 1940); Hoover's Lessee v. Gregory, 18 Tenn. (10 Yer.) 444 (1837); Dictum McQuiddy Printing Co. v. Hirsig, 134 S.W.2d 197 (Tenn. App. 1939)* (heir may not renounce).

Devise to A for life, remainder to his heirs created a reversion in the testator and did not create a remainder in A's collateral heirs, only in A's children when and if born. *Call v. Call, 367 S.W.2d 274 (Ky. 1963).*

(n26)Footnote 83. *Swaine v. Burton, 15 Ves. 365, 33 Eng. Rep. 792 (1808); Davis v. Kirk, 2 Kay & J. 391, 69 Eng. Rep. 834 (1856), but see Doe v. Timins, 1 B. & Ald. 530, 106 Eng. Rep. 195 (1818).*

See Stanley M. Johanson, *Reversions, Remainders, and the Doctrine of Worthier Title, 45 Tex. L. Rev 1 (1966).*

(n27)Footnote 84. Worthier title unless a contrary intention shown. *Morsman v. Internal Revenue Comm'r, 90 F.2d 18 (8th Cir. 1937); May v. Marx, 20 N.E.2d 821 (Ill. App. 1939); Nuckols v. Davis, 221 S.W. 507 (Ky. 1920); Loring v. Eliot, 82 Mass. (16 Gray) 568 (1860); Shaw v. Arnett, 33 N.W.2d 609 (Minn. 1948)* (rule of construction); *Stephens v. Moore, 249 S.W. 601 (Mo. 1923); Norman v. Horton, 126 S.W.2d 187 (Mo. 1939)* (rule of construction); *Conrad v. Funnell, 232 P. 950 (Okla. 1925); Seguin State Bank & Trust Co. v. Locke, 102 S.W.2d 1050 (Tex. 1937); Bottimore v. First & Merchants Nat'l Bank, 196 S.E. 593 (Va. 1938).*

Use of words "descend" or "revert" indicate worthier title. *Wilcoxen v. Owen, 185 So. 897 (Ala. 1938); Botzum v. Havana Nat'l Bank, 12 N.E.2d 203 (Ill. 1937).*

Worthier title is a rule of law. *Wilson v. Pharris, 158 S.W.2d 274 (Ark. 1942); Harris v. McLaran, 30 Miss. 533 (1855); In re Brolasky's Estate, 153 A. 739 (Pa. 1931); Cochran v. Frierson, 258 S.W.2d 748 (Tenn. 1953).*

Worthier title appears to be a rule of intent in *California. Bixby v. California Trust Co., 202 P.2d 1018 (Cal. 1949).*

Worthier title is a rule of construction. *Dooley v. Goodwin, 93 S.W. 47 (Ky. 1906); Frank Fehr Brewing Co. v.*

Johnston, 97 S.W. 1107 (Ky. 1906); Fidelity & Columbia Trust Co. v. Williams, 105 S.W.2d 814 (Ky. 1937); Powell v. Childers, 234 S.W.2d 158 (Ky. 1950); Thurman v. Hudson, 280 S.W.2d 507 (Ky. 1955); Wells v. Kuhn, 221 S.W. 19 (Mo. 1920); Doctor v. Hughes, 122 N.E. 221 (N.Y. 1919); Whittemore v. Equitable Trust Co., 165 N.E. 454 (N.Y. 1929); Julier v. Central Hanover Bank & Trust Co., 74 N.Y.S.2d 262 (1947); Petition of Stevens, 125 N.Y.S.2d 386 (1953); Braswell v. Braswell, 81 S.E.2d 560 (Va. 1954).

In New York the question of whether worthier title applies depends on the individual facts. Held a reversion in *Berlenbach v. Chemical Bank & Trust Co., 184 N.E. 83 (N.Y. 1932), aff'd, 256 N.Y.S. 563; Scholtz v. Central Hanover Bank & Trust Co., 68 N.E.2d 503 (N.Y. 1946),* on the grounds there was "no clear expression" of a purpose to grant a remainder. *But in Richardson v. Richardson, 81 N.E.2d 54 (N.Y. 1948),* the language was held to create a remainder because: (1) the settlor made a full formal disposition of the corpus, (2) the settlor made no reservation of a power of assignment in his lifetime, (3) the settlor reserved only a testamentary power of appointment.

Worthier title is question of grantor's intent. *Richardson v. Richardson, 81 N.E.2d 54 (N.Y. 1948)* (remainder found where grantor made full disposition of the principal of the trust, reserved no power to assign an interest during lifetime of grantor, surrendered all power except that of testamentary disposition and emphasized surrender of control).

A trust instrument was executed to beneficiaries for life and then to settlor or his heirs. The settlor's interest was sold to satisfy tort judgment. Purchaser brought quiet title suit after death of beneficiaries. The question raised was did this create a worthier title, or a contingent remainder in settlor's heirs. The court held worthier title to apply. Because it was clearly a reversion to settlor present here, question was raised as to whether it was subject to a condition subsequent. The court said no, upholding worthier title, but as a rule of construction, rather than of law. *In re Burchell's Estate, 87 N.E.2d 293 (N.Y. 1949).*

See Note, *Worthier Title, 46 Harv. L. Rev. 993 (1933);* Note, *Worthier Title Doctrine in Iowa, 49 Mich. L. Rev. 1066 (1951);* Joseph W. Morris, *The Inter Vivos Branch of the Worthier Title Doctrine, 2 Okla. L. Rev. 133 (1949). Matter of Estate of Grulke, 546 N.W.2d 626 (Iowa App. 1996).*

(n28)Footnote 85. 3 & 4 William iv, c. 106, § 3.

(n29)Footnote 86. Cal. Acts ch. 122, Cal. Civ. Code § 1073, Cal. Prob. Code § 6145.

The California statute abolishing *Shelley's Case* also abolished worthier title. *Bixby v. California Trust Co., 202 P.2d 1018 (Cal. 1949); Richardson v. Richardson, 81 N.E.2d 54 (N.Y. 1948);* Comment, Limitations to Settlors Heirs, *37 Cal. L. Rev. 283 (1949).*

The same result has probably also occurred in Pennsylvania, Pa. Cons. Stat. tit. 20, §§ 2514, 2517.

Abolished as to trusts only. Ind. Code § 30-4-2-7; Minn. Stat. Ann. § 500.14 (4); Neb. Rev. Stat. § 76-115 (by adoption of Uniform Property Act); Neb. Rev. Stat. § 76-114. Worthier title abolished. Conveyances take by purchase.

Worthier title abolished. Ark. Acts § 28-9-220.

Worthier title abolished. Cal. Prob. Code § 6145.

Where the doctrine of worthier title has been abolished, the distribution of the trust res on the grantor's death lies in equity, not in probate. *Gray v. Union Trust Co., 154 P. 306 (Cal. 1915).*

Where the doctrine of worthier title has been abolished the heirs and not the grantor are entitled to oil and gas rights. *Mills v. Mills, 121 S.W.2d 962 (Ky. 1938).*

See Comment, *Statutory Abolition of the Doctrine of Worthier Title, 47 Cal. L. Rev. 740 (1959)* as to the possible unconstitutionality of the retroactive provision of Cal. Civ. Code § 1073, Cal. Prob. Code § 6145.

Massachusetts has abolished the doctrine of worthier title in wills and inter vivos trusts. Mass. Ann. Laws ch. 184, §§ 33A, 33B.

Worthier title has been abolished in Texas. Tex. Prop. Code Ann. § 5.042; *see also* Comment, *The Doctrine of Worthier Title: The Effect of Article 1291a, 16 Baylor L. Rev. 429 (1964).*

Also was abolished in Indiana, but only in trusts. Ind. Code § 30-4-2-7.

West Virginia has abolished the doctrine of worthier title. W. Va. Code § 36-1-14a. *Harris Trust and Sav. Bank v. Beach, 513 N.E.2d 833 (Ill. 1987)* (noting the statutory abolition of the doctrine).

(n30)Footnote 87. *Mills v. Mills, 121 S.W.2d 962 (Ky. 1939); Norman v. Horton, 126 S.W.2d 187 (Mo. 1939); Kennedy v. Rutter, 6 A.2d 17 (Vt. 1939).*

Held a remainder not a reversion. *National Shawmut Bank, 53 N.E.2d 113 (Mass. 1944).*

Valid remainder, not worthier title, in gift to trustees for settlors for life and then to such as settlors should appoint with limitation over to settlor's heirs on failure of appointment. *In re Burchell's Estate, 87 N.E.2d 293 (N.Y. 1949).*

A limitation to the testator's next of kin as in intestacy created a remainder and not a reversion. *McKenna v. Seattle-First Nat'l Bank, 214 P.2d 664 (Wash. 1950).*

Worthier title held never applicable as a rule of law or construction in the *District of Columbia. Hatch v. Riggs Nat'l Bank, 361 F.2d 559 (D.C. Cir. 1966).*

Worthier title was not followed in *In re Valiquette's Estate, 173 A.2d 832, 839 (Vt. 1961).*

Indiana has abolished the doctrine of worthier title in trusts only. Ind. Code 30-4-2-7.

Massachusetts has abolished the doctrine of worthier title in wills and inter vivos trusts. Mass. Ann. Laws ch. 184, §§ 33A, 33B.

West Virginia has abolished the doctrine of worthier title. W. Va. Code § 36-1-14a. *Dennis v. Bird, 941 S.W.2d 486 (Ky. App. 1997)* (restricting application of the doctrine of worthier title to remainders, not reversions).

(n31)Footnote 88. *Wilcoxen v. Owen, 185 So. 897 (Ala. 1938); Fidelity & Columbia Trust Co. v. Williams, 105 S.W.2d 814 (Ky. 1937); Robinson v. Blankenship, 92 S.W. 854 (Tenn. 1906).*

(n32)Footnote 89. *Bixby v. California Trust Co., 202 P.2d 1018 (Cal. 1949). But see Gray v. Union Trust Co., 154 P. 306 (Cal. 1915); Bixby v. Hotchkis, 136 P.2d 597 (Cal. App. 1943). Levy v. Crocker-Citizens Nat. Bank, 94 Cal. Rptr. 1 (Cal. App. 1971)* (distinguishing Bixby as applying only to a special, rather than a general, class).

(n33)Footnote 90. 18 Edw. I, c. 1.

(n34)Footnote 91. Charles Butler & Francis Hargrave, Notes to Coke Littleton, § 12b (1832). So a devise to the testator's daughter. *Smith v. Triggs, 1 Strange 487, 93 Eng. Rep. 651 (1795),* or to the eldest son where there was primogeniture. Hinde v. Lyon, 2 Dyer 124a, *73 Eng. Rep. 271 (1794),* granddaughter. *Manbridge v. Plummer, 2 Myl. &*

K. 93, 39 Eng. Rep. 879 (1833).

Remainder to such persons as would take under intestate laws gave no interest which would pass by descent or devise. *Carnegie v. First Nat'l Bank, 129 S.E.2d 780 (Ga. 1963).*

(n35)Footnote 92. *Godolphin v. Abingdon, 2 Atk. 57, 26 Eng. Rep. 432. See* Co. Litt., § 22b. 18. J. Wesley Oler, *Remainders to Conveyors or Next of Kin, 44 Dick. L. Rev. 247 (1940).*

If the estate is not of the same quantity and quality as would have been taken by descent then worthier title does not apply. *McQuiddy Printing Co. v. Hirsig, 134 S.W.2d 197 (Tenn. App. 1939).*

Devise to A and her heirs but if she died without issue then to testator's heirs did not pass to A's heirs on death without issue. *Scott v. Jackson, 127 S.E.2d 234 (N.C. 1962).*

(n36)Footnote 93. *Hainsworth v. Pretty, Cro. Eliz. 919, 78 Eng. Rep. 1140 (1790).*

Treating wills branch of worthier title as an inapplicable anachronism. *City Nat'l Bank of Birmingham v. Andrews, 355 So. 2d 341 (Ala. 1978).* Devise created a remainder which could be renounced, not a reversion.

(n37)Footnote 94. *Gray v. Union Trust Co., 154 P. 306 (Cal. 1915).*

Kansas has revised the rule as to wills only. Kan. Gen. Stat. § 58-506.

Minnesota has probably abolished worthier title by statute. Minn. Stat. Ann. § 500.14.

Nebraska has abolished worthier title by statute. Neb. Rev. Stat. § 76-115.

North Carolina implies that heirs of a living person mean children. N.C. Gen. Stat. § 41-6. But the rule was used in *Therrell v. Clanton, 186 S.E. 483 (N.C. 1936).*

(n38)Footnote 95. *Belding v. Parsons, 101 N.E. 570 (Ill. 1913).* The limitation in this case was substantially as follows: A to B for life, remainder to C for life, remainder to the children of C who survive C in fee, but, if there are no such children of C, then to children of A who survive C and to their descendants, per stirpes, and, if there are no such descendants of A, to the D charity. A having died survived by two heirs, these heirs were held to have taken the reversion by descent and to be able to convey it so that it would merge with the life estate; the contingent remainders were destroyed.

Gilpin v. Williams, 25 Ohio St. 283 (1874) (vested reversion exists after a contingent remainder).

(n39)Footnote 96. *Pryor v. Castleman, 7 S.W. 892 (Ky. L. 1888); Baltes v. Union Trust Co., 72 N.E. 1005 (N.Y. 1904).*

A reversion after a fee tail is contingent. *Gilpin v. Williams, 25 Ohio St. 283 (1874).* And hence may be destroyed by statute. *Pollock v. Speidel, 27 Ohio St. 86 (1875).* Fletcher v. Hurdle, S.W.2d 109 (Ark. 1976).

(n40)Footnote 97. *Beal v. Higgins, 135 N.E. 759 (Ill. 1922).*

Remainder to A and B but if either die without bodily issue then to the other created cross executory interests in each. *Towns v. Walters, 168 S.E.2d 144 (Ga. 1969). Willhite v. Masters, 965 S.W.2d 406 (Mo. App. 1998).*

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CHAPTER 22 REVERSIONS

3-22 Thompson on Real Property, Thomas Editions § 22.06

AUTHOR: Professor David A. Thomas This chapter is based in part on ch. 30, George R. Thompson, Commentaries on the Modern law of Real Property (John S. Grimes, ed. 1979), which made an important contribution to preserving the American common law on reversions. J. Reuben Clark Law School Brigham Young University

§ 22.06 Rights of Reversioners

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§ 22.06(a) Rights Regarding Waste

As is the case with remainders, there is a great deal of difference of opinion among the courts as to the extent of a reversioner's legal rights as against both the life tenant and third parties. The reversioner was from very early times given remedies for waste by the life tenant. n98 A person not having an absolute and unqualified title to land can commit waste and be held liable for material alterations or destruction of the estate granted. The reversioner has his action at law for any injury done to the inheritance.

The reversioner is not without remedy, when the injury is of a permanent nature affecting the inheritance, for an action will lie against the tenant, either on the case for waste or an action on the case will lie against a stranger. n99 It has been decided that case in the nature of waste will lie, although the tenant has specially covenanted not to do waste, n100 and that this action may be maintained for permissive as well as for voluntary waste. n101 Generally, only such acts as are detrimental to the inheritance constitutes actionable waste. n102 The action of *quare clausum fregit* cannot be maintained by a reversioner not entitled to possession, but this form of action may be maintained against a tenant at will for an injury to the freehold. n103 When waste is threatened, an injunction to prevent it is the proper remedy. n104 An action of trespass by the reversioner will not lie against a tenant pending the term, because "the wrong which is the gist of the action is an offense against the actual possession and right of possession, and these are in the tenant." n105

A court of equity will not only protect the reversioner's estate against waste by a life tenant in possession, but will also declare the title of the reversioner as against the owners of the life estate in possession who claim a title in fee simple. n106

Even though a secured lender does not hold a reversion of the fee simple title, the lender may still bring an action for waste against a mortgagor who damages the property. In such cases, damages are granted only to the extent that the waste renders the debt insecured. n107

§ 22.06(b) Rights Regarding Possession

Where another is legally entitled to possession of land and the reversioner forcibly enters on him, such entry is an interference with such other's right to possession for which an action of trespass will lie. n108 A reversioner before breach of condition has no right to possession and can confer no such right on a licensee. n109 His right to enforce forfeiture is merely an inchoate right until decreed by a court of competent jurisdiction. n110 Upon the termination of a life estate, the reversioner becomes at once entitled to the possession of the real estate. It seems that the life tenant's tenant in possession will not be entitled to a notice to quit the premises or demand for the possession thereof from the owner of the reversion in order to enable the latter to maintain an action for possession. n111 The common-law right of partition extended only to those having concurrent undivided possessor interests in land. n112 Hence, it followed that the reversioner could not institute an action for partition against the holders of the immediate estate since he had neither possession nor the right of possession. n113 And, the practical problem of measuring the value of the reversion prevented the life tenant from partitioning against the reversioner. But, in some states today, statutes give the reversioner as well as the holder of the particular estate the right to have partition. n114 The mortality tables may sometimes be used to fix valuations.

The rule that a reversion will not be partitioned does not hinder an estate in possession from being partitioned among the cotenants, and the fact that there is a reversion is not a bar to partition among persons having an interest in possession; n115 but, in the absence of a statute to the contrary, it is the general rule that a life tenant is not entitled to maintain partition against reversioners or others having a future conditional interest. n116

§ 22.06(c) Rights Regarding Transfer

§ 22.06(d) Rights Affected by Statutes of Limitation and Laches

The possibility of the running of statutes of limitation against the reversioner depends to a considerable extent upon the nature of the reversion. If the reversion follows an estate of less than freehold, clearly the reversioner is barred since the tenant holds of him under privity of title. And, if the reversion follows a fee tail, barring of the fee by adverse possession would also seem to bar the reversion. But, where a life tenant is in possession, there is a great deal of disagreement as to whether adverse possession by a stranger will bar the reversioner as well as the life tenant.

Probably the weight of authority is that the statute of limitations does not begin to run against an action to recover possession by a reversioner until the termination of the preceding estate. n117 But there is a strong line of authority, relying upon the theory that adverse possession benefits the possessor, rather than punishes the owner, which permits adverse possession or prescription to run against the reversioner.

The title of reversioners may be lost by laches in failing to assert their claims against lienors whose liens were enforced during the lifetime of the owner of the particular estate. n118 "If a husband seised as tenant by the curtesy makes a conveyance in fee, and the grantee enters and continues in possession, claiming to own the whole absolutely, such possession will be regarded as adverse to the wife and those claiming under her only from the period of the husband's death." n119 Where an option to purchase is given a tenant during his term, and he commits actionable waste, it is held that the statute of limitations will not commence to run in his favor against an action for the waste until the termination of his tenancy or until it is determined that he will not exercise his option to purchase. n120 In a joint action for waste by several heirs against an assignee of the tenant by the curtesy in possession, it was held that there could be no recovery of any part of the alleged cause of action which was barred by the statute of limitations against any of the plaintiffs. n121

The life tenant may not hold adversely to the reversioner until the latter clearly receives notice of the life tenant's intent to disavow the fiduciary relationship existing with the reversioner and that the courts disagree as to whether the

purported conveyance of a fee by the life tenant is of itself such a disavowal as to make the grantee hold adversely to the reversioner.

FOOTNOTES:

(n1)Footnote 98. *See* Bryan Harris, *Tenancies and Reversions, 117 New L.J. 157 (1967).* Of course this is not without limitations. *See, e.g., Whittington v. Whittington, 608 So. 2d 1274* Miss. 1992) (refusing a remedy for life tenant's waste of an open well).

(n2)Footnote 99. *Randall v. Cleaveland, 6 Conn. 328 (1827); Stetson v. Day, 51 Me. 434 (1868); Lawry v. Lawry, 34 A. 273 (Me. 1896); Shattuck v. Gragg, 40 Mass. (23 Pick.) 88 (1839); Clark v. Holden, 73 Mass. (7 Gray) 8 (1856); Frawley v. Forrest, 38 N.E.2d 631 (Mass. 1941); Godard v. Babson-Dow Mfg. Co., 47 N.E.2d 303 (Mass. 1943); Stevens v. Rose, 37 N.W. 205 (Mich. 1888); Blake v. Hoover Motor Co., 212 P. 738 (N.M. 1923); Cannon v. Hatcher, 1 S.C. 260 (Hill 1833) 96 Eng. Rep. 657 (1776). Matter of Great Northern Iron Ore Properties, 419 N.W.2d 498 (Minn. App. 1988)* (citing statutory authority for such an action).

(n3)Footnote 100. *Kinlyside v. Thornton, 2 W. Bl. 1111.*

(n4)Footnote 101. White v. Wagner, *4 H. & J. 373 (Md. 1818).*

(n5)Footnote 102. *Whitehead v. Whitehead, 181 A. 684 (Del. Ch. 1935).*

(n6)Footnote 103. *Kimball v. Sumner, 62 Me. 305 (1873); Starr v. Jackson, 11 Mass. 519 (1814). See Bresnahan v. Hicks, 244 N.W. 218 (Mich. 1932).*

(n7)Footnote 104. *Loudon v. Warfield, 5 J.J. Marsh. (28 Ky. 1830) 196; Thayer v. Shorey, 191 N.E. 435 (Mass. 1934); Hemphill v. Mississippi State Hwy. Comm., 145 So. 2d 455 (Miss. 1962); Abbott v. Wagner, 188 N.W. 113 (Neb. 1922); Dooly v. Stringham, 7 P. 405 (Utah 1885); Brock v. Dole, 28 N.W. 334 (Wis. 1886).*

(n8)Footnote 105. *Brooks v. Rogers, 13 So. 386 (Ala. 1893).*

(n9)Footnote 106. *Laurance v. Mitchell, 15 So. 2d 583 (Ala. 1943).*

(n10)Footnote 107. *See Beiger Heritage Corp. v. Kilbey, 676 N.E.2d 784, 787-788 (Ind. Ct. App. 1997).*

(n11)Footnote 108. *Green v. Hammock, 16 S.W. 357 (Ky. 1891); Maryland Tel. & Tel. Co. v. Ruth, 68 A. 358 (Md. 1907).*

(n12)Footnote 109. *Maryland Tel. & Tel. Co. v. Ruth, 68 A. 358 (Md. 1907).*

(n13)Footnote 110. *In re Gaffers' Estate, 5 N.Y.S.2d 671 (1938).*

(n14)Footnote 111. *Guthmann v. Vallery, 71 N.W. 734 (Neb. 1897).*

(n15)Footnote 112. *Lawson v. Bonner, 40 So. 488 (Miss. 1906); Savage v. Savage, 23 P. 890 (Or. 1890).*

Accord: Restatement, Property, § 171.

See South Carolina Sav. Bank v. Stansell, 158 S.E. 131 (S.C. 1931).

(n16)Footnote 113. *Wilkinson v. Stuart, 74 Ala. 198 (1883); McQueen v. Turner, 8 So. 863 (Ala. 1891); Johnson v. Johnson, 89 Mass. (7 Allen) 196 (1863); Metcalfe v. Miller, 56 N.W. 16 (Mich. 1893); Brown v. Brown, 8 N.H. 93 (1835); Stevens v. Enders, 13 N.J.L. 271 (1833); Wood v. Sugg, 91 N.C. 93 (1884); Ziegler v. Grim, 6 Watts (Pa. 1837) 106; Baldwin v. Aldrich, 84 Vt. 526 (1861); Merritt v. Hughes, 15 S.E. 56 (W. Va. 1892).*

(n17)Footnote 114. *Deadman v. Yantis, 82 N.E. 592 (Ill. 1907); Smalley v. Isaacson, 42 N.W. 352 (Minn. 1889); Preston v. Brant, 10 S.W. 78 (Mo. 1888); Sikemeier v. Galvin, 27 S.W. 551 (Mo. 1894); Jenkins v. Fahey, 73 N.Y. 355 (1878); Bierce v. James, 11 S.W. 788 (Tenn. 1889); Bice v. Nixon, 11 S.E. 1004 (W. Va. 1890).*

(n18)Footnote 115. *See Jameson v. Hayward, 39 P. 1078 (Cal. 1895); Ray v. Poole, 123 S.E. 5 (N.C. 1924); Plano Mfg. Co. v. Kindschi, 111 N.W. 680 (Wis. 1907).*

(n19)Footnote 116. *See generally*: *Teasley v. Hulme, 104 S.E. 151 (Ga. 1920); Metcalfe v. Miller, 56 N.W. 16 (Mich. 1893); In re Frutchey, 183 N.Y.S. 786 (1920); Ray v. Poole, 123 S.E. 5 (N.C. 1924); Embleton v. McMechen, 143 N.E. 177 (Ohio St. 1924); Newell v. Willmarth, 76 A. 433 (R.I. 1910), 19 Ann. Cas. 807; Chickamauga Trust Co. v. Lonas, 201 S.W. 777 (Tenn. 1918); Plano Mfg. Co. v. Kindschi, 111 N.W. 680 (Wis. 1907).*

(n20)Footnote 117. *Orthwein v. Thomas, 21 N.E. 430 (Ill. 1889); Wallingford v. Hearl, 15 Mass. 471 (1819); Tilson v. Thompson, 27 Mass. (10 Pick.) 359 (1830); Reed v. Lowe, 63 S.W. 687 (Mo. 1901); Helming v. Forrester, 127 N.W. 373 (Neb. 1910); McFarland v. Flack, 127 N.W. 375 (Neb. 1910); McCorry v. King's Heirs, 22 Tenn. (3 Hum.) 267 (1842).*

That limitations run from determination of life estate, *see Huey v. Brock, 92 So. 904 (Ala. 1921); Koen v. Koen, 103 S.E. 322 (W. Va. 1920).*

"The right of entry in the person in remainder can, in no case, be affected by the statute of limitations during the existence of the particular estate; and the laches of a tenant for life will not, as a general rule, affect the party entitled." Angell, Limitations (6th ed.), § 371.

In Illinois a possibility of reverter or right of re-entry is lost seven years after the termination of the preceding estate or breach of condition if the holder of the immediate estate has paid taxes. *See Storke v. Penn Mut. Life Ins. Co., 61 N.E.2d 552 (Ill. 1945). Keesecker v. Bird, 490 S.E.2d 754, 771 (W. Va. 1997)* (since waste may occur as late as the last day of possession, the cause of action does not accrue until possession is relinquished; discovery doctrine does not toll statute further).

(n21)Footnote 118. *Huey v. Brock, 92 So. 904 (Ala. 1921)* (delay of 40 years).

(n22)Footnote 119. Angell, Limitations (6th ed.), § 371. *Heath v. White, 5 Conn. 228 (1824); Wallingford v. Hearl, 15 Mass. 471 (1819); Wilson v. Frost, 85 S.W. 375 (Mo. 1905); Jackson ex dem Swartwout v. Johnson, 5 N.Y. 74 (Cow. 1825).*

(n23)Footnote 120. *Powell v. Dayton, S. & G. R.R., 16 P. 863 (Or. 1888).*

(n24)Footnote 121. *Learned v. Ogden, 32 So. 278 (Miss. 1902).*

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CHAPTER 22 REVERSIONS

3-22 Thompson on Real Property, Thomas Editions § 22.07

AUTHOR: Professor David A. Thomas This chapter is based in part on ch. 30, George R. Thompson, Commentaries on the Modern law of Real Property (John S. Grimes, ed. 1979), which made an important contribution to preserving the American common law on reversions. J. Reuben Clark Law School Brigham Young University

§ 22.07 Miscellaneous Rules Regarding Reversions

The general rule that rent follows the reversion is applicable where a person grants a lease of lands and on his death conveys the land by will. In such case, rents coming due after the death of the testator, follow the reversion to the devisee. n122 The reversioner may sue to remove a cloud from the reversion but is under no duty to do so. n123

A reversion, whether defeasible or otherwise, is subject to levy of execution. n124

Under modern law, a reversion descends and can pass by will. n125

FOOTNOTES:
(n1)Footnote 122. *Rogers v. McKenzie, 65 N.C. 218 (1871).*

(n2)Footnote 123. *Huey v. Brock, 92 So. 904 (Ala. 1921).*

(n3)Footnote 124. *McKenna v. Seattle-First Nat'l Bank, 214 P.2d 664 (Wash. 1950); Young v. Lewis, 76 S.E.2d 276 (W. Va. 1953).*

(n4)Footnote 125. Heirs of holder of a reversion take per stirpes and per capita. *House v. White, 240 S.E.2d 489 (N.C. App. 1978);* N.C. Gen. Stat. 29-1. *Robertson v. North Inter-River Drainage Dist., 842 S.W.2d 544 (Mo. App. 1992).*

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CHAPTER 22 REVERSIONS

3-22 Thompson on Real Property, Thomas Editions § 22.08

AUTHOR: Professor David A. Thomas This chapter is based in part on ch. 30, George R. Thompson, Commentaries on the Modern law of Real Property (John S. Grimes, ed. 1979), which made an important contribution to preserving the American common law on reversions. J. Reuben Clark Law School Brigham Young University

§ 22.08 Bibliography

[Go To Supp]

Articles

Bell, Sharon J. "Osages, Iron Horses and Reversionary Interests: The Impact of United States v. Atterberry on Railroad Abandonments." Tulsa L.J. Vol. 20 (Winter 2984) 255.

Kempe, Joseph C. "Reconciling Diverse Authorities on Sales of Remainder Interests." Est. Plan.1 Vol. 20 (Mar./Apr. 1997) 119.

Wright, Danaya C. "Private Rights and Public Ways: Property Disputes and Rails to Trails In Indiana." Ind. L. Rev. Vol. 30 (1997) 723.

Annotations

Annotation, Circumstances Excusing Lessee's Failure to Give Timely Notice or Exercise of Option to Renew or Extend Lease, *27 A.L.R. 4th 266.*

Annotation, Divorce Property Distribution: Real Estate or Trust Property in Which Interest Vested Before Marriage and was Realized During Marriage, *60 A.L.R. 4th 217.*

Annotation, Duty as Between Life Tenant and Remainderman with Respect to Cost of Improvements or Repairs Made Under Compulsion of Governmental Authority, *43 A.L.R. 4th 1012.*

Annotation, Duty to Pay Real-Property Taxes as Affected by Time of Commencement or Termination of Life Estate, *8 A.L.R. 4th 643.*

Annotation, Eminent Domain: Measure and Elements of Lessee's Compensation for Condemnor's Taking or Damaging of Leasehold, *17 A.L.R. 4th 337.*

Annotation, Grant to One for Life, and Afterwards, Either Absolutely or Contingently, to Grantor's Heirs or Next of Kin, as Leaving Reversion or Creating Remainder, *16 A.L.R. 2D 691.*

Annotation, Implied Duty of Oil and Gas Lessee to Protect Against Drainage, *18 A.L.R. 4th 14.*

Annotation, Life Tenant's Death as Affecting Rights Under Lease Given by Him, *14 A.L.R. 4th 1054.*

Annotation, Measure of Damages or Compensation in Eminent Domain as Affected by Premises Being Restricted to Particular Educational, Religious, Charitable, or Noncommercial Use, *29 A.L.R. 5th 36* (discussing the value of the reversionary interest when condemnor owns determinable fee).

Annotation, Real Property Quiet-Title Actions Against United States Under Quiet Title Act *(28 U.S.C.S. § 2409a), 60 A.L.R. Fed. 645.*

Annotation, Remedy for Breach of Implied Duty of Oil and Gas Lessee to Protect Against Drainage, *18 A.L.R. 4th 147.*

Annotation, Slander of Title: Sufficiency of Plaintiff's Interest in Real Property to Maintain Action, *86 A.L.R. 4th 738.*

Annotation, Sufficiency of Provision of Lease to Effect Second or Perpetual Right of Renewal, *29 A.L.R. 4th 172.*

Annotation, Validity and Construction of Statutes Providing for Reversion of Mineral Estates for Abandonment or Nonuse, *16 A.L.R. 4th 1029.*

Annotation, Validity, Construction, and Effect of Statute or Lease Provision Expressly Governing Rights and Compensation of Lessee Upon Condemnation of Leased Property, *22 A.L.R. 5th 347.*

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Supp. To CHAPTER 22 REVERSIONS

3-22 Thompson on Real Property, Thomas Editions Supp. to § 22.02

Supp. to § 22.02 Definitions of Reversion.

[Go To Main]

§ 22.02(a) Several Definitions of Reversions. [Go To Main]

Add:

See also T. P. Gallanis, *The Future of Future Interests, 60 Wash & Lee L. Rev. 513 (2003)* (proposing reforms to future interest law that would remove many of the differences between reversions and other future interests).

Add:

Goldstein v. Lindner, 648 N.W.2d 892 (Wis. App. 2002) (Unlike royalties and contractual interests, a reversion is not an interest that arises from a contract; rather, a reversion arises by construction and operation of law whenever a grantor has conveyed less than his whole interest or estate, the undisposed portion being his when the grant is terminated.).

Ctr. for Molecular Med. & Immunology v. Township of Belleville, 19 N.J. Tax 342 (N.J. Tax. 2001) , rev'd on other grounds, 813 A.2d 1243 (N.J. Super. 2003) (holding that an estate in reversion is the residue of the estate left in the grantor, to commence in possession after determination of some particular estate granted by the grantor).

Add:

E-470 Public Highway Authority v. Argus Real Estate Partners, Inc., 70 P.3d 481 (Colo. App. 2002) (A "reversion" is the undisposed portion remaining in a grantor when that grantor conveys less than his or her whole estate and, therefore, retains a portion of the title.).

Add:

Mayor and City Council of Ocean City v. Taber, 367 A.2d 1233 (Md. 1977) (A "reversion" is any reversionary interest which is not subject to condition precedent; it arises when the owner of real estate devises or conveys an interest in it less than his own.).

Long v. Long, 74 Ohio Op. 2d 287, 343 N.E.2d 100 (Ohio 1976) ("Reversion" is said to be vested because there is no condition precedent to taking effect in possession other than termination of preceding estate; distinguishing feature of reversion is that it is not subject to conditions precedent to its taking effect in possession and all other conditions defeating a reversion are regarded as conditions subsequent.).

Ringgold v. Carvel, 76 A.2d 327 (Md. 1950) (A "reversion" is any reversionary interest which is not subject to a condition precedent, and is the residue of an estate left in the testator to commence in possession after the termination of some particular estate devised by him.).

Ditmore v. Michalik, 244 Mich. App. 569 (Mich. App. 2001) (holding that a reversion is a future interest that remains in the grantor).

§ 22.02(b) Defined as a Present, Vested Right. [Go To Main]

Add:

Gale v. Bath Central School District, 829 N.Y.S.2d 359 (2007) (purchasers of school land previously donated for educational purposes were not permitted to extinguish the reversion by means of a statute permitting an action to extinguish restrictions on land held for charitable purposes).

Miller v. Woodbury Trust Co., 64 A.2d 634 (N.J. Super. Ch. 1949) (An "estate in reversion" is residue of estate left in grantor, to commence in possession after natural termination of particular estate granted out by him, arising by operation of law, and is an estate in praesenti vested in sense of a present fixed right of enjoyment in futuro.).

Ctr. for Molecular Med. & Immunology v. Township of Belleville, 19 N.J. Tax 342 (N.J. Tax. 2001) , rev'd on other grounds, 813 A.2d 1243 (N.J. Super. 2003) (reversion is an actual estate in praesenti and is vested in the sense of a present fixed right to enjoy the property in the future).

Add:

Northwest Acceptance Corp. v. Lansdowne, 93 B.R. 243 (Bkrtcy. D. Or. 1988) (Reversionary interests are descendible, devisable, alienable, and assignable.).

Willhite v. Masters, 965 S.W.2d 406 (Mo. App. 1998) (reversion is both alienable and devisable).

§ 22.02(c) Types of Reversionary Interests. [Go To Main]

Add:

Shields v. Moffitt, 683 P.2d 530 (Okla. 1984) ("Estate in reversion" is residue of estate left by operation of law in grantor or his heirs commencing in possession on the determination of the particular estate granted or devised; it is not subject to a condition precedent.).

Folden v. Folden, 26 Ohio Op. 2d 240, 188 N.E.2d 193 (Ohio App. 1962) (A "reversion" is the residue of an estate left in the grantor, who commences in possession after the termination of a particular estate granted out by him.).

Rox Petroleum, L.L.C. v. New Dominion, L.L.C., 2008 OK 13 (Okla. 2008) (reversionary mineral interest); *Ellmae Phillips Co. v. U.S., 77 Fed. Cl. 387 (2007)* (property owner held reversionary interest upon railroad's abandonment of a right-of-way easement).

§ 22.02(d) Types of Reversions. [Go To Main]

Delete last sentence of footnote 9 and insert the following.

It is sometimes said that there are reversionary rights in easements or rights of way, especially when discussing railroad easements. *Hash v. United States, 403 F.3d 1308 (Fed. Cir. 2005)* ; *Caldwell v. United States, 391 F.3d 1226 (Fed. Cir. 2004)* ; *Renewal Body Works, Inc. v. United States, 64 Fed. Cl. 609 (Fed. Cl. 2005)* . However, use of "reversion" in this way is not consistent with traditional common law terminology. *Preseault v. United States 100 F.3d 1525, 1533 (Fed. Cir. 1996)* .

As the Nebraska Supreme court explained: "While the vocabulary of the common law of real property is often imported into the discussion of railroad rights-of-way, where those rights-of-way have been created by federal law, they are entirely creatures of federal statute, and their scope and duration are determined, not by common law principles, but by the relevant statutory provisions." *Whipps Land & Cattle Co. v. Level 3 Communications, LLC, 265 Neb. 472, 658 N.W.2d 258, 264 (Neb. 2003)* .

Further "as a matter of traditional property law terminology, a termination of the easements would not cause anything to 'revert' to the landowner. Rather, the burden of the easement would simply be extinguished, and the landowner's property would be held free and clear of any such burden." *Toews v. United States, 376 F.3d 1371, 1376 (Fed. Cir. 2004)* .

See also Richard A. Allen, *Does the Rails-to-Trails Act Effect a Taking of Property?, 31 Transp. L. J. 35, n. 37 (Fall 2003)* (agreeing that when an easement is terminated, it is more accurate to say "that the owner becomes entitled to full and exclusive possession of the property," rather than that a reversion takes place).

See Chapter 60, § 60.08 for discussion of termination of easements.

Add:

City of St. Paul v. State of Minnesota Dept. of Revenue, 754 N.W.2d 386 (Minn. App. 2008) (reversion to the state of restricted-use parcels held by the city denied).

§ 22.02(e) Reversions and Remainders Distinguished. [Go To Main]

Add:

Bradford v. Rain, 562 S.W.2d 514 (Tex. Civ. App. 1978) (Principal distinctions between a reversionary interest and a remainder interest are that a reversionary interest arises by operation of law apart from the intent of grantor whereas the remainder is created only by express limitation by the same instrument which creates the particular estate and that a reversion interest arises only in favor of the grantor whereas a remainder interest can be created only in favor of a stranger.).

Ctr. for Molecular Med. & Immunology v. Township of Belleville, 19 N.J. Tax 342 (N.J. Tax. 2001) , rev'd on other grounds, 813 A.2d 1243 (N.J. Super. 2003) (reversion created by operation of law).

Add:

Ctr. for Molecular Med. & Immunology v. Township of Belleville, 19 N.J. Tax 342 (N.J. Tax. 2001) , rev'd on other grounds, 813 A.2d 1243 (N.J. Super. 2003) .

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Supp. To CHAPTER 22 REVERSIONS

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Supp. to § 22.03 Incidents of Reversions.

[Go To Main]

Add:

Ditmore v. Michalik, 244 Mich. App. 569 (Mich. App. 2001) (reversion is a future interest).

Add:

Ctr. for Molecular Med. & Immunology v. Township of Belleville, 19 N.J. Tax 342 (N.J. Tax. 2001) rev'd on other grounds, 813 A.2d 1243 (N.J. Super. 2003) (holding that an estate in reversion is the residue of the estate left in the grantor, to commence in possession after determination of some particular estate granted by the grantor).

Add:

Jensen v. City of New Albany, Ind., 868 N.E.2d 525 (Ind. App. 2007) (reversionary interest extinguished when the state acquired the property for road construction purposes).

Matter of Bergman, 585 F.2d 1171 (2d Cir. 1978) (Under New York law, a reversion is fully alienable, descendible and devisable and is a form of ownership that applies with equal force to both real and personal property.).

Add:

Robertson v. North Inter-River Drainage Dist., 842 S.W.2d 544 (Mo. App. 1992) (Reversions are created by operation of law, vested but sometimes defeasible, and subject to transfer by deed, will, or intestate descent.).

Center for Molecular Medicine and Immunology v. Township of Belleville, 19 N.J. Tax 342 (N.J. Tax 2001) , rev'd on other grounds, 813 A.2d 1243 (N.J. Super. 2003) (A "reversion" is an actual estate in praesenti and is vested in the sense of a present fixed right to enjoy the property in the future.).

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Supp. to § 22.04 How Reversions Arise.

[Go To Main]

Add:

Nicoletti v. Allegheny County Airport Authority, 841 A.2d 156 (Pa. Cmwlth, 2004) (county, in leasing land to the local airport authority, "expressly and specifically retained a reversionary interest" in the lease agreement. Reversion was to take place "based on either the authority's material default of the terms of the agreement, the mutual agreement of the parties, or the expiration of the demised term of the agreement").

Winters v. County of Clatsop, 150 P.3d 1104 (Or. App. 2007) (an attempted sale of the property triggered an automatic reversion of the title to the county).

Add

Waterfowl Limited Liability Company v. United States, 453 F.3d 291 (5th Cir. 2006) (federal law governed the acquisition by U.S. of reversion in mineral rights upon the extinction of servitudes imposed on those rights).

§ 22.04(a) Grant. [Go To Main]

Add:

Goldstein v. Lindner, 648 N.W.2d 892 (Wis. App. 2002) (Reversions arise by operation of law, and not by any act of a party.).

Add:

Donaldson v. Ritenour, 524 A.2d 1044 (Pa. Cmwlth. 1987) ("Reversion" is remnant of estate retained by grantor or heirs after grant of part of interest, but "remainder" represents remnant of whole estate otherwise disposed of.).

Hornets Nest Girl Scout Council, Inc. v. Cannon Foundation, Inc., 339 S.E.2d 26 (N.C. App. 1986) (A "reversionary interest," whether a possibility of reverter or a right of reentry, is a future interest retained by grantor or his heirs and is considered vested for purposes of rule against perpetuities.).

§ 22.04(c) Reservation. [Go To Main]

Add:

Mount Olivet Cemetery Ass'n v. Salt Lake City, 164 F.3d 480 (1998) ("Possibility of reverter" is the interest retained by a grantor after conveyance of a determinable fee; it is a future contingent interest in real property, and, at best, a future estate in land.).

Following the language: " ... (d) giving the creator a right of re-entry following a fee upon a condition subsequent ..." insert following "subsequent" new footnote 44.1:

§ 22.04(d) Implication. [Go To Main]

Add:

Sides v. Beene, 938 S.W.2d 840 (Ark. 1997) (grantor's future interest following fee tail is "divestible reversion").

Add:

Robertson v. North Inter-River Drainage Dist., 842 S.W.2d 544 (Mo. App. 1992) (Reversions are created by operation of law, vested but sometimes defeasible, and subject to transfer by deed, will, or intestate descent.).

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Supp. to § 22.05 Reversions Under the Doctrine of Worthier Title.

[Go To Main]

Change Fletcher citation to:

536 S.W.2d 109 (Ark. 1976) .

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Supp. To CHAPTER 22 REVERSIONS

3-22 Thompson on Real Property, Thomas Editions Supp. to § 22.06

Supp. to § 22.06 Rights of Reversioners.

[Go To Main]

§ 22.06(a) Rights Regarding Waste. [Go To Main]

Add:

Reniere v. Gerlach, 752 A.2d 480 (R.I. 2000) (holding that life tenant did not commit actionable waste by abandoning property, failing to pay real estate taxes, and failing to make necessary and reasonable repairs).

§ 22.06(b) Rights Regarding Possession. [Go To Main]

Add:

Leichtfuss v. Dabney, 122 P.3d 1220 (Mont. 2005) (dominant tenement of easement held by life tenant reverted to fee owners when life tenancy ended).

§ 22.06(c) Rights Regarding Transfer. [Go To Main]

Insert the following as text for § 22.06(c):

Although it is possible that, at an early date, a reversion, not being a possessory interest, passed only by descent like a

possibility of reverter, everywhere today a reversion passes by descent, may be devised and may be alienated inter vivos, voluntarily by deed or involuntarily by judicial or execution sale. The reversion expectant upon the failure of a valid devise for lack of beneficiaries may be granted by deed or will, and, if by will, the devise may be contained in the same instrument creating the remainder or in a later will.[116.1] A reversion arising from a conditional limitation in a deed conveying land may be alienated and is not a bare possibility as mentioned in the statute.[116.2]

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Supp. to § 22.08 Bibliography.

[Go To Main]

Add to Articles:

Briggs, Robert R., "Aycock Pontiac, Inc. v. Aycock: Express Trust Terms Beware--Implied Reversions Are Here." *53 Ark. L. Rev. 885 (2000).*

Jensen, Ronald H. "Estate and Gift Tax Effects of Selling a Remainder: Have D'Ambrosio, Wheeler and Magnin Changed the Rules?" Florida Tax Rev. Vol. 4 (1999) 537.

Manns, F. Philip, Jr. "New Reasons to Remember the Estate Taxation of Reversions," *44 Real Prop. Tr & Est. L. J. 323* (Summer, 2009) .

Spence, Carl Jackson. "Linkous v. Candler: The Future of Acceleration of Remainders in Georgia." Ga. State L. Rev. Vol. 16 (2000) 879.

Add to Annotations

Annotation, Adverse possession: right of remainderman or reversioner to tack his possession to that of life tenant, 150 A.L.R. 557 .

Annotation, Commencement of running of statute of limitations respecting actions by owners of right of re-entry, or actions against third persons by reversioners, *19 A.L.R.2d 729.*

Annotation, Dower in reversion or remainder interest of husband, 21 A.L.R. 1073 .

Annotation, Murder of life tenant by remainderman or reversioner as affecting latter's rights to remainder or reversion, *24 A.L.R.2d 1120.*

Annotation, Reversion of title upon abandonment or vacation of public street or highway, 70 A.L.R. 564 .

Annotation, Reversion upon failure of contingency upon which future estate is limited as within residuary clause of will, 108 A.L.R. 464 .

Annotation, Right of reversioner or remainderman to maintain action or suit in respect of easement, 138 A.L.R. 1006 .

Annotation, Termination of trust where life interest and remainder or reversion are acquired by same person, *50 A.L.R.2d 1161* .

Annotation, Transfer or devolution of reversion as carrying lessee's covenants to repair, or to yield up in repair, 34 A.L.R. 782 .

Annotation, What acts, claims, circumstances, instruments, color of title, judgment, or thing of record will ground adverse possession in a life tenant as against remaindermen or reversioners, *58 A.L.R.2d 299* .

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§ 23.syn Synopsis to Chapter 23: REMAINDERS

§ 23.01 Introduction

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CHAPTER 23 REMAINDERS

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Supp. to § 23.01 Introduction.

[Go To Main]

First sentence, change "chapters" to "chapter"

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3-23 Thompson on Real Property, Thomas Editions Supp. to § 23.03

Supp. to § 23.03 History of Remainders.

[Go To Main]

Add:

Rutherford County v. Wilson, 2002 Tenn. App. LEXIS 145 at *17 (Feb. 28, 2002) , *affirmed in part and reversed in part by, 2003 Tenn. LEXIS 368* (Tenn., May 6, 2003) ("A remainder is a future interest created in a transferee which can become a present possessory estate only on the expiration of the preceding estate.").

Add:

Ctr. for Molecular Med. & Immunology v. Township of Belleville, 19 N.J. Tax 342 (N.J. Tax. 2001) , rev'd on other grounds, 813 A.2d 1243 (N.J. Super. 2003) (holding that an estate in reversion arises by operation of law and is distinguishable from a remainder which must be created by deed or devise).

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3-23 Thompson on Real Property, Thomas Editions Supp. to § 23.05

Supp. to § 23.05 How Remainders Arise.

[Go To Main]

add:

Voght v. Voght, 882 N.Y.S.2d 551 (2009) (creation of remainder by exercise of power of appointment).

Add:

See, e.g., Rutherford County v. Wilson, 2002 Tenn. App. LEXIS 145 at *35 (Feb. 28, 2002) , *affirmed in part and reversed in part by, 2003 Tenn. LEXIS 368* (Tenn., May 6, 2003) .

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Supp. To CHAPTER 23 REMAINDERS

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Supp. to § 23.06 Transferability of Remainders.

[Go To Main]

Add:

Danielewicz v. Arnold, 769 A.2d 274 (Md. Spec. App. 2001) (holding a vested remainder may be sold or conveyed).

Add:

Braunstein v. Hajjar, 385 B. R. 482 (D. Mass. 2008) (a trustee could not sell a debtor's remainder interest in the property free and clear of the life estate).

Ctr. for Molecular Med. & Immunology v. Township of Belleville, 19 N.J. Tax 342 (N.J. Tax. 2001) rev'd on other grounds, 813 A.2d 1243 (N.J. Super. 2003) (a remainder must be created by deed or devise).

Add:

United States v. Lugo, 122 Fed. Appx. 613, 618 (4th Cir. 2005) ("In Maryland, a contingent interest assigned by the grantor to a designated remainderman and contingent only to an event is descendible, divisible, and may be assigned by the remainderman"); *Mostoller v. Wachter, 314 B.R. 365, 374 (Bankr. D. Tenn. 2004)* (under Tennessee law, both vested and contingent remainder interests may be transferred).

Add:

Danielewicz v. Arnold, 769 A.2d 274 (Md. Spec. App. 2001) (holding a vested remainder may be sold or conveyed).

Add:

In re Estate of Ellis v. Green, 2002 Tenn. App. LEXIS 235 at *21 (April 15, 2002) .

Add after the first sentence in the second paragraph:

In re Estate of Ellis v. Green, 2002 Tenn. App. LEXIS 235 at *14-15 (April 15, 2002) .

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Supp. To CHAPTER 23 REMAINDERS

3-23 Thompson on Real Property, Thomas Editions Supp. to § 23.07

Supp. to § 23.07 Acceleration of Remainders.

[Go To Main]

Add:

Gottesman v. Estate of Gottesman, 2002 Ohio 6058 (Ohio Ct. App. 2002) .

Add:

Richey v. Hurst, 798 So. 2d 841, 843 (Fla. App. 2001) (interest disclaimed is disposed of in same manner as if disclaimant had predeceased the death or other event).

See, Radford, Mary F. "Wills, Trusts and Administration of Estates." Mercer L. Rev. Vol. 54 (Fall 2002) 583, at 608.

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3-23 Thompson on Real Property, Thomas Editions Supp. to § 23.08

Supp. to § 23.08 Rights and Duties of Those Who Hold Remainders.

[Go To Main]

Add:

Exception. Hilterbrand v. Carter, 27 P.3d 1086 (Or. App. 2001) (holding when cotenants hold concurrent life estates with contingent remainders, the contingent remainder which each cotenant has cannot be defeated by any act of the cotenant).

Add:

Ruggles v. Sabe, 670 N.W.2d 356 (N.D. 2003) (owner of one-third interest in vested remainder had action for waste against the life tenant who also held the other two-thirds interest in the remainder); *Singleton v. Donalson, 117 S.W.3d 516 (Tex. App. 2003)* (in an action for waste, court held the life tenant had the power to consume oil and gas produced from the property).

Add:

Maitland v. Allen, 594 S.E.2d 918 (Va. 2004) (a former wife, holder of a life estate, could not seek partition against the remainder interests of her children).

Add:

Clemons v. Thornton, 2008 Fla. App. LEXIS 3308 (Fla. Dist. Ct. App. 1st Dist. Mar. 10, 2008) (grantor held life estate concurrently with his wife, and held the remainder as sole property).

Add:

Jenkins v. Brown, 532 S.E.2d 302 (S.C. App. 2000) (statute of limitations does not begin to run against a remainderman until the death of the life tenant).

Add:

But see Friends of the Trails v. Blasius, 93 Cal. Rptr. 2d 193 (Cal. App. 3d Dist. 2000) (a remainderman has no legal capacity to resist or bar the adverse user, but the owner of the servient estate does have such legal capacity).

Add:

Collier v. Kincheloe, 180 P.3d 1157 (Mont. 2008) (when the life tenant failed to redeem the property from delinquent taxes, the tax deed to the county extinguished both the life estate and the remainder, conveying a fee simple absolute to the county).

Thomas v. Thomas, 2003 S.D. 7, 656 N.W.2d 740 (S.D. 2003) (absence from the premises does not relieve life tenant from duty not to commit waste and to pay property taxes).

Miller v. Miller, 2003 Ohio App. LEXIS 1271 (No. 81287, Mar. 20, 2003) (remainderman entitled to reimbursement of property taxes he had paid).

Add

RM 14 FK Corp. v. Bank One Trust Company, N.A., 831 N.Y.S.2d 120 (2007) (Holders of remainder interest had no right to prevent current estate holders from refinancing, so long as contractual conditions were met).

Add:

Collier v. Kincheloe, 180 P.3d 1157 (Mont. 2008) (when the life tenant, as taxpayer, failed to pay taxes, the estate acquired by the county in the tax deed also extinguished the remainder interest).

Add:

Friends of the Trails v. Blasius, 93 Cal. Rptr. 2d 193 (Cal. App. 3d Dist. 2000) (a remainderman has no legal capacity to resist or bar the adverse user, but the owner of the servient estate does have such legal capacity).

Brown v. Seal, 2005 Tenn. App. LEXIS 231 (No. E2004-01499-COA-R3-CV, Tenn. Ct. App., Apr. 21, 2005) (for adverse possession purposes, the statute of limitations does not begin to run until the death of the life tenant because the possession is not considered "adverse" to the remaindermen until then).

Add:

Chapman v. Thornhill, 802 So. 2d 149 (Miss. App. 2001) (life tenant's rights are limited according to rules for waste).

Bailey v. Delta Trust & Bank, 2004 Ark. LEXIS 723 (No. 04-411, Ark., Nov. 17, 2004) (life tenant must not squander or waste the property); *Hutchinson v. Estate of Nunn, 2004 Tenn. App. LEXIS 899* (No. W2004-00578-COA-R3-CV, Tenn. Ct. App., Dec. 30, 2004) (remaindermen allowed to sue estate when decedent's clear-cutting of timber caused waste to the property in which the remaindermen held interest).

Add:

Weber v. McGowan-Young, 2008 Ohio 4147 (Ohio Ct. App., Clark County Aug. 15, 2008) (partition of remainder interest).

Maitland v. Allen, 594 S.E.2d 918 (Va. 2004) (a former wife, holder of a life estate, could not seek partition against the remainder interests of her children).

Add:

Opha L. Estate ex rel. Buckland v. Keith, 647 S.E.2d 731 (W. Va. App. 2007) (absent a contrary agreement, proceeds from insurance provided by the life tenant are payable solely to the life tenant).

Add

Yorty v. Realty Investment & Mortgage Corp., 938 So.2d 1 (Fla. App. 2006) (property tax liens are not to be apportioned between the mortgagee and the remaindermand).

Add:

Hilterbrand v. Carter, 27 P.3d 1086 (Or. App. 2001) (when cotenants hold concurrent life estates with contingent remainders, the contingent remainder which each cotenant has cannot be defeated by any act of the cotenant).

Add:

Collier v. Kincheloe, 180 P.3d 1157 (Mont. 2008) (when the life tenant failed to redeem the property from delinquent taxes, the tax deed to the county extinguished both the life estate and the remainder, conveying a fee simple absolute to the county).

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3-23 Thompson on Real Property, Thomas Editions Supp. to § 23.09

Supp. to § 23.09 Remainders in Class Gifts.

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Add:

Rutherford County v. Wilson, 2002 Tenn. App. LEXIS 145 at *25 (Feb. 28, 2002) , *aff'd in part and rev'd in part by, 2003 Tenn. LEXIS 368* (Tenn., May 6, 2003) .

Add:

Rutherford County v. Wilson, 2002 Tenn. App. LEXIS 145 at *25 (Feb. 28, 2002) , *aff'd in part and rev'd in part by, 2003 Tenn. LEXIS 368* (Tenn., May 6, 2003) ("A class gift is [to] a group of persons who are not named, whose number may vary, and who have one or more characteristics in common.").

Add:

In re Est. of Garrett, 756 N.E.2d 920 (Ill. App. 3d Dist. 2001) (a gift in equal shares to the named individuals strengthens the conclusion that a class gift was not intended).

Add:

Rutherford County v. Wilson, 121 S.W.3d 591 (Tenn. 2003) (in the case of a class gift, the spouse of a deceased class member is not entitled to an interest in the property under the state's class gift statute).

Add:

In re Irrevocable Trust of Charles Stewart Mott, 2001 Mich. App. LEXIS 2210 at *10 (June 26, 2001) .

Add:

Rutherford County v. Wilson, 2002 Tenn. App. LEXIS 145 at *9, 24 (Feb. 28, 2002) , *aff'd in part and rev'd in part by, 2003 Tenn. LEXIS 368* (Tenn., May 6, 2003) (question of who remaindermen are and resulting proportionate share of each would be left until termination of the life estate).

Add:

Stalcup v. Detrich, 10 P.3d 3 (Kan. App. 2000) (remainder interests to children have been considered vested even as to afterborn children when the class is opened to let in the afterborn children).

Add:

Rutherford County v. Wilson, 2002 Tenn. App. LEXIS 145 at *26 (Feb. 28, 2002) , *aff'd in part and rev'd in part by, 2003 Tenn. LEXIS 368* (Tenn., May 6, 2003) ("A class of children cannot close until the death of the parent.")

Change second sentence in second paragraph to read:

A class of children cannot close until the death of the parent or parents. Add to footnote 280 the following citation: *Rutherford County v. Wilson, No. M2000-01382-COA-R3- Rutherford County v. Wilson, 2002 Tenn. App. LEXIS 145* at *26 (Feb. 28, 2002) , *aff'd in part and rev'd in part by, 2003 Tenn. LEXIS 368* (Tenn., May 6, 2003) ("A class of

children cannot close until the death of the parent.")

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Supp. To CHAPTER 23 REMAINDERS

3-23 Thompson on Real Property, Thomas Editions Supp. to § 23.10

Supp. to § 23.10 Remainders with Powers of Disposition or Appointment.

[Go To Main]

Change the placement of footnote 302 to the end of the sentence.

Add:

But see Williams v. Burgett, 831 So.2d 597, 598 (Ala. 2002) (in Alabama, an absolute power of disposition added to an estate for life or years is changes the estate into a fee absolute).

Hargis v. Fuller, 2005 Tenn. App. LEXIS 81 (No. M2003-02691-COA-R3-CV, Tenn. Ct. App., Feb. 7, 2005) (the owner of a life estate with a power of disposition, qualified or unqualified, can convey the fee simple estate and defeat the interest of remaindermen, but if the power of disposition is not exercised, the property passes to the remaindermen upon the death of the life tenant).

Add:

Cooley v. Williams, 31 S.W.3d 810 (Tex. App. Houston 2000) (finding that a life tenant may expressly be given unlimited power to dispose of the property during the life tenant's lifetime, and if such power is exercised, it defeats the remainderman's interest in the disposed-of property).

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Supp. To CHAPTER 23 REMAINDERS

3-23 Thompson on Real Property, Thomas Editions Supp. to § 23.11

Supp. to § 23.11 Vested and Contingent Remainders Compared.

[Go To Main]

§ 23.11(a) The Distinction Between Vested and Contingent Remainders. [Go To Main]

Add:

Rutherford County v. Wilson, 2002 Tenn. App. LEXIS 145 at *17 (Feb. 28, 2002) , *affirmed in part and reversed in part by, 2003 Tenn. LEXIS 368* (Tenn., May 6, 2003) (in classifying remainders, it is the nature of the interest conveyed which is determinative).

Stalcup v. Detrich, 10 P.3d 3 (Kan. App. 2000) (whether an interest is vested or contingent depends on the proper interpretation of the instrument which created it).

Osherow v. Porras, 312 B.R. 81 (Bankr. D. Tex. 2004) (according to Texas's rules of construction, a condition that precedes or is incorporated into the gift of the remainder is a condition precedent, while when a condition is added after a vested gift is made, the remainder is vested subject to divestment).

Add:

In re Rathe, 2004 Bankr. LEXIS 93 (No. M2003-02691-COA-R3-CV, Bankr. D. Neb., Feb. 3, 2004) (the fact that enjoyment of the fee in remainder is postponed, and may never take place at all, does not make the remainder contingent).

§ 23.11(b) Indicia of Vesting and Contingency in Remainders. [Go To Main]

Add:

Stalcup v. Detrich, 10 P.3d 3 (Kan. App. 2000) (courts must attempt to ascertain from the document itself the instrument maker's intention as to whether the remainder is vested or contingent).

Uchtorff v. Hanson, 693 N.W. 2d 790, 794 (Iowa 2005) ("whether a testamentary remainder is vested or contingent must be determined by the intent of the testator as expressed by the language of the will, if it is plain and unambiguous, and nothing else, considering the will as a whole, and giving effect to every provision thereof if it is reasonably possible").

§ 23.11(c) The Public Policy in Favor of Vesting of Remainders. [Go To Main]

Add:

Osherow v. Porras, 312 B.R. 81 (Bankr. D. Tex. 2004) ("Texas Courts will not construe a remainder as contingent when it can reasonably be taken as vested"); *In re Rathe, 2004 Bankr. LEXIS 93* (No. BK03-81956, Bankr. D. Neb., Feb. 3, 2004) (whenever possible, the interest is construed as vested rather than contingent).

Add:

Schmidt v. Wachovia Bank, 624 S.E.2d 34 (Va. 2006) (early vesting of estates is favored).

Add:

Schmidt v. Wachovia Bank, 624 S.E.2d 34 (Va. 2006) (early vesting of estates is favored).

Add:

Osherow v. Porras, 312 B.R. 81 (Bankr. D. Tex. 2004) ("Texas Courts will not construe a remainder as contingent when it can reasonably be taken as vested"); *In re Rathe, 2004 Bankr. LEXIS 93* (No. BK03-81956, Bankr. D. Neb., Feb. 3, 2004) (whenever possible, the interest is construed as vested rather than contingent).

Add:

In re Estate of Cruikshank, 746 N.Y.S.2d 769, 773 (2002) (a condition of survivorship will not be imputed unless

unequivocally expressed).

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Supp. to § 23.12 Vested Remainders.

[Go To Main]

§ 23.12(a) Remainders Vested Absolutely. [Go To Main]

Add:

Danielewicz v. Arnold, 769 A.2d 274 (Md. Spec. App. 2001) (holding that a vested remainder became a present possessory interest when holder of life estate died and until then, remainderman did not have present possession of her remainder interest).

Add:

Danielewicz v. Arnold, 769 A.2d 274 (Md. Spec. App. 2001) (a remainder is a fee simple interest lacking only present possession).

Add:

In re Estate of Ellis v. Green, 2002 Tenn. App. LEXIS 235 at *16, 20 (April 15, 2002) (remainder devised to a "deserving person" at a designated college is a vested remainder).

Add:

Danielewicz v. Arnold, 769 A.2d 274 (Md. Spec. App. 2001) (a remainder is a fee simple interest lacking only present possession).

Add:

Danielewicz v. Arnold, 769 A.2d 274 (Md. Spec. App. 2001) (holding that a vested remainder became a present possessory interest when holder of life estate died and until then, remainderman did not have present possession of her remainder interest).

§ 23.12(b) Remainders Vested Subject to Divesting. [Go To Main]

Add:

Osherow v. Porras, 312 B.R. 81 (Bankr. D. Tex. 2004) (according to Texas' rules of construction, a condition added after a vested gift is made is vested subject to divestment).

Add:

Gibson v. Gibson, 2004 Conn. Super. LEXIS 2208 (No. FA010458344S, Conn. Super. Ct., Aug. 6, 2004) (when the only contingency that would prevent receipt of the remainder interest is the death of the remainderman before the life beneficiary, the remainder is vested).

Add:

Bonta v. Burke, 120 Cal. Rptr. 2d 72, at 76 (App. 3d Dist. 2002) (remainder interest vested at time property was transferred; however, the interest was not realized until the power to revoke terminated, that is, when the grantor died and the remaindermen survived her death).

Vested. Temple Beth Israel v. Feiss, 2 P.3d 388 (Or. App. 2000) (a vested remainder subject to complete defeasance may be subject to a requirement of survivorship).

§ 23.12(c) Properties of Vested Remainders. [Go To Main]

Add:

Danielewicz v. Arnold, 769 A.2d 274 (Md. Spec. App. 2001) (a vested remainder is a present interest in property).

Add:

Taylor v. Taylor, 547 S.E.2d 161 (N.C. App. 2001) (a remainder is vested if, so long as it lasts, the only obstacle to the right of immediate possession by the remainderman is the existence of the preceding estate, or if it is subject to no condition precedent except the determination of the preceding estate).

Add:

Hutchinson v. Estate of Nunn, 2004 Tenn. App. LEXIS 899 (No. W2004-00578-COA-R3-CV, Tenn. Ct. App., Dec. 30, 2004) (remaindermen allowed to sue estate when decedent's clear-cutting of timber caused waste to the property in which they held interest).

Add:

See Cooley v. Williams, 31 S.W.3d 810 (Tex. App. - Houston 1st Dist. 2000) (a life tenant may be given the express power to dispose of property and if exercised defeats a remainderman's interest).

Add:

Jenkins v. Brown, 532 S.E.2d 302 (S.C. App. 2000) (the statute of limitations does not begin to run against a remainderman until the death of the life tenant).

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Supp. To CHAPTER 23 REMAINDERS

3-23 Thompson on Real Property, Thomas Editions Supp. to § 23.13

Supp. to § 23.13 Contingent Remainders.

[Go To Main]

§ 23.13(a) Contingent Remainders Generally. [Go To Main]

Add:

Uchtorff v. Hanson, 693 N.W. 2d 790, 793 (Iowa 2005) ("[c]ontingent remainders are where the estate in remainder is limited to take effect either to a dubious or uncertain person or upon a dubious or uncertain event"); *Baldwin v. Branch, 888 So. 2d 482, 487 (Ala. 2004)* (a remainder is said to be contingent when it is "limited either to a dubious and uncertain person, or upon the happening of a dubious or uncertain event, uncertainty of the right of enjoyment, as distinguished from the uncertainty of possession").

Add:

Hammons v. Hammons, 2009 Ky. App. LEXIS 23 (Ky. Ct. App. Feb. 13, 2009) (daughters had contingent interest in property under deed granting the remainder if assets remained upon death of the life tenant and at least one daughter either survived the life tenant or left issuing surviving the life tenant).

Taylor v. Taylor, 547 S.E.2d 161 (N.C. App. 2001) .

§ 23.13(c) The Effect of Limitations Over on Failure of Issue. [Go To Main]

Add:

But see, Temple Beth Israel v. Feiss, 2 P.3d 388 (Or. App. 2000) (the fact that a remainder is contingent on one event does not necessarily mean that it is also subject to a requirement of survivorship if not express).

§ 23.13(d) Remainders to Survivors. [Go To Main]

Add:

D.L. v. G.L., 811 N.E. 2d 1013, 1025 (Mass. App. Ct. 2004) (husband's remainder interest was contingent when it was dependent on whether his father died before a certain date)

Add:

Temple Beth Israel v. Feiss, 2 P.3d 388 (Or. App. 2000) (the fact that a remainder is contingent on one event does not necessarily mean that it is also subject to a requirement of survivorship if not express).

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3-23 Thompson on Real Property, Thomas Editions Supp. to § 23.14

Supp. to § 23.14 Bibliography.

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Add to Articles

Burke, Richard W and Michael P. Morley, "The Effect of a Step-Parent Adoption on a Grandchild's Remainder Interest in a Trust," 18 *Ohio Prob. L.J.* 221 (July/August 2008).

Horn, Jerold I. "Availability of a Qualified Severance (I) If the Severance Changes Beneficial Interests or Otherwise Coincides with Changes in Beneficial Interests and (II) If Remainder Dispositions are Outright," *33 ACTEC J. 94* (Fall, 2007).

Knaplund, Kristine S., "Postmortem Conception and a Father's Last Will," *46 Ariz. L. Rev. 91, 108-14 (2004)* (dealing with the rule of convenience).

Spence, Carl Jackson, "Linkous v. Candler: The Future of Acceleration of Remainders in Georgia." *16 Ga. St. U. L. Rev. 879 (2000).*

Add to Annotations

Annotation, *Adverse possession as against remainderman during life estate as affected by fact that conveyance by life tenant purported to cover fee,* 112 A.L.R. 1042 .

Annotation, *Character of remainder limited generally to the life tenant's children, 57 A.L.R.2d 1031* .

Annotation, *Compensation for diminution in value of the remainder of property resulting from taking or use of*

adjoining land of others for the same undertaking, 59 A.L.R.3d 488 .

Annotation, *Death of life tenant before death of testator as causing lapse or "acceleration" of remainder*, 133 A.L.R. 1367 .

Annotation, *Delivery or distribution to life tenant, or assent by executor to his possession or to the life interest, as inuring to benefit of the remaindermen and operating to take the remainder out of the estate, absent a trust or will provision retaining it, 68 A.L.R.2d 1107* .

Annotation, *Distribution as between life tenant and remainderman of proceeds of condemned property, 91 A.L.R.2d 963.*

Annotation, *Duty as between life tenant and remainderman as respects payment of improvement assessments, 10 A.L.R.3d 1309.*

Annotation, *Duty as between life tenant and remainderman with respect to cost of improvements or repairs made under compulsion of government, 43 A.L.R.4th 1012.*

Annotation, *Effect of premature termination of precedent estate to accelerate a contingent remainder*, 164 A.L.R. 1433 .

Annotation, *Effect of premature termination of precedent estate to accelerate remainder of which there is an alternative substitutional gift*, 164 A.L.R. 1297 .

Annotation, *Heirs or next of kin who take upon intestacy resulting from failure of contingent remainder after life estate as determinable as of date of death of the testator or of life tenant*, 132 A.L.R. 1069 .

Annotation, *Murder of life tenant by remainderman or reversion as affecting latter's right to remainder or reversion, 24 A.L.R.2d 1120* .

Annotation, *Nature of remainders created by will giving life estate to spouse of testator, with remainder to be divided equally between testator's heirs and spouse's heirs, 19 A.L.R.2d 371* .

Annotation, *Prior estate as affected by remainder void for remoteness*, 168 A.L.R. 321 .

Annotation, *Relinquishment of interest by life beneficiary in possession as accelerating remainder of which there is substitutional gift in case primary remainderman does not survive beneficiary, 7 A.L.R.4th 1084* .

Annotation, *Remaindermen as necessary or proper parties to action or proceeding between life tenant and trustee*, 136 A.L.R. 696 .

Annotation, *Right as between life tenant and remainderman in respect of property, estates, or securities of a wasting, consumable, or perishable nature*, 77 A.L.R. 753 .

Annotation, *Right of contingent remainderman to maintain an action for damages for waste, 56 A.L.R.3d 677* .

Annotation, *Right of reversioner or remainderman to maintain an action or suit in respect of easement*, 138 A.L.R. 1006 .

Annotation, *Right to, and effect of, partition of undivided interests held respectively in fee and in life estate with*

remainder, 134 A.L.R. 661 .

Annotation, *Right to contribution from remainderman, of life tenant who pays off encumbrance on property*, 87 A.L.R. 220 .

Annotation, *Rights and duties of life tenant and remainderman of income and corpus with respect to repairs and improvements*, 175 A.L.R. 1434 .

Annotation, *Rights as between the life tenant and remaindermen in respect of property, estates, or securities of a wasting, consumable, or perishable nature*, 170 A.L.R. 133 .

Annotation, *Rights as between estate of life tenant and remaindermen in respect of proceeds of sale or disposition made in exercise of power given life tenant, 47 A.L.R.3d 1078* .

Annotation, *Rights, duties, and liabilities of life tenant (legal or equitable) and remaindermen in respect of property insurance or proceeds thereof*, 126 A.L.R. 336 .

Annotation, *Rights in respect of crops as between the estate of life tenant and remainderman, 47 A.L.R.3d 784* .

Annotation, *Rights of life tenant and remaindermen inter se respecting increase, gains, and enhanced values of the estate, 76 A.L.R.2d 162* .

Annotation, *Sale or exchange of property which is subject to life estate and remainder, where it is unproductive, or income is insufficient to pay taxes and upkeep*, 76 A.L.R. 540 .

Annotation, *Vested or contingent character of remainder which is subject to be defeated by death of remainderman without issue before termination of a particular estate*, 109 A.L.R. 136 .

Annotation, *Words of survivorship in will disposing of estate in remainder as referable to death of testator or to termination of intervening estate, 20 A.L.R.2d 830* .

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CHAPTER 24 POSSIBILITIES OF REVERTER

3-24 Thompson on Real Property, Thomas Editions 24.syn

AUTHOR: Professor David A. Thomas This chapter is based in part on Ch. 31, George W. Thompson, Commentaries on the Modern Law of Real Property (John S. Grimes ed. 1979), which made a significant contribution to preserving the American common law on possibilities of reverter. J. Reuben Clark Law School Brigham Young University

§ 24.syn Synopsis to Chapter 24: POSSIBILITIES OF REVERTER

§ 24.01 Introduction

§ 24.02 Definition of Possibility of Reverter

§ 24.03 Examples of Possibilities of Reverter

§ 24.04 Common-Law History of Possibility of Reverter

§ 24.05 Possibility of Reverter Distinguished from Reversion

§ 24.06 Possibility of Reverter Distinguished from Right of Re-Entry

§ 24.07 Incidents of Possibilities of Reverter

§ 24.07(a) Subject to Statute of Frauds

§ 24.07(b) Alienability and Devisability

§ 24.08 Bibliography

Professor David A. Thomas n*
J. Reuben Clark Law School
Brigham Young University

FOOTNOTES:
(n1)Footnote *.
This chapter is based in part on Ch. 31, George W. Thompson, Commentaries on the Modern Law of Real Property

(John S. Grimes ed. 1979), which made a significant contribution to preserving the American common law on possibilities of reverter.

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CHAPTER 24 POSSIBILITIES OF REVERTER

3-24 Thompson on Real Property, Thomas Editions § 24.01

AUTHOR: Professor David A. Thomas This chapter is based in part on Ch. 31, George W. Thompson, Commentaries on the Modern Law of Real Property (John S. Grimes ed. 1979), which made a significant contribution to preserving the American common law on possibilities of reverter. J. Reuben Clark Law School Brigham Young University

§ 24.01 Introduction

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This chapter reviews the law governing possibilities of reverter in American jurisdictions. While possibilities of reverter are not the most commonly created future interests in American property law, they impact on several other future interests. The chapter includes sections that define possibilities of reverter, distinguish them from other interests, describe their common-law history, and explain their more important incidents.

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CHAPTER 24 POSSIBILITIES OF REVERTER

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AUTHOR: Professor David A. Thomas This chapter is based in part on Ch. 31, George W. Thompson, Commentaries on the Modern Law of Real Property (John S. Grimes ed. 1979), which made a significant contribution to preserving the American common law on possibilities of reverter. J. Reuben Clark Law School Brigham Young University

§ 24.02 Definition of Possibility of Reverter

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The interest that remains in a grantor, testator or settlor of a trust after creating a fee simple determinable is called a possibility of reverter. n1 The same name has been given to interests existing after creation of a conditional fee where de donis does not apply. The "possibility of reverter" is created by the conveyance of a limited fee. n2 A "possibility of reverter" is defined by the *Restatement of the Law of Property* as "any reversionary interest which is subject to a condition precedent." n3

Where determinable fees are created, a possibility of reverter automatically arises. n11

FOOTNOTES:

(n1)Footnote 1. *Donehue v. Nilges, 266 S.W.2d 553 (Mo. 1954) 45 A.L.R.2d 1150; Oldfield v. Stoeco Homes, Inc., 139 A.2d 291 (N.J. 1958), Luecke v. Wallace, 951 S.W.2d 267 (Tex. Ct. App. 1997)* (Both a "fee simple determinable" and a "possibility of reverter" vest immediately upon their creation), *but see, Knights and Ladies of Samaria v. Board of Educ., 688 A.2d 933 (Md. Ct. Spec. App. 1997)* (Under a Maryland statute, a possibility of reverter created before a certain date is invalid, unless the grantor files notice of intention to preserve the possibility of reverter).

John Chipman Gray, Rule Against Perpetuities 31 (2d ed. 1906), felt that the statute Quia Emptores Terrarum destroyed the possibility of creating possibilities of reverters. Sanders, Uses and Trusts 200 (4th ed.). Modern writers have disagreed. Richard R.B. Powell, *Determinable Fees, 23 Colum. L. Rev. 207 (1923);* W.R. Vance, *Rights of Reverter and the Statute Quia Emptores, 36 Yale L.J. 593 (1927).*

See Milton I. Goldstein, *Rights of Entry and Possibilities of Reverter as Devices to Restrict the Use of Land, 54 Harv. L. Rev. 248 (1940).*

Guida v. Thompson, 160 N.E.2d 153 (Ohio 1957) (which could, however, be conveyed).

Where city held a possibility of reverter the Fourteenth Amendment prohibited racial discrimination on the land. *Hampton v. Jacksonville, 304 F.2d 320 (5th Cir. 1962).*

A municipality is subject to the possibility of reverter in a conveyance to it in fee simple determinable. *Metropolitan Dade County v. Leslie Enters., 257 So. 2d 29 (Fla. 1972).*

Kentucky has abolished the fee simple determinable and possibility of reverter and has converted this into a "fee simple subject to a right of entry for condition broken." Ky. Rev. Stat. § 381.218.

The right of entry dies after 30 years from the date of the instrument. Ky. Rev. Stat. § 381.219.

Limitations over after defeasible fees are valid for 30 years after breach regardless of the rule against perpetuities. Ky. Rev. Stat. § 381.219.

Kentucky voids possibilities of reverter and right of entry created after 30 years from date of the instrument creating them, prior to July 1, 1960, unless re-recorded before July 1, 1965. Ky. Rev. Stat. § 381.221.

Any possibility of reverter or right of entry contained in deeds, grants or gifts from the Commonwealth, grants for public, charitable or religious purposes, leases, easements, rights-of-way, mortgages or trusts, or any public highways is exempted from §§ 381.219 and 381.221 referred to above. Ky. Rev. Stat. § 381.222.

See Comment, *Possibilities of Reverter and Powers of Termination in Michigan, 37 U. Det. L. J. 284 (1959);* Note, *Right of Entry and Possibility of Reverter: Traditional Uses -- Subdivisions -- Mineral Leases, 2 Willamette L.J. 479 (1963);* James A. Webster Jr., *The Quest for Clear Land Titles -- Whither Possibilities of Reverter and Rights of Entry, 42 N. C. L. Rev. 807 (1964). Whillhite v. Master, 965 S.W.2d 406 (Mo. App. 1998)* (possibility of reverter ceases if the right terminates according to terms of a contractual agreement). *But see Guillory v. Administrators of Tulane University, 212 F. Supp. 674 (D.C.La. 1962)* (limiting *Hampton*'s application).

(n2)Footnote 2. *Sorrels v. McNally, 105 So. 106 (Fla. 1925), North Finn v. D. L. Cook, 825 F. Supp. 278 (D. Wyo. 1993)* (in this case the court held that: 1) the prior transferor of a working interest in a foreclosed oil and gas lease has a possibility of reverter under a farm-out agreement in which the transferee of the working interest was required to convey 30% "back-in" working interest to assignee following payout; 2) liens did not attach to the transferor's reversionary interest; and 3) even if transferor's reversionary interest was alienable, the interest was not foreclosed. The court also held that a possibility of reverter is alienable together with or apart from the surface, and is exempt from the rule against perpetuities. It distinguished possibility of reverter from a power of termination, by the automatic reversion of the former, and discussed creation of reverter).

(n3)Footnote 3. Restatement of Property, § 154, (3). *See Northwestern Imp. Co. v. Lowry, 66 P.2d 792 (Mont. 1937); Copenhaver v. Pendleton, 155 S.E. 802 (Va. 1930),* and Minn. Laws 1949, ch. 201, affecting abolishing unintended reverters in express trusts.

An executory interest in or limitation to the heirs of the grantor was a possibility of reverter. *Commercial Nat'l Bank v. Martin, 340 P.2d 899 (Kan. 1959).*

As to the questions of possibility of reverter and rights of reentry in New York, *see In re Will of McCarthy, 347 N.Y.S.2d 490 (1973),* holding that rights of reentry are neither devisable nor alienable in *New York. County Comm'n of Boone County v. Hill, 460 S.E.2d 727 (W. Va. 1995)* (stoppage in use of facility as nursing home because of a labor strike did not amount to the use of land for a different purpose to vest title in the holder of the possibility of reverter); *Potts Run Coal Co. v. Benjamin Coal Co., 426 A.2d 1175 (Pa. Sup. Ct. 1981).*

(n4)Footnote 11. *Coffelt v. Decatur Sch. Dist. No. 17, 208 S.W.2d 1 (Ark. 1948), North Finn v. D. L. Cook, 825 F. Supp. 278 (D. Wyo. 1993)* (In this case the court held that: 1) the prior transferor of a working interest in a foreclosed oil and gas lease has a possibility of reverter under a farm-out agreement in which the transferee of the working interest was required to convey a 30% "back-in" working interest to assignee following payout; 2) liens did not attach to the transferor's reversionary interest; and 3) even if transferor's reversionary interest was alienable, the interest was not foreclosed. It also held that a possibility of reverter is alienable together with or apart from the surface, and is exempt from the rule against perpetuities. It distinguished possibility of reverter from a power of termination, by the automatic reversion of the former, and discussed creation of reverter). *Vollmann v. Rosenburg, 972 S.W.2d 490 (Mo. App. 1998)* (trust property of a testamentary trust that fails cannot be said to revert to the grantor under the theory of possibility of reverter unless it can be shown, and is alleged, that the will granted a fee simple determinable remainder).

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CHAPTER 24 POSSIBILITIES OF REVERTER

3-24 Thompson on Real Property, Thomas Editions § 24.03

AUTHOR: Professor David A. Thomas This chapter is based in part on Ch. 31, George W. Thompson, Commentaries on the Modern Law of Real Property (John S. Grimes ed. 1979), which made a significant contribution to preserving the American common law on possibilities of reverter. J. Reuben Clark Law School Brigham Young University

§ 24.03 Examples of Possibilities of Reverter

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Land dedicated to a particular public purpose will revert to the dedicator when there has been a full and lawful abandonment of the use for which the dedication has been made or when the dedication has spent its force by the use becoming impossible. n4 When a public way has been vacated, the interest of the public therein ceases, the burden upon the land which has been used as a public way is removed and possession reverts to the owner of the fee, together with the right to use the property in such manner as the owner may see proper, without regard to the former servitude to which it was subject. n5 Likewise, where land has been dedicated to public use for burial purposes, the fee simple title remaining in the dedicator, the dedicator has a right of reverter when the public has ceased to use the land for the purpose of a graveyard. n6 Under the early common law, land granted to a charitable corporation reverted to the grantor when the corporation died. n7

A possibility of a reverter of an interest in leased coal to the lessor is not an estate present or future, but a possibility of having a future estate in the coal remaining unmined. n12 Under the old rule a mere possibility of reverter is incapable of alienation or devise, n13 such an interest not being sufficient to constitute an estate. n14

FOOTNOTES:

(n1)Footnote 4. *McAlpine v. Chicago Great W. R.R., 75 P. 73 (Kan. 1904); Porter v. International Bridge Co., 93 N.E. 716 (N.Y. 1910). See Ford v. Detroit, 263 N.W. 425 (Mich. 1935).*

Devise to S for life, then to trustees to be used for a course in vocational agriculture, but if this is not done, to revert to the testator's heirs was held to create a possibility of reverter in the heirs and not a perpetuity. *Commercial Nat'l Bank v. Martin, 340 P.2d 899 (Kan. 1959).*

Confusing possibility of reverter and right of re-entry. *City of Wheeling v. Zane, 173 S.E.2d 158 (W. Va. 1970).*

Statement of consideration in a deed was not a right of reverter. *Stillwater Indus. Found., Inc. v. State ex rel. Bd. of Regents, 541 P.2d 173 (Okla. 1975), State Dep't of Transp. v. Scramuzza, 673 So. 2d 1249 (La. App. 1996); Wolfson v. City of St. Paul, 535 N.W. 2d 384 (Minn. App. 1995).*

(n2)Footnote 5. *Marietta Chair Co. v. Henderson, 49 S.E. 312 (Ga. 1904); Neil v. Independent Realty Co., 298 S.W. 363 (Mo. 1927), City of Louisville v. Louisville Scrap Material Co., 932 S.W. 2d 352 (Ky. 1996); Sun Oil Co. v. Gerstein, 206 So.2d 439 (Fla. App. 1968).*

(n3)Footnote 6. *Campbell v. Kansas City, 13 S.W. 897 (Mo. 1890); Tracy v. Bittle, 112 S.W. 45 (Mo. 1908); Newark v. Watson, 29 A. 487 (N.J. 1894).* And *see Steele v. Rosehill Cemetery, 19 N.E.2d 189 (Ill. 1938); A.F. Hutchinson Land Co. v. Whitehead Bros., 217 N.Y.S. 413 (1926).*

(n4)Footnote 7. A municipality is subject to the possibility of reverter in a conveyance to it in fee simple determinable. *Metropolitan Dade County v. Leslie Enters., 257 So. 2d 29 (Fla. 1972).*

(n5)Footnote 12. *Westbrook Coal Co. v. Hudson Coal Co., 42 A.2d 825 (Pa. 1945), Concord Oil Co. v. Pennzoil Exploration & Prod. Co., 878 S.W.2d 191 (Tex. App. 1994)* (a lessor of an oil and gas lease was held to retain a possibility of reverter consisting of a right to a fee simple estate in minerals when the lease terminated. The court also held that the possibility of reverter included the fraction of actual oil production in royalties that was reserved by lessor). Liberty Mutual Insur. Co. v. Reid Timber, Inc., No. 3:97cv103-D-A (N.D. Miss. 1998) (LEXIS 11473) (timber conveyed in a deed could be the proper subject of a possibility of reverter, and was conditioned upon title to the timber being severed from the real property within a certain time period); *Tarrant County Water Control & Improvement Dist. No. One v. Fullwood, 963 S.W.2d 60 (Tex. 1998).*

(n6)Footnote 13. *North v. Graham, 85 N.E. 267 (Ill. 1908)* (holding that an interest based on the possibility that the land should cease to be used for church purposes did not pass by quitclaim deed).

(n7)Footnote 14. *Vaughn v. Lanford, 62 S.E. 316 (S.C. 1908).*

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CHAPTER 24 POSSIBILITIES OF REVERTER

3-24 Thompson on Real Property, Thomas Editions § 24.04

AUTHOR: Professor David A. Thomas This chapter is based in part on Ch. 31, George W. Thompson, Commentaries on the Modern Law of Real Property (John S. Grimes ed. 1979), which made a significant contribution to preserving the American common law on possibilities of reverter. J. Reuben Clark Law School Brigham Young University

§ 24.04 Common-Law History of Possibility of Reverter

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The possibility of a reverter of land at common law was held an indeterminable fee and was not an estate in land. n20 It was neither a present nor a future right, but a mere possibility that a right might arise upon the happening of a contingency, which is not the subject of a grant, devise, or inheritance. This was because the grant or devise of a determinable fee passed the whole estate to the tenant in fee, leaving nothing in the grantor or devisor which could be the subject of grant, devise, or inheritance. Hence, it was settled that upon the termination of such an estate, it went to those who could bring themselves into the class of heirs of the person creating the estate at the time when the estate terminates, and not to those who were heirs at the time of the death of such person. n21 So a possibility of reverter retained by the grantor in an irrevocable trust made the trust taxable, since the beneficiaries might predecease the grantor, and there was no limitation over. n22

It seems probable that prior to quia emptores the feoffor creating a base fee retained an interest of such a tender nature that it was inalienable. It was not even of sufficient quality to descend to the heir. Instead it remained in the clouds (in nimbus) after creation until the fee determined. Then it rained down upon the person who then was the heir of the grantor. That is, it passed by descent cast. n23

Again at common law, in the grant of a qualified or determinable fee, the grantor was not vested with any title or interest in the land or in the reversion until the happening of the contingency upon which the land is to revert, for such contingency might never happen. The grantor had nothing to convey, and the grantor's deed in expectancy of a reverter vested no interest in the grantee, but was wholly without legal force or effect; n28 and the rule was the same where an attempted conveyance was by quitclaim deed. n29 Where the grantor had such an estate or interest as would descend to the heirs, n30 and if the grantor died before the happening of the contingency which is to effect a reversion, the possibility of reverter was cast by descent upon the heirs at the time of the grantor's death. n31 Also, a mere possibility that real estate may revert to the grantor was not devisable at common law, n32 and so it has been held that if it be a mere possibility of reverter attached to a determinable or conditional fee it was not an estate and was not alienable,

assignable, nor devisable, in the absence of a statute authorizing it. n33

FOOTNOTES:
(n1)Footnote 20. *Cookman v. Silliman, 2 A.2d 166 (Del. 1938); Sorrels v. McNally, 105 So. 106 (Fla. 1925); Prall v. Burckhartt, 132 N.E. 280 (Ill. 1921). Elmore v. Austin, 59 S.E.2d 205 (N.C. 1950); Miller v. Dierken, 33 A.2d 804 (Pa. Super. 1943); Vaughn v. Lanford, 62 S.E. 316 (S.C. 1908); Purvis v. McElveen, 106 S.E.2d 913 (S.C. 1959); University of Vt. & State Agri. College v. Ward, 158 A. 773 (Vt. 1932). County Sch. Bd. v. Dowell, 58 S.E.2d 38 (Va. 1950).*

(n2)Footnote 21. *Blount v. Walker, 9 S.E. 804 (S.C. 1889); Burnett v. Snoddy, 19 S.E.2d 904 (S.C. 1942). See Brill v. Lynn, 270 S.W. 20 (Ky. 1925); Halpin v. Rural Agri. Sch. Dist. No. 9, 194 N.W. 1005 (Mich. 1923).*

(n3)Footnote 22. *Spiegel's Estate v. Internal Revenue Comm'r, 335 U.S. 701 (1949).*

(n4)Footnote 23. *See* W.R. Vance, *Rights of Reverter and the Statute Quia Emptores, 36 Yale L.J. 593 (1927).*

Possibility of reverter is descendible. *City of Klamath Falls v. Bell, 490 P.2d 515 (Or. App. 1971).*

Descent cast has been abolished in *North Dakota. Cranston v. Winters, 238 N.W.2d 647 (N.D. 1976).*

(n5)Footnote 28. *Denver & S.F. Ry. Co. v. School Dist. No. 22, 23 P. 978 (Colo. 1890); Union Colony Co. v. Gallie, 88 P.2d 120 (Colo. 1939). Presbyterian Church v. Venable, 42 N.E. 836 (Ill. 1896); Prall v. Burckhartt, 132 N.E. 280 (Ill. 1921); Pure Oil Co. v. Miller-McFarland Drilling Co., 34 N.E.2d 854 (Ill. 1941); Blackert v. Dugosh, 145 N.E.2d 606 (Ill. 1957). Austin v. Calvert, 262 S.W.2d 825 (Ky. 1953); Puffer v. Clark, 168 N.W. 471 (Mich. 1918); Juif v. Dillman, 282 N.W. 892 (Mich. 1938); Vail v. Long Island R. Co., 12 N.E. 607 (N.Y. 1887); Dunkel v. Homindustries, 9 N.E.2d 949 (N.Y. 1937); Lipetz v. Papish, 131 N.Y.S.2d 104 (1954); Powers v. Bullwinkle, 11 S.E. 971 (S.C. 1890); Purvis v. McElveen, 106 S.E.2d 913 (S.C. 1959).* Possibility of reverter was not an estate but only a possibility of having the estate in the future. *Long v. Long, 343 N.E.2d 100 (Ohio 1976),* Kent. Rev. Stat. § 381.040.

(n6)Footnote 29. *North v. Graham, 85 N.E. 267 (Ill. 1908), Walker v. Foss, 930 S.W. 2d 701 (Tex. App. 1996).*

(n7)Footnote 30. *Presbyterian Church v. Venable, 42 N.E. 836 (Ill. 1896); North v. Graham, 85 N.E. 267 (Ill. 1908); Regular Predestinarian Baptist Church v. Parker, 27 N.E.2d 522 (Ill. 1940).*

Where there has been a conveyance of a lot to a school with the retention of a reverter when ceased to be used for school purposes and the grantors later conveyed the property to others but excepted the reversionary interest, the title vested in the heirs of the original grantors when the school ceased. *Shipton v. Sheridan, 531 S.W.2d 291 (Mo. App. 1975).*

(n8)Footnote 31. *North v. Graham, 85 N.E. 267 (Ill. 1989); Elmore v. Austin, 59 S.E.2d 205 (N.C. 1950).*

Missouri is undecided as to whether a possibility of reverter is a purely personal right or whether it descends to the heirs. *Nowlin v. Columbia Sch. Dist., 401 S.W.2d 394 (Mo. 1966).*

Kentucky voids possibilities of reverter and right of entry after 30 years from date of the instrument creating them, prior to July 1, 1960, unless re-recorded before July 1, 1965. Ky. Rev. Stat. § 381.221.

Any possibility of reverter or right of entry contained in deeds, grants or gifts from the Commonwealth, grants for public, charitable or religious purposes, leases, easements, rights-of-way, mortgages or trusts, or any public highways, is exempted from §§ 381.219 and 381.221. Ky. Rev. Stat. § 381.222. *Fletcher v. Ferrill, 227 S.W.2d 448 (Ark. 1950).*

(n9)Footnote 32. *Presbyterian Church v. Venable, 42 N.E. 836 (Ill. 1896); Upington v. Corrigan, 45 N.E. 359*

(N.Y. 1896); Vaughn v. Lanford, 62 S.E. 316 (S.C. 1908); Copenhaver v. Pendleton, 155 S.E. 802 (Va. 1930). Contra, and permitting devise. *Fletcher v. Ferrill, 227 S.W.2d 448 (Ark. 1950). See* Orville Ben Core, *Transmissibility of Certain Contingent Future Interests, 5 Ark. L. Rev. 111, 123 (1951).* Residuary clause. *Brown v. Independent Baptist Church, 91 N.E.2d 922 (Mass. 1950)* (and is not void for remoteness). A possibility of reverter is not devisable. Sheppard's Touchstone, *supra* note 17, at 120. *Collins v. Church of God of Prophecy, 800 S.W.2d 418 (Ark. 1990).*

(n10)Footnote 33. *Cookman v. Silliman, 2 A.2d 166 (Del. 1938); Prall v. Burckhartt, 132 N.E. 280 (Ill. 1921); Pond v. Douglass, 75 A. 320 (Me. 1909).* See *Magness v. Kerr, 254 P. 1012 (Or. 1927).*

Presbyterian Church v. Venable, 42 N.E. 836 (Ill. 1896); Pure Oil Co. v. Miller-McFarland Drilling Co., 34 N.E.2d 854 (Ill. 1941) (still unassignable in Illinois).

Purvis v. McElveen, 106 S.E.2d 913 (S.C. 1959) (not alienable by estoppel under warranty deed).

A reverter in a conveyance of a defeasible fee is void if it adversely affects the marketability of land. *Falls City v. Missouri P. R.R., 453 F.2d 771 (8th Cir. 1971).*

Dictum to the effect that a possibility of reverter following the transfer of a qualified fee is not capable of alienation, inter vivos or devisable at common law but are capable of descent.

In Ohio Rev. Code § 2131.04 remainders, executory interests, and other expectant estates are capable of alienation. *Long v. Long, 343 N.E.2d 100 (Ohio 1976), Fletcher v. Ferrill, 227 S.W.2d 448 (Ark. 1950).*

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CHAPTER 24 POSSIBILITIES OF REVERTER

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AUTHOR: Professor David A. Thomas This chapter is based in part on Ch. 31, George W. Thompson, Commentaries on the Modern Law of Real Property (John S. Grimes ed. 1979), which made a significant contribution to preserving the American common law on possibilities of reverter. J. Reuben Clark Law School Brigham Young University

§ 24.05 Possibility of Reverter Distinguished from Reversion

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A distinction is made between a reversion, which is an estate in praesenti, although to be enjoyed in the future, and a mere possibility of reverter, such as exists in all cases where the fee is limited on a contingency. The basis of the distinction lies in the fact that reversions are always vested estates corresponding to vested remainders, while the mere possibility of reverter is always contingent and corresponds to contingent remainders. n8 A "possibility of reverter" as distinguished from a "reversion" arises on a grant so limited that it may last forever or may terminate on the happening of a contingency. It is the possibility of having the fee again which exists in the grantor after the grant of a determinable or qualified fee. n9 More properly spoken in case of a base or qualified fee expiring by its own contingent limitation a possibility of reverter is a right to have a fee simple in possession contingent on the termination of a fee defeasible, and, in case of a fee limited on condition subsequent, it is a contingent right of re-entry on condition broken. n10

FOOTNOTES:
(n1)Footnote 8. *Copenhaver v. Pendleton, 155 S.E. 802 (Va. 1930).*

Possibility of reverter. *Bedyk v. Bank of Del., 176 A.2d 196 (Del. 1961).*

Statement of consideration in a deed was not a right of reverter. *Stillwater Indus. Found., Inc. v. State ex rel. Board of Regents, 541 P.2d 173 (Okla. 1975), City of Carthage v. United Missouri Bank, 873 S.W.2d 610 (Mo. App. 1994)* (A bank counterclaimed to quiet title and was held to have a possibility of reverter in city-owned property. The court also held that the possibility of reverter was an interest in land which is alienable and devisable, compared possibilities of reverter with contingent remainders, and distinguished the former with rights of entry); *Sides v. Beene, 938 S.W.2d 840 n.1 (Ark. 1997).*

(n2)Footnote 9. *United States v. 2,184.81 Acres of Land, 45 F. Supp. 681 (D. Ark. 1942).* In such a case the whole title is in the grantee until the contingency happens, and the holder of a bare possibility of reverter does not possess a present vested interest or estate in the land.

A possibility of reverter exists where there is a ninety-nine year lease renewable forever with the right to receive rents and enforce the covenants in the lease. *Welfare Fed'n v. Glander, 64 N.E.2d 813 (Ohio 1945),* Mount Olivet Cemetery Ass'n v. Salt Lake City, No. 97-4078 (10th Cir. 1998) (LEXIS 31324) (a non-profit organization that acquired a cemetery from the United States, subject to the United States's possibility of reverter, was deemed the owner of the entire present interest in the cemetery, not the United States, and was, therefore, subject to the city zoning ordinances).

(n3)Footnote 10. *Westbrook Coal Co. v. Hudson Coal Co., 42 A.2d 825 (Pa. 1945).*

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CHAPTER 24 POSSIBILITIES OF REVERTER

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AUTHOR: Professor David A. Thomas This chapter is based in part on Ch. 31, George W. Thompson, Commentaries on the Modern Law of Real Property (John S. Grimes ed. 1979), which made a significant contribution to preserving the American common law on possibilities of reverter. J. Reuben Clark Law School Brigham Young University

§ 24.06 Possibility of Reverter Distinguished from Right of Re-Entry

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Some of the courts have confused possibilities of reverter and rights of re-entry and have said, contrary to the general terminology, that possibilities of reverter exist after fees upon condition subsequent. n15 Some of the courts and occasionally a judge will treat possibilities of reverter and rights of re-entry as being closely related. n16 So it is said that the possibility of reverter after the termination of a qualified or determinable fee is similar to, though not quite identical with, the "right of re-entry" which remains in the grantor of land upon a condition subsequent. This right represents whatever is not conveyed by the deed, and it is the possibility that the land may revert to the grantor or grantor's heirs when the granted estate determines. n17 Likewise, it has been said that a possibility of reverter is any reversionary interest which is subject to a condition precedent. n18 One practical distinction between a right of entry for breach of a condition subsequent and a possibility of reverter upon a determinable fee is that in the former the estate in fee does not terminate until entry by the person having the right, while in the latter the estate reverts at once upon the occurrence of the event by which it is limited. n19

FOOTNOTES:
(n1)Footnote 15. *Taylor v. Continental S. Corp., 280 P.2d 514 (Cal. App. 1955); In re Hart's Estate, 311 P.2d 605 (Cal. App. 1957)* ("possibility of reverter" on breach of condition subsequent is a mere power to terminate, not an estate); *Farmer's High Sch. Consol. Dist. No. 3 v. Parker, 203 S.W.2d 516 (Mo. App. 1947); Purvis v. McElveen, 106 S.E.2d 913 (S.C. 1959)* ("possibility of reverter" exists after fee simple determinable or conditional).

Conveyance of a fee on condition subsequent creates a possibility of reversion in the grantor or his heirs. *Sorrels v. McNally, 105 So. 106 (Fla. 1925); Fayette County Bd. of Educ. v. Bryan, 91 S.W.2d 990 (Ky. 1936).*

University City v. Chicago, R. I. & P. R. Co., 149 S.W.2d 321 (Mo. 1941).

Deed to railroad to be used for repair shop but if not so used, to revert to the grantor or assigns created an alienable

possibility of reverter after a determinable fee, not an inalienable right of re-entry after a fee upon condition subsequent, "revert" being held to indicate determinable, not condition. *Georgia, Ashburn, Sylvester & Camilla Ry. v. Johnson, 174 S.E.2d 895 (Ga. 1970).*

The possibility of reverter after a determinable fee descends to the grantor's heirs. *Nowlin v. Columbia Sch. Dist., 401 S.W.2d 394 (Mo. 1966).* Jeffs v. Stubbs, No. 960454 (Utah 1998) (LEXIS 65) (court stated that "because the UEP represented to claimants that they could occupy the land for their lives, so long as they did not sell, mortgage, or abandon the property, the claimants' interest is actually a life estate subject to a condition subsequent. In other words, the UEP had both a reversionary interest, which vests upon the death of a claimant, and the possibility of reverter, which would only vest if a claimant sold, mortgaged, or abandoned the property"); United States v. 50.822 Acres, 950 F.2d 1165 (5th Cir. 1992).

(n2)Footnote 16. *Sanford v. Sims, 66 S.E.2d 495 (Va. 1951), School Dist. No. 6 v. Russell, 396 P.2d 929 (Colo. 1964)* (noting the confusion).

(n3)Footnote 17. *North v. Graham, 85 N.E. 267 (Ill. 1908); First Universalist Soc'y v. Boland, 29 N.E. 524 (Mass. 1892),* per Allen, J., *citing* Henry William Challis, The Law of Real Property (3d ed. 1911) §§ 31, 63-65, 153, 174, 198, 200, 212 (3rd ed. 1911); Richard Preston, An Elementary Treatise on Estates 431, 471 (1820); William Sheppard, The Touchstone of Common Assurances 120 (1785); Gray, *supra* note 1, §§ 33, 34, 39, and cases *cited*; *Proprietors of Church v. Grant, 69 Mass. 142* (3 Gray) (1855); *Attorney-General v. Merrimack Mfg. Co., 80 Mass. 586* (14 Gray) (1860); *Smith v. Harrington, 86 Mass. 566* (4 Allen) (1862); *Owen v. Field, 102 Mass. 90 (1869); Gillespie v. Broas, 23 Barb. 370 (N.Y. 1856).*

Strict construction of a possibility of reverter as a "forfeiture." *Cole v. Colorado Springs Co., 381 P.2d 13 (Colo. 1963). City of Carthage v. United Missouri Bank, 873 S.W.2d 610 (Mo. App. 1994)* (A bank counterclaimed to quiet title and was held to have a possibility of reverter in city-owned property. The court also held that the possibility of reverter was an interest in land which is alienable and devisable, compared possibilities of reverter with contingent remainders, and distinguished the former with rights of entry).

(n4)Footnote 18. *Perkins v. Iglehart, 39 A.2d 672 (Md. 1944); Calhoun v. Hays, 39 A.2d 307 (Pa. Super. 1944). City of Carthage v. United Missouri Bank, 873 S.W.2d 610 (Mo. App. 1994)* (A bank counterclaimed to quiet title and was held to have a possibility of reverter in city-owned property. The court also held that the possibility of reverter was an interest in land which is alienable and devisable, compared possibilities of reverter with contingent remainders, and distinguished the former with rights of entry); *Eastex Aviation, Inc. v. Sperry & Hutchinson Co., 522 F.2d 1299 (5th Cir. 1975).*

(n5)Footnote 19. *Lyford v. Laconia, 72 A. 1085 (N.H. 1909); Smith v. Glen Alden Coal Co., 32 A.2d 227 (Pa. 1943).*

McDougall v. Palo Alto Unified Sch. Dist., 28 Cal. Rptr. 37 (1963) (calling a possibility of reverter a right of re-entry); *Gregory v. Alexander, 367 S.W.2d 292 (Tenn. App. 1962), Knights and Ladies of Samaria v. Board of Educ. of Charles County, 688 A.2d 933, 937 (Md. Ct. Spec. App. 1997)* (court discusses importance, in this case, of distinction between possibility of reverter, where failure results automatically in the reversion of an estate to the original grantor in fee simple absolute without the need for entry, and the failure of a condition subsequent, which merely gives rise to a right of entry; the grantor does not obtain a fee simple absolute until he or she enters and retakes the land); *City of Carthage v. United Missouri Bank, 873 S.W.2d 610 (Mo. App. 1994)* (a bank counterclaimed to quiet title and was held to have a possibility of reverter in city-owned property. The court also held that the possibility of reverter was an interest in land which is alienable and devisable, compared possibilities of reverter with contingent remainders, and distinguished the former with rights of entry); *North Finn v. D. L. Cook, 825 F. Supp. 278 (D. Wyo. 1993)* (In this case the court held that: 1) the prior transferor of a working interest in a foreclosed oil and gas lease has a possibility of reverter under a farm-out agreement in which the transferee of the working interest was required to convey a 30%

"back-in" working interest to assignee following payout; 2) liens did not attach to the transferor's reversionary interest; and 3) even if transferor's reversionary interest was alienable, the interest was not foreclosed. It also held that a possibility of reverter is alienable together with or apart from the surface, and is exempt from the rule against perpetuities. It distinguished possibility of reverter from a power of termination, by the automatic reversion of the former, and discussed creation of reverter). Quill v. R. A. Inv. Corp., No. 16639 (Ohio Ct. App. 1997) (LEXIS 5959) (when the grantor's reversion is conditioned upon the grantor's own action, there exists a right of reentry, not a possibility of reverter).

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CHAPTER 24 POSSIBILITIES OF REVERTER

3-24 Thompson on Real Property, Thomas Editions § 24.07

AUTHOR: Professor David A. Thomas This chapter is based in part on Ch. 31, George W. Thompson, Commentaries on the Modern Law of Real Property (John S. Grimes ed. 1979), which made a significant contribution to preserving the American common law on possibilities of reverter. J. Reuben Clark Law School Brigham Young University

§ 24.07 Incidents of Possibilities of Reverter

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§ 24.07(a) Subject to Statute of Frauds

It has been held that a possibility of reverter is such an interest in land that it is subject to the Statute of Frauds, and its existence cannot be shown by a mere understanding of the parties. n24 Today a possibility of reverter is a valuable right. n25 But the courts are not in accord as to whether it has sufficient stature that it is entitled to constitutional protection against a statute that purports to change, modify or abolish an existing possibility of reverter. n26 And there is disagreement as to whether a possibility of reverter has sufficient dignity as to entitle its holder to receive compensation on a taking of the realty. n27

§ 24.07(b) Alienability and Devisability

An attempted alienation today does not destroy the possibility of reverter. n34 A possibility of reverter may be released even though inalienable. n35 However, North Carolina holds that a joinder of the possibility of reverter and the determinable fee in the same person does not terminate the possibility of reverter which passes by representation and not inheritance. Hence, apparently it cannot be released. n36

Although so inalienable and incapable of devise at common law, n37 the more modern rule permits alienation of a possibility of reverter. n38 But under statutes of some states providing that any person may devise all rights of entry for condition broken, a possibility of reverter for condition broken may be devised. n39 And today many courts hold that a possibility of reverter can be inherited, conveyed or released. n40 It then passes from the grantor to the grantor's successive heirs by descent, not by descent cast and is an interest owned by each heir in succession. It has been held that the owner of any reversionary interest in real estate has power, by an otherwise effective conveyance inter vivos, to transfer the interest or any part thereof. n41

Under the modern rule, on the death of the owner the possibility of reverter descends rather than passing by descent cast. n42 It is also devisable. It thus creates the problem of requiring the probate lawyer to ascertain its value for probate

and for succession tax purposes. If it merely passed by descent cast, it would have no value until the preceding estate in freehold determined, since it would go to the heir who answered the description at the time of determination, not the beneficiary of the original creator of the estate. There is also the problem of the surviving spouse's interest and of its valuation in eminent domain and insurance cases. The modern tendency is to make the possibility of reverter alienable. n43

Where a determinable fee has been carved out of a larger tract it has been held that the possibility of reverter passes with a conveyance of the initial tract where the deed did not except the determinable fee n44 or where the deed of the entire tract was subject to the determinable fee. n45 The transfer of the larger tract carries with it the possibility of reverter. n46 The holder of a possibility of a reverter may recover for any damage done to the property after the fee is determined. n47

COMPUTER-ASSISTED RESEARCH

LEXIS: possibil! w/2 reverter w/20 (aliena! or release! or descend! or devis!)

FOOTNOTES:
(n1)Footnote 24. *Itawamba County v. Sheffield, 13 So. 2d 649 (Miss. 1943).*

(n2)Footnote 25. *Addy v. Short, 89 A.2d 136 (Del. 1952).*

No value in possibility of reverter for eminent domain. *State v. Cheyenne County, 60 N.W.2d 593 (Neb. 1953); Buford v. First Sunset Dev. Inc., 1996 U.S. Dist. LEXIS 8271* (D. Kan.).

(n3)Footnote 26. Legislature may change, modify or abolish. *Union Colony Co. v. Gallie, 88 P.2d 120 (Colo. 1939); Prall v. Burckhartt, 132 N.E. 280 (Ill. 1921); Trustees of Schools of Twp. No. 1 v. Batdorf, 130 N.E.2d 111 (Ill. 1955).*

Cannot be affected by statute. *Fitch v. State, 95 A.2d 255 (Conn. 1953); Biltmore Village, Inc. v. Royal, 71 So. 2d 727 (Fla. 1954); Frensley v. White, 254 P.2d 982 (Okla. 1953); James v. Dalhart Consol. Indep. Sch. Dist., 254 S.W.2d 826 (Tex. Civ. App. 1952), Mount Olivet Cemetary Ass'n v. Salt Lake City, 961 F. Supp. 1547 (D. Utah 1997)* (statute waives the United States's possibility of reverter). *Knights and Ladies of Samaria v. Board of Educ. of Charles County, 688 A.2d 933 (Md. Ct. Spec. App. 1997)* (statute did not affect possibility of reverter); *Poppleton v. Village Realty Co., Inc., 535 N.W.2d 400 (Neb. 1995)* (statutory 30-year limitation on possibilities of reverter).

(n4)Footnote 27. The entire proceeds of a fire insurance policy are payable to the holder of the determinable fee, none to the possibility of reverter. *Board of Educ. of Raleigh County v. Winding Gulf Collieries, 157 F.2d 382 (8th Civ. 1946).*

Apportionment of condemnation award between holder of the fee and holder of the possibility of reverter, where proceedings were pending to terminate the estate by consolidation of school districts before happening of the condemnation. *United States v. 2,184.81 Acres of Land, 45 F. Supp. 681 (W.D. Ark. 1942).*

Proceeds of condemnation go to holder of determinable fee, not to holder of possibility of reverter. *Scovill v. McMahon, 26 A. 479 (Conn. 1892); First Reformed Dutch Church v. Croswell, 206 N.Y.S. 132 (1924).*

No value can be fixed on possibility of reverter. *Lyford v. Laconia, 72 A. 1085 (N.H. 1909)* (condemnation); *In re Terry's Estate, 112 N.E. 931 (N.Y. 1916); First Reformed Dutch Church v. Croswell, 206 N.Y.S. 132 (1924).*

(n5)Footnote 34. *Consolidated Sch. Dist. No. 102 v. Walter, 66 N.W.2d 881 (Minn. 1954).*

State by Mondale v. Indep. Sch. Dist. No. 31, 123 N.W.2d 121 (Minn. 1963).

An attempted conveyance of a possibility of reverter destroyed it. The court, however, confused rights of re-entry and possibilities of reverter. *Schoolcraft Community Sch. Dist. No. 50 v. Burson, 99 N.W.2d 353 (Mich. 1959).*

(n6)Footnote 35. *Proprietors of Church v. Grant, 69 Mass. 142* (3 Gray) (1855); *Smith v. School Dist. No. 6, 250 S.W.2d 795 (Mo. 1952); Trustees of Calvary Presbyterian Church v. Putnam, 162 N.E. 601 (N.Y. 1928).*

Application of Mareck, 100 N.W.2d 758 (Minn. 1960).

(n7)Footnote 36. *Elmore v. Austin, 59 S.E.2d 205 (N.C. 1950).*

(n8)Footnote 37. *Ruch v. Rock Island, 97 U.S. 693 (1878); Cookman v. Silliman, 2 A.2d 166 (Del. 1938); O'Donnell v. Robson, 88 N.E. 175 (Ill. 1909); Strothers v. Woodcox, 121 N.W. 51 (Iowa 1909); Austin v. Calvert, 262 S.W.2d 825 (Ky. 1953); Ringgold v. Carvel, 76 A.2d 327 (Md. 1950); Halpin v. Rural Agricultural Sch. Dist. No. 9, 194 N.W. 1005 (Mich. 1923); Consolidated Sch. Dist. No. 102 v. Walter, 66 N.W.2d 881 (Minn. 1954); Nicoll v. New York & E. R.R., 12 N.Y. 121 (1854); Van Rensselaer v. Ball, 19 N.Y. 100 (1859); James v. Dalhart Consol. Indep. Sch. Dist., 254 S.W.2d 826 (Tex. Civ. App. 1952).* Possibility of reverter is alienable. *Nichols v. Haehn, 187 N.Y.S.2d 773 (1959).*

Possibility of reverter cannot be alienated, but is not destroyed by attempted conveyance. *City of Klamath Falls v. Bell, 490 P.2d 515 (Or. App. 1971).*

In Illinois possibilities of reverter and rights of re-entry die 40 years after their creation. 765 Ill. Comp. Stat. 330/1 to 765 Ill. Comp. Stat. 330/7.

A possibility of reverter can exist only in the creator of the interest or his heirs. *Klawitter v. United States, 423 F. Supp. 1349 (D. Mont. 1976).*

Possibility of reverter at common law vests only in the creator or his heirs. *Klawitter v. United States, 423 F. Supp. 1349 (D. Mont. 1976).*

(n9)Footnote 38. Possibility of reverter descends. *School Dist. No. 6 v. Russell, 396 P.2d 929 (Colo. 1964); Battistone v. Banulski, 147 A. 820 (Conn. 1929); Richardson v. Holman, 33 So. 2d 641 (Fla. 1948); Reichard v. Chicago, B. & Q. R.R., 1 N.W.2d 721 (Iowa 1942); Austin v. Calvert, 262 S.W.2d 825 (Ky. 1953); Fidelity-Philadelphia Trust Co. v. Harloff, 30 A.2d 57 (N.J. 1943); Prince v. Charles Ilfeld Co., 383 P.2d 827 (N.M. 1963); Lipetz v. Papish, 125 N.E.2d 432 (N.Y. 1955); Nichols v. Haehn, 187 N.Y.S.2d 773 (1959); Scheetz v. Fitzwater, 5 Pa. 126 (1847); Slegal v. Herbine, 23 A. 996 (Pa. 1892); Lacy v. Montgomery, 124 A.2d 492 (Pa. Super. 1956); Calhoun v. Hays, 39 A.2d 307 (Pa. Super. 1944); Caruthers v. Leonard, 254 S.W. 779 (Tex. Civ. App. 1923); Collette v. Town of Charlotte, 45 A.2d 203 (Vt. 1946).* Possibility of reverter may be devised. *Fletcher v. Ferrill, 227 S.W.2d 448 (Ark. 1950); Johnston v. Los Angeles, 168 P. 1047 (Cal. 1917); Evans v. Safe Deposit & Trust Co., 58 A.2d 649 (Md. 1948); Brown v. Independent Baptist Church, 91 N.E.2d 922 (Mass. 1950); Ricks v. Merchants Nat'l Bank & Trust Co., 2 So. 2d 344 (Miss. 1941); County Sch. Bd. v. Dowell, 58 S.E.2d 38 (Va. 1950).*

Contra, Union Colony Co. v. Gallie, 88 P.2d 120 (Colo. 1939); Cookman v. Silliman, 2 A.2d 166 (Del. 1938); Regular Predestinarian Baptist Church v. Parker, 27 N.E.2d 522 (Ill. 1940).

Where a possibility of reverter instead of a power of termination is involved, there is a tendency to hold the interest conveyable, or at least not to result in a forfeiture. *Kennedy v. Kennedy, 188 S.E. 722 (Ga. 1936); Dyer v. Siano, 11 N.E.2d 451 (Mass. 1937); Magness v. Kerr, 254 P. 1012 (Or. 1927).*

A possibility of reverter may be released. *Brill v. Lynn, 270 S.W. 20 (Ky. 1925); Trustees of Calvary Presbyterian*

Church v. Putnam, 162 N.E. 601 (N.Y. 1928); Atkin v. Gillespie, 299 S.W. 776 (Tenn. 1927).

Possibilities of reverter pass by representation, not by descent. *Upington v. Corrigan, 45 N.E. 359 (N.Y. 1896); Trustees of Calvary Presbyterian Church v. Putnam, 162 N.E. 601 (N.Y. 1928); Sanford v. Sims, 66 S.E.2d 495 (Va. 1951)* (right of re-entry may be conveyed); *Saletri v. Clark, 108 N.W.2d 548 (Wis. 1961)* (where a dissolved corporation holds the possibility of reverter its stockholders take the fee when the terminable fee ends).

Contra, Pure Oil Co. v. Miller-McFarland Drilling Co., 34 N.E.2d 854 (Ill. 1941). See 135 A.L.R. 576 (1941).

Future interests are descendible, devisable and alienable. *In re Sparrow's Estate, 338 N.Y.S.2d 975 (1972).* Possibilities of reverter and rights of re-entry are descendible, devisable and alienable. *P.C.K. Props., Inc. v. Cuyahoga Falls, 176 N.E.2d 441 (Ohio App. 1960)* (dictum).

Possibility of reverter is descendible. *City of Klamath Falls v. Bell, 490 P.2d 515 (Or. App. 1971).*

A possibility of reverter not available to creditors though alienable. *Gushwa v. Gushwa, 177 N.E. 366 (Ind. App. 1931). Contra, Jensen v. Wilkinson, 133 S.W.2d 982 (Tex. Civ. App. 1939).* Michigan Pub. Acts 13, 1968 bars possibilities of reverter and rights of re-entry after 30 years from the creation of the interest unless extended 30 additional years recording written notice not less than 25 years nor more than 30 years after the creation of the interest.

See Orville Ben Core, *Transmissibility of Certain Future Interests, 5 Ark. L. Rev. 111 (1951).*

Possibility of reverter at common law vests only in creator or his heirs. *Klawitter v. United States, 423 F. Supp. 1349 (D. Mont. 1976).*

A possibility of reverter held alienable. *Cline v. Johnson County Bd. of Educ., 548 S.W.2d 507 (Ky. 1977).*

Possibility of reverter can be alienated and devised. *Collette v. Town of Charlotte, 45 A.2d 203 (Vt. 1946).* Limiting: *University of Vt. and State Agri. College v. Ward, 158 A. 773 (Vt. 1932), City of Carthage v. United Missouri Bank, 873 S.W.2d 610 (Mo. App. 1994)* (a bank counterclaimed to quiet title and was held to have a possibility of reverter in city-owned property. The court also held that the possibility of reverter was an interest in land which is alienable and devisable, compared possibilities of reverter with contingent remainders, and distinguished the former with rights of entry); *Sauls v. Cox, 67 N.E.2d 187 (Ill. 1946).*

(n10)Footnote 39. *Taylor v. Continental S. Corp., 280 P.2d 514 (Cal. App. 1955); Williams v. Thomas County, 65 S.E.2d 412 (Ga. 1951); Studdard v. Wells, 25 S.W. 201 (Mo. 1894). See Fletcher v. Ferrill, 227 S.W.2d 448 (Ark. 1950), overruling LeSieur v. Spikes, 175 S.W. 413 (Ark. 1915); Brown v. Independent Baptist Church, 91 N.E.2d 922 (Mass. 1950), Willhite v. Masters, 965 S.W.2d 406 (Mo. Ct. App. 1998)* (A "possibility of reverter" is alienable and devisable).

Possibility of reverter alienable under Ky. Rev. Stat. § 381.040. *Austin v. Calvert, 262 S.W.2d 825 (Ky. 1953).*

To the effect that a possibility of reverter passed under a general legacy. *Central Christian Church of Bradenton v. School Bd. of Manatee County, 314 So. 2d 598 (Fla. App. 1975).*

A possibility of reverter is distinguished from a reversion and is not assignable or devisable but descends and may be released. *City of Wheeling v. Zane, 173 S.E.2d 158 (W. Va. 1970), City of Carthage v. United Missouri Bank, 873 S.W.2d 610 (Mo. App. 1994)* (a bank counterclaimed to quiet title and was held to have a possibility of reverter in city-owned property. The court also held that the possibility of reverter was an interest in land which is alienable and devisable, compared possibilities of reverter with contingent remainders, and distinguished the former with rights of entry).

(n11)Footnote 40. *Cole v. Colorado Springs Co., 381 P.2d 13 (Colo. 1963); Fitch v. State, 95 A.2d 255 (Conn. 1953); Richardson v. Holman, 33 So. 2d 641 (Fla. 1948). Williams v. Thomas County, 65 S.E.2d 412 (Ga. 1951); Reichard v. Chicago, B. & Q. R. Co., 1 N.W.2d 721 (Iowa 1942); Frensley v. White, 254 P.2d 982 (Okla. 1953); London v. Kingsley, 81 A.2d 870 (Pa. 1951); Lacy v. Montgomery, 124 A.2d 492 (Pa. Super. 1956); James v. Dalhart Consol. Indep. Sch. Dist., 254 S.W.2d 826 (Tex. Civ. App. 1952); Sanford v. Sims, 66 S.E.2d 495 (Va. 1951).*

See Note, *Judicial Sale of Expectant Estates, 33 Ia. L. Rev. 692 (1948);* Russel R. Reno, *Alienability and Transmissibility of Future Interests in Maryland, 2 Md. L. Rev. 89 (1938);* Russel R. Reno, *Further Developments as to the Alienability and Transmissibility of Future Interests in Maryland, 15 Md. L. Rev. 193 (1955).* Possibilities of a reverter still cannot be devised in *Illinois. In re Bentley's Estate, 303 N.E.2d 166 (Ill. App. 1973).*

In Illinois possibilities of reverter and rights of re-entry die 40 years after their creation. 765 Ill. Comp. Stat. 330/1 to 765 Ill. Comp. Stat. 330/7.

Possibility of reverter passed under general devise in a will. *Central Christian Church of Bradenton v. School Bd. of Manatee County, 314 So. 2d 598 (Fla. App. 1975).*

A possibility of reverter is an alienable interest in property. *Cline v. Johnson County Bd. of Educ., 548 S.W.2d 507 (Ky. 1977).*

Kentucky has abolished the fee simple determinable and possibility of reverter and has converted this into a "fee simple with right of re-entry for condition broken." Ky. Rev. Stat., § 381.218.

The right of re-entry dies after 30 years from the date of the instrument. Ky. Rev. Stat., § 381.219. *Hamman v. Bright, 924 S.W.2d 168 (Tex. App. 1996); Concord Oil Co. v. Pennzoil Exploration & Prod. Co., 966 S.W.2d 451 (Tex. 1998)* (possibility of reverter in minerals was conveyable as an interest in land).

Limitations over after defeasible fees are valid for 30 years after breach regardless of the rule against perpetuities. Ky. Rev. Stat., § 381.219.

(n12)Footnote 41. *Calhoun v. Hays, 39 A.2d 307 (Pa. Super. 1944).*

Illinois has now limited the duration of possibilities of reverter and rights of re-entry to 40 years. 765 Ill. Comp. Stat. 330/4.

Possibility of reverter in a school deed remained in heirs of a grantor who had conveyed the balance of the land with a deed excepting the school lot. *Shipton v. Sheridan, 531 S.W.2d 291 (Mo. App. 1975).*

Under Kentucky law the possibility of reverter and the right to re-entry created prior to January 1, 1960 ceased to be a valid or enforceable act after thirty years, unless before July 1, 1967, the declaration of intent to preserve is filed. Ky. Rev. Stat. § 381.221; *Cline v. Johnson County Bd. of Educ., 548 S.W.2d 507 (Ky. 1977).*

(n13)Footnote 42. Possibility of reverter passes by descent. *City of Charlotte v. Charlotte Park Rec. Comm., 178 S.E.2d 601 (N.C. 1971).*

(n14)Footnote 43. Both possibilities of reverter and rights of re-entry are alienable in Oklahoma under statute. *Bonebrake v. McNeill, 491 P.2d 269 (Okla. 1971). Pennsylvania Dep't of Transp. v. Montgomery Township, 655 A.2d 1086 (Pa. Commw. 1995)* (possibility of reverter owned by partnership not subject to condemnation); *Conner v. Waring, 52 Md. 724 (1880).*

(n15)Footnote 44. *Fall Creek Sch. Tp. v. Shuman, 103 N.E. 677 (Ind. App. 1913).*

Possibility of reverter passed to grantee of land out of which the determinable fee was carved. *Thompson v. Godfrey, 379 P.2d 269 (Kan. 1963).*

Deeds to land adjacent to that deed as a determinable fee did not carry the possibility of reverter in absence of express provision to that effect. *In re Reichard's Petition, 146 A.2d 71 (Pa. Super. 1958).*

(n16)Footnote 45. *Richardson v. Holman, 33 So. 2d 641 (Fla. 1948).*

Grantors in 1893 conveyed a determinable fee for a portion of the premises owned by them to school district and later, by a series of conveyances, the balance of the tract came into the hands of the plaintiff. It was held that the appurtenance clause in the deeds in the chain, which included both of the words "reversion and reversions," did not pass to the grantees the possibility of reverter. *In re Reichard's Petition, 146 A.2d 71 (Pa. Super. 1958).*

(n17)Footnote 46. *Dvorak v. School Dist. Twp. of Dodge, 22 N.W.2d 238 (Iowa 1946).*

A deed describing a tract of land and excepting from the tract "the right and title" of a railroad company to whom an area had previously been conveyed out of the tract upon a fee upon condition subsequent carried with it the right of re-entry so that upon abandonment of the railroad the title to the railroad right-of-way passed to the assignee of the grantor, not the heirs of the grantor. *In re Wyatt's Claim, 141 N.E.2d 308 (Ohio App. 1955).*

Possibility of reverter passes to grantee of larger tract out of which the fee simple determinable was carved. *Thompson v. Godfrey, 379 P.2d 269 (Kan. 1963).*

In *Gotheridge v. Unified Sch. Dist. No. 365, 512 P.2d 478 (Kan. 1973),* where one had conveyed a one-acre tract out of a 39-acre tract for school purposes and later conveyed the balance of the 39 acres but did not specifically reserve the reversionary interest in the one-acre tract, the reversionary interest passed with the conveyance of the abutting tract.

The possibility of reverter was not included in mortgage of all land owned by the grantor. *Richardson v. Cambridge, 84 Mass. 118 (2 Allen 1861).*

Possibility of reverter held to be of so little value as to be incapable of estimate. *Trustees of First Congregational Church v. American Home Missionary Soc'y, 300 N.Y.S.2d 76 (1969).*

Where a portion of the tract had been conveyed for school purposes and the heirs of the grantor sold the tract, such sale did not carry the reversion to the portion which had previously been sold for school purposes and ceased to be used for school purposes. *In re Reichard's Petition, 146 A.2d 71 (Pa. Super. 1958).*

(n18)Footnote 47. *See Carr v. Georgia R.R., 74 Ga. 73 (1884); Board of Educ. v. Littrell, 190 S.W. 465 (Ky. 1917).*

Not sufficient interest in holder of possibility of reverter to prevent determinable fee from receiving entire award. *People ex rel. Dep't. of Public Works v. Fresno, 26 Cal. Rptr. 853 (1962).*

Where the event upon which the determinable fee is limited will probably occur "within a reasonable time," the possibility of reverter is a compensable property right in eminent domain. *Chew v. Commonwealth, 161 A.2d 621 (Pa. 1960). North Finn v. D. L. Cook, 825 F. Supp. 278 (D. Wyo. 1993)* (in this case the court held that: 1) the prior transferor of a working interest in a foreclosed oil and gas lease has a possibility of reverter under a farm-out agreement in which the transferee of the working interest was required to convey a 30% "back-in" working interest to assignee following payout; 2) liens did not attach to the transferor's reversionary interest; and 3) even if transferor's reversionary

interest was alienable, the interest was not foreclosed. It also held that a possibility of reverter is alienable together with or apart from the surface, and is exempt from the rule against perpetuities. It distinguished the possibility of reverter from a power of termination, by the automatic reversion of the former, and discussed creation of reverter).

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CHAPTER 24 POSSIBILITIES OF REVERTER

3-24 Thompson on Real Property, Thomas Editions § 24.08

AUTHOR: Professor David A. Thomas This chapter is based in part on Ch. 31, George W. Thompson, Commentaries on the Modern Law of Real Property (John S. Grimes ed. 1979), which made a significant contribution to preserving the American common law on possibilities of reverter. J. Reuben Clark Law School Brigham Young University

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Supp. To CHAPTER 24 POSSIBILITIES OF REVERTER

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Supp. to § 24.01 Introduction.

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This chapter reviews the law governing possibilities of reverter in American jurisdictions. While possibilities of reverter are not the most commonly created future interests in American property law, they impact on several other future interests. The chapter includes sections that define possibilities of reverter, distinguish them from other interests, describe their common-law history, and explain their more important incidents.

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Supp. to § 24.02 Definition of Possibility of Reverter.

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The interest that remains in a grantor, testator or settlor of a trust after creating a fee simple determinable is called a possibility of reverter.[1] The same name has been given to interests existing after creation of a conditional fee where de donis does not apply. The "possibility of reverter" is created by the conveyance of a limited fee. [2] *Washington State Grange v. Brandt, 148 P.3d 1069 (Wash. App. 2006)* (a deed containing a "reverts back" clause created a fee simple determinable with a possibility of reverter). A "possibility of reverter" is defined by the *Restatement of the Law of Property* as "any reversionary interest which is subject to a condition precedent."[3]

Where determinable fees are created, a possibility of reverter automatically arises. *King Associates, LLP v. Bechtler Development Corporation, 632 S.E.2d 243 (N.C. App. 2006)* (a deed granting a railroad right of way using the phrase "so long as" created a possibility of reverter rather than an easement).[4]

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Supp. to § 24.03 Examples of Possibilities of Reverter.

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Add:

Ellmae Phillips Co. v. U.S., 77 Fed. Cl. 387 (2007) (property owner held reversionary interest upon railroad's abandonment of a right-of-way easement); *Winters v. County of Clatsop, 150 P.3d 1104 (Or. App. 2007)* (an attempted sale of the property triggered an automatic reversion of the title to the county); *Hash v. U.S., 454 F. Supp. 2d 1066 (D. Idaho 2006)* (grants to railroad construed as granting fee simple determinable); *King Associates, LLP v. Bechtler Development Corp., 632 S.E.2d 243 (N.C. App. 2006)* (grants to railroad construed as grating fee simple determinable); *Allen v. Hall, 148 P.3d 939 (Utah 2006)* (former husband conveyed marital home to former wife on condition that it would revert to him if she moved more than 50 miles away, creating a valid fee simple determinable); *Rox Petroleum, L.L.C. v. New Dominion, L.L.C., 2008 OK 13 (Okla. 2008)* (possibility of reverter in minerals).

Land dedicated to a particular public purpose will revert to the dedicator when there has been a full and lawful abandonment of the use for which the dedication has been made or when the dedication has spent its force by the use becoming impossible.[**5**] When a public way has been vacated, the interest of the public therein ceases, the burden upon the land which has been used as a public way is removed and possession reverts to the owner of the fee, together with the right to use the property in such manner as the owner may see proper, without regard to the former servitude to which it was subject.[**6**] Likewise, where land has been dedicated to public use for burial purposes, the fee simple title remaining in the dedicator, the dedicator has a right of reverter when the public has ceased to use the land for the purpose of a graveyard.[**7**] *Ator v. Unknown Heirs, Personal Representatives, Devisees, Trustees, Successors and Assigns of Ator, 146 P.3d 821 (Okla. App. 2006)* (property conveyed to a school district for use in the school football program; when used for a private youth football program, the condition was violated). Under the early common law, land granted to a charitable corporation reverted to the grantor when the corporation died.[**8**]

A possibility of a reverter of an interest in leased coal to the lessor is not an estate present or future, but a possibility of having a future estate in the coal remaining unmined.[**9**] Under the old rule a mere possibility of reverter is incapable of alienation or devise,[**10**] such an interest not being sufficient to constitute an estate.[**11**]

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Supp. to § 24.04 Common-Law History of Possibility of Reverter.

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The possibility of a reverter of land at common law was held an indeterminable fee and was not an estate in land.[**12**] It was neither a present nor a future right, but a mere possibility that a right might arise upon the happening of a contingency, which is not the subject of a grant, devise, or inheritance. This was because the grant or devise of a determinable fee passed the whole estate to the tenant in fee, leaving nothing in the grantor or devisor which could be the subject of grant, devise, or inheritance. Hence, it was settled that upon the termination of such an estate, it went to those who could bring themselves into the class of heirs of the person creating the estate at the time when the estate terminates, and not to those who were heirs at the time of the death of such person.[**13**] So a possibility of reverter retained by the grantor in an irrevocable trust made the trust taxable, since the beneficiaries might predecease the grantor, and there was no limitation over.[**14**]

It seems probable that prior to quia emptores the feoffor creating a base fee retained an interest of such a tender nature that it was inalienable. It was not even of sufficient quality to descend to the heir. Instead it remained in the clouds (in nimbus) after creation until the fee determined. Then it rained down upon the person who then was the heir of the grantor. That is, it passed by descent cast.[**15**]

Again at common law, in the grant of a qualified or determinable fee, the grantor was not vested with any title or interest in the land or in the reversion until the happening of the contingency upon which the land is to revert, for such contingency might never happen. The grantor had nothing to convey, and the grantor's deed in expectancy of a reverter vested no interest in the grantee, but was wholly without legal force or effect;[**16**] and the rule was the same where an attempted conveyance was by quitclaim deed.[**17**] Where the grantor had such an estate or interest as would descend to the heirs,[**18**] and if the grantor died before the happening of the contingency which is to effect a reversion, the possibility of reverter was cast by descent upon the heirs at the time of the grantor's death.[**19**] Also, a mere possibility that real estate may revert to the grantor was not devisable at common law,[**20**] and so it has been held that if it be a mere possibility of reverter attached to a determinable or conditional fee it was not an estate and was not alienable, assignable, nor devisable, in the absence of a statute authorizing it.[**21**]

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Supp. to § 24.05 Possibility of Reverter Distinguished from Reversion.

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A distinction is made between a reversion, which is an estate in praesenti, although to be enjoyed in the future, and a mere possibility of reverter, such as exists in all cases where the fee is limited on a contingency. The basis of the distinction lies in the fact that reversions are always vested estates corresponding to vested remainders, while the mere possibility of reverter is always contingent and corresponds to contingent remainders.[**22**] A "possibility of reverter" as distinguished from a "reversion" arises on a grant so limited that it may last forever or may terminate on the happening of a contingency. It is the possibility of having the fee again which exists in the grantor after the grant of a determinable or qualified fee.[**23**] More properly spoken in case of a base or qualified fee expiring by its own contingent limitation a possibility of reverter is a right to have a fee simple in possession contingent on the termination of a fee defeasible, and, in case of a fee limited on condition subsequent, it is a contingent right of re-entry on condition broken.[**24**]

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Supp. to § 24.06 Possibility of Reverter Distinguished from Right of Re-Entry.

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Some of the courts have confused possibilities of reverter and rights of re-entry and have said, contrary to the general terminology, that possibilities of reverter exist after fees upon condition subsequent.[**25**] Some of the courts and occasionally a judge will treat possibilities of reverter and rights of re-entry as being closely related.[**26**] So it is said that the possibility of reverter after the termination of a qualified or determinable fee is similar to, though not quite identical with, the "right of re-entry" which remains in the grantor of land upon a condition subsequent.[**27**] This right represents whatever is not conveyed by the deed, and it is the possibility that the land may revert to the grantor or grantor's heirs when the granted estate determines.[**28**] Likewise, it has been said that a possibility of reverter is any reversionary interest which is subject to a condition precedent.[**29**] One practical distinction between a right of entry for breach of a condition subsequent and a possibility of reverter upon a determinable fee is that in the former the estate in fee does not terminate until entry by the person having the right, while in the latter the estate reverts at once upon the occurrence of the event by which it is limited.[**30**]

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3-24 Thompson on Real Property, Thomas Editions Supp. to § 24.07

Supp. to § 24.07 Incidents of Possibilities of Reverter.

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§ 24.07(a) Subject to Statute of Frauds. [Go To Main]

It has been held that a possibility of reverter is such an interest in land that it is subject to the Statute of Frauds, and its existence cannot be shown by a mere understanding of the parties.[**31**] Today a possibility of reverter is a valuable right.[**32**] But the courts are not in accord as to whether it has sufficient stature that it is entitled to constitutional protection against a statute that purports to change, modify or abolish an existing possibility of reverter.[**33**] And there is disagreement as to whether a possibility of reverter has sufficient dignity as to entitle its holder to receive compensation on a taking of the realty.[**34**]

§ 24.07(b) Alienability and Devisability. [Go To Main]

Add:

Bowers v. Taylor, 2007 Tex. App. LEXIS 3439 (Tex. App. Houston 1st Dist. May 3, 2007) (one-third interest in a possibility of reverter conveyed).

An attempted alienation today does not destroy the possibility of reverter.[**35**] A possibility of reverter may be released even though inalienable.[**36**] However, North Carolina holds that a joinder of the possibility of reverter and the determinable fee in the same person does not terminate the possibility of reverter which passes by representation and not inheritance.[**37**] Hence, apparently it cannot be released.[**38**]

Although so inalienable and incapable of devise at common law,[**39**] the more modern rule permits alienation of a possibility of reverter.[**40**] But under statutes of some states providing that any person may devise all rights of entry for condition broken, a possibility of reverter for condition broken may be devised.[**41**] And today many courts hold that a

possibility of reverter can be inherited, conveyed or released.[**42**] It then passes from the grantor to the grantor's successive heirs by descent, not by descent cast and is an interest owned by each heir in succession. It has been held that the owner of any reversionary interest in real estate has power, by an otherwise effective conveyance inter vivos, to transfer the interest or any part thereof.[**43**] A possibility of reverter cannot be extinguished in a tax foreclosure sale.[**44**]

Illinois has now limited the duration of possibilities of reverter and rights of re-entry to 40 years.[**44.1**]

Possibility of reverter in a school deed remained in heirs of a grantor who had conveyed the balance of the land with a deed excepting the school lot.[**45**]

Under Kentucky law the possibility of reverter and the right to re-entry created prior to January 1, 1960 ceased to be a valid or enforceable act after thirty years, unless before July 1, 1967, the declaration of intent to preserve is filed.

Under the modern rule, on the death of the owner the possibility of reverter descends rather than passing by descent cast.[**46**] It is also devisable. It thus creates the problem of requiring the probate lawyer to ascertain its value for probate and for succession tax purposes. If it merely passed by descent cast, it would have no value until the preceding estate in freehold determined, since it would go to the heir who answered the description at the time of determination, not the beneficiary of the original creator of the estate. There is also the problem of the surviving spouse's interest and of its valuation in eminent domain and insurance cases. The modern tendency is to make the possibility of reverter alienable.[**47**]

Where a determinable fee has been carved out of a larger tract it has been held that the possibility of reverter passes with a conveyance of the initial tract where the deed did not except the determinable fee[**48**] or where the deed of the entire tract was subject to the determinable fee.[**49**] The transfer of the larger tract carries with it the possibility of reverter.[**50**] The holder of a possibility of a reverter may recover for any damage done to the property after the fee is determined.[**51**]

COMPUTER-ASSISTED RESEARCH

LEXIS: possibil! w/2 reverter w/20 (aliena! or release! or descend! or devis!)

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CHAPTER 25 RIGHTS OF ENTRY

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§ 25.syn Synopsis to Chapter 25: RIGHTS OF ENTRY

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§ 25.07(e) Miscellaneous Rules Governing Entry

§ 25.08 Bibliography

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FOOTNOTES:
(n1)Footnote *.
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§ 25.01 Introduction

This chapter reviews the law in American states regarding rights of entry, the future interest associated with a fee simple subject to a condition subsequent. Because an interest in land subject to a right of entry is usually viewed as less marketable than a fee simple absolute, courts and legislatures in some states have imposed restrictions or limitations on enforcement and transfer of this interest. In any event, it is a right or an interest that is usually dormant or inchoate until the breach of condition occurs. The chapter reviews the history, incidents and enforcement of rights of entry.

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§ 25.02 History of Rights of Entry

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The common law apparently gave birth to rights of entry under three types of circumstances; (a) where a disseisin occurred, n1 (b) under a common-law mortgage and (c) by special reservation of a condition and right of re-entry in a conveyance. It would appear from Littleton that although Quia Emptores n2 prevented subinfeudation and thus made it impossible for one to enfeoff another and make the feoffee responsible for rendition of the feudal dues reserving a possibility in the feoffor, the statute did not, in Littleton's time at least, prevent a grantor from imposing a perpetual rent charge in a grant of a fee and providing for forfeiture on failure of payment. n3 The thought, however, that there could be imposed a permanent charge upon a fee after Quia Emptores was not followed by later authorities. n4 And Littleton treated as conditions what would now be considered as determinable interests, such as an estate during coverture. n5 The modern law recognizes the creation of estates upon condition subsequent with rights of re-entry remaining in the grantor. n6 A right of re-entry or power of termination cannot be created at inception in one other than the grantor or the grantor's heirs. n7

FOOTNOTES:
(n1)Footnote 1. *See* Shirley Cherin, *Validity of Conveyance by One Out of Possession of Real Property Held by Adverse Claimant, 16 St. John's L. Rev. 150 (1941).*

(n2)Footnote 2. 18 Edw., ch 1. As far back as Littleton it was indicated that though the deed did not contain a condition, if the feoffment had been intended to give a right of re-entry upon happening of a condition, the re-entry was valid since it was the feoffment which passed title and the deed was merely evidence thereof. Littleton, *Tenures*, L.3, C.5, § 359. Coke on Littleton, § 222(b).

(n3)Footnote 3. Littleton, *supra* note 2, at §§ 325-84.

(n4)Footnote 4. Case of fee simple under condition subsequent for right of re-entry must be exercised in the event of breach while a case of fee simple determinable with possibility of reverter ripens ipso facto into a fee upon breach.

Storke v. Penn Mut. Life Ins. Co., 61 N.E.2d 552 (Ill. 1945); Carpender v. New Brunswick, 39 A.2d 40 (N.J. 1944); Copenhaver v. Pendleton, 155 S.E. 802 (Va. 1930). City of Carthage v. United Missouri Bank, 873 S.W.2d 610 (Mo. App. 1994) (declaratory judgment determining whether the city owned a fee simple on condition subsequent or a fee simple determinable).

(n5)Footnote 5. Littleton, *supra* note 2, at § 380.

(n6)Footnote 6. *Richardson v. Holman, 33 So. 2d 641 (Fla. 1948)* (possibility of reverter followed fee upon express condition of use).

A right of re-entry for the breach of a particular condition is occasionally termed a "reversionary interest" or a "contingent reversionary interest" and is so regarded for some purposes. *Parry v. Berkley Hall School Found., 74 P.2d 738 (Cal. 1937).*

Rountree v. Richardson, 108 So. 2d 152 (Ala. 1959) (option to repurchase).

Illinois has now adopted a statute to the effect that rights of re-entry and possibilities of reverter are inalienable and not devisable, terminating all such as were 50 years old. *See* Comment, *Discussion on Possibilities of Reverter and Rights of Re-entry in Illinois, 43 N.W. U. L. Rev. 90 (1948). State of Nebraska, Dept of Roads v. Union Pacific R.R. Co., 490 N.W.2d 461 (Neb. 1992)* (original deed granted railroad's predecessors a fee simple subject to a condition subsequent); *Prieskorn v. Maloof, 991 P.2d 511 (N.M. App. 1999)* (restriction upon use created possibility of reverter or right of re-entry).

(n7)Footnote 7. United Methodist Church in *W. Sand Lake v. Dobbins, 369 N.Y.S.2d 817 (1975).*

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CHAPTER 25 RIGHTS OF ENTRY

3-25 Thompson on Real Property, Thomas Editions § 25.03

AUTHOR: Professor David A. Thomas This chapter is based on Ch. 31, George S. Thompson, Commentaries on the Modern Law of Real Property (John S. Grimes ed. 1979), which made a significant contribution toward preserving the American common law on rights of entry. J. Reuben Clark Law School Brigham Young University

§ 25.03 Rights of Entry as Enforceable Forfeitures

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While courts of equity have evinced strong dislike for the enforcement of a forfeiture, the power of the grantor, settlor or testator to create a condition and reserve a right of re-entry for breach is recognized and will be enforced. n8 Where the parties have enforced a forfeiture by providing for a re-entry for breach, and re-entry has been made, a court of equity is powerless to relieve against such forfeiture. n9 Moreover when the re-entry of the grantor is made under the express provisions of the contract and is lawful, the loss, if any, occasioned thereby to the grantee is damnum absque injuria. n10 The estate upon condition subsequent does not, however, die of itself as does a determinable fee. The right of re-entry contemplates a positive act by the holder thereof, not an automatic flowering as is true in the case of the possibility of reverter. Without some act on the part of the grantor or the grantor's heirs, by which to take advantage of the condition and its forfeiture, the estate remains in the grantee, even though the words of the condition are that "the estate shall thereupon be void and of no effect." n11

FOOTNOTES:
(n1)Footnote 8. In *Wisconsin, Glocke v. Glocke, 89 N.W. 118 (Wis. 1902); Danielson v. Danielson, 161 N.W. 787 (Wis. 1917); Knutson v. Anderson, 255 N.W. 907 (Wis. 1934),* the courts imply a right of re-entry in a deed given on condition of support of the grantor.

Some other courts have also adopted this tack. *Richter v. Richter, 12 N.E. 698 (Ind. 1887); Tomlinson v. Tomlinson, 70 N.E. 881 (Ind. 1904); Ford v. Ford, 118 N.E.2d 235 (Ohio 1954).*

Contra, Hawkins v. Third, 14 So. 2d 513 (Ala. 1943); Jones v. Reid, 193 S.E. 235 (Ga. 1937); Minor v. Minor, 62 S.E.2d 60 (N.C. 1950).

See Milton I. Goldstein, *Rights of Entry and Possibilities of Reverter as Devices to Restrict the Use of Land, 54 Harv. L. Rev. 248 (1940). D-F Fund VII v. Resolution Trust Corp., 1998 U.S. Dist. LEXIS 93 (N.D. Tex. 1998)* (because it is

not favored by courts, a forfeiture clause fails as a remedy unless clearly expressed as a condition subsequent); *Romero v. Nott, 847 P.2d 319 (N.M. App. 1993)* (an attempt to have grantors' stipulations ruled contrary to public policy was denied). *Cf. City of Lincoln v. Townhouser, Inc., 534 N.W.2d 756 (Neb. 1995)* (condition subsequent satisfied with grantor not entitled to re-enter the property); *Cleveland Indus. Square v. City of Cleveland, No. 67068, 1995 Ohio App. LEXIS 830 (Ohio App. 1995)* (right of re-entry upheld when grantee failed to comply with zoning ordinances and violated the condition subsequent); *Simi Inv. Co. v. Harris, 13 F. Supp. 2d 603 (S.D. Tex. 1998)* (in considering a claim for right of reentry, the court must determine if the language of the conveyance indicates an absolute or conditional grant). *Red Hill Outing Club v. Hammond, No. 97-312, 1998 N.H. LEXIS 103 (N.H. 1998)* (held that a condition subsequent shall be strictly construed when considering right of re-entry). Bluffs Park Protection Ass'n v. Radich, No. 21693-1-*II, 1998 Wash. App. LEXIS 830 (Wash. App. 1998)* (held that provision for right of entry is conveyed with specific language). *Application of Board of Ed. of Utica City School Dist., 184 N.Y.S.2d 735 (N.Y. Sup. 1959)* (holding that conditions subsequent w/right of re-entry are not favored as they tend to make an estate insecure). *Nielsen v. Woods, 687 P.2d 486 (Colo. App. 1984)* (stating that conditions subsequent which give right of re-entry are disfavored by the law since they tend to destroy and estate and the exercise of the right is a forfeiture). *Springmeyer v. City of South Lake Tahoe, 132 Cal. App.3d 375 (Cal. App. 1982)* (stating that a reversion is a drastic remedy for imposing a grantor's condition).

(n2)Footnote 9. *Watzman v. Unatin, 131 S.E. 874 (W. Va. 1926).* Holding that a possible reversionary interest was so remote as to come under the de minimis rule. *Hermann v. Brownell, 274 F.2d 842* (9th Cir.), *cert. denied, 364 U.S. 821 (1960).*

(n3)Footnote 10. *Watzman v. Unatin, supra* note 9.

(n4)Footnote 11. *Adams v. Ore Knob Copper Co., 7 F. 634 (C.C.D.N.C. 1880); Chalker v. Chalker, 1 Conn. 79 (1814); Osgood v. Abbott, 58 Me. 73 (1870); Yazoo & M. V. R. Co. v. Lakeview Trac. Co., 56 So. 393 (Miss. 1911); Phelps v. Chesson, 34 N.C. (12 Ired.) 194 (1951); White v. Britton, 56 S.E. 232 (S.C. 1906).* Reverter in will in death of devisee after marriage if devisee ever married and died without children. Devisee died unmarried and without children. Held no reverter since she never married. *Hardison v. Bridges, 111 S.E.2d 238 (Ga. 1959).*

A right of re-entry in fee upon condition subsequent requires some action by the grantor's successor to terminate the estate whereas a possibility of reverter vests automatically. *Stolarick v. Stolarick, 363 A.2d 793 (Pa. Super. 1976). City of Carthage v. United Missouri Bank, 873 S.W.2d 610 (Mo. App. 1994)* (declaratory judgment determining whether the city owned a fee simple on condition subsequent or a fee simple determinable).

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CHAPTER 25 RIGHTS OF ENTRY

3-25 Thompson on Real Property, Thomas Editions § 25.04

AUTHOR: Professor David A. Thomas This chapter is based on Ch. 31, George S. Thompson, Commentaries on the Modern Law of Real Property (John S. Grimes ed. 1979), which made a significant contribution toward preserving the American common law on rights of entry. J. Reuben Clark Law School Brigham Young University

§ 25.04 Divestiture of Title Only Upon Re-Entry

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The title to land conveyed upon a condition subsequent vests in the grantee, and the grantee's failure to perform the condition does not divest the title. The title is divested only upon the entry of the grantor or the grantor's heirs for the condition broken or by a suit for the recovery of possession, or other act equivalent to an entry. The possibility of reverter is not an estate in land, and until the contingency of the condition happens, the whole title is in the grantee, and the grantor has nothing to convey. n12

A breach of a condition subsequent in a deed does not ipso facto operate to revest the grantor with title, but the grantor must take appropriate action to become reinvested with title. n13 The grantor has no actual estate remaining, although the right of entry for condition broken is sometimes called, and for some purposes is regarded as, a "reversionary interest," or a "contingent reversionary interest." n14 The reversioner's right to enforce forfeiture is merely an inchoate right until decreed by the court. n15 The title is divested upon condition broken only by the entry of the grantor or the grantor's heirs or by a suit for the recovery of possession or some act equivalent to an entry. n16 This is true even though the conveyance expressly provides that on breach of condition the property is to revert to the grantor or the grantor's heirs. n17 An entry by the grantor, or any act equivalent thereto, showing a purpose to take advantage of the breach and to reclaim the estate forfeited thereby is all that is required. n18 It does not follow, however, that in every instance, where the contingency has happened which was to terminate an estate held by the grantee on condition subsequent, there must be a re-entry or demand by the grantor or heirs before there can be a recovery in a suit brought by the grantor or heirs for the possession or for partition of such real estate. Demand is never required when it fully appears that it would have been unavailing. n19 Where there is no grant of the fee there can be no forfeiture. n20 If the condition is one that the law will not enforce, the estate vests absolutely in the grantee upon the conveyance. n21

FOOTNOTES:

(n1)Footnote 12. *Davis v. Gray, 83 U.S. (16 Wall) 203 (1873); Schulenberg v. Harriman, 88 U.S. (21 Wall.) 44 (1875); Ruch v. Rock Island, 97 U.S. (7 Otto) 693 (1878); Rannels v. Rowe, 145 F. 296 (8th Cir. 1906); American Dirigold*

Corp. v. Dirigold Metals Corp., 125 F.2d 446 (6th Cir. 1942); United States v. 2,086 Acres of Land, 46 F. Supp. 411 (D.S.C. 1942); Worthen v. Ratcliffe, 42 Ark. 330 (1883); Skipwith v. Martin, 6 S.W. 514 (Ark. 1888); Shultz v. Beers, 245 P.2d 334 (Cal. App. 1952) (technically a right of re-entry or more correctly a power of termination and not a possibility of reverter remains in the grantor after a deed of a fee upon condition subsequent. Such an interest is not an estate in land); *Denver & S.F.R.R. v. School Dist. No. 22, 23 P. 978 (Colo. 1890); Union Colony Co. v. Gallie, 88 P.2d 120 (Colo. 1939); Wolf v. Hallenbeck, 123 P.2d 412 (Colo. 1942); Lewis v. Lewis, 51 A. 854 (Conn. 1902); Addy v. Short, 89 A.2d 136 (Del. 1952)* (a possibility of a reverter is an interest in land); *Sorrells v. McNally, 105 So. 106 (Fla. 1925); Taylor v. Sutton, 15 Ga. 103 (1854); Norris v. Milner, 20 Ga. 563 (1856); Moss v. Chappell, 54 S.E. 968 (Ga. 1906); Evans v. Brown, 27 S.E.2d 300 (Ga. 1943); Golconda Northern Ry. v. Gulf Lines Connecting R.R., 106 N.E. 818 (Ill. 1914); Hart v. Lake, 112 N.E. 286; Prall v. Burckhartt, 132 N.E. 280 (Ill. 1921); Storke v. Penn Mut. Life Ins. Co., 61 N.E.2d 552 (Ill. 1945); Cross v. Carson, 8 Blackf. 138 (Ind. 1846); Thorp v. Johnson, 3 Ind. 343 (1852); Thompson v. Thompson, 9 Ind. 323 (1857); Lindsey v. Lindsey, 45 Ind. 552 (1874); Cory v. Cory, 86 Ind. 567 (Ind. 1882); Elkhart Car-Works Co. v. Ellis, 15 N.E. 249 (Ind. 1888); Preston v. Bosworth, 55 N.E. 224 (Ind. 1899); Strothers v. Woodcox, 121 N.W. 51 (Iowa 1909); Hess v. Kernen, 149 N.W. 847 (Iowa 1914); Myers v. Daviess, 49 Ky. (10 B. Mon.) 394 (1850); Kenner v. American Contract Co., 72 Ky. (9 Bush) 202 (1872); Ricketts v. Louisville, St. L. & T. R. Co., 15 S.W. 182 (Ky. 1891); Kentland Coal & Coke Co. v. Keen, 183 S.W. 247 (Ky. 1890); Tallman v. Snow, 35 Me. 342 (1853); Osgood v. Abbott, 58 Me. 73 (1870); Chapman v. Pingree, 67 Me. 198 (1877); Abbott v. Fellows, 100 A. 657 (Me. 1917); Guild v. Richards, 82 Mass. 309 (16 Gray 1860); Hubbard v. Hubbard, 97 Mass. 188 (1867); Shattuck v. Hastings, 99 Mass. 23 (1868); Dyer v. Siano, 11 N.E.2d 451 (Mass. 1937); Hayward v. Kinney, 48 N.W. 170 (Mich. 1891); Chute v. Washburn, 46 N.W. 555 (Minn. 1890); Little Falls Water-Power Co. v. Belin, 72 N.W. 69 (Minn. 1897); Memphis & C.R. Co. v. Neighbors, 51 Miss. 412 (1875); Yazoo & M.V.R. Co. v. Lakeview Trac. Co., 56 So. 393 (Miss. 1911); O'Brien v. Wagner, 7 S.W. 19 (Mo. 1888); Bredell v. Kerr, 147 S.W. 105 (Mo. 1912); Adams v. Lindell, 5 Mo. App. 197 (1878); Hamilton v. Kneeland, 1 Nev. 40 (1865); Coon v. Brickett, 2 N.H. 163 (1819); Barker v. Cobb, 36 N.H. 344 (1858); New Jersey Zinc & Iron Co. v. Morris Canal & Banking Co., 15 A. 227 (N.J. Eq. 1888); Morris Canal & Banking Co. v. Brown, 27 N.J.L. 13 (1858); Nicoll v. New York & E.R. Co., 12 N.Y. 121 (1854); Duryee v. New York, 96 N.Y. 477 (1884); Vail v. Long Island R.R., 12 N.E. 607 (N.Y. 1887); Allen v. Great Neck Free Church, 269 N.Y.S. 341 (1934). Phelps v. Chesson, 34 N.C. (12 Ired.) 194 (1851); Oklahoma City v. Local Federal Sav. & Loan Ass'n, 134 P.2d 565 (Okla. 1943); Buckles v. Smith, 156 P.2d 1019 (Okla. 1945); Clark v. Jones, 144 P.2d 498 (Or. 1943); Smith v. Glen Alden Coal Co., 32 A.2d 227 (Pa. 1943); Berryman v. Schumacher, 3 S.W. 46 (Tex. 1887); Gulf, C. & S.F.R. Co. v. Dunman, 11 S.W. 1094 (Tex. 1889); Hanover Fire Ins. Co. v. Nash, 67 S.W.2d 452 (Tex. Civ. App. 1934); Copenhaver v. Pendleton, 155 S.E. 802 (Va. 1930); Halvorsen v. Pacific County, 156 P.2d 907 (Wash. 1945); Cales v. Ford, 28 S.E.2d 429 (W. Va. 1943); Nash v. Bloom, 114 N.W. 457 (Wis. 1908); Menge v. Radtke, 269 N.W. 313 (Wis. 1936); Nadler v. Nadler, 8 N.W.2d 306 (Wis. 1943).*

(n2)Footnote 13. *Reichard v. Chicago, B. & Q. R. Co., 1 N.W.2d 721 (Iowa 1942); Ohm v. Clear Creek Drainage Dist., 45 N.W.2d 117 (Neb. 1950); Neal v. State-Planters Bank & Trust Co., 184 S.E. 203 (Va. 1936). Willhite v. Masters, 1998 Mo. App. LEXIS 501 (Mo. App. 1998)* (exercising a right of re-entry requires an affirmative act). *Fremont Lumber Co. v. Starrell Petroleum Co., 364 P.2d 773 (Or. 1961)* (holding that an estate on condition subsequent does not revert on breach of condition, but requires an action by the grantor to manifest an intent to terminate the estate). *PCK Properties, Inc. v. City of Cuyahoga Falls, 176 N.E.2d 441 (Ohio App. 1960)* (holding that a right of re-entry is not automatic but occurs upon the election of the grantor).

(n3)Footnote 14. *Parry v. Berkeley Hall Sch. Found., 74 P.2d 738 (Cal. 1937)* (Dictum) *Farmer's High Sch. Consol. Dist. No. 3 v. Parker, 203 S.W.2d 516 (Mo. App. 1947)* (right of re-entry inalienable and cannot be devised but does descend); *Nicoll v. New York & Erie R.R., 12 N.Y. 121 (1854)* (right of re-entry is a mere possibility and passes by representation not by descent); *Upington v. Corrigan, 45 N.E. 359 (N.Y. 1896).*

(n4)Footnote 15. *In re Gaffers' Estate, 5 N.Y.S.2d 671 (1938).*

(n5)Footnote 16. *Plemmons v. Sharp, 119 S.E. 532 (Ga. 1923); Barnesville v. Stafford, 131 S.E. 487 (Ga. 1926); Tucker v. Immanuel Baptist Church, 237 P. 654 (Kan. 1925); Turner v. Lewis, 226 S.W. 367 (Ky. 1920); Smith v.*

Kuttawa, 226 S.W.2d 979 (Ky. 1928); Jackson v. Revere Sugar Refinery, 142 N.E. 909 (Mass. 1924); First Reformed Dutch Church v. Croswell, 206 N.Y.S. 132 (Mass. 1924); Blue v. Wilmington, 119 S.E. 741 (N.C. 1923). Yarbrough v. Yarbrough, 269 S.W. 36 (Tenn. 1925). Community of Priests v. Byrne, 255 S.W. 601 (Tex. Com. App. 1923). Forfeiture may be had against a grantee of the estate on condition broken. *Sherill v. Sherill, 99 So. 838 (Ala. 1924).*

(n6)Footnote 17. *Adams v. Ore Knob Copper Co., 7 F. 634 (C.C.D.N.C. 1880); Barnesville v. Stafford, 131 S.E. 487 (Ga. 1926); Osgood v. Abbott, 58 Me. 73 (1870); Yazoo & M.V.R. Co. v. Lakeview Trac. Co., 56 So. 393 (Miss. 1911); O'Brien v. Wagner, 7 S.W. 19 (Mo. 1888); Adams v. Lindell, 5 Mo. App. 197 (1878); Alexander Bldg. Corp. v. Carteret, 155 A.2d 263 (N.J. 1959)* (creates a right of re-entry); Towle v. Smith, 2 Rob. 489 (N.Y. 1864); *Stuyvesant v. Davis, 9 Paige 427 (N.Y. 1842); Phelps v. Chesson, 34 N.C. (12 Ired.) 194 (1851); White v. Britton, 56 S.E. 232 (S.C. 1906). See Sherill v. Sherill, 99 So. 838 (Ala. 1924); Thrall v. Spear, 22 A. 414 (Vt. 1891). Giddens v. Barrentine, 448 S.E.2d 441 (Ga. 1994)* (held that property automatically reverted to adjacent landowners following breach of conditions).

(n7)Footnote 18. *Schlesinger v. Kansas City & S.R.R., 152 U.S. 444 (1894).*

(n8)Footnote 19. *See* Restatement of the Law of Property, § 24, cmt. b, special note. *Stauffer v. Kessler, 130 N.E. 651 (Ind. App. 1921).*

(n9)Footnote 20. *Lake Erie & W.R.R. v. Ziebarth, 33 N.E. 256 (Ind. App. 1893).*

(n10)Footnote 21. *Parker v. Parker, 123 Mass. 584 (1878); Barksdale v. Elam, 30 Miss. 694 (1856); Reifsnyder v. Hunter, 19 Pa. 41 (1852); Walker v. Vincent, 19 Pa. 369 (1863); Philadelphia v. Girard, 45 Pa. 9 (1863).*

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CHAPTER 25 RIGHTS OF ENTRY

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§ 25.05 Rights of Entry as Interests Subject to Legislation

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If a right of re-entry is expressly reserved, a fee upon condition subsequent, not a covenant, is created. n22 The authorities have also differed widely, as in the case of possibilities of reverter, as to whether rights of re-entry are of sufficient dignity to be prohibited against legislation modifying or abolishing existing rights and as to whether the holder thereof is entitled to compensation on the taking of land, by eminent domain. n23

A noticeable tendency has developed to place a statutory restriction upon the duration of possibilities of reverter and rights of re-entry. n24

Some cases hold that rights of re-entry and possibilities of reverter are legal rights in land which cannot be taken away by statute. n25 Clearly, upon a re-entry by the grantor the estate revests the grantor as a matter of legal right, with the same estate had before the grant, and with all the improvements the grantee may have made upon the land. n26 After the grantor has entered upon the land for a breach of the condition, the land is not subject to attachment for the debts of the grantee contracted while the grantee was in possession, n27 and any lien or encumbrance obtained upon the land by a third person after the creation of the condition is destroyed. n28 A right of re-entry is barred by the statute of limitations after breach. n29

A possibility of reverter automatically happens upon the development of the event and termination of the preceding estate, and is alienable, but a right of re-entry is necessary in the case of a breach to effect forfeiture, and is not assignable, but passes only by descent. n30

Mere delay in the exercise of right of reentry does not constitute a waiver unless valuable improvements have been made on the property so that the declaration of forfeiture against the holder of the defeasible fee would be inequitable. n31

COMPUTER-ASSISTED RESEARCH

LEXIS: (rever! or right! w/5 re-entry) w/30 fee w/2 condition subsequent

FOOTNOTES:
(n1)Footnote 22. *Hoyt v. Ketcham, 5 A. 606 (Conn. 1886); Gray v. C. M. & St. P. Ry., 59 N.E. 950 (Ill. 1901); Northwestern University v. Wesley Mem. Hosp., 125 N.E. 13 (Ill. 1919); Trustees of Union College v. New York City, 73 N.Y.S. 51 (1901); Hamel v. Minneapolis, St. P. & S.S.M. Ry., 107 N.W. 139 (Minn. 1906).*

When the grantor has disposed of all the land in the area the grantor has lost the grantor's right of re-entry for breach of restrictions which have been set up as conditions subsequent.

Townsend v. Allen, 250 P.2d 292 (Cal. App. 1952).

Wakefield v. VanTassell, 66 N.E. 830 (Ill. 1903) (right of re-entry is not a perpetuity). *Dennis v. Bird, 941 S.W.2d 486 (Ky. App. 1997)* (words show that a right of re-entry was reserved, and not merely an option to repurchase).

(n2)Footnote 23. A statute which purported to terminate all reverter provisions which had been in effect more than twenty-one years was held unconstitutional even though the holder of the reverter was given one year from the date of act to enforce right since the right might not be enforceable at that time. *Biltmore Village, Inc. v. Royal, 71 So. 2d 727 (Fla. 1954).*

The holder of a right of re-entry may require the recipient of a condemnation award to use the proceeds only for the intended purpose. *In re Cook's Will, 277 N.Y.S. 26 (1935).*

(n3)Footnote 24. Fla. Stat. Ann., § 689.18 (21 years); 765 Ill Comp. Stat. 330-1 to 3301-7 (40 years); Mass. Laws Ann., ch. 184, § 23 (30 years); Minn. Stat. § 500.20 (6 years); R.I. Gen. Laws § 34-4-19 (20 years).

Kentucky voids possibilities of reverter and rights of entry after 30 years from the date of the instrument creating them, prior to July 1, 1960, unless re-recorded before July 1, 1965. Ky. Rev. Stat., § 381.221.

In Kentucky, any possibility of reverter or right of entry contained in deeds, grants or gifts from the Commonwealth, grants for public, charitable or religious purposes, leases, easements, rights-of-way, mortgages or trusts, or any public highways, is exempted from §§ 381.219 and 381.221. Ky. Rev. Stat., § 381.222.

See Fouts v. Largent, 94 N.E.2d 448 (Ind. 1950) (effect limited to possessory actions); *Ringgold v. Carvel, 76 A.2d 327 (Md. 1950)* (difference between a reversion and a possibility of reverter). *Knights & Ladies of Samaria v. Board of Educ. of Charles County, 688 A.2d 933 (Md. App. 1997)* (possibility of reverter extinguished by failure to record notice according to statutory schedule); *Hiller v. County of Anoka, 529 N.W.2d 426 (Minn. App. 1995)* (statute voids possibility of reverter retained by grantor of fee simple determinable interest 30 years from the date of the deed creating the possibility of reverter).

(n4)Footnote 25. *Santa Monica v. Jones, 232 P.2d 55 (Cal. 1951); Biltmore Village, Inc. v. Royal, 71 So. 2d 727 (Fla. 1954).*

New York has abolished the possibility of reverter and right of re-entry and has substituted a cause of action in equity to compel reconveyance. N.Y. Real Prop. Law § 345.

Nominal damages only in condemnation of right of re-entry or possibility of reverter. *Midwest Devs., Inc. v. Tulsa, 374 F.2d 683 (10th Cir. 1967).*

Rights of re-entry may be taken by eminent domain without consideration. *Board of County Comm'rs v. Thormyer, 159 N.E.2d 612 (Ohio 1959).*

Illinois has now limited the duration of possibilities of reverter and rights of re-entry to 40 years. 765 Ill. Comp. Stat. 330/4. *Port of Grays Harbor v. Bankruptcy Estate of Roderick Timber Co., 869 P.2d 417 (Wash. App. 1994)* (all parties with an interest in the property to share in eminent domain award); *Department of Transp. & Dev. v. Sanders, 628 So. 2d 1207 (La. App. 1993)* (all parties holding interests in the land should receive some part of the eminent domain award).

(n5)Footnote 26. *Scott v. Stipe, 12 Ind. 74 (1859); Hershman v. Hershman, 63 Ind. 451 (1878); Thomas v. Record, 47 Me. 500 (1859); Bartlett v. Jones, 60 Me. 246 (1872); Rowell v. Jewett, 71 Me. 408 (1880); Dolan v. Baltimore, 4 Gill 394 (Md. 1846);* Church in *Brattle Square v. Grant, 69 Mass. (3 Gray) 142 (1855); Barker v. Cobb, 36 N.H. 344 (1858).*

See, however, *De Peyster v. Michael, 6 N.Y. 467 (1852).*

(n6)Footnote 27. *Schlesinger v. Kansas City & S. R. Co., 152 U.S. 444 (1894).*

(n7)Footnote 28. *Thomas v. Record, 47 Me. 500 (1859); Moore v. Pitts, 53 N.Y. 85 (1873); Bay City Land Co. v. Craig, 143 P. 911 (Or. 1914); Citizens Water Co. v. McGinley, 175 S.W. 457 (Tex. Civ. App. 1915).*

(n8)Footnote 29. *Jeffries v. State for Use of Woodruff County, 226 S.W.2d 810 (Ark. 1950).*

Rights of re-entry lost through laches. *Metropolitan Park Dist. v. Unknown Heirs of Rigney, 399 P.2d 516 (Wash. 1965).*

In Illinois possibilities of reverter and rights of re-entry die 40 years after their creation. 765 Ill Comp. Stat. 330-1 to 330-7.

(n9)Footnote 30. *Stillwell v. Morley, 272 N.Y.S.2d 187 (1965).*

(n10)Footnote 31. *Stolarick v. Stolarick, 363 A.2d 793 (Pa. Super. 1976).*

Thompson on Real Property, Thomas Editions

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CHAPTER 25 RIGHTS OF ENTRY

3-25 Thompson on Real Property, Thomas Editions § 25.06

AUTHOR: Professor David A. Thomas This chapter is based on Ch. 31, George S. Thompson, Commentaries on the Modern Law of Real Property (John S. Grimes ed. 1979), which made a significant contribution toward preserving the American common law on rights of entry. J. Reuben Clark Law School Brigham Young University

§ 25.06 Who May Exercise Right of Entry

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§ 25.06(a) Grantor and Heirs

Littleton n32 stated that the grantor of a fee tail, fee simple, life estate or term could reserve a right of re-entry. Likewise, one holding an estate of less than fee simple absolute could transfer the estate upon a condition subsequent so that the right of re-entry itself need not be upon a fee simple absolute. And one may convey a lesser estate than one has and still retain a right of re-entry for breach of condition imposed on the estate conveyed in addition to the reversion. Only the grantor or the grantor's heirs can enforce a condition. Only one of them can enter for a breach of the condition. A condition and a right of re-entry for a forfeiture cannot be reserved to a stranger. n33 The grantor's right to take advantage of a breach of condition subsequent is neither an estate nor an interest in real property nor an assignable chose in action. n34

A right of re-entry at common law was not inheritable. The heirs of the grantor took as representatives by descent cast not as heirs by descent n35 and are determined as of the date of the happening of the contingency, not of the grantor's death. n36 And even today it is sometimes still held that the grantor's right to take advantage of a breach of a condition subsequent is not descendible. n37 Nor was the right of re-entry capable of being devised. n38

A right of re-entry could not be limited to a stranger but only to the feoffor. n39 Only the grantor or the grantor's heirs can take advantage of a breach of a condition. n40 The courts have disagreed as to whether a successor corporation by way of merger or consolidation can enforce a right of re-entry held by the previous corporation. n41

§ 25.06(b) Assignability of Rights of Entry

§ 25.06(b)(1) Some Rights of Entry Not Assignable

It is a settled common-law principle that a condition can be reserved only to the grantor and the grantor's heirs and not to a stranger. The reason for the rule is that the estate is not defeated, though the condition be broken, until entry by the

grantor or the grantor's heirs, and until such entry there is nothing to assign save a mere right of entry, which at common law is not assignable. n42 This rule does not apply to a subsequent purchaser in fee of land burdened with an easement granted upon condition. Such purchaser may enforce the performance of the condition upon which the grantor had conveyed to another an easement in the land. n43 Where a deed conveys an easement only, the right to enforce forfeiture for breach of condition subsequent is not confined to the grantor or the grantor's heirs but extends to those claiming under them. n44 Today generally the grantor's heirs, though not mentioned in the deed, may take advantage of a breach of condition by entry after the grantor's death. It does not matter that no estate descended to the heirs from the grantor. n45

An estate on condition is not defeated, though the condition be broken, until entry by the grantor or the grantor's heirs, and until such entry there is nothing to assign save a mere right of entry, which at common law is not assignable. n46 Until the contingency of the condition happens the whole title is in the grantee, and the grantor has nothing to convey. n47 So the right of entry for condition broken is not assignable at common law. n48 To allow such an assignment would be to encourage maintenance. n49 An attempted alienation destroyed the right of re-entry. n50

The right to enforce a condition does not pass by a deed of the reversion or by a conveyance of the land which is subject to the condition. After such a conveyance there is no person capable of making an entry or claim. The grantor has parted with the interest and also cannot make an entry or claim. The grantee cannot, because the grantee is a stranger to the condition. In some jurisdictions, however, it is held that after the condition is broken the grantor or the grantor's heirs have such vested right as may be assigned. n51

§ 25.06(b)(2) Some Rights of Entry Made Assignable by Statute

The right of re-entry or repossession for the breach of a condition subsequent is assignable by statute in some states. n52 Where a deed conveying a lot in a tract subject to a general improvement plan contained a condition restricting building within thirty feet of the property line, and provided that the grantor should have a right of re-entry for breach, the grantor may convey such reversionary right and cannot thereafter enforce the condition. n53 And in those jurisdictions where, in equity, choses in action or expectancies can be transferred there would appear to be no reason for continued blind adherence to the old rule that a right of re-entry is inalienable. n54

§ 25.06(b)(3) Extinguishment or Loss of Right of Entry by Assignment

By a general assignment made by the grantor to a third person of all the grantor's property, the condition is gone, and the grantee's estate becomes absolute, discharged from the condition. n55 So, if the grantor's estate is assigned under bankrupt or insolvent laws, the grantor cannot afterwards maintain ejectment or a writ of entry to recover possession for a breach of a condition subsequent. n56 The grantor's right of entry for a breach of condition cannot be taken in execution by a creditor, n57 but it is held that the grantee in fee of land burdened with an easement granted upon condition may maintain an action to take advantage of a breach or to enforce the performance of a condition upon which the grantor had conveyed the easement to a third person. n58

§ 25.06(c) Descendibility of Rights of Entry

§ 25.06(c)(1) Some Rights of Entry Are Descendible

Like a possibility of reverter, a right of re-entry on the death of the creator passed by descent cast, that is, it remained "in nimbus" under the condition, was broken and then was cast upon the shoulders of the grantor or, if deceased, upon the person who was then the grantor's heir. Until then it was not an estate, possibly not an interest in land. It did not pass by descent, devise or alienation. Today in many states it descends n59 and may be devised. Whether it is alienable inter vivos is still debatable and, like the possibility of reverter, its valuation remains a problem.

COMPUTER-ASSISTED RESEARCH

LEXIS: (grantor! or heir! or stranger! or feoffor! or third person) w/30 (enforce! or exercise!) w/15 right! w/5 re-entry or assign! w/15 right! w/5 re-entry

§ 25.06(c)(2) Some Rights of Entry Are Not Descendible

But where the condition is expressly made for the personal benefit of the grantor, the heirs cannot maintain an action for cancellation of the deed. n60 There are cases which hold that unless the heir of the grantor is named in the deed, the heir cannot re-enter for breach of condition. n61 Others hold that where the deed does not provide for a reversion in case of a breach of the condition, no remedy for breach descends to the heirs. n62 Where the performance of the condition is merely personal to the grantor, as for support, the grantor alone has the right to take advantage of a breach. n63 Thus, where the grantor claimed no breach of the grantee's covenant for support, retained no right of re-entry and did not seek rescission or cancellation of the deed, the grantor's heirs were held not entitled to a cancellation for such breach. n64 Where a deed from parents to a son reserved a lien securing the son's obligation to pay annuity to the parents or the survivor of them, the lien, being personal to the parents, was held not enforceable by the survivor's administrator. n65

§ 25.06(d) Other Parties Entitled to Enforce Rights of Entry

§ 25.06(d)(1) Enforcement by Corporate Successor

When the deed is by a corporation, its successor may take advantage of a forfeiture. n66 The sole stockholder of a corporate grantor who acquired title to the corporate property by deed before dissolution of the corporation has been held to be the "successor" of the corporation and entitled to the corporation's reversionary rights under another deed. n67 The reason given for holding that the right to enforce a condition does not pass by a deed of the reversion is that nothing that lies in action, entry or re-entry, can be granted over, and that to allow such an assignment would be to encourage maintenance. n68 The rule is the same whether the breach was before or after the assignment.

§ 25.06(d)(2) Enforcement by Trustees or Beneficiaries

The parties who can maintain a suit to enforce a trust must be either a cestui que trust or a trustee, must sue in the right of one of these or must have some legal interest in the subject matter of the trust, either granted or reserved, or by reverter. n69 If the condition be for the payment of money to a third person, while at common law this does not create a privity between the grantee and such third person, yet there is a tendency in modern adjudications to treat such a condition as raising a trust in favor of the beneficiary, which the beneficiary may enforce, n70 but the heir of a deceased beneficiary may not make entry upon breach of condition. n71

§ 25.06(d)(3) Enforcement by Governmental Grantor

Where the commonwealth is the grantor, it can take advantage of the breach of a condition subsequent only by a judicial proceeding or by a legislative declaration of forfeiture. n72 The state must enforce a condition by proceedings equivalent to an inquest of office. At common law, in a grant by the crown, as the sovereign could not make an entry for a breach of condition in person, it was necessary to assert the right by an inquest of office, or office-bound, n73 but now the state or government may provide by legislation the mode of asserting this right. n74 So, also, any public assertion by legislative act of the ownership of the estate after default of the grantee, such as an act resuming control and appropriating the property to particular uses, or granting it to others to carry out the original object, will revest the property in the state. n75

§ 25.06(d)(4) No Right of Enforcement in Stranger to Title

So those who are not heirs of the grantor cannot take advantage of the grantee's breach of a condition subsequent for the support of the grantor. n76 The possibility of a reverter because of the breach of a condition subsequent cannot be

alienated, and a purchaser of the real estate from the heirs of the grantor cannot enforce a forfeiture for a breach of condition. n77 A condition expressly made in favor of a stranger to the deed is void, n78 but it is no objection to a condition that the benefit of it is in favor of a stranger, the condition itself being in favor of the grantor. n79 A condition in express terms that the grantee shall not build upon a certain part of the land conveyed cannot be enforced by the owner of the adjacent property who derived his title from the same grantor. The grantor or his heirs must enforce the condition. n80 Where a husband and wife joined in a conveyance of land of which the husband was seised in fee, on condition that the grantee should support each of them for life, and the grantors were afterwards divorced, it was held that the husband only could enforce the condition. The wife's inchoate and contingent interest in the land did not entitle her to claim a forfeiture. n81 This common-law result is now much altered by statute. A condition in a deed conveying land to one for life, with remainder to one's heirs, prohibiting a conveyance of the land during the lifetime of the tenant for life, can be enforced only by the grantor and the grantor's heirs. Strangers in possession of the land cannot resist the foreclosure of a mortgage executed by the life tenant on the ground that it violated the condition in the deed. n82 One not an heir of the grantor cannot take advantage of the grantee's breach of condition subsequent for the support of the grantor. n83

The rule has relation only to a latter conveyance of the very property transferred by the deed carrying the condition, whereby the grantor loses that interest which bears some analogy to a reversion. n84 This rule would seem to apply where the attempt to pass the right of re-entry to a third person was made either before or after breach of condition. n85 As above noted, at common law, an attempted assignment of a right of re-entry for condition broken extinguished the condition and gave the holder of a base fee, a fee simple. n86 Though such conveyance be to a son of the grantor, who upon his father's death becomes his heir, and in the absence of the conveyance would have a right of entry, the condition subsequent, n87 taking back a mortgage for the purchase price, his assignment of the mortgage to a stranger in the usual form passed to the assignee only the mortgage title, subject to being defeated by a breach of the condition in the original deed. n88

Under a condition that so much of the premises conveyed as was unused for a purpose specified should revert to the grantor, a subsequent conveyance by the grantor of the part not used for such purpose, bounding the land by a line running along certain improvements made by the grantee, is an admission by the grantor that the land beyond such line was used or needed for use by the grantee for the purpose specified. n89 The fact that the original grantor imposes a condition with a right of reversion does not prevent a subsequent owner and grantor from imposing a like condition for such subsequent grantor's own benefit, and the right of the latter to re-enter and take possession of the property in the event of a breach of the condition is subject only to the prior right of the first grantor so to do, and the release by the latter of that right leaves intact the right of the former. n90 In the absence of proof that a restriction in a deed was imposed for the benefit of other land, it is construed as a personal covenant with the grantor. n91

§ 25.06(d)(5) Release of Right to Enforcement

The grantor may release the conditions of reverter, n92 by a deed to the grantee, or a conveyance to any other person which is inconsistent with the original grant. n93 The heirs at law may also release, by deed, a condition subsequent prior to the breach thereof. n94 A condition is released by a conveyance by the grantor of all interest in the property to the person holding the title. n95 Under the common-law theory the attempted transfer of a right of re-entry actually destroyed it since the grantor could not transfer the right to a stranger and lost it by the attempted transfer. n96 The right of reversion of title may be waived expressly or by acts, conduct and circumstances indicating that the grantor does not rely upon a covenant. n97

FOOTNOTES:
(n1)Footnote 32. Littleton, *supra* note 2, at §§ 325, 326.

The benefit of a condition subsequent could only be limited to the grantor or the heirs. Littleton, *supra* note 2, at § 594.

(n2)Footnote 33. *Ruch v. Rock Island, 97 U.S. 693 (1878). United States v. 2,086 Acres of Land, 46 F. Supp. 411 (D.S.C. 1942). Skipwith v. Martin, 6 S.W. 514 (Ark. 1888); Buckelew v. Estell, 5 Cal. 108 (1855); Smith v. Brannan, 13 Cal. 107 (1859); Childs v. Newfield, 28 P.2d 924 (Cal. App. 1934); Munro v. Eshe, 156 P.2d 700 (Colo. 1944); Holmes v. Brooks, 80 A. 773 (Conn. 1911); Norris v. Milner, 20 Ga. 563 (1856); Board of Educ. v. First Baptist Church, 63 Ill. 204 (1872); Neimeyer v. Knight, 98 Ill. 222 (1881); Boone v. Clark, 21 N.E. 850 (Ill. 1889); O'Donnell v. Robson, 88 N.E. 175 (Ill. 1909); Peoria Heights v. Keithley, 132 N.E. 532 (Ill. 1921); Dunne v. Minsor, 143 N.E. 842 (Ill. 1924). Cross v. Carson, 8 Blackf. 138 (Ind. 1846); Thompson v. Thompson, 9 Ind. 323 (1857); Copeland v. Copeland, 89 Ind. 29 (1883); Higbee v. Rodeman, 28 N.E. 442 (Ind. 1891); Piper v. Union Pac. R.R., 14 Kan. 568 (1875); McElroy v. Morley, 19 P. 341 (Kan. 1888); Owsley v. Owsley, 78 Ky. 257 (1880); Kentland Coal & Coke Co. v. Keen, 183 S.W. 247 (Ky. 1916); Price v. Virginia Iron, Coal & Coke Co., 188 S.W. 658 (Ky. 1916); Brill v. Lynn, 270 S.W. 20 (Ky. 1925); Bangor v. Warren, 34 Me. 324 (1851); Hooper v. Cummings, 45 Me. 359 (1858); Whitmore v. Church of Holy Cross, 117 A. 469 (Me. 1922); Dolan v. Baltimore, 4 Gill 394 (Md. 1846); Dawson v. Western Md. R.R., 68 A. 301 (Md. 1907); King's Chapel v. Pelham, 9 Mass. 501 (1813); Parker v. Nichols, 24 Mass. (7 Pick.) 111 (1829); Guild v. Richards, 82 Mass. (16 Gray) 309 (1860); Hayward v. Kinney, 48 N.W. 170 (Mich. 1891); Halpin v. Rural Agrl. Sch. Dist. No. 9, 194 N.W. 1005 (Mich. 1923); Winn v. Cole, 1 Miss. (1 Walk) 119 (1822); Jones v. St. Louis, K.C. & N.R.R., 79 Mo. 92 (1883); Towne v. Bowers, 81 Mo. 491 (1884); Jetter v. Lyon, 97 N.W. 596 (Neb. 1900); Watson v. Dalton, 18 N.W.2d 658 (Neb. 1945); Dewey v. Williams, 40 N.H. 222 (1860); Southard v. New Jersey Cent. R.R., 26 N.J.L. 13 (1856); Post v. Weil, 8 Hun. 418 (N.Y. 1876); Nicoll v. New York & E. R.R., 12 N.Y. 121 (1854); Van Rensselaer v. Ball, 19 N.Y. 100 (1859); Calvary Presbyterian Church v. Putnam, 224 N.Y.S. 651 (1927); Salamanca Trust Co. v. Crouse, 222 N.Y.S. 83 (1927); Brittain v. Taylor, 84 S.E. 280 (N.C. 1915); Blue v. Wilmington, 119 S.E. 741 (N.C. 1923); Shields v. Harris, 130 S.E. 189 (N.C. 1925); Oklahoma City v. Local Federal Sav. & Loan Ass'n, 134 P.2d 565 (Okla. 1943); Buckles v. Smith, 156 P.2d 1022 (Okla. 1945); Magness v. Kerr, 254 P. 1012 (Or. 1927); Drace v. Klinedinst, 118 A. 907 (Pa. 1922); Sapper v. Mathers, 133 A. 565 (Pa. 1926); Forth Worth Imp. Dist. No. 1 v. Weatherred, 149 S.W. 550 (Tex. Civ. App. 1912); Tickner v. Luse, 220 S.W. 578 (Tex. Civ. App. 1920).*

"No entry nor re-entry (which is all one) may be reserved or given to any person, but only to the feoffer, or to the donor, or to the lessor, or to their heirs, and such re-entry cannot be given to any other person." Littleton, *supra* n.2, at § 347; *Coke, supra n.2,* at § 214a; William Sheppard, The Touchstone of Common Assurances 127 (6th ed. 1785).

> And therefore, if an estate be made upon condition that upon such a contingent a stranger shall enter, or the estate shall cease, and another shall have it; however this may be so drawn as it may be a good condition to give him, his heirs, etc., that doth make the estate, an entry, yet it cannot be good to give the estate, or the entry, to a stranger.

Mr. Justice Field, in *Schulenberg v. Harriman, 88 U.S. (21 Wall) 44 (1875),* said:

> It is settled law that no one can take advantage of the nonperformance of a condition subsequent, annexed to an estate in fee, but the grantor or his heirs, or the successors of the grantor if the grant proceed from an artificial person; and if they do not see fit to assert their right to enforce a forfeiture on that ground, the title remains unimpaired in the grantee. The authorities on this point, with hardly an exception, are all one way, from the Year Books down. And the same doctrine obtains where the grant upon condition proceeds from the government; no individual can assail the title it has conveyed on the ground that the grantee has failed to perform the conditions annexed.

Where the grantor waives a forfeiture his heirs cannot revive the right and declare a forfeiture upon a ground which the grantor has waived and an attempt on their part to do so is ineffectual. *Plummer v. Worthington, 152 N.E. 133 (Ill. 1926).*

> A waiver of the time of payment is not a permanent waiver of the right to declare a forfeiture but is

only a temporary suspension of the right. It does not waive the payment of the money, but only promptness of payment. The right of forfeiture cannot, however, be exercised after such waiver without previously giving definite and specific notice of the intention to declare a forfeiture, and where the grantor dies without giving such notice, the right of his heirs to declare a forfeiture is subject to the same requirements that it can be exercised only after giving definite and specific notice. *Plummer v. Worthington, 152 N.E. 133 (Ill. 1926).*

The fact that after the execution of a contract to convey land in consideration of support during lifetime the grantor allowed a will he had previously executed which devised to the grantee the land in question to remain, until his death, unrevoked and unchanged, shows an acceptance on his part of the performance of the agreement for support. *Smith v. McHenry, 207 P. 1108 (Kan. 1922).*

Under a conveyance to a railroad company of a right-of-way with a provision that the deed should become void and the title to the land revert to the grantor if the railroad should be abandoned, where the grantor subsequently conveyed to a third party all the land except that which had been conveyed theretofore to the railroad and the railroad was thereafter abandoned, the title to the right of way reverted to the grantor and not to the grantee of the remainder of the tract. *Collins v. Baird, 263 P. 1048 (Kan. 1928).*

It appears to have been a rule of the common law that a condition annexed to real estate could be reserved only to the grantor or devisor and his heirs; that after the breach of the condition the estate did not ipso facto terminate, but continued until the grantor or his heirs made an entry on the land, who alone could take advantage of the breach. Another rule was that if the condition was followed by a limitation over to a third person instead of to himself and heirs and the condition was breached, it was called a conditional limitation, and the estate vested at once in the third party. It is also said that where the reservation was made to the grantor and his heirs this right remained in him and his heirs when the fee passed out of the grantor, but where the reservation was made to a third party nothing remained with the grantor because the whole estate passed out of him, and in case of a breach of his condition the third party was immediately vested with the right to enter and take possession. *Halpin v. Rural Agricultural School Dist. No. 9, 194 N.W. 1005 (Mich. 1923).*

(n3)Footnote 34. *Simms v. Folts Mission Institute, 276 N.Y.S. 145 (1934); Gainesville v. Brenau College, 103 S.E. 164 (Ga. 1920).*

An executory limitation over on sale to a colored person is unenforceable in the state courts. *Capitol Federal Sav. & Loan Ass'n v. Smith, 316 P.2d 252 (Colo. 1957).*

In New York still a right of re-entry cannot be conveyed and any attempted conveyance destroys it. But a possibility of reverter retained upon a conveyance of a fee upon limitation is alienable. *Nichols v. Haehn, 171 N.Y.S.2d 734 (1957).*

Right of re-entry is not alienable at common law. *In re McCarthy's Will, 347 N.Y.S.2d 490 (1973).*

At common law, an attempt to assign a right of re-entry destroyed the right of re-entry. United Methodist Church in *West Sand Lake v. Dobbins, 369 N.Y.S.2d 817 (1975). Burnett v. Snoddy, 19 S.E. 2d 904 (S.C. 1942)* (holding that a possibility of reverter is not a right and is not an estate which can be inherited). *Moore v. Sharpe, 121 S.W. 341 (Ark.1909)* (holding that right of entry not assignable).

(n4)Footnote 35. *Upington v. Corrigan, 45 N.E. 359 (N.Y. 1896); Calvary Presbyterian Church v. Putnam, 221 N.Y.S. 692, aff'd, 224 N.Y.S. 651 (1927); Edward John Noble Hosp. v. Board of Foreign Missions, 176 N.Y.S.2d 157 (1958); Gorton v. Wager, 149 N.Y.S.2d 887 (1956); Elmore v. Austin, 59 S.E.2d 205 (N.C. 1950).*

(n5)Footnote 36. *Edward John Noble Hosp. v. Board of Foreign Missions, 176 N.Y.S.2d 157 (1958).*

(n6)Footnote 37. *Simms v. Folts Mission Inst., 276 N.Y.S. 145 (1934). Contra, Davis v. Austin, 156 S.W.2d 903 (Mo. 1941).*

At common law the attempt to convey right of re-entry destroyed it. *Grant v. Koenig, 325 N.Y.S.2d 428 (1971).*

Right of re-entry descends to heirs of grantor at time of grantor's death not to heirs at time right of re-entry is exercisable. *City of Wheeling v. Zane, 173 S.E.2d 158 (W. Va. 1970).*

(n7)Footnote 38. *Calvary Presbyterian Church v. Putnam, 221 N.Y.S. 692, aff'd 224 N.Y.S. 651 (1927); Shields v. Harris, 130 S.E. 189 (N.C. 1925). Contra, Johnston v. Los Angeles, 168 P. 1047 (Cal. 1917); North v. Graham, 85 N.E. 267 (Ill. 1908); Copenhaver v. Pendleton, 155 S.E. 802 (Va. 1930).* In Illinois rights of re-entry for breach of conditions subsequent are devisable. *Boone v. Clark, 21 N.E. 850 (Ill. 1889); Golconda Northern Ry. v. Gulf Lines Connecting R.R. of Ill., 106 N.E. 818 (Ill. 1914).* Right of re-entry descends but is not devisable nor alienable. *Polette v. Williams, 456 S.W.2d 328 (Mo. 1970).*

(n8)Footnote 39. Littleton, *supra* note 2, at § 347.

(n9)Footnote 40. *Edward John Noble Hosp. v. Board of Foreign Missions, 176 N.Y.S.2d 157 (1958). Woman's Club of St. Albans v. James, 213 S.E.2d 469 (W. Va 1965)* (holding that fee simple subject to condition "subsequent subject to defeasance by the grantor or his heirs").

(n10)Footnote 41. *New York v. Coney Island Fire Dep't, 10 N.Y.S.2d 164 (1939). Contra, Union Colony Co. v. Gallie, 88 P.2d 120 (Colo. 1939).*

(n11)Footnote 42. *Nicoll v. New York & E.R.R., 12 Barb. 460* (N.Y.), *aff'd, 12 N.Y. 121 (1854); Riverton Country Club v. Thomas, 58 A.2d 89* (N.J.), *aff'd, 64 A.2d 347 (N.J. 1948)* (right of re-entry alienable by statute).

(n12)Footnote 43. *Pinkum v. Eau Claire, 51 N.W. 550 (Wis. 1892).*

(n13)Footnote 44. *Stevens v. Galveston, H. & S.A.R.R., 169 S.W. 644 (Tex. Civ. App. 1914), rev'd on other grounds, 212 S.W. 639 (Tex. Com. App. 1919).*

Unless it appears that a right or privilege is reserved for the benefit of the remaining lots of a grantor, in the deed itself or from a plan or from the situation of the property with reference to other land of the grantor, the grantees of other lots cannot enforce them. In order to give other lot owners this right, the grantor must create an equitable easement appurtenant to his remaining lots. *Hill v. Levine, 147 N.E. 837 (Mass. 1925).*

(n14)Footnote 45. *Warner v. Bennett, 31 Conn. 468 (1863); Thomas v. Record, 47 Me. 500 (1859); Osgood v. Abbott, 58 Me. 73 (1870); Jackson ex dem. Reeves v. Topping, 1 Wend. 388 (N.Y. 1828); Southwick v. New York Christian Missionary Soc'y, 135 N.Y.S. 392 (1912); Methodist Protestant Church v. Young, 40 S.E. 691 (N.C. 1902); Eisenhardt v. Siegel, 119 S.W.2d 810 (Mo. 1938)* (a killer took under right of re-entry upon death of holder of fee upon condition subsequent).

(n15)Footnote 46. *Battistone v. Banulski, 147 A. 820 (Conn. 1929). Brill v. Lynn, 270 S.W. 20 (Ky. 1925) Halpin v. Rural Agrl. Sch. Dist. No. 9, 194 N.W. 1005 (Mich. 1923); Nicoll v. New York & E. R.R.,12 N.Y. 121 (1854); O'Connor v. Saratoga Springs, 262 N.Y.S. 809 (1933); Magness v. Kerr, 254 P. 1012 (Or. 1927); Copenhaver v. Pendleton, 155 S.E. 802 (Va. 1930).*

(n16)Footnote 47. *Ruch v. Rock Island, 97 U.S. 693 (1878).*

(n17)Footnote 48. *Warner v. Bennett, 31 Conn. 468 (1863); Hoyt v. Ketcham, 5 A. 606 (Conn. 1886); Cookman v. Silliman, 2 A.2d 166 (Del. Ch. 1938); Williams v. Thomas County, 65 S.E.2d 412 (Ga. 1951)* (*contra*, and in accord with the modern trend); *Franks v. Sparks, 121 S.E.2d 27 (Ga. 1961); Prall v. Burckhartt, 132 N.E. 280 (Ill. 1921); Peoria Heights v. Keithley, 132 N.E. 532 (Ill. 1921); Paul v. Connersville & N. J. R. Co., 51 Ind. 527 (1875); Higbee v. Rodeman, 28 N.E. 442 (Ind. 1891); Federal Land Bank v. Luckenbill, 13 N.E.2d 531 (Ind. 1938); Ralston v. Hatfield, 143 N.E. 887 (Ind. App. 1924); Bangor v. Warren, 34 Me. 324 (1851); Hooper v. Cummings, 45 Me. 359 (1858); Dawson v. Western Md. R.R., 68 A. 301 (Md. 1907); Guild v. Richards, 82 Mass. (16 Gray) 309 (1860); Rice v. Boston & W. R. Corp., 94 Mass. (12 Allen) 141 (1866); Halpin v. Rural Agr'l Sch. Dist. No. 9, 194 N.W. 1005 (Mich. 1923)* (attempted conveyance of possibility of reverter by grantor extinguishes right of grantor and heirs); *Oakland County v. Mack, 220 N.W. 801 (Mich. 1928); Dolby v. Dillman, 278 N.W. 694 (Mich. 1938); Farmer's High Sch. Consol. Dist. No. 3 v. Parker, 203 S.W.2d 516 (Mo. App. 1947); Ashuelot Nat'l Bank v. Keene, 65 A. 826 (N.H. 1907); Southard v. New Jersey Cent. R.R., 26 N.J.L. 13 (1856); Cornelius v. Den, 26 N.J.L. 376 (1856); Jackson v. Topping, 1 Wend. 388 (N.Y. 1828); Parsons v. Miller, 15 Wend. 561 (N.Y. 1836); Underhill v. Saratoga & W.R. Co., 20 Barb. 455 (N.Y. 1855); Tinkham v. Erie R. Co., 53 Barb. 393 (N.Y. 1866); Nicoll v. New York & R. R. Co., 12 N.Y. 121 (1854); Berenbroick v. St. Luke's Hosp., 49 N.E. 1093 (N.Y. 1898); Fowler v. Coates, 94 N.E. 997 (N.Y. 1911); O'Connor v. Saratoga Springs, 262 N.Y.S. 809 (1933); Helms v. Helms, 49 S.E. 110 (N.C. 1904); Blue v. Wilmington, 119 S.E. 741 (N.C. 1923); Sharpe v. North Carolina R.R., 129 S.E. 826 (N.C. 1925); Frensley v. White, 254 P.2d 982 (Okla. 1953); School Dist. No. 21 v. Wallowa, 142 P. 320 (Or. 1914); Wagner v. Wallowa County, 148 P. 1140 (Or. 1915); Dallas v. Etheridge, 253 S.W.2d 640 (Tex. 1952)* (some jurisdictions now permit the assignment of rights of re-entry or "powers of termination"); *McBride v. Farmers & Merchants Gin Co., 152 S.W. 1135 (Tex. Civ. App. 1913); Perry v. Smith, 231 S.W. 340 (Tex. Comm. App. 1921); Stevens v. Pillsbury, 57 Vt. 205 (1884); Copenhaver v. Pendleton, 155 S.E. 802 (Va. 1930); Martin v. Ohio River R. Co., 16 S.E. 589 (W. Va. 1892).*

In California, Connecticut, Idaho, Kansas, Kentucky, Michigan, Mississippi, Montana, New Jersey, Rhode Island, Virginia and West Virginia, a right of re-entry is made alienable by statute.

(n18)Footnote 49. *Coke, supra* note 2, at § 214n. *Bangor v. Warren, 34 Me. 324 (1851); Nicoll v. New York & E.R.R., 12 N.Y. 121 (1854).*

(n19)Footnote 50. *Dyer v. Siano, 11 N.E.2d 451 (Mass. 1937); Dolby v. Dillman, 278 N.W. 694 (Mich. 1938); Berenbroick v. St. Luke's Hosp., 48 N.Y.S. 363 (1898)* (before breach); *Southwick v. New York Christian Missionary Soc'y, 135 N.Y.S. 392 (1912)* (after breach but before re-entry); *Magness v. Kerr, 254 P. 1012 (Or. 1927); Schoolcraft Community Sch. Dist. No. 50 v. Burson, 99 N.W.2d 353 (Mich. 1959).*

(n20)Footnote 51. *Moore v. Sharpe, 121 S.W. 341 (Ark. 1909); Faus v. Pacific Elec. R.R., 303 P.2d 814 (Cal. App. 1956); Waddell v. School Dist. No. 3, 257 P. 278 (Mont. 1927).*

(n21)Footnote 52. Such statutes obtain in California, Connecticut, and other states.

Los Angeles & Ariz. Land Co. v. Marr, 200 P. 1051 (Cal. 1921) (an actual transfer of the reversion or right of re-entry by succession, will or assignment is essential).

See in this connection, *Dolby v. Dillman, 278 N.W. 694 (Mich. 1938).*

(n22)Footnote 53. *Childs v. Newfield, 28 P.2d 924 (Cal. App. 1934).*

(n23)Footnote 54. *Faus v. Pacific Elec. R.R., 303 P.2d 814 (Cal. App. 1956); Joel v. Joel, 40 S.E.2d 541 (Ga. 1946). See* Restatement of The Law of Property, § 160, cmt. d.

In a few cases even the power of termination has been held transferable, often by a liberal interpretation of the statutes defining the types of interests in land which may be transferred by deed. *Shell Petr. Corp. v. Hollow, 70 F.2d 811 (10th*

Cir. 1934); Wright v. Hardy, 24 So. 697 (Miss. 1899); Copenhaver v. Pendleton, 155 S.E. 802 (Va. 1930) (dictum).

(n24)Footnote 55. *Guild v. Richards, 82 Mass. (16 Gray) 309 (1860); Underhill v. Saratoga & W.R. Co., 20 Barb. 455 (N.Y. 1855); Wagner v. Wallowa County, 148 P. 1140 (Or. 1915).*

(n25)Footnote 56. *Stearns v. Harris, 90 Mass. (8 Allen) 597 (1864).*

(n26)Footnote 57. *Prall v. Burckhartt, 132 N.E. 280 (Ill. 1921); Leach v. Leach, 10 Ind. 271 (1858); Bangor v. Warren, 34 Me. 324 (1851).*

(n27)Footnote 58. *Pinkum v. Eau Claire, 51 N.W. 550 (Wis. 1892).* Winslow, J., said:

> It would be a singular rule of law which would forever prevent the owner in fee of lands from questioning the right of another to maintain an easement upon his land when there existed a violation of the express condition upon which the easement was granted.

(n28)Footnote 59. Right of re-entry descends. *Polette v. Williams, 456 S.W.2d 328 (Mo. 1970).*

(n29)Footnote 60. *Hawkins v. Third, 14 So. 2d 513 (Ala. 1943).*

(n30)Footnote 61. *Daggett v. Ft. Worth, 177 S.W. 22 (Tex. Civ. App. 1915).*

(n31)Footnote 62. *Adkins v. Adkins, 188 S.W. 843 (Ky. 1916).*

(n32)Footnote 63. *Hawkins v. Third, 14 So. 2d 513 (Ala. 1943); Penas v. Cherveny, 161 N.W. 150 (Minn. 1917); Malicki v. Malicki, 248 N.W. 723 (Minn. 1933); Helms v. Helms, 47 S.E. 415 (N.C. 1904).*

(n33)Footnote 64. *Little v. Little, 169 S.E. 799 (N.C. 1933).*

(n34)Footnote 65. *Gamble v. Mosloski, 246 N.W. 368 (Minn. 1933).*

(n35)Footnote 66. *Schulenberg v. Harriman, 88 U.S. (21 Wall) 44 (1847); Cross v. Carson, 8 Blackf. 138 (Ind. 1846); Southard v. New Jersey Cent. R.R., 26 N.J.L. 13 (1856).*

(n36)Footnote 67. *Edwards v. West Woodridge Theater Co., 55 F.2d 524 (App. D.C. 1931).*

(n37)Footnote 68. *Coke, supra* note 2, at § 214a. *Bangor v. Warren, 34 Me. 324 (1851); Hooper v. Cummings, 45 Me. 359 (1858); Guild v. Richards, 16 Gray 309* (82 Mass) (1860); *Rice v. Boston & W. R. Corp., 12 Allen 141 (94 Mass. 1866); Underhill v. Saratoga & W.R. Co., 20 Barb. 455 (N.Y. 1855); Tinkham v. Erie R. Co., 53 Barb. 393 (N.Y. 1866); Williams v. Jackson ex dem. Tibbitts, 5 Johns. 489 (N.Y. 1854); Nicoll v. New York & E. R.R., 12 N.Y. 121 (1854). See Brill v. Lynn, 270 S.W. 20 (Ky. 1925); Halphin v. Rural Agrl. Sch. Dist. No. 9, 194 N.W. 1005 (Mich. 1923); Franks v. Sparks, 121 S.E.2d 27 (Ga. 1961).*

(n38)Footnote 69. *Shields v. Harris, 130 S.E. 189 (N.C. 1925).*

(n39)Footnote 70. *Weinreich v. Weinreich, 18 Mo. App. 364 (1885),* per Thompson, J., *citing Owsley v. Owsley, 78 Ky. 257 (1873); Rogers v. Gosnell, 51 Mo. 466 (1873); Smith v. Jewett, 40 N.H. 530 (1860); Sherman v. Dodge, 28 Vt. 26 (1855); Ralphsnyder v. Ralphsnyder, 17 W. Va. 28 (1880).*

Contra, Kellam v. Kellam, 2 Patt. & H. 357 (Va. 1796).

(n40)Footnote 71. *Welch v. Silliman, 2 Hill 491 (N.Y. 1842).*

(n41)Footnote 72. *Jackson v. Revere Sugar Refinery, 142 N.E. 909 (Mass. 1924)* (grant of a right to fill flats was not forfeited by the requirement of a license, and persons holding the grant were not liable for assessment for tidewater displacement).

(n42)Footnote 73. People v. Brown, 1 Caines 416 (N.Y. 1803).

(n43)Footnote 74. If the grant be a public one it must be asserted by judicial proceedings authorized by law, the equivalent of an inquest of office at common law, finding the fact of forfeiture and adjudging the restoration of the estate on that ground, or there must be some legislative assertion of ownership of the property for breach of the condition, such as an act directing the possession and appropriation of the property, or that it be offered for sale or settlement. At common law the sovereign could not make an entry in person, and therefore an office-found was necessary to determine the estate. *United States v. Repentigny, 72 U.S. (5 Wall) 211 (1866).*

The mode of asserting or of resuming the forfeited grant is subject to the legislative authority of the government. It may be after judicial investigation, or by taking possession directly under the authority of the government without these preliminary proceedings. *Schulenberg v. Harriman, 88 U.S. (21 Wall) 44 (1874).*

(n44)Footnote 75. *Farnsworth v. Minnesota & P.R.R., 92 U.S. 49 (1875); New Orleans P.R.R. v. United States, 124 U.S. 124 (1888); Schlesinger v. Kansas City & S.R.R., 152 U.S. 444 (1894); Attorney-General v. Gardiner, 117 Mass. 492 (1875).*

(n45)Footnote 76. *Rhodes v. Black, 170 S.E. 158 (S.C. 1933).*

(n46)Footnote 77. *Ralston v. Hatfield, 143 N.E. 887 (Ind. App. 1924). See Calvary Presbyterian Church v. Putnam, 221 N.Y.S. 692, aff'd, 224 N.Y.S. 651 (1927); Simms v. Folts Mission Institute, 276 N.Y.S. 145 (1934); Magness v. Kerr, 254 P. 1012 (Or. 1927).*

Cf., Waddell v. School Dist. No. 3, 257 P. 278 (Mont. 1927).

The common-law rule that the possibility of reverter is not an alienable or assignable estate is held abrogated in *Kansas. Shell Petr. Corp. v. Hollow, 70 F.2d 811* (10th Cir.), *cert. denied, 293 U.S. 573 (1934).*

A provision that "the grantee may re-divide said land into lots but no lot shall have a frontage of less than fifty feet" is in terms a personal agreement between the grantors and the grantee and the fact that it is not in the group of restrictions to be included in other deeds tends to show that it was not intended for the benefit of other lot owners. *Hill v. Levine, 147 N.E. 837 (Mass. 1925).*

A right personal to the grantor ceases with the grantor's death and cannot be enforced by others. *Shields v. Harris, 130 S.E. 189 (N.C. 1925).*

(n47)Footnote 78. *Gray v. Blanchard, 25 Mass. (8 Pick.) 284 (1829); Craig v. Wells, 11 N.Y. 315 (1854); Nicoll v. New York & E. R.R., 12 N.Y. 121 (1854); Richter v. Distelhurst, 101 N.Y.S. 634 (1906); Littlefield v. Mott, 14 R.I. 288 (1883);* Kellam's Ex'r v. Kellam, 2 Patt. & H. 357 (Va. 1851). *Contra, see Hamilton v. Kneeland, 1 Nev. 40 (1865); McKissick v. Pickle, 16 Pa. 140 (1851).*

(n48)Footnote 79. *Gilbert v. Peteler, 38 N.Y. 165 (1868).*

(n49)Footnote 80. *McElroy v. Morley, 19 P. 341 (Kan. 1888); Hamlen v. Keith, 50 N.E. 462 (Mass. 1898); Goodman v. Bingle, 48 S.W.2d 432 (Tex. Civ. App. 1932). But see Ball v. Milliken, 76 A. 789 (R.I. 1910).*

(n50)Footnote 81. *Copeland v. Copeland, 89 Ind. 29 (1883).*

(n51)Footnote 82. *Hayward v. Kinney, 48 N.W. 170 (Mich. 1891).*

(n52)Footnote 83. *Rhodes v. Black, 170 S.E. 158 (S.C. 1933).*

Where a joint tenant died after judgment but before levy, the survivor took free of the judgment. *Jackson v. Lacey, 97 N.E.2d 839 (Ill. 1951).*

(n53)Footnote 84. *Ingersoll Engineering & Constructing Co. v. Crocker, 228 F. 844 (6th Cir. 1915).*

(n54)Footnote 85. *Dyer v. Siano, 11 N.E.2d 451 (Mass. 1937).*

(n55)Footnote 86. *O'Connor v. Saratoga Springs, 262 N.Y.S. 809 (1933).*

(n56)Footnote 87. *Rice v. Boston & W. R. Corp., 94 Mass. (12 Allen) 141 (1866).*

(n57)Footnote 88. *Merritt v. Harris, 102 Mass. 326 (1869).*

(n58)Footnote 89. *McKelway v. Seymour, 29 N.J.L. 321 (1862).*

(n59)Footnote 90. *Weinberg v. Sanders, 198 N.Y.S. 121 (1923).*

(n60)Footnote 91. *Davis v. Skipper, 83 S.W.2d 318 (Tex. 1935).*

(n61)Footnote 92. *Childs v. Newfield, 28 P.2d 924 (Cal. 1934); Barnesville v. Stafford, 131 S.E. 487 (Ga. 1926),* 43 A.L.R. 1045; *Brill v. Lynn, 270 S.W. 20 (Ky. 1925); Calvary Presbyterian Church v. Putnam, 221 N.Y.S. 692, aff'd 224 N.Y.S. 651 (1927). Ours v. City of Rolla, 1998 Mo. App. LEXIS 345 (1998)* (when a municipality is the grantor, a release may be blocked by those who have standing because of special injury, peculiar right or interest in maintaining the restriction, or as taxpayers suing for abuse of funds).

(n62)Footnote 93. *Id.*

(n63)Footnote 94. *Id.*

(n64)Footnote 95. *Childs v. Newfield, 28 P.2d 924 (Cal. 1934); Hoyt v. Ketcham, 5 A. 606 (Conn. 1886). See Doe ex dem. Commyns v. Latimer, 2 Fla. 71 (1848); Cleveland, C.C. & I.R.R. v. Coburn, 91 Ind. 557 (1883).*

(n65)Footnote 96. *Hooper v. Cummings, 45 Me. 359 (1858). Rice v. Boston & W. R. Corp., 94 Mass. (12 Allen) 141 (1866); Avery v. Consumers Power Co., 253 N.W. 189 (Mich. 1934); Dolby v. Dillman, 278 N.W. 694 (Mich. 1938); Juif v. Dillman, 282 N.W. 892 (Mich. 1938); Consolidated Sch. Dist. No. 102 v. Walter, 66 N.W.2d 881 (Minn. 1954); Kilpatrick v. Twin States Realty Co., 10 So. 2d 447 (Miss. 1942); Tinkham v. Erie R. Co., 53 Barb. 393 (N.Y. 1866); Wagner v. Wallowa County, 148 P. 1140 (Or. 1915).*

See Hebrew Orphan Asylum v. New York, 270 N.Y.S. 310 (1934).

(n66)Footnote 97. *Mitchell v. Cheney Slough Irrig. Co., 134 P.2d 34 (Cal. App. 1943).*

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CHAPTER 25 RIGHTS OF ENTRY

3-25 Thompson on Real Property, Thomas Editions § 25.07

AUTHOR: Professor David A. Thomas This chapter is based on Ch. 31, George S. Thompson, Commentaries on the Modern Law of Real Property (John S. Grimes ed. 1979), which made a significant contribution toward preserving the American common law on rights of entry. J. Reuben Clark Law School Brigham Young University

§ 25.07 How Rights of Enforcement Are Exercised

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§ 25.07(a) By Entry or Claim

It is axiomatic that the bud of the right of re-entry does not ripen into an estate in interest and possession unless and until the holder of the right of re-entry takes the requisite steps to exercise such right. n98 The common-law remedy for enforcing the forfeiture of a condition is an entry. Actual entry, or, if that was impossible, a claim, was the original mode of enforcing forfeiture. "Regularly, when any man will take advantage of a condition, if he may enter he must enter, and when he cannot enter he must make a claim; and the reason is, for that a freehold and inheritance shall not cease without entry or claim." n99 The claim applied to things that did not lie in livery, and of which there could be no possession, such as a reversion or remainder. The bringing of an action of disseisin was not a claim within the meaning of the law, nor a substitute for an actual entry.

Claim was what was in the books called "continued claim." n100 As by the old common law a freehold could be created only by the ceremony of livery of seisin, the corresponding ceremony of re-entry was necessary in order to determine it, or, as Coke has it, "an estate of freehold cannot begin nor end without ceremony." n101 Re-entry for condition broken is still a proper method of effecting a forfeiture, not because it is necessary as a resumption of seisin and essential to a transfer of title, but because it is an open and unequivocal manifestation of the purpose of the grantor to take advantage of the breach of the condition subsequent. Any other method possessing those characteristics would suffice, n102 but no actual entry was required upon the breach of a condition subsequent in an estate for years or an incorporeal hereditament, for such an estate was not created by a livery of seisin. n103 The grantor parted with seisin when making the conveyance upon condition, and could regain this only by re-entry. No action for the recovery of the land could be brought by the grantor until the grantor had made entry upon the land after condition broken or made claim if entry was impossible. This was the early rule in some of the states, n104 and in North Carolina and South Carolina it remains the rule to the present time. n105 If several detached parcels of land are conveyed by the same deed, and are subject to the same condition, an entry upon one lot in the name of all the lots situated in the same county is sufficient. n106 It would seem that the ceremony of re-entry for the breach of a condition ought to be dispensed with, inasmuch as under the statute of uses the ceremony of livery of seisin is dispensed with in the creation of freehold estates. Accordingly, at the

present day, this ceremony is not generally necessary before the prosecution of an action for the recovery of possession.

§ 25.07(a)(1) What Constitutes Entry

There must be a re-entry or an act equivalent thereto. n107 An entry to enforce a forfeiture must be made for the purpose of taking advantage of the breach of condition. If it is made for some other purpose, it is not effective to divest the grantee of the estate by reason of the breach of the condition and does not lay the foundation for a recovery in ejectment by the grantor. n108 There are cases, however, which hold that, in effect, ejectment may be maintained without previous entry, demand, or notice. n109 The entry, moreover, in the language of sheppard-touchstone, n110 should be "an open and notorious act, equivalent to investiture of land by livery of seisin, that notoriety might be given to the change of title." It is not necessary, however, that the party entering should declare at the time for what purpose entry is made. The act speaks for itself. n111 The re-entry must be made after a breach of the condition. If made before a breach it may excuse the breach, because it may render performance impossible. n112 In the absence of an express provision that the entry must be made within a specified time after breach, it may be made at any time after breach and before the period of limitation fixed by statute. n113 It must be made upon the land of which forfeiture is claimed. n114

An actual entry followed by the use and cultivation of the land in dispute together with a claim of ownership and the subsequent conveyance of the property to another shows an effective and positive manifestation of an election to terminate the estate on condition broken and removes all doubt as to grantor's intention so to do. n115 It would seem that upon the breach of a condition subsequent the grantor should be allowed to treat the estate as having reverted, and to sue for a recovery thereof without going through the formality of a prior entry or demand for possession, and this is the view taken by some courts. n116 A re-entry or demand for possession is not necessary where the deed provides that the title shall revert to the grantor upon an adjudication that the condition has been broken n117 or where there is a covenant to reconvey on breach of condition. n118

§ 25.07(a)(2) When Notice and Demand Are Required

There is ordinarily no necessity for a demand upon the grantee prior to the entry, or for a notice subsequent to entry. n119 If it clearly appears that a demand would have been an idle ceremony, a demand need not be shown. n120 However, where there has not been a permanent waiver of a condition, but only a temporary suspension of the right to insist upon compliance, the right of forfeiture cannot be exercised after such waiver without previously giving definite and specific notice of the intention to declare a forfeiture. n121 The condition may be such that a demand or notice for its performance will be necessary. Thus, where the condition was that if the grantee should neglect or refuse to support a fence around the granted land the deed should be void, it was held that there was no forfeiture until the grantee had "neglected" or "refused" to support a fence, after notice or request, and had failed to do so after a reasonable time allowed for that purpose. n122

Where the condition was to pay certain legacies, and one of the legatees was absent from the state, before there could be a forfeiture by reason of the nonpayment of the legacy, a demand of payment was necessary. n123 There are cases which take the position that a demand for performance of a condition subsequent is a prerequisite to forfeiture of the estate. n124 In some cases it is held that a demand for performance is equivalent to an entry, n125 and a forfeiture cannot be claimed without such demand. If the grantee under a deed subject to a condition abandons the land without sufficient excuse and without any offer to perform a continuous service imposed by the condition, no demand for performance is necessary to entitle the grantor to re-enter. The grantee's abandoning the land is equivalent to a renunciation of rights under the deed and is authority to the grantor to enter. n126 However, if the condition is one that depends upon the nonuse of the property for a specified purpose for a time mentioned, there can be no demand for performance, for when the time has elapsed the breach of the condition is complete, and there is no breach until such time has elapsed. n127 The grantor is not required to demand performance of a condition subsequent before commencing an action of ejectment to recover the land. n128 Notice and demand are unnecessary where it is impossible for the grantee to comply with the conditions and a demand would be a useless thing. n129

§ 25.07(b) Legal Actions as Equivalent to Entry

It is a general rule that a writ of ejectment, a writ of entry, or a suit for the possession of the land, is equivalent to a re-entry. n130 So, any act equivalent to an entry by the grantor showing a purpose to take advantage of the breach of condition subsequent, and to reclaim the estate forfeited by such, is all that is required. n131

An action in ejectment may be maintained against a grantee for breach of condition in a deed, n132 and a previous formal entry need not be shown where the facts disclose a breach of the condition. n133 The action of ejectment to enforce a forfeiture of a condition may be maintained against subsequent purchasers from the original grantee upon condition. n134

§ 25.07(c) When Entry Is Defined in the Grant

It is usual in a grant on a condition subsequent to reserve in express terms to the grantor and the grantor's heirs a right of entry for breach of condition, n135 but the right is not dependent upon a specific recital thereof in the deed. n136 The parties themselves may, by a stipulation in the deed, provide what shall constitute a re-entry for a forfeiture or what shall be the evidence of such re-entry. Thus, they may stipulate that the grantor shall post a notice of re-entry upon the land, that within a specified time thereafter the land shall be considered as revested in the grantor, that such act will constitute a re-entry, and that after the expiration of such time it will defeat the purchaser's title. n137 Where the parties stipulate in the deed that the title shall revert upon the adjudication by a judicial tribunal that the condition has been violated, such adjudication amounts to a re-entry. n138

§ 25.07(d) Entry Before Breach

If the grantor is in possession when the condition is broken, the estate revests in the grantor at once, and the grantor's possession is presumed to be for the purpose n139 of holding under the forfeiture. If the grantor is already in possession, it is, however, in some cases declared that the grantor must manifest an intention of holding by reason of the breach of condition. n140 Facts showing that the grantee in possession, after breach of the condition, exercised acts of ownership or that the grantor residing with the grantee acknowledged the title of the latter and disclaimed any title in the grantor, are admissible in evidence to show that the grantor was not in possession for a forfeiture. n141 The grantor may thereafter maintain an action to quiet the title, but to do this the grantor must allege a breach of the condition, and a re-entry because of such breach. Such an action could not be sustained upon an allegation of a re-entry before breach. n142 To entitle the plaintiff to an action to quiet title, the plaintiff must recover on the strength of the plaintiff's own title. n143

§ 25.07(e) Miscellaneous Rules Governing Entry

If the grantor reserves to himself some special remedy for a breach of the condition, other than a forfeiture of the estate, the grantor may be limited to that remedy. n144 Where a covenant is coupled with a condition subsequent, the grantor has an election to proceed on the covenant or on the condition. n145

The right of re-entry accrues at the time of the breach thereof and the statute of limitations then commences running. n146 A change in circumstances justifies refusal to enforce the right of re-entry. n147 And any circumstance that prevents a forfeiture of an estate upon condition subsequent will of course prevent exercise of a right of re-entry. n148

Where a corporation holding land upon a condition subsequent is dissolved for acts or omissions which are also breaches of the condition, the title reverts to the original grantor without any entry by him or other act equivalent thereto. The dissolution of the corporation by judicial decree supersedes the necessity of a re-entry. n149

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LEXIS: (entry or enter! or claim) w/15 enforce w/5 forfeit! w/5 condition w/5 breach! or broke!
or
re-entry w/30 (writ or action w/1 ejectment) or (writ w/1 entry) or (suit w/1 possession)

FOOTNOTES:
(n1)Footnote 98. *Carruthers v. Spaulding, 275 N.Y.S. 37 (1934).* Deeds with the proviso that if the grantee died without any legal heirs, child or children, then upon death of the widow the land should descend to the grantors, were held to terminate the grantee's estate only upon his dying without heirs, excluding his wife, and created an estate in the heirs by way of executory limitations through words of purchase. *Noe v. Moseley, 36 N.E.2d 240 (Ill. 1941).*

Right of re-entry is destroyed by the creation of a limitation over. *Brattle Square Church v. Grant, 69 Mass. (3 Gray) 142 (1855); Brown v. Independent Baptist Church, 91 N.E.2d 922 (Mass. 1950).*

In the case of a determinable fee, however, the possibility of reverter remains even though there has been a limitation over. *First Universalist Soc'y v. Boland, 29 N.E. 524 (Mass. 1892).*

(n2)Footnote 99. *Coke, supra* note 2, at § 218a; Sheppard-Touchstone, *supra* note 33, at 153.

(n3)Footnote 100. It is explained by *Littleton, supra* note 3, at § 414.

(n4)Footnote 101. *Coke, supra* note 2, at § 214b.

A lease for years might begin without ceremony, and so might end without ceremony. A condition annexed to a lease for years did not, therefore, require an actual entry to enforce it, unless an entry is stipulated. Ejectment may be maintained without an actual entry. *See Moore v. Sharpe, 121 S.W. 341 (Ark. 1909).*

(n5)Footnote 102. *Rannels v. Rowe, 145 F. 296 (8th Cir. 1906); Bryan v. Bliss-Cook Oak Co., 178 F. 217 (8th Cir. 1910); Lewis v. Lewis, 51 A. 854 (Conn. 1902); Moss v. Chappell, 54 S.E. 968 (Ga. 1906); Hart v. Lake, 112 N.E. 286 (Ill. 1916); Preston v. Bosworth, 55 N.E. 224 (Ind. 1899); Strothers v. Woodcox, 121 N.W. 51 (Iowa 1909); Kentland Coal & Coke Co. v. Keen, 183 S.W. 247 (Ky. 1916); Abbott v. Fellows, 100 A. 657 (Me. 1917); Little Falls Water-Power Co. v. Belin, 72 N.W. 69 (Minn. 1897); Yazoo & M. V. R. Co. v. Lakeview Trac. Co., 56 So. 393 (Miss. 1911); Bredell v. Kerr, 147 S.W. 105 (Mo. 1912); Carruthers v. Spaulding, 275 N.Y.S. 37 (1934).*

(n6)Footnote 103. 4 James Kent Commentaries on American Law 128 (Rev. ed. 1895).

(n7)Footnote 104. *Chalker v. Chalker, 1 Conn. 79 (1814); Bowen v. Bowen, 18 Conn. 535 (1847); Warner v. Bennett, 31 Conn. 468 (1863); Voris v. Renshaw, 49 Ill. 425 (1867); Board of Educ. v. First Baptist Church, 63 Ill. 204 (1872); Throp v. Johnson, 3 Ind. 343 (1852); Boone v. Tipton, 15 Ind. 270 (1860); Kenner v. American Contract Co., 72 KY. (9 Bush) 202 (1872); Frost v. Butler, 7 Me. 225 (1831); Marwick v. Andrews, 25 Me. 525 (1846); Bangor v. Warren, 34 Me. 324 (1851); Tallman v. Snow, 35 ME. 342 (1853); Osgood v. Abbott, 58 Me. 73 (1870); Memphis & C.R.R. V. Neighbour, 51 Miss. 412 (1875); Willard v. Henry, 2 N.H. 120 (1819); Spear v. Fuller, 8 N.H. 174 (1835); Rollins v. Riley, 44 N.H. 9 (1860); Phelps v. Chesson, 34 N.C. (12 Ired.) 194 (1851); Hammond v. Port Royal & A.R.R., 15 S.C. 10 (1880).*

In Massachusetts an entry was necessary before the Revised Statutes of 1836, which provided that the demandant in a real action shall not to be required to prove an actual entry, and that proof of the right to enter shall be deemed sufficient proof of seisin. This applies to an action founded on a breach of condition. *Austin v. Cambridgeport, 38 Mass. 215 (21 Pick. 1838) 215. See Stearns v. Harris, 90 Mass. 597 (8 Allen 1864).*

It has been suggested, however, that *Sanborn v. Woodman, 59 Mass. (5 Cush.) 36 (1849); Stone v. Ellis, 63 Mass. (9*

Cush.) 95 (1851); Attorney-General v. Merrimack Mfg. Co., 80 Mass. (14 Gray) 586 (1860), are inconsistent. F. C. Loring, *Estates Upon Condition, 1 Am. L. Rev. 265, 269 (1866). Hubbard v. Hubbard, 97 Mass. 188 (1867),* decides that an action is equivalent to an entry.

(n8)Footnote 105. *Adams v. Ore Knob Copper Co., 7 F. 634 (C.C.N.C. 1880); Hammond v. Port Royal & A.R.R., 15 S.C. 10 (1880).*

(n9)Footnote 106. *Littleton, supra* note 2, at § 417; *Coke, supra* note 2, at § 252*B. Green v. Pettingill, 47 N.H. 375 (1867).*

(n10)Footnote 107. *Hooper v. Haas, 164 N.E. 23 (Ill. 1928). D'Addario v. D'Addario, 603 A.2d 1199 (Conn. App. 1992)* (holding that a forfeiture of fee simple estate subject to condition subsequent requires entry "to effectuate defeasance"). *Lake View Memorial Hospital v. Vermilion County, 318 N.E.2d 752 (Ill.App. 1974)* (holding that a fee upon condition subsequent can be terminated only by an entry of grantor upon a breach). *Contra, Lehigh Valley R. Co. v. Chapman, 171 A.2d 653 (N.J. 1961)* (holding that an actual re-entry no longer required to defeat estate on condition; a right to re-entry is enough).

(n11)Footnote 108. *Bowen v. Bowen, 18 Conn. 535 (1847); Stone v. Ellis, 63 Mass. (9 Cush.) 95 (1851).*

(n12)Footnote 109. *Union Pac. Ry. v. Cook, 98 F. 281 (8th Cir. 1899); Hart v. Lake, 112 N.E. 286 (Ill. 1916). Ritchie v. Kansas, N. & D.R.R., 39 P. 718 (Kan. 1895); Sioux City & St. P.R.R. V. Davis, 51 N.W. 907 (Minn. 1892). Union College v. New York, 65 N.E. 853 (N.Y. 1903); Brittain v. Taylor, 84 S.E. 280 (N.C. 1915); Sanderson v. Dee, 168 P. 1001 (Okla. 1917);* Upon the happening of a breach of a condition subsequent, where the condition is an essential part of the deed, ejectment lies for possession of the premises. *Denney v. Traders Nat'l Bank, 408 S.W.2d 71 (Mo. 1966).*

(n13)Footnote 110. William Sheppard, The Touchstone of Common Assurance 153 (6th ed-1785).

(n14)Footnote 111. *Bowen v. Bowen, 18 Conn. 535 (1847); Dugan v. Thomas, 9 A. 354 (Me. 1887).*

(n15)Footnote 112. *Elkhart Car-Works Co. v. Ellis, 15 N.E. 249 (Ind. 1888); Jump River Lumber Co. v. Moore, 35 N.W. 360 (Wis. 1887).*

(n16)Footnote 113. *Yazoo & M.V.R.R. v. Lakeview Trac. Co., 56 So. 393 (Miss. 1911); Sanford v. Sims, 66 S.E.2d 495 (Va. 1951).*

(n17)Footnote 114. *Missouri Historical Soc'y v. Academy of Science, 8 S.W. 346 (Mo. 1888).*

"Whatever necessity there may have anciently been for such a proceeding, the reason for it ceased with the disappearance of the fictions and devices resorted to, upon which to found the action of ejectment." *Sioux City & St. P.R.R. v. Singer, 51 N.W. 905 (Minn. 1892),* per Dickinson, J.

See Clark v. Holton, 57 Ind. 564 (1877); Ritchie v. Kansas, N. & D.R.R., 39 P. 718 (Kan. 1865); Hamilton v. Kneeland, 1 Nev. 40 (1865). And see Seeck v. Jakel, 141 P. 211 (Or. 1914).

(n18)Footnote 115. *Turner v. Lewis, 226 S.W. 367 (Ky. 1920).*

(n19)Footnote 116. *Lyman v. Suburban R. Co., 60 N.E. 515 (Ill. 1901); St. Joseph Lead Co. v. Fuhrmeister, 182 S.W.2d 273 (Mo. 1944)* (demand for possession with notice of forfeiture is an entry).

(n20)Footnote 117. *Fusha v. Dacono Town Site Co., 153 P. 226 (Colo. 1915).*

(n21)Footnote 118. *Union Pac. Ry. v. Cook, 98 F. 281 (8th Cir. 1899); Hart v. Lake, 112 N.E. 286 (Ill. 1916).*

(n22)Footnote 119. *Liebrand v. Otto, 56 Cal. 242 (1880); Georgia R. & Banking Co. v. Macon, 13 S.E. 21 (Ga. 1891); Evans v. Brown, 27 S.E.2d 300 (Ga. 1943); Richter v. Richter, 12 N.E. 698 (Ind. 1887); Royal v. Aultman & Taylor Co., 19 N.E. 202 (Ind. 1888); Tallman v. Snow, 35 Me. 342 (1853); Rowell v. Jewett, 69 Me. 293 (1879); Sanhorn v. Woodman, 59 Mass. (5 Cush.) 36 (1849); Langley v. Chapin, 134 Mass. 82 (1883); Whitton v. Whitton, 38 N.H. 127 (1859); Norton v. Valentine, 135 N.Y.S. 1084 (1912); New Edgewood Lake Corp. v. Kingston Trust Co., 285 N.Y.S. 130 (1936).*

(n23)Footnote 120. *Stauffer v. Kessler, 130 N.E. 651 (Ind. App. 1921).*

(n24)Footnote 121. *Plummer v. Worthington, 152 N.E. 133 (Ill. 1926)* (grantor having died without giving notice of intention to declare a forfeiture the heirs could revive the right to declare a forfeiture by giving notice).

Grantor cannot complain of insufficiency of repairs made some nine years previously, where he failed to give the grantee the required written notice that additional repairs were desired. *Simpson v. Simpson, 141 So. 50 (La. 1932).*

(n25)Footnote 122. *Merrifield v. Cobleigh, 58 Mass. (4 Cush.) 178 (1849).*

(n26)Footnote 123. *Bradstreet v. Clark, 38 Mass. (21 Pick.) 389 (1838).*

(n27)Footnote 124. *See Risley v. McNiece, 71 Ind. 434 (1880); Preston v. Bosworth, 55 N.E. 224 (Ind. 1899); Huntley v. McBrayer, 85 S.E. 213 (N.C. 1915).*

(n28)Footnote 125. *Clark v. Holton, 57 Ind. 564 (1877); Indianapolis, P. & C.R.R. v. Hood, 66 Ind. 580 (1879); Risley v. McNiece, 71 Ind. 434 (1880); Cory v. Cory, 86 Ind. 567 (1882); Ellis v. Elkhart Car-Works Co., 97 Ind. 247 (1884); Huffman v. Rickets, 111 N.E. 322 (Ind. App. 1916); Adkins v. Adkins, 188 S.W. 843 (Ky. 1916).*

(n29)Footnote 126. *Lindsey v. Lindsey, 45 Ind. 552 (1874); Risley v. McNiece, 71 Ind. 434 (1880); Schuff v. Ransom, 79 Ind. 458 (1881); Corey v. Corey, 86 Ind. 567 (1882); Ellis v. Elkhart Ellis v. Elkhart Car-Works Co., 97 Ind. 247 (1884); Richter v. Richter, 12 N.E. 698 (Ind. 1887).*

(n30)Footnote 127. *Ellis v. Elkhart Car-Works Co., 97 Ind. 247 (1884).*

(n31)Footnote 128. *New Edgewood Lake Corp. v. Kingston Trust Co., 285 N.Y.S. 130 (1936).*

(n32)Footnote 129. *Klamath County v. Klamath Dev. Co., 218 P. 932 (Or. 1923).*

(n33)Footnote 130. *Ruch v. Rock Island, 97 U.S. 693 (1878); Cowell v. Colorado Springs Co., 100 U.S. 55 (1879); Boone v. Clark, 21 N.E. 850 (Ill. 1889); Scott v. Stipe, 12 Ind. 74 (1859); Clark v. Holton, 57 Ind. 564 (1877); Indianapolis, P. & C.R.R. v. Hood, 66 Ind. 580 (1879); Wilson v. Wilson, 86 Ind. 472 (1882); Cleveland, C.C. & I.R.R. v. Coburn, 91 Ind. 557 (1883); Richter v. Richter, 12 N.E. 698 (Ind. 1887); O'Brien v. Wetherell, 14 Kan 616 (1875); Ritchie v. Kansas, N. & D.R.R., 39 P. 718 (Kan. 1895); Louisville & N.R.R. v. Covington, 65 Ky. (2 Bush) 526 (1866); Owensboro & N.R.R. v. Griffith, 17 S.W. 277 (Ky. 1891);* Mass. Gen. Laws ch. 237, §§ 4, 5; *Austin v. Cambridgeport, 38 Mass. (21 Pick.) 215 (1838); Hubbard v. Hubbard, 97 Mass. 188 (1867); Sioux City & St. P.R.R. v. Singer, 51 N.W. 905 (Minn. 1892); Towne v. Bowers, 81 Mo. 491 (1884); Clarke v. Brookfield, 81 Mo. 503 (1884); Ellis v. Kyger, 3 S.W. 23 (Mo. 1887); O'Brien v. Wagner, 7 S.W. 19 (Mo. 1888); Missouri Historical Soc. v. Academy of Science, 8 S.W. 346 (Mo. 1888); Weinreich v. Weinreich, 18 Mo. App. 364 (1885). Cornelius v. Ivins, 26 N.J.L. 376 (1857); Jackson ex dem. Bronck v. Crysler, 1 Johns. Cas. 125 (N.Y. 1799); Upington v. Corrigan, 23 N.Y.S. 451 (1893); Palmer v. Fort Plain & C. Plank Rd. Co., 11 N.Y. 376 (1854); Hosford v. Ballard, 39 N.Y. 147 (1868); Cruger v. McLaury, 41 N.Y. 219 (1869); Plumb v. Tubbs, 41 N.Y. 442 (1869); New Edgewood Lake Corp. v. Kingston Trust Co., 285 N.Y.S. 130 (1836); Raley v. Umatilla, 13 P. 890 (Or. 1887); Coffin v. Portland, 17 P. 580 (Or. 1888); Bear v. Whisler, 7 Watts 144 (Pa. 1838); Cook v. Trimble, 9 Watts 15 (Pa. 1839); Sheaffer v. Sheaffer, 37 Pa. 525 (1861); Sharon Iron Co. v. Erie, 41 Pa. 341 (1861); Brown v. Bennett, 75 Pa. 420 (1874); Rugge v. Ellis, 1 Bay 107* (S.C.); *Jeffery v. Graham, 61 Tex. 481*

(1884); Gulf, C. & S.F.R.R. v. Dunman, 11 S.W. 1094 (Tex. 1889). Martin v. Ohio R. R.R., 16 S.E. 589 (W. Va. 1892).

An action of unlawful entry and detainer is not sufficient *Bowyer v. Seymour, 13 W. Va. 12 (1878); Horner v. Chicago, M. & St. P.R.R., 38 Wis. 165 (1875); Pepin v. Prindle, 21 N.W. 254 (Wis. 1884).*

(n34)Footnote 131. The trustees of a railroad company had conveyed the road to a construction company upon condition that the road should be completed within a certain time, and, upon failure of the construction company to fulfill the condition, the trustees entered into a contract with a railway company already in possession of the property, reciting the condition and declaring a forfeiture under it. It was held that, the trustees having elected to treat the property as reverted to them and their action being equivalent, without judicial proceedings, to a re-entry, the interest of the construction company in the property was divested at the expiration of the time limited for performance of the conditions, and the property could not be subjected, by a suit brought after that time, to a judgment against the construction company recovered by complainants on the contract for the rails. *Schlesinger v. Kansas City & S.R.R., 152 U.S. 444 (1894).*

(n35)Footnote 132. *Chicago San. Dist. v. Chicago Title & Trust Co., 116 N.E. 161 (Ill. 1917); Epworth Assembly v. Ludington & N. R., 211 N.W. 99 (Mich. 1926); Moore v. Wingate, 53 Mo. 398 (1873); Jetter v. Lyon, 97 N.W. 596 (Neb. 1903); Reformed Church v. Schoolcraft, 65 N.Y. 134 (1875); Carruthers v. Spaulding, 275 N.Y.S. 37 (1934); Ringrose v. Ringrose, 33 A. 129 (Pa. 1895); Steward v. Workman, 102 S.E. 474 (W. Va. 1920); Mash v. Bloom, 110 N.W. 203 (Wis. 1907).*

(n36)Footnote 133. *Ritchie v. Kansas, N. & D.R.R., 39 P. 718 (Kan. 1895).*

(n37)Footnote 134. "It cannot be urged that it is even a hard case against such defendant, for he purchased with full knowledge of the condition; or, if not, it behooved him to inquire and examine the title before he purchased." *Jackson ex dem. Reeves v. Topping, 1 Wend. 388 (N.Y. 1828); Guffey v. Hukill, 11 S.E. 754 (W. Va. 1890); Martin v. Ohio R.R., 16 S.E. 589 (W. Va. 1892).*

Accelerating right of re-entry where limitation in the trust failed. *In re Shaul's Estate, 297 N.Y.S.2d 209 (1969).*

(n38)Footnote 135. *Thomas v. Record, 47 Me. 500 (1859); Mickleson v. Gypsy Oil Co., 238 P. 194 (Okla. 1925).*

(n39)Footnote 136. *Libby v. Winston, 93 So. 631 (Ala. 1922); Thomas v. Record, 47 Me. 500 (1859); Mickleson v. Gypsy Oil Co., 238 P. 194 (Okla. 1925).*

(n40)Footnote 137. *Swoll v. Oliver, 61 Ga. 248 (1878).*

Comment, *Legislative Limitation of Reverter and Forfeiture Provisions in Conveyances and Devises of Land -- A Proposed Statute for Kansas, 15 U. Kan. L. Rev. 346 (1967).*

(n41)Footnote 138. *Fusha v. Dacono Town Site Co., 153 P. 226 (Colo. 1915).*

(n42)Footnote 139. *Adams v. Ore Knob Copper Co., 7 F. 634,* (C.C.D.N.C. 1880); *Thompson v. Thompson, 9 Ind. 323 (1857); Clark v. Holton, 57 Ind. 564 (1877); Richter v. Richter, 12 N.E. 698 (Ind. 1887); Taylor v. Cedar Rapids & St. P.R.R., 25 Iowa 371 (1868); Frost v. Butler, 7 Me. 225 (1831); Andrews v. Senter, 32 Me. 394 (1851); Lincoln & Kennebeck Bank v. Drummond, 5 Mass. 321 (1809); Akasu v. Power, 91 N.E.2d 224 (Mass. 1950); Kilpatrick v. Twin States Realty Co., 10 So. 2d 447 (Miss. 1942); O'Brien v. Wagner, 7 S.W. 19 (Mo. 1888); Willard v. Henry, 2 N.H. 120 (1819); Rollins v. Riley, 44 N.H. 9 (1860); Brittain v. Taylor, 84 S.E. 280 (N.C. 1915);* Hamilton v. Elliott, 5 Serg. & Rawle 375 (Pa. 1819). Restatement of The Law of Property, § 160, and *see* § 161, showing exceptions to the rule stated in the text. *Wagner v. Wallowa County, 148 P. 1140 (Or. 1915).*

Regularly when a grantor will take advantage of a condition, if he may enter he must enter, and

when he cannot enter he must make claim, for the reason that a freehold and inheritance shall not cease without entry or claim. But if the grantor is himself in possession of the premises when the breach happens, the estate revests in him at once without any formal act on his part, and he will be presumed, after breach, to hold for the purpose of enforcing the forfeiture unless he waive the breach, which he may do. *Ordway v. Farrow, 64 A. 1116 (Vt. 1906).*

(n43)Footnote 140. *Hubbard v. Hubbard, 97 Mass. 188 (1867); Willard v. Henry, 2 N.H. 120 (1819). See Lincoln & Kennebeck Bank v. Drummond, 5 Mass. 321 (1809).*

(n44)Footnote 141. Drew v. *Baldwin, 4* N.W. 576 (Wis. 1880).

(n45)Footnote 142. *Richter v. Richter, 12 N.E. 698 (Ind. 1887); Elkhart Car-Works Co. v. Ellis, 15 N.E. 249 (Ind. 1888).*

(n46)Footnote 143. *Kozanjieff v. Petroff, 19 N.E.2d 563 (Ind. 1939),* 122 A.L.R. 479.

(n47)Footnote 144. *Hoyt v. Kimball, 49 N.H. 322 (1870).*

(n48)Footnote 145. *Neal v. State-Planters Bank & Trust Co., 184 S.E. 203 (Va. 1936).*

(n49)Footnote 146. *Sanford v. Sims, 66 S.E.2d 495 (Va. 1951); 38 Va. L. Rev. 266.*

(n50)Footnote 147. *Letteau v. Ellis, 10 P.2d 496 (Cal. App. 1932); Young v. Cramer, 100 P.2d 523 (Cal. App. 1940); Tower v. Compton Hill Imp. Co., 91 S.W. 104 (Mo. 1905); Siegel v. Herbine, 23 A. 996 (Pa. 1892); Daggett v. Fort Worth, 177 S.W. 222 (Tex. Civ. App. 1915); Hirsch v. Hancock, 343 P.2d 959 (Cal. App. 1959).*

Changed conditions defeat right of re-entry. *McArdle v. School Dist., 136 N.W.2d 422 (Neb. 1965).*

(n51)Footnote 148. *Letteau v. Ellis, 10 P.2d 496 (Cal. App. 1932); Koehler v. Rowland, 205 S.W. 217 (Mo. 1918)* (dictum).

(n52)Footnote 149. *Mott v. Danville Seminary, 21 N.E. 927 (Ill. 1889). See* Frederick E. Farrer, *Reverter to the Donor of the Legal Fee Vested in a Dissolved Corporation, 49 L.Q. Rev. 240 (1933);* M.W. Hughes, Reverter to the Donor of the Legal Fee Vested in a Dissolved Corporation, *51 L.Q. Rev. 347 (1935),* and the reply thereto by Frederick E. Farrer, Reverter to the Donor, etc.: Reply to Mr. Hughes, *51 L.Q. Rev. 361 (1935).*

But contrawise, if the corporation is the grantor retaining the right of re-entry dissolution does not destroy the right of re-entry. *Addy v. Short, 89 A.2d 136 (Del. 1952).*

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CHAPTER 25 RIGHTS OF ENTRY

3-25 Thompson on Real Property, Thomas Editions § 25.08

AUTHOR: Professor David A. Thomas This chapter is based on Ch. 31, George S. Thompson, Commentaries on the Modern Law of Real Property (John S. Grimes ed. 1979), which made a significant contribution toward preserving the American common law on rights of entry. J. Reuben Clark Law School Brigham Young University

§ 25.08 Bibliography

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Annotation, Commencement of Running of Statute of Limitations Respecting Actions of Owners of Right of Re-entry, or Actions Against Third Persons by Reversioners, *19 A.L.R. 2d 729.*

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Annotation, Validity of Statute Cancelling, Destroying, Nullifying, or Limiting Enforcement of Possibilities of Reverter or Rights of Re-entry for Condition Broken, *87 A.L.R. 3d 1011.*

Annotation, Waiver of, or Estoppel to Assert, Condition Subsequent or its Breach, *39 A.L.R. 2d 1116.*

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Supp. To CHAPTER 25 RIGHTS OF ENTRY

3-25 Thompson on Real Property, Thomas Editions Supp. to § 25.02

Supp. to § 25.02 History of Rights of Entry.

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Add:

County of Moore v. Humane Soc'y of Moore County, Inc., 578 S.E.2d 682 (N.C. App. 2003) (holding that upon the termination of the contract which contained the right of entry provision, the right of entry is no longer enforceable); *Ditmore v. Michalik, 625 N.W.2d 462 (Mich. App. 2001)* (holding a right of entry an interest remaining when the grantor creates an estate on condition subsequent).

Hash v. U.S., 454 F. Supp. 2d 1066 (D. Idaho 2006) (grants to railroad construed as granting fee simple determinable; fee simple determinable and fee simple subject to condition subsequent (with right of re-entry) compared).

Add:

Webb v. City of Dallas, Texas, 314 F.3d 787 (5th Cir. 2002) (describing heirs' right of reentry in order to redress their injuries).

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Supp. To CHAPTER 25 RIGHTS OF ENTRY

3-25 Thompson on Real Property, Thomas Editions Supp. to § 25.03

Supp. to § 25.03 Rights of Entry as Enforceable Forfeitures.

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Add:

Swaby v. Northern Hills Regional R.R. Authority, 769 N.W.2d 798 (S.D. 2009) (deed with certain habendum clauses created fee simple estates subject to condition subsequent, and the conditions were breached by abandonment). *Creech v. Ranmar Properties, 551 S.E.2d 224 (N.C. App. 2001)* (*N.C. Gen. Stat. §§ 42-3* provides that in all leases with a fixed time for the payment of rent, there shall be implied a forfeiture of the term upon failure to pay the rent within 10 days after a demand is made by the lessor or his agent on said lessee for all past-due rent, and the lessor may forthwith enter and dispossess the tenant without having declared such forfeiture or reserved the right of reentry in the lease.).

Zenon v. R.E. Yeagher Management Corp., 748 A.2d 900 (Conn. App. 2000) (The provision for reentry is ... the distinctive characteristic of an estate upon condition; and when it is found that by any form of expression the grantor has reserved the right, upon the happening of any event, to reenter, and thereby revest in himself his former estate, it may be construed as such.).

Howell v. Sykes, 526 S.E.2d 183 (N.C. App. 2000) (Conditions subsequent are not favored and are strictly construed; there must be clear and unambiguous indication of intent of forfeiture of the estate granted upon a breach of the condition.).

Glass v. Najafi, 92 Cal. Rptr.2d 606 (Cal. App. 1st Dist. 2000) (discussing policy preferring judicial process rather than self help in enforcement of right of re-entry).

Folendorf v. City of Angels, 2007 Cal. App. Unpub. LEXIS 10537 (Cal. App. 3d Dist. 2007) (conveyance of land from landowner to city, land to be used only for a firehouse, created a fee simple subject to condition subsequent, with right of entry for condition broken; the condition had not yet been violated).

Add:

Jasa v. LaMac Cleaners, Inc., No. C4- 02-1239, 2003 Minn. App. LEXIS 90, *3 (Minn. App. 2003) ("A landlord may bring an eviction action for nonpayment of rent irrespective of whether the lease contains a right of reentry clause. * * * In such an action, unless the landlord has also sought to evict the tenant by alleging a material violation of the lease * * *, the tenant may, *at any time before possession has been delivered,* redeem the tenancy and be restored to possession by paying to the landlord or bringing to court the amount of the rent that is in arrears * * *.").

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Supp. To CHAPTER 25 RIGHTS OF ENTRY

3-25 Thompson on Real Property, Thomas Editions Supp. to § 25.04

Supp. to § 25.04 Divestiture of Title Only Upon Re-Entry.

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Add:

In re Incorporated Village of Garden City, 734 N.Y.S.2d 225 (N.Y.A.D. 2001) (Deeds conveying property to church, which contained a restriction that the property was to be used for religious and educational purposes "without power, right, or authority to grant, convey, lease or mortgage the same in any way or manner whatsoever," but which did not contain any language providing for the automatic termination of church's interest in property in event property was no longer used for religious and educational purposes, did not contain a reversionary interest, but at most created a right of reentry.).

Yoder v. West Holmes School Dist. Bd. of Educ., 2001 Ohio App. LEXIS 5219 (No. 01-CA-012, Nov. 20, 2001) (A reversionary interest, such as a possibility of reverter, is not an interest that attaches to the land. Rather, it is the residue of the estate that is left in the grantor. When the qualified fee terminates, the land conveyed reverts to a person, not to other land. For an owner of property to have a right of reentry, he must show that he has at some time acquired the reversionary interest. One does not require a reversionary interest solely by virtue of being an owner of property which abuts the property on which the reversionary interest is claimed.).

Add:

Preferred Real Est. Equities, Inc. v. Hous. Sys., Inc., 548 S.E.2d 646 (Ga. App. 2001) (grantor's attempt to reenter under forfeiture clause is subject to a very strict construction).

Add:

Goldcrest Transport, Ltd. v. Across America Leasing Corp., 748 N.Y.S.2d 411 (N.Y.A.D. 2002) (Because a sublease is dependent upon and limited by the terms and conditions of the paramount lease from which it is carved, a subtenancy may be terminated by the expiration of the term of the prime tenant, or a re-entry by the landlord for a condition broken.).

Ditmore v. Michalik, 625 N.W.2d 462 (Mich. App. 2001) (A "right of entry" is an interest remaining when the grantor creates an estate on condition subsequent.).

Add:

Willhite v. Masters, 965 S.W.2d 406 (Mo. App. 1998) (Defeasible fee simple estate, gives rise to "right of entry" for a condition broken, and necessarily requires affirmative act of forfeiture because such condition operates upon an estate already created and vested, and renders it liable to be defeated.).

Knights and Ladies of Samaria v. Board of Educ. of Charles County, 688 A.2d 933 (Md. App. 1997) (Failure of special limitation on grant of real property, such as possibility of reverter, results automatically in reversion of estate to original grantor in fee simple absolute without need for entry, while failure of condition subsequent merely gives rise to right of entry, and grantor does not obtain fee simple absolute until he or she enters and retakes land.).

Add:

Ditmore v. Michalik, 625 N.W.2d 462 (Mich. App. 2001) ("Terminable interest" is a possessory or ownership interest in real property which is subject to termination by a provision in a conveyance or other instrument which either creates a right of reversion to a grantor or his heirs, successors or assigns or creates a right of entry on the occurrence of a specified contingency.).

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Supp. to § 25.05 Rights of Entry as Interests Subject to Legislation.

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Add:

Camenisch v. City of Stanford, 2003 Ky. App. LEXIS 211 (No. 2002-CA-000962-MR, Aug. 29, 2003) (holding that without express condition of forfeiture, the interest is a covenant, not a condition subsequent); *Ditmore v. Michalik, 625 N.W.2d 462 (Mich. App. 2001)* ("A *covenant* is an assurance that something will be done, while a condition provides that the legal relationship of the grantor and the grantee will be affected when an event that may or may not happen takes place.")

Add:

Mich. Comp. Laws Ann. §§ 554.62, 554.65 (If the specified contingency does not occur within 30 years after the terminable interest is created, the right of termination by reason of the specified contingency shall be unenforceable.) (A right of termination may be preserved by the recording, within a period of not less than 25 nor more than 30 years after creation of the terminable interest or within 1 year after the effective date of this act, whichever is later, of a written notice that the owner of such right of termination desires to preserve the same, such notice to be recorded in the register of deeds office of the county where the real property subject to such right of termination is located. Such notice shall be verified by oath, shall describe the land involved and the nature of such right of termination, including the specified contingency, and shall state the name and address of the owner of such right of termination. The recording of such notice shall operate to preserve such right of termination from the operation of this act for a period of 30 years from the date of recording of such notice.)

See Black Mountain Energy Corporation v. Bell County Board of Education, 467 F. Supp. 2d 715 (E.D. Ky. 2006) (state statute limiting the duration of rights of entry upheld as constitutional). *Resources Northwest, Inc. v. Rau, 22*

P.3d 1238 (Or. App. 2001) (construing *ORS 90.322(1) (c)* as to whether the statute imposes a time limitation on a landlord's right of entry).

Severns v. Union Pacific Railroad Co., 125 Cal. Rptr. 2d 100 (Cal. App. 2002) (A successor in interest to the original grantor has the right to exercise the power of termination to reclaim the land of a fee simple subject to condition subsequent. However, the Marketable Record Title Act (Civ. Code, § 880.020 *et seq.*) requires the successor in interest or the predecessor in interest to record in a timely way an intent to preserve the future interest, which was not done, resulting in an expiration of the power of termination.).

Add:

In re Incorporated Village of Garden City, 734 N.Y.S.2d 225 (N.Y.A.D. 2001) (At common law, a right of reentry was not assignable or devisable.).

Willhite v. Masters, 965 S.W.2d 406 (Mo. App. 1998) (Defeasible fee simple estate, gives rise to "right of entry" for a condition broken, and necessarily requires affirmative act of forfeiture because such condition operates upon an estate already created and vested, and renders it liable to be defeated; it is neither assignable, devisable or alienable, although it is descendible to heirs of grantor.).

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Supp. to § 25.06 Who May Exercise Right of Entry.

[Go To Main]

§ 25.06(a) Grantor and Heirs. [Go To Main]

Add:

See also Preferred Real Est. Equities, Inc. v. Hous. Sys., Inc., 548 S.E.2d 646 (Ga. App. 2001) (since grantor-corporation's successor was unascertainable, the right of entry could not be enforced).

§ 25.06(b)(1) Some Rights of Entry Not Assignable.

Add:

Willhite v. Masters, 965 S.W.2d 406 (Mo. App. 1998) (Defeasible fee simple estate, gives rise to "right of entry" for a condition broken, and necessarily requires affirmative act of forfeiture because such condition operates upon an estate already created and vested, and renders it liable to be defeated; it is neither assignable, devisable or alienable, although it is descendible to heirs of grantor.).

Add:

Est. of Vera Perrott Vietor, 2003 Cal. App. Unpub. LEXIS 8708 (No. A099902, Sept. 12, 2003) (testatrix devised all of the residue of her estate for the benefit of a foundation on the condition that the property not be despoiled by picnic

tables, barbecue pits, swimming pools, or like improvements).

Bridger v. Lake, 896 P.2d 406 (Mont. 1995) (A subsequent purchaser of a servient tenement is bound to take notice of rights that may be evident upon an inspection of the premises as well as those that may be learned by an inspection of the records.).

Add:

Rector v. Halliburton, 2003 Tenn. App. LEXIS 149 (No. M1999-02802-COA-R3-CV, Feb. 26, 2003) (Tenn. Ct. App. 2003) (Generally, easements determinable upon condition are of two types: (1) those that end upon the happening of a condition and (2) those that can be ended if the grantee fails to comply with conditions subsequent. The two types of easements do not work exactly the same. Easements that end upon the happening of some future condition are said to terminate ipso facto upon the happening of the specified event or contingency. In other words, the easement comes to an end without the necessity of any reclaiming action by the owner of the subservient estate.).

Add:

Skonieczny v. City of Eastlake, 2002 Ohio 5152 (Ohio App., Sept. 27, 2002) (right of entry was assignable).

Add:

Willhite v. Masters, 965 S.W.2d 406 (Mo. App. 1998) (Defeasible fee simple estate, gives rise to "right of entry" for a condition broken, and necessarily requires affirmative act of forfeiture because such condition operates upon an estate already created and vested, and renders it liable to be defeated; it is neither assignable, devisable or alienable, although it is descendible to heirs of grantor.).

Add:

Willhite v. Masters, 965 S.W.2d 406 (Mo. App. 1998) (Defeasible fee simple estate, gives rise to "right of entry" for a condition broken, and necessarily requires affirmative act of forfeiture because such condition operates upon an estate already created and vested, and renders it liable to be defeated; it is neither assignable, devisable or alienable, although it is descendible to heirs of grantor.).

Add:

Leelanau Trails Ass'n v. Flohe, 2000 Mich. App. LEXIS 2692 (No. 210544, Feb. 8, 2000) (A grantors' attempted conveyance of a possibility of reverter or right of entry nullifies the possibility of reversion or entry. The right to the reversion or entry cannot be conveyed before the grantee has breached the condition and any attempt to transfer the interest inter vivos nullifies the condition, even for the grantor. At common law only the grantor's transfer to his heirs at death could pass on a right of reversion.).

§ 25.06(c) Descendibility of Rights of Entry. [Go To Main]

§ 25.06(c)(1) Some Rights of Entry Are Descendible.

Add:

Willhite v. Masters, 965 S.W.2d 406 (Mo. App. 1998) (Defeasible fee simple estate, gives rise to "right of entry" for a condition broken, and necessarily requires affirmative act of forfeiture because such condition operates upon an estate already created and vested, and renders it liable to be defeated; it is neither assignable, devisable or alienable, although it is descendible to heirs of grantor.).

§ 25.06(c)(2) Some Rights of Entry Are Not Descendible.

Add:

Top of the Town, LLC v. Somers Sportsmen's Assoc., 797 A.2d 18 (Conn. 2002) (General Statutes §§ 52-575(a) provides in relevant part: "No person shall make entry into any lands or tenements but within fifteen years next after his right or title to the same first descends or accrues or within fifteen years next after such person or persons have been ousted from possession of such land or tenements; and every person, not entering as aforesaid, and his heirs, shall be utterly disabled to make such entry afterwards; and no such entry shall be sufficient, unless within such fifteen-year period, any person or persons claiming ownership of such lands and tenements and the right of entry and possession thereof against any person or persons who are in actual possession of such lands or tenements, gives notice in writing to the person or persons in possession of the land or tenements of the intention of the person giving the notice to dispute the right of possession of the person or persons to whom such notice is given and to prevent the other party or parties from acquiring such right, and the notice being served and recorded as provided in sections 47-39 and 47-40 shall be deemed an interruption of the use and possession and shall prevent the acquiring of a right thereto by the continuance of the use and possession for any length of time thereafter, provided an action is commenced thereupon within one year next after the recording of such notice. The limitation herein prescribed shall not begin to run against the right of entry of any owner of a remainder or reversionary interest in real estate, which is in the adverse possession of another, until the expiration of the particular estate preceding such remainder or reversionary estate.").

§ 25.06(d)(2) Enforcement by Trustees or Beneficiaries.

Add:

Reinarts v. County of Brown, 2003 Minn. App. LEXIS 281 (No. CO-02-1156, Mar. 11, 2003) (A trust instrument may convey the right of entry to trustees.).

§ 25.06(d)(4) No Right of Enforcement in Stranger to Title.

Add:

New Covenant Worship Center v. Wright, 601 S.E.2d 245 (N.C. App. 2004) (Because neither the grantor nor his heirs had at any time either re-entered the property or brought an action to terminate the continuing estate, the defendants, a third party, could not perform this task on the heirs' behalf.).

Add:

Pratt Inv. Co. v. Kennedy, 636 N.W.2d 844 (Minn. App. 2001) (Boundary line may be established by practical location in one of three ways: (1) the location relied upon must have been acquiesced in for a sufficient length of time to bar a right of entry under the statute of limitations, (2) the line must have been expressly agreed upon between the parties claiming the land on both sides thereof and afterward acquiesced in, or (3) the parties whose rights are to be barred must have silently looked on, with knowledge of the true line, while the other party encroached upon it or subjected himself to expense in regard to the land which he would not have had the line been in dispute.).

Add:

Lone Star Steakhouse & Saloon of Ohio, Inc. v. Quaranta, 2003 Ohio 3287, 2003 Ohio App. LEXIS 2957 (2002) (Proof existed that parties intended covenant restricting land usage to run with the land, where deeds indicated that restrictions were for benefit of purchasers, his heirs, and his assigns, original contract contained language that restrictions were intended to run with the land, and vendor and purchasers sought to release covenant, which would not have been necessary if covenant was personal in nature.).

§ 25.06(d)(5) Release of Right to Enforcement.

Add:

Arvada Urban Renewal Auth. v. Columbine Prof'l Plaza Ass'n, Inc., 85 P.3d 1066 (Colo. 2004) . (The right of re-entry for condition broken is terminated as to the property because the condition recited in the deeds has been fulfilled as to the property, or the grantor renounces right of re-entry and assigns all right to their successors in interest.).

Add:

Leelanau Trails Ass'n v. Flohe, 2000 Mich. App. LEXIS 2692 (No. 210544, Feb. 8, 2000) (A grantors' attempted conveyance of a possibility of reverter or right of entry nullifies the possibility of reversion or entry. The right to the reversion or entry cannot be conveyed before the grantee has breached the condition and any attempt to transfer the interest inter vivos nullifies the condition, even for the grantor. At common law only the grantor's transfer to his heirs at death could pass on a right of reversion.).

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Supp. to § 25.07 How Rights of Enforcement Are Exercised.

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§ 25.07(a) By Entry or Claim. [Go To Main]

§ 25.07(a)(1) What Constitutes Entry.

Add:

New Covenant Worship Center v. Wright, 601 S.E.2d 245 (N.C. App. 2004) (A conveyance of the later 1985 deed did not constitute a "re-entry" for purposes of terminating a fee simple subject to condition subsequent created by the 1967 deed.).

Add:

J & M Land Co. v. First Union Nat. Bank, 766 A.2d 1110 (N.J. 2001) (Under that right of entry, "the lawful owner might, at all times, restore himself by entering upon the wrongdoer, in a peaceable manner, and turning him out, [but if he did not succeed, he] must have recourse to his [ejectment] action at law.").

§ 25.07(a)(2) When Notice and Demand Are Required.

Add:

See also Pratt Inv. Co. v. Kennedy, 636 N.W.2d 844 (Minn. App. 2001) (to acquire land by practical location of

boundaries by acquiescence, a person must show by evidence that is clear, positive, and unequivocal that the alleged property line was "acquiesced in for a sufficient length of time to bar a right of entry under the statute of limitations.")

§ 25.07(d) Entry Before Breach. [Go To Main]

Add:

Brown v. Christian, 576 S.E.2d 894 (Ga. 2003) (A plaintiff seeking ejectment must recover on the strength of his own title; he may not rely on the weakness of the defendant's title. A plaintiff in an ejectment action, in order to recover, must establish that at the time of filing his action, he possesses legal title or its equivalent, as well as the right of entry.).

§ 25.07(e) Miscellaneous Rules Governing Entry. [Go To Main]

Add:

Utah Gospel Mission v. Salt Lake City Corp., 316 F. Supp. 2d 1201 (D. Utah 2004) (A right of entry reserved by the city applies only to the city's utility easements, view corridor and fencing limitations, and does not give the public the right to pass across the property.).

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Supp. to § 25.08 Bibliography.

[Go To Main]

Books

Bergin, Thomas F. and Paul G. Haskell, *Preface to Estates in Land and Future Interests* 59-62 (2d ed. 1984).

Articles.

Add:

French, Susan F. "Highlights of the New Restatement (Third) of Property: Servitudes." Real Prop. Prob. & Tr. J. Vol. 35 (Summer 2000) 225.

Whelan, Thomas M. "Enforcement of Commercial Leases: Evictions and Dealing With a Tenant's Personal Property." Tex. Wesleyan L. Rev. Vol. 3 (1997) 283.

Add to Annotations:

Annotation, Pre-emptive Rights to Realty as Violation of Rule Against Perpetuities or Rule Concerning Restraints on Alienation, *40 A.L.R.2d 920.*

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CHAPTER 26 EXECUTORY INTERESTS

3-26 Thompson on Real Property, Thomas Editions 26.syn

AUTHOR: Professor David A. Thomas This chapter is based in part on Ch. 31, George W. Thompson, Commentaries on the Modern Law of Real Property (John S. Grimes ed. 1979), which made a significant contribution to preserving the American Common Law on executory interests. J. Reuben Clark Law School Brigham Young University

§ 26.syn Synopsis to Chapter 26: EXECUTORY INTERESTS

§ 26.01 Introduction to the Chapter

§ 26.02 General Definitions of Executory Interests

§ 26.03 History of Executory Interests

§ 26.04 Executory Interests in Derogation of the Common Law

§ 26.05 Executory Interests Freed of Some Common-Law Limitations

§ 26.06 Executory Interests and Executory Devises Compared

§ 26.07 Executory Interests and Remainders Compared

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§ 26.09 A Fee Limited on a Fee By Way of Executory Devise

§ 26.10 Indestructibility of Executory Interests

§ 26.11 Alienability, Descendibility, and Transmissibility of Executory Interests

§ 26.12 Executory Interests After Sale

§ 26.13 Executory Interests and Waste

§ 26.14 Executory Interests and the Rule Against Perpetuities

§ 26.14(a) Failure of Issue

§ 26.14(b) Severance of Void Limitations

§ 26.15 Bibliography

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J. Reuben Clark Law School
Brigham Young University

FOOTNOTES:
(n1)Footnote *.
This chapter is based in part on Ch. 31, George W. Thompson, Commentaries on the Modern Law of Real Property (John S. Grimes ed. 1979), which made a significant contribution to preserving the American Common Law on executory interests.

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CHAPTER 26 EXECUTORY INTERESTS

3-26 Thompson on Real Property, Thomas Editions § 26.01

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§ 26.01 Introduction to the Chapter

This chapter reviews the American law of executory interests, which are often thought to be a part of the ancient common law, but are in reality interests that departed from some common-law principles. Executory interests are distinguished from other related property interests, and certain incidents of executory interests are discussed. The chapter covers in considerable detail the issues regarding the rule against perpetuities that impact on executory interests.

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CHAPTER 26 EXECUTORY INTERESTS

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§ 26.02 General Definitions of Executory Interests

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The term "executory interest," or "conditional limitation," is applied to any future interest not retained by the creator of the instrument and other than a remainder. An executory interest is any future interest created by an executory limitation and includes "all future interests, other than remainders." n1 Thus, where preceding an estate in fee, a limitation over on a prescribed condition which defeats the prior estate is an executory interest and not a remainder. n2

It has been said that a limitation over after a determinable fee is not a future interest, but an actually existent estate deprived of the right of immediate possession. n3

FOOTNOTES:

(n1)Footnote 1. *See* Restatement of The Law of Property, § 158.

> An executory devise is a limitation by will of a future estate or interest in land which cannot, consistently with the rules of law, take effect as a remainder, for it is well settled (and, indeed, has been remarked as a rule without an exception) that where a devise is capable according to the state of the objects at the death of the testator, of taking effect as a remainder, it shall not be construed to be an executory devise... . A remainder may be described to be an estate which is so limited as to be immediately expectant on the natural determination of a particular estate of freehold created by the same will, ... or [if an estate] being so preceded, is limited to take effect before or after, and not at, the expiration of such prior estate of freehold, it is an executory devise.

2 Thomas Jarman, A Treatise on Wills, 483 (8th ed. 1951).

(n2)Footnote 2. *St. John v. Dann, 34 A. 110 (Conn. 1895); Dean v. Crews, 81 So. 479 (Fla. 1919); Pitzer v. Morrison, 111 N.E. 1017 (Ill. 1916); Barrett v. Percival, 246 S.W. 143 (Ky. 1922); In re Gohn's Estate, 188 A. 144 (Pa.*

1936).

If a gift be to A and his heirs until C returns from Rome, then to B in fee, the limitation over is not good as a remainder, because the precedent estate, being an estate in fee, is abridged and brought to an abrupt termination by the gift over on a precedent contingency. Church in *Brattle Square v. Grant, 69 Mass. (3 Gray) 142* ((1855); *Hatfield v. Sneden, 54 N.Y. 280 (1873).* Estate in fee subject to a gift over in favor of a third party is an executory interest. *Chaney v. Gray, 898 S.W.2d 577 (Mo. App. 1995).*

(n3)Footnote 3. *Mountain City Missionary Baptist Church, 249 S.W.2d 875 (Tenn. 1952).*

Holding valid a limitation over after a fee. *Slowey v. Jenkins, 408 S.W.2d 452 (Ky. 1966).*

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CHAPTER 26 EXECUTORY INTERESTS

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§ 26.03 History of Executory Interests

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Somewhere around the middle of the thirteenth century there began to develop in English law the peculiar property concept known as the use. It is possible that it originated from the fertile minds of the ecclesiastical lawyers to avoid the consequences of the Statute De Religiosis n4 and other "mortmain" statutes n5 which prevented gifts of land to church organizations without royal consent. The scheme of the "use" placed n6 the legal title in one but the beneficial interest in the property in another. The law courts could not recognize anything but the legal title but the growing power of the royal authority embodied in the chancellor of the Exchequer and the developing courts of equity could act in pursuance against the holder of the legal title to force him to do justice to the holder of the beneficial interest for whom the property rights had been established.

Uses could arise in one of four ways. (1) A and A's heirs would enfeoff B and B's heirs for the use of C and C's heirs. This was a feoffment to uses. B, the feoffee held the legal title, C, the cestui que use, the equitable title. (2) A would agree to sell the property to B, B would pay the present consideration therefore, but A would not enfeoff B. A having thus bargained and sold to B but still retaining the legal title, B being entitled in justice to be enfeoffed of the legal title became a cestui que use. A had thus "bargained and sold" to the use of B. The equity courts would treat B as the equitable owner and the whole transaction would be a "bargain and sale" to uses. (3) A would enfeoff B and B's heirs without any consideration being paid or being payable by B. Equity treated consideration as the basis of the transmission of the equitable title. Therefore, since no consideration had passed from B to A the use "leaped back" into A and A had a "resulting use." (4) A out of the "love and affection" he felt for B, a close relation, would "covenant to stand seized" for the use of B. The blood relationship and love and affection was sufficient to raise a use in B.

The "use" became of vital importance in the English property law in the two hundred years following its invention, principally because it avoided much of the complications that arose out of the complexities of concepts of seisin. "Livery" or transfer of seisin required the presence of both feoffor and feoffee at the site or near thereto. A "use" could be transferred without any formalities of any kind not even writing being required.

The "cestui que use" avoided many of the onerous feudal dues and reliefs such as wardship. Attainder for treason could also be avoided by a secret use. Married women could hold property by way of use without their husbands being entitled to the rents, issues and profits. The doctrine of destructibility of contingent remainders could be avoided if the contingent remainderman held by way of use. And it became possible to create future interests by way of use that could not exist at common law.

The common-law requirements of seisin that prohibited a limitation over to a stranger after a limitation in fee and which prohibited a fee to arise in futuro n7 did not prevent the creation of a use to a third party after a use in fee or a use to arise some time in the future. A use could be created to shift over to a third person after the termination of a use, or a use which might itself arise to abridge a preceding fee, no livery of seisin being necessary to place a use in possession in equity.

Thus arose the shifting use and the springing use. So efficient was the use as a tool of the property lawyer that by the early part of the 16th century virtually all of the land of England was held to uses. And thus, so successfully had the tenants become in avoiding their feudal duties that Parliament passed in 1536 the "Statute of Uses" n8 in an attempt to restore the lord's rights.

The Statute of Uses, though a comparatively late development in the property law has been generally recognized as being part of the common law today. n9 The Statute of Uses had the effect of putting the legal title in the cestui que use so that, in a feoffment to uses where A enfeoffed B and B's heirs for the use of C and C's heirs after the statute the legal title passed through B to C, who thus had both the legal title and the use. n10 But the purpose and the effect of the statute was not to destroy the scheme of the use but merely to make the cestui que use liable to the lord and to the king for the feudal services and for treason. Many of the side effects of the use remained after the Statute of Uses.

Among the residuals of the use even after the statute were springing and shifting uses. By creating a use which the statute converted into a legal estate, it was possible to have as legal interests in land the springing and shifting use in situations where the common-law contingent remainder could not arise. So an interest in land could be limited over after a fee or to defeat a fee by way of a springing or shifting use. n11 As thus created by the statute, a "shifting use" is an interest limited to take effect in derogation of some other estate, and is limited by the deed creating it or is authorized to be created by a designated person. Thus in a deed to A and A's heirs, to the use of C and C's heirs until B shall marry F, B's estate is not good by way of remainder, for it mounts a fee on a fee, but it is an executory use, and because the interest shifts, on B's marriage, from C to B. Such uses were generally in England found in marriage settlements, where the first use was always to the owner in fee until the marriage and then to other uses. n12 Where the fee in the first taker created by a deed is made determinable, as upon the happening of a valid condition subsequent, followed by a limitation over of the fee or use to another upon the happening of the prescribed event, the fee or use shifts from the first to the second taker, whereby the deed is a conveyance under the Statute of Uses and is a clear case of shifting use. n13 Thus, where a fee is conveyed to the grantee with a subsequent provision in the deed, that, on the happening of a contingent event, the estate may be divested from such grantee and vested in a third person, whether or not such person be ascertained or in existence at the time of the execution of the deed, such a limitation is regarded as taking effect as a shifting use. n14

In the modern bargain and sale deed operating under the statute of uses, a conditional limitation may be created after a fee. n15 Under deeds operating by virtue of the statute of uses executory limitations can arise without the necessity of making a formal conveyance to uses. In some states, however, the common-law method of raising a use still has legal aftermath. n16

An executory gift cuts short a prior interest before its normal termination and usually shifts such interest to a third person. n17

A use is termed "springing" when it limits a freehold estate to commence in futuro. The estate thus limited springs up and takes effect on a future day, such as where a conveyance is made to A and A's heirs to the use of B and B's heirs after the marriage of B with F. Now the limitation to B is not good as a remainder, but is an executory use, springing up upon the marriage of B with F. There is no estate going before it, but it arises solely from the seisin of the grantor. In this respect it is distinguished from a shifting use, which is always in derogation of a preceding estate. n18 Shifting and springing uses are not executed until the ascertainment of the beneficiaries. n19 The grantor has a use in fee until the springing use takes effect. So that, in reality the springing use operates on the use in the grantor in the same manner that a shifting use does upon the preceding estate. n20 Originally a use was a purely equitable interest and might be raised after a limitation in fee, or it might be created in futuro without any preceding limitation in fee; or the order of priority might be changed by shifting uses or by powers; or a power of revocation might be reserved to the grantor or a stranger to recall and change the uses. n21 After the Statute of Wills, n22 limitations could arise by way of devise which corresponded to springing and shifting uses and which are generally termed executory devises. And springing and shifting uses and executory devises all are called conditional limitations.

COMPUTER-ASSISTED RESEARCH

LEXIS: executory w/2 interest! or gift! w/15 spring! or shift!
or
estate! w/5 in futuro

FOOTNOTES:
(n1)Footnote 4. 13 Edw., ch. 33.

(n2)Footnote 5. Magna Carta, cap. 43, ed. 1217.

(n3)Footnote 6. For the story of the "use" as an aid to charitable trusts today, *see* Fesch, *Cy Pres Doctrine In the United States* (1950), 4 and 3 Austin W. Scott, The Law of Trusts, 348.2 (2d ed. 1966).

(n4)Footnote 7. Limitations over after conditional fees, considered by Bracton to be capable of becoming life estates, were recognized by 2 Bracton, ch. 16, f. 17.

(n5)Footnote 8. *Statute of Uses, 27 Hen. 8,* ch. 10.

> (1) Whereby the common laws of this realm, lands, tenements and hereditaments be not devisable by testament, (2) nor ought to be transferred from one to another, but by solemn livery and seisin, matter of record, writing sufficient made bona fide, without covin or fraud; (3) yet nevertheless divers and sundry imaginations, subtle inventions and practices have been used, whereby the hereditaments of this realm have been conveyed from one to another by fraudulent feoffments, fines, recoveries and other assurances craftily made to secret uses, intents and trusts; (4) and also by wills and testaments, sometime made by nude parolx and words, sometime by signs and tokens, and sometime by writing, and for the most part made by such persons as be visited with sickness, in their extreme agonies and pains, or at such time as they have scantly had any good memory or remembrance; (5) at which times they being provoked by greedy and covetous persons lying in wait about them, do many times dispose indiscreetly and unadvisedly their lands and inheritances; (6) by reason whereof, and by occasion of which fraudulent feoffments, fines, recoveries and other like assurances to uses, confidences and trusts, divers and many heirs have been unjustly at sundry times disherited, the lords have lost their wards, marriages, reliefs, harriots, escheats, aids pur fair fits chivalier, & pur file marier, (7) and scantly any person can be certainly assured of any lands by them purchased, nor know surely against whom they shall use their actions or executions for their rights, titles, and duties; (8) also men married have lost their tenancies by the curtesy, (9) women their dowers, (10) manifest perjuries by trial of such secret wills and uses have been committed; (11) the King's highness hath lost the profits and advantages of the lands of persons

attainted, (12) and of the lands craftily put in feoffments to the uses of aliens born, (13) and also the profits of waste for a year and a day of lands of felons attainted, (14) and the lords their escheats thereof; (15) and many other inconveniencies have happened, and daily do increase among the King's subjects, to their great trouble and inquietness, and to the utter subversion of the ancient common laws of this realm; (16) for the extirping and extinguishment of all such subtle practised feoffments, fines, recoveries, abuses and errors heretofore used and accustomed in this realm, to the subversion of the good and ancient laws of the same, and to the intent that the King's highness, or any other his subjects of this realm, shall not in any wise hereafter by any means or inventions be deceived, damaged or hurt, by reason of such trusts, uses or confidences: (17) it may please the King's most royal majesty, that it may be enacted by his Highness, by the assent of the lords spiritual and temporal, and the commons, in this present parliament assembled, and by the authority of the same, in manner and form following; that is to say, that where any person or persons stand or be seised, or at any time hereafter shall happen to be seised, of and in any honours, castles, manor, lands, tenements, rents, services, reversions, remainders or other hereditaments, to the use, confidence or trust of any other person or persons, or of any body politick, by reason of any bargain, sale, feoffment, fine, recovery, covenant, contract, agreement, will or otherwise, by any manner means whatsoever it be; that in every such case, all and every such person and persons, and bodies politick, that have or hereafter shall have any such use, confidence or trust, in fee-simple, fee-tail, for term of life or for years, or otherwise, or any use, confidence or trust, in remainder or reverter, shall from henceforth stand and be seised, deemed and adjudged in lawful seisin, estate and possession of and in the same honours, castles, manors, lands, tenements, rents, services, reversions, remainders and hereditaments, with their appurtenances, to all intents, constructions and purposes in the law, of and in such like estates as they had or shall have in use, trust or confidence of or in the same; (19) and that the estate, title, right and possession that was in such person or persons that were, or hereafter shall be seised of any lands, tenements, or hereditaments, to the use, confidence or trust of any such person or persons, or of any body politick, be from henceforth clearly deemed and adjudged to be in him or them that have, or hereafter shall have, such use, confidence or trust, after such quality, manner, form and condition as they had before, in or to the use, confidence or trust that was in them.

See Percy Bordwell, *The Conversion of the Use Into a Legal Interest, 21 La. L. Rev. 1 (1935).*

(n6)Footnote 9. *Marshall v. Fisk, 6 Mass. 24 (1809); French v. French, 3 N.H. 234 (1825).*

Contra, Strout v. Burgess, 68 A.2d 241 (Me. 1949) (not applicable to personalty); *Farmers & Merchants Ins. Co. v. Jensen, 78 N.W. 1054 (Neb. 1899); Hastings v. Columbus, 42 Ohio St. 585 (1885).*

(n7)Footnote 10. *Wyman v. Brown, 50 Me. 139 (1863).*

(n8)Footnote 11. *Van Horne v. Campbell, 3 N.E. 316 (N.Y. 1885).*

(n9)Footnote 12. Church in *Brattle Square v. Grant, 69 Mass. 142 (3 Gray 1855); Battey v. Hopkins, 6 R.I. 443 (1860); Fogarty v. Stack, 8 S.W. 846 (Tenn. 1888). See* Restatement, Property, § 25, cmt. e.

(n10)Footnote 13. *Abbott v. Abbott, 59 N.E. 958 (Ill. 1901); Stoller v. Doyle, 100 N.E. 959 (Ill. 1913); Simonds v. Simonds, 85 N.E. 860 (Mass. 1908).*

An executory devise is given effect as a shifting or springing use. *McWilliams v. Havely, 283 S.W. 103 (Ky. 1926).*

(n11)Footnote 14. *Stoller v. Doyle, 100 N.E. 959 (Ill. 1913); Lockridge v. McCommon, 38 S.W. 33 (Tex. 1896); Ocheltree v. McClung, 7 W. Va. 232 (1874).*

Limitation to A for life then to B and C but if either died without bodily issue, then to the survivor, created life estate, remainders vested subject to divesting and executory devises which were capable of release but not alienation. *Towns v. Walters, 168 S.E.2d 144 (Ga. 1969).*

(n12)Footnote 15. *Stoller v. Doyle, 100 N.E. 959 (Ill. 1913).* Where the fee in the first taker created by a deed is made determinable, as upon the happening of a valid condition subsequent, followed by a limitation over of the fee or use to another upon the happening of the prescribed event, the fee or use shifts from the first to the second taker, whereby the deed is a conveyance under the statute of uses, as all American deeds are, and is a clear case of shifting use. *Abbott v. Abbott, 59 N.E. 958 (Ill. 1901).*

(n13)Footnote 16. *Woodard v. Clark, 72 S.E.2d 433 (N.C. 1952)* (legal future interests in personalty can be created by will but not by deed).

So in South Carolina a limitation may be grafted upon a conditional fee by way of executory devise if not too remote but not upon a fee conditional estate passing by deed. *Selman v. Robertson, 24 S.E. 187 (S.C. 1896); Williams v. Gause, 65 S.E. 241 (S.C. 1909); Antley v. Antley, 128 S.E. 31 (S.C. 1925).*

(n14)Footnote 17. *Beverlin v. First Nat'l Bank, 98 P.2d 200 (Kan. 1940).* Reversion to heirs of grantors on breach of condition created an executory limitation to heirs. *Standard Knitting Mills, Inc. v. Allen, 424 S.W.2d 796 (Tenn. 1967). See also Commerce Union Bank v. Warren County, 707 S.W.2d 854 (Tenn. 1986).*

(n15)Footnote 18. *Smith v. Brisson, 90 N.C. 284 (1883).*

A gift to city in a will as a site for a hospital provided the city accepted the devise within a year of the testatrix's death, was a springing executory interest which became vested in possession and in fee simple when the city accepted in time. *Southern Ill. Conf. of Methodist Church v. City of Edwardsville, 342 N.E.2d 315 (Ill. App. 1975).*

(n16)Footnote 19. *See Bibb v. Bibb, 86 So. 376 (Ala. 1920).*

(n17)Footnote 20. *Shapleigh v. Pilsbury, 1 Me. 271 (1821).*

(n18)Footnote 21. *Ricker v. Brown, 67 N.E. 353 (Mass. 1903). See* Percy Bordwell, *The Conversion of the Use Into a Legal Interest, 21 Ia. L. Rev. 1 (1935).*

(n19)Footnote 22. *32 Hen. 8,* ch. 1, amended 34 & *35 Hen. 8,* ch. 4.

A contingent remainder cannot defeat a preceding estate. Littleton, Tenures, §§ 721-723, 347.

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CHAPTER 26 EXECUTORY INTERESTS

3-26 Thompson on Real Property, Thomas Editions § 26.04

AUTHOR: Professor David A. Thomas This chapter is based in part on Ch. 31, George W. Thompson, Commentaries on the Modern Law of Real Property (John S. Grimes ed. 1979), which made a significant contribution to preserving the American Common Law on executory interests. J. Reuben Clark Law School Brigham Young University

§ 26.04 Executory Interests in Derogation of the Common Law

[Go To Supp]

As executory interests allow modes of limitation contrary to the common law, they are in derogation of it, and for this reason no limitation in a deed or will shall ever be considered an executory use or an executory devise, if it can possibly be good at common law by way of remainder. n23 These executory estates, being in derogation of the common law, are construed strictly. The law favors the old feudal remainder and treats every limitation by way of use or by way of devise as a remainder, whenever as a remainder it would be well limited at common law. n24 Among the rules governing remainders is one which forbids an estate to be limited over to another after a fee already granted. In such case there can be no such thing as defeating the fee already granted and transferring it to another by way of remainder because a remainder implies something left, which cannot be the case after the whole has been disposed of. While this cannot be done by way of remainder, it may be done by an executory devise which, according to the definition above, allows a departure from the rules of law governing remainders. n25 If the limitation by will does not depart from those rules prescribed for contingent remainders, it is, in that case, a contingent remainder and not an executory devise. n26

The rule that no limitation can be construed as an executory devise if it might be construed as a remainder does not apply where the gift is a trust. n27 A fee may be defeated by an executory limitation. n28 A conditional limitation may be engrafted on and supported by a fee making the latter dependent upon a contingency, which upon its occurrence, divests the previous estate and by termination vests a fee in the second taker. n29 But the courts have been reluctant to permit a fee once given to be cut off by an executory devise unless the intent is clear. n30 Under one line of authority, if a fee is once given a limitation over is void as repugnant. n31 But under other authorities the executory limitation may cut down the preceding fee. n32 A devise to one but upon the happening of a certain contingency to go immediately to another creates a base or determinable fee subject to an executory devise. n33

Nor can a remainder be created to follow a determinable fee, but such determinable fee is occasionally followed by an executory limitation shifting the estate to a person other than the immediate devisee or grantee upon the happening of the event terminating the defeasible estate. n34

COMPUTER-ASSISTED RESEARCH

LEXIS: (executory w/2 interest! or estate! or limit!) w/15 remainder w/2 vested or contingent or executory w/2 use or devise

FOOTNOTES:

(n1)Footnote 23. *Abbott v. Essex, 59 U.S. 202 (18 How. 1855); Doe ex dem. Poor v. Considine, 73 U.S. 458 (6 Wall 1867); Wright v. Tuscaloosa, 182 So. 72 (Ala. 1938); Bruce v. Bissell, 22 N.E. 4 (Ind. 1889); Lewis v. Payne, 77 A. 321 (Md. 1910); Hawley v. Northampton, 8 Mass. 3 (1811); Simonds v. Simonds, 85 N.E. 860 (Mass. 1908); Old Colony Trust Co. v. Brown, 191 N.E. 358 (Mass. 1934); Burleigh v. Clough, 52 N.H. 267 (1872); Watson v. Smith, 14 S.E. 640 (N.C. 1892); Love v. Lindstedt, 147 P. 935 (Or. 1915); Manderson v. Lukens, 23 Pa. 31 (1854); McCreary v. Coggeshall, 53 S.E. 978 (S.C. 1906); Pearson v. Easterling, 92 S.E. 619 (S.C. 1917).*

See Note, *Failure of Executory Interests and the Interstate Devaluation of Possibilities of Reverter and Rights of Entry, 37 Va. L. Rev. 117 (1951).*

(n2)Footnote 24. *Purefoy v. Rogers, 2 Wms. Saund. 380, 85 Eng. Rep. 1181 (1845).*

(n3)Footnote 25. *Mangum v. Piester, 16 S.C. 316 (1881).*

(n4)Footnote 26. 4 James Kent, Commentaries on American Law 265 (14th ed. 1896).

> Much of the confusion upon the question whether the language of a will creates an executory devise or contingent remainder has arisen from the failure to keep clearly in mind the marked and well-defined difference in the characteristics of the two estates. If the words of the will out of which the contingency arises are relied upon for purposes of defeating an estate which has already become vested, then this can only be done by construing them as an executory devise. But if the question is which of two estates shall become vested, then such estates will be construed as remainders, alternative or substitutional in their nature; and such remainders are always contingent.

Rutledge v. Fishburne, 44 S.E. 564 (S.C. 1903), quoted in Pearson v. Easterling, 92 S.E. 619 (S.C. 1917).

(n5)Footnote 27. *In re Koellhoffer's Estate, 25 A.2d 638 (N.J. 1942).*

(n6)Footnote 28. *Lantz v. Pence, 142 N.E.2d 456 (Ind. App. 1957).*

(n7)Footnote 29. Bryan v. Spires, 3 Brewst 580 (Pa. 1869).

(n8)Footnote 30. *Wallace v. R. E. Stone Co., 76 F.2d 269 (3d Cir. 1935); National Bank v. Ireland, 162 A. 54 (Del. 1933)* (clearly and unequivocally manifest); *Carroll v. Carroll, 58 S.W.2d 670 (Ky. 1933); Abbott v. Boston Safe Deposit & Trust Co., 154 N.E. 861 (Mass. 1927); In re Baker's Estate, 263 N.Y.S. 322 (1933); In re Heck's Estate, 32 A. 413 (Pa. 1895)* (must be unequivocally expressed); *Cross v. Miller, 138 A. 822 (Pa. 1927).*

(n9)Footnote 31. *Todd v. Stewart, 202 N.W. 844 (Iowa 1925); Stahl v. Weston, 106 N.W. 206 (Iowa 1906); Moran v. Moran, 106 N.W. 206 (Mich. 1906); Gannon v. Albright, 81 S.W. 1162 (Mo. 1904); Jackson ex dem. Townsend v. Bull, 10 Johns. 148 (N.Y. 1813).*

(n10)Footnote 32. *Mitchell v. Morse, 1 A. 141 (Me. 1885); Whiting v. Whiting, 44 N.W. 1030 (Minn. 1890); Chesnut v. Chesnut, 151 A. 339 (Pa. 1830); In re Byrne's Estate, 181 A. 500 (Pa. 1935); Booker v. Booker, 24 Tenn. (5 Humph.) 505 (1844).*

(n11)Footnote 33. *Carr v. Hermann, 158 N.E.2d 770 (Ill. 1959)* (this executory devise may be subject to a double contingency).

(n12)Footnote 34. *Guess v. Morgan, 26 S.E.2d 424 (Ga. 1943).*

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CHAPTER 26 EXECUTORY INTERESTS

3-26 Thompson on Real Property, Thomas Editions § 26.05

AUTHOR: Professor David A. Thomas This chapter is based in part on Ch. 31, George W. Thompson, Commentaries on the Modern Law of Real Property (John S. Grimes ed. 1979), which made a significant contribution to preserving the American Common Law on executory interests. J. Reuben Clark Law School Brigham Young University

§ 26.05 Executory Interests Freed of Some Common-Law Limitations

Since neither a use nor an executory devise arose by livery of seisin and thus did not depend on seisin for their existence, many of the infirmities of legal remainders did not attach to such executory limitations. No technical, indefinite or uncertain clause in one paragraph should be construed to defeat or lessen the plain devise made in an earlier clause of the will. n35 In cases where the remainderman dies before the termination of the life estate, the executory devisee takes the estate free from charges created by the remainderman. n36 At common law no remainder can be limited after a fee simple. n37 Another form of the rule is that there can be "no fee on a fee," or, "a fee cannot be mounted on a fee." n38 An executory devise, unlike a remainder, needs no particular estate to support it. n39

FOOTNOTES:

(n1)Footnote 35. The very reason of the institution of an executory devise being for the purpose of carrying out the wish of a testator, it should not be transformed into an instrument serving the purpose to defeat such will. *Imbrie v. Hartrampf, 198 P. 521 (Or. 1921). See* Restatement of The Law of Property, § 46, cmt. j.

Ohio permits "disentailment sales" to clear future interests. Ohio Rev. Code Ann. § 5303.21. R.T. Boehm, *Taxing Disentailment Sales, 21 Case W. Res. L. Rev. 72 (1969).*

(n2)Footnote 36. *Weberpals v. Jenny, 133 N.E. 62 (Ill. 1921).*

(n3)Footnote 37. *Ramseur v. Belding, 175 S.W.2d 977 (Ark. 1943); Slater v. Akron Exch. State Bank, 49 N.E.2d 344 (Ind. 1943); Culver v. Hess, 14 N.W.2d 692 (Iowa 1944);* Church in *Brattle Square v. Grant, 69 Mass. 142 (3 Gray 1855); Van Horne v. Campbell, 3 N.E. 316 (N.Y. 1885); Industrial Trust Co. v. Pendleton, 40 A.2d 849 (R.I. 1945).*

(n4)Footnote 38. The rule was founded upon the postulate that a conveyance of a fee was a conveyance of the whole estate, and that nothing was left upon which the limitation over could operate. Upon the assumption that a fee given in the first instance carried the entire and absolute interest in the land to the grantee, the common-law rule that there could be no further limitation was logical and consistent, because where the whole is given there can be nothing beyond that left to give. But under the statute of uses, and indeed before they were legalized by that statute, a species of

limitations known as shifting or springing uses had been recognized, which permitted ulterior estates to be created to arise upon the defeasance of prior estates in the same property, contrary to the strict rules of the common law. The courts after the passage of the *Statute of Wills (32 Hen. 8),* following the analogies furnished in conveyances to uses, and in support of the intention of the testator, gradually came to recognize the validity of limitations not permitted in conveyances at common law. *Van Horne v. Campbell, 3 N.E. 316 (N.Y. 1885).*

(n5)Footnote 39. *Deets v. Riggins, 6 A.2d 239 (Md. 1939).*

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CHAPTER 26 EXECUTORY INTERESTS

3-26 Thompson on Real Property, Thomas Editions § 26.06

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§ 26.06 Executory Interests and Executory Devises Compared

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Executory estates are of two classes: first, executory uses; and second, executory devises. An executory use is a limitation valid as a use but void at common law as a remainder. n40 It may be a springing use, such as is limited to take effect at a future time independently of and without being supported by any prior estate or a shifting use, as an interest limited so as to arise in derogation of a preceding estate. An executory devise is a limitation valid in a will, but void at common law as a remainder. Such estates or interests are not dependent upon any prior estate, but come into existence, when their time arrives, of their own inherent strength. n41 Such estates or interests may follow a fee and be contingent on an event which is to determine the fee. n42 Thus where a fee simple is devised which is to determine upon some future event and the entire estate is thereupon to go over to another, the gift has been given effect as an executory devise. n43 No estate vests at the death of the testator, but only on some future contingency. n44

An executory interest could not be created directly by deed at common law, but could be created only by executory devises in wills or by conveyances to uses by creating shifting and springing uses in deeds. n45 The original purpose of executory devises was to carry out the will of the testator and give effect to provisions which at common law could not operate as contingent remainders. n46 It was intended to remedy difficulties surrounding conveyances at common law which forbade a limitation over after a fee already granted, the creation of a future freehold or the granting of a fee on a fee, all of which can be done by an executory devise. n47

An executory devise does not vest at the death of the testator, but only on the happening of some future contingency. n48 It is such a disposition of realty by will that no estate vests at the death of the testator but only on the happening of a future contingency, or such a devise made to a person, whether in being or not, to take effect at a designated period after the death of the testator or at the death of a stranger. n49 If the testator's dominant intent was to give the whole estate in the first instance an executory devise over is void, n50 but if the intent was to reduce the fee once given the limitation over is good. n51

The distinction between an "executory devise" and a "vested remainder" is elementary. An "executory devise" is such a disposition of lands by will, that thereby no estate vests at the devisor's death, but only on some future contingency. n52 It needs no particular estate to support it. n53

FOOTNOTES:
(n1)Footnote 40. A grant to the first child of I. S. (if he have none at the time) is void as a remainder but valid as an executory devise. William Sheppard, The Touchstone of Common Assurances, 235 (1785).

(n2)Footnote 41. *Outland v. Bowen, 17 N.E. 281 (Ind. 1888); Miller v. Miller, 136 P. 953 (Kan. 1913).* Church in *Brattle Square v. Grant, 69 Mass. 142* (3 Gray) (1855). *Robinson v. Harris, 53 S.E. 755 (S.C. 1906); Comford v. Cantrell, 151 S.W.2d 1076 (Tenn. 1941). See McWilliams v. Havely, 283 S.W. 103 (Ky. 1926); Smith v. Hance, 11 N.J. Eq. 244 (1854).*

(n3)Footnote 42. *Humphreys v. Welling, 111 S.W.2d 123 (Mo. 1937).*

Where there is a gift in remainder with a limitation over on death, if the remainderman left no direct heirs, the remainderman had a fee with an executory devise over in the nature of a shifting use. *In re Estate of Carter, 404 S.W.2d 693 (Mo. 1966).*

(n4)Footnote 43. *First Presbyterian Church v. Lynott, 78 S.W.2d 396 (Mo. 1934).*

A devise to a son with limitation over on death before the wife created a fee with an executory interest is not a remainder. *Hemphill v. Mississippi State Highway Comm., 145 So. 2d 455 (Miss. 1962).*

(n5)Footnote 44. *Williams v. Floyd, 112 A. 377 (Del. Ch. 1920); Calvert v. Calvert, 130 N.E. 347 (Ill. 1921);* Davis v. McKown, 160 A.458 (Me. 1932); *Hull v. Calvert, 226 S.W. 553 (Mo. 1920); Imbrie v. Hartrampf, 198 P. 521 (Or. 1921); Spann v. Carson, 116 S.E. 427 (S.C. 1923); Hudson v. Leathers, 139 S.E. 196 (S.C. 1927).* Words "effective only upon" expiration of a deed create a springing executory interest. *Hamman v. Bright & Co., 924 S.W.2d 168 (Tex. App. 1996), vacated, 938 S.W.2d 718 (Tex. 1997);* Testator's will created a future interest in third parties triggered by devisee's remarriage. This created a determinable fee simple estate with an executory interest. Devisee's estate was terminated upon her remarriage and a gift over was given to third parties. *Chaney v. Gray, 898 S.W.2d 577 (Mo. App. 1995).*

(n6)Footnote 45. *Outland v. Bowen, 17 N.E. 281 (Ind. 1888); McWilliams v. Havely, 283 S.W. 103 (Ky. 1926); Van Horne v. Campbell, 3 N.E. 316 (N.Y. 1885). See Glenn v. Holt, 229 S.W. 684 (Tex. Civ. App. 1921).* Illinois Law recognizes that a certificate of purchase obtained from the state after a sale of X's land for non-payment of taxes represents an executory interest in real estate, not a lien over the land, and is therefore good as against the Trustee in *Bankruptcy of X. Jackson v. Midwest Partnership, 176 B.R. 156 (N.D. Ill. 1994).*

(n7)Footnote 46. *First Nat'l Bank v. De Wolfe, 188 A. 283 (Me. 1932).*

(n8)Footnote 47. *Wyman v. Brown, 50 Me. 139 (1863)* (fee mounted upon a fee by a shifting use); *Van Horne v. Campbell, 3 N.E. 316, 771 (N.Y. 1885)* (limitation after fee simple void at common law); *Dukes v. Shuler, 194 S.E. 817 (S.C. 1937).*

(n9)Footnote 48. *Davis v. McKown, 160 A. 458 (Me. 1932).*

For approaches to the traditional law of future interests, *see* Allison Dunham, *Possibility of Reverter and Powers of Termination -- Fraternal or Identical T, 20 U. Chi. L. Rev. 215 (1853).*

(n10)Footnote 49. *Hunt v. Carroll, 157 S.W.2d 429 (Tex. Civ. App. 1941).*

(n11)Footnote 50. *Todd v. Stewart, 202 N.W. 844 (Iowa 1925); Stahl v. Weston, 106 N.W. 206 (Iowa 1906), 106 N.W. 206 (Mich. 1906); Gannon v. Albright, 81 S.W. 1162 (Mo. 1904); Jackson ex dem. Townsend v. Bull, 10 Johns 148 (N.Y. 1813).*

(n12)Footnote 51. *Mitchell v. Morse, 1 A. 141 (Me. 1885); Alworth v. Seymour, 44 N.W. 1030 (Minn. 1890); Chesnut v. Chesnut, 151 A. 339 (Pa. 1830); Booker v. Booker, 24 Tenn. (5 Humph.) 505 (1844).*

(n13)Footnote 52. *Miller v. Miller, 136 P. 953 (Kan. 1913); Robinson v. Harris, 53 S.E. 755 (S.C. 1906).*

In New York executory limitations are no longer distinguished from remainders, but are grouped with them as future estates. *Doctor v. Hughes, 122 N.E. 221 (N.Y. 1919).*

Devise in trust with limitation over after death of testator's son and son's widow if any survived him to children of son, share and share alike. Though the gift to the children was an executory devise not being supported by a preceding estate in freehold it was held vested in the children and so not too remote. *Lanier v. Lanier, 126 S.E.2d 776 (Ga. 1962).*

(n14)Footnote 53. *Inglis v. Sailors Snug Harbor, 28 U.S. 99 (3 Pet. 1830); Miller v. Miller, 136 P. 953 (Kan. 1913); First Nat'l Bank v. De Wolfe, 188 A. 283 (Me. 1936); Sabledowsky v. Arbuckle, 52 N.W. 920 (Minn. 1892)* (freehold estate to commence in future may be created in Minnesota); *Robinson v. Harris, 53 S.E. 755 (S.C. 1906); Smith v. Smith, 62 S.E.2d 347 (W. Va. 1950).*

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CHAPTER 26 EXECUTORY INTERESTS

3-26 Thompson on Real Property, Thomas Editions § 26.07

AUTHOR: Professor David A. Thomas This chapter is based in part on Ch. 31, George W. Thompson, Commentaries on the Modern Law of Real Property (John S. Grimes ed. 1979), which made a significant contribution to preserving the American Common Law on executory interests. J. Reuben Clark Law School Brigham Young University

§ 26.07 Executory Interests and Remainders Compared

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A remainder may vest in interest before it vests in possession, but such capacity is denied to executory interests. n54 And under the great weight of authority a contingent remainder cannot be created to exist after a defeasible fee. n55 Nor can a contingent remainder follow a remainder vested subject to divesting. n56

A limitation over after a remainder vested subject to divesting is an executory limitation. n57 No estate vests at the death of the testator, but only on the happening of some future contingency. n58

An "estate in remainder," is one limited to take effect and be enjoyed after another is determined. No remainder can be limited after the grant of a fee simple, because the tenant in fee has the whole estate. n59 A "contingent remainder" is one limited to depend on an uncertain event or condition, n60 and the intention of the testator as shown in the will will control where there is controversy over the matter. n61

If the language of the will out of which the contingency arises is relied upon for the purpose of defeating an estate which has already become vested, then this can only be accomplished by construing it as an executory devise. If the question is which of the two estates shall become vested, then such estates will be construed as remainders, alternative or substitutional in their nature. n62

Another distinction is that while a contingent remainder may be barred or destroyed by several means, an executory limitation is bound to take effect upon the happening of the contingency, either by fine or recovery or by any alteration of the estate after which it is limited. n63 A remainder over cannot take effect as an executory devise where there is an unqualified power of disposal in the first taker. n64 There is an example of an executory devise in the case of a testamentary provision that should a named child of the testator die childless, the property was to go to another named daughter and her children. n65 There is an alternative contingent remainder and not an executory devise where the will devises land to one for life with remainder to the heirs of the devisee's body in fee and if the devisee leaves none then to

an institution to be incorporated. n66 So, there is a remainder and not an executory devise in a devise of land to one for life and at the devisee's death to the issue of the devisee's body, if any, and if not, then the land to go to the testators' heirs at law. n67

The doctrine of *Purefoy v. Rogers*, n68 that if an interest can take effect either as a contingent remainder or as an executory devise it must be a contingent remainder, still remains the law generally. So a devise to A and then to the children of B would go only to the children of B living at A's death, not in those born thereafter if it were an executory devise. Where X grants to Y a parcel of land reserving a determinable fee in a portion thereof, Y takes a springing use in the part reserved. n69

FOOTNOTES:

(n1)Footnote 54. *Beverlin v. First Nat'l Bank, 98 P.2d 200 (Kan. 1940).*

(n2)Footnote 55. *Chace v. Gregg, 32 S.W. 520 (Tex. 1895).*

(n3)Footnote 56. *Liebhardt v. Avison, 229 P.2d 933 (Colo. 1951).*

(n4)Footnote 57. Limitation over on death without bodily issue created a vested remainder subject to divesting on death without bodily issue. *Towns v. Walters, 168 S.E.2d 144 (Ga. 1969).*

(n5)Footnote 58. *Williams v. Floyd, 112 A. 377 (Del. Ch. 1920); Calvert v. Calvert, 130 N.E. 347 (Ill. 1921); Hull v. Calvert, 226 S.W. 553 (Mo. 1920); Imbrie v. Hartrampf, 198 P. 521 (Or. 1921); Hudson v. Leathers, 139 S.E. 196 (S.C. 1927); Coleman v. Coleman, 500 S.E.2d 507 (Va. 1998)* (when a will gave beneficiary a life estate followed by fee simple at the termination of life estate, the court held that interest was vested at the death of testator, not contingent on the life estate). In *Canoy v. Canoy, 520 S.E.2d 128 (NC 1999),* where a devise left property to a life tenant and then to the children, the court held that such a devise indicated an intent by the testatrix that a child would take no estate unless the child lived past the death of the life tenant. Thus, each child's remainder interest was contingent.

(n6)Footnote 59. Church in *Brattle Square v. Grant, 69 Mass. 142 (3 Gray 1855); Elsea v. Smith, 202 S.W. 1071 (Mo. 1918); Van Horne v. Campbell, 3 N.E. 316 (N.Y. 1885); Hudson v. Leathers, 139 S.E. 196 (S.C. 1927).*

(n7)Footnote 60. *Hignett v. Sherman, 224 P. 411 (Colo. 1924).*

(n8)Footnote 61. *Plummer v. Brown, 287 S.W. 316 (Mo. 1926); In re Thayer's Estate, 130 A. 683 (Vt. 1925).* For restatement distinction, *see* Restatement of the Law of Property, §§ 25, cmt. g, 46, cmt. r (2), 156, cmt. a.

(n9)Footnote 62. *Pearson v. Easterling, 92 S.E. 619 (S.C. 1917).*

(n10)Footnote 63. *Downing v. Wherrin, 19 N.H. 9 (1848).*

(n11)Footnote 64. *Methodist Church v. Fairbanks, 126 A. 823 (Me. 1924). See Hull v. Calvert, 226 S.W. 553 (Mo. 1920).*

(n12)Footnote 65. *Prince v. Barham, 127 S.E. 626 (Va. 1920).*

(n13)Footnote 66. *Fuller v. Black, 131 N.E. 641 (Ill. 1921). See Lindenberger v. Cornell, 229 S.W. 54 (Ky. 1921).*

Estate after a life estate was held to be an alternative contingent remainder. *Stevens v. Van Brocklin, 129 N.E. 68 (Ill. 1920).* Where testator devised homestead to O for life and at her death "to my son R and unto the heirs of his body in fee simple forever; provided that if R should not be living and have no heirs of his body surviving him" at the death of O, or if after the death of O, R should die leaving no heirs of his body surviving him, then in either event the remainder to a trust to be established, the court found that on the death of O, R received the homestead in fee simple, but if R

failed to survive O, his bodily heirs (if any) would take in fee simple; but if R failed to survive O and left no bodily heirs then the homestead would devise to the stipulated trust. As Testator had devised a life estate to O he could not devise another life estate to R using fee tail language. *Pickens v. Black, 885 S.W.2d 872, 875 (Ark. 1994).*

(n14)Footnote 67. *Wilkins v. Rowan, 185 N.W. 437 (Neb. 1921).*

A gift to the widow for life, remainder to the heirs of the son, but if the son died without issue then over to a brother, created a life estate in the wife with a contingent remainder to the son's heirs, which failed when the wife predeceased the son, with a reversion to the son followed by an executory devise to the brother. *Ryan v. Monaghan, 42 S.W. 144 (Tenn. 1897).*

(n15)Footnote 68. *2 Wms. Saund. 380, 85 Eng. Rep. 1181 (1845).*

(n16)Footnote 69. *See Moulton v. Trafton, 64 Me. 218 (1874);* Farnsworth v. Perry, 22 A.373 (Me. 1891); *Weed v. Woods, 53 A. 1024 (N.H. 1902); Walker v. Marcellus & O.L.R. Co., 123 N.E. 736 (N.Y. 1919).*

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CHAPTER 26 EXECUTORY INTERESTS

3-26 Thompson on Real Property, Thomas Editions § 26.08

AUTHOR: Professor David A. Thomas This chapter is based in part on Ch. 31, George W. Thompson, Commentaries on the Modern Law of Real Property (John S. Grimes ed. 1979), which made a significant contribution to preserving the American Common Law on executory interests. J. Reuben Clark Law School Brigham Young University

§ 26.08 Executory Interests Permit Freeholds to Commence in the Future

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By an executory devise a freehold may be made to commence in futuro, and needs no particular estate to support it. The future estate is to arise upon some specified contingency, and the fee is left to descend to the heir-at-law until such contingency happens. This contingency must happen within a reasonable time. Every executory devise is upon some condition or contingency and takes effect only upon the happening of such contingency or the performance of such condition. n70 Executory devises to unborn persons to take effect when they shall come into being are held valid. n71 A devise to a corporation to be created in futuro by the legislature is good as an executory devise. n72 Estates in land to commence in futuro may also be created by a deed of bargain and sale or by a covenant to stand seised to the use of the grantee. n73 In some jurisdictions, however, the doctrine that a bargain and sale, as well as a common-law conveyance, is valid to create a future interest in lands of the grantor, has been denied. n74

FOOTNOTES:

(n1)Footnote 70. *Inglis v. Sailors Snug Harbor, 28 U.S. 99 (3 Pet. 1830); Blackstone v. Althouse, 116 N.E. 154 (Ill. 1917); Trafton v. Hawes, 102 Mass. 533 (1869); Bell v. Scammon, 15 N.H. 381 (1844); Robinson v. Harris, 53 S.E. 755 (S.C. 1906). See* Restatement of the Law of Property, § 165.

(n2)Footnote 71. *Inglis v. Sailors Snug Harbor, 28 U.S. 99 (3 Pet. 1830); Rogers v. Ross, 4 Johns. Ch. 388 (N.Y. 1820); Burrill v. Boardman, 43 N.Y. 254 (1871); Robinson v. Harris, 53 S.E. 755 (S.C. 1906).*

(n3)Footnote 72. *Inglis v. Sailors Snug Harbor, 28 U.S. 99 (3 Pet. 1830); Ould v. Washington Hosp. for Foundlings, 95 U.S. 303 (1877); Burrill v. Boardman, 43 N.Y. 254 (1871).*

(n4)Footnote 73. *Varner v. Rice, 44 Ark. 236 (1884); West v. West, 29 N.E. 582 (Mass. 1892); McDaniel v. Johns, 45 Miss. 632 (1871); Bell v. Scammon, 15 N.H. 381 (1844); Jackson ex dem. Watson v. McKenny, 3 Wend. 233 (N.Y. 1829).*

(n5)Footnote 74. *Marden v. Chase, 32 Me. 329 (1850); Wallis v. Wallis, 4 Mass. 135 (1808); Trafton v. Hawes, 102 Mass. 533 (1869).*

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CHAPTER 26 EXECUTORY INTERESTS

3-26 Thompson on Real Property, Thomas Editions § 26.09

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§ 26.09 A Fee Limited on a Fee By Way of Executory Devise

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A fee may be limited after a fee by way of executory devise, but, if one devises in fee simple, one cannot make a limitation over by way of executory devise without cutting down the first fee to make room for the second. n75 A fee simple may, by an executory devise, be limited after a fee simple vested or contingent. n76 So, it is now generally recognized that a fee may be limited after a fee by a conveyance operating under the statute of uses or by way of executory devise, n77 but any executory interest which, by possibility, may not take effect until after lives in being and twenty-one years and ten months, is *ipso facto* and *ab initio* void. n78

A conditional limitation may be created although the deed carries a statutory warranty. n79 In the case of executory devises, the question whether the primary gift is in fee, so as to exhaust the entire estate, is in each case to be decided on an examination of the will as a whole, aided by extrinsic evidence to ascertain the actual intention of the testator, which is controlling. n80

FOOTNOTES:
(n1)Footnote 75. *Hambright v. Carroll, 168 S.E. 817 (N.C. 1933).*

(n2)Footnote 76. *Brammer v. Wallace, 198 F.2d 742 (6th Cir. 1952); In re Gohn's Estate, 188 A. 144 (Pa. 1952).*

(n3)Footnote 77. *Howard v. Carusi, 109 U.S. 725 (1884); Holmes v. Williams, 1 Root 335 (Conn. 1791); Glover v. Condell, 45 N.E. 173 (Ill. 1896); Williams v. Green, 92 N.E. 960 (Ill. 1910); Blackstone v. Althouse, 116 N.E. 154 (Ill. 1917); Sayward v. Sayward, 7 Greenl. 210 (Me. 1831); Combs v. Combs, 8 A. 757 (Md. 1887); Richardson v. Noyes, 2 Mass. 56 (1806); Hawley v. Northampton, 8 Mass. 3 (1811);* Church in *Brattle Square v. Grant, 69 Mass. (3 Gray) 142 (1855); Sullivan v. Garesche, 129 S.W. 949 (Mo. 1910); Donehue v. Nilges, 266 S.W.2d 553 (Mo. 1954)* (limitation over after determinable fee void for remoteness); *Anderson v. United Realty Co., 86 N.E. 644 (Ohio 1908); Rutledge v. Fishburne, 44 S.E. 564 (S.C. 1903).*

Estates may commence in future. Tex. Prop. Code Ann. § 5.041.

See Restatement of the Law of Property, § 46.

(n4)Footnote 78. *Symphony Space, Inc. v. Pergola Properties, Inc., 669 N.E.2d 799 (N.Y. 1996)* (If the parties to a transaction are corporations and no measuring lives are stated in the instruments to a transaction, the period is simply 21 years and any executory interest failing after 21 years is void).

(n5)Footnote 79. *Beatty v. Miley, 233 P.2d 269 (Okla. 1951).*

(n6)Footnote 80. *In re Hayward's Estate, 110 P.2d 956 (Ariz. 1941).*

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CHAPTER 26 EXECUTORY INTERESTS

3-26 Thompson on Real Property, Thomas Editions § 26.10

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§ 26.10 Indestructibility of Executory Interests

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The mere lapsing of intervening estates will never be allowed to defeat the limitation over, unless these estates be coupled with conditions upon which the subsequent limitations are in some way made to depend. n81 An executory limitation of a fee on a fee is not affected by the failure of the first estate to take effect by lapse or otherwise, but that which was to be an executory limitation is accelerated and becomes a limitation *in praesenti* and takes effect at the death of the testator, such as in a devise "To A and A's heirs, but if A dies under twenty-one and unmarried, then to B and B's heirs," with a residuary devise to C. If A dies under twenty-one and unmarried before the testator dies, the executory devise to B takes effect immediately on the death of the testator, and does not lapse in favor of the residuary devisee, C. n82

One major difference between the executory limitation and the contingent remainder is that the former is not destructible by merger or by termination of the preceding estate in freehold prior to vesting as a contingent remainder was at common law. n83 On the other hand a contingent remainder being destructible was not subject to the rule against remoteness of vesting as was an executory limitation. Today in some states a contingent remainder is indestructible also and therefore probably also subject to the rule against remoteness. An executory interest is not destroyed by merger of the particular and ultimate estate as is a contingent remainder. n84 A fee simple subject to an executory limitation is distinguishable from a fee simple subject to a condition subsequent in two primary areas. First, in a fee simple subject to an executory limitation, the grantor has given the right of reentry to a third person, while with a fee simple subject to a condition subsequent, the grantor has retained the right of reentry. Second, in a fee simple subject to an executory limitation, upon the occurrence of the condition or limitation, the termination of the fee estate is automatic. However, with a fee simple subject to a condition subsequent, the occurrence of the condition does not automatically terminate the fee interest, the grantor still must exercise that right. n85

Indestructibility being an essential element of an executory limitation, n86 upon the happening of the specified event it springs into being, terminating the preceding determinable fee. n87 The first taker has no power to defeat it by any act.

n88 When a valid executory limitation has been created the first taker has no power to destroy it by common recovery, n89 unless the limitation over is after an estate tail. n90 An executory limitation differs from a contingent remainder in that the latter may be barred or destroyed by several means, n91 whereas an executory limitation is bound to take effect when the contingency happens, and no fine, recovery, or alteration or sale of the estate after which it is limited will have the effect to prevent its taking effect. n92

A conditional limitation until it becomes entitled to possession is not considered as vested in interest. n93 It is, however, not a mere expectancy but is a future interest in land. n94 Generally a conditional limitation is subject to the same restrictions on transmissibility as the contingent remainder. n95

FOOTNOTES:
(n1)Footnote 81. *Pennington v. Pennington, 17 A. 329 (Md. 1889).*

(n2)Footnote 82. *Mathis v. Hammond, 6 Rich. Eq. 121* (S.C.); *Avelyn v. Ward, 1 Ves. Sr. 420, 27 Eng. Rep. 1117 (1749); See Blackstone v. Althouse, 116 N.E. 154 (Ill. 1917); Allen v. Parham, 5 Munf. 457 (Va. 1817).*

To wife for life then to named children, but if either die then to deceased's children created executory devises in unborn children. *Federal Land Bank v. Wood, 334 F. Supp. 1124 (D.S.C. 1970).*

(n3)Footnote 83. *Pells v. Brown, Cro. Jac. 590, 79 Eng. Rep. 504 (1791);* Manning's Case, 8 Co. Rep. 946, *77 Eng. Rep. 618* (n.a); *Lampet's Case, 77 Eng. Rep. 994* (Coke) (n.d.).

An executory devise can only be destroyed by a failure of the contingency upon which it is to take effect, and it could not, at the common law, be prevented from taking effect when the contingency happened, either by fine and recovery or in any of the modes by which contingent remainders could be destroyed. The executory devise being indestructible, the determinable quality of the fee of the first taker follows any transfer by him. *Becker v. Becker, 206 Ill. 53 (1903); Williams v. Elliott, 246 Ill. 548 (1903). Blackstone v. Althouse, 116 N.E. 154 (Ill. 1917).*

(n4)Footnote 84. *See Lantz v. Pence, 142 N.E.2d 456 (Ind. App. 1957).*

(n5)Footnote 85. *Gutierrez v. Rodriguez, 30 S.W.3d 558 (Tex. Ct. App. 2000).*

(n6)Footnote 86. *Park v. Powledge, 73 So. 483 (Ala. 1916); Bradford v. Mackenzie, 101 A. 774 (Md. 1917).*

(n7)Footnote 87. *Smith v. Shepard, 19 N.E.2d 368 (Ill. 1939).*

(n8)Footnote 88. *Smith v. Reynolds, 121 S.W.2d 572 (Tenn. 1938).*

(n9)Footnote 89. *Slaughter v. Slaughter, 23 Ark. 356 (1861); Williams v. Green, 92 N.E. 960 (Ill. 1910); Downing v. Wherrin, 19 N.H. 9 (1848); Burleigh v. Clough, 52 N.H. 267 (1872); Smith v. Bell, Mart & Yerg, 8 Tenn. 302 (1827).*

(n10)Footnote 90. *Taylor v. Taylor, 63 Pa. 481 (1870).*

(n11)Footnote 91. *Downing v. Wherrin, 19 N.H. 9 (1848).*

(n12)Footnote 92. *Holmes v. Williams, 1 Root 335 (Conn. 1791); L'Etourneau v. Henquenet, 50 N.W. 1077 (Mich. 1891); Downing v. Wherrin, 19 N.H. 9 (1848); Burleigh v. Clough, 52 N.H. 267 (1872); Garland v. Watt, 26 N.C. 287 (1844); Smith v. Bell, Mart & Yerg, 8 Tenn. 302 (1827); Bradley v. Carnes, 27 S.W. 1007 (Tenn. 1894).*

An executory devise can only be destroyed by a failure of the contingency upon which it is to take effect; and it could not, at the common law, be prevented from taking effect when the contingency happened, either by fine and recovery or in any of the modes by which contingent remainders could be destroyed. The executory devise being indestructible, the

determinable quality of the fee of the first taker follows any transfer by him. *Blackstone v. Althouse, 116 N.E. 154 (Ill. 1917), citing Becker v. Becker, 69 N.E. 49 (Ill. 1903); Williams v. Green, 92 N.E. 960 (Ill. 1910).*

Accord: Restatement of The Law of Property, § 162, cmt. c. *Williams v. Kimes, 949 S.W.2d 899 (Mo. 1997)* (Property foreclosed on during life tenancy was held to revert to remaindermen upon death of life tenant due to lack of notice to remaindermen. Contingent remainder was an ownership interest entitled to actual notice).

(n13)Footnote 93. Executory interests in one group of cases have been held to vest in interest. These cases have to do with gifts that are vested in interest with possession postponed, such as a bequest of $10,000 to A to be paid at 21. The gift is said to be vested with possession postponed. "... [I]t is our conclusion that in Texas equitable executory devises can vest prior to termination of the trust so an estate can vest in interest before it vests in possession ... ." *Hunt v. Carroll 157 S.W.2d 429, 437 (Tex. App. 1941).*

(n14)Footnote 94. Farley v. *Gilmer, 12* Ala. 141 (1847); *Kean v. Hoffecker, 2 Harr. 103 (Del. 1836); Blackstone v. Althouse, 116 N.E. 154 (Ill. 1917); Copenhaver v. Pendleton, 155 S.E. 802 (Va. 1930).*

Executory devises are estates, not mere possibilities. *Jernigan v. Lee, 182 S.E.2d 351 (N.C. 1971).*

A devise of a house with the provision that the sons of the testatrix should share in the proceeds in the event of the sale of the house conveyed to the sons an interest which was alienable before the sale was made. *Parker v. Blackmon, 553 S.W.2d 623 (Tex. 1977).*

(n15)Footnote 95. In Illinois an executory devise transmissible when the identity of the executory devisee who will take the estate upon the happening of the contingency is certain, but not if the persons to take the estate cannot be ascertained until the contingency happens. *Blackstone v. Althouse, 116 N.E. 154 (Ill. 1917),* relying on 4 Kent, *supra* note 39, at 261.

Trust in favor of testator's son and, at son's death, trustee should convey corpus to son's children, if he had lawful issue, and if he had no lawful issue, to named beneficiaries, created a contingent executory devise, after a fee conditional, for named beneficiaries, and where son died without children, but after named beneficiaries, the successors in interest of the named beneficiaries became absolutely vested with property. *Seawell v. Cheshire, 86 S.E.2d 256 (N.C. 1955).*

Holder of limitation over on fee defeasible on remarriage could release to fee holder. *Metz v. Betzner, 67 N.E.2d 651 (Ohio App. 1946).*

The executory devise may be released though not alienated. *Towns v. Walters, 168 S.E.2d 144 (Ga. 1969).*

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CHAPTER 26 EXECUTORY INTERESTS

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§ 26.11 Alienability, Descendibility, and Transmissibility of Executory Interests

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If the persons to whom the estate is to pass are not ascertainable until the contingency happens, the executory interest is not transmissible, because it cannot be known until the happening of the contingency in whom the interest will vest. If, however, the identity of the executory devise is certain and the object of the devise is fixed, so that upon the happening of the contingency the executory devisee will take the estate, the future interest is assignable, devisable and transmissible. n96 Under the provisions of some statutes an executory devise is held subject to grant or devise. n97 One exception to the rule of law that executory interests are transmissible and descend to heirs is where the interest is contingent on account of the person in whom it will vest on the happening of the contingency. In such case the executory interest is not transmissible, because if there is no person answering the given description, no interest has attached to anyone. n98 The taker of a conditional fee is generally without the power to convey so as to bar the taker of the fee on the happening of the contingency. n99

FOOTNOTES:

(n1)Footnote 96. *Barnitz v. Casey, 11 U.S. (7 Cranch) 456 (1813); Howell v. Deady, 48 F. Supp. 104 (D. Or. 1939); Kean v. Hoffecker, 2 Harr. 103 (Del. 1836); Blackstone v. Althouse, 116 N.E. 154 (Ill. 1917); Fitzgerald v. Daly, 119 N.E. 911 (Ill. 1918); Wallhauser v. Rummel, 96 A.2d 289 (N.J. Super. 1953); Seawell v. Cheshire, 86 S.E.2d 256 (N.C. 1955); De Haas v. Bunn, 2 Pa. 335 (1846).*

But see Wachovia Bank & Trust Co. v. Schneider, 70 S.E.2d 578 (N.C. 1952) (holding that contingent estates are not transmissible).

(n2)Footnote 97. *Copenhaver v. Pendleton, 155 S.E. 802 (Va. 1930).*

See special note, Restatement of the Law of Property § 162, for list of states that have enacted statutes declaring executory interests transmissible.

Executory devise after a fee conditional is devisable and descendible. *Seawell v. Cheshire, 86 S.E.2d 256 (N.C. 1955).*

(n3)Footnote 98. *Blackstone v. Althouse, 116 N.E. 154 (Ill. 1917).*

(n4)Footnote 99. *Roane v. Robinson, 127 S.E. 626 (N.C. 1955); Mercer v. Downs, 131 S.E. 575 (N.C. 1926); Massengill v. Abell, 134 S.E. 641 (N.C. 1926). See Barrett v. Percival, 246 S.W. 143 (Ky. 1922).*

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CHAPTER 26 EXECUTORY INTERESTS

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§ 26.12 Executory Interests After Sale

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Under the weight of authority a court of equity has the power to order a sale of land where a future interest is involved, creating a trust for the benefit of all persons who hold an interest in the property. n100 The cases are in disagreement as to whether a reversionary interest exists after an executory limitation, or whether if the limitation fails the fee becomes absolute. n101

FOOTNOTES:
(n1)Footnote 100. *Elmore v. Galligher, 87 So. 349 (Ala. 1921); Walker v. Blaney, 286 S.W.2d 479 (Ark. 1956); Clarke v. Chicago Title & Trust Co., 66 N.E.2d 378 (Ill. 1946); Coquillard v. Coquillard, 113 N.E. 474 (Ind. App. 1916).* Testator's wife who had life estate for farm on executory limitation was entitled to sale of farm, despite objection of children/remaindermen, whose proper remedy was to seek equitable distribution of funds or establishment of trust with income payable to life tenant. *McKinney v. McKinney, 888 S.W.2d 332 (Ky. App. 1994).*

(n2)Footnote 101. Fee simple becomes absolute. Jackson v. Noble, 2 Keen 590, *48 Eng. Rep. 755 (1838); See* Coke on Littleton, § 206a. *Dusenberry v. Johnson, 45 A. 103 (N.J. 1899). Cottrill v. Ranson, 490 S.E.2d 778 (W. Va. 1997)* (lands to be used for school purposes).

The nature of the devolution of an estate by the exercise of a power of appointment has been settled by adjudications. The property to be appointed does not belong to the donee of the power, but to the estate of the donor of the power. By the creation of the power, the donor enables the donee to act for the donor in the disposition of the property. The appointee designated by the donee of the power in the exercise of the authority conferred does not take as legatee or beneficiary of the person exercising the power but as recipient of a benefaction of the person creating the power. It is from the donor and not from the donee of the power that the property goes to the one who takes it. The right to exercise the power is not the property, and cannot be reached by the creditors, of the donee of the power. *Hogarth-Swann v. Weed, 174 N.E. 314 (Mass. 1931).* But there is no relation back arising so as to make the interest vest as of the date of the power, but rather it vests as of the time of exercise. Marlborough v. Godolphin, 2 Vest. Sr. 61.

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CHAPTER 26 EXECUTORY INTERESTS

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§ 26.13 Executory Interests and Waste

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The holder of a defeasible fee is not liable to the holder of a right of re-entry, a possibility of reverter or of a conditional limitation for waste. n102 This rule is subject, however, to a prohibition against equitable waste, i.e., a squandering, wanton and unconscionable, by the fee holder, in some states. n103 Even where land is conveyed as long as it shall be used for a specific purpose the taking of a profit such as oil and gas is not waste n104 unless it is specifically made defeasible upon another use. n105 An exception has been found, however, where the land was conveyed for a special public trust. n106

FOOTNOTES:

(n1)Footnote 102. *Taylor v. Continental S. Corp., 280 P.2d 514 (Cal. App. 1955); Curles v. Wade & Brimberry, 106 S.E. 1 (Ga. 1921); Gannon v. Peterson, 62 N.E. 210 (Ill. 1901); Fifer v. Allen, 81 N.E. 1105 (Ill. 1907); Hillis v. Dils, 100 N.E. 1047, reh'g denied, 102 N.E. 140 (Ind. App. 1913); Williams v. McKenzie, 262 S.W. 598 (Ky. 1924); Frensley v. White, 254 P.2d 982 (Okla. 1953); Davis v. Skipper, 83 S.W.2d 318 (Tex. 1935).*

A future contingent interest cannot recover damages from the fee owner as long as it is contingent. *Sargent Lake Ass'n v. Dan, 351 A.2d 54 (N.H. 1976).*

(n2)Footnote 103. *Fifer v. Allen, 81 N.E. 1105 (Ill. 1907).*

(n3)Footnote 104. *Carlsen v. Carter, 36 N.E.2d 740 (Ill. 1941); Priddy v. School Dist. No. 78, 219 P. 141 (Okla. 1923); Davis v. Skipper, 83 S.W.2d 318 (Tex. 1935).* In relation to oil and gas transactions, the Wyoming Court interpreted a deed of lands to W excepting and reserving "an undivided one-half interest in all the oil, gas and mineral rights ... for a period of 20 years from the 10th April 1940, and as long thereafter as oil, gas, or other minerals continue to be produced therefrom ... ." Subsequently, W conveyed the same interest to X, reserving all of the minerals. By 1960 there had been no production from the conveyed lands. The question was whether W had reserved the one-half mineral estate in which he had an executory interest, which later vested when no production occurred. Under usual analysis W's

executory interest in the one-half minerals would be void and not subject to the reservation. The court ... "chose to mangle the 'historical' features of common law estates which clearly prohibit a remainder interest from following a defeasible fee simple estate." The majority concluded that, unlike the typical executory interest which may last forever, W's interest is certain to become possessory when the production of minerals terminates and the contingent remainder is therefore a remainder subject to a mere postponement of the enjoyment of possessing the estate to a point which, while unknown, is certain to occur. *Williams v. Watt, 668 P.2d 620 (Wyo. 1983).*

(n4)Footnote 105. *Central Land Co. v. Grand Rapids, 4 N.W.2d 485 (Mich. 1942).*

(n5)Footnote 106. *Marshall v. Standard Oil Co., 61 P.2d 520 (Cal. App. 1936); Charles E. Knox Oil Co. v. McKee, 223 P. 880 (Okla. 1924).*

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CHAPTER 26 EXECUTORY INTERESTS

3-26 Thompson on Real Property, Thomas Editions § 26.14

AUTHOR: Professor David A. Thomas This chapter is based in part on Ch. 31, George W. Thompson, Commentaries on the Modern Law of Real Property (John S. Grimes ed. 1979), which made a significant contribution to preserving the American Common Law on executory interests. J. Reuben Clark Law School Brigham Young University

§ 26.14 Executory Interests and the Rule Against Perpetuities

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In order that a limitation over after a fee may operate to defeat the estate of the first taker the contingency must be such as will happen within the period prescribed for the vesting of future estates. n107 Limitations over upon the death of the first taker without issue are quite common and are construed as executory devises on definite failure of issue after an estate in fee simple. n108 Where the preceding executory or contingent limitations have failed to arise or take effect, the remainder over will nevertheless take effect as the first estate is considered only as a preceding limitation and not as a preceding condition to give effect to the subsequent limitation. n109 "If the precedent limitation, by what means soever, is out of the case, the subsequent limitation takes place." n110

§ 26.14(a) Failure of Issue

Where an estate is created in fee or for life, and on such estate another is conditioned to arise by way of executory devise on the occurrence of a given event, and that event does not occur so that the estate over cannot vest, then the first estate continues, and if a life estate, it is enlarged into a fee. n111 Thus where, by the will, an absolute gift of the property is made, in the first instance, followed by a limitation over, on the death of the devisee or legatee, the absolute gift is not taken away by the gift over, unless the gift over may itself take effect. n112

Under a gift to a devisee in fee with an executory devise over in case the devisee dies without issue, the executory devise is destroyed upon the birth of issue, and the devise to such issue becomes a devise in fee absolute. n113

Where the first taker has a fee by implication, and the devise over was upon the contingency that the first taker "should die without issue at his decease," it was held that these words did not import an indefinite failure of issue, but a failure of issue and death of the first taker, coupled with such limitation was good as an executory devise. n114 On the other hand, the words "without issue" have been construed to mean an indefinite failure of issue, and the remainder over has been held void as an executory devise, because too remote, as tending to a perpetuity. n115 In such a case the estate vests in the first taker. n116 A gift over on the failure of the descendants of the testator's parents has been held void

because dependent upon a contingency which may not happen within the limit prescribed by the rule against perpetuities. n117 The holder of a defeasible fee can, together with the holders of the limitations over, convey good title in North Carolina. n118

In cases of limitations over on death without issue, where "issue" means limited failure of issue, the courts follow either the successive or the substitutional rule. To A, but if A dies without issue to B, gives A a defeasible fee simple on the effective date of the gift with B a limitation over to B on A's death without children. The substitutional rule gives A a fee simple absolute if A is alive on the effective date. If the gift to A is in remainder and the gift is substitutional the courts differ as to whether A must survive the immediate estate. n119

§ 26.14(b) Severance of Void Limitations

If the estate in the first taker is in itself valid, it is not avoided by the fact that the limitation over is void by reason of its being impossible, repugnant or in violation of the rule against perpetuities. n120 Thus, the invalidity of a gift over in default of issue surviving a life tenant does not affect the primary gift to that issue. n121 Where the estate of the first taker is for life and the remainder over fails for any reason, the estate for life takes effect as a life estate. n122 Likewise, if the grant or devise to the first taker is in fee and the limitation over fails for any cause, the first taker's estate takes effect as a fee simple absolute. n123

FOOTNOTES:
(n1)Footnote 107. *Van Horne v. Campbell, 3 N.E. 316 (N.Y. 1885).*

(n2)Footnote 108. *Jackson ex dem. St. John v. Chew, 25 U.S. 153 (12 Wheat. 1827); Waring v. Jackson ex dem. Eden, 26 U.S. 570 (1 Pet. 1828); Britton v. Thornton, 112 U.S. 526 (1884); Roach v. Martin, 1 Harr. 548 (Del. 1835); Kean v. Hoffecker, 2 Harr. 103 (Del. 1836); Matthews v. Hudson, 7 S.E. 286 (Ga. 1888); Hertz v. Abrahams, 36 S.E. 409 (Ga. 1900); Glover v. Condell, 45 N.E. 173 (Ill. 1896); Williams v. Green, 92 N.E. 960 (Ill. 1910); Blackstone v. Althouse, 116 N.E. 154 (Ill. 1917); Outland v. Bowen, 17 N.E. 281 (Ind. 1888); Bennett v. Bennett, 174 S.W.2d 525 (Ky. 1943); Sayward v. Sayward, 7 Greenl. 210 (Me. 1831); Combs v. Combs, 8 A. 757 (Md. 1887); Safe Deposit & Trust Co. of Baltimore v. Bouse, 29 A.2d 906 (Md. 1943); Richardson v. Noyes, 2 Mass. 56 (1806); Hawley v. Northampton, 8 Mass. 3 (1811); Sims v. Conger, 39 Miss. 231 (1860); Hays v. Cole, 73 So. 2d 258 (Miss. 1954) but see, Rainey v. Holland, No. CA98-1112, 1999 Ark. App. LEXIS 551 (Ark. Ct. App. 1999).* (contingent remainder vesting at testator's death a substitutional gift); *Gannon v. Albright, 81 S.W. 1162 (Mo. 1954); In re Barrett's Estate, 123 N.W. 299 (Neb. 1909); Downing v. Wherrin, 19 N.H. 9 (1848); King v. First Nat'l Bank of Morristown, 38 A.2d 445 (N.J. 1944); Den ex dem. Trumbull v. Gibbons, 22 N.J.L. 117 (1849); Fosdick v. Cornell, 1 Johns. 440 (N.Y. 1806); Jackson ex dem. Burhans v. Blanshan, 3 Johns. 292 (N.Y. 1808); Jackson ex dem. Staats v. Staats, 11 Johns. 337 (N.Y. 1814); Anderson v. Jackson ex dem. Eden, 16 Johns. 382 (N.Y. 1819); Van Horne v. Campbell, 3 N.E. 316 (N.Y. 1885); Garland v. Watt, 26 N.C. 287 (1844); De Haas v. Bunn, 2 Pa. 335 (1846); Taylor v. Taylor, 63 Pa. 481 (1870); Lewis v. Claiborne, 13 Tenn. (5 Yer.) 369 (1821); Templeton v. Stong, 188 S.W.2d 560 (Tenn. 1945).*

In limitation over in a trust, if first taker died without issue, adoption by first taker did not defeat limitation over. *In re Notman's Estate, 290 N.Y.S.2d 231 (1968).*

(n3)Footnote 109. *Pennington v. Pennington, 17 A. 329 (Md. 1869); Burbank v. Whitney, 41 Mass. (24 Pick.) 146 (1839); Newell v. Nichols, 75 N.Y. 78 (1878).*

(n4)Footnote 110. *Avelyn v. Ward, 1 Ves. Sr. 420, 27 Eng. Rep. 1117 (1749).*

(n5)Footnote 111. *Comford v. Cantrell, 151 S.W.2d 1076 (Tenn. 1941).*

(n6)Footnote 112. *Id.*

(n7)Footnote 113. *Noth v. Noth, 127 N.E. 113 (Ill. 1920).*

Death without issue means, as concerns remainderman, death in lifetime of life tenant not merely the life of testator. *Trumbo v. Trumbo, 155 N.E.2d 62 (Ohio App. 1957).*

Limitation over on first taker's death prior to payment refers to death before legacy is de jure payable rather than death before actual receipt of legacy. *Sivia v. Snyder, 517 P.2d 812 (Okla. 1973).*

Death without issue as meaning death in the testator's lifetime is only a rule of construction. *In re Bonham's Estate, 143 A.2d 50 (Pa. 1958).*

(n8)Footnote 114. *Heard v. Horton, 1 Denio 165 (N.Y. 1845).*

(n9)Footnote 115. *Bell v. Scammon, 15 N.H. 381 (1844); Cabarrus Bank & Trust Co. v. Finlayson, 286 F.2d 251 (4th Cir. 1961).*

Devise in trust for son for life and then to issue, but if no issue then to testatrix' brothers and sisters. Issue meant definite failure so limitation was not too remote. *Poindexter v. Wachovia Bank & Trust Co., 128 S.E.2d 867 (N.C. 1963).*

Trust to pay income to three daughters for life and then to their children, but if any died without issue to the survivors or issue of any dead. It was held when two died without issue the entire income vested in the survivor absolutely. *In re Bonham's Estate, 143 A.2d 50 (Pa. 1958).*

(n10)Footnote 116. *Herron v. Stanton, 147 N.E. 305 (Ind. App. 1920).*

(n11)Footnote 117. *Talbot v. Riggs, 191 N.E. 360 (Mass. 1934).* Oil and gas top leases executed by grantors, which were to become effective if and when existing oil and gas leases expired or were terminated, did not convey vested possibilities of reverter to grantee, but rather conveyed springing executory interests that were subject to, and void under, the rule against perpetuities in the Texas state constitution; under express language of top leases, grantors did not make present conveyances of their possibilities of reverter, but instead conveyed interest that would vest in grantee only upon termination of existing leases, which could continue for indeterminate amount of time. *Hamman v. Bright & Co., 924 S.W.2d 168 (Tex. App. 1996).* Grantor's reservation of "all the oil and gas" as to subject property in deed reserved defeasible term interest to grantor and created springing executory interest. Grantee retained reversionary interest which vested at time deed was executed. Therefore, interest is valid under the rule against perpetuities. *Walker v. Foss, 930 S.W.2d 701 (Tex. App. 1996).*

(n12)Footnote 118. *Hales v. Renfrow, 49 S.E.2d 406 (N.C. 1948).* Ky. Rev. Stat. § 389A.030 "allows a devisee to join all parties to the fee simple absolute and partition the property" without the consent of the other parties, but "[t]his right to partition may be stopped if a party objects and the court finds this procedure would defeat the purpose of the testator in creating such estates." *McKinney v. McKinney 888 S.W.2d 332 (Ky. App. 1994).*

(n13)Footnote 119. *Substitutional. Washbon v. Cope, 39 N.E. 388 (N.Y. 1895).* Intent of testator. *Lawrence v. Calam, 140 N.E. 232 (N.Y. 1895).*

To A for life and then to B and C and their descendants per stirpes but if B or C die without descendants then over. The New York court construed "and" as "or" and followed the substitutional instead of the successive rule when B and C survived the testator but died with issue before *A. In re Larkin's Will, 172 N.E.2d 555 (N.Y. 1961).*

(n14)Footnote 120. *Herron v. Stanton, 147 N.E. 305 (Ind. App. 1920); Graham v. Whitridge, 57 A. 609, 58 A. 36 (Md. 1904);* Church in *Brattle Square v. Grant, 69 Mass. 142 (3 Gray 1855);* Scott v. Price, 2 Serg. & Rawle 59 (Pa.

1815).

(n15)Footnote 121. *Denison v. Denison, 78 N.E. 162 (N.Y. 1906).*

(n16)Footnote 122. Church in *Brattle Square v. Grant, 69 Mass. 142 (3 Gray 1855); Finch v. Wilkes, 41 N.Y.S. 227 (1896); Schlereth v. Schlereth, 66 N.E. 130 (N.Y. 1903).*

(n17)Footnote 123. *Doe ex dem. Cheesman v. Watson, 49 U.S. 263 (8 How. 1850); Outland v. Bowen, 17 N.E. 281 (Ind. 1888); Sullivan v. Garesche, 129 S.W. 949 (Mo. 1910); Cleveland v. Havens, 13 N.J. Eq. 101 (1860); Den ex dem. Trumbull v. Gibbons, 22 N.J.L. 117 (1849); Van Horne v. Campbell, 3 N.E. 316 (N.Y. 1885); Anderson v. United Realty Co., 86 N.E. 644 (Ohio 1908).*

Remainder to A and B but if either die without bodily issue then to the other created cross executory interests in each. *Towns v. Walters, 168 S.E.2d 144 (Ga. 1969).*

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CHAPTER 26 EXECUTORY INTERESTS

3-26 Thompson on Real Property, Thomas Editions § 26.15

AUTHOR: Professor David A. Thomas This chapter is based in part on Ch. 31, George W. Thompson, Commentaries on the Modern Law of Real Property (John S. Grimes ed. 1979), which made a significant contribution to preserving the American Common Law on executory interests. J. Reuben Clark Law School Brigham Young University

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Annotation, *Character of Remainder Limited Generally to the Life Tenant's Children, 57 A.L.R. 2d 103.*

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Annotation, *Distribution as Between Life Tenant and Remainderman of Proceeds of Condemned Property, 91 A.L.R. 2d 963.*

Annotation, *Gift or Grant to one Upon Marriage, if Married, Payable at Marriage, or the Like, as Vested or Contingent, 30 A.L.R. 2d 127.*

Annotation, *Grant to One for Life, and Afterwards, Either Absolutely or Contingently, to the Grantor's Heirs or Next of Kin, as Leaving Reversion or Creating Remainder, 16 A.L.R. 2d 691.*

Annotation, *Nature of Remainders Created by Will Giving Life Estate to Spouse of Testator, with Remainder to be Divided Equally Between Testator's Heirs and Spouse's Heirs, 19 A.L.R. 2d 371.*

Annotation, *Provision of Will That Children, etc., of Remainderman Who Dies Before Expiration of Precedent Estate or Time Fixed for Distribution to Remaindermen, Shall Take the Share to Which he Would Have Been Entitled, as Affecting the Remainder as Vested or Contingent, 47 A.L.R. 2d 900.*

Annotation, *Relinquishment of Interest by Life Beneficiary in Possession as Accelerating Remainder of Which There is Substitutional Gift in Case Primary Remainderman Does Not Survive Life Beneficiary, 7 A.L.R. 4th 1084.*

Annotation, *Right of Devisee of Precedent Estate to Take Under Limitation Over to Heirs or Next of Kin of Testator, 30 A.L.R. 2d 393.*

Annotation, *Testamentary Devise or Bequest Conditioned Upon Beneficiary's Supporting or Rendering Services to Named Person as Providing for Condition Subsequent or Precedent, 25 A.L.R. 2d 762.*

Annotation, *Time to Which Condition of Remainderman's Death Refers, Under Gift or Grant to One for Life or Term of Years and Then to Remainderman, but if Remainderman Dies Without Issue, then Over to Another, 26 A.L.R. 3d 407.*

Annotation, *Where Will Names Two or More Remaindermen to Take Under Different Contingencies, Must the One Whose Contingency Occurs Survive the Other to Make his Interest Transmissible?, 90 A.L.R. 2d 312.*

Annotation, *Wills: Bequest or Devise Referring to Services to be Rendered by Donee to Testator During Latter's Lifetime as Absolute or Conditional Gift, 22 A.L.R. 3d 771.*

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Supp. to § 26.02 General Definitions of Executory Interests.

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Add:

Deviney v. Nationsbank, 993 S.W. 2d 443, 448 (Tex. App. 1999) (person to whom property automatically passes on the occurrence of an executory limitation possesses an executory interest).

See Michael C. Blumm. *Issues in Environmental Law: Retracing the Discovery Doctrine: Aboriginal Title, Tribal Sovereignty, and Their Significance to Treaty-Making and Modern Natural Resources Policy in Indian Country, 28 Vt. L. Rev. 713, 738* (Spring, 2004) (arguing that grantees of Indian lands received an executory interest which would not become possessory until the federal government exercised its right of preemption on those lands).

Add:

Cooley v. Williams, 31 S.W.3d 810 (Tex. Civ. App. 2000) (an executory limitation is an event which, if it occurs, automatically divests one of devised property).

In re Smith, 2004 Mich. App. LEXIS 609 (Mich. Ct. App., 2004) (fee simple subject to executory interest would be granted to children of the holder of a life estate upon the termination of the life estate).

Add:

Cooley v. Williams, 31 S.W.3d 810 (Tex. Civ. App. 2000) (a determinable fee simple estate is a fee simple interest in every respect, except that it passes to another, who has an executory interest, if the contingency happens).

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Supp. to § 26.03 History of Executory Interests.

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Add:

Scott v. Brunson, 569 S.E.2d 385, 387 (S.C. App. 2002) ; *Deviney v. Nationsbank, 993 S.W. 2d 443, 448 (Tex. App. 1999)* .

Add:

Deviney v. Nationsbank, 993 S.W. 2d 443, 451 (Tex. App. 1999) (where ownership of real property passes from siblings to daughters in the event of partition, the daughters clearly have a shifting executory interest).

See generally Cooley v. Williams, 31 S.W.3d 810 (Tex. Civ. App. 2000) ; *Garza v. Rodriguez, 18 S.W.3d 694 (Tex. App. San Antonio 2000)* .

Add:

See generally Cooley v. Williams, 31 S.W.3d 810 (Tex. Civ. App. 2000) ; *Garza v. Rodriguez, 18 S.W.3d 694 (Tex. App. San Antonio 2000)* .

Add:

See also Ditmore v. Michalik, 625 N.W.2d 462 (Mich. App. 2001) (condition that the erection of structures would cause the title to the property to revert to the grantor created an executory limitation).

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Supp. to § 26.04 Executory Interests in Derogation of the Common Law.

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Add:

See Dunkel v. Hilyard, 766 N.E.2d 603 (Ohio App. 2001) .

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Supp. to § 26.06 Executory Interests and Executory Devises Compared.

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Add:

Cooley v. Williams, 31 S.W.3d 810 (Tex. Civ. App. 2000) (the occurrence of the executory limitation automatically divests one of devised property); *Nelson v. Provo City, 6 P.3d 567 (Utah App. 2000)* (fee simple determinable expires automatically on the occurrence of a stated event).

Add:

Est. of Vera Perrott Vietor, 2003 Cal. App. Unpub. LEXIS 8708 (No. A099902, Sept. 12, 2003) (testatrix devised all of the residue of her estate for the benefit of a foundation on the condition that the property not be despoiled by picnic tables, barbecue pits, swimming pools, or like improvements).

Garza v. Rodriguez, 18 S.W.3d 694 (Tex. App. San Antonio 2000) (example of a shifting executory interest in will).

Add:

But see Cooley v. Williams, 31 S.W.3d 810 (Tex. Civ. App. 2000) (holding that plaintiff held an executory interest in the decedent's estate, which contingency was the death of the plaintiff's grandfather with some of the decedent's property).

Add:

In re Commings, 297 B.R. 701, 704 (Bankr. N.D. Ill. 2003) (criticizes *Jackson* for concluding that a certificate of purchase is more than a lien).

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Supp. to § 26.07 Executory Interests and Remainders Compared.

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Add:

Meduna v. Holder, 2003 Tex. App. LEXIS 10568 (No. 03-02-00781-CV, Dec. 18, 2003) (estate may vest in interest before vesting in possession).

Add:

Jones v. Hill, 2004 Va. LEXIS 56 (No. 031514, Apr. 23, 2004) (when a devise is made and the property is not to be enjoyed in possession until some future period or event, it will, where no special intent to the contrary is manifested in the will, be held to be vested in interest immediately on the death of the testator).

Add:

Haley v. Regions Bank, 586 S.E.2d 633 (Ga. 2003) (children received an equal share of the estate subject to be divested by the death of a child without leaving lineal descendents).

Add:

Summers v. Garland, 98 S.W.3d 23 (Ark. 2003) (alternative contingent remainder vested after one of the beneficiaries was convicted of a felony).

Add:

Georgetown College v. Alexander, 2003 Ky. App. LEXIS 210 (No. 2002-CA-000651-MR, Aug. 29, 2003) (in interpreting wills dealing with alternative contingent remainders, courts are guided by the principle that the testatrix's intention must be determined by the language of the will).

Add:

Summers v. Garland, 98 S.W.3d 23 (Ark. 2003) (alternative contingent remainder vested after one of the beneficiaries was convicted of a felony).

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Supp. to § 26.08 Executory Interests Permit Freeholds to Commence in the Future.

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Add:

Nelson v. Provo City, 6 P.3d 567 (Utah App. 2000) (fee simple determinable expires automatically on the occurrence of a stated event).

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Supp. to § 26.09 A Fee Limited on a Fee By Way of Executory Devise.

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Add:

Richards v. Maiden, 34 Va. Cir. 494 (Va. Cir. Ct. 2000) .

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3-26 Thompson on Real Property, Thomas Editions Supp. to § 26.10

Supp. to § 26.10 Indestructibility of Executory Interests.

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Delete from last line of text on page 483:

have the effect to

Add:

Camenisch v. City of Stanford, 2003 Ky. App. LEXIS 211 (No. 2002-CA-000962-MR, Aug. 29, 2003) (a fee simple subject to a condition subsequent grants the right to re-entry or reversion); *Scott v. Brunson, 569 S.E.2d 385, 387 (S.C. App. 2002)* ; *Zenon v. R. E. Yeagher Mgmt. Corp., 57 Conn. App. 316, 748 A.2d 900, 905 (Conn. App. 2000)* ; *Deviney v. Nationsbank, 993 S.W. 2d 443, 448 (Tex. App. 1999)* .

Add:

Cooley v. Williams, 31 S.W.3d 810 (Tex. Civ. App. 2000) (an executory limitation springs into being automatically upon its occurrence); *Ctr. for Molecular Medicine v. Belleville, 19 N.J. Tax 342 (N.J. Tax 2001) rev'd on other grounds, 813 A.2d 1243 (N.J. Super. 2003)* (occurrence of an executory limitation automatically defeats a fee simple).

Add:

Garza v. Rodriguez, 18 S.W.3d 694 (Tex. App. San Antonio 2000) (example of a shifting executory interest in will).

Add:

Greene v. Rosin (*In re* Rosin), 1998 Bankr. M.D. Fla. LEXIS 1924 at *17 (June 4, 1998) (executory interest to be distinguished from a "mere possibility").

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Supp. To CHAPTER 26 EXECUTORY INTERESTS

3-26 Thompson on Real Property, Thomas Editions Supp. to § 26.11

Supp. to § 26.11 Alienability, Descendibility, and Transmissibility of Executory Interests.

[Go To Main]

Add:

In re Greer, 242 B.R. 389, 399 (Bankr. N.D. Ohio 1999) (executory interests and other expectant estates are "descendible, devisable, and alienable in the same manner as estates in possession").

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Supp. To CHAPTER 26 EXECUTORY INTERESTS

3-26 Thompson on Real Property, Thomas Editions Supp. to § 26.12

Supp. to § 26.12 Executory Interests After Sale.

[Go To Main]

Add:

Where real property was condemned by the State, proceeds of the condemnation award were invested, and holder of determinable life estate was entitled to receive investment income during the period of the tenancy, while the executory interest was to take the undiminished corpus thereafter. *Beech v. Hibbett, 2000 Tenn. App. LEXIS 464* at *5, 11 (July 19, 2000) .

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Supp. To CHAPTER 26 EXECUTORY INTERESTS

3-26 Thompson on Real Property, Thomas Editions Supp. to § 26.13

Supp. to § 26.13 Executory Interests and Waste.

[Go To Main]

Add:

Peoples' St. Bank v. Stenzel (In re Stenzel), 301 F.3d 945, 951 (8th Cir. 2002) (remainderman has no right to interfere unless waste was being committed); *Doramus v. Rogers Group, Inc. 2001 Tenn. App. LEXIS 127* at *39-40 (Feb. 28, 2001) (plaintiff with an executory interest may bring an action for waste, but available remedies depend on remoteness of possibility that interest will become a fee simple absolute).

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Supp. To CHAPTER 26 EXECUTORY INTERESTS

3-26 Thompson on Real Property, Thomas Editions Supp. to § 26.14

Supp. to § 26.14 Executory Interests and the Rule Against Perpetuities.

[Go To Main]

Add:

Washington State Grange v. Brandt, 148 P.3d 1069 (Wash. App. 2006) (executory interest language requiring the land to revert to the then owner of the original plot, without reference to a measuring life, violated the rule against perpetuities).

In re Smith, 2004 Mich. App. LEXIS 609 (No. 234640, Feb. 24, 2004) (executory interest was found not to violate the rule against perpetuities because the common law in Michigan provides that future interests should be treated as vested where there is any present interest in the income of the property).

A grant "effective only upon" termination of a determinable fee cannot vest until the prior interest has terminated. Because a determinable fee could continue forever, the deed may not vest within the period of the Rule and is void. *Peveto v. Starkey, 645 S.W.2d 770, 772 (Tex. 1982)* .

Johnson v. Ferris, 2001 Va. Cir. LEXIS 366 at *8 (May 31, 2001) .

§ 26.14(a) Failure of Issue. [Go To Main]

To the second line of the text on page 489, add:

and Kentucky

§ 26.14(b) Severance of Void Limitations. [Go To Main]

Add:

However, in some cases the court may declare the void interest to be a fee simple determinable, *See, e.g., Washington State Grange v. Brandt, 148 P.3d 1069 (Wash. App. 2006)* .

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Supp. To CHAPTER 26 EXECUTORY INTERESTS

3-26 Thompson on Real Property, Thomas Editions Supp. to § 26.15

Supp. to § 26.15 Bibliography.

[Go To Main]

Add to Books:

Thomas F. Bergin and Paul G. Haskell, *Preface to Estates in Land and Future Interests* 102-117 (2d ed. 1984).

Burby, William E. *Handbook of the Law of Real Property* (3d ed. 1965).

Cribbet, John and Corwin W. Johnson. *Principles of the Law of Property* (3d ed. 1989).

Moynihan, Cornelius J. and Sheldon F. Kurtz. *Introduction to the Law of Real Property* (4th ed. 2005).

Add to Articles:

Beyer, Gerry W., "Annual Survey of Texas Law: Wills and Trusts," *56 SMU L. Rev. 2071, 2081 (2003).*

Gallanis, T.P., "The Future of Future Interests," *60 Wash. & Lee L. Rev. 513 (2003).*

Gibbons, Max, "Of Windfalls and Property Rights: Palazzolo and the Regulatory Takings Notice Debate," *50 UCLA L. Rev. 1259, 1277 (2003).*

Add to Annotations:

Annotation, *Executory limitation creating life estate or other interest less than a fee, as operating to defeat the entire fee of the precedent defeasible estate or as merely carving the particular estate therefrom,* 140 A.L.R. 941 .

Annotation, *Delivery or Distribution to Life Tenant, or Assent by Executor to his Possession or to the Life Interest, as Inuring to Benefit of the Remaindermen and Operating to Take the Remainder out of the Estate, Absent a Trust or Will Provision Retaining It, 68 A.L.R.2d 1107* .

Annotation, *Executory limitation creating life estate or other interest less than a fee, as operating to defeat the entire fee of the precedent defeasible estate or as merely carving the particular estate therefrom,* 140 A.L.R. 941 .

Annotation, *Gift or Grant in Terms Sufficient to Carry the Whole Property Absolutely as so Operating Where Followed by a Purported Limitation Over of Property Not Disposed of by First Taker, 17 A.L.R.2d 7* .

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CHAPTER 27 THE LAW OF TRUSTS RELATED TO REAL PROPERTY

3-27 Thompson on Real Property, Thomas Editions 27.syn

AUTHOR: Professor David A. Thomas J. Reuben Clark Law School Brigham Young University

§ 27.syn Synopsis to Chapter 27: THE LAW OF TRUSTS RELATED TO REAL PROPERTY

§ 27.01 Introduction

§ 27.02 History of Trusts

§ 27.03 Definitions of Trust Terms

§ 27.03(a) Trust

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§ 27.05(c) Liabilities of Trustees

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§ 27.07 Bibliography

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CHAPTER 27 THE LAW OF TRUSTS RELATED TO REAL PROPERTY

3-27 Thompson on Real Property, Thomas Editions § 27.01

AUTHOR: Professor David A. Thomas J. Reuben Clark Law School Brigham Young University

§ 27.01 Introduction

This chapter provides an overview of the American law of trusts, with emphasis on trust law as it relates to the law of real property. Trusts have been a wonderfully adaptable feature of common-law jurisdictions for centuries, and have figured importantly in the creation and administration of real property interests, but are equally facile in dealing with other kinds of property interests. Thus the more general subject of trusts has been the focus of several single- and multi-volume legal treatises. This chapter, as stated, gives a more summary treatment of the subject of trusts in general, while pointing out and discussing in more detail the particular applications to real property interests. Where available, cited judicial and legislative sources will be drawn from cases and statutes related to real property. Likewise, the bibliography will include, in addition to standard works on the general subject of trusts, more specific works on the real property aspects of trusts.

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CHAPTER 27 THE LAW OF TRUSTS RELATED TO REAL PROPERTY

3-27 Thompson on Real Property, Thomas Editions § 27.02

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§ 27.02 History of Trusts

A trust has been rather tersely defined as "a property right held by one party for the use of another," n1 or as "a fiduciary obligation in which one person is the holder of the title to property subject to an equitable obligation to keep or use the property for the benefit of another." n2

Under medieval English law, a person who held title to property for the use of another was often referred to as a feoffee to uses, that is, one who had been enfeoffed -- or endowed with property -- to be held while being used by another.

The term "use" in English law derives from the Latin "opus," signifying a benefit or "on behalf of." One person could give land or chattels to another, for the use or benefit of a third person. Uses were employed by knights embarking on crusades, by one wishing to confer the benefit of land on a religious order not authorized to hold land, and by villeins who could convey their land only by yielding it to the lord "for the use of" the intended grantee. When a wardship was taken from an unfaithful guardian and given to another, the new guardian held "to the use of" the ward. n3

Uses had apparently become quite common during the fourteenth century, because several statutes of the latter part of that century deal with uses. One statute made lands held to the use of defrauding debtors subject to execution for their debts. n4 Another statute made uses for the benefit of religious houses and other corporations subject to the Statute of Mortmain, n5 meaning that no uses could be created for the benefit of such institutions, upon pain of forfeiture (except that mortmain practice permitted such conveyances after first obtaining a royal license). n6 By statute, uses became forfeitable for treason, as were other real property interests. n7

The beneficiary of the use, the "*cestui que* use," was frequently the party benefiting from a collusive or fraudulent arrangement, and perhaps was just as frequently the party victimized by an unfaithful feoffee who would not honor the terms of the use. Certainly much mischief could be accomplished by wrongful employment of the use:

> The purpose of such conveyances frequently was to enable the landowners to deal with their lands in a manner not countenanced by the common law or to evade the liabilities incident to legal ownership. Thus A, seised of Blackacre in fee simple and wishing to dispose of it by will, would enfeoff B in fee simple to hold to A's use during A's lifetime and after his death to transfer the land according to his will.

> (The student will recall that land generally was not devisable prior to 1540.) A landowner could by a feoffment to uses place his lands beyond the reach of his creditors seeking to levy an execution thereon. Again, a dying land owner could by a conveyance to several feoffees to uses (who would take as joint tenants) deprive the lord of the fee of the important incidents of wardship, marriage or relief. n8

It was also the rule that dower and curtesy would not attach to uses, which significantly aided the fee alienability of uses.

Succumbing to the attractive features of the use, however, the landowner became very vulnerable to a false feoffee:

> It is obvious that the success of a feoffor's attempt to put the legal ownership of his land in someone else and retain the beneficial ownership in himself depended on the feoffee keeping his promise to deal with the land according to the agreement made at the time of the feoffment. Unless some way could be found to enforce the feoffee's promise the feoffor's position was indeed precarious. In law the feoffee was the true owner; the cestui que use in possession was only a tenant at will. Seisin had vested in the feoffee by virtue of the feoffment and the law was not at all concerned with the feoffee's promise to deal with the land for the benefit of the feoffor or his nominees. n9

According to Ames, the English feoffee to uses was the direct counterpart of the German *Treuhand* or fiduciary, and the beneficiary of that use -- the *cestui que use* -- was therefore able to obtain only nominal protection for that interest in only the ecclesiastical courts. n10 While feoffments to use in land are in evidence from the beginning of the twelfth century, and were common by the fourteenth century, it does not appear that a disappointed beneficiary had a right of action in common-law courts; n11 such beneficiaries naturally turned to equity.

The situation was a natural setting for intervention by the Chancellor, acting on equitable principles to provide relief unavailable under the common law. So, early in the fifteenth century, the Court of Chancery began accepting cases in which feoffees were accused of not honoring their instructions in behalf of a *cestui que* use. The Chancery Court did not interfere with the feoffees' legal title, but did impose fines and imprisonment for misconduct of feoffees; from early in the fifteenth century bills in equity to enforce uses became frequent.

The first known equity decree in favor of a *cestui que use* dates from 1446, n12 although there may have been others before it. This first equity decree vindicating a *cestui que use* marks the real beginning of the use. So long as the obligation of a feoffee to uses to honor the use was only voluntary, the use was indistinguishable from its continental counterparts, such as the German *Treuhand* or fiduciary, but when the English chancellor turned the feoffee's moral duty into an enforceable obligation, then the uniquely English use came into being and the development of trust law began.

The motivation for this development, as with other areas of equity, was moral:

> The spectacle of feoffees retaining for themselves land which they received upon the faith of their dealing with it for the benefit of others was too repugnant to the sense of justice of the community to be endured. The common law could give no remedy, for by its principles the feoffee was the absolute owner of the land. A statute might have vested, as the Statute of Uses a century later did vest, the legal title in the *cestui que use.* But in the absence of a statute the only remedy for the injustice of disloyal feoffees to uses was to compel them to convey the title to the *cestui que use* or hold it for his benefit. Accordingly, the right of the *cestui que use* was worked out by enforcing the doctrine of personal obedience [to the order of the chancellor to convey the land]. n13

The next major event in the development of trust doctrine was a series of statutory reforms culminating in passage of the Statute of Uses itself in 1535. Before passage, legitimizing uses under equity jurisdiction had not quelled the abuses,

and movements for statutory reform continued to gain momentum. One statute permitting a remedy against a person receiving the profits of land, n14 and another statute enabling a *cestui que use* to convey a legal estate n15 reflected a policy position that the *cestui que use* should be treated as a legal owner of the property, not merely as an equitable owner. Based on this same position, other statutes declared void certain trusts and uses of chattels to the use of a settlor (similar to a modern grantor trust), n16 declared that wardship and reliefs would be due from the *cestui que use* of land held under military tenure, n17 and decreed that execution could be had against land held under a use, with the *cestui que use* permitted to employ whatever defenses were available to the legal owner. n18 When Richard III became king, after he had been enfeoffed to use by several of his associates, a statute required that such lands of which he was seised for the use of others were to be vested in the *cestui que use*, n19 another example of treating the owner of the use as the legal owner. This long-emerging legislative policy of treating the equitable interest of the *cestui que use* as a legal interest led inexorably to the great Statute of Uses which became effective in 1536. n20

Before that legislation, however, an extensive conveyancing practice involving uses had developed. During the period when enfeoffments to uses were common conveyancing devices, the uses could be included in a written document, stated orally, or declared to be the uses included in the grantor's will. If uses were not made known at the time of the enfeoffment, the grant was presumed to be for the use of the feoffor.

> A use could also be created in connection with any other common-law type of conveyance such as a fine, common recovery, lease, release or grant. Broadly speaking, a use could be created with or without a transfer of possession. A use was raised with a transfer of the possession where it was created upon an actual transfer of seisin as in the case of a feoffment to uses. No technical words were necessary to create a use, and the declaration of the use could be oral or written. The word "use" was frequently employed but it was not essential. Any words expressing the feoffor's intention that the legal estate should be held for the benefit of another person were sufficient. A declaration that the feoffee should hold the land upon trust or confidence for -- and his heirs, or that he should permit -- and his heirs to take the profits, was sufficient to raise a use. n21

Eventually, uses become so common that when a fee simple enfeoffment occurred and no use was declared, but the transaction was without consideration, a use was presumed in the feoffor. This implied use in the feoffor was termed a "resulting use."

Uses were often conveyed to several persons as joint tenants; this arrangement offered some security against simultaneous dishonesty by all the feoffees and, through operation of survivorship, avoided questions of dower or feudal incidents when any of the joint tenants died.

A use was also frequently raised by a bargain and sale agreement. By a bargain and sale agreement, oral or written, an owner accepted money consideration in return for a promise to sell the land to the buyer. The promise alone effected no conveyance of the legal title, but the bargainee would be treated in equity as the beneficial owner and, by a suit in equity, the bargainee could compel the bargainor to convey legal title. This arrangement was also a natural vehicle for raising a use. By bargain and sale the owner could agree to hold the land for use or benefit of the buyer and the buyer's heirs. Again, the buyer could compel the seller to permit the buyer's use of the land, including its rents and profits. As early as the fifteenth century, a bargain and sale that had not proceeded to conveyance of the legal title was deemed to have raised a use in the bargainee. For those who actually wanted no more than the use, the bargain and sale arrangement would thus be left in this suspended, uncompleted state, with the purchasers holding only equitable title in the form of a use. From the point of view of feudal tenurial doctrine, this circumstance was significant, because it meant, as mentioned above, that a use could be raised without a transfer of seisin. Parties also found appealing the confidentiality of the transaction, because without conveyance of the legal title, there was no occasion to make a public record of the transaction.

Conveying land to uses became extremely widespread n22 and resulted in much abuse, complication, and fraud. Most

of this was peremptorily wiped away with the enactment of perhaps the most famous and significant English property law statute, the Statute of Uses, n23 which became effective in 1536. The circumstances that finally prompted the monarchy to act against uses and force restrictive legislation through Parliament have been well summarized by Moynihan:

> This statute is probably the most important piece of legislation dealing with English land law, and its far-reaching consequences are still felt in our own times. The causes which led to its enactment are to be found in an English King's need of money. The Statute was primarily designed to restore to the Crown the feudal revenues which were being lost by means of the conveyance of lands to uses. In the sixteenth century the incidents of tenure, such as wardship, marriage, relief, primer seisin and escheat, were burdensome exactions on the tenant and, correspondingly, a profitable source of revenue for the lord of the fee. Since the king "alone was always lord and never tenant" he lost heavily when landowners by conveyances to joint feoffees to uses rid themselves of the incidents of tenure by retaining only the beneficial ownership. Henry VIII by means of the Statute of Uses sought to put an end to this drainage of the royal revenues ... The abolition of uses was not looked upon with favor by the land owning class who feared the loss of power to devise their lands, but Henry was able to enlist the support of the common-law lawyers in Parliament in putting through the Statute because of their deep-rooted jealousy of the Court of Chancery. As Maitland well puts it, the Statute "was forced upon an extremely unwilling Parliament by an extremely strong-willed king." n24

The method of the Statute of Uses was simple: it simply declared that whoever held the use would now also be deemed the holder of the legal title. Its essential but arcane language was paraphrased by Maitland:

> Where any person or persons shall be seised of any lands or other hereditaments to the use, confidence, trust of any other person or persons, in every such case such person and persons that shall have any such use, confidence or trust in fee simple, fee tail, for term of life or for years or otherwise shall stand and be seised deemed and adjudged in lawful seisin, estate and possession of and in the same lands and hereditaments in such like estates as they had or shall have in use. n25

The Statute of Uses did not alter the traditional common-law methods of conveying interests. Livery of seisin was effective to convey a freehold estate, a grant conveyed a vested remainder or a reversion, and an agreement and entry sufficed to convey a term of years. The common-law rule that a freehold to commence at some time in the future could not be created by conveyance remained in effect. The important impact of the Statute of Uses was to add several new possibilities for conveyancing.

Several kinds of uses were not converted into legal estates by the Statute of Uses. According to the wording of the statute, only uses derived from one who was seised of the land were to be executed into legal interests. Because seisin applied only to freehold estates, if one held a non-freehold estate to the use of another, that use was not executed. Uses raised on an estate held for a term of years, or on personal property such as chattels or a chose in action, were unexecuted.

If a person was seised to the use of another, who held to the use of yet another -- a so-called use limited on a use -- the second use had been held void even before the Statute of Uses. After the Statute of Uses, the second use continued to be held void -- notably in the famous *Tyrrel's Case* of 1557. n26

Thus the second use was at law deemed unexecuted, and in equity was still treated as void, so no interest at all passed under the second use. Sometime in the late seventeenth century, n27 after enactment of the statute abolishing tenures in 1660, n28 a use upon a use came to be upheld in equity. n29 This development once again enabled landholders to split their interests between legal and equitable titles, and the second uses came to be commonly referred to as a trust. The holders of the first use, executed into legal interests, became the trustees, not only holders of the legal title but also

bound to act in the interests of the trust owners or beneficiaries.

A few years after enactment of the Statute of Uses, still another category of uses was held exempt from execution into legal interests. These were the so-called active uses, created by a conveyance to uses with the grantee to perform affirmative duties in behalf of the *cestui que use*. Typically, such affirmative duties might consist of collecting and paying to the *cestui que use* the rents and profits from the property, or conveying the property at the direction of the *cestui que use*. This exemption for active uses is not in the wording of the Statute of Uses, but was invoked by judicial decision. The equitable estates arising out of unexecuted active uses tended to merge with the unexecuted uses upon use and together they emerged as early forms of the modern trust in the eighteenth century.

When equity courts came once again to recognize the passive trusts created by uses upon a use in the late seventeenth century, orderly development of the law of trusts began. Trusts came to be viewed, not with the abhorrence in which sixteenth century uses had been held, but with more eagerness to usefully employ the trust device for the convenience and benefit of individual citizens. n30

The association of trust doctrine with equity jurisprudence hindered acceptance of trusts in early American courts. Equity was viewed with suspicion in the United States because it was thought to confer too much discretion on judges; however, with gradual acceptance of equity powers in the courts, trusts also were accepted and utilized. One distinct contribution of American business to trust law was early recognition that a corporation could be a trustee.

In more modern times, trust law in America has been mostly developed by case law, although numerous state statutes address individual issues concerning various aspects of trustees' powers or the propriety of various trust activities. A few American states have adopted more or less comprehensive trust codes, either to embody or replace the common law, and various parts of traditional trust law have been taken into or reformed by several uniform acts. Similarly, the first Restatement of Trusts in 1935 and the second Restatement of Trusts in 1957, were promulgated by the American Law Institute to set forth American trust law as it is or ought to be, according to the drafters' perceptions and points of view.

In the early history of trusts, they were used almost exclusively for real property. Gradually, trusts came to be used for personal property as well, and now it may be said that "trusts of personal property have become far more important than trusts of land. The typical trust today is a trust of which the subject matter is income-producing securities." n31 For most purposes, the discussion of trust law in this chapter will apply without regard to whether the trust is of real or personal property.

FOOTNOTES:

(n1)Footnote 1. *Keplinger v. Keplinger, 113 N.E. 292, 293 (Ind. 1916).*

(n2)Footnote 2. George T. Bogert, Trusts 1 (6th ed. 1987).

(n3)Footnote 3. *Statute of Westminster I, 3 Edw. 1,* c. 48 (1275).

(n4)Footnote 4. *50 Edw. 3,* c. 6 (1376).

(n5)Footnote 5. *7 Edw. 1,* Stat. 2 (1279).

(n6)Footnote 6. *15 Rich. 2,* c. 5(4) (1391).

(n7)Footnote 7. *21 Rich. 2,* c. 3 (1397):

> And he for him and his heirs shall forfeit all the lands, tenements, and possessions, liberties and all other hereditaments, which he hath or *any other hath to his use*, or had the day of the treason done as

> well in fee tail as in fee simple to the King and his heirs, as well such lands holden of other as of himself forever; *and also such possession as other have to his use*. (Emphasis added.)

(n8)Footnote 8. Cornelius J. Moynihan, Introduction to the Law of Real Property 172 (2d ed. 1988).

(n9)Footnote 9. *Id.*

(n10)Footnote 10. James Barr Ames, *The Origin of Uses and Trusts*, in 2 Association of American Law Schools, Select Essays In Anglo-American Legal History 737, 739-741 (1908).

(n11)Footnote 11. *Id.* at 741.

(n12)Footnote 12. Myrfyne v. Fallan, 2 Cal. Ch. XXI (1446) (requiring the defendant to convey the property).

(n13)Footnote 13. James Barr Ames, *The Origin of Uses and Trusts*, in 2 Association of American Law Schools, Select Essays In Anglo-American Legal History 737, 742-743 (1908).

(n14)Footnote 14. *1 Hen. 7,* c. 1 (1485).

(n15)Footnote 15. *1 Rich. 3,* c. 1 (1484).

(n16)Footnote 16. *3 Hen. 7,* c. 4 (1487).

(n17)Footnote 17. *4 Hen. 7,* c. 17 (1489).

(n18)Footnote 18. *19 Hen. 7,* c. 15 (1504).

(n19)Footnote 19. 1 Rich. III, c. 5 (1483).

(n20)Footnote 20. *27 Hen. 8,* c. 10 (1535).

(n21)Footnote 21. Cornelius J. Moynihan, Introduction to the Law of Real Property 176 (2d ed. 1988).

(n22)Footnote 22. Indeed, according to Coke in the commentaries on Littleton, by the mid-fifteenth century, "the greater part of the lands in England ... were in use." Co. Lit. 272a.

(n23)Footnote 23. *27 Hen. 8,* c. 10 (1535).

(n24)Footnote 24. Cornelius J. Moynihan, An Introduction to the Law of Real Property 178-179 (2d ed. 1988). A detailed discussion of the political causes leading to the Statute of Uses is in 4 William Holdsworth, A history of English Law 450-461 (3d ed. 1945). The Quoted Passage of Maitland is from Frederic William Maitland, Equity, Also the Forms of Action at Common Law 35 (1909), who added:

> It [the Statute of Uses] was very unpopular and was one of the excuses, if not one of the causes, of the great Catholic Rebellion known as the Pilgrimage of Grace. It was at once seen that it would deprive men of that testamentary power, that power of purchasing the repose of their souls, which they had long enjoyed. The king was the one person who had all to gain and nothing to lose by the abolition of uses.

(n25)Footnote 25. Frederic William Maitland, Equity, Also the Forms of Action At Common Law 35 (1909).

(n26)Footnote 26. Benl., 1669, 61 (1557).

(n27)Footnote 27. The earliest case acknowledging the validity of the second use is the 1676 case of Grubb v. Gwillim, Selden Society, 1 Lord Nottingham's Chancery Cases 347, No. 487 (Vol. 73, 1957).

(n28)Footnote 28. Tenures Abolition Act, 12 Car. 2, c. 24 (1660).

(n29)Footnote 29. A. W. B. Simpson, A History of the Land Law 198-207 (2d ed. 1986).

(n30)Footnote 30. 1 Austin Wakeman Scott and William Franklin Fratcher, The Law of Trusts 24-25 (4th ed. 1987).

(n31)Footnote 31. *Id. at 26.*

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CHAPTER 27 THE LAW OF TRUSTS RELATED TO REAL PROPERTY

3-27 Thompson on Real Property, Thomas Editions § 27.03

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§ 27.03 Definitions of Trust Terms

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§ 27.03(a) Trust

Probably the most widely accepted general definition of a trust is that set forth in the two Restatements of Trust:

> A trust, as the term is used in the Restatement of this subject, when not qualified by the word "charitable," "resulting" or "constructive," is a fiduciary relationship with respect to property, subjecting the person by whom the [title to] property is held to equitable duties to deal with the property for the benefit of another person, which arises as a result of a manifestation of an intention to create it. n32

This definition helps distinguish trusts from other relationships that appear similar to trusts in that they feature fiduciary relationships, but are actually distinguishable. For example, a bailment would not be considered a trust, because the bailee is entrusted only with possession, but not title and ownership. n33 The executorship is even more similar to a trust, inasmuch as the executor or guardian often does hold title to the entrusted property; however, between the two concepts significant differences exist in powers held and possible liabilities to third parties. The executor usually has very narrow and specific duties and powers and is usually not charged with making investments or otherwise enlarging the estate. n34 The guardianship, although similar to the trust in many ways, also does not usually require the guardian to take legal title to the guardianship property. n35 Legal actions by the guardian are brought in the name of the ward, whereas trustees usually sue in their own names. Guardianship powers are usually fixed by law and, relative to trust powers, are narrow and inflexible. n36

A trust is also distinguishable from an agency relationship. Whereas the agent acts under the direction of the principal, the trustee usually acts according to the trust terms rather than at the direction of the beneficiaries. n37 The agency relationship is often terminable at the discretion of either principal or agent, whereas the trust is usually terminable only according to the terms of the trust agreement. n38

A mortgage is different from a trust in that the mortgagee holds a mere security interest and holds it strictly for the mortgagee's benefit; the trustee holds the trust property for the benefit of the beneficiaries. Normally, no fiduciary relationship exists between mortgagee and mortgagor as it does between trustee and beneficiary. n39 Also a pledgee is

much more like a mortgagee than a trustee. n40

If property is devised or bequeathed subject to a requirement on the recipient to make certain payments to third persons, such a charge does not create a trust relationship. Payment of the charge permits the devisee to keep the property; n41 nonpayment can result in an action against the property, but not necessarily against the devisee, since the interest of the charge beneficiary in the property is only a security interest. n42

Closely related to a transfer of property subject to a charge is a conveyance upon a condition, which may sometimes be considered as a conveyance in trust:

> If the conveyance is upon a condition subsequent, the transferee, although he cannot be compelled to perform the condition, can be compelled to surrender the property upon his failure to perform ... . Inasmuch as only the transferor or his heirs can take advantage of a condition, unless there is a valid gift over on breach of the condition, and inasmuch as the only remedy is a forfeiture for breach of the condition, a condition is not a very effective method of accomplishing the transferor's purpose to benefit the third person. Hence the courts have always been inclined to construe a conveyance as one upon trust rather than upon condition. n43

§ 27.03(b) The Creator of a Trust

Various terms are used to describe one who creates a trust by conveying property into trust. These terms include trustor, settlor, grantor, and -- in the case of a testamentary trust -- testator or testatrix. Outside the testamentary context, the terms are generally interchangeable, and in this chapter the term trustor will generally be used. n44

§ 27.03(c) The Property of the Trust

The property, whether real or personal, that is the subject matter of the trust is often referred to as the trust property, but other terms in frequent use include the trust estate, the trust res, the trust corpus, and the subject matter of the trust. This last phrase may be used to describe the property in which the trust holds an interest, although that interest may be something less than full legal title. n45

§ 27.03(d) Holders of Beneficial Interests

Those who hold beneficial interests in the trust may most simply be referred to as beneficiaries. However, the ancient and awkward term *cestui que trust* is also still in use, mostly in judicial opinions. Like its archaic counterpart, *cestui que use*, it signifies nothing more than one who holds a beneficial or equitable interest in the trust or use, respectively. In this chapter, the more intelligible term beneficiary will usually be used to describe a holder of an equitable or beneficial interest in the trust.

FOOTNOTES:

(n1)Footnote 32. Restatement of Trusts § 2. The words in brackets were added to this definition by Restatement (Second) Of Trusts § 2.

(n2)Footnote 33. *Doyle v. Burns, 99 N.W. 195 (Iowa 1904).*

(n3)Footnote 34. *Matter of Scheuer, 405 N.Y.S.2d 189 (1978); In re Estate of Bayles, 261 A.2d 684 (N.J. Super. 1970); Campbell v. Johnson, 79 N.E.2d 147 (Ohio App. 1948).*

(n4)Footnote 35. *State v. Whitaker, 638 S.W.2d 189 (Tex. App. 1982); Owen v. Hines, 41 S.E.2d 739 (N.C. 1947); In re Guardianship of Paulsen, 282 N.W. 36 (Wis. 1938); Lamar v. Micou, 112 U.S. 452, 5 S. Ct. 221, 28 L. Ed. 751 (1884). But see Ziady v. Curley, 396 F.2d 873 (4th Cir. 1968).*

(n5)Footnote 36. *Wilson v. McKleroy, 89 So. 584 (Ala. 1921)* (guardian needed authority of the court before selling ward's land). *But see Cross v. Rudder, 380 So. 2d 766 (Ala. 1979).*

(n6)Footnote 37. *Taylor v. Davis' Adm'x, 110 U.S. 330 (1884).*

(n7)Footnote 38. *Mairs v. Central Trust Co., 34 S.E.2d 742 (W. Va. 1945); Fidorski v. Maryeski, 11 Conn. Supp. 414 (1943); Huntoon v. Southern Trust & Commerce Bank, 290 P. 86 (Cal. App. 1930).*

(n8)Footnote 39. *De Phillips v. Mortgage Assoc., 291 N.E.2d 329 (Ill. App. 1972); Koury v. Sood, 62 A.2d 649 (R.I. 1948); Crockett v. Root, 146 P.2d 555 (Okla. 1943).*

(n9)Footnote 40. *Willett v. Herrick, 155 N.E. 589* (Mass.), *cert. denied, 275 U.S. 545 (1927).*

(n10)Footnote 41. *Gadekar v. Phillips, 375 A.2d 248 (1977); Torres v. Abeyta, 84 P.2d 592 (N.M. 1938); Lang v. Everling, 23 N.Y.S. 329 (1893).*

(n11)Footnote 42. *Nusz v. Nusz, 127 P.2d 441 (Kan. 1942); Hayes v. Sykes, 21 N.E. 1080 (Ind. 1889); Den v. Small, 20 N.J.L. 151 (1843).*

(n12)Footnote 43. 1 Austin Wakeman Scott And William Franklin Fratcher, The Law of Trusts 116 (4th ed. 1987).

(n13)Footnote 44. *Markham v. Fay, 884 F. Supp. 594 (D. Mass. 1995)* (the declaration of trust gave the settlor such power over the principal and income of the trust that both principal and income were in effect the settlor's property), *aff'd in part, rev'd in part, Markham v. Fay, 74 F.3d 1347 (1st Cir. 1996).*

(n14)Footnote 45. *In re Lefkas Gen. Partners, 112 F.3d 896 (7th Cir. 1997)* (holding that transferor does not retain any real or equitable interest in redevelopment after transferring property to a debtor's land trust).

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CHAPTER 27 THE LAW OF TRUSTS RELATED TO REAL PROPERTY

3-27 Thompson on Real Property, Thomas Editions § 27.04

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§ 27.04 Creation and Validity of Trusts

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This section describes the various methods by which trusts are created. In the case of express trusts, the creation of the trust is a conscious, intentional act on the part of the trustor. Other trusts that are not express are not necessarily "created," but may arise by operation of law.

§ 27.04(a) Express Trusts

An express trust, created intentionally by the trustor, may be created by written, spoken or other manifestation of that intent, coupled with an actual transfer of property to the trust. An intent to create an express trust may be manifested by a declaration, by transfer of property, or by entering into a contract to deliver property to another in trust. n46

COMPUTER-ASSISTED RESEARCH

LEXIS: intent! w/10 creat! w/50 (property or real property or real estate or land)

One who owns property may simply declare that the property is henceforth held in trust for specified beneficiaries. The declarant is not only the trustor, but is also the trustee. n47 A written declaration of trust for real property is required by the English Statute of Frauds, in force in most American states:

> all declarations or creations of trust or confidences of any lands, tenements or hereditaments, shall be manifested and proved by some writing signed by the party who is by law enabled to declare such trust, or by his last will in writing, or else they shall be utterly void and of none effect. n48

The requirement of a writing for trusts of realty is strong enough that even if the land in an unenforceable oral trust is sold, the trust which continues over the monetary proceeds of sale is also unenforceable, and even the proceeds are personalty. n49

Despite the "utterly void and of none effect" wording of the Statute of Frauds requirement of a writing for trusts of

realty, it is generally held that parties to a trust may agree that their oral trust of land is only voidable, that is, valid and enforceable so long as none of them raise an objection to the lack of a writing. n50 Also, the usual ways to compensate for lack of a formal writing, such as part performance n51 or producing a form of written memorandum of the agreement, n52 are available in the context of trusts. n53

If such a written memorandum is relied upon to satisfy the Statute of Frauds, it may be made by the trustor (in the case of declarations) either before or after the time the trust is created n54 -- but not after the transfer in trust n55 -- or by the trustee (in the case of transfers in trust) either before or at the time the trust is created. n56

COMPUTER-ASSISTED RESEARCH

LEXIS: statute of frauds w/50 trust w/50 (property or real property or real estate or land)

Settlors may also transfer property in trust by means of a will, but the will must be executed with all required formalities, usually a signed writing subscribed by two or more witnesses. And if a document lacks the formality required for a testamentary transfer in trust it may suffice as a written memorandum for a trust created before the settlor's death. n57 Frequently trustors transfer property in trust, but retain very significant powers over the trust property, such as the rights to receive trust income, to invade the trust estate for certain purposes, to revoke or alter the trust, and to give the trustee instructions as to management of the trust. Such a living trust is obviously a type of will substitute, but usually executed without the required will formalities. These arrangements will usually be upheld as valid living trusts as to the remainder interests, even though the trustor can effectively fully control and even terminate the trust before death. n58

A testamentary gift to a living trust (often effected by a so-called "pour over" will) can be nullified by revocation of the will, or by revocation of the living trust before the donor's death. State statutes may provide that the "pour over" testamentary gift may be added to the trust according to its terms at the time of the donor's death, rather than the terms in effect at the time the donor's will was executed. n59

COMPUTER-ASSISTED RESEARCH

LEXIS: pour over w/10 will w/50 trust

A trustor may also create an express trust by obtaining the promise by another to hold property in trust for a specified beneficiary; the declarant in such case is only the trustee. n60

An express trust may also be created when an owner of property (or the holder of a power to appoint property) transfers the property to another, to be held in trust for specified beneficiaries. The creation of the trust occurs by a combination of manifested intent, delivery of the property, and acceptance of the property by the designated trustee. n61 Frequently, property is devised by will to a trustee for the benefit of a third person. Assuming the will is valid, such a trust arises upon the testator's death n62 and is called a "testamentary trust"; other trusts are known as "inter vivos" trusts, or living trusts, or trusts between living persons.

COMPUTER-ASSISTED RESEARCH

LEXIS: trust w/5 (living or inter vivos) w/50 intent!
trust w/5 testament! w/50 intent!

A trustor may create a trust by procuring a promise from another to hold property in trust for a third person, or by making a promise to give property to another trust to hold for a party. This arrangement commonly occurs in the insurance context, when the trustor obtains and pays for a life insurance policy, with the policy proceeds payable to a

named trustee for the benefit of a named beneficiary. n63 Such an insurance trust arises at the time the policy is issued.

COMPUTER-ASSISTED RESEARCH

LEXIS: trust w/50 record! w/50 (property or real property or real estate or land)

Because most trusts involving realty are created by written trust instruments, issues of delivery of those written instruments often arise. Delivery may be effected by manually transferring possession or control of the document, or by telling another that the document is in effect, or by conduct of the trustor toward the beneficiary indicating that the beneficiary's rights are in effect. n64 If the trustor simply executes a self-declaration of trusteeship, courts usually hold it unnecessary for the document to be delivered to the beneficiary. n65 Failure to deliver the document physically will not obstruct creation of the trust if the trustor or declarant has otherwise manifested an intent to place the property in trust. n66

Usually a trust instrument need not be recorded in order to be valid or complete, n67 but recording, as always, affords protection against claims by subsequent bona fide purchasers of trust property.

COMPUTER-ASSISTED RESEARCH

LEXIS: trust w/50 record!

Just as recording is not required for trust instrument validity, consideration is also not essential for the creation or enforceability of a trust. n68 However, if an owner of property has merely agreed to place it in trust, or other essential steps toward creation of trust are incomplete or defective, a beneficiary who has not given consideration (or, in other words, is a "volunteer") cannot enforce the trust. n69 As in promissory contracts generally, if the intended beneficiary of the promise has sufficiently changed position in justified reliance on the promise to create a trust, the trustor may be forced to complete creation of the trust or to deny that the trust was created. n70

What may constitute consideration for a promise to create a trust is the same as consideration for agreements generally. Usually love and affection, or a duty to support, will not be considered valid consideration for a promise to give property in trust. n71 If consideration has been given, but performance is not forthcoming, a court of equity will either declare the trust or require specific performance. n72

COMPUTER-ASSISTED RESEARCH

LEXIS: trust w/20 creat! w/50 consideration w/50 (property or real property or real estate or land)

§ 27.04(b) The Subject Matter of the Trust

The trust estate must consist of some identifiable property, that is, a property interest held by the trustor at the time the trust was created. That interest may be any right, interest, or thing which may be the subject of property ... . Every kind of vested right which the law recognizes as valuable may be transferred in trust. n73

Common types of trust property that arise from real property are estates in land, mortgages, growing crops, n74 promissory notes, n75 equitable interests, n76 and a present right to future rents and profits. n77

If the trustor attempts to create a present trust with a property interest the trustor does not yet own, all that arises is an agreement to create a trust at some time in the future when the property interest is acquired, n78 and the validity of such an agreement depends on whether the element of consideration is present. n79

Property rights that are inalienable may not be transferred into a trust relationship, either by declaration or conveyance. n80 Real property examples of such rights are the reversionary interests of possibility of reverter and right of entry/power of termination, that either by state common law or state statute are inalienable. However, a trustee may convey trust land subject to such reversionary interests, and continue to hold those interests as part of the trust estate. Trusts may also hold contingent interests and equitable interests, such as an equity of redemption. n81

If some form of real property interest is given in trust, the affected land must be described with enough specificity that it can be definitely identified. Thus, an undivided interest in certain real property is sufficiently specific for a valid trust, if the land itself can be identified. n82 Under some circumstances, a power of appointment can also be a proper trust estate and it, too, often affects real property interests. One who is the grantee of a life estate coupled with a power of appointment requiring appointment of the remainder to specific beneficiaries is often considered to hold the power of appointment in trust. If the holder of the power dies without having exercised the power as required, a court may impose a constructive trust on the unappointed property for the benefit of the erstwhile beneficiaries. n83

A trust will be void for uncertainty if the purported trust estate is first subject to depletion for various discretionary bequests, without any assurance that any estate will be left for the trust. n84

It is well-established that an insurance policy may be placed in a trust estate, even though the beneficiary may be changed later by the insured (presumably also the trustor). The beneficiary's rights in the policy and proceeds are considered vested at the time of transfer into trust, but may be divested later upon the naming of a different beneficiary. n85

The huge variety of relationships and property interests that may form a trust estate has stimulated much litigation attempting to distinguish between trust and debt. The obligation of a trustee to beneficiaries is often likened to the obligation of a debtor to a creditor. Proper characterization of the relationship can make a difference in remedies available for misconduct, and whether a party qualifies for those remedies.

Several characteristics of trusts are unique and consistently distinguish trust relationships from debt relationships. n86 Trustees are fiduciaries to their beneficiaries; debtors have no fiduciary obligations to their creditors, at least not as far as their debtor-creditor relationship is concerned; trusts arise out of conveyance rather than contract, and are usually not based on consideration; a trustee's duties relate to specific property, while a debtor's obligation often are not required to be satisfied out of specific property; n87 remedies against a trustee are equitable, while those against a debtor are primarily legal and only secondarily equitable.

The buyer and seller under a specifically enforceable real estate contract may appear to be in a trust relationship, each as trustee required to render particular performance for the benefit of the other. However, neither owes fiduciary obligations to the other (indeed, a direct conflict of interest would exist on both sides of the transaction, if each party owed a fiduciary standard of conduct to the other) and the vendor has no duty to manage the property for the vendee until closing. n88

In a few situations involving a real property interest and the insolvency of one who holds the interest, the debt/trust distinction can be particularly troublesome. A tenant required to give a cash security deposit to the landlord is usually treated as a creditor rather than a beneficiary of the landlord; as a creditor, the tenant may reclaim the appropriate amount at the proper time, but not exactly the same money, and the landlord has more or less unfettered use privileges while possessing the fund. If the landlord were a trustee of security deposit funds, interest during the time of deposit would be owed, and, possibly, each individual deposit would need to be segregated from the others and from the landlord's own accounts. n89 These traditional relationships are now often modified by statutes imposing additional duties on landlords such that they may be considered trustees of security deposit funds for certain purposes.

In another troublesome realty-related area raising the question of debt or trust, a landowner may transfer property to

another in return for the grantee's promise to support the grantor during life. If the support is to be provided out of the specific property granted, a trust relationship for the life of the grantor may be found; n90 otherwise, courts may find instead that the grantor has simply created a rescindable contract n91 or retained a right of entry upon breach of the condition that support be provided. n92

COMPUTER-ASSISTED RESEARCH

LEXIS: trust w/20 (res or estate or corpus or property) w/50 necess!
trust w/20 (res or estate or corpus or property) w/50 certain!

§ 27.04(c) Who May Be the Trustee

The trustee may be any natural person or public or private corporation capable of taking title to the trust property. Only a few restrictions on the capability of property ownership apply to natural persons. At common law, and still in some states, the rights of aliens to own property interests are not complete. n93 Minors, even infants, may be trustees, but any contracts and conveyances they undertake are subject to being voided when the trustee reaches the age of majority, n94 and a beneficiary may require that a fully empowered substitute trustee be appointed. n95

Among the corporate entities entitled to trusteeships are governmental entities at all levels, n96 although they are usually immune to legal actions seeking to enforce claims arising out of their trust activities. Governmental entities often hold real property in trust, the land to be used for specific purposes n97 or held for the benefit of the public, such as ocean shoreland. n98 Municipalities may hold land in trust for specific purposes, purposes which the municipality is required or entitled to pursue. n99

If a municipality were acting as trustee for a purpose outside its proper scope of activity, the trust would not be terminated, but a new trustee could be appointed. n100 This is consistent with the traditional principle that equity will not allow a trust to fail for lack of a trustee.

A similar restraint is imposed on private corporations as trustees: the corporation may function as trustee when the trust activities are consistent with the corporation's own authorized purposes and activities. n101 If the trust is outside the scope of corporate power, the trust will continue, but a different trustee will be appointed. n102 States impose varying restrictions on foreign corporations functioning as trustees, such as requiring the foreign corporation to first become qualified to do business in the state, or may even completely prohibit the foreign corporation from acting as trustee. n103

Unincorporated associations are usually denied recognition as trustees, because they do not have the legal capacity to take title to real property. n104 If, however, such associations are given status as legal entities and are enabled to hold property, they could also be qualified to act as trustees. n105 Again, if a trust declaration names an unqualified association as trustee, a different trustee may be substituted.

A sole trustor may not be named as the sole beneficiary, since that would effect a merger of the legal and equitable estates in the trust property and cancel any purported trust arrangements. n106

One may validly appoint multiple trustees as the sole beneficiaries, because their relationship as cotenants, both legally and equitably, prevents merger. n107 Accordingly, a sole trustee appointed as one of several beneficiaries, or one of several trustees appointed as sole beneficiary, is also usually held to be a valid arrangement. n108 If two trustees are appointed for a trust under which one of the trustees and another person are beneficiaries, this arrangement, too, is usually upheld. n109

An apparent paradox in the position of the trustee is that notification and acceptance of the trusteeship are not necessary

for the validity of the trust (unless the trust was intended to be personal), n110 yet the trustee has the choice to accept or reject the appointment. Indeed, the appointment is ineffective without acceptance by the trustee. n111 Acceptance of the trusteeship must be exactly according to the terms on which it is tendered; otherwise, it is a rejection. n112 If and when the trustee does accept the appointment, the trustee's title relates back to the time the trust or the particular trusteeship was created. n113 Rejection by one or some, but not all, of the appointed trusts causes the title to be vested in only the accepting trustees. n114 A trustee's disclaimer or rejection of legal title may be oral, even with respect to real property. n115 When the trustee rejects the appointment, the legal title is in the trustor or, in the case of a testamentary trust, passes under the testator's estate. n116

The full freedom an appointed trustee has to decline the trust stands in contrast to the restrictions placed on a trustee's right to resign. Because the welfare of the beneficiaries is a prime consideration in an established trust, a trustee's request to resign must usually be based on some cause n117 and must be approved by an appropriate court. In the court proceeding, the beneficiaries are necessary parties, n118 and the court may impose conditions upon the trustee's release, n119 including payment of costs of the proceeding, if the resignation is simply for the trustee's convenience. n120 In place of these procedures, it is common for the trust declaration to authorize a simpler internal procedure for trustee resignation, n121 such as merely obtaining the beneficiaries' consent. n122

COMPUTER-ASSISTED RESEARCH

LEXIS: trustee w/20 natural person
trustee w/20 corpor!

§ 27.04(d) The Beneficiary

The rules relating to beneficiaries apply principally in the context of private trusts. While occasionally a charitable trust or a public trust will not have a named beneficiary, such as the trust for the public over ocean foreshore, every private trust is required to have a beneficiary. n123 The beneficiary must be described with enough specificity to be definitely identified. n124 While a trust naming as alternative beneficiaries particular persons, or any of them, is too vague to be enforceable, n125 naming a class of beneficiaries is sufficient, n126 even if the class members are yet to be selected by the trustee exercising full discretion. n127

A beneficiary must be a legal entity capable of taking title to property and becoming the obligee of any equitable obligation that the trustee is required to assume. n128 A beneficiary is qualified even if hindered by disabilities relating to property management or to making contracts. Thus minors, incompetents, and other similarly restricted persons under legal disability, qualify as trust beneficiaries. n129

An unborn person may be a beneficiary of a trust that will be effective upon the beneficiary's birth, n130 but may not be the sole beneficiary of a present trust.

Private trusts for particular animals are usually not enforceable, because the animal is not a legal entity capable of holding or judicially enforcing property rights. n131 If a trust names animals generally as beneficiaries or is created for the welfare of animals, it will be recognized as a charitable trust. Similarly, trusts for the benefit of inanimate objects also fail for lack of a proper beneficiary, unless it can be shown that the owner of the object is the real beneficiary. n132 Courts have had special difficulty in applying this rule consistently to private trusts for the purpose of erecting and caring for monuments. In decisions refusing to recognize such trusts, it is noted that no living person is benefited; n133 contrary decisions may recognize that such a trust gives satisfaction to the decedent's survivors or may simply reflect a state rule upholding cemetery upkeep trusts. n134 If such trusts fail as private trusts, they may yet be upheld as charitable trusts.

Neither notice to n135 nor acceptance by the beneficiary is required for the creation of the trust. n136 However, the

equitable interest pertaining to that beneficiary will not arise unless the beneficiary accepts it. Indeed, acceptance of an interest advantageous to the beneficiary is sometimes presumed. n137 The beneficiary's acceptance is necessary, in any event, because no beneficiary is required to accept property that may be worthless or even burdensome, n138 and because of one's common-law privilege to reject even an augmentation of one's property assets. n139 State statutes may make specific provision for disclaimers by beneficiaries.

An acceptance or a rejection by the beneficiary should be unconditional n140 and final, n141 and either action relates back to the time the interest was created. n142 If rejection accelerates a remainder interest, the acceleration may not be approved if it somehow contradicts the intent of the trustor. n143

A monumental and continuing scholarly debate over whether the beneficiary's interest is *in rem* or *in personam* or both has left the question so far without a consensual answer. One writer has summarized it as follows:

> The situation would seem to be summarized by the statement that while the right of the beneficiary was originally purely in personam against the trustee, it has become increasingly a right in rem and is now substantially equivalent to equitable ownership of the trust res. The beneficiary, of course, also has rights in personam against the trustee. Speaking of a transfer by the beneficiary of his interest under the trust, the Supreme Court of the United States has stated: "The assignment of the beneficial interest is not the assignment of a chose in action but of the 'right, title, and estate in and to the property.' " n144

In some states, statutory provisions may declare the beneficiary's interest to be *in personam*, or the trust instrument itself may declare the beneficiary's interest to be personal property, often for reasons connected with taxation or testamentary transfer. Such declarations of the trustor will be upheld. n145 The beneficiary's interest may indirectly come to be classed as personal property, if the trust is directed to sell real estate, n146 or as real property, if the trust is directed to invest in real estate. n147

The beneficiary's interest in the trust property may take any form appropriate for the holding of property interests, generally. n148

Although most beneficial interests are non-possessory, the trust may direct that a beneficiary also enjoy a present right of possession of trust property. n149 Co-beneficiaries are usually considered to be tenants in common, n150 but a trust instrument may create survivorship rights, n151 community property rights, n152 separate property rights, n153 joint tenancy interests, n154 or tenancy by the entireties interests n155 among the co-beneficiaries. Although it is not widely held that holders of concurrent interests in real property are in a fiduciary relationship with one another, courts agree that co-beneficiaries are indeed fiduciaries to one another and may not seek to gain undue advantage over each other. n156

The beneficiary is normally permitted to alienate the beneficiary's interest in the trust; n157 the trust instrument, however, may restrict that right or require trustee's approval or impose other conditions. n158 The beneficiary who takes under a testamentary trust, but who was indebted to the testator, takes the beneficial interest subject to the debt, which may be collected by the trustee. n159 If a beneficiary makes more than one conveyance of the same interest, the priority among grantees is determined in some states by the order of their conveyances, n160 and in other states by the time when the trustee was notified of the respective transfers. n161 In a few states, the second transferee must inquire as to prior transfers before obtaining the benefit of earlier notice to the trustee. n162

If a beneficiary's interest is to continue beyond the beneficiary's life, upon the beneficiary's death the interest passes to appropriate devisees, legatees, heirs or personal representative, depending on whether the beneficiary died testate or intestate, and upon whether the interest was classed as personal or real property. n163 The interest of an intestate beneficiary without heirs will pass to the state. n164

In those states where dower and curtesy rights in some form are still recognized, those rights may attach to the interest of a decedent beneficiary that continues beyond the beneficiary's death. n165 Likewise, a homestead right may attach to a beneficiary's equitable interest in real property. n166

The beneficiary's interest in the trust property is accessible to creditors for satisfaction of the beneficiary's debts. n167 Indeed, if the trust is passive, under the Statute of Uses or a state's equivalent statute, the beneficiary holds the legal title to the trust, which is subject to the legal remedy of execution. n168 Even under active trusts, the beneficiaries' interests are increasingly becoming subject to execution and other legal remedies as well as the equitable remedies. n169 Consistent with these rules is the rule that a beneficiary's interest in the trust property passes to the beneficiary's receiver n170 or trustee in bankruptcy. n171

Creditors may be barred from reaching the beneficiary's interest when, either by state statute or by trust provision, the beneficiary is prohibited from subjecting future payments of trust property or trust income to the claims of creditors. n172 Prohibiting the so-called "anticipation by assignment" does not affect the beneficiary's right to assign trust income or property for the benefit of creditors, or the creditors' rights to reach those assets, after those assets have been actually paid or transferred to the beneficiary. Provisions prohibiting such anticipation by assignment have usually been termed "spendthrift" clauses or trusts, and have been upheld in a majority of American state, either by statute or decision. n173

The English courts have not approved "spendthrift" trusts, and a few American decisions have followed the English rule. n174 In some states, "spendthrift" provisions are limited to protect only accumulations of trust income needed to provide for a beneficiary's customary needs; the surplus accumulations will be subject to claims of creditors. n175 These limitations are usually applied to income from trust realty, n176 but have occasionally also been applied to personal property in trust. n177 If a trustor attempts to create a spendthrift trust with the trustor as beneficiary, the trust itself will be valid, but the spendthrift provision will not be enforced. n178 And the assets of spendthrift trusts can be reached for a few types of claims against the beneficiary, claims deemed important as matters of public policy, such as tax charges, n179 tort claims, n180 and claims for necessities provided to the beneficiary. n181

It is in accord with this principle that the trustee under a "discretionary trust" cannot be forced by a beneficiary's creditor to make otherwise discretionary payments to the beneficiary. If the beneficiary has not yet received the payments, they cannot be reached by the beneficiary's creditor; n182 and the creditor cannot require payment to be made by a trustee who, under the trust instrument, has full discretion over whether to make any payments at all to the beneficiary. n183 However, if nonpayment by the trustee is deemed an abuse of discretion, payment may be directed by the court, n184 whereupon a creditor could reach the funds or assets in the hands of the beneficiary.

Even in a trust which is not discretionary, but directs the trustee to pay over to the beneficiary only those amounts necessary for certain limited purposes, such as maintenance and education, the beneficiary may not alienate the future payments and creditors may not require the payments to be made to them, notwithstanding the debts relate to the education and maintenance of the beneficiary. n185

If the beneficiaries of a trust are a group or a class, whose members' interests are so blended that no one person has an interest separate or distinct from the others' beneficial interests, then no transferee or creditor of any one beneficiary can obtain income from the trust. n186

COMPUTER-ASSISTED RESEARCH

LEXIS: trust w/50 beneficiar! w/20 legal entity

§ 27.04(e) Special Rules Relating to Private Trusts

§ 27.04(e)(1) Restrictions on and Varieties of Purposes

Private trusts of real or personal property may be established for any purpose that is not contrary to common law, to statutory law, or to public policy. n187 The trust purpose must appear with sufficient clarity that the trust can be enforced. n188 Numerous trusts are created to distribute trustors' estates; other purposes, as described by one authority, show the versatility of the trust device as well as illustrate the variety of ways trusts can affect real property interests:

> Other common purposes of private trusts include: (1) the management of the settlor's property for him, with the consequent escape from business problems and responsibilities; (2) the protection of the beneficiaries against misfortune or wastefulness, with the use of a spendthrift clause which could not be attached in the case of a gift of the legal interest; (3) securing the custody and preservation of insurance during the life of the insured and the collection and investment of the proceeds on maturity of the policies; (4) furnishing security to lenders, as in the case of the "corporate trusts" where the trustee holds a mortgage for the benefit of bondholders; (5) paying creditors of the settlor, as in the case of an assignment for their benefit made to a trustee, or in the case of an insolvent corporation, where the corporate property is vested in a liquidating trustee for the purpose of enabling him to conserve, sell, and distribute to creditors who hold certificates of beneficial interest; (6) trusts as an adjunct to the marketing of investments, as where there is an investment trust of securities or of real estate and shares in this trust are sold to the investing public, or where there is a "land trust" and the purchase and development of the realty is obtained by the sale of certificates of interest in the realty; (7) the "subdivision trust," where a tract is purchased and held for sale for the benefit of those who furnish capital and are reimbursed as lots are sold; (8) the voting trust, where corporate shares are placed in a trust by several stockholders so that they can be voted for desired corporate management and development purposes; (9) the so-called "Massachusetts" or "business" trust, where the assets of a business enterprise are transferred to a trustee for the purpose of having him manage and develop it, in which case the trust takes the place of a corporation and the trustees are similar to directors and officers and the beneficiaries to corporate shareholders; (10) a trust to carry on the business of a decedent, either indefinitely for profit or to wind up the enterprise and pay off creditors and legatees; (11) pension or profit sharing trusts for employees of a corporation, the fund being raised by contributions of the employer and sometimes its employees, where the objectives are retirement income and disability or death benefits, and occasionally stock purchase rights; (12) trusts created by court decree in order to work out a result which litigation shows to be desirable; (13) trusts created by a legislature in order to achieve a purpose which is deemed to be in the public interest; (14) trusts which are created for a wife or children incident to a separation of husband or wife or pursuant to a divorce decree. n189

COMPUTER-ASSISTED RESEARCH

LEXIS: (Private trust or trust) w/50 purpose w/50 (property or real property or real estate or land)
(private trust or trust) w/50 [word or phrase denoting trust purpose]

§ 27.04(e)(2) Application of the Rule Against Perpetuities

The common-law rule against perpetuities applies to private trusts, and prevents legal and equitable interests in both real and personal property from remaining contingent for too long. Gray's succinct statement of the rule is still the standard formulation: "No interest is good unless it must vest, if at all, not later than twenty-one years after some life in being at the creation of the interest." n190

This grand old rule, the bane of many lawyers and estate planners who have misunderstood or mismanaged its intricacies, is currently undergoing a quiet revolution. The validity of an interest subject to the rule has been traditionally judged as of the time the interest was created; if any possibility existed that the interest would not vest within the time allowed by the rule, the interest would be deemed invalid from the beginning, even if it were *possible*

for vesting to occur within the allowed time. A few jurisdictions refused to declare immediate invalidity in such circumstances, preferring to wait throughout the allowed time, hoping to save the interest if it did in fact vest within that time. Such an approach was termed "wait and see" for the common-law perpetuities period. Ten states have adopted this approach. n191 Five other states have statutory "wait and see" periods that differ from the common-law period. n192

A third variant of "wait and see" appears in the Uniform Statutory Rule Against Perpetuities, now adopted by twenty states. n193 According to this two-part approach, parties may seek to validate their contingent interests either under the common-law perpetuities approach (life in being plus twenty-one years) or may apply a 90-year wait-and-see period. If vesting still has not occurred at the end of the 90-year period, courts are authorized to reform rather than nullify the interest, so as to approximate the intent of the grantor.

Other state statutes exempt entirely employee benefit trusts and charitable trusts from the operation of the rule against perpetuities.

A less well-known form of the rule against perpetuities guards against holding a power of alienation too long in suspension. In a few states, statutes prohibit suspending the power to alienate real property for longer than the lives of two persons who were alive at the time the interest was created.

The very duration of private trusts has also been an issue. In some states the rule arose that private trusts could not endure at all beyond the period of the common-law rule against perpetuities. Earlier cases in those states applied that rule to void private trusts. n194

Most later cases rejected the rule and the result, and now place no durational limits on a private trust in which all the interests are vested. n195 This has been especially true with respect to trusts deemed to be destructible -- that is, subject to termination at any time by the trustee or the beneficiaries. n196

If the trustee is directed to accumulate income (usually for reinvestment), under the common law no durational limits were imposed upon the period of accumulation, as long as the income interests were vested. n197 The common law, however, is often modified by state statutes restricting the accumulations period to the common-law perpetuities limits on remoteness. Invalid accumulations are usually directed to be paid to the beneficiary who would have received the income in the absence of an accumulation provision. n198

COMPUTER-ASSISTED RESEARCH

LEXIS: (private trust or trust) w/50 (perpetuities or rule against perpetuities)

§ 27.04(f) Special Rules Relating to Charitable Trusts

While a private trust is usually intended to benefit a private person or enterprise, the purpose or effect of a charitable trust is to bring social benefits to the public or some portion of the public. n199 If the trustor's purpose in creating the trust is more consistent with a private trust, but the actual effect of the trust is charitable, the effect is controlling over the state purpose. n200

Such a situation may arise when a donor makes a major contribution in trust to a hospital or university building which is to be named after the donor, and the donor's immediate purpose may be obtaining personal recognition; such a trust is still deemed a charitable trust. n201

In determining whether the purpose of a trust is charitable, a rather expansive concept of charity is appropriate, including not only assistance to the poor but a wide range of philanthropic purposes. n202

Some confusion appears in the cases over whether the beneficiaries of a charitable trust must be indefinite. Typically the charitable trust beneficiaries are a group or a class, rather than specified individual persons, n203 but the public benefit to be conferred by a charitable trust must ultimately be conferred on the public by means of individual beneficiaries who are the recipients of the trust property or income. A trust with a large group of definite or specific beneficiaries might be considered charitable if the overall social advantage is significant. n204 If it is unclear whether the stated purposes of the trust should be considered as charitable or more appropriate for a private trust, the attempted trust may be treated as too vague and as unenforceable. n205

In some jurisdictions, the required minimum level of certainty is even higher for charitable trusts. n206 However, in most states it is acceptable to leave many details of trust administration and fulfillment of charitable purposes within the discretion of the trustee. n207

Support of religious institutions and activities is considered charitable. n208 No clear-cut rule has emerged distinguishing a valid religious purpose from a purpose of private devotion or enthusiasm. Earlier cases rejected trusts for the saying of masses as private trusts without living beneficiaries, n209 but more recent decisions have upheld them as charitable trusts, n210 or as gifts to the priest or church, n211 or as a trust created to pay funeral expenses. n212

Trusts to maintain public cemeteries could be enforced as valid charitable trusts, but trusts for upkeep of private cemeteries and monuments were not valid under the common law. n213 Trusts to maintain private cemeteries and monuments usually could not be charitable trusts because the benefits were for individuals rather than for the public n214 and were perpetual in duration; n215 such trusts could not be private trusts because no living person would benefit. n216 Now, in many states, statutes authorize perpetual trusts for cemetery and monument upkeep. n217 In a few states, trusts for perpetual care of a cemetery lot or monument are upheld as charitable trusts, sometimes on the ground that a public benefit is achieved in fostering respect for the dead. n218

Trusts for education of a substantial portion of the public have traditionally been upheld as charitable. n219 Even if the class of persons to be educated is quite limited, the trust will be upheld as a valid charitable trust if it can be shown that the trust confers a substantial social benefit. n220

A special class of valid charitable trusts has been termed "eleemosynary," n221 and these fall into two categories. One category consists of trusts intended to provide relief for the poor, either to those selected at the discretion of the trustee, n222 or to particular groups of poor, the groups being sufficiently large that their relief confers substantial social benefit. n223

The other category of eleemosynary trusts consists of trusts that promote health and aid for the sick and disabled. Trusts to promote health are generally those that aid some aspect of public health, such as funding of research, support of health care institutions, or educational support. n224 If an institution receives support from a trust fund, the institution may not be conducted for profit, although it may impose charges to cover operating costs. n225

Other valid charitable trusts consist of those intended to give aid or support to some legitimate governmental purpose. More specifically, these trusts are accepted because they confer public benefits by making life more happy, comfortable, or safe. The variety of such purposes is virtually unlimited. Trusts have been upheld as charitable trusts when created to pay public debts, expenses, or taxes; n226 to benefit residents of particular governmental subdivisions or entities; n227 to repair public facilities; n228 to provide or assist in operating public facilities, n229 such as parks, n230 playgrounds, n231 buildings, fire stations, n232 streets, n233 gardens, n234 utilities, and airports; n235 to promote patriotism or support military establishments or activities; n236 to promote peace, good will and harmony, either between nations, or within a nation; n237 and to promote change in law or policy, as long as the trust serves to improve rather than subvert the law. n238 However, trusts for the support of a particular political party are generally not accorded charitable status. n239

As appears from the foregoing paragraphs, the area between charitable and non-charitable trusts can be very gray. It is, therefore, helpful to list a few trust purposes that have been held to be not qualified as charitable. These include support of a private club, lodge or fraternal order; n240 distribution of cash or goods without regard to the need of the donees; n241 preservation and maintenance of inanimate objects, n242 except those that serve a public purpose; n243 and support individual animals or small groups of animals. n244

Several complications arise when a trust is created for both charitable and private purposes; such a trust may be known as a "mixed trust." The least difficult situation is presented by a mixed trust whose resources are separately identified and assigned for each purpose, which enables the trust to be treated as two separate trusts, one a charitable trust and the other as a private trust. n245 If the separation is not completely clear, a court may seek some evidence or indication of the trustor's intent to make a separation, principally in order to preserve the charitable portion of the mixed trust. n246 Without such evidence of indication, a court will preserve whatever part of the trust is valid under either charitable trust or private trust rules. n247

A trust whose purpose qualifies as charitable may usually be created according to the same rules that apply to private trusts. The trustor must be competent, the means of trust creation -- whether deed or will or other instrument -- must satisfy the applicable formalities requirements, n248 and the intent to create a trust must be clear. n249

In a few states, statutes may restrict certain trustors' efforts to create charitable trusts, and may limit the capacity of certain parties to function as trustees for charitable trusts. A testamentary gift in trust for a charitable purpose may be required to have been made before a certain period of time before the trustor's death, to ensure it was not made under improper influence. Assets transferred into a trust too close to the trustor's death would then pass to residuary legatees or next of kin. n250

Another type of statutory restriction is a limit on the proportion of the trustor's estate that may pass to the charitable trust. Gifts in trust that exceed such limits may be wholly or partially invalidated, and given instead to the trustor's close relatives, if they have made timely objection. n251

Gifts in trust for charitable purposes are also subject to the rule against perpetuities. n252

Only if the charitable gift in trust is to go over to another charitable trust at some indefinite time in the future is the rule against remoteness held not to apply. n253 This exception has been rationalized on the basis that once the property is indefinitely restricted under one charitable trust, prolonging the restrictions under a subsequent charitable trust does no further harm. n254 Vested gifts in charitable trust may be made in perpetuity or of indefinite duration. n255 Similarly, the usual rule forbidding unreasonable restraints on alienation are not enforced against the trustee of a charitable trust. n256 Not only are state statutes that impose these restrictions not applied to charitable trusts, but the limitations are also not imposed under common law. n257

If a charitable trust is directed to accumulate income, the time allowed to vest such accumulations must fall within the time prescribed by the rule against perpetuities. n258 Even if the vesting issue is settled, controversy often surrounds the actual distribution of accumulated trust funds. In some states, accumulation periods for trusts are governed by statute, often without distinction between private and charitable trusts. Normally, then, such statutory accumulation rules apply to charitable as well as private trusts, n259 but exceptions for charities have been recognized. n260 In states without governing statutes for charitable trust accumulations, application of such accumulated funds must be made within a reasonable time as defined, if necessary, by a court of equity. n261

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LEXIS: Charitable trust w/50 social benefit w/20 public

§ 27.04(g) Non-Express Trusts

The non-express trusts, or implied trusts, are classed as either constructive trusts or resulting trusts.

§ 27.04(g)(1) Constructive Trusts

§ 27.04(g)(1)(i) In General

A constructive trust is a creation of the courts, applied to one holding property wrongfully, and intended to ensure that the wrongful holder of the property gives the property or its proceeds or benefits to those rightfully entitled. Constructive trusts are a form of remedy for a wrong relating to the "trust" property:

> A constructive trust is the formula through which the conscience of equity finds expression. When property has been acquired in such circumstances that the holder of the legal title may not in good conscience retain the beneficial interest, equity converts him into a trustee n262

Even though the circumstances justifying a constructive trust are present, such a trust will not arise until explicitly created by a court. n263 The court's action creating a constructive trust will relate back to the time when the property began to be wrongfully held. n264 A constructive trust must be based on the plaintiff's entitlement to some actual property; n265 mere possessory or contract rights are not sufficient for the creation of a constructive trust. n266

Upon the death of one entitled to a constructive trust over real property, the right to the constructive trust property passes to heirs or devisees; if the constructive trust right is to personal property, the right passes to the decedent's next of kin or legatees. n267

Because the constructive trust is an equitable remedy, the party entitled to the remedy is also required to have acted equitably. n268 With respect to real property, for example, the plaintiff obtaining a constructive trust over property improved or preserved by the defendant may be required to reimburse the defendant for the cost of the improvements n269 or for preservation or maintenance expenses, n270 especially if the defendant acted under mistake or ignorance. Similarly, if the defendant obtained real property wrongfully, consideration paid by the defendant should be returned upon creation of the constructive trust over that property. n271 An additional important part of the remedy creating the constructive trust is a further decree requiring the constructive trustee to convey the property's title, deliver possession, pay profits or rental value, or otherwise account to the plaintiff. n272

No statute of frauds requirement applies to constructive trusts, both because such trusts are creatures of the courts, and because the traditional statute of frauds of English origin makes specific exception for constructive trusts. n273 However, the absence of a requirement for a writing may result in courts requiring a stronger justification to declare a constructive trust; indeed, "clear and convincing evidence" is the usual standard for the plaintiff's burden of proof, n274 and some courts ask for even stronger proof. n275

§ 27.04(g)(1)(ii) Circumstances Giving Rise to Constructive Trusts

A variety of circumstances can give rise to constructive trusts. A brief review of the most important of these follows: n276

Breach of Express Trust. When the trustee of an existing express trust obtains property or some other benefit through some breach of trust resulting from the trustee's disloyalty -- or resulting in the trustee's unjust enrichment -- the property so obtained may have a constructive trust imposed on it. n277 This same rule applies to almost any party in a fiduciary relationship, or even in a so-called confidential relationship, who obtains a personal benefit through breach of the duty of loyalty. n278

As an alternative to the constructive trust remedy, a court may simply order restitution or some other return to the status quo; as additional remedies, the court may order forfeiture of compensation or removal of the trustee. n279

These remedies will apply even if the trustee or other fiduciary did not intend to engage in wrongful conduct n280 and even if no harm to the beneficiary can be shown. n281

Typical examples of this type of misconduct are the trustee's employment of self to provide professional services, n282 the trustee's sale of the trustee's own property to the trust as an investment, n283 or the trustee's purchase of trust property. n284

Breach of Oral Trust of Real Property. Where one obtains property absolutely, but under an oral agreement to hold it in trust, that agreement will usually *not* be enforced by imposition of a constructive trust on the property so obtained; n285 however, a minority of courts do impose a constructive trust in such a situation if the property holder will be unjustly enriched, so that the Statute of Frauds will not itself be a means of perpetrating a wrong. n286

Breach of Duty to Beneficiary. In any direct transaction between the trustee and a beneficiary, the trustee is bound to deal fairly with and make full disclosure to the beneficiary. If this duty is breached in a transaction by which the trustee obtains property, a constructive trust may be imposed on such property. n287 Common examples of this situation are a trustee's purchase of a beneficiary's interest in the trust for an inadequate price, n288 and a beneficiary's gift of the interest to the trustee. n289

Breach of Unenforceable Contract to Convey Real Property. If a contract to convey real property is unenforceable because it is not in writing, and is breached, a constructive trust maybe imposed on the property to prevent unjust enrichment; however, other remedies, such as specific performance, n290 quasi-contractual recovery, n291 or, for executory contracts, simple return of consideration, n292 are usually available and preferable. Typical cases, such as being named in a will in return for personal services of care given near the end of the testator's life, have sometimes resulted in a constructive trust being imposed on the property promised to be bequeathed or devised, especially if valuation of the services is vague or difficult. n293 Another example appearing frequently in the case reports occurs when one purchases property, for less than market value, at a judicial sale under an oral promise to reconvey the property to the judgment debtor, and then reneges on the promise. If the judgment debtor refrains from bidding at the sale in reliance on the unenforceable oral promise to purchase and reconvey, a constructive trust may be imposed. n294

Breach of Oral Trust of Property Obtained by Will or Intestacy. One who obtains poperty by will or intestacy on the strength of a promise to give the property to or use the property on behalf of another, may become a constructive trustee, if the promise is not kept. A constructive trust will be imposed if the grantee of the property did not intend to carry out the promise, n295 or if the grantee was in a fiduciary or confidential relationship with the decedent, as discussed above. If the grantee intended to carry out the promise at the time it was made, but decided otherwise after the decedent died, almost all courts will still impose a constructive trust. n296

If the decedent has been induced to *not* make a will or otherwise dispose of the property in reliance on a promise of one to hold the property for another, a constructive trust will also be imposed if that promise is not honored. n297

Property Obtained by Homicide. If one, by the murder of another, obtains property through inheritance, survivorship under a joint tenancy or some similar means, courts have approved several ways to prevent the killer from profiting from the wrong, including imposition of a constructive trust. The constructive trust device is ideal for reconciling the impulse to not reward wrongdoing with the impulse to not rearrange fundamental doctrines of property law. n298

For instance, if one of two joint tenants wrongfully kills another and thus succeeds to sole ownership of the property by right of survivorship, the constructive trust device permits the incidents of the joint tenancy to place ownership of the property in the survivor/killer, but the property is then held for the benefit of the victim's heirs. n299 Some courts even

go so far as to determine what income benefits have been lost by the premature death of a joint owner:

> If H and W are tenants by the entirety, and H has an expectancy of ten years and W of fifteen years, the probable benefit which H will obtain from the property is the income of it for ten years. In all probability he will not become the survivor and receive the absolute title in severalty. If H murders W in such a situation, it would seem that a fair result would be to charge H with a constructive trust as to one-half of the income which should have gone to W during the ten year period, to permit H to retain the other half of the income during that period, and to make him a constructive trustee of the fee or absolute interest. n300

Some courts, however, permit the murderer to keep a one-half interest in the property and confine the constructive trust to the other half interest, regardless of the relative expectancies of the parties. n301

Property Obtained with Proceeds of Stolen or Converted Property. Usually no constructive trust is needed to remedy the wrong of stolen or embezzled property, since title does not pass to the wrongdoer. However, if the wrongdoer uses the stolen property to obtain other property in an otherwise proper transaction, a constructive trust may be imposed on the other property, requiring the wrongdoer to transfer title and possession to the victim. n302

When property is wrongfully appropriated by noncriminal conduct, such as by conversion, and then is used to obtain other property, that other property may be subject to a constructive trust; n303 similarly, a third party who has obtained the converted property, and who is not a bona fide purchaser, may also find a constructive trust imposed upon the converted property. n304 And property of a decedent or incompetent that has been improperly taken into the possession of and managed by another will be subject to a constructive trust. n305

Property Obtained by Fraud. Property obtained by fraudulent conduct may be subject to a constructive trust. n306 This rule also applies to property of a decedent obtained by fraudulent conduct before a probate court, n307 unless blocked by statutes establishing the finality of probate decrees. n308

Property Obtained by Mistake, Duress or Undue Influence. A conveyance of the wrong property or of property to the wrong grantee, under mistake of fact, is entitled to the remedy of constructive trust. n309 If such a conveyance takes place under the circumstances that the grantee or another has so dominated the grantor that the grantor's power of independent action is lost -- referred to as "undue influence" -- again a constructive trust is the appropriate remedy. n310 Likewise, a conveyance or the terms, the making of or the revoking of a will, under duress -- including restraint, violence or threats of violence or restraint -- is also subject to a constructive trust. n311

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LEXIS: Constructive trust w/50 breach
Constructive trust w/50 homicide
Constructive trust w/50 (theft or stolen or conver!)
Constructive trust w/50 fraud
Constructive trust w/50 (mistake or duress or undue influence)

§ 27.04(g)(2) Resulting Trusts

Whereas express trusts result from the intentional action of the trustor, and constructive trusts are judicial devices to correct wrongdoing with respect to property, a resulting trust is a judicially declared trust that is supposed to reflect the intent of a property owner. The intent that forms the basis of a resulting trust may be inferred from the conduct of the owner, or presumed because of a legal rule or fiction necessarily pertaining to the owner's conduct. n312 Resulting trusts are specifically exempted from most states' statutes of frauds and so may be based on non-written evidence. n313

If a purchaser of property directs the grantor to convey to another as grantee, the grantee -- if not related to the purchaser -- is generally considered to hold the property in trust for the benefit of the purchaser, a form of resulting trust. n314 If the purpose of this arrangement is unlawful or otherwise improper, a resulting trust will not be inferred. n315

Such an arrangement as described above is sometimes accompanied by an express oral agreement of trust between purchaser and grantee. This express oral trust, if it pertains to real property, may be disregarded because it is not in writing, n316 or it may be accepted as confirming the intentions and resulting trust already inferred from the other conduct of the parties. n317

A resulting trust with respect to real property may alter record title and other manifestations of ownership, so most courts require evidence that meets the "clear and convincing" standard, before declaring a resulting trust. n318

Some state statutes abolish resulting trusts with respect to real property, except in certain circumstances to avoid unjust enrichment. n319

In two other situations it is common for a court to find a resulting trust. First, if a gratuitous express trust fails for some reason other than illegality, a resulting trust in favor of the erstwhile trustor will be found. n320 Second, a gratuitous express trust that is funded with more property than is necessary to carry out the purposes of the trust, with no provision for disposition of the surplus, may be subject to a resulting trust of the surplus in favor of the trustor. n321 In jurisdictions where the *cy pres* doctrine is observed, excess principal in a charitable trust will be distributed according to *cy pres* principles, which seek to meet the expectations of the trustor as fully as possible. n322

COMPUTER-ASSISTED RESEARCH

LEXIS: Resulting trust w/50 (property or real property or real estate or land)

FOOTNOTES:
(n1)Footnote 46. *Raso v. Lago, 958 F. Supp. 686 (D. Mass. 1997)* ("Massachusetts law requires three elements to create an express trust: an intent to create a trust; clearly identifiable trust res; and identifiable beneficiaries"); *Ludwig v. Amsouth Bank, 686 So. 2d 1373 (Fla. Dist. Ct. App. 1997)* ("Where a trust instrument is unambiguous, the settlor's intention expressed in the trust controls ... . Extrinsic evidence should be considered only if the language used in the document is ambiguous.")

(n2)Footnote 47. *Deleuil's Executors v. Deleuil, 74 S.W.2d 474 (Ky. 1934). Fidelity Mut. Life Ins. Co. v. Harris Trust and Sav. Bank, 71 F.3d 1306 (7th Cir. 1995)* (default on mortgage of property held by a land trust authorized under state law).

(n3)Footnote 48. 29 Car. 2, c. 3, § 7.

(n4)Footnote 49. *Alexander v. Spaulding, 66 N.E. 694 (Ind. 1903).*

(n5)Footnote 50. *Myers v. Myers, 47 N.E. 309 (Ill. 1897).*

(n6)Footnote 51. *Bushner v. Bushner, 307 P.2d 204 (Colo. 1957); Pearson v. Pearson, 25 N.E. 342 (Ind. 1890); Feeney v. Howard, 21 P. 984 (Cal. 1889).*

(n7)Footnote 52. *Cartwright & Bro. v. United States Bank & Trust Co., 167 P. 436 (N.M. 1917); Marie M. E. Church v. Trinity M. E. Church, 97 N.E. 262 (Ill. 1911).*

(n8)Footnote 53. A trust of real estate will comply with the statute of frauds if it sets forth with reasonable definiteness the trust's property, its beneficiaries, and its purpose. *Hall v. World S&L Ass'n, 943 P.2d 855 (Ariz. Ct. App. 1997).*

(n9)Footnote 54. *Ellison v. Ganiard, 79 N.E. 450 (Ind. 1906); Johnson v. Candage, 31 Me. 28 (1849).*

(n10)Footnote 55. *Bryan v. Bigelow, 60 A. 266 (Conn. 1905).*

(n11)Footnote 56. *Williams v. Williams, 76 N.W. 1039 (Mich. 1898); Myers v. Myers, 47 N.E. 309 (Ill. 1897); Baldwin v. Humphrey, 44 N.Y. 609 (1874).*

When a trust instrument fails to embody the settlor's intent because of scrivener's error, it may be reformed on clear and decisive proof of mistake. To ascertain the settlor's intent, the court looks to the trust instrument as a whole and the circumstances known to the settlor on execution. *Pond v. Pond, 678 N.E.2d 1321 (Mass. 1997).*

(n12)Footnote 57. *Hiss v. Hiss, 81 N.E. 1056 (Ill. 1907); Leslie v. Leslie, 31 A. 170 (N.J. Super. Ch. 1895).*

(n13)Footnote 58. *Westerfeld v. Huckaby, 474 S.W.2d 189 (Tex. 1971); In re Steck's Estate, 81 N.W.2d 729 (Wis. 1957), but see McMahon v. Standard Bank and Trust Co., 202 Wis. 2d 564 (Wis. App. 1996); Ridge v. Bright, 93 S.E.2d 607 (N.C. 1956); Farkas v. Williams, 125 N.E.2d 600 (Ill. 1955); Leahy v. Old Colony Trust Co., 93 N.E.2d 238 (Mass. 1950); In re Shapley's Deed of Trust, 46 A.2d 227 (Pa. 1946); Cleveland Trust Co. v. White, 15 N.E. 2d. 627 (Ohio 1938); Goodrich v. City Nat'l Bank & Trust Co., 258 N.W. 253 (Mich. 1935); Davis v. Rossi, 34 S.W.2d 8 (Mo. 1930); Bear v. Milliken Trust Co., 168 N.E. 349 (Ill. 1929).*

(n14)Footnote 59. Typical of several states' statutes on this subject is the Uniform Testamentary Additions to Trusts Act.

(n15)Footnote 60. *Guaranty Trust Co. of New York v. New York Trust Co., 74 N.E.2d 232 (N.Y. 1947).*

(n16)Footnote 61. *Hinton's Executor v. Hinton's Committee, 76 S.W.2d 8 (Ky. 1934). In re Signal Hill-Liberia Ave. Ltd. P'ship, 189 B.R. 648 (E.D. Va. 1995)* (deed of trust created express trust in favor of limited partnership).

(n17)Footnote 62. *Moss v. Axford, 224 N.W. 425 (Mich. 1929).*

(n18)Footnote 63. *Shaw v. Johnson, 59 P.2d 876 (Cal. App. 1936).*

(n19)Footnote 64. *Halleck v. Halleck, 337 P.2d 330 (Or. 1959); McMahon v. Dorsey, 91 N.W.2d 893 (Mich. 1958); In re Shank, 240 B.R. 216 (Bankr. D. Md. 1999)* (mere delivery of property without intent to pass title creates a bailment, not a trust).

(n20)Footnote 65. *In re Eshbach's Estate, 46 A. 905 (Pa. 1900); Falk v. James, 26 A. 138 (N.J. 1893); In re Smith's Estate, 22 A. 916 (Pa. 1891).*

(n21)Footnote 66. *Collins v. Steuart, 44 A. 467 (N.J. Ch. 1899); McArthur v. Gordon, 26 N.E. 459, 801 (N.Y. 1891).*

(n22)Footnote 67. *Sprague v. Woods, 4 Watts & S. 192 (Pa. 1842).*

(n23)Footnote 68. *Harris Banking Co. v. Miller, 89 S.W. 629 (Mo. 1905); Van Cott v. Prentice, 10 N.E. 257 (NY. 1887); Padfield v. Padfield, 72 Ill. 322 (1874); Dennison v. Goehring, 7 Pa. 175 (1847).*

(n24)Footnote 69. *Farmers Ins. Exch. v. Zerin, 53 Cal. App. 4th 445 (1997)* ("A promise to hold property in trust for another, standing alone, will not create an equitable interest in that property"). *See also Austin v. Young, 106 A. 395*

(N.J. Ch. 1919); Harding v. St. Louis Union Trust Co., 207 S.W. 68 (Mo. 1918); Rousseau v. Call, 85 S.E. 414 (N.C. 1915); Central Trust Co. of New York v. Gaffney, 142 N.Y.S. 902 (1913); Hamilton v. Hall's Estate, 69 N.W. 484 (Mich. 1895); Estate of Webb, 49 Cal. 541 (1875).

(n25)Footnote 70. *Irwin v. Dyke, 1 N.E. 913 (Ill. 1885).*

(n26)Footnote 71. *In re James, 40 N.E. 876 (N.Y. 1895); Keffer v. Grayson, 76 Va. 517 (1882); Phillips v. Frye, 14 Allen 36 (Mass. 1867).*

(n27)Footnote 72. *Falk v. Janes, 26 A. 138* (N.J. Err. & App. 1893).

(n28)Footnote 73. *Burke v. Burke, 102 N.E. 293, 295 (Ill. 1913).*

(n29)Footnote 74. *Mauldin v. Armistead, 14 Ala. 702 (1848).*

(n30)Footnote 75. *Broughton v. West, 8 Ga. 248 (1850).*

(n31)Footnote 76. *Clark v. Frazier, 177 P. 589 (Okla. 1918); Tarbox v. Grant, 39 A. 378 (N.J. Super Ch. 1898).*

(n32)Footnote 77. A beneficial interest in an Illinois land trust is personal property rather than real property. *Municipal Trust & Sav. Bank v. United States, 114 F.3d 99 (7th Cir. 1997); Estate of Bowgren v. Commissioner of IRS, 105 F.3d 1156 (7th Cir. 1997)* (listing distinctive features of land trusts); *Gisborn v. Charter Oak Life Ins. Co., 142 U.S. 326 (1892).*

(n33)Footnote 78. *Bacon v. Bonham, 33 N.J. Eq. 614 (1881); Mastin v. Marlow, 65 N.C. 695 (1871).*

(n34)Footnote 79. *Id.*

(n35)Footnote 80. *In re M.J. Hoey & Co., 19 F.2d 764 (2d Cir. 1927); Thayer v. Pressey, 56 N.E. 5 (Mass. 1900).*

(n36)Footnote 81. *Ollis v. Ricker, 166 S.E. 801 (N.C. 1932).*

(n37)Footnote 82. *Rollestone v. National Bank of Commerce, 252 S.W. 394 (Mo. 1923).*

(n38)Footnote 83. *In re Uihlein's Will, 59 N.W.2d 641 (Wis. 1953).*

(n39)Footnote 84. *Wilce v. Van Anden, 94 N.E. 42 (Ill. 1911).*

(n40)Footnote 85. *Cannon v. Nicholas, 80 F.2d 934 (10th Cir. 1935); Goldman v. Moses, 191 N.E. 873 (Mass. 1934).*

(n41)Footnote 86. *In re Goldstein, 234 B.R. 214 (Bankr. D. Mass. 1999)* (Whether an agreement creates a debt or a trust can depend on a manifestation of intent to form a trust).

(n42)Footnote 87. *Schoemaker v. Hinze, 10 N.W. 86 (Wis. 1881).*

(n43)Footnote 88. *Mitchell v. White, 14 So. 2d 687 (Ala. 1943).*

(n44)Footnote 89. *State by Van Riper v. Atlantic City Elec. Co, 128 A.2d 861 (N.J. 1957); Povey v. Colonial Beacon Oil Co., 200 N.E. 891 (Mass. 1936); De Vol v. Citizens' Bank, 179 P. 282 (Or. 1919).*

(n45)Footnote 90. *Dew v. Requa, 239 S.W.2d 603 (Ark. 1951); Norton v. Norton, 195 P. 441 (Cal. App. 1920).*

(n46)Footnote 91. *Payne v. Winters, 77 A.2d 407 (Pa. 1951); Oglesby v. Thomas, 16 So. 2d 320 (Ala. 1944).*

(n47)Footnote 92. *Hoadley v. Hoadley, 39 A.2d 769 (Vt. 1944).*

(n48)Footnote 93. *Caparell v. Goodbody, 29 A.2d 563 (N.J. 1942); Beidler v. Dehner, 161 N.W. 32 (Iowa 1917).*

(n49)Footnote 94. *Des Moines Ins. Co. v. McIntire, 68 N.W. 565 (Iowa 1896); Levin v. Ritz, 41 N.Y.S. 405 (1895); McClellan v. McClellan, 65 Me. 500 (1876).*

(n50)Footnote 95. *Clary v. Spain, 89 S.E. 130 (Va. 1916); Walsh v. Walsh, 116 Mass. 377 (1874).*

(n51)Footnote 96. *United States v. Getzelman, 89 F.2d 531 (10th Cir. 1937), cert. denied, 302 U.S. 708 (1937); United States v. Jackson, 280 U.S. 183 (1930).*

(n52)Footnote 97. *Branson Sch. Dist. Re-82 v. Romer, 958 F. Supp. 1501 (D. Colo. 1997)* ("Colorado has an obligation enforceable under the Supremacy Clause to act as trustee for school lands granted under the Colorado Enabling Act for the benefit of the public schools"), *aff'd 161 F.3d 619 (10th Cir. 1998). See also Pinson v. Ivey, 1 Yer. 296 (Tenn 1930); Bedford v. Bedford's Adm'r, 35 S.W. 926 (Ky. 1896); In re President and Fellows of Yale College, 34 A. 1036 (Conn. 1896).*

(n53)Footnote 98. *Allen v. Allen, 32 A. 166 (R.I. 1895).*

(n54)Footnote 99. *Higginson v. Turner, 51 N.E. 172 (Mass. 1898); Phillips v. Harrow, 61 N.W. 434 (Iowa 1894); Cresson's Appeal, 30 Pa. 437 (1858).*

(n55)Footnote 100. *State ex rel. Higby v. Higby Co., 106 N.W. 382 (Iowa 1906).*

(n56)Footnote 101. *Latshaw v. Western Townsite Co., 158 P. 248 (Wash. 1916); Hossack v. Ottawa Dev. Ass'n, 91 N.E. 439 (Ill. 1910); State ex rel. Higby v. Higby Co., 106 N.W. 382 (Iowa 1906); White v. Rice, 70 N.W. 1024 (Mich. 1897); De Camp v. Dobbins, 29 N.J. Eq. 36 (1878); Bell County v. Alexander, 22 Tex 351 (1858).*

(n57)Footnote 102. *Cleveland Mortgage & Inv. Co. v. Gage, 198 So. 677 (Fla. 1940); Yandell v. Wilson, 183 So. 382 (Miss. 1938); Daniel v. Wade, 83 So. 99 (Ala. 1919); Hayden v. Hayden, 89 N.E. 347 (Ill. 1909).*

(n58)Footnote 103. *In re National Gypsum Co., 243 B.R. 676 (Bankr. N.D. Tex. 1999)* (A trustee can perform trustee duties for different trusts that do business with each other as long as the transactions are shown to treat each trust fairly).

(n59)Footnote 104. *Lael v. Crook, 97 S.W.2d 436 (Ark. 1936); Wittmeier v. Heiligenstein, 139 N.E. 871 (Ill. 1923); Rixford v. Zeigler, 88 P. 1092 (Cal. 1907); Douthitt v. Stinson, 63 Mo. 268 (1876).*

(n60)Footnote 105. *Schneider v. Kloepple, 193 S.W. 834 (Mo. 1917); Parker v. Cowell, 16 N.H. 149 (1849).*

(n61)Footnote 106. *Danforth v. Oshkosh, 97 N.W. 258 (Wis. 1903); Nellis v. Rickard, 66 P. 32 (Cal. 1901); Greene v. Greene, 26 N.E. 739 (N.Y. 1891); Butler v. Godley, 12 N.C. 94 (1826).*

(n62)Footnote 107. *Morgan v. Murton, 26 A.2d 45 (N.J. Sup. 1942); Johnson v. Muller, 86 P.2d 569 (Kan. 1939); Johnson v. Muller, 86 P.2d 569 (Kan. 1939); Sturgis v. Citizens' Nat'l Bank of Pocomoke City, 137 A. 378 (Md. 1927).*

(n63)Footnote 108. *Reed v. Browne, 66 N.E.2d 47 (N.Y. 1946); Allen v. Hendrick, 206 P. 733 (Or. 1922); In re Fox's Estate, 107 A. 863 (Pa. 1919); Tyler v. Mayre, 27 P. 160 (Cal. 1891), aff'd, 30 P. 196 (Cal. 1892).*

(n64)Footnote 109. *Dennis v. Omaha National Bank, 46 N.W.2d 606 (Neb. 1951); Denniston v. Pierce, 103 A. 557 (Pa. 1917); Weeks v. Frankel, 90 N.E. 969 (N.Y. 1910); Story v. Palmer, 18 A. 363 (N.J. Super. 1889); In re Pace, 699 N.Y.S.2d 257 (1999)* (Parents of a person who had suffered brain damage were allowed to be trustees despite the fact

that they were contingent remaindermen. As trustees they owe a fiduciary duty to the current beneficiary).

(n65)Footnote 110. *Richardson v. Mullery, 86 N.E. 319 (Mass. 1908); Thatcher v. Wardens, etc. of St. Andrew's Church of Ann Arbor, 37 Mich. 264 (1877).*

(n66)Footnote 111. *McFall v. Kirkpatrick, 86 N.E. 139 (Ill. 1908); F. G. Oxley Stave Co. v. Butler County, 166 U.S. 648 (1897); Brandon v. Carter, 24 S.W. 1035 (Mo. 1894);* Maccubbin v. Cromwell's ex'rs, *7 Gill. & J. 157 (Md. 1835).*

(n67)Footnote 112. *In re Roth's Will, 50 N.E.2d 281 (N.Y. 1943); Chase National Bank of City of New York v. Citizens Gas Co. of Indianapolis, 113 F.2d 217 (7th Cir. 1940), rev'd on jurisdictional grounds, 314 U.S. 63 (1941).*

(n68)Footnote 113. *Daley v. Daley, 14 N.E.2d 113 (Mass. 1938); Stocks v. Inzer, 168 So. 877 (Ala. 1936).*

(n69)Footnote 114. *In re Kellogg, 108 N.E. 844 (N.Y. 1915).*

(n70)Footnote 115. *In re Robinson, 37 N.Y. 261 (1867); Read v. Robinson, 6 Watts & S. 329 (Pa. 1843).*

(n71)Footnote 116. *Goss v. Singleton, 2 Head 67 (Tenn. 1858); Owens v. Cowan's Heirs, 7 B. Mon. 152 (Ky. 1846); Cushney v. Henry, 4 Paige 345 (N.Y. 1834).*

(n72)Footnote 117. *In re Loree's Trust Estate, 95 A.2d 435 (N.J. Super. Ch. 1953); Empire Trust Co. v. Sample, 50 N.Y.S.2d 5 (1944); Craig v. Craig, 3 Barb. Ch. 76 (N.Y. 1848).*

(n73)Footnote 118. *Riggs v. Moise, 128 S.W.2d 632 (Mo. 1939); Clay's Adm'r v. Edwards' Trustee, 2 S.W. 147 (Ky. 1886).*

(n74)Footnote 119. *In re Curtiss, 37 N.Y.S. 586 (1896).*

(n75)Footnote 120. *In re Jones, 4 Sandf. Ch. 615 (N.Y. 1847).*

(n76)Footnote 121. *Douglas Properties v. Stix, 159 So. 1 (Fla. 1935).*

(n77)Footnote 122. *Williams v. Hund, 258 S.W. 703 (Mo. 1924); Hart v. Equitable Life Assurance Society, 158 N.Y.S. 1063 (1916).*

(n78)Footnote 123. *In re Estate of West, 560 N.W.2d 810 (Neb. 1997)* ("a beneficiary [must] be definitely ascertained at the time of the trust's creation or definitely ascertainable within the period of the rule against perpetuities.") *See also Kaufman v. Federal Nat'l Bank, 191 N.E. 422 (Mass. 1934); Boskowitz v. Continental Ins. Co., 161 N.Y.S. 680 (1916); Matter of Catlin, 160 N.Y.S. 1034 (1916); Filkins v. Severin, 104 N.W. 346 (Iowa 1905); Eldridge v. See Yup Co., 17 Cal. 44 (1860).*

(n79)Footnote 124. *Isaacs v. Emory, 1 A. 713 (Md. 1885) Dyer's Appeal, 107 Pa. 446 (1884); First Presby. Soc. of Town of Chili v. Bowen, 21 Hun. 389 (N.Y. 1880); Barkley v. Lane's Ex'r., 6 Bush. 587 (Ky. 1869); German Land Ass'n v. Scholler, 10 Minn. 331 (1865).*

(n80)Footnote 125. *Wright v. Pond, 10 Conn. 255 (1834).*

(n81)Footnote 126. *Cowan v. Henika, 48 N.E. 809 (Ind. App. 1897); Loring v. Palmer, 118 U.S. 321 (1886); Heermans v. Schmaltz, 7 Fed. 566 (C.C. Wis. 1881).*

(n82)Footnote 127. *Applegate v. Brown, 95 N.W.2d 341 (Neb. 1959); In re Simard's Estate, 102 A.2d 508 (N.H. 1954); Gunn v. Wagner, 48 N.W.2d 292 (Iowa 1951); Lundie v. Walker, 9 A.2d 783 (N.J. Ch. 1939); In re Davis' Estate,*

56 P.2d 584 (Cal. App. 1936); Hughes v. Jackson, 81 S.W.2d 656 (Tex. 1935); Atwater v. Russell, 51 N.W. 629, application denied, 52 N.W. 26 (Minn. 1892).

(n83)Footnote 128. *Trotter v. Blocker, 6 Port. 269 (Ala. 1838).*

(n84)Footnote 129. *McCartney v. Jacobs, 123 N.E. 557 (Ill. 1919); Turner v. Barber, 62 S.E. 587 (Ga. 1908).*

(n85)Footnote 130. *Morsman v. Commissioner of Internal Revenue, 90 F.2d 18 (8th Cir. 1937), cert. denied, 302 U.S. 701 (1937); Folk v. Hughes, 84 S.E. 713 (S.C. 1915); Easton v. Demuth, 162 S.W. 294 (Mo. App. 1913); Carson v. Carson, 60 N.C. 575 (1864); Ashhurst v. Given, 5 Watts & S. 323 (Pa. 1843).*

(n86)Footnote 131. *In re Renner's Estate, 57 A.2d 836 (Pa. 1948).*

(n87)Footnote 132. *In re Zoller's Estate, 96 A.2d 321 (Pa. 1953); Kelly v. Nichols, 21 A. 906 (R.I. 1891).*

(n88)Footnote 133. *Gilmer's Legatees v. Gilmer's Ex'rs, 42 Ala. 9 (1868).*

(n89)Footnote 134. *In re Devereux' Estate, 48 Pa. D. & C. 491 (1943).*

(n90)Footnote 135. *In re Hovland's Estate, 101 P.2d 500 (Cal. App. 1940); De Leuil's Ex'rs v. De Leuil, 74 S.W.2d 474 (Ky. 1934); Clark v. Callahan, 66 A. 618 (Md. 1907).* In some cases, failure to give notice to the beneficiary may be evidence that the trustor had no genuine intent to create a trust. *See, e.g., Gobeille v. Allison, 76 A. 354 (R.I. 1910); Casteel v. Flint, 83 N.W. 796 (Iowa 1900).*

(n91)Footnote 136. *In re Pilot Radio & Tube Corp., 72 F.2d 316 (1st Cir. 1934); Plaut v. Storey, 30 N.E. 886 (Ind. 1892); Barr v. Schroeder, 32 Cal. 609 (1867).*

(n92)Footnote 137. *In re Duwe's Estate, 281 N.W. 669 (Wis. 1938).*

(n93)Footnote 138. *Roop v. Greenfield, 42 A.2d 614 (Pa. 1945).*

(n94)Footnote 139. *Bailey v. Worster, 68 A. 698 (Me. 1907); Cunniff v. McDonnell, 81 N.E. 879 (Mass. 1907).*

(n95)Footnote 140. *Bacon v. Barber, 6 A.2d 9 (Vt. 1939); Arnold v. Jones, 77 Tenn. (9 Lea) 545 (1882).*

(n96)Footnote 141. *Perkins v. Isley, 32 S.E.2d 588 (N.C. 1945); Blackwell v. Virginia Trust Co., 14 S.E.2d 301 (Va. 1941); Jourdan v. Andrews, 102 A. 33 (Pa. 1917).*

(n97)Footnote 142. *Stevens v. Stevens, 169 N.E. 570 (Ohio 1929); Stoehr v. Miller, 296 F. 414 (2d Cir. 1923).*

(n98)Footnote 143. *St. Louis Union Trust Co. v. Kern, 142 S.W.2d 493 (Mo. 1940); Trustees of Kenyon College v. Cleveland Trust Co., 196 N.E. 784 (Ohio 1935).*

(n99)Footnote 144. George T. Bogert, Trusts 135 (6th ed. 1987), *citing Blair v. Commissioner of Internal Revenue, 300 U.S. 5 (1937).*

(n100)Footnote 145. *Conway v. Adams County, 107 N.W.2d 418 (Neb. 1961), rehearing denied, opinion clarified, 108 N.W.2d 637 (Neb. 1961); Ephraim v. Metropolitan Trust Co. of California, 172 P.2d 501 (Cal. 1946); Duncanson v. Lill, 153 N.E. 618 (Ill. 1926).*

(n101)Footnote 146. *Wollard v. Sulier, 232 P.2d 991 (N.M. 1951).*

(n102)Footnote 147. *Ridgely v. Pfingstag, 50 A.2d 578 (Md. 1946).*

(n103)Footnote 148. *Tapley v. Dill, 217 S.W.2d 369 (Mo. 1949), but see, Theodore Short Trust v. Fuller, 7 S.W.3d 482 (Mo. App. 1999).*

(n104)Footnote 149. *Lincoln Bank & Trust Co. v. Lane, 303 S.W.2d 273 (Ky. 1957); Frye v. Burk, 12 N.E.2d 152 (Ohio App. 1936).*

(n105)Footnote 150. *In re Cavanaugh's Will, 95 N.Y.S.2d 383 (1950).*

(n106)Footnote 151. *Wallace v. Wallace, 190 S.E. 293 (Va. 1937).*

(n107)Footnote 152. *McFaddin v. Commissioner of Internal Revenue, 148 F.2d 570 (5th Cir. 1945).*

(n108)Footnote 153. *Id.*

(n109)Footnote 154. *Edmonds v. Commissioner of Internal Revenue, 90 F.2d 14 (9th Cir. 1937), cert. denied, 302 U.S. 713 (1937).*

(n110)Footnote 155. *Akin v. First Nat'l Bank of Winston-Salem, 42 S.E.2d 518 (N.C. 1947).*

(n111)Footnote 156. *Bodman v. Martha's Vineyard Nat'l Bank, 111 N.E.2d 670 (Mass. 1953); In re Du Plaine's Estate, 39 A. 947 (Pa. 1898); Spencer v. Harris, 252 P.2d 115 (Wyo. 1953).*

(n112)Footnote 157. *Blair v. Commissioner of Internal Revenue, 300 U.S. 5 (1937); Brown v. Fletcher, 253 Fed. 15 (2d Cir. 1918); Brown v. Ford, 91 S.E. 145 (Va. 1917); Boston Safe Deposit & Trust Co. v. Luke, 108 N.E. 64 (Mass. 1915); Managan v. Shea, 149 N.W. 378 (Wis. 1914); Freeman v. Maxwell 170 S.W. 1150 (Mo. 1914); Mortimer v. Jackson, 155 S.W. 341 (Tex. App. 1913); Jenkinson v. New York Finance Co., 82 A. 36 (N.J. Ch. 1911); Parkhill v. Doggett, 130 N.W. 411 (Iowa 1911); Jones v. Jones, 77 A. 270 (Md. 1910); Hiss v. Hiss, 81 N.E. 1056 (Ill. 1907); Cherry v. Cape Fear Power Co., 55 S.E. 287 (N.C. 1906); Riordan v. Schlicher, 41 So. 842 (Ala. 1906); Stump v. Warfield, 65 A. 346 (Md. 1906); Newton v. Jay, 95 N.Y.S. 413 (1905); Perrine v. Newell, 23 A. 492 (N.J. 1892); Henson v. Wright, 12 S.W. 1035 (Tenn. 1890); Martin v. Davis, 82 Ind. 38 (1882); Henderson v. Sherman, 11 N.W. 153 (Mich. 1882); Burnett v. Hawpe's Ex'r, 25 Gratt. 481 (Va. 1874); Tillson v. Moulton, 23 Ill. 600 (1860); Elliott v. Armstrong, 2 Blackf. 198 (Ind. 1829); Newhall v. Wheeler, 7 Mass. 189 (1810).*

(n113)Footnote 158. *Foster v. Friede, 37 Mo. 37 (1865).*

(n114)Footnote 159. *In re Freudmann's Estate, 192 N.Y.S.2d 993 (1959); Brown v. Sperry, 181 So. 734 (Miss. 1938).*

(n115)Footnote 160. *Lexington Brewing Co. v. Hamon, 160 S.W. 264 (Ky. 1913); Central Trust Co. v. Weeks, 44 N.Y.S. 828 (1897); Meier v. Hess, 32 P. 755 (Or. 1893); Putnam v. Story, 132 Mass. 205 (1882).*

(n116)Footnote 161. *Canton Exchange Bank v. Yazoo County, 109 So. 1 (Miss. 1926); Adamson v. Paonessa, 179 P. 880 (Cal. 1919); Lambert v. Morgan, 72 A. 407 (Md. 1909).*

(n117)Footnote 162. *Moorestown Trust Co. v. Buzby, 157 A. 663 (N.J. Ch. 1932); Salem Trust Co. v. Manufacturers Finance Co., 264 U.S. 182 (1924).*

(n118)Footnote 163. *Sutherland v. Pierner, 24 N.W.2d 883 (Wis. 1946); Courts v. Aldridge, 120 P.2d 362 (Okla. 1941); Cordon v. Gregg, 97 P.2d 732 (Or. 1940), petition adhered to on rehearing, 101 P.2d 414 (Or. 1940); Lamb v. First Huntington Nat'l Bank, 7 S.E.2d 441 (W. Va. 1940); Doran v. Kennedy, 141 N.W. 851 (Minn. 1913), aff'd, 237 U.S. 362 (1915); Shackleford v. Elliott, 70 N.E. 745 (Ill. 1904); Boone v. Davis, 8 So. 202 (Miss. 1886); Bredell v. Collier, 40 Mo. 287 (1867).*

(n119)Footnote 164. *In re Williams' Estate, 99 P.2d 349 (Cal. App. 1940); In re Linton's Estate, 48 A. 298 (Pa. 1901); Johnston v. Spicer, 13 N.E. 753 (N.Y. 1887); Matthews v. Ward, 10 Gill. & J. 443 (Md. 1839).*

(n120)Footnote 165. *Fletcher v. Felker, 97 F. Supp. 755 (W.D. Ark. 1951); Jones v. Glenn, 28 So. 2d 198 (Ala. 1946); Jamison v. Zausch, 126 S.W. 1023 (Mo. 1910); McCulloch v. Valentine, 38 N.W. 854 (Neb 1888).*

(n121)Footnote 166. *Smith v. Chenault, 48 Tex. 455 (1878); Jelinek v. Stepan, 43 N.W. 90 (Minn. 1889); Hewitt v. Rankin, 41 Iowa 35 (1875); Tarrant v. Swain, 15 Kan. 146 (1875); Allen v. Hawley, 66 Ill. 164 (1872).*

(n122)Footnote 167. *Morrison v. Doyle, 570 N.W.2d 692 (Minn. App. 1997)* (explaining that a court may temporarily restrain the transfer of real property to or from trust as security for satisfaction of judgment against a beneficiary of a trust or estate), *rev'd, 582 N.W.2d 237 (Minn. 1998). See also Taylor v. Harwell, 65 Ala. 1 (1880); Heath v. Bishop, 4 Rich. Eq. 46 (S.C. 1851).*

(n123)Footnote 168. *Loughney v. Page, 182 A. 700 (1936); Brevard County v. Ramsey, 658 So. 2d 1190 (Fla. App. 1995)* (passive trust not executed by the statute of uses).

(n124)Footnote 169. *Realty Exchange Corp. v. Phoenix Title & Trust Co., 487 P.2d 420 (Ariz. App. 1971); Humphrey v. Gerard, 77 A. 65 (Conn. 1910).*

(n125)Footnote 170. *Showalter v. G. H. Nunnelley Co., 257 S.W. 1027 (Ky. 1924).*

(n126)Footnote 171. *Horton v. Moore, 110 F.2d 189 (6th Cir. 1940), cert. denied, 311 U.S. 692 (1940), reh'g denied, 311 U.S. 728 (1940); In re Cunningham's Estate, 16 A.2d 712 (Pa. 1940); In re Reynolds, 243 Fed. 268 (D.C.N.Y. 1917); Jenks v. Title Guarantee & Trust Co., 156 N.Y.S. 478 (1915).*

(n127)Footnote 172. *Singer v. Singer, 237 S.W.2d 600 (Tex. 1951); Erickson v. Erickson, 266 N.W. 161 (Minn. 1936); Mellon v. Driscoll, 117 F.2d 477 (3d Cir. 1941), cert. denied, 313 U.S. 579 (1941); Medwedeff v. Fisher, 17 A.2d 141 (Md. 1941); Kelly v. Kelly, 79 P.2d 1059 (Cal. 1938); Snyder v. O'Connor, 81 P.2d 773 (Colo. 1938); Wagner v. Wagner, 91 N.E. 66 (Ill. 1910).*

(n128)Footnote 173. *Burns v. Miller, Hiersche, Martens, & Hayward, P.C., 948 S.W.2d 317 (Tex. App. 1997)* ("The effect of the spendthrift trust statute is that spendthrift trusts are exempt from attachment, execution, garnishment, or other seizure.") Dictum in a United States Supreme Court decision cleared the way for states' approval of spendthrift trusts. *Nichols v. Eaton, 91 U.S. (1 Otto) 716 (1875). See Broadway Nat'l Bank v. Adams, 133 Mass. 170 (1882).*

(n129)Footnote 174. *See, e.g., Tillinghast v. Bradford, 5 R.I. 205 (1858).*

(n130)Footnote 175. *Smith v. Smith, 124 P.2d 117 (Cal. App. 1942); Canfield v. Security-First National Bank of Los Angeles, 87 P.2d 830 (Cal. 1939); Magner v. Crooks, 73 P. 585 (Cal. 1903); Wetmore v. Wetmore, 44 N.E. 169 (N.Y. 1896); Williams v. Thorn, 70 N.Y. 270 (1877).*

(n131)Footnote 176. *Lundgren v. Hoglund, 711 P.2d 809 (Mont. 1985); Erickson v. Erickson, 266 N.W. 161 (Minn. 1936); Williams v. Smith, 93 N.W. 464 (Wis. 1903).*

(n132)Footnote 177. *Canfield v. Security-First Nat'l Bank of Los Angeles, 87 P.2d 830 (Cal. 1939); In re Williams, 79 N.E. 1019 (N.Y. 1907); Williams v. Thorn, 70 N.Y. 270 (1877). Security Pacific Bank Washington v. Chang, 80 F.3d 1412 (9th Cir. 1996)* ("[I]t is well-settled that when a court declares a spendthrift clause to be invalid, the court simply voids the spendthrift clause while leaving the rest of the trust intact though subject to the reach of creditors."). *Id. at 1419.*

(n133)Footnote 178. *Nelson v. California Trust Co., 202 P.2d 1021 (Cal. 1949); Jamison v. Mississippi Valley Trust Co., 207 S.W. 788 (Mo. 1918); De Rousse v. Williams, 164 N.W. 896 (Iowa 1917); Cunningham v. Bright, 117*

N.E. 909 (Mass. 1917); Wenzel v. Powder, 59 A. 194 (Md. 1904); Schenck v. Barnes, 50 N.E. 967 (N.Y. 1898); Hexter v. Clifford, 5 Colo. 168 (1879).

(n134)Footnote 179. *Fetting v. Flanagan, 45 A.2d 355 (Md. 1946); In re Rosenberg's Will, 199 N.E. 206 (N.Y. 1935).*

(n135)Footnote 180. Davies v. Harrison, 3 Pa. Dist. & Co. R. 481 (1923).

(n136)Footnote 181. *In re Lackmann's Estate, 320 P.2d 186 (Cal. App. 1958), see also In re Hinckley's Estate, 320 P.2d 186 (Cal. Dist. Ct. App. 1961); Sherman v. Skuse, 59 N.E. 990 (N.Y. 1901).*

(n137)Footnote 182. *Calloway v. Smith, 186 S.W.2d 642 (Ky. 1945); Todd's Ex'rs v. Todd, 86 S.W.2d 168 (Ky. 1935); Funk v. Grulke, 213 N.W. 608 (Iowa 1927); Foster v. Foster, 133 Mass. 179 (1882).*

(n138)Footnote 183. *In re Tone's Estate, 39 N.W.2d 401 (Iowa 1949).*

(n139)Footnote 184. *Constanza v. Verona, 137 A.2d 614 (N.J. Super. Ch. 1958); State v. Rubion, 308 S.W.2d 4 (Tex. 1957).*

(n140)Footnote 185. *Seattle First Nat'l Bank v. Crosby, 254 P.2d 732 (Wash. 1953); Jones v. Coon, 295 N.W. 162 (Iowa 1940); In re Keeler's Estate, 3 A.2d 413 (Pa. 1939); Keyser v. Mitchell, 67 Pa. 473 (1871).*

(n141)Footnote 186. *Russell v. Meyers, 260 S.W. 377 (Ky. 1924); Talley v. Ferguson, 62 S.E. 456 (W. Va. 1908); Linn v. Downing, 74 N.E. 729 (Ill. 1905); Bell v. Watkins, 1 So. 92 (Ala. 1887).*

(n142)Footnote 187. *Bettinger v. Bridenbecker, 63 Barb. 395 (N.Y. 1865).*

(n143)Footnote 188. *Gueutal v. Gueutal, 98 N.Y.S. 1002 (1906); Angus v. Noble, 46 A. 278 (Conn. 1900); Sheedy v. Roach, 124 Mass. 472 (1878).*

(n144)Footnote 189. George T. Bogert, Trusts 173-174 (6th ed. 1987).

(n145)Footnote 190. John Chipman Gray, The Rule Against Perpetuities § 201 (4th ed. 1942).

(n146)Footnote 191. Alaska, Kentucky, Mississippi, New Hampshire, Ohio, Pennsylvania, Rhode Island, South Dakota, Vermont, and Virginia.

(n147)Footnote 192. Illinois, Iowa, Maine, Maryland, and Washington.

(n148)Footnote 193. *California, Colorado, Connecticut, Florida, Georgia, Hawaii, Indiana, Kansas, Massachusetts, Michigan, Minnesota, Montana, Nebraska, Nevada, New Jersey, New Mexico, North Dakota, Oregon, South Carolina, and West Virginia. Pond v. Pond, 678 N.E.2d 1321 (Mass. 1997).*

(n149)Footnote 194. *Mercer v. Mercer, 52 S.E.2d 229 (N.C. 1949); Alexander v. House, 54 A.2d 510 (Conn. 1947); Tillman v. Blackburn, 124 S.W.2d 755 (Ky. 1939); Amory v. Trustees of Amherst College, 118 N.E. 933 (Mass. 1918); Armstrong v. Barber, 88 N.E. 246 (Ill. 1909); In re Shallcross' Estate, 49 A. 936 (Pa. 1901); Bigelow v. Cady, 48 N.E. 974 (Ill. 1897); Williams v. Herrick, 32 A. 913 (R.I. 1895); Barnum v. Barnum, 26 Md. 119 (1866).*

(n150)Footnote 195. *Colorado Nat'l Bank v. McCabe, 353 P.2d 385 (Colo. 1960); Finch v. Honeycutt, 97 S.E.2d 478 (N.C. 1957); Schmidt v. Schmidt, 261 S.W.2d 892 (Tex. Civ. App. 1953); Bardfeld v. Bardfeld, 92 A.2d 854 (N.J. Super. Ch. 1952); Guarantee Trust Co. v. Latz, 181 A. 645 (N.J. Ch. 1935); Deacon v. St. Louis Union Trust Co., 197 S.W. 261 (Mo. 1917); Loomer v. Loomer, 57 A. 167 (Conn. 1904); In re Johnston's Estate, 39 A. 879 (Pa. 1898).*

(n151)Footnote 196. *Cook v. Horn, 104 S.E.2d 461 (Ga. 1958); Schellentrager v. Tradesmen's Nat'l Bank and Trust Co., 88 A.2d 773 (Pa. 1952); Wechter v. Chicago Title & Trust Co., 52 N.E.2d 157 (Ill. 1943); Howe v. Morse, 55 N.E. 213 (Mass. 1899).*

(n152)Footnote 197. *Thellusson v. Woodford, 11 Ves. 112 (1799).*

(n153)Footnote 198. *Carlberg v. State Savings Bank & Trust Co., 143 N.E. 441 (Ill. 1924).*

(n154)Footnote 199. *Blue Cross & Blue Shield Mut. v. Blue Cross & Blue Shield Ass' n, 110 F.3d 318 (6th Cir. 1997)* (" 'charitable trust'... defined as 'any fiduciary relationship with respect to property arising under the law of this state or of another jurisdiction as a result of a manifestation of intention to create it, and subjecting the person by whom the property is held to fiduciary duties to deal with the property within this state for any charitable, religious, or educational purpose' "); *In re Freshour's Estate, 345 P.2d 689 (Kan. 1959); In re Petroleum Research Fund, 184 N.Y.S.2d 413 (1958); In re Pruner's Estate, 136 A.2d 107 (Pa. 1957); In re McKee's Estate, 108 A.2d 214 (Pa. 1954).*

(n155)Footnote 200. *In re Robbins' Estate, 21 Cal. Rptr. 797 (1962); Haggin v. International Trust Co., 169 P. 138 (Colo. 1917); In re Coleman's Estate, 138 P. 992 (Cal. 1914); French v. Calkins, 96 N.E. 877 (Ill. 1911); Richardson v. Essex Inst., 94 N.E. 262 (Mass. 1911).*

The director of an organization impressed as a charitable trust is the trustee of the trust. *Blue Cross & Blue Shield Mut. v. Blue Cross & Blue Shield Ass'n, 110 F.3d 318 (6th Cir. 1997).*

In re of Estate of Homburg, 697 So. 2d 1154 (Miss. 1997) (Courts should favor charitable trusts and enforce them whenever possible).

(n156)Footnote 201. *Woodstown Nat'l Bank & Trust Co. v. Snelbaker, 40 A.2d 222 (N.J. Ch. 1944), aff'd, 44 A.2d 210* (N.J. Err. & App. 1945).

(n157)Footnote 202. *Pace v. Dukes, 55 S.E.2d 367 (Ga. 1949); In re Scholler's Estate, 169 A.2d 554 (Pa. 1961); Commissioner of Internal Revenue v. Upjohn's Estate, 124 F.2d 73 (6th Cir. 1941).*

(n158)Footnote 203. *Averill v. Lewis, 138 A. 815 (Conn. 1927); Russell v. Allen, 107 U.S. 163 (1883).*

(n159)Footnote 204. *Harrison v. Barker Annuity Fund, 90 F.2d 286 (7th Cir. 1937); Kerner v. Thompson, 6 N.E.2d 131 (Ill. 1936); Boenhardt v. Loch, 107 N.Y.S. 786 (1907), aff'd, 113 N.Y.S. 747 (1908), aff'd, 92 N.E. 1078 (N.Y. 1910).*

(n160)Footnote 205. *In re Small's Estate, 58 N.W.2d 477 (Iowa 1953); In re Carpenter's Estate, 297 N.Y.S. 649 (1937); In re Shattuck's Will, 86 N.E. 455 (N.Y. 1908).*

(n161)Footnote 206. *Stoeer v. Meyer, 147 S.W.2d 1041 (Ky. 1941); Woodcock v. Wachovia Bank & Trust Co., 199 S.E. 20 (N.C. 1938), superseded by statute as recognized in Banner v. North Carolina Nat. Bank, 146 S.E.2d 89 (N.C. 1966); Wentura v. Kinnerk, 5 S.W.2d 66 (Mo. 1928).*

(n162)Footnote 207. *In re Finkelstein's Estate, 70 N.Y.S.2d 596 (1947); In re Jordan's Estate, 197 A. 150 (Pa. 1938); Kirwin v. Attorney General, 175 N.E. 164 (Mass. 1931); In re Anderson's Estate, 112 A. 766 (Pa. 1921); Grant v. Saunders, 95 N.W. 411 (Iowa 1903).*

(n163)Footnote 208. *Goetz v. Old Nat'l Bank of Martinsburg, 84 S.E.2d 759 (W. Va. 1954); In re Small's Estate, 58 N.W.2d 477 (Iowa 1953); Buchanan v. Willis, 255 S.W.2d 8 (Tenn. 1953).*

(n164)Footnote 209. *Festorazzi v. St. Joseph's Catholic Church of Mobile, 18 So. 394 (Ala. 1895).*

(n165)Footnote 210. *Morris v. Edwards, 124 N.E. 724 (N.Y. 1919); In re Hamilton's Estate, 186 P. 587 (Cal. 1919); Burke v. Burke, 102 N.E. 293 (Ill. 1913); In re Kavanaugh's Estate, 126 N.W. 672 (Wis. 1910); Coleman v. O'Leary's Ex'r, 70 S.W. 1068 (Ky. 1902); Kerrigan v. Tabb, 39 A. 701 (N.J. Super. Ch. 1898); In re Schouler, 134 Mass. 426 (1883).*

(n166)Footnote 211. *Harrison v. Brophy, 51 P. 883 (Kan. 1898); Sherman v. Baker, 40 A. 11 (R.I. 1898).*

(n167)Footnote 212. *Chelsea Nat'l Bank v. Our Lady Star of the Sea, Atlantic City, 147 A. 470 (N.J. Ch. 1929).*

(n168)Footnote 213. *Wood v. Oldfield, 106 N.E. 1014 (Mass. 1914); Bliss v. Linden Cemetery Ass'n, 87 A. 224 (N.J. Ch. 1913); Stewart v. Coshow, 142 S.W. 283 (Mo. 1911).*

(n169)Footnote 214. *In re Byrne's Estate, 100 A.2d 157 (N.H. 1953); In re Essig's Estate, 74 A.2d 787 (Pa. Super. 1950); Rhode Island Hosp. Trust Co. v. Proprietors of Swan Point Cemetery, 3 A.2d 236 (R.I. 1938); Travis v. Randolph, 112 S.W.2d 835 (Tenn. 1938); Bockel v. Fidelity Dev. Co., 101 S.W.2d 628 (Tex. Civ. App. 1937).*

(n170)Footnote 215. *Pope v. Alexander, 250 S.W.2d 51 (Tenn. 1952); Drennan v. Agurs, 82 S.E. 622 (S.C. 1914); Burke v. Burke, 102 N.E. 293 (Ill. 1913); Lounsbury v. Trustees of Square Lake Burial Ass'n, 129 N.W. 36 (Mich. 1910), aff'd, 137 N.W. 513 (Mich. 1912); Hilliard v. Parker, 74 A. 447 (N.J. Ch. 1909); McIlvain v. Hockaday, 81 S.W. 54 (Tex. Civ. App. 1904); In re Gay's Estate, 71 P. 707 (Cal. 1903); Sherman v. Baker, 40 A. 11 (R.I. 1898); Johnson v. Holifield, 79 Ala. 423 (1885); Piper v. Moulton, 72 Me. 155 (1881).*

(n171)Footnote 216. *Kingsley v. Montrose Cemetery Co., 26 N.E.2d 613 (Ill. App. 1940); Whiting v. Bertram, 199 N.E. 367 (Ohio App. 1935); In re Johnson's Will, 5 N.Y.S. 922 (1889).*

(n172)Footnote 217. *Mason v. Bloomington Library Ass'n, 86 N.E. 1044 (Ill. 1908).*

(n173)Footnote 218. *Opinion of the Justices, 133 A.2d 792 (N.H. 1957); Delaware Trust Co. v. Delaware Trust Co., 95 A.2d 569 (Del. Ch. 1953); FitzGerald v. East Lawn Cemetery, 10 A.2d 683 (Conn. 1940); Trustees of M. E. Church of Milford v. Williams, 96 A. 795 (Del. Super. 1914); Webster v. Sughrow, 45 A. 139 (N.H. 1898); Ford v. Ford Ex'r, 16 S.W. 451 (Ky. 1891).*

(n174)Footnote 219. *Vidal v. Mayor, Aldermen and Citizens of Philadelphia, 43 U.S. (2 How.) 127 (1844).*

(n175)Footnote 220. *Howard Savings Inst. v. Peep, 170 A.2d 39 (N.J. 1961); Champlin v. Powers, 90 A.2d 787 (R.I. 1952), but see Hanley v. Alarie, 746 A.2d 125 (R.I. 2000); Humphrey v. Board of Trustees, 165 S.E. 547 (N.C. 1932).*

(n176)Footnote 221. Pronounced "ell eh MOSS seh nery."

(n177)Footnote 222. *In re Brown's Estate, 295 P.2d 566 (Cal. App. 1956); Altman v. McCutchen, 210 S.W.2d 63 (Mo. 1948).*

(n178)Footnote 223. *In re Barbieri's Estate, 167 N.Y.S.2d 962 (1957); In re Pattberg's Will, 123 N.Y.S.2d 564 (1953), aff'd, 118 N.E.2d 903 (N.Y. 1954); Bader Realty & Inv. Co. v. St. Louis Housing Authority, 217 S.W.2d 489 (Mo. 1949); Clevenger v. Rio Farms, 204 S.W.2d 40 (Tex. Civ. App. 1947); Craven v. Wilmington Teachers Ass'n, 47 A.2d 580 (Del. 1946); Harrison v. Barker Annuity Fund, 90 F.2d 286 (7th Cir. 1937); Eccles v. Rhode Island Hosp. Trust Co., 98 A. 129 (Conn. 1916); Klumpert v. Vrieland, 121 N.W. 34 (Iowa 1909); Rader v. Stubblefield, 86 P. 560 (Wash. 1906); In re Strong's Appeal, 37 A. 395 (Conn. 1897); Trim v. Brightman, 31 A. 1071 (Pa. 1895); Webster v. Wiggin, 31 A. 824 (R.I. 1895); Holmes v. Coates, 34 N.E. 190 (Mass. 1893); Beardsley's Ex'r v. Selectmen of Bridgeport, 3 A. 557 (Conn. 1886); DeBruler v. Ferguson, 54 Ind. 549 (1876); Swasey v. American Bible Soc., 57 Me. 523 (1869).*

(n179)Footnote 224. *In re Carlson's Estate, 358 P.2d 669 (Kan. 1961); In re Masson's Estate, 298 P.2d 619 (Cal. App. 1956); Raser v. Johnson, 132 N.E.2d 819 (Ill. 1956); Pacific Home v. County of Los Angeles, 256 P.2d 36, sub. opinion, 264 P.2d 544 (Cal. 1953); Mirinda v. King, 78 A.2d 98 (N.J. Super. 1951); Hinson v. Smyer, 21 So. 2d 825 (Ala. 1945); Floyd v. Smith, 5 N.W.2d 695 (Mich. 1942); In re Schikowsky's Estate, 130 P.2d 598 (Kan. 1942); Noble v. First Nat'l Bank of Anniston, 1 So. 2d 289 (Ala. 1941); Sheen v. Sheen, 8 A.2d 136 (N.J. Ch. 1939); In re Somerville's Estate, 55 P.2d 597 (Cal. 1936); Case v. Hasse, 93 A. 728* (N.J. Eq.); *White v. Newark, 103 A. 1042 (N.J. 1914); Hayden v. Connecticut Hosp. for the Insane, 30 A. 50 (Conn. 1894).*

(n180)Footnote 225. *McClure v. Carter, 116 S.E.2d 260 (Va. 1960).*

(n181)Footnote 226. *Wood v. Oldfield, 106 N.E. 1014 (Mass. 1914); Girard Trust Co. v. Russell, 179 F. 446 (3d Cir. 1910).*

(n182)Footnote 227. *In re Garrison's Estate, 137 A.2d 321 (Pa. 1958); In re Langeloth's Trust, 102 N.Y.S. 2d 978 (1951), aff'd, 105 N.Y.S.2d 396 (1951); Trustees of New Castle Common v. Megginson, 77 A. 565 (Del. 1910).*

(n183)Footnote 228. *Blackford v. Anderson, 286 N.W. 735 (Iowa 1939); Town of Hamden v. Rice, 24 Conn. 350 (1856).*

(n184)Footnote 229. *Jensen v. Nelson, 19 N.W.2d 596 (Iowa 1945); Stuart v. Easton, 74 Fed. 854 (3d Cir. 1896), aff'd, 170 U.S. 383 (1898); Coggeshall v. Pelton, 7 Johns. Ch. 292 (N.Y. 1823).*

(n185)Footnote 230. *Haggin v. International Trust Co., 169 P. 138 (Colo. 1917); Lightfoot v. Poindexter, 199 S.W. 1152 (Tex. Civ. App. 1917); Hosmer v. Detroit, 141 N.W. 657 (Mich. 1913); Burr v. Boston, 95 N.E. 208 (Mass 1911); In re Bartlett, 40 N.E. 899 (Mass. 1895).*

(n186)Footnote 231. *Board of Assessors v. Cunningham Found., 26 N.E.2d 335 (Mass. 1940); In re Smith's Estate, 37 A. 114 (Pa. 1897).*

(n187)Footnote 232. *Richardson v. Mullery, 86 N.E. 319 (Mass. 1908); Bethlehem Borough v. Perseverance Fire Co., 81 Pa. 445 (1876);* Magill v. Brown, Fed. Cas. No. 8952 (1833).

(n188)Footnote 233. *Beck v. Philadelphia, 17 Pa. 104 (1851).*

(n189)Footnote 234. *Penny v. Croul, 43 N.W. 649 (Mich. 1889); Rotch v. Emerson, 105 Mass. 431 (1870); Cresson's Appeal, 30 Pa. 437 (1858).*

(n190)Footnote 235. *Harrison v. Barton, 358 P.2d 211 (Okla. 1960); Board of Cty. Comm'rs v. Warram, 285 P.2d 1034 (Okla. 1955).*

(n191)Footnote 236. *Sargent v. Town of Cornish, 54 N.H. 18 (1873).*

(n192)Footnote 237. *In re Peck's Estate, 335 P.2d 185 (Cal. App. 1959), cert. denied, 361 U.S. 826 (1959), reh'g denied, 361 U.S. 903 (1959); Mills v. Montclair Trust Co., 49 A.2d 889 (N.J. 1946); Parkhurst v. Burrill, 117 N.E. 39 (Mass. 1917).*

(n193)Footnote 238. *In re Robbins' Estate, 21 Cal. Rptr. 797 (1962); Gaston County United Dry Forces v. Wilkins, 191 S.E. 8 (N.C. 1937), superseded by statute as recognized in Banner v. North Carolina Nat. Bank, 146 S.E.2d 89 (N.C. 1966); Collier v. Lindley, 266 P. 526 (Cal. 1928); Taylor v. Hoag, 116 A. 826 (Pa. 1922); Peth v. Spear, 115 P. 164 (Wash. 1911); Garrison v. Little, 75 Ill. App. 402 (1897); George v. Braddock, 18 A. 881 (N.J. 1889); Haines v. Allen, 78 Ind. 100 (1881).*

(n194)Footnote 239. *Boorse Trust, 64 Pa. D. & C. 447 (1948); In re Grossman's Estate, 75 N.Y.S.2d 335 (1947).*

(n195)Footnote 240. *Veterans of Foreign Wars v. Kunz, 269 P.2d 882 (Cal. App. 1954); Claim of Phillips, 124 N.Y.S.2d 763 (1953), but see Masi v. Nagle, 7 Cal. Rptr. 2d 423 (Cal. App. 1992); Mason v. Perry, 48 A. 671 (R.I. 1901).*

(n196)Footnote 241. *Shenandoah Valley Nat'l Bank v. Taylor, 63 S.E.2d 786 (Va. 1951); In re Swayze's Estate, 191 P.2d 322 (Mont. 1948).*

(n197)Footnote 242. *Smith v. Powers, 117 A.2d 844 (R.I. 1955); Smith v. Heyward, 105 S.E. 275 (S.C. 1920), but see Evangelical Lutheran Charities Soc. v. South Carolina Nat'l Bank, 495 S.E.2d 199 (S.C. 1997); Kelly v. Nichols, 21 A. 906 (R.I. 1891).*

(n198)Footnote 243. *Linney v. Cleveland Trust Co., 165 N.E. 101 (Ohio App. 1928); Gibson v. Frye Institute, 193 S.W. 1059 (Tenn. 1917).*

(n199)Footnote 244. *In re Forrester's Estate, 279 P. 721 (Colo. 1929); Willett v. Willett, 247 S.W. 739 (Ky. 1923).*

(n200)Footnote 245. *Pope v. Alexander, 250 S.W.2d 51 (Tenn. 1952); Frost Nat'l Bank v. Boyd, 188 S.W.2d 199 (Tex. Civ. App. 1945), aff'd, 196 S.W.2d 497 (Tex. 1946); Amory v. Trustees of Amherst College, 118 N.E. 933 (Mass. 1918).*

(n201)Footnote 246. *In re Palethorp's Estate, 94 A. 1060 (Pa. 1915); Smart v. Durham, 86 A. 821 (N.H. 1913); St. Paul's Church v. Attorney General, 41 N.E. 231 (Mass. 1895).*

(n202)Footnote 247. *Rhode Island Hosp. Trust Co. v. Proprietors of Swan Point Cemetery, 3 A.2d 236 (R.I. 1938), aff'd, 7 A.2d 205 (R.I. 1939); Allred v. Beggs, 84 S.W.2d 223 (Tex. 1935); Reagh v. Dickey, 48 P.2d 941 (Wash. 1935).*

(n203)Footnote 248. *Poole v. Starke, 324 S.W.2d 234 (Tex. Civ. App. 1959).*

(n204)Footnote 249. *First Portland Nat'l Bank v. Kaler-Vaill Mem. Home, 151 A.2d 708 (Me. 1959); In re Momand's Will, 182 N.Y.S.2d 565 (1959); In re Battle's Estate, 108 A.2d 688 (Pa. 1954).*

(n205)Footnote 250. *In re Coleman's Estate, 163 P.2d 847 (Idaho 1945); In re Graham's Estate, 218 P. 84 (Cal. App. 1923).*

(n206)Footnote 251. *Monahan v. O'Byrne, 95 S.E. 210 (Ga. 1918); Trustees of Amherst College v. Ritch, 45 N.E. 876 (N.Y. 1897).*

(n207)Footnote 252. *Claiborne v. Wilson, 192 S.E. 585 (Va. 1937); Malmquist v. Detar, 255 P. 42 (Kan. 1927); In re Penrose's Estate, 101 A. 319 (Pa. 1917); Starr v. Minister and Trustees of Starr Meth. Prot. Church, 76 A. 595 (Md. 1910); Merrill v. American Bapt. Missionary Union, 62 A. 647 (N.H. 1905); Rolfe & Rumford Asylum v. Lefebre, 45 A. 1087 (N.H. 1898); Hopkins v. Grimshaw, 165 U.S. 342 (1897); Merritt v. Bucknam, 77 Me. 253 (1885); Jocelyn v. Nott, 44 Conn. 55 (1876); Village of Brattleboro v. Mead, 43 Vt. 556 (1870);* Proprietors of Church in *Brattle Square v. Grant, 69 Mass. (3 Gray) 142 (1855).*

(n208)Footnote 253. *McClure v. Carter, 116 S.E.2d 260 (Va. 1960); Tumlin v. Troy Bank & Trust Co., 61 So. 2d 817 (Ala. 1950); MacKenzie v. Trustees of Presbytery of Jersey City, 61 A. 1027* (N.J. Err. & App. 1905); *Trustees of Storrs Agr. Sch. v. Whitney, 8 A. 141 (Conn. 1887).*

(n209)Footnote 254. *Trustees of Storrs Agr. School v. Whitney, 8 A. 141 (Conn. 1887); Jones v. Habersham, 107 U.S. (17 Otto) 174 (1883).*

(n210)Footnote 255. *In re Coleman's Estate, 138 P. 992 (Cal. 1914); Wilson v. First Nat'l Bank of Independence, 145 N.W. 948 (Iowa 1914); Dykeman v. Jenkines, 101 N.E. 1013 (Ind. 1913); Harrington v. Pier, 82 N.W. 345 (Wis.*

1900); Penny v. Croul, 43 N.W. 649 (Mich. 1889); Allen v. Stevens, 55 N.E. 568 (N.Y. 1899).

(n211)Footnote 256. *Catholic Bishop of Chicago v. Murr, 120 N.E.2d 4 (Ill. 1954); Seif v. Krebs, 86 A. 872 (Pa. 1913).*

(n212)Footnote 257. *In re Woods' Trust Estate, 311 P.2d 359 (Kan. 1957); In re Lemon's Estate, 286 P.2d 691 (Wash. 1955); Goetz v. Old Nat'l Bank of Martinsburg, 84 S.E.2d 759 (W. Va. 1954); In re Pierce's Estate, 60 N.W.2d 894 (Iowa 1953), but see In re Estate of Weidman, 476 N.W.2d 357 (Iowa 1991); In re Geppert's Estate, 59 N.W.2d 727 (S.D. 1953); Davenport v. Davenport Found., 222 P.2d 11 (Cal. 1950); Smart v. Durham, 86 A. 821 (N.H. 1913); Hilliard v. Parker, 74 A. 447 (N.J1909); Farmers' & Merchants' Bank of Jamesport v. Robinson, 70 S.W. 372 (Mo. 1902); In re Smith's Estate, 37 A. 114 (Pa. 1897); Dexter v. Gardner, 7 Allen 243 (Mass. 1863);* Franklin v. Armfield, 2 Sneed 305 (Tenn. 1854); *Stanley v. McGowen, 37 N.C. 9 (1841).*

(n213)Footnote 258. *Porter v. Baynard, 28 So. 2d 890 (Fla. 1946); Perkins v. Citizens & Southern Nat'l Bank, 8 S.E.2d 28 (Ga. 1940).*

(n214)Footnote 259. *Thurlow v. Berry, 25 So. 2d 726 (Ala. 1946).*

(n215)Footnote 260. *Stubblefield v. Peoples Bank of Bloomington, 94 N.E.2d 127 (Ill. 1950).*

(n216)Footnote 261. *Wardens of St. Paul's Church v. Attorney General, 41 N.E. 231 (Mass. 1895); Codman v. Brigham, 72 N.E. 1008 (Mass. 1905); Ripley v. Brown, 105 N.E. 637 (Mass. 1914); Wood v. Oldfield, 106 N.E. 1014 (Mass. 1914); Frazier v. Merchants Nat'l Bank of Salem, 5 N.E.2d 550 (Mass. 1936); Brigham v. Peter Bent Brigham Hospital, 134 F. 513 (1st Cir. 1904); City of Boston v. Doyle, 68 N.E. 851 (Mass. 1903); In re Franklin's Estate, 24 A. 626 (Pa. 1892); Waterbury Trust Co. v. Porter, 38 A.2d 598 (Conn. 1944); Perkins v. Citizens & Southern Nat'l Bank, 8 S.E.2d 28 (Ga. 1940); Girard Trust Co. v. Rector, 52 A.2d 591 (Del. Ch. 1947); Conway v. Third Nat'l Bank & Trust Co. of Camden, 182 A. 916 (N.J. 1936); Penick v. Bank of Wadesboro, 12 S.E.2d 253 (N.C. 1940); Schreiner v. Cincinnati Altenheim, 22 N.E.2d 587 (Ohio App. 1939). See also Wendell Corp. Trustee v. Thurston, 680 A.2d 1314 (Conn. 1996)* ("The underlying debt, which Wendell seeks to satisfy, was incurred on behalf of the trust of which Thurston was a beneficiary. Therefore, we can presume that the trustee borrowed the money, he applied it on behalf of the trust and that, therefore, Thurston benefitted from it. Having enjoyed the benefit of the funds that the trustee borrowed, and having received a distribution without consideration from the trustee that left the trust effectively without funds, it is only fair that Thurston's ownership of an asset so distributed not be shielded from satisfaction of the debt that produced those funds in the first place." Thus, the court imposed a constructive trust on the distributed property.). *Id. at 1319.*

(n217)Footnote 262. *Beatty v. Guggenheim Exploration Co., 122 N.E. 378 (N.Y. 1919).*

(n218)Footnote 263. Principles of constructive trust can never be applied when there is nothing more than a broken verbal promise. *Edwards v. Edwards, 482 S.E.2d 701 (Ga. 1997). Healy v. Commissioner of Internal Revenue, 345 U.S. 278 (1953), reh'g denied, 345 U.S. 961 (1953).*

(n219)Footnote 264. *In re Marriage of Loftis, 2001 Tex. App. LEXIS 734* (held that wife was not entitled to constructive trust for paying off husband's property mortgage before their marriage); *McCabe v. Cambiano, 212 S.W.2d 237 (Tex. Civ. App. 1948); Jones v. Carpenter, 106 So. 127 (Fla. 1925); Loomis v. Roberts, 23 N.W. 816 (Mich. 1885).*

(n220)Footnote 265. *See Georgia Dist. Council of the Assemblies of God, Inc. v. Atlanta Faith Mem'l Church, Inc., 472 S.E.2d 66 (Ga. 1996)* ("A constructive trust cannot arise in the case because neither the relevant church documents nor anything else provided the District Council with a legal or equitable interest in Memorial's real property. Therefore, Memorial was free to transfer and sell its property as it desired during its membership, and as a result, issues of fraud and related discovery are not relevant in determining the ownership of the disputed church property."). *Id. at 69, 70.*

(n221)Footnote 266. *Witmer v. Brosius' Estate, 336 P.2d 455 (Kan. 1959); Ordahl v. Johnson, 93 N.E.2d 377 (Ill. App. 1950); Wier v. Kansas City, 204 S.W.2d 268 (Mo. 1947); Buettner Bros. v. Good Hope Miss. Bapt. Church, 18 So. 2d 75 (Ala. 1944); Bradford v. Chase Nat'l Bank of City of New York, 24 F. Supp. 28 (S.D.N.Y. 1938), aff'd, 105 F. 2d 1001 (2d Cir. 1939), aff'd, 309 U.S. 632 (1940).*

(n222)Footnote 267. *Tartaglis v. Hodges, 10 P.3d 176 (N.M. Ct. App. 2000)* (held the reconveyance of property to decedent's estate supported the imposition of a constructive trust for the benefit of the heirs); *Housewright v. Steinke, 158 N.E. 138 (Ill. 1927); Goodwin v. McMinn, 44 A. 1094 (Pa. 1899).*

(n223)Footnote 268. *Wilkins v. Wilkins, 198 So. 335 (Fla. 1940); In re McCrory Stores Corp., 12 F. Supp. 267 (S.D.N.Y. 1935).*

(n224)Footnote 269. *Weiss v. Storm, 126 So. 2d 295 (Fla. App. 1961); Ryan v. Plath, 140 P.2d 968 (Wash. 1943).*

(n225)Footnote 270. *Rathbun v. Hill, 354 P.2d 338 (Kan. 1960); Weber v. Jefferson County, 166 P.2d 476 (Or. 1946).*

(n226)Footnote 271. *Sykes v. Reeves, 24 S.E.2d 688 (Ga. 1943).*

(n227)Footnote 272. *United States v. Herbawi, 972 F. Supp. 171, 174 (W.D.N.Y. 1997)* ("In the forfeiture context, courts have held that a constructive trust, if proven, may establish an interest in the property superior to that of the defendant."); *Waterbury v. Nicol, 298 P.2d 211 (Or. 1956); Dietz v. Dietz, 70 N.W.2d 281 (Minn. 1955); Dominick v. Rhodes, 24 S.E.2d 168 (S.C. 1943). Maynor v. Pellegrino, 641 N.Y.S.2d 155,* (N.Y. App. Div. 1996) ("[T]he Statute of Frauds is not a defense to an action seeking the imposition of a constructive trust. In order to set forth a valid cause of action for a constructive trust, four elements must be alleged: (1) a confidential relationship, (2) an implied or express promise, (3) a transfer in reliance on the promise, and (4) unjust enrichment.") *Id. at 157.*

(n228)Footnote 273. *Freundschuh v. Freundschuh, 559 N.W.2d 706 (Minn. Ct. App. 1997); Schrager v. Cool, 70 A. 889 (Pa. 1908); Larmon v. Knight, 29 N.E. 1116 (Ill. 1892); Wood v. Rabe, 96 N.Y. 414 (1884); Mallagh v. Mallagh, 19 P. 256 (Cal. 1888); Pratt v. Clark, 57 Mo. 189 (1874); Brannin v. Brannin, 18 N.J. Eq. 212 (1867); Fairchild v. Rasdall, 9 Wis. 379 (1859).*

(n229)Footnote 274. *Hanigan v. Trumble, 562 N.W.2d 526 (Neb. 1997)* ("An action to impose a constructive trust is an equity action, and the party seeking the remedy of a constructive trust has the burden to establish a constructive trust by clear and convincing evidence"); *Arbolino v. Arbolino 152 A.2d 541 (R.I. 1959); Hill v. Irons, 113 N.E.2d 243 (Ohio 1953); Hughes v. Helzer, 185 P.2d 537 (Or. 1947); Leake v. Garrett, 268 S.W. 608 (Ark. 1925).*

(n230)Footnote 275. *Henrichs v. Sundmaker, 89 N.E.2d 732 (Ill. 1950); Knight v. Rowland, 209 S.W.2d 728 (Ky. 1948); Beach v. Beach, 207 S.W.2d 481 (Mo. 1947). McNeely v. Hiatt, 909 P.2d 191 (Or. Ct. App. 1996)* ("[T]he evidence shows that Hiatt breached her fiduciary duty in selling the property without a valid reason, that is, without any expected benefit to the trust or its beneficiaries. In fact, Hiatt conceded that she sold the Ranch in order to effectuate her new estate plan for Dollie Crockett, which included ensuring that plaintiffs did not inherit any interest in the Ranch. She compounded that breach of fiduciary duty by completing the sale in secrecy, without advising any of the beneficiaries."). *Id. at 196.*

(n231)Footnote 276. *In re Superior-Pacific Fund, Inc., 693 A.2d 248 (Pa. 1997)* ("a constructive trust arises when a person holding title to property is subject to an equitable duty to convey it to another on the ground he would be unjustly enriched if he were permitted to retain it. The necessity for such a trust may arise from circumstances evidencing fraud, duress, undue influence or mistake. The controlling factor in determining whether a constructive trust should be imposed is whether it is necessary to prevent unjust enrichment. One who seeks the imposition of a constructive trust must do so by clear, direct, precise and convincing evidence."); *Hanson v. FDIC, 113 F.3d 866 (8th Cir. 1997)* ("under Minnesota law, a constructive trust arises 'where a person holding title to property is subject to an

equitable duty to convey it to another on the ground that he would be unjustly enriched if he were permitted to retain it ....' "); *Logan v. Logan, 937 P.2d 967 (Kan. Ct. App. 1997)* ("A constructive trust arises 'wherever the circumstances under which property was acquired make it inequitable that it should be retained by the person who holds the legal title.' "); *Libutti v. United States, 107 F.3d 110 (2d Cir. N.Y. 1997)* ("Generally all that is required to impose a constructive trust is a finding that there was some wrongful act, usually, though not limited to, fraud, mistake, undue influence, or breach of a confidential relationship, which has resulted in a transfer of property."), *aff'd in part, rev'd in part, 178 F.3d 114 (2d Cir. 1999); Farmers Ins. Exch. v. Zerin, 53 Cal. App. 4th 445 (1997)* ("a constructive trust may be imposed in practically any case where there is a wrongful acquisition or detention of property to which another is entitled").

(n232)Footnote 277. *Industrial Indem. Co. v. Golden State Co., 316 P.2d 966 (Cal. 1957), cert. denied, 356 U.S. 927 (1958); Healy v. Commissioner of Internal Revenue, 345 U.S. 278 (1953), reh'g denied, 345 U.S. 961 (1953); Morris v. Morris, 258 S.W.2d 732 (Tenn. 1953); Akers v. Gillentine, 231 S.W.2d 369 (Tenn. 1948).*

(n233)Footnote 278. *Lesikar v. Rappeport, 33 S.W. 3d 282 (Tex. Ct. App. 2000)* (court imposed constructive trust where husband and wife acquired interest by fraud and had fiduciary duty as co-executrix of estate); *Procom Energy, L.L.A. v. Roach, 16 S.W.3d 377 (Tex. Ct. App. 2000)* (court held constructive trust arose from a breach of an oral promise by a party in a confidential or fiduciary relationship with another); *Rothman v. Wilson, 121 F.2d 1000 (9th Cir. 1941); Bainbridge v. Stoner, 106 P.2d 423 (Cal. 1940); Schneider v. Schneider, 146 S.W.2d 584 (Mo. 1940).*

(n234)Footnote 279. *Continental Ill. Nat'l Bank & Trust Co. of Chicago v. Kelley, 76 N.E.2d 820 (Ill. App. 1948); George Washington Mem. Park Cemetery Ass'n v. Memorial Dev. Co., 55 A.2d 675 (N.J. Ch. 1947); In re Lewis' Estate, 37 A.2d 559 (Pa. 1944).*

(n235)Footnote 280. *Bank of Mill Creek v. Elk Horn Coal Corp., 57 S.E.2d 736 (W. Va. 1950); Winger v. Chicago City Bank & Trust Co., 67 N.E.2d 265 (Ill. 1946).*

(n236)Footnote 281. *In re Bond & Mortgage Guar. Co., 103 N.E.2d 721 (N.Y. 1952); Slay v. Burnett Trust, 187 S.W.2d 377 (Tex. 1945).*

(n237)Footnote 282. *In re Lundberg's Will, 197 N.Y.S.2d 871 (1960); Gamble v. Gibson, 59 Mo. 585 (1875).*

(n238)Footnote 283. *First State Bank of Pineville v. Catron, 105 S.W.2d 162 (Ky. 1937); St. Paul Trust Co. v. Strong, 88 N.W. 256 (Minn. 1901).*

(n239)Footnote 284. *Vrooman v. Hawbaker, 56 N.E.2d 623 (Ill. 1944); Faust v. Murray, 15 N.W.2d 793 (Wis. 1944).*

(n240)Footnote 285. *Mills v. Mills, 112 So. 2d 298 (Fla. App. 1959); Robertson v. Robertson, 317 S.W.2d 272 (Ark. 1958); Fowley v. Braden, 122 N.E.2d 559 (Ill. 1954); Schiller v. Elick, 240 S.W.2d 997 (Tex. 1951); Horsley v. Hrenchir, 73 P.2d 1010 (Kan. 1937); Wright v. Young, 176 P. 583 (Ariz. 1918); Brindley v. Brindley, 72 So. 497 (Ala. 1916); Westphal v. Heckman, 113 N.E. 299 (Ind. 1916); Ussery v. Ussery, 166 S.W. 946 (Ark. 1914), but see In re Estate of Banko, 622 N.E.2d 476 (Ind. 1993); Ferguson v. Robinson, 167 S.W. 447 (Mo. 1914); In re Ryan's Estate, 100 N.W. 380 (Minn. 1904); Verzier v. Convard, 52 A. 255 (Conn. 1902); Andrew v. Andrew, 87 N.W. 494 (Iowa 1901); Krouskop v. Krouskop, 70 N.W. 475 (Wis. 1897); Lovett v. Taylor, 34 A. 896 (N.J. Sup. 1896); Dunn v. Zwilling, 62 N.W. 746 (Iowa 1895); Dailey v. Kinsler, 47 N.W. 1045 (Neb. 1891); Von Trotha v. Bamberger, 24 P. 883 (Colo. 1890); Wheeler v. Reynolds, 66 N.Y. 227 (1876).*

(n241)Footnote 286. *Schutz v. Schutz, 354 P.2d 694 (Wash. 1960); Kent v. Klein, 91 N.W.2d 11 (Mich. 1958); Orella v. Johnson, 242 P.2d 5 (Cal. 1952); Johnson v. Johnson, 205 P.2d 314 (Okla. 1949); Chandler v. Georgia Chem. Works, 185 S.E. 787 (Ga. 1936); Huffine v. Lincoln, 160 P. 820 (Mont. 1916); Becker v. Neurath, 149 S.W. 857 (Ky. 1912).*

(n242)Footnote 287. *McCartney v. McCartney, 134 N.E.2d 789 (Ill. 1956); In re Bond & Mortgage Guar. Co., 103 N.E.2d 721 (N.Y. 1952); Maddox v. Maddox, 38 N.W.2d 547 (Neb. 1949).*

(n243)Footnote 288. *Hardy v. Hardy, 230 S.W.2d 11 (Ark. 1950); Phillips v. Willis, 63 A.2d 171 (Del. 1949); Maddox v. Maddox, 38 N.W.2d 547 (Neb. 1949); Cluzel v. Brown, 29 A.2d 864* (N.J. Err & App. 1943).

(n244)Footnote 289. *Howland v. Smith, 193 N.Y.S.2d 140 (1959), app. dismissed, 199 N.Y.S.2d 495 (1960) motion denied, 218 N.Y.S.2d 55 (1961), aff'd, 219 N.Y.S.2d 607 (1961); In re Lobb's Will, 160 P.2d 295 (Or. 1945); Newkirk v. Stevenson, 67 S.E. 1013 (N.C. 1910).*

(n245)Footnote 290. *Hatcher v. Sawyer, 52 N.W.2d 490 (Iowa 1952); Bowles v. White, 57 S.E.2d 547 (Ga. 1950); Shives v. Borgman, 69 A.2d 802 (Md. 1949); Wright v. Dudley, 53 S.E.2d 29 (Va. 1949).*

(n246)Footnote 291. *Head v. Schwartz's Ex'r, 202 S.W.2d 623 (Ky. 1947); In re Rosenthal's Estate, 20 N.W.2d 643 (Wis. 1945); In re Anderson's Estate, 35 A.2d 301 (Pa. 1944), overruling recognized, In re Beeruk's Estate, 241 A.2d 755 (Pa. 1968).*

(n247)Footnote 292. *Murray v. Behrendt, 76 N.E.2d 431 (Ill. 1948); Morrison v. Farmer, 213 S.W.2d 813 (Tex. 1948).*

(n248)Footnote 293. *Monarco v. Lo Greco, 220 P.2d 737 (Cal. 1950); Rubalcava v. Garst, 206 P.2d 1154 (N.M. 1949); Wager v. Marshburn, 1 So. 2d 303 (Ala. 1941); Vandiver v. Stone, 41 P.2d 247 (Or. 1935).*

(n249)Footnote 294. *Booth v. Mason, 176 So. 201 (Ala. 1937); Chandler v. Riley, 210 S.W. 716 (Tex. Civ. App. 1919); Rush v. McPherson, 97 S.E. 613 (N.C. 1918); Eadie v. Hamilton, 146 P. 323 (Kan. 1915); Day v. Devitt, 81 A. 368 (N.J. 1911); Harras v. Harras, 110 P. 1085 (Wash. 1910); Griffin v. Schlenk, 102 S.W. 837 (Ky. 1907); Dickson v. Stewart, 98 N.W. 1085 (Neb. 1904); Rives v. Lawrence, 41 Ga. 283 (1870); Jenckes v. Cook, 9 R.I. 520 (1870); Price v. Reeves, 38 Cal. 457 (1869); Beegle v. Wentz, 55 Pa. 369 (1867); Arnold v. Cord, 16 Ind. 177 (1861); Northcraft v. Martin, 28 Mo. 469 (1859).*

(n250)Footnote 295. *In re Estate of Horrigan v. Ladner, 757 So. 2d 165 (Miss. 1999); Vance v. Grow, 190 N.E. 747 (Ind. 1934); In re Stirk's Estate, 81 A. 187 (Pa. 1911).*

(n251)Footnote 296. *Dalk v. Allen, 774 So. 2d 787 (Fla. Ct. App. 2000)* (imposition of constructive trust was not authorized, because the will was not signed and thus was invalid); *Barrett v. Thielen, 167 N.W. 1030 (Minn. 1918); Crinkley v. Rogers, 160 N.W. 974 (Neb. 1916); Rice Stix Dry Goods Co. v. W. S. Albrecht & Co., 113 N.E. 66 (Ill. 1916); Casey v. Casey, 146 N.Y.S. 348 (1914), aff'd, 153 N.Y.S. 1109 (1915); Winder v. Scholey, 93 N.E. 1098 (Ohio 1910); Trustees of Amherst College v. Ritch, 45 N.E. 876 (N.Y. 1897); Orth v. Orth, 42 N.E. 277 (Ind. 1895); Williams v. Vreeland, 29 N.J. Eq. 417 (1878); Hooker v. Axford, 33 Mich. 453 (1876); De Laurencel v. De Boom, 48 Cal. 581 (1874); Baylies v. Payson, 87 Mass. 473 (1862); McLellan v. McLean, 39 Tenn. 684 (1859); Church v. Ruland, 64 Pa. 432 (Pa. 1870).*

(n252)Footnote 297. *Barrett v. Thielen, 167 N.W. 1030 (Minn. 1918); Tyler v. Stitt, 112 N.W. 1091 (Wis. 1907).*

(n253)Footnote 298. *In re Foster's Estate, 320 P.2d 855 (Kan. 1958); Anderson v. Grasberg, 78 N.W.2d 450 (Minn. 1956); Wilson v. Randolph, 261 P. 654 (Nev. 1927); Murchison v. Murchison, 203 S.W. 423 (Tex. Civ. App. 1918); Eversole v. Eversole, 185 S.W. 487 (Ky. 1916); Wall v. Pfanschmidt, 106 N.E. 785 (Ill. 1914), superseded by statute as recognized in Estate of Vallerius, 629 N.E.2d 1185 (Ill. App. 1994); In re Gollnik's Estate, 128 N.W. 292 (Minn. 1910); McAllister v. Fair, 84 P. 112 (Kan. 1906); In re Kuhn's Estate, 101 N.W. 151 (Iowa 1904); Deem v. Milliken, 44 N.E. 1134 (Ohio 1895); Carpenter's Estate, 32 A. 637 (Pa. 1895); Owens v. Owens, 6 S.E. 794 (N.C. 1888).*

(n254)Footnote 299. *Parks v. Dumas, 321 S.W.2d 653 (Tex. Civ. App. 1959); Duthill v. Dana, 113 A.2d 499 (Me. 1952); Bates v. Wilson, 232 S.W.2d 837 (Ky. 1950); Sherman v. Weber, 167 A. 517 (N.J. Eq. 1933); Ellerson v. Westcott, 42 N.E. 540 (N.Y. 1896).*

(n255)Footnote 300. George T. Bogert, Trusts 298 (6th ed. 1987), *citing Colton v. Wade, 80 A.2d 923 (Del. Ch. 1951); In re Perry's Estate, 123 S.E.2d 99 (N.C. 1961); Neiman v. Hurff, 93 A.2d 345 (N.J. 1952).*

(n256)Footnote 301. George T. Bogert, Trusts 298 (6th ed. 1987), *citing Bradley v. Fox, 129 N.E.2d 699 (Ill. 1955); National City Bank of Evansville v. Bledsoe, 144 N.E.2d 710 (Ind. 1957), but see Turner v. Estate of Turner, 454 N.E.2d 1247 (Ind. App. 1983).*

(n257)Footnote 302. *National Mahaiwe Bank v. Barry, 125 Mass. 20 (1878); Lightfoot v. Davis, 91 N.E. 582 (N.Y. 1910); Newton v. Porter, 69 N.Y. 133 (1877).*

(n258)Footnote 303. *Burton v. Burton, 51 N.W.2d 297 (Mich. 1952); Ogilvie v. Smith, 54 S.E.2d 860 (S.C. 1949); Detroit Trust Co. v. Struggles, 278 N.W. 385 (Mich. 1938); People's Pittsburgh Trust Co. v. Saupp, 182 A. 376 (Pa. 1936); Bank of Brookings v. Aurora Grain Co., 186 N.W. 563 (S.D. 1922).*

(n259)Footnote 304. *Hyde v. Atlanta Woolen Mills Corp., 50 S.E.2d 52 (Ga. 1948); Brown v. New York Life Ins. Co., 152 F.2d 246 (9th Cir. 1945); Jansen v. Tyler, 49 P.2d 372 (Or. 1935).*

(n260)Footnote 305. *Johnston v. Johnston, 55 So. 2d 838 (Ala. 1951); Miske v. Habay, 63 A.2d 883 (N.J. 1949).*

(n261)Footnote 306. *New York Life Ins. Co. v. Nashville Trust Co., 292 S.W.2d 749 (Tenn. 1956); Bell v. Bell, 79 S.E.2d 524 (Ga. 1954); Lloyd v. Phillips, 71 N.Y.S.2d 103 (1947); Reiter v. Carroll, 198 S.W.2d 163 (Ark. 1946); Bankers' Trust Co. v. Patton, 33 P.2d 1019 (Cal. 1934); Nesbitt v. Onaway-Alpena Tel. Co., 168 N.W. 519 (Mich. 1918); Batty v. Greene, 92 N.E. 715 (Mass. 1910); Tetlow v. Rust, 76 A. 22 (Pa. 1910); Hays v. Gloster, 26 P. 367 (Cal. 1891); Valentine v. Richardt, 27 N.E. 255 (N.Y. 1891); Blakeslee v. Starring, 34 Wis. 538 (1874).*

(n262)Footnote 307. *Phillips v. Ball, 358 P.2d 193 (Okla. 1960); Honk v. Karlsson, 292 P.2d 455 (Ariz. 1956); Purinton v. Dyson, 65 P.2d 777 (Cal. 1937).*

(n263)Footnote 308. *Stevens v. Torregano, 13 Cal. Rptr. 604 (1961); Pico v. Cohn, 25 P. 970 (Cal. 1891), aff'd, 27 P. 537 (Cal. 1891).*

(n264)Footnote 309. *Reed v. Reed, 287 P.2d 889 (Okla. 1955); Loring v. Baker, 106 N.E.2d 434 (Mass. 1952); In re Bangor Trust Co., 178 A. 290 (Pa. 1935); Lamb v. Schiefner, 114 N.Y.S. 34 (1908); Cole v. Fickett, 49 A. 1066 (Me. 1901); Andrews v. Andrews, 12 Ind. 348 (1859).*

(n265)Footnote 310. *Kuehn v. Kuehn, 104 N.W.2d 138 (Wis. 1960); In re Metz' Estate, 100 N.W.2d 393 (S.D. 1960); Akin v. Evans, 156 A.2d 219 (Md. 1959); In re Walther's Will, 188 N.Y.S.2d 168 (1959).*

(n266)Footnote 311. *Latham v. Father Devine, 85 N.E.2d 168 (N.Y. 1949), rearg. denied, 86 N.E.2d 114 (N.Y. 1949); Pope v. Garrett, 211 S.W.2d 559 (Tex. 1948); Monach v. Koslowski, 78 N.E.2d 4 (Mass. 1948); Smith v. Stratton, 18 N.E.2d 328 (Mass. 1938); Olson v. Washington, 63 P.2d 304 (Cal. App. 1936); Mullin v. Mullin, 104 N.Y.S. 323 (1907).*

(n267)Footnote 312. *In re Superior-Pacific Fund, Inc., 693 A.2d 248 (Pa. 1997)* ("[A] resulting trust... may arise only where a disposition of property is made which raises an inference that it was not intended that the person or entity holding the property was to have the beneficial interest in it.").

(n268)Footnote 313. *Ward v. Hudgens, 22 S.W.2d 260 (Mo. Ct. App. 2000)* (plaintiff's delay in asserting his claim to a resulting trust was not unreasonable; the bar of laches was not triggered); *Edwards v. Edwards, 482 S.E.2d 701*

(Ga. 1997) ("An implied resulting trust can arise under three circumstances: (1) an express trust is created but fails for any reason; (2) a trust is fully performed without exhausting all of the trust property; and (3) a purchase money resulting trust is established.").

(n269)Footnote 314. *Brown v. Alexander, 79 So. 842 (Miss. 1918); Asam v. Asam, 86 A. 871 (Pa. 1913); Larisey v. Larisey, 77 S.E. 129 (S.C. 1913); Lander v. Persky, 83 A. 209 (Conn. 1912); Spradling v. Spradling, 142 S.W. 848 (Ark. 1911); Cowles v. Cowles, 131 N.W. 738 (Neb. 1911); LeRoy v. Norton, 113 P. 529 (Colo. 1911); Euler v. Schroeder, 76 A. 164 (Md. 1910); Masters v. Mayes, 92 N.E. 945 (Ill. 1910); Ratliff v. Elwell, 119 N.W. 740 (Iowa 1909); Howe v. Howe, 85 N.E. 945 (Mass. 1908); Pittock v. Pittock, 98 P. 719 (Idaho 1908); De Roboam v. Schmidtlin, 92 P. 1082 (Or. 1907); Flanary v. Kane, 46 S.E. 312 (Va. 1904); Plumb v. Cooper, 26 S.W. 678 (Mo. 1894); Summers v. Moore, 18 S.E. 712 (N.C. 1893); Fisk v. Patton, 27 P. 1 (Utah 1891); Burns v. Ross, 9 S.W. 468 (Tex. 1888); Mershon v. Duer, 40 N.J. Eq. 333 (1885). Cf. Fenderson v. Fenderson, 685 A.2d 600 (Pa. Super. Ct. 1996)* ("We find that it is not against public policy to enforce the instant resulting trust when the filed lawsuit was dismissed without any evidence that the claim which Bryan sought to avoid had any substantial foundation. As a result, the resulting trust in favor of Bryan Fenderson is valid and must be enforced."). *Id. at 606.*

Mont. Code Ann. § 72-33-218 (1997) (where a transfer of property is made to one person and the purchase price is paid by another, a resulting trust arises in favor of the person who paid the purchase price).

(n270)Footnote 315. *Towner v. Berg, 172 N.Y.S.2d 258 (1958); Yeiser v. Rogers, 116 A.2d 3 (N.J. 1955); In re Case's Estate, 118 N.E.2d 836 (Ohio 1954), but see In re Amos, 201 B.R. 184,* (Bankr. N.D. Ohio 1996); *Houlton v. Prosser, 194 P.2d 911 (Colo. 1948); Oyama v. California, 332 U.S. 633 (1948); Culley v. Carr, 45 A.2d 850 (N.J. Ch. 1946); Harrell v. Fiveash, 185 S.E. 327 (Ga. 1936); Murphy v. Johnson, 54 S.W.2d 158 (Tex. Civ. App. 1932); Koyoko Nishi v. Downing, 67 P.2d 1057 (Cal. App. 1937); Miller v. Davis, 50 Mo. 572 (1872).*

(n271)Footnote 316. *Partridge v. Berliner, 156 N.E. 352 (Ill. 1927); Keown v. Keown, 119 N.E. 785 (Mass. 1918); Mortgomery v. Craig, 27 N.E. 427 (Ind. 1891).*

(n272)Footnote 317. *North American Islamic Trust, Inc. v. Muslim Center of Miami, Inc., 771 So. 2d 1227 (Fla. Ct. App. 2000)* (held that the imposition of a resulting trust was warranted when the lender resued to transfer the property upon the purchaser's repayment of the loan); *Godzieba v. Godzieba, 143 A.2d 344 (Pa. 1958); Wimberly v. Kneeland, 293 S.W.2d 526 (Tex. App. 1956); Padgett v. Osborne, 221 S.W.2d 210 (Mo. 1949), overruled in part, Davis v. Roberts, 295 S.W.2d 152 (Mo. 1956); McCollum v. McCollum, 43 S.E.2d 663 (Ga. 1947); Long v. Huseman, 47 A.2d 75 (Md. 1946); Viner v. Untrecht, 158 P.2d 3 (Cal. 1945); Edwards v. Tenny, 154 P.2d 143 (Idaho 1944); Wilson v. Warner, 93 A. 533 (Conn. 1915). Fenderson v. Fenderson, 685 A.2d 600 (Pa. Super. Ct. 1996)* ("Upon review of the chancellor's findings of fact, there is clear, direct evidence that Bryan contributed to the purchase price and there is no evidence that he did not intend to receive a resulting trust. As a result, we find that a resulting trust was created at the time of settlement in Bryan Fenderson's favor in proportion to the amount he contributed."). *Id. at 606.*

(n273)Footnote 318. *Williams v. Ellis, 323 S.W.2d 238 (Mo. 1959); Palmisano v. Gagliano, 85 N.W.2d 398 (Wis. 1957); Powell v. Race, 10 So. 2d 142 (Fla. 1942); Bisceglia v. Bisceglia, 17 A.2d 182 (Pa. 1941); Wiley v. Dunn, 192 N.E. 661 (Ill. 1934).*

(n274)Footnote 319. Ky. Rev. Stat. §381;170; Mich. Comp. L. Ann. §§ 555.7-555.10; Minn. Stat. Ann. § 501B.07; N.Y. Est. Powers & Trusts Law §7-1.3; Wis. Stat. Ann. §701.04.

(n275)Footnote 320. *Dodson v. Winn, 169 N.E.2d 898 (Mass. 1960); First Nat'l Bank of Brunswick v. Stewart, 109 S.E.2d 606 (Ga. 1959); Commerce Nat'l Bank of Toledo v. Browning, 107 N.E.2d 120 (Ohio St. 1952); Bunker v. Jones, 181 F.2d 619 (D.C. App. 1950); Hansen v. Bear Film Co., 168 P.2d 946 (Cal. 1946); Huxley v. Security Trust Co., 33 A.2d 679 (Del. Ch. 1943); Pedrick v. Guarantee Trust Co., 197 A. 909 (N.J. Eq. 1938); In re Talston's Estate, 37 P.2d 76 (Cal. 1934); Trunkey v. Van Sant, 68 N.E. 946 (N.Y. 1903); Broadrup v. Woodman, 27 Ohio St. 553 (1875), but see*

Summers v. Summers, 699 N.E.2d 958 (Ohio App. 1997); Mcelroy v. Mcelroy, 113 Mass. 509 (1873); Blake v. Dexter, 66 Mass. 559 (1853).

(n276)Footnote 321. *In re Welsh's Will, 145 N.Y.S.2d 727 (1955); In re Jackson's Trust, 40 A.2d 393 (Pa. 1945); In re Devereux' Estate, 48 Pa. D. & C. 491 (1943); Lillard v. Lillard, 26 N.E.2d 933 (Ohio App. 1939); First Nat'l Bank of Bryan v. White, 91 S.W.2d 1120 (Tex. Civ. App. 1936); In re Mooney's Estate, 267 N.W. 196 (Neb. 1936); Jordan v. Jordan, 259 N.W. 386 (Minn. 1935).*

(n277)Footnote 322. *Security Trust Co. v. Willett, 97 A.2d 112 (Del. Ch. 1953).*

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CHAPTER 27 THE LAW OF TRUSTS RELATED TO REAL PROPERTY

3-27 Thompson on Real Property, Thomas Editions § 27.05

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§ 27.05 Powers, Duties and Liabilities of Trustees

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§ 27.05(a) Powers of Trustees n323

In general, when the trustee is granted certain powers by the unambiguous language of the trust instrument, neither the trustee nor the courts can add to or take away from such powers. n324 If a trustee is directed to perform some specific task, the power (and the duty) to accomplish that is referred to as a mandatory or an imperative power. n325 Tasks whose performance is left within the judgment of the trustee are usually called discretionary powers. n326 Upon judicial review, the judgment of the trustee in exercise of discretionary powers will usually not be overturned, as long as the trustee acted in good faith consideration of the purposes of the trust and the interests of the beneficiaries. n327 The trustee abuses the discretion if the trustee acts arbitrarily, in bad faith, capriciously, maliciously, or out of some other illegal or improper motive. n328 A trustee with "uncontrolled" or "absolute" discretion has only slightly more freedom of action, and trustee actions are still subject to judicial review. n329 If co-trustees cannot agree on the use of discretionary power, a court may remove one of them. n330

A trustee's power is personal if the trustor has made it clear that only the named trustee or trustees may exercise that power. n331 Occasionally courts must determine if a trustor's intent to create a personal trusteeship may be implied from the circumstances of the trust's creation. n332 Such an inference may be natural if the trust, for instance, is of short duration and concerns family matters; n333 a long-term trust administered by an elderly trustee may lead to the opposite inference. n334 Under a personal trusteeship, a trust ceases when the trustee dies or resigns or otherwise no longer acts as trustee. n335

Co-trustees are usually required to exercise their powers in concert, unless a contrary intent has been expressed by the trustor. n336 Consistent with this rule is the notion that co-trustees hold title to trust property as joint tenants. n337 However, public policy interest in the carrying out of charitable trusts has led courts to accept acts of only a majority of co-trustees over such trusts. n338 A trustee may delegate the exercise of a trust function or power to another responsible agent, but only in those circumstances where a reasonable and prudent property owner would not feel bound to use such power personally: n339

> [I]n the case of a power to sell realty the trustee should retain for his personal use the power to fix

> the sale price and the terms of the contract and deed, but ... he might employ a realtor to seek a purchaser and to negotiate with possible buyers. With regard to improved realty held for lease the trustee should fix rentals and general standards to be used in selecting tenants, but might use a real estate management firm to conduct interviews with proposed tenants, secure signatures to leases, and collect rents. n340

A power of sale in the trustee is usually found in the instrument creating the trust or inferred from the circumstances or given by statute. n341 The characteristics of this power may differ among trusts. Often the power to sell includes the power to exchange, n342 or the power to lease with an option to buy. n343 If no explicit power of sale is given for a trust, equity may imply a power of sale if it is necessary or useful in accomplishing the purposes of the trust. n344 A sale by a trustee without the power of sale may be approved beforehand by the beneficiaries' consent or afterward by the beneficiaries' ratification. n345

Courts of equity also have power to direct sales or intervene in sales of trust property, if such activity is necessary to carry out the purposes of the trust. n346

A trustee's exercise of the power of sale must be in accordance with the directions connected with the power of sale n347 or with a reasonably prudent person standard. n348 A trustee may also have an express or implied power to mortgage trust property as security for borrowing. n349 An express power to sell or invest usually does not include an implied power to mortgage. n350 And, as with the power of sale, courts of equity may order or intervene in a mortgage of trust property, n351 for the purpose of preserving the property or promoting its better management. n352 A mortgage given by a trustee without power to do so -- for funds borrowed and used to improve the mortgaged property -- is void, n353 but may result in an equitable lien in behalf of the lender. n354

A trustee with power to hold productive realty usually also has the power to lease that property; if such power is not expressly given, it is often implied as required to produce income from the property for the beneficiaries. n355 Courts of equity have inherent power to intervene in leasing, n356 and statutes often govern powers of trustees and courts to become involved in leases of trust property. n357 Leases of trust property ordinarily should not extend beyond the term of the trust, n358 but exceptions are known. n359 A trustee acting as landlord of trust property has a duty to obtain the tenant's compliance with the terms of the lease. n360 A trustee as landlord has the same duty to repair the premises as would be imposed upon any other landlord in those circumstances. n361 However, the trustee as landlord has no duty to improve the property, unless such improvement is necessary to make the property tenantable or otherwise productive. n362

COMPUTER-ASSISTED RESEARCH

LEXIS: trustee w/20 power w/20 mandatory or imperative w/50 (property or real property or real estate or land)
trustee w/20 power w/20 discretion! w/50 (property or real property or real estate or land)
trustee w/20 power w/20 personal w/50 (property or real property or real estate or land)

§ 27.05(b) Duties of Trustees

The trustee's first active duty is to take possession of the trust property or of the documents representing its ownership. n363 Having taken possession of the property, the trustee is obligated to take any steps necessary to preserve and protect the property n364 -- such as recording a deed or mortgage n365 -- and to defend it. n366 The trustee also may not attack the trust under a claim that the trust is void, n367 or assert a hostile title. n368

Trustees have a traditional duty to separate and identify trust property as trust property, referred to as earmarking. In the context of real property held in trust, earmarking meant that evidences of ownership of the property were required to indicate the trust ownership. Today, such earmarking is still required, but liability for not earmarking is now limited to damages proved to result from the failure to earmark. n369

If a trust imposes on the trustee the duty to distribute income, usually implicit therein is a duty to make the trust property productive. n370 As mentioned above, in the case of real property intended for rental, this duty may require the trustee to make expenditures in preparing the property for the rental market. In making payments to beneficiaries, the trustee is bound to follow trust instructions precisely. n371

COMPUTER-ASSISTED RESEARCH

LEXIS: trustee w/50 dut! w/20 possession w/50 (property or real property or real estate or land)
trustee w/50 dut! w/20 identif! w/50 (property or real property or real estate or land)
trustee w/50 dut! W/20 distribut! w/50 (property or real property or real estate or land)

§ 27.05(c) Liabilities of Trustees

A trustee's liabilities may be grounded in tort or in contract, and may arise from the trustee's role as property owner. As an owner of real property, a trustee may be personally liable, for example, for payment of taxes, n372 and for performance of obligations as either a landlord or a tenant. n373 When personal liability of the trustee is grounded solely on the trustee's position as holder of the legal title, the trustee is entitled to indemnification by the trust. The trustee is normally not liable for specific performance of contracts to convey. n374

Trustees of private trusts are personally liable for torts they commit in their capacity as trustees, n375 and also for the torts of their agents while acting on behalf of the trust. n376 In some jurisdictions, an action against a trustee tortfeasor may be brought against the trustee in the representative capacity, and any recovery assessed against the trust property. n377 According to a traditional view, trustees of charitable trusts were liable for their own torts but not for the torts of their agents. n378 This so-called charitable immunity has now been forsaken in several jurisdictions. n379

Trustees are also personally liable for breaches of contracts they have made in their representative capacity. n380 A co-trustee who did not join in making the contract is not liable on it. n381 Of course, this personal liability of the trustee merely defines the structure of the legal action seeking to establish or enforce that liability. Eventually, for almost all such personal liabilities the trustee is entitled to indemnification from the trust property. n382 Some American courts also accept the English rule that a trustee may also be indemnified by the beneficiaries if the trust assets are inadequate. n383 Under some circumstances, a contract creditor may recover in equity directly against the trust property, especially if recovery from the trustee personally is difficult, n384 or performance of the contract has enhanced the trust property's value. n385

COMPUTER-ASSISTED RESEARCH

LEXIS: trustee w/50 liabilit! w/20 tort w/50 (property or real property or real estate or land)
trustee w/50 liabilit! w/20 tort
trustee w/50 liabilit! w/20 personal
trustee w/50 liabilit! w/20 indemnif! w/50 (property or real property or real estate or land)

FOOTNOTES:
(n1)Footnote 323. *Farmers Ins. Exch. v. Zerin, 53 Cal. App. 4th 445 (1997)* ("A trust is a personal relationship between the trustee and the beneficiary... It does not create an interest in the trust res per se.").

(n2)Footnote 324. *Sorrel v. Sorrel, 1 S.W.3d 867 (Tex. Ct. App. 1999).*

(n3)Footnote 325. George T. Bogert, Trust 319 (6th ed. 1987).

(n4)Footnote 326. *Dennett v. Kuenzli, 936 P.2d 219 (Idaho App. 1997)* ("a trust is not a legal 'person' which can

own property or enter into contracts... a trustee may bring legal actions in his own name regarding property or contract interests of the trust estate."); *Rapp v. Rapp, 562 N.W.2d 359 (Neb. 1997)* ("attorney fees and expenses will ordinarily be allowed a trustee where they were incurred for the benefit of the estate"); *Buchanan v. Patterson, 159 N.E.2d 661 (N.Y. 1959); In re Fiedler's Estate, 151 A.2d 201 (N.J. Super. 1959); Whitaker v. McDowell, 72 A. 938 (Conn. 1909); Safe Deposit & Trust Co. of Baltimore v. Sutro, 23 A. 732 (Md. 1892).*

(n5)Footnote 327. *In re Eberhart, 656 N.Y.S.2d 159 (1997)* ("under New York law ... a trustee may not exercise a discretionary power in his own favor"); *Matter of Murphy, 146 N.Y.S.2d 848 (1955); Camden Safe Deposit & Trust Co. v. Read, 4 A.2d 10 (N.J. Eq. 1939); Marburg v. Safe Dep. & Trust Co. of Baltimore City, 9 A.2d 222 (Me. 1939); In re Vohland's Estate, 280 N.W. 241 (Neb. 1938); In re Sam's Estate, 258 N.W. 682 (Iowa 1935); Wight v. Mason, 180 A. 917 (1935); In re Ordean's Will, 261 N.W. 706 (Minn. 1935); Watling v. Watling, 27 F.2d 193 (6th Cir. 1928); Williams v. Hund, 258 S.W. 703 (Mo. 1924).*

(n6)Footnote 328. *Stallard v. Johnson, 116 P.2d 965 (Okla. 1941); In re Ahrens' Estate, 71 N.Y.S.2d 462 (1947), app. dismissed, 75 N.E.2d 271 (N.Y. 1947); Conlin v. Murdock, 43 A.2d 218 (N.J. Eq. 1945); In re Briggs' Estate, 27 A.2d 430 (Pa. 1942); Gardner v. O'Loughlin, 84 A. 935 (N.H. 1912).*

(n7)Footnote 329. *Norwest Bank Minnesota, N.A. v. Ode, 615 N.W.2d 91 (Minn. Ct. App. 2000)* (held that a mortgage sinced by the trustee as an individual, and not in the role of a trustee, was not binding); *Taylor v. McClave, 15 A.2d 213 (N.J. Eq. 1940); Heyer v. Bulluck, 186 S.E. 356 (N.C. 1936); Carrier v. Carrier, 123 N.E. 135 (N.Y. 1919); Keating v. Keating, 165 N.W. 74 (Iowa 1917).*

(n8)Footnote 330. *Woodard v. Mordecai, 67 S.E.2d 639 (N.C. 1951); McCarthy v. Tierney, 165 A. 807 (Conn. 1933).*

(n9)Footnote 331. *Sherry v. Little, 167 N.E.2d 872 (Mass. 1960); In re Towers' Trust, 164 N.Y.S.2d 449 (1957); Duncan v. Elkins, 45 A.2d 297 (N.H. 1946); In re Doe's Will, 285 N.W. 764 (Wis. 1939); Tilley v. Letcher, 82 So. 527 (Ala. 1919); Jacobs v. Wilmington Trust Co., 80 A. 346 (Del. Ch. 1911); United States Trust Co. v. Poutch, 113 S.W. 107 (Ky. 1908); Dillingham v. Hartin, 49 A. 143 (N.J. Eq. 1901).*

(n10)Footnote 332. *In re Warner's Will, 61 N.W.2d 840 (Minn. 1953); In re Canfield's Estate, 181 P.2d 732 (Cal. App. 1947); In re Boutwell's Estate, 22 A.2d 157 (Vt. 1941); Booth v. Krug, 14 N.E.2d 645 (Ill. 1938).*

(n11)Footnote 333. *Gilmore v. Gilmore, 41 S.E.2d 229 (Ga. 1947); Welch v. Wachovia Bank & Trust Co., 38 S.E.2d 197 (N.C. 1946); Security Co. v. Snow, 39 A. 153 (Conn. 1898).*

(n12)Footnote 334. *Munsey v. Laconia Home for the Aged, 164 A.2d 557 (N.H. 1960); In re Walker, 53 N.E.2d 378 (N.Y. 1944); Penn v. Pennsylvania Co. for Insurances, 171 S.W.2d 437 (Ky. 1943); Maryland Casualty Co. v. Safe Deposit & Trust Co. of Baltimore, 80 A. 903 (Md. 1911).*

(n13)Footnote 335. *Dillard v. Dillard, 34 S.E. 60 (Va. 1899). Walter E. Wilhite Revocable Living Trust v. Northwest Yearly Meeting Pension Fund, 916 P.2d 1264 (Idaho 1996)* ("[T]he next question we confront is whether a co-trustee can sell or exchange trust property individually. The district court found that Walter Wilhite had no power, as co-trustee, to sell or transfer property from the Trust without the consent of the co-trustee. We agree. The trust document contains several provisions which imply that the co-trustees must join in an act act such as this."). *Id. at 1271*

(n14)Footnote 336. *City of Boston v. Robbins, 126 Mass. 384 (1878); Dingman v. Boyle, 120 N.E. 487 (Ill. 1918); Morley v. Carson, 87 A. 713 (Pa. 1913); Fritz v. City Trust Co. of New York, 76 N.Y.S. 625 (1902), aff'd, 66 N.E. 1109 (N.Y. 1903); Carr v. Hertz, 33 A. 194 (N.J. Eq. 1895).*

(n15)Footnote 337. *Webster v. Vandeventer, 72 Mass. 428 (1856); Jackson ex dem. Erwin v. Moore, 6 Cow. 706 (N.Y. 1827).*

(n16)Footnote 338. *City of Boston v. Doyle, 68 N.E. 851 (Mass. 1903).*

(n17)Footnote 339. *Chicago Title & Trust Co. v. Zinser, 105 N.E. 718 (Ill. 1914); Fowler v. Coates, 94 N.E. 997 (N.Y. 1911); North Am. Trust Co. v. Chappell, 69 S.W. 546 (Ark. 1902); In re Bohlen's Estate, 75 Pa. 304 (1874); Morville, Jr. v. Fowle, 10 N.E. 766 (Mass. 1887).*

(n18)Footnote 340. George T. Bogert, Trusts 329 (6th ed. 1987), citing *Saunders v. Webber, 39 Cal. 287 (1870); United States Nat'l Bank of Omaha v. Alexander, 1 N.W.2d 920 (Neb. 1942); Schofield v. John R. Thompson Co., 109 F.2d 432 (6th Cir. 1940); Ross v. Freeman, 180 A. 527 (Del. Ch. 1935); Hibernian Banking Ass'n v. Roseboom, 214 Ill. App. 324 (1919); Gates v. Dudgeon, 66 N.E. 116 (N.Y. 1903).*

(n19)Footnote 341. *Livermore v. Livermore, 121 N.E. 27 (Mass. 1918); Shaw v. Bridgers, 76 S.E. 827 (N.C. 1912); Blair v. Hazzard, 112 P. 298 (Cal. 1910); Salisbury v. Bigelow, 37 Mass. 174 (1838).*

(n20)Footnote 342. *Gray v. Corcoran, 269 P.2d 1091 (Mont. 1954); Ash v. Ash, 10 A.2d 150 (N.J. Eq. 1940).*

(n21)Footnote 343. *Connely v. Haggarty, 56 A. 371 (N.J. Eq. 1903), aff'd, 64 A. 1133* (N.J. Err. & App. 1905).

(n22)Footnote 344. *Revoc Co. v. Thomas, 16 A.2d 847 (Md. 1940); Crown Co. v Cohn, 172 P. 804 (Or. 1918); Preston v. Safe Deposit & Trust Co., 81 A. 523 (Md. 1911); Wisdom v. Wilson, 127 S.W. 1128 (Tex. App. 1909); Clark v. Fleischmann, 116 N.W. 290 (Neb. 1908); Garesche v. Levering Inv. Co., 48 S.W. 653 (Mo. 1898).*

(n23)Footnote 345. *Matthews v. Thompson, 71 N.E. 93 (Mass. 1904); Rogers v. Tyley, 32 N.E. 393 (Ill. 1892); Long v. Long, 62 Md. 33 (1884); Swartz v. Duncan, 57 N.W. 543 (Neb. 1894); In re Post, 13 R.I. 495 (1876).*

(n24)Footnote 346. *Roberts v. Roberts, 102 N.E. 239* (Ill.); *Faulk v. Rosecrans, 264 P.2d 300 (Okla. 1953); Dallas Art League v. Weaver, 199 So. 831 (Ala. 1941); Hewitt v. Beattie, 138 A. 795 (Conn. 1927); Bibb v. Bibb, 86 So. 376 (Ala. 1920).*

(n25)Footnote 347. *Rooker v. Fidelity Trust Co., 151 N.E. 610 (Ind. 1926); Patterson v. Lanning, 87 N.W. 338 (Neb. 1901).*

(n26)Footnote 348. *Webb & Knapp, Inc. v. Hanover Bank, 133 A.2d 450 (Md. 1957); Reeder v. Lanahan, 74 A. 575 (Md. 1909); Johnston v. Eason, 38 N.C. 330 (1844).*

(n27)Footnote 349. *Bank of Visalia v. Dillonwood Lumber Co., 82 P. 374 (Cal. 1905); Fergusson v. Fergusson, 229 S.W. 738 (Ark. 1921); King v. Stowell, 98 N.E. 91 (Mass. 1912); Boskowitz v. Held, 44 N.Y.S. 136 (1897),* aff'd, *48 N.E. 1104 (N.Y. 1897); Guilmartin & Co. v. Stevens, 55 Ga. 203 (1875).*

(n28)Footnote 350. *Stengel v. Royal Realty Corp., 17 A.2d 127 (Md. 1941); Davis v. Pennsylvania Co., 12 A.2d 66 (Pa. 1940); Beakey v. Knutson, 174 P. 1149 (Or. 1918); Hamilton v. Hamilton, 128 N.W. 380 (Iowa 1910); Townsend v. Wilson, 59 A. 417 (Conn. 1904); Griswold v. Caldwell, 73 N.Y.S. 2 (1901); Loring v. Brodie, 134 Mass. 453 (1883); Stokes v. Payne Kennedy & Co., 58 Miss. 614 (1881).*

(n29)Footnote 351. *Schramm v. United States Nat'l Bank of Portland, 52 P.2d 181 (Or. 1935); Long v. Simmons Female College, 105 N.E. 553 (Mass. 1914); Butler v. Badger, 150 N.W. 233 (Minn. 1914); In re Windsor Trust Co., 127 N.Y.S. 586 (1911); Shirkey v. Kirby, 66 S.E. 40 (Va. 1909); Townsend v. Wilson, 59 A. 417 (Conn. 1904).*

(n30)Footnote 352. *Butler v. Badger, 150 N.W. 233 (Minn. 1914); Lyddane v. Lyddane, 137 S.W. 838 (Ky. 1911); Burroughs v. Gaither, 7 A. 243 (Md. 1886).*

(n31)Footnote 353. *Byron Reed Co. v. Klabunde, 108 N.W. 133 (Neb. 1906); Tuttle v. First Nat'l Bank of Greenfield, 73 N.E. 560 (Mass. 1905); First Nat'l Bank of Paterson, N.J. v. National Broadway Bank, 51 N.E. 398 (N.Y.*

1898); Taylor & Co. v. Clark, 56 Ga. 309 (1876).

(n32)Footnote 354. *Jones v. Swift, 15 N.E.2d 274 (Mass. 1938); Griley v. Marion Mortg. Co., 182 So. 297 (Fla. 1937).*

(n33)Footnote 355. First Nat'l Bank in *Wichita v. Magnolia Petroleum Co., 62 P.2d 891 (Kan. 1936); Smith v. Jones, 162 So. 496 (Fla. 1935); Hutcheson v. Bennefield, 42 S.E. 422 (Ga. 1902); Geer v. Traders' Bank of Canada, 93 N.W. 437 (Mich. 1903).*

(n34)Footnote 356. *Adams v. Cook, 101 P.2d 484 (Cal. 1940); Pedroja v. Pedroja, 102 P.2d 1012 (Kan. 1940); Colonial Trust Co. v. Brown, 135 A. 555 (Conn. 1926); Schroeder v. Woodward, 82 S.E. 192 (Va. 1914); Packard v. Illinois Trust & Savings Bank, 104 N.E. 275 (Ill. 1914).*

(n35)Footnote 357. 39 *Cortlandt St. Corp. v. Lambert, 205 N.Y.S. 161 (1924).*

(n36)Footnote 358. *Campbell v. Kawananakoa, 31 Haw. 500 (1930); In re Caswell's Will, 222 N.W. 235 (Wis. 1928); Standard Metallic Paint Co. v. Prince Mfg. Co., 19 A. 411 (Pa. 1890); Bergengren v. Aldrich, 29 N.E. 667 (Mass. 1885).*

(n37)Footnote 359. *Smith v. Widman Hotel Co., 49 N.W.2d 301 (S.D. 1951); Crown Co. v. Cohn, 172 P. 804 (Or. 1918); Upham v. Plankinton, 140 N.W. 5 (Wis. 1913).*

(n38)Footnote 360. *City Bank Farmers' Trust Co. v. Smith, 189 N.E. 222 (N.Y. 1934), aff'd 191 N.E. 217 (N.Y. 1934).*

(n39)Footnote 361. *Booth v. Bradford, 87 N.W. 685 (Iowa 1901); Disbrow v. Disbrow, 61 N.Y.S. 614, aff'd, 60 N.E. 1110 (N.Y. 1901); Kearney v. Kearney, 17 N.J. Eq. 59 (1899); Veazie v. Forsaith, 76 Me. 172 (1884); Sohier v. Eldredge, 103 Mass. 345 (1869).*

(n40)Footnote 362. *Booth v. Bradford, 87 N.W. 685 (Iowa 1901); Stevens v. Stevens, 30 N.Y.S. 625 (1894), aff'd, Stevens v. Melcher, 46 N.E. 965 (N.Y. 1897); Patterson v. Johnson, 113 Ill. 559 (1885).*

(n41)Footnote 363. *McLellan's Estate v. McLellan, 63 P.2d 1120 (Cal. 1936); April v. April, 6 N.E.2d 43 (N.Y. 1936); Speakman v. Tatem, 21 A. 466 (N.J. Eq. 1891).*

(n42)Footnote 364. *Morse v. Borough of Essex, Borough 173 A. 921 (N.J. Eq. 1934).*

(n43)Footnote 365. *Sprowles v. Eversole, 210 S.W.2d 346 (Ky. 1948); Scherger v. Union Nat'l Bank, 25 P.2d 588 (Kan. 1933); Partridge v. American Trust Co., 97 N.E. 925 (Mass. 1912).*

(n44)Footnote 366. *In re Estate of Campbell, 692 A.2d 1098 (Pa. Super. Ct. 1997)* (stating that trustee's primary duty is to preserve the trust assets and to ensure the safety of the trust principal); *American Nat'l Bank & Trust Co. of Chicago v. Vinson, 653 N.E.2d 13 (Ill. App. 1995)* (action by trust companies to eject occupant of land held in trust); *Rossi v. Davis, 133 S.W.2d 363 (Mo. 1939); In re Lowe's Estate, 192 A. 405 (Pa. 1937).*

(n45)Footnote 367. *In re Strange's Estate, 97 N.W.2d 199 (Wis. 1959); Federal Trust Co. v. Damron, 247 N.W. 589 (Neb. 1933).*

(n46)Footnote 368. *Fellows v. Bass, 56 So. 2d 831 (Miss. 1952); In re Eustace Estate, 87 P.2d 305 (Wash. 1939).*

(n47)Footnote 369. *In re Lefevre's Guardianship, 113 P.2d 1014 (Wash. 1941); Buckle v. Marshall, 10 S.E.2d 506 (Va. 1940).*

(n48)Footnote 370. *Rutanen v. Ballard, 678 N.E.2d 133 (Mass. 1997)* ("a trustee is not liable for damages for unforeseen drop in value if, before drop in value, his decision not to sell was reasonable, and ... [in] good faith"); *Weiss v. State, 939 P.2d 380 (Alaska 1997)* ("trustees have a duty to preserve trust property for the uses of the trust, but they do not necessarily have a duty to maintain the corpus of the trust forever"); a trustee who holds title to the assets that make up the trust estate and enters into contracts necessary to the management of the estate is subject to a fiduciary obligation to manage and use the assets for the benefit of the beneficiary. *Dennett v. Kuenzli, 936 P.2d 219 (Idaho Ct. App. 1997). Linder v. Officer, 135 S.W.2d 445 (Tenn. 1940); Moore v. Sanders, 106 S.W.2d 337 (Tex. Civ. App. 1937).*

(n49)Footnote 371. *Baar v. Fidelity & Columbia Trust Co., 193 S.W.2d 1011 (Ky. 1946); Countiss v. Whiting, 29 N.E.2d 277 (Ill. App. 1940); Selkirk-Priest Basin Ass'n v. Andrus, 899 P.2d 949 (Ida. 1995)* (where direct beneficiaries of trust assets were schools, environmental groups lacked standing to challenge administration of those trust assets).

(n50)Footnote 372. *Dunham v. City of Lowell, 86 N.E. 951 (Mass. 1909); Thiebaud v. Tait, 36 N.E. 525 (Ind. 1894).*

(n51)Footnote 373. *Moeller v. Superior Ct. of Los Angeles, 947 P.2d 279 (Cal. 1997)* ("trustee, rather than trust, is real party in interest in litigation involving trust property"), *but see Wells Fargo Bank v. Superior Court, 990 P.2d 591,* (Cal. 2000); *Board of Educ. v. Crilly, 37 N.E.2d 873 (Ill. App. 1941); Rainault v. Evarts, 7 N.E.2d 145 (Mass. 1937); McLaughlin v. Minnesota Loan & Trust Co., 255 N.W. 839 (Minn. 1934); Irvine v. MacGregor, 265 P. 218 (Cal. 1928).*

(n52)Footnote 374. *Hopkinson v. First Nat'l Bank, 200 N.E. 381 (Mass. 1936).*

(n53)Footnote 375. *In re Hodgson's Estate, 20 A.2d 294 (Pa. 1941); Smith v. Rizzuto, 276 N.W. 406 (Neb. 1937); Trani v. Gerard, 168 N.Y.S. 808 (1918); Boston Beef Packing Co. v. Stevens, 12 F. 279 (C.C.N.Y. 1882); Cheyenne-Arapaho Tribes of Okla. v. United States, 33 Fed. Cl. 464 (1995)* (action against United States for breach of trust responsibilities regarding mineral leases on tribal lands).

(n54)Footnote 376. *Curtis v. Title Guar. & Trust Co., 40 P.2d 562 (Cal. App. 1935); Baker v. Tibbetts, 39 N.E. 350 (Mass. 1895).*

(n55)Footnote 377. *Smith v. Coleman, 132 So. 198 (Fla. 1931); Ewing v. Wm. L. Foley, Inc., 280 S.W. 499 (Tex. 1926); Wright v. Caney River Ry. Co., 66 S.E. 588 (N.C. 1909); Miller v. Smythe, 18 S.E. 46 (Ga. 1893)*

(n56)Footnote 378. *Howard v. South Baltimore Gen. Hosp., 62 A.2d 574 (Md. 1948); Evans v. Lawrence & Mem. Asso. Hosps., 50 A.2d 443 (Conn. 1946); Herndon v. Massey, 8 S.E.2d 914 (N.C. 1940); Webb v. Vought, 275 P. 170 (Kan. 1929), overruled, Noel v. Menninger Foundation, 267 P.2d 934 (Kan. 1934); Farrigan v. Pevear, 78 N.E. 855 (Mass. 1906).*

(n57)Footnote 379. *Albritton v. Neighborhood Ctrs. Ass'n for Child Dev., 466 N.E.2d 867 (Ohio St. 1984); Fitzer v. Greater Greenville South Carolina Y.M.C.A., 282 S.E.2d 230 (S.C. 1981), but see Hanvey v. Oconee Memorial Hosp., 416 S.E.2d 623 (S.C. 1992); Howle v. Camp Amon Carter, 470 S.W.2d 629 (Tex. 1971); Kojis v. Doctors Hosp., 107 N.W.2d 131 (Wis. 1961); Parker v. Port Huron Hosp., 105 N.W.2d 1 (Mich. 1960); Molitor v. Kaneland Community Unit Dist. No. 302, 163 N.E.2d 89 (Ill. 1959), but see Dewitt v. McHenry County, 691 N.E.2d 388 (Ill. App. 1998)* (In response to *Molitor,* the Illinois legislature quickly reinstated many forms of sovereign immunity); *Dalton v. St. Luke's Catholic Church, 141 A.2d 273 (N.J. 1958), but see Weiss v. Goldfarb, 713 A.2d 427 (N.J. 1998)* (stating that *Dalton* has been superseded by statute); *Bing v. Thunig, 163 N.Y.S.2d 3, 143 N.E.2d 3 (1957); Noel v. Menninger Found., 267 P.2d 934 (Kan. 1954); Pierce v. Yakima Vall. Mem. Hosp. Ass'n, 260 P.2d 765 (Wash. 1953); Ray v. Tucson Med. Ctr., 230 P.2d 220 (Ariz. 1951); Malloy v. Fong, 232 P.2d 241 (Cal. 1951); Foster v. Roman Catholic Diocese of Vermont, 70 A.2d 230 (Vt. 1950).*

(n58)Footnote 380. *Bishop v. Bucklen, 60 N.E.2d 872 (Ill. 1945); Peyser v. American BEC & Trust Co., 107 F.2d 625 (App. D.C. 1939); In re Gibbons' Estate, 272 N.W. 553 (Neb. 1937); Slatt v. Thomas, 36 P.2d 459 (Colo. 1934).*

(n59)Footnote 381. *Cornett v. West, 173 P. 44 (Wash. 1918); Markel v. Peck, 151 S.W. 772 (Mo. App. 1912).*

(n60)Footnote 382. *Hamlen v. Welch, 116 F.2d 413 (1st Cir. 1940); In re Mathues' Estate, 185 A. 768 (Pa. 1936); United States v. Swope, 16 F.2d 215 (8th Cir. 1926).*

(n61)Footnote 383. *Darling v. Buddy, 1 S.W. 2d 163 (Mo. 1927); Equitable Trust Co. of New York v. Kingsley, 197 N.Y.S. 267 (1922), aff'd, 201 N.Y.S 900 (1923).* Typifying the mixed decisions are *Coffman v. Gates, 85 S.W. 657 (Mo. App. 1904); Wells-Stone Mercantile Co. v. Aultman, Miller & Co., 84 N.W. 375 (N.D. 1900); Roger Williams Nat'l Bank v. Groton Mfg. Co., 17 A. 170 (R.I. 1889).*

(n62)Footnote 384. *Caflisch Lumber Co. v. Lake Lynn Lumber Co. & Supply Co., 195 S.E. 854 (W. Va. 1938); Gates v. McClenahan, 100 N.W. 479 (Iowa 1904); Norton v. Phelps, 54 Miss. 467 (1877); Field v. Wilbur, 49 Vt. 157 (1876).*

(n63)Footnote 385. *Kann v. Kann, 344 Md. 689 (1997)* ("The equitable remedies of a trust beneficiary are: (a) to compel the trustee to perform his duties as a trustee; (b) to enjoin the trustee from committing a breach of trust; (c) to compel a trustee to redress a breach of trust; (d) to appoint a receiver to take possession of the trust property and administer the trust; (e) to remove the trustee.").

Brownfield v. McFadden, 68 P.2d 993 (Cal. App. 1937); In re Manning's Estate, 111 N.W. 409 (Iowa 1907); Henrietta Nat'l Bank v. Barrett, 25 S.W. 456 (Tex. Civ. App. 1894).

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CHAPTER 27 THE LAW OF TRUSTS RELATED TO REAL PROPERTY

3-27 Thompson on Real Property, Thomas Editions § 27.06

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§ 27.06 Modifying and Terminating Trusts

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The rules regarding alteration of trusts are conspicuously straightforward. Unless rules for altering are set forth in the trust instrument, there is no other means, express or implied, for changing the trust. n386 Under some circumstances, a form of estoppel is applied to bar beneficiaries who have consented to a change, albeit without authority to do so, from objecting to the carrying out of the change. n387 A court of equity has the power to alter the administrative provisions of a private trust, in order to better achieve the trust's purpose, n388 but it may not change the beneficiaries' interests, n389 unless all the beneficiaries request such a change. n390 As for charitable trusts, a court may not only change administrative provisions, n391 but -- under the *cy pres* power -- may also apply the trust funds to a different charitable purpose if the benefit to the trustor's originally intended purpose is no longer possible or practicable. n392 If, with respect to such a trust, the cy pres power is not applied, a resulting trust for the trustor and successors arises. n393

Similar principles govern the power to revoke a trust. Unless decreed otherwise by statute, the power to revoke a trust exists only as it is expressly stated in the instrument creating the trust, n394 and then only in the party to whom specifically given, whether the trustor, trustee, or another. n395

Statutes in some states permit beneficiaries, by unanimous written consent, to revoke a voluntary trust. n396 A court of equity may revoke or terminate a trust whose purpose has been accomplished n397 or has become impossible n398 or ille-gal. n399 Where the interests of the beneficiaries pass to the trustee, the legal and equitable estates in the trust property are merged, and the trust ceases to exist. n400

Finally, even if the trust purposes have not been accomplished, a court of equity has the power to terminate a trust upon the request of the trustor and all the beneficiaries. n401 If the trustor does not join in such a request, the majority American rule is that the court will refuse to terminate the trust. n402

COMPUTER-ASSISTED RESEARCH

LEXIS: trust w/50 (revok! or revoc! or terminat!) w/50 (property or real property or real estate or land)

trust w/50 (change or alter or modif!) w/50 (property or real property or real estate or land)
trust w/50 cy pres w/50 (property or real property or real estate or land)

FOOTNOTES:

(n1)Footnote 386. *Werbelovsky v. Manufacturers Trust Co., 209 N.Y.S.2d 564 (1961); Briggs v. Briggs, 346 S.W.2d 106 (Tex. 1961); Bayless v. Wheeler Kelly Hagny Trust Co., 109 P.2d 108 (Kan. 1941); Childs v. Gross, 107 P.2d 424 (Cal. App. 1940); Krause v. Jeannette Inv. Co., 62 S.W.2d 890 (Mo. 1933); Farwell v. Illinois Merchants Trust Co., 264 Ill. App. 49 (1931).*

(n2)Footnote 387. *Bryne v. Laura, 52 Cal. App. 4th 1054 (1997)* ("equitable estoppel may be employed to enforce an oral trust in land where the beneficiary has 'irrevocably changed his position in reliance upon the trust' "); *In re Newhouse's Estate, 212 N.Y.S.2d 2 (1960); Fry v. Stetson, 106 A.2d 662 (Pa. Super. 1954).*

(n3)Footnote 388. *Bolles v. Boatmen's Nat'l Bank of St. Louis, 255 S.W.2d 725 (Mo. 1953); United States Nat'l Bank of Portland v. First Nat'l Bank of Portland, 142 P.2d 785 (Or. 1943).*

(n4)Footnote 389. *In re Suhling's Will, 45 N.W.2d 608 (Wis. 1951); Springfield Safe Deposit & Trust Co. v. Friele, 23 N.E.2d 138 (Mass. 1939); In re Stanley's Will, 269 N.W. 550 (Wis. 1936); Stewart v. Hamilton, 270 S.W. 79 (Tenn. 1925).*

(n5)Footnote 390. *Gifford v. First Nat'l Bank of Menominee, 280 N.W. 108 (Mich. 1938); In re O'Keeffe's Estate, 3 N.Y.S.2d 739 (1938); Reynolds v. Reynolds, 182 S.E. 341 (1935).*

(n6)Footnote 391. *Howard Savings Inst. v. Peep, 170 A.2d 39 (N.J. 1961).*

(n7)Footnote 392. *Catron v. Scarritt Collegiate Inst., 175 S.W. 571 (Mo. 1915); Utica Trust & Deposit Co. v. Thompson, 149 N.Y.S. 392 (1914); Norris v. Loomis, 102 N.E. 419 (Mass. 1913); Lewis v. Gaillard, 56 So. 281 (Fla. 1911); In re Kramph's Estate, 77 A. 814 (Pa. 1910); Nichols v. Newark Hospital, 63 A. 621 (N.J. Eq. 1906); Inglish v. Johnson, 95 S.W. 558 (Tex. Civ. App. 1906); Troutman v. De Boissiere Odd Fellows' Orphans' Home & Indus. Sch. Ass'n, 64 P. 33 (Kan. 1901), rev'd, 71 P. 286 (Kan. 1903); In re Royer's Estate, 56 P. 461 (Cal. 1899); Heuser v. Harris, 42 Ill. 425 (1867).*

(n8)Footnote 393. *Shannep v. Strong, 160 P.2d 683 (Kan. 1945); Waterbury Trust Co. v. Porter, 38 A.2d 598 (Conn. 1944).*

(n9)Footnote 394. *Stipe v. First Nat'l Bank of Portland, 301 P.2d 175 (Or. 1956); Lamb v. First Huntington Nat'l Bank, 7 S.E.2d 441 (W. Va. 1940); Gray v. Union Trust Co. of San Francisco, 154 P. 306 (Cal. 1915); New Jersey Title Guar. & Trust Co. v. Parker, 93 A. 196 (N.J. Eq. 1915), aff'd, 96 A. 574* (N.J. Err. & App. 1916); *Hammerstein v. Equitable Trust Co., 141 N.Y.S. 1065 (1913); Fishblate v. Fishblate, 86 A. 469 (Pa. 1913); Lovett v. Farnham, 47 N.E. 246 (Mass. 1897).*

(n10)Footnote 395. *Richardson v. Stephenson, 213 N.W. 673 (Wis. 1927); Farlow v. Farlow, 34 A. 837 (Md. 1896); Falk v. Turner, 101 Mass. 494 (1869).*

(n11)Footnote 396. *See, e.g.*, N.Y. Est. Powers & Trusts Law §7-1.9; Okla. Stat. Ann.§tit. 60 175.41; Wis. Stat. Ann. §701.12.

(n12)Footnote 397. *Millsaps v. Johnson, 196 S.W. 202 (Tex. Civ. App. 1917); In re Packer's Estate, 92 A. 65 (Pa. 1914); In re Hagerstown Trust Co., 86 A. 982 (Md. 1913); Kahn v. Tierney, 120 N.Y.S. 663 (1909),* aff'd, *94 N.E. 1095 (N.Y. 1911); Taylor v. Richards, 117 N.W. 208 (Mich. 1908); Temple v. Ferguson, 72 S.W. 455 (Tenn. 1903); Cherry v. Richardson, 24 So. 570 (Ala. 1898).*

(n13)Footnote 398. *Gordon v. Gordon, 124 N.E.2d 226 (Mass. 1955); Jedor v. Chicago City Bank & Trust Co., 33 N.E.2d 220 (Ill. 1941).*

(n14)Footnote 399. *In re Solbrig's Will, 96 N.W.2d 97 (Wis. 1959); In re Morse, 160 N.E. 374 (N.Y. 1928); Schlessinger v. Mallard, 11 P. 728 (Cal. 1886).*

(n15)Footnote 400. *Tifft v. Ireland, 172 N.E. 865 (Mass. 1930); Cunningham v. Bright, 117 N.E. 909 (Mass. 1917); Wenzel v. Powder, 59 A. 194 (Md. 1904).*

(n16)Footnote 401. *Fowler v. Lanpher, 75 P.2d 132 (Wash. 1938); Botzum v. Havana Nat'l Bank, 12 N.E.2d 203 (Ill. 1937); O'Brien v. Holden, 160 A. 192 (Vt. 1932); Stephens v. Moore, 249 S.W. 601 (Mo. 1923); Angle v. Marshall, 47 S.E. 882 (W. Va. 1904).*

(n17)Footnote 402. *In re Simonin's Estate, 103 A. 927 (Pa. 1918).* Decisions following the minority rule are represented by *Blackburn v. Blackburn, 180 S.W. 48 (Ky. 1915); Claflin v. Claflin, 20 N.E. 454 (Mass. 1889), but see, Hamerstrom v. Commerce Bank of Kansas City, 808 S.W.2d 434 (Mo. Ct. App. 1991). Rabidas v. Murasko, 677 A.2d 331 (Pa. Super. Ct. 1996)* ("Generally, a trust executed without reservation of power by a settlor to revoke or reform the trust is irrevocable. An irrevocable trust may be rescinded by the settlor, however, if it is demonstrated that the trust was created through fraud, duress, undue influence, or mistake." (citation omitted)). *Id. at 333*

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CHAPTER 27 THE LAW OF TRUSTS RELATED TO REAL PROPERTY

3-27 Thompson on Real Property, Thomas Editions § 27.07

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§ 27.07 Bibliography

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Conferred by Will, 132 A.L.R. 1473.

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Annotation, *Validity under Rule Against Perpetuities, of Gift in Remainder to Creator's Great-grandchildren, Following Successive Life Estates to Children and Grandchildren, 18 A.L.R. 2d 671.*

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Supp. To CHAPTER 27 THE LAW OF TRUSTS RELATED TO REAL PROPERTY

3-27 Thompson on Real Property, Thomas Editions Supp. to § 27.03

Supp. to § 27.03 Definitions of Trust Terms.

[Go To Main]

§ 27.03(a) Trust. [Go To Main]

Add:

Galdjie v. Darwish, *7 Cal. Rptr. 3d. 178* (Dec. 4, 2003) (noting that the trustee who is subject to personal liability as the result of performance of his or her duties as trustee could seek reimbursement from trust assets).

§ 27.03(c) The Property of the Trust. [Go To Main]

Add:

Sabo v. Keidel, 745 N.W.2d 661 (N.D. 2008) (a quit claim deed conveying property to the trust is not admissible to contradict the terms of the trust).

In re Marriage of Brown, 183 P.3d 207 (Or. App. 2008) (a husband's interests in trust are property interests and cannot be awarded as a form of spousal support).

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Supp. To CHAPTER 27 THE LAW OF TRUSTS RELATED TO REAL PROPERTY

3-27 Thompson on Real Property, Thomas Editions Supp. to § 27.04

Supp. to § 27.04 Creation and Validity of Trusts.

[Go To Main]

§ 27.04(a) Express Trusts. [Go To Main]

Add:

Chavin v. PNC Bank, 816 A.2d 781 (Del. 2003) ("The cardinal rule of law in a trust case is that the intent of the settlor controls the interpretation of the instrument." The language of the trust instrument and the circumstances surrounding its construction must be used to determine intent). *See also Hughes v. 3M Retiree Med. Plan, 281 F.3d 786 (8th Cir. 2002)* . *Compare with Eychaner v. Gross, 779 N.E.2d 1115 (Ill. 2002)* (intent is determined by considering the entire document and the "plain and ordinary meaning of the words used").

In re Ingeneri, 321 B.R. 601 (Bankr..D.Me. 2005) (noting that attributes of an express trust include an explicit declaration of intention to create a trust, a trustee, a beneficiary, and trust property).

Add:

United States v. 7700 Stein Way, 2005 U.S. App. LEXIS 5051 (No. 02-56627, 9th Cir., Mar. 28, 2005) (noting that when trust property is real estate, the statute of frauds requires that the declaration of trust be in writing and that an adequate description of the trust property be provided).

Add:

See e.g., In re Estate of Romanowski, 771 N.E.2d 966 (Ill. App. 1st Dist. 2002) (Daughter exceeded grant of power of

attorney when she transferred her mother's property into a trust and received sale proceeds upon mother's death. Evidence of an oral agreement was inadmissible because the construction of the power of attorney demonstrated the mother's intent to not grant the daughter the authority to appoint contingent beneficiaries).

Mezey v. Fioramonti, 65 P.3d 980 (Ariz. App. 2003) (wife charged with knowledge of separation of husband's financial interests that would have been revealed by reasonable investigation regardless of whether any investigation was undertaken).

Add:

Tutorow v. Gerber, 2002 Cal. App. LEXIS 1139 (May 14, 2002) .

Add:

Dassori v. Patterson, 802 N.E.2d 553 (Mass. 2004) (a trust instrument may be reformed to conform with the settlor's intent, and to determine that intent the court looks to the instrument as a whole as well as circumstances known to the settler at execution. Introduction of extrinsic information may also be permissible); *Diwadkar v. Dalal, 790 N.E.2d 221 (Mass. 2003)* ; *In re Substitute Indenture of Trust, 789 N.E.2d 1051 (Mass. 2003)* .

Add:

Glaeske v. Shaw, 2003 661 N.W.2d 420 (Wis. App. 2003) (trust valid although it lacked two signatures, because it had its most significant relationship with Wisconsin, which did not require two signatures); *Kirschbaum v. Wennett, 806 N.E.2d 440 (Mass. App. 2004)* (when a trust provides for method of modification, that method must be strictly followed).

Add:

Jackson v. Callan Publ'g, Inc., 2005 Ill. App. LEXIS 170 (No. 1-03-2942, Feb. 28, 2005) ("The requirements for the creation of a charitable trust are: the intention to create a trust; a definite subject matter or trust property; a charitable purpose; and delivery of the trust property to another person as a trustee"); *In re AppOnline.com, Inc., 315 B.R. 259,* (Bankr. E.D.N.Y. 2004) (Under New York law, an express trust requires the actual delivery or legal assignment of the fund or other property to the trustee with the intention of passing legal title to him or her as trustee).

Add:

March v. March, 816 N.E.2d 1256 (Mass. App. Ct. 2004) (having failed to reserve a power to revoke the trust thus established, the trust must be deemed irrevocable, even if created without consideration).

§ 27.04(c) Who May Be the Trustee. [Go To Main]

Add:

Bilby v. Bilby, 2005 Conn. Super. LEXIS 747 (No. FA030196803S, Conn. Super. Ct. Mar. 18, 2005) (Each parent shall have the right to name a trustee to hold the proceeds of the life insurance for the support, education, health and welfare of the minor children). *See also Kudlach v. Kudlach, 2005 Conn. Super. LEXIS 616* (No. FA030127305S, Feb. 24, 2005) (Each parent shall have the right to name a trustee to hold the proceeds of the life insurance for the support, education, health and welfare of the minor child.)

Add:

Kelly v. Hard Money Funding, Inc., 494 Utah Adv. Rep. 31 (2004) (deed of conveyance is void unless the grantee is capable of holding the named property).

Edwards v. Burke, 102 P.3d 1271 (Mont. 2004) (stating that unincorporated associations cannot own real property and therefore must have an "identifiable trustee" which possesses the land in lieu of the association and takes responsibility for the duties of ownership).

Add:

Estate of Engelman v. Comm'r, 121 T.C. 54 (2003) (when an equitable and legal estate are united in a single person, the two interests generally merge and the trust terminates).

Kirschbaum v. Elizabeth Ortman Trust of 1977, 787 N.Y.S.2d 678 (N.Y. Sup. Ct. 2004) ("If one person has both legal and equitable title, i.e., is the sole beneficiary and sole trustee, the titles merge, and the merger destroys the trust unless another beneficiary has an interest").

§ 27.04(d) The Beneficiary. [Go To Main]

Add:

In re Milton Hershey Sch., 867 A.2d 674 (Pa. Commw. Ct. 2005) (stating that the beneficiaries of a private trust are specific, often few in number, and readily ascertainable).

In re Smeller, 855 N.E.2d 543 (Ohio App. 2006) (estate administrator could not sell estate property held in trust for decedent's child).

Add:

In re Testamentary Trust of Charnock, 597 S.E.2d 706 (N.C. 2004) (A "guardian ad litem" may be appointed to represent the interests of any unknown or unborn potential beneficiaries of the trust).

Add:

In re Scott Arthur Young, Debtor, 297 B.R. 492 (E.D. Tex. 2003) (revenue may be assigned by the beneficiary or by the court subjected to his debts).

Mahan v. Rudnick, 2004 Cal. App. Unpub. LEXIS 6592 (No. F042773, July 13, 2004) (Future interests may be sold, transferred, or devised in the s ame manner as present interests).

Add:

Rose v. Amsouth Bank of Florida, 296 F. Supp. 2d 383 (E.D. N.Y. 2003) (for assignees in the same action, the one prior in time is not always entitled to priority).

Add:

Moore v. Moore, 111 S.W.3d 530 (Mo. App. 2003) (in the absence of provisions prohibiting alienation, a vested equitable estate can be passed through inheritance).

Add:

Jackson v. Fid. & Deposit Co. of Maryland, 608 S.E.2d 901 (Va. 2005) (a beneficiary's debts are enforceable by creditors against the beneficiary's trust interest in the hands of the trustee regardless of any spendthrift provisions the trust contains).

Add:

Ventura County Dept. of Child Support Services v. Brown, *11 Cal. Rptr. 3d 489 (2004)* (a settlor may not create a spendthrift trust naming himself as sole beneficiary).

Add:

O'Brien v. Commissioner of Internal Revenue, T.C. Memo 2003-290, 86 T.C.M. (CCH) 461, 2003 Tax Ct. Memo LEXIS 291 (2003) (trusts are reachable for collection of federal tax liabilities).

Add:

Emmet County Bd. of Supervisors v. Ridout, 692 N.W.2d 821 (Iowa 2005) (Under certain circumstances, even the assets of a trust protected by a spendthrift clause may be reached to satisfy and enforce a claim against the beneficiary; i.e. for services rendered and materials furnished which preserve or benefit the interest of the beneficiary).

§ 27.04(e)(1) Restrictions on and Varieties of Purposes.

Add:

U.S. v. Neal, 255 F.R.D. 638 (W.D. Ark. 2008) (sham trusts used to shelter and hide assets from creditors).

In re Estate of Young, *72 Cal. Rptr. 3d 520 (2008)* ("tax avoidance" land trusts were void because of fraud or undue influence).

§ 27.04(f) Special Rules Relating to Charitable Trusts. [Go To Main]

Add:

Fletcher v. City of San Diego, 2002 Cal. App. Unpub. LEXIS 10282 (Nov. 7, 2002) .

NC Illinois Trust Co. v. Madigan, 351 Ill. App. 3d 311 (Ill. App. Ct. 2004) (noting that a charitable trust is designed to advance a certain social good or even to benefit society at large).

Add after the sentence: "Some confusion appears in the cases ... must be indefinite).

Blumenthal v. Sharon Hosp., 2003 Conn. Super. LEXIS 13 (Jan. 7, 2003) ("A charitable trust or gift is seen as being devoted to charitable purposes forever").

Add:

Indian Law Resource Center v. First Am. Bank (In re Estate of Smeltzer), 2002 Iowa App. LEXIS 1111 (Oct. 30, 2002) .

Add:

Hays v. Harmon, 809 N.E.2d 460 (Ind. Ct. App. 2004) ("Charitable trust means a trust in which all the beneficiaries are the general public or organizations ... and that is organized and operated wholly for religious, charitable, scientific, public safety testing, literary, or educational purposes").

Add:

In re Estate of Somers, 89 P.3d 898 (Kan. 2004) (noting that a charitable trust may be created for the relief of poverty, the advancement of education or religion).

Add:

Quinn v. BJC Health Sys., 2005 U.S. Dist. LEXIS 7910 (No. 404CV00768 ERW, E.D. Mo. Mar. 1, 2005) ("Charitable trusts require language which demonstrates a specific intent to create the trust").

Add:

Niemann v. Vaughn Community Church, 77 P.3d 1208 (Wash. App. 2003) (court properly removed the discriminatory restraint on alienation from VCC's deed).

§ 27.04(g) Non-Express Trusts. [Go To Main]

§ 27.04(g)(1) Constructive Trusts.

§ 27.04(g)(1)(i) In General.

Add:

Berryman v. Adams, 2003 Ala. Civ. App. LEXIS 708 (No. 2010991, Sep. 26, 2003) (when a judge imposes a constructive trust, it will not be disturbed unless clearly erroneous); *Lipton v. Donnenfeld, 5 A.D.3d 356, 773 N.Y.S.2d 82 (2004)* (a constructive trust will be imposed to satisfy justice).

Davis v. Estridge, 85 S.W.3d 308 (Tex. App. 2001) (imposition of constructive trust deemed inequitable); *Davis v. Barnfield, 833 So. 2d 58 (Ala. Civ. App. 2002)* (constructive trust imposed).

Northrup v. Brigham, No. 04-*P-87, 2005 Mass. App. LEXIS 400* (Apr 29, 2005) (A constructive trust is imposed to avoid the unjust enrichment of one party at the expense of the other where the legal title to the property was obtained by fraud or in violation of a fiduciary relationship). *See also Gaentner v. Benkovich, 18 A.D.3d 424, 795 N.Y.S.2d 246* ; N.Y. App. Div. May 2, 2005) (stating that the elements of a cause of action for a constructive trust are: (1) a confidential or fiduciary relationship, (2) a promise, (3) a transfer in reliance thereon, and (4) unjust enrichment).

Add:

Great-West Life & Annuity Ins. Co. v. Knudson, 534 U.S. 204 (2002) .

See Ferris, Baker, Watts, Inc. v. Stephenson (In re MJK Clearing), 286 B.R. 109 (Bankr. D. Minn. 2002) (specific property must be identified as belonging to the plaintiff in order for the court to impose a constructive trust).

Add:

Anderson v. Bellino, 658 N.W.2d 645 (Neb. 2003) (trustee may be reimbursed for expenses incurred in execution of the trust).

Add:

Amendola v. Kendzia, 2005 N.Y. App. Div. LEXIS 4604 (Apr 29, 2005) ("The statute of frauds does not furnish a defense to a cause of action seeking to impress a constructive trust on real property"). *See also Schwartz v. Houss, 2005 N.Y. Misc. LEXIS 427*, (N.Y. Sup. Ct. Jan. 3, 2005) (noting that the Statute of Frauds is not a defense to a cause of action for a constructive trust).

Add:

Official Comm. of Unsecured Creditors of Forman Enters. v. Forman (In re Forman Enters.), 281 B.R. 600 (Bankr. W.D. Pa. 2002) (the party seeking the imposition of a constructive trust has the burden of providing "clear, direct, precise and convincing" evidence).

Glaspy v. Glaspy, 545 S.E.2d 782 (N.C. App. 2001) (constructive trust could not be imposed absent clear and convincing evidence).

§ 27.04(g)(1)(ii) Circumstances Giving Rise to Constructive Trusts.

Add:

Salt Creek Rural Park Dist. v. Dep't of Revenue, 334 Ill. App. 3d 67, 777 N.E.2d 515 (Ill. App. 2002) (a constructive trust may be imposed when there is a finding of some form of wrongdoing).

Add:

Iwanow v. Iwanow, 834 N.Y.S.2d 251 (2007) (wife obtained constructive trust over land purchased by husband with title in a third party); *Keller v. Estate of Keller, 2007 Fla. App. LEXIS 727 (Fla. 4th DCA 2007)* (after the wife' death, a constructive trust was imposed on land purchased during marriage with joint funds); *Ruiz v. Meloney, 26 A.D.3d 485, 810 N.Y.S.2d 216 (2006)* (constructive trust could be imposed on property held by unmarried former cohabitants).

In re Kent Peterson, 2004 Tex. App. LEXIS 567 (No. 07-03-0512-CV, Jan. 20, 2004) (executor has fiduciary duty to disclose all material facts known that might affect the beneficiaries' rights).

In re Del-Met Corp., 2005 Bankr. M.D. Tenn. LEXIS 671 (No. 01-13208-KML-3-7, Mar. 4, 2005) (stating that Tennessee courts have imposed constructive trusts when a person makes use of some relation of influence or confidence to obtain the legal title upon more advantageous terms than could otherwise have been obtained).

Add:

Snyder v. Cowell, 2003 Tex. App. LEXIS 3139 (No. 08-01-00444-CV, Apr. 10, 2003) (self dealing by trustee may be attacked by the beneficiary even if he has suffered no damages and trustee has acted in good faith).

Add

Reale v. Reale, 485 F. Supp. 2d 247 (D.N.Y. 2007) (constructive trust not warranted without sufficient evidence of promise by landholders to share the property with siblings).

Add:

Armelin v. Armelin, 2003 Cal. App. Unpub. LEXIS 8885 (No. 8161395, Sep. 18, 2003) (statute of frauds is not a shield for fraud).

Jackson v. Callan Pub'lg, Inc., 356 Ill. App. 3d 326, 826 N.E.2d 413 (No. 1-03-2942, Feb. 28, 2005) ("When a person's property has been wrongfully appropriated and converted into a different form, equity impresses a constructive trust upon the new form or species of property") (*quoting Sadacca v. Monhart, 470 N.E.2d 589, 593-94 (Ill. 1984)* .

Add:

United States v. Nava, 404 F.3d 1119 (9th Cir. 2005) (fraud is generally one of the bases upon which a constructive trust is found). *See also Stewart v. Sewell, 2005 Tenn. App. LEXIS 222* (No. M2003-01031-COA-R3-CV, Tenn. Ct. App., Apr. 14, 2005).

Add:

Kalwitz v. Estate of Kalwitz, 822 N.E.2d 274 (Ind. Ct. App. 2005) ("The duty to convey the property may rise because it was acquired through fraud, duress, undue influence or mistake"). *See, e.g., In re Adell, 321 B.R. 562 (Bankr. M.D. Fla. 2005)* (a constructive trust may be imposed to prevent unjust enrichment of one person at the expense of another as a result of mistake in the transaction that causes the problem.)

Add:

Dickinson v. Dickinson, 87 S.W.3d 438 (Mo. App. 2002) (a constructive trust may be imposed when a party had "undue influence" over the financial decisions of the grantor).

In re Estate of George E. Brower, 772 N.Y.S.2d 112 (N.Y. App. Div. 2004) (a will is invalid when influence is such that testator acts against his free will or is too weak to resist).

Add:

But see Kaufman v. Cohen et. al., 307 A.D. 2d 113 (N.Y. App. Div. 2003) (in New York a constructive trust is governed by a statute of limitations that commences upon the wrongful act that gives rise to the trust).

Valencia v. Mississippi Baptist Med. Ctr., Inc., 2005 U.S. Dist. LEXIS 5422 (No. 04-CV-628BN, S.D. Miss. Mar. 29, 2005) (a constructive trust arises by operation of law against one who by duress or abuse of confidence holds the legal right to property).

§ 27.04(g)(2) Resulting Trusts.

Add:

Quill v. Malizia, 2005 Del. Ch. LEXIS 37 (No. 2239-S, Mar. 04, 2005) ("A resulting trust gives effect to the intention of

the parties, as evidenced by the circumstances surrounding the transaction, where it appears that the beneficial interest was not intended to follow the legal title").

Add:

City of Boston v. Roxbury Action Program, Inc., 68 Mass. App. Ct. 468 (Mass. App. Ct. 2007) (No. 300940, Mass. Land Ct. Apr. 26, 2005) ("A resulting trust may result if one party pays the purchase price of property but title is taken in the name of another").

Add:

But see In re Kimberly D. Ward, Debtor, 300 B.R. 692 (S.D. Ohio 2003) (constructive trust may be imposed when circumstances show that holder of the legal title is not holder of the beneficial interest as well).

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Supp. To CHAPTER 27 THE LAW OF TRUSTS RELATED TO REAL PROPERTY

3-27 Thompson on Real Property, Thomas Editions Supp. to § 27.05

Supp. to § 27.05 Powers, Duties and Liabilities of Trustees.

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§ 27.05(a) Powers of Trustees. [Go To Main]

Add:

In re JP Morgan Chase Bank, 852 N.Y.S.2d 718 (2008) (a testator's will could not be reformed to permit the trustee to sell certain property).

Add:

Dudoit v. Clifton, 158 P.3d 293 (Haw. App. 2006) (trustee action on claims of trespass against adjoining landowners: *Brear v. Fagan, 849 N.E.2d 211 (Mass. 2006)* .

Curran v. Kemper Nat'l Servs., Inc., 133 Fed. Appx. 740 (11th Cir. 2005) (stating that courts typically cannot control a trustee's exercise of power, except to prevent an abuse by the trustee of his discretion). *See also State v. Russell, 185 N.J. 290 (N.J. 2005)* (No. BER-P-500-04, N.J. Super. Ct. Ch. Div. Mar. 4, 2005) (noting that a court will not control a trustee's exercise of discretion as long the trustee acts in good faith and acts within the bounds of reasonable judgment). *See also* Prince v. Lynch, 2005 R.I. Super. Ct. LEXIS 24 (No. 03-1975, Feb 08, 2005) (quoting Restatement (Second) of Trusts, § 187 comment e: "The mere fact that if the discretion had been conferred upon the court, the court would have exercised the power differently, is not a sufficient reason for interfering with the exercise of the power by the trustee").

Add:

In re Testamentary Trust of Ethylener Charnock, 579 S.E.2d 887 (N.C. App. 2003) (courts will not control a trustee's discretionary powers unless trustee is acting dishonestly or fails to use reasonable judgment).

In re Scheidmantel, 868 A.2d 464 (Pa. Super. Ct. 2005) , (stating that even when there is no evidence of bad faith or improper motive, the exercise of discretion by trustees is subject to the limitation that they must not act outside the bounds of reasonable judgment). *See also Dwight v. JP Morgan Chase Bank, 2005 U.S. Dist. LEXIS 5351* (No. 3:03-cv-117, Mar. 31, 2005) (noting that liability of a trustee vested with discretionary powers attaches only if the discretion is abused.) *See also In re Goodman, 790 N.Y.S.2d 837 (N.Y. Sur. Ct. 2005)* ("[t]he court has the responsibility to ensure that the trustees do not abuse their discretion. Accordingly, the court has the authority to correct abuses in the exercise of absolute discretion that are arbitrary or the result of bad faith").

Add:

Owen v. Zorn Farms, Inc., 62 P.3d 854 (Ore. App. 2003) (trustee shall have power to manage, sell, and convey in order to maintain the trust estate).

add text following n. 362

Trustees, of course, also have powers to sue and be sued.[362.1] n362.1

§ 27.05(b) Duties of Trustees. [Go To Main]

Add:

Brigham v. Brigham, 11 So. 3d 374 (Fla. App. 2009) (a trustee's conveyance of trust land to himself was a conflict of interest requiring court approval).

Add:

Confederated Tribes and Bands of the Yakama Nation v. U.S., 89 Fed. Cl. 589 (Fed. Cl. 2009) (plaintiff claimed breach of trustee's trust and fiduciary duties by failing to collect rent from trust land trustees).

Klinger v. Schwartz (In re Klinger), 2002 U.S. Dist. LEXIS 10367 (D. Conn. May 9, 2002) ("the trustee had a fiduciary duty to maximize the estate").

Petrie v. Petrie, 19 P.3d 443 (Wash. App. 2001) (lack of good judgment as custodian of investment account held to be a breach of trustee's fiduciary duty); *Butera v. Attorneys' Title Guaranty Fund, Inc., 747 N.E.2d 949 (Ill. App. 2001)* (trust's transfer of property to corporation owned by beneficiaries did not qualify as a distribution by operation of law).

Marshall v. First Nat'l Bank Alaska, 97 P.3d 830 (Alaska 2004) ("A trustee has a duty to use reasonable care and skill to make the trust property productive").

Add:

Omnioffices, Inc. v. Kaidanow, 2002 U.S. Dist. LEXIS (Apr. 25, 2002) (improper delegation of statutory duties).

Add:

Mamoodjanloo v. Wolf, 190 P.3d 1170 (Okla. App. 2008) (even though trustees signed a disclosure form in connection with sale of the trust's real property, they were exempt from liability under the state residential condition disclosure act).

§ 27.05(c) Liabilities of Trustees. [Go To Main]

Add:

Kennedy v. The Droughton Trust, 277 Ga. App. 837 ; *627 S.E.2d 887* (Ga. App., 2006) (action for specific performance of land sale contract, brought against the trust and the trustee).

Add:

Clayborn v. Bankers Stand. Ins. Co., 75 S.W.3d 174 (Ark. 2002), overruled in part by, Low v. Ins. Co. of N. Am., 364 Ark. 427, 220 S.W.3d 670, 2005 Ark. LEXIS 772 (charitable-immunity doctrine "has become a rule of property").

Add:

Palm v. Stonehedge Farm Condominium Trust, No. 277787, Mass. Land Ct. Apr, 13, 2005) ("A provision in the trust instrument does not relieve the trustee of liability for breach of trust committed in bad faith, intentionally, or with reckless indifference to the interest of the beneficiary").

Add:

But see Societe Generale v. U.S. Bank Nat'l Ass'n, 325 F.Supp.2d 435 (S.D.N.Y. 2004) ("[W]hile a trustee may, under certain circumstances, be indemnified for contracts made in his capacity as trustee, liability will ordinary lie against him

in his individual capacity).

Add:

From the *Heart Church Ministries, Inc. v. Philadelphia-Baltimore Annual Conference, 964 A.2d 215 (Md. App. 2009)* (the local church did not have the power to revoke the denomination's trust over church real property).

Add:

In re Bankers Trust Co., 2004 N.Y. Misc. LEXIS 192 (No. 1623-1960, Feb. 24, 2004) (beneficiary may not complain when it consents to an act).

FOOTNOTES:
(n1)Footnote 362.1. *Liberty Property Trust v. Republic Properties Corporation, 570 F. Supp. 2d 95 (D.D.C. 2008)* (trust had power but lacked standing to pursue securities fraud claims).

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3-27 Thompson on Real Property, Thomas Editions Supp. to § 27.06

Supp. to § 27.06 Modifying and Terminating Trusts.

[Go To Main]

Add:

Hawes v. Colo. Div. of Ins., 2003 Colo. LEXIS 150 (March 3, 2003) (*cy pres* doctrine).

Blumenthal v. Sharon Hosp., 2003 Conn. Super. LEXIS 13 (Jan. 7, 2003) (applying the doctrine of *cy pres*, the court may resign the trust to a purpose that is closely related to its original intent).

Nat'l City Bank of Michigan/Illinois v. N. Ill. Univ., 353 Ill. App. 3d 282 (Ill. App. Ct. 2004) ("Under the doctrine of cy pres, a court has the authority to redirect the application of the trust property to some other charitable purpose in an instance where it becomes impossible, impracticable, or illegal to carry out the particular charitable purpose designated by the settler"). *See also In re Ruth Easton Fund, 680 N.W.2d 541* , Minn. App., 2004. Jun 01, 2004 (noting that the *cy pres* doctrine is appropriately applied only when reasonable efforts to comply with the literal language of the trust have failed).

Add:

But see In re Kathleen M. Huchins, Debtor, 306 B.R. 82 (D. Vt. 2004) (court may bar extinguishment of an equitable interest through merger when it would otherwise create an injustice).

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Supp. to § 27.07 Bibliography.

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Annotation, *Award of Attorney's Fees Out of Trust Estate in Action by Trustee Against Co-trustee, 24 A.L.R.4th 624.*

Annotation, *Bankruptcy: priority as between vendor's lien on real estate and rights of trustee in bankruptcy of purchaser*, 22 A.L.R. 1338 .

Annotation, *Felonious Killing of one Cotenant or Tenant by the Entireties by the Other as Affecting the Latter's Right in the Property, 42 A.L.R.3d 1116.*

Annotation, *Homicide as Precluding Taking Under Will or by Intestacy, 25 A.L.R.4th 787.*

Annotation, *Implied power of executor or testamentary trustee to sell real property*, 134 A.L.R. 378 .

Annotation, *Imposition or Declaration of Constructive or Resulting Trust in Unites States Savings Bonds, 51 A.L.R.2d 163* .

Annotation, *Liability for Personal Injury or Death Allegedly caused by Defect in Church Premises, 8 A.L.R.5th 1* .

Annotation, *Lien on, or trust in respect of, land, as security for repayment of without express agreement for security thereon money loaned to the purchaser and used in paying for the property*, 60 A.L.R. 1240 .

Annotation, *Modern Status and Application of Rule that Only Voluntary Transfer or Assignment of Claim Against United States is Within Assignment of Claims Act. 44 A.L.R. Fed. 775* .

Annotation, *Power of Court to Extend Term of Trust, 46 A.L.R.2d 907* .

Annotation, *Resignation or Removal of Executor, Administrator, Guardian, or Trustee, before Final Administration or Before Termination of Trust, as Affecting his Compensation 96 A.L.R. 3d 1102* .

Annotation, *Right to Intrench Upon Corpus, when Income is Insufficient, to Pay Stated Sum which Trust Instrument Directs to be Paid Periodically to Beneficiary Out of Income, 67 A.L.R. 2d 1393* .

Annotation, *Tort Immunity of Nongovernmental Charities-Modern Status, 25 A.L.R.4th 517* .

Annotation, *Trust Income or Assets as Subject to Claim Against Beneficiary for Alimony, Maintenance, or Child Support, 91 A.L.R. 2d 262* .

Annotation, *Trusts: Merger of Legal and Equitable Estates Where Sole Trustees are Sole Beneficiaries*, 7 A.L.R. 621 .

Annotation, *Trust Provisions for Payment, in the Trustee's Discretion or for a Designated Purpose, of Part or All of the Principal to a Beneficiary, 2 A.L.R.2d 1383* .

Annotation, *Validity and Construction of Trust Instrument which Fails to Designate Respective Interests of Benefiiciaries, 87 A.L.R. 3d 925* .

Annotation, *Validity and Effect of Provision or Condition Against Alienation in Gift for Charitable Trust or to Charitable Corporation, 100 A.L.R.2d 1208* .

Annotation, *Validity, as for a Charitable Purpose of Trust for Publication or Distribution of Particular Books or Writings, 34 A.L.R. 4th 419* .

Annotation, *Validity, Construction, and Application of Statutes or Ordinances Regulating Perpetual-Care Trust Funds of Cemeteries and Mausoleums, 54 A.L.R.5th 681* .

Annotation, *Validity, Construction, and Effect of Provisions of Charitable Trust Providing for Accumulation of Income, 6 A.L.R.4th 903* .

Annotation, *Implied power of executor or testamentary trustee to sell real property*, 134 A.L.R. 378 .

Annotation, *When Statute of Limitations Starts to Run Against Enforcement of Constructive Trust, 55 A.L.R.2d 220* .

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CHAPTER 28 RULES AGAINST PERPETUITIES

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§ 28.syn Synopsis to Chapter 28: RULES AGAINST PERPETUITIES

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§ 28.09 Bibliography

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FOOTNOTES:
(n1)Footnote *.
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§ 28.01 Introduction to the Chapter

No rule in Anglo-American property law has generated as much lawyerly debate and consternation as the rule against remoteness in vesting, commonly called the rule against perpetuities. Developed to improve transmissibility and therefore marketability of property interests, it has unfortunately assumed complexity and confusion all out of proportion to its significance in modern property rights and transactions. This chapter recounts the history and development of rules against remoteness in vesting, and reviews their most significant applications. The concluding section of the chapter is entitled "A Short Course in the Modern Rule Against Perpetuities" and is intended to provide an efficient, straightforward primer in the most important modern aspects of the rule. The widespread adoption of the Uniform Statutory Rule Against Perpetuities has unfortunately not eliminated the necessity for lawyers to be familiar with the traditional rule, because the uniform statutory rule provides for application of the traditional rule as an option.

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§ 28.02 Definition and History of the Rule Against Perpetuities

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The rule against perpetuities received its classic formulation in John Chipman Gray's treatise on the rule: "No interest is good unless it must vest, if at all, not later than twenty-one years after some life in being at the creation of the interest." n1 The rule is designed to prevent remoteness of vesting and thereby leave control of the wealth of the world more in the hands of the living than in the hands of the dead. n2 The rule limits "dead hand" control over property and keeps property available for productive development. n3

§ 28.02(a) Rules Against Perpetuities Generally

"Perpetuities" law has gone through three stages of development. The first involved the twin efforts of the nobility to avoid the impact of attainder for treason and of the church to avoid mortmain. The second concerned the attempts of the landed gentry to escape the impact of the industrial revolution and the growth of the commercial class. The third now relates to the desire of those holding accumulated wealth to escape the burden of taxation.

Evolving out of the first stage are the fee simple determinable, the fee tail, *Shelley's case*, destructibility of contingent remainders, *Wild's case*, worthier title, mortmain and similar future interest rules. The second stage saw restraints on alienation, remoteness of vesting, and the Thellusson statutes. The third stage is just in the process of development. It features spendthrift trusts, illusory trusts, too long duration of trusts and the "wait and see" doctrine, impossibility of birth of issue, definite versus indefinite "failure of issue" and similar modern attacks on the "rule against remoteness" brought about by the growth of the trust instrument as a mode of family settlement. The extent of its growth will depend upon the balancing by the courts and the legislatures of the public policy against tying up land as evidenced by Lord Norfolk's settlement with the use of the trust instrument to avoid the stress of administration of decedent's estates.

A key to the non-violent evolution of English law had been the "abhorrence of a perpetuity." n4 Its operation has been earlier seen in the birth of the "conditional fee" and, after "*De Donis*" n5 restored the fee tail, Taltarum's Case n6 which broke the grip of the fee tail as well as the judicial scheme of the warranty which cut off the family chains on the fee

simple. Sometimes, but not too often, it was assisted by parliamentary acts but principally the principle against perpetuities was the word of the courts and the lawyers. Parliamentary assistance came only at such times as the interests of the crown in controlling the power of the church, and of the barons, coincided with the interests of the commercial classes, and the crown was sufficiently strong to enforce its will. The basic principle behind the "perpetuities" struggle is the need for a strong central government to control society. If the legal system permits the locking up of property perpetually in religious and private lands, then powerful disruptive forces are created which will negate any hopes of the stable government necessary for the flowering of civilization. n7

In England "*De Donis*" and the consequent fee tail in part negated the efforts of the judges against perpetuities, and necessitated the succession or death taxes of Lloyd George in 1912 to break up the great landed estates. But the efforts of the judges to prevent perpetuities were sufficiently successful to permit the commercial interests to develop a great middle class that made its mark in the landed gentry and provided a sufficient cushion between the aristocracy and the proletariat to prevent social revolution.

In the English colonies the abundance of free land made for a shortage of farm labor, making large estates unprofitable except where slavery flourished, and the lack of an established church prevented the problem of perpetuities from ever becoming as acute as it was in England. The courts in the new world have, however, recognized the dangers that lurk in the new perpetuity. The "abhorrence" of perpetuity and the common law designs to avoid perpetuity have been respected in the United States almost as highly as they were in England. n8 Recently, the mighty weapons of taxation have proven even more efficacious in preventing the piling up of wealth. A limitation over after a fee, if the terre tenant died without issue living at death was early held void, and attempts to create unbarrable entails were repeatedly beaten down. n9

In this country the powerful opposing force of the landed barons with their pride of family has had but an infinitesimal influence. Two other new factors have, however, appeared to challenge the "perpetuities abhorrence." The first, arising out of the "laissez faire" doctrine of the 19th century of individual enterprise, finds expression in honoring "the intent of the testator." The second most recent movement comes from the natural desire to avoid taxation through the scheme of the trust. In both instances those promoting their own personal interests have made repeated and sometimes successful attacks upon the common-law safeguards as medieval anachronisms. n10 The extent to which the courts and the legislatures will continue to evade the common law dikes remains for the future. The entire perpetuities structure is thus under attack. The extent to which it will survive depends upon how far the courts will agree that modern taxation has supplanted the need for its existence. A number of states have constitutional prohibitions against "perpetuities." n11 A preemptive right without limit as a property right was held an unreasonable restraint on alienation and violated the rule against perpetuities. n12.

California has three rules: the rule against restraints on alienation, the rule against suspension of the absolute power of alienation (limiting duration of trusts) and the rule against remoteness of vesting. n13 The problem of perpetuities consists of two units. First, a group of property rules that bring about absolute vesting and, hence, free alienation of property: *Shelley's case*, *Wild's case*, n14 the doctrine of worthier title, the concept of words of limitation as against words of purchase, the rule of "death in the lifetime of the testator," or the "survivorship" rule, n15 and the "repugnancy" rule. Second, the "perpetuities rules," consisting of Mortmain, n16 the rule against restraints on alienation, n17 the rule against double possibilities, the rule against remoteness of vesting, n18 the rule against accumulations, n19 and the rule against too long duration of trusts.

Statutes prohibiting limitations for "accumulation only" have been held to be subject to strict construction. n20 So if the accumulation is only incidental and if the limitation vests within the period allowed by the rule against restraints on alienation, the trust is good and the provision for accumulation is also valid. n21 If the accumulation exists by reason of the action of the trustees and not by the mandate of the will, the statute does not apply. n22

The courts generally have followed the Thellusson case n23 in refusing to find a common law rule against

accumulations separate from the rule against remoteness. n24

The effect of the Thellusson statutes is merely to prevent the income from being accumulated for too long a period unless the method of creating the accumulation makes the gift of the principal too remote. n25

While the political pressure stemming from proponents of trust has led to statutory modification in some areas of the rule against remoteness, a counter stream of influence stemming from those who desire free alienation of land has led to statutory attacks on future interests which because they are vested are not subject to the rule against remoteness. The statutes of some states purport to destroy reversions, remainders and other limitations which do not appear in the record chain of title within fifty years, unless they are rerecorded within a specified time after the passage of the statute. n26 A Pennsylvania statute to this effect was held unconstitutional as conflicting and inconsistent, as attempting deprivation of property without due process of law and by impairing the obligation of contracts. n27 Florida, n28 Rhode Island n29 and Massachusetts n30 have also enacted legislation limiting the duration of possibilities of reverter and rights of re-entry.

Kentucky has also enacted legislation dealing with possibilities of reverter and rights of entry. n31

Where a gift contains provisions that violate public policy as limiting the beneficiaries on the ground of race or religion, the courts divide as to whether the deed is good and the provision is void or whether the whole gift is bad. n32

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LEXIS: rule! against accumulation!

§ 28.02(b) Relation of Rules Against Remoteness of Vesting to the Common Law

Although the rule against remoteness of vesting is oft spoken of as being common law n33 and is sometimes treated as such by the courts, n34 it is of too recent origin to be properly classed as common law. Instead it is actually a judge made doctrine. But as such it has received almost universal acceptance in America as well as in Great Britain and the British colonies. It prevails in all the states excepting as it may have been modified by statute. n35 This rule against perpetuities is a rule of law and not a rule of construction and, if it is violated, the devise or gift must fail. n36 The rule is a mode adopted by the common law for forwarding the circulation of property which it is its policy to promote. n37 The rule is one of high public policy. n38

In determining whether a devise offends the rule against perpetuities, the testator's intention must be first ascertained and then the rule applies, as it is a rule of law and not one of construction. n39 The rule being one of law not of construction or intent of the maker of the instrument, n40 a limitation which will not vest within the prescribed period is illegal and void and the maker may not preserve it. n41 Under the harsh concept of the rule as applied by many courts the existence of the rule cannot be even taken into consideration in construing the instrument. Thus the court in construing an instrument is limited to determining what interests the maker intended to create. Having made such determination, the court must then and only then ascertain if any of the limitations so recognized will violate the rule. If so the interest must fail. If the limitation over is vested it is valid though it will not vest in possession until after the running of the period. n42 In order not to violate the statute against perpetuities,the estate created must be such as that it can be determined at the time of its creation and that under no contingency will the time of its vesting be postponed beyond the limit fixed by the statute. n43 The rule against perpetuities does not depend upon what actually happens, but what may possibly happen, estimated from the time of the taking of effect of the instrument. n44 The application of the rule is determined by the possibilities of the case, not by its probabilities, nor by the actual event. No interest is good unless it must vest, if at all, not later than twenty-one years after some life in being at the creation of the interest. n45

The mere fact that the invalid executory limitation may be released by its holder does not validate it. n46 The rule was

devised to prevent the perpetual entailment of estates and to give them over to free conveyance. n47 The policy of the rule is to prevent property from being so tied up as to render it incapable of answering the ends of commerce. n48 The rule concerns itself only with the vesting, the commencing, of estates, and not at all with their termination. It makes no difference when such a vested estate or interest limited terminates. n49 It prohibits the creation of future interests or estates which by possibility may not become vested during the permitted period. n50

The rule is concerned only with the time of the commencement, the vesting of an estate, and not with the duration thereof. n51 The rule is concerned with the vesting, not the duration, of interests. n52 The rule is directed against the vesting of interests at a future date and is not applicable to interests which are already vested. n53 "That rule is that an estate which is granted must necessarily vest within a time limited by the lives of persons then in being, and twenty-one years and ten months thereafter, and if it does not necessarily vest within that time it is void for remoteness." n54 The common-law rule permits the tying up of property for lives in being at the death of the testator, and twenty-one years in addition.

The rule against perpetuities applies only to the vesting of future estates, not to vested estates, n55 and every future limitation of an estate is void as too remote unless it is apparent that it must take effect and vest or definitely not vest within the period allowed by the rule. n56 If the rule against perpetuities is not violated at the death of the testator, subsequent events cannot cause it to be. n57 The rule against perpetuities is satisfied by the vesting of the right to the estate within the limitations of the rule, though the beneficiaries may not then be known. n58

Perpetuities are not favored in the law, and a will will not be construed as creating a perpetuity unless the intention to do so is clear and plainly manifest. n59 So, if there are two possible constructions of a will, one of which would permit effect to be given to the whole will and the other would result in defeating the will, preference will be accorded to the construction which will uphold the will, even though the rule against perpetuities is not a rule of construction but a rule of property. n60 "On the one hand, it is clearly settled, that if there be two alternative limitations, one branch of which is too remote, and the other of which is capable of taking effect, the court will disregard the invalid limitation and give effect to that which is legal. *Longhead v. Phelps, (1770) 2 W. Bl. 704,* is an instance of this distinction, which rests on sound and settled rules of construction. On the other hand, if the limitations are ulterior to or expectant upon limitations which are too remote, they are void also, although made to a person in existence at the date of the will." n61

The courts are, however, showing an increasing tendency to use the rule as a guide to construction. n62 This does not mean that the rule itself is a rule of construction. It merely implies that if the instrument contains ambiguous language so that alternate implications would arise one of which would keep a limitation contingent beyond the allotted time, while the other will vest the limitations within the time permitted, the courts will presume that the maker was aware of the existence of the rule and intended to create a limitation that was valid. n63

There is a modern tendency for the courts to avoid the former doctrine and to consider the rule against remoteness in so construing instruments as to avoid a too remote vesting. n64

The law will not construe a limitation in a will into an executory devise when the limitation can, without doing violence to the intention of the testator, be given effect as a remainder, nor a remainder to be contingent when it can be taken to be vested. n65 Care should be exercised that the testator has not, in creating an executory devise, postponed the vesting beyond the period fixed by the rule against perpetuities. n66 An executory interest, in order to be valid, must take effect within the life or lives of those in being, and within twenty-one years thereafter, with the usual period of gestation added. n67

To be valid it is not necessary that the interest vest within the time, but merely that it vest if at all within the time. n68 The limitation must be based on human lives and on a period of years. n69 When parties to an agreement to convey land are corporations, and no measuring life or lives are stated in agreement, the permissible period of the rule against perpetuities is simply 21 years. n70 Where there are alternative gifts, the second alternative is valid even if the first is

too remote if the second must vest, if at all, within the allotted period. n71 For the purpose of determining the period of vesting, the common law always presumed the possibility of birth of children. n72

The common law rule is clear that if there is any possibility viewed from the effective date of the instrument that the limitation might not vest within the period it is void. n73 So the classic case of Jee v. Audley, n74 holding that if the vesting depends upon a question of birth of issue which might cause the vesting to be too remote, the impossibility of issue by virtue of age will never be admitted. n75 So it has been held that where vesting depended upon working out of gravel pits, n76 or upon the closing of administration of an estate, n77 the limitation was void. And so it was held that for the purpose of applying the rule against perpetuities both men and women are considered capable of having issue as long as they live. n78

It has been said, however, that medical evidence may sometimes be used to show impossibility of issue. n79 Even where further issue may be legally possible the court may find that the testator considered it impossible. n80 The doctrine that there is a conclusive presumption that living persons may have children is based on dangers of fraud and of illegal operations. n81

The law writers have recently fulminated against the absolute certainty of vesting within the time required by the common-law rule. n82 Some support to this theory is found in recent cases n83 and in legislation. n84 Under this "wait and see" doctrine the doubtful limitation will not fail as of the effective date of the instrument but will be kept alive for the allotted period of the rule in the hopes that it will vest within the permitted time. If it does so it is valid. But if it does not vest by the end of the period it then becomes void. n85 But the courts may not write a new will for the testator in order to circumvent the constitutional provision prohibiting perpetuities. n86 The rule deals with the vesting of estates and not with the enjoyment thereof. n87 The rule is satisfied if the power of alienation vests within the prescribed period of time, even though the possession and enjoyment of the property might be postponed beyond such period. n88

The common law rule against remoteness exists in California. n89 A will in trust for A for life, then to A's children for life, then their share to heirs of A's children violated the rule against perpetuities, not vesting as to the heirs of the children of A living at the life tenant's death. n90 A deed to A and A's children and their children gave to A and children alive at the time of the execution of the deed. A limitation to unborn grandchildren was void under the rule against perpetuities. The court did not construe this (as Kentucky and Tennessee would) as creating a life tenancy in the life tenant, nor did it give a reversion as to the void part. n91

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LEXIS: rule w/5 remoteness w/2 vesting

Once the rule against remoteness was discovered, the acceptance of its principle was almost universal. The only legal problem presented to the courts was the duration of the allowable period and the extent of its coverage.

In point of time of development, the third rule of the perpetuities is the rule against remoteness of vesting which Gray dubbed "the rule against perpetuities." n92 The common law "rules against remoteness" may be stated thus: "viewed as of the effective date of the instrument if there is any possibility that the interest will not vest within any ascertainable lives in being n93 plus twenty-one years in gross, n94 plus two or possibly three periods of gestation n95 then such interest is void ab initio." n96 The rule is one of law. n97 It is an expression of public policy to prevent property being so tied up by title restrictions as to take it out of the stream of commerce. It operates expressly to defeat the intention of the maker of the instrument.

The classic reason given for the development of the rule is that as long as there was no limitation over to a third party possible, except a contingent remainder, there was no threat to traffic in land. Although a contingent remainder could be long delayed in vesting by being limited after a fee tail still it could be destroyed either by merger or by termination of

the estate in freehold before the remainder had vested.

The Statute of Uses n98 gave rise to springing and shifting uses as legal interests and the Statute of Wills n99 bore the executory devise, both of which could be limited after an immediate interest in fee or need not be limited upon a prior estate of freehold. Then in the landmark case of Pells v. Brown n100 the principle was established that these newly found interests were not destructible as was a contingent remainder. Though this was somewhat restricted by the later case of Purefoy v. Rogers, n101 holding that if an interest was both a contingent remainder and a use or executory devise, it must be destructible as a contingent remainder. The decision of *Pells v. Brown* made it legally possible to tie up land for untold generations in the future so as to make it impossible to be sold or conveyed by limiting conditional future interests by way of use or devise after present estates of freehold or leasehold. The legal draftsmen were somewhat slow in realizing the possibilities and the courts the dangers in *Pells v. Brown*. In the case of Child v. Baylie, n102 eleven years before *Pells v. Brown* it had been held that a devise over after a devise of a term of years contingent upon the first devisee dying without issue living at his death was void for fear of a perpetuity of a term.

Then in the landmark decision of the *Duke of Norfolk's Case* n103 the court had to consider the draftsmen of Lord Norfolk's family settlement. The Duke had three sons, the eldest of whom was an idiot. Much of his land was entailed and would therefore go to the eldest son, the incompetent. To make provision for the second son and at the same time protect the third son in case as was expected, the eldest would soon die without issue, the Duke created a term of 200 years in trust for the second son in tail and if the eldest dies without issue in the lifetime of the second son then to the third son in tail. When the eldest son did so die, the second son with true fraternal spirit claimed that the limitation over to the third son was a perpetuity and therefore void so that the second son could take both the entailed land and the settlement lands. The court, however, held the limitation over good but declined to say what would be a bad limitation. Through a series of cases over the next 140 years n104 culminating in Cadell v. Palmer n105 the English courts lengthened the allowable period of time to any number of lives in being plus twenty-one years in gross (not limited to any minority) and to two, probably three periods of gestation.

The rule grew inexorably. Although its growth has been criticized n106 and its development deplored n107 its majesty has never been questioned by any court. The rule against remoteness of vesting is therefore the most amazing legal phenomenon of modern law. Despite the fact that it was not recognized in its infancy until the latter part of the 17th century, and not fully developed until well into the 19th century, it has been accepted as common law n108 even in those states which were carved out of the Northwest Territory where the Act of 1795 made the English common law as of 4 James I (1607) the common law of the territory.

The number of lives is not limited except that it has been held that they must be capable of ascertainment. n109 They must be human lives, not animals or insects. n110 The period of time is in gross, that is, it may run for twenty-one years not measured on lives or minorities but must not possibly exceed that time. The courts have had trouble with the extent to which this requirement must be strictly applied. n111

§ 28.02(c) Mortmain

The earliest of the perpetuities rules, "mortmain" was born out of statute, not judicial decisions. This fact and the cessation of the principal cause for the rule -- the established church -- have prevented this rule from being clearly recognized in American common law. The story of the struggle of the crown and the church for political supremacy in England begins with the reign of William I when the ecclesiastical courts were driven out of the common law. n112 The importance of masses, and later of indulgences, in the life of the period led to the transfer of substantial amounts of land to the church at a time when the structure of the hierarchy had not been sufficiently clearly established to enable church dignitaries to properly enfeoff one another. So the property once passing into religious hands was forever locked therein.

It has been suggested that the situation was aggravated by the coming into England in 1203 of the Franciscans with their

vows of poverty. The consequent flow of wealth into Franciscan hands, perhaps reflected in Dominican jealousy in Magna Charta, were enforced by the Provisions of Westminster. n113 Then in 1279 the statute De Viris Religosis n114 prevented gifts to religious houses without special royal license (a secret clause). In the time of Richard II n115 "the prohibition was extended to all corporate bodies." n116 Numerous other statutes struck at attempted evasions. n117 The rule did not apply to municipal corporations, which fact has led some writers to erroneously conclude that it did not apply to private corporations. But as late as the time of Holdsworth n118 conveyances to corporations generally were prohibited since the land thus became virtually unalienable.

Since the post obit gift had died with the coming of feudalism, n119 De Viris Religosis virtually terminated income to the church in England; it cut off gifts of land, the principal source of wealth. It is not altogether surprising to find that the birth of the "use" has been ascribed to the ingenuity of the ecclesiastical lawyers in order to avoid De Viris Religosis. In later times the use with post mortem power of disposition, or the equitable will, was developed to have the same result.

In the United States there was no pressing need for mortmain because of the lack of an established church. The absence of a similar doctrine in Spanish law, however, led in Mexico to the coming of Juarez and the incorporation of a similar doctrine into the constitution of 1852. This in turn led to ecclesiastically inspired revolt against Juarez and the coming of Maximilian. Mortmain therefore in the United States exists principally as a survival of the English doctrine rather than through its own vigor. The mortmain statutes have never become an integral part of our common law. The ghost of mortmain, however, survives in three fields: (a) limitation upon the power of corporations to hold land, n120 (b) statutory limitations upon gifts to charities, n121 (c) outright prohibitions of or restraints upon gifts to religious institutions. n122

There is some question as to whether mortmain was absorbed into the common law to the extent that a private corporation could not in the absence of statute hold title to realty. n123 Today all corporate statutes find it necessary to specifically confer such authority on corporations. In many of the states, however, the power to acquire and hold land is denied or limited in the case of certain types of corporations such as farming corporations, banking institutions and insurance companies. n124

The statutes controlling gifts by will to charities take three forms: (a) making voidable bequests to charities if the testator dies within a stated time after the execution of the will, n125 (b) limiting the amount of the testator's estate which can be left to charity, n126 and (c) limiting the extent to which the testator may disinherit his issue by charitable gifts. n127 There are no general mortmain statutes in the United States today, n128 and the existing statutes appear to be based upon the realistic approach that a testator in fear of the hereafter may be unduly influenced by representatives of charities to the prejudice of the natural objects of the testator's bounty, which was just as realistic in the days of De Viris Religosis, rather than the policy disfavoring entailing land. But the results lie in the same field as perpetuities. n129 California, Georgia, Idaho, Mississippi, and Ohio make voidable testamentary gifts to charity made within stated periods of time (varying from thirty days to one year).

It has been held, however, that these are not true mortmain statutes because they do not delimit the amount of property the charitable institution may hold but merely the testator's power of disposition. n130 Such decisions overlook De Viris Religosis, n131 the first mortmain statute, which was a limitation upon feoffments to religious institutions, not the amount of land such institutions could hold. But such statutes today are not intended to protect the public against accumulations of wealth by charitable institutions. n132 These decisions again overlook the fact that mortmain statutes were in part intended to protect the heir against the rapacity of religious orders.

The New York Mortmain Statute is designed to protect certain relatives nearest to the decedent. Their place of residence is irrelevant. n133

Statutes limiting amounts of charitable donations by will are not mortmain or declaratory of public policy in opposition

to charitable disposition by will. For example, the California legislature's intent was to protect the heirs at law against a hasty and improvident gift of the entire estate to charity. n134

So mortmain where it exists today is treated more as a restraint upon the improper exercise of the testamentary power by disinheriting the testator's issue rather than as an exercise of public policy. n135

The states which have statutes limiting charitable gifts have three theories: n136 (a) mortmain; n137 (b) lapse; n138 and (c) protection of natural beneficiaries. n139

The District of Columbia Mortmain Statute invalidating gifts to charities made under thirty days is itself invalid. n140

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LEXIS: mortmain w/30 rule against perpetuities

FOOTNOTES:
(n1)Footnote 1. John Chipman Gray, The Rule Against Perpetuities § 201, at 191 (4th ed. 1942). *See also* W. Barton Leach, *Perpetuities in a Nutshell, 51 Harv. L. Rev. 638, 639 (1938);* W. Barton Leach, *Perpetuities: The Nutshell Revisited, 78 Harv. L. Rev. 973 (1965).* Murphy Exploration & Prod. Co. v. Sun Operating L.P. 747, So. 2d 260 (Miss. 1999).

(n2)Footnote 2. *See* Lewis M. Simes, Public Policy and the Dead Hand 59-60 (1955).

(n3)Footnote 3. *See* Jesse Dukeminier & Stanley M. Johanson, Wills, Trusts, and Estates 761 (4th ed. 1990).

(n4)Footnote 4. A perpetuity "fights against God." Lord Egerton in *Trinity Term*, 41 Eliz. (1599), quoted in Carey, Cases in Chancery (1616) (1820 ed.).

(n5)Footnote 5. 13 Edw. I, Ch. 1 (1285).

(n6)Footnote 6. Y.B. 12 Edw. IV, 19.

(n7)Footnote 7. Theodore Mommen, *History of Rome*, has shown how "*Latafundia*" led to the barbarization of the Roman legions through the interruption of the life of the small Latin farmer, the corruption of *mensa* and *circenses* and the pollution of malaria. Edward Gibbon, Decline and Fall of the Roman Empire, and Charles Diehl, Byzantium (1957), have pictured the effect of feudalism on the Byzantine Empire.

See Michael Reidy, *Perpetuities and Mineral Development*, 22 Rocky Mt. Min. L. Inst. 15. *Jeffrey Lake Dev. v. Central Neb. Pub. Power & Irrigation Dist., 568 N.W.2d 585 (Neb. Ct. App. 1997)* ("a perpetual lease does not violate the rule against perpetuities...").

(n8)Footnote 8. Homeowners association regulation to continue for 26 years and then for 10-year renewals unless two-thirds of the members voted to terminate, was not a perpetuity since it could be terminated. *Kell v. Bella Vista Prop. Owners Ass'n, 528 S.W.2d 651 (Ark. 1975). Long Signature Homes, Inc. v. Fairfield Woods, Inc., 445 S.E.2d 489 (Va. 1994)* (real estate development contract was governed by the rule against perpetuities, and contract contingencies to convey land could not extend beyond 21 years from date of contract); *Shaver v. Clanton, 31 Cal. Rptr. 2d 595 (Cal. App. 1994)* (under uniform statutory rule against perpetuities, amendments to commercial lease that provided for perpetual options to renew were not void).

Because it was a perpetuity, the court refused to enforce a covenant requiring the owner to receive and pay for a seasonal water supply. Affirmative covenants are disfavored. *Eagle Enters. v. Gross, 349 N.E.2d 816 (N.Y. 1976).*

(n9)Footnote 9. Child v. Baylie, Cro. Jac. 459; *Germin v. Ascot, Moore 364, 72 Eng. Rep. 631; Cholmeley v. Humble, Moore 592, 72 Eng. Rep. 778;* Corbet's Case, 1 Coke 83b, *76 Eng. Rep. 1599;* Mildmay's Case, 6 Coke 40, 77 Eng. Rep. n.311.

(n10)Footnote 10. *See* Lewis M. Simes, *"Is the Rule Against Perpetuities Doomed" The Wait and See Doctrine, 52 Mich. L. Rev. 179 (1953);* Thomas L. Waterbury, *Some Further Thoughts on Perpetuities Reform, 42 Minn. L. Rev. 41 (1952);* W. Barton Leach, *Perpetuities: Staying the Slaughter of the Innocents, 68 L.Q. Rev. 35 (1952);* Guy Newhall, *Doctrine of the "Second Look," 92 Trusts & Est. 13 (1953);* Charles Looker, Leach, Simes et al., *Reform of the Rule Against Perpetuities, 92 Trusts & Est. 768 (1953).*

See Leach, *Perpetuities: The Nutshell Revisited, 78 Harv. L. Rev. 973 (1965);* Ralph E. Boyer & Robert A. Spiegel, *Land Use Control: Pre-Emptions, Perpetuities and Similar Restraints, 20 U. Miami L. Rev. 148 (1965);* Thompson G. Marsh, *Model Rule Against Perpetuities Act -- "if at all," 11 Prac. Law 73.*

See also Leo Glasser, *Trusts, Perpetuities, Accumulations and Powers Under the Estates, Powers and Trusts Law, 33 Brooklyn L. Rev. 551 (1967);* Lenoir, *A Reexamination of Perpetuities in Arizona, 10 Ariz. L. Rev. 347.*

Texas Constitution art. 1, § 26. Act 184, Session Law of Hawaii 1975, points up continued ownership of Hawaii in a few families and expresses the fact that this is against public policy.

This Act permits the housing authority to condemn, take over, subdivide, and sell properties held by individual owners so designed to break up the large held estates.

(n11)Footnote 11. Constitutional prohibition against perpetuities: Ark. Const. art. 2, Declaration of Rights 19; Nev. Const. art. 15, § 4; N.C. Const. art. 1, § 31; Okla. Const. art. 2, § 32. Tenn. Const. art. 1, § 22. Tex. Const. art. 1, § 26; Wyo. Const. art. 1, § 30.

Similar statute, N.M. Const. 1929, § 47-1-2.

All other states have statutes governing the period except Louisiana.

See Olin L. Browder Jr., *Future Interest Reform, 35 N.Y.U. L. Rev. 1255 (1960);* Ralph A. Phipps, *Perpetuities in South Dakota, 1 S.D.L. Rev. 1 (1956);* Oval A. Newman, *Perpetuities, Restraints on Alienability and Duration of Trusts, 16 Vand. L. Rev. 57 (1962).*

Constitutions prohibiting "perpetuities": Ariz. Const. art. 2, § 29; Mont. Const. art. 13, § 6; Okla. Const. art. 2, § 32.

Perpetuities prohibited. Tex. Const. art. 1, Sec. 26.

Similar statutes prohibit "perpetuities": Conn. Gen. Stat. § 45-95; Me. Rev. Stat. Ann. § 33-103; Md. Code Ann., Est. & Trusts § 11-103; Mass. Ann. Laws ch. 184A, § 1.

Whole gift void where bequest is of a residuary estate to a city for a play field. *La Fond v. City of Detroit, 98 N.W.2d 530 (Mich. 1959).*

Provisions in wills restraining alienation by partition are void as against public policy. *Neidler v. Donaldson, 224 N.E.2d 404 (Ohio 1967).*

See Robert S. Pasley, *The 1960 Amendments to the New York Statutes on Perpetuities and Powers of Appointment, 45 Cornell L.Q. 679 (1960).*

See also Garrett Logan, *Oklahoma Perpetuities and Such, 7 Tulsa L.J. 5 (1971).*

(n12)Footnote 12. *Atchison v. City of Englewood, 463 P.2d 297 (Colo. 1969). Fallschase Dev. Corp. v. Blakey, 696 So. 2d 833 (Fla. Dist. Ct. App. 1997)* (a right of first refusal, or a preemptive right, is a property interest and not just a contractual right toward which the rule against perpetuities may apply); *Carroll v. Eno, 654 N.Y.S.2d 368 (N.Y. App. Div. 1997)* (agreement that allows defendant a pre-emptive right to purchase an apartment does not violate the rule against perpetuities because the parties themselves are the measuring lives); *Webb v. Reames, 485 S.E.2d 384 (S.C. Ct. App. 1997)* (where the right of first refusal is a contingent non-vested interest, it is void if it is not certain to vest or fail within the time allotted by the rules against perpetuities).

(n13)Footnote 13. A restraint on alienation valid under the civil law is void under the common law if absolute. *Hart v. Gould, 259 P.2d 49 (Cal. App. 1953)* (restraint dated to days of Mexican occupation).

See Fraser & Sammis, *The California Rules Against Restraints on Alienation, etc., 4 Hastings L.J. 101,* reviewing the changes made by Cal. Stat. ch. 1463.

Attorney drafting a will violating perpetuities was held not liable for negligence, but it was held that a beneficiary might recover in contract as a third party beneficiary. *Lucas v. Hamm, 364 P.2d 685 (Cal. 1961).*

"Failure of issue" means definite failure. S.C. Code § 27-5-30.

(n14)Footnote 14. *See Real Property -- Wills -- Judicial Construction of "to A and His Children," 75 W. Va. L. Rev. 296.*

(n15)Footnote 15. Limitation over on death of beneficiary without issue refers to death in testator's lifetime. *Martin v. Taylor, 521 S.W.2d 581 (Tenn. 1975).*

Limitation over on death of first taker before testator took effect when first taker divorced testator. *In re Frederick's Estate, 311 So. 2d 376 (Fla. 1975);* Fla. Stat. Ann. § 731.101.

In a gift in remainder a limitation over on death without issue refers to death during the life of the life tenant. *Martin v. Taylor, 521 S.W.2d 581 (Tenn. 1975).*

Miss. Code, limitations on failure of issue mean death without children, § 89-1-13.

(n16)Footnote 16. Permitting an equity event to invade an accumulation provision in a charitable trust even though not violative of the statute. *In re James' Estate, 199 A.2d 275 (Pa. 1964).*

(n17)Footnote 17. In *Weber v. Texas Co., 83 F.2d 807 (5th Cir. 1936)* the rule against perpetuities was equated to restraints on alienation so that an unlimited time option was held not to violate the rule.

Rule restraints on alienation and against remoteness are of similar nature but do not rest on identical principles. *Mattern v. Herzog, 367 S.W.2d 312 (Tex. 1962). Peterson v. Tremain, 621 N.E.2d 385 (Mass. App. 1993)* (option to purchase land creates equitable interest subject to rule against perpetuities).

(n18)Footnote 18. Easement for pipelines giving grantee the option to lay additional lines when additional money was paid did not create an interest too remote but merely a postponement of the payment. *Traywick v. Transcontinental Gas Pipe Line Corp., 170 So. 2d 802 (Ala. 1965).*

(n19)Footnote 19. Accumulations are permitted in Wisconsin. Wis. Stat. § 701.21; Ga. Stat. Ann. § 44-15-4.

Where the accumulation provision would extend beyond the statutory time the court held the excess accumulation passed by intestacy. *Murphy v. Northern Trust Co., 162 N.E.2d 428 (Ill. 1959).*

Accumulation provision for widow's lifetime was void. *In re Remsen's Estate, 239 N.Y.S.2d 237 (1962).*

Pennsylvania permits accumulations for the minority of beneficiaries and the life of the settlor. *In re Wheelock's Estate, 164 A.2d 1 (Pa. 1960).*

Where the rule against accumulation is violated the accumulation if it relates to an interest vested in possession goes at once to the beneficiary, otherwise it goes to the residuary legatee unless the residuary estate was the subject of the accumulation, in which case it passes by intestacy. *In re Castner's Estate, 194 A.2d 330 (Pa. 1963).*

Under the English Accumulations Act 1800, replaced by § 164 of the 1925 Law of Property Act, the accumulation beyond the 21 years allowable period passes by intestacy.

See William R. Cohen, *The Rule Against Accumulations and "Wait and See," 33 Temp. L.Q. 34; Trust Depreciation Accounting and the Minnesota Statute o.n Accumulations, 46 Minn. L. Rev. 749 (1962).*

Accumulation statutes do not affect charitable trusts but the courts may terminate improper charitable accumulations under their general equity powers. *Franklin Found. v. Attorney General, 163 N.E.2d 662 (Mass. 1960).*

Provision to accumulate for 400 years held void ab initio. *Asche v. Asche, 199 A.2d 314 (Del. Ch. 1964), remanded, Asche v. Asche, 210 A.2d 306 (Del. Super Ct. 1965).*

In Ohio an accumulation is valid unless it violates the rule against perpetuities. *Vinson v. First Trust & Sav. Bank, 339 N.E.2d 670 (C.P. Ohio 1974).* Approving: Restatement of the Law of Trusts, 2d § 62(l).

The following states have "accumulation" statutes: Ala. Code § 3-4-252; Ariz. Rev. Stat. §§ 33-239, 33-261; Cal. Civ. Code §§ 723-726; Ill. Rev. Stat. ch. 30, § 153; Ind. Code 32-1-4-2, 32-1-4-5; Mich. Stat. Ann. §§ 26.36, 26.61, 26.63, 555.11, 555.13; Minn. Stat. § 500.17; Mont. Rev. Codes §§ 67-411-67-414; Nev. Rev. Stat. § 166.150; N.Y. Const. Laws, Pers. Prop. Law §§ 16, 16a, 17; Pa. Stat. tit. 20, § 6106; S.D. Code § 43-6-1 *et seq.*; Wis. Stat. § 701.21.

(n20)Footnote 20. *Henderson v. Troy Bank & Trust Co., 34 So. 2d 835 (Ala. 1948).*

(n21)Footnote 21. *Ramage v. First Farmers & Merchants Nat'l Bank, 30 So. 2d 706 (Ala. 1947).*

(n22)Footnote 22. *In re MacDonell's Estate, 39 N.W.2d 32 (Mich. 1949).*

(n23)Footnote 23. *Thellusson v. Woodford, 4 Ves. 227, 31 Eng. Rep. 117 (1799).*

(n24)Footnote 24. *Gertman v. Burdick, 123 F.2d 924 (D.C. Cir. 1941); Ramage v. First Farmers & Merchants Nat'l Bank, 30 So. 2d 706 (Ala. 1947).*

(n25)Footnote 25. A devise to accumulate until it reached a fixed figure and then to be paid to a charitable foundation with the trust property to be used for the benefit of great grandchildren of the testator was too remote even though it was to be held for the period of time voted under the law of *Delaware. Asche v. Asche, 199 A.2d 314 (Del. 1964).*

A void direction for accumulation does not affect the validity of the gift. *Third Nat'l Bank & Trust Co. v. Eaton, 294 N.E.2d 247 (Ohio App. 1972).*

It was held in *In re Estate of Castner v. Deir, 194 A.2d 330 (Pa. 1963),* that a devise providing for accumulation in a trust during the lives of grandchildren created a too lengthy accumulation. The excess accumulation went to the beneficiaries if their interest was vested, otherwise to the residuary beneficiaries. But if the residuary estate was the subject of the accumulations it passed by intestacy, not to the residuary legatees. If the trustee has the right to accumulate income this is not an invalid accumulation in New York. N.Y. Const. Laws, Est. Powers & Trusts § 9-2-3. *Estate of Outerbridge, 398 N.Y.S.2d 517 (1977).*

(n26)Footnote 26. Ill. Rev. Stat. ch. 30, § 37f-h (covering rights of re-entry and possibility of reverter and entry thereon after fifty years).

See Richard R. Powell, *Perpetuities in Arizona, 1 Ariz. L. Rev. 225 (1959); see also* Comment, *The Rule Against Perpetuities in Alabama, 18 Ala. L. Rev. 129 (1966).*

(n27)Footnote 27. *Girard Trust Co. v. Pennsylvania R. Co., 73 A.2d 371 (Pa. 1950).*

(n28)Footnote 28. Fla. Stat. Ann. § 68918. Statute held unconstitutional, however, to the extent it applied to existing restrictions. *Biltmore Village, Inc. v. Royal, 71 So. 2d 727 (Fla. 1954).*

(n29)Footnote 29. R.I. Pub. Laws ch. 3213.

(n30)Footnote 30. Mass. Ann. Laws ch. 260, § 23; *see also,* Mass. Acts 1954, ch. 640, § 3; Lewis M. Simes, Elimination of Stale Restrictions on the Use of Land. A.B.A. Section of Real Property, Probate and Trust Law, 1954 Proceedings.

(n31)Footnote 31. Kentucky has abolished the fee simple determinable and possibility of reverter and has converted this into a "fee simple subject to a right of entry for condition broken." Ky. Rev. Stat. § 381.218.

The right of entry dies after 30 years from the date of the instrument. Ky. Rev. Stat. § 381.219.

Limitations over after defeasible fees are valid for 30 years after breach regardless of the rule against perpetuities. Ky. Rev. Stat. § 381.219.

(n32)Footnote 32. Permitting *cy pres* to strike "Protestant Gentile" provisions in charitable gift under primary charitable intent rule. *Howard Sav. Inst. v. Peep, 170 A.2d 39 (N.J. 1960).*

See Mortmain Statutes-Questions of Constitutionality, 52 Notre Dame L. Rev. 638 (1977).

(n33)Footnote 33. *Barry v. Newton, 273 P.2d 735 (Colo. 1954).*

See Max A. Pock, *Rule Against Perpetuities -- A Comparison of Some Common-Law and Civil Law Jurisdictions, 35 St. John's L. Rev. 62 (1960);* H.R. Hahlo, *Problem of Perpetuities in South African Law -- An Essay in Applied Comparative Law, 37 Tul. L. Rev. 453 (1963);* David M. Schuyler, *Should the Rule Against Perpetuities Discard Its Vest?, 56 Mich. L. Rev. 887 (1958);* George L. Haskins, *Extending the Grasp of the Dead Hand: Reflections on the Origins of the Rule Against Perpetuities, 126 Pa. L. Rev. 19 (1977).*

(n34)Footnote 34. *Story v. First Nat'l Bank & Trust Co., 156 So. 101 (Fla. 1934).*

(n35)Footnote 35. *Fitchie v. Brown, 211 U.S. 321 (1908), aff'g 18 Haw. 52; Chilcott v. Hart, 45 P. 391 (Colo. 1896), 35 L.R.A. 41* (though the common law as of 1607 is the law in Colorado it is subject to changing conditions); *Alfred v. Marks, 49 Conn. 473 (1882); Taylor v. Crosson, 98 A. 375 (Del. 1916); Van Roy v. Hoover, 117 So. 887 (Fla. 1937); Hale v. Hale, 17 N.E. 470 (Ill. 1888); Keeler v. Lauer, 85 P. 541 (Kan. 1906); Towle v. Doe, 54 A. 1072 (Me.*

1903); Billingsley v. Bradley, 171 A. 351 (Md. 1934), 104 a.l.r. 274; *Loud v. St. Louis Union Trust Co., 240 S.W. 629 (Mo. 1923); Bunting v. Hromas, 177 N.W. 190 (Neb. 1920); Edgerly v. Barker, 31 A. 900 (N.H. 1891),* 28 l.r.a. 328; *Siedler v. Syms, 38 A. 424 (N.J. 1897); Mercer v. Mercer, 52 S.E.2d 229 (N.C. 1949); Gratton v. Gratton's Estate, 283 P. 747 (Or. 1929); In re Appleton's Appeal, 20 A. 521 (Pa. 1890),* 11 l.r.a. 85; *In re Johnston's Estate, 39 A. 879 (Pa. 1898); Rhode Island Hosp. Trust Co. v. Granger, 155 A. 358 (R.I. 1931); Woodruff Oil & Fertilizer Co. v. Yarborough's Estate, 142 S.E. 50 (S.C. 1928); Staines v. Burton, 53 P. 1015 (Utah 1898); In re Peck's Estate, 118 A. 527 (Vt. 1922); Otterback v. Bohrer, 12 S.E. 1013 (Va. 1891); Denny v. Hyland, 297 P. 1083 (Wash. 1931); Whelan v. Reilly, 3 W. Va. 597 (1869).*

See Lawrence M. Jones, *The Rule Against Perpetuities in Maryland, 18 Md. L. Rev. 93 (1958). Commerce Bank of Kansas City, N.A. v. Peabody Coal Co., 861 S.W. 2d 569 (Mo. App. 1993)* (under Kentucky law, interests created by pre-1960 instruments continue to be governed by the common-law rule against perpetuities).

(n36)Footnote 36. *Thomas v. Pullman Trust & Sav. Bank, 21 N.E.2d 897 (Ill. 1939). El Paso Prod. Co. v. PWG P'ship, 866 P.2d 311 (N.M. 1993)* (at common law, the rule against perpetuities was designed to prevent vesting of future interest in property at an indefinite date that could exceed the length of time established as a life in being at time of creation of interest plus 21 years); *Matter of Will of Shehan, 597 N.Y.Supp. 2d 1017 (N.Y. Sur. 1993)* (the rule against perpetuities is not a canon of construction but a legal prohibition; its purpose is not to determine intent but to prevent illegality, and, when the rule is applied, it defeats intent); *Symphony Space, Inc. v. Pergola Properties, Inc., 669 N.E.2d 799 (N.Y. 1996)* (the effect of the rule against perpetuities -- which is a statutory prohibition, not a rule of construction -- is always to defeat the intent of parties who create a remotely vesting interest).

> "The rule which has always been applied to cases of remoteness is this: You do not import the law of remoteness into the construction of the instrument, by which you investigate the expressed intention of the testator. You take his words, and endeavour to arrive at their meaning, exactly in the same manner as if there had been no such law, and as if the whole intention expressed by the words could lawfully take effect. I do not mean, that, in dealing with words which are obscure and ambiguous, weight, even in a question of remoteness, may not sometimes be given to the consideration that it is better to effectuate than to destroy the intention; but I do say, that, if the construction of the words is one about which a court would have no doubt, though there was no law of remoteness, that construction cannot be altered, or wrested to something different, for the purpose of escaping from the consequences of that law."

Rule against remoteness is a rule of law. *Lowe v. Rice, 291 S.W.2d 287 (Tenn. App. 1956).*

(n37)Footnote 37. *In re Lewis's Estate, 37 A.2d 482 (Pa. 1944).*

(n38)Footnote 38. *Ford v. Yost, 186 S.W.2d 896 (Ky. 1944),* 162 a.l.r. 149; *In re Jones's Estate, 190 A.2d 120 (Pa. 1963); Mattern v. Herzog, 367 S.W.2d 312 (Tex. 1963). Pathmark Stores, Inc. v. 3821 Assoc., L.P., 663 A.2d 1189 (Del. 1995)* (rule against perpetuities is based on public policy against restricting alienability of land); *In re Bradlees Stores, Inc., 194 B.R. 555 (N.Y. 1996)* (although rule against perpetuities has been questioned because of its harshness, state statutes make it clear that public policy of New York mandates application of this rule).

(n39)Footnote 39. *Smith v. Renne, 46 N.E.2d 587 (Ill. 1943).*

(n40)Footnote 40. *Emerson v. Campbell, 84 A.2d 148 (Del. 1951)* (object of rule against perpetuities is to defeat intent of testator).

(n41)Footnote 41. At this point we must recall two elementary principles in determining the validity of wills: First. Such validity must be determined not in the light of what has actually transpired, but from exactly the same point of view from which it would be regarded had a suit been brought to determine the validity of the will at the time of the

death of the testator, instead of at a subsequent period. That is to say, the validity of a will depends not on what has happened since the death of the testator, but on what might have happened. Second. "In determining the validity of limitations of estates, under the above statutes (the provisions of the Revised Statutes in reference to absolute ownership and restraint of alienation), it is not sufficient that the estates attempted to be created may, by the happening of subsequent events, be terminated within the prescribed period, if such events might so happen that such estates might extend beyond such period. In other words, to render such future estates valid, they must be so limited that in every possible contingency they will absolutely terminate at such period, or such estates will be held void." *In re Wilcox, 87 N.E. 497 (N.Y. 1909).*

See Willard L. Eckhardt, *Rule Against Perpetuities in Missouri, 30 Mo. L. Rev. 27 (1965).*

(n42)Footnote 42. *Seaver v. Fitzgerald, 6 N.E. 73 (Mass. 1886)* (vested limitation over after gift to unborn child for life).

A limitation to the nominal settlor of a trust was held to be a contingent limitation and, therefore, subject to the rule where another had actually furnished the consideration and, therefore, was actually the settlor. *Guaranty Trust Co. v. New York Trust Co., 74 N.E.2d 232 (N.Y. 1947).*

Trust reserving life estate, then to son and wife for life, then to children of son was not too remote. *Marks v. Southern Trust Co., 310 S.W.2d 435 (Tenn. 1958).*

(n43)Footnote 43. *McCreery v. Johnston, 110 S.E. 464 (W. Va. 1922)* (devise to daughters providing that in case of the death of any of the daughters without children surviving them, or of any of their children without leaving children surviving them, the part of his estate devised to them should revert to other children or their descendants held violative of the statute). Cf., *Carlberg v. State Sav. Bank & Trust Co., 143 N.E. 441 (Ill. 1924)* (life estate to wife, followed by life estate to sons and at their death to their lawful issue share and share alike, with a provision that if either or both of the testator's sons should die without leaving issue or descendants of any child or children the sons' share should revert to the testator's residuary estate does not violate the statute).

The bare possibility that the interest may not vest within the period makes the gift void. *In re Johnston's Estate, 303 P.2d 1 (Cal. App. 1956). In re Tamen, 22 F.3d 199 (9th Cir. 1994)* (agreement which conveyed to husband and wife and the survivor of them lifetime use of property, and which, upon the death of the survivor, further granted a 99-year lease to their descendants did not violate the rule against perpetuities).

The barest possibility that the interest may not vest within the period invokes rule. *Estate of Grove, 138 Cal. Rptr. 684 (1977).*

(n44)Footnote 44. *Reasoner v. Herman, 134 N.E. 276 (Ind. 1922). Fritschen v. Wanek, 924 P.2d 1288 (Kan. 1996)* (in ruling upon whether a future interest violates the rule against perpetuities, speculation concerning the probabilities of various subsequent developments is not indulged in by the courts; it is a sufficient violation of the rule if an interest might possibly vest beyond the period permitted).

The period of the perpetuities rule is counted from the time the testamentary power of appointment is created, but the facts which determine whether there has been a violation are viewed as of the date of exercise. *In re Bird's Estate, 37 Cal. Rptr. 288 (1964).*

(n45)Footnote 45. *Security Trust Co. v. Cooling, 42 A.2d 784 (Del. 1945).*

Even though subsequent events show that the interest actually vested within the time, it is void if it might not have done so. *Industrial Nat'l Bank v. Morey, 133 A.2d 724 (R.I. 1957);* Burruss v. *Baldwin, 103* S.E.2d 249 (Va. 1958).

But see Owen Tudor, *Absolute Certainty of Vesting Under The Rule Against Perpetuities -- A Self Discredited Relic, 34 Boston U. L. Rev. 129 (1954).*

(n46)Footnote 46. *In re Hargreaves, 43 Ch. D. 401.*

Contra, Joseph Schonthal Co. v. Sylvania, 21 N.E.2d 1008 (Ohio App. 1938).

(n47)Footnote 47. *Troutman v. De Boissiere Odd Fellows Orphans Home & Indus. Sch. Ass'n, 71 P. 286 (Kan. 1903).*

(n48)Footnote 48. *Shoemaker v. Newman, 65 F.2d 208 (D.C. Cir. 1933); Johnson v. Holifield, 58 Am. Rep. 596 (Ala. 1885); United States Fid. & Guar. Co. v. Douglas, 120 S.W. 328 (Ky. 1909); Edgerly v. Barker, 31 A. 900 (N.H. 1891),* 28 l.r.a. 328; *Barton v. Thaw, 92 A. 312 (Pa. 1914),* Ann. Cas. 1916D, 570.

See Shenandoah Valley Nat'l Bank of Winchester v. Taylor, 63 S.E.2d 786 (Va. 1951), 25 a.l.r.2d 1104.

The purpose of the rule against perpetuities is to prevent the taking of property out of commerce or trade for a prohibited period. *Rekdahl v. Long, 407 S.W.2d 339 (Tex. Civ. App. 1966). Gore v. Beren, 867 P.2d 330 (Kan. 1994)* (the rule against perpetuities springs from considerations of public policy; the underlying reason for and purpose of rule is to avoid fettering real property with interests dependent upon contingencies unduly removed and which isolate the property and exclude it from commerce and development for long periods of time); *Coble v. Patterson, 442 S.E.2d 119 (N.C. App. 1994)* (a remainder is vested if the only impediment to the right of immediate possession is the existence of a preceding estate). *Buck v. Banks, 668 N.E.2d 1259 (Ind. 1996)* (rule against perpetuities is a vital rule of property law intended to enhance marketability of property interests by limiting remoteness of vesting); *Snyder Bros., Inc., v. Peoples Natural Gas Co., 676 A.2d 1226 (Pa. 1996)* (rule against perpetuities prohibits restraints on alienation, or fettering of marketability of property over long periods of time by indirect restraints on alienation).

(n49)Footnote 49. *Owsley v. Harrison, 60 N.E. 89 (Ill. 1901); Phillips v. Harrow, 61 N.W. 434 (Iowa 1894); Pulitzer v. Livingston, 36 A. 635 (Me. 1896); In re Johnston's Estate, 39 A. 879 (Pa. 1898). See Dallapi v. Campbell, 114 P.2d 646 (Cal. App. 1941); Lunt v. Van Gorden, 294 N.W. 351 (Iowa 1940); In re Trimble's Estate, 14 N.W.2d 673 (Iowa 1944).*

(n50)Footnote 50. *Bank of California v. Ager, 109 P.2d 548 (Wash. 1941).*

(n51)Footnote 51. *Carlberg v. State Sav. Bank & Trust Co., 143 N.E. 441 (Ill. 1924); Bear v. Millikin Trust Co., 168 N.E. 349 (Ill. 1929),* 73 a.l.r. 173; *Hunt v. Carroll, 157 S.W.2d 429 (Tex. Civ. App. 1941).*

For the purpose of the rule against perpetuities, the test of vesting is not when the beneficial interests determine that arise within the period of lives in being plus 21 years but whether within such period it becomes certain that the interests are unconditional and will reach fruition in the future. *Third Nat'l Bank & Trust Co. v. Eaton, 294 N.E.2d 247 (Ohio App. 1972).*

(n52)Footnote 52. *Conley v. Gaylock, 108 S.E.2d 675 (W. Va. 1959).*

(n53)Footnote 53. *In re Trimble's Estate, 14 N.W.2d 673 (Iowa 1944); Curtis v. Maryland Baptist Union Ass'n, 5 A.2d 836 (Md. 1939),* 121 A.L.R. 1516; *Clark v. Union County Trust Co., 12 A.2d 365 (N.J. 1940); In re Lippincott's Estate, 3 A.2d 363 (Pa. 1939); In re McKee's Estate, 108 A.2d 214 (Pa. 1954); Bank of Cal. v. Ager, 109 P.2d 548 (Wash. 1941). Snyder Bros., Inc. v. Peoples Natural Gas Co., 676 A.2d 1226 (Pa. 1996)* (rule against perpetuities did not apply to fee simple determinable interest granted to lessee, because that interest was already vested); *Hubscher & Son v. Storey, 578 N.W.2d 701 (Mich. App. 1998)* (profit a prendre, a vested interest, is not subject to the rule against perpetuities).

(n54)Footnote 54. *McKibben v. Pioneer Trust & Sav. Bank, 6 N.E.2d 619 (Ill. 1937); Leonard v. Chicago Title & Trust Co., 18 N.E.2d 706 (Ill. App. 1939); Koehler v. Rowland, 205 S.W. 217 (Mo. 1918),* 9 a.l.r. 107. *See Lloyd v. McDiarmid, 19 N.E.2d 292 (Ohio App. 1937).*

Colorado persists in defining the rule as invalidating interests "limited to vest upon events not certain to occur within 21 years of some life in being at the creation of the interest." Thus omitting the customary language limited to vest "if at all." *Rocky Mtn. Fuel Co. v. Heflin, 366 P.2d 577 (Colo. 1961). Cloud v. Association of Owners, Satellite Apt. Bldg., Inc., 857 P. 2d 435 (Colo. App. 1992)* (rule against perpetuities does not invalidate every perpetual interest).

In Connecticut the period of the rule in 1972 was reduced to 18 years, but this was raised to 21 in 1973. Conn. Gen. Stat. 1958, § 45-96.

(n55)Footnote 55. *Spicer v. Moss, 100 N.E.2d 761 (Ill. 1951)* (a limitation in a deed to the grantor's daughter for life and then to the heirs of her body and in default thereof to the heirs of the body of the grantor's son did not create limitations void for remoteness since the limitations vested on the deaths of the son and daughter, fee tails having been converted into life estates in the first taker with contingent remainders to his heirs); *In re Wood's Trust Estate, 311 P.2d 359 (Kan. 1957)* (to wife and daughter for life and then to citizens of Willingham. Remainder was vested and therefore not too remote).

Executory devise valid if vests within the rule. *Erickson v. Palmer, 315 P.2d 164 (Or. 1957). Hubscher & Son v. Storey, 578 N.W.2d 701 (Mich. App. 1998)* (profit a prendre, a vested interest, is not subject to the rule against perpetuities).

(n56)Footnote 56. *Bank of Cal. v. Ager, 109 P.2d 548 (Wash. 1941).*

Rule against perpetuities applies to equitable interests. *Thomas v. Harrison, 191 N.E.2d 862 (Ohio 1962).*

(n57)Footnote 57. *Joseph Schonthal Co. v. Sylvania, 21 N.E.2d 1008 (Ohio App. 1938).*

(n58)Footnote 58. *Emerson v. Campbell, 84 A.2d 148 (Del. 1951)* (rule is applicable to vesting in interest not in enjoyment); *Swain v. Bowers, 158 N.E. 598 (Ind. App. 1927).*

(n59)Footnote 59. *Gray v. Stadler, 280 N.W. 675, 281 N.W. 280 (Wis. 1938). Urquhart v. Teller, 958 P.2d 714 (Mont. 1998)* (The rule against perpetuities should not be invoked to invalidate an option to purchase property where some construction of the instrument granting the option exists that can lead to the instrument's validity. In this case, the option would terminate six months following notice of seller's death, and the court found that although the option would go on in perpetuity if seller's heirs neglected to give notice, there is an implied duty on the part of seller's heirs to give notice; thus, notice is presumed to be given, and the interest is not a perpetuity).

(n60)Footnote 60. *Campbell v. Campbell, 230 S.W.2d 918 (Ky. 1950); New England Trust Co. v. Wood, 93 N.E.2d 547 (Mass. 1950); St. Louis Union Trust Co. v. Bassett, 85 S.W.2d 569 (Mo. 1935),* 101 a.l.r. 1266; *In re de Varona's Trust, 84 N.Y.S.2d 50 (1948); In re Wogatzky's Will, 86 N.Y.S.2d 884 (1949); In re Rostick's Estate, 86 N.Y.S.2d 164 (1949); Harris v. France, 232 S.W.2d 64 (Tenn. App. 1950); Collins v. Lyon, 24 S.E.2d 572 (Va. 1943). Abrams v. Templeton, 465 S.E.2d 117 (S.C. App. 1995)* (will which violated rule against perpetuities by making gift over of interest in real property to testator's great-grandchildren was upheld after court inserted savings clause to use testator's grandchildren who were alive at the time of death as the measuring lives).

To A for life, then to B for life and after B's death to Y charity. Held the validity of the gift to bounty did not depend upon B surviving *A. Williamson v. Brownlow, 410 S.W.2d 878 (Tenn. 1967).*

(n61)Footnote 61. In re Hewitt's Settlement, 1 ch. 810.

Samuel M. Fedders, *The Perpetuities Created in Those in En Ventre SaMere in Relation to the Termination of Common Law and Wait and See Measuring Lives: A Minor Heresy Stated and Defended, 62 Iowa L. Rev. 309 (1976).*

(n62)Footnote 62. *Roemhild v. Jones, 239 F.2d 492 (8th Cir. 1957)* (rule used is a means of construction. This seems to be the modern trend although there are earlier opinions to the effect that an instrument should be construed as though the rule never existed and then the rule applied to the limitation found to exist; *Shepard v. Union & New Haven Trust Co., 138 A. 809 (Conn. 1927)* ("If a construction is fairly open which will avoid turning a bequest into an illegal perpetuity and render the bequest valid and operative, the law favors it and courts must prefer it"); *Ireland v. Hudson, 41 P.2d 237 (Colo. 1935); Cartinhour v. Houser, 66 So. 2d 686 (Fla. 1953)* (an instrument may be construed to avoid the rule against remoteness); *Chapman v. Cheney, 61 N.E. 363 (Ill. 1901); Emler v. Emler, 106 S.W.2d 79 (Ky. 1937); Campbell v. Campbell, 230 S.W.2d 918 (Ky. 1950); Snyder v. Denit, 72 A.2d 757 (Md. 1950); Second Bank-State Trust Co. v. Second Bank-State Trust Co., 140 N.E.2d 201 (Mass. 1957); Davis v. Rossi, 34 S.W.2d 8 (Mo. 1930); Post v. Hover, 33 N.Y. 593 (1865); In re Friend's Estate, 6 N.Y.S.2d 205 (1938); Security Nat'l Bank v. Hannah, 114 S.E.2d 273 (N.C. 1960)* (trust to terminate when the youngest living grandchild became 21 was interpreted to mean the youngest grandchild living at the testator's death); *Braun v. Central Trust Co., 104 N.E.2d 480 (Ohio 1951), aff'd, 109 N.E.2d 476 (Ohio App. 1952); In re Mereto's Estate, 166 A. 893 (Pa. 1933); McCarley v. McCarley, 360 S.W.2d 27 (Tenn. 1962)* (gift in trust for education of grandchildren to be distributed when last grandchild finished college held valid by closing class to grandchildren living at testatrix" death).

Courts will adopt the construction that avoids an illegal perpetuity. *In re Stewart's Estate, 242 So. 2d 781 (Fla. App. 1970).*

A clause in a will, establishing trusts and providing that any trust which should otherwise violate the rule would terminate one day prior to the expiration of the allowable period, was held valid. *In re Lee's Estate, 299 P.2d 1066 (Wash. 1956).*

(n63)Footnote 63. *Stanton v. Stanton, 101 A.2d 789 (Conn. 1953)* ("descendants" meant those living at testator's death); *Cartinhour v. Houser, 66 So. 2d 686 (Fla. 1953); In re Neill's Estate, 89 N.Y.S.2d 394 (1949)* (example of a construction to avoid perpetuities); *In re Harrah's Estate, 72 A.2d 587 (Pa. 1950)* (Pennsylvania will separate remainders vertically to preserve those which vest at death of testator). *But see, In re Bradlees Stores, Inc., 194 B.R. 555 (N.Y. 1996)* (estate in property is void from the beginning if it could vest too remotely; court may not rewrite transfer to fit within the rule against perpetuities); *Urquhart v. Teller, 958 P.2d 714 (Mont. 1998)* (The rule against perpetuities should not be invoked to invalidate an option to purchase property where some construction of the instrument granting the option exists that can lead to the instrument's validity. In this case, the option would terminate six months following notice of seller's death, and the court found that although the option would go on in perpetuity if seller's heirs neglected to give notice, there is an implied duty on the part of seller's heirs to give notice; thus, notice is presumed to be given, and the interest is not a perpetuity).

(n64)Footnote 64. *In re Foster's Estate, 376 P.2d 784 (Kan. 1962)* (a provision for distribution in a testamentary trust, when the youngest grandchild reached 23 years was held too remote but the court exercised a power of excision by striking the provision for delay of distribution from the will); *First Portland Nat'l Bank v. Rodrique, 172 A.2d 107 (Me. 1961)* (where there were two alternative provisions in a will and one violated the rule against remoteness the other took effect when the event upon which it was limited happened); *Bowen v. Campbell, 181 N.E.2d 342 (Mass. 1962)* (it is public policy in Massachusetts that if two constructions are possible one of which will render the testamentary scheme valid and the other will violate the rule against perpetuities, the former must be adopted); *See also Old Colony Trust Co. v. Stephens, 190 N.E.2d 110 (Mass. 1963); In re Bassett's Estate, 190 A.2d 415 (N.H. 1963)* (court permitted an agreed termination of a testamentary trust where a question of the violation of the rule against remoteness of vesting was involved); *Poindexter v. Wachovia Bank & Trust Co., 128 S.E.2d 867 (N.C. 1963)* (perpetuities as guide for construction); *In re Mikaloff's Estate, 160 A.2d 703 (Pa. 1960)* (treating the rule as affecting remoteness of divesting

rather than remoteness of vesting); *Mattern v. Herzog, 367 S.W.2d 312 (Tex. 1963)* (if two interpretations are possible the one which avoids the rule against remoteness is preferred); *Fritschen v. Wanek, 924 P.2d 1288 (Kan. 1996)* (rule against perpetuities bears little relation to modern business practices, and courts should strive to interpret document in manner that avoids rule's application).

(n65)Footnote 65. *Wright v. Tuscaloosa, 182 So. 72 (Ala. 1938).*

(n66)Footnote 66. *Chilcott v. Hart, 45 P. 391 (Colo. 1896).*

If the accumulation makes the gift too remote the distribution is by intestacy. *In re Castner's Estate, 194 A.2d 330 (Pa. 1963). Hamman v. Bright & Co., 924 S.W.2d 168 (Tex. 1996)* (oil and gas top leases--which were to become effective if and when existing oil and gas leases expired or were terminated--conveyed springing executory interest that was void under the rule against perpetuities, because existing oil and gas leases could continue for an indeterminate amount of time).

(n67)Footnote 67. *Imbrie v. Hartrampf, 198 P. 521 (Or. 1921); Betts v. Snyder, 19 A.2d 82 (Pa. 1941).*

Devise to two children for life, remainders to the children of each life tenant with remainder over to the other child if one died without issue, the remainder over was valid only if the remainderman died with issue so that if both died without issue the share of each passed to his own heirs. *Anderson v. Anderson, 115 So. 2d 531, 121 So. 2d 393 (Miss. 1959).*

(n68)Footnote 68. *Bates v. Spooner, 54 A. 305 (Conn. 1903); Madison v. Larmon, 48 N.E. 556 (Ill. 1897); Sellers v. Archer, 134 N.E.2d 264 (Ill. 1956); Schee v. Boone, 243 S.W. 882 (Mo. 1922); In re Palmer's Estate, 315 P.2d 164 (Or. 1957);* Clarke v. *Clarke, 116* S.E.2d 449 (N.C. 1960) (a devise to heirs of testatrix's son to vest at testatrix's death does not violate the rule). Pathmark Stores, Inc. v. 3821 Assoc., 663 A.2d 1189 (Del. 1995) (30-year option between commercial entities held not to violate the rule against perpetuities); *Symphony Space, Inc. v. Pergola Properties, Inc., 631 N.Y.S.2d 136 (1995)* (option agreement void as violating the rule against remote vesting); *Rebh v. Lake George Ventures, Inc., 629 N.Y.S.2d 878 (1995)* (lease agreement held not in violation of rule against perpetuities); *Estate of Royer v. Wineland Equip., Inc., 663 A.2d 780 (Pa. Super. 1995)* (right of first refusal held not to violate the rule against perpetuities); *Conquistador Petroleum, Inc. v. Chatham, 899 S.W.2d 439 (Tex. App. 1995)* (option agreement providing that optionee had option to lease property if incumbent lessees did not exercise their option to obtain new lease within ten days after existing lease expired was held not in violation of rule against perpetuities); *Symphony Space, Inc., v. Pergola Properties, Inc., 669 N.E.2d 799 (N.Y. App. 1996)* (option to purchase contained in a lease violated the rule against perpetuities, since the option could be exercised after the lease term had expired); *Donzella v. New York Telephone Co., 641 N.Y.S.2d 423 (1996)* (purchase option written into lease did not violate the rule against perpetuities); *Buck v. Banks, 668 N.E.2d 1259 (Ind. 1996)* (preemptive option in contract, giving purchasers right to purchase additional 14 acres of land, violated the rule against perpetuities); *In re Bradlees Stores, Inc., 194 B.R. 555 (N.Y. 1996)* (creditor's option to purchase real estate from Chapter 11 debtor was void under the rule against perpetuities).

(n69)Footnote 69. A direction that administration be continued until all assets have liquidated themselves was an improper suspension of the power of alienation. *In re Johntson's Estate, 303 P.2d 1 (Cal. 1956).* But a limitation over after settlement of decedent's estate was valid under theory of reasonable time. *Belfield v. Booth, 27 A. 585 (Conn. 1893). See* Kales, *6 Ill. L. Rev. 373.*

Devise to testator's grandchildren was not too remote. *Lowe v. Rice, 291 S.W.2d 287 (Tenn. App. 1956).*

Deed to too many persons held a perpetuity. *State v. McGee, 204 N.W. 408 (Iowa 1925).*

(n70)Footnote 70. *In re Bradlees Stores, Inc., 194 B.R. 55 (N.Y. 1996).*

(n71)Footnote 71. *Springfield Safe Deposit & Trust Co. v. Ireland, 167 N.E. 261 (Mass. 1929),* 64 a.l.r. 1071; *Schettler v. Smith, 41 N.Y. 328 (1869); Miles v. Harford, 12 Ch. Div. 691; Doe d. Evers v. Challis, 18 Q.B. 231, 118 Eng. Rep. 87 (1850).*

Good alternatives can be sustained despite the invalidity of alternative dispositions separately stated. *Story v. First Nat'l Bank & Trust Co., 156 So. 101 (Fla. 1934).*

(n72)Footnote 72. *Landrum v. National City Bank, 80 S.E.2d 300 (Ga. 1954); Bozza v. First Nat'l Bank & Trust Co., 72 N.E.2d 51 (Ill. 1947); Trenton Banking Co. v. Hawley, 70 A.2d 896 (N.J. Super. 1950); McPherson v. First & Citizens Nat'l Bank, 81 S.E.2d 386 (N.C. 1954).*

As to testator's belief of impossibility of issue *see Snyder's Estate v. Denit, 72 A.2d 757 (Md. 1950).*

In *Worcester County Trust Co. v. Marble, 55 N.E.2d 446 (Mass. 1944),* the court avoided the possibility of issue rule by determining that the testator was aware of the advanced age of the "life in being."

(n73)Footnote 73. *Haggerty v. Oakland, 326 P.2d 957 (Cal. App. 1958),* 66 a.l.r.2d 718.

Always a possibility of issue. *Turner v. Turner, 196 S.E.2d 498 (S.C. 1973).*

A trust to continue until the direct blood line of the settlor became extinct and limitation over was void ab initio. *Kettler v. Atkinson, 383 S.W.2d 557 (Tex. 1964).*

(n74)Footnote 74. 1 Cox 324, *29 Eng. Rep. 1186 (1787).*

Parker v. Parker, 113 S.E.2d 899 (N.C. 1960) ("The law indulges the presumption that so long as a man lives he is capable of procreation"); *Crockett v. Scott, 284 S.W.2d 289 (Tenn. 1955),* 56 a.l.r.2d 442; *Rodgers v. Unborn Child or Children of Rodgers, 315 S.W.2d 521 (Tenn. 1958).*

(n75)Footnote 75. *Stanley v. Foster, 92 S.E.2d 925 (N.C. 1956); McPherson v. First & Citizens Nat'l Bank, 81 S.E.2d 386 (N.C. 1954); Karsh v. Atkins, 313 S.W.2d 253 (Tenn. 1958).*

Idaho has abolished the presumption of fertility in its suspension of alienation rule. Idaho Code 1947, § 55-111.

See W. Barton Leach, *Perpetuities: New Hampshire Defertilizes the Octogenarians, 77 Harv. L. Rev. 279 (1963).*

(n76)Footnote 76. In re Wood, 3 ch. 381.

(n77)Footnote 77. *Belfield v. Booth, 27 A. 585 (Conn. 1893).*

(n78)Footnote 78. *Rozell v. Rozell, 186 N.W. 489 (Mich. 1922). See Reasoner v. Herman, 134 N.E. 276 (Ind. 1922).*

The iconoclasts have commenced to gnaw at the sanctity of this precept. *See* W. Barton Leach, *Perpetuities in Perspective: Ending the Rule's Reign of Terror, 65 Harv. L. Rev. 721 (1952);* W. Barton Leach, *Perpetuities: Staying the Slaughter of the Innocents, 68 L.Q. Rev. 35 (1952).*

And see Bankers Trust Co. v. Pearson, 99 A.2d 224 (Conn. 1953), permitting the testator to presume impossibility of issue.

But such presumption even by all parties cannot be indulged in under some authorities. *Owings v. Owings, 247 S.W.2d*

221 (Ky. 1952).

(n79)Footnote 79. *Snyder v. Denit, 72 A.2d 757 (Md. 1950),* 18 a.l.r.2d 663; *Trenton Banking Co. v. Hawley, 70 A.2d 896 (N.J. Super. 1950).*

Medical evidence was sufficient to hold that a husband 63 and a wife 45 could not have children. *In re Bassett's Estate, 190 A.2d 415 (N.H. 1963).*

Tennessee now permits evidence to rebut. Jee v. Audley, 1 Cox 324, *29 Eng. Rep. 1186 (1787).*

See W. Barton Leach, *Perpetuities: New Hampshire Defertilizes the Octogenarians, 77 Harv. L. Rev. 279 (1963).*

(n80)Footnote 80. *Bankers Trust Co. v. Pearson, 99 A.2d 224 (Conn. 1953); In re Wright's Estate, 131 A. 188 (Pa. 1925); In re Bonham's Estate, 143 A.2d 50 (Pa. 1958)* (82-year-old woman presumed incapable of issue).

(n81)Footnote 81. *Byers v. Bedlow, 142 So. 894 (Fla. 1932).*

(n82)Footnote 82. *See* Charles Looker, et. al., Reform of Rule Against Perpetuities, 92 Trusts & Estates 768-774 (1953); Lewis M. Simes, *Is the Rule Against Perpetuities Doomed, 52 Mich. L. Rev. 179 (1953);* Owen Tudor, *Absolute Certainty of Vesting Under the Rule Against Perpetuities, 34 Boston U. L. Rev. 129 (1954).*

(n83)Footnote 83. *Merchants Nat'l Bank v. Curtis, 97 A.2d 207 (N.H. 1953).*

(n84)Footnote 84. W. Barton Leach, *Perpetuities Legislation, Massachusetts Style, 67 Harv. L. Rev. 1349 (1954);* Daniel M. Schuyler, *Should the Rule Against Perpetuities Discard Its Vest? 56 Mich. L. Rev. 683-726 (1958);* Thomas L. Waterbury, *Some Further Thoughts on Perpetuities Reform, 42 Minn. L. Rev. 41-105 (1956).*

See Robert J. Lynn & John W. Van Doren, *Applying the Rule Against Perpetuities to Remainders and Executory Interests: Orthodox Doctrine and Modern Cases, 27 U. Chi. L. Rev. 436 (1960).*

(n85)Footnote 85. Leach, *Perpetuities in Perspective, 65 Harv. L. Rev. 721 (1952); Legislation, Massachusetts Style, 67 Harv. L. Rev. 1349 (1954);* W. Barton Leach & James K. Logan, *Perpetuities: A Standard Saving Clause to Avoid Violations of the Rule, 74 Harv. L. Rev. 1141 (1961).*

(n86)Footnote 86. *Henderson v. Moore, 189 S.W.2d 59 (Tex. Civ. App. 1945).*

(n87)Footnote 87. *Howell v. Deady, 48 F. Supp. 104 (1939). Luecke v. Wallace, 951 S.W.2d 267 (Tex. App. 1997)* (rule against perpetuities "relates only to the vesting of estates and interests and has no bearing on the duration of the estate or the actual possession of it... . The rule is not applicable to present or immediate interests, nor is it applicable to those future interests in land which vest at their creation.").

(n88)Footnote 88. *Goodloe v. Goodloe, 166 S.W.2d 836 (Ky. 1942).*

A direction to the executor to maintain the cemetery lot was not a perpetuity since the executor had a reasonable time in which to perform which did not exceed the rule. *Ellis v. Andrews, 324 S.W.2d 917 (Tex. Civ. App. 1959). Coulter & Smith, LTD, v. Russell, 925 P.2d 1258 (Utah 1996)* (to satisfy rule against perpetuities, it is not necessary that the interest vest as actual possession of the property); *Snyder Bros., Inc. v. Peoples Natural Gas Co., 676 A.2d 1226 (Pa. 1996)* (rule against perpetuities applies only vesting of interest, not to enjoyment of that interest).

(n89)Footnote 89. *In re Sahlender's Estate, 201 P.2d 69 (Cal. App. 1948).*

See Some Perpetuities Problems under the Pennsylvania Estates Act of 1947 (Pa. Stat. Ann., tit. 20, §§ 301.4, 301.5),

97 U. Pa. L. Rev. 263 (1948); Oval A. Phipps, *The Pennsylvania Experiment in Perpetuities, 23 Temp. L.Q. 20 (1949);* Philip A. Briggs, *A Defense of Pennsylvania's Statute on Perpetuities, 23 Temp. L.Q. 313 (1950).*

Tiehen v. Hebenstreit, 42 N.W.2d 802 (Neb. 1950) (rule is the law in Nebraska).

Montana has now adopted the "Common Law Rule Against Perpetuities." Mont. Acts 1959, ch. 213.

(n90)Footnote 90. *In re Harrah's Estate, 72 A.2d 587 (Pa. 1950); Catlin v. Brown, 11 Hare 372, 68 Eng. Rep. 1319 (1853).*

Gift to "children of my grandchildren" which would permit after born great grandchildren to be included in the will provision violated the *Rule Against Remoteness of Vesting. National Bank of Ga. v. First Nat'l Bank of Atlanta, 218 S.E.2d 23 (Ga. 1975).*

(n91)Footnote 91. *Rose v. Rose, 60 S.E.2d 45 (Va. 1950).*

(n92)Footnote 92. *Gray, supra, n.1.*

Tennessee has the common-law rule against remoteness. *Eager v. McCoy, 228 S.W. 709 (Tenn. 1921).*

See Samuel M. Fedders, *The Perpetuities Created in Gross and the Child En Ventre Sa Mere in Relation to the Termination of Common Law and Wait and See Measuring Lives -- A Minor Heresy Stated and Defended, 62 Iowa L. Rev. 309 (1976).*

(n93)Footnote 93. *Bear v. Millikin Trust Co., 168 N.E. 349 (Ill. 1929),* 73 a.l.r. 173 (limitation based on lives of all persons then in being was void as being unreasonable); *In re Warren's Estate, 182 A. 396 (Pa. 1936),* 104 a.l.r. 1345 (lives are candles all burning at the same time); *Marks v. Southern Trust Co., 310 S.W.2d 435 (Tenn. 1958)* (trust reserving life estate then to son and wife for life then to children of son was not too remote); *Abbott v. Everett Trust & Sav. Bank, 312 P.2d 203 (Wash. 1957)* (where the will only provided for a life estate there was no violation of the rule against remoteness since the decedent died intestate as to the remainder which vested in her heirs).

(n94)Footnote 94. *Lloyd v. Carew, Show. Parl. Cas. 137, 1 Eng. Rep. 93 (1697)* (permitting 21 years in gross).

Tennessee has the common law rule against remoteness. *Eager v. McCoy, 228 S.W. 709 (Tenn. 1921).*

(n95)Footnote 95. Long v. Blackall, 7 T.R. 100, *101 Eng. Rep. 875 (1797).*

(n96)Footnote 96. *Fitchie v. Brown, 211 U.S. 321 (1908)* ("as long as the law permits" is valid); *Minot v. Paine, 120 N.E. 167 (Mass. 1918); Gale v. Gale, 159 A. 122 (N.H. 1932).*

See Samuel M. Fedders, *The Perpetuities Created in Gross and the Child in En Ventre Sa Mere in Relation to the Termination of Common Law and Wait and See Measuring Lives -- A Minor Heresy Stated and Defended, 62 Iowa L. Rev. 309 (1976).*

(n97)Footnote 97. *See Fidelity & Columbia Trust Co. v. Tiffany, 260 S.W. 357 (Ky. 1924).*

(n98)Footnote 98. 27 Hen. VIII, ch. 10.

The Texas constitutional provision against perpetuities has adopted the common-law rule against remoteness. *Mattern v. Herzog, 367 S.W.2d 312 (Tex. 1963).*

(n99)Footnote 99. 32 Hen. VIII, ch. 134 & 35 hen. VIII, ch. v. 5.

(n100)Footnote 100. Cro. Jac. 590.

(n101)Footnote 101. *2 Wms. Saund. 380.*

(n102)Footnote 102. Cro. Jac. 459.

(n103)Footnote 103. *3 Ch. Cas. 1 (1682).*

(n104)Footnote 104. Scatterwood v. Edge, 1 Salk. 229 and *Law v. Bunm, 3 P. Wms. 262,* holding that the limitation could be for any number of lives since they were "all candles lighted up at once"; Stephens v. Stephens, Cas. Temp. Talb. 228 (1736), adding the minority of a beneficiary after lives; *Thellusson v. Woodford, 11 Ves. 112 (1799),* permitting the lives to be others than beneficiaries; *Cadell v. Palmer, 1 Cl. & F. 372 (1833),* permitting the years to be in gross.

(n105)Footnote 105. *1 Cl. & F. 372 (1833).*

(n106)Footnote 106. *Cole v. Sewell, 2 H.L. Cas. 186 (1848).*

See W. Barton Leach, *Perpetuities in Perspective: Ending the Rule's Reign of Terror, 65 Harv. L. Rev. 721;* Daniel M. Schuyler, *Should the Rule Against Perpetuities Discard Its Vest? 56 Mich. L. Rev. 683-726 (1958).*

(n107)Footnote 107. *See* Thomas L. Waterbury, *Some Further Thoughts on Perpetuities Reform, 42 Minn. L. Rev. 41 (1958).*

(n108)Footnote 108. *Barry v. Newton, 273 P.2d 735 (Colo. 1954).*

(n109)Footnote 109. If a gift can take effect as a contingent remainder and so not be too remote it must be so construed. *Evers v. Challis, 7 H.L. Cas. 531 (1859).*

Bear v. Millikin Trust Co., 168 N.E. 349 (Ill. 1929), 73 a.l.r. 173; *Love v. Wyndham, 1 Mod. 50, 86 Eng. Rep. 724 (1838)* (if all candles be lit at once it is good).

Interesse termini not within the rule though to run for more than 21 years being vested. *Mann, Crossman & Paulin, Ltd. v. Registrar, 1 Ch. D. 202 (1918).*

(n110)Footnote 110. Life of a butterfly is too remote (dictum). In re Kelly (1932) *I.R. 255.*

Trust for life of dogs and cats held void. *In re McNeill's Estate, 41 Cal. Rptr. 139 (1964).*

(n111)Footnote 111. Time based closing of administration of estate held not too remote. *Union Trust Co. of Springfield v. Nelen, 186 N.E. 66 (Mass. 1933); Trautz v. Lemp, 46 S.W.2d 135 (Mo. 1932).*

Time based on when will would be probated held too remote. *Miller v. Weston, 189 P. 610 (Colo. 1920).*

(n112)Footnote 112. For a comprehensive discussion of the issues and consequences, *see* Alison Reppy & Leslie Jay Thompkins, Historical and Statutory Background of the Wills (1928).

See G. Stanley Joslin, *Mortmain in Canada and the United States: A Comparative Study, 29 Can. B. Rev. 621.*

(n113)Footnote 113. (1259), ch. 14.

(n114)Footnote 114. 7 Edw. I.

(n115)Footnote 115. 15 Richard II, ch. 5.

(n116)Footnote 116. 3 Holdsworth, *supra*, n.50, 87.

(n117)Footnote 117. 13 Edw. I, st. 1; 34 Edw. I, st. 3; 15 Rich. ii, ch. 5; 51 & 52 Vict., ch. 42.

The charter of 1217, ch. 43, contains a limitation on mortmain. This is supplemented by the Petition of Barns, ch. 10 (1258), and the provisions of Westminster, cap. 14 (1259), and culminated in De Viris Religosis of 7 Edw. I. *See* 2 Frederick Pollock & Frederick William Maitland, History of English Law, ch. 1, § 9 (2d ed. 1898).

(n118)Footnote 118. History of English Law Before the Time of Edward I.

Joshua Williams, Law of Real Property (17th ed.) 93, states categorically that no conveyance can be made to a corporation unless it has a license to take lands granted by the crown.

(n119)Footnote 119. 3 Holdsworth, *supra* n.50, 87.

In New York, as the matter stands at this writing, the mortmain statute does not permit one to contest a charitable bequest unless he would receive a pecuniary benefit from a successful contest, either as a beneficiary under the will or as a distributee. *In re Cairo's Estate, 312 N.Y.S.2d 925 (1970), aff'd, In re Estate of Cairo, 272 N.E.2d 574 (N.Y. 1971).*

(n120)Footnote 120. *Williams, supra, n.118* (17th ed.) 82, indicated that there was no forfeiture by mortmain of lands conveyed to a corporation if by royal license or by statute it was authorized to hold land.

Mortmain statute is intended to prevent undue influence on approaching death. *In re Lowe's Trust, 186 N.E.2d 648 (Ohio 1962).*

(n121)Footnote 121. Where a gift will fail under this statute the doctrine of dependent relative revocation has been invoked. *Linkins v. Protestant Episcopal Cathedral Found., 187 F.2d 357 (D.C. Cir. 1950); In re Kaufman's Estate, 155 P.2d 831 (Cal. 1945). See In re Sloan's Appeal, 32 A. 42 (Pa. 1895).*

Contra, In re Hoffner's Estate, 29 A. 33 (Pa. 1894).

Mississippi Sch. for the Blind v. Armstrong, 62 So. 2d 369 (Miss. 1953) (devises of realty to charity are void in Mississippi). *State Dep't of Assessments & Taxation v. North Baltimore Ctr., 743 A.2d 759, 765 (Md. Ct. Spec. App. 2000)* (stating that "the Mortmain Act of 1736 ... voided devises of land to charities").

(n122)Footnote 122. *See* Pennsylvania's mortmain statute is unconstitutional as denying charities equal protection of law. *In re Estate of Cavill, 329 A.2d 503 (Pa. 1974).*

Georgia's mortmain statute prohibits gifts made within 90 days of estate of not more than one third of the estate if wife and children survive. Ga. Code Ann. § 113-107. *Baker v. Citizens & S. Nat'l Bank, 242 S.E.2d 39 (Ga. 1978).*

(n123)Footnote 123. The statement found in I Blackstone Commentaries 475, to the effect that a corporation had power "to purchase lands and hold them for the benefit of themselves and their successors" is to be contrasted with the statement in Coke upon Littleton, to the effect that all corporations must have a license to purchase and hold funds in Mortmain. 7 and 8 William III, c. 37.

See Lathrop v. Commercial Bank, 3 Dana 114 (Ky. 1839), 33 Am. Dec. 481, denying that Mortmain ever became any part of the common law of Virginia; *Nuholl v. New York & Erie R. Co., 12 N.Y. 121 (1854); Berry v. Humble Oil & Ref. Co., 205 S.W.2d 376 (Tex. Civ. App. 1947).*

See Sutton's Hosp. Case, 10 Coke 23a, 30b, *77 Eng. Rep. 937.*

The answer may turn on the question as to whether the private corporation is the child of the municipal corporation or of the religious corporation which was subject to mortmain. *See* the *Merger and Commonwealth of Colchester v. Lawten, 1 Ves. & Bea. 226.*

Uses to corporations fell within Mortmain by 15 Rich. ii, ch. 5.

See John W. Curran *Charitable Trusts for Masses, 5 Depaul L. Rev. 246 (1956); Charities in Illinois, 7 Depaul L. Rev. 84 (1958).*

(n124)Footnote 124. Okla. Const. Art. 22, § 2.

(n125)Footnote 125. *Ireland v. Cleveland Trust Co., 157 N.E.2d 396 (Ohio 1958)* (valid when made within the prohibited statutory period if the heirs consent).

A charitable gift in will must be executed within statutory time prior to testator's death. *In re Davison's Estate, 215 P.2d 504 (Cal. App. 1950); Deeds v. Deeds, 94 N.E.2d 232 (Ohio 1950).*

Mortmain statute applied. *In re Scott's Estate, 31 Cal. Rptr. 438 (1963); Thomas v. Harrison, 191 N.E.2d 862 (Ohio 1962).*

Ohio has maintained its mortmain statute designed to protect only those who would take by intestacy and if the complainants were not heirs they could not evoke the statute against a charitable legatee. *Central Nat'l Bank v. Morris, 227 N.E.2d 418 (Ohio App. 1967).*

Mortmain statutes like those of Ohio date back to 9 Geo. II, ch. 36, which voided deeds to charity made within 12 months of death.

Mortmain statute inapplicable if new will merely repeats earlier will. Fla. Stat. Ann. § 731.19 (1964). *Linkins v. Protestant Episcopal Cathedral Found., 187 F.2d 357 (D.C. Cir. 1950); In re Baum's Estate, 211 A.2d 521 (Pa. 1965).*

Where a second will revoked a bequest to a hospital in a former will and a third will executed within 30 days of the testator's death made a new bequest, the gift in the third will was void under section 7c of the mortmain statute. *In re Gearhart's Estate, 255 A.2d 557 (Pa. 1969).*

The mortmain statute invoked. *Methodist Hosp. v. Slack, 330 So. 2d 882 (Miss. 1976).* Miss. Code. Ann. 1972, § 91-5-31.

In New York, as the matter stands at this writing, the New York mortmain statute does not permit one to contest a charitable bequest unless he would receive a pecuniary benefit from a successful contest, either as a beneficiary under the will or as a distributee. *Matter of Estate of Cairo, 312 N.Y.S.2d 925 (1970).* Holding that provision of the District of Columbia invalidating a devise or bequest to clergyman and religious organization made within thirty days of the testator's death was invalid. *Estate of French, 365 A.2d 621 (D.C. 1976).*

(n126)Footnote 126. *In re Jephcott's Estate, 251 P.2d 1001 (Cal. App. 1953)* (prohibiting giving more than a designated portion of the testator's estate to charity); *Booth v. Cureton, 81 So. 2d 662 (Fla. 1955)* (gift within time prohibited by statute before death invalid); *Decker v. American Univ., 20 N.W.2d 466 (Iowa 1945)* (such statutes are constitutional).

Not more than one-third of estate can be given to charity by will made less than 30 days before death. Excess is void. Mont. Code Acts 1945, ch. 93. *See* Fla. Stat. Ann., § 731.19. *Taylor v. Payne, 17 So. 2d 615 (Fla. 1944),* 154 a.l.r. 677.

Objection by legatees to charitable gifts because of mortmain statute was defeated by in terrorem clause in will. *In re Goyette's Estate, 66 Cal. Rptr. 103 (1968).*

The California statute can be avoided by making the charity the residuary legatee and making the substitutionary residuary legatee a third party. Thus the excluded heirs cannot complain since they have no reversionary interest nor intestate rights. *In re Davis' Estate, 168 P.2d 789 (Cal. App. 1946). See* G. Stanley Joslin, *Restrictions on the Testamentary Gift to Charities in California, 25 S. Cal. L. Rev. 419 (1952).*

Relatives excluded from a will by a residuary gift to charity with a substitutionary gift over cannot complain of the invalidity of the charitable gift. *In re Haines' Estate, 173 P.2d 693 (Cal. App. 1946).*

For the mechanics of calculation of allowable amounts see *In re Mayers' Will, 87 N.E.2d 422 (N.Y. 1949),* 11 a.l.r.2d 1136, overruling *In re Buck's Estate, 285 N.Y.S. 515 (1936); In re Miranda's Will, 271 N.Y.S. 913 (1934).*

New York's mortmain statute protects nonresidents as well as residents. *In re Halpern's Will, 368 N.Y.S.2d 845 (1975).*

In Ohio, the gift is valid up to 25% at the execution of the will, and the former one-year period is reduced to six months, *see* § 2107.06 of the Ohio Revised Code (1965). *See also Central Nat'l Bank v. Morris, 222 N.E.2d 674 (Ohio 1967).*

Ohio has maintained its mortmain statute designed to protect only those who would take by intestacy and if the complainants were not heirs they could not evoke the statute against a charitable legatee. *Central Nat'l Bank v. Morris, 227 N.E.2d 418 (Ohio App. 1967).*

Idaho now permits a bequest to charity unlimited even within 30 days prior to death if $100,000 goes to testator's lineal descendants. Idaho Sess. Laws 1965, ch. 109.

See Richard W. Schwartz, *The Ohio Mortmain Statute, as Amended, 17 Western Res. L. Rev. 83 (1965).*

(n127)Footnote 127. Only surviving issue and parents of testator can raise mortmain issue. N.Y. Decedent Estate Law, § 17; N.Y. Est. Powers & Trusts Law, § 5-3.3. Gifts to charity in excess of one half of estate can be challenged. *In re Cairo's Estate, 312 N.Y.S.2d 925 (1970).* Challenge must be made within six months except as to minors. *In re Rockefeller's Estate, 314 N.Y.S.2d 101 (1970).*

Charitable devises exceeding half of the testator's net estate are voidable. N.Y. Est. Powers & Trusts Law, § 5-3.3(a).

Where the mortmain statutes operate to protect a restricted group of relations only those within the stated confines of consanguinity can complain of the improper gift to charity. *In re Randall's Estate, 194 P.2d 709 (Cal. App. 1948); In re Holyland's Will, 116 N.Y.S.2d 628 (1952)* (cousins are not descendants who can object); *State v. Naze, 53 N.W.2d 172 (Wis. 1952).*

Only heirs can raise this objection. The statute, therefore, is rather one affecting pretermitted heirs than one of mortmain. *In re Davison's Estate, 215 P.2d 504 (Cal. App. 1950).*

Right to object to mortmain dies with person entitled. *In re Coburn's Estate, 97 Cal. Rptr. 597 (1971).*

Daughter not residuary legatee cannot raise mortmain. *In re Shamela's Estate, 257 So. 2d 77 (Fla. App. 1972).*

In New York, gifts to charity may not exceed one-half of gross estates less debts. *In re Knowles' Estate, 239 N.Y.S.2d 285 (1963).*

Heirs may waive statutory limitations on charitable devises since they are for the heirs' protection and are not the result of public policy. *Deeds v. Deeds, 94 N.E.2d 232 (Ohio 1950).*

Charitable trust invalid if two wills were executed within the statutory 30 days. *In re Gearhart's Estate, 255 A.2d 557 (Pa. 1969);* Pa. Stat. Ann., tit. 20, § 180.7.

See G. Stanley Joslin, *Restrictions on Testamentary Gifts to Charities in California, 25 S. Cal. L. Rev. 419 (1952).*

The right of issue to elect against an excessive charitable distribution is a limitation on the testator's personal right to devise. *Estate of Willey, 380 N.Y.S.2d 940 (1976).*

In New York an adopted child can invoke the mortmain statute. *In re Lawrence's Will, 381 N.Y.S.2d 713 (1974).*

To the effect that a child could not contest a charitable gift where the will clearly showed an intent to limit his bequest. *Estate of Alexander, 395 N.Y.S.2d 598 (1977).*

Pennsylvania's Mortmain Statute is unconstitutional as violating equal protection clause. *In re Estate of Cavill, 329 A.2d 503 (Pa. 1974); In re Estate of Riley, 329 A.2d 511 (Pa. 1974), cert. denied, 421 U.S. 971 (1975).*

Charitable bequests in wills must be executed at least 90 days before death and cannot carry more than one-third of the estate. *Crosby v. Alton Ochsner Med. Found., 276 So. 2d 661 (Miss. 1973),* 75 a.l.r.3d 853.

Held to the contrary unless decedent left a spouse or dependents. *Hard v. First Nat'l Bank of Columbus, 133 S.E.2d 19 (Ga. 1963).*

Gift held invalid under mortmain statute. *Crosby v. Alton Ochsner Med. Found., 276 So. 2d 661 (Miss. 1973),* 75 a.l.r.3d 853. *Estate of French, 365 A.2d 621 (D.C. 1976).*

Held in violation of the First and Fifth Amendments a statute invalidating gifts to religious bodies made within thirty days before death.

Under Missouri's mortmain statute, if land is devised to a charitable corporation and is not sold within ten years it reverts to the testator's heirs. *Methodist Hosp. v. Slack, 330 So. 2d 882 (Miss. 1976).*

(n128)Footnote 128. Mississippi formerly had a mortmain statute which was repealed. *Bell v. Mississippi Orphans Home, 5 So. 2d 214 (Miss. 1941). See Gardner v. McNeal, 82 A. 988 (Md. 1911),* 40 l.r.a. (N.S.) 553.

Statutes restricting charitable bequests are subject to strict construction. *In re Reardon's Estate, 52 Cal. Rptr. 68 (1966).*

Avoiding the mortmain statute in the case of gift to the City of New York on the grounds that special welfare programs are a legitimate function and therefore New York is not a charitable corporation. *In re Klitenik's Estate, 280 N.Y.S.2d 488 (1967).*

Mortmain statute enforced. *In re Norcross's Estate, 325 N.Y.S.2d 477 (1971).*

Enforcing the Pennsylvania Mortmain Act. In re Gearhart's Estate, 255 A.2d 557 (Pa. 1969); In re Smith's Estate, 256 A.2d 130 (Pa. 1969).

Pennsylvania's mortmain statute has been declared unconstitutional. *In re Riley's Estate, 329 A.2d 511 (Pa. 1974).*

Under Mississippi mortmain statute land reverts to the grantor or heirs if not disposed of by the charity within ten years. *Methodist Hosp. v. Slack, 330 So. 2d 882 (Miss. 1976).*

Pennsylvania's Mortmain Statute is unconstitutional as violating equal protection clause. *Conel's Estate, 329 A.2d 503 (Pa. 1974). Riley's Estate, 329 A.2d 8111 (Pa. 1975), cert. denied, 421 U.S. 971 (1975).*

Charitable bequests in wills must be executed at least 90 days before death and cannot carry more than one-third of the estate. *Crosby v. Alton Ochsner Med. Found., 276 So. 2d 661 (Miss. 1973).*

Held to the rule unless decedent left a spouse or dependents. *Hard v. First Nat'l Bank of Columbus, 133 S.E.2d 19 (Ga. 1963).*

(n129)Footnote 129. The California mortmain statute did not affect an Illinois testator, although testator left descendants in *California. Dreyfus v. First Nat'l Bank of Chicago, 424 F.2d 1171 (7th. Cir. 1970).*

Only the children can claim under a mortmain statute. *In re Holtermann's Estate, 23 Cal. Rptr. 685 (1962).*

Any one of the class of persons permitted by statute may raise the question of mortmain. *In re Goyette's Estate, 92 Cal. Rptr. 62 (1971).*

Mortmain statute held not applicable if will executed more than 90 days before testator's death. *Hood v. First Nat'l Bank of Columbus, 133 S.E.2d 19 (Ga. 1963),* and *Wesley Mem. Hosp. v. Thomson, 139 S.E. 15 (Ga. 1927).*

Mortmain statute as to gifts to charity if will made more than 90 days prior to death. *Hood v. First Nat'l Bank, 133 S.E.2d 19 (Ga. 1963).* Mortmain statutes may be looked to only by those adversely affected. *In re Faber's Will, 141 N.W.2d 554 (Iowa 1966),* so if only one of several heirs object only his share is augmented and then only proportionally.

Holding the mortmain statute which was applicable to "charities" did not apply to bequests to the sovereign (New York City) even though the sovereign is engaged in charitable activities. *In re Klitenik's Estate, 280 N.Y.S.2d 488 (1967).*

Strict construction of *Mortmain Act. In re Lowe's Estate, 191 N.E.2d 196 (Ohio App. 1963).*

Will provision, void for mortmain, passed by intestacy lacking a residuary legatee though heir was expressly disinherited under will. *Balyeat v. Morris, 276 N.E.2d 258 (Ohio App. 1971).*

Pennsylvania has declared its mortmain statute unconstitutional. *In re Cavill's Estate, 329 A.2d 503 (Pa. 1974).*

Cal. Prob. Code § 41, Ky. Rev. Stat. Ann. § 273.090, and Michigan (*see Hayden v. Hayden's Estate, 286 N.W. 150 (Mich. 1939))* have repealed their mortmain statutes.

Holding the Pennsylvania mortmain statute unconstitutional as violating the First Amendment "Due Process" clause. *In re Estate of Riley, 329 A.2d 511 (Pa. 1974).*

Georgia's mortmain statute prohibits gifts made within 90 days of estate of not more than one-third of the estate if wife and children survive. Ga. Code Ann. § 113-107; *Baker v. Citizens & S. Nat'l Bank, 242 S.E.2d 39 (Ga. 1978).*

Gift held invalid under mortmain statute. *Crosby v. Alton Ochsner Med. Found., 276 So. 2d 661 (Miss. 1973),* 75 a.l.r.3d 853.

In Mississippi the mortmain statute prohibits the charity from holding real property for more than ten years. *Methodist Hosp. v. Slack, 330 So. 2d 882 (Miss. 1976).*

Gifts to charity may be contested by issue and parents who benefit when the gift is in excess of one half of the estate. N.Y. Est. Powers & Trusts Law § 5-3.3.

(n130)Footnote 130. *In re Tone's Will, 174 N.Y.S. 391 (1919).*

(n131)Footnote 131. 7 Edw. I.

(n132)Footnote 132. *In re Davison's Estate, 215 P.2d 504 (Cal. App. 1950); Application of Franklin Nat'l Bank, 147 N.Y.S.2d 572 (1955); Ruple v. Hiram College, 171 N.E. 417 (Ohio App. 1928).*

Pennsylvania's Mortmain Statute is unconstitutional as violating equal protection clause. *In re Cavill's Estate, 9 A.2d 503 (Pa. 1974); In re Estate of Riley, 329 A.2d 511 (Pa. 1974), cert. denied, 421 U.S. 971 (1975).*

(n133)Footnote 133. *In re Will of Halpern, 368 N.Y.S.2d 845 (1975).*

New York's mortmain statute is not applicable unless there are children who would be entitled to take were not for the bequest. *In re Eckart's Estate, 382 N.Y.S.2d 429 (1976).*

In re Eckart's Estate, 368 N.Y.S.2d 28 (1975); Contin Master of Cairo, 312 N.Y.S.2d 925 (1970), aff'd, 272 N.E.2d 574 (N.Y. 1971).

(n134)Footnote 134. *In re Thomason's Estate, 54 Cal. Rptr. 229 (1966).*

New York's mortmain statute is not applicable unless there are children who would be entitled to take if it were not for the bequest. *In re Eckart's Estate, 382 N.Y.S.2d 429 (1976).*

(n135)Footnote 135. *Strother v. Kennedy, 127 S.E.2d 19 (Ga. 1962).*

Some states have statutes limiting the amount of realty a church may own. *See Goode's Admr. v. Goode, 38 S.W.2d 691 (Ky. 1931); Buchanan v. Willis, 255 S.W.2d 8 (Tenn. 1953).*

(n136)Footnote 136. Such charitable requests are voidable rather than void. *In re Lane's Estate, 186 So. 2d 257 (Fla. 1966).*

(n137)Footnote 137. *See* Richard Schwartz, *The Ohio Mortmain Statute as Amended, 17 Western Res. L. Rev. 83 (1965).*

A charitable request is invalidated in mortmain only if the heirs will benefit thereby. *Central Nat'l Bank v. Morris, 227 N.E.2d 418 (Ohio App. 1967).*

(n138)Footnote 138. Gifts to charity where testator dies within six months after will is made "lapse." *In re Lane's Estate, 186 So. 2d 257 (Fla. 1966).*

(n139)Footnote 139. But it has been said that statutes restricting charitable bequests are not those of mortmain but are designed to protect those who have a better claim to the testator's bounty. *In re Reardon's Estate, 52 Cal. Rptr. 68 (1966).*

(n140)Footnote 140. *Estate of French, 365 A.2d 621 (D.C. 1976),* as violating the U.S. Constitution, Amendments 1 and 5.

Thompson on Real Property, Thomas Editions

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CHAPTER 28 RULES AGAINST PERPETUITIES

3-28 Thompson on Real Property, Thomas Editions § 28.03

AUTHOR: Professor David A. Thomas This chapter is based in part on Ch. 31. George W. Thompson, Commentaries on The Modern Law of Real Property (John S. Grimes ed. 1979), which made a significant contribution toward preserving the American common law on perpetuities. J. Reuben Clark Law School Brigham Young University

§ 28.03 Interests That Are Subject to the Rule Against Remoteness of Vesting

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§ 28.03(a) Contingent Interests

The rule against remoteness of vesting applies basically to contingent interests. n141 Vested interests are not subject to the rule. n142 There are, however, exceptions on both scores. Technically rights of re-entry and possibilities of reverter n143 are contingent not vested yet neither are subject to the rule against remoteness, n144 probably for historical reasons. Reversions are not subject to the rule. n145

Thus, where a grant of land provided that the title should revert to the grantor if the land should be used for any purpose other than those stipulated, it was held not void as a restraint on alienation in violation of the statute against perpetuities, since the land was alienable so long as it was used for the purpose designated. n146

Where a title free of the condition can be treated at any time by all the persons interested joining in a deed, there is no violation of the rule against perpetuities. n147 The right or possibility of reverter upon the determination of a qualified fee is governed by the same rule in regard to remoteness as the right of reverter upon a condition subsequent and is not void on that account. n148 Restraints of forfeitures in preemptive rights are generally subject to the rule against restraints. n149 Whether estates upon condition are subject to the rule against perpetuities, so that if the condition is perpetual and the conditional estate may not arise or vest until after the period limited by that rule, it is void, or whether it would then vest in the grantor the grantor's heir or the grantor's devisee, is a question which must be considered as unsettled. n150

Remoteness has no application to vested estates or interests or such as begin within the period limited by the rule, no matter how long they may continue, but there are cases holding that the particular as well as the contingent devise is void where the contingency is or may be postponed beyond the limitation of the rule n151 and some authorities hold that a vested limitation is void if it follows a void contingent limitation. So under the old two lives in being rule in New York in a gift to A for life then to B for life then to C for life then to the children of D for their lives then to E, the gift to E would be void though a vested remainder. n152

At common law, contingent remainders being destructible were not subject to the rule.

Executory devises are subject to the rule, n153 as now are contingent remainders in some states. n154

Those cases which recognize limitations vested subject to divesting, *i.e.*, where the condition is subsequent as distinguished from contingent interests where the condition is precedent n155 do not apply the rule to such interests merely because the interest may be divested at a period later than that allowed if it vested prior thereto. A clause providing that at the death of the first life tenant the income shall be given to the living children of the first taker and the widow of any child is violative of the statute, since there might be no widow of a child until more than twenty-one years after the death of the first taker. n156

A devise to the testator's children of an undivided interest in a life estate, with remainder in fee limited on each of the interests to the respective surviving issue of each life tenant, and, in default of such issue, over in fee to the testator's surviving children, constituted contingent remainders, and hence constituted a valid suspension of alienation. n157 Generally, the rule is applicable alike to all future interests in real property which are not vested. n158 Under some statutes the rule is made applicable to real estate only, n159 while in others it is applicable to both real and personal property. n160 Future estates to be valid must generally be so limited that in every possible contingency they will terminate within the period prescribed by statute. n161 All future equitable interests in realty are subject to the rule. n162

Under one rule if a class gift is too remote as to some members it is too remote as to all. n163

It was held that where the contingent reversion was to the "farm" rather than to the grantors, their heirs or assigns, the vesting of the reversion was indefinitely suspended, because it was not known who would or might own the farm when the contingency happened. n164

It is not necessary that an interest be certain to vest within the period of the rule, only that it vest, if at all, within that time. n165

§ 28.03(b) Powers of Appointment

The courts have had considerable difficulty in applying the rule to powers of appointment. Definitely the rule also applies to powers. n166 "In powers, questions of remoteness are governed by three rules. 1. If a power can be exercised at a time beyond the limits of the rule against perpetuities, it is bad. 2. A power which cannot be exercised beyond the limits of the rule against perpetuities is not rendered bad by the fact that within its terms an appointment could be made which would be too remote. 3. The remoteness of an appointment depends on its distance from the creation and not from the exercise of the power. The first two rules relate to the creation of powers, the third to their execution." n167

The authorities disagree as to whether a general power to appoint under a will dates from the time of the creation of the power or the time of its exercise. n168 If the donee of the power may not be ascertained within the period of the rule he might not exercise it within the time and the gift of the power is void. n169 If, looked at as of the date of its creation, a power of appointment may not be exercised within the time of the rule it is void, n170 unless it is a general power of appointment where the rule is that the time is counted from the execution of the power not from the date of the instrument creating it. n171 The validity of a special power of appointment dates from the time of its creation, n172 so that if the appointment is ultimately made in such a manner that it would go to someone not in being at the time of creation or twenty-one years thereafter it is void. n173 But if it is so ultimately exercised that it will go within the time set by the rule it is valid. n174 Under the majority rule the period of the rule is calculated from the creation of a general testamentary power of appointment not from the time of its exercise. n175

Under the minority view a general testamentary power of appointment operates as a general power to appoint by will or deed so that the period of the rule begins to run from the date the power is exercised, not the effective date of the trust. n176

The time for testing the validity of limitations made under a general power of appointment is the date of the exercise of the power as though the donee had a fee, not the date of the creation of the power. n177 "If there will always be a tenant with power to alien the fee the future interests are not void no matter how remotely they might vest; if there might come to be a tenant without power to alien the fee because of the future interests, they are void if too remote." n178

§ 28.03(c) Class Gifts

Under the English rule where there is a gift to a class and there is any possibility that any member of the class might not take within the allowable time, the gift is void in toto. n179 But some cases will divide the gift if possible into subclasses and save those which do not violate the rule. n180 Where the gift over is limited on two contingencies one of which is good and the other bad the leading rule has been held to void the gift over. n181 A gift to a class that will not be ascertained until a time too remote is bad even though there are members of the class in existence at the time of the gift who might reach the required age within the time, for they might die before that time. n182 Where a devise is given to a class of persons answering a given description, and any member of that class may possibly have to be ascertained at a period exceeding the limits allowed by law, and is therefore incapable of taking, the whole devise is void. n183

In order for a class gift not to violate the rule against remoteness the entire class as a unit must both close within the period of the rule and also the interest of the members of the class must vest within that time. n184 Even if the class will be ascertained within the period of the rule the gift is void if it will not vest in the class within the allotted time as a gift to A as long as the oak tree stands and then to the children of B. n185 Where a trust is subject to revocation or diminution by the settlor the cases are not in harmony as to whether the time begins to run on the effective date of the trust n186 or on the settlor's death. n187

Even if a gift to one class in a group of classes is void this does not void the gifts to the other classes. n188

The courts have exercised extraordinary control over trusts to avoid the rule. n189 The question of the violation of the rule against remoteness may justify terminating a trust. n190

§ 28.03(d) Miscellaneous Interests

An interest may be in violation of the rule if it affects a property right and still be valid as a contract. n191

There is some authority to the effect that the rule does not only apply to wills and deeds but applies also to contracts. n192

A covenant not to sue, not being an interest in land, was not subject to the rule against perpetuities. n193

The leading rule is that the transfer of an obligation under contract which does not create property rights is subject to the rule even though the contract which creates the obligation is not. n194 Where a class gift remains open to let in afterborn persons so that the rule may be violated the entire class gift fails n195 unless the interests of those born within the appointed time will vest.

Other courts do not, however, apply the rule except as to devises and grants, n196 but the decisions are in conflict as to whether the rule against remoteness applies to contingent executory interests which arise out of contract. n197

A right given under a pipeline contract to permit additional pipelines to be laid at a future date did not violate the rule

against remoteness of vesting. The rule is concerned with the time in which title vests not mere postponement of enjoyment of possession. n198

An option violates the rule against remoteness of vesting where the parties had intended to exercise the option, if at all, only on the current contingency and that there was a possibility that the contingency might not occur within lives in being plus twenty-one years. n199

So while there are authorities holding that options to purchase contained in leases are void if they may be exercised later than the allotted period n200 to the rule. n201 Land purchase contracts have been held outside the rule on the theory that to be enforceable they must be acted upon within a reasonable time. n202 The validity of the option is measured by the twenty-one years in gross. n203 And the leaseholds are subject to the rule. n204

The later English cases n205 hold that a right of re-entry after condition broken is subject to the rule but that a possibility of reverter is not. n206 An executory limitation after a fee tail was valid since it could be destroyed by a common recovery whereas an executory limitation on a fee simple could not be. n207 A power to appoint by will is to be tested for remoteness as of the time of the creation of the power not the exercise thereof by the donee. n208

A trust in a will to benefit the education of an indefinite number of children was held not to be a charitable trust, and so violated the rule against perpetuities. n209 There is disagreement among the courts as to the extent options to buy are affected by the rule against remoteness. n210

Leaseholds are subject to the rule. n211 The rule against remoteness has no application to a lease for an indefinite term immediately effective. n212

While rights of re-entry have been generally free from the rule there has been some contrary authority where the rights are attached to preemptive rights with a condition subsequent. n213

It is held that in the absence of a statute, a right to perpetual renewal of leases is not prohibited by law as creating a perpetuity or a restraint on alienation. n214

There is disagreement among the courts as to whether preemptive rights to purchase may violate the rule against remoteness. n215

Options to purchase not contained in leases have been held to be within the rule. n216 One line of cases holds that an option to renew a lease is not within the rule against remoteness. n217 But there is substantial authority to the contrary. n218 While bare options are subject to the rule against remoteness, an option to purchase as part of a long-term lease of land for exercise of mining rights is a presently vested part of the mineral estate conveyed under the lease and is not subject to the rule. n219 The rule against remoteness is not applicable to covenants creating equitable servitudes as to use. n220 Nor is a covenant against use for a particular purpose. n221

Mortgages are not subject to the rule. n222 The rule has no application to contracts that do not create future interests in personalty. n223 Options without time limit to purchase mineral interests are valid. n224 The rule has been held to apply to cases where trusts have been created. n225 A power of trust of mortgage property was not a restraint on alienation. n226

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LEXIS: rule w/5 remoteness w/2 vesting w/30 interest! w/2 leasehold or contingent

The rule against remoteness applies to equitable interests and estates as well as legal interests and estates. n227

Conveyance of mineral interests contingent upon the discovery of minerals are subject to the rule, n228 but covenants in deeds are not so subject. n229

The rule has been held applicable to easements. n230

An equitable interest that can be enforced by specific performance is, unlike a mere contract right, subject to the rule against remoteness. n231

The rule against remoteness does not apply to a mere usufruct. n232

A grant of an easement is subject to the rule if it is in futuro, not immediately vested and may not vest within the period of the rule. n233

The rule against remoteness has been held inapplicable to "no term" oil and gas leases. n234 A preemptive right without limit as a property right was held an unreasonable restraint on alienation and violated the rule against perpetuities. n235 The rule against perpetuities applies only to estates which are limited to vest on the happening of a contingency. n236 The rule applies to an executory interest or estate, being an interest to take effect on the happening of a future contingency. Where the limitation tends to create a perpetuity it is void. n237 To constitute a valid executory limitation, the estate must be limited to vest in possession within the period prescribed by the rule. n238 The executory interest is void for remoteness if at its creation there exists a possibility that it may not take effect during any fixed number of now existing lives, nor within twenty-one years and ten months after the expiration of such lives, even though it is highly probable, or, indeed, almost certain that it will take effect within the time prescribed. n239 In the application of the rule, twenty-one years are allowed independently of any person's actual minority, but the ten months are allowed only when there is a child *en ventre sa mere*. n240

FOOTNOTES:

(n1)Footnote 141. *Sands v. Fly, 292 S.W.2d 706 (Tenn. 1956),* 57 a.l.r.2d 188; *In re Ashforth, L.R., 1 Ch. 535 (1905)* (rule applies to contingent remainders legal as well as equitable if they are too remote, but not to contingent remainders after fee tails since the fee tail could be destroyed by a fine or common recovery by the tenant).

Colorado Nat'l Bank v. McCabe, 353 P.2d 385 (Colo. 1960) (violating rule).

See Robert J. Lynn & John W. VanDoren, *Applying the Rule Against Perpetuities to Remainders and Executory Interests: Orthodox Doctrine and Modern Cases, 27 U. Chi. L. Rev. 436 (1960).*

See Marc Moller, *The Condominium Confronts the Rule Against Perpetuities, 10 N.Y. L.F. 377 (1964).*

A savings clause which attempted to rewrite the rule so that it would be actuated only upon the happening of an event which made remoteness an inevitability did not save the remainder interest. *Hagemann v. National Bank & Trust Co., 237 S.E.2d 388 (Va. 1977).*

It was indicated in *Estate of Unitt, 250 N.W.2d 644 (Neb. 1977),* that a contingent remainder is subject to the rule.

(n2)Footnote 142. *Haggerty v. Oakland, 326 P.2d 957 (Cal. App. 1963),* 66 a.l.r.2d 718 (dictum); *Johnson v. Pittsburgh Consol. Coal Co., 311 S.W.2d 537 (Ky. 1958).*

A presently vested easement subject to expansion on certain contingencies did not violate the rule against perpetuities. *Traywick v. Transcontinental Gas Pipe Line Corp., 170 So. 2d 802 (Ala. 1965).*

Remainder vested subject to divesting is not subject to rule. *Second Nat'l Bank of New Haven v. Harris Trust & Sav.*

Bank, 283 A.2d 226 (Conn. 1971).

Vested interests not subject to rule. *Second Nat'l Bank of New Haven v. Harris Trust & Sav. Bank, 283 A.2d 226 (Conn. Super. 1971).*

Fidelity Union Trust Co. v. Egenolf Day Nursery Ass'n, 166 A.2d 402 (N.J. Super. 1960) (rule is directed solely against too-long postponement of vesting, not enjoyment).

Postponement of possession is not affected. *McEwen v. Enoch, 204 P.2d 736 (1949); Forbringer v. Romano, 76 A.2d 825 (N.J. Super. 1950); McQueen v. Branch Banking & Trust Co., 68 S.E.2d 831 (N.C. 1952).*

A limitation to W, X and Y for life and on their death to be divided among the children of X and Y when they reached 25, vested in each child at the testator's death subject to opening up to admit afterborn persons until the death of X and Y and so did not violate the rule. "When" held not to be a word of contingency. *Wachovia Bank & Trust Co. v. Taylor, 120 S.E.2d 588 (N.C. 1961).*

In a testamentary trust for 30 years, the principal at the end of that time was to be distributed equally to the testator's five children and in the event of the death of any of the children, then to their children, and if they left no children, then to other residuaries, was held not to violate the rule against remoteness because the interest was vested subject to divesting and the limitations over were to the other children. *Finkbeiner v. Finkbeiner, 165 N.E.2d 825 (Ohio App. 1959).*

Trust for children's lives is valid as not too remote. *Pipkin v. Pipkin, 370 P.2d 826 (Okla. 1962).*

Where a testator gives a present gift of income from specific property with the principal to be given over at a future time to the same taker, even where there is a possibility of divestment of either the income or principal prior to the time the principal is to be turned over, the taker takes immediate vested income which is in the principal not subject to the rule against remoteness. *In re Mikaloff's Estate, 160 A.2d 703 (Pa. 1960).*

If all interests vest within the allotted period the trust may continue beyond lives in being and 21 years. *Black v. Gettys, 119 S.E.2d 660 (S.C. 1961).*

Not necessary that interest vest in possession within period. *Anderson v. Anderson, 386 P.2d 406 (Utah 1963); Snyder Bros., Inc. v. Peoples Natural Gas Co., 676 A.2d 1226 (Pa. 1996)* (rule against perpetuities did not apply to fee simple determinable interest granted to lessee, because that interest was already vested); *Hubscher & Son v. Storey, 578 N.W.2d 701 (Mich. App. 1998)* (profit a prendre, a vested interest, is not subject to the rule against perpetuities).

Condominiums are exempt from the rule against remoteness, 34 Wyo. Stat. 389.10.

(n3)Footnote 143. *Cowell v. Colorado Springs Co., 100 U.S. 55 (1879); Hopkins v. Grimshaw, 165 U.S. 342 (1897); Dozier v. Troy Drive-In Theatres, 89 So. 2d 537 (Ala. 1956); Strong v. Shatto, 187 P. 159 (Cal. App. 1919); Wakefield v. Van Tassell, 66 N.E. 830 (Ill. 1903),* 65 l.r.a. 511; *Congregational Church Bldg. Soc'y v. Everett, 36 A. 654 (Md. 1897),* 35 l.r.a. 693; *Tobey v. Moore, 130 Mass. 448 (1881).*

See Possibility of Reverter and the Rule Against Perpetuities in Kentucky, 46 Ky. L.J. 124 (1957); Knowles v. South County Hosp., 140 A.2d 499, 141 A.2d 263 (R.I. 1958) (will gave limitation over to life tenant's eldest male heir, dependent upon specific conditions with reversion on breach and then devised the reversion); *Hunt v. Carroll, 157 S.W.2d 429 (Tex. Civ. App. 1941)* (an executory interest can vest in interest prior to vesting in possession).

The rule is directed solely against the unlawful postponement of vesting and is not applicable to possession or

enjoyment. *Forbringer v. Romano, 71 A.2d 660 (N.J. Super. 1950); Finch v. Honeycutt, 97 S.E.2d 478 (N.C. 1957).*

Hopkins v. Grimshaw, 165 U.S. 342 (1897); French v. Old South Soc'y, 106 Mass. 479 (1871); Tobey v. Moore, 130 Mass. 448 (1881); First Universalist Soc'y v. Boland, 29 N.E. 524 (Mass. 1892), 15 l.r.a. 231. *See Hinton v. Gilbert, 128 So. 604 (Ala. 1930),* 70 a.l.r. 1192.

Accord: Restatement, Property, § 14, Comment b.

In *Fletcher v. Ferrill, 227 S.W.2d 448 (Ark. 1950),* 16 a.l.r.2d 1240, there was reversion to grantor's heirs after life estate and remainder to orphan's home. The court held that this was a possibility of reverter to grantor, and so words of limitation thus passed under residuary clause, and so not under rule against perpetuities as intestate; even if "heirs" were words of purchase, and void under rule of perpetuities, it would go under residuary clause.

Limitation over after determinable fee invalid but possibilities of reverter are valid. *City of Klamath Falls v. Bell, 490 P.2d 515 (Or. App. 1971). Snyder Bros., Inc. v. Peoples Natural Gas Co., 676 A.2d 1226 (Pa. 1996)* (rule against perpetuities did not apply to fee simple determinable interest granted to lessee, because that interest was already vested); *Hubscher & Son v. Storey, 578 N.W.2d 701 (Mich. App. 1998)* (profit a prendre, a vested interest, is not subject to the rule against perpetuities).

(n4)Footnote 144. *Tobey v. Moore, 130 Mass. 448 (1881).*

Rights of re-entry: *Cowell v. Colorado Springs Co., 100 U.S. 55 (1879); Libby v. Winston, 93 So. 631 (Ala. 1922); Strong v. Shatto, 187 P. 159 (Cal. App. 1919); City Nat'l Bank v. Bridgeport, 147 A. 181 (Conn. 1929); Gray v. Chicago, M. & St. P.R. Co., 59 N.E. 950 (Ill. 1901); Wakefield v. Van Tassell, 66 N.E. 830 (Ill. 1903),* 65 l.r.a. 511; *French v. Old South Soc'y, 106 Mass. 479 (1871); Koehler v. Rowland, 205 S.W. 217 (Mo. 1918),* 9 a.l.r. 107.

Possibilities of reverter: *North v. Graham, 85 N.E. 267 (Ill. 1908),* 18 l.r.a. (N.S.) 624; *First Universalist Soc'y v. Boland, 29 N.E. 524 (Mass. 1892),* 15 l.r.a. 231; *Institution for Sav. v. Roxbury Home for Aged Women, 139 N.E. 301 (Mass. 1923); Lougheed v. Dykeman Baptist Church & Soc'y, 40 N.Y.S. 586 (1896); Pennsylvania Horticultural Soc'y v. Craig, 87 A. 678 (Pa. 1913); Yarbrough v. Yarbrough, 269 S.W. 36 (Tenn. 1925);* Huggett v. Dep't of Natural Resources, No. 195548 (Mich. App. 1998) (LEXIS 280) (court notes that rights of reentry are not subject to the rule against perpetuities).

Right of re-entry held to violate rule. *Yarbrough v. Yarbrough, 269 S.W. 36 (Tenn. 1925).*

(n5)Footnote 145. *Erskine v. Klein, 126 S.E.2d 755 (Ga. 1962).*

But see In re Dees' Estate, 308 P.2d 90 (Kan. 1957) (reversion over to testator's heirs if devisee or heirs should ever sell or mortgage held void for remoteness).

(n6)Footnote 146. *Fayette County Bd. of Educ. v. Bryan, 91 S.W.2d 990 (Ky. 1936).*

The possibility of reverter, being a vested interest in real property, is capable at all times of being released to the person holding the estate on condition, or his grantee, and, if so released, vests an absolute and indefeasible title thereto. The grant or devise of a fee on condition does not, therefore, fetter and tie up estates so as to prevent their alienation, and thus contravene the policy of the law, which aims to secure the free and unembarrassed disposition of real property. It is otherwise with gifts of estates in fee, with limitations over upon a condition or event of an uncertain or indeterminate nature. The limitation over, being executory and depending upon a condition, or an event which may never happen, passes no vested interest or estate. It is impossible to ascertain in whom the ultimate right to the estate may vest, or whether it will ever vest at all, and therefore no conveyance or mode of alienation can pass an absolute

title, because it is wholly uncertain in whom the estate will vest on the happening of the event or breach of the condition upon which the ulterior gift is to take effect. Church in *Brattle Square v. Grant, 69 Mass. 142 (3 Gray 1855), 63* am. dec. 725, per Bigelow, J.

(n7)Footnote 147. *Ingersoll Eng'g & Constr. Co. v. Crocker, 228 F. 844* (6th Cir., 1915).

Customary and Expandable Easements: Applicability of the Rule Against Perpetuity, and Jardins, Mortmain Statutes: Questions of Constitutionality, 52 Notre Dame Lawyer 638 (1977).

(n8)Footnote 148. *First Universalist Soc'y v. Boland, 29 N.E. 524 (Mass. 1892),* 15 l.r.a. 231, Allen, J., said: "The very many cases cited in Gray, Prop., §§ 305-312, show conclusively that the general understanding of courts and of the profession in America has been that the rule as to remoteness does not apply, though the learned author thinks this view erroneous in principle"; *Jones v. Burns, 74 So. 2d 866 (Miss. 1954)* (reservation to grantor or his heirs is not within the rule).

(n9)Footnote 149. Applicable if restraint is reasonable. *Missouri State Hwy. Comm'n v. Stone, 311 S.W.2d 588 (Mo. App. 1958).*

Applicable, Cook v. Cook, 171 S.E.2d 508 (Ga. 1969); Hardy v. Galloway, 15 S.E. 890 (N.C. 1892).

(n10)Footnote 150. F.C. Loring, *Conditions, Estates upon, 1 Am. L. Rev. 265.* church in brattle square v. *Grant, 69 mass. 142 (3 Gray 1855), 63 Am. Dec. 725* (conditional limitation).

See Joseph B. Sherrard, *Perpetuities In Michigan Today*, Mich. Bar. J., March 1950, p. 5.

(n11)Footnote 151. *Hopkins v. Grimshaw, 165 U.S. 342 (1897)* (a resulting trust is not within rule); *Shoemaker v. Newman, 65 F.2d 208 (D.C. Cir. 1933); McKibben v. Pioneer Trust & Sav. Bank, 6 N.E.2d 619 (Ill. 1937); Barnum v. Barnum, 90 Am. Dec. 88 (Md. 1866); Deford v. Deford, 36 Md. 168 (1872); Hollander v. Central Metal & Supply Co., 71 A. 442 (Md. 1908),* 23 l.r.a. (N.S.) 1135; *Thorndike v. Loring, 81 Mass. 391 (15 Gray 1860); Fosdick v. Fosdick, 88 Mass. 41 (6 Allen 1863); In re Friday's Estate, 170 A. 123 (Pa. 1933),* 91 a.l.r. 766.

See Harold C. Woerner, *The Rule Against Perpetuities, 21 Tenn. L. Rev. 641 (1951).*

Direction of payment at the age of 35 was held as not postponing vesting so as to violate the rule against perpetuities. *Zimmerman v. First Nat'l Bank of Birmingham, 348 So. 2d 1359 (Ala. 1977).*

(n12)Footnote 152. *Supra*, n.1. *See also* In re Mortimer 2 ch. 502 (1905).

(n13)Footnote 153. Hancock v. Watson, L.R. 27, App. Cas. 14.

Executory devise valid if vests within the rule. *Erickson v. Palmer, 315 P.2d 164 (Or. 1957).*

A fund to be divided among those then living when the youngest grandchild became 25 was void. The contingent remainder was regarded as too remote. *Hagemann v. National Bank & Trust, 237 S.E.2d 388 (Va. 1977).*

(n14)Footnote 154. *Barry v. Newton, 273 P.2d 735 (Colo. 1954).*

See Robert J. Lynn & John W. Van Doren, *Applying the Rule Against Perpetuities to Remainders and Executory Interests: Orthodox Doctrine and Modern Cases, 27 U. Chi. L. Rev. 436 (1960). Hamman v. Bright & Co., 924 S.W.2d 168 (Tex. 1996)* (executory interest which cannot vest until condition precedent occurs is subject to rule against perpetuities).

(n15)Footnote 155. For a discussion of vested subject to divesting, *see* § 1988.

Dean v. First Nat'l Bank, 341 P.2d 512 (Or. 1959).

If there is a present gift of income to one to whom the principal is to be distributed later, though either may be divested, the gift is vested subject to being divested and, therefore, not too remote. *In re Mikaloff's Estate, 160 A.2d 703 (Pa. 1960).*

(n16)Footnote 156. *Tichenor v. Mechanics & Metals Nat'l Bank, 125 A. 323 (N.J. Eq. 1924).*

Limitation over the children or the survivors of them was made when the youngest of seven children living at the testatrix' death attained 21 was also void under the old *New York rule. In re Brennan's Will, 273 N.Y.S.2d 378 (1966).*

(n17)Footnote 157. *Waldon v. Baker, 88 P.2d 352 (Okla. 1939).*

Devise in trust for sons and son's issue born 20 years after son's death was held to be too remote where contingent. *Thomas v. Harrison, 191 N.E.2d 862 (Ohio 1962).*

(n18)Footnote 158. *Warner & Swasey Co. v. Rusterholz, 41 F. Supp. 498 (D. Minn. 1941); Reimer v. Smith, 142 So. 603 (Fla. 1932); Ashmore v. Newman, 183 N.E. 1 (Ill. 1932); Andrews v. Lincoln, 50 A. 898 (Me. 1901),* 56 l.r.a. 103; *Springfield Safe Deposit & Trust Co. v. Ireland, 167 N.E. 261 (Mass. 1929),* 64 a.l.r. 1071; *In re Johnston's Estate, 39 A. 879 (Pa. 1898); Barton v. Thaw, 92 A. 312 (Pa. 1914); Kennedy v. McMullen, 39 S.W.2d 168 (Tex. Civ. App. 1931).*

A limitation over after a determinable fee is void for remoteness and when the fee terminates the property returns to the heirs of the grantor. The Rule is one of law, not of construction. *Shipton v. Sheridan, 531 S.W.2d 291 (Mo. App. 1975).*

(n19)Footnote 159. *Becker v. Chester, 91 N.W. 87, 650 (Wis. 1902).*

It was indicated in *Estate of Unitt, 250 N.W.2d 644 (Neb. 1977),* that a contingent remainder is subject to the rule.

A trust to be distributed at the end of 25 years to heirs of three named persons was held to be too remote. *Palmer v. Ketner, 223 S.E.2d 913 (S.C. App. 1976).*

The rule affects contingent remainders. *Hagemann v. National Bank & Trust Co., 237 S.E.2d 388 (Va. 1977).* Forbidding alienation until youngest grandchild reached 25 was too remote.

The rule against perpetuities applies to real property and has no application to personal contracts which do not create or transfer any future equitable right in property. *W. D. Nelson & Co. v. Taylor Heights Dev. Corp., 150 S.E.2d 142 (Va. 1966).*

(n20)Footnote 160. *St. Louis Union Trust Co. v. Bassett, 85 S.W.2d 569 (Mo. 1935),* 101 a.l.r. 1266.

Forbringer v. Romano, 71 A.2d 660 (N.J. Super. 1950) (a gift of remainder to grandchildren of the testator vested subject to opening up and did not violate the rule).

In a gift to a class remainder with provision that if anyone should die without children surviving, his or her share should go to the survivors, the devise of the remainder in the alternative vested subject to opening and not subject to rule against remoteness. *Sands v. Fly, 292 S.W.2d 706 (Tenn. 1956),* 57 a.l.r.2d 188.

The rule has nothing to do with duration of vested interests. *Anderson v. Anderson, 386 P.2d 406 (Utah 1963).*

(n21)Footnote 161. *In re Von Deilen's Will, 278 N.Y.S. 689 (1935).*

(n22)Footnote 162. *Bigelow v. Cady, 48 N.E. 974 (Ill. 1897); Beverlin v. First Nat'l Bank, 98 P.2d 200 (Kan. 1940),* 155 a.l.r. 688; *Shepperd v. Fisher, 103 S.W. 989 (Mo. 1907); Hartson v. Elden, 26 A. 561 (N.J. Eq. 1893); In re Pruner's Estate, 162 A.2d 626 (Pa. 1960)* (limitation over after a determinable fee void for remoteness).

But under the common law rule, successive life estates if all are in being do not violate the rule. *Pixlee v. Petty, 274 S.W.2d 257 (Mo. 1955).*

(n23)Footnote 163. *See American Secur. & Trust Co. v. Cramer, 175 F. Supp. 367 (D.D.C. 1959); Parker v. Parker, 113 S.E.2d 899 (N.C. 1960).*

All or nothing rule of class gifts as respects remoteness does not prevail in *Mississippi. Carter v. Berry, 140 So. 2d 843 (Miss. 1962).*

(n24)Footnote 164. *McGaughey v. Spencer County Board of Educ., 149 S.W.2d 519 (Ky. 1941).*

(n25)Footnote 165. Where agreement of lease provided that the lessor leased and demised to the tenant, the tenant had a present right to possession at a future time and so not subject to the rule. *Isen v. Giant Food, Inc., 295 F.2d 136 (D.C. Cir. 1961).*

(n26)Footnote 166. *In re Trotter's Estate, 23 N.Y.S.2d 1007 (N.Y. 1940); In re Bearns' Estate, 23 N.Y.S.2d 1006 (N.Y. 1939); Harston v. Elden, 26 A. 561* (N.J. Eq.) (a power which may not be exercised within the rule is void); *Burlington County Trust Co. v. DiCastelcicala, 66 A.2d 164 (N.J. 1949); Moskowitz v. Federman, 51 N.E.2d 48 (Ohio App. 1943); In re Mifflin's Appeal, 15 A. 525* (Pa.), 1; *In re Warren's Estate, 182 A. 396 (Pa. 1936),* 104 a.l.r. 1345.

See John Chipman Gray, *General Powers and the Rule Against Perpetuities, 26 Harv. L. Rev. 720;* Albert Martin Kales, *General Powers and the Rule Against Perpetuities, 26 Harv. L. Rev. 64 (1912);* J.L. Thorndike, *General Powers and Perpetuities, 27 Harv. L. Rev. 705 (1914).*

In the case where general testamentary powers of appointment held that as respects the rule against remoteness of vesting the period begins from the date of donee's death. *Industrial Nat'l Bank v. Barrett, 220 A.2d 517 (R.I. 1966)* (minority rule).

See Lawrence Berger, *General Power of Appointment as an Interest in Property, 40 Neb. L. Rev. 104 (1960);* Lawrence M. Jones, *The Rule Against Perpetuities and Powers of Appointment: An Old Controversy Revived, 54 Iowa L. Rev. 456 (1968).*

(n27)Footnote 167. *Jackson v. Phillips, 14 Allen (96 Mass.) 539 (1867). See Bishop v. Bishop, 177 N.E. 302 (N.Y. 1931); In re Carvalho's Will, 57 N.Y.S.2d 311 (N.Y. 1944).*

In *Easton v. Hall, 154 N.E. 216 (Ill. 1926),* a trustee of the rest and residue of an estate was created to pay annuities to two sons of testatrix and their "widows" if any survive the sons. The corpus was given over to persons ascertainable only on the death of all the annuitants. One son predeceased testatrix. The other son, Charles, was 59 when testatrix died, and was then married to his second wife, who was some 15 years younger than himself. Because of the possibility that Charles might marry again, and die survived by this woman as his widow, and that such "widow" might not have been yet born when testatrix died, the gift over as to the corpus was wholly invalid. Accord: *Overby v. Scarborough, 90 S.E. 67 (Ga. 1916).*

In *Murphey v. Brown, 62 N.E. 275 (Ind. 1901),* testator's will gave legacies on conditions which would have violated the rule against perpetuities if he had forthwith died. All these legatees predeceased testator. The gift of the residue of the estate was good.

In *Bailey v. Bailey, 97 N.Y. 460* (=hr2), a testator created a trust to apply rents and profits for three lives. The widow, one of the three lives, renounced her rights under the will and claimed dower. The trust for the duration of the other two lives was sustained. *Cf., People's Trust Co. v. Flynn, 80 N.E. 1098 (N.Y. 1907).*

> In powers, questions of remoteness are governed by three rules. 1. If a power can be exercised at a time beyond the limits of the rule against perpetuities, it is bad. 2. A power which cannot be exercised beyond the limits of the rule against perpetuities is not rendered bad by the fact that within its terms an appointment could be made which would be too remote. 3. The remoteness of an appointment depends on its distance from the creation and not from the exercise of the power. The first two rules relate to the creation of powers, the third rule to their execution.

Gray, supra, n.1 p. 397.

> A power given to the unborn child of a living person is void; that is, if it is a power to be exercised by will only, or a special power to be exercised by deed.

Gray, supra, n.1 § 477, p. 400. *Camden Safe Deposit & Trust Co. v. Scott, 189 A. 653 (N.J. Eq. 1937),* 110 a.l.r. 1442.

See W. Barton Leach, *Powers of Sale in Trustees and the Rule Against Perpetuities, 47 Harv. L. Rev. 948 (1934).*

Limitation to charity over after gift to individuals held too remote. *Colorado Nat'l Bank v. McCabe, 353 P.2d 385 (Colo. 1960).*

A gift for a private mausoleum is within the rule against remoteness. *Eaton v. Miller, 250 A.2d 220 (Me. 1969).*

> The period of time during which an interest is destructible, pursuant to the uncontrolled volition, and for the exclusive personal benefit of the person having such a power of destruction is not included in determining whether the limitation is invalid under the rule against perpetuities.

Restatement, Property, § 373, *quoted in Ryan v. Ward, 64 A.2d 258 (Md. 1949),* 7 a.l.r.2d 1079.

If the donor of the power has the power to revoke the trust the rule against remoteness does not begin to operate until the estates become indestructible. *Fitzpatrick v. Mercantile-Safe Deposit & Trust Co., 155 A.2d 702 (Md. 1959).*

Held that the period of remoteness begins to run from the date of execution of a testamentary power of appointment given to a life tenant, where the donee had the power to appoint a new trustee or to revoke the trust upon happening of a contingency. *Fitzpatrick v. Mercantile-Safe Deposit & Trust Co., 155 A.2d 702 (Md. 1959), 20 Md. L. Rev. 142.*

Gift of remainder to such issue of life tenant as I may hereafter appoint was valid though no appointment thereafter made, all taking equally in default of appointment. *In re Fabbri's Will, 140 N.E.2d 269 (N.Y. 1957).*

A special power of appointment is too remote if it may be exercised at any time too late measured from the time of creation of the power. *Thomas v. Harrison, 191 N.E.2d 862 (Ohio 1962).*

Appointee's right vested upon the date of execution of the testamentary power of appointment. *Dean v. First Nat'l Bank, 341 P.2d 512 (Or. 1959).*

Finding that one to life remainder to another was valid. It was unsuccessfully argued that this was a dangerous "perpetuity." *Child v. Baylie, Cro. Jac. 459, 79 Eng. Rep. 393.*

(n28)Footnote 168. From time of creation. *Equitable Trust Co. v. Snader, 151 A. 712 (Del. 1930); Reed v. McIlvain, 77 A. 329 (Md. 1910); Gambrill v. Gambrill, 89 A. 1094 (Md. 1914); Minot v. Paine, 120 N.E. 167 (Mass. 1918),* 1 a.l.r. 365; *Cox v. Dickson, 100 A. 947 (Pa. 1917); Crolius v. Kramer, 123 A. 808 (Pa. 1924).*

Contra, Miller v. Douglass, 213 N.W. 320 (Wis. 1927).

Power of appointment to make distribution of a testamentary trust on death of life tenant did not violate the rule. *In re Stewart's Estate, 242 So. 2d 781 (Fla. App. 1971).*

General power of appointment is judged as of **the** time of exercise. *In re McMurtry's Estate, 326 N.Y.S.2d 965 (1971).*

For the purpose of the rule, interests stemming from a power do not vest until the power is exercised. *Dollar Sav. & Trust Co. v. First Nat'l Bank of Boston, 285 N.E.2d 768 (Ohio 1972).* Will left power of appointment to life tenant who appointed to her own trust. The trust appointed the grandchildren of donee of power. But all of donee's children were alive at death of testator.

The rule begins to run from the time of exercise of a general testamentary power of appointment. *Industrial Nat'l Bank v. Barrett, 220 A.2d 517 (R.I. 1966);* similar results under the Wisconsin statute. *Miller v. Douglass, 213 N.W. 320 (Wis. 1927).*

See Lawrence M. Jones, *The Rule Against Perpetuities and Powers of Appointment: An Old Controversy Revived, 54 Iowa L. Rev. 456 (1968).*

(n29)Footnote 169. *Hopkinson v. Swaim, 119 N.E. 985 (Ill. 1918); In re Appleton's Appeal, 20 A. 521 (Pa. 1890).*

(n30)Footnote 170. *Northern Trust Co. v. Porter, 13 N.E.2d 487 (Ill. 1938)* (time runs from date of creation of general testamentary power to appoint); *Webb v. Sadler, 14 L.R.-Eq. 533.*

(n31)Footnote 171. *In re Mifflin's Appeal, 15 A. 525 (Pa. 1888),* 1 l.r.a. 453.

Contradistinguished from the case of the creation of a future interest in the original will or deed is when such interest is created by the donee of a power. While the remoteness of the appointed estate is still measured from the time of the creation of the power (Lawrence's Est., *infra*), it is the fact and not the possibility which rules. If the appointment as actually made does not violate the rule, such appointment is not rendered void merely because the appointee might have appointed in a manner too remote. It is well settled that the exercise of a power of appointment is not rendered void because of the fact that within its terms an estate might be created which possibly would be too remote. The determination of the validity of the appointment in such cases depends upon the facts as they actually exist at the time the appointment is made and not possibilities; *In re Lawrence's Estate, 20 A. 521 (Pa. 1890); Northern Trust Co. v. Porter, 13 N.E.2d 487 (Ill. 1938).*

In testing any even case under the rule there is a distinction made between the effect of testamentary or inter vivos provisions made by the testator or settlor himself, and those made by a donee of a power of appointment under the terms of the trust. The distinction while narrow, is, nevertheless, extremely important. In cases of trusts created by a testator or settlor the validity of the disposition is governed by possible events, not necessarily by actual events as they may have happened to materialize. For instance, if an interest could arise beyond the limit fixed by the rule, the disposition is void

irrespective of the fact that such a person was in fact born within the limitation of the rule. The test is whether, under the provisions of the trust, it is possible for a person to take an interest held to be too remote under the rule. If so, the limitation is void; Thomas Jarman. A Treatise on Wills (6th ed. 1910); *In re Lilley's Estate, 116 A. 392 (Pa. 1922),* 28 a.l.r. 366; *Ledwith v. Hurst, 130 A. 315 (Pa. 1925); In re Scott's Estate, 152 A. 560 (Pa. 1930); In re Friday's Estate, 170 A. 123 (Pa. 1933),* 91 a.l.r. 766.

(n32)Footnote 172. *Bartlett v. Sears, 70 A. 33 (Conn. 1908); Brown v. Columbia Fin. & Trust Co., 97 S.W. 421 (Ky. 1906); Thomas v. Gregg, 24 A. 418 (Md. 1892); Dexter v. Attorney General, 112 N.E. 946 (Mass. 1916); Cleveland Trust Co. v. McQuade, 142 N.E.2d 249 (Ohio 1957); In re Lawrence's Estate, 20 A. 521 (Pa. 1890).*

(n33)Footnote 173. *Hopkinson v. Swaim, 119 N.E. 985 (Ill. 1918); Albert v. Albert, 12 A. 11 (Md. 1888); Levenson v. Manly, 87 A. 261 (Md. 1913); Stone v. Forbes, 75 N.E. 141 (Mass. 1905).*

(n34)Footnote 174. *Hillen v. Iselin, 39 N.E. 368 (N.Y. 1895).*

(n35)Footnote 175. Under the weight of authority the rule is to be applied to a general power to appoint by will as though it were a special power so that the period is computed from the time of creation of the power. *Mondell v. Thom, 143 F.2d 157 (1944); Northern Trust Co. v. Porter, 13 N.E.2d 487 (Ill. 1938); Gambrill v. Gambrill, 89 A. 1094 (Md. 1914); Lamkin v. Safe Deposit & Trust Co., 64 A.2d 704 (Md. 1949); Minot v. Paine, 120 N.E. 167 (Mass. 1918),* 1 a.l.r. 365; *In re Huntington's Estate, 170 N.Y.S.2d 452 (1957); American Trust Co. v. Williamson, 46 S.E.2d 104 (N.C. 1948); Cleveland Trust Co. v. McQuade, 142 N.E.2d 249 (Ohio App. 1957); In re Boyd's Estate, 49 A. 297 (Pa. 1901); In re Lovering's Estate, 96 A.2d 104 (Pa. 1953).*

Trust to wife for life and then to son for life with testamentary power of appointment. Son by will appointed to his wife if she survived him 20 days. Held too remote the son's wife was the third life and the 20-day condition made the appointment too remote. *In re Phelps' Trust, 159 N.Y.S.2d 55 (1957).*

Contra, Miller v. Douglass, 213 N.W. 320 (Wis. 1927).

The rule against remoteness runs from the date of exercise, not the date of creation of a general testamentary power of appointment. *Industrial Nat'l Bank v. Barrett, 220 A.2d 517 (R.I. 1966).*

(n36)Footnote 176. *Cleveland Trust Co. v. McQuade, 133 N.E.2d 664 (Ohio 1955); Miller v. Douglass, 213 N.W. 320 (Wis. 1927).*

(n37)Footnote 177. *In re Mifflin's Appeal, 15 A. 525 (Pa. 1888),* 1 l.r.a. 453.

A savings clause which attempted to rewrite the rule so that it would be actuated only upon the happening of an event which made remoteness an inevitability did not save the remainder interest. *Hageman v. National Bank & Trust Co., 237 S.E.2d 388 (Va. 1977).*

(n38)Footnote 178. *See* Everett Fraser, *The Rationale of the Rule Against Perpetuities, 6 Minn. L. Rev. 560, 575 (1922).*

(n39)Footnote 179. *Smith v. Internal Rev. Comm'r, 140 F.2d 759 (3d Cir. 1944); In re Kountz's Estate, 62 A. 1103 (Pa. 1906).*

> When a remainder is given to a class, and such remainder is vested in certain members of the class subject to open and let in other members, born afterwards or afterwards fulfilling a condition, the shares in such remainder or interest may be obnoxious to the Rule against Perpetuities, because their number and therefore their size may not be determinable until too remote a period. For instance, suppose land is devised to A, a bachelor, for life, remainder to his eldest son for life, remainder to those children of B

> who reach twenty-five. At the testator's death B is living and one of his children, C, has reached twenty-five. The interest of C is said to be vested, and yet the devise to B's children is invalid as too remote; for, although the minimum size of each child's share will be fixed at the death of B, the maximum may not be determined until twenty-five years after.

Gray, supra, n.1 (4th ed., 1942), § 205.2. *See In re Whitten, 62 L.T. 391 (1890).*

If the class gift lets in afterborn children who may be born too late the whole gift is void. *Leake v. Robinson, 2 Mer. 363, 16 R.R. 168, 35 Eng. Rep. 979.*

American Sec. & Trust Co. v. Cramer, 175 F. Supp. 367 (D.D.C. 1959) (dictum); *Crockett v. Scott, 284 S.W.2d 289 (Tenn. 1955),* 56 a.l.r.2d 442. *See Parker v. Parker, 113 S.E.2d 899 (N.C. 1960).*

The fact that interest taken by members of a class will diminish by birth of later members does not make the interest of the members of the class contingent. *Loadholt v. Harter, 194 S.E.2d 880 (S.C. 1973).*

(n40)Footnote 180. *Smith v. Internal Rev. Comm'r, 140 F.2d 759 (1944); Shepard v. Union & New Haven Trust Co., 138 A. 809 (Conn. 1927); Turner v. Safe Deposit & Trust Co., 129 A. 294 (Md. 1925); Dorr v. Lovering, 18 N.E. 412 (Mass. 1888); Kostarides v. Central Trust Co., 122 N.W.2d 729 (Mich. 1963); In re Herrmann's Estate, 22 A.2d 262 (N.J. Eq. 1941), aff'd in part, 28 A.2d 517 (N.J. Eq. 1942);* In re Jones' Estate, 29 D. & C. 2d 437, *aff'd, 190 A.2d 120 (Pa. 1963); Industrial Trust Co. v. Flynn, 60 A.2d 851 (R.I. 1948); Cattlin v. Brown, 11 Hare 372, 68 Eng. Rep. 1319 (1853).*

A trust to be distributed at the end of 25 years to heirs of three named persons was too remote. *Palmer v. Ketner, 223 S.E.2d 913 (S.C. App. 1976).*

(n41)Footnote 181. Refusing to split the alternatives. *Easton v. Hall, 154 N.E. 216 (Ill. 1926); Thorne v. Continental Nat'l Bank & Trust Co., 27 N.E.2d 302 (Ill. App. 1940);* Hancock v. Watson, H.L. L.R. 27 App. Cas. (1901).

Splitting the contingency. *Longhead v. Phelps, 2 W.B.L. 703, 96 Eng. Rep. 414.*

(n42)Footnote 182. *Taylor v. Crosson, 98 A. 375 (Del. Ch. 1916).*

(n43)Footnote 183. *Leake v. Robinson, 2 Mer. 363, 16 R.R. 168, 35 Eng. Rep. 979 (1817). But see Hills v. Simonds, 125 Mass. 536 (1879),* separating a gift into several classes to preserve the gift to valid classes.

A class gift is not invalid merely because the interest of one member might vest too remotely. *Carter v. Berry, 140 So. 2d 843 (Miss. 1962).*

A devise to testator's son in trust to be used to pay the living expenses, to defray the children's college expenses, and to convey the property to the children when the youngest reached 28 violated the rule against remoteness. *Parker v. Parker, 113 S.E.2d 899 (N.C. 1960).*

(n44)Footnote 184. *Stuart v. Stuart, 106 A.2d 771 (Del. 1953); Layton v. Black, 99 A.2d 244 (Del. 1953); Keefer v. McCloy, 176 N.E. 743 (Ill. 1931); Beverlin v. First Nat'l Bank, 98 P.2d 200 (Kan. 1940),* 155 a.l.r. 688; *Hall v. Hall, 123 Mass. 120 (1877); McGill v. Trust Co. of N.J., 121 A. 760 (N.J. 1923); McLaughlin v. Yingling, 213 P. 552 (Okla. 1923); Closset v. Burtchaell, 230 P. 554 (Or. 1924); In re Wanamaker's Estate, 6 A.2d 852 (Pa. 1939); Hassell v. Sims, 141 S.W.2d 472 (Tenn. 1940); Crockett v. Scott, 284 S.W.2d 289 (Tenn. 1955),* 56 a.l.r.2d 442.

Testamentary trust held nondevisable and void because class included those born too late. *McPherson v. First & Citizens Nat'l Bank, 81 S.E.2d 386 (N.C. 1954).*

Both minimum and maximum limits of a class must be established within the time of the rule. *Turner v. Turner, 196 S.E.2d 498 (S.C. 1973).*

See Ky. L.J., March 1947.

(n45)Footnote 185. *Sears v. Putnam, 102 Mass. 5 (1869); In re Lee's Estate, 299 P.2d 1066 (Wash. 1956).*

(n46)Footnote 186. *Ryan v. Ward, 64 A.2d 258 (Md. 1949),* 7 a.l.r.2d 1078 (effective date of trust where settlor could withdraw the entire corpus in limited amounts).

(n47)Footnote 187. The period did not begin to run in a life insurance trust where the settlor had reserved the right to revoke until the settlor died. *Manufacturers Life Ins. Co. v. Von Hamm-Young Co., 34 Haw. 288 (1937), 86 U. Pa. L. Rev. 221. But see* Earl F. Morris *The Rule Against Perpetuities as Applied to Living Trusts and Living Life Insurance Trusts, 11 U. Cinn. L. Rev. 327 (1937).*

(n48)Footnote 188. *Bowerman v. Taylor, 94 A. 652 (Md. 1915); Carter v. Berry, 140 So. 2d 843 (Miss. 1962).*

The court saved an otherwise remote gift to great-grandchildren by concluding that due to the advanced age of the testator's children the "lives in being" should be based on grandchildren then living. *Snyder's Estate v. Denit, 72 A.2d 757 (Md. 1950).*

(n49)Footnote 189. *Carter v. Berry, 140 So. 2d 843 (Miss. 1962).*

(n50)Footnote 190. *In re Bassett's Estate, 190 A.2d 415 (N.H. 1963). See also Old Colony Trust Co. v. Stephens, 190 N.E.2d 110 (Mass. 1963).*

(n51)Footnote 191. *See Worthing Corp. v. Heather, 2 Ch. 532 (1906) 7 Colum. L. Rev. 406,* holding a 30-year option void under the rule so far as it applied to realty but valid as a contract so action for breach would lie.

(n52)Footnote 192. *Holmes v. John Hancock Mut. Life Ins. Co., 41 N.E.2d 909 (N.Y. 1942).*

The rule against perpetuities does not apply to interests of vendee in sales contracts since such contracts must be performed within a reasonable time. *Hill v. State Box Co., 249 P.2d 903 (Cal. App. 1952).*

A limitation to "issue" is void where it ripens to indefinite failure of issue. *Pond v. Porter, 104 A.2d 228 (Conn. 1954).*

Interest in oil and gas lease held too remote. *Lathrop v. Eyestone, 227 P.2d 136 (Kan. 1951)* ("perpetual nonparticipating royalty" being personalty did not vest until reduced to possession).

See Options in Leases -- Rule Against Perpetuities, 60 W. Va. L. Rev. 212 (1958).

Reservation of minerals which contained an option to repurchase the surface to extent necessary for mining operations if ever commenced was too remote. *Rocky Mtn. Fuel Co. v. Heflin, 366 P.2d 577 (Colo. 1961),* 39 (dicta) 123.

The rule does not affect contract rights.

First Nat'l Bank & Trust Co. v. Purcell, 244 S.W.2d 458 (Ky. 1951).

See Marc Moller, *The Condominium Confronts the Rule Against Perpetuities, 10 N.Y.L.F. 377 (1964).*

(n53)Footnote 193. *Capian v. Pittsburgh, 100 A.2d 380 (Pa. 1953).*

(n54)Footnote 194. *First Nat'l Bank & Trust Co. v. Purcell, 244 S.W.2d 458 (Ky. 1951).*

(n55)Footnote 195. *Vickery v. Maryland Trust Co., 52 A.2d 100 (Md. 1947).*

(n56)Footnote 196. *Coffield v. Sorrells, 183 S.W.2d 223 (Tex. Civ. App. 1944).*

Reservation of mineral interest was vested and not subject to the rule. *Keville v. Hollister Co., 105 Cal. Rptr. 238 (Cal. 1972).*

The rule against remoteness of vesting does not operate against restrictive covenants. *McKinnon v. Neugent, 167 S.E.2d 593 (Ga. 1969).*

Unlimited right to extend leases in perpetuity does not violate the rule. *Seaboard Coast Line R. Co. v. Adcock, 168 S.E.2d 606 (Ga. App. 1969).*

Options in leases are not affected, W. Va. Code § 36-1-24, nor are employees' trusts, § 36-1-23.

(n57)Footnote 197. *Roemhild v. Jones, 239 F.2d 492 (8th Cir. 1957).*

Violates rule against perpetuities. *Dozier v. Troy Drive-In Theatres, 89 So. 2d 537 (Ala. 1956); Gearhart v. West Lumber Co., 90 S.E.2d 10 (Ga. 1955).*

A lease not to commence until completion of building held to violate the rule since there was at least a bare possibility that the building might not be completed within the time so the interest might not vest within the rule. *Haggerty v. Oakland, 326 P.2d 957 (Cal. App. 1958),* 66 a.l.r.2d 718.

Presumptive contracts held invalid restraints on alienation. *Kershner v. Hurlburt, 277 S.W.2d 619 (Mo. 1955); Missouri State Highway Comm'n v. Stone, 311 S.W.2d 588 (Mo. App. 1958).*

Right of way agreement authorizing laying of additional pipe lines was not within the rule. *Vandiver v. Transcontinental Gas Pipe Line Corp., 222 F. Supp. 731 (M.D. Ga. 1963).*

See Robert J. Lynn & John F. Ramser, *Applying the Rule Against Perpetuities to Functional Equivalents: Copps Chapel and the Woburn Church Revisited, 43 Iowa L. Rev. 36 (1957).*

When unlimited as to time, a first call violated the Rule against *Perpetuities. Atchison v. Englewood, 463 P.2d 297 (Colo. 1970).*

(n58)Footnote 198. *Kleinheider v. Phillips Pipeline Co., 528 F.2d 837 (8th Cir. 1975).*

(n59)Footnote 199. *United Va. Bank-Citizens & Marine v. Union Oil Co. of Cal., 197 S.E.2d 174 (Va. 1973).*

An independent option in *Hidden Meadows Dev. Co. v. Mills, 511 P.2d 737 (Utah 1973),* was held not to violate the rule because the lease was renewed from year to year and that there was nothing in the contract to indicate the parties intended the option to continue for an indefinite period, subject to be defeated at any one year by express agreement of the parties.

(n60)Footnote 200. *Morgan v. Griffith Realty Co., 192 F.2d 597 (10th Cir. 1951); Gearhart v. West Lumber Co., 90 S.E.2d 10 (Ga. 1955); Winstanley v. Chapman, 89 N.E.2d 506 (Mass. 1949); Gange v. Hayes, 237 P.2d 196 (Or. 1951); Barton v. Thaw, 92 A. 312 (Pa. 1914); Starcher Bros. v. Duty, 56 S.E. 524 (W. Va. 1907),* 9 l.r.a. (N.S.) 913.

Options to purchase in leases are within the rule. *First Huntington Nat'l Bank v. Gideon-Broh Realty Co., 79 S.E.2d 675 (W. Va. 1953),* changed by statute W. Va. Code Ann. § 3541(3).

See Future Interests -- Rule Against Perpetuities -- Legislation Exempting Options to Purchase in Leases, 56 Mich. L. Rev. 146 (1957).

Options to repurchase may also violate the rule against remoteness. *Hall v. Crocker, 241 S.W.2d 548 (Tenn. 1951).*

Contra, Hill v. State Box Co., 249 P.2d 903 (Cal. App. 1952) (rule does not apply to contracts).

An option is within the rule and is void if no time is stated within which the option must be exercised. *Middleton v. Western Coal & Min. Co., 241 F. Supp. 407 (W.D. Ark. 1965); Hendriksen v. Cubage, 288 S.W.2d 608 (Ark. 1956); but see Mattern v. Herzog, 367 S.W.2d 312 (Tex. 1963),* implying a reasonable time for exercise.

In Ohio, an accumulation is valid unless it violates the rule against perpetuities. *Vinson v. First Trust & Sav. Bank, 339 N.E.2d 670 (C.P. Ohio 1974).*

(n61)Footnote 201. *Dozier v. Troy Drive-In Theatres, Inc., 89 So. 2d 537 (Ala. 1956); Poland Coal Co. v. Hillman Coal & Coke Co., 55 A.2d 414 (Pa. 1947); Wing, Inc. v. Arnold, 107 So. 2d 765 (Fla. App. 1958).*

Dictum that the rule against remoteness does not apply to options contained in the lease. *Martin v. Prairie Rod & Gun Club, 348 N.E.2d 306 (Ill. App. 1976).*

(n62)Footnote 202. *Hill v. State Box Co., 249 P.2d 903 (Cal. App. 1952). Smith v. Stuckey, 503 S.E.2d 284 (Ga. App. 1998)* (court held that although there was no exact time requirement for performance under a stock option agreement, the option did not violate the rule against perpetuities because agreement was construed as requiring performance within a reasonable period of time. Court held that 21 years would be unreasonable, hence, no violation); *Collins v. Morris, 716 A.2d 384 (Md. App. 1998)* (reasonable time periods implied by law; thus the court found rule against perpetuities inapplicable); *Coulter & Smith, Ltd. v. Russell, 966 P.2d 852 (Utah 1998)* (ordinary rules of contract construction should be used before applying the rule against perpetuities. Under ordinary rules of contract law, court inferred a "reasonable time" limitation in exercising option. Court determined that the trier of fact needed to decide whether a "reasonable time" is more or less than 21 years).

(n63)Footnote 203. *United Va. Bank-Citizens & Marine v. Union Oil Co. of Cal., 197 S.E.2d 174 (Va. 1973),* 66 a.l.r.3d 1286.

(n64)Footnote 204. *Haggerty v. Oakland, 326 P.2d 957 (Cal. App. 1958),* 66 a.l.r.2d 718.

Gift to issue of 55-year-old childless widow held too remote. *In re Sahlender's Estate, 201 P.2d 69 (Cal. App. 1948).*

Oil and gas lease which gave an option to lease below a stated debt option to run as long as oil or gas was produced was void as a perpetuity. *Melcher v. Camp, 435 P.2d 107 (Okla. 1967), 21 Okla. L. Rev. 241.* Oklahoma has the common-law rule against remoteness.

A lease for an indefinite period of time, being terminated only by the lessee's inability to pay the monthly rent or to move, did not violate the rule against remoteness of vesting, since the interest vested immediately. *Conley v. Gaylock, 108 S.E.2d 675 (W. Va. 1959).*

(n65)Footnote 205. *See* John Humphrey Carlile Morris & W. Barton Leach, The Rule Against Perpetuities (2d ed. 1962); *See also Gray, supra, n.1, 297-304.*

(n66)Footnote 206. In re Chardon, Ch. 464 (1928); In re Chambers, ch. 267 (1950).

(n67)Footnote 207. Charles Fearne, An Essay on the Learning of Contingent Remainders and Executory Devises (Charles Butlered) (9th ed., 1831) 522.

(n68)Footnote 208. Both on principle and on authority our conclusion is that the remoteness of an appointment, made in the exercise of a power to appoint by will alone, so far as affected by the rule against perpetuities must be measured from the time of the creation and not the exercise of the power. *Minot v. Paine, 120 N.E. 167 (Mass. 1918),* 1 a.l.r. 365.

Accord: Warren's Estate, 182 A. 396 (Pa. 1936), 104 a.l.r. 1345, holding that an appointment by the donee of a testamentary power to her "children for life and then" over to persons not ascertainable until the end of these prior interests, is good, on the ground that all of donee's children alive at donee's death were also alive at the creation of the power.

(n69)Footnote 209. *Shenandoah Valley Nat'l Bank of Winchester v. Taylor, 63 S.E.2d 786 (Va. 1951).*

Gift for establishment of a memorial for deceased father held private trust and violating the rule against remoteness of vesting. *Carr v. Jones, 403 S.W.2d 181 (Tex. Civ. App. 1966).*

Trust to maintain a monument is a private trust subject to the rule against remoteness. *Carr v. Jones, 403 S.W.2d 181 (Tex. Civ. App. 1966).*

(n70)Footnote 210. Option in a deed to repurchase held too remote as creating a contingent interest in land. *Roundtree v. Richardson, 108 So. 2d 152 (Ala. 1959)* (reserved option to repurchase for an unlimited time held valid as a right of re-entry); *H. J. Lewis Oyster Co. v. West, 107 A. 138 (Conn. 1919); Neustadt v. Pearce, 143 A.2d 437 (Conn. 1958)* (a reservation in a deed of a right to repurchase violated the rule against remoteness); *Winsor v. Mills, 32 N.E. 352 (Mass. 1892); Barton v. Thaw, 92 A. 312 (Pa. 1914); Mattern v. Herzog, 367 S.W.2d 312 (Tex. 1963)* (option given one lessee to purchase other's share of realty held not too remote where will construed to require option to be exercised during administration of estate. Court will try to avoid perpetuities).

See Options and the Rule Against Perpetuities, 13 U. Fla. L. Rev. 214.

Leases and options expiring after the rule are not affected thereby and trusts violating the rule terminate at end of time. No possibility of issue after 65 or before 13. Ill. Rev. Stat. ch. 30, para. 194.

Holding a perpetual first call void under the rule against remoteness. *Atchison v. Englewood, 463 P.2d 297 (Colo. 1970),* 47 Denver L. Rev. 78.

Testamentary option without time limit is void under the rule. *Maddox v. Keeler, 177 S.W.2d 568 (Ky. 1944),* 162 a.l.r. 578; *Barton v. Thaw, 92 A. 312 (Pa. 1914); contra, Todd v. Citizens' Gas Co., 46 F.2d 855, cert. denied, 283 U.S. 852 (7th Cir. 1931); Keogh v. Peck, 147 N.E. 266 (Ill. 1925),* 38 a.l.r. 1151.

Determining that the rule against remoteness of vesting is applicable to purchase options only if "the danger of fettering free use of property is outweighed by the consideration of public concern and welfare." *Southeastern Pa. Transp. Auth. v. Philadelphia Transp. Co., 233 A.2d 15 (Pa. 1967), 72 Dick. L. Rev. 651.*

Rule does not apply to an option to purchase held by a municipality. *Southeastern Pa. Transp. Auth. v. Philadelphia*

Transp. Co., 233 A.2d 15 (Pa. 1967), 72 Dick. L. Rev. 651; Starcher Bros. v. Duty, 56 S.E. 524 (W. Va. 1907), 9 l.r.a. (N.S.) 913.

London & S.W. Ry. v. Gomm, L.R. 20 Ch. Div. 562.

Options to purchase contained in grants of fee simple estates are subject to the rule. *H. J. Lewis Oyster Co. v. West, 107 A. 138 (Conn. 1919), 34 Harv. L. Rev. 642, 29 Yale L.J. 87; Skeen v. Clinchfield Coal Corp., 119 S.E. 89 (Va. 1923), 22 Mich. L. Rev. 279, 10 Va. L. Rev. 333; Woodall v. Bruen, 85 S.E. 170 (W. Va. 1915), 14 Mich. L. Rev. 231.*

Options to purchase in gross held subject to the rule. *Turner v. Peacock, 113 S.E. 585 (Ga. 1922); Henderson v. Bell, 173 P. 1124 (Kan. 1918); In re Lilley's Estate, 116 A. 392 (Pa. 1922),* 28 a.l.r. 366; *Starcher Bros. v. Duty, 56 S.E. 524 (W. Va. 1907),* 9 l.r.a. (N.S.) 913.

Option to purchase contained in a lease is not subject to the rule since no interest is created in land. *Keogh v. Peck, 147 N.E. 266 (Ill. 1925),* 38 a.l.r. 1151.

A contract to convey is subject to the rule. *Eastman Marble Co. v. Vermont Marble Co., 128 N.E. 177 (Mass. 1920).*

Contra, to the extent that an action for damages lies for breach of such a covenant. *Worthing Corp. v. Heather (1906), 2 Ch. 532.*

See Berg, *Long Term Options and the Rule Against Perpetuities, 37 Cal. L. Rev. 1.*

The court held that a right of first refusal did not violate the rule against remoteness of vesting where it could only be exercised against the vendor and not against his heirs or devisees. *Watergate Corporation v. Reagan, 321 So. 2d 133 (Fla. App. 1975).*

Dictum that the rule against remoteness does not apply to options contained in the lease. *Martin v. Prairie Rod & Gun Club, 348 N.E.2d 306 (Ill. App. 1976).*

(n71)Footnote 211. *See* Edwin H. Abbott Jr., *Leases and the Rule Against Perpetuities, 27 Yale L.J. 878 (1918).*

Business lease for a term to commence upon completion of a building does not violate the rule against perpetuities. *Isen v. Giant Food, Inc., 295 F.2d 136 (D.C. Cir. 1961), 37 Notre Dame Law 561.*

Lease to commence on construction of a building was held contract to lease which is subject to rule if it can be specifically enforced. *Wong v. DiGrazia, 386 P.2d 817 (Cal. 1963).*

Contract was held not within rule where all rights therein vested within 21 years and any breach of the agreement was remedied during such period. *Wong v. DiGrazia, 386 P.2d 817 (Cal. 1963).*

Lease must commence within time of the rule. Where the lessee's interest was not to take effect until the completion of a building the lease was not void as violating the common law rule against remoteness not being based on lives or 21 years in gross. *Haggerty v. Oakland, 326 P.2d 957 (Cal. App. 1958),* 66 a.l.r.2d 718.

Contract to plat and subdivide was held not within rule. *Fisher v. Bailey, 385 P.2d 985 (Utah 1963).*

(n72)Footnote 212. *Fischer v. Parsons, 29 Cal. Rptr. 210 (Cal. App. 1963).*

A perpetual right of purchase violated the rule. *Davies v. McDowell, 549 S.W.2d 619 (Mo. App. 1977).*

(n73)Footnote 213. Rule applies. *Maynard v. Polhemus, 15 P. 451 (Cal. 1887).*

Called restraint on alienation. *Hardy v. Galloway, 15 S.E. 890 (N.C. 1892).*

Rule does not apply. *Dozier v. Troy Drive-In Theatres, Inc., 89 So. 2d 537 (Ala. 1956); French v. Old South Soc'y, 106 Mass. 479 (1961).*

(n74)Footnote 214. *Lonergan v. Connecticut Food Store, Inc., 357 A.2d 910 (Conn. 1975).* However, perpetual leases are not favored by the courts.

(n75)Footnote 215. Does not violate rule. *Wiendiate v. Leland, 225 N.W. 620 (Mich. 1929);* Personal to grantor. *Campbell v. Campbell, 230 S.W.2d 918 (Ky. 1950).*

Violates rule. Melcher v. Camp, 435 P.2d 107 (Okla. 1967); Atchison v. Englewood, 463 P.2d 297 (Colo. 1970), 40 a.l.r.3d 904; *Neustadt v. Pearce, 143 A.2d 437 (Conn. 1958); Concanon v. Haile, 81 D. & C. 480 (Pa. 1952).*

Rule held valid as to rights of re-entry where forfeiture clause existed. *Libby v. Winston, 93 So. 631 (Ala. 1922).*

(n76)Footnote 216. *Gearhart v. West Lumber Co., 90 S.E.2d 10 (Ga. 1955); Eastman Marble Co. v. Vermont Marble Co., 128 N.E. 177 (Mass. 1920), 34 Harv. L. Rev. 440* (long term option held void); *Woodall v. Bruen, 85 S.E. 170 (W. Va. 1915)* (perpetual option held void as a perpetuity); *First Huntington Nat'l Bank v. Gideon-Broh Realty Co., 79 S.E.2d 675 (W. Va. 1953).*

Clause in oil and gas lease authorizing lessee to pool and pay royalties on oil allocated to the particular tract did not violate rule against remoteness. *Phillips Petr. Co. v. Peterson, 218 F.2d 926 (10th Cir. 1954), 27 Rocky Mt. L. Rev. 361; Kenoyer v. Magnolia Petr. Co., 245 P.2d 176 (Kan. 1952).*

Option is only a contractual right and not affected by the rule. *Courseview, Inc. v. Phillips Petr. Co., 258 S.W.2d 391 (Ky. 1953).*

Pre-emptive rights may be personal or descendible. If the latter, they are subject to restraints on alienation and the rule against remoteness. *Old Mission Peninsula Sch. Dist. v. French, 107 N.W.2d 758 (Mich. 1961).*

Options in leases are not affected. W. Va. Code 1977 § 36-1-24. Employees trusts are also not affected, § 36-1-23.

(n77)Footnote 217. *Weber v. Texas Co., 83 F.2d 807 (5th Cir. 1936); Becker v. Submarine Oil Co., 204 P. 245 (Cal. App. 1921); In re Dees' Estate, 308 P.2d 90 (Kan. 1957)* (limitation over to heirs of testator if devisee should ever sell or mortgage was void for remoteness); *Lloyd's Estate v. Mullen Tractor & Equipment Co., 4 So. 2d 282 (Miss. 1941); Duryea v. Hendrickson, 161 N.Y.S. 999 (1916); Wallace v. Williams, 313 P.2d 784 (Okla. 1957); Gange v. Hayes, 237 P.2d 196 (Or. 1951)* (option held too remote); *Byars v. Cherokee County, 118 S.E.2d 324 (S.C. 1961)* (contingent option to repurchase is a right of re-entry also not too remote); *Mattern v. Herzog, 367 S.W.2d 312 (Tex. 1963), 1 Houston L. Rev. 182, 39 Notre Dame Law 211* (option to be exercised within a reasonable time does not violate the rule against perpetuities); *Thaw v. Gaffney, 83 S.E. 983 (W. Va. 1914),* 3 a.l.r. 495; *Todd v. Manufacturers' Light & Heat Co., 110 S.E. 446 (W. Va. 1922);* Rider v. Ford, 1 Ch. Div. (1923).

See William Berg Jr., *Long Term Options and the Rule Against Perpetuities, 37 Cal. L. Rev. 1 (1949);* Langeluttig, *Options to Purchase and the Rule Against Perpetuities, 17 Va. L. Rev. 461 (1931).*

Perpetual options to renew held void. *Becker v. Submarine Oil Co., 204 P. 245 (Cal. App. 1921).*

Holding that an option, though independent, did not violate the rule where the lease option specifically provided for

automatic renewal from year to year and distinguished from the situation where the owner was to be obligated to convey at a time beyond the period of the rule. *Hidden Meadows Dev. Co. v. Mills, 511 P.2d 737 (Utah 1973).*

(n78)Footnote 218. Option in perpetually renewable lease was void. *H. J. Lewis Oyster Co. v. West, 107 A. 138 (Conn. 1919); Wing, Inc. v. Arnold, Fla., 107 So. 2d 765 (Fla. 1958),* 77 a.l.r.2d 728 (the rule is a rule against restraint on improvements in options); *Keogh v. Peck, 147 N.E. 266 (Ill. 1925),* 38 a.l.r. 1151; *Pure Oil Co. of the Carolinas v. Baars, 31 S.E.2d 854 (N.C. 1944); Barton v. Thaw, 92 A. 312 (Pa. 1914); Skeen v. Clinchfield Coal Corp., 119 S.E. 89 (Va. 1923); Starcher Bros. v. Duty, 56 S.E. 524 (W. Va. 1907),* 9 l.r.a. (N.S.) 913; *Woodall v. Bruen, 85 S.E. 170 (W. Va. 1915); First Huntington Nat'l Bank v. Gideon-Broh Realty Co., 79 S.E.2d 675 (W. Va. 1953); London & S. W. Ry. v. Gomm, L.R., 20 Ch. Div. 562.*

William Berg Jr., *Long-Term Options and the Rule Against Perpetuities, 37 Cal. L. Rev. 1, 235, 419 (1949);* Edwin H. Abbott, *Leases and the Rule Against Perpetuities, 27 Yale L.J. 878 (1918);* Charles Sweet, *Some Recent Decisions on the Rule Against Perpetuities, 27 L.Q. Rev. 150;* Williams, *Contracts and the Rule Against Perpetuities*, 54 Sol. J. 471, 501 (1911); Joseph Warren, *Progress of the Law; Estates and Future Interests, 34 Harv. L. Rev. 639 (1920);* Albert Langeluttig, *Options to Purchase and the Rule Against Perpetuities, 17 Va. L. Rev. 461.*

(n79)Footnote 219. *Quarto Min. Co. v. Litman, 326 N.E.2d 676 (Ohio 1975)* (relying on Restatement of Property § 395, at 2326 (1959), but confusing restraints on alienation and remoteness of vesting).

(n80)Footnote 220. The rule against remoteness does not affect restrictive covenants. *McKinnon v. Neugent, 167 S.E.2d 593 (Ga. 1969).*

Covenants running with the land do not violate the rule against perpetuities. *Lowry v. Norris Lake Shores Dev. Corp., 203 S.E.2d 171 (Ga. 1974).*

The rule against remoteness does not affect restrictive covenants. *Cornett v. Houston, 404 S.W.2d 602 (Tex. Civ. App. 1966).*

Contra, Dunn v. Blackdown Properties, Ltd., [1961] ch. 433 (incorporation and a conveyance of a provision granting to the purchaser free use of such drains and sewers as then pass or thereafter to pass under roads violated the rule against remoteness).

See Robert J. Lynn & John F. Ramser, *Applying the Rule Against Perpetuities to Functional Equivalents: Copps Chapel and the Woburn Church Revisited, 43 Iowa L. Rev. 36 (1957).*

(n81)Footnote 221. *Carneal v. Kendig, 85 S.E.2d 235 (Va. 1955).*

(n82)Footnote 222. *Atlantic Trust Co. v. Woodbridge Canal & Irrig. Co., 86 F. 975 (C.C.D. Cal. 1897); Sacramento Bank v. Alcorn, 53 P. 813 (Cal. 1898); Board of Church v. First Presbyterian Church, 53 P. 671 (Wash. 1898); Knightsbridge Estates Trust, Ltd., 2 All E.R. 401 (1940).*

(n83)Footnote 223. *Walsh v. Secretary of State for India, 10 H.L. Cas. 367, 11 Eng. Rep. 1068 (1863).*

(n84)Footnote 224. *Chicago, Wilmington & Franklin Coal Co. v. Herr, 127 F.2d 1010 (7th Cir. 1942); Threlkeld v. Inglett, 124 N.E. 368 (Ill. 1919); Post v. Bailey, 159 S.E. 524 (W. Va. 1931).*

When unlimited as to time, a first call violated the rule against perpetuities. *Alchesm v. City of Eaglewood, 463 P.2d 297 (Colo. 1970), 400 Colo. L. Rev. 904.*

Conveyance of mineral interests giving grantee an unlimited option to purchase surface option held too remote

because an equitable contingent interest was created. *Middleton v. Western Coal & Min. Co., 241 F. Supp. 407 (W.D. Ark. 1965).*

A deed reserving to the grantor all minerals for 25 years gave the grantee an executory interest that was void for remoteness with a valid "reversion" in the grantor but the language of the deed passed the grantor's reversion to the grantee. *Brown v. Terra Bella Irrig. Dist., 330 P.2d 775 (Cal. 1958).*

See Bruce M. Jones, *The Rule Against Perpetuities as It Affects California Oil and Gas Interests, 7 U.C.L.A. L. Rev. 261 (1960);* C.J. Meyers, *The Effect of the Rule Against Perpetuities on Perpetual Non-Participating Royalty and Kindred Interests, 32 Tex. L. Rev. 369 (1954).*

(n85)Footnote 225. *Johnston v. Cosby, 29 N.E.2d 608 (Ill. 1940).*

In a testamentary trust, with income to go to four named persons 25 years after death of testator, the principal to be divided among the surviving income beneficiaries and a contingent remainder over to charity, the court held the gifts of income good, but the goods of principal void under the rule against remoteness. *Colorado Nat'l Bank v. McCabe, 353 P.2d 385 (Colo. 1960).*

Holding that creation of a trust to terminate when the youngest living child, testator's son, reached twenty-five, was not invalid; but a gift class must be certain to close within the period of time allowed by the rule. *Green v. Green, 221 N.E.2d 388 (Ohio 1966).*

Holding of the trust to maintain a monument is a private trust and not a charity, and, therefore, subject to rule against remoteness. *Carr v. Jones, 403 S.W.2d 181 (Tex. Civ. App. 1966).*

Until 1925 (Wis. Stat. § 230.14) in Wisconsin, neither the rule against remoteness nor against restraints on alienation was applicable to personalty. *Dodge v. Williams, 50 N.W. 1103 (Wis. 1879); Becker v. Chester, 91 N.W. 87 (Wis. 1902).*

(n86)Footnote 226. *Brooks Bank & Trust Co. v. Beers, 181 A. 391 (Conn. 1935); Moroney v. Haas, 115 N.E. 648 (Ill. 1917); Armstrong v. Armstrong, 53 Ky. (14 B. Mon.) 333 (1853); Jackson v. Phillips, 96 Mass. (14 Allen) 539 (1867); In re Trevor, 145 N.E. 66 (N.Y. 1924); Bullock v. Bullock, 1 Ch. 493; Minter v. Wraith, 13 Sim. 52, 60 Eng. Rep. 21.*

Contra, held inseparable and therefore void. *Donohue v. McNichol, 61 Pa. 73 (1869); Brooker v. Brooker, 106 S.W.2d 247 (Tex. 1937); McCreery v. Johnston, 110 S.E. 464 (W. Va. 1922).*

Where two possible constructions, the one avoiding the rule is to be adopted. *In re Schuette's Estate, 311 N.Y.S.2d 415 (1970).*

Holding that in interpreting an instrument it must be presumed that the testator was cognizant of the rules against perpetuities and intended a construction which would avoid it if possible. *Vinson v. First Trust & Savings Bank, 339 N.E.2d 670 (C.P. Ohio 1974).*

Provision to terminate devises which might violate the rule against remoteness upheld. *In re Burrough's Estate, 521 F.2d 277 (D.C. Cir. 1975).*

In re Frankel's Estate, 92 N.Y.S.2d 30 (1949).

(n87)Footnote 227. *Beverlin v. First Nat'l Bank, 98 P.2d 200 (Kan. 1940),* 155 a.l.r. 688.

Clause in oil and gas lease authorizing lessee to pool and pay royalties on oil allocated to the particular tract did not violate rule against remoteness. *Phillips Petr. Co. v. Peterson, 218 F.2d 926 (10th Cir. 1954); Kenoyer v. Magnolia Petr. Co., 245 P.2d 176 (Kan. 1952).*

The rule against remoteness is counted from the death of the settlor not the creation of the trust if the trust is revocable. *Cook v. Horn, 104 S.E.2d 461 (Ga. 1958).*

Interest in oil and gas lease held too remote. *Lathrop v. Eyestone, 227 P.2d 136 (Kan. 1951)* ("perpetual nonparticipating royalty" being personalty did not vest until reduced to possession).

Requirement that oil and gas rentals which might be derived from property devised to one person be divided among others did not violate the rule since the right to the royalties was vested. *In re Swingle's Estate, 289 P.2d 778 (Kan. 1955).*

Rule does not apply to vested equitable interests. *Finch v. Honeycutt, 97 S.E.2d 478 (N.C. 1957).*

See C.J. Meyers, *The Effect of the Rule Against Perpetuities on Perpetual Non-Participating Royalty and Kindred Interests, 32 Tex. L. Rev. 369 (1954).*

(n88)Footnote 228. *Victory Oil Co. v. Hancock Oil Co., 270 P.2d 604 (Cal. App. 1954).*

Oil and gas lease providing that drilling should commence when present zoning prohibitions should be lifted created a vested interest and was not too remote. *Francis v. Superior Oil Co., 102 F.2d 732 (10th Cir. 1939).*

Reservation of minerals for 25 years and thereafter as long as production continued, the mineral interest thus given to the grantee was held too remote. *Victory Oil Co. v. Hancock Oil Co., 270 P.2d 604 (Cal. App. 1954).*

A perpetual nonparticipating royalty interest is void as too remote. *Lathrop v. Eyestone, 227 P.2d 136 (Kan. 1951).*

Contra, as being a present vested interest. *Hanson v. Ware, 274 S.W.2d 359 (Ark. 1955),* 46 a.l.r.2d 1262.

Royalty reserved out of a possible future lease of oil and gas is too remote. *Howell v. Cooperative Refinery Ass'n, 271 P.2d 271 (Kan. 1954).*

See Bruce M. Jones, *The Rule Against Perpetuities as it Affects California Oil and Gas Interests, 7 U.C.L.A. L. Rev. 261 (1960);* Kuntz, *Rule Against Perpetuities and Mineral Interests, 7 Okla. L. Rev. 183;* C.J. Meyers, *Effect of the Rule Against Perpetuities on Perpetual Non-Participating Royalty and Kindred Interests, 32 Tex. L. Rev. 369 (1954).*

(n89)Footnote 229. *Young Men's Christian Ass'n v. Horn, 139 N.W. 805 (Minn. 1913)* (option to purchase which may not be exercised within the period is valid); *Capian v. Pittsburgh, 100 A.2d 380 (Pa. 1953).*

Devise to B subject to a special provision as to oil and gas that B and trustee for A should divide all oil and gas income did not violate the rule against remoteness by creating a perpetual royalty since it vested at the testator's death. *In re Swingle's Estate, 289 P.2d 778 (Kan. 1955), see also Goetz v. Goetz, 254 P.2d 822 (Kan. 1953).*

(n90)Footnote 230. *Caruthers v. Peoples Nat. Gas Co., 38 A.2d 713 (Pa. Super. 1944).*

(n91)Footnote 231. *H.J. Lewis Oyster Co. v. West, 107 A. 138 (Conn. 1919); First Nat'l Bank & Trust Co. v. Purcell, 244 S.W.2d 458 (Ky. 1951).*

(n92)Footnote 232. *Southern Airways Co. v. Dekalb County, 116 S.E.2d 602 (Ga. 1960).*

(n93)Footnote 233. Dunn v. Blackdown Props., Ltd., ch. 433 (1961) (grant of a right to connect with a sewer if and when constructed).

Agreement to lay a second pipeline upon payment held vested and not too remote. *Sorrell v. Tennessee Gas Transmission Co., 314 S.W.2d 193 (Ky. 1958), Caruthers v. Peoples Nat. Gas Co., 38 A.2d 713 (Pa. Super. 1944).*

(n94)Footnote 234. *Johnson v. Armstrong, 94 S.E. 753 (W. Va. 1918).*

Unitization clause is not too remote unless it affects cross transfers of property interests. *Phillips Petr. Co. v. Peterson, 218 F.2d 926 (10th Cir. 1954).*

Assignment of oil and gas lease overriding royalty preserving rights of assignor or against assignee's heirs and assigns violated Oklahoma's common-law rule against perpetuities. *Cities Service Oil Co. v. Sohio Petr. Co., 345 F. Supp. 28 (1972).*

Where the grantor in a deed reserved the oil and gas rights for 25 years, the limitation over violated the rule but the grantor retained a reversion which he could convey. *Brown v. Terra Bella Irr. Dist., 330 P.2d 775 (Cal. 1958), 58 Mich. L. Rev. 285.*

Perpetual option to renew oil and gas lease held valid. *Becker v. Submarine Oil Co., 204 P. 245 (Cal. App. 1921).*

A deed not reserving the minerals but reserving the exclusive right to execute oil and gas leases was held to create a special power of appointment which was void for remoteness. *Dallapi v. Campbell, 114 P.2d 646 (Cal. App. 1941).*

A deed excepting the oil and gas, so long as it should be produced in paying quantities, created a contingent interest in the oil and gas in the grantee which was void as being too remote. *Victory Oil Co. v. Hancock Oil Co., 270 P.2d 604 (Cal. App. 1954).*

Perpetual right of extension of lease does not violate the rule. *Seaboard Coast Line R. Co. v. Adcock, 168 S.E.2d 606 (Ga. App. 1969).*

Pooling clause held not too remote since all interests were vested. *Kenoyer v. Magnolia Petr. Co., 245 P.2d 176 (Kan. 1952).*

A clause in an oil and gas lease assignment that the assignee must reassign to the assignor under certain conditions is not too remote. *Mahan v. Brader, 242 S.W.2d 941 (Tex. Civ. App. 1951).*

See C.J. Meyers, *The Effect of the Rule Against Perpetuities on Perpetual Non-Participating Royalty and Kindred Interests, 32 Tex. L. Rev. 369 (1954).*

(n95)Footnote 235. *Atchison v. Englewood, 463 P.2d 297 (Colo. 1970),* 40 a.l.r.3d 404.

The rule against perpetuities operates against the oil and gas operating agreements in *Oklahoma. Producer's Oil Co. v. Gore, 437 F. Supp. 737 (ED. Okla. 1977),* 60 Okla. Stat. Ann. §§ 75-78.

(n96)Footnote 236. *See In re Appleton's Appeal, 20 A. 521 (Pa. 1890),* 11 l.r.a. 85; *In re Lilley's Estate, 116 A. 392 (Pa. 1922),* 28 a.l.r. 366.

(n97)Footnote 237. *Holmes v. Williams, 1 Root 335 (Conn. 1795); Pennington v. Pennington, 17 A. 329 (Md. 1889),* 3 l.r.a. 816; *Bradford v. Mackenzie, 101 A. 774 (Md. 1917); Proprietors of Church v. Grant, 69 Mass. (3 Gray) 142 (1855); Donehue v. Nilges, 266 S.W.2d 553 (Mo. 1954),* 45 a.l.r.2d 1150; *Bell v. Scammon, 15 N.H. 381, 41* am.

dec. 706; *Merrill v. American Baptist Missionary Union, 62 A. 647 (N.H. 1905),* 3 l.r.a. (N.S.) 1143; *McLaughlin v. Yingling, 213 P. 552 (Okla. 1923); Imbrie v. Hartrampf, 198 P. 521 (Or. 1921).*

Common law against perpetuities prevails in Oregon and Tennessee as to executory devises. *Closset v. Burtchaell, 230 P. 554 (Or. 1924); Eager v. McCoy, 228 S.W. 709 (Tenn. 1921). See In re Allen's Will, 181 N.Y.S. 398 (N.Y. 1920).*

(n98)Footnote 238. *McArthur v. Scott, 113 U.S. 340 (1885); Pennington v. Pennington, 17 A. 329 (Md. 1889),* 3 l.r.a. 816; *Proprietors of Church v. Grant, 69 Mass. (3 Gray) 142 (1855); Robinson v. Harris, 53 S.E. 755 (S.C. 1906),* 6 l.r.a. (N.S.) 330.

If interest vests within the time, the fact that it may not take possession until later is not material. *Lanier v. Lanier, 126 S.E.2d 776 (Ga. 1962).*

Limitation to private individual after gift to charity was held too remote. *In re Pruner's Estate, 162 A.2d 626 (Pa. 1960).*

(n99)Footnote 239. *See Barnitz v. Casey, 11 U.S. (7 Cranch) 456 (1813); Combs v. Combs, 8 A. 757 (Md. 1887); Hawley v. Northampton, 8 Mass. 3 (1811); In re Warren's Estate, 182 A. 396 (Pa. 1896),* 104 a.l.r. 1345.

Limitation over after life estate to corporation if created within 20 years after testator's death was valid. *Loats Female Orphan Asylum v. Essom, 150 A.2d 742 (Md. 1959).*

(n100)Footnote 240. *McArthur v. Scott, 113 U.S. 340 (1885); Hopkins v. Grimshaw, 165 U.S. 342 (1897); Otterback v. Bohrer, 12 S.E. 1013 (Va. 1891); Whelan v. Reilly, 3 W. Va. 597 (1869).*

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CHAPTER 28 RULES AGAINST PERPETUITIES

3-28 Thompson on Real Property, Thomas Editions § 28.04

AUTHOR: Professor David A. Thomas This chapter is based in part on Ch. 31. George W. Thompson, Commentaries on The Modern Law of Real Property (John S. Grimes ed. 1979), which made a significant contribution toward preserving the American common law on perpetuities. J. Reuben Clark Law School Brigham Young University

§ 28.04 The Operation of the Rule Against Remoteness of Vesting

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The time of the effective date of the instrument, not the time of making, determines its validity as respects the rule against remoteness. Under the New York law, a will for more than two lives was good if all but two predecease testator. n241 The effect of the rule against remoteness must be viewed as of the death of the testator, not the date of the will. n242

Evidencing attempts to avoid the rule, some of the authorities have been turning to the "second look" or "wait and see" doctrine. Under this theory the limitation over must be judged in light of the facts as they existed at the time the instrument became effective, not when it was executed. n243

Sometimes this is done by case law, n244 but usually by statute. n245 The retroactive effect of such statutes is the dispute. n246

Under this rule these general principles are asserted: 1. All reversionary interests, reversions, possibilities of reverter and rights of re-entry are vested. 2. Under the weight of authority, but not unanimous opinion, a remainder vested upon a condition subsequent, that is vested subject to divesting, is "vested" for the purpose of the rule. 3. An executory limitation, one which cuts off a previous estate, is not vested until it becomes entitled to possession. 4. A class gift is not vested under the majority rule until it is not only closed but also is vested in the individual members of the class, although there is strong authority to the effect that it is vested in the class when the class is closed, though some of the prospective members may drop out prior to the time of taking of possession. The law of the testator's domicile governs as to the application of the rule if personalty is involved. n247 The *lex situ* governs as to realty. n248 The test of the validity of limitations is always whether an estate attempting to be created must in every possible contingency terminate within the proper time. n249

The confusion as to the purpose of the perpetuities rules which led to the confounding of the rule against remoteness of

vesting and the "rule against absolute restraints on alienation" in the New York statutes and other similar laws has led the judges to improperly commingle the two rules. It is well established that the policy of the law of this country is that all property should, so far as possible, be free to be aliened or disposed of by its actual owners. There are, of course, limitations upon this rule, but they are carried no further than the necessity of the occasion warranting them requires. n250

It is said that the rule against perpetuities is aimed against undue restraints on alienation, by prohibiting the clogging of the title with future interests dependent on contingencies which may not occur at all, or until a remote period. n251

To avoid the rule it is not necessary to show that the interest will actually vest but that it will vest, if at all, within the period. n252

It is said that the test of alienability of real or personal property is that there are persons in being who can give a perfect title. There is no suspension of the absolute power of alienation, if all persons having interest, present and future, can convey a fee simple. So it has been erroneously said that this statute is not applicable to any interest that is alienable, though it is a contingent interest and may remain contingent for a period longer than that permitted by the statute for the suspension of the absolute power of alienation. n253 More properly stated an objectionable contingent interest or a "perpetuity" is a grant or devise of property wherein the vesting of an estate or interest is unlawfully postponed. The law allows the vesting of an estate or interest and also the power of alienation to be postponed for a period of a life or lives in being and twenty-one years and nine months thereafter. All restraints upon the vesting that may suspend it beyond that period are treated as perpetual restraints and void, and the estates or interests which are dependent on them are void. n254

Under the rule the limit for the creation of an executory interest to commence is within the period of a life or lives in being and 21 years, allowing for the period of gestation. n255 To be valid under the rule against perpetuities, the future interest must vest within a life or lives in being, and twenty-one years thereafter. If the person to take such interest is an infant, either born or *en ventre sa mere* during a life in being, the time may be extended until the termination of such infant's minority, thus extending the possible time of vesting to twenty-one years and the period of gestation after a life or lives in being. n256 The persons in being by whose lives the period allowed for vesting is in part measured may be indefinite in number, provided it is possible to ascertain the termination of the life of the last survivor in order to be able to ascertain when the period of twenty-one is to commence. Such persons need not be connected in any way with the property devised, that is, they need not be persons taking prior estates therein, nor need they even be relatives of the devisees. n257 Lives in being at testator's death, not date of will, control. n258 In case the time named for the vesting of the future interest is not measured by lives, but by a definite number of years, it is essential that the number of years be less than twenty-one, in order that the limitation be valid. n259 Thus, where no life in being forms any part of the period of postponement in vesting of title, the limit of time under the rule is 21 years. n260

A final gift of the balance of a trust estate to the legal representatives of the survivor was void because it was possible that no personal representative might be appointed until after twenty-one years subsequent to the end of the second life estate. n261

A will to an unnamed widow for life and over at her death was bad, since the widow was possibly not in existence. n262

So in the gift of a life estate to a daughter and at her death a gift of a life estate to a son and upon his death a life estate to his children with remainder to their heirs was an attempt to "suspend the power of alienation for a longer period than during the continuance of two lives in being at the creation of the estate and violates the statute against perpetuities. n263 A devise and bequest to the widow of the testator for life with remainder to his son and at his death "the same to go to his heirs forever" violated the statute of perpetuities in the absence of any discoverable intent to limit the meaning of the word "heirs" to the children of the son. n264 A limitation over after a fee upon condition subsequent is void for remoteness where the condition may not happen within the period. n265 When a limitation over after a fee upon

condition subsequent is too remote, the fee becomes absolute. n266

A limitation over after the ultimate termination of a fee tail estate is void. n267

The common-law rule permits any number of lives in being at least if ascertainable. It does not limit the lives to those of persons in being at the date of the will. n268 "Lives in being," as stated in the rule, means any lives whatsoever in being when the interest is created, and the persons whose lives are taken need have no interest in the estate. n269 The validity of the limitation is to be determined as of the time of the testator's death, and not at the time of the execution of the will. n270 Anciently, under the common law, it was possible by executory devise to lock up estates in families so as to prevent alienation for any period of time the owner might desire. Such an estate was termed a perpetuity, a thing which the law is said to abhor, as estates are made by it incapable of answering those purposes of social commerce, and providing for the sudden contingencies of private life for which property was first established.

The number of lives to be taken, in applying the rule against perpetuities, must be an ascertainable number, that is, the number of lives chosen must not be more than will admit of making out, by reasonable evidence, at what time the survivor ceases to exist. Provided the termination of the lives can be determined by reasonable evidence, their number is immaterial. n271 The requirement that the contingency on which the estate is to vest shall occur within the time named by the rule is absolute, and the mere improbability that it will occur after that time is immaterial. n272 A limitation not in compliance with the rule rendered valid by the happening of the contingency is not within the legal period. n273 Where an estate otherwise has vested or must vest within the period prescribed by the rule, its vesting is not rendered too remote by a direction that the enjoyment or possession thereof shall not occur until the owner of such estate attains a stated age. n274

The rule against remoteness of vesting deals only with vesting of interests, not the postponement of possession. n275

Thus, the vesting may be postponed beyond the lives of persons in being, in contravention of the rule, by a provision in the will construed as postponing the vesting until such time as the youngest of persons named should attain, or if living would have attained a certain age. n276 The rule is not violated by a direction in a will which may involve some delay in the actual conversion of the property, arising from any cause. Nor does the fact that the trustee is vested with a discretion to delay the sale of the real estate, not exceeding a certain period mentioned, involve an unlawful suspension of the power of alienation. n277 A provision in a will prohibiting alienation of devised real estate for a period of fifty years violates the statute against perpetuities. n278 A limitation otherwise valid under the rule is not impaired by an ensuing limitation which is void. n279

A clause creating a limitation over after a fee tail if the terre tenant attempted to bar the entail, was void as creating a "perpetuity." n280 Where there are several interests created by the instrument one or more of which are valid and one or more void, the courts are inclined to apply surgery and separate the good from the bad n281 unless they are so entwined that they cannot be separated n282 and the entire scheme of the estate will be destroyed, or unless the primary scheme was to benefit the void interest. n283

Where the estates created by the will are severable and part violate the rule, the valid trusts or gifts will be preserved unless the testator's entire scheme is thereby disrupted or injustice results. n284 Under the Pennsylvania rule, if the prior estates are valid in themselves, the court will not pass on the question of invalidity of the remainders until the prior estates are terminated. n285

If the void provision cannot be eliminated without distorting the entire gift, the whole is void. n286

Where the contingency is too remote there can be no valid remainder. Thus, where an estate is limited to a corporation not in existence, it is void, and a subsequent formation of the corporation during the existence of the particular estate does not give validity to the transaction. n287

The rule against perpetuities is applicable to trusts for private purposes. n288

There is no violation of the rule against perpetuities by the mere fact alone of a failure to limit the time for the execution of the trust. n289

Notwithstanding the existence of these judicial views the writers of these declarations, on the grounds of prudence, usually insert clauses which limit the duration of the trust to the time permitted by the rule against perpetuities. A common practice in this regard is to limit the trust to twenty-one years after the death of named children of the trustees.

A Massachusetts trust agreement by the terms of which the trustee is to hold the title to the fee and to lease in trust for certain specified purposes but the land trust certificate holder acquires an interest which is vendible and the owners of the property may avail themselves of the sums derived from a transfer of that interest for present purposes without personal liability, the payment being secured solely upon the trust estate without the personal liability of any one and, in the event of a default as defined in the trust instrument, a sale of the premises can be had, does not violate the rule against perpetuities notwithstanding no definite trust period is prescribed and that the parties to the transaction are numerous. n290 When the holders of the land trust certificates and the ultimate title certificates and the trustee can unite in a conveyance which conveys an absolute title to the trust estate, which conveyance can be made at any time without violating the trust agreement, the same does not violate the rule against perpetuities. n291

The validity of a trust depends upon there being a beneficiary who is definitely ascertained at the time of the creation of the trust or definitely ascertainable within the period of the "rule against perpetuities." There must be an outward manifestation, not secret, of the settlor's intention to create a trust. n292

When a limitation over after a determinable fee fails for remoteness, the possibility of reverter becomes entitled to possession when the fee determines. n293 A life estate is not enlarged into a fee simple absolute by the fact that the remainder over is void for remoteness, n294 nor is a determinable fee. n295 If the time for vesting of the interest is too remote then the interest is void *ab initio*. The courts are not wholly in accord as to the effect of this upon the other interests created by the instrument. Certainly any contingent interests limited over after the void interest are also void if they cannot take effect within the allotted period. n296 But there is disagreement as to whether a vested interest or a contingent interest which must vest, if at all within the period, is void if it follows a void interest. n297

It has been held that the creation of an executory limitation over after a fee upon condition subsequent destroys the right of re-entry so that if the executory limitation is void for remoteness as it would be unless expressly limited to happen within the period n298 -- there being no one to enter and terminate the immediate estate, the fee upon condition subsequent ripens into a fee simple absolute.

A covenant that the grantor would convey additional land to the grantee if a highway would be relocated, so that the granted tract would always be on the highway, created an equitable estate in the other land which was vested and was not subject to the rule. n299

The same theory has been applied, perhaps erroneously, to a fee simple determinable ripening it into a fee simple absolute where the limitation over fails. n300 This is not, of course, in harmony with the basic tenet of the fee simple determinable which theoretically dies of its own weakness, but the courts have had difficulty distinguishing between determinable fees and fees upon condition. n301 So it is held that upon the failure of an executory limitation the prior estate becomes indefeasibly vested. n302 It has been held that where an executory limitation over after a fee fails upon condition subsequent for impossibility, the fee becomes absolute. n303 There is, however, modern authority for the proposition that if the limitation over is void for remoteness, *ab initio*, the possibility of reverter still exists. n304

The rule against remoteness does not run while the interest is subject to a general power to appoint to another. n305 The

rule that a contingent devise to a class vests on the birth of a member of such a class cannot be applied so as to validate a void estate within the rule against perpetuities, as it would then conflict with the rule that the question whether the estate is void as perpetuity must be determined by what might happen rather than by what has happened. n306 If there are two alternative remainders, one of which is too remote, the other will take, n307 but if there are two alternatives which the testator has not separated, they both are void, n308 and the court will not imply a valid alternative where the testator has not expressed one even though he clearly intended one. n309

"The general rule is, that, if a limitation over is void for remoteness, it places all prior gifts in the same situation as if the devise over had been wholly omitted. If the prior gift was in fee, the estate is vested in the first taker discharged of the limitation over; if for life, it takes effect as a life estate." n310 The cases have taken widely divergent paths, however, as to the extent to which surgery should be performed on an instrument to cut out the diseased language and preserve the good gifts or to let the entire scheme fall. n311

It is a recognized principle in the law of property that where the donee of a general power attempts to make an appointment that fails, but where, nevertheless, the donee has manifested an intent wholly to withdraw the appointive property from the operation of the instrument creating the power for all purposes and not merely for the purposes of the invalid appointment, the attempted appointment will commonly be effective to the extent of causing the appointive property to be taken out of the original instrument and to become in effect part of the estate of the donee of the power. And where, as in this instance, the invalid appointment is in trust there will be a resulting trust to the estate of the donee of the power. n312

The validity of a power of appointment dates from its execution, not its exercise. n313 As applied to powers of appointment, the general rule is that if the power is testamentary it cannot be exercised so as to suspend vesting beyond the time originally allowed the donor. n314

The common law position that the court cannot take the rule into consideration nor give weight to its effect in construing an instrument is being largely ignored today. Instead, if an instrument is capable of two instructions -- one of which will make the future interest valid, the other will make it void, the courts presume the maker intended to create a valid estate. n315

A direction to a trustee to distribute the estate as soon as possible did not violate the rule against remoteness of vesting. n316

In an inter vivos trust the period allowable for remoteness of vesting begins to run from the effective date of the trust, even though for taxation and creditors' claims purposes the trust may be illusory. n317 But in such a case the settlor was not one of the two allowable lives in being under the former New York rule. n318 Where the settlor of an inter vivos trust retains a power of revocation, the time for vesting does not begin to run until the settlor dies. n319

In a growing number of states where the delay is a mere detail of judicial administration, the rule is not violated. n320 New York has indicated the possibility of avoiding the rule by creating a reversionary interest by one trust and disposing of such interest by another, n321 even where the two instruments if embodied in one would violate the rule. n322

It has been held that if it is possible for all of the holders of outstanding interests to join and convey a fee, there is no violation of the rule against remoteness. n323

FOOTNOTES:
(n1)Footnote 241. *In re Neill's Estate, 89 N.Y.S.2d 394 (1949).*

Gift to "grandchildren" when reaching 35 included afterborn grandchildren and violated the rule against perpetuities.

In re Ghiglia's Estate, 116 Cal. Rptr. 827 (1974).

Deed to wife for life, then to sons for life, and finally to sons' heirs violated the rule against perpetuities. *Mounts v. Roberts, 388 S.W.2d 117 (Ky. 1965).*

Gift in trust for the settlor and his wife providing that upon death of survivor the trustee should pay out the balance of the estate to the legal representative's survivor was void under the old New York rule as too remote. *Alexander v. Dolen, 274 N.Y.S.2d 661 (1966).*

The law of the donor's domicile, not that of the donee's, determines whether a power of appointment violates the rule. *Dollar Savings & Trust Co. v. First Nat'l Bank of Boston, 285 N.E.2d 768 (Ohio 1972).*

See Leach & Logan, *A Standard Saving Clause to Avoid Violations of the Rule, 74 Harv. L. Rev. 1141.*

See also Powell, *The Rule Against Perpetuities and Spendthrift Trusts in New York: Comments and Suggestions, 71 Colum. L. Rev. 688.*

(n2)Footnote 242. "*Southern v. Wollaston, 16 Beav. 166, 51 Eng. Reprint 740 (1852).*

(n3)Footnote 243. *Hill v. Birmingham, 38 A.2d 604 (Conn. 1944)* (court saved a gift to grandchildren to be paid "when" they reached 25 by closing the class of grandchildren at the death of the last child); *Applegate v. Brown, 95 N.W.2d 341 (Neb. 1959), 44 Minn. L. Rev. 1031* (in a gift to nephews and nieces the class closed at testator's death under rule of convenience and was not void for remoteness).

The rule against remoteness of vesting is so technical that disappointed legatees were denied recovery against the draftsman of a will where the bequest violated the rule against perpetuities. *Lucas v. Hamm, 364 P.2d 685 (Cal. 1961).*

Rule begins to run from date of creation of general powers of appointment (dictum). *Murphy v. Mercantile-Safe Deposit & Trust Co., 203 A.2d 889 (Md. 1964).*

The rule against perpetuities is viewed as of the testator's death. *North Carolina Nat'l Bank v. Norris, 203 S.E.2d 657 (N.C. App. 1974).*

See Robert J. Lynn & John W. VanDoren, *Applying the Rule Against Perpetuities to Remainders and Executory Interests: Orthodox Doctrine and Modern Cases, 27 U. Chi. L. Rev. 436, 462 (1960);* W. Barton Leach, *Perpetuities: New Absurdity Judicial and Statutory Corrections, 73 Harv. L. Rev. 1318.*

See also Lenoir, *A Reexamination of Perpetuities in Arizona, 10 Ariz. L. Rev. 347 (1968);* Ronald Maudsley, *Perpetuities: Reforming The Common Law Rule -- to Wait and See, 60 Cornell L.Q. 355 (1975);* Samuel M. Fedders, *Perpetuities: The Wait and See Disaster -- A Brief Reply to Professor Maudsley, with a View Aside To Professors Leach, Simes, Wade, Dr. Morris, et al, 60 Cornell L.Q. 380 (1975).*

(n4)Footnote 244. *Sears v. Coolidge, 108 N.E.2d 563 (Mass. 1952); Merchants Nat'l Bank v. Curtis, 97 A.2d 207 (N.H. 1953)* (court viewed facts as they existed at time life estates terminated).

Kentucky has adopted a "wait and see" and a *cy pres* statute.

Holding that a gift too remote is valid if it actually becomes vested within the period. *Phelps v. Shropshire, 183 So. 2d 158 (Miss. 1966),* 20 a.l.r.3d 1086.

Wait and see. *Burgess v. Howe, 359 A.2d 652 (Vt. 1976).*

(n5)Footnote 245. Ohio has adopted the wait and see doctrine. *See* Robert Lynn, *The Ohio Perpetuities Reform Statute, 29 Ohio St. L.J. 1 (1968).*

Pennsylvania in 1947 adopted a new statutory rule, Pa. Stat., tit. 20, § 301.4b, involving the "wait and see" doctrine and also Massachusetts, Mass. Gen. Laws 1932, ch. 184a. *Worcester County Trust Co. v. Marble, 55 N.E.2d 446 (Mass. 1944).*

(n6)Footnote 246. Wait and see rule applied to instruments created before the statute. *Warner v. Whitman, 233 N.E.2d 14 (Mass. 1968).*

"Wait and see" statute did not apply to interests created before the statute. *In re Jones's Estate, 190 A.2d 120 (Pa. 1963).*

Washington has now adopted the "wait and see" doctrine and also *cy pres* to beneficial interests in trust instruments. Wash. Rev. Code, §§ 11.98.010-11.98.030.

(n7)Footnote 247. *Whitney v. Dodge, 38 P. 636 (Cal. 1894); Cross v. United States Trust Co., 30 N.E. 125 (N.Y. 1892).*

Trust violating rule against remoteness in testator's domicile void though it would have been good at state of trustee's domicile. *In re Samuels' Will, 128 N.Y.S.2d 349 (N.Y. 1954).*

Rule does not apply to vested equitable interests. *Finch v. Honeycutt, 97 S.E.2d 478 (N.C. 1957).*

Saving an executory interest by calling it a right of re-entry. *Knowles v. South County Hosp., 140 A.2d 499, 141 A.2d 263 (R.I. 1958)* (the property was to revert to the testator's estate on the happening of a contingency. The residuary devisee then would take).

(n8)Footnote 248. *Freke v. Carbery, L.R., 16 Eq. 461, 21 W.R. 835 (1873).*

Wilmington Trust Co. v. Sloane, 54 A.2d 544 (Del. 1947); Ford v. Ford, 44 N.W. 1057 (Mich. 1890); Hobson v. Hale, 95 N.Y. 588 (1884).

(n9)Footnote 249. *In re Friend's Will, 28 N.E.2d 377 (N.Y. 1940).*

(n10)Footnote 250. *McCreery v. Johnston, 110 S.E. 464 (W. Va. 1922).*

See Constructional Devices and the New York Rule Against Perpetuities, 33 Fordham L. Rev. 259 (1964).

See also Richard R. Powell, *The Rule Against Perpetuities and Spendthrift Trusts in New York: Comments and Suggestions, 71 Colum. L. Rev. 688 (1971).*

(n11)Footnote 251. *Madison v. Larmon, 48 N.E. 556 (Ill. 1897); Northern Trust Co. v. Porter, 13 N.E.2d 487 (Ill. 1938);* Barnum v. Barnum, 90 am. dec. 88 (Md. 1866); *Gates v. Seibert, 57 S.W. 1065 (Mo. 1900); Hunt v. Wright 47 N.H. 396 (1866); In re Mifflin's Appeal, 15 A. 525* (Pa.), 1 l.r.a. 453; *Barton v. Thaw, 92 A. 312 (Pa. 1914); In re Reed's Estate, 23 Erie 20* (Pa.).

See In re Rolston's Estate, 10 N.Y.S.2d 660 (1939).

Testamentary provisions for suspension of trust until after probate of a will does not violate the rule against perpetuities. *Asche v. Asche, 216 A.2d 272 (Del. Ch. 1964).*

A will provided that there should be no "distribution" until all directions had been complied with, constituted only a postponement of enjoyment and no violation of the rule against perpetuities (*i.e.*, this was not construed as a condition precedent to vesting). *West v. Storm, 217 N.E.2d 825 (Ill. App. 1966).*

A gift in trust to pay the corpus to four named children at various ages with limitation over on death, leaving issue, was held contingent until time for payment arrived and the vesting in the grandchildren was too remote. *Curtis v. Citizens Bank & Trust Co., 318 S.W.2d 33 (Ky. 1958).*

A provision in a will that property devised to a daughter for life and then to her children but not to be sold until the grandchildren became 42 was void beyond the granddaughter's lifetime. *In re Kelly's Estate, 193 So. 2d 575 (Miss. 1967).*

Other authorities however treat the rule against remoteness as entirely distinct from the principles applicable to restraints on alienation.

See The Quest of the Best Vest, 37 So. Cal. L. Rev. 283 (1964); That "Simple and Clear Rule" -- The Common Law Rule Against Perpetuities in Mississippi, 34 Miss. L.J. 63 (1962).

A trust to the grantor for life then to pay to his issue for their support and to distribute on the death or becoming 25 of the issue of two named persons of the grantor's issue then living, *per stirpes*, did not violate the Rule since the court held that the trust would be terminated by the court if at the time of the death of the two named persons there was a grandchild not yet 25 who had not been alive at the time of creation of the trust. In the *Application of Wolfsohn, 339 N.Y.S.2d 755 (App. 1973), appeal denied by Matter of Wolfsohn, 297 N.E.2d 524 (N.Y. 1973).*

(n12)Footnote 252. *Mahoney v. Mahoney, 120 A. 342 (Conn. 1923); Grant v. Grant, 2 S.E.2d 421 (Ga. 1939).*

(n13)Footnote 253. *Swain v. Bowers, 158 N.E. 598 (Ind. App. 1927)* (the vesting of title under a devise in trust to children of specified persons, including posthumous children was not affected by a provision postponing enjoyment).

Fuller v. Hedgpeth, 80 S.E.2d 18 (N.C. 1954) (the rule applies to vesting in interest, not in enjoyment).

(n14)Footnote 254. *Ould v. Washington Hosp. for Foundlings, 95 U.S. 303 (1877); Duggan v. Slocum, 92 F. 806 (1899); Hill v. Birmingham, 38 A.2d 604 (Conn. 1944); Hart v. Seymour, 35 N.E. 246 (Ill. 1893); Johnston v. Cosby, 29 N.E.2d 608 (Ill. 1940); Smith v. Renne, 46 N.E.2d 587 (Ill. 1943); Sellers v. Archer, 134 N.E.2d 264 (Ill. 1956)* (to A for life then to B for life then to heirs of body of B did not violate the rule merely because of possibility B might not have heirs of the body); *In re Dees' Estate, 308 P.2d 90 (Kan. 1957)* (limitation over to heirs of testator if devisee should ever sell or mortgage was void for remoteness); *Taylor v. Dooley, 297 S.W.2d 905 (Ky. 1956)* (limitation over to children of bodily heirs of life tenant held too remote); *Pulitzer v. Livingston, 36 A. 635 (Me. 1896); Perkins v. Iglehart, 39 A.2d 672 (Md. 1944); Rutherfurd v. Farrar, 118 S.W.2d 79 (Mo. App. 1938); In re Johnston's Estate, 39 A. 879 (Pa. 1898); In re Warren's Estate, 182 A. 396 (Pa. 1936),* 104 a.l.r. 1345; *Betts v. Snyder, 19 A.2d 82 (Pa. 1941)* (a gift of a life estate with remainder over upon conditions subsequent as to use with a final limitation over on breach of conditions, the limitation over was void for remoteness and the existence of the gift over destroyed a right of re-entry in the grantor's heir); *Crockett v. Scott, 284 S.W.2d 289 (Tenn. 1955),* 56 a.l.r.2d 442 (to A for life then to B and the children of A and the heirs of those who were dead for life then to their children held too remote); *Bank of Cal. v. Ager, 109 P.2d 548 (Wash. 1941).*

See W. Burton Leach, *Perpetuities in a Nutshell, 51 Harv. L. Rev. 638.*

Trust to terminate on death of last surviving heir was too remote. *Frost Nat'l Bank of San Antonio v. Newton, 554 S.W.2d 149 (Tex. 1977).*

(n15)Footnote 255. *Haggerty v. Oakland, 326 P.2d 957 (Cal. App. 1958),* 66 a.l.r.2d 718 (rule applies if at the time of the creation of the instrument there appears any possibility the interest may not vest within the time); *Erickson v. Palmer, 315 P.2d 164 (Or. 1957)* (executory devise valid if vests within the rule); *In re Lewis' Estate, 37 A.2d 482 (Pa. 1944).*

Wright v. Renehan, 76 A.2d 705 (N.J. Super. 1950) (gift to great-grandchildren of a settlor held void).

Limitation over after unborn granddaughter's death in inter vivos trust held too remote. *United Cal. Bank v. Bottler, 94 Cal. Rptr. 227 (Cal. App. 1971).*

In a limitation in the will to the wife for life and then to testator's named children absolutely, a later provision, creating a limitation over in the event any named child predeceased the survivor of the testator and his wife, was invalid. *Schmidt v. Claus, 93 N.W.2d 592 (Iowa 1958).*

In the case of *In re Lattouf's Will, 208 A.2d 411 (N.J. Super. 1965),* the court allowed evidence of a hysterectomy in connection with the rule of remoteness of vesting. Finding no possibility of issue. *In re Ransom's Estate, 214 A.2d 521 (N.J. Super. 1965).*

In a gift to "vest in" three named remaindermen if living when a grandson became 30, it was held that it must vest during lives of remaindermen and, therefore, valid though these lives were not the measuring lives of the trust. *Finkbeiner v. Finkbeiner, 165 N.E.2d 825 (Ohio App. 1959).*

In *Abram v. Wilson, 220 N.E.2d 739 (Ohio 1966),* the court refused to find it was impossible for a man 75 to have children so as to take the rule against remoteness of vesting.

Will to son and daughter for life then to all grandchildren for life then to testator's heirs. All life estates held valid but remainder to heirs held too remote. *Sellers v. Powers, 426 S.W.2d 533 (Tex. 1968).*

Gift to unborn children of living grandchild did not violate the *Rule. Lowry v. Murren, 236 N.W.2d 627 (Neb. 1975).*

Class gift in remainder valid where interest would vest during life tenant's lifetime. *Zimmerman v. First Nat'l Bank of Birmingham, 348 So. 2d 1359 (Ala. 1977).*

Fund to be divided among those then living when youngest grandchild became 25 was void. Contingent remainder as too remote. *Hagemann v. National Bank & Trust Co., 237 S.E.2d 388 (Va. 1977).*

(n16)Footnote 256. *In re Holthausen's Will, 26 N.Y.S.2d 140 (1941);* Stephens v. Stephens, Cas. Temp. Talb. 228 (1736).

Every estate created by will or deed shall vest within the life or lives of those in being and 21 years and ten months thereafter. *McCreery v. Johnston, 110 S.E. 464 (W. Va. 1922).*

Under the common law the rule could not be considered in construing an instrument as to when a class closed or whether interests were vested or contingent. More recent cases, however, have used the rule in connection with construction so as to avoid a result which would violate the rule. *Bankers Trust Co. v. Pearson, 99 A.2d 224 (Conn. 1953).*

(n17)Footnote 257. *McArthur v. Scott, 113 U.S. 340 (1885); Chilcott v. Hart, 45 P. 391 (Colo. 1896),* 35 l.r.a. 41; *Madison v. Larmon, 48 N.E. 556 (Ill. 1897); Thellusson v. Woodford, 4 Ves. 227, aff'd, 11 Ves. 112, 8 R.R. 104, 1 Eng. Rul. Cas. 498 (1799).*

In a devise to children for life and then to grandchildren for life, remainder in fee to the great-grandchildren, life estate was valid but the limitation to great-grandchildren was void. *Thomas v. Utterback, 269 S.W.2d 251 (Ky. 1954).*

A devise to children of named nieces and nephews in trust continued until youngest child reached 30, whether born before or after the testator, vested at the death of the last survivor of the named nieces and nephews and the rule was not violated. *Harris v. France, 232 S.W.2d 64 (Tenn. App. 1950).*

See Robert J. Lynn, *Reforming The Rule Against Perpetuities: Choosing the Measuring Lives, 1965 Duke L.J. 720.*

It was held in *Hagemann v. National Bank & Trust Co., 237 S.E.2d 388 (Va. 1977),* that a bequest in a will which violated the rule against remoteness was not saved by a provision that the trust ran beyond a longer period than permitted by law, then upon the happening of such contingency that portion of the estate should be paid to person or persons to whom the portion would ultimately go under the other provisions. The savings clause was held void because it adopted the very provisions that made it void.

(n18)Footnote 258. *Matter of Unett's Estate, 250 N.W.2d 644 (Neb. 1977).*

(n19)Footnote 259. *Rolfe & Rumford Asylum v. Lefebre, 45 A. 1087 (N.H. 1898); Stein v. United States Nat'l Bank, 108 P.2d 1016 (Or. 1941).*

Trust to continue for 25 years and then to go to "heirs" of settlor's sisters violated the *Rule. Palmer v. Ketner, 223 S.E.2d 913 (N.C. App. 1976).*

(n20)Footnote 260. *Henderson v. Moore, 189 S.W.2d 59 (Tex. Civ. App. 1945), aff'd, Henderson v. Moore, 190 S.W.2d 500 (Tex. 1945).*

Colorado Nat'l Bank v. McCabe, 353 P.2d 385 (Colo. 1960) (trust for 25 years in gross held valid where the principal would vest, if at all, within lives of beneficiaries living at testator's death); *Perkins v. Iglehart, 39 A.2d 672 (Md. 1944)* (to grandchildren of testatrix surviving her son and his "in-law" was too remote); *Parker v. Parker, 113 S.E.2d 899 (N.C. 1960),* 40 n.c.l. Rev. 151 (gift in remainder to grandchildren when the youngest reached 28 violated the rule).

(n21)Footnote 261. *Alexander v. Dolen, 274 N.Y.S.2d 661 (1966).*

(n22)Footnote 262. *In re Manson's Estate, 88 N.Y.S.2d 95 (N.Y. 1949).*

Bequest to "widow of X" held not to violate rule as intended to refer to a person who is or will be alive in being on effective date of the instrument. *In re Williams' Will, 245 N.Y.S.2d 672 (1964).*

(n23)Footnote 263. Unless the vertical separability rule is applied, as in *In re Harrah's Estate, 72 A.2d 587 (Pa. 1950).*

See, however, *Tiehen v. Hebenstreit, 42 N.W.2d 802 (Neb. 1950)* (held valid); *Rose v. Rose, 60 S.E.2d 45 (Va. 1950).*

Under a conveyance in trust for the life of one of the grantees with full power on the part of the *cestui que* trust to devise and bequeath the property or any part thereof or any estate or interest therein to or for the use and benefit of such of her children and descendants in such proportions as she may see fit, a will left by the *cestui que* trust giving equitable life estates in the trust property which were to vest in four of her children immediately upon her death does not violate

the statute against perpetuities notwithstanding the four children were born after the execution of the trust deed creating the trust and power. *Hawkins v. Ghent, 140 A. 212 (Md. 1928).*

Deed to A for life, then to children of A for life, then to their heirs, violated the rule against perpetuities as to the gift to the heirs. *Mounts v. Roberts, 388 S.W.2d 117 (Ky. 1965).*

(n24)Footnote 264. *Bridgeport Trust Co. v. Parker, 116 A. 182 (Conn. 1922).*

(n25)Footnote 265. *Edward John Noble Hosp. v. Board of Foreign Missions, 176 N.Y.S.2d 157 (N.Y. 1958); St. Louis Union Trust Co. v. Kelley, 199 S.W.2d 344 (Mo. 1947).*

See Robert J. Lynn & John W. VanDoren, *Applying the Rule Against Perpetuities to Remainders and Executory Interests: Orthodox Doctrine and Modern Cases, 27 U. Chi. L. Rev. 436 (1960).*

(n26)Footnote 266. *Edward John Noble Hosp. v. Board of Foreign Missions, 176 N.Y.S.2d 157 (1958).*

(n27)Footnote 267. Limitation over after all "direct blood issue" held void as too remote. *Kettler v. Atkinson, 383 S.W.2d 557 (Tex. 1967).*

(n28)Footnote 268. *McArthur v. Scott, 113 U.S. 340, 28 L. Ed. 1015 (1885); Hosea v. Jacobs, 98 Mass. 65 (1867); Lowe v. Rice, 291 S.W.2d 287 (Tenn. App. 1956)* (devise to testator's grandchildren not too remote).

Where decedent in an irrevocable living trust retained a testamentary power of appointment, decedent's life was one of the measuring lives for the rule against remoteness. *In re Bauer's Trust, 200 N.E.2d 207 (N.Y.S. 1964).*

(n29)Footnote 269. *In re Friday's Estate, 170 A. 123 (Pa. 1933),* 91 a.l.r. 766.

Remainder to grandchildren of life tenant is void, if in a deed, since the parents of the remainderman may be born after date of the deed. *Bach v. Pace, 305 S.W.2d 528 (Ky. 1957).*

Where a will provided that the period of vesting could run only for the time valid under law, the court limited the lives on which the limitation was valid to named lives. *Asche v. Asche, 216 A.2d 272 (Del. Ch. 1964).*

Family settlement agreement had been designed by which real estate was divided among five children. The agreement provided that all oil and gas rights, leases or royalties of the entire property would be shared. Legal fees in the tracts were held in individual names, but there was an outstanding equitable fee simple interest in oil and gas rights in each of the other tracts held by each of the other children or their representatives. These fees were vested and were, therefore, subject to rule against remoteness. *Springer v. Litsey, 345 P.2d 669 (Kan. 1959).*

A conveyance to A and his bodily heirs created a life estate. The granting clause indicated where bodily heirs meant his children. *Bauer v. Bauer, 360 P.2d 852 (Kan. 1961).*

Devise of remainder interest to great-grandchildren was too remote and doctrine of separability was denied. *North Carolina Nat'l Bank v. Norris, 203 S.E.2d 657 (N.C. App. 1974).*

See W. Barton Leach and James K. Logan, *Perpetuities: A Standard Saving Clause to Avoid Violations of the Rule, 74 Harv. L. Rev. 1141 (1961).*

(n30)Footnote 270. *McArthur v. Scott, 113 U.S. 340 (1885); Hall v. Hall, 123 Mass. 120 (1877); Brown v. Brown, 6 S.W. 869, 7 S.W. 640 (Tenn. 1888).*

(n31)Footnote 271. *Fitchie v. Brown, 211 U.S. 321 (1908); Thellusson v. Woodford, 4 Ves. 227, aff'd 11 Ves. 112, 8 R.R. 104, 1 Eng. Rul. Cas. 498.*

(n32)Footnote 272. *Lawrence v. Smith, 45 N.E. 259 (Ill. 1896);* Jee v. Audley, 1 Cox 324, *1 R.R. 46.*

Pennsylvania also determines the question of violation of the rule against remoteness by the actual situation existing at the time of end of the allowed period. Pa. Stat., tit. 20, § 301.4b.

Gift to any of my relatives who name a child after me, held too remote. *In re Finn's Will, 262 N.Y.S.2d 972 (1965).*

(n33)Footnote 273. *In re Coggins' Appeal, 16 A. 579 (Pa. 1889).*

An inter vivos trust reserved life estate with general testamentary power of appointment. In default of appointment of failure thereof, one-half was to go to A for life if he survived settlor. The other one-half to children or issue thereof of the settlor, principal to be paid at 21 to youngest taker living at settlor's death. Settlor by will appointed to daughters for life remainder over to children or their issue on death of last of settlor's grandchildren living at settlor's death provided that, if gift was too remote, principal was to go to those entitled to the income. Both principal and alternative gift held void for remoteness. *McCreary's Trust Estate v. Pitts, 47 A.2d 235 (Pa. 1946).*

Possibility that testamentary trust in remainder would not vest until more than twenty-one years plus lives in being, plus period of gestation, caused the property to be passed by intestacy. *Palmer v. Ketner, 223 S.E.2d 913 (N.C. App. 1976).*

(n34)Footnote 274. *Camden Safe Deposit & Trust Co. v. Scott, 189 A. 653 (N.J. Eq. 1937).*

(n35)Footnote 275. *Kleinheider v. Phillips Pipe Line Co., 391 F. Supp. 159* (pipeline easements); *St. Louis Union Trust Co. v. Kelley, 199 S.W.2d 344 (Mo. 1947)* (will construction).

(n36)Footnote 276. *St. Louis Union Trust Co. v. Bassett, 85 S.W.2d 569 (Mo. 1935).*

A bequest to A and B and their surviving descendants *per stirpes* meant descendants living at testator's death and did not violate the *Rule. Antibus v. Hart, 135 N.E.2d 835 (Ind. App. 1956).*

Tennessee has abolished the rule of Jee v. Audley, 1 Cox 324, 39 Eq. Rep. 1186; Tenn. Code Ann. § 24-516.

(n37)Footnote 277. *Hagen v. Sacrison, 123 N.W. 518 (N.D. 1909).*

A will directing that funds should be used for the maintenance of a cemetery lot for the testator was valid against the rule where the executor had discretionary power as to reasonable time to perform the work. *Ellis v. Andrews, 324 S.W.2d 917 (Tex. Civ. App. 1959).*

(n38)Footnote 278. *Quilliam v. Union Trust Co., 142 N.E. 214 (Ind. 1924).*

Reservation of perpetual right to drill for oil and gas was a void perpetuity. *Dallapi v. Campbell, 114 P.2d 646 (Cal. 1941).*

Accumulation provision in testamentary trust for a period within Rule Against Remoteness is valid but a constructional preference is against accumulation. *Rogerson v. Wheeling Dollar Savings & Trust Co., 222 S.E.2d 816 (W. Va. 1976).*

(n39)Footnote 279. *Hawkins v. Ghent, 140 A. 212 (Md. 1928).*

(n40)Footnote 280. Corbet's Case, 1 Coke 83b.

(n41)Footnote 281. *Emerson v. Campbell, 84 A.2d 148 (Del. 1951); Davenport v. Davenport Found., 222 P.2d 11 (Cal. 1950)* (the court construed a gift in remainder to a class as including afterborn children and as, therefore, invalid in toto); *In re Foster's Estate, 376 P.2d 784 (Kan. 1962), 12 Kan. L. Rev. 460* (bequest in trust for grandchildren to be distributed when youngest reached 23 violated the rule but the trust was severable); *Carter v. Berry, 140 So. 2d 843 (Miss. 1962)* (class gift is not invalid merely because the interest of one member might vest too remotely); *Lockridge v. Mace, 18 S.W. 1145 (Mo. 1892),* may no longer be the Missouri doctrine as to perpetuities. *See McGowan v. St. Louis Union Trust Co., 369 S.W.2d 144 (Mo. 1892); In re Fischer's Will, 120 N.E.2d 688 (N.Y. 1954); In re Harrah's Estate, 72 A.2d 587 (N.Y. 1950); Harris v. France, 232 S.W.2d 64 (Tenn. 1950)* (a gift to a class was upheld as not too remote, being construed as vesting in the members of the class at birth with enjoyment postponed).

Exercising portions of a trust which violate the rule against remoteness of vesting so as to preserve valid provisions. *In re Freeman's Estate, 404 P.2d 222 (Kan. 1965).*

When an inter vivos trust contained a saving clause that if any provisions which violated the rule defending the parts should be ineffective, the trusts were preserved by the saving clause even though it contained language violative of the rule. *Nelson v. Mercantile Trust Co., 335 S.W.2d 167 (Mo. 1960).*

See In re Pendleton's Estate, 246 N.Y.S.2d 351 (N.Y. 1964); N.Y. Prop. Law, § 11a (where the age at which the person would take is too remote, New York reduces the age to 21 years, but this is only as to those or to whom it is necessary to reduce to save the interest. The others must wait until the stated time).

Provision of a will for termination of a testamentary trust upon "the day the youngest living child of my son, in being, on the date of my death, attains twenty-five years of age" operated to close class and resulted in vesting of remainders during life in being at death of the testator. *Green v. Green, 221 N.E.2d 388 (Ohio 1966).*

Instruments must be so construed so as to avoid rule against remoteness if possible. *Childs v. Sherman, 221 N.E.2d 748 (Mass. 1966).*

Missouri has now joined those states which permit the severability of an instrument to preserve the portion which does not violate the rule against remoteness. *Mercantile Trust Co. v. Hammerstein, 380 S.W.2d 287 (Mo. 1964); also see* Eckhardt, *Rule Against Perpetuities in Missouri, 30 Mo. L. Rev. 27.*

See W. Barton Leach & James K. Logan, *Perpetuities: A Standard Saving Clause to Avoid Violations of the Rule, 74 Harv. L. Rev. 1141 (1961).*

In ambiguous language the court adopts the construction which would uphold a contract against the rule against perpetuities, absent extrinsic evidence to show that the rule was violated. *Watergate Corp. v. Reagan, 321 So. 2d 133 (Fla. App. 1975).*

Saving portion of bequest which did not violate the rule. *Hagemann v. National Bank & Trust Co., 237 S.E.2d 388 (Va. 1977).*

(n42)Footnote 282. *Rozell v. Rozell, 186 N.W. 489 (Mich. 1922)* (under the circumstances of the particular case the life estates were sustained notwithstanding the invalidity of the remainders).

A devise to testator's daughter and, on her death without issue, to testator's nephews and nieces, if construed to refer generally to a death without issue, that is, either before or after the testator's death, would mean a limitation over after and indefinite failure of issue and, therefore, be void under the statute against perpetuities and the daughter would take a

fee tail at common law which is converted by the Indiana statute into a fee simple. *Quilliam v. Union Trust Co., 142 N.E. 214 (Ind. 1924).* Compare with the following case holding a bequest to a daughter of the rent and profits of certain property for life and at her death making provision for the distribution of the property among her lawful children and in the event of her death no issue her surviving, the property to be divided equally among her brothers and sisters and their issue does not violate the statute against perpetuities when it is apparent that the word "issue" was used as the equivalent of children. *Daskam v. Lockwood, 130 A. 92 (Conn. 1925).*

Devise to daughter for life and then to bodily heirs for life and then to their children was too remote. Daughter's life estate was valid but remainders over were too closely entwined with invalid provisions and were void. *Taylor v. Dooley, 297 S.W.2d 905 (Ky. 1956).*

Devise in trust to children upon reaching ages of 25 with part of income meanwhile and if any die then to their issue upon the issue reaching the same age was too contingent and too remote as to possible grandchildren. Entire trust was invalid as general scheme of the testator would be frustrated by upholding gift to children alone. *Curtis v. Citizens Bank & Trust Co., 318 S.W.2d 33 (Ky. 1958).*

A devise to one to have and to hold in fee simple, forever, with the proviso, however, that he shall not grant, bargain, sell and convey or in any manner dispose of the land devised, or the timber thereon, or any part, parcel or quantity thereof until the year 1975, but should the devisee die before such date the limitation relative to the sale of the land is declared null and void and the property devised made to vest absolutely in the wife and heirs of the devisee gives a life estate in devisees subject to be converted into fee on the arrival of the year 1975 if he be then living, and does not violate the statutes against perpetuities. *Bratton v. Graham, 111 So. 353 (Miss. 1927).*

Where two remote limitations cannot be disentangled from the other provisions of the trust the valid provisions are also destroyed under the theory of infectious invalidity. *New England Trust Co. v. Sanger, 149 N.E.2d 598 (Mass. 1958).*

"All or nothing at all" rule of remoteness does not prevail. *Carter v. Berry, 140 So. 2d 843 (Miss. 1962).*

Permitting excise of invalid provisions of a charitable trust. *In re Scholler's Estate, 169 A.2d 554 (Pa. 1961).*

If the general testamentary scheme is too remote incidental prior limitations also fall though they would take effect within the time limited. *In re Edwards' Will, 180 A.2d 590 (Pa. 1962).*

Entire class gift fails if there is any possibility that the gift to the class will not vest in every possible member of the class within the rule. *Abram v. Wilson, 220 N.E.2d 739 (Ohio 1966).*

Refusing to apply the doctrine of partial "approximation" to save gift by merely invalidating portion of an option that violated the *Rule. Pace v. Culpepper, 347 So. 2d 1313 (Miss. 1977).*

Saving clause effective only if will provisions as to perpetuity is ambiguous. *Hagemann v. National Bank & Trust Co., 237 S.E.2d 388 (Va. 1977).*

(n43)Footnote 283. Where several trusts are created by will which are independent of each other and each is complete within itself, some of which are lawful and others are unlawful, and which may be separated from each other, the illegal trusts may be cut out of the will and the legal ones permitted to stand. There is, however, a well-recognized limitation in all the reported cases and by the text-writers upon this rule which is equally well established with the rule, which is that when some of the trusts in the will are legal and some are illegal, if they are so connected together as to constitute an entire scheme for the disposition of the estate, so that the presumed wishes of the testator would be defeated if one portion were retained and other portions rejected, or if manifest injustice would result from such

construction to the beneficiaries or to some of them, then all the trusts must be construed together, and all must stand or all must fall. *Barrett v. Barrett, 99 N.E. 625 (Ill. 1912).*

Where too remote limitations cannot be disentangled from the other provisions of the trust the valid provisions are also destroyed under the theory of infectious invalidity. *New England Trust Co. v. Sanger, 149 N.E.2d 598 (Mass. 1958).*

Taylor v. Dooley, 297 S.W.2d 905 (Ky. 1956) ("infectious invalidity doctrine" applied).

Devise to wife for life, then to daughters or survivors for life, then to their children for life with limitation over to great-grandchildren and, if none, then to an institution violated the rule and doctrine of separability did not operate. *North Carolina Nat'l Bank v. Norris, 203 S.E.2d 657 (N.C. App. 1974).*

(n44)Footnote 284. *McCreary v. Pitts, 47 A.2d 235 (Pa. 1946); In re Lauck's Estate, 57 A.2d 855 (Pa. 1948);* Loddington v. Kime, 1 Salk 224, *91 Eng. Rep. 198.*

Contra, In re Packer's Estate, 92 A. 70 (Pa. 1914).

Clause in testamentary trust directing trustee to eliminate any provision violating perpetuities justified the court in eliminating lines postponing vesting beyond the time limit. *Cennamo v. American Sec. & Trust Co., 360 F. Supp. 1354 (D.D.C. 1973).*

See William J. Murphy *Separability and the Rule Against Perpetuities, 77 Dick. L. Rev. 277 (1973).*

It was held in *Hagemann v. National Bank & Trust Co., 237 S.E.2d 388 (Va. 1977),* that a bequest in a will which violated the rule against remoteness was not saved by a provision that the trust ran beyond a longer period than permitted by law, then upon the happening of such contingency that portion of the estate should be paid to person or persons to whom the portion would ultimately go under the other provisions. Savings clause was held void because it adopted the very provisions that made it void.

(n45)Footnote 285. *In re Micheletti's Estate, 151 P.2d 833 (Cal. 1944).*

(n46)Footnote 286. *Curtis v. Citizens Bank & Trust Co., 318 S.W.2d 33 (Ky. 1958)* (voiding the entire will where the gift was too remote).

Devise to wife for life, then to daughters or survivors for life, then to their children for life with limitation over to great-grandchildren and, if none, then to an institution violated the rule and doctrine of separability did not operate. *North Carolina Nat'l Bank v. Norris, 203 S.E.2d 657 (N.C. App. 1974).*

(n47)Footnote 287. *Zeisweiss v. James, 3 Am. Rep. 558 (Pa. 1870).*

(n48)Footnote 288. *Thorp v. Lund, 116 N.E. 946 (Mass. 1917); West Texas Bank & Trust Co. v. Matlock, 212 S.W. 937 (Tex. 1919).*

(n49)Footnote 289. Such a trust for the convenience of an unincorporated association in renting and selling land, under which the land is held for no other purpose, and where the income is not accumulated, but is distributed as it accrues, and where the land is to be sold free of trusts at the will of the association and where the whole equitable interest in the trust is at every moment vested absolutely in those who at that moment are shareholders and never can be vested in any other persons save by act of the absolute owners or by operation of law upon their property and not by force of any limitation contained in the deed of trust; the equitable interests so vested being also constantly vendible by their several owners without let or hindrance, as well as subject to their debts, and passing like other property upon

death, by virtue not of the deed of trust but of the general laws governing the disposition of the property of decedents, withdraws no property from commerce, and is not within the reason or the terms of what is called the "rule against perpetuities." The trust involves no future limitations, no restraint upon alienation, and no accumulations either of income or of principal. The provisions by which the trust fund may be at some time held for the benefit of persons not shareholders at its inception and who may become such at a period more remote than that allowed by the rule, are not future limitations made by the trust-deed in the sense in which the word "limitation" is used in speaking of the operation of the rule. If there shall ever be a shareholder other than those in which the whole equitable estate was absolutely vested at the inception of the trust; that shareholder will not take his interest by virtue of a limitation in the trust-deed, but because of his succession by virtue of the general principles of law, to the property of the original shareholder. The new shareholder, with reference to the rule, is in the same situation as a person who, after the expiration of all lives which were in being when a fee or an estate tail was created, and of a further period of twenty-one years, takes the fee by the operation of the law which makes property vendible by, or descendible from, the owner and not by virtue of a limitation in the instrument which created the fee. The entire ownership is never for a moment uncertain nor unvested, and at every moment each owner can freely dispose of his property, and at each moment it can be transferred to his creditor by the ordinary processes of the law, and at each moment the trust can be terminated at the will of the owners of the equitable interest.

Howe v. Morse, 55 N.E. 213 (Mass. 1899).

> The mere creation of a trust does not ipso facto suspend the power of alienation. It is only suspended by such trust, where a trust term is created, either expressly or by implication, during the existence of which a sale by the trustee would be in contravention of the trust. Where the trustee is empowered to sell the land without restriction as to time, the power of alienation is not suspended, although the alienation is in fact postponed the nonaction of the trustee, or in consequence of discretion reposed in him by the creator of the trust.

Robert v. Corning, 89 N.Y. 225 (1882). See Ward v. McMath, 241 S.W. 3 (Ark. 1922); Hart v. Seymour, 35 N.E. 246 (Ill. 1893); Minot v. Burroughs, 112 N.E. 620 (Mass. 1916); In re Pittock, 199 P. 633, 202 P. 216 (Or. 1921).

(n50)Footnote 290. *Baker v. Stern, 216 N.W. 147 (Wis. 1927),* 58 a.l.r. 462.

(n51)Footnote 291. *Id.*

(n52)Footnote 292. *Trustees of Graceland Cemetery Imp. Fund v. United States, 515 F.2d 763 (1975),* approving Restatement (Second) of Trusts § 112 (1959).

(n53)Footnote 293. Institution for Sav. in *Roxbury v. Roxbury Home for Aged Women, 139 N.E. 301 (Mass. 1923); Yarbrough v. Yarbrough, 269 S.W. 36 (Tenn. 1925).*

(n54)Footnote 294. *Nellis v. Rickard, 66 P. 32 (Cal. 1901); Comstock v. Bridgeport Trust Co., 138 A. 440 (Conn. 1927); Security Trust Co. v. Cooling, 42 A.2d 784 (Del. 1945); Foley v. Nalley, 184 N.E. 316 (Ill. 1932); Bankers Trust Co. v. Garver, 268 N.W. 568 (Iowa 1936); Graham v. Whitridge, 57 A. 609, 58 A. 36 (Md. 1904); Lovering v. Worthington, 106 Mass. 86 (1870); Wright v. Renehan, 76 A.2d 705 (N.J. Super. 1950).*

Contra, Maher v. Maher, 139 F. Supp. 294 (1956).

(n55)Footnote 295. *Brown v. Independent Baptist Church, 91 N.E.2d 922 (Mass. 1950); Jones v. Burns, 74 So. 2d 866 (Miss. 1954); Donehue v. Nilges, 266 S.W.2d 553 (Mo. 1954); Leonard v. Burr, 18 N.Y. 96 (1858); Colorado Nat'l Bank v. McCabe, 353 P.2d 385 (Colo. 1960)* (interest made contingent upon event prevailing for a specific term in excess of 21 years failed).

(n56)Footnote 296. If the provisions of a will are such that under them a violation of the rule against perpetuities may possibly happen, then the devise or interests dependent upon such provisions are void. *Thorne v. Continental Nat'l Bank & Trust Co., 27 N.E.2d 302 (Ill. App. 1940).*

See Herbert Barry, *Mr. Thellusson's Will, 22 Va. L. Rev. 416 (1936);* Herbert Barry, *The Duke of Norfolk's Case, 23 Va. L. Rev. 538 (1937);* Bordwell, *Alienability and Perpetuities, 22 Iowa L. Rev. 437 (1937), 23 Iowa L.Rev. 1 (1937);* Percy Bordwell, *Perpetuities From the Point of View of the Draftsman, 11 Rutgers L. Rev. 429 (1957);* Bertel M. Sparks *Perpetuities Problems of the General Practitioner, 8 U. Fla. L. Rev. 465 (1955).*

Mass. Laws § 1969. As respects perpetuities class is determined as if the person died after the happening of the event.

(n57)Footnote 297. Succeeding interest is void. *Sandford v. Sandford, 20 S.W.2d 83 (Ky. 1929); Ledwith v. Hurst, 130 A. 315 (Pa. 1925); Beard v. Westcott, 5 Taunt. 393, 5 B. & Ald. 801, 24 R.R. 553.*

Valid. Goldsborough v. Martin, 41 Md. 488 (1875).

If it is to be presumed that the testator would have preferred to die intestate if he had known that the principal gift violated the rule, the entire will fails. *In re Whitney's Estate, 167 P. 399 (Cal. 1917); Dotten v. Glennie, 106 A. 824 (Conn. 1919); Taylor v. Dooley, 297 S.W.2d 905 (Ky. 1956); Tompkins v. Pryor, 60 A.2d 801 (N.J. Eq. 1948); In re Lilley's Estate, 116 A. 392 (Pa. 1922).*

(n58)Footnote 298. *Edward John Noble Hosp. v. Board of Foreign Missions, 176 N.Y.S.2d 157 (1958).*

(n59)Footnote 299. *Greco v. Meadow River Coal & Land Co., 113 S.E.2d 79 (W. Va. 1960).*

(n60)Footnote 300. Limitation over after determinable fee is too remote. *Donehue v. Nilges, 266 S.W.2d 553 (Mo. 1954),* 45 a.l.r.2d 1150.

(n61)Footnote 301. *McMahon v. Consistory of St. Paul's Reformed Church, 75 A.2d 122 (Md. 1950).*

(n62)Footnote 302. *Howe v. Hodge, 38 N.E. 1083 (Ill. 1894); Chapman v. Cheney, 61 N.E. 363 (Ill. 1901).*

See Maher v. Maher, 139 F. Supp. 294 (1956), holding that if a limitation over is too remote the immediate estate becomes a fee simple absolute regardless of its quality. (Although this is not in accord with the feeling of most legal writers or other cases except in the instance of a limitation over after fee upon condition subsequent. Yet it must be remembered that the Rule Against Remoteness is of such comparatively recent origin that it cannot be said to have finally crystallized.)

See also Eugene F. Scales, *Disposition of Property in the Event of Failure of Subsequent Future Interests, 47 Ill. B.J. 692 (1959).*

(n63)Footnote 303. *McGlothlin v. McElvain, 95 N.E.2d 68 (Ill. 1950).*

Measure of rule is events which actually transpired, not possibility as of time of death of original donor under *Dollar Savings & Trust Co. v. First Nat'l Bank of Boston, 285 N.E.2d 768 (Ohio 1972).* But otherwise the common-law rule that the period is measured from the time of creation of the power, not its exercise, governs.

(n64)Footnote 304. *Donehue v. Nilges, 266 S.W.2d 553 (Mo. 1954).*

(n65)Footnote 305. *Pulitzer v. Livingston, 36 A. 635 (Me. 1896); In re Mifflin's Appeal, 15 A. 525 (Pa. 1888); Schellentrager v. Tradesmens Nat'l Bank & Trust Co., 88 A.2d 773 (Pa. 1952).*

Testator left to his son for life and then to his son's issue for their lives with power in the issue to appoint after 21 and in default of appointment to the daughter. The limitation to the daughter was void. *Ortman v. Dugan, 100 A. 82 (Md. 1917).*

The period of the rule against remoteness begins to run from the date of creation of a general testamentary power of appointment, not from date of its exercise. Restatement, Property, § 392.

In unconditional power of revocation, time began when such power ceased, usually at death of grantor unless released earlier. *Second Nat'l Bank of New Haven v. Harris Trust & Sav. Bank, 283 A.2d 226 (Conn. Super. 1971).*

(n66)Footnote 306. *Perkins v. Iglehart, 39 A.2d 672 (1944).*

Will directing to pay income to children per stirpes for 36 years was not too remote because gift was to named individuals and not to a class and so was vested. *Black v. Gettys, 119 S.E.2d 660 (S.C. 1961).*

(n67)Footnote 307. *In re Sahlender's Estate, 201 P.2d 69 (Cal. 1948); Brooks Bank & Trust Co. v. Beers, 181 A. 391 (Conn. 1935); Moroney v. Haas, 115 N.E. 648 (Ill. 1917); Armstrong v. Armstrong, 53 Ky. (14 B. Mon.) 333 (1853); Jackson v. Phillips, 96 Mass. 539 (14 Allen 1867); In re Trevor, 145 N.E. 66 (N.Y. 1924); Minter v. Wraith, 13 Sim. 52, 60 Eng. Rep. 21 (1842).*

Contra, held inseparable and therefore void. *Donohue v. McNichol, 61 Pa. 73 (1869); Brooker v. Brooker, 106 S.W.2d 247 (Tex. 1937); McCreery v. Johnston, 110 S.E. 464 (W. Va. 1922).*

Where two possible constructions, the one avoiding the rule is to be adopted. *In re Schuette's Estate, 311 N.Y.S.2d 415 (1970).*

Holding that in interpreting an instrument it must be presumed that the testator was cognizant of the rules against perpetuities and intended a construction which would avoid it if possible. *Vinson v. First Trust & Savings Bank, 339 N.E.2d 670 (C.P. Ohio 1974).*

Provision to terminate devises which might violate the rule against remoteness upheld. *In re Burrough's Estate, 521 F.2d 277 (D.C. Cir. 1975).*

(n68)Footnote 308. Devise to the first son of A. who might take Holy orders and then over if no such son. The devise was void because such a son might be born and take Holy orders more than 21 years after A's death, and the devise over was also void even though there was the implied alternative that A might die without having had a son. *Proctor Bishop of Bath and Wells, 2 H.Bl. 358, 126 Eng. Rep. 594 (1794).*

(n69)Footnote 309. *In re Wilcox, 87 N.E. 497 (N.Y. 1909).*

Contra, Lyons v. Bradley, 53 So. 244 (Ala. 1909); Hussey v. Sargent, 75 S.W. 211 (Ky. 1903) (a valid limitation implied as an alternative to an invalid limitation); *Edgerly v. Barker, 31 A. 900 (N.H. 1891).*

(n70)Footnote 310. *Lovering v. Worthington, 106 Mass. 86 (1870).*

The courts are not in accord as to whether a valid remainder following an invalid limitation is preserved and accelerated or whether it also falls. But some courts will not accelerate a contingent remainder, though valid, so it also fails for want of a preceding estate of feehold. *In re Fischer's Will, 120 N.E.2d 688 (N.Y. 1954).*

(n71)Footnote 311. *New England Trust Co. v. Sanger, 149 N.E.2d 598 (Mass. 1958)* (letting the entire scheme fail where to do so would better carry out the testator's intent than by separating the good from the void).

Whole will invalidated. *Barrett v. Barrett, 99 N.E. 625 (Ill. 1912); In re Feeney's Estate, 142 A. 284 (Pa. 1928). See 77 U. Pa. L. Rev. 523.*

California has evinced a desire to ameliorate the harshness of the rule. *Wong v. DiGrazia, 386 P.2d 817 (Cal. Rptr. 1963).*

The doctrine of "infectious invalidity" was applied in *Colorado Nat'l Bank v. McCabe, 353 P.2d 385 (Colo. 1960)* where the principal would be divided among the surviving income beneficiaries for 25 years after testatrix's death, with the continued remainder to certain charities. In the event of the death of one income beneficiary the remaining beneficiaries were to take the deceased's share. Court held that the income gift did not violate the rule against remoteness but the remainder interest did, and if the named individuals died before the termination of the trust, the interest undisposed of went to the heirs or next of kin of the testatrix.

Trust to terminate 25 years after testator's death violated remoteness. *Fuller v. Fuller, 122 S.E.2d 234 (Ga. 1961).*

A provision was upheld that if any gifts in the will violated the rule against perpetuities, the defending part should be ineffective. *Nelson v. Mercantile Trust Co., 335 S.W.2d 167 (Mo. 1960).*

In *Gwinner v. Schoeny, 171 N.E.2d 728 (Ohio App. 1960),* the doctrine applies to a testamentary trust which provided that income should be paid for beneficiary's lifetime, and after his death to his issue. These provisions were not class gifts and violated the rule only as respect to payments to issue not in being at the children's future death.

See Daniel M. Schuyler, *New Biology and the Rule Against Perpetuities*, 15 ucla L. Rev. 420 (1968); William Schwartz, *Mr. Justice Kenison and Creative Continuity in Perpetuities Law, 48 B.U. L. Rev. 207 (1968).*

(n72)Footnote 312. In a testamentary trust with income to named persons and 25 years later principal to go to surviving beneficiaries, income gifts were held valid but gift of principal was too remote. *Colorado Nat'l Bank v. McCabe, 353 P.2d 385 (Colo. 1960).*

Where an unconditional power of revocation is reversed by the settlor of an inter vivos trust, the period of rule against remoteness of vesting runs from the settlor's death or earlier revocation of power. *Second Nat'l Bank of New Haven v. Harris Trust & Sav. Bank, 283 A.2d 226 (Conn. Super. 1971).*

A provision that upon life tenant's death the corpus was to be distributed among those appointed by a named person violated the rule against perpetuities. *Stewart's Estate v. Caldwell, 271 So. 2d 754 (Fla. 1972).*

A revocable inter vivos trust, the income after the settlor's death to go to his wife for life and the corpus to be divided among his children at 21, was held valid because, being revocable, the rule against remoteness did not commence to run until after the settlor's death. *Cook v. Horn, 104 S.E.2d 461 (Ga. 1958).*

In a testamentary residuary trust to pay income to named children for life and then to pay to their issue per stirpes, it was held not a class gift but too remote as to issue of children not born at children's deaths. *Gwinner v. Schoeny, 171 N.E.2d 728 (Ohio App. 1960).*

A general power to appoint by will is a special power for perpetuities purposes. *Dollar Savings & Trust Co. v. First Nat'l Bank of Boston, 285 N.E.2d 768 (Ohio 1972).* Ohio has the "wait and see" and the cy pres rules by statute.

Where a trust to the state was void for remoteness a resulting trust arose for the residuary legatee. *MacDonald v. Manning, 239 A.2d 640 (R.I. 1968).*

Exercise of a power of appointment by will which provided that a trust could continue for life of any of the children or grandchildren or any other decedents who were alive at the time of another's death plus 21 years was invalid. *In re Spencer's Estate, 232 N.W.2d 491 (Iowa 1975).*

(n73)Footnote 313. Period began from time special power was created. *United California Bank v. Bottler, 94 Cal. Rptr. 227 (Cal. App. 1971).*

In Ohio an interest derived from a power of appointment is created by the instrument exercising the power, not the instrument creating the power for the purpose of applying the rule, but the rule is measured from the time of creation of the power, not from its exercise. *Dollar Savings & Trust Co. v. First Nat'l Bank of Boston, 285 N.E.2d 768 (Ohio 1972). See 34 Ohio S. L.J. 433.*

(n74)Footnote 314. *Minot v. Paine, 120 N.E. 167 (Mass. 1918); McCreary v. Pitts, 47 A.2d 235 (Pa. 1946).*

(n75)Footnote 315. *Curlee v. Wadsworth, 136 So. 2d 886 (Ala. 1962)* (rule invoked to construe will); Cal. Civ. Code, §§ 715.5-715.7, provides that no interest violates the rule if it can be reformed or construed to give effect to creator's general intent and vest within the time, validates interests that vest within 60 years after creation and makes spouse if person in being at creation also a life in being; *Lanier v. Lanier, 126 S.E.2d 776 (Ga. 1962)* (remainder to children or if any be dead then to issue and if any die sans issue then to other children or their descendants per stirpes, the afterborn children were held to have absolutely vested interests since a limitation over would be too remote); *Old Colony Trust Co. v. Stephens, 190 N.E.2d 110 (Mass. 1963)* (interpreting a trust to end on death of life beneficiaries to avoid remoteness); *Mattern v. Herzog, 367 S.W.2d 312 (Tex. 1963)* (construction taken that would not make gift too remote).

Rewriting a will by striking out provision that grandchildren must be 23 in order to save the gift from the rule. *In re Foster's Estate, 376 P.2d 784 (Tex. 1962),* 98 a.l.r. 2d 795.

Where will is possible of two constructions, the one which will not violate the rule against perpetuities will be adopted. *In re Greenwood's Will, 268 A.2d 867 (Del. 1970).*

Will must be construed to avoid rendering it void. *In re Miguet's Estate, 185 N.W.2d 508 (Iowa 1971).*

In the *Application of Wolfsohn, 339 N.Y.S.2d 755 (1973),* a trust for the grantor for life then to pay to his issue for their support and to distribute on the death or becoming 25 of the issue of two named persons of the grantors issue then living per stirpes did not violate the Rule against remoteness. The court held that the trust would be terminated by the court if at the time of the death of the two named persons there was a grandchild not yet 25 who had not been alive at the time of creation of the trust.

Holding that in interpreting an instrument it must be presumed that the testator was cognizant of the rule against perpetuities and intended a construction which would avoid it if possible and approving restatement of the law of trusts, 2D, § 62*F. Vinson v. First Trust & Sav. Bank, 339 N.E.2d 670 (C.P. Ohio 1974).*

Direction of payment at 35 held not to postpone vesting so as to violate the rule against perpetuities. *Zimmerman v. First Nat'l Bank of Birmingham, 348 So. 2d 1359 (Ala. 1977).*

A provision that a trust continue for the maximum time was permitted by the rule of perpetuities. *Wilmington Trust Co. v. Coyne, 373 A.2d 867 (Del. 1977).*

(n76)Footnote 316. *Myers v. Hardin, 186 S.W.2d 925 (Ark. 1945).*

Will which provided for trust to terminate "when the youngest of my grandchildren shall have completed his or her education" violated the rule. *Sheats v. Johnson, 189 S.E.2d 856 (Ga. 1972).*

(n77)Footnote 317. *McCreary v. Pitts, 47 A.2d 235 (Pa. 1946).*

(n78)Footnote 318. *Von Hesse v. MacKaye, 32 N.E. 615 (N.Y. 1892).*

(n79)Footnote 319. *Morgan v. Keyes, 99 N.E.2d 230 (N.Y. 1951).*

(n80)Footnote 320. 735 ilcs § 5-13-223. *In re Beardsley's Appeal, 60 A. 664 (Conn. 1905); Hoenig v. Lubetkin, 79 A.2d 278 (Conn. 1951); Elliott v. Travelers Ins. Co., 99 N.E.2d 274 (Ind. App. 1951).*

(n81)Footnote 321. *New York Trust Co. v. Weaver, 80 N.E.2d 56 (N.Y. 1948).*

(n82)Footnote 322. *In re Green's Estate, 262 N.Y.S. 456 (1932)* (if in one instrument a combination of limitations violating the rule is void).

Under the New York Statute where an age contingency would violate perpetuities, the age is reduced so as to make the gift valid. N.Y. Est. Powers & Trusts Law § 9-1.2. *In re Pendleton's Estate, 246 N.Y.S.2d 351 (1964).*

(n83)Footnote 323. *Traywick v. Transcontinental Gas Pipe Line Corp., 170 So. 2d 802 (Ala. 1965).*

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CHAPTER 28 RULES AGAINST PERPETUITIES

3-28 Thompson on Real Property, Thomas Editions § 28.05

AUTHOR: Professor David A. Thomas This chapter is based in part on Ch. 31. George W. Thompson, Commentaries on The Modern Law of Real Property (John S. Grimes ed. 1979), which made a significant contribution toward preserving the American common law on perpetuities. J. Reuben Clark Law School Brigham Young University

§ 28.05 The Rule Against Remoteness as Applied to Gifts in Charity

[Go To Supp]

The rule against remoteness has peculiar applications where gifts to charity are involved. Gifts to charitable trusts which vest immediately are not affected by the rule against remoteness or the rule against restraints on alienation. n324

A charitable gift may be made to a corporation yet to be formed. n325

Trusts for the care and maintenance of cemeteries and graves are charitable in Ohio. n326

A limitation over to a charity after a gift to a charity is not within the rule against remoteness. n327 A devise to charity with a limitation over to another charity on the happening of a certain contingency which may or may not happen does not violate the rule. n328 Especially is this true where such gifts are made with no intervening gift to or for the benefit of a private person or corporation, or to a contingent limitation over from one charity to another, n329 but it does apply to a gift to a private person, although limited over after an immediate gift to a charity. n330 But a gift to blood relatives of the testator is too limited to be a charitable gift. n331

The rule against perpetuities applies even to gifts for charity where there is no vesting of the corpus of the estate within the time allowed by law, but such rule can have no application after the corpus of an estate has vested for charity, as the very nature of a charity is a perpetuity. n332 Where a devise to charity is so given as not to vest within the period fixed by the rule, it is deemed within the rule and consequently void. n333 The authorities generally hold that the rule against perpetuities is not violated by the power given to a trustee to use discretion as to the time within which to make a sale of the real estate. n334 A devise over to charity after a life estate is not contrary to the rule against perpetuities; n335 but a gift over to an individual after a charitable trust is held subject to the rule against perpetuities, n336 and, likewise, where the gift is to an individual and then over to a corporation or person on a charitable trust. n337

The rule applies only to a contingent and not to a vested remainder interest, and it does not affect a vested remainder to

a charity where only postponement is as to possession and direct enjoyment. n338 The fact that a gift over is for a charitable purpose does not take it from the effect of the rule against perpetuities where the intervening estate violates such rule. n339 If instead of being a gift over after another bequest, the gift is made to charity upon the happening of a contingent event as a condition precedent, it is held that if the condition is too remote or for any other reason illegal, the gift to charity is void. n340 A gift to charity with a limitation over to another charity on the happening of a certain contingency which may or may not happen does not violate the rule. n341

An initial gift to a charity must vest within the period of the rule. n342 A gift to a charity to become effective when the charity comes into existence is treated as a present gift and valid n343 under the theory of immediateness of the purpose. Where, however, the gift to the charity to be formed is a limitation over after a previous gift the cases are divided. n344 A limitation over to a charity after a determinable fee to a non-charity is too remote. n345

A cemetery is not a religious use, permitting religious use in area otherwise inclined to residential and agricultural uses. n346

The cases are split as to whether bequests for perpetual care of cemeteries are charitable bequests. n347 A charitable trust for the benefit of a limited group is valid even though it is not demonstrated that financial need be employed. So a charitable trust for employees of a single corporation or related group corporations is valid even though their purpose was other than the relief of poverty or the eradication of disease. n348

A charitable trust must be for a public use or benefit and for an indefinite number of persons. n349

As respects charitable trusts, the Rule has been held to exempt a trust although the beneficiary may not be created during the allowable period. n350

A gift to a charity to be created does not violate the rule. Even though the charity might not be created within the time, the cy pres doctrine applies. n351

COMPUTER-ASSISTED RESEARCH

LEXIS: rule w/5 remoteness w/15 gift! w/5 charit!

FOOTNOTES:
(n1)Footnote 324. *Kingdom v. Record, 133 N.E.2d 921 (Ohio 1954),* upholding an immediate gift to a charity yet to be formed upon theory that title goes at once to the executor to hold in trust until the beneficiary is organized.

The statute of 43 Eliz. ch. 4 excluded gifts to charitable uses from the illegality rule of perpetuities.

Holding that the mere fact that a charitable gift may continue in perpetuity does not apply to subordinate details of the gift, particularly those which attempt to unduly restrict the use of the gift for changing conditions. *Trustees of Dartmouth College v. City of Quincy, 258 N.E.2d 745 (Mass. 1970).*

Limitation over, if purposes for which a charitable trust was created could not be carried out, violated the rule against remoteness of vesting. *Davenport v. Attorney Gen., 280 N.E.2d 193 (Mass. 1972).*

A gift to a charitable corporation which may not be organized within the rule against perpetuities is not void, the gift being immediate and held in trust under cy pres until the charity is organized. *Rice v. Stanley, 327 N.E.2d 774 (Ohio 1974).*

A devise of realty to be used as a home for parentless children, provided that if there was any reason why the trustees

could not carry out provisions of the trust such should revert to the estate, was held to be a charitable fee terminating when the beneficiaries of the trust no longer could be found. *In re Pruner's Estate, 162 A.2d 626 (Pa. 1960).*

A request in testamentary trust for charity that the trustee prefer first certain named relatives of the decedent did not prevent the trust from being charitable. *McClure v. Carter, 116 S.E.2d 260 (Va. 1960).*

See Louis B. Lusk, *Uncertain Future of Charitable Trusts, 15 Ala. L. Rev. 390 (1963); Remoteness of Vesting and the Charitable Trust, 31 Fordham L. Rev. 782 (1963).*

The question of whether a cemetery is public depends upon the public use rather than the ownership. *State ex rel. Willow Monument Works, Inc. v. Mountain Grove Cemetery Ass'n, 362 A.2d 1341 (Conn. 1975). United States on Behalf of U.S. Coast Guard v. Cerio, 831 F. Supp. 530 (E.D. Va. 1993)* (a charitable trust is public in nature and not subject to the rule against perpetuities, while a private trust is void if it offends the rule against perpetuities).

(n2)Footnote 325. *Hoenig v. Lubetkin, 79 A.2d 278 (Conn. 1951); Litcher v. Trust Co., 86 A.2d 601 (N.J. Super. 1952); Kingdom v. Record, 133 N.E.2d 921 (Ohio 1954).*

(n3)Footnote 326. *Bailey v. McElroy, 195 N.E.2d 559 (Ohio App. 1963).*

Statute excepted a trust for maintenance of graves from the rule against perpetuities. *Perry v. Twentieth St. Bank, 206 S.E.2d 421 (W. Va. 1974).*

(n4)Footnote 327. *McDonogh v. Murdoch, 56 U.S. 367 (How. 1853); Jones v. Habersham, 107 U.S. 174 (1883); Storrs Agrl. Sch. v. Whitney, 8 A. 141 (Conn. 1887); Dickenson v. Anna, 141 N.E. 754 (Ill. 1923); Herron v. Stanton, 147 N.E. 305 (Ind. App. 1920); MacKenzie v. Trustees of Presbytery of Jersey City, 61 A. 1027 (N.J. Eq. 1905); In re Lennig's Estate, 25 A. 1049 (Pa. 1893).*

A limitation over to a noncharity to go over after happening of a gift to a charity is too remote. *In re Pruner's Estate, 162 A.2d 626 (Pa. 1960).*

(n5)Footnote 328. *Smith v. Renne, 46 N.E.2d 587 (Ill. 1943).*

(n6)Footnote 329. *Russell v. Allen, 107 U.S. 163 (1883); Woodruff v. Marsh, 26 A. 846 (1893); Almy v. Jones, 21 A. 616 (R.I. 1891).*

Remainder to trustees for a charitable foundation was not too remote where it vested within the time though the identity of the ultimate beneficiaries was unknown. *In re Wood's Trust Estate, 311 P.2d 359 (Kan. 1957).*

(n7)Footnote 330. *Hopkins v. Grimshaw, 165 U.S. 342 (1897); Christ Church v. Donations & Bequests for Church Purposes, 35 A. 552 (Conn. 1896).*

In a devise of a determinable fee to church with limitation over to residuary legatees, limitation over was too remote but possibility of reverter remained which passed under the residuary devise. *Brown v. Independent Baptist Church, 91 N.E.2d 922 (Mass. 1950).*

(n8)Footnote 331. *Hardage v. Hardage, 84 S.E.2d 54 (Ga. 1954).*

A provision that a remainder interest should go to municipality in trust, the trustee to select a young man and to furnish him with a medical education on the promise that he would return to the town following completion of his education and practice medicine in that area was intended to promote the health and physical welfare of the entire population and, therefore, was a valid charitable trust. *In re Carlson's Estate, 358 P.2d 669 (Kan. 1961).*

Perpetual maintenance of private cemetery plot held too remote. *Eaton v. Miller, 250 A.2d 220 (Me. 1969).*

Gift for treatment of incurable disease of persons not beyond tenth degree of testatrix and husband was a charitable trust to which the rule did not apply. *Ministers & Missionaries' Benefit Board of American Baptist Convention v. McKay, 315 N.Y.S.2d 549 (1970).*

The testatrix's will established a gift in trust for a home for the aged with a provision that the trustee was requested to prefer testator's nieces and their heirs. This was a charitable trust, since the provision of the nieces and their heirs was not mandatory. A limitation over to such other charitable organization as the trustee might determine, after failure of the first charitable organization, did not violate the rule against remoteness. *McClure v. Carter, 116 S.E.2d 260 (Va. 1960).*

(n9)Footnote 332. *Hardage v. Hardage, 84 S.E.2d 54 (Ga. 1954); Reasoner v. Herman, 134 N.E. 276 (Ind. 1922). See Barr v. Geary, 142 N.E. 622 (Ind. App. 1924).*

Provision for 400 year accumulation was struck down and income was ordered to be paid to the charitable beneficiary currently. *In re James' Estate, 199 A.2d 275 (Pa. 1964).*

(n10)Footnote 333. *Jocelyn v. Nott, 44 Conn. 55 (1876); Parker v. Churchill, 30 S.E. 642 (Ga. 1898); Crerar v. Williams, 34 N.E. 467 (Ill. 1893); Clearspring v. Blough, 88 N.E. 511, 89 N.E. 369 (Ind. 1909); Brooks v. Belfast, 38 A. 222 (Me. 1897); State v. Holmes, 73 N.W. 548 (Mich. 1898).*

See Edward W. Roth, *Rule Against Perpetuities -- Vesting of Residuary Estate in Trust for Charity, Subject to a Condition Precedent, 49 Mich. L. Rev. 281 (1951); Goetz v. Old Nat'l Bank, 84 S.E.2d 759 (W. Va. 1954)* (attempt to create charitable trust fails where trustee given unbridled powers of distribution and unlimited length of time to so distribute property).

"Educational and benevolent uses" are considered charitable purposes exempt from rules against perpetuity. *Smith v. United States Nat'l Bank, 207 P.2d 1194 (Colo. 1949).*

Limitation over after termination of charitable trust was held too remote and property passed to settlor's heirs though charitable gift was a fee upon condition subsequent. *In re Pruner's Estate, 162 A.2d 626 (Pa. 1960). See also Townsend v. Charles Schalkenbach Home for Boys, 205 P.2d 345 (Wash. 1949).*

(n11)Footnote 334. *Hart v. Seymour, 35 N.E. 246 (Ill. 1893); Hagen v. Sacrison, 123 N.W. 518 (N.D. 1909); Bank of Cal. v. Ager, 109 P.2d 548 (Wash. 1941).*

Provision in the will holding fund in trust for twenty years, that as soon as possible thereafter to be paid to a charity, provided the charity accepted the gift within a year, did not violate the rule against remoteness, since it was the time of acceptance of the gift, not the delivery, that was so important. *Farnan v. First Union Nat'l Bank, 139 S.E.2d 14 (N.C. 1964).*

(n12)Footnote 335. *In re Mack's Appeal, 41 A. 242 (Conn. 1898).*

(n13)Footnote 336. *Society for Promoting Theological Educ. v. Attorney-General, 135 Mass. 285 (1883).*

Gift over to city after property ceased to be used as an armory was void. *Whitaker v. House, 372 S.W.2d 194 (Tenn. 1963).*

If a gift is in trust to pay the income perpetually to a charity and to a noncharity and there is no segregation of the income, the entire gift fails. *Carr v. Jones, 403 S.W.2d 181 (Tex. Civ. App. 1966).*

(n14)Footnote 337. *Leonard v. Burr, 18 N.Y. 96 (1858); Smith v. Townsend, 32 Pa. 434 (1859).*

(n15)Footnote 338. *In re Duprea, 6 N.Y.S.2d 555 (1938).*

Pennsylvania's "mortmain statute" is unconstitutional as denying equal protection to charities. *In re Cavill's Estate, 329 A.2d 503 (Pa. 1974).*

(n16)Footnote 339. *In re Stephan's Estate, 195 A. 653 (Pa. Super. 1937).*

A gift to a charity preceded by a gift to noncharity may be void for remoteness. *Colorado Nat'l Bank v. McCabe, 353 P.2d 385 (Colo. 1960), 33 Rocky Mt. L. Rev. 252, 39 Dicta 124.*

(n17)Footnote 340. *Jocelyn v. Nott, 44 Conn. 55 (1876).*

(n18)Footnote 341. *Storrs Agrl. Sch. v. Whitney, 8 A. 141 (Conn. 1887); Dickenson v. Anna, 141 N.E. 754 (Ill. 1923),* 30 a.l.r. 587; *Smith v. Renne, 46 N.E.2d 587 (Ill. 1943); Herron v. Stanton, 147 N.E. 305 (Ind. App. 1920); Christ's Hosp. v. Grainger, 1 Mac. & G. 460, 41 Eng. Rep. 1343 (1849).*

Applying cy pres to a private trust to prevent application of rule against remoteness. *In re Estate of Chun Quan Yee Hop, 469 P.2d 183 (Haw. 1970).*

(n19)Footnote 342. *In re Lord Stratheden & Campbell, L.R. (1894), 3 Ch. 265.*

Contra result, *Kasey v. Fidelity Trust Co., 115 S.W. 737 (Ky. 1909)* (limitation to charity over after definite failure of issue of testator's living niece).

(n20)Footnote 343. *Ould v. Washington Hosp., 95 U.S. 303 (1877); Jones v. Habersham, 107 U.S. 174 (1883); Brigham v. Peter Bent Brigham Hosp., 126 F. 796 (1903); Gregory v. Colorado Nat'l Bank, 13 P.2d 273 (Colo. 1932); Woodruff v. Marsh, 26 A. 846 (Conn. 1893); Sanderson v. White, 35 Mass. 328 (18 Pick. 1836); Odell v. Odell, 10 Allen 1 (Mass. 1865); Codman v. Brigham, 72 N.E. 1008 (Mass. 1905); In re Potts' Will, 199 N.Y.S. 880 (1923), aff'd, 142 N.E. 323* (N.Y.); *In re Tower's Estate, 266 N.Y.S. 43 (1933), aff'd, 266 N.Y.S. 995.*

"But where there is an unconditional gift to charity, the gift will be regarded as immediate and good, although the particular mode of carrying out the charity which the donor has indicated is too remote. Consequently in such a case if a direction for accumulation is invalid the only result is that the income is immediately distributable in charity; the heirs or next of kin are not let in." Gray, *supra*, n.1 § 678.

(n21)Footnote 344. Charitable gift valid. *In re LeFevre's Estate, 135 N.E. 203 (N.Y. 1922).*

Fatal hiatus. *First Camden Nat'l Bank & Trust Co. v. Collins, 168 A. 275 (N.J. Eq. 1933).*

(n22)Footnote 345. Institution for Savings in *Roxbury v. Roxbury Home for Aged Women, 139 N.E. 301 (Mass. 1923); In re Pruner's Estate, 162 A.2d 626 (Pa. 1960).*

(n23)Footnote 346. *Appeal of Russian Orthodox Church of the Holy Ghost, 152 A.2d 489 (Pa. 1959); Ellis v. Andrews, 324 S.W.2d 917 (Tex. Civ. App. 1959)* (will providing for maintenance of a cemetery lot did not violate the rule against remoteness since it was discretionary upon the executor).

(n24)Footnote 347. *Smart v. Durham, 86 A. 821 (N.H. 1913)* (charitable); *Shippee v. Industrial Trust Co., 110 A. 410 (R.I. 1920)* (noncharitable).

(n25)Footnote 348. *Boxer v. Boston Symphony Orchestra, Inc., 159 A.2d 336 (Mass. 1959); In re Reese's Will, 195*

N.Y.S.2d 144 (1960). See, however, Pennsylvania Bar Ass'n Endowment v. Robbins, 10 D. & C. 2d (Pa.) 637 (1956).

(n26)Footnote 349. *In re Freshour's Estate, 345 P.2d 689 (Kan. 1959);* In re Harrigan's Estate, 29 D. & C. 2d 119 (Pa. 1963), 13 Fiduciary 115 (trust for saying masses held charity).

(n27)Footnote 350. If in a will the testator evinces an intent that a charitable trust arise immediately it is valid even though the charity to be formed may not arise within the period *cy pres* applied. *Rice v. Stanley, 327 N.E.2d 774 (Ohio 1975).*

(n28)Footnote 351. *Rice v. Stanley, 327 N.E.2d 774 (Ohio 1975).*

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CHAPTER 28 RULES AGAINST PERPETUITIES

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AUTHOR: Professor David A. Thomas This chapter is based in part on Ch. 31. George W. Thompson, Commentaries on The Modern Law of Real Property (John S. Grimes ed. 1979), which made a significant contribution toward preserving the American common law on perpetuities. J. Reuben Clark Law School Brigham Young University

§ 28.06 The Rule Against Overlong Duration of Trusts

The rule against remoteness of vesting is not applicable to trustees since title to the real estate is vested in them. n352 Thus trusts are valid if the beneficial interests vest within the allotted period. n353 Nor does the rule against restraints on alienation apply to trusts where the trustees have the power to sell the realty. The validity of attempted restraints on alienation of interests of the beneficiaries depends on whether spendthrift trusts are recognized in the jurisdiction. n354 A private cemetery trust is not violative of perpetuities if all interests legal and equitable are vested. n355

The weight of authority holds that a charitable trust may endure forever. n356 As such trust is established for objects of public, general, and lasting benefit, it is allowed by the law to be as permanent as any human institution can be. The courts will readily infer an intention in the donor that it should be perpetual. n357 A devise to a bishop with power to sell and dispose of the land and to use the proceeds thereof, for the purpose of establishing a church, does not create a perpetuity. n358

It may be stated as a general rule that the rule against perpetuities is not applicable to charitable trusts, n359 but it must not be understood that the word "perpetuity" is here used in its primary sense, and the statement taken as merely meaning that the trust is not invalid, though it is indestructible, and though, since there is no definite cestui que trust to alien it, it is inalienable. n360 So, if the gift is such that it is recognized by the law as charitable, it may restrain the alienation of property beyond the period fixed by the rule and hold the property for such use. n361 Especially is this true where such gifts are made with no intervening gift to or for the benefit of a private person or corporation or to a contingent limitation over from one charity to another. n362 It does apply to a gift to a private person, although limited over after an immediate gift to a charity. n363 The rule against remoteness of vesting applies even to gifts for charity where there is no vesting of the corpus of the estate within the time allowed by law, but such rule can have no application after the corpus of an estate has vested for charity, as the very nature of a charity is a perpetuity. n364 Where a devise to charity is so given as not to vest within the period fixed by the rule, it is deemed within the rule, and consequently void. n365

The authorities generally hold that the rule against perpetuities is not violated by the power given to a trustee to use

discretion as to the time within which to make a sale of the real estate. n366 A devise over to charity after a life estate is not contrary to the rule against perpetuities, n367 but a gift over to an individual after a charitable trust is held subject to the rule against perpetuities, n368 and, likewise, where the gift is to an individual and then over to a corporation or person on a charitable trust. n369 The rule applies only to contingent and not to a vested remainder interest, and it does not affect a vested remainder to a charity where only postponement is as to possession and direct enjoyment. n370

The fact that a gift over is for a charitable purpose does not take it from the effect of the rule against perpetuities where the intervening estate violates such rule. n371 If instead of being a gift over after another bequest, the gift is made to charity upon the happening of a contingent event as a condition precedent, it is held that if the condition is too remote or is for any other reason illegal, the gift to charity is void. n372 A valid trust may be established for a charitable corporation to be formed in the future. n373

The rule against perpetuities is applicable to trusts for private purposes. n374

There is no violation of the rule against perpetuities by the mere fact alone of a failure to limit the time for the execution of the trust. n375

Notwithstanding the existence of these judicial views the writers of these declarations, on grounds of prudence, usually insert clauses which limit the duration of the trust, to the time permitted by the rule against perpetuities. A common practice in this regard is to limit the trust to twenty-one years after the death of named children of the trustees.

A Massachusetts trust agreement by the terms of which the trustee is to hold the title to the fee and to lease in trust for certain specified purposes but the land trust certificate holder acquires an interest which is vendible and the owners of the property may avail themselves of the sums derived from a transfer of that interest for present purposes without personal liability, the payment being secured solely upon the trust estate without the personal liability of anyone and, in the event of a default as defined in the trust instrument, a sale of the premises can be had, does not violate the rule against perpetuities notwithstanding no definite trust period is prescribed and that the parties to the transaction are numerous. n376 When the holders of the land trust certificates and the ultimate title certificates and the trustee can unite in a conveyance which conveys an absolute title to the trust estate, which conveyance can be made at any time without violating the trust agreement, the same does not violate the rule against perpetuities. n377

Some authorities have, however, developed a further "perpetuities" rule independent of the remoteness of vesting and restraints on alienation prohibitions. This rule is to the effect that if a trust is created purporting to be indestructible for a period of time longer than that allowable under the remoteness of vesting rule the trust is terminable from its inception. n378

This follows the theory that donations of property in perpetuity, except for charitable uses, are void, as being against public policy. n379 So Massachusetts "business trusts" may endure in perpetuity. n380 It seems likely that this phase of the law, at present only in a nascent stage will develop into a new perpetuities rule limiting all trusts to some reasonable limitation. n381 The presence of such a doctrine is recognized inferentially by legislation in many states legalizing employee's benefit, retirement, pension and profit sharing trusts. n382

COMPUTER-ASSISTED RESEARCH

LEXIS: rule against perpetuities w/30 charit! w/2 trust! or purpose! or use!

FOOTNOTES:

(n1)Footnote 352. *Otto v. Union Nat'l Bank, 238 P.2d 961 (Cal. 1951); Wilson v. D'Atro, 145 A. 161 (Conn. 1929); Greenwich Trust Co. v. Shively, 147 A. 367 (Conn. 1929); Story v. First Nat'l Bank & Trust Co., 156 So. 101 (Fla. 1934); O'Hare v. Johnston, 113 N.E. 127 (Ill. 1916).*

City Nat'l Bank & Trust Co. v. White, 169 N.E. 197 (Ill. 1929) (terminating private trusts of indefinite duration); *Wechter v. Chicago Title & Trust Co., 52 N.E.2d 157 (Ill. 1943)* (private trusts, though indestructible, need not be limited to the period of the rule); *Pulitzer v. Livingston, 36 A. 635 (Me. 1896), overruling Slade v. Patten, 68 Me. 380 (1878), Singhi v. Dean, 110 A. 865 (Me. 1920); Turner v. Safe Deposit & Trust Co., 129 A. 294 (Md. 1925)* (changing the earlier Maryland law); *Lovering v. Worthington, 106 Mass. 86 (1870); Lembeck v. Lembeck, 68 A. 337 (N.J. Eq. 1907); In re Lawrence's Estate, 20 A. 521 (Pa. 1890),* 11 l.r.a. 855; *In re Rhodes' Estate, 23 A. 553 (Pa. 1892); Tramell v. Tramell, 32 S.W.2d 1025 (Tenn. 1930), 35 S.W.2d 574 (Tenn. 1931); Kelly v. Womack, 268 S.W.2d 903 (Tex. 1954), rev'g, 261 S.W.2d 599 (Tex. Civ. App. 1953).*

Arkansas permits perpetual trusts for upkeep of cemetery plots not in excess of $2,500. Ark. Acts 445, 1966.

In California trusts may not have a duration beyond the period of the rule. Cal. Prob. Code, §§ 15413-14, changing *In re Walkerly's Estate, 41 P. 772 (Cal. 1895),* which held void a trust that prohibited the trustees from selling a part of the trust corpus for 25 years.

Ralph A. Newman, *Perpetuities, Restraints on Alienability and the Duration of Trusts, 16 Vand. L. Rev. 57 (1962).*

(n2)Footnote 353. *Williams v. Herrick, 32 A. 913 (R.I. 1895). See Loomer v. Loomer, 57 A. 167 (Conn. 1904); Hart v. Seymour, 35 N.E. 246 (Ill. 1893).*

Remainder to trustees for a charitable foundation was not too remote where it vested within the time, though the identity of the ultimate beneficiaries was unknown. *In re Woods' Trust Estate, 311 P.2d 359 (Kan. 1957).*

Trust wholly void where limitations to beneficiaries were too remote. *Siedler v. Syms, 38 A. 424 (N.J. Eq. 1897); In re Johnston's Estate, 39 A. 879 (Pa. 1898).*

In *McPherson v. First & Citizens Nat'l Bank, 81 S.E.2d 386 (N.C. 1954),* where there was a trust which would be remote if it had included after-born grandchildren the court declined to reform the trust as against unborn grandchildren in the absence of an applicable virtual representation statute.

Private trust void. In re Kelley, *I.R. 255.*

Florida now has held that if a trust is private, its period of enjoyment is limited to no longer than lives in being plus twenty-one years (plus a period of gestation). *Brown v. Saake, 190 So. 2d 56 (Fla. 1966).*

In *Mercantile Trust Co. v. Hammerstein, 380 S.W.2d 287 (Mo. 1964),* the court sustained a trust for 25 years in gross on the grounds the principal was vested. *See also Moran v. Sutter, 228 S.W.2d 682 (Mo. 1950).*

A private trust may endure for a period beyond that established by the rule against remoteness. *Tramell v. Tramell, 32 S.W.2d 1025 (Tenn. 1930).*

See George Downing, *Duration and Indestructibility of Private Trusts, 16 W. Res. L. Rev. 350 (1969).*

(n3)Footnote 354. *See* Erwin N. Griswold, *Reaching the Interest of a Beneficiary Spendthrift Trust, 43 Harv. L. Rev. 63 (1970).*

(n4)Footnote 355. *In re Chardon (1928) Ch. 464; Ellis v. Andrews, 324 S.W.2d 917 (Tex. Civ. App. 1959).*

(n5)Footnote 356. *Beach v. Gilbert, 133 F.2d 50 (D.C. Cir. 1943); Johnson v. Holifield, 58 Am. Rep. 596 (Ala. 1885); Haggin v. International Trust Co., 169 P. 138 (Colo. 1917); Sussex Trust Co. v. Beebe Hosp., 15 A.2d 246 (Del.*

1940); Hart v. Taylor, 133 N.E. 857 (Ill. 1921); Smith v. Renne, 46 N.E.2d 587 (Ill. 1943); Quinn v. Peoples Trust & Sav. Co., 60 N.E.2d 281 (Ind. 1945); Barr v. Geary, 142 N.E. 622 (Ind. App. 1924); Scobey v. Beckman, 41 N.E.2d 847 (Ind. App. 1942); Wilson v. First Nat'l Bank, 145 N.W. 948 (Iowa 1914); Frazier v. Merchants Nat'l Bank, 5 N.E.2d 550 (Mass. 1936); Buchanan v. Kennard, 136 S.W. 415 (Mo. 1911); Noice v. Schnell, 137 A. 582 (N.J. Eq. 1927); Holland v. Alcock, 16 N.E. 305 (N.Y. 1888); In re Borden's Estate, 42 N.Y.S.2d 560 (N.Y. 1943); Griffin v. Graham, 9 Am. Dec. 619 (N.C. 1820); Penick v. Bank of Wadesboro, 12 S.E.2d 253 (N.C. 1940); In re Hunter's Estate, 123 A. 865 (Pa. 1924); In re Tollinger's Estate, 37 A.2d 500 (Pa. 1944); Frost Nat'l Bank v. Boyd, 188 S.W.2d 199 (Tex. Civ. App. 1945).

A gift to a labor union unemployment fund is a "charitable gift." *In re Pattberg's Will, 123 N.Y.S.2d 564 (1953), 23 Fordham L. Rev. 220.*

See Clinton J. Najarian, *Charitable Giving and the Rule Against Perpetuities, 70 Dick. L. Rev. 455 (1966).*

(n6)Footnote 357. *Odell v. Odell, 92 Mass. 1 (10 Allen 1865); Webster v. Wiggin, 31 A. 824 (R.I. 1895),* 28 l.r.a. 510.

See Jesse Dukeminier, *Perpetuities Revision in California: Perpetual Trusts Permitted, 55 Cal. L. Rev. 678 (1967).*

(n7)Footnote 358. *Giblin v. Giblin, 182 N.W. 357 (Wis. 1921).*

See Kenneth R. O'Brien & Daniel E. O'Brien, *Seventy Years of Bequests for Masses in New York Courts, 23 Fordham L. Rev. 147 (1954).*

(n8)Footnote 359. *Regents of Univ. Sys. v. Trust Co. of Ga., 198 S.E. 345 (Ga. 1938); Alden v. St. Peter's Parish, 42 N.E. 392 (Ill. 1895); Ingraham v. Ingraham, 48 N.E. 561, 49 N.E. 320 (Ill. 1897); Morgan v. National Trust Bank, 162 N.E. 888 (Ill. 1928); Newton v. Newton Burial Park, 34 S.W.2d 118 (Mo. 1930); Mills v. Davison, 35 A. 1072 (N.J. Eq. 1896); Sherman v. Baker, 40 A. 11 (R.I. 1898).*

Similarly an absolute restraint on alienation on a charitable gift is valid. *Catholic Bishop of Chicago v. Murr, 120 N.E.2d 4 (Ill. 1954).*

(n9)Footnote 360. *Brooks v. Belfast, 38 A. 222 (Me. 1897).*

(n10)Footnote 361. *Russell v. Allen, 107 U.S. 163 (1883); Spence v. Widney, 46 P. 463 (Cal. 1896); Woodruff v. Marsh, 26 A. 846 (Conn. 1893); Parker v. Churchill, 30 S.E. 642 (Ga. 1898); Ingraham v. Ingraham, 48 N.E. 561, 49 N.E. 320 (Ill. 1897); Rush v. Dinwiddie, 37 N.E. 795 (Ind. 1894); Brooks v. Belfast, 38 A. 222 (Me. 1897); Teele v. Bishop of Derry, 47 N.E. 422 (Mass. 1897),* 38 l.r.a. 629; *Penny v. Croul, 43 N.W. 649 (Mich. 1889),* 5 l.r.a. 858; *Lane v. Eaton, 71 N.W. 1031 (Minn. 1897),* 38 l.r.a. 669; *Mills v. Davison, 35 A. 1072 (N.J. Eq. 1896),* 35 l.r.a. 113; *In re John C. Mercer Home, 29 A. 731 (Pa. 1894); Webster v. Wiggin, 31 A. 824 (R.I. 1895); Staines v. Burton, 53 P. 1015 (Utah 1898).*

Private cemetery is not a charitable use. *Pope v. Alexander, 250 S.W.2d 51 (Tenn. 1952).*

(n11)Footnote 362. *Russell v. Allen, 107 U.S. 163 (1883); Woodruff v. Marsh, 26 A. 846 (Conn. 1893); Almy v. Jones, 21 A. 616 (R.I. 1891),* 12 l.r.a. 414.

(n12)Footnote 363. *Hopkins v. Grimshaw, 165 U.S. 342 (1897); Christ Church v. Donations & Bequests for Church Purposes, 35 A. 552 (Conn. 1896).*

(n13)Footnote 364. *Reasoner v. Herman, 134 N.E. 276 (Ind. 1922). See Barr v. Geary, 142 N.E. 622 (Ind. App.*

1924).

(n14)Footnote 365. *Jocelyn v. Nott, 44 Conn. 55 (1876); Parker v. Churchill, 30 S.E. 642 (Ga. 1898); Crerar v. Williams, 34 N.E. 467 (Ill. 1893),* 21 l.r.a. 454; *Clearspring v. Blough, 88 N.E. 511, 89 N.E. 369 (Ind. 1909); Brooks v. Belfast, 38 A. 222 (Me. 1897); State v. Holmes, 73 N.W. 548 (Mich. 1898).*

(n15)Footnote 366. *Hart v. Seymour, 35 N.E. 246 (Ill. 1893); Hagen v. Sacrison, 123 N.W. 518 (N.D. 1909),* 26 l.r.a. (N.S.) 724.

(n16)Footnote 367. *In re Mack's Appeal, 41 A. 242 (Conn. 1898).*

(n17)Footnote 368. *Society for Promoting Theological Educ. v. Attorney-General, 135 Mass. 285 (1883).*

(n18)Footnote 369. *Leonard v. Burr, 18 N.Y. 96 (1858); Smith v. Townsend, 32 Pa. 434 (1859).*

(n19)Footnote 370. *In re Duprea, 6 N.Y.S.2d 555 (1938).*

(n20)Footnote 371. *In re Stephan's Estate, 195 A. 653 (Pa. Super. 1937).*

(n21)Footnote 372. *Jocelyn v. Nott, 44 Conn. 55 (1876).*

(n22)Footnote 373. *Assessors v. Trustees of Boston College, 6 N.E.2d 363 (Mass. 1937).*

(n23)Footnote 374. *Thorp v. Lund, 116 N.E. 946 (Mass. 1917); West Tex. Bank & Trust Co. v. Matlock, 212 S.W. 937 (Tex. 1919). State ex rel. Champion v. Holden, 953 S.W.2d 151 (Mo. Ct. App. 1997)* (for a private trust to be valid under the rule against perpetuities, a beneficiary must be "definitely ascertained at the time of the creation of the trust" or within the standard time allowed by the rule against perpetuities).

(n24)Footnote 375. Such a trust for the convenience of an unincorporated association in renting and selling land, under which the land is held for no other purpose, and where the income is not accumulated, but is distributed as it accrues, and where the land is to be sold free of trusts at the will of the association and where the whole equitable interest in the trust is at every moment vested absolutely in those who at that moment are shareholders, and never can be vested in any other persons save by act of the absolute owners or by operation of law upon their property and not by force of any limitation contained in the deed of trust; the equitable interests so vested being also constantly vendible by their several owners without let or hindrance, as well as subject to their debts, and passing like other property upon death, by virtue not of the deed of trust but of the general laws governing the disposition of the property of decedents, withdraws no property from commerce, and is not within the reason or the terms of what is called the "rule against perpetuities." The trust involves no future limitations, no restraints upon alienation, and no accumulations either of income or of principal. The provisions by which the trust fund may be at some time held for the benefit of persons not shareholders at its inception and who may become such at a period more remote than that allowed by the rule, are not future limitations made by the trust-deed, in the sense in which the word "limitation" is used in speaking of the operation of the rule. If there shall ever be a shareholder other than those in which the whole equitable estate was absolutely vested at the inception of the trust; that shareholder will not take his interest by virtue of a limitation in the trust-deed, but because of his succession, by virtue of the general principles of law, to the property of the original shareholder. The new shareholder, with reference to the rule, is in the same situation as a person who, after the expiration of all lives which were in being when a fee or an estate tail was created, and of a further period of twenty-one years, takes the fee by the operation of the law which makes property vendible by, or descendible from, the owner and not by virtue of a limitation in the instrument which created the fee. The entire ownership is never for a moment uncertain nor unvested, and at every moment each owner can freely dispose of his property, and at each moment it can be transferred to his creditor by the ordinary processes of the law, and at each moment the trust can be terminated at the will of the owners of the equitable interest.

Howe v. Morse, 55 N.E. 213 (Mass. 1899).

"The mere creation of a trust does not ipso facto suspend the power of alienation. It is only suspended by such trust, where a trust term is created, either expressly or by implication, during the existence of which a sale by the trustee would be in contravention of the trust. Where the trustee is empowered to sell the land without restriction as to time, the power of alienation is not suspended, although the alienation is in fact postponed by the nonaction of the trustee, or in consequence of discretion reposed in him by the creator of the trust." *Robert v. Corning, 89 N.Y. 225 (1822). See Ward v. McMath, 241 S.W. 3 (Ark. 1922); Hart v. Seymour, 35 N.E. 246 (Ill. 1893); Minot v. Burroughs, 112 N.E. 620 (Mass. 1916); In re Pittock, 199 P. 633, 202 P. 216 (Or. 1921),* 17 a.l.r. 218.

(n25)Footnote 376. *Baker v. Stern, 216 N.W. 147 (Wis. 1927),* 58 a.l.r. 462.

(n26)Footnote 377. *Id.*

(n27)Footnote 378. *Colonial Trust Co. v. Brown, 135 A. 555 (Conn. 1926); Gaess v. Gaess, 42 A.2d 796 (Conn. 1945),* 160 a.l.r. 432; *Story v. First Nat'l Bank & Trust Co., 156 So. 101 (Fla. 1934); Hopkinson v. Swaim, 119 N.E. 985 (Ill. 1918); Van Epps v. Arbuckle, 164 N.E. 1 (Ill. 1928); Southard v. Southard, 96 N.E. 941 (Mass. 1911); Moran v. Sutter, 228 S.W.2d 682 (Mo. 1950); In re City Bank Farmers Trust Co., 70 N.Y.S.2d 465 (1947)* (New York does not recognize such a rule); *Finch v. Honeycutt, 97 S.E.2d 478 (N.C. 1957); In re Throm's Estate, 106 A.2d 815 (Pa. 1954); In re Howard's Estate, 54 D.&C. (Pa.) 312 (1943); Wingert v. T. W. Phillips Gas & Oil Co., 157 A.2d 92 (Pa. 1959), 21 U. Pitt. L. Rev. 754* (trustee's oil and gas lease which is improper because of its extended duration is valid for the actual duration of the trust); *Williams v. Herrick, 32 A. 913 (R.I. 1895)* (perpetual trust held void); *In re Lee's Estate, 299 P.2d 1066 (Wash. 1956)* (upholding the validity of a private gift in trust for so long as the rule would permit and then a limitation over).

"It is conceded by all ... that the utmost extent of a trust at common law is limited by lives in being at its creation and for 21 years thereafter." *Fitchie v. Brown, 211 U.S. 321 (1908).*

Beneficiaries of a private trust must be ascertained within the rule against remoteness. *Feinberg v. Feinberg, 131 A.2d 658 (Del. 1957).*

Trust to endure for too long a period of time held wholly void though interests are vested. *Barnum v. Barnum, 26 Md. 119 (1866); American Colonization Soc'y v. Soulsby, 99 A. 944 (Md. 1917),* l.r.a. 1917C, 937; *Thorndike v. Loring, 81 Mass. 391 (5 Gray 1860).*

Contra, (*dictum) In re Johnston's Estate, 39 A. 879 (Pa. 1898)* citing Gray, *supra,* n.1.

Inter vivos trust for benefit of settlor and wife for life then to children and issued per stirpes of deceased children for life to be distributed among issue 21 years after death of last surviving child. Construed to create a separate trust for each child vesting at date of trust, no children having been born after the trust, and so valid as vesting within lives in being and 21 years. Court said trust would have been invalid if it had been to a class of children. *Second Bank-State Trust Co. v. Second Bank-State Trust Co., 140 N.E.2d 201 (Mass. 1957)* (would have been invalid also except for wait and see doctrine).

Private trust for maintenance of cemetery plot is void. *Detwiller v. Hartman, 37 N.J. Eq. 347 (1911) (1912);* 5 Ill. l. Rev. 379; George L. Clark, *Unenforceable Trusts and the Rule against Perpetuities, 10 Mich. L. Rev. 31;* Edward Q. Keasbey, *Gifts for Public Monuments, 29 Yale L.J. 729 (1920);* Joseph Warren, *The Progress of the Law, 1919-20, 34 Harv. L. Rev. 639 (1921); Honorary Trusts, 30 Colum. L. Rev. 60 (1930);* "The position of the critics is that since, as appears, the rule against perpetuities in its orthodox and accepted sense can have no application to such dispositions, the rule which the courts apply must be a new and distinct rule which they have created outright for the purpose, even

though the policy behind it is the same as that behind the rule against perpetuities proper and the time limit allowed is also the same... .

"The honorary trust contravenes the policy of the rule against perpetuities to prevent indirect restraints upon alienation and the control of property by the dead. The equitable title of the resulting cestui que trust could hardly be made less marketable by any overhanging future estates than by the powers vested in the honorary trustee. As already indicated, an outstanding power may be as objectionable to the rule as a springing use or an executory devise... ."

In New York private trusts running beyond the rule against perpetuities are void as suspending the power of alienation unless the trustee or another has the power to terminate. *Schenectady Trust Co. v. Emmons, 25 N.Y.S.2d 230 (1941), aff'd, 36 N.E.2d 461* (N.Y.).

Rule avoided by a finding of creation of separate trusts. *In re Goldstein's Will, 157 N.Y.S.2d 778 (1956).*

Trust of oil and gas interests for 10 years or as long thereafter as oil and gas is produced suspended absolute power of alienation too long. *Carlson v. Tioga Holding Co., 72 N.W.2d 236 (N.D. 1955).*

Educational trust void because beneficiaries indicated with sufficient clearness. *Brennan v. Winkler, 16 S.E. 190 (S.C. 1892).*

See Edward W. Cleary, *Indestructible Testamentary Trusts, 43 Yale L.J. 393 (1934);* Edmond Hatfield, *Perpetuities in Land Trusts, 40 Ill. L. Rev. 84 (1945);* Joseph P. Marray, *The Rule Against Prolonged Indestructibility of Private Trusts, 44 Ill. L. Rev. 467 (1949);* John A. Metz Jr., *Comment on the Application of the Rule Against Perpetuities to the Duration of Private Trusts in Pennsylvania, 4 U. Pitt. L. Rev. 157 (1938);* Eldred Dede *Perpetuities In Private Trusts In Wisconsin, 42 Marq. L. Rev. 514 (1959).*

Kendall v. Kendall, 261 P.2d 422 (Wash. 1953).

(n28)Footnote 379. *Smith v. Heyward, 105 S.E. 275 (S.C. 1920)* (fact that incidentally there is made provision for the care of the burying ground of the family and the keeping of the family tomb does not convert the donation into a charity).

A limitation over to private persons after a charitable gift of indefinite duration, violated the rule against remoteness. Under the circumstances, the interest left in the testator passed to his heirs regardless of whether it was a determinable fee or a fee subject to a conditional limitation. *In re Pruner's Estate, 162 A.2d 626 (Pa. 1960).*

(n29)Footnote 380. *Hart v. Seymour, 35 N.E. 246 (Ill. 1893); Wechter v. Chicago Title & Trust Co., 52 N.E.2d 157 (Ill. 1943); Howe v. Morse, 55 N.E. 213 (Mass. 1889).*

(n30)Footnote 381. *See* Eldred Dede, *Perpetuities in Private Trusts in Wisconsin, 42 Marq. L. Rev. 514 (1959).*

A trust is not invalid merely because its duration exceeds the time allowed for the rule against remoteness. *In re Walkerly's Estate, 41 P. 772 (Cal. 1895); see also Recent Legislation, Future Interests: Recent Changes in the Law on Future Interests in California. Cal. Civ. Code: repeal of sections 715.1, 770, 771, 774, 775, 777; new sec. 771; amendment of sections 715.3, 716, 724, 48 Cal. L. Rev. 134 (1960).*

(n31)Footnote 382. *See* employees benefit trusts exempted from rules against accumulations and perpetuities. Kan. Stat. Ann. § 59-3404; Ky. Rev. Stat. § 381.217.

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CHAPTER 28 RULES AGAINST PERPETUITIES

3-28 Thompson on Real Property, Thomas Editions § 28.07

AUTHOR: Professor David A. Thomas This chapter is based in part on Ch. 31. George W. Thompson, Commentaries on The Modern Law of Real Property (John S. Grimes ed. 1979), which made a significant contribution toward preserving the American common law on perpetuities. J. Reuben Clark Law School Brigham Young University

§ 28.07 Statutory Modification of the Rule Against Remoteness

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The legislators in a number of states have attempted to state a statutory "rule against perpetuities." More recently the Uniform Statutory Rule Against Perpetuities has been adopted by almost one-half of the states. To the extent that these acts vary from the "common-law" rule against remoteness of vesting the changes are largely caused by early obfuscation of what the rule was and its intended purpose.

It has been elsewhere seen in connection with restraints on alienation n383 that the New York code early failed to see the existence of two rules and spoke of the illegality of interests restraining alienation.

The rule against remoteness had become fairly well shaped in English law after Thellusson's case n384 as being lives in being plus 21 years. Yet for some unknown reason now lost in the mists of the past the New York drafters departed from the English thinking in two particulars. First, they prohibited absolute restraints on alienation rather than remoteness, second, they went back to Child v. Baylie, n385 and limited the allowable period to two lives in being on the effective date of the instrument. The New York statute was followed generally originally by the legislatures of Arizona, California, Idaho, Indiana, Michigan, Minnesota, Montana, North Dakota, Oklahoma, South Dakota, Wisconsin and the District of Columbia. Some variants were made in these states by extending the period to any number of lives in being, n386 lives not involved in the grant n387 and in some cases to named minorities thereafter, n388 or even to twenty-one years in gross after two lives or to lives in being or in the alternative a period in gross n389 or for the period of the common-law rule against remoteness n390 or longer. n391

In several of these states the common-law rule against remoteness had earlier existed and was changed by statutes. n392 In Arizona the statute applies to realty leaving the common law as to personalty. n393 In some states the statutes merely redeclare the common law. n394 Under the former New York rule the suspension of alienation, if at all, must be limited by not more than two lives in being at the creation of the estate. It could not be fixed or limited by a period of days, months, or years. n395

Under the old New York concept the test of the validity of a limitation was always whether an estate attempted to be created must in every possible contingency terminate within two lives in being. n396 In other states the statutes forbid the suspension of the absolute power of alienation for a longer period than the lives of persons in being at the death of the testator. n397 In Indiana the restraint against alienation was not limited to a particular number of lives in being in all cases except devises to charities. n398 In Ohio an estate in land could not be limited except to a person or persons in being or their immediate issue or descendants under the former rule. n399 In Wisconsin the rule became lives in being plus 30 years. n400 In Mississippi, it was provided that a devise may be made to a succession of donees then living, not exceeding two and to the heirs of the body of the remainderman, and, in default thereof, to the right heirs of the donor in fee simple. n401 The limitation, in order to be valid, must be so made that the estate, or whatever is devised, not only may, but must necessarily vest within the period prescribed by the statute. If by any possibility the vesting may be postponed beyond this period, the limitation over will be void. n402 Whether or not an instrument violates the law on perpetuities as to real estate must be determined by the law of the state in which the real estate is situated. n403 In some states perpetuities are prohibited by constitutional provision. n404 The common-law rule against perpetuities has been in force in Pennsylvania and is modified only by acts which are concerned with accumulations and property held in mortmain respectively. n405

Massachusetts made the first major statutory modification in the rule against remoteness in a hundred years by providing: (a) The "wait and see" doctrine shall be applied as of the time of termination of lives in being. n406 (b) Where the contingency is reaching an age beyond twenty-one the age is arbitrarily reduced to twenty-one (following the rule against accumulations practice). n407 (c) Terminating rights of re-entry and possibilities of reverter after thirty years if they are not subject to the rule against remoteness. The statute affected only inter vivos instruments and wills becoming effective after January 1, 1955. n408

Massachusetts adopted the Uniform Statutory Rule Against Perpetuities in 1989. n409 Ohio, n410 and Wyoming n411 have returned to the common-law rule against remoteness of vesting. In Ohio it is held that the statute readopting the common-law rule against perpetuities was not retroactive in its effect and operation and did not affect substantial future interests previously set up, where the statute did not in terms so provide. n412 New York Laws 1958, ch. 152, changed the rule against perpetuities from two lives in being to "lives in being" and to provide that a contingent gift in remainder could be limited on a prior gift in remainder to take effect if the first remaindermen die or the remainder otherwise determine during minority. Lives in being include unborn children. n413

In those states where the statutes follow the old New York phraseology and purport to prohibit restraints upon the absolute right of alienation for longer than stated periods, it is not clear whether such a statute changes the length of time permitted for remoteness of vesting, whether the common-law rule still remains or whether there still exists a rule against remoteness distinct from an absolute restraint on alienation. n414 New York found that its statute covered both restraints on alienation and remoteness of vesting where all parties could alienate. n415

Illinois has virtually returned to the common-law rule by permitting lives in being and, instead of in the alternative as formerly, a term of years. n416

The pressure of estate planners and corporate trustees to avoid succession taxes has led to the use of schemes, both judicial and legislative, to avoid much of the impact of the rule. n417 These plans have taken several roads: lengthening the period of the rules; n418 avoiding "infectious disability"; n419 using the rule as a guide to construction; n420 "wait and see"; n421 "discrete invalidity"; n422 reasonableness of period; n423 among others. All try to escape from taxes by the generation-skipping device.

Oklahoma added twenty-one years in 1941 by a statute operating prospectively. n424

The Pennsylvania statute prevented void limitations from returning to the grantor or testator's estate. A power of

revocation will save an otherwise invalid trust. n425

FOOTNOTES:
(n1)Footnote 383. Ariz. Rev. Stat. Ann. 1928, §§ 2761, 2762, said in *Lowell v. Lowell, 240 P. 280 (Ariz. 1925),* to have been taken from Wisconsin.

(n2)Footnote 384. *Thellusson v. Woodford, 4 Ves. 227, aff'd, 11 Ves. 112, 8 R.R. 104, 1 Eng. Rul. Cas. 498 (1799). See* Bicknell, *Perpetuity Rule and Lives in Being, 116 New L.J. 1313.*

(n3)Footnote 385. Cro. Jac. 459.

(n4)Footnote 386. Lives in being plus a contingent remainder in fee conditioned upon death before 21. Idaho Code 1932, §§ 54-111, 54-202.

See Walter H. Anderson, *The Rule Against Perpetuities*, 1 Idaho L.J. 73 (1931).

In re Walker's Will, 45 N.W.2d 94 (Wis. 1950), 23 a.l.r. 2d 991 (now changed in Wisconsin to lives in being and 30 years. Wisconsin has no rule against remoteness of vesting). Wis. Stat. § 700.16.

Michigan Compiled Laws now has the common-law rule, Mich. Comp. Laws 554.51. *See 62 Mich. L. Rev. 1.*

(n5)Footnote 387. *Huxford v. Milligan, 50 Ind. 542 (1875); Fidelity & Columbia Trust Co. v. Tiffany, 260 S.W. 357 (Ky. 1924).*

(n6)Footnote 388. Two lives and contingent remainder thereafter on death before 21. Mich. Comp. Laws 1929, §§ 12937-12939, 12941; Minn. Stat. 1927, §§ 8047-8049, 8051.

Lives in being and named minorities. Mont. Code Ann. 1921, §§ 6705, 6706, 6732-6735; Okla. Stat. 1931, §§ 11756, 11757, 11759, 11760; S.D. Codified Laws Ann. 1929, §§ 294, 295, 320-323, 326.

(n7)Footnote 389. In Montana lives in being or 25 years. Mont. Code Ann. 1921, § 5287, as amended by Laws 1933, ch. 203. Prior to 1933 the code was lives in being plus a contingent remainder vesting at majority.

See Oliver Rundell, *Perpetuities in Personal Property in Wisconsin, 4 Wis. L. Rev. 1 (1926).*

(n8)Footnote 390. D.C. Code Ann. 1929, tit. 25, ch. 6. *In re Hinckley's Estate, 58 Cal. 457 (1881).*

South Dakota exempts employee trusts from the rule against perpetuities and suspension of power of alienation. S.D. Codified Laws, 1967, §§ 60-13-1, 60-13-2.

"Lives in being" where settlor has the power to revoke are determined as of time settlor surrenders the right to revoke. Va. Code Ann. 1950, § 55-13.2.

Wis. Stat. 1973, Cemeteries, § 157.11.

Wyoming has the common-law rule against remoteness. Wyo. Stat. 1957, §§ 34-39, 34-40.

(n9)Footnote 391. Restraints on alienation limited to real property and allowable for lives in being plus 25 years with no rule against perpetuities as to either realty or personalty, denies presumption that person is able to have children at any stage of life and eliminates only violative part of a trust. Idaho Code 1947, § 55-111.

Lives in being at the creation of the estate and 30 years thereafter as the limitation of suspension of alienation except charitable uses, or literary, or charitable corporations, or cemetery corporations, or gifts for medicine. Wis. Stat. 1955, §§ 230.14, 230.15.

(n10)Footnote 392. *Lowell v. Lowell, 240 P. 280 (Ariz. 1925). In re Hinckley's Estate, 58 Cal. 457 (1881); Huxford v. Milligan, 50 Ind. 542 (1875).*

See Robert J. Lynn, *Reforming the Rule Against Perpetuities: Choosing the Measuring Lives, 1965 Duke L.J. 720;* Daniel M. Schuyler, *The Statute Concerning Perpetuities, 65 Nw. U. L. Rev. 3 (1970).*

(n11)Footnote 393. *Lowell v. Lowell, 240 P. 280 (Ariz. 1925).*

(n12)Footnote 394. *Wagner v. Wagner, 79 N.W.2d 319 (Iowa 1956); In re Dees' Estate, 308 P.2d 90 (Kan. 1957); Taylor v. Dooley, 297 S.W.2d 905 (Ky. 1956).*

See Future Interests -- Rule Against Perpetuities -- Legislation Exempting Options to Purchase in Leases. 56 Mich. L. Rev. 146 (1957).

(n13)Footnote 395. *De Buck v. Bousson, 294 N.W. 135 (Mich. 1940).*

After Sept. 1, 1959, successive life estates are not valid except to persons in being at date of creation. N.Y. Real Prop. Law § 43, as amended Acts 1959.

New York has now virtually returned to the common-law rule. N.Y. Est. Powers & Trusts Law, § 14-1.1.

N.Y. Laws 1972, ch. 583, amended N.Y. Est. Powers & Trusts Law § 9-1.3 to prevent the rule being applied so as to invalidate a gift because of the possibility a person might have a child by adoption. No other rules affecting instruments other than the rule against remoteness is affected. It applies to dispositions made after September 1, 1972. Subsection (3) of N.Y. Est. Powers & Trusts Law § 9-1.3 would appear to knock out evidence of a later hysterectomy as defeating the possibility of later born issue.

(n14)Footnote 396. *In re Friend's Will, 28 N.E.2d 377 (N.Y. 1940).*

New York has exempted real estate investment trusts from the rule against remoteness. N.Y. Laws 1961, ch. 341-45; N.Y. Est. Powers & Trusts Law § 9-1.1.

(n15)Footnote 397. *In re Walkerly's Estate, 41 P. 772 (Cal. 1895); In re Gray's Estate, 146 N.W. 722 (N.D. 1914),* l.r.a. 1917A, 611. *See* Cal. Civ. Code 1931, §§ 715, 716; Idaho Code 1932, § 54-111; 1913 N.D. Comp. Laws §§ 5287, 5288; S.D. Codified Laws 1929, § 294.

(n16)Footnote 398. Burns Stat. 1933, §§ 51-101, 56-142, 56-143; *Richmond v. Davis, 3 N.E. 130 (Ind. 1885).*

Indiana in 1945 returned to the "common law rule against perpetuities." Burns Stat. § 51-105.

(n17)Footnote 399. Ohio Gen. Code, § 10512-8.

(n18)Footnote 400. Wis. Stat. § 700.16(a)(1).

Okla. Stat. Ann. tit. 60 § 36. Successive life estates must be to living persons. Remainders on successive lives must be in fee. tit. 60 § 37. Contingent remainders cannot be limited on terms unless vested within lives in being, tit. 60 § 38.

(n19)Footnote 401. Miss. Code Ann. 1930, § 89-1-15.

Mississippi has a statute making a conveyance or devise of lands to a succession of donees then living and then to any person or heir. Miss. Code Ann. § 89-1-15. This is supplemental to the Mississippi common-law rule against perpetuities. *Shannon v. Riley, 121 So. 808 (Miss. 1929)* and applies only to successions of donees. *Lloyd's Estate v. Mullen Tractor & Equip. Co., 4 So. 2d 282 (Miss. 1941).*

Devise to wife for life as long as she remained a widow and then after 30 years after testator's death to such of the children or lined descendants who had not conveyed or tried to convey their interest or any part thereof in the interim was void under perpetuities statute. *McCormack v. Blanks, 85 So. 2d 204 (Miss. 1956).*

Redmond v. Redmond, 61 So. 552 (Miss. 1913) (this has been variously held as amending the common-law rule against remoteness); *Russell v. Federal Land Bank, 176 So. 737 (Miss. 1937)* (as a substitute for the common-law rule); *Anderson v. Anderson, 115 So. 2d 531, 121 So. 2d 393 (Miss. 1959).*

(n20)Footnote 402. *Fosdick v. Fosdick, 88 Mass. 41 (6 Allen 1863).*

(n21)Footnote 403. *Miller v. Douglass, 213 N.W. 320 (Wis. 1927).*

(n22)Footnote 404. *See Hawks v. Hamill, 288 U.S. 52 (1933).*

Okla. Stat Ann. tit. 60 § 75.

(n23)Footnote 405. *See* Phillip A. Brigg, *A Defense of Pennsylvania's Statute on Perpetuities, 23 Temp. L.Q. 313 (1950);* Oval A. Phipps, *The Pennsylvania Experiment in Perpetuities, 23 Temp. L.Q. 20 (1950).*

(n24)Footnote 406. Also reached by court decision in *Worcester County Trust Co. v. Marble, 55 N.E.2d 446 (Mass. 1944); Merchants Nat'l Bank v. Curtis, 97 A.2d 207 (N.H. 1953).*

See W. Barton Leach, *An Act Modifying and Clarifying the Rule Against Perpetuities, 39 Mass. L.Q. 15 (1954).*

The wait and see doctrine is followed in:

Conn. Gen. Stat. Ann. §§ 45a-502 - 45a-508.

Idaho Code § 55-111.

Iowa Code Ann., § 558.68.

Md. Ann. Code § 11-103.

Mass. Gen. Laws Ann. ch. 184a § 1.

Pa. Stat. Ann., §§ 6104-6105.

Vt. Stat. Ann., tit. 27, §§ 501-503.

Wash. Rev. Code Ann., § 11.98.130.

Some courts destroy the succeeding estate though vested, where the preceding estate fails by reason of violating the rule against remoteness. *Thornton v. Kirtley, 249 S.W.2d 803 (Ky. 1952).*

If, however, the interests created are so intertwined that they cannot be separated, the entire gift fails. *Vickery v. Maryland Trust Co., 52 A.2d 100 (Md. 1947).*

Maryland now has a "wait and see" statute. *See Murphy v. Mercantile-Safe Deposit & Trust Co., 203 A.2d 889 (Md. 1964).*

"Wait and see" in *Mississippi. Phelps v. Shropshire, 183 So. 2d 158 (Miss. 1966), 37 Miss. L.J. 487.*

Wait and see doctrine applied to options. *Mumma v. Hinkle, 74 Dauph. (Pa.) 97 (1958).*

Pennsylvania "wait and see" statute applies only to trusts created after January 1, 1948. *In re Davis' Estate, 297 A.2d 451 (Pa. 1972).*

See W. Barton Leach, *Perpetuities in Perspective: Ending the Rules Reign of Terror, 65 Harv. L. Rev. 721 (1952);* Lynn, *Reforming the Common Law Rule Against Perpetuities, 28 U. Chi. L. Rev. 488 (1961);* Harry M. Cross, *Rule Against Perpetuities in Trust Dispositions, 34 Wash. L. Rev. 330 (1959);* Jesse Dukeminier Jr., *Kentucky Perpetuities Law Restated and Reformed, 49 Ky. L.J. 3 (1961)* (analyzing the new Kentucky perpetuities act which adopts the common law subject to cy pres as to invalid interests in trusts and further subject to the "wait and see" doctrine).

See W. Barton Leach, *Perpetuities Legislation: Hail Pennsylvania!, 108 U. Pa. L. Rev. 1124 (1960);* William S. Paddock *The Rule Against Perpetuities -- Statutory Reform, 20 Case W. Res. L. Rev. 295 (1968).*

(n25)Footnote 407. *See also In re Estate of Kreuzer, 243 A.D.2d 207 (N.Y. 1998)* (the codification of the rule against perpetuities allowed reformation of interests so as not to violate the rule against perpetuities: "Where an estate would, except for this section, be invalid because made to depend, for its vesting or its duration, upon any person attaining or failing to attain an age in excess of twenty-one years, the age contingency shall be reduced to twenty-one years as to any or all persons subject to such contingency." The court therefore ordered that the provision "attaining the age of twenty-one (21) years" be substituted for the phrase directing distribution upon "attaining the age of thirty-five years (35)").

(n26)Footnote 408. Mass. Gen. L., 1954, ch. 184A.

Where there is an executory limitation over after a determinable fee and the limitation is void for remoteness the possibility of reverter remains and is valid. *Brown v. Independent Baptist Church, 91 N.E.2d 922 (Mass. 1950).*

See Lawrence M. Jones, *Reforming the Law -- The Rule Against Perpetuities, 22 Md. L. Rev. 269 (1962).*

Ronald Maudsley, *Perpetuities: Reforming the Common-Law Rule -- How to Wait and See, 60 Cornell L. Rev. 355 (1975);* Samuel M. Fedders, *Perpetuities: The Wait and See Disaster -- A Brief Reply to Professor Maudsley, With a Few Asides to Professors Leach, Simes, Wade, Dr. Morris, et al., 60 Cornell L. Rev. 380 (1975).*

(n27)Footnote 409. Mass. Gen. Laws Ann. ch. 184A, § 1-11. It applies only to instruments dated prior to its effective date; *Howson v. Crombie Street Congregational Church, 412 Mass. 526, 528, 590 N.E.2d 687, 689 (1992).*

(n28)Footnote 410. Page's Rev. Code, § 2131.8.

(n29)Footnote 411. Laws 1949, ch. 92.; Wyo. Stat. § 34-1-139.

Arizona has adopted the common-law rule against remoteness of vesting. Ariz. Rev. Stat., § 33-261.

(n30)Footnote 412. *Joseph Schonthal Co. v. Sylvania, 21 N.E.2d 1008 (Ohio App. 1938).*

(n31)Footnote 413. N.Y. Est. Powers & Trusts Law § 9-1.1.

See Richard R. Powell, *Changes in New York Statutes on Perpetuities and Accumulations: A Report and a Proposal, 58 Colum. L. Rev. 1196 (1958).*

A power of revocation will save an otherwise invalid trust. *Von Hesse v. MacKaye, 32 N.E. 615 (N.Y. 1892).*

A trust for six named children provided that when each child reached 30 his share of principal would be paid to him -- New York held the trust valid even with respect to the youngest child who would not reach age 30 within 21 years. The age contingency was reduced to 21 years under a statute providing for the reduction to validate the otherwise invalid trust. N.Y. Est. Powers & Trusts Law § 9-1.2. *In re Pendleton's Estate, 246 N.Y.S.2d 351 (1964).*

See Richard R. Powell, *The Rule Against Perpetuities and Spendthrift Trusts in New York: Comments and Suggestions, 71 Colum. L. Rev. 688 (1971).*

(n32)Footnote 414. Minnesota seems to have no common-law rule against remoteness and its statute covers only restraints on alienation. *Young Men's Christian Ass'n v. Horn, 139 N.W. 805 (Minn. 1913); Mineral Land Inv. Co. v. Bishop Iron Co., 159 N.W. 966 (Minn. 1916),* l.r.a. 1917D, 900.

(n33)Footnote 415. *In re Wilcox, 87 N.E. 497 (N.Y. 1909).*

California has repealed § 715.8 of the Civil Code, which would permit family trusts to be perpetual as long as living persons could convey a fee simple. Stat. 1970, ch. 45, p. 63.

Connecticut contemplates that where the rule would be violated because the interest is contingent upon a person reaching an age in excess of 21 years, the age contingency is reduced to 21 Conn. Gen. Stat. § 45a-504.

Revising the rule against remoteness. 765 ilcs 305-4.

See I. Leo Glasser, *Trusts, Perpetuities, Accumulations and Powers Under the Estates, Powers and Trusts Law, 33 Brooklyn L. Rev. 551 (1967);* Daniel M. Schuyler, *The Statute Concerning Perpetuities, 65 Nw. U. L. Rev. 3 (1971).*

(n34)Footnote 416. 765 ilcs 305-4.

See New York's Two-Part Statutory Substitute for the Common Law Rule Against Perpetuities, 38 Albany L. Rev. 570 (1974).

(n35)Footnote 417. *See* W. Barton Leach, *Perpetuities: New Absurdity, Judicial and Statutory Correctives, 73 Harv. L. Rev. 1318 (1960);* William S. Paddock, *The Rule Against Perpetuities -- Statutory Reform, 20 Case W. Res. L. Rev. 295 (1968);* Daniel M. Schuyler, *The Statute Concerning Perpetuities, 65 Nw. U. L. Rev. 3 (1971).*

See also James J. Lenoir, *A Reexamination of Perpetuities in Arizona, 10 Ariz. L. Rev. 347 (1968).*

(n36)Footnote 418. Arizona now has the common-law rule against perpetuities. Ariz. Rev. Stat., § 33-261.

Common-law rule restored: Ga. Code Ann. § 44-6-200; Ohio Rev. Code Ann., § 2131.08; Wyo. Stat. § 34-1-139.

Common-law rule. Dallapi v. Campbell, 114 P.2d 646 (Cal. App. 1941); Beverlin v. First Nat'l Bank, 98 P.2d 200 (Kan. 1940); In re Lewis' Estate, 37 A.2d 482 (Pa. 1944).

See James J. Lenoir, *A Reexamination of Perpetuities in Arizona, 10 Ariz. L. Rev. 347 (1968).*

(n37)Footnote 419. Invalid separated from valid gifts. *In re Schuette's Estate, 311 N.Y.S.2d 415 (1970).*

See Robert L. Fletcher, *A Rule of Discrete Invalidity: Perpetuities Reform Without Waiting, 20 Stan. L. Rev. 459 (1968).*

(n38)Footnote 420. N.Y. Est. Powers & Trusts Law § 9-1.3(c), makes a rebuttable presumption that the "unborn widow" does not violate the rule.

(n39)Footnote 421. Mississippi has now joined the "wait and see" states under the doctrine cited by res in the case before the Madison Superior Court. *See Phelps v. Shropshire, 183 So. 2d 158 (Miss. 1966).*

Ohio has adopted the "wait and see" rule. Applicable retroactively to a power of appointment. *Dollar Sav. & Trust Co. v. First Nat'l Bank of Boston, 285 N.E.2d 768 (Ohio 1972). See also* Robert J. Lynn, *The Ohio Perpetuities Reform Statutes, 29 Ohio St. L.J. 1 (1968).*

See Richard R. Powell, *The Rule Against Perpetuities and Spendthrift Trusts in New York: Comments and Suggestions, 71 Colum. L. Rev. 688.*

(n40)Footnote 422. *See* Robert L. Fletcher, *A Rule of Discrete Invalidity: Perpetuities Reform Without Waiting, 20 Stan. L. Rev. 459 (1968).*

(n41)Footnote 423. *Hill v. State Box Co., 249 P.2d 903 (Cal. App. 1952).*

(n42)Footnote 424. Okla. Stat. Ann. tit. 60, §§ 175.43, 175.47.

Oklahoma permits the court to apply the cy pres doctrine to the reformation of interests which violate the rule against perpetuities, both legal and equitable, to give effect to the general intent of the creator of the instrument. Okla. Stat. tit. 60, §§ 75-78.

Arizona has adopted the common-law rule.

(n43)Footnote 425. Pa. Stat. Ann. §§ 6104-6105.

But mere retention of income is insufficient. *McCreary's Trust Estate v. Pitts, 47 A.2d 235 (Pa. 1946).*

See Phillip Mechem, *Further Thoughts on the Pennsylvania Perpetuities Legislation, 107 U. Pa. L. Rev. 965 (1959).*

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CHAPTER 28 RULES AGAINST PERPETUITIES

3-28 Thompson on Real Property, Thomas Editions § 28.08

AUTHOR: Professor David A. Thomas This chapter is based in part on Ch. 31. George W. Thompson, Commentaries on The Modern Law of Real Property (John S. Grimes ed. 1979), which made a significant contribution toward preserving the American common law on perpetuities. J. Reuben Clark Law School Brigham Young University

§ 28.08 A Short Course in the Modern Rule Against Perpetuities

[Go To Supp]

The contents of the following section were prepared by Professor John Makdisi and are intended to provide a helpful introduction to the incidents and operation of the modern rule against perpetuities.

§ 28.08(a) History of the Rule n426

The history of the development of the Rule against Perpetuities lies in part in the dual court system in England which treated terms of years differently than freehold estates. Chattels were regulated by the ecclesiastical courts, and a term of years (otherwise known as a leasehold or non-freehold estate) was considered a chattel real. No certain reason for the classification of leaseholds as chattels is known, but it appears that while the ecclesiastical courts could entertain suits concerning the bequest of a term of years, they were prohibited from interfering with suits concerning freehold estates which fell within the jurisdiction of the common law courts. n427

In the 15th century, the owner of a chattel real could not grant a life estate in the term to another person without giving the grantee the whole term. n428 A life estate, being an estate of freehold, was considered of greater magnitude than a term of years no matter how long the term actually lasted. Upon such a grant, no reversion remained in the grantor; upon the death of the termor before the expiration of the term, the term passed to the personal representative. If a remainder had been granted by the original owner of the term of years to follow the life estate, this remainder was void. Likewise, a grant by a termor to take effect upon the termor's death was void as an attempt to reserve a life estate in a term. There was one exception. A grant of a term after the death of a stranger was good because there was no presumption that the stranger might not die within the term. n429

In 1579, a step was made towards removing the bar on future interests after a devise for life in a term of years. The court in Welcden v. Elkington n430 reconciled a subsequent devise to a son after a devise of the occupation for life to the wife by treating the devises as if they had been made in reverse order: first to the son and then to the wife. This transposition allowed the devise of the term of years to the wife to be

> upon a limitation only, viz. if she lived so long, for if it had amounted to an estate for life, (as it was objected) it would have swallowed up the whole term, an estate for life being in judgment of law greater than for years, in which case no remainder could be appointed over. n431

The court also noted that the devise for the occupation of the wife was a gift of the land itself and not of the occupation only. n432

In 1609, the court that decided Matthew Manning's Case n433 confirmed the validity of a future interest in a term of years following a devise to one for life. A possessor of a fifty-year term in a farm devised his lease to Matthew Manning after the death of his wife and gave the use and occupation of the farm to his wife during her life. The court determined that Matthew Manning took the lease by way of an executory devise and not by way of remainder. The court further stated that there was no difference devising a term for life with remainder over and devising a term for the use and occupation of another. "[T]he law will make construction of the words to satisfy his [the testator's] intent, and to put them into such order and course that his will shall take effect." n434 Thus, it was firmly established that the future interest after a devise for life was an executory devise, and the preceding estate for life was a gift of the land itself whether it had been devised as such or only for the use and occupation of the devisee.

Once the common law had accepted the concept of an executory devise in a term of years, it was an easy step technically to accept the concept of a devise over of the remainder of a term after the limitation of the term to one and the heirs of one's body. Such a devise was protected in 1612 in Retherick v. Chappel, n435 which cited *Manning's Case* and *Welcden* for support. It was not long, however, before a problem with perpetuity was recognized in permitting an executory devise to take effect following the limitation of a term in a fee-tail-like estate to one and the heirs of his body. A devise conceivably could be made to follow a limitation of indeterminate length.

This problem had already arisen and been settled in the law of freehold interests. In 1285, Parliament had enacted the *Statute De Donis Conditionalibus*, n436 which permitted landowners to tie up their land for several generations in fee tail estates without permitting the holder of the estate in the line of succession to convey an absolute interest in the land. This restraint on alienation was eventually avoided in 1472 when the courts sanctioned methods to evade the statute, and by the 16th century it was possible to convert an estate tail into a fee simple through a process known as "docking" or "barring the entail." n437 This procedure barred the rights of issue as well as those of the reversioner and remainderman.

Conveyancers attempted nonetheless to get around the ability to dock the entail, but to no avail. n438 It was therefore with some interest that they then turned to the term of years as a device for tying up interests in land for their clients. A fee tail estate technically could not be created in a term of years because its creation was permitted only in freehold estates by the *Statute De Donis*. It was thought, however, that a fee-tail-like interest could be created as in Retherick and prove immune to docking because the devices available to disentail a fee tail estate in freehold were not adaptable to the term of years. n439

The courts caught on to this scheme and soon prevented it as a mischievous perpetuity. In Bennet v. Lewknor, n440 the court found that a devise after a fee tail interest in a term was void. In Child v. Baylie, n441 this point was made even more emphatically. The limitation to one after an entail of a term was void "for such an entail of a term is not allowable in law, for the mischief which otherwise would ensue, if there should be such a perpetuity of a term." n442 Furthermore, the limitation over was void even after an interest in a term to one and one's assigns, the interest to take if one died without issue then living (a definite failure of issue construction which would give the limitation over, if at all, at the time of the first taker's death and no later). n443

The decision in Child v. Baylie was affirmed in 1623. It is therefore surprising that, despite their efforts to stem the tide of restraints on alienation, the judges decided in Pells v. Brown n444 (two years after the initial decision in *Child* and three years before its affirmance) that where freehold estates were concerned such a limitation over upon definite failure

of issue was valid and, furthermore, indestructible. The limitation's validity was decided on the basis of precedent, n445 and its indestructibility was decided in accordance with the policy of protecting the executory devisee from losing the interest through a common recovery. n446 The judges in *Pells* believed that any problem with perpetuities was insignificant when the contingency of an executory devise was at issue. (As Professor George Haskins has noted, "the word perpetuity connoted an inconvenient fettering of property in the sense that the interest created in a grantee might be inalienable for too long a time.") n447 In *Pells*, the estate which was subject to the executory devise was classified as a fee simple interest subject only to "a mere contingency, which peradventure never may happen." n448 Alienability was not considered a serious problem. In *Child v. Baylie*, despite the similarity to *Pells* in the type of contingent interest involved, the judges were apparently concerned with a larger problem: permitting entails within a term of years. Entails in freehold estates could be destroyed but not entails in terms of years, and to permit the latter would create estates which could be fettered indefinitely. In 1631, the courts resolved this problem directly by declaring that a term of years could not be entailed. n449

The holding in Pells v. Brown was not fully exploited by those desiring to tie up their estates. The case itself did not involve a serious perpetuity, and it has been suggested that its sudden and unexpected departure from pre-existing law raised considerable doubt among conveyancers and judges as to its soundness. n450 Consequently, terms of years subject to the rules established by *Manning's Case* and its progeny were largely preferred over freehold estates as a technique of estate planning. n451

This state of affairs lasted until 1682 n452 and led, along with problems besetting conveyancers, to the seminal case for the modern Rule against Perpetuities, the Duke of Norfolk's Case. n453 This case involved an attempt to entail an interest in a term of years with a devise over upon failure of issue within the lifetime of another person. When the Chancellor, Lord Nottingham, called on the heads of the three common law courts to advise him, they maintained in accordance with *Child v. Bailie* that the devise over was invalid. Lord Nottingham decided, nevertheless, that the devise over was valid. Asked where he would stop if not at the limit of *Child v. Baylie*, he replied:

> I answer, I will stop everywhere when any inconvenience appears, no where before. It is not yet resolved what are the utmost bounds of limiting a contingent fee upon a fee; and it is not necessary to declare what are the utmost bounds to the springing trust of a term, for whensoever the bounds of reason or convenience are exceeded, the law will quickly be known. n454

In the *Duke of Norfolk's Case, Child v. Baylie* was rejected and *Pells v. Brown* affirmed, not merely for a freehold estate but also with respect to a term of years. The *Norfolk* court fully established the place of executory interests in the law both for freeholds and terms of years, and it extended the period of time during which such a future interest might validly take. n455 The present limit on the period evolved over the next 150 years until it was finally settled in the early 19th century n456 and eventually stated by Gray as follows: "No interest is good unless it must vest, if at all, not later than twenty-one years after some life in being at the creation of the interest." n457

It is evident that interests created in terms of years were treated similarly to interests created in freehold estates with one major exception. What would ordinarily have been a remainder in a freehold estate after a grant of a life estate or a fee tail estate was an executory devise in a term of years. Consistent with the rule that executory interests could not vest in interest before they vested in possession, these interests were void if they could vest in possession beyond the perpetuities period. Gray notes the difference between a remainder in freehold and an executory devise in a term of years in the following example:

> Suppose a term is devised to A., who is now a bachelor, for life, on his death to A.'s eldest son for life, and on the death of such eldest son to A.'s other children absolutely. Here, had the subject of the devise been a fee instead of a chattel real, the gift to A.'s eldest son for life and the gifts in remainder to A.'s other children would all have vested in the lifetime of A., and so none of them would have been bad for remoteness. If, therefore, upon this devise of a term the estates for life are really life estates, then the

> final limitation to A.'s younger children is vested and good. But if what purport to be life estates in the term are really absolute interests, then the final limitation is an executory devise, which does not vest until it comes into possession, and is therefore too remote. n458

§ 28.08(b) The Separate Path of Chattels Personal n459

Since chattels personal can be held as present interests with possession postponed or as vested remainders with possession postponed, it is possible for some conveyances of such property to be valid where the same conveyance of real property would be invalid. This difference has confused some of the best commentators in the field and has produced an enduring misinterpretation of the famous case of Jee v. Audley. n460

In *Jee v. Audley* the testator attempted to convey an executory bequest in personalty. He bequeathed £1,000, the interest to be paid to his wife for life and the principal to go to his niece and the issue of her body, and "in default of such issue" to "the daughters then living" of John and Elizabeth Jee. Sir Lloyd Kenyon, the Master of the Rolls, found that the limitation to the daughters was void for remoteness under the Rule against Perpetuities. He interpreted the phrase "in default of such issue" as an indefinite failure of issue construction -- the condition would be satisfied when the issue of the niece ran out. Since the daughters' interest was contingent on their survival until the niece's line ran out, it was legally possible that the existing daughters would die and presently unborn daughters would be living at the time the niece's issue failed. A violation of the Rule against Perpetuities existed because the interest of the daughters could conceivably vest more than twenty-one years after a life in being at the creation of the interest.

The nature of the interests in this conveyance differed from that of interests in real property. *Jee* involved the conveyance of personal property: £1,000. In the law of chattels personal, there was no legal estate in fee tail; the *Statute De Donis* only authorized a fee tail in land. n461 Therefore, Mary Hall was considered to take an absolute interest in the money with an attempted executory limitation over. Gray maintains that a gift or bequest of the absolute property in a chattel personal can be followed by an executory limitation over -- as, for example, in the case of an executory bequest of a painting to A, but if A dies without issue (with a definite failure of issue construction), then to B. n462

It appears then from an application of these principles governing the law of chattels personal that the niece, Mary Hall, took a present vested absolute interest in the money subject to the use and occupation of the wife for life and subject to being cut short by an executory bequest in favor of the Jees' daughters living at the time Mary Hall's line expired. In such a case, the rule against perpetuities is violated, and the niece receives an indefeasibly vested interest in the money.

The analysis so far is standard fare for this case. Let us move on to Lord Kenyon's dictum in *Jee*: "If [the limitation in the conveyance of the £1,000] had been to "daughters now living,' or "who should be living at the time of my death,' it would have been very good; but as it stands, this limitation may take in after-born daughters." n463

In 1938 Professor Leach asserted that this dictum was "one hundred per cent wrong." n464 Twenty-three years later, he reiterated the same conclusion in more colorful language:

> Since I consider this case so bad, I take a certain ghoulish pleasure in pointing out that at page 688 Lord Kenyon makes a clear error. He says that if the gift had been to "daughters now living" it would have been good. This is wrong. To make it good the gift would have had to have been to "daughters now living who shall be living at the death without issue of Mary Hall." n465

In their textbook on property, Professors Dukeminier and Krier concur with Professor Leach's opinion. n466

If, however, one examines the law of personal property in this area, Lord Kenyon's statement may be taken as technically correct. In Hide v. Parratt, n467 the Court of Chancery held that a bequest of personal property to a wife for life and then to a son, Joseph, was valid. It stated that "the rule is, where personal chattels are devised for a limited time,

it shall be intended the use of them only, and not the devise of the thing itself, and therefore [the Lord Keeper] allowed the remainder over to be good." n468 Since the wife was considered to have only the use of the personal property, the present absolute interest (subject to the use in the wife) appears to have existed in the son (despite the Court's use of the term "remainder over"). The only other alternative is for the grantor's heirs to have held the present interest subject to an executory interest in the son, but this interpretation is doubtful in light of an earlier 1459 opinion.

The 1459 case n469 permitted the bequest of a Mass book to two people successively for their lives and upon the death of the second person to the parishioners of a certain parish. The case was in trespass, and although its report was inconclusive, it appears that the "life tenants" received a right to the use and occupation of the Mass book while the property or absolute interest remained in others. n470 This case proposes the rule that a gift of personal property is present and absolute in the final grantee subject to the use and occupation of "life tenants."

Relating these precedents to Jee v. Audley, one can formulate an argument justifying Lord Kenyon's dictum. If the bequest had been to Mary Hall and her issue and on the indefinite failure of her issue to the daughters now living of the Jees, the daughters now living take a present absolute vested interest subject to the use and occupation of Mary Hall and her issue. Such a present interest is valid under the rule against perpetuities. The use in Mary Hall would be a fee-tail-like interest recognized in an earlier 1565 opinion. n471 The opinion considered a devise of the use of jewels and pieces of plate of the late Chief Justice of England, Lord Fitz-James, to Nicholas Fitz-James and the heirs male of his body. The court held that the grantee of the plate had only the use and occupation. n472

What has not been recognized by the commentators is that the gift over upon failure of issue with an indefinite failure of issue construction was not necessarily a shifting executory bequest as it was in the actual conveyance in *Jee*. Where the gift over is subject to a condition precedent as in the facts of *Jee*, it is executory; where the "gift over" is not subject to a condition precedent but will take in possession at the end of a life-estate-like or fee-tail-like interest as in the dictum of *Jee*, it is present. Under this reasoning the dictum of Lord Kenyon would be correct.

This rule is applied at the time of the conveyance to prevent future interests from vesting too remotely. It does not apply to present interests not subject to open, vested remainders not subject to open, or reversionary interests (i.e., possibilities of reverter, n473 rights of re-entry, or reversions n474 It does apply to test for remoteness of vesting in the case of present interests subject to open, vested remainders subject to open, contingent remainders and executory interests. It also applies to equitable interests as it does to legal interests. n475

COMPUTER-ASSISTED RESEARCH

LEXIS: chattels personal w/30 rule against perpetuities

§ 28.08(c) The Concept of Vesting

The concept of "vesting" under the rule against perpetuities is fairly straightforward. A remainder becomes vested when it loses its contingencies, i.e., that the interest is in a person or persons born and ascertained and is not subject to a condition precedent.

In Seaver v. Fitzgerald n476 the testator devised to trustees in trust:

> to use so much of the income thereof as shall be needed to give to my daughter ... a good and suitable support so long as she live; also if she shall ever have a child or children, my said [trustees] shall support them in a proper manner from said income or property during the life of each and all; the balance of said income and the property after the death of my said child, and her child or children (if any), shall all be paid for the sole use and benefit of the Augustinian Society of Lawrence.

The court found the devise to the Augustinian Society valid under the rule against perpetuities since it vested immediately.

As for executory interests, Professor Leach states the considered view:

> It is of fundamental importance that executory interests have not the capacity, which remainders have, of vesting in interest before they vest in possession. Hence executory interests must *become possessory* within the period of perpetuities, while remainders need only *become vested*. n477

Professor Gray adds that this is true unless, of course, the executory interest is turned into a vested remainder. n478 Care must be exercised in reading authors who suggest that an executory interest, as such, may be vested for purposes of the rule against perpetuities. n479 As for interests subject to open, the requirement for vesting is dependent on the vesting of the interest in every member of the class; until vesting in every member occurs, at least one member has an executory interest. Reversionary interests are considered vested because these interests are technically not created; they are the leftovers from a vested interest and therefore remain vested. n480

In Mann, Crossman & Paulin, Ltd. v. Registrar of the Land Registry, n481 plaintiffs held the lease of a public-house for a term of fifty years. The lessor died, leaving the reversion to his wife and children, who in 1917 conveyed the reversion to the plaintiffs for 30 years, to commence from the date of expiration in 1946 of their existing lease. The question was raised whether the 1917 conveyance violated the Rule against Perpetuities since the leasehold would not vest in possession for another twenty-nine years. The court found that the lease in reversion was vested and did not violate the Rule.

COMPUTER-ASSISTED RESEARCH

LEXIS: vest! w/5 interest! w/30 rule against perpetuities

§ 28.08(d) Four Aspects of the Rule

The rule against perpetuities deserves careful attention to each phrase of its formulation. There are four aspects of the rule that are particularly important:

> (1) The rule states that for an interest to be valid it "must vest, if at all" within a certain period of time. This phrase requires that there be no situation that could ever occur after the conveyance in which the interest could vest beyond this period. The possible future situations are determined at the time of the conveyance regardless of the actual situation that occurs after the conveyance. If any situation, no matter how unlikely, n482 can be hypothesized that would cause the interest to vest too late, the interest is invalid. On the other hand, it is not necessary that the interest vest at all. It is only necessary that it not be able to vest too late under any hypothetical situation that could occur after the conveyance.

In Warren v. Albrecht n483 the testator devised a life estate followed by four alternative contingent remainders. Since each of these remainders was designated to vest, if at all, on the death of a life in being, the remainders were valid under the rule against perpetuities.

> (2) The period beyond which the vesting of an interest would be too late is "twenty-one years after some life in being at the creation of the interest." A life in being at the creation of the interest is just that--anyone who is alive at the time the conveyance became effective. Twenty-one years after some such life is twenty-one years after the death of every person alive at the time the conveyance became effective. If it is possible to hypothesize at the time of the conveyance a situation in the future in which the interest could vest more than twenty-one years after the death of every person alive at the time the conveyance became effective, then the interest is invalid.

One way in which to ensure validity of an interest under the rule is to link explicitly in the conveyance the vesting of the interest to a period of time within 21 years from the deaths of certain designated lives in being. These lives do not need to be involved with the taking of any interest in the property; they may be totally unconnected. The only caution is to avoid designating too many lives in being for this purpose. The courts in In re Villar n484 and in Warren's Will Trusts n485 sustained provisions in wills which postponed vesting until 20 years after the deaths of all descendants of Queen Victoria living at the time of the testator's death. There were 120 known descendants in 1929 and 194 in 1961. On the other hand, the court in In re Moore n486 did not permit the use of "all persons who shall be living at [the testator's] death."

One interesting case provided another restriction in England which Professor Leach n487 called the Rule Against Double Possibilities. Professor Leach also stated that it has never been applied in the United States. n488 In Whitby v. Mitchell n489 lands were conveyed in trust to a husband and wife for their lives, then to their descendants as they should by deed appoint and who are living at the time of the appointment. The husband and wife subsequently had two daughters and used their special power of appointment to give one half of the lands to each daughter for life, then to the use of such persons as each daughter should by will appoint, and in default of appointment, to the use of the daughters' children presently alive. The court found that the appointment by the husband and wife was bad, except for the life estate to the daughter: "the law as to land has always been that you cannot limit an estate to an unborn person for life, with remainder to the issue of that unborn person. Stated broadly, no one would dispute that proposition for a single moment; but it is said that if you do so limit, with a proviso that the unborn children of the unborn person who are to take shall be persons coming into existence within the period limited by the rule against perpetuities, that is good... . I do not know of any authority whatever for that limitation of the rule." Since the validity (for purposes of the rule against perpetuities) of the limitations under a special power of appointment are determined by reading them back into the original conveyance (but taking into consideration the facts existing at the time the appointment is made), the court likened this conveyance to one "to A for life, remainder to B for life, remainder to the first child of A by B for life, remainder to the children of that first child ... provided that such children shall be born within a life or lives now in being [naming the lives of A and B] and twenty-one years afterwards." This conveyance would be good under the rule against perpetuities, but the court found it invalid as a possibility on a possibility. Specifically, the Court of Appeal stated "you cannot have a limitation for the life of an unborn person, with a limitation after his death to his unborn children to take as purchasers."

> (3) In determining the twenty-one year period after the death of every person alive at the time the conveyance, actual periods of gestation are included where the child in gestation is born alive. Thus, O's devise "to his great-grandchildren when his first grandchild reaches twenty-one and no later," is valid even though at O's death his wife is pregnant with their first child, A, who might die thirty years later leaving his twenty-five year old wife pregnant with their first child, B, who might become pregnant with her first child, C, when she reaches twenty-one. O's child is considered a life in being at the time of the devise, despite his birth occurring after O's death. n490 The grandchild, B, when she reaches twenty-one, does so more than twenty-one years after A's death, but the extra time is permitted as an actual period of gestation. The great-grandchild, C, is born after the end of the twenty-one year period, but again the extra time is permitted as an actual period of gestation. Since no great-grandchild may take an interest more than twenty-one years after the death of a life in being at the creation of the interest (except for periods of actual gestation which are permitted), n491 the interest in the great-grandchild is valid under the rule against perpetuities.

In Thellusson v. Woodford n492 the testator gave the residue of his estate to trustees in trust to collect the rents and profits during the lives of all of his issue who should be living at the time of his death or "born in due time afterwards," and at the death of the last survivor, to divide the property equally and convey it to certain descendants then living in tail male. The court interpreted the words, "born in due time afterwards," from the intention of the testator manifested in the will to mean the time of gestation, and the life of a child *en ventre sa mere* was allowed to fix the time during which

the vesting of the property could be protracted. Furthermore, at the end of the perpetuities period, the court allowed that a child *en ventre sa mere* could be a taker when actually born.

> (4) The interests of members of a class are dependent on each other. None of the interests must be able to vest beyond the period of the rule or all the interests of the members of the class will be invalid. n493

In Ward v. Van der Loeff n494 the testator in a codicil to his will declared "that after her [his wife's] death my trustees shall stand possessed of the residuary trust funds in trust for all or any the children or child of my brothers and sisters who shall be living at the death of my wife or born at any time afterwards before any one of such children for the time being in existence attains a vested interest and who being a son or sons attain the age of 21 or being a daughter or daughters attain that age or marry if more than one, in equal shares." The court found that, despite the fact that on the date of the codicil the parents of the testator were both over the age of 66, n495 the gift to the children was void under the rule against perpetuities. As Lord Blanesburgh explained the perpetuity that could have eventuated upon the testator's death:

> It was ... necessary that they [the testator's parents] should have another child... . That child, in turn, had to have a child born after the death of the testator's widow -- one born in her lifetime would not have been excluded by the rule. And even a child so born would have brought about an infraction of the rule, only if it had also eventuated that no one of the already substantial and apparently increasing families of the testator's four living brothers and sisters had survived his widow having married or attained twenty-one.

§ 28.08(e) Difficulty of the Rule

In Feeney's Estate n496 the testator gave property to a trustee in trust to pay the income to his son William for life, and then

> the fund shall continue in trust during the lifetime of the children of the said son ... living at the time of his death ... in equal shares ... . Upon the death of any of the children of my son ... [that] child's proportionate share of the corpus of the said fund shall be paid to the residuary legatees [six other children of the testator] or their heirs.

The court determined that the gift to "the residuary legatees or their heirs" created a substitutionary gift to the heirs, thus making the gift to the residuary legatees contingent on their remaining alive until the termination of the preceding estates.

On these facts, the court found that the contingent remainders in the residuary legatees were invalid under the rule against perpetuities. The court concluded that these interests were invalid because they might vest too late:

> since it is apparent that a child might be born to the first life tenant after the latter comes into his estate at the death of the testator; that this child, if alive at the demise of its parent, would take an interest for life and might live more than twenty-one years; and that those entitled under the will to be paid the share of the principal on which such child had received income could not be ascertained, so that their interests would vest, till its death; finally, the person in question might be the only child of the first life tenant living at the time of the latter's death... . It may readily be seen that the contingent ultimate remainders thus created possibly may not vest until the death of a child born to the first life tenant after the death of testator, who would survive its parent more than twenty-one years, -- a period longer than that allowed by the rule against perpetuities.

The court made a mistake in its application of the rule against perpetuities. Each of the residuary legatees was living at

the death of the testator and therefore was a life in being. The contingency of his remainder was his death before the termination of the preceding estates. If he died before this time, his heirs would be determined and would have a vested remainder; if he died after this time, he would have a vested remainder upon the termination of the preceding estates. In either case, vesting would occur within the perpetuities period because the residuary legatees were the measuring lives n497

The difficulty in determining the validity of an interest under the rule against perpetuities is well recognized. In Lucas v. Hamm n498 the California Supreme Court held that an attorney who drafted a will provision violating the rule against perpetuities was not liable for negligence because the rule against perpetuities is " 'a technicality-ridden legal nightmare' and "a dangerous instrumentality in the hands of most members of the bar' ", and it would not be proper to find negligence. It is ironic that Cornelius Moynihan mentions this case in a footnote in his book, n499 and in the text on the same page he himself misstates the rule when he says "a future interest which, by any possibility, may not vest within twenty-one years after a life or lives in being at the time of its creation is void in its inception." In fact, a future interest may not vest within this time period and yet still be valid; it may never vest. For example, where O conveys "to A for life and then to B if B gets married," if B never gets married B's interest will never vest, but B's interest is a valid contingent remainder at the time it is created. Thomas Bergin and Paul Haskell n500 make the same mistake as Moynihan when they state that "the rule makes *void* any "*contingent*" interest *created in a transferee that, viewed from the moment of its creation*, is not *certain* to "*vest*" within the life of a *person living* at the time the interest is *created, plus* 21 years." Undoubtedly, these statements are oversights. The misstatements of the rule in both texts may be corrected by adding the words "if at all" after the word "vest," as Bergin and Haskell later do in their book. n501

Therefore, it may be helpful to examine at least one quick method for determining validity of interests under the rule against perpetuities.

§ 28.08(f) A Quick Method for Determining Validity

Validity of an interest under the rule against perpetuities can be determined by asking four questions. If the answers to any of these questions is affirmative, the interest is valid. If not, the interest is most likely invalid and merely needs a hypothetical example of an invalid situation to prove it.

QUESTION #1:

Must the vesting events, if they happen, all happen within the period of the rule? A vesting event is an event that must occur before the interest can vest. It may be birth or ascertainment of the interest holder or the occurrence of an event specified in a condition precedent.

QUESTION #2:

Must the interest terminate within the period? A life estate measured by a life in being at the time of the conveyance must terminate within the period because the twenty-one years cannot start to run until the life estate is over. n502

QUESTION #3:

If the destructibility rule is in operation within the jurisdiction, does the interest as a contingent remainder, not in a class nor transformable into an executory interest, follow a prior life estate(s) measured by a life(lives) in being? Such a contingent remainder is destroyed by the Destructibility of Contingent Remainders Rule if it does not vest on or before the termination of the prior life estate(s). Note that the Destructibility Rule does not apply to equitable contingent remainders. n503

QUESTION #4:

In the case of a class gift, must the class close and the interests of every member of the class vest, if at all, within the period of the rule? Where O conveys "to A for life, then to the children of A's first-born son who reach age fifteen" and A has no children at the time of the conveyance, the interest in the children of A's first-born son is valid. If no children of A's first-born son are born by the time A's life estate terminates, the children's interest will be destroyed by the destructibility rule. If a child is born to A's first-born son, that child (or representative) will become entitled to distribution no later than the death of A, thus closing the class on or before the death of all lives in being. No child of A's first-born son would be able to take a vested interest more than fifteen years (plus any actual period of gestation) later.

Note that in Question #3 above, the destructibility rule will not guarantee validity in the case of a class gift. For example, O's conveyance when A has no children "to A for life, then to the children of A who reach the age of fifty" creates an invalid (and therefore no) interest in the children. The hypothetical situation that proves the invalidity of the children's contingent remainder is that the first child of A might reach fifty when the second child is twenty (transforming the first child's interest into a vested remainder subject to open and the second child's interest into an executory interest), and then A and all lives in being at the time of the conveyance might die at this time and thirty years later the second child might reach fifty causing her interest to vest beyond the period of the rule.

Also the destructibility rule will not guarantee validity in the case of a contingent remainder transformable into an executory interest, such as O's conveyance "to A for life and then to the first child of A, but if that child does not reach fifty, then to B" when A has no children. B has an invalid (and therefore no) interest. At the time of the conveyance, B and the unborn first child of A have alternative contingent remainders. The hypothetical situation that proves the invalidity of B's interest is that the first child might be born (transforming that child's interest into a vested remainder in fee simple subject to executory limitation and transforming B's interest into an executory interest), and then A, B and all lives in being at the time of the conveyance might die at this time and then thirty years later the first child of A might die causing C's interest to vest beyond the period of the rule.

§ 28.08(g) Effect of Invalidity of an Interest

An interest that is invalid under the rule against perpetuities is struck from the conveyance, leaving the valid gifts to take effect with all remaining interests in the property left with the grantor. Thus, O's conveyance "to A for life, then ten years later to the first child of A to go to law school" is an invalid attempt to create an executory interest in the first child of A to go to law school. O's conveyance is valid only to give A a present interest in a life estate and to leave a reversion in O in fee simple absolute.

If the invalid interest is an executory interest that cuts short a fee simple estate in another grantee, the fee simple estate may be determinable or subject to condition subsequent. If the language of the condition is durational such as to create a fee simple determinable, the invalid future interest is struck but the condition remains as a condition subsequent and the grantor retains a possibility of reverter.

In Institution for Savings in Roxbury v. Roxbury Home for Aged Women n504 property was conveyed to the Institution "for their use as long as the present Institution shall continue to exists ... [and t]hat when the Institution shall cease to exist the Trustees shall convey the whole estate to [the Roxbury Home]. The court found that the Institution was not a charity and that the gift over to the Home was void under the rule against perpetuities. The Institution was left with a fee simple determinable and the original donor with a possibility of reverter.

If the condition is conditional such as to create a fee simple subject to condition subsequent, the invalid interest is struck as well as the condition and the fee simple becomes a fee simple absolute.

In Proprietors of the Church in Brattle Square v. Grant n505 there was a devise of realty:

> to the present deacons of the Church ... and their successors ... forever, upon this express condition and limitation, that is to say, that the minister... and in case the same is not improved for his use only, I then declare this bequest to be void and of no force, and order that said house and land then revert to my estate, and I give the same to my nephew, ... and to his heirs forever.

The court found that the gift over to the nephew was an executory devise that was void under the rule against perpetuities. "The general principle applicable to such cases is, that when a subsequent condition or limitation is void by reason of its being impossible, repugnant or contrary to law, the estate becomes vested in the first taker, discharged of the condition or limitation over, according to the terms in which it was granted or devised." The first taker took a fee simple absolute.

Thus, O's conveyance "to A as long as the old oak tree remains standing, then to B" gives A a fee simple determinable and leaves O with a possibility of reverter. O's conveyance "to A, but if the old oak tree falls, then to B" gives A a fee simple absolute. However, O's conveyance "to A, but if the old oak tree falls, then to the heirs of O" appears to give O a possibility of reverter after application of the Doctrine of Worthier Title, with no need to apply the rule against perpetuities. n506

If the invalid gift is an essential part of the testator's plan such that the testator would not have wished to grant the valid interests without the interests found invalid under the rule against perpetuities, the doctrine of "infectious invalidity" causes the valid gifts to fail as well.

In Taylor v. Dooley n507 testator's will devised one half of his real estate to his son and one half to his daughter, subject to the dower right in their mother. However, the son was designated to receive a fee simple absolute while the daughter was to receive a life estate "with remainder to the heirs of her body for and during their natural lives with remainder in fee to the children of her bodily heirs, and in the event she should die without bodily heirs surviving her, then the share herein devised to her shall pass to and become the property of [the son] in fee simple." The remainder in fee to the children of the bodily heirs of the daughter was void under the rule against perpetuities. If it were the only invalid interest, the testator would die intestate as to this interest and it would be split equally between daughter and son. This would result in the son receiving three-quarters of the property while the daughter received only one-quarter. The court found "that the testator intended to make equal gifts to his daughter and her descendants and to his son." Therefore, the court invalidated the gifts to both son and daughter and these interests passed by intestacy in equal shares to both.

In Barrett v. Barrett n508 the testator gave in trust a life estate to his widow, then life estates to the sons, then life estates to the grandchildren, then the corpus to be divided among the great-grandchildren. The interests of the great-grandchildren were void under the rule against perpetuities, and the court determined that all the interests must fail:

> We think it obvious, however, from the language of the entire will that the testator had in his mind, when he executed his will, a plan for the disposition of all his estate and not for the creation therein only of certain life estates... . [W]hen some of the trusts in the will are legal and some are illegal, if they are so connected together as to constitute an entire scheme for the disposition of the estate, so that the presumed wishes of the testator would be defeated if one portion were retained and other portions rejected, or if manifest injustice would result from such construction to the beneficiaries or to some of them, then all the trusts must be construed together, and all must stand or all must fall.

Conversely, if the invalid portions can be separated from the valid portions and still give effect to the general testamentary scheme, the valid clauses are upheld.

In Lovering v. Worthington n509 the testator made "a devise to Nancy Gay for her life, with a limitation over of a life estate to her children, and a further limitation over of a fee in the heirs at law of such children." The court stated that if

they "assume[d] that this devise includes children born after the death of the testator, and therefore that it is contingent and executory, yet it is not void for remoteness. The devise takes effect, and the life estate in each child necessarily becomes absolute, at the death of Mrs. Gay." In such a case the interest in the heirs at law would be void, but "it is clear that the effect of such invalidity is not to defeat the prior life estates. The general rule is, that, if a limitation over is void for remoteness, it places all prior gifts in the same situation as if the devise over had been wholly omitted."

A particular instance in which this question of infectious invalidity arises is the case where an interest which does not violate the rule against perpetuities is given after an interest which does infringe the rule. The cases go both ways in determining whether the whole conveyance fails or merely the interest which violates the rule.

In In re Hewett's Settlement n510 life estates were given in trust to a husband and wife, and upon the death of the survivor then in trust to the children of the marriage who being sons should attain the age of twenty-five or being daughters should attain that age or marry in equal shares, and, if there are none, then upon trust to pay the income in equal shares to the husband's three sisters, Helga, Hilda, and Hulda, for their lives, and then to others. The interest in the children was invalid under the rule against perpetuities, and the court found that the succeeding interests which did not violate the rule in themselves were invalid under English law, even though Gray on Perpetuities was cited for the opinion that they ought to be held valid in America.

If an interest subject to two conditions precedent, that are explicitly separated into two separate conditions by the language in the grant, is invalid because one of the conditions might occur beyond the period of the rule against perpetuities so as to vest the interest too late, the invalidating condition is struck from and the valid condition is left in the conveyance. n511

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LEXIS: invalid! w/2 interest w/30 rule against perpetuities

§ 28.08(h) Class Gifts

It was established as early as 1817 in the English case of Leake v. Robinson n512 that an entire class gift is void if it is possible for some member of that class to take a vested interest beyond the period of the rule against perpetuities. In Leake v. Robinson n513 the testator devised and bequeathed in trust for the benefit of William, his grandson, for life, then for the benefit of and ultimately to the children of William, but "in case [William] shall happen to die without leaving issue, living at the time of his decease, ... [then] unto and amongst all and every the brothers and sisters of [William], share and share alike, upon his, her, or their attaining twenty-five, if a brother or brothers, and if a sister or sisters, at such age or marriage... ." William died without issue. The court found that the class of his brothers and sisters consisted of all who were living at the time of William's death and no interest of a member of the class vested until he reached twenty-five or she reached twenty-five or married, since there was no antecedent gift with enjoyment postponed. Thus, the gift to the class of William's siblings was void since a member of the class could be an after-born who might not reach the age of twenty-five until after the period designated by the rule against perpetuities.

In In re Helme n514 the testator attempted to give the residue of a trust fund to his grandchildren with the following provision: "Upon the arrival at age of the youngest grandchild, or upon the death of the last surviving grandchild, who may be a minor, the residue of the trust fund, both income and capital, shall be equally divided among the grandchildren, then living and the issue of such as may be dead, the issue of deceased grandchild taking the share or interest the parent would have taken if living." The court determined that after-born grandchildren were included in this provision and that after-born grandchildren could not be separated as a class from prior born grandchildren. The court concluded that the gift was invalid under the rule against perpetuities.

Of course, the Rule of Convenience may close the class in such a way as to ensure that every member of the class could

not take a vested interest beyond the period of the rule against perpetuities.

In Picken v. Matthews n515 the testator gave in trust to "such of the children of my daughter Helen by her first husband (but not her children by her present husband), and the children of my daughter Charlotte, who being sons shall live to attain the age of twenty-five years, or being daughters shall attain that age or previously marry, whichever shall first happen; and I expressly direct that all such grandchildren shall participate equally without regard to the number of each family." At testator's death, one of these grandchildren had attained the age of twenty-five. The court followed the Rule of Convenience and allowed only those who were living at the death of the testator to take. Since these were all lives in being, the gift was valid under the rule against perpetuities.

In applying this rule it is important to determine when vesting takes place. In *Helme*, discussed above, vesting took place at the time for distribution, that is, "[u]pon the arrival at age of the youngest grandchild, or upon the death of the last surviving grandchild, who may be a minor." It is possible in other cases that vesting may take place earlier than the time for distribution, such as in the case of a freehold subject to a non-freehold and the case of a direction to pay after the vesting of the estate.

In McKibben v. Pioneer Trust & Savings Bank, n516 the testatrix left the residue of her estate to a trustee in trust for the children of her son, and stated that:

> [t]he trust estate ... shall continue until the youngest of said children living at the time of my death shall reach the age of thirty-five years, or if said youngest child shall die before reaching such age, at the date such child would have reached such age if he or she had lived... . In the period from my death until the termination of said trust, the income from said trust estate shall be divided equally among such children as may be living [and then to their children or their siblings]... . When said trust is so terminated, the corpus thereof and any undistributed income shall be divided equally among such children ... as may then be living, the children of any who may have died to take their parents share, per stirpes and not per capita.

At the death of the testatrix, there were three children of her son, the youngest of whom was one year old. The court found that the children took a valid vested interest with payment of principal postponed for thirty-four years. The estate was subject to open "to let in any children born to [the son] after the death of testatrix." n517

An exception to the rule of Leake v. Robinson is the doctrine of vertical separability established in 1853 in the English case of Cattlin v. Brown. n518 This doctrine has been restated by John Chipman Gray as follows: "When gifts are made to several persons by one description, but the amount of the gift to one is not affected by the existence or non-existence of the others, then the gifts are separable... . When, on a gift to a class, the number of shares is definitely fixed within the time required by the rule against perpetuities the question of remoteness is to be considered with reference to each share separately. n519

In Cattlin v. Brown n520 the testator devised to Thomas Cattlin for life, with remainder to all his children for life, with remainder as to every share of every child to the children of that child in fee. The court stated "suppose Thomas Bannister Cattlin to have four sons, A., B., C., and D., and A. and B. to be living at the testator's death and the others to be born afterwards. A. and B., on the testator's death, take an immediate vested interest in remainder for life, expectant on their father's death, with remainder to their respective children in fee, subject to their respective moieties being diminished on the birth of C. and D., but their exact shares are ascertained within the legal limits at the death of their father, and neither their life interests nor the remainder in fee are capable of being wholly divested in favor of any party beyond the legal limits... . The limitation as to the shares of C. and D. [going to their children] in the case I have supposed would be clearly void, as their children might be born at a period exceeding the limits which the law allows, they themselves not being in esse at the death of the testator."

In Estate of Weaver n521 a residuary trust formed by a will "provided life estates in the interest income for the testator's widow and his children, then to his grandchildren, with the principal to be liquidated and distributed to each of the testator's great-grandchildren upon the death of their beneficiary parent." It was claimed that the remainders in the great-grandchildren were invalid because at the time of the testator's death it was possible that a great-grandchild could be born beyond the perpetuities period. (A grandchild could be born, all lives in being could die, a period of more than twenty-one years could pass, and then a great-grandchild could be born, taking a vested remainder in fee simple absolute beyond the perpetuities period.) When the testator died, his grandchild, Heil Macklin was alive. The court found that Heil Macklin's children took a valid remainder interest as the great-grandchildren of the testator under the doctrine of vertical separability adopted in Pennsylvania in 1929 n522 (although they also found that the wait-and-see doctrine applied to make the interest valid). The court stated that the doctrine was applicable in this case because the separation "would not have been disruptive to the testator's overall testamentary plan." Therefore, the shares of the grandchildren living at the death of the testator could be separated from those of the grandchildren not living and the children of Heil Macklin would take valid interests under the rule against perpetuities.

Another form of this exception to the rule of Leake v. Robinson is the gift of a specific sum to each member of a class.

In Storrs v. Benbow n523 the testator bequeathed £500 apiece "to each child that may be born to either of the children of either of my brothers, to be paid to each of them on his or her attaining twenty-one." Although the class closed immediately and therefore all members were lives in being at the time of the bequest, the court offered the following dictum:

> I must add, however, that I do not say that the gift was at all remote if it meant a child to be born at any time, because this is not the case of a class; it is a gift of a pecuniary legacy of a particular amount to every child of every nephew which the testator then had, or of every nephew that might be born after his death, and is therefore good as to the children of the nephews he then had, and bad as to the children of nephews to be born after his death.

In In re Gay's Estate n524 the testatrix gave property in trust "[t]o pay $4,000 per annum to each of her six children for life. Out of the balance of the income to pay $1,000 per annum to a granddaughter, Deborah Gay Thomas, for life. Upon the death of each of her six children, to pay $1,000 per annum to their children ("who are living at the time of my death') for their lives. Upon the death of [these grandchildren], to pay $25,000 to his or her children or grandchildren then living, in such sums or proportions as he or she may by will appoint." At the death of the last surviving child of the testatrix, there were fifteen grandchildren, all of whom were alive at the death of the testatrix. Although the court did not discuss the validity of the powers of appointment given to the grandchildren, the court found them valid. This determination is correct since each grandchild was a life in being and was given a power over a specific sum. The possibility that other grandchildren might have been born after the death of the testatrix does not affect the validity of the powers in the grandchildren who are lives in being, although the power in an afterborn grandchild would have been void. n525

Care must be exercised in applying the severability exception to the Leake v. Robinson exception. There is no severability where, even though the maximum size of a class may be determined within the period of the rule against perpetuities, there is a possibility that the minimum number may be determined beyond the period (with the result that each class member's share may be enlarged beyond the period); in such a case the interest in the whole class is void. Note that in Cattlin v. Brown the shares found to be invalid in certain of the grandchildren were first held validly by their parents as members of a different class, and if the parents had died without issue, these shares would have reverted to the grantor's estate and would not have gone to the other grandchildren. If they had gone to the other grandchildren, there would have been no severability and the interests of all the grandchildren as a class would have been void.

In Pearks v. Moseley n526 the testator gave a legacy in trust to pay the interest to his child for life, then "in trust for all the children of my [child] who shall attain the age of twenty-one years, and the lawful issue of such of them as shall die

under that age leaving lawful issue at his, her, or their decease or respective deceases, which issue shall afterwards attain the age of twenty-one years, or die under that age leaving issue at his, her, or their decease or deceases respectively, as tenants in common, if more than one, but such issue to take only the share or shares which his, her, or their parent or parents respectively would have taken if living." The class consisted of both the testator's grandchildren who reached twenty-one and certain of his great-grandchildren who reached twenty-one or died before that age with issue. The court found that the contingency on the vesting of the interests of the great-grandchildren caused these interests as well as the interests of the grandchildren to be invalid. There was no severability. n527

COMPUTER-ASSISTED RESEARCH

LEXIS: class! w/2 gift! w/30 rule against perpetuities

§ 28.08(i) Powers of Appointment

The Rule against Perpetuities applies to powers of appointment in two respects: (1) the validity of the power, and (2) the validity of the appointed interests.

The validity of the power is determined for special powers and general testamentary powers by whether it is possible for the power to be exercised beyond the perpetuities period as measured from the time the power is created.

In Burlington County Trust Co. v. Di Castelcicala n528 the testatrix gave the residue of her estate by will in trust for the benefit of her husband for life, then to her two daughters for life, then the share of each daughter to their children for their lives, "with the power of disposal by will of the mother's share of the principal." The court stated that "[t]he grandchildren of the testatrix ... were all living at the time of the death of the testatrix, but the possibility of the birth of additional grandchildren after the death of the testatrix is conceded." Therefore, since one of these additional grandchildren might be the one to exercise the power, the court found that the power could be exercised beyond the period of the rule and was void.

In Camden Safe Deposit & Trust Co. v. Scott n529 the testator gave property in trust to his two daughters one-half each for each of their lives, then each of their shares to their children with the Trustee directed:

> to continue holding upon trust the shares of my granddaughters during the terms of their natural lives, and to continue holding upon trust the shares of my grandsons until they shall severally arrive at the age of thirty years... . And in case of the death of any one of my grandsons before attaining the age of thirty years and in case of the death of my granddaughters, I direct that my Trustee shall distribute the trust fund of the grandchild so dying in such manner as said grandchild shall by will direct but in default of such instructions then I direct that said deceased grandchild's share shall be distributed equally between the remaining brothers and sisters of the grandchild so dying, or in case of no brothers or sisters, then I direct it shall be distributed equally between all of my surviving grandchildren.

The court found that the testamentary power of appointment given to the grandchildren who might include persons not alive at the time of the creation of the power (as well as the gift over to the other grandchildren in default of appointment) was void under the rule against perpetuities.

The validity of the power is determined for general powers exercisable by deed or by deed or will by whether it is possible for the power to be acquired (become exercisable) beyond the perpetuities period as measured from the time the power is created.

In In re Hargreaves n530 a will created successive equitable life estates in the testatrix's two sisters and their surviving children, gave a general power of appointment of the remainder to the surviving life tenant, and gave the remainder in

default of appointment to the testatrix's heir at law. The court held the appointment to be invalid, stating: "This power is given to the last survivor of the sisters and their children. The children might not all be in being at the death of the testatrix; the power, therefore, is not given to a person who must necessarily be ascertained within the period allowed by the rule against perpetuities."

The validity of the appointed interests is determined for special powers and general testamentary powers by applying the rule against perpetuities at the time the power is created as if the appointed interests were created in the instrument creating the power, but taking into consideration the facts existing at the time the appointment is made. This method is sometimes called the "second look" doctrine. n531 The second look doctrine is also applied to gifts in default of appointment. n532

In Bundy v. United States Trust Co. n533 the testatrix left a will giving property to Carlotta to be held for her for life and then paid to such person as she should by will appoint. Carlotta left a will in which the appointive property was given in trust to pay to [her] adopted children, Emily and Martha, during their lives and the life of the survivor, so much of the income and in such shares and proportions as the trustee should determine, and the balance of the income elsewhere, and when both Emily and Martha should be dead to pay the principal in equal shares to their then living issue per stirpes and, in default of such issue, elsewhere. Emily and Martha were born after the death of the original testatrix. The court found that Carlotta's exercise of the power given to her by the testatrix was invalid: "It is clear that a discretionary trust is not vested, and if it continues beyond the period within which future interests can be created it is bad... . The discretionary provision for life to Emily, and Martha, and to their issue is void." n534

In Northern Trust Co. v. Porter n535 the donee of a general testamentary power attempted to appoint the principal and remaining income of a trust "[u]pon the death of the last surviving child of Pauline Porter White, or twenty-one years after the death of the last surviving child of Pauline Porter White who was living at the time of my [the donee's] death, whichever event shall happen first" to the then surviving lawful children of Pauline Porter White and the then surviving lawful descendants of her deceased child. The donee was the daughter of the donor; Pauline was the daughter of the donee; none of Pauline's children were in being at the death of the donor. Since Pauline's children were not lives in being at the time of creation of the power of appointment and the vesting event could not take place before the death of the last surviving child, the court found the exercise of the power invalid. The court rejected the idea that the period of the rule should be figured from the date of exercise of the power since the donee is not practically the owner since she cannot appoint to herself.

In Warren's Estate n536 the testator bequeathed in trust to pay the income to his daughter, Caroline, for life and then to hold and dispose of the principal in such manner as should be directed by Caroline's will. Caroline by will appointed to her trustee to hold for her husband for life and then

> to divide the income of the said trust estate into as many parts or shares as at the times of half-yearly distributions there shall be children of mine then living and children of mine then dead represented by descendants then living, ... and to pay ... to each child and descendant of a deceased child who shall thus be found entitled, his or her share of the income half-yearly [and the principal to be distributed upon the death of Caroline's surviving child].

If the bequest to the children had come directly from the testator to Caroline's children and descendants rather than through Caroline's appointment, it would have been void because the contingent interest in income did not vest until the time came for its payment and such income, viewed from the time of the testator's will, could conceivably have been paid beyond the perpetuities period if Caroline had had a child born after the testator's death. However, at the time of Caroline's appointment, her only two children had been born by the time of testator's death and the life of the survivor was the measuring life for the contingent interest in income. This fact, since it actually existed at the time the appointment was made, was usable in the perpetuities calculation (second look doctrine) and made the disposition valid even though the fact occurred at a later time than the time the rule against perpetuities became operative (the time of the

testator's creation of the general testamentary power of appointment in Caroline).

The validity of the appointed interests is determined for general powers exercisable by deed or by deed or will by applying the rule against perpetuities at the time the appointed interests are created.

COMPUTER-ASSISTED RESEARCH

LEXIS: power! w/2 appointment w/30 rule against perpetuities

§ 28.08(j) Exceptions to the Rule

The rule against perpetuities does not apply to gifts of future interests to charities when the prior interests are also to charities. If the prior gift is to a non-charity, the future gift to a charity is subject to the rule.

The rule against perpetuities does apply generally to options for the purchase of land, n537 but in some jurisdictions it does not apply to preemptive options n538 nor to a tenant's option in a lease to purchase the land or renew the lease, n539 nor to mortgages. n540

The rule does apply to accumulations of rents and profits for a period during which the title does not vest and the property remains unalienable, but such accumulations are permitted if the period falls within the rule against perpetuities. This pronouncement was made in Thellusson v. Woodford, n541 but the period granted by the rule against perpetuities was considered too long. In 1800 the Thellusson Act n542 was passed declaring that provisions for accumulation shall be void if made "for any longer term than the life or lives of any such grantor or grantors, settlor or settlors; of the term of twenty-one years from the death of any such grantor, settlor, devisor or testator; or during the minority or respective minorities of any person or persons, who shall be living, or en ventre sa mere, at the time of the death of such grantor, devisor, or testator; or during the minority or respective minorities only of any person or persons, who under the uses or trust of the deed, surrender, will, or other assurances, directing such accumulations, would for the time being, if of full age, be entitled unto the rents, issues, and profits, or the interest, dividends, or annual produce so directed to be accumulated."

Restrictions on accumulations do not apply to charitable gifts. In Frazier v. Merchants National Bank of Salem n543 the testator gave the bulk of his estate to a trustee with certain directions that ultimately required that the income be "permitted to accumulate and be added to principal until such time as the principal and accumulated interest shall amount to the sum of one million dollars," at which point the trustee was to hold the principal as a permanent trust fund for the benefit of the Salem Hospital. Since the gross value of the estate did not exceed $117,000, the court recognized that the period of accumulation would be long, but it found that the trust did not violate the rule against perpetuities.

The rule against perpetuities does apply to restraints on alienation if they are not otherwise invalid. In Colonial Trust Co. v. Brown n544 the court found that a restraint on a trustee preventing it from selling certain property during a period which could extend beyond the perpetuities period was invalid under the rule against perpetuities.

§ 28.08(k) Wait-and-See Doctrine

Professor W. Barton Leach started a movement to change the Rule against Perpetuities by advocating that the validity of interests should be judged by what actually happens rather than what might happen. n545 This new rule was thought by its proponents as "placing the validity of all non-vested interests on the same plane, whether the interest is created by a skilled draftsman or one not so skilled." n546

Under the traditional rule, if there is a life (or lives) that guarantees as of the time of the conveyance creating an interest that that interest will not vest too late, the interest is valid. Under the wait-and-see doctrine, one looks at all the lives

"which in some way restrict the time within which the gift can vest, and which are expressly or impliedly connected with the gift by the donor's directions," n547 one calculates the perpetuities period based on these lives, and one waits until the perpetuities period as calculated runs its course to determine whether an interest is invalid.

The first jurisdiction to put such a rule into operation was Pennsylvania in 1947 whose statute read: "Upon the expiration of the period allowed by the common law rule against perpetuities as measured by actual rather than possible events, any interest not then vested and any interest in members of a class the membership of which is then subject to increase shall be void." n548 Following Pennsylvania, a number of jurisdictions have adopted some form of this doctrine that has saved interests from invalidity under the old rule. n549

In Foley v. Evans n550 the testator's will placed the residue of his estate in trust for his two named daughters and then it stated: "Upon the death of my surviving daughter, I give, bequeath and devise all my estate to the children of my daughter, Ruth Evans, and to any children that my daughter, Dorothy Leonard, may have, said income to be divided equally among them, or the survivor of them, until each of said grandchildren shall reach the age of 25 years, when each grandchild shall receive his or her share of the principal of my estate." The court found that even if the will arguably violated the common law rule against perpetuities, the "wait-and-see" approach, adopted by statute, allowed a look at events that actually happened after the creation of the interests in the grandchildren. "Since all of the testator's grandchildren had been born and were in fact older than twenty-five at Dorothy's [the survivor's] death in 1984, no possible contingency could prevent vesting of the entire remainder interest in them [at that time within the period of the rule]."

COMPUTER-ASSISTED RESEARCH

LEXIS: (wait w/1 see) or (actual! w/1 happen!) w/30 rule against perpetuities

§ 28.08(l) Discretionary Trusts

A trustee may have discretionary power over the income or principal of a trust. If such power can be exercised beyond the perpetuities period, it may be viewed as one power that is totally void or as a succession of powers void only as to those powers which are exercisable beyond the perpetuities period. n551 Some courts also have struck down trusts that endure beyond the perpetuities period. n552

Professor Dukeminier suggests that the careful lawyer should always limit the duration of trusts to the perpetuities period with a saving clause such as the following:

> Notwithstanding any other provision in this instrument, this trust shall terminate, if it has not previously terminated, twenty-one years after the death of the survivor of the settlor's issue living at the date this instrument becomes effective. In case of such termination, the then remaining principal and undistributed income of the trust shall be distributed to the settlor's issue then living per stirpes. n553

COMPUTER-ASSISTED RESEARCH

LEXIS: discretionary w/5 trust! w/30 rule against perpetuities

§ 28.08(m) ***Cy Pres*** Doctrine or Equitable Approximation

A number of states have adopted legislation that allows reformation of interests that would violate the rule against perpetuities. n554 There also are a few jurisdictions who have reformed interests without the aid of legislation. n555

In Estate of Chun Quan Yee Hop n556 the court modified the terms of a testamentary trust in order to avoid its violation

of the rule against perpetuities. The will provided that the trust would end on the death of the testator's wife or thirty years from the date of his death, whichever was later, and at the termination of the trust the estate would be transferred to the survivors of the children and the lawful issue of any deceased child. The court limited the invalid term of thirty years to the twenty-one year period prescribed by the rule against perpetuities.

FOOTNOTES:

(n1)Footnote 426. The discussion in this section is reprinted with modifications from John Makdisi, *The Vesting of Executory Interests, 59 Tul. L. Rev. 366, at 370-376 (1984).* The Rule was first formulated in the *Duke of Norfolk's Case, 3 Ch. Cas. 1, 26 (1682),* cited in W. Barton Leach & Owen Tudor, The Rule Against Perpetuities, at 14 (1957). However, its formulation evolved over the next 150 years until it attained the form we see today after *Cadell v. Palmer, 1 Cl. & F. 372 (H.L. 1833),* cited in W. Barton Leach & Owen Tudor, The Rule Against Perpetuities, at 14.

(n2)Footnote 427. Frederick William Maitland, *The Seisin of Chattels, 1 Law Q. Rev. 324, at 338 (1885).*

(n3)Footnote 428. 3 W. William Walsh, Commentaries on the Law of Real Property § 313, at 229 (1947) (citing Popham's argument in *Welcden v. Elkington, 2 Plowd. 516, 520, 75 Eng. Rep. 763, 769 (K.B. 1579)). See also* Gray, *supra* note 1, at 168, 728-729.

(n4)Footnote 429. 3 Walsh, *supra* note 7, at 229, and Gray, *supra* note 1, at 730-731 (citing Rayman v. Gold, Moore 635, *72 E.R. 807 (K.B. 1592)).*

(n5)Footnote 430. *2 Plowd. 516, 75 Eng. Rep. 763 (K.B. 1579).*

(n6)Footnote 431. *2 Plowd. 516, at 519, 75 Eng. Rep. 763, at 767 (K.B. 1579).*

(n7)Footnote 432. *2 Plowd. 516, at 524, 75 Eng. Rep. 763, at 774 (K.B. 1579).* One year after Welcden, counsel in *Paramour v. Yardley, 2 Plowd. 539, 542-43, 75 Eng. Rep. 794, 799-800 (K.B. 1579),* argued:

> [I]n some things the occupation, profit, or use is a distinct thing from the property. As one may have the occupation or use of a glass to look at himself in, and another may have the property of it. So one may have the use of a map or of a globe, and another the property. And so one may have the use of a fire, and another the property. And so also of a book, one may have the occupation or use of it to read in it, and the property may be in another. So that in things of this kind the use, occupation, or function is distinct from the property. But otherwise in the case of land, for there he who has the occupation and use of it has the property of it for the time.

See also Percy Bordwell, *Interests in Chattels Real and Personal, 1 Mo. L. Rev. 119, 131-132 (1936)* (citing the quoted case).

(n8)Footnote 433. *8 Co. 94b, 77 Eng. Rep. 618 (1609).*

(n9)Footnote 434. *8 Co. 94b, at 95b, 77 Eng. Rep. 618, at 621 (1609).*

(n10)Footnote 435. *2 Bulst. 28, 80 Eng. Rep. 932 (K.B. 1612). See* Bordwell, *supra* note 11, at 138-139 & n.174 (cases are cited to show that Chancery had evidently long given protection to the devisee in such a case).

(n11)Footnote 436. 13 Edw., ch. 1 (1285).

(n12)Footnote 437. Cornelius Moynihan, Introduction to the Law of Real Property (2d ed. 1988); George Haskins, *"Inconvenience" and the Rule for Perpetuities, 48 Mo. L. Rev. 451, 460-461 (1983).*

(n13)Footnote 438. *See* Bordwell, *supra* note 432, at 139; Haskins, *supra* n.16, at 461.

(n14)Footnote 439. Bordwell, *supra* note 432, at 139.

(n15)Footnote 440. 1 Rolle 356, *81 Eng. Rep. 531 (K.B. 1616).*

(n16)Footnote 441. *Cro. Jac. 459, 79 Eng. Rep. 393 (K.B. 1618).*

(n17)Footnote 442. *Cro. Jac. 459, at 461, 79 Eng. Rep. 393, at 395 (K.B. 1618).*

(n18)Footnote 443. *See* Bordwell, *supra* n.16, at 139-140.

(n19)Footnote 444. *Cro. Jac. 590, 79 Eng. Rep. 504 (K.B. 1620). See* Bordwell, *supra* note 11, at 140.

(n20)Footnote 445. *Pells v. Brown, Cro. Jac. 590, 592, 79 Eng. Rep. 504, 506.* (K.B. 1620) (citing *Wellock v. Hammond, Cro. Eliz. 204, 78 Eng. Rep. 460 (K.B. 1590),* and Fulmerston v. Steward, 38 Eliz. Rot. 867, *73 Eng. Rep. 73).*

(n21)Footnote 446. *Cro. Jac. at 592-593, 79 Eng. Rep. at 506.*. For an explanation of the common recovery, *see A. James Casner* & W. Barton Leach, Cases and Text on Property 256-257 n.13 (2d ed. 1969).

(n22)Footnote 447. Haskins, *supra* note 16, at 464.

(n23)Footnote 448. *Cro. Jac. at 593, 79 Eng. Rep. at 506.*

(n24)Footnote 449. Haskins, *supra* note 16, at 461 & n.53 (citing *Sanders v. Cornish, Cro. Car. 230, 79 Eng. Rep. 801 (K.B. 1631)).*

(n25)Footnote 450. *Id.* at 465.

(n26)Footnote 451. *Id.* at 465-466.

(n27)Footnote 452. *See* Bordwell, *supra* note 11, at 140.

(n28)Footnote 453. *Howard v. Duke of Norfolk, 2 Swans. 454, 36 Eng. Rep. 690 (Ch. 1682).* This case was reversed in 1683 upon a bill of review but affirmed upon appeal to the House of Lords in 1685. For a well-documented history of this period through the Duke of Norfolk's Case, *see* George Haskins, *Extending the Grasp of the Dead Hand: Reflections on the Origins of the Rule Against Perpetuities, 126 U. Pa. L. Rev. 19 (1977);* Haskins, *supra* note 16.

(n29)Footnote 454. *2 Swans. at 468, 36 Eng. Rep. at 695.*

(n30)Footnote 455. *See* Haskins, *supra* note 32, at 19-21 & 35-45; Haskins, *supra* note 386, at 466-473.

(n31)Footnote 456. Jesse Dukeminier and Stanley Johanson describe this period of history in *Wills, Trusts, and Estates, supra* note 4, at 757, as follows:

> In Scatterwood v. Edge, 1 Salk. 229, *91 Eng. Rep. 203 (K.B. 1699),* it was held that it was sufficient if an interest would vest within a considerable number of lives in being, not merely one or two, "For let the lives be never so many, there must be a survivor, and so it is but the length of that life; for Twisden used to say, the candles were all lighted at once." In *Thellusson v. Woodford, 11 Ves. 112, 32 Eng. Rep. 1030 (Ch. 1805),* it was held that any number of lives reasonably capable of being traced could be used to measure the applicable perpetuities period. Concurrently with the expansion of lives in being from one or two to a considerable number, the courts were adding, first, a minority period and, subsequently, a period of 21 years in gross. Finally, in *Cadell v. Palmer, 1 Cl. & Fin. 372, 6 Eng. Rep. 956* (H.L. 1832, 1833), the period allowed by the Rule was settled: any reasonable number of lives in being plus 21 years

thereafter plus any actual periods of gestation.

(n32)Footnote 457. Gray, *supra* note 1, at 191. Interests following fee tail estates in freehold may be valid under the Rule against Perpetuities as vested remainders. A fee tail estate in a term of years could only be followed by an executory devise which would be void under the rule because it could vest only in possession. An attempt to convey a term in the form of a fee tail estate followed by an executory devise would seem, therefore, to convey an absolute interest. The question remains whether a reversionary interest after the "fee tail" in a term would be considered vested. In Eyres v. Faulkland, 1 Salk. 231, *91 Eng. Rep. 204 (K.B. 1697),* the court decided that a devise of a term of years to several successively for life gave the executor of the devisor the residue of the estate after the life estates terminated. The court called this interest a possibility of reverter. *Id. at 231, 91 Eng. Rep. at 205. See generally* Albert M. Kales, Estates, Future Interests and Illegal Conditions and Restraints in Illinois §109, at 106-107 (1920). Gray called this interest a reversion. Gray, *supra* note 1, at 734-735. He also thought that in theory the estate should go, not to the executor of the devisor, but to the executor of the legatee, but he recognized that the only authority opposed such a result. *Id.* at 749. Gray's interpretation is problematical insofar as a reversion suggests that the preceding estate may be followed by a remainder. But if the only interest in a devisee which can follow a life estate in a term is an executory interest, it would seem that in the absence of the executory interest, the life estate in the term resembles more a fee simple determinable followed by a possibility of reverter as the case maintains. *Accord* Homer F. Carey & Daniel M. Schuyler, Illinois Law of Future Interests 61 (1941); Lewis M. Simes, *Future Interests in Chattels Personal, 39 Yale L.J. 771, 772-773 n.4 (1930).*

(n33)Footnote 458. Gray, *supra* note 1, at 734; *see also id.* at 111. Gray is not aware of this problem arising in England or the United States. *Id.* at 735. He is of the opinion that the final limitation is void for remoteness. *Id.* at 749.

(n34)Footnote 459. The discussion in this section is reprinted with modifications from Makdisi, *supra* note 5, at 377, 384-86, and John Makdisi, Estates in Land and Future Interests: Examples and Explanations at 87-90 (1991). *Wedel v. American Elec. Power Serv. Corp., 681 N.E.2d 1122 (Ind. Ct. App. 1997)* (the question of when a royalty interest vests is dependent upon whether it is considered personal property or real property); *Luecke v. Wallace, 951 S.W.2d 267 (Tex. App. 1997)* (Royalty interests are "interests in real property" and "subject to the rule against perpetuities").

(n35)Footnote 460. 1 Cox 324, *29 Eng. Rep. 1186 (Ch. 1787).* For a discussion of advancements in reproduction technology and the effects of the rule against perpetuities, *see* Les A. McCrimmon, *Gametes, Embryos, and the Life in Being: The Impact of Reproductive Technology on the Rule Against Perpetuities, 34 Real Prop. Prob. & Tr. J. 679 (2000).*

(n36)Footnote 461. Jesse Dukeminier And James Krier, Property (3d ed. 1993), *supra* n.84, at 261; Gray, *supra* note 1, at 109.

(n37)Footnote 462. Gray, *supra* note 1, at 741-742, 745. *See* Carey & Schuyler, *supra* note 36, at 65. Butler's Note to 1 Fearne, *Contingent Remainders*, in W. Barton Leach, Cases and Materials on the Law of Future Interests 217 (2d ed. 1940), confirms that there are no remainders in personal property. The only future interest in a grantee is executory.

(n38)Footnote 463. 1 Cox 324, 326, *29 Eng. Rep. 1186, 1187 (Ch. 1787).*

(n39)Footnote 464. W. Barton Leach, *The Rule Against Perpetuities and Gifts to Classes, 51 Harv. L. Rev. 1329, 1341 (1938).*

(n40)Footnote 465. W. Barton Leach & James K. Logan, Manual for Teachers to Accompany Cases and Text on Future Interests and Estate Planning 171 (1961).

(n41)Footnote 466. Dukeminier & Krier, *supra* note 40, at 262.

(n42)Footnote 467. *2 Vern. 331 (1696).*

(n43)Footnote 468. *2 Vern. 331, at 332 (1696).*

(n44)Footnote 469. *Y.B. Trin., 37 Hen. 6,* pl. 11 (1459). For an account of the case, *see Paramour v. Yardley, 2 Plowd. 539, 542-543, 75 Eng. Rep. 794, 799-800 (K.B. 1579).*

(n45)Footnote 470. *See* 7 William Searle Holdsworth, A history of English Law 472-473 (2d ed. 1937); Bordwell, *supra* note 11, at 129; Gray, *supra* note 1, at 737.

(n46)Footnote 471. *Owen 33, 74 Eng. Rep. 879 (1565).*

(n47)Footnote 472. *See* Holdsworth, *supra* note 49, at 473, n.2.

(n48)Footnote 473. *See Collins v. Church of God of Prophecy, 800 S.W.2d 418 (Ark. 1990)* (rejecting the "total annihilation [of the vestedness of a possibility of reverter] by a sweep of the trial court's pen in characterizing it as "archaic' ").

(n49)Footnote 474. *See Brown v. Brown, 93 N.E. 357 (Ill. 1910)* ("all reversions are vested").

(n50)Footnote 475. *See Abbiss v. Burney, 17 Ch. D. 211 (1881)* (dictum).

(n51)Footnote 476. *6 N.E. 73 (Mass. 1886).*

(n52)Footnote 477. Leach, *supra* note 41, at 57. *See also White v. Fleet Bank of Maine, 739 A.2d 373 (Me. 1999);* White v. fleet *Bank of Maine, 739 A.2d 373 (Me. 1999).*

(n53)Footnote 478. Gray, *supra* note 1, § 14, at 108.

(n54)Footnote 479. *See* Jesse Dukeminier, *Contingent Remainders and Executory Interests: A Requiem for the Distinction, 43 Minn. L. Rev. 13, at 23-28 (1958),* with rebuttal in Makdisi, *supra* note 5.

(n55)Footnote 480. Of course, if the owner of a non-vested interest, such as a contingent remainder in fee simple, were to convey away a life estate, the recipient would take a contingent remainder in a life estate, leaving a reversion in a contingent remainder in fee simple in the grantor. Such a reversion would be contingent due to the fact that it is part of a contingent remainder. *Prieskorn v. Maloof, 991 P.2d 511 (N.M. Ct. App. 1999).*

(n56)Footnote 481. *1 Ch. 202 (1918).*

(n57)Footnote 482. Situations include even the medically impossible. *See, e.g.*, the case of Jee v. Audley, 1 Cox 324, *29 Eng. Rep. 1186 (1787),* where an interest was found invalid on the basis, among other things, that a very old person could have children. This notion has been colorfully captured in the label "fertile octogenarian." W. Barton Leach, *Perpetuities in a Nutshell, 51 Harv. L. Rev. 638, 643 (1938).* Another medical impossibility, a very small child capable of reproduction, has been labelled the "precocious toddler." W. Barton Leach, *Perpetuities: The Nutshell Revisited, 78 Harv. L. Rev. 973, 992 (1965).* Although recent developments in reproductive technology are challenging the incredibility of these assertions, *see* Les A. McCrimmon, *Gametes, Embryos, and the Life in Being: The Impact of Reproductive Technology on the Rule Against Perpetuities, 34 Real Prop. Prob. & Tr. J. 679 (2000).*

(n58)Footnote 483. *571 N.E.2d 1179 (Ill. App. 1991).*

(n59)Footnote 484. *1 Ch. 243 (1929).*

(n60)Footnote 485. 105 Sol. J. 511 (1961).

(n61)Footnote 486. *1 Ch. 936 (1901).*

(n62)Footnote 487. Leach, *supra* n.41, at 804-808.

(n63)Footnote 488. *Id.* at 808 n.1.

(n64)Footnote 489. *42 Ch. D. 494 (1889), aff'd, 44 Ch. D. 85 (1890).*

(n65)Footnote 490. Leach, *supra* n.41, at 754 n.10, states that for purposes of the rule against perpetuities, the child in gestation "is treated as born whether or not it is to his interest thus to be considered."

(n66)Footnote 491. Note that the rule, that a class stays open until it closes naturally if there is no member of the class at the time designated for distribution, is not applicable here because the grantor has manifested an intent to close the class no later than the time the first grandchild reaches 21.

(n67)Footnote 492. *4 Ves. 227, 11 Ves. 112 (1799).*

(n68)Footnote 493. *See* W. Barton Leach, *Perpetuities in a Nutshell, 51 Harv. L. Rev. 638, 648 n.27,* citing the English case of *Leake v. Robinson, 2 Mer. 363, 35 Eng. Rep. 979 (1817);* and W. Barton Leach, *The Rule Against Perpetuities and Gifts to Classes, 51 Harv. L. Rev. 1329 (1938).*

(n69)Footnote 494. [1924] A.C. 653.

(n70)Footnote 495. The court found that under the rule laid down in Jee v. Audley, the fact that the testator's mother was past the age of child-bearing was inadmissible for determining the validity of the interest under the rule against perpetuities.

(n71)Footnote 496. *142 A. 284 (Pa. 1928).*

(n72)Footnote 497. It is curious that Professor Leach used this case in his Cases and Materials on the Law of Future Interests 782-786 (2d ed. 1940), and he did not point out the mistake except for a cryptic footnote at the end of the case which stated that "[t]his case is discussed without adverse comment in [two law reviews]." *Dennis v. Bird, 941 S.W.2d 486 (Ky. Ct. App. 1997)* (because an option in a lease was personal to Bird, it did not violate the rule against perpetuities).

(n73)Footnote 498. *364 P.2d 685 (Cal. 1961), rev'g, Lucas v. Hamm, 11 Cal. Rptr. 727 (1961).* As Jesse Dukeminier has observed, the technicalities of the rule are such that they can trap even well-revered lawyers. Jesse Dukeminier, *A Modern Guide to Perpetuities, 74 Calif. L. Rev. 1867, 1912 (1986).*

(n74)Footnote 499. Moynihan, *supra* note 16, at 197, n.14.

(n75)Footnote 500. Thomas F. Bergin & Paul G. Haskell, Preface to Estates in Land and Future Interests 116 (2d ed. 1984).

(n76)Footnote 501. *See Id.* at 178 (citing Gray, The Rule Against Perpetuities § 201 (4th ed. 1942)) and at 181-82.

(n77)Footnote 502. *Cf. In re Estate of Maguire, 466 P.2d 358 (Kan. 1970)* (option that could only be exercised within the lifetime of a life in being was held valid).

(n78)Footnote 503. *See Abbiss v. Burney, 17 Ch. D. 211 (C.A. 1881)* (dictum).

(n79)Footnote 504. *139 N.E. 301 (Mass. 1923).*

(n80)Footnote 505. *3 Gray 142 (1855).*

(n81)Footnote 506. *See* Joseph Morris, *The Wills Branch of the Worthier Title Doctrine, 54 Mich. L. Rev. 451, 479 (1956).*

(n82)Footnote 507. *297 S.W.2d 905 (Ky. 1956), reh'g den*. (1957).

(n83)Footnote 508. *99 N.E. 625 (Ill. 1912).*

(n84)Footnote 509. *106 Mass. 86 (1870).*

(n85)Footnote 510. *1 Ch. 810 (1915).*

(n86)Footnote 511. *But see Abrams v. Templeton, 465 S.E.2d 117 (S.C. App. 1995)* (will which violated rule against perpetuities by making gift over of interest in real property to testator's great-grandchildren was upheld after court inserted savings clause to use testator's grandchildren who were alive at the time of death as the measuring lives).

(n87)Footnote 512. *2 Mer. 363, 35 Eng. Rep. 979 (1817).*

(n88)Footnote 513. *Id. Deviney v. Nationsbank, 993 S.W.2d 443 (Tex. App.1999)* (a brief but good synopsis of the law of class gifts in Texas).

(n89)Footnote 514. *123 A. 43 (N.J. Eq. 1923).*

(n90)Footnote 515. *10 Ch. D. 264 (1878).*

(n91)Footnote 516. *6 N.E.2d 619 (Ill. 1937).*

(n92)Footnote 517. The court also stated that "the children of any [of the son's children] who die take their parents' share, and the share of any child who dies without children goes to the survivors." In this part of the devise a violation of the Rule against Perpetuities which the court did not mention was the possibility that the testatrix's son could have another child (X), then all lives in being at the time of the devise (including the son and all his other children) could die without leaving any issue other than X, then X could have another child, and then X could die more than twenty-one years after the deaths of all lives in being but before the end of the thirty-four year period for payment of the principal of the trust. In such a case X's child would take the full beneficial interest in the trust beyond the period allowed under the Rule against Perpetuities and such an interest is void.

(n93)Footnote 518. *11 Hare 372, 68 Eng. Rep. 1319 (1853).*

(n94)Footnote 519. Gray, *supra* note 1, at 342, 345. *See* William J. Murphy, Separability and the Rule Against Perpetuities, *77 Dick. L. Rev. 277 (1973).*

(n95)Footnote 520. *11 Hare 372, 68 Eng. Rep. 1319 (1853).*

(n96)Footnote 521. *572 A.2d 1249, appeal denied, 582 A.2d 325 (Pa. Super. 1990).* For a case that purports to follow *Weaver* but actually misconstrues the vertical separability doctrine to make a void interest valid, *see* Estate of Coates, LEXIS 3770 (Pa. 1994) (contingent remainders having a possibility of vesting beyond the perpetuities period were found valid).

(n97)Footnote 522. *Kern's Estate, 145 A. 824 (Pa. 1929).*

(n98)Footnote 523. 3 De Gex, M. & G. 390 (Court of Chancery 1853), cited in Cattlin v. Brown, *supra*.

(n99)Footnote 524. *164 A. 786 (Pa. 1933).*

(n100)Footnote 525. *See Camden Safe Deposit & Trust Co. v. Scott, 189 A. 653 (N.J. Eq. 1936),* cited *infra*.

(n101)Footnote 526. 5 App. Cas. 714 (1880).

(n102)Footnote 527. *Johnson v. Cohan, 2000 Mass. Super. LEXIS 45 (Mass. Super. 2000)* (citing a state statute which allows a court to reform a disposition when a power of appointment violates the rule against perpetuities; addresses the subjects of powers of appointment and rule against perpetuities in Massachusetts).

(n103)Footnote 528. *66 A.2d 164 (N.J. 1949).*

(n104)Footnote 529. *189 A. 653 (N.J. Eq. 1937).*

(n105)Footnote 530. *43 Ch. D. 401* (C.A., 1890).

(n106)Footnote 531. Bergin & Haskell, *supra* note 79, at 202, gives the following example:

> Assume settlor irrevocably transfers inter vivos in trust to pay the income to A for life, remainder to such persons as A shall by will appoint. A appoints in trust for his children for their lives, and upon the death of the last surviving child, to pay the corpus to the grandchildren of A. All of A's children were alive at the date of the settlor's transfer in trust. A had a general testamentary power. Reading the appointment back into the donor's instrument of trust, the disposition is to A for life, then to A's children for their lives, then upon the death of the last surviving child of A, to the grandchildren of A. On its face, the remainder to grandchildren is invalid, but we are permitted to consider the fact that all of A's children were alive at the time of the creation of the grandchildren's interests; the children of A constitute measuring lives and the future interests in the grandchildren are valid because the interest of every member of the class must vest not later than the death of the last surviving child of A.

(n107)Footnote 532. *Sears v. Coolidge, 108 N.E.2d 563 (Mass. 1952).*

(n108)Footnote 533. *153 N.E. 337 (Mass. 1926).*

(n109)Footnote 534. This case might have fit under the section on the validity of special powers and general testamentary powers if one considers that the discretionary power in the trustees to apply income is, in effect, a power of appointment in the trustees. *See* Leach, *supra* note 41, at 892 n.16. In such a case, this special power of appointment in the trustees is invalid because it could be exercised beyond the period of the rule against perpetuities as measured from the time when the testatrix created the general testamentary power in *Carlotta*.

(n110)Footnote 535. *13 N.E.2d 487 (Ill. 1938).*

(n111)Footnote 536. *182 A. 396 (Pa. 1936). Lilly v. Citizens Fidelity Bank & Trust Co., 859 S.W.2d 666 (Ky. App. 1993)* (rule against perpetuities was not violated by testamentary power of appointment over portion of trust which could "continue until the death of the longest liver of my wife and the three children of ours").

(n112)Footnote 537. *See Neustadt v. Pearce, 143 A.2d 437 (Conn. 1958)* (unrestricted option to purchase real property); *Central Del. County Auth. v. Greyhound Corp., 588 A.2d 485 (Pa. 1991)* (discussing the constructional preference for the option to purchase in this case as opposed to an estate subject to condition subsequent and reversing the lower court which sought to remove repurchase options from the rule against perpetuities on the grounds of public policy). *In re Estate of Ohrt, 516 N.W.2d 896 (Iowa 1994)* (right of first refusal does not violate the rule against perpetuities when right is exercised during the lives of the named beneficiaries); *Adler v. Simpson, 610 N.Y.S.2d 351 (1994)* (rule against perpetuities applies to right of first refusal to acquire real property); *Citgo Petroleum Corp. v. Hopper, 429 S.E.2d 6 (Va. 1993)* (rule against perpetuities does not apply to option to purchase that is appendant to long-term lease, and exercisable within term of lease); *Low v. Spellman, 629 A.2d 57 (Me. 1993)* (right of first refusal to buy property for specified sum violated rule against perpetuities since it applied to heirs and assigns); Pathmark Stores,

Inc. v. 3821 Assoc., 663 A.2d 1189 (Del. 1995) (holding rule against perpetuities inapplicable to 30-year option contract between commercial entities). However, the rule against perpetuities does not apply to the state for the purpose if invalidating the state's repurchase option that otherwise would be subject to defeat by the rule against perpetuities. *Tolland Enterprises v. Commissioner of Transp., 647 A.2d 1045 (Conn. App. 1994); Symphony Space, Inc., v. Pergola Properties, Inc., 669 N.E.2d 799 (N.Y. App. 1996)* (rule against perpetuities applies to commercial purchase options, as well as to noncommercial options); *In re Bradlees Stores, Inc., 194 B.R. 555 (N.Y. 1996)* (creditor's option to purchase real estate from Chapter 11 debtor was void under the rule against perpetuities, because the option did not contain a specified time period within which it had to vest).

(n113)Footnote 538. *See Hornsby v. Holt, 359 S.E.2d 646 (Ga. 1987); Metropolitan Transp. Auth. v. Bruken Realty Corp., 501 N.Y.S.2d 306 (1986)* (rule does not apply to preemptive rights in commercial and governmental transactions); *Singer Co. v. Makad, Inc., 518 P.2d 493 (Kan. 1974)* (rule does not apply to commercial leases). *Contra, Village of Pinehurst v. Regional Invs. of Moore, Inc., 412 S.E.2d 645 (N.C. 1992)* (rule against perpetuities applicable to preemptive rights [*see also* dissenting opinion]), *Adler v. Simpson, 610 N.Y.S.2d 351 (N.Y. App. Div. 1994)* (rule against perpetuities applicable to right of first refusal to acquire residential/agricultural land), and *Stuart Kingston, Inc. v. Robinson, 596 A.2d 1378 (Del. 1991)* (a right of first refusal in a seller of property when the buyer received notice of an offer to purchase that he desired to accept was found to be invalid under the rule against perpetuities). The court in *Robinson* did recognize that a right of first refusal that terminates upon the death of either party is personal and does not violate the rule against perpetuities. *Kershner v. Hurlburt, 277 S.W.2d 619, 623 (Mo. 1955).* The discussion of the court focussed on the factors to be taken into consideration in determining whether the parties intended the right of first refusal to be personal. *Cronin v. McCarthy, 637 N.E.2d 668 (Ill. App. 1994);* (partnership agreement that granted managing partner option without specific time limitation for its exercise did not violate rule against perpetuities inasmuch as right was personal and terminated on death); *Jones v. Herald, 881 P.2d 116 (Okla. App. 1994)* (rule against perpetuities was not applicable to power of developer under restrictive covenant to unilaterally approve particular roofing materials, unless majority of lot owners amended the covenant; duration of time in which developer could unilaterally amend covenants involved neither a future interest nor was it aimed at preventing restrictions on alienation of property, as lot owners' interest in their property had vested); *Swartz v. Bianco Family Trust, 874 P.2d 430 (Colo. App. 1993)* (contractual provision creating preemptive right on part of any one of four property owners to purchase interests of co-owners at any time that one owner desired to sell his portion was unenforceable, although the provision created a technical violation of rule against perpetuities, because it was binding upon heirs and assigns of co-owner). *Symphony Space, Inc., v. Pergola Properties, Inc., 669 N.E.2d 799 (N.Y. App. 1996)* (rule against perpetuities does not apply to preemptive options if the option arises in a governmental or commercial transaction); *Royer v. Wineland Equip., Inc., 663 A.2d 780 (Pa. 1995)* (right of first refusal contained in deed violates rule against perpetuities, because the option did not set forth a time limit after which it would expire). Annotation, *Pre-emptive Rights to Realty as Violation of Rule Against Perpetuities or Rule Concerning Restraints on Alienation, 40 A.L.R. 3d 920..*

(n114)Footnote 539. *See Lonergan v. Connecticut Food Store, Inc., 357 A.2d 910 (Conn. 1975)* (option to renew the term of a real property lease), and *Texaco Refining & Mktg., Inc. v. Samowitz, 570 A.2d 170 (Conn. 1990)* (option to purchase contained in a long-term commercial lease of real property where the option must be exercised within the leasehold term; cases cited from Alabama, Colorado, Florida, Georgia, Illinois, Maryland, Ohio, Oklahoma and Washington in favor and a case from West Virginia against). *See* Jesse Dukeminier, *A Modern Guide to Perpetuities, 74 Cal. L. Rev. 1867, 1908 nn.142-143 (1986). Warren St. Assoc. v. City Hall Tower Corp., 608 N.Y.S.2d 429* (N.Y.A.D. 1 Dept. 1994) (where the option could be exercised after the initial lease term had expired, the rule against perpetuities has been held to apply); The Uniform Statutory Rule Against Perpetuities, which has been adopted in twenty jurisdictions, excludes such nondonative commercial transactions as options to renew, rights of first refusal, and commercial leases from coverage under the common-law rule against perpetuities. *See Shaver v. Clanton, 31 Cal. Rptr. 2d 595 (Cal. App. 1994). Symphony Space, Inc., v. Pergola Properties, Inc., 669 N.E.2d 799 (N.Y. App. 1996)* (option to purchase contained in a lease violated the rule against perpetuities on public policy grounds, since the option could be exercised after the lease term had expired); *Donzella v. New York Telephone Co., 641 N.Y.S.2d 423,* (N.Y. 1996) (purchase option written into lease did not violate the rule against perpetuities, because the option did not impermissibly

suspend the property owner's power of alienation); *Buck v. Banks, 668 N.E.2d 1259 (Ind. 1996)* (preemptive option in contract, giving purchasers right to purchase additional 14 acres of land, violated the rule against perpetuities); Getty Realty Corp. v. Hettler, No. 97-5637 (E.D. Penn. 1998) (LEXIS 1960) (court recognizes exception in lease agreements: "the rule against perpetuities does not apply to options to purchase contained in a lease and exercisable within the life of that lease").

(n115)Footnote 540. O'Reilly v. O'Reilly, LEXIS 3074 (Conn. 1991). (unreported as yet) ("mortgage is a vested fee simple interest subject to complete defeasance by the timely payment of the mortgage debt" in a title theory state such as Connecticut).

(n116)Footnote 541. *4 Ves. 227, 11 Ves. 112 (1799).*

(n117)Footnote 542. 39 & 40 geo. Ill, c. 98 (1800).

(n118)Footnote 543. *5 N.E.2d 550 (Mass. 1936). Matter of Estate of Kirk, 907 P.2d 794 (Id. 1995)* (since rule against perpetuities does not apply to charitable trusts, disposition of trust property providing that income from oil and gas leases was to be given to charitable organization did not violate rule against perpetuities).

(n119)Footnote 544. *135 A. 555 (Conn. 1926).*

(n120)Footnote 545. W. Barton Leach, *Perpetuities in Perspective: Ending the Rule's Reign of Terror, 65 Harv. L. Rev. 721, at 730 (1952)* (new approach called the wait-and-see doctrine). Murphy Exploration & Prod. Co. v. Sun Operating L.P. 747, So. 2d 260 (Miss. 1999); *Terry Homes, Inc. v. Crocker, 1999 Ohio App. LEXIS 5823 (Ohio Ct. App. 1999).*

(n121)Footnote 546. Restatement (Second) of Property (Donative Transfers) § 1.4 (1981).

(n122)Footnote 547. Robert Edgar Megarry & H.W.R. Wade, The Law of Real Property 253-54 (5th ed. 1984). Jesse Dukeminier has specified these lives as "(1) Any person who can affect the time the future interest vests in possession; (2) Any person who can affect vesting in interest, namely -- (a) The beneficiary or beneficiaries of the contingent interest; (b) Any person who can affect the identity of the beneficiary or beneficiaries; and (c) Any person who can affect any condition precedent attached to the gift or, in case of a class gift, any person who can affect any condition precedent attached to the interest of any member of the class." Jesse Dukeminier, *A Modern Guide to Perpetuities, 74 Calif. L. Rev. 1867, 1881-1882 (1986).*

(n123)Footnote 548. 20 Pa. Cons. Stat. Ann. § 6104(b). For a recent application of Pennsylvania's wait-and-see doctrine, *see Estate of Royer v. Wineland Equip., Inc., 663 A.2d 780 (Pa. 1995)* (preemptive option without term enforceable until twenty-one years after death of last life in being at time of its creation).

(n124)Footnote 549. Statutes exist in Alaska, Connecticut, Florida, Kentucky, Maine, Maryland, Massachusetts, Nevada, New Mexico, Ohio, Pennsylvania, Rhode Island, South Dakota, Vermont, Virginia, and, for trusts only, in Washington and Illinois; courts have adopted the wait-and-see doctrine in Mississippi and New Hampshire. *See* Jesse Dukeminier, *A Modern Guide to Perpetuities, 74 Calif. L. Rev. 1867, 1882-1883 nn. 49-50 (1986). Pond v. Pond, 678 N.E.2d 1321 (Mass. 1997)* (court reaffirms the validity of the "wait-and-see" doctrine in Massachusetts); Indiana, Iowa, Montana, North Carolina, and South Carolina join the list of states adopting a statutory form of the "wait-and-see" doctrine. Tiger, Inc. v. Time Warner Entertainment Co., No. 5:98-CV-713 (N.D. Ohio 1998) (LEXIS 18149) (possible events that may have caused a corporation's right of first refusal to violate the rule against perpetuities were insufficient to invoke the rule because the more lenient "wait-and-see" doctrine prescribed by statute required actual events as the basis for invoking the rule); Freeman v. Greenville Convalescent Home, Inc., No. 96-CA-00466 COA (Miss. Ct. App. 1998) (LEXIS 995) (Mississippi has adopted the "wait-and-see" approach: "The supreme court has adopted an ameliorative doctrine labeled the 'wait-and-see' approach. Only if the contingent future interest in fact fails to vest within the period of the rule will it be void. If it vests within the period, it will be valid"); In re Estate of Brown, No.

97-CA-00125 COA (Miss. Ct. App. 1998) (LEXIS 624) (under Mississippi's "wait-and-see" doctrine, right of first refusal deemed valid despite rule against perpetuities because the sale actually occurred well within the 21 year time period); *In re Trust ex rel. Wold, 708 A.2d 787 (N.J. 1998)* (in New Jersey, a 1991 statute provided a lenient "wait-and-see" period of 90 years. In this case, the court concluded that the 1991 statute applied to a 1944 trust in that the permissible period is determined by the law in effect at the time of the exercise of the power of appointment, rather than by the law in effect when the power of appointment was created); Venture Stores v. Pacific Beach Co., WD 55151 (Mo. Ct. App. 1998) (LEXIS 1995) ("tenant's option to buy or renew is not affected by the rule against perpetuities if the option is exercisable not later than the end of the term of the option to purchase, as long as it is part of the existing lease"); *White v. Fleet Bank of Maine, 739 A.2d 373 (Me. 1999)* (stating that Maine has adopted the wait-and-see doctrine).

(n125)Footnote 550. *570 N.E.2d 179 (Mass. App. Ct. 1991). Matter of Estate of Keenan, 519 N.W.2d 373 (Iowa 1994)* ("wait and see" provision of statute regarding rule against perpetuities is remedy of choice for vesting problems under rule against perpetuities, and reformation provisions are not triggered unless "wait and see" fails to validate challenged interest).

(n126)Footnote 551. *See* Jesse Dukeminier, *A Modern Guide to Perpetuities, 74 Calif. L. Rev. 1867, 1904-1905 n.132 (1986)* (citing Gray for the latter approach and cases for and against Gray's position).

(n127)Footnote 552. *See Id. at 1910 & n.151* (1986) (citing cases but suggesting that these courts did not know what they were doing). *State ex rel. Champion v. Holden, 953 S.W.2d 151 (Mo. Ct. App. 1997)* (for a private trust to be valid under the rule against perpetuities, a beneficiary must be "definitely ascertained at the time of the creation of the trust" or within the standard time allowed by the rule against perpetuities); *In re Estate of West, 560 N.W.2d 810 (Neb. 1997)* (trust beneficiary must be "definitely ascertained at the time of the trust's creation" or within the time allotted by the rules against perpetuities); *In re Clayton J. Richardson Trust, 634 A.2d 1005 (N.H. 1993)* (determination that will violates rule against perpetuities does not mandate that the will's provisions must entirely fail).

(n128)Footnote 553. *Id.* at 1911 (1986), and referring the reader to William M. McGovern Jr., *Perpetuities Pitfalls and How Best to Avoid Them*, 6 Real Prop., Prob. & Tr. J. 155 (1971). *Ludwig v. Amsouth Bank of Fla., 686 So. 2d 1373 (Fla. Dist. Ct. App. 1997)* (savings clause in trust manifested the settlor's intent for the trust to be valid for the maximum period allowed by the rule against perpetuities).

(n129)Footnote 554. *See* Bergin & Haskell, *supra* note 79, at 218-219 nn.14-15 (naming Alaska, California, Idaho, Iowa, Kentucky, Missouri, Nevada, New Mexico, Ohio, Oklahoma, Rhode Island, Texas, Vermont, Virginia, and Washington, with limited reformation statutes to provide for the reduction of an age contingency in Connecticut, Florida, Illinois, Maine, Maryland, Massachusetts, and New York). *Matter of Estate of Holt, 857 P.2d 1355 (Hawaii 1993)* (courts have generally held that if explicit termination date is lacking, but specific beneficiaries are named in trust instrument, then such beneficiaries are applicable measuring lives for calculation of legal trust duration under rule against perpetuities); *Johnson v. McLaughlin, 840 S.W.2d 668 (Tex. App. 1992)* (will, viewed in its entirety, manifested intent that title to residuary assets vest at death in trustees; contrary interpretation would violate rule against perpetuities, because administration of estate might have lasted more than 21 years after testator's death); *Trust Created Under Will of Damon, 869 P.2d 1339 (Hawaii 1994)* (if language of will is fairly open to more than one reasonable construction, reasonable construction that will turn provision into illegal perpetuity will not be preferred over another, if such other upholds validity of provision consistent with rule against perpetuities). In *Estate of Keenan, 519 N.W.2d 373 (Iowa 1994)*, for example, the court permitted reformation of a bequest that only allowed scholarships to be paid from the income of a trust to allow accelerated vesting through payment of scholarships from trust corpus as well as from trust income.

(n130)Footnote 555. *See* Dukeminier & Johanson, *supra* note 4, at 844, citing cases in *Colorado (commercial agreement reformed), Hawaii (Estate of Chun Quan Yee Hop), Kansas (semble), Mississippi (saving clause), and West Virginia. Buck v. Banks, 668 N.E.2d 1259 (Ind. 1996)* (court expressed willingness to reform contract to bring it within

rule against perpetuities; however, contract had been fully performed, leaving nothing to reform).

(n131)Footnote 556. *469 P.2d 183 (Haw. 1970).*

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CHAPTER 28 RULES AGAINST PERPETUITIES

3-28 Thompson on Real Property, Thomas Editions § 28.09

AUTHOR: Professor David A. Thomas This chapter is based in part on Ch. 31. George W. Thompson, Commentaries on The Modern Law of Real Property (John S. Grimes ed. 1979), which made a significant contribution toward preserving the American common law on perpetuities. J. Reuben Clark Law School Brigham Young University

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Annotation, *Applicability of Doctrine of Equitable Approximation to Cut Down to a Permissible Time Period the Time of a Testamentary Gift that Violates Rule Against Perpetuities, 95 A.L.R. 2d 807.*

Annotation, *Application of Cy Pres Doctrine to Trust for Promulgation of Particular Political or Philosophical Doctrines, 67 A.L.R. 3d 417.*

Annotation, *Character of Remainder Limited Generally to the Life Tenant's Children, 57 A.L.R. 2d 103.*

Annotation, *Character of Remainder Limited to Surviving Children of Life Tenant, 57 A.L.R. 2d 197.*

Annotation, *Cy Pres Doctrine as Affected by Sectarian or Doctrinal Differences or Factors, 3 A.L.R. 2d 78.*

Annotation, *Family Settlement of Testator's Estate, 29 A.L.R. 3d 8* (mentions that the complicated nature of the rule

against perpetuities may warrant judicial construction of a will so as not to deplete the decedent's estate in expensive, drawn-out family litigation. It is not, however, the main focus of the annotation).

Annotation, *Independent Option to Purchase Real Estate as Violating Rule Against Perpetuities or Restraints on Alienation, 66 A.L.R. 3d 1294.*

Annotation, *Lease for Term of Years, or Contract Therefor, as Violating Rule Against Perpetuities, 66 A.L.R. 2d 733.*

Annotation, *Modern Status of Presumption Against Possibility of Issue Being Extinct, 98 A.L.R. 2d 1258.*

Annotation, *Mortmain Statutes -- Validity and Effect, 6 A.L.R. 4th 603.*

Annotation, *Pre-emptive Rights to Realty as Violation of Rule Against Perpetuities or Rule Concerning Restraints on Alienation, 40 A.L.R. 3d 920.*

Annotation, *Rule Against Perpetuities Where Estate is Limited on Alternative Contingencies, one Within and One Beyond the Period Allowed by the Rule, 98 A.L.R. 2d 807.*

Annotation, *Rule Against Perpetuities Where Estate is Limited on Alternative Contingencies, one Within and One Beyond the Period Allowed by the Rule for Vesting Estates,* 64 A.L.R. 1077.

Annotation, *Separability, for Purposes of the Rule Against Perpetuities, of Gift to Several Persons by one Description, 56 A.L.R. 2d 450.*

Annotation, *Validity, Construction, and Application of Statutes or Ordinances Regulating Perpetual-Care Trust Funds of Cemeteries and Mausoleums, 54 A.L.R. 5th 681* (cites *Perry v. Twentieth Street Bank, 206 S.E.2d 421 (1974),* which indicates that statutes can validate perpetual care trusts that might otherwise violate the rule against perpetuities. Annotation, *Validity, Construction, and Effect of Provisions of Charitable Trust Providing for Accumulation of Income, 6 A.L.R. 4th 903.*

Annotation, *Validity of Option to Purchase Realty as Affected by Indefiniteness of Term Provided for Exercise, 31 A.L.R. 3d 522.*

Annotation, *Validity of Provision of Will or Conveyance Limiting Alienation to Certain Individuals or Those of a Limited Class, 36 A.L.R. 2d 1437.*

Annotation, *Validity, under Rule Against Perpetuities, of Gift in Remainder to Creator's Great-grandchildren, Following Successive Life Estates to Children and Grandchildren, 18 A.L.R. 2d 671.*

Annotation, *Violation of Rule Against Perpetuities, or Unlawful Restraint of Alienation or Suspension of Ownership, by Postponement of Vesting or Alienation of Ownership until Exercise of Discretion as to Sale or Disposal,* 89 A.L.R. 1047.

Annotation, *What Constitutes Negligence Sufficient to Render Attorney Liable to Person Other Than Immediate Client, 61 A.L.R. 4th 464* (includes a discussion of whether drafting a will in violation of the rule against perpetuities is sufficient negligence to create liability in the attorney as to third parties).

Annotation, *When Statute of Limitations Begins to Run Upon Action Against Attorney for Malpractice, 32 A.L.R. 4th 260* (statute of limitation began to run even though the rule against perpetuities is difficult to understand. The negligently drafted provision in the will should have been discovered immediately, no matter how difficult the law is).

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Supp. To CHAPTER 28 RULES AGAINST PERPETUITIES

3-28 Thompson on Real Property, Thomas Editions Supp. to § 28.02

Supp. to § 28.02 Definition and History of the Rule Against Perpetuities.

[Go To Main]

§ 28.02(a) Rules Against Perpetuities Generally. [Go To Main]

add:

Brown Bros. Harriman Trust Co., N.A. v. Benson, 688 S.E.2d 752 (N.C. App. 2010) (upholding constitutionality of a statute expressly superseding the common law rule against perpetuities).

Add:

Reynolds v. Gagen, 739 N.Y.S.2d 704 (2002) (contractual right to purchase one-half interest in real property did not violate rule against perpetuities).

After the citation to "Lucas v. Hamm ... " add:

cert. denied, 368 U.S. 987 (1962) .

After the citation to "In re Frederick's Estate ... " add:

cert. denied, Estate of Fredericks, 320 So. 2d 394 (1975) .

After the citation to "Weber v. Texas Co ... " add:

cert. denied, 299 U.S. 561 (1936) .

Owenby v. Holley, 567 S.E.2d 351 (Ga.App. 2002) (brother's option to purchase property upon sister's death did not violate the rule against perpetuities).

Add:

Meduna v. Holder, 2003 Tex. App. LEXIS 10568 (Tex. App. 2003) (Although the Rule against Perpetuities is one of law, the interpretation of a written instrument or instruments is ordinarily required for application of the rule; Texas law favors a construction allowing vesting at the earliest possible time and the courts will not construe an interest as contingent when it reasonably can be construed as vested.).

§ 28.02(b) Relation of Rules Against Remoteness of Vesting to the Common Law. [Go To Main]

After the citation to "Rekdahl v. Long ... " add:

aff'd, 417 S.W.2d 387 (1967) .

Add:

Park Station L.P. v. Bosse, 378 Md. 122, 835 A.2d 646 (Md. App. 2003) (a provision granting the right of first refusal does not violate the rule against perpetuities); *Firebaugh v. Whitehead, 263 Va. 398, 559 S.E.2d 611 (Va. 2002)* (the lack of duration limitation in the right of first refusal did not violate the rule against the rule of perpetuities).

Add:

Hochberg v. Proctor, 805 N.E.2d 979 (Mass. 2004) (The life estate was vested in interest, although not in possession, when the trust was created, so there was no violation of the rule against perpetuities.).

Add:

Dimon v. Starr, 749 N.Y.S.2d 78 (2002) (a contract which gave the plaintiff a future right to receive additional compensation for the sale of an interest in real property was held to violate the rule against perpetuities' prohibition against remoteness of vesting). *Cf Rich, Rich, & Nance v. Carolina Constr. Corp., 355 N.C. 190, 558 S.E.2d 77 (N.C.*

2002) (a requirement that a subsequent purchaser pay the vendor an "availability fee" did not violate the common-law rule against perpetuities).

Add:

Alexander ex rel. Alexander v. Estate of Alexander, 93 S.W.3d 688 (Ark. 2002) (use of the term "issue" in a rule against perpetuities provision did not indicate that the testator contemplated a grandson).

Add:

In re Certain Trusts Created by Certain Agreements, 742 N.Y.S.2d 777 (2002) (a trust provision granting granting to any "child" who was a beneficiary the right to exercise a power of appointment over the trust corpus upon reaching age of 25 was not ambiguous).

§ 28.02(c) Mortmain. [Go To Main]

Correct the name of the citation to:

Hood v. First Nat'l Bank of Columbus, 133 S.E.2d 19 ...

Correct the page of the citation of "Riley's Estate" to:

511.

After the citation to "*In re* Halpern's Will ..." add:

aff'd, In re Estate of Dewey, 387 N.Y.S.2d 426, 355 N.E.2d 386 (1976) .

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Supp. To CHAPTER 28 RULES AGAINST PERPETUITIES

3-28 Thompson on Real Property, Thomas Editions Supp. to § 28.03

Supp. to § 28.03 Interests That Are Subject to the Rule Against Remoteness of Vesting.

[Go To Main]

§ 28.03(a) Contingent Interests. [Go To Main]

Add:

E-470 Public Highway Authority v. Argus Real Estate, 70 P.3d 481 (Colo. Ct. App. 2002) (after owners transferred property to the highway authority, the owners did not have a present, reversionary interest in the property, and thus the agreement conveying the property was subject to the rule against perpetuities).

Argus Real Estate v. E-470 Public Highway Authority (2003 Colo. App. LEXIS 2038 (02CA2044, Dec. 31, 2003) (a party not involved in *E-470 Public Highway Authority v. Argus Real Estate, 70 P.3d 481* [Colo. Ct. App. 2002] brought an action based on the same claims made in *Argus I*. The court held that the Colorado Statutory Rule Against Perpetuities Act, § 15-11-1106(2) (1991) permits a reformation claim in the action that determined the rule was violated in *Argus I*).

Change the page number in the citation of "Cook v. Cook ..." to:

568.

Add

Washington State Grange v. Brandt, 148 P.3d 1069 (Wash. App. 2006) (executory interest violated the rule against perpetuities).

§ 28.03(b) Powers of Appointment. [Go To Main]

After the citation to "In re Stewart's Estate ..." add:

aff'd in part, quashed in part by Stewart's Estate v. Caldwell, 271 So. 2d 754 (Fla. 1972) .

After the citation to "Cleveland Trust Co. v. McQuade ..." add:

order reversed by Cleveland Trust Co. v. McQuade, 6 Ohio Op. 2d 493, 142 N.E.2d 249 (Ohio App. Ct. 1957) .

§ 28.03(d) Miscellaneous Interests. [Go To Main]

Add:

In re County Treasurer and ex Officio County Collector, 869 N.E.2d 1065 (Ill. App. 2007) (a covenant for assessments did not violate the rule against perpetuities).

add:

Tourneau, LLC v. 53rd and Madison Tower Development LLC, 896 N.Y.S.2d 631 (2010) (a lease whose commencement date was described as the date when the landlord substantially completed its work on the premises did not violate the Rule Against Perpetuities); *Johnson v. Nisbet, 891 N.Y.S.2d 180 (2009)* (a stipulation by one neighbor to not interfere with another neighbor's effort to acquire another parcel of land did not violate the rule against perpetuities).

Add

Omar v. Rozen, 867 N.Y.S.2d 458 (2008) (an option with no termination date did not violate the rule against perpetuities; a reasonable termination date was presumed); *Power Gas Marketing & Transmission, Inc. v. Cabot Oil & Gas Corp., 948 A.2d 807 (Pa. Super. 2008)* (a "preferential right to purchase" did not violate the rule against perpetuities). *Stephens v. Trust for Public Land, 475 F. Supp. 2d 1299 (N.D. Ga. 2007)* (right of first offer did not violate rule against perpetuities); In the *Matter of Estate of Owen, 855 N.E.2d 603 (Ind. App. 2006)* (right of first refusal did not violate the statutory rule against perpetuities); *Randolph v. Reisig, 727 N.W.2d 388 (Mich. App. 2007)* (right of first refusal did not violate rule against perpetuities).

Add:

Harrington v. Gage, 843 N.Y.S.2d 745 (2007) (option agreement violated rule against perpetuities).

change to read:

There are authorities holding that options to purchase contained in

Add:

Bortolotti v. Hayden, 866 N.E.2d 882 (Mass. 2007) (the rule against perpetuities did not bar a right of first refusal); *Stephens v. Trust for Public Land, 475 F. Supp. 2d 1299*) (a right of first offer did not violate the rule against perpetuities).

Add:

Malone v. Guynes, 250 S.W.3d 260 (Ark. App. 2007) (a restrictive covenant limiting uses of the land to single-family dwellings did not violate the rule against perpetuities).

Add:

Horse Creek Conservation Dist. v. State ex rel. Wyoming Attorney General, 221 P.3d 306 (Wyo. 2009) (a grant of public access did not violate the rule against perpetuities). *PCS Phosphate Co., Inc. v. Norfolk Southern Corp., 520 F. Supp. 2d 705 (E.D. N.C. 2007) aff'd 559 F.3d 212, 2009 U.S. App. LEXIS 5024* (provisions for relocating an easement did not violate the rule against perpetuities).

add:

Hensley-O'Neal v. Metropolitan Nat. Bank, 297 S.W.3d 610 (Mo. App. 2009) (holding that a pre-emptive right contract violated the rule against perpetuities).

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3-28 Thompson on Real Property, Thomas Editions Supp. to § 28.04

Supp. to § 28.04 The Operation of the Rule Against Remoteness of Vesting.

[Go To Main]

After the citation to "Lucas v. Hamm ... add:

cert. denied, 368 U.S. 987 (1962) .

Frazer v. Millington, 63 Va. Cir. 458 (Va. 2003) (A right of first refusal for the disposition of stock was an unreasonable restraint on alienability because it allowed the stock to be transferred intestate but did not allow it to be bequeathed; the right of first refusal, which was indefinite in duration, was also void ab initio under the common law Rule against Perpetuities.).

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Supp. To CHAPTER 28 RULES AGAINST PERPETUITIES

3-28 Thompson on Real Property, Thomas Editions Supp. to § 28.05

Supp. to § 28.05 The Rule Against Remoteness as Applied to Gifts in Charity.

[Go To Main]

Add:

Marsh v. Frost Nat'l Bank, 129 S.W.3d 174 (Tex. 2004) (a general gift in trust to all Americans eighteen years or older is not exempted from the rule against perpetuities as a general charitable trust when there is no intent that the trust would promote the social interest of the community).

Replace the citation of "Boxer v. Boston Symphony Orchestra, Inc. ..." with:

Boxer v. Boston Symphony Orchestra, Inc., 174 N.E.2d 363 (Mass. 1961) , overruled in part by Colby v. Carney Hospital, 254 N.E.2d 407 (Mass. 1969) .

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Supp. To CHAPTER 28 RULES AGAINST PERPETUITIES

3-28 Thompson on Real Property, Thomas Editions Supp. to § 28.06

Supp. to § 28.07 The Rule Against Overlong Duration of Trusts.

[Go To Main]

Add:

In re Mary E. Griffin Revocable Grantor Trust, 760 N.W.2d 318 (Mich. App. 2008) (a trust with no provision for distributing the corpus violated the rule against perpetuities); *Robinson v. North Pond Hunting Club, 890 N.E.2d 535 (Ill. App. 2008)* (a trust document with no provision terminating the trust violated the rule against perpetuities).

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Supp. To CHAPTER 28 RULES AGAINST PERPETUITIES

3-28 Thompson on Real Property, Thomas Editions Supp. to § 28.07

Supp. to § 28.07 Statutory Modifications of the Rule Against Perpetuities.

[Go To Main]

Add:

Selig v. State Highway Admin., 383 Md. 655 (Md. 2004) (In Maryland, the repeal of a statutory exception to the Rule against Perpetuities did not apply retroactively to a contract that was formed or a deed that was executed before the effective date of such changes.). *Old Port Cove Condominium Ass'n One, Inc. v. Old Port Cove Holdings, Inc., 954 So. 2d 742 (Fla. App. 2007)* (the statute repealing the common-law rule against perpetuities is fully retroactive).

add:

Brown Bros. Harriman Trust Co., N.A. v. Benson, 688 S.E.2d 752 (N.C. App. 2010) (upholding constitutionality of a statute expressly superseding the common law rule against perpetuities).

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Supp. To CHAPTER 28 RULES AGAINST PERPETUITIES

3-28 Thompson on Real Property, Thomas Editions Supp. to § 28.08

Supp. to § 28.08 A Short Course in the Modern Rule Against Perpetuities.

[Go To Main]

§ 28.08(c) The Concept of Vesting. [Go To Main]

Add:

Hochberg v. Proctor, 805 N.E.2d 979 (Mass. 2004) (the rule against perpetuities is not violated when vesting of possession occurs after the prescribed period as long as an interest is vested within the prescribed period).

§ 28.08(d) Four Aspects of the Rule. [Go To Main]

Add:

White Mt. Apache Tribe v. United States, 249 F.3d 1364, 1368 (Fed. Cir. 2001) (noting that the rule against perpetuities does not apply to conveyances made by the government).

§ 28.08(e) Difficulty of the Rule. [Go To Main]

After the citation to "Lucas v. Hamm ... " add

cert. denied, 368 U.S. 987 (1962) .

§ 28.08(g) Effect of Invalidity of an Interest. [Go To Main]

Add:

Meduna v. Holder, 2003 Tex. App. LEXIS 10568 (03-03-00781-CV, Dec. 18, 2003) (Under *Tex. Prop. Code Ann. § 5.043* when a conveyance partially violates the rule against perpetuities, the court should enforce the provisions of the conveyance that do not violate the rule and reform or construe the provisions that do violate the rule to effectuate the grantors intent within the rule).

§ 28.08(j) Exceptions of the Rule. [Go To Main]

Add:

Deer Cross Shopping LLC v. Stop & Shop Supermarket Co., 773 N.Y.S.2d 211 (N.Y. 2003) (appurtenant options to renew a lease do not violate the rule against perpetuities).

Add new note 544.1 at the end of the last paragraph of the section: n544.1

Add to text at end of page:

Utah has abolished the common law rule against perpetuities and now requires that vesting of interests be determined within 1,000 years from the time the interest is created.

Add:

Utah Code Ann. § 75-2-1203 (2003).

§ 28.08(k) Wait-and-See Doctrine. [Go To Main]

Bd. of County Comm'rs v. City of Cincinnati, 154 Ohio App. 3d 504 (Ohio App. 2003) (The city's right of first refusal to purchase property, valid under the state's statutory "wait and see" doctrine, did not violate the Rule against Perpetuities because actual events did not violate the rule.).

Arundel v. Marie, 860 A.2d 886 (Md. 2004) (The right of first refusal, void under the common law Rule against Perpetuities, was not covered by a statutory "wait and see" doctrine which provided for an election, because the interest

was subject to vesting prior to the end of a life estate or a life in being, and the sellers never elected to sell previously.).

§ 28.08(m) *Cy Pres* Doctrine or Equitable Apportionment. [Go To Main]

United Bank, Inc. v. Blosser, 624 S.E.2d 815 (W. Va. 2005) (under the state statute, the trust was held to be a valid charitable trust and exempt from application of the rule against perpetuities).

FOOTNOTES:
(n2)Footnote 544.1. *Larson Operating Co. v. Petroleum, Inc., 32 Kan. App. 2d 460 (Kan. App. 2004)* (The rule against perpetuities does not apply to commercial transactions.).

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Supp. to § 28.09 Bibliography.

[Go To Main]

Add to Articles:

Crown, Barry C. "Private Purpose Trusts and the Rule Against Perpetuities," 2009 *Sing. J. Legal Stud.* 646 (December, 2009).2010 Update for Ch. 29.

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CHAPTER 29 RESTRAINTS ON ALIENATION

3-29 Thompson on Real Property, Thomas Editions 29.syn

AUTHOR: Professor David A. Thomas This chapter is based in part on Ch. 31, George W. Thompson, Commentaries on the Modern Law of Real Property (John S. Grimes, ed. 1979), which made a significant contribution toward preserving the American common law governing restraints on alienation. J. Reuben Clark Law School Brigham Young University

§ 29.syn Synopsis to Chapter 29: RESTRAINTS ON ALIENATION

§ 29.01 Introduction to the Chapter

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§ 29.06 Bibliography

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FOOTNOTES:
(n1)Footnote *.
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CHAPTER 29 RESTRAINTS ON ALIENATION

3-29 Thompson on Real Property, Thomas Editions § 29.01

AUTHOR: Professor David A. Thomas This chapter is based in part on Ch. 31, George W. Thompson, Commentaries on the Modern Law of Real Property (John S. Grimes, ed. 1979), which made a significant contribution toward preserving the American common law governing restraints on alienation. J. Reuben Clark Law School Brigham Young University

§ 29.01 Introduction to the Chapter

This chapter reviews the development of doctrines governing restraints on alienation of property interests under the common law and in the jurisprudence of the American states. The law governing partial restraints is reviewed. The chapter concludes with a discussion of disposition of interests that are defeated under the rule against restraints on alienation.

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CHAPTER 29 RESTRAINTS ON ALIENATION

3-29 Thompson on Real Property, Thomas Editions § 29.02

AUTHOR: Professor David A. Thomas This chapter is based in part on Ch. 31, George W. Thompson, Commentaries on the Modern Law of Real Property (John S. Grimes, ed. 1979), which made a significant contribution toward preserving the American common law governing restraints on alienation. J. Reuben Clark Law School Brigham Young University

§ 29.02 Overview of Restraints on Alienationn1

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A restraint on alienation is "a provision which disables the owner of an interest in property from transferring it," n2 and is generally considered invalid. However, when a restraint on alienation is incorporated in a condition subsequent, the restraint may be considered valid in certain cases. n3

Restraints differ from conditions subsequent, inasmuch as the act that is subject to the restraint prevents transfer of property, whereas the act that is subject to the condition subsequent produces transfer of property. n3.1 Thus, if O conveys "to A" with a provision that prevents A from conveying the property to any other person, the provision is a restraint on alienation which, if it were valid (which it is not), would invalidate any attempt by A to convey and would leave the property in A's hands. If O conveys "to A as long as A does not drink alcohol, otherwise to B," A's not drinking alcohol is a condition subsequent which would produce the transfer of the property to B if A should drink alcohol. n4

A restraint on alienation is incorporated into a condition subsequent cutting short an estate in property when it prevents the transfer of the property to one person but the attempted transfer causes a forfeiture with the resulting transfer of the property to another person. Thus, O's conveyance "to A for life as long as A does not attempt to convey the property to B, otherwise the property shall revert to O" contains both a restraint on alienation (preventing transfer of the property to B) and a condition subsequent (producing transfer of the property to O).

A restraint on alienation is effective when it appears in a condition subsequent in a life estate followed by a reversion; it is not effective when it appears in a condition subsequent in a fee and prohibits alienation to any person at any time. n5 Other cases fall in between and are subject to the vagaries of policy.

In Morse v. Blood, n6 the court rejected the idea that a condition against alienation is good unless it takes away

substantially the whole power of alienation. The testator gave his widow property "on condition that in no case shall she give or bequeath one cent of said estate to any member of my family, or to any relation of her own." The court found this condition void as against public policy on the ground that it was "a most effectual method of restraining all alienation of the property during the life of [the widow], and until such time after her death as it can be definitely ascertained that she committed no breach of the condition in her lifetime."

In Furst v. Lacher, n7 the court found that the following clause created a condition subsequent which allowed the grantee to avoid the claims of creditors when he quitclaimed the property back to Annie Lacher, one of the grantors:

> This conveyance is made subject to the following agreement, to-wit: It is agreed and understood by and between the parties herein named that the above described property shall not be sold or conveyed or in any manner whatsoever encumbered, during the lifetime of either of the grantors herein named. And should the grantee herein named sell, convey or in any manner whatsoever encumber the above described property before the death of either of the Grantors herein named, then and in that case this conveyance shall be null and void and the title to the aforesaid parcels of land shall revert to and be vested in said Annie Lacher, her heirs or assigns.

A common type of restraint on alienation is implicit in the spendthrift trust. A spendthrift trust is:

> [a] trust created to provide a fund for the maintenance of a beneficiary and at the same time to secure the fund against his improvidence or incapacity; provisions against alienation of the trust fund by the voluntary act of the beneficiary or by his creditors are its usual incidents. n8

Spendthrift clauses are void as unlawful restraints on alienation and as against public policy in a few states, but are valid in a majority of states, sometimes subject to some statutory restrictions. n9

FOOTNOTES:

(n1)Footnote 1. § 29.02 was written by Dean John Makdisi.

(n2)Footnote 2. W. Barton Leach, Cases and Materials on the Law of Future Interests 944 (2d ed. 1940).

(n3)Footnote 3. *Cusick v. Meyer, 863 P.2d 486 (Or. App. 1993)* (condition subsequent was valid which allowed grantor to regain possession of a portion of land if the grantor partitioned the property within a certain time period).

(n4)Footnote 3.1. *Drayson v. Wolff, 661 N.E.2d 486 (Ill. App. 1996).*

(n5)Footnote 4. *Loveland v. CSX Transp., 622 So. 2d 1120 (Fla. App. 1993)* (condition subsequent was valid which required land to revert to the grantor if used for purposes other than that of maintaining a railroad).

(n6)Footnote 5. *Id.* at 944-945.

(n7)Footnote 6. *71 N.W. 682 (Minn. 1897).*

(n8)Footnote 7. *182 N.W. 720 (Minn. 1921)*

(n9)Footnote 8. Black's Law Dictionary 1400 (6th ed. 1990).

(n10)Footnote 9. Eugene Scoles & Edward C. Halbach, Jr., Problems and Materials on Decedents' Estates and Trusts 460 (4th ed. 1987). *In re Pearson, 212 B.R. 128 (Bankr. E.D. Va 1997)* (Restraint on alienation of the right to receive the principal from [a spendthrift trust] is effective until the principal is no longer in the hands of the trustee.); *Burns v. Miller, Hiersche, Martens, & Hayward, P.C., 948 S.W.2d 317 (Tex. App. 1997)* (Texas courts have long upheld restraints on alienation in spendthrift trusts.); *Domo v. McCarthy, 612 N.E.2d 706 (Ohio 1993)* (Spendthrift provision of

trust given full force and effect). Patricia E. Dilley, *Hidden in Plain View: The Pension Shield Against Creditors, 74 Ind. L.J. 355 (1999);* Eric Henzy, *Offshore and "Other" Shore Asset Protection Trusts,* 32 Vand.J. Transna'l L. 739 (1999); *In re Orr, 180 F.3d 656 (5th Cir. 1999);* Veit, Jeremy M., *Self-Settled Spendthrift Trusts and the Alaska Trust Act: Has Alaska Moved Offshore?,* Jeremy M. Veit, *16 Alaska L. Rev. 269 (1999).*

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CHAPTER 29 RESTRAINTS ON ALIENATION

3-29 Thompson on Real Property, Thomas Editions § 29.03

AUTHOR: Professor David A. Thomas This chapter is based in part on Ch. 31, George W. Thompson, Commentaries on the Modern Law of Real Property (John S. Grimes, ed. 1979), which made a significant contribution toward preserving the American common law governing restraints on alienation. J. Reuben Clark Law School Brigham Young University

§ 29.03 History of Restraints on Alienationn10

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§ 29.03(a) Restraints on Alienation Under the Common Law

It has been surmised n11 that many of the early enfeoffments were made for the purpose of requiring the feoffee to render personal service, primarily military, to the feoffor. As long as the consideration for the transfer of land was the rendition of future services it was natural to suppose that feoffments were made on condition created to prevent the feoffee from avoiding these requirements of service by transferring the feoff to another. Restraints on alienation were therefore undoubtedly a permanent feature of the early feudal land law. But as the common law flowered through *quia emptores terrorum* n12 and as the fee simple became freely alienable the right of alienation became an integral part of the fee simple. n13 Such restriction has nothing to do with the rule against perpetuities, but some courts apply the same limitations to such a provision if extended over what is considered an unreasonable period of time. n14

Under the feudal law, conditions in restraint of alienation were good wherever the grantor had the reversion. The feudal lord had the reversion. Upon the death of the lord's grantee without heirs, the land reverted to the grantor or lord from whom it proceeded. "The grantee, during the whole period from the Conquest down to the 18 Edward I, when the statute of *quia emptores* was passed, could not alien his land without the license or consent of the lord, who was the owner of his reversionary interest." n15 This statute provided that from henceforth it shall be lawful for any freeman to sell at his own pleasure his lands and tenements, or part of them, so that the feoffee shall hold the same lands and tenements of the chief lord of the same fee, by such service and customs as the feoffor held before. The effect of this statute was to change the tenure from the immediate to the superior lord, from the grantor to the king. It deprived the ordinary grantor of all power to impose any restraint on alienation. The statute did not apply to the king. n16

The feudal law further imposed a limitation upon alienation by the idea of homage. Seisin involved not merely the idea of possession and therefore title but also the requirement of loyalty to the liege lord. Seisin was therefore not merely a title concept but also an ethical relationship. n17 This relationship could not be shed by a transfer to another without the lord's consent. But, by the time of Bracton, homage as well as possession could be transferred, n18 unless the terms of

the feoffment had prevented alienation n19 and, by the time of Littleton, an absolute restraint on alienation was void as repugnant to the fee. n20 But partial restraints were valid. n21 So inseparable did this right of alienation become that, said the common law, any attempt to absolutely prevent the alienation even for a single hour was void. n22 This became a rule of law protected as a fundamental public policy to permit the free flow of land in commerce. n23

Although Coke had indicated that conditions against at least partial alienation were still permissible in his time this ceased to be the law. As evidence of the cliche that the English feudal law was what the eighteenth century lawyers thought it had been, the common law developed to the point that any absolute restraint on alienation was as repugnant to the fee, wholly void. n24 This is purely a matter of public policy. The historical reasons have been forgotten. So the rule is applicable in those states where *quia emptores terrorum* never became part of the common law. n25

§ 29.03(b) Restraints on Alienation in the American States

While the force of the rule against restraints on alienation is everywhere recognized in the United States its common-law application is by no means uniform. In Kentucky, and formerly Nebraska, n26 a doctrine of reasonable restraints is followed. n27 Some states rigidly apply the restraints rule. Others permit limited restraints n28 and still others permit conditions against alienation. n29

The law in the United States became confused when the 1828 New York code provided "the absolute power of alienation, shall not be suspended by any limitation or condition whatever, for a longer period than during the continuance of not more than two lives in being at the creation of the estate, except in the single case mentioned in the next section." n30 This, with variations, was adopted by other states. It had the effect of permitting an absolute limitation on alienation for a limited period. n31 As is elsewhere shown, the courts came to realize that this language embraced two concepts, the rule against remoteness of vesting and the rule against restraints on alienation. n32

As mentioned, the New York Code contemplated that every future estate should be void in its creation which suspended the absolute power of alienation for more than two lives in being. It also provided that the absolute power of alienation should not be suspended by any limitation or condition for longer than two lives in being. This has had the effect of permitting restraints on alienation for a period of two lives in being but no longer. No suspension for any period of time in gross is permitted, however. n33

Other states have followed the New York pattern of statutes contemplating "restraints on alienation" but the results have not been the same. California indicated that her statute enlarged the time for restraints on alienation but did not affect the rule against remoteness of vesting. n34 The California statute has now been repealed. n35 The courts have divided as to whether a provision in a mortgage accelerating the debt upon alienation is or is not a restraint. n36 Arizona, n37 Idaho, n38 Michigan, n39 Minnesota, n40 Montana, n41 North Dakota, n42 Oklahoma, n43 South Dakota, n44 Wisconsin, n45 all have statutory provisions for "restraints on alienations."

Under the leading rule any provision of a will or deed requiring the consent of any person other than owner, trustee or beneficiary as a condition for the sale of real estate is an illegal restraint on alienation. n46 Most of the cases, however, take the position that the right of alienation has been an inseparable incident to an estate in fee ever since the statute *quia emptores*. n47 In some states conditions against alienation of fee simple estates are void, n48 even though they are but for a limited time. n49

A will provision violating the statute prohibiting restraints on alienation was void as against public policy. n50

Other cases permit, as restraints on alienation, conditions which are limited to specified times, persons or purposes. n51 Some states uphold a condition against alienation which terminates the estate. n52 And the rule has been applied to fees only so that restraints may be affixed to life estates. n53 The majority rule today, however, permits restraints on alienation of legal interests. n54

Thus, a restriction in a deed to a father and son as joint tenants that neither shall sell or encumber the property without the consent of the other has been held void as constituting a restraint on the inherent right of alienation. n55 Under the common-law rule no restriction can be imposed upon a fee simple estate, and any attempt to limit or restrict the right of the owner of such estate for a single hour is repugnant to the estate and void. n56 So, in some states, the absolute power of alienation cannot be suspended by any limitation or condition for a longer period than during the continuance of two lives in being at the creation of the estate, and that such suspension occurs when there are no persons in being by whom an absolute interest in possession can be conveyed. n57 A provision restraining the grantee from offering or attempting to alienate is ordinarily void for uncertainty, n58 as is a clause prohibiting the grantee from conveying without the consent of the grantor. n59

A provision that property shall not be mortgaged or conveyed without the consent of named persons is a void restraint on alienation. n60 After an absolute conveyance in fee simple a clause providing that the grantee shall not mortgage or dispose of the property is repugnant and void, n61 as is a clause that the grantee shall not offer to mortgage or suffer a fine or recovery. n62

Under this doctrine one's estate in real property is that which one can sell or dispose of at pleasure or what one can pass on to another. n63 The owner of a fee-simple estate in land possesses certain rights that are incidental to such estate. Among these are the right to use and dispose of the estate, the latter being an inseparable incident of such estate. A fee simple estate and a restraint upon its alienation cannot in their nature coexist. Such a condition is clearly repugnant to the grant in fee simple. n64 So, unlimited power of alienation is one of the essential incidents of a fee-simple estate n65 and, conversely, an unlimited condition in restraint of alienation attached to a grant in fee is void. n66

Some cases hold that, if the restraints are limited in time and reasonable in application, they are valid. n67 One who owns a fee simple in real property has an estate that may last forever, having no termination; an estate which one may dispose of as one chooses, by will, deed or otherwise, and one descendible, not to some of one's heirs, but to any and all of the heirs one may have. n68 It has been held that a provision in a will prohibiting or postponing partition for a reasonable time or until the happening of a prescribed event is not a restraint on alienation, or a limitation repugnant to a fee. n69 It must not be understood from this that a fee simple estate is one free from the limited restraints which the law imposes on alienation, such as a limitation of the amount of land one may devise for charitable purposes, disposition in defraud of creditors, sale during the pendency of an action involving the title, and conveyances in derogation of the rights of dower, curtesy and homestead.

A permanent first call on the right to sell or lease is an invalid restraint on alienation. n70 A similar rule has been applied to options. n71 An attempt to restrict the sale of real estate by a provision in the deed when title is vested in fee is void as repugnant to the purpose of the grant. n72 Where the owners of an interest in realty conveyed such interest but, by agreement in the deed retained an interest in the realty, it was held that such retained interest would support the imposition on alienation where it was reasonably necessary to protect the interest retained. n73

Even where not void, agreements restricting the right to alienate or to make provision for any person by will are within the Statute of Frauds. n74

A condominium requirement that one who leases to sell must give a first call to the association is not an illegal restraint against alienation. n75

A contractual right granted by a person, and heirs and assignees, unlimited as to the time to purchase land on the same terms as the owner could and would observe, is void as a restraint on alienation. n76

An option violates the rule against remoteness of vesting where the parties had intended to exercise the option, if at all, only on the current contingency and that there was a possibility that the contingency might not occur within lives in

being plus twenty-one years. n77

Some courts have distinguished between options appurtenant to leases which would not violate the rule and those which are independent which are held to be subject to the rule. n78

An implied covenant not to partition is not void as a restraint on alienation. n79

The *Restatement of Property* classifies restraints on alienation into disabling restraints, forfeiture restraints and promissory restraints. n80 The public policy against restraints on alienation has sometimes taken on a constitutional aspect extending to legislation. n81

If an invalid restraint on alienation is so interwoven with the deed as to constitute a part thereof, the grant itself is a defeasible estate. n82

The courts are divided as to the validity of clauses in mortgages purporting to give the mortgagee the right to accelerate the indebtedness on sale of the mortgage premises. n83

COMPUTER-ASSISTED RESEARCH

LEXIS: restraint! w/2 alienation

FOOTNOTES:
(n1)Footnote 10. *See* Ralph Norvell, *The Power of Alienation: Direct Restraint v. Suspension, 31 N.Y.U. L. Rev. 894 (1956);* Merrill I. Schnebly, *Restraints Upon the Alienation of Legal Interests, 44 Yale L.J. 960 (1935).*

See Richard E. Manning, *The Development of Restraints on Alienation Since Gray, 48 Harv. L. Rev. 373 (1935);* Jack J. Rappeport, *The Equitable Separate Estate and Restraints on Anticipation, Its Modern Significance, 11 Miami L.Q. 85 (1957);* Herbert A. Bernhard, *The Minority Doctrine Concerning Direct Restraints on Alienation, 57 Mich. L. Rev. 1173 (1959); Direct Restraints on Alienation of Property in Mississippi, 34 Miss. L.J. 333 (1963).*

See also Oliver E. Laymon, *The Residence Requirement -- Indirect Restraint on Alienation?, 17 S.D.L. Rev. 327 (1972);* Ronald R. Volkmer, *The Application of the Restraints on Alienation Doctrine to Real Property Security Interests, 58 Iowa L. Rev. 747 (1973).*

Distinguishing between rule against restraints and rule against remoteness. *Davies v. McDowell, 549 S.W.2d 619 (Mo. App. 1977).*

A fee upon condition subsequent providing for forfeiture is not an illegal restraint on alienation. *Floyd v. Hoover, 234 S.E.2d 89 (Ga. App. 1977).*

See Bernhard, *The Minority Doctrine Concerning Direct Restraints on Alienation, 57 Mich. L. Rev. 1173; Direct Restraints on Alienation in Iowa, 22 Drake L. Rev. 342. Deviney v. Nationsbank, 993 S.W.2d 443 (Tex. App. 1999).*

(n2)Footnote 11. *De Peyster v. Michael, 6 N.Y. 467 (1852).*

(n3)Footnote 12. 18 Edw.

(n4)Footnote 13. Coke on Littleton, § 201 b. 2 William Blackstone, Commentaries, ch. 7. *See* John Dalrymple, An Essary Toward a General History of Fendal Property in Great Britian (3d ed. 1758) ch. 384.

"This is a principle founded in natural law." Aristotle has it that, "It is the definition of property to have in one's self the power of alienation." Grotius said: "Since the establishment of property, men who are masters of their own goods have by the law of nature the power of disposing of or of transferring all or any part of their effects to other persons, for this is the very nature of property, -- I mean of full and complete property." Grotius, b. 1, ch. 6, § 1. *De Peyster v. Michael, 6 N.Y. 467 (1852).*

Holding that a vested remainder after an income trust for the life of another can be made inalienable by the donor. *In re Vought's Estate, 250 N.E.2d 343 (N.Y. 1969).*

Free alienation of property is one of the essential ownerships of common-law property. *Board of County Comm'rs Pitkin County v. Pfeifer, 546 P.2d 946 (Colo. 1976).*

(n5)Footnote 14. *Howell v. Deady, 48 F. Supp. 104 (D. Or. 1939).*

(n6)Footnote 15. *De Peyster v. Michael, 6 N.Y. 467,* (1852).

> Restraints upon alienation of lands held in fee simple were of feudal origin. A feoffment in fee did not originally pass an estate in the sense in which we now understand it. The purchaser took only an usufructuary interest, without the power of alienation in prejudice of the heir, or of the lord. In default of heirs, the tenure became extinct, and the land reverted to the lord. The heir took by purchase and independent of the ancestor, who could not alien, nor could the lord alien the seigniory without the consent of the tenant. This restraint on alienation was a violent and unnatural state of things, contrary to the nature and value of the property, and the inherent and universal love of independence. It arose partly from favor to the heir, and partly from favor to the lord; and the genius of the feudal system was originally so strong in favor of restraint upon alienation that, by a general ordinance mentioned in the Book of Feifs, the hand of him who wrote a deed of alienation was directed to be struck off... . All the land in the kingdom is supposed, says Blackstone, to be holden mediately or immediately of the king, who is styled the lord paramount, or above all. Such tenants as held under the king immediately, when they granted out portions of their lands to inferior persons, became also lords with respect to those inferior persons, as they were still tenants with respect to the king, and, thus partaking of a middle nature, were called mesne or middle lords. So that, if the king granted a manor to A, and he granted a portion of the land to B, now B was said to hold of A, and A of the king; or, in other words, B held his lands immediately of A, but mediately of the king. The king, therefore, was styled lord paramount; A was both tenant and lord, or was a mesne lord, and B was called tenant paravail, or the lowest tenant, being he who was supposed to make avail or profit of the land. Out of the feudal tenures or holdings sprung certain rights and incidents, among which were fealty and escheat. Both these were incidents of socage tenure, of which alone it is necessary to speak. Fealty was the obligation of fidelity which the tenant owed to his lord. Escheat was the reversion of the estate on a grant in fee simple upon a failure of the heirs of the owner. Fealty was annexed to and attendant on the reversion. They were inseparable. These incidents of feudal tenure belonged to the lord of whom the lands were immediately holden; that is to say, to him of whom the owner for the time being purchased.

(n7)Footnote 16. Other cases recognized the force of *quia emptores* or the rule against restraint on alienation. So the *statute quia emptores* was never in force in New York, and restraints upon alienation could be made until July 4, 1776, from which time the statutes of 1779 and 1787 took effect retrospectively. *De Peyster v. Michael, 6 N.Y. 467 (1852).*

(n8)Footnote 17. Kenelm Edward Digby, An Introduction to the Law of History of Real Property (9th ed. 1892), 157, *so in* Magna Carta.

(n9)Footnote 18. Bracton, Lib. 11, cap. 19, fol. 18.

(n10)Footnote 19. Bracton, Lib. 11, cap. 19, fol. 45. "If a feoffment be made upon this condition that the feoffee shall not alien the land to any, this condition is void, because, when a man is so enfeoffed of lands or tenements, he hath power to alien them to any person by the law. For if such a condition should be good, then the condition should oust him of all power which the law gives him, which should be against reason and therefore such a condition is void." Littleton, Tenures, § 360; Coke on Littleton, § 222b.

(n11)Footnote 20. Littleton, Tenures, § 361.

(n12)Footnote 21. Littleton, Tenures, § 361; Coke on Littleton, § 233b, mentioning restraints on alienation to religious men and Jews since this was mortmain.

(n13)Footnote 22. Littleton, Tenures, § 263, indicated that a condition could not be imposed against alienation. Similar early decisions appear in Chudleigh's case, 1 Coke 120a, 1 Coke 131 b.

Littleton held that conditions against alienation of estates in fee were void.

Tenures, § 360, unless they merely prohibited alienation to certain persons or the like in which case the condition did not take away all power of alienation, § 361. And conditions against alienation of fee lands were good, § 362. But Coke insisted that this could not prevent the suffering of a common recovery. Coke on Littleton, § 224a.

Disabling restraint on alienation invalid though only for a limited time. *Page v. Page, 394 P.2d 612 (Utah 1964).*

A covenant of first refusal is not an unreasonable restraint on alienation. *Gilmore v. Letcher, 508 S.W.2d 257 (Mo. App. 1974). Emmons v. Trout Lake Club, Inc., 605 N.Y.S.2d 169 (1993)* (Right of first refusal is not an unreasonable restraint on alienation.); *Gore v. Beren, 867 P.2d 330 (Kan. 1994)* (Right of first refusal did not violate rule against perpetuities).

(n14)Footnote 23. *See* Digby, *supra,* note 15 at 157-168, 234-236.

Any attempt to annex a general restriction on alienation to a gift of any property is void as being repugnant to the gift. Joshua Williams, Principles of the Law of Real Property (17th ed.), 88. *In re Dugdale, 38 Ch. Div. 176.*

See Everett Fraser, The Rule Against Restraints on Alienation and Against Suspension of the Absolute Power of Alienation in Minnesota, 8 Minn. L. Rev. 185, 295, 9 Minn. L. Rev. 314 (1925); Edwin C. Goddard, *Perpetuity Statutes, 22 Mich. L. Rev. 95 (1923);* Ralph E. Kharas, *Trusts and the Suspension of the Power of Alienation in New York, 13 N.Y.U. L.Q. Rev. 191 (1936);* Manning, *The Development of Restraints on Alienation since Gray, 48 Harv. L. Rev. 373 (1935);* Rundell, *Perpetuities in Personal Property in Wisconsin, 4 Wis. L. Rev. 1 (1935);* Oliver S. Rundell, *The Suspension of the Absolute Power of Alienation, 19 Mich. L. Rev. 235 (1921);* Louisa Barcroft Runk, *American Statutory Modifications of the Rule Against Perpetuities of Trusts for Accumulations and of Spendthrift Trusts, 80 U. Pa. L. Rev. 397 (1932);* Merrill I. Schnebly, *Restraints Upon the Alienation of Legal Interests, 44 Yale L.J. 961 (1935);* Lowell Turrentine, *Suggestions for Revision of Provisions of the California Civil Code Regarding Future Interests, 21 Cal. L. Rev. 1 (1933);* William Walsh, *Indestructible Trusts as Perpetuities in New York, 43 Yale L.J. 1211;* Horace E. Whiteside. *Suspension of the Power of Alienation in New York, 13 Cornell L.Q. 31, 167 (1928).*

Absolute restraint on alienation for life is valid, and implying a right of re-entry where attempted alienation. *Atkinson v. Kish, 420 S.W.2d 104 (Ky. 1967).*

Sustaining restraint on alienation as designed to obtain or encourage acceptance of social or economic end. *Baker v. Loves Park Sav. & Loan Ass'n, 333 N.E.2d 1 (Ill. 1975).*

Holding absolute restraint of power of alienation of life estate is void. *Miller v. O'Neil, 361 N.E.2d 1165 (Ill. App. 1977).*

Inhibition against alienation reserved in a deed is repugnant to the fee. *Floyd v. Hoover, 234 S.E.2d 89 (Ga. App. 1977).*

(n15)Footnote 24. *Wright v. Pritchett, 102 S.E.2d 602 (Ga. 1958); Thompson v. Murphy, 37 N.E. 1094 (Ind. 1894); Morse v. Blood, 71 N.W. 682 (Minn. 1897); Diamond v. Rotan, 124 S.W. 196 (Tex. Civ. App. 1909); Bergin v. Bergin, 312 S.W.2d 409 (Tex. Civ. App. 1958); Kitchens v. Kitchens, 372 S.W.2d 249 (Tex. Civ. App. 1964).*

A void restraint was found. *La Sala v. American Sav. & Loan Ass'n, 489 P.2d 1113 (Cal. 1971); Cherry v. Home Sav. & Loan Ass'n, 81 Cal. Rptr. 135 (1969).*

Public policy against restraints on alienation. *Ambrose v. First Nat'l Bank of Nev., 482 P.2d 828 (Nev. 1971).*

General restraints on alienation are void as against public policy. *Southwestern Bell Tel. Co. v. Gravitt, 551 S.W.2d 421 (Tex. Civ. App. 1976).*

Direct Restraints on Alienation in Iowa, 22 Drake L. Rev. 342 (1973). Robbins v. HNG Oil Co., 878 S.W.2d 351 (Tex. App. 1994) (Restraints on alienation are contrary to public policy and forbidden and disallowed).

(n16)Footnote 25. "But the case before us, is the devise of an absolute fee, with a clause restraining the alienation and incumbering of the estate for a limited period, intended, no doubt, for the protection of the devisees, who alone are interested in the estate devised. In holding that such restraint is repugnant to the nature of the estate devised, and is void as against public policy, which in this state, in the interest of trade and commerce, gives to every absolute owner of property, who is *sui Juris*, the power to control and dispose of such property, and subjects the same to the payment of his debts, we are fully aware of the fact that many authorities may and have been cited to the contrary. Others, however, support the view we have taken, but I shall not attempt either to review or reconcile the cases, being content to rest the decision upon what we conceive to be sound principle and sound policy. The owner of property cannot transfer it absolutely to another, and at the same time keep it himself. We fully admit that he may restrain or limit its enjoyment by trusts, conditions or covenants, but we deny that he can take from a fee simple estate its inherent alienable quality, and still transfer it a fee simple." *Anderson v. Cary, 36 Ohio St. 506 (1881).*

In re Budd's Estate, 105 N.W.2d 358 (Wis. 1960) (limit. in a devise against sale for five years held void).

(n17)Footnote 26. *Kentland Coal & Coke Co. v. Keen, 183 S.W. 247 (Ky. 1916); Hiles v. Benton, 196 N.W. 903 (Neb. 1924); Andrews v. Hall, 58 N.W.2d 201 (Neb. 1953)* (partial restraint on alienation doctrine now repudiated based on public policy).

(n18)Footnote 27. *Cotney v. Eason, 113 So. 2d 512 (Ala. 1959)* (provision for termination of life estate and to go to testator's heirs if life estate was sold was valid). *Catholic Bishop of Chicago v. Murr, 120 N.E.2d 4 (Ill. 1954). See* § 2016.

Gift of life estate without right of alienation without consent of children together with residuary clause carrying the remainder, created a fee simple absolute with no restraint on alienation permitted. *Harvey v. Smith, 305 P.2d 718 (Cal. App. 1957).*

(n19)Footnote 28. *Bergin v. Bergin, 315 S.W.2d 943 (Tex. 1958)* (there could be a restriction on alienation in a bequest of stock).

Denying the reasonable restraints on alienation. *Andrews v. Hall, 58 N.W.2d 201 (Neb. 1953).*

See Herbert A. Bernhard, *The Minority Doctrine Concerning Direct Restraints on Alienation, 57 Mich. L. Rev. 1173 (1959). Wonsey v. Life Ins. Co. of North America, No. 98-40239, 1998 U.S. Dist. LEXIS 20744,* at *1 (S.D. Mich. Dec. 18, 1998) (Michigan held assignment of periodic payments pursuant to an annuity contract to be a fair restraint on alienation); Johnson v. First Colony Life Ins. Co., F. Supp. 2d 1227 (W.D. Cal. 1998) (California upheld nonassignability clause prohibiting assignment of right to receive proceeds of a contract as a valid restraint in denying summary judgment); *Mardis v. Brantley, 717 So. 2d 702,* (La. Ct. App. 1998) (In dictum, Louisiana court stated that persons who benefit from a restraint may enforce it in equity for injunctive relief).

(n20)Footnote 29. *Los Angeles Inv. Co. v. Gary, 186 P. 596,* (Cal. 1919); *Littlejohns v. Henderson, 295 P. 95 (Cal. App. 1931); Parmalee v. Morris, 188 N.W. 330 (Mich. 1922).*

A covenant against resale of realty without consent of adjoining lots is not an invalid absolute restraint on alienation. *Ink v. Plott, 175 N.E.2d 94 (Ohio 1960).*

Strict construction against restraints on alienation or assignment. *Chertkof v. Southlands Corp., 371 A.2d 124 (Md. 1977).*

(n21)Footnote 30. New York Rev. Stat. 1829, pt. 2, ch. 4, t. 4.

Relating perpetuities to restraints on alienation. *Robinson v. Speer, 185 So. 2d 730 (Fla. 1966).*

Free alienation of property is one of the essentials of common-law property ownership. *Board of County Comm'rs of Pitkin County v. Pfeifer, 546 P.2d 946 (Colo. 1976).*

(n22)Footnote 31. "The view that there was no such general New York rule as ... Vesting, appears to have been based upon a supposition that at the time when the Revisers were framing, and the Legislature enacting, the sections of the Revised Statutes which deal with these matters, it was still generally thought that the common-law Rule against Perpetuities was confined to a requirement, by the end of a term prescribed by law, of absolute alienability, and that it was only later that it came to be recognized that the Rule was a rule against remoteness of vesting." Chaplin, Suspension of the Power of Alienation (3d Ed.) §§ 2-4.

New York has held that a restraint on alienation imposed a vested remainder limited upon an entrusted life estate. *In re Vought's Estate, 250 N.E.2d 343 (N.Y. 1969).*

Restraint provision in a mortgage restricting the sale of property was a valid restraint on alienation. *Baker v. Loves Park Sav. & Loan Ass'n, 333 N.E.2d 1 (Ill. 1975).*

Holding the due on alienation clause in mortgages as an unreasonable restraint on alienation without a showing of necessity of protection of the mortgagee's legitimate interests. *Sanders v. Hicks, 317 So. 2d 61 (Miss. 1975).*

(n23)Footnote 32. *In re Sahlender's Estate, 201 P.2d 69 (Cal. App. 1948); Rodey v. Stotz, 273 N.W. 404 (Mich. 1937); Buck v. Walker, 132 N.W. 205 (Minn. 1911); In re Wilcox, 87 N.E. 497 (N.Y. 1909); Gange v. Hayes, 237 P.2d 196 (Or. 1951)* (distinguishing between restraints on alienation and rule against perpetuities).

Distinguishing between the rule against remoteness of vesting and the rule against restraints on alienation. *Atchison v. Englewood, 463 P.2d 297 (Colo. 1970).*

Holding that a vested remainder after a life estate in trust is inalienable if the donor expressly so provided. *In re Vought's Estate, 250 N.E.2d 343 (N.Y. 1969).*

Mississippi has a common-law rule against remoteness plus a statute controlling restraints on alienation of life estates. *Sanders v. Hicks, 317 So. 2d 61 (Miss. 1975).*

The District of Columbia has both a statute against perpetuities and the common-law rule against perpetuities. *In re Burrough's Estate, 521 F.2d 277 (D.C. Cir. 1975).*

Held that a statute permitting absolute restraints for a reasonable period on alienation was intended to cover remoteness of vesting, restated the common law and did not repeal the common-law rule against unreasonable restraints and power of alienation but that an absolute restraint for life was unreasonable. *Robertson v. Simmons, 322 S.W.2d 476 (Ky. 1959).*

(n24)Footnote 33. *Beekman v. Bonsor, 23 N.Y. 298 (1861); Kalish v. Kalish, 59 N.E. 917 (N.Y. 1901); Smith v. Chesebrough, 68 N.E. 625 (N.Y. 1903); In re Hitchcock's Will, 118 N.E. 220 (N.Y. 1917).*

New York is not definite as to the effect of limitations on assignment of trust principal. Affirmative as valid, *In re Vought's Estate, 293 N.Y.S.2d 34 (1967), but see Schrader v. Smith, 169 N.Y.S.2d 797 (1958). Carroll v. Eno, 654 N.Y.S.2d 368 (1997).*

(n25)Footnote 34. Cal. Civ. Code §§ 1872, 715, 716, 770, 772, 773, 777. *In re McCray's Estate, 268 P. 647 (Cal. 1928), rev'd,* P. 940 (Cal. App. 1927). *In re Hinckley's Estate, 58 Cal. 457 (1881),* California before the statute, had and now has the common law.

See Robert H. Gerdes, *Perpetuities and the California Rule Against Suspension of the Absolute Power of Alienation, 16 Cal. L. Rev. 81;* Wesley N. Hohfeld, *The Need of Remedial Legislation in the California Law of Trusts and Perpetuities, 1 Cal. L. Rev. 305 (1913).*

But the power to alienate is not suspended if there are persons in being who can join to alienate. *Toland v. Toland, 55 P. 681 (Cal. 1898); In re Campbell's Estate, 87 P. 573 (Cal. 1906); In re Phelp's Estate, 190 P. 17 (Cal. 1920).*

A provision of the California Constitution which prohibits the state from limiting the right of any person to alienate as he in his absolute discretion chooses, violates the 14th Amendment of the Constitution and is invalid. *Mulkey v. Reitman, 13 P.2d 825 (Cal. App. 1966), aff'd Reitman v. Mulkey, 387 U.S. 369 (1967).*

(n26)Footnote 35. Cal. Stat. 1951, ch. 1463, § 7.

Restraint on alienation is statutory. *Dallapi v. Campbell, 114 P.2d 646 (Cal. App. 1941).*

Lacking any danger to the security or frustration of purpose, a due on sale clause could not be enforced. *Fidelity Land Dev. Corp. v. Reider & Sons, 377 A.2d 691 (N.J. Super. 1977).*

See Connie B. Leonis, *The Due-On-Sale Clause as a Reasonable Restraint on Alienation -- Proposal for Texas. 8 St. Mary's L.J. 514 (1976);* Philip S. Ashley *Use of clauses "due on" to gain collateral benefits: A Common Sense Defense, 10 Tulsa L.J. 590 (1975).*

(n27)Footnote 36. Held a restraint on alienation. *Tucker v. Lassen Sav. & Loan Ass'n, 526 P.2d 1169 (Cal. 1974); Baker v. Loves Park Sav. & Loan Ass'n, 333 N.E.2d 1 (Ill. 1975); Coast Bank v. Minderhout, 392 P.2d 265 (Cal. 1964).*

Held not a restraint on alienation. *Board of Church Erection Fund v. First Presbyterian Church, 53 P. 671 (Wash. 1898); Baltimore Life Ins. Co. v. Harn, 486 P.2d 190 (Ariz. App. 1971); Tucker v. Pulaski Fed. Sav. & Loan Ass'n, 481 S.W.2d 725 (Ark. 1972); Mutual Fed. Sav. & Loan Ass'n v. Wisconsin Wire Works, 205 N.W.2d 762 (Wis. 1973).*

Metropolitan Life Ins. Co. v. Strand, 876 P.2d 1362 (Kan. 1994) (Due on sale clause in mortgage held not a restraint on alienation).

"Due on sale" held an unreasonable restraint on alienation. *Tucker v. Lassen Sav. & Loan Ass'n, 526 P.2d 1169 (Cal. 1974).*

See Geoffrey S. Mombach & Robert Levin, *Debt Acceleration on Transfer of Mortgaged Property, 29 U. Miami L. Rev. 584 (1975);* Ronald R. Volkmer, *The Application of the Restraints on Alienation Doctrine to Real Property Security Interests, 58 Iowa L. Rev. 747 (1973); Deeds of Trust -- Restraints Against Alienation -- "Due on" Clause is an Unreasonable Restraint on Alienation, Absent a Showing of Protection of Mortgagee's Legitimate Interests, 47 Miss. L.J. 331 (1976).*

"Due on sale" provision in a mortgage held enforceable without a showing that foreclosure is necessary to protect security. *Wellenkamp v. Bank of Am. Nat'l Trust & Sav. Ass'n, 137 Cal. Rptr. 488 (1977).*

Due on sale clauses are void in Michigan as unreasonable restraint in alienation. *Nickols v. Ann Arbor Sav. & Loan Ass'n, 250 N.W.2d 804 (Mich. 1977).*

Refusing to permit enforcement of due on sale clause in mortgage. *Continental Fed. Sav. & Loan Ass'n v. Fetter, 564 P.2d 1013 (Okla. 1977)* (court found transfer fee charged was unreasonable and see cases cited).

"Due on sale" upheld. *Ashley v. Leitch, 533 S.W.2d 831 (Tex. Civ. App. 1976).*

Due on sale clause upheld only where transfer increased lender's risk. *Bellingham First Fed. Sav. & Loan Ass'n v. Garrison, 553 P.2d 1090 (Wash. 1976).*

See also Robert William Cherry, Jr. *Mortgages -- Use of Due on Sale Clause by a Lender Is Not a Restraint on Alienation in North Carolina, 55 N.C.L. Rev. 310 (1977).*

Holding that restraints on alienations in mortgages are not invalid per se but valid only if reasonable under the circumstances. *Sanders v. Hicks, 317 So. 2d 61 (Miss. 1975).*

Mortgage "due on sale" applicable only where security threatened. *First Fed. Sav. & Loan Ass'n v. Britton, 345 So. 2d 300 (Ala. App. 1977).*

Due on sale provision in mortgage held a restraint on alienation. *Nichols v. Ann Arbor Fed. Sav. & Loan Ass'n, 250 N.W.2d 804 (Mich. App. 1977).*

Due on sale valid only if security risk is increased by transfer. *Bellingham First Fed. Sav. & Loan Ass'n v. Garrison, 553 P.2d 1090 (Wash. 1976).*

Due on sale clause held valid. *Mutual Fed. Sav. & Loan Ass'n v. Wisconsin Wire Works, 205 N.W.2d 762 (Wis. 1973); Baker v. Love's Parks Sav. & Loan Ass'n, 333 N.E.2d 1 (Ill. 1975).*

See Richard W. Barke & Iona I. Tagaropulos *Michigan's Looking Glass World of Due on Sale Clauses, 24 Wayne L. Rev. 971 (1978);* Herbert A. Bernhard, *The Minority Doctrine Concerning Direct Restraints on Alienation, 57 Mich. L. Rev. 1173 (1959);* William M. Flaherty, *Illinois Land Trusts and the Due-On-Sale Clause, 65 Ill. B.J. 376 (1977);* Griffith L. Humphrey, *Tucker v. Larson -- The Demise of the Due on Sale Clause in California? 10 U.S.F. L. Rev. 665 (1976);* Ronald R. Volkmer, *The Application of the Restraints on Alienation Doctrine to Real Property Security Interests, 58 Iowa L. Rev. 747-804 (1973);* Bernie Wolfe, *Beyond Tucker v. Lassen: The Future of the Due on Sale*

Clause of California, 27 Hastings L.J. 475 (1975); Mortgages--Use of Due On Sale Clause by a Lender Is Not a Restraint on Alienation in North Carolina, 55 N.C. L. Rev. 310; Kathy Agan Knox *The Due On Sale Clause: A Preemptive Controversy*, 10 Loyola L. L.A. Rev. 629 (1977); Connie B. Leonis, *The Due-On-Sale Clause as a Reasonable Restraint on Alienation -- Proposal for Texas*, 8 St. Mary's L. Rev. 514 (1976).

(n28)Footnote 37. Ariz. Rev. Code 1928, §§ 2761-2765, 2768. Originally this came from *Wisconsin. Lowell v. Lowell, 240 P. 280 (Ariz. 1925)* (two lives in being and 21 years thereafter except as to charitable and public trusts).

(n29)Footnote 38. Idaho Code 1932, §§ 54-111, 54-202 (lives in being).

A restraint on alienation of the right of a beneficiary to receive immediately the principal of a trust was void. *Ullman v. Cameron, 78 N.E. 1074 (N.Y. 1906).*

(n30)Footnote 39. Mich. Rev. Stat. 1846, ch. 14, §§ 14-16, 20; Mich. Comp. Laws 1929, §§ 12934-12936, 12940, 12943 (two lives in fee but a contingent remainder on a prior remainder in fee to take effect before reaching 21 by the first remainderman, is valid).

Alienation is not suspended if all in being can convey. *Cary v. Toles, 177 N.W. 279 (Mich. 1920); Russell v. Musson, 216 N.W. 428 (Mich. 1927).*

(n31)Footnote 40. Minn. Stat. 1927, §§ 8044, 8046, 8050, 8053 (two lives in being plus minority thereafter).

Alienation not suspended if all in being can convey. *Buck v. Walker, 132 N.W. 205 (Minn. 1911); Mineral Land Inv. Co. v. Bishop Iron Co., 159 N.W. 966 (Minn. 1916); Larson v. Johnson, 221 N.W. 871 (Minn. 1928).*

Minn. Stat. § 500.13. Absolute power of alienation may not be suspended for longer than two lives except a contingent remainder may be limited on death or other contingency before 18.

(n32)Footnote 41. Mont. Rev. Code 1921, §§ 6732-6735, 6738 (lives in being plus minorities).

(n33)Footnote 42. N.D. Laws 1933, ch. 203.

N.D. Cent. Code. Absolute power of alienation not suspended longer than lives in being and 21 years, § 47-02-27.

Restraints on alienation repugnant to the interest created are void, § 47-02-26.

N.D. Cent. Code. Alienation is suspended when there are no existing persons who can convey, § 47-02-31.

(n34)Footnote 43. Okla. Stat. §§ 11756, 11757, 11759, 11760 (lives in being plus minority).

See Garrett Logan, *Oklahoma Perpetuities and Such, 7 Tulsa L.J. 5 (1971).*

Okla. Stat. Ann. Absolute power of alienation suspension prohibited beyond lives in being, § 60-31.

But a contingent remainder in fee may be limited on death or other contingency before majority.

Restraints on alienation arising by contract are void if there is no forfeiture clause (dictum). *Lohmann v. Adams, 540 P.2d 552 (Okla. 1975)* (enforcing forfeiture clause).

(n35)Footnote 44. S.D. Comp. Laws §§ 294, 295, 320-323, 326 (lives in being plus minority).

(n36)Footnote 45. Wis. Stat. now §§ 230.14, 230.15 (lives in being plus 30 years).

Until 1925 (Wis. Stat. § 230.14) in Wisconsin, neither the rule against remoteness nor against restraints on alienation was applicable to personalty. *Dodge v. Williams, 50 N.W. 1103 (Wis. 1879); Becker v. Chester, 91 N.W. 87 (Wis. 1902).*

(n37)Footnote 46. A void restraint was found. *La Sala v. American Sav. & Loan Ass'n, 489 P.2d 1113 (Cal. 1971); Cherry v. Home Sav. & Loan Ass'n, 81 Cal. Rptr. 135 (1969).*

Prohibition against alienation in life estate is void. *Johnson v. Flanders, 89 S.E.2d 829 (Ga. App. 1955).*

Restriction on alienation of stock of a cooperative apartment upheld on the grounds that the restraint was of greater utility to the cooperative than to the damage which could be done to the public interest by reason of the rule against restraint on alienation. *Gale v. York Ctr. Community Coop., Inc., 171 N.E.2d 30 (Ill. 1960).*

A statute relating to the rule against remoteness does not affect the common-law rule against suspension of the power of alienation. *Robertson v. Simmons, 322 S.W.2d 476 (Ky. 1959).*

Both direct and indirect restraints which affect the marketability are void. *Cast v. National Bank of Commerce Trust & Sav. Ass'n of Lincoln, 183 N.W.2d 485 (Neb. 1971).*

Devise on condition that if devisee ever desired to sell, he must give the first call to X limited the right of alienation. *Holien v. Trydahl, 134 N.W.2d 851 (N.D. 1965).*

Devise to three children not to be sold except by mutual agreement held a void restraint on alienation. *Pavlikowski v. Ehrhardt, 161 A.2d 652 (Pa. Super. 1960).*

Restraint on alienation until grandchild became 21 was void.

A devise subject to a right of repurchase by a third person is an invalid restraint on alienation and being unlimited also violates the rule against remoteness. *Herzog v. Mattern, 359 S.W.2d 86 (Tex. Civ. App. 1962).*

Option to repurchase when church was financially able was limited on a life in being and so did not violate the rule against perpetuities, but was an unreasonable restraint on alienation. *Trustees of Casa View Assembly of God Church v. Williams, 414 S.W.2d 697 (Tex. Civ. App. 1967).*

Not to sell or mortgage deceased husband's real property until A became 21 was a void restriction on alienation of property. *Page v. Page, 394 P.2d 612 (Utah 1964).*

Provision in a will that devisee was not to sell, mortgage or lease any of the real estate devised for three years without the written agreement of a third party was an invalid restraint on alienation. *Ford v. Allen, 526 S.W.2d 643 (Tex. Civ. App. 1975).*

Florida prevents only unlimited or absolute restraints. *Robinson v. Randolph, 21 Fla. 629 (1885); Davis v. Geyer, 9 So. 2d 727 (Fla. 1942). LaFond v. Rumler, 574 N.W.2d 40 (Mich. App. 1997)* (Although the addendum did not restrict plaintiff's right to sell the property, the court found that it unduly restricted her right to sell the property at her chosen price and therefore was an unreasonable restraint on alienation).

(n38)Footnote 47. Coke on Littleton, § 436.*Murray v. Green, 28 P. 118 (Cal. 1883)* (restraint held void as repugnant); *Alderman v. Crenshaw, 66 S.E.2d 265 (Ga. App. 1951)* (restraint void); *McCleary v. Ellis, 6 N.W. 571 (Iowa 1880); Hutchinson v. Loomis, 244 S.W.2d 751 (Ky. 1951)* (forbidding conveyance of realty to anyone except heir of grantor and placing the burden of supporting grantor, providing for forfeiture and reserving life estate, restraint on

alienations of realty during life of grantor was reasonable and if unreasonable, restraint was void and deed stood the same as if no restraint on alienations had been imposed and in either event grantee's son took fee); *Williams v. Robinson, 36 A.2d 547 (Md. 1944); Kessner v. Phillips, 88 S.W. 66 (Mo. 1905); Loosing v. Loosing, 122 N.W. 707 (Neb. 1909), Watson v. Dalton, 18 N.W.2d 658, 20 N.W.2d 610 (Neb. 1945); Drachenberg v. Drachenberg, 58 A.2d 861 (N.J. Eq. 1948)* (conditions against alienation to be strictly construed); *De Peyster v. Michael, 6 N.Y. 467 (1852), Hardy v. Galloway, 15 S.E. 890 (N.C. 1892); Hamilton v. Link-Hellmuth, Inc., 146 N.E.2d 615 (Ohio App. 1957)* (restraints on alienation not favored); *Grossman v. Hill, 122 A.2d 69 (Pa. 1956)* (building restrictions which in effect prevented dividing two lots held void as a restraint on alienation); *Knight v. Chicago Corp., 183 S.W.2d 666 (Tex. Civ. App. 1944).*

See Percy Bordwell, *Alienability and Perpetuities, 22 Iowa L. Rev. 437 (1937); 23 Iowa L. Rev. 1 (1938).*

Both direct and indirect restraints which affect the marketability are void. *Cast v. National Bank of Commerce Trust & Sav. Ass'n of Lincoln, 183 N.W.2d 485 (Neb. 1971).*

See Direct Restraints on Alienation in Iowa, 22 Drake L. Rev. 342 (1933). Anderson & Middleton Lumber Co. v. Quinault Indian Nation, 929 P.2d 379 (Wash. 1996).

(n39)Footnote 48. Littleton, Tenures, § 360. *Wills v. Pierce, 67 S.E.2d 239 (Ga. 1951); Alderman v. Crenshaw, 66 S.E.2d 265 (Ga. App. 1951)* (even though the grantor and grantee are cotenants); *Johnson v. Flanders, 89 N.E.2d 829 (Ga. App. 1955); Clayton v. Burch, 80 S.E.2d 29 (N.C. 1954).*

Conveyance on Condition of release of claims as expectant heir was valid. *Owens v. Lackey, 25 So. 2d 423 (Ala. 1946).*

See William F. Fratcher, *Restraints on Alienation of Legal Interests in Michigan Property, 50 Mich. L. Rev. 675 (1952).*

Kass v. Lewin, 104 So. 2d 572 (Fla. 1958) (statute preventing the conveyance of certain lands without recording a plat was held an unconstitutional restraint on alienation); *Jackson v. Jackson, 113 S.E.2d 766 (Ga. 1960)* (limitation not to convey to anyone not bearing the Jackson name was an invalid restraint).

A void restraint was found. *La Sala v. American Sav. & Loan Ass'n, 489 P.2d 1113 (Cal. 1971); Cherry v. Home Sav. & Loan Ass'n, 81 Cal. Rptr. 135 (1969).*

(n40)Footnote 49. *Wright v. Pritchett, 102 S.E.2d 602 (Ga. 1958); Buckner v. Hawkins, 52 S.E.2d 16 (N.C. 1949); Bergin v. Bergin, 312 S.W.2d 409 (Tex. Civ. App. 1958).*

"Who can say whether the time is reasonable, until the question has been settled in the court of last resort; and upon what standard of certainty can the court decide it? Or, depending as it must upon all the peculiar facts and circumstances of each particular case, is the question to be submitted to a jury? The only safe rule of decision is to hold, as I understand the common law for ages to have been, that a condition or restriction which would suspend all power of alienation for a single day, is inconsistent with the estate granted, unreasonable and void." *Mandlebaum v. McDonell, 29 Mich. 78 (1874).*

Absolute restraints on alienation even for a limited time is void. *Hankins v. Mathews, 425 S.W.2d 608 (Tenn. 1968).*

A covenant of first refusal is not an unreasonable restraint on alienation. *Gilmore v. Letcher, 508 S.W.2d 257 (Mo. App. 1974).*

If the limitation on alienation is so interwoven with the deed as to be part thereof, the deed is treated as defeasible

estate and upon alienation the estate terminates. *Floyd v. Hoover, 234 S.E.2d 89 (Ga. App. 1977).*

(n41)Footnote 50. *Schenk v. Piper Aircraft Corp., 377 F. Supp. 477 (1974).*

Conditions in restraint of alienation are to be strictly construed in view of the public policy against the same. *First United Presbyterian Church v. Christenson, 339 N.E.2d 15 (Ill. 1975).*

Holding that restraints on alienations in mortgages are not invalid per se but valid only if reasonable under the circumstances. *Sanders v. Hicks, 317 So. 2d 61 (Miss. 1975).*

Devise for life with remainders but limitation over if remaindermen sold before 25. Limitation held a void restraint on alienation. *Harvey v. Harvey, 524 P.2d 1187 (Kan. 1974).*

(n42)Footnote 51. *Swain v. Maxwell, 196 S.W.2d 780 (Mo. 1946).*

Restraint for life of grantor is reasonable. *Frazier v. Combs, 130 S.W. 812 (Ky. 1910); Pond Creek Coal Co. v. Runyan, 170 S.W. 501 (Ky. 1914); Kentland Coal & Coke Co. v. Keen, 183 S.W. 247 (Ky. 1916); Turner v. Lewis, 226 S.W. 367 (Ky. 1920).*

Restraint for life of grantee is reasonable. *Harkness v. Lisle, 117 S.W. 264 (Ky. 1909); Cropper v. Bowles, 150 S.W. 380 (Ky. 1912); Thurmond v. Thurmond, 228 S.W. 29 (Ky. 1921); Cammack v. Allen, 250 S.W. 963 (Ky. 1923).*

Restraint during life tenant's life valid. *Lawson v. Lightfoot, 84 S.W. 739 (Ky. 1905).* Restraint until grantee reaches a certain age. *Stewart v. Brady, 66 Ky. 623 (3 Bush 1868); Wallace v. Smith, 68 S.W. 131 (Ky. 1902); Call v. Shewmaker, 69 S.W. 749 (Ky. 1902); Smith v. Isaacs, 78 S.W. 434 (Ky. 1904).* Not to sell for 20 years without other heir's consent. *Francis v. Big Sandy Co., 188 S.W. 345 (Ky. 1916); Cooper v. Knuckles, 279 S.W. 1084 (Ky. 1926).* Not to sell for 15 years after grantor's death. *Speckman v. Meyer, 220 S.W. 529 (Ky. 1920).*

Limitation that life estate was not to be subject to claims of creditors was void. *Luther v. Patman, 141 S.W.2d 42 (Ark. 1940); Ehrisman v. Sener, 29 A. 719 (Pa. 1894).*

Restraint against selling to anyone but grantor's heirs held void. *Chappell v. Frick Co., 179 S.W. 203 (Ky. 1915). Restraints void. Saffold v. Wright, 15 S.W.2d 456 (Ky. 1929); Courts v. Courts, 18 S.W.2d 957 (Ky. 1929).*

Agreement not to alienate except to grantor's heirs is invalid. *In re Vincent's Estate, 324 P.2d 403 (Mont. 1958).*

The old Nebraska rule followed *Kentucky. Loosing v. Loosing, 122 N.W. 707 (Neb. 1909)* (restraint void where for lives of stated persons); *Hiles v. Benton, 196 N.W. 903 (Neb. 1924)* (life estate); *Peters v. Northwestern Mut. Life Ins. Co., 227 N.W. 917 (Neb. 1929)* (10 years); *Nebraska Nat'l Bank v. Bayer, 243 N.W. 115 (Neb. 1932)* (during life of life tenant).

Proviso in absolute gift that devisee could only alienate to daughter was void. *In re Jeromo's Will, 166 N.Y.S.2d 959 (1957).*

Condition subsequent in deed is not an invalid restraint on alienation. *Genet v. Florida East Coast Ry. Co., 150 So. 2d 272 (Fla. App. 1963).*

The mere fact that the restriction placed on property makes it less valuable does not constitute an invalid restraint on alienation. Holiday Out in *Am. at St. Lucie, Inc. v. Bowes, 285 So. 2d 63 (Fla. App. 1973).*

Restraints on alienation of vested remainder held valid. *In re Vought's Estate, 250 N.E.2d 343 (N.Y. 1969).*

A direct restraint on alienation of property given to charitable corporation was upheld. *Wachovia Bank & Trust Co. v. John Thomasson Constr. Co., 168 S.E.2d 358 (N.C. 1979).*

Condition that property be used only for a charitable purpose was not an invalid restraint. *Ohio Soc. for Crippled Children & Adults, Inc. v. McElroy, 191 N.E.2d 543 (Ohio St. 1963).*

An agreement with an association of lot owners that membership in the association was a condition precedent to the purchase of a lot. Three objections could prevent membership. It was held an invalid restraint on alienation. *Lauderbaugh v. Williams, 186 A.2d 39 (Pa. 1962).*

Provision in the declaration of condominium allowing unit owners to lease or rent units no more than a month's rent period of ownership was not an invalid restraint on alienation. *Kroop v. Caravelle Condominium, Inc., 323 So. 2d 307 (Fla. App. 1975).*

Articles of incorporation which gave corporation option to purchase shares of deceased stockholder was not an invalid restraint on alienation. *Genter v. Palmer & Co., 566 P.2d 1358 (Colo. App. 1977).*

Restriction as to use by "family" means those related by blood marriage or adoption. *Feely v. Birenbaum, 554 S.W.2d 432 (Mo. App. 1977). Lorentzen v. Smith, 5 P.3d 1082 (N.M. Ct. App. 2000)* (holding right of first refusal for purchase of land were not unlawful restraints on alienation).

(n43)Footnote 52. Condition subsequent of forfeiture if grantees conveyed or encumbered during lifetime of grantor was valid. *Furst v. Lacher, 182 N.W. 720 (Minn. 1921),* or to one of colored race; *Los Angeles Inv. Co. v. Gary, 186 P. 596 (Cal. 1919); Queensborough Land Co. v. Cazeaux, 67 So. 641 (La. 1915); Koehler v. Rowland, 205 S.W. 217 (Mo. 1918).*

(n44)Footnote 53. *Ricks v. Riddell, 26 So. 2d 782 (Miss. 1946); Lockyer v. Savage, 2 Str. 947, 93 Eng. Rep. 959.*

(n45)Footnote 54. Spendthrift trust held valid. *Nichols v. Eaton, 91 U.S. 716 (1875); Broadway Nat'l Bank v. Adams, 133 Mass. 170 (1881).*

Spendthrift trust created by the settlor for his own benefit is invalid. *Pacific Nat'l Bank v. Windram, 133 Mass. 175 (1882); Brahmey v. Rollins, 179 A. 186 (N.H. 1935).*

The mere fact that the restriction placed on property makes it less valuable does not constitute an invalid restraint on alienation. Holiday Out in *Am. at St. Lucie, Inc. v. Bowes, 285 So. 2d 63 (Mo. App. 1973).*

See Herbert A. Bernhard, *The Minority Doctrine Concerning Direct Restraints on Alienation 57 Mich. L. Rev. 1173.*

Conditions in restraint of alienation in a will must be stated unequivocally and are strictly construed. *Moody v. Moody Nat'l Bank of Galveston, 522 S.W.2d 710 (Tex. Civ. App. 1975).*

Leasing restriction in condominium held not an invalid restraint on alienation. *Seagate Condominium Ass'n, Inc. v. Duffy, 330 So. 2d 484 (Fla. App. 1976).*

Restraints on alienation void only if unreasonable. *Carpenter v. Winn, 566 P.2d 370 (Colo. App. 1977). Carey v. Lincoln Loan Co., 998 P.2d 724 (Or. Ct. App. 2000)* (prepayment limitation in land sale contract was not a restraint on alienation).

(n46)Footnote 55. *Smith v. Smith, 287 N.W. 411 (Mich. 1939). Alaska v. Native Village of Venite Tribal Gov't., 522 U.S. 520 (1998)..*

(n47)Footnote 56. *Northwest Real Estate Co. v. Serio, 144 A. 245 (Md. 1929); Hall v. Hoak, 36 S.E.2d 567 (Va. 1946). Floyd v. Hoover, 234 S.E.2d 89 (Ga. App. 1977).*

(n48)Footnote 57. *Defreese v. Lake, 67 N.W. 505 (Mich. 1896); Casgrain v. Hammond, 96 N.W. 510 (Mich. 1903); In re Rong's Estate, 123 N.W. 471, 806 (Minn. 1909); Beekman v. Bonsor, 23 N.Y. 298 (1861); Greenland v. Waddell, 22 N.E. 367 (N.Y. 1889); Cross v. United States Trust Co., 30 N.E. 125 (N.Y. 1892); Murphy v. Whitney, 35 N.E. 930 (N.Y. 1894);Schlereth v. Schlereth, 66 N.E. 130 (N.Y. 1903); State ex rel. Analis v. Hunter, 39 N.E.2d 851 (Ohio St. 1942); Bartron v. Codington County, 2 N.W.2d 337 (S.D. 1942); Campbell v. State, 122 P.2d 458 (Wash. 1942); Ford v. Ford, 33 N.W. 188 (Wis. 1887); Lamberton v. Pereles, 58 N.W. 776 (Wis. 1894).*

See *Camden Safe Deposit & Trust Co. v. Scott, 189 A. 653 (N.J. Eq. 1937); In re Friday's Estate, 170 A. 123 (Pa. 1933)* Mich. Comp. Laws 1929, §§ 12934, 12935; Minn. Stat. Supp. §§ 8044, 8045; Wis. Stat. 1937, §§ 230.14, 230.15.

See Maurice Finkelstein, Notes on the Rule Against Perpetuities in New York 26, St. Johns L. Rev. 245 (1952); *27 St. Johns L. Rev. 291 (1953).*

(n49)Footnote 58. *Knight v. Chicago Corp., 183 S.W.2d 666 (Tex. Civ. App. 1944); Carson v. Simmons, 96 S.E.2d 800 (Va. 1957).*

(n50)Footnote 59. Coke on Littleton, § 223a; *William Sheppard, The Touchstone of Common Assurances (6th ed. 1785)* 130. *See Murray v. Green, 28 P. 118 (Cal. 1883); Bassett v. Budlong, 43 N.W. 984 (Mich. 1889).*

Any annuity which may be assigned, sold or transferred does not suspend the power of alienation. *In re Clark's Will, 284 N.Y.S.2d 244 (1967).*

(n51)Footnote 60. *Arndt v. Miller, 144 N.E.2d 835 (Ill. App. 1957); In re Dees' Estate, 308 P.2d 90 (Kan. 1957).*

Robertson v. Simmons, 322 S.W.2d 476 (Ky. 1959) (option for unlimited time violated rule against unreasonable suspension of alienation).

Striking down conditions that prevented sale or mortgage of donated property. *Ada C. Pollock-Blundon Ass'n v. Evans' Heirs, 273 So. 2d 552 (La. App. 1973).*

(n52)Footnote 61. *Alderman v. Crenshaw, 66 S.E.2d 265 (Ga. App. 1951); Hall v. Tufts, 35 Mass. 455 (18 Pick 1836); Gleason v. Fayerweather, 70 Mass. 348 (4 Gray 1855); Walker v. Vincent, 19 Pa. 369 (1852); Lawrence v. Singleton, 17 S.W. 265 (Tenn. 1875); Laval v. Staffel, 64 Tex. 370 (1885).*

(n53)Footnote 62. *Ware v. Cann, 10 Barn. & C. 433 (1885).*

Covenant in a contract of sale, that the purchaser would see that the buildings on lots were connected with sewer company facilities, was not a restraint on alienation. *Kempsville Util. Corp. v. Willis, 194 S.E.2d 740 (Va. 1973).*

(n54)Footnote 63. *Smith v. Federal Land Bank, 243 P.2d 1027 (Kan. 1952); Howard v. Mitchell, 105 S.W.2d 128 (Ky. 1936).*

(n55)Footnote 64. *Potter v. Couch, 141 U.S. 296 (1891); Howell v. Deady, 48 F. Supp. 104 (D. Or. 1939); Letzkus v. Nothwang, 279 S.W. 1006 (Ark. 1926); Murray v. Green, 28 P. 118 (Cal. 1883); Colonial Trust Co. v. Brown, 135 A. 555 (Conn. 1926); Robinson v. Randolph, 21 Fla. 629 (1885); Davis v. Geyer, 9 So. 2d 727 (Fla. 1942); Daniel v. Stewart, 110 S.E. 178 (Ga. 1921); McIntyre v. Dietrich, 128 N.E. 321 (Ill. 1920); Havely v. Comerford, 174 N.E. 830*

(Ill. 1931); Porter v. Porter, 45 N.E.2d 635 (Ill. 1942); Allen v. Craft, 9 N.E. 919 (Ind. 1887); Harkness v. Lisle, 117 S.W. 264 (Ky. 1909); Hawley v. Northampton, 8 Mass. 3 (1811); Bowen v. Campbell, 181 N.E.2d 342 (Mass. 1962); Clark v. Ferguson, 144 S.W.2d 116 (Mo. 1940); De Peyster v. Michael, 6 N.Y. 467 (1852); Welch v. Murdock, 135 S.E. 611 (N.C. 1926); Baker v. Alexander, 156 N.E. 223 (Ohio App. 1926); Friswold v. United States Nat'l Bank, 257 P. 818 (Or. 1927); In re Fairman's Estate, 135 A. 262 (Pa. 1926); Berry v. Hughes, 138 S.E. 846 (S.C. 1927); Dunlop v. Dunlop, 132 S.E. 351 (Va. 1926); McCreery v. Johnston, 110 S.E. 464 (W. Va. 1922). Deviney v. Nations Bank, 993 S.W.2d 443 (Tex. Ct. App. 1999) (devise granting life estate but prohibiting conveyance without mutual consent was a restraint on alienation and, thus, void).

(n56)Footnote 65. *Reeder v. Antrim, 110 N.E. 568, 112 N.E. 551 (Ind. App. 1915); Kerlee v. Smith, 124 P. 777 (Mont. 1912); Blair v. Muse, 2 S.E. 31 (Va. 1887).*

(n57)Footnote 66. *Hill v. Gray, 49 So. 676 (Ala. 1909); Graves v. Wheeler, 61 So. 341 (Ala. 1913); Gamble v. Gamble, 75 So. 924 (Ala. 1917); Ripperdan v. Weldy, 87 P. 276 (Cal. 1906); Robinson v. Randolph, 21 Fla. 629 (1885); Alderman v. Crenshaw, 66 S.E.2d 265 (Ga. App. 1951); Simerson v. Simerson, 20 Haw. 57 (1910); Walker v. Shepard, 71 N.E. 422 (Ill. 1904); Allen v. Craft, 9 N.E. 919 (Ind. 1887); In re Dees' Estate, 308 P.2d 90 (Kan. 1957)* (dictum) (restraint on alienation is void unless there is provided "an effective barrier to enforce it"); *Miller v. Denny, 34 S.W. 1079 (Ky. 1896); Wilson v. Barnes, 169 A. 791 (Md. 1934)* (provision for forfeiture if any of the devisees attempted to sell property left them as a home held valid); *Hawley v. Northampton, 8 Mass. 3 (1811); Kessner v. Phillips, 88 S.W. 66 (Mo. 1905); Pritchard v. Bailey, 18 S.E. 668 (N.C. 1893); Johnson v. Gaines, 55 S.E.2d 191* (N.C.); *Clayton v. Burch, 80 S.E.2d 29 (N.C. 1954); Sandford v. Sandford, 91 S.E. 294 (S.C. 1917); Lawrence v. Singleton, 17 S.W. 265 (Tenn. 1875); Bouldin v. Miller, 28 S.W. 940 (Tex. 1894); Kerns v. Carr, 95 S.E. 606 (W. Va. 1918); Bartkowiak v. Bartkowiak, 283 N.W. 49 (Mich. 1938); In re Budd's Estate, 105 N.W.2d 358 (Wis. 1960)* (conditioned upon the real estate not being sold, transferred or encumbered for five years from death).

Devise restricting sale of property until grandchildren reached 25 was an illegal restraint on alienation and was void. *Harvey v. Harvey, 524 P.2d 1187 (Kan. 1974).*

Will may not restrict alienation of fee simple estate. *Cast v. National Bank of Commerce Trust & Sav. Ass'n of Lincoln, 183 N.W.2d 485 (Neb. 1971).*

Reservation of proceeds of condemnation in a deed was not an invalid restraint on alienation. *Application of Mazzone, 22 N.E.2d 315 (N.Y. 1939), rev'g 4 N.Y.S.2d 1.* See *52 Harv. L. Rev. 323.*

Absolute restraints on alienation are void. *Chianese v. Culley, 397 F. Supp. 1344 (1975).*

A restraint in a contract of conveyance or deed that withholds from the conveyee the right of power to alienate without provision for forfeiture is void. *Lohmann v. Adams, 540 P.2d 552 (Okla. 1975).*

Absolute restraint of power of alienation of life estate is void. *Miller v. O'Neil, 361 N.E.2d 1165 (Ill. 1977). Cole v. Peters, 3 S.W.3d 846 (Mo. Ct. App. 1999)* (preemptive right to buy property was a restraint on alienation and, thus, void).

(n58)Footnote 67. *McCullough v. Gilmore, 11 Pa. 370 (1849); Fowlkes v. Wagoner, 46 S.W. 586 (Tenn. 1898).*

A condition in a gift of property for charitable purposes against sale or lease is valid since an equity court can authorize the prohibited sale when necessary. *Ohio Soc'y for Crippled Children & Adults, Inc. v. McElroy, 191 N.E.2d 543 (Ohio St. 1963).*

See Herbert A. Bernhard, *Minority Doctrine Concerning Direct Restraints on Alienation, 57 Mich. L. Rev. 1173*

(1959). Carroll v. Eno, 654 N.Y.S.2d 386 (1997) (Preemptive right to purchase plaintiff's cooperative apartment is not an unreasonable restraint on alienation).

(n59)Footnote 68. *Sumner v. Borders, 98 S.W.2d 918 (Ky. 1936).*

(n60)Footnote 69. *Hedricks v. Beam, 4 So. 2d 176 (Ala. 1941); Heininger v. Meissmer, 103 N.E. 565 (Ill. 1913); Swannell v. Wilson, 79 N.E.2d 26 (Ill. 1948); Elberts v. Elberts, 141 N.W. 57 (Iowa 1913); Porter v. Tracey, 162 N.W. 800 (Iowa 1917); Highfill v. Konnerman, 43 S.W.2d 657 (Ky. 1931); Roberts v. Jones, 30 N.E.2d 392 (Mass. 1940); Haeussler v. Missouri Iron Co., 19 S.W. 75 (Mo. 1892); Peterson v. Damoude, 152 N.W. 786 (Neb. 1915); Majerus v. Santo, 10 N.W.2d 608 (Neb. 1943); In re Currier's Estate, 245 N.Y.S. 703 (1930); Greene v. Stadiem, 152 S.E. 398 (N.C. 1930).*

As to what is a reasonable time, *see* 2 Restatement, Property, § 173, cmt. c.

(n61)Footnote 70. *Winsor v. Mills, 32 N.E. 352 (Mass. 1892); Roberts v. Jones, 30 N.E.2d 392 (Mass. 1940); Mahrt v. First Church of Christ Scientist, 142 N.E. 567 (Ohio Com. Pl. 1955), aff'd 142 N.E.2d 678.*

Extension of time for settlement of land sale contract until the court settled on title question did not violate the rule against perpetuities. *Wilkes v. German, 316 A.2d 200 (Del. 1974).*

The mere fact that the restriction placed on property makes it less valuable does not constitute an invalid restraint on alienation. Holiday Out in *Am. at St. Lucie, Inc. v. Bowes, 285 So. 2d 63 (Fla. App. 1973). Pyramid Constr. Co. v. Wind River Petroleum, Inc., 866 F. Supp. 513 (D. Utah 1994).*

It was held in *National Lumber Co. v. Goodman, 123 N.W.2d 147 (Mich. 1963),* that a clause in a land contract, requiring the vendee to obtain the approval of the vendor on instruments purporting to assign or convey the vendee's interest, was not an invalid restraint on alienation.

Restraints on alienation of vendee's interest set forth in land sale contract were valid and also prevented mortgaging so that the vendor can foreclose the vendee's interest over the objection of the vendee's mortgagee. *National Lumber Co. v. Goodman, 123 N.W.2d 147 (Mich. 1963).*

See Mortgages -- Use of Due On Sale Clause by a Lendor Is Not a Restraint on Alienation in North Carolina, 55 N.C. L. Rev. 310 (1977).

Non-assignability clause in real estate contract held invalid. *Murray First Thrift & Loan Co. v. Stevenson, 534 P.2d 909 (Utah 1975); Coraci v. Noack, 212 N.W.2d 164 (Wis. 1973).*

(n62)Footnote 71. *Locklear v. Tucker, 203 P.2d 380 (Idaho 1949); Windiate v. Lorman, 211 N.W. 62 (Mich. 1926); Mineral Land Inv. Co. v. Bishop Iron Co., 159 N.W. 966 (Minn. 1916); Epstein v. Werbelovsky, 184 N.Y.S. 330 (1920), aff'd 135 N.E. 902.*

Deed with option to repurchase if grantee did not build a warehouse within two years was not a restraint on alienation. *Genet v. Florida E. Coast Ry., 150 So. 2d 272 (Fla. App. 1963).*

Declaration of condominium provision that developer had exclusive right to rent both units held by him and units sold to members of condominium was not an invalid restraint on alienation. Holiday Out in *Am. at St. Lucie, Inc. v. Bowes, 285 So. 2d 63 (Fla. App. 1973).*

An option was held to violate the Rule Against Restraints On Alienation in *Commonwealth Realty Corp. v. Bowers, 274 A.2d 353 (Md. 1971). Fallschase Dev. Corp. v. Blakey, 696 So. 2d 833 (Fla. App. 1997)* (Right of first refusal

which runs with ownership of the land rather than a right to be exercised within the lifetime of either of the original parties to the contract is void because it violates the common-law rule against perpetuities). *Developers Mgmt. Ass'n, Inc. v. Eagle Creek Holdings, Inc., 636 So. 2d 91 (Fla. App. 1994)* (Fixed price option of unlimited duration was void as an unreasonable restraint on alienation). *Arclar v. Gates, 17 F. Supp. 2d 818,* (S.D. Ill. 1998) (Generally, an option to purchase or sell real estate exercisable outside period of rule against perpetuities is void as unreasonable restraint upon alienation; however, an option to purchase part of an overlying surface estate is an exception when granted for mining purposes); D-F Fund VIII v. Resolution Trust Corp., No. CA 3-96-*CV-3367-R, 1009, 1998 U.S. Dist. LEXIS 93* (N.D. Tex. Jan. 5, 1998) (Texas court denied summary judgment when plaintiff failed to show how a repurchase option was invalid as a restraint on alienation); *Venture Stores v. Pacific Beach Co., 980 S.W.2d 176,* (Mo. Ct. App. 1998) (Court upheld option to purchase a commercial lease at a set purchase price). But see *Urquhart v. Teller, No. 97-382, 1998 Mont. LEXIS 86,* (Mont. February 12, 1998) (grantor's right of first refusal in an option to sell or transfer a 10-acre parcel at or upon his death not triggered when property transferred because it was an unreasonable restraint on alienation). However, courts may permit special affirmative defenses to alleged breach of option agreements. *Silberstein v. SMO Associates, No. CV 970405625S, 1998 Conn. Super. LEXIS 851* (Although court granted plaintiff's motion to strike defendant's special defense of an unreasonable restraint on alienation, court implied that the defense would be allowed if supported by fact).

(n63)Footnote 72. *Porter v. Porter, 45 N.E.2d 635 (Ill. 1942).*

Holding that a covenant prohibiting sale or resale or rental to anyone who would be disapproved for membership in the property owners' association, constituted an unreasonable restraint on alienation and void as against public policy. *Tuckerton Beach Club v. Bender, 219 A.2d 529 (N.J. Super. 1966).*

A reservation in a deed of awards to be received from eminent domain was not an invalid restraint on alienation. *Application of Mazzone, 22 N.E.2d 315 (N.Y. 1939).*

(n64)Footnote 73. *Majerus v. Santos, 10 N.W.2d 608 (Neb. 1943).*

Conditions in restraint of alienation will not be implied. *Moody v. Moody Nat'l Bank of Galveston, 522 S.W.2d 710 (Tex. Civ. App. 1975).*

Covenant in a contract of sale that the purchaser would see that the buildings on lots were connected with sewer company facilities was not a restraint on alienation. *Kempsville Utils. Corp. v. Wills, 194 S.E.2d 740 (Va. 1973).*

If an invalid restraint on alienation is so interwoven with the deed as to constitute a part thereof the grant itself is a defeasible estate. *Floyd v. Hoover, 234 S.E.2d 89 (Ga. App. 1977).*

Restraint on alienation by life tenant and remaindermen was void since no provision for forfeiture and no beneficial interest remaining in grantor. *Lohmann v. Adams, 540 P.2d 552 (Okla. 1975).*

Permanent first call was a perpetuity. *Saulsberry v. Saulsberry, 160 S.W.2d 654 (Ky. 1942); Roberts v. Jones, 30 N.E.2d 392 (Mass. 1940); Haeussler v. Missouri Iron Co., 19 S.W. 75 (Mo. 1892).*

Contra: and to the effect that such agreements may exist in perpetuity. *Hunt v. Wright, 47 N.H. 396 (1867).*

Because it was a perpetuity the court refused to enforce a covenant requiring the owner to receive and pay for a seasonal water supply. Affirmative covenants are disfavored. *Eagle Enters, Inc. v. Gross, 349 N.E.2d 816 (N.Y. 1976).*

(n65)Footnote 74. *In re Baglione's Estate, 417 P.2d 683 (Cal. 1966).*

(n66)Footnote 75. *Chianese v. Culley, 397 F. Supp. 1344 (1975). Maddock v. Greenville Retirement Community,*

L.P., 1997 Del. Ch. LEXIS 24 (Repurchase option may be upheld if such a restraint is deemed reasonable under the circumstances). *See also Camino Gardens Ass'ns v. McKim, 612 So. 2d 636 (Fla. App. 1993)* (Rule which prohibits transfer of lots to nonmembers of homeowners association was void as an unreasonable restraint on alienation).

(n67)Footnote 76. *Atchison v. Englewood, 463 P.2d 297 (Colo. 1970). See also Procter v. Foxmeyer Drug Co., 884 S.W.2d 853 (Tex. App. 1994)* (Option agreement which extended perpetually and gave right to purchase for a specified sum was void as an unreasonable restraint on alienation).

(n68)Footnote 77. *United Va. Bank Citizens & Marine v. Union Oil Co. of Cal., 197 S.E.2d 174 (Va. 1973).*

(n69)Footnote 78. *Commonwealth Realty Corp. v. Bowers, 274 A.2d 353 (Md. 1971).*

(n70)Footnote 79. *Raisch v. Schuster, 352 N.E.2d 657 (Ohio App. 1975).*

(n71)Footnote 80. 4 Property, Restatement, 404.

As to the theory of reasonable restraints, *see* Herbert A. Bernhard, *Minority Doctrine Concerning Direct Restraints on Alienation, 57 Mich. L. Rev. 1173 (1959).*

(n72)Footnote 81. A statute requiring the recordation of plots as a condition precedent to the conveyance of plots of land of a certain size was unconstitutional as an unreasonable restraint of the right to alienate property. *Kass v. Lewin, 104 So. 2d 572 (Fla. 1958).*

(n73)Footnote 82. *Floyd v. Hoover, 234 S.E.2d 89 (Ga. App. 1977).*

(n74)Footnote 83. *Atchison v. City of Englewood, 463 P.2d 297 (Colo. 1970).*

Restraints on alienation arising by contract are void if there is no forfeiture clause (dictum). *Lohmann v. Adams, 540 P.2d 552 (Okla. 1975)* (enforcing forfeiture clause).

Lacking any danger to the security or frustration of purpose, a due on sale clause could not be enforced. *Fidelity Land Dev. Corp. v. Reider & Sons, 377 A.2d 691 (N.J. Super. 1977).*

Richard W. Barke & Iona I. Tagropulos, *Michigan's Looking Glass World of Due on Sale Clauses, 24 Wayne L. Rev. 971 (1978).*

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CHAPTER 29 RESTRAINTS ON ALIENATION

3-29 Thompson on Real Property, Thomas Editions § 29.04

AUTHOR: Professor David A. Thomas This chapter is based in part on Ch. 31, George W. Thompson, Commentaries on the Modern Law of Real Property (John S. Grimes, ed. 1979), which made a significant contribution toward preserving the American common law governing restraints on alienation. J. Reuben Clark Law School Brigham Young University

§ 29.04 Partial Restraints on Alienation

Quite generally, the courts have recognized the wisdom of Littleton's precepts n84 that there are valid partial restraints on alienation based on the persons to whom alienation may or may not be made or the conditions under which it may not be made. n85 Fees determinable upon alienation, conditions subsequent against alienation and executory limitations over on alienation are generally held to have no effect. n86 Conditions subsequent upon attempted alienation or limitations over in the event of alienation have, however, been recognized by the courts. n87 Conditions subsequent of this type are, however, like conditions subsequent generally subject to the courts' tendency to treat them as covenants. n88

A condition that the grantee or devisee shall not sell the land until reaching a certain age, such as twenty-five years or thirty-five years, is valid, the restriction not being unreasonable. n89 A condition not to alien within a limited time or during the lifetime of the grantor, is valid. n90 A condition not to convey before complying with certain stipulations as to improvements is valid. n91 A condition not to sell property disposed of by will until some fixed time, or until the happening of some contingency, is valid. n92

In a conveyance to several members of an association as tenants in common in undivided shares, a condition that the grantees will hold without partition or division is valid. It is not in restraint of alienation because each tenant may convey his share at his pleasure, n93 but the authorities differ in construing restraints on alienation for a limited time. One line of cases holds that a restraint upon the alienation of a fee simple title for a limited period, however brief, is inconsistent with and repugnant to the nature of such an estate, because one of the most important characteristics thereof is the power of alienation. n94 The other class of cases holds a restraint upon the alienation even of a fee simple title, if for a reasonable time, to be a valid restriction. n95

In some jurisdictions a partial restraint upon alienation may be imposed for a reasonable period, even in the case of the grant of the fee as, for instance, a provision prohibiting the grantee from selling or renting the land during the grantor's lifetime. n96 A limited restraint on alienation for a particular purpose is not repugnant to a grant of a fee simple estate.

n97 "It is entirely within the right and power of the grantor to impose a condition or restraint upon the power of alienation in certain cases, to certain persons, or for a certain time, or for certain purposes." n98

Reasonable restrictions may be placed upon the alienation or devolution of property for a limited period, to make provision for the support of persons ill-fitted to support themselves, as for instance to furnish sustenance for an improvident son or to prevent or hinder a testator's estate from being dissipated by grandchildren for whom, in his natural affection and solicitude, he would provide a life-enduring competence. n99 A mere admonitory clause in a deed or will is insufficient to create such a restriction. To make such restriction effective, some practical bar to a breach of such restriction must appear, such as the intervention of trustees having active duties to discharge during the restrictive period, a provision for re-entry or an alternative grant or devise over for breach of the conditions prescribed in the instrument itself. n100 A provision temporarily suspending partition is generally considered a reasonable and valid exercise of testamentary power. n101

Under the English rule, a condition against alienation by suffering a fine or common recovery was void. n102 But the American law permits conditions against a use for a particular purpose. n103 Sometimes the purpose behind restraint has been held to outweigh the effect of alienation. n104 Under the leading rule conditions alien only to a particular person or persons, n105 that land devised to a number of persons shall not be divided, n106 or sold during the lifetime of the grantee are void. n107 The doctrine that a condition in restraint of alienation is void has no application when the condition is contained in a grant by the United States to certain Indians, as the purpose of the proviso in such case is not to prevent the alienation of the land, but to protect the Indians from an improvident disposition of the land. n108

The English cases have indicated that a limitation that alienation not be made "outside the family" is valid. n109 The condition does not take away all power of alienation, but only imposes a limited restraint on alienation. The American cases have been inclined, however, to construe the rule more strictly and to require that a greater circle of possible transferees be created before the restriction is valid. n110 So a condition prohibiting the grantee from alienating to anyone except the heirs of the grantors was held invalid. n111 The more modern view is that limitations restraining alienation except to a particular class of persons are invalid. n112

The common-law rule against restraints on alienation does not apply to property held in trust where the trustee has the power to sell. n113 Restraint on alienation is valid where a charitable trust is created. n114 Conditions against alienation of leaseholds have been almost universally upheld. Until held unconstitutional by the United States Supreme Court n115 while restraints on alienation to persons of a particular race were void, n116 restraints on occupation and use by such person were valid. Conditions or restraints against alienation without the consent of another are void. n117 Kentucky permits absolute restraints on alienation if "reasonable." Nebraska also has a limited similar doctrine. Where the restraint takes the form of a covenant in a deed, the deed is good and the covenant fails. n118

Where there is an illegal condition subsequent with a right of re-entry or a limitation over an alienation, the condition is void and the right of re-entry or limitation over fails. n119

If the deed does not convey an estate in fee simple absolute, a provision that it shall revert to the grantor is not repugnant. Sometimes a deed, which upon its face seems to be void for repugnancy by reason of provisions restraining alienation, may be carried into effect if from the whole instrument the intention of the parties is manifest that the deed should not convey a fee simple absolute in the land for even the strongest words of conveyance will not pass an estate if, from other parts of the deed, the intention appears otherwise. n120 Thus, a quitclaim deed from a husband to his wife, with condition that she should not convey the land during his lifetime without his written consent, and that in case of her death before his decease the land should revert to him, was held not to convey the land to the grantee in fee simple absolute, but that the effect of it was that the title should, in the event of the death of either of the parties, pass to the survivor. n121 In some jurisdictions, a condition against alienation of a life estate is void, n122 while in others such conditions are held valid. n123 A life tenant, in the absence of restrain imposed by the instrument creating the life estate, may convey the life interest by deed, but can pass no greater interest in the property than the estate for life. n124

Under what appears to be a minority rule a life estate may be created which is not subject to claims of creditors. n125

A deed conveying a base fee is not rendered void by a condition restraining alienation. n126 A conveyance to a trustee by a husband forever in fee simple for the use of his wife and her children by him, born and to be born, with a condition in the habendum that if he should survive her the whole property should revert to him free from the trust, conveyed to the trustee a fee defeasible upon the contingency specified. On the happening of that contingency the title revested in the husband, and thenceforth, the property was his absolutely. n127

The grantor may, by a condition, reserve the power to revoke a voluntary conveyance during the grantor's lifetime. Such a condition is not open to the objection that it is contrary to public policy, on the ground that it enables the parties to the deed to defeat the rights of the grantee's creditors, for the deed is notice to the creditors of the power reserved. n128 A grantor may by condition reserve the power to revoke the voluntary conveyance during the grantor's lifetime, since such reservation is not inconsistent with the conveyance, but merely creates an executory limitation in favor of the grantor. n129 It has been held that a reservation of a right to revoke an absolute gift is void. n130 Thus, a deed to the grantee and his heirs forever, reciting an intent that if the grantee should die without heirs, the property should revert to the living heirs of the grantor's estate, and that the grantee should have only a lifetime interest, was held to convey a fee simple estate, notwithstanding the attempted limitations. n131 Where a grantor reserved a life estate in the land and provided in the deed that he had power to mortgage, sell, convey or otherwise dispose of the land, it was held that he had the power to mortgage or dispose of his life estate only. n132

Conditions in mortgages prohibiting alienation by the mortgagor without the mortgagee's consent have been questioned as being illegal restraints on alienation. n133 This has had varying treatment in the courts. Other restrictive clauses have been at issue on the same grounds.

California has distinguished between outright sales and sales contracts as respects "due on sale," validating the clause in a mortgage on outright sale n134 and invalidating in case of sales contracts as a restraint on alienation. n135

COMPUTER-ASSISTED RESEARCH

LEXIS: partial w/5 restraint! w/2 alienation

FOOTNOTES:

(n1)Footnote 84. "If the condition be such, that the feoffee shall not alien to such a one, naming his name, or to any of his heirs, or of the issue of such a one, or the like, which conditions do not take away all power of alienation from the feoffee, then such condition is good." Littleton, Tenures, § 361; Coke on Littleton, § 223a. *See Langdon v. Ingram, 28 Ind. 360 (1867); Francis v. Big Sandy Co., 188 S.W. 345 (Ky. 1916); Price v. Virginia Iron, Coal & Coke Co., 188 S.W. 658 (Ky. 1916); Dougal v. Fryer, 3 Mo. 40 (1831).*

(n2)Footnote 85. *Langdon v. Ingram, 28 Ind. 360 (1867); Stewart v. Barrow, 70 Ky. 368 (7 Bush 1870); Cornelius v. Den, 26 N.J.L. 376 (1857); Hill v. Hill, 4 N.Y. 419 (Barb. 1848)* (condition was not to alienate for 15 years, except to certain persons); *Large's Case, 2 Leon 82. See Imbrie v. Hartrampf, 198 P. 521* (Or.).

Nebraska has overruled its earlier decisions that "reasonable" restraints on alienation be permitted. *Andrews v. Hall, 58 N.W.2d 201 (Neb. 1953).*

Holding that all restraints on alienation direct or indirect are void. *Cast v. National Bank of Commerce Trust & Sav. Ass'n of Lincoln, 183 N.W.2d 485 (Neb. 1971).*

Seagate Condo. Ass'n, Inc. v. Duffy, 330 So. 2d 484 (Fla. App. 1976), citing *Thompson On Real Property. Craft v. Commissioner, 140 F.3d 638 (6th Cir. 1998)* (concurring opinion argued that IRS could attach trust income despite the

fact that the trust was unalienable); *Four Bros. Homes at Heartland Condo. II v. Gerbino, 262 A.D.2d 279 (N.Y. App. Div. 1999)* (holding that "under the circumstances presented, the prohibition on leasing is not an unreasonable restraint on the alienation of property").

(n3)Footnote 86. *Freeman v. Phillips, 38 S.E. 943 (Ga. 1901); Davis v. Hutchinson, 118 N.E. 721 (Ill. 1918); Cushing v. Spalding, 41 N.E. 297 (Mass. 1895); De Peyster v. Michael, 6 N.Y. 467 (1852); Diamond v. Rotan, 124 S.W. 196 (Tex. Civ. App. 1909); Dunlop v. Dunlop, 132 S.E. 351 (Va. 1926); Contra*: *Libby v. Winston, 93 So. 631 (Ala. 1922); Hinshaw v. Wright, 262 P. 601 (Kan. 1928); Furst v. Lacher, 182 N.W. 720 (Minn. 1921).*

Holding that a restrictive provision regarding alienation in the transfer of stock inter vivos is not applicable to testamentary dispositions. In *Matter of Estate of Riggs, 540 P.2d 361 (Colo. 1975).*

(n4)Footnote 87. *Potter v. Couch, 141 U.S. 296 (1891); Roemhild v. Jones, 239 F.2d 492 (1957); Bevins v. Dietrich, 7 S.E. 662 (Ga. 1940); McIntyre v. Dietrich, 128 N.E. 321 (Ill. 1920); Latimer v. Waddell, 26 S.E. 122 (N.C. 1896).*

Declaration of condominium provision that developer of a travel trailer park would receive a percentage of all rentals was not an invalid restraint on alienation. Holiday Out in *Am. at St. Lucie, Inc. v. Bowes, 285 So. 2d 63 (Fla. App. 1973).*

Contra: conditions subsequent restraining alienation are void whether direct or indirect. *Cast v. National Bank of Commerce Trust & Sav. Ass'n of Lincoln, 183 N.W.2d 485 (Neb. 1971).*

(n5)Footnote 88. *See Bonnell v. McLaughlin, 159 P. 590 (Cal. 1916); Cushing v. Spalding, 41 N.E. 297 (Mass. 1895); Christmas v. Winston, 67 S.E. 58 (N.C. 1910); Zillmer v. Landguth, 69 N.W. 568 (Wis. 1896).*

(n6)Footnote 89. *Stewart v. Brady, 66 Ky. 623 (3 Bush 1868); Dougal v. Fryer, 3 Mo. 40 (1831). See,* however, to the contrary, *Twitty v. Camp, 62 N.C. 61 (Phil. Eq. 1866); Christmas v. Winston, 67 S.E. 58 (N.C. 1910); Bouldin v. Miller, 28 S.W. 940 (Tex. 1894)* (conveyance to minors, "to be held in common and unsold" until the youngest shall become of age, is a conveyance of a fee simple without a condition, the breach of which would void the estate).

(n7)Footnote 90. *Frazier v. Combs, 130 S.W. 812 (Ky. 1910); McWilliams v. Nisly, 2 Pa. 507* (Serg. & Rawle 1816). *See,* however, *Taylor v. Mason, 22 U.S. 325 (1824).*

(n8)Footnote 91. *Grigg v. Landis, 21 N.J. Eq. 494 (1870). See Clarke v. Brookfield, 81 Mo. 503 (1884). See also Suffolk Business Ctr., Inc. v. Applied Digital Data Sys., 615 N.Y.S.2d 64 (1994)* (Real estate sales contract provision giving vendor option of repurchasing parcel if purchaser did not make certain improvements did not violate rule against unreasonable restraints on alienation).

(n9)Footnote 92. *Legge v. Canty, 4 A.2d 465 (Md. 1939).*

(n10)Footnote 93. *Hunt v. Wright, 47 N.H. 396 (1867). Contra*: *Smith v. Clark, 10 Md. 186 (1856); Lovett v. Gillender, 35 N.Y. 617 (1866).*Statutes may impose restraints on condominium owners who lease common areas appurtenant to independent living units. *Brown v. Rice, 716 So. 2d 807,* (Fl. Dist. Ct. App. 1998) (statutory restraint on limited common elements appurtenant to living units upheld to forbid a condo owner from conveying a garage independent of the apartment unit to which it was assigned).

(n11)Footnote 94. *See* in general: *Libby v. Winston, 93 So. 631 (Ala. 1922); Stamey v. McGinnis, 88 S.E. 935 (Ga. 1916); Jones v. Port Huron Engine & Thresher Co., 49 N.E. 700 (Ill. 1898); Goldsmith v. Petersen, 141 N.W. 60 (Iowa 1913); Ammon v. Ammon, 237 P. 926 (Kan. 1925); Hause v. O'Leary, 161 N.W. 392 (Minn. 1917); Holloway v. Green, 83 S.E. 243 (N.C. 1914); Schwren v. Falls, 87 S.E. 49 (N.C. 1915); Combs v. Paul, 133 S.E. 93 (N.C. 1926); Anderson v. Cary, 36 Ohio St. 506 (1881); O'Connor v. Thetford, 174 S.W. 680 (Tex. Civ. App. 1915); Gladstone Mtn. Mining Co.*

v. Tweedell, 232 P. 306 (Wash. 1925); White v. White, 150 S.E. 531 (W. Va. 1929).

In Mandlebaum v. McDonell, 29 Mich. 78 (1874), it was declared that a condition that would suspend all power of alienation for a single day is void. To like effect, *see McCleary v. Ellis, 6 N.W. 571 (Iowa 1880). See also Watkins v. Minor, 183 N.W. 186 (Mich. 1921)* (a provision against the grantees conveying or encumbering the property during the lifetime of the grantor void).

A provision in a deed granting the fee but restraining alienation by the grantee for 20 years after the death of the grantor is repugnant to the grant and void. *McFadden v. McFadden, 135 N.E. 31 (Ill. 1922); Goodman v. Andrews, 213 N.W. 605 (Iowa 1927).*

A restraint on alienation, although for a limited time, is as repugnant to the grant of a life estate as a fee in the land and is void as against public policy. *Department of Pub. Works v. Porter, 158 N.E. 366 (Ill. 1927).*

Both direct and indirect restraints which affect the marketability are void. *Cast v. National Bank of Commerce Trust & Sav. Ass'n of Lincoln, 183 N.W.2d 485 (Neb. 1971).*

(n12)Footnote 95. *See* in general: *Kentland Coal & Coke Co. v. Keen, 183 S.W. 247 (Ky. 1916); Cities Serv. Oil Co. v. Taylor, 45 S.W.2d 1039 (Ky. 1932); Chenault v. Burgess, 93 S.W. 664 (Ky. 1906); Queensborough Land Co. v. Cazeaux, 67 So. 641 (La. 1915); Dougal v. Fryer, 3 Mo. 40 (1831); Kessner v. Phillips, 88 S.W. 66 (Mo. 1905); Hunt v. Wright, 47 N.H. 396 (1867); De Peyster v. Michael, 6 N.Y. 467 (1852); Christmas v. Winston, 67 S.E. 58 (N.C. 1910); McWilliams v. Nisly, 2 Pa. 507* (Serg. & Rawle 1816); *Camp v. Cleary, 76 Va. 140 (1882); Gladstone Mtn. Mining Co. v. Tweedell, 232 P. 306 (Wash. 1925); White v. White, 150 S.E. 531 (W. Va. 1929); In re Budd's Estate, 105 N.W.2d 358 (Wis. 1960)* (condition in devise against alienating for five years held void).

Doctrine of reasonable restraints. *Malouff v. Midland Fed. Sav. & Loan Ass'n, 509 P.2d 1240 (Colo. 1973).*

Permitting restraints on alienation for limited periods. *Fleming v. Blarent, 151 S.W.2d 88 (Ark. 1941). Furst v. Lacher, 182 N.W. 720 (Minn. 1921). Contra: Hankins v. Mathews, 425 S.W.2d 608 (Tenn. 1968); In re Budd's Estate, 105 N.W.2d 358 (Wis. 1960).*

(n13)Footnote 96. *Turner v. Lewis, 226 S.W. 867 (Ky. 1920).*

Reasonable restraints on alienation to attain or encourage accepted social or economic ends are valid. *Hanigan v. Wheeler, 504 P.2d 972 (Ariz. App. 1972).*

Lauderbaugh v. Williams, 186 A.2d 39 (Pa. 1962) (dictum) (limited and reasonable restraints on alienation may be valid, holding agreement limiting conveyances only to members of an association, where consent of all but two was necessary to membership, was an unreasonable restraint).

A covenant of first refusal is not an unreasonable restraint on alienation. *Gilmore v. Letcher, 508 S.W.2d 257 (Mo. App. 1974).*

Florida prevents only unlimited or absolute restraints. *Robinson v. Randolph, 21 Fla. 629; Davis v. Geyer, 309 So. 2d 180 (Fla. 1975).*

(n14)Footnote 97. *Lynch v. Lynch, 159 S.E. 26 (S.C. 1931).*

(n15)Footnote 98. *Koehler v. Rowland, 205 S.W. 217 (Mo. 1918).*

Requirement of reconveyance to housing association which gave deeds to members to permit them to obtain

mortgages was valid. *Gale v. York Ctr. Community Coop., Inc., 171 N.E.2d 30 (Ill. 1960). First Rebecca Bapt. Church, Inc. v. Atlantic Cotton Mills, 440 S.E.2d 159 (Ga. 1993)* (Reverter clause in deed to charitable organization is enforceable).

(n16)Footnote 99. *Wright v. Jenks, 261 P. 840 (Kan. 1927).*

A restraint on alienation is not reasonable merely because commercially beneficial to the restrainer. *La Sala v. American Sav. & Loan Ass'n, 489 P.2d 113 (Cal. 1971).*

Reasonable restraints on alienation. *Lazzareschi Inv. Co. v. San Francisco Fed. Sav. & Loan Ass'n, 99 Cal. Rptr. 417 (1971).*

The fact that restriction on use makes the property less desirable and less valuable is not of itself an unlawful, unlimited restraint on alienation. Holiday Out in *Am. at St. Lucie, Inc. v. Bowes, 285 So. 2d 63 (Fla. App. 1973). Tamen v. Alhambra World Inv., Inc., 22 F.3d 199 (9th Cir. 1994)* (Restraints restricting sale of property prior to development were reasonable and not invalid).

Holding that a condition subsequent must be reasonable and not materially affect marketability. If it is unreasonable and affects marketability adversely, it is an indirect restraint on alienation and is void against public policy. *Cast v. National Bank of Commerce Trust & Sav. Ass'n of Lincoln, 183 N.W.2d 485 (Neb. 1971).*

See Kenneth A. Norsworthy, *Forfeiture Conditions on the Use of Land as Restraints on the Power of Alienation: A Question of Degree of Tolerance, 25 Baylor L. Rev. 135 (1973).*

(n17)Footnote 100. *Wright v. Jenks, 261 P. 840 (Kan. 1927); Hinshaw v. Wright, 262 P. 601 (Kan. 1928).*

(n18)Footnote 101. *Peterson v. Damoude, 152 N.W. 786 (Neb. 1915).*

See the following cases: Chapman v. York, *103 S. 567 (Ala. 1925); Ruggles v. Powers, 207 N.W. 116 (Iowa 1926); Crossan v. Crossan, 262 S.W. 701 (Mo. 1924); Dennig v. Mispagel, 260 S.W. 72 (Mo. 1924); Freeland v. Andersen, 211 N.W. 167 (Neb. 1926); Allison v. Coffin, 211 N.Y.S. 545 (1925).*

(n19)Footnote 102. *Anonymous*, Y. B. 21 Henry vi pt. 21, to the contrary, changed by Sonday's Case, 9 Coke 127b, *77 Eng. Rep. 915;* Portington's Case, 10 Coke 35a, *77 Eng. Rep. 976; Foye v. Hyrde, Cro. Jac. 697, 79 Eng. Rep. 605.*

(n20)Footnote 103. *Cowell v. Colorado Springs Co., 100 U.S. 55 (1879); Gray v. Blanchard, 25 Mass. 284 (8 Pick 1829); Sperry v. Pond, 5 Ohio 387 (1832), 24 Am. Dec. 296.*

See Milton I. Goldstein, *Rights of Entry and Possibilities of Reverter or Devises to Restrict the Use of Land, 54 Harv. L. Rev. 248 (1940);* Howard R. Williams, *Restrictions on the Use of Land: Conditions Subsequent and Determinable Fees, 27 Tex. L. Rev. 158 (1948).*

An agreement was construed to give an option for six months to purchase the lands at a fixed price if the owner ever desired to sell. *Brace v. Black, 144 A.2d 885 (N.J. Super. 1958).* The principle of the Restatement of Property was applied, balancing degree of restraint against social utility in order to determine the unreasonableness of a restraint. Restatement, Property, §§ 406-411, 413. *Munson v. Milton, 948 S.W.2d 486 (Tex. App. 1997)* (Temporary injunction, enjoining homeowners from "renting and/or leasing said property to the public for temporary or transient housing purposes" pursuant to subdivision's residential use restrictive covenant, did not impose unreasonable restraint on alienation).

(n21)Footnote 104. Holding a perpetual option was not a restraint on alienation, but was subject to the rule against

remoteness subject, however, to the wait-and-see doctrine. *Three Rivers Rock Co. v. Reed Crushed Stone, 530 S.W.2d 202 (Ky. 1975). Griggs v. Driftwood Landing, 620 So. 2d 582 (Ala. 1993)* (Conditions subsequent in conveyances of real property are to be strictly construed against the grantor).

(n22)Footnote 105. *Schermerhorn v. Negus, 1 Denio (N.Y.) 448; Attwater v. Attwater, 18 Beav. 330,* overruling Gill v. Pearson, 6 East 173.

(n23)Footnote 106. *Smith v. Clark, 10 Md. 186 (1856).*

(n24)Footnote 107. *Hardy v. Galloway, 15 S.E. 890 (N.C. 1892); Pritchard v. Bailey, 18 S.E. 668 (N.C. 1893).*

(n25)Footnote 108. *Pickering v. Lomax, 145 U.S. 310 (1892). Jicarilla Apache Tribe v. Board of County Comm'rs of County of Rio Arriba, 883 P.2d 136 (N.M. 1993)* (Lands acquired by Indian tribe by purchase are subject to Federal Restraints against alienation); *State of Connecticut v. Babbitt, 26 F. Supp. 2d 397 (D. Conn. 1998)* (affirmed federal restraints against alienation of tribal land held in trust by the government but denied restraints on land or natural resources located outside of settlement lands, held in fee by the Tribe).

(n26)Footnote 109. *McCullough v. Gilmore, 11 Pa. 370 (1849).*

"You may restrict alienation by prohibiting a particular class of alienation, or you may restrict alienation by prohibiting it to a particular class of individuals, or you may restrict alienation by restricting it to a particular time. In all these ways you may limit it, and it appears to me that in two ways, at all events, this condition is limited. First, it is limited as to the mode of alienation, because the only prohibition is against selling. There are various modes of alienation besides sale: a person may lease, or he may mortgage, or he may settle; therefore it is a mere limited restriction on alienation in that way. Then, again, it is limited as regards class; he is never to sell it out of the family, but he may sell it to any one member of the family. It is not, therefore, limited in the sense of there being only one person to buy. The will shows there were a great many members of the family when she made her will; a great many are named in it: therefore you have a class which probably was large, and was certainly not small."

A provision never to convey outside of the family held void as restraint on alienation. *Jackson v. Jackson, 113 S.E.2d 766 (Ga. 1960).*

(n27)Footnote 110. Alienation confined to nephews and nieces held good. *Gray v. Gray, 188 S.W.2d 440 (Ky. 1945).*

Race restrictions valid. *Queensborough Land Co. v. Cazeaux, 67 So. 641 (La. 1915); Koehler v. Rowland, 205 S.W. 217 (Mo. 1918).*

Contra: Guarantee & Trust Co. v. Garrott, 183 P. 470 (Cal. App. 1919); Porter v. Barrett, 206 N.W. 532 (Mich. 1925).

(n28)Footnote 111. *Chappell v. Chappell, 119 S.W. 218 (Ky. 1909); Dills v. Deavors, 266 S.W.2d 788 (Ky. 1953).*

(n29)Footnote 112. *Dills v. Deavors, 266 S.W.2d 788 (Ky. 1953); Wool v. Fleetwood, 48 S.E. 785 (N.C. 1904); Langston v. Wooten, 59 S.E.2d 605 (N.C. 1950); Manierre v. Welling, 78 A. 507 (R.I. 1911).*

A provision that the beneficiaries under a will shall "never sell or dispose of" any of the estate except to each other is an unreasonable restriction upon the power to alienate and therefore void. *Carpenter v. Allen, 248 S.W. 523 (Ky. 1923).*

A covenant of first refusal is not an unreasonable restraint on alienation. *Gilmore v. Letcher, 508 S.W.2d 257 (Mo. App. 1974). Kellner v. Bartman, 620 N.E.2d 607 (Ill. App. 1993)* (Right of first refusal not subject to RAP if sufficiently

definite as to price and terms, but still limited to life of parties).

(n30)Footnote 113. *In re Walker's Will, 45 N.W.2d 94 (Wis. 1950).*

Delaware now permits a spendthrift trust to assign up to 50% of the income to a charity. *Wilmington Trust Co. v. Carpenter, 168 A.2d 306 (Del. Ch. 1961).*

Profit-sharing plans may contain spendthrift trust provisions. *Hines v. Sands, 312 S.W.2d 275 (Tex. Civ. App. 1958).* In re Persky, Bankr. L. Rep. (CCH) & 77,820 (Bankr. E.D. Penn. Oct 5, 1998) (Pennsylvania bankruptcy court allows a federal tax lien to attach to a beneficiary's interest in a spendthrift trust).

(n31)Footnote 114. *Perin v. Carey, 65 U.S. 465 (1861); Stanley v. Colt, 72 U.S. 119 (1867); Jones v. Habersham, 107 U.S. 174 (1883); Dickenson v. Anna, 141 N.E. 754 (Ill. 1923); Smart v. Durham, 86 A. 821 (N.H. 1913); Mills v. Davison, 35 A. 1072 (N.J. Eq. 1896); First Presbyterian Church v. Wheeler, 149 A. 589 (N.J. Eq. 1930). In re Curtis v. Amquest Bank, No. 89,263 1998 Okla. Civ. App. LEXIS 124* (Okla. Ct. App. September 15, 1998) (trust fund provision prohibiting voluntary or involuntary alienation by trustor's son upheld as valid).

(n32)Footnote 115. *Shelley v. Kraemer, 334 U.S. 1 (1948).*

(n33)Footnote 116. *Title Guarantee Trust Co. v. Garrott, 183 P. 470 (Cal. App. 1919).*

(n34)Footnote 117. Hill v. Gray, *49 S. 676 (Ala. 1909); Maynard v. Polhemus, 15 P. 451 (Cal. 1887); Pacific Trust Co. v. Nagamori, 32 Haw. 323 (1932); Muhlke v. Tiedemann, 52 N.E. 843 (Ill. 1899); Manierre v. Welling, 78 A. 507 (R.I. 1911); Schwren v. Falls, 87 S.E. 49 (N.C. 1915); McCravey v. Otts, 74 S.E. 142 (S.C. 1912).*

Covenant in a contract of sale that the purchaser would see that the buildings on lots were connected with sewer company facilities was not a restraint on alienation. *Kempsville Utils. Corp. v. Wills, 194 S.E.2d 740 (Va. 1973). Pacific First Bank v. New Morgan Park Corp., 857 P.2d 895 (Or. App. 1993)* (Restraint on alienation without the consent of the landlord for any reason is valid).

(n35)Footnote 118. *Prey v. Stanley, 42 P. 908 (Cal. 1895); Northwest Real Estate Co. v. Serio, 144 A. 245 (Md. 1929); White v. White, 150 S.E. 531 (W. Va. 1929); Michalski v. Michalski, 142 A.2d 645 (N.J. Super. 1958)* (restraints on partitions are valid if for a reasonable time).

Restraints on alienation void only if unreasonable. *Carpenter v. Winn, 566 P.2d 370 (Colo. App. 1977).*

(n36)Footnote 119. The mere fact that the restriction placed on property makes it less valuable does not constitute an invalid restraint on alienation. Holiday Out in *Am. at St. Lucie, Inc. v. Bowes, 285 So. 2d 63 (Fla. App. 1973).*

(n37)Footnote 120. *Williams v. Bentley, 27 Pa. 294 (1856); Ogden v. Brown, 33 Pa. 247 (1859). Williams v. Estate of G.A. Williams, 865 S.W.2d 3 (Tenn. 1993)* (Despite the restraints on alienation, the intention of the drafter of the will controlled the will).

(n38)Footnote 121. *Bassett v. Budlong, 43 N.W. 984 (Mich. 1889),* Champlin, J., said: "It is evident that, by executing the deed to his wife, the grantor did not intend to part with the title to his real estate unless the contingency should occur of his dying before his wife died... . The condition in the deed ... is a clear indication that the title should not pass, because, if it was the intention that it should pass and the estate vest in his wife, the condition would be nugatory, and no force or effect be given to this part of the instrument."

(n39)Footnote 122. *Hunt v. Hawes, 54 N.E. 953 (Ill. 1899); Fell v. McCready, 259 N.Y.S. 572 (1933).*

(n40)Footnote 123. *Trammell v. Johnston, 54 Ga. 340 (1875); Conger v. Lowe, 24 N.E. 889 (Ind. 1890); Roberts v.*

Stevens, 24 A. 873 (Me. 1892); Lampert v. Haydel, 9 S.W. 780 (Mo. 1888); Weller v. Noffsinger, 77 N.W. 1075 (Neb. 1899); Gaines v. Sullivan, 109 S.E. 276 (S.C. 1921); Dulin v. Moore, 70 S.W. 742 (Tex. 1902).

(n41)Footnote 124. *Hawkins v. Jerman, 35 P.2d 248 (Or. 1934).*

A covenant of first refusal is not an unreasonable restraint on alienation. *Gilmore v. Letcher, 508 S.W.2d 257 (Mo. App. 1974). Perdew v. Townley, 623 So. 2d 798 (Fla. App. 1993)* (Quitclaim deed given by life tenant of real property conveyed grantor's life estate, but not remainder interest that reverted to life tenant's estate after quitclaim deed was executed).

(n42)Footnote 125. *Hiles v. Benton, 196 N.W. 903 (Neb. 1924). See* Richard E. Manning, *The Development of Restraints on Alienation Since Gray, 48 Harv. L. Rev. 373 (1975).* It has been held that a contractual perpetual preemptive right to repurchase violates Rule 3. But an exception to this preemptive rule has been found in fees upon condition. *Alebison v. City of Eaglewood, 463 P.2d 297 (Colo. 1970); French v. Old South Soc'y, 106 Mass. 479 (1871); Libby v. Winston, 93 So. 631 (Ala. 1922).*

(n43)Footnote 126. *Pennsylvania Horticultural Soc'y v. Craig, 87 A. 678 (Pa. 1913).*

(n44)Footnote 127. *Hauser v. St. Louis, 170 F. 906 (1909); Woods v. Woods, 13 S.E. 692 (Ga. 1891).*

(n45)Footnote 128. *Ricketts v. Louisville, St. L. & T. Ry. Co., 15 S.W. 182 (Ky. 1891),* per Holt, C. J., said: "Such a condition has always been known to the law of conveyancing. Coke says that grants may be revoked by virtue of a power expressly reserved in the deed"; Butler's case, 3 Coke on Littleton 25. *See Tennant v. John Tennant Mem. Home, 140 P. 242 (Cal. 1914).*

A provision in a deed that the property conveyed shall not be sold, conveyed, or encumbered during the life of either of the grantors, and that, if the grantee shall sell, convey or encumber the same before the death of either of the grantors the conveyance shall be void, and the title to the land shall revert to and be vested in the grantor, creates a condition subsequent, and if the grantee fails to comply therewith the title will revert. *Furst v. Lacher, 182 N.W. 720 (Minn. 1921).*

(n46)Footnote 129. *Bradish v. Sullivan, 173 A. 117 (R.I. 1934).*

(n47)Footnote 130. *Daniel v. Veal, 32 Ga. 589 (1861). See Crookum v. Ketchum, 50 P.2d 710 (Okla. 1935).*

(n48)Footnote 131. *Keels v. Crosswell, 185 S.E. 39 (S.C. 1936).*

(n49)Footnote 132. *Brady v. Fuller, 96 P. 854 (Kan. 1908).*

(n50)Footnote 133. Mortgage covenant against alienation was valid. *Coast Bank v. Minderhout, 392 P.2d 265 (Cal. 1964).*

Upholding clause providing for a foreclosure of a mortgage by accelerating at the option of mortgagee if the mortgagor conveys. *Mutual Fed. Sav. & Loan Ass'n v. Wisconsin Wire Works, 205 N.W.2d 762 (Wis. 1973).*

Clause in a mortgage denying the mortgagor's right to sell without a consent of mortgagees held unreasonable. *Sanders v. Hicks, 317 So. 2d 61 (Miss. 1975).*

"Due on sale" held not an improper restraint on alienation. *Mutual Fed. Sav. & Loan Ass'n v. Wisconsin Wire Works, 239 N.W.2d 20 (Wis. 1976); Baker v. Loves Park Sav. & Loan Ass'n, 333 N.E.2d 1 (Ill. 1975); Crockett v. First Fed. Sav. & Loan Ass'n, 224 S.E.2d 580 (N.C. 1976).*

(n51)Footnote 134. Upholding clause providing for a foreclosure of a mortgage by accelerating at the option of mortgagee if the mortgagor conveys. *Mutual Fed. Sav. & Loan Ass'n v. Wisconsin Wire Works, 205 N.W.2d 762 (Wis. 1973).*

Tucker v. Lassen Sav. & Loan Ass'n, 526 P.2d 1169 (Cal. 1974), struck down the arbitrary enforcement of a due on sale clause in a mortgage; William M. Flaherty, *Illinois Land Trusts and the Due On Sale Clause, 65 Ill. B.J. 376 (1977).*

(n52)Footnote 135. *Cherry v. Home Sav. & Loan Ass'n, 81 Cal. Rptr. 135 (1969).*

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CHAPTER 29 RESTRAINTS ON ALIENATION

3-29 Thompson on Real Property, Thomas Editions § 29.05

AUTHOR: Professor David A. Thomas This chapter is based in part on Ch. 31, George W. Thompson, Commentaries on the Modern Law of Real Property (John S. Grimes, ed. 1979), which made a significant contribution toward preserving the American common law governing restraints on alienation. J. Reuben Clark Law School Brigham Young University

§ 29.05 Provisions for Defeasance on Alienation

Littleton concluded that a condition against alienation, as well as direct restraints on alienation, are void. n136 This precept is generally followed today, so that a condition in restraint of alienation general as to time and person is void. n137 This rule obtains even though the restraint is for a limited or particular time. n138 Such a condition is void on the ground of public policy. n139 In a deed in fee simple, a condition that if the grantee shall die seised of the land, or of any part of it, such land shall revert to the grantor or the grantor's heirs, is repugnant to the grant and void. Upon the death of the grantee the land goes to the heirs. n140 In estates for life or for years, conditions in restraint of alienation are lawful. Such restraint is good by reason of a reversion remaining in the lessor. n141

A fee simple estate and a restraint upon its alienation cannot in their nature coexist. n142 A will provision violating the statute prohibiting restraint on alienation was void as against public policy. n143 Such a condition is repugnant to the nature of the estate granted or devised. n144 An absolute title to real estate cannot be devised subject to a restriction that the devisee shall not alienate the land before the devisee's youngest child arrives at a certain age, or before a certain date if such child dies before reaching such age. n145 A provision in a deed that the land shall not be conveyed or sold by the grantee without the grantor's consent has been held not void as repugnant to the estate conveyed by the granting clause. n146

Before determining whether or not a covenant, in reliance upon which persons other than the parties to the action may have acted in the purchase and improvement of land within its intended operation, should be held void as an undue restraint on alienation, all the provisions of the deed of which it forms a part should be considered insofar as they may reveal the general objects of the restriction, and the extent of its actual application should also be described. n147 Provisions in a deed which seek to prevent alienation are strictly construed. n148 The rules against restraints on alienations have nothing to do with the use and occupancy of property, but are intended only to make conveyancing free and unrestrained. n149 Conditions against alienation of contracts for sale of land have been sustained, the vendee's interest being equitable. n150 The courts are divided as to whether conditions against alienation of equitable interests are void in the same manner as those affecting legal interests, or whether they may be valid. n151

A condition not to convey without first giving the grantor the privilege of repurchasing is void, as is a condition requiring the payment of money for the privilege of alienating to a stranger. n152 A condition not to alien the land without first giving the grantor, the grantor's heirs or assigns, the privilege of repurchasing, was held void in North Carolina because the condition was indefinite as to time and might be exercised whenever the property should be sold, and indefinite as to the amount to be paid upon repurchase. n153 A condition or covenant that the grantor should "at any time" have the right of "pre-emption" of the property conveyed "at and after the same price as the above-mentioned consideration," gives the grantor the option to purchase at that price in preference to any other person, in case the owner desired or offered to sell at the price specified. n154 It is held that an owner of land may, for a valuable consideration, make a binding agreement that a certain person shall have the right to say whether or not he will take the property at such owner's death at a stipulated price. n155 Some states uphold a condition against alienation which terminates the estate. n156

A will provision violating the statute prohibiting restraint on alienation was void as against public policy. n157

Provisions for acceleration in mortgages upon alienation have generally been upheld as not being invalid restraints. n158 So the courts are not in accord as to whether "due-on-sale" acceleration or encumbrance clauses in mortgages are invalid restraints on alienation. n159

But other courts require the presence of some factors which would justify enforcement of the due on sale clause. These factors include the lender's inability to determine the transferee's financial capabilities, or disparity between stated and market place interest rates. n160

A due on sale clause is enforceable where a long-term sales contract is entered into since equitable conversion results. n161

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FOOTNOTES:
(n1)Footnote 136. Littleton, Tenures, § 360. Co. Litt. § 222b.

(n2)Footnote 137. Coke on Littleton § 436. *Taylor v. Mason, 22 U.S. 325 (1824); Hill v. Gray, 49 So. 676 (Ala. 1090); Libby v. Winston, 93 So. 631 (Ala. 1922)* (restraint for limited period does not defeat application of rule); *Norris v. Hensley, 27 Cal. 439 (1865); Murray v. Green, 28 P. 118 (Cal. 1883); Prey v. Stanley, 42 P. 908 (Cal. 1895); Cronk v. Shoup, 197 P. 756 (Colo. 1921); Stamey v. McGinnis, 88 S.E. 935 (Ga. 1916); Walker v. Shepard, 71 N.E. 422 (Ill. 1904); McFadden v. McFadden, 135 N.E. 31 (Ill. 1922)* (restraint of 20 years after death of grantor); *Easley v. Little, 145 N.E. 625 (Ill. 1924)* (conditions repugnant to grant are void); *Department of Pub. Works v. Porter, 158 N.E. 366 (Ill. 1927); McCleary v. Ellis, 6 N.W. 571 (Iowa 1880); Woodford v. Glass, 150 N.W. 69 (Iowa 1914); Goodman v. Andrews, 213 N.W. 605 (Iowa 1927)* (20 year restraint subsequent to death of life tenant); *Kirby v. Broaddus, 145 P. 875 (Kan. 1915); Ammon v. Ammon, 237 P. 926 (Kan. 1925); Bank of Powhattan v. Rooney, 72 P.2d 993 (Kan. 1937); Chappell v. Chappell, 119 S.W. 218 (Ky. 1909); Smith v. Clark, 10 Md. 186 (1856); Hawley v. Northampton, 8 Mass. 3 (1811); Hall v. Tufts, 35 Mass. 455 (18 Pick 1837); Blackstone Bank v. Davis, 38 Mass. 42 (21 Pick 1838); Gleason v. Fayerweather, 70 Mass. 348 (4 Gray 1855); Lane v. Lane, 90 Mass. 350 (8 Allen 1864); Mandlebaum v. McDonell, 29 Mich. 78 (1874); Watkins v. Minor, 183 N.W. 186 (Mich. 1921); Schulte v. Starks, 213 N.W. 102 (Mich. 1927)* (restraint on alienation to colored person held void); *Sloman v. Cutler, 242 N.W. 735 (Mich. 1932); Triplett v. Triplett, 60 S.W.2d 13 (Mo. 1933); Flanders v. Parker, 120 A. 558 (N.H. 1923); De Peyster v. Michael, 6 N.Y. 467 (1852); Oxley v. Lane, 35 N.Y. 340 (1866); Calvary Presbyterian Church v. Putnam, 221 N.Y.S. 692 (1927); Dick v. Pitchford, 21 N.C. 480 (1 Dev. & B. Eq. 1837); Twitty v. Camp, 62 N.C. 61 (Phil. Eq. 1866); Munroe v. Hall, 1 S.E. 651 (N.C. 1887); Hardy v.*

Galloway, 15 S.E. 890 (N.C. 1892); Pritchard v. Bailey, 18 S.E. 668 (N.C. 1893); Lee v. Oates, 88 S.E. 889 (N.C. 1916); Combs v. Paul, 133 S.E. 93 (N.C. 1926) (the rule holds even though the restraint is for a limited time); *Anderson v. Cary, 36 Ohio St. 506 (1881); Reifsnyder v. Hunter, 19 Pa. 41 (1852); Walker v. Vincent, 19 Pa. 369 (1852); In re Doebler's Appeal, 64 Pa. 9 (1870); In re Yard's Appeal, 64 Pa. 95 (1870); Pennsylvania Horticultural Soc'y v. Craig, 87 A. 678 (Pa. 1913); Kepler v. Kepler, 199 A. 198 (Pa. 1938); Lawrence v. Singleton, 17 S.W. 265 (Tenn. 1875); Bouldin v. Miller, 28 S.W. 940 (Tex. 1894); O'Connor v. Thetford, 174 S.W. 680 (Tex. Civ. App. 1915); Gladstone Mtn. Mining Co. v. Tweedell, 232 P. 306 (Wash. 1925); Fowler v. Wyman, 13 P.2d 501 (Wash. 1932); Bartlett v. Bartlett, 48 P.2d 560 (Wash. 1935); Deepwater Ry. v. Honaker, 66 S.E. 104 (W. Va. 1909); Kerns v. Carr, 95 S.E. 606 (W. Va. 1918); Brandon v. Robinson, 18 Ves. 429.*

See Reynolds v. Nicks, 172 S.W.2d 239 (Ark. 1943); Davis v. Geyer, 9 So. 2d 727 (Fla. 1942); Smith v. Smith, 287 N.W. 411 (Mich. 1939).

A subsequent limitation on the power of alienation of property, devised in fee simple, is void for repugnancy. *Letzkus v. Nothwang, 279 S.W. 1006 (Ark. 1926); Burr v. Tierney, 122 A. 454 (Conn. 1923); Welch v. Murdock, 135 S.E. 611 (N.C. 1926); Baker v. Alexander, 156 N.E. 223 (Ohio App. 1926)* (prohibition against executors closing estate for five years); *Friswold v. United States Nat'l Bank, 257 P. 818 (Or. 1927); In re Fairman's Estate, 135 A. 262 (Pa. 1926).*

Illinois excepts deeds to charitable trusts from this rule. *Catholic Bishop of Chicago v. Murr, 120 N.E.2d 4 (Ill. 1954).*

A devise in fee with a direction that the real estate shall not be sold, mortgaged, or encumbered during the life of the devisee, and that all taxes and repairs paid and the property kept insured is void as a restraint on alienation in the absence of any limitation over. *Davidson v. Auwerda, 186 N.W. 406 (Iowa 1922).*

A testator has the right to suspend the power of alienation for a limited time. *Wohlgemuth v. Des Moines Nat'l Bank, 192 N.W. 248 (Iowa 1923).*

See Kenneth A. Norsworthy *Forfeiture Conditions on the Use of Land as Restraints on the Power of Alienation: A Question of Degree of Tolerance, 25 Baylor L. Rev. 135 (1973).*

Distinguishing between absolute restraints on alienation and restraints would terminate the grantee's interest if there is an attempt to alienation. *Lohmann v. Adams, 540 P.2d 552 (Okla. 1975).*

(n3)Footnote 138. *Sisters of Mercy v. Lightner, 274 N.W. 86 (Iowa 1937); Douglass v. Stevens, 200 S.E. 366 (N.C. 1938).*

(n4)Footnote 139. *Haeussler v. Missouri Iron Co., 19 S.W. 75 (Mo. 1892), 16 L.R.A. 220; Pritchard v. Bailey, 18 S.E. 668 (N.C. 1893); Sharp v. Guthrie, 152 P. 403 (Okla. 1915); Deepwater Ry. v. Honaker, 66 S.E. 104 (W. Va. 1909).*

An intent to limit alienation in a will which does not provide for a limitation over on alienation, does not affect the fee simple given. *Stanton v. Dickson, 239 S.E.2d 741 (Ga. 1977); White v. Brown, 559 S.W.2d 938 (Tenn. 1977). Allison v. Vintage Sports Plaques, 136 F.3d 1443 (11th Cir. 1998)* (court extends patent law first-sale doctrine to celebrities' right of publicity based on the policy opposing restraints on alienation).

(n5)Footnote 140. *Wills v. Pierce, 67 S.E.2d 239 (Ga. 1951); McCleary v. Ellis, 6 N.W. 571 (Iowa 1951); Case v. Dwire, 15 N.W. 265 (Iowa 1883); Ide v. Ide, 5 Mass. 500 (1809); Bassett v. Budlong, 43 N.W. 984 (Mich. 1889); Second Reformed Presbyterian Church v. Disbrow, 52 Pa. 219 (1866).*

(n6)Footnote 141. *Nichols v. Eaton, 91 U.S. 716 (1875); Cotney v. Eason, 113 So. 2d 512 (Ala. 1959)* (if there is a limitation over or provision for forfeiture on alienation).

In the case of *Alsup v. Montoya, 488 S.W.2d 725 (Tenn. 1972),* the court held that while under *Keeling v. Keeling, 203 S.W.2d 601 (Tenn. 1947),* an absolute restraint on alienation of a life estate is valid, strange circumstances would justify the court from abrogating the restraint after a period of time; *Lewis v. Lewis, 57 A. 735 (Conn. 1904); Braman v. Stiles, 19 Mass. 460 (2 Pick. 1825); Hayward v. Kinney, 48 N.W. 170 (Mich. 1891); Watson v. Dalton, 18 N.W.2d 658, 20 N.W.2d 610 (Neb. 1945); De Peyster v. Michael, 6 N.Y. 467 (1852),* per Ruggles, C. J.; *White v. White, 30 Vt. 338 (1857); Camp v. Cleary, 76 Va. 140 (1882).*

"If a man have lands for a term of years on condition that he shall not grant over his estate, this is good by reason of the reversion remaining in the lessor." *In re Shankland's Appeal, 47 Pa. 113 (1864).*

Some early English cases held that alienation was a necessary incident of a life estate. *Brandon v. Robinson, 18 Ves. 429 (1811); Rochford v. Hackman, 9 Hare. 480 (1852). See* the following cases which adopted the English doctrine: *Pace v. Pace, 73 N.C. 119 (1875); Tillinghast v. Bradford, 5 R.I. 205 (1858).*

In the later case in *England of Wilkinson v. Wilkinson, 3 Swanst. 515 (1819),* Sir Thomas Plumer, M. R., holds that a restraint on the alienation of a life estate is valid.

Upholding a forfeiture clause upon alienation of the real estate. *Lohmann v. Adams, 540 P.2d 552 (Okla. 1975). Payne v. Palisades Interstate Park Comm'n, 611 N.Y.S.2d 699 (1994)* (Power of alienation was valid which was suspended only during the life estates of husband and wife).

(n7)Footnote 142. *Hauser v. St. Louis, 170 F. 906 (1909); Murray v. Green, 28 P. 118 (Cal. 1883); McCleary v. Ellis, 6 N.W. 571 (Iowa 1880); Kepler v. Larson, 108 N.W. 1033 (Iowa 1906); De Peyster v. Michael, 6 N.Y. 467 (1852).*

Warranty deed held invalid where it appeared that its sole purpose was to prevent the grantor from mortgaging the property. *McCuiston v. Rollman, 420 S.W.2d 925 (Ark. 1967).*

(n8)Footnote 143. *Schenk v. Piper Aircraft Corp., 377 F. Supp. 477 (1974).*

(n9)Footnote 144. *See Potter v. Couch, 141 U.S. 296 (1891); Crumpler v. Barfield & Wilson Co., 40 S.E. 808 (Ga. 1902); State Bank v. Thiessen, 289 N.W. 791 (Neb. 1939).*

(n10)Footnote 145. *Hudnutt v. John Hancock Mut. Life Ins. Co., 275 N.W. 581 (Iowa 1938).*

Devise for life with remainders but limitation over if remainder sold before age 25. Limitation held a void restraint on alienation. *Harvey v. Harvey, 524 P.2d 1187 (Kan. 1974).*

(n11)Footnote 146. *Iowa Farm Credit Corp. v. Halligan, 241 N.W. 475 (Iowa 1932).*

(n12)Footnote 147. *Shaw v. St. Paul's M. E. Church, 142 A. 380 (Md. 1927).*

(n13)Footnote 148. *Commonwealth ex rel. Bard v. Delaware Div. Canal Co., 1 A.2d 672 (Pa. 1938).*

(n14)Footnote 149. *Meade v. Dennistone, 196 A. 330 (Md. 1938).*

(n15)Footnote 150. *Sloman v. Cutler, 242 N.W. 735 (Mich. 1932); Bethel v. Matthews, 59 P.2d 1125 (Wash. 1936).*

See Edwin C. Goddard, *Non-Assignment Provisions in Land Contracts, 31 Mich. L. Rev. 1 (1932).*

Brokers' exclusive listing contract for 15 years was undue restraint on alienation. *Stone v. Reinhard, 183 S.E.2d 601*

(Ga. App. 1971).

Provision in sales contract preventing alienation without consent of vendors held unlawful restraint. *Lemon v. Nicolai, 190 N.W.2d 549 (Mich. App. 1971).*

(n16)Footnote 151. Valid. Hartwell v. Mobile Towing & Wrecking Co., *102 S. 450 (Ala. 1924)* (though direct restraint would be bad); *Waldo v. Cummings, 45 Ill. 421 (1867); Branhall v. Ferris, 14 N.Y. 41 (1856); Symmes v. Cauble, 67 S.E. 548 (S.C. 1910).*

Void. Potter v. Couch, 141 U.S. 296.

(n17)Footnote 152. Sheppard, *supra,* note 57 at 130. *Bassett v. Budlong, 43 N.W. 984 (Mich. 1889); Livingston v. Stickles, 7 N.Y. 253 (1852); De Peyster v. Michael, 6 N.Y. 467 (1852).*

The case of *Jackson v. Schutz, 18 N.Y. 174 (1820),* which is sometimes cited in favor of the validity of a condition giving the grantor the option of repurchasing, was upon this point the decision of a single judge, the other judges basing their decision upon another ground.

(n18)Footnote 153. *Hardy v. Galloway, 15 S.E. 890 (N.C. 1892). Low v. Spellman, 629 A.2d 57 (Me. 1993)* (Perpetual right of first refusal to purchase property for specified sum was void and violated the Rule Against Perpetuities because the right was perpetual to all heirs and assignees and thus was an unreasonable restraint on alienation).

(n19)Footnote 154. *In re Sullivan's Estate, 218 P.2d 1064 (Colo. 1950); Garcia v. Callender, 26 N.E. 283 (N.Y. 1891),* O'Brien, J., said: "The right of a person to purchase some part of the public lands at a specified price when opened for sale in preference to anyone else, is called the right of pre-emption in the practice of the government and in the decisions of the United States courts. The term is used here to express the idea that some one has the first right to purchase when the land is offered for sale, or the option of buying first."

(n20)Footnote 155. *Elliott v. Delaney, 116 S.W. 494 (Mo. 1909).*

(n21)Footnote 156. *Graham v. Johnson, 49 N.W.2d 540 (Iowa 1951)* (dictum); *Superior Oil Co. v. Johnson, 171 P.2d 658 (Kan. 1946); Outlaw v. Bowen, 285 S.W.2d 280 (Tex. Civ. App. 1955).*

Contra: *Andrews v. Hall, 58 N.W.2d 201 (Neb. 1953)* (a limitation over on breach of condition against alienation is void as against public policy).

(n22)Footnote 157. *Schenk v. Piper Aircraft Corp., 377 F. Supp. 477 (1974).*

(n23)Footnote 158. *See* Ronald R. Volkmer, *The Application of the Restraints on Alienation Doctrine to Real Property Security Interests, 58 Iowa L. Rev. 747 (1973).*

(n24)Footnote 159. Mortgage covenant against alienation was held valid. *Coast Bank v. Minderhout, 392 P.2d 265 (Cal. 1964),* overruled prior Melenkamp case.

Acceleration on sale clause in mortgage was not an unreasonable restraint. *Malouff v. Midland Fed. Sav. & Loan Ass'n, 509 P.2d 1240 (Colo. 1973).*

See Lawrence J. Warren, *Is the Practice of Raising the Interest Rate in Return for Not Exercising an Acceleration Clause on Assumption of a Mortgage Illegal in Texas as a Restraint on Alienation?, 13 S. Tex. L.J. 296 (1972).*

"Due on Sale" held an unreasonable restraint on alienation. *Tucker v. Lassen Sav. & Loan Ass'n, 526 P.2d 1169 (Cal.*

1974).

Mortgagor entering into land sale contract does not accelerate mortgage debt. *Tucker v. Lassen Sav. & Loan Ass'n, 526 P.2d 1169 (Cal. 1974), see* Griffith L. Humphrey, *Tucker v. Lassen: The Demise of the Due On Sale Clause in California, 10 U.S.F. L. Rev. 665 (1976).*

Leasing restriction in condominium held not an invalid restraint on alienation. *Seagate Condo. Ass'n, Inc. v. Duffy, 330 So. 2d 484 (Fla. App. 1976).*

Absolute restraint on alienation is void. *Miller v. O'Neil, 361 N.E.2d 1165 (Ill. App. 1977).*

"Due on Sale" held not an improper restraint on alienation. *Mutual Fed. Sav. & Loan Ass'n v. Wisconsin Wire Works, 239 N.W.2d 20 (Wis. 1976); Baker v. Loves Park Sav. & Loan Ass'n, 333 N.E.2d 1 (Ill. 1975).*

Holding the "due on sale" alienation clause in mortgages as an unreasonable restraint on alienation without a showing of necessity of protection of the mortgagee's legitimate interests. *Sanders v. Hicks, 317 So. 2d 61 (Miss. 1975).*

Enjoining "due on sale" default as unreasonable. Restraint clauses subject to strict construction. *Sanders v. Hicks, 317 So. 2d 61 (Miss. 1975).*

Due on sale clause held enforceable. *First Commercial Title, Inc. v. Holmes, 546 P.2d 232 (Nev. 1976).*

Due on sale was not an invalid restraint on alienation. *Crockett v. First Fed. Sav. & Loan Ass'n of Charlotte, 224 S.E.2d 380 (N.C. 1976).*

"Due on sale" clauses upheld. *Coast Bank v. Minderhout, 392 P.2d 265 (Cal. 1964); Cherry v. Home Sav. & Loan Ass'n, 81 Cal. Rptr. 135 (1969); Jones v. Sacramento Sav. & Loan Ass'n, 56 Cal. Rptr. 741 (1967); Hellbaum v. Lytton Sav. & Loan Ass'n, 79 Cal. Rptr. 9 (1969).*

Restraint on alienation by life tenant and remaindermen was void since there was no provision for forfeiture and no beneficial interest remaining in grantor. *Lohmann v. Adams, 540 P.2d 552 (Okla. 1975).*

Restraint on alienation with forfeiture clause held valid. *Lohmann v. Adams, 540 P.2d 552 (Okla. 1975).*

Mortgage clause permitting increase of interest rate on sale of the property was not a restraint of alienation. *Miller v. Pacific First Fed. Sav. & Loan Ass'n, 545 P.2d 546 (Wash. 1976).*

Due on sale clause upheld. *Bellingham First Fed. Sav. & Loan Ass'n v. Garrison, 553 P.2d 1090 (Wash. 1976).*

Due on sale clause held valid. *Mutual Fed. Sav. & Loan Ass'n v. Wisconsin Wire Works, 205 N.W.2d 792 (Wis. 1973).*

See also Griffith L. Humphrey, *Tucker v. Lassen -- The Demise Of The Due On Sale Clause in California?, 10 U.S.F. L. Rev. 665;* Ronald R. Volkmer, *The Application of the Restraints on Alienation Doctrine to Real Property Security Interests, 58 Iowa L. Rev. 747 (1973);* Bernie Wolf, *Beyond Tucker v. Lassen: The Future of the Due on Sale Clause of California, 27 Hastings L.J. 475 (1975); Mortgages -- Use of Due On Sale Clause by a Lender Is Not a Restraint On Alienation in North Carolina, 55 N.C.L. Rev. 310 (1977); Mortgages: Restrictions in the Transfer of the Fee -- Effect of Due on Sale Clauses, 28 Okla. L. Rev. 418 (1975).*

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Absolute restraint on alienation is void. *Miller v. O'Neil, 361 N.E.2d 1165 (Ill. 1977).*

Upholding a forfeiture clause upon alienation of the real estate. *Lohmann v. Adams, 540 P.2d 552 (Okla. 1975).*

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(n25)Footnote 160. *Mutual Fed. Sav. & Loan Ass'n v. Wisconsin Wire Works, 239 N.W.2d 20 (Wis. 2d 1976).*

(n26)Footnote 161. *Century Fed. Sav. & Loan Ass'n v. Van Glahn, 364 A.2d 558 (N.J. Super. 1976).*

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CHAPTER 29 RESTRAINTS ON ALIENATION

3-29 Thompson on Real Property, Thomas Editions § 29.06

AUTHOR: Professor David A. Thomas This chapter is based in part on Ch. 31, George W. Thompson, Commentaries on the Modern Law of Real Property (John S. Grimes, ed. 1979), which made a significant contribution toward preserving the American common law governing restraints on alienation. J. Reuben Clark Law School Brigham Young University

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Annotation, Application of Rule Against Perpetuities to Limitation Over on Discontinuance of Use for Which Premises Are Given or Granted, or the Commencement of a Prohibited Use, *45 A.L.R. 2d 1154.*

Annotation, Conflict Between Granting and Habendum Clauses as to Estate Conveyed, *58 A.L.R. 2d (1958) 1374.*

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Annotation, Determination of Price under Testamentary Option to Buy Real Estate, *13 A.L.R. 4th 947.*

Annotation, Doctrine that Gift which Might be Void under Rule Against Perpetuities will be Given Effect Where Contingency Actually Occurs Within Period of Rule, *20 A.L.R. 3d 1094.*

Annotation, Effect of Impossibility of Performance of Condition Precedent to Devise or Bequest, *39 A.L.R. 2d 522.*

Annotation, Effect of Statute upon Determination Whether Disposition of All or Residue of Testator's Property, Without Referring to Power of Appointment, Sufficiently Manifests Intention to Exercise Power, *16 A.L.R. 3d 911.*

Annotation, Gift or Grant in Terms Sufficient to Carry the Whole Property Absolutely or so Operating Where Followed by a Limitation Over of Property Not Disposed of by the First Taker, *17 A.L.R. 2d 7.*

Annotation, Grant to Lessee of First Privilege or Right to Purchase Leased Premises as Constituting Absolute or Conditional Option, *34 A.L.R. 2d 1158.*

Annotation, Grazing or Pasturage Agreement as Violation of Covenant in Lease or Provision of Statute Against Assigning or Subletting Without Lessor's Consent, *71 A.L.R. 3d 780.*

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Annotation, Rights of Holder of "First Refusal" Option on Real Property in Event of Sale at Foreclosure or Other Involuntary Sale, *17 A.L.R. 3d 962.*

Annotation, Rule Limiting Duration of Restraints on Alienation as Applicable to Covenant in Deed Restricting Use of Property, *10 A.L.R. 2d 824.*

Annotation, Self-Dealing by Developers of Condominium Project as Affecting Contracts or Leases with Condominium Association, *73 A.L.R. 3d 613.*

Annotation, Sufficiency of Provision of Lease to Effect Second or Perpetual Right of Renewal, *29 A.L.R. 4th 172.*

Annotation, Validity and Construction of Condominium Bylaws or Regulation Placing Special Regulations, Burdens, or Restrictions on Nonresident Unit Owners, *76 A.L.R. 4th 295.*

Annotation, Validity and Construction of Provision of Mortgage or Other Real Estate Financing Contract Prohibiting Prepayment for a Fixed Period of Time, *81 A.L.R. 4th 423.*

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Annotation, Validity and Enforceability of Condominium Owner's Covenant to Pay Dues or Fees to Sports or Recreational Facility, *39 A.L.R. 4th 129.*

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Annotation, Validity, Construction, and Effect of Clause in Franchise Contract Prohibiting Transfer of Franchise or Contract, *59 A.L.R. 3d 244.*

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Annotation, Validity of Option to Purchase Realty as Affected by Indefiniteness of Term Provided for Exercise, *31 A.L.R. 3d (1970) 522.*

Annotation, Validity of Restraint, Ending Not Later Than Expiration of a Life or Lives in Being, on Alienation of an Estate in Fee, *42 A.L.R. 2d 1243.*

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Annotation, What Transfers Justify Acceleration under Due-on-Sale Clause of Real Estate Mortgage, *22 A.L.R. 4th 1266.*

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Supp. To CHAPTER 29 RESTRAINTS ON ALIENATION

3-29 Thompson on Real Property, Thomas Editions Supp. to § 29.02

Supp. to § 29.02 Overview of Restraints on Alienation.

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Add:

Meduna v. Holder, 2003 Tex. App. LEXIS 10568 (No. 03-02-00781-CV, Dec. 18, 2003) (an unreasonable restraint on alienation does not void an entire deed; only the improper restraint clause is void).

Add:

Dennison v. North Dakota Department of Human Services, 640 N.W.2d 447 (N.D. 2002) (the state held a restraint on alienation that was excepted from the marketable record title act), *aff'd, 656 N.W.2d 25 (N.D. 2003)* ; *Alby v. Banc One Financial, 82 P.3d 675 (Wash. App. 2003)* (the postponement of full enjoyment of property, through a transaction that creates an estate that is already vested at the time of the transaction, is not a restraint on alienation).

Add:

Niemann v. Vaughn Community Church, 77 P.3d 1208 (Wash. App., 2003) (a deed requiring that a church be perpetually used only as a Protestant church was an unenforceable restraint on alienation); *Statham v. Kelly, 584 S.E.2d 246 (Ga. 2003)* (a condition subsequent that was repugnant to the fee simple estate was void as an absolute restraint on alienation).

Add:

In re Andrews, 301 B.R. 211 (N.D. Ohio 2003) (spendthrift clause was void because it was designed to prevent creditors from collecting from debtor).

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Supp. to § 29.03 History of Restraints on Alienation.

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§ 29.03(b) Restraints on Alienation in the American States. [Go To Main]

Add:

Alfaro v. Community Housing Imp. System & Planning Ass'n, Inc., *89 Cal. Rptr. 3d 659 (2009)* (a deed restriction limiting the resale prices of houses was ruled not an unreasonable restraint on alienation); *R & G Properties, Inc. v. Column Financial, Inc., 968 A.2d 286 (Vt. 2008)* (a security agreement provision barring substitution of collateral was not an unreasonable restraint on alienation); *Alby v. Banc One Financial, 82 P.3d 675 (Wash. App. 2003)* (Washington also uses the reasonableness standard to determine whether or not a restraint on alienation is void).

Mr. Sign Sign Studios, Inc. v. Miguel, 877 So. 2d 47 (Fla. Dist. Ct. App., 2004) (Florida uses the reasonableness doctrine).

Add:

Kelley v. Burnsed, 805 So. 2d 1101 (Fla. App. 2002) (an option was not an unreasonable restraint on alienation); *Sander v. Ball, 781 So. 2d 527 (Fla. App. 2001)* (an option for an unlimited period was held to be an unreasonable restraint on alienation); *Gangemi v. Zoning Board of Appeal of the Town of Fairfield, 763 A.2d 1011 (Conn. 2001)* (a condition of a zoning variance that prohibited rental of the property was held to violate the public policy against restraints on alienation).

Mr. Sign Sign Studios, Inc. v. Miguel, 877 So. 2d 47 (Fla. Dist. Ct. App., 2004) (an option to buy property did not act as an unreasonable restraint on the owner's right of alienation).

Add:

WFR Assocs. v. Mem'l Hosp., 2004 N.Y. Misc. LEXIS 421 (No. 6248-03, Apr. 18, 2004) (holding that owners and occupants of a condominium were not required to become members of the hospital because such requirement would have been in violation of the current NY law which requires a restraint on alienation to be reasonable).

Add:

But see Norville v. Carr-Gottstein Foods Co., 84 P.3d 996 (Alaska 2004) (the landlord's refusal to consent to the tenant granting a sublease to a bank was not a restraint on alienation).

Add:

Reagan Nat'l Adver. Of Austin, Inc. v. Capital Outdoors, Inc., 96 S.W.3d 490 (Tex. App. 2002) (A lease clause prohibiting releasing of a grandfathered billboard site to other advertisers for five years after termination of the lease was unenforceable against the grantee of an easement in the site allowing the erection of a new billboard.)

Add:

Reagan Nat'l Adver. Of Austin, Inc. v. Capital Outdoors, Inc., 96 S.W.3d 490 (Tex. App. 2002) (A lease clause prohibiting releasing of a grandfathered billboard site to other advertisers for five years after termination of the lease was unenforceable against the grantee of an easement in the site allowing the erection of a new billboard.); *Holtkamp v. State Univ. of Iowa Found., 2004 Iowa App. LEXIS 889* (Iowa Ct. App., 2004) (a will requiring that all three of the testator's children be deceased before the beneficiary can alienate property is not binding upon the beneficiary).

Add:

Alby v. Banc One Financial, 128 P.3d 81 (Wash. 2006) (a reverter clause in a deed was upheld as a valid restraint on alienation); *Griffith v. Kirsch, 886 A.2d 249 (Pa. Super. 2005)* (a provision in a will barring conveyance without prior consent was upheld as a reasonable restraint on alienation); *Vande Guchte v. Kort, 703 N.W.2d 611 (Neb. App. 2005)* (option to repurchase property was not an unlawful restraint on alienation); *Sandpiper Development and Construction, Inc. v. Rosemary Beach Land Co., 907 So.2d 684 (Fla. App. 2005)* (option to repurchase for a limited time was not an unreasonable restraint on alienation); *Libeau v. Fox. 880 A.2d 1049 (Del. Ch. 2005)* (restrictions on a joint tenant's right to dispose of her interest were not unreasonable restraints on alienation).

But see WFR Assocs. v. Mem'l Hosp., 3 Misc. 3d 766 (N.Y. Misc., 2004) (a restriction on leasing a condominium unit to a dentist that had fewer than 25 annual patient contacts with a hospital was unreasonable).

Add:

Firebaugh v. Whitehead, 559 S.E.2d 611 (Va. 2002) (Right of first refusal was valid and bound co-executors; because the property description was sufficient, lack of duration did not violate rule against perpetuities or create alienation restraint, and contract did not involve special skills).

Add:

Aldridge v. Overstreet, 584 S.E.2d 46 (Ga. App. 2003) (holding that a restrictive covenant that would prevent future owners from growing corn or cotton was unenforceable as a restraint on alienation).

Haines v. Great N. Paper, Inc., 808 A.2d 1246 (Maine 2002) (A Maine landowner's agreement to let members of a hunting and fishing club enter its timberland without paying access fees did not run with the land and did not limit the landowner's right to sell the land).

Add:

Statham v. Kelly, 584 S.E.2d 246 (Ga. 2003) (a condition subsequent that was repugnant to the fee simple estate was void as an absolute restraint on alienation); *Imerys Marble Co. v. J. M. Huber Corp., 577 S.E.2d 555 (Ga. 2003)* (restricting clause in a will that prevented the heirs of a fee simple estate from selling mineral interests was void as a restraint on alienation); *Spanish Oaks, Inc. v. Hy-Vee, Inc., 655 N.W.2d 390 (Neb. 2003)* (holding that a landlord can challenge a restraint clause in a sublease by the landlord's tenant, even though the landlord was not a party to the sublease, because the sublease clause against alienation interferes with the landlord's interest in fee simple).

Add:

Beachcomber Properties, L.L.C. v. Station One, Inc., 611 S.E.2d 191 (N.C. App. 2005) (a prohibition against conveying property as a time share unit was an unlawful restraint on alienation).

Add:

Town of Pinebluff v. Marts, 673 S.E.2d 740 (N.C. App. 2009) (an ordinance requiring developers to install a mini-park and reserve open space could not be collaterally attacked as an illegal restraint on alienation); *Navasota Resources, L.P. v. First Source Texas, Inc., 249 S.W.3d 526 (Tex. App. 2008)* (a preferential right provision is not an unreasonable restraint on alienation); *Godley Park Homeowners Ass'n, Inc. v. Bowen, 649 S.E.2d 308 (Ga. App. 2007)* (a restrictive covenant against erecting "For Sale" signs was not an unenforceable restraint on alienation).

Smith v. Osguthorpe, 58 P.3d 854 (Ut. App. 2002) (Family had to share lease payments received for leasing property to ski resort, where unambiguous language established that a partnership dissolution agreement was integrated, and reservation of share of lease payments was not a direct restraint).

Add:

Fohr v. Fohr, 735 N.W.2d 570 (Wis. App. 2007) (a will's prohibition on partition and sale was not an unlawful restraint on alienation).

Add:

Navasota Resources, L.P. v. First Source Texas, Inc., 249 S.W.3d 526 (Tex. App. 2008) (a preferential right to purchase an oil well was not an unreasonable restraint on alienation); *Stephens v. Trust for Public Land, 475 F. Supp. 2d 1299 (N.D. Ga. 2007)* (a right of first offer was not an unreasonable restraint on alienation).

Peavey v. Reynolds, 946 So. 2d 1125 (Fla. App. 2006) (a lease with an indefinite right to renew was an unreasonable restraint on alienation).

Spanish Oaks, Inc. v. Hy-Vee, Inc., 655 N.W.2d 390 (Neb. 2003) (Use restriction against subletting to certain retailers in commercial sublease was not a restraint on alienation or a breach of the covenant of good faith and fair dealing implied in a ground lease; rent-adjustment provision was unambiguous).

RTS Landfill, Inc. v. Appalachian Waste Sys., 2004 Ga. App. LEXIS 441 (No. A03A2027, Mar. 29, 2004); *Herrmann v. AMD Realty, Inc., 765 N.Y.S.2d 232 (2003)* (holding that a right of first refusal represented an unreasonable restraint on alienation because it had no time limit and it allowed the company with the right of first refusal to pay a lower price than the purchasing company); *Meduna v. Holder, 2003 Tex. App. LEXIS 10568* (No. 03-02-00781-CV, Dec. 18, 2003) (right of first refusal was an unreasonable restraint on alienation because the price for a holder of the interest of first refusal was fixed and the interest was unlimited in duration). *But see Lehn's Court Management LLC v. My Mouna Inc., 837 A.2d 504 (Pa. Super. 2003)* (a reasonable right of first refusal is allowable and does not constitute an unreasonable restraint on alienation).

Add

Bortolotti v. Hayden, 866 N.E.2d 882 (Mass. 2007) (right of first refusal did not violate the rule against restraints on alienation); *Old Port Cove Condominium Ass'n One, Inc. v. Old Port Cove Holdings, Inc., 954 So. 2d 742 (Fla. App. 2007)* (an option giving a right of first refusal was not an unreasonable restraint on alienation).

Stephens v. Trust for Public Land, 475 F. Supp. 2d 1299 (N.D. Ga. 2007) (right of first offer was not an unreasonable restraint on alienation).

Add:

Inwood Park Apts., Inc. v. Coinmach Indus. Co., 2004 NY Slip Op 24392 (N.Y. Misc., 2004) (a right of first refusal on a lease was an unreasonable restraint on alienation because it was not appurtenant to the lease and it could be exercised at any time after the lease expired).

Add

Vinson v. Johnson, 931 So. 2d 245 (Fla. App. 2006) (a will clause prohibiting sale or partition except upon unanimous agreement of the heirs was an unreasonable restraint on alienation).

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Abramowicz, Michael. "On the Alienability of Legal Claims." *114 Yale L.J. 697* (January, 2005).

"Right of First Refusal: As Restraint on Alienation," 35 *Real Estate Law Report* 4 (March 2006).

Robinson, Glen O. "Personal Property Servitudes." *71 U. Chi. L. Rev. 1449, 1454* (Fall, 2004).

Add to Annotations

Annotation, *Nature of Estates or Interests Created by Grant or Devise to One and Heirs if Donee Should Have Any*

Heirs, 16 A.L.R.2d 670 .

Annotation, *Restraint upon voluntary alienation of legal life estate*, 160 A.L.R. 639 .

Annotation, *Validity and Effect of Transfer of Possibility of Reverter or Right of Re-Entry, following Conveyance of Determinable Fee or Fee Subject to Condition Subsequent, 53 A.L.R.2d 224* .

Annotation, *Violation of rule against perpetuities, or unlawful, restraint of alienation or suspension of ownership, by postponement of vesting or alienation of ownership until exercise of discretion as to sale or disposal*, 89 A.L.R. 1046 .

Annotation, *Words of Survivorship in Will Disposing of Estate in Remainder as Referable to Death of Testator or to Termination of Intervening Estate, 20 A.L.R.2d 830* .

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CHAPTER 30 SPECIAL LEGAL RULES RELATING TO FUTURE INTERESTS

3-30 Thompson on Real Property, Thomas Editions 30.syn

AUTHOR: Dean John Makdisi College of Law University of Tulsa

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CHAPTER 30 SPECIAL LEGAL RULES RELATING TO FUTURE INTERESTS

3-30 Thompson on Real Property, Thomas Editions § 30.01

AUTHOR: Dean John Makdisi College of Law University of Tulsa

§ 30.01 Introduction to the Chapter

Future interests are regarded as the most complex aspect of American property law, partly because many of the basic legal doctrines are of ancient origin and forgotton rationale. Nevertheless, the doctrines, once mastered, are usually straightforward and reliable in application. It is probably inevitable that over the centuries those venerable doctrines would collect variants, exceptions and other special rules which, in their total impact, give additional substance to future interests' reputation for complexity. In this volume whose chapters are devoted to the various future interests in American property law, it is fitting that this concluding chapter survey these special rules, exceptions and other observations that apply to the modern American law of future interests. The chapter first surveys definitions of words and terms, then explains some of the more important specialized and often obscure legal rules, and gives clarifying explanations to various concepts and relationships unique to future interests.

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CHAPTER 30 SPECIAL LEGAL RULES RELATING TO FUTURE INTERESTS

3-30 Thompson on Real Property, Thomas Editions § 30.02

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§ 30.02 Specialized Definitions Pertaining to Future Interests

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§ 30.02(a) Present and Future Interests Distinguished

A present interest is present ownership of a present right to dominion over property. Such an interest is vested in possession. n1 Since a present interest in property may be an estate that ends at some time in the future, the person who holds the interest after the estate ends is the holder of a future interest. A future interest is a present ownership of a future right to dominion over property. If the future interest is created by one in oneself, it is called a reversionary interest. If it is created in one other than the grantor, it is called a remainder or an executory interest. A future interest is ownership that exists at the moment of creation, the time of conveyance, but it is not "ownership" of property in the common parlance of that term. The future interest holder does not have dominion over the property until it becomes a present interest.

The holder of a future interest is to be distinguished from the holder of a present interest with enjoyment postponed. Although enjoyment, one of the attributes of dominion, is postponed in both cases, the future interest holder follows some present interest holder who enjoys the property. In the case of the holder of a present interest with enjoyment postponed, the property is held by another for the benefit of the present interest holder. This difference becomes important in determining rights of inheritance n2 and the vested nature of the property interest under the Rule against Perpetuities. An estate is another way to describe a right to ownership. Whereas "interest" describes when and how an ownership in property begins, "estate" describes when and how it ends. There are three basic types of estates: fee simple, fee tail and life estate.

§ 30.02(b) Words of Limitation

Words of limitation need not be in a specific form or according to a specific content. They may be gathered from the whole conveyance.

In Webb v. Hearing n3 the testator stated in his will: "I bequeath to Francis my son my houses in London, after the death of my wife; and if my three daughters, or either of them, do overlive their mother, and Francis their brother and his heirs, then they to enjoy the same houses for term of their lives." The court found that Francis had a fee tail and

interpreted "heirs" as "heirs of his body," "for the limitation being to his sisters, it is necessarily to be intended, that it was if he should die without issue of his body; for they are his heirs collateral."

§ 30.02(c) "Heirs"

The heirs (or other groups described by words of similar import) of a designated person in a conveyance are defined by the laws of intestate succession that are (1) in existence at the time of that person's death and (2) in the jurisdiction governing the intestate devolution of the property if it were owned by the person at the time of death. n4

In Farmers Trust Co. v. Wilson n5 the testatrix devised her property to her husband for life and then to her heirs at law. At the time of the execution of the will in 1906 a spouse was not included within the statutory meaning of heir at law. The Intestate Act of 1917 then changed the law to include a spouse within this designation. The testatrix died in 1918. The court ruled that although the testatrix's intent was to be determined at the time of the execution of the will, the meaning of heir at law was to be determined by the law in effect at the time the will became effective. Thus, the husband received not only a life estate but also shared a vested remainder in the property with the other heir at law.

The statutes of each jurisdiction must be examined to determine whether the term "heirs" is declared to mean "children." n6

Heirs of a person are usually determined at the point of that person's death. n7 However, there are times when the use of the word "heirs" suggests that the testator meant those who would be heirs at a time other than the testator's death. n8

In Welch v. Brimmer n9 the testator devised a fee simple subject to an executory devise to his son with an executory devise "to the person or persons who shall be my heir or heirs at law" in the event his son should die without issue living at his death and Eliza Oliver should not then be living. The son was the sole heir presumptive and the court found that the testator's heirs should be determined as if he died at the time of the death of his son. The court stated that "[i]t is argued that it is absurd to suppose from such indefinite language that a testator intended to give to an only child -- a son, for example -- real estate in fee if he survive the testator, and then, if the son die leaving no issue surviving him, to devest him of it in order to give it back to him in fee."

Professor Leach points out that in Massachusetts the court reached opposite results within a period of four months upon facts that are strikingly similar. n10 In Gilman v. Congregational Home Missionary Society n11 the court construed "heirs" of the testator in the ordinary sense of the term as determined at the death of the testator when the testator gave a life estate to his daughter who turned out to be his sole heir at law, and at her death:

> to the children of my said daughter, living at the time of her said decease, or the issue of any deceased child, so living, by right of representation ... in case at the death of my said daughter, she leaves no issue or the issue of any deceased child, living, then ... her present [named] husband [to take a life estate] ... and at his decease, all ... to go to my heirs at law ... but if [he] is not living ... to go to my heirs at law.

In Boston Safe Deposit & Trust Co. v. Waite n12 the court construed "heirs" of the testator as determined at the death of his only son (who died without issue after the testator) when the testator gave a beneficial life estate to each of his children (he had only the one son at the time of his death who was his real heir at law) with remainder over to the then living issue, and if there be no such issue, then to the child's brothers and sisters then living or their issue then living, and if there be none such, then to the testator's heirs at law (who were the brothers and sisters of the testator when the testator was treated as having died after all his issue -- his only son -- died).

§ 30.02(d) "Issue"

Issue means descendants of all generations. n13 Heirs of the body means lineal descendants who would succeed under the intestacy laws. n14 Despite the difference in technical meaning, the term issue often is interpreted to mean heirs of the body. n15 At times it also may be interpreted to mean children. n16

In Kelly v. Mercantile-Safe Deposit and Trust Co. n17 a will provided for a gift over in favor of a testator's daughter's "issue, share and share alike." The court rejected the interpretation of a gift to all descendants of whatever generation and found "issue" to be the equivalent of "heirs of the body." The testator's daughter's child took to the exclusion of her two children and her grandchild.

In Newick v. Mason n18 the income from a trust created by will:

> was made payable to the testator's four children in equal shares during their lifetime, and 'as death occurs [the trustee is] to pay the income to the issue of said deceased child, but if any of ... said children should die without issue the share of said deceased child shall be equally divided among the survivors[.] [O]n the death of the survivor [the trustee is] to pay the income annually to the trustees when appointed of Hartley Masons reservation... .'

The lower court construed the word "issue" to be synonymous with "child" or "children." The Supreme Court upheld this construction, stating that " '[t]he cardinal rule of construction is to give effect to the intent of the testator, discerned within the four corners of the instrument, bearing in mind that such intention must be related to the time when the instrument was executed.'

A gift to issue may be considered contingent on their existence at the time for distribution. n19

§ 30.02(e) "Die Without Issue"

The condition subsequent "if A die without issue" is ordinarily construed to mean exactly what it says: At the point of A's death, if A has no issue, then the condition has occurred that will cut short (along with re-entry in the case of an estate subject to condition subsequent) the prior estate. n20 Thus, O's conveyance "to A and his heirs, but if A die without issue, then to B" creates a present interest in fee simple subject to executory limitation in A and an executory interest in fee simple absolute in B. When A dies, if A has issue, then A's estate loses the condition subsequent which can never occur and becomes a fee simple absolute. If A has no issue at the time of A's death, then A's estate is cut short automatically and B's interest becomes a present interest in fee simple absolute. The construction given to the condition in this ordinary case is called a definite failure of issue construction.

The preference today is for the definite failure of issue construction except in one case where the condition subsequent "if A die without issue" is construed to mean something else. n21 Following an estate in fee tail, it is construed to mean the termination of the line of issue designated in the fee tail estate. Thus, O's conveyance "to A and the heirs of his body, but if A die without issue, then to B" requires that the condition "if A die without issue" be read to mean "when the line of issue of A's body runs out." The meaning given to this condition in these circumstances essentially makes the condition superfluous, because it describes the termination of the fee tail estate. Thus, O's conveyance creates a present interest in fee tail in A and a vested remainder in B in fee simple absolute. The construction given to the condition in this exceptional case is called an indefinite failure of issue construction.

In White v. Summers n22 a devise gave a life estate to John Bowen, then a fee tail to each of his sons successively according to seniority, and in default of such issue to each of the sons (who attained the age of twenty-one) of his nephew in fee tail successively according to seniority, "and in default of such issue" to the daughter of his nephew for life, then to each of her sons in fee tail successively according to seniority. John Bowen died without sons and none of the sons of the nephew had attained the age of twenty-one at that time (with the consequent destruction of their remainders by the Destructibility Rule). A question raised was whether the gift to the nephew's daughter was vested or

contingent on the nephew having no son who lived to reach the age of twenty-one. The court stated that "[i]n my opinion, the words 'in default of such issue' are, and as a matter of conveyancing always have been, considered and used as apt words for the introduction of a remainder, and not as words of contingency." The court compared these words to those of "after the death" in a conveyance "to A for life, and after his death to... ." The remainder after A's life estate is not contingent on the death of A, but will take upon the forfeiture of A's life estate even though A still would be alive. Thus the remainder to the daughter's nephew was vested.

After the condition is determined to be superfluous, the fee tail can then be changed into the estate or estates designated in each state by statute.

Some courts construe the devise "to my daughter A, but if she dies without issue, to B" as substitutional, thereby giving the property to B only if A dies before the testator. n23 Also, there is some authority for construing the devise "to my spouse for life, remainder to my daughter A, but if she dies without issue, to her brothers and sisters or their issue" to allow the gift over only if A predeceases the life tenant. n24

§ 30.02(f) Lapse

A will speaks from the date of death of the testator, not from the date the will is made, unless a different intention is expressed. n25 Therefore, when a beneficiary under a will dies before the testator or disclaims the gift, the gift lapses in the absence of a testamentary or statutory provision for other disposition of the gift. n26 A lapsed gift does not pass to the beneficiary's estate. If it is neither a residuary nor a class gift, it passes to the general residuary legatees if there is a general residuary clause broad enough to cover the subject matter; otherwise it passes by intestacy. n27 If it is a residuary gift, it passes by intestacy, except in a few states where it may go to the remaining residuary beneficiaries. n28 If it is a class gift, it passes to the surviving members of the class. n29

A statutory provision for a disposition of a gift by will other than by lapse is called an antilapse statute. Most statutes substitute the beneficiary's lineal descendants in the case of a beneficiary who dies before the conveyance on the assumption that they are preferred to residuary or intestate takers. n30 The question arises, however, whether an antilapse statute should apply if the beneficiary dies before the will is made, and there is authority both ways. n31

§ 30.02(g) Repudiation or Renunciation

When a prior estate has been renounced, the remainder interest following it may not be accelerated if there is a condition precedent that bars its vesting. The primary consideration is the intention of the testator. Therefore, some conditions precedent that are contingent more on the termination of the prior estate than on the expressed event, such as death of the prior life tenant, do not bar vesting upon renunciation of the prior estate.

In Compton v. Rixey's Executors, n32 the testator stated in his will that "[u]pon the majority of my youngest child, my wife being alive and unmarried, I direct one-third of the net annual income ... to be paid over to my wife, as long as she live, and remains my widow, and the remaining two-thirds to be divided equally between my surviving children... . Upon the death of my wife, or her marriage, my youngest child living being of age, I direct my entire estate to go to and be divided equally between my children then living and the descendants per stirpes of such as may be then dead with issue surviving." The widow renounced her share seven years after the death of her husband. The four living children of the testator had reached majority and requested delivery of the estate to them. The court found that the children had contingent remainders that could not be accelerated because the children "then living" could not be ascertained until the death or remarriage of the wife. The court stated that acceleration generally has been allowed where the remainder "has been either vested, defeasible or an estate to one person followed by a substitutionary gift." However, here the court found the gift to the descendants was not substitutionary, that they took as purchasers, and "only those children who are living at the death or remarriage of the wife answer the description of donees."

§ 30.02(h) Acceleration

In Disston's Estate, n33 the testator devised his residuary estate in trust to pay his sister-in-law an annuity for life, then the income to be divided equally between his wife, his son, and his daughter. He then provided that "in the event of the death of either his son or daughter, leaving issue, during the lifetime of his widow, the share of the income of the one so dying should be paid to his or her issue; that should either of his children die without issue, during the lifetime of his widow, the income of the one so dying should be paid in equal shares to the widow and surviving child, so long as the former lived; further, that, upon the death of such surviving child, without issue, during the lifetime of his or her mother, all, income, subject to the payment of the before-mentioned annuity, should go to the testator's wife. As to the principal, subject to the annuity, at the death of his widow, the testator gave one-half of his residuary estate to his son, providing, however, that should the son then be deceased, the share in question should go to the latter's issue; the other half he directed [to his daughter] with remainder to her issue; he then provided that if either of his children should be dead, without issue, at the decease of his widow, the share of the one so dying should be paid to or held for the survivor; finally, should both children be so deceased, he gave the principal of his residuary estate to his nephews and nieces or their issue living at the time." The testator's widow elected to take against his will. The contingent remainders in the children were accelerated, subject to payment of the annuity, because the court found that the primary intent of the testator was to provide the alternative remainders as substitutionary "to prevent the occurrence of a lapse should either of the children die during the continuance of the trust."

Acceleration will not be allowed to the detriment of a disappointed legatee. If a wife renounces a life estate in order to take a statutory share payable out of the residue given to one legatee and the remainders after the life estate are to other legatees, the court may allow the income from the life estate to go to the residuary to help offset the loss of the statutory share. n34

FOOTNOTES:

(n1)Footnote 1. *See* Thomas F. Bergin & Paul G. Haskell, Preface to Estates in Land and Future Interests 180 (2d ed. 1984) for a general discussion of the difference between "vested in possession" and "vested in interest." *Picard v. Vermilion Parish Sch. Bd., 742 So. 2d 589 (La. Ct. App. 1999)* (defining a vested right as one which has become the property of a person in the form of a present interest). *See also Fairbanks v. Tulane Univ., 731 So. 2d 983 (La. Ct. App. 1999).*

(n2)Footnote 2. *See, e.g., Neuschafer v. McHale, 709 P.2d 734 (Or. 1985)* (transaction did not create a present interest with enjoyment postponed but rather an interest that vested in the event of deaths and, as such, was testamentary and void).

(n3)Footnote 3. Cro. Jac. 415 (K.B. 1617).

(n4)Footnote 4. 3 Restatement of The Law of Property §§ 305, 308, at 1671-72, 1706 (1940). *See Conway v. Childress, 896 S.W.2d 15 (Ky. App. 1994)* (intestacy statute in effect at the date of life tenant's death determines whether the life tenant's illegitimate children come within the class of remaindermen designated by the will as the life tenant's "heirs-at-law"). *Cf. Matter of Dodge Testamentary Trust, 330 N.W.2d 72 (Mich. App. 1982),* in which a will directed that upon the happening of certain events the corpus of a testamentary trust consisting of personal property should be distributed to the heirs of the testator's children. The court found that the heirs should be determined as of the date of death of each child and that the heirs should be defined according to the statutes of distribution in effect at the time of that child's death. However, the court looked to the intestate laws of the domicile of the testator rather than of the domicile of each child, quoting from another opinion to the effect that the testator is more familiar with the law of his own domicile than with the law of other jurisdictions. *In re Boyter, 2000 La. LEXIS 2 (La. 2000)* (stating that the law in existence at the time of decedent's death governs issues related to that death). *See also In re Dolese, 2000 La. App. LEXIS 35 (La. Ct. App. 2000); In re Estate of Fleming, 991 P.2d 128 (Wash. Ct. App 2000).*

(n5)Footnote 5. *63 A.2d 14 (Pa. 1949).*

(n6)Footnote 6. *See* W. Barton Leach, Cases and Materials on The Law of Future Interests 480 n.5 (2d ed. 1940).

(n7)Footnote 7. It is a well-established basic rule of construction in most jurisdictions according to Edward C. Halbach, Jr. & Eugene F. Scoles, Problems and Materials on Future Interests 147 (1977). They name the following exception: heirs of a person determined at the death of the testator where the testator devises to the heirs of the person who predeceased the testator. Adams, Cynthia, *Survey: Trusts and Decedents' Estates, 32 Ind. L. Rev. 1097 (1999)* (stating that Indiana generally determines a person's heirs at the time of his or her death).

(n8)Footnote 8. One argument is to prevent property from going to non-relatives. William M. McGovern, *Facts and Rules in the Construction of Wills, 26 U.C.L.A. L. Rev. 285, 291 (1978)* [hereinafter *Facts and Rules*].

(n9)Footnote 9. *47 N.E. 699 (Mass. 1897). Compare Holloway v. Holloway, 5 Ves. Jr. 399 (Ch. 1800)* ("heirs" given its normal meaning although one of the heirs was a named taker of another part of the bequest). A case similar to *Welch v. Brimmer is Warren-Boynton State Bank v. Wallbaum, 528 N.E.2d 640 (Ill. 1988).*

(n10)Footnote 10. Leach, *supra* note 6, at 465.

(n11)Footnote 11. *177 N.E. 621 (Mass. 1931).*

(n12)Footnote 12. *179 N.E. 624 (Mass. 1932).*

(n13)Footnote 13. *See Freeman v. Parsley, 3 Ves. Jr. 421 (Ch. 1797). Bilbrey v. Smithers, 937 S.W.2d 803 (Tenn. 1996)* (children born out of wedlock whose paternity is not decided before their father's death can establish a right to inherit through him if they file their claim within the proper time frame); *Johnson v. Cohan, 2000 Mass. Super. LEXIS 45 (2000)* (stating that a court will ordinarily define issue as all lineal descendants). *See also In re Shumavon, 260 A.D.2d 140, 701 N.Y.S.2d 84 (1999)..*

(n14)Footnote 14. 3 Restatement of The Law of Property § 306, at 1696 (1940)..

(n15)Footnote 15. *See* 3 Restatement of The Law of Property § 303, at 1658 (1940).

(n16)Footnote 16. *Elefante v. Newhall, 690 N.E.2d 283 (Mass. App. Ct. 1998)* (the word "issue" as used in the estate meant "child" and included son's adopted children).

(n17)Footnote 17. *278 A.2d 584 (Md. 1971).*

(n18)Footnote 18. *581 A.2d 1269 (Me. 1990).*

(n19)Footnote 19. *See In re Estate of Hylin, 286 N.E.2d 278 (N.Y. 1972).*

(n20)Footnote 20. It could also mean death without ever having had issue, but this meaning is not usually used. *See* Cornelius J. Moynihan, Introduction to The Law of Property 40 n.1 (2d ed. 1988); Bergin & Haskell, *supra* note 1, at 236-237.

(n21)Footnote 21. *See* 3 Restatement of The Law of Property § 267 & cmt. i (1940); Moynihan, *supra* note 20, at 41, where it is noted nevertheless that this constructional preference is not universal, and even where it exists now it may not apply to deeds or wills taking effect before a certain date.

(n22)Footnote 22. *2 Ch. D. 256, at 271-74 (1908).*

(n23)Footnote 23. Facts and Rules, *supra* note 8, at 291. *See Friedman v. Marshall, 876 S.W.2d 745 (Mo. App. 1994)* (devise to children and "in the event any of my heirs die without issue the real estate hereinabove bequeathed unto either of such children shall revert to and become the property of my estate for equal distribution among the

surviving heirs, including my beloved wife").

(n24)Footnote 24. *Id*. at 295; Jesse Dukeminier & Stanley M. Johanson, Wills, Trusts and Estates 689 (4th ed. 1990), stating that it is the majority view and citing 5 American Law of Property, § 21.53 (A. James Casner, ed. 1952).

(n25)Footnote 25. *Campbell v. Clark, 10 A. 702 (N.H. 1887).*

(n26)Footnote 26. Thomas E. Atkinson, Handbook of The Law of Wills 777 (2d ed. 1953). The time in which a gift may be disclaimed may be regulated by statute. *See Estate of Balson, 515 N.W.2d 474 (Wis. App. 1994).*

(n27)Footnote 27. *Id*. at 784.

(n28)Footnote 28. *Id*. at 784-785.

(n29)Footnote 29. Leonard Levin, *Lapse and Vesting of Interest Revisited*, 3 Hofstra Prop. L.J. 155, at 156 (1990).

(n30)Footnote 30. Mary Louise Fellows, *In Search of Donative Intent, 73 Iowa L. Rev. 611, at 637 (1988). See Early v. Bowen, 447 S.E.2d 167 (N.C. App. 1994)* (devise to two brothers or to the survivor does not prevent application of anti-lapse statute to distribute estate to issue of both brothers when both brothers died before the testator).

(n31)Footnote 31. *Compare* 2 Simes & Smith, *supra* note 61 § 64, at 150-151 (exclude), with 5 American Law of Property *supra* note 15 § 22.50, at 400 (include).

(n32)Footnote 32. *98 S.E. 651 (Va. 1919).*

(n33)Footnote 33. *101 A. 804 (Pa. 1917).*

(n34)Footnote 34. *See Sellick v. Sellick, 173 N.W. 609 (Mich. 1919)* (*quoting* from another case that "[i]t is well settled, when a widow elects not to take under a will, but to take under the law, her portion under the will will be sequestered to compensate those beneficiaries under the will whose shares are cut down by her election"). *Cf. Trustees Church Home v. Morris, 99 Ky. 317 (1896).*

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CHAPTER 30 SPECIAL LEGAL RULES RELATING TO FUTURE INTERESTS

3-30 Thompson on Real Property, Thomas Editions § 30.03

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§ 30.03 Specialized Rules Pertaining to Future Interests

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§ 30.03(a) How Estates End and Interests Begin

The fee simple absolute never ends naturally. n35 It is infinite in duration and can only be divided. The life estate and fee tail do end naturally at the end of a lifetime. In the case of the life estate, the lifetime is designated; the fee tail estate ends upon the death of the last in a line of issue. When the life estate and the fee tail end in this way, it is called a natural termination.

There are two other ways in which all three estates may end. They may be forfeited for waste of the property. n36 Such an ending is called an unnatural termination. Or they may be cut short by a condition subsequent.

A future interest that follows the ending of an estate or estates is characterized by how the estate or estates end. If no preceding estate must be cut short by a condition subsequent before the future interest can become a present interest, the future interest is called one of two things: a reversion if the grantor leaves the interest in himself n37 or a remainder if it is created by the grantor in one other than himself. If any preceding estate must be cut short by a condition subsequent before the future interest can become a present interest, the future interest is called one of three things: a possibility of reverter if the condition subsequent cuts short an estate determinable, a right of reentry n38 if the condition subsequent cuts short an estate subject to condition subsequent, or an executory interest if the estate cuts short an estate subject to executory limitation. n39 The possibility of reverter and the right of reentry are future interests left in the grantor. n40 The executory interest is a future interest created by the grantor in one other than himself.

Thus, for example, a conveyance from O "to A for life, then to B" creates a remainder in B; a conveyance from O "to A for life, then to O" creates a reversion in O; and a conveyance from O "to A for life, then to B, but if A ever gets married, then to C" creates a remainder in B and an executory interest in C. A conveyance from O "to A for life as long as A never gets married, then to B" creates a remainder in B because B's future interest can take upon the natural termination of A's life estate and does not have to follow the cutting short of the life estate by the condition subsequent of A's marriage (although it will follow the cutting short of the life estate if the condition subsequent occurs). A conveyance from O "to A as long as A does not get married, then to O" creates a possibility of reverter in O. A conveyance from O "to A for life as long as A does not get married, then to O" creates a reversion in O because O's

future interest can take upon the natural termination of A's life estate and does not have to follow the cutting short of A's life estate by the condition subsequent of A's marriage. A conveyance from O "to A but if A gets married then O shall have the right to reenter" creates a right of reentry in O that becomes a present interest upon the happening of the condition subsequent coupled with exercise of the right of reentry by the grantor or the grantor's successor in interest.

In Donehue v. Nilges n41 a grant to a school district for "so long as the aforesaid premises shall be used for a school house site and no longer, and if the aforesaid premises be no longer used for a school house site, it shall revert to and become the property of the grantors herein or those claiming ... by, through or under said grantors" was considered "a determinable fee, a fee simple estate which automatically terminates upon the occurrence of a specified event [and] there remained in the grantors a 'possibility of reverter.' " (The limitation over to those claiming by, through or under the grantors was found void under the rule against perpetuities, leaving only the possibility of reverter in the grantors.)

§ 30.03(b) Alienability

Most interests are alienable in all jurisdictions. Some jurisdictions do restrict the alienability of some interests, such as the possibility of reverter, n42 the right of re-entry, n43 and the contingent remainder. n44 The fee tail and the life estate are not devisable by definition, except the life estate pur autre vie. n45 A life estate is not inheritable by definition, except the life estate *pur autre vie*. n46 By definition, an interest in a fee tail is inheritable only by issue.

§ 30.03(c) Valuation

A gratuitous transfer of a property interest is subject to gift or estate taxation. Valuation of a future interest may be accomplished as follows:

> To value a remainder we must ascertain the present value of a sum of money to be received on the life tenant's death. The right to $1 one year from now is not worth $1 now, but only $1 less the amount of interest that could be earned on it. Assuming a 6 percent rate of interest, 94 cents today will grow to $1 a year from today. Hence, assuming a 6 percent interest rate, the right to $1 a year from now is now worth 94 cents. The more distant the right to receive the sum, the lower its present value. A dollar due in two years is worth 89 cents today (at 6 percent interest); by reinvesting interest, 89 cents today will grow into 94 cents one year from now, which will grow into $1 two years from now. The present value of the right to receive $1 at the end of three years is 84 cents... . To put it another way, 84 cents invested at 6 percent with interest compounded annually will be worth $1 at the end of three years.
>
> In order to value a remainder we must know the number of years the right to receive the sum will be deferred. Since we do not know how long the life tenant will actually live, we assume the life tenant will die at the time predicted by a life expectancy (mortality) table.
>
> The present value of a life estate and of a remainder together equal the present value of the whole property. Let us assume that we have property worth $100,000 today, an interest rate of 6 percent, a life estate in A, a remainder in B. How do we apportion this $100,000 present value between A's and B's interests? First, as for A, what is the present value of the right to receive $6,000 annually (6 percent of $100,000) for the life tenant's life expectancy? We seek a sum which, invested for the life tenant's life expectancy at 6 percent, will pay $6,000 for the given number of years and exhaust itself on final payment -- in short, the price of an annuity. To simplify the problem let us assume A has a life expectancy of only three years. As shown above the present value of $1 due at the end of one year is 94 cents; the present value of $1 due at the end of two years is 89 cents; and the present value of the right to receive $1 at the end of three years is 84 cents. The present value of the right to receive $1 for each of the three years is the sum of 94 cents and 89 cents and 84 cents, which is $2.67. Now what is the present value of the right to receive $6,000 for three years? $6,000 x 2.67 = $16,020, which is the present value of the life estate. The remainder has a present worth of $83,980. n47

§ 30.03(d) Merger Rule

Merger of two separate interests occurs when they are owned by the same person(s), one immediately follows the other, and the interests are both vested (or both contingent on the satisfaction of the same condition(s) precedent). n48

In Purefoy v. Rogers n49 a devise gave a life estate to the testator's widow and then, if she should have a son and name him after the testator, to such son and his heirs, but if the son should die under 21, then to the testator's heirs. The testator's heir conveyed his interest in the property to the widow before she had a son. The court found that the heir's conveyance to the widow merged out the intervening contingent remainder.

In Blocker v. Blocker n50 testator devised an undivided one-third of two thirds of a certain lot of land to his son John for life, "with remainder to such child or children of said John C. Blocker, Jr., as survive him, and if he should not be survived by a child or children, then to a non-sectarian orphanage... ." The sole heirs of the testator were his son John and his daughter Marguerite. John conveyed his life estate and both John and Marguerite conveyed their reversion in this property to one William Hill. The court found that "the life estate merged in the fee and the contingent remainders which theretofore had been supported by the said life estate were destroyed in spite of testator's intention as expressed in the will."

There are two exceptions to this rule:

> (1) A fee tail does not merge with a fee simple.
>
> (2) Although a vested interest is considered to follow another vested interest immediately even when there exists an intervening contingent remainder(s), two successive vested interests in the same person(s) do not merge if they are created in that person(s) simultaneously with the creation of the contingent remainder(s). n51

Merger may occur at the time of the conveyance, such as in the case of O's conveyance "to A for life, then to A's heirs" which is subject to the Rule in Shelley's Case. Merger may also occur at a time after the conveyance has become effective.

§ 30.03(e) Piggyback Rule

A term of years does not figure in the calculus of future interests. It merely takes from one of the interest holders the right to possession of the property for a fixed period of time. In this sense it rides piggyback on the interest.

In Cunliffe v. Brancker n52 a will devised:

> for the term of 120 years if the testator's niece, Sarah Cunliffe, should so long live, in trust to pay the yearly rents to said Sarah Cunliffe for her separate use; [then] to the use of John Cunliffe during his life, with remainder to the use of [the trustees] during the life of the said John Cunliffe, upon trust to preserve contingent uses and estates thereafter limited from being defeated or destroyed, and after the death of John Cunliffe to the use of such children of John and Sarah Cunliffe living at the death of Sarah as they or the survivor should appoint, and in default of appointment to the use of the children of John and Sarah Cunliffe living at the death of Sarah equally, with remainders over in the event that there should be no child of John and Sarah Cunliffe living at the death of the survivor of them.

The court found that the interests were legal and that the death of John before Sarah caused the freehold estates (lasting for the life of John and supporting the contingent remainders in the children) to terminate. Since the remainders did not vest before the termination of their supporting estates, the Destructibility of Contingent Remainders Rule caused them

to fail. The result was an intestacy upon the death of Sarah. [The term of years was non-freehold and could not support interests such as the contingent remainders in freehold. When the will became effective, the present interest was in John in a life estate with Sarah's term of years riding piggyback on his estate. It is interesting that both attempts to evade the Destructibility Rule -- a long term of years and a remainder in trustees to preserve contingent remainders -- failed in this case.]

§ 30.03(f) Rules of Construction and Rules of Law

The primary objective in construing a conveyance is to determine the disposition a conveyor intended to make. n53 This intent is usually determined "by the language employed in his conveyance [including vocabulary peculiar to the conveyor], read as an entirety and in light of the circumstances of its formulation." n54 However, the intent of the conveyor cannot always be ascertained and rules have developed to construe intent according to certain preferences such as the intent commonly prevalent among conveyors similarly situated, the public interest, and an interpretation of the conveyance that will make it legally more effective. n55 This chapter is devoted to the constructional preferences that have manifested themselves in the cases. In reading this chapter it is wise to keep in mind the words of Professor Leach:

> Any considerable examination of the authorities will indicate that English judges give far greater weight to prior decisions in matters of interpretation than American judges; in the main the English cases can be relied upon for the content and historic basis for a given rule but are deceptive as to its strength before an American court. Modern courts take rules of construction less seriously than used to be the practice. n56

§ 30.03(f)(1) Surplusage

Some words that appear to create a condition may be no more than mere surplusage. Thus, in a conveyance "to A for life, and then after A's death to B," B's remainder is vested and takes in possession even if A's life estate ends before A's death by disclaimer, release or forfeiture. n57

In Webb v. Hearing n58 the testator stated in his will: "I bequeath to Francis my son my houses in London, after the death of my wife; and if my three daughters, or either of them, do overlive their mother, and Francis their brother and his heirs, then they to enjoy the same houses for term of their lives." The court found that the interest of the daughters was not contingent since the words "do overlive their mother, and Francis their brother and his heirs" merely showed when their interest was to commence.

§ 30.03(f)(2) Implication

Some words do not create an estate explicitly but the court may find an estate by implication in order to prevent a partial intestacy n59 or incomplete dispositions in inter vivos transfers or to give effect to the manifest intention of the testator. It may be an alternative gift to issue.

In Estate of Blake n60 the testator devised the residue of his estate to trustees "to hold ... and pay over the net income therefrom in equal proportions quarterly to my said daughters ... and my granddaughter ..., until they shall respectively arrive at the age of thirty years, and as each of my said daughters and granddaughter arrives at the age of thirty years she shall have the right to demand and receive one third of the rest and residue of my said estate as her distributive share thereof, and to have and hold the same to her and her heirs forever, and if either of my said daughters or granddaughter shall die without issue and before she receives her distributive share of my estate, it is my desire that her share of my estate shall go to the surviving daughter, daughters or granddaughter as the case may be, share and share alike." The court found that the gift of the corpus was contingent on the beneficiary reaching the age of thirty; it did not vest with possession postponed. Although the entire interim income was given to the beneficiary, the presumption from Clobberie's Case of a present vested gift was not adopted because of the language used in connection with the right "to

demand and receive" and the presence of a gift over. Thus, the testator did not provide explicitly for the case where a daughter or granddaughter should die with issue before receiving her distributive share. The court found that in such a case the issue took the ancestor's share under the will by implication.

It may be a life estate. In Ralph v. Carrick n61 the testator gave the residue of his property to the children (or their descendants) of seven named aunts after the death of his wife. Some but not all of the children were heirs-at-law. The court determined that the wife did not receive a life estate by implication under the terms of the will, but it stated the principle on which a life estate by implication could be created:

> As regards an heir-at-law, if the real estate is given to him alone after the death of A.B., there is a gift to him at that time of what, in the absence of any gift, he would take immediately after the death of the testator. To make sense of this you must take it as expressing an intention to exclude the heir-at-law till that time arrives. Now an heir-at-law can only be excluded by giving the property to somebody else, and therefore, when there is a gift to the heir-at-law alone of real estate after the death of A., a gift of a life estate to A. is implied, because in no other way can the heir-at-law be excluded. But if the gift of the estate after the death of A. is to a stranger, that reasoning does not apply, for the stranger takes simply and entirely by the bounty of the testator, and in the absence of any gift, neither after the death of the named person nor at any other time, will he take anything, and it is not necessary to give anything to A. in order to postpone the gift to the stranger, for there is no difficulty in giving an estate to the stranger on the death of A., leaving it in the meantime to go to the heir-at-law.

The court then found that where the heirs-at-law after the death of the testator's wife would take under the will only a share of that which independently of the will would have come to them, it was not necessary to give the wife a life estate to postpone that smaller interest they would take under the will.

It may be cross-remainders. In Purdy v. Hayt n62 the testator gave real estate to his two sisters "during their respective lives" with a direction to sell it after their deaths and pay the income to his niece for life and then the principle to go to others. The court found that cross-remainders were implied and that upon the death of one of the sisters the other took a life estate in her share. In Smith v. Usher n63 testator gave a tract of land, Mixon place, to his two daughters "to be used and enjoyed by them during their natural lives ... and should [the two daughters] have lawful children, then at their decease, I give and devise said plantation to said heirs forever. But should both of said daughters die childless, I give and devise said Mixon place to my grandson Michael Smith." One daughter died leaving no children. Michael Smith's heir sought her one-half undivided interest in the property under the will. However, the court found that the living daughter was entitled to the dead daughter's share by an implied cross-remainder and that Smith's share was contingent on the death of both daughters without children.

It may be the creation of a remainder where otherwise there would have been a reversion. In Metcalf v. Framingham Parish n64 a bequest was given to Nancy Green and her husband, William:

> for and during their natural lives, as follows: First, during the life of said Nancy, the net income of the same shall be paid over semiannually to said Nancy. In case said Nancy should die before said William, then ... one half of said stock in equal parts to said Association and said Home. The income of the remainder shall be paid to said William as aforesaid during his natural life. Second. In case the said William should die before said Nancy, then at the decease of said Nancy the whole of said stock shall be transferred in equal shares to said Association and said Home, and said trust estate shall cease.

There is no express provision in this will for the disposition of William's share upon his death after Nancy's death. The court implied a gift to the named charities, the Association and the Home.

Some words that appear to create an estate by implication do not. In Bond v. Moore n65 the testatrix gave land to her

"son, Lester Curtis, during his lifetime [with a power of sale]; but should he die without children, then the estate, or so much of it as may remain after his reasonable expenses for living, etc., shall go to my nearest relatives." Lester, who had no children at the time the will was executed but did have children at the time of the testatrix's death, conveyed this land to a William Bond who reconveyed to Lester, upon which Lester claimed a fee simple absolute in this land. The court agreed that he had received a life estate by will and a reversion by intestate succession; when Lester conveyed these two vested interests in the property, the intervening contingent remainder in the nearest relatives was destroyed. The court (with three dissenters) did not imply a vested remainder in Lester's children subject to Lester's life estate, despite the gift over to the nearest relatives should Lester die without children.

§ 30.03(f)(3) Preference for Vesting

Due to the fragility of contingent interests, early vesting and early indefeasibility were considered in the public interest and judicial constructions made this a preference. n66 The consequences of a vested construction are the avoidance of the Destructibility of Contingent Remainders Rule, transferability inter vivos in states where contingent interests are not transferable, acceleration into possession upon the termination of the preceding estates, and avoidance of the rule against perpetuities. n67 It also promotes marketability by avoiding the uncertainty that exists in a contingent interest.

The early vesting of interests is particularly evident in the construction of conditions. The construction of conditions as precedent or subsequent is generally based on a common sense reading of the conveyance. Thus, O's conveyance "to A for life, then to B if B gets married, and if B does not get married, then to C" creates alternative contingent remainders in B and C. B's remainder is subject to the condition precedent of B's marriage. C's remainder is subject to the condition precedent of B's non-marriage. On the other hand, O's conveyance "to A for life, then to B, but if B does not get married, then to C" creates a vested remainder in B and an executory interest in C. The condition of non-marriage is a cutting off condition -- a condition subsequent. B gets a vested remainder at the time of the conveyance and this vested remainder will become a present interest upon A's death if B has not yet married, but as soon as B dies without having married, B's estate is cut off in favor of C's interest. At that time C's interest is transformed from an executory interest into a vested interest (either a remainder or a present interest depending on whether B has a remainder or a present interest at that time). n68

In Matter of Krooss, n69 Herman Krooss gave his residuary estate by will to his wife for life and then to his two children "to and for their own use absolutely and forever. In the event that either of my children aforesaid should die prior to the death of my beloved wife, Eliese Krooss, leaving descendants, then it is my wish and I so direct that such descendants shall take the share their parent would have taken if then living, share and share alike, to and for their own use absolutely and forever." The court interpreted the will to give to the two children of Herman vested remainders subject to divestment on the happening of two conditions, death before the life beneficiary and the leaving of descendants. The occurrence of only one of the conditions was not enough to divest a vested remainder in this case.

John Chipman Gray stated that "[i]f the conditional element is incorporated into the description of, or into the gift to, the remainder-man, then the remainder is contingent ["to A. for life, remainder to such of his children as survive him"]; but if, after words giving a vested interest, a clause is added divesting it ["to A. for life, remainder to his children, but if any child dies in the lifetime of A. his share to go to those who survive"], the remainder is vested." n70

In Festing v. Allen n71 the testator devised to his wife for life, then to his granddaughter for life, remainder to the children of his granddaughter who shall attain the age of twenty-one, and in the absence of such children, to other designated persons. The court found that the condition of attaining the age of twenty-one was a condition precedent on the interests of the granddaughter's children, and since no child had reached twenty-one by the termination of the preceding life estates, the contingent remainders in the granddaughter's children failed [under the Destructibility Rule].

In In re Trust of Lane n72 the court found that the distribution of the proceeds of a trust upon the deaths of the testator's children to "my grandchildren; Nancy Marie Brownell, Lois Lane, and Patricia Lane, or to the survivors of them if any

be deceased" created a vested remainder in these grandchildren subject to divestment by the condition subsequent of death of any of them leaving at least one of them surviving the deaths of the testator's children. The court stated that there is a preference for early vesting and refused to find that the grandchildren had contingent remainders because after the words giving the interest to them the testator added the clause "or to the survivors of them if any be deceased." n73 Thus, if all three remaindermen died before the deaths of the testator's children, the divesting condition would not take place and the property would be vested indefeasibly in the takers from the grandchildren.

Other examples of conveyances in which the nature of the condition is precedent so as to produce alternative contingent remainders in B and C are "to A for life, then if B gets married, to B, and if B does not get married, then to C," "to A for life, then to B if B gets married, and to C if B does not get married," "to A for life, then if B gets married, to B, and to C if B does not get married," and "to A for life, then if B gets married, to B and her heirs, otherwise to C and his heirs."

The one exception to this construction of conditions through a common sense reading is in the case where two conditions that are mirror images of each other are used to refer to an age contingency. Some cases have found that although the conveyance appears to create two alternative contingent remainders, it in fact creates a vested remainder and an executory interest. n74

In Edwards v. Hammond n75 a copyholder of land "surrendered to the use of himself for life, and after to the use of his eldest son and his heirs, if he live to the age of 21 years; provided, and upon condition, that if he die before 21, that then it shall remain to the surrenderer and his heirs." The court found that the interest in the son vested on the death of his father, subject to the condition subsequent that he reach 21, i.e., that if he failed to reach 21, the son's interest would be divested.

In Price v. Hall n76 the testator devised his real estate to his wife for life, and "after the death of my wife I give, devise, and bequeath the same equally to the child or children of my said grandson William Hall, if he leave any him surviving, but in case he leave no child or children him surviving, I give, devise, and bequeath my said real estates, or the residue thereof, unto the children or child of my cousin, Jonas Wilman." Mary Hall died after the testator, leaving William Hall and three children of William Hall surviving her. After Mary Hall's death, William Hall had two more children. The court found that the children had contingent remainders that were not satisfied by the time the preceding estate in Mary Hall had terminated, and therefore they failed. Edwards v. Hammond was distinguished on the ground that it was a gift to children on their attaining a particular age.

In a conveyance of the kind in *Edwards v. Hammond* it is also possible to create a present interest subject to divestment by an executory interest. In Phipps v. Ackers n77 the testator devised certain land to his godson, stating:

> [T]hey my trustees shall stand seised and be possessed thereof in trust and to the intent and purpose to assign, convey, and assure the same unto my godson, George Holland Ackers, ..., when and so soon as he, my said godson, shall attain his age of twenty-one years; and also do and shall pay unto my said godson, G.H. Ackers, the sum of 7000 *l.* at and upon his attaining his said age of twenty-one years. But in case my said godson, G.H. Ackers, shall depart this life before he attains the said age of twenty-one years without leaving issue of his body, lawfully to be begotten, then and in such case the [property], together with the said sum of 7000 *l.*, shall sink into and become part of the residue of my real and personal estate.

The court found that Ackers had an equitable present interest subject to divestment in favor of the person taking the residuary of the estate if Ackers died under age twenty-one and without leaving lawful issue.

§ 30.03(g) Adoption

When adoption laws were enacted in the second half of the 19th century, adopted children ordinarily could not take

unless the donor was the adoptive parent. n78 The presumption today in most jurisdictions is that adopted children are included in the designation of "children," "issue," descendants," and "heirs." n79 However, if adoption is used for the purpose of bringing a person under the provisions of a pre-existing testamentary instrument when the person clearly was not intended to be so covered, some courts may exclude the adopted person from the class. n80 Also, a child adopted by another may possibly not be included within the class of children of the natural parent "if such adoption removes the child from the broader family circle" of the natural parent. n81

§ 30.03(h) The Rule in *Wild's* Case

In 1599, Wild's Case n82 established two resolutions that have since influenced the construction of a devise "to A and A's children." The first resolution interpreted the devise when the children were not living at the time of death of the testator as a fee tail in A. The second resolution interpreted the devise when the children were living at the time of death of the testator as a life estate held concurrently by A and A's children as joint tenants.

Since the time of that case, the Rule in *Wild's Case* has been modified. n83 The preferred view gives a life estate to A and a contingent remainder to the children when the children are not living at the time of the conveyance, and a fee simple estate to A and A's children as a tenancy in common when the children are living at the time of the conveyance.

Where the devise is "to A for life, then to B and B's children" the existence of children at the death of the testator has been used to determine that the children share a fee simple with their parent.

In Wills v. Foltz, n84 the testator gave "to M.F. Wills a support as long as she remains single and the balance of my property I give to L.M. Grapes, S.A. Wills & Minnie V. Wills and their children after all my just debts are paid." The three named takers of the remainder were the daughters of the testator. At the time of the testator's death each had children; one child was born to one of the daughters after the testator's death. By applying the Rule in *Wild's Case* as of the testator's death, the court found that the daughters and their children took *per capita* a fee simple. Apparently, they had a vested remainder subject to open because the child born after the testator's death seems to have been included in the devise.

There are variations on these views of the Rule in *Wild's Case*. In Mississippi, in a grant to A and her children, while the modified view is adopted where children are in existence on the effective date of the grant, n85 children are excluded from the conveyance if they are not in existence at that time. n86

The shares taken by A and A's children when they take concurrently varies among the jurisdictions. They may all take as one class and share equally, or A may take an undivided one-half share and the children may take the other undivided one-half share equally. n87

§ 30.03(i) The Rule in *Shelley's* Case

The Rule in Shelley's Case n88 operates to convert a remainder in heirs into a remainder in the ancestor. If a conveyance or will gives a freehold estate in real property to a person preceding a remainder to that same person's heirs (or heirs of the body), and the estates are both legal or both equitable, the remainder is considered a remainder in fee simple (or fee tail) in the ancestor.

In City Bank & Trust Co. v. Morrissey, n89 Margaret Tyne left a will in which a trust was established for the benefit of William Tyne for life and then upon his death "that all the assets of the trust be converted into cash or distributed in kind to the heirs at law of the said William Tyne who survive him." The Rule in *Shelley's Case* applied to convert the equitable remainder in the real property of the trust into a remainder in William Tyne giving him, after merger, an equitable present interest in fee simple absolute in the realty. Since the Rule does not apply to personalty, the heirs retained their equitable remainder in the personal property. Therefore, the legatees under William Tyne's will received

the realty of the trust which Tyne was entitled to devise, while his heirs at law received the personalty that they had held until Tyne's death as an equitable remainder. This case confirmed that the Rule in *Shelley's Case* does apply to equitable interests, and both the interest in the ancestor and the interest in the heirs were equitable: The duty in the trustee to convert or distribute in kind the property of the remainder after the death of Tyne required the legal interest to be vested in the trustee and the equitable interest in the heirs. Furthermore, the fact that this duty was discretionary in the trustee prevented an equitable conversion of the heirs' property into personalty from taking place.

The Rule in *Shelley's Case* applies where the freehold estate is held by the ancestor as a cotenant. The rule also applies where the freehold estate is held as a vested remainder or as a contingent remainder subject to the same condition precedent as the following remainder in the heirs.

In Starnes v. Hill, n90 a deed conveyed land to C. A. Moore, trustee, "to the use of Madara J. Patterson for and during the time of her natural life, and, in the event that the said R.O. Patterson shall outlive his said wife, Madara J., that the said C.A. Moore and his heirs will then hold the same to the use of said R. O. Patterson for and during the term of his natural life, and, after the termination of the said life estates, that the said C. A. Moore and his heirs will then hold the same to the use of the heirs of the said R. O. Patterson, and them and their heirs forever." It was held that in equity R. O. received a contingent remainder in a life estate following the present interest in a life estate in Madara; R. O.'s heirs received a contingent remainder in fee simple absolute following the estates of Madara and R.O. The Rule in *Shelley's Case* could not apply until R.O. satisfied the condition precedent of survival of his wife because R.O.'s heirs were not subject to the same condition precedent.

The Rule in *Shelley's Case* does operate on a delayed basis, and if R.O. Patterson in the first case above did survive his wife, the rule would have operated to transform the heirs' contingent remainder into a remainder in R.O. At that time the present interest in a life estate in R.O. would merge with the vested remainder in fee simple absolute in R.O. to form a present interest in fee simple absolute in R.O.

The Rule in *Shelley's Case* is a rule of law and not a rule of construction. It is not possible to avoid the Rule based on a showing of the grantor's intent, unless the word "heirs" is intended to mean something other than heirs and the Rule is not applicable.

In Lydick v. Tate, n91 the testator devised to his "daughter during her widowhood, ... to have and to hold for and during her natural life, and at her death or remarriage the said land shall descend to her heirs." By the time the testator died, the daughter was no longer a widow; she also had three sons. The court considered the question whether "heirs" should be read in its technical sense, thus giving the daughter a fee simple absolute through operation of the Rule in *Shelley's Case*; n92 or whether "heirs" should be read as "children," thus giving the daughter's sons a fee simple absolute upon the death of the testator with the daughter no longer a widow. The court found no reason to read the word "heirs" in any way other than its technical sense, but its discussion suggested that a nontechnical reading would be acceptable if the proper circumstances existed.

Many states have abrogated the Rule in *Shelley's Case*. n93

§ 30.03(j) The Doctrine of Worthier Title

The Doctrine of Worthier Title operates to convert a future interest (remainder or executory interest) n94 or, in a devise, a present interest in real or personal property n95 in the heirs n96 of the grantor (not heirs of the body) n97 or next of kin n98 of the grantor or, in a devise, a named person(s) who is (are) the heir(s) n99 of the grantor into a reversionary interest in the grantor. If the limitation to the heirs is an executory interest, the doctrine has the effect of giving the grantor a possibility of reverter. n100 There are two branches to the Doctrine of Worthier Title: the testamentary branch and the inter vivos branch. The testamentary branch requires one additional element: The heir taking by the devise must take the same interest in quantity and quality that he would have taken if the devise would have been stricken out of the

will. n101

Authority for this doctrine developed in the 16th century in a number of cases, the most noted of which was Bingham's Case. n102 Although the doctrine was abolished in England in 1833, n103 it continues to be effective in both branches in several of the United States today. However, some states have abrogated the Doctrine of Worthier Title. n104

The testamentary branch of this rule appears to be a rule of law. n105 The inter vivos branch of this rule is a rule of construction and can be avoided by showing a contrary intent in the grantor. n106 A factor that may be taken into consideration in determining that there is an intent by the grantor to create a remainder in the grantor's heirs rather than a reversion in the grantor is a provision in the trust instrument that the grantor has the power to dispose of the property by will only. n107 Factors that may indicate an intent by the grantor to create a reversion are the retention of broad and extensive powers of control over trust property by the grantor, a provision that the property shall "revert" to the heirs or next of kin, a provision stating that the corpus of the trust is to be paid over to the grantor at the end of a certain period of time or upon the happening of some event but to the heirs or next of kin if the settlor is not living, and the fact that the settlor is the sole beneficiary other than the prospective heirs or next of kin. n108

In Whittemore v. Equitable Trust Co., n109 a trust was created in personal property for the lives of two beneficiaries, and then, in the summary words of the court:

> [a]t the death of the life beneficiary, the trustee is directed to do one of three things: pay the principal of the estate to the settlor, if he be alive; or, if he be dead, to pay it as directed in the settlor's last will and testament; or, if the settlor leave no will, to pay it to the persons who would then take under the Statute of Distributions.

The court found that:

> the settlor intended to make a complete disposition of all the estate at the time of the making of the instrument, ... [and t]he children or next of kin were given a vested remainder which might be divested by the last will and testament of the settlor; it could not be divested by the deed or assignment of the settlor.

The settlor did not have a reversion after the two life estates in the trust.

In Matter of Burchell, n110 the New York court determined that a limitation over to the heirs of the grantor in an inter vivos conveyance created a remainder in the heirs. The court relied on indications of the grantor's intent to create a remainder in the trust instrument, such as the reservation of a testamentary power of appointment as the sole control over the subsequent disposition of the corpus of the trust estate:

> The fact that the trust instrument reserved a power of appointment [as the sole control] is evidence that the settlor believed she had created an interest in the property on the part of others and reserved the power in order to defeat that interest or to postpone until a later date the naming of specific takers.

The consequences of the doctrine can be quite important, although in many cases the effect of taking by descent rather than by purchase is inconsequential. n111 When the inter vivos branch of the doctrine is applied and the grantor retains a reversionary interest, the grantor's interest continues to be alienable, the interest is subject to the claims of creditors, as sole beneficiary of a trust the grantor may terminate it, and the grantor's interest may be subject to certain tax consequences. n112

When the testamentary branch of the doctrine is applied and the heir(s) take by descent, the property taken by descent by a minor who then dies unmarried, under age and without issue, descends in turn to surviving brothers and sisters or

their issue rather than to the surviving parent in several jurisdictions. n113 Also, the property taken by descent rather than by will may have an effect on whether a spouse has waived the homestead, whether the spouse takes the homestead, as in Iowa, free from antecedent debts, whether the spouse will be affected by the fact that intestate assets are resorted to before testate assets in satisfying the claims of creditors or in paying specific legacies, whether dower is barred by statute, whether the rights of creditors can be defeated by renouncing the will, and whether the heir takes a possibility of reverter that may be inalienable. n114

§ 30.03(k) The Rule Against Perpetuities

In the case of an ambiguous construction in which one interpretation would violate the rule against perpetuities, there is authority both for resolving the ambiguity without regard for the rule and for avoiding violation of the rule. n115 Thus, in the latter case, for example, many courts have saved gifts by changing the age specified in the will to twenty-one. n116

§ 30.03(l) Interest with Possession Postponed

The Lord Chancellor in Clobberie's Case n117 stated: "If money were bequeathed to one at his age of twenty-one; if he dies before that age the money is lost. On the other side, if money be given to one, to be paid at the age of twenty-one years; there, if the party dies before, it shall go the executors." This case has been the basis for finding (1) that O's conveyance "to A at age twenty-one" creates an executory interest subject to the condition precedent of A's reaching twenty-one, (2) that O's conveyance "to A payable at age twenty-one" creates a present interest with payment postponed until A reaches the age of twenty-one, and (3) O's conveyance "to trustee X to pay the income to A until age twenty-one, and then to pay the principal to A at age twenty-one" creates a present interest in A with possession of the principal postponed until A reaches the age of twenty-one. n118

If a person who owns a present interest with possession postponed dies before reaching the time of postponement, the administrator is not entitled to the interest immediately but must wait until the time of postponement, unless the whole interest of the legacy is given in the meantime; a person claiming the legacy by a limitation over is entitled to it immediately. n119

The concept of a present vested interest with possession postponed appears to contradict the notion of a present interest that is considered vested in possession. Interests that are enjoyed in possession at some future time are generally considered future interests -- either executory interests or remainders. In fact, the concept of a present interest with possession postponed is contrary to the law of estates and future interests in land. It belongs to the law of chattels personal which developed from the Roman law through the jurisdiction of the ecclesiastical courts over legacies. n120

In the law of chattels personal before the 15th century, the treatment of future interests was similar to that of chattels real. "[Personalty] given to one for life, or even for a day, was a gift forever and would not bear a limitation over." n121 Absolute property was the only kind of property recognized in chattels personal; there was no tenure, and there were no estates as existed in the law of freehold estates. n122 The explanation for this rule of absolute ownership probably lies in the absence of a right of action which a potential reversioner or remainderman could pursue against the life tenant of a chattel personal. Professor Ames points out that:

> There was no action for chattels corresponding to the formedon in reverter and remainder for land. Detinue would, of course, lie in general on a contract of bailment; but the contract of bailment, like a contract for the payment of money, must be conceivably performable by the obliger himself, and therefore before his death; he could not create a duty binding only his executor. Consequently, there being no right of action against him, the life tenant's power of enjoyment was unrestricted. His ownership was necessarily absolute. n123

It does appear that terms of years could be created in chattels personal, but the grantee was thereby given the possession or use and occupation of the goods, not the property interest. The grantor retained a present ownership in the chattel, or if the chattel were bequeathed to another person subject to the term of years, that person was considered its present owner. n124

In 1459, a case n125 appeared which permitted the bequest of a Mass book to two people successively for their lives and upon the death of the second person to the parishioners of a certain parish. The case was in trespass, and although its report was inclusive, it appears that the "life tenants" received a right to the use and occupation of the Mass book while the property or absolute interest remained in others. n126 This case did not change the rule that a gift of personal property was absolute because the absolute interest in the property was never divided. It was merely subject to the use and occupation of the "life tenants." In 1565, the court considered a case n127 which involved a devise of the use of jewels and pieces of plate of the late Chief Justice of England, Lord Fitz-James, to Nicholas Fitz-James and the heirs male of his body. The court held that the grantee of the plate had only the use and occupation. n128

From what source does the concept of use and occupation, separate from the property itself, of a chattel personal arise? Professor Bordwell points out that it has always been confined to testamentary gifts and that therein lies the clue to its origin:

> Testamentary gifts were within the jurisdiction of the Ecclesiastical courts and later of Chancery and the greater part of the law relating to them was developed under the influence of the canon or civil law. That use and occupation had its genesis in the closely related *usus* and *habitatio* of the civil law is convincing. Chancery judges of the late Stuarts turned to the civilians to find the true doctrine. The civilian rule that there could not be a usufruct in perishables is reflected in the like English rule as to life estates in consumables. In the later civil law, *usus* and *habitatio* were classed as personal servitudes. These were "much more like limited ownerships than like servitudes, but since a terminable ownership was not recognized, the fact that they were of limited duration caused them to be considered as rights different from, and less than, ownership-*n jura, in re aliena*." Exactly the same distinction was made between the use and occupation of the English law and the property in the goods. The law of life estates was a law of limited ownership. Not so with use and occupation. It was something different and apart from the property or ownership. Again, in the classical Roman law "ownership could not be conferred on the terms that it was to end at a certain time or on the occurrence of a certain event: there was no such thing as a terminable ownership, expressly created." Compare this with Brooke's famous comment that "a gift or devise of a chattel for an hour is for ever," but "where a man devises that W.O. shall have the occupation of his plate for term of his life, and if he dies, that it shall remain to I.S. this is a good remainder: for the first hath but the occupation, and the other after him shall have the property." n129

It is evident that the concept of use and occupation was derived from the Roman law through the jurisdiction of the ecclesiastical courts over legacies, and because of this, the concept of possession in these courts developed a meaning quite distinct from the concept of seisin in the lay courts.

It should be noted that the 1459 case confronted two successive life estates, but that the 1565 case went further and dealt with a devise of chattels personal to an individual and the "heires males of his body." The courts did not comment adversely on this attempt to create an entail in a chattel personal by way of use and occupation as there was in the case of chattels real when the specter of a perpetuity was raised. The courts probably considered the absolute property undivided in the case of a chattel personal. The bequest of an interest which was less than the absolute property was a bequest of the use and occupation and not of the property itself. n130

This historical development in the law of chattels personal has been obscured by a number of textwriters, n131 including Gray, who initially supported the theory of the executory devise or bequest (from the law governing chattels real) in the case of future interests in chattels personal after a bequest for life. In later editions of his work, however,

Gray rejected his first opinion and reverted to the older theory of use and occupation:

> There can be no doubt, I think, that *this notion arose from overlooking the distinction between chattels real and personal. There is a legal presumption that a life estate is larger than any term for years, but there is no legal presumption that an interest for life in a picture will last longer than the picture itself.* And, further, there can be no bailment of land, while there can be bailment of a chattel. n132

Holdsworth, too, favored the older view. n133 He noted that, although the theory of the executory bequest in the case of chattels personal was supported by three English cases around the turn of the 20th century, n134 these cases never fully considered the issue. n135 Considering its history, the theory of use and occupation does make sense.

Gray's change of opinion appears to have prompted the composition of a Socratic dialogue between him and a Harvard law student. n136 The question was raised whether a gift to a college was too remote where the testator bequeathed a cup to his son for life, and on his death to the son's eldest son for life, and then to the college. In the dialogue, Gray asserts that the interest is executory, but that it is not too remote: "It is, indeed, on the one hand, executory, but on the other hand it is to be considered, on a question of remoteness, as if it were a devise of land, and, if it were land, the gift to the college would be vested and therefore not too remote." n137 The student pointed out that although Gray called the future interest executory it was still treated as vested. Gray confirmed this observation, and the student then asked, "but why, if you always treat them as if they were vested, do you persist in calling them executory?" Gray replied, "Because Lord Coke and Mr. Preston, and Mr. Joshua Williams say I must. We should revere the gods." n138

It is apparent from this dialogue that although a future interest after a life estate in a chattel personal may be called executory, it is in fact not executory. It is instead a vested interest which, as Gray explains elsewhere in his treatise, is a present absolute interest in personalty in accordance with the old common-law view on the subject. n139

In Clobberie's Case, n140 the seminal case for the present interest with possession postponed, a gift of money was given to A "at her age of 21 years, or day of marriage, to be paid unto her with interest." n141 She died before either contingency, and the court found that the money should go to her executor, which was another way of saying that the gift had vested in interest in A and was therefore part of the property which passed from her upon death. The court also stated that a gift to A to be paid at age twenty-one is treated in like manner, but a gift to A at twenty-one is lost if A dies before that age. n142

Clobberie's Case was decided in 1677 and involved a chattel personal. The court found that the interest vested immediately with possession postponed. If the use theory for chattels personal is applied, A did not have a future interest but rather a present, vested, and absolute interest in the property subject to the use and occupation of another (or possibly of A?) until the age of twenty-one when possession would become possible.

If the gift had been a freehold or chattel real, then A theoretically would have had an executory interest, and, in such a case, the interest would not have vested until it vested in possession. In Chandos v. Talbot, n143 decided fifty-four years after *Clobberie's Case*, the Court of Chancery found that a legacy given to a nephew, "to be paid at his age of twenty-five," was not vested insofar as it was charged upon land. As we saw in the development of chattels real, the creation of a future interest in a term of years became permissible in the form of an executory devise. In the law of chattels personal, the influence of the civil law caused a different course of development which allowed the courts to distinguish between the absolute property of personalty and its use and occupation. Consequently, a future interest like that in *Clobberie's Case* was vested only in the case of chattels personal.

Clobberie's Case has provoked widespread discussion from modern courts and textwriters. n144 They correctly believe that the case arose because of the influence of the civil law n145 and "doctrines about seisin which have no application to chattels." n146 Given the historical explanation just pursued, it would be logical to conclude that the present interest

with possession postponed in this case pertains uniquely to chattels personal and should never be confused with an executory interest.

In time, the principles in *Clobberie's Case* were applied to interests in land n147 as well as to interests in chattels personal, and herein some confusion may have arisen. A future interest like that in *Clobberie's Case*, when it appears for a landed estate, may seem to be an executory interest, but, by analogy with *Clobberie's Case*, it may in fact be a present interest with possession postponed. Since this interest vests under the case not only for purposes of transmissibility n148 but also for purposes of the Rule against Perpetuities, n149 it is now possible for these interests in land, which would have been non-vested executory interests in the absence of *Clobberie's Case*, to vest in interest before vesting in possession in those jurisdictions which apply *Clobberie's Case* to land.

The case of an interest presently vested but postponed in possession does exist legitimately for land in one situation--where the present interest is subject to a term of years. However, this situation requires that there be a non-freehold estate that occupies the property for a fixed period of time until the present interest holder takes in possession. Perhaps this situation existed in the late 16th century in Boraston's Case n150 as it is stated by Jarman: n151

> A testator devised land to A and B for eight years, and after the said term, the land to remain to his executors, for the performance of his will, till such time as H should accomplish his age of twenty-one years; and when the said H should come to his age of twenty-one, then to him, his heirs and assigns for ever. H died under twenty-one. It was contended, that the remainder was not to vest in him, unless he attained the prescribed age; but the court held it to be vested immediate, the case being, it was said, nothing else in effect than a devise to the executors, till H attained the age of twenty-one, remainder to H in fee; and that the adverbs of time, when, etc., do not make any thing necessary to precede the settling (i.e., the vesting) of the remainder, but merely expressed the time when it shall take effect in possession.
>
> It is observable, that in the greater number of the cited cases, the prior interest was created for the benefit of the ulterior devisee; but this circumstance does not seem to vary the principle, for the material fact, and that which constitutes the special characteristic for this class of cases, is, that there is a prior interest extending over the whole period for which the devise in question is postponed. It is therefore in effect a devise of the whole estate instanter to B, with the exception of a partial interest carved out for some (no matter what) purpose.

FOOTNOTES:

(n1)Footnote 35. Hopperton, Robert J. *Teaching Present and Future Interests: A Methodology for Students That Unifies Estates in Land Concepts, Structures, and Principles. 26 U. Tol. L. Rev. 621 (Spring 1995).*

(n2)Footnote 36. Forfeiture for waste is generally disfavored. It generally requires the existence of a statute. *See, e.g., Smith v. Smith, 241 S.W.2d 113 (Ark. 1951)* (no action permitted against a life tenant by a remainderman because no Arkansas statute granted such authority). Even where statutory authority exists, forfeiture is generally limited to forfeiture of the specific property wasted. *See, e.g., Smith v. Mattingly, 28 S.W. 503 (Ky. 1894)* (averment of voluntary waste in the destruction and removal of a large portion of fencing). Furthermore, if the waste to the property does not equal the value of the estate held by the one committing the waste, forfeiture may not be allowed. *See, e.g., Perry v. Perry, 170 N.Y.S. 415 (1918)* (no forfeiture when waste was $178 and estate valued at $186). However, when waste has occurred to the entire property to a serious degree, forfeiture has been permitted. *See, e.g., Trent v. Trent, 174 N.E.2d 274 (Ohio App. 1960)* (the property of a life tenant was forfeited when he mortgaged it and did not make subsequent improvements or repayment of the loan). The plaintiff in a forfeiture action may be a remainderman or reversioner, but not an heir expectant of a fee tail estate. *See Cook v. Hardin County Bank Co., 63 N.E.2d 686 (Ohio App. 1945).* A contingent remainderman does not generally have a right to maintain an action for damages for past waste but may be allowed an injunction to prevent a person in possession from committing future waste. *See, e.g., Edens v. Foulks, 163*

S.E.2d 51 (N.C. 1968).

Forfeiture of a felon's property to the government as a penalty for his crime was a part of English law that was transmitted to the United States in colonial times but has been abrogated by constitutional and statutory abolishment. *See Estate of Shields, 584 P.2d 139 (Kan. 1978),* for a discussion of the history of forfeiture for felony in the United States.

Note that an estate also may fail because the person to whom it is limited renounces it. The estate is considered ineffective in the inception with the renunciation relating back to the time when the creating instrument became operative. 2 Restatement of The Law of Property § 231 cmt. d (1936).

(n3)Footnote 37. According to Blackstone, a reversion is "the residue of an estate left in the grantor, to commence in possession after the determination of some particular estate granted out by him." *See* Cornelius J. Moynihan, Introduction to The Law of Property 104 (2d ed. 1988).

(n4)Footnote 38. Also called a power of termination, this interest is a reversionary interest. *But see* Bergin & Haskell, *supra* note 1, at 59 n.7 (noting that the Restatement of The Law of Property (1936) does not regard the right of reentry as a reversionary interest like the reversion and the possibility of reverter).

(n5)Footnote 39. Executory interests were made legal by the Statute of Uses in 1535. *27 Hen. 8,* c. 10. *See* Moynihan, *supra* note 20, at 181-84; Bergin & Haskell, *supra* note 1, at 102-115. *Deviney v. Nationsbank, 993 S.W.2d 443 (Tex App. Waco 1999)* (defining an executory interest).

(n6)Footnote 40. A question is raised whether a reversionary interest can be created by the grantor in a will. In a well-known Massachusetts case, the court found that a possibility of reverter created in a will may be taken under the will. In *Brown v. Independent Baptist Church of Woburn, 91 N.E.2d 922 (Mass. 1950),* the court held that the testator's gift of land to a church "and if the said Church shall be dissolved, or its religious sentiments shall be changed or abandoned, then my will is that this real estate shall go to my legatees" created an invalid executory interest under the rule against perpetuities. Therefore, the future interest became a possibility of reverter following a fee simple determinable and fell into and was passed on to the takers under the residuary clause of the will. Jesse Dukeminier claims that the case is wrong under orthodox doctrine "since a possibility of reverter retained by a will is created in the testator's heirs, not in the testator, who is dead." Jesse Dukeminier, *A Modern Guide to Perpetuities, 74 Cal. L. Rev. 1867, 1906 n.138 (1986)* [hereinafter *Modern Guide*]. According to Dukeminier, "[o]rthodox doctrine would hold that there is a possibility of reverter in [the intestate] heirs, not in the residuary devisees," and he cites *In re Pruner's Estate, 162 A.2d 626 (Pa. 1960)* for this proposition. J. Dukeminier & J. Krier, Property 269 (2d ed. 1988). However, Dukeminier goes on to contradict himself. He states that one "cannot have simultaneous *creation* and *transfer* of a future interest." *Id*. But the creation of the possibility of reverter in a will is simultaneous with the transfer of the testator's interest by intestate succession; both take place at the moment of death of the testator. Furthermore, In re Pruner's Estate, cited by Dukeminier as a case contrary to *Brown,* in fact cites *Brown* extensively as authority for its holding. The reason that the intestate heirs rather than the residuary devisees in *Pruner* took the possibility of reverter created in the will was that there were no residuary legatees to take!

One explanation that might be advanced for the compatibility of the result in *Brown* with the notion that one cannot have simultaneous creation and transfer of a future interest is found in the concept of a reversionary interest itself. A reversionary interest is not "created" in a technical sense. It is left in the grantor after other interests are created. *See* W. Barton Leach, Cases and Materials on The Law of Future Interests 3, 21 (2d ed. 1940). It is for this reason that a grantor owning an estate in fee simple absolute cannot create a reversionary interest in a life estate from that fee simple absolute; all she can do is cut down her fee simple estate. Therefore, transfer of a reversionary interest can occur simultaneously with the creation of a prior interest that leaves (rather than creates) that reversionary interest that was in the grantor up to her death. What a testator cannot do is specifically grant this future interest as a reversionary interest in her will, because then the future interest is no longer a reversionary interest but rather an executory interest. The only

way she can transfer this future interest as a reversionary interest is through the general residuary clause of her will (*see Brown*) or by intestate succession (*see Pruner*). *See City of Palm Springs v. Living Desert Reserve, 70 Cal. App. 4th 613 (Cal. Ct. App. 1999); Prieskorn v. Maloof, 991 P.2d 511 (N.M. Ct. App. 1999)* (employing a possibility of reverter); Cathedral of the Incarnation in the *Diocese of Long Island, Inc. v. Garden City Co., 697 N.Y.S.2d 56 (1999)* (distinguishing right of reentry and possibility of reverter); *Order of the Teachers of the Children of God, Inc. v. Trustees of the Estate of Diocese of Long Island, 687 N.Y.S.2d 684 (1999)* (explaining when and how a possibility of reverter can be extinguished).

(n7)Footnote 41. *266 S.W.2d 553 (Mo. 1954).*

(n8)Footnote 42. *See* Moynihan, *supra* note 20, at 110 & n.1 (inter vivos) and 111 & n.5 (devise). ;For a case in Missouri finding possibilities of reverter both alienable and devisable, *see City of Carthage v. United Missouri Bank, 873 S.W.2d 610 (Mo. App. 1994).*

(n9)Footnote 43. *See id*. at 115-17; Bergin & Haskell, *supra* note 1, at 60-61 (inter vivos and devise). Although a power of termination may not be transferred alone in a number of jurisdictions, it may be transferred as incident to a reversion. In some jurisdictions the attempted alienation of a right of re-entry destroys it. For statutes limiting the duration of the right of re-entry, *see* Moynihan, *supra* note 20, at 117 & n.2.

(n10)Footnote 44. *See* Moynihan, *supra* note 20, at 139-40; 1 American Law of Property § 4.67 (A. James Casner, ed. 1952) (inter vivos).

(n11)Footnote 45. Bergin & Haskell, *supra* note 1, at 37, 57.

(n12)Footnote 46. Bergin & Haskell, *supra* note 1, at 57.

(n13)Footnote 47. Dukeminier & Krier, *supra* note 40, at 223-224. *Estate of Fisher, 645 N.Y.S.2d 1020 (1996)* (the valuation for a person with a life estate is based upon the life tenant's age at the time of the sale of the property and not the date of the decedent's death).

(n14)Footnote 48. *Tarlton v. Stidham, 469 S.E.2d 38 (N.C. App. 1996).*

(n15)Footnote 49. *2 Wms. Saund. 380 (1671).*

(n16)Footnote 50. *137 So. 249 (Fla. 1931).*

(n17)Footnote 51. *See Purefoy v. Rogers, 2 Wms. Saund. 380 (1671).* If the person(s) acquires one or both of the vested interests after their creation, the two successive interests in that person(s) do merge at that time, even though the vested interests were originally created simultaneously with the contingent remainder.

(n18)Footnote 52. *3 Ch. D. 393 (1876).*

(n19)Footnote 53. 3 Restatement of The Law of Property § 241, at 1192 (1940).

(n20)Footnote 54. 3 Restatement of The Law of Property § 242, at 1196, 1199 (1940).

(n21)Footnote 55. 3 Restatement of The Law of Property § 243, at 1208-09 (1940).

(n22)Footnote 56. Leach, *supra* note 6, at 242.

(n23)Footnote 57. Jesse Dukeminier & Stanley M. Johanson, Wills, Trusts and Estates 655 (4th ed. 1990).

(n24)Footnote 58. Cro. Jac. 415 (K.B. 1617).

(n25)Footnote 59. William McGovern in Facts and Rules, *supra* note 8, at 309-310, advises that the facts of each case, such as the distortion of a scheme for equal distribution or an increase in taxes, should indicate the weight to be given the preference against intestacy: "Among other things, the court should ask, 'Who are the heirs?' An intestacy which results in escheat because the testator has no known heirs is undesirable. An intestacy is also undesirable if the testator's only heirs are remote collateral relatives. But if the heirs are the testator's children, a court should be less reluctant to allow intestate distribution. Some courts rely on extrinsic evidence of hostility or lack of affection between the heirs and the testator to bolster the presumption against intestacy." (footnotes omitted) *Estate of Sandstead v. Sandstead, 897 P.2d 883 (Colo. App. 1995)* (gift by implication cannot be inferred by mere silence, but must be founded on expressions in the will which lead to the inescapable inference of what the testator intended but failed adequately to express). *In re Bieley, 673 N.Y.S.2d 38 (N.Y. 1998)* (will called for residuary estate to be held in trust for life of testator's mother, and upon mother's death to two named beneficiaries or their decedents, but did not provide for a disposition if the mother predeceased the testator; court held the will created a gift by implication in favor of the two named beneficiaries).

(n26)Footnote 60. *108 P. 287 (Cal. 1910).*

(n27)Footnote 61. *5 Ch. D. 984 (Court of Chancery 1877), 11 Ch. D. 873* (Court of Appeal 1879).

(n28)Footnote 62. *92 N.Y. 446 (1883).*

(n29)Footnote 63. *33 S.E. 876 (Ga. 1899).*

(n30)Footnote 64. *128 Mass. 370 (1880).*

(n31)Footnote 65. *86 N.E. 386 (Ill. 1908).*

(n32)Footnote 66. 3 Restatement of The Law of Property § 243, at 1217-1219 (1940). Sir Edward Coke stated that "the law always delights in vesting of estates, and contingencies are odious in the law, and are the causes of troubles, and vesting and settling of estates, the cause of repose and certainty." *Roberts v. Roberts, 2 Bulst. 123, 131, 80 Eng. Rep. 1002, 1009 (K.B. 1613).* On the other hand, Professor Leach finds that there are not many judicial declarations as to why this preference exists, and he questions whether it is "possible that (apart for perpetuities cases, where a vested construction tends to save a gift) the preference for vested interests which the cases repeat ad nauseam has no foundation at all at the present time." Leach, *supra* note 6, at 257 n.3. For other commentators, *see* Susan French, *Imposing a General Survival Requirement on Beneficiaries of Future Interests: Solving the Problems Caused by the Death of a Beneficiary Before the Time Set for Distribution, 27 Ariz. L. Rev. 801, at 802 n.8* (against) and at 803 n.10 (for). *Trust of Cross v. Tett, 551 N.W.2d 344 (Iowa App. 1996)* (the status of a vested interest given to a person is not altered if that person predeceases the giver); Jesse Dukeminier, *The Uniform Probate Code Upends the Law of Remainders, 94 Mich. L. Rev. 148 (Oct. 1995); In re DiBiasio, 705 A.2d 972 (R.I. 1998)* (Law favors immediate vesting of remainders unless clearly indicated to the contrary. Preference for vesting is particularly strong when: (1) remaindermen are in existence at the death of the testator; (2) remainder is the residue of the estate; (3) gift is to the testator's relative; and (4) intestacy would otherwise result).

(n33)Footnote 67. Jesse Dukeminier & Stanley M. Johanson, Wills, Trusts and Estates 646 (4th ed. 1990).

(n34)Footnote 68. Bergin & Haskell, *supra* note 1, at 72, suggests the following rules to determine whether a condition is subsequent or precedent:

> When conditional language in a transfer (*e.g.*, "but if," "provided that," "on condition that") follows language that, taken alone, would be said to create a vested remainder, the condition so created is a condition subsequent. If, however, the conditional language appears before the language creating the remainder, or the conditional language seems to be a part of the description of the remainderman, the condition created thereby is a condition precedent. The rules we have given, we hasten to add, are not

> fixed rules of law. The intent of the parties to the transfer will, in theory, determine whether a condition is subsequent or precedent to the vesting of the remainder. But absent evidence of intent to the contrary, courts will use these mechanical rules to determine what the intent was. The rules are pretty much a fixture of our law of future interests. (emphasis removed.)

(n35)Footnote 69. *99 N.E.2d 222 (N.Y. 1951). But see Webb v. Underhill, 882 P.2d 127 (Or. App. 1994),* wherein the court found the following will provision to create alternative contingent remainders: For her use, benefit and enjoyment, for such period of her natural life as she shall remain unmarried, I give to my beloved wife, Agnes Webb, all of my property of every kind and nature, with the provision, ... *At the death of my said wife*, if she shall yet be in the use and enjoyment of said property, such as remains shall be divided as follows: One dollar ($1.00) each to Irene Barton and to Vivian Morse. The remainder shall be divided equally between: [four children who are here named]. But if one or more of these shall be dead, their share shall go to their lineal descendants, if any. If one or more of the four who live in Oregon and are last mentioned, shall be dead leaving no lineal descendants, the share of the deceased one, dead without lineal descendants, shall go to the survivors of the four who live in Oregon (last mentioned) or to their lineal descendants ... .

(n36)Footnote 70. John Chipman Gray, The Rule Against Perpetuities § 108. (4th ed. 1942) [hereinafter GRAY]. *See also* Lewis M. Simes & Allan F. Smith, The Law of Future Interests § 147 (2d ed. 1956).

(n37)Footnote 71. *12 Mees. & W. 279, 152 Eng. Rep. 1204 (Ex. 1843).*

(n38)Footnote 72. *592 A.2d 492 (Md. 1991).*

(n39)Footnote 73. *Coleman v. Coleman, 500 S.E.2d 507 (Va. 1998)* (court held that a beneficiary's interest in residuary estate vested on the death of the testator and was not contingent by a life estate).

(n40)Footnote 74. *See* Moynihan, *supra* note 20, at 128 (citing the English case of *Edwards v. Hammond, 3 Lev. 132, 83 Eng. Rep. 614 (1683),* in n.10), where the first future interest in each of the following conveyances is considered a vested remainder subject to divestment: "to B for life, then to C and his heirs when C attains the age of twenty-one, but if C dies under twenty-one to D and his heirs" and "to B for life, then to B's children, if they attain 21; and for want of such issue to X in fee." When the contingency is not concerned with age, the preference for vesting exception almost never operates. Thus Moynihan, *id. at 192,* describes the future interests in the following conveyance as alternative contingent remainders: "to B for life, and on B's death to C and his heirs, if C survives B; and if C dies before B, to D and his heirs." As Professor George Haskins used to say in his Property class at the University of Pennsylvania Law School, this last example "is too uncompromisingly contingent." Although Bergin & Haskell, *supra* note 1, applies the constructional preference for vesting to the conveyance "to A for life, remainder to B if he survives A, but if B does not survive A, then to C," the two cases cited for this proposition both contain an age contingency. *See id.* at 134-135 & n.47.

(n41)Footnote 75. *3 Lev. 132, 83 Eng. Rep. 614* (C.P., 1683).

(n42)Footnote 76. *L.R. 5 Eq. 399* (Court of Chancery 1868).

(n43)Footnote 77. *9 Cl. & F. 583* (House of Lords 1835).

(n44)Footnote 78. Jesse Dukeminier & Stanley M. Johanson, Wills, Trusts and Estates 681 (4th ed. 1990), referring to the stranger-to-the-adoption rule.

(n45)Footnote 79. *Id. at 682,* referring to the Uniform Probate Code § 2-611 (1983). *See, e.g., Estate of Hannan, 523 N.W.2d 672 (Neb. 1994)* (adopted child considered within meaning of the word "issue"). *Cf. Boatmen's Trust Co. v. Conklin, 888 S.W.2d 347 (Mo. App. 1994)* (adopted child not considered within meaning of the word "issue" as it was

defined in 1911 when testator executed his will, but may be considered within meaning of the words "heirs-at-law"); *D'Accardi v. Charter, 96 F.3d 97 1996 (4th Cir. 1996)* (equitably adopted children have rights where a valid contract to adopt exists, but does not actually occur; the contract in equity will be enforced for the benefit of the adoptive child; a subsequent unilateral decision to rescind does not affect the existence of an enforceable agreement); *Prudential Ins. Co. of Am. v. Smith, 657 So. 2d 1369 (La. App. 1995)* (an adopted child is entitled to proceeds from his biological father's life insurance policy that says "surviving issue"); *Gardner v. Hancock, 924 S.W.2d 857 (Mo. App. 1996)* (the doctrine of equitable adoption does not bar a child's inheritance rights in a natural parent's estate); *Fifth Third Bank v. Crosley, 669 N.E. 2d 904 (Ohio Misc. 1996)* (the adoption creates a parent-child relationship between the adoptee and the adopter for all purposes including inheritance); *MacCallum v. Seymour, 1996 Vt. LEXIS 111* (adopted children have the right to inherit from their "new" collateral or lineal relatives just as a child of blood relation does). *Williams v. Estate of Pender, 738 So. 2d 453 (Fla. App. 1999)* (children equitably adopted can inherit under Florida law, if equitable adoption is proven by clear and convincing evidence); *Miller v. Walker, 514 S.E.2d 22 (Ga. 1999)* (for the purposes of intestacy, an adopted child is not related to his or her biological parents). *See also* Gloria J. Banks, *Traditional Concepts and Nontraditional Conceptions: Social Security Survivor's Benefits for Posthumously Conceived Children, 32 Loy. L.A. L. Rev. 251 (1999);* Susan N. Gary, *Adapting Intestacy Laws to Changing Families, 18 LAW & INEQ. J. 1 (2000);* James R. Robinson, Comment, *Untangling the "Loose Threads": Equitable Adoption, Equitable Legitimation, and Inheritance in Extralegal Family Arrangements, 48 Emory L.J. 943 (1999).*

(n46)Footnote 80. *See Rhay v. Johnson, 867 P.2d 669 (Wash. App. 1994)* (adult adoptee), and*Minary v. Citizens Fid. Bank & Trust Co., 419 S.W.2d 340 (1967),* although Jesse Dukeminier & Stanley M. Johanson, Wills, Trusts and Estates 685 (4th ed. 1990) state that most recent cases hold to the contrary.

(n47)Footnote 81. Restatement (Second) of The Law of Property § 25.5 (Tent. Draft No. 8, 1985). *Estate of Ryan v. Ryan, 928 P.2d 735 (Ariz. App. 1996)* (an adopted child retains inheritance rights from both biological parents); *Newman v. Wells Fargo Bank, 926 P.2d 969 (Cal. 1996)* (adopted children will not be treated as children of the natural parent in the eyes of the law and will not be included among the children or issue for their natural father's sister's will); *Little v. Smith, 1997 Tex. LEXIS 10* (an adopted child may have rights of inheritance through their natural parents if the claim is brought within the statutory limitations period); *Wicks v. Veterens Steel Erection Co., 1996 Tenn. App. LEXIS 115* (children do not inherit from the natural parent or participate in the proceeds of a recovery in a wrongful death action occasioned by the natural parent's death); *Unsel v. Meier, 972 S.W.2d 466 (Mo. Ct. App. 1998)* (adopted granddaughter was precluded from taking double share C although she was the adopted grandchild of the testator, she was also the natural grandchild of the testator). *But see Foor v. Foor, 1999 Ohio App. LEXIS 1885 (Ohio App. 1999)* (stating that Ohio law allows an adopted child to inherit from his or her biological parents even when neither one remains a parent after adoption).

(n48)Footnote 82. *6 Co. 16b, 77 Eng. Rep. 277 (1599).*

(n49)Footnote 83. *See* Moynihan, *supra* note 20, at 42-43.

(n50)Footnote 84. *56 S.E. 473 (W. Va. 1907).*

(n51)Footnote 85. *Reddoch v. Williams, 92 So. 831,832 (Miss. 1922).*

(n52)Footnote 86. *Ewing v. Ewing, 22 So. 2d 225 (Miss. 1945)* (giving the parent a fee simple absolute to the exclusion of children). The dissent pointed out that the word "children" was inappropriately used as the equivalent of the word "heirs" in this case. For a description of what happens in other jurisdictions, *see In re Parant's Will, 240 N.Y.S.2d 558 (1963).*

(n53)Footnote 87. Bergin & Haskell, *supra* note 1, at 138-139 & n.9. *See* Ronald C. Link, *The Rule in Wild's Case in North Carolina, 55 N.C. L. Rev. 751 (1977),* for a general discussion and criticism of the Rule.

(n54)Footnote 88. 1 Co. Rep. 93b, *76 Eng. Rep. 206 (1581).* The Rule did not originate in Shelley's Case but in

fact appeared at least as early as 1366. *See* Moynihan, *supra* note 20, at 142.

(n55)Footnote 89. *454 N.E.2d 1195 (Ill. App. 1983).*

(n56)Footnote 90. *16 S.E. 1011 (N.C. 1893).*

(n57)Footnote 91. *44 N.E.2d 583 (Ill. 1942).*

(n58)Footnote 92. This case poses an interesting question beyond the interpretation of the word "heirs." The Rule in Shelley's Case was applied even though the precedent life estate was subject to the condition subsequent of widowhood, and this condition was broken before the devise became effective (at the testator's death). *Id. at 590-591*. This holding appears to violate the Rule which requires the existence of a precedent life estate.

(n59)Footnote 93. *See* Moynihan, *supra* note 20, at 150; Bergin & Haskell, *supra* note 1, at 97; John v. Orth, *Requiem for the Rule in Shelley's Case, 67 N.C. L. Rev. 681 (1989). In re Estate of Hendrickson, 736 A.2d 540 (N.J. Super. Ct. 1999)* (rejecting the Rule in Shelley's Case). *See also* Paul M. Sullivan, *Customary Revolutions: The Law of Custom and the Conflict of Traditions in Hawai'i, 20 Haw. L. Rev. 99, 124 (1998)* (stating that Hawaii has rejected the Rule in Shelley's Case as the law in that state).

(n60)Footnote 94. For cases applying the doctrine to executory interests, *see Coomes v. Frey, 133 S.W. 758 (Ky. 1911),* and *In re Brolasky's Estate, 153 A. 739 (Pa. 1931).*

(n61)Footnote 95. For cases applying the doctrine to personal property, *see* Joseph Morris, *The Inter Vivos Branch of the Worthier Title Doctrine, 2 Okla. L. Rev. 133, 141 n.35 (1949)* [hereinafter *Inter Vivos Branch*]. There is some question whether the doctrine in its testamentary branch applies only to real property. *See* Joseph Morris, *The Wills Branch of the Worthier Title Doctrine, 54 Mich. L. Rev. 451, 456, 493-94 (1956)* [hereinafter *Wills Branch*]. *Estate of Grulke, 546 N.W.2d 626 (Iowa App. 1996)* (in wills prior to 1979 a devise in a will that gives the same estate to the devisee that he or she would take by the laws of intestacy if there were no will the ultimate title passes by descent rather than under the will); Marianne M. Jennings, *Real Property Could Use Some Updating*, 24 Real Est. L.J. 103 (Fall 1995).

(n62)Footnote 96. Heirs are determined as of the death of the grantor and according to the law of the jurisdiction governing inheritance of the particular property. If the grantor indicates that the heirs or next of kin are to be determined at a time other than his death or by the laws of a jurisdiction other than that governing inheritance of the particular property, the doctrine does not apply. *See Inter Vivos Branch, supra* note 114, at 156-159.

(n63)Footnote 97. *See* Moynihan, *supra* note 20, at 159.

(n64)Footnote 98. *See Inter Vivos Branch, supra* note 114, at 142-143.

(n65)Footnote 99. *See Wills Branch, supra* note 114, at 453-454.

(n66)Footnote 100. *See Inter Vivos Branch, supra* note 114, at 135. Judge Morris also believes that this conclusion should hold for the testamentary branch of the doctrine. *See Wills Branch, supra* note 114, at 478.

(n67)Footnote 101. *See Wills Branch, supra* note 114, at 454-455, 462-466, 488-491.

(n68)Footnote 102. *2 Co. 91a, 76 Eng. Rep. 611* (1598-1600). For a brief history, *see Inter Vivos Branch, supra* note 114, at 136-137. The court in *Matter of Burchell, 87 N.E.2d 293 (N.Y. 1949),* states that:

> The doctrine had its origin in the feudal custom of awarding certain valuable incidents to the overlord upon the descent of property held by a feoffee. These incidents did not accrue if the property was acquired through purchase, and, in order to obviate this means of curtailing the payment of

incidents, title by descent was declared to be more worthy than title by purchase. If a gift over might pass to an heir by descent rather than by gift, he took his title through inheritance. Although the reason for the rule disappeared with the disappearance of feudal customs, the rule itself remained as part of the common law.

(n69)Footnote 103. 3 & 4 Wm. IV, c. 106, § 3 (1833).

(n70)Footnote 104. Thirteen states have abolished the doctrine by statute: Arkansas, California, Illinois, Indiana, Kansas, Massachusetts, Minnesota, Nebraska, New York, North Carolina, Pennsylvania, Texas and West Virginia. *See* Moynihan, *supra* note 20, at 161 n.2, and *Inter Vivos Branch*, *supra* note 114, at 170-173, and *Wills Branch*, *supra* note 114, at 494-495. It has also been repudiated without the aid of legislation. *See, e.g., Hatch v. Riggs Nat'l Bank, 361 F.2d 559 (D.C. Cir. 1966), Lucas v. Parsons, 24 Ga. 640 (1857),* and *Mitchell v. Dauphin Deposit Trust Co., 142 S.W.2d 181 (Ky. 1940).* Iowa is among those states abrogating the doctrine jurisprudentially. *See In re Estate of Kern, 274 N.W.2d 325 (Iowa 1979).* An Iowa appeals court recently affirmed the *Kern* Court's ruling that the abrogation was prospective only. *In re Estate of Grulke, 1996 546 N.W.2d 626 (Iowa App. 1996)..*

(n71)Footnote 105. *See Wills Branch*, *supra* note 114, at 456, 493. *Dennis v. Bird, 941 S.W.2d 486 (Ky. App. 1997)* (doctrine of worthier title noted as applying to remainders).

(n72)Footnote 106. Justice Cardozo in *Doctor v. Hughes, 122 N.E. 221 (N.Y. 1919),* stated that a "clear expression" of intention by the grantor was needed "to transform into a remainder what would ordinarily be a reversion." However, later cases have weakened this presumption and allowed only a weak constructional preference for a reversion. *See* Moynihan, *supra* note 20, at 158 & n.10. On the other hand, a very small number of jurisdictions apply the doctrine as a rule of law. *See Inter Vivos Branch*, *supra* note 114, at 143-150.

(n73)Footnote 107. *See Inter Vivos Branch*, *supra* note 114, at 151-154 (there is a difference of opinion among jurisdictions on this point).

(n74)Footnote 108. *See id*. at 154-160.

(n75)Footnote 109. *165 N.E. 454 (N.Y. 1929).*

(n76)Footnote 110. *87 N.E.2d 293 (N.Y. 1949).*

(n77)Footnote 111. The lack of consequences under the testamentary branch of the doctrine is such that the Restatement has called this branch dead. Restatement of Property § 314, cmt. on subsection (2) (1940). *See* 1 American Law of Property, *supra* note 15, § 419, p. 440.

(n78)Footnote 112. *See Inter Vivos Branch*, *supra* note 114, at 160-164.

(n79)Footnote 113. *See Wills Branch*, *supra* note 114, at 470-474 & nn.105-106 (listing statutes of this type in fourteen jurisdictions).

(n80)Footnote 114. *See id*. at 474-483.

(n81)Footnote 115. Facts and Rules, *supra* note 8, at 286, *citing* Ward v. Van der Loeff, A.C. 653, 660 (1924) (ignore rule) and 6 American Law of Property *supra*, note 15, §§ 24.45, 24.46 and Restatement of The Law of Property §§ 375 (1944) (avoid violation of rule). David M. Baxter, *If You Think You No Longer Need to Know Anything about the Rule Against Perpetuities, Then Read This! 74 WASH. U. L.Q. 713* (Fall, 1995); Ronald C. Link and Kimberly A. Licata, *Perpetuities Reform in North Carolina: The Uniform Statutory Rule Against Perpetuities, Nondonative Transfers, and Honorary Trusts*. 74 N.C. L. RV. 1783 (September, 1996).

(n82)Footnote 116. Facts and Rules, *supra* note 8, at 312-313. *In re Estate of Kreuzer, 674 N.Y.S.2d 505 (N.Y. App. Div. 1998)* (class gifts violated the rules against perpetuities but could be remedied by reducing the age contingency to 21 years of age).

(n83)Footnote 117. *2 Vent. 342, 86 Eng. Rep. 476 (1677).*

(n84)Footnote 118. The difference in result generated by the words "at" and "payable at" has long been criticized but nevertheless followed. *See* Facts and Rules, *supra* note 8, at 316. *Moyars v. Moyars, 717 N.E.2d 976 (Ind. Ct. App. 1999)* (holding that an interest with possession postponed is an alienable interest).

(n85)Footnote 119. Roden v. Smith, Amb. 588 (Court of Chancery 1744).

(n86)Footnote 120. The discussion on the history of the law of chattels personal in this note and in the main text following this note is reprinted with modifications from John Makdisi, *The Vesting of Executory Interests, 59 Tulane L. Rev. 366, at 368-369, 376-382 (1984).*

The distinction between interests in land and interests in personal property finds its basis, according to Professors Leach and Logan, "in the Roman Law, which was imported in England via the Canon Law, the Ecclesiastical Courts, Swinburne on Wills (1590) and the priestly status of the early Chancellors." W. Barton Leach & James K. Logan, Cases and Text on Future Interests and Estate Planning 286 (1961). Present interests with possession postponed developed along a path influenced by the civil law totally different from that of executory interests in the common-law courts. The reason for this bifurcation is found in the dual court system. Between the time of William the Conqueror and Henry II, the jurisdiction of the ecclesiastical courts was separated from that of the lay courts, and the ecclesiastical courts exercised jurisdiction over testamentary and intestate succession to personal property. Thomas F. Atkinson, *Brief History of English Testamentary Jurisdiction, 8 Mo. L. Rev. 107, 108-110 (1943);* Sir William Holdsworth, *The Ecclesiastical Courts and Their Jurisdiction, in* 2 Select Essays in Anglo-American Legal History 255, 262 (1908); Thomas Edward Scrutton, *Roman Law Influence in Chancery, Church Courts, Admiralty, and Law Merchant, in* 1 Select Essays in Anglo-American Legal History 208, 227-230 (1907); Walter Lichtenstein, *The Date of Separation of Ecclesiastical and Lay Jurisdiction in England, 3 Ill. L. Rev. 347, 353 (1908).* Ecclesiastical courts ruled on the validity and construction of testaments in the time of Glanvill (circa 1188), and by the time of Bracton and the reign of Henry III (1216-1272), they were probating testaments and compelling executors to carry out their testator's will. *See* Atkinson, *supra*, at 110, 112; O.W. Holmes, Jr., *Early English Equity, 1 Law Q. Rev. 162, 169 (1885).* The ecclesiastical courts did not administer the common law, which recognized the king as sovereign, but rather canon law, which recognized the Pope and which was studied in conjunction with Roman civil law, drawing on the latter for many of its doctrines and procedures. Atkinson, *supra*, at 115-116; Holdsworth, *supra*, at 259. As a result, the divergence in doctrine between the secular and the church courts produced different rules for the property interests governed by each court. The interests governed by the ecclesiastical courts consisted primarily of chattels bequeathed to the Church, as opposed to the freehold interests governed by the common-law courts.

(n87)Footnote 121. Gray, *supra* note 70 at 71.

(n88)Footnote 122. *Id*. at 735; *see* Percy Bordwell, *Interests in Chattels Real and Personal, 1 Mo. L. Rev. 119, at 126-127 (1936)* [hereinafter Bordwell]. This view of the law still persists for chattels personal which are consumed in the using. 7 William Holdsworth, A History of English Law 470-471 (2d ed. 1937) [hereinafter Holdsworth]; Albert Martin Kales, Estates, Future Interests and Illegal Conditions and Restraints in Illinois at 559 (1920); Homer F. Carey & Daniel M. Schuyler, Illinois Law of Future Interests at 66 (1941). For a description of consumables, *see* 1 Simes & Smith, *supra* note 61, at 404-405. The discussion of chattels personal in this section refers to personalty which is not consumed in the using.

(n89)Footnote 123. J.B. Ames, *The Disseisin of Chattels, 3 Harv. L. Rev. 313, 315-316 (1890). But see* Gray, *supra* note 61, at 736.

(n90)Footnote 124. Gray, *supra* note 70, at 110, 742; Holdsworth, *supra* note 122, at 471-472.

(n91)Footnote 125. *Y.B. Trin. 37 Hen. 6,* pl. 11 (1459). For an account of the case, *see Paramour v. Yardley, 2 Plowd. 539, 542-43, 75 Eng. Rep. 794, 799-800 (K.B. 1579).*

(n92)Footnote 126. *See* Holdsworth, *supra* note 122, at 472-73; Bordwell, *supra* note 122, at 129; Gray, *supra* note 61, at 737.

(n93)Footnote 127. *Owen 33, 74 Eng. Rep. 879 (1565).*

(n94)Footnote 128. *See* Holdsworth, *supra* note 122, at 473 n.2.

(n95)Footnote 129. Bordwell, *supra* note 122, at 128-129 (footnotes omitted).

(n96)Footnote 130. The courts insisted at first that the words "use and occupation" or similar words be used in devising less than an absolute interest in a chattel personal. Holdsworth, *supra* note 122, at 474 n.3, indicates that in 1608 there was a decision cited for the proposition that a devise of a chattel personal to one for life with remainder over to another was not permitted. By the late 17th century, however, courts accepted the argument that the exact words used were immaterial, and the devise of a chattel personal for life was construed as the devise of its use and occupation. *Hyde v. Parrat, 1 P. Wms. 1, 24 Eng. Rep. 269 (1695);* Bordwell, *supra* note 122, at 132; Gray, *supra* note 61, at 738-739; Holdsworth, *supra* note 122, at 476-477.

(n97)Footnote 131. Preston, Butler, Jarman, Lewis, Marsden, and possibly Lord Thurlow, but not Williams nor Fearne. *See* Holdsworth, *supra* note 122, at 476; David T. Oliver, *Interests for Life and Quasi-Remainders in Chattels Personal, 24 Law Q. Rev. 431, 431, 437-438 (1908).*

(n98)Footnote 132. Gray, *supra* note 61, at 739-740 (emphasis in the original).

(n99)Footnote 133. Holdsworth, *supra* note 122, at 477. *Accord* Leach & Logan, *supra* note 120, at 184; Kales, *supra* note 122, at 106. *Contra* 1 Simes & Smith, *supra* note 61, at 797, 800.

(n100)Footnote 134. In re Tritton, 6 Morell 250, [1889], *61 L.T.R. 301* (Q.B.); *In re Thynne, [1911], 1 Ch. 282; In re Backhouse, [1921], 2 Ch. 51. But see* Oliver, *supra* note 150, at 439 (*citing In re Percy, [1883], 24 Ch. D. 616).*

(n101)Footnote 135. Holdsworth, *supra* note 122, at 477.

(n102)Footnote 136. John Chipman Gray, *Future Interests in Personal Property, 14 Harv. L. Rev. 397-398 (1901), reprinted in* Gray, *supra* note 61, at app. F, 723-724 n.1, and Leach & Logan, *supra* note 120, at 186-187.

(n103)Footnote 137. Gray, *supra* note 155, at 397, *reprinted in* Gray, *supra* note 61, app. F at 723 n.1. *See also* Gray, *supra* note 70 at 750 (chattel personal).

(n104)Footnote 138. Gray, *supra* note 155, at 398, *reprinted in* Gray, *supra* note 61, app. F, at 724 n.1.

(n105)Footnote 139. *See also* Leach & Logan, *supra* note 120 at 184 (pointing out the clear error of explaining the rule as to chattels personal on the reading-backward basis which was applicable only to chattels real -- from which came the oft-repeated statement that "all future interests in chattels are executory").

(n106)Footnote 140. *2 Vent. 342, 86 Eng. Rep. 476 (Ch. 1677).*

(n107)Footnote 141. *2 Vent. 342, at 342, 86 Eng. Rep. 476, at 476 (Ch. 1677).*

(n108)Footnote 142. Jesse Dukeminier & Stanley M. Johanson, Wills, Trusts and Estates 670 (4th ed. 1990) states

that the gift at a designated age with interest and the gift payable at a designated age are both considered vested as in *Clobberie's Case,* but the gift at a designated age without interest has engendered a split among American jurisdictions over whether it is contingent on survivorship as in Clobberie's Case.

(n109)Footnote 143. *2 P. Wms. 601, 24 Eng. Rep. 877 (Ch. 1731), reprinted in part in* Leach & Logan, *supra* note 120, at 288.

(n110)Footnote 144. *See Joyner v. Duncan, 264 S.E.2d 76 (N.C. 1980); Elsbree Estate, 66 A.2d 851, 853 (Pa. 1949)* (Stern, J., dissenting); 3 Restatement of The Law of Property § 257 cmts. d & e (1940); 5 American Law of Property, *supra* note 15 §§ 21.17-18; Daniel M. Schuyler, *Should the Rule Against Perpetuities Discard Its Vest?, 56 Mich. L. Rev. 887, 902-03 (1958).* Support for the existence of the rule in Clobberie's Case before the 17th century can be found in H. Swinburne, A Brief Treatise of Testaments and Last Wills 171-75 (I. Windet 1590 & photo reprint 1978).

Commentators cite the tendency of modern courts to combine the rules applying to land and personalty. *See* Carey & Schuyler, *supra* note 122, at 439; Gray, *supra* note 61, at 69; Leach & Logan, *supra* note 120, at 288 n.35; 1 Simes & Smith, *supra* note 61, at 380; Schuyler, *supra,* at 897, 903 n.27, 916.

In the case of a gift to A to be paid at age twenty-one, there is an exception to vesting when the divide-and-pay-over rule for class gifts is applied, but this rule appears to be on the wane in the United States. *See* 5 American Law of Property, *supra* note 15 §§ 21.21, at 159-162 (1952); Schuyler, *supra,* at 903-904.

(n111)Footnote 145. *See, e.g.,* Leach & Logan, *supra* note 120, at 256, 286. *See also Hanson v. Graham, 6 Ves. Jr. 239, 31 Eng. Rep. 1030 (Ch. 1801), reprinted in* Leach & Logan, *supra* note 120, at 290-295 (citing passages from the Digest of Justinian and Code of Justinian to show the influence of the civil law on the common law).

(n112)Footnote 146. Lewis M. Simes, *Future Interests in Chattels Personal, 39 Yale L.J. 771, at 801 (1930).*

(n113)Footnote 147. *See* 5 American Law of Property, *supra* note 15 § 21.18, at 154; Carey & Schuyler, *supra* note 122, at 440 n.5 (*citing Bush v. Hamill, 112 N.E. 375, 376 (Ill. 1916));* Restatement of The Law of Property § 257 comment f (1940); Schuyler, *supra* note 163, at 903.

(n114)Footnote 148. For an explanation of this meaning of "vested," *see* Gray, *supra* note 61, at 112 n.2. *See generally* Kales, *supra* note 122, at 571-572.

(n115)Footnote 149. Carey & Schuyler, *supra* note 122, at 440-441 (discussing *Howe v. Hodge, 38 N.E. 1083 (Ill. 1984));* Simes, *supra* note 165, at 801.

Vesting in this case for purposes of the Rule against Perpetuities has been questioned. *See* Jesse Dukeminier, *Kentucky Perpetuities Law Restated and Reformed, 49 Ky. L.J. 3, 22-23 (1960).* Schuyler, *supra* note 163, at 907-908 states:

> Once again, however, one is justified in wondering whether validity or invalidity under the rule against perpetuities should be made to depend upon the application or non-application of a rule of construction which is largely lacking in logical foundation. That is exactly what happens in connection with the rule as to the effect of an intermediate income gift, for it is applied indiscriminately in determining whether future interests are vested in the sense of being non-contingent on survivorship or whether they are vested for purposes of the rule against perpetuities.

(n116)Footnote 150. 3 Co. Rep. 16 (1587).

(n117)Footnote 151. 2 Jarman, Wills 1345, 1346 (7th ed. 1930).

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CHAPTER 30 SPECIAL LEGAL RULES RELATING TO FUTURE INTERESTS

3-30 Thompson on Real Property, Thomas Editions § 30.04

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§ 30.04 Survivorship

[Go To Supp]

The preference for the vesting rule of construction is evident throughout the discussion of survivorship in this section.

§ 30.04(a) Implied

O's conveyance "to A, but if A dies without issue, then to B" gives B an executory interest with no condition of survivorship. If B predeceases A, B's executory interest will pass to B's heirs if not otherwise conveyed or devised by B.

In Pinbury v. Elkin, n152 testator devised to his wife "all his lands and tenements, money, clothes and yarn, to be freely by her possessed and enjoyed: provided if the said Hester died without issue by the testator Giles Davis, that then 80 *l.* should remain to his brother, John Davis, after her decease." The testator died without issue with only a personal estate, and John Davis predeceased Hester. The court found no condition of survivorship on the interest to John Davis.

O's conveyance "to A for life, then to B and B's heirs" gives a vested remainder to B. n153 This principle of vesting when there is an intermediate gift applies to a remainder in a class as well. n154 O's conveyance "to A for life, then to the children of A" gives a vested remainder subject to open to each child of A as it is born. n155

In In re Stanford's Estate, n156 the testatrix bequeathed the income of a fund of money to Amy Hansen, her niece, for life, and on her death the principal to "be delivered to the child or children" of Amy. Amy had one child, Walter, who predeceased her, and three adopted children who survived her. The court found that Walter's interest vested upon birth.

In Security Trust Co. v. Irvine, n157 the testator gave property to his two sisters, Martha and Mary, during their joint lives and during the lifetime of the survivor of them, and then he directed that the property "shall be equally divided among my brothers and sisters, share and share alike, their heirs and assigns forever, the issue of any deceased brother or sister to take his or her parent's share." The testator was survived by five brothers and sisters, all of whom died before Mary, the surviving life tenant. The court found that each of the five (including Martha and Mary) had a vested remainder from the time of the testator's death, subject to divestment by the issue that survived each and, where no issue survived a particular brother or sister, then that brother or sister had a vested remainder that became indefeasible upon

death. n158 There was no survivorship condition for the brothers and sisters of the testator, although there was a survivorship condition for the issue (as will be discussed in *Altman* below).

O's conveyance to a trustee to pay the income to A for life, then to divide the corpus and pay it over to B, C and D, generally gives vested remainders to B, C and D. n159 The divide-and-pay-over rule, which argues that the requirement of an act that cannot occur until a future time is a requirement of survivorship, has been widely criticized and generally discarded. n160

In Knight v. Pottgieser, n161 the testator gave real and personal property to his wife for life, "and upon and at her death the same to go to and be divided amongst my children and their descendants in equal shares, the descendant or descendants of a deceased child to take the parent's share in equal proportions." One of the testator's children died without issue after the testator's death and before the death of the wife. The court found that the deceased child had a vested remainder that was inheritable at his death. The court stated that "though a gift arises wholly out of directions to pay or distribute in futuro, yet if such payment or distribution is not deferred for reasons personal to the legatee, but merely because the testator desired to appropriate the subject matter of the legacy to the use and benefit of another for and during the life of such other, the vesting of the gift in remainder will not be postponed but will vest at once, the right of enjoyment only being deferred."

On the other hand, assuming the Rule in Shelley's Case does not apply, O's conveyance "to A for life, then to the issue of A" usually imposes a requirement of survivorship to the termination of A's life estate (particularly when the distribution is *per stirpes* and not per capita) either by condition precedent or condition subsequent. n162

In Altman v. Rider, n163 the testator left his estate to his daughter for life, with directions that upon her death the estate be liquidated and certain bequests paid in money, including $10,000 to Wolf Bodenheimer's descendants. The court found that a requirement of survivorship existed, that the descendants were determined at the death of the life tenant, and that distribution should be *per stirpes*. Since one of the sons of Wolf had died without issue, his share was to be divided among the lineal descendants of the other children of Wolf.

O's conveyance, in the absence of the Rule in *Shelley's Case*, "to A for life, then to A's issue, then to B" gives B a contingent remainder that is subject to the birth and survival of A's issue at the time of A's death but not subject to the survival of B at the time of A's death. n164

O's conveyance "to A for life, then to her children, if any; if none, to her brothers and sisters" gives alternative contingent remainders to A's children on the one hand and to A's brothers and sisters on the other. In some jurisdictions, only the brothers and sisters who survive A's death with no children can take. n165 However, this implied survivorship condition is rejected by a majority of states. n166

In a devise by A "to B for life, remainder to A's heirs," A's heirs may be determined at A's death but may have to survive B's death to take. n167

O's conveyance to a trustee to pay the income to herself for life, remainder to her sister, and with the reservation of a power in O "during her life, to amend, alter, revoke, or terminate" the trust, gives a vested remainder to O's sister subject to divestment by exercise of the power of revocation. n168

A springing executory interest in a legacy [can an interest in a legacy be springing?] may have a condition of survivorship of the taker to the time of taking with the exception of a legacy "with interest" or "to be paid at" a time in the future. n169

§ 30.04(b) Express

O's conveyance "to A for life, then to my surviving children" usually gives the children a remainder contingent on survivorship to the termination of the preceding life estate. n170 Likewise, O's conveyance "to A for life, then to my three sons or their survivors" gives the sons a remainder contingent on survivorship to the termination of the preceding life estate. n171 O's devise "to A for life, remainder to my children, the descendants of any deceased child to take the parent's share" may give the children a vested remainder subject to divestment if a child died before the life tenant, leaving children. n172 O's devise "to A's children and, if any of them should die before twenty-one, their share to the survivors" gives the children a present interest closing the class at the time of the testator's death. The survivors have an executory interest that becomes distributable if a child dies under the age of twenty-one; however, survivor is interpreted to be a part of the first class of children rather than using the Rule of Convenience to close a class of surviving children at the time of distribution. n173 The devise of a fee simple to one person and, in case of the person's death, to another may be a provision against lapse; in such a case, the first devisee must survive the death of the testator. n174

FOOTNOTES:
(n1)Footnote 152. 2 Vernon 758 (Court of Chancery 1718).

(n2)Footnote 153. Some commentators have suggested that general survival requirements should be imposed on future interest beneficiaries in order to increase the chances that the property will pass to beneficiaries the donor would have intended. One approach would analogize to the law of lapsed gifts and permit the testator to retain more control over the disposition of his property (presumably through the disposition of the reversionary interest). Leonard Levin, *Lapse and Vesting of Interest Revisited*, 3 Hofstra Property L.J. 155 (1990). Another more flexible approach would provide "that the property shall pass as the beneficiary appoints by his or her will to anyone except her creditors, her estate, or the creditors of her estate, and in default of appointment to her heirs determined as if she had died at the time for distribution." French, *supra* note 57, at 836. The Joint Editorial Board for the Uniform Probate Code advocates an antilapse statute approach which would provide that the property pass to the issue of the predeceasing beneficiary. *See* Jesse Dukeminier & Stanley M. Johanson, Wills, Trusts and Estates 668-669 (4th ed. 1990). These suggestions have not been adopted generally. *In re Estate of Mendelson, 697 N.E.2d 1210 (Ill. App. 1998)* (where the beneficiary predeceases the decedent in an Illinois Land Trust, and where the language of the trust instrument is unclear regarding whether the interest reverts to the beneficiary's or the decedent's estate, the interest will go to the estate of the decedent; in an Illinois Land Trust the trustee continues to hold legal and equitable title so there was nothing to go to the beneficiary's estate if she died before the decedent.).

(n3)Footnote 154. *See* cases *cited in* Facts and Rules, *supra* note 8, at 307 n.133. *See Dauer v. Butera, 642 N.E.2d 848 (Ill. App. 1994)* (devise in trust to life tenant and then to named children gave vested remainder to children that was inheritable when children predeceased life tenant).

(n4)Footnote 155. There is some authority for holding the children's interest contingent on the ground that the interest of a child who dies before the life tenant may go to a stranger. *See id*. at 290-291 (*citing Lady Poulet v. Lord Poulet, 23 Eng. Rep. 415 (Ch. 1683))*, and at 307 n.134 (for cases construing the interest of the child who predeceases the life tenant as contingent but distributable to the children who survive the life tenant).

(n5)Footnote 156. *315 P.2d 681 (Cal. 1957),* although the dissent cites Simes & Smith, *supra* note 61, § 640 at 78, for support of the requirement of survivorship to the time of taking.

(n6)Footnote 157. *93 A.2d 528 (Del. 1953).*

(n7)Footnote 158. *Contra*, Restatement (Second) of Property, Donative Transfers § 27.3, cmt. e (Tent. Draft No. 9, 1986):

> Because of the undesirability of having the gift pass through the deceased member's estate and because the provision for substitution of issue is a sufficient indication of the donor's intent that he did

not wish such a result, it should be presumed, in the absence of contrary indication, that the donor who provides for substitution of issue intends that the share of the other class members be enlarged if a class member fails to survive to the date of distribution and leaves no issue who so survive.

(n8)Footnote 159. *See Matter of Carne, 58 N.E. 47, 49 (N.Y. 1900).*

(n9)Footnote 160. Halbach & Scoles, *supra* note 27, at 90.

(n10)Footnote 161. *52 N.E. 934, 935 (Ill. 1898).*

(n11)Footnote 162. Halbach & Scoles, *supra* note 27, at 111.

(n12)Footnote 163. *291 S.W.2d 577 (Ky. App. 1956). See also Payne v. Palisades Interstate Park Comm., 611 N.Y.S.2d 699 (1994)* (99-year lease to descendants following a life estate did not violate rule against perpetuities because court interpreted "descendants" to mean "descendants living at the death of the life tenants").

(n13)Footnote 164. *Tapley v. Dill, 217 S.W.2d 369 (Mo. 1949).* The interest in B is an alternative contingent remainder and not a vested remainder because the contingent remainder in the issue is not allowed to divest a vested remainder. *See* Loddington v. Kime, 1 Salk. 224 (1695).

(n14)Footnote 165. *Lawson v. Lawson, 148 S.E.2d 546 (N.C. 1966).* Accord, *Fletcher v. Hurdle, 536 S.W.2d 109 (Ark. 1976),* and *Schau v. Cecil, 136 N.W.2d 515 (Iowa 1965).*

(n15)Footnote 166. Jesse Dukeminier & Stanley M. Johanson, Wills, Trusts and Estates 667 (4th ed. 1990), *citing* 5 American Law of Property, *supra* note 47, § 21.25; 2 Simes & Smith, *supra* note 61, at § 594.

(n16)Footnote 167. *Continental Ill. Nat'l Bank & Trust Co. v. Eliel, 161 N.E.2d 107 (Ill. 1959).*

(n17)Footnote 168. *First Nat'l Bank of Cincinnati v. Tenney, 138 N.E.2d 15 (Ohio 1956).*

(n18)Footnote 169. *See* Smell v. Dee, 2 Salk. 415 (Court of Chancery 1707) ("wherever the time is annexed to the legacy itself, and not to the payment of it, if the legatee dies before the time of payment, it is a lapsed legacy," i.e., the condition of survivorship exists). Henry Swinburne, A Briefe Treatise of Testaments and Last Willes at 172 (1590), claimed that the condition of survivorship exists if the time of taking is uncertain [*e.g.*, marriage or death] and it does not exist if the time of taking is certain [*e.g.*, a date certain], but *Clobberie's Case, 2 Vent. 342, 86 Eng. Rep. 476 (Ch. 1677),* separated out three situations without apparent differentiation between whether the time of taking was certain or uncertain: The condition of survivorship exists "if money were bequeathed to one *at* his age of twenty-one years"; the condition of survivorship does not exist "where one bequeathed a sum of money to a woman at her age of twenty-one years, or day of marriage, to be paid unto her *with interest*" or "if money be given to one, *to be paid at* the age of twenty-one years." (italics added) For a case where the intermediate income was given to the beneficiary and survivorship was not a condition, *see Coddington v. Stone, 9 S.E.2d 420 (N.C. 1940).*

(n19)Footnote 170. *See* Halbach & Scoles, *supra* note 27, at 120-122, which also gives a list of cases for and against a survival requirement to the time of possession when the word "or" is used. *Accord: Lawyer v. Munro, 118 So. 2d 654 (Fla. App. 1960)* (named nephews or their survivors or survivor); *Taylor v. Taylor, 92 N.W. 71 (Iowa 1902)* (children or their heirs); *Koelliker v. Denkinger, 83 P.2d 703 (Kan. 1938), modified on another point, 86 P.2d 740 (Kan. 1938)* (children, except that the heirs of any deceased child shall receive the child's share); *In re Gulbenkian's Will, 174 N.E.2d 481 (N.Y. 1961)* (court construed "and" to mean "or" and treated as "brothers or their heirs"). *Contra: Dow v. Bailey, 77 A.2d 567 (Me. 1950)* (son or his heirs); *Uphaus v. Uphaus, 315 S.W.2d 801 (Mo. 1958)* (children or their descendants); *In re Ferdinand's Estate, 97 N.W.2d 414 (Wis. 1959)* (sisters and brothers or the survivors of them).

(n20)Footnote 171. *See In re Montgomery's Estate, 2 N.Y.S.2d 406 (1938). Lamb v. Nationsbank, N.A., 507 S.E.2d 457 (Ga. 1998)* (Upon the death of my last surviving daughter, the corpus of my estate is to be divided into two equal parts, one of the parts to be immediately paid over and delivered to my nieces and nephew then living. In the event of the death of any of my nieces and nephews leaving children, the share of the parent shall be paid over and delivered to such children or their legal guardians." The court held this language imposed an express condition of survivorship on the nieces' and nephews' children.).

(n21)Footnote 172. *See Faris v. Nickel, 107 P.2d 721 (Kan. 1941).*

(n22)Footnote 173. *See Davidson v. Dallas, 14 Ves. 576 (Ch. 1808).*

(n23)Footnote 174. *See In re New York, L. & W.R.R. Co., 11 N.E. 492 (N.Y. 1887).*

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CHAPTER 30 SPECIAL LEGAL RULES RELATING TO FUTURE INTERESTS

3-30 Thompson on Real Property, Thomas Editions § 30.05

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§ 30.05 Alternative Grants Using "Or"

O's conveyance in the disjunctive "to A or to B" is void for uncertainty if the grantor has not otherwise manifested the intent as to the person who is to take. There are a number of cases, however, where a construction is possible.

In Ready v. Kearsley, n175 a grant "to J.S. or to his heirs" was interpreted to give a present interest in fee simple absolute to J.S. if he was living at the time the grant became effective or to his heirs if he was dead at that time. The court stated: "If J.S. is living, he has no heirs; and no two parties can claim adversely as grantees under the deed."

In Estate of Christen, n176 a will leaving the residue of an estate "to Joseph P. Kelly or Father Flanagan's Boys Home, or the survivor of them" was held to give the home the interest when Kelly predeceased the testator. The court did not concern itself with the interpretation had both parties survived the testator.

O's conveyance in the disjunctive "to A for life, then to B or to C" also offers a number of constructions. Dukeminier and Johanson interpret the conveyance "to A for life, remainder to B or C" to mean "to A for life, remainder to B, if B is then living, and if not, to C." n177 Another construction may switch the "or" to an "and."

In Peterson v. Neeld, n178 the court interpreted "or his heirs" to mean "and his heirs."

FOOTNOTES:
(n1)Footnote 175. *14 Mich. 215, at 224 (1866).*

(n2)Footnote 176. *48 Cal. Rptr. 26 (1965).*

(n3)Footnote 177. Jesse Dukeminier & Stanley M. Johanson, Wills, Trusts and Estates 664 (4th ed. 1990), *citing* 5 American Law of Property, *supra* note 47, § 21.16.

(n4)Footnote 178. *92 A.2d 62 (N.J. Super. 1952).*

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CHAPTER 30 SPECIAL LEGAL RULES RELATING TO FUTURE INTERESTS

3-30 Thompson on Real Property, Thomas Editions § 30.06

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§ 30.06 Cross Remainders

The conveyance "to A and B for their lives, remainder to C" is construed by many courts to create a cross remainder in the surviving life tenant in order to avoid an intestacy. n179

FOOTNOTES:
(n1)Footnote 179. Facts and Rules, *supra* note 8, at 307 & n.135. *Id*. at 307 & n.136, suggests two other methods of distribution: to pay the share of the first life tenant to die to his estate until the other life tenant dies, or to pay his share of the income to the remainderman. *In re Trust of Hasch, 721 N.E.2d 1111 (Ohio Ct. App. 1999).*

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CHAPTER 30 SPECIAL LEGAL RULES RELATING TO FUTURE INTERESTS

3-30 Thompson on Real Property, Thomas Editions § 30.07

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§ 30.07 Acceleration of Remainders

If a beneficiary gives up the interest before accepting it, the act is one of disclaimer or renunciation. If a beneficiary gives up the interest after accepting it, the act is one of release.

The Uniform Probate Code n180 allows a person to renounce the right to succession to any property, including a future interest, within nine months of the time the interest becomes indefeasibly vested. In such a case, the person renouncing is treated as if having predeceased the decedent at the time of the decedent's death. On the other hand, a person releasing the interest is not treated as if having predeceased the decedent.

In Ohio National Bank of Columbus v. Adair, n181 the testator created a testamentary trust with income beneficiaries, all of whom had died by 1978 except for Maribel. The trust provided that if they "shall die leaving issue surviving them, ... to such issue or to the issue of the survivor or survivors of them in equal shares, per stirpes." An alternative distribution was provided in case there should be no surviving issue. In 1978, Maribel had two children and three grandchildren. The court found that the trust would not terminate upon Maribel's renunciation of the income of the trust. While acceleration is permitted in the case of a vested remainder, it is not permitted in this case where it contravenes the intent of the testator in the expressed condition of survivorship referring to the time of death of Maribel. n182

FOOTNOTES:
(n1)Footnote 180. § 2-801 (1983).

(n2)Footnote 181. *374 N.E.2d 415 (Ohio 1978).*

(n3)Footnote 182. *See also* 2A Richard L. Powell and Patrick J. Rohan, Powell on Real Property §§ 309 & 310 (1968), 5 Austin Wakeman Scott, The Law of Trusts § 412.1 (3d ed. 1967), 2 Restatement of The Law of Property § 233 and cmt. e, 2 Simes & Smith, *supra* note 61, at § 796. Radford, Mary F., *Wills, Trusts, & Administration of Estates, 51 Mercer L. Rev. 527 (1999).*

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CHAPTER 30 SPECIAL LEGAL RULES RELATING TO FUTURE INTERESTS

3-30 Thompson on Real Property, Thomas Editions § 30.08

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§ 30.08 Substitutional Gifts

In the devise "to my children, the issue of any deceased child to take such child's share," the testator provides for children who predecease him. The question arises whether this class of children includes those who are dead at the time the will is made, and there is authority both ways. n183

In a devise "to each of my children for life, and upon the death of each child, that child's share shall go to his or her issue then living, but if no issue are then living, the share shall go to the child's surviving brothers and sisters," there is a question concerning the interpretation of the designation "surviving brothers and sisters." If the first child to die is survived by children and the second child to die is not, will the second child's share go only to the remaining brothers and sisters, or will it also go to the children of the first child to die? There is authority both ways. n184

FOOTNOTES:
(n1)Footnote 183. *See* Facts and Rules, *supra* note 8, at 288, *citing* Restatement of The Law of Property § 297 (1944) (exclude), and *In re Sibley's Trusts, 5 Ch. D. 494, 502 (1877)* (include).

(n2)Footnote 184. *Id.* at 289, *citing In re Estate of Thall, 219 N.E.2d 397 (N.Y. 1966)* (include children of the first child to die), and *In re Will of Gautier, 146 N.E.2d 771 (N.Y. 1957)* (exclude).

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CHAPTER 30 SPECIAL LEGAL RULES RELATING TO FUTURE INTERESTS

3-30 Thompson on Real Property, Thomas Editions § 30.09

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§ 30.09 Class Gifts

[Go To Supp]

§ 30.09(a) Definition

A class consists of a group of people who are designated to share in an interest without regard to the condition(s) precedent on their taking a share in the interest. John Chipman Gray stated: "A class is a number of persons having a common characteristic. By a gift to a class is meant a gift to persons, the share of each of whom is determined by the number of the class." n185 A class may be children, heirs, basketball players on the Chicago Bulls team, grandchildren by one's oldest daughter, or law students at The University of Tulsa. Thus, O's conveyance "to the children of my deceased sister A" gives a present interest in fee simple absolute to the class of A's children. In O's conveyance "to A's children who reach the age of twenty-one" the class is still A's children (not A's children who have reached the age of twenty-one), but each child who takes a share in the interest must satisfy the condition precedent of reaching the age of twenty-one.

In O's conveyance to an individual with a group, such as "to A for life, then to B and the children of C," the class consists of both, B and the children of C.

In In re Moss, n186 the testator gave his share in the Daily Telegraph newspaper "upon trust to pay the income thereof to my said wife for her life, and after her decease, upon trust for the said E.J. Fowler and the child or children of my sister Emily Walter who shall attain the age of twenty-one years equally to be divided between them as tenants in common." Before the testator's death E.J. Fowler died. Upon the wife's death after the testator, the five children of Emily Walter were all twenty-one. The court found that E.J. Fowler was designated as part of the class and therefore she did not have a share which lapsed by her death before the testator. The children were entitled to share the whole of the remainder.

Usually, a gift to named individuals, such as "to my children, A and B," is held not to give a class gift. n187 However, even in this case, if the testator evinces an intention to treat the individuals as a class, they will be so treated. n188 One situation in which no class gift will be found, even if the language is otherwise appropriate for a class gift, is when the shares are specified, such as "one-half to A, and one-half to B." n189

In O's conveyance "to A for life, then to A's children" A's children share a remainder as a class. If there are no children at the time of the conveyance, the unborn children share a contingent remainder and each must be born before they can share a vested remainder; the event of birth is a condition precedent. When the first child is born, that child's share in the contingent remainder is transformed into a vested remainder while the contingent remainder of the rest of the unborn children is transformed into an executory interest. The unborn children's interest is called an executory interest since it no longer follows the termination of the preceding estates but stands ready to cut into the estate(s) of the born child(ren) holding the vested remainder each time the condition precedent of birth of another child occurs. In this sense, the birth of each child is not only a condition precedent to the interest of that child, but a condition subsequent to the estate held by the children who are born; the occurrence of the event specified in the condition (birth) cuts down the share of each child who is born in order to let in the newly born child to share in their estate. The vested remainder held by the children who are born is thus "subject to open" or "subject to partial divestment."

§ 30.09(b) Exclusion

A class closes when there are no more members who can be or are allowed to be born into it. Thus, after O's conveyance "to X for life, then to A's children" when A dies, the class of A's children closes at the time of A's death because A cannot conceive any more children. The class of A's children includes all of A's children alive at the time of the conveyance or born thereafter, including any children conceived at the time of the conveyance or any time thereafter, as long as they are later born alive. n190 In this case, the class closes naturally because A cannot have any more children. n191 (The fact that A could have children through the preservation of the sperm or egg for fertilization at a point in time later than A's death is not considered, and such child would not be considered a member of the class.)

Since the birth of a member of a class may not occur until a long period of time has elapsed, a rule has been developed to close a class artificially if it does not close sooner naturally. It is called the Rule of Convenience n192 and can be stated as follows: A class will close to exclude future-born persons who would otherwise be members of the class when some member of the class (or one who holds the interest of a member of the class) becomes entitled to distribution, but only if the time designated in the conveyance for distribution (whether the time be immediate or the time be postponed until the termination of a prior interest or the happening of an event (other than the implied event of birth) or both) has arrived and the taker is born (or conceived and later born alive) at that time. n193

In In re Werhner's Settlement Trusts, n194 an inter vivos trust gave to "all such children of the settlor (whether now living or hereafter to be born) as being male attain the age of twenty-one years or being female attain that age or marry." The court found that the class closed when the first child reached twenty-one even though the settlor was still alive at that time. Any child born later would be excluded.

In Britton v. Miller, n195 the testatrix left her entire estate, including a remainder interest in certain property, "to the children of my brother, Stephen W. Britton, and of my sister, Mary F. Miller." Stephen had one child at the time of the testatrix's death (which child died later that year before the remainder interest became a present interest) and one child born later (but also before the remainder interest became a present interest). The court found that both children were included in the class and shared in the remainder interest, the deceased child's share going to the father. (The child born after the death of the testatrix, however, was not entitled to any of the property which was in the possession of the testatrix at the time of her death.) n196

It should be noted that this is a rule of construction and may give way to the contrary intent of the grantor. n197

The Rule of Convenience has four aspects that require special attention to ensure proper application of the rule. (1) The time designated in the conveyance for distribution is the occurrence of all events that terminate all prior estates and satisfy all conditions necessary to give a present interest to a class member except the condition of birth. (2) At the time designated in the conveyance for distribution a member of the class or one who has taken the interest of such member is entitled to distribution if such person is in existence. The existence of such person entitled to take distribution at that

time causes the Rule of Convenience to become operable, i.e., to close the class. The nonexistence of such person at that time causes the rule never to become operable and the class must close naturally. n198 (3) A person who would have been a member of the class but has died before the conveyance becomes effective is not a member of the class. A class member must be alive (or conceived, as long as later born alive) at or after the time the conveyance is effective. A person who is a member of the class and conveys away the interest or dies and leaves the interest to another has created one who takes the interest of the member of the class. If a condition precedent to that member's interest cannot be satisfied, however, neither the member nor the person who takes the member's interest can ever be entitled to distribution. (4) When the class closes, all members of the class then in existence (including persons in the womb as long as they are later born alive) continue to be members of the class. If a child is adopted, the time of adoption must occur before the class closes for the child to be included in the class. n199 Those persons who would have been members of the class except that they were later born or later adopted are excluded from membership.

In Thomas v. Thomas, n200 the testator gave to the six children of his son David and David's wife Elizabeth, stating that "[s]hould any of these children die unmarried and without issue, or any other children be born to my said son, I will that all of his children divide equally share and share alike." A previous clause in the will had provided that no gift should be paid over to any child until he reached his majority. After the testator's death, David had another son. At that time three of David's children had reached twenty-one. The court found that the after-born son of David was excluded from the devise because the time of distribution was the attainment of majority by the oldest child of David, and this event had closed the class before the birth of the after-born son. In the above-quoted section of the testator's will, the reference to "all" of the children was construed to mean all of those who came into being between the time of the testator's death and the period of distribution of the gift.

Thus, O's conveyance "to A's children" is a gift designated to be taken immediately. If A has any children alive (or in the womb and later born alive) at the time of the conveyance, those children are entitled to distribution immediately and the Rule of Convenience operates to close the class to all future-conceived (or presently-conceived but not born alive) children of A. On the other hand, if A has no children at the time of the conveyance, the Rule of Convenience can never operate in this case and the class will include all future born children of A. A's death will close the class naturally.

Likewise, O's conveyance "to A for life, then one day later to B's children" creates an interest in the class of B's children. The interest is an executory interest that will not become a present interest in any child until one day has passed after the death of A. The time designated in the conveyance for distribution is one day after the death of A. At that time the class will close to include all children born (or conceived and later born alive), and all other children later born will be excluded from membership in the class. If there are no children born (or conceived and later born alive) at the time designated for distribution, the Rule of Convenience will never apply in this case and the class will only close naturally by the death of B.

Likewise, O's conveyance "to A for life, then one day later to B's children who reach the age of eighteen" creates an interest in the class of B's children. The interest is an executory interest that will not become a present interest in any child until one day has passed after the death of A and the condition precedent is satisfied that that child must reach the age of eighteen. The time designated in the conveyance for distribution is one day after the death of A and when a child has reached the age of eighteen. n201 At that time the class will close to include all children of B who are born (or conceived and later born alive) at that time even if they have not yet reached the age of eighteen. All children who are conceived at a later time or conceived at that time but not born alive are excluded from membership of the class under the Rule of Convenience. Those children who are born but have not yet reached eighteen continue to hold an executory interest that will become upon each reaching eighteen a present interest with their siblings who have reached eighteen.

Likewise, O's conveyance "to A's children when the youngest reaches 21 with interest paid to A's children in the interim" creates an interest in the class of A's children. Under the rule in Clobberie's Case n202 A's children have a vested present interest with possession postponed. The class will close at the time for distribution which will occur when the youngest child of A at any one time reaches 21. At that time the class will close to include all of A's children

who are alive or were alive at some time between the time of the conveyance and the time for distribution. (If a child was born and died before reaching 21, that child is still a member of the class and her representatives will be entitled to a share at the time of distribution.)

In Lux v. Lux, n203 the testatrix left the residue of her estate "to my grandchildren, share and share alike. Any real estate included in said residue shall be maintained for the benefit of said grandchildren and shall not be sold until the youngest of said grandchildren has reached twenty-one years of age." The court found that the testatrix intended that her property be held in trust for the benefit of her grandchildren with income payable to the beneficiaries as it accrued. It also held that distribution of the trust corpus would be made at the time when the youngest of the then living grandchildren should attain the age of twenty-one.

When a member of the class becomes entitled to distribution, that member may take her minimum proportionate share of the whole estate. The remaining share of the estate may be held in trust to be distributed to the other members of the class as they become entitled to distribution. In some cases, particularly where the Rule of Convenience does not operate, it may be difficult to ascertain how many members of the class will become entitled to distribution. In such a case the members who are entitled to distribution may actually take the whole estate subject to partial divestment as and when the other members of the class become entitled to distribution. n204

When the gift is of income, the rule of convenience operates separately for each distribution.

In In re Wenmoth's Estate, n205 the testator gave the residue of his property upon trust to pay an annuity to his daughter for life, and then to apply the whole income "unto and equally between my grandchildren ... on their respectively attaining the age of twenty-one years, during their respective lives, share and share alike. The court found that "there is no reason why the rule [of convenience] should be applied beyond each periodical payment," and, assuming the life estate were over, the rule did not close the class as soon as the eldest reached the age of twenty-one. Rather, "any child at any time attaining twenty-one years will be entitled to a share of the income."

When a gift is of a specific sum to each member of a class, the class closes immediately even if there are no members of the class alive at the time of conveyance. n206

§ 30.09(c) Shares

The share of each member of a class is usually equal. However, where the class consists of a single individual plus a separate group of individuals, some courts have ruled that one-half goes to the single individual and the other half to be divided equally among the group. Professor Leach cites the following interesting case:

> The will of Griswold E. Warner of Sewickley, Pa., has the dubious distinction of having been construed in two of the possible three ways n207 by different courts. The will left realty and personalty "to A (a grandchild) and the heirs of B (a daughter)." The Supreme Court of Pennsylvania, dealing with the residuary personalty, ruled that one-half passed to A and the other half to the heirs of B. The Supreme Court of Illinois, dealing with realty in Chicago, ruled that A and the children of B took equal shares as a single class. n208

FOOTNOTES:

(n1)Footnote 185. Gray, *supra*, note 70, § 369, n.1. *Canoy v. Canoy, 520 S.E.2d 128 (N.C. Ct. App. 1999)* (defining the meaning of a class for the purposes of a class gift).

(n2)Footnote 186. *2 Ch. 314 (C.A. 1899), affirmed in House of Lords sub. nom.* Kingsbury v. Walter, A.C. 187 (1901).

(n3)Footnote 187. *Facts and Rules, supra* note 8, at 317.

(n4)Footnote 188. *See In re Ives' Estate, 148 N.W. 727 (Mich. 1914),* stating:

> We recognize the general rule contended for by appellee that, where property is given to several persons by name, to be equally divided between them, they take as tenants in common, and not as joint tenants, or as a class. But the authorities hold, we think, that this rule yields to a different construction when it plainly appears from the will that it was the intention of the testator that the survivors [of the testator] should take the whole. *Estate of Joslyn v. Davis, 38 Cal. App. 4th 1428 (1995)* (a granddaughter who was adopted fifteen years after her grandmother's death was entitled to enjoy the benefits from the trust set up in her father's name); *In re Estate of Schwake, 543 N.W.2d 125 (Minn. App. 1996)* (in Minnesota the antilapse statute applies to a class gift unless the testator's will indicates a specific intent contrary to its application).

(n5)Footnote 189. *Facts and Rules, supra* note 8, at 317-318.

(n6)Footnote 190. *See* Simes & Smith, *supra* note 61, § 650. Dukeminier & Johanson, *supra* note 24, at 673, states that a class of children also includes a child's issue if the child predeceases the testator and if the gift does not lapse but goes to the child's issue under an anti-lapse statute.

(n7)Footnote 191. There is a conclusive presumption that a person may have children up to the time of death. *See* Bergin & Haskell, *supra* note 1, at 143. *Estates of Herman v. Urteago, 39 Cal. App. 1525 (1995)* (mere statements in a will of gifts to "my spouse's issue" and "my spouse's children" are unenforceable if that spouse has been divorced); *Bowles v. Bradley, 461 S.E.2d 811 (S.C. 1995)* (in South Carolina class gifts include adopted children).

(n8)Footnote 192. In England it is called the rule in Andrews v. Partington, 3 *Bro. C.C. 401, 29 Eng. Rep. 610 (Ch. 1791). See* Halbach & Scoles, *supra* note 27, at 132-133.

(n9)Footnote 193. *See* Devisme v. Mello, 1 *Bro. C.C. 537 (1782),* cited by Professor Leach as the leading English case on the rule that the class stays open until the time for first principal distribution. Leach, *supra* note 7, at 390 n.21.

(n10)Footnote 194. *1 All Eng. Rep. 184 (1961).*

(n11)Footnote 195. *63 N.C. 271 (1869).*

(n12)Footnote 196. The opposite conclusion was reached by the court in *Baylies v. Hamilton, 55 N.Y.S. 390 (1899).* In that case the testator gave an equitable life estate to his brother in trust "and upon his death the same shall go with my residuary estate." He gave the residue to his brother's children, "the share of any child dying before attaining the age of twenty-one years to go to the survivor, and in case all said children die before attaining the age of twenty-one years, ... to the children of Nathalie E. Baylies." At the date of the testator's will, his brother had two children. Another was born before the testator's death, and a fourth was born after the testator's death. The court found that "under the residuary clause, only those children who were living at the death of the testator were entitled to take," excluding the child born after the testator's death. The fact that the testator gave the residuaries a future interest after a life estate did not leave a class open until the life estate was over. The court stated that "had the testator provided in respect to the remainder of the real estate devised to [the brother] for life, that upon his death such remainder should go to the children of his brother, the after born child of [his brother] would have been entitled to participate."

(n13)Footnote 197. *McDowell National Bank of Sharon v. Applegate, 388 A.2d 666 (Pa. 1978), citing Earle Estate, 85 A.2d 90 (Pa. 1951).*

(n14)Footnote 198. *Weld v. Bradbury, 2 Vern. 705 (Ch. 1715)* (bequest to children of J.S. and J.N. but no child was living at the death of the testator).

(n15)Footnote 199. *In re Silberman's Will, 242 N.E.2d 736 (N.Y. 1968), discussed in* Samuel M. Fetters, *The Determination of Maximum Membership in Class Gifts in Relation to Adopted Children:* In Re Silberman's Will Examined, *21 Syracuse L. Rev. 1 (1969).*

(n16)Footnote 200. *51 S.W. 111 (Mo. 1899).*

(n17)Footnote 201. *See Austin's Estate, 173 A. 278 (Pa. 1934)* (in which the class closed after a class member had reached the prescribed age).

(n18)Footnote 202. *Clobberie's Case, 2 Vent. 342, 86 Eng. Rep. 476 (Ch. 1677).*

(n19)Footnote 203. *288 A.2d 701 (R.I. 1972).*

(n20)Footnote 204. Bergin & Haskell, *supra* note 1, at 143, *citing* 5 American Law of Property, *supra* note 15 § 22.42, at 355, but nevertheless indicating that there is little case authority on this subject.

(n21)Footnote 205. *37 Ch. D. 266 (Ch. 1887).*

(n22)Footnote 206. *See Rogers v. Mutch, 10 Ch. D. 25 (1878).*

(n23)Footnote 207. (1) All take the same share as members of the same class; (2) the single individual takes one-half and the group as a separate class takes one-half; and (3) the single individual takes one-half and the group takes one-half, but they are all treated as one class.

(n24)Footnote 208. Leach, *supra* note 6, at 364 n.8 (case cites omitted). *Moore v. Stern, 468 S.E.2d 607 (N.C. App. 1995)* (if the predecessor would have taken a share of a lapsed residuary gift, then the qualified issue of that person may also participate in the lapsed gift).

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CHAPTER 30 SPECIAL LEGAL RULES RELATING TO FUTURE INTERESTS

3-30 Thompson on Real Property, Thomas Editions § 30.10

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§ 30.10 Powers of Appointment

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§ 30.10(a) Definitions

It is possible for a donor to give a power to a donee to create a future interest in the donor's property. Thus, O may convey a life estate to A and give A a power to appoint the property in A's will to one of A's children, otherwise the remainder in fee simple absolute after the life estate to go to B. O is the donor of the power to sell; A is the donee; A's children are the objects or beneficiaries of the power; the child who actually receives the property is the appointee; and B is the taker or beneficiary in default of appointment of the gift in default of appointment.

The appointee generally is considered a taker from the donor, not from the donee. n209 As Professor Simes has stated, "the exercise of a power of appointment relates back to the creation of the power." n210 However, the appointment may not be made by the donee to one who has died before the appointment even though the death of the appointee be after the power has been created by the donor. n211 The interest in the taker of the gift over in default of appointment is considered vested subject to divestment upon the exercise of the power of appointment. n212 Exercise of a power involves exercise of a condition subsequent cutting short the gift over in default of appointment. Thus, where the life tenant has the power to dispose of the remainder in fee simple after the life estate, the remainder is vested. n213 It is possible for the gift over in default of appointment to be contingent by its terms, n214 but not on the ground that it is subject to the non-exercise of a power of appointment. n215

§ 30.10(b) Types of Powers

There are several types of powers. n215.1 A general power of appointment can be exercised in favor of anyone, including the donee. It may be (1) testamentary or exercisable by will, (2) exercisable by deed, or (3) exercisable by deed or will.

A special power of appointment can be exercised only in favor of a group of persons not including the donee, the donee's estate, creditors or creditors of the donee's estate. n216 It may be (1) testamentary or exercisable by will, (2) exercisable by deed, or (3) exercisable by deed or will n217

§ 30.10(b)(1) General Testamentary Power

In In re Estate of Curtis, n217.1 the court found that a devise "to my daughter, Mary Louise Curtis Bok, for her lifetime" with "full power by will or other testamentary instrument to dispose of any or all of said property, but failing such disposition, upon her death, ... to such of my grandchildren as shall be living at the death of my said daughter" gave her a life estate and a general testamentary power of appointment. The gift over in default of the exercise of the power precluded the enlargement of the estate to a fee simple.

§ 30.10(b)(2) General Power Exercisable by Deed or Will

In New England Trust Co. v. Wood, n217.2 the testator left the residue of a trust to trustees, who "shall pay the income thereof to my wife ... during her life and after her death shall hold the said trust premises and the income thereof for such heir or heirs as my said wife shall by deed will or codicil appoint... ." The court interpreted the words "heir or heirs" as "beneficiary or beneficiaries," and found that the will created a life estate in the wife with a general power of appointment by deed or will. The wife exercised the power by her will.

§ 30.10(b)(3) Special Testamentary Power

In Estate of duPont, n218 the testator left one-third of the residue of his estate in trust for the benefit of his daughter and created in her a special testamentary power of appointment over this share. The will provided that the trustee was "upon her death to transfer, assign, and pay over the principal of her share of [the testator's] residuary estate unto such of her children and issue of deceased children, and in such proportions as she may by her Last Will and Testament or any writing in the nature thereof direct, limit and appoint." The court found that she exceeded the bounds of her special power in its subsequent exercise.

§ 30.10(b)(4) Special Power Exercisable by Deed

In Estate of Colman, n219 the testator's wife was given a life estate in two trusts with two powers of appointment. By a general power of appointment by will, she was empowered to distribute the remainder of one of the trusts. By a special power of appointment by deed "[s]he had the right to require that the trustee distribute principal to her in an amount not exceeding $5,000 or 5% of the total trust estate, whichever is greater, in any one year, ... only in favor of [her] four children, their spouses or descendants, or to organizations existing primarily for charitable, educational, or religious purposes." The court found that the inheritance tax upon the remainder interest was deferred until the death of the donee (testator's wife) even in the case, as here, where the trustee Bank had the power to invade trust corpus for the wife's benefit to meet her needs and expenses.

The special power may be exclusive or non-exclusive. When no right of selection or exclusion is granted to the donee of the power, it is non-exclusive, i.e., each member of the group must receive some minimum amount by the appointment. Inappropriate exclusion, including the failure to give a substantial share of the fund to each object of the power, will invalidate the attempted exercise of the power. If the donee is granted the right to exclude entirely any members of the class, it is exclusive, i.e., the donee may or may not appoint to every member of the group.

In Young v. Waterpark, n220 a marriage settlement directed that £10,000 should be paid and distributed among certain younger children (there were seven) of the marriage in such shares as Sir H. Cavendish and Sarah his wife, or the survivor of them, should by deed appoint, and, for want of appointment, equally. Cavendish and his wife appointed the whole of the £10,000 in different sums, the last being £3,000 to George Cavendish. Since two children who died were excluded and this special power was non-exclusive, the court declared that the personal representative of the two children was entitled to2/7 of the £3,000.

In Barrett's Executor v. Barrett, n221 the objects of a non-exclusive power consisted of a widow, two brothers and a

sister. The donee appointed $147,000 to the widow and $1,000 each to the two brothers and the sister. The court found the appointments to the siblings to be manifestly illusory and therefore void.

To avoid the unfairness of a division of the last appointment of a fund among all the objects of a power, as happened in Young v. Waterpark above, a hotchpot clause may be added to the power of appointment, providing that "no one who takes by appointment shall (in the absence of an expressed direction in the appointment to the contrary) share in the unappointed part without bringing his appointed share into the general fund to be distributed as in default of appointment." n222

If there is no restriction placed by the donor against a partial exercise of the special power, such an exercise is valid. n223 A power of appointment, general or special, is personal to the donee and cannot be transferred or assigned, but a further power of appointment may be created during the exercise of a power. n224 Professor Leach has elaborated rules to govern this situation:

> May the donee of a power delegate his discretion by creating a new power of appointment? In the first place it must be borne in mind that a general power of appointment is the practical equivalent of ownership of the property. Hence if the donee has a general power of appointment the creation by him of a new power is not treated as the delegation of delegated authority but as the creation of new authority by a substantial owner. Similarly, in the execution of a special power it is permissible to give a general power of appointment to an object of the power, since the general power is the equivalent of ownership even, it seems, where the power is exercisable by will only. Apart from these situations, however, the *maxim delegatus delegare non potest* must be reckoned with; and to whatever extent a discretion personal to the donee has been given, the authority is non-delegable. In the ordinary case of a power in A to appoint among his children it is plainly impossible for him to transfer the power of selection, even to a surviving spouse or to the trustees of the fund to be appointed. Still, if the power is couched in broad terms, it might be possible to create some little discretion in the trustees -- as, for instance, a discretionary authority to advance income to the presumptive taker of a share. In proportion as the class of appointees becomes diffuse the apparent personal quality of the discretion reposed in the donee diminishes, and the possibility of delegation increases. Thus, where a power was given to a daughter to appoint among the donor's lineal descendants it was held that she could properly appoint to her son for life and give to him a power to appoint the remainder among the donor's lineal descendants. Each particular case becomes a problem in determining whether the attempted delegation violates the intention of the donor. n225

Other terminology used in this area of powers of appointment include power in gross (donee has one estate in the property and the power to appoint another), power appendant (donee has an estate that will be cut short by the exercise of the power), n226 power simply collateral n227 (donee only has a power in the property), and reserved power (donor makes himself or herself also a donee of a power).

§ 30.10(c) Words That Create or Exercise a Power

No special words are necessary to create a power of appointment, as long as the donor manifests an intent to do so implicitly or explicitly. Care must be taken to avoid precatory words. Care also must be taken in the language used to exercise the power. In order for an act to be deemed an exercise, the intent to exercise must be shown:

> The power may be executed without reciting it, or even referring to it, provided the act shows that the donee had in view the subject of the power. In the case of wills, it has been repeatedly declared, and is now the settled rule, that in respect to the execution of the power, there must be a reference to the subject of it, or to the power itself; unless it be in a case in which the will would be inoperative, without the aid of the power, and the intention to execute the power became clear and manifest. The general rule

> of construction, both as to deeds and wills, is, that if there be an interest and a power existing together in the same person, over the same subject, and an act be done without a particular reference to the power, it will be applied to the interest, and not to the power. n228

However, courts have permitted the exercise of a power without specific reference to it. Where a will neither expresses nor implies an intention to exercise a power but no contrary intent is shown, a general residuary clause in the will may be considered an exercise of a general power of appointment n229 and also may be considered an exercise of a special power of appointment, n230 but in neither case is this the majority position n231 and it is contrary to the Uniform Probate Code. n232

In Hartford-Connecticut Trust Co. v. Thayer, n233 Darius Miller left $500,000 in trust to pay the income to Elizabeth Miller for life, and "upon her death to pay, transfer and deliver the principal of said fund ... to such beneficiaries as my said wife, by her will, may direct" and in default of appointment to her heirs at law. Elizabeth's will contained a residuary clause but did not mention the power of appointment nor the $500,000 fund. The court found, nevertheless, that the power was executed in Elizabeth's will because she knew she had a right to dispose of the fund and executed her will at a time she had no such property herself.

If the power is exercised by the residuary clause, whether by court interpretation as in the *Hartford-Connecticut Trust Co.* case above or by statute, the assets may not be marshaled against the intent of the donee so as to avoid application of the rule against perpetuities. n234

§ 30.10(d) Power and Ownership Compared

A power appendant is a power to appoint an interest that is owned by the donee. It is generally not valid in the United States. There is no justification for such a power, and there are two reasons for rejecting it: "First, the power might permit the defeat of rights of third persons (creditors, spouses) which had attached to the owned interest. Second, disabilities to transfer the owned interest (infancy, coverture) or to transfer it to particular persons or in a particular way (direct transfers to a spouse, direct creation of estates in co-ownership in the transferor and another) might not prevent an effective appointment." n235

In Niemann v. Zacharias, n236 a devise of the residue of an estate to certain individuals and "to their heirs, devisees and legatees as set forth in their last wills ... in fee simple" passed the residue only to the named individuals because "there can be no such thing as a power appendant."

Likewise, an unqualified power given to a life tenant to dispose of property devised by will enlarges the life estate to a fee simple title and may trigger the rule of repugnancy.

In Sterner v. Nelson, n237 the testator devised property to his wife "absolutely with full power in her to make such disposition of said property as she may desire; conditioned, however, that if any of said property is remaining upon the death of [the wife], or in the event that she predeceases me then and in such event such of said property as remains shall vest in my foster daughter ... and her children." The court found that the testator created a fee simple absolute rather than a life estate with authority to dispose of so much of the property as the wife chose during her lifetime, and the purported gift over to the foster daughter and her children was considered an invalid repugnancy. n238 The court adopted "the majority rule to the effect that where there is a grant, devise, or bequest to one in general terms only, expressing neither fee nor life estate, and there is a subsequent limitation over of what remains at the first taker's death, if there is also given to the first taker an unlimited and unrestricted power of absolute disposal, express or implied, the grant, devise, or bequest to the first taker is construed to pass a fee. The attempted limitation over, following a gift which is in fee with full power of disposition and alienation, is void."

The rule of repugnancy has received critical treatment by some authors. n239

§ 30.10(e) Unexercised Power or Ineffective Appointment

§ 30.10(e)(1) General Power

A donee of a general power may exercise the power as if disposing of the donee's own property. This power generally includes the right to appoint in trust and to create new powers of appointment. If the power is not exercised or is exercised only partially, the property not appointed passes to the takers in default or, if there are none, back to the donor. n240

An appointment under a general testamentary power which lapses as to the interest of the appointee by the death of the appointee before the death of the donee is not an effective appointment, n241 but when the appointment is to a trustee for the benefit of one who dies before the death of the donee n242 or for the benefit of one who cannot take because the gift fails for remoteness under the rule against perpetuities, n243 the appointment is not invalid but goes by way of resulting trust to the person who would be entitled to the donee's property.

The doctrine of allocation is the marshaling of appointive assets and assets owned by the donee, both of which are blended in a common disposition, in such a way as to avoid an ineffective appointment or a violation of the rule against perpetuities and to give effect to the donee's intent. n244 A second means of avoiding the passing of appointive property in default of appointment or back to the donor's estate, when allocation is not possible, is the doctrine of capture, which gives the appointive property that is the subject of an ineffective appointment to the donee who manifests an intent (often by the blending of appointive assets with assets owned by the donee in a common disposition) to assume control of it for all purposes and not merely for the purposes of the ineffective appointment. n245

In Fiduciary Trust Co. v. Mishou, n246 Martha Parker created a general testamentary power of appointment in herself in a trust fund in 1851, and in default of such appointment, directed that the income should be paid to her husband, Richard, for life with a general testamentary power of appointment, and in default of such appointment to others. Martha attempted to dispose of all her property, including all property over which she had any power of appointment, by a will in which she bequeathed the residue of her estate to trustees in trust with distributions until the decease of her last surviving child at which time the fund was to be distributed to certain people then living. Since the rule against perpetuities started running on the appointive property from the date of creation in 1851 rather than the date the exercise of the power by will became effective (Martha died in 1878), the distribution of the fund to interests that would vest upon the decease of her last surviving child (who was not born in 1851) was invalid. The court found "that the complete blending by Mrs. Parker in her will of the appointive property with any property owned by her outright shows her intent to capture the appointive property for her own estate" even in the presence of a gift in default of appointment. The appointive property became part of Martha's estate, but the court determined that it would not pass by way of the residuary clause according to the otherwise invalid limitations. Rather, it would pass as intestate property.

An attempted exercise of a power of appointment by will may not be valid if the power itself is created after the will has been executed even though before the death of the donee.

In Matteson v. Goddard, n247 the court found that powers of appointment reserved by a donor in deeds after he executed his will were not exercised by the following words in his will: "All the rest and residue of my property, real, personal, and mixed, wherever situated and of whatever kind, of which I may be possessed at the time of my death, or over which I at the time of my death may have the power of testamentary disposition, I give, devise, and bequeath to... ." The court read the language of the will technically not to cover the powers created in the deeds but appears to have been influenced more by its interpretation of the intent of the donor: "There is one way, however, in which it may be that a power can be executed by or according to a pre-existing will; namely, where the power is created or reserved with the intent that it shall be so executed, in case the will is left to take effect." The court then found that the donor did not intend to have the power executed by his then existing will.

§ 30.10(e)(2) Special Power

A donee of a special power is restricted by the limitations imposed by the donor. n248 He may not be allowed to appoint in further trust n249 or to create a new power. n250 If the special power is not exercised, the property not appointed passes to the takers in default or, if there are none, to either the donor or the class of appointees depending on the intention of the donor. n251

In Burrough v. Philcox, n252 the surviving child of the testator was made a donee of a special power by will "to dispose of all my real and personal estates amongst my nephews and nieces or their children, either all to one of them, or to as many of them as my surviving child shall think proper." The donee failed to exercise this power. The court found evidence in the will of the testator's intention "of giving the property to the nephews and nieces, and their children, subject to the selection and distribution of the survivor of the son and daughter; and that they all constitute the class to take all the property as to which no such selection and distribution has been made." As the court stated, "When there appears a general intention in favor of a class and a particular intention in favor of individuals of a class to be selected by another person, and the particular intention fails, from that selection not being made, the court will carry into effect the general intention in favor of the class... . [I]n such a case, the court will not permit the objects of the power to suffer by the negligence or conduct of the donee, but fastens upon the property a trust for their benefit."

In Bridgewater v. Turner, n253 the testator gave to Eliza Seay a tract of land and household furniture for her life and "at her death I desire it to go to one of my nephews and I leave it with her to decide which one it shall be... . It is my desire that the above described tract shall remain in the hands of the family as long as possible, for here sleeps my wife, my father and mother." At the death of Seay there were three nephews and children of a fourth deceased nephew. Seay did not exercise the power. Despite the power to appoint to only one member of the class, the court found the general intent of the testator in favor of an implied gift to the whole class of nephews in default of appointment. Since this class had a vested remainder subject to be (but was not) defeated by the exercise of the power, the children of the deceased nephew inherited his share.

In In re Combe, n254 the testator gave life estates to his wife and son and then "In trust for such person or persons as my said son ... shall by will appoint but I direct that such appointment must be confined to any relation or relations of mine of the whole blood." The court found no intent on the part of the testator to give a gift to a class in default of appointment and therefore declared "that upon the release of the power of appointment the property will go, subject to the life interests of the widow and the son, as upon an intestacy" (even though the widow and the son would then take the entire estate between them!).

If the appointment in a non-exclusive power excludes a member of the group it is completely invalid; it passes to the takers in default or, if there are none, to the class of appointees in equal parts. n255 If the appointment in a special power otherwise violates the restrictions imposed by the donor, only that part of the appointment which does not violate the restrictions is valid; the other part passes to the takers in default or, if there are none, to the class of appointees in equal parts. n256

In Loring v. Marshall, n257 the testatrix left the residue of her estate in trust with income payable to certain designated individuals, and then "to the use of the wife and issue of each of my said [two] nephews as he may by will have appointed" with a provision that restricted the income to each wife for her life if she was living at the testatrix's death. The will provided that if either of the nephews left no appointees living, then the trust fund should be paid to the appointees of the other nephew, and if both nephews left no living appointees, then it should be paid to charities. One nephew died leaving no living appointees. The other left a wife, who was living at the testatrix's death, and a child. The latter nephew appointed to his wife the right to income for her life. No provision was made for the principal of the trust fund and this case was brought to determine the taker. The court found that there was no gift in default of appointment since the gift to the charities was contingent on the nephews leaving no living appointees. In the absence of any explicit direction in the will, the court stated that the property not appointed should go in equal shares to the members of the

class to whom the property could have been appointed. Applying this rule of law, the court determined that the principal should go to the nephew's child, since the wife was restricted by the terms of the appointment to a life interest.

The doctrine of allocation is used where possible to avoid violation of the restrictions imposed by the donor. Allocation is the marshalling of appointive assets and assets owned by the donee, both of which are blended in a common disposition, in such a way as to avoid an ineffective appointment to a non-object, or a violation of the rule against perpetuities, and to give effect to the donee's intent. n258

§ 30.10(f) Contract to Exercise an Appointment

If the appointment of a special power is made "to an object of the power in consideration of a benefit conferred upon or promised to a non-object, the appointment is ineffective to whatever extent it was motivated by the purpose to benefit the non-object." n259

In Matter of Carroll, n260 the donee of a special power to dispose to children or kindred willed $250,000 to her cousin with the understanding that the cousin would give $100,000 of this bequest to the donee's husband. The court found that a bargain had been made to benefit a non-object. Since the court found it impossible to separate the valid from the invalid disposition, the whole appointment was found invalid.

On the other hand, an appointment pursuant to a contract to exercise a testamentary special power of appointment in favor of an object is effective.

In Coffin v. Cooper, n261 Sarah Field received a life estate and a testamentary power of appointment to such of her children as she should appoint, and in default of appointment for her children equally. Sarah covenanted with one of her children, John, and with two strangers in title to appoint in her will to her son John certain sums of money in order that he might use this interest for the purpose of securing advances of goods to him. The purpose was to benefit the son and not a non-object. The court held the subsequent appointment effective and suggested that the covenant would have been enforceable had it been breached in favor of other appointees.

The contract to exercise a testamentary power of appointment itself is unenforceable. n262 Unlike a contract to appoint under a power exercisable by deed, which is considered an exercise of discretion to appoint, n263 a contract to exercise a testamentary power of appointment is considered an interference with the will of the donor that the power be exercised upon the donee's death. This principle applies to general and special testamentary powers alike.

In In re Bradshaw, n264 Bradshaw received a life estate and a testamentary power of appointment for such children or other issue as he should appoint, and in default of appointment the children were to receive equally. Bradshaw covenanted to appoint not less than £6,000 to the children of his second marriage, but in his will Bradshaw failed to make an effective appointment because he violated the rule against perpetuities, among other reasons. The court found that the covenant was not valid because the donee of a testamentary special power has a fiduciary duty to exercise it by his will alone.

In Northern Trust Co. v. Porter, n265 Frances Porter was given a general testamentary power to appoint a fund. She contracted to exercise this power by appointing one-half of it to her son. Her will only appointed a life estate to the son in one-third of the fund, with a remainder that was void under the rule against perpetuities. The court found the life estate and remainder to be inseparable and the whole appointment failed. The son sought to recover damages under these circumstances, but his claim was rejected by the court.

§ 30.10(g) Conditions

Conditions may not be annexed to an appointment and may be the cause of failure of the appointment itself:

> [W]hile it may be that, if the intention of the donee of the power is that the beneficiary to whom he appoints and who falls within the class of beneficiaries designated by the donor of the power should receive the benefits of the appointment, even at the expense of the failure of the conditions which he has annexed to the appointment, then the appointment may stand, but the conditions will fall because under such circumstances the donee of the power is really carrying out, as the quasi trustee that he is, the wishes of the donor, yet, if it is plain that the intention of the donee in the exercise of the power is not to benefit the appointee unless and except benefit to himself or to some one not an object of the power result, then the appointment itself is bad. n266

§ 30.10(h) Release

A power of appointment may be released. n267 One celebrated English case n268 has elaborated the rules governing release:

> [A] power simply collateral, that is, a power to a stranger, who has no interest in the land, cannot be extinguished or suspended by any act of his own or others with respect to the land. It is clear, too, that it cannot be released, where it is to be exercised for the benefit of another.
>
> It must be equally clear that it may be released, where it is for his own benefit, as a power to charge a sum of money for himself. In such case, his joining in a conveyance of the land clear of the charge, would be a release.
>
> I think that every power reserved by the grantor, whether he has retained an interest in the estate as tenant for life or otherwise, is an interest in him, which may be released or extinguished... . It differs altogether from a naked authority given to a mere stranger. It is so much reserved by him out of the estate.
>
> I think that every power reserved to a grantee for life, though not appendant to his own estate, as a leasing power, to take effect after the determination of his own estate, and therefore, in gross, may be extinguished. In respect of his freehold interest he can act upon the estate, and his dealing with the estate so as to create interests inconsistent with the exercise of his power, must extinguish his power. The general principle is, that it is not permitted to a man to defeat his own grant. Such a power in gross in tenant for life would not be defeated by a conveyance of his life estate, as a power appendant or leasing power would be defeated; because the conveyance of his life estate is not inconsistent with the exercise of his power.
>
> Quaere. Could such a power in gross in a tenant for life be released? If he were grantor, ... it could be released; and I think it may equally be released, if he is grantee... .

These rules govern cases of powers appendant, n269 powers in gross, powers simply collateral and reserved powers.

In Jones v. Winwood, n270 William and Frances Davies were given a joint power appendant to their estates in certain lands. William conveyed away his interest in the land. Then William and his wife exercised their joint power to convey the whole fee. The court found that William could not derogate from his own previous conveyance and that the exercise of the joint power was effective to convey only that part of the fee which William had not previously conveyed.

In Smith v. Death, n271 the testator gave Charles Brown a life estate with a power in gross to appoint the remaindermen from among his children, and in default of such appointment to Charles' first son in fee tail with remainders over. The court held that Charles was permitted to extinguish his power by joining with his son in suffering a recovery. His action created an interest inconsistent with the exercise of his power and he was not permitted to defeat it.

In Seidel v. Werner, n272 a life tenant, now deceased, with a testamentary power of appointment, provided in a separation agreement (later approved as part of a Mexican consent judgment for divorce) that he would make, and would not revoke, a will in which he would exercise his testamentary power of appointment in favor of his children by his second wife. Instead, he executed a will in which he exercised his testamentary power of appointment in favor of his third wife. The court found that the provision in the separation agreement was a contract to exercise a testamentary power of appointment not presently exercisable and as such was invalid. The argument was made that this provision should at least be construed as a release of the power of appointment, in which case the children had a share in the remainder in default of appointment (which was given to "issue of [the life tenant] then surviving *per stirpes*"). The court rejected this argument on the grounds that there was no intent to release given the contemplation of future action and that the substantial effect of the promised exercise of the power would not have been the same as would have followed from a release.

A release of testamentary power to appoint may be an effective alternative to an unenforceable contract to appoint under a testamentary power.

In In re Evered, n273 a wife took a life estate in realty with a testamentary special power to appoint to issue of the marriage, and in default of appointment, sons and daughters would take. The wife covenanted that she would not exercise her testamentary power of appointment to reduce the share of each of her three sons below £7,000 and she released her power of appointment to that extent. When the wife died, she had seven children, and her will failed to appoint in such a way that each of her three sons would receive £7,000. Such an appointment would have satisfied the wife's covenant. In the absence of such an appointment, the court found that, although the covenant was not specifically enforceable, it governed the extent of the release of her power of appointment so that "she was bound to leave the fund unappointed to the extent necessary to leave each son £7000. under the ultimate trust in default of appointment in favor of her seven children in equal shares, that is to say to the extent of £49,000."

§ 30.10(i) Claims of Creditors

A power to appoint may be subject to the claims of creditors if the power is exercised. n274 It is immune to the claims of creditors if the power is not exercised. n275

In Irwin Union Bank & Trust Co. v. Long, n276 the court found that the right to withdraw up to 4% of market value from the principal of a trust created a general power of appointment. Insofar as it remained unexercised, "then creditors are in no position to either force the exercise of the power or to reach the trust corpus."

FOOTNOTES:

(n1)Footnote 209. *Hogarth-Swann v. Weed, 174 N.E. 314 (Mass. 1931),* which also states that "[t]he validity and effect of the instrument whereby the power of appointment as to personal property is exercised must be determined as to both form and substance by the law of the domicil of the donor and not of the donee of the power."

(n2)Footnote 210. Lewis M. Simes, Handbook of The Law of Future Interests § 57, at 128 (2d ed. 1966).

(n3)Footnote 211. Duke of Marlborough v. Lord Godolphin, 2 Vesey Sr. 61 (Court of Chancery 1750).

(n4)Footnote 212. Doe d. Willis v. Martin, 4 T.R. 39, *100 Eng. Rep. 882 (K.B. 1790). Lambert v. Thwaites, L.R. 2 Eq. 151* (Court of Chancery 1866), states a general principle to govern the case where no express gift over in default of appointment exists:

> If the instrument itself gives the property to a class, but gives a power to A. to appoint in what shares and in what manner the members of that class shall take, the property vests, until the power is exercised, in all the members of the class, and they will all take in default of appointment; but if the instrument does not contain a gift of the property to any class, but only a power to A. to give it, as he may think fit,

> among the members of that class, those only can take in default of appointment who might have taken under an exercise of the power. In that case the court implies an intention to give the property in default of appointment to those only to whom the donee of the power might give it.

(n5)Footnote 213. *Ammco Ornamental Iron, Inc. v. Wing, 31 Cal. Rptr. 2d 564 (Cal. App. 1994); Ducker v. Burnham, 34 N.E. 558 (Ill. 1893).*

(n6)Footnote 214. *See Seidel v. Werner, 364 N.Y.S.2d 963, aff'd on opinion below, 376 N.Y.S.2d 139 (1975), discussed infra*.

(n7)Footnote 215. Dukeminier & Johanson, *supra* note 24, at 731.

(n8)Footnote 215.1. *See Forsee v. United States, 76 F. Supp. 2d 1135 (D. Kan. 1999)* (discussing the rules of general powers of appointment). *See also Dickinson v. Wilmington Trust Co., 734 A.2d 605 (Del. Ch. 1999); Estate of Walsh v. Commissioner, 110 T.C. 393 (T.C. 1998); Gilroy v. Gilroy, 235 B.R. 512 (Bankr. D. Mass. 1999); Ahren v. Thomas, 730 A.2d 756 (Conn. 1999).*

(n9)Footnote 216. *See* Bergin & Haskell, *supra* note 1, at 151, although Leach, *supra* note 6, at 577 n.1, points out that in *Wetmore v. Henry, 102 N.E. 189 (Ill. 1913),* a special power to appoint was given to a donee who was also included among the beneficiaries of the power.

(n10)Footnote 217. *In re Carmichael v. Heggie, 506 S.E.2d 308 (S.C. App. 1998)* (surviving spouse could not use the general powers given to her as executor to convey fee simple interest to her son in property in which she had a life estate and general testatmentary power of appointment; she could not convey an interest she didn't have).

(n11)Footnote 217.1. *307 A.2d 251 (Pa. 1973). Catch v. Phillips, 73 Cal. App. 4th 648 (Cal. Ct. App. 1999)* (holding a power of appointment invalid because the appointing document was unsigned).

(n12)Footnote 217.2. *93 N.E.2d 547 (Mass. 1950). E. Norman Peterson Marital Trust v. Commissioner of Internal Revenue, 78 F.3d 795 (2d Cir. 1996)* (for tax purposes a general power of appointment is viewed as being essentially identical to outright ownership of the property). *Dean v. United States, 17 F. Supp. 2d 972, 974 n.5 (W.D. Mo. 1999)* (a donee cannot use a special power of appointment to appoint property to himself); *First Union Nat'l Bank v. Ingold, 523 S.E.2d 725 (N.C. Ct. App. 1999)* (defining the restrictions on passage of property under a special power of appointment).

(n13)Footnote 218. *379 A.2d 570 (Pa. 1977). Nowlin v. Frost Nat'l Bank, 908 S.W.2d 283 (Tex. App. 1995)* (Karl Nowlin validly exercised his special testamentary power of appointment in favor of a Heart Institution and AIDS Foundation, and his heirs could not collect on that part of Karl's estate.); *Frazer v. Millington, 475 S.E.2d 811 (Va. 1996). See also Simpson v. Simpson, 1999 Ohio App. LEXIS 2886 (1999)* (refusing to grant a special testamentary power of appointment to the settlor's sons).

(n14)Footnote 219. *552 P.2d 1 (Colo. 1976).*

(n15)Footnote 220. *13 Sim. 199* (Court of Chancery 1842).

(n16)Footnote 221. *179 S.W. 396 (Ky. 1915).* The application of the doctrine of illusory appointment in this case is rejected in many jurisdictions. *See Hawthorn v. Ulrich, 69 N.E. 885 (Ill. 1904).*

(n17)Footnote 222. Kales, *supra* note 122, at 712.

(n18)Footnote 223. Bergin & Haskell, *supra* note 1, at 157-160.

(n19)Footnote 224. *Id.* at 154, 157-159.

(n20)Footnote 225. Leach, *supra* note 6, at 732-733 (footnotes omitted).

(n21)Footnote 226. A power appendant is generally not valid in the United States.

(n22)Footnote 227. *See In re McKallip's Estate, 188 A. 343 (Pa. 1936).*

(n23)Footnote 228. *Dunning v. Vandusen, 47 Ind. 423 (1874), quoting* from 4 James Kent, Commentaries on American Law (Rev. ed. 1889) 334, 335. *Wright v. Greenberg, 2 S.W.3d 666 (Tex. App. Houston 1999)* (unless it is very clear that a person is exercising a power of appointment by means of a will, the power will be deemed unused).

(n24)Footnote 229. *Armory v. Meredith, 7 Allen 397 (1863). Compare Bank of New York v. Black, 139 A.2d 393 (N.J. 1958)* (general rule "that a residuary clause, general in its nature, will not ordinarily suffice to exercise a power of appointment" was not applied because intent to appoint was found implied from the facts of the case including the close family connection between the parties involved).

(n25)Footnote 230. *See Beals v. State St. Bank and Trust Co., 326 N.E.2d 896 (Mass. 1975), reversed by* statute in 1978 (Mass. Gen. Laws Ann. ch. 191, § 1(A)(4) (1981)).

(n26)Footnote 231. *See* Dukeminier & Johanson, *supra* note 24, at 737-738, *citing* Susan French, *Exercise of Powers of Appointment: Should Intent to Exercise Be Inferred from a General Disposition of Property?, 1979 Duke L.J. 749.*

(n27)Footnote 232. § 2-610.

(n28)Footnote 233. *134 A. 155 (Conn. 1926).*

(n29)Footnote 234. *See Low v. Bankers' Trust Co., 200 N.E. 674 (N.Y. 1936).*

(n30)Footnote 235. 2 Restatement (Second) of The Law of Property § 12.3 (1986).

(n31)Footnote 236. *176 N.W.2d 671 (Neb. 1970).*

(n32)Footnote 237. *314 N.W.2d 263 (Neb. 1982).*

(n33)Footnote 238. This rule of repugnancy is followed in a majority of jurisdictions.

(n34)Footnote 239. *See Fox v. Snow, 76 A.2d 877 (N.J. 1950)* (dissenting opinion); 3 Simes & Smith, *supra* note 61, at §§ 1481-1491; 6 American Law of Property *supra* note 15 § 26.43. These sources are *cited in* Dukeminier & Johanson, *supra* note 24, at 724, which gives the rule of repugnancy as one reason never to create a legal fee simple with the power to consume or a legal life estate. A trust is a much better device to accomplish the creation of a power to dispose. *See, e.g., Beals v. State St. Bank & Trust Co., 326 N.E.2d 896 (Mass. 1975)* (will placing the residue of property in a trust, the income of which was to be paid to the wife during her life, then to be divided among each daughter to be paid during her life, and on her death the principal of such portion to be paid and disposed of as she may appoint by will).

(n35)Footnote 240. Bergin & Haskell, *supra* note 1, at 153-154, 160, 164. *See Estate of Leighton, 638 A.2d 723 (Me. 1994)* (donee of a general power of appointment granted in a will died before the testatrix and the court found that the power failed for lack of a donee).

(n36)Footnote 241. *In re Davies' Trusts, L.R. 13 Eq. 163* (Court of Chancery 1871) (distinguishing the case of an appointment to A in trust for B with B dying before the death of the donee). It should be noted that in some cases a

seeming appointment to one other than the donee may in fact be an appointment by the donee to herself with a subsequent distribution. *See Willoughby Osborne v. Holyoake, 22 Ch. D. 238* (Court of Chancery 1882). In such cases the appointment is obviously valid and the gift by will to one who has died before the death of the donee lapses, leaving the property to be distributed under the residuary clause of the donee's will or by intestate succession to the heirs of the donee.

(n37)Footnote 242. *In re Van Hagan, L.R. 16 Ch. D. 18 (1880).*

(n38)Footnote 243. *Talbot v. Riggs, 191 N.E. 360 (1934).*

(n39)Footnote 244. Dukeminier & Johanson, *supra* note 24, at 743-744, *citing* Restatement (Second) of Property, Donative Transfers §§ 22.1, 22.2 (1986).

(n40)Footnote 245. Dukeminier & Johanson, *supra* note 24, at 744-745, *citing* Restatement (Second) of Property, Donative Transfers § 23.2 (1986), and Thomas L. Jones, *Consequences of an Ineffective Appointment -- Capture, 18 Ala. L. Rev. 229 (1966).*

(n41)Footnote 246. *75 N.E.2d 3 (Mass. 1947).*

(n42)Footnote 247. *21 A. 914 (R.I. 1891).*

(n43)Footnote 248. Bergin & Haskell, *supra* note 1, at 157.

(n44)Footnote 249. *But see Loring v. Karri-Davies, 357 N.E.2d 11 (Mass. 1976).*

(n45)Footnote 250. Dukeminier & Johanson, *supra* note 24, at 740.

(n46)Footnote 251. Bergin & Haskell, *supra* note 1, at 165. For different theories by Lord Eldon, Professor Gray and Professor Kales supporting the allocation of the gift to the class of appointees, *see* Leach, *supra* note 6, at 630-631 n.12.

(n47)Footnote 252. *5 Mylne & C. 72* (Court of Chancery 1840).

(n48)Footnote 253. *29 S.W.2d 659 (Tenn. 1930).*

(n49)Footnote 254. Ch. 210 (Court of Chancery 1925).

(n50)Footnote 255. Bergin & Haskell, *supra* note 1, at 155, 165.

(n51)Footnote 256. *Id.* at 158-160.

(n52)Footnote 257. *484 N.E.2d 1315 (Mass. 1985).*

(n53)Footnote 258. Dukeminier & Johanson, *supra* note 24, at 743-744, *citing* Restatement (Second) of Property, Donative Transfers §§ 22.1, 22.2 (1986).

(n54)Footnote 259. *Horne v. Title Insurance & Trust Co., 79 F. Supp. 91 (S.D. Cal. 1948), citing* Restatement of Property §§ 353.

(n55)Footnote 260. *8 N.E.2d 864 (N.Y. 1937).*

(n56)Footnote 261. *2 Drew. & S. 365* (Court of Chancery 1865). An appointment pursuant to a contract to exercise a general testamentary power is also effective. *Benjamin v. Morgan Guaranty Trust Co. of N.Y., 609 N.Y.S.2d 276 (1994)..*

(n57)Footnote 262. The promisee who has given value does have a remedy in restitution. Dukeminier & Johanson, *supra* note 24, at 726.

(n58)Footnote 263. Leach, *supra* note 6, at 688.

(n59)Footnote 264. *1 Ch. 436 (Chancery Division 1902).*

(n60)Footnote 265. *13 N.E.2d 487 (Ill. 1938).*

(n61)Footnote 266. *Chenoweth v. Bullitt, 6 S.W.2d 1061 (Ky. 1928).*

(n62)Footnote 267. *See* Bergin & Haskell, *supra* note 1, at 167-168, indicating possible restrictions. *See Dean v. United States, 183 F.3d 812 (8th Cir. 1999); Green v. Finney 593 N.W.2d 190 (Mich. Ct. App. 1999).*

(n63)Footnote 268. *West v. Berney, 1 Russ. & M. 431, 434* (Court of Chancery 1819).

(n64)Footnote 269. A power appendant is generally not valid in the United States.

(n65)Footnote 270. *3 Mees. & W. 653* (Court of Exchequer 1838).

(n66)Footnote 271. 5 Mad. 371 (Court of Chancery 1820). The holding of this case was followed in *Thorington v. Thorington, 1 So. 716 (Ala. 1887),* which permitted the donee of a testamentary power in gross to release it in favor of her children, the takers in default.

(n67)Footnote 272. *364 N.Y.S.2d 963, aff'd on opinion below 376 N.Y.S.2d 139 (1975).*

(n68)Footnote 273. *2 Ch. 147 (1910).*

(n69)Footnote 274. *See Clapp v. Ingraham, 126 Mass. 200 (1879), Quinn v. Tuttle, 177 A.2d 391 (N.H. 1962)* (stating that some jurisdictions other than New Hampshire have alleviated this situation by statute and occasionally by some "not very sure-footed" cases), and *In re Masson's Estate, 298 P.2d 619 (Cal. App. 1956)* (finding that the donee of a general testamentary power of appointment appointed the property to her estate to be distributed by her executors and therefore the property was subject to the claims of her creditors). *But see Rhode Island Hosp. Trust Co. v. Anthony, 142 A. 531 (R.I. 1928)* (rejecting the idea that a general power of appointment when exercised gave the donee an interest subject to the claims of creditors or subject to the claim of a child to a statutory share).

(n70)Footnote 275. A number of state statutes are to the contrary. Creditors of a donee of a general power presently exercisable can reach the property immediately; creditors of a general testamentary power can reach the property at the donee's death. Dukeminier & Johanson, *supra* note 24, at 712.

(n71)Footnote 276. *312 N.E.2d 908 (Ind. App. 1974),* following *Gilman v. Bell, 99 Ill. 144 (1881).*

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CHAPTER 30 SPECIAL LEGAL RULES RELATING TO FUTURE INTERESTS

3-30 Thompson on Real Property, Thomas Editions § 30.11

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Supp. To CHAPTER 30 SPECIAL LEGAL RULES RELATING TO FUTURE INTERESTS

3-30 Thompson on Real Property, Thomas Editions Supp. to § 30.02

Supp. to § 30.02 Specialized Definitions Pertaining to Future Interests.

[Go To Main]

§ 30.02(a) Present and Future Interests Distinguished. [Go To Main]

Add:

Temple Beth Israel v. Feiss, 2 P.3d 388 (Or. App. 2000) (A "future interest," by definition, involves a postponement of possession and enjoyment of property.).

§ 30.02(c) "Heirs." [Go To Main]

Add:

Brown v. Johnson, 97 S.W.3d 924 (Ark. App. 2003) ("Children," as used in a will or deed, is a broader term than the word "heirs" and may include adopted children.).

§ 30.02(d) "Issue." [Go To Main]

Add:

Alexander ex rel. Alexander v. Estate of Alexander, 93 S.W.3d 688 (Ark. 2002) (Testator's uses of the term "issue" in

section of will referring to issue of testator's son and daughter, and in section that defined terms in will, were insufficient under permitted-child statute to suggest that testator contemplated grandson, who was the issue of testator's predeceased child.).

In re Estate of Harrison, 689 A.2d 939 (Pa. Super. App. 1997) (When used in its common legal or technical sense, "issue" is multigenerational term meaning all succeeding generations.).

Scaife v. Roberson, 2003 Tenn. App. LEXIS 230 (No. E2002-02666-COA-R3-CV, Mar. 21, 2003) (daughter born out of wedlock must clearly establish paternity before she can inherit from decedent father).

Add:

In re Estate of Goodwin, 739 N.Y.S.2d 239 (N.Y. Sur. 2002) (Term "descendants," used in will, was synonymous with "issue," referring to all those proceeding from body of another, such as child or grandchild, to remotest degree.).

Add:

Alexander ex rel. Alexander v. Estate of Alexander, 93 S.W.3d 688 (Ark. 2002) (Testator's use of the term "issue" in language stating that "any gift, devise of bequest hereunder shall vest not later than twenty-one (21) years after the death of the last survivor of [testator's] issue living on the date of [testator's] death" was a technical usage of term within language incorporated to avoid the rule against perpetuities, rather than an indication that testator contemplated grandson, who was the issue of testator's predeceased child, for purposes of determining grandchild's heirship under pretermitted-child statute.).

§ 30.02(f) Lapse. [Go To Main]

Add:

Taylor v. Taylor, 547 S.E.2d 161 (N.C. App. 2001) (Remainders vest at the death of the testator, unless some later time for vesting is clearly expressed in the will, or is necessarily implied therefrom.).

Coleman v. Coleman, 500 S.E.2d 507 (Va. 1998) (Beneficiary's fee simple interest in residue of testator's estate vested upon testator's death, and was not rendered contingent by testator's giving beneficiary a life estate in property, where nothing in testator's will indicated any intent to postpone vesting of remainder interest in residuary estate.).

Add:

Jones v. Hill, 2004 Va. LEXIS 56 (No. 031514, Apr. 23, 2004) (holding that if a lapse occurs, the share that would have gone to the now deceased remainderman can be reached by his creditors).

In re Estate of Peterson, 64 Va. Cir. 428 (2004) (Words of limitation giving to beneficiary's "heirs and assigns forever" did not prevent lapse.); *Baldwin v. Branch, 888 So. 2d 482 (Ala. 2004)* (Although the state's anti-lapse statue does not apply to trusts, the beneficiary's share did not lapse upon her death because it had already vested in interest).

Add:

Deviney v. NationsBank, 993 S.W.2d 443 (Tex. App. 1999) (When a member of the class predeceases the testator, his share lapses in favor of the surviving class members; however, class members with vested interests cannot drop out of the class by virtue of their death after vesting but before distribution.).

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Supp. To CHAPTER 30 SPECIAL LEGAL RULES RELATING TO FUTURE INTERESTS

3-30 Thompson on Real Property, Thomas Editions Supp. to § 30.03

Supp. to § 30.03 Specialized Rules Pertaining to Future Interests.

[Go To Main]

§ 30.03(a) How Estates End and Interests Begin. [Go To Main]

Add:

Gutierrez v. Rodriguez, 30 S.W.3d 558 (Tex. App. Texarkana 2000) (When a grantor grants or devises a fee simple subject to a condition subsequent, the grantor retains the right of reentry and the right to terminate the grantor's estate if the condition occurs.).

Add:

Cooley v. Williams, 31 S.W.3d 810 (Tex. App. Houston 2000) (A fee simple estate subject to an executory limitation is a "determinable fee simple estate," which is a fee simple interest in every respect, except that it passes to another, who has an "executory interest," if the contingency happens.).

Board of County Sup'rs of Prince William County v. United States, 48 F.3d 520 (Fed. Cir. 1995) ("Fee simple subject to executory limitation" is created when fee simple is by its terms subject to divestment in favor of person other than conveyor upon happening of specified event; other person has "executory interest.").

§ 30.03(b) Alienability. [Go To Main]

Add:

Willhite v. Masters, 965 S.W.2d 406 (Mo. App. 1998) (Upon creation of determinable fee simple estate, grantor retains interest of "possibility of reverter," which is both alienable and devisable.).

Add:

In re Incorporated Village of Garden City, 734 N.Y.S.2d 225 (N.Y.A.D. 2001) (Right of reentry allegedly created by deeds conveying property to church, which contained restriction requiring property to be used for religious and educational purposes, could not be assigned, where common law in effect at time deeds were executed in late 1800s did not allow such a right to be assigned or devised.).

§ 30.03(c) Valuation. [Go To Main]

Add:

In re Estate of Sauer, 757 N.Y.S.2d 709 (2003) (value of life estate is based on the age of the person holding the life estate at the time of sale of the property, not at the time of the decedent's death).

In re Estate of Strohe, 791 N.Y.S.2d 818 (2005) (In allocating sale proceeds between a life tenant and a remainderman, the court directed the calculation be based on the life tenant's age and the interest rate as outlined by New York property law and not on the IRS actuarial tables or the specific facts of the case.).

§ 30.03(d) Merger Rule. [Go To Main]

Add:

Sanderson v. Hudlett, 832 So.2d 845 (Fla. App. 2002) (There can be no merger at law, without a union of titles in the same person; nor, in equity unless, also, there is an express or presumed intention on the part of those concerned in the transaction that it should operate as a merger.).

Auerbach v. Great Western Bank, 88 Cal. Rptr. 2d 718 (Cal. App. 1999) (Under the doctrine of "merger," if a single person is simultaneously the owner of identical legal and equitable interests in the same thing, the equitable interest merges in the legal and absolute ownership ensues, without any division into legal and equitable interests.).

Steger v. Muenster Drilling Co., 2003 Tex. App. LEXIS 10437 (No. 2-02-228-CV, Dec. 11, 2003) (estates will not be merged if the result is adverse to the holder of the interests); *Word Invs., Inc. v. Bruinsma (In re TML, Inc.), 291 B.R. 400 (W.D. Mich. 2003)* (when one party holds a dominant and a servient interest in property, the lesser interest is merged into the greater interest); *Conrad/Dommel v. W. Dev. Co., 815 A.2d 828 (Md. App. 2003)* (when the greater interest and the lesser interest meet in one person, the lesser interest is merged into the greater). *But see In re Hutchins, 306 B.R. 82 (D. Vt. 2004)* (court can decline to apply merger of greater and lesser interests if there is an equitable reason

to do so).

§ 30.03(f) Rules of Construction and Rules of Law. [Go To Main]

Add:

In re Estate Of Sawyer, 772 N.Y.S.2d 170 (N.Y. App. Div. 2004) (Intention of drafter ultimate guide, estate only meant to descend to survivors.); *Woodring v. Woodring, 596 S.E.2d 370 (N.C. Ct. App. 2004)* (Trial court must try to ascertain testator's intent when determining whether he meant to bequeath two separate shares to a husband and wife or one share for both.).

§ 30.03(f)(1) Surplusage.

Add:

Berry v. Trible, 626 S.E.2d 440 (Va. 2006) (surplusage theory not applied to a purported holographic will).

§ 30.03(f)(2) Implication.

Add:

In re Will of Standish, 772 N.Y.S.2d 430 (2004) (holding that, in cases of obvious omission or error in a will, the court can grant a gift by implication).

In re Standish, 4 A.D.3d 858 (N.Y. App. Div. 2004) (Gift by implication only in "rare and exceptional" cases.).

§ 30.03(f)(3) Preference for Vesting.

Add:

Dyer v. Dyer, 566 S.E.2d 665 (Ga. 2002) (It is the policy of the law to encourage free alienability of property, and attempts to remove either land or chattels from circulation in trade are discouraged not only by the rule against perpetuities, the abolition of fee tails, the early vesting of estates, and the doctrine of virtual representation, but by the rule against unreasonable restraints on alienation.).

Ransom v. Bebernitz, 782 A.2d 1155 (Vt. 2001) (The law favors early vesting, and no estate will be held contingent unless positive terms are employed in the will indicating a contrary intention.).

Besch v. Schumacher, 599 N.W.2d 846 (Neb. App. 1999) (The policy of the law has always been to look with favor upon the early vesting of estates, and a remainder will never be held to be contingent if it can reasonably be held to be a vested remainder.).

Coleman v. Coleman, 500 S.E.2d 507 (Va. 1998) (Early vesting rule provides that unless the intention to postpone vesting is clearly indicated in the will, all devises and bequests are to be construed as vesting at the testator's death.).

Summers v. Summers, 699 N.E.2d 958 (Ohio App. 1997) (Law favors early vesting of testamentary bequest, and will postpone vesting beyond death of testator only if will clearly expresses an intent to do so.).

Goelet v. Manice, 2003 R.I. Super. LEXIS 69 (No. 99-0107, Apr. 15, 2003) (testamentary construction is not warranted if the testator's intent is clear).

Peters v. Allison, 814 N.E.2d 568 (Ohio Ct. App. 2004) (Remainder in grandchildren vested upon testator's death and interest passed to grandchild's widow even though grandchild predeceased father.); *In re Uchtorff, 693 N.W.2d 790 (Iowa 2005)* (Remainderman's interest vested at testator's death, remainderman did not need to survive life tenant.); *Hochberg v. Proctor, 805 N.E.2d 979 (Mass. 2004)* (Beneficiary's life estate vested in interest, although not in possession, when trust was created and so did not violate the rule against perpetuities.)

§ 30.03(g) Adoption. [Go To Main]

Add:

Brown v. Johnson, 97 S.W.3d 924 (Ark. App. 2003) (Deed, which conveyed remainder interest in property to mother's heirs "by" father, unambiguously excluded any of their adopted children; in common-sense terms, a person's heirs "by" a particular person means that person's child or children "born or begot of" that particular person, meaning natural children.).

Unsel v. Meier, 972 S.W.2d 466 (Mo. App. 1998) (Public policy and intent expressed in grandfather's will that his children have equal fee tail interest in real estate precluded recognition of adoption of adult grandchild in relation to entailed interest so as to enable her to receive double share through both her natural and adoptive parents.).

Add:

But see Smalley v. Parks, 108 S.W.3d 138, 141 (Mo. App., 2003) (the doctrine of equitable adoption only applies if a person can show clear evidence of the intent of the decedent to adopt).

Commerce Bank v. Blasdel, 141 S.W.3d 434 (Mo. Ct. App. 2004) (According to the law in effect at time of the trust's execution, adopted children are "lineal descendants" of adoptive parents' ancestors.); *Ehrenclou v. MacDonald, 117 Cal. App. 4th 364 (Cal. Ct. App. 2004)* (Adopted adults do not qualify as "children then living."); *McGehee v. Edwards, 268 Va. 15, 268 Va. 23, 597 S.E.2d 99 (Va. 2004)* (According to the law in effect at time of the trust's execution, adopted children could not inherit from adoptive parents' ancestors).

Add:

Demund v. LaPoint, 647 N.Y.S.2d 662 (N.Y. Sup. 1996) (Even though life tenant under testator's will adopted adult nephew, nephew could not inherit properties as tenant's child, under precautionary addendum of statutory provision allowing adopted person to inherit from adoptive parent, since this would have cut off nephew's sisters' remainder rights.).

In re Medeiros Testamentary Trust, 96 P.3d 1098 (Haw. 2004) (According to the law in effect at time of the trust's execution, adopted child could not inherit from natural father).

§ 30.03(i) The Rule in Shelley's Case. [Go To Main]

Add:

Lusk v. Broyles, 694 So.2d 4 (Ala. Civ. App. 1997) (Under common-law "Rule in Shelley's Case," when ancestor by any gift or conveyance took estate of freehold, and in same gift or conveyance estate was limited to his or her heirs in fee or in tail, words "the heirs" were deemed as matter of substantive law to be words of limitation and not of purchase; however, this rule is not followed in Alabama, as it has been superseded by statute which requires that grantor's intent to sever grantee's life estate interest from grantee's heirs' remainder interest be honored according to express terms of conveyance.).

John V. Orth, "The Mystery of The Rule in Shelley's Case," *7 Green Bag 2d 45 (2003).*

§ 30.03(j) The Doctrine of Worthier Title. [Go To Main]

Add:

Dennis v. Bird, 941 S.W.2d 486 (Ky. App. 1997) (Rule against perpetuities and doctrine of worthier title apply to remainders, that is, in cases in which grantor doesn't convey entire fee simple absolute but holds back something for third party, not himself or herself.).

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Supp. To CHAPTER 30 SPECIAL LEGAL RULES RELATING TO FUTURE INTERESTS

3-30 Thompson on Real Property, Thomas Editions Supp. to § 30.04

Supp. to § 30.04 Survivorship.

[Go To Main]

§ 30.04(a) Implied. [Go To Main]

After the citation to "Schau v. Cecil ..." add:

superseded by statute as stated in Davies v. Radford, 433 N.W.2d 704 (Iowa 1988) .

§ 30.04(b) Express. [Go To Main]

After the citation to "*In re* Montgomery's Estate ..." add:

order reversed by In re Montgomery's Estate, 15 N.Y.S.2d 729 (N.Y.A.D. 1939) .

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Supp. To CHAPTER 30 SPECIAL LEGAL RULES RELATING TO FUTURE INTERESTS

3-30 Thompson on Real Property, Thomas Editions Supp. to § 30.09

Supp. to § 30.09 Class Gifts.

[Go To Main]

§ 30.09(a) Definition. [Go To Main]

Add:

Deviney v. Nationsbank, 993 S.W.2d 443 (Tex. App. Waco 1999) (A devise constitutes a "class gift" when it grants property to a group of persons bearing a certain relationship to the testator or to each other, such that they can be designated by the same general name, as "brothers" or "sisters.").

In re Estate of Prioleau, 606 S.E.2d 769 (S.C. 2004) (Class of "then-living grandchildren" closed at grandfather's death.).

§ 30.09(b) Exclusion. [Go To Main]

Add:

Deviney v. Nationsbank, 993 S.W.2d 443 (Tex. App. Waco 1999) (Requirement of uncertainty as applied to a class gift by devise can be satisfied by the possibility that the number in the class may increase or decrease in the future.).

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Supp. To CHAPTER 30 SPECIAL LEGAL RULES RELATING TO FUTURE INTERESTS

3-30 Thompson on Real Property, Thomas Editions Supp. to § 30.10

Supp. to § 30.10 Powers of Appointment.

[Go To Main]

§ 30.10(a) Definitions. [Go To Main]

Add:

Estate of Sieber v. Oklahoma Tax Com'n, 41 P.3d 1038 (Okla. Civ. App. 2001) (A "general power of appointment" is a power exercisable in favor of anyone, including the donee, his or her estate, or his or her creditors or creditors of the estate.).

§ 30.10(b) Types of Power. [Go To Main]

Edwards v. Urice, 99 P.3d 256 (Okla. Civ. App. 2004) (Power of appointment was effective even though property was not delivered until settlor's death since.).

§ 30.10(b)(2) General Power Exercisable by Deed or Will.

Add

In re Chervitz Trust, 198 S.W.3d 658 (Mo. App. 2006) (a husband's exercise of the power of appointment to appoint assets of his wife's trust to his trust was effective); *In re Johnson, 190 S.W.3d 469 (Mo. App. 2006)* (limited power of appointment created by trust).

Replace "Dean v. United States" with:

Simpson v United States

§ 30.10(f) Contract to Exercise an Appointment. [Go To Main]

Add:

Montgomery v. Browder, 930 S.W.2d 772 (Tex. App. Amarillo 1996) (Life tenant's illegal promise in purchase and sale contract for land to make testamentary gift to purchasers, in excess of her authority under will, of balance on promissory note given for purchase was not severable from remainder of the contract, and therefore contract was void and court would leave parties as it found them; express terms of contract provided that forgiveness of unpaid balance of promissory note was part of consideration therein, and purchasers conceded that forgiveness of debt was important part of agreement.).

§ 30.10(g) Conditions. [Go To Main]

Add:

Giammarrusco v. Simon, *91 Cal. Rptr. 3d 50 (2009)* (application for declaratory judgment relating to exercise of power of appointment did not violate the will's no contest clause).

§ 30.10(h) Release. [Go To Main]

Replace "Dean v. United States" with:

Simpson v United States

Add:

In re Albasi, 765 N.Y.S.2d 213 (2003) (New York statute requires that property covered by a power of appointment is subject to creditor's claims).

§ 30.10(i) Claims of Creditors [Go To Main]

add:

In re Chappell, 883 N.Y.S.2d 857 (2009) (creditors of a donee of an appointive power can reach the trust's appointive property).

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3-30 Thompson on Real Property, Thomas Editions Supp. to § 30.11

Supp. to § 30.11 Bibliography.

[Go To Main]

Change: "Baxter, David M." to "Becker, David M."

Add to Articles:

Alan S. Acker, "Using Testamentary Powers of Appointment to Maximize Estate Exemptions and Basis Step Up: Best Thing Since Sliced Bread?" 17 *Ohio Prob. L.J.* 106 (January/February 2007).

Andersen, Roger W. "Present and Future Interests: A Graphic Explanation." *Seattle U. L. Rev.* Vol. 19 (Fall 1995) 101.

Bell, Abraham & Gideon Parchomovsky. "A Theory of Property." *Cornell L. Rev.* Vol. 90 (March 2005) 531.

Butler, Keith L. Comment. "Long Live the Dead Hand: A Case for Repeal of the Rule Against Perpetuities in Washington." *Wash. L. Rev.* Vol. 75 (Oct. 2000) 1237.

Dobris, Joel C. "The Death of the Rule Against Perpetuities, or the RAP Has No Friends." *Real Prop., Prob & Tr. J.* Vol. 35 (Fall 2000) 601.

Hoffman, Sharona. "Birth After Death: Perpetuities and The New Reproductive Technologies." *Ga. L. Rev.* Vol. 38 (Winter 2004) 575.

Knaplund, Kristine S. "Postmortem Conception and a Father's Last Will." *Ariz. L. Rev.* Vol. 46 (Spring 2004) 91.

Morris, Joseph W. "The Worthier Title Doctrine: Does the Draft Restatement III of Property Write a Premature

Obituary?" *45 Washburn L.J. 387 (Winter 2006).*

Orth, John V. "Intention in The Law Of Property: The Law of Unintended Consequences." *Green Bag 2d* Vol. 8 (Fall 2004) 59.

VanCannon, Kayla. Comment. "Fathering A Child From The Grave: What Are The Inheritance Rights Of Children Born Through New Technology After The Death Of A Parent?" *Drake L. Rev.* Vol. 52 (Winter 2004) 331.

Add to Annotations

Annotation, *Election to take against will as extinguishing power of appointment, 38 A.L.R.2d 977.*

Annotation, *Gift over by implication after estate during life or until marriage, where property is expressly given over at death and first taker marries, or vice versa, 73 A.L.R.2d 484.*

Annotation, *Implication of gift in inter vivos trust instrument, 11 A.L.R.2d 681.*

Annotation, *Implication of right of life tenant to entrench upon or dispose of corpus from language contemplating possible diminution or elimination of gift over, 31 A.L.R.3d 6.*

Annotation, *Implication of right of life tenant to entrench upon or dispose of corpus from language relating to the extent of his dominion over the corpus, of the beneficial purpose of the provision for the life tenant, 31 A.L.R.3d 169.*

Annotation, *Partial exercise of power of appointment, 4 A.L.R.2d 919* .

Annotation, *Power of appointment as exclusive or nonexclusive-modern views, 69 A.L.R.2d 1285* .

Annotation, *Power to appoint as exercisable by creation of new power by donee*, 169 A.L.R. 727 .

Annotation, *Validity of testamentary exercise of power of appointment by donee sane when will was executed but insame thereafter, 19 A.L.R.4th 1002* .

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CHAPTER 31 JOINT TENANCIES

4-31 Thompson on Real Property, Thomas Editions 31.syn

AUTHOR: Professor John V. Orth School of Law University of North Carolina

§ 31.syn Synopsis to Chapter 31: JOINT TENANCIES

§ 31.01 Concurrent Estates.

§ 31.02 Analytical Synopsis of the Law of Joint Tenancies.

§ 31.03 Joint Tenancies in the Context of Concurrent Estates.

§ 31.04 Outline of the Chapter.

§ 31.05 History of the Law of Joint Tenancies.

§ 31.06 Creation of Joint Tenancies.

§ 31.06(a) Creation of Joint Tenancies at Common Law.

§ 31.06(b) The Doctrine of the Four Unities.

§ 31.06(c) Special Problem in Creation of Joint Tenancies Caused by the Doctrine of the Four Unities: Conveyance by Grantor to Grantor and Another or Others.

§ 31.06(d) Modern Statutes Concerning Creation of Joint Tenancies.

§ 31.06(e) Joint Tenancies of Personal Representatives and Trustees.

§ 31.06(f) Joint Life Estates.

§ 31.06(g) Creation of Estates Similar to Joint Tenancies.

§ 31.07 Incidents of Joint Tenancies.

§ 31.07(a) Action of Waste.

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§ 31.07(c) Action of Account.

§ 31.07(d) Action of Ejectment.

§ 31.07(e) Creditors' Rights.

§ 31.08 Termination of Joint Tenancies.

§ 31.08(a) Termination by Act of All Joint Tenants.

§ 31.08(b) Termination by Act of One Joint Tenant.

§ 31.08(c) Termination by Operation of Law.

§ 31.09 The Future of the Law of Joint Tenancies.

§ 31.10 Bibliography.

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CHAPTER 31 JOINT TENANCIES

4-31 Thompson on Real Property, Thomas Editions § 31.01

AUTHOR: Professor John V. Orth School of Law University of North Carolina

§ 31.01 Concurrent Estates.

Whenever two or more persons own the same thing at the same time, a form of concurrent ownership exists. At common law n1 concurrent estates in land are of three types: joint tenancies, tenancies in common, and tenancies by the entirety -- the latter limited to persons married to one another. (A fourth form of concurrent estate, tenancy in coparcenary, was important historically, but is now obsolete). n2 Concurrent estates in land are not restricted to freehold estates but may exist in leaseholds, easements, and other interests in real property; nor are they restricted to present estates, but may exist in future interests as well. A further form of concurrent ownership is recognized by statute, as opposed to common law, in those states adopting the Uniform Partnership Act. n3 Concurrent ownership of personalty is also recognized, the forms of ownership being copied from those for land.

Whenever property is owned by one person alone, there exists a sole ownership, known (by contrast to the concurrent tenancies) as a tenancy in severalty. At common law there is a presumption in favor of sole ownership: in the words of Sir William Blackstone, "all estates are supposed to be of this sort, unless where they are expressly declared to be otherwise." n4

FOOTNOTES:
(n1)Footnote 1. The "common law" referred to is the common law of England as it was at the time of American Independence, for which the best and most convenient source is Sir William Blackstone's four-volume Commentaries on the Laws of England, first published in 1765 to 1768. The present author is acutely aware that continuing to refer to this body of law in the present tense is peculiar for a number of reasons: first, because the common law of England continued to grow and change in its native land; second, because the transplanted common law continued to grow and change in the various American jurisdictions; and finally, because there is something truly metaphysical in talking presently about a "law" that is not now recognized and enforced in at least one jurisdiction. Nonetheless, the author is convinced that there continues to be value, not merely heuristic, in using the common law in this sense as the background against which to place all later developments.

(n2)Footnote 2. On tenancy in coparcenary, *see* Chapter 35, *infra*.

(n3)Footnote 3. On tenancy in partnership, *see* Chapter 34, *infra*. Ever since the days of Joseph Story, it has been recognized that concurrent ownership in and of itself does not establish a partnership. Joseph Story, Commentaries on

the Law of Partnership 3-4 (1841); Uniform Partnership Act § 7(2) ("Joint tenancy, tenancy in common, tenancy by the entireties, joint property, common property, or part ownership does not of itself establish a partnership, whether such co-owners do or do not share any profits made by the use of the property."), 7 U.L.A. 18 (1949).

(n4)Footnote 4. 2 William Blackstone, Commentaries 179 (1766).

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CHAPTER 31 JOINT TENANCIES

4-31 Thompson on Real Property, Thomas Editions § 31.02

AUTHOR: Professor John V. Orth School of Law University of North Carolina

§ 31.02 Analytical Synopsis of the Law of Joint Tenancies.

[Go To Supp]

Joint tenancy is a form of concurrent estate; as such, it implies the ownership by two or more persons of the same property at the same time. n5 Forms of concurrent ownership are distinguishable by reference to three incidents: (1) alienability, the quality of being transferable inter vivos by sale or gift; (2) devisability, the quality of being transferable at death by devise; and (3) inheritability, the quality of passing at death to the heir of the deceased. Each joint tenant possesses the power to alienate an undivided interest in the concurrent estate, but no joint tenant possesses a devisable or inheritable interest. n6 By contrast, each tenant in common has a share that is alienable, devisable, and inheritable; no tenant by the entirety has a share that is devisable or inheritable. n7

Types of concurrent ownership without devisable and inheritable shares for each co-owner are described as including a "right of survivorship" or *jus accrescendi*, meaning that on the death of one co-owner the interest of the deceased accrues to the surviving co-owner or co-owners. n8 The survivor or survivors benefit, in other words, at the decease of the co-owner whose interest terminates. "The common law theory," as explained by eminent authorities, "is that the decedent's interest vanishes at death, and therefore no probate is necessary because no interest passes to the survivor at death." n9 No true right exists, the so-called "right of survivorship" merely describing the effect of the death of a co-owner in such forms of concurrent estate. n10

Survivorship is an incident of joint tenancies and tenancies by the entirety; it is lacking in tenancies in common. Because of the right of survivorship, dower was not exigible in joint tenancies when husbands held estates with persons other than their wives. n11 Dower, the common law provision for widows, was obviously not an issue with respect to tenancies by the entirety. Despite the existence of the right of survivorship in an otherwise valid joint tenancy held by husband and wife, certain agreements, such as a prenuptial agreement or an agreement to execute a mutual will, can affect the disposition of the estate at the death of one of the spouses. n12

At the older common law the anomalous combination in joint tenancies of alienability and the right of survivorship was summarized by describing the individual joint tenant's holding as *per my et per tout*, a Law French phrase meaning "by the share (moiety) and by the whole." n13 Because each held "by the whole," the death of one joint tenant left the other

or others still holding the entire estate as before. Because each held also "by the share," each joint tenant had the power to alienate an undivided fractional interest. The phrase is not, of course, an explanation but only a restatement of the result.

By virtue of English statutes universally accepted as part of the common law in America, each joint tenant and each tenant in common (but no tenant by the entirety) has a right to demand partition of the estate, that is, its division into shares, each divided share to be held in severalty. n14 Partition in kind is obviously best suited to large, especially rural, estates. Because some estates are unsuited to partition in kind, a later English statute, also copied in America, provided for partition by sale and division of the proceeds. n15

Because joint tenancies are commonly used by married couples in states in which tenancies by the entirety are not recognized, it is perhaps appropriate to notice here the existence in many states of homestead exemptions. n16 Although conceptually distinct from the form of concurrent estate by which married persons hold real property, the homestead exemption may in some cases affect results, particularly where creditors' rights are involved. n17 Also, in case of joint tenants married to one another, distribution of assets on divorce will be governed by the state's law of equitable distribution rather than by the technicalities of title.

FOOTNOTES:

(n1)Footnote 5. The common law did not at first use the concept of ownership with respect to land, preferring to describe those with interests in real property as "tenants," a word derived from the Latin for "holders." What was "held" was, therefore, a "tenancy." *See* A.W.B. Simpson, A History of the Land Law 47-48 (2d ed. 1986). In modern parlance tenancy means ownership, and the words are used interchangeably in this chapter.

(n2)Footnote 6. "A joint tenant has not an interest which is devisable." 4 James Kent, Commentaries on American Law 513 (12th ed. by O.W. Holmes, 1873). Explaining this rule, Kent observed that Lord Coke, relying on Littleton, had maintained that there was a momentary priority in favor of the survivor over the devisee (*citing* Edward Coke, Commentary Upon Littleton § 287, p. 185b (1628)); a "better reason," as Kent (and Coke) recognized is that "the survivor claims under the first feoffor, which is title paramount to that of the devisee."

(n3)Footnote 7. At one time, the husband holding in tenancy by the entirety with his wife was recognized as having a power to alienate his interest subject only to his wife's right of survivorship; the wife had no comparable power. *See* § 33.05, *infra*.

(n4)Footnote 8. One state has codified the common law rule concerning the right of survivorship:

> No will or other testamentary disposition or testamentary provision of one of the owners in joint tenancy of real or personal property or of an interest in real or personal property shall destroy or affect the joint tenancy or prevent the entire title and interest owned by the joint tenants from becoming vested upon his death in the joint tenants who shall have survived him. Upon the death of an owner in joint tenancy of real or personal property or of an interest in real or personal property, leaving surviving him coowners under such joint tenancy, all of the interest and title which, immediately before such death was owned by all of the joint tenants under such joint tenancy, shall become vested in the survivors of such joint tenants in spite of and without regard to the provisions of a will of the joint tenant so dying or the admission to probate of such will and without regard to whether such will was executed before or after the creation of the joint tenancy.

Colo. Rev. Stat. § 15-15-102.

(n5)Footnote 9. Jesse Dukeminier & Stanley M. Johanson, Willls, Trusts, and Estates 350 (6th ed. 2000).

(n6)Footnote 10. The right of survivorship has been described as not a property interest at all, but a "mere expectancy," analogous to a devisee's expectancy under the will of a living person. *Mitchell v. Mitchell, 91 Cal. Rptr. 2d 192 (Cal. App. 1999).* Although bearing some resemblance to a contingent remainder in the survivor, the right of survivorship in joint tenancies differs in a material way: it may be eliminated by the act of one joint tenant. *See, e.g., Geib v. McKinney, 617 A.2d 1377 (Conn. 1992). See also* § 31.08(b), *infra*.

Gifts to classes involve a feature similar to the right of survivorship: if one class member predeceases the testator, the surviving class members divide the gift. *See Dewire v. Haveles, 534 N.E.2d 782 (Mass. 1989)* ("The general rule is that ... members of a class are joint tenants with rights of survivorship."). Until the death of the testator, no true right of survivorship is involved, and certainly no joint tenancy.

(n7)Footnote 11. Where dower remains, the rule is still applies. *See Funches v. Funches, 413 S.E.2d 44 (Va. 1992).*

(n8)Footnote 12. *King v. King, 962 P.2d 1118 (Kan. App. 1998)* (prenuptial agreement); *Murphy v. Glenn, 964 P.2d 581 (Colo. App. 1998)* (agreement to execute a mutual will).

The equitable doctrine of election, by which a devisee may be forced to choose between accepting a benefit under the will while surrendering some interest the will undertakes to dispose of, or alternatively rejecting the benefit provided by the will and retaining the interest, has been applied to property held in joint tenancy by the testator and the devisee, but the intention to put the survivor to an election must be clearly expressed. *Williamson v. Williamson, 657 N.E.2d 651 (Ill. App. 1995), noted in 21 S. ILL. U. L.J. 211 (1996). See also In re Estate of Vittorio, Sr., 546 N.W.2d 751 (Minn. App. 1996)* (a will may in an appropriate case impose enforceable duties on the surviving joint tenant).

(n9)Footnote 13. Thomas Littleton, Tenures § 288 (ca. 1481). The Law French word "*my,"* equivalent to the English "moiety," means generally "share" or more particularly "half." Because joint tenants at common law hold equal interests, Blackstone translated the phrase *per my et per tout* as "by the half or moiety, and by all." 2 William Blackstone, Commentaries 182 (1766). If there are more than two joint tenants, however, each holds "by the [equal] share and by the whole."

(n10)Footnote 14. *31 Hen. 8*, c. 1 (1539); *32 Hen. 8*, c. 32 (1540). On partition, *see* Chapter 38, *infra*.

(n11)Footnote 15. 31 & 32 Vict., c. 40 (1868). *See* Heather Conway, *The Repeal of an Act for Jointenants 1542 and the Jurisdiction to Order Partition or Sale Under the Partition Acts 1868 and 1876*, 19 Dublin U. L.J. 1 (1997). Although partition by sale and division is most common due to the difficulty of partitioning many estates in kind, it is important to remember that a joint tenant against whom a partition action is brought retains the right to insist on partition in kind if it is possible. *Kellner v. Kellner, 593 N.W.2d 1 (Neb. App. 1999); Eli v. Eli, 557 N.W.2d 405 (S.D. 1997).* Minor inequalities in value and minor losses incidental to sale of smaller parcels may be offset by requiring the party insisting on partition in kind to make cash payments to the others, a payment historically known as "owelty."

(n12)Footnote 16. *E.g.*, N.C. CONST. art. x, § 1 (exempting realty "to a value fixed by the General Assembly but not less than $1,000, to be selected by the owner thereof"). *See* John V. Orth, The North Carolina State Constitution: A Reference Guide 151-53 (1993). Other states have more generous provisions.

(n13)Footnote 17. *See, e.g., O'Hagan v. United States, 86 F.3d 776 (8th Cir. 1996)* (applying Minnesota law) (creditor of spouse holding residence as joint tenant with other spouse can force sale of debtor spouse's right of survivorship, but present possession of non-debtor spouse is secured from creditor by state homestead exemption). *See also Pratt v. Langston, 669 So. 2d 967 (Ala. 1995)* (purported conveyance by one spouse of half interest subject to life estate in other spouse in jointly owned homestead could not affect homestead and was therefore ineffective as a severance).

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CHAPTER 31 JOINT TENANCIES

4-31 Thompson on Real Property, Thomas Editions § 31.03

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§ 31.03 Joint Tenancies in the Context of Concurrent Estates.

At the time of American Independence the joint tenancy was the common law's preferred form of concurrent estate. Although never created by operation of law, it was presumed in all voluntary transfers to two or more persons. n18 (If two transferees were married to one another, they took a tenancy by the entirety, a form of concurrent ownership available only to married persons). n19 Soon after Independence, dissatisfaction with the joint tenancy's right of survivorship emerged; the absence of devisable and inheritable shares sometimes defeated expectations within the family of the deceased tenant. In consequence, corrective statutes were passed in many states. Despite a wide variety of wording, they operated in one of two ways: either they eliminated the right of survivorship in joint tenancies, making the estate largely indistinguishable from tenancies in common, or they reversed the common law presumption in favor of joint tenancies to favor tenancies in common, ensuring that all joint tenancies were knowingly entered into. Statutes eliminating the right of survivorship tended to be earlier than statutes reversing the presumption. Today, in all jurisdictions still recognizing the joint tenancies, it can be confidently asserted that the old common law presumption in its favor is gone; transfers by sale, gift, or devise to two or more persons now create tenancies in common unless otherwise plainly stated.

FOOTNOTES:
(n1)Footnote 18. The common law presumption operated only in transfers to natural persons. This was because of the right of survivorship which Blackstone thought ought to be "mutual." Thus he explained the rule that "neither the king, nor any corporation, can be a joint-tenant with a private person" by the absence of mutuality: "for the king and the corporation can never die." 2 William Blackstone, Commentaries 184 (1766). The rule against corporations holding as joint tenants was altered by statute in England a century ago. 62 & 63 Vict., c. 20 (1899). Joint tenancies in America are not limited to natural persons; indeed, in trusts, it is frequently the case that one of the co-trustees will be a bank or trust company and the other a family member, friend, or financial advisor. The institutional trustee is valued precisely because its immortality lends continuity. *See* Paul G. Haskell, Preface To Wills, Trusts And Administration 82 (2d ed. 1994).

(n2)Footnote 19. On tenancies by the entirety, *see* Chapter 33, *infra*.

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CHAPTER 31 JOINT TENANCIES

4-31 Thompson on Real Property, Thomas Editions § 31.04

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§ 31.04 Outline of the Chapter.

The product of a long history, the joint tenancy was a well-defined form of concurrent estate on the eve of the American War of Independence; in consequence, this chapter must begin with a review of the history of the law of joint tenancies (§ 31.05). Thereafter, the modern estate is considered under three broad headings: creation of joint tenancies (§ 31.06), incidents of joint tenancies (§ 31.07), and termination of joint tenancies (§ 31.08). A glimpse at the future of the law of joint tenancies is also attempted (§ 31.09). Finally, the chapter concludes with a select bibliography of the law of joint tenancies (§ 31.10).

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CHAPTER 31 JOINT TENANCIES

4-31 Thompson on Real Property, Thomas Editions § 31.05

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§ 31.05 History of the Law of Joint Tenancies.

In a typically memorable phrase Justice Oliver Wendell Holmes once observed, "Upon this point a page of history is worth a volume of logic." n20 The law of concurrent estates is another such point. Although the common law of concurrent estates begins with feudalism, it is worth noting that concurrent ownership is very much older than feudalism. Despite the centuries-old legal assumption that individual ownership is the norm and concurrent ownership the exception, the fact is that ancient law, as Sir Henry Maine long ago pointed out, "knows next to nothing of individuals... . It is more than likely that joint-ownership, and not separate ownership, is the really archaic institution... ." n21 Nonetheless, the long history of English feudalism left its mark on the joint tenancy and explains the common law presumption in its favor, just as traditional concepts of marriage and the role of women lie behind the law of tenancy by the entirety. Tenancy in common, the form of concurrent ownership that historically arose in default of any other, was least marked by the contingencies of the past. In modern times it displaced the joint tenancy as the preferred form of concurrent ownership of land.

Under feudalism, land was thought of as owing various services to the feudal overlord higher up the tenurial ladder. There was thus a practical advantage in preserving estates intact. Whenever an estate passed to two or more persons, they were expected to hold it as a unit. The right of survivorship, preserving the entire estate in the survivor, gave effect to this expectation. Until statutes adopted during the reign of King Henry VIII, n22 a joint tenant could not compel the partition of the joint estate; partition required the consent of all the joint tenants. In this respect the early joint tenancy resembled the modern tenancy by the entirety.

As feudalism decayed, the joint tenancy found a new role, one that also favored the right of survivorship. Among the services owed by feudal estates were charges payable to the overlord on succession at death (relief), as well as opportunities for profit by the overlord in case the heir was underage (wardship and marriage). Other disadvantages of feudal landholding included lack of the power to devise and inflexibility in the future interests that could be created. All these could be avoided by the feoffment to uses in which equitable ownership was separated from legal ownership with its onerous duties and restraints; the estate was transferred to a legal owner who held "for the use of" the beneficial owner. Since feudal incidents still attached to the legal owner, it was desirable to avoid if possible succession on death and inheritance by a minor. Here the joint tenancy could be of service. By enfeoffing a group of joint tenants, one could postpone succession at death; the right of survivorship maintained the estate until the death of the last to die. n23

Indeed, by periodic transfers to still more joint tenants, one could -- barring bungling or major catastrophes -- keep the estate from passing at death indefinitely. (The arrangement resembles modern trusts in which, incidentally, joint tenancies remain useful.) n24 The prevalence of joint tenancies in feoffments to uses reinforced the older expectation that concurrent ownership would be accompanied by a right of survivorship. Ironically, while the original preference for survivorship was based on a desire to maintain feudalism, the subsequent frequency of joint tenancies in feoffments to uses was designed to undercut it.

The Statute of Uses (1535), n25 which transformed equitable estates into legal ones, and the final extinction of feudal dues by the Statute of Tenures (1660) n26 eliminated the justification for the presumption in favor of joint tenancies. Nonetheless, legal inertia was sufficient to maintain it until the time of the American Revolution. As a practical matter, of course, no one with competent legal counsel should have fallen foul of the rule; express language or adroit conveyancing could always produce a tenancy in common, rather than a joint tenancy with its associated right of survivorship.

In the newly independent American states, legal advice was less readily available (and perhaps less competent). Landholdings tended to be much smaller than the patrimonial estates in the "Mother Country," and reliance on professional counselors less routine. In addition, the political break caused by the Revolution created an opening for wide-ranging reform. Inherited legal practices such as entail and primogeniture attracted criticism. Property law was reformed to one degree or another in all states. n27 In North Carolina, for example, an omnibus statute in 1784 abolished entail, modified primogeniture, reformed dower, and eliminated the right of survivorship in joint tenancies. n28 The sole expression of legislative intention with respect to the change in concurrent estates appeared in the preamble to the relevant section of the statute: "in real and personal estate held in join-tenancy the benefit of survivorship is a manifest injustice to the families of such as may happen to die first." n29 The injustice referred to is presumably that of reasonable expectations defeated; widows and heirs or devisees of deceased owners discovering that they take no share in the concurrent estate because it was held, unbeknownst to them and perhaps even to the co-owners themselves, in joint tenancy. n30 The legislative remedy was to abolish the "benefit of survivorship." With only a few insignificant changes in wording, the Act of 1784 has endured to the present, its current form appearing in North Carolina General Statutes § 41-2:

> [I]n all estates, real or personal, held in joint tenancy, the part or share of any tenant dying shall not descend or go to the surviving tenant, but shall descend or be vested in the heirs, executors, or administrators, respectively, of the tenant so dying, in the same manner as estates held by tenancy in common... . n31

The North Carolina Act of 1784 did not abolish joint tenancies as such, but by ending the right of survivorship in inheritable estates it made them practically indistinguishable from tenancies in common. n32

A second type of statute dealing with the problem of the unwanted right of survivorship reversed the common law presumption. In Illinois, for example, an 1827 statute still in force provides:

> No estate in joint tenancy in any lands, tenements or hereditaments, or in any parts thereof or interest therein, shall be held or claimed under any grant, legacy or conveyance whatsoever heretofore or hereafter made, other than to executors and trustees, unless the premises therein mentioned shall expressly be thereby declared to pass not in tenancy in common but in joint tenancy... . n33

Experience simplified the drafting. An Iowa statute of 1851, also still in force, provides simply:

> Conveyances to two or more in their own right create a tenancy in common unless a contrary intent is expressed. n34

As a result of these two types of statutes, joint tenancies were either shorn of their right of survivorship or relegated to second place. Just as legal policy makers in the late 19th century favored the unencumbered fee simple absolute and sole over concurrent ownership, so they preferred tenancies in common over joint tenancies. Curiously, the 20th century has witnessed a resurgence of joint tenancies. Professor Thompson described the revolution:

> The law's treatment of the survivorship philosophy has made a circle. Its origin has been ascribed to the needs of the feudal system. So as the idols of seisin were overthrown so did the law develop a distaste for the right of survivorship, but the expense and delay incident upon administration of a decedent's estate today has led to a widespread revival of the survivorship tool as means of effecting a simple and economical transfer of property on death. n35

In states like Maine that have eliminated tenancies by the entirety, married purchasers of property have begun to choose joint tenancies over tenancies in common, presumably because of the right of survivorship. n36 The same is true in Iowa n37 and West Virginia. n38 Even in North Carolina, which still offers married persons the choice of tenancies by the entirety, the joint tenancy has made a surprising comeback, presumably to serve unmarried persons holding property together. n39

FOOTNOTES:

(n1)Footnote 20. *New York Trust Co. v. Eisner, 256 U.S. 345, 349 (1921)* (construing constitutional limitation on the imposition of a "direct tax").

(n2)Footnote 21. Henry Maine, Ancient Law 152-53 (1861).

(n3)Footnote 22. *31 Hen. 8*, c. 1 (1539); *32 Hen. 8*, c. 32 (1540).

(n4)Footnote 23. *See* S.F.C. Milsom, Historical Foundations of the Common Law 211 (2d ed. 1981).

(n5)Footnote 24. *See* § 31.06(e), *infra*.

(n6)Footnote 25. *27 Hen. 8*, c. 10 (1535).

(n7)Footnote 26. 12 Car. 2, c. 24 (1660).

(n8)Footnote 27. *See* John V. Orth, *After the Revolution: "Reform" of the Law of Inheritance, 10 Law & History Rev. 33 (1992);* Stanley Katz, *Republicanism and the Law of Inheritance in the American Revolutionary Era, 76 Mich. L. Rev. 1 (1977).*

(n9)Footnote 28. Act of 1784, ch. 22, *reprinted in* 24 The State Records of North Carolina 574 (Walter Clark ed. 1904).

(n10)Footnote 29. *Id.* § 6. In the 18th century, the words "joint tenancy" were often hyphenated. *See, e.g.,* 2 William Blackstone, Commentaries 180, 193-94 (1766). The form "join-tenancy," used in the North Carolina statute, occasionally appeared. Joseph Story ran the two words together, "jointenancy." Joseph Story, Commentaries on the Law of Partnership 4 (1841). Earlier, the form "joyntenants" was common. *See* Edward Coke, Commentary Upon Littleton § 277, p. 180a.

(n11)Footnote 30. In Ohio the state supreme court early held that the right of survivorship did not exist: "The jus accrescendi is not founded in principles of natural justice, nor in any reasons of policy applicable to our society or institutions." *Seargent v. Steinberger, 2 Ohio 305 (1826).*

(n12)Footnote 31. N.C. Gen. Stat. § 41-2. In 1784 what is now the state of Tennessee was then the western part of North Carolina, so the Act of 1784 applied there as well; it remains in effect in that jurisdiction too. Tenn. Code Ann. §

66-1-107.

By amendment in 1991 it again became possible, for the first time in two centuries, for North Carolinians to create joint tenancies with right of survivorship by express provision. *See* John V. Orth, *The Joint Tenancy Makes a Comeback in North Carolina, 69 N.C. L. Rev. 491 (1991).* Because a comparable concession has not been made in Tennessee, the jurisprudence of that state continues to exhibit a variety of unconventional estates with attached "rights of survivorship." *E.g., Runions v. Runions, 207 S.W.2d 1016 (Tenn. 1948).*

(n13)Footnote 32. At common law widows had no dower rights in estates held by their husbands in joint tenancies with another or others, while they had such rights in their husbands' tenancies in common. The elimination of the right of survivorship eliminated the basis for this distinction, and no North Carolina case has been found indicating any continuing difference in this regard. In Connecticut, where the right of survivorship was early rejected as "odious and unjust," there existed "no essential difference between the rights of joint tenants and tenants in common." *Whittlesey v. Fuller, 11 Conn. 337 (1836).*

(n14)Footnote 33. 765 ILCS 1005/1.

(n15)Footnote 34. Iowa Code Ann. § 557.15.

(n16)Footnote 35. 4 George W. Thompson, Commentaries on the Modern Law of Real Property 29 (John S. Grimes ed. 1979). *See also* John V. Orth, *Joint Tenancy Law: Plus Ca Change... 5 Green Bag 2d 173 (2002).*

(n17)Footnote 36. "A high percentage of conveyances to husband and wife, or to persons in close relationship, especially of residential property, have contained these words ['as joint tenants and not as tenants in common'] in some part of the instrument of conveyance." *Palmer v. Flint, 161 A.2d 837, 842 (Me. 1960).*

(n18)Footnote 37. "Starting from a base of less than 1% in 1933, the incidence of joint tenancy in Iowa rose to 6% of all transfers in 1938, escalated to 10% in 1940, and then rocketed to 31% by 1944. The rate of increase slowed down somewhat during the next decade, but by 1954 the 45% level was reached in most of the counties. Between 1954 and 1964, the expansion in usage generally continued, and the latest figures show that in 1964 an average of 52% of all Iowa land transfers created joint tenancies." N. William Hines, *Real Property, Joint Tenancies: Law, Fact, and Fancy, 51 Iowa L. Rev. 582, 586-87 (1966).*

(n19)Footnote 38. "[L]awyers practicing in the field of real property now estimate that about 90% of the deeds written in the more populous counties of this state, conveying real property for use as a home, are made to both husband and wife, and about 90% of such deeds contain some sort of language, creating or attempting to create some kind of survivorship between such husband and wife." Robert L. Merricks, *Joint Estates in Real Property in West Virginia, 61 W. Va. L. Rev. 101, 101 (1959).*

(n20)Footnote 39. *See* John V. Orth, *The Joint Tenancy Makes a Comeback in North Carolina, 69 N.C. L. Rev. 491 (1991).*

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CHAPTER 31 JOINT TENANCIES

4-31 Thompson on Real Property, Thomas Editions § 31.06

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§ 31.06 Creation of Joint Tenancies.

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First to be examined is the creation of joint tenancies at common law (§ 31.06(a)); then, the doctrine of the four unities, a description of the nature of joint tenancies used to determine whether one was created (§ 31.06(b)), and a special problem of common occurrence involving the four unities, conveyance by grantor to grantor and another or others (§ 31.06(c)). Next are modern statutes concerning the creation of joint tenancies (§ 31.06(d)), and, routinely excepted from such statutes, joint tenancies of executors or trustees (§ 31.06(e)). Finally attention turns to joint life estates (§ 31.06(f)) and the creation of estates similar to joint tenancies (§ 31.06(g)).

§ 31.06(a) Creation of Joint Tenancies at Common Law.

At common law on the eve of the American Revolution the transferor of real property to two or more unmarried persons could designate the form of concurrent estate created: joint tenancy or tenancy in common. n40 In the absence of a clear expression one way or the other, the law presumed an intention to create a joint tenancy. In 1766 Sir William Blackstone could thus lay down the law: "Now, if an estate be given to a plurality of persons, without adding any restrictive, exclusive, or explanatory words, as if an estate be granted to A and B and their heirs, this makes them immediately joint-tenants in fee of the lands." n41

At common law a joint tenancy could be created only by inter vivos transfer or by testamentary disposition, in other words, only by deed or devise. Joint tenancies could never arise by operation of law; that is, co-heirs never received an estate in joint tenancy by intestate succession. The explanation lies originally in the law of inheritance rather than in the law of joint tenancies: the canons of inheritance at common law were designed to produce a single male heir in each generation if at all possible. n42 Sole ownership excludes concurrent ownership. If no male heir existed, then at common law females of the same degree succeeded together in a form of concurrent ownership, but not joint tenancy. At common law co-heirs took as tenants in coparcenary. n43 Reform of the law of inheritance, admitting all males of the same degree of relationship and eliminating the preference given to males over females, greatly increased the number of co-heirs in each generation. Although sometimes explained in terms of a presumed common law rule against the creation of joint tenancies by operation of law, the process really reflected an independent preference at the relevant time for tenancies in common over joint tenancies.

In further corroboration of the last point is the fact that at common law joint tenancies could arise by adverse possession. "If two or three, etc. disseise another of any lands or tenements to their own use," wrote Sir Thomas Littleton in the 15th century, "then the disseisors are joint-tenants." n44 Today in the case of a plurality of adverse possessors it is expected that the modern preference in favor of tenancy in common would prevail. n45

Even at common law problems of construction could arise respecting deeds and devises. The schematic transfer mentioned by Blackstone, "to A and B and their heirs," resulted in a joint tenancy in fee only in the absence of "restrictive, exclusive, or explanatory words." The common law presumption in favor of joint tenancies was not a rule of law but only a rule of construction; as such, it could be rebutted by a plain statement in favor of some other form of concurrent ownership. A transfer of distinct shares, as "to A one-half and to B one-half," would not produce a joint tenancy because it did not purport to transfer a joint interest in the whole. n46

At common law the presumption in favor of joint tenancies could sometimes clash with the rule in the law of wills favoring intention even if inartfully expressed. Blackstone recited a hyper-technical distinction in the interpretation of the words "to A and B, equally to be divided between them": in a deed, he said, it had been held to produce a joint tenancy because "it implies no more than the law has annexed to that estate, viz. divisibility," while in a devise it produced a tenancy in common because "the devisor may be presumed to have meant what is most beneficial to both the devisees." n47 After reviewing the pitfalls, Blackstone concluded that the "most usual as well as the safest way" to avoid an unintended joint tenancy was "to add express words of exclusion as well as description, and limit the estate to A and B, to hold as tenants in common, and not as joint-tenants." n48 Some conveyancers favored the phrase "share and share alike" in grants creating tenancies in common; by indicating that each grantee took a share or moiety, it excluded the holding "by the whole" (*per tout*) requisite for joint tenancies.

At common law the hypertechnical Rule in Wild's Case could be involved in the unintentional creation of a joint tenancy. By the so-called Second Resolution in Wild's Case, a devise to a person and to that person's children is presumed, if the person has living children at the time the devise becomes effective, to be a gift to the person and the children as a class; the form of concurrent estate is presumed to be joint tenancy because of the common law presumption in favor of that estate. n49

At common law although each joint tenant held by the whole as well as by the share, each had to hold equal shares; that is to say, the share of each joint tenant could always be determined by dividing the whole estate by the number of joint tenants. This requirement was summed up in the unity of interest, described in the next subsection. Today, legislation may permit joint tenants to hold unequal shares at law, contrary to the requirement of unity of interest. n50 By contrast, tenants in common could hold unequal shares; unity of interest was not a requisite of their estate.

Where purchasers contribute unequally toward the price of land, title to which is taken in joint tenancy, a question may arise concerning the purchasers' respective shares. Although at law the shares of joint tenants must be equal, it is possible in equity for unequal shares to be recognized, or for a constructive trust to be impressed on one shareholder in favor of another to prevent unjust enrichment. n51 Nonetheless, because of the legal requisite of unity of interest and the equal chance of enjoying the benefit of the right of survivorship, it is appropriate to place the burden of proof on the party claiming unequal shares in equity. The possibility of a gift from the party contributing a disproportionate share should not be ignored, even if later hotly denied in the midst of a dispute between the co-tenants. A creditor aware of a deed in joint tenancy is not required to investigate the possibility of unequal ownership and may presume equal shares. n52

The problem of unequal contributions to the acquisition of property held in joint tenancy most often arises in the marital context. When spouses acquire real property as joint tenants, a rebuttable presumption exists that the purchasing spouse made a gift to the marital estate. No such presumption exists when the parties are merely engaged to be married. n53 Gifts may be made subject to condition, and a gift of an interest as joint tenant made in contemplation of marriage is

presumed to be conditional on the occurrence of the marriage. n54

The estate of joint tenancy is created at the moment the operative instrument becomes effective. In case of a variance in the description of the estate between the contract for deed and the deed itself, the deed prevails in accordance with the general doctrine of merger. n55

§ 31.06(b) The Doctrine of the Four Unities.

Although really a description of the nature rather than the creation of the joint tenancy, the doctrine of the "four unities" must be introduced at this point because of its relevance to the creation of joint tenancies at common law. Sir William Blackstone's statement of the doctrine has become classic:

> The *properties* of a joint estate are derived from it's unity, which is fourfold; the unity of *interest*, the unity of *title*, the unity of *time*, and the unity of *possession:* or, in other words, joint-tenants have one and the same interest, accruing by one and the same conveyance, commencing at one and the same time, and held by one and the same undivided possession. n56

The significance of the four unities for purposes of the creation of joint tenancies is that their presence -- all of them together -- was the touchstone for whether any given transfer resulted in a joint tenancy. Where the four unities were, there was a joint tenancy. (If the transferees were married to one another, they had a "fifth unity," the unity of person, and a tenancy by the entirety resulted. n57) Conversely, where one or more of the four unities was lacking, there could be no joint tenancy, regardless of a transferor's intent to create that form of concurrent estate.

Even in Blackstone's day, the requisite unity of time was subject to an exception where a transfer was to a class not all of whose members had yet qualified, such as to the children of a living person. n58 In addition, adepts at conveyancing under the Statute of Uses could also work wonders with time by means of springing or shifting uses or executory devises. n59

The requisite unity of possession required a unity of right to possess, not actual possession -- as seen from the fact that future interests could be held in joint tenancy. n60 As Blackstone himself put it: "estates of any quantity or length of duration, and whether they be in actual possession or expectancy, may be held ... in joint-tenancy ... and in common." n61 By the same token, a joint tenant out of possession of a present estate does not suffer loss to a joint tenant in possession, absent ouster. n62 Joint tenants can formalize the relationship by an agreement regulating their possessory rights, even to the point of providing for the exclusive possession by one. n63

In the modern world, agreements between joint tenants concerning exclusive rights to possession are sometimes encountered in property settlements incident to divorce. While it would be wiser to sever the joint tenancy, some divorcing couples who hold property as joint tenants leave the title as is, agreeing (for example) that one has the right to exclusive possession until death or remarriage. In and of itself, such an agreement does not sever the joint tenancy, although a court may find a severance in the totality of the circumstances. n64 Despite a divorce decree providing that property "shall remain in joint tenancy," either joint tenant retains the right to sever the joint tenancy, severance being an inherent incident of the estate, although it is a violation of the decree and subject to penalty. n65

By the time of Blackstone the drawbacks of joint tenancies were well recognized, despite the common law's presumption in their favor. Blackstone himself admitted: "In general it is advantageous for the joint-tenants to dissolve the jointure." n66 The strictness with which the doctrine of the four unities was applied in the early cases may, paradoxically, have been part of an effort to mitigate the harshness of the rule by avoiding unwanted joint tenancies. In modern times, when in many states the creation of joint tenancies is largely a matter of intent, it is natural to find the rigors of the doctrine of the four unities being relaxed. n67

§ 31.06(c) Special Problem in Creation of Joint Tenancies Caused by the Doctrine of the Four Unities: Conveyance by Grantor to Grantor and Another or Others.

For a transfer to result in the creation of a joint tenancy, it must, in order to satisfy the doctrine of the four unities create a concurrent estate in which all transferees have "one and the same interest, accruing by one and the same conveyance, commencing at one and the same time, and held by one and the same undivided possession." n68 A special problem of common occurrence is the attempted transfer by a grantor to the grantor and another or others, for example "A to A and B and their heirs." The intention is to share the ownership. (A similar problem arises in the law of tenancies by the entirety when one spouse conveys property owned by that spouse to the two spouses together: "H to H and W and their heirs" or "W to W and H and their heirs.") n69 The transfer, obviously one between living persons, must be by deed; the special problem considered here cannot arise in a devise.

Unlike the problems described earlier in the creation of joint tenancies at common law, the problem is not one of ascertaining intention. The grant in question may be in express terms "A to A and B and their heirs as tenants in common and not as joint tenants." The problem is with the doctrine of the four unities: because A as grantor is conveying directly to A and B as grantees, at least two of the four unities are lacking, title and time. The grantees' interests do not accrue "by one and the same conveyance," nor do they commence "at one and the same time"; A's interest stemmed from some original transfer to A, while B's stems from the grant in question. At common law even the presumption in favor of joint tenancies did not help in this situation; the presumption took effect if intention was unexpressed or unclear, but the problem here, as pointed out earlier, is not with intention. The problem is that without the unities no joint tenancy could be created -- no matter how ardently the transferor desired to produce that estate. n70

The common law solution to this common law problem was to use two successive conveyances: a grantor desiring to create a joint tenancy in the grantor and another would first convey to one with no interest in the property (a "straw man") who would then promptly reconvey the estate to the grantor and the co-tenant. n71 Schematically, the two conveyances would run "A to X and heirs," then "X to A and B and their heirs." In this manner, the doctrine of the four unities would indubitably be satisfied. It may be worth noting that the common law rule is perfectly logical and would produce no hardship (and very little extra paperwork) if every grantor were properly counseled. It is homemade deeds or careless lawyering that causes the problem. n72

Long after the time of Blackstone it was argued that the four unities are in fact present despite a grant directly (without mesne conveyance to a "straw man") from grantor to grantor and another or others. The theory is that the grant creates a new unit, the joint tenancy, so the title of the new unit accrues by one and the same conveyance and commences at one and the same time. n73 (The theory has also been advanced more plausibly in the context of the attempted creation of a tenancy by the entirety by a grant directly from one spouse to the two spouses together; in this case it has the advantage that the married pair is recognized for other purposes as a legal unit. n74) Despite that ingenuity, in the creation of joint tenancies the theory must be recognized as a departure from the received common law. The problem is not only historical, but also logical: the grant is sought to be justified by its result, when the question is whether the grant can in fact create this result, the fallacy of "begging the question," classically labeled *petitio principii,* when what is to be proved is all along taken for granted. n75

More straightforward is a resolution based on abandonment of the requirement that the four unities must be present when a grantor intends unmistakably to create a joint tenancy by conveyance directly from grantor to grantor and one or more others. Although sometimes accomplished by judicial decision, n76 this is more simply done by statute. A Maine statute, typical of statutes in many states, provides:

> A conveyance of real property by the owner thereof to himself and another or others, or by the owners thereof to themselves or to themselves and another or others, as joint tenants or with the right of survivorship, or which otherwise indicates by appropriate language the intent to create a joint tenancy between such owner or owners and such other or others or between themselves by such conveyance,

> shall create an estate in joint tenancy in the property so conveyed between all of the grantees, including the grantor. n77

Unusually one state, Minnesota, in addition to a provision analogous to that in Maine, n78 strikes directly at the root of the problem in another provision:

> The common law requirement for unity of time, title, interest, and possession in the creation of a joint tenancy is abolished. n79

A similar but analytically distinct problem arises when an owner makes a grant of an undivided one-half of his property to another. Here again the intention may be to share the ownership, but no joint tenancy results, either by application of the common law presumption in its favor or by express words describing that estate, because joint tenants do not hold only a share in the estate; each holds the whole as well. n80 In one state, Utah, the statute permitting the direct conveyance by grantor to grantor and another or others in joint tenancy also permits the creation of that estate by the grantor's conveyance of "an interest in land in which an interest is retained by the grantor" if the grantor expressly declares that intention. n81 In states without such express authorization one must trust the courts to perceive, if necessary, the functional equivalence of such a partial transfer and the more common direct conveyance.

More than half the states have statutes dealing with the problem of a conveyance by grantor to grantor and one or more others as joint tenants. In general the statutes are clear enough. Although only a few, like the West Virginia statute, expressly eliminate the need for a "straw party deed," n82 all have that effect. Particular attention must be paid to the formula required to express the requisite intention. Although many statutes permit any form of words that clearly declares the grantor's will, it is probably safest to add words of exclusion as well as words of description, as "A to A and B and their heirs as joint tenants and not as tenants in common." In some states it may be necessary to include a specific reference to survivorship: "as joint tenants with right of survivorship." n83 Although few statutes follow the example from Maine set out *supra* and explicitly include the case of a conveyance by two owners, presumably tenants in common, to themselves as joint tenants (or to themselves and another or others as joint tenants), it is submitted that all the statutes cover it because of the rule of statutory construction that the singular generally includes the plural. For the same reason the Hawaii statute seems redundant when after authorizing grants from a grantor to the grantor and another or others as joint tenants, it goes on to authorize grants by joint tenants to themselves and another or others as joint tenants. n84

Current statutes, from 29 states and the District of Columbia, are summarized below:

Alabama. Grantor may convey directly to grantor and another or others as joint tenants with right of survivorship but only if those words are used or "it clearly appears that the intent is to create such a survivorship between joint tenants." n85

California. Conveyance by grantor to grantor and another or others creates joint tenancy when expressly declared to be so. n86

Colorado. Grantor may create joint tenancy by conveyance to grantor and another or others so long as conveyance is expressly declared to be "in joint tenancy." n87

Connecticut. Joint tenancy may be created by conveyance to two or more persons "among whom may be the grantor or grantors." n88

Delaware. Conveyance by grantor to grantor and another or others "as joint tenants, with right of survivorship" is effective. n89

District of Columbia. Joint tenancy may be created by conveyance in which one or more of the grantors is also one of the grantees. n90

Georgia. Conveyance in which grantor conveys to grantor and another or others may create joint tenancy. n91

Hawaii. Land may be conveyed by grantor to grantor and another or others as joint tenants. n92

Illinois. Estate with right of survivorship may be created notwithstanding that grantor is also grantee; estate with right of survivorship has all the effects of a common law joint tenancy. n93

Kansas. Conveyance from grantor to grantor and one or more persons as joint tenants is effective. n94

Maine. Conveyance by grantor to grantor and another or others "as joint tenants or with the right of survivorship, or which otherwise indicates by appropriate language the intent to create a joint tenancy" shall create that estate. n95

Maryland. Conveyance by grantor to grantor and another or others in joint tenancy is valid "without the use of a straw man as an intermediate grantee-grantor." n96

Massachusetts. Grantor may convey to grantor "jointly with another person" in the same manner as to another person. n97

Michigan. Conveyance expressing intent to create joint tenancy in grantor together with grantee or grantees is effective. n98

Minnesota. Grantor may convey directly to grantor and another or others as joint tenants. n99

Mississippi. Conveyance by grantor to grantor and another or others in joint tenancy "with right of survivorship" creates that estate. n100

Montana. Conveyance by grantor to named joint tenants including grantor creates joint tenancy "without the necessity of any transfer or conveyance to or through a third person." n101

Nebraska. Conveyance by grantor to grantor and another or others as joint tenants is effective. n102

Nevada. Joint tenancy may be created by conveyance from a sole grantor to grantor and others. n103

New Jersey. Conveyance by grantor to grantor and another or others as joint tenants is as effective as if the interest had been conveyed to a third party and by such third party to the grantees. n104

New Mexico. Joint tenancy may be created when "expressly declared" in a conveyance by grantor to grantor and another or others. n105

North Carolina. Conveyance by grantor to grantor and another or others "as joint tenants with right of survivorship" creates that estate. n106

Ohio. Conveyance in which grantor is also grantee is effective to create estate indicated in the conveyance. n107

Oklahoma. Joint tenancy may be created by conveyance from grantor to grantor and one or more other persons. n108

South Carolina. Conveyance by grantor to grantor and another or other persons creates joint tenancy with right of

survivorship if instrument "expressly provides for a right of survivorship." n109

South Dakota. Conveyance by grantor to grantor and another or others which "by the method of describing such grantees, or by the language of the granting or *habendum* clause therein evinces an intent to create a joint tenancy" has such an effect. n110

Utah. Conveyance by grantor to grantor and another or others with words declaring joint tenancy creates that estate; same result for conveyance by grantor of an interest to another or others with words declaring joint tenancy. n111

Virginia. Conveyance by grantor to grantor and another is as valid "as if the deed had been made by one or more persons who are not also grantee or grantees." n112

Washington. Conveyance by grantor to grantor and others may create joint tenancy. n113

West Virginia. Conveyance by grantor to grantor and another or others in joint tenancy with right of survivorship is as valid as if conveyed by "a straw party deed." n114

Wisconsin. Common law requirements of unity of title and time for creation of joint tenancy abolished. n115

Wyoming. Grantor may convey to grantor and another or others as joint tenants "without the necessity of any transfer or conveyance to or through a third person." n116

§ 31.06(d) Modern Statutes Concerning Creation of Joint Tenancies.

Most American states today have statutes bearing on the creation of joint tenancies. These statutes are of two general types, one eliminating the right of survivorship, the other reversing the common law presumption in favor of joint tenancies. A few states have abolished joint tenancies altogether, although by a variety of devices estates with right of survivorship may still be created.

Statutes doing away with the right of survivorship as an incident of joint tenancies actually alter the nature of the estate. Joint tenancies may theoretically still be created. Indeed, there may theoretically still be a residual presumption in their favor, but no joint tenancy as it existed at common law may be created, because it no longer exists in the jurisdiction. The Tennessee statute, for example, provides:

> In all estates, real and personal, held in joint tenancy, the part or share of any tenant dying shall not descend or go to the surviving tenant or tenants, but shall descend or be vested in the heirs, executors, or administrators, respectively, of the tenant so dying, in the same manner as estates held by tenancy in common. n117

The more common type of statute leaves the estate untouched and merely reverses the presumption in its favor. Under such statutes one must by appropriate words make plain an intention to create a joint tenancy; it will not be presumed. The Delaware statute, for example, excludes the finding of a joint tenancy in any deed or devise "unless the premises therein mentioned are expressly granted, devised, or conveyed to such persons, to be held as joint tenants and not as tenants in common," n118 while the Iowa statute on conveyances more simply provides that deeds to two or more persons shall create a tenancy in common "unless a contrary intent is expressed." n119 Although the wording of the statutes may vary from jurisdiction to jurisdiction, it should be true that no particular formula is required to create a joint tenancy; the intention must only be plainly expressed. To paraphrase Blackstone, the safest way -- in the absence of a statutory formula -- would seem to be to add words of exclusion as well as words of description: "to A and B, as joint tenants, and not as tenants in common."

A particular problem may arise where the word "jointly" appears, as in "to A and B jointly." The word "jointly" has an ordinary sense of "together," as well as a legal connotation of "as joint tenants." When coupled with a presumption in favor of tenancies in common, this will usually result in a finding that an intention to create a joint tenancy has not been plainly expressed. n120 In a few states, however, the statute raising a presumption in favor of tenancies in common expressly permits the presumption to be rebutted by, among other phrases, the declaration that transferees take "jointly," n121 a result unlikely to be reached in the absence of statute.

In states that have abolished tenancies by the entirety, it is possible that transfers evidencing an intent to create that estate will result instead in joint tenancies as the only alternative offering a right of survivorship. Connecticut and New Hampshire statutes, for example, provide that a transfer to two persons "as tenants by the entirety" creates a joint tenancy. n122 The same result for the same reason may be reached in states recognizing tenancies by the entirety when transfers to two persons name that estate but the transferees are not in fact husband and wife. n123 Usually the mere description of the grantees as husband and wife -- inaccurate in this case -- is held insufficient as an expression of an intent to create a right of survivorship. n124

In deeds, words of limitation describing the estate are normally placed in the *habendum* clause, introduced by the memorable phrase "to have and to hold" (*habendum et tenendum*). In case of inconsistency within the various parts of a deed, the ancient rules of conveyancing give preference to the granting clause if it describes a greater estate, but with respect to concurrent estates deciding relative degrees of "greatness" may be metaphysical indeed. In Kansas a statute resolves all doubts:

> Where a deed, transfer or conveyance grants an estate in joint tenancy in the granting clause thereof and such deed, transfer, or conveyance has a *habendum* clause inconsistent therewith, the granting clause shall control. n125

In general, it may be fervently hoped that the entire instrument will be read to effectuate the intention of the parties, notwithstanding the technicalities; a statute may require this result, n126 or it may be reached by judicial construction. n127 In case of ambiguity it may be necessary to admit extrinsic evidence. n128

Harder to categorize are statutes that abolish joint tenancies and create in lieu thereof a tenancy with right of survivorship. An Oregon statute candidly describes this estate as a "tenancy in common in the life estate with cross-contingent remainders in the fee simple." n129 Such estates, described more fully elsewhere (§ 31.06(g)), raise intricate problems concerning the alienability of both present and future interests. n130 Few of the statutes address these problems, although an Ohio enactment expressly permits the conveyance of the life interest by one of the survivorship tenants, subject to the indestructible remainder of the other. n131

The years have played their usual tricks in the interpretation of dubious grants. In Oregon, which has abolished joint tenancies, a transfer to two or more persons "as joint tenants" results in a tenancy in common. n132 In Virginia, which has eliminated the right of survivorship as an incident of common law joint tenancies, n133 a statutory right of survivorship may be created, n134 but merely conveying to grantees "as joint tenants, and not as tenants in common" has been held insufficient to create the right of survivorship. n135 In West Virginia, which has also eliminated the right of survivorship as an incident of common law joint tenancies, n136 a statutory "joint tenancy with right of survivorship" is recognized; n137 the same statute also provides that a transfer to multiple owners whose names are linked together with the word "or" is declared to create such a survivorship tenancy. n138 In Alabama words of survivorship must be used: a grant to two or more "as joint tenants" creates a functional tenancy in common; that is, on death the interest of the so-called joint tenant descends as if it had been severed, n139 but in Michigan, which permits joint tenancies if expressly described, the addition of words of survivorship has been held to indicate an estate for joint lives with alternative contingent remainders in the survivor, rather than a joint tenancy as such. n140 In Virginia, a conveyance to a husband and wife "as joint tenants with the full common law right of survivorship" is held to create a tenancy by the entirety. n141 In Massachusetts a conveyance to a husband and wife "as joint tenants" is held to create a tenancy by the

entirety unless a contrary intention appears. n142

Like all deeds, conveyances in joint tenancy must in general be in writing. However, an oral agreement by two tenants in common to create a joint tenancy may be enforceable if an appropriate exception to the Statute of Frauds is available. n143 Also like all deeds, conveyances by a grantor to the grantor and another as joint tenants are voidable if induced by fraud. n144 Equally, conveyances into joint tenancy, even if induced by fraud, are subject to ratification. n145

Because based in intention, a joint tenancy can be created only by a person who is legally competent to execute the operative instrument. As to adults, competency will be presumed, so a challenger must prove lack of competence. n146 The intention to create a joint tenancy will be presumed from the use of the appropriate words; one who denies the requisite intention bears the burden of proving its absence at the time title was taken by clear and convincing evidence. n147 Conversely, one who claims that the intention to create a joint tenancy was present at the time title was taken although the necessary words were omitted, bears the burden of proving the same by clear and convincing evidence. n148

Even with respect to joint tenancies properly described for purposes of local law, a question may arise concerning the exact moment of the estate's creation. Only at the effective date does the right of survivorship attach. In case two or more purchasers enter into an installment land contract and the deed ultimately to be delivered is stipulated to be in joint tenancy, the question of what type of tenancy they hold while the contract remains executory may be dispositive of the rights of a survivor, should one purchaser die before delivery. In general, the doctrine of "equitable conversion" treats the contract as the operative event if it is specifically enforceable: the purchasers acquire an equitable title, while the vendor holds legal title as security for the payment of the purchase price. Although it is possible to recognize a right of survivorship in equity and at least one state has legislation requiring that it be done in this case, n149 it may equally be argued that the statutes concerning creation of joint tenancies refer to taking legal, not equitable, title. In resolving this problem much will probably depend on the state of sympathy for or against joint tenancies. Whatever the resolution, it should correlate with the result reached in the reverse situation, when vendors holding as joint tenants enter into an installment land contract: if their legal title is ipso facto converted into a tenancy in common, that would indicate that the equitable title is indeed primary. If, on the other hand, their legal title as joint tenants is unaffected, that would indicate that, absent an expressed intention to the contrary, the joint tenancy commences with the acceptance of the deed. n150

A related problem arises in the situation, probably not uncommon, in which two persons intend to buy property and to take title as joint tenants, but only one signs the contract for deed. When the deed describing the estate as in joint tenancy is delivered, the Doctrine of the Four Unities (*see* § 31.06(b)) may not be technically satisfied; specifically, the unity of time (and perhaps the unity of title as well) may be found lacking because, by virtue of the doctrine of equitable conversion, the party to the contract had acquired an equitable title earlier. Thanks to the relaxation of the rigor of the old law, intention has been allowed to prevail, even in a case in which the contract described the signer as the sole purchaser. n151 When a contract for deed provides for a conveyance to the purchasers in joint tenancy and the deed as subsequently delivered runs to them as tenants in common, the contract will control unless it can be shown that the parties intended to terminate the joint tenancy. n152

The various state statutes concerning the creation of joint tenancies are summarized below:

Alabama. Right of survivorship as incident of joint tenancy abolished, but if instrument creating joint tenancy states that it is "with right of survivorship" or uses other words showing such intention, then right of survivorship will be recognized. n153

Alaska. Joint tenancy in real property abolished. n154 Transfer to two or more persons (except transfer to executors and trustees) construed to create tenancy in common; transfer to married couple presumed to create tenancy by the entirety. n155

Arizona. Transfers to two or more persons create tenancies in common, not joint tenancies, except transfers in trust, or to executors, or to a husband and wife; transfers may, however, by express words "vest the estate in the survivor upon the death of a grantee or devisee." n156 Property acquired by husband and wife is community property, n157 although the spouses may by express agreement take title as joint tenants. n158

Arkansas. Right of survivorship abolished. n159 Transfers to two or more persons (except transfers to executors and trustees) create tenancies in common, unless expressly declared to create joint tenancies. n160

California. Transfer to two or more persons creates joint tenancy when expressly declared to be so. n161 Devise to two or more persons vests in them tenancy in common unless the will otherwise provides. n162

Colorado. No joint tenancy shall be created unless it is declared to be "in joint tenancy," except in transfers to executors, trustees, or fiduciaries. n163

Connecticut. Joint tenancy created by transfer to two or more natural persons (1) as joint tenants or as tenants in common and to the survivor and heirs, or (2) for their joint lives with a remainder to the survivor and heirs, or (3) as joint tenants with right of survivorship, or (4) as tenants by the entirety, or (5) as joint tenants. n164

Delaware. Joint tenancy may be created only by transfer expressly declared to create estate "to be held as joint tenants and not as tenants in common," except transfer to executors or trustees. n165

District of Columbia. Transfer to two or more persons, including married couples, creates tenancy in common, unless expressly declared to be a joint tenancy. n166

Florida. Transfer to two or more persons creates tenancy in common, unless instrument creating the estate expressly provides for "the right of survivorship." n167

Georgia. Transfer to two or more persons creates tenancy in common, "unless the instrument expressly refers to the takers as 'joint tenants,' 'joint tenants and not as tenants in common,' or 'joint tenants with survivorship' or as taking 'jointly with survivorship.'" ("Language essentially the same" may also be used.) n168

Hawaii. Transfer to two or more persons creates tenancy in common, but joint tenancy may be created if it manifestly appears that it was intended to create joint tenancy (exception for executors and trustees). n169

Idaho. Transfer to two or more persons (except executors or trustees) creates tenancy in common, unless expressly declared to be otherwise. n170 Every interest created in favor of two or more persons (except partners for partnership purposes) is an interest in common, unless declared to be a "joint interest" or community property. n171

Illinois. Concurrent estates (except of executors and trustees) deemed to be tenancies in common, but transfers expressly declared to pass estates "not in tenancy in common but in joint tenancy" create joint tenancies. n172

Indiana. Transfers to two or more persons create tenancy in common, unless expressly declared that transferees hold "in joint tenancy and to the survivor of them" or unless it manifestly appears that it was intended to create an estate in joint tenancy. n173 Exception for mortgages, conveyances in trust, and conveyances to husband and wife; executors and trustees hold in joint tenancy. n174

Iowa. Conveyances to two or more persons create tenancies in common, unless a contrary intent is expressed. n175

Kansas. Transfer to two or more persons including transfer to husband and wife creates tenancy in common, unless the

language used makes it clear that a joint tenancy was intended (exception for executors or trustees). n176

Kentucky. No right of survivorship in joint tenancies. n177 Exception for executors and trustees and estates for which it manifestly appears that right of survivorship was intended. n178

Maine. Transfers to two or more persons (except conveyances in mortgage) create estates in common, unless otherwise expressed. n179

Maryland. Presumption against joint tenancy unless instrument expressly provides that the property granted is to be held in joint tenancy. n180

Massachusetts. Transfer to two or more persons creates tenancy in common, unless it is expressed in transfer that transferees shall take "jointly," or "as joint tenants," "or in joint tenancy," or "to them and the survivor of them" or unless it manifestly appears that it was intended to create an estate in joint tenancy. n181

Michigan. Transfer to two or more persons creates tenancy in common, unless expressly declared to be in joint tenancy. n182 Exception for mortgages, transfers in trust, to executors, and to husband and wife. n183

Minnesota. Transfer to two or more persons creates tenancy in common, unless expressly declared to be in joint tenancy. Exception for mortgages, transfers in trust or to executors. n184

Mississippi. Transfer to two or more persons creates tenancy in common, unless it manifestly appears that it was intended to create an estate in joint tenancy with right of survivorship (exception for mortgages and transfers in trust). n185

Missouri. Transfer to two or more persons (other than executors and trustees and husband and wife) creates tenancy in common, unless expressly declared to be in joint tenancy. n186

Montana. Joint interest created when expressly declared in the transfer to be a joint tenancy, or when granted or devised to executors or trustees as joint tenants. n187 Transfer to two or more persons creates tenancy in common, unless declared to be "a joint interest." n188

Nevada. Transfer to two or more persons (except to executors and trustees) creates tenancy in common, unless expressly declared to be in joint tenancy. n189

New Hampshire. Transfer to two or more persons creates tenancy in common, unless expressly stated that estate is to be held "as joint tenants, or to them and the survivor of them" or unless other words are used clearly expressing an intention to create a joint tenancy. The addition, following the names in the granting clause of the words "as joint tenants with right of survivorship" or "as tenants by the entirety" constitutes a clear expression of intention to create a joint tenancy. n190

New Jersey. To create an estate in joint tenancy, transfer must expressly set forth that it is intended to create an estate in joint tenancy, and not an estate of tenancy in common. n191

New Mexico. Transfer to two or more persons (other than executors or trustees) creates tenancy in common, unless clearly expressed to create joint tenancy. n192 Conveyance or mortgage to two or more persons designated "as joint tenants" means to them as joint tenants "and to the survivor of them and the heirs and assigns of the survivor." n193 Transfer "to two or more persons as joint tenants, to two or more persons and to the survivor of them and the heirs and assigns of the survivor, or to two or more persons with right of survivorship" is prima facie evidence of a joint tenancy and conclusive as to purchasers or encumbrancers for value; in litigation joint tenancy may be established by a

preponderance of the evidence. n194

New York. Transfer to two or more persons (except as executors, trustees or guardians) creates tenancy in common, unless expressly declared to be a joint tenancy. n195

North Carolina. Right of survivorship in joint tenancy abolished, but a "joint tenancy with right of survivorship" may be created if the instrument expressly provides for a right of survivorship. n196 Joint tenancies preserved for joint trustees, n197 joint mortgagees or trustees with a power of sale, n198 and joint executors or administrators. n199

North Dakota. Transfer to two or more persons creates tenancy in common, unless acquired by them in partnership for partnership purposes, or "unless declared in its creation to be a joint tenancy." n200 Devise to two or more persons creates tenancy in common, unless a different intention clearly appears. n201

Ohio. Transfer to two or more persons "for their joint lives and then to the survivor or survivors of them" creates a "survivorship tenancy"; transfer containing language showing clear intent to create a survivorship tenancy to be liberally construed to do so. n202 Although a survivorship tenant may transfer the tenant's share, it is conditioned on the survivorship of the grantor and does not affect the interest of a survivorship tenant who does not join in the conveyance; that is, it does not sever the estate. n203

Oklahoma. Devise to more than one person creates tenancy in common. n204 Joint tenancy may be created by transfer if expressly declared. n205

Oregon. Transfer to two or more persons (except to husband and wife or to executors or trustees) creates tenancy in common, unless it is clearly and expressly declared that transferees take "with right of survivorship." Declaration of right of survivorship creates "tenancy in common in the life estate with cross-contingent remainders in the fee simple." Joint tenancy abolished; use of words "joint tenants" without indication of an intent to create a right of survivorship creates tenancy in common. n206

Pennsylvania. Right of survivorship abolished. n207

Rhode Island. Transfer to two or more persons creates tenancy in common, "unless it be declared that the tenancy is to be joint, or that the same is to such persons and the survivors or survivor of them, or to them as trustees or executors, or unless the intention manifestly appears that such persons shall take as joint tenants and not as tenants in common." n208

South Carolina. Joint tenancy severed by death of joint tenant, and estate is distributed as a tenancy in common, "unless the instrument which created the joint tenancy expressly provides for a right of survivorship." n209

South Dakota. Transfer to two or more persons creates joint tenancy when expressly declared to be in joint tenancy (or when to executors or trustees as joint tenants). n210 Every interest in favor of two or more persons is an interest in common, "unless acquired by them in partnership, for partnership purposes, or unless declared on its creation to be a joint interest." n211

Tennessee. Right of survivorship abolished. n212

Texas. Joint tenancy severed by death of one joint tenant, but right of survivorship may be provided by written agreement of joint owners; no agreement may be inferred from fact that property is held in joint ownership. n213

Utah. Conveyance to two or more persons creates a tenancy in common, unless expressly declared to be otherwise; joint tenancy may be described by words "joint tenancy," "with rights of survivorship," "and to the survivor of them," or words of similar import. n214

Vermont. Transfer to two or more persons creates tenancy in common, unless it is expressed that transferees take "jointly" or "as joint tenants" or "in joint tenancy" or "to them and the survivors of them"; exception for transfers in trust or to husband and wife or in which it manifestly appears that it was intended to create an estate in joint tenancy. n215

Virginia. Joint tenancy severed by death of one joint tenant. n216 Exceptions for joint tenancy of executors or trustees and for transfer in which it manifestly appears that it was intended that the decedent's portion should then belong to the others. n217

Washington. Joint tenancy may be created by written instrument that expressly declares interest to be joint tenancy. n218 Transfer to two or more persons creates tenancy in common, unless acquired by partners for partnership purposes, or declared to be a joint tenancy, or acquired by executors or trustees. n219

West Virginia. Joint tenancy severed by death of one joint tenant. n220 Exceptions for joint tenancy of executors or trustees and for transfer in which it manifestly appears that it was intended that the part of one dying should then belong to the others. n221 Title in multiple owners whose names are linked by "the disjunctive 'or'" is joint tenancy with right of survivorship, unless expressly stated otherwise. n222

Wisconsin. Transfer to two or more persons creates tenancy in common, unless intention to create joint tenancy is expressed. n223 Joint tenancy may be created if intention to do so is expressed; expressions of intention include "as joint tenants," "as joint owners," "jointly," "or the survivor," "with right of survivorship." n224 Transfer to husband and wife is presumed to be in joint tenancy, unless the intention to create a tenancy in common is expressed. n225 Co-personal representatives and co-trustees hold property as joint tenants. n226

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§ 31.06(e) Joint Tenancies of Personal Representatives and Trustees.

In certain contexts joint tenancies are useful in carrying out the special purposes for which land is held; the right of survivorship makes the continuance of the estate less subject to the accidents of human mortality. Personal representatives, whether executors or administrators, hold property for the temporary purpose of settling an estate; trustees hold property for the benefit of others. In such cases, joint tenancies facilitate the work of titleholders, and statutes that abolish the right of survivorship in general or that reverse the common law presumption in favor of joint tenancy often preserve the estate or presumption for certain purposes. An Arkansas statute, for example, provides that "every interest in real estate granted or devised to two (2) or more persons, other than executors and trustees as such, shall be in tenancy in common unless expressly declared in the grant or devise to be a joint tenancy," n227 and the Pennsylvania statute abolishing the right of survivorship in joint tenancies concludes with the proviso, "That nothing in this act shall be taken to affect any trust estate." n228 Joint guardians are also within the reason of the rule; a New York statute makes express provision for joint guardians. n229

It may be recalled from the history of the law of joint tenancies that that concurrent estate was routinely chosen for those holding legal title "for the use of" another, an arrangement that led to the modern trust. n230 The same considerations remain operative today. Whether or not expressly excepted from the legislation concerning joint tenancies, the estate should be more readily recognized in transfers to executors or trustees. Although a few statutes (like Montana's) literally limit their exception to grants or devises to executors or trustees "as joint tenants," n231 it is submitted that the express description of the concurrent estate is unnecessary; it may be implied from the role to be performed by the grantees or devisees.

Less common than exceptions in favor of joint executors and trustees are exceptions in favor of joint mortgagees. (In states in which deeds of trust substitute for mortgages the exception in favor of joint trustees serves the purpose.) Again the object is to aid the titleholders in performing their function, and again the exception deserves generous construction; indeed, in the absence of an express exception, an intention to create a joint tenancy may well be inferred from the role to be performed by the grantees. n232

At one time, partnership property was held by the partners in joint tenancy. The advantages of the right of survivorship for continuity of business operations are obvious, but so is the risk of loss by spouses, heirs, or devisees of deceased partners. With respect to personal property an exception to the right of survivorship was anciently made, derived from the law merchant, summed up in the phrase, "*Jus accrescendi inter mercatores locum non habet"* (The right of survivorship has no place between merchants). n233 The exception never applied to real property. The law of joint tenancy, even as modified, was not well suited to the needs of partners, and in modern times a new tenancy in partnership was created by statute. n234 Some of the older statutes on joint tenancy still contain detailed provisions on partnerships. The North Carolina statute, for example, originally adopted in 1784, includes a lengthy proviso:

> Provided, that estates held in joint tenancy for the purpose of carrying on and promoting trade and commerce, or any useful work or manufacture, established and pursued with a view of profit to the parties therein concerned, are vested in the surviving partner, in order to enable him to settle and adjust the partnership business, or pay off the debts which may have been contracted in pursuit of the joint business; but as soon as the same is effected, the survivor shall account with, and pay, and deliver to the heirs, executors and administrators respectively of such deceased partner all such part, share, and sums of money as he may be entitled to by virtue of the original agreement, if any, or according to his share or part in the joint concern, in the same manner as partnership stock is usually settled between joint merchants and the representatives of their deceased partners. n235

More commonly, a statute (as in Idaho) reversing the common law presumption in favor of joint tenancies preserves it for property acquired by persons "in partnership, for partnership purposes." n236 Like the exception for joint tenancies of executors and trustees, the exception for partnership property even if not express should be implied.

§ 31.06(f) Joint Life Estates.

Joint tenancies may be created in estates other than estates fee simple. n237 As Blackstone himself put it: "estates of any quantity or length of duration ... may be held ... in joint-tenancy." n238 Joint life estates involve the concurrent ownership of property by two or more persons as long as both or all are alive; on the death of one joint life tenant, the right of survivorship preserves the estate in the other or others. The effect of a joint life estate, in other words, is to create an estate that will last (unless severed) until the death of the last to die. n239

At common law, when words of inheritance were required to create an estate in fee, a joint life estate could be created simply by a transfer to two or more, for example, "to A and B." n240 In most jurisdictions today there is a presumption in favor of fee estates, so words descriptive of a life estate are required, as "to A and B for life." In many states, furthermore, the common law presumption in favor of joint tenancy has been reversed, so words expressing an intent to create that form of concurrent ownership would also be required, as "to A and B as joint tenants for life." In states that have eliminated the right of survivorship rather than reverse the presumption in favor of joint tenancy, it is possible that joint life estates are unaffected, indeed, that the old presumption in favor of joint tenancies still has effect with regard to them; the wording of the statute eliminating the right of survivorship may apply only to estates of inheritance, not to life estates. n241

The joint life estate should be distinguished from the similar sounding estate for joint lives. Two or more persons holding an estate, the duration of which is measured by their joint lives, hold an estate that will last so long as both are alive; that is, an estate for joint lives will end at the death of the first to die. n242 (Confusingly, this estate is actually a

tenancy in common, that is, a tenancy in common for joint lives.) Such an estate may be created by a transfer limiting the estate to the joint lives of the transferees, as "to A and B for their joint lives." There is an unfortunate tendency in the cases to describe such estates as "indestructible." n243 Obviously, they are destructible by the act of all the joint owners, and individual shares are alienable. What is indestructible by the act of one joint owner is whatever future interest follows the estate for joint lives -- unlike the right of survivorship in joint tenancy, which can be "destroyed" by any act of one joint tenant that terminates the joint tenancy. n244

Distinguishing the joint life estate from the estate for joint lives is complicated by the fact that a given transfer may provide for a remainder to the survivor for life, as "to A and B for their joint lives, then to the survivor of them for life." Technically, the estate that results would be a tenancy in common for joint lives with alternative contingent remainders for life in the survivor. One who holds with another an estate for joint lives plus a contingent remainder for life can convey no more than the share in the estate for joint lives and -- if the jurisdiction permits the alienation of contingent interests -- the contingent remainder for life.

§ 31.06(g) Creation of Estates Similar to Joint Tenancies.

In jurisdictions in which joint tenancies have been abolished or in which the right of survivorship has been eliminated, the joint tenancy as it was at common law does not exist. There, one may encounter attempts to create estates similar to common law joint tenancies. The judges may be acquiescent in many cases, since the right of survivorship as such has never been found to be contrary to public policy; the problem addressed by the statutes was the unwitting creation of an estate with right of survivorship.

The most common expedient, and the one best grounded in common law estates and future interests, is an estate for joint lives followed by a remainder in fee to the survivor; the transfer would run "to A and B for their joint lives, then to the survivor of them and the survivor's heirs." Such an estate resembles a joint tenancy in that possession is shared during life and the survivor ends up with the entire estate. In terms of legal concepts, the difference is that during life each has only an estate for their joint lives (technically a tenancy in common) plus a contingent remainder in fee simple absolute. The consequence of the concepts is that each has an alienable interest in the estate for joint lives. The remainder in fee, being contingent, was not alienable at common law; whether it is now depends on the law of the jurisdiction. n245 In any event, the contingent remainder of one is not destructible by the act of the other, whatever else may be the case with destructibility. n246 By contrast, each joint tenant possesses the power to alienate a share, in effect withdrawing the share and terminating the right of survivorship as to that share. n247

Further complicating matters, as seen in subsection on modern statutes concerning the creation of joint tenancies (§ 31.06(d)) are statutes conflating joint tenancies with estates for joint lives plus contingent remainders in the survivor. The Connecticut statute does so expressly:

> A conveyance of real estate or any interest therein by deed or will or other instrument of conveyance to two or more natural persons ... in such form that the conveyance runs unto the grantees or devisees for their lives, or their joint lives, with a remainder or other interest limited to the survivor of them and to the last survivor's heirs and assigns ... creates a joint tenancy in fee simple with right of survivorship added and the tenants holding under any such conveyance shall be known as joint tenants. n248

The same effect may be achieved less obviously by statutes like Alabama's recognizing rights of survivorship, but not joint tenancies as such. n249 Kentucky's statute and caselaw is to the same effect. n250

Sometimes anomalous estates are recognized by courts when a transfer apparently intended to create a joint tenancy runs afoul of some technical rule, such as the common law rule referred to in the subsection concerning direct conveyances in joint tenancy by a grantor to the grantor and another or others (§ 31.06(c)). n251

In addition to the estate for joint lives with cross contingent remainders in fee, there exists in some jurisdictions an ill-defined right of survivorship created "by contract." n252 Here two or more persons hold an estate, usually in fee simple, subject to an agreement that the survivor shall have the whole estate. While recognized by the case law in a few jurisdictions, it is unclear how a legal estate in real property can be created by contract rather than conveyance. Nor is it clear why wills or mutual agreements to make a will would not better express what is being attempted. The incidents of such an "estate" are vague; the cases usually arise after the death of one of the contracting parties and the only issue is whether to give effect to the express intention that the survivor take all. n253

FOOTNOTES:

(n1)Footnote 40. Tenancies by the entirety were available only to persons married to one another. At common law married persons taking title together took as tenants by the entirety. *See* Chapter 33, *infra*.

In case of a transfer to a husband and wife and another or others as joint tenants, the married pair took as tenants by the entirety, holding their share in joint tenancy with the other or others. *Bednar v. Bednar, 688 A.2d 1200 (Pa. Super. 1997).* At common law because of the "unity of person" based on matrimony, the married couple took the share of one person, not two. *See* § 33.06(d), *infra*.

There is nothing to prevent two married couples (or more) who hold undivided shares as tenants by the entirety from holding the entire estate together as joint tenants. *See, e.g., Hercules v. Jones, 609 A.2d 837 (Pa. 1992)* ("To H1 or W1, his wife, or H2 or W2, his wife ..., as joint tenants with the right of survivorship ... and not as tenants in common"). Today, when married persons are free to hold property other than as tenants by the entirety, two (or more) couples may hold their undivided shares as joint tenants, while holding together as tenants in common. *See, e.g., Wachter Dev. v. Gomke, 544 N.W. 2d 127 (N.D. 1996)* ("Arnold and Luella Gomke owned one-half of the property as joint tenants. Similarly, Nyla and Wayne Kilber owned one-half of the property as joint tenants. Together, Gomkes and Kilbers owned the property as tenants in common"). With the use of apt language, married couples can hold together as joint tenants, each individual holding separately as joint tenant. *See, e.g., Tedesco v. Tedesco, 702 N.Y.S.2d 459* (Sup. Ct., App. Div. 2000) (grant to H1 and W1 and H2 and W2, "all as joint tenants with right of survivorship" held to create estate with 4 joint tenants).

(n2)Footnote 41. 2 William Blackstone, Commentaries 180 (1766). Bizarrely, one court found that use of the plural, "*their* heirs and assigns," indicated a tenancy in common. "If '*his* or *her*' heirs and assigns had been used a strong argument could be made that the grantor intended a right of survivorship." *In re Estate of Michael, 238 A.2d 338 (Pa. 1966). See also Kipp v. Chip's Estate, 732 A.2d 127 (Vt. 1999).*

(n3)Footnote 42. 2 William Blackstone, Commentaries 208, 212, 214 (1766).

(n4)Footnote 43. On tenancy in coparcenary, *see* Chapter 35, *infra.*

(n5)Footnote 44. Thomas Littleton, Tenures § 278 (ca. 1481) (Eugene Wambaugh ed. 1903).

(n6)Footnote 45. *Cf. Preston v. Smith, 293 S.W.2d 51 (Tenn. 1956)* (husband and wife acquiring title by adverse possession take as tenants in common), *noted in 16 Md. L. Rev. 352 (1956), 22 Mo. L. Rev. 91 (1957), 24 Tenn. L. Rev. 892 (1957), 10 Vand. L. Rev. 460 (1957).* Note that joint tenancy is not a meaningful alternative in Tennessee, the right of survivorship being eliminated by statute, Tenn. Code Ann. § 66-1-107; the choice in Tennessee when married persons are involved is between tenancy in common and tenancy by the entirety.

(n7)Footnote 46. Thomas Littleton, Tenures § 298 (ca. 1481). Because words of inheritance are not included in the example, the estate created at common law would have been for life rather than in fee simple. This result has probably been reversed in all American jurisdictions. In this chapter, estates in fee simple are presumed unless otherwise expressly declared. For joint life estates, *see* § 31.06(f), *infra*.

(n8)Footnote 47. 2 William Blackstone, Commentaries 193 (1766). For a recent case, collecting authorities, *see* Estate of Madeska, 8 Conn. Prob. L.J. 216 (Conn. Probate Ct. 1993).

(n9)Footnote 48. 2 William Blackstone, Commentaries 193-94 (1766).

(n10)Footnote 49. Wild's Case, 6 Co. Rep. 16b, *77 Eng. Rep. 277 (K.B. 1599). See* Ronald C. Link, *The Rule in Wild's Case in North Carolina, 55 N.C. L. Rev. 751 (1977). See also* David M. Becker, *Debunking the Sanctity of Precedent, 76 Wash. U. L.Q. 853 (1998)* (discussing modern interpretations of Second Resolution in Wild's Case).

(n11)Footnote 50. *See, e.g.*, Conn. Gen. Stat. Ann. § 47-14a. *See also Estate of Lasater, 54 P.3d 511 (Kan. App. 2002)* (presumption that joint tenants hold legal estate in equal undivided shares is rebuttable).

(n12)Footnote 51. The result may be criticized as the recognition in equity of a "tenancy in common with right of survivorship," although it is perhaps possible to explain the situation by saying that the joint tenants hold the legal estate in equal undivided shares in trust for themselves as tenants in common holding the equitable estate in unequal undivided shares.

The Maine Supreme Judicial Court has consistently drawn a distinction between unequal contributions made in the purchase of the joint tenancy and unequal contributions made thereafter: "To allow the consideration of contributions preceding the joint tenancy would defeat the joint ownership." *Boulette v. Boulette, 627 A.2d 1017 (Me. 1993); Bradford v. Dumond, 675 A.2d 957 (Me. 1996).* Although in 1997, the court overruled a line of cases holding that joint tenancy property acquired with nonmarital funds could not be marital property, *Long v. Long, 697 A.2d 1317 (Me. 1997), noted in 50 Me. L. Rev. 471 (1998),* it subsequently reaffirmed its holding in *Boulette* and *Bradford. Ackerman v. Hojnowski, 804 A.2d 412 (Me. 2002).*

(n13)Footnote 52. In the *Matter of Teranis, 128 F.3d 469 (7th Cir. 1997)* (applying Wisconsin law).

(n14)Footnote 53. *Hofferkamp v. Brehm, 652 N.E.2d 1381 (Ill. 1995); Larman v. Larman, 991 P.2d 536 (Okla. 1999)* (presumption of gift from purchasing spouse is rebuttable, but only by clear and convincing evidence).

(n15)Footnote 54. *Boydston v. Loveless, 890 P.2d 267 (Colo. 1995).*

(n16)Footnote 55. *Epstein v. Wintroub, 561 N.W.2d 82 (Iowa App. 1996)* (contract described grant as to H and W "as tenants in common," while deed described grant as to H and W "as joint tenants").

(n17)Footnote 56. 2 William Blackstone, Commentaries 180 (1766). In Blackstone's day proper usage for the possessive of "it" was "it's," not, as it would be today, "its."

(n18)Footnote 57. *See* § 33.06(b) *infra*.

(n19)Footnote 58. 2 William Blackstone, Commentaries 180-82 (1766).

(n20)Footnote 59. W. D. Edwards, Law of Property in Land 155 (5th ed. 1888).

(n21)Footnote 60. *Cookman v. Silliman, 2 A.2d 166 (Del. 1938)* (joint tenancy in possibility of reverter), *noted in 17 Chi.-Kent L. Rev. 187 (1939).*

(n22)Footnote 61. 2 William Blackstone, Commentaries 179 (1766).

(n23)Footnote 62. On ouster, *see* § 31.07(d), *infra*.

(n24)Footnote 63. *Tindall v. Yeats, 64 N.E.2d 903 (Ill. 1946); Downing v. Downing, 606 A.2d 208 (Md. 1992)* (agreement between joint tenants by which one retains all rental income held not to affect unity of possession).

(n25)Footnote 64. *Mann v. Bradley, 535 P.2d 213 (Colo. 1975); United States v. Gibbons, 71 F.3d 1496 (10th Cir. 1995)* (applying Colorado law); *Waxler v. Dalsted, 529 N.W.2d 176 (N.D. 1995).*

(n26)Footnote 65. *Smolen v. Smolen, 956 P.2d 128 (Nev. 1998).*

(n27)Footnote 66. 2 William Blackstone, Commentaries 187 (1766). Although, as Blackstone expressly acknowledged, "jointure" had a specific meaning in the law of marriage settlements, he used the word here as a synonym for joint tenancy.

(n28)Footnote 67. *E.g., Nunn v. Keith, 268 So. 2d 792 (Ala. 1972)* (in creation of joint tenancy requirement of the unity of time is eliminated), *noted in 25 Ala. L. Rev. 851 (1973).*

(n29)Footnote 68. 2 William Blackstone, Commentaries 180 (1766).

(n30)Footnote 69. *See* § 33.06(c), *infra*.

(n31)Footnote 70. *Deslauriers v. Senesac, 163 N.E. 327 (Ill. 1928), noted in 14 Iowa L. Rev. 352 (1929), 38 Yale L.J. 682 (1929); Porter v. Porter, 45 N.E.2d 635 (Ill. 1942)* (construing deed by A and B as tenants in common to themselves as joint tenants), *noted in 38 Ill. L. Rev. 104 (1943). See also Dolley v. Powers, 89 N.E.2d 412 (Ill. 1949), noted in 45 Ill. L. Rev. 132 (1950)* (result reversed by statute in Illinois, 765 ILCS 1005/1b); *Stuehm v. Mikulski, 297 N.W. 595 (Neb. 1941), noted in 27 Iowa L. Rev. 149 (1941), 26 Minn. L. Rev. 128 (1941)* (result reversed by statute in Nebraska, Neb. Rev. Stat. § 76-118).

(n32)Footnote 71. "'The term "straw man" originated in the early British halls of justice. Professional witnesses loitering in such halls signalled their willingness to testify to any matter -- for a price -- by wearing straw in their shoes.' *Note. The Use of Straw Men in Massachusetts Real Estate Transactions, 44 B.U. L. Rev. 187, 187-88 (1964).* From this shady origin the straw man came to be used in more legitimate ways, particularly as a conduit in real estate transactions." Charles Donahue, Et Al., Cases And Materials on Property 625 n. 1 (2d ed. 1983).

(n33)Footnote 72. It may also be worth noting that the whole problem could have been avoided by closer attention to the potentials of conveyancing. In a deed operating under the Statute of Uses a grantor could create a joint tenancy in grantor and another or others. *Strout v. Burgess, 68 A.2d 241 (Me. 1949).*

(n34)Footnote 73. *Therrien v. Therrien, 46 A.2d 538 (N.H. 1946), noted in 32 Corn. L.Q. 291 (1946); 36 Ky. L.J. 202 (1948); Lipps v. Crowe, 100 A.2d 361 (N.J. 1953)* (concerning effectiveness of conveyance executed prior to statute, N.J. Stat. Ann. § 46:3-17.1, expressly authorizing such conveyance).

(n35)Footnote 74. *See* § 33.06(c), *infra*.

(n36)Footnote 75. *See* Aristotle, Prior Analytics II:16.

(n37)Footnote 76. *Switzer v. Pratt, 23 N.W.2d 837 (Iowa 1946), noted in 32 Iowa L. Rev. 155 (1946), 45 Mich. L. Rev. 638 (1947), 36 Ky. L.J. 202 (1948); Irvine v. Helvering, 99 F.2d. 265 (C.C.A. 8th 1938), noted in 23 Minn. L. Rev. 385 (1939).*

(n38)Footnote 77. Me. Rev. Stat. Ann. tit. 33, § 159.

(n39)Footnote 78. Minn. Stat. § 500.19(4).

(n40)Footnote 79. Minn. Stat. § 500.19(3). *Cf.* Wis. Stat. Ann. § 700-19(5) (common law requirements of unity of time and title for creation of joint tenancy abolished).

(n41)Footnote 80. 2 William Blackstone, Commentaries 193 (1766).

(n42)Footnote 81. Utah Code Ann. § 57-1-5.

(n43)Footnote 82. W. Va. Code § 36-1-20(a). *See also* Md. Real Prop. Code Ann. § 4-108(A) (eliminating need for "straw man as an intermediate grantee-grantor"); Mont. Code Ann. § 70-20-105(a) (eliminating necessity for transfer "through a third person"); N.J. Stat. Ann. § 46:3-17.1 (direct conveyance as effective as conveyance through "third party"); Wyo. Stat. § 34-1-140 (eliminating necessity for transfer "through a third person").

(n44)Footnote 83. *E.g.*, Del. Code Ann. tit. 25, § 311; Miss. Code § 89-1-7; N.C. Gen. Stat. § 41-2.

(n45)Footnote 84. Haw. Rev. Stat. § 509-2.

(n46)Footnote 85. Ala. Code § 35-4-7.

(n47)Footnote 86. Cal. Civ. Code § 683(a).

(n48)Footnote 87. Colo. Rev. Stat. § 38-31-101.

(n49)Footnote 88. Conn. Gen. Stat. Ann. § 47-14a.

(n50)Footnote 89. Del. Code Ann. tit. 25, § 311.

(n51)Footnote 90. D.C. Code Ann. § 45-216.

(n52)Footnote 91. Ga. Code § 44-6-190(a).

(n53)Footnote 92. Haw. Rev. Stat. § 509-2.

(n54)Footnote 93. 765 ILCS 1005/1b.

(n55)Footnote 94. Kan. Stat. Ann. § 58-501.

(n56)Footnote 95. Me. Rev. Stat. Ann. tit. 33, § 159.

(n57)Footnote 96. Md. Real Prop. Code Ann. § 4-108(A).

(n58)Footnote 97. Mass. Gen. Laws Ann. ch. 184, § 8.

(n59)Footnote 98. Mich. Comp. Laws Ann. § 565.49. *See* Edward H. Hoenicke, Comment, *Elimination of the Straw Man in the Creation of Joint Estates in Michigan, 54 Mich. L. Rev. 118 (1955).*

(n60)Footnote 99. Minn. Stat. § 500.19(4).

(n61)Footnote 100. Miss. Code § 89-1-7.

(n62)Footnote 101. Mont. Code Ann. § 70-20-105(a).

(n63)Footnote 102. Neb. Rev. Stat. § 76-118.

(n64)Footnote 103. Nev. Rev. Stat. § 111.065(1).

(n65)Footnote 104. N.J. Stat. Ann. § 46:3-17.1.

(n66)Footnote 105. N. Mex. Stat. Ann. 1978, § 47-1-36.

(n67)Footnote 106. N.C. Gen. Stat. § 41-2. *See* John V. Orth, *The Joint Tenancy Makes a Comeback in North*

Carolina, 69 N.C. L. Rev. 491 (1991) (recommending adoption of statute).

(n68)Footnote 107. Ohio Rev. Code Ann. § 5302.18.

(n69)Footnote 108. Okla. Stat. Ann. tit. 60, § 74.

(n70)Footnote 109. S.C. Code Ann. § 62-2-804.

(n71)Footnote 110. S.D. Codified Laws Ann. § 43-2-14. The same rule applies with respect to conveyance by grantor to grantor and spouse. S.D. Codified Laws Ann. § 43-2-13.

(n72)Footnote 111. Utah Code Ann. § 57-1-5.

(n73)Footnote 112. Va. Code Ann. § 55-9.

(n74)Footnote 113. Wash. Rev. Code Ann. § 64.28.010.

(n75)Footnote 114. W. Va. Code § 36-1-20(a).

(n76)Footnote 115. Wis. Stat. Ann. § 700.19(5).

(n77)Footnote 116. Wyo. Stat. § 34-1-140.

(n78)Footnote 117. Tenn. Code Ann. § 66-1-107.

(n79)Footnote 118. Del. Code Ann. tit. 25, § 701.

(n80)Footnote 119. Iowa Code Ann. § 557.15.

(n81)Footnote 120. *Mustain v. Gardner, 67 N.E. 779 (Ill. 1903)* ("The word 'jointly,' found in the devise, cannot be accepted as sufficient to show, clearly and explicitly, that the testator intended that the estate devised should possess the attribute of survivorship. Tenants in common or coparceners hold the estate 'jointly,' until a severance is effected."); *Taylor v. Taylor, 17 N.W.2d 745 (Mich. 1945), noted in 43 Mich. L. Rev. 1180 (1945); Montgomery v. Clarkson, 585 S.W.2d 483 (Mo. 1979); In re Estate of Hillyer, 664 So. 2d 361, 362 (Fla. App. 1995)* ("A tenancy in common is considered jointly owned property"); *Application of Girard, 653 N.Y.S.2d 6 (1997)* (construing devise of all property held "jointly" to include all property held in any form of co-ownership, not limited to that held in joint tenancy).

(n82)Footnote 121. Mass. Gen. Laws Ann. ch. 184, § 7; Vt. Stat. Ann. tit. 27, § 2; Wis. Stat. Ann. § 700.19(1). *See also* Ga. Code Ann. § 44-6-190(a) ("jointly with survivorship").

(n83)Footnote 122. Conn. Gen. Stat. § 47-14a; N.H. Rev. Stat. Ann. § 477:18. *See* Wis. Stat. Ann. § 700.19(2) (transfer to husband and wife presumed to create joint tenancy). *See also Epstein v. Wintroub, 561 N.W.2d 82 (Iowa App. 1996)* (grant to "husband and wife as joint tenants" sufficient to rebut statutory presumption in favor of tenancy in common, although an expanded description is preferred: "to husband and wife as joint tenants with full rights of survivorship and not as tenants in common").

(n84)Footnote 123. Mass. Gen. Laws Ann. ch. 184, § 7 (transfer to two persons as tenants by the entirety, who are not married, creates joint tenancy); N.Y. Estates, Powers And Trusts Law § 6-2.2(c) (transfer to unmarried persons described as husband and wife creates joint tenancy unless expressly declared to be tenancy in common); 765 Ill Comp. Stat. 1005/1c (a devise, conveyance, assignment, or other transfer to two grantees who are not in fact husband and wife that purports to create an estate by the entirety shall be construed as having created an estate in joint tenancy). *See also Young v. Young, 376 A.2d 1151 (Md. App. 1977)* (conveyance to A and B, who were not married but thought they were, "as tenants by the entireties with right of survivorship" held to create joint tenancy despite statutory presumption against

that estate); *Powers v. Buckowitz, 347 S.W.2d 174 (Mo. 1961)* ("straw party" deed to A and B, mother and daughter, "as tenants by entirety and to the survivor of them" held to create joint tenancy despite statutory presumption against that estate), *noted in 27 Mo. L. Rev. 287 (1962). Contra*: State *ex rel. Ashauer v. Hostetter, 127 S.W.2d 697 (Mo. 1939)* (devise by father to two daughters "as tenants by the entirety" held to create tenancy in common), *noted in 5 Mo. L. Rev. 114 (1940).*

Compare In re Estate of Reigle, 652 A.2d 853 (Pa. 1995) (conveyance "to A and B, son and mother... as tenants by the entirety" held to create joint tenancy) *with In re Estate of Bruce, 538 A.2d 923 (Pa. Super. 1988)* (conveyance to unmarried grantees mistakenly described as husband and wife held not to create joint tenancy).

(n85)Footnote 124. *Compare Brissett v. Sykes, 855 S.W.2d 330 (Ark. 1993)* ("to A and B, husband and wife" held not to create joint tenancy) *and Snyder v. Snyder, 880 S.W.2d 596 (Mo. App. 1994)* ("to A and B his wife" held not to create joint tenancy) *with Wood v. Wood, 571 S.W.2d 84 (Ark. App. 1978)* ("to A and B, husband and wife, as tenants by the entirety" held to create joint tenancy). *See also In re Estate of Bruce, 538 A.2d 923 (Pa. Super. 1988)* (conveyance to unmarried grantees mistakenly described as husband and wife held not to create joint tenancy).

(n86)Footnote 125. Kan. Stat. Ann. § 58-501. *See also* Okla. Stat. Ann. tit. 60, § 74 (granting clause controls inconsistent *habendum*).

(n87)Footnote 126. *E.g.*, N. C. Gen. Stat. § 39-1.1(a):

> In construing a conveyance executed after January 1, 1968, in which there are inconsistent clauses, the courts shall determine the effect of the instrument on the basis of the intent of the parties as it appears from all the provisions of the instrument.

(n88)Footnote 127. *Riggs v. Snell, 350 P.2d 54 (Kan. 1960), noted in 1 Washburn L.J. 498 (1961); Hennigh v. Hennigh, 309 P.2d 1022 (Mont. 1957), noted in 19 Mont. L. Rev. 69 (1957); Kipp v. Chip's Estate, 732 A.2d 127 (Vt. 1999)* (rejecting common law rule of construction favoring granting over *habendum* clause in case of inconsistency).

(n89)Footnote 128. This prescription obviously presumes the desuetude of the old rule excluding extrinsic evidence in cases of patent ambiguity. *But see James v. Taylor, 969 S.W.2d 672 (Ark. App. 1998)* (refusing to admit extrinsic evidence to aid in construing conveyance to A, B, and C "jointly and severally"); *Kipp v. Chip's Estate, 732 A.2d 127 (Vt. 1999)* (despite inconsistency between granting and *habendum* clauses, refusing to admit extrinsic evidence of grantor's intent, including scrivener's testimony, because of statutory preference in favor of tenancy in common).

(n90)Footnote 129. Or. Rev. Stat. § 93.180.

(n91)Footnote 130. *See, e.g., Wallace v. Wallace, 396 S.E.2d 208 (Ga. 1990)* (stating that the effect of one joint tenant's alienation of that tenant's interest "is unclear").

(n92)Footnote 131. Ohio Rev. Code Ann. § 5302.20(C)(2).

(n93)Footnote 132. Or. Rev. Stat. § 93.180.

(n94)Footnote 133. Va. Code Ann. § 55-20.

(n95)Footnote 134. Va. Code Ann. § 55-21.

(n96)Footnote 135. *Hoover v. Smith, 444 S.E.2d 546 (Va. 1994).*

(n97)Footnote 136. W. Va. Code § 36-1-19.

(n98)Footnote 137. W. Va. Code § 36-1-20(a).

(n99)Footnote 138. W. Va. Code § 36-1-20(b).

(n100)Footnote 139. *Marshall v. Nelson, 622 So. 2d 889 (Ala. 1993).*

(n101)Footnote 140. *Ames v. Cheyne, 287 N.W. 439 (Mich. 1939)* ("to A and B as joint tenants and not tenants in common, and to the survivor thereof"), *noted in 3 U. Det. L.J. 20 (1939), 6 U. Pitt. L. Rev. 44 (1939), 38 Mich. L. Rev. 875 (1940); Rowerdink v. Carothers, 54 N.W.2d 715 (Mich. 1952)* ("to A and B or the survivor of them"); *Jones v. Green, 337 N.W.2d 85 (Mich. App. 1983)* ("to A and B as joint tenants with full rights of survivorship and not as tenants in common").

(n102)Footnote 141. *In re Zella, 196 B.R. 752 (E.D. Va. 1996).*

(n103)Footnote 142. *Fekkes v. Hughes, 237 N.E.2d 19 (Mass. 1968).*

(n104)Footnote 143. *Davis v. Roberts, 563 N.W.2d 16 (Iowa Ct. App. 1997).*

(n105)Footnote 144. *Marden v. Dorthy, 54 N.E. 726 (N.Y. 1899).*

(n106)Footnote 145. *Rosen v. Rosen, 663 N.Y.S.2d 228 (1997)* (ratification by execution of deed severing joint tenancy and by failing for many years to seek cancellation of original transfer).

(n107)Footnote 146. *Hofferkamp v. Brehm, 652 N.E.2d 1381 (Ill. 1995)* (elderly and hospitalized purchaser took title as joint tenant with younger fiancee).

(n108)Footnote 147. *Matter of Estate of Ashton, 898 P.2d 824 (Utah 1995); In re Marriage of Finer, 920 P.2d 325 (Colo. App. 1996); Hatcher v. Hatcher, 933 P.2d 1222 (Ariz. App. 1996).*

(n109)Footnote 148. *Matter of Estate of Vadney, 634 N.E.2d 976 (N.Y. 1994)* (scrivener's error); *In re Snyder, 880 S.W.2d 596 (Mo. App. 1994)* (fact that parties live together, have children prior to purchase and later marry does not clearly indicate intention to take as joint tenants).

(n110)Footnote 149. Ill. Ann. Stat. ch. 76, para. 1a. *See In re Estate of Martinek, 488 N.E.2d 1332 (Ill. App. Ct. 1986).*

(n111)Footnote 150. *See* § 31.08(a), *infra*.

(n112)Footnote 151. *Cornell v. Heirs of Walik, 235 N.W.2d 828 (Minn. 1975); Pappas v. Pappas, 177 N.W.2d 401 (Minn. 1970).* A more technical explanation of this result may be that the title conferred by equitable conversion is an equitable, as opposed to a legal, title; the latter to which the doctrine of the four unities properly applies passes to the joint tenants at the closing.

(n113)Footnote 152. *Remus v. Schwass, 92 N.E.2d 127 (Ill. 1950).*

(n114)Footnote 153. Ala. Code § 35-4-7. *See Ex Parte Martin, 775 So.2d 202 (Ala. 2000)* (construing deed to three persons "for and during their joint lives and upon the death of either of them, then to the survivor of them in fee simple" to create a joint tenancy).

(n115)Footnote 154. Alaska Stat. § 34.15.130.

(n116)Footnote 155. Alaska Stat. § 34.15.110.

(n117)Footnote 156. Ariz. Rev. Stat. Ann. § 33-431.

(n118)Footnote 157. Ariz. Rev. Stat. Ann. § 25-211.

(n119)Footnote 158. *Collier v. Collier, 242 P.2d 537 (Ariz. 1952).*

(n120)Footnote 159. Ark. Code § 28-8-101.

(n121)Footnote 160. Ark. Code § 18-12-603.

(n122)Footnote 161. Cal. Civ. Code § 683(a).

(n123)Footnote 162. Cal. Probate Code § 21106.

(n124)Footnote 163. Colo. Rev. Stat. § 38-31-101.

(n125)Footnote 164. Conn. Gen. Stat. Ann. § 47-14a.

(n126)Footnote 165. Del. Code Ann. tit. 25, § 701.

(n127)Footnote 166. D.C. Code Ann. § 45-216.

(n128)Footnote 167. Fla. Stat. § 689.15.

(n129)Footnote 168. Ga. Code § 44-6-190(a).

(n130)Footnote 169. Haw. Rev. Stat. § 509.1.

(n131)Footnote 170. Idaho Code § 55-508.

(n132)Footnote 171. Idaho Code § 55-104.

(n133)Footnote 172. 765 ILCS 1005/1b.

(n134)Footnote 173. Ind. Code Ann. § 32-1-2-7.

(n135)Footnote 174. Ind. Code Ann. § 32-1-2-8.

(n136)Footnote 175. Iowa Code Ann. § 557.15.

(n137)Footnote 176. Kan. Stat. Ann. § 58-501.

(n138)Footnote 177. Ky. Rev. Stat. Ann. § 381.120.

(n139)Footnote 178. Ky. Rev. Stat. Ann. § 381.130. *See Sanderson v. Saxon, 834 S.W.2d 676 (Ky. 1992)* (construing statute to provide for creation of right of survivorship indestructible by act of one joint tenant). The *Sanderson* case, which was decided by a closely divided court, makes the joint tenancy in Kentucky functionally an estate for joint lives with alternative contingent remainders in the survivor. For a discussion of this estate, *see* § 31.06(g), *infra*.

(n140)Footnote 179. Me. Rev. Stat. Ann. tit. 33, § 158.

(n141)Footnote 180. Md. Real Prop. Code Ann. § 2-117.

(n142)Footnote 181. Mass. Gen. Laws Ann. ch. 184, § 7.

(n143)Footnote 182. Mich. Comp. Laws Ann. § 554.44.

(n144)Footnote 183. Mich. Comp. Laws Ann. § 554.45.

(n145)Footnote 184. Minn. Stat. § 500.19(1).

(n146)Footnote 185. Miss. Code § 89-1-7.

(n147)Footnote 186. Mo. Ann. Stat. § 442.450 (Vernon).

(n148)Footnote 187. Mont. Code Ann. § 70-1-307.

(n149)Footnote 188. Mont. Code Ann. § 70-1-314.

(n150)Footnote 189. Nev. Rev. Stat. § 111.060.

(n151)Footnote 190. N.H. Rev. Stat. Ann. § 477:18.

(n152)Footnote 191. N.J. Stat. Ann. § 46:3-17.

(n153)Footnote 192. N. Mex. Stat. Ann. 1978, § 47-1-15.

(n154)Footnote 193. N. Mex. Stat. Ann. § 47-1-35.

(n155)Footnote 194. N. Mex. Stat. Ann. § 47-1-16.

(n156)Footnote 195. N.Y. Estates, Powers And Trusts Law § 6-2.2(a).

(n157)Footnote 196. N.C. Gen. Stat. § 41-2. *See* John V. Orth, *The Joint Tenancy Makes a Comeback in North Carolina, 69 N.C. L. Rev. 491 (1991).*

(n158)Footnote 197. N.C. Gen. Stat. § 41-3.

(n159)Footnote 198. N.C. Gen. Stat. § 45-8.

(n160)Footnote 199. N.C. Gen. Stat. § 28A-13-5.

(n161)Footnote 200. N.D. Cent. Code § 47-02-08.

(n162)Footnote 201. N.D. Cent. Code § 56-05-34.

(n163)Footnote 202. Ohio Rev. Code Ann. § 5302.20. Survivorship deed in blank given in statutory short form. *Id.* § 5302.17.

(n164)Footnote 203. Ohio Rev. Code Ann. § 5302.20(C)(2).

(n165)Footnote 204. Okla. Stat. Ann. tit. 84, § 184.

(n166)Footnote 205. Okla. Stat. Ann. tit. 60, § 74.

(n167)Footnote 206. Or. Rev. Stat. § 92.18.

(n168)Footnote 207. Or. Rev. Stat. § 93.180. Notwithstanding the statute, joint tenancy with right of survivorship may be created by transfer if expressly declared, the usual form of words being "as joint tenants with right of survivorship and not as tenants in common." *In re Estate of Michael, 218 A.2d 338 (Pa. 1966).* The effect of judicial construction, in other words, has been to transform the statute from one abolishing the right of survivorship in joint tenancies into one raising a rebuttable presumption in favor of tenancies in common.

(n169)Footnote 208. R.I. Gen. Laws § 34-3-1.

(n170)Footnote 209. S.C. Code Ann. § 62-2-804. *See also* S.C. Code Ann. § 27-7-40 (in a conveyance use of the words "as joint tenants with rights of survivorship, and not as tenants in common" is conclusive of the intention to create a joint tenancy).

(n171)Footnote 210. S.D. Codified Laws Ann. § 43-2-12.

(n172)Footnote 211. S.D. Codified Laws Ann. § 43-2-17.

(n173)Footnote 212. Tenn. Code Ann. § 66-1-107. Although the right of survivorship in joint tenancies created by law is abolished, Tennessee courts have long recognized the right of parties to create a right of survivorship (and in effect a joint tenancy with right of survivorship) by agreement. *Jones v. Jones, 206 S.W.2d 801 (Tenn. 1947);* Bunch v. Bunch, C.A. No. 02*A01-9705-CH-00106, 1998 Tenn. App. LEXIS 8.*

(n174)Footnote 213. Tex. Probate Code § 46(a). *See* Don T. Cates, Legislation, *Joint Tenancy in Texas, 9 Baylor L. Rev. 118 (1957).*

(n175)Footnote 214. Utah Code Ann. § 57-1-5 (amended to provide that "beginning on May 5, 1997, every ownership interest in real estate granted to two persons in their own right who are designated as husband and wife in the granting documents is presumed to be a joint tenancy interest with rights of survivorship, unless severed, converted, or expressly declared in the grant to be otherwise").

(n176)Footnote 215. Vt. Stat. Ann. tit. 27, § 2.

(n177)Footnote 216. Va. Code Ann. §§ 55-20, 55-20.1 now permits ownership of real or personal property as joint tenants with or without the right of survivorship. A joint tenancy without the right of survivorship would be the functional equivalent of a tenancy in common.

(n178)Footnote 217. Va. Code Ann. § 55-21.

(n179)Footnote 218. Wash. Rev. Code Ann. § 64.28.010.

(n180)Footnote 219. Va. Code Ann. § 64.28.020.

(n181)Footnote 220. W. Va. Code § 36-1-19.

(n182)Footnote 221. W. Va. Code § 36-1-20(a).

(n183)Footnote 222. W. Va. Code § 36-1-20(b).

(n184)Footnote 223. Wis. Stat. Ann. § 700.18.

(n185)Footnote 224. Wis. Stat. Ann. § 700.19(1).

(n186)Footnote 225. Wis. Stat. Ann. § 700.19(2).

(n187)Footnote 226. Wis. Stat. Ann. § 700.19(4).

(n188)Footnote 227. Ark. Code § 18-12-603.

(n189)Footnote 228. Pa. Stat. Ann. tit. 68, § 110 (Purdon).

(n190)Footnote 229. N.Y. Estates, Powers And Trusts Law § 6-2.2(a).

(n191)Footnote 230. *See* § 31.05, *supra*.

(n192)Footnote 231. Mont. Code. Ann. § 70-1-307.

(n193)Footnote 232. *E.g.*, Me. Rev. Stat. Ann. tit. 33, § 160 (conveyance in mortgage or trust to two or more persons with power to appoint a successor if one dies is in joint tenancy unless otherwise expressed).

(n194)Footnote 233. Edward Coke, Commentary Upon Littleton § 283, p. 182a (1628). *See* Chantal Stebbings, *Jus Accrescendi Inter Mercatores Locum Non Habet*, 5 J. Legal Hist. 152 (1984).

(n195)Footnote 234. Uniform Partnership Act, 6 U.L.A. 1(1969). On tenancy in partnership, *see* Chapter 34, *infra*.

(n196)Footnote 235. N.C. Gen. Stat. § 41-2.

(n197)Footnote 236. Idaho Code § 55-104.

(n198)Footnote 237. Anciently joint tenancies in fee tail were known. A grant to two or more persons "and the heirs of their bodies" created a joint life estate (lasting until the death of the last to die), with several inheritance in fee tail. The heirs held as tenants in common and not as joint tenants. Thomas Littleton, Tenure § 283 (ca. 1481). *See* Anne L. Spitzer, *Joint Tenancy with Right of Survivorship: A Legacy from Thirteenth Century England, 16 Tex. Tech. L. Rev. 629, 636 (1985).*

(n199)Footnote 238. 2 William Blackstone, Commentaries 179 (1766).

(n200)Footnote 239. *See, e.g., Deviney v. Nationsbank, 993 S.W.2d 443 (Tex. App. 1999)* (devise created joint life estate with right of survivorship in testator's daughters and remainder in fee simple subject to executory interest in testator's siblings).

(n201)Footnote 240. Eminent conveyancers repeatedly pointed out that while at common law a grant "to A and B and to the survivor of them" created a joint life estate, the words "and to the survivor of them" were surplusage. 2 William Blackstone, Commentaries 180 note (John Frederick Archbold ed. 1811); *id.* (Joseph Chitty ed. 1826).

(n202)Footnote 241. *Powell v. Allen, 75 N.C. 450 (1876)* (construing statute directing that share of deceased joint tenant "shall not descend or go to the surviving tenant, but shall descend or be vested in the heirs, executors, or administrators, respectively, of the tenant so dying, in the same manner as estates held by tenancy in common"); *Burton v. Cahill, 135 S.E. 332 (N.C. 1926); Dew v. Shockley, 243 S.E.2d 177 (N.C. App. 1978). Contra: Briggs v. Estate of Briggs, 950 S.W.2d 710 (Tenn. App. 1997)* (construing devise to two persons for "their lifetime" to create estate lasting until death of second and holding share of first to die to be inheritable and devisable).

(n203)Footnote 242. *See, e.g., Hollowell v. Hollowell, 430 S.E.2d 235 (N.C. 1993).*

(n204)Footnote 243. *See, e.g., In re Tibbetts, 186 B.R. 140 (Bankr. S.D. Ala. 1995).*

(n205)Footnote 244. *See* § 31.09(b) *infra*.

(n206)Footnote 245. *See, e.g., Wallace v. Wallace, 396 S.E.2d 208 (Ga. 1990)* (stating that the effect of one joint tenant's alienation of that tenant's interest "is unclear").

(n207)Footnote 246. *Hilterbrand v. Carter, 27 P.3d 1086 (Ore. 2001)* (where cotenants hold concurrent life estates with contingent remainders in fee, the contingent remainder of each cotenant cannot be defeated by any act of the other cotenant). In jurisdictions still recognizing the doctrine of the destructibility of contingent remainders, it is possible that if one of the tenants for joint lives receives the remainder, it would merge with the life estate and destroy the intervening contingent remainders (saving the present estate of the other tenant for joint lives).

(n208)Footnote 247. *Durant v. Hamrick, 409 So. 2d 731 (Ala. 1982), noted in 34 Ala. L. Rev. 147 (1983)* (grant to tenants in common with a contingent remainder in fee in the survivor differs from joint tenancy in that right of survivorship is indestructible by act of one).

(n209)Footnote 248. Conn. Gen. Stat. Ann. § 47-14a.

(n210)Footnote 249. Ala. Code § 35-4-7. *See Nettles v. Matthews, 627 So. 2d 870 (Ala. 1993)* (describing grant to two persons "for and during their joint lives and upon the death of either of them, then to the survivor of them in fee simple" as creating a joint tenancy with right of survivorship).

(n211)Footnote 250. Ky. Rev. Stat. Ann. § 381.130. *See Sanderson v. Saxon, 834 S.W.2d 676 (Ky. 1992).*

(n212)Footnote 251. *Anson v. Murphy, 32 N.W.2d 271 (Neb. 1948), noted in 28 Neb. L. Rev. 117 (1948); Hass v. Hass, 21 N.W.2d 398 (Wis. 1946), noted in 44 Mich. L. Rev. 1144 (1946), 23 Notre Dame Lawyer 103 (1947), 30 Marq. L. Rev. 182 (1946), 1947 Wis. L. Rev. 117. But see Palmer v. Flint, 161 A.2d 837 (Me. 1960)* (finding joint tenancy despite technical difficulties with the grant because an estate for joint lives followed by cross contingent remainders in the survivor is "such an unusual estate").

(n213)Footnote 252. *Vettori v. Fay, 137 S.E.2d 810 (N.C. 1964); Chandler v. Kountze, 130 S.W.2d 327 (Tex. Civ. App. 1939), noted in 18 Tex. L. Rev. 232 (1940).* Enacting the contract theory, a Texas statute authorizes the creation of a right of survivorship by written agreement of the joint owners. Tex. Probate Code § 46(a). *See* Don T. Cates, *Joint Tenancy in Texas, 9 Baylor L. Rev. 118 (1957).*

(n214)Footnote 253. A joint tenancy with right of survivorship, in a jurisdiction where such estates may be created "by agreement," despite the abolition by statute of a right of survivorship in joint tenancies in general, has been held to be partitionable like any other joint tenancy. Bunch v. Bunch, C.A. No. 02*A01-9705-CH-00106, 1998 Tenn. App. LEXIS 8.*

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CHAPTER 31 JOINT TENANCIES

4-31 Thompson on Real Property, Thomas Editions § 31.07

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§ 31.07 Incidents of Joint Tenancies.

[Go To Supp]

Various incidents of joint tenancies have been described in earlier sections. In the analytical synopsis of the law of joint tenancies (§ 31.02*)* it was pointed out that each joint tenant possesses the power to alienate an undivided share but that no joint tenant possesses a devisable or inheritable share; in the same section was described the right of survivorship, referred to by Sir William Blackstone as the "grand incident of joint estates." n254 It was also noted that each joint tenant has a right to partition, in kind or by sale and division of the proceeds. The most famous features of joint tenancies, the four unities, were described in the context of the creation of joint tenancies at common law (§ 31.06(b)). To be covered in this section are the incidents relevant to the relationship between joint tenants during the existence of the estate.

In contrast to the technicality, even hyper-technicality, of the law concerning the creation of joint tenancies, the law governing the relations between joint tenants is marked by a degree of vagueness. In place of strict rules, causing uncertainty only by the extent to which they will be enforced, are loose rules applied "under all the circumstances." To a degree, this is unavoidable: many of the disputed relationships between joint tenants are sorted out in the context of partition proceedings, which are equitable in nature. Furthermore, the courts are understandably reluctant to assume a supervisory role in continuing relationships marked by discord. The power of alienation and the right to partition, possessed by every joint tenant, provide openings for exit from contentious relationships, and rules are sometimes applied with an eye to encouraging their exercise.

The incidents of joint tenancies are organized in this section according to the remedies available to one joint tenant as against the other or others: for damage to the freehold to the detriment of a cotenant, n255 the action of waste (§ 31.07(a)); for contribution to the necessary expenses of preserving the estate, the action for contribution (§ 31.07(b)); for profits from the estate at the expense of a cotenant, the action of account (§ 31.07(c)); and for the ouster of one cotenant by another, the action of ejectment (§ 31.07(d)). Creditors' rights, dependent on the rights of individual cotenants, are also considered (§ 31.07(e)). Because the mutual rights and duties of joint tenants with respect to use of the property are the same as those of tenants in common, the comparable section of the next chapter may also be consulted. n256

§ 31.07(a) Action of Waste.

Joint tenants have equal rights of possession. From this unity of possession it follows that damage to the freehold caused by one joint tenant is an injury to another joint tenant. n257 Waste may be committed by one joint tenant personally or through the actions of third parties, as where one joint tenant gives permission to a stranger to enter and cut timber. n258 The remedy is an action of waste, first made available as Blackstone explained, "by construction of the statute Westm. 2. c. 22." n259 Ordinarily the action of waste protects the holder of a future interest against damage to the freehold by a present possessor, so its use by one joint tenant against another is not free from difficulty: the right of survivorship gives each joint tenant only a contingent interest in the future estate.

Damage to the freehold includes any diminishment in its value. In the case of mineral deposits, the classic example of "wasting assets," removal by one joint tenant causes obvious injury to the interest of another joint tenant. The case is not so clear where the resource is a renewable one. Cutting timber was recognized in England for centuries as waste, presumably because of the long period of maturation. Ordinary farming operations that do not unreasonably deplete the soil should not, however, be treated as waste since they leave the productive asset unaffected.

Whether one joint tenant has caused damage to the freehold constituting waste may be difficult to determine when the alleged waste is the result not of action but of inaction; permissive waste results from a failure to act, as by failing to keep a structure wind and water tight. This problem should be addressed in tandem with the problem of contribution for necessary expenses, covered in the following subsection. If a joint tenant in possession is chargeable with permissive waste for allowing a building to fall into disrepair, that is, has breached a duty to an out-of-possession joint tenant to make necessary expenditures, then the joint tenant in possession should have a correlative right to call on the other for contribution. Without a duty to share the cost, a joint tenant out of possession should have no right to hold a joint tenant in possession liable for permissive waste.

It is sometimes implied that a joint tenant in possession making necessary repairs is not entitled to contribution because of the tenant's enjoyment of the benefits of use and occupation. n260 Yet this seems contradictory both to the theory of concurrent ownership and to practical fairness. The theory of concurrent estates is that each co-tenant has an equal right to possession. The "unity of possession" does not require actual occupancy. In practice, it would be capricious to hold a joint tenant in possession liable for the cost of repairs only if they happen to become necessary during his or her occupation.

If waste has already occurred, the remedy is damages, measured by the diminishment in value of the complaining joint tenant's undivided share. Following an early English precedent, legislation in some states provides for treble damages in certain cases. n261 If waste is in prospect, an injunction should be granted. Where the issue of past waste arises in a partition proceeding, it should be charged to the one responsible. In a partition in kind the part wasted, if geographically distinct, should be assigned to the one who committed the waste; the shares, of course, should be valued as if the waste had not occurred. The idea is as old as the Statute of Westminster II, cited by Blackstone: "And if he do choose to take his Part in a Place certain, the Part wasted shall be assigned for his Part, as it was before he committed the Waste." n262 In a partition by sale and division of the proceeds, the cost should be attributed to the share of the one responsible.

One joint tenant is under no obligation to insure the property held in joint tenancy against the risk of loss by accidental fire. In consequence, if one joint tenant does take out a fire insurance policy, paying all the premiums, and a fire occurs, the insured joint tenant is entitled to the entire proceeds. n263

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LEXIS: waste w/50 (joint w/3 tenan!)

§ 31.07(b) Action for Contribution.

Claims for waste arise against a joint tenant in possession for damage to the freehold; claims for contribution arise against a joint tenant, usually one out of possession, for a proportionate share of expenses. When a joint tenant improves the property on his or her own initiative, a claim against another joint tenant for a share of expenses should be rejected. n264 "A man cannot be improved out of his estate"; n265 in other words, a joint tenant cannot be compelled to contribute to the expenses of improvement, because the costs may equal or even exceed the unrealized value of the undivided share. An improver dissatisfied with this rule can always exercise the right to partition. In a partition in kind, the improver should be awarded, insofar as possible, the share benefited by the improvement. In a partition by sale and division of the proceeds, the improver should, if possible, be awarded, not the cost of the improvement, but the increment in value attributable to the improvement; this is appropriate because the out-of-pocket cost of the improvement may exceed the incremental value. Short of partition, an action of account (described in the next subsection) can take the improvement into consideration in determining the joint tenants' respective shares; increased income attributable to the improvement should be allotted to the improver. Exactitude in any of these calculations will be impossible, and doubts should be resolved against the improver. Before making the improvement a prudent joint tenant would have secured the agreement of the other joint tenant or tenants or have partitioned the estate.

On the contrary, when the expenses are not discretionary, contribution should be enforced. In this case there is no possibility of being "improved out of one's estate"; rather, the expenses are a necessary cost of preserving the estate. Repairs needed to keep a structure wind and water tight are a case in point. If an action of waste is available to enforce the duty to make such repairs, then an action for contribution should be available to enforce the duty to share the cost. As pointed out in the preceding subsection, the two should go together.

In the case of repairs, even "necessary" repairs, it is imaginable to deny both the action of waste and the action for contribution; there may be no public interest in discouraging what would otherwise be permissive waste. As in the case of improvements, partition is always available to a dissatisfied joint tenant. Taxes are another matter. Unlike improvements, they are not discretionary, and unlike deterioration of private property, their prompt and efficient collection is a matter of public concern. n266 Where taxes on joint property are a joint and several liability, their payment by one joint tenant is a public duty and discharges the public duty of another joint tenant. n267 In such cases the tax-paying joint tenant should be entitled to contribution from the other joint tenant or tenants. While there seems to be no reason to refuse a present action for money, it is also possible to attain the same economic result by adjusting the equitable shares of the joint tenants so that in case of subsequent partition (in kind or by sale and division of the proceeds) or an action of account, the tax-paying joint tenant will be compensated. n268

Mortgage payments are often analogized to taxes, although they differ in that the original source of the obligation was voluntarily assumed, not imposed by law; the joint tenants had no duty to give a mortgage. While it is certainly appropriate to enforce an express agreement to contribute, and while an implied agreement may well be instinct in the circumstances, it is submitted in this case that it is not essential for the law to impose a duty to contribute apart from agreement. The parties have voluntarily encumbered their own property and may be expected to provide for the associated obligation. n269

Courts are divided on the issue of the right of a surviving joint tenant to demand from the estate of a deceased joint tenant contribution of a pro rata share of the payment due on a debt represented by a jointly executed promissory note secured by a mortgage on the joint estate. Since title to the joint estate is now in the surviving joint tenant or tenants, it seems inequitable to require the estate of the deceased joint tenant, in the absence of prior agreement by the deceased, to contribute to exonerate the debt on property in which, by virtue of the right of survivorship, it has no further interest. n270

Although not strictly part of the discussion of the action for contribution, failure to pay taxes or a mortgage raises the question of a joint tenant's duty in case of foreclosure and sale. May one joint tenant bid at a sale in an attempt to buy the property for himself or herself as sole owner? The answer depends on whether there exists a relationship of trust and

confidence between the joint tenants. Although often recognized by the courts, the fiduciary relationship is properly grounded in a relationship apart from the merely proprietary one; joint tenants, for example, may be husband and wife or members of the same family who took the property by testate or intestate succession, or they may be business associates embarked on a common venture. n271 Even if a fiduciary relationship is found to exist, it may be questioned whether it ought to prevent a joint tenant from acting in his or her own interest in the absence of any evidence of fraud or overreaching. Obviously, if one joint tenant does buy but is not permitted to take the estate in severalty, another joint tenant is required to make contribution before claiming an unencumbered share. n272 Any such belated right to a share conditioned on a duty to contribute suggests that an action for contribution was available all along.

The cases on contribution are often complicated by the fact that one of the joint tenants, usually the one demanding contribution, is enjoying the use and occupation of the premises, while the other joint tenant is not. As noted in the following subsection, an action of account does not normally provide recovery for anything except rents and profits received in excess of the joint tenant's proportionate share. The benefits of possession may often seem in a rough way to offset the claim for contribution. It would appear, however, that the fact of who is in possession of the property should properly be irrelevant since each joint tenant has an equal right to possession. As always, a dissatisfied joint tenant can alienate or secure a partition.

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LEXIS: contribution w/50 (joint w/3 tenan!)

§ 31.07(c) Action of Account.

Just as the action of waste protects a joint tenant if another joint tenant damages the estate, so the action of account protects a joint tenant if another joint tenant profits from the estate. The common law originally refused to recognize a right by one joint tenant to demand an accounting: the unity of possession was thought to entitle each joint tenant equally to any proceeds, so the first to receive profits could keep them. The only exception was if one joint tenant had agreed to act as bailiff for another, collecting rents and profits, then an action could be brought if the terms of the agreement were breached. A general remedy was finally created by statute in 1706, the oft-cited "Statute of Queen Anne," which permitted actions of account "by one joint tenant, and tenant in common, his executors and administrators, against the other, as bailiff for receiving more than comes to his just share or proportion... ." n273 By constituting each joint tenant a bailiff for the other insofar as receipts were concerned, the statute brought every joint tenancy within the erstwhile exception.

Received in America as part of the common law or adopted in various forms by the several states, n274 the Statute of Queen Anne continues to shape the remedy. A Michigan statute, for example, closely tracks its English forerunner:

> One joint tenant or tenant in common, and his executors or administrators, may maintain an action for money had and received, against his co-tenant for receiving more than his just proportion of the rents or profits of the estate owned by them as joint tenants or tenants in common. n275

The key word in the Statute of Queen Anne is "receiving." The theory of the statute was based on the legal fiction of each joint tenant serving as bailiff for the other and was effective as far as it went. Left outside the scope of the statute were benefits enjoyed by one joint tenant, as the benefit of occupying part or all of the estate. No receipts are generated in such a case, so the stewardship of the fictitious bailiff cannot be invoked. Because of the unity of possession, each joint tenant is equally entitled to the intangible benefits of ownership.

Some commentators have argued that the economic value of the benefit enjoyed should be treated as a receipt. n276 It is submitted that it is better policy not to extend the remedy. n277 A dissatisfied joint tenant is free to sever the estate or demand partition at any time. Furthermore, it should be noted that under the Statute of Queen Anne and its progeny no

compensation is provided the "bailiff" for services rendered; the receiver is held to account for everything in excess of "his just share or proportion." n278 Obviously, if a joint tenant in possession is liable for the imputed value of occupancy, a credit ought to be allowed for the value of any work performed on behalf of the joint tenant out of possession. The difficulty of valuing these services is an additional argument against a too nice attempt at adjudicating continuing disputes between parties who would do better in going their separate ways.

Property settlements incident to divorce sometimes unwisely leave joint tenancies intact while providing for exclusive possession by one of the ex-spouses. In the absence of express agreement for rent, none is owed by the joint tenant in possession. n279

Obviously, an unequivocal claim of sole dominion and control signals adverse possession of the estate and implicates the action of ejectment, the subject of the next subsection. Once adverse possession has been established, but before it has ripened into a limitation title, the adversely possessing cotenant is liable for rent to the cotenant out of possession. n280

COMPUTER-ASSISTED RESEARCH:

LEXIS: accounting w/50 (joint w/3 tenan!)

§ 31.07(d) Action of Ejectment.

Joint tenants hold "by one and the same undivided possession." n281 Because each joint tenant is entitled to possession of the whole, each is enabled to defend the estate against strangers. Title may be vindicated and trespassers removed from any part by an action of ejectment brought by any joint tenant. n282 Failure to remove adverse possessors of the concurrent estate may eventually result in loss of title, as with any present estate. Permission given by one joint tenant to a third party to enter and cut timber is a sufficient defense to an action for trespass brought by another joint tenant against the third party, although the situation may give rise to an action for waste against the joint tenant who gave the permission. n283

More difficult is the question whether an action of ejectment may be brought by one joint tenant against another. In general, the action may be brought if the possession of the complaining joint tenant has been interfered with by another joint tenant; however, recognizing the accrual of such a cause of action has momentous consequences, since it may begin the running of the statute of limitations for purposes of adverse possession. As a result, courts have been slow to find an interference with possession in theory, normally insisting on an actual ouster. This protects the joint tenant out of possession, who is entitled to rely on his or her own right to possession, unless it is unequivocally contravened. While a joint tenant in possession need not necessarily communicate his or her adverseness directly to the joint tenant out of possession, the act signaling ouster must be so open and continuous that any prudent person would have noticed it. n284 Evidence of ouster will vary from case to case. One court has wisely remarked that there can be "no 'open and shut' rule," but that many factors may need to be considered:

> What in one case would be sufficient as a warning might not be enough in another. Relationship of the parties, their reasonable access to the property and opportunity or necessity for dealing with it, their right to rely upon conduct and assurances of the tenant in possession, kinship, business transactions directly or incidentally touching the primary subject-matter, silence when one should have spoken, natural inferences arising from indifference -- these and other means of conveying or concealing intent may be important in a particular case, but not controlling in another; for after all what a designated plaintiff or defendant had in mind when he or she consummated an act or engaged in a course of conduct often depends upon the personal equation and the individual's method of expression. n285

Sometimes property settlements incident to divorce are the source of problems concerning the right to possession. A

divorcing couple who held title to their residence in joint tenancy may leave the title unchanged while giving one spouse exclusive possession. Certainly such an agreement is no evidence of ouster, and ordinarily it does not give rise to an obligation on the part of the joint tenant in possession to pay any rent, even to the extent of one-half in value, to the joint tenant out of possession. n286 In the charged emotional environment surrounding divorce, it may happen that the non-possessing joint tenant may enter without the permission of the possessing joint tenant. While undoubtedly a breach of the agreement, the entry is not technically a trespass, n287 although it may constitute the statutory crime of "home invasion." The best solution, obviously, is to eliminate the source of the problem by severing the tenancy.

Because each joint tenant is entitled to possession of the whole, each is enabled to give consent to a police search of the entire estate; each joint tenant is held to have assumed the risk that another joint tenant will permit the search in the absence of the other. n288 The consent is generally not valid to permit a search if another joint tenant, present at the same time, objects. n289

COMPUTER-ASSISTED RESEARCH:

LEXIS: ejectment or trespass w/50 (joint w/3 tenan!)

§ 31.07(e) Creditors' Rights.

Because each joint tenant has a title, an interest, and a right to possession, the concurrent estate is an asset that creditors may seek to attach. Nonetheless, nothing may be done to the prejudice of another joint tenant so long as the estate lasts. Of real interest to creditors, therefore, is the joint tenant's power to sever the estate by alienating an undivided share. A judgment lien on the property does not, in and of itself, work a severance, because it does not destroy any one of the unities; it becomes valueless on the death of the debtor survived by another joint tenant. n290 *"Jus accrescendi praefertur oneribus"* (The right of survivorship is preferred to encumbrances), was described as "a maxime in law" by Sir Edward Coke hundreds of years ago. n291

Execution of the lien and a judicial sale of the interest during the debtor's lifetime obviously does result in severance because it ends the unities of title, interest, and possession; as an exercise of the power of alienation, even if involuntary, it terminates the joint tenancy. n292 Legislation in individual states may, of course, alter the effect of the common law rules, n293 and homestead exemptions commonly affect creditor's rights where married joint tenants are involved. n294

In case of the bankruptcy of one joint tenant, the joint tenancy is severed as to the bankrupt's share since the appointment of a bankruptcy trustee transfers title to the trustee. The trustee is empowered to sell the debtor's interest and may, under circumstances in which the sale of an undivided interest is impractical, sell the interests of both the debtor and the non-debtor cotenant as well. n295 In such cases, the non-debtor cotenant has a right of first refusal to purchase the property at the price at which the sale is to be consummated; n296 if that right is not exercised, the non-debtor cotenant is entitled to the appropriate share of the sale proceeds. n297

Because the death of an indebted joint tenant extinguishes that joint tenant's share, nothing transfers from the deceased joint tenant to the surviving joint tenant or tenants, so there is ordinarily no possibility of using statutes against fraudulent transfers to set aside the right of survivorship. n298

Increasingly, criminal law provides for the forfeiture of property used in criminal activity. Ordinarily the interest of innocent co-owners are spared by statute, although this seems not to be constitutionally required. n299

COMPUTER-ASSISTED RESEARCH:

LEXIS: (creditor w/3 right) w/50 (joint w/3 tenan!)

FOOTNOTES:
(n1)Footnote 254. 2 William Blackstone, Commentaries 183-84 (1766).

(n2)Footnote 255. Although often used to describe co-owners of an estate held in tenancy in common, the label "cotenants" can also refer to co-owners of estates held in joint tenancy or tenancy by the entirety.

(n3)Footnote 256. *See* § 32.07, *infra*.

(n4)Footnote 257. It would be tempting to base many of the remedies available to one joint tenant against another on the unity of interest rather than on the unity of possession. This would, however, obscure the fact that for centuries joint tenants and tenants in common have been treated as having the same rights *inter se*, despite the fact that tenants in common share only the unity of possession.

(n5)Footnote 258. *Kapler v. Kapler, 755 A.2d 502 (Me. 2000).*

(n6)Footnote 259. 2 William Blackstone, Commentaries 183 (1766). The statute Blackstone cites, Westminster II, enacted in 1285, is among the earliest in the English statute book. Technically 13 Edw. I, it is most famous for its first chapter, better known as De Donis Conditionalibus, the legal basis of the fee tail. Chapter 22 literally provides the action of waste to tenants in common, rather than to joint tenants, which is why "construction" was required:

> Whereas two or more do hold Wood, Turfland, or Fishing, or other such Thing in common, wherein none knoweth his several, and some of them do Waste against the Minds of the other, an Action may lie by a Writ of Waste; (2) and when it is come unto Judgement, the Defendant shall choose either to take his Part in a Place certain, by the Sheriff, and by the View, Oath, and Assignment of his Neighbours sworn and tried for the same Intent, or else he shall grant to take nothing from henceforth in the same Wood, Turf-land, and such other, but as his Partners will take. (3) And if he do choose to take his Part in a Place certain, the Part wasted shall be assigned for his Part, as it was before he committed the Waste. (4) And there is such a Writ in this Case, that is to say, Cum A. & B. tenent boscum pro indiviso, B. fecit vastum, & c.

It is instructive that tenants in coparcenary were not granted the action of waste because they, alone among concurrent owners at the time, could compel partition. *See* 2 Edward Coke, Institutes 403. (Joint tenants were not enabled to compel partition until the statutes of Henry VIII. *See* § 31.05, *supra*). The lesson seems to be that the founders of the common law saw no need to arbitrate disputes among co-owners who could escape the concurrent ownership at will.

(n7)Footnote 260. 2 American Law of Property 78 at n. 2 (A. James Casner ed. 1952).

(n8)Footnote 261. *E.g.*, Iowa Code § 658.1. *Cf.* 6 Edw. I, c. 5 (Statute of Gloucester) (1278).

(n9)Footnote 262. 13 Edw. I, c. 22 (1285).

(n10)Footnote 263. *Furnace v. Comins, 693 N.Y.S. 2d 755 (App. Div. 1999).*

(n11)Footnote 264. Contributions for improvements may be recovered only where the improvements are necessary to preserve the premises. *Bednar v. Bednar, 688 A.2d 1200 (Pa. Super. 1997).*

(n12)Footnote 265. Cornelius J. Moynihan, Introduction to the Law of Real Property 217 (2d ed. 1988). *See also Hernandez v. Hernandez, 645 So. 2d 171 (Fla. App. 1994).*

(n13)Footnote 266. Adam Smith compared governments to joint tenancies and taxes to the contributions required of joint tenants: "The expence of government to the individuals of a great nation, is like the expence of management to the joint tenants of a great estate, who are all obliged to contribute in proportion to their respective interests in the

Estate." An Inquiry into the Nature and Causes of the Wealth of Nations 777 (Edwin Cannan ed. 1937).

(n14)Footnote 267. Where taxes are not joint obligations, payment by one joint tenant of the taxes owed by another is voluntary and therefore not subject to recovery in an action for contribution. *Bednar v. Bednar, 688 A.2d 1200 (Pa. Super. 1997).*

(n15)Footnote 268. Because of the relationship of trust and confidence between the joint tenants, the statute of limitations does not ordinarily begin to run until a demand is made for contribution or for partition. *But see Bednar v. Bednar, 688 A.2d 1200 (Pa. Super. 1997)* (statute of limitations began to run at time of expenditure for necessary repairs).

(n16)Footnote 269. *Giles v. Sheridan, 137 N.W.2d 828 (Neb. 1965)* (joint tenants agreed to pay mortgage in equal shares).

(n17)Footnote 270. *See Matter of Estate of Zahn, 702 A.2d 482 (N.J. Super. 1997); Mellor v. O'Connor, 712 A.2d 375 (R.I. 1998)* (describing result, refusing right of contribution from estate of deceased joint tenant, as "the minority rule"). *Contra: Vincent v. Troutman, No. E-2001-03035-COA-R3-CV, 2002 Tenn. App. LEXIS 378 (Tenn. App. 2002)* (promissory note signed only by deceased joint tenant). A similar problem may arise in the case of tenancies by the entirety. *See* § 33.07(b), *infra.*

(n18)Footnote 271. *Cooper v. Cooper, 783 A.2d 430 (Vt. 2001).*

(n19)Footnote 272. The joint tenant's share may be subject to an equitable lien, or the joint tenant may be found to hold the share as a constructive trustee.

(n20)Footnote 273. Often cited as 4 Anne, c. 16, § 27, and dated 1705, the statute is properly 4 & 5 Anne, c. 16, § 27 (1706). Although the most widely used edition of the English statutes, Pickering's Statutes At Large, makes it appear that Queen Anne's parliament adjourned in December 1705, it actually continued in session into January, when the present statute was enacted. *See* 11 William Holdsworth, A History of English Law 519, 526 (1938). The complete text of the relevant section of the statute is as follows:

[A]ctions of account shall and may be brought and maintained against the executors and administrators of every guardian, bailiff, and receiver; and also by one joint tenant, and tenant in common, his executors and administrators, against the other, as bailiff for receiving more than comes to his just share or proportion, and against the executor and administrator of such joint tenant, or tenant in common; and the auditors appointed by the court, where such action shall be depending, shall be, and are hereby empowered to administer an oath, and examine the parties touching the matters in question, and for their pains and troubles in auditing and taking such account, have such allowance as the court shall adjudge to be reasonable, to be paid by the party on whose side the balance of the account shall appear to be.

(n21)Footnote 274. Ala. Code § 6-7-40; Alaska Stat. § 34.15.120; Ark. Code § 18-60-101; Conn. Gen. Stat. Ann. § 52-404; Del. Code Ann. tit. 25, § 702; D.C. Code Ann. § 16-101; Ga. Code § 44-6-121 to 122; 765 ILCS 1005/4a; Ind. Code Ann. § 34-1-51-1; Kan. Stat. Ann. § 58-2522; Me. Rev. Stat. Ann. tit. 33, § 953; Md Real Prop. Code Ann. § 14-106; Mich. Comp. Laws Ann. § 554-138; Minn. Stat. § 557-06; N.H. Rev. Stat. Ann. § 507:3; N.Y. Real Prop. Acts Law § 1201; Or. Rev. Stat. § 105.820; R.I. Gen. Laws § 10-2-1; Vt. Stat. Ann. tit. 12, § 4251; Va. Code Ann. § 8.01-31; W. Va. Code § 55-8-13; Wyo. Stat. § 1-32-119.

(n22)Footnote 275. Mich. Comp. Laws Ann. § 554.138.

(n23)Footnote 276. Lawrence Berger, *An Analysis of the Economic Relations Between Cotenants, 21 Ariz. L. Rev. 1015 (1979).*

(n24)Footnote 277. *Clark v. Covington, 438 N.E.2d 628, 629 (Ill. App. 1982)* ("In order to render one co-tenant

liable to another co-tenant for the rent or use of jointly owned property, there must be something more than mere occupancy of the property by one and forbearance from occupancy by another.").

(n25)Footnote 278. Bunch v. Bunch, C.A. No. 02*A01-9705-CH-00106, 1998 Tenn. App. LEXIS 8* ("absent an agreement, a cotenant is not entitled to credit for the value of personal services in managing and caring for the property").

(n26)Footnote 279. *Hernandez v. Hernandez, 645 So. 2d 171 (Fla. App. 1994).*

(n27)Footnote 280. *Cf. Cox v. Cox, 71 P.3d 1028 (Idaho 2003)* (tenants in common).

(n28)Footnote 281. 2 William Blackstone, Commentaries 180 (1766).

(n29)Footnote 282. 2 William Blackstone, Commentaries 80 (1766).

(n30)Footnote 283. *Kapler v. Kapler, 755 A.2d 502 (Me. 2000).*

(n31)Footnote 284. *Arizona v. Superior Court of Maricopa County, 936 P.2d 558 (Ariz. App. 1997)* (in context of dispute between spouses holding property as joint tenants, one joint tenant held liable under criminal damage statute for damage to jointly held property). Even if accurate as a matter of criminal law, the holding should not begin the running of the statute of limitations for purposes of adverse possession.

(n32)Footnote 285. *Linebarger v. Late, 216 S.W.2d 56, 59 (Ark. 1948).*

(n33)Footnote 286. *See* § 31.07(c) *supra*. One joint tenant may sue for damage to her proportionate share. *McClurkin v. Ziebach & Webb Timber Co., 666 So. 2d 520 (Ala. App. 1995).*

(n34)Footnote 287. *Hernandez v. Knutson, No. C1-95-268, 1995 Minn. App. LEXIS 1198 (Minn. App. 1995)* (unpublished).

(n35)Footnote 288. *United States v. Matlock, 415 U.S. 164 (1974).*

(n36)Footnote 289. *State v. Walker, 941 P.2d 1 (Wash. App. 1997).*

(n37)Footnote 290. *Musa v. Segelke & Kohlhaus Co., 272 N.W. 657 (Wis. 1937); Eder v. Rothamel, 95 A.2d 860 (Md. 1953), noted in 14 Md. L. Rev. 151 (1954); Grothe v. Cortlandt Corp., 15 Cal. Rptr. 2d 38 (Cal. App. 1992); Helinski v. Harford Mem. Hosp., 831 A.2d 40 (Md. 2003).*

A statute may in certain cases preserve the effectiveness of a judgment lien on the debtor's share after death. *See United States v. Librizzi, 108 F.3d 136 (7th Cir. 1997)* (federal tax lien); John E. Talsky, Comment, *Concurrent Ownership: Joint Tenancy and Tenancy in Common Under Chapter 700, 55 Marq. L. Rev. 321 (1975)* (state tax lien).

See also Dieden v. Schmidt, 104 Cal. App. 4th 645 (2002) (judgment lien perfected on property held in tenancy in common that was later converted into joint tenancy may be executed even after death of the indebted tenant).

(n38)Footnote 291. Edward Coke, Commentary Upon Littleton § 286, p. 185a (1628).

(n39)Footnote 292. *Boissonnault v. Savage, 625 A.2d 454 (N.H. 1993).* Termination may not be effective until the period of redemption has expired. *Jackson v. Lacey, 97 N.E.2d 839 (Ill. 1951), noted in 30 Chi.-Kent L. Rev. 189 (1952).*

(n40)Footnote 293. *See, e.g.,* S.C. Code Ann. § 27-7-40 (joint tenancy may not be encumbered without all joint tenants joining in the encumbrance).

(n41)Footnote 294. *See, e.g., O'Hagan v. United States, 86 F.3d 776 (8th Cir. 1996)* (applying Minnesota law) (creditor of spouse holding residence as joint tenant with other spouse can force sale of debtor spouse's right of survivorship, but present possession of non-debtor spouse is secured from creditor by state homestead exemption). *See also Pratt v. Langston, 669 So. 2d 967 (Ala. 1995)* (purported conveyance by one spouse of half interest subject to life estate in other spouse in jointly owned homestead could not affect homestead and was therefore ineffective as a severance).

(n42)Footnote 295. Bankruptcy Code § 363(h):

The trustee can sell both the estate's interest and the interest of the non-debtor in property owned as tenants in common, joint tenants, or tenants by the entirety only if:

(1) partition in kind of such property among the estate and such co-owners is impracticable;

(2) sale of the estate's undivided interest in such property would realize significantly less for the estate than sale of such property free of the interest of such co-owners;

(3) the benefit to the estate of a sale of such property free of the interests of co-owners outweighs the detriment, if any, to such co-owners; and

(4) such property is not used in the production, transmission, or distribution, for sale, of electric energy or of natural or synthetic gas for heat, light, or power.

One commentator has described this section as going "too far." Thomas E. Plank, *The Constitutional Limits of Bankruptcy, 63 Tenn. L. Rev. 487, 571 (1996).*

(n43)Footnote 296. Bankruptcy Code § 363(i).

(n44)Footnote 297. Bankruptcy Code § 363(j).

(n45)Footnote 298. *Mahlin v. Goc, 547 N.W.2d 129 (Neb. 1996). But see Gallagher v. Kirschner, 632 N.Y.S.2d 857 (1995)* (in case of deceased murderer whose estate was insufficient to satisfy wrongful death judgment, right of survivorship set aside as fraudulent conveyance).

(n46)Footnote 299. *Cf.* Bennis v. Michigan, 516 U.S.442 (1996) (forfeiture of personal property).

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CHAPTER 31 JOINT TENANCIES

4-31 Thompson on Real Property, Thomas Editions § 31.08

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§ 31.08 Termination of Joint Tenancies.

[Go To Supp]

As a form of concurrent ownership, joint tenancies can exist only when there are two or more owners of the same property at the same time. If, for whatever reason, ownership of the estate passes to a single person, joint tenancies and all other forms of concurrent ownership cease. Multiple ownership is only a necessary and not a sufficient condition of joint tenancies; for any given case of concurrent ownership to be a joint tenancy there must also be present the four unities of time, title, interest, and possession. n300 A joint tenancy can be terminated by any act destructive of its constituent unities. In fact, for purposes of termination only three of the four unities matter: title, interest, and possession. As Sir William Blackstone long ago conceded, the unity of time, "which respects only the original commencement of the joint estate, cannot indeed (being now past) be affected by any subsequent transactions." n301 In this section will be examined termination by act of all the joint tenants (§ 31.08(a)), by act of one joint tenant (§ 31.08(b)), and -- regardless of the act of any or all joint tenants -- by operation of law (§ 31.08(c)).

COMPUTER-ASSISTED RESEARCH:

LEXIS: termin! w/50 (joint w/3 tenan!) & sever!

§ 31.08(a) Termination by Act of All Joint Tenants.

Joint tenancies may be terminated by the act of all joint tenants. Obviously, a grant by all joint tenants to a stranger as sole owner ("A and B to C and heirs") terminates the joint tenancy; what had been held as a concurrent estate is now held in severalty. A grant by all joint tenants of less than the complete fee simple ("A and B, the lower forty acres to C and heirs") does not terminate the joint tenancy in the remaining interest. By the same token, all joint tenants may lease or mortgage the property without causing a severance. n302 Although subject to some doubt, the same should hold true even in states that still nominally regard mortgages as conveyances. n303

As among themselves, all joint tenants may terminate the joint tenancy by destroying the unity of title, interest, or possession. (The unity of time is now beyond change.) For example, a grant of a described part of the estate by all joint tenants to one joint tenant ("A and B, the lower forty acres to A and heirs") terminates the joint tenancy as to that part;

the remaining part of the estate is, of course, still held in joint tenancy. The same result will follow if an undivided share is granted ("A and B, one-half to A and heirs"); although the unity of possession remains, the unities of title and interest in the granted share are destroyed. For the same reason, joint tenants can terminate the joint tenancy altogether by conveying it in undivided shares to one another ("A and B, one-half to A and heirs, one-half to B and heirs"). The effect is to transform the joint tenancy into a tenancy in common. n304 *A fortiori* a joint tenancy is terminated if the whole estate is divided into shares and conveyed ("A and B, the lower forty acres to A and heirs, the remaining forty acres to B and heirs"); this is, in fact, a voluntary partition in kind. Mere negotiations to divide land held in joint tenancy are obviously not enough to terminate the joint tenancy. n305

When property held in joint tenancy is sold, a question may arise concerning the tenancy in which the proceeds of the sale are held. Because of the power each joint tenant has to sever the tenancy, the distinction between joint tenancies and tenancies in common in regard to use of the money is rarely significant. The problem, as ever, concerns the right of survivorship. What should be done with the proceeds of sale when one joint tenant dies before division? In general, the presumption in favor of tenancies in common in personalty should be applied in the absence of an expressed intention in favor of joint tenancy. n306 In other words, a voluntary sale by joint tenants should be treated like a partition by sale and division of the proceeds. Wisconsin, to the contrary, has legislation on the subject preserving the right of survivorship in the money. n307

If a voluntary sale by joint tenants is treated as operating to sever the tenancy, a question may arise concerning the moment at which the sale is effective. The ordinary sale begins with a contract to convey, and the law of "equitable conversion" has long treated the contract, if it is specifically enforceable, as the operative event; at the moment of contracting, the purchaser acquires an equitable title to the property, while the vendors hold the legal title as security for the payment of the purchase price. A persuasive argument can be made, based on the doctrine of the four unities, that delivery of the deed, that is, transfer of the legal title, is the operative event for purposes of terminating the joint tenancy. The unities have always been legal, as opposed to equitable, prerequisites for the estate of joint tenancy, and the legal estate continues, regardless of the state of the equitable title, until its "legal" termination by the delivery of the deed. n308 Should specific performance be sought and obtained by either party to the land sale contract, it would be the vendors, collectively as joint tenants, who would be required to deliver the deed. A South Dakota statute adopts the rule that a contract for the sale of land does not terminate the vendors' joint tenancy unless the contract expressly so provides. n309 In one state, a court reached the same result, although its holding was affected by the fact that the jurisdiction does not recognize the doctrine of equitable conversion. n310

There is some modern authority to the effect that joint tenants can terminate the joint tenancy by mutual agreement to hold as tenants in common without a deed. n311 This cannot be reconciled with the doctrine of the four unities and reflects the modern preference for intention over technicalities.

§ 31.08(b) Termination by Act of One Joint Tenant.

Joint tenancies may be terminated by any act of one joint tenant that destroys the unity of title, interest, or possession. n312 (The unity of time is now beyond change.) Although the common law insisted that a joint tenant had an interest in every part of the joint estate, it nonetheless recognized a power in each joint tenant to convey an interest in an undivided share, in effect withdrawing that share from the joint tenancy. So, if A holding an estate with B in joint tenancy makes a conveyance to C, C receives an undivided one-half. n313 The process is known as severance: A has severed the joint tenancy. After the conveyance, B and C each hold undivided one-half shares; the form of concurrent estate must perforce be tenancy in common since A's conveyance destroyed the unities of title and interest. C holds a new interest by a new title; only possession remains united. Severance also occurs if A holding an estate in joint tenancy with B conveys a remainder interest to C and reserves a life estate. n314

The effect of recognizing a power of alienation in joint tenants is to permit each joint tenant to convey an interest that, strictly speaking, he or she did not have; the conveyance creates the interest. n315 Furthermore, where only two joint

tenants are involved, the conveyance transforms the remaining interest, terminating the so-called right of survivorship. n316 The moment the conveyance becomes legally operative is the moment the joint tenancy is terminated; until then the joint tenancy with its associated incident of the right of survivorship remains in effect. n317 Ordinarily a joint tenancy can be severed by one joint tenant without the knowledge or consent of the other joint tenant or tenants. n318 Local legislation may modify this common law result. n319 California, for example, requires that a severing instrument be recorded before the severing joint tenant dies. n320

A special case exists where there are three or more joint tenants and one of them makes a conveyance. The grantee receives as an undivided share the pro rata interest of the grantor; for example, if A, B, and C are joint tenants and A conveys to D, D receives an undivided one-third. Because the severance terminated the joint tenancy as to that share, D holds the share as tenant in common, but because the severance left two concurrent owners, B and C, the joint tenancy persists as to them. In consequence, an undivided two-thirds share is held by B and C as joint tenants, while an undivided one-third share is held by D as tenant in common with them. As Blackstone himself reminded us: "estates of any quantity or length of duration, and whether they be in actual possession or expectancy, may be held ... in joint-tenancy." n321 As between B and C, all the incidents of joint tenancy persist, including the right of survivorship. This is only just, since there is no reason why A's unilateral act should alter the joint tenancy as between B and C; should either wish to sever the tenancy, each has the power to do so. By contrast, where there are only two joint tenants and one conveys, the remaining share must be affected. n322

In terms of legal concepts, it makes no difference whether the grantee of the alienating joint tenant is a stranger -- D in the above example -- or another one of the joint tenants; that is, where A, B, and C are joint tenants and A conveys to B. The severed share is still held by tenancy in common, and the remaining share is still held by joint tenancy. The only difference is that the same person -- B in the present example -- holds two interests by two distinct tenancies: the one-third share granted by A in tenancy in common with C, and the remaining two-thirds in joint tenancy with C. n323 It is not exactly true to say that B holds a total share of two-thirds, since the part held in joint tenancy is held, as all joint tenancies are held, "by the share and by the whole" (*per my et per tout)*, and is subject to the right of survivorship.

Because each joint tenant is already seised "by the whole," it was not required at common law that the normally indispensable words of inheritance appear in a release by one joint tenant to another. n324 Because severance is a voluntary act, it is effective only if the severing party is legally competent. Although a severance that appears proper on its face is presumed to be effective, it remains open to challenge for undue influence in appropriate cases. n325

A singular but revealing problem concerning termination of joint tenancies occurs when one joint tenant attempts to sever the joint tenancy by a self-conveyance; that is, when A and B are joint tenants and A, intending to terminate the joint tenancy and convert it into a tenancy in common, conveys from A as joint tenant to A as tenant in common. The common law would unhesitatingly hold the joint tenancy still in effect; a conveyance to oneself has no legal consequence and therefore does not destroy any unities. n326 In modern American law with its emphasis on intention this result seems harsh, since the object sought by the grantor is not contrary to public policy and, by use of a conveyance to a "straw man" and reconveyance, could have been obtained at common law. n327 The objection is even stronger if the jurisdiction has a statute expressly eliminating the need for a "straw man" in the creation of a joint tenancy when grantor transfers to grantor and another or others. n328

Although permitting termination of joint tenancies by a self-conveyance comports with a preference for effectuating intention, it does create the opportunity for one joint tenant to gain an advantage over the other or others by executing the self-conveyance and delivering it to an heir or devisee with instructions to record it, if but only if, the self-conveyor dies first, in which case the severance will be effective and the interest will pass by intestacy or devise; if the self-conveyor survives the other joint tenant or tenants, the self-conveyance can be suppressed and the survivor take all by right of survivorship. n329 In consequence, some states require recording for effectiveness of self-conveyances, although it is unlikely in ordinary cases that an unsuspecting joint tenant would think to inspect the records of title. n330

Whether a lease by one joint tenant severs the joint tenancy is a question almost as old as the estate itself; one judge likened it to "a comet in our law: though its existence in theory has been frequently recognized, its observed passages are few." n331 Because a lease is a conveyance of a present estate, albeit a non-freehold estate, it might be held to destroy the unities of title and interest, and thereby sever the joint tenancy. There is respectable authority to this effect. n332 Yet what the lessor retains is an interest in fee simple subject to the lease (although commonly called a reversion), which is still held with the other joint tenant or tenants. The right of survivorship, and therefore the joint tenancy, should still be recognized in the fee simple estate. If the joint tenancy is regarded as unsevered by the lease, the question may arise whether the lease can extend beyond the life of the lessor; that is, if the lessor dies before the lease expires, is the right of survivorship in the other joint tenant or tenants subject to the lease? An affirmative answer enjoyed wide support in America for several decades. n333 But it has now been abandoned in favor of the more logical view that, if a lease by one joint tenant does not sever the fee simple estate, it does not encumber the survivorship rights of the other joint tenant or tenants. Should the leasing joint tenant die before the term expires, the lease would terminate -- just as it would if a life tenant had made a lease and died before it expired. n334

This result has the benefit of being consistent with other aspects of the law of joint tenancy. Because it is generally accepted that joint tenants may agree among themselves on their respective use of the property, even providing by contract for the exclusive possession of one, without causing a severance, n335 it seems only logical to permit one joint tenant to lease his or her interest to a stranger without terminating the joint tenancy. n336 This conclusion is bolstered by the fact that the lessor does not ordinarily intend by the lease to sever the tenancy; other acts, such as the conveyance of the entire interest in the freehold, unequivocally express an intention to sever.

A mortgage given by one joint tenant raises the same problem as a lease: is the joint tenancy severed? This question too is like a "comet in our law," an intriguing academic question of limited practical significance. It is a rare (or negligent) commercial lender who would accept a mortgage from a joint tenant without first seeing that the joint tenancy was severed or that all the joint tenants had signed. n337 In consequence, the cases almost always involve private arrangements, usually within a family. At common law a mortgage was a conveyance, so it necessarily destroyed the unities of title and interest. n338 Yet in modern law a mortgage is generally recognized to be in reality only a pledge of the title as security for a loan rather than a conveyance. In many American states, particularly in the West, the "title theory" of mortgages has been explicitly replaced with the "lien theory." In these states it is easy to see why a mortgage by one joint tenant is held not to sever the joint tenancy: no more than any other unforeclosed lien does it destroy any of the constitutive unities. n339 It is harder to see why the common law result should continue to pertain even in "title theory" states, unless there remains a real rather than a technical sense in which title or interest is affected by the mortgage. n340 Statutes in some jurisdictions alter the common law result. In Wisconsin, for example, a statute provides that on the death of a mortgaging joint tenant the survivor takes subject to the mortgage. n341 In South Carolina a statute prohibits any encumbrance of a joint tenancy unless all joint tenants join in the encumbrance.

Although each joint tenant has a right to sever the joint tenancy, this right may be restricted by express agreement, as by an agreement not to sell or partition. If limited to a reasonable time, agreements against partition are presumptively valid, n342 although courts are often reluctant to enforce them against an unwilling party, particularly if circumstances have changed since the inception of the agreement. n343 Agreements against sale may be unenforceable as restraints on alienation, unless construed merely as agreements not to demand partition by sale. n344 Given the greater weight accorded intention in modern law, agreements against sale of an undivided interest may pass muster today, at least if limited to a reasonable time and so long as circumstances have not changed. In addition, the right to sever may be limited by estoppel, as where one joint tenant has permitted another to rely on the continuation of the joint tenancy. n345

In addition to termination by a voluntary conveyance by one joint tenant, a joint tenancy may be terminated by judicial action on the demand of one joint tenant. Originally authorized by English statutes, the right to judicial partition is now accepted as an essential feature of the joint tenancy. n346 Although partition will sever a joint tenancy, the severance is effective only on the entry of the final partition order; merely filing an action for partition will not end the joint tenancy.

Consequently, the death of a joint tenant during the pendency of the partition action will result in the extinction of the deceased joint tenant's share; the remaining joint tenant or tenants will then hold the entire estate by right of survivorship. n347

Legislation in most states gives a surviving spouse a right to elect a share in the estate of a deceased spouse in lieu of whatever is offered by the decedent's will. Traditionally the decedent's estate for purposes of calculating the elective share was limited to the probate estate, but modern statutes may provide for the probate estate to be augmented by the value of interests passing outside probate, including joint tenancies passing by right of survivorship. n348 In such cases, if the decedent's estate is otherwise unable to fund the elective share, it may be necessary to deny recognition to the right of survivorship, in effect causing the severance of the joint tenancy. n349

The Uniform Probate Code permits a surviving joint tenant to "disclaim" the interest accruing by the right of survivorship, n350 and at least one state has held that a surviving joint tenant may "renounce" the right of survivorship. n351 In this case, while death would ordinarily terminate the share of the dying joint tenant, the survivor's disclaimer would relate back to the moment of death and sever the joint tenancy, converting it into a tenancy in common. n352 An analogy is attempted to the renunciation of an intestate share and the disclaimer of a testamentary gift. This is, however, to mistake the nature of the right of survivorship. Rather than an interest passing from the deceased joint tenant to the surviving joint tenant, the right of survivorship registers the subtraction from the estate of the interest of the deceased and consequent enlargement of the interest of the survivor. The true rationale would seem to be a recognition of estates with rights of survivorship as substitutes for wills.

A Uniform Disclaimer of Property Interests Act, promulgated in 1999 and incorporated in 2002 into the Uniform Probate Code, n353 changes the treatment of disclaimers by joint tenants. n354 Under the Act, a joint tenant can disclaim either the decedent's equal fractional share of the property (without tracing the source of contributions to the purchase price) or all of the jointly held property other than the part contributed by the disclaimant (that is, with tracing). n355

§ 31.08(c) Termination by Operation of Law.

Joint tenancies may be terminated by operation of law without regard to the act of the joint tenants, together or separately. Again, the key is terminating the concurrent ownership or, if that continues, destroying at least one of the unities of title, interest, or possession. (The unity of time is now beyond change.) By right of survivorship the estate continues after the death of a joint tenant; when only one is left, that one holds no longer in joint tenancy but in severalty. n356 Any legal event that destroys one of the unities also ends the joint tenancy. As an example Sir William Blackstone described two joint tenants for life when the remainder descends to one of them: by operation of the law of inheritance and the doctrine of merger, the unity of interest is destroyed and the joint tenancy thereby terminated. n357

Joint tenancies are terminated by operation of law when taken by the state through the power of eminent domain. Transfer to a sole owner, even if the result of an involuntary taking, ends the state of concurrent ownership and with it the joint tenancy. In case of a taking, of course, money is substituted for the land, the "just compensation" required by constitutional law. The money paid for the estate should itself be held in joint tenancy; by operation of law it has been substituted for the estate, a process referred to as "involuntary conversion" -- conversion in the sense of transformation from realty to personalty -- so the nature of the holding should be unaffected. Of course, property held in joint tenancy, including money, is subject to the right of survivorship only so long as the estate remains unsevered. n358

COMPUTER-ASSISTED RESEARCH:

LEXIS: termin! w/50 (joint w/3 tenan!) & "eminent domain" or condem!

Other involuntary events resulting in the substitution of money for real property held in joint tenancy are sometimes

mistakenly likened to the exercise of the power of eminent domain. For example, the value of land and buildings held by joint tenants may be insured; if damaged by casualty, the insurer will be obligated to pay. The proceeds of the policy are in a sense money substituted for property and the precipitating event is in fact involuntary, but the money need not be held in the same tenancy as the realty because, unlike the taking by eminent domain, the money is not substituted for the estate. The estate has not been terminated by operation of law. The dispositive question must be who owned the policy of insurance and by what title.

An involuntary sale of the share of one joint tenant, as in the foreclosure of a mortgage, tax lien, or judgment lien, severs the joint tenancy, substituting the purchaser of the share as tenant in common with the remaining tenant or tenants. n359 (If two or more joint tenants remain, they continue to hold their shares in joint tenancy.) Perfection of a judgment lien on the property does not itself work a severance because it does not destroy any of the unities. n360 Even the sale itself may not finally terminate the joint tenancy until the period of redemption has expired. n361

Where married persons hold property in joint tenancy a problem can arise in case of divorce. Unless the parties voluntarily sever the joint tenancy, the right of survivorship is unaffected by the change in marital status; divorce has no effect on the necessary unities. n362 The problem is particularly acute in jurisdictions in which tenancy by the entirety is not available, so the only survivorship tenancy is the joint tenancy. (Where married persons hold as tenants by the entirety the effect of divorce is to sever the tenancy. n363) Obviously, as part of the property settlement, prudent divorce counsel should arrange to sever any joint tenancies between the separating spouses. As one court has observed, "We cannot expect divorced parties to continue a business relationship that will optimize resources and profits[;]... it is particularly important to avoid creating situations where the divorced parties remain in joint management of income producing property." n364

In a growing number of states, statutes provide for the automatic termination of joint tenancies on the divorce of the owners:

Alaska. Divorce converts joint tenancy with right of survivorship into tenancy in common. n365

Arkansas. Final decree of divorce terminates right of survivorship unless court order specifically provides otherwise; parties become tenants in common. n366

Connecticut. Divorce severs joint tenancy, effective on the recording of certified copy in land records of the town where the land lies. n367

Michigan. Joint tenancy of husband and wife becomes tenancy in common on divorce. n368

Ohio. If two "survivorship tenants" married to one another are divorced, estate becomes tenancy in common. n369

South Carolina. Filing of divorce decree converts joint tenancy into tenancy in common unless otherwise specifically ordered. n370

Virginia. Divorce converts joint tenancy into tenancy in common. n371

The Uniform Probate Code, in a provision copied by legislation in many states, provides that, absent agreement or court order to the contrary, divorce "severs the interest of the former spouses in property held by them at the time of the divorce or annulment as joint tenants with the right of survivorship..., transforming the interests of the former spouses into tenancies in common." n372

In states without statutes on the subject, the courts may be expected to scrutinize the parties' behavior in search of an agreement to sever the joint tenancy. n373 Problems of peculiar complexity can arise if the estate, rather than being in

joint tenancy, was in tenancy in common for joint lives followed by alternative contingent remainders in fee simple in the survivor. n374

A melancholy instance of termination by operation of law is the murder by one joint tenant of another. As one court remarked, "Unfortunately, courts of our nation too often have had to deal with the disposition of property after a killing of one co-tenant by the other." n375 If A and B are joint tenants and A murders B, the joint tenancy is terminated; on the death of B the right of survivorship preserves the estate in A, who now holds in severalty. Thus far, one might say the joint tenancy was terminated not by operation of law but by the act of one joint tenant. So outrageous is the act, however, that courts have struggled to devise means to prevent ordinary rules from operating in this case. n376 The resulting hodge-podge has been cataloged by one court:

> (1) The killing does not affect the right of the surviving tenant to take the entire interest in the joint tenancy property.
>
> (2) The killing destroys the survivorship characteristics of the tenancy and the estate in the property reverts to a tenancy in common. In some instances a constructive trust is imposed on a one-half interest in the property to effect this result.
>
> (3) The killing does not result in a termination of the joint tenancy; the survivor and the heirs of the victim remain joint tenants.
>
> (4) The killing deprived the wrongdoer of all interest in the property.
>
> (5) The killing does not interfere with the vesting of title in the survivor but: (a) The killer is chargeable as a constructive trustee of the whole of the property absolutely, or, in some instances, subject to a life estate in himself as to a one-half interest therein, or the equivalent of such a life estate. (b) The killing raises a conclusive presumption that in the natural course of events the deceased joint tenant would have survived the killer and a constructive trust is imposed to effect this result. (c) The killing raises a doubt as to who would survive, which should be resolved against the killer and the whole property subjected to a constructive trust. (d) A constructive trust is imposed on the property to the extent the interest of the killer is enlarged by his wrongful act. n377

Most states nowadays have statutes on the subject, and the Uniform Probate Code includes a sensible provision severing the joint tenancy (option 2 above without the imposition of a constructive trust). n378

Rejection of the right of survivorship in the case of the murdering joint tenant is dependent upon a final determination of responsibility, n379 but once determined, the legal consequence for the right of survivorship -- whatever it is -- relates back to the time of the crime. During the interval between the death and the final determination of responsibility, a constructive trust may need to be imposed on the legal title-holder in order to preserve the property. No rule should be applied, however, to the injury of a good faith purchaser who reasonably relied on the appearance of title in the meantime, although money paid to a murderer by such a purchaser should be traced and subjected to the rule.

Because the reason for refusing to recognize the usual right of survivorship is to prevent a wrongdoer from profiting from the wrong, a difficulty can arise in the case of so called murder-suicide, that is, when the slayer immediately commits suicide. Any rule that deprives the slayer of a momentary benefit actually deprives the slayer's heirs or devisees, who most often are totally innocent. Some courts have recognized that such cases raise difficult questions under provisions of the federal and most state constitutions that prohibit forfeiture or corruption of blood. n380 Conversely, where a guilty slayer survives the victim for an appreciable period of time, the policy against profiting from wrongdoing may encourage a court to go beyond the usual presumption of equal shares in joint tenancies, n381 and to trace the respective contributions of slayer and victim, as in cases of divorce. If the slayer contributed less than half the

value of the property, the slayer may be deprived of proportionately more than one-half. n382 In one state, Kansas, a special rule applies if the murdering joint tenant immediately commits suicide: murderer and victim are treated as if they died simultaneously. n383

One issue too often left obscure by the statutes is the type of crime that triggers their application. Many slayer statutes preclude one joint tenant convicted of the "willful killing" of a co-tenant from benefiting from the right of survivorship, but whether the provision applies to a joint tenant pleading guilty to manslaughter is left for judicial resolution. n384

Care must be taken not to let the technical form of the estate impede the application of the chosen rule. Legislation in one state, Alabama, explicitly applies as well to tenancies in common for life with cross-contingent remainders in fee to the survivor. n385 In Rhode Island the complex problem of a joint tenancy of three or more persons including a slayer and victim is addressed. n386

A curious variation on the usual slayer problem is presented by a recent New York case. n387 A slayer, who was not a concurrent owner with the victim, was shot and killed by the police in the course of their investigation. In a wrongful death action against the slayer's estate, the victim's estate was awarded damages. The slayer's estate was insolvent, but the slayer had been a joint tenant with others who benefited from the right of survivorship. On petition of the victim's estate, the court set aside the survivorship as a fraudulent conveyance, in effect severing the joint tenancy and making the slayer's share available for attachment.

COMPUTER-ASSISTED RESEARCH:

LEXIS: termin! w/50 (joint w/3 tenan!) & slayer or murder! or kill

In case of the insanity of a joint tenant, a guardian may be appointed to manage the incompetent's affairs. There is no transfer of legal title in this situation, so no severance should be recognized. n388 The remaining joint tenant or tenants are not disadvantaged by the appointment of the guardian since they remain free to sever the joint tenancy at will.

One final problem concerns the simultaneous death of joint tenants. The right of survivorship assumes the possibility of determining the order of death. If that is impossible, there is no choice but to treat the joint tenancy as terminated and to dispose of the estate as if it had been a tenancy in common; that is, providing a pro rata share to each joint tenant's heirs or devisees. The Uniform Simultaneous Death Act as adopted in many states enforces this result by raising a presumption of simultaneous death unless there is "sufficient evidence" to the contrary. n389 In 1991 the Uniform Simultaneous Death Act was revised to require survivorship by at least 120 hours in order to prevent the diversion of property based only on a brief and perhaps technical survivorship. n390

FOOTNOTES:

(n1)Footnote 300. For the doctrine of the four unities, *see* § 31.06(b), *supra*.

(n2)Footnote 301. 2 William Blackstone, Commentaries 185 (1766).

(n3)Footnote 302. The case of a mortgage or lease by all joint tenants should be distinguished from the case of a mortgage or lease executed by only one of the joint tenants, examined in the next subsection.

(n4)Footnote 303. *Downing v. Downing, 606 A.2d 208 (Md. 1992)* (mortgage by all joint tenants). *See also* Conn. Gen. Stat. § 47-14e.

(n5)Footnote 304. *Cf.* S.C. Code Ann. § 27-7-40 (conveyance by all joint tenants to themselves "as tenants in common" converts the joint tenancy into a tenancy in common).

(n6)Footnote 305. In the *Matter of Pollard, 678 N.Y.S.2d 126 (1998).*

(n7)Footnote 306. *In re Estate of King, 572 S.W.2d 200 (Mo. Ct. App. 1978); Hughes v. Hughes, 356 N.E.2d 225 (Ind. App. 1976); Illinois Pub. Aid Comm'n v. Stille, 153 N.E.2d 59 (Ill. 1958), noted in 1958 U. Ill. L.F. 658.*

(n8)Footnote 307. Wis. Stat. Ann. § 700.21(a) (if co-vendors held as joint tenants, purchase price is payable to them as joint tenants). *See also id.* § 700.19(3) (if co-vendors held as joint tenants and purchase money mortgage names them as mortgagees, they take mortgage as joint tenants, unless intention to take mortgage as tenants in common is expressed).

(n9)Footnote 308. *Weise v. Kizer, 435 So. 2d 381 (Fla. App. 1983); Wonka v. Cari, 637 N.W.2d 92 (Wis. 2001); Watson v. Watson, 126 N.E.2d 220 (Ill. 1955).*

(n10)Footnote 309. S.D. Codified Laws Ann. § 43-26-4. *Contra: In re Baker's Estate, 78 N.W.2d 863 (Iowa 1956), noted in 42 Iowa L. Rev. 646 (1957), 55 Mich. L. Rev. 1194 (1957), 33 N.D. L. Rev. 246 (1957), 32 Tul. L. Rev. 153 (1957); Buford v. Dahlke, 62 N.W.2d 252 (Neb. 1954), noted in 41 Cornell L.Q. 154 (1955), 34 Neb. L. Rev. 501 (1955). But see* Neb. Rev. Stat. § 76-2.109 (no contract executed by all joint tenants severs the joint tenancy unless the intention to sever expressly appears in the instrument).

For the special problems raised when the land to be conveyed is registered under the Torrens Act, *see Naiburg v. Hendriksen, 19 N.E.2d 348 (Ill. 1939), noted in 17 Chi.-Kent L. Rev. 393 (1939).*

(n11)Footnote 310. *Estate of Phillips v. Nyhus, 874 P.2d 154 (Wash. 1994).*

(n12)Footnote 311. *See* William E. Burby, Handbook of the Law of Real Property 220 (3d ed. 1965) ("A joint tenancy may be terminated by mutual agreement of the owners. The agreement need not be in writing and may be express or implied."). The most common examples found in the cases involve divorced joint tenants who fail to destroy any of the unities. *See* § 31.08(c), *infra.*

(n13)Footnote 312. The terminating act must be done during life; because of the right of survivorship, one joint tenant cannot sever the joint tenancy posthumously, as by testamentary provision. The rule dates to a time before Lord Coke, who stated "the rule of law" to be *"jus accrescendi praefertur ultimae voluntati"* (the right of survivorship is preferred to the last will). Edward Coke, Commentary Upon Littleton § 287, p. 185b (1628). In the *Matter of the Estate of Huff, 676 So. 2d 264 (Miss. 1996);* Colo. Rev. Stat. § 15-15-102 (interest held in joint tenancy is not devisable). *See generally* R.H. Helmholz, *Realism and Formalism in the Severance of Joint Tenancies, 77 Neb. L. Rev. 1 (1998).*

If state law allows deeds effective on death, such deeds should not operate to sever joint tenancies unless the other joint tenant or tenants agree. *See* 2003 Nev. Stat. 409.

An exception to the rule that a joint tenancy may not be severed posthumously arises when a surviving spouse's elective share cannot be satisfied out of probate assets; if the deceased spouse had made transfers into joint tenancies during life, the joint tenancies can be reached to satisfy the surviving spouse's elective share to the extent of the deceased spouse's contribution. N.Y. Est., Powers & Trusts Law § 5-1.1-A; N.C. Gen. Stat. § 30-3.2(d)(4); *Estate of Antonopoulos, 993 P.2d 637 (Kan. 1999)* (*citing* Kan. Stat. Ann. § 59-6a209(a)). The same result is indicated by the Uniform Probate Code § 2-205 (1990, as amended in 1993).

Another exception, more apparent than real, arises when a will expressly requires a devisee to make an election whether to retain property acquired by right of survivorship or take a benefit offered by the will; severance, if it occurs, is actually the result of the survivor's choice. *Estate of Williamson v. Williamson, 657 N.E.2d 651 (Ill. App. 1995)* (intention to put the survivor to an election must be clearly expressed). *See also In re Estate of Vittorio, Sr., 546 N.W.2d 751 (Minn. App. 1996)* (a will may in an appropriate case impose enforceable duties on the surviving joint tenant). Merely consenting to the probate of a will purporting to transfer a portion of real estate held in joint tenancy is not an election nor does it estop the surviving joint tenant from asserting the right of survivorship. *Harbin v. Harbin, 582*

S.E.2d 131 (Ct. App. Ga. 2003).

(n14)Footnote 313. The power of one joint tenant to convey a share in the estate does not extend to a conveyance by metes and bounds, because the conveyance by one joint tenant cannot effect a partition in kind. Such a conveyance may, however, be effective to transfer an undivided interest, and its indication of the location of the share on the ground may be taken into account in a subsequent judicial partition. *Johnson v. MacIntyre, 740 A.2d 599 (Md. App. 1999).*

One of two joint tenants obviously cannot convey the entire estate. Where one joint tenant nonetheless contracts to convey the joint estate, although specific performance is not possible, the contracting joint tenant will be liable in damages for breach of contract. *Warner v. Denis, 933 P.2d 1372 (Haw. App. 1997).*

(n15)Footnote 314. *Klouda v. Pechousek, 110 N.E.2d 258 (Ill. 1953). Cf. Hammond v. McArthur, 183 P.2d 1 (Cal. 1947)* (one of two joint tenants conveyed life estate to the other), *noted in 36 Cal. L. Rev. 133 (1948), 21 S. Cal. L. Rev. 295 (1948).*

(n16)Footnote 315. A less extreme instance of the same phenomenon is the reservation of an easement in the conveyance of a fee simple. Since the grantor had no easement in the granted property prior to the conveyance, the reservation creates the interest.

(n17)Footnote 316. *Boissonnault v. Savage, 625 A.2d 454 (N.H. 1993)* (severance by partition sale; one joint tenant's expectation of owning entire property on death of other joint tenant not sufficient to defeat severance); *Crowther v. Mower, 876 P.2d 876 (Utah App. 1994)* (severance by unrecorded quitclaim deed by one joint tenant; other joint tenant not good faith purchaser for purpose of recording statute).

(n18)Footnote 317. *See Heintz v. Hudkins, 824 S.W.2d 139 (Mo. App. 1992)* (in partition proceeding brought by one joint tenant, interlocutory order of sale did not sever joint tenancy); *In re Marriage of Hilke, 841 P.2d 891 (Cal. 1992)* (in divorce proceeding, dissolution of marriage and reservation of jurisdiction over property issues did not sever joint tenancy).

(n19)Footnote 318. *Boissonnault v. Savage, 625 A.2d 454 (N.H. 1993)* (severance by partition sale; one joint tenant's expectation of owning entire property on death of other joint tenant not sufficient to defeat severance); *Crowther v. Mower, 876 P.2d 876 (Utah App. 1994)* (severance by unrecorded quitclaim deed by one joint tenant; other joint tenant not good faith purchaser for purpose of recording statute).

(n20)Footnote 319. *See, e.g.*, S.C. Code Ann. § 27-7-40 (joint tenancy may not be conveyed without all joint tenants joining in the conveyance); Nev. Const. Art. 4, § 30 (homestead property held in joint tenancy may not be alienated without the joint consent of husband and wife).

(n21)Footnote 320. Cal. Civ. Code § 683.2 (severing instrument must be recorded before the severing joint tenant dies or must be notarized less than three days before severing joint tenant dies and recorded less than seven days after severing joint tenant dies; exception for conveyances from one joint tenant to another).

(n22)Footnote 321. 2 William Blackstone, Commentaries 179 (1766).

(n23)Footnote 322. At least one state, North Carolina, has codified the common law rule:

Upon conveyance to a third party by less than all of three or more joint tenants holding property in joint tenancy with right of survivorship, a tenancy in common is created among the third party and the remaining joint tenants, who remain joint tenants with right of survivorship as between themselves. Upon conveyance to a third party by one of two joint tenants holding property in joint tenancy with right of survivorship, a tenancy in common is created between the third party and the remaining joint tenant.

N.C. Gen. Stat. § 41-2. The use of the words "third party" in the first quoted sentence is somewhat misleading: the person referred to is the grantee of the conveying joint tenant, whoever that may be, even another one of the joint tenants.

(n24)Footnote 323. *Jackson v. O'Connell, 177 N.E.2d 194 (Ill. 1961)* (*citing* Edward Coke, Commentary Upon Littleton § 312, p. 196a (1628)). One commentator has observed that many modern cases on common law severance of joint tenancies are "embellished with quotations from Coke upon Littleton" and shrewdly attributes this to the fact that "where logical deduction is impossible, it is tempting instead to appeal to authority." Barry C. Crown, *Partial Alienation by One Co-Owner of Land*, 2000 Singapore Journal of Legal Studies 92.

(n25)Footnote 324. Edward Coke, Commentary Upon Littleton § 1, p. 9b (1628); 4 James Kent, Commentaries on American Law 7 (12th ed. by O.W. Holmes, 1873).

(n26)Footnote 325. *Mathis v. Hammond, 486 S.E.2d 356 (Ga. 1997).*

(n27)Footnote 326. *Clark v. Carter, 70 Cal. Rptr. 923 (1968); Canterbury v. Kovacich, 74 P.3d 457 (Colo. App. 2003).*

(n28)Footnote 327. *Riddle v. Harmon, 162 Cal. Rptr. 530 (1980); In re Estate of Carpenter, 189 Cal. Rptr. 651 (1983).* For a recent case illustrating the use of a "straw party" conveyance by one joint tenant to convert the joint tenancy into a tenancy in common, *see Estate of Hoffman, 653 N.W.2d 94 (S.D. 2002).*

(n29)Footnote 328. For a list of such statutes, *see* § 31.06(c), *supra*. *See Minonk State Bank v. Grassman, 447 N.E.2d 822 (Ill. 1983).* On this case, *see* Jeffrey Jackson, *Voluntary Termination of Joint Tenancies: Illinois Eliminates the Straw Man*, 17 John Marshall L. Rev. 765 (1984). *See also Re v. Re, 46 Cal. Rptr. 2d 62 (1995)* (two of three joint tenants created joint tenancy between themselves -- and tenancy in common with third joint tenant -- by self conveyance); Neb. Rev. Stat. § 76-118(4) (conveyance by one joint tenant to himself with "the intention to effect a severance of the joint tenancy" has that effect). *Contra: In re Lambert, 34 B.R. 41 (Bankr. D. Colo. 1983). See generally* Peter Butt, *Severance of Joint Tenancy by Unilateral Declaration: New Proposals in New South Wales*, 69 Australian L.J. 570 (1995).

A transfer by one joint tenant from himself to himself as trustee of his revocable trust severs the joint tenancy. *Smolen v. Smolen, 956 P.2d 128 (Nev. 1998).*

Severance by self-conveyance does not violate an injunction against transfer or disposition pending a dissolution of marriage. *Mitchell v. Mitchell, 91 Cal. Rptr. 2d 192 (Cal. App. 1999). Cf. Estate of Hoffman, 653 N.W.2d 94 (S.D. 2002)* (holding that severance of joint tenancy and its conversion into a tenancy in common -- in this case by use of a "straw party" conveyance -- does not violate a restraining order against transfers).

(n30)Footnote 329. *See* Samuel M. Fetters, *An Invitation to Commit Fraud: Secret Destruction of Joint Tenant Survivorship Rights, 55 Fordham L. Rev. 173 (1986).*

(n31)Footnote 330. *California.* Cal. Civ. Code § 683ff. *See also Patience v. Snyder, 93 Cal. Rptr. 2d 265 (2000)* (holding that purpose of statute is prevent fraud or secret suppression of the severance, not to provide record notice to purchasers concerning the state of the title).

Kentucky. KY. Rev. Stat. Ann. § 381.130 (not applicable to property that constitutes principal residence of married couple).

Utah. In re Estate of Knickerbocker, 912 P.2d 969 (Utah 1996) (requiring recordation for validity of self-conveyance, in order to give other joint tenant or tenants an opportunity to discover the severance), *noted in 1997 Utah L. Rev. 226.*

In 2002 Utah Code Ann. § 57-1-5 was amended to make clear that the interest of one joint tenant in the joint tenancy is severed and thereafter held in tenancy in common when one joint tenant makes a "bona fide" self-conveyance.

(n32)Footnote 331. *Tenhet v. Boswell, 554 P.2d 330, 334-35 (Cal. 1976)* (Mosk, J.). The question is as old as Littleton and Coke. *See* Edward Coke, Commentary Upon Littleton § 302, p. 191b.

(n33)Footnote 332. 2 American Law of Property 10 at n.10 (A. James Casner ed. 1952).

(n34)Footnote 333. *Swartzbaugh v. Sampson, 54 P.2d 73 (Cal. 1936), noted in 25 Cal. L. Rev. 202 (1937);* William E. Burby, Handbook of the Law of Real Property 221 (3d ed. 1965).

(n35)Footnote 334. *Tenhet v. Boswell, 554 P.2d 330 (Cal. 1976), noted in 66 Cal. L. Rev. 69 (1978).* The surviving joint tenant who did not sign the lease may, of course, have acted in such a way during its existence as to have ratified the lease or at least be estopped to reject it. *Lindseth v. Huffman, No. D038138, 2002 Cal. App. Unpub. LEXIS 6003 (Cal. App. 2002)* (finding no estoppel in the facts of that case).

(n36)Footnote 335. *Tindall v. Yeats, 64 N.E.2d 903 (Ill. 1946).* As leases come to be treated "like any other contract," this analogy should become ever more obvious.

(n37)Footnote 336. *Bangen v. Bartelson, 553 N.W.2d 754 (N.D. 1996)* ("when one joint tenant leases her own interest in the common property to another without the consent of the other joint tenant, the lessee succeeds to the rights of the lessor, and is entitled to enjoy the possession of the property with the other joint tenant just as fully as the lessor would but for the lease").

(n38)Footnote 337. Comment, *Protecting a Mortgagee's Interest Against a Surviving Joint Tenant, 11 Stan. L. Rev. 574, 578 n. 30 (1959)* ("Current policy among commercial lenders in California is to refuse loans on the security of a mortgage by one joint tenant, probably because title companies refuse to insure them due to the lack of positive law in the area.").

For an illustration of the negligence referred to the text, *see Stewart v. AmSouth Mortgage Co., 679 So. 2d 247, 248* (Ala. App.) *rev'd, 679 So. 2d 251 (Ala. 1996).* At trial, the AmSouth lawyer testified that, at the time of closing, AmSouth had not furnished him with the deed and he was not aware that the mother and the daughter owned the property as joint tenants. He further explained:

> This was during what we call the glut of refinancing. We were doing forty of these in a given day, literally, and we were sending abstracts out to abstract companies. Abstract companies were behind. I did know from AmSouth that the deed was to be conveyed from [the mother] to her daughter... . So when this particular loan came up on that given day the abstract had not come back to me. I called the abstract [company] and got what I commonly call "a verbal," which is done by one of my real estate secretaries. They came back and said ... "there are no liens or judgments on the property." Unfortunately, I presumed the deed had been transferred and strictly into [the daughter's] name and not knowing that we did not request that [the mother] sign the mortgage. If I had seen the abstract and if I had seen the deed then I would have had to insist [the mother] sign the mortgage... .

(n39)Footnote 338. York v. Stone, 1 Salk. 158, *91 Eng. Rep. 146 (Ch. 1709);* Simpson's Lessee v. Ammons, 1 Bin. Pa. 175 (1806); *Moliere's Lessee v. Noe, 4 U.S. 450 (Pa. 1806).* Some modern cases continue to adhere to the common law. *E.g., Stewart v. AmSouth Mortgage Co., 679 So. 2d 247, 248 (Ala. App. 1995), rev'd on other grounds, 679 So. 2d 251 (Ala. 1996); Schaefer v. Peoples Heritage Sav. Bank, 669 A.2d 185 (Me. 1995)* (but noting that if mortgage had been discharged rather than foreclosed, mortgagor would have remained a joint tenant).

(n40)Footnote 339. *People v. Nogarr, 330 P.2d 858 (Cal. 1958), noted in 11 Stan. L. Rev. 574 (1959), 47 Ky. L.J.*

565 (1959); Harms v. Sprague, 456 N.E.2d 976 (Ill. App. 1983) ("a mortgage creates only a lien and does not pass or interfere with the mortgaging joint tenant's title"); *Townsend v. Chase Manhattan Mortgage Corp, 657 N.W.2d 741 (Mich. App. 2002)* (mortgage given by one joint tenant does not survive death of mortgagor even when proceeds of mortgage were used to purchase the property). *See also Brant v. Hargrove, 632 P.2d 978 (Ariz. App. 1981)* (finding no severance when husband who held with his wife as joint tenants executed a deed of trust signing for himself and forging his wife's signature). *Contra: General Credit Co. v. Cleck, 609 A.2d 553 (Pa. 1992)* (despite jurisdiction's acceptance of "lien theory" of mortgages, mortgage given by one joint tenant held to sever joint tenancy).

(n41)Footnote 340. It has been argued that a mortgage by one joint tenant severs the estate because it destroys the unity of interest. 2 American Law of Property 10 at n.13 (A. James Casner ed. 1952). Yet this view seems inconsistent with the view that an unforeclosed creditor's lien does not destroy the unity of interest.

(n42)Footnote 341. Wis. Stat. Ann. § 700.24.

(n43)Footnote 342. *See* Lewis M. Simes, Handbook of the Law of Future Interests § 117, p. 249 (2d ed. 1966).

(n44)Footnote 343. *See, e.g., Michalski v. Michalski, 142 A.2d 645 (N.J. Super. Ct. 1958).*

(n45)Footnote 344. *See* 6 American Law of Property § 26.76, p. 522 (A. James Casner ed. 1952).

(n46)Footnote 345. *O'Hagan v. United States, 86 F.3d 776 (8th Cir. 1996)* (applying Minnesota law) (joint tenant relied on continued existence of joint tenancy by signing mortgage note). *But see Estate of Gulledge, 673 A.2d 1278 (D.C. App. 1996)* (payment of consideration for undivided one-half interest in joint tenancy did not create protected expectation of survivorship sufficient to defeat severance).

(n47)Footnote 346. On partition, *see* Chapter 38, *infra.*

(n48)Footnote 347. *Brown v. Brown, 706 N.E.2d 872 (Ohio Ct. Com. Pl. 1998).*

(n49)Footnote 348. *E.g.*, N.Y. Est., Powers & Trusts Law § 5-1.1-A; N.C. Gen. Stat. § 30-3.2. *See also* Uniform Probate Code § 2-205(1).

(n50)Footnote 349. *In re Estate of Antonopoulos, 993 P.2d 637 (Kan. 1999).*

(n51)Footnote 350. Uniform Probate Code § 2-801(b)(3):

A surviving joint tenant [or tenant by the entireties] may disclaim as a separate interest any property or interest therein devolving to him [or her] by right of survivorship. A surviving joint tenant [or tenant by the entireties] may disclaim the entire interest in any property or interest therein that is the subject of a joint tenancy [or tenancy by the entireties] devolving to him [or her], if the joint tenancy [or tenancy by the entireties] was created by act of a deceased joint tenant [or tenant by the entireties], the survivor did not join in creating the joint tenancy [or tenancy by the entireties], and has not accepted a benefit under it.

Without a power to disclaim, the only way to avoid the automatic right of survivorship was to sever prior to death, a practice once commonly recommended by estate planners. *See Severing Joint Property Interests*, 16 Real Property, Probate, and Trust Law J. 435 (1981) (Report of the Committee on Estate Planning and Drafting: Inter Vivos Transfers and Property Ownership).

(n52)Footnote 351. *Boucher v. Johnson, 373 A.2d 349 (N.H. 1977). See also In re Estate of Lamson, 662 A.2d 287 (N.H. 1995)* (executor of estate of survivor may renounce on behalf of estate).

(n53)Footnote 352. *See, e.g.*, Conn. Gen. Stat. § 45a-583(f):

The disclaimer of an interest in real property by a joint tenant following the death of another joint tenant shall have the same effect as if (1) before dying, the deceased joint tenant had severed his interest by a conveyance to, and receipt of, reconveyance from, a stranger, (2) such severed interest of the deceased joint tenant, upon his death, had passed in equal shares to any nondisclaiming joint tenant or joint tenants, and (3) if there were no nondisclaiming joint tenants, as if such interest had passed as part of estate of the deceased joint tenant.

See also Wis. Stat. Ann. § 701.27 (permitting disclaimer by surviving joint tenants); MD. Ann. Code, Est. & Trust § 9.201 (same).

(n54)Footnote 353. UPC art. 2, pt. 11, replacing § 2-801.

(n55)Footnote 354. For a critical analysis of the act, *see* Adam J. Hirsch, *Revisions in Need of Revising: The Uniform Disclaimer of Property Interests Act, 29 Fla. St. U. L. Rev. 109 (2001). See also* the candid discussion by the reporter for the UDOPIA, William P. LaPiana, *Some Property Law Issues in the Law of Disclaimers*, 38 Real Property, Probate & Trust L. J. 207 (2003).

(n56)Footnote 355. Uniform Disclaimer of Property Interests Act § 7(a).

(n57)Footnote 356. As a legal matter, the right of survivorship in joint tenancy is clear enough; as a practical matter, it may require time and money to establish title in the survivor to the satisfaction of title examiners. A few states have adopted statutes aimed at streamlining the process. *See, e.g.*, Okla. Stat. Ann. tit. 58, § 912, *criticized in* A. F. Ringold, Comment, *Concurrent Estates: A Job Not Well Done -- Oklahoma's New Joint Tenancy Termination Statute, 29 Okla. L. Rev. 121 (1976). See also* Utah Code Ann. § 57-1-5.1 (documents evidencing the termination of joint tenancies may not be recorded unless they include an affidavit with the legal description of the property, a description of the interest to be terminated, indexing identification of the instrument by which the interest was created, and a copy of any relevant death certificate).

(n58)Footnote 357. 2 William Blackstone, Commentaries 186 (1766).

(n59)Footnote 358. In at least one state, Illinois, this result is required by statute. 765 ILCS 1005/2 (in case of condemnation of property held in joint tenancy or tenancy by the entirety proceeds in the hands of the County Treasurer are subject to survivorship, but any tenant may claim a share without consent of other and thereby terminate the right of survivorship).

(n60)Footnote 359. *Boissonnault v. Savage, 625 A.2d 454 (N.H. 1993).* Under the Bankruptcy Act the trustee in bankruptcy is empowered under certain circumstances to sell the interests of both debtor and non-debtor joint tenant or tenants, preserving to the non-debtor only the appropriate share of the sale proceeds. Bankruptcy Code § 363(h) & (j). *See* § 31.07(e), *supra.* A similar power exists to collect delinquent federal income taxes. I.R.C. § 7403.

(n61)Footnote 360. *Musa v. Segelke & Kohlhaus, 272 N.W. 657 (Wis. 1937); Eder v. Rothamel, 95 A.2d 860 (Md. 1953), noted in 14 Md. L. Rev. 151 (1954); Grothe v. Cortlandt Corp., 15 Cal. Rptr. 2d 38 (Cal. App. 1992)* (recorded levy that has not yet resulted in execution sale did not sever joint tenancy). *See also Perrot v. Frankie, 605 So. 2d 118 (Fla. App. 1992)* (by statute, judgment against one joint tenant does not become effective lien on property until recorded); *Knibb v. Security Ins. Co., 399 A.2d 1214 (R.I. 1979)* (levy of execution is a mere lien which does not sever a joint tenancy until the judicial sale).

(n62)Footnote 361. *Jackson v. Lacey, 97 N.E.2d 839 (Ill. 1951), noted in 30 Chi.-Kent L. Rev. 189 (1952).*

(n63)Footnote 362. *Porter v. Porter, 472 So. 2d 630 (Ala. 1985).*

(n64)Footnote 363. *See* § 33.08(d), *infra*.

(n65)Footnote 364. *Berry v. Berry, 658 A.2d 1097, 1099 (Me. 1995).* Another court has observed that "[i]t is generally improper to continue a joint or common tenancy between the parties, as contrary to the public policy of discouraging continued litigation and ongoing financial interaction between divorced spouses." *In re Marriage of Simon, 856 P.2d 47 (Colo. App. 1993).* The courts are not unanimous on the point. *See Hodson v. Keiser, 81 S.W.3d 363 (Tex. App. 2002)* ("[I]t is not uncommon for spouses to retain a joint tenancy in the marital homestead until the children reach majority... . This compromise may be necessary when there are insufficient assets to permit offsetting property awards to the spouses... . Where minor children are involved, it may be preferable for both spouses to maintain an interest in the property so that the children may continue to live in the home.").

(n66)Footnote 365. Alaska Stat. § 13.12.804.

(n67)Footnote 366. Ark. Code § 9-12-317.

(n68)Footnote 367. Conn. Gen. Stat. Ann. § 47-14g.

(n69)Footnote 368. Mich. Comp. Laws Ann. § 552.102.

(n70)Footnote 369. Ohio Rev. Code Ann. § 5302.20(C)(5).

(n71)Footnote 370. S.C. Code Ann. § 27-7-40.

(n72)Footnote 371. Va. Code Ann. § 20-111.

(n73)Footnote 372. Uniform Probate Code § 2-804(b), 8 U.L.A. 184 (Supp. 1994). For states adopting the Uniform Probate Code section, *see* Ariz. Rev. Stat. Ann. § 14-2804(A)(2); Colo. Rev. Stat. § 15-11-804(2)(b); Haw Rev. Stat. § 506:2-804(b)(2); Mont Code Ann. § 72-2-804(2)(b); N.M. Stat. Ann. § 42-2-804(B)(2); N.D. Cent. Code § 30.1-10-04(2)(b); S.D. Codified Laws § 29A-2-804(b)(2).

(n74)Footnote 373. *Mann v. Bradley, 535 P.2d 213 (Colo. 1975); Wardlow v. Pozzi, 338 P.2d 564 (Cal. 1959); Sondin v. Bernstein, 467 N.E.2d 926 (Ill. App. 1984); Watford v. Hale, 410 So. 2d 885 (Ala. 1982);* In the *Matter of Estate of Bates, 492 N.W.2d 704 (Iowa App. 1992); Zulk v. Zulk, 502 N.W.2d 116 (S.D. 1993); Waxler v. Dalstead, 529 N.W.2d 176 (N.D. 1995); United States v. Gibbons, 71 F.3d 1496 (10th Cir. 1995)* (applying Colorado law). *See Estate of Croteau v. Croteau, 722 A.2d 464 (N.H. 1998)* (Broderick, J. concurring) (advocating recognition of a presumption that divorce severs a joint tenancy held by husband and wife unless there is "a clear expression" of a contrary intention).

In a bizarre twist on the usual situation, in which a court finds a presumed intention to sever to save the parties the inconveniences of a continued joint tenancy after divorce, a Virginia court held that a statute converting joint tenancies into tenancies in common when the owners divorce operated to defeat the intention of a divorcing couple who converted their tenancy by the entirety into a joint tenancy apparently with the intention of preserving the right of survivorship after divorce. *McDaniel v. May, 43 Va. Cir. 589 (1997)* (construing Va. Code Ann. § 20-111).

(n75)Footnote 374. *In re Tibbetts, 186 B.R. 140 (Bankr. S.D. Ala. 1995)* (divorce decree converted tenancy in common for joint lives with alternative contingent remainders into joint tenancy).

(n76)Footnote 375. *Estate of Castiglioni, 47 Cal. Rptr. 2d 288, 289 n.2 (Cal. App. 1995).*

(n77)Footnote 376. *Re Estate of Larendon, 266 A.2d 763, 42 A.L.R.3 D 1107 (Pa. 1970), noted in 9 Duquesne L. Rev. 297 (1970); Anderson v. Grasberg, 78 N.W.2d 450 (Minn. 1956), noted in 3 How. L.J. 163 (1957), 33 N.D. L. Rev. 118 (1957), 43 Va. L. Rev. 265 (1957); Bradley v. Fox, 129 N.E.2d 699 (Ill. 1955), noted in 5 De Paul L. Rev. 316 (1956), 31 N.Y.U. L. Rev. 963 (1956), 58 W. Va. L. Rev. 422 (1956), 9 Vand. L. Rev. 892 (1956), 1 Vill. L. Rev. 358 (1956), 34 Chi.-Kent. L. Rev. 318 (1956); In re King's Estate, 52 N.W.2d 885 (Wis. 1952), noted in* 5 ala. L. Rev. 152 (1952), *2 De Paul L. Rev. 101 (1952), 27 Tul. L. Rev. 131 (1952), 6 Okla. L. Rev. 228 (1953), 1953 Wis. L. Rev. 567;*

Welsh v. James, 95 N.E.2d 872 (Ill. 1950), noted in 29 Chi.-Kent. L. Rev. 260 (1951), 20 Fordham L. Rev. 211 (1951), 1951 U. Ill. L.F. 172, 1951 Wash. U. L.Q. 582; Ponke v. Ponke, 564 N.W.2d 101 (Mich. App. 1997); Gallimore v. Washington, 666 A.2d 1200 (D.C. App. 1995) (murder of one joint tenant by another severs joint tenancy); *Lakatos v. Billotti, 509 S.E.2d 594 (W. Va. 1998)* (interpreting slayer statute to deprive murdering joint tenant of all interest in property).

(n78)Footnote 377. *Whitfield v. Flaherty, 228 Cal. App. 2d 753 (1964).* A somewhat similar list appears in *Duncan v. Vassaur, 550 P.2d 929, 930-31 (Okla. 1976).*

(n79)Footnote 378. Uniform Probate Code § 2-803:

(b) Any joint tenant who feloniously and intentionally kills another joint tenant thereby effects a severance of the interest of the decedent so that the share of the decedent passes as his property and the killer has no rights by survivorship. This provision applies to joint tenancies [and tenancies by the entirety] in real and personal property, joint and multiple-party accounts in banks, savings and loan associations, credit unions and other institutions, and any other form of co-ownership with survivorship incidents.

...

(d) Any other acquisition of property or interest by the killer shall be treated in accordance with the principles of this section.

(e) A final judgment of conviction of felonious and intentional killing is conclusive for purposes of this section. In the absence of a conviction of felonious and intentional killing the Court may determine by a preponderance of evidence whether the killing was felonious and intentional for purposes of this section.

(f) This section does not affect the rights of any person who, before rights under this section have been adjudicated, purchases from the killer for value and without notice property which the killer would have acquired except for this section, but the killer is liable for the amount of the proceeds or the value of the property... .

8 U.L.A. 172 (1983). In 1990 a revised Uniform Probate Code was promulgated. Section 2-803 was substantially revised, although the general effect of the new version remains the same. The pre-1990 version is printed here because of the large number of states whose legislation it influenced.

(n80)Footnote 379. As a comment to the Uniform Probate Code § 2-803 makes clear, guilt or innocence in the sense of criminal law is not the issue:

While conviction in the criminal prosecution under this section is treated as conclusive on the matter of succession to the murdered person's property, acquittal does not have the same consequences. This is because different considerations as well as a different burden of proof enter into the finding of guilty in the criminal prosecution. Hence it is possible that the defendant on a murder charge may be found not guilty and acquitted, but if the same person claims as an heir or devisee of the decedent, he may in the probate court be found to have feloniously and intentionally killed the decedent and thus be barred under this section from sharing in the estate... . In many of the cases arising under this section there may be no criminal prosecution because the murderer has committed suicide.

8 U.L.A. 173 (1983).

(n81)Footnote 380. For a sensitive discussion of the murder-suicide problem, *see Estate of Castiglioni, 47 Cal. Rptr. 2d 288, 295-96 (1995), noted in 33 Idaho L. Rev. 53 (1997). See also Williams v. Thoman, 649 N.W.2d 1 (Iowa 2002)* (although local law provides that slaying joint tenant loses the right of survivorship, in a case of murder-suicide held that the slaying severed the joint tenancy, allowing the slayer's share to pass through the slayer's estate).

In some cases involving murder-suicide, the Simultaneous Death Act may also be relevant. *See* the discussion later in this subsection. *See also In re Estate of Miller, 840 So.2d 703 (Miss. 2003).*

(n82)Footnote 381. *See* § 31.06(a) *supra*.

(n83)Footnote 382. *Estate of Castiglioni, 47 Cal. Rptr. 2d 288 (1995)* (failure to require tracing would result in "placing in a better financial condition a spouse who terminates the marriage by murder than one who terminates the marriage by the legal process of dissolution of marriage"); *Estate of Garland, 928 P.2d 928 (Mont. 1996).*

(n84)Footnote 383. Kan. Stat. Ann. § 59-513.

(n85)Footnote 384. *See Hood v. Vandevender, 661 So. 2d 198 (Miss. 1996)* (holding that slayer statute does not apply to manslaughter). *Cf. In re Estate of Bartolovitch, 616 A.2d 1043 (Pa. 1992)* (one spouse's conviction of voluntary manslaughter severs tenancy by the entirety).

(n86)Footnote 385. Ala. Code § 43-8-253(b).

(n87)Footnote 386. R.I. Gen. Laws § 33-1-1-6(b): victim's estate receives any enrichment that would have accrued to slayer as result of victim's death; if innocent tenant survives slayer, he or she receives benefit from victim's estate; if slayer survives all innocent tenants, victim's estate gets one-half at once and other half at slayer's death.

(n88)Footnote 387. *Gallagher v. Kirschner, 632 N.Y.S.2d 857 (App. Div. 1995).*

(n89)Footnote 388. *Moore v. Self, 473 S.E.2d 507 (Ga. 1996). See also* Okla. Stat. Ann. tit. 60, § 74 (incompetency does not terminate joint tenancy or tenancy by the entirety).

(n90)Footnote 389. Uniform Simultaneous Death Act § 24-3:

(a) Where there is no sufficient evidence that two joint tenants or tenants by the entirety have died otherwise than simultaneously, the property shall be distributed one half as if one had survived and one half as if the other had survived. If there are more than two joint tenants and all of them have so died, the property thus distributed shall be the proportion that one bears to the whole number of joint tenants.

(b) For the purpose of this section, the term "joint tenants" includes owners of property held under circumstances which entitled one or more to the whole of the property on the death of the other or others.

8A U.L.A. 164 (1985).

(n91)Footnote 390. 8B U.L.A. 257 (1993). Uniform Probate Code § 2-702(c) now also requires that "co-owners with the right of survivorship" survive for at least 120 hours. 8 U.L.A. 150 (Supp. 1994). Note that this provision,

treating survivorship for no more than 120 hours as if the deaths were in fact simultaneous, causes the loss of the marital deduction in estate taxation.

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CHAPTER 31 JOINT TENANCIES

4-31 Thompson on Real Property, Thomas Editions § 31.09

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§ 31.09 The Future of the Law of Joint Tenancies.

The law of joint tenancies is deeply rooted in Anglo-American legal history. That in itself would seem to secure it a continuing place in the American law of property, but unless it corresponds to some present and future human need, it will not flourish. The right of survivorship, which Sir William Blackstone called "the grand incident of joint estates," n391 seems perennially popular; it has certainly demonstrated its appeal by spreading to forms of personal property unknown in the Middle Ages, such as bank accounts and investment securities. The joint tenancy today is often a convenient alternative to a will.

Yet the right of survivorship is the weakness as well as the strength of the joint tenancy. Because of the injustice of unexpected rights of survivorship, some American states early eliminated it as an incident of joint tenancies, and many others created a statutory presumption against joint tenancies. Blackstone long ago conceded that "in general it is advantageous for the joint tenants to dissolve the jointure; since thereby the right of survivorship is taken away, and each may transmit his own part to his own heirs." n392 Misgivings about the right of survivorship may explain the joint tenant's anomalous power to alienate; they certainly explain some modern cases recognizing a severance in situations short of the destruction of one of the time-hallowed unities.

A joint tenant's power to sever the joint estate by a simple conveyance may defeat the expectations in another way: the other joint tenant or tenants may have expected to benefit on the death of the first to die. This has led some practitioners to counsel clients electing a joint tenancy to include an agreement against sale or partition, or to advise against the use of the traditional joint tenancy altogether in favor of a joint life estate with alternative contingent remainders or a trust with beneficial co-owners. The problem is acute in jurisdictions permitting severance by a self-conveyance, particularly by a self-conveyance undisclosed to the other joint tenant or tenants and perhaps even unrecorded and therefore undiscoverable. An unscrupulous joint tenant could use this power to preserve a share for heirs or devisees, while retaining the option to suppress the self-conveyance in case of the prior decease of the other joint tenant or tenants and gain the entire estate by right of survivorship. Courts and legislatures have begun to display some hostility to secret severance.

Perhaps the greatest threat to the traditional right of survivorship, however, is the slowly growing acceptance of the survivor's power to disclaim. The traditional theory that each joint tenant is seised of the whole and that, in

consequence, the death of one joint tenant does not result in the conferral of any benefit on the survivor but only in the termination of the decedent's right may be yielding to an acceptance of the joint tenancy as simply a means of providing for succession at death, in other words, a "will substitute."

The erosion of the doctrine of the four unities in cases involving both the creation and the severance of joint tenancies has greatly reduced the technical distinction between this form of concurrent ownership and tenancies in common. The driving force here has been the increased emphasis on intention. Intention has always been important in the law, but heretofore it was as important that it be expressed in stereotyped legal forms. The law of joint tenancies is approaching, although it has not yet reached, the point at which two or more persons owning property together may hold in joint tenancy only if and so long as each intends to do so. When that day arrives, it will inevitably be marked by an even greater need for individual judicial determinations of the state of many titles. Then at last it might be possible to begin the search for manifestations of intention that will be universally accepted as legally binding.

One other source of pressure for further development of the law of joint tenancies may be noticed. In jurisdictions that have eliminated tenancies by the entirety (a form of concurrent ownership restricted to married persons), the choice of concurrent estates is limited to joint tenancies and tenancies in common; the same choice is available to all. In jurisdictions that still have tenancies by the entirety, on the contrary, the menu of choices is longer and includes one available only to co-owners married to one another. To the extent that renewed demand for joint tenancies in such jurisdictions comes from married persons seeking a form of concurrent ownership comparable to tenancies by the entirety, it may generate pressure to assimilate joint tenancies to tenancies by the entirety. To the extent unmarried persons seek whatever advantages inhere in the "marital estate," it may lead to pressure to admit all "couples" (however defined).

FOOTNOTES:

(n1)Footnote 391. 2 William Blackstone, Commentaries 183-84 (1766).

(n2)Footnote 392. 2 William Blackstone, Commentaries 187 (1766).

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CHAPTER 31 JOINT TENANCIES

4-31 Thompson on Real Property, Thomas Editions § 31.10

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§ 31.10 Bibliography.

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Sum Owing on Mortgage or Other Lien, 48 A.L.R.2d (1956) 1305.

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Annotation, *Right Under Mortgage by Co-owners of Undivided Interests to Foreclose as Against Less Than All of Such Interests*, 82 A.L.R. (1933) 1347.

Annotation, *Severance or Termination of Joint Tenancy by Conveyance of Divided Interest Directly to Self, 7 A.L.R.4th (1981) 1268.*

Annotation, *Survivorship in Respect* of *Real or Personal Property as Affected by Murder of One of The Parties Jointly*

Interested by Other Party so Interested, 98 A.L.R. (1935) 773.

Annotation, *Use of Word "Joint" or "Jointly" in Provision of Deed Other Than the Granting or Habendum Clause as Indicating Intention to Create a Joint Tenancy Rather Than One in Common Between the Grantees*, 157 A.L.R. (1957) 566.

Annotation, *What Acts by Joint Tenant or Joint Tenants Will Sever or Terminate Joint Tenancy*, 129 A.L.R. (1940) 813.

Annotation, *What Acts by One or More Joint Tenants Will Sever or Terminate the Tenancy, 64 A.L.R.2d (1959) 918.*

Annotation, *What Constitutes a Devise or Bequest in Joint Tenancy Notwithstanding Statute Raising a Presumption Against Joint Tenancy, 46 A.L.R.2d (1956) 523.*

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Supp. To CHAPTER 31 JOINT TENANCIES

4-31 Thompson on Real Property, Thomas Editions Supp. to § 31.02

Supp. to § 31.02 Analytical Synopsis of the Law of Joint Tenancies.

[Go To Main]

Add at the end of the note:

Revised Uniform Partnership Act § 202 (to the same effect).

Add at end of note:

Legal systems derived from Roman law express the right to partition with the maxim, *"Nemo in communione potest invitus detineri"* (No one can be kept in co-ownership against his will).

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Supp. to § 31.06 Creation of Joint Tenancies.

[Go To Main]

§ 31.06(a) Creation of Joint Tenancies at Common Law. [Go To Main]

Add after second sentence:

Even in the absence of legislation, there may now be no more than a presumption that joint tenants hold equal shares in the property.

Add at the end of the first sentence in the note:

Vt. Stat. Ann. tit. 27, § 2 (joint tenants may own unequal interests in the joint tenancy).

Add at the end of the first paragraph in note 51:

The Indiana Court of Appeals has refused to allow equitable adjustment of the equal shares of joint tenants. *Ramer v. Smith, 896 N.E.2d 563 (Ind. App. 2008)* .

§ 31.06(b) The Doctrine of the Four Unities. [Go To Main]

Add to note 60:

Nelson v. Killman (In re Killman), 2010 Bankr. LEXIS 625 (Bankr. W.D. Mo. Feb. 26, 2010) (finding no authority for the premise that unity of possession requires that all of the tenants live on the property).

Add at the end of the note:

Estate of Johnson, 739 N.W.2d 493 (Iowa 2007) (renouncing Doctrine of Four Unities in favor of an "intent-based approach" but still rejecting evidence of intent unless expressed in an "instrument effectuating the intent"). *Cf In re Estate of Potthoff, 733 N.W.2d 860 (Neb. 2007)* (maintaining Doctrine of Four Unities and denying effect to notarized and recorded "notice of severance"); *Gonzalez v. Sanchez, 2008 Cal. App. Unpub. LEXIS 3533 (Cal. App. 2d Dist. 2008)* (utilizing Doctrine of Four Unities to determine whether joint tenancy was created).

§ 31.06(d) Modern Statutes Concerning Creation of Joint Tenancies. [Go To Main]

Add at the end of the note:

See Estate of Sherman ex rel. Maddock v. Estate of Sherman ex rel. Snodgrass, 597 S.E.2d 850 (S.C. App. 2004) .

At the end of the first full sentence in the run-over paragraph, add new footnote: n118.1

Add before *See* signal:

Colo. Rev. Stat. § 38-31-201 (conveyance purporting to create a tenancy by the entirety creates instead a joint tenancy).

Add to note 123:

Estate of Thomas, 199 P.3d 1090 (Wyo. 2009) (conveyance to grantors' two children "as tenants by the tntireties [sic] with right of survivorship, and not as tenants in common" held to create a joint tenancy).

Add at the end of the note:

See Estate of Shelton, 796 N.E.2d 955 (Ohio App. 2003) (transfer to two unmarried persons "as husband and wife, for their joint lives, remainder to the survivor" creates joint tenancy with right of survivorship).

Add at the end of the note:

See Smith v. Rucker, 593 S.E.2d 497 (S.C. App. 2004) (construing grant to two persons "for and during their joint lives and upon the death of either of them, then to the survivor... in fee simple" as creating a joint tenancy).

At the end of the first sentence of the first full paragraph, Add new Note 244.1: n244.1

Add at end of note:

Smith v. Cutler, 623 S.E.2d 644 (S.C. 2005) (explaining that "the Court created the estate of tenancy in common with a right of survivorship because South Carolina did not permit husband and wife to hold property as tenants by the entirety").

§ 31.06(g) Creation of Estates Similar to Joint Tenancies. [Go To Main]

Add to note 246 after citation of Hilterbrand:

In Oregon, a conveyance to two persons "not as tenants in common, but with right of survivorship," creates concurrent life estates with contingent remainders in the survivor. Such a conveyance is known as an "*Erickson* deed" after *Erickson v. Erickson, 115 P.2d 172 (1941)* , which recognized the estate. *In re Domestic Partnership of Branam and Beaver, 202 P.3d 886 (Or. App. 2009)* .

Add after the last sentence of the runover paragraph:

A South Carolina court has reached the same conclusion.

FOOTNOTES:
(n1)Footnote 118.1. For Native Americans subject to the American Indian Probate Reform Act of 2004, Pub. L. No. 108-374, *118 Stat. 1773,* the common law presumption in favor of joint tenancy with right of survivorship was reinstated in devises to two or more, as part of a program to reduce further fractionation of Indian allotments. *25 U.S.C. § 2206(c)*.

(n2)Footnote 244.1. In Michigan, the same result is reached by a grant in "joint tenancy with full rights of survivorship." *Jackson v. Green, 771 N.W.2d 675 (Mich. 2009)* . In Oregon, the appropriate words are "not as tenants in common, but with right of survivorship." *In re Domestic Partnership of Branam and Beaver, 202 P.3d 886 (Or. App. 2009)* .

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Supp. To CHAPTER 31 JOINT TENANCIES

4-31 Thompson on Real Property, Thomas Editions Supp. to § 31.07

Supp. to § 31.07 Incidents of Joint Tenancies.

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§ 31.07(b) Action for Contribution. [Go To Main]

Add at end of first full paragraph:

Once an improvement is agreed to by a co-tenant, the co-tenant may not refuse to contribute to its cost merely because the improvement does not result in a permanent increase in the value of the common owned property.

§ 31.07(d) Action of Ejectment. [Go To Main]

Delete.

Add after the block quotation at the end of the first full paragraph:

Special problems may arise if the purportedly ousted cotenant is incompetent during some or all of the relevant period. n258.1

Add at the end of the note:

Parker v. Shecut, 562 S.E.2d 620 (S.C. 2002) (changing locks and refusing a key constitutes ouster).

Replace cited case with:

Georgia v. Randolph, 547 U.S. 103, 126 S.Ct. 1515 (2006) .

§ 31.07(e) Creditors' Rights. [Go To Main]

Add after second paragraph:

In states still recognizing the common law of exoneration of debt in the law of wills, a general direction in a will to "pay all just debts" may not be interpreted to require the estate to pay the mortgage debt on property passing by right of survivorship to the joint tenant of the testator.[299.1] n299.1

Add after the last full sentence on the page:

The judgment lien also becomes valueless if the debtor's property becomes subject to a contract of sale prior to execution. By virtue of the doctrine of equitable conversion, the seller's interest is mere legal title held as security for the payment of the purchase price. "For purposes of determining whether a judgment lien may attach, it is equitable title that matters."

Add at end of note:

Bankers' Trust Co. v. Woodall, 144 P.3d 126 (N. Mex. App. 2006) .

Add at end of note:

Wisner v. Pavlin, 719 N.W.2d 770 (S.D. 2006) (refusing to extend homestead right to survivor of unmarried couple).

Add new note 294.1 at the end of the first sentence of the second paragraph: n294.1

FOOTNOTES:
(n3)Footnote 299.1. *Manders v. King, 667 S.E.2d 59 (Ga. 2008)* .

(n4)Footnote 294.1. Bankruptcy courts, applying state law, disagree concerning the time of severance of the joint tenancy and its conversion into a tenancy in common. *Compare In re Lambert, 34 B.R. 41 (Bankr. D. Colo. 1983)*

(holding that filing of the petition severs the joint tenancy) with *Durnal v. Borg-Warner Acceptance Corp. (In re DeMarco), 114 B.R. 121 (Bankr. N.D. W.Va. 1990)* (holding that filing of the petition does not sever the joint tenancy).

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Supp. To CHAPTER 31 JOINT TENANCIES

4-31 Thompson on Real Property, Thomas Editions Supp. to § 31.08

Supp. to § 31.08 Termination of Joint Tenancies.

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§ 31.08(a) Termination by Act of All Joint Tenants. [Go To Main]

Add to note 302:

Estate of Quick, 905 A.2d 471 (Pa. 2006) (leases executed by joint tenants individually did not sever joint tenancy although executed at different times because action did not signify intent to sever).

Add at end of note:

A judgment lien against the interest of one of the joint tenants cannot be levied against the equitable interest acquired by the purchaser by virtue of the doctrine of equitable conversion. *Chambers v. Cardinal, 935 A.2d 502 (Md. App. 2007)* .

Add to note 311:

Beudert-Richard v. Richard, 894 N.Y.S.2d 22 (Sup. Ct. App. Div. 2010) (separation agreement incident to divorce severs joint tenancy).

§ 31.08(b) Termination by Act of One Joint Tenant. [Go To Main]

Add before the See generally signal at the end of the first paragraph of the note:

Nicholas v. Nicholas, 83 P.3d 214 (Kan. 2004) (in the absence of a deed, neither informal writings nor an executed will sufficient to sever joint tenancy).

After the third sentence in the first full paragraph, add new sentence:

Similarly, a judicial partition is effective only on the date of the final decree, not on the filing of the petition.[317.1]
n317.1

Add to note 317.1:

Jackson v. Estate of Green, 771 N.W.2d 675 (Mich. 2009) (a dissenting justice thought the state's survival statute permitted the estate of a deceased joint tenant to maintain a partition action commenced while the estate's decedent was still alive).

Add to note 338:

Land America Commonwealth Title Ins. Co. v. Kolozetski, 992 A.2d 681 (N.H. 2010) (mortgage by one joint tenant severs joint tenancy).

Add at the beginning of the note:

Taylor v. Canterbury, 92 P.3d 961 (Colo. 2004) (recognizing effectiveness of severance by self-conveyance, but declining to decide whether the self-conveyance must be recorded to provide notice to other joint tenants).

Add at end of note:

Bankers' Trust Co. v. Woodall, 144 P.3d 126 (N. Mex. App. 2006) .

Add at end of note:

Ohio Rev. Code Ann. § 5302.20(C)(2) (in a joint tenancy with right of survivorship, one joint tenant can not unilaterally terminate the survivorship rights of another joint tenant).

Add after Minonk State Bank case:

Sathoff v. Sutterer, 869 N.E.2d 354 (Ill. App. Ct. 2007) (when two of three joint tenants conveyed from themselves to themselves also as joint tenants, the joint tenancy with the remaining co-tenant was severed) ("Common sense, as well as legal efficiency, dictates that [the two] should have been able to accomplish directly what they could otherwise achieve indirectly by the use of elaborate legal fictions.").

Add to paragraph on Utah:

In 2006 *Utah Code Ann. § 57-1-5* was further amended to make clear that where there are more than two joint tenants, a self-conveyance by one joint tenant does not sever the joint tenancy as to the remaining joint tenants.

Add paragraph between California and Kentucky:

Colorado. Taylor v. Canterbury, 92 P.3d 961 (Colo. 2004) (declining to decide whether self-conveyance by one joint tenant must be recorded to provide notice of severance to other joint tenants).

Add to note 330 after Kentucky:

New York.

N.Y. Real Prop. Law § 240-c.

Add at the end of the note:

See Biggers v. Crook, 656 S.E.2d 835 (Ga. 2008) (a mortgage or "deed to secure debt" does not sever a joint tenancy).

Add at the end of the run-over paragraph:

Where all joint tenants join in the mortgage, the unities are preserved and the joint tenancy is unaffected.

Add to note 339:

Biggers v. Crook, 656 S.E.2d 835 (Ga. 2008) (in case of first impression, held deed to secure debt executed by one joint tenant did not sever joint tenancy).

At the end of the first full paragraph, add new sentence:

If a joint tenant can disclaim the right of survivorship, then the will of the dying joint tenant can put the survivor to the election of disclaiming or taking some other offered benefit, but the intention to require the election must be clearly expressed. n355.1

§ 31.08(c) Termination by Operation of Law. [Go To Main]

Add at end of note:

Bankruptcy courts, applying state law, disagree concerning the time of severance of the joint tenancy and its conversion into a tenancy in common. *Compare In re Lambert, 34 B.R. 41 (Bankr. D. Colo. 1983)* (holding that filing of the petition severs the joint tenancy) with *Durnal v. Borg-Warner Acceptance Corp. (In re DeMarco), 114 B.R. 121 (Bankr. N.D. W.Va. 1990)* (holding that filing of the petition does not sever the joint tenancy).

Add at end of note:

Bankers' Trust Co. v. Woodall, 144 P.3d 126 (N. Mex. App. 2006) .

At the end of the first full paragraph, add new sentences:

Short of sale, a joint tenancy may be severed by operation of law when a joint tenant receives state-supplied Medicare benefits, in order for the state to recover the cost of care. As the states, at the urging of the federal government implement "asset recovery programs," the frequency of such severances may be expected to increase.

Add to note 373:

Young v. McIntyre, 672 S.E.2d 196 (W.Va. 2008) (in case of divorce, an agreement to sever a joint tenancy can be implied from conduct inconsistent with continuation of the joint tenancy).

Add to note 378:

In 2007 North Dakota followed Massachusetts and adopted legislation that deprived the slayer of the slayer's own share in property held in joint tenancy with the victim, raising a question of an unconstitutional forfeiture. *Mass. Gen. Laws ch. 265, § 46*; *N.D. Cent. Code § 30.1-10-03(3)(b)*. Each statute is the subject of a critical student comment. *See* Robert F. Hennessy, "Property--The Limits of Equity: Forfeiture, Double Jeopardy, and the Massachusetts 'Slayer Statute," 39 *Western New England L. Rev.* 159 (2009). *See* Bradley Myers, "The New North Dakota Slayer Statute: Does It Cause a Criminal Forfeiture?" *83 N.D. L. Rev. 997 (2007).*

Add at end of the paragraph:

Although recognizing that statutes may require a different result, the latest Restatement of Property reaffirms the position of the Restatement of Restitution that a slaying joint tenant is entitled only to one-half the income from the property for life.[378.1] n378.1

Add at the end of the note:

But see Ellis v. Ellis, 71 S.W.3d 705 (Tenn. 2002) (survivorship properties in Tennessee unaffected by the 120 hour provision of the Uniform Simultaneous Death Act), *noted in 33 U. Memphis L. Rev. 681 (2003).*

FOOTNOTES:
(n5)Footnote 317.1. *Rusnak v. Phebus, 2008 Tenn. App. LEXIS 328* (No. M2007-01592-COA-R9-CV, May 29, 2008) (matter of first impression in Tenn.); *Mercurio v. Headrick, 983 So.2d 773 (Fla. App. 2008)* (matter of first impression in Fla.); *Orlando v. DePrima, 870 N.Y.S.2d 871 (N.Y. Sup. 2008)* (citing *Rusnak*).

(n6)Footnote 355.1. *Williamson v. Williamson, 657 N.E.2d 651 (Ill. App. 1995)* .

(n7)Footnote 378.1. *Restatement (Third) of Property: Wills and Other Donative Transfers* § 8.4 (2003) (reaffirming *Restatement of Restitution* § 188).

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Annotations

Annotation, *Judgment Lien or Levy of Execution on One Joint Tenant's Share or Interest as Severing Joint Tenancy, 51 A.L.R.4th 906* .

Annotation, *Rights in Proceeds of Insurance on Property Held Jointly with Right of Survivorship, Where One of Joint Owners Dies Pending Payment of Proceeds, 4 A.L.R.3d 427* .

Annotation, *What Constitutes a Devise or Bequest in Joint Tenancy Notwithstanding Statute Raising a Presumption Against Joint Tenancy, 46 A.L.R.2d 523* .

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CHAPTER 32 TENANCIES IN COMMON

4-32 Thompson on Real Property, Thomas Editions 32.syn

AUTHOR: Professor John V. Orth School of Law University of North Carolina

§ 32.syn Synopsis to Chapter 32: TENANCIES IN COMMON

§ 32.01 Concurrent Estates.

§ 32.02 Analytical Synopsis of the Law of Tenancies in Common.

§ 32.03 Tenancies in Common in the Context of Concurrent Estates.

§ 32.04 Outline of the Chapter.

§ 32.05 History of the Law of Tenancies in Common.

§ 32.06 Creation of Tenancies in Common.

§ 32.06(a) Creation by Operation of Law: The Single Unity, Possession.

§ 32.06(b) Creation by Express Limitation.

§ 32.06(b)(1) At Common Law.

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§ 32.07 Incidents of Tenancies in Common.

§ 32.07(a) Action of Waste.

§ 32.07(b) Action for Contribution.

§ 32.07(c) Action of Account.

§ 32.07(d) Action of Ejectment.

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§ 32.08 Termination of Tenancies in Common.

§ 32.08(a) Termination by Act of All Tenants in Common.

§ 32.08(b) Termination by Act of One Tenant in Common.

§ 32.08(c) Termination by Operation of Law.

§ 32.09 The Future of the Law of Tenancies in Common.

§ 32.10 Bibliography.

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CHAPTER 32 TENANCIES IN COMMON

4-32 Thompson on Real Property, Thomas Editions § 32.01

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§ 32.01 Concurrent Estates.

Whenever two or more persons own the same thing at the same time, a form of concurrent ownership exists. At common law n1 concurrent estates in land are of three types: joint tenancies, tenancies in common, and tenancies by the entirety -- the latter limited to persons married to one another. (A fourth form of concurrent estate, tenancy in coparcenary, is now obsolete). n2 Concurrent estates in land are not restricted to freehold estates but may exist in leaseholds, easements, and other interests in real property; nor are they restricted to present estates, but may exist in future interests as well. A further form of concurrent ownership is recognized by statute, as opposed to common law, in those states adopting the Uniform Partnership Act. n3 Concurrent ownership of personalty is also recognized, the forms of ownership being copied from those for land.

Whenever property is owned by one person alone, there exists a sole ownership, known -- by contrast to the concurrent tenancies -- as a tenancy in severalty. At common law there is a presumption in favor of sole ownership: in the words of Sir William Blackstone, "all estates are supposed to be of this sort, unless where they are expressly declared to be otherwise." n4

FOOTNOTES:
(n1)Footnote 1. The "common law" referred to is the common law of England as it was at the time of American Independence, for which the best and most convenient source is Sir William Blackstone's four-volume Commentaries on the Laws of England, first published in 1765 to 1768. The present author is acutely aware that continuing to refer to this body of law in the present tense is peculiar for a number of reasons. First, because the common law of England continued to grow and change in its native land; second, because the transplanted common law continued to grow and change in the various American jurisdictions; and finally, because there is something truly metaphysical in talking presently about a "law" that is not now recognized and enforced in at least one jurisdiction. Nonetheless, the author is convinced that there continues to be value, not merely heuristic, in using the common law in this sense as the background against which to place all later developments.

(n2)Footnote 2. On tenancy in coparcenary, *see* Chapter 35, *infra*.

(n3)Footnote 3. On tenancy in partnership, s*ee* Chapter 34, *infra*. Ever since the days of Joseph Story, it has been recognized that concurrent ownership in and of itself does not establish a partnership. Joseph Story, Commentaries on

the Law of Partnership 3-4 (1841); Uniform Partnership Act § 7(2) ("Joint tenancy, tenancy in common, tenancy by the entireties, joint property, common property, or part ownership does not of itself establish a partnership, whether such co-owners do or do not share any profits made by the use of the property"), 7 U.L.A. 18 (1949).

(n4)Footnote 4. 2 William Blackstone, Commentaries 179 (1766).

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CHAPTER 32 TENANCIES IN COMMON

4-32 Thompson on Real Property, Thomas Editions § 32.02

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§ 32.02 Analytical Synopsis of the Law of Tenancies in Common.

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Tenancy in common is a form of concurrent estate; as such, it implies the ownership by two or more persons of the same property at the same time. n5 Forms of concurrent ownership are distinguishable by reference to three incidents: (1) alienability, the quality of being transferable inter vivos by sale or gift; (2) devisability, the quality of being transferable at death by devise; and (3) inheritability, the quality of passing at death to the heir of the deceased. Each tenant in common possesses an interest in the concurrent estate that is alienable, devisable, and inheritable. By contrast, each joint tenant possesses the power to alienate an interest, but no joint tenant possesses a devisable or inheritable interest; no tenant by the entirety has an interest that is devisable or inheritable. n6 Unlike joint tenancies and tenancies by the entirety, tenancies in common involve no right of survivorship.

By virtue of English statutes widely accepted as part of the common law in America, each tenant in common (like each joint tenant) has a right to demand partition of the estate, that is, its division into shares, each divided share to be held in severalty. n7 Partition in kind is obviously best suited to large, especially rural, estates. Because some estates are unsuited to partition in kind, a later English statute, also copied in America, provides for partition by sale and division of the proceeds. n8

FOOTNOTES:
(n1)Footnote 5. The common law did not at first use the concept of ownership with respect to land, preferring to describe those with interests in real property as "tenants," a word derived from the Latin for "holders." What was "held" was, therefore, a "tenancy." *See* A.W.B. Simpson, A History of The Land Law 47-48 (2d ed. 1986). In modern parlance, tenancy means ownership, and the words are used interchangeably in this chapter.

(n2)Footnote 6. At one time, the husband holding in tenancy by the entirety with his wife was recognized as having a power to alienate his interest subject only to his wife's right of survivorship; the wife had no comparable power. *See* § 33.05, *infra*.

(n3)Footnote 7. *31 Hen. 8*, c. 1 (1539); *2 Hen. 8*, c. 32 (1540). On partition, *see* Chapter 38, *infra*.

(n4)Footnote 8. 31 & 32 Vict., c. 40 (1868).

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CHAPTER 32 TENANCIES IN COMMON

4-32 Thompson on Real Property, Thomas Editions § 32.03

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§ 32.03 Tenancies in Common in the Context of Concurrent Estates.

Although at the time of American Independence the joint tenancy was the common law's preferred form of concurrent estate, it has now been decisively displaced by the tenancy in common. Very much a residual form of concurrent ownership in colonial days -- it was what arose in default of a joint tenancy -- the tenancy in common is today the paradigmatic form of concurrent ownership. Just as Sir William Blackstone in his *Commentaries on the Laws of England* began his discussion of forms of concurrent ownership with a description of joint tenancies and then proceeded to describe other forms in terms of how far they departed from this model, n9 so a modern commentator is tempted, but for the joint tenancy's historical precedence, to begin with the tenancy in common. Although historically the tenancy in common was, one might say, a joint tenancy manque, today the tenancy in common might logically come first, with the other forms of concurrent ownership being treated as tenancies in common plus one or two peculiarities.

FOOTNOTES:
(n1)Footnote 9. 2 William Blackstone, *Of Estates in Severalty, Joint-Tenancy, Coparcenary, and Common*, in Commentaries ch. 12 (1766).

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CHAPTER 32 TENANCIES IN COMMON

4-32 Thompson on Real Property, Thomas Editions § 32.04

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§ 32.04 Outline of the Chapter.

As old as the joint tenancy -- it was the form of concurrent estate that arose in case of the failure of a joint tenancy -- the tenancy in common was not favored by the common law. Perhaps in consequence it was not burdened by the perplexing doctrines that collected around the joint tenancy, remaining a remarkably simple form of concurrent ownership. After a review of the history of the law of tenancies in common (§ 32.05), the chapter examines the estate under three broad headings: creation of tenancies in common (§ 32.06), incidents of tenancies in common (§ 32.07), and termination of tenancies in common (§ 32.08). A glimpse at the future of the law of tenancies in common is also attempted (§ 32.09). Finally, the chapter concludes with a select bibliography of the law of tenancies in common (§ 32.10).

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CHAPTER 32 TENANCIES IN COMMON

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§ 32.05 History of the Law of Tenancies in Common.

The law of tenancies in common developed in tandem with the law of joint tenancies. As formal requirements accumulated for the creation of a joint tenancy, particularly the learning later epitomized in the doctrine of the four unities, n10 the need emerged to recognize a residual form of concurrent estate, basically a catch-all for concurrent tenancies that were not, for one reason or another, joint tenancies.

Because the latter estate had formal requirements for its creation, a grantor to two or more persons, even a grantor intending to create a joint tenancy, could fail to create that estate, while nevertheless succeeding in transferring the property. The result was a tenancy in common. Because a joint tenancy had formal requirements for its continued existence, joint tenants, even those intending to maintain the estate, could experience its termination. The result again was a tenancy in common.

Because a joint tenancy could not arise by operation of law, it was necessary to recognize some kind of concurrent estate when property passed involuntarily to two or more persons. Once again the result was a tenancy in common. Here the development of the estate was furthered by the parallel development of the tenancy in coparcenary. n11 At common law that estate arose when land descended from an ancestor to two or more heirs; it was largely limited to females since the canons of inheritance preferred males to females and, among males of equal degree, the first born (primogeniture). n12 Unlike joint tenants, tenants in coparcenary had no right of survivorship, an incident also lacking from tenancies in common. Tenants in coparcenary were the first concurrent owners entitled to compel partition, hence their distinctive name, "parceners," and this power was eventually extended by statute to tenancies in common (and joint tenancies). n13

Although at the date of American Independence the joint tenancy remained the common law's favored form of concurrent estate, leading lawyers by then recognized that it involved many risks for owners. In 1766 Sir William Blackstone counseled: "In general it is advantageous for the joint-tenants to dissolve the jointure." n14 In America unwanted, even unknown, joint tenancies could wreak havoc on settled expectations. When North Carolina abolished the right of survivorship in joint tenancies in 1784, the statute recited: "in real and personal estate held in join-tenancy the benefit of survivorship is a manifest injustice to the families of such as may happen to die first." n15 In Ohio the state supreme court early held that the right of survivorship did not exist: "The jus accrescendi is not founded in principles of natural justice, nor in any reasons of policy applicable to our society or institutions," n16 while a

Connecticut court in 1836 succinctly labeled the right of survivorship "odious and unjust." n17

American legislation and, to a lesser extent, judicial decisions set about altering the status quo with respect to concurrent estates, shearing joint tenancies of the right of survivorship or reversing the common law presumption in their favor. The result was an upsurge in tenancies in common (or in joint tenancies without the right of survivorship, which were functionally similar). n18 When legislation in many states abolished tenancies by the entirety, a special form of concurrent ownership limited to married persons, n19 the field of concurrent estates was further narrowed. Although most states retained either joint tenancies or tenancies by the entirety, and some retained both, all continued to offer tenancies in common. Increasingly the estate once relegated to last place in the common law system of concurrent ownership, has become the preferred form.

FOOTNOTES:

(n1)Footnote 10. On the doctrine of the four unities, *see* § 31.06(b), *supra.* On tenancy in coparcenary, *see* Chapter 35, *infra*.

(n2)Footnote 11. On tenancy in coparcenary, *see* Chapter 35, *infra*.

(n3)Footnote 12. 2 William Blackstone, Commentaries 208, 212, 213 (1766).

(n4)Footnote 13. *31 Hen. 8,* c. 1 (1539); *32 Hen. 8,* c. 32 (1540). On partition, *see* Chapter 38, *infra*.

(n5)Footnote 14. 2 iWlliam Blackstone, Commentaries 187 (1766). Although, as Blackstone elsewhere acknowledged, "jointure" had a specific meaning in the law of marriage settlements, he used the word here as a synonym for joint tenancy.

(n6)Footnote 15. Act of 1784, ch. 22, § 6, *reprinted in* 24 The State Records of North Carolina 574 (Walter Clark ed. 1904). In the 18th century, the words "joint tenancy" were often hyphenated. *See, e.g.,* 2 William Blackstone, Commentaries 180, 193-94 (1766). The form "join-tenancy," used in the North Carolina statute, occasionally appeared. Joseph Story ran the two words together, "jointenancy." Joseph Story, Commentaries on The Law of Partnership 4 (1841). Earlier, the form "joyntenants" was common. *See* edward Coke, Commentary Upon Littleton § 277, p. 180a.

(n7)Footnote 16. *Seargent v. Steinberger, 2 Ohio 305 (1826).*

(n8)Footnote 17. *Whittlesey v. Fuller, 11 Conn. 337, 339 (1836).*

(n9)Footnote 18. *See Whittlesey v. Fuller, 11 Conn. 337, 339 (1836)* (without the right of survivorship, there was "no essential difference between the rights of joint tenants and tenants in common").

(n10)Footnote 19. In some states the Married Women's Property Act, which recognized the right of married women to own property in their own right, was interpreted to abolish the tenancy by the entirety. *See* § 33.05, *infra*.

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CHAPTER 32 TENANCIES IN COMMON

4-32 Thompson on Real Property, Thomas Editions § 32.06

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§ 32.06 Creation of Tenancies in Common.

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Tenancies in common can arise unintentionally by operation of law (§ 32.06(a)), or intentionally, by express limitation (§ 32.06(b)). The intentional creation of tenancies in common is facilitated by modern statutes, so creation by express limitation is considered as at common law (§ 32.06(b)(1)) and under modern statutes (§ 32.06(b)(2)).

§ 32.06(a) Creation by Operation of Law: The Single Unity, Possession.

Because the tenancy in common was a residual estate at common law, Sir William Blackstone listed as the first means of its creation the destruction of a joint tenancy without severance of possession n20 and cited as an example the case of two joint tenants for life when the remainder descends to one of them. n21 The complexities of the doctrine of the four unities made it possible for the intentional creation of a joint tenancy to fail, as, for example, at common law when a grantor attempted a conveyance to grantor and another or others as joint tenants; because the unities of time and title were lacking, a tenancy in common resulted. n22 The same was true of a tenancy by the entirety, also dependent on the constant presence of the four unities, n23 plus a fifth unity "of person" based on marriage. A tenancy in common may be created by the divorce of a married couple holding as tenants by the entirety without the destruction of any of the four unities. n24 The same result may follow in jurisdictions in which the only marital estate is a joint tenancy. n25

Although it is possible for joint tenants or tenants by the entirety to intend the conversion of their estate into a tenancy in common and to destroy one of the unities in order to accomplish this, the creation of the tenancy in common in such a case is still "by operation of law," because the effect is caused by the destruction of the unities, whether or not the destruction is deliberately intended to create a tenancy in common.

Perhaps the most common example of the creation of tenancies in common by operation of law today occurs in cases of intestate succession: when two or more persons of equal degree of kinship inherit property together they take title under modern intestacy statutes as tenants in common. Upon the termination of a trust with multiple beneficiaries of the same equitable estate, the legal title vests in the beneficiaries as tenants in common by operation of law. n26

Because the doctrine of the four unities is central to the creation and continued existence of joint tenancies and tenancies

by the entirety, it is worthwhile to note explicitly its absence from the law of tenancies in common. For the creation and preservation of a tenancy in common only a single unity is necessary: the unity of possession. This is, of course, simply another way of saying that the tenancy in common is a form of concurrent ownership. Without two or more sharing the right to possess the same property at the same time there would be no concurrent ownership at all. It should be emphasized that the unity of possession means the right to possess, not necessarily actual possession -- as seen from the fact that future interests could be held in tenancy in common. As Blackstone himself put it: "estates of any quantity or length of duration, and whether they be in actual possession or expectancy, may be held ... in joint-tenancy ... and in common." n27 Tenants in common can formalize the relationship by an agreement regulating their possessory rights, even to the point of providing for the exclusive possession by one. n28

Because unity of interest is not required, it is not necessary that tenants in common have equal shares. Nonetheless, there is a presumption that the shares are equal. n29 A tenant in common claiming other than an equal share bears the burden of proving it; n30 in some states the presumption of equal shares in tenancy in common may be rebutted only by clear and convincing evidence. n31 A creditor aware of a deed in tenancy in common is not required to investigate the possibility of unequal ownership and may presume equal shares. n32

Although at common law title acquired by multiple adverse possessors was in joint tenancy, n33 today the modern presumption in favor of tenancy in common would prevail. n34

§ 32.06(b) Creation by Express Limitation.

The intention to create a tenancy in common by a transfer to two or more persons could always be accomplished if expressed in the proper terms. Since the required form of expression has been affected by legislation, it is necessary to consider, first, the situation at common law (§ 32.06(b)(1)), then, the effect of modern statutes (§ 32.06(b)(2)).

§ 32.06(b)(1) At Common Law.

At common law a presumption existed in favor of joint tenancies as a form of concurrent ownership. In 1766 Sir William Blackstone laid down the law as follows: "Now, if an estate be given to a plurality of persons, without adding any restrictive, exclusive, or explanatory words, as if an estate be granted to A and B and their heirs, this makes them immediately joint-tenants in fee of the lands." n35 Much learning was devoted at common law to whether one form or another of express limitation was sufficient to avoid the effect of this rule. For example, although it was always accepted that a devise of land to two or more persons "equally to be divided among them, share and share alike" created a tenancy in common because of the deference accorded to intention in the construction of wills, there long remained doubt about whether the same words in deeds would have that effect. n36 After reviewing the pitfalls, Blackstone concluded that the "most usual as well as the safest way" to avoid an unintended joint tenancy was "to add express words of exclusion as well as description, and limit the estate to A and B, to hold *as tenants in common, and not as joint tenants*." n37

Without words of inheritance, grants at common law resulted in estates for life only. Blackstone's last example, "to A and B as tenants in common and not as joint tenants" would have resulted in a tenancy in common for joint lives, an estate that would end at the death of the first to die. (By contrast, a joint life estate would by virtue of the right of survivorship last until the death of the last to die). n38 Where a grantor seized in fee simple created an estate for joint lives (or, for that matter, a joint life estate), a residuum obviously was left, retained as a reversion or disposed of by a further limitation in remainder. As explored elsewhere, n39 a few states like Ohio have created by statute a "survivorship tenancy" in lieu of the common law joint tenancy; such an estate results from a transfer to two or more persons "for their joint lives and then to the survivor or survivors of them." n40 As expressly recognized in a similar Oregon statute, this estate is properly described as a "tenancy in common in the life estate with cross-contingent remainders in fee simple." n41

Tenancies in common may be created in estates other than fee simple and in all forms of future interests. n42 Tenancies in common may be combined with other forms of concurrent ownership; that is, an undivided interest held by plural owners in joint tenancy or tenancy by the entirety may be held with the owner or owners of another undivided interest in tenancy in common. For example, A and B may hold one-half as joint tenants, and C and D may hold the other one-half as joint tenants, while the two units hold the whole as tenants in common. n43 Married couples holding their respective interests as joint tenants or as tenants by the entirety may hold together as tenants in common. n44

Despite the common law's general presumption in favor of joint tenancies, a different presumption obtained in the case of party walls, that is, walls built on the property line between adjoining owners, usually providing support for structures on each lot. At common law party walls were presumed to be held by the adjoining owners as tenants in common. n45 Today party walls may be found to be owned in severalty with mutual easements of support. n46

§ 32.06(b)(2) Under Modern Statutes.

Legislation bearing on the creation of tenancies in common is often aimed principally at reversing the common law presumption in favor of joint tenancies or, in the case of married persons, of tenancies by the entirety; in other words, telling how a joint tenancy or tenancy by the entirety is *not* created, a statute tells how a tenancy in common *is* created. An Alaska statute, for example, provides:

> (a) A conveyance or devise of land or an interest in land made to two or more persons, other than to executors and trustees, as such, shall be construed to create a tenancy in common in the estate, except, as provided in (b) of this section.
>
> (b) A husband and wife who acquire title in real property hold the estate as tenants by the entirety, unless it is expressly declared otherwise in the conveyance or devise. The conveyance shall recite the marital status of the parties acquiring title to real property. n47

Without an express declaration to the contrary, a tenancy in common is created. n48 Other statutes addressing the same problem are more simply phrased. An Iowa statute, for example, provides: "Conveyances to two or more in their own right create a tenancy in common unless a contrary intent is expressed." n49

As described elsewhere, n50 an earlier type of statute, also aimed at problems caused by the common law presumption in favor of joint tenancies, altered the nature of joint tenancies by eliminating the right of survivorship. Read literally, such statutes leave the common law presumption in place, although they eliminate the major distinction between joint tenancies and tenancies in common. In jurisdictions with statutes of this type it would probably be wise, in order to avoid any risk from lingering rules concerning joint tenancies, to follow Blackstone's formula and add "express words of exclusion as well as description," that is, to transfer "to A and B and their heirs as tenants in common and not as joint tenants."

Special rules concern concurrent estates transferred to joint executors, administrators, and trustees; n51 joint mortgagees are also within the reason of the rule, as are joint guardians. n52 In many states such estates are presumed to be joint tenancies rather than tenancies in common, in order to facilitate the performance of the tasks for which the land was acquired. n53 Concurrent estates acquired by business partners may be held in special "tenancies in partnership." n54 In states still recognizing tenancies by the entirety transfers to married couples may, as in Alaska, be presumed to be in that form of concurrent ownership; express language to the contrary can in all states rebut the presumption. In deeds, words of limitation describing the estate are normally placed in the habendum clause, introduced by the memorable phrase "to have and to hold" (habendum et tenendum). In case of inconsistency within the various parts of a deed, the ancient rules of conveyancing give preference to the granting clause if it describes a greater estate, n55 but with respect to concurrent estates deciding relative degrees of "greatness" may become metaphysical. In general, it may be fervently hoped that the entire instrument will be read to effectuate the intention of the parties, notwithstanding the technicalities;

a statute may require this result. n56 In an appropriate case it may be necessary to admit extrinsic evidence. n57

Apart from the special cases listed above, the creation of tenancies in common in multiple transferees should be unproblematic. Although probably not necessary, it is always better to describe the estate created as "tenancy in common"; in special cases words of exclusion, "and not as joint tenants or tenants by the entirety," may be necessary. The word "jointly" is ambiguous: it may mean simply "together," or it may be meant to connote "in joint tenancy." Coupled with the strong presumption in favor of tenancies in common, it will not usually result in the finding of a joint tenancy. n58 Under no circumstances should a drafter desiring to create a tenancy in common in fee simple ever use the words "with right of survivorship," "to them and the survivor of them," or similar expressions. n59

A grant to one person *or* another ("to A *or* B") may be construed to mean to the two together ("to A and B") as tenants in common. n60 In Oregon, which has abolished joint tenancies, a transfer to two or more persons "as joint tenants" results in a tenancy in common. n61 In Virginia, which has eliminated the right of survivorship as an incident of common law joint tenancies, n62 a statutory right of survivorship may be created, n63 but merely conveying to grantees "as joint tenants, and not as tenants in common" has been held insufficient to create the right of survivorship and a tenancy in common results. n64 In Alabama, too, words of survivorship must be used to create a joint tenancy (or its functional equivalent): a grant to two or more "as joint tenants" creates an estate that operates as a tenancy in common; that is, on death the interest descends as if it had been severed. n65

Although recording of deeds is standard practice (and brings material benefits), recording is not essential to validity: a properly executed but unrecorded deed from a grantor to two grantees as tenants in common is effective from the date of delivery.

The various state statutes are summarized below:

Alabama. Right of survivorship as incident of joint tenancy abolished, but if instrument creating joint tenancy states that it is "with right of survivorship" or uses other words showing such intention, then right of survivorship will be recognized. n66

Alaska. Joint tenancy in real property abolished. n67 Transfer to two or more persons (except transfer to executors and trustees) shall be construed to create tenancy in common; transfer to married couple presumed to create tenancy by the entirety. n68

Arizona. Transfers to two or more persons create tenancies in common not joint tenancies, except transfers in trust, or to executors, or to a husband and wife; transfers may, however, "by express words vest the estate in the survivor upon the death of a grantee or devisee." n69 Property acquired by husband and wife is community property, n70 although the spouses may by express agreement take title as joint tenants. n71

Arkansas. Right of survivorship abolished. n72 Transfers to two or more persons (except transfers to executors and trustees) create tenancies in common, unless expressly declared to create joint tenancies. n73

California. Transfer to two or more persons creates joint tenancy when expressly declared to be so. n74 Devise to two or more persons vests in them tenancy in common unless the will otherwise provides. n75

Colorado. No joint tenancy shall be created unless estate is declared to be "in joint tenancy," except in transfers to executors, trustees, or fiduciaries. n76

Connecticut. Joint tenancy created by transfer to two or more natural persons (1) as joint tenants or as tenants in common and to the survivor and heirs, or (2) for their joint lives with a remainder to the survivor and heirs, or (3) as joint tenants with right of survivorship, or (4) as tenants by the entirety, or (5) as joint tenants. n77

Delaware. Joint tenancy may be created only by transfer expressly declared to create estate "to be held as joint tenants and not as tenants in common," except transfer to executors or trustees. n78

District of Columbia. Transfer to two or more persons, including married couples, creates tenancy in common, unless expressly declared to be a joint tenancy. n79

Florida. Transfer to two or more persons creates tenancy in common, unless the instrument creating the estate shall expressly provide for "the right of survivorship." n80

Georgia. Transfer to two or more persons creates tenancy in common, "unless the instrument expressly refers to the takers as 'joint tenants,' 'joint tenants and not as tenants in common,' or 'joint tenants with survivorship' or as taking 'jointly with survivorship.'" ("Language essentially the same" may also be used.) n81

Hawaii. Transfer to two or more persons creates tenancy in common, but joint tenancy may be created if it manifestly appears that it was intended to create joint tenancy (exception for executors and trustees). n82

Idaho. Transfer to two or more persons (except executors or trustees) creates tenancy in common, unless expressly declared to be otherwise. n83 Every interest created in favor of two or more persons (except partners for partnership purposes) is an interest in common, unless declared to be "a joint interest" or community property. n84

Illinois. Concurrent estates (except of executors and trustees) deemed to be tenancies in common, but transfers expressly declared to pass estates "not in tenancy in common but in joint tenancy" create joint tenancies. n85

Indiana. Transfer to two or more persons creates tenancy in common, unless expressly declared that transferees hold "in joint tenancy and to the survivor of them" or unless it manifestly appears that it was intended to create an estate in joint tenancy. n86 Exception for mortgages, conveyances in trust, and conveyances to husband and wife; executors and trustees hold in joint tenancy. n87

Iowa. Conveyances to two or more persons create tenancies in common, unless a contrary intent is expressed. n88

Kansas. Transfer to two or more persons, including transfer to husband and wife, creates tenancy in common, unless the language used makes it clear that a joint tenancy was intended (exception for executors or trustees). n89

Kentucky. No right of survivorship in joint tenancies, n90 except for transfers to executors and trustees and estates for which it manifestly appears that right of survivorship was intended. n91

Maine. Transfers to two or more persons (except conveyances in mortgage) create estates in common, unless otherwise expressed. n92

Maryland. Presumption against joint tenancy, unless instrument expressly provides that the property granted is to be held in joint tenancy. n93

Massachusetts. Transfer to two or more persons creates tenancy in common, unless it is expressed in transfer that transferees shall take "jointly," or "as joint tenants," or "in joint tenancy," or "to them and the survivor of them" or unless it manifestly appears that it was intended to create an estate in joint tenancy. n94

Michigan. Transfer to two or more persons creates tenancy in common, unless expressly declared to be in joint tenancy. n95 Exception for mortgages, transfers in trust, to executors, and to husband and wife. n96

Minnesota. Transfer to two or more persons creates tenancy in common, unless expressly declared to be in joint tenancy. Exception for mortgages, transfers in trust or to executors. n97

Mississippi. Transfer to two or more persons creates tenancy in common, unless it manifestly appears that it was intended to create an estate in joint tenancy with right of survivorship (exception for mortgages and transfers in trust). n98

Missouri. Transfer to two or more persons (other than executors and trustees and husband and wife) creates tenancy in common, unless expressly declared to be in joint tenancy. n99

Montana. Joint interest created when expressly declared in the transfer to be a joint tenancy, or when granted or devised to executors or trustees as joint tenants. n100 Transfer to two or more persons creates tenancy in common, unless declared to be "a joint interest." n101

Nevada. Transfer to two or more persons (except to executors and trustees) creates tenancy in common, unless expressly declared to be in joint tenancy. n102

New Hampshire. Transfer to two or more persons creates tenancy in common, unless expressly stated that estate is to be held "as joint tenants, or to them and the survivor of them" or unless other words are used clearly expressing an intention to create a joint tenancy. The addition, following the names in the granting clause of the words "as joint tenants with right of survivorship" or "as tenants by the entirety" constitutes a clear expression of intention to create a joint tenancy. n103

New Jersey. To create an estate in joint tenancy, the transfer must expressly set forth that it is intended to create an estate in joint tenancy and not an estate of tenancy in common. n104

New Mexico. Transfer to two or more persons other than executors or trustees creates tenancy in common, unless clearly expressed to create joint tenancy. n105 Conveyance or mortgage to two or more persons designated "as joint tenants" means to them as joint tenants "and to the survivor of them and the heirs and assigns of the survivor." n106 Transfer "to two or more persons as joint tenants, to two or more persons and to the survivor of them and the heirs and assigns of the survivor, or to two or more persons with right of survivorship" is prima facie evidence of a joint tenancy and conclusive as to purchasers or encumbrancers for value; in litigation joint tenancy may be established by a preponderance of the evidence. n107

New York. Transfer to two or more persons (except as executors, trustees or guardians) creates tenancy in common, unless expressly declared to be a joint tenancy. n108

North Carolina. Right of survivorship in joint tenancy abolished, but a "joint tenancy with right of survivorship" may be created if the instrument expressly provides for a right of survivorship. n109 Joint tenancies preserved for joint trustees, n110 joint mortgagees or trustees with a power of sale, n111 and joint executors or administrators. n112

North Dakota. Transfer to two or more persons creates tenancy in common, unless acquired by them in partnership for partnership purposes, or "unless declared in its creation to be a joint tenancy." n113 Transfer to executors or trustees as joint tenants creates joint tenancy. n114

Ohio. Transfer to two or more persons "for their joint lives and then to the survivor or survivors of them" creates a "survivorship tenancy"; transfer containing language showing clear intent to create a survivorship tenancy to be liberally construed to do so. n115 Although a survivorship tenant may transfer his or her share, it is conditioned on the survivorship of the grantor and does not affect the interest of a survivorship tenant who does not join in the conveyance, that is, it does not sever the estate. n116

Oklahoma. Devise to more than one person creates tenancy in common. n117 Joint tenancy may be created if expressly declared. n118

Oregon. Transfer to two or more persons (except to husband and wife) or to executors or trustees creates tenancy in common, unless it is clearly and expressly declared that transferees take "with right of survivorship." Declaration of right of survivorship creates "tenancy in common in the life estate with cross-contingent remainders in the fee simple." Joint tenancy abolished; use of words "joint tenants" without indication of an intent to create a right of survivorship creates tenancy in common. n119

Pennsylvania. Right of survivorship abolished. n120

Rhode Island. Transfer to two or more persons creates tenancy in common, "unless it be declared that the tenancy is to be joint, or that the same is to such persons and the survivors or survivor of them, or to them as trustees or executors, or unless the intention manifestly appears that such persons shall take as joint tenants and not as tenants in common." n121

South Carolina. Joint tenancy severed by death of joint tenant, and estate is distributed as a tenancy in common, "unless the instrument which created the joint tenancy expressly provides for a right of survivorship." n122

South Dakota. Transfer to two or more persons creates joint tenancy when expressly declared to be in joint tenancy (or when to executors or trustees as joint tenants). n123 Every interest in favor of two or more persons is an interest in common, "unless acquired by them in partnership, for partnership purposes, or unless declared on its creation to be a joint interest." n124

Tennessee. Right of survivorship abolished. n125

Texas. Joint tenancy severed by death of one joint tenant, but right of survivorship may be provided by written agreement of joint owners; no agreement may be inferred from fact that property is held in joint ownership. n126

Utah. Conveyance to two or more persons creates a tenancy in common, unless expressly declared to be otherwise; joint tenancy may be described by words "joint tenancy," "with rights of survivorship," "and to the survivor of them," or words of similar import. n127

Vermont. Transfer to two or more persons creates tenancy in common, unless it is expressed that transferees take "jointly" or "as joint tenants" or "in joint tenancy" or "to them and the survivors of them"; exception for transfers in trust or to husband and wife or in which it manifestly appears that it was intended to create an estate in joint tenancy. n128

Virginia. Joint tenancy severed by death of one joint tenant. n129 Exceptions for joint tenancy of executors or trustees and for transfer in which it manifestly appears that it was intended that the part of one dying should then belong to the others. n130

Washington. Joint tenancy severed by death of one joint tenant. n131 Transfer to two or more persons creates tenancy in common, unless acquired by partners for partnership purposes, or declared to be a joint tenancy, or acquired by executors or trustees. n132

West Virginia. Joint tenancy severed by death of one joint tenant. n133 Exceptions for joint tenancy of executors or trustees and for transfer in which it manifestly appears that it was intended that the part of one dying should then belong to the others. n134 Title in multiple owners whose names are linked by "the disjunctive 'or'" is joint tenancy with right of survivorship, unless expressly stated otherwise. n135

Wisconsin. Transfer to two or more persons creates tenancy in common, unless intention to create joint tenancy is expressed. n136 Joint tenancy may be created if intention to do so is expressed; expressions of intention include "as joint tenants," "as joint owners," "jointly," "or the survivor," "with right of survivorship." n137 Transfer to persons married to one another creates joint tenancy, unless intention to create tenancy in common is expressed. n138 Co-personal representatives and cotrustees hold property as joint tenants. n139

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FOOTNOTES:
(n1)Footnote 20. 2 William Blackstone, Commentaries 192 (1766). Blackstone added that a tenancy in common would also arise in case of the destruction of a tenancy in coparcenary without severance of possession.

(n2)Footnote 21. 2 William Blackstone, Commentaries 186 (1766). On joint life estates, *see* § 31.06(f), *supra*.

(n3)Footnote 22. *See* § 31.06(c), *supra*.

(n4)Footnote 23. *See* § 33.06(c), *infra*.

(n5)Footnote 24. *See* § 33.08(d), *infra*. The transformation of the tenancy by the entirety into a tenancy in common, once it occurs, is final; that is to say, the remarriage of the parties does not revive the tenancy by the entirety. *Barrett v. Barrett, 614 A.2d 299 (Pa. 1992).*

(n6)Footnote 25. *See* § 31.08(c), *supra*.

(n7)Footnote 26. *Sorel v. Sorel, 1 S.W.3d 867 (Tex. App. 1999).*

(n8)Footnote 27. 2 William Blackstone, Commentaries 179 (1766).

(n9)Footnote 28. *See Butler ex rel. Butler v. Rafferty, 792 N.E.2d 1055 (N.Y. 2003)* (brother and sister, tenants in common, contracted for exclusive possession of respective halves; brother not liable in tort for injury occurring on sister's half).

(n10)Footnote 29. At least one state, Wisconsin, has enacted the presumption. Wis. Stat. Ann. § 700.20 (tenants in common presumed to own equal shares, unless contrary intent expressed in instrument of transfer).

(n11)Footnote 30. *Tipp v. Skjelset, 947 P.2d 480 (Mont. 1997)* (presumption of equal shares may by rebutted by parol evidence); *Bradford v. Dumond, 675 A.2d 957 (Me. 1996)* (unequal contributions to purchase of tenancy in common is evidence of intention to hold unequal shares).

(n12)Footnote 31. *See Burt v. Skrzyniarz, 526 S.E.2d 848 (Ga. 2000).*

(n13)Footnote 32. In the *Matter of Teranis, 128 F.3d 469 (7th Cir. 1997)* (applying Wisconsin law).

(n14)Footnote 33. Thomas Littleton, Tenures § 278 (ca. 1481).

(n15)Footnote 34. *Cf. Preston v. Smith, 293 S.W.2d 51 (Tenn. 1956)* (husband and wife acquiring title by adverse possession take as tenants in common), *noted in 16 Md. L. Rev. 352 (1956), 22 Mo. L. Rev. 91 (1957), 24 Tenn. L. Rev. 892 (1957), 10 Vand. L. Rev. 460 (1957).* Note that joint tenancy is not a meaningful alternative in Tennessee, the right of survivorship having been eliminated by statute; the choice in Tennessee when married persons are involved is between tenancy in common and tenancy by the entirety.

(n16)Footnote 35. 2 William Blackstone, Commentaries 180 (1766).

(n17)Footnote 36. 2 William Blackstone, Commentaries 180 note (Joseph Chitty ed. 1826).

(n18)Footnote 37. 2 William Blackstone, Commentaries 193-94 (1766) (italics in original).

(n19)Footnote 38. *See* § 31.06(f), *supra*.

(n20)Footnote 39. *See* § 31.06(d), *supra*.

(n21)Footnote 40. Ohio Rev. Code Ann. § 5302.20(A).

(n22)Footnote 41. Or. Rev. Stat. § 93.180. *See also* Conn. Gen. Stat. Ann. § 47-14a; Neb. Rev. Stat. § 76-117; Wis. Stat. Ann. § 700.17(3).

(n23)Footnote 42. *See, e.g., Dalton v. Real Estate & Improvement Co., 92 A.2d 585 (Md. 1952)* (tenancy in common in right-of-way easement); *ECM, Inc. v. Placer Dome U.S., Inc., Nos. 96-15966, 96-16019, 1997 U.S. App. LEXIS 34851 (9th Cir. 1997)* (tenancy in common in leasehold); *Enron Oil & Gas Co. v. Worth, 947 P.2d 610 (Okla. Ct. App. 1997)* (tenancy in common in mineral estate). Owners of boundary line trees are considered tenants in common. *Holmberg v. Bergin, 172 N.W.2d 739 (Minn. 1969).*

(n24)Footnote 43. *E.g., Wachter Dev. v. Gomke, 544 N.W.2d 127 (N.D. 1996).*

(n25)Footnote 44. *Margarite v. Ewald, 381 A.2d 480 (Pa. Super. 1977)* (grant "to H and W, his wife, and X" held to create tenancy by the entirety in H and W in one-half with other one-half held by X, the two halves held in tenancy in common); *In re Estate of Michael, 218 A.2d 338 (Pa. 1966)* (tenants by the entirety).

(n26)Footnote 45. *Watson v. Gray, 14 Ch. D. 192 (1880);* 3 James Kent, Commentaries on American Law 438 (12th ed. by O.W. Holmes, 1873).

(n27)Footnote 46. *Covert v. Richards, 535 N.W.2d 701 (Neb. 1995); Sakele Brother, LLC v. Safdie, 752 N.Y.S.2d 626 (2002).*

(n28)Footnote 47. Alaska Stat. § 34.15.130.

(n29)Footnote 48. *Voss v. Brooks, 907 P.2d 465 (Alaska 1996)* (grant to two unmarried persons "as joint tenants" held to create tenancy in common).

(n30)Footnote 49. Iowa Code Ann. § 557.15.

(n31)Footnote 50. *See* § 31.05, *supra*.

(n32)Footnote 51. *See* § 31.06(e), *supra.*

(n33)Footnote 52. N.Y. Estates, Powers And Trusts Law § 6-2.2(a).

(n34)Footnote 53. *See* § 31.06(e), *supra*.

(n35)Footnote 54. On tenancy in partnership, *see* Chapter 34, *infra*.

(n36)Footnote 55. Tiffany, Real Property 674 (new abridged ed. 1940).

(n37)Footnote 56. *E.g.*, N. C. Gen. Stat. § 39-1.1(a):

In construing a conveyance executed after January 1, 1968, in which there are inconsistent clauses, the courts shall determine the effect of the instrument on the basis of the intent of the parties as it appears from all the provisions of the instrument.

(n38)Footnote 57. This prescription obviously presumes the desuetude of the old rule excluding extrinsic evidence in cases of patent ambiguity. *Kipp v. Chip's Estate, 732 A.2d 127 (Vt. 1999)* (rejecting common law rule of construction favoring granting over habendum clause in case of inconsistency, but refusing to admit extrinsic evidence of grantor's intent, including scrivener's testimony, because of statutory preference in favor of tenancy in common).

(n39)Footnote 58. *In re Estate of Hillyer, 664 So. 2d 361, 362 (Fla. App. 1995)* ("A tenancy in common is considered jointly owned property.") *But see* Mass. Gen. Laws Ann. ch. 184, § 7 (transfer to two or more persons to hold "jointly" results in joint tenancy).

(n40)Footnote 59. A drafter may, of course, in creating a tenancy in common for joint lives, limit a remainder to the survivor (or to some other person).

(n41)Footnote 60. *In re McDow, 248 B.R. 466 (M.D. Fla. 2000); Keiser v. Koester, No. A-96-1045, 1997 Neb. App. LEXIS 122.*

(n42)Footnote 61. Or. Rev. Stat. § 93.180. *See also* Alaska Stat. § 34.15.130; *Voss v. Brooks, 907 P.2d 465 (Alaska 1996)* (grant to two unmarried persons "as joint tenants" held to create tenancy in common).

(n43)Footnote 62. Va. Code Ann. § 55-20.

(n44)Footnote 63. Va. Code Ann. § 55-21.

(n45)Footnote 64. *Hoover v. Smith, 444 S.E.2d 546 (Va. 1994).*

(n46)Footnote 65. *Marshall v. Nelson, 622 So. 2d 889 (Ala. 1993).*

(n47)Footnote 66. Ala. Code § 35-4-7.

(n48)Footnote 67. Alaska Stat. § 34.15.130.

(n49)Footnote 68. Alaska Stat. § 34.15.110.

(n50)Footnote 69. Ariz. Rev. Stat. Ann. § 33-431.

(n51)Footnote 70. Ariz. Rev. Stat. Ann. § 25-211.

(n52)Footnote 71. *Collier v. Collier, 242 P.2d 537 (Ariz. 1952).*

(n53)Footnote 72. Ark. Code § 28-8-101.

(n54)Footnote 73. Ark. Code § 18-12-603.

(n55)Footnote 74. Cal. Civ. Code § 683(a).

(n56)Footnote 75. Cal. Probate Code § 21106.

(n57)Footnote 76. Colo. Rev. Stat. § 38-31-101.

(n58)Footnote 77. Conn. Gen. Stat. Ann. § 47-14a.

(n59)Footnote 78. Del. Code Ann. tit. 25, § 701.

(n60)Footnote 79. D.C. Code Ann. § 45-216.

(n61)Footnote 80. Fla. Stat. § 689.15.

(n62)Footnote 81. Ga. Code § 44-6-190(a).

(n63)Footnote 82. Haw. Rev. Stat. § 509.1.

(n64)Footnote 83. Idaho Code § 55-508.

(n65)Footnote 84. Idaho Code § 55-104.

(n66)Footnote 85. 765 Ill Comp. Stat. 1005/1.

(n67)Footnote 86. Ind. Code Ann. § 32-1-2-7.

(n68)Footnote 87. Ind. Code Ann. § 32-1-2-8.

(n69)Footnote 88. Iowa Code Ann. § 557.15.

(n70)Footnote 89. Kan. Stat. Ann. § 58-501.

(n71)Footnote 90. Ky. Rev. Stat. Ann. § 381.120.

(n72)Footnote 91. Ky. Rev. Stat. Ann. § 381.130.

(n73)Footnote 92. Me. Rev. Stat. Ann. tit. 33, § 158.

(n74)Footnote 93. Md. Real Prop. Code Ann. § 2-117.

(n75)Footnote 94. Mass. Gen. Laws Ann. ch. 184, § 7.

(n76)Footnote 95. Mich. Comp. Laws Ann. § 554.44.

(n77)Footnote 96. Mich. Comp. Laws Ann. § 554.45.

(n78)Footnote 97. Minn. Stat. § 500.19(1).

(n79)Footnote 98. Miss. Code § 89-1-7.

(n80)Footnote 99. Mo. Ann. Stat. § 442.450 (Vernon 1986).

(n81)Footnote 100. Mont. Code Ann. § 70-1-307.

(n82)Footnote 101. Mont. Code Ann. § 70-1-314.

(n83)Footnote 102. Nev. Rev. Stat. § 111.060.

(n84)Footnote 103. N.H. Rev. Stat. Ann. § 477:18.

(n85)Footnote 104. N.J. Stat. Ann. § 46:3-17.

(n86)Footnote 105. N. Mex. Stat. Ann. 1978, § 47-1-15.

(n87)Footnote 106. N. Mex. Stat. Ann. 1978, § 47-1-35.

(n88)Footnote 107. N. Mex. Stat. Ann. 1978, § 47-1-16.

(n89)Footnote 108. N.Y. Estates, Powers and Trusts Law § 6-2.2(a).

(n90)Footnote 109. N.C. Gen. Stat. § 41-2. *See* John V. Orth, *The Joint Tenancy Makes a Comeback in North Caro*lina, *69 N.C. L. Rev. 491 (1991).*

(n91)Footnote 110. N.C. Gen. Stat. § 41-3.

(n92)Footnote 111. N.C. Gen. Stat. § 45-8.

(n93)Footnote 112. N.C. Gen. Stat. § 28A-13-5.

(n94)Footnote 113. N.D. Cent. Code § 47-02-08.

(n95)Footnote 114. N.D. Cent. Code § 47-02-06.

(n96)Footnote 115. Ohio Rev. Code Ann. § 5302.20. Survivorship deed is given statutory short form in Ohio Rev. Code Ann. § 5302.17.

(n97)Footnote 116. Ohio Rev. Code Ann. § 53-2.20(C)(2).

(n98)Footnote 117. Okla. Stat. Ann. tit. 84, § 184.

(n99)Footnote 118. Okla. Stat. Ann. tit. 60, § 74.

(n100)Footnote 119. Or. Rev. Stat. § 93.180.

(n101)Footnote 120. Pa. Stat. Ann. tit. 68, § 110. Notwithstanding the statute, a joint tenancy with right of survivorship may be created by transfer if expressly declared, the usual form of words being "as joint tenants with right of survivorship and not as tenants in common." *In re Estate of Michael, 218 A.2d 338 (Pa. 1966).* The effect of judicial construction, in other words, has been to transform the statute from one abolishing the right of survivorship in joint tenancies into one raising a rebuttable presumption in favor of tenancies in common.

(n102)Footnote 121. R.I. Gen. Laws § 34-3-1.

(n103)Footnote 122. S.C. Code Ann. § 62-2-804.

(n104)Footnote 123. S.D. Codified Laws Ann. § 43-2-12.

(n105)Footnote 124. S.D. Codified Laws Ann. § 43-2-17.

(n106)Footnote 125. Tenn. Code Ann. § 66-1-107.

(n107)Footnote 126. Tex. Probate Code § 46(a). *See* Don T. Cates, Legislation, *Joint Tenancy in Texas, 9 Baylor L. Rev. 118 (1957).*

(n108)Footnote 127. Utah Code Ann. § 57-1-5.

(n109)Footnote 128. Vt. Stat. Ann. tit. 27, § 2.

(n110)Footnote 129. Va. Code Ann. § 55-20.

(n111)Footnote 130. Va. Code Ann. § 55-21.

(n112)Footnote 131. Wash. Rev. Code Ann. § 64.28.010.

(n113)Footnote 132. Wash. Rev. Code Ann. § 64.28.020.

(n114)Footnote 133. W. Va. Code § 36-1-19.

(n115)Footnote 134. W. Va. Code § 36-1-20(a).

(n116)Footnote 135. W. Va. Code § 36-1-20(b).

(n117)Footnote 136. Wis. Stat. Ann. § 700.18.

(n118)Footnote 137. Wis. Stat. Ann. § 700.19(1).

(n119)Footnote 138. Wis. Stat. Ann. § 700.19(2).

(n120)Footnote 139. Wis. Stat. Ann. § 700.19(4).

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CHAPTER 32 TENANCIES IN COMMON

4-32 Thompson on Real Property, Thomas Editions § 32.07

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§ 32.07 Incidents of Tenancies in Common.

[Go To Supp]

As already observed in the analytical synopsis of the law of tenancies in common (§ 32.02), each tenant in common has a share that is alienable, devisable, and inheritable. Although lacking what Sir William Blackstone called the "grand incident" of concurrent estates -- the right of survivorship n140-- and bound together by only one of the four unities -- the unity of possession -- tenancies in common nonetheless share with other forms of concurrent ownership the same potential for problems caused by two or more cotenants n141 having simultaneous rights in the same thing. The same problems are met by the same remedies: for damage to the freehold to the detriment of a cotenant, the action of waste (§ 32.07(a)); for contribution to the necessary expenses of preserving the estate, the action for contribution (§ 32.07(b)); for profits from the estate at the expense of a cotenant, the action of account (§ 32.07(c)); and for the ouster of one cotenant by another, the action of ejectment (§ 32.07(d)). Creditors' rights, dependent on the rights of individual cotenants, are also considered (§ 32.07(e)).

As a preliminary matter, it may be observed that the law governing the relations between cotenants is marked by a degree of vagueness; rules are applied "under all the circumstances." To an extent, this is unavoidable: many of the disputed relationships between cotenants are sorted out in the context of partition proceedings, which are equitable in nature. Furthermore, the courts are understandably reluctant to assume a supervisory role in on-going relationships marked by discord. The power of alienation and the right to partition, possessed by every cotenant (except tenants by the entirety), provide openings for exit from contentious relationships, and rules are sometimes applied with an eye to encouraging their exercise.

§ 32.07(a) Action of Waste.

Tenants in common hold "by one and the same undivided possession." n142 From this unity of possession it follows that damage to any part of the freehold caused by one tenant in common is an injury to another tenant in common. The remedy is an action of waste, made available as Blackstone explained, by the ancient Statute of Westminster II, adopted in 1285. n143 Ordinarily the action of waste protects the holder of a future interest against damage to the inheritance by a present possessor, so its use by one tenant in common against another is not free from difficulty: each has a share only, albeit an undivided one, in the estate of inheritance. Nonetheless, until the shares are divided by partition, the

cotenant accused of waste cannot assert in defense that the damage was to an interest no larger than the cotentant's own share.

Damage to the freehold includes any permanent diminishment in its value. In the case of mineral deposits, the classic example of "wasting assets," removal by one tenant in common causes injury to another tenant in common. n144 The case is not so clear where the resource is a renewable one. Cutting timber was recognized in England as waste, presumably because of the long period of maturation, although in America, where trees were once superabundant, this rule was abandoned. Ordinary farming operations that do not unreasonably deplete the soil should not be treated as waste, since they leave the productive asset unaffected.

Whether one tenant in common has caused damage to the freehold constituting waste may be difficult to determine when the alleged waste is permissive, that is, resulting from an omission to act, such as by failing to keep a structure wind and water tight. This problem should be addressed in tandem with the problem of contribution for necessary expenses, covered in the following subsection. If a cotenant in possession is chargeable with permissive waste for allowing a building to fall into disrepair, that is, has a duty to a cotenant out of possession to make necessary repairs, then the cotenant in possession should have a correlative right to call on the other for contribution. Without a duty to share the cost, a cotenant out of possession should not be able to hold a cotenant in possession liable for permissive waste.

It is sometimes implied that a cotenant in possession making necessary repairs is not entitled to contribution because of the benefit enjoyed of use and occupation. n145 Yet this seems contradictory both to the theory of concurrent ownership and to practical fairness. The theory of concurrent estates is that each cotenant has an equal right to possession: the "unity of possession" does not require actual occupancy. In practice it would be capricious to hold a cotenant in possession liable only for the cost of repairs that happen to become necessary during his or her occupation.

If waste has already occurred, the remedy is damages, measured by the diminishment in value of the complaining cotenant's undivided share. As with waste in other circumstances, waste by one co-tenant may give rise to treble damages; this may be particularly true with respect to those concurrent estates in which a fiduciary relationship is recognized. n146 If waste is in prospect, an injunction may be granted, but only if the threatened conduct is particularly serious or malicious. Where the issue of past waste arises in a partition proceeding, it should be charged to the one responsible. In a partition in kind, the part wasted, if geographically distinct, should be assigned to the one who committed the waste; the shares, of course, should be valued as if the waste had not occurred. The idea is as old as the Statute of Westminster II: "And if he do choose to take his Part in a Place certain, the Part wasted shall be assigned for his Part, as it was before he committed the Waste." n147 In a partition by sale and division of the proceeds, the cost should be attributed to the share of the one responsible.

COMPUTER-ASSISTED RESEARCH:

LEXIS: waste w/50 (tenan! w/3 common)

§ 32.07(b) Action for Contribution.

Claims for waste typically arise against a cotenant in possession for damage to the freehold; claims for contribution arise against a cotenant out of possession for a proportionate share of expenses. When a cotenant improves the property at the cotenant's own initiative, a claim against another cotenant for a share of expenses should be rejected. "A man cannot be improved out of his estate"; n148 in other words, a cotenant cannot be compelled to contribute to the expenses of improvement, lest the costs reduce, or even destroy, the unrealized value of the undivided share. An improver dissatisfied with this rule can always exercise the right to partition. In a partition in kind, the improver should be awarded, insofar as possible, the share benefited by the improvement; in a partition by sale and division of the proceeds, the improver should be awarded the increment in value attributable to the improvement, which is not

necessarily the same amount as the cost of the improvement. Short of partition, an action of account (described in the next subsection) can take the improvement into consideration in determining the cotenants' respective shares; increased income attributable to the improvement should be allotted to the improver. Exactitude will be impossible in any of these calculations, and doubts should be resolved against the improver. Before making the improvement a prudent cotenant would have secured the agreement of the other cotenant or cotenants or have partitioned the estate.

On the contrary, when the expenses are not discretionary, contribution should be enforced. In this case there is no possibility of being "improved out of the estate"; rather, the expenses are a necessary cost of preserving the estate. Repairs needed to keep a structure wind and water tight are a case in point. If the action of waste is available to enforce the duty to make such repairs, then, as pointed out in the preceding subsection, the cotenant who could have enforced the duty against another cotenant should logically be required to contribute to its cost. In the case of necessary repairs, it is possible to deny both the action of waste and the action for contribution; there may be no public policy in discouraging what would otherwise be permissive waste. As in the case of improvements, partition is always available to a dissatisfied cotenant.

Taxes are another matter. Unlike improvements, they are not discretionary, and unlike deterioration of private property, their prompt and efficient collection is a matter of public concern. Where taxes on co-owned property are a joint and several liability, their payment by one cotenant is a public duty and discharges the public duty of another cotenant; in such cases the tax-paying cotenant should be entitled to contribution from another cotenant. n149 The result should be the contrary where the undivided interests are separately assessed for taxes. n150 Separate assessment for taxes may raise another issue. Failure of one tenant in common to pay the assessed taxes will trigger a tax foreclosure and eventual sale of the undivided interest, but unless a notice of the delinquency is served on the other tenants in common before sale, they may discover themselves in a cotenancy with a stranger. The courts are divided on whether notice is required in such cases, n151 although it is difficult to see why an involuntary sale should trigger a right to notice when a voluntary sale does not. While there seems to be no reason to refuse a present action for money in appropriate cases, it is also possible to attain the same economic result by equitable liens so that in case of partition (in kind or by sale and division of the proceeds) or in an action of accounting the tax-paying cotenant will be compensated. n152

Mortgage payments are often analogized to taxes although they differ in that the original source of the obligation was voluntarily assumed. While it is certainly appropriate to enforce an express agreement to contribute and while an implied agreement may well be instinct in the circumstances, it is submitted in this case that it is not essential for the law to impose a duty to contribute apart from agreement.

While not strictly part of the discussion of the action for contribution, failure to pay taxes or a mortgage may raise the question of a cotenant's scope of action in case of foreclosure and sale. May a cotenant bid at the sale in an attempt to buy the property as sole owner? The answer depends on whether there exists a relationship of trust and confidence between the cotenants. Although often recognized by the courts, the fiduciary relationship is properly grounded in a relationship apart from the merely proprietary one; the co-owners, for example, may be members of the same family who took the property by testate or intestate succession, or they may be business associates engaged in a common venture. n153 But, as one court pointed out: "Although tenants in common have a good faith obligation in their dealings in regard to jointly owned property, unless other facts show that one party reposed special confidence in the other, a fiduciary relationship does not exist between the tenants." n154 No fiduciary relationship would seem to bind strangers who happen to share ownership, as for example, a cotenant and another who acquired the share of a deceased cotenant. n155 As another court observed: "One co-tenant may not even know who other co-tenants are." n156

Even if a fiduciary relationship is found to exist, it may be questioned whether it ought to prevent a cotenant from acting in the cotenant's own interest in the absence of any evidence of fraud or overreaching. Obviously, if one cotenant is not permitted to hold the redeemed estate in severalty, another cotenant is required to make contribution before claiming an unencumbered share. To preserve the interest the delinquent cotenant must contribute within a reasonable time, a period that must be determined with respect to all the circumstances. n157 Any such belated right to a share conditioned on a

duty to contribute suggests that an action for contribution was available all along.

The cases on contribution are often complicated by the fact that one of the cotenants, usually the one demanding contribution, is enjoying the benefits of possession, while the other cotenant is not. As noted in the following subsection, an action of account does not normally provide recovery for anything except rents and profits received in excess of the cotenant's proportionate share. The benefits of possession often may seem in a rough way to offset the claim for contribution. It would appear, however, that the fact of who is in possession of the property should properly be irrelevant since each cotenant has an equal right to possession. As always, a dissatisfied cotenant can secure a partition. The action for contribution, which is the legal remedy provided for violation of a cotenant's right, should be distinguished from an action for violation of a contract; that is to say, cotenants may by contract impose duties other than and greater than those imposed by law on all tenants in common. n158

COMPUTER-ASSISTED RESEARCH:

LEXIS: contribution w/50 (tenan! w/3 common)

§ 32.07(c) Action of Account.

Just as the action of waste protects a tenant in common if another tenant in common damages the estate, so the action of account protects a tenant in common if another tenant in common profits from the estate. The common law originally refused to recognize a right by one tenant in common to demand an accounting: the unity of possession was thought to entitle each tenant in common equally to any proceeds, so the first to receive any profits could keep them. The only exception was where one tenant in common agreed to act as bailiff for the other, then an action could be brought if the terms of the agreement were breached. The action of account was finally created by statute in 1706, the oft-cited "Statute of Queen Anne," which permitted actions of account "by one ... tenant in common ... against the other, as bailiff for receiving more than comes to his just share or proportion... ." n159 By constituting each tenant in common a bailiff for the other insofar as receipts were concerned, the statute brought every tenancy in common within the exception.

Received in America as part of the common law or adopted in various forms by the states, n160 the Statute of Queen Anne continues to shape the remedy. An Oregon statute, for example, closely tracks its English forerunner:

> A tenant in common may maintain any proper action, suit or proceeding against his cotenant for receiving more than his just proportion of the rents or profits of the estate owned by them in common. n161

The key word in the statute is "receiving." The theory, as has been described, was based on the legal fiction of each tenant in common serving as bailiff for the other and was effective as far as it went. Left outside the scope of the statute were benefits enjoyed by one tenant in common, for example, the benefit of occupying part or all of the estate. No receipts are generated in such cases, so the stewardship of the fictitious bailiff cannot be invoked. Because of the unity of possession, each tenant in common is equally entitled to the intangible benefits of ownership. Some commentators have argued that the economic value of the benefit enjoyed should be treated as a receipt. n162 It is probably better policy not to extend the remedy. n163 A dissatisfied tenant in common is free to enter and enjoy the possession or to transfer the cotenant's share of the estate or demand partition at any time.

Because a cotenant is entitled to rely on the faithfulness of the other cotenant, there is no time limit set for the bringing of an action of account; that is to say, one cotenant may rely on the cotenant receiving rents and profits ("the bailiff") to account for the excess no matter how long the lapse of years. n164 Only if an agreement to account at a certain time is breached or if a demand for an accounting is made and refused does the statute of limitations begin to run on the action. n165

Obviously, an unequivocal claim of sole dominion and control signals adverse possession of the estate and implicates the action of ejectment, the subject of the next subsection. Once adverse possession has been established, but before it has ripened into a limitation title, the adversely possessing cotenant is liable for rent to the cotenant out of possession. n166

COMPUTER-ASSISTED RESEARCH:

LEXIS: accounting w/50 (tenan! w/3 common)

§ 32.07(d) Action of Ejectment.

Tenants in common hold "by one and the same undivided possession." n167 Because each tenant in common is entitled to possession of the whole, each is enabled to defend the whole possession against strangers. Title may be vindicated and trespassers removed by an action of ejectment brought by any tenant in common. n168 Failure to remove adverse possessors of the concurrent estate may eventually result in loss of title, as with any present estate.

Although possession of real property is normally notice to all the world of the possibility of some kind of claim on behalf of the possessor, in the case of tenancies in common the possession of one tenant in common is not necessarily notice of a claim to more than a share in the tenancy in common; specifically, the possession of a tenant in common who has a prior unrecorded deed from another tenant in common is not secured against the claim of a subsequent purchaser in good faith of the same share. n169

Because each tenant in common is entitled to possession of the whole, each is enabled to give consent to a police search of the entire estate; each tenant in common is held to have assumed the risk that another tenant in common will permit the search in the absence of the other. n170 The consent is generally not valid to permit a search if another tenant in common, present at the same time, objects. n171

More difficult is the question whether an action of ejectment may be brought by one tenant in common against another. In general, the action may be brought if the complaining cotenant has been interfered with in possession, but recognition of the accrual of such a cause of action has momentous consequences, since it may begin the running of the statute of limitations for purposes of adverse possession. In consequence, the courts have been slow to find a merely theoretical interference with possession, normally insisting on an actual ouster. n172 This protects the cotenant out of possession who is entitled to rely on his or her own right to possession unless it is unequivocally contravened.

A cotenant in possession need not necessarily communicate adverseness directly to the cotenant out of possession, but the act signaling ouster must be so open and continuous that any prudent cotenant out of possession would have noticed it. Ordinarily ouster is accomplished by acts in pais, that is, on the ground, but in exceptional cases it may appear in judicial records. n173 Ouster is obvious where one tenant in common conveys the whole estate to a third party who enters into possession, n174 and the recording of a conveyance to a stranger of a fee simple interest by one tenant in common may be evidence of ouster from the entire parcel for purposes of adverse possession. n175 A tenant in common who claims sole title by adverse possession and who alleges that ignorance of the cotenancy excused a failure to provide the other tenants in common with notice bears the burden of proving that there was no reason to believe that a cotenancy existed. n176 In New York a statute restates the common law presumption that possession by one tenant in common is not adverse to the right to possession of another tenant in common but limits the presumption to ten years; n177 thereafter, a presumption of adversity arises. n178 In some cases the evidence of presumptive ouster may be overwhelming. As one court put it:

> [W]here one tenant in common enters upon the whole estate, substantially improves it beyond that ordinarily proper for full enjoyment or use of the estate as a tenant in common, takes all the rents and profits, pays all the taxes, makes it his home and openly claims the whole for more than the period of the

statute of limitations, an ouster of his cotenants will be presumed although not otherwise proved. n179

The power of one tenant in common to alienate that tenant's share includes the power to lease the share. Where one tenant in common leases the whole parcel, the presumption is that the lessor is not acting adversely to the interests of the other tenants in common; however, leasing may in combination with other circumstances be evidence of adversity. n180

COMPUTER-ASSISTED RESEARCH:

LEXIS: ejectment or trespass w/50 (tenan! w/3 common)

§ 32.07(e) Creditors' Rights.

Because each tenant in common has an interest in the estate, a creditor of one cotenant can attach that cotenant's share. Attachment, levy, and even foreclosure and sale of the debtor's interest do not compromise any protected expectation of the other cotenant or cotenants: the creditor is only forcing the debtor to do what the debtor was entitled to do at any time. By the same token, the non-debtor cotenant retains all the usual rights in the estate: the creditor cannot complain, for example, if another cotenant transfers an interest or begins partition proceedings. n181 The creditor, in short, can have no greater rights in the estate than the debtor. A creditor aware of a deed in tenancy in common is not required to investigate the possibility of unequal ownership and may presume equal shares. n182

In case of the bankruptcy of one tenant in common, the bankruptcy trustee is empowered to sell the debtor's interest and may, under circumstances in which the sale of an undivided interest is impractical, sell the interests of the debtor cotenant and the non-debtor cotenant or cotenants. n183 In such cases, a non-debtor cotenant has a right of first refusal to purchase the property at the price at which the sale is to be consummated; n184 if that right is not exercised, the non-debtor cotenant is entitled to the appropriate share of the sale proceeds. n185

Because a judgment creditor's interest in the tenancy in common is limited to the share of the indebted cotenant, another cotenant can convey an undivided share by warranty deed without breach of the covenants for title: the lien is not an encumbrance on the title of the non-debtor cotenant. n186 The courts are divided on whether a non-debtor cotenant has a right to notice of a foreclosure sale of the interest in the commonly owned property of a indebted tenant in common, n187 although, it is difficult to see why an involuntary sale should trigger a right to notice when a voluntary sale does not.

COMPUTER-ASSISTED RESEARCH:

LEXIS: (creditor w/3 right) w/50 (tenan! w/3 common)

FOOTNOTES:
(n1)Footnote 140. 2 William Blackstone, Commentaries 183-84 (1766).

(n2)Footnote 141. Although often used to describe co-owners of an estate held in tenancy in common, the label "cotenants" can also refer to co-owners of estates held in joint tenancy or tenancy by the entirety. It is used in this chapter, particularly in the present section on incidents of tenancies in common, to emphasize the fundamental similarities with the law concerning the incidents of joint tenancies and, to a certain degree, the incidents of tenancies by the entirety.

(n3)Footnote 142. 2 William Blackstone, Commentaries 180 (1766).

(n4)Footnote 143. 2 William Blackstone, Commentaries 183, 194 (1766). The Statute of Westminster II is among the earliest in the English statute book. Technically *13 Edw. 1,* it is most famous for its first chapter, better known as De

Donis Conditionalibus. Chapter 22 provides the action of waste to one tenant in common against another:

> Whereas two or more do hold Wood, Turfland, or Fishing, or other such Thing in common, wherein none knoweth his several, and some of them do Waste against the Minds of the other, an Action may lie by a Writ of Waste; (2) and when it is come unto Judgement, the Defendant shall choose either to take his Part in a Place certain, by the Sheriff, and by the View, Oath, and Assignment of his Neighbours sworn and tried for the same Intent, or else he shall grant to take nothing from henceforth in the same Wood, Turf-land, and such other, but as his Partners will take. (3) And if he do choose to take his Part in a Place certain, the Part wasted shall be assigned for his Part, as it was before he committed the Waste. (4) And there is such a Writ in this Case, that is to say, Cum. A. & B. tenant boscum pro indiviso, B. fecit vastum, & c.

It is instructive that tenants in coparcenary were not granted the action of waste because they, alone among concurrent owners at the time, could compel partition. *See* 2 Edward Coke, Institutes 403. The lesson seems to be that the founders of the common law saw no need to arbitrate disputes among co-owners who could escape the concurrent ownership at will.

(n5)Footnote 144. *White v. Smyth, 214 S.W.2d 967 (Tex. 1948), noted in 1 Baylor L. Rev. 364 (1949), 27 Tex. L. Rev. 863 (1949).* A tenant in common of a mineral estate may prospect and develop the estate but not to the exclusion of the other tenant or tenants in common. *Enron Oil & Gas Co. v. Worth, 947 P.2d 610 (Okla. Ct. App. 1997)* (tenancy in common in mineral estate).

(n6)Footnote 145. American Law of Property 78 at n. 2 (A. James Casner ed. 1952).

(n7)Footnote 146. *Watts v. Krebs, 962 P.2d 387 (Idaho 1998);* Iowa Code § 658.1.

(n8)Footnote 147. *13 Edw. 1,* c. 22 (1285).

(n9)Footnote 148. Cornelius J. Moynihan, Introduction To The Law of Real Property 217 (2d ed. 1988).

(n10)Footnote 149. *Richardson v. Gibson, 793 So. 2d 801 (Ala. Civ. App. 2001).*

(n11)Footnote 150. *Jennings v. Bradfield, 454 P.2d 81 (Colo. 1969); Stoltz v. Maloney, 630 P.2d 560 (Ariz. App. 1981); In re Proceedings for Clallam County for Foreclosure of Liens, 922 P.2d 73 (Wash. 1996).*

(n12)Footnote 151. *Requiring notice: Kneedler v. League Wide, Inc., 979 P.2d 163 (Mont. 1999); Burbach v. Sussex County Municipal Utilities Auth., 723 A.2d 137 (N.J. App. 1999). Not requiring notice*: *Jennings v. Bradfield, 454 P.2d 81 (Colo. 1969); Jesberg v. Klinger, 358 P.2d 770 (Kan. 1961).*

(n13)Footnote 152. *Rose v. Holbrook, 287 S.W.2d 914 (Ky. App. 1956), noted in 9 Baylor L. Rev. 232 (1957).*

(n14)Footnote 153. *Givens v. Givens, 387 S.W.2d 851 (Ky. 1965)* (family members); *Watts v. Krebs, 962 P.2d 387 (Idaho 1998)* (divorced spouse).

(n15)Footnote 154. *Turkey Creek, LLC v. Rosania, 953 P.2d 1306, 1312 (Colo. Ct. App. 1998). See also Douglas v. Jepson, 945 P.2d 244 (Wash. App. 1997)* (mere existence of tenancy in common without more does not create a fiduciary relationship). *But see* Alan M. Weinberger, *Expanding the Fiduciary Relationship Bestiary: Does Concurrent Ownership Satisfy the Family Resemblance Test, 24 Seton Hall L. Rev. 1767 (1994)* (arguing that legal relationship between co-owners is so "intermingled and intertwined" that it ought to be recognized as a fiduciary relationship).

(n16)Footnote 155. *Wilson v. S. L. Rey, Inc., 21 Cal. Rptr. 2d 552 (1993)* (cotenant acquired share by foreclosure).

(n17)Footnote 156. *Douglas v. Jepson, 945 P.2d 244, 248 (Wash. App. 1997).*

(n18)Footnote 157. *Laura v. Christian, 537 P.2d 1389 (N.M. 1975)* (payment of mortgage after foreclosure but prior to sale); *Bradley v. Bradley, 554 N.W.2d 761 (Minn. 1996)* (action by redeeming cotenant to extinguish right of nonredeeming cotenant for failure to contribute). *See also Ex Parte Walker, 739 So.2d 3 (Ala. 1999)* (cotenants who waited 63 years to offer to share cost of redemption from tax sale barred from reclaiming their interests).

(n19)Footnote 158. *Kalman v. Perry, 1999 Mass. App. Div. 1 (1999).*

(n20)Footnote 159. Often cited as 4 Anne, c. 16, § 27, and dated 1705, the statute is properly 4 & 5 Anne, c. 16, § 27 (1706). Although the most widely used edition of the English statutes, Pickering's Statutes At Large, makes it appear that Queen Anne's parliament adjourned in December 1705, it actually continued in session into January, when the present statute was enacted. *See* 11 William Holdsworth, A History of English Law 519, 526 (1938). The complete text of "the Statute of Anne" is as follows:

> actions of account shall and may be brought and maintained against the executors and administrators of every guardian, bailiff, and receiver; and also by one joint tenant, and tenant in common, his executors and administrators, against the other, as bailiff for receiving more than comes to his just share or proportion, and against the executor and administrator of such joint tenant, or tenant in common; and the auditors appointed by the court, where such action shall be depending, shall be, and are hereby empowered to administer an oath, and examine the parties touching the matters in question, and for their pains and troubles in auditing and taking such account, have such allowance as the court shall adjudge to be reasonable, to be paid by the party on whose side the balance of the account shall appear to be.

(n21)Footnote 160. Ala. Code § 6-7-40; Alaska Stat. § 34.15.120; Ark. Code §§ 18-60-101; Conn. Gen. Stat. Ann. § 52-404; Del. Code Ann. tit. 25, § 702; D.C. Code Ann. § 16-101; Ga. Code §§ 44-6-121 to 122; 765 ILCS 1005/4a; Ind. Code Ann. § 34-1-51-1; Kan. Stat. Ann. § 58-2522; Me. Rev. Stat. Ann. tit. 33, § 953; Md. Real Prop. Code Ann. § 14-106; Mich. Comp. Laws Ann. § 554.138; Minn. Stat. § 557.06; N.H. Rev. Stat. Ann. § 507:3; N.Y. Real Prop. Acts Law § 1201; Or. Rev. Stat. § 105.820; R.I. Gen. Laws § 10-2-1; Vt. Stat. Ann. tit. 12, § 4251; Va. Code Ann. § 8.01-31; W. Va. Code § 55-8-13; Wyo. Stat. § 1-32-119.

(n22)Footnote 161. Or. Rev. Stat. § 105.820.

(n23)Footnote 162. Lawrence Berger, *An Analysis of the Economic Relations Between Cotenants, 21 Ariz. L. Rev. 1015 (1979).*

(n24)Footnote 163. *Baird v. Moore, 141 A.2d 324 (N.J. 1958)* (no accounting for imputed value of possession by one of two tenants in common); *Esteves v. Esteves, 775 A.2d 163 (N.J. App. 2001)* (reaffirming the holding in *Baird* but qualifying it to permit recovery of imputed rent when, on a final accounting following sale, the tenant who had been in possession demands contribution from the tenant who had been out of possession for operating and maintenance expenses); *Heyse v. Heyse, 176 N.W.2d 316 (Wis. 1970)* (tenant in common in possession is not ordinarily obliged to pay rent to cotenant out of possession); *Martin v. Martin, 878 S.W.2d 30 (Ky. App. 1994); Keith v. El-Kareh, 729 P.2d 377 (Colo. App. 1986)* ("in the absence of a written agreement, tenants in common are not entitled to rent from each other unless the tenant seeking rent has been ousted from possession"); *Ashley v. Baker, 867 P.2d 792 (Alaska 1994); Parceluk v. Knudtson, 139 N.W.2d 864 (N.D. 1966); Yakavonis v. Tilton, 968 P.2d 908 (Wash. App. 1998)* ("prior to ouster, there must be an agreement to pay rent ...; after ouster, the occupying cotenant owes the nonoccupying tenant rent"). *Contra: Modic v. Modic, 633 N.E.2d 1151 (Ohio App. 1993).*

(n25)Footnote 164. *Goergen v. Maar, 153 N.Y.S.2d 826 (1956).*

(n26)Footnote 165. *Heller v. Heller, 45 P.3d 859 (Kan. App. 2002)* (action of account accrued when one tenant in

common agreed to lease the undivided interest to the other tenant in common, thereby changing their relationship to that of landlord and tenant).

(n27)Footnote 166. *Diaz v. Security Union Title Ins. Co., 639 So.2d 1004 (Fla. App. 1994); Yakavonis v. Tilton, 968 P.2d 908 (Wash. App. 1998); Cox v. Cox, 71 P.3d 1028 (Idaho 2003).*

(n28)Footnote 167. 2 William Blackstone, Commentaries 180 (1766).

(n29)Footnote 168. *Dahlberg v. Holden, 238 S.W.2d 699 (Tex. 1951), noted in 30 Tex. L. Rev. 379 (1952).*

(n30)Footnote 169. *Martin v. Thomas, 49 S.E. 118 (W.Va. 1904).*

(n31)Footnote 170. *United States v. Matlock, 415 U.S. 164 (1974).*

(n32)Footnote 171. *State v. Walker, 941 P.2d 1 (Wash. App. 1997).*

(n33)Footnote 172. *Spiller v. Mackereth, 334 So.2d 859 (Ala. 1976); Coggan v. Coggan, 239 So.2d 17 (Fla. 1970); Smith v. Tremaine, 350 P.2d 180 (Or. 1960); Fallon v. Davidson, 320 P.2d 976 (Colo. 1958), noted in 56 Mich. L. Rev. 1360 (1958); Farnsworth v. O'Neal, 130 So. 101 (Miss. 1930), noted in 4 So. Cal. L. Rev. 325 (1931); Martin v. Martin, 878 S.W.2d 30 (Ky. App. 1994)* ("ouster must amount to exclusive possession of the entire jointly held property"); *Pitson v. Sellers, 613 N.Y.S.2d 1005 (1994)* (ouster requires "a distinct assertion of a right hostile to the owner and brought home to him"); *Wheeling Dollar Bank v. City of Delray Beach, 639 So.2d 113 (Fla. App. 1994)* (ouster found where one-quarter owner conveyed whole to city which operated public tennis courts on property for 50 years); *Freeman v. Freeman, 473 S.E.2d 467 (S.C. App. 1996)* ("Only in rare, extreme cases will the ouster by one cotenant of the other cotenants be implied from exclusive possession and dealings with the property, such as collection of rents and improvement of the property."); *Perez v. Perez, 644 N.Y.S.2d 168 (N.Y. Sup. 1996); Gonzalez v. Gonzalez, 653 N.Y.S.2d 700 (1997)* ("exclusive occupation standing alone, does not constitute an ousting"); *Cox v. Cox, 71 P.3d 1028 (Idaho 2003)* (ouster found in case of disagreement between cotenants leading one to vacate the premises). *See also Purtle v. Denver Roller, Inc., No. CA 99-872, 2000 Ark. App. LEXIS 251 (Ark. App. 2000)* (in action concerning disputed ownership of grave plot held as tenancy in common, court observed "[t]here could hardly be any more complete ouster from a grave plot than burial of another in it.").

(n34)Footnote 173. *See, e.g., Beck v. Beck, 481 S.E.2d 317 (N.C. App. 1997)* (in answer to petition for partition filed over 20 years earlier but not prosecuted, one tenant in common had denied that petitioning tenant in common had any interest in property); *Yakavonis v. Tilton, 968 P.2d 908 (Wash. App. 1998)* (ouster on date trial court erroneously ruled, in partition action brought by the other cotenant, that the other cotenant was sole owner).

(n35)Footnote 174. *Snook v. Bowers, 12 P.3d 771 (Alaska 2000).*

(n36)Footnote 175. *Wright v. Wright, 512 S.E.2d 618 (Ga. 1999); Buchanan v. Redinger, 975 P.2d 1235 (Kan. App. 1999).*

(n37)Footnote 176. *Petran v. Allencastre, 985 P.2d 1112 (Haw. App. 1999).*

(n38)Footnote 177. N.Y. Real Prop. Actions & Proceedings Law § 541. *See* Jason Legg, Comment, *Real Property Actions and Proceedings Law Section 541: The Mind-Buster Busted, 58 Albany L. Rev. 1485 (1996).*

(n39)Footnote 178. *See Myers v. Bartholomew, 697 N.E.2d 160 (N.Y. 1998).*

(n40)Footnote 179. *Unick v. Saint Joseph Loan & Trust Co., 21 N.W.2d 752, 755 (Neb. 1946). See also Collier v. Welker, 199 S.E.2d 691 (N.C. App. 1973)* (applying "concept of presumptive ouster": ouster presumed if one tenant in common has been in undisturbed possession for twenty years), *noted in 10 Wake Forest L. Rev. 300 (1974); Wachovia Bank of North Carolina v. Weeks, 562 S.E.2d 304 (N.C. App. 2002)* (reaffirming *Collier* and applying concept of

"constructive ouster").

(n41)Footnote 180. *Wright v. Wright, 512 S.E.2d 618 (Ga. 1999).*

(n42)Footnote 181. *Rostan v. Huggins, 5 S.E.2d 162 (N.C. 1939), noted in 24 Minn. L. Rev. 707 (1940).*

(n43)Footnote 182. In the *Matter of Teranis, 128 F.3d 469 (7th Cir. 1997).*

(n44)Footnote 183. Bankruptcy Code § 363(h):

> The trustee can sell both the estate's interest and the interest of the non-debtor in property owned as tenants in common, joint tenants, or tenants by the entirety only if:
>
> (1) partition in kind of such property among the estate and such co-owners is impracticable;
>
> (2) sale of the estate's undivided interest in such property would realize significantly less for the estate than sale of such property free of the interest of such co-owners;
>
> (3) the benefit to the estate of a sale of such property free of the interests of co-owners outweighs the detriment, if any, to such co-owners; and
>
> (4) such property is not used in the production, transmission, or distribution, for sale, of electric energy or of natural or synthetic gas for heat, light, or power.

One commentator has described this section as going "too far." Thomas E. Plank, *The Constitutional Limits of Bankruptcy, 63 Tenn. L. Rev. 487, 571 (1996).*

(n45)Footnote 184. Bankruptcy Code § 363(i).

(n46)Footnote 185. Bankruptcy Code § 363(j).

(n47)Footnote 186. *Windell v. Miller, 687 N.E.2d 585 (Ind. App. 1997).*

(n48)Footnote 187. *Requiring notice: Kneedler v. League Wide, Inc., 979 P.2d 163 (Mont. 1999); Burbach v. Sussex County Municipal Utilities Auth., 723 A.2d 137 (N.J. App. 1999). Not requiring notice*: *Jennings v. Bradfield, 454 P.2d 81 (Colo. 1969); Jesberg v. Klinger, 358 P.2d 770 (Kan. 1961).*

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CHAPTER 32 TENANCIES IN COMMON

4-32 Thompson on Real Property, Thomas Editions § 32.08

AUTHOR: Professor John V. Orth School of Law University of North Carolina

§ 32.08 Termination of Tenancies in Common.

As the simplest form of concurrent ownership, marked by the single unity of possession, the tenancy in common can be terminated by any act that ends the state of multiple ownership. In keeping with the treatment of the termination of other forms of concurrent ownership, the terminating acts are considered under the headings: termination by act of all the tenants in common (§ 32.08(a)), termination by act of one tenant in common (§ 32.08(b)), and termination by operation of law (§ 32.08(c)).

COMPUTER-ASSISTED RESEARCH:

LEXIS: termin! w/50 (tenan! w/3 common)

§ 32.08(a) Termination by Act of All Tenants in Common.

Tenancies in common may be terminated by the act of all the tenants in common. Obviously, a grant by all the tenants in common to a stranger as sole owner ("A and B to C and heirs") terminates the tenancy in common; what had been held as a concurrent estate is now held in severalty. It is equally obvious that grants of divided shares ("A and B, the lower forty acres to A and heirs, the upper forty acres to B and heirs") terminate the tenancy in common; what had been an undivided estate held concurrently has become divided estates held in severalty. The former resembles partition by sale and division of the proceeds; the latter is a voluntary partition in kind.

It is also possible for tenants in common to terminate their tenancy by a transfer from themselves as tenants in common to themselves as joint tenants ("A and B to A and B as joint tenants and not as tenants in common"), or -- if they are married to one another -- to themselves as tenants by the entirety ("A and B to A and B, husband and wife, as tenants by the entirety and not as joint tenants"). At common law an intermediate conveyance to a straw man was required to perfect the unities in these cases. As tenants in common, they hold undivided shares by several titles, or several shares by one title, while joint tenants hold by the share and by the whole (*per my et per tout*). Also joint tenants and tenants by the entirety must, at common law, hold equal shares in order that the unity of interest be satisfied. Straw conveyances are probably no longer required anywhere, although only a few states have legislation expressly addressing the matter. n188

To convey land held in tenancy in common, the joinder of all the tenants is, of course, necessary. Because all the multiple owners may in some cases be difficult to locate, a state may by statute provide means by which less than all the co-owners may transfer a complete interest. n189 Where conveyances by tenants in common take the form of a warranty deed, as is the usual practice, the warrantors are jointly liable in case of breach; an exception to this rule is recognized if the warranty expressly limits each warrantor's liability to his or her own interest. n190

Obviously, it is possible for one tenant in common to authorize the other tenant or tenants in common to convey the concurrent estate on behalf of all. If, however, the requisite statutory formalities for granting the authority, such as the Statute of Frauds' requirement of a writing, are not complied with, the resulting deed is voidable, not void, and therefore susceptible to ratification by the nonparticipating tenant in common. n191

§ 32.08(b) Termination by Act of One Tenant in Common.

Tenancies in common may be terminated by the act of one tenant in common. Obviously, if two persons hold as tenants in common, the release by one of that one's interest to the other will terminate the tenancy in common. The common law requirement of the use of words of inheritance whenever fee interests are conveyed does not apply to releases by one tenant in common to another. n192

Although at common law one tenant in common had no right to force a partition in kind, that right was conceded by statute as early as the reign of King Henry VIII. n193 The proceedings were simplified a century and a half later, at the time of King William III. n194 These statutes were received as part of the common law in America (or local substitutes were adopted), so one tenant in common is now everywhere entitled to a partition in kind; the effect is to give one tenant in common the right to demand a divided share in the estate. Because some estates are unsuited to partition in kind, a later English statute, also copied in America, provides for partition by sale and division of the proceeds. n195

Because a transfer by one tenant in common of that tenant's share to a stranger merely substitutes the grantee for the grantor in the undivided possession, it does not terminate the tenancy in common, in contrast to a joint tenancy. n196 What one tenant in common has to transfer is an undivided interest. An attempt to convey a divided interest, as by describing a particular fraction of the property, is an attempt to partition in kind without the consent of the other tenant or tenants in common and without the safeguards of a judicial partition. While some of the older authorities hold such a conveyance void, the modern rule is to hold it voidable, that is, valid as between the parties until and unless voided by the nontransferring tenant or tenants in common. n197

Although one tenant in common can transfer or encumber that tenant's share, the tenant cannot alter the share of the other tenant or tenants in common; for instance, one tenant in common cannot impose an easement by grant or dedication on the common property. n198 Neither can one tenant in common, by offering the share for sale, compel the other tenant or tenants in common to purchase the offering tenant's share. n199

Each tenant in common has a title that is separate and distinct. In the absence of an agreement to sell the property together, each tenant in common is free to transfer or encumber the interest without the consent or knowledge of the other tenant or tenants in common. In consequence, absent additional facts indicating a fiduciary relationship between the tenants, one tenant in common may profit from information concerning the common property; for example, one tenant in common may purchase another's interest for resale at a higher price without disclosure of the opportunity to the other. n200

In case property is held in tenancy in common, an option in favor of one tenant in common to purchase the share of another tenant in common that is unlimited as to time violates the common-law Rule Against Perpetuities and is void. n201

§ 32.08(c) Termination by Operation of Law.

Tenancies in common may be terminated by operation of law without regard to the act of the tenants in common, together or separately. The key is terminating the concurrent ownership. When the state in its exercise of the power of eminent domain takes part or all of the estate owned by tenants in common, it transfers what had been owned concurrently to itself as sole owner; the cotenants receive the estate's value in money. The effect is identical to a voluntary transfer by all the tenants in common to a sole owner (or to a partition by sale and division of the proceeds) and terminates the tenancy in common. In case of a partial taking, the estate is terminated as to that part and continues as to the rest; the cotenants share the condemnation award in proportion to their respective interests. n202

FOOTNOTES:

(n1)Footnote 188. Haw. Rev. Stat. § 509-2 (also authorizing conveyance by tenants in common to themselves and another or others as joint tenants and conveyance by married co-owners to themselves as tenants by the entirety); Me. Rev. Stat. Ann. tit. 33, § 159 (also authorizing conveyance by tenants in common to themselves and another or others as joint tenants).

(n2)Footnote 189. *See, e.g.,* Ark. Code Ann. § 15-32-501 (sale and removal of timber permitted when at least eighty percent of co-owners join in grant and remaining co-owners cannot be located despite "diligent search and inquiry"; absentee owners' share of sale proceeds to be held by clerk of court).

(n3)Footnote 190. *Windell v. Miller, 687 N.E.2d 585 (Ind. App. 1997)* (construing grant from two tenants in common who "are each conveying and warranting their respective undivided one-half interest").

(n4)Footnote 191. *Treglia v. Zanesky, 788 A.2d 1263 (Conn. App. 2001).*

(n5)Footnote 192. 4 James Kent, Commentaries on American Law 7 (12th ed. by O.W. Holmes, 1873).

(n6)Footnote 193. *31 Hen, 8,* c. 1 (1539); *32 Hen. 8,* c. 32 (1540).

(n7)Footnote 194. 8 & 9 Will. 3, c. 3 (1697).

(n8)Footnote 195. 31 & 32 Vict., c. 40 (1868).

(n9)Footnote 196. *See* § 31.08(b), *supra*.

(n10)Footnote 197. *Toulouse v. Board of Comm'rs of Island County, 949 P.2d 829 (Wash. App. 1998)* ("A tenant in common cannot convey her fractional undivided interest in a parcel of property so as to divide it into separate lots."); *Kean v. Dench, 413 F.2d 1 (3d Cir. 1969)* (applying law of Virgin Islands).

(n11)Footnote 198. *Texas Mortgage Co. v. Phillips Petroleum Co., 470 F.2d 497 (5th Cir. 1972)* (applying Texas law).

(n12)Footnote 199. *In re Scipio, 203 B.R. 237 (Bankr. D Md. 1996).*

(n13)Footnote 200. *Douglas v. Jepson, 945 P.2d 244 (Wash. App. 1997).*

(n14)Footnote 201. *Nash v. Scott, 966 S.W.2d 936 (Ark. App. 1998).*

(n15)Footnote 202. *In re Development Authority of Philadelphia, 257 A.2d 520 (Pa. 1969).*

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CHAPTER 32 TENANCIES IN COMMON

4-32 Thompson on Real Property, Thomas Editions § 32.09

AUTHOR: Professor John V. Orth School of Law University of North Carolina

§ 32.09 The Future of the Law of Tenancies in Common.

The future of the law of tenancies in common is almost certainly bright. It is inconceivable that a system of property law would dispense altogether with concurrent ownership. It is only to be expected that two or more persons will want to hold property together, and it is inevitable under modern laws of inheritance that property will sometimes pass to two or more heirs. No imaginable public policy will prohibit concurrent ownership; even in days when the rule of primogeniture expressed a preference for keeping estates together, tenancies in common (as well as other forms of concurrent ownership) were tolerated. The real question, as explored elsewhere, n203 is whether any form of concurrent ownership other than tenancies in common will continue to exist. With its freedom of alienation and devise, its inheritable shares, and its right to partition, the estate of tenancy in common seems ideally suited to the modern ethos of individualism. Tenants in common remain together only so long as each and every one wants to, and no longer. What had been for Blackstone a residual estate, recognized when all else failed, has become the modern paradigm of concurrent ownership. Rather than viewing it as some kind of defective joint tenancy, modern observers tend to see the tenancy in common as the norm from which other forms of concurrent ownership (if any) deviate to one degree or another.

FOOTNOTES:
(n1)Footnote 203. *See* § 31.09, *supra*; *see* § 33.09, *infra*.

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CHAPTER 32 TENANCIES IN COMMON

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Supp. to § 32.02 Analytical Synopsis of the Law of Tenancies in Common.

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Add at end of note:

Legal systems derived from Roman law express the right to partition with the maxim, *"Nemo in communione potest invitus detineri"* (No one can be kept in co-ownership against his will).

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Supp. to § 32.06 Creation of Tenancies in Common.

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§ 32.06(a) Creation by Operation of Law: The Single Unity: Possession. [Go To Main]

Add at end of the note:

Clark v. Dady, 131 S.W.3d 382 (Mo. App. 2004) (presumption of equal shares may be rebutted by proof of unequal contributions toward purchase price, "provided there is neither a family relationship among the co-tenants nor any evidence of donative intent on the part of those who contributed more than their pro rata amounts").

Add new note 26.1 at end of 5th sentence in second full paragraph: n26.1

§ 32.06(b). Creation by Express Limitation [Go To Main]

§ 32.06(b)(1). At Common Law.

Add at the end of the run-over paragraph:

By judicial decision South Carolina recognizes a so-called "tenancy in common with a right of survivorship."

§ 32.06(b)(2). Under Modern Statutes. Va. Code § 1

Add at the end of the first full paragraph:

For Native Americans subject to the American Indian Probate Reform Act of 2004, the common law presumption in favor of joint tenancy with right of survivorship is reinstated in devises to two or more persons, as part of a program to reduce further fractionation of Indian allotments.

At the end of the first sentence of the second full paragraph, add new note: n57.1

FOOTNOTES:
(n1)Footnote 26.1. Because each tenant in common has "a separate and distinct interest," notice of tax foreclosure proceedings must be sent separately to each cotenant whose interest is being foreclosed. *Homeowners Solutions v. Nguyen, 200 P.3d 743 (Wash. App. 2009)* .

(n2)Footnote 57.1. Perhaps nothing is simple. A Massachusetts court wrestled with the meaning of a devise to multiple devisees, one of whom was expressly given a "right to occupy for life" and concluded that it resulted in an ordinary tenancy in common with no additional rights to possession in any co-tenant. *Hershman-Tcherepnin v. Tcherepnin, 873 N.E.2d 771 (Mass. App. 2007)* .

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Supp. to § 32.07 Incidents of Tenancies in Common.

[Go To Main]

§ 32.07(b) Action of Contribution. [Go To Main]

Add at the end of the first full paragraph:

Once an improvement is agreed to by a co-tenant, the co-tenant may not refuse to contribute to its cost merely because the improvement does not result in a permanent increase in the value of the common owned property.

§ 32.07(c) Action of Account. [Go To Main]

Add to Note 163:

Daly v. Shepherd, 645 S.E.2d 485 (Va. 2007) (in absence of ouster, cotenant in possession of property that is capable of co-occupation is not liable to cotenant out of possession for pro rata share of fair rental value).

§ 32.07(d) Action of Ejectment. [Go To Main]

Add at the end of the first full paragraph:

Although each tenant in common is entitled to defend the whole possession against strangers, recovery in an action for

damages brought by fewer than all the tenants in common entitles them only to a proportionate share of the total damages.

Replace cited case with:

Georgia v. Randolph, 547 U.S. 103, 126 S.Ct. 1515 (2006) .

Add before See also signal:

Estate of Duran, 66 P.3d 326 (N.M. 2003) (silence and evasive answers by cotenant in possession about intention regarding property did not constitute ouster).

Add:

Preciado v. Wilde, 139 Cal. App. 4th 321, 42 Cal. Rptr. 3d 792 (2006) (evidence of ouster of a cotenant must "be stronger than that which would be required to establish a title by adverse possession in a stranger").

Scott v. Yarbro, 2008 Tenn. App. LEXIS 615 (Tenn. Ct. App. Oct. 15, 2008) (distinguishing between acts required to extinguish cotenants' title by adverse possession and those required to extinguish cotenants' title by prescription, but finding neither on facts of this case).

Add at the end of the first full paragraph:

Special problems may arise if the purportedly ousted cotenant is incompetent during some or all of the relevant period.

§ 32.07(e) Creditors' Rights. [Go To Main]

Add at the end of the runover paragraph:

Although tenants in common generally have the right to possession of the entire premises, they may contract otherwise. While not affecting the rights of a creditor without notice, a contract may limit liability for personal injuries to the cotenant in possession and control of the site of the injury.

§ 32.08(b) Termination by Act of One Tenant in Common. [Go To Main]

At the end of the last paragraph, add new sentence:

Because partition is considered an essential element of tenancy in common, an attempt by a grantor to prohibit partition is viewed as an invalid restraint on alienation.

At the end of the note, add:

Gray v. Caldwell, 904 So. 2d 212 (Miss. 2005) .

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CHAPTER 33 TENANCIES BY THE ENTIRETY

4-33 Thompson on Real Property, Thomas Editions 33.syn

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CHAPTER 33 TENANCIES BY THE ENTIRETY

4-33 Thompson on Real Property, Thomas Editions § 33.01

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§ 33.01 Concurrent Estates.

Whenever two or more persons own the same thing at the same time, a form of concurrent ownership exists. At common law n1 concurrent estates in land are of three types: joint tenancies, tenancies in common, and tenancies by the entirety -- the latter limited to persons married to one another. (A fourth form of concurrent estate, tenancy in coparcenary, is now obsolete). n2 Concurrent estates in land are not restricted to freehold estates but may exist in leaseholds, easements, and other interests in real property; nor are they restricted to present estates, but may exist in future interests as well. A further form of concurrent ownership is recognized by statute, as opposed to common law, in those states adopting the Uniform Partnership Act. n3 Concurrent ownership of personalty is also recognized, the forms of ownership being copied from those for land.

Whenever property is owned by one person alone, there exists a sole ownership, known -- by contrast to the concurrent tenancies -- as a tenancy in severalty. At common law there is a presumption in favor of sole ownership: in the words of Sir William Blackstone, "all estates are supposed to be of this sort, unless where they are expressly declared to be otherwise." n4

FOOTNOTES:
(n1)Footnote 1. The "common law" referred to is the common law of England as it was at the time of American Independence, for which the best and most convenient source is William Blackstone's four-volume Commentaries on the Laws of England, first published in 1765 to 1768. The present author is acutely aware that continuing to refer to this body of law in the present tense is peculiar for a number of reasons: first, because the common law of England continued to grow and change in its native land; second, because the transplanted common law continued to grow and change in the various American jurisdictions; and finally, because there is something truly metaphysical in talking presently about a "law" that is not now recognized and enforced in at least one jurisdiction. Nonetheless, the author is convinced that there continues to be value, not merely heuristic, in using the common law in this sense as the background against which to place all later developments.

(n2)Footnote 2. On tenancy in coparcenary, *see* Chapter 35, *infra*.

(n3)Footnote 3. *See* Chapter 34, *infra*. Ever since the days of Joseph Story, it has been recognized that concurrent ownership in and of itself does not establish a partnership. Joseph Story, Commentaries on the Law of Partnership 3-4

(1841); Uniform Partnership Act § 7(2) ("Joint tenancy, tenancy in common, tenancy by the entireties, joint property, common property, or part ownership does not of itself establish a partnership, whether such co-owners do or do not share any profits made by the use of the property."), 7 U.L.A. 18 (1949).

(n4)Footnote 4. 2 William Blackstone, Commentaries on the Laws of England 179 (1766).

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CHAPTER 33 TENANCIES BY THE ENTIRETY

4-33 Thompson on Real Property, Thomas Editions § 33.02

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§ 33.02 Analytical Synopsis of the Law of Tenancies by the Entirety.

Tenancy by the entirety is a form of concurrent estate; as such, it implies the ownership by more than one person of the same property at the same time. n5 Unlike other forms of concurrent ownership, tenancy by the entirety is limited to persons married to one another. n6 Forms of concurrent ownership are distinguishable by reference to three qualities: (1) alienability, the quality of being transferable inter vivos by sale or gift; (2) devisability, the quality of being transferable at death by devise; (3) inheritability, the quality of passing at death to the heir of the deceased. Neither tenant by the entirety has an interest in the concurrent estate that is devisable or inheritable. n7 By contrast, each joint tenant possesses the power to alienate an undivided interest and sever the estate, but no joint tenant possesses a devisable or inheritable interest; each tenant in common has an interest that is alienable, devisable, and inheritable.

Types of concurrent ownership without devisable and inheritable shares for each co-owner are described as including a "right of survivorship" or *jus accrescendi*, meaning that on the death of one co-owner the interest of the deceased accrues to the surviving co-owner or co-owners. n8 The survivor or survivors benefit, in other words, at the decease of the co-owner whose interest terminates. "The common law theory," as explained by eminent authorities, "is that the decedent's interest vanishes at death, and therefore no probate is necessary because no interest passes to the survivor at death." n9 No true right exists, the so-called "right of survivorship" merely describing the effect of the death of a co-owner in such forms of concurrent estate. n10 Survivorship is an incident of tenancies by the entirety and joint tenancies; it is lacking in tenancies in common.

Unlike the right of survivorship in joint tenancies, the right of survivorship in tenancies by the entirety is indestructible by any act of one co-tenant, short of ending the marriage. To summarize the result at common law, the holding of each co-tenant in a tenancy by the entirety was described in Law French as being *per tout et non per my*, "by the whole and not by the share (moiety)," n11 meaning each holds the whole or entire interest but not an undivided share and therefore lacks the power to alienate.

Unlike a tenant in common and a joint tenant, a tenant by the entirety has no right to demand partition of the estate. n12 Before the modern era of fading interspousal immunity, the rule against partition of tenancies by the entirety could be explained on the ground that neither husband nor wife could sue the other. n13 Today it must be supported by a public policy in favor of protecting marital property from the unilateral act of one spouse, including the claims of one spouse's

creditors.

Marital property, particularly residential real estate, is in many states also protected from the claims of creditors by a homestead exemption. n14 To this extent homesteads and tenancies by the entirety are similar, but they differ in significant respects. As itemized by one court:

> In contrast to the homestead right, a tenancy by the entirety: (1) is a form of ownership in property; (2) does not arise unless both spouses are owners of the property; (3) is accompanied by a right of survivorship which grants the surviving spouse a fee interest in the entire property (not a personal privilege akin to a life estate); and (4) is a right which cannot pass by intestate succession or will of the predeceased spouse. n15

FOOTNOTES:

(n1)Footnote 5. The common law did not at first use the concept of ownership with respect to land, preferring to describe those with interests in real property as "tenants," a word derived from the Latin for "holders." What was "held" was, therefore, a "tenancy." *See* A.W.B. Simpson, A History of the Land Law 47-48 (2d ed. 1986). In modern parlance, tenancy means ownership, and the words are used interchangeably in this chapter.

(n2)Footnote 6. The form of concurrent ownership limited to persons married to one another is referred to in various sources as "tenancy by the entirety," "tenancy by the entireties," and "tenancy by entireties." All mean the same, but in this chapter only the first is used.

(n3)Footnote 7. At one time, the husband holding in tenancy by the entirety with his wife was recognized as having a power to alienate his interest subject only to his wife's right of survivorship; the wife had no comparable power. *See* § 33.05, *infra*.

(n4)Footnote 8. *See In re Birney, 200 F.3d 225 (4th Cir. 1999)* (applying Maryland law) (bankrupt tenant by the entirety does not "inherit" any interest on the death of the other tenant by the entirety, so the entirety property is not available to creditors whose claims are against the bankrupt alone); *Fazekas v. Fazekas, 737 A.2d 1262 (Pa. Super. 1999)* ("When one spouse dies, the surviving spouse takes no new estate; rather, the only change is in the legal entity holding the estate").

(n5)Footnote 9. Jesse Dukeminier & Stanley M. Johanson, Willls, Trusts, and Estates 350 (6th ed. 2000).

(n6)Footnote 10. The right of survivorship in tenancies by the entirety is sometimes analogized to a future interest. *E.g., United States v. Diemer, 859 F. Supp. 126 (D.N.J. 1994)* ("Under New Jersey law, tenants by the entirety each 'hold as tenants in common for their joint lives' ..., subject to the other spouse's right of survivorship."); United States v. 44133 Duchess Dr., 863 F. Supp. 492 (E.D. Mich. 1994) ("Under Michigan law, the individual interest of a tenant by the entireties is the functional equivalent of a life estate with a right of survivorship."); *Newman v. Chase, 359 A.2d 474 (N.J. 1976)* ("[e]ach tenant by the entirety is a tenant in common with the other during the joint lives of the spouses"). The analogy is inexact, as will appear below.

(n7)Footnote 11. 2 William Blackstone, Commentaries 182 (1783).

(n8)Footnote 12. On partition, *see* Chapter 38, *infra*.

(n9)Footnote 13. 2 William Blackstone, Commentaries 182 note (W. Lewis ed. 1902).

(n10)Footnote 14. *E.g.*, N.C. Const. art. x, § 1 (exempting realty "to a value fixed by the General Assembly but not less than $1,000, to be selected by the owner thereof"). *See* John V. Orth, The North Carolina State Constitution: A Reference Guide 151-53 (1993). Other states have more generous provisions.

(n11)Footnote 15. *United States v. Jones, 877 F. Supp. 907, 919 (D. N.J. 1995).*

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CHAPTER 33 TENANCIES BY THE ENTIRETY

4-33 Thompson on Real Property, Thomas Editions § 33.03

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§ 33.03 Tenancies by the Entirety in the Context of Concurrent Estates.

At the time of American Independence tenancy by the entirety had only indistinctly emerged as a separate form of concurrent estate. In the first edition of his *Commentaries on the Laws of England* in 1766 Sir William Blackstone did not so much as mention it in his discussion of concurrent ownership; only in the final, posthumous edition of 1783 was a single-sentence summary of the estate added. n16 No oversight, the omission had occurred because Blackstone did not view ownership by husband and wife as a situation involving multiple owners, "husband and wife being considered as one person in law." In fact, tenancy by the entirety was as much a creature of common law concepts of marriage and the status of women as it was of concepts of concurrent ownership. If marriage resulted in the formation of one new legal entity, then it would be no truer of the marital unit than of a corporation to speak of it as holding a concurrent estate. n17 As married women gradually gained recognition of their legal personality, the estate of tenancy by the entirety came to be seen as a specialized form of joint tenancy, limited to persons married to one another and, for reasons of public policy, inseverable by the act of one spouse.

FOOTNOTES:
(n1)Footnote 16. "And therefore, if an estate in fee be given to a man and his wife, they are neither properly joint-tenants, nor tenants in common: for husband and wife being considered as one person in law, they cannot take the estate by moieties, but both are seised of the entirety, *per tout et non per my*; the consequence of which is, that neither the husband nor the wife can dispose of any part without the assent of the other, but the whole must remain to the survivor." 2 William Blackstone, Commentaries 182 (1783). *See* John V. Orth, *Tenancy by the Entirety: The Strange Career of the Common Law Marital Estate, 1997 B.Y.U. L. Rev. 35.*

(n2)Footnote 17. While admitting that "there is something metaphysical -- and to the modern mind something peculiar -- about this ancient transformation upon death of the first tenant," one judge likened it to a corporation owning real property:

> If the corporation is owned by two shareholders and one shareholder dies, the ownership of the real property does not change. Title remains vested in the corporation even if the shareholder's death results in the transfer of the decedent's stock interest to the survivor.

In re Hunter, 284 B.R. 806, 811 (Bankr. E.D. Va. 2002) (Mayer, J.).

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CHAPTER 33 TENANCIES BY THE ENTIRETY

4-33 Thompson on Real Property, Thomas Editions § 33.04

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§ 33.04 Outline of the Chapter.

Because tenancy by the entirety was to begin with as much a part of the law concerning marriage as it was of the law of concurrent estates, the historical survey of the law of tenancies by the entirety with which the chapter begins (§ 33.05) must take into account the legal capacity of married women to own property, as well as concepts of concurrent ownership among persons *sui juris*. Thereafter, the modern estate is considered under three broad headings: creation of tenancies by the entirety (§ 33.06), incidents of tenancies by the entirety (§ 33.07), and termination of tenancies by the entirety (§ 33.08). After a brief consideration of the likely future of the law of tenancies by the entirety (§ 33.09), the chapter will conclude with a select bibliography of the law of tenancies by the entirety (§ 33.10).

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CHAPTER 33 TENANCIES BY THE ENTIRETY

4-33 Thompson on Real Property, Thomas Editions § 33.05

AUTHOR: Professor John V. Orth School of Law University of North Carolina

§ 33.05 History of the Law of Tenancies by the Entirety.

Va. Code § 1

From very early times the common law recognized the capacity of unmarried women (femes sole) to hold property. Although in the law of inheritance males of the same degree were preferred to females, women were accepted as heirs. n18 For reasons no longer completely clear, the rule of primogeniture, preferring the firstborn over others of the same degree, was not applied to female heirs, n19 so a form of concurrent ownership, tenancy in coparcenary, n20 was early recognized.

Married women (femes covert) were in an altogether different situation from unmarried women and widows. Property they owned in their own right (in severalty) passed into the control of their husbands on marriage. Women acquired dower rights in their husbands' real property, unless it was held in joint tenancy with another or others, and married men acquired more extensive rights in their wives' real property, known as curtesy, contingent on the birth of live offspring to the couple. n21 Beginning in the 17th century, equity began to enforce trusts created, usually by landowning fathers, to preserve property for the sole and separate use of women during marriage. n22

The property rights of married women mentioned in the preceding paragraph -- real property owned by women during marriage, dower rights, and equitable interests in trusts for their sole and separate use -- were always distinct from tenancy by the entirety. These rights all were rights in severalty; although profoundly affected by the marriage and the rights of husbands, none of them was held by the spouses together. By contrast, tenancy by the entirety described the situation in which husband and wife owned the same property at the same time.

Despite the fact that the title was in husband and wife together, the common law accorded the husband all the powers of dominion and control over the property: as to the land, the two became one, the quip ran, and "the husband was the one." n23 He had all the powers of ownership except the power to defeat her right of survivorship. In terms of the analysis used earlier (§ 33.02, *supra*), his interest was not devisable or inheritable. Although the predominance of the husband was originally rooted in concepts of sex roles and matrimony, by the time of American Independence it was associated almost inextricably with the estate of tenancy by the entirety.

The movement for women's rights in the 19th century resulted eventually in the removal in all jurisdictions of the disability of married women to control their own property during marriage. The effect, as A.V. Dicey pointed out, was to give to all married women the rights with respect to all property once limited to the beneficiaries of trusts for their sole and separate use. n24 The intimate connection between the status of women and the estate of tenancies by the entirety is nowhere better illustrated than in the judicial decisions that, once the rights of married women to hold property had been recognized by Married Women's Property Acts, there was no longer any such estate as tenancy by the entirety. n25 It was only in those states that permitted the estate after recognizing married women's rights that tenancy by the entirety became what it is today, simply a form of concurrent ownership and not also (or mainly) an expression of women's disability during marriage. England, the land of its birth, eliminated the estate in 1925 by converting the tenancy by the entirety into a joint tenancy. n26

So far had the law traveled from 1783 when Blackstone declared in an afterthought: "if an estate in fee be given to a man and his wife, they are neither properly joint-tenants, nor tenants in common," n27 that in 1893 a Massachusetts judge could declare with equal assurance: "an estate in entirety is an estate in joint tenancy." n28 The distinguishing characteristic, the inseverable right of survivorship, was explained by Blackstone, logically enough, as the inevitable consequence of the legal effect of matrimony, "husband and wife being considered as one person in law," n29 while his Massachusetts counterpart had to leave it as a special "limitation" on the peculiar joint tenancy. n30 Blackstone's unqualified assertion that "neither the husband nor the wife can dispose of any part without the assent of the other" n31 came to be understood to mean that "during their joint lives neither the husband nor the wife can destroy the right of survivorship without the assent of the other party." n32 In consequence, a limited power of alienation in the husband, limited by his wife's indefeasible right of survivorship, came to be recognized in some jurisdictions. n33

The classification of tenancy by the entirety as a mere variant of joint tenancy was to cause almost as many problems as it solved. n34 The concurrence of the four unities (time, title, interest, and possession), a necessary prerequisite for the estate of joint tenancy, n35 had never before been a problem with tenancy by the entirety, "husband and wife being considered as one person in law." Once the distinct legal personhood of married women was accepted, the paradox arose in states continuing to recognize tenancy by the entirety that husband and wife were two persons, yet "the husband was the one." What could the unities of interest and possession mean when the husband had all rights of dominion and control?

With glacial slowness, in a process not completed until late in the 20th century, state after state acted to equalize the rights of spouses over property held by the entirety. n36 At last, the modern reality of the estate emerged: a form of concurrent estate limited to married persons and offering them security of title and some degree of protection from creditors. The legal benefits of the tenancy by the entirety, coupled perhaps with the decline of male-dominated notions of marriage, may explain the increasing prevalence of the estate. Even in states where the tenancy by the entirety remained available in the nineteenth century, many parcels of residential real estate continued to be held by the husband in sole ownership; increasingly in the twentieth century the married grandchildren hold in tenancy by the entirety. n37 In Professor Moynihan's apt phrase, tenancy by the entirety is "an anomaly based on an anachronism," n38 yet (like so many of the common law's anomalies) it serves a modern purpose. Having broken free at last from its roots in the male-dominated world of feudal England, tenancy by the entirety has become the common law's answer to the civil law system of community property. n39

FOOTNOTES:

(n1)Footnote 18. 2 William Blackstone, Commentaries 212 (1766) (second canon of descent: "the male issue shall be admitted before the female").

(n2)Footnote 19. 2 William Blackstone, Commentaries 214 (1766) (third canon of descent: "where there are two or more males in equal degree, the eldest only shall inherit; but the females all together"). It has been suggested that at least one reason for admitting all female heirs of the same degree was that it was more profitable for the lord to have the wardship and marriage of all heiresses. A.W.B. Simpson, A History of the Land Law 58-59 (2d ed. 1986).

(n3)Footnote 20. *See* Chapter 35, *infra*.

(n4)Footnote 21. 2 William Blackstone, Commentaries 126, 129 (1766).

(n5)Footnote 22. For the development over time of trusts for the sole and separate use of married women, *see* 5 William Holdsworth, A History of English Law 312-15 (3d ed. 1945), 6 *id*. 644-45 (2d ed. 1937), and 12 *id*. 275-76 (1938).

(n6)Footnote 23. John E. Cribbet, Et Al., Cases and Materials on Property 329 (6th ed. 1990).

(n7)Footnote 24. A.V. Dicey, Lectures on the Relation Between Law and Public Opinion in England During the 19th Century 393 (2d ed. 1914).

(n8)Footnote 25. *Clark v. Clark, 56 N.H. 105 (1875); Cooper v. Cooper, 76 Ill. 57 (1875); Davis v. Davis, 75 S.E.2d 46 (S.C. 1953); Appeal of Robinson, 33 A. 652 (Me. 1895); Lawler v. Byrne, 96 N.E. 892 (Ill. 1911), noted in 7 Ill. L. Rev. 52 (1912). Contra*: *Bloomfield v. Brown, 25 A.2d 354 (R.I. 1942).*

(n9)Footnote 26. Law of Property Act, 1925, 15 & *16 Geo. 5*, ch. 20, § 39(6), sched. 1, pt. 6.

(n10)Footnote 27. 2 William Blackstone, Commentaries 182 (1783).

(n11)Footnote 28. *Morris v. McCarty, 32 N.E. 938, 939 (Mass. 1893).*

(n12)Footnote 29. 2 William Blackstone, Commentaries 182 (1783).

(n13)Footnote 30. *Morris v. McCarty, 32 N.E. 938, 939 (Mass. 1893).*

(n14)Footnote 31. 2 William Blackstone, Commentaries 182 (1783).

(n15)Footnote 32. *Morris v. McCarty, 32 N.E. 938, 939 (Mass. 1893).*

(n16)Footnote 33. *See King v. Greene, 153 A.2d 49 (N.J. 1959)* ("the husband could, at common law, alienate his right of survivorship, or, more properly, his fee simple subject to defeasance").

(n17)Footnote 34. The Uniform Probate Code conflates joint tenancies and tenancies by the entirety by defining "joint tenants with the right of survivorship" to include "co-owners of property held under circumstances that entitle one ... to the whole of the property on the death of the other," that is, to include tenants by the entirety. U.P.C. § 1-201(26), 8 U.L.A. 10 (Supp. 1994).

(n18)Footnote 35. On the doctrine of the four unities in the law of joint tenancy, *see* § 31.06(b), *supra*.

(n19)Footnote 36. In what was probably the last law of its type in the United States, North Carolina adopted the Tenancy by the Entirety Reform Act in 1982, now codified in N.C. Gen. Stat. § 39-13.6:

A husband and wife shall have an equal right to the control, use, possession, rents, income, and profits of real property held by them in tenancy by the entirety. Neither spouse may bargain, sell, lease, mortgage, transfer, convey or in any manner encumber any property so held without the written joinder of the other spouse... .

See William A. Reppy, *North Carolina's Tenancy by the Entirety Reform Legislation of 1982, 5 Campbell L. Rev. 1 (1982).* In states that did not view the Married Women's Property Acts as sounding the death knell for tenancies by the entirety, the acts could at least be read to prevent the husband from exercising exclusive possession and control of such estates. *See, e.g., Bloomfield v. Brown, 25 A.2d 354 (R.I. 1942).*

(n20)Footnote 37. *See* Carole Shammas Et al., Inheritance in America: From Colonial Times to the Present (1987) (in Bucks County, Pa., in 1890 less than 1% of married couples held residential real estate "together"; in the 1920s "deeds belonging to married couples rose to 20%; by 1940 to 54.8%; by 1960 to 80%"). In the present author's own family in nearby Lancaster County, Pa., his grandparents' home was titled in the name of his grandfather as sole owner, while his parents took title to their home as tenants by the entirety.

(n21)Footnote 38. Cornelius J. Moynihan, Introduction to the Law of Real Property 223 (2d ed. 1988).

(n22)Footnote 39. *See* John V. Orth, *Tenancy by the Entirety The Strange Career of the Common Law Marital Estate, 1997 B.Y.U. L. Rev. 35.*

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CHAPTER 33 TENANCIES BY THE ENTIRETY

4-33 Thompson on Real Property, Thomas Editions § 33.06

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§ 33.06 Creation of Tenancies by the Entirety.

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First to be examined is the creation of tenancies by the entirety at common law (§ 33.06(a)); then, the doctrine of the four unities, encountered also in the law of joint tenancies, is reviewed, n40 plus the additional "unity of person," based on marriage (§ 33.06(b)). The requirement of the four unities generates a special problem in the creation of tenancies by the entirety, similar to one in the creation of joint tenancies: n41 conveyance by the grantor to the grantor and the grantor's spouse (§ 33.06(c)). Likewise, the requirement of the fifth unity, that of "person," also generates a special problem in the creation of tenancies by the entirety: transfer to spouses and another or others (§ 33.06(d)). Next to be considered are modern statutes concerning the creation of tenancies by the entirety (§ 33.06(e)), and finally the creation of estates similar to tenancies by the entirety (§ 33.06(f)).

§ 33.06(a) Creation of Tenancies by the Entirety at Common Law.

At common law at the time of American Independence, the transfer of real property to persons married to one another resulted in the creation of a tenancy by the entirety, an estate in which the husband had complete power of dominion and control, but in which the wife had an indefeasible right of survivorship. n42 Because of the disability of a married woman to exercise property rights, the result was functionally similar to a transfer to a married woman in severalty (unless a trust to her sole and separate use was involved). No special words were required to create a tenancy by the entirety, because it was presumed at common law that a transfer of an estate in fee simple to married persons ("to H and W, husband and wife, and their heirs") was in tenancy by the entirety and not in any other form of concurrent ownership. It was not even necessary to describe in so many words the transferees as husband and wife; the presumption applied if they were in fact married to one another. Because the matrimonial tie was an objective fact, a tenancy by the entirety could be created unintentionally, as by a transfer to a married couple, "to H and W and their heirs," when the grantor did not intend to create a tenancy by the entirety; it could even be created unwittingly, as by a transfer "to A and B and their heirs," when the grantees were, unknown to the grantor, in fact married to one another.

It was difficult, if not impossible, at common law to avoid the creation of a tenancy by the entirety when the grantees were a married couple. n43 Blackstone explained the rule: "if an estate in fee be given to a man and his wife, they are neither properly joint-tenants, nor tenants in common: for husband and wife being considered as one person in law, they

cannot take the estate by moieties, but both are seised of the entirety, *per tout et non per my* ... ." n44 Once it became established that husband and wife could hold land by a tenancy other than a tenancy by the entirety, the question arose: What form of words would be required to rebut the presumption in favor of a tenancy by the entirety? It would seem that any restrictive, exclusive, or explanatory words expressing the requisite intent would suffice. n45 It would be safest, however, after naming the estate intended to be created, to add the words "and not as tenants by the entirety."

At common law a tenancy by the entirety could be created only by inter vivos transfer or by testamentary disposition, in other words, only by deed or devise. The intention to create a tenancy by the entirety will be presumed from the use of the appropriate words; one who denies the requisite intention bears the burden of proving its absence at the time title was taken. Conversely, one who claims that the intention to create a tenancy by the entirety was present at the time title was taken although the necessary words were omitted bears the burden of proving the same. A transfer by one spouse of solely owned property into a tenancy by the entirety with the other spouse may, of course, be challenged on the grounds that undue influence was exerted. n46 Tenancies by the entirety could never arise by operation of law. As with the same rule concerning joint tenancies, n47 the explanation lies originally in the law of inheritance rather than in the law of tenancies by the entirety: spouses could never be co-heirs of a deceased ancestor.

Although at common law joint tenancies could arise by adverse possession, n48 it is today assumed that the presumption in favor of tenancies in common in the construction of written instruments of title applies as well to original titles. The case with tenancies by the entirety is, however, more complicated. The question of what estate a married couple acquired by adverse possession did not arise at common law: the married woman's state of subordination to her husband precluded her from securing an interest by her own possession. Today in states still recognizing tenancies by the entirety, particularly those that have eliminated common law joint tenancies, the estate by the entirety is often presumed in written transfers of title. Possessing practical advantages for married persons, tenancy by the entirety is routinely chosen in such states. Unhampered by any authentic common law rule against tenancies by the entirety arising from adverse possession, the courts may well recognize the estate in appropriate cases. n49

Because marriage is a prerequisite to the creation of tenancy by the entirety, the problem sometimes arises of what estate is created by a transfer to two unmarried persons "as tenants by the entirety." At common law the result would have been governed by the general presumption in favor of joint tenancy: all transfers to two or more persons were presumed to create that estate. Now that that presumption has been everywhere replaced with a general presumption in favor of tenancy in common, it is necessary to scrutinize the transfer for expressions of intention. The better result seems to be to recognize a joint tenancy in such cases, since that estate, unlike tenancy in common, provides a right of survivorship, albeit a destructible one. n50 In a few states statutes direct that result. n51 In states in which common law joint tenancies are not available, one may find a court recognizing an unusual estate, such as a tenancy in common for life with alternative contingent remainders in fee simple in the survivor. n52 Even in a jurisdiction that recognizes joint tenancies one court has signaled a willingness to entertain the argument, in case of an attempted conveyance of a tenancy by the entirety to unmarried persons, that it "approximate a tenancy by the entirety by creating, for each party, a tenancy in common for life with a contingent future interest in the whole." n53 Where a deed erroneously recites that the grantees are husband and wife, successors in interest to one or both of the grantees may be estopped to deny the recital. n54

Although the common law presumption in favor of joint tenancies has been everywhere reversed, the common law presumption in favor of tenancies by the entirety for estates transferred to married persons has held its own in those states still recognizing the tenancy. Usually, as detailed below (§ 33.06(e)), the presumption in favor of tenancies by the entirety is now produced by legislation, but in a few states it continues as a matter of common law. n55

Tenancies by the entirety may be created in contracts for the sale of land or in purchase money mortgages. Although legal title to the fee simple subject to the contract or mortgage is usually also in tenancy by the entirety, there is no necessity that it be so; in other words, a sole owner with fee simple title may arrange to convey it by a contract or subject to a mortgage that is held concurrently with a spouse as tenants by the entirety. n56

§ 33.06(b) The Doctrine of the Four Unities, Plus One, "Unity of Person," Based on Marriage.

Because tenancies by the entirety came to be viewed as a special type of joint tenancies, once the legal capacity of married women was accepted, it is necessary at this point to review the doctrine of the four unities, a summary description of the nature of joint tenancies used as a touchstone for determining whether they had been created. Sir William Blackstone's statement of the four unities, quoted before in the chapter on joint tenancies, n57 is also relevant here:

> The *properties* of a joint estate are derived from it's unity, which is fourfold; the unity of *interest*, the unity of *title*, the unit of *time*, and the unity of *possession*: or, in other words, joint-tenants have one and the same interest, accruing by one and the same conveyance, commencing at one and the same time, and held by one and the same undivided possession. n58

The significance of the doctrine of the four unities for purposes of the creation of tenancies by the entirety is that their presence, all of them together, was necessary for the creation of any form of joint estate. Where the four unities were, there was a joint estate. Conversely, where one or more of the four unities was lacking, there could be no joint estate, regardless of a transferor's intent to create one.

What sets tenancies by the entirety apart from other joint tenancies is the existence of a so-called "fifth unity": the unity of persons based on marriage. n59 Although sometimes dignified by reference to the biblical notion that the two married persons became "one flesh" (Gen. 2:24), the true legal explanation was that in consequence of marriage the woman lost her capacity to exercise control over property. She became, in effect, the ward of her husband, a consequence acknowledged by the gloss applied to the text "the two became one": "and the husband was the one." n60 Without the "fifth unity" there can be no tenancy by the entirety; unmarried persons cannot hold together by that form of concurrent ownership. If unmarried persons take title to real property "as tenants by the entirety" or "as husband and wife," no tenancy by the entirety can arise. (What estate is created is discussed in the preceding subsection.) Whether the subsequent marriage of unmarried persons who originally took title "as tenants by the entirety" or "as husband and wife," can transform the estate into a tenancy by the entirety has been decided in the negative. n61 The mere fact of subsequent marriage by co-owners cannot transform the concurrent estate; the marriage tie must exist at the creation of the estate for it to be a tenancy by the entirety.

Restricting tenancies by the entirety to persons married to one another necessarily makes marriage law an adjunct to property law: marriage law determines if the "unity of persons" necessary for a tenancy by the entirety exists between the parties. Whether restricting the advantages incident to tenancy by the entirety to married persons is fair or constitutional is a much-contested question today. n62 The problem is posed in its most challenging form in the case of same-sex couples who are denied the legal opportunity to marry. Hawaii has addressed the problem by legislation permitting couples who cannot otherwise be legally married to register as "reciprocal beneficiaries," who are granted many of the rights of married persons, including the right to hold property together as tenants by the entirety. n63 By contrast, Vermont permits same-sex couples who have entered into "civil unions" to hold property as tenants by the entirety. n64

§ 33.06(c) Special Problem in Creation of Tenancies by the Entirety Caused by the Doctrine of the Four Unities: Conveyance by Grantor to Grantor and Spouse.

Although Sir William Blackstone, writing at the time of American Independence, emphatically denied that husband and wife could take title as joint tenants, n65 the view has since become firmly established in America that tenancy by the entirety is in fact only a species of joint tenancy. In consequence, for a transfer to result in the creation of a tenancy by the entirety, it must satisfy the requirements of a joint tenancy, most notably the doctrine of the four unities; that is, it must create a concurrent estate in which both transferees have "one and the same interest, accruing by one and the same conveyance, commencing at one and the same time, and held by one and the same undivided possession." n66 A special

problem of common occurrence is caused by the attempted conveyance by a grantor to the grantor and the grantor's spouse: "H to H and W and their heirs" or "W to W and H and their heirs." A similar problem arises in the law of joint tenancies when a grantor conveys property owned by the grantor to the grantor and another or others as joint tenants: "A to A and B and their heirs." n67

The problem here is not one of intention: it arises even if the grant is unambiguously intended to create a tenancy by the entirety, as "H to H and W and their heirs, as tenants by the entirety and not as joint tenants or tenants in common." At common law the problem was occasioned by the legal incapacity of married women: "a man cannot grant any thing to his wife," Blackstone baldly stated, "for the grant would be to suppose her separate existence." n68 Today, after the universal recognition of married women's "separate existence," the problem is the technical one caused by the doctrine of the four unities: because one spouse as grantor is conveying directly to that spouse and the other as grantees, at least two of the four unities are lacking, title and time. The grantees' interests do not accrue "by one and the same conveyance," nor do they commence "at one and the same time": the interest of the grantor stemmed from some original transfer, while the interest of the grantor's spouse stems from the grant in question. Without all the unities a joint tenancy and *a fortiori* a tenancy by the entirety could not arise, no matter how much the transferor desired to create that estate.

The common law solution to this common law problem was to use two successive conveyances: a grantor desiring to create a tenancy by the entirety in the grantor and the grantor's spouse would first convey to one with no interest in the property (a "strawman"), n69 who would then promptly reconvey the estate to the grantor and the grantor's spouse. n70 Schematically the conveyances would run "H to X and heirs," then "X to H and W and their heirs." In this manner the doctrine of the four unities would indubitably be satisfied. It may be worth noting that the common law rule is perfectly logical and produces no hardship (and only a little extra paperwork) if every grantor is properly counseled. It is homemade deeds or sloppy lawyering that causes the problem. n71

It has sometimes been argued that the four unities are in fact present despite a grant directly (without mesne conveyance to a straw man) from grantor to grantor and spouse. The theory is that the grant is to a legally recognized unit, the "one person" of the married pair, so the title of the unit accrues by one and the same conveyance at one and the same time, thereby supplying the missing unities of title and time. n72 (A similar theory has also been advanced in the context of an attempted creation of a joint tenancy by a grant directly from a grantor to the grantor and another; in this case, however, the unit is supposedly constituted by the grant itself.) n73 If the theory were accepted, it would mean that the creation of tenancies by the entirety do not require four unities plus one, but only the fifth unity because it would subsume all the others.

More straightforward is a resolution based on abandonment of the requirement that the four unities must be present when a grantor unmistakably intends to create a tenancy by the entirety through conveyance directly from the grantor to the grantor and the grantor's spouse. Although sometimes accomplished by judicial decision, n74 this is more simply done by statute. A North Carolina statute, for example, provides:

> A conveyance of real property, or any interest therein, by a husband or a wife to such husband and wife vests the same in the husband and wife as tenants by the entirety unless a contrary intention is expressed in the conveyance. n75

A similar but analytically distinct problem arises when an owner makes a grant of an undivided one-half of the property to a spouse. Here again the intention may be to share the ownership. No tenancy by the entirety results, either by application of the common law presumption in its favor where a married couple is the grantee or by express words describing that estate, because tenants by the entirety do not each hold a half share (or moiety) in the estate; each has an interest in the entirety. The same reasoning prevents the creation of a joint tenancy in a comparable case. Legislation may, obviously, change the common law rule. In Florida the statute permitting direct conveyance by the grantor to the grantor and the grantor's spouse as tenants by the entirety also permits the creation of that estate by the grantor's direct

conveyance of a half interest to the spouse if "the purpose to create the estate is stated." n76 In Oregon the only means expressly authorized by statute to create a tenancy by the entirety by direct conveyance by one spouse to another is by conveyance of an undivided one-half with "words indicating an intention to create an estate in entirety." n77

A majority of states still recognizing tenancy by the entirety have legislated on the subject of a conveyance by the grantor to the grantor and the grantor's spouse as tenants by the entirety. In general the statutes are self-explanatory. Although the statutes of only a small minority of states (such as Maryland) expressly eliminate the need for a "straw man as an intermediate grantee-grantor," n78 all have that effect. Particular attention must be paid to the formula required to express the requisite intention: under the North Carolina statute a tenancy by the entirety is presumed "unless a contrary intention is expressed," n79 but in most states an express declaration of intention is required. It is probably sufficient to describe the estate created as tenancy by the entirety, but it is safest to add words of exclusion as well: "and not as joint tenants or tenants in common." In a few states, such as Mississippi, it may be necessary to include a specific reference to survivorship: tenants by the entirety "with right of survivorship." n80 Although the Hawaii statute explicitly includes the case of a conveyance by spouses, presumably already tenants in common or joint tenants, to themselves as tenants by the entirety, n81 it is submitted that all the statutes should be interpreted to cover that case as well because of the rule of statutory construction that the singular generally includes the plural.

Current statutes are summarized below:

Alaska. Conveyance by grantor to grantor and spouse as tenants by the entirety is effective. n82

Delaware. Conveyance by either spouse to themselves as tenants by the entireties is authorized. n83

District of Columbia. Tenancy by the entireties may be created by conveyance in which grantor is also grantee. n84

Florida. Tenancy by the entirety may be created by (1) conveyance by one spouse to the other if "the purpose to create the estate is stated," or (2) conveyance by one spouse to both spouses. n85

Hawaii. Land may be conveyed by a person to himself and his spouse or by spouses to themselves as tenants by the entirety. n86

Illinois. Tenancy by the entirety may be created notwithstanding the fact that grantor or grantors are also grantee or grantees. n87

Maryland. Conveyance by grantor to grantor and spouse in tenancy by the entirety is valid "without the use of a straw man as an intermediate grantee-grantor." n88

Massachusetts. Conveyance by a person to himself and spouse as tenants by the entirety creates that estate. n89

Michigan. Conveyance expressing intent to create tenancy by the entireties in grantor together with grantee is effective. n90

Mississippi. Conveyance by grantor to grantor and spouse in "entirety with right of survivorship" creates that estate. n91

Missouri. Conveyance by grantor to grantor and another may create tenancy by the entireties. n92

New Jersey. Conveyance by grantor to grantor and spouse creates tenancy by the entirety. n93

North Carolina. Conveyance by grantor to grantor and spouse creates tenancy by the entirety, "unless a contrary

intention is expressed." n94

Oklahoma. Tenancy by the entirety may be created by conveyance from grantor to grantor and spouse. n95

Oregon. Conveyance by one spouse to other of undivided one-half with "words indicating an intention to create an estate in entirety" is effective. n96

Tennessee. Conveyance by grantor to grantor and spouse creates tenancy by the entirety if the conveyance is intended to have that effect. n97

Virginia. Conveyance by grantor to grantor and another is valid. n98

Wyoming. Grantor may convey to grantor and spouse as tenants by the entirety "without the necessity of any transfer or conveyance to or through a third person." n99

§ 33.06(d) Special Problem in Creation of Tenancies by the Entirety Caused by the "Unity of Person": Transfer to Husband, Wife, and Another or Others.

For a transfer to result in the creation of a tenancy by the entirety, it must not only satisfy the doctrine of the four unities, required for a joint tenancy, it must also satisfy the requirement of the fifth unity, the "unity of person," based on marriage. Only when all five unities are present, is there a tenancy by the entirety. At common law a transfer of an estate in fee simple to married persons ("to H and W and their heirs") would result, all other things being equal, in a tenancy by the entirety. So would a transfer "to H, W, and X and their heirs" result in a tenancy by the entirety as between the married couple. H and W would hold their share as tenants by the entirety, and X would hold X's share in some form of concurrent estate with them -- at the older common law, as joint tenant. n100 The special problem here is not whether H and W take as tenants by the entirety, but how much they take. Do H and W, being in some sense one person, take one-half, X taking the other half? Or, do H and W, being in a stronger sense two persons, take two-thirds together, X taking the remaining one-third?

There is certainly ancient and eminent authority that the "unity of person" created by marriage makes the married pair equal to one person in the distribution of undivided shares in transfers to them and another or others; in other words, that in case of a transfer "to H, W, and X and their heirs," H and W share one-half, not two-thirds. n101 It is submitted that this result is now anachronistic: since 1925 husband and wife in England, the original home of the "unity of person," have been treated as two persons in the acquisition of property. n102

The special problem considered here does not arise where the grantor stipulates the share each grantee is to take, n103 further proof, if any were required, that the law no longer requires that husband and wife be treated as "one person." It is submitted that recognizing the personhood of both spouses would be more likely to comport with the grantor's intention, as well as be consistent with the legal effect of modern marriage. n104

In one state, Massachusetts, a statute partially addresses the problem: in a transfer to three or more persons words creating a joint tenancy apply to all transferees regardless of marital status, unless a contrary intent appears. n105 The result in this limited case is to recognize the legal personality of all transferees and presumably secure each an equal share, without of course solving the problem of what share a couple taking as tenants by the entirety would receive.

§ 33.06(e) Modern Statutes Concerning Creation of Tenancies by the Entirety.

Many American states have statutes dealing with tenancies by the entirety. In Connecticut and New Hampshire the estate is merged with joint tenancies: a transfer to two persons "as tenants by the entirety" results in a joint tenancy. n106 In other states the estate of tenancy by the entirety is abolished by indirection: either the Married Women's

Property Act is construed to have made the estate impossible n107 or a list of permitted concurrent estates simply omits tenancy by the entirety. n108 In Washington and West Virginia the right of survivorship as an incident of tenancies by the entirety is eliminated, n109 leaving an anomalous estate, the exact contours of which are unclear. In those jurisdictions still recognizing tenancies by the entirety, n110 legislation may deal with the common law presumption favoring such tenancies in transfers to married couples. The statute of one state, North Carolina, simply enacts the common law presumption:

> A conveyance of real property, or any interest therein, to a husband and wife vests title in them as tenants by the entirety when the conveyance is to:
>
> (1) A named man "and wife," or
>
> (2) A named woman "and husband," or
>
> (3) Two named persons, whether or not identified in the conveyance as husband and wife, if at the time of conveyance they are legally married;
>
> unless a contrary intention is expressed in the conveyance. n111

More commonly, as in the Massachusetts statute, it reverses the common law presumption, making it necessary to add express words in order to create the estate:

> A devise of land to a person and his spouse shall, if the instrument creating the devise expressly so states, vest in the devisees a tenancy by the entirety. n112

In the absence of legislation, the common law presumption in favor of tenancies by the entirety may still be recognized. n113 In Massachusetts, so strong is the presumption in favor of tenancy by the entirety when transfers to a husband and wife are involved, that a conveyance to a husband and wife "as joint tenants" is held to create a tenancy by the entirety unless a contrary intention is expressed. n114

The exact words required to create a tenancy by the entirety vary from state to state. In New York a grant to a named man and "his wife" and, presumably, a named woman and "her husband" -- in the older fashion of conveyancing *et ux*. and *et vir*, respectively -- is sufficient. n115 It is probably safest to use the formula required by the Illinois statute: "to H and W, husband and wife, not as joint tenants or tenants in common but as tenants by the entirety." n116 A few states (such as Mississippi) require explicit reference to the intended right of survivorship: "as tenants by the entirety with right of survivorship." n117

Even with respect to tenancies by the entirety properly described for purposes of local law, a question may arise concerning the exact moment of the estate's creation. Only at the effective date do the incidents, including the right of survivorship, attach. In case two married purchasers enter into an installment land contract and the deed ultimately to be delivered is stipulated to be in tenancy by the entirety, the question of what type of tenancy they hold while the contract remains executory may be important, if, for example, one purchaser should die or the marriage be terminated by divorce before delivery. In general, the doctrine of "equitable conversion" treats the contract as the operative event if it is specifically enforceable: the purchasers acquire an equitable title, while the vendor holds legal title as security for the payment of the purchase price. Although it is possible to recognize the incidents of a tenancy by the entirety in equity, it may equally be argued that the statutes concerning the creation of tenancies by the entirety refer to taking legal, not equitable title. Legislation in one state, Indiana, answers the question of what effect divorce has on married purchasers under an installment land contract: they own "equal shares," n118 presumably as tenants in common. In resolving disputes in complicated situations much will probably depend on the jurisdiction's state of sympathy for or against tenancies by the entirety.

Whatever the resolution, it should correlate with the result reached in the reverse situation, when vendors holding as tenants by the entirety enter into an installment land contract: if their legal title is automatically converted into a tenancy in common, that would indicate that the equitable title is indeed primary. If, on the other hand, their legal title as tenants by the entirety is unaffected, that would indicate that, absent an expressed intention to the contrary, the tenancy by the entirety commences with the acceptance of the deed. n119 Whether property to which title is taken in tenancy by the entirety during marriage is marital property for purposes of division on divorce may depend on the local equitable distribution statute. n120

A related problem arises in the situation, probably not uncommon, in which two persons intend to buy property and to take title as tenants by the entirety, but only one signs the contract for deed. n121 When the deed describing the estate as in tenancy by the entirety is delivered, the Doctrine of the Four Unities (*see* § 33.06(b)) is not technically satisfied; specifically, the unity of time (and perhaps the unity of title as well) is lacking because, by virtue of the doctrine of equitable conversion, the party to the contract had acquired an equitable title earlier. As the rigor of the old law lessens, intention should be allowed to prevail, even in a case in which the contract described the signer as the sole purchaser.

A summary of the legislation concerning the creation of tenancies by the entirety is as follows:

Alaska. Transfer to married couple creates tenancy by the entirety unless it is expressly declared otherwise; for this rule to apply to a conveyance, it must "recite the marital status of the parties." n122

Hawaii. Transfer to two persons creates tenancy in common, but tenancy by entirety may be created if it manifestly appears that it was intended. n123

Illinois. Transfer of homestead property to persons "named and expressly identified ... as husband and wife, not as joint tenants or tenants in common but as tenants by the entirety" creates tenancy by the entirety. n124

Indiana. When husband and wife purchase real property or lease with option to purchase, that contract presumptively creates tenancy by the entireties, unless it is expressly declared that it is intended to create a tenancy in common. n125

Kentucky. Transfer to husband and wife presumed to create tenancy in common, but if "a right of survivorship" is expressly provided for, then there is "a mutual right to the entirety by survivorship." n126

Massachusetts. Devise to married couple creates tenancy by the entirety if the devise expressly so states. n127

Mississippi. Transfer to husband and wife creates tenancy in common, unless it manifestly appears that it was intended to create an estate in "entirety with the right of survivorship." n128

New York. Transfer to husband and wife creates tenancy by the entirety, unless expressly declared to be joint tenancy or tenancy in common. n129

North Carolina. Conveyance to husband and wife creates tenancy by the entirety, unless a contrary intention is expressed in the conveyance. n130

Oklahoma. Tenancy by the entirety created by transfer if expressly declared. n131

Virginia. Right of survivorship abolished. Exception for transfer in which it manifestly appears that it was intended that the part of one dying should then belong to the other. n132

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§ 33.06(f) Creation of Estates Similar to Tenancies by the Entirety.

When it is not possible, for one reason or another, for two grantees to take title to property as tenants by the entirety, the issue may arise whether an estate or combination of estates and future interests with characteristics similar to a tenancy by the entirety may be used to create its functional equivalent. The issue may arise in the case of a married couple in a jurisdiction that does not recognize tenancies by the entirety, or in the case of unmarried persons in a jurisdiction that does recognize the estate. The joint tenancy, as already observed (§ 33.02), is not the functional equivalent of the tenancy by the entirety: although without a devisable or inheritable interest, a joint tenant does have the power to alienate a share and sever the estate. Any joint tenant may demand a partition at any time. By contrast, a tenant by the entirety has no power to sever the estate and no right to partition. In any event, of course, the joint tenancy itself is not available in all jurisdictions.

The creation of an estate for joint lives with cross contingent remainders to the survivor in fee begins to approximate the tenancy by the entirety. n133 Although each co-tenant has an interest alienable for life, neither can extinguish the remainder of the other. Alternatively, the creation of a tenancy in common when coupled with mutual and enforceable agreements against partition or alienation and agreements to devise each interest to the other achieves some of the attributes of a tenancy by the entirety. Notably lacking, however, is the blanket security from creditors of one co-tenant provided by tenancies by the entirety in some jurisdictions. (*See* § 33.07(e), *infra*). Creditors can certainly reach the several interest of the debtor. The agreements against partition or alienation and the agreements to make wills are obviously not effective to prevent a creditor from foreclosing a lien on one share. n134

FOOTNOTES:
(n1)Footnote 40. *See* § 31.06(b), *supra*.

(n2)Footnote 41. *See* § 31.06(c), *supra*.

(n3)Footnote 42. Tenancies by the entirety are generally permitted only in real property for reasons rooted deep in the common law of marital estates. Since a woman lost all control of her personalty on marriage, there was no marital estate in personalty. In realty, by contrast, the common law did recognize tenancy by the entirety while seemingly denying, because of the marital unity, that it was truly a form of concurrent estate, as explained in the preceding subsection.

In New York, where cooperative apartments are common, these interests, represented by shares of stock with an appurtenant proprietary lease, were considered personal property and therefore ineligible for holding in tenancies by the entirety. Effective January 1, 1996 the New York Estates, Powers and Trusts Law §§ 6-2.1 and 6-2.2 were amended to permit spouses to hold these interests as tenants by the entirety. In addition, the amendment raises a presumption that all transfers of interests in cooperative apartments after the effective date to persons married to one another are to them as tenants by the entirety, thereby paralleling the law concerning real property.

(n4)Footnote 43. Blackstone, both as judge and as commentator, declared against the proposition that husband and wife could hold otherwise than by the entirety. Green v. King, 2 Black. W. 1211, *96 Eng. Rep. 713 (K.B. 1777)* (Blackstone, J.); 2 William Blackstone, Commentaries 182 (1783). But other, later authorities have argued the contrary. H. W. Challis, Law of Real Property 305 (1887); 2 William Blackstone, Commentaries 182 note (William Draper Lewis ed. 1902) ("There is nothing ... in the relation of husband and wife which prevents them from being tenants in common.").

(n5)Footnote 44. 2 William Blackstone, Commentaries 182 (1783).

(n6)Footnote 45. *Dearman v. Bruns, 181 S.E.2d 809 (N.C. App. 1971)* (devise to H and W "to share equally" held

to create tenancy in common).

(n7)Footnote 46. *Kar v. Hogan, 150 N.W.2d 77 (Mich. 1976).*

(n8)Footnote 47. *See* § 31.06(a), *supra*.

(n9)Footnote 48. Thomas Littleton, Tenures § 278 (c. 1481).

(n10)Footnote 49. *Contra*: *Preston v. Smith, 293 S.W.2d 51 (Tenn. 1956), noted in 16 Md. L. Rev. 352 (1956), 22 Mo. L. Rev. 91 (1957), 24 Tenn. L. Rev. 892 (1957), 10 Vand. L. Rev. 460 (1957); Whiteside v. Rottger, 913 S.W.2d 114 (Mo. App. 1995).*

(n11)Footnote 50. *Morris v. McCarty, 32 N.E. 938 (Mass. 1893); Coleman v. Jackson, 286 F.2d 98 (D.C. 1960), cert. denied, 366 U.S. 933 (1961); Young v. Young, 376 A.2d 1151 (Md. 1977); In re Estate of Shelton, 796 N.E.2d 955 (Ohio App. 2003). Contra*: *Smith v. Stewart, 596 S.W.2d 346 (Ark. 1980);* In *Matter of Estate of Kappler, 341 N.W.2d 113 (Mich. 1983).* Whether a joint tenancy or a tenancy in common will be found may depend on whether more than a mere recital of the supposititious marital relationship is included. *Compare Wood v. Wood, 571 S.W.2d 84 (Ark. 1978)* ("to A and B, husband and wife, as tenants by the entirety" held sufficient to create a joint tenancy with right of survivorship) *with Brissett v. Sykes, 855 S.W.2d 330 (Ark. 1993)* ("to A and B, husband and wife," held insufficient to create a right of survivorship) *and Snyder v. Snyder, 880 S.W.2d 596 (Mo. App. 1994)* ("to A and B his wife" held insufficient to create a right of survivorship). *Compare In re Estate of Reigle, 652 A.2d 853 (Pa. 1995)* (conveyance "to A and B, son and mother ... as tenants by the entirety" held to create joint tenancy) *with In re Estate of Bruce, 538 A.2d 923 (Pa. Super. 1988)* (conveyance to unmarried grantees mistakenly described as husband and wife held not to create joint tenancy). *See also Lee v. Estate of Peay, C.A. No. 1862-S, 1998 Del. Ch. LEXIS 95 (Del. Ch. 1998)* (grant to brother and sister "as tenants by the entireties and not as tenants in common" held to create a joint tenancy with right of survivorship).

(n12)Footnote 51. Transfer to two persons, who are not married to one another, as tenants by the entirety creates a joint tenancy. Mass. Gen. Laws Ann. ch. 184, § 7. Transfer to unmarried persons described as husband and wife creates a joint tenancy unless expressly declared to be a tenancy in common. N.Y. Est. Powers & Trusts Law § 6-2.2(c). A devise, conveyance, assignment, or other transfer to two grantees who are not in fact husband and wife that purports to create an estate by the entirety shall be construed as having created an estate in joint tenancy. 765 ILCS 1005/1c.

(n13)Footnote 52. *Runions v. Runions, 207 S.W.2d 1016 (Tenn. 1948).*

(n14)Footnote 53. *Gallimore v. Washington, 666 A.2d 1200, 1202 n.2 (D.C. App. 1995).*

(n15)Footnote 54. *Jacobs v. Miller, 15 N.W. 42 (Mich. 1883). See* Malcolm John Montague, Note and Comment, *Tenancies by the Entirety -- Conclusive Presumption of Marriage from False Recital in a Deed or Contract, 32 Or. L. Rev. 254 (1953)* (noting *Merit v. Losey, 240 P.2d 933 (Or. 1952)* and *Hughes v. Kay, 242 P.2d 788 (Or. 1952)).* In case of a long-continued cohabitation under circumstances of apparent marriage, one spouse may be estopped from denying the legal validity of the marriage required for the creation of a tenancy by the entirety. *Lambertini v. Lambertini, 655 So. 2d 142 (Fla. App. 1995).*

(n16)Footnote 55. *Parramore v. Parramore, 368 So. 2d 1308 (Fla. 1978); In re Ginn, 186 B.R. 898 (Bankr. D. Md. 1995); In re Meyer, 187 B.R. 650 (Bankr. W.D. Mo. 1995).*

(n17)Footnote 56. *Vandenberg v. Wells, 721 So. 2d 453 (Fla. App. 1998).*

(n18)Footnote 57. *See* § 31.06(b), *supra*.

(n19)Footnote 58. 2 William Blackstone, Commentaries 180 (1766). In Blackstone's day proper usage for the

possessive of "it" was "it's," not, as it would be today, "its."

(n20)Footnote 59. Whether a valid marriage exists is, of course, a matter of state law, so that, for instance, a tenancy by the entirety can be recognized in a couple bound by a "common law marriage" if such is recognized in that jurisdiction. *Veneziale v. Midfirst Bank, 267 B.R. 695 (Bankr. E.D. Pa. 2001).*

(n21)Footnote 60. John E. Cribbet, Et Al., Cases and Materials on Property 329 (6th ed. 1990).

(n22)Footnote 61. *Snyder v. Snyder, 880 S.W.2d 596 (Mo. App. 1994).* Persons with an interest in legal history may see a similarity in this case to the ancient debate in the common law about whether an illegitimate child was legitimated by the subsequent marriage of the parents. At the Parliament of Merton in 1235 the barons of England refused to permit legitimation *per subsequens matrimonium* despite canon law in favor, proudly proclaiming "*Nolumus leges Angliae mutare*." *See* 2 William S. Holdsworth, A History or English Law 218 (4th ed. 1936).

(n23)Footnote 62. *See Goodridge v. Dept. of Public Health, 440 Mass. 309, 798 N.E.2d 941 (Mass. 2003)* (holding denial of marriage license to same-sex couples a violation of due process); *Opinions of the Justices to the Senate, 440 Mass. 1201, 802 N.E.2d 565 (2004)* (proposed legislation prohibiting same-sex couples from marrying but allowing them to form civil unions with all the consequences of marriage does not satisfy the state constitution's equal protection and due process clauses). *See also* John V. Orth, *Night Thoughts: Reflections on the Debate Concerning Same-Sex Marriage, 3 Nev. L.J. 560 (2003).*

(n24)Footnote 63. Haw Rev. Stat. § 509.2.

(n25)Footnote 64. 15 Vt. Stat. Ann. tit. 23, § 1204.

(n26)Footnote 65. 2 William Blackstone, Commentaries 182 (1783).

(n27)Footnote 66. 2 William Blackstone, Commentaries 180 (1766).

(n28)Footnote 67. *See* § 31.06(c), *supra*.

(n29)Footnote 68. 1 William Blackstone, Commentaries 430 (1765) (*citing* Edward Coke, Commentary Upon Littleton § 168, p. 112a (1628)).

(n30)Footnote 69. "'The term 'straw man' originated in the early British halls of justice. Professional witnesses loitering in such halls signalled their willingness to testify to any matter, for a price, by wearing straw in their shoes." *Note, The Use of Straw Men in Massachusetts Real Estate Transactions, 44 B.U. L. Rev. 187, 187-88 (1964).* From this shady origin the straw man came to be used in more legitimate ways, particularly as a conduit in real estate transactions." Charles Donahue, Et Al., Cases and Materials on Property 625 n.1 (2d ed. 1983). In addition to the common-law solution to the problem involving the use of a straw-party conveyance, an equitable alternative was available, although rarely used: a married grantor could enfeoff himself and his wife to their use, relying on the Statute of Uses to "execute" the use and convert it into a legal estate. *See* Cornelius J. Moynihan, Introduction to the Law of Real Property 182 (2d ed. 1988).

(n31)Footnote 70. One court described the process as the usual means for creating the estate:

> Where a husband owns land and conveys it to a third party (strawman) who in turn conveys it to said husband and his wife, such conveyance creates an estate by the entireties... . Indeed, this is the device customarily used in creating such an estate in land owned by one spouse, when it is desired that it be held by the entireties.

Smith v. Smith, 107 S.E.2d 530, 536 (N.C. 1959).

(n32)Footnote 71. A Mississippi case illustrates a peculiar problem with a transfer through a strawman: Although the conveyances were apparently in proper form, the second (to husband and wife as tenants by the entirety) was recorded before the recording of the initial conveyance to the strawman. At the time of the recording of the conveyance to the husband and wife, in other words, the grantor did not yet have record title. Using the doctrine of after-acquired title, the court held the title in the husband and wife to be in tenancy by the entirety. *Lampley v. United States, 17 F. Supp. 2d 609 (N.D. Miss. 1998).*

(n33)Footnote 72. *Woolard v. Smith, 94 S.E.2d 466 (N.C. 1956)* (married couple is "an entity separate from the individuals"), *noted in 14 Wash. & Lee L. Rev. 291 (1957); In re Klatzl's Estate, 110 N.E. 181 (N.Y. 1915)* (Collin, J., dissenting) ("The husband did not convey to himself, but to a legal unity or entity which was the consolidation of himself and another."); *In re Meyer, 206 B.R. 410 (Bankr. E.D. Va. 1997)* (construing tenancy by the entirety in Virginia as entity separate from individual spouses). *Contrast* Cox v. Commissioner, 97 TNT 152-6 (Tax Ct. 1997) (holding that "both [tenants by the entirety] had title to the building in question, and not a fictional but separate entity"). In a somewhat different context, that of civil procedure, the argument that a married couple in their character as tenants by the entirety form but a single entity has been rejected as "ingenious but fallacious." *Fry v. Marconi, 20 Pa. D. & C. 2d 575 (Pa. Com. Pl. 1959).*

(n34)Footnote 73. *See* § 31.06(c), *supra*.

(n35)Footnote 74. *Ebrite v. Brookhyser, 244 S.W.2d 625 (Ark. 1951); Boehringer v. Schmid, 232 N.Y.S. 360 (1928), 9 B.U. L. Rev. 134 (1929), 17 Geo. L.J. 266 (1929), 13 Minn. L. Rev. 612 (1929), 13 Minn. L. Rev. 618 (1929).*

(n36)Footnote 75. N.C. Gen. Stat. § 39-13.3(b).

(n37)Footnote 76. Fla. Stat. § 689.11.

(n38)Footnote 77. Or. Rev. Stat. § 108.090.

(n39)Footnote 78. Md. Real Prop. Code Ann. § 4-108. *See also* Wyo. Stat. § 34-1-140.

(n40)Footnote 79. N.C. Gen. Stat. § 39-13.3(b).

(n41)Footnote 80. Miss. Code § 89-1-7.

(n42)Footnote 81. Haw. Rev. Stat. § 509-2.

(n43)Footnote 82. Alaska Stat. § 34.15.140(c).

(n44)Footnote 83. Del. Code Ann. tit. 25, § 309.

(n45)Footnote 84. D.C. Code Ann. § 45-216.

(n46)Footnote 85. Fla. Stat. § 689.11.

(n47)Footnote 86. Haw. Rev. Stat. § 509-2.

(n48)Footnote 87. Ill. Ann. Stat. ch. 76, para. 1c.

(n49)Footnote 88. Md. Real Prop. Code Ann. § 4-108.

(n50)Footnote 89. Mass. Gen. Laws Ann. ch. 184, § 8.

(n51)Footnote 90. Mich. Comp. Laws Ann. § 565.49. *See* Edward H. Hoenicke, Comment, *Elimination of the Straw Man in the Creation of Joint Estates in Michigan, 54 Mich. L. Rev. 118 (1955).*

(n52)Footnote 91. Miss. Code § 89-1-7.

(n53)Footnote 92. Mo. Ann. Stat. § 442.025.

(n54)Footnote 93. N.J. Stat. Ann. § 37:2-18.

(n55)Footnote 94. N.C. Gen. Stat. § 39-13.3(b).

(n56)Footnote 95. Okla. Stat. Ann. tit. 60, § 74.

(n57)Footnote 96. Or. Rev. Stat. § 108.090.

(n58)Footnote 97. Tenn. Code Ann. § 66-1-109. *See* Russell v. Russell, No. No. 01*A01-9611-PB-00516, 1997 Tenn. App. LEXIS 333 (Tenn. App. 1997)* (conveyance by one spouse to both spouses raises a presumption of intent to create tenancy by the entirety).

(n59)Footnote 98. Va. Code Ann. § 55-9.

(n60)Footnote 99. Wyo. Stat. § 34-1-140.

(n61)Footnote 100. In terms of legal concepts the problem is no more complicated if two married couples are involved, as "to H1 and W1 and H2 and W2 and their heirs." The married couples would each hold their shares as tenants by the entirety; together the couples would hold, at the unreformed common law, in joint tenancy. Today for a joint tenancy to result, even in those jurisdictions still recognizing the estate, express words would be required. *See* § 31.06(d), *supra*.

For modern cases, *see Nelson v. Hotchkiss, 601 S.W.2d 14 (Mo. 1980), noted in 46 Mo. L. Rev. 439 (1981); In re Estate of Michael, 218 A.2d 338 (Pa. 1966); Hercules v. Jones, 609 A.2d 837 (Pa. 1992)* ("to H1 or W1, his wife, or H2 or W2, his wife ..., as joint tenants with the right of survivorship ... and not as tenants in common" held to create joint tenancy between married couples with each couple holding undivided half-interest in tenancy by the entirety).

(n62)Footnote 101. If a joint estate be made of land to a husband and wife and to a third person, in this case the husband and wife have in law in their right but the moiety, [and the third person shall have as much as the husband and wife, viz. the other moiety, etc.] And the cause is, for that the husband and wife are but one person in law, and are in like case as if an estate be made to two joint-tenants, where the one hath, by force of the jointure, the one moiety in law, and the other the other moiety, [etc.] In the same manner it is where an estate is made to the husband and wife and to two other men, in this case the husband and wife have but the third part, and the other two men the other two parts, etc., *causa qua supra*.

Thomas Littleton, Tenures § 291 (c. 1481) (Eugene Wambaugh ed. 1903).

For 20th century cases applying this rule, *see Mosser v. Dolsay, 27 A.2d 155 (N.J. 1942); In re Gardner, 202 S.E.2d 318 (N.C. 1974); Jenni v. Gamel, 602 S.W.2d 696 (Mo. Ct. App. 1980); Margarite v. Ewald, 381 A.2d 480 (Pa. Super. 1977). See also Matter of Buttonow, 49 Misc. 2d 445 (N.Y. 1966)* (grant to married couple and third person "jointly" held to create tenancy by the entirety in one-half and joint tenancy in one-half); *Bednar v. Bednar, 688 A.2d 1200 (Pa. Super. 1997)* (husband and wife held one-half as tenants by the entirety with third person who held one-half as joint tenant with right of survivorship).

(n63)Footnote 102. Law of Property Act, 1925, 15 & *16 Geo. 5*, ch. 20, § 37.

(n64)Footnote 103. *Fekkes v. Hughes, 237 N.E.2d 19 (Mass. 1968).*

(n65)Footnote 104. A question of intention may arise where, for example, in a state preserving the common law presumption in favor of tenancy by the entirety in grants to married persons, parents having two adult children convey to a married child and spouse and to an unmarried child, without words describing the estate granted. Does each child take one half? Or do the three grantees take each one-third?

(n66)Footnote 105. Mass. Gen. Laws Ann. ch. 184, § 7.

(n67)Footnote 106. Conn. Gen. Stat. § 47-14a; N.H. Rev. Stat. Ann. § 477:18.

(n68)Footnote 107. *Appeal of Robinson, 33 A. 652 (Me. 1895); Clark v. Clark, 56 N.H. 105 (1875); Cooper v. Cooper, 76 Ill. 57 (1875).*

(n69)Footnote 108. Iws. Stat. Ann. § 700.17(1) ("Interests in property may be owned concurrently by 2 or more persons as joint tenants or as tenants in common.").

(n70)Footnote 109. Wash. Rev. Code Ann. § 11.04.071; W. Va. Code § 36-1-19

(n71)Footnote 110. It is believed that 25 American jurisdictions still recognize tenancies by the entirety:

See Alaska Stat. § 34.15.140(c) & § 34.15.110(b). *See* Ark. Code § 9-12-317. *See* Del. Code Ann. tit. 25, § 309. *See* D.C. Code Ann. § 45-216 & § 16-910. *See* Fla. Stat. § 689.11 & § 689.15. *See* Haw. Rev. Stat. § 509-1 & § 509-1. *See* Ill. Ann. Stat. ch. 76, para. 1c. *See* Ind. Code Ann. § 32-4-2-1 & § 56-402/o3. *See* Ky. Rev. Stat. Ann. § 381.050. *See* Md. Real Prop. Code Ann. § 4-108. *See* Mass. Gen. Laws Ann. ch. 184, § 8. *See* Mich. Comp. Laws Ann. § 552.102, § 57-71, § 557.81, § 57.101. *See* Miss. Code § 89-1-7. *See* Mo. Ann. Stat. § 442.025. *See* N.J. Stat. Ann. § 37:2-18. *See* N.Y. Estates, Powers and Trusts Law § 6-2.2(b). *See* N.C. Gen. Stat. § 39-13.3(b) & § 39-13.6(b). *See* Okla. Stat. Ann. tit. 60, § 74. *See* Or. Rev. Stat. § 108.090. *See* Pa. Cons. Stats. 23, § 3507. *See* R.I. Gen. Laws § 34-11-3. *See* Tenn. Code Ann. § 66-1-109 & § 66-1-110. *See Town of Corinth v. Emery, 22 A. 618 (Vt. 1891);* Vt. Stat. Ann. tit. 15, § 67. *See* Va. Code Ann. § 55-21; *Vasilion v. Vasilion, 66 S.E.2d 599 (Va. 1951). See* Wyo. Stat. § 34-1-140. Ohio briefly experimented with tenancy by the entirety. *See Koster v. Bondrieux, 463 N.E.2d 39 (Ohio App. 1982). See also* Patricia J. Reedy, Legislation Note, *S.201: Ohio's Statute Creating a New Survivorship Tenancy, 11 U. Dayton L. Rev. 481 (1986).* Ohio tenancies by the entirety created during the state's brief experiment with the estate remain valid despite the subsequent repeal of the enabling legislation. Ohio Rev. Code Ann. § 5302.21(A).

(n72)Footnote 111. N.C. Gen. Stat. § 39-13.6(b). An intention not to create a tenancy by the entirety may be indicated by words describing any incident of the created estate inconsistent with tenancy by the entirety. *See Dearman v. Bruns, 181 S.E.2d 809 (N.C. App. 1971)* (devise to H and W "to share equally" held to create tenancy in common).

(n73)Footnote 112. Mass. Gen. Laws Ann. ch. 184, § 7. *See also* N.Y. Estates, Powers and Trusts Law § 6.2-2(b) (grant to husband and wife creates tenancy by the entirety "unless expressly declared to be a joint tenancy or tenancy in common").

(n74)Footnote 113. *See, e.g., In re Arango, 992 F.2d 611 (6th Cir. 1993)* (applying Tennessee law); *Parramore v. Parramore, 368 So. 2d 1308 (Fla. App. 1978); In re Ginn, 186 B.R. 898 (Bankr. D. Md. 1995); In re Meyer, 187 B.R. 650 (Bankr. W.D. Mo.1995); In re Kelly, 289 B.R. 38 (Bankr. D. Del. 2003).*

(n75)Footnote 114. *Fekkes v. Hughes, 237 N.E.2d 19 (Mass. 1968).*

(n76)Footnote 115. *Federal Home Loan Mtg. Corp. v. Toles, 95-7167, 99 F.3d 401 (E.D.N.Y. 1996).*

(n77)Footnote 116. Ill. Ann. Stat. ch. 76, para. 1c. *See Travelers Indem. Co. v. Engel, 81 F.3d. 711 (7th Cir. 1996)* (applying Illinois law) (grant "to H and W as tenants by the entirety" held not to create that estate because grantees were not expressly identified as "husband and wife"). Illinois law no longer requires that a conveyance creating a tenancy by

the entirety expressly state that the grantees are husband and wife, although they must in fact be so.

(n78)Footnote 117. Miss. Code § 89-1-7.

(n79)Footnote 118. Ind. Code Ann. § 32-4-2-2.

(n80)Footnote 119. *See* § 31.08(a), *infra*

(n81)Footnote 120. *See, e.g., Robertson v. Robertson, 593 So. 2d 491 (Fla. 1991)* (contract to purchase land entered into by unmarried woman but title taken as tenancy by entirety after marriage).

(n82)Footnote 121. For the reverse situation, *see* Sunshine v. Del Sole, N.J. Sup. Ct., App. Div. No. (N.J. May 30, 2003) (unmarried woman executed contract to convey real property but married prior to closing and husband refused to release his interest; held: specific performance ordered and husband's interest extinguished).

(n83)Footnote 122. Alaska Stat. § 34.15.110(b).

(n84)Footnote 123. Haw. Rev. Stat. § 509-1.

(n85)Footnote 124. 765 ILCS 1005/1c. By amendment effective January 1, 2002, the Illinois statute no longer requires that a conveyance creating a tenancy by the entirety expressly state that the grantees are husband and wife (although they must in fact be so); nor need the conveyance any longer expressly exclude the intention to create a tenancy in common or a joint tenancy.

(n86)Footnote 125. Ind. Code Ann. § 32-4-2-1.

(n87)Footnote 126. Ky. Rev. Stat. Ann. § 381.050.

(n88)Footnote 127. Mass. Gen. Laws Ann. ch. 184, § 7.

(n89)Footnote 128. Miss. Code § 89-1-7.

(n90)Footnote 129. N.Y. Est. Powers & Trusts Law § 6-2.2(b).

(n91)Footnote 130. N.C. Gen. Stat. § 39-13.6(b).

(n92)Footnote 131. Okla. Stat. Ann. tit. 60, § 74.

(n93)Footnote 132. Va. Code Ann. § 55-21. Tenancy by the entirety "with right of survivorship" comes within the exception. *Vasilion v. Vasilion, 66 S.E.2d 599 (Va. 1951). Compare In re Zella, 202 B.R. 712 (Bankr. E.D. Va. 1996)* (conveyance to husband and wife "as joint tenants with the full common law right of survivorship" held to create tenancy by the entirety in Virginia) *with In re Scialdone, 197 B.R. 225 (Bankr. E.D. Va. 1996)* ("When real property is conveyed to a husband and wife, the deed must specify that a tenancy by the entireties is intended, or this intent must otherwise appear in the deed.").

(n94)Footnote 133. *See* § 31.06(g), *supra*.

(n95)Footnote 134. *See, e.g., Central Benefits Mut. Ins. Co. v. RIS Adm'rs Agency, 637 N.E.2d 291 (Ohio 1994)* (grant "to H and W for their joint lives, remainder to the survivor of them" created joint tenancy with right of survivorship, not tenancy by the entirety, so property could be reached by husband's judgment creditors). For further reflections on this subject, *see* John V. Orth, *Night Thoughts: Reflections on the Debate Concerning Same-Sex Marriage, 3 Nev. L. J. 560* (2003

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CHAPTER 33 TENANCIES BY THE ENTIRETY

4-33 Thompson on Real Property, Thomas Editions § 33.07

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§ 33.07 Incidents of Tenancies by the Entirety.

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Several of the incidents of tenancies by the entirety have been described in earlier sections. In the analytical synopsis of the law of tenancies by the entirety (§ 33.02), it was observed that neither tenant by the entirety has a share in the joint estate that is devisable or inheritable. Although some courts recognized in the husband a power of alienation, it was limited by the wife's indefeasible interest. In the same section was described the right of survivorship, the "grand incident" of tenancies by the entirety, as it is of joint tenancies. Because a tenant by the entirety lacks the power to sever the estate, the right of survivorship is, if anything, even "grander" because it is indestructible by any act of the other tenant by the entirety. Other properties that tenancies by the entirety share with joint tenancies are summed up in the doctrine of the four unities, described in the context of the creation of tenancies by the entirety (§ 33.06(b)); in the same subsection was described a fifth unity, the so-called "unity of person" based on marriage, unique to tenancies by the entirety.

To be covered in this section are the incidents relevant to the relationship between tenants by the entirety during the subsistence of the estate. Historically, few if any actions could be maintained by one tenant by the entirety against the other, because, in general, one spouse could not sue the other. This rule has steadily eroded, so the materials are organized in terms of the remedies that will presumably become progressively available: actions of waste (§ 33.07(a)); for contribution (§ 33.07(b)); of account (§ 33.07(c)); and of ejectment (§ 33.07(d)); as well as creditors' rights (§ 33.07(e)). Because the mutual rights and duties of joint tenants and tenants in common with respect to the property have been far more fully developed than the respective rights and duties of tenants by the entirety, the comparable sections of the chapters on the other concurrent estates may also be consulted. n135

§ 33.07(a) Action of Waste.

Tenants by the entirety are "seised of the entirety." n136 From this simple fact it follows that any damage to the freehold caused by one tenant by the entirety is an injury to the other tenant by the entirety. Unlike joint tenancies and tenancies in common, for which actions of waste were provided directly or by judicial construction of the venerable Statute of Westminster II (1285), n137 no remedy for waste of a tenancy by the entirety was available at common law because of the fifth unity, the matrimonial bond between tenants by the entirety. Whether viewed as an incident of the

tenancy ("the action of waste does not lie between tenants by the entirety") or, more properly, as a specific incident of the general principle that one spouse could not sue another, the fact remained that waste was a wrong for which no remedy was offered tenants by the entirety. Since the husband had complete dominion and control of the estate, the effect was to make his holding "without impeachment for waste." With the general weakening of interspousal immunity from suit and changing concepts of the legal effect of marriage, it may be doubted whether the inability of either spouse to sue the other for waste can remain the rule for much longer.

COMPUTER-ASSISTED RESEARCH:

LEXIS: waste w/15 (tenan! w/3 entiret!)

§ 33.07(b) Action for Contribution.

As between co-tenants, claims for contribution may arise when one makes an expenditure in connection with the property. The most common forms of expenditure giving rise to claims for contribution involve repairs, taxes, mortgage payments, and improvements. Historically claims for contribution were not made by one tenant by the entirety against another, not only because spouses could not sue one another at common law but also because the husband had complete dominion and control over the property, subject only to the wife's indefeasible right of survivorship.

The logic of equal rights for each spouse in property held in tenancy by the entirety and the decline of interspousal immunity from suit seem to lead to the possibility of actions for contribution by one tenant by the entirety against another, particularly where spouses are estranged and living apart but not divorced. If so, the principles developed with respect to other forms of concurrent ownership will apply to tenancies by the entirety as well, with the exception that a policy of encouraging dissentient co-tenants to partition the estate will necessarily be inapplicable: one tenant by the entirety has no right to partition. In general, however, it ought to remain true that one co-tenant should not be compelled to contribute to improvements or other expenses not necessary to the preservation of the estate. Conversely, a co-tenant ought to share expenses such as for taxes and necessary repairs required to preserve the estate for the benefit of both. n138

Courts are divided on the issue of the right of a surviving tenant by the entirety to demand from the estate of a deceased tenant by the entirety contribution of a share of the payment due on a debt represented by a jointly executed promissory note secured by a mortgage on the property held in tenancy by the entirety. Since sole title to the property is now in the surviving tenant by the entirety, it seems inequitable to require the estate of the deceased tenant by the entirety, in the absence of prior agreement by the deceased, to contribute to exonerate the debt on property in which, by virtue of the right of survivorship, it has no further interest. n139

§ 33.07(c) Action of Account.

Just as the action of waste was not available at common law to protect one tenant by the entirety from injury to the freehold caused by the other tenant by the entirety -- most often it was the wife's interest that was damaged by the husband -- so the action of account was not available to protect one tenant by the entirety when the other profited from the estate. Again, most often it was the husband who profited at the wife's expense. The absence of the action of account in the context of tenancies by the entirety was just a negative way of saying that the husband was entitled to all the rents and profits from the estate. n140

More recent legislation indicates that the old order is changing. Consider, for example, a Massachusetts statute of 1980:

> A husband and wife shall be equally entitled to the rents, products, income or profits and to the control, management and possession of property held by them as tenants by the entirety. n141

As the situation of the spouses is equalized, making the tenancy by the entirety in more and more aspects merely a specialized form of joint tenancy reserved for married persons, it can be expected that actions of account will eventually become available to each tenant by the entirety. n142 The venerable "Statute of Queen Anne," n143 the foundation for the action of account with respect to joint tenancies and tenancies in common, could today be read as authorizing the action between tenants by the entirety.

§ 33.07(d) Action of Ejectment.

At common law the husband had complete dominion and control over property held with his wife in tenancy by the entirety; he could even exclude her from possession. n144 In this state of affairs (ignoring for the moment interspousal immunity from suit), it goes without saying that the wife could not maintain an action of ejectment against the husband. An ouster of the husband by the wife, if imaginable at common law, would seem to give rise to an action, assuming rules of procedure permitted it to proceed.

The reconceptualization of tenancy by the entirety as a specialized form of joint tenancy entails a recognition of the spouses' equal rights of interest and possession, two of the four requisite unities. Now having equal rights of possession, neither spouse can exclude the other. n145 In addition, statutes remedying the wife's historic disabilities in tenancies by the entirety often explicitly recognize equal rights to possession. n146 Once she has a right to possession, she has an action of ejectment if possession is infringed.

Because each tenant by the entirety is entitled to possession of the whole, each is enabled to give consent to a police search of the entire estate; each tenant by the entirety is held to have assumed the risk that the other tenant by the entirety will permit the search. n147 The consent is generally not valid to permit a search if the other tenant by the entirety, present at the same time, objects. n148

§ 33.07(e) Creditors' Rights.

Creditors' rights in property held in tenancy by the entirety depend on the extent of the debtor's interest. At common law the wife lacked dominion and control over property she held with her husband, so her creditors (if at common law she could have any creditors in her own right) could not attach her "property." n149 The husband, on the contrary, had dominion and control at common law but no (or only a limited) power of alienation. As states that still recognized the tenancy by the entirety came to regard it as a specialized form of joint tenancy, n150 one in which the husband had a power of alienation, albeit one limited by the wife's indefeasible right of survivorship, creditors of the husband were enabled to reach his entire interest. n151

As the rights of the spouses in the property have approached equality, it might have been expected that creditor's rights would have grown correspondingly. In a few states they did:

> If ... the husband could alienate his right of survivorship at common law, the wife, by virtue of the [Married Women's Property Act], can alienate her right of survivorship. And it follows, that if the wife takes equal rights with the husband in the estate, she must take equal disabilities. Such are the dictates of complete equality. Thus, the judgment creditors of either spouse may levy and execute upon their separate rights of survivorship. n152

In states adopting this view, the bankruptcy of one tenant by the entirety may lead to the sale by the trustee in bankruptcy of the debtor's interest. In addition, in such cases the Bankruptcy Act permits the trustee, under circumstances in which the sale of an undivided interest is impractical, to sell the interests of both debtor and non-debtor. n153 In such cases, the non-debtor has a right of first refusal to purchase the property at the price at which the sale is to be consummated; n154 if that right is not exercised, the non-debtor is entitled to the appropriate share of the sale proceeds. n155 Also in states adopting this view, one spouse can encumber the entirety property, but only to the

extent of that spouse's share; a mortgage by one tenant by the entirety is secured by the mortgagee's right to possession and right of survivorship. n156 Encumbrance by one spouse, where permitted, does not sever the tenancy by the entirety. n157

A substantial majority of states still recognizing tenancies by the entirety have, however, rejected this view and held that the estate may not be attached by creditors of only one spouse. n158 In these states, property held in tenancy by the entirety may be attached only by creditors of both spouses; so for example, in order to encumber entirety property by mortgage, both spouses must grant the mortgage. n159 It follows that a creditor with distinct judgments, one against the husband and another against the wife, cannot levy on the entirety property. n160

The older line of argument was to the effect that since the owners of a tenancy by the entirety are, in some sense, one person, then only creditors of both spouses -- that is, creditors of that fictional one person -- can reach the entirety property. A more modern argument is that since each has equal, indefeasible rights in the entirety property, then it would be unfair to subject the interest of one to the debts of the other. The result is often justified in terms of a public policy in favor of matrimony:

> The Married Woman's Property Statutes have changed the common-law principles of marital unity so that the husband cannot now assert an exclusive right to the rents and profits or divest the wife of her share directly by conveyance or indirectly by execution. Although it is said that no technical changes have been made in the estate by entirety, the results are different. Now each is entitled to the enjoyment and benefits of the whole and neither has a separate estate therein which may be subjected to a conveyance or execution. These are obvious advantages, some of which can be attained by no other form of tenancy. They are frequently the cause or motive of creating the entirety. The reason for this is no longer merely the fictional unity of husband and wife. The interest in family solidarity retains some influence upon the institution. It is available only to husband and wife. It is a convenient mode of protecting a surviving spouse from inconvenient administration of the decedent's estate and from the other's improvident debts. In that protection the estate finds its peculiar and justifiable function. n161

Tenancy by the entirety can also be justified as protecting the interests of those especially vulnerable. n162 One judge expressed the policy more bluntly: "the archaic fiction of a tenancy by the entireties is preserved *only* because it makes it almost impossible for creditors to reach a debtor's family house." n163

The effect is to permit any amount of real property to be shielded from the creditors of either spouse, a major incentive for married persons to hold property in tenancies by the entirety in such jurisdictions, subject only to an exception for fraudulent conveyance. n164 The implications for public policy, already serious in the case of immunity from creditors' rights, become grave indeed in law enforcement cases seeking the forfeiture of property used in criminal activity: where one spouse is innocent, the interest of the guilty party in property held in tenancy by the entirety is immune from forfeiture. n165

Whether a particular obligation is sufficiently the act of both parties is a question of fact. There is a presumption that during the marriage either spouse has the power to act for both, so long as the benefits inure to both. n166 For example, a construction contract executed by only one spouse may, if breached, give rise to a mechanics' lien. n167 Even a land sale contract executed by only one tenant by the entirety may bind the other if conditions of estoppel exist. n168 A statute may make certain debts of one spouse the joint debt of the married couple; in that case property held in tenancy by the entirety would be available to the creditor of the indebted spouse. n169 Without a power of attorney, however, one tenant by the entirety may not, it has been held, effectively consent to changes in restrictive covenants binding the property. n170

Recently, the United States Supreme Court held for the first time that a federal tax lien on property held in tenancy by the entirety is not necessarily governed by state law concerning creditors' rights. n171 Although the details have yet to

be worked out, it appears that the Court has refused to recognize, for purposes of federal tax law, the common law basis of the tenancy by the entirety -- that the married couple constitute a single entity -- and has chosen instead to treat the tenancy by the entirety as a matter of federal law as a special form of joint tenancy, one inseverable on the act of (or on behalf of) one of the two tenants. n172

The application of bankruptcy law to tenancies by the entirety can produce surprises. For example, after a filing in bankruptcy by one tenant by the entirety, the death of the other tenant by the entirety does not result in the addition of the property to the bankruptcy estate, even though the property is now solely owned by the bankrupt. When owned by both tenants by the entirety, the property was not subject to the claims of the creditors of only one, and the death of the other did not result in succession by the bankrupt to new ownership; it only eliminated one of the former owners. n173 One court, confronting the question of the effect of the death of one tenant by the entirety after a bankruptcy sale of the entirety property but before distribution of the proceeds to joint creditors, held that the involuntary sale had not severed the tenancy by the entirety and therefore distributed the proceeds to creditors of the surviving spouse. n174 Where both spouses survive, another unexpected result may ensue: the discharge of the bankrupt spouse converts the remaining undischarged debt into the sole debt of the non-bankrupt spouse, whose share in any remaining property held in tenancy by the entirety cannot be reached by the creditor, since only a creditor of both spouses can reach entirety property. n175

Incident to the property settlement of divorcing tenants by the entirety, a court may award the property to one of the spouses in sole ownership. Creditors of the spouse not receiving title to the property, who were unable to reach it to satisfy their claim while it was held in tenancy by the entirety, have argued that the effect of the decree is to convert the title, however briefly, into a tenancy in common before vesting it in the sole owner, and that their claim attaches in that instant. n176 The Florida Supreme Court has rejected the argument: "Even though ...a tenancy by the entirety becomes a tenancy in common by operation of law upon dissolution of marriage, we reject the 'twinkling of a legal eye' analysis... . Entireties property is not subject to a lien against only one tenant." n177

COMPUTER-ASSISTED RESEARCH

LEXIS: (creditor w/3 right) w/50 (tenan! w/3 entiret!)

FOOTNOTES:
(n1)Footnote 135. *See* §§ 31.07 and 32.07, *supra*.

(n2)Footnote 136. 2 William Blackstone, Commentaries 182 (1783).

(n3)Footnote 137. 13 Edw., c. 22 (1285). It is instructive that tenants in coparcenary were not granted the action of waste because they, alone among concurrent owners at the time, could compel partition. *See* 2 Edward Coke, Institutes 403. (Joint tenants were not enabled to compel partition until the statutes of King Henry VIII. *See* § 31.05, *supra*.) The lesson seems to be that the founders of the common law saw no need to arbitrate disputes among co-owners who could escape the concurrent ownership at will. The modern application would seem to be that tenants by the entirety are more in need of the remedy provided by the action of waste than other concurrent owners.

(n4)Footnote 138. *Baran v. Jaluski, 689 A.2d 1283 (Md. App. 1997)* ("a co-tenant in a tenancy by the entireties is entitled, to the same extent as a co-tenant in a tenancy in common or joint tenancy is entitled, to contribution for that spouse's payment of the carrying charges which preserve the property").

(n5)Footnote 139. *In re Keil's Estate, 145 A.2d 563 (Del. 1958)* (action by wife against husband's executors for contribution toward joint mortgage debt), *noted in 73 Harv. L. Rev. 425 (1959), 42 Marq. L. Rev. 555 (1959), 37 N.C. L. Rev. 333 (1959), 13 Wyo. L.J. 267 (1959), 58 Mich. L. Rev. 137 (1959), 11 Stan. L. Rev. 778 (1959); Florio v. Greenspan, 165 N.E.2d 753 (Mass. 1960).*

(n6)Footnote 140. *Childs v. Childs, 199 N.E. 383 (Mass. 1936); Pineo v. White, 70 N.E.2d 294 (Mass. 1946).*

(n7)Footnote 141. Mass. Gen. Laws Ann. ch. 209, § 1.

Michigan. "A husband and wife shall be equally entitled to the rents, products, income, or profits, and to the control and management of real or personal property held by them as tenants by the entirety." Mich. Comp. Laws Ann. § 557-71.

North Carolina. "A husband and wife shall have an equal right to the control, use, possession, rents, income, and profits of real property held by them in tenancy by the entirety. Neither spouse may bargain, sell, lease, mortgage, transfer, convey or in any manner encumber any property so held without the written joinder of the other spouse... ." N.C. Gen. Stat. § 39-13.6(a). *See* William A. Reppy, *North Carolina's Tenancy by the Entirety Reform Legislation of 1982, 5 Campbell L. Rev. 1 (1982).*

(n8)Footnote 142. *Lindenfelser v. Lindenfelser, 153 A.2d 901 (Pa. 1959)* ("we believe the modern rule to be that where husband and wife are separated but not divorced and where one of them is excluded from the exercise or enjoyment of rights inherent in an estate held by the entireties, an accounting of the property so held may be ordered and the property or proceeds divided equally between them").

(n9)Footnote 143. Often cited as 4 Anne, c. 16, § 27, and dated 1705, the statute is properly 4 & 5 Anne, c. 16, § 27 (1706). Although the most widely used edition of the English statutes, Oickering's Statutes At Large, makes it appear that Queen Anne's parliament adjourned in December 1705, it actually continued in session into January, when the present statute was enacted. *See* 11 William Holdsworth, A History of English Law 519, 526 (1938). The relevant section of the statute is as follows:

> actions of account shall and may be brought and maintained ... by one joint tenant, and tenant in common, his executors and administrators, against the other, as bailiff for receiving more than comes to his just share or proportion, and against the executor and administrator of such joint tenant, or tenant in common... .

(n10)Footnote 144. *D'Ercole v. D'Ercole, 407 F. Supp. 1377* (U.S. Dist. Ct., D. Mass. 1976) (husband's right to exclusive possession of property held in tenancy by entirety not violation of wife's rights under Fifth and Fourteenth Amendments to U.S. Constitution); *Voight v. Voight, 147 N.E. 887 (Mass. 1925).*

(n11)Footnote 145. *T.A. v. Allen, 669 A.2d 360 (Pa. Super. 1995).*

(n12)Footnote 146. *See, e.g.*, Mass Gen. Laws Ann. ch. 209, § 1; N.C. Gen. Stat. § 39-13.6(a).

(n13)Footnote 147. *United States v. Matlock, 415 U.S. 164 (1974).*

(n14)Footnote 148. *State v. Walker, 941 P.2d 1 (Wash. App. 1997).*

(n15)Footnote 149. *Licker v. Gluskin, 164 N.E. 613 (Mass. 1929).*

(n16)Footnote 150. *Morris v. McCarty, 32 N.E. 938 (Mass. 1893).*

(n17)Footnote 151. *Raptes v. Pappas, 155 N.E. 787 (Mass. 1927).*

(n18)Footnote 152. *King v. Greene, 153 A.2d 49, 60 (N.J. 1959), noted in 5 Vill. L. Rev. 154 (1959), 58 Mich. L. Rev. 601 (1960), 14 Rutgers L. Rev. 457 (1960), 73 Harv. L. Rev. 792 (1960). But see* N.J. Stat. Ann. § 43:3-17.4 (as to estates created after 1988, either spouse prohibited from severing, alienating, or otherwise affecting their respective interests in the property during the marriage or upon separation without the written consent of the other).

See also Coraccio v. Lowell Five Cents Sav. Bank, 612 N.E.2d 650 (Mass. 1993) (by virtue of legislation equalizing rights of spouses in property held as tenants by the entirety, either spouse may convey or encumber his or her interest), *noted in 30 New Eng. L. Rev. 85 (1995). But see* Mass. Gen. Laws Ann. ch. 209, §§ 1, 1A (tenants by the entirety holding under a deed dated prior to Feb. 11, 1980 may elect to have tenancy exempted from claims of creditors of debtor spouse).

Because in states taking this view creditors of one spouse can levy on the debtor's interest but cannot affect the non-debtor's interest, tenancies by the entirety have been labeled "partial bars" to creditors' rights. *See* Steve R. Johnson, *Fog, Fairness, and the Federal Fisc: Tenancy-by-the-Entireties Interests and the Federal Tax Lien, 60 Mo. L. Rev. 839 (1995)* (listing ten "partial bar jurisdictions").

(n19)Footnote 153. Bankruptcy Code § 363(h):

The trustee can sell both the estate's interest and the interest of the non-debtor in property owned as tenants in common, joint tenants, or tenants by the entirety only if:

(1) partition in kind of such property among the estate and such co-owners is impracticable;

(2) sale of the estate's undivided interest in such property would realize significantly less for the estate than sale of such property free of the interest of such co-owners;

(3) the benefit to the estate of a sale of such property free of the interests of co-owners outweighs the detriment, if any, to such co-owners; and

(4) such property is not used in the production, transmission, or distribution, for sale, of electric energy or of natural or synthetic gas for heat, light, or power.

One commentator has described this section as going "too far." Thomas E. Plank, *The Constitutional Limits of Bankruptcy, 63 Tenn. L. Rev. 487, 571 (1996).*

(n20)Footnote 154. Bankruptcy Code § 363(i).

(n21)Footnote 155. Bankruptcy Code § 363(j).

(n22)Footnote 156. *United States v. Avila, 88 F.3d 229 (3d Cir. 1996)* (applying New Jersey law). Even in states permitting the encumbrance by one spouse of property held in tenancy by the entirety, the mortgagee's interest in possible distribution rights following divorce would be subject to the equitable distribution rights of the non-mortgagor spouse. *Vander Weert v. Vander Weert, 700 A.2d 894 (N.J. Super. 1997)* (concerning tenancy by the entirety acquired before legislation prohibiting, as to estates created after 1988, either spouse from severing, alienating, or otherwise affecting their respective interests in the property during the marriage or upon separation without the written consent of the other).

(n23)Footnote 157. *United States v. Lee, 12 F. Supp. 2d 858 (C.D. Ill. 1998); V.R.W., Inc. v. Klein, 503 N.E.2d 496 (N.Y. 1986).*

(n24)Footnote 158. *Sawada v. Endo, 561 P.2d 1291 (Haw. 1977)* (listing support for majority rule); *In re Persky, 134 B.R. 81 (Bankr. E.D.N.Y. 1991)* (applying majority rule), *noted in 31 U. Louisville J. Fam. L. 164* (1992-93).

Because in states taking this view creditors of one spouse cannot levy at all on the entirety property, tenancies by the entirety have been labeled "full bars" to creditors' rights. *See* Steve R. Johnson, *After* Drye: *The Likely Attachment of the Federal Tax Lien to Tenancy-by-the-Entireties Interests, 75 Ind. L.J. 1163 (2000)* (listing sixteen "full bar jurisdictions"). In North Carolina, which adheres to the majority rule denying rights to creditors of only one spouse, the rule was applied to a case in which an indebted husband joined with his wife in making a gratuitous transfer of the property to his parents; husband and wife then divorced; on husband's second marriage, his parents transferred the property gratuitously to his new wife, who sold it and invested the proceeds in property titled to herself and her husband as tenants by the entirety. *Dealer Supply Co. v. Greene, 422 S.E.2d 350 (N.C. 1992).*

(n25)Footnote 159. *Farris v. Jefferson Bank, 194 B.R. 931 (Bankr. E.D. Pa.1996)* (describing Maryland and Pennsylvania law). *But see Goldman v. Goldman, 711 N.Y.S. 2d 128 (N.Y. 2000)* (holding that a mortgage given by one tenant by the entirety while a divorce action was pending survived entry of the judgment of divorce and award of the property to the other tenant by the entirety).

(n26)Footnote 160. *Rogers v. Rogers, 512 S.E.2d 821 (Va. 1999).*

(n27)Footnote 161. *Fairclaw v. Forest, 130 F.2d 829, 833 (D.C. Cir. 1942), cert. denied, 318 U.S. 756 (1943).*

(n28)Footnote 162. *See United States v. Craft, 535 U.S. 274 (2002)* (Scalia, J., dissenting) (describing tenancy by the entirety as "a form of property ownership that was of particular benefit to the stay-at-home spouse or mother. She is overwhelmingly likely to be the survivor that obtains title to the unencumbered property; and she (as opposed to her business-world husband) is overwhelmingly unlikely to be the source of the individual indebtedness against which a tenancy by the entirety protects.").

(n29)Footnote 163. *Harris v. Crowder, 322 S.E.2d 854, 858-59 (W.Va. 1984)* (emphasis in original) (Neely, J.).

(n30)Footnote 164. *Garden State Standardbred Sales Co. v. Seese, 611 A.2d 1239 (Pa. 1992). But see In re Goldberg, 166 B.R. 776 (Bankr. D. Mass. 1994)* (although spouses elected coverage under Mass. Gen. Laws Ann. ch. 209, §§ 1, 1Apreventing seizure of property held as tenants by the entirety by creditor of either spouse after filing for bankruptcy, election held not fraudulent because statute had no exception for pre-existing creditors). *See also E.J. McKernan Co. v. Gregory, 643 N.E.2d 1370 (Ill. App. 1994)* (although debtor husband transferred house to himself and his wife as tenants by the entirety after judgment was entered against him, transfer held not fraudulent because "specifically and unambiguously sanctioned by statute"). For a discussion of the effect of subsequent Illinois legislation by the court that decided *McKernan, see Harris Bank St. Charles v. Weber, 700 N.E.2d 722 (Ill. App. 1998).* Creditors' rights in tenancies by the entirety in Illinois have finally been clarified by the state supreme court in *Premier Property Mgmt., Inc. v. Chavez, 728 N.E.2d 476 (Ill. 2000).*

(n31)Footnote 165. *United States v. 15621 S.W. 209th Ave., 894 F.2d 1511 (11th Cir. 1990)* (applying Florida law) (government may file *lis pendens*, preserving its right to seek forfeiture of separate interest of guilty party acquired at death of innocent spouse or by severance of tenancy by the entirety); *United States v. Certain Real Property at 2525 Leroy Lane, 910 F.2d 343 (6th Cir. 1990) (Leroy Lane I), 972 F.2d 136 (6th Cir. 1992)* (Leroy Lane II) (applying Michigan law); United States v. Parcel of Real Property Known as 1500 Lincoln Ave., 949 F.2d 73 (3d Cir. 1991) (applying Pennsylvania law) (government may seek forfeiture of interest of guilty party, subject to innocent spouse's present right of enjoyment and right of survivorship), *noted in 37 Vill. L. Rev. 996 (1992), 8 B.Y.U. J. Pub. L. 197 (1993), 54 U. Pitt. L. Rev. 553 (1993). See* Annotation, *Who Is Exempt from Forfeiture of Real Property Under "Innocent Owner" Provision of 21 U.S.C. 881(a)(7), 110 A.L.R. Fed. 569 (1992);* Ann Marie Feely, Comment, *Forfeiture of Marital Property Under 21 U.S.C. § 881(a)(7)*: *Irreconcilable Differences*? *37 Vill. L. Rev. 1487 (1992);* Eric G. Zajac, *Tenancies by the Entirety and Federal Civil Forfeiture Under the Crime Abuse Prevention and Control*

Act: A Clash of Titans, 54 U. Pitt. L. Rev. 533 (1993).

(n32)Footnote 166. *J.R. Christ Constr. Co. v. Olevsky, 232 A.2d 196 (Pa. 1967); In re* Wetzler, 192 B.R.109 (Bankr. D. Md. 1996) ("For contracts entered into by a husband and a wife, there is a presumption that they do so jointly as entireties and not as individuals.").

(n33)Footnote 167. *Guistra Dev. Co. v. Lee, 631 A.2d 199 (Pa. 1993).*

(n34)Footnote 168. *Vetrano v. Ashe, 606 N.Y.S.2d 398 (1993)* (other spouse knew of payments and benefited from them).

(n35)Footnote 169. *See In re* Rucker, C.A. No. 96-0088-*H, 1997 U.S. Dist. LEXIS 1586 (U.S. Dist. Ct. W.D. Va. 1997)* (construing VA. CODE § 8.01-220.2 concerning medical expenses).

(n36)Footnote 170. *Ross v. Laurel Glen Homeowners Association, 43 Va. Cir. 205 (1997).*

(n37)Footnote 171. *United States v. Craft, 535 U.S. 274 (2002), noted in 34 Loy. U. Chi. L.J. 245 (2002), 71 UMKC L. Rev. 731 (2003).* For conflicting views of the implications of *Craft*, *see* Steve R. Johnson, *Why* Craft *Isn't Scary*, 37 Real Property, Probate and Trust J. 440 (2002) *and* Albert F. Rush, *United States v. Craft: Saying Goodbye to Tenancy by the Entirety? 17 Probate and Property 59* (Jan./Feb. 2002).

(n38)Footnote 172. *See In re Knapp, 285 B.R. 176 (Bankr. M.D. N.C. 2002)* (refusing to extend the reasoning in *Craft* beyond its application to federal tax liens); *In re Basher, 291 B.R. 357 (Bankr. E.D. Pa. 2003)* (for purpose of federal tax lien, valuing bankrupt husband's interest in tenancy by the entirety as one-half fair market value discounted by husband's and wife's life expectancies).

(n39)Footnote 173. *Birney v. Smith, 200 F.3d 225 (4th Cir. 1999)* (applying Maryland law).

(n40)Footnote 174. *Ballard v. United States, 65 F.3d 367 (4th Cir. 1995)* (applying Virginia law).

(n41)Footnote 175. *In re Van Der Heide, 164 F.3d 1183 (8th Cir. 1999)* (applying Missouri law).

(n42)Footnote 176. The creditors' theory draws some support from an analogy to claims against the beneficiaries of spendthrift trusts. Although the trustee of a discretionary spendthrift trust cannot be compelled to exercise discretion in favor of the beneficiary in such cases, it has been held that if the trustee in fact exercises discretion to make a distribution to the beneficiary, there is a moment in time when a creditor's claim can be effective. "At least for some appreciable time, however brief, the award must precede the delivery of the income he is to receive, and during that time the lien of execution attaches." *Hamilton v. Drogo, 150 N.E. 496 (N.Y. 1926).* The rejection of the analogy in the case of divorcing tenants by the entirety may be attributed to the greater degree of sympathy courts feel for an exspouse as opposed to a beneficiary of a spendthrift trust.

(n43)Footnote 177. *Sharp v. Hamilton, 520 So. 2d 9 (Fla. 1988).*

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CHAPTER 33 TENANCIES BY THE ENTIRETY

4-33 Thompson on Real Property, Thomas Editions § 33.08

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§ 33.08 Termination of Tenancies by the Entirety.

[Go To Supp]

As a form of concurrent ownership, a tenancy by the entirety can exist only so long as two persons, married to one another, own the same property at the same time. If, for whatever reason, ownership of the estate passes to one person, the tenancy by the entirety (like all forms of concurrent ownership) terminates. Now that tenancy by the entirety is commonly viewed as a specialized form of joint tenancy, it is bound by the doctrine of the four unities of time, title, interest, and possession; should any one fail, the tenancy by the entirety ceases. n178 In addition, the so-called fifth unity, the "unity of person," describes the necessity for a lawful marriage subsisting between the two co-tenants; n179 should the marriage terminate for whatever reason, the tenancy by the entirety ceases. One court succinctly summarized the possibilities: "The tenancy by the entirety can be changed by voluntary act of the couple, divorce or death." n180 In this section, termination will be examined by act of both tenants by the entirety (§ 33.08(a)), by act of one tenant by the entirety (§ 33.08(b)), and -- regardless of the act of either or both tenants by the entirety -- by operation of law (§ 33.08(c)). An additional section will address the special issues arising from termination by divorce (§ 33.08(d)).

COMPUTER-ASSISTED RESEARCH

LEXIS: termin! w/50 (tenan! w/3 entiret!)

§ 33.08(a) Termination by Act of Both Tenants by the Entirety.

Tenancies by the entirety may be terminated by the act of both tenants by the entirety. Obviously, a grant by both tenants to a third party to hold in severalty ("H and W to C and heirs") terminates the tenancy by the entirety because it eliminates any form of concurrent ownership. Just as obviously, a grant by both tenants by the entirety to two or more other persons to hold in some other form of concurrent ownership ("H and W to A and B and heirs as joint tenants") terminates the tenancy by the entirety. The same is true of any grant by both tenants to one of them as sole owner ("H and W to H" or "H and W to W"); since each was already seised of the whole (*per tout*), words of inheritance would seem not to be required, even in states that have not otherwise eliminated that requirement. Likewise, a grant by both tenants by the entirety to themselves in some other form of concurrent ownership (for example, "H and W to H and W as tenants in common" or "H and W to H and W as joint tenants") terminates the tenancy by the entirety. n181

A grant by both tenants by the entirety to themselves in the same capacity would not affect the tenancy by the entirety, but where tenants by the entirety convey to themselves in a different capacity, as from themselves as a marital unit to themselves as trustees, the tenancy in the beneficial estate may be severed. n182 An express agreement to terminate a tenancy by the entirety without a deed may be effective as between the spouses but cannot affect the rights of third parties without notice. By analogy to recent developments in the law of joint tenancies, n183 it is possible that a court may recognize a severance by implied mutual agreement. n184 Obviously, joint action by both tenants to end their marriage by divorce would also terminate the tenancy by the entirety. n185

When property held in tenancy by the entirety is sold, a question may arise concerning the tenancy in which the proceeds of the sale are held. For historical reasons, personal property including money cannot ordinarily be held in tenancy by the entirety, n186 so the choice is between tenancy in common and joint tenancy (in jurisdictions still recognizing the latter). In general, the presumption in favor of tenancies in common should be applied in the absence of an expressed intention in favor of joint tenancy. n187 Because of the power each joint tenant has to sever the tenancy, the distinction in regard to use is rarely significant; the problem, as ever, concerns the right of survivorship. What should be done with the proceeds of a sale when one of the selling tenants by the entirety dies before division? The problem is most likely to arise when the sale involves a purchase money mortgage in favor of the sellers or when the sale is by an installment contract and the deed is not to be delivered until the final payment. At least one state, Michigan, has legislated on the subject, preserving the right of survivorship in such cases. n188

Should an option to buy property held in tenancy by the entirety be granted by both tenants, a question may arise if one tenant dies before the option is exercised. In what is called a case of first impression one court ruled, over a vigorous dissent, that the option lapsed. The majority reasoned that the offer to sell was made by the tenants by the entirety as a marital unit rather than as individuals and therefore expired on the death of one. n189

If a voluntary sale by tenants by the entirety is treated as operating to sever the tenancy, a question may arise concerning the moment at which the sale is effective. The ordinary sale begins with a contract to convey, and the law of "equitable conversion" has long treated the contract as the operative event if it is specifically enforceable; the purchaser acquires at the moment of contracting an equitable title to the property, while the vendors hold the legal title as security for the payment of the purchase price. n190 It has been held that, just as equitable conversion shifts the risk of loss to the purchaser, so also it converts the vendors' equitable interest in the money into a tenancy in common, absent an expressed intent to the contrary. n191 A persuasive argument can be made, however, based on the doctrine of the four unities, that delivery of the deed, that is, transfer of the legal title, is the operative event for purposes of termination. The unities have always been legal, as opposed to equitable, prerequisites for the estate of tenancy by the entirety, and that estate continues, regardless of the state of the equitable title, until its "legal" termination at the closing. Should specific performance be sought and obtained by either party to the land sale contract, it would be the vendors, both of them as tenants by the entirety, who would be required to deliver the deed. Again, with respect to the purchase price when paid at the closing, it is submitted that the presumption in favor of tenancy in common should govern in the absence of expressed intention to the contrary.

§ 33.08(b) Termination by Act of One Tenant by the Entirety.

Although, like joint tenancies, tenancies by the entirety may be terminated by any act that destroys one of the four unities, neither tenant by the entirety alone has the legal capacity to destroy the unity of title, interest, or possession. (The unity of time is now beyond change.) This statement is subject to two exceptions, one more apparent than real. In the early nineteenth century the husband was recognized in some states to have a power of alienation, but exercise of this power did not terminate the wife's right of survivorship. Although the unities of title, interest, and possession were apparently compromised or destroyed, the essence of the estate somehow endured. The one act of a tenant by the entirety acting alone that certainly can terminate the tenancy by the entirety is a release of interest to the other ("H to W" or "W to H"). n192 At common law this was impossible by direct conveyance. As Sir William Blackstone bluntly

stated over two hundred years ago, "a man cannot grant any thing to his wife ..., for the grant would be to suppose her separate existence." n193 Today a married woman's "separate existence" is well established, although some states long maintained a special procedure for married women's conveyances, often including a private examination by a legal officer to determine whether the conveyance was truly voluntary, or unreasonable or injurious to her. n194 Since each was already seised of the whole (*per tout*), words of inheritance would not, by analogy to conveyances between joint tenants, be required. n195

Because tenancies by the entirety also required a fifth unity, the "unity of person" based on matrimony, an act of one tenant by the entirety effective to terminate the marriage is also effective to terminate the estate. Now that divorce is generally available "on demand," one tenant can terminate the tenancy by the entirety by invoking the power of the law to end the legal state of matrimony. n196

The Uniform Probate Code has been revised to permit a surviving tenant by the entirety to "disclaim" the interest accruing by the right of survivorship. n197 While the death of a tenant by the entirety would ordinarily terminate the interest of the deceased, the survivor's disclaimer would relate back to the moment of death and sever the tenancy by the entirety, converting it into a tenancy in common. An analogy is attempted to the renunciation of an intestate share and the disclaimer of a testamentary gift. This is, however, to mistake the nature of the right of survivorship. Rather than an interest passing from the deceased tenant by the entirety to the surviving tenant by the entirety, the right of survivorship registers the subtraction from the estate of the interest of the deceased and consequent enlargement of the interest of the survivor. Although a notable departure from the theory of tenancies by the entirety, the result may be justified in the interest of treating all means of succession at death alike: an heir may renounce an intestate share and a devisee may disclaim a testamentary gift.

A Uniform Disclaimer of Property Interests Act (UDOPIA), promulgated in 1999 and now incorporated into the Uniform Probate Code, works a further change in the treatment of disclaimers by tenants by the entirety. n198 Under the UDOPIA, a tenant by the entirety can disclaim either the decedent's equal fractional share of the property (without tracing the source of contributions to the purchase price) or all of the jointly held property other than the part contributed by the disclaimant (that is, with tracing). n199

§ 33.08(c) Termination by Operation of Law.

Tenancies by the entirety may be terminated by operation of law without regard to the intention of either or both tenants. Again, the key is terminating the concurrent ownership or, if that continues, destroying at least one of the four unities or the fifth unity, the "unity of person" based on marriage. By right of survivorship a tenancy by the entirety is terminated by the death of one tenant by the entirety; since only one is left, the survivor holds no longer as tenant by the entirety but as tenant in severalty, in other words, as sole owner.

Tenancies by the entirety are terminated by operation of law when taken by the state by the power of eminent domain. Transfer to a sole owner, even if the result of an involuntary transfer, ends the state of concurrent ownership and with it the tenancy by the entirety. In case of a taking, of course, money is substituted for the land, the "just compensation" required by constitutional law. This money, unlike the proceeds of a voluntary sale, has not been acquired by the intentional act of the tenants by the entirety and so poses a problem since personal property including money may not ordinarily be held in the form of tenancy by the entirety. n200 To change the tenancy in a case of "involuntary conversion" (conversion in the sense of transformation from realty to personalty) could be unfair to one or both of the tenants by the entirety, so courts have admitted an exception in such cases and permitted the proceeds to be held as if in tenancy by the entirety. n201 Technically, the powers of equity may be invoked to impress on the proceeds the incidents of a tenancy by the entirety.

COMPUTER-ASSISTED RESEARCH

LEXIS: termin w/50 (tenan! w/3 entiret!) & "eminent domain" or condem!

It may be doubted whether the same result should be reached in any other case. n202 For example, the value of land and buildings held by tenants by the entirety may be insured against loss by casualty, and if damaged, the insurer will be obligated to pay on the policy. The payment is in a sense money substituted for real property and the precipitating event is in fact involuntary, but the money need not be held in the same tenancy as the realty because, unlike the taking by eminent domain, the money is not substituted for the estate. The estate has not, in fact, been terminated, although its value may have been diminished. n203 An exception may be admitted in case of a fire insurance policy and the arson of one tenant by the entirety: the criminal act may be held to sever the tenancy by the entirety so that the innocent spouse may be entitled to one-half the insurance proceeds. n204

Even when the estate has been terminated by involuntary sale, such as by a foreclosure sale pursuant to a mortgage or deed of trust, the analogy to a taking by eminent domain is imperfect and the law of "involuntary conversion" should not be applied. n205 The encumbrance was voluntarily assumed and the proximate cause of the sale was not the exercise of state power but the default in payment. The true analogy is to a voluntary sale. n206

One melancholy instance of termination by operation of law must be considered: the murder by one tenant by the entirety of the other. Professor Powell commented laconically years ago on the social statistics: "The abundance of recent cases suggests the increased frequency of murdering tenants by the entireties." n207 Of course, if H and W hold real property as tenants by the entirety and one murders the other, the tenancy by the entirety is terminated: on the death of one the right of survivorship preserves the entire estate to the other who holds in severalty. Thus far, one might say the tenancy by the entirety was terminated not by operation of law but by the act of one tenant by the entirety. So outrageous is it that a murderer should profit by the crime that courts and legislatures have struggled to devise means to prevent ordinary rules from operating in this case. One court listed five different possibilities:

> (1) The murderer is entitled to take and keep all the property.
>
> (2) The murderer holds the property on constructive trust, but only for the value of the use of one-half of the property for the victim's lifetime expectancy.
>
> (3) The murderer is a constructive trustee for the victim's estate of the whole of the property, subject to a life estate in the murderer in the whole of the property.
>
> (4) The murderer is a constructive trustee of the whole of the property for the victim's estate.
>
> (5) The murderer is a constructive trustee for the victim's estate in one-half of the property. n208

Another possibility is simply to treat the tenancy by the entirety as terminated as of the moment the crime was complete, converting it into a tenancy in common, in effect option (5) without the fiction of the constructive trust. n209 This is the approach adopted by the Uniform Probate Code. n210 A few states have more complicated arrangements, similar to options (2) and (3), seeking to deprive the murderer of any possibility of gain. n211

Rejection of the right of survivorship in case of a "murdering tenant by the entirety" is dependent on a final determination of responsibility, n212 but once determined, the consequence relates back to the time of the crime. During the interval between the death and the final determination of responsibility, a constructive trust may need to be imposed on the legal title-holder in order to preserve the property. n213 If the property had in the meantime been transferred to a good faith purchaser who reasonably relied on the appearance of title, the rule should not be applied, but the money paid by the purchaser should be traced and treated as a substitute res.

Because the reason for refusing to recognize the usual right of survivorship is to prevent a wrongdoer from profiting

from the wrong, a difficulty can arise in the case of so called murder-suicide, that is, when the slayer immediately commits suicide. Any rule that deprives the slayer of a momentary benefit actually deprives the slayer's heirs or devisees, who most often are totally innocent, and may raise difficult questions under provisions of the federal and most state constitutions that prohibit forfeiture or corruption of blood. n214 Conversely, where a guilty slayer survives the victim for an appreciable period of time, the policy against profiting from wrongdoing may encourage a court to go beyond the usual presumption of equal shares in tenancies by the entirety and to trace the respective contributions of slayer and victim, as in cases of divorce. If the slayer contributed less than half the value of the property, the slayer may be deprived of proportionately more than one-half. In some cases involving murder-suicide, the Simultaneous Death Act, discussed later in this subsection, may also be relevant. n215

Short of murder, one tenant by the entirety can act so egregiously against the interests of the other that a court may recognize a severance. n216

COMPUTER-ASSISTED RESEARCH

LEXIS: termin! w/50 (tenan! w/3 entiret!) & slayer or murder! or kill!

In case one tenant by the entirety becomes incompetent, it may be argued that a severance ought to be recognized because, given the indestructible right of survivorship coupled with the lack of any individual power to alienate or compel partition, the property would otherwise be "locked up." Perhaps the better solution is to leave the incompetent spouse's interest to be protected in ordinary course by a guardian. n217

One final problem concerns the simultaneous death of tenants by the entirety. The right of survivorship assumes the possibility of determining the order of death. If that is impossible, there is no choice but to treat the tenancy by the entirety as terminated and to dispose of the estate as if it had been a tenancy in common. In such a case, then, one-half of the estate would pass to each tenant's heirs or devisees. The Uniform Simultaneous Death Act as adopted in many states enforces this result by raising a presumption of simultaneous death unless there is "sufficient evidence" to the contrary. n218 In 1991 the Uniform Simultaneous Death Act was revised to require survivorship by at least 120 hours in order to prevent the diversion of property based only on a brief and perhaps technical survivorship. n219

Statutes giving a surviving spouse a right to dissent from the provisions of the deceased spouse's will and to take a "forced share" of the deceased's estate may contain directions concerning the treatment of tenancies by the entirety. Typically the survivor will be credited with a benefit from the right of survivorship in property held in tenancy by the entirety to the extent of the deceased spouse's contribution to the purchase of the entirety property. n220

§ 33.08(d) The Effect of Termination by Divorce.

Once a divorce is final, no tenancy by the entirety can continue between the parties; one of the legal effects of divorce, then, is to terminate the tenancy. n221 Such a termination may be said to be "by operation of law," but that must be understood to mean that it is a necessary consequence of the divorce; the divorce itself ends the marriage "by operation of law" but it occurs only at the initiation of one or both spouses. Because tenancy by the entirety is limited to persons married to one another, it cannot continue after the marriage is over. Saying that divorce destroys the fifth unity, the "unity of person" is simply to say the same thing in other words.

Divorce terminates a tenancy by the entirety as of the final decree; merely filing for divorce does not terminate the tenancy, so the death of one tenant by the entirety after filing but before final decree results in the sole ownership of the property by the other by right of survivorship. n222

Because the tenancy by the entirety is now regarded as merely a specialized form of joint tenancy available only to persons married to one another, it would seem logical to conclude that on the termination of marriage by divorce, all

other things remaining the same, the parties would then hold as joint tenants. Although the so-called fifth unity is destroyed, the four unities remain. Of course, the property settlement accompanying the divorce normally provides for the sale or other disposition of estates held concurrently. If it did not, however, and if the parties did nothing inconsistent with one of the four unities, then the estate would apparently be in joint tenancy. n223 The principal inconvenience of this result is the continuing right of survivorship: on the death of one, the other would be sole owner of the entire estate, a result unlikely to be desired by the divorced couple. In case property was inadvertently still held together after divorce, the courts would be expected to look closely (and critically) at whether the unities of interest and possession were still intact. n224 The problem of characterizing after divorce a concurrent estate that had once been a tenancy by the entirety arises, of course, only in jurisdictions that still offer a choice, that is, those in which both joint tenancies and tenancies in common remain available. n225

In a number of states, statutes similar to the Uniform Probate Code, n226 cut the Gordion knot and declare the effect of divorce to be the termination of a tenancy by the entirety and its replacement by a tenancy in common:

Arkansas. Final decree of divorce terminates tenancy by entirety, unless court order specifically provides otherwise; parties become tenants in common. n227

District of Columbia. Final decree of annulment or divorce terminates tenancy by the entirety in the absence of a valid antenuptial or postnuptial agreement. n228

Florida. Upon dissolution of marriage tenants by entirety become tenants in common. n229

Illinois. Upon judgment of dissolution of marriage, tenancy by the entirety becomes, by operation of law, tenancy in common. n230

Indiana. Final decree of dissolution of marriage converts tenancy by the entirety into tenancy in common. n231

Michigan. Tenancy by entireties becomes tenancy in common on divorce. n232

Pennsylvania. Divorce converts tenancy by the entirety into tenancy in common. n233

Virginia. Divorce converts tenancy by the entirety into tenancy in common. n234

Even in the absence of statute, a court may find as a matter of state common law that an effect of divorce is to convert tenancies by the entirety into tenancies in common. n235 The transformation by divorce of a tenancy by the entirety into a tenancy in common is final. The remarriage of the parties does not revive the tenancy by the entirety. n236 The only way to recreate the tenancy by the entirety is with a new deed.

Conversion of a tenancy by the entirety into a tenancy in common does not necessarily eliminate all grounds for dispute. One spouse may have contributed all or most of the funds with which the property was purchased. Unlike joint tenancies, tenancies in common need not be held in equal shares, although there is a presumption in favor of equality. n237 The original transaction may have involved an element of gift, the party contributing the disproportionate share of the cost donating the excess over one-half to the other. It has been held that the party claiming the benefit bears the burden of proving the gift. n238

Equitable distribution statutes, governing the disposition of property on divorce, often include special rules for real property held in tenancy by the entirety, raising a presumption that the property is marital regardless of who funded its original acquisition. It is then up to the spouse who claims a special equity interest to prove that a gift was not intended. n239 The equitable distribution of marital property on divorce, required by statutes in many states, is an issue distinct from the issue of legal title under traditional rules of property. As one court explained:

> Determining who has legal title... has little or no bearing upon how the value of an asset is to be equitably distributed by a monetary award... . The mandate in a property distribution ... is to allocate to each party a fair portion of the marital wealth... . Equitable distribution deviates from traditional views of property ownership in that whether the property is separate or marital is determined by the statutory definition and is not determined by legal title. n240

As part of the property settlement, divorce counsel should ordinarily arrange to convert all concurrent estates held by the divorcing spouses into sole ownerships. n241 Indeed, it would be prudent to make the conversion at the time of filing for divorce in order to avoid the possibility that death before final settlement would lead to the survivor taking all.

FOOTNOTES:

(n1)Footnote 178. On the doctrine of the four unities, *see* §§ 31.06(b) and 33.06(b), *supra*.

(n2)Footnote 179. On the "fifth unity," the unity of person, based on marriage, *see* § 33.06(b), *supra*.

(n3)Footnote 180. *Prario v. Novo, 645 N.Y.S.2d 269, 271 (1996).* Another court offered a somewhat more comprehensive account:

> [T]enancies by the entireties have been found to convert to tenancies in common where the instrument creating the estate grants a time-limited interest, where one spouse transfers his interest to the other spouse so that she then holds the property in fee simple, where the spouses reconvey the property to themselves as tenants in common, where one spouse dies, where the couple divorces, or where one spouse murders the other.

United States v. Lee, 12 F. Supp. 2d 858, 860 (C.D. Ill. 1998). Even this list is not, as appears from the following subsections, exhaustive.

(n4)Footnote 181. Where tenants by the entirety convey to themselves as joint tenants, no problem with the four unities arises because as tenants by the entirety, they already satisfied those requirements.

(n5)Footnote 182. *In re Stanke, 234 B.R. 439 (W.D. Mo. 1999); Rollins v. Alvarez, 792 So.2d 695 (Fla. App. 2001).* Legislation may permit a transfer in trust to retain the incidents of a tenancy by the entirety. *See, e.g.*, Va. Code Ann. § 55-20.1 (limiting effect to property used as "principal family residence").

(n6)Footnote 183. *See* § 31.08(a), *supra*.

(n7)Footnote 184. *See Fazekas v. Fazekas, 737 A.2d 1262 (Pa. Super. 1999)* ("it is well established that severance of an entireties estate 'may be achieved only through divorce, a joint conveyance or mutual agreement, either express or implied'").

(n8)Footnote 185. On termination of tenancies by the entirety by divorce, *see* § 33.08(d), *infra*.

(n9)Footnote 186. The rule limiting tenancies by the entirety to realty is rooted deep in the common law of marital estates. Since a woman lost all control of her personalty on marriage, there was no marital estate in personalty. In realty, by contrast, the common law did recognize the possibility of a married woman's ownership of an interest in tenancy by the entirety with her husband while seemingly denying, because of the marital unity, that it was truly a form of concurrent estate. *See* § 33.05, *supra*. Today, some states that recognize tenancy by the entirety in realty also recognize it in personalty. In those states, the discussion in the remainder of this paragraph is irrelevant.

(n10)Footnote 187. *In re Estate of Blumenthal, 141 N.E. 911 (N.Y. 1923); Reif v. Reif, 621 N.E.2d 1279 (Ohio App. 1993). Contra*: *Finley v. Thomas, 691 A.2d 1163 (D.C. App. 1997)* (proceeds of sale of property held in tenancy by the

entirety presumed to be held in same tenancy).

(n11)Footnote 188. Mich. Comp. Laws Ann. § 557.81 (in case of sale of land held in tenancy by the entirety by purchase money mortgage or land contract, right of survivorship applies to mortgage or contract).

(n12)Footnote 189. *Beall v. Beall, 434 A.2d 1015 (Md. 1981), noted in 42 Md. L. Rev. 508 (1983).*

(n13)Footnote 190. *See* Sunshine v. Del Sole, N.J. Sup. Ct. App. Div. (N.J. 2003) (unmarried woman executed contract to convey real property but married prior to closing and husband refused to release his interest; held: specific performance ordered and husband's interest extinguished).

(n14)Footnote 191. *Panushka v. Panushka, 349 P.2d 450 (Or. 1960), noted in 36 N.D. L. Rev. 203 (1960), 14 Vand. L. Rev. 687 (1961); Matter of Maguire's Estate, 291 N.Y.S. 631 (1936), noted* in *46 Yale L.J. 1077 (1937).*

(n15)Footnote 192. *Runco v. Ostroski, 65 A.2d 399 (Pa. 1949); Hale v. Hale, 125 N.E.2d 142 (Mass. 1955), noted in* B.U. L. Rev. 464 (1955). In three states, Hawaii, Michigan, and Tennessee, statutes expressly permit the termination of a tenancy by the entirety by a conveyance by one spouse to the other. Haw. Rev. Stat. § 509-2; Mich. Comp. Laws Ann. § 557.101; Tenn. Code Ann. § 66-1-110.

(n16)Footnote 193. 1 William Blackstone, Commentaries 430 (1765) (*citing* Edward Coke, Commentaries Upon Littleton § 168, p. 112a (1628)). When a married woman acquired property at common law, it passed into her husband's dominion and control. *Clark v. Clark, 644 A.2d 449 (D.C. 1994); In re Estate of Childress, 588 So. 2d 192 (Miss. 1991). See* Annotation, *Validity and Effect of One Spouse's Conveyance to Other Spouse of Interest in Property Held as Estate by the Entireties, 18 A.L.R.5th (1994) 230.*

(n17)Footnote 194. *Davis v. Vaughn, 91 S.E.2d 165 (N.C. 1956), noted in 34 N.C. L. Rev. 571 (1956).* The intention of one tenant by the entirety to release to the other is presumed from the use of appropriate words; however, even if the proper words are used, it remains open to the grantor to show that there was in fact no intention to release. *Abney v. Abney, C.A. No. 181, 1991 Tenn. App. LEXIS 278.*

(n18)Footnote 195. *Cf.* Edward Coke, Commentary Upon Littleton § 1, p. 9b (1628).

(n19)Footnote 196. On termination of tenancies by the entirety by divorce, *see* § 33.08(d), *infra*.

(n20)Footnote 197. UNIFORM PROBATE CODE § 2-801(b)(3):

A surviving joint tenant [or tenant by the entireties] may disclaim as a separate interest any property or interest therein devolving to him [or her] by right of survivorship. A surviving joint tenant [or tenant by the entireties] may disclaim the entire interest in any property or interest therein that is the subject of a joint tenancy [or tenancy by the entireties] devolving to him [or her], if the joint tenancy [or tenancy by the entireties] was created by act of a deceased joint tenant [or tenant by the entireties], the survivor did not join in creating the joint tenancy [or tenancy by the entireties], and has not accepted a benefit under it.

Cf. Md. Ann. Code, Est. & Trust § 9.201 (permitting disclaimer by surviving tenant by the entirety only if deceased spouse had given written consent to disclaimer during life).

(n21)Footnote 198. For a critical analysis of the act, *see* Adam J. Hirsch, *Revisions in Need of Revising: The Uniform Disclaimer of Property Interests Act, 29 FLA. ST. U. L. REV. 109 (2001). See also* the candid discussion by the reporter for the UDOPIA, William P. LaPiana, *Some Property Law Issues in the Law of Disclaimers*, 38 Real Property, Probate & Trust L.J. 207 (2003).

(n22)Footnote 199. UDOPIA § 7(a).

(n23)Footnote 200. The rule limiting tenancies by the entirety to realty is rooted deep in the common law of marital estates. Since a woman lost all control of her personalty on marriage, there was no marital estate in personalty. In realty, by contrast, the common law did recognize the possibility of a married woman's ownership of an interest in tenancy by the entirety with her husband while seemingly denying, because of the marital unity, that it was truly a form of concurrent estate. *See* § 33.05, *supra*. Today, some states that recognize tenancy by the entirety in realty also recognize it in personalty. In those states, the discussion in the remainder of this paragraph is irrelevant.

(n24)Footnote 201. *Ronan v. Ronan, 159 N.E.2d 653 (Mass. 1959). Contra*: Ill. Ann. Stat. ch. 76, § 2(d) (in case of condemnation of property held in joint tenancy or tenancy by the entirety, proceeds in the hands of the County Treasurer are subject to survivorship, but any tenant may claim share without consent of other and thereby terminate survivorship).

(n25)Footnote 202. A compelling case for equitable conversion may be made in the rather unusual circumstances involved in *In re Ballard, 65 F.3d 367 (4th Cir. 1995)* (applying Virginia law). A married couple in bankruptcy were ordered to sell the property they held as tenants by the entirety; after the sale but before the proceeds were distributed to joint creditors, one spouse died. The court held that the sale had not severed the tenancy by the entirety, so the proceeds passed by right of survivorship and were, therefore, distributable to the creditors of the survivor.

(n26)Footnote 203. *Hawthorne v. Hawthorne, 192 N.E.2d 20 (N.Y. App. 1963), noted in 28 Albany L. Rev. 319 (1964), 30 Brooklyn L. Rev. 376 (1964), 13 Buff. L. Rev. 501 (1964), 49 Cornell L.Q. 559 (1964); Mercer v. New York Property Underwriting Assn., 668 N.Y.S.2d 664 (N.Y. App. Div. 1998)* (although spouses owned insured property as tenants by the entirety, policy belonged to only one spouse, who alone was entitled to proceeds); *Arred v. United States, 830 F. Supp. 212 (S.D.N.Y. 1993). Contra*: *Regnante v. Baldassare, 448 N.E.2d 775 (Mass. App. 1983).*

(n27)Footnote 204. *Fuston v. National Mut. Ins. Co., 440 N.E.2d 751 (Ind. App. 1982);* Finch v. Tennessee Farmers Mut. Ins. Co., C.A. No. 01*A01-9607-CV-00342, 1997 Tenn. App. LEXIS 146 (Tenn. App. 1997). See also DePalma v. Bates County Mut. Ins. Co., 923 S.W.2d 385 (Mo. App. 1996)* (contract of insurance, narrowly construed, held not to preclude recovery by innocent spouse), *noted in 67 Mo. L. Rev. 77 (2002); Continental Union Ins. Co. v. State Farm Fire & Cas. Co., 546 F. Supp. 543, 546 (D. Colo. 1982)* (cataloguing the reasons to include: "that policy language excluding coverage must be explicit, or that what is in question is the spouse's interest in the insurance policy, not the interest in the property, or that the fault of the wrongdoing spouse cannot be imputed to the innocent spouse").

(n28)Footnote 205. This is obviously true, in states permitting the practice, where one (rather than both) of the tenants by the entirety encumbers the entirety property.

(n29)Footnote 206. *In re Foreclosure of Deed of Trust, 279 S.E.2d 566 (N.C. 1981).*

(n30)Footnote 207. Richard R. Powell & Patrick J. Rohan, Powell on Real Property 626 (abr. ed. 1968).

(n31)Footnote 208. *National City Bank of Evansville v. Bledsoe, 144 N.E.2d 710 (Ind. 1957)* (discussing 4 Scott on Trusts § 493.2 at 3204-07 (2d ed.)).

(n32)Footnote 209. *Goldsmith v. Pearce, 75 N.W.2d 810 (Mich. 1956), noted in 3 Wayne L. Rev. 153 (1957); Estate of Grund v. Grund, 648 N.E.2d 1182 (Ind. App. 1995); Budwit v. Herr, 63 N.W.2d 841 (Mich. 1954), noted in 5 Cath. U. L. Rev. 195 (1955); Barnett v. Couey 27 S.W.2d 757 (Mo. 1930), noted in 11 B.U. L. Rev. 129 (1931); Hicks v. Boshears, 846 S.W.2d 812 (Tenn. 1993); In re Estate of Bartolovitch, 616 A.2d 1043 (Pa. 1992)* (one spouse's conviction of voluntary manslaughter severs tenancy by the entirety).

(n33)Footnote 210. Uniform Probate Code § 2-803:

(b) Any joint tenant who feloniously and intentionally kills another joint tenant thereby effects a severance of the interest of the decedent so that the share of the decedent passes as his property and the killer has no rights by survivorship. This provision applies to joint tenancies [and tenancies by the entirety] in real and personal property, joint and multiple-party accounts in banks, savings and loan associations, credit unions and other institutions, and any other form of co-ownership with survivorship incidents.

...

(d) Any other acquisition of property or interest by the killer shall be treated in accordance with the principles of this section.

(e) A final judgment of conviction of felonious and intentional killing is conclusive for purposes of this section. In the absence of a conviction of felonious and intentional killing the court may determine by a preponderance of evidence whether the killing was felonious and intentional for purposes of this section.

(f) This section does not affect the rights of any person who, before rights under this section have been adjudicated, purchases from the killer for value and without notice property which the killer would have acquired except for this section, but the killer is liable for the amount of the proceeds or the value of the property.

8 U.L.A. 172 (1983).

In 1990 a revised Uniform Probate Code was promulgated. UPC § 2-803 was substantially revised, although the general effect of the new version remains the same. The pre-1990 version is printed here because of the large number of states whose legislation it influenced.

(n34)Footnote 211. *New Jersey*. Husband who murdered wife holds estate in trust for wife's heirs to the value of her life interest in one-half net income. *Sherman v. Weber, 167 A. 517 (N.J. 1933).*

New York. Estate of Mathew, 706 N.Y.S. 2d 432 (N.Y. 2000) (slayer spouse entitled to commuted value of life estate in one-half of the proceeds of the sale of property held in tenancy by the entirety).

North Carolina. One half passes to the victim's estate; other half passes to victim's estate at slayer's death. N.C. Gen. Stat. § 31A-5.

Rhode Island. One half of property held by slayer and victim as tenants by the entirety passes to victim's estate at victim's death; other half passes to victim's estate at slayer's death. R.I. Gen. Laws § 33-1.1-5.

(n35)Footnote 212. As a comment to the Uniform Probate Code § 2-803 makes clear, guilt or innocence in the sense of criminal law is not the issue:

While conviction in the criminal prosecution under this section is treated as conclusive on the matter of succession to the murdered person's property, acquittal does not have the same consequences. This is because different considerations as well as a different burden of proof enter into the finding of guilty in the criminal prosecution. Hence it is possible that the defendant on a murder charge may be found not guilty and acquitted, but if the same person claims as an heir or devisee of the decedent, he may in the probate court be found to have feloniously and intentionally killed

the decedent and thus be barred under this section from sharing in the estate... . In many of the cases arising under this section there may be no criminal prosecution because the murderer has committed suicide.

8 U.L.A. 173 (1983).

(n36)Footnote 213. *Estate of Grund v. Grund, 648 N.E.2d 1182 (Ind. App. 1995).*

(n37)Footnote 214. *See In re Estates of Covert, 761 N.E.2d 571 (N.Y. 2001)* (holding in case of murder-suicide that jointly held property is divided between the estates of husband and wife), *noted in 49 Buff. L. Rev. 1341 (2001).*

(n38)Footnote 215. *Cf. In re Estate of Miller, 840 So.2d 703 (Miss. 2003).*

(n39)Footnote 216. *See, e.g., Eichman v. Paton, 393 So. 2d 655 (Fla. App. 1981)* (in partition action filed by wife's guardian after husband had assaulted her so grievously that she was rendered incompetent, court held that "the unity between the parties which forms the basis for the entireties form of ownership [had] been dissolved by [the husband's] felonious act").

(n40)Footnote 217. *See* Okla. Stat. Ann. tit. 60, § 74 (incompetency does not terminate joint tenancy or tenancy by the entirety).

(n41)Footnote 218. Uniform Simultaneous Death Act § 3:

Where there is no sufficient evidence that two joint tenants or tenants by the entirety have died otherwise than simultaneously the property shall be distributed one-half as if one had survived and one-half as if the other had survived...

8A U.L.A. 575 (1983).

(n42)Footnote 219. 8B U.L.A. 257 (1993). Uniform Probate Code § 2-702(c) now also requires that "co-owners with the right of survivorship" survive for at least 120 hours. 8 U.L.A. 150 (Supp. 1994). Note that this provision, treating survivorship for no more than 120 hours as if the deaths were in fact simultaneous, causes the loss of the marital deduction in estate taxation.

(n43)Footnote 220. N.Y. Est., Powers & Trusts Law § 5-1.1-A (e); N.C. Gen. Stat. § 30-1. *See Funk v. Masten, 485 S.E.2d 890 (N.C. App. 1997).*

(n44)Footnote 221. The validity of the divorce is, of course, a matter of local law; whether, for example, to recognize a foreign divorce as terminating a tenancy by the entirety. *Russ Realty Corp. v. Orlando, 733 N.Y.S.2d 447 (2001).*

(n45)Footnote 222. *Fazekas v. Fazekas, 737 A.2d 1262 (Pa. Super. 1999).*

(n46)Footnote 223. *Shepherd v. Shepherd, 336 So.2d 497 (Miss. 1976), noted in 48 Miss. L.J. 352 (1977); Ayers v. Petro, 417 So.2d 912 (Miss. 1982)* (reaffirming rule in *Shepherd*).

(n47)Footnote 224. *Sbarbaro v. Sbarbaro, 102 A. 256 (N.J. 1917).*

(n48)Footnote 225. *See, e.g., Clouse v. Clouse, 207 S.W.2d 576 (Tenn. 1948)* (Tennessee does not recognize right of survivorship in joint tenancy, making it indistinguishable from tenancy in common).

(n49)Footnote 226. Uniform Probate Code § 2-804(b) provides that, absent agreement or court order to the contrary, divorce "severs the interest of the former spouses in property held by them at the time of the divorce or annulment as joint tenants with the right of survivorship..., transforming the interests of the former spouses into

tenancies in common." 8 U.L.A. 184 (Supp. 1994). U.P.C. § 1-201(26) defines "joint tenants with the right of survivorship" to include "co-owners of property held under circumstances that entitle one ... to the whole of the property on the death of the other..." that is, to include tenants by the entirety. 8 U.L.A. 10 (Supp. 1994).

(n50)Footnote 227. Ark. Code § 9-12-317.

(n51)Footnote 228. D.C. Code Ann. § 16-910. This statute has been interpreted to mean that the parties may agree that divorce does not terminate the tenancy by the entirety. *Benson v. United States, 442 F.2d 1221 (D.C. Cir. 1971).*

(n52)Footnote 229. Fla. Stat. § 689.15.

(n53)Footnote 230. 765 ILCS 1005/1c.

(n54)Footnote 231. Ind. Code Ann. § 32-4-2-2.

(n55)Footnote 232. Mich. Comp. Laws Ann. § 552-102.

(n56)Footnote 233. Pa. Cons. Stat. 23, § 3507. *See* Eunice Ross, Note, *Spouses Formerly Tenants by the Entireties Become Tenants in Common by Divorce, 11 U. Pitt. L. Rev. 468 (1950);* W. H. Frederick, Note, *Are Judgement Creditors in a Better Position Now That Divorce Changes Tenancy by the Entireties to Tenancy in Common*? *54 Dick. L. Rev. 349 (1950).*

(n57)Footnote 234. Va. Code Ann. § 20-111.

(n58)Footnote 235. *Tucker v. Dudley, 164 A.2d 891 (Md. 1960); Nelson v. Mahurin, 944 S.W.2d 10 (Ky. App. 1998).*

(n59)Footnote 236. *Barrett v. Barrett, 614 A.2d 299 (Pa. 1992); Sanders v. Sanders, 1997 Ark. App. Lexis 542 (Ark. App. 1997).*

(n60)Footnote 237. *See* § 32.05(a), *supra*.

(n61)Footnote 238. *Rayher v. Rayher, 101 A.2d 524 (N.J. 1953); Smith v. Smith, 597 So. 2d 370 (Fla. App. 1992); Lemley v. Lemley, 649 A.2d 1119 (Md. App. 1994); Kincaid v. Kincaid, 912 S.W.2d 140 (Tenn. App. 1995).* In many states there is a strong presumption, when one spouse places title to property in tenancy by the entirety, in favor of finding a gift of the one-half interest. *See, e.g., Ramsey v. Ramsey, 531 S.W.2d 28 (Ark. 1975)* (presumption of gift from spouse furnishing more than half the consideration for purchase of property to be held as tenants by the entirety can be overcome only "by clear, positive, unequivocal, unmistakable, strong and convincing evidence"); *Mulling v. Mulling, 912 S.W.2d 934, 937 (Ark. 1996).*

(n62)Footnote 239. *See, e.g., Robertson v. Robertson, 593 So. 2d 491 (Fla. 1991).*

(n63)Footnote 240. *Lightburn v. Lightburn, 472 S.E.2d 281 (Va. App. 1996).*

(n64)Footnote 241. One court has observed that "We cannot expect divorced parties to continue a business relationship that will optimize resources and profits [;]... it is particularly important to avoid creating situations where the divorced parties remain in joint management of income producing property." *Berry v. Berry, 658 A.2d 1118 (Me. 1995).*

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CHAPTER 33 TENANCIES BY THE ENTIRETY

4-33 Thompson on Real Property, Thomas Editions § 33.09

AUTHOR: Professor John V. Orth School of Law University of North Carolina

§ 33.09 The Future of the Law of Tenancies by the Entirety.

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Just as the history of the law of tenancies by the entirety was shaped by the law of marriage, so future development of this form of concurrent ownership will continue to be driven by that related body of law. Married persons everywhere can take title as tenants in common; in jurisdictions recognizing joint tenancies, that alternative is also available. The key question for the future will be the continued availability of a distinctive form of marital ownership. So long as the property of married couples is thought deserving of different (presumably more favorable) treatment than property owned by two unrelated persons, tenancies by the entirety will endure. n242

As with the joint tenancy, an estate also distinguished by a right of survivorship, the tenancy by the entirety is threatened by the growing acceptance of the survivor's power to disclaim. The traditional theory that each tenant by the entirety is seised of the entirety and that, in consequence, the death of one does not result in the conferral of any benefit on the other but only in the termination of the decedent's right may be yielding to an acceptance of the tenancy by the entirety as simply another means of providing for succession at death, in other words, a "will substitute." Closely related is the steady advance of creditors' rights against an indebted tenant's right of survivorship. At present limited to the sovereign rights of the tax collector, these rights could grow to extend to debts incurred by the receipt of other government benefits, and eventually to encompass creditors' rights in general. As that happens, the tenancy by the entirety, while remaining a distinctive form of joint tenancy, will become increasingly less distinct.

If tenancies by the entirety remain available and advantageous, certain unmarried persons will demand equal access to the estate. So long as these persons are eligible for marriage, their demands may be met by reliance on a policy favoring the married state. Where a couple is ineligible for marriage, such as a same-sex couple, the defense of the status quo will depend on defense of the traditional heterosexual match. One court has already indicated that it finds current law a violation of due process for same-sex couples. n243 Whether or not marriage as such is opened to same-sex couples, the benefits incident to holding property as tenants by the entirety may be granted to them by recognizing other means of creating the "unity of persons" required for the estate. Hawaii has addressed the problem by legislation permitting any two persons who cannot otherwise be legally married to register as "reciprocal beneficiaries," granted many of the rights of married persons, including the right to hold property together as tenants by the entirety. n244 By contrast, Vermont

permits same-sex couples to enter into "civil unions," the functional equivalent of marriage, and to hold property as tenants by the entirety. n245 Alternatively, an entirely new tenancy could be recognized, in addition to the existing tenancy in common, joint tenancy, and tenancy by the entirety. n246

FOOTNOTES:

(n1)Footnote 242. The continuing fertility of the concepts underlying the estate of tenancy by the entirety is demonstrated by the suggestion, in connection with new reproductive technologies, that human embryos be viewed as held in tenancy by the entirety. David A. Rameden, *Frozen Semen as Property in Hecht v. Superior Court: One Step Forward, Two Steps Backward, 63 Umkc L. Rev. 377 (1993).*

(n2)Footnote 243. *See Goodridge v. Dept. of Public Health, 440 Mass. 309, 798 N.E.2d 941 (Mass. 2003)* (holding denial of marriage license to same-sex couples a violation of due process); *Opinions of the Justices to the Senate, 440 Mass. 1201, 802 N.E.2d 565 (2004)* (proposed legislation prohibiting same-sex couples from marrying but allowing them to form civil unions with all the consequences of marriage does not satisfy the state constitution's equal protection and due process clauses). *See also* John V. Orth, *Night Thoughts: Reflections on the Debate Concerning Same-Sex Marriage, 3 Nev. L. J. 560 (2003),* who thought the problem was one of equal protection.

(n3)Footnote 244. Haw Rev. Stat. § 509.2.

(n4)Footnote 245. 15 Vt. Stat. Ann. tit. 23, § 1204.

(n5)Footnote 246. *See* Peter M. Carrozzo, *Tenancies in Antiquity: A Transformation of Concurrent Ownership for Modern Relationships, 85 Marq. L. Rev. 424 (2001)* (advocating recognition of a new form of concurrent estate).

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CHAPTER 33 TENANCIES BY THE ENTIRETY

4-33 Thompson on Real Property, Thomas Editions § 33.10

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§ 33.10 Bibliography.

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Annotation, *Who Is Exempt from Forfeiture of Real Property Under "Innocent Owner" Provision of 21 U.S.C. 881(a)(7), 110 A.L.R. Fed. 569.*

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Supp. To CHAPTER 33 TENANCIES BY THE ENTIRETY

4-33 Thompson on Real Property, Thomas Editions Supp. to § 33.05

Supp. to § 33.05 History of the Law of Tenancies by the Entirety.

[Go To Main]

Add at the end of the note:

See also Cady Stanton, *On Divorce* (1861), *in* 2 *Man Cannot Speak for Her: Key Texts of the Early Feminists* 236, 237 (Campbell ed. 1989).

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Supp. To CHAPTER 33 TENANCIES BY THE ENTIRETY

4-33 Thompson on Real Property, Thomas Editions Supp. to § 33.06

Supp. to § 33.06 Creation of Tenancies by the Entirety.

[Go To Main]

§ 33.06(a) Creation of Tenancies by the Entirety at Common Law. [Go To Main]

Add to note 50:

Estate of Thomas, 199 P.3d 1090 (Wyo. 2009) (conveyance to grantors' two children "as tenants by the tntireties [sic] with right of survivorship, and not as tenants in common" held to create a joint tenancy).

Change citation to N.Y. Est. Powers & Trusts Law from § 6-2.2(c) to § 6-2.2(d).

At the end of the first full paragraph, add new paragraph:

The estate of tenancy by the entirety may be created in equitable estates held in trust.

Add new last paragraph:

Tenancies by the entirety may be created in estates other than estates in fee simple. Just as joint life estates involve the concurrent ownership of property by two or more persons as long as both or all are alive and on the death of one joint life tenant the right of survivorship preserves the estate in the other or others (§ 31.06(f)), so the effect of a life estate held in tenancy by the entirety is to create an estate that will last (unless severed) until the death of the last to die.

§ 33.06(b) The Doctrine of the Four Unities, Plus One, "Unity of Person," Based on Marriage. [Go To Main]

Add at the end of the runover paragraph:

It is possible that if two unmarried persons take title as tenants by the entirety in contemplation of marriage and the marriage subsequently occurs, the marital estate may then be recognized.

§ 33.06(c) Special Problem in Creation of Tenancies by the Entirety Caused by the Doctrine of the Four Unities: Conveyance by Grantor to Grantor and Spouse. [Go To Main]

Add at the end of the note:

See In re Kelly, 316 B.R. 629 (D. Del. 2004) (statute does not require express statement of intention to create tenancy by the entirety when one spouse conveys directly to the married couple).

§ 33.06(d) Special Problem in Creation of Tenancies by the Entirety Caused by the "Unity of Person": Transfer to Husband, Wife, and Another or Others. [Go To Main]

Add text between New Jersey and North Carolina:

New York. Conveyance from sole owner to himself and another as tenants by the entirety as effective as if from a stranger.

Add to Note 101:

Aderhold v. Aderhold, 983 So.2d 43 (Fla. Dist. Ct. App. 2008) (grant to husband and wife and husband's mother created tenancy by the entirety in married couple in one-half, held in tenancy in common with mother's one-half).

§ 33.06(e) Modern Statutes Concerning Creation of Tenancies by the Entirety. [Go To Main]

Replace *See* N.J. Stat. Ann. § 37:2-18 with *See* N.J. Stat. Ann. § 46:3-17.2.

Add at end of note:

By legislation in 2006 Colorado made clear that a conveyance purporting to create a tenancy by the entirety creates instead a joint tenancy. *Colo. Rev. Stat. § 38-31-201*.

Ohio's statutory "survivorship tenancy" is the functional equivalent of tenancy by the entirety. 19 Ohio Jur.3d (2009) Cotenancy § 5 (citing *Ohio Rev. Code Ann. § 5302.17*).

Add:

Capital Fin. Co. of Del. Valley, Inc. v. Asterbadi, 912 A.2d 191 (N.J. Super. Ch. Div. 2006) .

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Supp. To CHAPTER 33 TENANCIES BY THE ENTIRETY

4-33 Thompson on Real Property, Thomas Editions Supp. to § 33.07

Supp. to § 33.07 Incidents of Tenancies by the Entirety.

[Go To Main]

§ 33.07(d) Action of Ejectment. [Go To Main]

Replace cited case with:

Georgia v. Randolph, 547 U.S. 103, 126 S.Ct. 1515 (2006) .

Add at end of run-over paragraph:

Although each tenant by the entirety has equal right to possession, the title to the estate remains in the tenants as a marital unity, so both tenants may be held to be necessary parties in an action against a third party for encroachment.[146.1] n146.1

§ 33.07(e) Creditors' Rights. [Go To Main]

Add to note 152, second paragraph:

The Massachusetts statute prevents execution of the creditor's claim so long as the subject property is the principal residence of the nondebtor spouse.

Alaska Stat. § 09.38.100(a) (judgment creditor of debtor holding property with spouse in tenancy by the entirety may

cause a severance through execution).

Add after second paragraph:

An anomalous provision in the Oklahoma statute authorizing joint tenancies and tenancies by the entirety seems to allow creditors of one spouse to attach the entirety property. *Okla. Stat. Ann. tit. 60, § 74. See* Tom R. Russell, Note. *Title 60, Section 74 of the Oklahoma Statutes: A Unique Form of Tenancy by the Entirety*. *58 Okla. L. Rev. 317 (2005).*

Add at end of note:

Allen v. Branch Banking & Trust Co., 2010 Tenn. App. LEXIS 204 (Tenn. Ct. App. Mar. 18, 2010) . ("a spouse's transfer or encumbrance of property owned by tenancy by the entirety without the consent of the other spouse transfers or encumbers only the first spouse's right of survivorship").

At the end of the run-over paragraph, add the following sentences:

Where a judgment creditor acquired the interest of one tenant by the entirety, an anomalous "tenancy in common with right of survivorship" has been recognized. In such a case it has been held that if the property does not admit of shared possession and if partition is inequitable, the creditor-coowner is entitled to one-half the fair rental value, subject to a duty of contribution to the costs of upkeep and taxes.

Add before *But see* signal:

, *Ethridge v. Tierone Bank, 2006 Mo. App. LEXIS 659 (Mo. Ct. App. 2006)* .

Add to note 164:

In re Werner, 2009 Bankr. LEXIS 829 (Bankr. N.D. Ill. Apr. 8, 2009) (transfer into tenancy by the entirety not set aside because not made with sole intent of avoiding creditor).

Add at the end of the note:

The Statute of Frauds or other legislation concerning the control of property held in tenancy by the entirety may require the signature of both tenants to be enforceable. *Parker v. Glosson, 641 S.E.2d 735 (N.C. App. 2007)* ; *Burgin v. Owen, 640 S.E.2d 427 (N.C. App. 2007)* .

Add at end of note:

But see Paternoster v. United States, 640 F. Supp. 2d 983 (S.D. Ohio 2009) (applying *Craft* to Ohio's statutory "survivorship tenancy" on the ground that is the functional equivalent of tenancy by the entirety).

Add at end of second full paragraph:

Valuation of a spouse's interest in property held in tenancy by the entirety for purposes of federal law has proven difficult: whether to use joint-life actuarial tables or to assume that each spouse's interest is of equal value, regardless of life expectancy. To the extent the latter assumption is chosen, the estate resembles a special form of joint tenancy.

Add at the end of the run-over paragraph:

Creditors entitled to support, such as ex-spouses and children, may be entitled to access property held in tenancy by the entirety that is otherwise exempt.

At the end of the first full paragraph, add new sentences:

A consent order by one spouse to transfer that spouse's interest in a tenancy by the entirety to the other spouse as part of the property settlement on divorce does not itself sever the tenancy. A creditor of the spouse bound to make the transfer cannot levy on the debtor's interest until the actual transfer or until divorce converts the tenancy by the entirety into a tenancy in common. In states making judgment liens entered on the judgment docket effective against after-acquired property, a creditor of an indebted tenant by the entirety would be well-advised to docket the judgment lien immediately even though there is no present property to levy against.

Add at the end of the note:

See also William H. Baker, Drye and Craft: *How Two Wrongs Can Make a Property Right, 64 U. Pitt. L. Rev. 745 (2003).*

Add at the end of the second full paragraph:

It must be emphasized that federal law concerning the enforcement of federal tax liens against one spouse holding property in tenancy by the entirety does not alter state law concerning the enforcement of judgment liens, even if the judgment is in favor of the state itself.[172.1] n172.1

Add at the end of the note:

Spears v. Boyd, 313 B.R. 212 (W.D. Mich. 2004) (reversing bankruptcy court ruling that filing in bankruptcy severed tenancy by the entirety and exposed debtor's half interest to claims of creditors).

Add to note 177:

Frantz v. Frantz, 972 A.2d 525 (Pa. Super. 2009) (property held in tenancy by the entirety by couple in course of divorce--and subject to court order to convey to non-debtor spouse--not subject to creditor's claim while held *in custodia legis*).

FOOTNOTES:
(n1)Footnote 146.1. *Loree v. Barnes, 875 N.Y.S.2d 350 (N.Y. S.Ct. App. Div. 2009)* .

(n2)Footnote 172.1. *Walters v. Leech, 757 N.W.2d 468 (Mich. App. 2008)* (refusing to impose child support lien against property held in tenancy by the entirety when only one of the tenants by the entirety was obligated).

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Supp. To CHAPTER 33 TENANCIES BY THE ENTIRETY

4-33 Thompson on Real Property, Thomas Editions Supp. to § 33.08

Supp. to § 33.08 Termination of Tenancies by the Entirety.

[Go To Main]

§ 33.08(a) Termination by Act of Both Tenants by the Entirety. [Go To Main]

Add at end of note:

In re Bellingroehr, 403 B.R. 818 (W.D. Mo. 2009) (where trust possesses the essential restrictions against severability and transferability that characterize a tenancy by the entirety, a transfer in trust by tenants by the entirety does not result in severance).

Add at the end of the first full paragraph:

A problem may arise when a contract for the sale of property held in tenancy by the entirety is executed by only one of the two tenants. The Statute of Frauds or other legislation concerning the control of property held in tenancy by the entirety may require the signature of both tenants to be enforceable.

At end of last paragraph, Add new note 191.1: n191.1

§ 33.08(b) Termination by Act of One Tenant by the Entirety. [Go To Main]

Add at end of note:

By legislation in 2006 Virginia eliminated the restriction to "principal family residence" on transfers of entirety property to trusts and extended the protection against separate creditors to "any property" held in trust by husband and wife in tenancy by the entirety. *Va. Code Ann. § 55-20.2*.

§ 33.08(c) Termination by Operation of Law. [Go To Main]

At the end of the second full paragraph, add new sentence:

If a tenant by the entirety can disclaim the right of survivorship, then the will of the dying tenant by the entirety can put the survivor to the election of disclaiming or taking some other offered benefit, but the intention to require the election must be clearly expressed.

Add at the end of the run-over paragraph:

Obviously, recording a judgment against a judgment debtor holding property with a spouse in tenancy by the entirety does not sever the tenancy and such judgment is extinguished as to the property held in tenancy by the entirety if the judgment debtor predeceases the spouse.[199.2] n199.2

Add at the end of the run-over paragraph:

Although recognizing that statutes may require a different result, the latest Restatement of Property reaffirms the position of the Restatement of Restitution that a slaying tenant by the entirety is entitled only to one-half the income from the property for life.[211.1] n211.1

Add:

Massachusetts. The slayer statute, adopted in 2002, deprives the slayer of the slayers's own share in property held in tenancy by the entirety with the victim, raising a question of an unconstitutional forfeiture. *Mass. Gen. Laws ch. 265, § 46*. The statute is the subject of a critical student comment. *See* Robert F. Hennessy, "Property--The Limits of Equity: Forfeiture, Double Jeopardy, and the Massachusetts 'Slayer Statute,' " 39 *Western New England L. Rev.* 159 (2009).

Add to Note 215:

Estate of Vernum v. Estate of Vernum, 961 A.2d 181 (Pa. Super. 2008) (applying Slayer Statute rather than Simultaneous Death Act to case of murder-suicide).

§ 33.08(d) The Effect of Termination by Divorce. [Go To Main]

Add at end of note:

Dillingham v. Dillingham, 688 S.E.2d 499 (N.C. Ct. App. 2010) (presumption of gift can be overcome only by "clear, cogent, and convincing evidence").

FOOTNOTES:
(n3)Footnote 191.1. *Butcher v. Beatty, 2010 Ark. 130 (2010)* (agreement by husband and wife to terminate tenancy by the entirety by conveyance from husband and wife to wife as sole owner in return for payment by wife to husband is not specifically enforceable where husband died before the time for performance); *United States v. Cone, 2009 U.S. Dist. LEXIS 74253 (M.D. Fla. 2009)* (plea agreement by married couple to transfer property held in tenancy by the entirety to the government at a later date did not sever the tenancy by the entirety).

(n4)Footnote 199.2. *Smith v. Kofstad, 206 P.3d 441 (Alaska 2009) . But see Alaska Stat. § 09.38.100(a)* (judgment creditor of debtor holding property with spouse in tenancy by the entirety may cause a severance through execution).

(n5)Footnote 211.1. *Restatement (Third) of Property: Wills and Other Donative Transfers* § 8.4 (2003) (reaffirming *Restatement of Restitution* § 188).

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Supp. To CHAPTER 33 TENANCIES BY THE ENTIRETY

4-33 Thompson on Real Property, Thomas Editions Supp. to § 33.09

Supp. to § 33.09 The Future of the Law of Tenancies by the Entirety.

[Go To Main]

After the next-to-last sentence in the first full paragraph, add new sentence:

The New Jersey Supreme Court recently held that denying same-sex couples the rights incident to marriage, including the right to hold property together as tenants by the entirety, violates the equal protection guarantee of the state constitution, but gave the state legislature 180 days from the date of decision to remedy the violation without indicating whether civil unions would be sufficient.

Add to note 244:

The European Court of Human Rights recently rejected an argument by two unmarried sisters who had lived together for many years that denial of the exemption from estate taxation on the death of the first to die--an exemption available to same-sex couples in the United Kingdom who registered as domestic partners--was a violation of their rights under the European Convention for the Protection of Human Rights and Fundamental Freedoms. Burden v. The United Kingdom, App. No. 13378/05, Eur. Ct. H.R. (Grand Chamber 2008), discussed in John V. Orth, "In re: Tenancy by the Entirety: Married Couples, Common Law Marriages, and Same-Sex Partners: Orth v. Orth," 85 *North Dakota L. Rev.* (2009).

Add at the end of the first full paragraph:

Note. Judicial and legislative changes concerning the availability of marriage (and the concomitant property consequences of marriage) to couples formerly excluded are occurring at such a rapid pace in states that still recognize tenancy by the entirety that it is difficult to keep the text current on this subject. The reader is advised to consult the most recent domestic relations developments in states of interest.

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Supp. To CHAPTER 33 TENANCIES BY THE ENTIRETY

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Ahart, Alan M. "*The Liability of Property Exempted in Bankruptcy for Pre-Petition Domestic Support Obligations After BAPCPA: Debtors Beware.*" 81 *Am. Bankr. L.J.* Vol. 81 (2007) 233.

Baker, William H. "*Drye and Craft: How Two Wrongs Can Make a Property Right.*" 64 *U. Pitt. L. Rev*. Vol. 64 (2003) 745.

Orth, John V. *"In re Tenancy by the Entirety--Married Couples, Common Law Marriages, and Same-Sex Partners:* Orth v. Orth." 85 *North Dakota L. Rev.* Vol. 85 (2009) 287.

Reilly, Kathleen. Note. *"Making a Killing in Real Estate: Solving the Mystery of Murder's Effect on Tenancy by the Entirety in New York--A Legislative Solution." St. John's L. Rev.* Vol. 82 (2008) 1203.

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Russell, Tom R. Note. "Title 60, Section 74 of the Oklahoma Statutes: A Unique Form of Tenancy by the Entirety." *Okla. L. Rev.* 58 (2005) 317.

Books

Add:

Smith, Roger J. *Plural Ownership*. Oxford: Oxford University Press, 2005.

Annotations

Annotation, *Estate by Entireties as Affected by Statute Declaring Nature of Tenancy Under Grant or Devise to Two or More Persons, 32 A.L.R.3d 570* .

Annotation, *Retrospective Operation of Legislation Affecting Estates by the Entireties, 27 A.L.R.2d 868* .

Annotation, *Use of Debtor's Individual Funds or Property for Acquisition, Improvement of, or Discharge of Liens on, Property Held in Estate by Entireties as a Fraud upon Creditors, 7 A.L.R.2d 1104* .

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CHAPTER 34 TENANCY IN PARTNERSHIP

4-34 Thompson on Real Property, Thomas Editions 34.syn

AUTHOR: Professor Alan M. Weinberger Saint Louis University School of Law

§ 34.syn Synopsis to Chapter 34: TENANCY IN PARTNERSHIP

§ 34.01 Introduction to Tenancy in Partnership.

§ 34.02 Common Law Approach to Partners' Property Rights.

§ 34.02(a) Common Law Definition of Partnership Property.

§ 34.02(b) Common Law Approach to Partners' Property Interests.

§ 34.02(b)(1) Partnership Property Held as Tenants in Common.

§ 34.02(b)(2) Doctrine of "Partner's Equity."

§ 34.03 Uniform Partnership Act Approach to Partnership Property.

§ 34.03(a) Definition of Tenancy in Partnership.

§ 34.03(b) Nature of Partnership Property: Intention of U.P.A.

§ 34.03(c) Distinguishing Partnership Property from Separate Property.

§ 34.03(c)(1) In General: Intent.

§ 34.03(c)(2) Use, Occupancy and Possession.

§ 34.03(c)(3) Property Acquired with Partnership Funds or Credit.

§ 34.03(c)(4) Property Acquired in Partnership Name.

§ 34.03(c)(5) Other Indicators of Intent.

§ 34.03(c)(6) Change from Partnership to Individual Property.

§ 34.03(d) Partner's Interest in Specific Partnership Property.

§ 34.03(e) Partner's Interest in the Partnership.

§ 34.03(f) Partner's Right to Participate in Management.

§ 34.03(g) Specific Partner's Property Rights.

§ 34.03(g)(1) Possession.

§ 34.03(g)(2) Assignability.

§ 34.03(g)(3) Creditors' Rights.

§ 34.03(g)(4) Inheritability.

§ 34.03(g)(5) Marital Interests, Rights of Divorced Spouses, Heirs or Next of Kin.

§ 34.03(h) Partnership Property and the Effect of the Statute of Frauds.

§ 34.04 Conflicting Interests in the U.P.A. Approach.

§ 34.05 Revised Uniform Partnership Act Approach to Partnership Property

§ 34.06 Bibliography.

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CHAPTER 34 TENANCY IN PARTNERSHIP

4-34 Thompson on Real Property, Thomas Editions § 34.01

AUTHOR: Professor Alan M. Weinberger Saint Louis University School of Law

§ 34.01 Introduction to Tenancy in Partnership.

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Prior to the promulgation of the Uniform Partnership Act [hereinafter referred to as "U.P.A."] in 1914 by the National Conference of Commissioners on Uniform State Laws [sometimes hereinafter referred to as "N.C.C.U.S.L."] n1 it was unclear whether partnership property was owned by the partnership, as an entity, or by the partners individually, as tenants in common. The prevailing common law view, the so-called aggregate approach, held that a partnership was an aggregate of individuals that held title to partnership property in trust for the partnership. An opposing view, the so-called entity approach, viewed a partnership as substantially similar to a corporation in this respect by allowing property to be acquired directly by and held in the name of the partnership entity.

Developing a coherent theory of partnership property was a principal objective of the drafters of the U.P.A. n2 Their approach required separating the individual partner from partnership assets. n3 To this end, the U.P.A. introduced two new concepts into partnership law. First, specific partnership property (both real and personal) would be held by the partners in a unique n4 and somewhat esoteric n5 form of concurrent ownership designated as a "tenancy in partnership." n6 Second, the nature of a partner's interest in the partnership would be a share of the profits and surplus. n7

The rather awkward statutory elucidation of the tenancy in partnership concept reflects the tension between the entity and aggregate models of partnership. n8 Nominally, "[a] partner is co-owner with his partners of specific partnership property holding as a tenant in partnership." n9 This phrasing represents the drafters' bow to the aggregate theory, which holds that each partner owns a direct stake in partnership assets. n10 In their very next breath, however, the drafters proceed systematically to negate each important attribute of individual ownership of specific partnership property, interposing the partnership as a separate legal entity standing between the partners and partnership assets. n11 Thus, an individual partner "has no right to possess such property for any [nonpartnership] purpose without the consent of his partners." n12 Furthermore, "[a] partner's right in specific partnership property is not assignable except in connection with the assignment of rights of all the partners in the same property." n13 Finally, "[a] partner's right in specific partnership property is not subject to attachment or execution, except on a claim against the partnership." n14

The tenancy in partnership has been described as a "tailor-made" tenancy, a creature of necessity designed to meet the exigencies of the partnership relationship. n15 The tenancy effectively separates not only the individual partner, but also the partner's personal creditors, from any interest in specific partnership assets. To the drafters of the U.P.A., the tenancy in partnership was considered central to the stability and viability of the partnership form of organization. n16

As one commentator phrased it:

> The basic policy judgment was that particular pieces of partnership property, and potentially, the very business of the partnership, should not be jeopardized by every claim of separate creditors. Thus, the Uniform Act was drafted so that no partner has any interest in specific partnership assets for her own personal purposes; she has nothing to convey voluntarily, nor can her personal creditors force such a conveyance. Rather, her interest in the partnership is her share of the profits and surplus, and it is against this interest that her separate creditors may seek a charging order. n17

Indeed, preventing interference with partnership business by protecting partnership property from execution and attachment by individual creditors may have formed the principal reason the NCCUSL directed the U.P.A. drafters to embrace the entity theory. n18

In 1986 an American Bar Association subcommittee recommended extensive revisions to the U.P.A. n19 The revised U.P.A. [hereinafter referred to as "R.U.P.A."] would eliminate the tenancy in partnership. n20 The abolition of the tenancy in partnership represents perhaps the most remarkable revision proposed by the R.U.P.A. In a salutary effort more directly to state the substance of present law, the R.U.P.A. categorically embraces the entity theory.

FOOTNOTES:

(n1)Footnote 1. Uniform Partnership Act of 1914, 6 U.L.A. (1969).

(n2)Footnote 2. Judson A. Crane, *Twenty Years Under the Uniform Partnership Act, 2 U. Pitt. L. Rev. 129, 135 (1936).*

(n3)Footnote 3. Donald J. Weidner, *A Perspective to Reconsider Partnership Law, 16 Fla. St. U. L. Rev. 1, 11 (1988).*

(n4)Footnote 4. Cornelius J. Moynihan, Introduction to the Law of Real Property, 207 n.1 (2d ed. 1988).

(n5)Footnote 5. Donald J. Weidner, *A Perspective to Reconsider Partnership Law, 16 Fla. St. U. L. Rev. 10 n.43 (1988).*

(n6)Footnote 6. U.P.A. § 25(1).

(n7)Footnote 7. Although it is unclear precisely what financial rights "profits" and "surplus" describe, it is generally agreed that the term "profits" refers to the partner's right to receive distributions of funds by the ongoing partnership in excess of current liabilities. "Surplus" refers to the excess of all partnership assets over partnership liabilities upon the liquidation and termination of the entity after all partnership creditors have been satisfied. *See* Alan R. Bromberg & Larry E. Ribstein, Bromberg and Ribstein on Partnership § 3.04(c) (1991).

(n8)Footnote 8. "The tenancy in partnership is perhaps the most telling example of the statute's adoption of an entity solution with a concurrent insistence that it be stated in aggregate terms." Donald J. Weidner, *A Perspective to Reconsider Partnership Law, 16 Fla. St. U. L. Rev. 12 (1988).*

(n9)Footnote 9. U.P.A. § 25(1).

(n10)Footnote 10. Donald J. Weidner, *A Perspective to Reconsider Partnership Law, 16 Fla. St. U. L. Rev. 4-5*

(1988).

(n11)Footnote 11. Donald J. Weidner, *A Perspective to Reconsider Partnership Law, 16 Fla. St. U. L. Rev. 4 & 11 (1988).*

(n12)Footnote 12. U.P.A. § 25(2)(a).

(n13)Footnote 13. U.P.A. § 25(2)(b).

(n14)Footnote 14. U.P.A. § 25(2)(c).

(n15)Footnote 15. Report by Walter George Smith, Chairman of the Committee on Commercial Law, 7 U.L.A. 5, *cited in* Laurens Williams, *The Uniform Partnership Act Comes to Nebraska, 22 Neb. L. Rev. 215 (1943).*

(n16)Footnote 16. Donald J. Weidner, *A Perspective to Reconsider Partnership Law, 16 Fla. St. U. L. Rev. 10 (1988).*

(n17)Footnote 17. Donald J. Weidner, *A Perspective to Reconsider Partnership Law, 16 Fla. St. U. L. Rev. 12 (1988).*

(n18)Footnote 18. Alan R. Bromberg & Larry E. Ribstein, Bromberg and Ribstein on Partnership § 3.05 (1991).

(n19)Footnote 19. U.P.A. Revision Subcommittee of the Committee on Partnership and Unincorporated Business Organizations, *Should the Uniform Partnership Act Be Revised?, 43 Bus. Law. 121 (1987).*

(n20)Footnote 20. *See* § 34.05 *infra*. *See* Matthew G. Dore, *Partnership Law and Practice Under the New Iowa Uniform Partnership Act, 47 Drake L. Rev. 497 (1999)* (discusses the entity theory of partnership property as well as other aspects of the Revised Act).

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CHAPTER 34 TENANCY IN PARTNERSHIP

4-34 Thompson on Real Property, Thomas Editions § 34.02

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§ 34.02 Common Law Approach to Partners' Property Rights.

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§ 34.02(a) Common Law Definition of Partnership Property.

Before promulgation of the U.P.A. in 1916, the common law grappled with the question of whether a partnership was to be treated as an entity or as an aggregate of individuals. n21 The aggregate approach constituted a serious handicap to the viability of the partnership form of organization as an efficient entity for the practical conduct of business operations, because under this view, a partnership could not hold title to property in the partnership name. n22 As a result, title to partnership property had to be taken in the names of one or more of the individual members of the partnership. This tended to create obstacles for the partnership. For example, in the event of the death of a partner, the deceased partner's interest in partnership property would likely pass to the deceased partner's heirs rather than to the remaining partners who would require its use to continue operating the partnership business.

Although the common law did not allow a partnership to hold legal title to property in the partnership name, creative common law judges recognized the practical difficulties and provided some relief through the imaginative use of legal fictions. When property was purchased by a partnership and title taken in the partnership name, courts held that partners whose names appeared in the partnership name held legal title to the property in trust for the other partners. n23 If the firm name was fictitious, equitable title was considered to have passed to the partners, with legal title remaining in the grantor. n24

§ 34.02(b) Common Law Approach to Partners' Property Interests.

§ 34.02(b)(1) Partnership Property Held as Tenants in Common.

It followed from the common law view of a partnership as an aggregate of individuals that a partnership could not hold legal title to property. When property was acquired in trust for the partnership, the property was held by the partners as tenants in common. n25 As a result, each cotenant, or partner, had a right to possess the property independently of all other members of the partnership. n26 Each cotenant could also transfer, devise or encumber the cotenant's interest without the consent of the other cotenants. If a cotenant transferred the interest for value to a good faith purchaser, the transferee's interest would be superior to any interest of the partnership, thus allowing a stranger to obtain an interest in

partnership property to the disadvantage of the partnership. n27

In the absence of an agreement to the contrary, property held as tenants in common would descend to the heirs of a deceased cotenant, which also could be disadvantageous to the partnership.

§ 34.02(b)(2) Doctrine of "Partner's Equity."

Early common law recognized the disadvantages to the partnership when partnership property was considered to be held by the partners as tenants in common. In an effort to resolve some of these problems partners were allowed to agree among themselves and with their creditors for collective ownership of partnership property. To avoid the need for a separate agreement the tenancy in common was modified by the doctrine of "partner's equity." Although each partner did not have a specific lien on partnership property, the doctrine of partner's equity held that each partner had an equitable right to have partnership property applied first to the payment of firm debts and liabilities, including amounts owed to the partners themselves. n28

While partner's equity served mainly to protect the partners, it also afforded limited protection to creditors of the partnership. n29 Partnership creditors were protected only to the extent that a partner was able to enforce this right. If the partner was not in a position to enforce it, creditors of the firm could not enforce it either. n30 If a partner had transferred the partner's interest in the partnership, thereby dissolving the partnership, a creditor would no longer be able to force the partner to invoke the partner's rights under the doctrine of partner's equity, leaving the creditor unprotected. n31 As a result, the doctrine of partner's equity was not a satisfactory solution for either the partners or creditors of the partnership.

FOOTNOTES:

(n1)Footnote 21. For further discussion *see* § 34.04 *infra. See also* Alan R. Bromberg & Larry E. Ribstein, Bromberg and Ribstein on Partnership § 1.03 (1991).

(n2)Footnote 22. *City Bank Farmers Trust Co. v. United States, 47 F. Supp. 98 (Ct. Cl. 1942).*

(n3)Footnote 23. *Cole v. Mettee, 47 S.W. 407 (Ark. 1898).*

(n4)Footnote 24. *Schlake v. Healey, 187 N.W. 427 (Neb. 1922); Frost v. Wolf, 14 S.W. 440 (Tex. 1890).*

(n5)Footnote 25. *Kentucky Block Cannel Coal Co. v. Sewell, 249 F. 840 (6th Cir. 1918); Waycross Military Ass'n v. Hier, 76 S.E.2d 486 (Ga. 1953)* (if title to property is taken in the name of an unincorporated organization the members thereof own the property as tenants in common).

(n6)Footnote 26. 20 Am. Jur. 2d, *Cotenancy and Joint Ownership* § 33 (1965).

(n7)Footnote 27. Alan R. Bromberg & Larry E. Ribstein, Bromberg and Ribstein on Partnership § 3.04 (1991).

(n8)Footnote 28. *R.A. Myles & Co. v. A. D. Davis Packing Co., 81 So. 863 (Ala. Ct. App. 1919); Saunders v. Reilly, 12 N.E. 170 (N.Y. Ct. App. 1887).*

(n9)Footnote 29. *Case v. Beauregard, 99 U.S. 119 (1878); Endries v. Paddock, 271 N.Y.S. 848 (1934)* (mortgage assignee took subject to equities that would have been available against mortgagor).

(n10)Footnote 30. *Case v. Beauregard, 99 U.S. 119 (1878); Sargent v. Blake, 160 F. 57 (5th Cir. 1908)* (rights of creditors of partnership to be paid out of partnership property in preference to individual creditors do not attach until application is made to court for administration of partnership property, and even then only if a partner at the time had the right to enforce).

(n11)Footnote 31. *Case v. Beauregard, 99 U.S. 119 (1878); Sherck v. First Nat'l Bank of Hereford, 206 S.W. 507 (Tex. Com. App. 1918).*

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CHAPTER 34 TENANCY IN PARTNERSHIP

4-34 Thompson on Real Property, Thomas Editions § 34.03

AUTHOR: Professor Alan M. Weinberger Saint Louis University School of Law

§ 34.03 Uniform Partnership Act Approach to Partnership Property.

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In 1914, after 10 years of work, the NCCUSL adopted the Uniform Partnership Act and recommended its enactment by the states. n32 The U.P.A. was, for the most part, a codification of prior common law with one notable exception, the tenancy in partnership.

§ 34.03(a) Definition of Tenancy in Partnership.

Part V of the U.P.A. addresses the property rights of a partner. U.P.A. § 25 states that "a partner is co-owner with his partners of specific partnership property holding as tenant in partnership." n33 The incidents of this tenancy in partnership are that:

> (a) Each partner, subject to agreement among the partners, has an equal right with all other partners to possess specific items of partnership property for partnership purposes,
>
> (b) A partner's interest in specific items of partnership property is not assignable except in connection with the rights of all the partners,
>
> (c) A partner's interest in specific items of partnership property is not subject to attachment or execution except on a claim against the partnership,
>
> (d) On the death of a partner his interest in specific items of partnership property vests in the surviving partners, and
>
> (e) A partner's interest in specific items of partnership property is not subject to dower, curtesy or allowance to widows, heirs or next of kin. n34

§ 34.03(b) Nature of Partnership Property: Intention of U.P.A.

U.P.A. § 8 provides the statutory definition of partnership property. Included in this definition is "all property originally brought into the partnership stock or subsequently acquired by purchase or otherwise on account of the partnership," n35 and all property acquired with partnership funds, unless a contrary intention is shown. n36 One of the most significant changes introduced by the U.P.A. into partnership law was to authorize partnerships to hold and transfer title to real property in the partnership name: n37 "Any estate in real property may be acquired in the partnership name" and any property "so acquired can be conveyed only in the partnership name." n38

After attempting to define what partnership property consists of, the U.P.A. describes the extent of the property rights of an individual member of the partnership. A partner's property rights consist of a partner's rights in specific partnership property, his interest in the partnership and his right to participate in management. n39 Each of these property rights will be discussed in turn. However, in any dispute involving the property of the partnership, the threshold inquiry will be whether property belongs to the partnership or to the partner individually.

§ 34.03(c) Distinguishing Partnership Property from Separate Property.

Courts have provided an analytical framework for distinguishing a partner's separate property from partnership property. Relevant factors for consideration include evidence as to the intention of the partners, the nature of use, occupancy and possession of the property, and the source of funds used to acquire the property. Courts have also considered the effect of change from partnership property to individual property.

COMPUTER-ASSISTED RESEARCH:

LEXIS: partnership w/15 property w/30 intent! or presumption

WESTLAW: partnership /p property /p intent! or presumption

§ 34.03(c)(1) In General: Intent.

The intention of the partners as to whether property belongs to the partnership or to the individual partners is a controlling factor in the determination of ownership. n40

The best evidence of intention of the partners is a written partnership agreement defining what is, or is not, partnership property, and describing the treatment of future acquired partnership property. n41 However, the partnership agreement need not be in writing. Courts have enforced oral and even implied partnership agreements. n42

When there is no formal written agreement the partners' intentions may be inferred from their actions and from the circumstances. n43 However, the partners' expressed intentions may be insufficient to overcome the presumption created by the manner in which title was acquired, especially if the partners appear to have understood the consequences of the estate in which title was taken. n44 As a result, intention is mainly a question of fact, with the focus primarily on the intention of the partners at the time the property was acquired. n45 In the absence of clear evidence of intent, courts consider other indicia of intent, including manner of use, receipt of rental income and distribution of proceeds of sale. n46

While the intention of the partners may be controlling as among them, a court will look beyond intention when a third party has relied on the apparent ownership of the property. n47

§ 34.03(c)(2) Use, Occupancy and Possession.

Each partner has an equal right to possess partnership property for partnership purposes. n48 However, the mere use or possession of property by the partnership is not conclusive evidence that property belongs to the partnership. n49 When

use or possession is coupled with additional factors, such as payment of taxes and insurance from partnership funds, ownership by the partnership will usually be found. n50 Overall use, occupancy and possession are considered only slight evidence of partnership property. n51 A partner may contribute the use of property to the partnership while retaining title individually.

§ 34.03(c)(3) Property Acquired with Partnership Funds or Credit.

A strong presumption of partnership ownership is created when property is purchased with partnership funds or credit. The U.P.A. provides that "unless a contrary intention appears, property acquired with partnership funds is partnership property." n52 Although the use of partnership property in and of itself is only slight evidence of ownership, use combined with the fact that the property was purchased with partnership funds is highly significant. n53 Even when property is registered or titled in the name of one partner, use of partnership funds to purchase the property will support a finding of partnership property. n54

The use of partnership funds does not consist exclusively of using money or cash from a partnership account. It may also arise from partnership credit or payment by one or more of the partners who in turn would be reimbursed by the partnership. n55 A similar situation arises when property is apparently purchased with partnership funds but a partner's capital account is credited with the amount of the payments. The fact that title is taken individually by the partner, coupled with a charge to his partnership account, should serve to rebut the presumption created by the use of partnership funds or even prevent it from arising in the first place. n56 It is important that the partnership books properly reflect the transaction.

The presumption of partnership ownership created by the use of partnership funds is rebuttable. n57 Once the presumption has been rebutted it no longer carries evidentiary weight. n58 The presumption from use of partnership funds does not arise when the rights of third parties are involved. n59

§ 34.03(c)(4) Property Acquired in Partnership Name.

At common law, a partnership was not allowed to take title to real property in the partnership name. n60 U.P.A. § 8(3)-(4) removed this obstacle by allowing any estate in real property to be acquired and conveyed in the partnership name.

Just as the use of partnership funds to finance the acquisition of property creates a strong presumption in favor of ownership by the partnership, so too does the holding of record title in the name of the partnership. n61 The reverse, however, is not always true. Property whose title is held in the name of one or more individual partners may nevertheless belong to the partnership. This may be especially true when other factors, such as the use of partnership funds and the intention of the partners that the property belong to the partnership, are present. n62 When the partners intend the property to be partnership property, the fact that title is in one or more individual members of the partnership will not supersede the intention of the partners. n63 Once again the intention of the partners that property belongs to the partnership, despite the manner of holding title, will not prevail over the rights of an innocent third party. n64

§ 34.03(c)(5) Other Indicators of Intent.

Various other factors are relevant to the determination that property belongs to the partnership rather than to the individual members of the partnership. Making improvements to real property with partnership funds, paying taxes or insurance, collecting rents, n65 making certain types of entries in the partnership books, n66 taking depreciation on partnership tax returns, n67 and making mortgage payments from partnership funds, may all indicate ownership of property by the partnership.

Making improvements to real property with partnership funds may not be sufficient to support a finding of ownership

by the partnership, but the value of the improvements may belong to the partnership. n68 Payment of taxes and insurance, without more, may also not be sufficient to support a finding that property belongs to the partnership, because payment of such costs is typically a requirement in many leases. n69

§ 34.03(c)(6) Change from Partnership to Individual Property.

Title to property owned by the partnership is held by the individual members of the partnership as tenants in partnership. n70 Property which was once partnership property may become property of the individual partners upon agreement of the partners, as a distribution in kind, n71 or on dissolution of the partnership. n72 When a partnership is dissolved and property transferred to its members, the individual partners may take title as tenants by the entireties n73 or as tenants in common. n74

Until there has been actual winding up and termination of the partnership, the partners continue to hold title as tenants in partnership and must account for use and profits. n75

§ 34.03(d) Partner's Interest in Specific Partnership Property.

The U.P.A. ascribes three types of property rights to each partner. The first is a partner's rights in specific partnership property. n76 Each partner holds title to partnership property as tenant in partnership with the other members of the partnership. However, unlike other forms of joint ownership, the tenant in partnership owns no individual rights in specific items of partnership property.

The incidents of the U.P.A. tenancy in partnership are such that each partner has an equal right to possess specific items of partnership property for partnership purposes. n77 However, no partner has the right to assign the partner's interest in specific partnership property; n78 nor is a partner's interest in specific partnership property subject to attachment or execution by the partner's individual creditors. n79 On the death of a partner the interest vests in the surviving partners and is not subject to dower or curtesy. n80

Thus, as a practical matter, the U.P.A. effectively negates virtually all significant incidents of individual property ownership with the result that ownership is effectively in the firm. n81 Nevertheless, some courts have taken the curious view that an individual partner has a sufficient ownership interest in partnership property to preclude being found guilty of the crimes of theft or embezzlement. n82 Other courts have reached a different interpretation of the U.P.A. On this issue, and some states have modified criminal statutes to avoid such an overly technical escape from criminal liability. n83

§ 34.03(e) Partner's Interest in the Partnership.

The second property right of a partner is the interest in the partnership. A partner's interest in the partnership is the partner's "share of the profits and surplus, and that share is considered personal property." n84 A partner's interest in the property of the partnership has been analogized to the interest of a corporate stockholder in the property of the corporation. n85

A partner's rights in specific items of partnership property are not assignable or subject to attachment. However, because a partner's interest in the partnership is considered personal property, that interest is assignable n86 and may be reached by a partner's individual creditors. n87

The U.P.A. provides "that no partner is entitled to remuneration for acting in the partnership business." n88 Accordingly, absent contrary agreement among the partners, no partner is entitled to an interim distribution of profits.

Since a partner's interest in the partnership is assignable, the U.P.A. provides that an assignee is entitled to receive the

profits to which the assigning partner would have been entitled. n89 A creditor of an individual partner who has obtained a charging order n90 may also be entitled to divert the share of the profits that the debtor partner would otherwise have been entitled to receive. n91

Subject to agreement among the members of the partnership, each partner is entitled to be repaid the partner's contribution, "whether by way of capital or advances to the partnership property and to share equally in the profits and surplus remaining after all liabilities." n92 Absent agreement to the contrary, a partner must wait until the partnership is terminated before becoming entitled to such repayment.

§ 34.03(f) Partner's Right to Participate in Management.

The final property right ascribed to a partner by the U.P.A. is the right to participate in firm management. n93 Each partner has an equal right "in the management and conduct of the partnership business," n94 the right to approve any new partners, n95 the right to decide matters affecting or in contravention of the partnership business n96 and the right to obtain information relating to the partnership. n97

Absent agreement to the contrary, the U.P.A. assumes that all partners share equally in the management of the partnership, even where partners have contributed unequally to partnership capital. n98

A partner's management right is not assignable except perhaps with the consent of all the partners. n99 Accordingly, an assignee of a partner may be entitled to profits and surplus, but would ordinarily not be entitled to participate in a decision by the partnership to disburse profits. n100 An assignee may be able to compel dissolution so as to force distribution of profits and capital. n101

§ 34.03(g) Specific Partner's Property Rights.

Each partner owns an interest in specific partnership property, an interest in the partnership and a right to participate in the management of the partnership. Each of these interests is affected by the incidents of the tenancy in partnership enumerated in U.P.A. § 25(2).

§ 34.03(g)(1) Possession.

Unlike the common law tenant in common who enjoys broad rights of possession, U.P.A. § 25(2)(a) provides that, subject to contrary agreement, each partner has an equal right to possess specific partnership property but for partnership purposes only. n102 A partner may possess partnership property for personal use only with the consent of the partners. n103 A partner using property for personal purposes without the consent of the partners may be held accountable to the partnership. n104

§ 34.03(g)(2) Assignability.

An individual partner may not assign the interest in specific partnership property n105 nor the right to participate in management. n106 The partner may assign the interest in the partnership. n107

U.P.A. § 25(2)(b) provides that a partner's interest in specific partnership property is not assignable except in connection with the assignment of rights of all the partners in the same property. n108 This enables the partners to dispose of partnership assets when all partners consent.

A comment in the U.P.A. explains why non-assignability is a necessary attribute of the partnership relation. n109 "If A and B are partners and A attempts to assign all his right in partnership property ... to C, and the law recognizes the possibility of such a transfer, C would pro tanto become a partner with B." n110 "But a partnership is a voluntary relation. B cannot have a partner thrust upon him by A without his, B's consent." n111

When a partner attempts to assign or convey the interest in specific partnership property, the conveyance is generally considered void, with the partnership retaining the entire interest. n112 It is also generally held that a partner cannot assign or convey any interest in specific partnership property to secure a personal debt. n113

A partner's interest in the partnership is assignable. U.P.A. § 27 provides that "a conveyance by a partner of his interest in the firm does not of itself dissolve the partnership," unless the assigning partner withdraws. However, the assignee does not become a partner by virtue of the assignment. n114 An assignee is entitled to receive only the profits to which the assigning partner would have been entitled. n115 An assignee is further restricted in that the assignee may not interfere in partnership management, require any information about or account of partnership transactions, or inspect the partnership books and records. n116 Upon dissolution the assignee is entitled to receive the assignor's interest. n117 In addition to the limitations set forth in the U.P.A., the assignee is also bound by any limitations found in the partnership agreement. n118

Although the assignee is, absent agreement to the contrary, entitled to no more than profits, the assignee's interest is subject to partnership debts incurred both before and after the assignment. However, the assignee is not a partner and is not personally liable for partnership debts.

The right to participate in management is not assignable, n119 based on the principle of "delectus personae" or choice of the person. n120 The U.P.A. reflects this principle by distinguishing between the partner's interest in the partnership, which is assignable, and the partner's right to participate in management, which is not assignable. n121

§ 34.03(g)(3) Creditors' Rights.

A significant, if not the principal, motivation for the drafters of the U.P.A. was to eliminate the confusion that prevailed at common law surrounding the rights of an individual partner's creditors to attach the partner's interest in firm property. n122 The earliest cases, based on the aggregate approach, allowed the separate creditors of an individual member of the partnership to reach the partner's share, but in doing so the creditor was allowed to seize the entire property. n123 The courts later provided protection against such action by applying the doctrine of "partner's equity," which allowed partners to apply firm property for firm purposes, before the property could be applied for any other purpose. n124

In an effort to resolve the confusion that prevailed at common law over the rights of an individual partner's separate creditors, the drafters of the U.P.A. originally sought to adopt the entity theory. n125 This theory would have effectively prevented separate creditors of an individual partner from reaching partnership property. As described in § 34.01 *supra* and § 34.04 *infra*, the final draft of the U.P.A. was based on the aggregate theory. However, specific items of partnership property were protected against the individual partner's separate creditors through the tenancy in partnership device.

U.P.A. § 25(2)(c) provides that "a partner's right in specific partnership property is not subject to attachment or execution, except on a claim against the partnership." U.P.A. § 28 authorizes the creditors of an individual partner to reach the partner's interest by obtaining a charging order.

Although U.P.A. § 25(2)(c) specifically mentions attachment and execution, creditors have also been allowed garnishments, judgment liens and injunctions. n126 Partners may not shield property from creditors by transfer to the partnership. If the partnership's title is not apparent from the public record, the creditor of an individual partner who has relied on the status of record title may be able to reach what otherwise would have been considered partnership property. n127

A partner's individual creditors may be protected when the partnership files for bankruptcy. It has been held that "where the debtor is a partnership, the automatic stay only restrains actions against the partnership or the property of the

partnership estate. Unless the partners personally file for bankruptcy relief, the automatic stay does not restrain actions against them or their property." n128

Just as a partner's interest in the firm is assignable, it may also be reached by the partner's individual creditors. U.P.A. § 28(1) allows a judgment creditor of a partner to obtain a court order charging the interest of the debtor partner. Although the U.P.A. refers to "any judgment creditor of a partner," n129 nonjudgment creditors, such as spouses seeking alimony or child support, have also attempted to use the charging order remedy. n130

The U.P.A. provides that a judgment creditor may request the court to issue an order requiring that partnership distributions that otherwise would have been made to the partner be diverted to the partner's creditor. n131 However, as with assignment, the creditor is not entitled to any distributions of profits, unless the partnership agreement so provides; n132 nor is the creditor allowed to participate in the management of the partnership business. If the partnership agreement does not provide for distributions of profits, the charging order may be foreclosed. n133

Although the U.P.A. inferentially authorizes foreclosure, some courts have limited the availability of this remedy to situations where the creditor's debt would not be satisfied within a reasonable time through the division of distributions. n134 One state has modified its version of the U.P.A. to prevent foreclosure at any time. n135

The U.P.A. provides that the partnership interest may be redeemed prior to foreclosure by any one or more of the partners using separate property, or using partnership property if all partners consent. n136 This is consistent with the U.P.A.'s effort to protect the partnership from interference by outsiders. If the partnership interest is not redeemed prior to foreclosure, it may be purchased by the creditor, the partners or a third party. Because of the limited rights the purchaser would receive, it is not likely such a sale would attract interest from any but the immediate parties.

Because the purchaser of a foreclosed charging order is in effect an assignee, the purchaser is entitled to seek judicial dissolution as authorized by U.P.A. § 32(2)(b). Upon dissolution the purchaser would be entitled to whatever amounts the debtor partner would have received.

COMPUTER-ASSISTED RESEARCH:

LEXIS: partnership w/15 property or interest w/30 (creditor w/15 right or interest

WESTLAW: partnership /s property or interest /p (creditor /s right or interest)

§ 34.03(g)(4) Inheritability.

At early common law the partners held title to partnership property as tenants in common. This meant that a deceased partner's interest in partnership property would descend to the decedent's heirs. The courts protected the remaining partners from interference by the heirs under the doctrine of equitable conversion. This allowed a court to treat "realty as if it were personalty to enable surviving partners to use it or its proceeds in winding up the firm." n137 Equitable conversion was either out-and-out or complete, in the English courts, or pro tanto, in the majority of American courts.

Pro tanto conversion required assets to be used or sold only as far as necessary to protect firm creditors or the remaining partners. n138 The problem with pro tanto conversion was that the remaining partners could pick which assets to sell during the winding up of the firm, without input from the deceased partner's heirs. n139

The U.P.A. removed the uncertainties prevailing at common law by providing that "on the death of a partner his right in specific partnership property vests in the surviving partner or partners... ." n140 The partners are to use the property for partnership purposes only during the winding up or continuation of the business of the partnership.

The deceased partner's estate is entitled to the partner's interest in the partnership. U.P.A. § 26 provides that this interest is personal property and is intended to require out-and-out conversion in every case. n141 The partners may agree as to the distribution of partnership property on the death of a partner, n142 or, if no agreement was made, the interest is subject to the provisions of the U.P.A. The deceased partner's representative may either allow continuation of the partnership n143 or compel dissolution of the partnership. n144

§ 34.03(g)(5) Marital Interests, Rights of Divorced Spouses, Heirs or Next of Kin.

The U.P.A. states that "a partner's interest in specific partnership property is not subject to dower, curtesy, or allowance to widows, heirs or next of kin." n145 However, absent state statute, the partner's interest in the partnership may be subject to such claims. n146

Although the U.P.A. is silent with regard to the rights of divorced spouses, courts have generally construed their rights in the same manner as other partner property rights. n147 The divorced spouse has no right to specific partnership property and it is not subject to equitable distribution at divorce. n148

A spouse generally has rights in the partner's interest in the partnership and this interest is considered marital property. While courts generally hold that the value of the partnership interest is to be included in the marital estate, n149 there is some disagreement over how the value should be determined. Although some courts hold that spouses are entitled to the full value of the partnership interest, including goodwill, n150 others have held that the value of the partnership interest should be determined according to the partnership agreement. n151 One court has held that the value should be fixed as of the date of divorce. n152 Where a court awarded the partner's actual interest, not just its value, the spouse was subject to the same restrictions as any other assignee, and was not entitled to participate in management of the partnership business. n153

§ 34.03(h) Partnership Property and the Effect of the Statute of Frauds.

Although the U.P.A. does not require a partnership agreement to be in writing, each state has enacted some form of the Statute of Frauds, which generally requires a writing, signed by the party to be charged, for the sale or transfer of an interest in land. n154 A question arises as to whether a transfer by a partnership, or between partners, is required to be in writing.

The U.P.A. gives the individual partners limited rights in partnership property, n155 which perhaps makes the partner's interest in the partnership the most important right. The partner's interest in the partnership is characterized as personal property. n156 Based on this interpretation courts have upheld oral partnership agreements, n157 even when the partnership's only asset was land. n158 In upholding oral partnership agreements courts have reasoned that a partner is not seeking to acquire an interest in land but is instead claiming an interest in the partnership. n159

A different issue arises when a partner is claiming an interest in property that was owned individually by another partner and that was allegedly transferred to the partnership. n160 Here courts have made a distinction between a partner who is seeking a share of the profits and a partner who is seeking to obtain a conveyance of title to property, or is seeking an interest in real property. n161

The Statute of Frauds problem has also arisen in a slightly different context. The U.P.A. does not allow a partner to assign the interest in partnership property "except in connection with the assignment of the rights of all the partners." n162 When a partner is found to have acted within the scope of the partner's authority and has agreed to sell partnership property, the other partners cannot invoke the Statute of Frauds to claim that written authorization was required to transfer their interests. n163 The Statute of Frauds has also been used to protect a partnership when one partner has attempted to bind the partnership without its approval, and the contract failed to state that the partner was an agent and failed to name the partnership as principal. n164

FOOTNOTES:

(n1)Footnote 32. The U.P.A. has been adopted in 49 states, the District of Columbia, Guam and the Virgin Islands. Georgia, in 1984, was the last state to adopt the U.P.A. Ga. Code Ann. §§ 14-8-1 to 14-8-43 (1989). The partnership statute enacted in Georgia made massive revisions to the U.P.A. and influenced the decision to undertake the U.P.A. revision project described in § 34.05 *infra.* Donald J. Weidner, *A Perspective to Reconsider Partnership Law, 16 Fla. St. U. L. Rev. 2 (1988).* Professor Weidner is the Reporter for the Revised Uniform Partnership Act. For cases under the U.P.A. *see, e.g.: United States v. Triangle Oil, 277 F.3d 1251 (10th Cir. 2002)* (partner in joint venture has rights in specific partnership property held as a tenant in partnership); *Grand Street Artists v. General Electric Company, Civil No. 96-3774, 2000 U.S. Dist. LEXIS 7076 (D. N.J. 2000)* (CERCLA case involving industrial property held by co-owners as tenants in partnership).

(n2)Footnote 33. U.P.A. § 25(1).

(n3)Footnote 34. U.P.A. § 25(2)(a)-(e).

(n4)Footnote 35. U.P.A. § 8(1).

(n5)Footnote 36. U.P.A. § 8(1)-(2).

(n6)Footnote 37. Don L. Kristinik, III, *Transferring Title to Partnership Real Property Under the U.P.A. and Proposed R.U.P.A., 27 Real Prop. Prob. & Tr. J. 143, 149 (1992).*

(n7)Footnote 38. U.P.A. § 8(3).

(n8)Footnote 39. U.P.A. § 24.

(n9)Footnote 40. *Price v. District of Columbia Rental Hous. Comm'r, 512 A.2d 263 (D.C. 1986). See also Duckson v. Cargill, 9 S.W.3d 556 (Ark. Ct. App. 2000)* in which case the court found that the intent of the parties regarding the real property was for it to be separate property, held as tenants in common, rather than as partnership property connected with their business of raising horses.

(n10)Footnote 41. *Curtis v. Campbell, 336 S.W.2d 355 (Ky. 1960)* (property owned individually was expressly designated as partnership property in original partnership agreement).

(n11)Footnote 42. *Klingstein v. Rockingham Nat'l Bank of Harrisburg, 182 S.E. 115 (Va. 1935).*

(n12)Footnote 43. *Klingstein v. Rockingham Nat'l Bank of Harrisburg, 182 S.E. 115 (Va. 1935).* Intent was inferred from the fact that partner listed real estate as belonging to firm on bank loan application, all taxes and insurance were paid out of partnership funds and the partnership occupied the property.

(n13)Footnote 44. *Rooney v. Rooney, 605 A.2d 520 (Vt. 1992).*

(n14)Footnote 45. *Pluth v. Smith, 23 Cal. Rptr. 550 (1962); Price v. District of Columbia Rental Hous. Comm'r, 512 A.2d 263 (D.C. 1986); In re Capps, 135 B.R. 821 (Bankr. E.D. Tenn. 1992).*

(n15)Footnote 46. *Bode v. Prettyman, 30 N.W.2d 627 (Neb. 1948); Barton v. Barton, 996 P.2d 1 (Wyo. 2000)* (property was not deemed to be partnership property when there was no written partnership agreement, and revenue earned therein was used for non-partnership interests, even though the claim was made that the rental properties were operated as a business venture and partnership tax returns were filed).

(n16)Footnote 47. *Morgan Guar. Trust Co. v. Alexander Equities, Inc., 268 S.E.2d 660 (Ga. 1980)* (where property was acquired by partnership but titled in name of defendant and individual partner as tenants in common with no indication of partnership, third party held entitled to rely on state of record title).

(n17)Footnote 48. U.P.A. § 25(2)(a); *see* § 34.03(g)(1) *infra*.

(n18)Footnote 49. *Gorger v. Gorger, 555 P.2d 1 (Or. 1976); Strother v. Strother, 436 So. 2d 847 (Ala. 1983)*

(n19)Footnote 50. *Klingstein v. Rockingham Nat'l Bank of Harrisburg, 182 S.E. 115 (Va. 1935). See also Mischke v. Mischke, 530 N.W.2d 235 (Neb. 1995)* (where partnership paid taxes, made improvements, and used property for partnership purposes, title was found to be held by individual rather than by partnership without evidence of intent on part of the titleholder to devote the property to partnership purposes). The case of Mischke v. Mischke was affirmed in part, reversed in part and remanded in *Mischke v. Mischke, 571 N.W. 2d 248 (Neb. 1997).* The requisite intent that the land be partnership property was not found in the case of *Thomas v. Lloyd, 17 S.W. 3d 177 (Mo. Ct. App. 2000),* though many factors were considered, including use, name, title, and payment of taxes.

(n20)Footnote 51. *Attaway v. Stanolind Oil & Gas, 232 F.2d 790 (10th Cir. 1956).*

(n21)Footnote 52. U.P.A. § 8(2).

(n22)Footnote 53. *In re Gerlach's Estate, 72 A.2d 271 (Pa. 1950).*

(n23)Footnote 54. *In re Estate of Palmer, 708 P.2d 242 (Mont. 1985).*

(n24)Footnote 55. *Gates Rubber Co. v. Williford, 530 S.W.2d 11 (Mo. Ct. App. 1975). See Muben-Lamar, L.P. v. Department of Revenue, 763 So. 2d 1209 (Fla. Dist. Ct. App. 1st Dist. 2000)* which determined that the partnership bought the real property by issuing valuable partnership interests in consideration for land. The court cited Fla. Rev. Sta. § 620.8201 (a partnership is an entity separate and distinct from its partners).

(n25)Footnote 56. *Bachard v. Walker, 455 N.W.2d 851 (S.D. 1990).*

(n26)Footnote 57. *Reiners v. Sherard, 233 N.W.2d 579 (S.D. 1975); Bachard v. Walker, 455 N.W.2d 851 (S.D. 1990).*

(n27)Footnote 58. *Id.*

(n28)Footnote 59. *Kook v. American Sur. Co., 210 A.2d 633 (N.J. Super. Ct. App. Div. 1965).*

(n29)Footnote 60. *See* § 34.02, *supra*.

(n30)Footnote 61. *Brown v. Brown, 320 S.W.2d 721 (Tenn. Ct. App. 1959); In re Fulton, 43 B.R. 273 (Bankr. M.D. Tenn. 1984).*

(n31)Footnote 62. *In re K & L Limited, 741 F.2d 1023 (7th Cir. 1984)* (real estate bought with partnership funds, for partnership purpose, and applied to partnership use, is firm property regardless of whether title is in all partners, in one of them, or in a stranger). *But see In re* Trempe, No. 90 C 1459, *1990 U.S. Dist. LEXIS 5627 (N.D. Ill 1990)* (which noted that *In re K&L Ltd.* has been superseded by statute regarding jurisdiction).

(n32)Footnote 63. *In re Palm Gardens Nursing Home, 46 B.R. 685 (Bankr. E.D.N.Y. 1985)* (named partners holding in trust for the partnership).

(n33)Footnote 64. *Morgan Guar. Trust Co. v. Alexander Equities, Inc., 268 S.E.2d 660 (Ga. 1980).*

(n34)Footnote 65. *Price v. District of Columbia Rental Hous. Comm'r, 512 A.2d 263 (D.C. 1986).*

(n35)Footnote 66. *In re Gerlach's Estate, 72 A.2d 271 (Pa. 1950).*

(n36)Footnote 67. *In re Palm Gardens Nursing Home, 46 B.R. 685 (Bankr. E.D.N.Y. 1985).*

(n37)Footnote 68. *Speka v. Speka, 268 P.2d 129 (Cal. App. 1954).*

(n38)Footnote 69. *Gates Rubber Co. v. Williford, 530 S.W.2d 11 (Mo. Ct. App. 1975).*

(n39)Footnote 70. U.P.A. § 25(1).

(n40)Footnote 71. *Diversified Fruit Farms v. Johnson, 58 S.W.2d 73 (Tex. Com. App. 1933).*

(n41)Footnote 72. *Webber v. Rosenberg, 64 N.E.2d 98 (Mass. 1945).*

(n42)Footnote 73. *Gorger v. Gorger, 555 P.2d 1 (Or. 1976)* (ranch formerly owned by husband-wife partnership).

(n43)Footnote 74. *Webber v. Rosenberg, 64 N.E.2d 98 (Mass. 1945)* (written agreement distributing partnership property to former partners as tenants in common).

(n44)Footnote 75. *Kraus v. Kraus, 164 N.E. 743 (N.Y. 1928).*

(n45)Footnote 76. U.P.A. § 24(1).

(n46)Footnote 77. U.P.A. § 25(2)(a).

(n47)Footnote 78. U.P.A. § 25(2)(b).

(n48)Footnote 79. U.P.A. § 25(2)(c).

(n49)Footnote 80. U.P.A. § 25(2)(d)-(e).

(n50)Footnote 81. "U.P.A. Section 25(2) ... systematically strips from the individual parties every incident normally associated with ownership ... . In short, under the U.P.A. individual partners own the partnership in theory, but all the incidents of ownership are vested in the partnership." Melvin A. Eisenberg, An Introduction to Agency and Partnership 64 (1987). *Harleysville Mut. Ins. Co. v. Packer, 60 F.3d 1116 (4th Cir. 1995)* (under a state statute providing that the partner is co-owner of partnership property, the partner did not have such an ownership interest that he "owned" the property); *Vannoy v. Thomas, 176 B.R. 758 (M.D.N.C. 1994)* (partnership property was not part of a partner's estate in bankruptcy). *See also In re Israel Halpern, 229 B.R. 67 (Bankr. E.D.N.Y. 1999)* (regarding tenancy in partnership).

(n51)Footnote 82. *Ohio v. King, 460 N.E.2d 1143 (Ohio Ct. App. 1983); People v. Clayton, 728 P.2d 723 (Colo. 1986).*

(n52)Footnote 83. *State v. Birch, 675 P.2d 246 (Wash. Ct. App. 1984);* superseded by statute, *see State v. Webb, 824 P.2d 1257 (Wash. Ct. App. 1992).*

(n53)Footnote 84. U.P.A. § 26; *see also Mountain States Bank v. Irvin, 809 P.2d 1113 (Colo. Ct. App. 1991).*

(n54)Footnote 85. Alan R. Bromberg & Larry E. Ribstein, Bromberg and Ribstein on Partnership § 3.04 (1991).

(n55)Footnote 86. U.P.A. § 27; *Farmers State Bank & Trust v. Mikesell, 554 N.E.2d 900 (Ohio Ct. App. 1988).*

(n56)Footnote 87. U.P.A. § 28.

(n57)Footnote 88. U.P.A. § 18(f).

(n58)Footnote 89. U.P.A. § 27(1).

(n59)Footnote 90. U.P.A. § 28(1).

(n60)Footnote 91. *See* § 34.03(g)(3) *infra*.

(n61)Footnote 92. U.P.A. § 18(1).

(n62)Footnote 93. U.P.A. § 24(3).

(n63)Footnote 94. U.P.A. § 18(e).

(n64)Footnote 95. U.P.A. § 18(g).

(n65)Footnote 96. U.P.A. § 18(h).

(n66)Footnote 97. U.P.A. §§ 19 and 20.

(n67)Footnote 98. *Morrison v. Ultican, 213 P.2d 617 (Wash. 1950)* (partner held bound by partnership agreement that management of partnership should be exercised by partners representing a majority of the contributed capital).

(n68)Footnote 99. U.P.A. § 18(g).

(n69)Footnote 100. *Temple v. White Lakes Plaza Assoc., 816 P.2d 399 (Kan. Ct. App. 1991).*

(n70)Footnote 101. U.P.A. § 32(2).

(n71)Footnote 102. *Bode v. Prettyman, 30 N.W.2d 627 (Neb. 1948); Stephen v. Phillips, 689 P.2d 939 (N.M. Ct. App. 1984); Omican, Inc. v. King, 688 S.W.2d 818 (Tenn. 1985); Putman v. Shoaf, 620 S.W.2d 510 (Tenn. Ct. App. 1981).*

(n72)Footnote 103. *Manufacturers Bldg. v. Heller, 235 N.W.2d 825 (Minn. 1975).*

(n73)Footnote 104. *Kraus v. Kraus, 164 N.E. 743 (N.Y. 1928).*

(n74)Footnote 105. U.P.A. § 25(2)(b).

(n75)Footnote 106. U.P.A. § 18(g).

(n76)Footnote 107. U.P.A. § 27. *Citizens First Nat'l Bank of N.J. v. Bluh, 656 A.2d 853 (N.J. Super. A.D. 1995)* (partner held no separate interest in partnership assets and had only the right to encumber his interest in the partnership).

(n77)Footnote 108. *Driesbach v. Eifler, 764 S.W.2d 631 (Ky. Ct. App. 1989).*

(n78)Footnote 109. 6 Uniform Laws Annotated, Commissioners Note to § 25, 1969 Main Volume Comment, 1991.

(n79)Footnote 110. 6 Uniform Laws Annotated, Commissioners Note to § 25, 1969 Main Volume Comment, 1991.

(n80)Footnote 111. 6 Uniform Laws Annotated, Commissioners Note to § 25, 1969 Main Volume Comment, 1991.

(n81)Footnote 112. *Jade, Inc. v. Benewald, 468 N.W.2d 138 (S.D. 1991).*

(n82)Footnote 113. *Bates County Nat'l Bank v. Wilson, 767 S.W.2d 101 (Mo. Ct. App. 1989); Columbia Mtg. Co. v.*

Hsich, 708 P.2d 1226 (Wash. Ct. App. 1986); Farmers State Bank & Trust v. Mikesell, 554 N.E.2d 900 (Ohio Ct. App. 1988); Madison Nat'l Bank v. Newrath, 275 A.2d 495 (1971).

(n83)Footnote 114. U.P.A. § 18(g).

(n84)Footnote 115. U.P.A. § 27(1).

(n85)Footnote 116. U.P.A. § 27(1).

(n86)Footnote 117. U.P.A. § 27(2).

(n87)Footnote 118. *Temple v. White Lakes Plaza Assoc., 816 P.2d 399 (Kan. Ct. App. 1991).*

(n88)Footnote 119. U.P.A. § 27(1).

(n89)Footnote 120. "Partners traditionally had the right to veto any new additions to the partnership, referred to as *delectus personae*. In other words, partnership being a 'voluntary association,' each member of a partnership has the right to choose his associates." Harold G. Reuschlein and William A. Gregory, The Law of Agency and Partnership 266-267 (2d ed. 1990).

(n90)Footnote 121. *Temple v. White Lakes Plaza Assoc., 816 P.2d 399 (Kan. Ct. App. 1991).*

(n91)Footnote 122. William D. Lewis, *The Uniform Partnership Act -- A Reply to Mr. Crane's Criticism, 29 Harv. L. Rev. 158, 164 (1915).*

(n92)Footnote 123. Heydon v. Heydon, 1 Salkild 302, *91 Eng. Rep. 340 (1693).*

(n93)Footnote 124. *See supra* § 34.02(b)(2).

(n94)Footnote 125. William D. Lewis, *The Uniform Partnership Act -- A Reply to Mr. Crane's Criticism, 29 Harv. L. Rev. 158, 164 (1915).*

(n95)Footnote 126. *Buell Cabinet Co. v. Sudduth, 608 F.2d 431 (10th Cir. 1979); Hilke v. Bank of Washington, 251 S.W.2d 963 (Mo. Ct. App. 1953).*

(n96)Footnote 127. *Morgan Guar. Trust Co. v. Alexander Equities, Inc., 268 S.E.2d 660 (Ga. 1980)* (for a partnership to protect real property from judgment creditors of individual partners, title must be taken in the partnership name).

(n97)Footnote 128. *In re Palm Gardens Nursing Home, 46 B.R. 685, 687 (Bankr. E.D.N.Y. 1985).* This is consistent with the view of the bankruptcy courts that a partnership is a legal entity, separate from the individual partners. *See Resolution Trust Corp. v. Security Town Co., 745 F. Supp. 1216 (E.D. La. 1990).*

(n98)Footnote 129. U.P.A. § 28(1).

(n99)Footnote 130. Alan M. Weinberger, *Making Partners Pay Child Support: The Charging Order at 100, 27 Hous. L. Rev. 297, 317 (1990).*

(n100)Footnote 131. U.P.A. § 28(1).

(n101)Footnote 132. U.P.A. § 27(1).

(n102)Footnote 133. While U.P.A. § 28(2) does not specifically provide for foreclosure, it does so inferentially by stating that "the interest charged may be redeemed at any time before foreclosure..."

(n103)Footnote 134. *City of New York v. Bencivenga, 169 N.Y.S.2d 515 (1955).*

(n104)Footnote 135. Ga. Code. Ann. § 14-8-28 comment (1989).

(n105)Footnote 136. U.P.A. § 28(2)(a)-(b).

(n106)Footnote 137. Alan R. Bromberg & Larry E. Ribstein, Bromberg and Ribstein on Partnership § 3.05(f)(1) (1991).

(n107)Footnote 138. *District of Columbia v. Riggs Nat'l Bank, 335 A.2d 238 (D.C. 1975).*

(n108)Footnote 139. *See* William D. Lewis, *The Uniform Partnership Act, 24 Yale L.J. 617 (1916).*

(n109)Footnote 140. U.P.A. § 25(2)(d).

(n110)Footnote 141. *See* William D. Lewis, *The Uniform Partnership Act, 24 Yale L.J. 617 (1916).*

(n111)Footnote 142. *District of Columbia v. Riggs Nat'l Bank, 335 A.2d 238 (D.C. 1975); Kilhoffer v. Zeis, 179 N.Y.S. 523 (1919).*

(n112)Footnote 143. *See* U.P.A. §§ 31, 41 and 42.

(n113)Footnote 144. *See* U.P.A. §§ 31, 37, 38 and 40.

(n114)Footnote 145. U.P.A. § 25(2)(e).

(n115)Footnote 146. *Kilhoffer v. Zeis, 179 N.Y.S. 523 (1919).*

(n116)Footnote 147. *See Driesbach v. Eifler, 764 S.W.2d 631 (Ky. Ct. App. 1989)* (holding that wife, who had no interest in partnership assets, could not transfer any portion of partnership property).

(n117)Footnote 148. *Warren v. Warren, 675 S.W.2d 371 (Ark. Ct. App. 1984).*

(n118)Footnote 149. *Temple v. Temple, 365 N.W.2d 561 (S.D. 1985). See Crimson v. Crimson, 34 S.W.3d 763 (Ark. App. 2000)* (holding that the fair market value standard was the appropriate standard to be used).

(n119)Footnote 150. *Stern v. Stern, 331 A.2d 257 (N.J. 1975); Brooks v. Brooks, 756 P.2d 161 (Wash. Ct. App. 1988); but see, Travis v. Travis, 794 P.2d 96 (Okla. 1990)* (refusing to award goodwill value).

(n120)Footnote 151. *Hertz v. Hertz, 657 P.2d 1169 (N.M. 1983).*

(n121)Footnote 152. *Glover v. Glover, 689 S.W.2d 592 (Ark. Ct. App. 1985).*

(n122)Footnote 153. *Temple v. White Lakes Plaza Assoc., 816 P.2d 399 (Kan. Ct. App. 1991).*

(n123)Footnote 154. *See Qualicare-Walsh, Inc. v. Ward, 947 F.2d 823 (6th Cir. 1991); Palmer v. S.B. Fuqua, 641 F.2d 1146 (5th Cir. 1981); Wingate v. Coombs, 379 S.E.2d 304 (Va. 1989).*

(n124)Footnote 155. *See* U.P.A. § 25.

(n125)Footnote 156. U.P.A. § 26; *Pyle v. Wolf Corp., 354 F. Supp. 346 (D. Or. 1972)* (ownership of limited partnership interest in oil and gas rights is not real property under U.L.P.A. but is considered personal property); *Potter v. The Homestead Preserv. Assoc., 412 S.E.2d 1 (N.C. 1992).*

(n126)Footnote 157. *Jacobs v. Thomas, 600 A.2d 1378 (Conn. App. Ct. 1991); Mattikow v. Sudarsky, 162 N.E. 296 (N.Y. 1928).*

(N127)Footnote 158. *Forward v. Beucler, 702 F. Supp. 582 (E.D. Va. 1988); Wingate v. Coombs, 379 S.E.2d 304 (Va. 1989); Citizens Bank of Clovis v. Williams, 630 P.2d 1228 (N.M. 1981).*

(n128)Footnote 159. *Liffiton v. DiBlasi, 566 N.Y.S.2d 148 (1991); Walsh v. Rechler, 542 N.Y.S.2d 262 (1989); Mattikow v. Sudarsky, 162 N.E. 296 (N.Y. 1928).*

(n129)Footnote 160. *Ludwig v. Walter, 331 S.E.2d 177 (N.C. Ct. App. 1985)* (Statute of Frauds applicable to alleged promise by defendant partner to convey to plaintiff partner an interest in real property in exchange for cash contribution); *Della Ratta v. Broadneck Dev. Corp., 410 A.2d 32 (Md. 1980).*

(n130)Footnote 161. *Della Ratta v. Broadneck Dev. Corp., 410 A.2d 32 (Md. 1980); Liffiton v. DiBlasi, 566 N.Y.S.2d 148 (1991).*

(n131)Footnote 162. U.P.A. § 25.

(n132)Footnote 163. *Block v. Lea, 688 P.2d 724 (Haw. Ct. App. 1984).*

(n133)Footnote 164. *Marth v. Edwards, 465 N.W.2d 248 (Wis. Ct. App. 1990)* (state statute required disclosure of principal and agent in contract for sale of real property). Marth v. Edwards was overruled by *Wyss v. Albee, 193 Wis. 2d 101, 532 N.W.2d 444 (1995).*

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CHAPTER 34 TENANCY IN PARTNERSHIP

4-34 Thompson on Real Property, Thomas Editions § 34.04

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§ 34.04 Conflicting Interests in the U.P.A. Approach.

When the Commissioners on Uniform State Laws first set out to develop the U.P.A., an important motivation was to clarify the rights of creditors and partners in specific partnership property by adopting the entity theory that a partnership was a legal person. n165 The original draft of the U.P.A. defined a partnership as "a legal person formed by the association of two or more individuals for the purpose of carrying on business with a view to profit." n166 However, following the death of the original chairman and principal drafter, Dean James Barr Ames of Harvard, the new chairman and principal drafter, Dean William Draper Lewis of the University of Pennsylvania, convinced the Commissioners to reject the entity theory and adopt the aggregate theory. Lewis felt that adopting the entity theory would change "existing law in a matter of vital importance, because the [entity] theory itself is based on an assumption false in fact, namely that third persons dealing with a partnership do not deal directly with the partners as principals. They do." n167

The Commissioners were persuaded by Lewis's reasoning and the result is the U.P.A. as it exists today. A criticism of the U.P.A. from its inception has been that while the Act defines the partnership as an aggregate of individuals, n168 much of the remainder of the Act treats the partnership as an entity. n169

FOOTNOTES:
(n1)Footnote 165. William D. Lewis, *The Uniform Partnership Act -- A Reply to Mr. Crane's Criticism, 29 Harv. L. Rev. 158, 164 (1915).*

(n2)Footnote 166. William D. Lewis, *The Uniform Partnership Act -- A Reply to Mr. Crane's Criticism, 29 Harv. L. Rev. 158, 165 (1915).*

(n3)Footnote 167. William D. Lewis, *The Uniform Partnership Act -- A Reply to Mr. Crane's Criticism, 29 Harv. L. Rev. 158, 166 (1915). See also* Harold G. Reuschlein and William A. Gregory, The Law of Agency and Partnership 248-249, 264 (2d ed. 1990).

(n4)Footnote 168. *See* U.P.A. § 6.

(n5)Footnote 169. This conflict was identified by Judson Crane as early as 1915. Professor Crane noted that "Sec. 6 defines partnership as 'an association of two or more persons to carry on as co-owners a business for profit.' The term

'association' is ambiguous -- an association may or may not be treated as a legal person. Sec. 8 is entitled 'Partnership Property,' and this term is used continually throughout the Act. It implies ownership by the partnership, an entity, distinct from the partners. Sec. 8(3) enables the partnership to take title to real estate in the partnership name, and such estate can be reconveyed only in the partnership name. This would seem to make the partnership as such the subject of rights, and thus a legal person... . These extracts seem more consistent with the entity than with the aggregate view of the nature of the partnership and illustrate the difficulty, if not impossibility, not only of writing and talking about the partnership, but of formulating its rights and obligations without treating it as a legal person." Judson A. Crane, *The Uniform Partnership Act - A Criticism, 28 Harv. L. Rev. 762, 770-771 (1915).*

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CHAPTER 34 TENANCY IN PARTNERSHIP

4-34 Thompson on Real Property, Thomas Editions § 34.05

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§ 34.05 Revised Uniform Partnership Act Approach to Partnership Propertyn170

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Criticism of the U.P.A., which began as early as 1915, has continued unabated. n171 In 1987 the NCCUSL appointed a drafting committee to extensively revise the U.P.A. The R.U.P.A. currently is in approved final draft. n172

The R.U.P.A. would completely revise portions of the U.P.A. while leaving other portions unchanged. Three basic policy decisions were reached early in the process. The first, of basic importance to partnership property rights, is a movement away from the aggregate theory toward the entity theory. n173

In one short sentence the R.U.P.A. resolves nearly 80 years of debate by clearly providing that "[a] partnership is an entity." n174 The official comment states that this "is intended to allay previous concerns that a deed is necessary to convey title from an "old' partnership to a "new' partnership when there is a change in the cast of partners." n175 R.U.P.A. § 203 defines partnership property by providing that "[p]roperty transferred to or otherwise acquired by a partnership is property of the partnership and not of the partners individually." The intention of this definition is to state clearly what was the result of U.P.A. § 25, that property belongs to the partnership as an entity. n176 R.U.P.A. § 204 is designed to deal with the problem of when property is acquired by the partnership. R.U.P.A. § 204 is in part based on U.P.A. § 8 but requires that the exact partnership name be used in the instrument transferring title. n177 R.U.P.A. § 203(c) creates a rebuttable presumption that property belongs to the partnership "if purchased with partnership assets, even if not acquired in the partnership name," when there is an indication "of the person's capacity as a partner or of the existence of a partnership." R.U.P.A. § 204 proceeds further to create a presumption, again rebuttable, that when there is no "indication in the instrument transferring title to the property of the person's capacity as a partner or of the existence of a partnership and without use of partnership assets, [the property] is presumed to be separate property, even if used for partnership purposes."

R.U.P.A. § 501 abolishes the concept of tenancy in partnership, because the concept is rendered superfluous. R.U.P.A. § 501 provides that "a partner is not a co-owner of partnership property and has no interest that can be transferred, whether voluntarily or involuntarily, in partnership property." This is "intended to state more directly the substance of the intended rule: it is the entity that owns the asset and not the individual partners pro rata." n178 Combined with

R.U.P.A. § 203, § 501 continues the current rule that a partner's interest in partnership property is not subject to exemptions, allowances or rights of a partner's spouse, heirs, or next of kin. n179

R.U.P.A. § 502(1) clarifies U.P.A. § 26 by providing that the "only transferable interest of a partner in the partnership is the partner's interest in distributions. This interest is personal property." R.U.P.A. § 503(a)(3) continues the provisions of U.P.A. § 27 by stating that a transfer does not entitle the transferee to participate in management, to require information or an account of partnership transactions. The transferee is entitled only to receive distributions to which the transferor would otherwise have been entitled. n180

R.U.P.A. § 504 is intended to clarify the charging order remedy. n181 R.U.P.A. § 504(b) clarifies the charging order remedy by expressly providing it is a lien on the transferable interest of the partner and, as such, may be foreclosed by court order. The purchaser at the foreclosure sale is given the rights of a transferee. n182 As in U.P.A. § 28(2) the charged interest may be redeemed at any time prior to foreclosure. n183 R.U.P.A. § 504(e) provides that the charging order is the exclusive remedy by which a judgment creditor of a partner may satisfy its judgment against the debtor's partnership interest, contrary to decisions of some courts allowing garnishment and injunction. n184

FOOTNOTES:

(n1)Footnote 170. "The National Conference of Commissioners on Uniform State Laws" ("NCCUSL") first promulgated the Revised Uniform Partnership Act ("RUPA") in 1994, and pronounced it ready for adoption by the states. Revised Unif. P'ship Act (amended 1997), 6 U.L.A. 35-152 (Supp. 2000). A majority of the states have adopted some version of the RUPA, including section 403, which contains partner disclosure obligations and information rights, and section 404, which sets forth general standards for partner conduct. *See id.*, 6 U.L.A. 1 (providing a table listing states that have adopted the RUPA); Robert W. Hillman, Allan W. Vestal & Donald J. Weidner, "The Revised Uniform Partnership Act (2000)." William J. Callison and Allan W. Vestal, "They've Created a Lamb with Mandibles of Death: Secrecy, Disclosure, and Fiduciary Duties in Limited Liability Firms." *76 Ind. L.J. 271*, note 1 (2001).

(n2)Footnote 171. *See* Joseph H. Drake, *Partnership Entity and Tenancy in Partnership: The Struggle for a Definition, 15 Mich. L. Rev. 609 (1917);* A. Ladru Jensen, *Is a Partnership Under the Uniform Partnership Act an Aggregate or an Entity?, 16 Vand. L. Rev. 377 (1963);* Jeremy E. Goldstein and John Goode, *Entity and Aggregate Theories of Partnership: The Need for Clarification*, 1 Prob. and Prop. 14 (Nov./Dec. 1987); and Steven A. Waters and Joni Gaylor, *Partnerships, 45 Sw. L.J. 553 (1991).*

(n3)Footnote 172. The states that have adopted the Revised Uniform Partnership Act are: Alabama (Ala. Code §§ 10-8A-101 *et seq.*); Alaska (A.S. §§ 32.06.201 *et seq.*); Arizona (Ariz. Rev. Stat. §§ 29-1001 *et seq.*); Arkansas (A.R.S. §§ 29-1001 *et seq.*); California (Cal. Corp. Code § 15611 *et seq.*); Colorado (Colo. Rev. Stat. §§ 7-64-101 *et seq.*); Connecticut (Conn. Gen. Stat. §§ 34-300 *et seq.*); Delaware (6 Del. C. §§ 15-101 *et seq.*); District of Columbia (D.C. Official Code, 2001 Ed. §§ 33-101.1 *et seq.*); Florida (Fla. Stat. §§ 620-.8100 *et seq.*); Georgia (Ga. Code Ann. §§ 14-9-101 *et seq.*); Hawaii (H.R.S. §§ 425-101 *et seq.*); Idaho (Ida. Code Ann. §§ 53-3-101 *et seq.*); Iowa (Iowa Code §§ 486A.101 *et seq.*); Kansas (K.S.A. §§ 56a-101 *et seq.*); Maryland (Md. Code Ann. §§ 9A-101 *et seq.*); Minnesota (Minn. Stat. §§ 323A.1-01 *et seq.*); Montana (Mont. Code Ann. §§ 35-10-101 *et seq.*); Nebraska (Neb. Rev. Stat. §§ 67-301 *et seq.*); New Jersey (N.J.S.A. §§ 42:1A-1 *et seq.*); New Mexico (NMSA 1978 §§ 54-1-47, 54-1A-101 *et seq.*); North Dakota (N.D. Cent. Code §§ 45-13-01 *et seq.*); Oklahoma (Okla. Stat. tit. 54 § 1-100 *et seq.*); Oregon (Or. Rev. Stat. §§ 67.005 *et seq.*); South Dakota (SDCL §§ 48-7A-101 *et seq.*); Tennessee (T.C.A. §§ 66-1-101 *et seq.*); Texas (Tex. Rev. Civ. Stat. Ann. Art. 6132b-1.01 *et seq.*); Vermont (11 V.S.A. §§ 3201 to 3313); Virgin Islands (26 V.I.C. §§ 1 to 230); Virginia (Va. Code Ann. §§ 50-73.79 *et seq.*); Washington (Wash Rev. Code. 25.05-005); West Virginia (W. VA. Code 47B-1-1 *et seq.*); and Wyoming (Wyo. Stat. Ann. §§ 17-21-101 *et seq.*).

(n4)Footnote 173. *See* Donald J. Weidner, *Three Policy Decisions Animate Revision of Uniform Partnership Act, 46 Bus. Law. 427 (1991).* The remaining decisions deal with partnership breakups and the importance of a partnership agreement.

(n5)Footnote 174. R.U.P.A. § 201. The entity theory of partnership property as well as other concepts of the Revised Act are discussed in an article by Matthew G. Dore, *Partnership Law and Practice Under the New Iowa Uniform Partnership Act, 47 Drake L. Rev. 497 (1999).*

See also the discussion by Walthall, Howard P. Sr., "What Do You Mean 'we' kemo sabe? Partnership Law and Client Responsibilities of Office Sharing Lawyers", Cumb. L. Rev. 28 (1997/1998) 601. *See* also the discussion by Powell, Paul, "Dissociating the Fiduciary: Duty Revisions and the Resulting Confusion in Idaho's New Partnership Law, Idaho L. Rev. 36 (1999) 145 which discussed fiduciary duties owned by a partnership under the new Act.

(n6)Footnote 175. R.U.P.A. comment to § 201.

(n7)Footnote 176. R.U.P.A. comment to § 203.

(n8)Footnote 177. R.U.P.A. comment to § 204.

(n9)Footnote 178. R.U.P.A. comment to § 501.

(n10)Footnote 179. R.U.P.A. comment to § 501. *See also Cheesecake Factory, Inc. v. Baines, 964 P. 2d 183 (N.M. 1998)* (discussing the New Mexico Act, which became effective July 1, 1997, and noting that in this case the seller's reliance on the representation of partnership was reasonable); and *Creel v. Lilly, 729 A2d 385 (Md. 1999)* (holding that RUPA applied only when the agreement was silent on a particular point and neither under the agreement nor under the Act was a sale of all partnership assets required on the death of a partner). Under the Revised Uniform Partnership Act there is no "wrongful" dissolution and thus only when a partner wrongly disassociates from the partnership can the remaining partners sue for damages. *Horizon/CMS Healthcare Corp. v. Southern Oaks Health Care, Inc., 732 So. 2d 1156 (Fla. Dist. Ct. App. 5th Dist. 1999).*

(n11)Footnote 180. R.U.P.A. § 503(b).

(n12)Footnote 181. R.U.P.A. comment to § 504.

(n13)Footnote 182. R.U.P.A. § 504(b).

(n14)Footnote 183. R.U.P.A. § 504(b).

(n15)Footnote 184. *See* § 34.03(g)(3) *supra*.

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CHAPTER 34 TENANCY IN PARTNERSHIP

4-34 Thompson on Real Property, Thomas Editions § 34.06

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Annotation, *Property Rights Arising from Relationship of Couple Cohabiting Without Marriage, 3 A.L.R. 4th 13.*

Annotation, *When Real Estate Owned by Partner Before Formation of Partnership Will Be Deemed to Have Become Assets of Firm, 45 A.L.R. 2d 1009.*

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Supp. To CHAPTER 34 Tenancy in Partnership

4-34 Thompson on Real Property, Thomas Editions Supp. to § 34.01

Supp. to § 34.01 Introduction to Tenancy in Partnership

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Add:

Daly v. Messina, 2008 N.Y. App. Div. LEXIS 4401 (N.Y. App. Div. 2d Dep't 2008) (court ruled that the parties held property as tenants in partnership and not as tenants in common).

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Supp. to § 34.02 Common Law Approach to Partners' Property Rights.

[Go To Main]

§ 34.02(b) Common Law Approach to Partners' Property Interests. § 20-718.103(10) to **Fla. Stat.**

§ 34.02(b)(1) Partnership Property Held as Tenants in Common

Add:

But see, Powell v. Powell, 325 B.R. 6 (N.D. Alabama 2005) (debtor who owned partnership property as tenant in partnership did not hold undivided interest as tenant in common, joint tenant or tenant by the entirety; the tenancy in this case was not joint, because the partners held disproportionate shares of the partnership).

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Supp. To CHAPTER 34 Tenancy in Partnership

4-34 Thompson on Real Property, Thomas Editions Supp. to § 34.03

Supp. to § 34.03 Uniform Partnership Act Approach to Partnership Property.

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§ 34.03(a) Definition of Tenancy in Partnership [Go To Main]

Add:

See, Peck v. Bentas, 16 LCR 667 (Mass. Land Ct. 2008) (discussing the tenancy in partnership created by Massachusett's Partnership Act).

§ 34.03(c) Distinguishing Partnership Property from Separate Property. [Go To Main]

§ 34.03(c)(2) Use, Occupancy and Possession.

Add new note 51.1 at the end of the subsection: n51.1

§ 34.03(c)(3) Property Acquired with Partnership Funds or Credit.

Add:

See Eckert v. Eckert, 425 N.W.2d 914 (N.D. 1988) .

See e.g. Gorelick v. Montanaro, 990 A.2d 371 (Conn. App. 2010) ; *Michael A. Grassmueck, Inc. v. Wurst, 2009 Bankr. LEXIS 3400 (D. Or. 2009)* .

§ 34.03(c)(4) Property Acquired in Partnership Name

Add:

Michael A. Grassmueck, Inc. v. Wurst, 2009 Bankr. LEXIS 3400 (D. Or. 2009) ; *Beal v. McGuire, 216 P.3d 1154 (Alaska 2009)* .

Add:

In re Powell, 325 B.R. 6 (N.D. Ala. 2005) (partner owned partnership property as tenant in partnership and not an undivided interest as tenant in common, joint tenant, or tenant by the entirety).

§ 34.03(e) Partner's Interest in the Partnership. [Go To Main]

Add:

Kirk v. NASA Corridor L.P., 346 Fed. Appx. 545 (11th Cir. 2009) .

Add:

See In re S. Canaan Cellular Invs., 2010 Bankr. LEXIS 1022 (E.D. Pa.2010) .

§ 34.03(g)(2) Assignability.

Add:

See Hammond Oil Co. v. Standard Oil Co. of New Jersey, 181 N.E. 583 (N.Y. 1932) .

§ 34.03(g)(3) Creditors' Rights.

Correction:

Under the COMPUTER-ASSISTED RESEARCH section, *add a close parenthesis* ()) *after* interest

§ 34.03(g)(5) Marital Interest, Rights of Divorced Spouses, Heirs or Next of Kin.

Add to note after *Travis* citation:

Cole v. Cole, 110 S.W.3d 310 (Ark. Ct. App. 2003) (holding that the value is not binding on a non-shareholding spouse).

Change Cole v. Cole, 110 S.W.3d 310 (Ark. Ct. App. 2003) to Cole v. Cole, 110 S.W.3d 310 (Ark. App. 2003)

Add:

Barton v. Barton, 639 S.E.2d 481 (Ga. 2007) (holding that the buy-sell agreement established by a closely-held partnership is not binding on the non-shareholder spouse and calling this the view of a "clear majority of courts").

Add:

But see Mitchell v. Mitchell, 732 P.2d 208 (Ariz. 1987) (holding that an agreement is a factor but not conclusive in determining the value of the partnership interest).

FOOTNOTES:
(n1)Footnote 51.1. *See Cyrus v. Cyrus, 64 N.W.2d 538 (Minn.1954)* .

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Supp. To CHAPTER 34 Tenancy in Partnership

4-34 Thompson on Real Property, Thomas Editions Supp. to § 34.05

Supp. to § 34.05 Revised Uniform Partnership Act Approach to Partnership Property.

§§ 515A.1.101-515A.4-117 *to* MINN. STAT. ANN.

Add:

See also Clay B. Wortham, *Revised Uniform Partnership Act: Anomalies of a Simplified, Modernized Partnership Law, 92 KY. L.J. 1083 (2004).*

Add:

See David J. Dietrich, *Mandatory Sales of Joint Ownership Property Under the Revised Uniform Partnership Act*, 18 Prob. and Prop. 9 (Sep./Oct. 2004).

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Supp. To CHAPTER 34 Tenancy in Partnership

4-34 Thompson on Real Property, Thomas Editions Supp. to § 34.06

Supp. to § 34.06 Bibliography.

[Go To Main]

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Christopher Anglim, *Joined in Common Law Enterprise: A Bibliography on the Origins of Early Anglo-American Partnership Law*

Add to Articles

Anderson, Mark. "Not Our Grandparents' Partnership Statute." *Advoc. (Idaho)* Vol. 46 (2003) 12.

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Add to Annotations

Annotation, *Sale or Transfer of Interest by Partner as Dissolving Partnership, 75 A.L.R.2d 1038* .

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CHAPTER 35 TENANCY IN COPARCENARY

4-35 Thompson on Real Property, Thomas Editions 35.syn

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§ 35.syn Synopsis to Chapter 35: TENANCY IN COPARCENARY

§ 35.01 Introduction to the Chapter.

Alaska Stat. §§ 34Outline of the Chapter.

07Definition.

§ 20A-718.401 to FLA. STAT.History of Tenancy in Coparcenary.

§ 20a-719.401 to FLA. STAT.Tenancy in Coparcenary Distinguished from Other Real Property Interests.

§ 35.05(a) Tenancy in Coparcenary Distinguished from Tenancy in Common.

§ 35.05(b) Tenancy in Coparcenary Distinguished from Joint Tenancy.

§ 35.05(c) Tenancy in Coparcenary Distinguished from Tenancy by the Entirety.

§ 20A-718.103(13) to FLA. STAT.Incidents of Tenancy in Coparcenary.

§ 35.06(a) Possession by Coparceners.

§ 35.06(b) Accounting and Contribution Among Coparceners.

§ 35.06(c) Actions by Coparceners.

§ 35.06(d) Inter Vivos Conveyances.

§ 35.06(e) Curtesy and Dower on Tenancies in Coparcenary.

§ 35.07 Partition of Tenancy in Coparcenary.

§ 35.07(a) Voluntary Partition.

§ 35.07(b) Compulsory Partition.

§ 35.07(c) Voidable Partitions.

§ 35.07(d) "Hotchpot."

§ 35.08 Status of Tenancy in Coparcenary in the United States Today.

§ 35.08(a) In General.

§ 35.08(b) Tenancy in Coparcenary in Statutes.

§ 35.09 Bibliography.

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CHAPTER 35 TENANCY IN COPARCENARY

4-35 Thompson on Real Property, Thomas Editions § 35.01

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§ 35.01 Introduction to the Chapter.

Tenancy in coparcenary is one of the five types of concurrent estates known to the common law. The other four types of concurrent estates, joint tenancy (*supra* Ch. 31), tenancy in common (*supra* Ch. 32), tenancy by the entirety (*supra* Ch. 33), and tenancy in partnership (*supra* Ch. 34) are of modern legal significance. Tenancy in coparcenary, where that terminology is used in modern statutes in the United States, is hardly distinguishable from tenancy in common. Therefore, the discussion in this chapter will be more of historical significance and interest than of modern application.

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CHAPTER 35 TENANCY IN COPARCENARY

4-35 Thompson on Real Property, Thomas Editions § 35.02

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§ 35.02 Outline of the Chapter.

This chapter discusses the tenancy in coparcenary from a historical viewpoint and the modern significance of the tenancy. Tenancy in coparcenary is defined in § 35.03. The history of coparcenary is discussed in § 35.04. In § 35.05 coparcenary's distinctive features are compared to those of other concurrent estates. Following this historical review, § 35.06 examines the incidents of coparcenary. The incident from which coparcenary derives its name is considered in § 35.07, which explores the methods of partition dating from the time of Littleton in the fifteenth century. Concluding the chapter is § 35.08 surveying the use of coparcenary terminology in modern American state statutes. This section also summarizes the treatment of coparcenary in modern American cases.

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CHAPTER 35 TENANCY IN COPARCENARY

4-35 Thompson on Real Property, Thomas Editions § 35.03

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§ 35.03 Definition.

"Tenancy in coparcenary" refers to the early common law concurrent estate that was created when inheritable lands descended from a common ancestor to two or more persons who held the lands as one heir. The coheirs were known as "coparceners" n1 or "parceners" n2 because each could compel the partition of the land. n3 A tenancy in coparcenary was created only by descent and never by purchase and arose by operation of the common law or of a particular custom.

A tenancy in coparcenary by the common law arose when a person died owning inheritable land but without a male heir. The common law's system of primogeniture dictated that the eldest son be the heir. When no male heir was available, the decedent's female heirs of the nearest degree inherited as tenants in coparcenary and the coparceners constituted only a single heir. For example, if the decedent had daughters, but no male heir, the daughters inherited as coparceners. Similarly, if the decedent had no daughters, then the decedent's sisters inherited as coparceners. Likewise, if no sisters or daughters existed, then the decedent's aunts inherited as coparceners. n4 Males could also be coparceners by the common law if it happened that a male inherited from an original female coparcener. For example, when a landowner with only two daughters died, the daughters were coparceners. If one of the daughters died leaving a son as heir, that son and his aunt would then hold as coparceners. n5

A tenancy in coparcenary by particular custom was created in those areas of England, such as the county of Kent, which recognized the gavelkind descent of lands rather than primogeniture. Under the custom of gavelkind, when a person died leaving several sons, the inheritable land descended to all the sons, who inherited the lands as tenants in coparcenary. n6

FOOTNOTES:
(n1)Footnote 1. The terms "coparcener" and "parcener" were adopted from the Old French "parconier," meaning "sharer" and the French "parcon" and Latin "partition-em" meaning a "parting" or "division." *See* 3 The Oxford English Dictionary 901 (1989).

(n2)Footnote 2. *See* 11 The Oxford English Dictionary 216 (1989).

(n3)Footnote 3. 2 William Blackstone, Commentaries *189.

(n4)Footnote 4. Littleton, Tenures § 242.

(n5)Footnote 5. Coke on Littleton *164b.

(n6)Footnote 6. Littleton, Tenures § 265.

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CHAPTER 35 TENANCY IN COPARCENARY

4-35 Thompson on Real Property, Thomas Editions § 35.04

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§ 35.04 History of Tenancy in Coparcenary.

While the terms "coparceners" and "parceners" are found in modern statutes, n7 the estate of tenancy in coparcenary generally has been relegated to obscurity by modern property authorities, who devote little or no attention to the topic. n8 That the tenancy in coparcenary is a "relic of the dim past" n9 makes a discussion of its history particularly appropriate.

Before the Norman Conquest, various local customs determined who should be heir to land. n10 It is not clear how widespread the custom was, but apparently before the Conquest a common form of inheritance was not by the eldest son under primogeniture but by all the sons or daughters who took as one heir under coparcenary. n11 Although customs of common inheritance were eventually replaced in most of England by primogeniture, common inheritance remained the custom in Kent, where it was called "gavelkind"; in 1926 n12 both primogeniture and gavelkind were abolished in England. At least by the time of Glanville in the twelfth century, primogeniture was the primary form of inheritance except where the land was "anciently partible" by custom, in which case the land was divided equally among all the sons, n13 creating coparceners by particular custom. More commonly, coparceners arose by operation of the common law. This occurred when one died leaving only female heirs among whom the inheritance was divided. n14

The feudal lord's interest in the incidents of tenure was influential in the development of the procedure by which land was inherited. n15 Originally the eldest daughter (or her husband) was the only coparcener who represented the fee and who did homage to the feudal lord. The land was held in a "parage" tenure in which the younger sisters held their shares of the eldest sister and their service to the lord was done through her. n16 The advantage to the lord of this arrangement was that he looked to only one person for the service. The disadvantage was that he could not rightly claim the incidents of wardship and marriage from the younger sisters, since he did not take homage from them. Because the incidents of tenure, including wardship and marriage, eventually became more valuable to the lord than the services, another method of obtaining the benefit of the incidents developed. n17 By 1236 the king had already been taking homage and receiving the incidents of tenure from all the coparceners. n18 In that year the king set out the law "of whom do the younger sisters hold?" in a writ answering such an inquiry from the English in Ireland. The 1236 writ n19 explained that if the coparceners held in chief of the king, each must do homage to the king; if the coparceners held the lands of a mesne lord, then only the eldest did homage, with the younger sisters doing their services through the eldest. However, the mesne lord in the latter case had the wardships and marriages of all the coparceners. n20

In Bracton's day the law was as set forth in the writ of 1236; n21 however, Britton suggested that the lords accept homage from all the coparceners as the king did, so that the lords would not lose the wardships and marriages. n22 The law of parage began to disappear as the lords began to accept homage from all of the sisters. n23 Because the lords took homage from all the coparceners, the law came to recognize the interests of all the coparceners. n24

By the time of Littleton, the estate in coparcenary had achieved its full development. n25

In England the tenancy in coparcenary could be created only by descent. In 1926 estates created by descent, whether created by the common law or by particular custom, were abolished, so that when a person holding land in fee simple died intestate, a tenancy in coparcenary no longer resulted. n26 However, the abolition did not affect the descent of lands held in fee tail. n27 Therefore, in England it is still possible for coparcenary to arise when entailed lands devolve on female coheirs. In that case the interests of the coparceners are equitable entailed interests in the proceeds of the sale of the land that is held in trust for sale. n28

Because primogeniture does not exist and because the tenancy in common and the tenancy in coparcenary have become almost indistinguishable, the tenancy in coparcenary is of little importance in the United States. The terminology of coparcenary is still found in the statutes, n29 but no distinction from a tenancy in common is apparent in its treatment. n30

FOOTNOTES:
(n1)Footnote 7. *See* § 35.08(a) *infra.*

(n2)Footnote 8. Statements reflecting the treatment of coparcenary by a few of those authorities follow:

"Also classifiable as cotenancy is the estate in coparcenary, which was known at common law, but is virtually obsolete under modern statutes whereby joint heirs hold as tenants in common." 20 Am. Jur. 2d *Cotenancy and Joint Ownership* § 1 (1965). "Rarely mentioned in the cases as a separate form of ownership, coparcenary is a relic of the dim past now indistinguishable in its incidents from tenants in common." David Thomas, *Tenancy in Common, Tenancy in Partnership, and Tenancy in Coparcenary, in* Powell on Real Property(R), ch. 50, § 50.09 (originally P 609) (Michael Allan Wolf, ed. Matthew Bender). "As estates descend in every state to all the children equally, there is no substantial difference left between coparceners and tenants in common ... and the technical distinction between coparcenary and estates in common may be considered as essentially extinguished in the United States." 4 James Kent, Commentaries on American Law 376 (12th ed. 1873).

(n3)Footnote 9. David Thomas, *Tenancy in Common, Tenancy in Partnership, and Tenancy in Coparcenary, in* Powell on Real Property(R), ch. 50, § 50.09 (originally P 609) (Michael Allan Wolf, ed. Matthew Bender).

(n4)Footnote 10. Stroud Francis Charles Milsom, Historical Foundations of the Common Law 11 (2d ed. 1981).

(n5)Footnote 11. John Hamilton Baker, An Introduction to English Legal History 303, 306 (3d ed. 1990); Stroud Francis Charles Milsom, Historical Foundations of the Common Law 11 (2d ed. 1981).

(n6)Footnote 12. Law of Property Acts, 1922 and 1925; Stroud Francis Charles Milsom, Historical Foundations of the Common Law 11 (2d ed. 1981).

(n7)Footnote 13. The Treatise on the Laws and Customs of the Realm of England Commonly Called Glanvill 75 (George Derek Gordon Hall ed. 1965).

(n8)Footnote 14. *Id.* at 76.

(n9)Footnote 15. 2 Frederick Pollock & Frederic Maitland, The History of English Law 278 (2d ed. 1898).

(n10)Footnote 16. *Id.* at 276. The coparceners inherited as one heir and held their shares "in parage," meaning that the eldest only was tenant with respect to the lord, with the other coparceners holding their shares by the eldest. The younger coparceners owed no services or incidents to the eldest; though they held of the elder, the younger were somehow also equal to the eldest. *See* John Hamilton Baker, An Introduction to English Legal History 306 (3d ed. 1990).

(n11)Footnote 17. 3 William Holdsworth, A History of English Law 174 (reprint 1973).

(n12)Footnote 18. *Id.*

(n13)Footnote 19. The writ is referred to as *Stratum Hiberniae de Coheredibus*. 2 Frederick Pollock & Frederic Maitland, The History of English Law 277 (2d ed. 1898).

(n14)Footnote 20. *Id.*

(n15)Footnote 21. 2 Bracton 226-227 (Samuel Edmund Thorne ed. 1968); 2 Frederick Pollock & Frederic Maitland, The History of English Law 277 (2d ed. 1898).

(n16)Footnote 22. 2 Britton 29, 40 (Francis Morgan Nichols ed. 1865).

(n17)Footnote 23. 2 Frederick Pollock & Frederic Maitland, The History of English Law 278 (2d ed. 1898).

(n18)Footnote 24. 3 William Holdsworth, A History of English Law 175 (reprint 1973).

(n19)Footnote 25. Littleton, Tenures §§ 241, 265.

(n20)Footnote 26. The Administration of Estates Act 1925, § 45(1) provides:

(1) With regard to the real estate and personal inheritance of every person dying after the commencement of this Act, there shall be abolished--

(a) All existing modes, rules and canons of descent, and of devolution by special occupancy or otherwise, of real estate, or of a personal inheritance, whether operating by the general law or by the custom of gavelkind or borough english or by any other custom of any county, locality, or manor, or otherwise howsoever ...

(n21)Footnote 27. *Id.* § 45 (2). "Nothing in this section affects the descent or devolution of an entailed interest."

(n22)Footnote 28. 39 Halsbury's Laws of England *Co-ownership* P 567 (4th ed. 1982).

(n23)Footnote 29. *See* § 35.08(a) *infra*.

(n24)Footnote 30. Tiffany suggested that one result of recognizing that persons taking jointly by descent are coparceners rather than tenants in common is that the interests taken by devise, *i.e.*, as tenants in common, are not the same as interests taken by descent, *i.e.*, as coparceners. 1 Herbert Tiffany, The Law of Real Property § 193, at 644 (1920). *See Donnely v. Turner, 60 Md. 81 (1882); Gilpin v. Hollingsworth, 3 Md. 190 (1852).*

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CHAPTER 35 TENANCY IN COPARCENARY

4-35 Thompson on Real Property, Thomas Editions § 35.05

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§ 35.05 Tenancy in Coparcenary Distinguished from Other Real Property Interests.

[Go To Supp]

§ 35.05(a) Tenancy in Coparcenary Distinguished from Tenancy in Common.

The early common law tenancy in coparcenary was much like a present day tenancy in common, but differed in several respects from the early tenancy in common. The tenancy in coparcenary was created only by descent and never by purchase, while before the Statute of Wills, the tenancy in common was created only by purchase. n31 Coparceners always had the right to compel partition, while until the statute enacted during the reign of Henry VIII, tenants in common did not have the right of partition. n32 A tenancy in coparcenary required the unities of possession, title, and interest; a tenancy in common required only the unity of possession. n33 Right of survivorship was not a characteristic of the tenancy in coparcenary, n34 nor is it of the tenancy in common. n35 Thus, in both estates each cotenant's interest is inheritable by the heirs. This similarity caused the tenancy in coparcenary to eventually become almost indistinguishable from the tenancy in common. Therefore, coparcenary ceased to be of importance and is seldom mentioned as a distinct form of concurrent ownership in modern cases. n36

§ 35.05(b) Tenancy in Coparcenary Distinguished from Joint Tenancy.

Tenancy in coparcenary was distinguished from joint tenancy in that before the Statute of Wills of 1540, coparcenary arose only by descent, while a joint tenancy was created only by inter vivos conveyance. n37 Three other features of the early common law tenancy in coparcenary further distinguish it from the joint tenancy. The first is that tenants in coparcenary could compel a partition of the estate, while joint tenants did not have the right to compel partition until 1539. n38 The second distinction is that the tenancy in coparcenary did not share the outstanding characteristic of the joint tenancy, the right of survivorship. n39 This second distinction gave rise to the third, which is that the tenants in coparcenary held the estate by only three of the four unities by which joint tenants hold that estate. Coparceners held by the unities of possession, interest, and title, but not of time. n40 When a coparcener's interest in the estate descended to the coparcener's heirs rather than accruing to the other coparceners n41 as it would under right of survivorship, the heirs became coparceners at a time different from the time the original estate was created. n42

§ 35.05(c) Tenancy in Coparcenary Distinguished from Tenancy by the Entirety.

In addition to being created only by descent and never by purchase, a major difference between tenancy in coparcenary and tenancy by the entirety is the requirement that tenants by the entirety be husband and wife. Also, tenants in coparcenary could compel partition, while tenants by the entireties could not. Nor did the tenancy in coparcenary share the characteristic of the right of survivorship with tenancy by the entireties. Tenants in coparcenary held by the three unities of possession, interest, and title; tenants by the entireties hold by all four unities plus the unity of marriage. n43

FOOTNOTES:

(n1)Footnote 31. Under the Statute of Wills tenancies in common could be created by descent or devise. *32 Hen. 8,* c. 1 (1540).

(n2)Footnote 32. *31 Hen. 8,* c. 1 (1539); *32 Hen. 8,* c. 32 (1540).

(n3)Footnote 33. *See* Ch. 32 *supra*.

(n4)Footnote 34. 2 William Blackstone, Commentaries *188.

(n5)Footnote 35. 3 William Holdsworth, A History of English Law 127 (reprint 1973).

(n6)Footnote 36. *Graham v. Graham, 22 Ky. 561 (1828); Donnelly v. Turner, 60 Md. 81 (1882); Gilpin v. Hollingsworth, 3 Md. 190 (1852); Phillips v. Wells, 133 S.E. 581 (Va. 1926).*

See David Thomas, *Tenancy in Common, Tenancy in Partnership, and Tenancy in Coparcenary, in* Powell on Real Property(R), ch. 50, § 50.09 (originally P 609) (Michael Allan Wolf, ed. Matthew Bender).

(n7)Footnote 37. The Statute of Wills provided for the creation of joint tenancies by devise and tenancies in common by devise and by descent. *32 Hen. 8,* c. 1 (1540).

(n8)Footnote 38. *31 Hen. 8,* c. 1 (1539); *32 Hen. 8,* c. 32 (1540); 2 William Blackstone, Commentaries *188.

(n9)Footnote 39. 2 William Blackstone, Commentaries *188.

(n10)Footnote 40. *Id.*

(n11)Footnote 41. Britton alludes to a right of accruer among sisters if one died. 1 Britton 315, 316 (Francis Morgan Nichols ed. 1865). But if at one time a right of survivorship existed between parceners, at least by the 14th century it did not. 3 William Holdsworth, A History of English Law 127 (reprint 1973).

(n12)Footnote 42. 2 William Blackstone, Commentaries *188.

(n13)Footnote 43. *See* Ch. 33 *supra*.

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CHAPTER 35 TENANCY IN COPARCENARY

4-35 Thompson on Real Property, Thomas Editions § 35.06

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§ 35.06 Incidents of Tenancy in Coparcenary.

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The tenancy in coparcenary shares some incidents with both joint tenancy and tenancy in common. The incidents shared with joint tenancy derive from the unities of title, interest, and possession; those shared with the tenancy in common derive from not having the right of survivorship. Although coparceners "make but one heir," n44 they will be seen as having separate ownership for many purposes, because each coparcener's interest is inheritable. n45 Most of the rules concerning possession, accounting, and contribution apply to coparceners in the same manner as they do to other cotenancies. n46 Many states have statutes with provisions specifically applying to all forms of concurrently held property, including those concerning actions for accounting, contribution, partition, or waste among cotenants. These statutes usually list coparceners along with joint tenants and tenants in common as the cotenants to which the statutes apply. n47 Thus, some of the incidents of coparcenary discussed below, while not recognized at early common law, have been made applicable to modern coparceners by statute.

§ 35.06(a) Possession by Coparceners.

Generally, the entry by one coparcener is the entry by all and the possession of one is the possession of all. n48 This general rule reflects the unity of possession and was usually applied when no disadvantage resulted. But it has been held that a feoffment executed by one coparcener under a general entry and in actual possession operated to oust the other coparceners, because the entry of the feoffor-coparcener was considered the entry of all. n49

§ 35.06(b) Accounting and Contribution Among Coparceners.

Most of the usual accounting and contribution rules for cotenants apply to coparceners as well. Coparceners may sue each other for an accounting of rents and profits. n50 Contributions for improvements and repairs may not be had, n51 but setoffs at the time of partition may compensate the improver. n52

§ 35.06(c) Actions by Coparceners.

Coparceners must sue and be sued jointly on matters relating to their land; since their title is joint, the action must also

be joint. n53 Although a coparcener has the right to lease the individual share of land held in coparcenary, n54 when coparceners act as landlords, all must join in a lease. n55 They cannot sue separately in actions for rent, n56 but one may sue on behalf of all the coparceners. n57 All coparceners must also join in actions of ejectment n58 or of distress. n59

Blackstone said that, like joint tenants, coparceners could not "have an action of trespass against each other," but unlike joint tenants, they could not bring an action for waste, n60 because they always had a right to partition to end the waste. n61 However, equity would intervene to restrain a coparcener from committing destructive waste. n62

§ 35.06(d) Inter Vivos Conveyances.

Coparceners can convey their shares to another coparcener or to a stranger. When coparceners conveyed to each other, they could do so by release n63 or by feoffment n64 accomplished by a quit-claim deed.

When, before partition, a coparcener conveys the share to a stranger, the land conveyed is no longer held in coparcenary but in common. n65 The conveyance by one coparcener disunites the grantor's title and interest from those of the coheirs. n66 So if one of only two coparceners conveys the interest to a stranger, the estate in coparcenary is destroyed and the remaining coparcener and the stranger hold as tenants in common. If one of more than two coparceners conveys to a stranger, the coheirs who did not convey are still coparceners as between each other. n67 A stranger who buys the interest of a coparcener before partition stands in the place of that coparcener, and the buyer's interest is subject to any equities that may exist in favor of a third party at the time of the purchase. n68

A conveyance by a coparcener who is out of possession of land that is being held adversely by a fellow coparcener is considered champertous and is thus void. n69 However, the deed in such a case will be void only if at the time of the deed an ouster clearly had occurred. n70

§ 35.06(e) Curtesy and Dower on Tenancies in Coparcenary.

The estate of tenancy in coparcenary is subject to curtesy n71 and dower, n72 wherever such rights exist. The incidents of curtesy and dower apply to coparcenary because, as in a tenancy in common, there is no right of survivorship.

FOOTNOTES:

(n1)Footnote 44. *Stedman v. Bates, 91 Eng. Rep. 338 (1695)* (the rent descended as one inheritance because the coparceners took as one heir). *See* Littleton, Tenures § 241; 2 William Blackstone, Commentaries *187.

(n2)Footnote 45. Coke on Littleton *164a.

(n3)Footnote 46. *O'Bannon v. Robert's Heirs, 32 Ky. (2 Dana) 54, 55 (1834)* (despite a "surprising dearth of authority," the court saw no reason why parceners should not come under same rule for responsibility from one cotenant to another for rents and profits). *See* David Thomas, *Concurrent Ownership, in* The American Law of Real Property § 4.01[1] (1992).

(n4)Footnote 47. *See* § 35.08(a) *infra*. *See, e.g., Fernandes v. Rodriquez, 735 A.2d 871, 878 (Conn. App. 1999), rev'd, 761 A.2d 1283 (Conn. 2000); County of Blue Earth v. Turtle, 593 N.W.2d 258, 262 (Minn. App. 1999), review denied, 1999 Minn. LEXIS 424* (Minn. June 29, 1999).

(n5)Footnote 48. *Doe dem Gill v. Pearson, 102 Eng. Rep. 1253 (K.B. 1805)* (one coheir could enter for breach of a condition and that entry would vest seisin in both heirs).

(n6)Footnote 49. *Doe dem Reed v. Taylor, 5 B. & Ad. 576, 110 Eng. Rep. 903 (1833)* (one of five coparceners executed a feoffment with livery of seisin that operated to oust her coheirs); Gerry v. Holford, 2 Cro. Eliz. 615, *78 Eng.*

Rep. 856 (1598) (when one coparcener entered generally and made a lease for life of "all that his house," the entire house passed).

(n7)Footnote 50. *O'Bannon v. Roberts, 32 Ky. (2 Dana) 54 (1834)* (plaintiff entitled to accounting for his share of value of the occupancy of the land); *Graham v. Graham, 22 Ky. 561 (1828);* (court ordered an accounting of rents and profits between coparceners); *Tyson v. Fairclough, 47 Eng. Rep. 955 (1824)* (account of rents); *Drury v. Drury, 1 Chan. Rep. 49, 21 Eng. Rep. 504* (1630-31) (one of two coheirs ordered to answer to the other for a moiety of the profits); *Kline v. Nationsbank of Virginia, N.A., 886 F. Supp. 1285 (E.D. Va. 1995)* (court cites Va. Code Ann. § 8.01-31, which allows accounting by a coparcener receiving more than a just share); *Hogan v. Hogan, 855 S.W.2d 905 (Ark. 1993)* (court cites Arkansas statute establishing coparceners' and joint tenants' duty of accounting).

(n8)Footnote 51. *Graham v. Graham, 22 Ky. 561, 563 (1828)* (court refused to award compensation to an improving coparcener "so as to make his co-parceners his debtors").

(n9)Footnote 52. *Id.* (court stated that parcener's rent should be reduced by the amount he spent on improvements); *Denton v. Lazenby, 879 P.2d 607 (Kan. 1994)* (in a partition action, the court gave credit to a coparcener for the cost of improvements made to the partitioned property).

(n10)Footnote 53. *Hoffar v. Dement, 5 Gill 132, 137 (Md. 1847)* (court concluded that coparceners could not recover in separate actions); *Stevenson v. Cofferin, 20 N.H. 150, 152 (1849)* ("[T]he common law rigidly required [coparceners] to join in real actions for the recovery of their estate"); Coke on Littleton *164a, *180b; Abraham Freeman, Cotenancy and Partition §§ 329, 330 (2d ed. 1886).

(n11)Footnote 54. *The Lord Mountjoy's Case, 77 Eng. Rep. 52, 56 (K.B. 1589)* (the English judge agreed that one coparcener "might let her moiety, yielding the moiety of accustomable rent").

(n12)Footnote 55. Doe dem Rushworth v. Williamson, 6 L.T.O.S. 1000 (1845) (coparceners all must join in a demise).

(n13)Footnote 56. *Hoffar v. Dement, 5 Gill 132, 137 (Md. 1847)* (coparceners could not recover in separate actions on an implied agreement to rent); *Decharms v. Horwood, 10 Bing 526, 131 Eng. Rep. 999 (1834)* (one coparcener could not sue separately for his or her part of the rent due to all the coparceners).

(n14)Footnote 57. *Leigh v. Shepherd, 2 Brod. & B. 465, 129 Eng. Rep. 1046 (1821)* (one coparcener was allowed to sue to recover rent on behalf of fellow coparceners).

(n15)Footnote 58. *Boner v. Juner, 91 Eng. Rep. 1385 (N.P. 1698).*

(n16)Footnote 59. *Waring v. Slingluff, 63 Md. 53 (1885)* (omitting the name of one who was entitled to a share of the rent was fatal to the distress action).

(n17)Footnote 60. *See* Ch. 70 *infra* for discussion of waste.

(n18)Footnote 61. 2 William Blackstone, Commentaries *188. Coparceners were not included in the remedy of waste in the *Statute of Westminster II, 13 Edw. 1,* c. 22 (1285), because they could compel partition. 2 Coke Institutes *403.

(n19)Footnote 62. *See* cases cited in 78 Am. Jur. 2d *Waste* § 4, at 397 n.33; 93 C.J.S. *Waste* § 1, at 560, nn.11-13.

(n20)Footnote 63. Coke on Littleton *164a. Release was possible because of the unity of interest. 3 William Holdsworth, A History of English Law 126 (reprint 1973).

(n21)Footnote 64. Coke on Littleton *164a.

(n22)Footnote 65. Littleton, Tentures' 309; 2 William Blackstone, Commentaries *189.

(n23)Footnote 66. 2 William Blackstone, Commentaries *191.

(n24)Footnote 67. Abraham Freeman, Cotenancy and Partition § 84 (2d ed. 1886).

(n25)Footnote 68. *Flynn v. Herye, 4 Mo. App. 360 (1877).* In this case, before partition, a lot had been sold to defendant, who built on the lot. Plaintiff later bought three of the seven coparceners' interests, also before partition. After partition, plaintiff discovered that defendant's building encroached on one of his lots. The court held that plaintiff could not have his deed reformed because the lots assigned to plaintiff should have taken into account the defendant's building. The court held, "One who purchases the right, title, and interest of copartners in land before partition, takes an inchoate title only to the particular lot which he afterwards acquires by partition, and takes subject to equities existing at the time between the heirs whose interest he has purchased and third parties." *Id. at 365-66.*

(n26)Footnote 69. *Wall v. Wayland, 59 Ky. (2 Metc.) 155 (1859).*

(n27)Footnote 70. *Id. Bird v. Bird, 40 Me. 398, 403 (1855).*

(n28)Footnote 71. Littleton, Tenures § 264.

(n29)Footnote 72. 2 William Cruise, A Digest of the Laws of England Respecting Real Property *Coparcenary* § 10 (1834).

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CHAPTER 35 TENANCY IN COPARCENARY

4-35 Thompson on Real Property, Thomas Editions § 35.07

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§ 35.07 Partition of Tenancy in Coparcenary.n73

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A partition of a tenancy in coparcenary can be either voluntary or compulsory. A partition is voluntary when the coparceners divide the land by a mutual agreement. It is compulsory when suit is brought to have a court determine the division of land. At early common law, one or more coparceners could sue on a writ of partition to compel partition. Modern partition statutes now provide for the division of jointly owned land. The partition statutes usually authorize a partition by sale when a partition in kind would cause prejudice to any of the cotenants. n74 A nominal preference for partition in kind is proclaimed by the courts, but as a practical matter partition by sale is the usual result, especially when small tracts of land with a single house are the object of partition. n75

§ 35.07(a) Voluntary Partition.

In Littleton's day voluntary partition of an estate held in coparcenary could be effected by four different methods. The first method was by the agreement of the coparceners among themselves assigning to each a separate part of the land. n76 The second method was by the coparceners choosing some of their friends to divide the lands into the appropriate number of parts. Each coparcener would then select one of the divided parts with the eldest having first choice. n77 The third method of voluntary partition was by allowing the eldest sister to divide the land into equal parts. In this case when each coparcener selected one of the parts, the eldest would make her selection only after all the others had done so. n78 The rule that the eldest divided but chose last was based on the maxim *cujus est divisio, alterius est electio* and was to avoid partiality. n79 The fourth and final voluntary method of partition was by lot. Here a description of each divided part of the land was wrapped in a little ball of wax. The balls of wax were then put into a hat. Each coparcener, beginning with the eldest and continuing in chronological order, would draw a ball out of the hat. n80 In the words of Littleton:

> [I]f there be four parceners, and after partition of the lands be made, every part of the land by itself is written in a little scrowle and is covered all in waxe in the manner of a little ball, so as none may see the scrowle, and then the four balls of waxe are put in a hat to be kept in the hands of an indifferent man, and then the eldest daughter shall first put her hand into the hat, and take a ball of waxe with the scrowle within the same ball for her part, and then the second sister shall put her hand into the hat and take

> another, the 3 sister the 3 ball, and the 4 sister the 4 ball & c. and in this case every one of them ought to stand their chance and allotment. n81

Voluntary partitions could allow fewer than all the coparceners to have partition. One of three coparceners could have partition so that she held her part separate from the two other sisters who continued to hold the remaining land together in coparcenary until they decided to partition. n82 Under a compulsory partition all coparceners were forced to participate. n83

At early common law a voluntary partition could be made by parol or by deed. n84 After the Statute of Frauds, parol partition was no longer available. n85 An estate in coparcenary might involve an indivisible inheritance such as a castle. n86 When this happened, the eldest took the indivisible inheritance but accounted to the other sisters for its value when the remainder of the inheritance was divided. Or the coparceners might validly agree to take turns in occupying or enjoying an indivisible inheritance; such arrangements were known as "turn about" partitions. n87

When equal division cannot be made in voluntary partition by modern cotenants, payments by one or more cotenants to the other cotenants may be made to equalize the division. Such equalizing payments are called owelty.

§ 35.07(b) Compulsory Partition.

Coparceners or parceners, as Littleton said, were so named because they could be compelled to partition by one or more of them suing on a writ of partition. n88 The writ was called *breve de partitione facienda*, "a writ whereby the coparceners are compelled to make partition." n89 When a coparcener sued on a writ of partition and judgment was given, the sheriff and a jury went on the land and made a division of the land. The sheriff would assign the parts of the land to the coparceners as he saw fit. n90

Only coparceners could take advantage of the common law writ of partition. The writ would lie against a coparcener or someone succeeding to a coparcener's interest, such as a deceased sister's husband claiming his curtesy interest. In this example, the coparceners could compel partition against the husband, but if the husband wanted partition and the coparceners did not, the husband could not compel partition. n91

Originally only coparceners had the right to compel partition; joint tenants and tenants in common did not. This rule was based on the reasoning that joint tenants and tenants in common were created by purchase, which indicated that they came into the cotenancy relationship voluntarily, while coparceners arose involuntarily by the law of descent and might need to end an unfortunate co-ownership with people with whom they could not agree. n92 In a similar unfortunate co-ownership, joint tenants and tenants in common had only the remedies of voluntary partition, buying out the co-owner, or selling their shares. The inconvenience caused by these limitations on remedies eventually resulted in the statute, 31 Henry VIII, ca. 1, giving the other cotenants the right to compel partition in estates of inheritance, n93 and in the next year with the statute 32 Henry VIII, ca. 32, conferring the same right on those holding estates not of inheritance. n94 The "tedious, chargeable [expensive], and oftentimes ineffectual" n95 proceedings under those statutes were remedied for seven years by the statute 8 & 9 William III, ca. 31, and made perpetual by statute 3 & 4 Anne, ca. 18, § 2. n96 In the meantime, a superior equitable partition action developed in the Chancery Court and quickly replaced the common law procedure. n97

§ 35.07(c) Voidable Partitions.

Some voluntary partitions resulting in unequal parcels were voidable. An agreement between two coparceners who were of age, unmarried, and of sane memory to divide land held in fee simple into unequal parcels with one parcel being more valuable than the other, could not be defeated. n98 But if the partition were of entailed lands or if any of the coparceners were of unreliable memory, the agreement was good as between the coparceners, but the issue of the coparcener receiving the lesser part could challenge the partition. n99 Also, if land were partitioned so that one

coparcener was allotted land in fee and the other land in tail, the issue of the coparcener allotted the fee, who later sold it and then died, could enter and occupy the land in tail held by the other coparcener. n100

An unequal partition made by the husband of a coparcener would bind the husband, but could be challenged after his death by the coparcener having the lesser part. n101 Similarly, a partition resulting in an infant receiving the lesser part could be defeated either after the infant came of age or while still an infant. However, the unequal partition could be ratified by the younger coparcener when she came of age. n102

§ 35.07(d) "Hotchpot."

"Hotchpot" is a term that was associated with the partition of lands held by coparceners in fee simple. A man owning lands in fee simple might give some of his land to his eldest daughter in "frankmarriage" n103 and later die, leaving the rest of his fee simple land, worth more than the frankmarriage portion, to descend in coparcenary. The eldest sister, who had received land in frankmarriage, could not share in the coparcenary land, unless she agreed to include the frankmarriage land in the general partition of the land. This inclusion was referred to as bringing those lands into hotchpot. n104 Littleton explained hotchpot as follows: "[T]his word (hotchpot) is in English a pudding; for in this pudding is not commonly put one thing alone, but one thing with others together." n105 The question of whether to bring her land into hotchpot was left up to the recipient of the frankmarriage land. If she chose not to bring it into hotchpot, it was assumed she was sufficiently provided for by the advancement. n106 The law of hotchpot did not apply to lands in fee tail. n107

FOOTNOTES:

(n1)Footnote 73. *See generally* Abraham Freeman, Cotenancy and Partition §§ 393-419 (2d ed. 1886).

(n2)Footnote 74. *See, e.g.,* Idaho Code § 6-501.

(n3)Footnote 75. Russell Niles & William Walsh, *"Concurrent Estates*" § 6.26, at 113-114, *in* 2 American Law of Property (1952).

(n4)Footnote 76. Littleton, Tenures § 243; Coke on Littleton *166a.

(n5)Footnote 77. Littleton, Tenures § 244; Coke on Littleton *166a; 2 William Blackstone, Commentaries *189.

(n6)Footnote 78. Littleton, Tenures § 245; Coke on Littleton *166a.

(n7)Footnote 79. Coke on Littleton *166b.

(n8)Footnote 80. Littleton, Tenures § 246; Coke on Littleton *167a.

(n9)Footnote 81. Littleton, Tenures § 246.

(n10)Footnote 82. *Id.* § 276.

(n11)Footnote 83. *See* § 35.07(b) *infra*.

(n12)Footnote 84. Littleton, Tenures § 250; Coke on Littleton *169a.

(n13)Footnote 85. 2 William Blackstone, Commentaries *324.

(n14)Footnote 86. Or a "chief messuage [that was] the head of an earldom ... or ... a barony." 2 Bracton on the Laws and Customs of England 222 (Samuel Edmund Thorne ed. 1968).

(n15)Footnote 87. Coke gives as an example a *"piscarie incertaine."* Two coparceners might agree for the first to

take fish for the first half of the year and the second to take fish the second half of the year or for the first to have the first fish and the second to have the second fish, etc. Coke on Littleton *165a, *167b.

(n16)Footnote 88. Littleton, Tenures § 241; *Beach v. Beach, 74 P.3d 1 (Colo. 2003)* (coparceners may compel partition).

(n17)Footnote 89. Coke on Littleton *164b. According to Coke, the reference in Littleton § 241 to *breve de participatione* is "false printed"; "participatione" should be "partitione."

(n18)Footnote 90. Littleton, Tenures §§ 247-249.

(n19)Footnote 91. *Id.* § 264.

(n20)Footnote 92. Abraham Freeman, Cotenancy and Partition § 421 (2d ed. 1886).

(n21)Footnote 93. The statute provided that joint tenants and tenants in common of estates of inheritance could be compelled to make partition in "like manner and form as coparceners by the common laws of this realm have been and are compelled to do, and the same writ to be pursued at the common law." *31 Hen. 8*, c. 1 (1539).

(n22)Footnote 94. *32 Hen. 8*, c. 32 (1540).

(n23)Footnote 95. Preamble to 8 and 9 Will. 3, c. 31 (1696-97).

(n24)Footnote 96. 3 & 4 Anne, c. 18, § 2 (1704); Abraham Freeman, Cotenancy and Partition § 421 (2d ed. 1886).

(n25)Footnote 97. Restatement of Property, Ch. 11, Topic 1, Introductory note, at 654 (1936).

(n26)Footnote 98. Littleton, Tenures § 255; Coke on Littleton *166a, *170a.

(n27)Footnote 99. Coke on Littleton *166a.

(n28)Footnote 100. Littleton, Tenures § 260.

(n29)Footnote 101. Littleton, Tenures § 256; Coke on Littleton *171a.

(n30)Footnote 102. Littleton, Tenures § 258; Coke on Littleton *171b.

(n31)Footnote 103. Frankmarriage is "a species of estates-tail, freely given by a relation for advancement of his kinswoman in marriage." 2 William Blackstone, Commentaries *190.

(n32)Footnote 104. *Id.*

(n33)Footnote 105. Littleton, Tenures § 267.

(n34)Footnote 106. The term "hotchpot" is used in modern statutes providing for advancements to descendants of intestate decedents to be brought into hotchpot. *See* Miss. Code Ann. § 91-1-17; Va. Code Ann. § 64.1-17; W. Va. Code § 42-4-1. W. Va. Code § 42-4-1, repealed by Acts 1992, C75.

(n35)Footnote 107. Littleton, Tenures § 274; 2 William Blackstone, Commentaries *191.

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CHAPTER 35 TENANCY IN COPARCENARY

4-35 Thompson on Real Property, Thomas Editions § 35.08

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§ 35.08 Status of Tenancy in Coparcenary in the United States Today.

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§ 35.08(a) In General.

As indicated previously, n108 the tenancy in coparcenary in the United States n109 has for the most part been subsumed by the tenancy in common. However, coparcenary terminology is still found occasionally in some American statutes n110 and cases. n111 When the terminology is used, a court most frequently cites a partition statute or some other statute that lists coparceners as a form of joint ownership to which the statute applies. n112 The terminology is used as the court determines whether the statute applies in a particular situation. In partition actions n113 and other actions involving cotenants, n114 the parties are often called "parceners" or "coparceners."

COMPUTER-ASSISTED RESEARCH:

LEXIS: coparcen! or parcen!

NOTE: Relevant cases predate the earliest cases in database.

§ 35.08(b) Tenancy in Coparcenary in Statutes.

Although the modern estate in coparcenary is hardly distinguishable from a tenancy in common, the terminology is still found in statutes in at least thirty states and the District of Columbia. n115 The only modern distinction between coparceners and tenants in common is that coparceners are cotenants of property passing to them by intestate succession. A few descent and distribution statutes provide that intestate property passes in parcenary. n116 Even in those states whose descent and distribution statutes do not specify that intestate property pass in parcenary, the statutory reference typically will be to "joint tenants, tenants in common, or coparceners" n117 in a provision applying to concurrently held property.

The types of statutes or provisions in statutes containing references to parceners, coparceners, or parcenary, in descending order of frequency, may be summarized as follows:

1. Statutes providing for the partition and the sale of land.

2. Statutes providing for an action in the nature of an accounting among cotenants. These include those relating to use and occupation, rents and profits, contribution for repairs and improvements, and receiving more than a just proportion.

3. Statutes providing for liability of cotenants for waste.

4. Statutes of descent and distribution providing that intestate property passes in parcenary and providing for advancements to be brought into hotchpot.

5. Statutes providing for regaining possession of land, including ejectment actions, forcible entry and detainer actions, and actions to quiet title.

6. Statutes providing for the leasing or partition of jointly held mineral lands.

7. Statutes relating to taxes paid on jointly held land.

8. Statutes providing for a statement of ownership of property in an indictment when the property is jointly owned.

9. Statutes including coparceners in the definition of cotenant or tenant.

10. Statutes providing for coparceners creating a joint tenancy by voluntary partition to themselves.

11. Statutes providing for action for trespass to jointly held land.

12. Statutes abolishing tenancy in coparcenary.

13. Miscellaneous statutes and provisions, including provisions for compensation and costs in suits by cotenants, a provision relating to the sale of jointly held land pending an action for damages from a milldam, a provision for levying execution on a debtor-cotenant's interest in real estate, and provision for the clerk's office to index deeds made by coparceners.

State statutory references to coparcenary are summarized as follows:

Alabama. Statutes give a coparcener the right to commence an action of forcible entry and detainer inuring to the benefit of all coparceners, n118 and the right to commence an action against a coparcener in the nature of an accounting for receiving more than a lawful proportion. n119 When a coparcener devises a freehold estate with a contingent interest as a remainder, any interested party may have partition. n120

Arkansas. Statutes give coparceners the right to partition, n121 provide for sale and division of proceeds of lands when some coparceners are infants or insane, n122 give the right to an accounting n123 and the right to treble damages for damage caused by trespass. n124 Mineral land statutes give coparceners the right to lease and operate the lands, n125 and to partition an oil and gas lease interest, if it is unleased and non-producing. n126 Taxation statutes provide that the payment of taxes by a coparcener when a fellow coparcener has not paid shall be credited to the paying coparcener upon partition of the land n127 and give coparceners the right of redemption of realty sold for taxes. n128

Colorado. The mines and minerals statutes include coparcener in the definition of "tenant" n129 and give a coparcener the right to lease an interest in a mine. n130

Connecticut. Statutes give coparceners the right to partition n131 and give any interested party that same right when a

coparcener has devised a freehold interest in property with a contingent interest. n132 Coparceners are given the right to an action for an accounting. n133 A criminal procedure statute provides that when a statement of ownership is necessary in an indictment and the property is owned by coparceners, it is sufficient to name one of them and to describe a coparcener as such, if it is necessary to mention a coparcener. n134

Delaware. Partition statutes and those providing for partition proceedings list coparceners among the cotenants having the right to partition. n135 Coparceners are also given the right to an action against their fellow coparceners in the nature of an accounting for use and occupation n136 and for waste. n137 The decedents' estates and fiduciary relation statutes provide that after-born children shall be allotted intestate real estate as parceners, not in severalty, n138 and that a court may order a minor coparcener's guardian to sell the real estate for the minor's benefit. n139 The criminal procedure statute provides that when it is necessary in an indictment to state the ownership of property that is held in coparcenary, it is sufficient to name one person only and to describe the property as belonging to that person and others. n140

District of Columbia. This jurisdiction has abolished coparcenary estates. n141

Florida. Statutes give coparceners right to partition. n142

Hawaii. Statute preserves the rights of coparceners to partition registered land. n143 Criminal procedure statute provides that when it is necessary to refer to the ownership of property held in coparcenary, it is sufficient to name one of the persons as the owner with others and to describe any partners as coparceners. n144 A statute setting out the legal incidents of the leasehold time share interests provides that nothing therein shall be construed to relieve the owners of a leasehold time share of the rights of partition between coparceners and other cotenants. n145

Idaho. The partition statute gives coparceners the right to a partition action or for sale of the property if a partition would cause prejudice. n146

Illinois. The oil and gas statutes give majority holders of joint interests in lands the right to drill to protect the land, n147 and provide that before the court order authorizing the right to drill is issued, the court shall find that plaintiffs hold lands jointly, with coparceners listed as a way the lands could be so held. n148

Indiana. Coparceners are authorized to bring an action in the nature of an accounting for a fellow coparcener "receiving more than his just proportion." n149

Kansas. Statute provides that a joint tenancy may be created by coparceners in voluntary partition to themselves. n150 Statutes also provide for contribution by a coparcener when a managing coparcener makes repairs and improvements, if made with the knowledge of and without objection from the other coparcener n151 and for an action in the nature of an accounting against a coparcener for receiving more than a just proportion of the rents and profits. n152

Kentucky. Coparceners committing waste are liable for damages. n153 Statutes also provide that when a coparcener prosecutes an action for the benefit of the other coparceners, the court shall allow compensation, n154 and in actions between parceners, the court shall exercise judicial discretion in regard to costs. n155

Maryland. The statute provides for partition by parceners or for sale and division of the proceeds. n156 The criminal procedure statute provides that when it is necessary to refer to property held by parceners, it is sufficient to name one person as owner of the property with others and to describe partners as coparceners. n157

Michigan. Oil, gas and minerals statutes give majority coparceners the right to develop oil and gas n158 and other mineral rights n159 and empower the court to grant decrees authorizing the development of oil and gas n160 and other mineral rights. n161

Mississippi. Statute gives coparceners the right to bring an ejectment action against another coparcener if an ouster is proved. n162 Partition statutes give coparceners the right to partition by agreement and arbitration n163 and by decree of the Chancery Court. n164 Statutes also provide that liens created by a coparcener remain on that coparcener's share after partition, n165 title paramount to the coparceners' title is not affected by partition, n166 and certain situations entitle a coparcener to a new partition. n167 The descent and distribution statute provides for parceners to bring advancements into hotchpot. n168

Missouri. Statutes give coparceners the right to partition n169 and provide that parceners committing waste are liable to their coparceners for damages. n170

Nevada. Mines and minerals statutes provide for the partition of mining claims by coparceners, n171 who may unite for purposes of division. n172 Majority coparceners who have formed a corporation or association for the purpose of developing a mining claim are given the right to bring an action against non-members of the corporation or association for their proportion of the money expended in developing the claim. n173 The minority coparceners' proportion of money expended shall be that amount that bears the same proportion to the money expended as the minority coparceners' interest bears to the whole mining claim. n174 Any number of coparceners may be joined as defendants in an action for money expended, but each is entitled to plead separately. n175 The summons in an action for money expended developing a mining claim shall specify the amount due from each coparcener. n176 The money expended shall be a lien against the minority coparcener's share. n177

New Jersey. The partition statutes include coparcener in the definition of cotenant. n178 In an action of waste between parceners, if the defendant elects partition after a judgment, the part assigned to the defendant shall include the wasted part. n179 The Validating Acts provide that partition of land is not invalid because of a supposed lack of the court's power or because of a defect in the form of application, if the application is between coparceners or heirs of deceased coparceners. n180

New Mexico. Statutes give coparceners the right to partition, n181 give more than ten coparceners the right to sue as a committee in a quiet title action, n182 and provide for the joinder of two or more coparceners as plaintiffs. n183

Ohio. The descent and distribution statute provides that, except for property subject to a monetary charge of a surviving spouse, intestate property passes in parcenary. n184 Coparceners are given the right to compel partition, n185 the right to an action in the nature of accounting for rents and profits, and the right to bring an action for waste. n186 Taxation statutes provide that the proportion of tax liability paid by one coparcener when the other coparceners have not paid shall be deemed paid on that coparcener's share. n187 A coparcener may redeem a portion of the land that has been sold for delinquent taxes even if other coparceners do not join in the redemption, n188 and those purchasing forfeited lands may have partition in the manner of coparceners. n189 If an abandoning parent is prohibited from inheriting from a deceased child, the property of the deceased child shall be distributed or pass in parcenary as if the parent had predeceased the deceased child. n190 Banks and savings and loan associations are authorized to bring partition proceedings for the interests of coparceners in any tangible or intangible personal property. n191

Oklahoma. Statutes provide for actions in the nature of accounting if coparceners may have contribution for repairs and improvements made with the knowledge of other coparceners and without their objection n192 and may maintain an action against a coparcener who receives more than a just proportion of rents and profits. n193 Also, coparceners may create a joint tenancy by voluntary partition. n194

Pennsylvania. Taxation statutes provide for tax claims by municipalities against property owned by coparceners. n195 A coparcener has the right to pay a proportionate part of taxes due n196 at any time before the land is sold for failure to pay taxes, n197 and the coparcener's interest is not to be sold for the failure of a co-owner to pay a proper share of taxes. n198

Rhode Island. Coparceners are given the right to an accounting n199 and one coparcener may bring an action for waste n200 in the name of all coparceners. Coparceners shall forfeit double the amount of waste done on an estate held in coparcenary. n201 Coparceners may be compelled to partition, whether the estate be one of inheritance, for life, or for years. n202 In an action for possession or for mesne profits, all or less than all may sue or each may sue for a share. n203 A waters and navigation statute provides that when a plaintiff coparcener sells a part of the land, alleged to be injured, to one of the cotenants after a suit for damages from a milldam has commenced, the suit shall go forward as if the sale had not been made. n204

Texas. The descent and distribution statute provides that intestate property passes in parcenary. n205

Utah. The partition statute provides for partition of mining claims by coparceners, n206 who may unite for the purpose of dividing the claim. n207

Vermont. Coparceners have the right to partition n208 and to an action for an accounting, which may be tried to a jury. n209 Execution may be levied on a debtor coparcener's undivided interest. n210

Virginia. Coparceners may have an accounting in equity n211 and may compel partition n212 or have a sale in lieu of partition. n213 Provision is also made for partition of land held under a homestead exemption by a coparcener. n214 In any partition suit involving unrepresented shares, attorney's fees may be allowed out of the unrepresented parceners' shares. n215 Coparceners bringing an ejectment action must prove ouster. n216 Coparceners are liable to their cotenants in damages for committing waste. n217 Voluntary partition by coparceners of estates of inheritance must be by deed, n218 which shall be indexed in the clerk's office under the names of the grantors and grantees, n219 and a recording tax of fifty cents per deed of partition shall be collected. n220 The descent and distribution statute provides that intestate property passes in parcenary n221 and that advancements be brought into hotchpot. n222 The taxation statutes provide for the apportionment of taxes upon partition of property held by coparceners. n223 In a statute validating certain tax deeds under a repealed statute, a savings clause protects the title of coparceners when the grantee in a deed is a coparcener. n224 The records and indexing statute provides that a deed made by coparceners shall be indexed in the names of the grantors and the grantees and the name of the former record title owner listed in the first clause of the instrument. n225

West Virginia. Coparceners are entitled to compel partition n226 or have an allotment or sale of the entire property if partition is not convenient, taking care that a deceased coparcener's proceeds are applied to creditors' claims. n227 Coparceners are liable in damages to their cotenants for waste n228 and may maintain an action of accounting for a cotenant receiving more than a just share. n229 In an action of ejectment, a coparcener must prove actual ouster. n230 The descent and distribution statute provides for intestate property passing in parcenary n231 and for advancements being brought into hotchpot. n232 Under the taxation statutes, the statute providing for assessment states that "any ... coparcener ... , in the absence of satisfactory proof of a fiduciary relationship, shall be entitled to acquire the interest of ... his co-owners ... , without being required to hold the same under any constructive trust." n233 The statutes providing for the sale of land for taxes n234 and for a school fund n235 provide that all co-owners, *except coparceners*, shall be entitled to purchase at the sale for his own account.

Wyoming. Coparceners may be compelled to partition n236 and to bring actions against their cotenants in the nature of an accounting for their shares of rents and profits and for waste. n237 When a person dies intestate, the estate shall pass and be distributed in parcenary. n238

COMPUTER-ASSISTED RESEARCH:

In LEXIS state codes may be searched for provisions containing the terminology, "coparcenary," "coparcener," "parcenary" or "parcener."

LEXIS: coparcen! or parcen!

FOOTNOTES:
(n1)Footnote 108. *See* authorities cited in note 8, *supra*.

(n2)Footnote 109. The tenancy was abolished in England in 1925.

(n3)Footnote 110. *See* statutes summarized in § 35.08(b) *infra*.

(n4)Footnote 111. *Winters Nat'l Bank & Trust Co. v. Riffe, 206 N.E.2d 212 (1965)* (estate in coparcenary defined). Other cases: 9A Words & Phrases 327-28 (1960); 31 Words & Phrases 82 (1957); 20 Am. Jur. 2d *Cotenancy and Joint Ownership* § 1, at 92 n.5; 86 C.J.S. *Tenancy in Common* § 3, at 362 nn.12-18.

(n5)Footnote 112. *See, e.g., Lerman v. Levine, 541 A.2d 523 (Conn. 1988)* (court cites Conn. Gen. Stat. Ann. § 52-404 providing for collection by cotenant for use and occupation payments); *Garrison v. Smith, 561 N.E.2d 1041 (Ohio App. 1988)* (court cites the descent and distribution statute as it determines whether a child born out of wedlock may share in intestate estate); *Whitby v. Overton, 413 S.E.2d 42 (Va. 1992)* (court cites Va. Code Ann. § 8.01-81 as it determines that a life tenant did not have the right to compel partition against remaindermen). *In re Sprouse, 178 B.R. 99 (W.D. Va. 1995)* (court cities Va. Code of 1919 providing that coparceners could be compelled to partition); *Morris v. Solesbee, 892 S.W.2d 281 (Ark. App. 1995)* (includes citation to Arkansas statute giving persons holding land in coparcenary right to partition); *Bryan v. Looker, 640 N.E.2d 590 (Ohio App. 1994)* (court mentions partition rights between coparceners); *McGill v. Roush, 621 N.E.2d 865 (Ohio App. 1993)* (court cities Ohio Rev. Code § 5307.06, which allows the trial court to award owelty to a coparcener); *Modic v. Modic, 633 N.E.2d 1151 (Ohio App. 1993)* (court cites Ohio Rev. Code. § 5307.24, which provides for recovery of rents and profits by one coparcener from another, and provides for an action for waste against another coparcener); *Sword v. Sword, 620 N.E.2d 199 (Ohio App. 1993)* (partition action in which court cites Ohio Rev. Code § 5307.01, providing for right of partition by a coparcener); *Hunter v. Christian, 446 S.E.2d 177 (W. Va. 1994)* (wrongful death action in which court cites W. Va. Code § 42-1-1 providing that an intestate's title to real estate may descend and pass in parcenary to the intestate's kindred); *Signorelli v. Signorelli, 434 S.E.2d 382 (W. Va. 1993)* (court cites W. Va. Code § 55-8-13, providing for an accounting between coparceners); *Webber v. Webber, 962 S.W. 2d 345 (Ark. 1998)* (refers to Ark. Stat. Ann. § 18-60-401, the partition statute); *Ex Parte State Mut. Ins. Co., 715 So. 2d 207 (Ala. 1997)* (refers to a bill delivered in the names of several people and their "parceners"); *Gallant v. Cavallaro, 717 A. 2d 283 (Conn. App. 1998)* (refers to Conn. Gen. Stat. Ann. § 52-495 giving right to partition); *Butler v. Hayes, 487 S.E.2d 229 (Va. 1997)* (discusses whether to give credit for "parcener's" improvement to property).

(n6)Footnote 113. *See, e.g., Wolfrey v. Pence, 297 S.E.2d 643 (1982)* (partition suit in which court referred to parties as coparceners). *Peters v. Robinson, 636 A.2d 926 (Del. 1994)* (partition action between parties referred to as parceners).

(n7)Footnote 114. *Dixon v. Feaster, 448 So. 2d 554 (Fla. Dist. Ct. App. 1984)* (action seeking a way of necessity in which court stated that no express easement was conveyed by coparceners); *Pocahontas Land Corp. v. Evans, 332 S.E.2d 604 (W. Va. 1985)* (court referred to defendants as coparceners in an action to set aside deeds as clouds on title).

(n8)Footnote 115. Occasionally state court cases refer to coparceners included in state code statutory language. *See, e.g., Custom Modular Industries, Inc. v. Mount, 2003 Conn. Super. LEXIS 766* (Conn. Super. Ct. Mar. 17, 2003); *Bove v. Bove, 2002 Conn. Super. LEXIS 621* (Conn. Super. Ct. Feb. 11, 2002); *Lochhaas v. Burnett, 77 S.W.2d 12 (Mo. App. 2002); Romansik v. Boccia, 2002 Ohio App. LEXIS 3141* (Ohio Ct. App., Trumbull County June 21, 2002).

(n9)Footnote 116. *See, e.g.,* Ohio Rev. Code Ann. § 2105.06.

(n10)Footnote 117. *See, e.g.,* Ala. Code § 6-6-312.

(n11)Footnote 118. Ala. Code § 6-6-312.

(n12)Footnote 119. *Id.* § 6-7-40.

(n13)Footnote 120. *Id.* § 19-3-170.

(n14)Footnote 121. Ark. Stat. Ann. § 18-60-401.

(n15)Footnote 122. *Id.* § 18-60-425.

(n16)Footnote 123. *Id.* § 18-60-101.

(n17)Footnote 124. *Id.* § 18-60-102(b).

(n18)Footnote 125. *Id.* § 15-56-301.

(n19)Footnote 126. *Id.* § 15-73-401.

(n20)Footnote 127. *Id.* § 26-35-303.

(n21)Footnote 128. *Id.* § 26-37-307.

(n22)Footnote 129. Colo. Rev. Stat. § 34-44-102.

(n23)Footnote 130. *Id.* § 34-44-110.

(n24)Footnote 131. Conn. Gen. Stat. Ann. § 52-495.

(n25)Footnote 132. *Id.* § 52-496.

(n26)Footnote 133. *Id.* § 52-404.

(n27)Footnote 134. *Id.* § 54-59.

(n28)Footnote 135. Del. Code Ann. tit. 25, §§ 721, 728, 730, 732, 741, 746, 747; Del. Code Ann. R. Ch. Ct. 183.

(n29)Footnote 136. *Id.* § 702.

(n30)Footnote 137. *Id.* § 904.

(n31)Footnote 138. *Id.* tit. 12, § 303.

(n32)Footnote 139. *Id.* § 3951.

(n33)Footnote 140. *Id.* tit. 11, § 3104.

(n34)Footnote 141. D.C. Code Ann. § 45-217.

(n35)Footnote 142. Fla. Stat. Ann. §§ 64.031, 64.041.

(n36)Footnote 143. Haw. Rev. Stat. § 501-81.

(n37)Footnote 144. *Id.* § 806-35.

(n38)Footnote 145. Haw. Rev. Stat. § 501-246.

(n39)Footnote 146. Idaho Code § 6-501.

(n40)Footnote 147. 765 Ill. Comp. Stat 520/7.

(n41)Footnote 148. *Id.* para. 4907, § 7.

(n42)Footnote 149. Ind. Code Ann. §§ 32.15-5-1, 32-30-9-1.

(n43)Footnote 150. Kan. Stat. Ann. § 58-501(c).

(n44)Footnote 151. *Id.* § 58-2521.

(n45)Footnote 152. *Id.* § 58-2522.

(n46)Footnote 153. Ky. Rev. Stat. Ann. § 381.390.

(n47)Footnote 154. *Id.* § 412.070.

(n48)Footnote 155. *Id.* § 453.040.

(n49)Footnote 156. Md. Real Prop. Code Ann. § 14-107.

(n50)Footnote 157. Md. Ann. Code art. 27, § 605.

(n51)Footnote 158. Mich. Comp. Laws Ann. § 319.101.

(n52)Footnote 159. *Id.* § 324.63302.

(n53)Footnote 160. *Id.* § 319.108.

(n54)Footnote 161. *Id.* § 324.63304.

(n55)Footnote 162. Miss. Code Ann. § 11-19-85.

(n56)Footnote 163. *Id.* § 11-21-1.

(n57)Footnote 164. *Id.* § 11-21-3.

(n58)Footnote 165. *Id.* § 11-21-39.

(n59)Footnote 166. *Id.* § 11-21-41.

(n60)Footnote 167. *Id.* § 11-21-45.

(n61)Footnote 168. *Id.* § 91-1-17.

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(n63)Footnote 170. *Id.* § 537.460.

(n64)Footnote 171. Nev. Rev. Stat. § 39.500.

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(n67)Footnote 174. *Id.* § 520.020.

(n68)Footnote 175. *Id.* § 520.030(2).

(n69)Footnote 176. *Id.* § 520.040(2).

(n70)Footnote 177. *Id.* § 520.060.

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(n72)Footnote 179. *Id.* § 2A:65-4.

(n73)Footnote 180. N.J. Stat. Ann. § 24-1.1.

(n74)Footnote 181. N.M. Stat. Ann. § 42-5-1.

(n75)Footnote 182. *Id.* § 42-6-3.

(n76)Footnote 183. *Id.* § 42-6-6.

(n77)Footnote 184. Ohio Rev. Code Ann. §§ 2105.06, 2105.061.

(n78)Footnote 185. *Id.* §§ 5307.01, 5307.03.

(n79)Footnote 186. *Id.* § 5307.21.

(n80)Footnote 187. *Id.* § 323.46.

(n81)Footnote 188. *Id.* § 5721.26.

(n82)Footnote 189. *Id.* § 5723.15.

(n83)Footnote 190. *Id*. § 2106.10.

(n84)Footnote 191. *Id*. § 1109.73.

(n85)Footnote 192. Okla. Stat. Ann. tit. 41, § 20.

(n86)Footnote 193. *Id.* tit. 41, § 21.

(n87)Footnote 194. *Id.* tit. 60, § 74.

(n88)Footnote 195. Pa. Stat. Ann. tit. 53, § 7109.

(n89)Footnote 196. *Id.* tit. 72, § 5511.12.

(n90)Footnote 197. *Id*. tit. 72, § 5969.

(n91)Footnote 198. *Id.* tit. 72, § 5968.

(n92)Footnote 199. R.I. Gen. Laws § 10-2-1.

(n93)Footnote 200. *Id.* § 34-14-3.

(n94)Footnote 201. *Id.* § 34-14-2.

(n95)Footnote 202. *Id.* §§ 34-15-1, 34-15-2, and 34-15-3.

(n96)Footnote 203. *Id.* § 34-20-3.

(n97)Footnote 204. *Id.* § 46-18-14.

(n98)Footnote 205. Texas Prob. Code Ann. § 38 (Vernon).

(n99)Footnote 206. Utah Code Ann. § 78-39-12.

(n100)Footnote 207. *Id.* § 78-39-13.

(n101)Footnote 208. Vt. Stat. Ann. tit. 12, § 5161.

(n102)Footnote 209. *Id.* tit. 12, §§ 4251 and 4257.

(n103)Footnote 210. *Id.* tit. 12, § 2785.

(n104)Footnote 211. Va. Code Ann. § 8.01-31.

(n105)Footnote 212. *Id.* § 8.01-81.

(n106)Footnote 213. *Id.* § 8.01-83.

(n107)Footnote 214. *Id.* § 34-8.

(n108)Footnote 215. *Id.* § 8.01-92.

(n109)Footnote 216. *Id.* § 8.01-141.

(n110)Footnote 217. *Id.* § 55-212.

(n111)Footnote 218. *Id.* § 55-2.

(n112)Footnote 219. *Id.* § 17-79.

(n113)Footnote 220. *Id.* § 58.1-806.

(n114)Footnote 221. *Id.* § 64.1-1.

(n115)Footnote 222. *Id.* § 64.1-17.

(n116)Footnote 223. *Id.* § 58.1-3225.

(n117)Footnote 224. *Id.* § 58.1-3960.

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(n119)Footnote 226. W. Va. Code § 37-4-1.

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(n122)Footnote 229. *Id.* § 55-8-13.

(n123)Footnote 230. *Id.* § 55-4-15.

(n124)Footnote 231. *Id.* § 42-1-1.

(n125)Footnote 232. *Id.* § 42-4-1. W. Va. Code § 42-4-1, repealed by Acts 1992, C75.

(n126)Footnote 233. *Id.* § 11-4-9.

(n127)Footnote 234. *Id.* §§ 11A-3-6 and 11A-3-49.

(n128)Footnote 235. *Id.* § 11A-4-26.

(n129)Footnote 236. Wyo. Stat. §§ 1-32-101 and 1-32-103.

(n130)Footnote 237. *Id.* § 1-32-119.

(n131)Footnote 238. *Id.* § 2-4-101.

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CHAPTER 35 TENANCY IN COPARCENARY

4-35 Thompson on Real Property, Thomas Editions § 35.09

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Yiannopoulos, A. N. "The Legal Servitude of Passage." *Tul. L. Rev.* Vol. 71 (1996) 1 (the term "coparceners" is used throughout to mean co-workers).

Annotations

Annotation, *Accountability of Cotenants for Rents and Profits or Use and Occupation, 51 A.L.R.2d 388.*

Annotation, *Adverse Possession Between Cotenants, 82 A.L.R.2d 5.*

Annotation, *Adverse Possession Between Cotenants Who Are Unaware of Cotenancy, 27 A.L.R.4th 420.*

Annotation, *Burden of Proof in Partition Suits as Regards Alleged Prior Voluntary Partition of Property, 1 A.L.R.2d 247; 1 A.L.R.2d 473.*

Annotation, *Contribution, Subrogation and Similar Rights, as Between Cotenants, Where One Pays the Other's Share of Sum Owing on Mortgage or Other Lien, 48 A.L.R.2d 1305.*

Annotation, *Estate Created by Deed to Persons Described as Husband and Wife But Not Legally Married, 9 A.L.R.4th 1189.*

Annotation, *Grant of Part of Cotenancy Land, Taken from Less Than All Cotenants, as Subject to Protection Through Partition, 77 A.L.R.2d 1376.*

Annotation, *Property Rights Arising from Relationship of Couple Cohabiting Without Marriage, 3 A.L.R.4th 13.*

Annotation, *Right to Partition of Overriding Royalty Interest in Oil and Gas Leasehold, 58 A.L.R.3d 1052.*

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Supp. To CHAPTER 35 Tenancy in Coparcenary

4-35 Thompson on Real Property, Thomas Editions Supp. to § 35.05

Supp. to § 35.05 Tenancy in Coparcenary Distinguished from Other Real Property Interests.

[Go To Main]

§ 35.05(a) Tenancy in Coparcenary Distinguished from Tenancy in Common. [Go To Main]

Add:

Annotation, *Rights and remedies of judgment creditor or of purchaser under execution, in respect of estate in real property held in joint tenancy*, 111 A.L.R. 171 (stating that "tenancy in coparcenary" shares characteristics with joint tenancies and tenancies in common, but lacks the chief characteristic of a joint tenancy, the right of survivorship).

§ 35.05(b) Tenancy in Coparcenary Distinguished from Joint Tenancy. [Go To Main]

Add:

Peter M. Carrozzo, *Tenancies in Antiquity: A Transformation of Concurrent Ownership for Modern Relationships, 85 Marq. L. Rev. 434 (2001)* (noting that a tenancy by coparcenary was created by the laws of inheritance, never by deed or will, as distinguished from joint tenancies, which before the Statute of Wills in 1540 could be created only by inter vivos conveyance).

§ 35.05(c) Tenancy in Coparcenary Distinguished from Tenancy by the Entirety. [Go To Main]

Add:

See In re Sampath, 314 B.R. 73, 78-80 (E.D. Va. 2004) for a concise explanation of Blackstone on this point.

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4-35 Thompson on Real Property, Thomas Editions Supp. to § 35.06

Supp. to § 35.06 Incidents of Tenancy in Coparcenary.

[Go To Main]

Add:

Morris v. Morris, 2004 Va. App. LEXIS 447 (Va. Ct. App. 2004) (No. 3173-03-4, Va. Ct. App., Sep. 14, 2004) (*Virginia Code Annotated § 8.01-31* states that "An accounting in equity may be had against any fiduciary or by one joint tenant, tenant in common, or coparcener for receiving more than comes to his just share or proportion"). *See also In re Sampath, 314 B.R. 73 (Bankr. E.D. Va. 2004)* ("Tenants in common, joint tenants, and coparceners, shall be compellable to make partition") (quoting *Va. Code § 1* (1849)).

§ 35.06(b) Accounting and Contribution Among Coparceners. [Go To Main]

Add:

Morris v. Morris, 2004 Va. App. LEXIS 447 (Va. Ct. App. 2004) (No. 3173-03-4, Va. Ct. App., Sep. 14, 2004) (*Virginia Code Annotated § 8.01-31* states that "An accounting in equity may be had against any fiduciary or by one joint tenant, tenant in common, or coparcener for receiving more than comes to his just share or proportion). *See also Hutchins v. Payless Auto Sales, Inc., 85 P.3d 1010 (Wyo. 2004)* (*Wyoming Statutes Annotated § 1-32-119* (2003) allows one tenant in common or coparcener to recover his share of rents and profits from a cotenant and to maintain an action of waste against another).

§ 35.06(c) Actions by Coparceners. [Go To Main]

Add:

But see Hutchins v. Payless Auto Sales, Inc., 85 P.3d 1010 (*Wyoming Statutes Annotated § 1-32-119* (2003) allows one tenant in common or coparcener to recover his share of rents and profits from a cotenant and to *maintain an action of waste* against another) (emphasis added).

§ 35.06(e) Curtesy and Dower on Tenancies in Coparcenary. [Go To Main]

Lochhaas v. Burnett, 77 S.W.3d 12 (Mo. Ct. App. 2002) (noting that the estate of tenancy in coparcenary is subject to both curtesy and dower) (citing *Mo. Ann. Stat. § 528.030* (2000)).

Estates and Interests Arising from Marriage, 2 Tiffany Real Prop. § 561 (2004) ("If the wife holds property in common or coparcenary with others, the husband is entitled to curtesy").

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Supp. To CHAPTER 35 Tenancy in Coparcenary

4-35 Thompson on Real Property, Thomas Editions Supp. to § 35.07

Supp. to § 35.07 Partition of Tenancy in Coparcenary.

[Go To Main]

Add:

See, e.g., Romero v. Bernell, 603 F. Supp. 2d 1333 (D.N.M. 2009) (statute authorizing partition for lands held in tenancy in coparcenary).

Annotation, *Right to, and effect of, partition of undivided interests held respectively in fee and in life estate with remainder*, 134 A.L.R. 661 (2004) (noting that most statutes allowing for partition of land held in coparcenary also allow partition by sale when partition by kind would result in prejudice).

Add:

See, e.g., Conn. Gen. Stat. §§ 520495, 52-502; Rev. Stat. Mo. § 528.040 (2000).

§ 35.07(b) Compulsory Partition. [Go To Main]

Add:

In re Sampath, 314 B.R. 73 (Bankr. E.D. Va. 2004) ("Tenants in common, joint tenants, and coparceners, shall be compellable to make partition") (quoting Fla. Stat. § 20a-718.117 (1849)). *See also Maitland v. Allen, 594 S.E.2d 918*

(Va. 2004) (*Virginia Code Annotated § 8.01-81* provides that "coparceners of real property ... shall be compellable to make partition and may compel partition").

§ 35.07(d) "Hotchpot." [Go To Main]

Advancement--Doctrine of Hotchpot, 1 Baldwin's Oh. Prac. Merrick-Rippner Prob. L. § 20.3 (Angela G. Carlin ed., 2004) (The term "hotchpot" means the blending and mixing of property belonging to different persons in order to divide it equally).

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Supp. To CHAPTER 35 Tenancy in Coparcenary

4-35 Thompson on Real Property, Thomas Editions Supp. to § 35.08

Supp. to § 35.08 Status of Tenancy in Coparcenary in the United States Today.

[Go To Main]

§ 35.08(a) In General. [Go To Main]

Morris v. Morris, 2004 Va. App. LEXIS 447 (Va. Ct. App. 2004) (No. 3173-03-4, Va. Ct. App., Sep. 14, 2004) (citing *Virginia Code Annotated § 8.01-31*, providing that "[a]n accounting in equity may be had against any fiduciary or by one joint tenant, tenant in common, or coparcener for receiving more than comes to his just share"); *In re Sampath, 314 B.R. 73 (Bankr. E.D. Va. 2004)* ("Tenants in common, joint tenants, and coparceners, shall be compellable to make partition") (quoting *Va. Code § 1* (1849)). *See also Mable Cleary Trust v. Edward-Marlah Muzyl Trust, 686 N.W.2d 770 (Mich. Ct. App. 2004)* (citing *Mich. Comp. Laws § 319.101* and listing coparceners as a form of joint ownership to which the statute applies); *Maitland v. Allen, 594 S.E.2d 918 (Va. 2004)* (*Virginia Code Annotated § 8.01-81* provides that "coparceners of real property ... shall be compellable to make partition and may compel partition"); *Gray v. Koons, No. CA 03-964, 2004 Ark. App. LEXIS 277* (Apr. 7, 2004) (citing *Ark. Code Ann. § 18-60-102(b)* which includes coparceners with joint tenants, tenants in common, and other co-owners); *LaBow v. Rubin, 2004 Conn. Super. LEXIS 611* (No. CV030400970S, Mar. 12, 2004) ("[A]ny person holding real property as a joint tenant, tenant in common, coparcener or tenant in tail has a right to partition pursuant to *Connecticut General Statutes Annotated § 52-495*); *Hutchins v. Payless Auto Sales, Inc., 85 P.3d 1010 (Wyo. 2004)* (*Wyoming Statutes Annotated § 1-32-119* (2003) allows one tenant in common or coparcener to recover his share of rents and profits from a cotenant and to maintain an action of waste against another).

Add:

Hutchins v. Payless Auto Sales, 85 P.3d 1010 (*Wyoming Statutes Annotated § 1-32-119* (2003) allows one tenant in common or coparcener to recover his share of rents and profits from a cotenant and to maintain an action of waste against another).

§ 35.08(b) Tenancy in Coparcenary Statutes. [Go To Main]

Add:

Labow v. Rubin, 95 Conn. App. 454 (2006) ; *Stone v. Stone, 2006 Ohio 1996 (Ohio Ct. App. 2006)* (No. 6-04-12, Ohio App., April 24, 2006); *Campbell v. Harmon, 628 S.E.2d 308 (Va. 2006)* ; *Green v. Southern Landfill Management, Inc., 914 So. 2d 705 (Miss. 2005)* ; *Kester v. Small, 618 S.E.2d 380 (W. Va. 2005)* .

***Change* Id § 3951 to Id tit. 12 § 3951.**

***Change* D.C. Code Ann. § 45-217 *to* D.C. Code Ann. § 42-517**

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Supp. to § 35.09 Bibliography.

[Go To Main]

Add to Books:

Cribbet, John E. and Corwin W. Johnson, *Principles of the Law of Property* 101-102 (3d ed. 1989).

Estates and Interests Arising from Marriage, 2 Tiffany Real Prop. § 561 (2004) ("If the wife holds property in common or coparcenary with others, the husband is entitled to curtesy").

Add to Articles:

Gillian K. Bearns, Note, *Real Property--Giulietti v. Giulietti--Partition by Private Sale Absent Specific Statutory Authority, 26 W. New Eng. L. Rev. 125 (2004)* (discussing coparceners and the historical development of partition).

Ralph C. Brashier, *Consanguinity, Sibling Relationships, and the Default Rules of Inheritance Law: Reshaping Half-Blood Statutes to Reflect the Evolving Family, 58 SMU L. Rev. 137 (2005)* (citing the *Ohio Revised Code Annotated § 2105.06* which states that when a person dies intestate having title or right to any personal property, or to any real estate or inheritance, in this state, the personal property shall be distributed, and the real estate or inheritance shall descend and pass in parcenary).

Peter M. Carrozzo, *Tenancies in Antiquity: A Transformation of Concurrent Ownership for Modern Relationships, 85 Marq. L. Rev. 434 (2001)* (noting that a tenancy by coparcenary was created by the laws of inheritance, never by deed or will, as distinguished from joint tenancies, which before the Statute of Wills in 1540 could only be created by inter vivos conveyance).

Add to Annotations:

Louise Harmon & Eileen Kaufman, Dazzling the World: A Study of India's Constitutional Amendment Mandating Reservations for Women on Rural Panchayats, *19 Berkeley Women's L.J. 32 (2004)* (discussing all-male coparcenary with respect to ancestral property).

Rosisch-Schwartz, Damaris. "Tenancy by the Entirety: The Traditional Version of the Tenancy is the Best Alternative for Married Couples, Common Law Marriages, and Same-Sex Partnerships," *84 N.D. L. Rev. 23 (2008).*

Annotation, *Rights and remedies of judgment creditor or of purchaser under execution, in respect of estate in real property held in joint tenancy*, 111 A.L.R. 171 (stating that "tenancy in coparcenary" shares characteristics with joint tenancies and tenancies in common, but lacks the chief characteristic of a joint tenancy, the right of survivorship).

Annotation, *Right to, and effect of, partition of undivided interests held respectively in fee and in life estate with remainder*, 134 A.L.R. 661 (2004) (noting that most statutes allowing for partition of land held in coparcenary also allow partition by sale when partition by kind would result in prejudice).

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CHAPTER 36 CONDOMINIUMS AND COOPERATIVES

4-36 Thompson on Real Property, Thomas Editions 36.syn

AUTHOR: Professor Frederic White Cleveland State University Cleveland-Marshall College of Law

§ 36.syn Synopsis to Chapter 36: CONDOMINIUMS AND COOPERATIVES

§ 36.01 Overview of the Law of Condominiums and Cooperatives.

§ 36.02 Outline of the Chapter.

§ 36.03 Definitions.

§ 36.04 Distinctive Features of Condominiums and Cooperatives.

§ 36.04(a) Condominiums Distinguished from Cooperatives.

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§ 36.05 History of Condominiums and Cooperatives.

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§ 36.06(a) Terminology and Statutory Provisions.

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§ 36.07 Tort and Contract Liabilities Associated with Condominiums and Cooperatives

§ 36.07(a) Liability of the Condominium Association.

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§ 36.12 Problems Associated with Condominium Conversion.

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§ 36.14 Forms.

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CHAPTER 36 CONDOMINIUMS AND COOPERATIVES

4-36 Thompson on Real Property, Thomas Editions § 36.01

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§ 36.01 Overview of the Law of Condominiums and Cooperatives.

The law pertaining to condominiums and cooperatives generally is concerned with the property rights of occupants of separate units in multi-unit buildings or developments who seek to secure the benefits of individual ownership together with shared responsibilities. The term "condominium" generally refers to an interest in property based on a system of separate ownership of individual units in multi-unit projects. In contrast, the term "cooperative" usually connotes one of several different kinds of ownership entities used by individuals to acquire the advantages of collective living. Indeed, it has been stated that a condominium is simply a form of cooperative. n1 The rise of the use of the condominium concept in this country essentially is the result of dissatisfaction with the notion of the cooperative.

The term "condominium" originally implied co-ownership and may be rooted in ancient Roman law. The concept was virtually unknown in the United States until the early 1960's. Both condominium and cooperative living arrangements are the result of the inability of many Americans to realize the dream of individual home ownership. This was caused by such diverse factors as large population growth and increased urbanization; scarcity of land within commuting distance of large urban centers; rising costs of real estate, labor and building materials; inflation generally; and smaller, more mobile families. n2 It is likely, also, that certain tax advantages spurred both homebuyers and home builders to examine new types of living arrangements. Various economic factors such as land scarcity, new home construction costs, changing family patterns and lifestyles, together with a growing elderly population, probably will contribute to the steady if not spectacular growth in the condominium ownership concept.

FOOTNOTES:

(n1)Footnote 1. Charles E. Ramsey, *Condominium, The New Look in Co-ops,* 9 n.*3 Prac. Law. 21 (1963).*

(n2)Footnote 2. *See Symposium on the Law of Condominiums,* 48 St. John's L. Rev. No. 4 at xi-xx (1974). *See also* Institute of Real Estate Management, the Owner's and Manager's Guide to Condominium Management (1984) (hereafter, *Owner's Guide*).

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CHAPTER 36 CONDOMINIUMS AND COOPERATIVES

4-36 Thompson on Real Property, Thomas Editions § 36.02

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§ 36.02 Outline of the Chapter.

This chapter discusses the law of condominiums and cooperatives primarily in the context of residential property rights. The concepts are defined in § 36.03, *infra*. The concepts are distinguished from each other in § 36.04, *infra*. The history of condominiums and cooperatives is included in § 36.05, *infra*.

The legal structure of both concepts is discussed in §§ 36.06-36.08, *infra*, pre-sale disclosure and association control are discussed in § 36.09, § and § 36.10, *infra* respectively.

Consumer problems and condominium conversions are discussed in § 36.11 and § 36.12, *infra* respectively. Concluding the chapter are sections on remedies (§ 36.13) and forms (§ 36.14).

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CHAPTER 36 CONDOMINIUMS AND COOPERATIVES

4-36 Thompson on Real Property, Thomas Editions § 36.03

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§ 36.03 Definitions.

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The term "condominium" has been defined as a system of separate property ownership rights in individual units in multi-unit projects. The term has also been described as a type of joint condominium or co-ownership. It has been stated that the condominium concept established the creation of a set of vertical boundaries separated into horizontal apartments, units, floors or stories. Upon separation, each individual unit has been characterized for real property purposes as being an individual estate in land. n3

Before the introduction of the condominium concept a cooperative was considered to be a generic term for any one of several types of organizations which could be utilized by occupants of individual units to acquire the advantages of joint ownership of real property. Today, occupants of cooperatives are typically tenants of a business entity, usually a corporation, as well as owner-shareholders of the business entity from which they rent. n4

As applied to a building or project, the terms "condominium" or "cooperative" refer to the building or project subject to the condominium form or cooperative form of ownership.

FOOTNOTES:
(n1)Footnote 3. *See* Uriel Reichman, *Residential Private Governments: An Introductory Survey, 43 U. Chi. L. Rev. 253 (1976). See also* Condominium Law and Practice, § 1.01 (Matthew Bender). *Sea Watch Stores v. Council of Unit Owners of Sea Watch Condo, 691 A.2d 750 (Md. App. 1997),* notes that condominiums, while representing a unique form of property ownership, do not create real property. A condominium is a subdivision of land and "no less a subdivision in real property terms than a subdivision of physical grounds that extends, not vertically, but horizontally." *Id. at 752.* As a result, "both the general law as to the use of real property and the law regulating condominiums apply when one is dealing with the uses to which horizontal slices of a vertical column of real property, i.e., a condominium unit, may be subjected." *Id. at 753.* A condominium is strictly a creature of statute, and therefore provisions of a declaration under which the condominium is created must conform to statutory requirements; to the extent that they conflict therewith, the statute must prevail. *Winkleman v. Toll, 661 So. 2d 102 (Fla. Dist. Ct. App. 1995).* "Condominium" combines two distinct forms of ownership of real property: (1) exclusive ownership of individual unit

of multi-unit condominium project, and (2) ownership as tenant in common of common areas of project, in proportion to each unit's interest in the total project. *Agassiz West Condominium Ass'n v. Solum, 257 N.W.2d 244 (N.D. App. 1995).*

(n2)Footnote 4. *See* William Jay Lippman, Condominium and Co-op Closings 7-9 (P.L.I., New York, 1987). The fact that cooperatives are essentially corporations, and the owners of cooperatives are thus shareholders, the rights and obligations of the cooperative and its shareholders can involve knotty questions not only of substantive law but of choice of law. In Williams v. 5300 Columbia Pike Corp., 891 F. Supp. 1169 (E.D. Va. 1995) (Delaware corporation law determined whether the price set for units as part of a condominium conversion by the cooperative was fair). *See infra* § 36.12.

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CHAPTER 36 CONDOMINIUMS AND COOPERATIVES

4-36 Thompson on Real Property, Thomas Editions § 36.04

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§ 36.04 Distinctive Features of Condominiums and Cooperatives.

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§ 36.04(a) Condominiums Distinguished from Cooperatives.

Condominiums are a form of ownership of real property in which the separately occupied units in a multi-unit building or complex are subject to individual ownership by different owners, with each unit owner holding an appurtenant undivided share in certain aspects of the entire building or complex. Thus, the purchaser of a condominium acquires full title to such buyer's individual unit, plus an undivided interest in common areas and facilities. n5 Such common areas and facilities typically include the lobby, grounds, electrical and mechanical systems, together with recreational facilities such as swimming pools and tennis courts. n6

Unlike the typical condominium arrangement, a cooperative project generally establishes unitary ownership of an entire project, including all individual units and common areas, by an entity such as a corporation. Purchasers of cooperative units generally obtain the right to lease their individual units from the corporation. As a corollary to their leasehold interests such persons also typically receive stock certificates or similar evidence of ownership of shares in the proprietary corporation. Ownership of stock and the tenant's interest in the lease are said to be interdependent. n7

§ 36.04(b) Condominiums and Cooperatives Distinguished from Other Types of Property Interests.

The primary distinguishing feature between condominium and cooperative property owners on the one hand and individual owners of property, on the other hand, is that the former have shared responsibilities with other owners that individual property owners do not possess. Thus, for example, with respect to condominium projects, separate units in a multi-unit building are subject to ownership by different owners, but appurtenant to each individual unit is an undivided ownership share in the common elements. Florida, for example, defines condominiums as "units that may be owned by one or more persons, and in which there is, appurtenant to each unit, an undivided share in common elements." n8

With regard to the common elements, such ownership rights are most directly analogous to the typical kinds of joint entitlement to common areas held by tenants in a multi-tenant building.

FOOTNOTES:

(n1)Footnote 5. *See Symposium on the Law of Condominiums,* 48 St. John's L. Rev. No. 4, xi-xx (1974). It is not uncommon for the declaration or association bylaws to prohibit severance of the unit ownership or use from the ownership or use of the common areas. *See, e.g., Liebler v. Point Loma Tennis Club, 47 Cal. Rptr. 2d 783 (Cal. App. 1995)* (covenant prohibiting severance was valid and reasonable and had been fairly applied).

(n2)Footnote 6. *Id.* States' condominium laws also recognize what are known as "limited common areas." Such areas are typically defined as "those common elements which are reserved for the use of a certain condominium unit or units to the exclusion of other units, as specified in the declaration of condominium." Fla. Stat. § 718.103(17). These limited common areas are appurtenant to the units to which they are reserved and cannot be separately conveyed. *Brown v. Rice, 716 So. 2d 807 (Fla. App. 1998)* (attempted conveyance of a parking spot assigned to one unit by owner of that unit to owner of another unit ineffective).

(n3)Footnote 7. For a general description of the cooperative housing concept see the description of Co-op City, New York, contained in *United Housing Found., Inc. v. Forman, 421 U.S. 837, reh'g denied, 423 U.S. 884 (1975). See Quality Mgmt. Services v. Banker, 685 N.E.2d 367 (Ill. App. 1997)* (lease arrangement in usual cooperative apartment organizations created sufficient indicia of landlord tenant relationship as to make Forcible Entry and Detainer Statute applicable to cooperatives). *But see Kadera v. Superior Court, 931 P.2d 1067 (Ariz. App. 1996)* (cooperative arrangement is not a landlord-tenant arrangement; cooperative corporation's remedy against shareholder lay in Arizona's real estate laws not its landlord-tenant laws). The owner of shares in a cooperative housing project is treated like the owner of a house or apartment in applying the limits on deductions for dwelling units. *Loss Limits for Dwellings Apply to Co-Op Apartments*, Tax'n for Accountants (Aug. 1996); *Firth v. Lu, 12 P.3d 618 (Wash. App. 2000)* (even though a purchaser of a cooperative unit acquires shares of stock, the interest transferred is an interest in real property, and thus a contract to purchase such a unit must comply with the statute of frauds; the contract in this case lacked a legal description of the property and thus did not comply with the statute of frauds).

(n4)Footnote 8. Fla. Stat.. § 20-718.103(10). The affairs of the condominium association are controlled by the *Condominium Property Act. Apple II Condominium Ass'n v. Worth Bank & Trust Co., 659 N.E.2d 93 (Ill. App. 1995).* "Condominium" combines two distinct forms of ownership of real property: (1) exclusive ownership of individual unit of multi-unit condominium project, and (2) ownership as tenant in common of common areas of project, in proportion to each unit's interest in the total project. *Agassiz West Condominium Ass'n v. Solum, 257 N.W.2d 244 (N.D. App. 1995). Schwartzman v. Schoening, 669 N.E.2d 228 (Mass. App. 1996)* (right to use condominium parking space is in the nature of an easement appurtenant to condominium unit). As a Pennsylvania court put it "[A] condominium form of ownership in real estate succeeds because unit owners agree to cooperate in maintenance of common elements." *Mayflower Square Condominium Ass'n v. KMALM, Inc., 724 A.2d 389 (Pa. 1999).*

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CHAPTER 36 CONDOMINIUMS AND COOPERATIVES

4-36 Thompson on Real Property, Thomas Editions § 36.05

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§ 36.05 History of Condominiums and Cooperatives.

First Amendment

§ 36.05(a) Origins of Condominiums.

According to at least one author, there is evidence of the sale of a part of a building in ancient Babylon nearly two thousand years prior to the birth of Christ. n9 Evidence of a system similar to condominiums has been found by researchers among various ancient ethnic cultures including the Greeks, the Hebrews, the Moslems and the Egyptians. n10 Nevertheless, it has been written that the evidence has been "inconclusive" that the Romans, to whom the condominium concept is mostly attributed, accepted the condominium concept in its totality. n11

Although "condominium" originally connoted co-ownership, and is rooted in ancient Roman Law, n12 the condominium's true beginnings in the Western Hemisphere can be traced to its introduction in Puerto Rico with the enactment of the Horizontal Property Statute in 1958. n13 The concept did not really begin to play a significant role in American property ownership until a 1964 amendment to § 234 of the National Housing Act. n14 In that year Congress authorized the F.H.A. to issue mortgage insurance for "individually owned units in multi-family structures." n15 The amendment authorized insurance of mortgages to finance construction, rehabilitation, and sale of condominiums. The amendment also permitted the issuance of blanket mortgages as well as allowing for condominiums of more than one structure. Such changes apparently inspired and motivated the "rapid state of legislative endorsement of the condominium concept." n16

Condominium law is still a relatively new concept in the United States. With the passage of the National Housing Act, Congress paved the way for the states to enact appropriate condominium legislation. Today, all fifty states, together with the District of Columbia and the Virgin Islands, have enacted condominium legislation. n17

§ 36.05(b) Origins of Cooperatives.

While not as new as the condominium concept, the cooperative was nevertheless not introduced to the United States until after World War I. The cooperative's legislative origins are generally the same as the condominium's. Today, because the cooperative has been surpassed in usage by the condominium in virtually every section of the country, with the possible exception of New York State, most discussion of cooperatives in this chapter is subsumed within the

discussion of condominiums.

FOOTNOTES:

(n1)Footnote 9. Alberto Ferrer & Karl Stecher, Law of Condominium 15 (1967).

(n2)Footnote 10. *Id.*

(n3)Footnote 11. Alberto Ferrer & Karl Stecher, Law of Condominium 17 (1967).

(n4)Footnote 12. *See* Charles W. Pittman, *Land Without Earth -- The Condominium, 15 U. Fla. L. Rev. 203, 205 (1962);* Condominium law and Practice, § 1.01 (Matthew Bender).

(n5)Footnote 13. P.R. Laws Ann. tit. 31, §§ 1291-1293(k).

(n6)Footnote 14. *12 U.S.C. § 01715y.*

(n7)Footnote 15. *12 U.S.C. § 01715y.*

(n8)Footnote 16. Alberto Ferrer & Karl Stecher, Law of Condominium, ch. 3, § 31 (1967).

(n9)Footnote 17. *See* the Practical Lawyer's Manual of Modern Real Estate Practices 87 (Joint Committee on Continuing Legal Education, American Law Institute, American Bar Association, 1969).

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CHAPTER 36 CONDOMINIUMS AND COOPERATIVES

4-36 Thompson on Real Property, Thomas Editions § 36.06

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§ 36.06 Creation of Condominiums and Cooperatives.

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§ 36.06(a) Terminology and Statutory Provisions.

Unlike most Anglo-American concepts of property law, condominium ownership is based on statutory authority, not on common law concepts. Every jurisdiction in the United States has enacted a condominium statute. n18 All of them attempt to regulate procedures, delineate the duties of the individual unit owners as well as of the condominium association, provide for distribution of responsibilities in the event of damage, destruction or condemnation, and determine the legal rights of condominium unit owners and associations in the event of defaulting individual unit owners. In addition, such statutes generally provide for prohibitions against partition and for separate property tax assessments of individual units. Model legislation, drafted by the Federal Housing Administration, provides the basis for some American condominium legislation. n19 In addition, the Uniform Condominium Act, initially approved in 1977 and amended in 1980, provides the basis for other state condominium legislation. n20

West Virginia was the first state to model its condominium legislation on the Uniform Act. n21 West Virginia condominium law provides for the creation and organization, continued operation, termination and transfer of condominium interests. Its provisions apply only to property that has been specifically designated as condominium property pursuant to a declaration executed and filed for record by the condominium owner. Any condominium that is created and structured so as to comply with West Virginia law creates either a valid fee simple interest in the property or a leasehold. n22 Other states adopting the Uniform Act or variations of it include: Maine, n23 Minnesota, n24 Alabama, n25 Missouri, n26 New Mexico, n27 and Arizona. n28 Condominiums and cooperatives are sometimes discussed as interchangeable, but actually possess significant differences. A condominium owner possesses essentially two types of property interests: (1) individual ownership of, usually, a residential unit, n29 and (2) shared ownership of common areas and facilities. By way of contrast, the cooperative owner is usually a shareholder in a corporation which owns the entire facility. Typically, cooperative residents hold proprietary leases on their residence units by virtue of their shareholder status. They are responsible for paying for the periodic costs associated with their individual leases, together with their respective shares of overhead for the entire facility. In these kinds of arrangements the corporation owns the property and thus only the corporation may mortgage it. This sometimes makes purchase more difficult than it would be in a typical condominium situation. The cooperative seems to be used primarily in east coast communities. n30

The provisions of the various state statutes authorizing the establishment of the condominium, in addition to those of Puerto Rico and the District of Columbia, vary considerably in their terminology. Such variations include differences in the names of the statutes themselves. For example, such names as "Horizontal Property Act," n31 "Horizontal Property Regimes Act," n32 and "Condominium Property Act" n33 exist throughout the various states. Cooperative housing legislation, on the other hand, might be embodied within a statute involving the rights of tenants. The Florida legislation, called the "Housing and Rent Act of 1948," n34 was one example. Although its use is generally said to pre-date that of the condominium in the United States, a model act for the cooperative was not approved until some years after uniform condominium legislation. n35 Only one state, Virginia, n36 has enacted the Uniform Cooperative Act.

The term condominium is generally used in three different ways: to denote a system of property ownership, to indicate the entire building or project existing under such ownership, and to identify individual units and appurtenant ownership interests in common elements of the condominium. While condominiums are usually created using the fee simple estate, only a statutory prohibition is thought to be able to prevent a condominium from being formed using a long term leasehold estate. n37 The same is generally true for cooperatives. n38

Because condominiums are enabled by statutory authority, courts must look to the statutory scheme as well as the individual project's condominium declaration and other documents to determine the legal rights of owners and the association. n39 The documents creating the condominium usually consist of a condominium declaration, articles of incorporation for the condominium association, bylaws for the governance of the association, the operation of the project and the conduct of the individual unit holders, and the deeds used for conveying each individual condominium unit.

Cooperatives generally require some type of corporate charter, corporation bylaws and leases or occupancy agreements for individual unit holders.

The condominium declaration or master deed is generally the instrument that establishes the condominium entity. n40 Typically, the declaration or master deed must be filed with the proper public recording officer in the jurisdiction where the condominium property is situated. n41 It has been held that the condominium declaration is more than a mere contract delineating the mutual rights and obligations of the parties. It also assumes some of the attributes of a covenant running with the land, circumscribing the extent and limits of the use and enjoyment of real property. n42 Indeed, absent consent, or an amendment to the declaration, the enjoyment and use of the real property cannot be impaired or diminished. n43 Thus, it has been held that where restrictions contained in a condominium declaration are unclear, and capable of being exercised in an arbitrary, capricious and unreasonable manner, they will be held invalid and unenforceable. n44

Articles of incorporation and bylaws for condominium associations generally conform to the practices of each local jurisdiction for the typical proprietary business entity. Deeds for individual condominium units must conform to local conveyance practice which, of course, includes sufficient designation of the particular unit transferred. In addition, other matters such as use restrictions and covenants are incorporated by reference into the deed.

The dominant organizational structure for the cooperative is the corporate form. n45 The other forms of concurrent ownership, including the joint tenancy, the tenancy in common or the business trust, all have been found to be of limited utility. A joint tenancy arrangement is impractical, for example, because its creation requires a conveyance to all the grantees simultaneously by means of a single instrument. A tenancy in common arrangement would be problematic because of the potential for unlimited liability attaching to individual apartment holders for obligations incurred in the maintenance or use of the cooperative project.

Documentation for the typical kind of corporate cooperative organization usually includes a corporate charter or articles

of incorporation, a set of corporate bylaws and a proprietary lease or occupancy agreements for the holders of each individual unit. These documents taken together constitute the contract between the owners and the cooperative corporation. Cooperatives' bylaws are generally analogous to the condominium bylaws and declaration.

§ 36.06(b) Instruments of Creation.

§ 36.06(b)(1) Condominium Instruments.

The creation of a condominium generally requires articles of incorporation or of the association representing the owners. In addition, there is usually a set of association bylaws, as well as deeds for each individual unit. The most important condominium document, however, is the condominium declaration. According to the Uniform Condominium Act it should contain at least the following information:

(1) the name of the condominium;

(2) the name of every local jurisdiction (i.e., county) in which any part of the condominium is located;

(3) a legally sufficient description of the real estate included in the condominium;

(4) a statement of the maximum number of units which the declarant reserves the right to create;

(5) a description of the boundaries of each unit;

(6) a description of limited common elements;

(7) a description of any real estate (except real estate subject to development rights) which may be allocated subsequently as limited common elements;

(8) a description of any special development rights or other types of special rights reserved by the declarant, together with a legally sufficient description of the real estate to which such rights apply;

(9) if any development rights may be exercised with respect to different parcels of real estate at different times, a statement to that effect, together with other pertinent information with respect to such rights;

(10) any other conditions or limitations under which the rights described in paragraph (8) may be exercised or will lapse;

(11) an allocation to each unit of common element interests, votes and common expense liabilities;

(12) any restrictions on use, occupancy and alienation of units; and

(13) recording data for easements, licenses and the like which affect the condominium. n46

Of course, states that have adopted the Uniform Condominium Act or variations of it generally require the foregoing declaration information. n47 It has been held in disputes involving purported ambiguities in a condominium declaration that such ambiguities must be construed against the developer who authored the declaration. n48

§ 36.06(b)(2) Cooperative Instruments.

Like the condominium, the cooperative also generally requires an organizational charter, usually corporate in form, a set of bylaws and a proprietary lease or occupancy agreement. It is common to restrict the sale of cooperative shares or memberships. The Uniform Cooperative Act also provides for a declaration of cooperative which contains provisions not unlike those contained in the Uniform Condominium Act. n49 It appears, generally, however, that the material appearing in the Uniform Act's "declaration" is included as bylaws of most cooperatives. Such bylaws typically contain the following information: name and location of the corporation; purpose; membership eligibility; transfers of membership by death; termination of membership; meetings and voting procedures; qualification and removal of directors; election and removal of officers; methods of amendment; and fiscal management. With respect to use and occupancy regulations, one lease commentator has written:

> In corporate cooperatives, provisions imposing restraints on alienation and occupancy of the apartments and procedures for the enforcement of assessments against the tenant-owners must be carefully drawn so as to comply with policy mandates of the law and effectively secure objectives of the parties. It is important to provide that the successors to the original tenants will be bound by all the provisions in the corporate-lease setup and that the integral plan of operation will be preserved, irrespective of such things as bankruptcies of particular tenants, the passing of property by testate or intestate succession, or as a result of claims against the estate of a tenant-cooperator. n50

Occasionally, questions of unreasonable restraints on alienation arise in the cooperative housing field. An early case, for example, *Gale v. York Center Community Cooperative*, n51 examined the question of whether a cooperative housing association could partially restrain the alienability of its members' property interests in order to maintain its existence as a cooperative enterprise. In agreeing with the trial court which held such restraints as valid, the Supreme Court of Illinois stated:

> It seems to us the agreements [between the association and individual unit holders] show a studied effort on the part of the association to retain some voice in the selection of new members and at the same time give its members as much freedom as possible in alienating their interests. Experience shows this to be the only way to keep cooperative housing co-operative ... As necessary as these restrictions may be to

> cooperative housing, it must be determined whether they violate the rule against restraints on alienation.
>
> * * *
>
> We are of the opinion that the utility of the restraints in this agreement outweigh the injurious consequences to the public, if any. The legislature has given its approval to ownership of residential property on a co-operative basis by providing that not-for-profit corporations may be organized for this purpose. [citations omitted]. The restrictions on transfer of a membership are reasonably necessary to the continued existence of the co-operative association. This demonstrates the social utility of the partial restraints and might of itself be a basis for sustaining them. In addition, however, enforcement of the restraints in question would not appear to produce injurious consequences to the public. n52

On the other hand, however, it has been held that a cooperative association could disapprove a sublease of an apartment pursuant to a vote of the stockholders when the plaintiff had negotiated a contract of sale with the general agent of the defendant cooperative apartment owner and the contract provided, among other things, that the plaintiff could sell or rent one of the apartments included in the contract.

FOOTNOTES:

(n1)Footnote 18. For a complete list of enabling legislation *see* Appendix B-1, Condominium law and Practice (Matthew Bender); *see also* Ferrer & Stecher, Law of Condominium, ch. 7 (1967). *See also* Uniform Condominium Act (hereinafter Uniform Act), National Conference of Commissioners on Uniform State Laws (1977). *See generally* Condominiums, Planned Unit Developments and Conversion Documents (Committee on Continuing Professional Education, American Law Institute, American Bar Association, 1985). The fact that condominiums, as a legal form of property ownership, are initially creatures of statute has two major consequences. First, a condominium simply does not exist as a legal entity unless statutory requirements for its creation have been met. *See infra* § 36.06(b). Second, the rights and obligations of owners are found in part in the statutes governing condominiums and in part in the condominium declaration and the bylaws of the condominium association. In some cases, the developer or unit owners of a condominium may adjust their statutory rights and duties through the declaration and bylaws; in others, the statute trumps inconsistent declarations and bylaws. For example, in *Dunes South Homeowners Ass'n, Inc. v. First Flight Builders, Inc., 459 S.E.2d 477 (N.C. 1995),* the court held that the developer was statutorily bound to pay its pro-rata share of maintenance expenses for common areas based upon the number of units it owned, even though the condominium declaration exempted the developer from an obligation to make these payments.

(n2)Footnote 19. *See* Model Statute for the Creation of Apartment Ownership (Federal Housing Administration) (hereinafter, F.H.A. Model Act). *See also* Curtis J. Berger, *Condominium, Shelter or a Statutory Foundation, 63 Colum. L. Rev. 987 (1963).*

(n3)Footnote 20. Uniform Condominium Act, 1977 (National Conference of Commissioners on Uniform State Laws). In New Hampshire, the court determined that the Condominium Act applies to all condominium projects, although the Act's administration and enforcement provisions do not generally apply if not more than ten units are included in the condominium. *Patch v. Arsenault, 653 A.2d 1079 (N.H. 1995).*

(n4)Footnote 21. *See* W. Va. Code §§ 36B-4-101-36B-4-118.

(n5)Footnote 22. *Id.*

(n6)Footnote 23. *See* Me. Rev. Stat. Ann. §§ 33-1601-101-33-1604-118.

(n7)Footnote 24. *See* Minn. Stat. Ann. §§ 515A.1.101-515A.4-117.

(n8)Footnote 25. *See* Ala. Code §§ 35-8A-101-35-8A-417.

(n9)Footnote 26. *See* Mo. Ann. Stat. §§ 448.1-101-448.4-120.

(n10)Footnote 27. *See* N.M. Stat. Ann. §§ 47-7A-1-47-7D-20.

(n11)Footnote 28. *See* Ariz. Rev. Stat. §§ 33-1201-33-1270.

(n12)Footnote 29. While this chapter is primarily concerned with *residential* condominium relations, most states provide for the creation and establishment of condominiums in non-residential property, including unimproved land and commercial and industrial buildings and projects. *See generally* Charles A. Goldstein et al., *Commercial and Industrial Condominiums: An Overall Analysis,* 48 no. *4 St. John's L. Rev. 817 (1974);* Daniel S. Shapiro, *Commercial Condominiums: Significant Tax Benefits If Pro*perly Structured, *41 J. Taxation 46 (1974);* Daniel S. Shapiro, *Commercial Condominiums: Tax Considerations for Unit Purchasers and the Association, 41 J. Taxation 204 (1974).*

(n13)Footnote 30. *See* William J. Lippman, Condominium and Co-op Closings, 7-9 (P.L.I. 1987).

(n14)Footnote 31. *See, e.g.,* Ark. Code Ann. §§ 18-13-101-18-13-120; D.C. Code Ann. tit. 45, §§ 1701-1734; S.C. Code Ann. §§ 27-31-10-27-31-300.

(n15)Footnote 32. *See* Alaska Stat., tit. 34, §§ 7-10-7-460; Wash. Code Rev., tit. 64, §§ 64.32.010 - 64.32.920

(n16)Footnote 33. *See* Ohio Rev. Code Ann. § 5311.

(n17)Footnote 34. *See* Fla. Stat. ch. 719. This has since been changed to the "Cooperative Act." Fla. Stat. § 20a-719.

(n18)Footnote 35. *See* Uniform Model Real Estate Cooperative Act (National Conference of Commissioners on Uniform State Laws 1981).

(n19)Footnote 36. Va. Code §§ 13.1-301-13.1-311.1.

(n20)Footnote 37. *See, e.g.,* Fla. Stat. § 20a-718.401.

(n21)Footnote 38. *See* Fla. Stat. § 20a-719.401.

(n22)Footnote 39. *Woodside Village Condo Assn. v. Jahren, 806 So. 2d 452 (Fla. 2002).*

(n23)Footnote 40. *See, e.g.,* Ohio Rev. Code Ann. § 5311.05; Fla. Stat. § 20a-718.103(13). For an excellent brief description of the typical process by which the condominium form of ownership is created, *see Harrington v. Blackston, 459 S.E.2d 309 (S.C. App. 1995).*

(n24)Footnote 41. *See* Ohio Rev. Code Ann. § 5311.06. *Big Sky Hidden Village Owners Ass'n v. Hidden Village, Inc., 915 P.2d 845 (Mont. 1996)* (the declaration is the instrument which when filed subjects property to the statutory regime governing condominiums; property not included in the declaration is not covered by statute even if described in a survey related to condominium development).

(n25)Footnote 42. *Pepe v. Whispering Sands Condo. Ass'n, 351 So. 2d 755 (Fla. App. 1975). Board of Directors of 175 East Delaware Pl. Homeowners Ass'n v. Hinojosa, 679 N.E.2d 407 (Ill. App. 1997)* (all restrictions in the declaration enjoy a presumption of validity and are covenants that run with the land).

(n26)Footnote 43. *Id.*

(n27)Footnote 44. *O'Neil v. Atwell, 598 N.E.2d 110, jurisdictional motion overruled, 579 N.E.2d 1453 (Ohio 1991).*

(n28)Footnote 45. Other kinds of organizational structures for the cooperative include: co-ownership in joint tenancy, co-ownership as tenants in common and the "Massachusetts" or business trust form of organization. For further discussion of these types of cooperative arrangements *see* for example: David Clurman et al., Condominiums and Cooperatives, 181-187 (2d ed. 1984); Walter W. Miller, *Cooperative Apartments: Real Estate or Securities,* §§ *45 B.U. L. Rev. 463 (1965);* and Philip M. Smith, *A Survey of the Legal Aspects of Cooperative Apartment Ownership, 16 U. Miami L. Rev. 305 (1961). Wapnick v. Seven Park Ave. Corp., 658 N.Y.S.2d 604 (A.D. 1st Dept. 1997)* (provision of Business Corporation Law prohibiting unequal treatment of shareholders holding same class of stock applies to cooperative corporation and invalidates assessment of varying fees depending on whether shareholder is an original or subsequent purchaser of shares).

(n29)Footnote 46. Uniform Condominium Act § 2-105.

(n30)Footnote 47. *See, e.g.*, W. Va. Code § 36B-2-105. In construing the statute governing the declaration of condominium, words of common usage should be construed in their plain and ordinary sense. Condominium associations are strictly creatures of statute, and their powers and duties, including the power to raise funds, must be strictly construed. *Scudder v. Greenbrier C. Condominium Ass'n, 663 So. 2d 1362 (Fla. App. 1995).* A condominium is strictly a creature of statute, and therefore provisions of declaration under which the condominium is created must conform to statutory requirements; to the extent that they conflict therewith, the statute must prevail. *Winkleman v. Toll, 661 So. 2d 102 (Fla. App. 1995).*

(n31)Footnote 48. *See Alternative Dev., Inc. v. St. Lucie Club & Apt. Homes Condo. Ass'n, Inc., 608 So. 2d 822 (Fla. App. 1992); Bradford Square Condominium Assn., Inc. v. Miller, 573 S.E.2d 405 (Ga. App. 2002)* (the instruments govern the legal rights between the condominium unit owners and the association). Amending the condominium master deed to extend time to add additional phases to the condominium was improper without approval of all unit owners whose percentage interest in common areas was affected. Although the master deed permitted the developer to add phases without approval of any unit owner, this right was limited to seven years after recording of the master deed, and since there were no phases added by the time the right expired, the unit owner's percentage interest became fixed. *Suprenant v. First Trade Union Sav. Bank, FSB, 666 N.E.2d 1026 (Mass. App. 1996).* Operative documents of the condominium association, such as bylaws and declarations, give rise to both tort and contract obligations. *Insurance Co. of N. Am. v. Aspen Alps Condominium Ass'n, 915 F. Supp. 1122 (D. Colo. 1996).* The declaration is an instrument by which property is submitted to provisions of the *Unit Ownership Act*, and actual filing of the declaration is an action which subjects the property in question to the provisions of the *Act*. *Big Sky Hidden Village Owners Ass'n v. Hidden Village, Inc., 915 P.2d 845 (Mont. 1996).* The *Common Interest Ownership Act* (CIOA) is a comprehensive legislative scheme that governs the creation, organization, and management of all forms of common interest communities. *Fruin v. Colonndale One at Old Greenwich Ltd. P'ship, 676 A.2d 369 (Conn. 1996).*

Even if the articles of declaration of the condominium, limiting the rental of the unit to 14 days per year, were a restriction on alienation, it was valid under the *Condominium Act. Breezy Point Holiday Harbor Lodge-Beechside Apt. Owners' Ass'n v. B.P. P'ship, 531 N.W.2d 917 (Minn. App. 1995).* An amendment to the declaration of condominium ownership limiting occupancy of association units to unit owners and their immediate families was a valid exercise of the association's power; the restriction was not arbitrary, against public policy, or in violation of a fundamental constitutional right. *Apple II Condominium Ass'n v. Worth Bank & Trust Co., 659 N.E.2d 93 (Ill. App. 1995).* In *Bank One, Dayton, N.A. v. Sunshine Meadows Condominium Ass'n, 641 So. 2d 1333 (Fla. 1994),* the court ruled that consent to a lien by all the condominium unit owners was required in the amendment of the declaration of the condominium. *See also Condominiums: Mortgage Lien Covers Only Common Elements,* 25 Real Est. L. Rep. 8 (June 1995). A condominium is created by the act of recording, not by the erection of a physical structure. *Pilgrim Pl. Condominium Ass'n. v. KRE Properties, Inc., 666 A.2d 500 (Me. 1995).* Under Florida law, a condominium is created by filing a declaration of the condominium in the public records of the county where the land is located, with the declarations executed and acknowledged according to the requirements for the deed. *In re River Ranch, Inc., 188 B.R. 693 (Bankr. M.D. Fla. 1995).* When a controversy regarding the rights of the condominium unit owner arise, the court must examine

all relevant provisions of the Horizontal Property Act, master deed, and allied documents, reading those provisions together, in relation to each other and harmonized, if possible. *Harrington v. Blackstone, 459 S.E.2d 309 (S.C. App. 1995).* The Horizontal Property Act requires developer of a horizontal property regime to record the master deed, which expresses a comprehensive list of particulars. *Heritage Federal Sav. & Loan v. Eagle Lake & Golf Condominiums, 458 S.E.2d 561 (S.C. App. 1995).* Interesting legal questions arise when purported amendments to the declaration seek to limit rights of current owners. *Wellington Property Management v. Parc Corniche Condominium Assoc., 755 S.2d 825 (Fla. App. 2000)* (amendment provision could not be applied retroactively). *See also, Woodside Village Condominium Assoc. v. Jahren, 754 So. 2d 831 (Fla. App. 2000)* (amendments to declarations of condominium that are adopted subsequent to a unit owner's purchase and that significantly alter substantial rights that existed in unit owners at the time of their purchase require a strict scrutiny as to whether they have unreasonably altered existing rights). *But see*: *Shorewood West Condominium Ass'n v. Sadri, 992 P.2d 1008 (Wash. 2000)* (amendments to a declaration, even if they seriously restrict property rights, may be applied to current owners because owners have pre-existing notice of procedures by which the declaration may be amended).

(n32)Footnote 49. *See* Uniform Cooperative Act § 2-105.

See Condominium law and Practice, § 9.04[f], 9-16 (Matthew Bender).

(n33)Footnote 50. *171 N.E.2d 30 (Ill. 1960).*

(n34)Footnote 51. *Id. at 32-34.*

(n35)Footnote 52. *See Crossman v. Pease & Elliman, Inc., 284 N.Y.S.2d 751 (1st Dept. 1967), aff'd mem., 309 N.Y.S.2d 600 (1970).*

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CHAPTER 36 CONDOMINIUMS AND COOPERATIVES

4-36 Thompson on Real Property, Thomas Editions § 36.07

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§ 36.07 Tort and Contract Liabilities Associated with Condominiums and Cooperatives

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§ 36.07(a) Liability of the Condominium Association.

The Uniform Act is consistent with most condominium legislation which prohibits actions for wrongs brought about by the condominium association from being brought against individual unit owners. n53 The Uniform Act provision was introduced to make it clear that actions in tort or contract arising out of acts or omissions of the condominium association should be brought against the association and not against individual unit owners. n54 According to commentary on the Uniform Act the section was introduced as a change to the law in some states that required plaintiffs to name individual unit owners as the real parties in interest in any action involving the association. n55 The subsection also provides that a condominium unit owner is not precluded from bringing an action in tort or contract against the association simply because such person is a unit owner or a member or officer of the condominium association. n56 Accordingly, it has been held that the condominium unit owners' association is the proper party, on behalf of all unit owners and of each of them, to bring an action for damages pertaining to the common areas sustained by any or all of the unit owners. n57

§ 36.07(b) Liability of the Cooperative Association.

The Uniform Cooperative Act has a provision similar to that of the Uniform Condominium Act, indicating that actions arising out of acts or omissions by the cooperative association should be brought against it, and not against individual proprietary lessees. n58

FOOTNOTES:
(n1)Footnote 53. Uniform Condominium Act § 3-111. *Centeg Realty, Inc. v. Siegler, 899 S.W.2d 195 (Tex. 1995)* (homeowners' association is a separate legal entity distinct from its owners). When individual unit owners obtained a money judgment against their condominium association for unauthorized acts, the association levied a special assessment against the owners to raise the necessary funds. The court ruled that the owners can be assessed to pay themselves and their attorney. *Condominiums: Unit Owners Assessed to Pay Themselves Damages*, 25 Real Est. L. Rep. 6 (Oct. 1995). *See also Ocean Trail Unit Owners Ass'n v. Mead, 650 So. 2d 4 (Fla. 1994).*

(n2)Footnote 54. Uniform Condominium Act § 3-111, cmt. 1; *Martinez v. Woodmar IV Condominiums Homeowners Ass'n, 941 P.2d 218 (Ariz. 1997)* (the association has a duty of reasonable care to maintain the safety of the common areas in light of its control over those areas). The purchaser of a condominium unit was entitled to offset of $12,000 from monthly common charge payments based upon water damage to her unit under the vendor's offering plan; vendor was responsible for prompt repair of water leakage problem, and vendor's delay in making the repairs caused damage. *Granada Condominium I v. Morris, 639 N.Y.S.2d 91 (1996).* Express written obligations contained in the declaration of a trust that the trustee was responsible for the maintenance and repair of the common elements of condominiums imposed a nondelegable duty on the trustee, which rendered him liable to tenants who fell from a porch when the railing on the porch gave way, for negligence of the carpenter who repaired the railing. *O'Brien v. Christensen, 662 N.E.2d 205 (Mass. 1996).* The condominium association's fiduciary relationship with its owners requires that in dealing with unit owners, association must act both reasonably and in good faith. *Billig v. Buckingham Towers Condominium Ass'n I, 671 A.2d 623 (N.J. Super. App. Div. 1996).* Operative documents of the condominium association, such as bylaws and declarations, give rise to both tort and contract obligations. *Insurance Co. of N. Am. v. Aspen Alps Condominium Ass'n, 915 F. Supp. 1122 (D. Colo. 1996).* The Homeowner's association had no duty to tell prospective purchaser about construction defects in townhouse or existence of civil action against the developer to repair defects where the association did not act as vendor, was not party to the contract, and did not assume a special relationship with the purchaser. *Kovich v. Paseo Del Mar Homeowner's Ass'n, 48 Cal. Rptr. 2d 758 (1996).* A Puerto Rico federal court held that the estate of a woman with a mental illness could maintain an action under the *Fair Housing Amendments Act* (FHAA) against members of the board of a condominium association for conduct that allegedly caused the woman to commit suicide. *Schroeder v. De Bertolo, 979 F. Supp. 173 (D.P.R. 1995). See also Zoning, Housing, & Custody*, 19 Mental & Physical Disability L. Rep. 345 (May/June 1995). A minor whose family was renting a condominium unit was an "invitee," for the purposes of determining whether the owner of the condominium unit or owners' association had a duty to protect the minor from a snake bite the child received in the swimming pool area. *Robison By and Through Robinson v. Gantt, 673 So. 2d 441 (Ala. Civ. App. 1995).* The association is expressly obligated to maintain and keep the common areas in good repair, and cannot escape liability by arguing that the company that it employed to perform its obligations was an independent contractor. *Sacker v. Perry Realty Serv., 457 S.E.2d 208 (Ga. App. 1995). See also Condominiums: Unit Owner is Invitee of Association, Tax Newsline*, 25 Real Est. L. Rep. 9 (Feb. 1996); *Winding River Village Condominium Ass'n v. Barnett, 459 S.E.2d 569 (Ga. App. 1995)* (death of a child who fell into the condominium swimming pool). Whether realty company was an agent of the condominium was immaterial to liability for criminal acts against the resident where the company did not have control over security decisions at the condominium. *Centeq Realty, Inc. v. Siegler, 899 S.W.2d 195 (Tex. 1995).* The directors of a condominium association could not be held liable to the association for their errors and omissions. *Curbelo v. Sweetwater Creek Homeowners Condominium Ass'n, 653 So. 2d 1073 (Fla. App. 1995); Fisher v. HBS Mgmt., Inc., 469 S.E.2d 885 (Ga. App. 1996)* (condominium manager not liable in absence of evidence that it had actual or constructive knowledge of dangerous condition (invisible ice) on common parking area); *Lacy v. Sutton Pl. Condominium Ass'n, 684 A.2d 390 (D.C. App. 1996)* (tenant of condominium unit owner sued condominium association and management company for injuries when he fell through ceiling from attic; rules and regulations of condominium association prohibited access to attic space; tenant was therefore a trespasser and defendants would be liable only upon a showing of willful and wanton conduct); *O'Brien v. Christensen, 662 N.E. 205 (Mass. 1996)* (express written declaration in deed of condominium trust that trustee was responsible for maintenance and repair imposed non-delegable duty); *Cooley v. Pheasant Run at Rosemont Condo, 781 So. 2d 1182 (Fla. App. 5th Dist. 2001)* (unit owners not individually liable for injuries suffered by guest in common area).

(n3)Footnote 55. *Id.*

(n4)Footnote 56. *Id.* It has been held in North Dakota that a unit owner may sue the condominium association for its failure to comply with the condominium's bylaws. *Agassiz West Condominium Ass'n v. Solum, 527 N.W.2d 244 (N.D. 1995).* For nuisance purposes, the relationship between the condominium unit owners' property interest in his unit and jointly owned common areas is akin to that of adjacent property owners and the unit owner can maintain a nuisance action against the condominium association for nuisance on common areas. *McEneaney v. Chestnut Hill Realty Corp.,*

650 N.E.2d 93 (Mass. App. 1995). But see Strayer v. Covington Creek Condo. Ass'n, 678 N.E.2d 1286 (Ind. App. 1997) (refusing to recognize exceptions to the general rule that members of unincorporated associations, including condominium associations, cannot sue the association for tortious acts) and *LaSalle Nat'l Trust v. Board of Dir of the 1100 Lake Shore Dr. Condo. Ass'n, 449, 677 N.E.2d 1378,* (Ill. App. 1997) (exceptions to a board's general fiduciary duty to unit owners are to be narrowly construed). *See also National Title Ins. Co. v. Lakeshore 1 Condominium Ass'n, 691 So. 2d 1104 (Fla. App. 1997)* (condominium association, having undertaken, pursuant to the declaration, to manage insurance proceeds for unit owners and mortgagees, owed plaintiff, a mortgagee, a duty of reasonable care in management of proceeds). *But see Perlow v. Goldberg, 700 So. 2d 148 (Fla. App. 1997)* (in a case involving allegations of mismanagement of insurance proceeds, even if their actions are wrongful, individual directors cannot be held liable in negligence; under Florida statute only fraud, criminal activity or self dealing/ unjust enrichment will subject an individual director to liability). *See also Pershad v. Parkchester South Condominium, 662 N.Y.S.2d 993 (N.Y. City Civ. Ct. 1997)* (homeowners' association has non-delegable duty to maintain common elements in good repair; plaintiff's remedies for breach of this duty *do not* include withholding of assessment payments in derogation of by-laws). For a thoughtful case defining the scope of officers' personal liability to unit owners, *see Reedeker v. Salisbury, 952 P.2d 577 (Utah App. 1998).*

(n5)Footnote 57. *Stony Ridge Ass'n v. Auerbach, 410 N.E.2d 782 (Ohio App. 1979); Berish v. Bornstein, 770 N.E.2d 961 (Mass. 2002)* (the condominium unit owners' association is the only party under Massachusetts law that may bring suit regarding the common areas on behalf of its unit owners since they cede management of the common areas to the association). *See e.g. Sevigny v. Dibble Hollow Condominium Assn., Inc., 819 A.2d 844 (Conn. App. 2003). See e.g. Chatelain v. Portage View Condominiums, 783 N.E.2d 587 (Ohio App. 2002). Osorno v. Simone, 779 N.E.2d 645 (Mass. App. 2002)* (under state statute a thirteen-unit condominium was not a "building" subject to building code). The business judgment rule is applied to actions taken by the condominium's board of managers. *Nuzzo v. Board of Mgrs. of Jefferson Village Condominium No. 1, 644 N.Y.S.2d 546 (1996).* As a general matter, a third party has authority to consent to the search of areas of mutual use to which she has joint access. 1120 *Central Condominiums Owners Ass'n v. City of Seal Beach, 59 F.3d 174 (9th Cir. 1995); Richland Run Homeowners Ass'n. v. CHC Durham Corp., 473 S.E.2d 649 (N.C. App. 1996)* (under governing statute, any cause of action regarding common areas is to be brought by manager or board at the discretion of the board; homeowner's association itself did not have standing to bring suit absent authority in by-laws); *Milton v. Council of Unit Owners of Bentley Place Condominium, 708 A.2d 1047 (Md. App. 1998)* (association could sue developer and general contractor under implied statutory warranty for defects in common elements); *Lamden v. LaJolla Shores Clubdominium Homeowners Ass'n, 87 Cal. Rptr. 2d 237 (1999),* defining the standards by which condominium boards' decisions are to be tested). *See also Bennett v. Weimar, 975 P.2d 691 (Alaska 1999)* (courts will not substitute their judgment for that of a condominium association unless association's judgment is unreasonable; expenditures for renovation were not unreasonable); *Caswell Cove Condo. Assoc. v. Milford Partners, Inc., 753 A.2d 361 (Conn. App. 2000)* (because condominium association was authorized by statute to bring action on behalf of unit owners against developer, unit owners were not necessary parties to such suits); *ECC Construction, Inc. v. Ganson, 98 Cal. Rptr. 2d 292 (2000)* (contractor who signed contract for earthquake repair could not sue owners individually for alleged breach of contract). *But see Church v. General Electric Co., 138 F. Supp. 2d 169 (D. Mass. 2001)* (individual unit owners, as well as the association, have standing to sue an alleged contaminator of the common area where the owners allege that the damage devalued their units).

(n6)Footnote 58. Uniform Cooperative Act, § 3-111. Schultz v. 400 Coop. Corp., 736 N.Y.S.2d 9 (2002); Dugue v. 1818 Newkirk Mgt. Corp., 756 N.Y.S.2d 51 (2003); *Mariaux v. Turtle Bay Towers Corp., 753 N.Y.S.2d 505 (2003).* The court held that the co-op corporation, but not the unit owner, is liable for injuries to workman, even if the unit owner, and not the co-op corporation, contracted for the renovation work. *Denota v. 45 East 85th Street Corp., 622 N.Y.S.2d 192 (1995). Cooperatives and Condominiums*, 5 N.Y. Real Est. L. Rep. 2 (Mar. 1995). The Second Circuit upheld a preliminary injunction under the *Fair Housing Amendments Act* (FHAA) requiring an apartment cooperative to provide an apartment owner who has multiple sclerosis with an immediately convenient parking space. *Shapiro v. Cadman Towers, Inc., 51 F.3d 328 (2d Cir. 1995). See also Zoning, Housing, and Custody*, 19 Mental & Physical Disability L. Rep. 345 (May/June 1995). The co-op corporation must rebuild a building damaged by fire even where the damages

exceed half of the building's market value. *Bernard v. Scharf, 634 N.Y.S.2d 919 (N.Y. Civ. Ct. 1995). See also Cooperatives and Condominiums*, 12 N.Y. Real Est. L. Rep. 2 (Oct. 1995).

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CHAPTER 36 CONDOMINIUMS AND COOPERATIVES

4-36 Thompson on Real Property, Thomas Editions § 36.08

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§ 36.08 Termination.

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§ 36.08(a) Termination of Condominiums.

Most condominium statutes provide that the condominium common elements shall remain undivided, and that no unit owner or other person may bring an action for partition or division of the condominium ownership so long as the condominium arrangement continues. This agreement is ignored, of course, when the condominium is actually terminated.

Aside from involuntary cessation by eminent domain, the condominium arrangement is usually terminated only by mutual agreement among a certain percentage of unit owners. The Uniform Act, for example, recommends that such termination occur only if 80% or more of the association votes affirmatively. n59 According to one comment on the termination section of the Uniform Act, "[r]ecognizing that unanimous consent from all unit owners would be impossible to secure as a practical matter on a project of any size, subsection (a) states a general rule that 80% consent of the unit owners would be required for termination of a project. The declaration may require a larger percentage of the unit owners and, in a non-residential project, it may require a smaller percentage." n60 West Virginia, for example, is in accord with the Uniform Act recommendation of an eighty percent vote. n61 Ohio and Florida, on the other hand, indicate that unless the declaration states otherwise, a condominium can only be terminated by the consent of all unit holders. n62

In addition to voluntary termination, most state statutes also provide for partition or other forced sale on the decision of a certain percentage of unit owners. n63 This often happens, for example, in situations where the condominium project has become obsolete. n64

§ 36.08(b) Termination of Cooperatives.

Like the Uniform Condominium Act, the Uniform Cooperative Act also allows for termination of the cooperative upon the affirmative vote of the holders of eighty percent of the holders of votes in the association. n65 Virginia is in accord with the Uniform Act. n66

FOOTNOTES:

(n1)Footnote 59. Uniform Condominium Act § 2-118(a). *See also* F.H.A. Model Statute, § 6(c).

(n2)Footnote 60. Uniform Condominium Act § 2-118, cmt. 2.

(n3)Footnote 61. *See* W. Va. Code § 36B-2-118.

(n4)Footnote 62. Ohio Rev. Code Ann. § 5311.17; Fla. Stat. § 20a-718.117.

(n5)Footnote 63. *See* the discussion in Condominium Law and Practice, ch. 8 (Matthew Bender).

(n6)Footnote 64. *Id.*

(n7)Footnote 65. Uniform Cooperative Act § 2-117. Apartments revert to rent-regulated status after foreclosure on co-operative corporation. *Federal Home Loan Mtg. Corp. (FHLMC) v. New York State Division of Housing and Community Renewal (DHCR), 662 N.E.2d 773 (N.Y. 1995). Apartments Revert to Rent-Regulated Status After Foreclosure on Co-Operative Corporation, Cooperatives and Condominiums*, N.Y. Real Est. L. Rep. (Feb. 1996).

(n8)Footnote 66. *See* Va. Code Ann. § 55-454.

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CHAPTER 36 CONDOMINIUMS AND COOPERATIVES

4-36 Thompson on Real Property, Thomas Editions § 36.09

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§ 36.09 Disclosures Required Before Sale of Condominium and Cooperative Interests.

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§ 36.09(a) Introduction.

One writer has noted that "(I)t is a sad commentary that most condominium unit purchasers do not read the prospectus or offering plan before signing a contract and closing title, even where state law makes such plans mandatory." n67

In addition, even when the offering statement is examined it can be viewed as so complex that a prospective condominium purchaser might still be misled or confused by the nature and complexities of the condominium interest to be purchased and the documents required to be completed.

To help in avoiding this potential for confusion and misinformation many other states, including Ohio, n68 Illinois, n69 Connecticut, n70 Pennsylvania, n71 Florida, n72 Hawaii, n73 New Mexico and others, provide for statutory pre-sale disclosure protection for prospective condominium purchasers. For example, Ohio Rev. Code § 5311.25 sets out rules for pre-sale disclosures that include:

1. Escrow requirements with respect to deposits and downpayments;

2. Information about what rights, if any, will be retained by the developer in condominium common elements;

3. Information about what condominium interests have already been sold;

4. Information concerning the execution of management contracts; and

5. Information concerning warranties for labor and materials for certain repairs or replacements made to the condominium property. n74

Article 4 of the Uniform Condominium Act sets forth extensive rules governing the protection of condominium purchasers. According to at least one comment on the Uniform Act:

> The best "consumer protection" that the law can provide to any purchaser is to insure that he has an opportunity to acquire an understanding of the nature of the products which he is purchasing. Such a result is difficult to achieve, however, in the case of the condominium purchaser because of the complex nature of the bundle of rights and obligations which each unit owner obtains. For this reason, the Act, adopting the approach of many so-called "second generation" condominium statutes, sets forth a lengthy list of information which must be provided to each purchaser before he contracts for a unit. n75

Consumer disclosures generally must be made in both the condominium declaration and the written offering statement. In addition, all disclosure statutes provide that neither a condominium developer or such developer's agent may offer to sell or sell a condominium ownership interest until the condominium instruments provide detailed information concerning the rights of both purchaser and developer. In essence, statutes of this type are anti-fraud provisions which place affirmative duties on the developer and warn the developer not to omit any material facts from the condominium documents. n76 Violation of these provisions will allow the potential purchaser and, in some cases, the Attorney General, or like officer, n77 to pursue various remedies.

§ 36.09(b) Disclosure Statement.

Prospective condominium purchasers generally are to be given readable and understandable written statements of the features and circumstances of the condominium development. Understanding the nature of the product has been said to be the best consumer protection. n78 Most state laws require numerous items of information to be given to prospective purchasers, to help achieve this goal. n79

There do not appear to be any particular industry or legal standards for a determination of what constitutes a "readable and understandable" written offering statement. Nevertheless, it appears that the requirements for what is "readable and understandable" generally will be met if the declarant provides a clear and precise enumeration of the necessary information as required by the statute.

§ 36.09(c) Development/Developer Identity.

Written offering statements generally include: (1) the name and address of the condominium development, and the name, address and telephone number of the developer and the development manager or such manager's agent. While this information may not prove to be very useful if the developer is either new to the business or unknown to the prospective buyer, if the developer has established condominium projects in the past, then the new buyer can make inquiries of parties who have had previous dealings with the developer. Most states' requirements in this respect are slightly more extensive than the information required by the terms of the Uniform Condominium Act, which mandates only that the statement fully and accurately disclose the name and address of the declarant. n80

§ 36.09(d) Narrative Description of the Project.

Generally, written offering statements must include a narrative description of the project, including the total number of units, the types and price of each type of unit, the total number of units that may be included in the development because of future expansion or merger, and a precise statement of the nature of the condominium ownership being offered. n81

This information may be particularly important in those cases where condominiums may expand to include additional units. n82 Such information allows the potential condominium purchaser to make an intelligent decision about whether the benefits and amenities that the developer promises will adequately serve the number of condominium unit owners who ultimately will use the project. In addition, the potential purchaser will be able to ascertain from this information whether the developer intends to rent a significant number of units. This could be crucial, because condominium projects with a high percentage of rental units have a more transient population than those with a greater proportion of

owner occupancy.

Condominium offering statements frequently contain projections concerning future expansion. The statutes are generally imprecise in this area and thus there is no definitive answer to how much information about future goals must be given in a condominium offering statement. The Uniform Act requires a one-year projection of budget. n83

§ 36.09(e) Construction Status.

Most condominium projects need governmental approval of some type, especially if they are being newly built. Written statements must disclose material information such as construction status, the zoning site plan and other approvals. In addition, actual or scheduled dates of completion of buildings, recreational facilities and other common area facilities must be disclosed.

A common disclosure requirement is that the developer reveal to the potential condominium unit purchaser both the status of construction and scheduled dates of completion. When a developer fails to meet contract obligations the condominium owner's usual remedy is the right to sue for damages. If the failure is severe enough and affects sufficient numbers of condominium unit owners, the attorney general, or similar public officer, may be brought in for appropriate cases. In Ohio, for example, in such cases where the public officer believes that substantial numbers of persons have been adversely affected by a developer's acts or omissions, the attorney general has the power to obtain declaratory judgments, secure injunctive relief, bring a class action, or sue for damages. n84

§ 36.09(f) Financing.

Potential condominium buyers generally must be told any significant terms of any financing offered by or through the developer. Disclosure statutes ordinarily do not indicate any particular method for how condominium unit prices are to be stated. Nevertheless, most of them do require developers to reveal significant terms of any financing offered by or through the developer and items such as any minimum down payment requirements. n85 Certainly such information, in connection with the stated price of a condominium unit, should enable prospective purchasers to make an intelligent decision about the true price of the unit, including their choices concerning financing the unit. For example, while the restrictive practice of requiring that all condominium purchasers who need mortgage financing place their mortgages with one lender is allowed in some jurisdictions, in others condominium developers must inform potential purchasers that they may seek financing at some institution other than the one with which the developer is working. Of course, the reality of condominium financing is that developers usually prefer dealing with one or a small group of lending institutions because (1) in new condominium projects some lenders condition the making of construction loans upon the receipt of all or a vast majority of the individual unit mortgage applications; (2) builders often prefer to deal with one institution especially those that have dealt with condominiums before and are familiar with the concept; and (3) the use of one lending institution may lead to a more favorable interest rate for the buyer and therefore provide an inducement to purchase.

§ 36.09(g) Warranties.

Condominium purchasers generally are given a description of warranties for structural elements and mechanical and other systems in the condominium project. Usually, these items must be stated separately for units and for common areas and facilities. The Uniform Condominium Act contains a provision pertaining to express warranties for quality. n86

In addition to express warranties, implied warranties of fitness and merchantability have been held to extend to the purchase of new condominium units. The Florida case of Gable v. Silver n87 was one of the first to recognize the now commonly accepted idea that an implied warranty of fitness comes with the purchase of a new condominium unit and such warranty continues to exist even after the expiration of express warranties. In the *Gable* case the court, in effect,

gave the purchasers of a new condominium unit the same rights as the purchasers of a traditional home. The primary issue in *Gable* revolved around whether an express one-year warranty of the condominium air-conditioning system could have additional implied warranties of fitness and merchantability imposed upon it. The *Gable* court stated that it could:

> ... it has been consistently held that an express warranty is not inconsistent with, does not negate or exclude implied warranties of fitness and merchantability. They may easily coexist. We hold such coexistence lies here. (footnote omitted) n88

It has been held that a trial court erred when it failed to grant damages to condominium unit purchasers after the developer failed properly to soundproof and insulate party walls in accordance with plans and specifications as filed with and approved by the local municipality. n89 The warranty that a condominium unit is fit for its intended use is based on an objective test. Thus, in a case involving purchasers of a condominium unit who complained that their air conditioning unit made so much noise that the dwelling was thereby rendered uninhabitable, it was held that the unit owners' complaints showed merely their individual sensitivity to noise and did not meet the burden of showing general uninhabitability. n90 In addition, the purchasers were subject to a defense that they had had reasonable opportunities to discover the purported defect and did not do so. n91 In addition, it has been held that a clause in a condominium sales contract expressly warranting that the developer would correct all defective work for one year from the date of sale, did not preclude the purchaser's action for breach of the implied warranty of fitness where there was no express disclaimer or renunciation of any alternative form of warranty. n92 In some states even explicit disclaimers of warranties will not be allowed. Thus, in Ohio a developer is prohibited from selling or offering to sell a condominium or ownership interest in a condominium development unless the developer has furnished as a minimum:

> ... a two-year warranty covering the full cost of labor and materials for any repair or replacement of roof and structural components, and mechanical, electrical, plumbing, and common service elements serving the condominium property or additional property as a whole, occasioned or necessitated by a defect in material or workmanship and a one-year warranty covering the full cost of labor and materials for any repair or replacement of structural, mechanical, and other elements pertaining to each unit, occasioned or necessitated by a defect in material or workmanship ... n93

Furthermore, in an analogous disclaimer situation, the Ohio Supreme Court decided in Stony Ridge Hill Condominium Association v. Auerbach, n94 that a condominium builder and its representatives could not release themselves from liability for either personal injury or property damage by giving an express disclaimer of such liability in the condominium declaration. In that case, involving a suit over allegedly defective roofs, the Ohio Supreme Court determined that such an express disclaimer of liability was in direct conflict with the Condominium Act, which empowered condominium owners to bring an action for damages to the common areas. The court stated:

> The condominium Declaration and By-Laws are not binding upon the Owners Association, or upon the unit owners, for the following reasons. First, it is clear that RC 5311.20, empowering the Owners Association to sue pertaining to the common areas, is not subject to the provisions of the Declaration of Condominium Ownership and the By-Laws executed and filed pursuant to RC Chapter 5311. Nowhere in RC 5311.20 is any reference made to declarations and bylaws. When the legislature intended that in a statute in RC Chapter should be subject to the provisions of the declarations or bylaws, it expressly stated the legislative intent. Accordingly, the release of liability of defendants by the provisions of the Declaration is in conflict with R.C. 5311.20, and is, therefore, invalid. n95

§ 36.09(h) Common Area Expenses.

The calculation of expense projections is one of the most critical portions of the condominium offering statement. For example, a developer could provide a false picture of the true expenses incurred in a condominium development by providing many of the amenities such as painting and lawn maintenance, etc., during the initial sales period. The sales

practice of intentionally understating budget estimates for these services in an offering statement is generally referred as "lowballing." n96 In such instances, usually after the initial sales period, or, perhaps, after the first few years of existence of the condominium, the owners themselves often have to bear the unexpected burden of such costs. It is, therefore, important, not only for the prospective condominium purchaser to closely scrutinize the expense projections for costs, but also for the types of expenses that are involved. In order to protect consumers from such practices, the Uniform Condominium Act requires that the offering statement include a description of "any services not reflected in the budget that the declarant provides, or expenses that he pays, and what he expects may become at any subsequent time a common expense of the association and the projected common expense assessment attributable to each of those services or expenses for the association and for each type of unit." n97

§ 36.09(i) Association Management and Contracts.

Any potential condominium buyer should be informed, before such purchaser takes possession, how the condominium is to be managed. For example, Ohio law requires that the developer reveal any "significant provisions" for the management of the condominium project. Among these various disclosures are included (1) the conditions under which a unit owners' association is to be formed, (2) the apportionment of voting rights among members of the association, (3) the contractual rights and responsibilities of the unit owners' association, and (4) a statement advising the purchaser that the condominium documents are binding legal instruments and describing under what circumstances such instruments can be altered or amended by the unit owners' association. n98

Potential purchasers must also be given facsimiles of any management contract or any other agreement providing for the operation, use, maintenance of or access to any part of the condominium development. The information generally must include a brief narrative of the effect of each agreement upon the purchaser. Such information typically includes specifications of both charges and services under each agreement. In addition, the developer must disclose any relationship between the management agent and the developer. Agreements that are not fair and reasonable are usually subject to invalidation cancellation by a stated percentage of unit owners other than the developer. n99

§ 36.09(j) Encumbrances and Liens.

Potential condominium purchasers usually must be given the significant terms of any encumbrances, easements, liens, and matters of title affecting the condominium development. The rules for such required disclosures are similar to those involving management contracts, lease arrangements and the like.

§ 36.09(k) Restraints on Transfer.

The developer must reveal the existence of any rights of first refusal or other restrictions which might affect the use or transferability of condominium units. n100

§ 36.09(l) Pending Litigation.

Any pending litigation affecting the condominium project must be revealed. Pending litigation generally refers only to a lawsuit that has been actually filed. Nevertheless, it is arguable that a developer who does not reveal sufficient information about an imminent law suit could possibly be sued for fraudulent misrepresentation. In addition, ordinarily, when litigation is revealed there is a duty to reveal the projected significance of such litigation.

FOOTNOTES:

(n1)Footnote 67. Patrick J. Rohan, *Condominiums and the Consumer: A Checklist for Counseling the Unit Purchaser, 48 St. John's L. Rev. 1028, 1032 (1974). See also* J. David Ramsey, *Representing the Buyer of a Community Unit, 9 Prob. & Prop. 46* (Jan./Feb. 1995).

(n2)Footnote 68. Ohio Rev. Code Ann. § 5311.25.

(n3)Footnote 69. Ill. Comp. Stat. Ann. ch. 765, para. 605.22.

(n4)Footnote 70. Conn. Gen. Stat. Ann. § 47-71b.

(n5)Footnote 71. Pa. Stat. Ann. tit. 68, § 3406.

(n6)Footnote 72. Fla. Stat. § 718.504.

(n7)Footnote 73. Haw. Rev. Law § 514A-61.

(n8)Footnote 74. *See* Ohio Rev. Code Ann. § 5311.25.

(n9)Footnote 75. Uniform Condominium Act, § 4-103, cmt. 1. *See also* Kenton L. Kuehnle, *Condominium Revision in Ohio: A Nightmare for Developers and the Courts, 9 Capital U.L. Rev. 241 (1979).*

(n10)Footnote 76. *Id.*

(n11)Footnote 77. *See, e.g.*, N.Y. Gen. Bus. Law § 352-e, Subdivision 1(b). *See also Charles H. Greenthal & Co. v. Lefkowitz, 299 N.E.2d 657 (N.Y. 1973)* (holding that under New York law, the Attorney General's acceptance for filing of an offering for a cooperative plan, did not divest the Attorney General of the authority to investigate the validity of the plan pursuant to a consumer complaint).

(n12)Footnote 78. Uniform Condominium Act § 4-102, cmt. 1.

(n13)Footnote 79. *See, e.g.*, W. Va. Code § 36B-4-103; Va. Code § 55-79.90.

(n14)Footnote 80. *See* Uniform Condominium Act § 4-102(a)(1).

(n15)Footnote 81. *See, e.g.*, Va. Code Ann. § 55-79.90(2). In order for a project to be considered an expanding condominium for the purposes of statutes governing expansion, the declaration must state the maximum number of units that may be added in the future and provide a general outline of the land, buildings, and common place areas that may be added. Amendments to the original declaration of the condominium which were signed and filed by the developer alone, without written consent of the unit owners, could not meet the requirements for establishing an expanding condominium. *Rock Lake Estates Unit Owners Ass'n v. Township of Lake Mills, 536 N.W.2d 415 (Wis. App. 1995).*

(n16)Footnote 82. *See, e.g.*, Ohio Rev. Code Ann. § 5311.01(R) which defines "expandable condominium property" as property "the original declarant of which reserves the right to add as additional property."

(n17)Footnote 83. Uniform Condominium Act § 4-103(a)(5).

(n18)Footnote 84. *See* Ohio Rev. Code Ann. § 5311.27(C).

(n19)Footnote 85. *See, e.g.*, Uniform Condominium Act § 4-103(a)(9), that the public offering statement should include: "a description of any financing offered or arranged by the declarant."

West Virginia (W. Va. Code § 36B-4-103(a)(9) and Virginia (Va. Code Ann. § 55-79.90(7), are in general accord with the Uniform Act provision. On the other hand, Ohio (Ohio Rev. Code Ann. § 5311.26(D)) is more stringent and requires:

The significant terms of any financing offered by or through the developer to purchasers of the condominium ownership interests in the development, including the name of any bank or other institution involved in the financing, the minimum down payment, a statement that the prospective purchaser may obtain financing from another bank or

institution, and the annual interest rate.

(n20)Footnote 86. *See* Uniform Condominium Act § 4-113.

(n21)Footnote 87. *258 So. 2d 11, aff'd, 264 So. 2d 418 (Fla. 1972).*

(n22)Footnote 88. *Id. at 14.*

(n23)Footnote 89. *See David v. B & J Holding Corp., 349 So. 2d 676 (Fla. App. 1977). See also* Annotation, *Liability of Vendor for Damages Occasioned by Defective Condition Thereof, 50 A.L.R. 3D 1071 (1973).* An "ordinary consumer" could reasonably expect that fireproofing applied to a building's steel frame would not release hazardous materials, affirming application of the consumer expectation test in an asbestos damage action. Bunker Hill Towers Condominium Ass'n, et. al. v. W.R. Grace & Co., Conn. No. B072642. *See also Consumer Expectation*, 5 Mealey's App. Rep. Prod. Liab. 12 (1996). The warranty of habitability does not apply to individual units within the condominium, and the individual unit owner cannot withhold payment of common charges and assessments in derogation of condominium bylaws based upon defective conditions in the unit or in common areas, or disagreement with actions lawfully taken by the *Board of Managers. Abbady v. Abbady, 629 N.Y.S.2d 6 (1995).*

(n24)Footnote 90. *See Putnam v. Roudebush, 352 So. 2d 676 (Fla. App. 1977); see also* Annotation, *Liability or Warranties and Representations in Connection with the Sale of Air-Conditioning Equipment, 15 A.L.R. 3D 1207 (1973).* The right to bring a claim for breach of implied warranty of fitness in condominium construction belongs to the unit owners, and the right may be exercised by unit owners in aggregate through their condominium association in matters of common interest. *Charley Toppino & Sons, Inc. v. Seawatch at Marathon Condominium Ass'n, 658 So. 2d 922 (Fla. 1994); Ass'n of Unit Owners of Bridgeview Condos v. Dunning, 69 P.3d 788 (Ore. App. 2003)* (a claim filed by the association for breach of warranty was improperly dismissed when the warranty claim was a matter affecting the condominium as a whole).

(n25)Footnote 91. *Id.*

(n26)Footnote 92. *See Rapallo South, Inc. v. Jack Taylor Dev. Corp., 375 So. 2d 587 (Fla. App. 1979), cert. denied, 385 So. 2d 758 (Fla. App. 1980).* While the two-year statute of limitations applied to the condominium association's claims against the developer for breach of warranties not contained in the Uniform Condominium Act (UCA), the six-year statute governed breach of warranties under *UCA. Hyland Hill North Condominium Ass'n v. Hyland Hill Co., 549 N.W.2d 617 (Minn. 1996).*

(n27)Footnote 93. *See* Ohio Rev. Code Ann. § 5311.25(E).

(n28)Footnote 94. *64 Ohio App. 2d 40 (1979).*

(n29)Footnote 95. *Id. at 45-46.* For an excellent discussion of the scope of these remedies in Maryland and the standing of an association to seek them, *see Milton Company v. Council of Unit Owners of Bentley Place Condominium, 729 A.2d 981 (Md. 1999)* (holding that association had standing by statute to sue developer for damages arising out of defects in individually owned buildings).

(n30)Footnote 96. *See* Comment 4, Uniform Condominium Act § 4-103.

(n31)Footnote 97. Uniform Condominium Act § 4-103(a)(6). *See Richardson Lifestyle Ass'n v. Houston, 853 S.W.2d 796 (Tex. Ct. App. 1993).*

(n32)Footnote 98. *See* Ohio Rev. Code Ann. § 5311.26(H). *See Unrau v. Kidron Bethel Retirement Services, 27 P.3d 1 (Kan. 2001)* (for an excellent discussion of proper contours of developer's relationship with Board and Board's fiduciary duties).

(n33)Footnote 99. *See, e.g.*, Fla. Stat. § 718.302(1), (2).

(n34)Footnote 100. Even though tenants were entitled to protections of the mobile home statute, park owners could not ignore notice requirements of the condominium ownership statute when attempting to sell individual lots as condominiums. *Russell v. Atkins, 679 A.2d 333 (Vt. 1996).* Condominium unit owners had standing to sue under the Fair Housing Act (FHA) for the condominium association's alleged discrimination in refusing to allow owners to sell condominium to buyers with children under the age of 18, where owners alleged that they lost opportunities to sell their condominium at a higher price because of the "no children" rule and that they suffered financial strain due to additional mortgage payments that they incurred as a result of the rule. *Simovits v. Chanticleer Condominium Ass'n, 933 F. Supp. 1394 (N.D. Ill. 1996). See also Purchaser Who Buys Co-Op Shares from a Sponsor Becomes Holder of Unsold Shares if Shares Were Purchased with Intent to Hold for Investment Purposes, Cooperatives and Condominiums*, N.Y. Real Est. L. Rep. (July 1996).

See also Assignee of Unsold Shares May Sell Only to Reasonable Individuals, Cooperatives and Condominiums, N.Y. Real Est. L. Rep. (July 1996). The vendor's sale of two condominium units used as a recreation room and party room "subject to" lease of those rooms between the vendor and the condominium association was insufficient to reserve to the vendor the right to collect rental payments on property no longer owned by him. *Peyton Place Condominium Ass'n v. Guastella, 668 So. 2d 1174 (La. App. 1996).* The Condominium Act allows imposition of personal liability upon persons other than the declarant who materially participate in and had required knowledge of the prohibited act. *Unit Owners Ass'n of Summit Vista Lot 8 Condominium v. Miller, 677 A.2d 138 (N.H. 1996).* The sale of a condominium in a project containing only three units was exempt from the administration and enforcement provisions of the Condominium Act, including the civil remedy section. *Patch v. Arsenault, 653 A.2d 1079 (N.H. 1995).*

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CHAPTER 36 CONDOMINIUMS AND COOPERATIVES

4-36 Thompson on Real Property, Thomas Editions § 36.10

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§ 36.10 Legal Rules Governing Association Management and Control.

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§ 36.10(a) Constitution and Bylaws.

Condominium property is neither self-administered nor self-maintained. The nature of the concept requires that at least with respect to common areas and facilities some mechanism be established for their care and upkeep. For this reason, all statutory schemes establishing the condominium mandate some sort of condominium property control vehicle. Such vehicles are called by various names, including unit owners' association, condominium association and council of co-owners. With respect to the name of these groups it has been stated:

> Whatever its name, the purpose of every organization of condominium unit owners is the same: to encourage a form of ownership that reduces the cost of operations through the sharing of expenses with others, while realizing an appreciation of the investment that each unit owner has made in his or her home. The association acts as a minigovernment that operates the condominium, maintains the common areas, establishes procedures, collects assessments, and makes all the decisions that are vital to the operation of the association. Through the purchase of a condominium each owner joins the association. By such membership each owner becomes responsible for the economic and social success of the entire community.
>
> It is imperative that all people involved in a condominium association fully understand their responsibilities and duties. n101

The Uniform Condominium Act provides for the management of a condominium project by a "unit owners' association." n102 It has been stated that the existence of such a structure clarifies the relationship between the developer and other unit owners, and makes it simpler for the developer to involve unit owners in the governance of the condominium project, even during periods in which the declarant has reserved control of the project. n103

Condominium associations are usually governed by bylaws. n104 Bylaws provide the basic administrative framework of the unit owners association and are similar to traditional corporate bylaws. Typically, condominium association bylaws must provide for:

1. A description of the form of administration of the association, providing for the titles of the officers and for a board of administration, and specifying the powers, duties, manner of selection and removal, and compensation (if any) of the officers and board members.

2. A provision that the owners of each unit have one vote, the owners of a majority of the units constitute a quorum, and that decisions may be made by the owners of a majority of the units represented at a meeting at which a quorum is present.

3. A provision that meetings of the board of administration must be open to all unit members, and that notice of such meeting must be posted at least 48 hours in advance except in an emergency.

4. A provision for an annual meeting and procedures for the calling of unit owner meetings.

5. A provision for the keeping of minutes.

6. A requirement concerning content and notice of an annual budget.

7. A description of the manner of collecting unit owners' common expenses.

8. A provision with respect to unit transfer fees, if any.

9. A provision for the method of amending the bylaws. n105

Generally, meeting and voting notification procedures are left up to individual associations. Quorum requirements usually are based on a total of the individual unit owners interests in the property; such requirements generally range from 51 to 75%.

§ 36.10(b) Management Agreements.

Usually a condominium association is self-governing and elects a board comprised of and representing unit owners to make decisions that affect it. One of the most important decisions that the board must make is how the association is to be managed. According to one commentator, four types of condominium management techniques are generally recognized: 1) self-management; 2) on-site management; 3) financial management; and 4) full agency management. n106

Management companies generally serve one of two roles for condominium associations, financial management or full agency management.

Financial managers provide accounting and bookkeeping services and work primarily with the budget and finance committee. In addition, some financial managers provide investment counseling for an additional fee.

Full agency management obviously relieves the association of the burden of giving day to day attention to the operations of the condominium community. Since association boards usually change their membership periodically, in large associations especially it is probably essential that some type of full time management team is considered. This arrangement provides continuity for the operations of the condominium association.

Self-management is usually inexpensive and sometimes can be used to advantage by smaller unit owner associations.

Normally, self-management does not mean self-maintenance. Self-managers simply must contract for many services as

well properly allocate their time to perform the various administrative, operational and fiscal obligations required by self-management. In addition to time constraints, the board must consider the legal implications of self-management. Self-management does not preclude the members of any board from being sued for mismanagement. In addition, insurance costs for liability coverage may be higher for a board that decides to manage a condominium association on its own.

§ 36.10(c) Board of Managers.

Only by successfully marketing the project can a condominium developer succeed in the most obvious goal of producing profit. The role of the developer in turning over the project to new unit owners has been likened to that of a businessperson turning over an established business to new people with no business experience. The transition process is one of the most problematic areas affecting developer/unit owner relationships.

Transition of condominium ownership has at least two phases: (1) the gradual involvement of the residents in the operation of the unit owners association and (2) the actual transfer of control to the residents. In some circumstances this process may be easier than in others. For example, in a condominium conversion situation featuring numerous long-term tenants converting to owners the process may be a fairly simple one. This is because the persons involved will likely have more knowledge about the building than the developer has. In a new condominium situation the process is potentially much more complex.

Many problems can arise during the transition period, such as:

- Failure to recognize in the design phase the importance of planning for a smooth transfer of operational controls to the owners.
- Failure to orient buyers to the association process.
- Failure to identify and involve resident leaders.
- Failure to complete, or faulty construction of, the common elements.
- Incomplete association financial records.
- Turning over the association to the owners either too early in the sales period, or too late in the occupancy period.
- Developer and manager indifference to violations of the rules or covenants, and their failure to uniformly enforce them. n107

These kinds of problems can be alleviated with proper information, training and assistance given to the new owners by the development team.

Although a condominium unit purchaser automatically becomes a member of the unit owners association at the time of purchase, few owners know how such an organization works.

Usually, the governing documents of the unit owners association, the declaration and the bylaws, authorize how the board of directors governs the association. The initial board is formed at the creation of the condominium and is appointed by the developer. This group, sometimes called the declarant board, governs the board under the developer's control. The board then serves as a vehicle for the protection of the developer's investment as well as a tool for the promotion of the condominium unit sales. The inevitable conflict in this kind of situation is based upon the developer's

short-term interest in the project as opposed to the necessarily long-term interests of individual unit owners. In this period it has been stated that the developer may take one of three approaches:

> Some developers may run the associations as dictatorships, either failing to organize them or dominating them so completely that the residents play no important roles. When all of the units in a project have been sold, the developers operating this way may leave residents to fend for themselves. These developers may do a good job of protecting the initial value of the condominium developments with high rates of sales, but they fail in their obligations to prepare the unit owners for association responsibilities after their departure.
>
> A second approach that may be used by some developers is to transfer control of the association too soon -- that is, before leaders have been adequately trained or organized. These unit owners, forced to manage by trial and error without effective guidance, make decisions without considering their long-term effects. This is a frequent problem in condominium projects that sell too quickly.
>
> The third -- the model -- developers control the early stages of the association through an effective management agent who has the proven skills to train the future association leaders. Unit owners will experience a smoother transition if they are fortunate enough to purchase their condominium units from a developer who educates the owners in this manner. The management agent, as the guiding hand, prepares the association for its future responsibilities while also looking out for the best interests of the condominium. The management agent, then, becomes both educator and protector, providing the necessary liaison between owners and the developer. n108

Many states attempt to establish time tables for the gradual transfer of control from developer to unit owner. This was done in response to developer abuses such as indefinitely retaining control over a certain percentage of units, selling units to developer-controlled parties, packing the board of directors with developer-controlled parties or unilaterally reserving the right to amend either the declaration or the bylaws. n109

The purported solution to protracted developer control of the condominium project is based upon increasing unit owner involvement in the project as the percentage of units sold grows, with an outside time limit. Nevertheless, even such limits on developer control cannot completely prohibit the developer from retaining the control, especially when there remain unsold individual units. Some states limit the impact of this potential problem by prohibiting the developer from purchasing a certain number of units as investments for the developer's own account, n110 or grant the association an option to purchase any unsold units at the end of a certain period. n111

Even if it can be argued that these solutions work, they usually impact only when the project is relinquished by the developer, rather than on the kinds of managerial information that should be distributed to unit owners during the interim period. Indeed, most statutes are silent on this point.

Whether the developer acts alone, or hires an outside management firm, there are certain basic things that should be done during the interim period. The developer should:

1. Communicate with and educate the consumer early.

2. Identify and nurture potential leaders in the unit owners association.

3. Involve the unit owners in the managerial process function.

4. Involve the unit owners in the governing function. n112

Most state statutes provide for the gradual transfer of control from the condominium developer to the condominium unit owners. Real unit owner control, however, does not begin until the first board of directors that is entirely or substantially controlled by the individual owners is elected. This usually occurs after a certain time period expires, or a certain percentage of the unit interests have been sold, whichever comes first. n113 At this stage, it is time for the condominium association to become self-governing.

Most condominium owners associations are governed by bylaws which shall provide for a board of managers. Usually, the board of managers exercises all the power and authority of the unit owners' association, unless the statute, the condominium declaration, or the by-laws provide otherwise.

Laws vary on the required number of board members. As the official policy-making body of the unit owners association, the board makes most of the major decisions affecting the condominium association and the unit owners. The position of board membership carries with it innumerable responsibilities. The specific duties of any board of managers depends on the size and complexity of the unit owners association. Typical duties may include:

1. Preparing and adopting an annual budget; establishing reserve funds.

2. Levying assessments against unit owners.

3. Opening association bank accounts and designating signatories.

4. Collecting the assessments, depositing them in the proper accounts.

5. Providing for the operation and upkeep of the property.

6. Designating, hiring, and dismissing personnel.

7. Making and amending the use and occupancy rules and regulations.

8. Letting contracts for repairs.

9. Enforcing provisions of the declaration, bylaws, and rules and regulations.

10. Obtaining and renewing insurance.

11. Paying for authorized services.

12. Keeping books with detailed accounts in accordance with accepted accounting principles.

13. Borrowing money on behalf of the condominium.

14. Acquiring, holding, and disposing of condominium units in the event of foreclosure.

15. Doing such other things as specified in the condominium act, the declaration, the bylaws, or actions of the unit owners association. n114

The board usually establishes administrative policies through the use of policy resolutions, or formal statement adopted by the board to chart its plan of action. Ordinarily, such policy resolutions are established after giving all residents of the condominium project an opportunity to voice their individual opinions. Such opinions are usually stated at regular or special meetings of the association and give all members of the association a chance to participate in the overall policy

making process.

Once such policy resolutions are adopted, the usual procedure is that the original be filed by the secretary of the board of managers with the condominium bylaws and resolution records and a copy sent to each member of the unit owners association. Some associations also publish such resolutions in an association newsletter.

Some unit associations use a common method of delegating a board's duties by hiring a property management firm. Such agreements, usually called condominium management agreements, will vary in size and complexity with the type of condominium association. Even under such agreements which delegate authority only the board of managers can establish the association policy.

The members of the unit owners association elect the members of the board of managers, based on the allocation of votes as established by the condominium declaration. Most state laws do not establish a set number of board members but provide that at a certain percentage of board members their terms of office expire periodically, usually annually. To guard against the danger of ties, most condominium associations provide for an odd number of board members.

Usually the declaration and bylaws will describe methods of election, terms of office, and removal and filling vacancy procedures. Some of the more typical provisions include procedures for election notification, nomination of candidates, balloting, methods of voting and vote tabulation. Most state laws prescribe the minimum contents of the unit owners' association bylaws, but do not specifically direct how the board of managers of such association should operate on a daily basis. Since the Board governs the fiscal, administrative and operational affairs of the association, it is necessary for the Board to have secured certain basic documentation from the developer during the transition period, including all assessments and fees collected, all expenses and all delinquencies, if any. The financial records of the association should be audited. Additionally, the board should secure comprehensive records of all contract and bidding activities, all pertinent documents, including all correspondence relating to the association. The new board may also have to set about the task of collecting delinquent assessments, as well as set up adequate reserves for future expansion. Further, the board should obtain copies of all of the association's insurance policies and review them. The first elected Board, and all subsequent boards, should have the ability to review all of the condominium's records, to create an operating budget for the condominium project, and to take action, where necessary, with respect to the condominium's common areas. n115

§ 36.10(d) Association Officers.

Most state laws provide for the election of association officers by the unit owners. Such officers usually include a president, one or more vice presidents, a secretary, a treasurer, and such other officers as the board of managers may desire.

Generally, the president is the chief executive officer of the association and the chairman of the board. The vice president presides in the absence of the president. If there is more than one vice president, the bylaws usually provide for a hierarchy with respect to conducting meetings. When there is more than one vice president each one typically is responsible for a specific function. For example, there may be a vice president for building and grounds and another for finance. The secretary acts as the official record keeper of the association. Of course, the treasurer is responsible for the fiscal records of the association.

In addition to the duties of the condominium association board, how the committees function is very important to the overall success of the condominium project. One commentator has written:

> Once a board of directors has been elected and its officers chosen, the next step is to appoint committees. The committee system can relieve the board of some of its work load and facilitate the business of the association by researching issues prior to their debate at meetings. Committees should be

assigned specific tasks and encouraged to take minutes of their meetings and make brief but complete reports and recommendations at board and membership meetings. No board of directors can function adequately without the assistance of others, and every association is composed of members with a broad range of talents. A committee structure of standing committees and special committees will, therefore, enable the board to draw upon this expertise. Committees will help both to run the association and serve as an excellent way to train future association leaders. n116

Standing committees are set up to recommend changes and implement policies of the association. They do not establish policy because that is the board's responsibility. Standing committees see to the continuing needs of the association and typically perform the following duties:

a. Architectural control -- responsible for controlling the architectural integrity of the community.

b. Landscape and grounds -- responsible for upkeep and maintenance of outdoor areas for recreation, parking and driveways. Sometimes combined with the Maintenance committee. In large associations often works with the management firm to write specifications for landscape and gardening contracts, prepare bid packages, evaluate formal bids and make appropriate recommendations to the board of managers. In addition, this committee usually has the responsibility for monitoring the contractor's performance once the bid has been let.

c. Budget and finance -- responsible for the collection of assessments, keeping of records and payments of obligations of the association. These duties are most often done in conjunction with the services of an accountant who makes an audit and files the association's tax returns.

d. Insurance -- establish the initial insurance needs of the association and monitor the changes in such needs.

e. Maintenance -- Similar to that of the Landscape and Grounds committee except that its responsibility usually relates to the interior and structural portions of the common areas of the community. Sometimes combined with the duties of the Landscape and Grounds committee. Duties usually include inspection of the interior common areas, review of work specifications in contracts for such areas and the inspection of work in progress.

f. Rules and regulations -- responsible to update the association's bylaws and rules and regulations, usually as the result of either changing attitudes in the condominium community or changes in the law.

g. Social/Recreation -- responsible for bringing unit owners together through various social activities. Usually in larger condominium associations.

h. Newsletter -- responsible for informing the community of activities and events affecting it.

i. Welcoming -- responsible for making the transition from one home to another a more pleasant experience.

In addition, some associations establish a covenants committee to assist counsel in doing at least preliminary work on such items as delinquent assessments, violations of association rules and regulations and foreclosures. This committee also usually serves as the association's judiciary board for hearing cases involving rules infractions and reporting its recommendations to the board.

Special or ad hoc committees are appointed by the board of managers to carry out specific non-recurring duties.

§ 36.10(e) Use and Control of the Premises.

It is generally acceptable for a condominium association to impose covenants and restrictions upon the use and enjoyment of the common areas of a condominium project. n117 Such restrictions, however, must be fair and reasonable. n118 Thus, a condominium association restriction of carports for the parking of automobiles or bicycles, as applied to a "clean, non-commercial pickup truck" used solely for personal transportation to and from work was held to be unreasonable, and, thus unenforceable. n119 On the other hand, it was held not to be unreasonable for a condominium project to require membership in the condominium owners' association as a prerequisite for permission to use the project's amenities. n120

§ 36.10(f) Common Expenses and Profits.

It is typical to distribute common profits and charge common expenses to individual unit owners in proportion to their respective ownership interests. n121 It is not uncommon, unless the condominium declaration or bylaws provide otherwise, for a condominium unit owners' association, upon approval of the board of managers, to assert the right to place a lien on the ownership interest of any unit owner who fails to pay such owner's respective share of common expenses, or is delinquent for a certain period of time after such payments become due and payable. n122

FOOTNOTES:

(n1)Footnote 101. Institute of Real Estate Management, the Owner's and Manager's Guide to Condominium Management 20 (1984). *Agassiz West Condominium Ass'n v. Solum, 527 N.W.2d 244 (N.D. 1995)* (a condominium project functions like a "quasi-government").

(n2)Footnote 102. Uniform Condominium Act § 3-101. Even if the articles of declaration of the condominium limiting the rental of the unit to 14 days per year were a restriction on alienation, it was valid under the *Condominium Act. Breezy Point Holiday Harbor Lodge-Beechside Apt. Owners' Ass'n v. B.P. P'ship, 531 N.W.2d 917 (Minn. App. 1995).*

(n3)Footnote 103. *Id. See* Comment 1. *See Common Rights and Obligations Among Unit Owners under the Minnesota Uniform Condominium Act, 10 Wm. Mitchell L. Rev. 157 (1984). See also* Ohio Rev. Code Ann. § 5311.08, which mandates the establishment of a "unit owners association for the administration of the condominium property." The association is governed by a set of bylaws which must contain certain specific powers and duties. The unit owners' association essentially is charged with the responsibility for upkeep and maintenance of the condominium's common areas and facilities, establishing and collecting common assessments, collecting adequate reserves, establishing rules and regulations of the association and generally furthering the goals of all of the unit owners. Ohio Rev. Code Ann. § 5311.08. But, such bylaws can be frightening to those who want the advantages of ownership in common interest communities. One writer suggests a "bill of rights" for each housing association: "In drafting the constitutions of private residential governments, developers should include a bill or rights to ensure future citizens of the community that the majority cannot unite to deprive them of the liberties they are not willing to sacrifice for the advantages of ownership in the community." Susan F. French , *The Constitution of a Private Residential Government Should Include a Bill of Rights, 27 Wake Forest L. Rev. 345, 350 (1992).* Condominium associations are strictly creatures of statute, and their powers and duties, including the power to raise funds, may be strictly construed. *Scudder v. Greenbrier C. Condominium Ass'n, 663 So. 2d 1362 (Fla. App. 1995). Unrau v. Kidron Bethel Retirement Services, 27 P.3d 1 (Kan. 2001)* (developer may control board during marketing phase but must relinquish control at end of that phase).

(n4)Footnote 104. *See* Uniform Condominium Act § 3-106. *Northwoods Condominium Owners' Assn. v. Arnold, 770 N.E.2d 627 (Ohio App. 2002)* (Condominium unit owners must comply with bylaws if the restrictions are reasonable); *Board of Directors of 175 East Delaware Pl. Homeowners Ass'n v. Hinojosa, 679 N.E.2d 407 (Ill. App. 1997)* (where there is a conflict between the Declaration and the by-laws, the Declaration prevails). *See also Shareholder Agreement Does not Preclude Adoption of New Proprietary Lease, Cooperatives and Condominiums*, N.Y. Real Est. L. Rep. (July 1996). Operative documents of the condominium association, such as bylaws and declarations, give rise to both tort and contract obligations. *Insurance Co. of N. Am. v. Aspen Alps Condominium Ass'n, 915 F. Supp.*

1122 (D. Colo. 1996). See also Cooperatives and Condominiums, 11 N.Y. Real Est. L. Rep. 2 (Sept. 1995). For a discussion on whether timeshare condominium owners are bound by the restrictions located in the master deed and bylaws, *see generally*: R. David Proffitt, *Case Law Developments, Property Law, 47 S.C. L. Rev. 138 (Autumn 1995); Quinones v. Board of Managers of Regalwalk, 673 N.Y.S.2d 450 (A.D. 1998)* (owners were entitled to a preliminary injunction against the board which was seeking to take action against owners for operating a group family day care home out of their unit; although board's action did not violate "business judgment" rule, it did violate public policy reflected in statutory prohibition against onerous restrictions on group family day care homes).

(n5)Footnote 105. *See* Fla. Stat. § 719.106. *Lake Arrowhead Chalets Timeshare Owners Ass'n v. Lake Arrowhead Chalets Owners Ass'n, 59 Cal. Rptr. 2d 875 (1996)* (where amendment to bylaws adversely affects a class of owners, a majority of that class must approve the amendment). Illinois statutory law provides further that by-laws must include "restrictions on and requirements respecting the use and maintenance of the units and the use of the common elements, not set forth in the declaration, as are designed to prevent unreasonable interference with the use of their respective units and of the common elements by the several unit owners." 765 ILCS 605/18(k); *Shorewood West Condominium Association v. Sadri, 966 P.2d 372 (Wash. App. 1998)* (court adopts "reasonableness" test for post-purchase amendments but notes that even reasonable amendments may not be selectively enforced); *Buckingham v. Weston Village Homeowners, 571 N.W.2d 842 (N.D. 1997)* (board's authority to make rules, regulations or amendments "limited by a determination of whether the action is unreasonable, arbitrary, capricious or discriminatory").

(n6)Footnote 106. *See* Institute of Real Estate Management, the Owner's and Manager's Guide to Condominium Management 96-100 (1984). The Condominium Property Act is designed to encourage associations to be self-governing, and it is members themselves who are in the best position to make determinations regarding restrictions. *Apple II Condominium Ass'n v. Worth Bank & Trust Co., 659 N.E.2d 93 (Ill. App. 1995).*

(n7)Footnote 107. *See* Creating a Community Association: the Developer's Role in Condominium and Homeowner Associations 63 (The Urban Land Inst. and the Community Ass'ns Inst.) (hereinafter, Developer's Role).

(n8)Footnote 108. *See* Institute of Real Estate Management, the Owner's and Manager's Guide to Condominium Management 49-50 (1984).

(n9)Footnote 109. *See* Comparative Critique, at 182.

(n10)Footnote 110. *See* Jamie Lappin Emmer, Note, *Real Property: Oklahoma Condominiums, Prevention of Abuse, 28 Okla. L. Rev. 189, 197 (1075).*

(n11)Footnote 111. *See* Comparative Critique, at 187-190.

(n12)Footnote 112. *See* Institute of Real Estate Management, the Owner's and Manager's Guide to Condominium Management 49-52 (1984); Creating a Community Association: the Developer's Role in Condominium and Homeowner Associations 63-74 (The Urban Land Inst. and the Community Ass'ns Inst.).

(n13)Footnote 113. *See, e.g.*, Uniform Condominium Act § 3-103(d) & (e).

(n14)Footnote 114. *See* Institute of Real Estate Management, the Owner's and Manager's Guide to Condominium Management 57 (1984). *See also Board of Directors of 175 East Delaware Pl. Homeowners Ass'n v. Hinojosa, 679 N.E.2d 407 (Ill. App. 1997)* (the board has broad powers to regulate day-to-day living in the association but its rules and regulations must be "objective, even-handed, nondiscriminatory and applied uniformly"); *LaSalle Nat'l Trust v. Board of Directors of the 1100 Lake Shore Dr. Condo Ass'n, 677 N.E.2d 1378 (Ill. App. 1997)* (the board and each of its individual members owed a fiduciary duty to the unit owners); *Artesani v. Glenwood Park Condominium Assoc., 750 A.2d 961 (R.I. 2000)* (whatever the nature of the ownership of the units, it was the condominium statute and declaration that controlled the relationship and responsibilities of the parties); *Kim v. Flagship Condominium, 744 A.2d 227 (N.J. Super. 2000)* (held that "when a condominium association allows a third party the virtually exclusive right to market

and operate a hotel-type rental program ... the Association has a fiduciary obligation to protect each member's right to participate in that program on fair and equal terms").

(n15)Footnote 115. The business judgment rule is applied to actions taken by the condominium's board of managers. *Nuzzo v. Board of Mgrs. of Jefferson Village Condominium No. 1, 644 N.Y.S.2d 546 (1996).*

Just as a corporation is distinct from its shareholders, a condominium homeowners' association is a separate legal entity from its unit owners. *Centeq Realty, Inc. v. Siegler, 899 S.W.2d 195 (Tex. 1995).* In Timmerman v. Board of Mgrs. of Anchorage Condominium, the court determined that the condominium board of managers acted beyond the scope of their authority as board members and without good faith when, without authorization, in the by-laws they formed an executive committee which suspended further meetings of the board of managers. *622 N.Y.S.2d 320 (1995).*

(n16)Footnote 116. *See* Institute of Real Estate Management, the Owner's and Manager's Guide to Condominium Management 83 (1984).

(n17)Footnote 117. *See, e.g., Bernardo Villas Mgt. Corp. No. Two v. Black, 235 Cal. Rptr. 509 (1987). Bradford Square Condominium Assn., Inc. v. Miller, 573 S.E.2d 405 (Ga. App. 2002)* (the condominium association was responsible for maintaining the common areas, but this duty did not extend to securing the common areas against criminal acts by third parties); *see also* Annotation, *Validity and Construction of Condominium Association's Regulations Governing Member's Use of Common Facilities, 72 A.L.R. 3d 308 (1976).* One of the aspects of common ownership of the common areas that has caused problems is the assignment of parking spaces to individual unit owners, especially where certain parking spaces (e.g., covered ones) are considered more valuable than others. *Alpert v. Le'Lisa Condominium, 667 A.2d 947 (Md. App. 1995). But see United States on Behalf of Woodruff v. Fairways Villa Condominium Ass'n, 879 F. Supp. 798 (D. Ohio 1995); Ng v. Quiet Forest II Homeowners Association, 87 F.3d 1321 (9th Cir. 1996).* Owners of "residential units" of condominium building had nondelegable duty to keep the premises in good repair. *Kandell v. Saunders, 637 N.Y.S.2d 114 (N.Y.A.D. 1996).* A unit owner who was not paying exclusive use fee could be barred from exclusively using a common element. *Rosso v. Golden Surf Towers Condominium Ass'n, 651 So. 2d 787 (Fla. Dist. Ct. App. 1995).* An amendment to the declaration of condominium ownership limiting occupancy of association units to unit owners and their immediate families was a valid exercise of the association's power; restriction was not arbitrary, against public policy, or in violation of a fundamental constitutional right. *Apple II Condominium Ass'n v. Worth Bank & Trust Co., 659 N.E.2d 93 (Ill. App. Ct. 1995).*

Condominium association's "one rider" rule, pursuant to which only one resident from each unit was allowed to utilize the association's transportation services and additional residents could use service only by paying added surcharge, violated statute providing that transportation services were to be assessed as common expenses, as failing to require contribution from unit owners in proportion to their ownership interests. *Scudder v. Greenbrier C. Condominium Ass'n, 663 So. 2d 1362 (Fla. App. 1995).* Condominium corporation had the power to impose fines upon condominium owner, who violated a rule prohibiting nonresident owners from using common recreational facilities, pursuant to its governing documents which provided that enforcement of rules could be enforced by means of fines and also contained a schedule of such fines, where owner received copies of governing documents and rules when he purchased his condominium unit. *Liebler v. Point Loma Tennis Club, 47 Cal. Rptr. 2d 783 (1995).* Parking spaces of condominium complex were not "limited common elements," as they would not be conveyed with unit, but rather, each parking space was assigned only so long as certain person owned the unit. Once the unit was sold to someone new, the parking space would be reallocated to a different person, not necessarily a new owner. *Alpert v. Le'Lisa Condominium, 667 A.2d 947 (Md. App. 1995).* The clubhouse was a common element that could not be sold as separate property of mortgagor in foreclosure, where the master deed's description of real property submitted to horizontal property regime. *Heritage Federal Sav. & Loan v. Eagle Lake & Golf Condominiums, 458 S.E.2d 561 (S.C. App. 1995).* The condominium association did not violate the illegal business practice statute by enacting and attempting to enforce a rule which generally prohibited animals outside of individual units, thereby effectively prohibiting owners from keeping large dogs in units, absent evidence that the association was involved in trade or commerce or that it acted unfairly or deceptively. Regulation on

the use of a condominium unit that unreasonably interferes with the enjoyment by various owners is permissible only if the restriction is contained within either the by-laws or the master deed. Condominium rules which generally prohibited animals outside of their individual units was held to be an invalid and unenforceable restriction, as rule effectively prohibited owners from keeping large dogs inside their units and was not contained within either the by-laws of the condominium or the master deed. *Granby Heights Ass'n v. Dean, 647 N.E.2d 75 (Mass. App. 1995).* The condominium association and its board of directors had the authority to levy daily fines against the condominium owner for the owner's failure to comply with condominium documents regarding the appearance of the condominium units, where the declaration of ownership signed by the owner expressly incorporated statutory powers granted to the association by the Condominium Act, and the Act expressly permitted a levy of fines for violations of condominium documents. *Stewart v. Kopp, 454 S.E.2d 672 (N.C. App. 1995).* Each unit owner in a condominium, in choosing to purchase a unit, must give up certain rights and privileges which normally accompany fee ownership of property and agree to subordinate those rights and privileges to the group's interest. *Agassiz West Condominium Ass'n v. Solum, 527 N.W.2d 244 (N.D. 1995).* While owners are entitled to exclusive possession and fee simple absolute ownership of their units, those rights were subject to provisions of the Condominium Act, including reasonable restrictions on use of the unit. *Breezy Apartment Owners' Ass'n v. B.P. Partnership, 531 N.W.2d 917 (Minn. App. 1995).* Recorded use restriction appearing in the original condominium documentation deserve higher degree of deference on judicial review than those subsequently promulgated by the condominium board of directors, considering that unit owners had notice of recorded use restrictions when they purchased their units. *Ridgely Condominium Ass'n v. Smyrnioudis, 660 A.2d 942 (Md. App. 1995).* These restrictions may be created in the Declaration and Bylaws or in restrictions contained in deeds to individual units or both. Where restrictions on use are found in both and the restrictions conflict, courts must decide which prevail. As long as both are reasonable and do not so conflict as to create an impossible situation regarding use (as where one compels a particular use and the other prohibits it), the more restrictive use normally is imposed. *Sea Watch Stores v. Council of Unit Owners of Sea Watch Condo, 691 A.2d 750 (Md. App. 1997). Sea Watch* overruled *Alpert v. Le'Lisa Condominium, 667 A.2d 947 (Md. App. 1995),* in light of a subsequent Maryland Court of Appeals decision in *Ridgely Condominium Ass'n v. Smyrnioudis, 681 A.2d 494 (Md. 1996). Board of Directors of 175 East Delaware Pl. Homeowners Ass'n v. Hinojosa, 679 N.E.2d 407 (Ill. App. 1997)* (no-dog rule promulgated by board held to be reasonable). *St. Jean Place Condominium Assoc. v. DeLeo, 745 A.2d 738 (R.I. 2000)* (an owner of one unit in a condominium complex claimed to have acquired title to a portion of the common area by adverse possession); *Behm v. Victory Lane Unit Owners' Assn, Inc., 728 N.E.2d 1093 (Ohio App. 1999)* (by virtue of statute and the condominium declaration, board had duty to maintain and repair common areas, including buildings' foundation); *Hofmeyer v. Willow Shores Condominium, 722 N.E.2d 311 (Ill. App. 1999)* (purpose for allowing limited common areas is to prevent owners of some units from being forced to pay a proportionate share of maintenance costs of areas or amenities from which they derive no use or benefit).

(n18)Footnote 118. *See Scott v. Sanstein Corp., 491 So. 2d 334 (Fla. App. 1986).* Many states follow a two-tiered approach to the substantive validity of condominium restrictions, an approach first set forth in *Hidden Harbour Estates, Inc. v. Basso, 393 So. 2d 637, 639B40 (Fla. Dist. 1981).* That case distinguished two categories of cases involving enforcement of restrictions. The first category is restrictions found in the condominium declaration itself. The second category is restrictions enacted by the board of directors. First category restrictions are "clothed with a very strong presumption of validity which arises from the fact that each individual unit owner purchases his unit knowing of and accepting the restrictions to be imposed." *Id. at 639.* Such restrictions are not to be invalidated "absent a showing that they are wholly arbitrary in their application, in violation of public policy, or that they abrogate some fundamental constitutional rights." *Id.* Thus, a declaration restriction may be in some sense unreasonable yet withstand judicial scrutiny. The rule is different in the second category. Here the "reasonableness" test is appropriate to "somewhat fetter the discretion of the board of directors." *Id. at 640.* Bylaw restrictions must be reasonably related to "the promotion of the health, happiness and peace of mind of the unit owners." *Id. Accord, Nahrstedt v. Lakeside Village Condominium Ass'n, 878 P.2d 1275 (Cal. 1994); Apple II Condominium Ass'n v. Worth Bank & Trust Co., 659 N.E.2d 93 (Ill. App. 1995); Ridgely Condominium Ass'n v. Smynrloudis, 660 A.2d 942 (Md. App. 1995).* Companion animals can be crucial to the physical and mental health of elderly people and people with disabilities, and federal law provides a limited right to keep animals despite "no pet" clauses in leases and homeowners association or condominium bylaws. Cynthia

Yockey, *Best Friends for Life: Your Right to Animals in "No Pet" Housing* (1996). *See also Best Friends for Life: Your Right to Animals in "No Pet" Housing, By Cynthia Yockey, Book Review*, Fed. Lawyer (June 1996). The Fair Housing Act Amendments of 1988, *42 U.S.C. § 3604,* prohibit housing discrimination against the handicapped, and defines such discrimination to include the failure to make reasonable accommodations, such as permitting use of a seeing-eye dog, to enable a person to use and enjoy a dwelling. A regulation banning motorcycles from the condominium development was a matter within the condominium board's authority, barring judicial review of reasonableness of the board's actions under the business judgment rule, absent proof of bad faith, fraud, self-dealing, or other misconduct on the part of the board. *Nuzzo v. Board of Mgrs. of Jefferson Village Condominium No. 1, 644 N.Y.S.2d 546 (N.Y.A.D. 1996).* The condominium association's permission to make alterations in an individual unit may not be refused, unless denial of permission serves to protect other affected interests; conversely, if unit owner's plans for work in the unit do not in appreciable way affect other interests, it is not reasonable for permission to be denied. *Billig v. Buckingham Towers Condominium Ass'n I, 671 A.2d 623 (N.J. Super. Ct. App. Div. 1996).* A condominium association, as a private association, could not abridge the First Amendment rights, and thus, the condominium restriction against posting signs on units, without the approval of the Board of Directors, was not a permissible infringement of free speech. *Midlake on Big Boulder Lake, Condominium Ass'n v. Cappuccio, 637 A.2d 340 (Pa. Super. 1996).* A condominium rule which generally prohibited animals outside of individual units was invalid and unenforceable restriction, as the rule effectively prohibited owners from keeping large dogs inside units and was not contained either in the bylaws of the condominium or its master deed. Any regulation on use of the condominium unit that unreasonably interferes with enjoyment by various owners is permissible only if the restriction is contained by bylaws or the master deed. *Granby Heights Ass'n v. Dean, 647 N.E.2d 75 (Mass. App. 1995).* For a brief history of the enforcement of pet restrictions *see* Daniel R. Puterbaugh, *The Reasonable Pet: An Examination of the Enforcement of Restrictions in California Common Interest Developments After Nahrstedt v. Lakeside Village Condominium Ass'n, Inc.,* Santa Clara L. Rev. 793 (1996). *See also* Paula C. Murry, *Restrictive Covenants in Homeowners' Associations: Are They Going to the Dogs?*, 23 Real Est. L.J. 356 (Spring 1995); Armand Arabian, *Condos, Cats, and CC&RS: Invasion of the Castle Common, 23 Pepp. L. Rev. 1 (1995);* and Sheri L. Marvin, *California Supreme Court Survey February 1994-December 1994, III. Condominiums, 22 Pepp. L. Rev. 1692 (1995).* For an excellent commentary on *Nahrstedt v. Lakeside Village Condominium Ass'n,* and the "as applied" reasonableness standard, *see* Carl B. Kress, *Beyond Nahrstedt: Reviewing Restrictions Governing Life in a Property Owner Association, 42 UCLA L. Rev. 837 (Feb. 1995).* In reviewing rules and regulations promulgated by condominium associations, the court should apply a "reasonableness" test. *Scudder v. Greenbrier C. Condominium Ass'n, 663 So. 2d 1362 (Fla. App. 1995).* The appropriate standard of judicial review for evaluating a condominium bylaw amendment containing a use restriction is reasonableness; while a more deferential standard may be employed when considering provisions contained in original condominium documentation, later adopted provisions that are passed by less than unanimous approval of all unit owners have potential to discriminate against certain classes of owners; thus, one factor that should influence heavily in applying reasonableness is uniformity. *Ridgely Condominium Ass'n v. Smyrnioudis, 660 A.2d 942 (Md. App. 1995). Soho Bazaar v. Board of Managers, 266 A.D.2d 65, 698 N.Y.S.2d 626 (1999)* (contract vendee lacks standing to enforce condominium bylaws).

(n19)Footnote 119. *Bernardo Villas Mgt. Corp. Number Two v. Black. Rossow v. Brentwood Farms Dev., Inc., 651 N.W.2d 458 (Mich. App. 2002)* (a driveway that encroached on condominium owner's property due to a surveying error was held to be a common area and the court authorized an easement).

See also Scudder v. Greenbrier C. Condo. Ass'n, 663 So. 2d 1362 (Fla. App. 1995) (assessment for offsite transportation services invalidated because the association's "one rider" rule, allowing only one rider from a unit to use the transportation at one time unless a surcharge for each additional rider was paid, was unreasonable and discriminatory); *Granby Heights Ass'n v. Dean, 647 N.E.2d 75 (Mass. 1995)* (rule prohibiting walking of dogs across common areas held unreasonable); *Ridgely Condominium Ass'n v. Smyrnioudis, 660 A.2d 942 (Md. App. 1995)* (bylaw amendment that prohibited clients of commercial establishments in units on lower floors from gaining access through the main lobby held unreasonable); *Timmerman v. Board of Mgrs. of Anchorage Condominium, 622 N.Y.S.2d 320 (1995)* (board members acted beyond the scope of their authority and without good faith when without bylaw authorization they formed an executive committee which suspended further meetings of the board).

(n20)Footnote 120. *Scott v. Sanstein Corp., 491 So. 2d 334 (Fla. App. 1986).*

(n21)Footnote 121. *See* Uniform Condominium Act § 3-107. A question that may arise regarding liability for assessments is whether an owner is not liable before his or her unit is actually built. In *Aluminum Industries Corp. v. Camelot Trails Condominiums Corp., 535 N.W.2d 74 (Wis. App. 1995),* the court held that an unbuilt condominium is a unit subject to assessment unless the declaration or bylaws provide otherwise; *Pilgrim Place Condominium Ass'n v. KRE Properties, Inc., 666 A.2d 500 (Me. 1995)* (Maine's condominium statute did not direct an answer to whether unbuilt units could be the subject of assessments). A unit owner may not refuse to pay fees simply because he or she disagrees with the board's decision. *See Abbady v. Abbady, 629 N.Y.S.2d 6 (A.D. 1995); Agassiz West Condominium Ass'n v. Solum, 527 N.W.2d 244 (N.D. 1995).* Condominium by-laws stating that each condominium unit owner would be liable for his or her portion of each assessment while he or she was the unit owner meant that the collective owners of the condominium unit would be liable for the unit's portion of the total assessment only to the extent of their individual ownership, so owner who held only one percent interest in the unit could not be held jointly and severally liable for all assessments and related charges levied on the unit. *Chattahoochee Chase Condominium Ass'n v. Ruben, 472 S.E.2d 520 (Ga. App. 1996).* The purchaser of a condominium unit was entitled to offset of $12,000 from monthly common charge payments based upon water damage to her unit; under the vendor's offering plan, vendor was responsible for prompt repair of water leakage problem, and vendor's delay in making the repairs caused damage. *Granada Condominium I v. Morris, 639 N.Y.S.2d 91 (1996).* The provision of the ondominium declarations stating that the damage to any unit "resulting from the maintenance, repair, emergency repair or replacement of any of the general common elements" would be a common expense to all owners applied to the damage resulting from repair in the boiler room, which was a common area and not merely to situations where the association managers were compelled to enter the owner's unit to conduct maintenance or repair. *Insurance Co. of N. Am. v. Aspen Alps Condominium Ass'n, 915 F. Supp. 1122 (D. Colo. 1996).* A condominium owner may not escape the pro rata share of expenses by waiver; rather, one seeking adjustment based upon Horizontal Property Law's statutory factors of floor area, number of occupants, demand on public utilities, and accessibility to limited common elements is obligated to demonstrate reasonableness of the reduction sought. *Plaza Condominium Ass'n v. Wellington Corp., 920 S.W.2d 51 (Ky. 1996).* A tenant who resided in condominium unit and received benefit of the condominium's common areas, including free gas, heat, and water, was not required to pay common area fees where nonoccupying owner of the unit failed to pay fees, filed bankruptcy, and permitted the tenant to remain in the unit without charging rent or assigning rent to his creditors. *Foxwood Square Condominium I v. Albert, 643 N.Y.S.2d 912 (N.Y.City Civ. Ct. 1996).* Membership assessments that exceeded the expenses of a condominium management association were taxable income because they were not constructively refused by members. Also, capital assessments that the member did not specifically approve were not capital contributions. *Excess Assessments Taxable to Condo Management Co., Real Estate,* 24 Tax'n for Lawyers 4 (Jan./Feb. 1996). *See also Taxability of Member Assessments Collected by Time-Share Condominium Management Association*, 84 J. of Tax'n (Jan. 1996), and *Excess Assessments Taxable to Condo Management Co.*, 55 Tax'n for Acct. 380 (Dec. 1995). The Maine Condominium Act implies that the creation of units owned by the declarant and the concomitant obligation to pay assessments may occur prior to the actual construction of the physical units. *Pilgrim Place Condominium Ass'n v. KRE Properties, Inc., 666 A.2d 500 (Me. 1995).* A statute increasing the authority of the condominium owners' association to impose fees did not apply retroactively to an association formed before its effective date. *Miesch v. Ocean Dunes Homeowners Ass'n, 464 S.E.2d 64 (N.C. App. 1995).* The condominium management company could not recover from a condominium owner the expenses and losses that were incurred after the date that the agency agreement between the two parties automatically terminated. The owners' association complied with the condominium agreement in its calculation of assessments against the condominium owner. *Lakepoint Condominium 2 Owners Ass'n v. Durian, 906 S.W.2d 396 (Mo. Ct. App. 1995).* The beneficiary of a trust that developed condominiums owed a fiduciary duty to the condominium association to adequately fund the reserve; the statute required the beneficiary to pay a proportionate share of common expenses for unsold units, and Historical and Practice Notes to statute indicated that this language either codified or clarified preexisting law. *Maercker Point Villas Condominium Ass'n v. Szymski, 655 N.E.2d 1192 (Ill. App. 2d 1995).* By executing and recording the declaration of condominium unit ownership, the developer submitted its condominium project to statutes on unit ownership. The developer of the condominium project was statutorily prohibited from unilaterally exempting itself from payment to the homeowners' association of its pro rata share of

maintenance assessments for its own units. *Dunes South Homeowners' Ass'n v. First Flight Builders, Inc. 459 S.E.2d 477 (N.C. 1995).* Condominium property on which no construction has taken place is a "unit" subject to assessment for common expenses. *Aluminum Indus. Corp. v. Camelot Trails Condominium Corp., 535 N.W.2d 74 (Wis. App. 1995).* The condominium association had authority to assess special fees against certain owners for insurance and maintenance expenses for common areas and facilities located within a fenced-in pool area adjacent to their units, to which they had exclusive rights and easement. They took title with notice that they had sole responsibility for expenses associated with the pools. *Podell v. Lahn, 651 N.E.2d 859 (Mass. App. 1995).* When individual unit owners obtained a money judgment against their condominium association for unauthorized acts, the association levied a special assessment against the owners to raise the necessary funds. The court ruled that the owners can be assessed to pay themselves and their attorney. *Condominiums: Unit Owners Assessed to Pay Themselves Damages*, 25 Real Est. L. Rep. 6 (Oct. 1995). *See also Ocean Trail Unit Owners Ass'n v. Mead, 650 So. 2d 4 (Fla. 1994).* The condominium owners' duty to pay assessments is conditioned solely on whether the unit owner holds title to the condominium unit and whether the assessment conforms to the declaration of the condominium and the bylaws of the association, which are authorized by statute. *Ocean Trail Unit Owners' Ass'n v. Mead, 650 So. 2d 4 (Fla. 1994).* Future units in homeowner's association could be subject to assessment before condominium declaration was filed pursuant to the *Condominium Act. Packard Real Estates Homeowners' Ass'n v. James V. Paige, Jr., Dev., Inc., 645 N.Y.S.2d 242 (1996).* Liens for delinquent common expense assessments on individual condominium units are creatures of statute, and the court must respect intricate priority scheme that legislature has established for such items. *Dime Sav. of New York, FSB v. Muranelli, 667 A.2d 803 (Conn. App. 1995).* In order to foreclose on a condominium unit based upon the unit owner's failure to to pay special assessment, the condominium association was required to prove that it sent written notice of specific purpose or purposes of the assessment to each unit owner. *Star Lake Estates Ass'n v. Auerbach, 656 So. 2d 271 (Fla. Dist. Ct. App. 1995).* The mere fact that an individual condominium unit owner may not withhold payment of common charges and assessments in derogation of condominium by-laws based on a defective condition of his unit or common areas does not mean that the unit owner is precluded from interposing any defenses to action brought by the Board of Managers for foreclosure even when there is no claim that the unit owner is in derogation of any of the condominium by-laws. *Residential Bd. of Managers of Century Condominium by Simons v. Berman, 633 N.Y.S.2d 478 (1994). Huskey v. Managers of Condos of Edelweiss, 696 N.E.2d 753 (Ill. App. 1998)* (board cannot change plaintiffs' ownership interest in common area without consent of all unit owners); *Gulf Shores Council of Co-owners, Inc. v. Raul Cantu No. 3 Family Ltd. Partnership, 985 S.W. 2d 667 (Tex. App. 1999)* (recognizing condominium association's considerable discretion to determine expenses and assessments); *Alma Investments, Inc. v. Bahia Mar Co-Owner Ass'n, 999 S.W. 2d 820 (Tex. App. 1999)* (condominium agreement provision allowing developer to exempt certain owners from maintenance charges held void as against public policy and state condominium act requiring each co-owner to contribute a pro-rata share).

(n22)Footnote 122. *See, e.g.*, Ohio Rev. Code § 5311.18(A). Because delinquencies in condominium fees can leave owners in severe financial difficulties some commentators advocate giving the owners' associations lien priority over a condominium owner's first mortgage. *See, e.g.*, Grahame K. Wells, Note, *The Use of Super-liens to Promote Cooperation Between Condominium Associations and Lenders*, 13 Ann. Rev. Banking L. 477 (1994). The association must give an owner adequate notice of its intention to record a lien for these unpaid assessments, however. *Loigman v. Kings Landing Condo., 734 A.2d 367 (N.J. Super. 1999); Mountain View Condominium Ass'n v. Bomersbach, 734 A.2d 468 (Pa. 1999)* (association that won judgment for attorney's fees against owner may recover attorney's fees for trying to recover attorney's fees).

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CHAPTER 36 CONDOMINIUMS AND COOPERATIVES

4-36 Thompson on Real Property, Thomas Editions § 36.11

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§ 36.11 Common Conflicts Encountered by Condominium and Cooperative Owners

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§ 36.11(a) Loss of Deposit/Downpayment.

When a prospective condominium unit purchaser makes a downpayment or a deposit a legally binding obligation between the purchaser and the developer or the developer's agent is created. The amount of the deposit or downpayment is immaterial. Thus, unless a condominium purchase is in violation of state law, it is binding when executed. A mere violation of the statutes governing condominiums, at least where those statutes have consumer protection as their goal, may not be enough to justify a refusal by purchaser to perform or to compel return of the purchaser's downpayment in the absence of a nexus between the violation and purchaser's refusal to perform. n123

A typical requirement with respect to such deposits and downpayments is that they are held in a trust or escrow account until delivered at settlement, or otherwise returned or credited to the account of the purchaser. This information is usually required to be placed in the condominium declaration. In addition, under certain conditions some states provide for the payment of interest on downpayments or deposits. n124

When a condominium developer does not return a prospective downpayment or deposit the usual types of contract remedies apply. In addition, under circumstances where substantial numbers of persons have been affected, and substantial harm has occurred, many states provide the state attorney general with the power to pursue declaratory judgment actions, as well as pursue class actions for damages. n125 More often, however, the attorney general's power with respect to condominiums and cooperatives is limited to the use of the subpoena power for the purpose of investigating wrongdoings in the condominium offering statements. New York n126 represents one example.

§ 36.11(b) Burdensome Contracts.

Many of the major problems associated with condominium ownership have to do with burdensome or unconscionable agreements for both condominium management and for recreational facilities. With respect to each it has been observed:

> A mandatory provision of typical offering plans requires the purchaser to become a member of the

> recreational association and to pay an annual fee for the use of the recreational facilities. Some plans also require that the owner-member pay for any increase in real property taxes associated with the facilities. Furthermore, title to the facilities is retained by the sponsor--in other words, it does not become part of the common elements. In addition to the abuses, one plan examined stated that the annual dues would be increased by a cost-of-living factor; in other words, as the consumer price index rose, so would the level of the annual "dues."
>
> * * *
>
> The management agreement is another booby trap of the typical offering. Some sponsors insert in the master deed a requirement that the sponsor or the sponsor's appointee be the managing agent of the project for, say, a period of 50 years. Management, as has been pointed out, is a vital necessary for the successful operation of a project. It must be carried out with skill and proficiency. When management is entrusted to an incompetent or a rascal with a larcenous bent, there can be all sorts of adverse ramifications. The agent can pad bills, order unnecessary work and repairs, put favorites on the payroll, and carry out a raft of other deceptive practices which serve to line his pockets and raise the operating expenses of a project. n127

There is no legal prohibition against a developer retaining ownership interests in condominium recreational facilities furnished to condominium unit owners and others. Typically, one of the problems that arises when the developer retains property interests in the condominium recreational facilities is the conflict over the developer's ability to lease the recreational facilities to a separate operator at the developer's option. Generally, the facilities operator pays a rental fee to the developer which means, of course, that neither the unit owners nor the association reap any financial benefits from the arrangement. In addition, if what the operator or the developer delivers is inefficient the quality of recreational services might be low. The typical response is to limit the length of these kinds of contracts. This is the general approach taken by the Uniform Condominium Act. n128

§ 36.11(c) Physical Defects.

The following excerpt illustrates some of the problems that can occur when substantial physical defects are allowed to exist in a condominium:

> Ben and Elaine were down in Miami, ready to retire, flush with cash from the recent sale of their home in New Jersey, and ready for a retirement condominium apartment.
>
> They looked around a lot and finally bought a two-bedroom unit from a suspicious-looking widow who muttered responses to most of their questions. The apartment was a really nice accommodation in a high-rise building that was some 15 to 20 years old. Eighteen months after they moved in, a meeting of the owners was called to discuss the replacement of the two elevators in the building. Numerous complaints had been made about the awful condition of the cars and their frequent failures. Oftentimes the cars would stop and get stuck between floors. In fact, old Mr. Cohen had a heart attack and died during one of those failures. Yes, they would have to be replaced. Estimates were received, and the total cost was indicated at $125,000.
>
> Where does the money come from? You guessed it. There was no provision for replacements in the monthly charges, so special assessments will have to be made. How much has not been determined at the moment, but you may rest assured that the total will be quite substantial.
>
> Moral:
>
> 1. Be sure to include ALL expenses, including a reserve for potential replacements.

2. Don't delude yourself as to the true costs of ownership.

3. A replacement provision means you are materially underestimating expenses.

4. Have the building inspected by a reputable contractor or other specialist to determine the condition of its various components. (emphasis added) n129

The foregoing illustrates the absolute necessity of a thorough inspection of both the individual condominium unit and as much of the entire project as possible. This is especially true of older facilities. A thorough inspection, using experts, if possible, can help prevent the potential unit purchaser from becoming involved in problems like those described above.

State law usually requires developers to describe any warranties for structural elements and mechanical and other systems, in both individual units and for common areas and facilities. Such warranties usually appear in the condominium declaration and offering statements. Consequently, if they discover that there has been a breach of warranty, unit owners then have the right to seek damages and other appropriate remedies. In addition, usually unless the condominium declaration provides otherwise, damage to or destruction to any or all parts of the common areas must be promptly repaired by the management association or board of managers.

§ 36.11(d) Conflicts of Interest.

Ohio law specifically states:

> No developer or agent, directly or indirectly, shall sell or offer to sell a condominium ownership interest in a condominium development unless he discloses fully and accurately to each prospective purchaser of the interest all material circumstances or features affecting the development, by preparing and providing to each prospective purchaser a readable and understandable written statement of such circumstances or features. The statement shall not intentionally omit any material fact or contain any untrue statement of a material fact... . n130

Ohio law, like the law of most states, does not specifically disallow conflicts of interest on the part of the developer. Nevertheless, the condominium declaration is the proper vehicle for statements concerning, for example, the developer's retention of a property interest in recreational facilities provided to unit owners, a potential conflict of interest. In addition, any actual or potential conflict not disclosed enables unit owners, and in some instances, the attorney general, to bring actions for both damages and declaratory relief.

§ 36.11(e) Financing.

The Uniform Act requires the developer to disclose "any financing offered or arranged by the declarant." n131 Other state requirements are more extensive. n132

§ 36.11(f) Selection of Occupants and Subleasing.

The bylaws of the condominium association generally determine how occupants of units are selected and what restrictions condominium unit owners have on the transfer of their units. n133 For example, some condominium association bylaws provide the unit owners' association with the right of first refusal. n134 This means that a unit owner may be required to offer the unit to the association before it can be sold to a third party. In addition, some bylaws contain strict rules on assignment or subleasing of ownership interests. n135

FOOTNOTES:
(n1)Footnote 123. *Fruin v. Colonnade One at Old Greenwich Ltd. P'ship, 662 A.2d 129 (Conn. App. 1995)* (statute was not intended "as a vehicle for purchasers to avoid a purchase agreement by citing alleged violations bearing no

relationship to the defaulting purchaser's acts"); *Thompson v. HWG Group, Inc., 664 A.2d 489 (N.H. 1995)* (statute creates liability only where purchasers rely; plaintiffs had no knowledge of misstatement of developer so could not have relied on it).

(n2)Footnote 124. *See, e.g.*, Ohio Rev. Code Ann. § 5311.25(A); Fla. Stat. § 718.202(1).

When a condominium developer breaches the purchase contract with the purchaser by failing to complete construction free from defective materials and in workmanlike manner, developer was not entitled to recover damages on counterclaim for purchaser's failure to close, nor retain earnest money under contractual forfeiture provision. *Daugherty v. Bruce Realty & Dev., Inc., 892 S.W.2d 332 (Mo. App. 1995).*

(n3)Footnote 125. *See, e.g.*, Ohio Rev. Code Ann. § 5311.27(C).

(n4)Footnote 126. *See, e.g., Charles H. Greenthal & Co. v. Lefkowitz, 299 N.E.2d 657 (N.Y. 1973).*

(n5)Footnote 127. *See* Hubin, Warning! Condominium Ownership May be Dangerous to Health, Wealth and Peace of Mind 64-66 (Irwin 1976).

(n6)Footnote 128. *See* Uniform Condominium Act § 3-105, cmts. 1 and 2.

(n7)Footnote 129. *See* Hubin, Warning! Condominium Ownership May be Dangerous to Health, Wealth and Peace of Mind 108-109 (Irwin 1976).*Socy. Hill Condominium Assn., Inc. v. Socy. Hill Assoc., 789 A.2d 138 (N.J. Super. 2002)* (in cases of alleged construction defects, look to the master deed and statutory definition to determine whether an item is part of the common area). *See Kovich v. Paseo Del Mar Homeowners' Ass'n, 48 Cal. Rptr. 2d 758 (1996)* (condominium association had no duty to tell purchaser about construction defects or existence of civil action against developer to repair defects; association was not the seller, was not a party to the contract and had no special relationship with the buyer).

(n8)Footnote 130. Ohio Rev. Code Ann. § 5311.26.

(n9)Footnote 131. *See* Uniform Condominium Act § 4-103(a)(9).

(n10)Footnote 132. *See* Ohio Rev. Code Ann. § 5311.26(D), which indicates a developer must show:

The significant terms of any financing offered by or through the developer to purchasers of the condominium ownership interests in the development, including the name of any bank or other institution involved in the financing, the minimum down payment, a statement that the prospective purchaser may obtain financing from another bank or institution, and the annual interest rate.

Any failure on the developer's part to disclose significant terms like those described above render such developer liable for damages and declaratory relief.

"Foreclosure" for purposes of the statute determining the liability of the developer and the lender upon foreclosure of condominium development includes instances in which the lender acquires a deed in lieu of foreclosure. *Moloney v. Boston Five Cents Sav. Bank, FSB, 663 N.E.2d 811 (Mass. 1996).*

(n11)Footnote 133. *Gulf Shores Council of Co-owners, Inc. v. Raul Cantu No. 3 Family Ltd Partnership, 985 S.W. 2d 667 (Tex. App. 1999)* (where owner challenged Board's decision to prohibit outside leasing agents, court upheld Board's decision under a reasonableness standard; decision was not arbitrary, capricious or discriminatory).

(n12)Footnote 134. *Soho Bazaar, Inc. v. Board of Managers of Soho Intern. Arts. Condominium, 698 N.Y.S.2d 626 (1999)* (a contract vendee lacks standing to enforce condominium bylaws; the essence of the vendee's complaint was

that Board had wrongfully purchased units under right of first refusal in by-laws).

(n13)Footnote 135. *Apple II Condominium Ass'n v. Worth Bank & Trust Co., 659 N.E.2d 93 (Ill. App. 1995)* (an Illinois condominium association may prohibit the leasing of units; if the prohibition results from Board action it will be upheld if it is affirmatively shown to be reasonable in purpose and application, if prohibition is made a part of condominium declaration it is presumed valid unless it is arbitrary or violates public policy or unit owners' constitutional rights). A lender/mortgagee that had foreclosed on a condominium unit and held absolute title to the unit was considered a constructive "landlord," for purposes of statute limiting the landlord's ability to eject elderly, blind, or physically disabled tenants. The lender became the owner, and thus, the landlord, when the entire title to the unit became vested in it as a result of the foreclosure judgment and the passing of law days. *First Federal Bank, FSB v. Whitney Dev. Corp., 677 A.2d 1363 (Conn. 1996).* In purchasing a townhouse, the purchaser impliedly agreed that property rights being sold were subordinate to interest of the homeowners' association as a whole. *Kovich v. Paseo Del Mar Homeowner's Ass'n, 48 Cal. Rptr. 2d 758 (1996).*

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CHAPTER 36 CONDOMINIUMS AND COOPERATIVES

4-36 Thompson on Real Property, Thomas Editions § 36.12

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§ 36.12 Problems Associated with Condominium Conversion.

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§ 36.12(a) History.

The condominium concept in the United States is just over thirty years old; the general public has thus tended to associate the term "condominium" with new construction. In fact, many people think of a condominium as a type of new building and not simply another form of property ownership. Condominium conversion is therefore a relatively new concept. Studies indicate that few rental properties, if any, were converted to condominium ownership in the United States prior to 1970. n136 Since that time, however, there has been a relatively steady acceleration of condominium conversions of rental housing. n137

There are numerous schools of thought on why the concept of condominium conversion has been steadily advancing:

> Two distinct lines of argument have been advanced to explain why and where conversions occur. One is that conversions are products of distressed rental markets, in which landlords sell for conversion as a response to declining profitability. On the demand side, rental market distress would be evidenced by slow growth or decline in population or the rate of new household formation, lack of competition for available units and net out-migration of population. On the supply side, distress would be indicated by a combination of high rental vacancy rates, depressed rent levels, low rates of new rental construction, and high rates of rental losses from inventory.
>
> Another explanation for conversions is that they respond to a strong and growing demand for ownership produced largely by rapid inflation. Strong demand and inflation tend to price traditional single-family homes beyond the reach of some new, younger households and other middle-income people who would otherwise be in the market. On the demand side, evidence of growing preferences for ownership would include strong sales of single-family homes, as well as condominiums, and relatively low vacancy rates in certain neighborhoods and communities. A large pool of younger, relatively more affluent renter households might indicate that an area has great potential demand for multi-family ownership, including ownership of converted properties. On the supply side, strong ownership demand would be reflected by relatively high levels of new construction of both single-family homes and

condominiums. (citations omitted) n138

One commentator has listed three primary reasons and seven secondary reasons why developers have entered into the condominium conversion process. Primary reasons seem to be inflation, location, and profitability. Inflation is a factor because some investors are of the opinion that rental rates have not outstripped the cost of living; thus more profitable uses of funds have been sought, one of them being the condominium. Location is important because of increasingly scarce land in urban centers. Profitability is important because theoretically condominium conversion yields more funds to the developer than does new construction. n139

Other advantages of condominium conversion include the following:

1. There is always flexibility to revert to previous use if the conversion is not successful.

2. Often the costs of development are more clearly ascertainable.

3. Existing tenants create a built in market.

4. Less expertise in site planning, engineering and architecture, obtaining building permits, construction and construction management, and finance is required for a conversion than for new development.

5. Urban locations offer the advantages of time-saving, gas-saving and money-saving economics.

6. Conversions can attract people to an existing neighborhood at lower prices than comparable new construction.

7. The current popularity of restored traditional architecture and quality can be taken advantage of in older buildings. n140

Regardless of what reasons exist for condominium conversions, it is not likely that the trend will conclude soon. Nevertheless, condominium conversion probably has as many detractors as it does proponents. Thus, the arguments have generally gone along the following lines:

> One of the most controversial issues in the field of condominium development relates to conversion condominiums. Opponents of conversions point out that the frequent result of conversions, which occur principally in large urban areas, is to displace low- and moderate-income tenants and provide homes for more affluent persons able to afford the higher prices which the converted apartments command. Indeed, studies indicate that the burden of conversion displacement falls most frequently on low- and moderate-income and elderly persons. At the same time, the conversion of a building to condominium ownership can lead to a substantial increase in property value, a result which proponents believe can be an important factor in curtailing the problem of declining urban tax bases. Proponents also point out the conversion of rental units in inner-city areas to individual ownership frequently results in the stabilization of buildings concerned, thus providing an important technique for use in neighborhood revitalization. n141

§ 36.12(b) Legal Issues.

Restrictions on developers' abilities to convert rental housing to condominium use are few. Most of restrictions relate to notice. For example, the Uniform Condominium Act "... in an attempt to strike a fair balance between the competing interests of rental tenants and prospective owners, [subsection b of UCA 4-112] provides the tenant a right for 60 days to purchase the unit which he leases at a price and on terms offered by the declarant. The subsection discourages

unreasonable offers by declarants by providing that, if the tenant fails to accept the terms offered, the declarant may not thereafter sell the unit at a lower price or upon more favorable terms to a third person for at least 180 days. n142 The Uniform Condominium Act also explicitly prohibits the developer from violating existing tenant leasehold rights. n143 The various states provide for similar notice and purchase provisions. n144

If a tenant fails to exercise the option to purchase a condominium within the time constraints indicated in the statute and then fails to vacate the premises the general rule is that statutory condominium conversion restrictions do not prohibit the use of the particular state's summary process provisions for evictions. n145 Of course, it has been held that failure to give proper notice of condominium conversion to a tenant is a valid defense to a summary eviction process. n146

FOOTNOTES:

(n1)Footnote 136. *See generally* H.U.D., The Conversion of Rental Housing to Condominiums and Cooperatives: A National Study of Scope, Causes and Impacts, (1980) (hereafter, 1980 H.U.D. Study).

(n2)Footnote 137. *Id. See also* Keith B. Romney, Condominium Development Guide, § 10.1 (2d ed. 1983 & Supp. 1990).

(n3)Footnote 138. 1980 H.U.D. Study, *supra* n.130, at V-1, V-2. *See also* Converting Rental Housing into Condominiums (P.L.I. 1975).

(n4)Footnote 139. Keith B. Romney, Condominium Development Guide, § 10.1[2] (2d ed. 1983 & Supp. 1990).

(n5)Footnote 140. *Id.*

(n6)Footnote 141. Uniform Condominium Act § 4-112, cmt. 1. *See also* Williams, The Great Condominium Ripoff, ch. 6; Hubin, Warning! Condominium Ownership May be Dangerous to Health, Wealth and Peace of Mind 72-76 (Irwin 1976).

See Williams v. 5300 Columbia Pike Corp., 901 F. Supp. 208 (E.D. Va. 1995) (the court found the board's valuation "eminently sensible" inasmuch as "plaintiffs were paid for exactly what they had at the time of repurchase, namely, shares in a cooperatively owned apartment building").

(n7)Footnote 142. Uniform Condominium Act § 4-112, cmt. 2.

(n8)Footnote 143. Uniform Condominium Act § 4-112(e).

(n9)Footnote 144. *See, e.g.,* Conn. Gen. Stat. Ann. § 47-88b. The *Condominium and Cooperative Abuse Relief Act* was intended to eliminate potential for abuse to which the conversion process lends itself. *Condominium and Cooperative Abuse Relief Act* of 1980 § 608(b), *15 U.S.C. § 3607*(b). *WHCS Real Estate Ltd. P'ship v. 33 Greenwich Owners Corp., 642 N.Y.S.2d 483 (1996).* Under Delaware law, the plaintiff generally bears the burden of proof on fairness of purchase price for nonparticipating shares in conversion of cooperative apartment building into condominiums, and must overcome the business judgment rule mandating substantial deference to decisions of the cooperative's board of directors. Williams v. 5300 Columbia Pike Corp., 901 F. Supp. 208 (E.D. Va. 1995). A cooperative corporation, which owned title to living units in which shareholders resided, was not precluded under Delaware law from requiring that shareholders purchase their units, as part of a condominium conversion, or sell units to corporation at a price allegedly below market, even though some shareholders were allegedly financially unable to purchase the condominium units. It was sufficient that requirement to purchase or right to sell applied equally to all shares. Williams v. 5300 Columbia Pike Corp., 891 F. Supp. 1169 (E.D. Va. 1995). The tenant was barred from suing on a breach of contract claim in connection with condominium conversion by his default in failing to tender purchase price for his unit pursuant to purchase agreement and failure to allege that he was ready, willing and able to do so. *Yalkowsky v. Century Apts. Assoc., 626 N.Y.S.2d 181 (1995).*

(n10)Footnote 145. *See, e.g.*, Uniform Condominium Act § 4-112, Comment 4; Conn. Gen. Stat. Ann. § 47.88b(g).

(n11)Footnote 146. *Glenn Chaffer, Inc. v. Kennedy, 433 A.2d 1018 (Conn. 1981); see also* Annotation, *Validity and Construction of Law Regulating Conversion of Rental Housing to Condominiums, 21 A.L.R. 4th 1083 (1983).*

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CHAPTER 36 CONDOMINIUMS AND COOPERATIVES

4-36 Thompson on Real Property, Thomas Editions § 36.13

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§ 36.13 Remedies for Misconduct by Developer, Association or Owner.

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§ 36.13(a) Remedies Against the Developer.

State condominium disclosure laws generally mandate that condominium sales information supplied by the developer conform to strict guidelines. n147 It has been stated that the best "consumer protection" that the law can provide to any purchaser is to insure that such purchaser has an opportunity to acquire an understanding of the nature of the products that are being purchased. n148 As with other kinds of consumer products this is also true of the condominium purchase.

In addition to any other remedies available, contracts or agreements for the sale of condominium units which violate such disclosure guidelines are usually voidable for some period after the date of the sale of the interest. n149 Upon the exercise by the purchaser of the right to rescind the contract or agreement, usually within fifteen days of execution, the deposit or down payment must be promptly returned. n150 Often disgruntled purchasers may sue for and receive reasonable attorney's fees. n151 In some states, the failure to promptly return such payments constitutes a felony. n152 Developers may also be liable for both express and implied warranties of fitness and merchantability. n153 Lastly, in some states statutes allow the attorney general n154 or a state real estate board to intervene. n155

§ 36.13(b) Remedies Against the Association.

The unit owners association may sue or be sued as a separate legal entity in actions relating to the common areas and facilities, or in actions relating to any right, duty, or obligation possessed or imposed upon the association by statute or otherwise. n156 Generally speaking, service of process in these instances is made either on the chief officer of the association, or upon the person named in the condominium declaration. All parties to condominium instruments are expected to comply with the terms of the condominium documents. This includes all covenants, conditions and restrictions set forth in the deed and other instruments which are subject to the condominium declaration, bylaws or other condominium rules and regulations.

It is clear that individual condominium unit owners can become defendants in cases involving breaches of the foregoing covenants, conditions, and restrictions. It is equally clear that condominium associations, not individual association officers, are generally the proper defendants in cases involving such breaches. n157 Of course, condominium

associations and unit owners may also act as plaintiffs. n158

§ 36.13(c) Remedies Against Owners.

Unless the declaration or the bylaws provide otherwise, when unit owners default in the payment of condominium assessments, the owners' association usually has the right to place a lien upon the estate or interest of any condominium unit, together with its appurtenant percentage of interest in the common areas and facilities for payment of the common expenses chargeable against the unit, if such charges remain outstanding for a period of time after they have become due and payable. n159 Such liens either explicitly or implicitly do not have priority of mortgages or real estate taxes. n160

FOOTNOTES:
(n1)Footnote 147. *See, e.g.,* Uniform Condominium Act § 4-103; Fla. Stat. 718.504; Conn. Gen. Stat. Ann. § 47-71b. The provision of a condominium purchase agreement prohibiting individual unit owners from seeking relief directly from sponsors, with respect to any common element, was enforceable, except with regard to claims for flood damage, which were reserved in the survival agreement. *Devlin v. 645 First Ave. Manhattan Co., 645 N.Y.S.2d 476 (1996).* A disabled person alleged that architectural barriers to the condominium project violate the *Fair Housing Act* and Hawaii Revised Statutes Chapter 515 -- Discrimination in Real Property. The court dismissed the complaint, holding that the plaintiff had failed to allege an injury in fact traceable to defendant's denial of his right to purchase or rent housing. *Ricks v. Beta Dev. Co., 92 F.3d 1193 (9th Cir. 1996).* The unit owners of Lords Landing Village Condominium ("unit owners"), having obtained a $1.1 million judgment against the condominium developer, filed this action against the developer's insurance company, to compel them to pay the judgment. The court concluded that the policy issued by Continental did not cover the loss because it did not rise from an "occurrence" within the meaning of the policy. *Lords Landing Village Condominium Council of Unit Owners v. The Continental Ins. Co., 92 F.3d 1179 (4th Cir. 1996).*

(n2)Footnote 148. Uniform Condominium Act § 4-103, cmt. 1. While two-year statute of limitations applied to the condominium association's claims against the developer for breach of warranties not contained in the Uniform Condominium Act (UCA), six-year statute governed breach of warranties under *UCA. Hyland Hill North Condominium Ass'n v. Hyland Hill Co., 549 N.W.2d 617 (Minn. 1996).* The Condominium Act imposes personal liability for misrepresentations in the condominium offering statement, even absent evidence that the trust which held title to the property during its construction and sale of the condominium project was to promote injustice or fraud. The *Act* is specifically designed to allow condominium owners to pierce the corporate veil and impose liability on individual participants. *Unit Owners Ass'n of Summit Vista Lot 8 Condominium v. Miller, 677 A.2d 138 (N.H. 1996).* Alleged misstatements or omissions which were contained in the condominium registration application and of which unit owner had no knowledge, did not violate the statute making declarant liable to purchaser for statement or omission of material fact if the purchaser relied on the untruth or omission. *Thompson v. H.W.G. Group, Inc., 664 A.2d 489 (N.H. 1995).* The potential purchaser of a condominium unit could not rescind the purchase contract on the basis of the defender-vendor's alleged violation of the *Common Interest Ownership Act* (CIOA); the purchaser neither alleged unconscionability on the part of the defendants nor acted to rescind the contract within 15 days of execution of the purchase contract, and CIOA violations played no role in the purchaser's decision to terminate the contract. *Fruin v. Colonnade One at Old Greenwich Ltd. P'ship, 676 A.2d 369 (Conn. 1996).*

(n3)Footnote 149. *See, e.g.,* Fla. Stat. § 718-202(5).

(n4)Footnote 150. *See, e.g.,* Ohio Rev. Code § 5311.27(a); W. Va. Code § 36B-4-108.

(n5)Footnote 151. Fla. Stat. § 718.506(2).

(n6)Footnote 152. *See Grey v. Coastal States Holding Co., 578 A.2d 1080, cert. denied, 580 A.2d 57 (Conn. 1987);* Fla. Stat. § 20a-718.202(7).

(n7)Footnote 153. For an excellent discussion of the scope of these remedies in Maryland and the standing of the association to seek them, *see Milton Company v. Council of Unit Owners of Bentley Place Condominium, 729 A.2d 981 (Md. 1999)* (holding that association had standing by statute to sue developer for damages arising out of defects in individually owned buildings). *See also Seven Bridges Courts Assoc. v. Seven Bridges Develop. Inc., 714 N.E.2d 601 (Ill. App. 1999)* (holding that developers of townhouses, like developers of condominiums, have a fiduciary duty to the association but have a limited right to abrogate or modify that duty in the declaration).

(n8)Footnote 154. Ohio Rev. Code Ann. § 5311.27(c). When a condominium developer breached the purchase contract with the purchaser by failing to complete construction free from defective materials and in workmanlike manner, developer was not entitled to recover damages on counterclaim for purchaser's failure to close, nor retain earnest money under contractual forfeiture provision. *Daugherty v. Bruce Realty & Dev., Inc., 892 S.W.2d 332 (Mo. Ct. App. 1995).*

(n9)Footnote 155. *See* Va. Code Ann. §§ 55-79.98B55-79.103.

(n10)Footnote 156. *Agassiz West Condominium Ass'n v. Solum, 527 N.W.2d 244 (N.D. 1995)* (owner can sue association for failure to comply with bylaws or for injuries resulting from negligence arising out of failure to perform upkeep of common areas); *Sacker v. Perry Realty Serv., Inc., 457 S.E.2d 208 (Ga. App. 1995)* (association potentially liable for injury to unit owner on common area where declaration expressly obligated association to maintain common areas and keep them in good repair).

(n11)Footnote 157. *But see Griffith v. Faltz, 785 P.2d 119 (Ariz. 1990),* holding that a Uniform Condominium Act provision under Arizona law alleging that a wrong done by a condominium association shall be brought against such association and not any individual unit owner, did not require that a complaint alleging tortious conduct by the president of the condominium association be brought against the association, but could be brought directly against the individual. A condominium association is not authorized to request homeowner's consumer credit report, based upon the contractual agreement between the condominium association and the unit owner, without the express consent of the unit owner. *Daley v. Haddonfield Lumber, Inc., 943 F. Supp. 464 (D. N.J. 1996).* For nuisance purposes, the relationship between the condominium unit owner's property interest in the unit and jointly owned common areas is akin to that of adjacent property owners, and the unit owner can maintain a nuisance action against the condominium association for nuisance on common areas. *McEneaney v. Chestnut Hill Realty Corp., 650 N.E.2d 93 (Mass. App. Ct. 1995). See also Condominiums: Unit Owner Sues Trustees for Nuisance, Tax Newsline,* 25 Real Est. L. Rep. 11 (Apr. 1996). The trial court's grant of summary judgment to the condominium association would be reversed in a suit by the unit owner for personal injury sustained when she tripped over a railroad tie in a dark parking lot. Even assuming that the condominium management company was an independent contractor, the condominium association was not relieved of all liability where, in declaration of the condominium, the association was expressly obligated to maintain and keep the common areas in good repair. The association could not escape liability by arguing that the company that it employed to perform its obligations was an independent contractor. When a unit owner sues the condominium for personal injury damages, the owner is deemed an invitee rather than a licensee, thus imposing a duty on the association to exercise ordinary care. *Sacker v. Perry Realty Services, Inc., 457 S.E.2d 208 (Ga. App. 1995). See also, Condominiums: Unit Owner is Invitee of Association, Tax Newsline,* 25 Real Est. L. Rep. 9 (Feb. 1996). Condominium unit owners had standing to sue under the Fair Housing Act (FHA) for the condominium association's alleged discrimination in refusing to allow owners to sell condo to buyers with children under the age of 18, where they knew about the rule when they bought the unit, and where owners alleged that they lost opportunities to sell their condominium at a higher price because of the "no children" rule and that they suffered financial strain due to additional mortgage payments that they incurred as a result of the rule. *Simovits v. Chanticleer Condominium Ass'n, 933 F. Supp. 1394 (N.D. Ill. 1996).* Condominium unit owners could pursue compensatory damage claims against condominium association only if condominium association pursued such claims against the unit owners; should the association determine not to proceed, then the owners would be foreclosed as well. *Billig v. Buckingham Towers Condominium Ass'n I, 671 A.2d 623 (N.J. Super. Ct. App. Div. 1996).* The purchaser of a condominium unit was entitled to offset of $12,000 from monthly common charge payments based upon water damage to her unit under the vendor's offering plan; vendor was

responsible for prompt repair of water leakage problem, and vendor's delay in making the repairs caused damage. *Granada Condominium I v. Morris, 639 N.Y.S.2d 91 (1996).* A Puerto Rico federal court held that the estate of a woman with a mental illness could maintain an action under the Fair Housing Amendments Act (FHAA) against members of the board of a condominium association for conduct that allegedly caused the woman to commit suicide. *Schroeder v. De Bertolo, 979 F. Supp. 173 (D.P.R. 1995).* The condominium association and its board of directors had the authority to levy daily fines against the condominium owner for the owner's failure to comply with condominium documents regarding the appearance of the condominium units, where the declaration of ownership signed by the owner expressly incorporated statutory powers granted to the association by the Condominium Act, and the Act expressly permitted a levy of fines for violations of condominium documents. *Stewart v. Kopp, 454 S.E.2d 672 (N.C. App. 1995).* Mere membership in a cooperative does not signify an interest sufficient to disqualify a person from serving as a juror in litigation involving the cooperative. *Larson v. Williams Elec. Corp., 534 N.W.2d 1(N.D. 1995).* A higher level of deference is necessary when courts review decisions made by self-governing bodies such as condominium associations. *Apple II Condominium Ass'n v. Worth Bank & Trust Co., 659 N.E.2d 93 (Ill. App. 1995).* A unit owner's suit against the townhouse association based on denial of request for permission to install screening was action "with respect to the contract" within the meaning of the statute mandating that contractual attorney fee provisions be reciprocal obligations; owner fulfilled his contractual duty under the declaration of covenants and restrictions by submitting an application for approval to the architectural control committee, and the association forced the owner to file suit by arbitrarily refusing to approve plans where similar structures had been approved before. *Jakobi v. Kings Creek Village Townhouse Ass'n, 665 So. 2d 325 (Fla. App. 1995).* Condominium associations had to be regarded as prevailing parties and were entitled to award of attorney fees and costs previously assessed in connection with prior trial, where associations ultimately prevailed on the central issue presented in the initial trial and had a judgment entered against them only on a separate issue not injected or litigated until after a case was remanded for a second trial. *Scudder v. Greenbrier C. Condominium Ass'n, 663 So. 2d 1362 (Fla. Dist Ct. App. 1995).* In an action alleging fraud and breach of contract based on purchaser's inability to use the unit for commercial purposes, purchaser of condominium unit failed to offer sufficient evidence of damages, absent any evidence as to the difference between consideration paid and the value of the unit as professional unit, which was allowed under condominium offering plan. Xenopoulos v. Board of Managers of 150 East 56th Street Condominium, 633 N.Y.S.2d (1995). The trial court improperly awarded the unit owner of condominium damages for repairs to interior surfaces of walls in her unit, in the owner's action against the condominium association for offset to her unpaid common charges for cost of repairs. *Agassiz West Condominium Ass'n v. Solum, 527 N.W.2d 244 (N.D. 1995).* The board of managers of a condominium association acted in bad faith and without basis in law when it refused to respond to a request by the sponsor of the condominium's conversion for permission to alter the building's structure so as to connect the sponsor's existing basement garage to an affiliated basement garage in an adjacent building. *Hunt v. Sharp, 649 N.E.2d 1201 (N.Y. 1995). See Four Jay's Constr., Inc. v. Marina at the Bluffs Condo Ass'n, 846 So. 2d 555 (Fla. App. 2003)* (homeowner association was properly sued as the class representative of the owners of the condominium when seeking to resolve interest in regard to all units and not individual owners).

(n12)Footnote 158. *See Margate Village Condo. Ass'n v. Wilfred, Inc., 350 So. 2d 16 (Fla. App. 1977),* holding that a condominium association had standing to bring suit against a developer to test the validity of a recreational lease; *see also* Annotation, *Standing to Bring Action Relating to Real Property of Condominiums, 74 A.L.R. 4th 165 (1989).*

(n13)Footnote 159. *See* Uniform Condominium Act § 3-116; Conn. Stat. Ann. § 47-82; Va. Code Ann. 55-79.84. *Hodges v. Canyon Creek Ridge No. 1 Homeowner's Assn., Inc., 2002 Tex. App. LEXIS 1976* (Mar. 19, 2002). *Alpenwald Village Inc. v. Town of Readsboro, 687 A.2d 481 (Vt. 1996)* (holding that a purchaser at a tax sale who accepts a tax collector's deed does assume personal liability for payment of assessments). Future units in homeowner's association could be subject to assessment before condominium declaration was filed pursuant to the Condominium Act. Condominium by-laws stating that each condominium unit owner would be liable for his or her portion of each assessment while he or she was the unit owner meant that the collective owners of the condominium unit would be liable for the unit's portion of the total assessment only to the extent of their individual ownership, so owner who held only one percent interest in the unit could be held jointly and severally liable for all assessments and related charges levied on the unit. *Chattahoochee Chase Condominium Ass'n v. Ruben, 472 S.E.2d 520 (Ga. App. 1996).* Vendor of

condominium was entitled to reasonable attorney fees it incurred in recovering the purchaser's unpaid common charges. *See also Unit Owner Entitled to Offset in Condominium's Action to Recover Common Charges, Cooperatives and Condominiums,* N.Y. Real Est. L. Rep. (Apr. 1996). The provision of the condominium declarations stating that the damage to any unit "resulting from the maintenance, repair, emergency repair or replacement of any of the general common elements" would be a common expense to all owners applied to the damage resulting from repair in the boiler room, which was a common area and not merely to situations where the association managers were compelled to enter the owner's unit to conduct maintenance or repair. *Insurance Co. of N. Am. v. Aspen Alps Condominium Ass'n, 915 F. Supp. 1122 (D. Colo. 1996).* In view of the condominium bylaws' express provision for the recovery of attorney fees, the trial court had no basis for denying the association recovery of such fees in its action for unpaid assessments. *Oakland East Manors Condominium Ass'n v. LaRoza, 669 So. 2d 1138 (Fla. App. 1996).* Evidence that the condominium association did not receive the unit owner's payment on semiannual assessment supported judgment for the association in its action to recover the assessment. *Ward v. 3900 Condominium Ass'n, 670 So. 2d 1182 (Fla. Dist. Ct. App. 1996).* Condominium owner was personally liable for unpaid condominium association assessments following foreclosure sale which resulted in insufficient funds to pay assessments after satisfaction of large first mortgage. *Maya Marca Condominium Apts. v. O'Rourke, 669 So. 2d 1089 (Fla. App. 1996).* A statute making attorney fees payable if party violates by-laws of the condominium association does not apply if the co-owner claims rights pursuant of bylaws, even though the claim may be determined to be invalid. *Plaza Condominium Ass'n v. Wellington Corp., 920 S.W.2d 51 (Ky. 1996).* Under Massachusetts Condominium Act, condominium association's lien for unpaid common charges or expenses cannot achieve "super priority" status unless action is first instituted by the condominium association to enforce the lien. *Trustees of McIntosh Condominium Ass'n v. F.D.I.C., 908 F. Supp 58 (D. Mass. 1995).* Under New York law, late charges, attorney fees, repair charges, referee fees, and advertising and publishing costs were not "common charges" covered by the condominium lien. *In re Eatman, 182 B.R. 386 (Bankr. S.D.N.Y. 1995).* The court held that a condominium owner was not entitled to withhold the payment of common charges or her pro rata share of insurance because of a dispute over the repair of common areas. *Agassiz West Condominium Ass'n v. Solum, 527 N.W.2d 244 (N.D. 1995).* Where permitted by statute and the condominium instruments, association that provides utilities may terminate those utilities to unit owner who has failed to pay assessments. *See* Fontaine Condominium Ass"n v. *Schnacke, 496 S.E.2d 553 (Ga. App. 1998)* (association's termination of electrical service to owner who was over $10,000 in adjudicated arrears upheld). *Loigman v. Kings Landing Condo., 734 A.2d 367 (N.J. Super. 1999); Mountain View Condominium Ass'n v. Bomersbach, 734 A.2d 468 (Pa. 1999)* (association that won judgment for attorney's fees against owner may recover attorney's fees for trying to recover attorney's fees). *Board of Managers of Mews v. Farajzadeh, 712 N.Y.S.2d 722 (Misc. 2000). See also*: *Moshyedi v. Council of Unit Owners, 132 Md. App. 184, 752 A.2d 279 (Md. App. 2000); Hidden Grove Condo. Ass'n v. Crooks, 744 N.E.2d 305 (Ill. App. 2001)* (late fee of $25 a month for unpaid assessments was unreasonable charge and unenforceable); *Glen v. June, 782 A.2d 430 (N.J. Super. 2001)* (association's placement of lolly column in unit owner's driveway, thus barring unit owner's use of driveway and access to garage, was an impermissible means by which to encourage payment of overdue assessments).

(n14)Footnote 160. *See* Uniform Condominium Act § 3-116(b); Bankers Trust Co. v. Board of Managers of the Park 900 Condo., 616 N.E.2d 848 (N.Y. 1993). Many states give statutory priority to such liens. These statutory schemes often depart "from the common law rule of first in time equals first in right." *Dime Sav. Bank of New York, FSB v. Muranelli, 667 A.2d 803, 805 (Conn. App. 1995).* Some statutory schemes go so far as to recognize a "super priority lien" which will allow association assessments that accrued during the six months immediately preceding commencement of a foreclosure action to take priority over prior security interests. *See, e.g.,* Conn. Gen. Stat. § 47-258(b). *See also Carroll v. Oak Hall Assocs., L.P., 898 S.W.2d 603 (Mo. App. 1995)* (common area expense assessment is a statutory lien). *But see Trustees of MacIntosh Condominium Ass'n v. F.D.I.C., 908 F. Supp. 58 (D. Mass. 1995) (12 U.S.C. § 1825*(b)(2), which protects the assets of the FDIC as a receiver of a failed bank, prohibits the imposition of any lien, including a lien with super-priority status, in FDIC foreclosures); *Colchester Towne Condo. Council of Co-Owners v. Wachovia Bank, N.A., 581 S.E.2d 201 (Va. 2003)* (statute requiring that association's lien is "subject to prior liens" requires that proceeds from foreclosure sale be first applied to satisfy first deed of trust).

Thompson on Real Property, Thomas Editions

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CHAPTER 36 CONDOMINIUMS AND COOPERATIVES

4-36 Thompson on Real Property, Thomas Editions § 36.14

AUTHOR: Professor Frederic White Cleveland State University Cleveland-Marshall College of Law

§ 36.14 Forms.

The documentation for condominiums obviously vary from state to state. The following is an example of basic condominium forms that might be used in the state of Ohio.

1.01 CONSUMER CHECKLIST n161

FINANCIAL

1._____Can you afford the condominium?

a. What are your present income, expenses and lifestyle?

b. How will they change if you purchase a condominium?

c. Will your downpayment be refunded if you are unable to get mortgage credit on terms acceptable to you?

d. Will settlement costs be over and above the downpayment?

e. Does the projected budget of the condominium indicate that the assessments will remain relatively stable? (Sometimes the major burden of condominium ownership is not the unit cost, but rather the monthly assessments for an owner's proportionate share of maintenance and related expenses.)

f. Is a "liquidated damage" clause in the purchase agreement (it indicates conditions under which you could lose your downpayment). Is it understandable to you?

CONSTRUCTION AND AMENITIES

2._____Does the condominium property appear to be well constructed?

a. Is there only one model, or is the project substantially completed?

b. Are floors level? Do windows leak? Do corners meet? Is the electrical system adequate, etc.?

3._____Is the size and layout acceptable?

a. Is floor covering provided?

b. Are elevators and trash receptacle conveniently located?

c. Is there enough closet space?

d. Is security sufficient?

e. Is parking adequate? For guests? For domestic employees and contractors?

f. Are schools, shopping, parks, etc. close by?

g. How are utilities metered?

h. Are the recreational facilities adequate? Will there be a separate charge for them? n162

i. Are children and pets permitted?

ORGANIZATION

4._____Have you read all of the condominium organizational documents? Do you understand them?

a. Are you in agreement with most or all of their provisions?

b. Is the amendment process acceptable to you?

c. Are the rules and regulations acceptable?

d. Do you agree with the definitions of common maintenance duties versus unit owner obligations?

INSURANCE

5._____Does the condominium have adequate insurance against fire, liability, theft, or heating unit malfunction or accident?

UNIT OWNER CONTROL

6._____What are the restrictions on your right to resell?

7._____What are the restrictions on your right to sublease?

8._____Is the developer reliable?

1.02 CONDOMINIUM DECLARATION n163

This is the Declaration of_____Condominium made day of this_____day of_____, 20_____, pursuant to the provisions of Chapter 5311 of the Revised Code of Ohio (the "Condominium Act").

RECITALS

A._____, n164 a_____, n165 (the "Declarant"), is the owner in fee simple of all of the real property hereinafter described and the improvements thereon and appurtenances thereto.

B. The Declarant desires to create of this property a site of individually owned units, and commonly owned areas and facilities, and to these ends to submit this property to condominium ownership under the provisions of the Condominium Act.

1. The terms used in this Declaration shall have the meanings given to them under Section 5311.01 of the Condominium Act. n166

2. Legal description of the land: Situated in the State of Ohio, County of_____,_____of_____, and bounded and described as follows:

[Legal description]

3. The Condominium Property subject to this Declaration shall be known as_____Condominium.

4. The Condominium Property shall consist[initially] n167 of_____(_____) residence units,_____(_____) garages, private walkways and driveways for pedestrian and vehicular traffic. [As it can be accomplished, the balance of land described hereinabove and herewith subjected to RC Chapter 5311 shall be improved with additional residence units, garages and private walkways and driveways, but not to exceed_____(_____) units. This Declaration will be amended from time to time to accomplish these purposes]. There shall be no commercial facilities, and there shall be the following restrictions upon the use or uses thereof:

a. All units shall be restricted to single family residential use and occupancy only;

b. There shall be no commercial facilities in the condominium;

c. No place of business the practice of any profession may be conducted or permitted in any unit or in any common area within the Condominium; and

d. All unit owners shall be members of the_____Condominium Unit Owners Association and be bound by the By-Laws and Rules and Regulations thereof.

5. General description of the Condominium: n168

6. Unit designations and descriptions: n169

7. Description of common areas: n170 All other common areas and facilities are as defined in the Condominium Act.

8. This is to certify that each unit owner shall be a member of the_____Condominium Unit Owners Association, the sole function of which shall be the administration of the condominium property.

9. The person upon whom service of process shall be made for the_____Condominium Unit Owners Association is:_____.

10. [Until all residence units and garages which are planned for real property described hereinabove and referred to in paragraph (4) are completed, this Declaration can be amended by the Board of Managers without the consent or approval of unit owners.]

11. [Except for the provisions of paragraph (10) above and thereafter,] this Declaration may be from time to time amended by an affirmative vote of not less than seventy-five (75%) of the full voting power of the unit owners in terms of such unit owner's percentage of interest in the common areas and facilities as defined by the Condominium Act.

IN WITNESS WHEREOF, the said_____, Inc., an Ohio corporation, owner in fee simple of the land and appurtenances herein described sets its hands by_____its president, and_____, its secretary, this_____day of_____, 20_____.

_____, Inc.

Signed and acknowledged
in the presence of:

By: _____
President

_____
_____

By: _____
Secretary

State of Ohio
ss:
County of Cuyahoga

Before me, a notary public in and for said county, personally appeared the above-named_____, Inc., by_____, its president, and_____, its secretary, who acknowledged that they did sign the foregoing instrument and that the same is the free act and deed of said corporation, and the free act and deed of each of them personally and as such officer.

In testimony whereof, I have hereunto set my hand and official seal at_____, Ohio, this_____day of_____, 20_____.

_____
Notary Public

My commission expires_____, 20_____.

[Seal]

This instrument was prepared by:

1.03 CONDOMINIUM ASSOCIATION ARTICLES OF INCORPORATION n171

ARTICLES OF INCORPORATION
CONDOMINIUM ASSOCIATION

In compliance with the requirements of the provisions of Chapter 1702 of the Ohio Revised Code, the undersigned hereby forms a corporation not for profit and certifies:

ARTICLE I

The name of the corporation is_____Condominium Association (the "Association").

ARTICLE II

The principal office of the Association shall be or such place in_____, County, Ohio, as the Board of Trustees of the Association shall specify from time to time.

ARTICLE III Purpose and Powers

Forthwith upon the creation of the Association the undersigned is creating a condominium under the provisions of Chaper 5311 of the Revised Code of Ohio, known as_____Condominium (the "Condominium"), of the property described in Exhibit A hereto. n172 The purposes for which the Association is formed are to be and act as the unit owners association for the Condominium to provide for the maintenance, preservation, and architectural control of the property of the Condominium, and to promote the health safety and welfare of the residents of the Condominium, and for these purposes to:

a) Exercise all of the powers and privileges and perform all of the duties and obligations of the Association as set forth in these Articles of Incorporation, and the Declaration and Bylaws of the Condominium (the "Articles," the "Declaration" and the "Bylaws," respectively);

b) fix, levy, collect and enforce payment by any lawful means, all charges or assessments pursuant to the terms of the Declaration, and pay all expenses in connection therewith and all office and other expenses incident to the conduct of the business of the Association;

c) acquire (by gift, purchase or otherwise), own, hold, improve, build upon, operate, maintain, convey, sell, lease, or otherwise dispose of real or personal property in connection with the affairs of the Association.

d) borrow money to fulfill its purposes;

e) administer and enforce terms, conditions, covenants, restrictions, and regulations upon, under and subject to which the Condominium or any part thereof may now or hereafter be used, and fix and provide any such terms, conditions, covenants, restrictions and regulations, and administer, enforce, alter, amend, change, add to, extend, waive, or terminate, in whole or in part, any of the same;

f) provide the residents and Unit Owners of the Condominium with (i) normal utility services not separately provided to individual units, (ii) services supplemental to municipal services, and (iii) Common Areas and Facilities maintenance service;

g) be, function and act as the unit owners association of the Condominium, under the provisions of Chapter 5311 of the Revised Code of Ohio, and delegate such authority as it desires to a managing agent;

h) have and exercise any and all powers, rights, and privileges which a corporation organized under Chapter 1702 may now or hereafter have or exercise by law; and

i) take any action necessary, expedient, incidental, appropriate or convenient to the carrying out of the foregoing purposes. The Association shall not do any act or enter into any agreement or enter into any transaction in a manner which would violate any provision of Chapter 5311 of the Ohio Revised Code or the provisions of these Articles, the Declaration, or the Bylaws.

ARTICLE IV Membership

Every person or entity who is a record owner of a fee or undivided fee simple interest in a Unit shall be a member of the Association, and is herein called a "Unit owner." The foregoing is not intended to include persons or entities who hold an interest merely as security for the performance of an obligation. Membership shall be appurtenant to and may not be separated from ownership of a Unit, and transfer of a Unit shall automatically transfer membership to the transferee. Voting rights of members shall be as set forth in the Declaration and Bylaws. (The latter of which shall also be and serve as the Association's Code of Regulations).

ARTICLE V Board of Trustees (Managers)

The names and addresses of the persons who are initially to act in the capacity of Trustees, until the selection of their successors, (as provided in the Declaration and Bylaws), are:

Name_____Address_____

The number, qualifications, manner and time of selection of successor Trustees, and their terms of office, shall be as set forth in the Declaration and Bylaws.

The Board of Trustees shall be and act as the board of managers of the Condominium and shall have all of the powers and all of the duties of the board of managers as defined in Chapter 5311 of the Revised Code of Ohio and of the board of trustees as defined in Chapter 1702 of the Revised Code of Ohio, except as such powers may be limited or expanded by the provisions of these Articles, the Declaration or the Bylaws.

ARTICLE VI Notice and Quorum

Notice and quorum requirements shall be in accordance with the provisions of the Bylaws.

ARTICLE VII Indemnification

(1) The Association shall indemnify every person who is or has been a Trustee, officer, agent, or employee of the Association and those persons' respective heirs, legal representatives, successors and assigns, against expenses, including attorneys' fees, and judgments, decrees, fines, penalties and amounts paid in settlement actually and reasonably incurred in connection with any threatened, pending or completed action, suit or proceeding, whether civil, criminal, administrative or investigative, and whether in an action or proceeding by or in the right of the Association, or otherwise, in which such person was or is a party or is threatened to be made a party by reason of the fact that person was a Trustee, officer, employee or agent of the Association, or is or was serving in such capacity at the request of the Association, provided that person (a) acted in good faith and in a manner that person believed to be in or not opposed to interests of the Association, and (b) in any matter the subject of a criminal action or proceeding, had no reasonable cause to believe the questioned conduct was unlawful, but provided that in the case of any threatened, pending or completed action or suit by or in the right of the Association to procure a judgment in its favor against any such person by reason of that person serving in such capacity, no indemnification shall be made in respect of any claim, issue, or matter to which such person shall have been adjudged to be liable for negligence or misconduct in the performance of a duty to the Association unless and only to the extent that the court in which such action was brought shall determine upon application that in view of all the circumstances of the case that person is fairly and reasonably entitled to indemnity for such expenses as the court shall deem proper.

(2) Unless ordered by a court, the determination of indemnification, pursuant to the foregoing criteria, shall be made (a) by a majority vote of a quorum of the Trustees of the Association who were not and are not parties to or threatened with any such action, suit, or proceeding, or (b) if such a quorum is not obtainable, or if a majority of a quorum of disinterested Trustees so direct, in a written opinion by independent legal counsel other than an attorney, or a firm having associated with it an attorney, who has been retained by or who has performed services for the Association or any person to be indemnified within the past five years, or (c) by the Unit owners, or (d) by the court in which such action, suit or proceeding was brought.

(3) Any such indemnification shall not be deemed exclusive of any other rights to which such person may be entitled under law, any agreement, or any insurance purchased by the Association, or by vote of Unit owners, or otherwise.

ARTICLE VIII Duration

The Association shall exist so long as the condominium regime of the Condominium exists, and no longer.

ARTICLE IX Dissolution

The Association may be dissolved only with the same consents as are required to terminate the Condominium regime, as provided in the Declaration.

ARTICLE X Definitions

All terms used herein shall have the same meanings as set forth in the Declaration.

ARTICLE XI Amendments

The Articles may be amended only under the same terms and conditions, and with the same approvals, as are provided in the Declaration for its amendment.

_____

SOLE INCORPORATOR

1.04 CONDOMINIUM ASSOCIATION BYLAWS n173

BYLAWS OF_____CONDOMINIUM ASSOCIATION

ARTICLE I NAME, PURPOSE AND LOCATION

The name of this Association shall be_____Condominium Association (the "Association"), which corporation, not for profit, n174 is created pursuant to the provisions of Chapter 1702 of the Ohio Revised Code, and which Association is also created pursuant to the provisions of Chapter 5311 of the Ohio Revised Code, as the unit owners' association for_____Condominium. The sole purpose of the Association is to manage, govern and control_____Condominium in accordance with the aforesaid Chapter 5311.

ARTICLE II DEFINITIONS

All of the terms used herein shall have the same meanings as set forth in the Declaration of Condominium (the "Declaration"), recorded simultaneously herewith with the Recorder of_____County.

ARTICLE III MEMBERSHIP

Each unit owner, as defined in the Declaration, shall be a member of the Association.

ARTICLE IV VOTING

Each unit owner shall have voting power in proportion to such unit owner's percentage of interest in the common areas and facilities. Such voting power may be exercised by the unit owner or owners, or such owner or owners heirs, assigns or personal representatives.

ARTICLE V MEETINGS

1) There shall be an annual meeting of the Association, within the first twenty-one days of January of each year at a place and time as determined by the Board of Managers.

2) At the annual meeting the unit owners shall elect the necessary member or members of the Board of Managers for the ensuing year. At such annual meeting any matters concerning the welfare of the_____Condominium may be discussed and referred to the Board of Managers for proper action.

3) At the annual meeting the president, vice president or vice presidents, secretary and treasurer shall submit reports in writing for the year ending.

4) Written notice of each meeting of the unit owners shall be given by, or at the direction of, the secretary or person authorized to call the meeting, by mailing a copy of such notice, postage prepaid, at least five (5) days prior to such meeting, to each unit owner entitled to vote thereat, addressed to the unit owner's address last appearing on the books of the Association, or supplied by such unit owner to the Association for the purpose of notice, or by delivering a copy of that notice at such address at least five (5) days before such meeting. The notice shall specify the place, day and hour of the meeting, and, in the case of a special meeting, the purpose of the meeting. Notice of such meeting may be waived in writing.

5) Special meetings of the unit owners may be called by the president, vice president or any one of them, secretary, treasurer, or, by unit owners constituting at least twenty five percent (25%) n175 of the voting power. Notice of such

meetings shall be given in accordance with the procedure contained in Section 4 hereof.

6) Annual and special meetings shall be presided over and conducted by the president of the Board, or in such officer's absence, the vice president, secretary and treasurer in that order.

7) To constitute a quorum at any annual or special meeting at least fifty percent of the voting power must be present at such meeting. n176 At any meeting of unit owners, a unit owner may vote in person or by proxy. All proxies shall be in writing and filed with the secretary prior to the meeting. Every proxy shall be revocable and shall automatically cease upon conveyance by a unit owner of such owner's unit.

8) Except as otherwise provided in the Declaration, or by law, a majority of the voting power of unit owners voting on any matter that be determined by the unit owners at a duly called and noticed meeting shall be sufficient to determine the matter. Robert's Rules of Order shall apply to the conduct of all meetings.

9) Any action that could be taken by unit owners at a meeting may be taken without a meeting with the affirmative vote or approval, in writing, of unit owners having not less than a majority of the voting power of unit owners, or such greater proportion of the voting power as may be required by the Declaration, or by law.

ARTICLE VI BOARD OF MANAGERS

1) The Association shall be governed by a board of managers consisting of three members, n177 each of whom shall be the owner of an interest in a unit of the condominium property.

2) The first board shall consist of three members for respective terms of three years, two years and one year, and as the term of each such member expires the successor shall be elected for a term of three years so that the term of one member expires annually. Each board member shall hold office until the expiration of the term for which such member shall have been elected and shall continue in office until such officer's successor shall have been duly elected and qualified. Such election shall be by secret written ballot.

3) The member or members of the board of managers shall be elected at the annual meeting of the unit owners and shall be elected by a plurality of voting power.

4) In case of any vacancy in the board of managers through death, resignation or disqualification, the remaining managers, by affirmative vote of a majority shall elect a successor to hold office for the unexpired portion of the term of the manager whose place shall be vacant and until the election and qualification of a successor.

5) A majority of the managers in office at the time shall constitute a quorum for meetings.

6) Unless otherwise determined by the unit owners at a meeting duly called and noticed for such purpose, no manager shall receive compensation for any service rendered to the Association as a manager. Such manager, however, may be reimbursed for actual expenses incurred in the performance of duties as a manager.

7) Meeting of the Board of Managers shall be held on such dates as the board may designate and shall be called by and held at the request of the president or any two members of the board.

ARTICLE VII POWERS OF THE BOARD OF MANAGERS

Except for such power and authority reserved to the unit owner under either the Declaration or by law, the board of managers shall exercise all powers and authority under the Declaration and under law with respect to condominium property. The Board shall have the right, power and authority to:

1) Take all actions the board deems necessary to comply with all requirements of the Declaration, the Association Bylaws and all other legal requirements;

2) Enforce the covenants, conditions and restrictions contained in the Declaration;

3) Repair, maintain and improve the Common Areas;

4) Obtain insurance coverage not less than that required pursuant to the Declaration;

5) Establish, enforce, levy and collect assessments as provided in the Declaration;

6) Adopt and publish rules and regulations governing the use of the Common Areas and the personal conduct of unit owners, occupants and their guests thereon, and establish penalties for the infraction thereof;

7) Suspend the voting rights of a unit owner during any period in which such unit owner shall be in default in the payment of any assessment levied by the Association;

8) Declare the office of a member of the board to be vacant in the event such board member shall be absent from three consecutive regular meetings of the board;

9) Authorize the officers to enter into one or more management agreements in order to facilitate the efficient management of the condominium property; and

10) Do all things and take all actions permitted to be taken by the Association by law or the Declaration not specifically reserved thereby to others.

ARTICLE VIII DUTIES OF THE BOARD OF MANAGERS

1) Cause to be kept a complete record of all its acts and corporate affairs and to present a statement thereof to owners at each annual meeting of the unit owners, or any special meeting when such statement is requested in writing by unit owners representing one-half (1/2) or more of the voting power of unit owners;

2) Supervise all officers, agents and employees of the Association and see that their duties are properly performed;

3) Fix the amount of assessments against each unit, give proper notice of each such assessment and foreclose the lien against any property for which assessments are not paid, all in accordance with the Declaration;

4) Procure and maintain insurance as provided in the Declaration, and as the board deems advisable, including the bonding of all officers or employees of the Association handling money;

5) Cause the property subject to the Association's jurisdiction to be maintained within the scope of authority provided in the Declaration, including causing the restrictions created by the Declaration to be enforced; and

6) Take all other actions required to comply with all requirements of law and the Declaration.

ARTICLE IX OFFICERS

1) At the first meeting of the board of managers in each year, held next after the annual meeting of the unit owners association, the board of managers shall elect officers of the association, and designate and appoint such subordinate

officers and employees as it shall determine. They may also appoint an executive committee or special committees and may employ a managing agent or custodian and define the agent or custodian's salary and duties.

2) The officers of this Association shall be a president, vice president, secretary, and treasurer, all of whom shall be members of the board of managers. They shall be elected for a term of one year by the board of managers and serve until their successors are elected and qualified.

3) Any officer or employee elected or appointed by the board of managers, other than a board member, may be removed at any time upon a vote of a majority of the whole board of managers.

4) The president shall conduct all meetings of the Association and the board of managers; the vice president shall act in the absence of the president; the secretary shall keep the minutes of Association and Board of Managers meetings; and they shall handle the financial affairs of the Association, including deposits of funds, and shall write and sign checks for the legitimate expenses of the Association as authorized by the board of managers, and prepare and maintain the records required by RC 5311.09.

ARTICLE X COMMITTEES

The Board shall appoint a nominating committee and may appoint such other committees as it deems appropriate in carrying out its purposes.

ARTICLE XI ADMINISTRATIVE RULES AND REGULATIONS

The board may adopt administrative rules and regulations governing the use and operation of the condominium property not in conflict with the declaration or these bylaws by a vote of a majority of the board members. Such rules and regulations may be amended from time to time by a majority vote of the members of the board of managers, or by a vote of seventy five percent (75%) of the voting power of the unit owners association at the annual meeting or at a special meeting of the same.

ARTICLE XII USE OF UNIT AND COMPLIANCE WITH BYLAWS

Each unit shall be used and occupied only as a private dwelling by the owner, owners or such owner or owner's tenant. Each unit or any part thereof shall not be used for any other purpose. Each unit occupant shall respect the comfort and peace of mind of such occupant's neighbors, as well as other occupants of the condominium. Each owner shall not do, or permit to be done, or keep in the unit, anything which increases the rate of fire insurance for the condominium property, or do or suffer to be done any act or thing which shall be a nuisance, annoyance, inconvenience, or damage to the unit or any occupants of the condominium.

Each unit owner shall abide by the provisions of the bylaws of the Association, the administrative rules and regulations as promulgated hereunder, the Declaration, as well as the provisions of Ohio Revised Code Chapter 5311 and any amendments thereto, and each owner shall use such owner's unit and sell and convey the same, exercise the privilege of being an owner only in a way which will not violate any of the provisions of the bylaws, administrative rules and regulations, as amended from time to time, or any provisions of the Declaration.

ARTICLE XIII BOOKS AND RECORDS

The books, records and financial statements of the Association, including annual audited financial statements when such are prepared, shall be available during normal business hours or under other reasonable circumstances, upon request of the Association, for inspection by unit owners and the holders and insurers of first mortgages on units. Likewise, during normal business hours or under other reasonable circumstances, the Association shall have available for inspection by unit owners, lenders and their insurers, and prospective purchasers, current copies of the Declaration and related

organizational documents, including these bylaws, and the rules and regulations governing the operation of the Condominium.

ARTICLE XIV AUDITS

Upon the written request of the Association by any first mortgagee of a unit, or its insurer, or by vote of the holders of a majority of the voting power of unit owners, the board shall cause the preparation and furnishing to those requesting of an audited financial statement of the Association for the preceding fiscal year, provided that no such statement need be furnished earlier than ninety (90) days following the end of such fiscal year.

ARTICLE XV FISCAL YEAR

Unless otherwise changed by the Board, the fiscal year of the Association shall begin on the first day of January and end on the 31st day of December of every year, except that the first fiscal year of the Association shall begin on the date of the Association's incorporation.

ARTICLE XVI AMENDMENTS

These bylaws may be amended from time to time at an annual or special meeting of the Association, by an affirmative vote of not less than seventy-five percent (75%) of the unit owners in terms of each unit owner's percentage of ownership in the common areas and facilities. Such amendment shall be effective from the time a certificate setting forth such amendment is delivered for recording to the Recorder for_____, Ohio. In witness whereof, the said_____, Inc., an Ohio Corporation, owner of all units in_____Condominium, does hereby adopt these bylaws by_____, its president, and_____, its secretary, this_____day of_____, 20_____.

_____, Inc.

Signed and acknowledged in the presence of:	By: _____ President
_____	_____
_____	Secretary
_____	
[usual notary form]	

1.05 CONDOMINIUM ASSOCIATION RULES AND REGULATIONS n178

RULES AND REGULATIONS OF THE
_____ CONDOMINIUM UNIT
OWNERS ASSOCIATION

1. The Condominium Unit Owners Association (the "Association"), acting by and through its Board of Managers (the "Board"), has adopted the following Rules and Regulations (the "Regulations"). These Regulations may be amended from time to time by resolution of the Board or the Association.

2. Terms used herein shall have same meaning as such terms have in the Declaration of Condominium Ownership (the "Declaration") or the Ohio Condominium Act (the "Act").

3. The unit owners shall comply with these regulations governing the building, public halls, terraces, balconies, recreational areas, grounds, parking areas and any other appurtenances to the Condominium Property.

4. No part of the Condominium shall be used for any purpose other than residential housing and the common purposes for which the Condominium was designed.

5. Any common sidewalks, driveways, entrances, or passageways shall not be obstructed or used by any unit owner for any other purpose than ingress to and egress from the units.

6. Nothing shall be done or kept in any of the common areas and facilities that will increase the rate of insurance for the Condominium or contents thereof without the prior written consent of the Board. No unit owner shall permit *anything* to be done or kept in such owner's unit or the common areas and facilities that will result in cancellation of insurance on the Condominium or contents thereof. No waste shall be committed on the common areas and facilities.

7. Disposition of garbage and trash shall be only by the use of garbage disposal units or by use of common trash and garbage facilities.

8. Unit owners and their families and invitees shall not use sidewalks, driveways, entrances, or passageways as play areas.

9. No rugs or other materials shall be dusted from windows, balconies, decks, or patios by beating or shaking. Each unit owner shall keep such owner's unit in a good state of preservation, repair and cleanliness, and shall not sweep or throw or permit to be swept or thrown therefrom, or from the doors or windows thereof, any dirt or other substance.

10. No work of any kind shall be done upon the exterior building walls or upon the general or limited common areas by any unit owner. All such work is the responsibility of the Association.

11. Unit owners and occupants shall exercise reasonable care to avoid making or permitting to be made, loud, disturbing, or objectionable noises and in using or playing or permitting to be used or played musical instruments, radios, phonographs, television sets, amplifiers, and any other instruments or devices in such manner as may disturb or tend to disturb owners, tenants, or occupants of other units.

12. If permitted by law, the Board reserves the right to place "For Sale," "For Rent" or "For Lease" signs on any unsold or unoccupied units, and the right is hereby given to any Mortgagee who may become the owner of any unit to place such signs on any unit owned by the Mortgagee, but in no event will any sign be larger than a size approved by the Board in writing.

13. No unit owner shall display any sign visible from the exterior of any unit, nor place on or remove from the Condominium Property plants of any description with the prior written consent of the Board.

14. No unit shall be used for any unlawful purpose and no unit owner shall do or permit any unlawful act in or upon such owner's unit.

15. No animals or reptiles of any kind shall be raised, bred or kept in any unit or the common elements without the consent of the Board.

16. No vehicle belonging to or under the control of a unit owner or member of such owner's family, or an invitee, shall be parked in such manner as to impede or prevent ready access to any entrance to or exit from any unit or building on the Condominium Property. Unless otherwise authorized by the Association, the parking areas shall not be used for any

purpose other than parking automobiles. No buses, trucks, trailers, boats, recreational or commercial vehicles shall be parked in the parking areas or in the driveways, except in those areas, if any, specifically designated for such parking by the Board.

17. The Association assumes no liability for nor shall it be liable for any 1085 or damage to articles stored in any common or other storage area.

18. Any damage to the common areas and facilities, or to common personal property caused by a unit owner, or such owner's family members or other unit occupants or invitees, shall be repaired at the expense of that unit owner.

19. No unit owner, resident or tenant shall install wiring for electrical or telephone installation or for any purpose, nor shall any television or radio antennae, machines, or air conditioning units be installed on the exterior of the Condominium, nor shall any similar improvements that protrude through the walls or the roof of the Condominium be constructed, except as may be expressly authorized by the Association.

20. The agents of the Board or the Managing Agent, and any contractor or worker authorized by the Board or the Managing Agent, may enter any room or unit in the Condominium with the written permission of the unit owner at reasonable business hours for the purpose of discharging their respective duties and responsibilities. In the case of emergencies entry may be immediate and without such permission.

21. Employees and agents of the Association are not authorized to accept packages, keys, money (except for Condominium assessments), or articles of any description from or for the benefit of any unit owner.

22. The Association assumes no responsibility for any injury incurred by any person using Condominium recreational facilities and all such persons use such facilities at their own risk. The Association reserves the right to bar any unit owner from the use of Condominium recreational facilities for failure to make payment of any assessments or fees as provided for in the Condominium Bylaws.

23. Complaints regarding the management of the Condominium or regarding actions of unit owners shall be made in writing to the Board or the Managing Agent.

THE FOREGOING CONDOMINIUM RULES AND REGULATIONS ARE SUBJECT TO AMENDMENT AND TO THE PROMULGATION OF FURTHER REGULATIONS

1.06 CONDOMINIUM MANAGEMENT AGREEMENT
MANAGEMENT AGREEMENT

THIS AGREEMENT is made this_____day of_____, 20_____, between n179 _____(the "Association"), and n180 _____(the "Managing Agent").

WHEREAS, (1) is a_____, n181 and is the owner of_____condominium dwelling units in_____building(s) (the "Condominium Property"), situated in the_____, County of_____, State of Ohio; and

WHEREAS, the Association, acting by and through its Board of Managers, pursuant to it Declaration of Condominium Ownership, appoints, n182 _____as its exclusive Managing Agent to manage the Condominium Property, and the Managing Agent accepts such appointment in mutual agreement as to all that follows; and

NOW, THEREFORE, in consideration of the mutual promises of the parties herein contained, the parties do hereby agree as follows:

1. APPOINTMENT OF MANAGING AGENT

The Association hereby appoints the Managing Agent as the exclusive agent of the Association, to operate and manage the common areas of the Condominium Property, subject to the direction and control of the Board of Managers of the Association, and the Managing Agent hereby accepts the appointment on the terms and conditions hereinafter described. The obligations and duties conferred upon the Managing Agent by the Board of Managers are confined only by the common areas and facilities of the Condominium Property. The Managing Agent covenants to furnish its best skill and judgment and to cooperate in furthering the interests of the Association. The Managing Agent agrees to furnish efficient business administration and supervision and to perform its responsibilities, both administrative and advisory, in the best and soundest manner consistent with the effective management techniques and in the most expeditious and economical manner consistent with the best interests of the Association.

2. TERM OF AGREEMENT

The term of this Agreement shall commence on the date first above written and shall continue until n183 _____unless sooner terminated in accordance with the provisions of this Agreement.

3. LIAISON WITH THE BOARD

The Managing Agent shall principally communicate to the Board of Managers and to the Association membership to the extent practicable, through one or more designated liaisons appointed by the Board of Managers. Notwithstanding the appointment of one or more Liaisons, the Managing Agent shall communicate with the Directors, Officers, and Committee Chairs in the exercise of their mutual responsibilities.

4. OPERATING DUTIES OF THE MANAGING AGENT

Under the direction of the Board of Managers the Managing Agent shall repair maintain the common areas of the Condominium Property. The duties of the Managing Agent shall include the following:

a. To hire, supervise and discharge such personnel as may be necessary to operate and maintain the Condominium Property. All such personnel shall be employees of the Association and not of the Managing Agent, and their compensation shall be considered to be an operating expense of the Association. Any major change in personnel shall be approved by the Board of Managers. Any employee who handles or is responsible for the handling of the Association's monies shall, without expense to the Association, be bonded by a fidelity bond in an amount not less than, n184 evidence of which shall be furnished to the satisfaction of the Association.

b. To pay Association operating expenses for utilities, communications (including telephone and postage expenses) and supplies with Association funds.

c. Subject to the approval of the Board of Managers, and on its behalf, to enter into contracts for such services and utilities as the Board shall direct, for the proper operation, maintenance and repair of the Condominium Property; and to order such equipment, tools, appliances, materials and supplies as are necessary to properly maintain the Condominium Property.

d. To maintain business-like relations with the Association and its members, and respond in a systematic fashion for

services with respect to the Common Areas of the Condominium Property.

e. To attend regularly scheduled monthly meetings of the Board of Managers, additional Board and committee meetings, as requested, and the Annual Meeting of the Association. When directed, to send formal notification of such meeting at the expense of the Association.

f. To operate and maintain the Condominium Property consistent with the overall plan of the Association. Unless specifically authorized by the Board of Managers, the expenses incurred for any one item of repair or replacement should not exceed the sum of n185 _____,_____._____dollars. Nevertheless, emergency repairs involving, in the Managing Agent's professional opinion, immediate danger to life or property, immediately necessary for the preservation and safety of the occupants of the Condominium Property, or required to avoid the suspension of any necessary Condominium Property, shall be made at the Managing Agent's direction irrespective of cost. Notwithstanding such authority with respect to emergency repairs, the Managing Agent understands and agrees that it will, if possible, confer immediately with the person or persons designated as Liaison pursuant to Article 3 hereof.

g. To notify all unit owners of all rules, regulations and notices promulgated by the Association.

h. At the Association's direction and under its control, to purchase or renew all Association insurance policies for the various coverages enumerated in the Declaration of Condominium Ownership.

5. FISCAL DUTIES OF THE MANAGING AGENT

a. Prior to the end of the fiscal accounting year, to prepare and submit an annual operating budget of the proposed expenditures which, when approved by the Association, shall serve as the basis for monthly assessment for the next fiscal year.

b. To collect by a mutually agreed upon method all funds due the Association from the unit owners and other sources. Such funds shall include, but not be limited to, all monthly assessments and special assessments imposed by the Board of Managers on such unit owners, pursuant to the Condominium Declaration and Bylaws. All amounts so collected shall be placed in a financial institution or institutions in accounts as designated by the Board of Managers. Such deposits shall be insured by the Federal Deposit Insurance Corporation, or other similar federal agency. The Managing Agent shall make diligent efforts to collect all delinquencies and, when directed by the Association, provide necessary information and cooperation with the Association's legal counsel. The Managing Agent does not guarantee the collection of Assessments and other charges relating to the Condominium Property and shall not be responsible for the failure to collect the same.

c. From the funds collected and deposited in the aforesaid account or accounts to cause to be disbursed regularly and punctually, (i) fire and liability insurance premiums, and (ii) sums otherwise due and payable by the Association as operating expenses authorized to be incurred under this Agreement, including the Managing Agent's fee. After disbursement in the order above specified, any balance remaining in such accounts may be disbursed or transferred from time to time, as directed by the Board of Managers. The Managing Agent shall not be obliged to incur any liability or obligation of the Association in an amount that exceeds the existing balance of the Association's operating account.

d. To prepare and file on behalf of the Association all returns and reports required under federal, state and local laws relating to employees, including, but not limited to withholding, unemployment, FICA and worker's compensation, and to timely pay all taxes and premiums associated with such reports and returns from the aforementioned accounts. Notwithstanding the foregoing, the Managing Agent shall pay from its own funds any penalties, interest, or fines levied as a result of errors and delays caused by the Managing Agent. The Managing Agent shall not be responsible for the

preparation of annual tax returns of the Association to any taxing body. If so directed, however, by the Board of Managers, the Managing Agent shall make appropriate arrangements for such filing.

e. To furnish the Board of Managers with a monthly statement of Cash Receipts and Disbursements, including a current list of all delinquencies in funds due the Association.

6. LIABILITY OF MANAGING AGENT

Except for wilful acts or for breaches of duties constituting gross negligence, the Association shall indemnify and hold the Managing Agent harmless from all claims, actions and damages arising from the performance of its duties under this Agreement.

Regardless of the provisions of indemnification set forth hereinabove, the Managing Agent shall maintain in force, for the entire term of this Agreement, liability and business insurance, a fidelity bond and such other forms of insurance and bonding as may be hereinafter reasonably required by the Board, for both Association employees and Managing Agent employees as designated, in amounts which are approved by the Board, naming the Board as beneficiary and/or obligee as applicable.

7. COMPENSATION

The compensation which the Managing Agent shall be entitled to receive for all services performed under this agreement shall be n186 _____payable as follows: n187 _____

Special reports outside of the scope of this Agreement shall be prepared by the Managing Agent in accordance with the request and direction of the Board of Managers, at a fee mutually agreed upon by the parties. In the event of any major restoration or modification cost exceeding n188 _____due to fire or other hazard, or by direction of the Association is undertaken, a special supervisory fee will be payable to the Managing Agent. The amount of such fee and its basis will be determined by separate agreement between the Board of Managers and the Managing Agent.

8. TERMINATION OF AGREEMENT

Either party to this Agreement may terminate it without cause by giving written notice to the other party by registered mail at least n189 _____days prior to the termination date. In such event this agreement shall expire at the conclusion of the n190 _____day notice period. Upon the termination of this Agreement, the parties shall account to each other for all matters outstanding as of the date of the termination of the Agreement. The Association shall indemnify the Managing Agent against any outstanding obligations or liabilities, beneficial to the Association, which the Managing Agent may have incurred hereunder. The Managing Agent shall document any outstanding obligations.

9. NOTICES

All notices required hereunder shall be in writing and shall be deemed given if delivered in person or mailed by certified or registered mail, addressed as follows:

To the Association: To the Managing Agent:

10. MISCELLANEOUS

Terms used in this Agreement shall be defined in the same manner as in the Condominium Act, or if not defined therein, as defined in the Condominium Declaration or Bylaws.

11. ENTIRE AGREEMENT

This agreement constitutes the entire agreement between the parties, and no variance or modifications thereof shall be valid and enforceable, except by an agreement in writing. This Agreement shall inure to the benefit of and constitute a binding obligation upon the parties hereto, their respective heirs, personal representatives, successors and assigns.

IN WITNESS WHEREOF, the parties hereto have set their hands this_____of_____, 20_____.

_____ASSOCIATION

WITNESSES:
_____
_____
_____
_____
_____
_____
_____

By: _____

By: _____
(Managing Agent)
By:_____
By: _____

1.07 RECEIPT FOR CONDOMINIUM DOCUMENTS

RECEIPT

UNIT § _____ n191

By affixing (my) our signature(s) below, where indicated, (I) we hereby acknowledge that (I) we have received from, n192 _____the following documents and/or information sheets relative to the purchase of the property located at_____, Ohio, commonly known as Unit § _____ n193

_____Two (2) copies of the Right to Rescind Sheet

_____Specifications and Unusual Standard Features included in Unit §

_____ n194

_____General Information Letter n195

_____Deed n196 to Condominium Unit § _____ n197

_____Covenants and Restrictions

_____Declaration of Condominium Ownership

_____Condominium Association Bylaws

_____Condominium Association Code of Regulations n198

Date: _____
_____

Date: _____ (Buyer)
_____

1.08 RIGHT OF RESCISSION

The following information is given in connection with a credit transaction dated_____, 20_____, between n199 _____and n200 _____, the Purchaser(s).

NOTICE TO CUSTOMER REQUIRED BY FEDERAL LAW

You have entered into a transaction on_____, 20_____, which may result in a lien, mortgage, or other security interest on your home. You have a legal right under Federal Law to cancel this transaction, if you desire to do so, without any penalty or obligation within three (3) business days from the above date or any later date on which all material disclosures required under the Truth in Lending Act have been given to you. If you so cancel the transaction, any lien, mortgage, or other security interest on your home arising from this transaction is automatically void. You are also entitled to receive a refund of any downpayment or other consideration if you cancel. If you decide to cancel this transaction, you may do so by notifying n201 _____at_____, n202 by mail or telegram sent not later than midnight. n203

You may also use any other form of written notice identifying the transaction if it is delivered to the above address not later than that time. This notice may be used for that purpose by dating and signing below.

(I) we hereby cancel this transaction. Date:_____

_____

Date:_____

_____

EFFECT OF RESCISSION. When a customer exercises the right to rescind under Paragraph (1) of this section, the customer is not liable for any finance or other charge, and any security interest becomes void upon such a rescission. Within ten (10) days after receipt of notice of rescission, the creditor shall return to the customer any money or property given as earnest money, downpayment, or otherwise, and shall take any action necessary or appropriate to reflect the termination of any security interest created under the transaction. If the creditor has delivered any property to the customer, the customer may claim possession of it. Upon the performance of the creditor's obligations under this section, the customer shall tender the property to the creditor, except that if return of the property in kind would be impracticable or inequitable, the customer shall tender its reasonable value. Tender shall be made at the location of the property or at the residence of the customer, at the option of the customer. If the creditor does not take possession of this property within ten (10) days after tender by the customer, ownership of the property vests in the customer without obligation on the customer's part to pay for it.

(I) (WE) hereby acknowledge receipt of two (2) copies of this Notice of Right to Rescind.

Date: _____ _____
Date: _____ (Purchaser)
_____
(Purchaser)

This instrument prepared by:

_____

1.09 WARRANTY DEED FOR CONDOMINIUM UNIT n204

WARRANTY DEED
KNOW ALL MEN BY THESE PRESENTS:

That_____, Inc., an Ohio corporation, of the City of_____, County of_____, and State of Ohio, Grantor, in consideration of the sum of One Dollar ($1.00) and other valuable consideration to it paid by_____, of the City of_____, County of_____, and State of Ohio, Grantee, the receipt whereof is hereby acknowledged, does hereby grant, bargain, sell and convey to the said_____,_____heirs and assigns forever, the following real estate situated in the County of_____, in the State of Ohio, and in the City of_____:

Unit_____, along with garage number_____, and an undivided_____percent (_____%) interest in the common areas and facilities of_____Condominium located in_____, Ohio, as the same is shown of record upon the drawings in Condominium Plat Book_____Pages_____to_____, both inclusive, Recorder's Office,_____County, Ohio.

Prior conveyance: Volume:_____Page:_____

Recorder's Office,_____County, Ohio

For the purpose of carrying out the general plan and development and management of_____Condominium, its bylaws, administrative rules and regulations, the provisions of the declaration and the provisions of RC Chapter 5311, and to maintain the character and standards thereof, and as a part of the consideration hereof, the Grantor, for itself, its successors and assigns, does covenant and agree with the Grantee that any future deed or deeds conveying units as now, or as may hereafter be established in said condominium, shall maintain and impose upon and subject said units to the agreements, conditions and restrictions hereinafter set forth.

The Grantor executes and delivers this deed and the Grantee accepts the same and the premises hereby conveyed subject to the following agreements, conditions and restrictions which are for the mutual protection and benefit of, and shall be enforceable by each and every owner of a unit or units in said condominium and its unit owners association, and the Grantee, for the Grantee and the Grantee's heirs and assigns, covenants and agrees to and with the Grantor to keep and perform each of said agreements, conditions and restrictions, as follows:

(1) Grantee becomes with the delivery of this deed, a member of_____Condominium Unit Owners Association and is bound by its bylaws and administrative rules and regulations as amended from time to time.

(2) The unit herein conveyed shall be used for residential purposes only, thereby prohibiting business or professional use.

(3) If the parties hereto, or any one of them, or their heirs and assigns, shall violate or attempt to violate any of the covenants or restrictions herein (which shall include the bylaws and administrative rules and regulations of_____Condominium Unit Owners Association herein by reference), it shall be lawful for the board of managers of the unit owners association or any unit owner to prosecute any proceeding at law or in equity against the person or persons violating or attempting to violate any such covenant or restriction to prevent the person or persons from so doing and/or recover damages for such violation.

[Grantee hereby grants grantee's proxy to the first board of managers elected in accordance with the bylaws of the condominium unit owners association to vote for amendments to the declaration of Condominium (including the bylaws and drawings) in order to increase the number of units of the condominium property to a total not to exceed_____(_____) and thereby cause reductions of each unit's percentage of interest in the common areas and facilities, which percentage for any unit shall, however, always be in the proportion that the fair value of such unit bears to the fair value of all units]. n205

To have and to hold said premises with all the privileges and appurtenances thereunto belonging to the Grantee and to the Grantee's heirs and assigns, forever. And the Grantor for itself and its successors does hereby covenant with the Grantee and the Grantee's heirs and assigns, that it is lawfully seized of the premises aforesaid; that said premises are free and clear from all encumbrances whatsoever excepting taxes and installments of special assessments, if any, due and payable in the_____, 20_____tax collection period and thereafter; and that it will forever warrant and defend the same with the appurtenances unto the said Grantee and the Grantee's heirs and assigns, against the lawful claims of all persons whomsoever, except as aforesaid.

In witness whereof, the Grantor,_____, Inc., has hereunto caused its name to be subscribed, pursuant to a resolution adopted by the board of managers, by_____, its president, on this_____day of_____, 20_____.

Signed and acknowledged_____, Inc.
in the presence of

_____ By: _____

_____ President
_____

State of Ohio
ss:
County of Cuyahoga

Be it remembered that on this_____day of_____20_____, before me, the subscriber, a notary public in and for said county, personally came the above-named_____, Inc., by_____, its president, duly authorized by resolution adopted by its board of managers, and acknowledged the signing of the same to be the free act and deed of said corporation and of himself as such officer, for the uses and purposes therein mentioned.

In testimony whereof, I have hereunto subscribed my name and affixed my official seal on the day and year last aforesaid.

_____
Notary Public

[Seal]

My commission expires_____, 20_____

This instrument prepared by:

_____

1.10 CONSENT OF MORTGAGEE n206

The undersigned hereby consents to the execution and delivery of the foregoing instruments, and to the filing in the office of the Recorder of_____County, Ohio; and hereby subjects the mortgage executed by undersigned, which mortgage is filed as Document No._____, Vol._____, Page_____, in said office of the Recorder of_____, County, Ohio, to the provisions of the Condominium Act of the State of Ohio and to the provisions of the foregoing instruments.

Dated:_____

_____
(Mortgagee)
By: _____

Witnesses:

_____
_____

[Acknowledgement]

This instrument was prepared by:

_____

FOOTNOTES:

(n1)Footnote 161. Most of these considerations are the same ones that should go into the purchase of a traditional, detached single-family home. For additional consumer checklists, for both cooperatives and condominiums, *see* Nancy Ann Connery, *Precontract Considerations, Pre-Contract Due Diligence for Purchasers*, Practicing Law Institute, Real Estate Law and Practice Course Handbook Series, PLI Order No. N4-4599 (May 1996).

(n2)Footnote 162. Sometimes this charge can be expensive and built-in. This is especially problematic if the developer has already entered into a long-term agreement with a third party for the provision of recreational services.

(n3)Footnote 163. The Condominium Declaration is the most important of the condominium organizational documents and each one should be tailored to the specific problems of each individual project. This form is primarily based on the minimum requirement of the Ohio Condominium Act. A more expansive document might include more detailed information about easements, construction defects, assessment procedures, dissenting owners, remedies for covenants, violations and sales of units by present owners. The condominium organizational documents, including the Bylaws and drawings, must be filed with the County Auditor in the county or counties in which the property is located.

(n4)Footnote 164. Name of declarant.

(n5)Footnote 165. Legal status of declarant.

(n6)Footnote 166. Some declarations spell out the defined terms in detail. They are in most cases, however, a repetition of the statute. Some developers hand out copies of the statute with their information material for prospective purchasers.

(n7)Footnote 167. This information should be included in case of an expandable condominium.

(n8)Footnote 168. This information must be tailored to the unique circumstances of each project.

(n9)Footnote 169. *Id.*

(n10)Footnote 170. *Id.*

(n11)Footnote 171. Chapter 5311 does not specifically authorize what type of entity the unit owners association must be. Nevertheless, the trend seems to be that they are usually formed as non-profit corporations. One commentator lists the following considerations that appear to make the non-profit corporation the favored entity for unit owners associations:

a. Alleviation of uncertainties regarding power, authority;

b. Comprehensive nature of RC Chapter 1702 provides a basis of association operation that is superior to the minimal provisions of Chapter 5311;

c. Name use protection;

d. Limitation on liability for officers and members; and

e. General legal and lender acceptance of the vehicle (based on Robert L. Loveland, "Formation Documentation," Ohio Legal Institute, Condominiums (1980)).

(n12)Footnote 172. Use the legal description contained in the warranty deed (FORM 1.09).

(n13)Footnote 173. Required to be filed with the Declaration with the County Auditor. RC 5311.06.

(n14)Footnote 174. Any changes in these percentages should be checked against the requirements of Chapter 1702 of the Ohio non-profit corporation law, since, in effect, the bylaws of a condominium are the "code of regulations" required under Chapter 1702.

(n15)Footnote 175. Any changes in these percentages should be checked against the requirements of Chapter 1702 of the Ohio non-profit corporation law, since, in effect, the bylaws of a condominium are the "code of regulations" required under Chapter 1702.

(n16)Footnote 176. *Id.*

(n17)Footnote 177. Ohio Rev. Code Ann. § 5311.08.

(n18)Footnote 178. Bylaws have a higher legal priority than rules and regulations. Rules and regulations generally are more easily amended than bylaws. This set of rules and regulations is for illustration purposes. Each set of such rules and regulations should be adapted for particular residential settings. For example, a high rise condominium may have different needs than a scatter-site development. Some condominium association may want to allow pets; others may prohibit them altogether. Some associations have strict prohibitions against children; some simply regulate children by placing age restrictions upon them.

(n19)Footnote 179. Name of Condominium Association.

(n20)Footnote 180. Name of Managing Agent.

(n21)Footnote 181. Name of Condominium Association.

(n22)Footnote 182. Type of legal entity, *i.e.*, corporation.

(n23)Footnote 183. Date of contract termination.

(n24)Footnote 184. Amount of bond. This amount should be discussed with Association legal and insurance counsel before implementation.

(n25)Footnote 185. Repair and maintenance upper limit. Consult appropriate advisors.

(n26)Footnote 186. Amount of managing agent fee.

(n27)Footnote 187. Calculation of managing agent fee. Some associations also place provisions here with respect to fees for so-called "non-routine" services.

(n28)Footnote 188. Cost necessitating special managing agent fee. Once again, appropriate association advisors should be consulted.

(n29)Footnote 189. Time limit for termination. Most associations use from 30 to 60 days here.

(n30)Footnote 190. *Id.*

(n31)Footnote 191. Condominium unit designation.

(n32)Footnote 192. Name of developer.

(n33)Footnote 193. Condominium unit designation.

(n34)Footnote 194. If included.

(n35)Footnote 195. Most of the larger developers include a general information sheet, sometimes in the form of a special newsletter for first-time buyers.

(n36)Footnote 196. This is usually a warranty deed.

(n37)Footnote 197. Condominium unit designation.

(n38)Footnote 198. Additional documents as necessary, *i.e.*, amendments to the declaration since its filing with the county recorder.

(n39)Footnote 199. Name of seller.

(n40)Footnote 200. Name of purchaser.

(n41)Footnote 201. Name of seller.

(n42)Footnote 202. Address of seller.

(n43)Footnote 203. Period of three days after contract execution.

(n44)Footnote 204. While a warranty deed is generally preferred, in some circumstances it is acceptable to receive a quitclaim deed instead.

(n45)Footnote 205. This paragraph should be added in expandable condominium situations.

(n46)Footnote 206. If there is a mortgage on the premises, the mortgagee should consent to the creation of the condominium and subject its mortgage thereto.

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CHAPTER 36 CONDOMINIUMS AND COOPERATIVES

4-36 Thompson on Real Property, Thomas Editions § 36.15

AUTHOR: Professor Frederic White Cleveland State University Cleveland-Marshall College of Law

§ 36.15 Bibliography.

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Annotation, *Condominium Association's Liability to Unit Owner for Injuries Caused by Third Person's Criminal Conduct, 59 A.L.R.4th 489.*

Annotation, *Contractual or State Regulatory Pro*visions Respecting Formation, Composition, and Powers of Governing Body of Condominium Association, *13 A.L.R.4th (1982) 598.*

Annotation, *Liability for Unpaid Assessments, 39 A.L.R.4th (1985) 114.*

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Annotation, *Standing to Bring Action Relating to Real Property of Condominium, 74 A.L.R.4th (1989) 165.*

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Annotation, *Pro*per Party Plaintiff in Action for Injury to Common Areas of Condominium Development, *39 A.L.R.4th 114.*

Annotation, *Validity and Construction of Condominium Bylaws or Regulations Placing Special Regulations, Burdens, or Restrictions on Nonresident Unit Owners, 76 A.L.R.4th 295.*

Annotation, *Validity and Construction of Condominium Association's Regulations Governing Member's Use of Common Facilities, 72 A.L.R.3d 308.*

Annotation, *Validity and Construction of Law Regulating Conversion of Rental Housing to Condominiums, 21 A.L.R.4th 1083.*

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Supp. To CHAPTER 36 CONDOMINIUMS AND COOPERATIVES

4-36 Thompson on Real Property, Thomas Editions Supp. to § 36.03

Supp. to § 36.03 Definitions

[Go To Main]

Add at end of second full paragraph:

A condominium is not defined as a "place of accommodation" under the ADA, and thus is not covered by the Act.

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Supp. To CHAPTER 36 CONDOMINIUMS AND COOPERATIVES

4-36 Thompson on Real Property, Thomas Editions Supp. to § 36.04

Supp. to § 36.04 Distinctive Features of Condominiums and Cooperatives

[Go To Main]

§ 36.04(a) Condominiums Distinguished from Cooperatives [Go To Main]

Change:

Agassiz ... 257 to **527**.

§ 36.04(b) Condominiums and Cooperatives Distinguished from Other Types of Property Interests § 20a-718.202(7) to Fla. Stat.

Delete crossed out language from quoted language from Fla. Stat. § 718.103(17) in footnote 6:

"... certain **The material within the following brackets is overstruck in the original. [condominium]** unit ... declaration **The material within the following brackets is overstruck in the original. [of condominium]** ."

Change:

§ 718.103(17) to § 718.103(**19**)

Subsequent History:

Firth v. Lu, 12 P.3d 618 **reversed** by *Firth v. Lu, 49 P.3d 117 (Wash. 2002)* (Statute of Frauds does not apply to an agreement to transfer shares in a corporation that operated a cooperative).

Add:

(Cooperatives have the same remedies available to them as does an ordinary landlord) should be added to explanatory parenthetical for Quality Mgmt. Serv. v. Banker.

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Supp. To CHAPTER 36 CONDOMINIUMS AND COOPERATIVES

4-36 Thompson on Real Property, Thomas Editions Supp. to § 36.05

Supp. to § 36.05 History of Condominiums and Cooperatives

[Go To Main]

§ 36.05(a) Origins of Condominiums [Go To Main]

Change:

Fla. Stat.. *§ 20-718.103(10) to* ***Fla. Stat.*** **§ 718.103(11)**.

Change:

Agassiz ... 257 to **527**.

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Supp. To CHAPTER 36 CONDOMINIUMS AND COOPERATIVES

4-36 Thompson on Real Property, Thomas Editions Supp. to § 36.06

Supp. to § 36.06 Creation of Condominiums and Cooperatives

[Go To Main]

§ 36.06(a) Termination and Statutory Provisions [Go To Main]

The Uniform Condominium Act is based on the Uniform Common Interest Ownership Act.

text accompanying notes 21 & 22: Move so that it follows the inserted paragraph below on the Uniform Common Interest Ownership Act and immediately precedes the paragraph beginning with "Condominiums and cooperatives ... " Delete "Other" and Capitalize the "S" in "states" to begin the paragraph after the preceding sentences are moved. This sentence, beginning "States adopting ..." should be included at the end of the prior paragraph.

Change:

*W. VA. CODE §§ 36B-4-101*36B-4-118 *to W. VA. CODE §§ 36B-4-101*36B-4-120

Change:

MINN. STAT. ANN. *§§ 515A.1.101-515A.4-117 to MINN. STAT. ANN.* §§ 515A.1.101-515A.4-118

After Note 27, add text and Note 27.1:

Nebraska, n27.1

North Carolina,

Add new footnote 27.2: n27.2

Pennsylvania,

Add new footnote 27.3: n27.3

Rhode Island,

Add new footnote 27.4: n27.4

Texas,

Add new footnote 27.5: n27.5

Virginia,

Add new footnote 27.6: n27.6

Washington,

Add new footnote 27.7: n27.7

Louisiana,

Add new footnote 27.8: n27.8

Tennessee,

Add new footnote 27.9: n27.9

Add:

Fla. Stat. Ann. 719.101

after footnote 28, end the paragraph. Thus Condominiums *should start a new paragraph*.

Add the following paragraph between the paragraph ending at footnote 28 and the paragraph beginning "Condominiums and cooperatives ... "

The Uniform Common Interest Ownership Act ("UCIOA") is another uniform act that provides a comprehensive model code for governing condominiums. The UCIOA was drafted in 1982, two years after the amendments to the Uniform Condominium Act, and it was amended in 1994.[28.1] In drafting the UCIOA, the Uniform Law Commission combined three model acts: the Uniform Condominium Act, the Uniform Planned Community Act, and the Model Real Estate Cooperative Act.[28.2] Consequently, the UCIOA is much more expansive than the Uniform Condominium Act in that it aims to govern condominiums, real estate cooperatives, and planned communities.[28.3] The UCIOA was drafted to supersede the Uniform Condominium Act.[28.4] The following states have adopted the UCIOA: Alaska,[28.5] Colorado,[28.6] Connecticut,[28.7] Delaware,[28.8] Minnesota,[28.9] Nevada,[28.10] Vermont,[28.11] and West Virginia.[28.12]

Add new footnote 28.1: n28.1

Add new footnote 28.2: n28.2

Add new footnote 28.3: n28.3

Add new footnote 28.4: n28.4

Add new footnote 28.5: n28.5

Add new footnote 28.6: n28.6

Add new footnote 28.7: n28.7

Add new footnote 28.8: n28.8

Add new footnote 28.9: n28.9

Add new footnote 28.10: n28.10

Add new footnote 28.11: n28.11

Add new footnote 28.12: n28.12

Change:

D.C. Code Ann. Tit. 45, §§ 1701- 1734 to *D.C. Code §§ 42-2001-42-2051*.

Change:

Alaska Stat., tit. 34, §§ 7-10- 7-460 to *Alaska Stat. §§ 34,07*.010-34.07.460.

See, e.g., Villas W. II of Willowridge v. McGlothin, 841 N.E.2d 584 (Ind. Ct. App. 2006) (Covenants cannot violate the Fair Housing Act).

(end of citation beginning "See also Villas ... ": Add Subsequent History

(*Rev'd 885 N.E.2d 1274 (Ind. 2008)* (conducting a fact-sensitive inquiry and then reversing the trial court's determination that the FHA was violated)).

Add:

The National Conference of Commissioners on Uniform State Laws no longer lists this Act on its online database.

Uniform Law Commission, Search Acts,
http://www.nccusl.org/Update/DesktopDefault.aspx?tabindex=2&tabid=60 (last visited April 28, 2010).

Change:

Fla. Stat. *§ 20A-718.401 to FLA. STAT.* § 718.401

Change:

Fla. Stat. *§ 20a-719.401 to FLA. STAT.* § 719.401

Change:

Fla. Stat. *§ 20A-718.103(13) to FLA. STAT.* § 718.103(15)

Supplement, page 25: Delete lines 9-10 (The cited case has been reversed, *885 N.E.2d 1274, 1285 (Ind. 2008)* .)

Add:

See e.g., Villas W. II of Willowridge v. McGlothin, 841 N.E.2d 584 (Ind. Ct. App. 2006) (Covenants cannot violate the Fair Housing Act).

Subsequent History:

Harrington **vacated** by *Harrington v. Blackston, 473 S.E.2d 47 (S.C. 1996)* (vacated after the parties reached a settlement).

§ 36.06(b) Instruments of Creation [Go To Main]

§ 36.06(b)(1) Condominium Instruments

Subsequent History:

Harrington **vacated** by *Harrington v. Blackston, 473 S.E.2d 47 (S.C. 1996)* (vacated after the parties reached a settlement).

Add:

The Condominium Act of 1976 governs common interest communities created on or before Dec. 31, 1984.

Add:

See also Villas W. II of Willowridge v. McGlothin, 841 N.E.2d 584 (Ind. Ct. App. 2006) (Restrictive covenants may violate the FHA, but a fact-sensitive analysis is needed).

Subsequent History:

Woodside Vill. **quashed** by *Woodside Vill. Condo. Ass'n v. McClernan, 806 So. 2d 452 (Fla. 2002)* .

FOOTNOTES:
(n1)Footnote 27.1. *NEB. REV. STAT. §§ 76-825-76-894*; Jonathan D. Ross-Harrington, "Property Forms in Tension: Preference Inefficiency, Rent-Seeking, and the Problem of Notice in the Modern Condominium," *28 YALE L. & POL'Y REV. 187, 213 n.118 (2009).* For an analysis of the changes Nebraska made to the Uniform Act see Marjean M. Gillaspie, "L.B. 433: A New Legal Framework for Nebraska Condominiums," *17 CREIGHTON L. REV. 377* (1983-84).

(n2)Footnote 27.2. *N.C. GEN STAT. §§ 47C-1-101-47C-4-120*; Ross-Harrington, supra note 27.1 at 213 n.118.

(n3)Footnote 27.3. Pa. Cons. Stat. §§ 3101- 3414 ; Ross-Harrington, supra note 27.1 at 213 n.118.

(n4)Footnote 27.4. *R.I. GEN. LAWS §§ 34-36.1-1.01-34-36.1-4.20*; Ross-Harrington, supra note 27.1 at 213 n.118.

(n5)Footnote 27.5. TEX. RULES AND CODES ANN. §§ 82.001- 82 .164; Ross-Harrington, supra note 27.1 at 213 n.118.

(n6)Footnote 27.6. *VA. CODE ANN. §§ 55-79.39-55-79.103*; Ross-Harrington, supra note 27.1 at 213 n.118.

(n7)Footnote 27.7. *WASH. REV. CODE §§ 64.34.005-63.34.950*; Ross-Harrington, supra note 27.1 at 213 n.118.

(n8)Footnote 27.8. *LA. REV. STAT. ANN. §§ 9:1121.101-9:1124.116*.

(n9)Footnote 27.9. *Tenn. Code Ann. §§ 66-27-201-66-27-507*.

(n10)Footnote 28.1. Uniform Law Commission, Summary: Uniform Common Interest Ownership Act (1994), http://www.nccusl.org/update/uniformact_summaries/uniformacts-s-ucioa94.asp (last visited April 27, 2010).

(n11)Footnote 28.2. Katharine N. Rosenberry & Curtis G. Sproul, "A Comparison of California Common Interest Development Law and the Uniform Common Interest Ownership Act," *38 SANTA CLARA L. REV. 1009, 1011 (1998).*

(n12)Footnote 28.3. Jonathan D. Ross-Harrington, "Property Forms in Tension: Preference Inefficiency, Rent-Seeking, and the Problem of Notice in the Modern Condominium," *28 YALE L. & POL'Y REV. 187, 212 (2009).*

(n13)Footnote 28.4. *Id.*

(n14)Footnote 28.5. *ALASKA STAT. §§ 34.08.010-34.08.995*.

(n15)Footnote 28.6. *COLO. REV. STAT. §§ 38-33.3-101-38.33.3-319*.

(n16)Footnote 28.7. *CONN. GEN. STAT. §§ 47-200-47-299*.

(n17)Footnote 28.8. *DEL. CODE ANN. tit. 25 §§ 81-101-81-421*.

(n18)Footnote 28.9. *MINN. STAT. §§ 515B.1-101-515B.4-118*.

(n19)Footnote 28.10. *NEV. REV. STAT. §§ 116.001-116.795*.

(n20)Footnote 28.11. *Vt. Stat. Ann. tit. 27A §§ 1-101-4-120*.

(n21)Footnote 28.12. *W. VA. CODE §§ 36B-1-101-36B-4-120*.

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Supp. To CHAPTER 36 CONDOMINIUMS AND COOPERATIVES

4-36 Thompson on Real Property, Thomas Editions Supp. to § 36.07

Supp. to § 36.07 Tort and Contract Liabilities Associated with Condominiums and Cooperatives.

[Go To Main]

§ 36.07(a) Liability of the Condominium Association. [Go To Main]

Change:

755 So. 2d 825 to *755 So. 2d 824*

Add:

Garron v. Pier Point Condo. Ass'n, 2009 Wash. App. Lexis 1861, 11-12 (Wash. App. 2009) (citing the Condominium Act in holding the lower court did not abuse its discretion in barring suit against individual homeowners when the alleged wrong was committed by the homeowner association).

Add:

See also Brandon Farms Prop. Owners Ass'n v. Brandon Farms Condo. Ass'n, 180 N.J. 361 (N.J. 2004) (holding that the condo association can not be held liable for the failure of the association members' to pay outstanding assessments).

Add:

N.M. Stat. Ann. § 47-7C-13 requires liability insurance for condominium associations.

Change:

Schroeder v. De Bertolo, 879 F. Supp. 173 to *Schroeder v. De Bertolo, 879 F. Supp. 173* .

Change:

O'Brien v. Christensen, 662 N.E. 205 should be *662* ***N.E.2d*** *205* .

Add:

Petrosky v. Embry Crossing Condo. Ass'n, 2007 Ga. App. LEXIS 318 (Ga. App. 2007) (Resident barred from recovery against association because he had equal constructive knowledge of a hazardous condition that caused him injury, which knowledge absolved the association of any liability); *Comm. for a Better Twin Rivers v. Twin Rivers Homeowners' Ass'n, 890 A.2d 947 (N.J. App. 2006)* (The requirements of reasonableness, good faith, and fair dealing are among the inherent limitations on the business judgment rule); *Caracci v. Cobblestone Vill. Condo. Ass'n, 927 So. 2d 542, 546 (La. App. 2006)* (Condominium association officer was held to be immune from an action against them and the association by an individual unit owner and a tenant); *La. Rev. Stat. § 9:2792.7* (An association officer who is not compensated for his or her services is not individually liable for acts or omissions that result in damage or injury when such damage or injury arise out of his or her good faith and authorized management of the association, except that his or her misconduct is willful or wanton); *Chee v. Amanda Goldt Prop. Mgmt., 143 Cal. App. 4th 1360 (1st Dist. 2006)* (Condominium CC&Rs do not impose vicarious liability on a unit owner for negligence of a tenant since CC&Rs do not have the legal authority to expand tort law); *Ala. Code§ 35-8A-311* (Neither the association or nor any individual unit owner is liable for another individual unit owner's torts that relate to a portion of the condominium that the tort feaser is responsible to maintain); *Bowman v. State, 206 S.W.3d 467 (Tenn. App. 2006)* (Since weather forecasts alone do not constitute notice, property owners cannot be held liable for failing to remove natural accumulations of snow or ice of which they had no notice).

Change:

Petrosky v. Embry Crossing Condo. Ass'n, 2007 Ga. App. Lexis 318 (Ga. App. 2007) to *Petrosky v. Embry Crossing Condo. Ass'n, 643 S.E.2d 855 (Ga. App. 2007)*

Delete: (case was reversed, *929 A.2d 1060 (N.J. 2007))*

Comm. For a Better Twin Rivers v. Twin Rivers Homeowners' Ass'n, 890 A.2d 947 (N.J. App. 2006) (The requirements of reasonableness, good faith, and fair dealing are among the inherent limitations on the business judgment rule);

Change:

(Condominium association officer was held to be immune ... to (Condominium association officers were held to be immune ...

Delete *id*.

Add:

Uniform Condominium Act § 3-111, cmt. 1.

Delete *id*.

Add:

Uniform Condominium Act § 3-111, cmt. 1. *Wash. Rev. Code Ann. § 64.34.344* (permitting individual unit owners to bring an action against their condominium association under both theories of torts or contracts)

Barrasso v. Hillview West Condominium Trust, 904 N.E.2d 778 (Mass. App. 2009) (negligence action brought by condominium owner against condominium trust).

Add:

Aff'd 738 N.W.2d 910 (Minn. 2007) .

Add:

Munro v. Jordan, 2010 Mass. App. Div. 1, 4 (Mass. App. 2010) ("While the obligation of the condominium Trustees to maintain and repair the common elements of the property in the present case was created by contract, a breach of that obligation may provide a basis for an action in tort." (citing *O'Brien v Christensen, 662 N.E.2d 205 (Mass. 1996))* .

§ 36.07(b) Liability of the Cooperative Association [Go To Main]

Add:

Heiman v. Workers' Comp. Appeals Bd., 149 Cal. App. 4th 724 (2d Dist. 2007) (An association need not be incorporated to exercise rights given to associations); *In re Three A's Holdings, L.L.C., 47 Bankr. Ct. Dec. 281 (Bankr. D. Del. 2007)* (California law gives associations "discretionary decision-making authority" to enforce use restrictions); *Standard Fire Ins. Co. v. Spectrum Cmty. Ass'n, 141 Cal. App. 4th 1117 (4th Dist. 2006)* (Association allowed to sue developer for construction defects on behalf of owners even though association did not exist when defects occurred because the association was the first party able to maintain a legal claim against the developer and holds a cause of action); *Caprer v. Nussbaum, 825 N.Y.S.2d 55 (2006)* (Individual unit owners lacked standing to bring a damages claim to the common interest. Condominium Act gives the association board exclusive right to sue for injury to common areas on behalf of unit owners); *Weldy v. Northbrook Condo. Ass'n, Inc., 904 A.2d 188 (Conn. 2006)* (When assessing the validity of a board of directors' action, a court first determines whether the board acted within the scope of its authority and, second, whether the action was reached by reasoned or arbitrary means); Restatement (Third) of Property: Servitudes § 6.11 (2000) ("[T]he association has the power to institute, defend, or intervene in litigation or administrative proceedings in its own name, on behalf of itself, or on behalf of member property owners in a common-interest community on matters affecting the community.").

Delete (The case was reversed. See also *473 S.E.2d 649, 654 (N.C. App. 1996)* (Greene, J., dissenting) (providing the reasoning on which the state supreme court based its reversal--one of the two reasons was that the complaint should not have been dismissed because it was not brought in the name of the real party in interest).

Richland Run Homeowners Ass'n v. CHC Durham Corp. 473 S.E.2d 649 (N.C. App. 1996) .

Subsequent History:

Bernard **affirmed** by *Bernard v. Scharf, 656 N.Y.S.2d 583 (1997)* , which was in turn **reversed and dismissed** by *Bernard v. Scharf, 675 N.Y.S.2d 64* , which was then **reversed** by Bernard v. Scharf, N.Y.S.2d, which was then **remitted** by *Bernard v. Scharf, 689 N.Y.S.2d 1 (1999)* .

See, e.g., 905 5th Associates, Inc. v. 907 Corp., 851 N.Y.S.2d 393 (2008) (tenant action against cooperative, alleging damage from renovation work).

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Supp. To CHAPTER 36 CONDOMINIUMS AND COOPERATIVES

4-36 Thompson on Real Property, Thomas Editions Supp. to § 36.08

Supp. to § 36.08 Termination

[Go To Main]

§ 36.08(a) Termination of Condominiums [Go To Main]

Change:

... West Virginia, for example, is in accord. ... Ohio and Florida, on the other hand. ... to West Virginia and Florida, for example, are in accord. ... Ohio, on the other hand. ...

Add:

FLA. STAT. § 718.117

Delete:

Fla. Stat. § 20a-718.117

Add:

Ala. Code § 35-8-20 (A condominium may also be terminated by a court upon the petition of an individual unit owner in the event of the total destruction of all improvements of the condominium without an agreement to rebuild within a reasonable time or when such rebuilding is not completed within a reasonable time) and (Only a majority of association

votes are required to terminate the condominium if no agreement is made to repair substantial damage to the condominium, or if an agreed repair is not completed within a reasonable time).

§ 36.08(b) Termination of Cooperatives [Go To Main]

Add:

Matter of 160 Bleecker St. Owners, Inc. v. Division of Hous. & Cmty. Renewal, 812 N.Y.S.2d 495 (2006) (When buildings are converted pursuant to a non-eviction plan, units occupied by renters at the time of the conversion remain subject to rent regulation).

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Supp. To CHAPTER 36 CONDOMINIUMS AND COOPERATIVES

4-36 Thompson on Real Property, Thomas Editions Supp. to § 36.09

Supp. to § 36.09 Disclosure Required Before Sale of Condominium and Cooperative Interests

[Go To Main]

§ 36.09(a) Introduction [Go To Main]

Change:

Ill. Comp. Stat. Ann. Ch. 765, para. 605.22 to *765 ILL. COMP. STAT. ANN. 605/22*

Change;

PA. STAT. ANN. Tit. 68, § 3406 to 68 PA. CONS. STAT. § 3406

line 10 of the subsection, add, after "New Mexico," new footnote 73.1 n73.1

Delete *Id.* and Add

Uniform Condominium Act § 4-103, cmt. 1.

§ 36.09(c) Development/Developer Identity. [Go To Main]

Add:

Shinney v. Cambridge Homes, Inc., 2005 Mich. App. LEXIS 463 (Mich. Ct. App., 2005) (Michigan law requires the "names, addresses, and previous experience with condominium projects of each developer and any management agency, real estate broker, residential builder, and residential maintenance and alteration contractor"; when this information was not disclosed, the purchasers we allowed to withdraw from the purchase agreement).

Add:

Herlson v. RTS Residential Block, LLC, 993 A.2d 699, 2010 Md. App. Lexis 60 (Md. App. 2010) (holding that a change to the CC&Rs which allowed purchasers to rent out their units immediately, rather than having to live in them for 12 months, was material information to a prospective purchaser under contract).

§ 36.09(f) Financing [Go To Main]

Add:

See also Ala. Code § 35-8A-403(a)(9) (Offering statement must "fully and accurately disclose" a "description of any financing offered or arranged by the declarant.").

§ 36.09(g) Warranties Ind. Code Ann. § 31-1-11.5-11

Add:

See also Ala. Code § 35-8A-403(a)(10) (Offering statement must "fully and accurately disclose" the "terms and significant limitations of any warranties provided by the declarant.").

Change:

VA. CODE ANN. *§ 55-79.90(7) to VA. CODE ANN.* § 55-79.90(a)(7)

Add:

See also Conn. Gen. Stat. Ann. § 47-74e ("An implied warranty of fitness and merchantability shall attach ... [to] the date of the recording of the original condominium instruments ... . This implied warranty shall inure to the benefit of

each unit owner and his successors, and to the benefit of the declarant."); *Permanent Mission of the Republic of Estonia v. Thompson, 2007 U.S. Dist. LEXIS 16396 (D.N.Y. 2007)* (An agreement to waive the warranty of habitability is "void as contrary to public policy."); *Morris v. Flaig, 2007 U.S. Dist. LEXIS 28923 (D.N.Y. 2007)* (Plaintiff allowed to recover punitive damages for "particularly egregious breaches of the implied warranty of habitability," despite general rule to the contrary, "because claims ... seek to enforce important public rights to safe and appropriate housing.").

Change:

Annotation, Liability of Vendor for Damages Occasioned by Defective Condition Thereof, *50 A.L.R. 3D 1071 (1973)* . to Annotation, Liability of Vendor of Condominiums for Damage Occasioned by Defective Condition Thereof, *50 A.L.R. 3D 1071 (1973)* .

Change:

Bunker Hill Towers Condominium Ass'n, et. Al. v. W.R. Grace & Co., Conn. No. B072642 to Bunker Hill Towers Condominium Ass'n, et. Al. v. W.R. Grace & Co., Docket No. B072642 (Cal. App. 1994).

Change;

Putnam v. Roudebush, 352 So. 2d 908 to *Putnam v. Roudebush, 352 So. 2d 908*

Line 3 of the text,

Replace Ohio Supreme Court with Ohio Court of Appeals.

Replace the second block quote with the following:

The condominium Declaration and the By-Laws are not binding upon the Owners Association, or upon the unit owners, for the following reasons. First, it is clear that *R.C. 5311.20*, empowering the Owners Association to sue pertaining to the common areas, is not subject to the provisions of the Declaration of Condominium Ownership and the By-Laws executed and filed pursuant to R.C. Chapter 5311. Nowhere in *R.C. 5311.20* is any reference made to declarations or bylaws. When the legislature intended that a statute in R.C. Chapter 5311 should be subject to the provisions of the declaration or bylaws, it expressly stated that legislative intent. Accordingly, the release of liability of defendants by the provisions of the Declaration is in conflict with *R.C. 5311.20*, and is, therefore, invalid.

Authority overruled:

Hyland **overruled** by *Vlahos v. R&I Constr. of Bloomington, Inc., 676 N.W.2d 672 (Minn. 2004)* (applying two-year statute of limitations after recognizing the court's earlier error in failing to distinguish between Minnesota statutory warranties and the UCA).

Replace with:

Custom Ag Serv. of Montevideo, Inc. v. Comm'r of Revenue, 2006 Minn. Tax LEXIS 24 (Minn. T.C. 2006) (when a statute contains both general and specific provisions, the specific provisions are controlling) (supports accepting a longer statute of limitation if provided for a specific cause within a general provision).

Add:

But see Peterson v. Cornerstone Prop. Dev., LLC, 720 N.W.2d 716 (Wis. App. 2006) (Items not covered in the express limited warranty were subject to the "as is" clause in the contract thus precluding the buyer from recovering damages).

Change:

Citation should be: *Stony Ridge Hill Condominium Owners Ass' n v. Auerbach, 18 Ohio Op. 3d 26, 410 N.E.2d 782 (Ohio App. 1979)* .

Add:

To effectively disclaim implied warranties, the written disclaimer must be conspicuous. *See e.g., Recursion Software, Inc. v. Interactive Intelligence, Inc. 425 F. Supp. 2d 756 (N.D.Tex. 2006)* (concluding that a disclaimer that was relatively short, not buried, and typed in all capital letters was noticeable to a reasonable person and thus enforceable). *See also Waytec Elecs. Corp. v. Rohm & Haas Elec. Materials, LLC, 459 F. Supp. 2d 480 (W.D. Va. 2006), 459 F. Supp. 2d 480* ; *R.O.W. Window Co. v. Allmetal, Inc. 856 N.E.2d 55 (Ill. Dist. 2006) . See also Standard Fire Ins. Co. v. Spectrum Cmty. Ass'n, 141 Cal. App. 4th 1117 (4th Dist. 2006)* (Association allowed to sue developer for construction defects on behalf of owners even though association did not exist when defects occurred because the association was the first party able to maintain a legal claim against the developer and holds a cause of action); *Caprer v. Nussbaum, 825 N.Y.S.2d 55 (2006)* (Individual unit owners lacked standing to bring a damages claim to the common interest. Condominium Act gives the association board exclusive right to sue for injury to common areas on behalf of unit owners); Restatement (Third) of Property: Servitudes § 6.11 (2000) ("[T]he association has the power to institute, defend, or intervene in litigation or administrative proceedings in its own name, on behalf of itself, or on behalf of member property owners in a common-interest community on matters affecting the community.").

Change:

Id. at 45-46 . to Id. at 786-87 .

Add:

Westfield Ins. Co. v. Birkey's Farm Store, Inc., 2010 Ill. App. Lexis 216, 34-40 (Ill. App. 2010) ;

Delete:

459 F. Supp. 2d 480

§ 36.09(h) Common Area Expenses. [Go To Main]

Add:

Mikulecky v. Bart, 825 N.E.2d 266 (Ill. App. Ct., 2004) (Illinois law requires that condominium seller disclose information regarding anticipated capital expenditures; window replacement that would cost each owner more than $10,000 should have been disclosed to a buyer).

See N.C. Gen. Stat. Ann. § 47C-4-103; *Vt. Stat. Ann. tit. 27A § 4-103*; *Ala. Code § 35-8A-403* (seeking to eliminate "the common deceptive sales practice known as 'lowballing' " by requiring disclosure. Lowballing defined as "a practice by which a declarant intentionally underestimates the budget for the association by providing many of the services himself during the initial sales period ... intending these services [to] become expenses of the association, thereby substantially increasing the periodic common expense assessments which association members must ultimately bear.").

§ 36.09(j) Encumbrances and Liens [Go To Main]

Add footnote:

See e.g., Conn. Gen. Stat. Ann. § 47-71b ("[O]ffering statement shall include ... the significant terms of any encumbrances, easements, liens and matters of title affecting the condominiums."). *See also Ariz. Rev. Stat. § 32-2181* (requiring a "true statement of the condition of the title to the land," which includes disclosure of encumbrances, liens, and easements).

§ 36.09(l) Pending Litigation [Go To Main]

Add footnote:

See e.g., Swinson v. Lords Landing Vill. Condo., 758 A.2d 1008 (Md. 2000) (a contract for the resale of a condominium is unenforceable is the seller fails to inform the buyer about pending litigation); Md. Code Ann. [Real Prop.] § 11-135(a)(4)(vii) ("[A] contract for the resale of a unit ... is not enforceable unless the contract of sale contains ... [a] statement of any judgments against the condominium and the existence of any pending suits to which the council of unit owners is a party."). *But see Ariz. Rev. Stat. § 33-1258* ("Books and records kept by or on behalf of the association and the board may be withheld from disclosure to the extent that the portion withheld relates to ... [p]ending litigation.").

FOOTNOTES:
(n22)Footnote 73.1. **Va. Code Ann. § 20-107.39(1) to -20.**

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Supp. To CHAPTER 36 CONDOMINIUMS AND COOPERATIVES

4-36 Thompson on Real Property, Thomas Editions Supp. to § 36.10

Supp. to § 36.10 Legal Rules Governing Association Management and Control.

[Go To Main]

§ 36.10(a) Constitutions and Bylaws. [Go To Main]

Add:

Reed v. Sunset Cove Condo. Owners Ass' n, 199 S.W.3d 875, 880 (Mo. App. 2006) ("[B]y-laws constitute the rules and regulations that govern the internal administration of the condominium."); *Circle Villas Condo. Ass'n v. Circle Prop. Owners' Ass'n, 957 So. 2d 1207 (Fla. 4th DCA 2007)* (declaring covenants by master condominium homeowners' association that restricted membership did not bar one of the many individual associations within the development from bringing an action in proper standing against the master association).

Shea v. Meadows of Branford, 2004 Conn. Super. LEXIS 1099 (Conn. Super. Ct., 2004) (even though the association denied permission for owner to install a hot tub in his privacy yard, his installing the hot tub was permissible because the bylaws of the association required notice of denial of any request and the owner was never given notice of the denial); *Riverside Park Condos. Unit Owners Ass'n v. Lucas, 2005 ND 26* (N.D., 2005) (bylaw restriction on pets was reasonable); *Woodbridge Condos. Owners' Ass'n v. Jennings, 2004 Ohio 5317* (Ohio Ct. App., 2004) (bylaw regulation unreasonably prevented owner from installing a satellite dish); *Horwitz v. 1025 Fifth Ave., Inc., 7 A.D.3d 461* (N.Y. App. Div., 2004) (cooperative's prohibition of awnings was effective against owners).

Add:

Whalen v. Down E. Cmty. Hosp., 980 A.2d 1252, 1254-55 (Me. 2009) (stating reasonable bylaws create a binding contract between members and homeowners' association).

Add:

Armstrong v. Ledges Homeowners Ass'n, 633 S.E.2d 78 (N.C. 2006) (limiting powers of the association to those granted to it in the original declaration, notwithstanding an amendment to the declaration, which must be "reasonable in light of the contracting parties' original intent.").

Subsequent History:

Shorewood, 966 P.2d 372 was **reversed** by *Shorewood West Condo. Ass'n v. Sadri, 992 P.2d 1008 (Wash. 2000)* .

§ 36.10(c) Board of Managers [Go To Main]

Add:

See e.g., Ala. Code§ 35-8A-303; *N.C. Gen. Stat. Ann. § 47C-3-103* (preferring a gradual transfer to a one-time turnover in order to involve owners earlier in the management of the association).

Add:

Comm. for a Better Twin Rivers v. Twin Rivers Homeowners' Ass'n, 890 A.2d 947 (N.J. App. 2006) (a community takes on a "quasi-municipal" status when it performs public functions or impacts public interests directly and such a status makes classical public sector limitations applicable to the association).

Add:

Kaung v. Bd. of Managers of Biltmore Towers Condo. Ass'n, 895 N.Y.S.2d 505, 507 (N.Y. App. Div. 2010) ("The business judgment rule limits judicial review of decisions made by a condominium's board of managers to whether the board's action was authorized and whether it was taken in good faith and in furtherance of the legitimate interests of the condominium." (quoting *Schoninger v. Yardarm Beach Homeowners' Ass'n, 523 N.Y.S.2d 523, 529 (N.Y. App. Div. 2009))* .

Add:

Heiman v. Workers' Comp. Appeals Bd. of State, *57 Cal. Rptr. 3d 56* (Cal.App. 2 Dist. 2007) (A homeowners association is a discrete legal entity, separate from the owners, even if it is not incorporated); *Comm. for a Better Twin Rivers v. Twin Rivers Homeowners' Ass'n, 890 A.2d 947 (N.J. App. 2006)* (The requirements of reasonableness, good faith, and fair dealing are among the inherent limitations on the business judgment rule).

§ 36.10(e) Use and Control of the Premises. Conn. Gen. Stat. § 46(B)

Add:

Riverside Park Condos. Unit Owners Ass'n v. Lucas, 2005 ND 26 (N.D., 2005) (owner's contention that he was merely being "visited" by a dog and that he was not keeping the dog did not overcome the pet restriction of the association); *Weldy v. Northbrook Condo. Ass'n, 2004 Conn. Super. LEXIS 1205* (Conn. Super. Ct., 2004) (condo association's clarification of a rule that animals be kept on leashes of no more than 20 feet was within the association's authority).

Authority overruled:

Bernardo Villas Management Corp. **overruled** by *Nahrstedt v. Lakeside Vill. Condo. Ass'n, 878 P.2d 1275 (Cal. 1994)* .

Authority overruled:

Alpert **overruled** by *Sea Watch Stores Ltd. Liab. Co. v. Council of Unit Owners of Sea Watch Condo., 691 A.2d 750 (Md. App. 1997)* .

Subsequent History:

United States on Behalf of Woodruff **vacated** by *United States v. Fairways Villas Condo. Ass'n, 920 F. Supp. 115 (D. Ohio 1996)* .

Add:

Edge Mgmt. Consulting, Inc. v. Blank, 25 A.D.3d 364 (N.Y. App. Div. 2006) (contractual and statutory duties to maintain condominium is enforceable against the unit's owner). *But see Villas W. II of Willowridge v. McGlothin, 841 N.E.2d 584 (Ind. App. 2006)* (declaring a restrictive covenant prohibiting leasing a violation of the Fair Housing Act); *Bogomolov v. Condo. Ass'n, 127 P.3d 762 (Wash. App. 2006)* (amending the condominium declaration to convert common areas into limited common areas would require a unanimous vote from all unit owners since it would change the percentage of ownership for condominium owners in the common area).

Board of Managers of Bayside Plaza Condominium, 855 N.Y.S.2d 230 (2008) (unit owners had an easement permitting them to maintain HVAC equipment on the terrace); *Gennis v. Pomona Park Bd. of Managers, 828 N.Y.S.2d 472 (2007)* (the board was not required to obtain the owners' consent before undertaking a restoration project).

Change: (original citation was overruled at *89 Conn. App. 581,* but the appellate court decision was subsequently overruled)

Weldy v. Northbrook Condo. Ass'n, 2004 Conn. Super. LEXIS 1205 (Conn. Super. Ct., 2004) (condo association's clarification of a rule that animals be kept on leashes of no more than 20 feet was within the association's authority). to *Weldy v. Northbrook Condo. Ass'n, 904 A.2d 188 (Conn. 2006)* (condo association's clarification of a rule requiring that animals be kept on leashes by not allowing leashes over 20 feet in length was within the association's authority and was not an amendment to the association's declaration).

Add: (following first full P)

Nikolai v. Deer Run Owners' Ass'n, 2009 Ohio App. LEXIS 5525 (Ohio. App. 2009) (association did not have authority to pass an amendment that converted condominium roofs from common areas to limited common areas without a unanimous vote of owners).

Add to P 2 of 117, page 270-71:

Queen's Grant II Horizontal Prop. Regime v. Greenwood Dev. Corp., 628 S.E.2d 902 (S.C. App. 2006) (allowing an amendment, by the developer's assignor, to the original covenants to increase assessments "because the master deed reserved all rights under the declaration of covenants."); *City of Bowie v. MIE Props., Inc., 2007 Md. LEXIS 260 (Md. 2007)* (because covenants are independent controls on property, they can be more restrictive than zoning classifications imposed by a zoning authority); *Garfink v. Cloisters at Charles, Inc., 897 A.2d 206 (Md. 2006)* (the traditional law governing easements applies to an easement granted in a condominium declaration); *Multari v. Gress, 2007 Ariz. App. LEXIS 63 (Ariz. Ct. App. 2007)* (preventing a developer from using private deed restrictions to change the covenants and restrictions applicable to all owners in the community since such action had the same impact as an amendment, which required a two-thirds vote of the owners).

Change:

Midlake on Big Boulder Lake, 637 A.2d 340 **should be *673 A.2d 340* .**

Add:

Queen's Grant II Horizontal Prop. Regime v. Greenwood Dev. Corp., 628 S.E.2d 902 (S.C. App. 2006) (Condominium ownership is subject to deed restrictions and covenants like any other real property, whether a horizontal or a vertical regime); *In re IDC Clambakes, Inc., 360 B.R. 24 (Bankr. D.R.I. 2007)* (common elements of a condominium may not be unilaterally conveyed by a unit owner); *Hill v. Ghamaty, 143 Cal. App. 4th 1156 (4th Dist. 2006)* (upholding reasonable declaration of covenants, conditions, and restrictions that prevented any use of unit other than as a single-family dwelling). *But see Villas W. II of Willowridge v. McGlothin, 841 N.E.2d 584 (Ind. App. 2006)* (restrictive covenants cannot violate the Fair Housing Act); *Comm. for a Better Twin Rivers v. Twin Rivers Homeowners' Ass'n, 890 A.2d 947 (N.J. App. 2006)* (The requirements of reasonableness, good faith, and fair dealing are among the inherent limitations on

the business judgment rule); *Finderne Heights Condo. v. Rabinowitz, 915 A.2d 16 (N.J. App. 2007)* (providing that condominium associations, as a readily available alternative to litigation, must provide "fair and efficient procedure[s]" for resolving disputes between the association and owners, as well as between owners). *But see Walters v. Blankenship, 931 So. 2d 137 (Fla. App. 2006)* (enforcing an owner's violation of a restrictive covenant against posting signs did not violate the owner's *First Amendment* right of free speech).

Add:

Auburn Woods I Homeowners Assn. v. Fair Employment & Housing Com., 121 Cal. App. 4th 1578 (Cal. Ct. App., 2004) (condo association's refusal to allow residents permission to keep a dog that helped them with their depression was unreasonable); *Unit Owners Ass'n v. Lucas, 2005 ND 26* (N.D., 2005) (bylaw restriction on pets was reasonable); *Woodbridge Condos. Owners' Ass'n v. Jennings, 2004 Ohio 5317* (Ohio Ct. App., 2004) (bylaw regulation unreasonably prevented owner from installing a satellite dish); *Villa De Las Palmas Homeowners Assn. v. Terifaj, 33 Cal. 4th 73* (Cal., 2004) (upholding a condo association's restriction on pets); *Yankovski v. Keller, 18 Mass. L. Rep. 431* (Mass. Super. Ct., 2004) (holding that association's denial of permission to alter the inside of a condo unit was unreasonable).

Change:

Daniel R. Puterbaugh, "The Reasonable Pet: An Examination of the Enforcement of Restrictions in California common Interest Developments After Nahrstedt v. Lakeside Village Condominium Ass'n, Inc.," Santa Clara L. Rev. 793 (1996) to Daniel R. Puterbaugh, "The Reasonable Pet: An Examination of the Enforcement of Restrictions in California Common Interest Developments After Nahrstedt v. Lakeside Village Condominium Ass'n, Inc., *36 Santa Clara L. Rev. 793 (1996)*

Change:

In re IDC Clambakes, Inc., 360 B.R. 24 (Bankr. D.R.I. 2007) (common elements of a condominium may not be unilaterally conveyed by a unit owner); to *In re IDC Clambakes, Inc., 360 B.R. 24 (Bankr. D.R.I. 2007)* (common elements of a condominium may not be unilaterally conveyed by a unit owner), rev'd on other grounds, *Goat Island S. Condo. Ass'n v. IDC Clambakes, Inc., 382 B.R. 178 (D.R.I. 2008)* .

Add:

Clear Lake Riviera Cmty. Ass'n v. Cramer, *105 Cal. Rptr. 3d 815 (Cal. App. 2010)* (holding that circumstantial evidence is proper--direct evidence is not required--to prove that an association's "use restrictions were properly adopted in an action to enforce the restrictions").

Add:

Clear Lake Riviera Cmty. Ass'n v. Cramer, *105 Cal. Rptr. 3d 815 (Cal. App. 2010)* ("Use restrictions contained in a

recorded declaration are afforded a 'presumption of validity' and are enforced unless found unreasonable under a deferential standard. While use restrictions outside the declaration are not afforded the same presumption of validity, they are nonetheless enforced unless they fail a 'straight reasonableness test.'" (citations omitted)).

Change:

Bernardo Villas Management Corp. is missing citation *(190 Cal.App.3d 153* (4 Dist. 1987)). But *Bernard* **overruled** by *Nahrstedt v. Lakeside Vill. Condo. Ass'n, 878 P.2d 1275 (Cal. 1994)* .

§ 36.10(f) Common Expenses and Profits. [Go To Main]

Add:

Fox River Condo. Ass'n v. Townhomes of River Place, 719 N.W.2d 800 *(Wis. App. 2006)* (distinguishing land from unit and concluding that the developer was not subject to association assessments until the units were actually constructed); *Blumberg v. Albicocco, 820 N.Y.S.2d 711 (N.Y. 2006)* (before reviewing a board's decision, a court must first determine if the board has the power it seeks to exercise; and a board's power must either be statutorily granted or derived from the condominium declaration or by-laws); *In re Northwood Props., LLC, 356 B.R. 81 (D. Mass. 2006)* (restricting phasing rights without unit owners' express consent to add more units since adding units materially affected their percentage interest in common areas and facilities).

Change:

Aluminum Industries Corp. v. Camelot Trails Condominiums Corp., 535 N.W.2d 74 (Wis. App. 1995) , to *Aluminum Industries Corp. v. Camelot Trails Condominiums Corp., 535 N.W.2d 74 (Wis. App. 1995)* , review granted *537 N.W.2d 570 (Wis. 1995)* ,

Add:

Saddle Ridge Corp. v. Bd. of Review for Town of Pacific, 774 N.W.2d 475 (Wis. App. 2009) , ("[V]acant land reserved for development within a partially developed condominium project is a common element of the condominium, ownership of which is determined under the condominium declaration."), review granted *779 N.W.2d 176 (Wis. 2010)* .

Add:

Harbours Condo. Ass'n, Inc. v. Hudson, 852 N.E.2d 985 (Ind. App. 2006) (entitling condominium association to foreclose on condominium liens for unpaid past-due assessments); *Trustees of Cider Hill Condo. Trust v. DeOliveira, 2007 Mass. App. Div. 1 (Mass. App. Div. 2007)* (allowing recovery of late fees for unpaid assessments).

Surrey Condo. Ass'n v. Webb, 2005 Mo. App. LEXIS 699 (Mo. Ct. App., 2005) (association's lien against the owner was void because the condominium declaration did not allow the association to levy maintenance fees).

Barry v. Board of Managers of Elmwood Park Condominium II, 853 N.Y.S.2d 827 (2007) (action by unit owner against condominium board of managers for violation of Fair Debt Collections Practices Act).

after 13 Ann. Rev. Banking L. 477 (1944) Add:

See also *Wellington Condo. Trust v. Pino, 2010 U.S. Dist. LEXIS 15541* u17 (D. Mass 2010) (under Massachusetts law, a condominium association's lien for up to six months of delinquent fees for common charges will take priority over a first mortgage if the association sends the proper documentation to the mortgage company).

Add:

Oronoque Shores Condo. Ass'n No. 1 v. Smulley, 968 A.2d 996, 999-1000 (Conn. App. 2009) (allowing execution of a lien where all legal formalities had been met).

Add:

While a defaulting seller may be compelled to specifically perform, a defaulting buyer will not be compelled to specifically perform, but may forfeit their down payment, assuming requisite notice is given to the defaulting buyer. Without adequate notice, however, the buyer is entitled to their down payment plus any appropriate interest. *Rivera v. Konkol, 15 Misc. 3d 1122A, 841 N.Y.S.2d 221*(A) , Slip Copy (N.Y. Sup. Ct. 2007) (for buyer to forfeit his deposit upon default, three requirements must be met: (1) clear notice that time is of the essence, (2) notice must specify a reasonable time to perform, and (3) notice must inform party that he will default if he does not perform by that date); *Lepi Enters. v. Nat'l Envtl. Serv. Corp., 440 F.3d 937, 940 (8th Cir. 2006)* (recognizing that if one of the parties to a contract fails to perform their duty, the other party may be excused from performing their duty under the contract).

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Supp. To CHAPTER 36 CONDOMINIUMS AND COOPERATIVES

4-36 Thompson on Real Property, Thomas Editions Supp. to § 36.11

Supp. to § 36.11 Common Conflicts Encountered by Condominium and Cooperative Owners

[Go To Main]

§ 36.11(a) Loss of Deposit/Downpayment. [Go To Main]

after first parenthetical ending in "purchaser's Acts" Add:

aff'd, *676 A.2d 369 (Conn. 1996)*

Delete (was reversed at *48 A.D.3d 347* (N.Y. App. Div.):

Rivera v. Konkol, 841 N.Y.S.2d 221 (N.Y. Sup. Ct. 2007) (for buyer to forfeit the deposit upon default three requirements must be met: (1) clear notice that time is of the essence, (2) notice must specify a reasonable time to perform, and (3) notice must inform party that he will default if he does not perform by that date);

Add:

Ament v. One Las Olas, Ltd., 2005 Fla. App. LEXIS 3044 (Fla. Dist. Ct. App., 2005) (holding that a contract breaching seller is required to return all deposit monies paid by the buyer); *Shinney v. Cambridge Homes, Inc., 2005 Mich. App. LEXIS 463* (Mich. Ct. App., 2005) (holding that sellers were entitled to a refund of their deposit).

Add:

See, e.g., Helmer v. Comito, 877 N.Y.S.2d 370 (2009) (action by unit owners challenging authority of condominium managers to enter into contract for construction work).

§ 36.11(c) Physical Defects. 750 ILCS 5/530

Add:

Torosian v. Bigsbee Village Homeowners Ass'n, 848 N.Y.S.2d 452 (2007) (action against owner and manager of condominium complex and provider of snowplowing services for slip and fall injuries); *Abbattista v. King's Grant Master Ass'n, 833 N.Y.S.2d 592 (2007)* (action against condominium owner and manager and snow removal contractor for slip and fall injuries).

§ 36.11(d) Conflicts of Interest Ind. Code. Ann. § 31-1-11.5-11

Add:

Restatement (Third) of Property: Servitudes § 6.20 (2000) (the developer must "disclose the amount by which the developer is providing or subsidizing services that the association is or will be obligated to provide; ... disclose all material facts and circumstances affecting the condition of the property that the association is responsible for maintaining; and ... disclose all material facts and circumstances affecting the financial condition of the association, including the interest of the developer and the developer's affiliates in any contract, lease, or other agreement entered into by the association").

Trs. of Hunters Vill. Condo. Trust v. Gerke, 2007 Mass. App. Div. 23 (Mass. App. Div. 2007) (action against unit who converted common funds to private use while acting as condominium property manager).

§ 36.11(e) Financing [Go To Main]

Add:

Restatement (Third) of Property: Servitudes § 6.20 (2000) (the developer must "disclose the amount by which the developer is providing or subsidizing services that the association is or will be obligated to provide; ... disclose all material facts and circumstances affecting the condition of the property that the association is responsible for maintaining; and ... disclose all material facts and circumstances affecting the financial condition of the association, including the interest of the developer and the developer's affiliates in any contract, lease, or other agreement entered into by the association).

§ 36.11(f) Selection of Occupants and Subleasing [Go To Main]

Add:

See e.g., *Hill v. Ghamaty, 143 Cal. App. 4th 1156 (4th Dist. 2006)* (upholding reasonable declaration of covenants, conditions, and restrictions that prevented an owner from renting out rooms in owner's unit). *But see Villas W. II of Willowridge v. McGlothin, 841 N.E.2d 584 (Ind. App. 2006)* (declaring a restrictive covenant prohibiting leasing a violation of the Fair Housing Act because the covenant's effect resulted in discrimination against a black unit owner).

E.g., *Herlson v. Rts Residential Block 5, 2010 Md. App. LEXIS 60 (Md. App. 2010)* (as originally declared, potential owners of condominiums had to commit to "purchasing the Unit as [their] primary, year round residence and covenant[] and agree[] not to lease the Unit until after the [potential owners have] occupied the Unit as [their] principle year round residence for twelve (12) consecutive months."); *Apple Valley Gardens Ass'n v. MacHutta, 763 N.W.2d 126 (Wis. 2009)* (upholding an amendment to the association bylaws that created a flat ban on renting when no limitation had existed prior to the amendment).

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Supp. To CHAPTER 36 CONDOMINIUMS AND COOPERATIVES

4-36 Thompson on Real Property, Thomas Editions Supp. to § 36.12

Supp. to § 36.12 Problems Associated with Condominium Conversion.

[Go To Main]

§ 36.12(a) History. Me. Rev. Stat. Ann. Tit. 19, § 722-A(1)

at end of note, after "apartment building)" Add:

aff'd, *1996 U.S. App. LEXIS 31004 (4th Cir. 1996)*

§ 36.12(b) Legal Issues. Md. Cts. & Jud. Proc. Code Ann. § 3-6A-05(B)

Add:

Matter of 160 Bleecker St. Owners, Inc. v. Division of Hous. & Cmty. Renewal, 812 N.Y.S.2d 495 (2006) (When buildings are converted pursuant to a non-eviction plan, units occupied by renters at the time of the conversion remain subject to rent regulation).

Bohbot v. Santa Monica Rent Control Board, *34 Cal. Rptr. 3d 827 (2005)* (action to evict a tenant from a legal converted condominium unit).

Add:

Fore L. Realty v. McManus, 2006 Mass. App. Div. 130 (Mass. App. Div. 2006) (entitling tenants whose apartments are

being converted into condominiums to adequate notice of the conversion).

Steier v. Schreiber, 810 N.Y.S.2d 431 (2006) (tenant with status of "tenant in occupancy" was entitled to purchase her unit according to the condominium conversion plan).

Change:

WHCS Real Estate Ltc. P'ship v. 33 Greenwich Owners Corp., 642 N.Y.S.2d 483 (1996) . to *WHCS Real Estate Ltc. P'ship v. 33 Greenwich Owners Corp., 642 N.Y.S.2d 483 (N.Y. Sup. Ct. 1996)* , aff'd, *663 N.Y.S.2d 171 (N.Y. App. Div. 1997)* .

Change:

Williams v. 5300 Columbia Pike Corp., 901 F. Supp. 208 (E.D. Va. 1995) . to Williams v. 5300 Columbia Pike Corp., 901 F. Supp. 208 (E.D. Va. 1995) , aff'd, *1996 U.S. App. LEXIS 31004 (4th Cir. 1996)* .

Change:

Williams v. 5300 Columbia Pike Corp., 891 F. Supp. 1169 (E.D. Va. 1995) . to Williams v. 5300 Columbia Pike Corp., 891 F. Supp. 1169 (E.D. Va. 1995) , sum. jdmt. granted, *901 F. Supp. 208 (E.D. Va. 1995)* , aff'd, *1996 U.S. App. LEXIS 31004 (4th Cir. 1996)* .

Fore L. Realty v. McManus, 2006 Mass. App. Div. 130 (Mass. App. Div. 2006) (entitling tenants whose apartments are being converted into condominiums to adequate notice of the conversion).

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Supp. To CHAPTER 36 CONDOMINIUMS AND COOPERATIVES

4-36 Thompson on Real Property, Thomas Editions Supp. to § 36.13

Supp. to § 36.13 Remedies for Misconduct by Developer, Association or Owner

[Go To Main]

§ 36.13(a) Remedies Against the Developer [Go To Main]

Change: (the case cited was vacated and remanded, *520 U.S. 893 (1997)*

The unit owners of Lords Landing Village Condominium ("unit owners"), having obtained a $1.1 million judgment against the condominium developer, filed this action against the developer's insurance company, to compel them to pay the judgment. The court concluded that the policy issued by Continental did not cover the loss because it did not rise from an "occurrence" within the meaning of the policy. Lords Landing Village condominium *Council of Unit Owners v. The Continental Ins. Co., 92 F.3d 1179 (4th Cir. 1996)* .

to

The unit owners of Lords Landing Village Condominium (unit owners"), having obtained a $1.1 million judgment against the condominium developer, filed this action against the developer's insurance company--claiming the shoddy workmanship constituted an "accident"--to compel them to pay the judgment. The court concluded that the policy issued by Continental did not cover the loss because it did not rise from an "accident" within the meaning of the policy. Lords Landing Village condominium *Council of Unit Owners v. The Continental Ins. Co., 1999 U.S. App. LEXIS 21938, 7 (4th Cir. 1999)* .

Replace with: after last parenthetical ending in "general provision." Add:

aff'd, *728 N.W.2d 910 (Minn. 2007)* .

Authority overruled:

Hyland **overruled** by *Vlahos v. R&I Constr. of Bloomington, Inc., 676 N.W.2d 672 (Minn. 2004)* (applying two-year statute of limitations after recognizing the court's earlier error in failing to distinguish between Minnesota statutory warranties and the UCA).

Replace with:

Custom Ag Serv. of Montevideo, Inc. v. Comm'r of Revenue, 2006 Minn. Tax LEXIS 24 (Minn. T.C. 2006) (when a statute contains both general and specific provisions, the specific provisions are controlling) (supports accepting a longer statute of limitation if provided for a specific cause within a general provision).

Add:

Archdiocese of San Salvador v. FM Int'l, LLC, 2006 DNH 102 (D.N.H. 2006) (acknowledging that a corporate officer could be liable as a "direct participant" with the corporation in a claim of deceptive and unfair practices).

Change:

Fla. Stat. *§ 20a-718.202(7) to Fla. Stat.* § 718.202(7)

§ 36.13(b) Remedies Against the Association. [Go To Main]

Add:

Kaung v. Board of Managers of Biltmore Towers Condominium Ass'n, 873 N.Y.S.2d 421 (2008) (action by unit owners against managers of condominium association to enjoin placement of wireless communication antennae on the roof).

In re Bayshore Yacht & Tennis Club Condominium Ass'n., Inc., 336 B.R. 866 (Bankr. S.D. Fla. 2006) (declaration of condominium creates and governs the condominium and the relationships between unit owners and between unit owners and the association); *Heiman v. Workers' Comp. Appeals Bd., 149 Cal. App. 4th 724 (2d Dist. 2007)* (An association need not be incorporated to exercise rights given to associations); *In re Three A's Holdings, L.L.C., 47 Bankr. Ct. Dec. 281 (Bankr. D. Del. 2007)* (California law gives associations "discretionary decision-making authority" to enforce use restrictions); *Standard Fire Ins. Co. v. Spectrum Cmty. Ass'n, 141 Cal. App. 4th 1117 (4th Dist. 2006)* (Association allowed to sue developer for construction defects on behalf of owners even though association did not exist when defects occurred because the association was the first party able to maintain a legal claim against the developer and holds a cause of action); *Caprer v. Nussbaum, 825 N.Y.S.2d 55 (2006)* (Individual unit owners lacked standing to bring a damages claim to the common interest. Condominium Act gives the association board exclusive right to sue for injury to common areas on behalf of unit owners); *Weldy v. Northbrook Condo. Ass'n, Inc., 904 A.2d*

188 (Conn. 2006) (When assessing the validity of a board of directors' action, a court first determines whether the board acted within the scope of its authority and, second, whether the action was reached by reasoned or arbitrary means); Restatement (Third) of Property: Servitudes § 6.11 (2000) ("[T]he association has the power to institute, defend, or intervene in litigation or administrative proceedings in its own name, on behalf of itself, or on behalf of member property owners in a common-interest community on matters affecting the community.").

Add: after parenthetical ending in "the roof." Add:

aff'd, *895 N.Y.S.2d 505 (N.Y. App. Div. 2010)* .

Add:

Plank v. Stone, 2005 Conn. Super. LEXIS 64 (Conn. Super. Ct., 2005) (holding that association was not liable to party who was injured in the storage area of the carport, because the storage area was under control of the individual owner and was not a common area); *Poulet v. H.F.O., L.L.C., 353 Ill. App. 3d 82* (Ill. App. Ct., 2004) (condo associations have the exclusive right to sue on any matter that affects more than one unit in the association; therefore, individual owners' complaints were dismissed); *Denton v. Hahn, 2004 Tenn. App. LEXIS 605* (Tenn. Ct. App., 2004) (summary judgment granted to tenant because the metal threshold which caused injury to the plaintiff was part of the condominium's common area and the association was responsible for it); *Gorgoni v. Sideris Plumbing & Heating Corp., 2005 N.Y. App. Div. LEXIS 4752* (N.Y. App. Div., 2005) (association was not the proper defendant when plaintiff's unit sustained damage from a neighbor's water leak, because the association was not responsible to repair the pipes).

Change:

Schroeder v. De Bertolo, 879 F. Supp. 173 should be ***879*** *F. Supp. 173 (D.P.R. 1995)* .

Add:

But see Petrosky v. Embry Crossing Condo. Ass'n, 2007 Ga. App. LEXIS 318 (Ga. Ct. App. 2007) (resident barred from recovery against association because he had equal constructive knowledge of a hazardous condition that caused him injury, which knowledge absolved the association of any liability); *Norman v. Jones Lang LaSalle Ams., Inc., 627 S.E.2d 382 (Ga. App. 2006)* (barring recovery against property managers because injured plaintiff had equal or greater constructive knowledge of the hazard which caused the injury); *Caracci v. Cobblestone Vill. Condo. Ass'n, 927 So. 2d 542, 546 (La. App. 2006)* (condominium association officer was held to be immune from an action against them and the association by an individual unit owner and a tenant); *La. Rev. Stat. § 9:2792.7* (An association officer who is not compensated for his or her services is not individually liable for acts or omissions that result in damage or injury when such damage or injury arise out of his or her good faith and authorized management of the association, except that his or her misconduct is willful or wanton); *Chee v. Amanda Goldt Prop. Mgmt., 143 Cal.App.4th 1360 (1st Dist. 2006)* (Condominium CC&Rs do not impose vicarious liability on a unit owner for negligence of a tenant since CC&Rs do not have the legal authority to expand tort law); *Ala. Code§ 35-8A-311* (Neither the association or nor any individual unit owner is liable for another individual unit owner's torts that relate to a portion of the condominium that the tort feaser is responsible to maintain); *Bowman v. State, 206 S.W.3d 467 (Tenn. App. 2006)* (Since weather forecasts alone do not

constitute notice, property owners cannot be held liable for failing to remove natural accumulations of snow or ice of which they had no notice); Hous. Opportunities Project for Excellence, Inc. v. Key Colony No. 4 Condo. Assoc., 2007 U.S. Dist. LEXIS 1911, 13-14 (D. Fla. 2007) (to waive rights under the Fair Housing Act, the waiver must be knowing and intentional. Merely being aware of a restriction at time of purchase is not a knowing and intentional waiver of the rights protected under the Fair Housing Act); *Finderne Heights Condo. v. Rabinowitz, 915 A.2d 16 (N.J. App. 2007)* (providing that condominium associations, as a readily available alternative to litigation, must provide "fair and efficient procedure[s]" for resolving disputes between the association and owners, as well as between owners); *Villas W. II of Willowridge v. McGlothin, 841 N.E.2d 584 (Ind. App. 2006)* (a fact-sensitive analysis is needed to review association restrictions); *Weldy v. Northbrook Condo. Ass'n, Inc., 904 A.2d 188 (Conn. 2006)* (When assessing the validity of a board of directors' action, a court first determines whether the board acted within the scope of its authority and, second, whether the action was reached by reasoned or arbitrary means).

Change:

Xenopoulos v. Board of Managers of 150 East 56th Street Condominium, 633 N.Y.S.2d (1995). to *Xenopoulos v. Bd of Managers of 150 E. 56th St. Condo., 633 N.Y.S.2d 790 (1995)* .

Standard Fire Ins. Co. v. Spectrum Cmty. Ass'n, 141 Cal. App. 4th 1117 (4th Dist. 2006) (Association allowed to sue developer for construction defects on behalf of owners even though association did not exist when defects occurred because the association was the first party able to maintain a legal claim against the developer and holds a cause of action); *Weldy v. Northbrook Condo. Ass'n, Inc., 904 A.2d 188 (Conn. 2006)* (When assessing the validity of a board of directors' action, a court first determines whether the board acted within the scope of its authority and, second, whether the action was reached by reasoned or arbitrary means); Restatement (Third) of Property: Servitudes § 6.11 (2000) ("[T]he association has the power to institute, defend, or intervene in litigation or administrative proceedings in its own name, on behalf of itself, or on behalf of member property owners in a common-interest community on matters affecting the community."). *But see Caprer v. Nussbaum, 825 N.Y.S.2d 55 (2006)* (Individual unit owners lacked standing to bring a damages claim to the common interest. Condominium Act gives the association board exclusive right to sue for injury to common areas on behalf of unit owners).

Add:

Sea Pines Condo. III Ass'n v. Steffens, 61 Mass. App. Ct. 838 (Mass. App. Ct., 2004) (condominium association was the proper party to bring suit, but because the defendant allowed the individual owners to intervene, they became the proper party to the suit); *Trs. of Denholm Condo. Trust v. Doyle, 18 Mass. L. Rep. 25* (Mass. Super. Ct., 2004) (holding that an owner was individually responsible for condo fees, even though he owned the unit by trust); *Surrey Condo. Ass'n v. Webb, 2005 Mo. App. LEXIS 699* (Mo. Ct. App., 2005) (association could not levy maintenance fee because it could only levy assessments as provided by the condominium declaration); *Murphy v. State, 14 A.D.3d 127* (N.Y. App. Div., 2004) (individual owner was not the proper plaintiff because the association was the owner for purposes of eminent domain).

after "Unless the declaration or the bylaws provide otherwise," Add new footnote 158.1 n158.1

(after *Villas W.II of Willowridge v. McGlothin, 841 N.E.2d 584 (Ind. App. 2006)* (a fact-sensitive analysis is needed to review association restrictions): Add Subsequent History

(885 N.E.2d 1274 (Ind. 2008) (Rev'd (conducting a fact-sensitive inquiry and then reversing the trial court's determination that the FHA was violated)).

Change:

Page 288. Note 158: to Page 288, n. 158: Add

§ 36.13(c) Remedies Against Owners. [Go To Main]

Delete:

Parallel citation in Moshyedi not necessary. Retain ***752 A.2d 279*** (omit *132 Md App 184*).

Delete: (case was reversed, *929 A.2d 1060 (N.J. 2007))*

Comm. For a Better Twin Rivers v. Twin Rivers Homeowners' Ass'n, 890 A.2d 947 (N.J. App. 2006) (The requirements of reasonableness, good faith, and fair dealing are among the inherent limitations on the business judgment rule);

Add:

Harbours Condo. Ass'n, Inc. v. Hudson, 852 N.E.2d 985 (Ind. App. 2006) (entitling condominium association to foreclose on condominium liens for unpaid past-due assessments); *Trustees of Cider Hill Condo. Trust v. DeOliveira, 2007 Mass. App. Div. 1 (Mass. App. Div. 2007)* (allowing recovery of late fees for unpaid assessments); *Comm. for a Better Twin Rivers v. Twin Rivers Homeowners' Ass'n, 890 A.2d 947 (N.J. App. 2006)* (The requirements of reasonableness, good faith, and fair dealing are among the inherent limitations on the business judgment rule); *First Atl. Fed. Credit Union v. Perez, 918 A.2d 666 (N.J. App. 2007)* (expenses does not include counsel fees absent express specific statutory rules to the contrary).

Add:

Brandon Farms Prop. Owners Ass'n v. Brandon Farms Condo. Ass'n, 180 N.J. 361 (N.J., 2004) (holding that a

developer cannot hold condo association responsible for assessments); *Canterbury Arms Condo. Ass'n v. Lato, 2004 Conn. Super. LEXIS 1765* (Conn. Super. Ct., 2004) (holding that the association could recover the entire amount of the assessments levied, and that the defendant's offer to use another piece of real estate as collateral did not make the association whole).

after sentence "Many states give statutory priority to such liens.": Add

Wellington Condo. Trust v. Pino, 2010 U.S. Dist. LEXIS 15541, 16-17 (D. Mass 2010) (under Massachusetts law, a condominium association's lien for up to six months of delinquent fees for common charges will take priority over a first mortgage if the association sends the proper documentation to the mortgage company); NYCTL 1998- 2 *Trust v. Johnson, 881 N.Y.S.2d 365, 365 (N.Y. Sup. Ct. 2009)* ([*New York Real Property Law] § 339-z* provides that upon the sale or conveyance of a unit, unpaid common charges must be paid out of the sale proceeds by the grantee. The term sale or conveyance has been deemed to refer to a sale or voluntary transfer of the condominium unit rather than to the foreclosure of a first mortgage. (citations omitted)).

FOOTNOTES:
(n23)Footnote 158.1. *River Plaza Homeowner's Ass'n v. Healey, 904 N.E.2d 1102, 1110 (Ill. App. Ct. 2009)* (affirming dismissal of an action brought by homeowner's association where the association failed to obtain consent of two-thirds of homeowners before bringing the action as mandated by the association's by-laws).

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Supp. to § 36.15 Bibliography.

[Go To Main]

Add to Articles:

William C. Ballard, "Who Decides Whether To Build It Higher, The Condominium Community Or The Court?", *80 Fla. Bar J. 56 (2006).*

Davidson, Kristin L. *Bankruptcy Protection for Community Associations as Debtors. 20 Bank. Dev. J. 583 (Spring 2004).*

Farkas, Jeremy I. "New Secondary Mortgage Market Guidelines for Attached Condominium Units: What Vermont Real Estate Attorneys Need to Know," 34 *Vt. B.J.* 50 (Summer, 2008).

Franzese, Paula A. "Trust and Community: The Common Interest Community as Metaphor and Paradox," 72 *Missouri L. Rev.* 1111 (Fall, 2007).

Elwin Griffith, "The Challenge of Communicating with the Consumer and Validating the Debt Under the Fair Debt Collection Practices Act," *55 Kan. L. Rev. 61 (2006).*

Steven M. Henderson, "Walking the Line between Contract and Tort in Construction Disputes: Assessing the Use of Negligent Misrepresentation to Recover Economic Loss after *Presnell*," *95 Ky. L.J. 145 (2006).*

Terrell R. Lee, "In Search of the Middle-Ground: Protecting the Existing Rights of Prior Purchasers in Common Interest Communities," *111 Penn L. Rev. 759 (2007).*

Newman, Dara K. "If You Can't Build It, They Won't Come: Condominium Construction Moratoria and Gentrification," *35 B.C. Envtl. Aff. L. Rev. 593 (2008).*

Pinkerton, Trevor G., "Escaping the Death Spiral of Dues and Debt: Bankruptcy and Condominium Association Debtors," *26 Emory Bankr Dev. J. 125 (2009)* .

Richards, Kathryn B. "The Illinois Condominium Property Act: An Analysis of Legislative Efforts to Improve Tenants' Rights in the Condominium Conversion Process," *57 DePaul L. Rev. 829 (Spring 2008).*

Robert G. Schwemm, "Barriers to Accessible Housing: Enforcement Issues in 'Design and Construction' Cases Under The Fair Housing Act," *40 U. Rich. L. Rev. 753 (2006).*

Aric Short, "Post-Acquisition Harassment and the Scope of the Fair Housing Act," *58 Ala. L. Rev. 203 (2006).*

Add to Annotations

Annotation, *Award of Punitive Damages to Prevailing Plaintiffs in Actions Brought Pursuant to § 813 of Fair Housing Act, 175 A.L.R. Fed. 405 (2006)* .

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CHAPTER 37 MARITAL PROPERTY

4-37 Thompson on Real Property, Thomas Editions 37.syn

AUTHOR: Professor Douglas Haddock School of Law St. Mary's Univ. of San Antonio

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§ 37.04(b) European Influence: The Common Law Tradition.

§ 37.04(c) European Influence: The Civil Law Tradition.

§ 37.04(d) Early American Marital Property Influences.

§ 37.05 The Marital Relationship.

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§ 37.05(b) The Formalities of Ceremonial Marriage.

§ 37.05(c) Common Law Marriage.

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§ 37.07(b) The Uniform Probate Code and Marital Property at Death in Modern Common Law Jurisdictions.

§ 37.07(c) Equitable Distribution Upon Dissolution of Marriage in Modern Common Law Jurisdictions.

§ 37.07(d) The Uniform Marital Property Act.

§ 37.08 Defining Marital Property in Community Property States.

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§ 37.09(a) Contract Formalities.

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§ 37.12 Management and Control of Marital Property.

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CHAPTER 37 MARITAL PROPERTY

4-37 Thompson on Real Property, Thomas Editions § 37.01

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§ 37.01 Overview of the Law of Marital Property.

The intersection of "property" and "marriage," two major institutions of our society, is the focus of this chapter. In all American jurisdictions, marriage has a significant impact on property rights. Couples contemplating marriage today presumably give more thought to matters of marital property than did those who went before them. Even so, the impact of marriage on property is not necessarily felt as often by the parties *during* the marriage as it is by them and their family or families at the end of the marriage. Some issues are raised during the marriage in connection with transactions between the two spouses, or between the spouses and a third person. Other questions frequently arise when the marriage comes to an end, either because of a divorce or because of the death of one of the partners.

American marital property laws arise from two distinct sources, the civil law of the European continent and the English common law. These two conceptions of the effect of marriage on property are fundamentally different, but because of modern changes in the common law, the two systems are looking more and more alike.

The common law model of property is essentially characterized by individual ownership and rights earned through individual effort or skill. Marriage does not change this, and property of married persons is viewed primarily as an individual matter. The civil law, on the other hand, views the efforts and skills of a married person as part of a "community" endeavor, the community being that of husband and wife. We refer, therefore, to "community property" in the civil law, that being property that is the product of the effort or skill of a married person. Ownership of such property is shared by the community of the married couple, rather than simply being lodged in the individual whose effort more directly produced it.

The civil law thus recognizes immediate consequences for property rights as a result of marriage. Marriage was also a significant event in common law states, and certain consequences gradually developed. These consequences, however, generally take effect only upon dissolution of the marriage. Protection has evolved in the form of property rights for surviving spouses when the other spouse dies, and for the divorced or divorcing spouse who has little or no individual property. In community property jurisdictions, this kind of protection has been a part of the very fabric of marital property, since each spouse had a 50 % ownership interest in most property acquired by either spouse during the marriage.

The community property system originally took root in only eight of the states (Arizona, California, Idaho, Louisiana, Nevada, New Mexico, Texas and Washington). Elsewhere the common law notions prevailed. It is somewhat remarkable that community property became the rule in even eight American jurisdictions, since every state except Louisiana generally adopted the common law rather than the civil law. The fact that most of the American community property jurisdictions are otherwise adherents to the common law also has affected the evolution of marital property law in those states. In any event, the majority of American states have followed the path of the common law of marital property.

The basic concepts of the community property system consist of sound rules governing the disposition of marital property after death of a spouse or after divorce, and a good case can be made for the merits of community property ideals and principles. In the areas of death and divorce, the common law has been moving very steadily in a direction similar to that charted out by the civil law.

A uniform marital property law n1 has adopted a community property regime of marital property and in the 1980s one state, Wisconsin, abandoned the common law approach for a code patterned after the uniform act. The current version of the Uniform Probate Code has also adopted significant provisions patterned after the marital property law of community property states. Because these codes are recent and relatively comprehensive enactments, and generally reflect much of the learning about the past, present and future of marital property, the Uniform Marital Property Act, the Wisconsin Marital Property Act, n2 and the Uniform Probate Code are quoted rather extensively in this chapter.

FOOTNOTES:
(n1)Footnote 1. Unif. Marital Property Act, 9A U.L.A. 97.

(n2)Footnote 2. Wis. Stat. Ann. ch. 766.

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CHAPTER 37 MARITAL PROPERTY

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§ 37.02 Outline of the Chapter.

After these introductory sections, this chapter provides a brief historical sketch of the background of American marital property law. This sketch reviews the way Native Americans viewed property and family, and some comments about the civil law and common law origins of modern law. The common law of marital property is briefly explained, after which the modern law in the "common law property" states is summarized. This leads naturally into a transition that has occurred or is occurring from the individualism of the common law of marital property to the more equitable sharing principles exemplified in the community property systems of the civil law. This transition is reflected, for example, in the provisions of the Uniform Probate Code and the development of the concept of equitable distribution upon dissolution of marriage.

This transition may or may not lead to further developments in the common law property states. In any event, the discussion leads quite naturally into the Uniform Marital Property Act, in which the National Conference of Commissioners on Uniform State Laws has proposed that the states adopt a community property system of ownership to govern marital property during marriage. This brings us to a more detailed discussion of the community property systems on which that Act is based.

Discussion of the community property systems now in force in nine states (Arizona, California, Idaho, Louisiana, Nevada, New Mexico, Texas, Washington, and Wisconsin) is divided into various topics. Definitions of "community" and "separate" property are set forth and some of the fundamental presumptions of community property systems are examined. The extent to which parties are given autonomy and authorized by contract to create their own scheme of marital property rights is also explored. Some of the discussion of "community property" includes reference to common law states as well as to community property states. For example, recognition of goodwill n3 as an asset divisible upon divorce is a part of the discussion of community property classification but is also an important issue in common law states. Indeed, because of the increasing similarity of the two systems, particularly at divorce, much of the discussion of each system is also relevant to the other.

After reviewing some of the complications that can confuse marital property classification, such as purchases spanning a period of time, commingling of different types of property, and the problem of tracing property back to its original source, we consider classification of title to specific types of property. Following this, the somewhat different questions

of management and control are next taken up. This leads quite naturally into classification of marital debt and the rules of marital property liability.

Although much of the discussion up to this point is very pertinent in situations involving disposition of marital property when the marriage dissolves, by voluntary dissolution or death of one spouse, two sections of the chapter focus specifically on some of the particular issues in those events. The chapter concludes with some important conflict of laws issues.

FOOTNOTES:
(n1)Footnote 3. *See* § 37.11(c)(1), *infra*.

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CHAPTER 37 MARITAL PROPERTY

4-37 Thompson on Real Property, Thomas Editions § 37.03

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§ 37.03 Definitions.

Much of this chapter is devoted to the definitions and rules of "marital property" in community property states. A few introductory remarks about terms are in order at this point. Because of the two distinct origins of American marital property, words can be confusing. References in this chapter to the two sets of states usually identify them as "community property states [or jurisdictions]" and "common law property states [or jurisdictions]." Because most of the "community property states" are also "common law states" in the broader sense of that term, the term "common law property" is used to distinguish those states from common law/community-property jurisdictions.

As used generally in this chapter, the term "marital property" includes *all* assets and liabilities of married couples, whether labeled by any particular legal system as "community," "separate" or something else. In community property states, "marital property" is divided into "community property" and "separate property." The latter generally includes property acquired before marriage and property acquired during the marriage by gift, devise or inheritance. All other property of the spouses is "community property."

In common law property states, with their individualistic scheme of property ownership, there is no "community property," although for purposes of divorce common law states have essentially borrowed the concept, frequently referring to such property as "marital property." In that context, then, "marital property" has a more narrow meaning than the inclusive and generic definition noted in the preceding paragraph. n4 Technically speaking, there was originally no "separate property" in common law property states either, since separate property is a corollary of community property. With the evolution just referred to, however, the term "separate property" is sometimes now used in common law property states as well as community property states. The Uniform Marital Property Act and the relatively new Wisconsin Marital Property Act based on the Uniform Act use the term "marital property" for community property and the term "individual property" for separate property. Because of the recent adoption of a community property system in Wisconsin, that state has a more complicated definitional problem than most, since some property owned by married couples will be classified under the new act and other property will still be classified under the old common law property system. All of this may sound rather confusing in the abstract, but the meanings of these terms will usually be clear from the context in which they are used.

FOOTNOTES:

(n1)Footnote 4. With the development of the law governing division of property upon a divorce has come more widespread usage of the term, and it is sometimes necessary to focus carefully on the particular usage. In the context of division of property in divorce, marital property has been defined as "all property acquired during the marriage regardless of whether it is held individually or in some form of co-ownership." Gerald C. Mclellan, Equitable Distribution Law and Practice 97 (1985). McLellan asserts that exclusions from this definition typically include property acquired by gift, descent and devise. This corresponds to the term "community property" in the community property jurisdictions and is narrower than the general usage of the term "marital property" in this chapter. As noted in § 37.03, in this chapter marital property generally means all property of either or both spouses during a marriage.

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CHAPTER 37 MARITAL PROPERTY

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§ 37.04 Sources of American Marital Property Law.

§ 37.04(a) Native Americans and Communal Property.

The historical origins of American law are generally rich and diverse, and the law of "marital property" is certainly no exception. We start with a brief look at the customs prevalent among the indigenous people of the American continent several hundred years ago. n5 In historical terms, this is an appropriate starting place for a discussion of American marital property law, although the subject has infrequently been a part of "American" legal discourse. n6

The clash of cultures that occurred when the Europeans encountered the Native Americans can be explained to some degree in terms of philosophy about property rights. What is now the United States was, of course, inhabited by many societies, differing from one another in many respects. Generalizations are suspect, but a sampling of Native American philosophy, contrasted with the attitudes brought across the Atlantic with the English and other Europeans, might give us a fuller sense of the property law that existed on this continent before and after Columbus.

One rather striking and far-sighted feature of original American philosophy about property concerns the reverence with which these Americans viewed the land. The concept of "ownership" of the land, as it had been evolving in feudal England and other European societies, apparently was not a part of early American philosophy. Consider, for example, the following statements. The first is from "The Columbus Letter of March 14th 1493":

> I gave to all I approached whatever articles I had about me, such as cloth and many other things, taking nothing of theirs in return: but they are naturally timid and fearful. As soon however as they see that they are safe, and have laid aside all fear, they are very simple and honest, and exceedingly liberal with all they have; none of them refusing any thing he may possess when he is asked for it, but on the contrary inviting us to ask them. They exhibit great love towards all others in preference to themselves: they also give objects of great value for trifles, and content themselves with very little or nothing in return... .
>
> [W]hen they got rid of the fear they at first entertained, [they] would come out in throngs, crowding the roads to see us, some bringing food, others drink, with astonishing affection and kindness... .

> [T]hese people are so amiable and friendly that even the King took a pride in calling me his brother... .
>
> I could not clearly understand whether the people possess any private property, for I observed that one man had the charge of distributing various things to the rest, but especially meat and provisions and the like. I did not find, as some of us had expected, any cannibals amongst them, but on the contrary, men of great deference and kindness. n7

One reason Columbus could not sense notions of private property among the people he found on the American continent is suggested by Wilbur R. Jacobs in the following passage:

> As the cutting edge of white settlement sliced deeper into aboriginal lands, the European method of landholding, which had caused irreversible changes in the lives of native peoples throughout the world, also moved westward pushing the Indians into the interior and surrounding reserves that the tribesmen managed to keep. One of the tragedies of American history is the poignant narrative of the dispossession of the woodland tribes. Like their cousins further west, they conceived of the land in an entirely different way than the Europeans. Their enemy, the white settlers, were largely fugitives from the European landlord system. First-, second-, third-, and even fourth-generation settlers were fiercely determined, Indians or no Indians, to have a piece of the great new world they could call their own, their very own piece of the rich good earth. The Indian, as we have seen, saw the land as supernaturally provided for man's use and not subject to sale or individual ownership. For the tribesmen, the land, as well as the life-sustaining plant and animal life on it, was part of the bounty of Mother Earth. Though tribal and village councils often controlled garden plots or maize fields, and some Algonquian tribes seem to have developed family hunting territories to conserve beaver from fur trade exploitation, the woodland Indians, as well as other North American tribesmen, had no real conception of the full meaning of individual land ownership. They regarded the land, the wilderness, and the heavens as part of a sacred, mystically conceived explanation of life. Thus the whites misunderstood the woodland Indian's almost astonishing awareness of the ecological relationships between plants and animals, which was attributed to the Indian's sharper perception of such phenomena. As we now know, the awareness was due instead to an attitude of reverence toward nature, the result of a different culture than the white man's. It is this basic difference in attitude toward the land that helps to explain the clash between natives and settlers. n8

Referring to proposals of purchase made by the new American inhabitants to the old, the following response is reported:

> Indians always said in opposition to such proposals, "We cannot sell the land, for it belongs not to us, but to all our people, to our children and our children's children as well as to us, and we cannot sell what is theirs." n9

One similarity between this philosophy and the ideas that had evolved in feudal England is the desire to preserve the land for successive generations -- children, grandchildren, etc. In England, for example, the concept of inheritance developed and landholders persistently attempted to retain land in the family indefinitely for future generations, as with fee tail estates. There is, however, a different cast to the two points of view. The English saw the land as a place for individual development and exploitation; the natives considered it in more reverential terms, emphasizing their responsibilities of stewardship. For many Native Americans, land and other natural resources have been sacred. n10

Perhaps few would today dispute the proposition that the European drive for development and productivity and the Native American reverence for the environment both have an important place in our modern relationship to the earth. In some respects, the clash between these two views continues as one of the important social issues of our time.

Another possible contrast between the two points of view, perhaps more pertinent to marital property, concerns the

relationships among family, community and property rights. In some ways the English tradition stressed individual property rights with a gender bias and paternalistic tendencies. Some of the Native American societies were maternalistic in nature, but in any event, Native Americans generally seem to have been more communal than the Europeans in their attitudes about property. Consider, for example, the following accounts:

> All peoples of the world have some concept of property rights, and the North American Indians are no exception. Their aboriginal ideas on this subject differed considerably from those of the European colonists, and showed a great variation from one tribe to another. To begin with, property might be owned by a single individual, two or more individuals, an entire community, or a tribal group. The number of joint owners might vary all the way from two persons to thousands.
>
> The variation in property rights which surrounded a single person's activity might be great. Thus a man might own his weapons individually, own a fishing station jointly with relatives, share hunting territory with the whole tribe, share the meat he obtained with other families in his community, share the fish he caught with only his own household, and earn the right to sing a bear song at a public ceremony by having slain a bear. n11

Speaking of groups inhabiting various parts of North America, Driver describes the nature of property in land:

> *Northwest Coast.* -- On the Northwest Coast and, to some extent, elsewhere, it was seldom the entire landscape which was parceled out to groups of kindred but only the most favored sites. These were nominally owned by rich men, each of whom granted permission to his house or village mates, most of whom were his relatives, to exploit the land. That such permission was never refused proves that the use of the land belonged to the entire group of kindred rather than to a single individual. What at first appears to be individual ownership turns out to be a sort of stewardship -- the right to direct the economic exploitation of the tract by the local group. Over most of the area, from the Wiyot to the Bella Coola, such usufruct was patricentered; but in the north, from the Haisla north to the Tlingit, it was matricentered. Such private ownership applied to fishing, hunting, trapping, and wild-plant-gathering rights.
>
> Rules and regulations surrounding fishing sites were strictest on the Northwest Coast, where the rich man held title to the weir n12 but could not refuse permission to members of his household or village to fish there. Sometimes sharing was accompanied by dividing up the twenty-four-hour period so that the weir was used by different men at different times. Where this system prevailed, the nominal owner managed to retain the time period which was likely to yield the most fish... . At a man's death, his fishing rights passed to his son. In addition to those privately owned fishing stations, there were communally owned weirs, which were constructed annually at certain places in the river... .
>
> *Plateau.* -- On the Plateau, the large weirs at the most profitable fishing places were owned or shared by everyone in a community, and even outsiders who chanced along were commonly given a share of the catch. It was only the small weirs or scaffolds, built and operated by single men or small groups of relatives, which may be said to have been patricentered... .
>
> *Plains.* -- On the Plains, where band and tribal organization existed, hunting territory was controlled by the band or tribe. The boundaries between bands or tribes are difficult to establish, and neighboring tribes often shared a large territory... . Vague as knowledge of tribal or band territories is, we know for sure that no individual or small group of individuals within a Plains tribe owned any hunting land.
>
> *Prairies.* -- On the Prairies, control of hunting lands was similar to that on the Plains, with tribal, village, or band ownership the rule. Individuals or kinship groups did not own unimproved hunting territory, and if traps, fences, or pounds were so owned, other than for a season, it has not been reported

> except for eagle pits... .
>
> Turning to farming, we find the Hidatsas and Mandans on the Missouri River divided into maternal lineages, lineage segments, and matrilocal extended families, the women of which owned their own farm plots... . Although title to a particular plot might technically be vested in an individual, it was normally cultivated by work parties of matrilineally related women, who worked each other's gardens in a group.

§ 37.04(b) European Influence: The Common Law Tradition. n13

Because of European tradition, and the fact that the customs and life-styles of the Native Americans were never taken seriously by the European "settlers" of this continent, the law that took root in the United States generally traces its origins not to the customs of Native Americans but rather to the law of Europe. More specifically, the European settlers of this continent brought with them various ideas concerning property and marriage. These origins are usually classified in terms of the "common law" system of England and the "civil law" system of the European continent.

The common law tradition of England relies substantially on evolution of legal principles through decisions made and opinions rendered by courts. At the same time common law was evolving in England, codifications of law were evolving in the countries of continental Europe, tracing their origins back to the compilations of law developed in the Roman Empire. These contemporaneous developments in different parts of Europe gave rise to fundamental differences in the promulgation of laws and in legal systems themselves, as well as some significant differences in the substance of law.

According to the tradition of England and the United States, the most fundamental and supreme law of the land is a "Constitution," which in the United States is a relatively short, written document. As every American school child knows, the United States Constitution establishes dual governments -- national (or federal) and state -- and a tripartite system of government at the national level, with executive, legislative and judicial branches. This pattern has been replicated in various forms in the fifty state governments, with state constitutions and three branches of government. With some qualification, matters of marriage, family and property were left to the states by the United States Constitution, and our marital property law is therefore not uniform from state to state.

In theory, even in common law jurisdictions, the legislative branch is the body primarily responsible for formulating policy and "making" law. This theory is somewhat simplistic in practice. It is certainly a basic premise of the Anglo-American common law that the "law" evolves through judicial resolution of individual disputes by application of precedent and the doctrine of stare decisis. At an early date in England, courts held that decisions and opinions in earlier cases had precedential value and should govern the decisions in subsequent cases. This doctrine of *stare decisis* was fundamental to the evolution of common law.

It is generally true that the common law system of England has had a dominant influence in the United States. Certainly the evolution of legal principles in the courts has been a major feature of American life, even to the extent that constitutional limitations on legislative enactments are defined by the courts. And because of this and the traditional emphasis on the case method of study in American law schools, law students sometimes seem to assume that "common law" is the only real and definitive law in our system. As lawyers, they quickly learn otherwise.

Under the American form of government, then, law is in fact made by both the legislative and the judicial branches of government in each state. Both branches are subject to the national and state constitutions, and in some respects, each can check the other. The courts, for example, are frequently required to interpret legislation. Courts can also overturn statutes if they are unconstitutional. The legislature, on the other hand, can make new law and policy to override "common law" or judicial interpretation of statutes. Matters are complicated even further when the executive branch is thrown into this mix. Administrative regulation, at both the federal and state levels of government, has become a massive part of our law, and in many instances requires the attention of lawyers, courts and legislators. We shall here be

concerned, however, with the activities of courts and legislatures.

In the common law world of the United States, courts have traditionally made law in the first instance, and also interpreted and applied the laws promulgated by the legislative branch. The decisions of these common law courts, particularly the appellate courts, have typically been published, creating a body of law accessible to courts, lawyers and the public.

Because of the dominant influence of England in the formative years of the United States, the individual states typically adopted the common law of England as part of their common law. This record of judicial decisions and the reasons for them, first in the English courts and then in the courts of each of the American jurisdictions, coupled with the principle of *stare decisis*, became a great aid in discerning what the "law" was and predicting what courts would do in new cases. A tremendous mass of judicially created law gradually accumulated in the common law courts.

A balance was struck by the common law courts between permanence and flexibility. The Wisconsin Supreme Court states the matter well:

> Inherent in the common law is a dynamic principle which allows it to grow and to tailor itself to meet changing needs within the doctrine of *stare decisis*, which, if correctly understood, was not static and did not forever prevent the courts from reversing themselves or from applying principles of common law to new situations as the need arose. If this were not so, we must succumb to a rule that a judge should let others "long dead and unaware of the problems of the age in which he lives, do his thinking for him." Mr. Justice Douglas, *Stare Decisis, 49 Columbia L. Rev. 735, 736.* n14

§ 37.04(c) European Influence: The Civil Law Tradition.

In terms of both form and substance, the English common law was one of the most influential sources for the early development of our legal system. Forty-nine of the fifty states are generally referred to as "common law" states. Even so, the English common law is not the only source of early influence. Louisiana is not considered a common law state. That state was more heavily influenced by a tradition somewhat different from the common law of England. A second legal system, usually referred to as "civil law," had developed in places such as France and Spain. n15 During early evolutionary periods of the civil law, the countries involved had relatively absolute and monolithic governments, unrestrained by a written constitution or any system of governmental checks and balances. The "law" was created not by courts or American-style legislators, but by the monarchs. Periodic royal decrees evolved into "codes" setting forth the rules applicable to various relationships among the people and between the people and the crown.

As one might expect, the codes of the civil law were less flexible than the laws of the courts and legislatures in common law jurisdictions. A judicial system did evolve but that too was controlled by the crown. The civil law courts resolved disputes but they did not issue or publish written opinions, and the principle of *stare decisis* was not a part of their custom.

Because of the invasion of European peoples and customs on the American continent during the past several centuries, both of these very different ways of developing law have had significant influence in modern American law, particularly in the area of marital property. Although Louisiana is the only state that followed the civil law tradition in a pervasive way, notions of marital property from France and Spain took root in eight of the fifty states, and arguably have influenced the evolution of the law in many of the common law states. We now turn to some brief historical and geographical background concerning the early origins of modern American marital property law.

§ 37.04(d) Early American Marital Property Influences.

Having considered the general nature of common law and civil law, we now turn to the relationship between these

systems and the early European settlements in America. More specifically, we explore briefly the early origins of American marital property law. We have noted that only one state, Louisiana, adopted civil law generally; other states adopted the common law tradition. n16 As to marital property, there is a qualification to this rule: the civil law governing property rights between spouses took hold not only in Louisiana but in seven other states as well. n17 These developments can be understood in the context of North American history during the 17th through 19th centuries. n18

At the same time English (common law) influence began to dominate North American thinking in the eastern part of the continent, influence from other parts of Europe was being felt in southern and western regions. French exploration stretched along the St. Lawrence and Mississippi Rivers and the Great Lakes from Quebec to New Orleans. Spanish settlements meanwhile expanded from Mexico through the southwestern part of North America. Much of the land west of the Mississippi River was thus under the control of France and Spain early in the evolution of the United States.

In the second half of the 18th century, France's colonial holdings in North America essentially came to an end. France ceded most of the area under French control east of the Mississippi River to England and turned the western colonies and New Orleans over to Spain. At the beginning of the 19th century, Spain ceded Louisiana back to France, setting the stage for the dramatic purchase of the vast Louisiana territory by the young United States of America. Many areas then included in the purchase eventually fell into the common law tradition of the developing new world successor to England. One area that was very much influenced by French and Spanish customs and tradition -- New Orleans and the surrounding territory, now defined by the boundaries of the state of Louisiana -- retained the civil law system of those nations.

Most of the territory that had been under French control ultimately did not adhere to the civil law tradition, in whole or even in part. This may seem somewhat surprising, inasmuch as occupation by the French of the middle of what is now the United States lasted for many decades. Two significant developments, among others, help explain the movement toward the common law of marital property in most of the developing country. In 1787, the Congress acting under the Articles of Confederation adopted the "Ordinance of 1787: The Northwest Territorial Government." n19 This significant document set forth in some detail provisions of government and law applicable to the "Northwest Territory," which subsequently became the states of Illinois, Indiana, Michigan, Ohio and Wisconsin. Those states followed the Ordinance of 1787 as their law began to evolve. Other territories also imitated these states, and therefore the Ordinance, as the movement toward statehood moved to other regions of the country. A second important and related development is simply the movement of people from the eastern part of the country, where the English common law tradition prevailed, into the west. The French and the Spanish may have had control of much of the continent, but in terms of numbers, people of English origin eventually dominated the landscape.

The importance of the Ordinance of 1787 for purposes of marital property law can be understood by a reading of the rather explicit substantive commands of section 2:

> Be it ordained by the authority aforesaid, That the estates both of resident and non-resident proprietors in the said territory, dying intestate, shall descend to, and be distributed among, their children and the descendants of a deceased child in equal parts, the descendants of a deceased child or grandchild to take the share of their deceased parent in equal parts among them; and where there shall be no children or descendants, then in equal parts to the next of kin, in equal degree; and among collaterals, the children of a deceased brother or sister of the intestate shall have, in equal parts among them, their deceased parent's share; and there shall, in no case, be a distinction between kindred of the whole and half blood; saving in all cases to the widow of the intestate, her third part of the real estate for life, and one-third part of the personal estate; and this law relative to descents and dower, shall remain in full force until altered by the legislature of the district. n20

These provisions are, of course, based on the English common law. They place a significant imprint on the property law of the affected territories, and indirectly on other developing regions of early America. Section 2 of the ordinance does

contain a sort of savings clause which reads as follows:

> and personal property may be transferred by delivery, saving, however, to the French and Canadian inhabitants, and other settlers of the Kaskaskies, Saint Vincents, and the neighboring villages, who have heretofore professed themselves citizens of Virginia, their laws and customs now in force among them, relative to the descent and conveyance of property. n21

By its own terms, this clause would not be likely to have any lasting or pervasive impact on the property law of the territories.

Until the Louisiana Purchase in 1803, the Anglo-Americans had not explored or settled the vast area west of the Mississippi River in any substantial way. As noted above, however, that changed drastically in the 19th century when waves of settlers moved from east to west. Although much of the area had been under the control of Spain, the English influence soon overwhelmed the sparse Spanish settlements. By the middle of the century, when these territories became independent of Mexico, Anglo-Americans greatly outnumbered those of Spanish and Mexican descent. And at that time, legal systems as we now know them were unknown in these frontier regions. It is not surprising, therefore, that the civil law was not generally adopted by the people of the western states. Very few of the settlers were trained in the civil law, the codes were not generally available, and the whole notion of a civil law system was foreign to a majority of the residents.

As was noted earlier, however, the civil law influence did not disappear entirely from the United States. In addition to Louisiana, where the civil law took root in a relatively complete way, seven states ultimately chose to follow the civil law tradition as it applied to property rights of married couples. These seven states are Texas, New Mexico, Arizona, California, Nevada, Idaho, and Washington. The history of the adoption of "community property" principles in these seven states is fascinating, but beyond the scope of this chapter. W. S. McClanahan suggests two general reasons for the survival of this part of the civil law in these states. n22 First is the familiar property problem of status quo and vested rights: under the Spanish and Mexican regimes, property acquired by married persons was held under a community property system. Undoing or changing this scheme presumably would have caused significant problems. A second reason concerns the beginnings of a movement that is still evolving at the end of the 20th century. Even before the middle of the 19th century the common law treatment of married women had come under attack. Justifiable criticism was launched against rules by which women essentially forsook their property rights by marriage. n23 Married Women's Property Acts were adopted by the states, removing some of the disabilities imposed by law upon married women. n24 Meanwhile, the western states were in the formative stages of government and law and some of them presumably saw the civil law system of community property in a favorable light as a result of the furor over common law marital property. The community property system thus survived in areas where it was already familiar to sufficient numbers because of Spanish influence.

FOOTNOTES:

(n1)Footnote 5. For discussion of Indian land claims, see Vol. 7, ch. 57, *Indian Land, infra.*

See also Powell on Real Property (R), ch. 67, *Indian Land Claims*(Michael Allan Wolf ed., Matthew Bender).

(n2)Footnote 6. It is unfortunate that the traditions of the people who had lived on the American continent for thousands of years before the arrival of the Europeans have been marginalized for so many years. Under these circumstances, it is no surprise that those traditions and customs have not played a major role in the way the "new Americans" view marital property. Chapter 1 of this treatise discusses property concepts among primitive cultures, and Chapter 57 considers Indian lands; the purpose of this section is simply to compare briefly Native American ideas about family, community and property with the more established views of 21st century America.

(n3)Footnote 7. Virgil Vogel, This Country Was Ours 34 (1972).

(n4)Footnote 8. Wilbur R. Jacobs, Dispossessing the American Indian (1972).

(n5)Footnote 9. Gilmore, *Some Indian Ideas of Property*, Indian Notes, Vol. 5, No. 2 (Apr. 1928).

(n6)Footnote 10. In comparison with Whites in the United States today, the Indians were at least ten times as religious. Every thought and act was hedged or bolstered by religion or magic, which ranged all the way from an amorphous feeling of reverence to the performance of elaborate rituals where every word and gesture was prescribed in advance. The distinction between natural and supernatural was never sharply drawn by Indians, who tended to blend the two into one harmonious whole.

Harold E. Driver, Indians of North America 396 (2d ed. rev. 1969).

(n7)Footnote 11. Harold E. Driver, Indians of North America 269, 270 (2d ed. rev. 1969).

(n8)Footnote 12. A weir is "any sort of fence or barrier sufficient to block a fish yet permit the passage of water." *Id.* at 87.

(n9)Footnote 13. Because of the way American marital property law has evolved, a brief excursion into comparative law is necessary. The growth and development of English and American "common law" of property in general is explored in much more detail in chapters 2-7 in this treatise.

(n10)Footnote 14. *Bielski v. Schulze, 114 N.W.2d 105, 110 (Wis. 1962)* (footnote omitted).

(n11)Footnote 15. It would be a mistake to assume that there is a uniform model of "civil law." The evolution of law in all societies naturally takes unique forms according to the particular culture, traditions and government of those societies.

(n12)Footnote 16. Puerto Rico also follows the civil law tradition.

(n13)Footnote 17. As discussed below, these additional seven states were Texas, New Mexico, Arizona, California, Nevada, Idaho, and Washington.

(n14)Footnote 18. A more detailed account of these developments, with reference to community property, can be found in W. S. McClanahan, Community Property Law in the United States 55-164 (1982).

(n15)Footnote 19. U.S. Code Ann. Const. Art. I, 17-23.

(n16)Footnote 20. *Id.* at 17.

(n17)Footnote 21. *Id.* at 17-18.

(n18)Footnote 22. W. S. McClanahan, Community Property Law in the United States § 3:22 at 118-119 (1982).

(n19)Footnote 23. *See* § 37.06(a), *infra*.

(n20)Footnote 24. *See* § 37.07(a), *infra*.

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CHAPTER 37 MARITAL PROPERTY

4-37 Thompson on Real Property, Thomas Editions § 37.05

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§ 37.05 The Marital Relationship.

Ariz. Rev. Stat. Ann. § 25.202A

The existence of "marital property" depends on a marital relationship. This may seem obvious, but in recent years parties in relationships other than the traditional marriage have asserted rights similar to property rights accorded married persons. Two of the most obvious examples involve heterosexual couples who are not married but are living together and sharing their lives in a fashion similar to typical married persons, and homosexual couples who are doing likewise. It is quite clear that matters of marriage, family and other relationships, whether similar to traditional marriages and families or not, are among the most important and divisive social issues of our time.

Even though marriage is essential to the existence of marital property, the subject of "family law" is really beyond the scope of this chapter, and we do not directly devote much space here to the legal details of the marital relationship. n25 For the most part in this chapter, in discussing marital property, we take marriage relationships for granted, and this section does nothing more than summarize some very fundamental premises about marriage.

§ 37.05(a) Defining Marriage.

In our society, the state has assumed a substantial interest in the family and in the marriage relationship that is at the center of the traditional American family. "[S]ubject to constitutional limitations, the state has exclusive dominion over the legal institution of marriage and the state alone has the 'prerogative of creating and overseeing this important institution.'" n26 Marriage in the United States "has been deemed a private relationship of a man and a woman (husband and wife) which involves 'interests of basic importance in our society.'" n27 To date, arguments that relationships other than the traditional marital relationship ought to be given the same legal status as marriage have not met with success. This is not to say that change has not occurred, but the marital relationship in our society in significant respects is still defined as it has been for centuries.

> According to the English law, and to its American counterpart, the legal definition of marriage was clear and quite specific, although its outlines had to some extent to be inferred from the judicial resolution of marital conflicts rather than being directly stated in statutory provisions. As so defined, marriage was a permanent, monogamous relationship between a man and woman, divorce being virtually

> impossible in England until the latter half of the Nineteenth Century. n28

Although the permanency of many marriages has dwindled in modern times, and divorce has become commonplace, the traditional conception of marriage in American law remains mostly intact. Attempts to promote the legal benefits of marriage for same-sex marriages are still not completely successful, even in the face of some serious constitutional objections. n29 In a representative case from before 2003, a Washington court responded to a claim that that state's Equal Rights Amendment required that the County Auditor not discriminate against two males seeking a marriage license:

> The fact remains that marriage exists as a protected legal institution primarily because of societal values associated with the propagation of the human race... . [T]he refusal of the state to authorize same-sex marriage results from ... impossibility of reproduction rather than from an invidious discrimination "on account of sex." Therefore, the definition of marriage as the legal union of one man and one woman is permissible as applied to appellants, notwithstanding the prohibition contained in the ERA, because it is founded upon the unique physical characteristics of the sexes and appellants are not being discriminated against because of their status as males per se. n30

In 2003, the Massachusetts Supreme Judical Court ruled in Goodridge v. Department of Public Health that it is unconstitutional to bar same-sex couples from marriage. n31

§ 37.05(b) The Formalities of Ceremonial Marriage. n32

Although there is a historical basis for recognition of informal marriages, n33 in most states certain ceremonial formalities are required. And in all states, ceremonial marriages are recognized. In exercising their control over marriage, the states have enacted a wide variety of laws. All states generally require that parties obtain a license before marriage. This licensing procedure serves the purpose of screening applicants for marriage eligibility; information is furnished under oath concerning matters such as age, relationship between the two parties, if any, and prior marriages. This information is, of course, pertinent to certain qualifications imposed by the state on parties who desire to be married. If the licensing officer concludes from the application that the parties are not eligible to marry, the officer will deny the application. Most states impose a short waiting period, typically several days, between the issuance of the license and the marriage ceremony. Some type of physical examination may also be required of the applicants, usually for the purpose of determining whether either party is infected by any sexually transmitted disease.

The actual solemnization of marriage is also regulated by statute. Religious leaders and civil officers such as judges are authorized to perform wedding ceremonies. In most states, no special form of ceremony is required, although witnesses are often required. The ceremony is memorialized on a marriage certificate or marriage license which may be used as evidence of the marriage.

The consequences of noncompliance with marriage formalities vary from state to state. There is, of course, a strong desire to validate marriage relationships, at least when the parties had acted in good faith, and marriages will therefore often be upheld despite formal flaws. This makes good sense when defects are relatively minor, where nullification would serve no useful purpose, or when the problem comes to light many years after the marriage.

§ 37.05(c) Common Law Marriage.

Although recognition of "common law marriage" has been on the decline in the United States, eleven states and the District of Columbia still recognize the possibility of a valid "informal" marriage. n34 And with a society as mobile as modern America, virtually all jurisdictions may have occasion to consider common law marriages that have arguably arisen under the laws of one of the twelve jurisdictions recognizing common law marriage directly. n35

No formal ceremony is required for a common law marriage, of course, but certain requirements must be met for the courts to recognize such marriages. The elements required include capacity, mutual agreement to enter into the marriage relationship, public recognition of the existence of the marriage, cohabitation or mutual and open assumption of marital duties. n36 Attitudes about common law marriage vary, not only as between states that recognize it and states that don't, but also even among the twelve states that still accept it. These differences in opinion are reflected in some of the details of common law marriage from state to state, such as whether agreements must be express or can be implied and the degree of evidentiary proof required to establish the marriage. The Uniform Marriage and Divorce Act presents two alternative provisions, one permitting common law marriage and the other prohibiting it. n37 Commenting on the difference of opinion and the alternative provisions, the drafters of that Act state:

> These alternatives are presented because the line of cleavage in the states, between those which consider the common law marriage to be a highly useful social institution and those which insist that all marriages *de jure* should be contracted in accordance with prescribed statutory formalities, proved impossible to erase... . The alternatives are a signal to state legislatures that this issue should be re-examined even if the state is one of those which has already abolished common law marriage. n38

§ 37.05(d) Defective Marriages: The Putative Spouse Doctrine.

There are, of course, occasions when an apparently valid marriage is in fact defective. Perhaps the most common example is a marriage between two parties while one of the parties is still validly married to a third person. Because of our society's ban on plural marriages, a married person cannot enter into a valid marriage relationship with a second spouse without first procuring a divorce from the first spouse. The fact that marriage to a second spouse before divorce from the first is illegal has not always prevented such "marriages." In some cases, both parties may truly believe that they are legally capable of contracting marriage, as in the case of a defective divorce from the first spouse. In other cases, one of the two parties may be "innocent" and the other "guilty," knowing that he or she is already married to another. And in common law marriage situations, where there is no "ceremony," parties might erroneously believe that they have satisfied the requirements of a common law marriage.

In some instances, courts have been persuaded that persons involved in invalid marriage relationships should nevertheless be treated as spouses for certain purposes. The primary example of this is that the "putative spouse" may be entitled to a division of property when the putative marriage comes to an end. n39 To qualify as a putative spouse in this sense, one must have a reasonable, good faith belief that a valid marriage exists. n40

§ 37.05(e) Property Rights of Unmarried Partners.

In a sense, this subject is, by definition, beyond the scope of a chapter devoted to "marital property." As discussed in § 37.05(a), however, claims to legal treatment similar to that accorded married persons have arisen in significant numbers in recent years and in that sense the issues posed are pertinent here and are therefore briefly noted.

Perhaps the most famous case involving these issues was Marvin v. Marvin, n41 in which the court concluded that unmarried partners could enter into a valid contract affecting their property rights, so long as the agreement did not rest upon illicit consideration. n42 This case received a good bit of notoriety, in part because it departed from the earlier view that any such "contract" would be illegal. n43

Intimate relationships not based on marriage have now given rise to property claims based on a number of theories, including "express or implied contract, partnership, resulting or constructive trust, and even various tort theories." n44 It is generally necessary, however, that a claimant establish a right to recover under a specific established theory. n45 In a 1992 Nevada case, Western States Constr., Inc. v. Michoff, n46 a dispute arose between an unmarried man and woman who had cohabited for nine years. They had formed a corporation together and engaged in the business of renting construction equipment. The couple held themselves out as husband and wife and acted as though they were co-owners

of the corporation. When the relationship came to an end, in a suit against both the man and the corporation, the woman sought one-half of the parties' assets. The court reiterated its approval of Marvin v. Marvin, referring to the rule adopted in an earlier Nevada case that "unmarried cohabitants will not be denied access to the courts to make property claims against each other merely because they are not married." In a passage clarifying their earlier opinion, the court goes on to say:

> Our brother Springer [a dissenting Justice] believes that the district court was misled by our statement in *Hay* that if unmarried cohabiting adults agree to hold their property as if they are married, "the community property laws of the state will apply by analogy." Justice Springer concludes that "[u]nmarried persons cannot own community property, by analogy or otherwise." *Marvin*, however, strongly supports our statement in *Hay* that the community property law may apply by analogy. While unmarried couples cannot actually own community property, this is so only because community property is a creature of statute which arises after a couple is legally married. *See* Nev. Rev. Stat. § 123.220. Yet unmarried couples are not precluded from holding their property as though they were married. *See Marvin, 557 P.2d at 116.* In such a case, the community property law can apply by analogy. *Hay, 100 Nev. at 199, 678 P.2d at 674.* Thus we hold that unmarried cohabiting adults may agree to hold property that they acquire as though it were community property.

In a similar Washington case, Connell v. Francisco, n47 a couple had had a six-year relationship in several states. During that time, the man's net worth increased from $1,400,000 to $2,700,000. The woman, Connell, sought a division of property of the relationship comparable to a division that would be available to married partners. Although some statutory benefits have been consistently denied to "partners in a meretricious relationship," the court held that the trial court correctly concluded that the statute providing for disposition of marital property "applied by analogy" in cases involving long-term relationships. Moreover, in attempting to make an equitable distribution of property, the trial court erred in excluding from any consideration property characterized as separate property of Francisco (the man). The court also decided that Connell would be entitled to the benefit of the community property presumption.

COMPUTER-ASSISTED RESEARCH

LEXIS: property w/2 right! w/30 unmarried w/2 partner! or person!

FOOTNOTES:

(n1)Footnote 25. Helpful and much more detailed summaries of the subject can be found in the Second Student Edition and Second Practitioner's Edition of Homer H. Clark, Jr., The Law of Domestic Relations in the United States.

(n2)Footnote 26. *Singer v. Hara, 522 P.2d 1187, 1197 (Wash. App. 1974)* (quoting *Coleman v. Coleman, 291 N.E.2d 530, 534 (Ohio St. 1972)*). *Cf. Baehr v. Miike, 910 P.2d 112 (Haw. 1996)* (church and clergy denied intervention in action, because they failed to adequately demonstrate that intervention would assist in the just and equitable adjudication of the issues), *aff'd* by *Baehr v. Miike, 950 P.2d 1234 (Hawaii 1997).*

See also West v. West, 689 N.E.2d 1215, 1218 (Ill. App. Ct. 1998) (marriage is a three-party contract between the man, the woman and the state; the state represents the public interest in the institution of marriage and that public interest allows a state to intervene in certain situations to protect the interests of family members).

(n3)Footnote 27. *Singer v. Hara, 522 P.2d 1187, 1197 (Wash. App. 1974)* (quoting *Boddie v. Connecticut, 401 U.S. 371, 376 (1971)).*

(n4)Footnote 28. Homer H. Clark, Jr., The Law of Domestic Relations in the United States 24 (2d student ed. 1988).

(n5)Footnote 29. *Id.* at 75-80. *Cf. Tucker v. Tucker, 910 P.2d 1209 (Utah 1996)* (father awarded custody of minor

child after trial court found mother's cohabitation with same-sex partner during marriage and in presence of child demonstrated mother's lack of moral example); *In re H.N.R., 666 A.2d 535 (N.J. Super. 1995)* (biological mother's same-sex partner allowed to adopt biological mother's children, because it was in the children's best interest); *In re M.M.D., 662 A.2d 837 (D.C. 1995)* (unmarried same-sex couples are eligible to petition the court for a decree of adoption). *Storrs v. Holcomb, 645 N.Y.S.2d 286 (1996)* (State of New York does not recognize or authorize same-sex marriages, and such gender based classification does not offend due process or equal protection clauses); *Dean v. District of Columbia, 653 A.2d 307 (D.C. 1995)* (District of Columbia statute prohibited clerk from issuing marriage license to same-sex couple). *Mueller v. Commissioner, 82 T.C.M. (CCH) 764 (2001)* (taxing married couples differently from same-sex couples does not violate constitution); *In re Estate of Gardiner, 22 P.3d 1086 (Kan. Ct. App. 2001)* (statute barring same-sex marriages did not violate equal protection as applied to marriage between man and post-operative transsexual).

(n6)Footnote 30. *Singer v. Hara, 522 P.2d 1187, 1195 (Wash. App. 1974). See also Rosengarten v. Downes, 802 A.2d 170 (Conn. App. 2002)* (foreign same-sex civil union was not a "marriage" under statute providing subject matter jurisdiction over the dissolution of marriages); *Baker v. Nelson, 191 N.W.2d 185 (Minn. 1971)* (other definitions of marriage that preclude same-sex unions cited at *191 N.W.2d 185, 186).*

(n7)Footnote 31. *Goodridge v. Department of Pub. Health, 440 Mass. 309, 798 N.E.2d 941 (2003)* ("The Massachusetts Constitution ... forbids the creation of second-class citizens. ... . The [Commonwealth of Massachusetts] has failed to identify any constitutionally adequate reason for denying civil marriage to same-sex couples.").

See also Opinions of the Justices to the Senate, 440 Mass. 1201, 802 N.E.2d 565 (2004) (proposed Massachusetts legislation that would prohibit same-sex couples from marrying, but allow them to form civil unions with all of marriage's "benefits, protections, rights and responsibilities," did not comply with the equal protection and due process requirements of the Constitution of the Commonwealth and articles 1, 6, 7, 10, 12 and 16 of the Declaration of Rights.)

(n8)Footnote 32. A much more detailed summary of this subject, which forms the basis of this section, can be found in Homer H. Clark, Jr., The Law of Domestic Relations in the United States § 2.3, at 34-44 (2d student ed. 1988).

(n9)Footnote 33. Homer H. Clark, Jr., The Law of Domestic Relations in the United States § 2.3, at 22-23 (2d student ed. 1988).

(n10)Footnote 34. *Id.* § 2.4 at 46. The eleven states are Alabama, Colorado, Iowa, Kansas, Montana, Oklahoma, Pennsylvania, Rhode Island, South Carolina, Texas, and Utah. At the time Clark's book was published, thirteen states and the District of Columbia recognized common law marriage. Ohio has since decided against continuing recognition of such relationships as valid marriages. Ohio Rev. Code Ann. § 3105.12. The statute provides that "On and after the effective date of this amendment ... common law marriages are prohibited in this state, and the marriage of a man and woman may occur in this state only if the marriage is solemnized ... ." *Id.* § 3105.12(B)(1). Exceptions are extended to common law marriages occurring in Ohio prior to the effective date of the statute and to common law marriages "in another state or nation that recognizes the validity of common law marriages ... ." *Id.* § 3105.12(B)(3)(a). *Williams v. Williams, 1996 Ohio App. LEXIS 3508* (common-law marriage that occurred in Ohio before October 10, 1991 recognized as valid). In 1996 the Georgia legislature enacted a statute providing that common-law marriages entered into in Georgia after January 1, 1997 would not be recognized. Ga. Code Ann. § 19-3-1.1. On January 1, 1996, Idaho stopped recognizing common-law marriages entered into in the state. Idaho Code § 32-201. In marked contrast to the majority trend, Utah enacted a statute in 1998 providing that unsolemnized marriages would be recognized if arising from a contract between the parties, who have cohabited, who mutually assume marital rights, duties and obligations, who hold themselves out as and have acquired a uniform general reputation as husband and wife. Utah Code Ann. § 30-1-4.5(1). Milot, Lisa. *Restitching the American Marital Quilt: Untangling Marriage from the Nuclear Family, 87 Va. L. Rev. 701 (2001).*

(n11)Footnote 35. *See Brissett v. Sykes, 855 S.W.2d 330 (Ark. 1993).* In *Brissett*, a dispute arose over ownership of

a one-half interest in property that had been conveyed to Leon and Ruth Brissett "husband and wife." In fact, Leon and Ruth had never formally married, but Leon was claiming a right of survivorship as a tenant by the entirety. This claim was based on the contention that a common law marriage existed between the two. They had apparently agreed to be married in 1977 while living in New York and held themselves out to the public as husband and wife. The couple "traveled in a motor home to almost every state in the nation and some Canadian provinces, but maintained their permanent residence in New York until they moved to Arkansas in 1986." *Id. at 331*. Common law marriages may not be created in Arkansas, but Arkansas courts recognize common law marriages contracted by law in other states where the parties actually reside. Ark. Code Ann. § 9-11-107. In this particular case, however, Leon did not present evidence that trips to states recognizing common law marriage were made for the purpose of changing their residency, nor did he present evidence as to the requirements of establishing a common law marriage in the states Ruth and he had visited. The court therefore affirmed the Chancellor's conclusion that the record did not support a finding that a common law marriage was established.

(n12)Footnote 36. *Adams v. Boan, 559 So. 2d 1084 (Ala. 1990)* (capacity, mutual consent, public recognition and cohabitation); *People v. Lucero, 747 P.2d 660 (Colo. 1987)* (mutual consent, cohabitation, open assumption of marital relation); *Coates v. Watts, 622 A.2d 25 (D.C. 1993)* (*express* mutual agreement, cohabitation); *In re Estate of Fisher, 176 N.W.2d 801 (Iowa 1970)* (present intent and agreement, continuous cohabitation, public declaration that parties are husband and wife); *Fleming v. Fleming, 559 P.2d 329 (Kan. 1977)* (capacity to marry, present agreement, holding out of each other as husband and wife to the public); Mont. Code Ann. § 40-1-403; *In re Marriage of Geertz, 755 P.2d 34 (Mont. 1988)* (capacity to contract marriage, assumption of marital relationship by mutual consent, cohabitation, repute in the community that parties are husband and wife); *Gainey v. Barnhart, 299 F.3d 1004 (8th Cir. 2002)* (applying Arkansas law the claimant was unable to prove dissolution of previous marriages and so could not enter into a common law marriage with the decedent); *Faber v. TGI-Friday's Inc., 148 F. Supp. 2d 556 (E.D. Pa. 2001)* (without the use of verba praesenti common-law marriage will still be recognized where the parties' intent, as expressed by their words, is that they were married); *Clark v. Clark, 27 P.3d 538 (Utah 2001)* (evidence was sufficient to establish common-law marriage when parties lived together after divorce and held themselves out and acquired reputation as husband and wife); *In re* Marriage of Hallgarth, No. 07-01-0013-*CV, 2001 Tex. App. LEXIS 3660* (Tex. Ct. App. May 29, 2001) (if circumstances creating common-law marriage occur while one party is married to another person, the common-law marriage comes to fruition upon dissolution of that marriage); *Standifer v. Standifer, 26 P.3d 104 (Okla. 2001)* (common-law marriage is formed when "the minds of the parties meet in consent at the same time"); *Joye v. Yon, 547 S.E.2d 888 (S.C. Ct. App. 2001)* (common-law marriage exists if the parties presently intend to enter into a marriage contract); *Hall v. Apfel, 2001 WL 681631,* at *3 (W.D. Tex. April 4, 2001) (to establish common-law marriage, parties must agree to marry, live together in the state as husband and wife, and represent to others that a marriage exists. If the 2nd and 3rd criteria are met, the 1st may be inferred). *Cf. Shepherd v. Ledford, 926 S.W.2d 405 (Tex. App. 1996)* (by stipulation a person was given standing as common law spouse), *aff'd* by *Shepherd v. Ledford, 962 S.W.3d 28, 41 Tex. 1998); Balser v. Mosley, No. CA97-05-109, 1998 Ohio App. LEXIS 131* (Ohio App. 12 Dist.) (no common-law marriage existed where there was no in praesenti marriage agreement between partners). *See also In re Estate of Hunsaker, 968 P.2d 281, 284 (Mont. 1998)* (The party asserting a common law marriage has the burden of proving three elements: 1. that the parties were competent to enter into a marriage; 2. that the parties assumed a marital relationship by mutual consent and agreement; and 3. that the parties confirmed their marriage by cohabitation and public repute); *State Farm Fire & Cas. Co. v. Platt, 4 F. Supp. 2d 399 (E.D. Pa. 1998)* (Under Pennsylvania law, there is a rebuttable presumption of common law marriage, if these essential elements co-exist: 1. Constant cohabitation between a man and a woman, both of whom have the capacity to be married, and 2. General, as distinguished from partial or divided, reputation as husband and wife in their community).

(n13)Footnote 37. Unif. Marriage and Divorce Act § 211, 9A U.L.A. 177.

(n14)Footnote 38. Unif. Marriage and Divorce Act § 211 comment at 177.

(n15)Footnote 39. *See* J. Thomas Oldham, Divorce, Separation and the Distribution of Property § 2.03[4][b] (1993). *Manker v. Manker, 644 N.W.2d 522, 532 (Neb. 2002)* (as a matter of first impression, the putative spouse

doctrine does not provide a legal basis for alimony and property division).

(n16)Footnote 40. J. Thomas Oldham, Divorce, Separation and the Distribution of Property § 2.03[4][a]. *Estate of DePasse v. Harris, 118 Cal. Rptr. 2d 143 (2002)* (husband's awareness of the lack of the required marriage license shows he did not have a good faith belief the marriage was lawful); *Saacks v. Saacks, 688 So. 2d 673, 675-676 (La. Ct. App 1997)* (putative spouse status allows good-faith spouse a share in community property).

(n17)Footnote 41. *557 P.2d 106 (Cal. 1976).*

(n18)Footnote 42. Some questions have been raised as to whether this is a workable rule. *See* J. Thomas Oldham, Divorce, Separation and the Distribution of Property § 1.02[4]. Because payment for performance of sexual services remains illegal in most states, there is arguably a problem in recognizing contractually many intimate relationships. *Posik v. Layton, 695 So. 2d 759, 761 (Fla. Ct. App. 1997)* (support contract similar to prenuptial agreement valid between homosexual partners); *Byrne v. Laura, 60 Cal. Rptr. 2d 908, 913 (Cal. Ct. App. 1997)* (an oral *Marvin-type* agreement is enforceable against estate of deceased unmarried partner). The argument is that cohabitation of this type *always* involves a sexual component. This perceived difficulty may, however, rest on too narrow a conception of such relationships. Just as there is presumably much more than sex involved in a marriage, partners who are not married also might have other significant components in their relationship. Indeed, most couples would probably bristle at the suggestion that any agreement they might have concerning property is directly related to sexual services.

(n19)Footnote 43. J. Thomas Oldham, Divorce, Separation and the Distribution of Property § 1.02[1].

(n20)Footnote 44. J. Thomas Oldham, Divorce, Separation and the Distribution of Property § 1.01. *Lobaugh v. Lobaugh, 753 A.2d 834 (Pa. Super. 2000)* (cohabiting between ex-wife and male friend terminated alimony under a marital property settlement agreement).

(n21)Footnote 45. J. Thomas Oldham, Divorce, Separation and the Distribution of Property § 1.02[5][i]. As Professor Oldham points out, even *Marvin* itself is indicative of this principle. On retrial, the judge found against the plaintiff on all theories presented but nevertheless awarded her $104,000. The award was reversed on appeal because no approved theory of recovery had been established. *Marvin v. Marvin, 122, 176 Cal. Rptr. 555 (1981).*

(n22)Footnote 46. *840 P.2d 1220 (Nev. 1992).*

(n23)Footnote 47. *872 P.2d 1150 (Wash. App. 1994), aff'd in part, rev'd in part by Connell v. Francisco, 898 P.2d 831 (Wash. 1995).*

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CHAPTER 37 MARITAL PROPERTY

4-37 Thompson on Real Property, Thomas Editions § 37.06

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§ 37.06 The Common Law of Marital Property.

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In this section, we summarize the historical background of the law of marital property in common law jurisdictions. This sketch is necessarily very brief and barely scratches the surface. In the following section, the major themes of the modern evolution of marital property law in common law states is presented. The trend of the law in common law states, at least in the areas of divorce and death, quite clearly brings the common law states and the community property states closer together. The reader can get a feeling for the historical background by reading this section. The modern revisions of marital property law have a unifying theme that can be seen in the next section.

"Common law" is not a very precise term; it refers to law made by courts and is, of course, subject to change over time. n48 There is, therefore, no single and authoritative source we can refer to when speaking of the common law, which has spanned many centuries in England and the United States. In this section, the discussion refers to the common law of America during the 19th and 20th centuries. Some changes in the common law during that time period are noted in this section, and in § 37.07 we explore other transitions from the earlier common law doctrine to the modern law of marital property in common law jurisdictions.

The United States has borrowed extensively from England in creating and maintaining a legal system. In some form, the common law of England is a part of the common law of every state but Louisiana. The combination of this English background and American land and circumstances may explain a good deal about the evolution of American law. The early English settlers were accustomed to staking out claims to property and asserting rights of dominion and rights to exclude others from their territory. They were also in need of new territory and found an abundance of it on the American continent. As noted in § 37.04(a), the European settlers were a bit baffled by their encounters with the natives; their befuddlement can be partially explained by the very different views the two cultures had with regard to land and property in general.

Native Americans saw land as a resource to be enjoyed and used by all, or at least by some sort of "community"; it was not necessarily something to be "owned" or appropriated for oneself. English settlers, on the other hand, emphasized the concept of "private property." This term has been defined as "a relationship among human beings such that the so-called

owner can exclude others from certain activities or permit others to engage in those activities and in either case secure the assistance of the law in carrying out his decision." n49 These private property notions of ownership and the power to exclude are not peculiar to England and America, but they are significant features of the common law view of property.

§ 37.06(a) Title and Management of Marital Property Under the Common Law.

It is not necessarily a corollary of "private property" that ownership be defined in individual rather than communal terms. When it comes to the impact of marriage on private property, however, the common law of England and the United States has certainly emphasized individual ownership. Even concurrent ownership arrangements under the common law, such as tenancy in common and joint tenancy, are essentially defined in terms of individual rights. Property accumulated as a result of one's labors would be "owned" by the individual laborer, irrespective of whether that person had a spouse. As has been discussed, this point of view differs substantially from that of the civil law, where ownership of property resulting from a married person's labors is effectively attributed to the "marital community" (laborer *and* spouse) rather than to the individual laborer.

Although "community" or "shared" ownership was not really a part of common law, marriage did have a very significant impact on property rights. The English common law, and the American common law patterned after it, were quite plainly sexist and paternalistic. n50 In marriage, women essentially forfeited most of their property rights. They were unable to own property or to make many contracts. In England, women were disfavored even in inheritance because of the rule of primogeniture, whereby the eldest son and then other sons were heirs, to the exclusion of daughters.

Describing some features of English law before 1800, Professor Chused writes:

> The general outlines of common law coverture rules emerged in the thirteenth century. Upon marriage, the husband gained power and control over his wife's freehold estate for the term of the marriage, or, upon the birth of a child, for the husband's life, and obtained ownership of his wife's personal property. A woman's ability to contract was suspended upon marriage. Equitable exceptions to these rules did not emerge until the late sixteenth century, when antenuptial contracts and trusts for the separate use of the wife appeared. The chancery cases also gave wives power to will their separate estates, donate them to their husbands, sell them to strangers, and perhaps deal with them by contract. Though consent of the husband for the establishment of the separate equitable estate was still necessary, equity courts of the late seventeenth century began to require an "equity to a settlement" to insure some financial safeguards for wives whose husbands sought to make use of assets in a separate estate. This period also saw the emergence of enforceable separation agreements, support decrees for wives leaving their marital home due to the fault of the husband, and cases confirming the ability of married women to execute powers. Not until the mid-eighteenth century did chancery courts take the crucial step of recognizing a separate estate created without the husband's consent. In a related development, the courts began to examine dispositions of a separate estate more carefully to avoid coercion by husbands. The separate estate became subject to the debts of married women by the end of the eighteenth century. n51

Although much of the American common law was modeled after the English common law, Professor Chused points out that many of the problems encountered in the colonies were unique, resulting in legal responses not always consistent with the English law. He notes, for example, evidence that "women, sometimes even married women, received land grants in some of the Colonies." n52 As the colonies developed, however, "English legal models became more important" and the husband's dominance in matters of property prevailed. n53 Even so, Professor Chused reports that "[m]odern legal historians studying coverture are now recognizing that post-war judicial and legislative decisions on the applicability of English law in the state, territorial, and federal systems were not uniform." n54

Although women lost significant property rights in marriage, in practice, married women probably played a more

significant role in matters of property than is sometimes supposed. The evolution of different roles for husbands and wives in the early American family partially explains the sexist law of American jurisdictions. In any event, the effect of marriage on day-to-day property rights of women was significant, as summed up by Professor Chused:

> As the nineteenth century began, real property owned by a married woman in a legal estate was subject to the management and control of her husband. Personal property of a wife became the property of her husband as soon as he reduced it to possession. Where equity courts existed, separate equitable estates could be created for married women's property, but the protections to be provided a wife by the equitable forum had to be specifically delineated in the document creating the estate. n55

Although we have emphasized the individual under the common law, title can, of course, be held in common. One form of common law concurrent estate -- the tenancy by the entirety (or entireties) -- is a form of "marital property" and is limited to husband and wife. n56 The tenancy by the entirety is similar to the joint tenancy with its right of survivorship. n57 To the famous "unities" of the joint tenancy (time, title, interest and possession) was added a fifth unity, that of "husband and wife." n58 Like the common law of marital property generally, the tenancy by the entirety did not originally involve equality between the spouses. Here too the husband had rather exclusive and broad powers of management and control. n59 The husband was entitled to exclusive possession and control, but neither spouse could unilaterally sever or partition the estate during their joint lives. n60 In other words, the husband could not defeat the wife's survivorship rights by a transfer to a third party. The third party's interest would be subject to the survivorship right and would expire if the wife survived the husband. n61

The Hawaii Supreme Court has described the difference between joint tenancy and tenancy by the entirety as follows:

> A joint tenant has a specific, albeit undivided, interest in the property, and if he survives his cotenant he becomes the owner of a larger interest than he had prior to the death of the other joint tenant. But tenants by the entirety are each deemed to be seized of the entirety from the time of the creation of the estate. At common law, this taking of the "whole estate" did not have the real significance that it does today, insofar as the rights of the wife in the property were concerned. For all practical purposes, the wife had no right during coverture to the use and enjoyment and exercise of ownership in the marital estate. All she possessed was her contingent right of survivorship. n62

With the demise of the idea that wife and husband were one legal person came questions about the tenancy by the entirety, which in a sense was based on the unity of husband and wife. Some states did not adopt, or abandoned, the entirety concept. In a fairly complete 1951 survey of entirety law, Dean Oval A. Phipps reported that at that time twenty-nine states did not recognize tenancy by the entirety. n63 More recently, Stoebuck and Whitman have reported that "tenancies by the entirety have been abolished in all but twenty jurisdictions." n64 In most jurisdictions where the tenancy still exists, its characteristics have been modified. Dean Phipps stated in 1951 that only three states -- Massachusetts, Michigan and North Carolina -- still applied the "common law" version of tenancy by the entirety. Spousal equality, however, is now the rule even in states where some form of the common law tenancy by the entirety has survived. n65

Because it is still recognized in half of the common law property jurisdictions of the United States, tenancy by the entirety continues to be an important part of American marital property law. It is a unique brand of "marital property" in the common law property states, but it falls far short of the sharing concepts of community property states. Even though there has generally been a presumption that a conveyance to husband and wife creates a tenancy by the entirety, individual ownership still prevails as to acquisitions other than transfers to wife and husband. Income of either party is therefore not owned by both spouses as tenants by the entirety, but rather belongs to the spouse whose labor most directly produced the income.

The modern direction of the tenancy by the entirety may be represented by a recent Massachusetts case. n66 Discussing

a Massachusetts statute, the court there states:

> [A] tenancy by the entirety remains a unitary title, and the statute simply guarantees each spouse an equal right to the whole. Whatever the husband could do at common law, the wife now may do as well. Each spouse continues to have a [sic] indestructible right of survivorship, and the estate remains inseverable and not subject to voluntary partition. Nor, by virtue of G.L. c. 209, § 1, may a creditor of either seize the principal residence absent the joint signature of the spouses. One spouse, acting alone, cannot convey or encumber the *entire* estate, because any conveyance or encumbrance remains subject to the other's survivorship right. n67

The Massachusetts court also declares that either spouse may convey or encumber his or her interest in property held as tenants by the entirety, although they recognize that this is inconsistent with the rule in some states requiring consent of both spouses for a transfer of any interest in entirety property.

In Missouri, a statutory presumption in favor of tenancy by the entirety arises when "any deposit is made in the name of two persons or the survivor thereof who are husband and wife unless otherwise specified" n68 This presumption may be rebutted only by a showing that is "so strong, clear, positive, unequivocal and definite as to leave no doubt in the trial judge's mind." n69 In a recent case, for example, a signature card to an account declaring title was held as "Joint Tenants with Right of Survivorship" was insufficient to rebut the presumption. The court suggested as adequate the following language: "Joint Tenants with Right of Survivorship and Not as Tenants by the Entirety." n70

COMPUTER-ASSISTED RESEARCH

LEXIS: (tenancy w/1 entirety) or (marital w/1 property) w/30 title or manage! w/50 common law

§ 37.06(b) Disposition of Marital Property at Death Under Early American Common Law.

The doctrine of primogeniture did not take hold in the American colonies or states, and intestate succession laws in the early United States of America "provided for descent to widows and children of both sexes." n71 Testamentary control over property was another matter. As noted in § 37.06(a), women generally lost their title to personal property upon marriage and thus married women had no personalty to will, except with the consent of their husbands. Transfers at death of the married woman's equitable estate in real property could be enforced but were not common. n72 Professor Chused reports that his own research and that of others suggests that women began to write more wills at the beginning of the 19th century, but that they were usually widows or unmarried women bequeathing personal property. n73 Gradually, legislation bestowing various forms of testamentary power upon married women was enacted by the states, and women as well as men acquired and exercised the power to dispose of property at death.

Notwithstanding testamentary power, there is apparently an innate sense that marriage partners should not have absolute control over their property at death, to the exclusion of their spouses. In light of the consequences of marriage on a woman's property rights, some protection of widows was essential. Technically, a spouse was not an heir, but the common law did protect widows through "dower." This protection was modest, however, in light of the economic position and legal incapacity of married women. Upon her husband's death, a woman was entitled to a life estate in one-third of all land in which the husband had an estate of inheritance any time during the marriage. Similar protection evolved in favor of the husband who survived his wife. Provided that a child was born during the marriage, a surviving husband would be entitled to "curtesy," which amounted to a life estate in all of the wife's real and personal property.

§ 37.06(c) Disposition of Marital Property at Divorce Under Early American Common Law.

We have noted that in common law states, other than legal disability of the wife, marriage had almost no effect on property rights during the marriage. Title determined ownership and gender determined control. The logical extension

of the individual title theory of the common law in a divorce setting is that each party takes her or his property and the two go their separate ways. This is, in fact, an accurate description of the common law of marital property at divorce. "[F]or purposes of property division at divorce, spouses were treated like unmarried cohabitants." n74 Property accumulated by the spouses during the marriage therefore went with the accumulating partner, and that owner's spouse had no claim on the property. This was, of course, a serious problem for non-accumulating spouses, who, in a male-dominated work-world, were usually women.

Marriage was not entirely meaningless insofar as property rights were concerned. Consistent with the paternalistic nature of the common law, a system developed whereby a husband might continue to have an obligation to support his wife and children after divorce through the payment of "alimony" and "child support." In earlier times, divorce was routinely based on fault, and if the wife was at fault, even the alimony obligation might be nullified. n75

The common law title system "had disastrous social consequences for divorced women." n76 It is no wonder that alimony was not seen as an adequate answer to marital property rights upon divorce. As discussed in § 37.07(c), virtually every common law state has moved away from total reliance on alimony for appropriate distribution of property rights at divorce.

FOOTNOTES:

(n1)Footnote 48. By definition, the "common law" is always an evolving, dynamic force. It is therefore peculiar that we speak so often of the "common law" in terms that seem to suggest a static quality. Professor Richard H. Chused has made this same point: "Authors often speak of the common law without reference to its modification over time." Richard H. Chused, *Married Women's Property Law: 1800-1850, 71 Geo. L.J. 1359, 1386 n.103 (1983).* In addition to the American common law of the 1800's and 1900's, some background material from England and from earlier times is included here. Professor Chused's article contains many excellent insights on this subject and is relied on for this brief historical backdrop.

(n2)Footnote 49. Felix Cohen, *Dialogue on Private Property, 9 Rutgers L. Rev. 357, 373 (1954).*

(n3)Footnote 50. One of the most striking judicial comments espousing this point of view is the following:

> Man is, or should be, woman's protector and defender. The natural and proper timidity and delicacy which belongs to the female sex evidently unfits it for many of the occupations of civil life. The constitution of the family organization, which is founded in the divine ordinance, as well as in the nature of things, indicates the domestic sphere as that which properly belongs to the domain and functions of womanhood... . The paramount destiny and mission of woman are to fulfil the noble and benign offices of wife and mother. This is the law of the Creator.

Bradwell v. Illinois, 83 U.S. (1 Wall.) 130, 141 (1873) (Bradley, J., concurring). In terms of management and control, if not title, the "individual" upon whom common law property rights were bestowed was the husband, generally to the exclusion of the wife. In a sense, the common law required that property management and control be lodged in individuals and not in couples; single men and women could control property but in the event of marriage, control was to be exercised still by an individual, the husband. As is discussed in § 37.12, the American community property states were not originally much different in this respect. There too, the husband exercised considerable control over the marital property, often to the exclusion of the wife. There was, however, a fundamental difference between the way each system viewed "ownership" of or "title" to marital property. In community property states both husbands and wives were generally considered owners of the property acquired during the marriage.

(n4)Footnote 51. Richard H. Chused, *Married Women's Property Law: 1800-1850, 71 Geo. L.J. 1359, 1386 (1983)* (footnotes omitted).

(n5)Footnote 52. Richard H. Chused, *Married Women's Property Law: 1800-1850, 71 Geo. L.J. 1359, 1389 (1983).*

(n6)Footnote 53. Richard H. Chused, *Married Women's Property Law: 1800-1850, 71 Geo. L.J. 1359, 1390 (1983).*

(n7)Footnote 54. Richard H. Chused, *Married Women's Property Law: 1800-1850, 71 Geo. L.J. 1359, 1391 (1983).*

(n8)Footnote 55. *Id. at 1361.* "Eventually, the idea developed that the best interests of women and society in general would be served by the establishment of some system whereby women could control and convey their own property. To that end, the English courts of equity developed the concept of a wife's *separate estate* which softened the harsh treatment of married women at common law." Joyce Hens Green, et al., Dissolution of Marriage § 10.02 at 361 (1986).

(n9)Footnote 56. The tenancy by the entirety is considered in more detail in chapter 33 of this treatise.

(n10)Footnote 57. The right of survivorship simply means that as one joint tenant dies, surviving joint tenants take the deceased tenant's share of the joint tenancy, rather than having that share pass to the decedent's heirs or under the decedent's will.

(n11)Footnote 58. It is perhaps more accurate to say that because the common law viewed husband and wife as one legal person, any transfer to a husband and wife would effectively be a transfer to one person.

(n12)Footnote 59. Oval A. Phipps, *Tenancy by Entireties, 25 Temp. L.Q. 24 (1951).*

(n13)Footnote 60. *Coraccio v. Lowell Five Cents Savings Bank, 612 N.E.2d 650 (Mass. 1993).*

(n14)Footnote 61. Oval A. Phipps, *Tenancy by Entireties, 25 Temp. L.Q. 24, 26 (1951).* Students in basic property classes are often a bit mystified when they learn that a joint tenant's right of survivorship can be defeated unilaterally by another joint tenant by a simple conveyance to a third party. Such an event converts a joint tenancy into a tenancy in common. One explanation of this consequence is that one or more of the traditional "four unities" of joint tenancy is destroyed by the conveyance. The students' reaction, however, is probably grounded in some common sense about natural expectations of people and the easy defeasance of survivorship rights under joint tenancy may well be ill-advised law. In this respect, the tenancy by the entireties, with rules against partition and indefeasible survivorship rights may make more sense, or at least more closely coincide with expectations.

(n15)Footnote 62. *Sawada v. Endo, 561 P.2d 1291, 1295 (Haw. 1977).*

(n16)Footnote 63. Oval A. Phipps, *Tenancy by Entireties, 25 Temp. L.Q. 24, 32 (1951).* Dean Phipps elaborates by categorizing the states as follows: In the eight original community property states (Arizona, California, Idaho, Louisiana, Nevada, New Mexico, Texas and Washington) the tenancy was never recognized because it was not consistent with community property; in Connecticut, Nebraska and Ohio, the tenancy was inconsistent with judicial interpretations of the common law; in fifteen states (Alabama, Colorado, Georgia, Illinois, Iowa, Kansas, Maine, Minnesota, Montana, New Hampshire, North Dakota, South Carolina, South Dakota, West Virginia and Wisconsin) the tenancy was abrogated by the Married Women's Property Acts and, in some cases, other legislation; and in three states (Mississippi, Oklahoma and Utah) the tenancy was treated by statute or by the courts as a joint tenancy.

(n17)Footnote 64. William B. Stoebuck and Dale A. Whitman, The Law of Property 193 3d ed. (2000). In an interesting discrepancy, these authors report that Ohio tenancies by the entirety created and recorded prior to April 4, 1985, are preserved by ohio Rev. Code § 5302.21, *id.* n.3, whereas Dean Phipps listed Ohio as one of the states where tenancy by the entirety never existed. Oval A. Phipps, *Tenancy by Entireties, 25 Temp. L.Q. 24, 32 (1951).* Hawaii,

which was admitted to the union after publication of Dean Phipps's article, is not mentioned among the twenty jurisdictions listed but it too still recognizes the tenancy by the entireties. *Sawada v. Endo, 561 P.2d 1291 (Haw. 1977).*

(n18)Footnote 65. In *Coraccio v. Lowell Five Cents Savings Bank, 612 N.E.2d 650, 654 (Mass. 1993),* the Massachusetts Supreme Judicial Court noted this change:

> In an attempt to equalize the rights of men and women holding property as tenants by the entirety, the Legislature adopted G.L. 209, § 1, which provides, in relevant part: "A husband and wife shall be equally entitled to the rents, products, income or profits and to the control, management and possession of property held by them as tenants by the entirety."

(n19)Footnote 66. *Id.*

(n20)Footnote 67. *Coraccio v. Lowell Five Cents Savings Bank, 612 N.E.2d 650, 654 (Mass. 1993).*

(n21)Footnote 68. § 362.470.5 R.S. Mo. 1994.

(n22)Footnote 69. *Scott v. Flynn, 946 S.W.2d 248, 251 (Mo. Ct. App. 1997).*

(n23)Footnote 70. *Scott v. Flynn, 946 S.W.2d 248, 251 (Mo. Ct. App. 1997).*

(n24)Footnote 71. Richard H. Chused, *Married Women's Property Law: 1800-1850, 71 Geo. L.J. 1359, 1366 (1983)* (citations omitted).

(n25)Footnote 72. Richard H. Chused, *Married Women's Property Law: 1800-1850, 71 Geo. L.J. 1359, 1366, n.27 (1983).*

(n26)Footnote 73. Richard H. Chused, *Married Women's Property Law: 1800-1850, 71 Geo. L.J. 1359, 1366, n.27 (1983).*

(n27)Footnote 74. J. Thomas Oldham, Divorce, Separation and the DIstribution of Property § 3.02 at 3-3 (1993).

(n28)Footnote 75. J. Thomas Oldham, Divorce, Separation and the DIstribution of Property § 3.02 at 3-3-3-5 (1993).

(n29)Footnote 76. *Id.* at 3-4. Oldham continues: "At divorce, the wife frequently had no property, no earning capacity, and possibly the custody of minor children. Alimony and child support could be awarded, but collection was difficult, particularly if the husband left the state."

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CHAPTER 37 MARITAL PROPERTY

4-37 Thompson on Real Property, Thomas Editions § 37.07

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§ 37.07 The Transition from "Individualism" to "Community" in Common Law Jurisdictions.

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The foregoing discussion makes quite clear some of the deficiencies of the early common law as a means of establishing equitable principles of marital property. The title of this section suggests that common law jurisdictions are responding to these deficiencies by moving closer to community property principles of marital property. This is probably indisputable. This does not mean that the differences between the two systems have disappeared, but they are quite certainly shrinking. This is particularly true with respect to disposition of property at death and divorce.

The nature of this evolution is reflected in the most recent version of the Uniform Probate Code and is summarized in the comment to Part 2 of Article II of the Code:

> The partnership theory of marriage, sometimes also called the marital-sharing theory, is stated in various ways. Sometimes it is thought of "as an expression of the presumed intent of husbands and wives to pool their fortunes on an equal basis, share and share alike." M. Glendon, The Transformation of Family Law 131 (1989). Under this approach, the economic rights of each spouse are seen as deriving from an unspoken marital bargain under which the partners agree that each is to enjoy a half interest in the fruits of the marriage, i.e., in the property nominally acquired by and titled in the sole name of either partner during the marriage (other than in property acquired by gift or inheritance). A decedent who disinherits his or her surviving spouse is seen as having reneged on the bargain. Sometimes the theory is expressed in restitutionary terms, a return-of-contribution notion. Under this approach, the law grants each spouse an entitlement to compensation for non-monetary contributions to the marital enterprise, as "a recognition of the activity of one spouse in the home and to compensate not only for this activity but for opportunities lost."
>
> *Id.*
>
> No matter how the rationale is expressed, it is sometimes thought that the community-property system, including that version of community law promulgated in the Uniform Marital Property Act, recognizes the partnership theory, but that the common law system denies it. In the ongoing marriage, it

> is true that the basic principle in the common law (title-based) states is that marital status does not affect the ownership of property. The regime is one of separate property. Each spouse owns all that he or she earns. By contrast, in the community-property states, each spouse acquires an ownership interest in half the property the other earns during the marriage. By granting each spouse *upon acquisition* an immediate half interest in the earnings of the other, the community-property regimes directly recognize that the couple's enterprise is in essence collaborative.
>
> The common law states, however, also give effect or purport to give effect to the partnership theory when a marriage is dissolved by divorce. If the marriage ends in divorce, a spouse who sacrificed his or her financial-earning opportunities to contribute so-called domestic services to the marital enterprise (such as child-rearing and homemaking) stands to be recompensed. All states now follow the equitable-distribution system upon divorce, under which "broad discretion [is given to] trial courts to assign to either spouse property acquired during the marriage, irrespective of title, taking into account the circumstances of the particular case and recognizing the value of the contributions of a nonworking spouse or homemaker to the acquisition of that property. Simply stated, the system of equitable distribution views marriage as essentially a shared enterprise or joint undertaking in the nature of a partnership to which both spouses contribute -- directly and indirectly, financially and nonfinancially -- the fruits of which are distributable at divorce." J. Gregory, The Law of Equitable Distribution P 1.03, at p. 1-6 (1989). n77

In this section we explore briefly the modern "common law" of marital property in several specific areas: (1) Ownership during marriage; (2) Disposition of marital property at death in modern common law jurisdictions; and (3) Disposition of marital property at divorce in modern common law jurisdictions.

COMPUTER-ASSISTED RESEARCH

LEXIS: common law w/50 marital w/1 property w/30 partnership w/1 theory

§ 37.07(a) Married Women's Property Acts and Marital Property Ownership During Marriage in Modern Common Law Jurisdictions.

Early attempts to remedy the legal abyss in which married women found themselves occurred in the mid-1800's. It should be no surprise, however, that patterns of sexism and paternalism do not readily and easily subside or disappear. The process of legislation and interpretation sometimes works slowly in remedying ills, and even 150 years later, the attempt to eliminate gender discrimination on a broad scale has not yet fully succeeded. Even so, significant progress has been made.

Early statutes in the states are typically and quite directly referred to as "Married Women's Property Acts." Their purpose was quite simply the elimination of the common law disabilities of married women. Professor Clark summarizes the terms and ultimate effect of these acts as follows:

> Broadly speaking then, the Married Women's Property Acts have given the married woman the right to acquire, own and transfer all kinds of property, to make contracts, to engage in business or be employed and keep her own earnings, and to sue or be sued. She may also make a will, may testify in civil or criminal suits ... and she is fully responsible for her own criminal and tortious conduct. n78

Married Women's Property Acts did not, of course, address all of the gender inequality in American society and in the common law system of marital property. A married woman's legal right to acquire and own property is of less consequence than it might be, because the earning power of women may still lag behind that of men, and in common law states, a husband's income is owned solely by the husband. Even so, the Acts were a very important step, giving the

married woman at least the right to own property she owned before the marriage and property she acquires during the marriage.

In a sense, little more need be said about common law marital property during the marriage. Once the inequalities of the common law are rectified, we are still back to individual ownership by the spouses during the marriage; the effects of the marriage on property, during the marriage, are minimal. A few additional points are worth mentioning.

One form of common law marital property already discussed is tenancy by the entirety. n79 As noted in § 37.06(a), this form of marital ownership is still in force in a number of states, but it is by no means comparable to community property.

Transfers between spouses are, of course, permitted. It is often said, however, that there is a confidential relationship between wife and husband, and that relationship can lead to careful scrutiny of transactions between spouses. n80

It is in the area of ownership during the marriage that the common law states and the community property states still have the most fundamental differences. By its very nature, the common law addresses problems as they arise, and those jurisdictions have accordingly turned their attention primarily to issues relating to breakup of a marriage through either divorce or death. n81 Changes have certainly occurred in common law marital property during the marriage but the basic premise remains individual, rather than shared, ownership during the marriage. Whereas the common law originally recognized only one married individual -- the husband -- as the repository of marital property for many purposes, modern law in common law states recognizes both the husband and wife. This can be contrasted with community property systems in which property earned and accumulated during the marriage is generally not "hers" or "his" but "theirs." Classifying property in this way essentially addresses some of the fairness issues encountered with common law marital property, but does so with a different concept of ownership during the marriage.

COMPUTER-ASSISTED RESEARCH

LEXIS: common law w/50 married women's property acts w/30 ownership w/5 property

§ 37.07(b) The Uniform Probate Code and Marital Property at Death in Modern Common Law Jurisdictions. n82

One apparent deficiency in the common law of marital property concerns disposition of marital property at the death of one of the spouses. With the movement to gender equality, both spouses have relatively full testamentary power in modern common law jurisdictions. Keep in mind, however, the impact of individual ownership during the marriage on the meaning of that power. Once again, in a single wage-earner family, title may give one spouse almost exclusive testamentary control over the property of the marriage. Again, contrast this with the community property system, in which title to all earnings during the marriage is shared equally by the spouses at the outset.

Protection of families has always been a high priority for American policymakers, and this has been reflected in many ways in our law, including the treatment of marital property at the death of one spouse. The common law response to the problems created by the individual title model of marital property has been briefly noted at § 37.06(b). That response has been judged not to provide sufficient protection for surviving spouses.

One's spouse is now routinely an heir under laws of intestate succession. The surviving spouse will receive a substantial share of the decedent spouse's estate if the decedent did not have an effective will. If a will purports to "disinherit" a spouse, however, additional protection is necessary. Most states have abolished common law dower and curtesy and have replaced them with a statutory "forced share" or "elective share" in the decedent spouse's estate in favor of the surviving spouse. These statutes have the same basic objective as dower and curtesy but are generally regarded as more effective in carrying out policies of family protection. The statutes are designed to prevent a wife or husband from

totally "disinheriting" an unwilling spouse and to provide financial support for the surviving spouse in a realistic and equitable way. n83 Dower accomplished the first, less ambitious objective, at least in theory, but was not as effective in carrying out the second.

The following statute is an example of a modern elective share statute:

> 1. When a married person dies testate as to any part of his estate, a right of election is given to the surviving spouse solely under the limitations and conditions herein stated:
>
> (1) The surviving spouse, upon election to take against the will, shall receive in addition to exempt property and the allowance under section 474.260 one-half of the estate, subject to the payment of claims, if there are no lineal descendants of the testator; or, if there are lineal descendants of the testator, the surviving spouse shall receive one-third of the estate subject to the payment of claims;
>
> (2) When a surviving spouse elects to take against the will he shall be deemed to take by descent, as a modified share, such part of the estate as comes to him under the provisions of this section, and shall take nothing under the will;
>
> (3) Whenever there is an effective election to take against a will which provides for benefits to accrue upon the death of the surviving spouse, the election has the same effect as to the benefits as if the surviving spouse had predeceased the testator, unless the will otherwise provides. n84

Dower was limited in several significant ways. The surviving spouse was entitled only to a life estate, and then only in *real* property in which the decedent spouse owned an inheritable interest during the marriage. In many cases, such an interest would provide little protection. Statutes such as that just quoted address this problem by expanding the surviving spouse's share temporally (making it a fee simple rather than a life estate) and by extending it to reach personal as well as real property.

The statutory shares have no doubt been an improvement over dower. n85 Even so, because of a sense that community property concepts provide a more equitable solution to disposition of marital property at the death of one spouse, common law jurisdictions may yet move further in the direction of community property states. This trend was discussed at the beginning of this section. Its potential influence on disposition of marital property at death is evident in the following additional passage from the comment at the beginning of Part 2 of the revised version of Article II of the Uniform Probate Code:

> The main purpose of the revisions is to bring elective-share law into line with the contemporary view of marriage as an economic partnership. The economic partnership theory of marriage is already implemented under the equitable-distribution system applied in both the common law and community-property states when a marriage ends in divorce. When a marriage ends in death, that theory is also already implemented under the community-property system and under the system promulgated in the Uniform Marital Property Act. In the common law states, however, elective-share law has not caught up to the partnership theory of marriage.
>
> The general effect of implementing the partnership theory in elective-share law is to increase the entitlement of a surviving spouse in a long-term marriage in cases in which the marital assets were disproportionately titled in the decedent's name; and to decrease or even eliminate the entitlement of a surviving spouse in a long-term marriage in cases in which the marital assets were more or less equally titled or disproportionately titled in the surviving spouse's name. n86

Under the specific provisions of the Uniform Probate Code, the elective share is designed to approximate the natural course of events in a community property jurisdiction. This is accomplished by establishing an elective share that is

"equal to the value of the elective-share percentage of the augmented estate, determined by the length of time the spouse and the decedent were married to each other," n87 in accordance with a graduated scale provided in the statute and reproduced here:

If the decedent and the spouse were married to each other:	The elective-share percentage is:
Less than 1 year.....	Supplemental Amount Only.
1 year but less than 2 years	3% of the augmented estate.
2 years but less than 3 years	6% of the augmented estate.
3 years but less than 4 years.....	9% of the augmented estate.
4 years but less than 5 years.....	12% of the augmented estate.
5 years but less than 6 years.....	15% of the augmented estate.
6 years but less than 7 years.....	18% of the augmented estate.
7 years but less than 8 years.....	21% of the augmented estate.
8 years but less than 9 years.....	24% of the augmented estate.
9 years but less than 10 years.....	27% of the augmented estate.
10 years but less than 11 years.....	30% of the augmented estate.
11 years but less than 12 years.....	34% of the augmented estate.
12 years but less than 13 years.....	38% of the augmented estate.
13 years but less than 14 years.....	42% of the augmented estate.
14 years but less than 15 years.....	46% of the augmented estate.
15 years or more.....	50% of the augmented estate. n88

This graduated schedule defining the elective share of a surviving spouse in the decedent spouse's estate in effect resembles the natural course of events in community property states. The relative amount of community property naturally increases as the duration of the marriage increases. The property brought into a marriage in a community property state is, by definition, separate property. n89 As the parties remain married year after year, the percentage of their assets that would be classified as community property gradually increases. Assuming that 100% of a couple's assets are community property at the death of the first to die, 50% of those assets would simply not be a part of the decedent's estate but rather would be owned by the surviving spouse. In this respect, the Uniform Probate Code elective share provision would replicate the effect of community property. Whether these provisions of the Uniform Probate Code represent a trend that will make its way into the law of many states is yet to be seen. The evolution of marital property law in the area of divorce, discussed in § 37.07(c), suggests that modifications similar to those proposed in the Uniform Probate Code may eventually be adopted.

COMPUTER-ASSISTED RESEARCH

LEXIS: common law w/50 marital w/1 property w/30 (death or die! or uniform probate code)

§ 37.07(c) Equitable Distribution Upon Dissolution of Marriage in Modern Common Law Jurisdictions.

Common law states traditionally "distributed assets upon divorce based on title." n90 Under that practice, if there is only one "working" spouse, and the marriage dissolves, the "non-working" spouse could be left penniless. In this fashion, the combination of individual ownership under the common law and a work-world dominated by men might lead to significant inequities for married women upon divorce.

A majority of policymakers in common law property states have almost uniformly concluded that the common law title system does not provide an appropriate basis for division of property upon divorce. The basic idea that has displaced the original common law is essentially very simple: At dissolution of a marriage, n91 property of the spouses, or at least a substantial part of it, should be equitably divided between the spouses. n92 "Title," in other words, should not control distribution of all property of spouses in the event of divorce. n93

"Equitable distribution has its historical roots in the community property law of Mexico, France, and Spain." n94 Widespread adoption of "equitable distribution" in common law property states suggests that the common law property states have concluded that community property is in some ways superior to the common law as a system of marital property ownership. In community property states, on the other hand, title to property earned during the marriage is shared by wife and husband, regardless of which spouse "earned" the property. This more or less assures an equitable distribution of title to marital assets at any time during the marriage. Inherent in that system is recognition of the fact that property earned during marriage is in reality the product of both spouses. n95

The influence of community property on equitable distribution in the common law property states is evident in the common law concept of "marital property." In a few states, courts are given authority to divide equitably *all* of either or both spouses' property. n96 In most states, however, the property subject to equitable distribution, often referred to as marital property, is essentially equivalent to community property. The line drawn is generally the same as the line between community and separate property. All assets acquired before marriage and assets acquired by gift, devise or inheritance ("separate property" in community property states) during marriage, are generally excluded from equitable division and must be allotted to the appropriate "owner." n97 In a few states, this same general principle applies but courts are given authority under some circumstances to divide equitably the "separate property" as well as the marital property. n98

Many equitable distribution statutes contain guidelines or factors the courts are to consider in exercising their discretion. n99 There is a good amount of common ground among the states and the guidelines to be considered include the following:

Age

Health

Station in life

Occupation

Amount of income

Vocational skills

Needs

Provisions for custody of children

Contribution, including services as homemaker, in acquisition and protection of assets

Dissipation of property

Income tax consequences

Cause for dissolution

Debts

Obligations and rights from prior marriage

Contribution of one to the education or earning power of the other

Antenuptial contracts

Family ties and obligations

Separate property retirement rights

COMPUTER-ASSISTED RESEARCH

LEXIS: common law w/50 divorce! w/30 equit! w/1 distribution or divide!

§ 37.07(d) The Uniform Marital Property Act.

We have seen the development from the relatively crude protections provided by dower and curtesy to more thorough statutory shares designed to recognize the fact that marriage is like a partnership and to protect more fully the property interests of one spouse upon the death of the other. The common law jurisdictions have also enthusiastically adopted a principle of equitable distribution of property when a breakup of marriage occurs. Thus, in two of the situations where marital property law matters most, the common law has, in effect, moved toward the long-established traditions of community property. In retrospect, it is a bit ironic that the adverse effects of individual ownership under the common law have been addressed with relatively little attention to the fundamental reasons for those effects. In a sense, this development is no doubt due to the case by case course of the common law.

In noting the transition from common law individualism to the sharing ideal, we do not necessarily suggest that community property will take over as the dominant American system of marital property. In defining marital property rights during the marriage, the common law, individualist tradition of property ownership is firmly entrenched in most states. Nevertheless, in 1983, the National Conference of Commissioners on Uniform State Laws approved a Uniform Marital Property Act which would have the states incorporate the sharing principle of community property into property ownership during marriage as well as when marriage ends. Wisconsin has enacted a form of this Act. It does not seem likely that many other states will follow Wisconsin's example in the near future.

Because the Commissioners have set forth so well the argument for adoption of the Uniform Marital Property Act, we include here a lengthy excerpt from the Act's Prefatory Note:

> The institution of property is the embodiment of accidents, events, and the wisdom of the past. It is before us as clay into which we can introduce the coloration and configuration representing our wisdom. How great, how useful this new ingredient may be will largely determine the future happiness, and perhaps the continued existence of our society. Powell, The Law of Real Property (Rohan 4th ed. 1977).
>
> Marriages have beginnings and endings. For their participants, the period between these points *is* the marriage. This Act is a property law. It functions to recognize the respective contributions made by mean [sic] and women during a marriage. It discharges that function by raising those contributions to the level of defined, shared and enforceable property rights at the time the contributions are made.

The challenge to create such a framework is not new. Basic differences in approaches to marital economics go back for many centuries. *See* Charles Donahue, Jr., *What Causes Fundamental Legal Ideas? Marital Property in England and France in the Thirteenth Century, 78 Mich. L. Rev. 59 (1979);* Judith T. Younger, *Marital Regimes: A Story of Compromise and Demoralization, Together with Criticism and Suggestions for Reform, 67 Cornell L. Rev. 45 (1981).* In modern times the challenge was well articulated twenty years ago by the Report of the Committee on Civil and Political Rights to the President's Commission on the Status of Women. In 1963 that Report said:

Marriage is a partnership to which each spouse makes a different but equally important contribution. This fact has become increasingly recognized in the realities of American family living. While the laws of other countries have reflected this trend, family laws in the United States have lagged behind. Accordingly, the Committee concludes that during marriage each spouse should have a legally defined and substantial right in the earnings of the other spouse and in the real and personal property acquired as a result of such earnings, as well as in the management of such earnings and property. Such right should survive the marriage and be legally recognized in the event of its termination by annulment, divorce, or death. This policy should be appropriately implemented by legislation which would safeguard either spouse against improper alienation of property by the other.

In the twenty years after those words much has changed regarding the institution of marriage, even though the challenge has not been fully met.

A prime example is the very demography of marriage and its terminal events. In 1963, 66.31% of all terminated marriages ended by death and 33.69% by divorce. By 1979 only 42.77% terminated by death, while 57.23% ended by dissolution. For half a decade the ratio of marriages to dissolution has been about two to one. The latest figures were 2,438,000 marriages and 1,219,000 divorces in 1981. The two to one ratio contrasts with 1930, when there were six marriages to every dissolution.

Statistics are not the only evidence of dramatic change. Statehouses have reflected it. Beginning with California at the end of the 60's and promulgation of the Uniform Marriage and Divorce Act in the early 70's, no-fault divorce has swept the statute books. In 1983 Illinois and South Dakota stand alone in adhering to fault-based divorce, and efforts to change to no-fault continue in Illinois. "Equitable distribution" of property became the handmaiden of no-fault divorce in the Uniform Marriage and Divorce Act and in most other reforms. Forty-one traditional common law jurisdictions now use some form of property division as a principal means of resolving economic dilemmas on dissolution. Adding the eight community property jurisdictions in which such a division is an inherent aspect of spousal property rights yields a total of 49. The one state missing on the property division roster is Mississippi. These property division developments address and typically adopt sharing concepts and bring many common law jurisdictions close to a deferred community property approach to divorce. Elizabeth A. Cheadle, *The Development of Sharing Principles in Common Law Marital Property States, 28 U.C.L.A. L. Rev. 1269 (1981); See also* Younger, *op. cit., supra*.

The ferment of change has not been limited to dissolution. The Uniform Probate Code was promulgated in 1969. Fourteen states are now listed as Code states or as substantially conforming states. Article II of the Code contains the concept of an augmented estate. It borrows heavily from New York's 1966 version of the idea. It is an advance on traditional forced-share procedures, operating by the creation of a larger universe of property against which a spousal right of election is exercisable. It accomplishes this by penetrating the veil of title and other techniques which have developed to insulate assets from the reach of forced-share statutes. In the official comment to the Code the augmented estate provisions are described as preventing arrangements by the owner of wealth which would transmit property to others than a surviving spouse by means other than probate for the deliberate purpose of defeating the rights of a surviving spouse.

It is worth noting that the Code's provisions, as well as conventional forced-share provisions in common law states, leave a gap. They transform assets into a sharing mode in a meaningful way only when the "have-not" spouse survives. If the sequence of death is the opposite, the have-not spouse has no power to dispose of assets over which he or she has no title in any common law jurisdiction.

The long-arm augmented estate provisions of the Uniform Probate Code may not go far enough to accommodate the perception of most laymen. A significant empirical study published in 1978 indicates a widespread public preference for a distribution of an *entire* intestate estate to a surviving spouse, whether or not there are surviving children. Fellows et al., *Public Attitudes About Distribution at Death and Intestate Succession Laws in the United States*, 1978 Am. B. Found. Research J. 319.

Obviously the "everything to each other" mode is confined to dispositions at death. An imposing body of case law testifies to a paradigm shift in this view when the question of "Who should get what and when?" is asked at a dissolution! And it is the equitable distribution court's demanding role in the judicial process to monitor and referee the ensuing contests in the divorce courts. Burgeoning advance sheets clearly indicate just how difficult the referee's job is when it must be done well over a million times a year!

In 1981 yet another shift was added to the catalog of change. After years of debate, tax-free interspousal transfers entered the stage under the auspices of the Economic Recovery Tax Act of 1981. Wall Street Journal columnist Vermont Royster furnished a characteristically succinct summary of it all:

The marriage ceremony may say you two are now one and even include that phrase about with all my worldly goods I thee endow. The Internal Revenue Service has always taken a different view. It's wanted its share.

... wait until January 1, 1982, and ... after that magic date you can share with your spouse as much as you please of those worldly goods ... without so much as a by-your-leave from the federal tax man. In 1982 no more gift and estate taxes between spouses." Wall St. J., Sept. 2, 1981.

Heavy economic responsibilities of married couples and methods of coping with them point to yet another trendline of the last few decades. It is that of the two-worker households in which sharing the burden of producing family income is becoming routine. In more than half of American marriages with two spouses present there is a working wife and the number is growing. When there are children, the ratio is even higher. In more than two-thirds of current upper income marriages ($24,000 or more) there are two wage earners. Sharing of responsibility for wages from *outside* the home is altering traditional spousal roles and particularly economic roles, rights, and responsibilities.

Thus the stage is set by substantial social and legislative change in the duration of marriages and in the economics of the termination of marriages by dissolution and death.

The Uniform Marital Property Act makes its appearance on that stage to offer a means of establishing present shared property rights of spouses *during* the marriage. This approach is bottomed on two propositions. The first is creation of an immediate sharing mode of ownership. The second proposition is that the sharing mode during marriage is an ownership right already in existence at the end of a marriage. Thus recognition and perfection of shared and vested ownership rights in marital property are in place at divorce or death. They do not have to come to fruition as a result of a court-ordained and possibly adversary "division" or by a statutorily-sanctioned "transfer."

Is the Uniform Marital Property Act a panacea for the malaise of marriage? Will it lower the divorce rate? Save the family? Eliminate marital violence? Be fully comprehensible? Be welcomed by all? Lower the cost of the family house? Create better parents? Solve child abuse? Avoid probate? Lower the

cost of death or divorce?

Perhaps some but certainly not all of the above. If it does affect any of those considerations, it will take time and the process will be subtle. The disintegrating forces operating on marriages and families are many and complex. It would be a bold claim to suggest that any legislation could fully identify and rectify the problems in such an area. But the obvious and apparent existence of problems in the economic area of marriage certainly justifies an effort to identify and rectify them. The Uniform Marital Property Act is precisely such an effort. n100

COMPUTER-ASSISTED RESEARCH

LEXIS: uniform marital property act

FOOTNOTES:
(n1)Footnote 77. Unif. Prob. Code Rev. Art. II, Pt. 2, cmt. 8 U.L.A. 86-87.

(n2)Footnote 78. Homer H. Clark, Jr., The Law of Domestic Relations in the United States 290 (2d student ed. 1988) (footnotes omitted). Professor Clark includes in a footnote a comprehensive list of Married Women's Property Acts.

(n3)Footnote 79. *See* § 37.06(a), *supra*. Tenancy by the entirety is discussed in more detail in chapter 33 of this treatise.

(n4)Footnote 80. *See* § 37.12(b), *infra*, for discussion of duties between spouses in community property states. Representative of cases in common law states are *Erdmann v. Erdmann, 261 P.2d 367 (Mont. 1953), O'Quin v. O'Quin, 230 S.W.2d 16 (Ark. 1950); Shenk v. Shenk, 571 S.E.2d 896 (Va. App. 2002)* (a written assignment executed by husband and wife constituted a marital agreement and converted marital property into the wife's separate property). *In re Marriage of Gordon, 540 N.W.2d 289 (Iowa App. 1995)* (lot purchased with funds inherited by husband was awarded to wife, along with marital home); *Schmidlapp v. Schmidlapp, 632 N.Y.S.2d 593 (1995)* (unimproved parcel of land had changed from wife's separate property to marital property); *Stanley v. Stanley, 454 S.E.2d 701 (N.C. App. 1995)* (quitclaim deed for marital property land did not withdraw that property from the marital estate); *Harrison v. Harrison, 912 S.W.2d 124 (Tenn. 1996)* (property's increase in value was not marital property because the wife had not substantially contributed to the preservation and depreciation of the property); *Beard v. Beard, 758 N.E.2d 1019 (Ind. Ct. App. 2001)* (parcels of land husband transferred to wife prior to divorce were considered marital property); *Sampson v. Sampson, 14 P.3d 272 (Alaska 2000)* (inherited property may be conveyed to the marital estate when that is the intent of the owner and conduct demonstrates that intent).

(n5)Footnote 81. *See* § 37.07(b) and § 37.07(c) for discussion of these issues.

(n6)Footnote 82. This subject is covered in more detail in chapters 88 and 89 of this treatise. The purpose of this brief treatment is simply to place the subject in the context of marital property.

(n7)Footnote 83. Professor Emery has suggested that jurisdictions use two policy justifications for their protective elective share provisions:

First, community property states treat the marriage as a partnership and recognize that there is often a division of labor between the husband and wife... . These jurisdictions formally recognize the contribution of both spouses by treating the income of either partner as property of the partnership, owned equally by husband and wife.

The second justification is based upon the view that the spouse that participates in the income-producing labor has a duty to support the family. Jurisdictions following this theory have

traditionally determined that this obligation of support should survive the termination of the marriage by death of the spouse as well as by divorce.

Alfred C. Emery, *The Utah Uniform Probate Code -- Protection of the Surviving Spouse -- The Elective Share, 1976 Utah L. Rev. 771, 772. See also Aragon v. Estate of Snyder, 715 A.2d 1045, 1047 (N.J. Super. Ct. App. Div. 1998)* (object of the elective share statute is the prohibition of the disinheriting of a spouse in need of continuous support); *In re Estate of Zimmerman, 579 N.W.2d 591, 595 (N.D. 1998), aff'd in part, rev'd in part, 633 N.W. 2d 594 (N.D. 2001)* (the goal of an elective share of the augmented estate is to protect the surviving spouse from deprivation or destitution by disinheritance); *In re Brand, 251 B.R. 912 (Bankr. S.D. Fla. 2000)* (elective share is for express purpose of caring for surviving spouse and not to augment estate for benefit of heirs); *In re Gervais, 770 A.2d 877 (R.I. 2001)* (purpose of elective share statute was to remedy the inadequate protection afforded by dower); *Sheldon v. Sheldon, 987 P.2d 1229 (Or. Ct. App. 1999)* (statutory right to elective share expresses important public policy that cannot be lightly disregarded).

(n8)Footnote 84. Mo. Ann. Stat. § 474.160 (Vernon 1992).

(n9)Footnote 85. *Deutsch v. Commissioner of Internal Revenue, T.C. Memo 1997-470 (U.S. Tax Court 1997)* (comparing Florida's elective share statute to the dower statute it replaced; spouse's elective share held to be tax exempt, just as dower had been); United States v. Real Property located at 221 *Dana Ave., Hyde Park, MA, 239 F.2d 78 (1st Cir. 2001)* (a dower interest, which is a life estate, would in most cases be worth less than the elective share, which is in fee simple).

(n10)Footnote 86. Unif. Prob. Code Rev. Art. II, Part 2, cmt. 8 U.L.A. 86.

(n11)Footnote 87. *Id.* § 2-201. *See also In re Estate of Pfeiffer, 658 N.W.2d 14 (Neb. 2003)* (a widow legally separated from the decedent at the time of his death still qualifies for the elective share). *But see Boetsma v. Boetsma, 768 N.E.2d 1016 (Ind. App. 2002)* (the antenuptial agreement waived the surviving spouse's right to the elective share).

(n12)Footnote 88. *Id.* § 2-201. The definition of "augmented estate" under this statute is, of course, of considerable significance. The augmented estate consists of (1) the value of the decedent's probate estate, after funeral and administration expenses, homestead allowance, family allowances and exemptions, and enforceable claims; (2) the value of the decedent's reclaimable estate (defined below); (3) the value of property to which the surviving spouse succeeds by reason of the decedent's death, other than by homestead allowance, exempt property, family allowance, and testate or intestate succession; and (4) the value of property owned by the surviving spouse at the decedent's death, reduced by enforceable claims, plus the value of amounts that would have been includible in the surviving spouse's reclaimable estate had the spouse predeceased the decedent. *Id.* § 2-202(b). The "reclaimable estate" includes several categories of property including (a) property to the extent of decedent's interest held by the decedent and any other person, with right of survivorship; (b) proceeds of insurance on the life of, and controlled by, the decedent payable to any person other than the decedent's surviving spouse; and (c) property transferred in specified ways or circumstances by the decedent to any person other than a bona fide purchaser at any time during the marriage. The purpose of this formula is "to implement a partnership or marital-sharing theory." *Id.* § 2-202 cmt. *See also In re Estate of Jenkins, 97 S.W.3d 126 (Tenn. Ct. App. 2003)* (the new statutory changing-fraction method instead of fixed-fraction method used to calculate the elective share).

(n13)Footnote 89. Community property from a former marriage is not always partitioned at the dissolution of the marriage. Community property nevertheless ceases at the termination of the marriage and the interests of the former spouses in such cases would no longer be community property (of the first marriage) but separate property of each owned as tenants in common.

(n14)Footnote 90. Joyce Hens Green, et al., Dissolution of Marriage § 10.07 at 371 (1986).

(n15)Footnote 91. Equitable distribution depends upon the dissolution of a valid, existing marriage. In *Farah v. Farah, 429 S.E.2d 626 (Va. App. 1993)* an attempt to dissolve a marriage and equitably distribute the property owned by the parties failed because the court determined that there was no lawful marriage in the first place. Virginia follows the usual rule that a marriage valid where celebrated will be valid in Virginia. In this case the ceremony was performed under Islamic or Pakistani customs but the "marriage" occurred in England, and under English law was not valid.

(n16)Footnote 92. Basic questions concerning the definition of "property" still arise. A Connecticut court recently discussed "whether ... irrevocable vested remainders conditioned on survival are subject to the court's consideration in determining property and alimony awards in an action for dissolution." *Carlisle v. Carlisle, No. D.N. FA93 0132653S, 1994 Conn. Super. LEXIS 2662.* The court concluded that they are.

(n17)Footnote 93. Professor Oldham states: "no 'common law' state still applies a pure 'title' approach to property division at divorce. All of these states now utilize some version of an 'equitable distribution' approach." J. Thomas Oldham, Divorce, Separation and the Distribution of Property § 3.01 at 3-2 (1993).

(n18)Footnote 94. Gerald D. Mclellan, Equitable Distribution Law and Practice 3 (1985). McLellan's book is a useful research tool on equitable distribution. McLellan groups jurisdictions according to whether they have equitable distribution statutes; whether all property is treated as "marital property" or whether some property is excluded; and whether guidelines are enumerated for the court to consider. *Id.* at 87-91. An Appendix summarizing the law in each state is also included. *Id.* at 224-284.

(n19)Footnote 95. *See* § 37.08, *infra*. *Owen v. Owen, 798 So. 2d 394 (Miss. 2001)* (division of marital property focussing only on the husband's economic factors was improper); *King v. King, 760 So. 2d 830 (Miss. 2000)* (the wife's noneconomic contributions must be considered in distributing marital property); *Khajanchi v. Khajanchi, 537 S.E.2d 845 (N.C. Ct. App. 2000)* (both spouses contribute economically to marriage whether directly by employment or indirectly by providing homemaker services).

(n20)Footnote 96. Ind. Code Ann. § 31-1-11.5-11; Kan. Stat. Ann. ch. 60 1610(b)(1); Mass. Gen. Laws Ann. ch. 208 § 34; Mont. Code Ann. § 40-4-202(1).

(n21)Footnote 97. Ark. Code Ann. § 9-12-315; Del. Code Ann. tit. 13, § 1513(b); D.C. CodE Ann. § 16-910(a); Ky. Rev. Stat. § 403.190(2); Md. Cts. & Jud. Proc. Code Ann. § 3-6A-01; Mo. Ann. Stat. § 452.330(1); N.J. Stat. Ann. § 2A:34-23; N.Y. Dom. Rel. Law §§ 236(B)(1)(d) & 236(B)(5)(b); N.C. Gen. Stat. § 50-20(d); 23 Pa. Const. Stat. Ann. § 3323(a); Tenn. Code Ann. § 36-4-121(b); Va. Code Ann. § 20-107.3(1). *Pelletier v. Pelletier, 662 N.Y.S.2d 64 (S. Ct. App. Div. 1997)* (property transferred to wife by a cousin constituted a gift and was therefore separate property; real estate purchase with wife's separate property was not subject to equitable distribution); *Gross v. Gross, 469 S.E.2d 636 (W. Va. 1996)* (equitable distribution is a three-step process involving classifying, valuing, and dividing the marital property).

(n22)Footnote 98. Ala. Code § 30-2-51 (if property is used regularly during the marriage for the common benefit of the spouses); Iowa Code Ann. § 598.21(2) (if court finds refusal to do so would be inequitable); Me. Rev. Stat. Ann. tit. 19, § 722-A(2) (if parties request division); Minn. Stat. Ann. § 518.58, Subd. 2 (up to one-half can be distributed if provision for one is so inadequate that unfair hardship would otherwise result); *Dawson-Austin v. Austin, 920 S.W.2d 776 (Tex. App. 1996)* (unequal division of community property was just and right, as long as it was equitable and circumstances justified disproportionate division); *Christian v. Christian, 637 N.W.2d 377 (S.D. 2001)* (trial court did not abuse its discretion in awarding husband credit for only 280 out of 320 acres of farmland he inherited).

(n23)Footnote 99. Ala. Code § 30-2-51; Ark. Code Ann. § 9-12-315; Colo. Rev. Stat. § 14-10-113(1); Conn. Gen. Stat. § 46(b)-81(a); Del. Code Ann. tit. 13, § 1513(a) & (c); D.C. Code Ann. § 16-910(b); Haw. Rev. Stat. § 580-47(a); 750 ILCS 5/503; Ind. Code Ann. § 31-1-11.5-11; Iowa Code Ann. § 598.28; Kan. Stat. Ann. § 60-1610(b)(1) (1992); Ky. Rev. Stat. Ann. § 403.190(1); Me. Rev. Stat. Ann. tit. 19, § 722-A(1); Md. Cts. & Jud. Proc. Code Ann. §

3-6A-05(b) (1993); Mass. Gen. Laws Ann. ch. 208, § 34; Minn. Stat. Ann. § 518.58 (1993); Mo. Ann. Stat. § 452.330(1); Mont. Code Ann. § 40-4-202(1); Neb. Rev. Stat. § 42-373; N.C. Gen. Stat. § 50-20(c); Or. Rev. Stat. § 107.105(1)(f); 23 Pa. Const. Stat. Ann. § 3323(d); R.I. Gen. Laws § 15-5-16.1; Tenn. Code Ann. § 36-4-121(a) & (c); Vt. Stat. Ann. tit. 15, § 751; Va. Code Ann. § 20-107.3(D) (1993); Wyo. Stat. § 20-2-114; *Guida v. Guida, 816 So. 2d 717 (Flor. App. 2002)* (equitable distribution has to be supported by substantial competent evidence). *See also In re Petition of Fenzau, 53 P.3d 43 (Mont. 2002)* (equitable distribution can account for medical and financial needs of the spouse which result from the other spouse's physical, mental, or emotional abuse during the marriage); *Garces v. Garces, 704 So. 2d 1106 (Fla. App. 1998)* (citing Fla. Stat. ch. 61.08(2), listing factors such as standard of living during the marriage, duration of the marriage, age, physical and emotional condition, services and career building contributed to the marriage, and other factors); *Quinn v. Quinn, 1997 Va. App. LEXIS 573 (Va. App. 1997)* (upholding trial court's discretionary application of statutory factors); *Moore v. Moore, No. 0470-97-4, 1997 Va. App. LEXIS 576 (Va. App. 1997)* (trial court's equitable distribution of marital property is not set aside unless clearly wrong or the court misapplied or failed to consider statutory guidelines). *See also Barker v. Barker, 500 S.E.2d 240, 245 (Va. Ct. App. 1998)* (trial court properly considered such factors as age, expenses, distribution of assets, and earning capacity of parties in determining equitable distribution award); *In re Marriage of Wendell, 581 N.W.2d 197, 199 (Iowa Ct. App. 1998)* (in considering accumulations to premarital assets for purposes of equitable distribution, court does not limit its focus to parties' direct contributions to increase, but rather considers the contributions of each party to the overall marriage); *In re Marriage of Carter, 740 N.E.2d 82 (Ill. App. 2000)* (equitable distribution of marital assets required to be in just proportions); *Tibbetts v. Tibbetts, 762 A.2d 937 (Me. 2000)* (marital property to be divided in just proportions); *Atkinson v. Atkinson, 32 S.W.3d 41 (Ark. App. 2000)* (unequal distribution of marital property was justified); *Adams v. Adams, 778 So. 2d 825 (Ala. Civ. App. 2000)* (awarding wife 16% of marital property was not equitable).

(n24)Footnote 100. Unif. Marital Property Act prefatory note, 9A U.L.A. 97.

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CHAPTER 37 MARITAL PROPERTY

4-37 Thompson on Real Property, Thomas Editions § 37.08

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§ 37.08 Defining Marital Property in Community Property States.

[Go To Supp]

§ 37.08(a) The Rationale for "Separate" and "Community."

This writer has resided as a married person in five different states, three common law states and two community property states. As we have moved from state to state, the legal system of marital property in each state has had little apparent impact on our day-to-day lives. The reason for this is probably obvious, and the reader has presumably concluded that my spouse and I were never divorced, that both of us are still living, and possibly that my spouse and I own no property of any consequence, or at least have engaged in a minimal number of property transactions. All of these conclusions are accurate. If our experience is typical of those married couples who have never divorced and are still living, it is probably safe to say that such couples (even many of those with property) are not affected very much by marital property law during the marriage. Having said that, we hasten to add that at some point in virtually every marriage, years and even decades of property transactions, and the marital property law governing them, will become very important. And in many marriages, issues of classification will assume great significance with some frequency. Marital property classification in community property states is important when spouses purchase property, when a creditor extends credit, when a couple is considering marriage, when dissolution of marriage is considered, and when a spouse dies. Even though classification of marital property is not always an apparent issue, it is always an important issue in the legal structure of community property states.

A central feature of the civil law tradition of marital property is the need to classify property of married persons as either "separate" or "community." Under the common law, with its individualist approach to property ownership, this problem does not arise, although other problems of classification may exist.

As to assets acquired during marriage, the basic distinction between separate and community property can be effectively understood through an exploration of terms used to characterize the two: Separate property is that which is acquired by either spouse through "lucrative title," whereas community property is that which is acquired by "onerous title." In this context, lucrative means acquired without a valuable consideration or exchange and onerous means done or given for some equivalent in exchange.

According to the law in community property states, a married couple is generally one for purposes of property

ownership--a community. The efforts of each spouse are in fact community efforts and not really individual efforts. The rewards each receives for those efforts -- compensation for work, for example ("onerous" activity) -- is accordingly community property. If, on the other hand, a married person receives a gratuity -- a benefit with no exchange or effort on her part, i.e., "lucrative" title, such as a gift -- no community effort is expended and the title is separate. These simple concepts provide the basis for understanding much of the classification process in community property states. The simplicity is, of course, sometimes obscured, but onerous and lucrative title are helpful guidelines.

§ 37.08(b) Statutory Definitions.

The statutes of community property states, and the Uniform Marital Property Act, contain statements of this distinction between separate and community property. As we shall see, some of these provisions are deceptively simple. In any event, the statutory definitions are a good starting place in defining community property and separate property and they are set forth below, for the time being without commentary. We shall then explore some of the details of property classification. It is also worth noting at this point that much of the law of marital property in community property states is statutory, and we shall review many of those statutes in subsequent sections of this chapter. In line with common law tradition, in most community property states, many details were originally left for courts to sort out, but in recent years legislatures have codified much of the law. And in Wisconsin, the only recent convert to community property, many details were incorporated into the legislation in the first instance.

The statutory definitions are quite consistent with one another and conform to the distinction between lucrative and onerous title. Assets acquired during marriage are community property unless they are acquired by gift, last will or descent. Assets acquired by single persons and those acquired by married persons through gift, will or descent, are separate property.

Ariz. Rev. Stat. Ann.

§ 25-211:

All property acquired by either husband or wife during the marriage, except that which is acquired by gift, devise or descent, is the community property of the husband and wife.

§ 25-213 :

All property, real and personal, of each spouse, owned by such spouse before marriage, and that acquired afterward by gift, devise or descent, and also the increase, rents, issues and profits thereof, is the separate property of such spouse.

Cal. Fam. Code Ann. n101

§ 760:

Except as otherwise provided by statute, all property, real or personal, wherever situated, acquired by a married person during the marriage while domiciled in this state is community property.

§ 770:

(a) Separate property of a married person includes all of the following:

(1) All property owned by the person before marriage.

(2) All property acquired by the person after marriage by gift, bequest, devise, or descent.

(3) The rents, issues, and profits of the property described in this section.

Idaho Code

§ 32-903 :

All property of either the husband or the wife owned by him or her before marriage, and that acquired afterward by either by [sic] gift, bequest, devise or descent, or that which either he or she shall acquire with the proceeds of his or her separate property, by way of moneys or other property, shall remain his or her sole and separate property.

§ 32-906:

(1) All other property acquired after marriage by either husband or wife is community property. The income of all property, separate or community, is community property unless the conveyance by which it is acquired provides or both spouses, by written agreement specifically so providing, declare that all or specifically designated property and the income from all or the specifically designated property shall be the separate property of one of the spouses or the income from all or specifically designated separate property be the separate property of the spouse to whom the property belongs... .

La. Civ. Code Ann.

Art. 2325 :

A matrimonial regime is a system of principles and rules governing the ownership and management of the property of married persons as between themselves and toward third persons.

Art. 2326:

A matrimonial regime may be legal, contractual, or partly legal and partly contractual.

Art. 2327 :

The legal regime is the community of acquest and gains established in Chapter 2 of this Title. [Articles 2334-2369]

Art. 2335 :

Property of married persons is either community or separate, except as provided in Article 2341.1.

Art. 2338 :

The community property comprises: property acquired during the existence of the legal regime through the effort, skill, or industry of either spouse; property acquired with community things or with community and separate things,

unless classified as separate property under Article 2341; property donated to the spouses jointly; natural and civil fruits of community property; damages awarded for loss or injury to a thing belonging to the community; and all other property not classified by law as separate property.

Art. 2341 :

The separate property of a spouse is his exclusively. It comprises: property acquired by a spouse prior to the establishment of a community property regime; property acquired by a spouse with separate things or with separate and community things when the value of the community things is inconsequential in comparison with the value of the separate things used; property acquired by a spouse by inheritance or donation to him individually; damages awarded to a spouse in an action for breach of contract against the other spouse or for the loss sustained as a result of fraud or bad faith in the management of community property by the other spouse; damages or other indemnity awarded to a spouse in connection with the management of his separate property; and things acquired by a spouse as a result of a voluntary partition of the community during the existence of a community property regime.

Art. 2341.1:

A. A spouse's undivided interest in property otherwise classified as separate property under Article 2341 remains his separate property regardless of the acquisition of other undivided interests in the property during the existence of the legal regime, the source of improvements thereto, or by whom the property was managed, used, or enjoyed.

B. In property in which an undivided interest is held as community property and an undivided interest is held as separate property, each spouse owns a present undivided one-half interest in that portion of the undivided interest which is community and a spouse owns a present undivided interest in that portion of the undivided interest which is separate.

Nev. Rev. Stat.

§ 123.130:

1. All property of the wife owned by her before marriage, and that acquired by her afterwards by gift, bequest, devise, descent or by an award for personal injury damages, with the rents, issues and profits thereof, is her separate property.

2. All property of the husband owned by him before marriage, and that acquired by him afterwards by gift, bequest, devise, descent or by an award for personal injury damages, with the rents, issues and profits thereof, is his separate property.

§ 123.220 :

All property, other than that stated in NRS 123.130, acquired after marriage by either husband or wife, or both, is community property unless otherwise provided by:

1. An agreement in writing between the spouses, which is effective only as between them.

2. A decree of separate maintenance issued by a court of competent jurisdiction.

3. NRS 123.190. [referring to written authority amounting to a gift from one spouse to another]

4. A decree issued or agreement in writing entered pursuant to NRS 123.259. [providing for division of community property in certain situations]

N.M. Stat. Ann.

§ 40-3-8 :

A. "Separate property" means:

(1) property acquired by either spouse before marriage or after entry of a decree of dissolution of marriage;

(2) property acquired after entry of a decree entered pursuant to Section 40-4-3 NMSA 1978, unless the decree provides otherwise; [§ 40-4-3 provides for division of property of separated spouses without a dissolution of the marriage]

(3) property designated as separate property by a judgment or decree of any court having jurisdiction;

(4) property acquired by either spouse by gift, bequest, devise or descent; and

(5) property designated as separate property by a written agreement between the spouses including a deed or other written agreement concerning property held by the spouses as joint tenants or tenants in common in which the property is designated as separate property.

B. Except as provided in Subsection C of this section, "community property" means property acquired by either or both spouses during marriage which is not separate property. Property acquired by a husband and wife by an instrument in writing whether as tenants in common or as joint tenants or otherwise will be presumed to be held as community

property unless such property is separate property within the meaning of Subsection A of this section.

E. "Property" includes the rents, issues and profits thereof. n102

Tex. Const. Art. 16, § 15:

All property, both real and personal, of a spouse owned or claimed before marriage, and that acquired afterward by gift, devise or descent, shall be the separate property of that spouse; and laws shall be passed more clearly defining the rights of the spouses, in relation to separate and community property; ...

Tex. Fam. Code Ann.

§ 5.01:

(a) A spouse's separate property consists of:

(1) the property owned or claimed by the spouse before marriage;

(2) the property acquired by the spouse during marriage by gift, devise, or descent; and

(3) the recovery for personal injuries sustained by the spouse during marriage, except any recovery for loss of earning capacity during marriage.

(b) Community property consists of the property, other than separate property, acquired by either spouse during marriage.

Wash. Rev. Code Ann.

§ 26.16.010 :

Property and pecuniary rights owned by the husband before marriage and that acquired by him afterwards by gift, bequest, devise or descent, with the rents, issues and profits thereof, shall not be subject to the debts or contracts of his wife, and he may manage, lease, sell, convey, encumber or devise by will such property without the wife joining in such management, alienation or encumbrance, as fully and to the same effect as though he were unmarried.

§ 26.16.020 :

The property and pecuniary rights of every married woman at the time of her marriage or afterwards acquired by gift, devise or inheritance, with the rents, issues and profits thereof, shall not be subject to the debts or contracts of her husband, and she may manage, lease, sell, convey, encumber or devise by will such property to the same extent and in

the same manner that her husband can, property belonging to him.

§ 26.16.030 :

Property not acquired or owned, as prescribed in RCW 26.16.010 and 26.16.020, acquired after marriage by either husband or wife or both, is community property... .

Wis. Stat. Ann. n103

§ 766.31:

(1) All property of spouses is marital property except that which is classified otherwise by this chapter and that which is described in sub. (8).

(4) Except as provided under subs. (7)(a), (7p) and (10), income earned during marriage and after the determination date n104 is marital property.

(6) Property owned at a marriage which occurs after 12:01 a.m. on January 1, 1986, is individual property of the owning spouse if, at the marriage, both spouses are domiciled in this state.

(7) Property acquired by a spouse during marriage and after the determination date is individual property if acquired by any of the following means:

(a) By gift during lifetime or by a disposition at death by a 3rd person to that spouse and not to both spouses. A distribution of principal or income from a trust created by a 3rd person to one spouse is the individual property of that spouse unless the trust provides otherwise.

(b) In exchange for or with the proceeds of other individual property of the spouse.

(c) From appreciation of the spouse's individual property except to the extent that the appreciation is classified as marital property under s. 766.63.

(d) By a decree, marital property agreement or reclassification under sub. (10) designating it as the individual property of the spouse.

(e) As a recovery for damage to property under s. 766.70, except as specifically provided otherwise in a decree or marital property agreement.

(f) As a recovery for personal injury except for the amount of that recovery attributable to expenses paid or otherwise satisfied from marital property and except for the amount attributable to loss of income during marriage.

(7p) Income attributable to all or specified property other than marital property, with respect to which a spouse has executed under s. 766.59 a statement unilaterally designating that income as his or her individual property, is individual property.

(8) Except as provided otherwise in this chapter, the enactment of this chapter does not alter the classification and ownership rights of property acquired before the determination date or the classification and ownership rights of property acquired after the determination date in exchange for or with the proceeds of property acquired before the determination date.

(9) Except as provided otherwise in this chapter and except to the extent that it would affect the spouse's ownership rights in the property existing before the determination date, during marriage the interest of a spouse in property owned immediately before the determination date is treated as if it were individual property.

Uniform Marital Property Act

§ 4:

(a) All property of spouses is marital property except that which is classified otherwise by this [Act].

(d) Income earned or accrued by a spouse or attributable to property of a spouse during marriage and after the determination date is marital property.

(f) Property owned by a spouse at a marriage after the determination date is individual property.

(g) Property acquired by a spouse during marriage and after the determination date is individual property if acquired:

(1) by gift or a disposition at death made by a third person to the spouse and not to both spouses;

(2) in exchange for or with the proceeds of other individual property of the spouse;

(3) from appreciation of the spouse's individual property except to the extent that the appreciation is classified as marital property under Section 14;

(4) by a decree, marital property agreement, written consent, or reclassification under Section 7(b) designating it as the individual property of the spouse;

(5) as a recovery for damage to property under Section 15, except as specifically provided otherwise in a decree, marital property agreement, or written consent; or

(6) as a recovery for personal injury except for the amount of that recovery attributable to expenses paid or otherwise satisfied from marital property.

(h) Except as provided otherwise in this [Act] the enactment of this (Act] does not alter the classification and ownership rights of property acquired before the determination date.

(i) Except as provided otherwise in this [Act] and to the extent it would affect the ownership rights of the spouse that existed in the property before the determination date, during marriage the interest of a spouse in property owned immediately before the determination date is treated as if it were individual property.

§ 37.08(c) The Community Property Presumption.

Because of the fact that issues of marital property classification frequently arise many years after acquisition of the property, it is unlikely that any system of community property could function without some fairly clear presumptions about classification of marital property. It will frequently not be easy, many years after acquisition, for a party to establish with solid evidence whether property possessed by a married person is community or separate in nature. There are important presumptions in every community property state that address such problems. We now turn our attention to those presumptions.

The primary marital property presumption concerns property acquired by someone during marriage. It is quite natural to assume that such acquisitions are obtained "onerously," i.e., by community effort. The presumption in every community property state is that property acquired during the marriage is community property of that marriage. Note, however, the implicit question within this statement of the presumption: Was the property acquired during the marriage? And must the community property proponent prove that fact? In some jurisdictions, explicitly or by implication, the answer to the second question is no and the presumption can be more broadly stated: Property *possessed* during the marriage is presumed to be community property.

In some states, courts have held that the community property presumption is implicitly created by the statute defining community property. n105 In other jurisdictions, the legislatures have enacted explicit statutes establishing the presumption. n106 The presumption is strong but it is rebuttable upon a showing of clear and convincing evidence. n107 Rebutting the presumption of course involves establishing that the property falls within the definition of separate property, by proving, for example, that the property was received by gift or inheritance. A relationship between the community property presumption and the length of a marriage has been recognized, either explicitly or in the way the presumption is applied. In essence, the presumption has greater force where the marriage has been a long relation than where a couple has been married for only a short time. n108 This is especially pertinent in states where the presumption on its face applies to all property "possessed" (as opposed to "acquired") during the marriage. California has also incorporated into its statutes a qualification of the presumption for probate situations where the decedent's marriage had terminated more than four years before the person's death:

> The presumption that property acquired during marriage is community property does not apply to any property to which legal or equitable title is held by a person at the time of the person's death if the marriage during which the property was acquired was terminated by dissolution of marriage more than four years before the death. n109

Other presumptions, so-called, have evolved in various circumstances, sometimes favoring community property and other times separate property. Some of these are closely related to or are offshoots of the general community property presumption. It may indeed be simpler to think of many of these other "presumptions" as qualifications of, or elaborations on, the general community property presumption, rather than additional (and confusing) procedural complexities. The purpose of the law in this area is to help us classify marital property properly; the community property presumption and its corollary doctrines should represent a common sense way to achieve that objective in specific cases.

One of the thorniest presumption problems in recent years concerns the mixture of community property and recitals of joint tenancy in California. Questions of classification in these situations created a flurry of activity in the California courts and legislature for over a decade.

Prior to 1966, California courts had held that a conveyance to husband and wife "as joint tenants" destroys the presumption that the property is community; in such cases, the husband and wife would own such property as separate estates, with each spouse owning a one-half interest. n110 That presumption could not be overcome merely by proof that community funds were used to purchase the property or by evidence of the undisclosed intention of one of the spouses. n111

Because of problems associated with characterizing a couple's home as separate rather than community property upon dissolution of the marriage, an exception to this separate property presumption was adopted by the legislature; it became a part of § 5110 of the California Civil Code, providing: "When a single-family residence of a husband and wife is acquired by them during marriage as joint tenants, for the purpose of division of such property upon dissolution of marriage or legal separation only, the presumption is that such single-family residence is the community property of the husband and wife." n112 Note the qualifications to the exception, limiting its application to a single-family residence and to actions for dissolution of marriage and legal separation.

Meanwhile, in 1980 the California Supreme Court decided *In re Marriage of Lucas*. n113 In that case, the court concluded that the act of taking title in a joint and equal form of ownership (joint tenancy) is inconsistent with an intention to preserve a separate property interest. The presumption, they said, is that a residence acquired in joint tenancy during the marriage is community property, and that presumption could be overcome only by a showing of an agreement or understanding to the contrary. The trial court therefore erred in confirming a separate property interest in the wife, even though her separate funds were used to acquire and improve the residence. The only pertinent findings

were that neither party intended a gift to the other and such evidence was insufficient to rebut the community property presumption; some evidence of an agreement or understanding that the wife was to retain a separate property interest would be necessary.

Effective starting in 1984, the provision imposing a community property presumption on residences formally owned in joint tenancy was expanded to apply to all property acquired in joint tenancy form during the marriage. n114 The statute provided that the presumption could be rebutted by either of the following:

> (a) A clear statement in the deed or other documentary evidence of title by which the property is acquired that the property is separate property and not community property.
>
> (b) Proof that the parties have made a written agreement that the property is separate property.

Before this legislation, proof of an oral agreement that the residence was separate property could be used to rebut the community presumption. This would not be possible under the new law, and in an effort to extend the new act as far as possible, the legislature provided that it would apply not only to proceedings commenced on or after January 1, 1984 (its effective date) but also to "Proceedings commenced before January 1, 1984, to the extent proceedings as to the division of property are not yet final on January 1, 1984." n115 The California Supreme Court, however, held that the act could not be constitutionally applied to preclude proof of an oral agreement as to the separate character of marital property in any proceeding commenced prior to January 1, 1984. n116

In the legislative response to these developments, the Law Revision Commission lamented both the decision in *Lucas* and the fact that an oral agreement could be used to overcome the community presumption. n117

The substance of a revised § 4800.1 is identical to the earlier version, except that affected forms of joint ownership were expanded to include tenancy in common, tenancy by the entirety and community property as well as joint tenancy. In addition to the substantive provisions, the legislature included three paragraphs of findings, including the following:

> The methods provided by case and statutory law have not resulted in consistency in the treatment of spouses' interests in property which they hold in joint title, but rather, have created confusion as to which law applies at a particular point in time to property, depending on the form of title, and, as a result, spouses cannot have reliable expectations as to the characterization of their property and the allocation of the interests therein, and attorneys cannot reliably advise their clients regarding applicable law.

The foregoing law has now been superseded, effective January 1, 1994, by the most recent legislative chapter in this saga. This most recent attempt to resolve the confusion and establish a workable presumption in this situation provides as follows:

> (a) For the purpose of division of property upon dissolution of marriage or legal separation of the parties:
>
> (1) Property acquired by the parties during marriage on or after January 1, 1984, and before January 1, 1987, in joint tenancy form is presumed to be community property.
>
> (2) Property acquired by the parties during marriage on or after January 1, 1987, in joint form, including property held in tenancy in common, joint tenancy, tenancy by the entirety, or as community property is presumed to be community property.
>
> (b) The presumptions under subdivision (a) are presumptions affecting the burden of proof and may be rebutted by either of the following:

(1) A clear statement in the deed or other documentary evidence of title by which the property is acquired that the property is separate property and not community property.

(2) Proof that the parties have made a written agreement that the property is separate property.

(c) Nothing in this section affects the character of property acquired by married persons that is not described in subdivision (a). n118

Note that the legislature has now acquiesced in the court's constitutional objections to its earlier attempts to make changes in the presumption retroactive. Thus we have different, but now relatively clear, rules for different time periods. These presumptions are still applicable only in dissolution and legal separation proceedings, but they apply to real and personal property, wherever acquired. A written document is necessary to rebut the presumption, but again that is only for the purpose of division of property at dissolution of marriage.

In a 1994 California case, n119 a judgment creditor of the former husband sought an order for the sale of a dwelling, title to which had been taken as joint tenants by the husband and wife. In a dissolution proceeding, the dwelling had been listed as a community asset, and the creditor of the husband sought to treat it as community property. A trial court's determination that the property was not community property was upheld on appeal. The couple had declared that they intended to hold the property as joint tenants and that it was listed as community property only because of advice from counsel that in dissolution, as between the spouses, there is a presumption that the property is community absent a specific statement in the deed or other documentary evidence to the contrary. The trial court had also refused to order the sale on the ground that the value of the former husband's interest was less than the combined amount of the homestead exemption and encumbrances. Based on statutory interpretation, the appellate court disagreed with this part of the trial court's opinion.

In Arizona, when one spouse buys property with separate funds and places it in joint tenancy, it is presumed that the spouse intended to make a separate property gift to his spouse of one-half of the property. n120 Even though joint tenancy property is considered separate property, the Arizona statute governing the disposition of marital property requires that courts "divide the community, joint tenancy and other property equitably, though not necessarily in kind, without regard to marital misconduct." n121

In a 1997 case, the Arizona Supreme Court held that even though one half of the joint tenancy property in question was a separate gift to the non-purchasing spouse, it was subject to equitable division upon divorce. n122 In that case, the court determined that considering the brief duration of the marriage (less than a month), it would be unequitable to divide the joint tenancy house worth $140,000 equally. "Since marital joint tenancy property is subject to equitable division upon dissolution generally, if we treated 'gifted' joint tenancy as requiring an equal, not equitable, division, we would be giving greater property rights to a non-contributing spouse than to a contributing one. Instead, the 'gift' in the non-purchasing spouse of joint tenancy property is an equitable right in the property, not an irrevocably gifted interest in half." n123

Various other "presumptions" have found their way into the law, frequently relating to recitals in documents of title. Recitals in instruments of conveyance can provide some answers to questions of classification. They do not answer all questions and in many cases will not answer questions definitively. For example, the fact that only one spouse is named as grantee in a deed does not generally overcome the community property presumption. Recitals are nevertheless often good evidence of factual matters and intention, and should be used and interpreted as such. Recitals in a deed naming only one spouse as grantee might state that consideration paid for the property is that spouse's separate property and that title is being taken as part of the separate estate. This is certainly some evidence of the facts stated. n124

Some presumptions are related to the demise of paternalism in marital property law. Prior to the 1970's, for example, husbands in most community property jurisdictions had exclusive rights of management and control over property of

the community. Along with a move to more equal treatment of the sexes came presumptions designed to protect a married woman's title to the property under these circumstances. n125 A typical example is the following California statute:

> Notwithstanding any other provision of this part, whenever any real or personal property, or any interest therein or encumbrance thereon, was acquired before January 1, 1975, by a married woman by an instrument in writing, the following presumptions apply, and are conclusive in favor of any person dealing in good faith and for a valuable consideration with the married woman or her legal representatives or successors in interest, regardless of any change in her marital status after acquisition of the property:
>
> (a) If acquired by the married woman, the presumption is that the property is the married woman's separate property.
>
> (b) If acquired by the married woman and any other person, the presumption is that the married woman takes the part acquired by her as tenant in common, unless a different intention is expressed in the instrument.
>
> (c) If acquired by husband and wife by an instrument in which they are described as husband and wife, the presumption is that the property is the community property of the husband and wife, unless a different intention is expressed in the instrument. n126

Transfers between spouses, discussed more fully in the next section, have caused some difficulty and have resulted in additional presumptions. Again, the law in this area has been very much influenced by sexist and paternalistic influences and the movement away from those influences in the 20th century. It is only very recently that married women have achieved some significant measure of equality in terms of management and control of community property.

Intention is not always set forth clearly in document recitals. There may be a variety of possible reasons or explanations for such transactions and in the absence of any guidance by the parties the law will supply a presumptive conclusion. In Idaho, for example, property conveyed by one spouse to the other is presumed to be the separate property of the grantee spouse, although the income from such property is not separate property unless this fact is specifically stated in the instrument of conveyance. n127 One spouse may make a valid gift of her or his separate property to the other spouse and such transactions may give rise to a separate property presumption. The Texas Constitution, for example, now includes the following language: "[I]f one spouse makes a gift of property to the other that gift is presumed to include all the income or property which might arise from that gift of property." n128

One spouse unsuccessfully launched an interesting attack on the proposition of gift from one spouse to another. She asserted that on dissolution of the marriage she was entitled to a return of property she had given him on the theory that consideration for the transfer was the state of marriage and its continuation. Violation of marital vows resulting in divorce was such a betrayal of confidence, she claimed, that a constructive trust should be imposed in her favor. The court did not agree, stating simply that one spouse may make a valid gift of his or her separate property to the other spouse. n129

A slightly different, but related, situation is presented when property is purchased with separate funds but title is taken in the names of both spouses. In such circumstances, a presumption arises that a gift to the non-contributing spouse was intended. n130 Note that the gift in such cases could arguably be to the separate estate or the community estate of the parties. In a sense, however, the definitions of separate and community property contradict the proposition of a "gift to the community," since property acquired by gift is by definition separate property. Even so, with the more liberal allowances for autonomous classification by the spouses, gifts to the community are possible, at least in some states. n131

COMPUTER-ASSISTED RESEARCH

LEXIS: community w/1 property w/30 presum! w/15 separate or joint tenancy or title or recital or paternalism or transfer!

FOOTNOTES:
(n1)Footnote 101. These provisions took effect on January 1, 1994. They are restatements, with one modification, of prior sections 5110, 5107 and 5108 of the California Civil Code.

(n2)Footnote 102. In *Swing v. Fingado, 850 P.2d 978 (N.M. 1993),* the following question was certified to the Supreme Court of New Mexico by the United States Court of Appeals for the Tenth Circuit:

> Do the 1984 amendments to § 40-3-8 N.M. Stat. Ann. 1978 (as enacted), apply retroactively so as to convert property acquired by husband and wife as joint tenants prior to the passage of the amendments, and thus originally held as separate property, into community property which would be included in the bankruptcy estate?

The New Mexico court answered the Tenth Circuit's question in the affirmative. They stated that "property acquired before 1984 by a husband and wife through an instrument designating them as joint tenants is presumed to be held as community property, even though it may also be held as joint tenancy property." In a fairly elaborate opinion, the court further held that "under the 1984 amendments to this state's community property statutes, the properties were properly characterized as community property and were therefore included in the bankruptcy estate under Subsection 541(a)(2) of the Bankruptcy Code."

(n3)Footnote 103. As noted in § 37.01, Wisconsin recently adopted a community property system patterned after the Uniform Marital Property Act. In the Uniform Act and in Wisconsin's legislation, the terms "marital property" and "individual property" are used rather than "community property" and "separate property."

(n4)Footnote 104. According to § 766.01(5), "Determination date" means the last to occur of (a)marriage, (b)12:01 a.m. on the date that both spouses are domiciled in Wisconsin, and (c)12:01 a.m. on January 1, 1986, which was the effective date of Wisconsin's marital property legislation.

(n5)Footnote 105. Ariz. Rev. Stat. Ann. § 25-211 (1991) creates a presumption that property acquired during marriage is community property. *Arizona Cent. Credit Union v. Holden, 432 P.2d 276 (Ariz. App. 1967). See also Verheyden v. Verheyden, 757 P.2d 1328 (Nev. 1988).*

(n6)Footnote 106. La. Civ. Code Ann. art. 2340 provides: "Things in the possession of a spouse during the existence of a regime of community of acquest and gains are presumed to be community, but either spouse may prove that they are separate property." This provision was effective on January 1, 1980, and the comment accompanying the statute notes that it "suppresses the requirement of a double declaration established by Louisiana jurisprudence." *See also Tullier v. Tullier, 464 So. 2d 278 (La. 1985).* This refers to an irrebuttable presumption that had been applied in Louisiana as to immovable property purchased by the husband during marriage unless the documents of acquisition declared that the property (1) was purchased with his separate funds and (2) was being acquired for his separate estate. *Phillips v. Nereaux, 357 So. 2d 813 (La. Ct. App. 1978).* A New Mexico statute provides that "Property acquired during marriage by either husband or wife, or both, is presumed to be community property." N.M. Stat. Ann. § 40-3-12A. New Mexico also has a provision specifically stating that property acquired by a husband or wife "by an instrument in writing whether as tenants in common or as joint tenants or otherwise" is presumed to be community property. N.M. Stat. Ann. § 40-3-8B. *See also* Tex. Fam. Code Ann. § 5.02 ("Property possessed by either spouse during or on dissolution of marriage is presumed to be community property."); Wis. Stat. Ann. § 766.31(2) ("All property of spouses

is presumed to be marital property.")

(n7)Footnote 107. *Porter v. Porter, 195 P.2d 132 (Ariz. 1948)* (strong, satisfactory, convincing, clear and cogent, or nearly conclusive); *Jacobson v. Bunker Hill & Sullivan Mining & Concentrating Co., 28 P. 396 (Idaho 1891)* (preponderance of evidence); *Hinckley v. Hinckley, 583 So. 2d 125 (La. Ct. App. 1991)* (clear, positive and of a legally certain nature); *Verheyden v. Verheyden, 757 P.2d 1328 (Nev. 1988)* (clear and certain proof); *Stroshine v. Stroshine, 652 P.2d 1193 (N.M. 1982)* (preponderance of the evidence); *cf. Eliasen v. Fitzgerald, 668 P.2d 110 (Idaho 1983)* (presumption overturned on appeal without reference to the degree of proof); Tex. Fam. Code Ann. § 5.02 ("The degree of proof necessary to establish that property is separate property is clear and convincing evidence."); *Madsen's Estate v. C.I.R., 650 P.2d 196 (1982)* (clear and convincing proof). *Edwards v. Edwards, 817 So. 2d 414 (Lou. App. 2002)* (a reasonable factual basis existed for determination that the money was unpartitioned community property). *In re Marriage of Gillespie, 948 P.2d 1338, 1343 (Wash. App. 1997); Hunt v. Hunt, 952 S.W.2d 564 (Tex. App. 1997)* (the spouse asserting that certain property is separate bears the burden of rebutting the community property presumption by clear and convincing evidence); *Fidelity & Deposit Co. v. Gaspard, 1997 U.S. Dist. LEXIS 8689 (E.D. La. 1997)* (general and "self-serving" testimony that property is separate is not sufficient to rebut the community property presumption); *United States v. Elam, 112 F.3d 1036 (9th Cir. 1997)* (holding that prenuptial agreement was relevant in determining whether the community property presumption was rebutted as to a forwarded tax overpayment); *Noil v. Noil, 699 So. 2d 1134 (La. App. 1997)* (holding that wife's evidence that house was bought with prize money from sweepstakes the wife entered was not sufficient to rebut the presumption; winnings resulted from wife's skill in solving word puzzles, and until the legislature classifies sweepstakes prizes as separate, they are considered community property); *Worzala v. Worzala, 913 P.2d 1178 (Idaho 1996)* (community property presumption rebutted with evidence showing reasonable certainty that property is separate property); *Lormand v. Lormand, 673 So. 2d 1345 (La. App. 1996)* (evidence of commingling separate and community property undermines ability to show clear, positive, and legally certain proof of separate property); *Hebert v. Hebert, 650 So. 2d 436 (La. App. 1995)* (husband failed to carry burden of proof in showing funds used to construct community home on separate property were themselves separate property). The following cases hold that the presumption of community property can be rebutted by clear and convincing evidence: *Koher v. Morgan, 968 P.2d 920 (Wash. Ct. App. 1998); Bahr v. Kohr, 980 S.W.2d 723 (Tex. Ct. App. 1998).*

(n8)Footnote 108. *E.g., In re Duncan's Estate, 70 P.2d 174 (Cal. 1937). See also Zorilla v. Wahid, 83 S.W.3d 247 (Tex. App. 2002)* (trial court acted within its discretion in awarding 60% of marital property to the wife and 40% to the husband); *Toth v. Toth, 946 P.2d 900, 903-904 (Ariz. 1997)* (finding that where marriage lasted only a few weeks, "equal" distribution of property would not be "equitable").

(n9)Footnote 109. Cal. Fam. Code Ann. § 802.

(n10)Footnote 110. *Beck v. Beck, 51 Cal. Rptr. 491 (1966).*

(n11)Footnote 111. *Knego v. Grover, 25 Cal. Rptr. 158 (1962).*

(n12)Footnote 112. Cal. Civ. Code Ann. § 5110, Explanation of Amendments.

(n13)Footnote 113. *166 Cal. Rptr. 853 (1980).*

(n14)Footnote 114. Cal. Civ. Code Ann. § 4800.1.

(n15)Footnote 115. 1983 Cal. Stats. ch. 342, § 4.

(n16)Footnote 116. *In re Marriage of Buol, 705 P.2d 354 (Cal. 1985).*

(n17)Footnote 117. *See* Cal. Civ. Code Ann. § 4800.1, Law Revision Commission Comment.

(n18)Footnote 118. Cal. Fam. Code Ann. § 2580. *Dorn v. Solomon, 67 Cal. Rptr. 2d 311, 312 (1997)* (noting that

property held in joint tenancy is presumed to be community property at dissolution and not upon the death of a joint tenant).

(n19)Footnote 119. *Abbett Electric Corp. v. Storek, 27 Cal. Rptr. 2d 845 (1994).*

(n20)Footnote 120. *Toth v. Toth, 946 P.2d 900 (Ariz. 1997)* (citing *Becchelli v. Becchelli, 508 P.2d 59 (Ariz. 1973)); Valladee v. Valladee, 718 P.2d 206, 210 (Ariz. Ct. App. 1986)).*

(n21)Footnote 121. Ariz. Rev. Stat. § 25-318 (1997).

(n22)Footnote 122. *Toth v. Toth, 946 P.2d 900, 902 (Ariz. 1997).*

(n23)Footnote 123. *Id.*

(n24)Footnote 124. Recitals, in and of themselves, do not necessarily overcome the community property presumption. Courts in Louisiana, for example, have held that "the 'double declaration' is not in itself proof of the separate status and does not of itself overcome the presumption; it merely permits the introduction of evidence if a party seeks to prove the separate nature of property acquired during a community." *Succession of Pittman, 282 So. 2d 799, 804 (La. Ct. App. 1973).* A Louisiana statute provides: "A declaration in an act of acquisition that things are acquired with separate funds as the separate property of a spouse may be controverted by the other spouse unless he concurred in the act. It may also be controverted by the forced heirs and the creditors of the spouses, despite the concurrence by the other spouse." La. Civ. Code Ann. art. 2342.

(n25)Footnote 125. *In re Marriage of Saslow, 710 P.2d 346, 353, 553 n.9 (Cal. 1985).* The court notes that the presumption can be overcome only by clear and convincing evidence. *Ragan v. Commissioner of Internal Revenue, 135 F.3d 329* (5th Cir.) (personal earnings, while community property, are subject to the sole management and control of the person who earned them) (*citing* Tex. Fam. Code. Ann. § 3.102).

(n26)Footnote 126. Cal. Fam. Code Ann. § 803. *See also* N.M. Stat. Ann. § 40-3-12.

(n27)Footnote 127. Idaho Code § 32-906(2).

(n28)Footnote 128. Tex. Const. Ann. Art. 16, § 15.

(n29)Footnote 129. *Bohn v. Bohn, 455 S.W.2d 401 (Tex. Civ. App. 1970). Kerly v. Kerly, 910 P.2d 279 (Nev. 1996)* (conveyance of title to real property to husband presumed to be a gift, if wife's interest is separate property rather than community property); *In re Morrison, 913 S.W.2d 689 (Tex. App. 1995).*

(n30)Footnote 130. *Sloane v. Sloane, 646 P.2d 299 (Ariz. Ct. App. 1982).* We have already discussed the California experience with similar problems.

(n31)Footnote 131. *Nichols v. Nichols, 648 P.2d 780 (N.M. 1982). In re* Marriage of Werstiuk, No. 19341-8-*II, 1997 Wash. App. LEXIS 1440 (Wash. App. 1997)* (holding that when a spouse purchases property with separate funds but title is taken in the names of both spouses, a rebuttable presumption of a gift to the community arises.); *Winkle v. Winkle, 951 S.W.2d 80, 88 (Tex. App. 1997)* (where separate funds are used to pay for living expenses, it constitutes a gift to the community).

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CHAPTER 37 MARITAL PROPERTY

4-37 Thompson on Real Property, Thomas Editions § 37.09

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§ 37.09 Autonomous Classification: Agreements and Other Transactions Between Spouses.

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§ 37.09(a) Contract Formalities.

We have seen that the community property presumption is rebuttable. One possible way of rebutting the presumption, or of regulating classification of marital property, is by contract or transfer between the spouses. Generally speaking, the modern trend has been to allow parties greater autonomy in their business and personal affairs and this is also the case with respect to agreements and transactions concerning marital property.

Every community property state recognizes marital property agreements in some fashion. These agreements can take numerous forms, including pre-marital agreements, contracts between spouses, and separation agreements. We are concerned here primarily with law regulating agreements, before or during marriage, that would somehow alter the characterization of property in community property states. The statutes set forth various formal requirements and allow parties to design their own marital property regimes, with some limitations. General contract law and remedies will, of course, also apply.

Contract formalities are similar from state to state. Five community property states -- Arizona, California, Nevada, Texas and Wisconsin -- have adopted the Uniform Premarital Agreement Act. Some statutes contain general authorization for premarital and other marital property agreements and then spell out some other details in other statutes. n132 The law appears to be moving in the direction of general contractual empowerment of both persons about to marry and those already married. We shall consider here agreements concerning marital property rights, entered into before or during marriage, using the term "marital property agreement." The reader is cautioned, however, that legal distinctions may sometimes be drawn between agreements between married persons and those between persons yet to be married.

Statutes typically provide that a marital property agreement shall be in writing and signed by both parties. n133 Consideration is not usually necessary. n134 Premarital agreements become effective upon marriage. n135 Recording of agreements is sometimes advisable, and execution and acknowledgment in the same manner required of conveyances of real property is necessary for recording purposes. n136 A writing is required for amendment or revocation of marital property agreements. n137

Marital property agreements executed before marriage will not, of course, be enforceable against a spouse in the event of involuntary execution by that spouse or unconscionability. n138

COMPUTER-ASSISTED RESEARCH

LEXIS: contract! or transfer! w/15 rebut! w/2 presumption w/30 community w/1 property

§ 37.09(b) Substance of Contracts in General.

Modern statutes on marital property agreements provide considerable autonomy to the contracting parties. Parties may agree with respect to: n139

Rights and obligations of each of the parties in any property of either or both of them whenever and wherever acquired or located (Arizona, California, Nevada, Texas, and Wisconsin);

The right to buy, sell, use, transfer, exchange, abandon, lease, consume, expend, assign, create a security interest in, mortgage, encumber, dispose of, or otherwise manage and control property (Arizona, California, Nevada, Texas, and Wisconsin); n140

The disposition of property upon separation, marital dissolution, death, or the occurrence or nonoccurrence of any other event (Arizona, California, Nevada, Texas, and Wisconsin);

The making of a will, trust, or other arrangement to carry out the provisions of the agreement (Arizona, California, Nevada, Texas, and Wisconsin);

Modification or elimination of spousal support (Arizona, Nevada, Texas, Wisconsin); n141

The ownership rights in and disposition of the death benefit from a life insurance policy (Arizona, California, Nevada, and Texas);

Providing that upon the death of either spouse any of either or both spouse's property passes without probate to a designated person, trust or other entity by nontestamentary disposition (Wisconsin);

The choice of law governing the construction of the agreement (Arizona, California, Nevada, Texas, and Wisconsin); and,

Any other matter, including their personal rights and obligations, not in violation of public policy or a statute imposing a criminal penalty (Arizona, California, Nevada, Texas, and Wisconsin).

Marital property agreements may not adversely affect the right of a child to support. n142

In Idaho and New Mexico, all contracts for "marriage settlements" must be in writing and executed and acknowledged or proved as are conveyances of land. n143 Such agreements must also be recorded in the office of the recorder of "every county in which any real estate may be situated which is granted or affected by such contract." n144 As to authority to redefine marital property contractually, statutory language in Idaho simply states: "The property rights of husband and wife are governed by this chapter, unless there is a marriage settlement agreement entered into prior to or during marriage containing stipulations contrary thereto." n145 In New Mexico, "Either husband or wife may enter into any engagement or transaction with the other, or with any other person respecting property, which either might, if unmarried, subject, in transactions between themselves, to the general rules of common law which control the actions of persons occupying confidential relations with each other." n146

Louisiana's civil law treatment of marital property agreements is unique. The "legal regime" of marital property is the "community of acquest and gains." n147 Matrimonial agreements, "establishing a regime of separation of property or modifying or terminating the legal regime," are permitted. n148 Matrimonial agreements may be executed before or during marriage. n149 Where a prenuptial agreement is made, a contractual community, rather than a legal community, is created, n150 but there are limitations on contractual autonomy during the marriage. Except for the first year after moving into and acquiring a domicile in Louisiana, spouses may not enter into a matrimonial agreement modifying or terminating a matrimonial regime (other than subjecting themselves to the legal regime) without court approval. n151 Also, spouses may not by agreement before or during marriage renounce or alter the "marital portion" or the established order of succession to property at death. n152 The current marital portion may not exceed one million dollars and amounts to "one-fourth of the succession in ownership if the deceased died without children, the same fraction in usufruct for life if he is survived by three or fewer children, and a child's share in such usufruct if he is survived by more than three children." n153

Spouses may also choose to exercise control over classification of particular items of marital property by various sorts of transfers between themselves. Because of property classification in a community property system, and the complexity that arises from it, seemingly simple transactions between spouses can be confusing. Courts and legislators have struggled to apply sensible interpretations to what people can do and have done.

Washington provides for agreements "concerning the status or disposition of the whole or any portion of the community property, then owned by [the husband and wife] or afterwards to be acquired, to take effect upon the death of either." n154 Note that this unusual statute provides for an agreement quite different from the others discussed in this section. It provides not for definition or regulation of marital property during the marriage or in the event of divorce, but rather for provisions to take effect upon the death of either spouse. The statute is discussed further in § 37.14(a).

There is probably very little reason to limit the options available to spouses concerning classification of marital property. We have seen that modern law favors considerable contractual autonomy for spouses, and agreements can be fashioned that spell out in some detail the classification of all marital property. By definition, such agreements are the product of thought and attention by the parties and involve conscious choices. When transfers occur between spouses, however, the purposes and the possible consequences may not always be evident.

§ 37.09(c) Interspousal Transactions in Texas.

Texas has perhaps the most colorful history on the subject of autonomous control over classification of marital property. Article 16, § 15 of the Texas Constitution sets forth the basic framework of marital property in Texas. As adopted in 1876, that section provided:

> All property, both real and personal, of the wife, owned or claimed by her before marriage, and that acquired afterward by gift, devise or descent, shall be her separate property; and laws shall be passed more clearly defining the rights of the wife, in relation as well to her separate property as that held in common with her husband. Laws shall also be passed providing for the registration of the wife's separate property.

Because the Texas marital property regime is established by the constitution, it has been less flexible than a system based on only statute and judicial interpretation. Although this provision seemed to be nothing more than a definition of wife's separate property, and was apparently intended as a fairly simple protection for married women against the legislature, the Texas Supreme Court gave it great force as a limiting factor in defining marital property generally in Texas. n155 It became entrenched as a powerful and relatively immutable control, frustrating efforts on the part of spouses to exercise autonomy, and otherwise limiting the ability of the legislature and others to adapt the marital property system to changing needs.

For many years, spouses attempted to convert their community property to separate property, but the response in the courts was essentially that the constitution tells us what community property is and what separate property is, and both they and the parties themselves were powerless to change that, or even to give the constitutional provision anything but a very narrow construction. In terms of autonomy of the spouses, this extreme restraint came to a head in King v. Bruce. n156 Homer and Clara Bruce desired to convert their community property into separate estates to provide for Clara's economic security without being subjected to liability for federal gift taxes. They executed a contract purporting to divide 324 shares of stock so as to make 162 shares Homer's separate property and 162 Clara's separate property. That attempt was foiled by the Galveston Court of Civil Appeals. In its opinion, the court stated:

> There is no question but that the partition agreement is a fair one, and such as will appeal to the conscience of the court... . The question here is ... did the agreement have the effect of changing the community character of the 324 shares of stock into that of separate property of the spouses?...
>
> In our opinion the agreement effected neither a partition of the community estate in the 324 shares, nor any transfer of any interest therein from the community estate to the separate estates of the parties... . The only method of voluntarily transferring title is by gift, sale, or exchange. "But the intentions of parties cannot change the character of an estate which is fixed by law, and which they by their acts create."
>
> *McLean v. State, Tex.Civ.App., 181 S.W.2d 725, 726.* n157

The court further noted that separate property of either spouse could be conveyed to the other and that community property could be conveyed by the husband to the wife so as to make it her separate property. Whether particular property was community or separate depended, they said, upon "the existence or non-existence of the facts, which, by the rules of law, give character to it, and not merely upon the stipulations of the parties that it shall belong to one class or the other." n158

The Bruces did not give up on their attempt to convert their community property to separate property without making gifts. Instead, they concocted a rather elaborate scheme in an effort to solve their problem. In 1946, they traveled to New York City, where they engaged in certain transactions. At a New York bank, Mr. Bruce drew a check for $5,800 on a Texas bank account containing that amount of the Bruces' community funds. With that sum he opened an account in the New York bank. He then withdrew $4,000 from that account in the form of 4,000 silver dollars. Half of these were then placed in each of two containers, labeled "Container No. 1" and "Container No. 2." Mr. Bruce then drew a check for $1,000 on the New York account receiving in return two cashier's checks for $500 each, payable jointly to the Mr. and Mrs. Bruce. Finally, two more checks were drawn, for $400 each, payable to Mr. and Mrs. Bruce. The Bruces then endorsed one each of the two cashier's checks and one each of the $400 checks to each other and executed a written contract. Under the terms of the contract, the containers of silver dollars and the checks were "delivered," half to Mr. Bruce and half to Mrs. Bruce. Each then deposited $2,900 in his and her separate accounts in the New York bank and received individual cashier's checks for that amount. The contract recited these events and their purpose and noted that it was wholly executed and performed in New York and that the parties intended that the laws of New York apply to, and govern and control the validity and effect of the contract.

The Texas Supreme Court reversed lower court decisions favorable to the Bruces. They wrote:

> Hence, when the Constitution says that as to property, not owned or claimed by the wife at marriage, it becomes her separate property when acquired in one of three specified modes, *the Legislature is prohibited from saying that property acquired after marriage in some other mode may also become the wife's separate property.* n159

The court did not agree that the law of New York governed the transaction. Mr. Bruce, a lawyer, contended for his wife and himself that there was no legal impediment to prevent a solvent husband from converting part of the community

property into the separate property of his wife so that it could not be reached by future creditors of the husband. The court did not agree, stating that the "fundamental change in state policy" advocated by Mr. Bruce must be made through the legislative and constitutional channels provided by law, not in the courts.

In a sense, the Bruces lost the battle but won the war. Article 16, § 15 of the Texas Constitution was promptly amended with the addition of the following proviso:

> provided that husband and wife, without prejudice to pre-existing creditors, may from time to time by written instrument as if the wife were a feme sole partition between themselves in severalty or into equal undivided interests all or any part of their existing community property, or exchange between themselves the community interest of one spouse in any property for the community interest of the other spouse in other community property, whereupon the portion or interest set aside to each spouse shall be and constitute a part of the separate property of such spouse. n160

Additional amendments pertinent to transactions between spouses have subsequently been added to the Texas constitutional framework for marital property. Article 16, § 15 now provides:

> All property, both real and personal, of a spouse owned or claimed before marriage, and that acquired afterward by gift, devise or descent, shall be the separate property of that spouse; and laws shall be passed more clearly defining the rights of the spouses, in relation to separate and community property; provided that persons about to marry and spouses, without the intention to defraud pre-existing creditors, may by written instrument from time to time partition between themselves all or part of their property, then existing or to be acquired, or exchange between themselves the community interest of one spouse or future spouse in any property for the community interest of the other spouse or future spouse in other community property then existing or to be acquired, whereupon the portion or interest set aside to each spouse shall be and constitute a part of the separate property and estate of such spouse or future spouse; spouses also may from time to time, by written instrument, agree between themselves that the income or property from all or part of the separate property then owned or which thereafter might be acquired by only one of them, shall be the separate property of that spouse; if one spouse makes a gift of property to the other that gift is presumed to include all the income or property which might arise from that gift of property; and spouses may agree in writing that all or part of their community property becomes the property of the surviving spouse on the death of the spouse.

Note that as it now reads, the constitution permits certain, specific transactions between the spouses. Although the changes have broadened spouses' options considerably, transactions that fall outside of the permitted options presumably remain unconstitutional. For example, there appears to be no constitutionally safe way to change separate property into community property. n161

§ 37.09(d) Interspousal Transactions in California.

Other states have had a more liberal approach toward autonomy than Texas. It should be noted that husband and wife have a confidential relationship and that they owe one another various duties of loyalty and trust. n162 These duties provide an overarching framework for contractual autonomy of spouses in their dealings with one another.

Current California law provides that, subject to the "fiduciary" duties just mentioned, "either husband or wife may enter into any transaction with the other, or with any other person, respecting property, which either might if unmarried." n163 More specifically, California statutes include the following general provision, which has been in effect since January 1, 1985. When originally adopted, this section codified what was already the basic California rule that spouses could transmute the character of marital property.

Subject to Sections 851 to 853, inclusive, married persons may by agreement or transfer, with or without consideration, do any of the following:

(a) Transmute n164 community property to separate property of either spouse.

(b) Transmute separate property of either spouse to community property.

(c) Transmute separate property of one spouse to separate property of the other spouse. n165

Since January 1, 1985, it has been necessary that the transmutation be in writing by an express declaration "made, joined in, consented to, or accepted by the spouse whose interest in the property is adversely affected." n166 Transmutations of real property must be recorded to be effective against third parties without notice, n167 and they are, of course, subject to laws governing fraudulent transfers. n168 The writing requirement of § 852 does not apply to gifts between spouses of clothing, jewelry or other personal articles "used solely or principally by the spouse to whom the gift is made and that is not substantial in value taking into account the circumstances of the marriage." n169 Section 852 does not affect the law governing characterization of property in which separate and community property have been commingled. n170

Statutes in California and some other states provide that community property transferred to a revocable trust controlled by both spouses jointly remains community property unless the trust instrument or instrument of transfer expressly provides otherwise. n171 This provision was designed in part to ensure community property income tax treatment under the Internal Revenue Code. n172

§ 37.09(e) Interspousal Transactions in Louisiana.

In Louisiana, married persons may, by marriage contract, make such donations as they think proper. n173 A married person may also, by marriage contract or during marriage, give to the spouse "in full property" all that the married person might give to a stranger. n174 Donations of property, present and future, are subject to the same rules that govern donations to a third person, n175 and are not revoked by the birth of children, provided they do not exceed the limits on what spouses are permitted to dispose of to each other. n176 The Code also sets forth the effect of donations between spouses. Donation by one spouse to another of the donor's undivided interest in community property transforms that interest into the separate property of the donee. n177

Spouses in Louisiana have had some limits on their power to engage in property transactions with one another. Until 1979, n178 a contract of sale between husband and wife could take place only in three situations: (1) transfer of property from one to the other after judicial separation; (2) when a transfer by the husband to the wife had a legitimate cause, such as replacing her effects; and (3) transfer from the wife to the husband in payment of a sum promised as dowry. n179 In 1981, the following statute was adopted:

> The transfer by a spouse to the other spouse of a thing forming part of his separate property, with the stipulation that it shall be part of the community, transforms the thing into community property. As to both movables and immovables, a transfer by onerous title must be made in writing and a transfer by gratuitous title must be made by authentic act. n180

FOOTNOTES:

(n1)Footnote 132. California, for example, provides that "The property rights of husband and wife prescribed by statute may be altered by a premarital agreement or other marital property agreement." Cal. Fam. Code Ann. § 1500. *See also In re Estate of Bachmeier, 52 P.3d 22 (Wash. 2002)* (a community property agreement does not impliedly terminate by operation of law when the marriage underlying it becomes defunct).

(n2)Footnote 133. Ariz. Rev. Stat. Ann. § 25-202A; Cal. Fam. Code Ann. § 1611; Nev. Rev. Stat. § 123A.040

(1992); Tex. Fam. Code Ann. § 5.42; Wis. Stat. Ann. § 766.58(1). *Hardy v. United States, CV-N-94-0824-ECR, 1997 U.S. Dist. LEXIS 11790 (D. Nev. 1997)* (ruling that an oral agreement for opting out of the community property regime may be upheld under the doctrine of equitable estoppel).

(n3)Footnote 134. Ariz. Rev. Stat. Ann. § 25-202A; Cal. Fam. Code Ann. § 1611; Nev. Rev. Stat. § 123A.040; Tex. Fam. Code Ann. § 5.42; Wis. Stat. Ann. § 766.58(1).

(n4)Footnote 135. Ariz. Rev. Stat. Ann. § 25-201; Cal. Fam. Code Ann. § 1613; Nev. Rev. Stat. § 123A.060 (1992); Tex. Fam. Code Ann. § 5.44 (1993); Wis. Stat. Ann. § 766.58(5).

(n5)Footnote 136. Cal. Fam. Code Ann. § 1502; Wis. Stat. Ann. § 766.58(11).

(n6)Footnote 137. Ariz. Rev. Stat. Ann. § 25-204; Cal. Fam. Code Ann. § 1614; Nev. Rev. Stat. § 123A.070 (1992); Tex. Fam. Code Ann. § 5.45; Wis. Stat. Ann. § 766.58(4).

(n7)Footnote 138. Ariz. Rev. Stat. § 25-202C; Cal. Fam. Code Ann. § 1615; Nev. Rev. Stat. § 123A.080; Tex. Fam. Code Ann. § 5.46; Wis. Stat. Ann. § 766.58(6). These statutes are almost identical and are based on the Uniform Premarital Agreement Act. Attached to the provisions on unconscionability in Arizona, California and Texas are additional qualifications that the party seeking to avoid the agreement "was not provided a fair and reasonable disclosure of the property or financial obligations of the other party"; "did not voluntarily and expressly waive, in writing, any right to disclosure of the property or financial obligations of the other party"; and "did not have, or reasonably could not have had, an adequate knowledge of the property or financial obligations of the other party." In other words, the agreement is not enforceable if it was unconscionable *and* the party was not provided fair and reasonable disclosure, etc. In Nevada and Wisconsin, however, the disclosure-or-notice-of-property elements apparently are an independent test for enforceability. In those states, the absence of fair and reasonable disclosure of the other spouse's property or financial obligations; the absence of knowledge or notice thereof; and, in Nevada, the absence of a written waiver of any right to disclosure of property and financial obligations, constitute a separate basis for unenforceability, independent of the conscionability provision; *DeLong v. DeLong, 941 S.W.2d 539 (Mo. App. 1998)* (ruling that agreements must be conscionable and entered into "freely, fairly, knowingly, understandingly, and in good faith and full disclosure").

(n8)Footnote 139. These provisions are found in Ariz. Rev. Stat. Ann. § 25-203; Cal. Fam. Code Ann. § 1612; Nev. Rev. Stat. § 123A.050; Tex. Fam. Code Ann. § 5.43; and Wis. Stat. Ann. § 766.58(3).

(n9)Footnote 140. In an admirable simplification of the essence of this statement, stripped of unnecessary verbiage, the Wisconsin statute simply states: "Management and control of any of either or both spouses' property." Wis. Stat. Ann. § 766.58(3)(b).

(n10)Footnote 141. This provision is qualified in Wisconsin. Modification or elimination of spousal support may not result in a spouse having less than necessary and adequate support, and the court may require the other spouse or spouse's estate to provide support, notwithstanding the agreement, if the agreement effectively makes the spouse eligible for public assistance. Wis. Stat. Ann. § 766.58(9). The latter provision is also a part of the law in Arizona [Ariz. Rev. Stat. § 25-202D] and Nevada [Nev. Rev. Stat. § 123A.080(2)].

(n11)Footnote 142. Ariz. Rev. Stat. § 25-203B (1992); Cal. Fam. Code § 1612(b); Nev. Rev. Stat. § 123A.050(2) (1992); Tex. Fam. Code § 5.43(b); Wis. Stat. Ann. § 766.58(2).

(n12)Footnote 143. Idaho Code § 32-917; N.M. Stat. Ann. § 40-2-4.

(n13)Footnote 144. Idaho Code § 32-918; N.M. Stat. Ann. § 40-2-5. The recording or non-recording of such contracts has "a like effect as the recording or nonrecording of a conveyance of real property." Idaho Code § 32-919. *See also* N.M. Stat. Ann. § 40-2-6; Cal. Fam. Code Ann. § 1502(b).

(n14)Footnote 145. *Id.* at § 32-916. *See also Stockdale v. Stockdale, 643 P.2d 82 (Idaho Ct. App. 1982)* (husband and wife may elect at any time to change the character of their property, but only in the manner provided by statutes, including §§ 32-917-32-919).

(n15)Footnote 146. N.M. Stat. Ann.

(n16)Footnote 147. La. Civ. Code Ann. art. 2327.

(n17)Footnote 148. La. Civ. Code Ann. art. 2328.

(n18)Footnote 149. La. Civ. Code Ann. art. 2331.

(n19)Footnote 150. La. Civ. Code Ann. art. 2326; *Clay v. United States, 161 F.2d 607 (5th Cir. 1947).*

(n20)Footnote 151. La. Civ. Code Ann. art. 2329.

(n21)Footnote 152. La. Civ. Code Ann. art. 2330. For discussion of the "marital portion" *see* § 37.14(b), *infra*.

(n22)Footnote 153. La. Stat. Ann.

(n23)Footnote 154. Wash. Rev. Code Ann. § 26.16.120.

(n24)Footnote 155. *See* Joseph W. McKnight, *Texas Community Property Law: Conservative Attitudes, Reluctant Changes,* 56 Law and Contemporary Problems 71 (1993) (citing *Arnold v. Leonard, 273 S.W. 799 (Tex. 1925); Gohlman, Lester & Co. v. Whittle, 273 S.W. 808 (Tex. 1925); Cauble v. Beaver-Electra Refining Co., 274 S.W. 120 (Tex. 1925).*

(n25)Footnote 156. *201 S.W.2d 803 (Tex. 1947).*

(n26)Footnote 157. *Bruce v. Permian Royalty Co. No. 2, 186 S.W.2d 686, 687 (Tex. Civ. App. 1945),* writ refused..

(n27)Footnote 158. *Bruce v. Permian Royalty Co. No. 2, 186 S.W.2d 686, 687 (Tex. Civ. App. 1945),* writ refused. (quoting *Kellett v. Trice, 66 S.W. 51, 53 (Tex. 1902)).*

(n28)Footnote 159. *King v. Bruce, 201 S.W.2d 803, 807 (Tex. 1947)* (quoting *Arnold v. Leonard, 273 S.W. 799, 802 (Tex. 1925)).*

(n29)Footnote 160. Tex. Const. Art. 16, § 15, Historical Notes.

(n30)Footnote 161. There is one way in which this transmutation might be accomplished under Texas law. A spouse could "commingle" separate property with community property, in which case the entire fund would be classified as community if it was impossible to "trace" the separate property. *See* § 37.10(b). In some cases, this will not be a secure way of converting separate property into community property, since the owner of the separate property might later decide to, and be able to, trace the separate property.

(n31)Footnote 162. "Husband and wife contract toward each other obligations of mutual respect, fidelity, and support." Cal. Fam. Code Ann. § 720; "[I]n transactions between themselves, a husband and wife are subject to the general rules governing fiduciary relationships which control the actions of persons occupying confidential relations with each other. This confidential relationship imposes a duty of the highest good faith and fair dealing on each spouse, and neither shall take any unfair advantage of the other. This confidential relationship is a fiduciary relationship subject to the same rights and duties of nonmarital business partners ... ." Cal. Fam. Code Ann. § 721(b). "Each spouse shall act in good faith with respect to the other spouse in matters involving marital property or other property of the other spouse. This obligation may not be varied by a marital property agreement." Wis. Stat. Ann. § 766.15 . *See* § 37.12(b), *infra*, for

further discussion of duties spouses owe one another.

(n32)Footnote 163. Cal. Fam. Code Ann. § 721.

(n33)Footnote 164. "Transmute" and "transmutation" are terms frequently used to denote a change in the classification of marital property, from community to separate or separate to community.

(n34)Footnote 165. Cal. Fam. Code Ann. § 850.

(n35)Footnote 166. Cal. Fam. Code Ann. § 852(a). When it was enacted in 1984, § 852 overruled existing case law permitting oral agreements. A writing signed by the adversely affected spouse is not an "express declaration" for this purpose unless it contains language expressly stating that the characterization or ownership of the property is being changed. *In re Estate of MacDonald, 794 P.2d 911 (Cal. 1990).* "A statement in a will of the character of property is not admissible as evidence of a transmutation of the property in a proceeding commenced before the death of the person who made the will." Cal. Fam. Code Ann. § 853.

(n36)Footnote 167. Cal. Fam. Code Ann. § 852(b).

(n37)Footnote 168. Cal. Fam. Code Ann. § 851. *In re Marriage of Haines, 39 Cal. Rptr. 2d 673 (1995)* (presumption of undue influence, rather than presumption of title, applies when wife transmutes her share in marital property in exchange for husband's cosignature on loan).

(n38)Footnote 169. Cal. Fam. Code Ann. § 852(c).

(n39)Footnote 170. Cal. Fam. Code Ann. § 852(d).

(n40)Footnote 171. Cal. Fam. Code Ann. § 761(a); Idaho Code § 32-906A.

(n41)Footnote 172. Cal. Fam. Code Ann. § 761(a) Law Revision Commission Comments.

(n42)Footnote 173. La. Civ. Code Ann. art. 1743. *Salsbury v. Salsbury, 658 So. 2d 734 (La. App. 1995)* (former family home was community property); *Palmer v. Palmer, 654 So. 2d 1 (Miss. 1995)* (oil and gas properties in Louisiana subjected to resulting or constructive trust in favor of former wife).

(n43)Footnote 174. *Id.* art. 1746.

(n44)Footnote 175. *Id.* art. 1745.

(n45)Footnote 176. La. Civ. Code Ann. art. 1750.

(n46)Footnote 177. La. Civ. Code Ann. art. 2343.

(n47)Footnote 178. There is apparently some confusion as to whether the repeal of earlier law was effective in 1979 or 1980. *See Dyess v. Horton, 476 So. 2d 1025 (La. Ct. App. 1985); Freeman v. Freeman, 430 So. 2d 673 (La. Ct. App. 1983).*

(n48)Footnote 179. La. Civ. Code Ann. art. 2446.

(n49)Footnote 180. La. Civ. Code Ann. art. 2343.1. "Authentic act" is defined in La. Civ. Code Ann. art. 1833 : "An authentic act is a writing executed before a notary public or other officer authorized to perform that function, in the presence of two witnesses, and signed by each party who executed it, by each witness, and by each notary public before whom it was executed."

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CHAPTER 37 MARITAL PROPERTY

4-37 Thompson on Real Property, Thomas Editions § 37.10

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§ 37.10 The Complications of Time and Mixed Property.

Ariz. Rev. Stat. Ann. § 25.202A

We introduce at this point some of the complications of the marital property classification process. More specifically, some of the difficulties that result from acquisitions that take place over a period of time, and mixed ownership that may result from such acquisitions or otherwise, are briefly explored here. Related issues are covered in more detail in other sections. For purposes of exposition, the subjects discussed here are divided into two subsections, but they are so closely related that in some respects they must be considered together.

§ 37.10(a) Inception of Title vs. Pro Rata Apportionment.

We have seen that acquisitions during marriage are presumptively community property and acquisitions before marriage are separate property. Thus, if John Jones, a single man, pays $15,000 for an automobile, it is a separate property automobile. If Jones is a married man at the time of the purchase the vehicle is presumptively community property. But matters are not always that simple. Suppose, for example, that the acquisition involves a "purchase" of property over a period of time. Real property, automobiles, and other expensive items are frequently not purchased outright; their purchase may be financed over a period of years. n181 Should they be classified for marital property purposes according to the funds used to pay off the indebtedness or in some other fashion?

Some states follow an "inception of title" doctrine, meaning that the marital property classification is fixed at the time of original acquisition. n182 Under this theory, property "purchased" by a single woman one month before marriage, with a 10 percent down payment and the balance payable over five years, would be her separate property regardless of whether the payments are made with community funds. n183

To characterize title purchased on credit (entirely or in part) in a state like Texas, where title is determined at its inception, it is necessary to ascertain the nature of the credit. Classifying loans and credit is comparable to classifying property. As a general rule, the classification of credit follows the same patterns as classifying property.

In the first place, community property theory suggests that credit extended to a married person or couple is presumptively community credit, just as acquisitions of a married person are. The parties can, of course, specifically

provide that the credit is extended to the borrower on the borrower's separate account and that the payment of the loan can be required only from the borrower's separate property. This would be generally effective to overcome the community presumption. n184 Another way of putting this same basic idea is to say that the determinative question is to what estate is the lender looking for repayment of the loan. n185

Suppose a married couple purchases property with 10 percent down, out of the husband's separate funds, and the balance is to be paid over five years. The nature of the credit extended at the inception of title would determine the characterization of 90 percent of the title: If it was community credit (as it presumptively would be) the property would be 90 percent community and 10 percent separate property of the husband. Under the inception of title doctrine, the fact that separate property was used to pay off the loan would not make the purchased asset separate. n186

In Arizona, where the down payment is made with separate property and there is a primary borrower, the property has been characterized as separate, even if the lender insists on co-signing by the other spouse. n187

As we have seen in the foregoing discussion, inception-of-title analysis is used in Texas, New Mexico and Washington. An alternative to inception-of-title analysis, used in California, is characterization of title according to the source of the funds used to pay off the indebtedness on the property (in addition to the source of any down payment). In the earlier example, where a single person purchases property one month before marriage, paying 10% down, and payments on the balance are subsequently completed with community funds, title would be characterized as 10 percent separate property of the purchasing spouse and 90 percent community property. n188

Louisiana doesn't quite follow either the inception-of-title or pro rata apportionment approaches to classification of "commingled" n189 property. The statutory definition of separate property includes "property acquired by a spouse with separate things or with separate and community things when the value of the community things is inconsequential in comparison with the value of the separate things used." n190 Unlike most states, then, apportionment of title is not necessary; the question for classification in the case of commingled assets in Louisiana is whether the amount of community property in the mix is "inconsequential." If so, the entire fund is separate property, and if not, the entire fund is community property. n191 Thus, an account opened with about $9,000 from wife's separate funds was entirely separate property even though additional deposits of $60 and $283 were made with community funds. n192 The amount of community property commingled with the separate property was inconsequential. Of course in cases where the commingled community property was consequential, or where separate funds cannot be identified or differentiated from community funds, the entire fund will be classified as community property. n193

COMPUTER-ASSISTED RESEARCH

LEXIS: (pro rata w/1 apportion! or inception w/1 title) w/30 marital w/1 property

§ 37.10(b) Commingled Property and Tracing in General.

We have noted the general presumption that acquisitions during the marriage are community property. Therefore, in any dispute about marital property the burden of proof initially rests with the person contending that the property is, in whole or in part, separate property of one of the spouses. This brings us to the process involved in establishing that proof. In essence, we are simply matching the facts with the definitions of separate and community property.

The separate property proponent may, for example, establish that the property was (1) a donation, not an onerous acquisition; (2) purchased with separate funds, for one spouse's separate estate, rather than with community funds; or (3) purchased and paid for n194 before the marriage. Note that in the second example the asset in question is a "second generation" property, meaning that it was acquired in exchange for some other asset owned by the purchaser. The process used in such cases to link an asset with its original source is referred to as "tracing" -- the asset in question is traced to other assets which can be identified as separate property.

By definition, any onerous acquisition requires an exchange of one valuable asset (money or other property right) for another. I pay $15,000, for example, for a new automobile. Within a year or two, I might trade that car in on another one. n195 Then, a few years later, I could sell the second automobile for $10,000 and use the $10,000 to purchase stock in General Motors. If a dispute subsequently arises over the nature of the ownership of the GM stock, and I want to establish that it is, in whole or in part, my separate property, it would be necessary to "trace" the stock back to other items in this chain and establish that the stock's origins were found in separate property.

And what happens to classification if funds used to purchase property come from different "estates," n196 perhaps the community estate, the separate estate of the husband and the separate estate of the wife? Suppose that (1) I was married at the time I purchased the first automobile and up to the present; (2) I can prove that the $15,000 paid for the first automobile was a bequest from a wealthy uncle; and (3) the second car dealer gave me $10,000 in trade for my first automobile and I paid an additional $10,000 from savings to make up the $20,000 purchase price. I can trace the GM stock back to the $10,000 received when I sold the second car; to the second car; to the first car; to the $15,000 inherited from my uncle. Have we, through this tracing process, established that the stock is separate property? The answer is yes and no. To prove that the stock is *entirely* separate property, it would be necessary also to prove that the $10,000 in savings was separate property, which might also require additional tracing.

If the $10,000 is community property, however, the GM stock would presumably be one-half my separate property and one-half community property. When spouses mix the property of one marital estate with the property of another marital estate, the result is "commingled" property. Commingling is, of course, a fairly common occurrence.

Tracing and commingling are not always linked -- tracing will often be necessary whether or not community and separate property have been commingled -- but they must frequently be analyzed together. Assuming the savings in the example in the preceding paragraph is community property illustrates both tracing and commingling. Both the process and the proof can be difficult and complex, and we have seen that the burden of overcoming the community presumption is a heavy one. There are, of course, many examples illustrating tracing and commingling in various contexts. n197

Title to property can be mixed between the marital estates whether the state follows an inception of title approach to characterization or a pro rata approach. Suppose, for example, that real property is purchased with a down payment of 20% from the husband's separate funds and a loan for the balance. In California, where the pro rata approach is used, the remaining issue is the source of funds used to pay off the loan. If they are entirely community property, title would be 20% husband's separate property and 80% community property, subject to additional pro rata apportionment for appreciation attributable to each estate over the years. n198 In Texas, which characterizes title at its inception, the unanswered question will be different but title to the property may still be mixed. If the credit used to pay the 80 percent was community credit (which it will presumptively be) in Texas title would be 20% separate property of the husband and 80% community property. n199

Wisconsin has essentially codified the usual rules concerning commingled property:

> Except as provided otherwise in §§ 766.61 [life insurance] and 766.62 [deferred employment benefits], mixing marital property with property other than marital property n200 reclassifies the other property to marital property unless the component of the mixed property which is not marital property can be traced. n201

As discussed in § 37.10(a), Louisiana has a unique provision concerning commingled property. There, separate property includes "property acquired by a spouse with separate things or with separate and community things when the value of the community things is inconsequential in comparison with the value of the separate things used." n202 The question then is not the percentage contributed by each estate but whether the community property contribution was

consequential. Tracing will still be necessary, however, since the estate contributing assets but not receiving credit in the form of title may still be entitled to reimbursement. n203

If a spouse wishes to maintain the separate identity of property, there are obvious risks in commingling such property with community property. The burden of proof is on the separate property proponent and it is a heavy burden. Thus, commingling presents the possibility that one spouse can convert large amounts of separate property of the other spouse into community property simply by mixing with it a small amount of community property. Careful record-keeping may avoid this result but records are not always kept or available. The following Comment addresses this problem.

> *What of De Minimis Mixing?* An obvious matter of concern is the possibility of serious injustice that could result from mixing a minimal amount of marital property with a substantial amount of other property. *See* Reppy and Samuels, *Community Property in the United States,* pp. 128 et seq. (1982). For example, one principal payment might be made from marital property on a large mortgage on a valuable piece of individual real property. This would mix marital and individual property. Another example might be one deposit of marital property to a very large individual bank account. However these types of transactions lend themselves to solution by an application of tracing, since the underlying types of property are very much record-oriented. Meeting the burden of proof in a tracing process from the records should usually be possible.
>
> A more difficult case is that of fungible properties -- a large stamp, coin or precious, gem collection, for example. These will create the same types of problems that they already create when they are not in unified ownership. Commingling of fungible goods without being willing to sacrifice ownership is a highly dangerous practice and would remain so under the Act. In reality the spouse who stands to gain from a reclassification arising from a "tainting" of a large collection of fungibles with a small amount of marital property will have to carry the burden of proving that a mixing even occurred. In a sense that imposes the burden on that spouse to trace the marital property *into* the mixed property, which will be an effective though backward threshold method of tracing. n204

Another significant area involving mixed property concerns the situations where the labor and skill attributable to one estate enhances the capital of another estate. This can happen, for example, when a married individual owns a separate property business and runs that business with community effort and skill. These situations are discussed in § 37.11(c)(5) in connection with classification of interests associated with business and investment.

COMPUTER-ASSISTED RESEARCH

LEXIS: commingl! w/15 community w/1 property w/30 tracing or trace! de minimus w/5 comming1! or mix! w/30 community w/1 property

FOOTNOTES:

(n1)Footnote 181. Discussion of marital debt and liabilities imposed on marital property generally is found in § 37.13.

(n2)Footnote 182. *See Cummings v. Anderson, 614 P.2d 1283 (Wash. 1980); E.I. DuPont de Nemours & Co. v. Garrison, 124 P.2d 939 (Wash. 1949). See also Camp v. Camp, 972 S.W.2d 906, 909 (Tex. Ct. App. 1998)* (inception of title determining whether property is separate or community property occurs when a party first has a right of claim to the property by virtue of which title is finally vested).

(n3)Footnote 183. *See Hawkins v. Hawkins, 612 S.W.2d 683 (Tex. Civ. App. 1981); English v. Sancez, 796 P.2d 236 (N.M. 1990); Hickey v. Griggs, 738 P.2d 899 (N.M. 1987); Hollingsworth v. Hicks, 258 P.2d 724 (N.M. 1953); Laughlin v. Laughlin, 155 P.2d 1010 (N.M. 1944). See also In re Binge's Estate, 105 P.2d 689 (Wash. 1940).* As the *Hawkins* case illustrates, reimbursement may be due from one marital estate to the other, but title is characterized at its inception. Reimbursement is discussed elsewhere in this chapter.

Where equity requires, qualifications may be applied. When a couple plans to marry, for example, and one of the two takes title in his name alone (before the marriage), in violation of their confidential relationship and contrary to the understanding of the other, a court may impose a constructive trust on the nominal owner's title, notwithstanding the inception of title doctrine. *Andrews v. Andrews, 677 S.W.2d 171 (Tex. Civ. App. 1984).*

(n4)Footnote 184. *See Lepel v. Lepel, 456 P.2d 249 (Idaho 1969); Gapsch v. Gapsch, 277 P.2d 278 (Idaho 1954).*

(n5)Footnote 185. *Gudelj v. Gudelj, 259 P.2d 656 (Cal. 1953); McElyea v. McElyea, 163 P.2d 635 (N.M. 1945).*

(n6)Footnote 186. *Fritch v. Fritch, 335 P.2d 43 (Wash. 1959).*

(N7)Footnote 187. *Kingsbury v. Kingsbury, 379 P.2d 893 (Ariz. 1963).*

(n8)Footnote 188. *See In re Marriage of Marsden, 181 Cal. Rptr. 910 (1982)* (title apportioned according to original payment made out of separate property and the amount contributed out of community; appreciation in property was also apportioned based on the percentage of the purchase price paid by each estate); *Malmquist v. Malmquist, 792 P.2d 372 (Nev. 1990)* (separate loan obtained before marriage; appreciation apportioned according to payments made by each estate). *See also In re Marriage of Nored, 971 S.W.2d 328, 331 (Mo. Ct. App. 1998)* (status of property as marital or separate is based not on "inception of title" rule, but on "source of funds" approach, under which the character of the property is determined according to the source of funds which financed the purchase).

(n9)Footnote 189. *See* § 37.10(b).

(n10)Footnote 190. La. Civ. Code Ann. art. 2341.

(n11)Footnote 191. La. Civ. Code Ann. art. 2338 provides that "property acquired with community things or with community and separate things, unless classified as separate property under Article 2341" is community property.

(n12)Footnote 192. *Succession of Russo, 246 So. 2d 26 (La. Ct. App. 1971). See also Kyson v. Kyson, 596 So. 2d 1308 (La. Ct. App. 1991).*

(n13)Footnote 193. *Thibodaux v. Thibodaux, 577 So. 2d 758 (La. Ct. App. 1991).* Note also, as discussed in § 37.10(b), that the character of commingled funds is still significant in Louisiana, apart from issues of marital property classification. The estate contributing assets but not receiving credit in the form of title may still be entitled to reimbursement. *Succession of Russo, 246 So. 2d 26 (La. Ct. App. 1971).*

(n14)Footnote 194. In a state following inception-of-title doctrine, it would not be necessary to prove that the property was completely paid for before marriage.

(n15)Footnote 195. These exchanges of one asset for another are sometimes referred to as "mutations." The first mutation in this example changed a sum of money into an automobile; the second mutation was a second car for the first.

(n16)Footnote 196. The term "estate" in this context refers not to the estate of a decedent but simply to the ongoing marital estates during the marriage.

(n17)Footnote 197. The following cases illustrate the process: *Franklin v. Franklin, 253 P.2d 337 (Ariz. 1953); Porter v. Porter, 195 P.2d 132 (Ariz. 1948); Blaine v. Blaine, 159 P.2d 786 (Ariz. 1945); In re Marriage of Lucas, 614 P.2d 285 (Cal. 1980); In re Marriage of Mix, 536 P.2d 479 (Cal. 1975); Beck v. Beck, 51 Cal. Rptr. 491 (1966); Lang v. Lang, 711 P.2d 1322 (Idaho Ct. App. 1985); Martsch v. Martsch, 645 P.2d 882 (Idaho 1982); Thibodaux v. Thibodaux, 577 So. 2d 758 (La. Ct. App. 1991); Succession of Norwood v. Norwood, 519 So. 2d 338 (La. Ct. App. 1988); Lane v. Lane, 375 So. 2d 660 (La. Ct. App. 1978); Nichols v. Nichols, 648 P.2d 780 (N.M. 1982); Corley v.*

Corley, 594 P.2d 1172 (N.M. 1979); Malmquist v. Malmquist, 792 P.2d 372 (Nev. 1990); Gibson v. Gibson, 614 S.W.2d 487 (Tex. Civ. App. 1981); Pollok v. Pollok, 499 P.2d 231 (Wash. App. 1972); In re Matter of Estate of Lloyd, 487 N.W.2d 647 (Wis. Ct. App. 1992); Oliver v. Oliver, 812 So. 2d 1128 (Miss. App. 2002) (spouse's separate funds from inheritance were not commingled with funds in a checking account so as to become marital property); *Lansberry v. Lansberry, 1997 Tex. App. LEXIS 2196 (Tex. App. 1997)* (holding that trial court did not err in finding that proceeds of stock account opened before marriage were community property where the account held commingled separate and community funds and records were not clear enough for reliable tracing); *DeWitt v. Edward L. Jones Estate, 211 Wis.2d 891 (Wis. App. 1997)* (nonmarital real estate found to be marital property under UMPA because of commingling with marital property); *Hayton v. Hayton, 1997 Wash. App. LEXIS 634 (Wash. App. 1997)* (ruling that where a spouse uses community funds to improve the other spouse's separate property without intending a gift, the right to reimbursement is limited to the increase in value to the property); *In re Cupp, 730 P.2d 870 (Ariz. 1986); In re Braud, 53 Cal. Rptr. 2d 179 (1996).* (N. 185). Singley v. Singley, No. 1999-*CT-00754-SCT, 2003 Miss. LEXIS 305 (Miss. App. 2000)* (ex-husband's inheritance was commingled and thus become marital property).

(n18)Footnote 198. *See In re Marriage of Marsden, 181 Cal. Rptr. 910 (1982).*

(n19)Footnote 199. *Bell v. Bell, 593 S.W.2d 424 (Tex. Civ. App. 1980).*

(n20)Footnote 200. Note that "property other than marital property" is not the equivalent of "individual property" in Wisconsin. Individual property is essentially the same as separate property in other community property states, and includes "[p]roperty owned at a marriage ... if, at the marriage, both spouses are domiciled in this state." Wis. Stat. Ann. § 766.31. "Property other than marital property" includes individual property and any other property that is not marital (community) property.

(n21)Footnote 201. Wis. Stat. Ann. § 766.63(1).

(n22)Footnote 202. La. Civ. Code Ann. Art. 2341.

(n23)Footnote 203. *Succession of Russo, 246 So. 2d 26 (La. Ct. App. 1971).*

(n24)Footnote 204. Unif. Marital Property Act § 14 cmt., 9A U.L.A. 97, 131; *Pelanda v. Pelanda, 2002 Ohio 1123 (Ohio App. 2002)* (dispute between former husband and wife over the value of the inheritance was de minimis).

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CHAPTER 37 MARITAL PROPERTY

4-37 Thompson on Real Property, Thomas Editions § 37.11

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§ 37.11 Classification of Particular Assets.

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We now proceed to some of the other details of marital property classification, focusing on the many issues that have tested the simplicity of the statutory definitions of separate and community property. Even though the community property system arose out of the civil law tradition, with its emphasis on codification, many of these issues were addressed initially in the courts. Even in common law community property states, much of the law has now been codified. In that sense, the law in the common law jurisdictions has moved somewhat closer to the civil law tradition of preferring governance by codes rather than judicial decision. As would be expected, the Louisiana Civil Code has long addressed more definitional issues than the statutes in common law jurisdictions originally did. With the addition of the Wisconsin Marital Property Act, based on, but even more thorough than, the Uniform Marital Property Act, and a fairly comprehensive California code, the trend toward codification is quite clear.

In this section we consider the codified rules of marital property classification and some of the responses of the courts to issues of classification. After this exploration of details about marital property "title," in § 37.12 we consider issues of management and control of marital property. Powers of management do not necessarily coincide with title, but there are clear connections between the two.

§ 37.11(a) Classification When Spouses Are Separated.

Questions sometimes arise as to the duration of the marital community. n205 In states recognizing common law marriage there may be some doubt as to when the marriage began. n206 A more common problem is the time when a marital community ends. When husband and wife are living separate and apart from one another, the proper classification of earnings is not necessarily clear. Divorce is a conclusive end to a marriage, but in a sense, the "community" of husband and wife can be severed before divorce, upon separation, for example. In recognition of this fact, some states have adopted the rule that earnings during separation are the separate property of the party acquiring them. n207

Questions can arise concerning the definition of "separate and apart." n208 An Idaho statute n209 provided that the earnings and accumulations of only the wife, while she is living separate from her husband, are the wife's separate

property. This provision, however, created an unconstitutional distinction in the division of property upon divorce and amounted to a denial of equal protection under the United States Constitution. n210

In an Arizona case, n211 the wife testified that the marriage was irretrievably broken. Subsequent to that, the husband received lottery winnings, and he asserted that the marital community ended no later than the wife's testimony. The Arizona court did not agree, concluding that a marital community endures in Arizona until a final dissolution is ordered by the court.

§ 37.11(b) Professions and Employment.

§ 37.11(b)(1) Salary and Wages.

Perhaps the most elementary example of community property is pay received for labor during marriage. The fundamental premise of community property is that the product of labor, effort and skill expended by a married person is community property, and therefore, salary and wages earned during the marriage are indisputably community property. n212 Salary and wages earned prior to marriage are, of course, separate property.

§ 37.11(b)(2) Retirement Benefits Generally.

Classification of retirement benefits and related interests has been frequently litigated in recent years, usually in the context of proceedings to dissolve the marriage. Retirement rights are generally viewed as deferred compensation, leading to the conclusion that classification as community or separate will depend on whether there is a marital community n213 during the period the benefits accrue. n214 In earlier times, courts tended to focus on whether retirement and other benefits were "vested" or "contingent" during the marriage. n215 Those that were not vested during the marriage would not be community property. The modern rule, however, is that classification should not depend on whether the benefits are vested or contingent or whether they have matured and are immediately payable. n216 "Pension rights, whether or not vested, represent a property interest; to the extent that such rights derive from employment during coverture, they comprise a community asset subject to division in a dissolution proceeding." n217 With increasing awareness of the importance of dealing with prospective retirement benefits upon dissolution of marriage, some states have adopted statutes directing courts to determine the rights of the parties in retirement benefits. n218 And lawyers assisting parties in dissolution should always raise and deal with the subject of retirement benefits.

If the benefits have accrued in part during marriage and in part while the employee was single, classification will be divided in some way between the community estate and the employee's separate estate. Computations can sometimes present problems. Valuation and apportionment of interests in a retirement plan depend first of all on the type of plan in question. As explained by the Arizona Supreme Court:

> The two major kinds of pension plans are "defined contribution" and "defined benefit" plans. Under a defined contribution plan, a specified amount of money is periodically contributed to a fund by the employer, the employee, or both. This fund is invested and the earnings are divided proportionally among all the plan participants. At any moment in time, there is a specific amount of money assigned to the account of each participant. These plans are thus analogous to a savings account. The total amount of benefits receivable under such a plan depends upon the success of fund investments. By contrast, under a defined benefit plan, the benefits are specified in advance, usually as a percentage of salary and related to years of service, and no account is kept for the employee... .
>
> With either type of plan, its present cash value must be determined before a present lump-sum satisfaction of the parties' interests can be made. Various actuarial calculations are used to discount the present value of the retirement plan to reflect contingencies affecting the eventual payout, including discounts for mortality, interest, probability of vesting, and probability of continued employment. However, not all of these calculations are applicable to every retirement plan:

> Valuation depends in part on the type of plan involved. In a defined contribution plan, employing individual accounts to which contributions are credited, the best estimate of present value is the amount currently credited to the employee's account. An adjustment, however, must be made if the account figure is not vested or if it is not payable when the employee dies prior to reaching retirement age. If those factors are present, then the account balance must be discounted for the probability of vesting and for the probability of survival to retirement. n219

Once a value is placed on the benefits, it is often necessary to apportion them between the estates which own the benefits. If the marriage is in force throughout the entire period retirement benefits are accruing, the benefits would, of course, be 100% community property, and the apportionment would simply be 50% ownership in each spouse. In other cases, a "time rule" is probably the most frequently used method for apportioning benefits. Ownership of community property is shared equally by the spouses, meaning that each owns a one-half interest. A pro rata apportionment formula to determine the non-employee spouse's percentage of ownership of the retirement fund might be:

> (no. months married under the plan / no. of months employed under the plan as of the date of retirement) x value of benefits as of the date of retirement / 2. n220

This method is appropriate only if the amount of the benefits is substantially related to the number of years of service. n221 In cases where the dissolution of marriage precedes the retirement, this formula may have the effect of improperly skewing the apportionment. This would occur, for example, when the employee's retirement benefits were increased after the divorce. Some jurisdictions have accordingly indicated that the benefits should be apportioned based upon the value of the community's interest at the time of the divorce, not the date of retirement. n222

Wisconsin has a relatively detailed statute responding to a number of the issues that have been litigated in other states:

> (1)(a) Except as provided in par. (b), a deferred employment benefit attributable to employment of a spouse occurring after the determination date is marital property.
>
> (b) A deferred employment benefit attributable to employment of a spouse occurring after the determination date is mixed property if, after the determination date and during the period of employment giving rise to the benefit, the employed spouse or his or her spouse are at any time not domiciled in this state. The marital property component of that mixed property is the amount which results from multiplying the entire benefit by a fraction, the numerator of which is the period of employment giving rise to the benefit that occurred after the determination date and during marriage and the denominator of which is the total period of employment giving rise to the benefit.
>
> (2) A deferred employment benefit attributable to employment of a spouse occurring while the spouse is married and partly before and partly after the determination date is mixed property. The marital property component of the mixed property is the amount which results from multiplying the entire benefits by a fraction, the numerator of which is the period of employment giving rise to the benefit that occurred after the determination date and during marriage and the denominator of which is the total period of employment giving rise to the benefit.
>
> (2m) Unless provided otherwise in a decree or marital property agreement, a mixed property deferred employment benefit shall be valued as of a dissolution or an employee spouse's death.
>
> (3) Ownership or disposition provisions of a deferred employment benefit which conflict with sub. (1) or (2) are ineffective between spouses or former spouses or between a surviving spouse and a person claiming under a deceased spouse's disposition at death.
>
> (4) If a deferred employment benefit plan administrator makes payments or takes actions in

accordance with the plan and the administrator's records, the administrator is not liable because of those payments or actions.

(5) The marital property interest of the non-employee spouse in a deferred employment benefit plan terminates at the death of the non-employee spouse if he or she predeceases the employee spouse. n223

COMPUTER-ASSISTED RESEARCH

LEXIS: marital or community w/1 property w/30 (retirement w/3 benefit!) or pension!

§ 37.11(b)(3) Government Retirement Benefits.

Absent statutory provisions to the contrary, retirement benefits from the military and other government pension plans are generally treated in a fashion comparable to private retirement plans. n224 One significant difference for federal retirement plans is that under the Supremacy Clause of the United States Constitution, state community property law can be overridden. Thus, in 1979, the United States Supreme Court ruled that benefits under the Railroad Retirement Act pension could not be diverted, through a state's community property laws, from the employee to the employee's spouse. n225

A similar development involving military retirement and a clash between the states and the federal government has commanded a considerable amount of judicial and legislative attention in the past 15 years. Two years after *Hisquierdo*, in *McCarty v. McCarty*, the court held that a California court had improperly awarded part of the husband's military retirement benefits to the wife. n226 The court found that the application of state community property law conflicted with the federal military retirement scheme, which required that the retirement pay be treated as separate property of the serviceman or woman. This was a significant departure from earlier treatment of military retirement pay and individuals and community property states immediately responded.

A major question in the states concerned whether *McCarty* was to be applied retroactively. That issue was presented in the state courts with varying results. Representative of the answers that were generally adopted is the position that *McCarty* could not apply to judgments which became final before the date of the *McCarty* decision. n227 The rule of *McCarty* was applied, however, in cases that were on appeal when *McCarty* was decided. n228

Congress also responded quickly to the dilemmas created by the *McCarty* decision. In September of 1982, they enacted the "Uniformed Services Former Spouse's Protection Act." n229 This turn of events was no doubt enthusiastically welcomed by community property jurisdictions, but in a sense it complicated even further the struggle in the states to develop an effective approach to the problems of military retirement. In effect, the Act overturned the *McCarty* decision, but it created another set of retroactivity problems. Although the stated effective date of the Act was February 1, 1983, Congressional intent appeared to be complete nullification of the *McCarty* decision. n230 Another flood of cases followed. The courts tended to give the statute a broad interpretation, saying that decrees entered between the date of *McCarty* and the date the statute was enacted could be reopened, although in some cases settlements were found equitable and the matters were not, in fact, reopened. n231

§ 37.11(b)(4) Disability Benefits.

Disability benefits have been somewhat difficult to characterize. Several approaches appear in the decisions. According to one popular view, they are essentially a replacement for lost earnings and, as such, would presumably be classified according to whether the recipient is married or single during the period for which earnings are replaced. n232 Complications arise, however, because of the close connection between retirement and disability pay. When the disabled spouse can choose between regular retirement pay and disability retirement, courts have been reluctant to ignore the spouse's community property claim even when benefits are not payable during the marriage. To the extent the

benefits represent or replace deferred compensation or retirement pay, they have been given the same treatment as retirement benefits. n233 The decision in such cases depends on the nature of the disability program and the characterization of the payments. If the payments derive from injury or from lost earning capacity, rather than work or labor, courts will classify them according to the time they are received. Some plans are seen as a mixture of retirement pay and compensation for lost earnings; in that event, the retirement portion is classified as deferred compensation, and characterization of the portion replacing lost earnings depends upon whether it is replacing earnings during the marriage or after dissolution. n234

Some disability plans have been compared to worker's compensation benefits and classified as separate property if received after termination of the marriage. n235 A Louisiana court has said that disability benefits that do not qualify as deferred compensation should be classified in the same fashion as worker's compensation and tort damage awards. n236

Disability coverage can be purchased by individuals from insurance companies. Such insurance is not necessarily related to employment except in the sense that it is designed to protect the earning capacity of the insured. Some courts have classified these insurance benefits according to the source of premium payments. n237 Under this approach, if the policy was paid for with community funds the benefits are classified as community property. This view has been criticized because disability is fundamentally different from life insurance; it is, rather, protection of earning power and therefore should be classified the same way earnings are -- as community property for the period during the marriage and as separate property if received after the marriage. n238

COMPUTER-ASSISTED RESEARCH

LEXIS: marital or community w/1 property w/30 disability w/3 benefit!

§ 37.11(b)(5) Worker's Compensation and Severance Pay.

Worker's compensation benefits are similar to disability benefits: Both compensate the employee for loss of earning capacity. If received during marriage they are community property and if received after the marriage they are separate property. n239 Severance pay is not generally characterized as a form of deferred compensation and therefore will be classified only as of the date it is received. n240

This conclusion again is based on the nature of the benefit. If the severance pay is received after the divorce, and the payments are based not on some contractual arrangement with the employer or an insurance company, but on the loss of employment, the pay will be viewed as consideration for termination, not as consideration for community effort, and therefore would be classified as separate property of the employee. n241 If, however, the right is derived from the terms of employment, the pay might be classified as community property, at least in part. n242 Where the payment is derived from a private contract of insurance, and the community pays the premiums, the community estate may have an interest in the payments unless the payments are intended to replace post-dissolution income that would be separate property of the insured. n243

§ 37.11(b)(6) Profit-sharing and Stock Options.

Other benefits of employment available to some are incentives such as profit-sharing plans and stock options. The analysis in such cases has been similar to the analysis of retirement benefits: These payments are not gifts from the employer but rather are another form of compensation for work performed. To the extent the benefits have vested during the marriage, they are classified as community property. n244 The key date for allocation of stock options between a divorcing husband and wife appears to be the time the stocks become vested, as opposed to the dates the options could be exercised. n245 This is similar to the rule applied to retirement benefits, although in that case, "vesting" in the usual sense of that word is not required. In the context of a variation on the question, it is likely that technical vesting would not be required for stock options either. The key point is when did ownership begin, not when

were all contingencies removed. n246

§ 37.11(b)(7) Life Insurance Provided by the Employer.

Life insurance policies n247 are sometimes provided by employers as a benefit of employment. Such a policy on the life of a married person has been characterized as community property even though the premiums are not deducted from the employee's salary. n248 The reasoning, of course, is that the insurance is a benefit earned by employment during marriage.

Life insurance provided by an employer as a benefit of employment can be easily overlooked, giving rise to conflicting claims, such as by a surviving spouse and former spouse. It is necessary to address both the relationship between the employee and the spouse and the contractual relationship with the insurance company. A Washington couple divorced in 1978 and in a settlement agreement the wife transferred to the husband as his separate property all life insurance policies on his life. The husband did not, however, change the beneficiary designation of a group policy on the employer's records, and when the husband remarried and then died, a dispute over the insurance proceeds ensued between the former wife, who was the named beneficiary, and the widow, who claimed the proceeds as community property. In a decision overruling earlier cases, the Washington Supreme Court concluded that the character of funds used to pay the most recent term should determine whether a term life insurance policy is separate or community property. n249 In a "Solomonesque" twist, the court awarded one-half of the proceeds to the widow (the policy was community property of the second marriage) and one-half to the former spouse (named as beneficiary in the policy, thus receiving the insured's one-half interest). n250

§ 37.11(b)(8) Social Security Benefits.

Social Security benefits have been compared to defined benefit pension plans, suggesting that they should be treated as deferred "compensation." n251 This opinion has not prevailed and was abandoned even by the court that proposed it, which reasoned that the comprehensive federal regulation of Social Security indicates that Congress had preempted the field, preventing a division of benefits under state law. n252 It is not entirely clear, however, that state law is entirely preempted. For example, should disability benefits under Social Security be treated in the same way as other disability pay? A Texas trial court thought so, but the appellate court reversed on the basis of preemption. n253 However, Louisiana resolves the preemption problem by allocating to the other spouse ownership of community property equal in value to the social security benefit:

> When federal law or the provisions of a statutory pension or retirement plan, state or federal, including but not limited to social security, preempt or preclude community classification of property that would have been classified as community property under the principles of the Civil Code, the spouse of the person entitled to such property shall be allocated or assigned the ownership of community property equal in value to such property prior to the division of the rest of the community property. n254

§ 37.11(c) Business and Investment.

In § 37.11(b) we focused on "Professions and Employment," discussing various property rights and benefits associated with labor and service. In this section we concentrate on a few classification problems and questions generally associated with "capital" rather than labor. There is not necessarily a bright line between these two, of course, but this categorization seems useful for purposes of organizing the discussion.

§ 37.11(c)(1) Business and Professional Goodwill.

We have discussed salary and other forms of compensation related to employment, such as retirement benefits. In § 37.11(c)(4), *infra* we explore "rents, issues and profits," income derived from property or investments owned by one or both spouses. In some cases, this income will result from ownership of a business or professional practice. In addition to

profits and other physical assets, where one or both spouses own a business, or engage in a professional practice, the less tangible form of wealth known as "goodwill" presents serious marital property issues.

Professor Blumberg has defined goodwill as follows:

> Goodwill is widely understood today as a constellation of inseparable intangible assets that inhere in a business or practice and enable it to realize supernormal earnings. The earnings are supernormal in the sense that they exceed the sum of the market value of the manager's labor and a reasonable return on all tangible assets and individually quantifiable intangible assets. The supernormal earnings are usually characterized as excess earnings; their existence is both an indicator of goodwill and an important factor in measurement of its value. n255

Goodwill associated with a business has generally been subject to classification as community property. n256 Goodwill associated with a "professional practice" has presented an apparently more difficult problem. The reason for the difficulty may be the perception that "professions" are distinctive because they involve personal service; thus the "business" of a professional is essentially wrapped up in the practitioner and can only be continued by that person. In effect, there seem to be two slightly different distinctions drawn in goodwill cases. "Business" or "commercial" goodwill is sometimes distinguished from "professional" goodwill. A related but not identical distinction has been made between "marketable" and "unmarketable" goodwill. Because professional practices have been seen as "personal," and not readily transferable, any goodwill associated with them is sometimes not seen as a marital asset.

Blumberg addresses whether market transferability is and should be required for recognition and division of goodwill at divorce. She writes that a minority of eleven states recognize only goodwill that can be transferred in the market. n257 A majority of states, however, recognize both marketable and non-marketable goodwill as "marital property" in the context of divorce. n258

Treatment of "professional" goodwill, whether in those terms (professional vs. commercial) or in terms of marketability, has not been uniform but a trend might be discernible. A California court was perhaps the first in the second half of the 20th century to recognize the possibility that professional goodwill was community property divisible on dissolution of the marriage. n259 A Texas court had much earlier suggested as much, n260 but that conclusion was not confirmed by the state's highest court. In a fairly recent decision, the Texas Supreme Court took the general position that professional goodwill simply cannot be separated from the professional person, and therefore is not generally community property capable of division upon dissolution of a marriage. n261 Professor James W. Paulsen states: "In the two decades since *Nail*, every other community property jurisdiction has answered the professional goodwill question contrary to Texas, and the inequity of the Texas rule is becoming more and more apparent." n262 Even later Texas decisions have recognized the possibility of divisible professional goodwill where it is determined that it exists independently of the personal ability of the professional spouse and has commercial value. n263 This test is similar to a Wisconsin case involving a dental practice, in which the court required a showing that the goodwill was marketable and had value over and above the practice's assets and the professional's skills and services. n264 Certainly the weight of authority has moved in the direction established by California, and professional goodwill will generally be subject to classification as community property, at least in some cases. n265 There are instances where courts have reached a contrary conclusion, but these may be explained by specific circumstances. For example, it has been held that the professional goodwill of a lawyer in a large firm is not a divisible marital asset. n266

Whether the trend suggested by Professor Paulsen in community property states will move most states to accept professional goodwill on the same basis as commercial goodwill is yet to be seen. At the moment, it appears that a number of states will continue to focus on marketability as a test of whether goodwill can be treated as marital or community property. It is unlikely, however, that many future decisions will turn on the distinction between "professional" and "commercial."

COMPUTER-ASSISTED RESEARCH

LEXIS: marital or community w/1 property w/30 goodwill w/5 business or professional

§ 37.11(c)(2) Professional Education and Licenses.

More than a few divorcing spouses have tried to take claims to professional skills and attributes one step further than the claims to a share of professional goodwill. Some have asserted a claim to benefits from their partners' professional degrees and licenses acquired during the marriage. Like the goodwill claims, this claim can arise in both common law property states and community property states.

The basic issue in these cases has been whether professional degrees and licenses can be classified as property. If so, in community property states, a second question is whether it is community property, half-owned by the spouse and subject to division in divorce. It seems likely that a degree or license, to the extent it was earned during the marriage, would be characterized as community property, if it is property at all.

States have been reluctant, however, to classify professional degrees and licenses as property. Unlike goodwill of an existing business, the value of a degree or a license seems to be too indefinite and conjectural for courts to consider as property. n267 The states have, nevertheless, recognized a need for some recompense for the person who has supported his or her spouse through the years of acquiring professional education and licensing, only to find the marriage dissolving soon thereafter. California, for example, has provided for reimbursement by statute:

> (a) "Community contributions to education or training" as used in this section means payments made with community or quasi-community property for education or training or for the repayment of a loan incurred for education or training, whether the payments were made while the parties were resident in this state or resident outside this state.
>
> (b) Subject to the limitations provided in this section, upon dissolution of marriage or legal separation of the parties:
>
> (1) The community shall be reimbursed for community contributions to education or training of a party that substantially enhances the earning capacity of the party. The amount reimbursed shall be with interest at the legal rate, accruing from the end of the calendar year in which the contributions were made.
>
> (2) A loan incurred during marriage for the education or training of a party shall not be included among the liabilities of the community for the purpose of division pursuant to this division but shall be assigned for payment by the party. n268

The statute goes on to provide for equitable modification of the reimbursement in appropriate circumstances, including substantial benefit to the community from the education, training or loan; n269 offsetting education or training received by the other party for which community contributions were made; and reduction of the need of the party for support as a result of gainful employment made possible by the education or training. Reimbursement pursuant to this statute is the exclusive remedy of the community or a party "for the education or training and any resulting enhancement of the earning capacity of a party." n270

Louisiana has also provided for reimbursement of expenditures for education to the extent the claimant did not benefit from the increased earning power during the marriage. n271 Washington and Wisconsin have also recognized the possibility of reimbursement to compensate the spouse supporting the degree earner. n272

A Texas decision voices a somewhat different analysis of the reimbursement question:

> The rule is sometimes stated that on dissolution of the marriage, if one party has contributed separate property, or if community funds have been applied to the enhancement of the property of the other, reimbursement is allowed. We do not have this here. Any reimbursement here is referable only to the education of one of the spouses, which we have held is not a property right, and which was admittedly paid for from community funds. Moreover, there are no pleadings seeking reimbursement. n273

For these reasons, the court concluded that the trial court erred in awarding $20,000 as a part of the division of the estate of the parties as reimbursement for community expenses for education of one spouse.

At least one common law court has suggested a similar analysis:

> If the plan fails by reason of the termination of the marriage, we do not regard the supporting spouse's consequent loss of expectation by itself as any more compensable or demanding of solicitude than the loss of expectations of any other spouse who, with the hope and anticipation of the endurance of the relationship ... has invested a portion of his or her life, youth, energy and labor in a failed marriage. n274

COMPUTER-ASSISTED RESEARCH

LEXIS: marital or community w/1 property w/30 professional w/2 (degree! or education or skill! or license!)

§ 37.11(c)(3) Appreciating Assets in General.

In several states at least, a distinction is drawn for purposes of classification between income from property (rents, profits and increase) -- discussed in § 37.11(c)(4), *infra* -- and an increase in the value of property. In all states, increases in value of property over time (appreciation) take the same character as the original property. One important question is whether the property has experienced any change in kind. If not, that is if the only change is in value, ownership of the property does not change. Thus a painting purchased with $5,000 in community funds, which doubles in value during the marriage, is $10,000 worth of community property. Community real property valued at $100,000 early in the marriage may be community property worth $200,000 at the time of dissolution. It is necessary, however, as illustrated in the following sections, to investigate the source of the increase in value. If, for example, the real property has increased in value because of a substantial change wrought by one spouse's separate estate (an improvement placed on the property and paid for with separate funds), in some states the title will not be 100% community. n275

§ 37.11(c)(4) Income from Property and Investments.

A common type of increase is the income derived from property, commonly referred to as "rents, issues and profits." This category is somewhat more complicated than pay received for labor. Profit derived from community property is always community property. There is not a uniform rule of classification, however, for rents and profits earned from separate property. Statutory definitions of separate and community property resolve the issue in some of the states.

In Arizona, n276 California, n277 Nevada, n278 New Mexico, n279 and Washington, n280 rents, issues and profits are included in statutory definitions of separate property. In states where parties are given relatively complete contractual autonomy, this characterization can be modified by agreement between the parties.

Two states classify income from separate property as community property but allow the owning spouse to change that classification unilaterally. Louisiana, for example, has the following statute:

> The natural and civil fruits of the separate property of a spouse, minerals produced from or attributable to a separate asset, and bonuses, delay rentals, royalties, and shut-in payments arising from mineral leases are community property. Nevertheless, a spouse may reserve them as his separate property

> by a declaration made in an authentic act or in an act under private signature duly acknowledged. n281

Wisconsin follows the same basic approach as Louisiana but spells out more detail concerning the statement or declaration that would change the classification:

> Income attributable to all or specified property other than marital property, with respect to which a spouse has executed under s. 766.59 a statement unilaterally designating that income as his or her individual property, is individual property. n282

The statement mentioned must be in writing, and within five days of the signing, the executing spouse must deliver a copy of the statement to the other spouse. n283 The statute also allows premarital statements under similar terms and also provides for revocation of the statement.

Texas definitions of separate and community property do not explicitly state the character of income from separate property. Because the income is not classified as separate property it is community property. n284 The Texas Constitution now allows some autonomy on this subject:

> [S]pouses also may from time to time, by written instrument, agree between themselves that the income or property from all or part of the separate property then owned or which thereafter might be acquired by only one of them, shall be the separate property of that spouse... n285

In a related change in Texas law, also mentioned in connection with presumptions, the Texas Constitution now includes the following passage: "[I]f one spouse makes a gift of property to the other that gift is presumed to include all the income or property which might arise from that gift of property." n286

In a long and awkward sentence, Idaho also characterizes the income from separate property as community property, subject to some qualification:

> The income of all property, separate or community, is community property unless the conveyance by which it is acquired provides or both spouses, by written agreement specifically so providing, declare that all or specifically designated property and the income from all or the specifically designated property shall be the separate property of one of the spouses or the income from all or specifically designated separate property be the separate property of the spouse to whom the property belongs. n287

COMPUTER-ASSISTED RESEARCH

LEXIS: marital or community w/1 property w/30 income w/3 property or investment

§ 37.11(c)(5) Mixing Labor of One Estate with Capital of Another.

Wisconsin's Marital Property Act provides as follows:

> Application by one spouse of substantial labor, effort, inventiveness, physical or intellectual skill, creativity or managerial activity to either spouse's property other than marital property creates marital property attributable to that application if both of the following apply:
>
> (a) Reasonable compensation is not received for the application.
>
> (b) Substantial appreciation of the property results from the application. n288

Paragraph (1) of this statute simply states the usual rule that results from commingling and the community property

presumption: the separate property proponent must trace that part which she claims is separate to separate contribution. n289

Paragraph (2) raises another issue: Commingling of community effort, skill, etc. with a separate asset to create something of mixed character, and possibly of greater value or worth. The Wisconsin statute is based on § 14 of the Uniform Marital Property Act. The Comment to the Uniform Act provides the following elaboration:

> The section deals with another extremely important issue. It is the situation arising from the application to the individual property of one spouse of personal effort by the other spouse and carrying the burden of proving its elements will be difficult. The rule of the section is strict. It articulates a bias against creation of marital property from such an act unless the effort has been substantial and has been responsible for substantial appreciation. Routine, normal, and usual effort is not substantial. Though drawing a precise line as to what is substantial and what is not is not possible, the section does not create opportunity to translate for recognizing minimal effort to a property interest. The section is only satisfied by proof of (1) a truly substantial effort followed by (2) a truly substantial appreciation *attributable to the effort* for which (3) no reasonable compensation was received.

The values involved may include income and capital, and questions may arise as to both. As to income, in jurisdictions where all income during marriage is community property, n290 whether earned on separate or community property, classification is not an issue: All income earned during marriage will be community property. Classification of income will also not be an issue when it is consumed in the course of business.

The states have generally either allowed a change in classification as a result of community labor or have provided for reimbursement in appropriate cases. It may be that there is little practical difference in the ultimate outcome in cases from state to state.

In California, community labor expended to preserve or enhance separate title can be reflected in a change in ownership. The problem of characterizing title to income and capital has been approached from two directions, depending on the circumstances. In some cases, a reasonable rate of return on capital (separate property) is assumed and attributed to the separate estate; the balance of the income and any appreciation is allocated to the community estate on the theory that it resulted from the efforts, labor, and skill of the spouse during marriage. n291 In other cases the matter has been approached from the other direction: A reasonable wage or salary is allocated to the community estate for the community efforts, labor, and skill, and the balance of the income and any appreciation is attributed to the separate estate. n292

In Texas, these problems have caused a fair amount of difficulty. Texas follows the inception of title doctrine, n293 meaning that characterization is determined at the time of purchase. Subsequent contributions from a non-owning estate may result in a right to reimbursement but generally have not changed the characterization of title. In this area, that principle conflicts with the fundamental premise that the results of the efforts, labor and skill of a married person are community property. Even so, Texas has opted to follow a reimbursement approach, concluding that "the reimbursement theory more nearly affords justice to both the community and separate estates." n294 Under that theory,

> the community will be reimbursed for the value of the time and effort expended by either or both spouses to enhance the separate estate of either, other than that reasonably necessary to manage and preserve the separate estate, less the remuneration received for that time and effort in the form of salary, bonus, dividends and other fringe benefits, those items being community property when received. n295

Vallone v. Vallone n296 is a representative example of the issues that arise in this area. In that case, the husband worked in a restaurant owned and operated by his father. After a few years, he received the assets of the business as a gift from his father. The husband subsequently incorporated the business, using both the gift and community assets as

capital. At that point, separate capital (the gift from father) represented about 47% of the value of the corporation. The original capitalized value of the corporation was just under $20,000, and under the husband's direction the business was very successful. He received about $200,000 per year in salary and bonuses, and at the time of the divorce the court found the business to be worth $1,000,000.

The wife, of course, claimed that the interest of the community estate in the business was large, consisting not only of the original community capital (53% of the original value) but also a considerable amount of community labor put into the business by the husband. The trial court nevertheless determined that the business was only 53% community property and awarded the wife 70% of the community property stock in the company. The court of civil appeals reversed, reasoning that the trial court did not take into consideration "the large increment to appellee's separate property by reason of community labor." n297 That decision, however, was reversed by the Texas Supreme Court, which affirmed the judgment of the trial court. The Supreme Court noted that a spouse may expend a reasonable amount of talent or labor in management of his or her separate estate without impressing community character upon the property. n298 They also discussed the possibility of an equitable right of reimbursement in this case but concluded that the trial court did not abuse its discretion in dividing the community estate of the parties. n299

Actual application of these theories does not necessarily lead to clear and precise answers. W.S. McClanahan has pointed out, for example, two possible outcomes in applying the reimbursement theory, depending on whether the reimbursement is based on the value of the spouse's time and effort (the "cost-oriented approach") or on the increase in the value of the stock or other capital asset caused by the effort (the "result-oriented approach"). n300

There is apparently one exception to the non-title theory in Texas. In *Vallone*, the courts concluded that the corporation was not operated as the husband's "alter ego." If a separate property corporation is deemed the alter ego of the owning spouse, at divorce the corporate veil is pierced and the corporation is treated as a proprietorship; profits of the business are, in that event, considered community property. n301

The Idaho court has also suggested that the question is whether the community has received fair and adequate compensation for its labor. n302 The trial court should consider the nature and size of the business, the nature and extent of community involvement in the business, and the growth patterns of the business. The proper inquiry is then whether the over-all compensation received by the community is equivalent to the compensation the business would have had to pay a non-owner employee to perform the same services.

It will probably be necessary to continue to resolve these problems on a case-by-case basis, but perhaps the bias against creation of community property reflected in the Wisconsin statute and the Uniform Marital Property Act reflect a trend. The approaches taken in other states are similar to the analyses described above. n303

The converse of the situations described above can also arise. In a California case, for example, the court held that when a community property asset was enhanced by labor or capital of a surviving spouse, following the death of the other spouse, heirs of the survivor should receive a greater share of the asset than the heirs of the predeceased spouse. n304

COMPUTER-ASSISTED RESEARCH

LEXIS: marital or community w/1 property w/30 (effort or labor) w/5 appli! w/5 individual w/2 property

§ 37.11(d) Personal Injury Awards.

Awards received as a result of personal injury to a spouse do not fit neatly into either the category of "lucrative" acquisitions (gifts) or the category of "onerous" acquisitions (compensation for effort). Even so, there is a fair amount of consistency from state to state in treatment of personal injury awards. Classification generally depends on the nature of the loss and the award compensating for that loss. The states have drawn a distinction between damages for "personal"

or individual injuries, such as bodily injury and pain and suffering, and losses to the community, such as lost earnings during the marriage and medical expenses. n305

Some states have spelled out these distinctions by statute. Nevada's general statutory definition of separate property includes "that acquired [after marriage] ... by an award for personal injury damages ..." n306 In another section the statute provides for "segregation of damage awards when spouses sue jointly":

> When a husband and wife sue jointly, any damages awarded shall be segregated as follows:
>
> 1. if the action is for personal injuries, damages assessed for:
>
> (a) Personal injuries and pain and suffering, to the injured spouse as his separate property.
>
> (b) Loss of comfort and society, to the spouse who suffers such loss.
>
> (c) Loss of services and hospital and medical expenses, to the spouses as community property. n307

The Texas statute simply provides:

> (a) A spouse's separate property consists of:
>
> ...
>
> (3) the recovery for personal injuries sustained by the spouse during the marriage, except any recovery for loss of earning capacity during marriage. n308

Louisiana addresses damages for personal injury with the following statute:

> Damages due to personal injuries sustained during the existence of the community by a spouse are separate property.
>
> Nevertheless, the portion of the damages attributable to expenses incurred by the community as a result of the injury, or in compensation of the loss of community earnings, is community property. If the community regime is terminated otherwise than by the death of the injured spouse, the portion of the damages attributable to the loss of earnings that would have accrued after termination of the community property regime is the separate property of the injured spouse. n309

Wisconsin's statute provides:

> (7) Property acquired by a spouse during marriage and after the determination date is individual property if acquired by any of the following means:
>
> ...
>
> (f) As a recovery for personal injury except for the amount of that recovery attributable to expenses paid or otherwise satisfied from marital property and except for the amount attributable to loss of income during marriage. n310

The California statutory treatment of damages for personal injuries is more involved: n311

§ 780. Damages for personal injury to married person as community property

Except as provided in Section 781 and subject to the rules of allocation set forth in Section 2603, n312 money and

other property received or to be received by a married person in satisfaction of a judgment for damages for personal injuries, or pursuant to an agreement for the settlement or compromise of a claim for such damages, is community property if the cause of action for the damages arose during the marriage.

§ 781. Cases where damages for personal injury are separate property

(a) Money or other property received or to be received by a married person [in the manner described in § 780] is the separate property of the injured person if the cause of action for the damages arose as follows:

(1) After the entry of a judgment of dissolution of a marriage or legal separation of the parties.

(2) While either spouse, if he or she is the injured person, is living separate from the other spouse.

(b) Notwithstanding subdivision (a), if the spouse of the injured person has paid expenses by reason of the personal injuries from separate property or from the community property, the spouse is entitled to reimbursement of the separate property or the community property for those expenses from the separate property received by the injured person under subdivision (a).

(c) Notwithstanding subdivision (a), if one spouse has a cause of action against the other spouse which arose during the marriage of the parties, money or property paid or to be paid by or on behalf of a party to the party's spouse of that marriage in satisfaction of a judgment for damages for personal injuries to that spouse, or pursuant to an agreement for the settlement or compromise of a claim for the damages is the separate property of the injured spouse.

§ 782. Injuries to married person by spouse

(a) Where an injury to a married person is caused in whole or in part by the negligent or wrongful act or omission of the person's spouse, the community property may not be used to discharge the liability of the tort-feasor spouse to the injured spouse or the liability to make contribution to a joint tort-feasor until the separate property of the tort-feasor spouse, not exempt from enforcement of a money judgment, is exhausted.

(b) This section does not prevent the use of community property to discharge a liability referred to in subdivision (a) if the injured spouse gives written consent thereto after the occurrence of the injury.

(c) This section does not affect the right to indemnity provided by an insurance or other contract to discharge the tort-feasor spouse's liability, whether or not the consideration given for the contract consisted of community property.

§ 783. Injuries to married person by third party; extent concurring negligence of spouse allowable as defense

If a married person is injured by the negligent or wrongful act or omission of a person other than the married person's spouse, the fact that the negligent or wrongful act or omission of the spouse of the injured person was a concurring cause of the injury is not a defense in an action brought by the injured person to recover damages for the injury except in cases where the concurring negligent or wrongful act or omission would be a defense if the marriage did not exist.

COMPUTER-ASSISTED RESEARCH

LEXIS: marital or community w/1 property w/30 personal w/1 injury w/5 award!

§ 37.11(e) Insurance Policies.

Insurance comes in many forms and can cover almost anything. Insurance proceeds compensating for some losses, such as the loss of personal or real property, will generally be treated as a mutation of the property they replace, thus taking on the same character as that property had. One spouse cannot convert the other spouse's separate property into community property with the proceeds of insurance on the property, even though the insurance was purchased with the non-owning spouse's separate funds. n313

The treatment of life insurance policies is somewhat more complicated. n314 Policies of life insurance can have two different types of value:

rights in the policy during the life of the insured including any cash value in the policy, and rights to the proceeds upon the death of the insured. Marital property issues can arise in both cases.

Life insurance has traditionally been classified according to the source of the premium payments. n315 The most comprehensive statutory treatment n316 of life insurance, however, provides as follows:

(3) Except as provided in subs. (4) to (6): n317

> (a) 1. Except as provided in subd. 2, n318 the ownership interest and proceeds of a policy issued after the determination date which designates the insured as the owner are marital property, regardless of the classification of property used to pay premiums on the policy.
>
> (b) The ownership interest and proceeds of a policy issued before the determination date which designates the insured as the owner are mixed property if a premium on the policy is paid from marital property after the determination date, regardless of the classification of property used to pay premiums on that policy after the initial payment of a premium on it from marital property. The marital property component of the ownership interest and proceeds is the amount which results from multiplying the entire ownership interest and proceeds by a fraction, the numerator of which is the period during marriage that the policy was in effect after the date on which a premium was paid from marital property and the denominator of which is the entire period that the policy was in effect.
>
> (c) 1. Except as provided in subd. 2, n319 the ownership interest and proceeds of a policy which designates the spouse of the insured as the owner are individual property of its owner, regardless of the classification of property used to pay premiums on the policy.
>
> (d) This chapter does not affect the ownership interest and proceeds of a policy that designates a person other than either spouse as the owner, if no premium on the policy is paid from marital property

> after the determination date. If a premium on the policy is paid from marital property after the determination date, the ownership interest and proceeds of the policy are in part property of the designated owner of the policy and in part marital property of the spouses, regardless of the classification of property used to pay premiums on that policy after the initial payment of a premium on it from marital property. The marital property component of the ownership interest and proceeds is the amount which results from multiplying the entire ownership interest and proceeds by a fraction, the numerator of which is the period during marriage that the policy was in effect after the date on which a premium was paid from marital property and the denominator of which is the entire period that the policy was in effect.

This Wisconsin statute can be confusing, in part because it necessarily focuses on the transition from common law property to community property. It essentially breaks classification into four categories of cases:

1. Policies issued after marriage designating the insured as the owner;

2. Policies issued before marriage designating the insured as the owner;

3. Policies designating the spouse of the insured as the owner; and

4. Policies designating a person other than either spouse as the owner.

Assuming that all events occur after the effective date of the act, the ownership interest and proceeds from policies in the first category are marital property, regardless of the classification of property used to pay premiums. As to policies issued before marriage (category #2), the ownership interest and proceeds become mixed property as soon as a premium is paid from marital property.

Policies designating the spouse of the insured as the owner are that person's individual property, regardless of the classification of property used to pay premiums. The fourth category of cases is not affected by the statute if no premium is paid from marital property. If marital property is used to pay a premium, the ownership interest and proceeds are in part property of the designated owner and in part marital property.

In Texas, the inception of title principle has been applied to life insurance, resulting in a separate property characterization of proceeds of policies issued to the husband before marriage, even though some of the premiums were paid with community funds. n320 During the life of the insured, any cash surrender value is attributed to the estate or estates that own the policy. Thus, cash surrender value of a policy acquired during marriage is presumptively community property. n321 Where the insured spouse dies, survived by the beneficiary spouse, a gift to the survivor is presumed and the proceeds are the surviving beneficiary's separate property. n322 As noted in a recent opinion, n323 Texas courts have struggled with the treatment of life insurance proceeds when the insured names a beneficiary other than the surviving spouse. A person does not have authority to dispose of an ex-spouse's half of the community proceeds of a community owned life insurance policy simply by a change of beneficiary. At the death of an insured spouse, however, with a third person or the decedent's estate designated as beneficiary, the designation will be valid in the absence of actual or constructive fraud. The pivotal question, says the court, is whether the gift of the surviving spouse's share of the community proceeds was unfair to that spouse, and factors considered in making that determination include the size of the gift in relation to the total size of the community estate, the adequacy of the remaining estate to support the surviving spouse, and the relationship between the insured and the beneficiary.

A 1993 Washington opinion compares term life insurance to disability insurance policies. n324

The court stated:

> Certainly the two types of policies share some common characteristics. Both are contracts and

> historically a right of contract enforcement is a property interest. Both insure against the risk of economic loss, although in the case of life insurance there also may be donative intent of a testamentary nature. Neither type of policy, in its pure form, accrues cash value. Both types of policies insure against a stated risk for a specified policy period. Both types of policies may be expected to return, in the event of the happening of the contingency insured against (death or disability while the policy is in force), a far greater return than merely the amount invested, together with interest thereon. Both types of policies require the payment of money in exchange for the benefit provided. An insurance policy of any kind is onerously acquired, in exchange for the payment of funds.
>
> There are some differences, as well, primarily with respect to the nature of the risk involved. A disability policy is designed to protect against the risk of loss of the insured's future earning capacity. Earning capacity is not a divisible asset, although it is a factor to be considered when dividing the community and separate property in a dissolution proceeding. *In re Marriage of Hall, 692 P.2d 175 (1984).* An able-bodied spouse leaves a dissolved marriage with his or her earning capacity intact, and his or her former spouse has no property interest in that earning capacity. A disabled spouse leaves a dissolved marriage with his or her earning capacity impaired or nonexistent. His or her ability to acquire assets in the future, by means of employment, is likewise impaired or nonexistent.

As to disability pay that might be received after age 65, the court concluded that the lower court had not erred in characterizing the potential pay as in the nature of a pension.

COMPUTER-ASSISTED RESEARCH

LEXIS: marital or community w/1 property w/30 insurance w/2 polic! or proceed!

FOOTNOTES:

(n1)Footnote 205. Wisconsin's statute actually defines "during marriage." Wis. Stat. Ann. § 766.01(8) (West 1993). That statute does not really address the issue raised here, which is when does the marriage itself start and end, but rather imposes another qualification for community property purposes. In effect, the Wisconsin act only applies while both parties are (1) married and (2) domiciled in Wisconsin. *See* § 37.16(b).

(n2)Footnote 206. *See* § 37.05(c). *Beckham v. Beckham, 41 S.W.3d 908 (Mo. App. 2001)* (a marital residence purchased while the parties were cohabiting was considered marital property).

(n3)Footnote 207. California has addressed this issue in two ways: Cal. Fam. Code Ann. §§ 771 (while living separate and apart) and 772 (after entry of a judgment of legal separation) (Deering 1993); Wash. Rev. Code Ann. § 26.16.140 (when a husband and wife are living separate and apart). The Washington statute applies to marriages that are in essence defunct. *Aetna Life Ins. Co. v. Bunt, 754 P.2d 993 (Wash. 1988). See also In re Marriage of Umphrey, 267 Cal. Rptr. 218 (1990). Stelly v. Guidroz, 838 So. 2d 900 (Lou. App. Cir. 2003)* (husband's monthly payments received after the petition for dissolution of the marriage was filed was separate property). Graham v. Graham, No. 21716-3-*II, 1997 Wash. App. LEXIS 1782 (Wash. App. 1997)* (ruling that for determining the community or separate nature of property, the test is "whether the parties' conduct exhibits a decision to renounce the community, with no intention of ever resuming the marital relationship"). *Vaughn v. Vaughn, 798 So. 2d 431 (Miss. 2001)* (wife was awarded prejudgment interest on her share of the marital property).

(n4)Footnote 208. *Aetna Life Ins. Co. v. Boober, 784 P.2d 186 (Wash. App. 1990)* (time of separation was relatively short and no formal proceedings were ever commenced).

(n5)Footnote 209. Idaho Code § 32-909.

(n6)Footnote 210. *Suter v. Suter, 546 P.2d 1169 (Idaho 1976).* The Idaho court noted that Idaho Code § 32-712

(1983) provides for a just assignment of community property upon the dissolution of marriage. The classification of all post-separation earnings as community property does not determine their disposition upon divorce. A Nevada statute also formerly provided that the earnings of a wife while she was living separate from her husband were her separate property. Nev. Rev. Stat. Ann. § 123.180d (Michie 1991).

(n7)Footnote 211. *Lynch v. Lynch, 791 P.2d 653 (Ariz. 1990). See also In re Marriage of Griswold, 48 P.3d 1018 (Wash. App. 2002)* (the husband's bonus was compensation for his services during the year in which husband and wife separated, and thus was community property); *Dolan v. Dolan, 558 S.E.2d 218 (N.C. App. 2002)* (the trial court erred in not determining whether post-separation rental income should be a distributional factor).

(n8)Footnote 212. *See, e.g., Donn v. Kunz, 79 P.2d 965 (Ariz. 1948)* (earnings belong to community, not to either individual spouse); *Hamlin v. Merlino, 272 P.2d 125 (Wash. 1954)* (salary paid husband from his separate property corporation); Wis. Stat. Ann. § 766.31(4); *Pruitt v. Pruitt, 94 S.W.3d 429 (Mo. App. 2003)* (husband's bonus was marital property); *Macher v. Macher, 746 N.E.2d 120 (Ind. App. 2001)* (the wife's income tax refund was not marital property). *See also Emard v. Hughes Aircraft Co., 153 F.3d 949, 955 (9th Cir. 1998)* (because fringe benefit is part of employee's earnings, fringe benefit is community property, under California law, to the extent that it is earned through employment during marriage).

(n9)Footnote 213. A marital community exists when the parties are married and domiciled in a community property state. *See Noyes v. Noyes, 662 A.2d 921 (Me. 1995)* (value of marital property increased to account for two-year period between initial divorce judgment, which was vacated on appeal, and second divorce hearing when property was to be divided).

(n10)Footnote 214. *Johnson v. Johnson, 638 P.2d 705 (Ariz. 1981); Gillmore v. Gillmore, 629 P.2d 1 (Cal. 1981); Maslen v. Maslen, 822 P.2d 982 (Idaho 1991); Griggs v. Griggs, 686 P.2d 68 (Idaho 1984); Johnson v. Johnson, 582 So. 2d 926 (La. Ct. App. 1991); Forrest v. Forrest, 668 P.2d 275 (Nev. 1983); Otto v. Otto, 455 P.2d 642 (N.M. 1969); Cearley v. Cearley, 544 S.W.2d 661 (Tex. 1976); Nuss v. Nuss, 828 P.2d 627 (Wash. App. 1992);* Wis. Stat. Ann. § 766.62. *See also Sims v. Sims, 358 So. 2d 919 (La. 1978). In re Miller, 915 P.2d 1314 (Colo. 1996)* (whether stock options constitute marital property depends on whether they were granted in consideration of past or future services); *Blevins v. Blevins, 649 So. 2d 315 (Fla. App. 1995)* (wife not entitled to temporary retirement benefits because they did not accrue during marriage).

(n11)Footnote 215. *French v. French, 112 P.2d 235 (Cal. 1941), overruled, In re Marriage of Brown, 544 P.2d 561 (Cal. 1976).*

(n12)Footnote 216. *Van Loan v. Van Loan, 569 P.2d 214 (Ariz. 1977); Brown v. Brown, 544 P.2d 561 (Cal. 1976); Shill v. Shill, 599 P.2d 1004 (Idaho 1979); T.L. James & Co. v. Montgomery, 332 So. 2d 834 (La. 1975); Gemma v. Gemma, 778 P.2d 429 (Nev. 1989); Cearley v. Cearley, 544 S.W.2d 661 (Tex. 1976); Copeland v. Copeland, 575 P.2d 99 (N.M. 1978); Payne v. Payne, 512 P.2d 736 (Wash. 1973). In re Marriage of Duggan, 659 N.W.2d 556 (Iowa 2003)* (former wife was entitled to 50% of any post-dissolution cost-of-living adjustments to pension benefits); *Brasili v. Brasili, 827 So. 2d 813 (Ala. Civ. App. 2002)* (husband's 401(k) account was a retirement benefit for division of marital property purposes). *See also In re Marriage of Lehman, 955 P.2d 451, 454 (Cal. 1998)* (Community property may include right to retirement benefits accrued by employee spouse whether or not right to retirement benefits is "vested" and whether or not it is "matured"); *Burchfield v. Finch, 968 S.W.2d 422 (Tex. Ct. App. 1998)* (spouse has community property interest in portion of retirement benefits that other spouse earned during marriage, even though benefits at time of divorce had not yet matured).

(n13)Footnote 217. *Brown v. Brown, 544 P.2d 561, 562-563 (Cal. 1976).*

(n14)Footnote 218. Cal. Code Ann. § 2610; Tex. Fam. Code Ann. § 3.633. *Krafick v. Krafick, 663 A.2d 365 (Conn. 1995)* (court has power, acting equitably, to value and distribute pension benefits); *McMichael v. McMichael,*

552 N.W.2d 688 (Mich. App. 1996) (court discretion must not be restricted unduly with regard to premarriage and postdivorce pension contributions).

(n15)Footnote 219. *Johnson v. Johnson, 638 P.2d 705, 710 (Ariz. 1981) Cf. Wainwright v. Wainwright, 888 P.2d 762 (Alaska 1995)* (failure to account for inflation when valuing present value of marital portion of pension is inequitable).

(n16)Footnote 220. *See May v. May, 716 S.W.2d 705 (Tex. Ct. App. 1986).* Note that this does not necessarily mean that the non-employee spouse would be entitled to exactly 50 percent of the benefits in a dissolution of the marriage. Courts in some states may divide the community property as equity demands, and the non-employee could receive more or less than 50 percent. *See* § 37.15, *infra*. The apportionment process described here allocates shares to the respective separate and community estates. How those estates are distributed in a divorce is a second step that will not necessarily be entirely determined by classification. In this formula, that second step is represented by "/ 2," *i.e.* an equal division. *In re Kelm, 912 P.2d 545 (Colo. 1996)* ("time rule" incorrectly applied by district court to calculate wife's share of husband's pension plan).

(n17)Footnote 221. *In re Marriage of Poppe, 97 Cal. App. 3d 1 (1979); Gowan v. Gowan, 54 Cal. App. 4th 80, 89-91 (1997)* (holding that the time rule properly considered all of husband's years employed for single employer during two separate employment periods; husband did not present sufficient evidence to show that the pension was earned only during second period of employment).

(n18)Footnote 222. *Madrid v. Madrid, 684 P.2d 1169 (N.M. 1984); Berry v. Berry, 647 S.W.2d 945 (Tex. 1983).* Wisconsin has included this principle in its statutes, directing that the valuation should be made as of dissolution or an employee spouse's death. Wis. Stat. Ann. § 766.62(2m). The Wisconsin statute also spells out the formula for apportioning benefits. *Id.* § 766.62(1b)(2).

(n19)Footnote 223. Wis. Stat. Ann. § 766.62. Paragraph 5 of this section, providing that the non-employee's interest in deferred employment benefit plans does not survive the non-employee spouse who predeceases the employee spouse, is essentially duplicated in Wis. Stat. Ann. § 766.31(3). That section contains the provisions on classification of property.

(n20)Footnote 224. *Swope v. Mitchell, 324 So. 2d 461 (La. Ct. App. 1975).*

(n21)Footnote 225. *Hisquierdo v. Hisquierdo, 439 U.S. 572 (1979).* In *In re Estate of Mundell, 857 P.2d 631 (Idaho 1993),* the Idaho Supreme Court concluded that pertinent Internal Revenue Code provisions did not preempt Idaho community property law as it relates to the characterization of individual retirement accounts. Federal disability and social security benefits, which do preempt state community property laws, were distinguished from IRA's because those benefits are received from federal programs regulated by federal guidelines, including a statutory "anti-attachment" clause protecting the benefits from all legal process.

(n22)Footnote 226. *McCarty v. McCarty, 453 U.S. 210 (1981).*

(n23)Footnote 227. *In re Marriage of Fellers, 178 Cal. Rptr. 35 (1981); Segrest v. Segrest, 649 S.W.2d 610 (Tex. 1983); In re Marriage of Brown, 653 P.2d 602 (Wash. 1982). See also Collins v. Collins, 798 A.2d 1155 (Md. Ct. Spec. App. 2002)* (the husband's military retirement benefit that accrued before McCarty v. McCarty was marital property).

(n24)Footnote 228. *Budreau v. Budreau, 658 P.2d 192 (Ariz. 1982); Rice v. Rice, 645 P.2d 319 (Idaho 1982),* overruled by *Griggs v. Griggs, 686 P.2d 68 (Idaho 1984).*

(n25)Footnote 229. Pub. L. No. 97-252, title X, *96 Stat. 730* (Sept. 8, 1982).

(n26)Footnote 230. *See In re Marriage of Konzen, 693 P.2d 97 (Wash. 1985), cert. denied, 473 U.S. 906 (1985);*

Mackey v. Mackey, 768 N.E.2d 644 (Ohio 2002) (benefits received by a member of the military under the Voluntary Separation Initiative (VSI) qualify as marital property under the state statute). *In re Marriage of Heupel, 936 P.2d 561,* (Colo. 1997) (holding that where husband selects early retirement under the Special Separation Benefit (SSB) or Voluntary Separation Incentive (VSI) programs, those funds are subject to marital property division); *In re McElroy, 905 P.2d 1016 (Colo. App. 1995)* (special separation benefits are not subject to federal preemption of state law concerning state marital property).

(n27)Footnote 231. *Edsall v. Superior Court, 693 P.2d 895 (Ariz. 1984); In re Marriage of Fairfull, 207 Cal. Rptr. 523 (1984); Menard v. Menard, 460 So. 2d 751 (La. Ct. App. 1984); Burton v. Burton, 669 P.2d 703 (Nev. 1983); Harkins v. Harkins, 681 P.2d 722 (N.M. 1984); Miller v. Miller, 671 S.W.2d 135 (Tex. Ct. App. 1984); In re Marriage of Smith, 669 P.2d 448 (Wash. 1983); Abernathy v. Fishkin, 699 So. 2d 235, 238 (Fla. 1997)* (under the Uniformed Services Former Spouses Protection Act (USFSPA), disability payments may not be treated as community or marital property); *Toone v. Toone, 952 P.2d 112 (Utah App. 1998)* (holding that enactment of the Uniformed Services Former Spouse's Protection Act (USFSPA) after the divorce decree was issued was not a sufficient change in circumstances for reopening the case); *Kramer v. Kramer, 567 N.W.2d 100,* (Neb. 1997) (holding that notwithstanding the USFSPA, a court may consider disability payments and the waiver of retirement pay in determining whether there has been a material change in the circumstances of the parties requiring a modification of the divorce decree).

(n28)Footnote 232. *Luna v. Luna, 608 P.2d 57 (Ariz. Ct. App. 1979); In re Leland, 847 P.2d 518 (Wash. App. 1993).*

(n29)Footnote 233. *Perras v. Perras, 726 P.2d 617 (Ariz. Ct. App. 1986); Villasenor v. Villasenor, 657 P.2d 889 (Ariz. Ct. App. 1982); In re Marriage of Stenquist, 582 P.2d 96 (Cal. 1978); In re Marriage of Pace, 183 Cal. Rptr. 314 (1982); Johnson v. Johnson, 582 So. 2d 926 (La. Ct. App. 1991); Powers v. Powers, 779 P.2d 91 (Nev. 1989); Bordes v. Bordes, 707 So. 2d 471 (La. App. 1998)* (holding that since husband's "disability retirement" plan was calculated according to number of years worked, it amounted to deferred compensation and was community property; husband's second disability fund was separate property because it was awarded solely because of his disability, which occurred after termination of the marriage), *rev'd* by *Bordes v. Bordes, 730 So. 2d 443 (La. 1999); Palazzolo v. Palazzolo, 663 N.Y.S. 2d 58,* (N.Y. App. Div. 1997) (holding that to the extent that disability payments are deferred compensation, they are subject to equitable distribution); *Bennett v. Bennett, No. 1621-96-4, 1997 Va. App. LEXIS 611 (Va. App. 1997)* (rejecting husband's argument that disability retirement was separate property because it was a post marital "stream of income"; all benefits earned during marriage were subject to equitable distribution); *Hyde v. Hyde, 697 So. 2d 1061, 1065 (La. App. 1997)* (holding that disability funds were separate property where employer paid disability insurance premiums and husband would have no right to the funds absent the injury); *Newsom v. Petrilli, 919 S.W.2d 481 (Tex. App. 1996)* (disability benefits under the Fire Fighter's Relief and Retirement Fund are community property); *In re Leland, 847 P.2d 518 (Wash. App. 1993).*

(n30)Footnote 234. *Villasenor v. Villasenor, 657 P.2d 889 (Ariz. 1982); In re Marriage of Saslow, 710 P.2d 346 (Cal. 1985); In re Marriage of Pace, 183 Cal. Rptr. 314 (1982).*

(n31)Footnote 235. *Bonar v. Bonar, 614 S.W.2d 472 (Tex. Ct. App. 1981).*

(n32)Footnote 236. *Lachney v. Lachney, 529 So. 2d 59 (La. Ct. App. 1988); Holman v. Holman, 84 S.W.3d 903 (Ky. 2002)* (as matters of first impression disability retirement benefits were properly classified as marital or nonmarital property according to the character of the property they replaced, and the former husband's future earnings constituted his separate nonmarital property); *In re Marriage of Cranor, 78 S.W.3d 150 (Mo. App. 2002)* (as a matter of first impression, the disability retirement benefits that exceeded the amount the husband would have been entitled to had he opted for immediate retirement constituted the husband's non-marital property and the remainder constituted marital property). *See Chance v. Chance, 694 So. 2d 613, 619 (La. App. 1997); Bauser v. Bauser, 694 N.E.2d 136 (Ohio App. 1997)* (holding that disability payments are a type of personal injury award and are marital property only to the extent that they are accepted in lieu of "old-age retirement pay" and the "retirement pay value is included in the disability

pension benefit"); *Mercer v. Mercer, 671 So. 2d 937 (La. App. 1996)* (disability benefits were substitutions for wage losses, and consequently separate property); *Brant v. Brant, 649 So. 2d 111 (La. App. 1995)* (disability benefits were not deferred compensation, and were separate property).

(n33)Footnote 237. *In re Marriage of Saslow, 191 Cal. Rptr. 749 (1983); Andrle v. Andrle, 751 S.W.2d 955 (Tex. Ct. App. 1988). See In re Marriage of Elfmont, 891 P.2d 136 (Cal. 1995)* (disability payments were separate property, since premiums were not paid out of community property with intent of providing community retirement income); *In re Marriage of Brewer, 949 P.2d 404, 406-407 (Wash. Ct. App. 1998)* (holding that while the source of premiums rule had been criticized, it was still valid precedent; private disability insurance proceeds were community property because all premiums were paid with community funds), *aff'd in part, rev'd in part* by *Brewer v. Brewer, 976 P.2d 102 (1999).*

(n34)Footnote 238. *In re Marriage of Saslow, 191 Cal. Rptr. 749 (1983), rev'd in part and remanded, In re Marriage of Saslow, 710 P.2d 346 (Cal. 1985).* In *In re Marriage of Elfmont, 27 Cal. Rptr. 2d 744 (1994),* a California Court of Appeal has, perhaps, clarified the California Supreme Court's holding in In re Marriage of Saslow. The husband in *Elfmont* had purchased several disability policies during the marriage. The court says that *Saslow* neither establishes nor implies a process to apportion disability benefits on the basis of the portion of premiums paid from community or separate funds. They describe disability insurance policies in terms similar to term life insurance, stating that a disability policy is for a specified term and each period the disability insurance is purchased anew. Unlike life insurance, however, disability benefits may commence during the marriage and continue after separation. As to benefits paid after marriage, the issue is whether the payments were in the nature of income replacement or retirement benefits. In this case, although the premiums were paid during the marriage with community funds, after the parties separated, the premiums were paid with husband's separate property and it was during this time that he became disabled. Because the disability did not occur during marriage, nor during a term which had been paid for with community funds, the benefits were husband's separate property. (A dissenter is not comfortable with this interpretation of *Saslow*). *Opinion superseded* by *In re Marriage of Elfmont, 874 P.2d 901 (Cal. 1994).*

(n35)Footnote 239. *Bugh v. Bugh, 608 P.2d 329 (Ariz. Ct. App. 1980); In re Marriage of Fisk, 4 Cal. Rptr. 2d 95 (Cal. Ct. App. 1992); Monk v. Insurance Co. of N. Am., 324 So. 2d 880 (La. Ct. App. 1975); Hicks v. Hicks, 546 S.W.2d 71 (Tex. Civ. App. 1976). See also Pudlish v. Pudlish, 796 A.2d 346 (Pa. Super. 2002)* (worker's compensation benefits that accrued after separation were not marital property and so were not subject to equitable distribution).

(n36)Footnote 240. *In re Marriage of Bishop, 729 P.2d 647 (Wash. App. 1986); Williams v. Williams, 590 So. 2d 649 (La. Ct. App. 1991).*

(n37)Footnote 241. *Wright v. Wright, 189 Cal. Rptr. 336 (1983). Luczkovich v. Luczkovich, 496 S.E.2d 157 (Va. App. 1998)* (holding that severance pay is separate property where husband worked for employer only a few months before termination and received the severance package after separation).

(n38)Footnote 242. *In re Marriage of Skaden, 566 P.2d 249 (Cal. 1977). See also Brill v. Brill, 65 S.W.3d 583 (Mo. App. 2002)* (as a matter of first impression, the husband's severance pay contract which stated that he would receive three years of continued salary in the event of the husband's loss of employment constituted separate property).

(n39)Footnote 243. *Donnelly v. Donnelly, 190 Cal. Rptr. 756 (1983),* overruled *In re Marriage of Saslow, 710 P.2d 1346 (Cal. 1985).*

(n40)Footnote 244. *Fox v. Smith, 531 S.W.2d 654 (Tex. Civ. App. 1975); Matter of Marriage of Joiner, 755 S.W.2d 496 (Tex. Ct. App. 1988)* (husband entitled to 20 percent as separate property because it vested when he was single). *In re Marriage of Robert, 652 N.W.2d 537 (Minn. App. 2002)* (as a matter of first impression, the wife's interest in a retained-earnings account was separate property); *In re Marriage of Huston, 967 P.2d 181 (Colo. App. 1998); Stachovsky v. Stachovsky, 951 P.2d 346* (Wash. App. Div. 3) (holding that all stocks purchased during the marriage and those purchased after separation with community funds were community property; options that vested after separation

but were awarded 50% for past employment and 50% for future contributions to company were only 50% community property).

See also Annotation, *Divorce and Separation: Treatment of Stock Options for Purposes of Dividing Marital Property, 46 A.L.R. 4th 640.*

(n41)Footnote 245. *In re Marriage of Walker, 265 Cal. Rptr. 32 (1989); Sharber v. Sharber, 35 S.W.3d 841 (Ky. App. 2001)* (an incentive bonus that did not accrue during the marriage was not considered subject to division as marital property).

(n42)Footnote 246. *Mestayer v. Williams, 569 So. 2d 1102 (La. Ct. App. 1990).*

(n43)Footnote 247. Insurance policies that are not part of an employee benefit package are discussed at § 37.11(e). *Graham v. Graham, 465 S.E.2d 614 (W. Va. 1995)* (term life insurance policy obtained as employment benefit during marriage is marital property).

(n44)Footnote 248. *Seaman v. Seaman, 756 S.W.2d 56 (Tex. Ct. App. 1988); Aetna Life Ins. Co. v. Bunt, 754 P.2d 993 (Wash. 1988). See also Camp v. Camp, 972 S.W.2d 906, 909 (Tex. Ct. App. 1998)* (life insurance policy characterized as community property).

(n45)Footnote 249. *Aetna Life Ins. Co. v. Wadsworth, 689 P.2d 46 (Wash. 1984). See also Aetna Life Ins. Co. v. Bunt, 754 P.2d 993 (1988).*

(n46)Footnote 250. In a similar Idaho case, husband and wife were divorced and the decree specified that husband's employee "retirement plan" was his separate property. The decree did not, however, mention a group term life insurance policy paid for by the employer. The husband subsequently named his son as beneficiary of the "Employees Pension Plan" but made no change in the life insurance policy. After the husband's death, the court held that the term policy was not a community asset and therefore did not become tenancy-in-common property at divorce. The proceeds were therefore payable to the former wife and named beneficiary. *Noyes v. Noyes, 679 P.2d 152 (Idaho Ct. App. 1984).*

(n47)Footnote 251. *In re Marriage of Hillerman, 88 Cal. App. 3d 315, 151 Cal. Rptr. 764 (1979), vacated, 167 Cal. Rptr. 240 (1980).*

(n48)Footnote 252. *In re Marriage of Hillerman, 167 Cal. Rptr. 240 (1980). See also In re Brane, 908 P.2d 625 (Kan. App. 1995)* (court could consider spouses' social security income when dividing marital property, even though anti-assignment clause of Social Security Act precludes court from dividing social security income); *Jefferies v. Jefferies, 895 P.2d 835 (Utah App. 1995)* (husband's "401(a)" fund, which provided retirement income for intergovernmental agency in place of social security, could be considered in determining amount of marital assets and in making appropriate allocation). *Compare Reymann v. Reymann, 919 S.W.2d 615 (Tenn. App. 1995)* (anticipated social security benefits are not a part of the marital estate).

(n49)Footnote 253. *Richard v. Richard, 659 S.W.2d 746 (Tex. Ct. App. 1983)* (husband had converted military disability benefits to Social Security disability benefits.)

(n50)Footnote 254. La. Rev. Stat. Ann. § 9:2801.1 (Supp. 2003) (community property; allocation and assignment of ownership).

(n51)Footnote 255. Grace Ganz Blumberg, *Identifying and Valuing Goodwill at Divorce*, 56 Law and Contemporary Problems 217, 221 (1993). As illustrative of goodwill constituents, Blumberg states that goodwill may include reputation, continuing patronage, strategic location, effective advertising, the value of a skilled, trained, efficient work force, assemblage of property, plant, and equipment in a productive unit, and systems, controls, and methods developed as part of the operation. *Id.* at 221-22. This excellent article contains helpful information concerning

measurement and valuation of goodwill, subjects which are beyond the scope of this chapter.

(n52)Footnote 256. *See, e.g., Carr v. Carr, 701 P.2d 304 (Idaho Ct. App. 1985); Berger v. Berger, 648 N.E.2d 378 (Ind. App. 1995)* (proceeds from sale of husband's dental practice were in nature of compensation for goodwill, and included in marital property); *Endres v. Endres, 532 N.W.2d 65 (S.D. 1995)* (goodwill of divorcing parties' concrete business was marital property).

(n53)Footnote 257. Grace Ganz Blumberg, *Identifying and Valuing Goodwill at Divorce*, 56 Law and Contemporary Problems 217, 230 (1993). The states named are Arkansas, Florida, Hawaii, Kansas, Maryland, Missouri, Nebraska, Pennsylvania, Tennessee, Texas, and Wisconsin. *Id.* n.35. *Tortorich v. Tortorich, 902 S.W.2d 247 (Ark. App. 1995)* (goodwill of husband's oral surgery practice was not marital property); *Skrabak v. Skrabak, 673 A.2d 732 (Md. Ct. Spec. App. 1996)* (goodwill that is marital property must be an asset having a separate value from the reputation of the practitioner).

(n54)Footnote 258. *Id.* 229, n.33. *Traczyk v. Traczyk, 891 P.2d 1277 (Okla. 1995)* (goodwill of husband's medical practice was marital property).

(n55)Footnote 259. *Mueller v. Mueller, 301 P.2d 90 (Cal. App. 1956).*

(n56)Footnote 260. *Randolph v. Graham, 254 S.W. 402 (Tex. Ct. App. 1923).*

(n57)Footnote 261. *Nail v. Nail, 486 S.W.2d 761 (Tex. 1972).* Much earlier, the Texas Court of Appeals had suggested that the goodwill of a professional person is as much an asset as that of a merchant. *Randolph v. Graham, 254 S.W. 402 (Tex. Ct. App. 1923).*

(n58)Footnote 262. James W. Paulsen, *Remember the Alamo[ny]! The Unique Texas Ban on Permanent Alimony and the Development of Community Property Law*, 56 Law and Contemporary Problems 7, 59 (1993).

(n59)Footnote 263. *Geesbreght v. Geesbreght, 570 S.W.2d 427 (Tex. Ct. App. 1978); Finn v. Finn, 658 S.W.2d 735 (Tex. Ct. App. 1983); Hirsch v. Hirsch, 770 S.W.2d 924 (Tex. Ct. App. 1989).*

(n60)Footnote 264. *Peerenboom v. Peerenboom, 433 N.W.2d 282 (Wis. Ct. App. 1988).*

(n61)Footnote 265. *Mitchell v. Mitchell, 732 P.2d 208 (Ariz. 1987)* (goodwill of an accounting partnership was a community asset); *Wisner v. Wisner, 631 P.2d 115 (Ariz. 1981)* (professional goodwill can be divided as community property); *Ford v. Ford, 782 P.2d 1304 (Nev. 1989)* (goodwill of solo medical practice can be community property even though it depends on continued presence of the practitioner and despite difficulty of selling the practice); *Hurley v. Hurley, 615 P.2d 256 (N.M. 1980)* (goodwill of medical practice is divisible as community property even though difficult to sell or value); *In re Fleege v. Fleege, 588 P.2d 1136 (Wash. 1979)* (approving appellate court decision establishing professional goodwill as community property); *Lewis v. Lewis, 336 N.W.2d 171 (Wis. Ct. App. 1983)* (professional partnership with cross purchase agreement setting value of goodwill).

(n62)Footnote 266. *Holbrook v. Holbrook, 309 N.W.2d 343 (Wis. Ct. App. 1981).*

(n63)Footnote 267. *Wisner v. Wisner, 631 P.2d 115 (Ariz. Ct. App. 1981); In re Marriage of Aufmuth, 152 Cal. Rptr. 668 (1979); Todd v. Todd, 78 Cal. Rptr. 131 (1969); Muckleroy v. Muckleroy, 498 P.2d 1357 (N.M. 1972); Frausto v. Frausto, 611 S.W.2d 656 (Tex. Ct. App. 1981); Fernau v. Fernau, 694 P.2d 1092 (Wash. App. 1984); DeWitt v. DeWitt, 296 N.W.2d 761 (Wis. Ct. App. 1984).* For an interesting discussion about dividing the value of a professional degree, *see Sullivan v. Sullivan, 184 Cal. Rptr. 796 (Ct. App. 1982); In re Marriage of Lee, 938 P.2d 650, 655 (Mont. 1997)*(holding that professional degrees are not property because they have no transferable value, are personal to the holder, terminate upon death and possess none of the "usual attributes of property"); *Montague v. Montague, 1997 Ohio App. LEXIS 5520 (Ohio App. 1997)* (holding that while a professional degree is not a marital asset, the future value of

the degree or license is considered in reaching an equitable award of alimony); *Lapham v. Ruflin, 661 N.Y.S.2d 373, 374 (S. Ct. App. Div. 1997)* (holding that teaching certificate in mathematics is considered marital property under New York rule); *McSparron v. McSparron, 662 N.E.2d 745 (N.Y. 1995).*

(n64)Footnote 268. Cal. Fam. Code Ann. § 2641. This statute was applied in *In re Marriage of Watt, 262 Cal. Rptr. 783 (1989).*

(n65)Footnote 269. There are rebuttable presumptions that the community (a) has not substantially benefitted from community contributions made less than 10 years before the commencement of the proceeding, and (b) has substantially benefitted from community contributions made more than 10 years before the commencement of the proceeding. *Id.*

(n66)Footnote 270. *Id.*

(n67)Footnote 271. La. Civ. Code Ann. art. 121. *Cf. Barron v. Barron, 669 So. 2d 622 (La. App. 1996)* (husband was not entitled to reimbursement for his financial contributions to wife's degree due to his substantial income during this period and lack of sacrifice toward degree).

(n68)Footnote 272. *Washburn v. Washburn, 677 P.2d 152 (Wash. 1984)* (sets out factors for equitable compensation); *Haugan v. Haugan, 343 N.W.2d 796 (Wis. 1984)* (equitable compensation, considering restitution, opportunity cost, and enhanced earning capacity of student spouse).

(n69)Footnote 273. *Frausto v. Frausto, 611 S.W.2d 656 (Tex. Ct. App. 1980).*

(n70)Footnote 274. *Mahoney v. Mahoney, 442 A.2d 1062 (N.J. App. Div. 1982); Milteer v. Milteer, 720 N.Y.S.2d 194 (2001)* (the wife's nursing license was considered marital property); *Hassanin v. Hassanin, 719 N.Y.S.2d 254 (2001)* (the husband's undergraduate degree in engineering was considered marital property).

(n71)Footnote 275. In states following the inception of title doctrine discussed in § 37.10(a), a right to reimbursement may be available to the contributing estate but title presumably would not be recharacterized. *See also In re Marriage of Kunze, 47 P.3d 489 (Or. App. 2002)* (the wife rebutted the presumption that the appreciation in value during the marriage was marital property); *McManus v. McManus, 638 N.Y.S.2d 411 (2002)* (the husband was not entitled to a marital property credit for the appreciation in value of an inherited family business that improved because of passive market forces); *Elman v. Elman, 45 P.3d 176 (Utah App. 2002)* (equity required that the wife receive a fair share of the appreciation on the husband's premarital partnership interest); *Roden v. Roden, 949 P.2d 67, 70 (Ariz. App. 1997)* (holding that where the value of a separate property business increases because of community efforts, the increase is separate property if the business pays the community a "fair return for its labor"); *Thomas v. Thomas, 776 So. 2d 1092 (Fla. App. 2001)* (increased equity in a house attributable to improvements was considered marital property).

(n72)Footnote 276. Ariz. Rev. Stat. Ann. § 25-213.

(n73)Footnote 277. Cal. Fam. Code Ann. § 770.

(n74)Footnote 278. Nev. Rev. Stat. § 123.130.

(n75)Footnote 279. N.M. Stat. Ann. § 40-3-8. After definitions of separate and community property, this statute simply states the "'Property' includes the rents, issues and profits thereof." *Id.* P E. By this definition separate property produces separate income and community property produces community income.

(n76)Footnote 280. Wash. Rev. Code Ann. §§ 26.16.010 & 26.16.020.

(n77)Footnote 281. La. Rev. Stat. Ann. art. 2339. The second paragraph of this article requires recording of the declaration described in the second sentence. This rule has been applied to interest paid on a personal injury judgment. *Roge v. Roge, 604 So. 2d 721 (La. App. 1992).*

(n78)Footnote 282. Wis. Stat. Ann. § 766.31(7p). Paragraph 1 of the same statute provides that all property of spouses is marital property except that which is classified otherwise in Chapter 766 of Wisconsin's statutes.

(n79)Footnote 283. *Id.* § 766.59.

(n80)Footnote 284. "Community property consists of the property, other than separate property, acquired by either spouse during marriage." Tex. Fam. Code Ann. § 5.01(b). *Ridgell v. Ridgell, 960 S.W.2d 144 (Tex. App. 1997).*

(n81)Footnote 285. Tex. Const. Ann. Art. 16, § 15.

(n82)Footnote 286. *Id.*

(n83)Footnote 287. Idaho Code § 32-906 (1983). *See also Kauffman v. Kaufmann, 101 S.W.3d 35 (Mo. App. 2003)* (the husband's share of income earned on the rentals of signs located on his separate property was marital property).

(n84)Footnote 288. Wis. Stat. Ann. § 766.63(2). In *In re Estate of Kobylski, 503 N.W.2d 369 (Wis. App. 1993),* the Wisconsin Court of Appeals applied the "industry mixing" provisions of § 766.63(2). Painting and yard work, without more, qualified only as routine maintenance and therefore did not create a marital property component in the separate residence. Enlargement of the garage did qualify as a "substantial" contribution but the case was remanded to determine whether the separate labor resulted in "substantial" appreciation, another component of the statutory test.

(n85)Footnote 289. *See* § 37.10(b). In *In re Estate of Kobylski, 503 N.W.2d 369 (Wis. App. 1993),* the Wisconsin Court of Appeals applied § 766.63(1) to a residence brought into the marriage as separate property (referred to in Wisconsin as "individual property") of the wife and improved with community funds and labor. The exact language of paragraph (1) of the statute is as follows: "Except as provided otherwise in §§ 766.61 and 766.62, mixing marital property with property other than marital property reclassifies the other property to marital property unless the component of the mixed property which is not marital property can be traced." In this case, there were records showing community contributions to the property and the court held that the trial court had erred in concluding that tracing was not possible. They conclude, however, that the statute simply precludes reclassification of the separate property residence as a community (or "marital") property residence when tracing can be performed. It does not, they say, answer the "remedy" question in this situation. They note that the majority of community property states hold that when community funds are used to improve separate property of one of the spouses, and tracing is established, the improvements "acquire the classification of the underlying property." The community estate does have a right of reimbursement for the funds expended by the community. The measure of reimbursement then becomes yet another issue. Analyzing decisions in other states, the Wisconsin court concludes that measuring reimbursement by the "enhancement in value" to the property (rather than the cost of the improvement) is "more likely to ensure the equitable treatment of both the contributing estate and the benefitted estate in most situations." Under this test, reimbursement would not be available for maintenance expenditures which do not enhance the property's value.

(n86)Footnote 290. *See* § 37.11(c)(4), *supra.*

(n87)Footnote 291. *Pereira v. Pereira, 103 P. 488 (Cal. 1909); In re Marriage of Allen, 116 Cal. Rptr. 2d 887 (2002)* (the marital community was to be reimbursed for community funds used on a separate residence).

In *In re Marriage of Dekker, 21 Cal. Rptr. 2d 642 (1993),* a California court of appeal said *Pereira* is typically applied "where business profits are principally attributed to efforts of the community."

(n88)Footnote 292. *Van Camp v. Van Camp, 199 P. 885 (Cal. App. 1921).*

(n89)Footnote 293. *See* § 37.10(a), *supra*.

(n90)Footnote 294. *Jensen v. Jensen, 665 S.W.2d 107, 109 (Tex. 1984).*

(n91)Footnote 295. *Id.*

(n92)Footnote 296. *Vallone v. Vallone, 644 S.W.2d 455 (Tex. 1982).*

(n93)Footnote 297. *Vallone v. Vallone, 618 S.W.2d 820, 824 (Tex. Civ. App. 1981).*

(n94)Footnote 298. For this proposition, they cited *Norris v. Vaughan, 260 S.W.2d 676 (Tex. 1953).*

(n95)Footnote 299. In Texas, the court has discretion in dividing the community estate upon divorce, Tex. Fam. Code Ann. § 3.63, but they do not have discretion to award separate real property of one spouse to the other. *Eggemeyer v. Eggemeyer, 554 S.W.2d 137 (Tex. 1977).* In this case, a dissenter wrote that "the majority has confused discretion in *division* of property with discretion in *classifying* property ... a trial court, however, has no discretion in classifying property." *644 S.W.2d at 460.*

(n96)Footnote 300. W.S. Mcclanahan, Community Property Law in the United States § 6:18 at 121 (Clark Boardman Callaghan 1992 Supp.).

(n97)Footnote 301. *Zisblatt v. Zisblatt, 693 S.W.2d 944 (Tex. Ct. App. 1985).*

(n98)Footnote 302. *Speer v. Quinlan, 525 P.2d 314 (Idaho 1974).*

(n99)Footnote 303. *Cockrill v. Cockrill, 601 P.2d 1334 (Ariz. 1979)* (abandoning an "all or nothing" rule and following the California approaches); *Johnson v. Johnson, 510 P.2d 625 (Nev. 1973)* (Nevada apparently applies California approaches); *Michelson v. Michelson, 551 P.2d 638 (N.M. 1976)* (where husband owned 50 percent of corporation, community did not acquire an interest where there was no proof that husband's salary was not reasonable or adequate).

(n100)Footnote 304. *Estate of Nereson, 239 Cal. Rptr. 865 (1987).*

(n101)Footnote 305. *Jurek v. Jurek, 606 P.2d 812 (Ariz. 1980); Russell v. Russell, 801 P.2d 93 (N.M. Ct. App. 1990); Russell v. Russell, 740 P.2d 127 (N.M. Ct. App. 1987); Soto v. Vandeventer, 245 P.2d 826 (N.M. 1952); Roberson v. U-Bar Ranch, Inc., 303 F. Supp. 730 (D.N.M. 1968); Graham v. Franco, 488 S.W.2d 390 (Tex. 1972); Brown v. Brown, 675 P.2d 1207 (Wash. 1984)* (overruling prior rule that recovery for personal injury was community property). *White v. White, 705 So. 2d 123 (Fla. App. 1998); Byington v. Byington, 568 N.W.2d 141, 145 (Mich. Ct. App. 1997); Munroe v. Munroe, 695 N.E.2d 1155 (Ohio App. 1997); Ritter v. Ritter, 690 So. 2d 1372, 1376 (Fla. App. 1997); Vanzant v. Vanzant, No. CA 96-554, 1997 Ark. App. LEXIS 236 (Ark. App. 1997)* (holding that mere labeling of a claim as "personal injury" does not qualify the claim for marital property exemption from equitable distribution; the claim must be for a disability or future medical expenses traced to a specific incident or tortious act); *In re Pace, 664 N.E.2d 320 (Ill. App. 1996)* (husband's personal injury award was marital property); *In re Leland, 847 P.2d 518 (Wash. App. 1993). Standefer v. Standefer, 26 P.3d 104 (Okla. 2001)* (annuities from the settlement of the husband's and wife's tort claims were considered marital property).

(n102)Footnote 306. Nev. Rev. Stat. § 123.130.

(n103)Footnote 307. Nev. Rev. Stat. § 123.121 (1991). Paragraph 2 of this section provides that damages for injury to property "shall be awarded according to the character of the injured property."

(n104)Footnote 308. Tex. Fam. Code Ann. § 5.01. Paragraph (b) places everything other than separate property, which would include loss of earning capacity during marriage, into the category of community property.

(n105)Footnote 309. La. Civ. Code Ann. art. 2344.

(n106)Footnote 310. Wis. Stat. Ann. § 766.31. *See also* Annotation, *Divorce and Separation: Determination of*

Whether Proceeds from Personal Injury Settlement or Recovery Constitute Marital Property, 109 A.L.R. 5th 1 (2003). In *Khoroosi v. Khoroosi, 524 N.W.2d 647 (Wis. App. 1994),* a divorce proceeding, the court states: "While a personal injury settlement is marital [community] property, the court should presume that the injured person is entitled to the settlement amounts that are not specifically allocated." Because no evidence was presented on the nature of the losses, the trial court properly awarded the injured spouse all of the settlement proceeds.

(n107)Footnote 311. Cal. Fam. Code Ann. §§ 780-783.

(n108)Footnote 312. Section 2603 is in Part 4 of the Family Code, titled "Special Rules for Division of Community Estate," and provides that "community estate personal injury damages" (described in § 780 and not separate property as described in § 781) "shall be assigned to the party who suffered the injuries unless the court ... determines that the interests of justice require another disposition." In every case, at least one-half of the damages must be assigned to the party who suffered the injuries. This provision allocating community estate personal injury damages is an exception to the otherwise strict California rule that community property must be divided equally. *In re Marriage of Saslow, 710 P.2d 346 (Cal. 1985).* In effect, then, the California treatment of damages for personal injury is actually quite similar to that in the other states.

(n109)Footnote 313. *Doss v. Roberts, 487 S.W.2d 839 (Tex. Civ. App. 1972).*

(n110)Footnote 314. Life insurance policies are also discussed in connection with employment benefits. *See* § 37.11(b)(7).

(n111)Footnote 315. *Polk v. Polk, 39 Cal. Rptr. 824 (1964); Allie Estate, 329 P.2d 903 (Cal. 1958); Roselli v. Rio Communities Serv. Station, Inc., 787 P.2d 428 (N.M. 1990); In re Marriage of Brewer, 949 P.2d 404, 406 (Wash. App. 1997), aff'd in part, rev'd in part* by *Brewer v. Brewer, 976 P.2d 102 (Wash. 1999); Wear v. Mizell, 946 P.2d 1363, 11367 (Kan. 1997)* (holding that proceeds are community property where the insured property is owned by the community; the proceeds are treated as replacement for the insured property); *Estate of Bellingham v. Bellingham, 933 P.2d 425, 427 (Wash. App. 1997).*

(n112)Footnote 316. Wis. Stat. Ann. § 766.61.

(n113)Footnote 317. Subsection (4) provides that this section does not affect a creditor's interest in the ownership interest or proceeds of a policy assigned to or payable to the creditor. Subsection (5) provides that the interest acquired under a decree or settlement agreement incident to a prior marriage or to parenthood is not marital property. Subsection (6) provides that this section does not affect the ownership interest or proceeds if neither spouse is designated as an owner and no marital property is used to pay a premium.

(n114)Footnote 318. Subdivision 2 provides:

> 2. If after the issuance of a policy described under subd. 1 the insured or his or her spouse are at any time not domiciled in this state, the ownership interest and proceeds of the policy are mixed property. The marital property component of the ownership interest and proceeds is the amount which results from multiplying the entire ownership interest and proceeds by a fraction, the numerator of which is the period during marriage that the policy was in effect and the denominator of which is the entire period that the policy was in effect.

(n115)Footnote 319. Subdivision 2 provides:

> 2. If after the issuance of a policy described under subd. 1 the insured or his or her spouse are at any time not domiciled in this state, the ownership interest and proceeds of the policy are individual property and property that is other than individual or marital property. The individual property component of the

ownership interest and proceeds is the amount which results from multiplying the entire ownership interest and proceeds by a fraction, the numerator of which is the entire period during which the policy was in effect less that period during which the insured or his or her spouse were at any time not domiciled in this state and the denominator of which is the entire period that the policy was in effect.

(n116)Footnote 320. *McCurdy v. McCurdy, 372 S.W.2d 381 (Tex. Civ. App. 1963).* The community did have a right of reimbursement for the premiums paid from community funds. *Cooper v. Cooper, No. B14-92-00125-CV, 1993 Tex. App. LEXIS 2014.*

(n117)Footnote 321. *Grost v. Grost, 561 S.W.2d 223 (Tex. Civ. App. 1977). Graham v. Graham, 465 S.E.2d 614 (W. Va. 1995)* (term life insurance policy obtained during marriage as an employment benefit was marital property). *See Kambur v. Kambur, 652 So. 2d 99 (La. App. 1995)* (value of policies divided by court).

(n118)Footnote 322. *Pope Photo Records, Inc. v. Malone, 539 S.W.2d 224 (Tex. Civ. App. 1976); Wohlenberg v. Wohlenberg, 485 S.W.2d 342 (Tex. Civ. App. 1972). Estate of Street, T.C. Memo. 1997-32* (holding that where the insured party names a beneficiary other than the spouse, the policy is removed from the category of community property, even when the policy is purchased with community funds, so long as there is no fraud upon the wife).

(n119)Footnote 323. *Street v. Skipper, 887 S.W.2d 78 (Tex. App. 1994).*

(n120)Footnote 324. *In re Leland, 847 P.2d 518, 526 (Wash. App. 1993).*

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CHAPTER 37 MARITAL PROPERTY

4-37 Thompson on Real Property, Thomas Editions § 37.12

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§ 37.12 Management and Control of Marital Property.

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An early characteristic of the law governing management of marital property in both common law and community property systems was male dominance. In common law states married women were legally disabled and a husband had control over the wife's property as well as his own. In community property states, married women often had control over their separate property but husbands were by law the managing partners of community property.

At long last, n325 modern statutes have eliminated male dominance in management and control, at least in legal terms. In the 1960's and 1970's new schemes of marital property management emerged, reflecting a greater equality between wife and husband than ever before.

§ 37.12(a) Management of Separate Property.

Although it had been very slow to make significant concessions to equality of the sexes, with the Texas Matrimonial Act of 1967 Texas was the first state to adopt a marital property management statute incorporating equal treatment of the spouses as to all marital property. Under the current Texas statute, "each spouse has the sole management, control, and disposition of his or her separate property." n326 A significant qualification of this provision exists in the case of a homestead. Whether the family homestead is separate property of either spouse or community property, "neither spouse may sell, convey, or encumber it without the joinder of the other spouse." n327 Exceptions to this rule, subject in some cases to certain formalities, are provided where one spouse (1) has been judicially declared incompetent, n328 (2) is in fact incompetent or has disappeared or abandoned the homestead, n329 or (3) is reported to be a prisoner of war or missing on public service of the United States. n330

Other jurisdictions also treat the spouses equally in management and control of separate property. Washington's current statutor defining and establishing management of separate property provides as follows:

> Property and pecuniary rights owned by the husband before marriage and that acquired by him afterwards by gift, bequest, devise or descent, with the rents, issues and profits thereof, shall not be subject to the debts or contracts of his wife, and he may manage, lease, sell, convey, encumber or devise

> by will such property without the wife joining in such management, alienation or encumbrance, as fully and to the same effect as though he were unmarried. n331
>
> The property and pecuniary rights of every married woman at the time of her marriage or afterwards acquired by gift, devise or inheritance, with the rents, issues and profits thereof, shall not be subject to the debts or contracts of her husband, and she may manage, lease, sell, convey, encumber or devise by will such property to the same extent and in the same manner that her husband can, property belonging to him. n332

Other community property states also provide that each spouse, without consent or joinder of the other spouse, may convey, encumber and otherwise dispose of his or her separate property. n333

§ 37.12(b) Duties Between Spouses.

The primary relationship in community property, of course, is the relationship between wife and husband. We have noted that only very recently have American jurisdictions departed from the position that it is the husband's role to manage community property. Now that the management of marital property, and specifically community property, is more equally shared by the spouses, the relationship between them and their property has been cast in a new light. Modern cases and statutes have addressed specifically the relationship between spouses and the duties they owe one another in the management of marital property.

In some instances, duty to one's spouse is described in terms of good faith. Section 2 of the Uniform Marital Property Act, for example, provides:

> (a) Each spouse shall act in good faith with respect to the other spouse in matters involving marital property or other property of the other spouse. This obligation may not be varied by a marital property agreement.
>
> (b) Management and control by a spouse of that spouse's property that is not marital property in a manner that limits, diminishes, or fails to produce income from that property does not violate subsection (a).

Wisconsin has an identical provision. n334 A Louisiana spouse "is liable for any loss or damage caused by fraud or bad faith in the management of the community property." n335

In Texas, duties between the spouses, other than the duty to support one another, n336 have been less explicitly spelled out, although there apparently is a relationship of trust and confidence between husband and wife pertaining to community property. n337 In Texas, as elsewhere, actions by spouses can sometimes constitute a "fraud on the community." n338 If a disposition by one spouse works a fraud on the community property rights of the other, some corrective measures will be available, usually reimbursement to the community estate in conjunction with property division upon divorce. n339 In the event the managing spouse wrongfully converts community property to his own individual use or squanders it, the other spouse may, in dissolution proceedings, seek a greater share of the remaining community property. n340 Distinguishing those situations, however, a Texas court has stated that absent a fraud on the community, the managing spouse is not responsible to the other spouse for "good faith, but unwise, investment of community funds resulting in losses to the community estate." n341

In recent years, more frequent references to "trust," "confidence," and "fiduciary duty" have appeared in describing the relationship between spouses with respect to management of community property. n342 California, for example, had a statutory requirement that spouses act in good faith with respect to one another, n343 but that provision has now been replaced by a fiduciary duty described in the following terms:

> Each spouse shall act with respect to the other spouse in the management and control of the community property in accordance with the general rules governing fiduciary relationships which control the actions of persons having relationships of personal confidence as specified in Section 721, n344 until such time as the property has been divided by the parties or by a court. This duty includes the obligation to make full disclosure to the other spouse of all material facts and information regarding the existence, characterization, and valuation of all assets in which the community has or may have an interest and debts for which the community is or may be liable, and to provide equal access to all information, records, and books that pertain to the value and character of those assets and debts, upon request. n345

Remedies for breach of the fiduciary duty just mentioned, and procedures for enforcing them, are spelled out by statute. n346 Remedies include an accounting of the property and obligations of the spouses, addition of the spouse's name to community property held in the name of the other spouse alone, and an award equal to 50% of any asset transferred in breach of the fiduciary duty set forth in § 721 plus attorney's fees and court costs.

Spouses in New Mexico owe one another a fiduciary duty when managing community property. n347 In Idaho, husband and wife "contract toward each other obligations of mutual respect, fidelity and support." n348 The Idaho statute providing for equal control by the spouses over the entirety of the community property gives each spouse the power to encumber more than their own half of the property; this power imposes a fiduciary duty on the spouses, continuing until the marriage terminates. n349

In Nevada, neither spouse has any interest in the property of the other, n350 but that rule is subject to the following statute:

> Either husband or wife may enter into any contract, engagement or transaction with the other, or with any other person respecting property, which either might enter into if unmarried, subject in any contract, engagement or transaction between themselves, to the general rules which control the actions of persons occupying relations of confidence and trust toward each other. n351

This summary may suggest that the states are now imposing more strict duties on spouses. One significant difference between responsibility based on good faith or fraud, as opposed to fiduciary duty, may be in proof of the element of intent. In the former case, the spouse claiming bad faith or fraud may be burdened with the requirement of establishing that the managing spouse took action with the intent to affect adversely the interests of the other. n352

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LEXIS: community w/1 property w/30 spouse! w/5 duty or liab! or relation! or act!

§ 37.12(c) Management of Community Property in Texas.

The Texas treatment of the management and control of community property is unique. For management purposes, Texas community property is essentially divided into three parts -- one for each spouse and one for both spouses as a unit:

> (a) During marriage, each spouse has the sole management, control, and disposition of the community property that he or she would have owned if single, including but not limited to:
>
> (1) personal earnings;
>
> (2) revenue from separate property;
>
> (3) recoveries for personal injuries; and

> (4) the increase and mutations of, and the revenue from, all property subject to his or her sole management, control, and disposition.
>
> * * *
>
> (c) Except as provided in Subsection (a) of this section, the community property is subject to the joint management, control, and disposition of the husband and wife, unless the spouses provide otherwise by power of attorney in writing or other agreement. n353

If "sole management community property" n354 of one spouse is mixed or combined with "sole management community property" of the other spouse, it is subject to joint management of the husband and wife unless the spouses provide otherwise "by power of attorney in writing or other agreement." n355

The Texas list of sole management community property is potentially very broad, encompassing much of what an average husband or wife would acquire and accumulate during marriage, preceded by the phrase, "including but not limited to." Even so, experience suggests that a substantial portion of community property will be joint management property. For one thing, sole management property of one spouse will frequently be mixed with sole management property of the other, bringing paragraph (b) into play. Also, where husband and wife take title in both names or jointly finance the purchase of property, it will probably be characterized as joint management community property. n356

The term "sole management," applied to community property, necessarily has a meaning slightly different from the same term applied to separate property. Community property, even if managed by one spouse alone, is *owned* by both spouses, and there is a relationship of trust and confidence between husband and wife pertaining to that property. n357 Even so, the non-managing spouse is not required to approve of or agree with dispositions made by the managing spouse of his or her sole management community property. n358

The meaning of "joint management" is apparently ambiguous. It seems quite clear that one spouse could not transfer the other's interest in joint management community property without the other spouse's consent. n359 Whether one spouse can transfer her own interest in joint management community property without joinder by the other spouse is not so obvious. One court has said this is clear, n360 but then made the following statement:

> One spouse cannot alone convey or encumber joint management community property unless the spouses have otherwise agreed. Tex. Fam. Code Ann. 5.22(c). Appellant has failed to present a statement of facts from which it could be determined whether such an agreement existed. Without a "power of attorney in writing or other agreement" to the contrary, James B. Miller had no authority to contract to dispose of the entire joint management community property without his wife joining in the contract. n361

The first sentence and the last sentence of this passage are subtly different because of the insertion of the word "entire" in the last sentence. This word does not appear in the statute. The *Vallone* court's interpretation of § 5.22 is suspect. If the legislature had meant "joint and several management," which would make it more or less equivalent to tenancy in common, it seems they would have said so. There is authority for a different interpretation which this writer believes has more merit. That interpretation is that paragraph (c) of § 5.22 means that *no* interest in joint management community property can be transferred or encumbered by one spouse acting unilaterally. n362

§ 37.12(d) Management of Community Property in General.

After the Texas move toward equality in management of community property in 1967, Washington next led the way in 1972. n363 As to community property, Washington provides for equal and several management and control with significant exceptions:

> Either spouse, acting alone, may manage and control community property, with a like power of disposition as the acting spouse has over his or her separate property, except:
>
> (1) Neither spouse shall devise or bequeath by will more than one-half of the community property.
>
> (2) Neither spouse shall give community property without the express or implied consent of the other.
>
> (3) Neither spouse shall sell, convey, or encumber the community real property without the other spouse joining in the execution of the deed or other instrument by which the real estate is sold, conveyed, or encumbered, and such deed or other instrument must be acknowledged by both spouses.
>
> (4) Neither spouse shall purchase or contract to purchase community real property without the other spouse joining in the transaction of purchase or in the execution of the contract to purchase.
>
> (5) Neither spouse shall create a security interest other than a purchase money security interest as defined in RCW 62A.9-107 in, or sell, community household goods, furnishings, or appliances, or a community mobile home unless the other spouse joins in executing the security agreement or bill of sale, if any.
>
> (6) Neither spouse shall acquire, purchase, sell, convey, or encumber the assets, including real estate, or the good will of a business where both spouses participate in its management without the consent of the other: Provided, that where only one spouse participates in such management the participating spouse may, in the ordinary course of such business, acquire, purchase, sell, convey or encumber the assets, including real estate, or the good will of the business without the consent of the non-participating spouse. n364

Perhaps the most important qualifications of the right to manage community property separately are the requirements in paragraphs (3) and (4) that both spouses join in selling, conveying, encumbering, purchasing or contracting to purchase community real property. "Joinder" in such cases is a question of fact, but it may be based upon authorization, ratification or estoppel as well as actual signing by both spouses. n365

As is often the case with statutory language, ambiguity and unanswered questions persist. The statute does not, for example, spell out the consequences when one spouse does not join in the transaction. The choice of words is interesting -- "Neither spouse shall purchase or contract to purchase *community* real property without the other spouse." In Washington, consistent with this language, the consequence of non-joinder by one spouse in a real estate transaction appears to be that the affected property or obligation is impressed with a separate, rather than community, character. n366

In addition to the provisions requiring joinder in the sale and purchase of community real property, note that where both spouses participate in the management of assets, neither spouse alone may "acquire, purchase, sell, convey, or encumber" those assets, including real estate and the good will of a business. n367

Nevada's general statute on management and control of community property n368 is almost identical to the Washington statute. Even so, transfers of community real property by one spouse, without the other spouse's joinder are apparently voidable under Nevada law by the non-signing spouse. n369

Arizona has adopted a system of management and control of community property similar to that in force in Washington and Nevada:

> * * *

B. The spouses have equal management, control and disposition rights over their community property, and have equal power to bind the community.

C. Either spouse separately may acquire, manage, control or dispose of community property, or bind the community, except that joinder of both spouses is required in any of the following cases:

1. Any transaction for the acquisition, disposition or encumbrance of an interest in real property other than an unpatented mining claim or a lease of less than one year. n370

Again the requirement that husband and wife both be joined in real property transactions in community property is worthy of note. The language of this statute is different from that used in Washington and Nevada: "joinder of both spouses is required in ... any transaction for the acquisition, disposition or encumbrance of an interest in real property..." Unless both spouses have joined, a purported transfer of community real estate is voidable. n371 This is not to say that the signing spouse, and the signing spouse's separate property, will not be responsible or liable for the transaction. n372

California's statutory regulations concerning management and control of community property are among the most detailed provisions anywhere. As in several other jurisdictions, either spouse has management and control of community property subject to some significant qualifications, and also subject to the fiduciary obligations discussed in § 37.12(b), *supra*. One of the primary qualifications is that both spouses "must join in executing any instrument by which ... community real property or any interest therein is leased for a longer period than one year, or is sold, conveyed, or encumbered." n373

Each spouse generally has absolute power of disposition, other than testamentary disposition, of community personal property. n374 A spouse may not, however, make gifts or otherwise dispose of community personal property for less than fair and reasonable value, without written consent of the other spouse. n375 Community personal property used in the family dwelling, and furniture, furnishings, and fittings of the homes, as well as clothing of the other spouse and minor children is also protected against unilateral transfer by one spouse. n376

Any business or interest in a business that is all or substantially all community personal property is subject to "primary management and control" by the spouse operating the business. Primary management and control means that "the managing spouse may act alone in all transactions but shall give prior written notice to the other spouse of any sale, lease, exchange, encumbrance, or other disposition of all or substantially all of the personal property used in the operation of the business." n377 Remedies for a breach of this notice requirement are limited to those established for breach of fiduciary duty between spouses; the validity of a transaction or transfer of any interest is not affected.

Idaho also provides that either the husband or wife has the right to manage and control community property, except that neither may sell, convey or encumber community real estate without joinder by the other. n378 Where joinder is required, there is authority for the proposition that failure of a spouse to join in a conveyance renders the conveyance void, n379 but a party can waive the protection of this section expressly or by conduct. n380

New Mexico's statute starts from the other direction, requiring joinder in all transfers, conveyances, or mortgages of real property, or contracts therefor, with the exceptions of purchase-money mortgages, transactions made pursuant to a validly executed and recorded power of attorney, and leases for five years or less. n381 In a variation on the common law, the New Mexico requirement of joinder also applies to separate real property owned by the spouses as joint tenants or tenants in common. n382 Transactions attempted in violation of this requirement "shall be void and of no effect." n383

As in other states, either spouse in New Mexico "alone has full power to manage, control, dispose of and encumber the entire community personal property." n384 There are, however, special rules when one or both spouses are named in documents evidencing ownership of community personal property or in a written agreement with a third party. Where

only one spouse is named in a document evidencing ownership, or in a written agreement between that spouse and a third party, designating that spouse as having sole management authority, only the spouse so named or designated may manage and control the property. n385 And where both spouses are so named or designated, both must join to dispose of or encumber the property if the names of the spouses are joined by the word "and." If the names of the spouses are joined by "or" or "and/or" either spouse alone may dispose of or encumber the property. n386

It appears that either spouse also may have full power alone to manage and control a business. n387

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LEXIS: community w/1 property w/15 management or control! or power! w/5 spouse!

§ 37.12(e) Protection of Third Parties.

Management and control issues arise between spouses, of course, but third parties will necessarily be involved in some fashion. Texas relies on a series of presumptions to protect third parties dealing with married individuals transferring property subject to their sole management: n388

> (a) During marriage, property is presumed to be subject to the sole management, control, and disposition of a spouse if it is held in his or her name, as shown by muniment, contract, deposit of funds, or other evidence of ownership, or if it is in his or her possession and is not subject to such evidence of ownership.
>
> (b) A third person dealing with a spouse is entitled to rely (as against the other spouse or anyone claiming from that spouse) on that spouse's authority to deal with the property if:
>
> (1) the property is presumed to be subject to the sole management, control, and disposition of the spouse; and
>
> (2) the person dealing with the spouse:
>
> (A) is not a party to a fraud upon the other spouse or another person; and
>
> (B) does not have actual or constructive notice of the spouse's lack of authority. n389

In appropriate cases, this presumption is decisive as between the spouses and the third party; the managing spouse can unilaterally convey the whole community property interest to the third party. n390

In Washington, even as to community real property, a deed from one spouse who is the only owner named in the record title to an actual bona fide purchaser is sufficient "to convey to, and vest in, such purchaser the full legal and equitable title to such real estate free and clear of any and all claims of any and all persons whatsoever, not appearing of record..." n391 A spouse of the titled owner can protect his or her interest against a possible bona fide purchaser by recording an instrument giving notice of the community property interest in the property "within a period of ninety days from the date when such legal title has been made a matter of record..." n392

In California, protection is accorded to the good faith purchaser without knowledge of the marriage relation, who accepts a lease, contract, mortgage or deed from the spouse holding record title to community real property. n393 New Mexico also protects innocent purchasers against the adverse effects of their community property management provisions. n394

COMPUTER-ASSISTED RESEARCH

LEXIS: community w/1 property w/30 third w/1 part! w/5 protect!

§ 37.12(f) Gifts of Community Property.

One final area of managing community property that deserves mention here concerns gifts. n395 The Uniform Marital Property Act, for example, provides:

> (a) A spouse acting alone may give to a third person marital property that the spouse has the right to manage and control only if the value of the marital property given to the third person does not aggregate more than [$500] in a calendar year, or a larger amount if, when made, the gift is reasonable in amount considering the economic position of the spouses. Any other gift of marital property to a third person is subject to subsection (b) unless both spouses act together in making the gift.
>
> (b) If a gift of marital property by a spouse does not comply with subsection (a), the other spouse may bring an action to recover the property or a compensatory judgment in place of the property, to the extent of the non-compliance. The other spouse may bring the action against the donating spouse, the recipient of the gift, or both. The action must be commenced within the earlier of one year after the other spouse has notice of the gift or 3 years after the gift. If the recovery occurs during marriage, it is marital property. If the recovery occurs after a dissolution or the death of either spouse, it is limited to one-half of the value of the gift and is individual property. n396

Disputes about transfers from one spouse to a third party typically arise in the context of divorce or death. Discussion of those subjects in §§ 37.14 and 37.15, *infra* is pertinent here. There is also some pertinent discussion in § 37.12(b), *supra*, concerning duties of spouses to one another.

> Gifts are sometimes made to third parties in the form of life insurance benefits, discussed in § 37.11(e), *supra*, and these too may be subject to restrictions designed to protect the non-donor spouse. Wisconsin has a statute similar to the Uniform Marital Property Code provision quoted above, with specific references to gifts of life insurance and detailed provisions concerning life insurance generally. n397

Gifts of community property from one spouse, without the consent of the other, may be a fraud on the non-consenting spouse's property rights. Unlike an exchange for consideration, the community estate receives nothing for what is sometimes a very valuable interest. The approach suggested by the Uniform Marital Property Act is probably an accurate reflection of modern policy concerning the unilateral use of management powers over community property to benefit third parties.

FOOTNOTES:

(n1)Footnote 325. We shall not here explore the many historical details of management and control in the United States. At a minimum, the evolution of marital equality in management and control of property is well into its second century in the United States. In the mid-19th century, "Married Women's Property Acts" were adopted in a number of states, giving married women relatively complete control over their property. *See* 1 American Law of Property § 5.56 (A.J. Casner ed. 1952). In community property jurisdictions, the "most comprehensive, unique, and ultimately important reform" occurred in Texas in 1913. W.S. McClanahan, Community Property Law in the United States, § 9:7 at 449 (1982). In that year, Texas adopted a new management scheme, whereby married women were given some control of certain community property, namely their own earnings and income from their separate property. This may now seem to be a fairly modest concession, but it took many more years for further reform: "Despite drafting difficulties and judicial setbacks, this 1913 reform would produce a more comprehensive reform in the late 1960's." *Id.* As late as 1970, the husband was the designated manager of community property in every community property state except Texas. *See id.* § 9:9 at 452.

(n2)Footnote 326. Tex. Fam. Code Ann. § 5.21.

(n3)Footnote 327. *Id.* § 5.81.

(n4)Footnote 328. *Id.* §§ 5.82 (separate property) & 5.84 (community property).

(n5)Footnote 329. *Id.* § 5.83 (separate property).

(n6)Footnote 330. *Id.* § 5.83 (separate property).

(n7)Footnote 331. Wash. Rev. Code Ann. § 26.16.010.

(n8)Footnote 332. *Id.* § 26.16.020.

(n9)Footnote 333. Ariz. Rev. Stat. Ann. § 25-214A; Cal. Fam. Code Ann. 770(b) (1993); Idaho Code § 32-904; Nev. Rev. Stat. § 123.170; N.M. Stat. Ann. § 40-3-13; Wis. Stat. Ann. § 766.51(1)(a). *See also* Unif. Marital Property Act § 5(a)(1), 9A U.L.A. 97.

(n10)Footnote 334. Wis. Stat. Ann. § 766.15. A remedy is also explicitly provided for a breach of this duty "resulting in damage to the claimant spouse's property." *Id.* § 766.70(1). *See also* Unif. Marital Property Act § 15(a), 9A U.L.A. 97, 132 (referring to "the claimant spouse's present undivided one-half interest in marital property.") In Wisconsin, an action for breach of the duty must be commenced within six years after the claimant spouse acquires "actual knowledge of the facts giving rise to the claim." Wis. Stat. Ann. § 766.70(1). Under the U.M.P.A., the statutory period of limitations is three years. Uniform Marital Property Act § 15(d), 9A U.L.A. 97, 133. Interpreting Wis. Stat. Ann. § 766.15, the Wisconsin court concluded that the statutory duty of good faith was exclusive in matters involving marital property, and that there was no separate common law action for intentional misrepresentation between spouses. *Gardner v. Gardner, 499 N.W.2d 266 (Wis. App. 1993).*

(n11)Footnote 335. La. Civ. Code Ann. art. 2354. *See also Brown v. Brown, 680 So. 2d 1203 (La. App. 1996)* (husband, who serves as an officer of a corporation which held marital assets, owes a fiduciary duty to that corporation).

(n12)Footnote 336. Tex. Fam. Code Ann. § 4.02.

(n13)Footnote 337. *Massey v. Massey, 807 S.W.2d 391 (Tex. Ct. App. 1991).*

(n14)Footnote 338. *See Grothe v. Grothe, 590 S.W.2d 238 (Tex. Civ. App. 1979); Roberson v. Roberson, 420 S.W.2d 495 (Tex. Civ. App. 1967); Pride v. Pride, 318 S.W.2d 715 (Tex. Civ. App. 1958).*

(n15)Footnote 339. *See Belz v. Belz, 667 S.W.2d 240 (Tex. Ct. App. 1984).*

(n16)Footnote 340. *Grothe v. Grothe, 590 S.W.2d 238 (Tex. Civ. App. 1979); Reaney v. Reaney, 505 S.W.2d 338 (Tex. Civ. App. 1974).*

(n17)Footnote 341. *Andrews v. Andrews, 677 S.W.2d 171, 175 (Tex. Ct. App. 1984).*

(n18)Footnote 342. *See In re Moore, 890 S.W.2d 821 (Tex. App. 1994).* The court states that an allegation of breach of fiduciary duty in divorce and a claim of fraud on the community are the same. No separate action exists, however, to recover for the actions of a defrauding spouse. Such a claim is to be asserted for the trial court's consideration in the division of the community estate. *See also Connell v. Connell, 889 S.W.2d 534 (Tex. App. 1994).* For a recent case involving claims of fraud in very interesting circumstances, *see In re Devine, 869 S.W.2d 415 (Tex. App. 1993).*

(n19)Footnote 343. *See* Cal. Civ. Code § 5125(e).

(n20)Footnote 344. J. thomas Oldham, Divorce, Separation and the Distribution of Property § 3.01 at 3-2 (1993).

(n21)Footnote 345. Cal. Fam. Code Ann. § 1100(e). In *Burch v. George, 866 P.2d 92 (Cal. 1994),* a surviving spouse contended that a no contest clause in the decedent spouse's estate plan should not be enforced, urging the strong public policy of § 1100, favoring "fair dealing between the spouses," as the basis of her argument. The California Supreme Court disagrees, noting that a no contest clause does not result in any forfeiture or conversion of the spouse's community property, but rather acts as a disinheritance device. (Justices Kennard and Mosk voiced a vigorous dissent to this conclusion).

(n22)Footnote 346. *Id.* § 1101.

(n23)Footnote 347. *Roselli v. Rio Communities Serv. Station, Inc., 787 P.2d 428 (N.M. 1990); Fernandez v. Fernandez, 806 P.2d 582 (N.M. Ct. App. 1991).*

(n24)Footnote 348. Idaho Code § 32-901 (1983). *See also Gerow v. Covill, 960 P.2d 55 (Ariz. Ct. App. 1998)* (agreeing with Idaho and California courts, Arizona court held that a fiduciary relationship between spouses does exist with respect to community assets).

(n25)Footnote 349. *Compton v. Compton, 612 P.2d 1175 (Idaho 1980).*

(n26)Footnote 350. Nev. Rev. Stat. § 123.060.

(n27)Footnote 351. *Id.* § 123.070.

(n28)Footnote 352. *See Bagur v. C.I.R., 603 F.2d 491 (5th Cir. 1979); Auger v. Auger, 381 So. 2d 879 (La. Ct. App. 1980).* It is not entirely clear what the difference is between an obligation of "good faith" and the fiduciary obligation imposed in California and other states. A California statute explains the California duty in terms of good faith, albeit a high degree of good faith: "This confidential relationship imposes a duty of the highest good faith and fair dealing on each spouse, and neither shall take any unfair advantage of the other. This confidential relationship is a fiduciary relationship subject to the same rights and duties of non-marital business partners ..." Cal. Fam. Code Ann. § 721(b). In practice, it is quite likely that the duties in the various states will closely resemble one another.

(n29)Footnote 353. Tex. Fam. Code Ann. § 5.22.

(n30)Footnote 354. As the states began to increase the wife's management powers, the label "special community" was used to describe that portion of the community property that was under the wife's exclusive control.

(n31)Footnote 355. Tex. Fam. Code Ann. § 5.22(b); *United States v. Blanche, 1997 U.S. Dist. LEXIS 3122 (W.D. Tex. 1997)* (characterizing property acquired with combined community funds as joint-management community property).

(n32)Footnote 356. *Cockerham v. Cockerham, 527 S.W.2d 162 (Tex. 1975); Cooper v. Texas Gulf Indus., Inc., 513 S.W.2d 200 (Tex. 1974). But see McCloy v. Silverthorne, 296 F.3d 370 (5th Cir. 2002)* (a Texas land parcel purchased with joint funds of the debtor and non-debtor spouse was sole-management community property of the debtor).

(n33)Footnote 357. *Massey v. Massey, 807 S.W.2d 391 (Tex. Ct. App. 1991).*

(n34)Footnote 358. *Id.*

(n35)Footnote 359. *Cumming v. Johnson, 616 F.2d 1069 (9th Cir. 1979).*

(n36)Footnote 360. *Vallone v. Miller, 663 S.W.2d 97 (Tex. Ct. App. 1983), citing Williams v. Portland State Bank, 514 S.W.2d 124 (Tex. Civ. App. 1974).*

(n37)Footnote 361. *Vallone v. Miller, 663 S.W.2d 97, 99 (Tex. Ct. App. 1983).*

(n38)Footnote 362. *Dalton v. Don I. Jackson, 691 S.W.2d 765 (Tex. Ct. App. 1985). United States v. Blanche, No. SA-95-CA-0419, 1997 U.S. Dist. LEXIS 3122 (W.D. Tex. 1997)* (following *Dalton* rather than *Vallone*; holding one spouse cannot without consent dispose of sole management community property absent written authorization).

(n39)Footnote 363. 1972 Wash. Laws, Extra Sess. ch. 108.

(n40)Footnote 364. Wash. Rev. Code Ann. § 26.16.030.

(n41)Footnote 365. *Reid v. Cramer, 603 P.2d 851 (Wash. App. 1979); Daily v. Warren, 558 P.2d 1374 (Wash. App. 1977); Pixton v. Silva, 534 P.2d 135 (Wash. App. 1975).*

(n42)Footnote 366. *Smith v. Stout, 700 P.2d 343 (Wash. App. 1985).* It has also been demonstrated that this provision can have consequences not only in terms of management and control but also in terms of marital property liability. *Colorado Nat'l Bank v. Merlino, 668 P.2d 1304 (Wash. App. 1983),* discussed at § 37.13(b)(5), *infra.*

(n43)Footnote 367. Wash. Rev. Code Ann. § 26.16.030(6).

(n44)Footnote 368. Nev. Rev. Stat. § 123.230 (1991 & 1992).

(n45)Footnote 369. *In re Lemons & Assocs., Inc. 69 B.R. 360 (Bankr. D. Nev. 1987).*

(n46)Footnote 370. Ariz. Rev. Stat. Ann. § 25-214.

(n47)Footnote 371. *See Geronimo Hotel & Lodge v. Putzi, 728 P.2d 1227 (Ariz. 1986).*

(n48)Footnote 372. *Id.*

(n49)Footnote 373. Cal. Fam. Code Ann. § 1102(a).

(n50)Footnote 374. *Id.* § 1100(a). *See also In re Murin, 283 B.R. 588,* (Bankr. D. Ariz 2002) (the *Rundle* doctrine, as applied under Arizona law to make any contract executed by one spouse encumbering community property without other spouse's consent void and not merely suspended, did not apply to property that the debtor held as tenant by the entirety with his wife, such that any defect in deed of trust that the debtor executed in his name only upon this entireties property was cured when the property was awarded to the debtor by the divorce court).

(n51)Footnote 375. *Id.* § 1100(b). Gifts mutually given by both spouses to third parties or by one spouse to the other are excepted.

(n52)Footnote 376. *Id.* § 1100(c).

(n53)Footnote 377. *Id.* § 1100(d).

(n54)Footnote 378. Idaho Code § 32-912 (1993).

(n55)Footnote 379. *Keller v. Rogstad, 733 P.2d 705 (Idaho 1987).*

(n56)Footnote 380. *Lowry v. Ireland Bank, 779 P.2d 22 (Idaho Ct. App. 1989).*

(n57)Footnote 381. N.M. Stat. Ann. § 40-3-13.

(n58)Footnote 382. *Id.*

(n59)Footnote 383. *Id.*

(n60)Footnote 384. *Id.* § 40-3-14A.

(n61)Footnote 385. *Id.* § 40-3-14B.

(n62)Footnote 386. *Id.* § 40-3-14C.

(n63)Footnote 387. *Amador v. Lara, 603 P.2d 310 (N.M. Ct. App. 1979)* (income tax returns were filed as a partnership and wife assisted husband in business).

(n64)Footnote 388. Property subject to the spouse's sole management is her separate property and her sole management community property. *See* § 37.12(c) for discussion of sole management community property in Texas.

(n65)Footnote 389. Tex. Fam. Code Ann. § 5.24.

(n66)Footnote 390. *Cumming v. Johnson, 616 F.2d 1069 (9th Cir. 1979).*

(n67)Footnote 391. Wash. Rev. Code Ann. § 26.16.095.

(n68)Footnote 392. *Id.* § 26.16.100.

(n69)Footnote 393. Cal. Fam. Code Ann. § 1102(c)(2).

(n70)Footnote 394. N.M. Stat. Ann. § 14-9-3; *Jeffers v. Martinez, 658 P.2d 426 (N.M. 1982).*

(n71)Footnote 395. Because of the requirement that both spouses join in transfers of community *real* property, discussed in § 37.12(c), *supra*, the discussion in this section will be pertinent primarily to personal property.

(n72)Footnote 396. Unif. Marital Property Act § 6, 9A U.L.A. 97.

(n73)Footnote 397. Wis. Stat. Ann. §§ 766.53 & 766.61. *See also* § 37.11(e), *supra*.

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CHAPTER 37 MARITAL PROPERTY

4-37 Thompson on Real Property, Thomas Editions § 37.13

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§ 37.13 Marital Debt and Liability.

[Go To Supp]

In common law states, with their individualist approach to property, the subject of marital debt and liability is relatively simple. One can connect the debt with the debtor (or debtors) and with that individual debtor's (or debtors') property and know who is liable and what property can be used to satisfy that liability. If it is solely the husband's debt, he is personally liable and his property can be used to satisfy the debt. If both spouses incurred the debt, the property of either or both can usually be used to satisfy the debt.

In community property states, however, the matter is potentially more complex. n398 We could have three potential "owners" of obligations -- wife's separate estate, husband's separate estate, and the community estate -- and three types of property. And these "owners" can be obligated individually or in combination with one another. In Texas, with its division of community property into three pots for purposes of management, n399 the matter can be even more complicated. There we have the potential of five, not three, categories of property on the one hand and obligation on the other: (1) wife's separate; (2) husband's separate; (3) wife's sole management community; (4) husband's sole management community; and (5) joint management community.

The states approach the subject of marital debt and liability from somewhat different directions. Some break debt into the same classifications as property; others do not. Some statutes use terms such as "liabilities of a spouse" or "liabilities of the spouses" or "debts of the wife or husband" or "a spouse's obligation," rather than, or in addition to, "separate liability [or debt]" or "community liability [or debt]." n400 It is not always clear what any of these terms mean or how they fit into the marital property system.

In linking obligations and liability in a community property system, there are at least two possible ways of framing and discussing the issues. We might start by classifying the obligations and then assessing the liability of various types of marital property for each type of obligation. Another approach is to identify the property owned by the spouses and then determine the kinds of obligations that can be satisfied out of each type of property. The latter approach seems generally more satisfactory because of the differences in the way jurisdictions refer to or classify debt. In some states, debt is essentially treated as an individual matter and the marital implications are simply sorted out in the allocation of marital

property liability.

In §§ 37.13(b)(4) and 37.13(b)(5), *infra*, we discuss the liability of separate property and the liability of community property, respectively, for the obligations that either or both spouses have incurred. More limited subjects are singled out in the subsections preceding those, because these subjects sometimes receive specialized legal treatment:

1. Classification of debt in some states, corresponding to classification of property;

2. Liability for necessaries and support of the family;

3. Liability for torts committed by either or both spouses;

4. Liability for premarital debts incurred by either spouse.

§ 37.13(a) Classification of Debt.

On the surface, a sensible place to start a discussion of marital debt and liability might seem to be "classification of debt," just as much of the beginning of this chapter is devoted to "classification of property." As we have seen, in community property states, the process of classification of property either as "community property" or as "separate property" of one of the spouses is fundamental to the whole marital property scheme. Some states have carried this classification one step further, putting marital debt into similar categories, although the definitions and distinctions drawn with respect to "separate" and "community" debt are more obscure and fuzzy than the comparable definitions of property.

In a provision substantially parallel to the definitions of separate and community property, New Mexico's legislature has defined marital debt as follows:

> A. "Separate debt" means:
>
> (1) a debt contracted or incurred by a spouse before marriage or after entry of a decree or dissolution of marriage;
>
> (2) a debt contracted or incurred by a spouse after entry of a decree entered pursuant to Section 40-4-3 N.M. Stat. Ann. 1978, n401 unless the decree provides otherwise;
>
> (3) a debt designated as a separate debt of a spouse by a judgment or decree of any court having jurisdiction;
>
> (4) a debt contracted by a spouse during marriage which is identified by a spouse to the creditor in writing at the time of its creation as the separate debt of the contracting spouse;
>
> (5) a debt which arises from a tort committed by a spouse before marriage or after entry of a decree of dissolution of marriage or a separate tort committed during marriage; or
>
> (6) a debt declared to be unreasonable pursuant to Section 2 [40-3-10.1 N.M. Stat. Ann. 1978] n402 of this act.
>
> B. "Community debt" means a debt contracted or incurred by either or both spouses during marriage which is not a separate debt. n403

Louisiana's legislature has also defined marital obligations in terms of "separate" and "community":

> An obligation incurred by a spouse may be either a community obligation or a separate obligation. n404
>
> An obligation incurred by a spouse during the existence of a community property regime for the common interest of the spouses or for the interest of the other spouse is a community obligation. n405
>
> A separate obligation of a spouse is one incurred by that spouse prior to the establishment or after termination of a community property regime, or one incurred during the existence of a community property regime though not for the common interest of the spouses or for the interest of the other spouse. An obligation resulting from an intentional wrong not perpetrated for the benefit of the community, or an obligation incurred for the separate property of a spouse to the extent that it does not benefit the community, the family, or the other spouse, is likewise a separate obligation. n406

In another parallel with marital property, Louisiana has also adopted a presumption that obligations incurred during marriage are community debts. n407 In one fashion or another, other states impose a similar presumption. In Wisconsin, for example, the legislature avoids the "community" label, but states:

> An obligation incurred by a spouse during marriage, including one attributable to an act or omission during marriage, is presumed to be incurred in the interest of the marriage or the family. n408

Even without the aid of statutes, courts have also sometimes patterned their classification of debt after the definitions of marital property. n409 Debt incurred before or after marriage is separate debt. Whether one of both spouses sign the papers, loans during marriage are presumptively incurred on behalf of the community. This can, of course, be contradicted and overcome by evidence that the obligation was in fact a separate debt. Such evidence would include loan documentation indicating that the creditor is looking only to the spouse's separate estate for satisfaction, but rebuttal of the presumption is not necessarily an easy task, even with some evidence. n410

Even though the signature of one spouse alone may be sufficient to make a loan a community obligation, when a creditor seeks the right to satisfy an obligation out of the assets of either or both spouses, the signatures and commitments of both should usually be obtained. n411 This approach will not only ensure that the debt is a community obligation, but will also give the lender greater protection in the event of a dissolution of the marriage before the obligation is satisfied. Because of the possibility of divorce, future earnings cannot really be characterized as community property until they are earned, and therefore one spouse does not have the ability to commit irrevocably the future earnings of the other spouse. n412

COMPUTER-ASSISTED RESEARCH

LEXIS: community w/1 property w/30 marital w/1 debt! w/15 classif!

§ 37.13(b) Liability of Marital Property.

Unlike Louisiana and New Mexico, most of the states have not attempted to define marital debt in terms of "separate" and "community," at least by statute. This is not necessarily surprising, since the definitions are not ends in and of themselves. Classifying marital obligations in this fashion may even add unnecessary complexity to the matter. Most states have simply addressed directly the basic questions of what marital property can be used to satisfy obligations incurred by either or both spouses.

In a sense, it may be a misnomer to speak of "liability of property" since it is really people who are liable. Property itself is typically defined by lawyers in terms of relationships among people rather than the assets themselves. Even so, in the world of marital property, speaking of liability in terms of various classes of property makes some sense as a shorthand term of reference. Also, statutes and courts frequently use this terminology.

As the only state to move from a common law marital property system to a community property system, Wisconsin approaches the subject of debt and liability from the interesting perspective of both the common law and the civil law systems. Wisconsin law is based on, but somewhat different than, the Uniform Marital Property Act. The statutory provisions setting out the rules are discussed in some detail in a 1993 decision of the Wisconsin Court of Appeals. n413 Four categories of obligations are specified in the Uniform Marital Property Act: (1) Support; (2) Family purposes; (3) Premarital obligations; and (4) All other obligations.

§ 37.13(b)(1) Liability for Necessaries and Support.

An obligation to support one's spouse and children is often expressed in law, and some states impose broad liability on marital property for items that are necessary to support the family. California, which adopted a comprehensive scheme of marital property liability in 1984, imposes an obligation to support one's spouse, n414 and provides that a married person is personally liable for the following debts incurred by the person's spouse during marriage:

> (1) A debt incurred for necessaries of life of the person's spouse while the spouses are living together.
>
> (2) Except as provided in Section 4302, a debt incurred for common necessaries of life of the person's spouse while the spouses are living separately. n415

A similar obligation is imposed for the benefit of minor children:

> Subject to this division, the father and mother of a minor child have an equal responsibility to support their child in the manner suitable to the child's circumstances. n416

If a parent neglects to provide necessaries for a child under the parent's charge, according to the parent's circumstances, a third person may in good faith supply the necessaries and recover their reasonable value from the parent. n417

Other states enforce obligations to provide necessaries in a fashion similar to that adopted by California. n418 In Nevada, rather sexist distinctions still survive. If a husband neglects to make adequate provision for the support of his wife, and a person in good faith supplies her with articles necessary for her support, the husband is liable for the reasonable value of the articles provided. n419 The wife, on the other hand, "must support the husband out of her separate property when he has no separate property and they have no community property and he, from infirmity, is not able or competent to support himself." n420 Neither husband nor wife is obligated to support a spouse who has abandoned the other. n421

Louisiana simply provides that "A spouse is solidarily liable with the other spouse who incurs an obligation for necessaries for himself or the family." n422 Under this statute each spouse is liable for obligations incurred by either for necessaries. As between the spouses themselves, however, in the absence of any contrary provision in a matrimonial agreement, "each spouse contributes in proportion to his means." n423

Under Washington law, "expenses of the family and the education of the children, including stepchildren, are chargeable upon the property of both husband and wife, or either of them, and they may be sued jointly or separately." n424 A proviso to a statute excusing a spouse from liability for premarital and separate debts of the other spouse states that the obligation to support a child may be collected out of the parent's or stepparent's separate property, earnings and accumulations, and his or her share of community property. It also exempts funds in a community bank account that can be identified as earnings of the non-obligated spouse from satisfaction of the child support obligation of the debtor spouse. n425

COMPUTER-ASSISTED RESEARCH

LEXIS: marital or community w/1 property w/30 liab! or obligat! w/5 necessar! or support!

§ 37.13(b)(2) Liability for Torts.

Tortious liability has been distinguished from contractual liability and we also consider it separately here. As with all forms of liability, the separate property of the judgment debtor or tortfeasor can naturally be used to satisfy the debt. n426 The question of liability of the other marital estates -- community property and non-tortfeasor's separate property -- is not so easily resolved.

In the most detailed statutory treatment of the subject, California provides that a person is not liable for any injury or damage caused by the spouse except where the persons would have been liable if the marriage had not existed. n427 Washington, in a similar provision, allows no recovery against the separate property of one spouse for injuries committed by the other spouse, except where there would be joint responsibility if the marriage did not exist. n428

The statutes in some states do not explicitly address tortious liability. In other states, the subject may be addressed but not really resolved by statute. n429 Some courts, with or without statutory guidance, have adopted some version of the following test for liability of community property for the torts of a spouse: If the tort was committed in furtherance of the community's interest, or with the support, knowledge, consent or ratification of the other spouse, or if the community benefitted from the tort, community property will be liable. n430 Even where no community interest is involved, liability may extend to the tortfeasor's one-half interest in community property. n431

In Louisiana, an "obligation resulting from an intentional wrong not perpetrated for the benefit of the community, or an obligation incurred for the separate property of a spouse to the extent that it does not benefit the community, the family, or the other spouse" is a separate obligation. n432 Separate obligations may be satisfied during the community regime from community property as well as the separate property of the spouse who incurred the obligation. n433

In Texas, all community property is, by statute, "subject to tortious liability of either spouse incurred during marriage" and community property over which the tortfeasor has management power is subject to tortious liability incurred before marriage. n434 In California too, all community property is apparently subject to tortious liability of either spouse incurred during marriage. Priorities for satisfaction of tort liability under the California statute are established along lines similar to the test described in the preceding paragraphs, i.e., depending on whether the liability is based upon an act or omission which occurred during the performance of an activity for the benefit of the community. If so, the liability shall "first be satisfied from the community estate property and second from the separate property of the married person." n435 If not, the liability is satisfied in reverse order of that just stated. n436 To the extent the liability is satisfied out of insurance proceeds, none of these rules apply, whether the proceeds are community property or separate property. n437

COMPUTER-ASSISTED RESEARCH

LEXIS: marital or community w/1 property w/30 liab! w/5 tort!

§ 37.13(b)(3) Liability for Premarital Debts.

Debts incurred before marriage can generally be satisfied from community property and from the separate property of the spouse who incurred the debt. n438 Separate property of the non-debtor spouse is not available for that purpose. n439

In most states, the community property that can be used to satisfy the premarital obligation of one spouse is limited to property that can be attributed in some fashion to the debtor spouse. In Arizona, for example, the limitation is defined in

terms of the value of the spouse's contribution to community property which would have been that spouse's separate property if single. n440 That would presumably include all earnings of the debtor spouse, even though one-half of those earnings, during marriage, are property of the other spouse. The Wisconsin statute n441 is very similar to Arizona's, and the Texas statute incorporates that state's unique scheme of marital property management to come to a similar conclusion concerning the liability of community property for premarital debts. n442 In other states, the limitation on community property that can be used to satisfy premarital obligations of one spouse is couched not in terms of property that would have been that spouse's separate property if single, but rather, in terms of protecting the non-debtor spouse's ownership interest in community property. n443

In California, "earnings of a married person during marriage are not liable for a debt incurred by the person's spouse before marriage." n444 Earnings are defined as compensation for personal services performed "whether as an employee or otherwise." This exception is, however, limited. To remain not liable, the earnings must be segregated in a deposit account in which the spouse has no right of withdrawal and in which no significant amount of other property in the community estate is commingled. In effect, then, it would probably be necessary for a spouse to be aware of this law and take conscious steps to insulate community earnings from the spouse's premarital debts.

In Louisiana, all community property is available to satisfy a premarital debt n445 but upon termination of the community property regime, the non-debtor spouse is entitled to reimbursement for one-half of the property so used. n446

COMPUTER-ASSISTED RESEARCH

LEXIS: community w/1 property w/30 liab! w/5 debt! w/2 premarital or (before w/1 marriage)

§ 37.13(b)(4) Liability of Separate Property Generally.

Separate property of a spouse is, of course, liable for debts incurred by that spouse before or during marriage n447 and is not liable for separate debts incurred by the other spouse before or during marriage, unless both spouses are otherwise liable. n448

The rules regarding responsibility of a separate estate for community obligations are, perhaps, less obvious than the rules of responsibility for separate debt. One possible view might be that community debts can be satisfied only out of community property. It does, however, make sense that the community estate of the spouses, at least in part, would be responsible for all debts of either or both spouses, separate as well as community.

It is clear that community obligations can, in some states and to some extent, be satisfied out of separate property of the debtor spouse. n449 In some states, however, the statutes are simply framed in different terms. As noted in § 37.13(b)(2), *supra*, for example, California avoids reference to separate obligations and community obligations. Rather, the separate property of a married person "is liable for a debt incurred by the person before or during marriage" n450 and "is not liable for a debt incurred by the person's spouse before or during marriage." n451

Likewise, in Texas, a "spouse's separate property is not subject to liabilities of the other spouse unless both spouses are liable by other rules of law." n452

To understand the Texas approach to marital property liability, it may be necessary to address that state's unique system of characterizing management and control of marital property. n453 There appears to be some authority for the proposition that Texas debt, like Texas property, is divided into five classifications:

1. Separate debt of the wife;

2. Separate debt of the husband;

3. Sole community debt of the husband;

4. Sole community debt of the wife;

5. Joint community debt.

The Texas Supreme Court has suggested that debts contracted during marriage are presumed to be "joint community obligations" and that "the fact that the debts are community liabilities would not, alone, necessarily lead to the conclusion that they were joint liabilities." n454 Are there, then, "joint community obligations" and "sole community obligations" of each spouse?

These statements in the *Cockerham* opinion, and perhaps the Texas statutes themselves, have caused some confusion. In that case, the court concluded that debts incurred in the operation of a dress shop were "joint community debts." Lower courts have attempted to apply the apparent distinction drawn in that case, between "joint community obligations" and other community obligations, but not with complete success. In one suit commenced after divorce, involving debts incurred by the husband during marriage, the court concluded that the debts were not joint liabilities and that former community property allotted to the wife in the divorce was not subject to the liability. n455

In a somewhat parallel development that also occurred in 1980, the Texas constitutional provision on marital property was amended. Before the amendment, the provision stated that spouses could partition community property without prejudice to pre-existing creditors. That passage now reads as follows:

> [P]ersons about to marry and spouses, *without the intention to defraud pre-existing creditors*, may by written instrument from time to time partition between themselves all or part of their property, then existing or to be acquired, or exchange between themselves the community interest of one spouse or future spouse in any property for the community interest of the other spouse or future spouse in other community property then existing or to be acquired, whereupon the portion or interest set aside to each spouse shall be and constitute a part of the separate property and estate of such spouse or future spouse; n456

Although this provision is directed primarily to arrangements during and before marriage, and does not necessarily affect partition in the context of dissolution of the marriage, the amendment could conceivably be applied or relied upon for the proposition that creditors are less well off now than before the amendment, since the test is now intent-to-defraud rather than prejudice-to.

Another case involved intervention by an attorney in a divorce action. n457 The attorney sought attorney's fees for former representation of the wife and the court concluded that the husband and wife were jointly and severally liable, without discussing *Cockerham*. A dissenting justice objected, however, that the majority did not abide by the commands of *Cockerham*. He would have held that there was a community debt involved but not a "joint" liability, thus avoiding the conclusion that the husband's separate property would be subject to the debt in violation of Texas law that a spouse's separate property "is not subject to the liabilities of the other spouse unless both spouses are liable by other rules of law." n458 Even the dissenter, however, apparently would have held that all community property was liable for the obligation.

This rather extended discussion of a problem unique to Texas may put the question of marital property liability generally into sharper focus. In classifying debt as "community" and "separate," courts and legislatures in Texas and most of the other community property states may have fallen into a trap that has caught many other students of American property law: Forgetting that "property" is not so much "things" as it is relationships among people with

respect to things. In this regard, characterization of marital property works well in setting out pertinent relationships between husband and wife. Attempts to characterize debt as "community" or "separate," however, may unduly complicate matters and cloud the issues, especially if we break the classification down even further, as has arguably happened in Texas. Liability for debt in marriage potentially involves wife, husband and creditor. Property interests of each of these three are at stake. The question is what property interests of husband and what property interests of wife can be taken to satisfy the debt. The answer may simply depend on whether either or both are debtors.

Discussing the Texas rules of marital property liability and the confusion generated by *Cockerham*, one author has put the matter this way:

> As you can see from Section 5.61 [of the Texas Family Code], there are only two types of contract debts in Texas. A contract debt can be the debt of one spouse, or it can be the debt of both spouses. The *Cockerham* court concluded that the husband had ratified the wife's debts, so the debts were the debts of both spouses. So far, so good. Unfortunately, the court stated that debts contracted during marriage are presumed to be "joint community obligations," whatever that means. The court is correct that credit purchases are considered community property, for characterization purposes. However, there is no such thing as a "community debt" for purposes of creditors' rights. n459

Because of the shared ownership theory of community property, title to property (and therefore creditors' practices) will vary from community property states to common law states. Even so, the law of debt and liability probably need not differ as much from one system to another as does marital property title. Even in a community property system, it is possible to define debt in terms of joint liability and separate liability, avoiding the concept of community debt. If one spouse is liable, either independently of, or jointly with, the other spouse, property "owned" by that spouse could be subject to the obligation. Once we identify which *person* or *persons* are indebted, we simply link that obligation to property "owned" by that person or persons to determine liability.

Some definition of ownership for these purposes would be required. As to separate property, ownership is easily defined. As to community property, two options seem most likely: All property in the community estate could be owned, for these purposes, by each spouse, meaning a creditor of either could satisfy the obligation out of all community property; or each spouse might be considered owner of only one-half of the community estate, meaning that if only one spouse is indebted, only one-half of the community property would be available to satisfy the debt.

A theoretical complication arises for these definitions of community ownership for purposes of marital debt. Unlike a tenant in common or a joint tenant, a spouse does not have a unilateral right to withdraw his or her interest or to partition community property, and one might contend that allowing a creditor of one spouse to satisfy liability out of community property violates this principle. Indivisible interests are made divisible through debt. This does not seem to be a very substantial objection and we see no reason that a creditor should not be able to reach at least the debtor spouse's interest in community property. And, as we see in § 37.13(b)(5) *infra*, the states have certainly not gone so far in actually protecting community property from creditors.

All of this is not to suggest that the matter of marital property liability is simple and that there are no difficult issues involved; quite the contrary is true. There are matters that need attention, such as concerns about marital income and rights of reimbursement, and the law of liability of marital property could benefit from further attention in community property states.

COMPUTER-ASSISTED RESEARCH

LEXIS: separate w/1 property w/15 liab! w/5 debt!

§ 37.13(b)(5) Liability of Community Property in General.

As has been noted, since 1984, California has had one of the most comprehensive statutory treatments of marital debt and liability. The statute defines "debt" in broad terms n460 and sets forth a sweeping statement of liability of the community estate:

> Except as otherwise expressly provided by statute, the community estate is liable for a debt incurred by either spouse before or during marriage, regardless of which spouse has the management and control of the property and regardless of whether one or both spouses are parties to the debt or to a judgment for the debt. n461

Thus, California generally allows all creditors of either spouse, whether the debt would elsewhere be referred to as "separate" or "community," to reach all community property to satisfy the debt. As discussed in § 37.13(b)(3), *supra*, one significant exception to this is that earnings of a married person during marriage are not liable for a premarital debt of the person's spouse. n462 This exception is, however, limited to earnings that are segregated in a deposit account in which the spouse has no right of withdrawal and in which no significant amount of other property in the community estate is commingled.

Louisiana also takes a relatively broad view of community property liability. The statute says simply that "A separate or community obligation may be satisfied during the community property regime from community property and from the separate property of the spouse who incurred the obligation." n463

If, however, community property is used to satisfy a separate obligation of a spouse, the other spouse or her or his heirs are entitled to reimbursement when the marriage ends. n464

Other states do not necessarily have rules of community property liability that are as favorable to creditors as California and Louisiana. There is little, if any, doubt that community debts or joint debts of both spouses can be satisfied out of community property not only in California and Louisiana but in all community property jurisdictions. n465 Differences occur, however, with respect to individual or separate obligations of the spouses.

As with other questions of marital property management and liability, the most unique approach to liability of community property is found in Texas. As discussed in § 37.12(c), *supra*, Texas divides community property into "sole management" community property of each spouse and "joint management" property of both spouses. n466

And the confusing issue of "community debt" in Texas is discussed in § 37.13(b)(4), *supra*. By a combination of express statutory language and implication from statutory language, it is clear that community property can be used to satisfy what would be community debt in other jurisdictions, or joint debt of both spouses. But some specific situations would be resolved differently, in form if not in substance, in Texas than in other states.

If Texas spouses are jointly obligated, all community property is subject to liability to satisfy the obligation. Exceptions to liability of community property appear in the Texas statute on rules of marital property liability, n467 but those limitations are prefaced by the phrase, "unless both spouses are personally liable as provided by Section 4.031." That section in turn provides that a person is personally liable for acts of the person's spouse only if the spouse acts as an agent for the person or incurs a debt for necessaries. n468 In essence, then, spouses can be jointly liable either because both incurred the liability personally or because one was acting as an agent for the other as well as for himself or herself. If each is liable, the obligation can be satisfied out of all community property. If only one spouse incurred the liability, however, the statutory rules of marital property liability come into play. In that case, the community property subject to the debtor's sole management and control is liable for the obligation n469 and community property subject to the non-debtor's sole management and control is not liable for the obligation unless it is a tortious liability. n470 Community property subject to the spouses' joint management and control is liable for the debts of either or both spouses.

Other states have also taken a more restrictive view than California and Louisiana concerning the liability of community property for separate or individual debts of the spouses. n471 The Arizona statute provides that:

> The community property is liable for the premarital separate debts or other liabilities of a spouse, incurred after September 1, 1973, but only to the extent of the value of that spouse's contribution to the community property which would have been such spouse's separate property if single. n472

The phrase, "or other liabilities of a spouse," is ambiguous. It could refer to liabilities other than premarital obligations or it might refer to premarital liabilities other than separate debts. The courts have apparently opted for the second interpretation, and the statute has been construed to mean that a separate debt incurred after marriage cannot be satisfied from community property. n473

In a case involving conflict of laws issues, a married Washington resident executed an agreement to purchase land in Colorado. n474 The purchase papers disclosed the man's marital status, but his spouse had no knowledge of the transaction and did not ratify it. When the man defaulted on the purchase, the creditor obtained a default judgment in Colorado. The Washington court held that the Colorado judgment was entitled to full faith and credit but that Washington law determined what property was subject to the judgment. Had this been a transaction for purchase of personal property, it would have been a community obligation, but the Washington management statute n475 requires joinder of the spouse to make a real property transaction a community obligation. Thus community property was not liable for the husband's separate debt.

In New Mexico, the debtor spouse's one-half interest in community property is subject to the debtor's separate debt, but only if the debtor's separate property (excluding property in which each spouse has an undivided equal interest as a tenant in common or joint tenant) is insufficient. n476 The other spouse's interest in community property is not liable for the separate debt of the debtor spouse. n477 Thus, when one spouse's separate property is exhausted, one-half of the non-debtor spouse's income is available to satisfy the obligation. n478

Now that equal management rules exist in community property states, either spouse can, of course, incur obligations on behalf of the community. And we have seen that an obligation incurred during the marriage may be presumed to be a community debt, even though only one spouse is involved in the transaction. n479 Under such circumstances, one issue that arises is which parties should be sued in an action to collect on a community debt. The obvious answer is that both spouses should usually be named as defendants. In Arizona, in an action on a community debt, "the spouses shall be sued jointly." n480 The community obligation is to be satisfied "first, from the community property, and second, from the separate property of the spouse contracting the debt or obligation." n481

COMPUTER-ASSISTED RESEARCH

LEXIS: community w/1 property w/15 liab! w/5 debt!

FOOTNOTES:

(n1)Footnote 398. We suggest in § 37.13(b)(3) that some states may have unduly complicated marital property liability by characterizing debt in the same way property is classified, *i.e.*, as "community debt" and "separate debt."

(n2)Footnote 399. *See* § 37.12(c), *supra*.

(n3)Footnote 400. *See* Idaho Code Ann. §§ 32-910 & 32-911; Tex. Fam. Code Ann. § 5.61; Wash. Rev. Code Ann. § 26.16.200; Wis. Stat. Ann. § 766.55.

(n4)Footnote 401. This section provides for division of property without dissolution of marriage.

(n5)Footnote 402. N.M. Stat. Ann. § 40-3-10.1 provides:

The court, at the time of the final decree of dissolution of marriage, may declare, as between the parties, a debt to be unreasonable if it was incurred by a spouse while the spouse was living apart and the debt did not contribute to the benefit of both spouses or their dependents.

(n6)Footnote 403. *Id.* § 40-3-9. *See also In re Monroe, 282 B.R. 219 (Bankr. D. Ariz. 2002)* (judgment debt of the nondebtor husband, on which the debtor-wife was not individually liable, but which, being in the nature of community debt, could be enforced against debtor-wife's interest in community property).

(n7)Footnote 404. La. Civ. Code Ann. art. 2539.

(n8)Footnote 405. *Id.* art. 2360.

(n9)Footnote 406. *Id.* art. 2363.

(n10)Footnote 407. *Id.* art. 2361. *Keene v. Reggie, 701 So. 2d 720, 728 (La. App. 1997)* (presumption that debts incurred during marriage are community debts is rebuttable; courts must examine the uses to which the proceeds are put). *See also Ford Motor Credit Co. v. Epps, 708 So. 2d 824 (La. Ct. App. 1998)* (Louisiana also recognizes the presumption that obligations incurred during marriage are community debts).

(n11)Footnote 408. Wis. Stat. Ann. § 766.55(1). This paragraph goes on to say that a separately signed statement that the obligation is incurred for the marriage or the family is conclusive evidence that it is such an obligation, except that such statement does not affect interspousal rights and remedies.

(n12)Footnote 409. *See* W.S. McClanahan, Community Property Law in the United States § 10:4 at 485 (1982).

(n13)Footnote 410. *See Brubaker v. Hovde, 723 P.2d 1193 (Wash. App. 1986).*

(n14)Footnote 411. In some cases, signatures of both spouses will be legally necessary to bind the community estate. We have noted, for example, the requirement that both spouses join in transactions affecting real property. *See* § 37.12(c), *supra*. *See also* Ariz. Rev. Stat. Ann. § 25-214(c) (1991):

Either spouse separately may ... bind the community, except that joinder of both spouses is required in any of the following cases:

...

(2) Any transaction of guaranty, indemnity or suretyship. Under this provision, an Arizona court has held that a guaranty signed by only the husband was binding only on the husband's separate estate.

Consolidated Roofing & Supply Co. v. Grimm, 682 P.2d 457 (Ariz. Ct. App. 1984).

(n15)Footnote 412. *See U.S. v. ITT Consumer Fin. Corp., 816 F.2d 487 (9th Cir. 1987); Twin Falls Bank & Trust Co. v. Holley, 723 P.2d 893 (Idaho 1986).*

(n16)Footnote 413. *St. Mary's Hosp. Med. Ctr. v. Brody, 519 N.W.2d 706 (Wis. App. 1994).* The court notes that the support category provides "the widest range of assets a creditor can reach to satisfy an obligation." Wisconsin Statutes § 766.55(2)(a) provides: "A spouse's obligation to satisfy a duty of support owed to the other spouse or to a child of the marriage may be satisfied only from all marital property and all other property of the obligated spouse." The trial court judgment provided that the husband's creditor (for medical services incurred a few months before divorce)

"may only satisfy the amount of this Judgment out of marital assets assigned to the [wife] to the extent of the value of the marital property at the date of [her] divorce." The appellate court concluded that this limitation was in error and it therefore reversed.

(n17)Footnote 414. Cal. Fam. Code Ann. § 4300. As between the spouses, a person's obligation of support is to be satisfied first out of community property and when there is no community property or quasi-community property out of that person's separate property. *Id.* § 4301. This duty of support can be enforced by either the obligee spouse or by the county, and reasonable attorney's fees and court costs can be ordered in a proceeding brought by the county. *Id.* § 4303.

(n18)Footnote 415. Cal. Fam. Code Ann. § 914. Section 4302 provides that "A person is not liable for support of the person's spouse when the person is living separate from the spouse by agreement unless support is stipulated in the agreement."

Under § 914, separate property of the non-obligor spouse can, of course, be used to satisfy the liability. Paragraph (b) of that section establishes a right to reimbursement in the event such property is applied to satisfy the obligation when it could have been satisfied out of community property or separate property of the obligor spouse.

(n19)Footnote 416. *Id.* § 3900. This duty of support continues in favor of unmarried children who are full-time high school students until they complete the 12th grade or attain the age of 19 years, whichever occurs first. *Id.* § 3901. Similar duties are imposed in other states. *See* Tex. Fam. Code Ann. § 4.02 (as long as they are minors and as long thereafter as they are enrolled in high school).

(n20)Footnote 417. Cal. Fam. Code Ann. § 3950.

(n21)Footnote 418. *See* Idaho Code § 32-1003 (1983) (language almost identical to California statute); Tex. Fam. Code Ann. §§ 4.02 & 4.03 ("A spouse or parent who fails to discharge the duty of support is liable to any person who provides necessaries to those to whom support is owed."); Wis. Stat. Ann. § 766.55 (spouse's obligation to satisfy a duty of support owed to spouse or child may be satisfied from all marital [community] property and all other property of the obligated spouse); *O'Carolan v. Hopper, 71 S.W.3d 529 (Tex. App. 2002)* (the trial court abused its discretion in awarding only spousal support in lieu of any community property).

(n22)Footnote 419. Nev. Rev. Stat. § 123.090 (separate property of husband is liable if community property is insufficient).

(n23)Footnote 420. *Id.* § 123.110. Until 1988, Idaho had the same provision. Idaho Code § 32-915 (1983), *repealed* 1988 Idaho Laws ch. 50, § 2.

(n24)Footnote 421. Nev. Rev. Stat. § 123.100.

(n25)Footnote 422. La. Civ. Code Ann. art. 2372. *Simon v. Charles, 689 So. 2d 716, 717* (La. App.) (finding that since shelter is a necessary family expense, lease agreement was a community obligation, even though it was signed by only one spouse)**.**

(n26)Footnote 423. *Id.* art. 2373.

(n27)Footnote 424. Wash. Rev. Code Ann. § 26.16.205. The obligation to support stepchildren terminates upon dissolution, decree of legal separation, or death. The stepparent may also petition for termination of the obligation when a petition for dissolution or separation is filed. *Sunkidd Venture, Inc. v. Snyder-Entel, 941 P.2d 16,* (Wash. App. 1997) (holding that since housing is a family expense, a residential lease extension was a community obligation, even though only one spouse signed the agreement).

(n28)Footnote 425. Wash. Rev. Code Ann. § 26.16.200.

(n29)Footnote 426. *See, e.g.,* Cal. Fam. Code Ann. § 1000. Some statutes setting forth rules of marital property liability do not explicitly state that a debtor spouse's separate property can be used to satisfy his debt, perhaps because it is so obvious that this would be the case. *See* Tex. Fam. Code Ann. § 5.61.

(n30)Footnote 427. Cal. Fam. Code Ann. § 1000(a). California has, with some success, attempted to avoid the separate-community labels with respect to debt. *See Grolemund v. Cafferata, 111 P.2d 641 (Cal. 1941).* When referring to obligations, California statutes speak of debts incurred by persons, not "separate debts" or "community debts." The statutes do, however, speak of "liability of the community estate" and "liability of separate property" in referring to the estates from which obligations can be satisfied. *See, e.g.,* Cal. Fam. Code Ann. §§ 910 & 913.

(n31)Footnote 428. Wash. Rev. Code Ann. § 26.16.190. Texas likewise provides that except where other doctrines, such as agency, respondeat superior or joint enterprise, impose liability, neither spouse is individually or personally liable for torts of the other spouse. *Lawrence v. Hardy, 583 S.W.2d 795 (Tex. Civ. App. 1978).* A Texas spouse's separate property is therefore not generally subject to the tortious liability of the other spouse. *See* Tex. Fam. Code Ann. § 5.61(a).

(n32)Footnote 429. In New Mexico, the definition of "separate debt" includes "a debt which arises from a tort committed by a spouse before marriage or after entry of a decree of dissolution of marriage or a separate tort committed during marriage." N.M. Stat. Ann. § 40-3-9A(5). Statutes do not define "separate tort," however, leaving the problem of determining whether a tort committed by a spouse during marriage is a "community" or "separate" tort to the courts. *Dell v. Heard, 532 F.2d 1330 (10th Cir. 1976).*

(n33)Footnote 430. *Selby v. Savard, 655 P.2d 342 (Ariz. 1982); Garrett v. Shannon, 476 P.2d 538 (Ariz. 1970); Howe v. Haught, 462 P.2d 395 (Ariz. App. 1969); Hansen v. Blevins, 367 P.2d 758 (Idaho 1962); Delph v. Potomac Ins. Co., 620 P.2d 1282 (N.M. 1980); Milbradt v. Margaris, 693 P.2d 78 (Wash. 1985); de Elche v. Jacobsen, 622 P.2d 835 (Wash. 1980); Blais v. Phillips, 502 P.2d 1245 (Wash. 1972).*

(n34)Footnote 431. *de Elche v. Jacobsen, 622 P.2d 835 (Wash. 1980);* Wis. Stat. Ann. § 766.55(2)(cm) ("An obligation incurred by a spouse during marriage, resulting from a tort committed by the spouse during marriage, may be satisfied from the property of that spouse that is not marital property and from that spouse's interest in marital property."); *Keene v. Edie, 907 P.2d 1217 (Wash. App. 1996)* (tortfeasor's community property containing real property must remain immunized from victim's collection efforts, but the victim may proceed against tortfeasor's community property containing personal property). *See also Keene v. Edie, 935 P.2d 588, 589-590 (Wash. 1997)* (following *de Elche* and overturning *Brotton v. Jangert, 23 P. 688 (Wash. 1890)), aff'd after reverse and remand* by *Keene v. Edie, 980 P.2d 1283 (Wash. 1999).*

(n35)Footnote 432. La. Civ. Code Ann. art. 2363.

(n36)Footnote 433. La. Civ. Code Ann. art. 2345. If community property is used to satisfy a separate obligation, the non-obligated spouse is entitled to reimbursement upon termination of the community property regime. The reimbursement is "for one-half of the amount or value that the property had at the time it was used." *Id.* art. 2364.

(n37)Footnote 434. Tex. Fam. Code Ann. § 5.61(d). *See also, Lawrence v. Hardy, 583 S.W.2d 795 (Tex. Civ. App. 1978).*

(n38)Footnote 435. Cal. Fam. Code Ann. § 1000(b)(1).

(n39)Footnote 436. *Id.* § 1000(b)(2). Here too, Washington has applied a similar rule, providing that the tortfeasor's separate property should be primarily liable, and if there is insufficient separate property to satisfy the obligation, tortfeasor's half-interest in community personal property will next be liable. *de Elche v. Jacobsen, 622 P.2d 835 (Wash. 1980).*

(n40)Footnote 437. *Id.* § 1000(c).

(n41)Footnote 438. *See, e.g.,* Wis. Stat. Ann. § 766.55(c)1. The Wisconsin statute contains a fairly detailed explanation of the obligations affected by this provision: "An obligation incurred by a spouse before or during marriage that is attributable to an obligation arising before marriage or to an act or omission occurring before marriage."

(n42)Footnote 439. Cal. Fam. Code Ann. § 913(b)(1); Idaho Code Ann. §§ 32-910 & 32-911 (1983); La. Civ. Code Ann. art. 2345; Wash. Rev. Code Ann. § 26.16.200.

(n43)Footnote 440. Ariz. Rev. Stat. Ann. § 25-215. The statute applies to debts and liabilities incurred after September 1, 1973.

(n44)Footnote 441. Wis. Stat. Ann. § 766.55(2)(c)1 provides that "marital property which would have been the property of [the debtor] spouse but for the marriage" is liable for premarital obligations. Note, however, that the Arizona statute's limitation is expressed in terms of "value," whereas the Wisconsin limitation is stated in terms of "property."

(n45)Footnote 442. Tex. Fam. Code Ann. § 5.61(b) & (c). Paragraph (b) provides that community property subject to a spouse's sole management and control is not subject to liabilities incurred by the other spouse before marriage; paragraph (c) provides that community property subject to a spouse's sole management and control is subject to liabilities incurred by him before or during marriage. For discussion of the Texas system of management of marital property, see § 37.12(c), *supra*. During marriage, each spouse has sole management of property he or she would have owned if single, including personal earnings and revenue from separate property. Tex. Fam. Code Ann. § 5.22.

(n46)Footnote 443. Nev. Rev. Stat. § 123.050 (1991) (neither separate property of a spouse "nor his share of the community property is liable for the debts of the other spouse contracted before the marriage"); N.M. Stat. Ann. §§ 403-9 & 40-3-10 (1989) (neither spouse's interest in community property shall be liable for the separate debt of the other spouse).

(n47)Footnote 444. Cal. Fam. Code Ann. § 911.

(n48)Footnote 445. La. Civ. Code Ann. art. 2345.

(n49)Footnote 446. *Id.* art. 2364 (property is valued as of the time it was used).

(n50)Footnote 447. Cal. Fam. Code Ann. § 913(a); Idaho Code § 32-911 (1983) (applicable by its terms only to wife's debts and property); La. Civ. Code Ann. art. 2345; N.M. Stat. Ann. § 40-3-10A.

(n51)Footnote 448. Cal. Fam. Code Ann. § 913(b)(1); Idaho Code § 32-911 (applicable by its terms only to wife's debts and property); N.M. Stat. Ann. § 40-3-10A; Tex. Fam. Code Ann. § 5.61(a); Wash. Rev. Code Ann. § 26.16.200. *See also Leasefirst v. Borelli, 17 Cal. Rptr. 2d 114 (1993),* in which the earnings of a wife had been designated as separate property by a prenuptial agreement.

(n52)Footnote 449. Ariz. Rev. Stat. Ann. § 25-215D (1991) (spouses shall be sued jointly and debt shall be satisfied first from community property and second from the separate property of the debtor spouse); La. Civ. Code Ann. art. 2345 (during community property regime, community obligation may be satisfied from community property and from separate property of the debtor spouse) & art. 2365 (upon termination of community property regime, the spouse whose separate property was used to satisfy a community obligation may be entitled to reimbursement); N.M. Stat. Ann. § 40-3-12 (community debts are to be satisfied first from all community property; then from property held in joint tenancy or tenancy in common, excluding the residence of the spouses; then from the residence in some situations; then from the separate property of the debtor spouse). Idaho prohibits satisfaction of a community debt from separate property unless both spouses consent in writing to the obligation: "any community obligation incurred by either the husband or the wife without the consent in writing of the other shall not obligate the separate property of the spouse

who did not so consent; provided, however, that the husband or wife may by express power of attorney give to the other the complete power to sell, convey or encumber community property, either real or personal." Idaho Code § 32-912.

(n53)Footnote 450. Cal. Fam. Code Ann. § 913(a).

(n54)Footnote 451. *Id.* § 913(b)(1). Paragraph (2) provides that a spouse's joinder or consent to an encumbrance of community property to secure payment of a debt incurred by the other spouse does not subject the spouse's separate property to liability for the debt unless she or he also incurred the debt.

(n55)Footnote 452. Tex. Fam. Code Ann. § 5.61.

(n56)Footnote 453. *See* § 37.12(c), *supra*.

(n57)Footnote 454. *Cockerham v. Cockerham, 527 S.W.2d 162, 171 (Tex. 1975). Patel v. Kuciemba, 82 S.W.3d 589 (Tex. App. 2002)* (the court distinguished *Cockerham v. Cockerham* and held that the spouse was not actually involved in the other spouse's business other than operating two of the convenience stores, which did not include decisions or knowledge of the other spouse's business borrowing; *Cockerham* was decided before passage of § 3.201 of the Texas Family Code which states: "(a) A person is personally liable for the acts of the person's spouse only if: (1) the spouse acts as the agent for the person; ...").

(n58)Footnote 455. *Miller v. City Nat'l Bank, 594 S.W.2d 823 (Tex. Ct. App. 1980).* The process of partition involved in the *Miller* case adds to the difficulty in the area of creditors' rights. When parties divorce, community property is divided in some fashion between the spouses, becoming the separate property of each. *Miller* suggests that this partition may affect adversely those who extended credit during the marriage. In another case decided in the same year as *Miller*, the court said plainly that an order making a division of community property and requiring the husband to pay community debts contracted by him could not have any legal effect upon the husband's creditor. *Inwood Nat'l Bank of Dallas v. Hoppe, 596 S.W.2d 183 (Tex. Ct. App. 1980).* As in a number of similar cases, the debtor spouse in *Hoppe* was bankrupt and the creditor sought satisfaction from property allocated to the non-debtor spouse in the divorce. The issue of liability of what was community property after divorce is discussed in more detail in § 37.13(b)(5). In *Nelson v. Citizens Bank & Trust Co., 881 S.W.2d 128 (Tex. App. 1994),* the court distinguished *Cockerham* and held that the wife was not personally liable for a corporate debt guaranteed by the husband and secured by a deed of trust signed by both spouses. This, the court said, "does not come close to the active involvement of the non-signing spouse in *Cockerham*."

(n59)Footnote 456. Tex. Const. art. 16, § 15 (emphasis added).

(n60)Footnote 457. *Wileman v. Wade, 665 S.W.2d 519 (Tex. Ct. App. 1983).* The attorney was apparently able to avoid the partition issue by intervening in the proceeding where that partition would take place.

(n61)Footnote 458. Tex. Fam. Code Ann. § 5.61(a).

(n62)Footnote 459. J. Thomas Oldham, Texas Marital Property Rights 289 (1987).

(n63)Footnote 460. "'Debt' means an obligation incurred by a married person before or during marriage, whether based on contract, tort, or otherwise." Cal. Fam. Code Ann. § 902.

(n64)Footnote 461. *Id.* § 910(a). In paragraph (b), "during marriage" is defined to exclude the period during which spouses are living separate and apart before a judgment of dissolution or legal separation.

(n65)Footnote 462. Tex. Fam. Code Ann. § 911.

(n66)Footnote 463. La. Civ. Code Ann. art. 2345; *General Fin. Serv., Inc. v. Thompson, 987 F. Supp. 505 (M.D. La. 1997)* (ex-wife failed to rebut presumption that debt incurred during marriage was a community debt; held liable to

extent of her share of community property), *aff'd* by *General Fin. v. Thompson, 149 F.3d 1178 (5th Cir. 1998).*

(n67)Footnote 464. La. Civ. Code Ann. art. 2364. The reference to the heirs does not come from the statute itself but from the "Comments" attached to it. The Comments also note that "the obligation to reimburse is heritable," citing La. Civ. Code Ann. arts. 1765 and 1984. The amount of reimbursement is "one-half of the amount or value that the property had at the time it was used." Reimbursement may be due back to the time the petition for separation is filed if the community is terminated as of that date. *Shel-Boze, Inc. v. Melton, 509 So. 2d 106 (La. Ct. App. 1987).*

(n68)Footnote 465. Ariz. Rev. Stat. Ann. § 25-215 (1991) (to be satisfied first from community property and then from separate property of debtor spouse); Wash. Rev. Code Ann. § 26.16.040 (community real estate subject to liens of judgments recovered for community debts); Wis. Stat. Ann. § 766.55(2)(b) (obligation incurred by spouse in interest of marriage may be satisfied only from all marital property and all other property of the incurring spouse).

(n69)Footnote 466. Tex. Fam. Code Ann. § 5.22.

(n70)Footnote 467. *Id.* § 5.61(b).

(n71)Footnote 468. *Id.* § 4.031. The statute also states that agency does not arise solely because of the marriage relationship.

(n72)Footnote 469. *Id.* § 5.61(c).

(n73)Footnote 470. *Id.* § 5.61(b).

(n74)Footnote 471. As we are seeing, there is a significant variation in the way states deal with the issue of community property liability. Several states allow part of the community property to be used to satisfy a spouse's separate or individual debt. Some states, such as Louisiana, allow all of the community property to be used to satisfy a separate debt, but ultimately allow reimbursement to the community estate when separate debts are satisfied from it. And in New Mexico, discussed *infra*, designated priorities have the effect of forcing satisfaction from separate property, even though part of the community can be reached if separate property is insufficient. From the point of view of the spouses, reimbursement at the time the marriage dissolves does have an effect that brings it somewhat closer to the states that subject only part of the community property to liability for a separate debt. But from the creditor's point of view, what counts is whether there is sufficient property subject to the debt, available at the time collection is attempted. In that regard, some states, such as Louisiana and California, appear to be more hospitable to creditors than others.

(n75)Footnote 472. Ariz. Rev. Stat. Ann. § 25-215B (1991). This statute is also discussed at § 37.13(b)(3).

(n76)Footnote 473. *Schilling v. Embree, 575 P.2d 1262 (Ariz. Ct. App. 1977).*

(n77)Footnote 474. *Colorado Nat'l Bank v. Merlino, 668 P.2d 1304 (Wash. 1983).*

(n78)Footnote 475. Wash. Rev. Code Ann. § 26.16.030(4).

(n79)Footnote 476. N.M. Stat. Ann. § 40-3-10A.

(n80)Footnote 477. *Id.*

(n81)Footnote 478. *Central Adjustment Bur., Inc. v. Thevenet, 686 P.2d 954 (N.M. 1984).*

(n82)Footnote 479. *See* § 37.13(a).

(n83)Footnote 480. Ariz. Rev. Stat. Ann. § 25-515D.

(n84)Footnote 481. *Id.*

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CHAPTER 37 MARITAL PROPERTY

4-37 Thompson on Real Property, Thomas Editions § 37.14

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§ 37.14 Disposition of Marital Property at Death in Community Property States.n482

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Classification of marital property, as community or separate, is of significance when one of the spouses dies. Indeed, much of the litigation over disposition of marital property at death concerns the classification of property. Much of this entire chapter is therefore pertinent to disposition of marital property at death in community property states. Classification determines both the degree of testamentary power a spouse has over property and the course of inheritance of marital property.

We have noted that all American jurisdictions except for Louisiana and Puerto Rico have generally accepted the common law tradition, rather than the traditions of the civil law, as the foundation of their legal systems. The one qualification of this is the law of marital property, where the civil law's community property system originally found favor in seven states that otherwise followed the common law. The mixture of civil and common law is noticeable in the area of disposition of marital property at death. Laws concerning wills and inheritance in the community property states have generally been patterned after similar provisions in common law states, rather than the civil law. Classification of marital property as community or separate, under the civil law model, remains important, but the form of the law governing disposition at death in most community property states is similar to that in the common law property states. Reference should also be made at this point to "quasi-community" property, discussed at § 37.14(c), *infra*. In some community property states, some property of couples who have migrated into those states from common law property states will be treated as community property at death, even though it would otherwise be separate or common law property.

Because of the influence of the common law, law governing disposition of property at death in the community property states is sometimes a bit confusing. There are essentially two systems in effect, one applicable to non-community property, or to one spouse's interests in separate and community property, and borrowed from the common law tradition, and the other for disposition of community property. Terminology in the statutes is not always carefully crafted with the community property system in mind, and terms such as "estate of the parties" have required interpretation.

In this section we focus specifically on testamentary power, protective measures that come into play at the death of a spouse and override testamentary wishes, and intestate succession.

§ 37.14(a) Testamentary Power in Community Property States.

We have discussed in other sections of this chapter the definition of "separate property" and the fact that it is not really equivalent to the individualist concepts of common law property states. Because of the influence of the common law in connection with disposition of property at death, however, the unique nature of separate property can be a bit blurred. Separate property is 100% owned by one spouse. In essence, as one would expect, the owner of separate property has rather complete power over disposition of that property, including testamentary transfer. One exception to this is the "disposable portion" and "forced heirship" concept in Louisiana, discussed in § 37.14(b), *infra*.

Idaho's code states that a married person has power to devise the person's separate property and share of community property. n483 California's code explicitly provides: "Upon the death of a married person, one-half of the community property belongs to the surviving spouse and the other half belongs to the decedent." n484 These statements accurately reflect the general scope of testamentary power over marital property.

These provisions are consistent with the fundamental characteristic of community property, i.e., that onerous acquisitions during the marriage are not solely the property of the spouse who "earned" them but rather are equally shared by both spouses. Title, from the time of acquisition, is owned 50% by the wife and 50% by the husband. During the marriage, community ownership means that each spouse owns 50% of each community asset. If a couple's community assets include two parcels of real property, each worth $100,000, each individual owns a 50% interest in each parcel. Technically, one cannot unilaterally effect a partition by transferring a 100% interest in one parcel, claiming that the other parcel is the spouse's half of the community estate.

In effect, this state of affairs carries on through one spouse's death, subject to a few qualifications. In other words, power to dispose of marital property at death essentially coincides with title, subject to some protective measures considered in § 37.14(b), *infra*. Only 50% of any asset classified as community property at death of one spouse is generally subject to disposition by that spouse's will or other testamentary disposition. By the very nature of the ownership, the other 50% is simply the survivor's property; it is not in any sense a part of the decedent spouse's estate. And neither spouse has power to devise the other spouse's separate property. Wisconsin has confirmed this attribute of community property with the following statute:

> Upon the death of either spouse, the surviving spouse retains his or her undivided one-half interest in each item of marital [i.e., community] property. The surviving spouse's undivided one-half interest in each item of marital property is not subject to administration. n485

We have observed, however, that some exercises of control over community property are not consistent with the shared nature of the ownership. One spouse occasionally exceeds established limits and purports to exercise authority not only over the spouse's own share, but also over the spouse's share of community property. This can happen during the marriage or in connection with testamentary transfers, as illustrated by the following two examples. In both cases, disposition of property at death of one spouse may be implicated.

The first example involves an exercise of testamentary power. The fact that one spouse has testamentary power over only 50% of any community asset has not prevented attempts to exceed that power. Originally, as discussed in § 37.12, *supra*, the husband had rather complete powers of management over community property, at least during the marriage, even though title was generally shared with the wife. As managers of the community estate, husbands frequently attempted to exercise control over that property even at death, by purporting to devise all of the community property or all of specified community assets to a trustee or some other party. Now that paternalism in marital property has diminished, and equality of control over community property has become the rule, one spouse's inclination to exercise

either inter vivos or testamentary power over all of the community property has presumably declined. It remains possible, however, for either spouse to include the other spouse's share of community property in a testamentary disposition.

Although an attempt by one spouse to devise the other spouse's share of community property is generally not effective to do what it purports to do, a survivor can be "put to an election [of benefits]" at the death of the spouse. Where one spouse attempts to devise the surviving spouse's share of community property, and at the same time includes the spouse as a beneficiary under the will, the survivor is not necessarily entitled to take both the benefits under the will and the share of the community property. The survivor must elect whether to take *either* the share of the community property *or* the property left under the will.

In some instances, there is no clear expression of exactly what "property" the testator purports to transmit, and interpretation is required. Ambiguity can occur because of the language in the will itself or because of the combination of language and circumstances. In a California case, n486 for example, a husband's will provided: "All property in which at this date I have an interest is my separate property, pursuant to the provisions of a certain property settlement agreement heretofore entered into between my said wife and me. It is my intention to dispose of all property over which I have the power of testamentary disposition." n487 Specific gifts and a gift of the residue of the estate were included in the will. The principal asset of the estate was ranch property, taken in the husband's name and purchased with the proceeds of the sale of other property, also in the husband's name. The trial court found that the property settlement agreement referred to in the will was abrogated upon subsequent reconciliation of the parties and that all of the property in which the deceased husband had an interest was community property. The Supreme Court of California summarizes the effect of a will that puts the decedent's spouse to an election:

> If the respondent be required to make an election, she may repudiate the will and claim her statutory share of the community property or she may reject her interest under the law and claim under the will. She cannot take under both. If no election be required, one-half of the property found by the trial court to be community property would belong to the surviving spouse (Probate Code § 201) and she would be entitled to the additional interests conferred upon her by the will. n488

Although recognizing that an intention to dispose of a surviving spouse's interest in community property will not be implied where another construction is permissible, the court in this case concluded that the surviving spouse in this case was required to make an election. They note that the will established that the decedent believed that the property settlement agreement was still in force and that the property conveyed by the will was the decedent's separate property.

Many cases have been litigated over whether a surviving spouse was put to an election. If the will is very clear and expressly requires that the surviving spouse make an election no question about the intent of the testator is presented. The courts typically honor such wishes and force the surviving spouse to make an election. n489 To some, this deference to clearly expressed intent to convey property belonging to another is not appropriate. n490 There is something a bit unseemly about giving any effect to an act which could be described as overreaching on the part of the testator. Under that view, it would presumably make more sense to require an election only where the testator *unintentionally* purported to dispose of the surviving spouse's share of community property. Perhaps the survivor's election, originally known as "the widow's election" is little more than a holdover from the days when husbands managed all community property; the ability to put the surviving wife to an election might be described as one last gasp from the grave. Nevertheless, it is still a part of our marital property law. In light of the nature of community property and the imperfect understanding of community property concepts by wives and husbands, it may still serve some useful purpose, at least in occasional cases. McClanahan makes the following observation:

> By the 1940's, the use of the widow's election had become a favored estate planning device in California. The most common use was for the husband to require the wife to elect to allow her share of the community property to pass to a trust (or trusts) created in his will, or to take her share outright and

> renounce the terms of the will. There was a wealth of case law and literature on the widow's election. As a result of substantial changes in community property laws in recent years, particularly in management and control, and in death and gift tax laws, the forced election of the surviving spouse appears to have declined in favor as an estate planning device. n491

A second example of overstepping management powers can involve inter vivos transfers as well as testamentary transfers. Even in cases based on inter vivos transactions, questions concerning such activity frequently arise after the death of one of the spouses and are properly considered here. We referred earlier in this section to the fact that each spouse owns a 50% interest in *each item* of community property. Questions have arisen as to whether this "item" theory of control over community property persists after dissolution of the marriage, either by the death of one of the spouses or by divorce. Problems have sometimes arisen when one spouse has unilaterally purported to transfer 100% of a community asset and an effort is made by the other spouse, after the death of the donor/transferor spouse, to reclaim the surviving spouse's original share of the particular piece of property. Assuming the surviving spouse's rights have been violated, n492 at least two remedial approaches have been suggested. According to one approach, item-by-item ownership by the surviving spouse in effect continues after the decedent spouse's death. This means, for example, that in appropriate cases, after the donor/spouse's death, the surviving spouse may recapture the survivor's share of the community interest in items that had been the object of "unauthorized" gifts of community property. n493

A different approach, sometimes referred to as an "aggregate" theory, would, in effect, discontinue item-by-item ownership when one spouse dies. The surviving spouse would be entitled to 50% of the community estate in the aggregate, but not necessarily in each item of community property in the estates of the parties. An "aggregate" approach was taken by an Arizona court in a case involving an insurance policy on the decedent spouse's life. n494 Before his death, the husband changed the beneficiary from his wife to his son by a previous marriage. After the husband's death, a dispute arose between the son and the wife concerning the insurance proceeds, most of which were attributable to community property premium payments. The Arizona court summarized three views concerning the effect of a married person's designation of someone other than the person's spouse as the beneficiary of a community property life insurance policy, without the spouse's consent: (1) Some courts have held the beneficiary designation void as a fraud upon the non-consenting spouse's rights, and the non-consenting spouse could insist that all of the proceeds be placed in the decedent's estate as community property; (2) The designation is partially voidable but is effective as a gift of that share of the proceeds (50%) over which the insured would have testamentary power; and (3) The designation is valid and is not a fraud on the spouse's right if the insured is fulfilling a duty (of support of children, for example) and the funds expended are not unreasonably out of proportion to other community assets remaining. They then conclude that Arizona's rule is closest to the third (attributed to Texas), although different from each of the three approaches. There is, they say, no fraud on the surviving spouse's rights as long as the surviving spouse receives "at least as much in value as one half of all the community and other jointly acquired property." n495 In other words, as long as the survivor has received 50% of the aggregate of community property and other shared-ownership-property, a gift by the deceased spouse of a community item is not defective.

Washington has an old and unique statute that can indirectly affect testamentary power and disposition of marital property at death:

> Nothing contained in any of the provisions of this chapter or in any law of this state, shall prevent the husband and wife from jointly entering into any agreement concerning the status or disposition of the whole or any portion of the community property, then owned by them or afterwards to be acquired, to take effect upon the death of either. But such agreement may be made at any time by the husband and wife by the execution of an instrument in writing under their hands and seals, and to be witnessed, acknowledged and certified in the same manner as deeds to real estate are required to be, under the laws of the state, and the same may at any time thereafter be altered or amended in the same manner; Provided, however, That such agreement shall not derogate from the right of creditors, nor be construed to curtail the powers of the superior court to set aside or cancel such agreement for fraud or under some

other recognized head of equity jurisdiction, at the suit of either party. n496

The statute explicitly refers to agreements that take effect upon the death of either spouse, and thus applies only to those contracts that will not take effect during the joint lifetimes of the spouses. n497 Agreements of this type can effectively control disposition of property at death and qualify or limit the testamentary power of each spouse. A couple could, for example, execute today an enforceable contract that would have no immediate effect, but would, at the death of the first spouse to die, convert the separate property of the decedent spouse into community property. n498

A 1997 U.S. Supreme Court case, *Boggs v. Boggs,* n499 explored the conflict between state community property law and the Employment Retirement Income Security Act (ERISA). In *Boggs*, a Louisiana woman devised to her children her one-half share in her husband's retirement funds. The husband subsequently remarried, and upon his death the second wife and the children from the first marriage quarreled over the retirement proceeds. The Supreme Court held that while the children of the first wife possessed a valid claim under state community property law, ERISA pre-empted state law and invalidated those claims.

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LEXIS: community w/1 property w/15 power! w/2 testamentary or will!

§ 37.14(b) Protective Measures at Death in Community Property States.

We have considered the common law evolution designed to protect one spouse economically after the other's death. n500 As we saw, such protection was arguably essential to protect married women who were deprived of most of their property "rights" during the marriage. Even after the changes giving married women greater property rights, common law property ownership has typically been weighted in favor of working husbands. In those cases where one spouse or the other still suffers a property disadvantage under the individual title system, because the spouse is not employed outside of the home during the marriage or earns much less than the spouse, our law still favors protection upon the death of the wealthier spouse. Protection is not limited, of course, to one spouse or the other according to relative wealth of the parties.

Protection originally came in the form of dower (and curtesy) but that rather limited protection has been replaced by more substantial statutory shares in favor of the surviving spouse. We have also noted, in § 37.07(b), *supra*, the possible trend, represented by the Uniform Probate Code, bringing the common law property states into a philosophical alliance with the community property states.

As has been suggested, the very nature of community property more effectively protects a surviving spouse's interests. In a fairly long marriage, for example, unaffected by agreements altering the community property system of ownership, a couple in a community property state might accumulate assets valued at *x*. Chances are that most of those assets will be community property. Assuming that all of the assets are community property, that all of the family earnings during the marriage came from husband's employer, and that husband has now died, the value of the decedent husband's estate will be only fifty percent of *x*. The other fifty percent of the accumulated wealth has always been owned by the wife and she retains control over that property at the death of her husband. In this manner, the surviving spouse is fairly protected, even though she was not employed outside the home during the marriage. n501

Even though the community property system of ownership may be fundamentally fair in the way disposition at death is affected, there are additional limitations and qualifications on testamentary power in community property states. There are, of course, policy reasons to favor the living over the dead where property is concerned. An extreme version of such policies could eliminate testamentary power altogether. n502 Even though some allowance of "dead-hand-control" is an important part of American property law, other factors will sometimes trump the testamentary power of the decedent.

Protective measures affecting disposition of property at death of a spouse or parent are generally designed to protect the well-being of the decedent's spouse and family. Perhaps the most common of these are statutes protecting a home and some personal property for a surviving spouse and/or children. These measures typically put exempt property beyond the reach of creditors, but in a few instances they may have other effects. Although such provisions are generally beyond the scope of the subject of marital property, we consider here some of the law of one state, Texas.

The protection afforded by Texas law is, in some respects, unique and pertinent to the subject of marital property rights. Property "exempt from execution or forced sale by the constitution and laws of the state," n503 other than the homestead, is set apart to the surviving spouse or children. n504 The homestead is delivered to the surviving spouse, and if there is no surviving spouse, "to the guardian of the minor children and unmarried children, if any, living with the family." n505 As with Texas definitions of marital property, n506 this statutory provision is based on a Texas constitutional provision:

> On the death of the husband or wife, or both, the homestead shall descend and vest in like manner as other real property of the deceased, and shall be governed by the same laws of descent and distribution, but it shall not be partitioned among the heirs of the deceased during the lifetime of the surviving husband or wife, or so long as the survivor may elect to use or occupy the same as a homestead, or so long as the guardian of the minor children of the deceased may be permitted, under the order of the proper court having the jurisdiction, to use and occupy the same. n507

It is this provision, and the statutes and cases based on it, that make Texas marital property/homestead law unique. n508 This constitutional survivor's-homestead-right has been held to be equivalent to a legal life estate created by operation of law. n509 The right does not depend on any ownership interest per se, but rather is the same "whether the homestead be the separate property of the deceased or community property between the surviving spouse and the deceased." n510 As long as the surviving spouse elects to use or occupy the property as a homestead, it cannot be partitioned among those who otherwise own the property, even if the spouse has no ownership interest apart from the survivor's homestead right. n511

Based on the civil law, Louisiana and Puerto Rico provide a different form of protection for surviving spouses and children, thereby imposing significant qualifications on testamentary power. These limitations are placed in historical context by McClanahan as follows:

> The principle of "forced heirship" is traceable prior to the Spanish and French codes, to the Roman Civil Law. By the era of the Emperor Justinian, Roman law had developed the concept of the "pars legitima", or "Legitime", which could be claimed by the descendants or parents of the deceased spouse from the total property of the decedent (known as "the succession"), as against the will of the decedent. Four or fewer descendants could claim one-half, and where there were no descendants, the parents of the descendants could claim one third. The portion reserved for the forced heirs was known as "the reserve". The reserve included, not only the property owned by the decedent at death, but also certain donations inter vivos. The remainder of the succession was freely disposable by will, and was known as "the disposable portion". n512

Forced heirship is generally foreign to the common law, and thus is not a part of the law in most United States jurisdictions. It did become a part of the law of Louisiana, but its current form is somewhat different from the original. The class of "forced heirs" is now narrowly drawn. The term is currently defined to include descendants of the first degree (children) who are either under the age of 23 or incapable of taking care of themselves or their property. n513 It does not include parents n514 or descendants other than children, except as representatives of a deceased child who would not have attained the age of 23 at the donor's death. n515

The disposable portion over which a testator has control varies depending on the number of forced heirs. "Donations

inter vivos and *mortis causa* cannot exceed three-fourths of the property of the donor if he leaves, at his death, one forced heir, and one-half if he leaves, at his death, two or more forced heirs." n516 Thus the legitime, or forced share to which the children are entitled is 25% if there is only one forced heir and 50% is there are two or more. This share is reserved by law and cannot be defeated "unless the donor has just cause to disinherit him." n517 The disposable portion includes all property belonging to the donor or testator plus the value of property disposed of by donation inter vivos. n518 It does not, however, include premiums on, or proceeds of, insurance policies on the life of the donor. The value of any such proceeds payable to a forced heir or for the heir's benefit is "applied and credited in satisfaction of his forced share." n519

In addition to the forced share in favor of children, there is also a unique measure in Louisiana law that protects surviving spouses. This provision does not operate to benefit all surviving spouses but is effective "[w]hen a spouse dies rich in comparison with the surviving spouse." n520 This "marital portion is one-fourth of the succession in ownership if the deceased died without children, the same fraction in usufruct for life if he is survived by three or fewer children, and a child's share in such usufruct if he is survived by more than three children." n521 As one would expect, the marital portion has been the subject of much litigation. Under the present version of the statute, it is not entirely clear when one has "died rich" in comparison with the surviving spouse. A husband whose estate was valued at over $600,000 was considered "rich" in comparison to his wife, whose assets amounted to just over $60,000. n522 Payments due to the surviving spouse as a result of the death are deducted from the marital portion. n523

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LEXIS: community w/1 property w/30 protect! w/5 death or die!

§ 37.14(c) Inheritance in Community Property States.

The nature of title in community property states has significant effects on inheritance. In the event a decedent spouse does not exercise testamentary power over the decedent's separate property and share of the community estate, disposition of that property is left to the state's laws of intestate succession. Approaches to marital property inheritance vary some from state to state. As we consider inheritance, one important premise to keep in mind is that the surviving spouse's share of community property is not a part of the decedent spouse's estate. Only the decedent's share of the community estate is subject to intestate succession at the time the first spouse dies.

Primary beneficiaries of intestate succession laws are, of course, spouses, children and parents. In some states, a surviving spouse of an intestate decedent will inherit all of the decedent's share of community property, regardless of whether children or other relatives also survive. n524 There has been a trend in favor of leaving the entire estate to the spouse, even if there are also children of the marriage surviving. The current version of the Uniform Probate Code, for example, provides:

The intestate share of a decedent's surviving spouse is:

> (1) the entire intestate estate if:
>
> (i) no descendant or parent of the decedent survives the decedent; or
>
> (ii) all of the decedent's surviving descendants are also descendants of the surviving spouse and there is no other descendant of the surviving spouse who survives the decedent... n525

If the decedent leaves issue surviving, however, the surviving spouse does not take all of the decedent's share of community property in two community property states. In Louisiana, "the surviving spouse shall have a legal usufruct over so much of that share as may be inherited by the descendants." n526 A Texas statute provides that as to all property belonging to the community estate of the husband and wife, if there be surviving any lineal descendants of the

deceased, the surviving spouse "shall be entitled to one-half of said property, and the other half shall pass to such child or children, or their descendants." n527

If the decedent leaves no surviving children or other lineal descendants, the surviving spouse sometimes inherits all of the decedent's separate property in addition to the decedent's share of community property. n528 In other states, however, the surviving spouse inherits all of the decedent's separate property only if the decedent is not survived by a larger group of designated relatives. n529 The surviving spouse's share of the intestate estate when the decedent is survived by issue, or other heirs varies from state to state. n530

California has unique "in-law inheritance" provisions under which a significant portion of the decedent's estate may pass, in some situations, to the decedent's in-laws rather than the decedent's blood relatives. Section 6402 of the California Probate Code generally provides for inheritance by issue of a predeceased spouse if the decedent is not survived by relatives no more distant than grandparent or issue of a grandparent. Section 6402.5 contains even more favorable provisions for the decedent's in-laws in cases where the predeceased spouse died not more than 15 years before the decedent with reference to real property and not more than 5 years with reference to personal property, and the decedent is not survived by a spouse or issue. In such cases, the successive order of inheritance is (1) issue of predeceased spouse; if none, then (2) parents of the predeceased spouse; if none, then (3) issue of parents of the predeceased spouse; if none, then (4) to the next of kin of the decedent. Other surviving kin of the predeceased spouse are also preferred over escheat as to any portion of the decedent's estate "attributable to the decedent's predeceased spouse."

In a recent opinion, n531 a California Court of Appeals has recently confirmed earlier cases holding that the source of the property's acquisition controls its treatment for purposes of in-law inheritance. Where, for example, the law applies and the source of property in the estate of the second spouse to die is community property accumulated during the marriage, the property is divided between relatives of the decedent and relatives of the predeceased spouse. In this case, the "source rule" applied to property transmuted from separate property to community property during the predeceased spouse's lifetime. The lower court erred in treating the predeceased spouse's former separate property as community property for purposes of intestate succession. It should rather be traced to its source (as separate property) and treated accordingly for inheritance purposes.

COMPUTER-ASSISTED RESEARCH

LEXIS: community w/1 property w/15 inheritance

FOOTNOTES:

(n1)Footnote 482. Various subjects related to disposition of property at death are explored in some detail in other chapters of this treatise. The purpose of this section is simply to sketch briefly the particular impact of marriage, in community property states, on transmission of wealth at the death of a married person.

(n2)Footnote 483. Idaho Code § 15-3-101. *See also* Nev. Rev. Stat. § 123.230 (1991); N.M. Stat. Ann. § 45-2-805.

(n3)Footnote 484. Cal. Prob. Code § 100. This would presumably be true even without the statute by virtue of the nature of community property.

(n4)Footnote 485. Wis. Stat. Ann. § 861.01.

(n5)Footnote 486. *In re Wolfe's Estate, 311 P.2d 476 (Cal. 1957).*

(n6)Footnote 487. *311 P.2d at 477.*

(n7)Footnote 488. *Id. at 478.*

(n8)Footnote 489. *See, e.g., Reed v. Nevins, 425 P.2d 813 (N.M. 1967); Davis v. East Tex. Sav. & Loan Ass'n, 354 S.W.2d 926 (Tex. 1962).*

(n9)Footnote 490. W. De Funiak and M. Vaughn, Principles of Community Property 496-498 (2d ed. 1971).

(n10)Footnote 491. W.S. McClanahan, Community Property Law in the United States § 11:6 at 516 (1982). In footnotes omitted here, McClanahan provides more details concerning this estate planning device and lists a number of pertinent articles.

(n11)Footnote 492. Courts would typically consider such a situation in terms of whether the transfer amounted to a fraud on the surviving spouse's community property rights. A Wisconsin statute defines such fraud and allows the surviving spouse to prevail over fraudulent property arrangements. Wis. Stat. Ann. § 861.17. A property arrangement is fraudulent if it (a) is made by the decedent during marriage or in anticipation of marriage for the primary purpose of defeating the rights of the surviving spouse; and (b) is a breach of the duty of good faith for the purpose of defeating the rights of the surviving spouse in or to marital property.

(n12)Footnote 493. *Dargie v. Patterson, 169 P. 360 (Cal. 1917).*

(n13)Footnote 494. *Gaethje v. Gaethje, 442 P.2d 870 (Ariz. App. 1968).* Citing this case, Professor Blumberg says that "[o]f the community property states that have considered the issue, only Arizona has adopted the aggregate approach to community property distribution at death." Grace Ganz Blumberg, Community Property in California 593 (1987). In some instances, the item-theory is apparently mandated by statute. *See* wis. Stat. Ann. § 861.01(1).

(n14)Footnote 495. *Gaethje v. Gaethje, 442 P.2d 870, 875 (Ariz. 1968)* (property received by the survivor includes will, joint tenancy, intestacy and trust).

(n15)Footnote 496. Wash. Rev. Code Ann. § 26.16.120.

(n16)Footnote 497. *Ivers Estate, 104 P.2d 467 (Wash. 1940).*

(n17)Footnote 498. *Brown v. Boeing Co., 622 P.2d 1313 (Wash. App. 1980).*

(n18)Footnote 499. *Boggs v. Boggs, 117 S. Ct. 1754, 1763 (1997).*

(n19)Footnote 500. *See* § 37.07(a), *supra*.

(n20)Footnote 501. Implicit in these conclusions, of course, is the judgment that shared ownership of property acquired during the marriage is fair and equitable. Some might disagree, but the evolution of American marital property law, in common law property states as well as community property states, is persuasive evidence that dissenters would be a small minority.

(n21)Footnote 502. Contrary to what is perhaps popular opinion, there is probably no constitutional right to dispose of property at death. In *Irving Trust Co. v. Day, 314 U.S. 556 (1942),* the Supreme Court wrote: "Rights of succession to the property of a deceased, whether by will or by intestacy, are of statutory creation, and the dead hand rules succession only by sufferance. Nothing in the Federal Constitution forbids the legislature of a state to limit, condition, or even abolish the power of testamentary disposition over property within its jurisdiction." *Id. at 562.* This principle has been modified in *Hodel v. Irving, 481 U.S. 704 (1987),* a rather unique case involving extreme fractionation of American Indian lands and an escheat provision in the Indian Land Consolidation Act. In that case, the Court held that *complete* abolition of *both* descent and devise of a particular class of property may be a taking of property, but they also specifically reaffirm the continuing vitality of the *Irving Trust Co.* case and others like it. It is therefore possible that a state could leave inheritance laws intact but do away with testamentary power. This is presumably an academic question, as no state is likely to attempt such a thing in the foreseeable future.

(n22)Footnote 503. Tex. Prob. Code Ann. § 271.

(n23)Footnote 504. *Id.* § 272.

(n24)Footnote 505. *Id.*

(n25)Footnote 506. *See* § 37.08(b) *supra*.

(n26)Footnote 507. Tex. Const. Ann. art. 16, § 52.

(n27)Footnote 508. Other states have laws concerning disposition of the home at death of one spouse, but these generally are not comparable to the Texas Provision. Wisconsin, for example, provides: "If the intestate estate includes an interest in a home, the interest of the decedent is assigned to the surviving spouse as part of his or her share under [the intestate succession statute]." Wis. Stat. Ann. § 852.09. The surviving spouse has the option of requesting that the home not be so assigned.

(n28)Footnote 509. *Williams v. Williams, 569 S.W.2d 867 (Tex. 1978)* (holding that the homestead right could be waived by a premarital agreement).

(n29)Footnote 510. Vernon's Tex. Prob. Code § 282.

(n30)Footnote 511. Vernon's Tex. Prob. Code § 284. The guardian of minor children has a similar right to use and occupation of the homestead until the court no longer permits it. *Id.* § 285.

(n31)Footnote 512. W.S. McClanahan, Community Property Law in the United States § 11:1, at 504, n. 1 (1982).

(n32)Footnote 513. La. Civ. Code Ann. art. 1493.

(n33)Footnote 514. La. Civ. Code Ann. art. 1494 was repealed by Acts 1981, No. 442, § 1.

(n34)Footnote 515. La. Civ. Code Ann. art. 1493.

(n35)Footnote 516. *Id.* art. 1495.

(n36)Footnote 517. *Id.* art. 1494.

(n37)Footnote 518. *Id.* art. 1505. Donations are valued "in the state in which [the property] was at the period of the donation." The calculation provided for in Article 1505 is similar in form to the "augmented estate" concept of the Uniform Probate Code. *See* note 85, *supra*.

(n38)Footnote 519. *Id.* art. 1505.D.

(n39)Footnote 520. *Id.* art. 2432.

(n40)Footnote 521. La. Civ. Code Ann. art. 2434. In any case, the amount of the marital portion is now limited to $1,000,000.

(n41)Footnote 522. *Succession of Monroe, 494 So. 2d 336 (La. Ct. App. 1986).* The wife was entitled to her statutory share even though the spouses had executed a marriage contract declaring their property to be separate.

(n42)Footnote 523. La. Civ. Code Ann. art. 2435.

(n43)Footnote 524. Cal. Prob. Code Ann. § 6401(a); Idaho Cod E § 15-2-102; N.M. Stat. Ann. § 45-2-102; Wash. Rev. Code Ann. § 11.04.015. *But see Succession of Richaud, 835 So. 2d 653 (La. App. 2002)* (the decedent's spouse

does not have usufruct over the decedent's share of community property).

(n44)Footnote 525. Unif. Prob. Code § 2-102, 8 U.L.A. 76. The Code also includes an alternative provision for community property states (§ 2-102A); it is identical to § 2-102 except that it is limited to the decedent's separate property. The community property provision contains an additional sentence providing for the decedent's share in the community property. The comment to § 2-102 explains: "Empirical studies support the increase in the surviving spouse's intestate share, reflected in the revisions of this section. The studies have shown that testators in smaller estates (which intestate estates overwhelmingly tend to be) tend to devise their *entire* estates to their surviving spouses, even when the couple has children."

(n45)Footnote 526. La. Civ. Code Ann. art. 890. The usufruct terminates when the surviving spouse marries, unless the deceased had granted a usufruct for life. *Succession of Becker, 704 So. 2d 825, 829 (La. App 1997)* (holding that surviving spouse is bound to provide for deceased spouse's heirs).

(n46)Footnote 527. Tex. Prob. Code Ann. § 45. Consistent with the trend referred to earlier in this section, the Texas Probate Code has been amended. Section 45 now provides:

(a) On the intestate death of one of the spouses to a marriage, the community property estate of the deceased spouse passes to the surviving spouse if:

(1) no child or other descendant of the deceased spouse survives the deceased spouse; or

(2) all surviving children and descendants of the deceased spouse are also children or descendants of the surviving spouse.

(b) On the intestate death of one of the spouses to a marriage, if a child or other descendant of the deceased spouse survives the deceased spouse and the child or descendant is not a child or descendant of the surviving spouse, one-half of the community estate is retained by the surviving spouse and the other one-half passes to the children or descendants of the deceased spouse. The descendants shall inherit only such portion of said property to which they would be entitled under Section 43 of this code. In every case, the community estate passes charged with the debts against it.

(n47)Footnote 528. Ariz. Rev. Stat. Ann. § 14-2102; N.M. Stat. Ann. § 45-2-102. In Texas, if the deceased leaves no surviving children, or their descendants, the surviving spouse inherits all of the decedent's separate estate and one-half of the "the lands of the intestate, without remainder to any person." Tex. Prob. Code Ann. § 38(b)2.

(n48)Footnote 529. Cal. Prob. Code Ann. § 6401 (if decedent left no surviving issue, parent, brother, sister, or issue of deceased brother or sister); Idaho Code §§ 15-2-101 and 15-2-102 (1979) (if decedent left no surviving issue or parent); La. Civ. Code Ann. art. 894 (if decedent left no surviving descendants, parents, or descendants of parents); Vernon's Tex. Prob. Code Ann. § 38(b)2 (if decedent left no surviving descendants, parents, or descendants of parents); wash. Rev. Code Ann. § 11.04.015 (if decedent left no surviving issue or parent or issue of parent).

(n49)Footnote 530. *See, e.g.,* Cal. Prob. Code Ann. § 6401 (surviving spouse takes all of the community intestate estate and one-half of the separate intestate estate); N.M. Stat. Ann. § 45-2-102 (spouse takes all of the community intestate estate and one-fourth of the decedent's separate intestate estate); Idaho Code § 15-2-102 (1979) (surviving

spouse takes all of the community intestate estate and as to the separate intestate estate, the first $50,000 plus one-half of the balance if survived by a parent or parents but not by issue, or by issue, all of whom are issue of the surviving spouse; one-half if survived by issue, one or more of whom are not issue of the surviving spouse).

(n50)Footnote 531. *Estate of Newman, 30 Cal. Rptr. 2d 547 (1994).*

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CHAPTER 37 MARITAL PROPERTY

4-37 Thompson on Real Property, Thomas Editions § 37.15

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§ 37.15 Division of Marital Property at Divorce in Community Property States.

Ariz. Rev. Stat. Ann. § 25.201

In some form, equitable division of marital property at divorce is a part of the law in all states. Common law property states have patterned their systems of equitable distribution at dissolution of marriage after community property law. A comparison of the two models, and a discussion of the influence the community property system has had in common law property states is found in § 37.07(c), *supra*. Related discussion is found in § 37.07(b), *supra*, in the context of disposition of marital property at death.

Because title (separate and community) approximately reflects the contributions of each spouse to acquisition of property, n532 a fair allocation of marital property at divorce might simply be made along title lines in community property states. This can be contrasted with common law property states, where in many cases a division along title lines would generally not be perceived as fair and equitable. n533 In any event, in community property jurisdictions, a good starting place for analysis is to assume that division of property at dissolution of the marriage will be made along the same lines as marital property title. In other words, separate property of each spouse would typically be assigned to that spouse and community property would be divided evenly between the parties. One important modern qualification of this principle is discussed in § 37.16(c), *infra* concerning "quasi-community" property.

Even in community property states, however, division of property at divorce has not been quite as simple as dividing property according to title. Just as there are variations among the common law property states regarding division of property at divorce, n534 various approaches to the issue have evolved in community property states. In several states, by requirement or admonition, community property is divided equally between the spouses. California's Family Code, for example, provides:

> Except upon the written agreement of the parties, or on oral stipulation of the parties in open court, or as otherwise provided in this division, in a proceeding for dissolution of marriage or for legal separation of the parties, the court shall ... divide the community estate of the parties equally. n535

The court also has jurisdiction to divide the separate property interests held by the spouses as joint tenants or tenants in common, "together with, and in accordance with the same procedure for and limitations on, division of community

estate." n536

There are some special rules that explain and qualify somewhat the mandate of equal division. Under appropriate circumstances, the court may award an asset to one party "on such conditions as the court deems proper to effect a substantially equal division of the community estates." n537 The court may also award from one party's share any amount that party deliberately misappropriated. n538 Finally, community estate personal injury damage awards are assigned to the party who suffered the injuries unless the court determines that the interests of justice require another disposition. n539

A few states other than California also impose an "equal division" requirement with respect to community property. n540 Louisiana statutes, based as they are on the civil law, have always differed from the law in other states, but an equal division of community property has always been required. Under prior law, the legal regime of community property in Louisiana would terminate, *inter alia*, upon "separation from bed and board." n541 The judgment of separation from bed and board carried with it "the separation of goods and effects." n542 A newer version of the first of these statutes provides that the legal regime of community property is terminated by death, judgment of divorce or separation of property, or matrimonial agreement. n543 If the parties do not agree between themselves as to a partition of marital property, the statutes provide for a judicial partition in which the court "shall divide the community assets and liabilities so that each spouse receives property of an equal net value." n544

In other states, courts are perhaps given slightly more discretion in the division of marital property. Consider this Texas statute :

> In a decree of divorce or annulment the court shall order a division of the estate of the parties in a manner that the court deems just and right, having due regard for the rights of each party and any children of the marriage. n545

This provision gives the court discretion to divide property unequally, as long as it is a "just and right" division. Questions have arisen, however, concerning what property is affected. The phrase "estate of the parties" is ambiguous. The Texas Supreme Court resolved the confusion, reasoning that the singular "estate" indicated that the statute applied only to community property, and not to the parties' separate estates. n546 Thus the court may make an equitable division of community property but may not divest one party of the party's separate property under this statute. Other states also provide for "equitable" as opposed to "equal" division of the community estate. n547

Wisconsin's statute states that "the court shall divide the property of the parties and divest and transfer the title of any such property accordingly." n548 The statute also provides that the court "shall presume that all other property is to be divided equally between the parties, but may alter this distribution without regard to marital misconduct after considering" a number of the factors discussed in § 37.07(c), *supra*. n549 Any separate property of one of the spouses "shall remain the property of such party and may not be subjected to a property division under this section except upon a finding that refusal to divide such property will create a hardship on the other party or on the children of the marriage, and in that event the court may divest the party of such property in a fair and equitable manner." n550

As we have just noted in the discussion of Texas and Wisconsin, separate property is not usually subject to equal or equitable division in the same way community property is. With some qualifications, separate property of one spouse may be invaded in appropriate cases for the purpose of support of a spouse or children. n551 A spouse's separate property in California, for example, can be used for support of the other spouse, but the court may deny support out of that separate property if the spouse who would be supported has a separate estate, is earning a livelihood, or there is sufficient community property or quasi-community property to provide support. n552 The court may also deny support of one spouse out of the separate property of the other spouse if custody of the children has been awarded to the latter spouse. n553

Except for provisions regarding support, separate property must usually be assigned to the spouse whose property it is. One exception to this is Washington, where the statute provides that the court shall "make such disposition of the property and the liabilities of the parties, either community or separate, as shall appear just and equitable" after considering factors such as the nature and extent of community and separate property, the duration of the marriage, and the economic circumstances of each spouse. n554 The California legislature declares that it is the policy of the state to protect and preserve community property and quasi-community property, to ensure fair and sufficient child and spousal support awards, and to achieve a division of community and quasi-community assets and liabilities upon the dissolution of marriage. To promote this policy, a full and accurate disclosure of all assets and liabilities must be made in the early stages of the dissolution. n555 In an attempt to balance this requirement with the interests of third parties, the California Supreme Court has reviewed its decisions and concluded:

> From these cases and statutes, the general rule can be distilled that when one spouse in a marriage dissolution proceeding seeks discovery from a third party, the court is required to balance the spouse's need for discovery against the privacy interests of the third party. In weighing the need of the spouse, the court should consider all relevant factors, including how the requested information would help resolve the issues that remain between the spouses; any relationship between either spouse and the third party; the information that the other spouse or third party has already provided or agreed to provide; and any specific reasons to distrust the adequacy or reliability of the information already obtained or offered.
>
> In weighing the privacy interests of the third party, the court should consider the nature of the information sought, its inherent intrusiveness, and any specific showing of a need for privacy, including any specific harm that disclosure of the information might cause. For example, the third party may demonstrate that public disclosure of confidential information would damage its competitive position or embarrass persons not involved in the litigation. Upon request, the court should review the information in camera before production to assess its value to the requesting spouse and the harm disclosure might cause to the third party. Any discovery order should be carefully tailored to protect the interests of the requesting spouse in obtaining a fair resolution of the issues while not unnecessarily invading the privacy of the third party. Also upon request, the court should consider appropriate protective orders. n556

As in the case of succession at death of one of the spouses, special provisions often apply to the homestead. The following statute:

> 2. If a homestead has been selected from the community property, it may be assigned to either party, either absolutely, provided such assignment is considered in distribution of the community property, or for a limited period, subject in the latter case to the future disposition of the court; or it may be divided or be sold and the proceeds divided.
>
> 3. If a homestead has been selected from the separate property of either, it must be assigned to the former owner of such property, subject to the power of the court to assign it for a limited period to the other spouse. n557

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FOOTNOTES:

(n1)Footnote 532. "Contribution" in this sense includes those contributions made by a spouse not employed outside the home. The trend has certainly been to place a value on such services, which indirectly contribute to wage-earning, which is the same as, or similar to the value placed on the wage-earner's labor. In some measure, such valuation has always been a part of the law in community property states, and it has certainly become a part of the law in common law property states, at least in the context of divorce. *See* § 37.07(c), *supra*.

(n2)Footnote 533. *See* § 37.06(c), *supra*. There may be, of course, some disagreement about what is fair and equitable. These statements reflect the apparent trend of American law, at least in the context of divorce.

(n3)Footnote 534. *See* § 37.07(c) *supra*.

(n4)Footnote 535. Cal. Fam. Code Ann. § 2550. The disposition of the community estate is subject to revision on appeal. *Id.* § 2555. The court is also given continuing jurisdiction to divide community estate assets or liabilities that were not previously adjudicated, and in such cases, the court "shall equally divide the omitted or unadjudicated community estate asset or liability, unless the court finds upon good cause shown that the interests of justice require an unequal division of the asset or liability." *Id.* § 2556.

(n5)Footnote 536. *Id.* § 2650.

(n6)Footnote 537. *Id.* § 2601.

(n7)Footnote 538. *Id.* § 2602.

(n8)Footnote 539. *Id.* § 2603. The court is directed to take into account the needs of each party, the time that has elapsed since recovery of the damages, and all other facts. In all cases, at least one-half of the damages must be assigned to the party who suffered the injuries.

(n9)Footnote 540. McClanahan classifies California, Louisiana, New Mexico and Puerto Rico as equal distribution jurisdictions. W.S. McClanahan, Community Property Law in the United States §§ 12:6-12:9 (1982).

(n10)Footnote 541. La. Civ. Code Ann. art. 2356.

(n11)Footnote 542. *Id.* art. 155.

(n12)Footnote 543. *Id.* art. 2356.

(n13)Footnote 544. La. Rev. Stat. § 9:2801(4)(b).

(n14)Footnote 545. Tex. Fam. Code Ann. § 3.63(a). *See also In re Marriage of Becerra, 100 S.W.3d 637 (Tex. App. 2003)* (evidence was legally sufficient to support the trial court's finding that a disproportionate division of community property in favor of the wife was appropriate). In *Twyman v. Twyman, 855 S.W.2d 619 (Tex. 1993),* the Texas Supreme Court adopted the tort of intentional infliction of emotional distress and concluded that action on such a tort could be brought in a divorce proceeding, subject to the principles of res judicata and the sound discretion of the trial court. The court noted that in dividing the marital estate, the trial court may take into account the fault of the parties, if pleaded. (Factors also mentioned from earlier decisions include capacities and abilities, benefits which the party not at fault would have derived from continuation of the marriage, business opportunities, education, and relative financial condition and obligations.) The court stated that a spouse should not be allowed to recover tort damages and a disproportionate share of the community estate based on the same conduct. Although the court concluded that Ms. Twyman could not recover based on the findings of fact made in the case, it remanded for a new trial because the case originally proceeded under the wrong legal theory.

(n15)Footnote 546. *Eggemeyer v. Eggemeyer, 554 S.W.2d 137 (1977).* When community property is not divided in the divorce proceeding, the two parties become owners as tenants in common. Subsequent actions to partition the property can be and have been brought at a later date. This has occurred with some frequency in disputes involving retirement benefits that had not matured at the time of the divorce. Until 1987, such a partition was necessarily an equal division of the property, unlike the equitable division possible at divorce. In 1987, the Texas legislature adopted a statutory partition for some situations in what is now §§ 3.90-3.93 of the Texas Family Code. Sections 3.91 and 3.92 provide that when the divorce court fails to divide community property, "the court [if later asked to partition the

property] shall divide the property in a manner that the court deems just and right." This is the same standard applied in division upon divorce. Lawyers have been admonished in numerous decisions, however, to deal with *all* property of the spouses in the divorce proceeding, and the careful lawyer's clients should not generally be required to use these provisions of the Family Code. In *In re Moore, 890 S.W.2d 821 (Tex. App. 1994),* a residuary clause of the divorce decree stated that "any community property or its value not otherwise awarded by this Decree shall continue to be owned by the parties in equal undivided interests." The husband objected to this provision on the basis of the Family Code partition provisions, claiming that "any property not divided is not owned in equal interests under those statutory provisions." The court did not agree but rather concluded that the provisions of §§ 3.90-3.92 were not applicable, since all community property had been divided.

(n16)Footnote 547. Ariz. Rev. Stat. Ann. § 25-318; Idaho Code § 32-712; Nev. Rev. Stat. § 125.150; Wash. Rev. Code Ann. § 26.09.080.

(n17)Footnote 548. Wis. Stat. Ann. § 767.255.

(n18)Footnote 549. Wis. Stat. Ann. § 767.255.

(n19)Footnote 550. Wis. Stat. Ann. § 767.255.

(n20)Footnote 551. *See, e.g.,* Nev. Rev. Stat. § 125.150.

(n21)Footnote 552. Cal. Fam. Code § 4321.

(n22)Footnote 553. *Id.*

(n23)Footnote 554. Wash. Rev. Code Ann. § 26.09.080.

(n24)Footnote 555. Cal. Fam. Code § 2100.

(n25)Footnote 556. *Schnabel v. Superior Court, 854 P.2d 1117, 1122 (1993).*

(n26)Footnote 557. Idaho Code § 32-712.

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CHAPTER 37 MARITAL PROPERTY

4-37 Thompson on Real Property, Thomas Editions § 37.16

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§ 37.16 Multi-State Marital Property and Conflict of Laws.

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We conclude by addressing important issues of interstate marital property. Many modern families reside in or have significant connections with numerous states during the course of a marriage. Conflict of laws issues will continue to arise with increasing frequency. We have noted numerous variations in the marital property law of the states, including the fundamental differences between common law states and community property states. As couples move from state to state, or have property or engage in property transactions in states other than their domiciliary state, many issues can arise concerning the legal implications of these multi-state connections. n558

Most lawyers are familiar with the subject of conflict of laws, but a few introductory remarks will set the stage for this section. The body of law usually labeled "conflict of laws" is sometimes divided into several topics, including choice of law, personal jurisdiction, and interstate enforcement of judgments. In the areas of family law and community property, significant questions frequently arise concerning all three of these topics.

For the most part, choice of law doctrine is judge-made theory that evolves in the context of litigation. Courts do not always apply the law of their own states to resolve litigation. When transactions or occurrences have connections with more than one state, and those states have pertinent laws that differ from one another, it is necessary to determine which of these conflicting laws should apply in assessing the rights and liabilities of the parties. This process is referred to as "choice of law." In some cases the proper rules governing the case, or the issues involved, will be found in a state or states other than the forum state. Each jurisdiction develops its own rules or theory by which it makes the decision of where to find the appropriate law.

During the first half of the 20th century, the accepted approach to choice of law was embodied in the *Restatement, First, of Conflict of Laws*, which was more or less uniformly applied throughout the United States. The *First Restatement* approach is essentially "territorialist" in nature: The applicable law is chosen by reference to significant events that took place within geographical (state) boundaries, and the rights and liabilities of the parties are defined by the law of that place. Thus, the law applied in personal injury cases is the law of the place where the injury occurred; the validity of a contract is determined by the law of the place where the contract was made; and the law affecting real property

transactions is the law of the state where the property is located.

Some states still follow the territorialist approach to choice of law. Many, however, have concluded that the arbitrary choices of the *First Restatement* too often result in unfair decisions. It is impossible to describe briefly the newer approaches to choice of law, but a common denominator is attention to the policies involved in the competing laws. With respect to most real property issues, a very strong preference for the law of the "situs," i.e., the location of the property, persists, but in other areas there is a substantial difference in method, if not results.

§ 37.16(a) Validity of Marriage and Jurisdiction at Divorce.

Although the subject of family law generally is beyond the scope of this chapter, we have noted that the existence of marital property obviously depends on the existence of a marital relationship. n559 Here we consider a few fundamental issues of conflict of laws relative to the beginning and ending of a marriage.

Marriage has frequently been described in terms of a three-party relationship involving wife, husband and the state. This description reflects a strong societal interest in marriage, and the creation and institution of marriage is regulated by each individual state. Requirements and formalities of marriage vary from state to state. We have indicated, for example, that twelve states and the District of Columbia still recognize common law marriage. n560 Such marriages are not recognized in other states. This is a conflict of laws that may become significant when a common law husband and wife move to a state that does not recognize common law marriage. A dispute might there arise over marital property and the validity of the marriage. Because of a strong public policy favoring validity, legislatures and courts have consistently chosen to apply the law of the state where the marriage was celebrated if the marriage is valid under that law. A New Mexico statute, for example, provides: "All marriages celebrated beyond the limits of this state, which are valid according to the laws of the country wherein they were celebrated or contracted, shall be likewise valid in this state, and shall have the same force as if they had been celebrated in accordance with the laws in force in this state." n561

Conflicts may also arise over the termination of the marriage. In a recent Washington case, for example, the couple was married in Texas in 1941. In 1954, the wife became mentally ill, and the husband abandoned her three years later. In 1982, the husband married again in Tijuana, Mexico, and settled with his new wife in Washington State. While the couple was domiciled in Washington, the husband won about $2 million from a lottery ticket. When the husband died in 1991, a daughter from the first marriage claimed that the first marriage was still valid because marriage is terminable only by death or divorce in Texas, where the marriage was contracted. According to the daughter, the Texas marriage was never terminated and she was entitled to her mother's share of the lottery winnings. The Washington court refused to apply Texas law, however. The court reasoned that Washington law applied since the husband received the winnings while domiciled in Washington. Under Washington law, a marriage can be ruled defunct without the existence of a divorce decree or the death of one of the spouses. The court determined that the Texas marriage was defunct and that the daughter had no claim on the lottery money. n562

Jurisdictional concerns sometimes arise when a marriage is dissolving and parties go their separate ways, sometimes crossing state boundaries. Under modern law, a state where either spouse is domiciled appears to have jurisdiction to terminate the marriage relationship. n563 Personal jurisdiction over both parties is necessary, however, for litigation affecting property interests. n564 In 1977, the United States Supreme Court began to apply the *International Shoe* test of minimum contacts, fairness and substantial justice to all exercises of jurisdiction over defendants. n565 This is a departure from earlier standards of amenability to jurisdiction, which were satisfied by presence within the forum state of *either* the person *or* property of the defendant. In the context of some marital property disputes, the effect of the new test may not differ much from the old. This may be true, for example, where one spouse and the property in dispute are within the forum state. As the Court recognized, "jurisdiction over many types of actions which now are or might be brought *in rem* would not be affected by a holding that any assertion of state-court jurisdiction must satisfy the *International Shoe* standard." n566

These cases may present significant jurisdictional problems. Where spouses separate, and one moves to another state and takes marital property to that state and seeks there to litigate marital property rights, questions may be raised about whether the absent spouse is amenable to jurisdiction. If the property was moved surreptitiously or without the consent of the absent spouse (who didn't move), it may be a denial of due process to force that spouse to come to the second state. n567

A number of other issues concerning jurisdiction to divide marital property have arisen. The strong "situs rule" has been mentioned earlier in this section. Courts in a state where real property is located are not obliged to give full faith and credit to judgments from another state affecting title to that property. n568 Courts are therefore reluctant to order directly a division of foreign real estate. The approach that can be taken, assuming the court has personal jurisdiction over both spouses, is to affect title indirectly by ordering the signing of appropriate conveyances by the parties. n569 Conveyances signed pursuant to such orders are valid and will probably be enforced in most states. n570

Modern statutes will occasionally address issues of marital property located in another jurisdiction, including the one just discussed. In California, the court is directed, if possible, to divide community property and quasi-community property "in such a manner that it is not necessary to change the nature of the interests held in the real property situated in the other state." n571 If that is not possible, the court may effect a division of the property by (a) requiring the parties to execute conveyances or take other necessary actions with respect to the out-of-state real property or (b) award to the party who would have been benefitted by the conveyances or other actions the money value of the interest that would have been received. This statute thus directs California courts to take a practical approach to the problem of foreign real property, recognizing that a California decree directly affecting the property might not be enforceable.

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LEXIS: marital w/1 property w/30 (valid! w/2 marriage) or (divorce! w/2 jurisdiction)

§ 37.16(b) Classification of Marital Property During Marriage in Interstate Situations.

In modern society, people will sometimes reside in one state and own property in another. And with the shift in the nature of wealth from tangible to intangible assets, simply placing property geographically becomes a difficult proposition. In multi-state situations, conflict of laws focuses on connecting factors or policy considerations for the purpose of choosing the appropriate law to determine property classification. The process of identifying the law that should be applied is not easily mastered; because of the very nature of the situations, conflict-of-laws problems tend to be rather intractable and lawyers and courts frequently struggle with application of the principles and theory.

The nature of property ownership is generally classified as of the time of acquisition. Under the situs rule, discussed in § 37.16(a), *supra*, one would expect real property to be characterized according to the law of the place where the property is located. n572 More specifically:

> (1) The effect of marriage upon an interest in land acquired by either of the spouses during coverture is determined by the law that would be applied by the courts of the situs.
>
> (2) These courts would usually apply their own local law in determining such questions. n573

This statement is accurate but somewhat misleading. Under this approach, one might expect that real property in state X purchased by a husband and wife domiciled in state Y would be classified according to the law of state X. If state X is a common law property state and state Y is a community property state, one would assume that the property is characterized as common law marital property. But this conclusion arguably overlooks important considerations, particularly the fact that the state X real property will be a mutation of other property n574 and might properly be

classified accordingly. In other words, if the parties pay the total purchase price of $100,000 with community funds acquired in state Y, should the courts in state X apply the law of state Y, the marital domicile, and classify the real property as community property? About such issues, the authors of the Restatement state:

> [Courts of the situs state] would usually hold that any marital property interests which the spouses had in the funds or other property exchanged for the land have been transferred to the land itself. So if land in a common law state is purchased with funds that are held in community because acquired while the spouses were domiciled in a community property state (compare § 258), the courts of the situs would usually hold that the spouses -- at least as between themselves -- have the same marital property interests in the land as they formerly had in the funds. n575

This same approach is also applied in reverse of the example described above, when a married person domiciled in a common law property state purchases property in a community property state. Although community property statutes do not explicitly confine their effects to citizens domiciled within the state, n576 courts have concluded that legislatures did not intend for the statute to apply to property acquired by married persons residing in other states. The following passage from an early Washington case illustrates the point:

> We are clear that personal property acquired by either husband or wife in a foreign jurisdiction, which is by the law of the place where acquired the separate property of one or the other of the spouses, continues to be the separate property of that spouse when brought within this state; and, it being the separate property of that spouse owning and bringing it here, property in this state, whether real or personal, received in exchange for it, or purchased by it, if it be money, is also the separate property of such spouse. n577

The Restatement provision dealing with acquisition of personal property during the marriage focuses on the test used throughout the Restatement -- "most significant relationship to the spouses and the movable" -- with greater weight usually given to the state where the spouses were domiciled at the time of acquisition. n578 As to whether one spouse acquires an interest in movables owned by the other at the time of marriage, the applicable law will usually be that of the state "where the other [owner] spouse was domiciled at the time of the marriage." n579

We see that with respect to both real and personal property, classification for marital property purposes depends heavily on domicile of the parties, when married with respect to property brought into the marriage, and when the property is acquired, if during the marriage.

COMPUTER-ASSISTED RESEARCH

LEXIS: marital w/1 property w/30 classif! w/5 during w/2 marriage w/15 interstate

§ 37.16(c) Quasi-Community Property.

When couples move from a community property state to a common law property state, or from a common law property state to a community property state, significant property consequences can develop. We have noted that the individualist tradition of the common law generally treats property acquired directly by the efforts of one spouse (salary and wages during marriage, for example) as that spouse's individual property. The other spouse has no ownership interest in the property. In cases where only one spouse is employed, and property is accumulated over a number of years in a common law state, the accumulated wealth is entirely "owned" by the employee-spouse. As we have seen, ownership of the same wealth accumulated in a community property jurisdiction would be shared equally by the spouses.

In interstate settings, this fundamental difference between common law states and community property states can become particularly significant. Suppose, for example, that a wife and husband are domiciled for many years in a

common law property state and there accumulate a significant amount of wealth. Assume further that only one of them was employed outside the home during that time and that under the common law property system that earning spouse would be the exclusive owner of the accumulated wealth. If the couple decides to retire to a community property state marital property issues might become very significant. As we have noted throughout this chapter, the marital property law of community property states is designed to provide equitably for each spouse. But if our retired couple now seeks a divorce or one of them dies, the original community property doesn't work very well if the property accumulated by the couple is characterized, as it would be under traditional choice of law analysis referred to in § 37.16(b), *supra*, as separate property of one spouse. Because the consequences at divorce or death in community property states are tied into the community-separate distinction, and depend on that dichotomy for fairness in property division at divorce or disposition at death, the system did not originally handle effectively cases like our example.

The problem, of course, is the mixture in a case like this between two fundamentally different systems of marital property. The problem is not as severe for spouses who move from community property states to common law property states. Possible inequities can be avoided as a result of the adoption of equitable distribution upon divorce in the common law property states. As we saw in § 37.15, *supra*, the same issues in community property states are not necessarily handled in the same way, tied in as they are to the community-separate classification scheme.

California once addressed this problem by legislation converting separate property earned during marriage by incoming migrants from common law property states into the equivalent of California community property. The change essentially occurred as the couple entered the state, intending to make it their home. The California court decided, however, that this approach to the problem was unconstitutional under the Due Process and Privileges and Immunities Clauses of the Fourteenth Amendment. n580

Several community property states have now adopted a more limited approach to the problem of migrating couples from common law property states. The label that has been attached to these measures is "quasi-community property." The idea is quite simple, as illustrated by the following statutory definition, and comes into play at divorce and/r death of a spouse:

> "Quasi-community property" means all real or personal property, wherever situated, acquired before or after the operative date of this code in any of the following ways:
>
> (a) By either spouse while domiciled elsewhere which would have been community property if the spouse who acquired the property had been domiciled in this state at the time of its acquisition.
>
> (b) In exchange for real or personal property, wherever situated, which would have been community property if the spouse who acquired the property so exchanged had been domiciled in this state at the time of its acquisition. n581

California quasi-community property is made a part of the "community estate" for purposes of both division of marital property at divorce n582 and disposition of a spouse's property at death. n583 Texas and Arizona have also adopted the concept of quasi-community property, but only for purposes of division of property at divorce. n584 Two states, Washington and Idaho have adopted the quasi-community concept solely for purposes of disposition at death. n585

COMPUTER-ASSISTED RESEARCH

LEXIS: quasi-community w/1 property

FOOTNOTES:

(n1)Footnote 558. These problems can also arise, of course, in an international context. We will here limit our discussion to interstate settings within the United States.

(n2)Footnote 559. *See* § 37.05, *supra*.

(n3)Footnote 560. *See* § 37.05(c), *supra*.

(n4)Footnote 561. N.M. Stat. Ann. § 40-1-4. This statute has been applied in recognition of a common law marriage consummated in another state, although New Mexico does not otherwise recognize common law marriages. *Bivians v. Denk, 652 P.2d 744 (N.M. Ct. App. 1982).*

(n5)Footnote 562. *Seizer v. Sessions, 940 P.2d 261, 265-268 (Wash. 1997).*

(n6)Footnote 563. *Williams v. North Carolina, 317 U.S. 287 (1942); Williams v. North Carolina, 325 U.S. 226 (1945).* Marriage has been perceived as a "res," and originally, the place of the "matrimonial domicile" was the state which had jurisdiction to terminate the marriage. Because of the demands of public policy, *ex parte* divorce in a state where only one of the spouses is domiciled is now recognized. Statutes in most states impose residency requirements, usually construed as domiciliary requirements, before a divorce can be obtained. Most residency requirements are one year or less, pursuant to a decision upholding the Iowa one-year requirement against constitutional attack. *Sosna v. Iowa, 419 U.S. 393 (1975). See* Homer H. Clark, Jr. The Law of Domestic Relations in the United States § 12.2 at 413 (2d student ed. 1988).

(n7)Footnote 564. *Estin v. Estin, 334 U.S. 541 (1948).*

(n8)Footnote 565. *Shaffer v. Heitner, 433 U.S. 186 (1977).*

(n9)Footnote 566. *433 U.S. at 208, 97 S. Ct. at 2582;* Johnson v. Johnson, No. 02*A01-9603-CH-00061, 1997 Tenn. App. LEXIS 806 (Tenn. App. 1997)* (applying the *International Shoe* test).

(n10)Footnote 567. In *Kulko v. Superior Ct., 436 U.S. 84 (1978),* the Court held that a former husband was not amenable to jurisdiction in California. After a divorce in New York, the marital domicile, the wife moved to California. She there sued to increase the former husband's child support obligations. Even though he had purchased an airplane ticket and sent one child to live with the mother, the Court did not agree with the mother's contention that these contacts were sufficient to make the New York spouse amenable to jurisdiction in California. He had not purposefully availed himself of the benefits of California law. This case seems analogous to the situation described in the text. This issue, and many other conflict of laws problems, are discussed in J. Thomas Oldham, *Conflict of Laws and Marital Property Rights, 39 Baylor Law Rev. 1255, 1264-1266 (1987).*

(n11)Footnote 568. *Fall v. Eastin, 215 U.S. 1 (1909).* The situs state may, of course, give the foreign judgment full faith and credit if it chooses to do so. Out of respect for state sovereignty, however, the Court has been reluctant to apply the full faith and credit clause to judgments respecting real property in another state. As the states become more unified and less suspicious of one another, it is quite possible that courts will begin to give more credit to foreign judgments respecting land in the forum state.

(n12)Footnote 569. *Fall v. Eastin, 215 U.S. 1 (1909).*

(n13)Footnote 570. Even a decree ordering a party to sign an instrument of conveyance, thus affecting title to foreign real property only indirectly, will sometimes be deemed an invalid order by the situs state. *See Sammons v. Sammons, 479 So. 2d 223 (Fla. Dist. Ct. App. 1985).* In fact, the distinction between decrees having an indirect effect and those having a direct effect on foreign land may not make good sense. The proper response, however, may be some relaxation of the situs principle as a matter of choice of law in the situs state.

(n14)Footnote 571. Cal. Fam. Code Ann. § 2660.

(n15)Footnote 572. Restatement (Second) of Conflict of Laws § 234 cmt. a (1971).

(n16)Footnote 573. Restatement (Second) of Conflict of Laws § 234 (1971). The same basic rule is also applied in determining the effect of marriage upon an interest owned by a spouse at the time of marriage. *Id.* § 233. The Restatement presents one view among many regarding choice of law generally. Other approaches to choice of law have been adopted in numerous states. In the area of marital property, however, the Restatement (Second) is probably as accurate a generalization about the law of the states as can be found.

(n17)Footnote 574. *See* § 37.10(b). Spouses residing in one state and purchasing real property in another will almost always be using "domiciliary-state-property" to purchase the out-of-state property. This being the case, characterization of the property for marital purposes will usually depend on whether the situs state really does "usually apply their own local law in determining" the effect of the marriage on the property.

(n18)Footnote 575. Restatement (Second) of Conflict of Laws § 234, cmt. (1971). The comment suggests that courts would usually apply their own law where the rights of some third party are involved.

(n19)Footnote 576. In some cases, there is an explicit reference to domicile. California's definition of community property refers to property "acquired by a married person during the marriage while domiciled in this state." Cal. Fam. Code Ann. § 760.

(n20)Footnote 577. *Brookman v. Durkee, 90 P. 914, 915 (Wash. 1907). See also McCarver v. Trumble, 660 S.W.2d 595 (Tex. Ct. App. 1983).*

(n21)Footnote 578. Restatement (Second) of Conflict of Laws § 258 (1971).

(n22)Footnote 579. Restatement (Second) of Conflict of Laws § 257 (1971).

(n23)Footnote 580. *Estate of Thornton, 33 P.2d 1 (Cal. 1934).*

(n24)Footnote 581. Cal. Fam. Code Ann. § 125. The Law Revision Commission Comment to this section explains that it ensures that "the division of marital property on dissolution of marriage ... will not be controlled by the fortuity of when or where the property was initially acquired."

(n25)Footnote 582. *Id.* § 2501.

(n26)Footnote 583. For purposes of disposition at death, quasi-community property is defined again in Cal. Prob. Code Ann. § 66. "Upon the death of a married person domiciled in this state, one-half of the decedent's quasi-community property belongs to the surviving spouse and the other half belongs to the decedent." *Id.* § 101. As with community property, a spouse has testamentary power over one-half of the quasi-community property. *Id.* § 6101. The surviving spouse takes the decedent's share of the intestate quasi-community property, just as with community property. *Id.* § 6401.

(n27)Footnote 584. Ariz. Rev. Stat. Ann. § 25-318; Tex. Fam. Code Ann. § 3.63.

(n28)Footnote 585. Idaho Code § 15-2-201 (1993); Wash. Rev. Code Ann. §§ 26.16.220 & 26.16.230.

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CHAPTER 37 MARITAL PROPERTY

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Annotation, *Spouse's Professional Degree or License as Marital Property for Purposes of Alimony, Support, or Property Settlement, 4 A.L.R.4th (1981) 1294.*

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Supp. To CHAPTER 37 Marital Property

4-37 Thompson on Real Property, Thomas Editions Supp. to § 37.05

Supp. to § 37.05 The Marital Relationship.

[Go To Main]

§ 37.05(a) Defining Marriage. [Go To Main]

Add:

Li v. State, 338 Ore. 376 (Or. 2005) (categorizing the marital relationship as "one in which the state is deeply concerned and over which it exercises a jealous dominion"); *State v. Green, 2004 UT 76 (Utah 2004)* (Durham, C.J., concurring) ("[t]he institution of marriage has always been peculiarly a creature of the state, and subject to regulation by its legislature") (quoting *Hendrick v. Hendrick, 1999 OK CIV APP 15 (Okla. App. 1998)* .

Add:

Knight v. Superior Court, 128 Cal. App. 4th 14 (Cal. App. 2005) (noting that "[f]or determining a U.S. governmental meaning, "the word 'marriage' means only a legal union between one man and one woman as husband and wife, and the word 'spouse' refers only to a person of the opposite sex who is a husband or a wife") (quoting Ariz. Rev. Stat. Ann. § 25.204)).

In re Parentage of Robinson, 383 N.J. Super. 165 (Ch. Div. 2005) (biological mother's same-sex partner presumed to be the parent of the child under the Artificial Insemination Statute).

Add:

Li v. State, 338 Ore. 376 (Or. 2005) (stating that, as a statutory matter, marriage in Oregon is limited to opposite-sex

couples); *Knight v. Superior Court, 128 Cal. App. 4th 14 (Cal. App. 2005)* (noting that, in California, domestic partners do not receive a number of marital rights and benefits, i.e., they may not file joint tax returns and their earned income is not treated as community property for state income tax purposes); *Armijo v. Miles, 127 Cal. App. 4th 1405 (Cal. App. 2005)* ("Prop. 22 assures that only opposite-sex marriages validly contracted outside this state will be recognized as valid in California. Same-sex marriages will be given no recognition"); *Lane v. Albanese, 2005 Conn. Super. LEXIS 759* (Conn. Super. Ct., 2005) (noting that states may choose to not recognize same-sex marriages that were performed beyond the state's borders); *In re Simmons, 293 Ill. App. 3d 1151* (Ill. App. Ct., 1997) (holding transsexual male's marriage to wife was invalid as a same-sex marriage, and did not become valid when he had his internal female organs removed).

After the first paragraph of footnote 31, add the following:

But see Hernandez v. Robles, 805 N.Y.S.2d 354 (2005) (holding that Domestics Relations Law provision that did not permit same-sex marriage did not violate due process or equal protection provisions of the New York Constitution); *Morrison v. Sadler, 821 N.E.2d 15 (Ind. App. 2005)* (holding that Indiana's Defense of Marriage Act (DOMA) did not violate Equal Privileges and Immunities Clause nor "due course of law" provision of State Constitution).

§ 37.05(c) Common Law Marriage. [Go To Main]

Add:

Knight v. Superior Court, 128 Cal. App. 4th 14 (Cal. App. 2005) (noting that California recognizes the validity of a common law marriage contracted in another state which would be valid under the laws of that state); *Stovall v. City of Memphis, 2004 Tenn. App. LEXIS 536 (Tenn. Ct. App. 2004)* (common-law marriage shall not be recognized as valid regardless of the fact that such marriage may be considered lawful in a state or jurisdiction where the couple lives or formerly lived).

Add:

Brown v. State, 108 P.3d 1018 (Kan. Ct. App. 2005) (noting that a requirement of common law marriage is the present intent to be married); *Perrotti v. Meredith, 2005 PA Super 57 (Pa. Super. Ct. 2005)* (a common law marriage can be created only by an exchange of words in the present tense, spoken with the specific purpose that the legal relationship of husband and wife is created by such exchange); *Thompson v. Barnhart, 2005 U.S. Dist. LEXIS 117 (D. Kan. 2005)* (noting that common law marriage requires a legal capacity to marry, a mutual present marriage agreement between the parties, and a holding out of each other to the public as husband and wife); *Harris v. Harris, 2004 Ohio 6741 (Ohio Ct. App. 2004)* (noting that the requirements of common law marriage are an agreement of marriage in praesenti, cohabitation as husband and wife, and a holding out by the parties to those with whom they normally come into contact, resulting in a reputation as a married couple in the community); *Davis v. State, 2004 OK CR 36 (Okla. Crim. App. 2004)* ("To establish a valid common law marriage, there must be evidence of an actual mutual agreement between the spouses to be husband and wife, a permanent relationship, an exclusive relationship--proved by cohabitation as man and wife, and the parties to the marriage must hold themselves out publicly as man and wife"); *Snyder-Murphy v. City Of Cedar Rapids, 695 N.W.2d 44 (Iowa App. 2004)* ("The three elements of a common-law marriage are: (1) the present

intent and agreement to be married; (2) continuous cohabitation; and (3) public declaration that the parties are husband and wife"); *Wachter v. Wachter, 607 S.E.2d 818 (W. Va. 2004)* (noting that because proving the existence of an agreement is often difficult, most states that recognize common-law marriage allow their courts to infer an agreement from the other elements of common-law marriage).

§ 37.05(d) Defective Marriages: The Putative Spouse Doctrine. [Go To Main]

Add:

Williams v. Williams, 97 P.3d 1124 (Nev. 2004) (noting that the putative spouse doctrine applies in annulment proceedings for purposes of property division; holding that wife believed in good faith that she was divorced from her first husband when she entered into marriage with second husband, and therefore, she qualified as a putative spouse under putative spouse doctrine).

§ 37.05(e) Property Rights of Unmarried Partners. [Go To Main]

Add:

In re Marriage of Martin, 681 N.W.2d 612 (Iowa 2004) (noting that courts do have authority to adjudicate property claims of unmarried persons who cohabitat. "Persons who cohabitate tend to accumulate property and the rights of the persons to such property may become disputed when the cohabitation ends").

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Supp. To CHAPTER 37 Marital Property

4-37 Thompson on Real Property, Thomas Editions Supp. to § 37.06

Supp. to § 37.06 The Common Law of Marital Property.

[Go To Main]

§ 37.06(a) Title and Management of Marital Property Under the Common Law. Ariz. Rev. Stat. Ann. § 25.202C

Footnote 52 should read as follows:

Id. at 1386 (footnotes omitted).

Footnote 53 should read as follows:

Id. at 1389.

Footnote 54 should read as follows:

Id. at 1390.

Add:

Schlossberg v. Barney, 380 F.3d 174 (Md. Ct. App. 2004) ("A tenancy by the entireties is essentially a joint tenancy with rights of survivorship between the husband and wife rendered individually indissoluble by the common law theory that the husband and wife are one person").

Add:

But see Mechele Dickerson, Richard B. Hagedorn, and Frank W. Smith, Jr., *Collection of Unsecured Debts*, 1 The Law of Debtors and Creditors § 6:84 (thirty states and the District of Columbia still recognize tenancy by the entirety).

Add:

United States v. Sheehan, 2004 U.S. Dist. LEXIS 23804 (D. Pa. 2004) ("The essential characteristics of the tenancy are that each spouse is seised of the whole or the entirety and not a divisible part thereof, that neither spouse may independently appropriate property to his or her own use to the exclusion of the other, that neither spouse may independently sever the estate by conveying part of the property away and the right of survivorship whereby upon the death of one spouse the other becomes the sole owner of the entireties property").

Change citation to:

Id.

§ 37.06(b) Disposition of Marital Property at Death Under Early American Common Law. [Go To Main]

Footnote 72 should read as follows:

Id. at 1366, n.27 .

Footnote 73 should read as follows:

Id.

§ 37.06(c) Disposition of Marital Property at Divorce Under Early American Common Law. [Go To Main]

Footnote 74 should read as follows:

J. Thomas Oldham, Divorce, Separation and the Distribution of Property § 3.02 at 3-3 (1993).

Footnote 75 should read as follows:

Id. at 3-3- 3-5 .

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Supp. To CHAPTER 37 Marital Property

4-37 Thompson on Real Property, Thomas Editions Supp. to § 37.07

Supp. to § 37.07 The Transition from "Individualism" to "Community" in Common Law Jurisdictions.

[Go To Main]

§ 37.07(a) Married Women's Property Acts and Marital Property Ownership During Marriage in Modern Common Law Jurisdictions. [Go To Main]

Add:

Goodwin v. Goodwin, 263 S.W.3d 703 (Mo. App. 2008) (a husband's individual investment in a house and surrounding land); *Dorsey v. Dorsey, 972 So. 2d 48 (Miss. App. 2008)* (neither the husband's company nor land donated to him by his family transmuted into marital property).

Conley v. Conley, 2005 Tenn. App. LEXIS 281 (Tenn. Ct. App. 2005) (noting that when a spouse treats separate property in such a way as to give evidence of an intention that it become marital property, this action creates a rebuttable presumption of a gift to the marital estate); *Bersin v. Golonka, 2005 N.C. App. LEXIS 1052 (N.C. Ct. App. 2005)* (stating that "a restriction on the transfer of stock does not apply to interspousal transfers of stock which is marital property absent an express provision [addressing] such transfers") (quoting *Bryan-Barber Realty, Inc., v. Fryar, 461 S.E.2d 29, 32 (1995))* .

§ 37.07(b) The Uniform Probate Code and Marital Property at Death in Modern Common Law Jurisdictions. [Go To Main]

Add:

See also In re Sprenkle-Hill Estate, 2005 Mich. App. LEXIS 496 (Mich. Ct. App. 2005) (noting that the purpose of an

elective-share statute "is to prevent disinheritance of the spouse"); *Velde v. Velde, 867 So. 2d 501 (Fla. Dist. Ct. App. 2004)* ("[t]he purpose of the elective share is to protect the surviving spouse"); *McInnis & McInnis, 199 Ore. App. 223 (Or. Ct. App. 2005)* (noting that a party can waive of statutory right to take elective share); *Dempsey v. Dempsey, 2005 Fla. App. LEXIS 5960 (Fla. Dist. Ct. App. 2005)* ("The elective share is a substitute for dower and curtesy, which have been abolished").

Footnote 85 should read as follows:

Deutsch v. Commissioner of Internal Revenue, T.C. Memo 1997-470 (U.S. Tax Court 1997) (comparing Florida's elective share statute to the dower statute it replaced; spouse's elective share held to be tax exempt, just as dower had been) *disagreed with by Brigham v. U.S., 160 F.3d 759 (1st Cir. 1998)* (holding that federal statute Ariz. Rev. Stat. Ann. § 25.203 does not allow the exclusion of an elective share from taxation as asserted by the *Deutsch* court); *United States v. 221 Dana Ave., Hyde Park, MA, 239 F.3d 78 (1st Cir. 2001)* (a dower interest, which is a life estate, would in most cases be worth less than the elective share, which is in fee simple).

Add:

In re Estate of Soard, 2005 Tenn. App. LEXIS 128 (Tenn. Ct. App. 2005) (noting that there is a UPC provision that all years of marriage between the parties are counted even if those periods may be separated by divorce); *Richard v. Richard, 2004 Minn. App. LEXIS 1475 (Minn. Ct. App. 2004)* (noting that one may waive the right to an elective share in the Uniform Probate Code by agreement) (citing *Affiliated Banc Group, Ltd. v. Zehringer, 527 N.W.2d 585 (Minn. Ct. App. 1995))* ; *McMillan v. Follansbee, 194 Or. App. 145 (Or. Ct. App. 2004)* (it is possible to waive a statutory right to partition, just as it is possible to waive other statutory rights, such as an elective share).

Add:

In re Estate of Soard, 2005 Tenn. App. LEXIS 128 (Tenn. Ct. App. 2005) (noting that the Tennessee statute utilizes only 4 levels of percentage entitlement compared to the 16 levels of the UPC).

The first two lines on page 364 should be deleted.

§ 37.07(c) Equitable Distribution Upon Dissolution of Marriage in Modern Common Law Jurisdictions. [Go To Main]

Add:

Morris v. Morris, 5 So. 3d 476 (Miss App. 2008) (land titled in husband's name was marital property).

Steneken v. Steneken, 2005 N.J. LEXIS 578 (N.J. 2005) (defining property that may be equitably distributed as including property that was both real and personal, which was legally and beneficially acquired by them or either of them during the marriage).

Add:

Guy v. Guy, 955 A.2d 212 (Maine 2008) (language in the deed by which a couple purchased land did not convert the pre-existing buildings on the land, owned by the wife, into marital property).

Rowan v. Rowan, 2005 Tenn. App. LEXIS 53 (Tenn. Ct. App. 2005) ("Title switches from husband to wife after equitable distribution and therefore does not play a major role in the distribution itself").

Add:

Steneken v. Steneken, 2005 N.J. LEXIS 578 (N.J. 2005) (defining property that may be equitably distributed as including property that was both real and personal, which was legally and beneficially acquired by them or either of them during the marriage). *But see Fitzgerald v. Fitzgerald, 2005 Miss. App. LEXIS 240 (Miss. Ct. App. 2005)* ("Property acquired by one spouse during a previous marriage is not considered marital property"). *Smith v. Smith, 8 A.D.3d 728 (N.Y. App. Div. 2004)* ("In making equitable distribution of marital property, courts should not ignore a spouse's non-economic contributions").

Dawkins v. Dawkins, 687 S.E.2d 52 (S.C. 2010) (court had discretion to award 60% of marital property to the wife).

Footnote 96 should read as follows:

Ind. Code Ann. § 31-1-11.5-11 repealed by P.L. 1-1997, Sec. 157; *Kan. Stat. Ann. ch. 60-1610(b)(1) amended by* 2005 Kansas Laws ch. 154 (S.B. 7); *Mass. Gen. Laws Ann. ch. 208 § 34*; Ariz. Rev. Stat. Ann. § 25.203B.

Schulz v. Schulz, 979 So.2d 297 (Fla. App. 2008) (the trial court abused its discretion in declaring certain assets to be marital property even though they had been designated as nonmarital assets by the parties); *Mattioli v. Mattioli, 853 N.Y.S.2d 235 (2008)* (a former residence that had been sold with distribution of funds from the sale to the parties was not marital property subject to equitable distribution).

Footnote 97 should read as follows:

Ark. Code Ann. § 9-12-315; *Del. Code Ann. tit. 13, § 1513(b)*; *D.C. Code Ann. § 16-910(a)*; *Ky. Rev. Stat. § 403.190(2)*; *Md. Cts. & Jud. Proc. Code Ann. § 3-6A-01*; *Mo. Ann. Stat. § 452.330(1)*; *N.J. Stat. Ann. § 2A:34-23*; *N.Y. Dom. Rel. Law §§ 236(B)(1)(D) & 236(B)(5)(B)*; *N.C. Gen. Stat. § 50-20(D)*; *23 Pa. Const. Stat. Ann. § 3323(A)*; *Tenn. Code Ann. § 36-4-121(B)*; *Va. Code Ann. § 20-107.39(1)*. *Pelletier v. Pelletier, 662 N.Y.S.2d 64 (S. Ct. App. Div. 1997)* (property transferred to wife by a cousin constituted a gift and was therefore separate property; real estate purchase with wife's separate property was not subject to equitable distribution); *Gross v. Gross, 469 S.E.2d 636 (W. Va. 1996)* (equitable distribution is a three-step process involving classifying, valuing, and dividing the martial property).

Fitzgerald v. Fitzgerald, 639 S.E.2d 866 (W. Va. App. 2006) (the husband's permanent total disability benefits were martial property subject to equitable distribution); *In re Marriage of Edwards, 861 N.E.2d 1020 (Ill. App. 2006)* (a judgment for child support arrearage from the wife's previous marriage was not marital property, but the attorney fee award included in the judgment was marital property); *Shannon v. Shannon, 847 N.E.2d 203 (Ind. App. 2006)* (a worker's compensation benefit that covered lost income prior to the divorce was marital property); *Gainer v. Gainer, 639 S.E.2d 746 (W. Va. App. 2006)* (wife could be reimbursed for the portion of marital property used to buy military service credits).

Footnote 98 should read as follows:

Ala. Cod § 30-2-51 (if property is used regularly during the marriage for the common benefit of the spouses); *Iowa Code Ann. § 598.21(2)* (if court finds refusal to do so would be inequitable); *Minn. Stat. Ann. § 518.58, Subd. 2* (up to one-half can be distributed if provision for one is so inadequate that unfair hardship would otherwise result); *Dawson-Austin v. Austin, 920 S.W.2d 776 (Tex. App. 1996)* (unequal division of community property was just and right, as long as it was equitable and circumstances justified disproportionate division); *Christians v. Christians, 637 N.W.2d 377 (S.D. 2001)* (trial court did not abuse its discretion in awarding husband credit for only 280 out of 320 acres of farmland he inherited).

Footnote 99 should read as follows:

Ala. Code § 30-2-51; *Ark. Code Ann. § 9-12-315*; *Colo. Rev. Stat. § 14-10-113(1)*; *Conn. Gen. Stat. § 46(B)*-81(A); *Del. Code. Ann. Tit. 13, § 1513(A)* & *(C)*; *D.C. Code Ann. § 16-910(B)*; *Haw. Rev. Stat. § 580-47(A)*; *750 ILCS 5/530*; *Ind. Code. Ann. § 31-1-11.5-11 repealed by* P.L. 1-1997, Sec. 157; *Iowa Code Ann. § 598.28*; *Kan. Stat. Ann. § 60-1610(B)(1) amended by* 2005 Kansas Laws Ch. 154 (S.B. 7); *Ky. Rev. Stat. § 403.190(1)*; *Me. Rev. Stat. Ann. Tit. 19, § 722-A(1)*; *Md. Cts. & Jud. Proc. Code Ann. § 3-6A-05(B)* (1993); *Mass. Gen. Laws Ann. Ch. 208, § 34*; *Minn. Stat. Ann. § 518.58* (1993); *Mo. Ann. Stat. § 452.330(1)*; *Mont. Code Ann. § 40-4-202(1)*; *Neb. Rev. Stat. § 42-373*; *N.C. Gen. Stat. § 50-20(C)*; *Or. Rev. Stat. § 107.105(1)(F)*; *23 Pa. Const. Stat. Ann. § 3323(D)*; *R.I. Gen. Laws § 15-5-16.1*; *Tenn. Code Ann. § 36-4-121(A)* & *(C)*; *Vt. Stat. Ann. Tit. 15, § 751*; *Va. Code Ann. § 20-107.3(D)* (1993); *Wyo. Stat. § 20-2-114*; *Guida v. Guida, 816 So. 2d 717 (Fla. App. 2002)* (equitable distribution has to be supported by substantial competent evidence). *See also In re Petition of Fenzau, 54 P.3d 43 (Mont. 2002)* (equitable distribution can account for medical and financial needs of the psouse which result from the other spouse's physical, mental, or emotional abuse during the marriage); *Garces v. Garces, 704 So. 2d 1106 (Fla. App. 1998)* (citing *Fla. Stat. ch. 61.08(2)*, listing factors such as standard of living during the marriage, duration of the marriage, age, physical and emotional condition, services and career building contributed to the marriage, and other factors); *Quinn v. Quinn, 1997 Va. App. LEXIS 573 (Va. App. 1997)* (upholding trial court's discretionary application of statutory factors); *Moore v. Moore, No. 0470-97-4, 1997 Va. App. LEXIS 576 (Va. App. 1997)* (trial court's equitable distribution of marital property is not set aside unless clearly wrong or the court misapplied or failed to consider statutory guidelines). *See also Barker v. Barker, 500 S.E.2d 240, 245 (Va. Ct. App. 1998)* (trial court properly considered such factors as age, expenses, distribution of assets, and earning capacity of parties in determining equitable distribution award); *In re Marriage of Wendell, 581 N.W.2d 197, 199 (Iowa Ct. App. 1998)* (in considering accumulations to premarital assets for purposes of equitable distribution, court does not limit its focus to parties' direct contributions to increase, but rather considers the contributions of each party to the overall marriage); *In re Marriage of Carter, 740 N.E.2d 82 (Ill. App. 2000)* (equitable distribution of marital assets required to be in just proportions); *Tibbetts v. Tibbetts, 762 A.2d 937 (Me. 2000)* (marital property to be divided in just proportions); *Atkinson v. Atkinson, 32 S.W.3d 41 (Ark. App. 2000)* (unequal distribution of marital property was justified); *Adams v. Adams, 778 So. 2d 825 (Ala. Civ. App. 2000)* (awarding wife 16% of marital property was not

equitable).

Winter v. Winter, 857 N.Y.S.2d 69 (2008) (division of marital assets included spousal maintenance, child support, husband's share of add-on child expenses, allocation of marital property and assets, and division of legal expenses); *Keown v. Keown, 883 N.E.2d 865 (Ind. App. 2008)* (marital residence value reduced by costs of repairs and costs of sale); *Johnson v. Chapin, 854 N.Y.S.2d 18 (2008)* (wife's share of the amount of appreciation that accrued in the husband's separate property that was renovated during the marriage was reduced); *Berger v. Berger, 747 N.W.2d 336 (Mich. App. 2008)* (husband's affair favored wife in finding on the child custody best interest factor of moral fitness, but did not justify 70/30% division of marital property in favor of wife); *Heskett v. Heskett, 245 S.W.3d 222 (Ky App. 2008)* (husband's dissipation of marital property entitled the wife to the return of the down payment she had made toward the purchase of the marital home).

Popowich v. Korman, 900 N.Y.S.2d 297 (2010) (brokerage account in wife's name, the right to repayment of loans, and a beach house and townhouse were all marital property); *Armstrong v. Armstrong, 900 N.Y.S.2d 476 (2010)* (funds received by the husband under a severance agreement were not treated as marital property); *Cease v. Cease, 900 N.Y.S.2d 182 (2010)* (property acquired during the marriage is presumed to be marital property, but the presumption is subject to rebuttal); *Gilliam v. McGrady, 691 S.E.2d 797 (Va. 2010)* (presumption that assets received or acquired during the marriage are marital property did not apply to the husband's trust fund tax debt that he incurred alone during the marriage); *Lucas v. Lucas, 307 S.W.3d 712 (Mo. App. 2010)* (order prohibiting husband from transferring, concealing, disposing of or diminishing marital property); *Michel v. Michel, 692 S.E.2d 381 (Ga. 2010)* (military retirement benefits treated as marital property even though the couple had been married less than ten years); *Gregg v. Gregg, 31 So. 3d 1277 (Miss. App. 2010)* (increase in value of retirement funds treated as marital property); *Newman v. Patton, 692 S.E.2d 322 (Ga. 2010)* (wife's stock options that vested prior to the marriage but were exercised during the marriage were the wife's separate property); *Puskar v. Puskar, 29 So. 3d 1201 (Fla. App. 2010)* (proceeds from sale of home, which was the wife's premarital asset, were not marital property); *Potts v. Potts, 303 S.W.3d 177 (Mo. App. 2010)* (husband's business was non-marital property); *Olson v. Olson, 226 P.3d 751 (Utah App. 2010)* (because the parties had commingled their personal and corporate finances, the corporate debt was treated as marital property); *Curry v. Curry, 987 A.2d 233 (R.I. 2010)* (a co-op was determined to be marital property); *Larsen-Ball v. Ball, 301 S.W.3d 228 (Tenn. 2010)* (a $17 million attorney fee acquired by the husband after the petition for divorce was filed but before the final divorce judgment was treated as marital property).

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Supp. To CHAPTER 37 Marital Property

4-37 Thompson on Real Property, Thomas Editions Supp. to § 37.08

Supp. to § 37.08 Defining Marital Property in Community Property States.

[Go To Main]

§ 37.08(b) Statutory Definitions. [Go To Main]

Ariz. Rev. Stat. Ann. § 25-213 should read as follows:

A spouse's real and personal property that is owned by that spouse before marriage and that is acquired by that spouse during marriage by gift, devise or descent, and the increase, rents, issues and profits of that property, is the separate property of that spouse.

Change citation to:

Swink v. Fingado, 850 P.2d 978 (N.M. 1993) .

Footnote 104 should read as follows:

According to § 766.01(5), "Determination date" means the last to occur of (a) marriage, (b) 12:01 a.m. on the date that both spouses are domiciled in Wisconsin, and (c) 12:01 a.m. on January 1, 1986, which was the effective date of Wisconsin's marital property legislation.

§ 37.08(c) The Community Property Presumption. [Go To Main]

Add:

Sullivan v. Sullivan, 159 S.W.3d 529 (Mo. Ct. App. 2005) ("All property acquired by either spouse subsequent to the marriage and prior to a decree of legal separation or dissolution of marriage is presumed to be marital property regardless of whether title is held individually or by the spouses in some form of co-ownership such as joint tenancy, tenancy in common, tenancy by the entirety, and community property"); *McGee v. McGee, 2005 La. App. LEXIS 678 (La. Ct. App. 2005)* ("Except as provided in Article 2363, all obligations incurred by a spouse during the existence of a community property regime are presumed to be community obligations") *La. Civ. Code Art. 2361*).

The third case in footnote 107, Hinckley v. Hinckley, along with all of the citation and parenthetical material should be replaced as follows:

Talbot v. Talbot, 864 So. 2d 590 (La. 2003) (presumption that things in the possession of a spouse during the existence of the marriage are community property is rebuttable by either spouse upon a showing by a preponderance of the evidence of the separate nature of property brought into the community);

The case *Madsen's Estate v. C.I.R, 650 P.2d 196* should have further information attached to it. The case in whole should read as follows:

Madsen's Estate v. C.I.R., 650 P.2d 196 (1982) overruled by Aetna Life Ins. Co. v. Wadsworth, 689 P.2d 46 (1984) (clear and convincing proof);

Add:

Prague v. Prague, 2005 Tex. App. LEXIS 3143 (Tex. App. 2005) ("Property possessed by either spouse on dissolution of the marriage is presumed to be community property" *Tex. Fam. Code Ann. § 3.003(a)* (Vernon 1998). "To overcome this presumption, the spouse claiming certain property as separate property must clearly identify the property claimed to be separate"); *In re Bivins, 2005 Tex. App. LEXIS 3182 (Tex. App. 2005)* (noting that property obtained during a marriage is presumptively community property, and that "a party who contends that property is separate property bears the burden of proving that contention by clear and convincing evidence"); *Pace v. Pace, 2005 Tex. App. LEXIS 3100 (Tex. App. 2005)* ("The testimony of a spouse seeking to overcome the community property presumption need not be corroborated to meet the clear and convincing standard"); *In re Marriage of Lamp, 2004 Wash. App. LEXIS 2337* (Wash. Ct. App., 2004) ("A rebuttable presumption arises that property acquired during the marriage with separate funds is a gift to the community. Absent clear and convincing proof to the contrary, separate funds used to acquire property in the names of both spouses are subject to this presumption"); *In re Marriage of Elkin, 2004 Wash. App. LEXIS 2242 (Wash. Ct. App. 2004)* ("This presumption may be rebutted by the spouse claiming a separate property interest. The spouse with the separate property interest must trace the assets to a separate property source. *Id.* Tracing must be proved by clear and convincing evidence").

Add:

LeMere v. LeMere, 2003 WI 67 (Wis. 2003) (stating that "the court shall presume that all property is to be divided

equally between the parties, but may alter this distribution without regard to marital misconduct after considering the length of the marriage").

Footnote 110 should be amended to read as follows:

Beck v. Beck, 51 Cal. Rptr. 491 (1996) superseded by statute as stated in In re Marriage of Weaver, 273 Cal. Rptr. 696 (1990) .

Footnote 114 should be amended to read as follows:

Cal. Civ. Code Ann. § 4800.1 repealed by Stats. 1992, c.162 (A.B.2650), § 3, operative Jan. 1 1994.

Add:

Awad v. Rasmussen-Awad, 2004 Tex. App. LEXIS 3226 (Tex. App. 2004) ("A deed executed and delivered during the marriage with no recital that the conveyance was to the separate estate of the grantee is presumptively community property") (quoting *Van Zandt v. Van Zandt, 451 S.W.2d 322, 326 (Tex. App. 1970)* .

The last citation in footnote 124 should be amended to read as follows:

La. Civ. Code Ann. art. 2342(A).

Footnote 125 should be amended to read as follows:

In re Marriage of Saslow, 710 P.2d 346, 353, n.9 (Cal. 1985) . The court notes that the presumption can be overcome only by clear and convincing evidence. *Ragan v. C.I.R., 135 F.3d 329 (5th Cir. 1998)* (personal earnings, while community property, are subject to the sole management and control of the person who earned them) (*citing Tex. Fam. Code Ann. § 3.102(a)(1)*).

Add:

Conley v. Conley, 2005 Tenn. App. LEXIS 281 (Tenn. Ct. App. 2005) ("When a spouse treats separate property in such a way as to give evidence of an intention that it become marital property, this action creates a rebuttable presumption of a gift to the marital estate"); *Sloan v. Hitt, 594 S.E.2d 259 (N.C. Ct. App. 2004)* ("[P]roperty acquired by gift from the other spouse during the course of the marriage shall be considered separate property only if such an intention is stated in the conveyance." *N.C. Gen. Stat. § 50-20(b)(2)* (2003)).

Add:

In re Marriage of Black, 2005 Wash. App. LEXIS 460 (Wash. Ct. App. 2005) ("A spouse's use of his or her separate funds to purchase property in the names of both spouses, absent any other explanation, permits a presumption that the purchase or transaction was intended as a gift to the community") (citing *In re Marriage of Hurd, 848 P.2d 185 (1993))*
.

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Supp. To CHAPTER 37 Marital Property

4-37 Thompson on Real Property, Thomas Editions Supp. to § 37.09

Supp. to § 37.09 Autonomous Classifications: Agreements and Other Transactions Between Spouses.

[Go To Main]

§ 37.09(a) Contract Formalities. [Go To Main]

Add:

In re Marriage of Starkman, 2005 Cal. App. LEXIS 788 (Cal. Ct. App. 2005) (noting that married persons may transmute the separate property of either spouse into community property "by agreement or transfer").

Footnote 133 should be amended to read as follows:

Ariz. Rev. Stat. Ann. § 25.202A; *Cal. Fam. Code Ann. § 1611*; *Nev. Rev. Stat. § 123A.040* (1992); *Tex. Fam. Code Ann. § 4.002*; *Wis. Stat. Ann. § 766.58(1)*. *Hardy v. United States, 1997 U.S. Dist. LEXIS 11790 (D. Nev. 1997)* (ruling than an oral agreement for opting out of the community property regime may be upheld under the doctrine of equitable estoppel).

Footnote 134 should be amended to read as follows:

Ariz. Rev. Stat. Ann. § 25.202A; *Cal. Fam. Code Ann. § 1611*; Wash. Rev. Code Ann. § 11-04.015 (1992); *Tex. Fam. Code Ann. § 4.002*; *Wis. Stat. Ann. § 766.58(1)*.

Footnote 135 should be amended to read as follows:

Ariz. Rev. Stat. Ann. § 25.201; *Cal. Fam. Code Ann. § 1613*; *Nev. Rev. Stat. § 123A.060* (1992); *Tex. Fam. Code Ann. § 4.004*; *Wis. Stat. Ann. § 766.58(5)*.

Add:

Kudrov v. Kudrov, 2005 NY Slip Op. 50257U (N.Y. Misc. 2005) ("[t]he agreement itself must be acknowledged in the manner required to entitle a deed to be recorded. Thus, there must be an oral acknowledgment before an authorized officer, and a written certificate of acknowledgment must be attached to the agreement").

Footnote 137 should be amended to read as follows:

Ariz. Rev. Stat. Ann. § 25.204; *Cal. Fam. Code Ann. § 1614*; *Nev. Rev. Stat. § 123A.070* (1992); *Tex. Fam. Code Ann. § 4.005*; *Wis. Stat. Ann. § 766.58(4)*.

The first part of footnote 138, which lays out different statutes, should be amended to read as follows:

Ariz. Rev. Stat. Ann. § 25.202C; *Cal. Fam. Code Ann. § 1615*; *Nev. Rev. Stat. § 123A.080* (1992); *Tex. Fam. Code Ann. § 4.006(A)*; *Wis. Stat. Ann. § 766.58(6)*.

The last case in footnote 138, and the parenthetical information, should be replaced by the following:

J.A.D. v. F.J.D., 978 S.W.2d 336 (Mo. 1998) (ruling that agreements must be conscionable and entered into "freely, fairly, knowingly, understanding, and in good faith and full disclosure").

§ 37.09(b) Substance of Contracts in General. [Go To Main]

Footnote 139 should be amended to read as follows:

Ariz. Rev. Stat. Ann. § 25.203; *Cal. Fam. Code Ann. § 1612*; *Nev. Rev. Stat. § 123A.050* (1992); *Tex. Fam. Code Ann. § 4.003*; *Wis. Stat. Ann. § 766.58(3)*.

Footnote 142 should be amended to read as follows:

Ariz. Rev. Stat. Ann. § 25.203B (1992); *Cal. Fam. Code Ann. § 1612(B)*; *Nev. Rev. Stat. § 123A.050(2)* (1992); *Tex. Fam. Code Ann. § 4.003(B)*; *Wis. Stat. Ann. § 766.58(1)*.

Change citation to:

Idaho Code § 32-916. See also ...

Footnote 146 should be amended to read as follows:

N.M. Stat. Ann. § 40-2-2

Footnote 153 should be amended to read as follows:

La. Civ. Code Ann. art. 2434.

§ 37.09(d) Interspousal Transactions in California. [Go To Main]

Footnote 165 should be amended to read as follows:

Cal. Fam. Code Ann. § 850(c).

Add:

In re Marriage of Weaver, 127 Cal. App. 4th 858 (Cal. Ct. App. 2005) (*Cal. Fam. Code Ann. § 852(a)*, provides that a transmutation of property is not valid unless made in writing by an express declaration).

The last citation in footnote 166, Cal. Fam. Code Ann. § 853, should be amended as follows:

Cal. Fam. Code Ann. § 853(a).

Footnote 176 should be amended to read as follows:

Id. art. 1750

Footnote 177 should be amended to read as follows:

Id. art. 2343.

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Supp. to § 37.10 The Complications of Time and Mixed Property.

[Go To Main]

§ 37.10(a) Inception of Title vs. Pro Rata Apportionment. [Go To Main]

Add:

Pace v. Pace, 2005 Tex. App. LEXIS 3100 (Tex. App. 2005) ("The inception of title doctrine fixes the character of certain property interests when a party first acquires a right or claim to the property; title need not be vested at such time"); *D.B. v. K.B., 2005 Tex. LEXIS 232 (Tex. 2005)* (noting that the characterization of property as either "community" or "separate" is determined by the inception of title to the property which occurs when a party first has the right of claim to the property).

The first case in footnote 183, *Hawkins v. Hawkins*, should be deleted.

Add:

In re Marriage of Elkin, 2004 Wash. App. LEXIS 2242 (Wash. Ct. App. 2004) (the trial court properly determined that the family home and the condo in Maui were community property, because they were purchased during the Elkins' marriage. However, the court also concluded that the down payments on both the family home and condo were made by Mr. Elkin with separate property funds).

Footnote 187 should be amended to read as follows.

Kingsbery v. Kingsbery, 379 P.2d 893 (Ariz. 1963) .

Add:

Gill v. Gill, 895 So. 2d 807 (La. Ct. App. 2005) ("A person's separate estate is comprised, among other things, of property acquired by a spouse prior to the establishment of a community property regime and property acquired by a spouse with separate things or with separate and community things when the value of the community things is inconsequential in comparison with the value of the separate thing use").

§ 37.10(b) Commingled Property and Tracing in General. [Go To Main]

Add:

Simpson v. Simpson, 2005 Va. App. LEXIS 169 (Va. Ct. App. 2005) (affirming the trial court in finding that certain property was separate, based on the husband's sufficient tracing of sources and based on the wife's failure to show that marital funds were commingled); *In re Marriage of Marzetta, 2005 Wash. App. LEXIS 694 (Wash. Ct. App. 2005)* ("The character of separate property continues through transfers if it can be traced and identified; the separate property is not rendered community property unless the separate property is commingled to the extent that it may not be distinguished or apportioned"); *Measor v. Measor, 160 Ohio App. 3d 60 (Ohio Ct. App. 2005)* ("In order to establish separate property when it is commingled with property of any other type, the source of funds must be traceable"); *Richard v. Richard, 2004 Minn. App. LEXIS 1475 (Minn. Ct. App. 2004)* ("In order to maintain its nonmarital character, nonmarital property must be kept separate from marital property or, if commingled, be readily traceable. Because the record establishes that the parties retained separate accounts during the marriage and did not commingle the accounts with marital property, tracing was not necessary").

Add:

VanWormer v. VanWormer, 2005 Va. Cir. LEXIS 15 (Va. Cir. Ct. 2005) (noting that any appreciation in the accounts as of the date is to be apportioned as marital and separate property in the same ratio).

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Supp. to § 37.11 Classification of Particular Assets.

[Go To Main]

§ 37.11(a) Classification When Spouses Are Separated. [Go To Main]

Add:

Stageberg v. Stageberg, 2005 Minn. App. LEXIS 484 (Minn. Ct. App. 2005) (noting that property acquired during cohabitation prior to marriage is not marital property); *Chase v. Chase, 109 P.3d 942 (Alaska 2005)* ("Property acquired by a couple prior to marriage may be considered marital property when the property was acquired during premarital cohabitation. So long as the parties do marry, the trial court is free to consider the parties' entire relationship, including any period(s) of premarital cohabitation, in making its property division") (citing *Murray v. Murray, 788 P.2d 41, 42 (Alaska 1990))* .

§ 37.11(b) Professions and Employment. [Go To Main]

§ 37.11(b)(1) Salary and Wages.

Add:

In re Marriage of Marzetta, 2005 Wash. App. LEXIS 694 (Wash. Ct. App. 2005), overruled in part by, In re Marriage of McCausland, 159 Wn.2d 607, 152 P.3d 1013, 2007 Wash. LEXIS 124 (noting that all salaries or wages earned by either spouse becomes community property, granting each partner an undivided one-half interest in such community property); *Greene v. Greene, 2004 Ohio 3529 (Ohio Ct. App. 2004)* ("Many appellate courts have likened sick leave benefits to deferred bonus payments or pension plan accumulations and, thus, categorized these benefits as marital property").

The first case in footnote 212 should be amended to read as follows:

See, e.g., Donn v. Kunz, 79 P2d 965 (Ariz. 1900) (earnings belong to community, not to either individual spouse) *overruled in part by Mortensen v. Knight, 305 P.2d 463 (Ariz. 1956)* ;

The last case in footnote 212 should be amended to read as follows:

See also Emard v. Hughes Aircraft Co., 153 F.3d 949, 955 (9th Cir. 1998) (because fringe benefit is part of employee's earnings, fringe benefit is community property, under California law, to the extent that it is earned through employment during marriage) *abrogation recognized by Connecticut Gen. Life. Ins. Co v. Riner, 351 F. Supp. 2d 492 (W.D. Va. 2005)* (stating that under ERISA, courts are divided as to whether insurance proceeds from a decedents work can properly be paid to the spouse as community property or must go directly to the beneficiaries' estate).

§ 37.11(b)(2) Retirement Benefits Generally.

Add:

In re Marriage of Schriner, 2005 Iowa Sup. LEXIS 58 (Iowa, 2005) ("As with pensions, a future interest is properly considered as a marital asset subject to distribution at the time of the divorce to the extent the future interest accrues during the marriage").

Add:

Wilkinson v. Wilkinson, 2004 Ala. Civ. App. LEXIS 309 (Ala. Civ. App. 2004) (recognizing that retirement funds--vested or nonvested, matured or not matured--are marital property divisible upon divorce) (citing *Johnson v. Johnson, 851 P.2d 4 (Wyo. 1993)* and *Wyo. Stat. Ann. § 20-2-114*); *Jordan v. Jordan, 2004 Va. App. LEXIS 285 (Va. Ct. App. 2004)* ("The court may direct payment of a percentage of the marital share of any pension, profit-sharing or deferred compensation plan or retirement benefits, whether vested or nonvested, which constitutes marital property and whether payable in a lump sum or over a period of time") (citing *Va. Code Ann. § 20-107.3*).

Add:

Navas v. Navas, 43 Va. App. 484 (Va. Ct. App. 2004) ("The court may direct payment of a percentage of the marital

share of any pension ... or retirement benefits, whether vested or nonvested, which constitutes marital property and whether payable in a lump sum or over a period of time") (*Va. Code Ann. § 20-107.3(G)(1)*).

Add:

McKnight v. McKnight, 2005 N.Y. App. Div. LEXIS 5257 (N.Y. App. Div. 2005) ("The court has discretion and flexibility in selecting valuation dates for marital assets that are appropriate and fair under the circumstances").

Add:

Prague v. Prague, 2005 Tex. App. LEXIS 3143 (Tex. App. 2005) (noting that when the value of such benefits is in issue, the benefits are to be apportioned to the spouses based upon the value of the community's interest at the time of divorce, not at the time of retirement) (citing *Berry v. Berry, 647 S.W.2d 945, 947 (Tex. 1983))* .

Footnote 226 should amended to read as follows:

McCarty v. McCarty, 453 U.S. 210 (1981) superseded by statute as stated in Brown v. Robertson, 606 F. Supp. 494 (D.C. Tex. 1985) (noting that the *McCarty* decision was "overruled by Congressional action in the passage of the Uniformed Services Former Spouses' Protection Act," *10 U.S.C. § 1408 (1983)*; *See infra § 37.11(b)(3)* n.229.

§ 37.11(b)(3) Government Retirement Benefits.

Add:

In re Marriage of Birt, 208 Ariz. 546 (Ariz. Ct. App. 2004) ("The Arizona Supreme Court found that Congressional intent to wipe out the effects of *McCarty* on persons who had been divorced in the interim period provided express authorization for setting aside such decrees").

§ 37.11(b)(4) Disability Benefits.

Add:

Hoback v. Hoback, 2004 Tenn. App. LEXIS 205 (Tenn. Ct. App. 2004) (In *Gragg*, this Court held that disability benefits do not represent deferred compensation earned during the marriage, but "replace income which is lost before retirement," and therefore, were not marital property absent a showing "that a portion of a spouse's 'disability benefits' is

actually representative of retirement benefits").

The case Hyde v. Hyde should be amended to read as follows:

Hyde v. Hyde, 697 So. 2d 1061, 1065 (La. App. 1997) (holding that disability funds were separate property where employer paid disability insurance premiums and husband would have no right to the funds absent the injury) *declined to follow by Bordes v. Bordes, 730 So. 2d 443 (La. 1999)* .

§ 37.11(b)(6) Worker's Compensation and Severance Pay.

The last case in footnote 244 should be amended to read as follows:

In re Marriage of Stachofsky, 90 Wn. App. 135, 951 P.2d 346 (Wash. App. Div. 3) (holding that stocks purchased during the marriage and those purchased after separation with community funds were community property; options that vested after separation but were awarded 50% for past employment and 50% for future contributions to company were only 50% community property).

§ 37.11(c)(2) Professional Education and Licenses.

Footnote 271 should be amended to read as follows:

La. Civ. Code Ann. art. 121. Cf. Barrow v. Barrow, 669 So. 2d 622 (La. App. 1996) (husband was not entitled to reimbursement for his financial contributions to wife's degree due to his substantial income during this period and lack of sacrifice toward degree).

Footnote 274 should be amended to read:

Mahoney v. Mahoney, 442 A.2d 1062 (N.J. App. Div. 1982) reversed by Mahoney v. Mahoney, 91 N.J. 488 (N.J. 1982) ; *Milteer v. Milteer, 720 N.Y.S.2d 194 (2001)* (the wife's nursing license was considered marital property); *Hassanin v. Hassanin, 719 N.Y.S.2d 254 (2001)* (the husband's undergraduate degree in engineering was considered marital property).

In the text, the line before the quotation based on note 274 should be amended to read:

At least one common law court has suggested a similar analysis, though this analysis was not accepted when it was

reviewed by a higher court:

§ 37.11(c)(4) Income from Property and Investments.

Footnote 284 should read as follows:

"Community property consists of the property, other than separate property, acquired by either spouse during marriage." *Tex. Fam. Code Ann. § 3.002. Ridgell v. Ridgell, 960 S.W.2d 144 (Tex. App. 1997)* .

Add:

Neibaur v. Neibaur, 125 P.3d 1072 (Idaho 2005) (the community was entitled to reimbursement from husband's corporation in divorce action).

§ 37.11(c)(5) Mixing Labor of One Estate with Capital of Another

Footnote 299 should read as follows:

In Texas, the court has discretion in dividing the community estate upon divorce, *Tex. Fam. Code Ann. § 7.002*, but they do not have discretion to award separate real property of one spouse to the other. *Eggemeyer v. Eggemeyer, 554 S.W.2d 137 (Tex. 1977)* . In a similar case, a dissenter wrote that "the majority has confused discretion in *division* of property with discretion in *classifying* property ... a trial court, however, has no discretion in classifying property." *Vallone v. Vallone, 644 S.W.2d 455, 460* (Sondock, J., dissenting).

§ 37.11(d) Personal Injury Awards [Go To Main]

Footnote 308 should read as follows:

Tex. Fam. Code Ann. § 3.002. This section places everything other than separate property, which would include loss of earning capacity during marriage, into the category of community property.

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Supp. To CHAPTER 37 Marital Property

4-37 Thompson on Real Property, Thomas Editions Supp. to § 37.12

Supp. to § 37.12 Management and Control of Marital Property.

[Go To Main]

§ 37.12(a) Management of Separate Property [Go To Main]

The text before footnote 326 should be amended to read as follows:

Under the current Texas statute, "each spouse has the sole management, control, and disposition of that spouse's separate property."

Footnote 326 should be amended to read as follows:

Tex. Fam. Code Ann. § 3.101.

The text before footnote 327 should be amended to read as follows:

Whether the family homestead is separate property of either spouse or community property, "neither spouse may sell, convey, or encumber the homestead without the joinder of the other spouse."

Footnote 327 should be amended to read as follows:

Id. § 5.001.

Footnote 328 should be amended to read as follows:

Id. § 5.002 (separate property) & 5.003 (community property).

Footnote 329 should read as follows:

Id. § 5.101 (separate property).

Footnote 330 should read as follows:

Id.

§ 37.12(b) Duties Between Spouses [Go To Main]

Footnote 336 should be amended to read as follows:

Tex. Fam. Code Ann. § 2.501.

§ 37.12(c) Management of Community Property in Texas [Go To Main]

The statute based on footnote 353 in the text should be amended to read as follows:

During marriage, each spouse has the sole management, control, and disposition of the community property that the spouse would have owned if single, including:

personal earnings;

revenue from separate property;

recoveries for personal injuries; and

the increase and mutations of, and revenue from, all property subject to the spouse's sole management, control, and disposition.

* * * * * *

(c) Except as provided in Subsection (a), community property is subject to the joint management, control, and

disposition of spouses unless the spouses provide otherwise by power of attorney in writing or other agreement.

Footnote 353 should be amended to read as follows:

Tex. Fam. Code Ann. § 3.102.

Footnote 355 should be amended to read as follows:

Tex. Fam. Code Ann. § 3.102(b).

§ 37.12(e) Protection of Third Parties [Go To Main]

The statute quoted on pages 453-454 of the text should be amended to read as follows:

During marriage, property is presumed to be subject to the sole management, control, and disposition of a spouse if it is held in that spouse's name, as shown by muniment, contract, deposit of funds, or other evidence of ownership, or if it is in that spouse's possession and is not subject to such evidence of ownership.

A third person dealing with a spouse is entitled to rely, as against the other spouse or anyone claiming from that spouse, on that spouse's authority to deal with the property if:

the property is presumed to be subject to the sole management, control, and disposition of the spouse; and

the person dealing with the spouse:

is not the part to a fraud on the other spouse or another person; and

does not have actual or constructive notice of the spouse's lack of authority.

Footnote 389 should be amended to read as follows:

Tex. Fam. Code Ann. § 3.104.

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Supp. To CHAPTER 37 Marital Property

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Supp. to § 37.13 Marital Debt and Liability

[Go To Main]

Footnote 400 should be amended to read as follows:

See Idaho Code Ann. §§ 32-910 & *32-911*; 35 Pa. Cons. Stat. § 1700-1; *Wash Rev. Code Ann. § 26.16.200*; *Wis. Stat. Ann. § 766.55*.

§ 37.13(b) Missing [Go To Main]

§ 37.13(b)(2) Liability for Torts.

The last citation in footnote 428 should be amended to read as follows:

See Tex. Fam. Code Ann. § 3.201(a).

Footnote 434 should be amended to read as follows:

Tex. Fam. Code Ann. § 3.201(d). See also, Lawrence v. Hardy, 583 S.W.2d 795 (Tex. Civ. App. 1978) .

§ 37.13(b)(3) Liability for Premarital Debts.

Footnote 442 should be amended to read as follows:

Tex. Fam. Code Ann. § 3.201(b) & *(c)*. Paragraph (b) provides that community property subject to a spouse's sole management and control is not subject to liabilities incurred by the other spouse before marriage; paragraph (c) provides that community property subject to a spouse's sole management and control is subject to liabilities incurred by him before or during marriage. For discussion of the Texas system of management of marital property, *see supra* 37 .12(c). During marriage, each spouse has sole management of property that the spouse would have owned if single, including personal earnings and revenue from separate property. *Tex. Fam. Code Ann. § 3.102*.

§ 37.13(b)(4) Liability of Separate Property Generally.

Footnote 448 should be amended to read as follows:

Cal. Fam. Code Ann. § 913(b)(1); *Idaho Code § 32-911* (1983) (applicable by its terms only to wife's debts and property); *N.M. Stat. Ann. § 40-3-10A*; *Tex. Fam. Code Ann. § 3.201(a)*; *Wash. Rev. Code Ann. § 26.16.200*. *See also Leasefirst v. Borelli, 17 Cal. Rptr. 2d 114 (1993)* , in which the earnings of a wife had been designated as separate property by a prenuptial agreement.

Footnote 452 should be amended to read as follows:

Tex. Fam. Code Ann. § 3.201.

Footnote 458 should be amended to read as follows:

Tex. Fam. Code Ann. § 3.201(a).

§ 37.13(b)(5) Liability of Community Property in General.

Footnote 462 should be amended to read as follows:

Cal. Fam. Code Ann. § 911.

Footnote 466 should be amended to read as follows:

Tex. Fam. Code Ann. § 3.102.

Footnote 467 should be amended to read as follows:

Id. § 3.201(b).

Footnote 469 should be amended to read as follows:

Id. § 3.201(c).

Footnote 470 should be amended to read as follows:

Id. § 3.201(b).

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4-37 Thompson on Real Property, Thomas Editions Supp. to § 37.14

Supp. to § 37.14 Disposition of Marital Property at Death in Community Property States.

[Go To Main]

§ 37.14(c) Inheritance in Community Property States. D.C. Code Ann. § 45-1404

Footnote 524 should be amended to read as follows:

Cal. Prob. Code Ann. § 6401(a); *Idaho Code § 15-2-102*; *N.M. Stat. Ann. § 45-2-102*; *Wash. Rev. Code Ann. § 11-04.015*. *But see Succession of Richaud, 793 So. 2d 1252 (La. App. 2002)* (the decedent's spouse does not have usufruct over the decedent's share of community property).

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Supp. to § 37.15 Division of Marital Property at Divorce in Community Property States.

[Go To Main]

The first citation in footnote 545 should be amended to read as follows:

Tex. Fam. Code Ann. § 7.001(a).

Footnote 546 should be amended to read as follows:

Eggemeyer v. Eggemeyer, 554 S.W.2d 137 (1977) . When community property is not divided in the divorce proceeding, the two parties become owners as tenants in common. Subsequent actions to partition the property can be and have been brought at a later date. This has occurred with some frequency in disputes involving retirement benefits that had not matured at the time of the divorce. Until 1987, such a partition was necessarily an equal division of the property, unlike the equitable division possible at divorce. In 1987, the Texas legislature adopted a statutory partition for some situations in what is now §§ 9.201- 9 .204 of the *Texas Family Code. Sections 9.203* and *9.204* provide that when the divorce court fails to divide community property, "the court [if later asked to partition the property] shall divide the property in a manner that the court deems just and right." This is the same standard applied in division upon divorce. Lawyers have been admonished in numerous decisions, however, to deal with *all* property of the spouses in the divorce proceeding, and the careful lawyer's clients should not generally be required to use these provisions of the Family Code. In *In re Marriage of Moore, 890 S.W.2d 821 (Tex. App. 1994)* , a residuary clause of the divorce decree stated that "any community property or its value not otherwise awarded by this Decree shall continue to be owned by the parties in equal undivided interests." The husband objected to this provision on the basis of the Family Code partition provisions, claiming that "any property not divided is not owned in equal interests under those statutory provisions." The court did not agree but rather concluded that the provisions of §§ 9.201-9.204 were not applicable, since all community property had been divided.

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Supp. to § 37.16 Multi-State Marital Property and Conflict of Laws.

[Go To Main]

§ 37.16(c) Quasi Community Property [Go To Main]

Footnote 580 should read as follows:

Estate of Thornton, 33 P.2d 1 (Cal. 1934) .

Footnote 584 should read as follows:

Ariz. Rev. Stat. Ann. § 25-318; *Tex. Fam. Code Ann. § 7.002*; *See, e.g., In re Estate of Lamparella, 109 P.3d 959 (Ariz. App. 2005)* .

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Add to Articles

Acker, Sarah C. "All's Fair in Love and Divorce: Why Divorce Attorney's Fees Should Constitute a Dissipation of Marital Assets in Order to Retain Equity in Marital Property Distributions," 15 *Am. U. J. Gender Soc. Pol'y & L.* 147 (2006).

Ellis, Benjamin M. "Protecting the Right to Marital Property: Ensuring A Full Equitable Distribution Award with Fraudulent Conveyance," *30 Cardozo L. Rev. 1709* (March, 2009).

Featherston, Tom, and Allison Dickson. "Marital Property Liabilities," *73 Tex. B.J. 16* (January, 2010).

Flannery, Michael T. "Military Disability Election and the Distribution of Marital Property Upon Divorce," *56 Cath. U. L. Rev. 297* (Winter, 2007).

Musselman, James L. "Once Upon a Time in Bankruptcy Court: Sorting Out Liability of Marital Property for Marital Debt is No Fairy Tale," *41 Fam L.Q. 249* (Summer, 2007).

Pagel, Brian F., Jr. "After the Split: The Marital Property Act's Effects on Debt After Marriage," 80 *Wis. Law.* 8 (November, 2007).

Sheldon, John C. "Defining Marital Property," 25 *Me. B.J.* 48 (Winter, 2010).

Annotations

Delete last Annotation on page 513.

Add to Annotations

Annotation, *Copyright, patent, or other intellectual property as marital property for purposes of alimony, support, or divorce settlement, 80 A.L.R.5th 487* .

Annotation, *Default decree in divorce action as estoppel or res judicata with respect of marital property, 22 A.L.R.2d 724* .

Annotation, *Divorce and separation: Determination of whether proceeds from personal injury settlement or recovery constitute marital property, 109 A.L.R.5th 1* .

Annotation, *Divorce and separation: Workers' compensation benefits as marital property subject to distribution, 30 A.L.R. 5th 139* .

Annotation, *Spouses's professional degree or license as marital property for purposes of alimony, support, or property settlement, 3 A.L.R.6th 447* .

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CHAPTER 38 PARTITION

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AUTHOR: Patricia Reyhan Albany Law School Union University

§ 38.syn Synopsis to Chapter 38: PARTITION

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§ 38.02 Voluntary Partition.

§ 38.02(a) General Principles.

§ 38.02(b) Effect of Voluntary Partition.

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§ 38.03(a)(2)(i)(C) Implied Agreements Waiving the Right to Partition.

§ 38.03(a)(2)(ii) Testamentary and Trust Restrictions on the Right to Partition.

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§ 38.03(a)(3) Partition of More Than One Tract in a Single Action.

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§ 38.03(b) Rules of Procedure.

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§ 38.04(a) Partition in Kind.

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§ 38.05(b) Alternate Method -- Appraisal and Sale to One of the Co-Owners.

§ 38.05(c) Disposition of Proceeds of Sale.

§ 38.06 Final Accounting -- Improvements, Expenses, Rents and Profits.

§ 38.07 Costs of Litigation and Attorneys' Fees.

§ 38.08 Partition of Successive Interests.

§ 38.09 Partition of Condominiums or Time-Share Arrangements.

§ 38.09(a) Condominiums.

§ 38.09(b) Time-Shares.

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CHAPTER 38 PARTITION

4-38 Thompson on Real Property, Thomas Editions § 38.01

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§ 38.01 Introduction.

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Co-ownership of land has many benefits, especially at its inception. Two or more parties who cannot afford to purchase or maintain desired realty alone may join forces to accomplish a shared purchase. One who desires to give or devise real property to the objects of his or her bounty can do so in a manner treating all equally, if that is the desire. For its benefits, however, co-ownership also carries considerable burdens. These burdens are most troublesome when cotenants cannot agree on the use, occupation, improvement or, ultimately, disposition of the shared realty. The judicial right of partition exists to allow cotenants to sever their relationship in a manner that neither unduly benefits nor harms any individual cotenant. n1 As the Maine Supreme Court once stated, the purpose of partition is:

> to eliminate by a simple and inexpensive procedure the evils and injustices which often are incident to the holding of land in common or joint tenancy. As the common owners have equal rights in the use and enjoyment of the estate, serious injury is likely to occur to the interest of all if they are not in accord in its management. To meet this difficulty [partition statutes provide] for a prompt division of their respective interests. n2

Put more positively, a partition action "enable[s] those who own property in common to sever their interests" in order to "take possession [of], enjoy and improve [their] separate estate[s]." n3

The law of partition falls into two general categories:

(1) voluntary partition and

(2) judicial or involuntary partition.

Within each of these categories are two subcategories:

(a) actual physical partition (partition in kind) and

(b) partition by sale.

Partition of real property is governed by statute in every state. n4

COMPUTER-ASSISTED RESEARCH

LEXIS: partition! w/30 co-own! w/15 land!

FOOTNOTES:

(n1)Footnote 1. *Frame v. Frame, 740 P.2d 655 (Mont. 1987)* (the fundamental objective of a partition proceeding is to be fair and equitable and confer no unfair advantage upon any of the cotenants). Occasionally, partition serves this function even in the absence of a co-tenancy. *County of Blue Earth v. Turtle, 593 N.W.2d 258 (Minn. App. 1999)* presents the issue of partition rights where partition is sought of two adjoining, but separately owned, parcels of land on both of which stands a single indivisible structure. The county gained title to parcel 1 through a tax foreclosure proceeding by which the Turtles lost all of their interest in that parcel. They continued, however, to own parcel 2. Prior to the foreclosure proceeding, the Turtles had built a 12-unit apartment building across the two parcels. After the proceeding the county sought partition. Neither parcel 1 nor parcel 2 was held in co-tenancy. The court found the existence of the common building sufficient to support an equitable right to partition.

(n2)Footnote 2. *Hoadley v. Wheelwright, 163 A. 790 (Me. 1933).*

See also Little v. Penney, 517 P.2d 809 (Okla. App. 1973) (main purpose of partition is to avoid inconvenience of joint possession). For an example of the acrimony that can arise between cotenants, see *Tillett v. Lippert, 909 P.2d 1158 (Mont. 1996).*

(n3)Footnote 3. *Rosenbaum v. Rosenbaum, 349 N.E.2d 73 (Ill. App. 1976), appeal after remand, 382 N.E.2d 270 (Ill. App. 1978), appeal dismissed, 442 U.S. 935, reh'g denied, 444 U.S. 888 (1979). See also Lichtenstein v. Lichtenstein Bldg. Corp., 442 S.W.2d 765 (Tex. Civ. App. 1969)* (partition is a right much favored upon the ground that it not only secures peace but promotes industry and enterprise); *Peters v. Robinson, 636 A.2d 926 (Del. 1994)* (purpose of partition is to sever joint ownership so that each owner may enjoy property in severalty).

(n4)Footnote 4. Ala. Code § 35-6-20 *et seq.*; Alaska Stat. § 09.45.260 *et seq.*; Ariz. Rev. Stat. Ann. § 12-1211 *et seq.*; Ark. Code Ann. § 18-60-401 *et seq.*; Cal. Civ. Proc. Code § 872.010 *et seq.*; Colo. Rev. Stat. Ann. § 38-28-101 *et seq.*; Conn. Gen. Stat. Ann. § 52-495 *et seq.*; Del. Code Ann. tit. 25, § 721 *et seq.*; D.C. Code Ann. § 16-2901 *et seq.*; Fla. Stat. Ann. § 64.011 *et seq.*; Ga. Code Ann. § 44-6-140 *et seq.*; Haw. Rev. Stat. § 668-1 *et seq.*; Idaho Code § 6-501 *et seq.*; Ill. Comp. Ann. Stat. ch. 735, § 5-17-101 *et seq.*; Ind. Code Ann. § 32-17-4-8; Iowa Code Ann. § 651.1 *et seq.*; Rules of Court Rule 270 *et seq.*; Kan. Stat. Ann. § 60-1003; Ky. Rev. Stat. Ann. § 381.135 *et seq.*; La. Civ. Code Ann. art. 807; La. Code Civ. Proc. Ann. art. 4601 *et seq.*; Md. Code Ann., Real Prop. § 14-107 *et seq.*; Me. Rev. Stat. Ann. tit. 14, § 6501 *et seq.*; Mass. Ann. Laws ch. 241; Mich. Stat. Ann. § 27A.3301 *et seq.*; Minn. Stat. Ann. § 558.01 *et seq.*; Miss. Code Ann. § 11-21-1 *et seq.*; Mo. Ann. Stat. § 528.010 *et seq.*; Mont. Code Ann. § 70-29-101 *et seq.*; Neb. Rev. Stat. § 25-21.100; Nev. Rev. Stat. Ann. § 39.010 *et seq.*; N.H. Rev. Stat. Ann. § 547-C:1 *et seq.*; N.J. Stat. Ann. § 2A:56-1 *et seq.*; N.M. Stat. Ann. § 42-5-1 *et seq.*; N.Y. Real Prop. Acts § 901 *et seq.*; N.C. Gen. Stat. § 46-1 *et seq.*; N.D. Cent. Code § 32-16-01 *et seq.*; Ohio Rev. Code Ann. § 5307.01 *et seq.*; Okla. Stat. Ann. tit. 12, § 1501.1 *et seq.*; Or. Rev. Stat. § 105.205 *et seq.*; 42 Pa. Con. Stat. Ann. § 1552; R.I. Gen. Laws § 34-15-1 *et seq.*; S.C. Code Ann. § 15-61-10 *et seq.*; S.D. Codified Laws Ann. § 21-45-1 *et seq.*; Tenn. Code Ann. § 29-27-101 *et seq.*; Tex. Prop. Code Ann. § 23.001 *et seq.*; Utah Code Ann. § 78-39-1 *et seq.*; Vt. Stat. Ann. tit. 12, § 5161 *et seq.*; Va. Code Ann. § 8.01-81 *et seq.*; Wash. Rev. Code Ann. § 7.52.010 *et seq.*; W. Va. Code § 37-4-1 *et seq.*; Wis. Stat. Ann. § 842.01 *et seq.*; Wyo. Stat. § 1-32-101 *et seq.*

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CHAPTER 38 PARTITION

4-38 Thompson on Real Property, Thomas Editions § 38.02

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§ 38.02 Voluntary Partition.

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§ 38.02(a) General Principles.

The law governing voluntary partition is relatively straightforward. n5 One of the general incidents of land ownership is the power to convey, and the power of partition is one example of the general power to convey. The key requirement of a voluntary partition is that all of the co-owners of the co-owned estate must join in the partition of the parcel. n6 In the simplest of scenarios, A, B and C are co-owners of a parcel. All agree

(1) on the fact that they desire to sever their joint tenancy,

(2) on the proper division of the property into aliquot (proper individual) shares, and

(3) on the assignment of shares to individual owners.

A, B and C will then exchange mutual deeds n7 in which all join as grantors to one as grantee for each of the three parcels. Each of the previous co-owners becomes sole owner of one of the parcels. n8 A voluntary partition entered into by all co-owners will be legally effective unless there is some contractual defense to its recognition, such as fraud or unconscionability, or if the partition has as its primary purpose the defrauding of third parties. n9

An important requirement is that there must be agreement not only as to the desirability of the severance of the common ownership but also on the precise nature of it. n10 Discord among the co-owners about allocation of the divided shares may prevent voluntary partition. This discord may be eliminated in practice without the necessity of court action by allowing a neutral third party to allocate the shares. n11 Where the physical description of the shares has resulted in shares of greater or lesser value, the parties may agree on a monetary value reflecting the difference to be paid by a recipient of a greater share to a recipient of a smaller share. n12

Another alternative, where the precise mechanics of a physical partition are a subject of discord among co-owners, is sale of the entire parcel. n13 This alternative may also be attractive to co-owners who are not in discord but who agree that the value of the parcel as a whole exceeds the sum of the values of its parts. Whatever the motivation for a partition

by sale, it is essential in voluntary partitions that all of the co-owners agree to the sale. Once the sale is completed the former co-owners divide the proceeds according to their respective shares.

The above discussion assumes a written conveyance by the co-owners either to each other or to a third party. Serious legal problems arise when the co-owners reach a parol agreement which is not followed by written conveyances and then go into separate possession of their agreed-upon parcels. Before adoption of the Statute of Frauds, the oral agreement combined with the individual possession sufficed to sever the joint tenancy. The Statute of Frauds clouded the issue considerably, inasmuch as it requires a writing to convey an interest in land. Relatively recent cases addressing the issue, recognizing that partition is an equitable remedy, have on the basis of estoppel given effect to parol partitions followed by separate possession. n14 In essence, courts in these cases apply a general exception to the Statute of Frauds based upon part performance of an oral contract. n15

COMPUTER-ASSISTED RESEARCH

LEXIS: voluntary w/5 partition w/30 co-own! w/15 land!

§ 38.02(b) Effect of Voluntary Partition.

While there is no question of the right of co-owners to partition voluntarily their co-owned land, the precise legal effect of their actions has caused troublesome questions when raised in certain post-partition contexts. These questions are raised by the traditional judicial view that a voluntary partition simply severs the unity of possession and does not operate to convey title. n16 While this view of the effect of partition is understandable in the context of parol partitions, it may also be applied where the partition was accomplished by deed. n17 Even where parties use full warranty deeds to effect the conveyance, the same rule is applied. n18

The primary context in which this issue has arisen is in a voluntary partition, if a co-owner and spouse obtain their portions of the property as tenants by the entirety where the co-owner but not the spouse previously held the co-owned interest. The traditional rule described above results in the conclusion that the spouse takes nothing. n19 The same result is reached where the conveyance is to the co-owner and the co-owner's children. n20

A few courts have indicated a willingness to recognize a new title where the intent of the parties to create one is manifestly clear. n21 Of course, even where partition is ineffective in the creation of a new title in a non-co-owner, the co-owner who does receive separate ownership of the parcel may accomplish the desired result by a second conveyance as sole grantor to the grantees of choice.

COMPUTER-ASSISTED RESEARCH

LEXIS: voluntary w/5 partition w/30 co-own! w/15 land! w/15 effect!

FOOTNOTES:

(n1)Footnote 5. *Douglas v. Douglas, 280 So. 2d 146 (Ala. App. 1973)* (co-owners may partition acreage in any fashion they desire); *Rowland v. McAlester Fuel Co., 201 S.W.2d 742 (Ark. 1947)* (a voluntary partition is a partition made through the mutual consent of co-owners); *Harmon v. Harmon, 508 So. 2d 616 (La. App. 1987), writ denied, 513 So. 2d 1210 (La. 1987)* (co-owners may agree to voluntary and binding partition).

(n2)Footnote 6. *Moore v. Hill, 79 A.2d 840 (N.H. 1951)* (voluntary partition by deed executed by fewer than all tenants was invalid *unless* none of the owners of the conveyed land was required to give the non-participating cotenant his share); *State v. Kirkpatrick, 299 S.W.2d 394 (Tex. Civ. App. 1957)* (all cotenants must be party to voluntary partition); *Dierschke v. Central Nat'l Branch of First Nat'l Bank, 876 S.W.2d 377 (Tex. App. 1994).*

(n3)Footnote 7. *O'Brien v. O'Brien, 391 N.Y.S.2d 502 (1976)* (partition may be accomplished by written instrument in deed form or otherwise); *Houston Oil Co. of Tex. v. Kirkindall, 145 S.W.2d 1074 (Tex. 1941)* (co-owners may partition through deed or other written instrument).

(n4)Footnote 8. *Prothro v. Holder, 479 S.W.2d 248 (Ark. 1972)* (voluntary partition is effected by mutual releases or conveyances to each individual owner by co-owners); *Albro v. Allen, 454 N.W.2d 85 (Mich. 1990)* (partition of lands may be accomplished voluntarily by co-tenants); *Weever v. Weever, 579 P.2d 216 (Okla. App. 1978)* (partition agreement is not a conveyance but a remedial measure to relieve multiple undivided landowners of potential inconveniences and incompatibilities); *Stradt v. First United Methodist Church of Huntington, 567 S.W.2d 810 (Tex. Civ. App. 1978), rev'd, 573 S.W.2d 186 (Tex. 1978)* (common owners may agree to partition co-owned land so that each receives a separate share in severalty).

(n5)Footnote 9. *Young v. Bozeman, 190 S.E.2d 523 (Ga. 1972)* (agreements to partition will generally be upheld in absence of injury to third persons); *Carter Oil Co. v. McQuigg, 112 F.2d 275 (Ill. 1940)* (partition will be set aside if purpose was to defraud innocent third parties such as those with mortgages or leases on undivided interest).

(n6)Footnote 10. *Swindle v. Curry, 129 S.E.2d 144 (Ga. 1962)* (a partition agreement may be set aside for indefiniteness); *Giardina v. Giardina, 158 So. 615 (La. 1935)* (agreement held unenforceable as indefinite where parties agreed not to partition until real estate values rose).

(n7)Footnote 11. *Hemphill v. Hemphill, 7 S.E.2d 762 (Ga. App. 1940)* (partition may be made by arbitrators selected by co-owners); *Glovier v. Dingus, 4 S.E.2d 551 (Va. 1939)* (partition may be made by commissioners selected by co-owners).

(n8)Footnote 12. *See* general discussion of owelty *infra* at nn.124-128. *Sayers v. Pyland, 161 S.W.2d 769 (Tex. 1942)* (agreement to pay owelty is a lien which may be implied even if not express).

(n9)Footnote 13. *Krokroskia v. Martin, 61 So. 2d 630 (La. App. 1952)* (private partitions in form of sale are valid).

(n10)Footnote 14. *Snodgrass v. Snodgrass, 115 So. 21 (Ala. 1927)* (parol agreement binding if accompanied by exclusive possession); *Herrman v. Golden, 418 N.E.2d 187 (Ill. App. 1981)* (oral partition valid if it exists, is followed by separate possession, is reasonably certain as to its subject matter, is based on valuable consideration and is fair); *Howard v. Carmichael, 35 S.W.2d 852 (Ky. 1931)* (where co-owners take individual possession of separate parts and hold individually for a number of years, partition is presumed); *Cave v. Wells, 5 S.W.2d 636 (Mo. 1928)* (parol partition and exclusive possession held valid); *Hughes v. Kay, 242 P.2d 788 (Or. 1952)* (parol partition with exclusive possession does not violate Statute of Frauds); *Martin v. Taylor, 521 S.W.2d 581 (Tenn. 1975)* (parol partition followed by exclusive possession is binding and enforceable); *Reynolds v. Mangrum, 250 S.W.2d 283 (Tex. Civ. App. 1952)* (parol partition with possession is valid); *Allen v. Allen, 166 P. 1169 (Utah 1917)* (parol partition plus separate possession is valid).

(n11)Footnote 15. *Johnson v. Long, 199 A. 459 (Md. 1938)* (parol partition with possession is part performance which takes the agreement out of the Statute of Frauds).

(n12)Footnote 16. *Prothro v. Holder, 479 S.W.2d 248 (Ark. 1972)* (exchange of partition deeds without any other consideration does not convey title); *Harvey v. Moran's Adm'r, 245 S.W.2d 452 (Ky. 1952)* (partition does not transfer title); *Thurmon v. Hogg, 72 So. 2d 500 (La. 1954)* (partition does not transfer title); *Holt v. Holt, 202 S.W.2d 650 (Tenn. 1947)* (partition does not transfer title, but merely severs unity of possession); *Foster v. Foster, 151 S.E. 157 (Va. 1930)* (partition creates no new title). *Dierschke v. Central Nat'l Branch of First Nat'l Bank, 876 S.W.2d 377 (Tex. App. 1994).*

(n13)Footnote 17. *Brown v. Smith, 405 S.W.2d 249 (Ark. 1966)* (partition deed does not create a title but merely severs unity of possession); *Combs v. Combs, 160 S.E.2d 308 (N.C. 1968)* (partition deed does not convey title).

(n14)Footnote 18. *Keith v. Keith, 599 S.W.2d 214 (Mo. App. 1980); Combs v. Combs, 160 S.E. 308 (N.C. 1968).* Keith v. Keith was superseded by statute as stated in *Plant v. Plant 825 S.W.2d 674 (Mo. App. 1992).*

(n15)Footnote 19. *Powell v. Powell, 183 S.W. 625 (Mo. 1916)* (no tenancy by the entirety was created in deed to co-owner and her non-co-owner spouse); *Harris v. Ashley, 248 S.E.2d 393 (N.C. 1978)* (partition severs unity of possession; it does not create a new tenancy by the entirety); *Johnson v. Beard, 332 S.W.2d 208 (Tenn. 1960)* (partition severs unity of possession; it does not create a new tenancy by the entirety). Powell v. Powell was superseded by statute as stated in *Stephens v. Stephens 842 S.W.2d 909 (Mo. App. 1992).*

(n16)Footnote 20. *Edwards v. Batts, 97 S.E.2d 101 (N.C. 1957)* (children who were not co-owners could not take title through partition).

(n17)Footnote 21. *Douglas v. Douglas, 280 So. 2d 146, cert. denied, 280 So. 2d 149 (Ala. 1973); Brown v. Brown, 297 S.E.2d 619 (N.C. App. 1982), rev. den., 301 S.E.2d 388 (N.C. 1983).*

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CHAPTER 38 PARTITION

4-38 Thompson on Real Property, Thomas Editions § 38.03

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§ 38.03 Involuntary Partition.

[Go To Supp]

§ 38.03(a) Rules of Law.

§ 38.03(a)(1) Partition as a Matter of Right.

Unless exceptional circumstances exist, n22 any tenant in common or joint tenant has a right to seek a judicial partition of land in which the common interest is held. n23 This right exists even where every other co-owner of the land objects to the partition. Objections to this right on constitutional grounds have not succeeded. n24

Although the opposite was once the case, a cotenant is now not required to be in actual possession of the land in order to seek partition. n25 But, at least as to those claiming a present, as opposed to future, n26 interest, a right to possession is essential. n27 As a result, courts have held that a cotenant who is ousted from the co-owned property must succeed in an action to recover possession as a prerequisite to a suit for partition. Similarly, where, as part of a divorce decree, an ex-spouse has been given exclusive possession of realty held in tenancy in common with the former spouse, the ex-spouse who is out of possession may not sue for partition. n28 An allegation of ownership will normally be held to imply a right of possession so parties are not required to allege separately their possessory rights. n29

The motive of the plaintiff in seeking partition is irrelevant even in equity. n30 A court in equity may, however, deny partition where the interests of the other parties would be irreparably harmed. n31 Equity courts rarely find such irreparable harm. Arguments that partition will displace children or spouses have failed. n32 The following illustrates the kind of situation where the standard may be met. A owns parcel 1, B owns parcel 2 and A, B and C are co-owners of parcel 3. C brings an action for partition of parcel 3. Where parcel 3 is the only reasonable means of access to the other two parcels and partition cannot be made without denying or substantially restricting that access, partition may be denied. n33

At one time, courts followed the rule that if there were any challenge to the existence or extent of a party's title or interest in the property sought to be partitioned, a court hearing the partition petition could not or should not evaluate or decide the title or interest question. n34 Thus, once the defendant challenged plaintiff's title, the partition proceeding was dismissed or held in abeyance until the title issues could be resolved in a separate action. Only a small majority of

states continue to adhere to this limiting view of the court's power in a partition proceeding. n35 The majority of states have changed this rule and now allow a court hearing a partition action to adjudge challenged claims and interests, decide all questions of title and remove clouds on title where appropriate. n36 As one court put it, "[i]f one owner by merely filing a plea setting up want of title in the petitioner could force him to establish his title in a suit at law before proceeding with his petition for partition, the salutary purpose of [the statutory right of partition] would be thwarted." n37

If one party challenges the title or interest of another, the timing of the resolution of the challenge depends upon whether the partition is to be made in kind or through sale. n38 If the land is to be actually divided among those with a rightful claim to it, issues of title and interest often must be resolved before the partition is made, simply because the number and size of the shares must be known in advance. Where, however, both the number and size of the shares are known and the title dispute involves only identification of the rightful claimant to one of the shares, the court may proceed with the physical partition of the land, allot the undisputed shares and then resolve title issues involving the disputed share.

Where partition is to be by sale, statutes in many states require that title issues be resolved in advance of the sale. n39 In other states the court is required to resolve title issues only before full distribution of the proceeds of the sale. n40

In one instance a title dispute must be decided before either kind of partition. Because a court may not order a partition if none of the interested parties seek it, n41 if there is a single petitioner and the title of that person is challenged the court must determine that person's title initially in order to determine the right to sue for partition:

> The person wishing the partition brings a civil action in which he claims the right to a partition. If another party in the action claims that the person bringing the action does not have title the question of title can be tried as a claim in the action. If it is found that the person bringing the action has no title to the premises the case will be terminated at that point. If, on the other hand, it is found that he has a sufficient title to maintain a claim for partition he will proceed to do so in the same action. n42

COMPUTER-ASSISTED RESEARCH

LEXIS: involuntary or right! w/5 partition w/15 land!

§ 38.03(a)(2) Exceptions to the Right.

§ 38.03(a)(2)(i) Agreements Waiving the Right to Partition.

The right to partition which is held by cotenants may be voluntarily relinquished by them through agreements to waive the right. In most cases these are written agreements, and some courts have held that the Statute of Frauds requires that they be. A few courts, however, have enforced oral agreements under principles applicable to the general Statute of Frauds exceptions based on past performance. In occasional cases, courts have shown a willingness to recognize implied agreements by cotenants to waive partition rights based upon a course of conduct by the cotenants or upon evidence that the purpose of the co-tenancy would be undermined by recognition of a unilateral right to partition.

COMPUTER-ASSISTED RESEARCH

LEXIS: agreement! w/15 waiv! w/5 right! w/5 partition

§ 38.03(a)(2)(i)(A) Written Agreements Waiving the Right to Partition.

Despite some objections that written agreements waiving the right to partition interfere with the alienability of land, virtually every court that has addressed the issue has recognized a general power of co-tenants to bind themselves to

agreements in writing waiving the right of partition. n43 The burden of proof is on the party alleging the agreement. n44 Because such agreements do function to restrict the alienability of land, most courts require that such agreements not be unreasonable or extend for an indefinite period of time. n45 Agreements which are binding only during the lives of the cotenants are held to satisfy this standard. n46 Where agreements are silent as to duration, most courts will not imply a reasonable duration n47 unless the agreement clearly indicates a basis for such implication.

The majority of courts have held that a valid agreement by cotenants waiving the right to partition, where the agreement purports to do so, will be held binding on the successors in interest to the contracting cotenant. n48 It is essential, however, that the mutual agreement indeed purport to bind successors. n49 A similar bar to the exercise of a right to partition arises not only when the cotenants contract with each other to waive the right but when the instrument through which a cotenant took the interest prohibits exercise of the right. n50

COMPUTER-ASSISTED RESEARCH

LEXIS: writ w/2 agreement! w/15 waiv! w/5 right! w/5 partition

§ 38.03(a)(2)(i)(B) Oral Agreements Waiving the Right to Partition.

Oral agreements not to partition have raised more troublesome questions for courts asked to enforce them. The major obstacle to enforcement of such agreements has been the Statute of Frauds. n51

Increasingly, courts have overcome the obstacle and enforced oral agreements by employing general exceptions to the operation of the statute. Thus, the statute has not been a bar where the oral agreement has been substantially performed, so that the refusal to enforce it would essentially amount to fraud. n52

COMPUTER-ASSISTED RESEARCH

LEXIS: oral w/2 agreement! w/15 waiv! w/5 right! w/5 partition

§ 38.03(a)(2)(i)(C) Implied Agreements Waiving the Right to Partition.

Agreements not to seek a partition have been implied by courts where the purpose of the cotenants in holding the property in cotenancy would be defeated by a partition. n53 "It is settled law that if it appears the tenants in common of a tract of land have formulated plans and entered into agreements in reference to the management of the common property and the plans and agreement are of such a character that to grant partition would be to destroy the mutual agreement of the parties, then an agreement not to partition will be implied." n54 It is not sufficient that the parties have merely contemplated they would not partition the property. n55 Rather, there must be affirmative evidence from writings or conduct that this was the intention of the parties.

A common situation where a court appears willing to imply an agreement waiving a partition right is if formerly married parties agree that one can remain in the marital home in exchange for a forbearance in demanding support from the other. This arises most often when the wife is allowed to remain in the home and the husband agrees to pay costs of maintaining the home and, as a result, the wife does not seek alimony. Courts uniformly have rejected the husband's later request for partition, reasoning that the other agreements imply an agreement by the husband to waive the right to partition. n56 An agreement not to exercise the right of partition has also been implied where cotenants agreed that any and all decisions regarding the property were to be made by majority decision of the cotenants. n57

In a number of cases, defendants seeking to bar a partition have argued that the cotenants impliedly agreed not to partition when they took title as joint tenants with right of survivorship, the survivorship language suggesting the cotenants were to remain in that relationship until there was a single survivor. Courts uniformly reject this argument.

n58

COMPUTER-ASSISTED RESEARCH

LEXIS: implied w/2 agreement! w/15 waiv! w/5 right! w/5 partition

§ 38.03(a)(2)(ii) Testamentary and Trust Restrictions on the Right to Partition.

Courts will uphold a testamentary restriction on the right of partition where that restriction is limited in its duration. n59 Partition will be barred even if the restriction does not apply to plaintiff's interest if plaintiff's interest is derived from a common instrument restricting the partition right of another cotenant. For example, in *Rodkey v. Rees*, n60 partition was denied because a cotenant of the plaintiff was a testamentary trustee barred by the terms of the trust from selling, transferring or disposing of the trust. The court stated the rule that where the cotenancy interests derived from the decedent, partition is not allowed "if to do so contravenes a condition or restriction imposed on the estate by will or deed of the one through whom the person seeking partition claims." n61

Partition will not be granted if to do so would violate the terms of a trust or defeat the trust's purposes. n62 Some courts hold that property held in an active trust may not be partitioned unless expressly authorized by the trust. n63 The fact that a co-ownership interest in land is held in trust will never bar other cotenants, whose interests are not in trust, from seeking partition. n64

COMPUTER-ASSISTED RESEARCH

LEXIS: testament! or trust w/5 restrict! w/30 right! w/5 partition

§ 38.03(a)(2)(iii) Equitable Considerations Barring the Right to Partition.

The rule that partition is a matter of right is qualified by the equitable principle that that right will not be recognized where to order partition will work a fraud, hardship or undue oppression on a party resisting the partition. n65 This exception is applied only in rare circumstances. n66

Hassell v. Workman n67 exemplifies the rare case where a court refused partition on the ground that to allow it would work an injustice on one of the cotenants. Plaintiff and defendant were tenants in common with equal shares of adjoining lots on which a warehouse had been built. Defendant managed the property, which was worth less than $10,000 at the time of purchase. Plaintiff sought partition by sale. Defendant resisted. Evidence at trial indicated that plaintiff was fully satisfied with defendant's management of the property; that the premises were subject to a lease generating $620 per month; that plaintiff's interest individually was likely to bring more money if sold than as a share of proceeds of a public auction of the premises; that defendant, while unable to purchase plaintiff's share, had offered to assist plaintiff in selling it to a third party; that defendant did not desire to sell the defendant's interest because the defendant did not know of any other investment that would bring so great a return; and that the property sought to be partitioned by sale was, at the time of trial, worth between $60,000 and $65,000, which would subject both plaintiff and defendant to considerable tax liability. On these facts, the trial court concluded that a partition at that time would work a hardship and be an "instrument of oppression" upon the defendant. n68 The Oklahoma Supreme Court affirmed.

Another of the rare cases in which partition is refused solely on the ground that to order it would work an injustice unacceptable to the court is *Condrey v. Condrey*. n69 Two elderly parents in poor health and unable to support themselves conveyed their residence and property to themselves and their son and daughter-in-law as joint tenants with right of survivorship. The reason for the conveyance was protection of the parties. The parents desired to retain their home but needed the son and daughter-in-law to live on the property to maintain and improve it. The son and daughter-in-law wanted assurance that the labor and money they expended would accrue to them on the parents' death

rather than being shared with the other children of the parents. In denying the son and daughter-in-law's prayer for partition the court noted, "[i]t is not conceivable under these facts that the parents ... intended by said arrangement to put themselves in position to be forced from their home or surrender their right to live there... . Where the effect of granting partition would be to reach a result such as would exist in this case we believe that a court of equity has the right in its discretion to refuse to grant it... ." n70

COMPUTER-ASSISTED RESEARCH

LEXIS: equit! w/30 right! w/5 partition

§ 38.03(a)(3) Partition of More Than One Tract in a Single Action.

Where co-owners hold separate tracts in common, it is well-established that these tracts may be partitioned in a single action. n71 It is not necessary that each co-owner have the same share in each tract. n72

As a general rule, multiple tracts cannot be included in one partition action if a co-owner of one tract does not have a co-ownership interest in another included tract. An exception exists where the tracts in question once had co-owners in common. For example, if A, B, and C were, at one time, co-owners of parcels 1 and 2, and C sold C's interest in parcel 2 to D, A or B could bring a single action to partition parcels 1 and 2, making both C and D parties.

The above paragraphs address the permissiveness of joining multiple co-owned tracts in a single action. The general rule is that multiple tracts *should* be included in a single proceeding where the co-ownership of the multiple tracts was created in a single instrument, such as a will or through the legal effect of a single event, such as death intestate. n73

When multiple tracts, co-owned by the same persons, are joined in a single partition proceeding, the court is to consider the tracts together in considering whether a physical partition can be fairly and equitably made. n74 The fact that one tract cannot be divided in kind will not justify a sale if it is possible to divide the multiple tracts among the multiple owners equitably.

COMPUTER-ASSISTED RESEARCH

LEXIS: partition w/15 multiple w/2 tracts

§ 38.03(a)(4) Partition of Property Subject to a Lease.

Partition is complicated somewhat if the property to be partitioned is subject to a lease. The basic rule in such a case is that neither a partition in kind nor a partition sale will affect the lessee's possessory rights. n75 If the lease was executed by all co-owners, any partition will be subject to the lease. n76 A partition in kind will be delayed in possessory effect until the lease is terminated. A partition by sale could be consummated but the purchaser would take subject to the lease. n77

A lease executed by fewer than all the co-owners does not bar a partition action. n78 Where the lease is executed by one co-owner only and a physical partition is ordered, the lease will normally continue on the property allotted to the lessor. n79 A partition sale would cause greater problems but the appropriate answer seems to be that the lessee and the purchaser would be tenants in common for the remainder of the lease.

COMPUTER-ASSISTED RESEARCH

LEXIS: partition w/15 property w/5 subject w/2 lease!

§ 38.03(b) Rules of Procedure.

§ 38.03(b)(1) Complaint or Prayer for Partition.

Many states define by statute those matters that must be specifically set out in the complaint or petition for partition. The following seem to be consistently required:

(1) a sufficient description of the property to be partitioned;

(2) the names and shares of each owner, known and unknown; and

(3) a prayer for division or, if sale is sought, an averment that the standard for sale has been met. n80

Some statutes require in addition a statement of the estimated value of the land. n81 Others require a statement of the "origin, nature and extent" of the respective shares. n82 Many states require that the fact of unknown owners be specifically alleged in the complaint. n83 Where there are unknown owners, notice must be given to such owners through publication. n84 In some states, the court is statutorily empowered to appoint counsel or a guardian to represent unknown owners. n85

COMPUTER-ASSISTED RESEARCH

LEXIS: complaint! or prayer! w/15 partition!

§ 38.03(b)(2) Parties -- Plaintiff.

By either statute or case law, every state requires that a party plaintiff be an "interested" party. An "interested" party is a tenant in common or joint tenant, or a party who claims a recognized right on behalf of a tenant in common or joint tenant. n86 In general, tenants by the entirety cannot seek partition without converting that interest to a tenancy in common or joint tenancy. n87 Most community property states similarly do not allow a unilateral action for partition. n88 Courts that have addressed the issue have held that cotenant lessees may partition a leasehold as long as the lessor's rights are not thereby affected. n89 A judgment creditor of a cotenant does not have such an interest as to give the judgment creditor a right to partition. n90

Devisees of real property generally are not permitted to bring an action for partition if partition is directly contrary to the terms of a will through which they took their interest. n91 Additionally, no property held wholly in an estate may be partitioned until the estate is ready for distribution. n92 But if a cotenant's interest is not part of an estate that includes other cotenants' interests, an action may be brought by the former. n93 A trustee in bankruptcy of a cotenant may bring an action for partition where authorized by the bankruptcy court. n94

COMPUTER-ASSISTED RESEARCH

LEXIS: plaintiff! w/15 interested w/1 part! w/30 partition!

§ 38.03(b)(3) Parties -- Defendant.

All states require that the plaintiff name as defendants all others who claim "interests" in the same property. Minimally, "interested" persons include all others who are co-owners of the subject property. Some states require that each of such defendants set forth in the answer the origin, nature and extent of the defendant's interest. n95

Courts have held that any purchaser under contract to buy the interest of a cotenant should be made a party. n96

States vary on whether persons who hold liens on the property sought to be partitioned must be made parties. Some differentiate between holders of liens against the entire property and holders of liens on less than the entire property. n97 Others require that all lienholders of record be made parties, whether the lien is on all or part of the subject property. n98 Still others prohibit making any person who does not hold legal title a party. n99 Such states usually provide for notice to others having a claim or encumbrance against the property, such as mortgagees, lienholders and attaching creditors and allow these persons to intervene to protect or establish their rights. n100 Other states allow but do not require persons holding liens to be made parties. n101

COMPUTER-ASSISTED RESEARCH

LEXIS: defendant! w/15 interested w/1 part! w/30 partition

§ 38.03(b)(4) Intervention.

Most states provide a right of intervention for an "interested" person who has not been made a party. n102 The definitions of "interested person" for purposes of intervention are similar to definitions of persons who should be made party-defendants, n103 except in those rare states that provide for intervention by persons who by statute cannot be made defendants. n104 It has been held that a person who holds a simple money judgment against one or more co-owners cannot intervene in a partition action. n105

COMPUTER-ASSISTED RESEARCH

LEXIS: interven! w/30 interested w/1 person w/50 partition!

FOOTNOTES:
(n1)Footnote 22. *See* discussion *infra* at § 38.03(a)(2).

(n2)Footnote 23. *Ragland v. Walker, 387 So. 2d 184 (Ala. 1980), appeal after remand, 411 So. 2d 106 (Ala. 1982);* Ark. Code Ann. § 18-60-404. Arkansas' rule is unique. It provides that a stranger who purchases a co-ownership interest in real property of ten acres or more may not sue for partition for three years after the date of purchase unless the purchaser individually or collectively with other plaintiffs owns 50% of the property to be partitioned. *Farmer v. Farmer, 526 A.2d 1365 (D.C. App. 1987); Hazelwood v. Hazelwood, 345 So. 2d 819 (Fla. App. 1977); Ellis v. Jenkins, 295 S.E.2d 736 (Ga. 1982); Heldt v. Heldt, 193 N.E.2d 7 (Ill. 2d 1963);* Ind. Code Ann. § 32-4-5-1; La. Civ. Code Ann. art. 807; *Baltimore Gas & Elec. Co. v. Bowers, 157 A.2d 610 (Md. 1960); Albro v. Allen, 454 N.W.2d 85 (Mich. 1990);* Minn. Stat. Ann. § 558.01; Mo. Ann. Stat. § 528.030; *Martinez v. Martinez, 650 P.2d 819 (N.M. 1982); Yeshiva Univ. v. Edelman, 176 N.Y.S.2d 534, aff'd, 181 N.Y.S.2d 180 (1958); First Trust Co. of N.D. v. Mast, 385 N.W.2d 104 (N.D. 1986); Wilson v. Hartman, 545 P.2d 742 (Okla. 1976); Ware v. Ware, 809 S.W.2d 569 (Tex. App. 1991);* Vt. Stat. Ann. tit. 12, § 5161; *Prario v. Novo, 645 N.Y.S.2d 269 (1996)* (tenancy by the entirety cannot be divided absent consent of both spouses or divorce); *Dierschke v. Central Nat'l Branch of First Nat'l Bank, 876 S.W.2d 377 (Tex. App. 1994). But see Dunn v. Patton, 718 N.E.2d 264 (Ill. App. 1999)* (mineral rights are subject to partition only if held in co-tenancy and severed from the surface estate; where, as here, the party seeking partition owned the mineral rights and the party resisting partition had mineral and surface rights, partition is not available); *Glover v. Ware, 510 S.E.2d 895 (Ga. App. 1999)* (where a sheriff's sale of a debtor's co-owned interest occurs, this sale does not itself constitute a partition but is rather an involuntary conveyance; purchaser in sheriff's sale becomes co-tenant and may seek partition).

(n3)Footnote 24. *McNeely v. Bone, 698 S.W.2d 512 (Ark. 1985)* (upheld against 5th and 14th Amendment challenges); *Kluthe v. Hammerquist, 188 N.W. 749 (S.D. 1922)* (upheld against state constitutional law challenge); *Coolidge v. Coolidge, 287 A.2d 566 (Vt. 1971)* (upheld against state constitutional law challenge); *Hegewald v. Neal, 626 P.2d 535 (Wash. App. 1981)* (partition is not a "taking" within meaning of Due Process Clause); *Leonardo v.*

Leonardo, 746 N.Y.S.2d 90 (2002) (withdrawal provision of partnership agreement required partition of partners' interests in real property).

(n4)Footnote 25. *Harrington v. Harrington, 568 A.2d 468, cert. denied, 573 A.2d 315 (Conn. App. 1990); Dugan v. Dugan, 287 N.Y.S. 230 (1936).*

(n5)Footnote 26. *See* discussion *infra* at § 38.08.

(n6)Footnote 27. *Melcher v. Melcher, 263 A.2d 91 (Conn. Supp. 1970); Wallace v. Wallace, 396 S.E.2d 208 (Ga. 1990); Bronson v. Bronson, 448 N.E.2d 1231 (Ind. App. 1983); Lima v. Lima, 570 N.E.2d 158 (Mass. App. 1991);* Miss. Code Ann. § 11-21-3; *Brelsford v. Scheltz, 564 S.W.2d 404 (Tex. Civ. App. 1978); Stillings v. Stillings, 280 S.E.2d 689 (W. Va. 1981); Bryan v. Looker, 640 N.E.2d 590 (Ohio App. 1994)* (plaintiff must have title and right of possession); *Treiber v. Citizens State Bank, 598 N.W.2d 96 (N.D. 1999)* (where land was held in fee simple as to an undivided two-thirds of the property and the holder of that share held a life estate only in the remaining third, partition was not permitted under the rule that partition is available only when there are two or more co-tenants with the possessory interest; here plaintiff was sole owner of the possessory interest).

(n7)Footnote 28. *Cannon v. Morris, 407 So. 2d 372 (Fla. App. 1981)* (ultimately holding that under the decree the remarriage of the spouse in possession terminated the exclusiveness of that possession); *Bronson v. Bronson, 448 N.E.2d 1231 (Ind. App. 1983); Thurmond v. Thurmond, 547 N.Y.S.2d 385 (1989); Moore v. Baker, 24 S.E.2d 749 (N.C. 1943). Estate of Goodwin v. Goodwin, 721 N.E.2d 886 (Ind. App. 1999); Ayers v. Ayers, 711 N.Y.S.2d 426 (2000).*

(n8)Footnote 29. Ky. Rev. Stat. Ann. § 60.1003 (a)(4).

(n9)Footnote 30. *Schmit v. Klumpyan, 663 N.W.2d 331 (Wis. App. 2003)* (although sale of the property contrary to the wishes of one co-owner was the motivation for the second co-owner's partition action, the second co-owner did not improperly initiate the partition action); *Futura Realty, Inc. v. Wigdor, 421 So. 2d 536 (Fla. App. 1982); Rosenbaum v. Rosenbaum, 349 N.E.2d 73 (Ill. App. 3d 1976), appeal after remand, 382 N.E.2d 270 (Ill. Dec. 1978), appeal dismissed, 442 U.S. 935, reh'g denied, 444 U.S. 888 (1979).*

(n10)Footnote 31. *See* discussion *infra* at §§ 38.03(a)(2)(iii).

(n11)Footnote 32. *Heldt v. Heldt, 193 N.E.2d 7 (Ill. 2d 1963).*

(n12)Footnote 33. Louisiana has addressed this and related scenarios by statute. La. Civ. Code Ann. art. 1303 provides:

There can be no partition, when the use of the thing held in common is indispensable to the coheirs, to enable them to enjoy, or to derive an advantage from the portion of the effects of the succession falling to them, such as an entry which serves as a passage to several houses, or a way common to several estates, and other things of the same kind.

Whether the statute applies equally to co-purchasers was raised but not decided in *Vusovich v. Thorne, 498 So. 2d 1072 (La. 1986). See also Putnam v. Putnam, 78 N.Y.S. 987 (1902).*

(n13)Footnote 34. *Hoffman v. Beard, 22 Mich. 59 (1870).*

(n14)Footnote 35. *Cook v. Boehl, 53 A.2d 555 (Md. 1947)* (questions of title cannot be decided in a partition proceeding); *Lemay v. Hardin, 48 S.W.3d 59 (Mo. App. W.D. 2001); Kinkead v. Spillers, 983 S.W.2d 425 (Ark. 1999)* (if title is in dispute, as here due to possible adverse possession claim against property by third-party, partition is not appropriate).

(n15)Footnote 36. Ala. Code § 35-6-23Ariz. Rev. Stat. Ann. § 12-1213;*Johnston v. Smith, 454 S.W.2d 649 (Ark.*

1970); Cal. Civ. Proc. Code § 872.610; *Halton v. Johnson, 103 S.E. 233 (Ga. 1920);* Haw. Rev. Stat. § 668-7; Idaho Code § 6-508; *Hartman v. Hartman, 297 N.E.2d 199 (Ill. App. 3d 1973);* Iowa Civ. Proc. Rules § 275; Miss. Code Ann. § 11-21-9; Mont. Code Ann. § 70-29-201; Nev. Rev. Stat. Ann. § 39.080; N.Y. Real Prop. Acts. Law § 907; N.D. Cent. Code § 32-16-08; R.I. Gen. Laws § 34-15-19; S.D. Codified Laws Ann. § 21-45-12; *Smith v. Cooper, 541 S.W.2d 274 (Tex. Civ. App. 1976);* Utah Code Ann. § 78-39-8; Va. Code Ann. § 8.01-81; Wash. Rev. Code Ann. § 7.52.070; *Witzel v. Tena, 295 P.2d 1115 (Wash. 2d 1956);* W. Va. Code § 37-4-1. *But see Schair v. Duquet, 650 N.E.2d 809* (Mass. App.), rev. den., *652 N.E.2d 145 (Mass. 1995)* (partition action is not to be used where primary purpose of party requesting partition is to try title rather than partition land); *Green v. Pearson, 937 S.W.2d 743 (Mo. App. 1996)* (appeals court rejected argument that trial court committed reversible error by ordering land partitioned without first requiring plaintiff to adjudicate her right to possession through an action in ejectment against defendant).

(n16)Footnote 37. *Hoadley v. Wheelwright, 163 A. 790, 791 (Me. 1933).*

(n17)Footnote 38. *See* discussion, *infra*, at § 38.04.

(n18)Footnote 39. *Bean v. Northcutt, 199 So. 7 (Ala. 1940)* (where shares are in dispute, the dispute should be resolved before sale; held error to do the reverse); Mont. Code Ann. § 70-29-203; Nev. Rev. Stat. Ann. § 39.080; N.D. Cent. Code § 32-16-08 (when the sale of the premises is necessary, the title must be ascertained ... before the judgment of sale can be made... .); S.D. Codified Laws Ann. § 27-45-12; Utah Code Ann. § 78-39-8.

(n19)Footnote 40. Alaska Stat. § 09.45.410 (sale may precede determination of shares). For an example of the difficulties that may arise in determining the exact percentage of ownership interests held by competing co-tenants, see *Marsh Cattle Farms v. Vining, 707 So. 2d 111 (La. App. 1998).*

(n20)Footnote 41. *Wiley v. Wiley, 485 So. 2d 2 (Fla. App. 1986)* (court cannot order partition where no party wants it).

(n21)Footnote 42. Mich. Stat. Ann. § 27A.3301 Committee Comment. *See, e.g., Spears v. Spears, 769 A.2d 523 (Pa. Super 2001)* (there is no per se rule that precludes a co-tenant from asserting adverse possession as a defense to another co-tenant's action for partition; if first co-tenant can show acquisition of title by adverse possession, second co-tenant no longer has an ownership interest and thus has no right to seek partition); *Tinney v. Tinney, 770 A.2d 420 (R.I. 2001)* (alleged co-tenant of sixty-room mansion sought partition); *Williams v. Brown, 476 S.E.2d 753 (Ga. 1996)* (under law as it existed in 1961, illegitimate children would not qualify as "children" designated as takers in deed; therefore claimants had no interest in land and no right to partition).

(n22)Footnote 43. *American Med. Int'l, Inc. v. Feller, 131 Cal. Rptr. 270 (1976); Rayhol Co. v. Holland, 148 A. 358 (Conn. 1930); Carter v. Carter, 516 A.2d 917 (D.C. App. 1986); Smith v. Moughan, 442 So. 2d 338 (Fla. App. 1983); Bowers v. Bowers, 65 S.E.2d 153 (Ga. 1951); Johnson v. Johnson, 297 N.E.2d 285 (Ill. App. 3d 1973);* La. Civ. Code Ann. art. 807 (agreement for up to fifteen years); *Stout v. Stout, 564 S.W.2d 89 (Mo. App. 1978); Terrible v. Terrible, 534 P.2d 919 (Nev. 1975); Bessen v. Glatt, 566 N.Y.S.2d 750 (1991); Schultheis v. Schultheis, 675 P.2d 634 (Wash. App. 1984). Gore v. Beren, 867 P.2d 330 (Kan. 1995); Diggs v. Diggs, 446 S.E.2d 873 (N.C. App. 1994); Marchetti v. Karpowich, 667 A.2d 724 (Pa. Super. 1995)* (recognizing the rule that joint owners are free to enter into agreements restricting the right to partition but holding that the agreement at issue did not purport to bar partition in the factual circumstances presented); *MCEN 1996 Partnership v. Glassell, 42 S.W.3d 262* (Tex. App. -- Corpus Christi 2001) (enforcing a written agreement among co-owners waiving the right to partition).

(n23)Footnote 44. *Bydalek v. Bydalek, 71 N.E.2d 19 (Ill. 1947).*

(n24)Footnote 45. *Harrison v. Domerque, 78 Cal. Rptr. 797 (1969); Condrey v. Condrey, 92 So. 2d 423 (Fla. 1957); Rosenberg v. Rosenberg, 108 N.E.2d 766 (Ill. 1952); Valley v. Valley, 199 A.2d 93 (N.H. 1964); Goodpasture v. Goodpasture, 278 A.2d 531 (N.J. Super. 1971); Prude v. Lewis, 430 P.2d 753 (N.M. 1967); Raisch v. Schuster, 352 N.E.2d 657 (Ohio App. 1975); Shoup v. Shoup, 364 A.2d 1319 (Pa. 1976); Schultheis v. Schultheis, 675 P.2d 634*

(Wash. App. 1984) (an agreement never to partition is not enforceable). For an example of such an agreement that was held to violate the Rule Against Perpetuities, see *Nash v. Scott, 966 S.W.2d 936 (Ark. App. 1998).*

(n25)Footnote 46. *Condrey v. Condrey, 92 So. 2d 423 (Fla. 1957).*

(n26)Footnote 47. *Hyatt v. Hyatt, 417 A.2d 726 (Pa. Super. 1979)* (agreement did not limit duration and therefore was an unreasonable restraint on alienation).

(n27)Footnote 48. *Bowers v. Bowers, 65 S.E.2d 153 (Ga. 1951); Altman v. Altman, 67 N.Y.S.2d 119 (1946), aff'd 297 N.Y. 973, 80 N.E.2d 359 (1948); Kayann Props., Inc. v. Cox, 149 S.E.2d 553 (N.C. 1966); Davis v. Davis, 44 S.W.2d 447 (Tex. Civ. App. 1931).*

(n28)Footnote 49. *Flournoy v. Kirkman, 192 S.W. 462 (Mo. 1917).*

(n29)Footnote 50. *American Med. Int'l Inc. v. Feller, 131 Cal. Rptr. 270 (1976); Bowers v. Bowers, 65 S.E.2d 153 (Ga. 1951); Altman v. Altman, 67 N.Y.S.2d 119 (1946),* aff'd *80 N.E.2d 359 (N.Y. 1948); Davis v. Davis, 44 S.W.2d 447 (Tex. Civ. App. 1931); Carter v. Weowna Beach Community Corp., 429 P.2d 201 (Wash. 2d 1967).*

(n30)Footnote 51. *Hotchkin v. Hotchkin, 253 A.2d 184 (N.J. Super. 1969). Prario v. Novo, 645 N.Y.S.2d 269 (1996)* (agreement not to partition that is not in writing violates the statute of frauds).

(n31)Footnote 52. *Twin Lakes Reservoir & Canal Co. v. Bond, 401 P.2d 586, cert. denied, 382 U.S. 902 (Colo. 1965); Condrey v. Condrey, 92 So. 2d 423 (Fla. 1957); Beach v. Beach, 56 P.3d 1125 (Colo. App. 2002)* (right to partition not orally waived).

(n32)Footnote 53. *Twin Lakes Reservoir & Canal Co. v. Bond, 401 P.2d 586 (Colo. 1965), cert. denied, 382 U.S. 902 (1965).*

(n33)Footnote 54. *Nagel v. Kitchen, 44 N.E.2d 853 (Ill. 1942).*

(n34)Footnote 55. *Coolidge v. Coolidge, 287 A.2d 566 (Vt. 1971); Gore v. Beren, 867 P.2d 330 (Kan. 1994)* (recognizing right to waive expressly or impliedly the right to partition; parties held to have impliedly waived their right to partition during period of preemptive rights created by written agreement of the parties); *In re Marriage of Homann, 658 N.E.2d 492 (Ill. App. 1995)* (recognizing the general rule that cotenants may validly agree not to partition but holding there existed no basis for implying an agreement barring partition in this case).

(n35)Footnote 56. *Goodpasture v. Goodpasture, 278 A.2d 531 (N.J. Super. 1971); McDowell v. McDowell, 301 S.E.2d 729 (N.C. App. 1983); Braaten v. Braaten, 278 N.W.2d 448 (S.D. 1979); Diggs v. Diggs, 446 S.E.2d 873 (N.C. App. 1994)* (right to partition may be expressly or impliedly waived; implied waiver recognized where ex-spouse was given the right to live in the home).

(n36)Footnote 57. *Raisch v. Schuster, 352 N.E.2d 657 (Ohio App. 2d 1975).*

(n37)Footnote 58. *Albro v. Allen, 454 N.W.2d 85 (Mich. 1990)* (*overruling Ames v. Cheyne, 287 N.W. 439 (Mich. 1939)* which had implied an agreement not to partition from use of survivorship language); *Stout v. Stout, 564 S.W.2d 89 (Mo. App. 1978); Spires v. Hoover, 466 S.W.2d 344 (Tex. Civ. App. 1971).* But the mere filing of a partition action does not sever joint tenancy nor destroy right of survivorship, *Rausch v. Hogan, 28 P.3d 460 (Mont. 2001).*

(n38)Footnote 59. Ark. Code Ann. § 18-60-413; *Peterson v. Damoude, 152 N.W. 786 (Neb. 1915); Greene v. Greene, 26 N.E. 739 (N.Y. 1891); Tombs' Estate, 39 A.2d 367 (Pa. Super. 1944).*

(n39)Footnote 60. *527 P.2d 1150 (Okla. App. 1974).*

(n40)Footnote 61. *Id. at 1152.*

(n41)Footnote 62. *Rayhol Co. v. Holland, 148 A. 358 (Conn. 1930).*

(n42)Footnote 63. *Altschuler v. Chicago City Bank & Trust Co., 43 N.E.2d 673,* (1942) *aff'd in part, rev'd in part, Yedor v. Chicago City Bank & Trust Co., 44 N.E.2d 604 (Ill. 1942).*

(n43)Footnote 64. *Tibbetts v. Tibbetts, 93 A. 178 (Me. 1915).*

(n44)Footnote 65. Ga. Code Ann. § 44-6-141 (court may, at its discretion, postpone or deny a prospective partition "if it appears that the present interest of any cotenant may not be protected thereby"); *Hulslander v. Hulslander, 371 N.E.2d 652 (Ill. Dec. 1977)* (cotenant does have a right to partition, but may be denied where equitable principles in furtherance of other interests of parties so require); Kan. Stat. Ann. § 60-1003(d).

(n45)Footnote 66. *Condrey v. Condrey, 92 So. 2d 423, 427 (Fla. 1957)* (litigants should be wary of relying on the expectation that the court will so exercise its discretion (to deny partition), since it should be exercised only in extreme cases or where manifest injustice, fraud or oppression will result if partition is granted); *Cook v. Williams, 546 S.E.2d 767 (W. Va. 2001)* (trial court erred in refusing partition to ex-wife solely because ex-husband used the property for a business and had made improvements to the property).

(n46)Footnote 67. *260 P.2d 1081 (Okla. 1953).*

(n47)Footnote 68. *Id. at 1083.*

(n48)Footnote 69. *92 So. 2d 423 (Fla. 1957).*

(n49)Footnote 70. *Id. at 427. See also Freundschuh v. Freundschuh, 559 N.W.2d 706 (Minn. App. 1997)* (case remanded to determine whether property purchased by father in father and son's name in fact created a constructive trust in son's share for father, thus barring son's right to partition); *Bermudez Y. Santos v. Bermudez Y. Santos, 773 So. 2d 568 (Fla. App. 3d Dist. 2000)* (in light of elderly co-tenant's ill health, suggesting to parties and court on remand that Florida law (*Condrey v. Condrey, 92 So. 2d 423 (Fla. 1957))* allows refusal to authorize partition if the effect is to oust ill and financially weak elderly co-tenant from home).

(n50)Footnote 71. *Murphy v. Superior Ct., 70 P. 1070 (Cal. 1902);* Del. Code Ann. tit. 25, § 746; *Hoyt v. Ruge, 197 N.Y.S. 527 (1922); Keystone State Theatre Co. v. Widmyer, 79 A.2d 239 (Pa. 1951).*

(n51)Footnote 72. *Keystone State Theatre Co. v. Widmyer, 79 A.2d 239 (Pa. 1951); Yturria v. Kimbro, 921 S.W.2d 338 (Tex. App. 1996)* (partition should generally encompass the entire estate held in co-tenancy even if comprised of numerous parcels; it is not necessary to assign each cotenant a share of each parcel).

(n52)Footnote 73. *Lovett v. Lovett, 112 So. 768 (Fla. 1927); Corbin v. Corbin, 217 S.W.2d 798 (Ky. 1949); Barnes v. Lynch, 24 N.E. 783 (Mass. 1890); Contra Price v. Simpson, 29 S.E.2d 394 (Va. 1944).*

(n53)Footnote 74. *Martin v. Carroll, 177 So. 144 (Ala. 1937).*

(n54)Footnote 75. Alaska Stat. § 09.45.260; Ariz. Rev. Stat. Ann. § 12-1220; Mass. Ann. Laws ch. 241, § 1; N.H. Rev. Stat. Ann. § 247-C:1; Va. Code Ann. § 8.01-91 (Michie 1992).

(n55)Footnote 76. Mass. Ann. Laws ch. 241, § 1.

(n56)Footnote 77. *McLear v. Balmat, 186 N.Y.S. 180, aff'd, 132 N.E. 883, appeal granted, 132 N.E. 904 (N.Y. 1921).*

(n57)Footnote 78. *Thomas v. Farr, 44 N.E.2d 434 (Ill. 1942); Cook v. Boehl, 53 A.2d 555 (Md. 1947); In re McCullough, 119 A. 585 (Pa. 1923).*

(n58)Footnote 79. N.H. Rev. Stat. Ann. § 247-C:1.

(n59)Footnote 80. Ala. Code § 35-6-42; Ariz. Rev. Stat. Ann. § 12-1211; Ark. Code Ann. § 18-60-401; Cal. Civ. Proc. Code § 872.230; Fla. Stat. Ann. § 64.041; Ga. Code Ann. § 44-6-160; Haw. Rev. Stat. § 668-3; Ind. Code Ann. § 32-17-4-2; Iowa Civ. Proc. Rule 271; Kan. Stat. Ann. § 60-1003(a)(1); Ky. Rev. Stat. Ann. § 381.135(1); Me. Rev. Stat. Ann. § 6502; Minn. Stat. Ann. § 558.03; Mo. Ann. Stat. § 528.050; Mont. Code Ann. § 70-29-103; N.H. Rev. Stat. Ann. § 547-C:2; N.Y. Real Prop. Acts. § 905; Ohio Rev. Code Ann. § 5307.03; Okla. Stat. Ann. tit. 12, § 1501.1; Vt. Stat. Ann. tit. 12, § 5163; Wis. Stat. Ann. § 842.05.

(n60)Footnote 81. Ariz. Rev. Stat. Ann. § 12-1211.

(n61)Footnote 82. S.D. Codified Laws Ann. § 21-45-11.

(n62)Footnote 83. Cal. Civ. Proc. Code § 872.520; Fla. Stat. Ann. § 64.041; Idaho Code § 6-502; Kan. Stat. Ann. § 60.1003a(2); Mo. Ann. Stat. § 528.070; Nev. Rev. Stat. Ann. § 39.020; N.H. Rev. Stat. Ann. § 547-C:4; N.M. Stat. Ann. § 42-5-2; N.D. Cent. Code § 32-16-02; Okla. Stat. Ann. tit. 12, § 1502; Or. Rev. Stat. § 105.215; S.D. Codified Laws Ann. § 21-45-6; Tenn. Code Ann. § 29-27-110; Utah Code Ann. § 78-39-2.

(n63)Footnote 84. Alaska Stat. § 09.45.280; Ariz. Rev. Stat. Ann. § 12-1212; Cal. Civ. Code §§ 872.310, 872.320; Haw. Rev. Stat. § 668-9; Me. Rev. Stat. Ann. tit. 14, § 6503; Minn. Stat. Ann. § 588.02; Nev. Rev. Stat. Ann. § 39.060; N.H. Rev. Stat. Ann. § 547-C:6; N.C. Gen. Stat. § 46-b; Or. Rev. Stat. § 105.230; R.I. Gen. Laws § 34-15-7; Tenn. Code Ann. § 29-27-111; Utah Code Ann. § 78-39-2; Wash. Rev. Code Ann. § 7.52.050.

(n64)Footnote 85. Ala. Code § 35-6-25; Mass. Ann. Laws ch. 241, § 9; Nev. Rev. Stat. Ann. § 39.060; N.C. Gen. Stat. § 46-6.

(n65)Footnote 86. *Richardson v. Richardson, 417 So. 2d 158 (Ala. 1982);* Colo. Rev. Stat. Ann. § 38-28-101; Conn. Gen. Stat. Ann. § 52-495; Ill. Comp. Stat. Ann. ch. 735, § 5/o17-101; Mont. Code Ann. § 70-29-104 (no person other than a joint tenant or tenant in common may be a plaintiff); N.Y. Real Prop. Acts. § 901; N.C. Gen. Stat. § 46-3; Or. Rev. Stat. § 105.205; S.D. Codified Laws Ann. § 21-45-1; Tenn. Code Ann. § 29-27-101; Tex. Prop. Code § 29.001; Utah Code Ann. § 78-39-1; Va. Code Ann. § 8.01-81; Wash. Rev. Code Ann. § 7.52.010; *Lathem v. Hestley, 514 S.E.2d 440 (Ga. 1999)* (if plaintiff could prove implied constructive trust in his favor he would have right to partition).

(n66)Footnote 87. *Lowe v. Morrison, 711 S.W.2d 833 (Ark. 1986); Robinson v. Evans, 554 A.2d 332 (D.C. App. 1989);* Ill. Comp. Stat. Ann. ch. 735, § 5/17-103; *Maddams v. Maddams, 223 N.E.2d 519 (Mass. 1967); V.R.W., Inc. v. Klein, 503 N.E.2d 496 (N.Y.S. 2d 1986); Newman v. Chase, 359 A.2d 474 (N.J. 1976); Shoup v. Shoup, 364 A.2d 1319 (Pa. 1976)* (when a tenancy by the entirety is converted to a tenancy in common, partition is appropriate); *Clark v. Clark, 644 A.2d 449 (D.C. App. 1994)* (no partition of tenancy by the entirety).

(n67)Footnote 88. Cal. Civ. Proc. Code. § 872.210.

(n68)Footnote 89. Baldwin v. *Baldwin, 516* So. 2d 560 (Ala. 1987); *Home Stake Prod. Co. v. Tri-State Pipe Co., 415 P.2d 377 (Kan. 1966).*

(n69)Footnote 90. *Roy v. Abraham, 92 So. 792 (Ala. 1922); Bauer v. Migliaccio, 561 A.2d 674 (N.J. Super. 1989). But see United States v. Hopkins, 859 F. Supp. 208 (S.D. W. Va. 1994)* (under West Virginia law, creditor of joint tenant could seek partition if interests of other cotenants were not prejudiced).

(n70)Footnote 91. Ark. Code Ann. § 18-60-413; Mo. Ann. Stat. § 528.130. *See* discussion *supra* § 38.03(a)(2)(ii).

(n71)Footnote 92. Conn. Gen. Stat. Ann. § 52-503; *Leonard v. Browne, 134 So. 2d 872 (Fla. App. 1961);* Ind. Code Ann. § 32-17-4-5; Mo. Ann. Stat. § 528.140. Under certain circumstances the administrator of an estate may bring a partition action. *Gallant v. Cavallaro, 50 Conn. App. 132, 717 A.2d 283 (1998)* (administrator of estate has standing to seek partition, even over objection of heirs or devisees where administrator alleges that the property's value is necessary to settle claims against the estate).

(n72)Footnote 93. *McQueen v. Forsythe, 55 So. 2d 545 (Fla. 1951); Tom v. Tom, 26 N.E.2d 410 (Ind. App. 1940).*

(n73)Footnote 94. *Washington v. Phillips, 60 So. 2d 337 (Ala. 1952); Langford v. Brickell, 138 So. 75 (Fla. 1931).*

(n74)Footnote 95. Idaho Code § 6-507; Iowa Code Ann. § 651.2; Kan. Stat. Ann. § 60-1003(b); Mont. Code Ann. § 70-29-112; Nev. Rev. Stat. Ann. § 39.070; N.D. Cent. Code § 32-16-07; Okla. Stat. Ann. tit. 12, § 1504; Or. Rev. Stat. § 105.235; Utah Code Ann. § 78-39-7; Wash. Rev. Code Ann. § 7.52.060; *Pinckney v. Atkins, 454 S.E.2d 339 (S.C. App. 1995)* (master erred in failing to require that plaintiff name and serve the heirs of a deceased co-owner).

(n75)Footnote 96. *Gilstrap v. Gilstrap, 397 N.E.2d 1277 (Ind. App. 1979). Coastland Corp. v. North Carolina Wildlife Resources Com'n, 517 S.E.2d 661 (N.C. App. 1999)* (sovereign immunity does not bar a suit for partition by a co-owner with the sovereign).

(n76)Footnote 97. Iowa Rules of Civ. Proc. 273 (a holder of a lien against less than the entire property must be made a party; a holder of a lien against the whole property may be made a party); Mont. Code Ann. § 70-29-105 (plaintiff may make any lienholder against the whole property a defendant; any such lienholder of record not made a defendant is not bound by the action).

(n77)Footnote 98. Kan. Stat. Ann. § 60-1003(a)(3); Minn. Stat. Ann. § 588.02; Mont. Code Ann. § 70-29-107 (if there are outstanding lienholders of record not made parties, the court must order that they are made parties or appoint a referee to determine validity of lien); Nev. Rev. Stat. Ann. § 39.050; N.D. Cent. Code § 32-16-03; Or. Rev. Stat. § 105.220; S.D. Codified Laws Ann. § 21-45-4; Utah Code Ann. § 78-39-3.

(n78)Footnote 99. Mass. Ann. Laws ch. 241 § 6; N.Y. Real Prop. Acts. § 913.

(n79)Footnote 100. Mass. Ann. Laws ch. 241, § 6.

(n80)Footnote 101. N.Y. Real Prop. Acts. § 904; Wash. Rev. Code Ann. § 7.52.030.

(n81)Footnote 102. Ala. Code § 35-6-21; Ark. Code Ann. § 18-60-408; Mo. Ann. Stat. § 528.080; N.M. Stat. Ann. § 42-5-4.

(n82)Footnote 103. *See* discussion *supra* at § 38.03(b)(3).

(n83)Footnote 104. Mass. Ann. Laws ch. 241, § 6.

(n84)Footnote 105. *Slusarz v. Slusarz, 151 N.E.2d 411 (Ill. App. 1958); Winn v. Maddox, 263 S.W.2d 470 (Mo. App. 1953).*

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CHAPTER 38 PARTITION

4-38 Thompson on Real Property, Thomas Editions § 38.04

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§ 38.04 Physical Partition or Partition in Kind.

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In all but a few jurisdictions, n106 partition in kind is at least nominally favored over partition by sale. n107 In most states, sale is authorized only if physical partition would result in great prejudice to one or more of the co-owners. n108 Other states apply a lower standard. n109 Regardless of which standard for favoring partition in kind is applied, it is usually easily met by making one of two showings: (1) the physical attributes of the property make equitable partition in kind impracticable, or (2) the interests of the owners would better be promoted by partition by sale, which usually means that the value of the whole is materially greater than the sum of its parts. n110 *Schnell v. Schnell* n111 is illustrative of the view held by the majority of states on what constitutes great prejudice:

> In determining if great prejudice would result from a partition, the question is not which alternative would provide optimal economic value or maximum functional use. The resultant parcels need not be the economic, functional or aesthetic equivalent of the original parcel. Rather, great prejudice exists when "the value of the share of each in case of a partition would be materially less than his share of the money equivalent that could probably be obtained from the whole." Thus, sale of land in partition should not be ordered unless it is necessary to protect the parties from "serious pecuniary injury." n112

The burden of proof is on the party desiring a sale. n113 In many states, courts are expressly allowed to physically partition a part of the property and sell the rest where the court determines that prejudice to the parties is reduced thereby. n114

COMPUTER-ASSISTED RESEARCH

LEXIS: physical or kind w/2 partition!

§ 38.04(a) Partition in Kind.

The process by which partition in kind is accomplished is remarkably similar from state to state. The court determines

that the plaintiff has the right to a partition and enters an order or writ of partition establishing the shares of each of the co-owners. n115 Most states authorize the court to order a partial physical partition where the shares of one or more of the co-owners are undisputed but the shares or entitlements of others remain in dispute. n116 The court normally does not physically divide the property, however. That task is given to a panel of commissioners or referees, usually three in number. n117

This panel divides the property into shares n118 and decides upon an allocation of those shares to individual owners. n119 If the court deems it appropriate, the panel may determine that physical partition cannot be made. n120 The result of the panel's efforts are then reported to the court and parties. The parties may file objections to the report. Unless the court on its own initiative upholds an objection or finds a ground for rejecting the panel's report, the court confirms the report and enters a judgment of partition. The judgment passes title without the execution of conveyances. n121

The statutes and case law give relatively little guidance on the proper method of physically dividing the property except to mandate that the division reflect the number of shares and the fractional size of the shares (where the land is held in tenancy in common). The number of shares does not necessarily correspond to the number of co-owners, inasmuch as most states allow two or more co-owners to combine their shares for partition purposes. n122 In such instances, these co-owners remain co-owners as to themselves, and only the co-ownership relationship with the others is severed. Where each part of the land is fungible, the task of physical division is simplified. Where, however, some portions are more valuable than others, it is clear that quality and value are to control over identical quantity in making the division. n123

COMPUTER-ASSISTED RESEARCH

LEXIS: partition w/2 kind

§ 38.04(b) Owelty.

It is not uncommon that the realty that is the subject of the partition action cannot be divided into shares in a manner that makes rational use of the land. A road or river may bisect property creating a natural partition line but not creating the appropriately sized parcels. The particular placement of buildings may make equal partition difficult without dividing the buildings. In cases where the most sensible division of land does not create the appropriate shares courts are empowered to award owelty. Owelty is a means through which a court can equalize shares by requiring the recipient of the larger share to pay a compensating sum of money to the recipient of the smaller share. Owelty is only available where there is a partition in kind. n124

In most states the power to award owelty is recognized by statute. n125 Whether by statute or case law, these states normally caution that the power to award owelty is to be used sparingly. n126 At least one state, Mississippi, provides that when owelty is awarded, it is a lien superior to all other liens. n127 Most states provide that owelty cannot be required to be made by unknown owners or by minors unless the minor has personal property sufficient for that purpose. n128

§ 38.04(c) Allocation of Shares.

A court, with the assistance of the commissioners, must not only divide the shares but must allocate the shares among the co-owners. Again, the case law and statutes give little assistance in this regard. If a co-owner has individually improved one part of the land that co-owner should be awarded that part, n129 unless other factors counsel otherwise. It is also appropriate, but not mandatory, for a court to allot to one co-owner a part adjacent to other land owned by that co-owner. n130 A few states have recognized that if a co-owner sells a specific parcel purporting to sell full title, that part should be allotted to that purchaser if to do so will not materially injure the other co-owners. n131

Where there is no compelling reason to allot any particular lot to a particular owner, n132 it is normally the practice of

the panel to allot the lots randomly or by lottery. n133 As long as the means employed is not irregular or unfair it will normally be upheld. n134

COMPUTER-ASSISTED RESEARCH

LEXIS: partition w/50 allocat! w/5 share!

§ 38.04(d) Incidental Effects of Physical Partition.

It is the rule in all states that a recorded lien attaching to the co-owned interest of one cotenant will attach to the share allotted to that cotenant. n135 These liens are subordinated, however, to the partition costs assigned to the owner. n136

FOOTNOTES:
(n1)Footnote 106. *Harris v. Johnson, 356 N.E.2d 1107 (Ill. Dec. 1976);* Iowa Rules of Civ. Proc. Rule § 278 (property will be sold unless there is a specific prayer for partition in kind and a showing that partition in kind is equitable and practicable); *Fannin v. Fannin, 75 S.W.2d 1042 (Ky. 1934)* (this rule does not govern town lots).

(n2)Footnote 107. *Anderson v. Anderson, 108 S.E. 907 (Ga. App. 1921); Kauffman v. Eckhardt, 263 N.W. 610 (Minn. 1935), amended 264 N.W. 781 (1936); Brown v. Boger, 139 S.E.2d 577 (N.C. 1965); Weever v. Weever, 579 P.2d 216 (Okla. App. 1978); Robertson v. Robertson, 425 S.W.2d 707 (Tex. Civ. App. 1968).*

(n3)Footnote 108. Alaska Stat. §§ 09.45.290, 09.45.330; Ark. Code Ann. § 18.60.401; Colo. Rev. Stat. Ann. § 38-28-107; Haw. Rev. Stat. § 668-1; Idaho Code § 6-501 (1990); Ill. Comp. Stat. Ann. ch. 735, § 5/17-116; Mich. Stat. Ann. § 27A.3332; Minn. Stat. Ann. § 558.01; Mo. Ann. Stat. 528.250, 528.340; Mont. Code Ann. § 70-29-202; Nev. Rev. Stat. Ann. § 39.010; N.H. Rev. Stat. Ann. § 547-C:25; N.J. Stat. Ann. § 2A:56-2; N.M. Stat. Ann. § 52-5-7; N.Y. Real Prop. Acts. § 921; N.D. Cent. Code § 32-16-12; Or. Rev. Stat. § 105.245; *De Bartolo v. Di Battista, 367 A.2d 701 (R.I. 1976);* S.D. Codified Laws Ann. § 21-45-28; Utah Code Ann. § 78-39-12; Wash. Rev. Code Ann. § 7.52.080. *Ark-La-Miss Timber Co., Inc. v. Wilkins, 833 So. 2d 1154 (La. App. 2002)* (because partition in kind would not be equitable to both parties, partition by licitation (auction) was ordered); *Ashley v. Baker, 867 P.2d 792 (Alaska 1994)* (great prejudice refers to economic harm); *Heartland Fed. Sav. & Loan Ass'n v. Camp, 870 P.2d 182 (Okla. App. 1994)* (attorneys' fee award to purchaser's attorney upheld where purchaser had intervened in partition action and services had benefitted interests of cotenants). Courts also consider the prejudice to cotenants desiring partition in kind, including prejudice that results from failure to value sentimental attachment to land. In *Eli v. Eli, 557 N.W.2d 405 (S.D. 1997),* the court emphasized the fact that the land in question had been held in the family for generations and that one cotenant desired to keep at least her share of the land in the family for exactly that reason.

(n4)Footnote 109. Cal. Civ. Proc. Code § 872.820 (sale authorized if parties agree or if more equitable than partition in kind); Conn. Gen. Stat. Ann. § 52-500; *Delfino v. Vealencis, 436 A.2d 27 (Conn. 1980)* (sale appropriate if it is in best interest of owners); *Wilcox v. Willard Shopping Ctr. Assoc., 544 A.2d 1207 (Conn. 1988), appeal after remand, 579 A.2d 130 (Conn. App. 1990)* (party requesting sale must show that partition in kind is impracticable or inequitable or that the interests of the owners are better promoted by a sale); Del. Code Ann. tit. 25, § 729 (sale permitted if partition is detrimental to the interests of the parties); Ga. § 44-6-166.1; Ind. Code Ann. § 32-17-4-5 (sale only if partition in kind cannot be made without damage to the owners); La. Code Civ. Proc. Ann. § 4606; Md. Code Ann. Real Prop. § 14-107(a) (sale only if partition in kind will cause loss or injury to an interested party); Miss. Code Ann. § 11-21-11 (sale appropriate if it better promotes interests of all parties or if equal division cannot be made); Ohio Rev. Code Ann. § 5307.09 (sale appropriate if partition would cause manifest injury); S.C. Code Ann. § 15-61-20 (sale appropriate if partition in kind cannot be made without injury or unfairness to owners); *Johnson v. Hendrickson, 24 N.W.2d 914 (S.D. 1946)* (sale is authorized if the sum of the value of the parts is materially less than the whole); *Nicely v. Nicely, 293 S.W.2d 30 (Tenn. App. 1956);* Va. Code Ann. § 8.01-03 (sale authorized if physical partition cannot conveniently be made or if interests of the parties will be promoted).

(n5)Footnote 110. *Geary v. Kirksey, 351 S.W.2d 846 (Ark. 1961)* (partition in kind found impracticable where property consisted of two long narrow strips intersecting each other and used as runways); *Wilcox v. Willard Shopping Ctr. Assoc., 544 A.2d 1207 (Conn. 1988)* (subject property was a shopping mall; determination that partition in kind was impracticable upheld); *Bulliard v. Bienvenu, 663 So. 2d 373 (La. App. 1995)* (partition in kind of 13.01 acres inappropriate where property was irregular in shape, had a house located on one part of it, was encumbered with a servitude; and where partition would landlock many of the 120 equal lots into which the 13.01 acres were to be divided); *Connally v. Nevils, 702 So. 2d 1043 (La. App. 1997)* (regardless of parties' stipulation that land was susceptible to partition in kind, ultimate decision on this mixed question of law and fact lies with the judge); *Schneider v. Putnam, 705 A.2d 1117 (Me. 1998)* (partition by sale is appropriate where in kind partition would create a worthless lot in violation of zoning ordinance); *Friend v. Friend, 964 P.2d 1219 (Wash. App. 1998)* (partition in kind is rendered inappropriate where resulting lots would violate zoning ordinance).

See Liner v. Lewis, 792 So. 2d 822 (La. App. 2d Cir. 2001) (containing a recitation of the basic standards to be employed in determining whether partition in kind or partition by sale is appropriate).

(n6)Footnote 111. *346 N.W.2d 713 (N.D. 1984).*

(n7)Footnote 112. *Id. at 716* (citations omitted). In accord, *see Brown v. Boger, 139 S.E.2d 577 (N.C. 1965).* As *Robertson v. Robertson, 484 S.E.2d 831 (N.C. App. 1997),* indicates, not all pecuniary loss is considered. *See also Anderson v. Anderson, 560 N.W.2d 729 (Minn. App. 1997)* (tax consequences to one party of a sale are not a mandated consideration in the court's exercise of discretion as to whether to order partition in kind or by sale).

(n8)Footnote 113. *Madison v. Lambert, 399 So. 2d 840 (Ala. 1981); Richmond v. Dofflemyer, 164 Cal. Rptr. 727 (1980); Rice v. Dowling, 581 A.2d 1061 (Conn. App. 1990), cert. denied, 584 A.2d 1190 (Conn. 1991); Boyd v. Boyd, 361 A.2d 146 (Md. App. 1976)* (proof must be by preponderance of the evidence); *Vinson v. Johnson, 493 So. 2d 947 (Miss. 1986); Kayann Props., Inc. v. Cox, 149 S.E.2d 553 (N.C. 1966); Schnell v. Schnell, 346 N.W.2d 716 (N.D. 1984); Sensabaugh v. Sensabaugh, 349 S.E.2d 141 (Va. 1986); Hegewald v. Neal, 582 P.2d 529 (Wash. App. 1978).* For an interesting illustration of variant motivations among disputing co-tenants in seeking physical partition on the one hand, or partition by sale on the other, see *Cecola v. Ruley, 12 S.W.3d 848 (Tex. App. 2000).*

(n9)Footnote 114. Alaska Stat. § 09.45.340; Cal. Civ. Proc. Code § 872.830; *Richmond v. Dofflemyer, 164 Cal. Rptr. 727 (1980)* (court may order part division of property and part sale if this is more equitable than division of the whole); Del. Code Ann. tit. 25, § 730; D.C. Code Ann. § 16-2901; Haw. Rev. Stat. § 668-4; Ind. Code Ann. § 32-17-4-4; Iowa Code Ann. § 651.3 (part partition in kind and part sale is authorized if partition in kind cannot conveniently be made of entire parcel); Mass. Ann. Laws ch. 241 § 4; Minn. Stat. Ann. § 558.14; *Swogger v. Taylor, 68 N.W.2d 376;* Miss. Code Ann. § 11-21-11; Mont. Code Ann. § 70-29-204; N.J. Stat. Ann. § 2A:56-3; N.C. Gen. Stat. § 46-16; *Bennett v. Floyd, 115 S.E.2d 659 (S.C. 1960);* Va. Code Ann. § 8.01-83; W. Va. Code § 37-4-3.

(n10)Footnote 115. Cal. Civ. Proc. Code § 872.710(b); Kan. Stat. Ann. § 60-1003(2); Mass. Ann. Laws ch. 241, § 10; Minn. Stat. Ann. § 558.04; N.Y. Real Prop. Acts. § 915; Ohio Rev. Code Ann. § 5307.04; Okla. Stat. Ann. tit. 12, § 1505; S.D. Codified Laws Ann. § 21-45-15. *Langevin v. York, 907 P.2d 981 (Nev. 1995)* (In this case, the court applied the presumption that where cotenants contribute unequally to the purchase price, they intend "to share in proportion to the amount contributed to the purchase price." Since one of the cotenants paid the entire purchase price of two of the disputed parcels, he was awarded the two parcels outright). *Id. at 984,* quoting *Sack v. Tomlin, 871 P.2d 298, 303 (Nev. 1994).*

(n11)Footnote 116. Idaho Code § 6-509 (1990); Mass. Ann. Laws ch. 241, § 5; N.J. Stat. Ann. § 2A:56-6; N.Y. Real Prop. Acts. Law § 916; S.D. Codified Laws Ann. § 21-45-16; Utah Code Ann. § 78-39-9; Wash. Rev. Code Ann. § 7.52.080.

(n12)Footnote 117. Ariz. Rev. Stat. Ann. § 12-1215(b); Ark. Code Ann. § 18-60-414; Cal. Civ. Proc. Code §

872.710(c); Colo. Rev. Stat. Ann. § 38-28-105; Del. Code Ann. tit. 25, § 724; Ga. Code Ann. § 44-6-163; Haw. Rev. Stat. § 668-13; Idaho Code § 6-513; Ill. Comp. Stat. Ann. ch. 735, § 5/o17-106; Ind. Code Ann. § 32-4-56; Kan. Stat. Ann. § 60-1003(2); Ky. Rev. Stat. Ann. § 381.135(4); Me. Rev. Stat. Ann. § 6511; Mass. Ann. Laws ch. 241, § 12; Minn. Stat. Ann. § 558.04; Miss. Code Ann. § 11-21-15; Mo. Ann. Stat. § 528.200; N.H. Rev. Stat. Ann. § 547-C:11; N.M. Stat. Ann. § 42-5-6; N.Y. Real Prop. Acts. Law § 915; N.C. Gen. Stat. § 46-7; N.D. Cent. Code § 32-16-13; Ohio Rev. Code Ann. § 5307.04; Okla. Stat. Ann. tit. 12, § 1506; Or. Rev. Stat. § 105.255; R.I. Gen. Laws § 34-15-24; S.C. Code Ann. § 15-61-60; S.D. Codified Laws Ann. § 21-45-15; Tenn. Code Ann. § 29-27-114; Utah Code Ann. § 78-39-13; Vt. Stat. Ann. tit. 12, § 5169; Wash. Rev. Code Ann. § 7.52.080; Wyo. Stat. § 1-32-104.

(n13)Footnote 118. *See* discussion *infra* at § 38.04(b). *Hart v. Hart, 497 S.E.2d 496 (Va. App. 1998)* (partitioning court has the power to grant an easement over one parcel for the benefit of the other as part of a partition in kind).

(n14)Footnote 119. *See* discussion *infra* at § 38.04(c). *Crawford v. Crawford, 2002 Tenn. App. LEXIS 814* (No. E2202-00372-COA-RS-CV, Nov. 14, 2002) (statute permitted a partial partition in kind).

(n15)Footnote 120. *See* discussion *supra* at § 38.04(d). Ariz. Rev. Stat. Ann. § 12-1218; Ark. Code Ann. § 18-60-415; Kan. Stat. Ann. § 60-1003(2); Miss. Code Ann. § 11-21-17; Mo. Ann. Stat. § 528.340. *Kubish v. Zega, 767 A.2d 148* (Conn. App.), cert. den., *769 A.2d 62 (Conn. 2001)* (court is not bound by recommendations contained in committee's or commissioner's report); *Dunn v. BL Development Corp., 747 So. 2d 284 (Miss. App. 1999)* illustrates some problems with physical partition when there are numerous owners with variant shares. Here the ownership interests were, among others, 2323/3360ths, 1/56th, 11/480th and 1/28th.

(n16)Footnote 121. Ga. Code Ann. § 44-6-142; *Von Behren v. Oberg, 902 S.W.2d 338 (Mo. App. 1995)* (in evaluating the commissioners' recommended in-kind partition, court is to consider equality of division, not based solely on numbers of acres but also on all factors that bear on value); *Tillett v. Lippert, 909 P.2d 1158 (Mont. 1996)* (trial judge modified referee's suggested division of land in order to provide cotenant with access to cotenant's federally leased land); *Wilson v. McGuire, 463 S.E.2d 614 (S.C. App. 1995)* (noting that the trial court should not reject the commissioners' report unless the division proposed by the commissioners is clearly shown to be "erroneous, unfair, unjust and inequitable" and holding that the trial judge abused his discretion in rejecting the commissioners' report in the absence of competent evidence that in kind partition was impossible, impracticable or unfair).

(n17)Footnote 122. Ill. Comp. Stat. Ann. ch. 735, § 5/o17-113; Ind. Code Ann. § 32-17-4-8; Mass. Ann. Laws ch. 241, § 5; Mo. Ann. Stat. § 528.170; N.J. Stat. Ann. § 2A:56-4; N.Y. Real Prop. Acts. Law § 917; N.C. Gen. Stat. § 46-13; Utah Code Ann. § 78-39-13; Vt. Stat. Ann. tit. 14, § 1735; Va. Code Ann. § 8.01-82; W. Va. Code § 37-4-2. Utah Code Ann. § 78-39-11 (amended in 1995 to clarify internal statutory reference). The fact that two or more co-owners may combine their shares for partition purposes may impact the decision as to whether physical partition is possible or practicable. In *Cain v. Christie, 937 P.2d 119 (Okla. Civ. App. 1997),* one cotenant, holding a 1/6 share, demanded a partition by sale of parcels he co-owned with numerous members of the Cherokee Nation. If each of the co-owners were to be given individual shares, partition in kind would have been impossible. All of the Cherokee Nation co-owners desired to have their interests considered together and to have a partition in kind. Viewed as a division into only two shares, one representing plaintiff's interest and the other representing the collectivity of defendants' interests, partition in kind was possible and appropriate. Accord, *Sims v. Sims, 930 P.2d 153 (N.M. 1996)* (cotenants are permitted to "pool" their interests; the purposes for allowing partition are not undermined if some but not all cotenants wish to retain their collective proportion of the property).

(n18)Footnote 123. *Dondero v. Van Sickel, 11 Nev. 389 (1876)* (if land cannot be divided into parcels of equal size without placing too much value on one parcel, court should divide land into parcels of equal value rather than size); N.C. Gen. Stat. § 46-10; S.D. Codified Laws Ann. § 21-45-17; *Spires v. Hoover, 466 S.W.2d 344 (Tex. App. 1971); Clawson v. Silver, 26 P.3d 209 (Utah 2001)* (simple fact that "like kind" partition was not possible because structure stood on one part of property and not another did not, of itself, compel partition by sale; case was remanded for consideration of partition in kind with award of owelty to allow land to stay in family with "strong attachment" to it).

(n19)Footnote 124. *English v. Brantley, 361 So. 2d 549 (Ala. 1978). Devco, Inc. v. Richey, 707 So. 2d 161, 164 (La. App. 1998)* contains an excellent summary of the practical function of owelty:

> ... [i]t is possible to determine an amount to award the disadvantaged party in order to achieve equality. Once the value of each parcel has been determined, the focus turns to the amount of the difference in value of each parcel. The party who is awarded the more valuable parcel must compensate the co-owner with an amount that would make the parcels equal or nearly equal in value. Here, for example, if there are two parcels, equality can be gained by conveying an amount that equals one-half of the total difference in value of the two parcels to the disadvantaged co-owner.

Clawson v. Silver, 26 P.3d 209 (Utah 2001) (simple fact that "like kind" partition was not possible because structure stood on one part of property and not another did not, of itself, compel partition by sale; case was remanded for consideration of partition in kind with award of owelty to allow land to stay in family); *Kubish v. Zega, 767 A.2d 148, cert. den. 769 A.2d 62 (Conn. 2001)* (award of owelty functions "to preserve the action as one of partition in kind, rather than converting it into a partition by sale").

(n20)Footnote 125. Ala. Code § 35-6-24 (1991); Alaska Stat. § 09.45.590 (1992); Cal. Civ. Proc. Code §§ 872.140, 873.250; *Filipetti v. Filipetti, 479 A.2d 1229, cert. denied, 482 A.2d 709 (Conn. App. 1984); Borum v. Deese, 26 S.E.2d 538 (Ga. 1943);* Idaho Code § 6-541; Me. Rev. Stat. Ann. tit. 14, § 6515; Mass. Ann. Laws ch. 241, § 14; *Albro v. Allen, 454 N.W.2d 85 (Mich. 1990);* Minn. Stat. Ann. § 558.11; Miss. Code Ann. § 11-21-13; Mont. Code Ann. § 70-29-209; Nev. Rev. Stat. Ann. 39.440; N.H. Rev. Stat. Ann. § 547-C:22; N.Y. Real Prop. Acts. Law § 943; N.D. Cent. Code § 32-16-41; Or. Rev. Stat. § 105.250; S.D. Codified Laws Ann. § 21-45-19; Tenn. Code Ann. § 29-27-117; Utah Code Ann. § 78-39-41; Wash. Rev. Code Ann. § 7.52.440.

(n21)Footnote 126. *Washington v. Phillips, 60 So. 2d 337 (Ala. 1952);* Mich. Stat. Ann. § 27A.3336; *Hoverson v. Hoverson, 12 N.W.2d 501 (Minn. 1943); Anderson v. Anderson, 560 N.W.2d 729 (Minn. App. 1997)* (owelty is appropriate when a sale is disadvantageous to the parties but an equal division cannot be had without great prejudice to the owners); *Culley v. McFadden Lake Corp., 674 N.E.2d 208 (Ind. App. 1996)* (trial court had power to award owelty even in absence of consent from all cotenants).

(n22)Footnote 127. Miss. Code Ann. § 11-21-33.

(n23)Footnote 128. Alaska Stat. § 09.45.590; Idaho Code § 6-541; Minn. Stat. Ann. § 558.11; Mont. Code § 70-29-209; Nev. Rev. Stat. Ann. 39.440; N.D. Cent. Code § 32-16-41; Or. Rev. Stat. § 105.250; S.D. Codified Laws Ann. § 21-45-19; Utah Code Ann. § 78-39-41.

(n24)Footnote 129. *Washington v. Phillips, 60 So. 2d 337 (Ala. 1952); Graham v. Inlow, 790 S.W.2d 428 (Ark. 1990);* Cal. Civ. Proc. Code § 872.220 (the value of the improvement is excluded from valuing the share); *Boley v. Skinner, 20 So. 1017 (Fla. 1896);* Haw. Rev. Stat. § 668-4; Me. Rev. Stat. Ann. tit. 14, § 6514 (value of improvement is considered in valuing share); Mass. Ann. Laws ch. 241, § 23; Mont. Code Ann. § 70-29-207 (the value of the improvement is excluded from valuing the share); *Webb v. Mitchell, 371 S.W.2d 754 (Tex. Civ. App. 1963);* Utah Code Ann. § 78-39-13; *Cummings v. Anderson, 614 P.2d 1283 (Wash. 2d 1980).*

(n25)Footnote 130. *Gray v. Crotts, 293 S.E.2d 626 (N.C. App. 1982); Barth v. Barth, 901 P.2d 232 (Okla. App. 1995)* (trial court did not abuse its discretion in allotting share to cotenant who owned adjoining land; in fact, court suggested in dictum that failing to so allocate the parcel in issue might have constituted an abuse of discretion).

(n26)Footnote 131. Cal. Civ. Proc. Code § 872.230; Mont. Code Ann. § 70-29-208; *Johnson v. MacIntyre, 740 A.2d 599 (Md. 1999)* (conveyance to a third party by one joint tenant, without the consent of the other joint-tenant, of a parcel, described by metes and bounds, out of a larger, jointly held tract, after which the third party sought partition).

(n27)Footnote 132. Iowa Rules of Civ. Proc. § 285 (court may for good reason order referees to make specific allotment of a particular contract to a particular individual); *Chesmore v. Chesmore, 484 P.2d 516 (Okla. 1971)* (court may direct commissioners to allot a particular portion to a particular owner); *Connally v. Nevils, 702 So. 2d 1043 (La. App. 1997)* (after parties have sought judicial partition in kind, parties may not by stipulation avoid drawing by lots to assign parcels).

(n28)Footnote 133. *Arnett v. Deem, 220 S.W. 725 (Ky. App. 1920)* (commissioners could use lottery or any other fair measure); La. Code Civ. Proc. § 4642; Miss. Code Ann. §§ 11-21-21, 11-21-23; *Gray v. Crotts, 293 S.E.2d 626 (N.C. App. 1982)* (parcels must be equally divided in terms of value for lottery to be appropriate); *McNeal v. McNeal, 732 So. 2d 663 (La. App. 1999).*

(n29)Footnote 134. *Gray v. Crotts, 293 S.E.2d 626 (N.C. App. 1982). Robertson v. Robertson, 484 S.E.2d 831 (N.C. App. 1997)* (assigning parcels by a flip of a coin is not improper).

(n30)Footnote 135. Ala. Code § 35-6-51; *Wood v. Barnett, 94 So. 338 (Ala. 1922);* Alaska Stat. § 09.45.270; Cal. Civ. Proc. Code § 873, 260; *Baltzell v. Daniel, 149 So. 639 (Fla. 1933);* Idaho Code § 6-518; Ill. Comp. Stat. Ann. ch. 735, § 5/17-114; Me. Rev. Stat. Ann. tit. 14, § 6525; Mass. Ann. Laws ch. 241, § 28; Mich. Stat. Ann. § 27A.3350; Minn. Stat. Ann. § 558.09; Miss. Code Ann. § 11-21-39; Mont. Code Ann. § 70-29-215; Nev. Rev. Stat. Ann. § 39.210; N.J. Stat. Ann. § 2A:56-16; N.Y. Real Prop. Acts. Law § 929; N.D. Cent. Code § 32-16-18; Or. Rev. Stat. § 105.220; S.D. Codified Laws Ann. § 21-45-27; Utah Code Ann. § 78-39-18; Wash. Rev. Code Ann. § 7.52.030; *Davis v. Lyons, 700 So. 2d 794 (Fla. App. 1997)* (contested existence of judgment lien against one co-tenant did not preclude other co-tenant from receiving her share of proceeds of partition sale); *Ponton v. Poisson, 709 A.2d 1047 (R.I. 1998)* (holding that a co-tenant's interest may be unilaterally mortgaged during a partition by sale proceeding; the mortgage lien attaches to the mortgaging co-tenant's share and in the resultant proceeds from the sale).

(n31)Footnote 136. *See* discussion *infra* at nn.167-174. Alaska Stat. § 09.45.270; Minn. Stat. Ann. § 558.09; Mont. Code Ann. § 70-29-215; Nev. Rev. Stat. Ann. § 39.480; N.J. Stat. Ann. § 2A:56-16; Or. Rev. Stat. § 105.220; S.D. Codified Laws Ann. § 21-45-27; Utah Code Ann. § 78-39-18; Wash. Rev. Code Ann. § 7.52.030.

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CHAPTER 38 PARTITION

4-38 Thompson on Real Property, Thomas Editions § 38.05

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§ 38.05 Partition by Sale.

Conn. Gen. Stat. § 47a-15

Unless all parties to the partition action agree, a court may not order a partition sale of the subject property absent a finding that under the governing standard, a partition in kind will harm the interests of one or more of the parties. As noted in the section on partition in kind, the most common rule is that physical partition will be ordered unless such partition will result in manifest prejudice. n137 A court is not to make such a finding without some evidence before it on the issue. n138 This evidence normally comes from one of two sources. First, parties themselves may offer evidence on the issue and the court may make a finding based upon that evidence. Second, the referees or commissioners appointed by the court to devise a physical partition of the land n139 may report to the court that a physical partition will, in their judgment, cause the requisite injury and offer supporting evidence to support this judgment. n140 In such case, the commissioner may appraise the land and include that appraisal in their report to the court. n141

COMPUTER-ASSISTED RESEARCH

LEXIS: partition w/2 sale!

§ 38.05(a) Mechanics of Sale.

Once it is determined that a partition sale is appropriate, the court will so order and will set the general terms of the sale and any special requirements for the process under which the sale is undertaken. Although courts are authorized to conduct the sale, n142 the far more common practice, authorized by statute, is to appoint commissioners or referees to do so. n143

In a few states, the court may order the land sold either by private sale or public auction, whichever is more likely to produce the highest sum for distribution. n144 California and Massachusetts further require the court to use whatever means of sale is agreed to by the parties. n145 The most common statutory requirement, however, is that which directs that the sale be made to the highest bidder at a public auction. n146

Any proceeding for partition sale which is conducted by a commissioner or referee must be submitted to the court

ordering it. Only when the court confirms the sale is it final. n147 Any objections to the proceeding or the price may be submitted to the court prior to the final confirmation. n148 Courts are authorized to set aside a public sale if the price is too low. n149

COMPUTER-ASSISTED RESEARCH

LEXIS: term! w/15 partition w/2 sale!

§ 38.05(b) Alternate Method -- Appraisal and Sale to One of the Co-Owners.

Most courts addressing the issue have held that it is improper to order one cotenant to sell the cotenant's interest in the entire property to another cotenant. n150 A minority have held otherwise, allowing such an order if full payment is received by the party ordered to sell. n151

While, as a general rule, a court may not compel a co-owner to sell to or buy from another co-owner, many states provide a statutory mechanism for appraisals and sale of the subject property to a co-owner or co-owners who want to buy. n152 This mechanism avoids the need for a public sale and often results in a higher price for the co-owner whose interest is sold. Although the statutory schemes in these states vary in minor detail, they provide essentially as follows: once the court has determined that a partition by sale is appropriate, it appoints commissioners to conduct an appraisal of the property and set an appraised price. This price is communicated to the parties. Each party then informs the court of whether the party wishes to be a buyer or seller. If there are no sellers, the action is either dismissed n153 or a public sale is held. If there are no buyers, or in some states, if no more than one buyer, n154 a public sale is held. Ideally, one or more of the co-owners will wish to sell and one (or more) will wish to buy. The court oversees the payments under this scheme.

COMPUTER-ASSISTED RESEARCH

LEXIS: appraisal! w/2 sale! w/50 partition

§ 38.05(c) Disposition of Proceeds of Sale.

The proceeds of the partition sale are applied as follows: general costs, cost of referees, satisfaction of liens, distribution to the owners according to their share. n155 Most states have specific rules that direct what is to be done with shares allotted to unknown co-owners. n156 The most common direction is that the funds are to be invested in specified government bonds or deposited with designated types of banking institutions. n157

COMPUTER-ASSISTED RESEARCH

LEXIS: proceed! w/15 partition w/2 sale!

FOOTNOTES:
(n1)Footnote 137. *See* text *supra* at nn.108-114.

(n2)Footnote 138. *Ragland v. Walker, 387 So. 2d 184 (Ala. 1980), appeal after remand, 411 So. 2d 106 (Ala. 1982); Thompson v. Mitchell, 429 So. 2d 388 (Fla. App. 1983);Vinson v. Johnson, 493 So. 2d 947 (Miss. 1986). Joseph v. Joseph, 719 N.E.2d 323 (Ill. App. 1999)* (holding that the commissioners' report is not to be judged by the "manifest weight of the evidence" standard but rather is to be received as an aid to the court in making its own independent determination); *State ex rel. Bowser v. Hill, 550 S.E.2d 62 (W. Va. 2001)* (court did not abuse its discretion by ordering sale at public auction when neither co-tenant would acquiesce in allotment of property to the other). The court's determination will be given a high level of deference on appeal.

(n3)Footnote 139. *See* text *supra* at n.117.

(n4)Footnote 140. Ariz. Rev. Stat. Ann. § 12-1218; Ark. Code Ann. § 18-60-415; Colo. Rev. Stat. Ann. § 38-28-107; Mass. Ann. Laws. ch. 241, § 14; Mo. Ann. Stat. § 528.250; N.M. Stat. Ann. § 42-5-7; Wis. Stat. Ann. § 842.11.

(n5)Footnote 141. S.C. Code Ann. § 15-61-80.

(n6)Footnote 142. Ark. Code Ann. § 18-60-424. *Forney v. Forney, 926 S.W.2d 889 (Mo. App. 1996)* (sale is to be conducted in compliance with specifics of court decree but will be set aside for irregularity only if non-compliance is so substantial as to be prejudicial to the parties).

(n7)Footnote 143. Ark. Code Ann. § 18-60-420; Cal. Civ. Proc. Code § 872.510; Conn. Gen. Stat. Ann. § 52-502; Fla. Stat. Ann. § 64.061.

(n8)Footnote 144. *Copeland v. Giles, 123 So. 2d 147 (Ala. 1960);* Cal. Civ. Proc. Code § 873.520; Iowa Rules Civ. Proc. § 289; Mass. Ann. Laws ch. 241, § 31; Minn. Stat. Ann. § 558.01. *Welch v. Zucco, 665 So. 2d 697 (La. App. 1995)* (trial court could not order plaintiffs to sell their interest to defendant); *Orgain v. Butler, 496 S.E.2d 433 (Va. 1998)* (noting the standard that the Chancellor was to order the method of sale likely to obtain the highest sales price unless that method was unachievable because of the circumstances or the parties' conduct, the court reversed the Chancellor's conclusion that sale should be by public auction rather than through a private real estate broker).

(n9)Footnote 145. Cal. Civ. Proc. Code § 873.600; Mass. Ann. Laws. ch. 241, § 6.

(n10)Footnote 146. Alaska Stat. § 09.45.420; Ark. Code Ann. § 18-60-420; Fla. Stat. Ann. § 64.071; Ga. Code Ann. § 44-6-167; Haw. Rev. Stat. § 668.14; Idaho Code § 6-524; Mont. Code Ann. § 70-29-301; Mo. Ann. Stat. § 528.340; Nev. Rev. Stat. Ann. § 39.270; N.D. Cent. Code § 32-16-24; Ohio Rev. Code Ann. § 5307.11; Or. Rev. Stat. § 105.280; S.D. Codified Laws Ann. § 21-45-30; Utah Code Ann. § 78-39-24; Wash. Rev. Code Ann. § 7.52.270; Wyo. Stat. 1-32-111.

(n11)Footnote 147. Ark. Code Ann. § 18-60-422; Cal. Civ. Proc. Code § 873.710; Fla. Stat. Ann. 64.071; Haw. Rev. Stat. § 668.14; *Tillett v. Lippert, 909 P.2d 1158 (Mont. 1996)* (trial court acted within its sound discretion in modifying referee's recommended partition boundaries upon concluding that recommended boundaries were inequitable).

(n12)Footnote 148. Cal. Civ. Proc. Code § 873.720. *See also, Gray v. Superior Court of Sonoma County, 60 Cal. Rptr. 2d 428 (1997)* (party who seeks partition is not entitled to take a voluntary dismissal after an unfavorable referee's report; allowing such dismissal would circumvent statutory scheme that provides specific procedures for filing objections).

(n13)Footnote 149. *Deverell v. Horton, 234 So. 2d 879 (Ala. 1970); Kaecek v. Knight, 447 So. 2d 900 (Fla. App. 1984).*

(n14)Footnote 150. *McCready v. McCready, 810 P.2d 624 (Ariz. 1991); Hairston v. Hairston, 454 A.2d 1369 (D.C. App. 1983); Janik v. Janik, 474 N.E.2d 1054 (Ind. App. 1985).*

(n15)Footnote 151. *Libby v. Lorrain, 430 A.2d 37 (Me. 1981);* S.C. Code Ann. § 15-61-90.

(n16)Footnote 152. Cal. Civ. Proc. Code § 873.910 *et seq.* (requires agreement of the parties to use the partition by appraisal procedures); Ga. Code Ann. § 44-6-166; Kan. Stat. Ann. § 60-1003(c)(5); Ohio Rev. Code Ann. § 5307.09; Okla. Stat. Ann. tit. 12, § 1512; Va. Code Ann. § 8.01-83; Wyo. Stat. § 1-32-109. The major issue that arises through this method is whether the established price at which the sale is to be made is a fair one. In determining the fair market

value of land, the judge is normally empowered to consider all uses to which the property might be put. These uses are not necessarily those the parties would consider but rather those that third parties in arms-length transactions would consider the highest and best use of the land. *Delta Materials Corp. v. Bagdon, 682 N.E.2d 927 (Mass. App. 1997).*

(n17)Footnote 153. Ga. Code Ann. § 44-6-166.

(n18)Footnote 154. Kan. Stat. Ann. § 60-1003(c)(5).

(n19)Footnote 155. Alaska Stat. § 09.45.380; Cal. Civ. Proc. Code § 873.820; Idaho Code § 6-520; Minn. Stat. Ann. § 558.16; Nev. Rev. Stat. Ann. § 39.230; N.D. Cent. Code § 32-16-20; Or. Rev. Stat. § 105.285; S.D. Codified Laws Ann. § 21-45-51; Tenn. Code Ann. § 29-27-218; Utah Code Ann. § 78-39-20; Wash. Rev. Stat. Ann. § 7.52.220; *Wawrzusin v. Wawrzusin, 623 N.Y.S.2d 255 (1995)* (reimbursement out of partition sale proceeds for improvements is not appropriate where improvement is made for improver's own purposes without the agreement or consent of the other cotenant).

(n20)Footnote 156. Haw. Rev. Stat § 668-9; Idaho Code § 6-529; Iowa Code Ann. § 651.1; Nev. Rev. Stat. Ann. § 39.400; Or. Rev. Stat. § 105.370; R.I. Gen. Laws. § 34-15-18; Tenn. Code Ann. § 29-27-218.

(n21)Footnote 157. Mass. Ann. Laws. ch. 241, § 34 (savings bank or trust company); Minn. Stat. Ann. § 558.29 (interest-bearing securities); Mont. Code Ann. § 70-29-329 (United States or Montana bonds); N.D. Cent. Code § 32-16-37 (United States bonds); S.D. Codified Laws Ann. § 21-45-55 (United States bonds); Utah Code Ann. § 78-39-37 (United States or Utah bonds).

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CHAPTER 38 PARTITION

4-38 Thompson on Real Property, Thomas Editions § 38.06

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§ 38.06 Final Accounting -- Improvements, Expenses, Rents and Profits.

Conn. Gen. Stat. § 4-15

Often when judicial partition is sought, whether in kind or by sale, one of the co-owners will seek compensation for improvements made to the co-owned property. Where a partition in kind is made, the party making the improvement will be allotted the improved portion of the land if this can be done without working an unfairness to the other co-owners. n158 Where partition is to be made by sale or where the improved portion cannot be allotted to the improver in a partition in kind, the improving co-owner may ask the court to award money to the co-owner to reflect the value of the improvement. Because a partition action is equitable in nature, courts will make such an award if appropriate, n159 treating the action as akin to an equitable accounting. n160 The proper valuation of the improvement is not its cost but the amount by which it enhanced the value of the property. n161 This rule considering increase in value rather than cost applies only where the improvement was made without the knowledge or consent of the other cotenants. In *Denton v. Lazenby*, n162 the court addressed the credit issue where the cotenants had agreed to the improvement. The court initially noted the rationale for the "increased value" rule if such agreement is not present:

> A rationale for allowing compensation for the value of improvements is to prevent a nonimproving cotenant from being unjustly enriched by improvements to which he or she did not contribute. One of the reasons for limiting the amount of reimbursement to the increase in value of the property is to prevent one cotenant from negating another cotenant's interest in the property by making expensive improvements and then being reimbursed for the cost of improvements which the nonimproving cotenant did not desire or which do not comparably increase the value of the property. [This rule] protects both the improving cotenant and the nonimproving cotenant: The nonimproving cotenant is not burdened with the cost of improvident improvements, and the improving cotenant is protected when his or her improvements have greatly appreciated in value. n163

Because this rationale did not apply to improvements made with the consent of cotenants, the court found cost to be the more equitable measure. The court may make similar adjustments where one party has borne an undue share of the expenditures associated with the property, n164 including funds paid in discharge of a mortgage. n165

Just as a cotenant may recover for expenses or improvements made to benefit the co-owned property, the cotenant may

be charged for rents and profits that were received by the cotenant in excess of the pro rata share. n166 In addition, a cotenant who has excluded other cotenants from possession may be required to account to the others for their share of the fair rental value of the property. n167 A court will not order such reimbursements unless a demand for them is made by the other co-owners. n168

COMPUTER-ASSISTED RESEARCH

LEXIS: partition w/2 sale! w/30 improvement! or expense! or rent! or profit!

FOOTNOTES:
(n1)Footnote 158. *See* discussion *supra* at n.129.

(n2)Footnote 159. *Graham v. Inlow, 790 S.W.2d 428 (Ark. 1990); Martinez v. Martinez, 638 P.2d 834 (Colo. App. 1981); Hackett v. Hackett, 598 A.2d 1112 (Conn. Supp. 1990), aff'd, 598 A.2d 1103, cert. denied, 600 A.2d 1359 (Conn. 1991); Borum v. Deese, 26 S.E.2d 538 (Ga. 1943); Janik v. Janik, 474 N.E.2d 1054 (Ind. App. 1985); Renensland v. Ellenberger, 574 P.2d 217 (Kan. App. 1977);* La. Code Civ. Proc. Ann. § 4626; Mass. Ann. ch. 241, § 25; *Knowlton v. Knowlton, 673 S.W.2d 502 (Mo. App. 1984)* (award for improvements may be enforced in equity where they are made in good faith, are of a substantial nature, materially enhance the value of the property and it is equitable to enforce them); N.Y. Real Prop. Acts § 944; *In re Sivak's Estate, 58 A.2d 456 (Pa. 1948); White v. Pleasants, 317 S.E.2d 489 (Va. 1984); Heyse v. Heyse, 176 N.W.2d 316 (Wis. 2d 1970); Butler v. Hayes, 487 S.E.2d 229 (Va. 1997)* (Cotenants, who believed they had been deeded a 5/8 interest, were correctly informed by other cotenants that their deed was defective, since the grantor held only a 1/8 interest. Despite this information, the mistaken cotenants made numerous improvements for which they later sought credit in a partition action. In denying their request even though they did validly hold a 1/8 interest, the court noted that the improvements were made at a time when the claimants did not know whether they held any interest at all. In the court's view, the claimants had unclean hands and thus were not worthy of equitable relief). *Burnett v. Burnett, 742 So. 2d 859 (Fla. App. 1999)* offers an explanation of the proper sequence of legal determinations in order to partition a marital residence under Florida law. The first step calls upon the trial court to make a finding of the value of the marital residence. The second step is to order a sale. The third step is to impound the proceeds of that sale. The fourth step, and final one before payment to the parties, is to hold an ancillary proceeding to establish credits due between the parties. *See also, Biondo v. Powers, 743 So. 2d 161 (Fla. App. 1999),* where trial court improperly valued joint tenants' interests in partition based upon their respective investments in the property and its maintenance, thus valuing one joint tenant's share at 85% and the other at 15%. The appeals court held that the proper method required an initial 50/50 split between the two joint tenants. Once that split is made, offsets may be applied to reflect individual contributions to the expenses of maintaining the property, including mortgage payments, insurance payments, taxes and necessary repairs.

(n3)Footnote 160. *Wood v. Barnett, 94 So. 338 (Ala. 1922); Worthing v. Cossar, 93 A.D.2d 515, 462 N.Y.S.2d 920 (1983).*

(n4)Footnote 161. *Graham v. Inlow, 790 S.W.2d 428 (Ark. 1990); Gerontopoulos v. Gerontopoulos, 66 P.2d 724 (Cal. App. 1937); Martinez v. Martinez, 638 P.2d 834 (Colo. App. 1981); Janik v. Janik, 474 N.E.2d 1054 (Ind. App. 1985);* Mass. Ann. Laws ch. 241, § 25; *Dalgarno v. Baum, 30 S.E.2d 559 (Va. 1944). But see, Bednar v. Bednar, 688 A.2d 1200 (Pa. Super. 1997)* (remodeling of bathroom, erecting a sunroom and landscaping were not necessary to preserve and safeguard the property; therefore cotenant was not entitled to contribution); *Hernandez v. Hernandez, 645 So. 2d 171 (Fla. App. 1994); In re Marriage of Marr, 638 N.E.2d 303 (Ill. App. 1994)* (in order to get credit for improvement made without the knowledge or consent of other cotenants, proper consideration is increase in value, not cost);*Christen v. Christen, 38 S.W.3d 488 (Mo. App. S.D. 2001)* (refusing to authorize reimbursement to improving co-tenant in absence of proof of increased value attributable to improvement).

(n5)Footnote 162. *879 P.2d 607 (Kan. 1994).*

(n6)Footnote 163. *Id. at 609* (citations omitted).

(n7)Footnote 164. *Hackett v. Hackett, 598 A.2d 1112 (Conn. Supp. 1990), aff'd, 598 A.2d 1103 (Conn. App. 1991), cert. denied, 600 A.2d 1359 (Conn. 1992); Borum v. Deese, 26 S.E.2d 538 (Ga. 1943); Beckham v. Eggleston, 341 S.W.2d 337 (Mo. App. 1960); Worthing v. Cossar, 462 N.Y.S.2d 920 (1983); Community Bank of Chillicothe v. Campbell, 870 S.W.2d 838 (Mo. App. 1994)* (expenses for repairs made in good faith for substantial benefit of all cotenants may be divided in partition where circumstances indicate such is equitable); *Hernandez v. Hernandez, 645 So. 2d 171 (Fla. App. 1994)* (expenditures preserving property are legitimate items for credit, including necessary and reasonable repairs, maintenance and replacement). *But see Bednar v. Bednar, 688 A.2d 1200 (Pa. Super. 1997)* (in Pennsylvania, a cotenant, by statute, is legally obliged to pay only his or her share; cotenants who voluntarily pay other cotenants' shares are not entitled to contribution from that cotenant); *Richardson v. Gibson, 793 So. 2d 801 (Ala. Civ. App. 2001)* (a co-tenant in exclusive occupation is entitled to contribution from co-tenants of their pro-rata share of taxes paid by occupying cotenant but not of insurance premiums, pest control expenses and replacement of the water heater).

(n8)Footnote 165. *Lawrence v. Harvey, 607 P.2d 551 (Mont. 1980); Henson v. Henson, 72 S.E.2d 873 (N.C. 1952); Hawkins v. Hawkins, 464 N.E.2d 199* (Ohio Misc. 2d, Comm. Pl. 1984).

(n9)Footnote 166. *Spence v. Spence, 195 So. 717 (Ala. 1940); Janik v. Janik, 474 N.E.2d 1054 (Ind. App. 1985);* La. Code Civ. Proc. Ann. § 4626; *Hawkins v. Hawkins, 464 N.E.2d 199* (Ohio Misc. 2d, Comm. Pl. 1984).

(n10)Footnote 167. *Stylianopoulos v. Stylianopoulos, 455 N.E.2d 477 (Mass. App. 1983), rev. denied, 459 N.E.2d 824 (Mass. 1984); Cahill v. Kerins, 784 So. 2d 685 (La. App. 2d Cir. 2001)* (co-tenant in exclusive possession may sue for contribution by co-tenants of their pro-rata share of mortgage; no off-set for value of exclusive possession; off-set was permissible against occupying co-tenant's charges for repair and maintenance).

(n11)Footnote 168. *Bessen v. Glatt, 566 N.Y.S.2d 750 (1991).*

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CHAPTER 38 PARTITION

4-38 Thompson on Real Property, Thomas Editions § 38.07

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§ 38.07 Costs of Litigation and Attorneys' Fees.

[Go To Supp]

Most states provide specific statutory directives on the apportionment of costs. Costs associated with partition typically include attorneys' fees for the common benefit, n169 fees and expenses of the commissioners or referees, compensation paid to the surveyor, reasonable costs of the title report, and any other expenses determined to be of common benefit to the parties. n170 Whether partition has resulted from partition in kind or sale, these costs are uniformly applied to the parties in relation to their proportionate interest in the property or the proceeds. n171 Where partition is in kind, these costs become a lien on the owner's allotted parcel superior to other liens. n172 The one consistent exception to the general rule of cost allocation is that, where costs are generated by a dispute between fewer than all the co-owners or other interested parties, costs specific to that dispute will be shared only by the parties to the dispute. n173

States that make statutory provision for attorneys' fees fall into two groups. The majority provide for the inclusion of attorneys' fees in the general costs to be allocated to the parties regardless of which parties' attorneys generated the fees, to the extent those fees were generated for the common good of the co-owners and other interested parties. n174 A minority authorize inclusion only of plaintiff's attorney's fees and only to the extent such fees were generated for the common good. n175 The determination of which fees accrued to the common good is made by the court. n176 The burden of proof is on the party seeking the award of such fees.

COMPUTER-ASSISTED RESEARCH

LEXIS: partition w/2 sale! w/50 litigation w/5 cost! partition w/2 sale! w/30 attorney! w/5 fee!

FOOTNOTES:
(n1)Footnote 169. *See* discussion *infra* at nn.174-176. *See also Williams v. McIntyre, 632 So. 2d 446 (Ala. 1993)* (upholding award of attorneys' fees); *Diaz v. Security Union Title Ins. Co., 639 So. 2d 1004 (Fla. App. 1994)* (awarded attorneys' fees in a partition suit where the fees were accrued in proceedings outside the partition action, because those outside proceedings had established and protected the interests of the cotenants); *Buchanan v. Mitchell, 873 S.W.2d 945 (Mo. App. 1994)* (factors a court may consider in awarding attorneys' fees include "amount and character of the legal

services rendered, the nature and importance of the litigation, the decree of responsibility assumed by the attorney, the degree of professional skill and expertise the attorney demonstrates, and the value of the property."); *Jernigan v. Jernigan, 678 So. 2d 1169 (Ala. 1996)* (defendant's as well as plaintiff's attorneys' fees may be ordered paid out of common fund if and to the extent that defendant's attorney's efforts served the interests of all cotenants); *Hopper v. Daniel, 38 S.W.3d 370 (Ark. App. 2001)* (where case presented alternative claims, only one of which involved partition, award of attorney's fees was properly limited to those fees incurred in relation to partition claim).

(n2)Footnote 170. Cal. Civ. Proc. Code § 874.010.

(n3)Footnote 171. Alaska Stat. § 09.45.620; Ark. Code Ann. § 18-60-418; Cal. Civ. Proc. Code § 874.040; Del. Code Ann. tit. 25, § 735; Fla. Stat. Ann. § 64.081; Idaho Code § 6-545; Ill. Comp. Stat. Ann. ch. 735, § 5/o17-125; Ind. Code Ann. § 32-17-4-21; Iowa Rules Civ. Proc. § 893 (all costs are to be advanced by the plaintiff and eventually apportioned per share except as to contests which are billed to the loser); Kan. Stat. Ann. § 60-1003(5); Ky. Rev. Stat. Ann. § 381.135(11) (costs apportioned except costs associated with a specific dispute of law or fact, which are charged to the loser); Me. Rev. Stat. Ann. tit. 14, § 6516; Mass. Ann. Laws tit. 241, § 22 (rule applies unless court determines that an alternative allocation is more equitable); Minn. Stat. Ann. § 558.10; Mo. Ann. Stat. § 528.460; Mont. Code Ann. § 70-29-218; Nev. Rev. Stat. Ann. § 39.170; N.J. Stat. Ann. § 2A:56-11; N.M. Stat. Ann. § 42-5-1; N.D. Cent. Code § 32-16-45; Ohio Rev. Code Ann. § 5307.25; Okla. Stat. Ann. tit. 12, § 1515; R.I. Gen. Laws § 34-15-22; S.D. Codified Laws Ann. § 21-45-24; Utah Code Ann. § 78-39-45; Wash. Rev. Code Ann. § 7.52.480. Fla. Stat. Ann. § 64.081 (amended in 1995 to provide gender-neutral language).

(n4)Footnote 172. Alaska Stat. § 09.45.620; S.D. Codified Laws Ann. § 21-45-24; Utah Code Ann. § 78-39-45.

(n5)Footnote 173. Alaska Stat. § 09.45.620; Mont. Code Ann. § 70-29-218; Or. Rev. Stat. § 105.405; S.D. Codified Laws Ann. § 21-45-24; Utah Code Ann. § 78-39-45; Wash. Rev. Code Ann. § 7.52.480.

(n6)Footnote 174. Cal. Civ. Proc. Code § 874.010; Fla. Stat. Ann. § 64.081; Idaho Code § 6-545; Ind. Code Ann. § 32-17-4-21; Mont. Code Ann. § 70-29-218; N.M. Stat. Ann. § 42-5-8; N.D. Cent. Code § 32-16-45; Ohio Rev. Code Ann. § 5307.25; Or. Rev. Stat. § 105.405; S.C. Code Ann. § 15-61-110; S.D. Codified Laws Ann. § 21-45-24; Tenn. Code Ann. § 29-27-121; Utah Code Ann. § 78-39-45; Wash. Rev. Code Ann. § 7.52.480; Wyo. Stat. § 1-32-101.

(n7)Footnote 175. Ark. Code Ann. §§ 18-60-419, 18-60-419; Iowa Code Ann. § 894 (fee is calculated as percentage of appraised price if partition in kind or sale price); La. Code Civ. Proc. Ann. § 4613 (but this fee is not to be paid out of the share of any party represented in the proceeding by an attorney); *Kuller v. Kuller, 109 N.W.2d 561 (Minn. 1961);* Miss. Code Ann. § 11-21-31; *Richards v. Stuckenberg, 478 S.W.2d 405 (Mo. App. 1972). Lux v. Schroeder, 645 N.E.2d 1114 (Ind. App. 1995)* (statute authorizing plaintiff attorney's fees not intended to apply when all sides are represented by counsel, defendant contests matters in the complaint and the defendant does not derive a benefit from plaintiff's counsel's services).

(n8)Footnote 176. *Padgett v. Haston, 651 S.W.2d 460 (Ark. 1983); O'Neill v. O'Neill, 551 So. 2d 228 (Miss. 1989)* (plaintiff's attorneys' fees are awarded at discretion of court, but usually will not be allowed if suit is resisted and defendant employs an attorney in good faith); N.M. Stat. Ann. § 42-5-8; *In re Marriage of Marr, 638 N.E.2d 303 (Ill. App. 1994)* (no attorneys' fees to plaintiff where defendant proffered substantial defense in good faith); *Buchanan v. Mitchell, 873 S.W.2d 945 (Mo. App. 1994)* (plaintiff's attorneys' fees should not be awarded for those services that did not inure to the defendant's benefit, as where plaintiff and defendant were contesting the size of their shares); *Parks v. Rapp, 907 S.W.2d 286 (Mo. App. 1995)* (court lists appropriate factors in determining amount of attorneys' fees as "consideration of the amount and character of legal services rendered, the nature and importance of the litigation, the degree of responsibility imposed or incurred by the attorney, and the degree of professional ability, skill and experience called for and exercised" as well as "the prime and most significant factor" -- the sale price; *Rahat v. Golmirzaie, 966 S.W.2d 883 (Ark. 1998)* (notes that statutory provisions for attorneys' fees in partition actions exist to reflect an appreciation for "the painstaking preparation before filing of the suit and the necessity for meticulous compliance with

procedural requirements thereafter... .") The *Rahat* court found nothing per se unreasonable in basing the amount of attorney's fees on a percentage of the sales price of the partitioned property. *Hopper v. Daniel, 38 S.W.3d 370 (Ark. App. 2001)* (where case presented alternative claims, only one of which involved partition, award of attorney's fees was properly limited to those fees incurred in relation to partition claim).

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CHAPTER 38 PARTITION

4-38 Thompson on Real Property, Thomas Editions § 38.08

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§ 38.08 Partition of Successive Interests.

Partition developed as a remedy for parties with concurrent ownership interests in real property. The applicability of partition rules to circumstances involving successive interest holders has provided an array of troublesome questions for courts.

The traditional rule was that, because co-owners of remainders or reversionary interests did not have a right to possession, they could not maintain a partition action even of only their future interests. This ban was recognized because the policies behind recognition of a right of partition were not implicated. "[P]ersons having estates in land under which they had no right to possession, were in no respect inconvenienced or damnified by the undivided possession held by others." n177 A minority of states continue to adhere to this rule. n178

Some states have changed this rule by statute and authorize partition actions among the holders of future interests when a life tenant is still in possession. n179 This authorization is limited to those who hold vested as opposed to contingent interests. n180 The reason for this rule appears to be that those with vested interests are legally assumed to have a future possessory interest while those whose interests are contingent may never have a possessory interest. Where there are only two estate holders, one holding a life estate and one holding a future interest, there are no "co-owned" interests and partition is generally not allowed by either of the estate holders. n181

Although these statutes allow partition of future interests, such partition normally cannot affect a life tenant of the whole of the property without the life tenant's consent. n182 Without such consent the partition must be made subject to the possessory rights of the life tenant. n183 Some statutory schemes do permit sale of a life estate in part but not all of the land under certain circumstances. n184 Where the life estate is sold, most statutory schemes offer the life tenant a choice. The court may, if the life tenant consents, value the interest of the life tenant, usually through annuity principles, in order to adequately compensate the life tenant. n185 The life tenant is paid that sum outright. If the tenant does not consent, the court must determine a just sum to be invested for the life tenant. n186 In essence the court determines the value of the share to which the life estate attaches and gives the life tenant a "life estate" in that sum of money. The principal is then turned over to the future interest holder at the termination of the life estate. In other states, the statute does not differentiate between situations where the life tenant consents or does not but simply provides that where a sale is made the court shall order investment of the proceeds in such a way as to protect all persons having an interest in the

proceeds. n187 Where partition is part in kind and part through sale and there is a life estate in an undivided share of the property, the life estate may be set off in the unsold portion. n188 Many states apply these same rules in favor of a tenant for years. n189

In most jurisdictions a life tenant, although in possession, may not compel a partition against a remainderman. n190 A life tenant may be able to compel a partition in kind against another life tenant who co-owns the life estate, n191 but will not be able to compel a partition sale without the consent of the remaindermen. n192 If, however, a life tenant co-owns the life estate with one co-owner and co-owns the remainder with another, the life tenant may have partition because of co-ownership of the fee simple estate. n193 An example of a state's unwillingness to extend this rule is provided by *Barden v. Pappas*: n194

A, the life tenant, brought an action for partition against the two remaindermen, B and C. B agreed to the partition; C did not and challenged on the ground that A had no right to the relief requested. A then transferred one-half of A's life interest to B and B transferred one-half of B's remainder to A. The court refused to allow the life tenant to partition against C in this circumstance, holding that the rule that a life tenant cannot maintain partition against a remainderman "is not affected by the fact that the plaintiff shares an interest with one of the defendants in the remainder." n195

A few states will allow a life tenant to seek partition but will leave the court discretion as to whether to order it. California's statutory section is illustrative:

> Partition as to successive estates in the property shall be allowed if it is in the best interest of all the parties. The court shall consider whether the possessory interest has become unduly burdensome by reason of taxes or other charges, expense of ordinary or extraordinary repairs, character of the property and change in the character of the property since creation of the estates, circumstances under which the estates were created and change in the circumstances since creation of the estates, and all other factors that would be considered by a court of equity having in mind the intent of the creator of the successive estates and the interests and needs of the successive owners. n196

Missouri's statute is similar, authorizing suit by a defendant for a partition sale on the same grounds.

Georgia allows partition in kind by a life tenant against remaindermen but does not allow a sale. n197 This allowance is given only to owners of an undivided portion for life, not to sole owners of a life estate. n198

COMPUTER-ASSISTED RESEARCH

LEXIS: partition w/30 successive w/2 interest! partition w/30 life w/2 tenant!

FOOTNOTES:

(n1)Footnote 177. A.C. Freeman, Cotenancy & Partition § 440 at 582-83 (San Francisco: Bancroft-Whitney 2d ed. 1886).

(n2)Footnote 178. *Weed v. Knox, 27 So. 2d 419 (Fla. 1946)* (one remainderman cannot bring a suit for partition against another remainderman where there is an outstanding life estate in a third person); Ga. Code Ann. § 85-1504; Idaho Code § 6-501; Mass. Laws Ann. ch. $1, § ; Mich. Stat. Ann. § 27A.3308; Miss. Code Ann. § 11-21-3; *Golick v. Lukus, 215 A.2d 551 (N.J. Super. 1965);* N.D. Cent. Code § 32-16-01; *Foppe v. Foppe, 103 N.E.2d 319 (Ohio Mis. 1951); Fry v. Stetson, 87 A.2d 305 (Pa. 1952).*

(n3)Footnote 179. Alaska Stat. § 09.45.260 (held to authorize suit for partition among co-remaindermen in *Dimond v. Kelly, 629 P.2d 533 (Alas. 1981));* Ark. Code Ann. § 18-60-401; Cal. Civ. Proc. Code § 872.710; Del. Code Ann. tit. 25, § 721; Haw. Rev. Stat. § 668-1; Ind. Code Ann. § 32-17-5-1; N.H. Rev. Stat. Ann. § 547-C:1; N.J. Stat. Ann. §

2A:56-37; N.M. Stat. Ann. § 42-5-1.

(n4)Footnote 180. *Hayden v. McNamee, 63 N.E.2d 876 (Ill. 1945)* (citing rule that where the life estate extends to the whole estate and the remainder is contingent, the contingent remainderman may not seek partition); *Albro v. Allen, 454 N.W.2d 85 (Mich. 1990)* (contingent remainders are not subject to partition); *Garland v. Raunheim, 288 N.Y.S.2d 417 (1968).*

(n5)Footnote 181. *Beach v. Beach, 74 P.3d 1 (Colo. 2003)* (Colorado law did not allow a mother to partition her life estate interest in real property from her daughter's remainder interest in the same property); *Bernat v. Kivior, 494 N.E.2d 425 (Mass. App. 1986); In re Estate of Alban, 591 N.W.2d 725 (Min. App. 1999)* (life tenant cannot have partition against remainderman because they are not co-tenants).

(n6)Footnote 182. Alaska Stat. § 09.45.320; *Aniton v. Robinson, 134 So. 2d 764 (Ala. 1961)* (one who has a mere reversionary interest cannot compel partition against one owning an outstanding life estate in and to the entire property); Del. Code Ann. tit. 25, § 737; Minn. Stat. Ann. § 558.08; N.C. Gen. Stat. 46-23; Tenn. Code Ann. § 29-27-123; Wash. Rev. Code Ann. § 7.52.110. *But see* Cal. Civ. Proc. Code § 873.840(c) (authorizing sale of whole property and placement of proceeds in trust with life income paid to life tenant and corpus paid to remainderman at termination of life estate).

(n7)Footnote 183. Alaska Stat. § 09.45.230; *Monroe v. Monroe, 294 S.W.2d 338 (Ark. 1956); Schmidt v. Schmidt, 143 N.E. 75 (Ill. 1924); Heintz v. Wilhelm, 186 N.W. 305 (Minn. 1922);* N.C. Gen. Stat. § 46-23; Or. Rev. Stat. § 105.265; S.D. Codified Laws Ann. § 21-45-25; Puryear v. Belcher, a*4 S.W.2d 344 (Tenn. 1981);* Wis. Stat. Ann. § 842.11.

(n8)Footnote 184. Alaska Stat. § 09.45.450 (if life tenant of part of property is a party, court may set off a portion of property to which the life estate attaches and either sell that part subject to the life estate or "if in the judgment of the court a due regard to the interest of all the parties requires the sale of that estate also, the sale may be ordered"); Cal. Civ. Proc. Code § 873.840; Or. Rev. Stat. § 105.315.

(n9)Footnote 185. Alaska Stat. § 09.45.460; Haw. Rev. Stat. § 668-12; Idaho Code § 6-527; Minn. Stat. Ann. § 558.26; Mont. Code Ann. § 70-29-326; Nev. Rev. Stat. Ann. § 39.300; N.C. Gen. Stat. § 46-24; N.D. Cent. Code § 32-16-27; Or. Rev. Stat. 105.320; S.D. Codified Laws Ann. § 21-45-53; Utah Code Ann. 78-39-27.

(n10)Footnote 186. Alaska Stat. § 09.45.470; Haw. Rev. Stat. § 668-12; Idaho Code § 6-528; Minn. Stat. Ann. § 558.26; Nev. Rev. Stat. Ann. § 39.310; N.D. Cent. Code § 32-16-28; Or. Rev. Stat. § 105-325.

(n11)Footnote 187. Conn. Gen. Stat. Ann. § 52-500.

(n12)Footnote 188. Alaska Stat. § 09.45.340; Cal. Civ. Proc. Code § 873.830; Haw. Rev. Stat. § 668-12; Idaho Code § 6-519; Mont. Code. Ann. § 70-29-214; Nev. Rev. Stat. Ann. § 39.220; N.D. Cent. Code § 32-16-19; Or. Rev. Stat. § 105.310; Wash. Rev. Code Ann. § 7.52.140.

(n13)Footnote 189. Alaska Stat. §§ 09.45.320, 09.45.340; Haw. Rev. Stat. § 668-12; S.C. Codified Laws Ann. § 21-45-29; Wash. Rev. Code Ann. § 7.52.140.

(n14)Footnote 190. Ariz. Rev. Stat. Ann. § 12-1220; *Garcia-Tunon v. Garcia-Tunon, 472 So. 2d 1378 (Fla. App. 1985); Rekovsky v. Glisczinski, 212 N.W. 595 (Minn. 1927); Burrow v. Haywood, 466 S.W.2d 892 (Tenn. 1971);* Tex. Prop Code Ann. § 23.003; *Whitby v. Overton, 413 S.E.2d 42 (Va. 1992); Plano Mfg. Co. v. Kindschi, 111 N.W. 680 (Wis. 1907); Peters v. Robinson, 636 A.2d 926 (Del. 1994)* (life tenant may not seek partition against remainderman).

(n15)Footnote 191. *Cottingham v. Love, 99 So. 907 (Ala. 1924); Whittaker v. Porter, 151 N.E. 905 (Ill. 1926); Albro v. Allen, 454 N.W.2d 85 (Mich. 1990)* (life tenant co-owners may have partition in kind of life estate only); *Rupp*

v. Molitor, 9 S.W.2d 609 (Mo. 1928); R.I. Gen. Laws § 34-15-2 (Michie 1984).

(n16)Footnote 192. Ga. Code Ann. § 44-6-172. An interesting application of these rules is found in *Laired v. Salata, 659 So. 2d 65 (Ala. 1995).*

(n17)Footnote 193. Mich. Stat. Ann. § 27A.3316; Miss. Code Ann. § 11-21-3. *Westerdale v. Grossman, 728 N.E.2d 67 (Ill. App. 2000)* (the fact that a remainder was contingent did not bar a life tenant from seeking partition).

(n18)Footnote 194. *532 So. 2d 707 (Fla. App. 1988).*

(n19)Footnote 195. *532 So. 2d 707, 709 (Fla. App. 1988).*

(n20)Footnote 196. Cal. Civ. Proc. Code § 872.010. *See also Golick v. Lukas, 215 A.2d 551 (N.J. Super. 1965);* Alaska Stat. § 09.45.260.

(n21)Footnote 197. Ga. Code Ann. § 44-6-172.

(n22)Footnote 198. *Williams v. Colleran, 195 S.E.2d 413 (Ga. 1973).*

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CHAPTER 38 PARTITION

4-38 Thompson on Real Property, Thomas Editions § 38.09

AUTHOR: Patricia Reyhan Albany Law School Union University

§ 38.09 Partition of Condominiums or Time-Share Arrangements.

§ 38.09(a) Condominiums.

With the advent of condominiums as a popular type of property ownership, a number of states established special rules to govern one aspect of condominium ownership. In the typical condominium arrangement, the owner owns not only an individual unit but an interest in the common areas of the condominium development, which each unit owner owns in common with the other unit owners. Some states provide by statute that condominium owners cannot sue to partition the commonly owned areas. n199 A few others recognize this basic rule but provide exceptions where material damage has occurred to the common areas and the condominium association has determined not to repair the damage, or where, after a statutorily defined time, the entire condominium project is economically unprofitable and the condominium association has determined not to undertake improvements to make it profitable. n200

Where partition of a unit is sought by co-owners thereof, the normal partition rules apply with the result that partition by sale rather than partition in kind is ordered.

COMPUTER-ASSISTED RESEARCH

LEXIS: partition w/30 condominium! or time-shar!

§ 38.09(b) Time-Shares.

The partition rule regarding time-shares, where set out by statute, appears to be uniform. An owner of a time share may not bring an action for partition except as permitted in the time-share instrument. n201

FOOTNOTES:
(n1)Footnote 199. Fla. Stat. Ann § 718.107; Me. Rev. Stat. Ann. tit. 33, § 1602-107; Mich. Stat. Ann. § 26:50 (137).

(n2)Footnote 200. Conn. Gen. Stat. Ann. § 47-74; Idaho Code § 55-1511; Ill. Comp. Stat. Ann. ch. 765, § 605/8; Mass. Ann. Laws ch. 183A, § 5; Miss. Code Ann. § 89-9-15; Mo. Ann. Stat. § 448.140(4); Mont. Code Ann. § 70-23-405; Nev. Rev. Stat. Ann. § 117.050; N.C. Gen. Stat. § 47A-7; N.D. Cent. Code § 47.04.1-9; Okla. Stat. Ann. tit.

60, § 527; Or. Rev. Stat. § 100.515.

(n3)Footnote 201. Ark. Code Ann. § 18-14-307; Fla. Stat. Ann. § 721.22; Ill. Comp. Stat. Ann. ch. 735, § 100/11; La. Rev. Stat. Ann. art. 9:1131.7; Me. Rev. Stat. Ann. tit. 33, § 592; Mass. Ann. Laws ch. 183B, § 14; N.C. Gen. Stat. § 93A-43; R.I. Gen. Laws § 34-41-204; Tex. Prop. Code Ann. § 221.014; Va. Code Ann. § 55-372; W. Va. Code § 36-9-20.

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Supp. To CHAPTER 38 PARTITION

4-38 Thompson on Real Property, Thomas Editions Supp. to § 38.01

Supp. to § 38.01 Introduction.

[Go To Main]

Add:

Sclafani v. Dweck, 856 A.2d 487 (Conn. App. 2004) (holding that in Conn., right to partition is discretionary to the court in equity); *McMillan v. Follansbee, 93 P.3d 809 (Or. App. 2004)* ; *Taylor v. Canterbury, 92 P.3d 961 (Colo. 2004)* (recognizing that a voluntary partition severs a joint tenancy).

Add:

Southard v. Southard, 105 S.W.3d 560 (Mo. App. 2003) (holding that partition of land is statutory according to state); *Ark Land Co. v. Harper, 599 S.E.2d 754, 758-59 (W. Va. 2004)* .

See, John Mark Huff, "Chop It Up for Sell It Off: An Examination of the Evolution of West Virginia's Partition Statute," *111 W. Va. L. Rev. 169* (Fall, 2008).

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Supp. To CHAPTER 38 PARTITION

4-38 Thompson on Real Property, Thomas Editions Supp. to § 38.02

Supp. to § 38.02 Voluntary Partition.

Haw. Rev. Stat. Ann. § 52-71

§ 38.02(a) General Principles. [Go To Main]

Add:

Burdette v. Estate of Burns, 200 S.W.3d 358 (Tex. App. 2006) (equal partition settlement agreement and stipulation was not set aside by the court).

Eisenberg v. Tuchman, 892 A.2d 1016 (Conn. App. 2006) (Cotentants agreed to stipulate to the proposed partition).

Add:

Glovier v. Dingus, 4 S.E.2d 551 (1939) (after executing a voluntary parol partition followed by a written agreement with the other side, a party was not entitled to a judicial partition instead).

Add:

Lack v. Payne, 151 S.W.3d 862 (Mo. App. 2004) (holding that partition is appropriate when the trial court is asked to divide the interests of the property where ownership is not at issue).

Add:

Bissonnette v. Ventura, 2004 R.I. Super. LEXIS 202 (R.I. Super. 2004) (recognizing availability of partition by sale as valid).

Add:

But see In re Estate of Duran, 66 P.3d 326 (N.M. 2003) (holding that oral partition agreements are nevertheless subject to other contract restrictions [here oral partition declared void because *minor* did not validate partition agreement]).

§ 38.02(b) Effect of Voluntary Partition. [Go To Main]

Add:

Young Properties v. Wolflick, 87 P.3d 235 (Colo. App. 2003) (holding that in partition proceedings, court need not create new interests in property, but must only severe unity of possession).

Wittich v. Wittich, 948 So. 2d 195 (La. App. 2006) (arbitrator's decision regarding partition of property was not set aside).

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Supp. To CHAPTER 38 PARTITION

4-38 Thompson on Real Property, Thomas Editions Supp. to § 38.03

Supp. to § 38.03 Involuntary Partition.

[Go To Main]

§ 38.03(a) Rules of Law. [Go To Main]

§ 38.03(a)(1) Partition as a Matter of Right.

Add:

Watson v. Pascal, 811 N.Y.S.2d 422 (2006) (a former landowner claiming she was tricked into conveying was not entitled to seek partition).

Add:

See e.g.,; *Brewer v. Schalansky, 102 P.3d 1145 (Kan. 2004)* ; *Arthur v. Dist. of Columbia, 857 A.2d 473 (D.C. App. 2004)* .

Add:

Sclafani v. Dweck, 856 A.2d 487 (Conn. App. 2004) (holding that no person can be compelled to remain the owner with another of real estate); *Food Services Corp. v. Rheam, 145 S.W.3d 484 (Mo. App. 2004)* (holding that partition is available at request of one or more of the joint tenants).

Add:

United States v. Wendling, 359 F. Supp. 2d 850 (D. N.D. 2005) .

Add:

Schmidt v. Wittinger, 687 N.W.2d 479 (N.D. 2004) (holding that partition is available only where cotenants have current posssessory interests).

Jackson v. Estate of Green, 771 N.W.2d 675 (Mich. 2009) (a tenant's estate could not pursue an already commenced partition action after the tenant's death).

Add:

But see Sclafani v. Dweck, 856 A.2d 487 (Conn. App. 2004) (holding that a court has power to create easements where such an exercise will facilitate an equitable partition in kind).

Add:

Lack v. Payne, 151 S.W.3d 862 (Mo. App. 2004) (holding that trial court did not abuse its equitable powers in quieting title in Plaintiff, rather than partitioning property, where ownership of property was at issue); *Pedersen v. Brook, 851 A.2d 627 (N.H. 2004)* (noting that court has power within partition proceedings to also settle title concerns).

§ 38.03(a)(2) Exceptions to the Right.

§ 38.03(a)(2)(i) Agreements Waiving the Right to Partition.

§ 38.03(a)(2)(i)(A) Written Agreements Waiving the Right to Partition.

Add:

Libeau v. Fox, 892 A.2d 1068 (Del. 2006) (joint tenant by written agreement waived right to partition).

Williams v. Moody Land & Cattle, L.P., 2005 Tex. App. LEXIS 2302 , *unreported opinion*, (Tex. App. 2005). *But see McMillan v. Follansbee, 93 P.3d 809 (Or. App. 2004)* (holding that although one can choose to waive right to partition, written waiver of right to partition is unenforceable where no clear and unequivocal manifestation to waive is present).

Add:

Cf. Brewer v. Schalansky, 102 P.3d 1145 (Kan. 2004) (holding that because right to partition have a favored status, any waivers of such should be strictly construed).

Add:

Cf. McMillan v. Follansbee, 93 P.3d 809 (Or. App. 2004) (holding that although one can choose to waive right to partition, such waivers must be both clearly and manifestly accepted to be enforceable).

§ 38.03(a)(2)(i)(C) Implied Agreements Waiving the Right to Partition.

Add:

Brewer v. Schalansky, 102 P.3d 1145 (Kan. 2004) .

Add:

McMillan v. Follansbee, 93 P.3d 809 (Or. App. 2004) (holding that although one can choose to waive right to partition, written waiver of right to partition is unenforceable where no clear and unequivocal manifestation to waive is present).

Add:

See Mansour Properties LLC. v. I-85/GA. 20 *Ventures, Inc., 592 S.E.2d 836 (Ga. 2004)* (holding that a "right of first refusal" agreement implied a waiver of right to partition).

§ 38.03(a)(2)(iii) Equitable Consideration Barring the Right to Partition.

Add:

See Adair Holdings, LLC. v. Duwa, 686 N.W.2d 235 (Iowa App. 2004) (recognizing that presence of "special equities" in a particular case may limit absolute right to partition); *O'Connell v. O'Connell, 694 N.W.2d 429 (Wisc. App. 2005)* (noting that in equitable actions like that of partition, courts will not enforce it to the extent of doing inequity to others). *Cf. Delucca v. Delucca, 871 A.2d 72 (N.H. 2005)* (noting that a court's partition powers are equitable in nature, and court must consider circumstances of each case to achieve complete justice); *Hunt v. Hunt, 788 N.Y.S. 2d 219 (N.Y. App. Div. 2004)* (noting that equitable nature of partition action grants court authority to adjust the rights of parties so each receives his or her proper share of the property and its benefits).

§ 38.03(b)(1) Complaint or Prayer for Partition.

Add:

Golden v. Waterhouse, 953 So. 2d 927 (La. Ct. App. 2007) (the trial court that had entered the judgment of divorce had continuing jurisdiction to partition the property).

Cf. Kimura v. Kamalo, 107 P.3d 430 (Haw. 2005) (holding that court may use its powers in equity to partition on the behalf of unknown owners, even if such owners do not directly make an appearance in the partition action).

add new text and footnote 85.1 at end of subsection:

The state constitution may guarantee a right to a jury trial in a partition action. n85.1

§ 38.03(b)(2) Parties--Plaintiff.

add:

Mayfair Investment Corp. v. Bryant, 922 N.E.2d 123 (Ind. App. 2010) (An owner of a one-sixth interest in a tract was entitled to bring an action for partition of the tract).

Add:

Arthur v. District of Columbia, 857 A.2d 473 (D.C. App. 2004) (recognizing that neither cotenant may unilaterally seek partition of property held by tenancy by the entirety); *Scarison, Inc. v. Paracha, 777 N.Y.S. 2d 131 (N.Y. App. Div. 2004)* (holding that property held by tenancy by the entirety is not partionable so long as the marriage exists, even where one owner's part interest was bought by a subsequent purchaser at a judicial sale); *In re Sampath, 314 B.R. 73 (Bankr. E.D. Va. 2004)* (same).

Add after But see:

In re Sampath, 314 B.R. 73 (Bankr. E.D. Va. 2004) (holding that creditors have all the rights of an individual cotenant-debtor and may partition, but not where the cotenant has no such individual right [as in the case of property held by tenancy by the entirety]).

§ 38.03(b)(3) Parties--Defendant.

Add:

Ransom v. Holman, 608 S.E.2d 600 (Ga. 2005) (holding that defendant was correctly dismissed because he no longer holds no interest in the property in this case).

§ 38.03(b)(4) Intervention.

Add:

Coker Properties, L.P. v. Brooks, 604 S.E.2d 766 (Ga. 2004) (holding that former cotenant had no right to intervene in partition action between successors of original cotenants).

FOOTNOTES:
(n1)Footnote 85.1. *See, e.g., Gilman v. Lake Sunapee Properties, LLC, 977 A.2d 483 (N.H. 2009)* .

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Supp. To CHAPTER 38 PARTITION

4-38 Thompson on Real Property, Thomas Editions Supp. to § 38.04

Supp. to § 38.04 Physical Partition or Partition in Kind.

[Go To Main]

Add:

McCorison v. Warner, 859 A.2d 609 (Conn. Super. 2004) (holding partition in kind is preferred method of partition); *Schmidt v. Wittinger, 687 N.W.2d 479 (N.D. 2004)* (holding same); *Ark Land Co. v. Harper, 599 S.E.2d 754 (W. Va. 2004)* (holding same).

Add:

Sheets v. Simms, 138 P.3d 1249 (Kan. App. 2006) (partition in kind not ordered because it was not practicable).

Schmidt v. Wittinger, 687 N.W.2d 479 (N.D. 2004) (holding that partition in kind should be ordered unless great prejudice to one or more cotenants is shown); *Delucca v. Delucca, 871 A.2d 72 (N.H. 2005)* (holding that court must determine viability of partition in kind without causing great prejudice to any cotenant before ordering partition by sale).

Add:

Hunt v. Hunt, 788 N.Y.S.2d 219 (N.Y. App. Div. 2004 (holding that court may partition by sale based upon parties' preference for such).

Add:

Lasseigne v. Baker, 924 So. 2d 1074 (La. Ct. App. 2006) (No. 05-CA-734, Feb. 27, 2006, La. App.) (parcel not qualified to be partitioned in kind).

McCorison v. Warner, 859 A.2d 609 (Conn. Super. 2004) (holding that court could not partition in kind even though majority of cotenants wished to do so, because topography of land made it impracticable); *Chaney v. Upchurch, 603 S.E.2d 255 (Ga. 2004)* (noting that court may order sale when partition in kind cannot be done conveniently and sale would better suit the parties' interests); *Entrada Co. v. Unopened Succession, 882 So. 2d 661 (La. App. 2004)* (holding that court may not partition in kind when division would result in loss of [overall] value or inconvenience to cotenants); *Schmidt v. Wittinger, 687 N.W.2d 479 (N.D. 2004)* (holding great prejudice is shown when the value of the share of each in case of a partition would be materially less than the share of the money equivalent that each could probably obtain from the whole). *See also Ark Land Co. v. Harper, 599 S.E.2d 754 (W. Va. 2004)* (holding that in addition to the usual tests for impracticability of partition in kind, court may also consider longstanding ownership and sentimental or emotional interests).

McNamara v. Mossman, 230 P.3d 1286 (Colo. App. 2010) (partition in kind determined to not result in manifest prejudice to the parties).

Add:

Schmidt v. Wittinger, 687 N.W.2d 479 (N.D. 2004) ; *Ark Land Co. v. Harper, 599 S.E.2d 754 (W. Va. 2004)* .

Add:

McCorison v. Warner, 859 A.2d 609 (Conn. Super. 2004) (holding that Conn. law authorizes court to either partition in kind or partition by sale, but not a combination of both).

§ 38.04(a) Partition in Kind. [Go To Main]

Add:

Flood v. Kalinyaprak, 84 P.3d 27 (Mont. 2004) (holding that where a party can prove unequal contribution towards the property to be partitioned, the property will be partitioned in proportion to each tenant's contribution); *Bixler v. Oro Mgmt., LLC., 86 P.3d 843 (Wyo. 2004)* (holding same).

Gibbs v. Kashak, 883 N.E.2d 825 (Ind. App. 2008) (the court did not abuse its discretion in ordering a partition in kind).

Add:

Kimura v. Kamalo, 107 P.3d 430 (Haw. 2005) (commissioner undertook to partition land commensurate with order of the court so to do); *Laurita v. Estate of Moran, 607 S.E.2d 506 (W. Va. 2004)* (accepting commissioner's recommendation in manner of partitioning in kind).

Add:

Romero v. Bernell, 603 F. Supp. 2d 1333 (D. N.M. 2009) (partition ordered despite argument that associated inchoate wind power rights were not capable of being partitioned).

Laurita v. Estate of Moran, 607 S.E.2d 506 (W. Va. 2004) (recognizing that commissioner's report is not final and may be rejected by the court).

Insert new footnote 121.1 after "The statutes and case law give relatively little guidance on the proper method of physically dividing the property except to mandate that the division reflect the number of shares and the fractional size of the shares (where the land is held in tenancy in common)." n121.1

Add:

In re Last Will and Testament of Lynn, 878 So. 2d 1052 (Miss. App. 2004) (holding that court may order further partitioning where prior partitioning resulting in gross inequities amongst shares).

§ 38.04(c) Allocation of Shares. [Go To Main]

Add:

Cf. In re Last Will and Testament of Lynn, 878 So. 2d 1052 (Miss. App. 2004) (holding that where "improvements" actually decreased the value of the land to be partitioned, those "improvements" were appropriately ordered destroyed by the responsible parties before final determination of the partition).

Add:

Zimmerman v. Marsh, 618 S.E.2d 898 (S.C. 2005) (partition by allotment).

Laurita v. Estate of Moran, 607 S.E.2d 506 (W. Va. 2004) (holding that cotenant is entitled to have share of partitioned land allotted adjacent to land he may already hold if such can be done without damage to the interests of other cotenants).

§ 38.04(d) Incidental Effects of Physical Partition. [Go To Main]

Add:

Cf. Clark v. Dady, 131 S.W.3d 382 (Mo. App. 2004) (noting that "[i]n the case of a partition in kind, reimbursement for expenses is effectuated by placing an equitable lien on the property partitioned to the other party").

FOOTNOTES:
(n2)Footnote 121.1. *But see Delucca v. Delucca, 871 A.2d 72 (N.H. 2005)* (holding that in New Hampshire the "primary method of partition is by division of the land itself by metes and bounds among the tenants in common").

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Supp. To CHAPTER 38 PARTITION

4-38 Thompson on Real Property, Thomas Editions Supp. to § 38.05

Supp. to § 38.05 Partition by Sale.

[Go To Main]

Add:

Cathey v. McPhail & Associates, Inc., 989 So.2d 494 (Miss. App. 2008) (the burden of proving the property was not subject to partition in kind was met).

Schmidt v. Wittinger, 687 N.W.2d 479 (N.D. 2004) (acknowledging that court may order partition by only when there is sufficient evidence of great prejudice to a party); *Delucca v. Delucca, 871 A.2d 72 (N.H. 2005)* (noting that trial court should consider certain factors [here, value of land as a whole versus value of land subdivided into lots] before ordering partition by sale); *Ark Land Co. v. Harper, 599 S.E.2d 754 (W. Va. 2004)* (holding that court may consider evidence other than value of land to be partitioned [such as longtime ownership and emotional attachment] when determining whether partition in kind or by sale is appropriate).

McCormick v. Pickert, 856 N.Y.S.2d 306 (2008) (the trial court did not abuse its discretion in ordering a partition by sale before an accounting had occurred); *Keen v. Campbell, 249 S.W.3d 927 (Mo. App. 2008)* (substantial evidence supported a determination that partition in kind could not be accomplished without prejudice to the parties).

§ 38.05(a) Mechanics of Sale. [Go To Main]

Add:

Hataway v. Nicholls, 893 So. 2d 1054 (Miss. 2005) (special master ordered to conduct sale).

Add:

Hataway v. Nicholls, 893 So. 2d 1054 (Miss. 2005) (special master ordered to deliver deed to the "highest bidder for cash").

Add:

Long v. Spencer, 137 S.W.3d 923 (Tex. App. 2004) (holding that any objections to the terms of a sale must be made before property is sold).

Add:

But see Necaise v. State, 916 So. 2d 553 (Miss. Ct. App. 2005) (holding that appellate court may not set aside sale for low price alone when trial court did not so find).

§ 38.05(b) Alternate Method--Appraisal and Sale to One of the Co-Owners. [Go To Main]

Add:

McCorison v. Warner, 859 A.2d 609 (Conn. Super. 2004) (holding that court cannot order one cotenant to buy the interests of another).

Add:

Ala. Code § 35-6-100 (2005).

§ 38.05(c) Disposition of Proceeds of Sale. [Go To Main]

Add:

Sullivan v. Dorsa, *27 Cal. Rptr. 3d 547 (Cal. App. 2005)* (referee's attorney's fees); *Segal v. Segal, 863 A.2d 221 (Conn. App. 2004)* (judgment lien to be satisfied out of proceeds of sale); *Kimura v. Kamalo, 107 P.3d 430 (Haw. 2005)* (general costs to be apportioned according to proportionate interests in property to be partitioned); *Parker v. Shecut, 597 S.E.2d 793 (S.C. 2004)* (escrow agent's fees and costs of appraisal to be shared according to proportionate interest in property). *But see Pedersen v. Brook, 851 A.2d 627 (N.H. 2004)* (holding that "[e]quity does not require that the proceeds in partition always be divided strictly according to the relative value of the estates held by the respective

parties").

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Supp. To CHAPTER 38 PARTITION

4-38 Thompson on Real Property, Thomas Editions Supp. to § 38.06

Supp. to § 38.06 Final Accounting--Improvements, Expenses, Rents and Profits

[Go To Main]

Add:

Clark v. Dady, 131 S.W.3d 382 (Mo. App. W.D. 2004) (recognizing that court is authorized to award 100% of the property in kind to one party and place an equitable lien on it for reimbursement of repairs and improvements made to it by the other party).

Add:

Bahnmiller v. Bahnmiller, 181 P.3d 443 (Idaho 2008) (compensation for improvements ordering for one of the tenants in common upon partition).

Add:

Laughon v. O'Braitis, 602 S.E.2d 108 (S.C.App. 2004) (sister entitled to credit based on increase in value of property as a result of her renovation of living room, dining room, and kitchen despite doing so unilaterally).

Add:

Moises v. Guzman, 904 So. 2d 1 (La. Ct. App. 2004) (co-owner entitled to reimbursement for money spent on upkeep of property even when not only personal payments, but payments from companies the co-owner owned, also made payments on the property); *Clark v. Dady, 131 S.W.3d 382 (Mo. App. W.D. 2004)* (recognizing entitlement to reimbursement for taxes, insurance and necessary repairs and improvements on the property); *Schmidt v. Wittinger, 687 N.W.2d 479 (N.D. 2004)* (parties entitled to reimbursement for another farmers share of the taxes and other expenses they paid for him). *But see Hutchins v. Payless Auto Sales, Inc., 85 P.3d 1010 (Wyo. 2004)* (Party not entitled to reimbursement for repairs and improvements when business foreclosed on the co-tenant's property because party could not establish that business was liable for waste or loss of rent the co-tenant caused the party). England v. Alicea, 1090625 (Ind. App. 2005) (husband must reimburse ex-wife for the amount she spent remodeling the real estate because divorce decree required).

Add:

Moises v. Guzman, 904 So. 2d 1 (La. Ct. App. 2004) (co-owner entitled to reimbursement for mortgage payments made on property even when not only personal payments, but payments from companies the co-owner owned, also made payments on the property); *Clark v. Dady, 131 S.W.3d 382 (Mo. App. W.D. 2004)* (recognizing that parties are entitled to reimbursement for finance or mortgage payments made on the property); England v. Alicea, 1090625 (Ind. App. 2005) (husband required to reimburse ex-wife for amount she spent on mortgage payments).

Add:

McCorison v. Warner, 859 A.2d 609 (Conn. Super. 2004) (man required to pay taxes and rent for occupancy and use of a building and surrounding farm that were part of the partitioned property); *Nicholson v. Johnston 855 A.2d 97 (Pa. Super. 2004)* (mortgage expenses incurred by one party offset any claims by the other party for rental payments).

Add:

Clark v. Dady, 131 S.W.3d 382 (Mo. App. W.D. 2004) (recognizing that party out of possession, even if not ousted, is entitled to reimbursement for his share of the reasonable rental value of the premises during the other party's exclusive possession if the party in possession is given credit for expenditures made in maintaining and improving the property); *Laughon v. O'Braitis, 602 S.E.2d 108 (S.C.App. 2004)* (sister required to pay for sibling's share of the property although sibling not considered ousted); *Parker v. Shecut, 597 S.E.2d 793 (S.C. 2004)* (brother who ousted co-tenant sister required to pay her one-half rental value of the property minus allowable expenses).

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Supp. to § 38.07 Costs of Litigation and Attorneys' Fees.

[Go To Main]

add:

Wedge v. Millard, 228 P.3d 452 (Mont. 2010) (awarded attorney's fees in connection with motion to compel and motion directing transfer of property).

add:

Poruba v. Poruba, 919 N.E.2d 1066 (Ill. App. 2009) (sole life tenant not permitted to bring partition action against sole remainderman; they are not considered "co-owners" of the property).

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CHAPTER 39 LEASEHOLD ESTATES

4-39 Thompson on Real Property, Thomas Editions 39.syn

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§ 39.syn Synopsis to Chapter 39: LEASEHOLD ESTATES

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§ 39.02 Historical Development of Leasehold Estates.

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§ 39.06(b)(6) Summary Proceeding for Possession.

§ 39.07 Bibliography.

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CHAPTER 39 LEASEHOLD ESTATES

4-39 Thompson on Real Property, Thomas Editions § 39.01

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§ 39.01 Overview of Leasehold Estates.

Property interests in residential apartments, commercial office space, retail space, and agricultural lands are commonly held as leasehold estates. In some locations, especially in Hawaii, it is common to find major property developments, including entire subdivisions or large skyscrapers on lands made available by the property owners under long-term leases, often of 99-year terms. The same historical common law doctrines and modern statutory rules governing leasehold estates apply whether the lease creates an interest in the tenant for a week or for several decades, and whether the property consists of space in a small apartment or storage shed or covers thousands of acres of undeveloped land. The common feature of all leasehold estates is the right of the lessee or tenant to possess specified real property in which the lessor or landlord has a greater estate or property interest. In every lease, the property interests in the property are shared between the landlord and the tenant. The landlord retains the ownership of the property as a future interest in the form of a reversion. The tenant obtains the present possessory interest in the leased property for the duration of the lease.

Leases of personal property are also common in our modern society. However, the interest created is not a leasehold estate, and the parties are not designated as landlord and tenant. These characteristics apply only to leases of real property. In fact, the law of leasehold estates -- most often called landlord/tenant law today -- developed in feudal England and became an important part of modern American land laws. n1 Many features of today's landlord/tenant doctrines result from that ancient land-based tradition, even though many leasehold estates, in particular leases of space in high-rise buildings, no longer have any connection to the land under the structure.

Doctrines affecting the landlord/tenant relationship have undergone more major revisions in the past generation than in many previous centuries. The changes are based on the shift in the primary object of the leasehold -- from the agricultural lease of land to the residential lease of dwellings and the commercial lease of business structures. The changes have occurred primarily through rejection of the traditional doctrine of *caveat emptor* and the replacement of the property doctrine of independent covenants by the contract rule that covenants are mutually dependent. n2

This chapter begins with a general overview of the forms of leasehold estates, including the relationship between the landlord and the tenant, the distinctions between leasehold estates and other interests resembling them, the characteristics of conveyance and contract, and the historical characterization of leasehold estates as both personal and

real property interests. Historically, four distinct types of leasehold estates have been recognized, although today the distinctions have been modified so that many states now identify only two forms of residential leasehold estates: the tenancy for definite term and the periodic tenancy. n3 The other traditional designations of the tenancy at will and the tenancy at sufferance are far less frequently encountered. They are, however, still employed in many jurisdictions to designate leasehold interests which do not satisfy the definitions of the two dominant forms of leasehold estates. n4

The historical portion of this chapter explains the development of the traditional landlord/tenant doctrines. Crucial changes have resulted through statutes modifying the inherited common law and through judicial decisions, especially ones in recent decades. Governmental regulation of leases has become more common, particularly in residential leases. Courts and legislatures have expanded tenant rights by adopting consumer protection principles based on public policy as contained in local housing codes as the basis for imposing an implied warranty of habitability on residential lease arrangements. Important models for public regulation of landlord/tenant law have influenced widespread modification of the traditional law of leases. The Commissioners on Uniform State Laws have produced the Uniform Residential Landlord/Tenant Act. n5

A significant minority of states have adopted this Act. n6 The American Law Institute published the *Restatement (Second) of Pro*perty (Landlord and Tenant) in 1976. n7 The first *Restatement of Pro*perty did not originally cover landlord/tenant law. n8 Finally, the chapter focuses on modern leasing practices, including legislation affecting evictions, an area of landlord/tenant law generally requiring the assistance of lawyers through court action.

FOOTNOTES:

(n1)Footnote 1. Restatement (Second) of Property, Introduction p. 1-6 (1977).

(n2)Footnote 2. Robert S. Schoshinski, American Law of Landlord and Tenant § 3.10 (Lawyers Co-op. 1980) (explaining the early development of landlord/tenant law and the traditional rule of *caveat lessee*).

(n3)Footnote 3. *See* Restatement (Second) of Property § 1.6, statutory note (2) (1977) (listing the states which have modified or done away with the common law presumptions which create a tenancy at will).

(n4)Footnote 4. Restatement (Second) of Property § 1.6, statutory note (1) (listing the states which have codified the common law presumption of tenancy at will). It is worth noting that almost every state now requires some period of advance notice before termination of a "tenancy at will." *Id.* § 1.6, statutory note (3).

(n5)Footnote 5. Uniform Residential Landlord and Tenant Act, 7b U.L.A. 427.

(n6)Footnote 6. States that have adopted the Uniform Residential Landlord and Tenant Act include: Alaska, Arizona, Florida, Hawaii, Iowa, Kansas, Kentucky, Montana, Nebraska, New Mexico, Oregon, Rhode Island, South Carolina, Tennessee, and Virginia. Uniform Residential Landlord and Tenant Act, 7b U.L.A. 427. (1974 & Supp. 1990) (Citing statutes whereby states have enacted U.R.L.T.A.).

(n7)Footnote 7. Restatement (Second) of Property (1977).

(n8)Footnote 8. The definition of "real property" from the Restatement of Property does not include estates for years, periodic tenancies, tenancies at will or tenancies at sufferance. Restatement of Property § 8 cmt. (1944).

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CHAPTER 39 LEASEHOLD ESTATES

4-39 Thompson on Real Property, Thomas Editions § 39.02

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§ 39.02 Historical Development of Leasehold Estates.

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Leasehold estates have existed since the early days of feudal England. The purposes served by these forms of property interests and the rights created in the parties have shifted over the centuries. They apparently had their beginnings in the money-lending business as a means of subverting the prohibitions on usury. n9 Leasehold interests were created in the lender by the owner of the property as a means of repaying a loan of money. The lender could use the land and its crops until the loan and the agreed value of the usurious "interest" had been satisfied. The primary function of leases over the centuries has changed, however. A landowner generally uses a leasehold estate to make income from property by transferring the possessory interest to another person. In the usual transaction, the landowner keeps a future interest in the property in the form of a reversion. Following expiration of the leasehold estate, the possessory right in the property reverts back to the landlord.

The law of leasehold estates developed in the context of agricultural lands. In recent centuries, commercial buildings and tenant housing have become the primary objects of leases. As the land itself has become less important than the structures on the land, statutes have altered many traditional leasehold doctrines. Shelter and commercial space in urban and suburban areas have replaced the historically primary focus on farm lands for a large majority of tenants in today's society.

Today, leasehold estates function in a wide variety of commercial and residential settings. Important protections for the tenant apply today in residential leasehold estates, even though the contractual lease may not mention them. n10 Commercial tenants can obtain similar protections if they are covered in the lease agreement.

§ 39.02(a) Conveyance and Contract Characteristics.

Historically, leases have been characterized as a conveyance and have been governed by the property laws of each state. n11 This view of a lease is warranted because a lease creates an interest in land. Accordingly, a tenant's interest is designated as an estate in land.

A lease is also a contract between the landlord and tenant. The typical written lease contains numerous covenants

regarding the rights and duties of the parties to the lease agreement. Over the centuries, the contract feature of a lease has been less prominent than its nature as a property conveyance. n12 Although express provisions in the lease have been enforceable in courts, as in the case of any other form of contract, general principles governing the relationship were generally lifted from property law rather than contract law. n13

The essence of a lease was historically viewed as creation of possessory property rights in the land. General contract principles that might have applied were ignored. Thus, for example, the contract principle of frustration of purpose was generally not applied, even though the structures on the leased property may have been destroyed. n14 The tenant was still bound under the lease because the estate in land continued in the tenant despite loss of the structures. Another contract principle requiring mitigation of damages was likewise considered inapplicable in lease situations. n15 Thus, if a tenant abandoned the property, the landlord was permitted to ignore the tenant's action and continue to hold the tenant responsible for the rent. Because of the conveyance of the leasehold estate, the law viewed the tenant as holding the right to possession of the land, even though the tenant was no longer occupying the property. Today, the law has changed by often applying the mitigation of damages principle from contract law. n16 The court may inquire as to what the landlord could reasonably receive from a new tenant in determining the rent that can be recovered by the landlord from an abandoning tenant.

Thus courts and legislatures now pay increasing attention to the contract nature of a lease. The emphasis has shifted away from a focus on the rights obtained by a tenant in land owned by the landlord. The lease, especially in the residential context, is viewed as an agreement for space and services related to a building. The tenant is often recognized as a consumer; the product is a dwelling. Principles developed in other consumer contexts relating to protected expectations of the product quality or product liability have been increasingly applied in defining the rights of tenants. n17 Increased attention to health, safety, and the relative bargaining positions of the parties has resulted in newly articulated duties imposed on the landlord.

Because of the dual nature of the lease as a conveyance and a contract, lawmakers and judges are able to apply principles from both property law and contract law in establishing rules to govern the lease arrangement and in determining the respective rights and duties of the landlord and tenant.

In recent decades, the tenant's rights under a lease have been strengthened through two significant developments based on consumer protection principles applied to leases. First, tenants have received increased protections because of adoption of the implied warranty of habitability in residential leases to replace the age-old doctrine of *caveat emptor*. n18 Previously, the tenant was solely responsible for the physical condition of the property. Because a lease involved a conveyance of an estate in land, the protections available to the purchaser of goods were not considered applicable. So, although purchasers of goods were entitled to implied warranties regarding suitability of the personal property involved, through either a general warranty of merchantability or the more specific warranty of fitness for specific purposes, n19 tenants received no comparable implied warranties regarding the condition of the real property. Exceptions to this tenant responsibility existed. For example, if the landlord knew of defects in the condition of the premises that were not readily observable -- the latent defect exception to the doctrine of lessee beware -- then the landlord had both contractual and tort responsibilities based on the defective conditions. n20 Similarly, landlords were responsible for unsafe conditions if they existed because of the landlord's negligence in repairing or constructing the premises. n21 Much expansion of these tenant remedies has occurred over recent decades, as courts and legislatures in almost all states have modified the common law rule by adopting the implied warranty of habitability in residential leases. n22

The second major change in the law of residential leases is the abandonment of the traditional property law principle of independence of covenants. n23 Under that traditional approach, the landlord was entitled to receive rent from the tenant as long as the tenant had the possessory estate in the land. Creation of a leasehold estate in the tenant was similar to a sale of the property, with the rent obligation serving the same purpose as the purchase price. It did not matter what covenants were left unfulfilled on the landlord's part. If the tenant was in possession of the land, the tenant had no excuse to breach covenants in the lease. The only remedy available to the non-breaching tenant was a court action for

damages caused by the landlord's failure to perform as promised. n24 Specifically recognized exceptions existed, relieving the tenant of the rent obligation if the landlord actually or constructively evicted the tenant from the land. Alternatively, an ousted tenant could seek to recover possession through the help of the courts. n25

Because lease covenants were considered independently enforceable, the landlord was similarly blocked from terminating the tenant's rights under the lease, even if the tenant failed to abide by the lease covenants. Typically, however, the landlord inserted a forfeiture provision in the lease permitting termination of the lease if the tenant defaulted in paying the rent. Statutes have also given landlords power to terminate a lease based on the tenant's breach of the rental covenant. n26 Without an express forfeiture clause in the lease or a statutory authorization permitting termination, the independent covenant principle from common law would be in force, and the landlord would have to allow the tenant to continue occupying the property under the lease. The landlord would be limited to a suit for damages to recover the rent owed.

Under the contrasting contract law principle, based on interdependency of covenants, the parties' covenants are viewed as mutually dependent. Breach by one party serves as an excuse for non-performance by the other party. Either party may seek rescission of the contract or may apply the remedy of an offset to compensate for the other party's breach of a covenant. Apparently, these contract doctrines developed after and in a different direction from, the property doctrines of landlord and tenant law. n27 The traditional approach has been largely replaced by the adoption of the rule from contract law that covenants are mutually dependent. Now, a tenant may have a defense justifying underpayment of the rent based on the landlord's failure to perform contractual obligations owed to the tenant. n28 These duties of the landlord may be express promises in the lease or they may be imposed on every landlord under the recently recognized implied warranty of habitability. n29

These two major shifts have given tenants new rights to assert as defenses in eviction actions based on nonpayment of rent. Tenants also have broader opportunities under the habitability warranty and the mutually dependent covenant principle to initiate tort actions to recover damages against landlords who have failed to perform their duties under the lease. These modern developments affecting the tenant's rights and the landlord's obligations are covered in Volume 5, Chapter 40 (§ 40.23) *infra.*

COMPUTER-ASSISTED RESEARCH

LEXIS: leasehold w/1 estate! w/30 character! w/15 contract! or conveyance!

§ 39.02(b) Real Property or Personal Property Characteristics.

A lease creates a recognized interest in land. It would seem that leases should be included in the broad category of real property for all purposes. However, leases have historically been defined in a separate category because they are sometimes treated as personal property and other times as real property. At common law, this hybrid nature of the treatment of leases was expressed by the designation of a lease as a "chattel real," indicating "its rather curious status as a personal property interest in land." n30

The reasons for considering a lease as personal property are historical. In feudal England, real property interests were protected by so-called real actions. An aggrieved party was allowed to recover possessory interests in land from anyone interfering with the claimant's exclusive rights. A tenant under a lease did not have access to these court remedies. An ousted tenant could not seek help from the courts in regaining possession of the property. The tenant's rights were limited to the recovery of damages in a suit against the landlord. In today's world, the original reasons for treating a lease as personal property no longer apply. Every jurisdiction provides a summary proceeding for possession designed to adjudicate possessory rights in the property between disputing parties under a lease. n31 Courts and legislatures have, nonetheless, perpetuated the confusion.

The definition of a lease as real or personal property may make a difference in a number of issues. First, in probate proceedings the category of property may determine who obtains the rights in specific items owned by the decedent. Before adoption of the Statute of Wills in England in 1540, personal property could be transferred under a will but real property could not. Even today, a will may specify that personal property goes to one individual and real property goes to another. In earlier eras, intestate succession statutes often defined a different group to receive the personal property of a person who died without a will than the persons designated to receive the real property of the estate. Those kinds of distinctions have been removed in intestacy statutes, but they may continue in the case of a will. One distinction in probate proceedings continues. Since the law of the decedent's domicile governs disposition of personal property, a court in the state of domicile has power to determine who receives personal property, even if the property is located in another state. In contrast, a real property interest in another state cannot be administered in a court in the decedent's state of domicile. Ancillary proceedings must be conducted in the state where the real property is located. A lease is generally considered personal property in this context; therefore, no ancillary probate proceedings are necessary for distributing a decedent's interest in a lease of property in another state. n32

Second, every state statutorily requires certain actions to validly execute real property transactions, such as written documentation to satisfy the Statute of Frauds, recording, or other conveyancing requirements.

Third, some states have a statute defining real property generally. In all of these situations, the consequences will differ depending on the categorization of a lease as a personal or a real property interest. The most helpful statutes will specifically refer to leases because of the historical background. This potential confusion should be a sufficient reason for drafting private documents carefully, to make clear whether leases are to be included or excluded by a broad reference to either real property or personal property.

COMPUTER-ASSISTED RESEARCH

LEXIS: lease! w/30 property w/15 real or personal

FOOTNOTES:

(n1)Footnote 9. 2 Frederick Pollock and Frederic William Maitland, The History of English Law 111-113 (2d ed. 1903). *See also* Restatement of Property, Introduction p. 1-2.

(n2)Footnote 10. *See* § 40.23, *infra*, which addresses the warranty of habitability. *See also* Robert S. Schoshinski, American Law of Landlord and Tenant § 3.16-3.29 (Lawyers Co-op. 1980).

(n3)Footnote 11. William B. Stoebuck and Dale A. Whitman, The Law of Property § 6.10 (West, 3d ed., 2000) (hereinafter Stoebuck and Whitman). *Stonehedge Square L.P. v. Movie Merchants, Inc., 715 A.2d 1082 (Pa. 1998)* ("Thus, in modern landlord-tenant law, leases have a dual nature, both as conveyances of protected property interests and also as contracts. Because of this historical background in which leases are sometimes viewed as conveyances and sometimes as contracts, problems in leases may be resolved either by principles of property law or by principles of contract law. At common law, the mitigation of damages in a lease was regarded as being controlled by property law. Because the lease was a conveyance of real property, the tenant owned a non-freehold estate, and the landlord had no duty to mitigate damages arising from the tenant's breach of the lease"). *See also*, Lisa Kerszencwejg, "Contracts vs. Conveyances: A Criticism of Stonehedge Square Ltd. Partnership v. Movie Merchants, Inc.," *61 U. Pitt. L. Rev. 559 (2000).*

(n4)Footnote 12. Originally the lease was viewed only as a contract. Over time, the lease became recognized only as a conveyance. Presently, the shift is once again toward a recognition of the contract nature of a lease. For an explanation of this evolution, *see* Restatement (Second) of Property, Introduction (1977); Michael Weinberg, *From Contract to Conveyance: The Law of Landlord and Tenant, 1800-1920 (Part I), 1 S. Ill. U. L.J. 29-32 (1980).* For a good overview of the historical evolution of the landlord/tenant relationship, *see* Hiram H. Lesar, *The Landlord-Tenant*

Relation in Perspective: From Status to Contract and Back in 900 Years?, 9 Kan. L. Rev. 369 (1961).

(n5)Footnote 13. William B. Stoebuck and Dale A. Whitman, The Law of Property § 6.10 (West, 3d ed., 2000).

(n6)Footnote 14. Traditional common law held that the destruction of a leased building by fire, flood, wind or some other force of nature would not relieve the tenant of his obligation to pay rent or grant him a right to terminate the lease. *See, e.g., Viterbo v. Friedlander, 120 U.S. 707, 30 L. Ed. 776, 7 S. Ct. 962 (1887); National Motels, Inc. v. Howard Johnson, Inc., 373 F.2d 375 (4th Cir. 1967); Lawson v. Taylor Hotels, Inc., 411 S.W.2d 669 (Ark. 1967); Sigal v. Wise, 158 A. 891 (Conn. 1932); Romer v. Topel, 414 N.W.2d 787 (Minn. App. 1987); Bradley v. McCabe 438 P.2d 468 (Okla. 1967). But see, e.g., Albert M. Greenfield & Co. v. Kolea, 380 A.2d 758 (Pa. 1977)* (court relieved party whose expectations were not met due to destruction of the structure); *See also* Restatement (Second) of Property § 5.4 (1977) (a court may grant relief when a change occurs, caused suddenly by a non-manmade force which renders the property unsuitable for the purpose for which the lease was created).

(n7)Footnote 15. The traditional view is that the landlord has no duty to mitigate damages. *E.g., Heckel v. Griese, 171 A. 148 (N.J. 1934). See also* Restatement (Second) of Property § 12.1 cmt. i (1977) (explaining rationale for traditional rule). *Stonehedge Square L.P. v. Movie Merchants, Inc., 715 A.2d 1082 (Pa. 1998)* ("Thus, in modern landlord-tenant law, leases have a dual nature, both as conveyances of protected property interests and also as contracts. Because of this historical background in which leases are sometimes viewed as conveyances and sometimes as contracts, problems in leases may be resolved either by principles of property law or by principles of contract law. At common law, the mitigation of damages in a lease was regarded as being controlled by property law. Because the lease was a conveyance of real property, the tenant owned a non-freehold estate, and the landlord had no duty to mitigate damages arising from the tenant's breach of the lease").

(n8)Footnote 16. Courts are divided over whether a landlord must damages. *See, e.g., Wright v. Baumann, 398 P.2d 119 (Or. 1965); Sommer v. Kridel, 378 A.2d 767 (N.J. 1977).*

(n9)Footnote 17. While most progress in the legal protection of consumer expectations occurred in the area of contracts for the sale of goods, it was eventually extended to other sales contracts, including the sale of a new house by a vendor/builder. *See* U.C.C. §§ 2-314, 2-315. *See also Javins v. First Nat'l Realty Corp., 428 F.2d 1071, 1075-1076* (D.C. Cir.), *cert. denied, 400 U.S. 925 (1970); Wawak v. Stewart, 449 S.W.2d 922 (Ark. 1970); Schipper v. Leavitt & Sons, Inc., 207 A.2d 314 (N.J. 1965);* James H. Backman, *The Tenant As A Consumer? A Comparison of Developments in Consumer Law and In Landlord/Tenant Law, 33 Okla. L. Rev. 1 (1980);* John Forrester Hicks, *The Contractual Nature of Real Pro*perty Leases, *24 Baylor L. Rev. 443, 487-89 (1972).* Among the states adopting or acknowledging the implied warranty of habitability are: *Alaska,* Alaska Stat. §§ 34.03.100, 34.03.160, 34.03.180 (1990); *Arizona,* Ariz. Rev. Stat. Ann. §§ 33-1324, 33-1361, 33-1365; *California,* Cal. Civ. Code §§ 1941-42; *Green v. Superior Court, 517 P.2d 1168 (Cal. 1974); Connecticut,* Conn. Gen. Stat. §§ 47a-7, 47a-13; *Todd v. May, 316 A.2d 793 (Conn. 1973); Delaware,* Del. Code Ann. tit. 25, § 5303; *District of Columbia, Javins v. First Nat'l Realty Corp., 428 F.2d 1071* (D.C. Cir.), *cert. denied, 400 U.S. 925 (1970); Florida,* Fla. Stat. Ann. §§ 83.51, 83.56; *Georgia,* Ga. Code Ann. § 44-7-13; *Warner v. Arnold, 210 S.E.2d 350 (Ga. App. 1974); Hawaii,* Haw. Rev. Stat. § 521-42; *Lemle v. Breeden, 462 P.2d 470 (Haw. 1969); Idaho,* Idaho Code § 6-320; *Illinois, Glasoe v. Trinkle, 479 N.E.2d 915 (Ill. 1985); Jack Spring, Inc. v. Little, 280 N.E.2d 208 (Ill. 1972); Indiana, Breezewood Mgt. Co. v. Maltbie, 411 N.E.2d 670 (Ind. Ct. App. 1980); Iowa,* Iowa Code Ann. § 562A.15; *Mease v. Fox, 200 N.W.2d 791 (Iowa 1972); Kansas, Steele v. Latimer, 521 P.2d 304 (Kan. 1974); Kentucky,* Ky. Rev. Stat. Ann. §§ 383.595-383.625; *Maine,* Me. Rev. Stat. Ann. tit. 14 § 6021; *Maryland,* Md. Real Prop Code Ann. § 8-211; *Massachusetts,* Mass. Ann. Laws ch. 239, § 8A; *Boston Housing Auth. v. Hemingway, 293 N.E.2d 831 (Mass. 1973); Michigan,* Mich. Stat. Ann. § 26.1109; *Rome v. Walker, 196 N.W.2d 850 (Mich. App. 1972); Minnesota,* Minn. Stat. Ann. § 504.18 (repealed 1999); *Fritz v. Warthen, 213 N.W.2d 339 (Minn. 1973); Missouri, King v. Moorehead, 495 S.W.2d 65 (Mo. Ct. App. 1973); Montana,* Mont. Code. Ann. § 70-24-303; Nebraska, Neb. Rev. Stat. § 76-1419; *Nevada,* Nev. Rev. Stat. Ann. § 118A.290; *New Hampshire, Kline v. Burns, 276 A.2d 248 (N.H. 1971); New Jersey, Marini v. Ireland, 265 A.2d 526 (N.J. 1970); Berzito v. Gambino, 308 A.2d 17 (N.J. 1973); New Mexico,*N.M. Stat. Ann. § 47-8-20; *New York,* N.Y. Real Prop. Law § 235-b; *Park W. Mgt. Corp. v.*

Mitchell, 404 N.Y.S.2d 115 (1978), aff'd, 391 N.E.2d 1288, cert. denied, 444 U.S. 992 (1979); North Carolina, N.C. Gen. Stat. § 42-42; *North Dakota*, N.D. Cent. Code § 47-16-13.1; *Ohio, Glyco v. Schultz, 289 N.E.2d 919 (Ohio 1972); Oklahoma*, Okla. Stat. Ann. tit. 41, § 118; *Oregon*, Or. Rev. Stat. § 90.320; *L & M Inv. Co. v. Morrison, 594 P.2d 1238 (Ore. 1979); Pennsylvania, Pugh v. Holmes, 405 A.2d 897 (Pa. 1979); Rhode Island*, R.I. Gen. Laws § 34-18-22; *South Caro*lina, S.C. Code Ann. § 27-40-440; *Tennessee*, Tenn. Code Ann. § 66-28-304; *Texas, Kamarath v. Bennett, 568 S.W.2d 658 (Tex. 1978) superseded by statute as stated in, Garza-Vale v. Kwiecien, 796 S.W.2d 500 (Tex. Ct. App 1990);* Tex. Prop. Code Ann. § 92.052, 92.056; *Utah, Wade v. Jobe, 818 P.2d 1006 (Utah 1991) superseded by statute as stated in, Carlie v. Morgan, 922 P.2d 1 (Utah 1996); Vermont*, Vt. Stat. Ann. tit. 9 §§ 4457-58; *Hilder v. St. Peter, 478 A.2d 202 (Vt. 1984); Virginia*, Va. Code Ann. §§ 55-248.13, 55-248.21; *Washington*, Wash. Rev. Code Ann. §§ 59.18.060, 59.18.070; *Foisy v. Wyman, 515 P.2d 160 (Wash. 1973); West Virginia*, W. Va. Code § 37-6-30 (establishes landlord's obligations but does not provide a specific statutory remedy for breach); *Teller v. McCoy, 253 S.E.2d 114 (W.Va. 1978); Wisconsin, Pines v. Perssion, 111 N.W.2d 409 (Wis. 1961). See Briggs & Stratton Corp. v. Concrete Sales & Servs., 20 F. Supp. 2d 1356 (M.D. Ga. 1998)* (court notes that leases are regarded as contractual relationships--this is a commercial lease case) affirmed by, Concrete Sales & Servs., Inc. v. Blue Bird Body Co., 211 F.3d (11th Cir. 2000); *Sauve v. Nix, 985 P.2d 997 (Alaska 1999)* ("we agree with the general trend in the case law allowing such suits and conclude that commercial landlords in Alaska owe a duty of reasonable care under the circumstances to employees of their commercial lessees"); *Johnson v. Scandia Assocs., 717 N.E.2d 24 (Ind. 1999)* (discussing what remedies are available to a tenant for breach of implied warranties); *McAllister v. Boston Hous. Auth., 708 N.E.2d 95 (Mass. 1999)* (stating that the implied warranty of habitability applies to significant defects in the property, not to the natural accumulation of snow and ice); *Antwuan A. v. Heritage Mut. Ins. Co., 596 N.W.2d 456 (Wis. 1999)* (holding that a breach of implied warranty of habitability allows for only contractual damages).

(n10)Footnote 18. *See* n.17, *supra.*

(n11)Footnote 19. *See* U.C.C. § 2-314 (1977) (Implied warranty of merchantability); U.C.C. § 2-315 (1977) (Implied warranty of fitness for a particular purpose).

(n12)Footnote 20. Restatement (Second) of Property § 17.1. *See also, Becker v. I.R.M. Corp., 698 P.2d 116 (Cal. 1985)* (landlord held strictly liable for injuries resulting from latent defects on rental premises) *overruled, Peterson v. Superior Ct., 899 P.2d 905 (Cal. 1995)* (holding that there is no strict liability); *Johnson v. O'Brien, 105 N.W. 2d 244 (Minn. 1960)* (landlord held liable for injuries to a tenant's daughter-in-law where he had no actual knowledge of, but should have known of, a defect to back stairway of home); William B. Stoebuck and Dale A. Whitman, The Law of Property § 6.10 (West, 3d ed., 2000). *Stewart ex rel Stewart v. Aldrich, 788 A.2d 603* (Me. 02) (landlord not liable for injuries caused by tenant's dog, because the landlord did not have knowledge of or control over the dog).

(n13)Footnote 21. Restatement (Second) of Property § 17.7 (1977). All courts agree that the landlord is liable if, in attempting to repair a defect, the landlord conceals it or actually makes it more dangerous. Jurisdictions are split as to liability if the defect is not worsened or concealed. *See Janofsky v. Garland, 109 P.2d 750 (Cal. 1941)* (landlord liable for injury resulting from negligent repair of leased premises even though defect not worsened or concealed). *But see* Restatement (Second) of Property § 17.7, Caveat (1977) (expressing no opinion as to whether landlord will be liable for injury occurring on leased premises after negligent repair which neither concealed nor made more dangerous the defect).

(n14)Footnote 22. *See* n.17, *supra.*

(n15)Footnote 23. *See generally* 6 Samuel Williston, Williston on Contracts §§ 816-17 (3d ed. Jagger 1962).

(n16)Footnote 24. 6 Samuel Williston, Williston on Contracts § 816 n.11 (3d ed. Jagger 1962) (action for damages).

(n17)Footnote 25. 6 Samuel Williston, Williston on Contracts § 816 n.11 (3d ed. Jagger 1962) (action to compel

fulfillment of covenant).

(n18)Footnote 26. *See, e.g.*, Uniform Residential Landlord and Tenant Act § 4.20 (a), 7 B U.L.A. 427 (1974) (landlord entitled to terminate lease in cases of material non-compliance by the tenant with the rental agreement).

(n19)Footnote 27. William B. Stoebuck and Dale A. Whitman, The Law of Property § 6.10, at 265 (West, 3d ed., 2000); *Huber Inv. Corp. v. Warner, 1998 Ohio App. LEXIS 649* (No. 16545, Jan. 30, 1998) (an action to evict is an election to rescind the contract of lease, and is a remedy available to landlord upon tenant's non-compliance with lease terms).

(n20)Footnote 28. Robert S. Schoshinski, American Law of Landlord and Tenant § 3.30 (Lawyers Co-op. 1980) (categorizing state statutes by tenant remedy into: those providing for comprehensive remedies including rent abatement; those providing a repair-and-deduct remedy; those authorizing rent escrow; and those providing for the appointment of a receiver).

(n21)Footnote 29. *See* n.17, *supra* (list of jurisdictions adopting the implied warranty of habitability doctrine).

(n22)Footnote 30. William B. Stoebuck and Dale A. Whitman, The Law of Property § 6.11 (West, 3d ed., 2000). *see also, Matter of Dibert, Bancroft & Ross Co., Ltd., 117 F.3d 160 (5th Cir. 1997)* (in Louisiana, a lease of real property is a personal contract but it still enjoys many of the attributes of a real contract); *First Southern Sav. Bank v. Tuton, 443 S.E.2d 345 (N.C. App. 1994)* (chattels real are subject to the rules applicable to personal property).

(n23)Footnote 31. Robert S. Schoshinski, American Law of Landlord and Tenant § 6.10-6.22 (Lawyers Co-op. 1980) (statutory summary proceeding available in all jurisdictions).

(n24)Footnote 32. William B. Stoebuck and Dale A. Whitman, The Law of Property § 6.11-6.12 (West, 3d ed., 2000).

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CHAPTER 39 LEASEHOLD ESTATES

4-39 Thompson on Real Property, Thomas Editions § 39.03

AUTHOR: Professor James H. Backman J. Reuben Clark Law School Brigham Young University

§ 39.03 Real Property Interests of Landlords and Tenants.

[Go To Supp]

A leasehold estate divides the interests in property between the landlord and tenant. The tenant has the possessory right to the property for a period of time that is shorter in duration than the landlord's rights in the property. The landlord always retains a non-possessory interest in the form of a future interest estate in the property called a reversion. n33 Generally, the landlord owns the fee title to the property before creating the leasehold estate in the tenant. In that case, the landlord's reversionary interest is a future interest that will once again become a possessory fee title as soon as the tenant's interest in the property terminates. It is possible, however, that the tenant receives an interest through a sub-lease, meaning that the sub-tenant's possessory rights end and revert back to the sub-tenant's landlord (the tenant under the original lease) for the remaining period of the original lease. n34 The crucial characteristic is that landlords never give away all of their ownership interest in the property when a leasehold estate is created. If they do, the transaction would not be designated as a lease but would be a conveyance of the landlord's ownership interest through a sale or gift of a freehold estate or, in the case of a sub-lease, through a transfer of a leasehold interest in the property. n35

The leasehold is usually created by an agreement to lease. It is possible but unusual for a landlord to establish the leasehold estate through a deed or in a will establishing the tenant's rights.

COMPUTER-ASSISTED RESEARCH

LEXIS: leasehold w/1 estate! w/30 landlord! w/15 tenant!

FOOTNOTES:
(n1)Footnote 33. William B. Stoebuck and Dale A. Whitman, The Law of Property § 6.12 (West, 3d ed., 2000).

(n2)Footnote 34. For a general discussion of the distinction between subleases and assignments, *see* Robert S. Schoshinski, American Law of Landlord and Tenant § 3.11 (Lawyers Co-op. 1980).

(n3)Footnote 35. *Secret Oaks Owner's Ass'n, Inc., v. Dep't of Envtl. Protection, 704 So. 2d 702 (Fl. App. 1998)*

(easement holders have non-possessory interests only).

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CHAPTER 39 LEASEHOLD ESTATES

4-39 Thompson on Real Property, Thomas Editions § 39.04

AUTHOR: Professor James H. Backman J. Reuben Clark Law School Brigham Young University

§ 39.04 Leaseholds Distinguished from Other Relationships.

[Go To Supp]

A lease conveys the possessory interest in property from a landlord to a tenant. Other types of conveyancing -- the creation of present freehold estates and future interests -- are distinguished from creation of a lease because either they convey something more than the present right to possession or they create interests in the property that never will be possessory. These non-possessory rights include easements, real covenants running with the land, and equitable servitudes.

Originally the common law distinguished between leases, considered non-freehold estates, and the range of ownership interests called freehold estates. Unlike freehold estates, leases are not the means of transferring ownership in property. A lease creates possessory rights in the tenant, but nothing more. Like the creation of leases, the transfer of freehold estates other than future interests -- the fee simple absolute, the fee tail, and the life estate -- involves the transfer of the owner's rights to possessory rights. In the case of freehold conveyances, however, the grantee receives something more than present possessory rights. The grantor no longer owns the freehold interest conveyed, and the grantee of a freehold estate becomes an owner of the property. As far as the interest being conveyed is concerned, the grantee of a freehold estate replaces the grantor as owner of that particular interest. The grantor may retain certain interests in the property but transfers ownership of the particular interest conveyed to the grantee. Others may share that ownership as co-owners. In contrast, the landlord conveying a leasehold estate to a tenant retains the ownership of the estate, or interest involved, but carves out the present possessory interest for the tenant. n36

Freehold estates may also be divided between present and future interests in the property. n37 Although the conveyance of remainder interests and other freehold estates included in the category of future interests does not transfer present possessory rights in the property, the grantee receiving a future interest estate is considered a present owner of the property. Thus, the ownership of the property is split between the life tenant, who is entitled to possession of the property, and the remaindermen, whose interests become possessory upon the life tenant's death. In contrast, the tenant never shares in the ownership of the property. A lease transfers the owner's present possessory rights but does not make the tenant an owner of the property. Ownership remains in the landlord, whose present possessory interest in the property is transformed into a future interest estate, a reversion, at the moment the leasehold estate is created. The

landlord continues to have the freehold estate in the property.

The landlord/tenant relationship is the one remaining tenurial estate left over from the feudal English systems of land ownership. Originally, all freehold estates were held under some lord of the land, with the king as the supreme lord. The owners of an estate owed certain formal obligations to their immediate overlord. The overlords continued to be entitled to certain feudal incidents arising from the conveyance of an estate in the land to new tenurial owners. Today, the designations of landlord and tenant represent that tenurial relationship from earlier eras. Conveyances of freehold estates and future interests in property no longer involve tenurial forms of ownership, but the conveyance of a leasehold estate continues the tenurial form of ownership. The tenant receives the right to possess property of the landlord. The landlord remains the owner of the property and is entitled to rent from the property, one of the age-old incidents dating back to feudal England.

The possessory rights of a tenant represent a lesser estate than the ownership rights available through the freehold estates -- both present possessory and future interest estates. A tenant has the right to possess real property, but the property remains the property of another. At the other end of the spectrum of rights in property are the non-possessory rights to use the property of another. In the hierarchy of property interests, a tenant's possessory rights are ranked higher than these non-possessory property rights. A lease is to be distinguished from these interests. Even though they involve similar rights to use or occupy the property of another, the rights under a license, an easement or a covenant are distinguished from a lease because they are rights of use, but do not include the right to possession associated with lease. n38 Several situations arise where the distinction is a close question. A variety of factors are considered by the courts when they need to distinguish between a lease and one of several closely related non-possessory interests in property. Typically adjudicated situations where the distinction between a possessory lease and a non-possessory right to use or occupy property include sign or billboard cases, vending machines or other concessions cases, innkeeper or lodger cases, and cases involving housing for employees. n39

The key for the courts in determining whether possessory rights result in a lease or whether an interest exists permitting use or occupancy without possessory rights is the intent of the parties. n40 The circumstances of the transaction, including the language used by the parties, are considered in deciding whether they intended to create a lease or some lesser interest in the property. n41 Possession is characterized by the power to control designated property by excluding others from using it. n42 In ambiguous situations, courts focus on circumstances related to control of the property. n43

The consequences of determining that an interest is possessory include property-based remedies available through the courts to protect and regain possession against anyone interfering with these rights. A tenant enjoying possessory rights may bring trespass actions to protect those rights. n44 In contrast, a licensee may recover damages for interference with its non-possessory rights, but only against the owner. n45 Non-possessory rights may also be protected through an injunction, but not against the property owner if the interest is revocable. n46

COMPUTER-ASSISTED RESEARCH

LEXIS: lease! w/50 freehold w/2 estate! l lease! w/50 future w/1 interest! l lease! w/50 possess! w/2 right! w/30 intent!

§ 39.04(a) Sign Cases.

It is possible to lease property for a sign or a billboard. It is also common to obtain a non-possessory license or easement permitting the sign to be installed. In an ambiguous situation, the court will weigh the various circumstances bearing on the feature of control. If the property owner retains control of the area for maintenance, continues to use the area for other purposes, and restricts access to the area, the court will tend to find a lease was not created, because the property owner retained primary control of the space. The court's conclusion would be that the right to use the property existed but not the right of possession that is essential for determining whether a lease was created. n47 Leasehold interests in billboards and signs may have sufficient value to require compensation if taken by government action. n48

COMPUTER-ASSISTED RESEARCH

LEXIS: lease! w/30 sign! or billboard!

§ 39.04(b) Concession Cases.

The right to use or occupy a specific space for business purposes generally arises under a lease giving the business tenant full rights of possession. Several situations commonly occur, however, where it is ambiguous whether possessory rights under a lease or use rights under a license or other non-possessory interest are intended. Common examples arise from the installation of laundry equipment or other types of vending machines within a commons area in a housing or commercial building. n49 The same question exists regarding specialized departments in a store or refreshment stands in malls or theaters. n50 Agreements permitting sharecropping may also raise the same issue in some situations. Each of these situations could be conducted under a possessory lease. However, it is also possible that the relationship should be categorized as a non-possessory interest involving a license, an easement or an employment relationship. Factors to be considered by a court include whether the space is permanently set or can be altered, whether the property owner's employees have access to the space, and who controls maintenance and upkeep of the physical space.

COMPUTER-ASSISTED RESEARCH

LEXIS: lease w/30 business w/15 possess! w/5 right! or interest!

§ 39.04(c) Housing Related to Employment.

Usually, housing arrangements furnished by employer to employees will create possessory rights under a lease. The control given to the employee regarding the use of the housing is usually broad and unrestricted. Situations exist, however, as in the case of housing for a maid or a property guard, where the employer retains rights to control who can have access to the employee's housing, what hours the housing is available, what activities are allowed, and even what furnishings are permitted. n51 In such cases, the usual incidents of control and right to exclude others associated with a possessory right are largely missing. The less control the employee has over the space being used for employee housing, the more likely the arrangement will be considered a license or other non-possessory interest in the employee.

COMPUTER-ASSISTED RESEARCH

LEXIS: employee! w/15 possess! w/30 hous! w/5 arrange! w/30 lease!

§ 39.04(d) Lodging Cases.

The issue of a lease or a non-possessory interest in lodging cases illustrates another set of consequences flowing from characterization of the interest. n52 The parties' liabilities are affected, as well as their rights. If a lease is not involved, the property owner owes to the guest or lodger a higher degree of protection against personal injury than a landlord owes a tenant. The standard of care for safety of occupants increases proportionately with the level of control exercised by the owner of the property. A number of arrangements exist in which the use of the property involved falls short of the possession determination required for a lease. Guests in hotels and motels are usually transient occupants for short periods of time. A lodger or boarder occupies housing space for a longer time but is still distinguished from a residential tenant who is under a lease. Factors leading to designation of one of these non-lease categories include control features such as maid service, duration of stay, preparation of meals, degree of unrequested access by the owner, and how the use of the space is advertised to the public.

In two situations described in the following two subsections, someone other than the tenant has the right to possess

property owned by someone else.

COMPUTER-ASSISTED RESEARCH

LEXIS: lodg! w/30 lease! w/15 possess!

§ 39.04(e) Possession Related to Purchase Contract.

Between the time parties enter into a purchase agreement and the date on which the seller conveys title to the property, the purchaser is viewed as the equitable owner, even though the seller is still the legal owner of the title. n53 Often a purchaser is permitted to take possession of the property before obtaining the seller's deed. During this interim period, the purchaser, like the tenant under a lease, is in possession of property owned by another person. Yet the positions of the tenant and the purchaser are different. The purchaser is considered the beneficial owner of the property before receiving the deed from the seller, for the purchaser is entitled to enforce the contract against the seller through a suit for specific performance. If, on the other hand, the seller stays in possession even though the title has been conveyed or the agreement specifies that the purchaser should have possession, the seller is considered to be a tenant of the purchaser. The purchaser is entitled to recover the fair rental value of the property from the seller.

COMPUTER-ASSISTED RESEARCH

LEXIS: possess! w/15 purchase w/5 contract! or agreement!

§ 39.04(f) Lender in Possession.

Under the principles of mortgage law, lenders are permitted to take possession of the mortgaged property in certain situations. n54 The main purpose of this right to possession is to protect the lender in the case of a default in the borrower's payment obligations. The lender in possession must take care of the property and must account to the borrower for any profits obtained through the possession by applying them to the obligation owed by the borrower. Here again, the lender, like the tenant, is in possession of property owned by another.

COMPUTER-ASSISTED RESEARCH

LEXIS: lender w/5 possess! w/30 mortgage!

FOOTNOTES:

(n1)Footnote 36. *Velarde v. United States, 992 F. Supp. 1235 (D. Colo. 1998)* (the right to purchase ownership is a right to the freehold estate while the right to lease is less than a freehold estate); *De Leon v. Creely, 972 S.W.2d 808 (Tex. App. 1998)* (a crucial element in a valid lease arrangement is a manifest intent of the lessor to not occupy the premises and of the lessee to occupy them; the lessee obtains a present possessory interest in the estate while the lessor obtains a future reversionary interest). In Ohio, a ninety-nine year lease that is renewable forever is a "perpetual lease" and although it is called a perpetual lease, it is treated as a freehold estate. *See, Quill v. R.A. Investment Corp., 707 N.E.2d 35 (Ohio Ct. App. 1997).*

(n2)Footnote 37. For a general discussion of future interests, *see* Arthur R. Gaudio, Ed., the American Law of Real Property §§ 3.01-3.08 (Arthur R. Gaudio ed. 1991).

(n3)Footnote 38. William B. Stoebuck and Dale A. Whitman, The Law of Property § 6.2 (West, 3d ed., 2000); Restatement (Second) of Property § 1.2 (1977); Restatement of Property §§ 450, 512, 530 (1936).

(n4)Footnote 39. *See* §§ 39.04(a)-(d), *infra*, and accompanying notes.

(n5)Footnote 40. Powell on Real Property (R) § 16.02 (Michael Allan Wolf ed., Matthew Bender). *Doll v. Grand Union Co., 925 F.2d 1363 (11th Cir. 1991) but see, DPLM, Ltd. v. J.H. Harvey Co., 526 S.E.2d 409 (Ga. Ct. App. 1999). American Jewish Theatre, Inc. v. Roundabout Theatre Co., 610 N.Y.S.2d 256 (1st Dept. 1994)* (the action to determine whether an agreement was a license or a lease; the manifest intention of the parties was to create a lease and that intent was more persuasive than the actual language in the agreement).

(n6)Footnote 41. *In re Yachthaven Restaurant, Inc., 103 B.R. 68 (E.D. N.Y. 1989).*

(n7)Footnote 42. *Soderholm v. Chicago Nat'l League Ball Club, Inc., 587 N.E.2d 517 (Ill. App. Ct. 1992); Davis v. Dinkins, 585 N.Y.S.2d 978 (N.Y. Sup. Ct. 1992), aff'd in part, rev'd in part, 206 A.D.2d 365 (N.Y. App. Div. 1994).*

(n8)Footnote 43. *See, e.g., Delaware v. Penn Cent. Corp., 445 A.2d 939, 946-47 (Del. Sup. Ct. 1982); Slutzky v. Cuomo, 498 N.Y.S.2d 550 (1986); T-Vestco Litt-Vada v. Lu-Cal One Oil Co., 651 S.W.2d 284, 289-91 (Tex. Ct. App. 1983). Bruyn Produce Co. v. Romero, 508 N.W.2d 150 (Mich. App. 1993)* (an agreement with employees was not a lease).

(n9)Footnote 44. William B. Stoebuck and Dale A. Whitman, The Law of Property § 6.34 (West, 3d ed., 2000).

(n10)Footnote 45. *See, e.g.,* Powell on Real Property (R) §§ 39.04, 16.02 (Michael Allan Wolf ed., Matthew Bender). *Cf. Patterson v. Shoffner Sand of Okla., Inc., 530 P.2d 580 (Okla. App. 1974)* (holding that licensees can recover against third parties).

(n11)Footnote 46. Powell on Real Property (R) § 16.02 (Michael Allan Wolf ed., Matthew Bender).

(n12)Footnote 47. For a general discussion of sign cases, *see* William B. Stoebuck and Dale A. Whitman, The Law of Property § 6.3 (West, 3d ed., 2000) and 1 American law of Property § 3.2 (A. James Casner ed. 1952).

For discussion of aesthetic and historic preservation values in land use regulation, including sign control provisions, see Powell on Real Property (R) § 79D.02 (Michael Allan Wolf ed., Matthew Bender).

(n13)Footnote 48. *Reg'l Transp. Dist. v. Outdoor Sys. Inc., 34 P.3d 408 (Colo. 2001)* (terminating billboard lease is not a taking requiring compensation); *DOT v. Drury Displays, Inc., 764 N.E.2d 166;* (Ill. App. 2002) (where state DOT condemns billboards, DOT must pay fair market value to companies leasing space from railroad); *Adams Outdoor Adver. v. City of E. Lansing, 614 N.W.2d 634 (Mich. 2000)* (no compensation for lease interest where city's sign code prohibited rooftop signs; leasehold interest does not include right to display signs on rooftop).

(n14)Footnote 49. For a discussion of cases involving coin-operated laundries, *see* Powell on Real Property (R) §§ 39.04, § 16.02 (Michael Allan Wolf ed., Matthew Bender). *Linro Equip. Corp. v. Westage Tower Assoc., 650 N.Y.S.2d 399 (App. Div. 1996)* (Company's agreement to install and maintain coin-operated laundry machines in condominium complex and to pay condominium's managing corporation "rent" each month created license to use designated space for purpose of providing service to tenants, rather than lease, since company did not have sole and exclusive dominion and control over designated space).

(n15)Footnote 50. For a discussion of cases involving department stores and refreshment stands, *see* William B. Stoebuck and Dale A. Whitman, The Law of Property § 6.4 (West, 3d ed., 2000). *Park v. Automotive Realty Corp., 1998 U.S. Dist. LEXIS 857* (No. 94 Civ. 4451, Jan. 29, 1998, S.D.N.Y.) (in determining whether an agreement for sales booths constituted a license or lease, the court looked to whether the lessee/licensee had exclusive possession and the right to exclude the lessor/licensor from a specific area).

(n16)Footnote 51. For a discussion of cases involving employee housing, *see* Powell on Real Property (R) §§ 39.04, 16.02 (Michael Allan Wolf ed., Matthew Bender).

(n17)Footnote 52. For a discussion of cases involving lodging, *see* William B. Stoebuck and Dale A. Whitman, The Law of Property § 6.6 (West, 3d ed., 2000); *Goode v. St. Stephens United Methodist Church, 494 S.E.2d 827 (S.C. Ct. App. 1997)* (social guest of tenant at apartment complex, who was assaulted by third persons while at complex, was a licensee, so owner did not owe any duty to protect the guest).

(n18)Footnote 53. For a discussion of cases involving purchase contracts, *see* William B. Stoebuck and Dale A. Whitman, The Law of Property § 6.8 (West, 3d ed., 2000); Powell on Real Property (R) § 16.02 (Michael Allan Wolf ed., Matthew Bender); *Edwards v. Van Skiver, 681 N.Y.S.2d 893 (1998)* (plaintiffs, having entered into a purchase contract, took possession and, therefore, equitable title to the property).

(n19)Footnote 54. For a discussion of cases involving lenders in possession, *see* William B. Stoebuck and Dale A. Whitman, The Law of Property § 6.9 (West, 3d ed., 2000); Powell on Real Property (R) § 16.02 (Michael Allan Wolf ed., Matthew Bender); *In re Rodriguez, 218 B.R. 764 (E.D. Pa. 1998)* (discusses the proper steps to be taken by a lender in order to become a legitimate mortgagee-in-possession. Also, the duty of the mortgagee in possession to maintain the premises is discussed).

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CHAPTER 39 LEASEHOLD ESTATES

4-39 Thompson on Real Property, Thomas Editions § 39.05

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§ 39.05 Traditional Types of Leasehold Estates.

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Two major characteristics of a leasehold estate are the duration of the tenant's rights and the means by which those rights can be terminated.

The doctrines governing duration and termination differ depending on the type of leasehold estate involved. Thus, the term for years is primarily characterized by the definite maximum duration of the tenant's rights. Unless circumstances arise triggering a recognized ground for earlier termination, the tenant's rights under the estate for a term of years continue until the specified end of the term. The other recognized leasehold estates have no set expiration date. Their duration is continuous until events triggering a termination occur.

Traditionally, the law has recognized four distinct forms of leasehold estates. Virtually every text lists them as: (1) the tenancy for years (sometimes called a tenancy for a term or a term for years); (2) the periodic tenancy (or tenancy from period to period); (3) the tenancy at will; and (4) the tenancy at sufferance (or occupancy at sufferance). In practical terms, however, only two types of tenancy are commonly used. In fact, a number of states, including the states that have adopted the Uniform Residential Landlord and Tenant Act, recognize these two forms of tenancy only. n55 Under the Uniform Act, a rental agreement either fixes a definite term or creates a periodic tenancy. n56

The necessity to consider all four of the traditionally recognized tenancy estates will continue. Even where the Uniform Act has been enacted to govern residential tenancies, traditional doctrines still apply to commercial leases. In other states, the four traditional tenancies continue to exist in both residential and commercial contexts. As a practical matter, almost all tenancies are either a tenancy for years or a periodic tenancy.

The two primary forms of tenancies for years or periodic tenancies are sufficient to cover almost all leasehold purposes. When the tenant or landlord is concerned about certainty regarding the duration of the lease, the tenancy for years will be the preferred choice. Certainty is most important when either party needs to make plans that can be relied on. A definite term for a tenancy is most crucial when plans are being made for significant investment of resources in a particular piece of property. For example, if the property is being improved or renovated for specific purposes or if the

location is significant for commercial or personal reasons, the tenancy for a definite term is the preferred type of tenancy. Commercial tenancies and relatively high-priced residential tenancies are most often in the form of a tenancy for years. The tenants in these circumstances generally desire to secure the right to retain the property for the specified term. Through renewal or extension provisions in the lease, they often have further rights to choose to remain beyond the period set as the term in the original lease. A tenant or landlord subject to a long-term tenancy for years may always assign the remaining tenancy for years to another person if plans change and the tenant or landlord no longer desires to exercise the rights under the lease. Even under a term for years, a tenancy may end prematurely if either party breaches the lease agreement. In particular, a tenant who fails to keep current on rent payment obligations may lose the tenancy through the landlord's court action to dispossess the tenant. n57

The choice of tenancy will be a periodic tenancy when flexibility is the main objective of the parties. This type of tenancy has no definite ending date. The tenant's rights to occupy the property and the landlord's rights to receive rent continue indefinitely until something happens to bring the tenancy to an end. Termination may occur at any time by either party giving proper notice that the tenancy will no longer continue beyond the date specified in the termination notice. The periodic tenancy is particularly common in residential leases for low or moderately priced housing. Neither party is bound for a lengthy term, yet each is entitled to continual rights under the tenancy until the necessary steps are taken to terminate the periodic tenancy.

A number of states have erased a primary distinction between the common periodic tenancy and the less common tenancy at will. Traditionally, a tenancy at will had virtually no protection against an unexpected termination by either party. The tenancy ended any time either party decided to discontinue the tenancy at will. Today it is common for statutes to require advance notice before a tenancy at will can be terminated by either party. n58 Once notice is a prerequisite for the termination of a tenancy at will, this form of tenancy becomes more similar to the periodic tenancy category and may differ only in the number of days of advance notice specified in the state's statutes for termination of this type of tenancy.

In a similar manner, many states have eliminated important distinctions between the tenancy at sufferance and the periodic tenancy. At common law, the landlord had the right to remove an occupying holdover tenant by means of court action or by self-help force. Today, many states protect the holdover tenant by requiring the landlord to bring an action for possession in the same manner as the landlord would remove a periodic tenant who has stayed beyond the termination date announced in a proper tenancy-ending notice. n59

In some circumstances, even the distinction between the definite term of a tenancy for years and the indefinite duration of a periodic tenancy is negated. New Jersey became the first state to adopt a good-cause termination requirement in residential tenancies. n60 Subject to certain specified exceptions, a periodic tenant has the right to remain a tenant under a periodic tenancy and to renew an expired term for years, as long as the landlord has no good reason for bringing the tenancy to an end. Similarly, landlords in federally subsidized housing projects are limited in their traditional rights to end a periodic tenancy or to refuse to renew a tenancy for years. n61 In these instances, the form of tenancy as traditionally categorized becomes less meaningful. No matter what form is specified in the lease or under traditional doctrines, every tenancy protected by these residential statutes creates an entitlement to continued rights as a tenant. Terminations are prohibited unless they are based on specific situations recognized by the statutes as constituting a good cause for termination.

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LEXIS: leasehold w/1 estate! w/30 categor!

§ 39.05(a) Tenancy (or Term) for Years.

The term for years is the most common form of leasehold estate when the lease is for agricultural lands or commercial

structures. The term for years is also frequently used by tenants in high-priced dwellings. The reason for preferring an estate for years in these circumstances is the greater certainty regarding the duration of the lease in comparison with the other types of leasehold estate. Certainty is important for both the landlord and the tenant, so that they can make efficient plans for the future.

A leasehold estate is designated as a term for years if the lease establishes a fixed duration for the lease. n62 The fact that the term can be either cut short under powers given to the parties in cases of breach of lease obligations or extended under a renewal provision does not alter the characterization of a lease that otherwise qualifies as a tenancy for years. The duration of most fixed-term leases is actually uncertain because they are usually defeasible estates -- subject to early termination under specific circumstances such as nonpayment of rent. In such cases, the leases are actually terms for years subject to conditions subsequent.

Nevertheless, the term for years must specify in advance a definite ending date of the tenancy. n63 The fixed time for termination establishes the maximum length of the initial leasehold term. Some courts have permitted the termination date to be tied to an event with an uncertain date, as long as the event is certain to occur and capable of being ascertained by objective observers. Examples of this judicial flexibility are the cases specifying the end of the lease term "at the end of the war." n64 The usefulness of this kind of a lease for defense-related purposes has justified this relaxation of the certainty requirement.

The beginning date must also be certain, but it may be either a fixed date or a date that is capable of being computed precisely. Thus, a lease may begin upon the occurrence of a specified event or action, such as the date the tenant commences employment in the community or the date a prior tenant vacates the property.

Courts have usually ignored the possible problem that a lease with an uncertain beginning date may violate the rule against perpetuities. Potentially, the beginning date may not occur for a very long time, and that is impermissible under the rule. One means of avoiding the problem is a presumption that the lease must commence within a reasonable time, which is defined as 21 years or less. By specifying a reasonable time as a shorter period than the theoretically indeterminate time, the courts avoid exceeding the perpetuities period of lives in being 21 plus years. n65

The length of a tenancy for years may be as short as a specified number of days or as long as the parties specify. Thus, any tenancy with a fixed duration, whether it is a tenancy for a day, a week, or for 100 years is designated as a tenancy for years.

Some states limit the duration of all leases or of certain types of leases. A typical example is the 10-year limitation placed on agricultural leases in North Dakota. n66 Other leases with maximum duration limits include leases of city lots, leases from the government, and leases of oil land or shellfish land. n67 In some cases, long-term leases extending beyond a specific length such as 100 years are converted into fee estates. n68

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LEXIS: tenancy or term w/2 year!

§ 39.05(b) Periodic Tenancy.

The periodic tenancy has become increasingly important because it fits the circumstances of so many lease arrangements better than the other categories of tenancies. Its primary characteristics are continuity, informality and flexibility. The periodic tenancy fits between the certainty and definiteness of the tenancy for years and the instability and transitional nature of the tenancy at will and the tenancy at sufferance. It is truly the catch-all category of leases. In numerous instances, it arises to replace one of the other categories, either because the formalities required for a valid tenancy for years were not satisfied or because the temporary, transitional feature of the tenancy at will or tenancy at

sufferance merely served as a bridge leading to the more secure features of the periodic tenancy. n69

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LEXIS: periodic w/1 tenanc!

§ 39.05(b)(1) Circumstances.

The periodic tenancy is better adapted to the modern circumstance of leasing than the other categories of leases. As in the case of consumer purchases of durable goods, many transactions are arranged with the focus on convenient financing. The purchaser is attracted by the availability of low down-payments and low monthly payments based on long-term, flexible financing.

Commercial leases and leases of large homes or luxury apartments are more likely arranged as tenancies for years rather than periodic tenancies, but among the majority of residential tenants, the periodic tenancy is the most common. Usually, the socio-economic level of residential tenants is the middle or low income class. The upwardly mobile middle class may rent for the beginning years after leaving their parents' home, eventually moving on to enjoy home ownership, the continuing dream of American families. For large numbers of poorer families, however, the periodic tenancy is the only prospect for obtaining a suitable place to live through their entire lives. In both cases, the periodic tenancy is more accessible to them financially than the alternatives of long-term tenancies for years or the relatively more expensive requirements of achieving home ownership with its attendant down payment, credit eligibility requirements, property taxes, and capital maintenance expenses.

In arranging a periodic tenancy, the consumer/tenant's primary financial concerns are the amounts of the monthly rent and the security deposit. The landlord's main objective is to fill the vacancy so the apartment can generate a continuing monthly cash flow required to cover the mortgage and other ownership expenses. The tenant's source of income is based on regular wages, payable at least once a month if not more often. The landlord's mortgage payments also come due on a monthly basis. Each party to the residential lease is interested in continuing the arrangement as long as the monthly wages or salary are sufficient and the monthly mortgage obligations are covered.

Certainty of duration is not as important. In fact, a long term lease may be a problem. If the tenant's circumstances change, it is convenient to have the option of moving to another residence. Perhaps the tenant needs to move because of a new job or because of a transfer from the present employer. Or the tenant may discover that a more modest or a better residence would be preferable because of being financially overextended on the one side, or earning a better income on the other end of a fluctuating economic situation. From the landlord's point of view, flexibility may be preferred over certainty in order to be able to terminate a relatively undesirable tenant's lease with the hope of obtaining a tenant who is more dependable or more quiet or less prone to complaining or demanding.

Many landlords prefer the informality of periodic tenancies. Unless they have many apartments for rent, they are probably not very experienced on the business side of leasing. Formal contracts are more common in apartment complexes large enough to justify employment of a resident manager to deal with the tenants. A periodic tenancy may be the chosen arrangement, largely because it can be created as an oral lease. n70 In many cases, it is likely that the only terms discussed in negotiating the lease are the date the tenancy can begin, the monthly rent, and the security deposit. By necessity, the periodic tenancy is the only type of lease that can arise with that degree of informality.

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LEXIS: periodic w/1 tenanc! w/30 circumstance! periodic w/1 tenanc! w/30 commercial w/5 lease!

§ 39.05(b)(2) Characteristics.

A periodic tenancy is a lease involving the obligation to pay rent at regular intervals, which continues indefinitely until one of the parties terminates the lease by giving proper notice. n71 Its primary features are continuity, informality, and flexible security. The original period automatically extends for as many successive periods as the parties desire. Unlike the tenancy for years, no definite termination is established. In comparison to the tenuous nature of the tenancy at will, the death of either party or a transfer of the property interest by either party does not interrupt the continuity of the lease. n72 Neither the landlord nor the tenant can abruptly bring the tenancy to an end as was possible under the common law's tenancy at will or tenancy at sufferance. Each party is afforded a period of time after the required notice of termination, during which the lease continues until the date of termination announced in the notice arrives.

The informality of a periodic tenancy is one of the features distinguishing it from the tenancy for years. Although it may be created by an express formal document specifying that the parties intend to create a tenancy from period to period, this kind of formality is generally present only if the residential or commercial landlord uses a form lease containing that kind of specific language. More often, the parties' agreement is placed in the category of a periodic tenancy by inference because the parties do not pay any attention to the type of lease they are creating. n73 In the typical situation, the tenant is permitted to move into the apartment after agreeing to pay rent on a monthly basis. No one mentions the duration of the lease or specifically designates the lease as a periodic tenancy. The law merely imposes the periodic tenancy title on the "general rental" arrangement initiated by the parties. n74 In accordance with the parties' course of dealing with each other, including the payment of the monthly rental obligation by the tenant, the law infers that they intend to form a periodic tenancy. Thus, the relationship will continue from month to month until one of the parties provides the notice required by the state's statute for terminating a periodic tenancy. n75

Although the periodic tenancy arrangement is permitted to be casually formed, the parties obtain a degree of security that is unavailable under the tenancy at will or the tenancy at sufferance. The notice requirement is the only means available for either party to force a termination of the lease. The security is present in the periodic tenancy, but it remains flexible in comparison to the strict certainty of the term for years. For either party, there is a means available for terminating a lease that is no longer desirable. The security provided by the notice requirement lasts only until the notice is received and the required number of days following proper notice have passed.

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LEXIS: periodic w/1 tenanc! w/30 feature! or character!

§ 39.05(b)(3) The Residual Tenancy.

As noted previously, a periodic tenancy can be created by express intent of the parties or by inference from the parties' course of dealing when the probable intent is not specifically stated. In addition to these two methods of consensual creation of the periodic tenancy, there are three other common leasing arrangements that result in the formation of a periodic tenancy. In each of these three situations, the original or intended form of tenancy ends up inadvertently, but inevitably, as a periodic tenancy. In these cases, a periodic tenancy is formed not because the parties negotiated with the original intent of forming a periodic tenancy, but because that category of lease is the residual category for characterizing leases that do not otherwise fit in one of the other categories. In each of these situations, the original form of the tenancy or the form of tenancy intended by the parties was either a tenancy at will, a tenancy at sufferance, or a tenancy for years. Despite its origins or the parties' intent, each of these arrangements ends up as a periodic tenancy. First, an "informal" periodic tenancy may result from an invalid attempt to create a tenancy for years. n76 Second, creation of a periodic tenancy is one of the possible elections available to a landlord confronted with a holdover tenant originally characterized as a tenant at sufferance. n77 Finally, a lease originally fitting within the category of the tenancy at will may be transformed into a more securely protected periodic tenancy based on the parties' course of dealing. n78

The distinction between the tenancy for years and the periodic tenancy is found in varying requirements for creation and for termination of lease in the two categories. The relationship between the parties during the existence of the tenancy is the same under either type of tenancy. Thus, it is natural for courts to remedy deficiencies in the formal requirements for the creation of a tenancy for years by treating the existing relationship between the leasing parties as a periodic tenancy. The formalities required to create a tenancy for years do not apply to the periodic tenancy. Thus, when a tenant enters into possession of property with permission of the landlord, even though the intended term for years is invalid because the parties failed to satisfy the applicable Statute of Frauds writing requirement, courts generally validate the arrangement by treating the invalid tenancy for years as a periodic tenancy instead. n79 All other terms of the attempted lease apply, except the designation of the duration or term. The duration feature of the intended but deficiently created lease is eliminated from the relationship because that provision of the lease subjected the arrangement to the unmet requirements of the Statute of Frauds. The rent to be paid, the maintenance responsibilities, and other provisions in the originally intended lease remain applicable. The automatic termination date specified in the aborted tenancy for years is replaced by the periodic tenancy's continuity characteristic. The lease may be terminated earlier or later than the originally specified date. In any case, the method for terminating the resulting periodic tenancy is by the requisite notice for that category of leases.

The second residual situation resulting in creation of a periodic tenancy is the holdover tenant relationship. Whenever any category of lease properly comes to an end, the tenant loses any further right to possession. An occasional tenant, however, wrongfully continues to occupy the property. In the holdover situation, the landlord is free to deal with the tenant in one of two ways without regard to the tenant's desires. The landlord can seek either to remove the tenant from possession or to impose a new lease on the tenant. n80 Prior to the landlord's choice, the tenant is considered to be a tenant at sufferance. n81 If the landlord chooses to keep the holdover tenant obligated under a new lease, the lease will generally be in the category of a periodic tenancy, if the tenant is making periodic payments of rent. After the landlord makes that election, the tenancy at sufferance is transformed into a periodic tenancy and the tenant is obligated to continue making rental payments until the lease is terminated by proper notice by one of the parties. If the landlord chooses not to transform the holdover's tenancy at sufference into a new tenancy, the holdover may be dealt with as a trespasser.

Another means by which a periodic tenancy arises is the natural course of events transforming what was originally a mere tenancy at will into the more common periodic tenancy form of lease. Whenever a tenant under a tenancy at will begins making regular periodic payments of rent which the landlord accepts, the law infers that the parties intended to change the original tenancy at will into a periodic tenancy. n82 By being transformed into a periodic tenancy, the lease is made subject to notice requirements as a prerequisite to its termination.

Termination of periodic estates must be triggered by notice given in advance by either party that the tenancy is ending on a specified date. n83 If the required notice is not given, the periodic tenancy is automatically renewed for a new period. Advance notice is needed so the parties can make arrangements necessitated by the termination of the lease. The tenant must relinquish possession on the termination date.

To accomplish that task, the tenant must pack and remove personal belongings from the premises and arrange for new accommodations, if necessary. The landlord needs the time between the date of the notice and the time set for termination to make arrangements to find a replacement tenant or to personally take over possession previously held by the periodic tenant.

The notice requirements for terminating periodic tenancies are set by statute. A typical notice requirement may be 15 days or one month prior to the end of the current period. n84 Originally, the common law requirement was notice equal to the length of the period with a maximum of six months advance notice. n85 A periodic tenancy from year to year required the full six months notice. n86 Now, statutes have reduced the advance notice requirement to terminate a year to year periodic tenancy to a shorter period ranging from 15 days to three months. Both the statutory and the original common law notice requirements have been allowed to be changed by agreement in the lease, except where a statute

specifically prohibits modification of the statutory notice periods. n87

The notice requirements are strictly applied. If the notice requirement is 30 days, the notice must be given no less than 30 days prior to the end of the current period. An example is helpful to understand proper application of the notice requirement. If, for example, a periodic tenancy ends on the 31st day of December, then the 30-day notice must be given no later than December 1st. A notice given on December 15th is not sufficient to end the tenancy on December 31st. Nor will the periodic tenancy come to an end in the middle of January, even though that date is 30 days after the notice date of December 15th. In fact, some states have been so strict that they will not permit the December 15th notice to end the periodic tenancy on January 31st, (even though 30 days have clearly elapsed) unless the notice specifically mentioned termination of the estate on January 31st. n88 Some more lenient states would consider such notice sufficient to terminate the tenancy at the end of the next period that is at least 30 days after the notice. n89

In that case, even though the December 15th notice may have improperly designated December 31st or January 15th as the termination date, the defective notice would have been effective in terminating the periodic tenancy on January 31st.

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LEXIS: residual w/5 tenanc!

§ 39.05(c) Tenancy at Sufferance.

Traditionally, courts and authors have referred to the tenancy at sufferance as an additional form of tenancy. n90 It differs from the other three categories, however, in significant ways. First, it is not an actual estate involving possessory rights. In fact, it is considered as wrongful possession by a tenant whose original right to possession under one of the other three forms of tenancy has terminated. n91 Second, it is not a consensual relationship. It exists because of the unauthorized retention of possession of a tenant whose landlord has not yet acted in response to the wrongful actions of the holdover tenant. For these reasons, it seems appropriate to designate this category of a landlord/tenant relationship as an *occupancy* at sufferance rather than as a tenancy at sufferance. n92

An occupancy at sufferance continues until the landlord takes some action to alter the unexpected extension of the tenant's presence on the landlord's property. n93 Two alternatives are available to the landlord in response to the tenant's intrusive action. First, because the tenant's right to remain in possession has ended, the landlord can elect to treat the tenant as a trespasser. n94 Historically, the landlord could forcibly remove the tenant and the tenant's goods as long as the landlord acted reasonably. n95 Today, many jurisdictions require the landlord to initiate court proceedings to remove the tenant from the property, unless the tenant turns over possession voluntarily. Self-help force is prohibited. n96

Courts have not considered the occupant at sufferance a trespasser until the landlord has ordered the holdover tenant to vacate the property. n97 The courts' characterization is based on a concern for the landlord's rights rather than the tenant's protection. If the holdover tenant were viewed as a trespasser from the beginning of the holdover period, then the landlord could potentially lose title to the property under the doctrine of adverse possession if the wrongful occupancy by the tenant lasted a sufficiently long period of time. n98 In fact, the landlord owed no greater care historically to the occupying tenant at sufferance than to a normal trespasser. The landlord was liable only for intentional injuries to a holdover tenant or a trespasser. n99

The landlord has a second alternative in dealing with an unanticipated holdover tenant. The occupancy at sufferance can be converted into a new lease relationship at the election of the landlord. The holdover tenant has no means of backing out from the new lease imposed upon the tenant by the landlord. The tenant's wrongful occupancy is viewed as a sufficient basis for inferring the tenant's approval of continuing possession under a new lease. The new lease can be formally created as one of the other three types of tenancies -- for a definite term, at will or as a periodic tenancy. It is

more common for an implied tenancy from period to period to result from the holdover relationship. Once the tenant offers to pay rent and the landlord accepts it, an implied periodic tenancy exists. The resulting new tenancy is recognized retroactively to the beginning of the holdover period. n100

Statutes have modified the rights and duties arising through an occupancy at sufferance. First, the landlord is often required to provide notice to an occupying tenant before terminating the possession of the tenant, even though the continued occupancy is wrongful. n101 Second, statutes typically provide for the landlord's right to recover fair rental value from the tenant for the period of time the occupancy at sufferance extends. n102

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LEXIS: tenanc! w/2 sufferance

§ 39.05(d) Tenancy at Will.

The tenancy at will created rights of possession in a tenant for an indefinite time, so it is considered an estate in land. n103 It differs from a tenancy from period to period because it is not measured by any specific period of time. It lasts only as long as neither party does anything to terminate the tenant's possessory interest or until the tenancy at will is transformed into a periodic tenancy. If the landlord has sole rights to terminate the tenancy at will, it is nonetheless considered a tenancy at will. n104 Some courts infer a reciprocal right in the tenant, even if the creating document only mentions the landlord's termination rights. n105 On the other hand, if the tenant has exclusive rights to terminate the interest, courts generally consider the tenant to have a life estate or a fee simple in the property rather than a tenancy at will. n106

The tenancy at will arises in most cases by implication rather than by express creation by the parties. n107 It is possible, but uncommon, for the parties to expressly agree that the tenant will have possession under a tenancy at will. In that case, both parties should know that their relationship is vulnerable to being terminated at any time, for the tenancy at will continues only as long as both parties mutually consent to its existence. If either party conveys or assigns its interest in the property to another, then the tenancy at will comes to an end because one of the original parties no longer has an interest in the property to support the tenancy based on the mutual will of the original landlord and the original tenant. n108 A sub-lease by the tenant does not result in termination of the tenancy at will, however. n109 The death of either party destroys the tenancy at will. n110 Any other action by either party that is inconsistent with the continuation of a tenancy at will results in termination of the tenancy. n111 These illustrations underscore the personal, license-like characteristics of the tenancy at will. Another means of terminating the tenancy at will is the announced decision by either the landlord or the tenant that the tenancy no longer exists.

The most frequently encountered tenancy at will is created by operation of law, based on circumstances resulting in the unintentional creation of this form of tenancy. Typically, tenancies at will that are created by operation of law exist as such for only a short period and are ultimately treated as periodic tenancies. In several states, however, every tenancy created under an invalid oral lease is viewed as a tenancy at will. n112 Whenever a party takes possession of property under an invalid deed or lease, the owner of the property becomes the landlord and the person in possession becomes the tenant under a tenancy at will. The tenant has a legal right to be in possession, but that right may be removed or relinquished at any time. In the situation involving an invalid term for years lease because of failure to meet the formal requirements of the Statute of Frauds, the tenant generally begins making regular rental payments to the landlord. As soon as the payments are made and accepted, the tenancy at will is replaced by a periodic tenancy, measured by the period covered by the rental payment. It is possible to have a tenancy at will in which rental payments are expected, but only if the parties expressly intend to create such a tenancy. If the tenancy at will arises by implication, then the payment of rent changes the tenancy into a tenancy from period to period.

In its original form, the parties under a tenancy at will had no protections against immediate termination of their rights

under a tenancy at will. By requiring advance notice in order to legally terminate a tenancy at will, modern statutes have attempted to protect the tenant from sudden evictions and the landlord from unexpected loss of rental income. n113 Sometimes the notice statutes apply to terminations based on transfer of a party's interest or death of one of the parties. Usually, though, the notice requirement applies only to the more common termination situations in which a party ends a tenancy at will by merely announcing or demanding its termination. A major distinction between the categories of tenancies at will and periodic tenancies is largely eliminated if prior notice is required by statute in order to terminate the tenancy at will.

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LEXIS: tenanc! w/2 will

FOOTNOTES:
(n1)Footnote 55. *See* § 39.01, *supra* n.6.

(n2)Footnote 56. Uniform Residential Landlord and Tenant Act § 1.401 (d), 7B U.L.A. 427 (1974).

(n3)Footnote 57. *See* William B. Stoebuck and Dale A. Whitman, The Law of Property § 6.79 - 6.81 (West, 3d ed., 2000); Restatement (Second) of Property § 12.1, statutory note (1977) (summary eviction proceedings for nonpayment of rent).

(n4)Footnote 58. Restatement (Second) of Property § 12.1, statutory note (1977) (summary eviction proceedings for nonpayment of rent).

(n5)Footnote 59. Restatement (Second) of Property § 12.1, statutory note (1977).

(n6)Footnote 60. N.J. Stat. Ann. § 2A**:** 18-61.1.

(n7)Footnote 61. Under regulations of the Department of Housing and Urban Development, federally assisted, publicly owned housing is an exception to the general rule regarding evictions. 24 CFR §§ 247.1-247.10; *Thorpe v. Housing Auth., 393 U.S. 268 (1969); Caulder v. Housing Auth., 433 F.2d 998* (4th Cir.), *cert. denied, 401 U.S. 1003 (1970); Housing Auth. v. Mosby, 192 N.W.2d 913 (Wis. 1972). See also Joy v. Daniels, 479 F.2d 1236 (4th Cir. 1973); Kutcher v. Housing Auth., 119 A.2d 1 (N.J. 1955).* State and local regulations may also regulate public housing. *Escalera v. Housing Auth., 425 F.2d 853 (2d Cir. 1970), cert. denied, 400 U.S. 853; Sanders v. Cruise, 173 N.Y.S.2d 871 (1958)* Robert S. Schoshinski, American Law of Landlord and Tenant § 3.8 (Lawyers Co-op. 1980).

(n8)Footnote 62. Restatement (Second) of Property § 1.4 (1977).

(n9)Footnote 63. Restatement of Property § 19 cmts. a and b (1944); *Good Ol' Days Commissary, Inc. v. Longcrier Family L.P., 522 S.E.2d 249 (Ga. App. 1999)* (a lease for a term of 40 years or during the lifetimes of the lessees establishes a definite ending date of the tenancy).

(n10)Footnote 64. *See, e.g., Beeson v. LaVasque, 223 S.W. 355 (Ark. 1920); Jones v. Schneer, 63 N.Y.S.2d 627 (1946); but cf. Stanmeyer v. Davis, 53 N.E.2d 22 (Ill. App. Ct. 1944); Michael Tuck Found. v. Hazelcorn, 65 N.Y.S.2d 387 (1946)* (holding that a lease "for the duration of the war" and for one year after the signing of an armistice between the U.S. and Germany and Italy was too indefinite and created a tenancy at will); *Lace v. Chantler, 1 K. B. 368 (1944)* (English Court of Appeal holding a lease "for a duration" of World War II was too indefinite to create a tenancy for years). The English Parliament overturned *Chantler* by statute, 7 & *8 Geo. 6*, ch. 34 (1944).

(n11)Footnote 65. *See* Restatement (Second) of Property § 1.8 cmt. b (1977); *Wonderfair Stores, Inc. of Ariz. v. Walgreen Ariz. Drug Co., 511 F.2d 1206, 1213 (9th Cir. 1975)* (citing *Wong v. Di Grazia, 386 P.2d 817, 823 (Cal. 1963)); Shaver v. Clanton, 31 Cal. Rptr. 2d 595 (Cal. App. 1994)* (the Uniform Statutory Rule Against Perpetuities,

which has been adopted by California, explicitly excludes from the rule interests created in commercial transactions such as options to renew and rights of first refusal and commercial leases).

(n12)Footnote 66. N.D. Cent. Code § 47-16-02.

(n13)Footnote 67. N.D. Cent. Code § 47-16-02 (limiting leases of city lots to periods of 99 years); Ark. Code Ann. § 22-4-501 (limiting leases of public parks, playgrounds, golf courses, and swimming pools to 99 years); Tenn. Code Ann. § 66-7-103 (limiting oil and gas leases to periods of 10 years); R.I. Gen. Laws §§ 20-10-3, 20-10-6 (limiting leases of underwater lands for aquaculture to periods of 10 years).

(n14)Footnote 68. *See* Restatement (Second) of Property § 1.4 stat. note at 20-21 (1977) (listing state statutes that convert long-term leases to freeholds). In Ohio, a ninety-nine year lease that is renewable forever is a "perpetual lease" and, although it is called a perpetual lease, it is treated as a freehold estate. *See, Quill v. R.A. Investment Corp., 707 N.E.2d 35 (Ohio Ct. App. 1997).*

(n15)Footnote 69. *See generally* William B. Stoebuck and Dale A. Whitman, The Law of Property § 6.17 (West, 3d ed., 2000).

(n16)Footnote 70. *See* William B. Stoebuck and Dale A. Whitman, The Law of Property § 6.17 (West, 3d ed., 2000); David S. Hill, Landlord and Tenant law in a Nutshell 13 (3d ed., 1995).

(n17)Footnote 71. Restatement (Second) of Property § 1.5 cmt. f (1977); *Mobile Eye Center, P.C. v. Van Buren Partnership, 826 So.2d 135 (Ala. 2002)* (renewal provision which stated that the lease "may" be renewed with the mutual consent of the parties did not operate to automatically renew the lease, but was an unenforceable agreement to agree to a renewal of the lease; although provision stated that the lessee would give written notice if he did not intend to renew the lease, the provision did not say that renewal was automatic if no such notice was given.)

(n18)Footnote 72. Powell on Real Property (R) § 16.04 (Michael Allan Wolf ed., Matthew Bender).

(n19)Footnote 73. *See* Powell on Real Property (R) § 16.04 (Michael Allan Wolf ed., Matthew Bender) (listing the three situations in which the law infers a periodic tenancy). *Transcontinental Gas Pipe Line Corp. v. Calco Enterprises, 511 S.E.2d 671 (N.C. Ct. App. 1999)* (if a tenant and landlord have an invalid lease, but the tenant makes rental payments and the landlord accepts them, a periodic tenancy is assumed at law).

(n20)Footnote 74. *See* William B. Stoebuck and Dale A. Whitman, The Law of Property § 6.17 (West, 3d ed., 2000) (stating that the most common form of periodic tenancy is a "general letting" in which the parties discuss only payment of rent).

(n21)Footnote 75. Most state statutes provide for a notice period between 30 days and 3 months if the periodic tenancy is for one-year periods. *See, e.g.*, Cal. Civ. Code § 1946 (30 days notice); Colo. Rev. Stat. § 13-40-107 (3 months notice). If the period is less than a year, most state statutes require notice of one full period. *See, e.g.*, Mich. Comp. Laws Ann. § 554.134 (requiring notice of one full period for any periodic tenancy for less than three months). *Cf.* Alaska Stat. § 34.03.290 (a) (requiring 14 days notice for a week-to-week tenancy); Ariz. Rev. Stat. Ann. § 33-341 (a) (a year-to-year tenancy terminates automatically after end of the period unless the landlord grants permission for the tenant to remain).

(n22)Footnote 76. *See* William B. Stoebuck and Dale A. Whitman, The Law of Property § 6.17 (West, 3d ed., 2000); *but see* Powell on Real Property (R) § 16.05 (Michael Allan Wolf ed., Matthew Bender) (listing cases where courts still infer a tenancy at will instead of a periodic tenancy when a lessee takes possession under an invalid lease).

(n23)Footnote 77. *Id.*

(n24)Footnote 78. *See, e.g., Metzer v. Connally Realty Co., 45 S.E.2d 199 (Ga. 1947)* (holding that parties' prior course of dealing indicates the tenancy period intended); *Longmier v. Kaufman, 663 S.W.2d 385 (Mo. Ct. App. 1983)* (holding that an invalid attempt to make an oral 50-year lease created a tenancy at will, which became a month-by-month periodic tenancy when the tenant made, and the landlord accepted, monthly rent payments); *Prescott v. Smits, 505 A.2d 1211 (Vt. 1985). First Interstate Bank v. Tanktech, Inc., 864 P.2d 116 (Colo. 1993)* (although the acceptance of rent by a landlord upon expiration of the lease is sufficient to create a holdover tenancy, if the landlord and tenant were original parties to the lease, they should not be bound to the terms of a lease which they might not be aware of and which they had no power to negotiate); 1400 *Broadway Assoc. v. Henry Lee & Co., 614 N.Y.S.2d 704 (1994)* (a holdover tenant, by continuing to pay rent, and an owner, by continuing to accept it, have crafted only a month-to-month periodic tenancy).

(n25)Footnote 79. *See* § 39.05, *supra* n.59 and accompanying text. *But see* John E. Cribbet & Corwin W. Johnson, Principles of the law of Property 56, n.9 and accompanying text (3d ed. 1989). *Santacroce Associates v. Cambino, 1998 Conn. Super. LEXIS 220* (No. CV 970257458, Feb. 3, 1998) (tenancy for years, invalid because of the Statute of Frauds, results in year to year periodic tenancy when lessee takes possession of the premises).

(n26)Footnote 80. John E. Cribbet & Corwin W. Johnson, Principles of the law of Property 58 (3d ed. 1989). *See, e.g., Steiner v. Minkowski, 596 N.E.2d 492 (Ohio Ct. App. 1991); City of Cleveland v. A.J. Rose Mfg. Co., 624 N.E.2d 245 (Ohio App. 1993)* (in Ohio there is no privity of contract between the original lessor and a subtenant and that a subtenant's right to possession terminates when the rights of the original lessee terminate).

(n27)Footnote 81. John E. Cribbet & Corwin W. Johnson, Principles of the law of Property 58 (3d ed. 1989); see also 49 Am. Jur. 2d landlord AND Tenant § 81 (1970); *A. O. Smith Corp. v. Kaufman Grain Co., 596 N.E.2d 1156 (Ill. App. Ct. 1992); Meyer v. Cohen, 632 N.E.2d 22 (Ill. App. 1993)* (under Illinois law, the termination of a lease and the surrender of the premises are different events, and a tenant who remains in possession of the premises after his lease expires or is terminated becomes a tenant at sufferance); *Clark v. Whitehead, 874 S.W.2d 282 (Tex. App. 1994)* (a landlord may elect to treat a lessee in possession after the expiration of the lease as either a trespasser or as a tenant holding over under the terms of the original lease).

(n28)Footnote 82. *See* Powell on Real Property (R) § 16.05 (Michael Allan Wolf ed., Matthew Bender). *See, e.g., Weishaar v. Strimbu, 601 N.E.2d 587 (Ohio Ct. App. 1991).*

(n29)Footnote 83. Restatement (Second) of Property § 1.5 cmt. f (1977); *see also Dickens v. Hall, 718 P.2d 683 (N.M. 1986)* (holding that a month-to-month periodic tenancy requires notice before termination).

(n30)Footnote 84. For a list of different states' statutory notice requirements, *see* Restatement (Second) of Property § 1.5 stat. note at 29-33 (1977). *Cf.* Uniform Residential Landlord AND Tenant Act § 4.301(b) (1972), which requires 60 days' written notice to terminate a month-to-month periodic tenancy.

(n31)Footnote 85. Powell on Real Property (R) § 16.04 (Michael Allan Wolf ed., Matthew Bender).

(n32)Footnote 86. Powell on Real Property (R) § 16.04 (Michael Allan Wolf ed., Matthew Bender).

(n33)Footnote 87. *See, e.g.*, Mass. Gen. Laws Ann. ch. 186, § 15A (waiver of notice is void as against public policy). *Havington v. Glover, 722 A.2d 500 (N.H. 1998)* (though common law suggested that period for notice in terminating periodic tenancies could be agreed upon, such common law tradition did not survive a legislative enactment that precisely proscribed the way in which notice was to be given).

(n34)Footnote 88. Powell on Real Property (R) § 16.04 (Michael Allan Wolf ed., Matthew Bender). *Boss v. Koch, 589 N.W.2d 456 (Wis. App. 1998)* (an example of a court refusing to honor termination because notice of termination to the tenant was improper); *Davidson v. Kenney, 971 S.W.2d 896 (Mo. Ct. App. 1998)* (Missouri follows strict construction in determining whether notice requirements have been complied with in terminating a periodic tenancy).

(n35)Footnote 89. *See, e.g., Harry's Village, Inc. v. Egg Harbor Township, 446 A.2d 862 (N.J. 1982).* This is the position accepted by Restatement (Second) of Property § 1.5 cmt. f (1977). *But cf. Market Dundee Corp. v. Jaramillo, 582 A.2d 850 (N.J. Super. Ct. App. Div. 1990)* (holding to strict common law if the requirements of notice are not substantially complied with) *overruled,* 809*B811 Washington Street Associates v. Grego, 600 A.2d 1222 (N.J. Super. Ct. App. Div. 1992); Phillips v. Albanese, 755 N.Y.S.2d 403 (2003)* (tenant was not prejudiced as a result of claimed defects in termination notices because he received adequate notice of the charges against him and available remedies)

(n36)Footnote 90. *See, e.g., Jesse Dukeminier & James E. Krier, Property* 451-456 (5th ed. 2002); Restatement of Property § 22 (1936); *Leslie Pontiac, Inc. v. Novak, 202 N.W.2d 114 (Iowa 1972); Gray v. Gray, 286 P.2d 138 (Or. 1955)* (citing Oregon statute that classified recognized types of tenancies, which included tenancy at sufferance).

(n37)Footnote 91. Cornelius J. Moynihan and Sheldon Kurtz, Introduction to the Law of Real Property 92-93 (3d ed. 2002); Restatement of Property § 22 (1936). *Dale v. H.B. Smith Co., 136 F.3d 843 (1st Cir. 1998)* (tenancy at sufferance can arise before, and after, summary proceedings); *Amcor Trust Co. v. Minnesota Diversified Prods., 1998 U.S. Dist. LEXIS 11893* (No. 97- 0619, Jul. 28, 1998, N.D. Ill.) (court notes that under Illinois law, tenant's failure to vacate after lease expires creates tenancy at sufferance or holdover tenancy); *Herrera v. Colon, No. 971219035, 1998 Conn. Super. LEXIS 789* (court notes that termination of a lease does not necessarily end the tenancy since the tenant might hold over and become a tenant at sufferance). *City of New York v. Utsey, 714 N.Y.S.2d 410 (N.Y. App. Div. 2000)* (a trespasser who never had a proper right to possession cannot claim a tenancy at sufferance).

(n38)Footnote 92. Arthur Gaudio (ed.), the American law of Real Property § 5.03[5] (1991).

(n39)Footnote 93. *Benton v. Williams, 88 N.E. 843 (Sup. Ct. Mass. 1909)* (holding that the tenancy continues due to laches or forbearance by the landlord).

(n40)Footnote 94. William B. Stoebuck and Dale A. Whitman, The Law of Property § 6.20 (West, 3d ed., 2000).

(n41)Footnote 95. *Benton v. Williams, 88 N.E. 843 (Sup. Ct. Mass. 1909). See generally* William B. Stoebuck and Dale A. Whitman, The Law of Property § 6.80 (West, 3d ed., 2000).

(n42)Footnote 96. Most states have enacted a statute requiring the landlord to give the tenant written notice before commencing an action for eviction. *See, e.g.,* Ky. Rev. Stat. Ann. § 383.695; D.C. Code Ann. § 45-1404.

(n43)Footnote 97. *See, e.g., Slusher v. Indiana, 437 N.E.2d 97 (Ind. Ct. App. 1982); Brown v. Guerrier, 457 N.E.2d 630 (Mass. 1983).*

(n44)Footnote 98. Powell on Real Property (R) § 16.06 (Michael Allan Wolf ed., Matthew Bender).

(n45)Footnote 99. *See, e.g., Slusher v. Indiana, 437 N.E.2d 97 (Ind. Ct. App. 1982); Brown v. Guerrier, 457 N.E.2d 630 (Mass. 1983). Selvy v. Beigel, 670 N.E.2d 784 (Ill. App. 1996)* (lessor was not liable to residents of apartment building for exposure to lead paint because the residents did not establish landlord/tenant relationship).

(n46)Footnote 100. William B. Stoebuck and Dale A. Whitman, The Law of Property § 6.20 (West, 3d ed., 2000).

(n47)Footnote 101. *See* § 39.05, *supra* n.58 and accompanying text.

(n48)Footnote 102. *See, e.g.,* Mass. Gen. Laws Ann. ch. 186, § 3 (allowing recovery of fair rental value); Conn. Gen. Stat. § 47a-3c (in absence of agreement, landlord is entitled to fair rental value).

(n49)Footnote 103. Restatement of Property § 21 (1936) (defining this estate as one with no "designated period of duration").

(n50)Footnote 104. Powell on Real Property (R) § 16.05 (Michael Allan Wolf ed., Matthew Bender).

(n51)Footnote 105. Powell on Real Property (R) § 16.05 (Michael Allan Wolf ed., Matthew Bender); 49 Am. Jur. 2d Landlord and Tenant § 77, (1970). The Restatement of Property has adopted the reciprocal termination view, Restatement of Property § 21 cmt. a (1936).

(n52)Footnote 106. The Restatement (Second) of Property agrees with this view, Restatement (Second) of Property § 1.6 cmt. g (1977).

(n53)Footnote 107. *See, e.g.,* Powell on Real Property (R) § 16.05 (Michael Allan Wolf ed., Matthew Bender); *Napier v. Napier, 564 S.E.2d 418 (W.Va. 2002)* (payment of rent is not a prerequisite to being a tenant and, in the absence of a lease agreement to contrary, a tenancy-at-will is created where one occupies residential property with the permission of its owner, but without being required to make periodic payments of rent); *Bernet v. Rogers, 519 N.W.2d 808 (Iowa 1994)* (tenancy at will is not created without the assent, express or implied, of both parties) *But see Petty v. Faith Bible Christian Outreach Center, Inc., 584 N.W.2d 303 (Iowa 1998).* Some courts have held that a mortgagor who remains in possession after foreclosure is a tenant at will. Also, some court have held that when a mortgagee requests rent payments after foreclosure, the tenant is no longer a tenant at sufferance but a tenant at will. *Diner One, Inc. v. Bank South, 466 S.E.2d 234 (Ga. App. 1995); City of New York v. Utsey, 714 N.Y.S.2d 410 (N.Y. App. Div. 2000)* (The occupancy of a squatter can eventually mature into a tenancy at will).

(n54)Footnote 108. *Irving Oil Corp. v. Maine Aviation Corp., 704 A.2d 872 (Me. 1998)* (court notes that a tenancy at will cannot be assigned or conveyed, and attempts to do so by will or deed will automatically terminate the tenancy at will).

(n55)Footnote 109. *See* Powell on Real Property (R) § 16.05 (Michael Allan Wolf ed., Matthew Bender).

(n56)Footnote 110. 49 Am. Jur. 2d landlord and Tenant § 76 (1970).

(n57)Footnote 111. 49 Am. Jur. 2d landlord and Tenant §§ 77, 80 (1970).

(n58)Footnote 112. *See* Cornelius J. Moynihan and Sheldon Kurtz, Introduction to the Law of Real Property 88-93 (3d ed. 2002); *Eldridge v. Loftis, 723 So. 2d 562 (Ala. 1998)* (court notes that a parol gift in land, though invalid to convey title, can create a tenancy at will); *Hawkins Pro-Cuts, Inc., v. Garcia, 1998 Ohio App. LEXIS 96* (No. 97APE09-1249, Apr. 23, 1998) ("A party who takes possession of premises under an invalid lease creates a periodic tenancy at will, and the period of the tenancy is determined by the provisions for the payment of rent").

(n59)Footnote 113. *See* Restatement (Second) of Property § 1.6 stat. note at 41-45 (1977) (list of state statutes that have modified the common law by, among other things, requiring notice); *Davidson v. Kenney, 971 S.W.2d 896 (Mo. Ct. App. 1998)* (example of statute governing the termination of month-to-month tenancy by requiring one month's notice, in writing, to person in possession, requiring person to move); *Dismuke v. Abbott, 505 S.E.2d 58 (Ga. App. 1998)* (statute imposes certain notice requirements in terminating tenancy at will); Cochran v. Motorcar Techs., No. 97*APE09-1249, 1998 Ohio App. LEXIS 1702* (when a tenant holds over, payment and acceptance of rent obligates the tenant to commit to a new term identical to the prior term).

Thompson on Real Property, Thomas Editions

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CHAPTER 39 LEASEHOLD ESTATES

4-39 Thompson on Real Property, Thomas Editions § 39.06

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§ 39.06 Creation and Termination of Leasehold Estates.

[Go To Supp]

§ 39.06(a) Creation.

The creation of a valid and enforceable lease is governed by general contract principles and by the Statute of Frauds provisions requiring a written document in specified situations. Because required formalities are not always met, some attempts to create a lease are ineffective. In other situations, courts have validated a lease arrangement even though certain formal deficiencies exist. This section discusses the range of possibilities recognized by the law in dealing with the creation of leases. At one end of the spectrum are the attempts to create a lease that failed completely. These are the situations where no agreement was reached. Two common categories are the unenforceable agreements to agree and the agreement that fails because the parties intended the preliminary negotiations to be finalized at a later point. In the middle of the range of possibilities, courts may determine that the parties have a binding contract to lease the property but not an actual lease. In a related situation, the common law recognized a distinction between a tenant's rights before taking possession under a lease and after a formal entry into possession occurs. The pre-possession rights under a valid lease were called *interesse termini*. n114 A final set of lease categories have been established to deal with a lease that failed to meet the strict requirements of the Statute of Frauds. Under these doctrines, the parties may end up with a different type of lease than they attempted to create. It was essential to permit deficient leases to be partially enforceable even though they lacked the formalities to be fully recognized. If the parties acted as if their lease were enforceable, then the courts could not totally reject the existence of the lease. Courts have also excused compliance with the Statute of Frauds in situations where doctrines of part performance or estoppel justify enforcement of the parties' attempted lease agreement even though certain formal requirements were lacking. The ultimate possibility is the creation of a fully enforceable lease meeting all the formalities for its validity.

COMPUTER-ASSISTED RESEARCH

LEXIS: leasehold w/1 estate w/30 creat!

§ 39.06(a)(1) Invalid Leases.

The minimum formalities required for a binding contract are consideration and the agreement of the parties through the

requisite meeting of the minds. A lease could arise as a gift if the prerequisites of intent, delivery and acceptance were met. Most leases, however, are both conveyances and contracts. n115

Leases may fail at the creation stage because the prerequisites for an enforceable contract are not met. Usually that means that the parties never reached the level of coming to an agreement. The most typical examples are the cases where the parties never proceeded beyond the stage of preliminary negotiations. n116 Sometimes the parties actually reach an agreement, but the courts refuse to enforce it in two recurring cases. First, if the parties merely agreed to agree at a later date, then no binding contract exists. n117 The essential terms of the intended lease agreement are lacking so the agreement to agree is invalid for indefiniteness. In addition, the required consideration to support a valid contract is missing because neither party has given anything of value. The other situation arises when the original agreement is documented by an informal binder that is to be formalized at a later time by a more complete, formal document. n118 In that case, the parties lack the necessary intent to be presently bound by their agreement. Each of these situations lacks the present intent to agree to something but includes the intention to postpone coming to an agreement until a later time.

Another category of invalid leases is the lease for an illegal purpose. n119 An illegal lease is often considered void from the outset, and neither party is entitled to any remedies for failure to abide by the terms of the lease agreement. n120 In other cases, the court considers the lease terminated when the illegality is brought to its attention, but the court works out a remedy so the parties are given fair treatment under the circumstances of the case. n121

COMPUTER-ASSISTED RESEARCH

LEXIS: lease! w/5 invalid! or fail!

§ 39.06(a)(2) Enforceable Contracts to Execute a Lease.

The law distinguishes between a lease and a contract to make a lease. Each of these forms of agreement is binding and creates enforceable rights and duties between the parties. A lease being a conveyance of an interest in land is more than a contract because it creates a leasehold estate in the tenant. The distinction is important for identifying the remedies available in the case of a breach of the agreement. n122 If the agreement is characterized as a lease, both contract remedies and remedies available for the protection of possessory interests are applicable. Breach may give a party the right to terminate the lease agreement and seek damages for the losses connected with the breach. The rent specified in the lease agreement is the standard for measuring damages under a broken lease. If, in contrast, the agreement is a contract to execute a lease, then no rights of possession have been transferred; in other words, no conveyance has occurred. The parties merely have the contractual right to enforce the promise to execute a lease. The remedy for breach is the recovery of damages. However, damages are measured by a different standard than in the case of the failure to abide by the terms of a lease agreement. Rather than recovering rent, the non-breaching party is entitled to damages based on the difference between the rent that would have been received under the unexecuted lease and the fair rental value of the property. n123

COMPUTER-ASSISTED RESEARCH

LEXIS: enforc! w/2 contract! w/2 execut! w/2 lease!

§ 39.06(a)(3) *Interesse Termini*.

The common law tradition treated the tenant under a term for years lease that was to begin at a future date differently from the tenant who had already entered into possession under the lease. This is a different distinction than the contract to execute a lease category, discussed in the previous paragraph. The tenant under a valid lease agreement who had not yet taken possession, because the lease was to commence in the future, had rights called *interesse termini*. n124 In essence, these rights were considered to be merely contractual rights until the tenant entered into actual possession. A

tenant with rights under *interesse termini* had only the same remedies as the parties with a mere contract to execute a lease described previously. Damages were not measured by the rent owed under the lease but by the difference between the specified rent and the fair rental value of the leased property.

The lease agreement which is to commence in the future is not the same as a contract to execute a lease. As long as the present intent of the parties is to give an immediate interest in the property to the tenant, the fact that the present interest involves a possession date to commence in the future does not change the fact that a present interest is given. The situation is analogous to the law of future interests where an immediate transfer of a future interest, with the present possessory interest to commence at a future date, is nonetheless considered a valid transfer in the present of a future interest.

COMPUTER-ASSISTED RESEARCH

LEXIS: interesse termini

§ 39.06(a)(4) Statute of Frauds Compliance Issues.

The original Statute of Frauds and the version currently in effect in most jurisdictions have two provisions potentially governing leases. First, the real property clause requires leases, like other transfers of property interests, to be in writing, unless the lease is for a term of less than a specified period. n125 Originally, the maximum length of an oral lease was three years. Now, it is generally one year. Second, the contract clause requires a writing if the contract is not to be performed within a one year maximum time limit. n126

The lease category affected by these writing requirements of the Statute of Frauds is the tenancy for years, because many leases of this type designate a term exceeding the common one-year limitation. It is possible to have a periodic tenancy that is governed by the Statute of Frauds. Virtually all periodic tenancies, however, designate an initial period of one year or less and thus fit within the exception permitting oral leases of one year or less. The fact that periodic tenancies continue until terminated by one of the parties, and often extend beyond one year, does not change the outcome. As long as the recurring period designated in the oral lease is no longer than a year-to-year tenancy, the writing requirement does not apply.

Courts are split on the related issue of lease renewal provisions. If the lease term is for one year, but the lease provides for renewals or extensions, must the lease be in writing because the original term plus the possible renewal result in a lease that exceeds the permitted one year term for an oral lease? n127 The *Restatement* rule allows an oral lease by considering the renewal period as separable from the designated initial term. n128

Most courts have also validated an oral lease for a term of one year, even though the lease agreement is arranged several weeks or months before the lease term is to commence. n129 Unless the contract can be performed within one year, the question arises whether the contract provision requiring a writing should apply. The usual answer is that the more specific provision authorizing oral leases for a term of one year or less should govern. This lenient position is consistent with the common practice of agreeing to a lease in advance of the date of occupancy.

COMPUTER-ASSISTED RESEARCH

LEXIS: statute w/1 frauds w/30 lease!

§ 39.06(a)(5) Invalid Tenancy for Years Recognized as Another Form of Tenancy.

Many oral leases violate the Statute of Frauds because they exceed the time period in which the writing requirement does not apply. Even though the oral lease agreement is not enforceable, the parties generally proceed as if the lease

were valid. In most cases, the tenant moves in and begins to pay the rent, just as the parties agreed. By the time one of the parties challenges the validity of the lease, a landlord/tenant relationship has usually existed for a period of time. Courts typically invalidate only part of such an oral lease agreement. Complete refusal to recognize the lease relationship would be absurd, because the parties have, in fact, acted as if a lease existed. The courts do, however, alter the type of tenancy involved. Although the parties orally agreed to a tenancy for years, they are treated as if they had agreed to a periodic tenancy. n130 Many other features of the lease arrangement are upheld, including the rent, maintenance obligations, and restrictions on permitted activities. The major difference is that the set duration of the oral lease is ignored and replaced by a periodic tenancy with the period measured by the time intervals between payments of rent. n131 It is possible, but rare, that the new tenancy will be considered a tenancy at will based on the fact that the landlord has allowed the tenant to take possession of the property under an unenforceable term for years. n132 As soon as the landlord accepts rent from the tenant, however, courts have a basis for considering the lease as a periodic tenancy tied to the length of the period covered by the rent payment. If the rent has been paid once a month, then the invalid term for years will be recognized as a month-to-month periodic tenancy.

COMPUTER-ASSISTED RESEARCH

LEXIS: invalid! w/2 tenanc! w/2 year!

§ 39.06(a)(6) Part Performance and Estoppel Exceptions to Compliance with the Statute of Frauds.

Occasionally, the requisite facts exist to permit enforcement of an oral lease that would otherwise be unenforceable for failure to meet the requirements of the Statute of Frauds. Courts have excused compliance with the Statute of Frauds under the exception doctrines of part performance or estoppel. These equitable doctrines are applied in two major types of cases. Under the part performance doctrine, the court must be convinced by compelling evidence that the acts of one of the parties would not have occurred unless there had, in fact, been the oral lease agreement as asserted. n133 Generally, the acts required must be more than transfer of possession and payment of rent, because those acts are as consistent with a short-term periodic tenancy as they are with a lengthy term for years. Other acts that may be considered sufficient include substantial permanent improvements on the property constructed by the tenant to meet its special long-term requirements or by the landlord in order to accommodate the tenant's intended use of the property over the asserted term of the oral lease. n134

The second doctrine, equitable estoppel, is applied in cases when non-enforcement of the oral lease would cause irreparable damage to one of the parties who has reasonably relied on the existence of the oral lease agreement. n135

In both of these situations, the parties are allowed to enforce the oral lease, including its definite term, despite failure to meet the Statute of Frauds requirement. Courts have justified these exceptions to prevent the Statute of Frauds from producing inequitable results. n136 In the case of most oral leases, the possibility of recognizing a periodic tenancy in place of the unenforceable tenancy for years will be the preferred outcome. Application of the equitable exceptions to the Statute of Frauds based on part performance or equitable estoppel is less often the result.

COMPUTER-ASSISTED RESEARCH

LEXIS: lease! w/50 part w/1 performance w/30 statute of frauds lease! w/50 estoppel w/30 statute of frauds

§ 39.06(a)(7) Fully Enforceable Leases.

A lease agreement, whether written or oral, consists of four essential terms: designation of the parties, the description of the property, the rent obligation, and the duration of the lease. n137 Each may be expressly mentioned, or the required provisions of the lease agreement may be implied from the circumstances of the transaction. n138 General rules of

construction apply to leases. Courts, in construing the terms of a lease, consider the language of the parties, their actions, the purpose of the lease arrangement, and any other circumstances surrounding the transaction. n139

The parties may not be specifically named in the agreement, as long as someone with an ownership interest, including any one of several co-owners of the property, completes transfer of the tenant's possessory interest to an ascertainable person or entity. Every party to the agreement, however, must have the capacity to hold or transfer property interests under the general law of the jurisdiction. Mental illness, age of minority, imprisonment, duress, and lack of authority to act on behalf of a corporation or trust are examples of incapacitating circumstances.

The necessary description of the property may be ascertained by the physical acts of the tenant in asserting possessory rights in the leased property.

If rent is not specifically discussed in negotiating the lease agreement, then the parties' course of dealing may supply the necessary designation of rent. In the rare case of a lease arising as a gift, rent may not be expected. In all other cases, however, courts are able to impose a fair rental valuation on the parties if they have not otherwise set the rent through their agreement or actions. n140

Today's presumption, in the absence of a specified duration for the lease agreement, is that the parties intended a periodic tenancy. The Uniform Residential Landlord and Tenant Act provides that, "unless the rental agreement fixes a definite term, the tenancy is ... month to month." n141

The Statute of Frauds also requires specified signatures in addition to its writing requirement. Some states indicate that both parties must sign the lease; n142 others require the signature of the landlord. n143 The most common approach is to require the signature of the party to be charged in an action to enforce the terms of a lease. n144 The practical effect of this rule is that each party should ensure that the other party's signature is included because it is not known at the time of the agreement which of the parties may need to seek judicial enforcement.

Most leases are created by express agreement of the parties. In certain circumstances, however, a court may impose a lease relationship on the parties by operation of law. Thus, as previously mentioned, in the case of an invalid term for years, for failure to meet the requirements of the Statute of Frauds, the court may determine that the parties nonetheless have a periodic tenancy. The parties may also be subject to a continuing lease relationship in the holdover situation. A tenant may be obligated under a new lease even though it does not agree to one following the natural termination of a tenancy for years. The fact that the tenant remains in possession beyond the end of the lease term is a sufficient basis for the landlord to enforce continuing obligations against the tenant. Some jurisdictions permit the landlord to hold the tenant to a term equal in length to the original, expired term of the lease. n145 Others limit the new term to one additional year. n146 Most states, however, consider the holdover to be bound under a new lease, but with a duration measured as a periodic tenancy from month to month. n147

As indicated, oral leases are enforceable if the period of the lease term does not exceed the length of time set by the Statute of Frauds. Most states have a one-year period. Virtually all periodic tenancies, and many short-term tenancies for years, are fully enforceable even though they are not in writing. In fact, the leniency of the Statute of Frauds has probably contributed to the wide-spread informality of leasing, especially in residential leases. Commercial leases and longer-term residential leases are generally enforceable as long as they are in writing.

Some states impose other requirements, such as recording, on leases that are subject to the Statute of Frauds writing requirement. n148 Failure to record does not invalidate the lease transaction between the landlord and tenant, but may affect the validity of the lease in relation to purchasers of the leased property. A purchaser in good faith who is without notice of the unrecorded lease for a valuable consideration takes the property free of the tenant's interest in the property. By recording the lease, the parties are protected against legally protected purchasers because recording constitutes constructive notice of the interest. Possession by the tenant, however, is sufficient notice of the tenant's interest in the

property to prevent a purchaser from qualifying for the protected position of a bona fide purchaser without notice.

COMPUTER-ASSISTED RESEARCH

LEXIS: lease! w/2 fully w/2 enforc!

§ 39.06(b) Termination.

Termination of leasehold estates is also governed by numerous, ancient common-law rules. However, a termination of a leasehold estate that is initiated by the landlord through eviction proceedings is primarily governed by modern statutes in every jurisdiction. The statutes typically prescribe the necessary steps to be taken for the termination by eviction for each particular type of leasehold estate. n149

Traditionally, termination of leases has been the primary focus of statutes governing the landlord/tenant relationship. Common law rules have continued to govern the characteristics of leasehold estates in all respects except termination. Except for the Statute of Frauds, the statutes do not normally deal with creation of leases. Statutes have also been relatively silent on the permissible rights and duties of the leasehold parties during the duration of the lease. As the warranty of habitability doctrine has developed, however, numerous states have adopted statutory approaches defining these new tenant rights and landlord duties. n150

Statutes dealing with leasehold estates continue predominantly to regulate termination issues. Termination is affected by statutes detailing landlord and tenant remedies in case of non-compliance with lease provisions. Termination also arises in statutes dealing with abandonment, surrender, mitigation of damages, retaliatory eviction, and the holdover tenant. Recently, the traditional rights to terminate have been restricted in several statutes requiring a good cause for eviction of tenants. n151 Finally, virtually every state has adopted some form of dealing expeditiously with possession issues once a lease has terminated. The summary dispossession proceedings, often prescribed in forcible entry and unlawful detainer statutes, have become the primary forum in which courts deal with landlord/tenant issues.

These modern statutes focus on prompt resolution of landlord/tenant disputes. The speedy proceeding is available because shelter in residential leases and office space in commercial leases are crucial necessities. In earlier eras, when farming was the primary purpose of leases, the land was the important commodity. Crops were the crucial source for payments required under the lease. Now, the structures are generally more important than the land. Cash earned by a commercial tenant's use of the office space or wages earned by the residential tenant have replaced crops as the basis for required payments to the landlord. Growing seasons have given way to significantly shorter pay periods. To preserve the income-producing purpose of leasehold estates, landlords must be able to regain possession of property quickly from nonpaying tenants.

The most significant differences today between the various forms of leasehold estates are based on statutory prerequisites for evicting a tenant in summary proceedings for possession. Thus, the landlord is required to serve notice on the tenant as a prerequisite for a court-ordered eviction involving every type of leasehold estate except the term for years. n152 Moreover, even the term for years can be terminated through proper notice if the tenant has failed to pay rent, just as in the case of other types of leasehold estates. n153

Tenancies are generally subject to termination in several ways: (1) tenancies expire naturally; (2) landlords may exercise specified powers to terminate tenancies; (3) tenants may exercise specified powers to terminate tenancies; (4) the landlord's estate may end; and (5) the parties may terminate the tenancy by agreement. n154 The tenancy for a term is the only form of tenancy that ends automatically by the mere passage of time. Otherwise, tenancies are terminated only by some act, agreement or event.

COMPUTER-ASSISTED RESEARCH

LEXIS: leasehold w/1 estate! w/30 terminat!

§ 39.06(b)(1) Termination of the Various Forms of Tenancy.

The term for years is distinguished by a provision setting a definite ending date for the tenancy. Unless the tenancy has terminated earlier, the tenancy ends automatically once the specified date arrives. Either the landlord or tenant may generally terminate the tenancy earlier if the other party fails to comply with the duties established in the lease.

As with other forms of tenancy, the tenant's rights under the lease no longer exist if the landlord's estate comes to an end in any way other than a voluntary transfer to a successor. Four common situations arise; first, if the landlord's estate was less than a fee simple in the property, both the landlord's and the tenant's rights in the property end when the landlord's estate is extinguished. This occurs if the landlord holding a mere life estate dies. n155 In that situation, both the life estate and the tenant's leasehold estate are terminated upon the landlord's death. A similar result occurs if the landlord had some other form of defeasible estate, such as a fee subject to a condition subsequent, and the prescribed events to extinguish the landlord's estate occur. Second, if the landlord's property is taken under the government's power of eminent domain, then the tenant's interest is also extinguished. n156 The tenant may be entitled to share in the compensation received because of the taking. Third, a tenant's interest in a lease may be rejected by the bankruptcy trustee in the case of the landlord's bankruptcy. n157 Finally, a mortgage foreclosure in which the landlord's interest is involuntarily relinquished to satisfy a debt obligation which was secured by the landlord's property prior to creation of the lease results in termination of the tenant's interest in the property. n158

In contrast, periodic tenancies never expire automatically because they are continuous by definition. Termination by either party requires giving proper notice to the other party. The same events listed above that result in termination of the landlord's estate also curtail the tenant's periodic tenancy. n159

In the case of the tenancy at will, either party was previously able to bring the lease to an end by any act or statement indicating that the tenancy had terminated. Some states now treat the tenancy at will like a periodic tenancy by requiring advance notice to terminate the lease unless termination is caused by the death of one of the parties or the transfer of the party's interest in property to another. n160

Unless the state requires advance notice, the landlord is permitted to terminate the holdover's wrongful possession of the leased property at any time.

COMPUTER-ASSISTED RESEARCH

LEXIS: lease! or tenanc! w/15 terminat!

§ 39.06(b)(2) Landlord Remedies.

Termination due to the tenant's non-compliance with the terms of the lease agreement is one of the landlord's primary remedies. n161 The landlord may seek damages or an injunction as an alternative remedy available because of a tenant's breach. If the lease is terminated, the landlord becomes eligible to reclaim possession of the property. At the same time, the landlord may seek damages occasioned by the tenant's breach of the lease.

A landlord may be denied termination, however, in several situations. The court may determine that the alleged breach did not occur. The tenant may successfully assert the defense of waiver or estoppel. The landlord may not have given sufficient advance notice of a breach determined to have been readily curable.

Nonpayment of rent is most often the basis for a landlord's right to terminate the tenancy. State statutes often provide

for termination by the landlord because of a tenant's failure to pay rent. n162 The landlord is usually required to provide notice in the alternative requiring either payment of delinquent rent within a specified period or calling for termination of the tenancy. n163

A tenant may also be evicted for failure to abide by specified conditions in the lease or for acts of nuisance. n164 Unless the state's statute provides for termination based on these failures of the tenant, the lease must specify that the tenant is subject to forfeiting its rights under the lease due to these prescribed acts or because of the tenant's failure to meet the conditions specified.

The landlord is allowed to apply the tenant's security deposit to satisfy monetary damages caused by the tenant's breach. n165 The landlord may also be assisted in recovering damages through a statutory provision giving the landlord a lien in the tenant's personal property remaining on the premises. n166

COMPUTER-ASSISTED RESEARCH

LEXIS: landlord! w/15 remed! w/50 terminat! or evict!

§ 39.06(b)(3) Tenant Remedies.

A landlord's failure to comply with specified conditions in the lease opens to the tenant two alternative remedies. First, the tenant may seek termination based on the landlord's breach, together with monetary damages or injunctive relief. n167 Second, the tenant may choose to affirm continuation of the lease and recover for any damages resulting from the landlord's noncompliance. Injunctive relief is also available. The tenant's right to withhold rent and the repair-and-deduct remedy are two new affirmative remedies available to a tenant when the landlord has breached its warranty of habitability. n168

The tenant remedies must often be preceded by a notice to the landlord demanding compliance with the lease or, alternatively, calling for termination of the lease. n169 Some statutes provide that, in the case of a recurring noncompliance by the landlord within a specified period after the initial notice to comply or terminate was given, the tenant may give notice of termination without having to allow for compliance that could potentially forestall termination. n170 The tenant may directly assert the landlord's acts of noncompliance in an action or counterclaim or may assert them as a defense in an action initiated by the landlord.

In termination situations. the tenant's damages are measured as the difference between the fair rental value of the property and the rent called for under the terms of the lease. Special damages are awarded to cover the tenant's consequential costs prior to the landlord's breach, such as initial costs of moving to the property, fixture or improvement expenses, and other costs occasioned by the breach, such as relocation costs. Damages for lost profits are often not awarded without clear, non-speculative proof of a reasonable certainty.

COMPUTER-ASSISTED RESEARCH

LEXIS: tenant! w/15 remed! w/50 terminat! or continu!

§ 39.06(b)(4) Abandonment, Surrender and Mitigation of Damages.

Termination by agreement of the parties may cut short any form of tenancy. Three very different situations result in termination by agreement of the parties: (1) express agreement to terminate; (2) abandonment by the tenant and express acceptance of the termination by the landlord; and (3) abandonment by the tenant and conduct by the landlord construed as an acceptance of a surrender by operation of law.

The clearest surrender is a written document signed by the parties agreeing that the lease should terminate on a specified date. Because a surrender involves the transfer of a property interest, the Statute of Frauds applies, and a writing is necessary unless the surrender is implied from the actions of the parties.

An abandonment is viewed by the law as the equivalent of the tenant's agreement to terminate the lease. n171 The landlord's side of the agreement to terminate may arise in one of two ways. First, the landlord may explicitly declare an intent to accept the tenant's surrender, resulting in termination of the lease. Second, the landlord's actions in response to the tenant abandonment may be the basis for implying the landlord's acceptance of the tenant's proffered surrender of the lease. n172

Often the landlord's actions are equivocal, so it is difficult to predict the status of the lease. Traditionally, the landlord was entitled to the tenant's continuing performance of obligations under the lease despite the tenant's abandonment of possession. n173 Thus, the landlord could elect to do nothing in response and could continue to hold the tenant liable for payment of rent obligations for the continuing duration of the lease. Today, however, courts often impose a duty on the landlord to make reasonable efforts to find a new tenant in order to mitigate the damages arising because of the tenant's abandonment. n174 Under the mitigation doctrine, the landlord must attempt to lease the property to a new tenant. To be safe, the landlord should notify the tenant that the efforts to find a new tenant should not be considered an unconditional acceptance of the tenant's abandonment. Landlords have been permitted by the courts to enter into a new lease on behalf of the original tenant in order to continue the original tenant's liability for any deficiency in rental payments arising under the new lease. n175 In that case, the original tenant is still bound in case the new tenant fails to pay the agreed rent or in the situation where the new lease reasonably provides for a lower rental obligation than the original lease. Otherwise, the landlord's actions in renting to a new tenant could be interpreted as an acceptance of the surrender of the lease by operation of law. n176

The category of the lease makes a difference in the abandonment/surrender situations. Under a term for years lease, the tenant's obligation potentially extends to the end of the term, even if the tenant abandons the property early in the term. The landlord must make reasonable efforts to obtain a new tenant, and the original tenancy ends as soon as a new tenancy begins or should have begun had reasonable attempts to re-rent been made. In the case of a periodic tenancy, the original tenant's obligation is automatically renewed for an indefinite series of periods as long as the landlord is meeting its obligations under the mitigation of damages doctrine by taking reasonable steps to find a new tenant. The tenant's abandonment terminates the tenancy in either a tenancy at will or an occupancy at sufferance. n177 The tenant's unilateral action is sufficient to terminate the ongoing mutual agreement of the parties required to continue a tenancy at will. In the occupancy at sufferance, the tenant has no duty to continue the wrongful holdover giving rise to this form of tenancy. However, the tenant's abandonment must occur before the landlord exercises the right to hold the tenant bound under a new tenancy. Modern statutes may obligate the tenant to pay the fair rental value for the period of time prior to the tenant's abandonment of the property.

COMPUTER-ASSISTED RESEARCH

LEXIS: terminat! w/15 agreement! w/50 abandonment or surrender!

§ 39.06(b)(5) Restrictions on Termination.

Most terminations are based neither on abandonment and surrender nor on non-compliance with lease obligations by one of the parties. These terminations arising problem situations are few in number compared to the more common terminations based on natural changes in circumstances. Many tenancies for a term are renewed repeatedly, with provisions for rent revised to reflect changes in the economy. A new lease is required because the original term for years has ended. When a tenant decides to vacate the property at the pre-determined end of the tenancy, no action is necessary to terminate the term for years which expires automatically under its own lease provisions.

Periodic tenancies, in contrast, continue automatically until one of the parties triggers a termination. Usually, the reason for terminating is based on personal decisions unrelated to any fault or deficiency caused by the other party in the lease. Residential tenants move on to new locations because of changed family circumstances, job and income situations or personal expectations. Commercial tenants move because of a variety of business motivations. Landlords decide to terminate tenancies in order to renovate the property, to utilize the property for themselves, and for many other reasons based on personal or business choices.

Traditionally, no restrictions have blocked either party from terminating a tenancy at will or an occupancy at sufferance at any time unless the jurisdiction requires advance notice.

Under current laws, several restrictions have been imposed on landlords to prevent them from exercising their traditional rights to terminate tenancies in certain situations. These doctrines, primarily applied in residential tenancies, have been established in recognition of the fact that many tenants need protection from unwarranted or unreasonable terminations. Because a tenant's home comes to have important personal meaning, several new limitations have been imposed on landlords in order to minimize unwarranted disruption of tenants' lives and expectations. Tenants are often viewed as consumers, and the residential lease is treated as the consumer product deserving of special protections because of perceived differences in bargaining power and knowledge in dealing with more sophisticated and powerful landlords. These protections are particularly important to elderly tenants and tenants with limited means who are hardest hit by dislocation expenses and difficulties and by limited low-cost housing availability.

First, under the doctrine of retaliatory eviction, a tenant has a defense to certain court actions by the landlord aimed at terminating the tenant's possessory rights under the lease. If an eviction is motivated by retaliation due to the tenant's conduct in complaining about conditions of habitability of the premises, then the defense of retaliatory eviction is available to allow the tenant's rights to continue under the tenancy. n178

Second, tenants in housing provided or subsidized by the government have the right to continue their tenancies unless their landlords can establish specifically listed grounds for terminating the tenancy. n179 These good cause restrictions apply to continuation of periodic tenancies and to the right of a term for years tenant to lease renewals when the term comes to an end. The tenant is protected from being forced out of the housing if the landlord has no good reason for ending the tenancy.

New Jersey was the first state to adopt good cause eviction restrictions that apply to all private residential leases. n180 A landlord can no longer evict a tenant merely to free up the apartment for a new tenancy. The good causes recognized by the statute include tenant breaches, abandonment and misconduct. The landlord may also remove the apartment from the market for the landlord's personal or family use, in order to make renovations or repairs, and to use the property for non-residential purposes. The mere desire to be freed from a specific tenant for personal reasons or for no specific reason is no longer a legal basis for evicting a tenant in that jurisdiction.

Rent control ordinances also place restrictions on landlords in their traditional freedom to terminate tenancies. By removing the right of landlords to increase rent amounts, these laws eliminate one of the motivations leading to terminations of residential tenancies. If the landlord is unable to increase the rent for a new tenant, then the existing tenant is less likely to face a termination.

COMPUTER-ASSISTED RESEARCH

LEXIS: restrict! w/15 terminat!

§ 39.06(b)(6) Summary Proceeding for Possession.

Once a termination occurs, the landlord has the right to retake possession of the property. Usually the tenant voluntarily

vacates the premises. If the tenant remains in possession in defiance of the landlord, the tenant is technically a holdover tenant under an occupancy at sufferance. At common law, the landlord was permitted to oust the tenant through self-help measures, as long as the landlord did not use undue force. n181 In most jurisdictions today, statutes prohibit the landlord from forcibly removing the tenant. n182Instead, the landlord must seek assistance from the courts in dispossessing a holdover tenant. All states make stream-lined summary proceedings available to the landlord for regaining possession from tenants whose rights under their tenancy have been terminated. n183

Under these summary dispossession or unlawful detainer statutes, the landlord is able to obtain relatively quick relief -- usually within a few days or weeks -- compared to the normal time period for most civil actions, which may require several years before the matter is tried by the court. The procedures usually provide for the following: a shortened period for filing the tenant's answer to the landlord's pleadings, limitations on the issues and defenses that can be raised, expedited or limited discovery, an early hearing date, non-availability of juries, and quick enforcement by local officials under some type of a writ of restitution.

In order to qualify for the summary dispossession proceedings, the landlord must rigorously meet the procedural requirements. The tenancy must be properly terminated before the court will act. Thus, the requirements for terminating the various categories of tenancies must be carefully observed. The term for years does not require any advance notice, but the date set by the lease must have passed. The statutes typically provide for differing notice periods for proper termination of the tenancy depending on whether it was a periodic tenancy from month to month or year to year, or a tenancy at will or sometimes even if the holdover tenant merely has a tenancy at sufferance but has received no prior notice as required by the dispossession statute.

As a penalty for holding over beyond the legal termination of a tenant's rights, the statutes typically impose treble damage liability or some other penalty amount on the tenant. If the termination was based on the tenant's nonpayment of the rent, some statutes provide a grace period for the tenant to pay the delinquent rent and preserve a right to remain in possession under a continuing tenancy.

COMPUTER-ASSISTED RESEARCH

LEXIS: summary w/30 proceeding w/30 possess!

FOOTNOTES:
(n1)Footnote 114. The term *interesse termini* has been used to refer both to the tenant's rights before the leasehold begins if the leasehold is to begin *in futuro*, and also to the tenant's rights after the leasehold has begun but before he takes possession. *See* William B. Stoebuck and Dale A. Whitman, The Law of Property § 6.13 (West, 3d ed., 2000).

(n2)Footnote 115. *See* Cornelius J. Moynihan and Sheldon Kurtz, Introduction to the Law of Real Property 94 (3d ed. 2002); Powell on Real Property (R) § 16.02 (Michael Allan Wolf ed., Matthew Bender); *Przybylski, Inc. v. Corcoran, 1999 Wash. App. LEXIS 91* (No. 40698-1-I, Jan. 19, 1999) (a lease, like any contract, is not formed unless the parties mutually assent).

(n3)Footnote 116. Such cases are decided using standard contract law principles. *See, e.g., I.K. Corp. v. One Financial Place Partnership, 558 N.E.2d 161 (Ill. App. Ct. 1990).*

(n4)Footnote 117. *See, e.g., Teachers Ins. & Annuity Ass'n of Am. v. Tribune Co., 670 F. Supp. 491 (S.D.N.Y. 1987)* (holding that a "mutual commitment to a contract," if major terms are left to be negotiated, does not create a binding contract, but an informal agreement or letter of intent may create a binding contract); *Carmon v. Soleh Boneh, Ltd., 614 N.Y.S.2d 555 (1994)* (letter of intent was only evidence of an agreement to agree); *Sayer v. Bowley, 503 N.W.2d 166 (Neb. 1993)* (oral understanding between the parties was an agreement to agree rather than a complete contract that could simply be memorialized at a later time). *See also Johnson Intern., Inc. v. City of Phoenix, 967 P.2d*

607 (Ariz. Ct. App. 1998) (concluding that a "memorandum of understanding" between a developer and a city was not sufficient to support a claim of promissory estoppel); *Gorodensky v. Mitsubishi Pulp Sales Inc., 92 F. Supp. 2d 249 (S.D. N.Y. 2000)* (stating that a letter of intent between a new company and a potential purchaser of the company's product was not a binding contract based on all factors considered) *affirmed by, Gorodensky v. Mitsubishi Pulp Sales, Inc., 242 F.3d 365 (2d Cir. 2000).*

(n5)Footnote 118. *See, e.g., Chapman v. Brokaw, 588 N.E.2d 462 (Ill. App. Ct. 1992); Philmer Mid-Atl., Inc. v. York St. Assocs. II, 566 A.2d 1253 (Pa. Super. Ct. 1989). Schroth v. Seminole Supermarket, Inc., 829 So.2d 597 (La. App. 2002)* (whether co-owner of property who did not sign lease nonetheless consented to lease).

(n6)Footnote 119. For an overview of the area of leases for illegal purposes, *see* Restatement (Second) of Property § 9.1, rep. note at 308 (1977); Powell on Real Property (R) § 16.02 (Michael Allan Wolf ed., Matthew Bender).

(n7)Footnote 120. *See, e.g., Lozano v. Brant, 343 P.2d 177 (Cal. Dist. Ct. App. 1959)* (citing §§ 1598 and 1668 of the California Civil Code, which state that contracts, including leases, for illegal purposes are void); *see also Louis Friedman Realty Co. v. De Stefan, 217 N.Y.S. 142 (1926).*

(n8)Footnote 121. *See, e.g., 220 West 42 Assocs. v. Cohen, 302 N.Y.S.2d 494 (1969)* (holding that a landlord can void a lease for an illegal purpose, but the tenant cannot, as this would allow a tenant to abort a lease at any time merely by performing illegal acts upon the premises).

(n9)Footnote 122. *See* William B. Stoebuck and Dale A. Whitman, The Law of Property § 6.11 (West, 3d ed., 2000).

(n10)Footnote 123. *See, e.g., Quality Wig Co. v. J. C. Nichols Co., 728 S.W.2d 611 (Mo. Ct. App. 1987); Tel-Ex Plaza, Inc. v. Hardees Restaurants, Inc., 255 N.W.2d 794 (Mich. Ct. App. 1977).*

(n11)Footnote 124. As mentioned above, the term *interesse termini* has been used to refer both to the tenant's rights before the leasehold begins if the leasehold is to begin *in futuro*, and also to the tenant's rights after the leasehold has begun but before he takes possession. *See* William B. Stoebuck and Dale A. Whitman, The Law of Property § 6.13 (West, 3d ed., 2000).

(n12)Footnote 125. *See* Restatement (Second) of Property § 2.1 stat. note at 68-76 (1977) (detailed list of state Statute of Frauds provisions).

(n13)Footnote 126. *See* Robert S. Schoshinski, American Law of Landlord and Tenant § 2.5 (Lawyers Co-op. 1980).

(n14)Footnote 127. *See* Powell on Real Property (R) § 16.03 (Michael Allan Wolf ed., Matthew Bender). *See also Carter v. Schick, 817 S.W.2d 238 (Ky. Ct. App. 1991)* (holding that when both parties agree that an oral lease was for successive monthly periods, the Statute of Frauds was no bar to recovery or rent arrearage if renewals of the oral lease exceeded 12 months).

(n15)Footnote 128. Restatement (Second) of Property § 2.1 cmt. f (1977).

(n16)Footnote 129. *See, e.g., Bell v. Vaughn, 53 P.2d 61 (Ariz. 1935); accord,* Restatement (Second) of Property § 2.1 (1977); *but cf. Jellet v. Rhode, 45 N.W. 13 (Minn. 1890); Greenwood v. Strother, 16 S.W. 138 (Ky. 1891).*

(n17)Footnote 130. Three views govern how a court will infer the length of the periodic tenancy which results in this situation. For an explanation of each view and supporting cases, *see* Restatement (Second) of Property § 2.3 rep. note at 86-87 (1977). *Santacroce Associates v. Cambino, 1998 Conn. Super. LEXIS 220* (No. CV 970257458, Feb. 3, 1998) tenancy for years, invalid because of the Statute of Frauds, results in year to year periodic tenancy when lessee

takes possession of the premises).

(n18)Footnote 131. Restatement (Second) of Property § 2.3 (1977).

(n19)Footnote 132. This is the view of the Restatement (Second) of Property § 2.3 (1977).

(n20)Footnote 133. *See, e.g., Rich Taubman Assocs. v. Harvyn Stamford, Inc., 645 A.2d 1039 (Conn. App. 1993); Aylett v. Aylett, 60 P.3d 1114 (Or. App. 2003)* (defendant's acts of part performance under oral lease agreement were exclusively and unequivocally referable to agreement and took it out of scope of statute of frauds); *Tiegs v. Watts, 954 P.2d 877 (Wash. 1998)* ("we have recognized as enforceable leases ones that do not fully comply with statutory requisites when under the facts it would be inequitable for the challenging parties to assert invalidity of their own agreements. An instrument may be taken out of operation of the statute of frauds by a form of equitable estoppel based upon the notion it would be inequitable for the challenging party to assert invalidity of the instrument to which that party agreed. An unacknowledged lease, which is to some extent a parol contract concerning real estate, must be proven by clear and convincing evidence. A lease prepared by the lessor should be interpreted in favor of the lessee. Leases have been sustained where the lessee had performed acts called for in the lease in reliance upon it, giving rise to estoppel or part performance").

(n21)Footnote 134. *See, e.g., Sutton v. Warner, 15 Cal. Rptr 2d 632 (Ct. App. 1993); Wing v. Munns, 849 P.2d 954 (Idaho Ct. App. 1992) rev'd, Wing v. Munns, 849 P.2d 924 (Idaho 1993);* Kruse v. *Hemp, 853 P.2d 1373 (Wash. 1993) modified, Berg v. Ting, 886 P.2d 564 (Wash. 1995); Fandley v. Lee, 880 S.W.2d 164 (Tex. App. 1994)* (an oral agreement for the sale of land may be enforced in equity provided the purchaser can show that (1) partial consideration was paid; (2) the purchaser took possession of the property; and (3) the purchaser made valuable permanent improvements to the property. In order for the improvements to be "valuable," so as to allow an oral agreement sale of land to be enforced in equity, improvements must be substantial and add materially to the value of the property).

(n22)Footnote 135. *See, e.g., Player v. Chandler, 382 S.E.2d 891 (S.C. 1989); Kolkman v. Roth, 656 N.W.2d 148 (Iowa 2003)* (promissory estoppel exception of the statute of frauds applied to admit into evidence an oral lease in excess of one year); *EP Operating Co. v. MJC Energy Co., 883 S.W.2d 263 (Tex. App. 1994)* (in order to establish an equitable estoppel sufficient to preclude the Statute of Frauds defense, the party had the burden to raise and prove during the trial: (1) a false representation or concealment of material facts; (2) made with knowledge, actual or constructive, of those facts; (3) with the intention that it should be acted on; (4) to a party without knowledge, or the means of knowledge of those facts; and (5) who detrimentally relied upon the misrepresentation); *Davis v. Nelson, 880 S.W.2d 658 (Mo. App. 1994)* (the Statute of Frauds did not preclude enforcement of the oral agreement to execute documents terminating the condominium arrangement and creating a party wall agreement because: (1) the owner of the adjoining unit relied on the promise by purchasing the adjoining lot; (2) the reliance on the promise was foreseeable; and (3) failure to enforce the contract would result in injustice); *Tiegs v. Watts, 954 P.2d 877 (Wash. 1998).*

(n23)Footnote 136. *See, e.g., Magcobar N. Am. v. Grassco Oilfield Servs., Inc., 736 S.W.2d 787 (Tex. Ct. App. 1987). Tiegs v. Watts, 954 P.2d 877 (Wash. 1998); Corder v. Idaho Farmway, Inc., 986 P.2d 1019 (Idaho App. 1999)* (Idaho law allows courts to compel specific performance of an oral lease even if it exceeds a term of one year in the case of partial performance).

(n24)Footnote 137. *See, e.g., Sunset Mobile Home Park v. Parsons, 324 N.W.2d 452 (Iowa 1982); Davis v. Dinkins, 613 N.Y.S.2d 933 (1994).*

(n25)Footnote 138. *See, e.g., Santa Monica Rent Control Bd. v. Bluvshtein, 281 Cal. Rptr. 298 (Ct. App. 1991), but see, Notrica v. State Compensation Ins. Fund, 83 Cal. Rptr. 2d 89 (Cal. Ct. App. 1999).*

(n26)Footnote 139. *See, e.g., Mouton v. P.A.B., Inc., 450 So. 2d 410 (La. Ct. App. 1984)* (determining amount of rent by examining parties' intent and actions).

(n27)Footnote 140. Most states have enacted statutes that allow the landlord to recover fair rental value for a leasehold. *See* § 39.05, *supra* n.104 and accompanying text.

(n28)Footnote 141. Uniform Residential Landlord & Tenant Act § 1.401(d) (1972).

(n29)Footnote 142. *See, e.g.*, Pa. Stat. Ann. tit. 68, § 250.202.

(n30)Footnote 143. *See, e.g.*, Idaho Code § 9-503.

(n31)Footnote 144. *See, e.g.*, Ala. Code § 8-9-2. For a comprehensive listing of state statutes dealing with the signing requirement for leases, *see* Restatement (Second) of Property § 2.1 stat. note at 68 (1977).

(n32)Footnote 145. *See, e.g.*, Mont. Code Ann. § 70-26-204.

(n33)Footnote 146. *See, e.g.*, Cal. Civ. Proc. Code § 1161 (tenants who hold over for more than 60 days get an additional one-year term).

(n34)Footnote 147. *See, e.g.*, Ariz. Rev. Stat. Ann. § 33-342; N.J. Stat. Ann. § 46-8-10.

(n35)Footnote 148. *See* Restatement (Second) of Property § 2.1 stat. note at 74-76 (1977) for a complete listing of state statutes which require recording of long-term leases.

(n36)Footnote 149. *See* Restatement (Second) of Property § 14.1 stat. note at 3-11 (1977) for a list of state statutes governing eviction of tenants; *Havington v. Glover, 722 A.2d 500 (N.H. 1998)* (though common law suggested that period for notice in terminating periodic tenancies could be agreed upon, such common law tradition did not survive a legislative enactment that precisely prescribed the way in which notice was to be given).

(n37)Footnote 150. *See* Restatement (Second) of Property stat. note to ch. 5 at 150-168 (1977) for a list of state statutes imposing obligations on landlords to maintain leaseholds in liveable condition; *see also* Robert S. Schoshinski, American Law of Landlord and Tenant § 3.30 (Lawyers Co-op. 1980) (categorizing state statutes by tenant remedy). For examples, see *Pick v. Cohen, 100 Cal. Rptr. 2d 839 (2000)* (West Hollywood's Rent Stabilization Ordinance is upheld as a permissible exercise of police power designed to protect tenants from involuntary displacement).

(n38)Footnote 151. *See* Restatement (Second) of Property § 14.8 stat. note at 54-60 (1977) (comprehensive listing of state statutes prohibiting retaliatory eviction by landlord, including statutes which create a presumption of landlord retaliation in certain circumstances); *see also* Deborah Hodges Bell, *Providing Security of Tenure for Residential Tenants: Good Faith as a Limitation on the Landlord's Right to Terminate, 19 Ga. L. Rev. 483 (1985);* Kenneth Salzberg & Audrey A. Zibelman, *Good Cause Eviction, 21 Williamette L. Rev. 61 (1985);* Daine M. Goodman, Note, *Just Cause Eviction: Limiting a Landlord's Ability to Evict, 11 San Fern. V. L. Rev. 71 (1983). Minneapolis Pub. Hous. Auth. v. Lor, 591 N.W.2d 700 (Minn. 1999)* (good cause for eviction exists when a member of the household engages in threatening criminal activity).

(n39)Footnote 152. William B. Stoebuck and Dale A. Whitman, The Law of Property § 6.73 - 6.76 (West, 3d ed., 2000). Restatement (Second) of Property § 12.1, statutory note 1 (1977); Annotation, Right of Landlord Legally Entitled to Possession to Dispossess Tenant Without Legal Process, 6 A.L.R.3 d 177 (1966).

(n40)Footnote 153. William B. Stoebuck and Dale A. Whitman, The Law of Property § 6.79 (West, 3d ed., 2000).

(n41)Footnote 154. *Napleton v. Ray Buick, Inc., 704 N.E.2d 864 (Ill. App. 1998).*

(n42)Footnote 155. *See* Powell on Real Property (R) § 16.03 (Michael Allan Wolf ed., Matthew Bender).

(n43)Footnote 156. *See City of Manhattan v. Galbraith, 945 P.2d 10 (Kan. App. 1997)* (lessee's interest in leased

property terminated when title vested in condemnor).

(n44)Footnote 157. *See* § 84.03(f), *infra.*

(n45)Footnote 158. *Twelve Oaks Tower I, Ltd. v. Premier Allergy, Inc., 938 S.W.2d 102 (Tex. App. 1996)* (foreclosure of mortgage terminated lease).

(n46)Footnote 159. *Boss v. Koch, 589 N.W.2d 456 (Wis. App. 1998)* (the court refused to honor termination because notice of termination to the tenant was improper); *Davidson v. Kenney, 971 S.W.2d 896 (Mo. App. 1998)* (Missouri follows strict construction in determining whether notice requirements have been complied with in terminating a periodic tenancy).

(n47)Footnote 160. *See* § 39.05(d), *supra* n.113 and accompanying text.

(n48)Footnote 161. *See, e.g.,* Uniform Residential Landlord & Tenant Act § 4.20(a); Restatement (Second) of Property § 1.7 and cmts. a, f (1977); *Darnet Realty Associates. v. 136 East 56th St. Owners, Inc., 246 A.D.2d 312 (N.Y.S. Ct. 1998)* (parties limited to remedies agreed upon in lease); *Brentwood Investors v. Wal-Mart Stores, 1998 U.S. Dist. LEXIS 9222* (No. C-95-0853, Ju. 17, 1998, N.D. Cal.) (illustrates that termination is a remedy available to the landlord) affirmed by, *Brentwood Investors v. Wal-Mart Stores, Inc., 225 F.3d 661 (9th Cir. 2000).*

(n49)Footnote 162. *See* Restatement (Second) of Property § 12.2 Statutory Note at 399-405 (1977) (list of state statutes allowing for summary recovery of possession of property for nonpayment of rent).

(n50)Footnote 163. *Id. Cache County v. Beus 978 P.2d 1043 (Utah App. 1999)* (landlords must strictly comply with the statute before they are entitled to terminate the tenancy).

(n51)Footnote 164. *See* Restatement (Second) of Property § 12.2 Statutory Note at 450-452 (list of state statutes governing waste and alterations by tenant, and landlord's remedies); *id.* at stat. note to ch. 5, 152-154 (list of state statutes addressing the question of destruction of the leasehold). *See generally* 49 Am. Jur. 2d Landlord and Tenant § 85 (1970) (discussing landlord remedies for nuisance). *Huber Inv. Corp. v. Warner, 1998 Ohio App. LEXIS 649* (No. 16545, Jan. 30, 1998) (an action to evict is an election to rescind the contract of lease, and is a remedy available to landlord upon tenant's non-compliance with lease terms); *Housing Auth. of Portland v. Comstock, 988 P.2d 407 (Ore. Ct. App. 1999)* (holding that state law allows a landord to terminate a lease when the tenant threatens the landlord or an employee of the landlord).

(n52)Footnote 165. *See* Restatement (Second) of Property § 12.1 Statutory Note at 413-16 (list of state statutes governing security deposits).

(n53)Footnote 166. *See* Restatement (Second) of Property § 12.1 Statutory Note at 409-415 (list of state statutes giving the landlord a lien on tenant's goods to satisfy rent obligation); *see generally* Powell on Real Property (R) § 16A.01 (Michael Allan Wolf ed., Matthew Bender); Robert S. Schoshinski, American Law of Landlord and Tenant § 6.22 (Lawyers Co-op. 1980).

(n54)Footnote 167. *Shoemaker v. Whitt, 718 N.E.2d 932 (Oh. App. 1998)* (mentions tenants' right to terminate upon breach by landlord).

(n55)Footnote 168. *See* Robert S. Schoshinski, American Law of Landlord and Tenant § 3.30 (Lawyers Co-op. 1980) (categorizing state statutes by tenant remedy, including repair-and-deduct, rent escrow, appointment of a receiver, etc.); *Rutherford v. Bee Gee Excelsior Management, Inc., 750 N.Y.S.2d 611 (2002)* (plaintiff could not seek recovery of rent overcharge against building's managing agent where she failed to exhaust administrative remedies); *Committed Community Assoc. v. Croswell, 659 N.Y.S.2d 691 (1997); Law v. Franco, 690 N.Y.S.2d 893 (N.Y. Sup. Ct. 1999)* (under certain circumstances a tenant may withhold rent when the landlord has breached the warranty of habitability) *affirmed*

by, Committed Community Assocs. v. Croswell, 673 N.Y.S.2d 708 (App. Div. 2d Dep't 1998); *CAP Partners v. Cameron, 599 N.W.2d 309 (N.D. 1999)* (statutory law can provide tenants additional remedies, while not limiting existing common law remedies).

(n56)Footnote 169. *See, e.g.,* Ohio Rev. Code Ann. § 5321.07; Tex. Prop. Code Ann. § 92.052.

(n57)Footnote 170. Uniform Residential Landlord and Tenant Act § 4-101. *CAP Partners v. Cameron, 599 N.W.2d 309 (N.D. 1999)* (state statute allows a tenant to terminate the contract when landlord's actions, or inactions, with regard to habitability of the building constructively evict the tenant); *Decade 80-I, Ltd, v. PDQ Food Stores, 593 N.W.2d 94 (Wis. Ct. App. 1999)* (tenant had right to declare lease terminated if landlord did not repair default within 30 days of notification).

(n58)Footnote 171. *State v. Hawkins, 967 P.2d 966 (Ut. Ct. App. 1998)* (the abandonment of a lease is manifest when the tenant leases the premises with the intent to terminate possession, control, and the terms of the lease contract).

(n59)Footnote 172. *See Carlton Chambers Co. v. Trask, 158 N.E. 786, 789* (Mass. Sup. Ct., 1927) ("Any acts which are equivalent to an agreement on the part of a tenant to abandon and on the part of the landlord to resume possession of demised premises amount to a surrender of a term by operation of law"); *Quarles v. Shoemaker, 978 S.W.2d 551 (Tenn. Ct. App. 1998)* ("Abandonment acquiesced in by the landlord amounts to a surrender, and is a restoration of the landlord's occupancy. Abandonment of the lease" -- that is, the leaving of the premises with the intention not to return "-- or the relinquishment by the lessee of rights under the lease, without intention to resume them, may therefore be treated by the landlord as a termination of the lease... . The abandonment of possession by the tenant will not work a surrender of the premises, unless it is assented to by the lessor, and such acceptance must be shown by word or acts, such, for example, as entry into possession"); 159 *East, Inc. v. Margolis, 702 So. 2d 286 (Fla. Dist Ct. App. 1997)* (lessor lawfully retook possession of leased premises upon lessee's abandonment, as defined by terms of parties' commercial lease).

(n60)Footnote 173. *See* Cornelius J. Moynihan and Sheldon Kurtz, Introduction to the Law of Real Property 114-115 (3d ed. 2002).

(n61)Footnote 174. *See* Cornelius J. Moynihan and Sheldon Kurtz, Introduction to the Law of Real Property 114-115 (3d ed. 2002). *See, e.g., Properties Inv. Group of Mid-America v. J.B.A., Inc., 495 N.W.2d 624 (Neb. 1993); Hilliard v. Robertson, 570 N.W.2d 180 (Neb. 1997)* (evidence that the only advertising used by landlord to relet apartment was faded sign on front lawn warranted finding that landlord did not mitigate damages); *Finish Line, Inc. v. Jakobitz, 557 N.W.2d 914 (Iowa Ct. App. 1996)* (lessor failed to mitigate damages by renting the building out to businesses that did not pay rent); *Seramonte Assocs. v. Smith, 1998 Conn. Super. LEXIS 787* (No. 97068247, Jan. 20, 1998) (the court found that plaintiff has exerted reasonable efforts to mitigate damages after defendant abandoned premises).

(n62)Footnote 175. *See, e.g., Nylen v. Park Doral Apts., 535 N.E.2d 178 (Ind. Ct. App. 1989); United States Nat'l Bank of Or. v. Homeland, Inc., 631 P.2d 761 (Or. 1981).*

(n63)Footnote 176. *See, e.g., Grueninger Travel v. Lake County Trust Co., 413 N.E.2d 1034 (Ind. Ct. App. 1980). See also Mileusnich v. Novogroder Co., Inc., 643 N.E.2d 937 (Ind. Ct. App. 1994).*

(n64)Footnote 177. *Dale v. H.B. Smith Co., 136 F.3d 843 (1st Cir. 1998)* (abandonment terminates the tenancy at sufferance).

(n65)Footnote 178. *See Murphy v. Fermano, 2002 Mass. App. Div. 220 (2002)* (tenant's written response to landlord's inquiry, denying he had anything to do with his smoke alarm going off, did not qualify as a report of a code violation and, thus, could not form basis for retaliatory eviction); *Ghadamian v. Channing, 742 N.Y.S.2d 632 (2002)* (tenant's claim of retaliatory eviction was invalid due to lack of good faith effort); *Youssef v. United Mgmt. Co., 683*

A.2d 152 (D.C. Cir. 1996) (lessor had burden of proving by clear and convincing evidence nonretaliatory purpose behind tenants' eviction).

(n66)Footnote 179. *See generally* Powell on Real Property (R) § 16.05 (Michael Allan Wolf ed., Matthew Bender) (discussing federal legislation in public housing); William B. Stoebuck and Dale A. Whitman, The Law of Property § 6.81 (West, 3d ed., 2000). *Department of Housing and Urban Development v. Rucker, 535 U.S. 125 (2002)* (Court held that the Anti-Drug Abuse Act is constitutional-the Act allows for evictions on basis of drug-related criminal activity engaged in by tenant's household members, guests, or other persons under their control *absent tenants' knowledge of such activities*) (emphasis added); *Lohman v. New York City Housing, 291 A.D.2d 288 (NYAD 2002)* (excessive noise constituted sufficient ground for termination of tenancy under doctrine of non-desirability); *Padilla v. Martinez, 752 N.Y.S.2d 28 (2002)* (New York Housing Authority decision to evict tenant on the ground of non-desirability overturned because Authority violated policy designed to afford procedural safeguards to tenants whom it suspects are mentally disabled).

(n67)Footnote 180. N.J. Stat. Ann. § 2A 18-61.3. *Franklin Tower One, L.L.C. v. N.M, 725 A.2d 1104 (N.J. 1999)* (a landlord's refusal to accept housing or rental vouchers from low income tenants is not good cause for termination and violates New Jersey law).

(n68)Footnote 181. *See* § 39.05, *supra* n.59 and accompanying text.

(n69)Footnote 182. *See* § 39.05, *supra* n.59 and accompanying text.

(n70)Footnote 183. *See* Restatement (Second) of Property § 14.1 stat. note at 3-11 (1977) (list of state statutes allowing actions for summary dispossession and unlawful detainer); *see also* Robert S. Schoshinski, American Law of Landlord and Tenant §§ 6.10-6.21 (Lawyers Co-op. 1980) (statutory summary proceedings available in all jurisdictions); *Gonzalez v. Peterson, 678 N.Y.S.2d 855 (1998)* (statute requires the existence of a holdover tenancy in order for the court to acquire jurisdiction in summary proceedings. Here, because termination was improper, no holdover tenancy was created; hence, no jurisdiction).

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CHAPTER 39 LEASEHOLD ESTATES

4-39 Thompson on Real Property, Thomas Editions § 39.07

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§ 39.07 Bibliography.

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Supp. To CHAPTER 39 Leasehold Estates

4-39 Thompson on Real Property, Thomas Editions Supp. to § 39.02

Supp. to § 39.02 Missing

Ala. Code § 35

§ 39.02(a) Conveyance and Contract Characteristics. Miss. Code Ann. § 89-7-9

Add:

Christopher Vaeth, Annotation, Landlord's Duty, on Tenant's Failure to Occupy, or Abandonment of, Premises, to Mitigate Damages by Accepting or Procuring Another Tenant, *75 A.L.R.5th 1 (2005)* .

Add:

Manglona v. Gov't. of the Commonwealth of the N. Mariana Islands, 2005 N. Mar. I. LEXIS 13 PP 48-55, 2005 MP 15 (N. Mar. I. Oct. 4, 2005) (discussing the two different schools of thought, noting that the majority of states require the landlord to mitigate damages).

Sylva Shops, Ltd. P'ship v. Hibbard, 623 S.E.2d 785 (N. C. Ct. App. 2006) (discussing landlord's duty to mitigate).

JJ&C Realty v. Crooks, 2005 Conn. Super. LEXIS 102, *11 (Jan. 11, 2005) ("A landlord has a duty to mitigate a tenant's damages.")

Add:

In re; *Stancil, 2005 Bankr. LEXIS 2185* (Bankr. D.C. Nov. 7, 2005) (DC circuit follows the implied warranty of habitability).

Kan. Stat. Ann. § 58-2545(c) (2006) (Substantial Breach of Warranty of Habitability; Prevailing Party). Correct:

Del. Code Ann. Tit. 25 § 5305 (2005) (discussing landlord's obligations, including to "provide a rental unit which shall not endanger the health, welfare or safety of the tenants or occupants and which is fit for the purpose for which it is expressly rented.") (§ 5303 is just the landlord's duty to deliver the premises on time).

Add:

D.C. Code Ann. § 14-301 (codifying the implied warranty of habitability for leases).

Add and Correct:

O.C.G.A. § 44-7-14 Tort Liability of Landlord (Looks like § 44-7-13 should be changed to O.C.G.A. as well)

Add:

Ameripride Linen & Apparel Servs. v. Eat Well, Inc., 836 N.E.2d 1116 (Mass. App. Ct. 2005) (applying Massachusetts statute for implied warranty of habitability/damages).

Correct:

Mich Stat. Ann. § 26.1109 should be changed to *Mich. Comp. Laws § 554.139* (2005) (Covenant that the premises are fit for their intended use, implied warranty of habitability); § 554.633 (2005) (a lease agreement cannot covenant away the implied warranty of habitability).

Fritz v. Warthen, 213 N.W.2d 339 (Minn. 1973) superseded by statute as contained in Fraser v. Fraser, 642 N.W.2d 34 (Minn. Ct. App. 2002) .

Add:

Minn. Stat. § 504B.161 (2005) (covenant of lessor to keep the premises in a condition "fit for the use intended by the parties").

Edie v. Gray, 121 P.3d 516 (Mont. 2005) (applying Montana's statute for the implied warranty of habitability).

Correct:

R.R.S. Neb. § 76-1419 (2005).

Add:

Matte v. Shippee Auto Inc., 876 A.2d 167 (N.H. 2005) (Implied warranty of habitability does not extend to commercial leases)

Edge Mgt. Consulting Inc. v. Blank, 807 N.Y.S.2d 353 (N.Y. App. Div. 2006) (applying the statute and stating that there is no indemnification against others participating in creating the unfit premises because landlord has independent duty to maintain the premises).

Dean v. Hill, 615 S.E.2d 699 (N.C. Ct. App. 2005) ; *Gibbs v. Cobb, 2005 N.C. App. LEXIS 916* (filed May 3, 2005) (applying statute).

Correct:

Glyco v. Schultz, 62 Ohio Op. 2d 459, 289 N.E.2d 919 (Ohio 1972) , *superseded by statute as contained in Laster v. Bowman*, 370 N.E.2d (Ohio Ct. App. 1977),

Add:

Article 9 of the Uniform Commercial Code (Anderson 2006).

Article 9 of the U.C.C. (2005) (lessor cannot collect rents while a dwelling is unfit for habitation).

Correct:

Kamarath v. Bennett, 568 S.W.2d 658 (Tex. 1978) superseded by statute as contained in Bolin Dev. Corp. v. Indart, 803 S.W.2d 817 (Tex. App. 1991) (not in Garza-Vale as stated in the footnote. Garza-Vale only questioned it).

Add:

Gym-N-I Playgrounds, Inc. v. Snider, 158 S.W.3d 78 (Tex. App. 2005) (discussing the different approaches the Texas courts of appeal take in addressing the implied warranty of habitability).

Correct:

Wade v. Jobe (it isn't clear this is superseded because they used *Wade* to decide the case in *Carlie*).

Add:

Article 9 of the Uniform Commercial Code (2005) (Owner's Duties--Maintenance of Common Areas, Building, and Utilities--Duty to Correct--No Duty to Correct Condition Caused by Renter--Owner May Refuse to Correct)

Willard v. Parsons Hill P'ship, 882 A.2d 1213 (Vt. 2005) (Vermont's statute habitability of premises did not supersede the common law implied warranty of habitability in regards to latent defects; only in regards to patent ones. The common law implied warranty of habitability still applies to latent defects and no notice need be given).

Cromer v. Johnson Vill., L.L.C., 68 Va. Cir. 442 (Va. Cir. Ct. 2005) (Cannot contract away the duty of implied warranty of habitability).

Monohon v. Antilla, 2005 Wash. App. LEXIS 2751 (filed Oct. 25, 2005) (applying the warranty involves the rental agreement); *but see also Powers v. Hollinger Family Props., L.L.C., 2005 Wash. App. LEXIS 836* (filed Apr. 25, 2005) (the landlord's duty extends only to those duties listed in the statute).

Willbanks v. Ombrellaro, 2005 Wash. App. LEXIS 676 (filed Apr. 19, 2005) (applying the statute).

Pies v. Perssion, 111 N.W.2d 409 (Wis. 1961) is codified in *Wis. Stat. § 704.07* as stated in *Zehner v. Vill. of Marshall, 2006 WI App. 6, 2005 Wisc. App. LEXIS 1083* (Dec. 8, 2005) .

Wielen v. Simonson, 701 N.W.2d 653 (Wis. Ct. App. 2005) (full rent abatement is not proper unless the tenant is no longer in possession).

Correct:

Suave v. Nix should actually read Suave v. Winfree.

Add:

Mankiewicz v. Leominster Regency Assocs. L.P., 2005 Mass. Super. LEXIS 156 (Mar. 29, 2005) (no new cause of action for negligence is created by the sanitary code).

Holt v. Hegwood, 708 N.W.2d 21 (Wis. App. 2005) (General welfare and safety statutes should not be construed to create private causes of action if it does not purport to create them.)

Add:

W.E. Shipley, Annotation, *Modern Status of Rule Requiring Actual Knowledge of Latent Defect in Leased Premises as Prerequisite to Landlord's Liability to Tenant Injured Thereby, 88 A.L.R.2d 586 (2005)* .

W.E. Shipley, *Annotation, Liability for Injury to Guest in Home or Similar Premises, 25 A.L.R. 2d 598 (2005)* .

Danny R. Veilleux, *Landlord's Liability to Third Person for Injury Resulting from Attack on Leased Premises by Dangerous or Vicious Animal Kept by Tenant, 87 A.L.R. 4th 1004 (2005)*

Rhaney v. Univ. of Maryland E. Shore, 880 A.2d 357, 364-365 (Md. 2005) ("[A] landlord has no obligation to maintain the leased premises for the safety of the tenant.' In certain circumstances, a duty to a tenant in the leased premises may arise out of dangerous and defective conditions within the common areas controlled by the landlord, but only in a narrow context- the landlord must have actual knowledge of activity taking place in the common areas that may affect the demised premises or, in the alternative, the landlord should have had such knowledge and foreseen the harm suffered.")(quoting *MACROBUTTONHtmlResAnchor Hemmings v. Pelham Wood Ltd. Liab. Ltd. P'ship, 826 A.2d 443, 452 (Md. 2003))* .

Jessop v. Carmichael Mgmt., 614 S.E.2d 827, 828 (Ga. Ct. App. 2005) ("A landlord has no duty to inspect premises while a tenant is in possession, and if the premises fall into disrepair it is the tenant's duty to notify the landlord.").

Kane v. Bd. of Appeals, 887 A.2d 1060 (Md. 2005) (landlord may be liable when harm is caused by a dangerous condition the landlord promised to, but ultimately failed to fix; voluntarily repairs but repairs negligently; and the landlord may be liable for negligence for violating safety ordinances.).

Add:

Matte v. Shippee Auto Inc., 876 A.2d 167 (N.H. 2005) (discussing independent and dependent lease covenants and refusing to adopt the concept of dependent covenants. *Id.* at 170-173).

Nathan Lane Assocs., L.L.P. v. Merchs. Wholesale of Iowa, Inc., 698 N.W.2d 136, 139 (Iowa 2005) (no right to possession, then no duty to pay rent).

Add:

Livinggood v. Balsdon, 2006 N.D. LEXIS 17 , P 5, 2006 N.D. 11 (filed Jan. 31, 2006) ("Specific performance is one of the available remedies in cases involving an interest in real estate when it has unique character or if monetary damages are otherwise inadequate compensation for a breach of contract.").

§ 39.02(b) Real Property or Personal Property Characteristics [Go To Main]

Add:

Matter of Lupo v. Bd. of Assessors of Town of Huron, 799 N.Y.S.2d 405, 413 (N.Y. Sup. Ct. 2005) ("[A] lease is chattel real constituting the personal property of the lessee ...").

Frank C. Minvielle, L.L.C. v. IMC Global Operations, Inc., 380 F. Supp. 2d 755, 774 (W.D. La. 2005) (contractual

considerations, characterizing mineral lease as a "limited personal servitude").

Morris v. Solomon State Bank (In re Elder), 2005 Bankr. LEXIS 2143, *16 (Bankr. Kan. Nov. 7, 2005) (Kansas statute provides that a manufactured home is a fixture and personal property.).

Trenolone v. Cook Exploration Co., 166 S.W.3d 495 (Tex. App. 2006) (parties can contract for easement to revert to landowners while certain fixtures on the easement remain the easement holder's personal property).

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Supp. To CHAPTER 39 Leasehold Estates

4-39 Thompson on Real Property, Thomas Editions Supp. to § 39.03

Supp. to § 39.03 Real Property Interests of Landlords and Tenants

[Go To Main]

insert after the sentence ending "shorter in duration than the landlord's rights in the property."

Add new footnote 32.1:

Clean Earth Dredging Techs., Inc. v. Hudson County Improvement Auth., 877 A.2d 363, 368 (N.J. Super. Ct. App. Div. 2005) ("[A] lease gives the right of exclusive possession for all purposes not prohibited by its terms.") (alterations in original) (quoting *Thiokol Chem. Corp. v. Morris County Bd. of Taxation, 41 N.J. 405, 417, 197 A.2d 176 (1964))* .

Add:

Goff v. State, 875 A.2d 132, 144 n.12 (Md. 2005) ("A leasehold estate or tenancy is more than a non-possessory interest in property, yet something less than a present freehold estate.")(quoting Douglas M. Bregman & Gary G. Everngam, Maryland Landlord-Tenant Law Practice and Procedure, at 15-16 (3d ed. 2003)).

Santa Fe Trail Neighborhood Redev. Corp. v. W.F. Coen & Co., 154 S.W.3d 432, 439-443 (Mo. Ct. App. 2005) (discussing the different attributes of a license and a lease and stating that condemnation awards should be split between lessor and tenant (pursuant to state law)).

Brennan Hous. Auth. v. Davies, 158 S.W.3d 53, 60 (Tex. App. 2005) ("However, a lessor's contractual right to enter the premises to make repairs and alterations is not a reservation of control over a part of the premises.").

Riverwood Commer. Park, LLC v. Standard Oil Co., 698 N.W.2d 478, 482 (N.D. 2005) ("The major distinction between a lease and an easement or license is that a lease confers exclusive use and possession of the property against the world, including the landowner, whereas an easement or license merely grants a right or permission to nonexclusive use of the land for a specific, limited purpose.")

Add:

Kiehm v. Adams, 126 P.3d 339, n. 19 (Haw. 2005) ("[A] mutual agreement to end a lease before the term ends is in effect a surrender, the rights of the sublessee are the same as when there is a surrender.")

Pinzon v. A & G Props., 874 A.2d 347, 353 (D.C. 2005) (If a landlord sues for possession of the premises, the tenant cannot create a defense based on the landlord's failure to perform certain obligations.)

Add:

Goff v. State, 875 A.2d 132, 144 n.12 (Md. 2005) ("A leasehold estate or tenancy is more than a non-possessory interest in property, yet something less than a present freehold estate.")(quoting Douglas M. Bregman & Gary G. Everngam, Maryland Landlord-Tenant Law Practice and Procedure, at 15-16 (3d ed. 2003)).

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Supp. To CHAPTER 39 Leasehold Estates

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Supp. to § 39.04 Leaseholds Distinguished from Other Relationships.

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§ 39.04(a) Sign Cases. Md. Ann. Code Real Prop. §§ 8-304, 8-305, 8-314

Add:

Goff v. State, 875 A.2d 132, 144 n.12 (Md. 2005) ("A leasehold estate or tenancy is more than a non-possessory interest in property, yet something less than a present freehold estate.")(quoting Douglas M. Bregman & Gary G. Everngam, Maryland Landlord-Tenant Law Practice and Procedure, at 15-16 (3d ed. 2003)) .

Sugarhill Ltd. v. Brezo, 2005 Ohio App. LEXIS 1811 , *P 40-42, 2005 Ohio 1889* (Apr. 22, 2005) (comparing what would constitute a freehold estate and what would constitute a leasehold).

Ward v. Brown, 2005 Fla. App. LEXIS 9374, * 5-6, *30 Fla. L. Weekly D 1532,* (June 17, 2005) (tenants pursuant to a perpetual lease were considered the equitable owners of the property).

Brennan Hous. Auth. v. Davies, 158 S.W.3d 53, 60 (Tex. App. 2005) ("However, a lessor's contractual right to enter the premises to make repairs and alterations is not a reservation of control over a part of the premises.").

Kiehm v. Adams, 126 P.3d 339, *19-24 (Haw. 2005) ("In contrast to a lease, a license in the law of real property conveys no estate in land, is not assignable, and is revocable at the will of the licensor." Also, roomers and lodgers are different than tenants, and therefore can be accepted by a lessee without violating a prohibition on subletting. The difference between a lease and a license is determined by the "intention of the parties as ascertained from the nature of the agreement.")

Nathan Lane Assocs., L.L.P. v. Merchs. Wholesale of Iowa, Inc., 698 N.W.2d 136, 139 (Iowa 2005) ("A landlord-tenant relationship exists only if the landlord transfers the right to possession of the leased property.") (quoting Rest. 2d Property § 1.2 (1977)).

Santa Fe Trail Neighborhood Redev. Corp. v. W.F. Coen & Co., 154 S.W.3d 432, 439-441 (Mo. Ct. App. 2005) (discussing the different attributes of a license and a lease).

Dyke v. Jackson, 2005 Tex. App. LEXIS 6461 (filed Aug. 10, 2005).

Massawa Enterprises v. Silverstein, 2005 Mich. App. LEXIS 3167 (Dec. 20, 2005) (differences between a license and a lease).

Pope v. Lee, 879 A.2d 735, 740 (N.H. 2005) (courts will enforce perpetual leases if it is the parties' intent).

Nagle v. GOM Shelf, L.L.C., 2005 U.S. Dist. LEXIS 34759, *12 (S.D. Tex. Jun. 24, 2005) ("[A] 'property owner' includes one holding the mineral leases for the land on which an oil and gas well is located because a mineral lease conveys a fee simple determinable in real property.").

after the sentence "The possessory rights of a tenant represent a lesser estate than the ownership rights available through the freehold estates--both present possessory and future interest estates.

Add new footnote 37.1:

Sugarhill Ltd. v. Brezo, 2005 Ohio App. LEXIS 1811 , P 40-42, 2005 Ohio 1889 (Apr. 22, 2005) (comparing what would constitute a freehold estate and what would constitute a leasehold).

Brennan Hous. Auth. v. Davies, 158 S.W.3d 53, 60 (Tex. App. 2005) ("However, a lessor's contractual right to enter the premises to make repairs and alterations is not a reservation of control over a part of the premises.").

Add:

Kohman v. Rochambeau Realty & Dev. Corp., 792 N.Y.S.2d 458, 461 (N.Y. App. Div. 2005) (Sullivan, J., Dissenting) ("If a building owner allows a tenant to use a portion of the owner's property that is not part of the lease, such use is recognized as a license... . A license with respect to the use and occupancy of the grantor's premises is cancelable at will and without cause.")

Add:

Kiehm v. Adams, 126 P.3d 339, 19-21 (Haw. 2005) ("In contrast to a lease, a license in the law of real property conveys no estate in land, is not assignable, and is revocable at the will of the licensor." Also, roomers and lodgers are different than tenants, and therefore can be accepted by a lessee without violating a prohibition on subletting. The difference between a lease and a license is determined by the "intention of the parties as ascertained from the nature of the agreement.")

Slue v. New York Univ. Med. Ctr., 2006 US Dist. LEXIS 401 (S.D.N.Y. Jan. 3, 2006) (Oral lease is enforceable, but it

still must agree on "area to be leased, the duration of the lease, and the price to be paid.") (citing Rest. 2d Property: Landlord & Tenant § 2.1 (1977); quoting *Davis v. Dinkins, 206 A.D.2d 365, 613 N.Y.S.2d 933, 935* (2d Dep't. 1994)) .

Add:

First Franklin Square Assocs. v. Franklin Square Prop. Account, 790 N.Y.S.2d 527 (N.Y. App. Div. 2005) ("The central distinguishing characteristic of a lease is the surrender of absolute possession and control of property to another party for an agreed-upon rent." This possession even excludes the landlord except as provided in the lease agreement.) (quoting *Matter of Plaza v City of New York, 305 A.D.2d 604, 606, 759 N.Y.S.2d 748 (N.Y. App. Div. 2003))* .

Add:

But see In re Goldstein (In re Will of Diamondstein), 6 Misc. 3d 1014A, 800 N.Y.S.2d 346 (Surrogate Ct. of N.Y. 2005) ("[I]n order for an agreement, oral or written, to be enforceable as a lease, all of the essential terms must be agreed upon, including duration.") (internal citations omitted).

Add:

Upper Southampton Twp. v. Upper Southampton Twp. Zoning Hearing Bd., 885 A.2d 85 (Pa. Commw. Ct. 2005) (Lease for billboard created new economic development even though the exact location for the sign was not specified. Because the entire property was chosen to put the sign up, the exact location of the sign was irrelevant and the right was considered a lease, not a license.).

Trading Fair Houston, Inc. v. SignAd, Inc., 2005 Tex. App. LEXIS 5636, *7 (Jul, 19, 2005) (Right to erect a billboard was a lease, not a license for several reasons, mostly dealing with the language in the agreement).

Harrell v. Lamar Co. L.L.C., 2005 Miss. App. LEXIS 664, * 8-9 (Sep. 20, 2005) (A lease for a billboard was found to be valid even though the description was subject to several configurations. The parties' intent controlled).

Denny Wiekhorst Equip., Inc. v. Tri-State Outdoor Media Group, Inc., 693 N.W.2d 506 (Neb. 2005) (when lessee failed to take down billboard within a reasonable time after the expiration of the lease the sign became realty and belonged to the owner of the property).

Page 572 note 48: Add:

Clear Channel Outdoor v. City of Lakewood, 2005 U.S. Dist. LEXIS 26408 (W.D. Wash. Jun. 3, 2005) (owner of billboard brought takings action. Action was not ripe because he did not exhaust all other resources to receive compensation).

Pima County v. Clear Channel Outdoor, Inc., 2006 Ariz. App. LEXIS 4 (Jan. 25, 2006) (Billboard owner had to remove billboards because of condemnation proceeding. He was given other land to erect the billboards as just compensation, but he was not exempt from the zoning restrictions and building codes on the new realty).

Sunshine Props. L.L.C. v. State DOT, 900 So. 2d 714 (Fla. Dist. Ct. App. 2005) (lessor of land that lessees had trade fixtures on did not have to pay the lessees a portion of the lessor's condemnation award because the lessees were not represented in the settlement).

Lamar Whiteco Outdoor Corp. v. City of W. Chicago, 823 N.E.2d 610, 623 (Ill. App. Ct. 2005) ("billboard owners have a right to just compensation for any condemned sign")(citing *DOT v. Drury Displays, Inc., 764 N.E.2d 166, 172 (Ill. App. Ct. 2002))* .

Eller Media Co. v. Miss. Transp. Comm'n., 900 So. 2d 1156 (Miss. 2005) .

Adams Outdoor Adver. v. City of Madison, 2005 Wisc. App. LEXIS 1099, 14-20 (Dec. 14, 2005) (determining whether a "cost less depreciation" or a "income" method of valuation for condemnation awards for condemned billboards should be adopted, question on cert to the Wisconsin Supreme Court).

§ 39.04(b) Concession Cases. [Go To Main]

Add:

Theatre Confections v. Sunstar Theatres Coral Springs, 2003 U.S. Dist. LEXIS 12604 (D.N.Y. 2003) (according to the lease agreement, the theatre was required to deposit funds from the sale of concessions directly into the bank account of the tenant).

§ 39.04(d) Lodging Cases Va. Code Ann. § 55

Add:

Goff v. State, 875 A.2d 132, 144 n.12 (Md. 2005) ("A leasehold estate or tenancy is more than a non-possessory interest in property, yet something less than a present freehold estate.")(quoting Douglas M. Bregman & Gary G. Everngam, Maryland Landlord-Tenant Law Practice and Procedure, at 15-16 (3d ed. 2003)) .

Ashley v. Waffle House, Inc., 2006 U.S. Dist. LEXIS 2880 (D.S.C. Jan. 10, 2006) (duty that an owner owes to an invitee or business visitor is reasonable care).

Matthew D. Lincoln, *Note: Landowners' Duty to Guests of Invitees and Tenants: Vogt v. Murraywood Swim & Racquet Club and Goode v. St. Stephens United Methodist Church, 57 S.C.L. Rev. 387 (2005).*

§ 39.04(e) Possession Related to Purchase Contract [Go To Main]

Add:

Hans v. Lucas, 703 N.W.2d 880 (Neb. 2005) (equitable conversion for buyers in possession was not applicable because the contract put the risk of loss on the seller while the buyer was in occupancy).

After the sentence "Yet the positions of the tenant and the purchaser are different." add new footnote 53.1:

Renault & Handley Oakmead Solar Joint Venture, et al. v. Applied Materials, Inc., 2005 Cal. App. Unpub. LEXIS 1073 (Cal. Ct. App. filed Feb. 7, 2005) (When a tenant exercises an option to purchase, the tenant is no longer a lessee, but is instead a vendee and the lessor/lessee relationship and its incidents no longer exist. Vendee is under no obligation to pay rent from that time on if vendee has paid the purchase price; if the purchase price has not been paid, then the vendee must pay either rent or interest on the purchase price.) (citing *Sacks v. Hayes, 146 Cal. App. 2d Supp. 885, 887-888 (1956) In re Zach's Estate, 257 Iowa 234, 131 N.W.2d 484, 486 (1965))* .

After the sentence "If, on the other hand, the seller stays in possession even though the title has been conveyed or the agreement specifies that the purchaser should have possession, the seller is considered to be a tenant of the purchaser." add new footnote 53.2:

Grimm v. Huckabee, 891 So. 2d 608 (Fla. Dist. Ct. App. 2005) (Tenants in possession pursuant to a sales contract were to pay rent in exchange for their possession. The owner they contracted with was a predecessor in interest to the landlord, and the owner transferred title to the landlord, who did not show at closing and never completed the sales contract. Tenants claimed they could not be evicted during this time, that they were not holdover tenants, and that they should not have to pay statutory damages for holding over. The court found they were allowed an evidentiary hearing before they were evicted.).

Khatib v. Bolton, 614 S.E.2d 811 (Ga. Ct. App. 2005) (buyer in possession before closing was in possession as a tenant, not a purchaser).

Spraybary v. Mallinson, 2005 Wash. App. LEXIS 2416 (filed Sep. 15, 2005) (panel decision) (Purchasers took possession pursuant to a sales contract. The property did not sell at the closing date and because time was of the essence, the sales contract was extinguished. At that point the purchasers became monthly tenants and were subject to an unlawful detainer action).

Barnes v. Jackson, 2005 Del. Ch. LEXIS 127 (Aug. 29, 2005) (option to purchase does not survive the termination/expiration of a lease).

§ 39.04(f) Lender in Possession N.M. Stat. Ann. §§ 48-6-1 and 48-3-6

Add:

Lucas v. Fairbanks Capital Corp., 618 S.E.2d 488, 500-502 (W. Va. 2005) (Starcher, J., dissenting) (brief history of mortgages and lenders in possession).

Sensenich v. Molleur (In re Chase), 2005 Bankr. LEXIS 196, *6 (Bankr. Vt. Jan. 27, 2005) (discussing Vermont's strict

foreclosure process).

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Supp. To CHAPTER 39 Leasehold Estates

4-39 Thompson on Real Property, Thomas Editions Supp. to § 39.05

Supp. to § 39.05 Traditional Types of Leasehold Estates.

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Add:

Cecil v. Viacom Outdoor Group, Inc., 2005 U.S. Dist. LEXIS 19361, * 9-11 (E.D. Mich. Sep. 8, 2005) (Michigan recognizes three types of tenancies: tenancy at will, estate for years, and tenancy at sufferance; discusses the differences between the three).

Add:

Megan J. Ballard, *Legal Protections for Home Dwellers: Caulking the Cracks to Preserve Occupancy, 56 Syracuse L. Rev. 277 (2006)* (discussing federally subsidized housing and preserving occupancy in it).

Blatch v. Hernandez, 360 F. Supp. 2d 595 (S.D.N.Y. 2005) (describing procedures to terminate tenant's occupancy).

§ 39.05(a) Tenancy (or Term) for Years. [Go To Main]

Add:

Air Pegasus of D.C., Inc. v. United States, 60 Fed. Cl. 448 (Ct. Cl. 2004) (even though the lessee entered into a real property lease that allowed it to operate a heliport in Washington, D.C., no property right to public navigable airspace

arose, and the government could prevent the tenant from operating its business).

After the sentence "Thus, a lease may begin upon the occurrence of a specified event or action, such as the date the tenant commences employment in the community or the date a prior tenant vacates the property." add new footnote 64.1:

Cape Oil Delivery, Inc. v. Hayes, 2005 Mass. Super. LEXIS 671, * 20-21 (Dec. 14, 2005) ("The term of the lease need not be keyed to a fixed calendar date. 'It is generally held to be essential to the validity of a lease for years that it prescribe with reasonable certainty the date of commencement and the duration of the term of the lease, but this rule does not prevent the creation of tenancies in which the term is not absolutely fixed and where the time of commencement is stated to depend upon the happening of an event. After the happening of the event any uncertainty is removed and the lease in this respect is valid.") (quoting *Wunsch v. Donnelly, 19 N.E.2d 70, 71 (Mass. 1939))* .

Correct:

Tenn. Code Ann. § 66-7-103 (2005) says that the terms will be limited to ten years unless natural gas or oil is being produced. If production ends for any six month period after the original ten years, then the lease will be terminated.

R.I. Gen. Laws § 20-10-3 (2006) says that the original lease term for leases of coastal waters may be for a period of 15 years, followed by ten year renewals.

§ 39.05(b) Periodic Tenancy. [Go To Main]

Add:

Clover Belt Farms v. Rademacher, 699 N.W.2d 253, *7 (Wis. Ct. App. 2005) (a person without a lease becomes a periodic tenant under Wisconsin law).

Vander Wielen v. Van Asten, 706 N.W.2d 123 (Wis. Ct. App. 2005) (discussing Wisconsin's tenancy statutes).

Gulf Coast Realty Co. v. Prof'l Real Estate Partners, Inc., 2005 Ala. LEXIS 123 (released Aug. 12, 2005) (Alabama law presumes that if no duration is set, that a periodic tenancy arises from Dec. to Dec., unless it is expressly provided that it is a tenancy at will).

Radvansky v. City of Olmsted Falls, 395 F.3d 291, 297 n. 1, 303 n. 9 (6th Cir. 2005) (A tenant that takes possession under an invalid lease is only a tenant at will. At the point that he pays rent and the rent is accepted, the tenancy becomes a periodic tenancy. Tenant's rights in periodic tenancy are possessory, and landlord can be liable for trespass if they enter during the tenant's term.) (citing *State v. Brisbin, 1989 Ohio App. LEXIS 571* (Feb. 16, 1989)) .

Gulf coast *Realty Co. v. Prof'l Real Estate Partners, Inc., 2005 Ala. LEXIS 123,* *39 n. 16 (released Aug. 12, 2005) (presumption periodic tenancy may be rebutted by the surrounding circumstances showing a different intent) (citing Restatement (Second) of Property, Landlord & Tenant § 1.5 cmt. d.).

Macray v. Clubs, Inc., 32 Kan. App. 2d 711 (Kan. App. 2004) (a payment of rent by tenant would automatically create a year-to-year tenancy); *Ruiz v. New Garden Twp., 376 F.3d 203 (3d Cir. 2004)* (where tenants had month to month leases, they could not have expected more than 30 days additional occupancy upon notice that their landlord decided to terminate their lease, and they received sufficient notice of a decision that the property was not zoned for residential use).

§ 39.05(b)(1) Circumstances

Add:

Radvansky v. City of Olmsted Falls, 395 F.3d 291, 297 n. 1 (6th Cir. 2005) (Oral lease was invalid, but created a tenancy at will that could be converted into a periodic tenancy by paying and accepting rent.).

Add:

Gulf Coast Realty Co. v. Prof'l. Real Estate Partners, Inc., 2005 Ala. LEXIS 123, *37-38 (released Aug. 12, 2005) ("A landlord-tenant relationship may be created to endure until one of the parties has given the required notice to terminate the tenancy at the end of a period.") (quoting Restatement (Second) of Property § 1.5 (1977)) (month's notice is sufficient for terminating a periodic tenancy).

After the sentence "Each party is afforded a period of time after the required notice of termination, during which the lease continues until the date of termination announced in the notice arrives." add new footnote 72.1:

Mabe v. Montague, 2005 N.C. App. LEXIS 1218, *5 (filed July 5, 2005) (a holdover tenant recognized by the landlord from an original tenancy of a year or more becomes a periodic tenant without any further action and is subject to the terms as they "may be applied to existing conditions." Periodic tenancy may be terminated at the year's end by one thirty days notice.)

Kilcoyne Props., LLC v. Fischbach, 2004 Ohio 7272 (Ohio App. 2004) (an improperly executed commercial lease, signed by both parties, was invalid; accordingly, a month-to-month tenancy was created); *Clover Belt Farms v. Rademacher, 2005 Wisc. App. LEXIS 405 (Wis. App. 2005)* (the parties' agreement did not amount to a lease, and without a lease the tenant became a periodic tenant).

Add:

Radvansky v. City of Olmsted Falls, 395 F.3d 291, 297 n. 1 (6th Cir. 2005) (Ohio law requires notice before

terminating a periodic tenancy, and the landlord cannot use self help.)

E.C. Dev., LTD. v. Gen. Conf. Corp. of the Seventh Day Adventist, 2005 Guam 9, 2005 Guam LEXIS 10 (filed July 20, 2005) (applying law based on California's statute).

See also Wasatch Property Management v. Degrate, 112 P.3d 647 (Cal. 2005) (discussing the interaction between § 1946 and § 1954.535, which provide for 90 days notice to tenants affected by the termination of a landlord's contract with the government that limits rent) for determining the length of notice that must be given under California law).

Colo. Rev. Stat. § 13-40-107 (2005) provides for decreasing lengths of notice, depending on the length of the tenancy. It ranges from three months to a day.

Horizon Homes v. Nunn, 684 N.W.2d 221 (Iowa 2004) (owner of a federally subsidized housing project could not terminate a tenant's month-to-month lease, as the landlord had to show good cause and specify those grounds constituting good cause in its notice of termination); *Owens v. Shoreline Real Estate Co., 2004 Wi. App 109 (Wis. App. 2004)* (in a month to month tenancy, the tenant was required to give 60 days notice to vacate, as indicated by the contract, instead of the 28 day statutory period); *Hyder v. Montgomery County, 160 Md. App. 482 (Md. Ct. Spec. App. 2004)) cert. denied, 386 Md. 181 (Md. 2005)* (tenants' obligation for rent under a month to month contract terminated on April 30 where they gave written notice to the landlord on April 1).

§ 39.05(b)(3) The Residual Tenancy

Add:

Radvansky v. City of Olmsted Falls, 395 F.3d 291, 297 n. 1 (6th Cir. 2005) (Oral lease was invalid, but created a tenancy at will that could be converted into a periodic tenancy by paying and accepting rent.).

Add:

Radvansky v. City of Olmsted Falls, 395 F.3d 291, 297 n. 1 (6th Cir. 2005) (Oral lease was invalid, but created a tenancy at will that could be converted into a periodic tenancy by paying and accepting rent.).

Clover Belt Farms v. Rademacher, 699 N.W.2d 253, *7 (Wis. Ct. App. 2005) (a person without a lease becomes a periodic tenant under Wisconsin law)

T.C. Williams, Annotation, *Character and Duration of Tenancy Created by Entry under Invalid or Unenforceable Lease, 6 A.L.R.2d 685 (2005)* .

Add:

Mabe v. Montague, 2005 N.C. App. LEXIS 1218, *5 (filed Jul. 5, 2005) (a holdover tenant recognized by the landlord from an original tenancy of a year or more becomes a periodic tenant without any further action and is subject to the terms as they "may be applied to existing conditions." Periodic tenancy may be terminated at the year's end by thirty days notice.)

Add:

Roth v. Dillavou, 835 N.E.2d 425, 429-430 (Ill. App. Ct. 2005) (discussing a tenant in possession after the expiration of his lease and the options that present themselves to the landlord when a tenant is in possession after the term of its lease. Also mentions that the discretion of how to treat the tenant resides solely with the landlord) (citing A.O. Smith corp. v. *Kaufman Grain Co., 596 N.E.2d 1156 (Ill. App. Ct. 1992)* & *Bransky v. Schmidt Motor Sales, Inc., 584 N.E.2d 892 (Ill. App. Ct. 1991))* .

Zirp-Burnham LLC v. E. Terrell Assocs., 826 N.E.2d 430 (Ill. App. Ct. 2005) (when a month to month tenancy is created, it is governed by the terms of the original lease) (citing A.O. Smith corp. v. *Kaufman Grain co., 596 N.E.2d 1156 (Ill. App. Ct. 1992))* .

Add:

Radvansky v. City of Olmsted Falls, 395 F.3d 291, 297 n. 1 (6th Cir. 2005) (Oral lease was invalid, but created a tenancy at will that could be converted into a periodic tenancy by paying and accepting rent.).

Clover Belt Farms v. Rademacher, 699 N.W.2d 253, *8 (Wisc. Ct. App. 2005) (notice required for termination).

Burgos v. Cross Sound Cable Co., 2005 Conn. Super. LEXIS 2537, *29 (Sep. 20, 2005) ("[A] person who takes possession of premises under an invalid lease creates a tenancy at will.") (citing *Weishaar v. Strimbu, 601 N.E.2d 587, 592 (Ohio Ct. App. 1991))* .

Add:

Gulf Coast Realty Co. v. Prof'l. Real Estate Partners, Inc., 2005 Ala. LEXIS 123, *34-39 (released Aug. 12, 2005) (quoting the restatement and analyzing the different notice requirements, while finally adopting a month's notice as appropriate).

Restatement (Second) of Property § 1.5 stat. note 2(a)-(c) (1977).

Add:

Barran v. Kinas, 2005 Ohio 2002, 2005 Ohio App. LEXIS 1906 , P 15 (Apr. 28, 2005) (Landlord was allowed to keep security deposit to cover rent for month that tenant vacated when the tenant did not give proper notice for termination)

Wis. Stat. § 704.19 (2005) (If a tenant moves out without giving notice, then the lease is terminated as if notice was given to the landlord on the date that the landlord learns of the vacation of the premises).

Correct:

Market Dundee Corp. v. Jaramillo, 582 A.2d 850 (N.J. Super. Ct. App. Div. 1996) overruled in 809-811; *Washington Street Assoc. v. Grego, 600 A.2d 1222, 1228 n. 3 (1992)*

§ 39.05(c) Tenancy at Sufferance. [Go To Main]

Add:

Cecil v. Viacom Outdoor Group, Inc., 2005 U.S. Dist. LEXIS 19361, *10 (E.D. Mich. Sep. 8, 2005) (recognizing the tenancy at sufferance as a distinct type of tenancy).

Add:

United States v. Hunyady, 409 F.3d 297, 301 (6th Cir. 2005) (a tenant at sufferance is created after a wrongful holding over after an initial lawful period of possession) (citing *Ryal's, Inc. v. Stavropoulos, 263 N.W. 770, 770 (Mich. 1935)* ; *School Dist. v. Batsche, 64 N.W. 196, 197 (Mich. 1895))*

Cecil v. Viacom Outdoor Group, Inc., 2005 U.S. Dist. LEXIS 19361, *10-11 (E.D. Mich. Sep. 8, 2005) (the right to original possession had to be by agreement, no landlord/tenant relationship exists in a tenancy at sufferance).

In re Lawson, 333 B.R. 503, 2005 Bankr. LEXIS 2187 (Bankr. D.C. Oct. 28, 2005) (there must be consideration and a contractual relationship to create tenant at sufferance; otherwise they are merely a licensee or a permissive user) (citing to the code and several cases).

Qureshi v. Fiske Capital Mgmt., 59 Mass. App. Ct. 463 (Mass. App. 2003) (after negotiations for a new lease had ended unresolved, tenant became a tenant at sufferance).

Add:

Cecil v. Viacom Outdoor Group, Inc., 2005 U.S. Dist. LEXIS 19361, *11-12 (E.D. Mich. Sep. 8, 2005) (landlord may treat tenant as either trespasser or a tenant under the terms of the original lease) (quoting John G. Cameron, Jr., Michigan Real Property Law; Principles and Commentary, pp. 893 (2d ed. 1993)).

Roth v. Dillavou, 835 N.E.2d 425, 430 (Ill. App. Ct. 2005) (landlord may either treat tenant as trespasser or a holdover tenant).

After the sentence "Today, many jurisdictions require the landlord to initiate court proceedings to remove the tenant form the property, unless the tenant turns over possession voluntarily." add new footnote 95.1:

McAdam v. Lorden, 2005 U.S. Dist. LEXIS 21900, *9 (D. N.H. Sep. 26, 2005) (some cases have held that the "debtor in possession of leased property has an equitable interest that may be included in the bankruptcy estate and protected by the automatic stay.")(citing *Schewe v. Fairview Estates (In re Schewe), 94 B.R. 938, 946 (Bankr. W.D. Mich. 1989)* ; *In re Onio's Italian Rest. Corp., 42 B.R. 319, 321 (Bankr. S.D.N.Y. 1984))* .

But see also In re Turner, 326 B.R. 563, 573 (Bankr. W.D. Pa. 2005) as cited in *McAdam v. Lorden, 2005 U.S. Dist. LEXIS 21900,* *11-12 (D. N.H. Sep. 26, 2005) ("[A] mere possessory interest (for instance, a 'squatter' or tenant at sufferance) in an expired lease at the time of filing is not enough to sustain the protections of the automatic stay.").

Add:

Radvansky v. City of Olmsted Falls, 395 F.3d 291, 297 n. 1 (6th Cir. 2005) (Ohio law requires notice before terminating a periodic tenancy, and the landlord cannot use self help.)

Reeves v. Rodgers, 2006 Ore. App. LEXIS 197, *7 (filed Feb. 15, 2006) (no notice required before terminating a tenancy at sufferance).

Correct:

D.C. Code Ann. § 45-1404 needs to be changed to § 42-3204 (2006).

Add:

United States v. Hunyady, 409 f.3d 297, 301 (6th Cir. 2005) (At common law, the tenant at sufferance had the "passive acquiescence by the property owner." If the landlord re-enters and disallows the occupancy, then the tenant becomes a trespasser.) (citing *Allen v. Carpenter, 15 Mich. 25 (1866))* .

Add:

Witcher v. Bennett, 120 S.W.3d 922 (Tex. App. 2003) appeal dismissed Witcher v. Bennett, 2006 Tex. App. LEXIS 159 (Jan. 10, 2006) (tenants did not have continuous possession necessary for an adverse possession claim, and instead were considered tenants at sufferance).

After the sentence "The occupancy at sufferance can be converted into a new lease relationship at the election of the landlord." add new footnote 99.1:

Cecil v. Viacom Outdoor Group, Inc., 2005 U.S. Dist. LEXIS 19361, *11-12 (E.D. Mich. Sep. 8, 2005) (landlord may treat tenant as either trespasser or a tenant under the terms of the original lease) (quoting John G. Cameron, Jr., Michigan Real Property Law; Principles and Commentary, pp. 893 (2d ed. 1993)).

Roth v. Dillavou, 835 N.E.2d 425, 430 (Ill. App. Ct. 2005) (landlord may either treat tenant as trespasser or a holdover tenant).

After the sentence "The new lease can be formally crated as one of the other three types of tenancies--for a definite term, at will or as a periodic tenancy." add new footnote 99.2:;

Batesville Casket Co. v. Merlin Enters. Realty Trust et al., 2005 Mass. Super. LEXIS 564 (Oct. 28, 2005) (tenancy at sufferance can become tenancy at will by agreement, express or implied, by the parties)(quoting *Staples v. Collins, 73 N.E.2d 729, 729 (Mass. 1947))* .

Vander Wielen v. Van Asten, 706 N.W.2d 123, 132 (Wis. Ct. App. 2005) (when landlord accepted rent from an individual, that individual was the landlord's tenant, either at will or periodic).

After the sentence "It is more common for an implied tenancy from period to period to result from the holdover relationship." add new footnote 99.3:

Radvansky v. City of Olmsted Falls, 395 F.3d 291, 297 n. 1 (6th Cir. 2005) (Oral lease was invalid, but created a tenancy at will that could be converted into a periodic tenancy by paying and accepting rent.).

Add:

But see Roth v. Dillavou, 835 N.E.2d 425, 430 (Ill. App. Ct. 2005) (no notice is needed to terminate possession).

Olmstead v. Nodland, 828 N.E.2d 338, 340 (Ill. App. Ct. 2005) (can terminate tenancy at sufferance by demanding possession).

Some states go further, as shown in *AIMCO Props., LLC v. Dziewisz, 883 A.2d 310 (N.H. 2005)* (tenancy at sufferance can only be terminated for good cause).

Reeves v. Rodgers, 2006 Ore. App. LEXIS 197, *7 (filed Feb. 15, 2006) (no notice required before terminating a tenancy at sufferance).

NY CLS Real P. § 228 (2005) (notice is required to terminate tenancy at sufferance)

Add:

But see *Cecil v. Viacom Outdoor Group, Inc., 2005 U.S. Dist. LEXIS 19361, 13-14* (E.D. Mich. Sep. 8, 2005) (following the common law as explained by Blackstone and not allowing a property owner burdened by a tenancy at sufferance to collect rent because it is the landowner's own fault for allowing a tenancy at sufferance. Landowner may only recover rent if a demand is made) (citing 2 *Blackstone Comm.150-1 and Hogsett v. Ellis, 17 Mich. 351 (1868))* .

§ 39.05(d) Tenancy at Will. N.M. Stat. Ann. § 48-3-5.

After the sentence "It lasts only as long as neither party does anything to terminate the tenant's possessory interest or until the tenancy at will is transformed into a periodic tenancy." add new footnote 103.1:

Olmstead v. Nodland, 828 N.E.2d 338, 340 (Ill. App. Ct. 2005) (demand for possession can terminate a tenancy at will)

Add:

Cecil v. Viacom Outdoor Group, Inc., 2005 U.S. Dist. LEXIS 19361, 10 (E.D. Mich. Sep. 8, 2005) (either party may terminate a tenancy at will at their discretion).

Add:

Cecil v. Viacom Outdoor Group, Inc., 2005 U.S. Dist. LEXIS 19361, 10 (E.D. Mich. Sep. 8, 2005) (tenancy at will is based on an agreement, express or implied, that there will be a landlord/tenant relationship).

64 *Wall St., LLC v. City of Norwalk, 2005 Conn. Super. LEXIS 2278,* *2 (Aug. 26, 2005) (memorandum of decision) (lease agreement without determinate time limit is a tenancy at will) (quoting 1 S. Williston, Contracts (4th Ed. 1990) § 4.19, p. 443-44)

Comcast of California I, Inc. v. City of Walnut Creek, 371 F. Supp. 2d 1147, 1155 (N.D. Cal. 2005) (if parties operate a franchise without a formal agreement, then they are holdover tenants "subject to termination by either side at will").

Keeton Corr., Inc. v. RJ & RK, Inc., 858 So. 2d 349, 350 (Fla. Dist. Ct. App. 2003) (a double rent provision applied to a tenancy at will and was not limited to a written lease with a fixed expiration date); *Gu v. Liu, 262 Ga. App. 443 (Ga.*

App. 2003) (an oral agreement to rent property that contained no specified time for termination of the tenancy, was treated as a tenancy at will).

After the sentence "In that case, both parties should know that their relationship is vulnerable to being terminated at any time, for the tenancy at will continues only as long as both parties mutually consent to its existence." add new footnote 107.1:

Coleman v. Mula, 2005 Mass. Super. LEXIS 440, 5 (Aug. 18, 2005) (tenancy at will only exists as long as both parties mutually desire it).

Add:

Sugarhill Ltd. v. Brezo, 2005 Ohio App. LEXIS 1811 , P 42, 2005 Ohio 1889 (Apr. 22, 2005) (generally, tenant at will cannot sublet the premises) (citing *Motor Service Co. v. Public Utilities Com., 66 Ohio Op. 2d 1, 305 N.E.2d 788, 792 (Ohio 1974))* .

Add:

Radvansky v. City of Olmsted Falls, 395 F.3d 291 (6th Cir. 2005) (invalid lease makes a tenancy at will).

Nacoochee Corp. v. Suwanee Inv. Partners, LLC, 620 S.E.2d 641, 644 (Ga. Ct. App. 2005) (oral lease creates a tenancy at will).

Lewis v. Marcum, 2003 Ohio 3861 (Ohio App. 2003) (a tenancy at will was created when possession of the property was taken under an invalid lease).

After the sentence "In the situation involving an invalid term for years lease because of failure to meet the formal requirements of the Statute of Frauds, the tenant generally begins making regular rental payments to the landlord." add new footnote 112.1:

But see Batesville Casket Co. v. Merlin Enter. Realty Trust, 2005 Mass. Super. LEXIS 564, *6-7 (Oct. 28, 2005) (accepting rent after the lease has expired creates "prima facie proof" of a tenancy at will) (quoting *Staples v. Collins, 73 N.E.2d 729, 729 (Mass. 1947))* .

Add:

Mulholland v. Poole, 866 A.2d 122 (Me. 2005) (Maine statute requires thirty day notice to terminate a tenancy at will, except for in certain circumstances).

14 M.R.S. § 6002 (2005).

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Supp. To CHAPTER 39 Leasehold Estates

4-39 Thompson on Real Property, Thomas Editions Supp. to § 39.06

Supp. to § 39.06 Creation and Termination of Leasehold Estates.

[Go To Main]

§ 39.06(a) Creation. Kan. Stat Ann. § 58

§ 39.06(a)(1) Invalid Leases

Add:

Nesco Acceptance Corp. v. Jay (In re Jay), 432 F.3d 323, 326 (5th Cir. 2005) ("A lease does not constitute a contract of sale.")

Add:

But see *Lowes Home Ctrs. v. LL&127, LLC, 147 Fed. Appx. 516, 522, 2005 U.S. App. LEXIS 17021* (6th Cir. filed Aug. 11, 2005) (In Michigan, "parties can enter into an enforceable contract that requires them to execute another contract at a later date." However, the original contract must have the essential and material terms of the contemplated future agreement included in it; otherwise it will fail for indefiniteness.).

Ski River Dev., Inc. v. Mccalla, 167 S.W.3d 121, 133-134 (Tex. App. 2005) (if the essential and material terms are absent from an agreement, then the agreement is not enforceable; "a contract providing for an agreement to be negotiated in the future is void" The court may supply terms for the agreement.).

Sproviero v. J.M. Scott Assocs., Inc., 2005 Conn. Super. LEXIS 1452 (June 1, 2005) ("An agreement to agree to a material term at a later time is no agreement at all.") (quoting *Drayton v. Petteway, 2003 Conn. Super. LEXIS 1350,* *4 (May 5, 2003)) (memorandum decision).

GRB Farm v. Christman Ranch, Inc., 108 P.3d 507, 510 (Mont. 2005) ("An agreement that requires the parties to agree to material terms in the future is not an enforceable agreement whereby specific performance will be granted." Court found the agreement unenforceable because is didn't have "complete and material terms for determining duration and payments for another lease term in the negotiation clause.")

Hostcentric Techs, Inc. v. Republic Thunderbolt, LLC, 2005 U.S. Dist. LEXIS 11130 *17-19 (S.D.N.Y. June 9, 2005) (discussing preliminary agreements and the circumstances under which they are valid or invalid).

Clover Belt Farms v. Rademacher, 699 N.W.2d 253, *5 (Wisc. Ct. App. 2005) (under Wisconsin law, the lease must have a "fixed commencement date" to be valid) (citing *Wis. Stat. § 704.01* (2005)).

Ater the sentence "The essential terms of the intended lease agreement are lacking so the agreement to agree is invalid for indefiniteness." add new footnote 117.1:

Clover Belt Farms v. Rademacher, 699 N.W.2d 253 (Wisc. Ct. App. 2005) .

Add:

First Am. Kickapoo Operations, L.L.C. v. Multimedia Games, Inc., 412 F.3d 1166, 1177 (10th Cir. 2005) ("One who by appropriate means causes the nonperformance of an illegal agreement or an agreement having a purpose or effect in violation of an established public policy is not liable for pecuniary harm resulting from the nonperformance.") (quoting Restatement (Second) of Torts § 774 (1979)).

New York City Housing Authority v. Pretto, 795 N.Y.S.2d 871, 873-874 (N.Y. Civ. Ct. 2005) (illegal lease is void; tenant cannot use laches to defend against an action brought by the landlord to evict the tenant for illegal actions on the property)

Correct:

Louis Friedman Realty Co. v. De Stefan, 217 N.Y.S. 142 (N.Y. App. Term 1926) , rev' d by *Louis Friedman Realty Co v. De Stefan, 222 N.Y.S. 371 (Sup. Ct. NY App. Div. 1927)*

Add:

Walburn v. City of Naples, 2005 U.S. Dist. LEXIS 37805 (M.D. Fla. Sep. 22, 2005) (individual entered into an illegal contract with the city and the contract was void ab initio).

Pierce County v. Wash. Shellfish, Inc., 2005 Wash. App. LEXIS 391 (filed Mar. 8, 2005) (illegal portion of the contract was severable, so the entire contract should not be declared illegal).

Matter of Waldman v. New York City Department of Housing Preservation and Development, 10 Misc.3d 1075A, (N.Y. Sup. Ct. Dec. 30 2005) (a change in law that would otherwise render a lease void ab initio does not give a right to "unilaterally abrogate" the lease, but instead the lease "remains in effect for the duration of the term.")

N.Y. City Housing Authority v. Taylor, 2005 N.Y. Slip. Op. 50209U (N.Y. App. Term. Feb. 18, 2005) .

§ 39.06(a)(2) Enforceable Contracts to Execute a Lease

After the sentence "Breach may give a party the right to terminate the lease agreement and seek damages for the losses connected with the breach." add new footnote 122.1:

Lichtefeld v. Mactec Engineering & Consulting, Inc., 2005 U.S. Dist. LEXIS 7933, 6 (W.D. Ky. Feb. 4, 2005) ("cases involving a lessee's breach of a covenant contained in a lease, the lessor is entitled to recover his actual damages, but may not receive a windfall").

After the sentence "The remedy for breach is the recovery of damages." add new footnote 122.2:

Cape Oil Delivery, Inc. v. Hayes, 2005 Mass. Super. LEXIS 671, 25 (Dec. 14 2005) (agreement for present demise that commenced at a future time was not a contract to make a lease, but was a lease itself).

GRB Farm v. Christman Ranch, Inc., 108 P.3d 507, 510 (Mont. 2005) ("An agreement that requires the parties to agree to material terms in the future is not an enforceable agreement whereby specific performance will be granted." Court found the agreement unenforceable because is didn't have "complete and material terms for determining duration and payments for another lease term in the negotiation clause." The court declined to calculate damages.).

After the first full sentence on the page, add new footnote 122.1: n122.1

§ 39.06(a)(3) Interesse Termini

After the sentence "As long as the present intent of the parties is to give an immediate interest in the property to the tenant, the fact that the present interest involves a possession date to commence in the future does not change the fact that a present interest is given." add new footnote 124.1:

Cape Oil Delivery, Inc. v. Hayes, 2005 Mass. Super. LEXIS 671, *25-27 (Dec. 14, 2005) ("Based on the language of the Agreement and the circumstances surrounding the drafting of the Agreement, the parties manifested an intent for a present demise to commence in the future, and this Court has no doubt that the instrument is a lease rather than an agreement to form a lease at some future time." Even though there was no specific date, the time that the lease was to commence was seven days after a specified event, which was enough to make it valid.).

§ 39.06(a)(4) Statute of Frauds Compliance Issues.

Add:

Prof'l. Bull Riders, Inc. v. Autozone, Inc., 144 Fed. Appx. 735, 737, 2005 U.S. App. LEXIS 17262 *8 (filed Aug. 15, 2005) (Even if the contract provides for a term longer than one year, if there is an option in the contract that would allow it to be performed in less than one year it is not within the statute of frauds).

30 *Carmine LLC v. Depierro, 791 N.Y.S.2d 383, 390-391 (N.Y. Civ. Ct. 2005)* (lease that otherwise ran afoul of the statue of frauds was enforced because (1) an agency relationship authorizing signature could be found after piecing together different written documents (2) the lease was ratified, (3) the attornment was accepted).

Lipton v. Kiamie Princess Marion Realty Corp., 2 A.D.3d 318 (N.Y. App. Div. 2003) (since lease agreement was signed on behalf of defendant landlord by person who did not have binding authority set forth in writing, it was unenforceable according to the statute of frauds).

Add:

Szymanowski v. Brace, 987 A.2d 717 (Pa. Super. 2009) (statute of frauds precludes enforceability of any unwritten agreement to assign a lease).

Add:

Gulf Coast Marine Assocs. v. C-Port Galveston, 2005 U.S. Dist. LEXIS 27950, *5 (S.D. Tex. Nov. 8, 2005) (if the option for renewal is at the lessee's option, then the original and renewed period are considered for statute of frauds purposes; if the option requires the lessor's permission, then only the original term is considered to determine whether the statute of frauds requires it in writing)

Mabe v. Montague, 2005 N.C. App. LEXIS 1218, *6-7 (filed July 5, 2005) (tenancy renewable annually did not violate the statute of frauds under a statute of frauds not requiring written leases for leases less than three years).

§ 39.06(a)(5) Invalid Tenancy for Years Recognized as Another Form of Tenancy

Add:

Clover Belt Farms v. Rademacher, 699 N.W.2d 253, *7 (Wisc. Ct. App. 2005) ("Because there was no lease, [the tenant] became a periodic tenant.")

Add:

Nacoochee Corp. v. Suwanee Inv. Partners, LLC, 620 S.E.2d 641, 644 (Ga. Ct. App. 2005) (discussing a case in which an oral lease created a tenancy at will) (discussing *Norris v. Downtown LaGrange Dev. Auth., 259 S.E.2d 729 (Ga. Ct. App. 1979))* .

Radvansky v. City of Olmsted Falls, 395 F.3d 291, 297 n. 1 (6th Cir. 2005) (Oral lease was invalid, but created a tenancy at will that could be converted into a periodic tenancy by paying and accepting rent.).

After the sentence "As soon as the landlord accepts rent from the tenant, however, courts have a basis for considering the lease as a periodic tenancy tied to the length of the period covered by the rent payment." add new footnote 132.1:

Radvansky v. City of Olmsted Falls, 395 F.3d 291, 297 n. 1 (6th Cir. 2005) (Oral lease was invalid, but created a tenancy at will that could be converted into a periodic tenancy by paying and accepting rent.).

Connolly v. Powell, 118 P.3d 1232, 1236 (Idaho Ct. App. 2005) (landlord could not evict a tenant because there was no written agreement).

§ 39.06(a)(6) Part Performance and Estoppel Exceptions to Compliance with the Statute of Frauds

Add:

In re Camelot Casino Cruises, Inc., 2005 Bankr. LEXIS 1663, * 8, 14 (Bankr. M.D. Fla. July 6, 2005) ("[T]o remove the agreement from the statute based on part performance, the party must establish acts that 'relate clearly and unequivocally to the agreement, exclusive of any other relation between the parties touching the agreement.' " There was not sufficient meeting of the minds on several key terms.) (quoting *Player v. Chandler, 382 S.E. 2d 891, 894 (S.C. 1989))* . See also *In re Camelot Casino Cruses, Inc., 330 B.R. 263, 267-268, 2005 Bankr. LEXIS 2152,* *9 (M.D. Fla. 2005) .

Santaro v. Jack of Hearts Carpet Co., 800 N.Y.S.2d 356, *9-10 (N.Y. Sup. Ct. 2005) (improvements to the property were not enough to establish part performance because the improvements were not "unequivocally referable" to documents purported to be the lease. Also, the part performance must be completed by the party insisting on performance.)

FMS Mgmt. Sys. v. Rodriguez, 2006 Bankr. LEXIS 65, *32-33 (M.D. Fla. Jan. 17, 2006) (taking possession according to a lease removes that lease from the statute of frauds).

Rentz v. Grant, 934 So. 2d 368, 2006 Ala. LEXIS 10, *12-14 (released Jan. 13, 2006) (In order to save a contract using part performance, part of all of the purchase price must be paid and possession must have been taken. Payment may consist of anything of monetary value or improvements constructed pursuant to a contract of sale. Possession will not be found if there is any other explanation for the possession than an alleged contract) (this case was dealing with a sale, but its rules were interesting).

Brown v. Brown, 2005 Ohio 1838, 2005 Ohio App. LEXIS 1757 (Apr. 14, 2005) (part performance allowed to validate a life estate in property).

Mukai Living Trust v. Lopez, 111 P.3d 1150, 1152 (Or. Ct. App. 2005) (denying part performance excusal of non-compliance with the statute of frauds).

Nacoochee Corp. v. Suwanee Inv. Partners, LLC, 620 S.E.2d 641, 644 (Ga. Ct. App. 2005) (talking about case in which possession and rental payments were not enough to validate the lease under the statute of frauds when the duration of the lease term was absent from the agreement) (discussing *Norris v. Downtown LaGrange Dev. Auth., 259 S.E.2d 729 (Ga. Ct. App. 1979))* .

Rosenberg v. Ridge St. Partners, LLC, 801 N.Y.S.2d 781 (N.Y. App. Term 2005) (Money payments are not enough to establish part performance; there must be another action such as improving the property or taking possession.).

Radvansky v. City of Olmsted Falls, 395 F.3d 291, 296 n.1 (6th Cir. 2005) ("partial performance will not take a parol agreement out of the Statute of Frauds without a showing of detrimental reliance by the party arguing partial perfomance, or an unconscionable advantage obtained by the party raising the statute") (quoting *Manifold v. Schuster, 586 N.E.2d 1142, 1144-1145 (Ohio Ct. App. 1990))* .

Add:

Portsmouth Redevelopment & Hous. Auth. v. Ison, 66 Va. Cir. 336, 358, 2005 Va. Cir. LEXIS 39, *50 (Jan. 18, 2005) (reasonable reliance and continued improvements because of an oral amendment to a written agreement will squash a statute of frauds claim).

Correct:

Wing v. Munns was not reversed by the second Wing v. Munns case, it was affirmed by it.

Add:

Kanistros v. Holeman, (Feb. 18, 2005), 2005 Ohio 660 (using estoppel to award a landlord the security deposit pursuant to an oral lease).

Merci Corp. v. World Int'l. Corp., 2005 N. Mar. I. LEXIS 8, 2005 MP 10 , P 31 (June 27, 2005) (in order for promise to qualify for promissory estoppel, the promise must be "clear and definite")

Smith v. Smith, 2005 Tenn. App. LEXIS 733, *14-28 (filed Nov. 22, 2005) (discussing equitable estoppel as it relates to the statute of frauds in land sale agreements).

Massaro Ltd. P'ship (Park West Two) v. Baker & Taylor Inc., 2005 U.S. App. LEXIS 27993, *6 (3d Cir. Dec. 15, 2005) (even if a party "reasonably and foreseeably relies" relies on a promise, whether the promise is enforceable depends on "the reasonableness of the promisee's reliance, on its definite and substantial character in relation to the remedy sought, on the formality with which the promise is made, on the extent to which the evidentiary, cautionary, deterrent and channeling functions of form are met by the commercial setting or otherwise, and on the extent to which such other policies as the enforcement of bargains and the prevention of unjust enrichment are relevant.") (quoting Restatement (Second) of Contracts § 90 cmt. b (1981)).

Meshbesher & Spence, Ltd. v. Sprint Spectrum, L.P., 2005 U.S. Dist. LEXIS 13565 , PP 2-8 (D. Minn. July 6, 2005).

Odens Family Props., LLC v. Twin Cities Stores, Inc., 393 F. Supp. 2d 824, 829 (D. Minn. 2005) ("[P]romissory estoppel can not be used to alter the terms of a contract that has been reduced to writing.")

Nakada v. De la Floor, 2005 Cal. Unpub. LEXIS 5346, *17 (Cal. Ct. App. 2005) ("Tenants' abandonment of further negotiations to obtain a suitable property was reasonable detrimental reliance.")

Cape Oil Delivery, Inc. v. Hayes, 2005 Mass. Super LEXIS 671, *37 (Dec. 14, 2005) ("material reliance" and the absence of a "binding contract" are required to apply estoppel).

Mukai Living Trust v. Lopez, 111 P.3d 1150, 1154 (Or. Ct. App. 2005) ("[D]octrine of part performance subsumes doctrine of equitable estoppel ...") (citing *Luckey v. Deatsman, 343 P.2d 723, 725 (Or. 1959))* .

Zheng v. Bradley Operating L.P., 2006 Wisc. App. LEXIS 157, *6 (Feb. 16, 2006) ("If, as here, a contract covers all the material elements of a party's relationship, the remedy of estoppel is not available.")

Robert A. Brazener, Annotation, Coment Note.-- Promissory Estoppel as Basis for Avoidance of Statute of Frauds, *56 A.L.R.3d 1037 (2005)* .

Add:

30 *Carmine LLC v. Depierro, 791 N.Y.S.2d 383, 390 (N.Y. Civ. Ct. 2005)* (court will enforce a lease that otherwise does not comply with the statute of frauds in order to prevent injustice or to prevent fraud from being committed on one of the contracting parties).

§ 39.06(a)(7) Fully Enforceable Leases

Add:

Nacoochee Corp. v. Suwanee Inv. Partners, LLC, 620 S.E.2d 641, 643 (Ga. Ct. App. 2005) (essential term of a lease is a description of the property).

Renouf v. Heller, 2005 Mich. App. LEXIS 1698, *4 (July 14, 2005) (price is an essential term of a lease).

In re Goldstein (In re Will of Diamondstein), 800 N.Y.S.2d 346, *3 (Surr. Ct. N.Y. 2005) (duration of a lease is an essential term).

Slue v. New York Univ. Med. Ctr., 409 F. Supp. 2d 349, *27 (S.D.N.Y. 2006) ("Nevertheless, certain essential factors must be present in the agreement to establish an oral lease under New York law, including the 'area to be leased, the duration of the lease, and the price to be paid.' ") (quoting *Davis v. Dinkins, 613 N.Y.S.2d 933, 935 (1994))* .

NIPCMUC Props., LLC v. PDC-El Paso Meriden, LLC, 2005 Conn. Super. LEXIS 2094 *11 n. 12 (Aug. 11, 2005) (listing statutory elements of writing).

Clover Belt Farms v. Rademacher, 699 N.W.2d 253, *7 (Wisc. Ct. App. 2005) (valid elements for a lease under Wisconsin law include description of the property, signatures of all parties, and rent obligation) (citing Ariz. Rev. Stat. Ann. § 33-1372 (2005)).

Meshbesher & Spence, Ltd. v. Sprint Spectrum, L.P., 2005 U.S. Dist. LEXIS 13565, *13 (D. Minn. 2005) (when the agreement is to commence is a material term) (dictum).

Add:

FMS Mgmt. Sys. v. Rodriguez (In re Ranch House Motor Inn Int'l. Inc.), 2006 Bankr. LEXIS 65, *26-27 (Bankr. M.D. Fla. Jan. 17, 2006) ("Parol evidence is admissible to determine the description of a piece of property 'so long as the instrument itself shows that the parties were contemplating a particular piece of property--rather than an unspecified piece of property or alternative descriptions or property to be obtained later.' ") (quoting *Bajrangi v. Magnethel Enterprises, Inc., 589 So. 2d 416, 419 (Fla. 5th DCA 1991))* .

after the sentence "General rules of construction apply to leases."

Add new footnote 138.1:

Kuehl Farms v. Barth, 2006 Minn. App. Unpub. LEXIS 16, *3-4 (Filed Jan. 3, 2006) (applying contract construction to a lease).

after the sentence "The necessary description of the property may be ascertained by the physical acts of the tenant in asserting possessory rights in the leased property."

Add new footnote 139.1:

FMS Mgmt. Sys. v. Rodriguez (In re Ranch House Motor Inn Int'l. Inc.), 2006 Bankr. LEXIS 65, *26-27 (Bankr. M.D. Fla. Jan. 17, 2006) ("Parol evidence is admissible to determine the description of a piece of property 'so long as the instrument itself shows that the parties were contemplating a particular piece of property--rather than an unspecified piece of property or alternative descriptions or property to be obtained later.' ") (quoting *Bajrangi v. Magnethel Enterprises, Inc., 589 So. 2d 416, 419 (Fla. 5th DCA 1991))* .

Adams v. Adams, 2006 Alas. LEXIS 30, (Feb. 24, 2006) *10-15 (allowing reformation of a property description contained in a lease as that description pertained to an option to purchase included in the lease).

Nacoochee Corp. v. Suwanee Inv. Partners, LLC, 620 S.E.2d 641, 643 (Ga. Ct. App. 2005) (To avoid running afoul of the statute of frauds, "a lease agreement must describe the property to be leased with sufficient clarity and definiteness to disclose the lessor's intentions and permit identification of the property.").

Add:

Nakada v. De la Flor, 2005 Cal. App. Unpub. LEXIS 5346, *24-25 (Cal. Ct. App. Filed June 21, 2005) (actual agreed rental will take precedence over expert opinion as to fair rental value).

Bombora House, Inc. v. Dufour Pastry Kitchens, Inc., 805 N.Y.S.2d 218 (N.Y. App. Term 2005) (term providing for rent to be determined at "fair market value as reasonably determined by the Landlord" was sufficiently definite).

Add:

But see GRB Farm v. Christman Ranch, Inc., 108 P.3d 507, 510 (Mont. 2005) (if no "clear and definite mode for determining the amount of payment" is absent, the "essential terms in the lease agreement were not enforceable.") (citing *Riis v. Day, 613 P.2d 696, 698 (Mont. 1980)*).

Kiehm v. Adams, 126 P.3d 339, *10 n. 5 (Haw. 2005) (Hawaii law provides that if no duration is specified, then the tenancy is month to month) (quoting *H.R.S. § 521-22* (1993)).

Add:

C.R.S. 4-2.5-201 (2005).

N.J. Stat. Ann. §§ 46:8-19 to 46:8-26 (2005).

after the sentence "Thus, as previously mentioned, in the case of a ninvalid temr for years, for failure to meet the requirements of the Statute of Frauds, the court may determine that the parties nonetheless have a periodic tenancy."

Add new footnote 144.1:

Clover Belt Farms v. Rademacher, 699 N.W.2d 253, *7 (Wis. Ct. App. 2005) (a person without a lease becomes a periodic tenant under Wisconsin law).

Radvansky v. City of Olmsted Falls, 395 F.3d 291, 297 n. 1 (6th Cir. 2005) (A tenant that takes possession under an invalid lease is only a tenant at will. At the point that he pays rent and the rent is accepted, the tenancy becomes a periodic tenancy).

after the sentence "The parties may also be subject to a continuing lease relationship in the holdover situation."

Add new footnote 144.2:

Roth v. Dillavou, 835 N.E.2d 425, 430 (Ill. App. Ct. 2005) ("Even when a holdover tenancy is not created, the parties' conduct may create a month-to-month tenancy.").

Correct:

Mont. Code. Ann. § 70-26-204 (2005) (this states that it should be on the same terms and the same time, but it also states that if the rent is payable monthly that the holdover should not exceed one month, and in total, not more than one year).

Add:

N.C. Gen. Stat. § 42 (2006) (month to month tenancy not to exceed one year).

Add:

; *Cal. Civ. Code § 1945* (2006).

25 Del. C. § 5108 (2005).

Wis. Stat. § 704.25 (2005).

Correct:

N.J. Stat. Ann. § 46:8-10

§ 39.06(b) Termination. Ga. Code Ann. § 44

after the sentence "Termination also arises in statutes dealing with abandonment, surrender, mitigation of damages, retaliatory eviction, and the holdover tenant."

Add new footnote 150.1:

Cal. Civ. Code § 1951.2 (2006) (tenant abandoning the premises terminates the lease; this statute lists the landlord's

remedies).

Sarah Clinton, Note: Evicting the Innocent: Can the Innocent Tenant Defense Survive a Rucker Preemption Challenge? *85 B.U.L. Rev. 293, 296- 297 (2005)* (discussing eviction in public housing).

Terrence M. Gilbride, 2003-2004 Survey of New York Law: Real Property Law, *55 Syracuse L. Rev. 1293 (2005).*

Add:

Scarborough v. Winn Residential L.L.P./Atlantic Terrace Apts, 890 A.2d 249, *27 (D.C. 2006) (Under case law, a landlord is not required to "weigh additional considerations opposing and favoring eviction before pursuing lease termination" in cases where there has been criminal activity).

Add:

West Side Ltd. P'ship. v. W.B.Y. Ventures, L.L.C., 2005 N.C. App. LEXIS 1470 (filed Aug. 2, 2005) (lease provision could eliminate the need for notice of termination of possession upon default).

Crabtree Ave. Inv. Group, LLC v. Steak & Ale of N.C., Inc., 611 S.E.2d 442 (N.C. App. 2005) (where a lease did not require any notice of termination, plaintiff could effectively terminate the lease without notice following defendant's failure to pay rent within 10 days of written demand for rent past due).

§ 39.06(b)(1) Termination of the various Forms of Tenancy.

after the sentence "Unless the tenancy has terminated earlier, the tenancy ends automatically once the specified date arrives."

Add new footnote 154.1:

Crawford Square Cmty. v. Turner (In re Turner), 326 B.R. 563, 575 (W.D. Pa. 2005) (comparing the difference between "expiration' of a lease with 'termination' of a lease").[155]

Add:

Olmstead v. Nodland, 828 N.E.2d 338, 340-341 (Ill. App. Ct. 2005) ("At common law ... upon the death of the life

tenant, the lessee became a tenant by sufferance or at will." Although a statute would allow for continuation of a current lease term to finish (or continue longer if provided by the parties to the lease) if the landlord holding a life estate died, the provision in the lease did not allow for a longer continuation of the lease) (citing *Craig v. Launer, 104 N.E.2d 830 (Ill. App. Ct. 1952))* .

Balboa Bay Club, Inc. v. Howard, 2005 Cal. Unpub. LEXIS 3271 (filed Apr. 11, 2005) ("Although the death of a tenant automatically terminates a tenancy at will or at sufferance, it does not under ordinary circumstances terminate a tenancy for a fixed term.")

Add:

But see USA Independence Mobile Home Sales, Inc. v. City of Lake City, 908 So. 2d 1151, 1155 (Fla. Dist. Ct. App. 2005) ("[A] partial taking of a leasehold estate under the power of eminent domain does not constitute an eviction of the lessee and he remains bound to perform the obligations assumed by him under the terms and provisions of the lease.") (quoting *Orange State Oil Co. v. Jacksonville Expressway Auth., 143 So. 2d 892, 894 (Fla. Dist. Ct. App. 1962))* .

Singh v. BP Prods. N. Am. Inc., 2006 U.S. Dist. LEXIS 3778, *7-13 (N.D. Ill. Jan. 31, 2006) .

Zoeller v. United States, 65 Fed. Cl. 449, 460-462 (2005) (eminent domain under a contract in which the government is the lessor is governed by breach of contract principles, not a taking).

Redevelopment Agency of San Diego v. Attisha, *27 Cal. Rptr. 3d 126, 133 (Cal. Ct. App. 2005)* ("Where all the property subject to a lease is acquired for public use, the lease terminates.") (quoting *Cal. Code Civ. Proc. § 1265.110* n. 2 (2006)).

after the sentence "The tenant may be entitled to share in the compensation received because of the taking."

Add new footnote 156.1:

In re Condemnation by the DOT, 871 A.2d 896, 900 n. 3 (Pa. Commw. Ct. 2005) (stating that where a complete taking has occurred, lessee can recover the difference between the "fair rental value of the leased premises and the rent actually reserved in the lease ... projected over the remaining term of the lease and discounted to present worth" but cannot recover future income.)

Santa Fe Trail Neighborhood Redevelopment Corp. v. W.F. Coen & Co., 154 S.W.3d 432, 444-448 (W.D. Mo. 2005) .

Redevelopment Agency of San Diego v. Attisha, *27 Cal. Rptr. 3d 126, 133-134 (Cal. Ct. App. 2005)* .

Houlihan Rests., Inc. v. APAC-Florida, Inc., 911 So. 2d 816, 819 (2005) (if the terms of the lease provide, tenant's share in interest can include the value of a sublease by the tenant).

Sunshine Props. L.L.C. v. State DOT, 900 So. 2d 714 (2005) .

Blood v. Hartland Township, 2005 Ohio 3860, 2005 Ohio App. LEXIS 3553 , P 23 (July 29, 2005) ("It is well-settled law that a lessee has standing to pursue a takings claim where the leasehold interest was appropriated, and the lessee may assert claims for damages and receive compensation for resulting losses.").

Eller Media Co. v. Miss. Transp. Comm'n., 900 So. 2d 1156 (Miss. 2005) .

Add:

In re Haskell L.P., 321 B.R. 1, 7 (Bankr. D. Mass. 2005) ("In the case of a Debtor/lessor's rejection of a lease, however, the power is limited and. (sic) tenants are given two options: either treat the lease as terminated and make a claim for damages, or continue in possession and pay rent.")

Jetz Laundry Sys. v. Wingates, LLC, 2005 U.S. Dist. LEXIS 11301, *6 (Bankr. S.D. Ohio June 10, 2005) ("With respect to an executory lease of real property, the Bankruptcy Code limits the power of rejection 'so as to preclude eviction of the lessee.' ") (quoting *Precision Industries, Inc. v. Qualitech Steel SBQ, LLC, 327 F.3d 537, 546 (7th Cir. 2003))* .

In re Smith, 2005 Bankr. LEXIS 2389, *7 (C.D. Ill. Dec. 4, 2005) ("[T]he automatic stay does not apply to 'any act by a lessor to the debtor under a lease of nonresidential real property that has terminated by the expiration of the stated term of the lease before the commencement of or during a case under this title to obtain possession of such property.' ") (quoting Conn. Gen. Stat. Ann. § 47a-21(d)(2)).

But see 8648 KBLA, LLC v. Cross, 2005 Cal. Unpub. LEXIS 9037, *33 (filed Oct. 3, 2005) ("some courts have held that rejection of an unexpired lease by the bankruptcy trustee does not terminate the lease") (citing McLaughlin v. Walnut Properties, Inc., *14 Cal. Rptr. 3d 369, 374-376 (Cal. Ct. App. 2004)* .

Add:

McAdam v. Lorden, 2005 U.S. Dist. LEXIS 21900, *10 (D.N.H. Sep. 26, 2005) ("State law provides that the purchaser at a mortgage foreclosure sale may recover possession from an occupant through a possessory action after providing notice in writing to quit the premises.") (citing *RSA § 540:12* (1997)).

12 U.S.C. § 3713 (2006) (gives tenants of qualified multifamily dwellings may retain possession for the remainder of their lease or one year, whichever is less).

Medford II, LLC v. Scope Int'l. Inc., 808 N.Y.S.2d 918, *3 (D.N.Y. Suffolk 2005) ("It is well established that a tenant is a necessary party to a foreclosure action and the failure to name a tenant in possession pursuant to a lease which is subordinate to the mortgage in the foreclosure action leaves the tenant's rights unaffected by the judgment and sale.")

Rockaway Improvement, LLC v. Danco Transmission Corp., 801 N.Y.S.2d 138, 141 (N.Y. Civ. Ct. 2005) .

Danzy v. Nia Abstract Corp., 7 Misc.3d 1025A (N.Y. Sup. Ct. May 12, 2005) .

Potter v. Mullen, 2005 Tex. App. LEXIS 4304, *3-4 (filed Jun. 3, 2005) (forcible detainer action allowed against defendant that refuses to relinquish possession after demand and proper notice and is, inter alia, "a tenant at will or by sufferance, including an occupant at the time of foreclosure of a lien superior to the tenant's lease").

Page 603 after the sentence "Termination by either party requires giving proper notice to the other party."

Add new footnote 158.1:

Gulf Coast Realt Co. v. Prof'l Real Estate Partners, Inc., 2005 Ala. LEXIS 123, *37 (Aug. 12, 2005) ("A landlord-tenant relationship may be created to endure until one of the parties has given the required notice to terminate the tenancy at the end of a period.") (quoting Restatement (Second) of Property: Landlord and Tenant § 1.5 (1977)).

Mabe v. Montague, 2005 N.C. App. LEXIS 1218, *7 (filed Jul. 5, 2005) ("one month is sufficient notice to terminate the agreement for this year to year periodic tenancy.")

Ohio Rev. Code Ann. § 5321.17 (2006) (as cited in *Barran v. Kinas, 2005 Ohio 2002, 2005 Ohio App. LEXIS 1906* , P 14 (Apr. 28, 2005)).

Rev. Code Wash. § 59.04.020 (2005) (as cited in *Spraybary v. Mallinson, 2005 Wash. App. LEXIS 2416,* *7 (Sep. 15, 2005)) .

Vander Wielen v. Van Asten, 706 N.W.2d 123, (Wis. Ct. App. 2005) (If any periodic tenant vacates the premises without notice to the landlord and fails to pay rent when due for any period, such tenancy is terminated as of the first date on which it would have terminated had the landlord been given proper notice on the day the landlord learns of the removal.) (quoting *Wis. Stat. § 704.19 (6)* (2005)).

Clover Belt Farms v. Rademacher, 699 N.W. 2d 253 (Wis. Ct. App. 2005)

Wis. Stat. § 704.19 (2005).

But see Comcast of Cal. I, Inc. v. City of Walnut Creek, 371 F. Supp. 2d 1147, 1155 (N.D. Cal. 2005) (either side may terminate a holdover tenancy at will).

200 *W. 58th St., LLC v. Little Egypt Corp., 7 Misc.3d 1017A, 1017A* (N.Y. Civ. Ct. Feb. 10, 2005) ("The right to terminate a tenancy is conditioned on a fully valid predicate notice.")

Add:

Cecil v. Viacom Outdoor Group, Inc., 2005 U.S. Dist. LEXIS 19361, *9 (E.D. Mich. Sep. 8, 2005) (tenancy at will "may be terminated at the discretion of either party.").

Code of Ala. § 35-9-3 (2005) (as quoted in *Gulf Coast Realty Co. v. Prof'l. Real Estate Partners, Inc., 2005 Ala. LEXIS 123,* *36-37 (Aug. 12, 2005)) (termination of tenancy at will is by notice).

AGI v. Leonhardt, 2005 Cal. App. Unpub. LEXIS 7975, *19 (filed Sep. 1, 2005) (either party may terminate a tenancy at will at their will).

Balboa Bay Club, Inc. v. Howard, 2005 Cal. Unpub. LEXIS 3271 (filed Apr. 11, 2005) ("Although the death of a tenant automatically terminates a tenancy at will or at sufferance, it does not under ordinary circumstances terminate a tenancy for a fixed term.")

Olmstead v. Nodland, 828 N.E.2d 338, 340 (Ill. App. Ct. 2005) ("Tenancies at will or by sufferance are terminated by a proper demand for possession.").

Mulholland v. Poole, 866 A.2d 122, 124 (Me. 2005) (citing statute that requires notice before termination of tenancy at will).

Kosa v. Legg, 2006 N.Y. Misc. LEXIS 296, *28, *2006 N.Y. Slip Op. 26061,* *9 (N.Y. Sup. Ct. Feb. 10 2006) (may terminate a tenancy at will at any time).

Clover Belt Farms v. Rademacher, 699 N.W. 2d 253, *4 (Wis. Ct. App. 2005) (citing *Wis. Stat. § 704.19* (2005) and its provisions for terminating tenancies at will).

*RPC Props. v. Olson, 2005 Minn. App. Unpub. LEXIS 121 , ** (Aug. 2, 2005) (citing *Minn. Stat. § 504B.135* (2005) requiring notice to terminate a tenancy at will).

§ 39.06(b)(2) Landlord Remedies

Add:

Lu v. Grewal, *30 Cal. Rptr. 3d 623, 627 (Cal. Ct. App. 2005)* ("Under the common law in effect prior to the enactment, the breach of the lease, if treated as a termination, ended the lessee's obligation to pay rent, forcing a lessor to abandon its claim. If the lessor opted not to terminate, the choices were also limited: sue on each monthly rental payment as it came due; or re-lease for the benefit of the tenant.") (citing Landlord-Tenant Legislation: Revising an Old Common Law Relationship" *2 Pacific L.J. 259, 261-263 (1971)).*

Jet 1 Ctr., Inc. v. City of Naples Airport Auth. (*In re Jet 1 Ctr., Inc., 335 B.R. 771,* *28-29 (Bankr. M.D. Fla. Aug. 26, 2005) (listing three different remedies for a commercial lessor to pursue in event of breach by the lessee and requirements for a lease to be terminated pre-petition).

After the sentence "The landlord may seek damages or an injunction as an alternative remedy available because of a tenant's breach." add new footnote 161.1:

Often, the statutory remedies are held to be exclusive and the landlord cannot resort to remedies that are not prescribed in the statute. See *Connolly v. Powell, 118 P.3d 1232, 1235 (Idaho Ct. App. 2005)* ; Sarete, Inc. v. 1344 U. St. Ltd. P'shp., 871 A.2d 480, 489-490 (D.C. 2005) .

after the sentence "If the lease is terminated, the landlord becomes eligible to reclaim possession of the property."

Add new footnote 161.2:

In re WD Ins. Servs., 2005 Bankr. LEXIS 567, *11 (Bankr. E.D. Va. Feb. 28, 2005) ("at common law a landlord's election to reenter and terminate the lease based on the tenant's default entitled the landlord to recover only for the rent then due.")

But see Swinson v. Coates & Lane, Inc., 2005 U.S. App. LEXIS 9048, *3 (D.C. App. Mar. 18, 2005) (landlord could not retake possession of the premises because there was no provision in the lease agreement allowing for that; instead, the landlord had to settle for breach of contract damages).

after the sentence "At the same time, the landlord may seek damages occasioned by the tenant's breach of the lease."

Add new footnote 161.3:

Lu v. Grewal, *30 Cal. Rptr. 3d 623, 627 (Cal. Ct. App. 2005)* (California statute changed the common law in treated abandonment as "de facto termination of the lease," which changed the landlord's "continuing right to rent under the lease into a damage claim for rent lost through the tenant's abandonment.")

M.J. Realty Trust II v. Dinnocenzo, 2005 Mass. App. Div. 35, 38, 2005 Mass. App. Div. LEXIS 1 *10 (Mar. 17, 2005) (absent a lease provision to the contrary, upon a "termination of the lease ... any claim ... for rent thereafter accruing according to the terms of the lease [is] barred.") (parenthetical, alterations in original) (quoting *Locke v. Fahey, 288 Mass. 341, 344, 193 N.E. 26 (1934))* .

Nick & Duke LLC v. John Hollings, Inc., 2006 N.Y. Slip. Op. 50372U, *6 (N.Y. Civ. Ct. Jan. 4, 2006) ("impossibility of

performance by one of the parties to a lease may constitute a defense to an action based on breach of the lease") (citing 74 NY Jur 2d, Landlord and Tenant § 109 (2006)).

after the sentence "The landlord may not have given sufficient advance notice of a breach determined to have been readily curable."

Add new footnote 161.4:

Conn. Gen. Stat. § 47a-15 (2004)

after the sentence "Nonpayment of rent is most often the basis for a landlord's right to terminate the tenancy."

Add new footnote 161.5:

Crawford Square Cmty. v. Turner (In re Turner), 326 B.R. 563, 574 (W.D. Pa. 2005) .

McKee Realty, LLP v. Futons Plus III, LLC, 2006 Conn. Super. LEXIS 91, *12-13 (Jan. 9, 2006) ("commercial summary process action based on nonpayment of rent, the Landlord must prove all the elements of the case by a fair preponderance of the evidence. The essential elements are: (1) On or about a certain date, the landlord and the tenant entered into an oral or written, lease/rental agreement for a weekly/monthly/yearly term for use and occupancy of a certain premises; (2) The tenant agreed to pay an agreed-upon rent by a certain date; (3) The tenant took possession of the premises pursuant to the lease; (4) The tenant failed to pay the rent due under the lease by a certain date; (5) The landlord caused a proper Notice to Quit Possession to be served on the tenant to vacate the premises on or before a certain termination date; and (6) Although the time given in the Notice to Quit Possession of the premises has passed, the tenant still continues in possession of the premises. Failure of the landlord to establish any of the necessary elements, by a fair preponderance of the evidence, results in judgment for the tenant.").

Matte v. Shippee Auto, Inc., 876 A.2d 167 (N.H. 2005) .

PWV Acquisition, LLC v. Maddox, 801 N.Y.S.2d 781, 781 (2005) (per curiam) ("A history of repeated nonpayment proceedings brought to collect chronically late rental payments supports an eviction proceeding on the ground that the

tenant has violated a 'substantial obligation' of the tenancy[.]") (quoting *Adam's Tower Ltd. Partnership v. Richter, 186 Misc. 2d 620, 621, 717 N.Y.S.2d 825, 826 (N.Y. App. Term 2000))* .

Add:

Southway Corp. v. Metro. Realty & Dev. Co., LLC, 2005 Ark. App. LEXIS 284 (Apr. 6, 2005) (late rent was a material breach of the contract).

Amber Resources Co. v. U.S., 78 Fed. Cl. 508 (2007) (restitution damages calculated upon anticipatory repudiation).

§ 39.06(b)(2) Landlord Remedies.

Add:

Gallogly v. Kurrus, 2005 Conn. Super. LEXIS 1286, *29 (May 16, 2005) ("it has long been 'the common method in drafting leases ... to gather some or all of the covenants, by reference, into a condition subsequent, an agreement by the parties, that a breach by the tenant of any or all of the covenants on his part shall give the landlord the right to terminate the tenancy by means and in a manner usually indicated.' ") (quoting *Robinson v. Weitz, 370 A.2d 1066, 1069 (Conn. 1976))* .

Conn. Gen. Stat. § 4-15 (2004).

DiBella v. Fiumara, 63 Mass. App. Ct. 640, 644, 2005 Mass. App. LEXIS 522, *7 (June 2, 2005) ("a landlord may only terminate a lease if the tenant commits a material breach, defined in our cases as a breach of an 'essential and inducing feature of the contract[].' " (alterations in original) (quoting *Bucholz v. Green Bros. Co., 272 Mass. 49, 52, 172 N.E. 101, 102 (1930))* .

Healthsouth Corp. v. HRES1 Props. Trust, 2005 Mass. Super. LEXIS 482 (Sep. 25, 2005) .

Alonzo v. Perichon, 2006 N.Y. Misc. LEXIS 282, *2 (N.Y. Sup. Ct. Feb. 22, 2006) (landlord is entitled to possession if tenant creates a nuisance, even if the tenant remedies part of the nuisance after the evidence closed).

CHI-AM Realty, Inc. v. Guddahl, 794 N.Y.S.2d 778, 779 (N.Y. App. Term 2005) (five episodes of flooding in a year and a half was enough to constitute a nuisance).

After the sentence "Unless the state's statute provides for termination based on these failures of the tenant, the lease must specify that the tenant is subject to forfeiting its rights under the lease due to these prescribed acts or because of the tenant's failure to meet the conditions specified.", add new footnote 164.1:

Anastacio Ramirez v. Superior Court of Ventura County, 2005 Cal. Unpub. LEXIS 9573, (filed Oct. 20, 2005)

("Language creating forfeiture must be "so clear as to leave no doubt that the grantor intended that an estate upon condition subsequent should be created.") (quoting *Hawley v. Kafitz, 83 P. 248, 249 (Cal. 1905))* .

Jenkins v. Eckerd Corp., 913 So. 2d 43, 54 (Fla. Dist. Ct. App. 2005) ("while forfeitures are not favored under Florida law, the law allows for parties to make contracts that will result in forfeiture 'and when it is clear from the terms of the contract that the parties have so agreed, a court of law as well as the court of equity, will enforce the forfeiture.' ") (quoting *Nelson v. Hansard, 143 Fla. 898, 899-900, 197 So. 513, 514 (1940))* .

Henry & Baltic Assoc. v. K & Q Food Corp., 796 N.Y.S.2d 837, 838 (N.Y. Sup. Ct. 2005) ("Language in written instruments that work a forfeiture must be strictly construed.")

Add:

200 *W. 58th St., LLC v. Little Egypt Corp., 7 Misc. 3d 1017A, 1017A* (N.Y. Civ. Ct. Feb. 10, 2005) ("The right to terminate a tenancy is conditioned on a fully valid predicate notice.")

Matter of Lee v. Ho-Park, 16 A.D.3d 986, 793 N.Y.S.2d 214 (N.Y. App. Div. 2005) (landlord could not prove that operators had abandoned possession, nor did the landlord give notice of default or a demand for rent; therefore, the operators could retain possession).

Add:

250 L.L.C. v. PhotoPoint Corp., *32 Cal. Rptr. 3d 296, 301 (Cal. Ct. App. 2005)* (security deposit can only offset rent currently due) (quoting St. James, Landlord Beware: Will a Security Deposit Survive a Bankruptcy? 26 Cal. Bankr. J. 44, 47 (2001))

Kan. Stat. Ann. § 58-2550 (Page 2006).

Ariz. Rev. Stat. Ann. § 33-1321(A) (Deering 2006).

Turner v. 1212 S. Mich. P'ship., 823 N.E.2d 1062, 1072 (Ill. App. Ct. 2005) .

Durf v. Molter, 839 N.E.2d 1208, 1210-1211 (Ind. Ct. App. 2005) (landlord must provide notice before keeping the security deposit).

Bacon v. Atlas Home Corp., 2005 Ohio 6979 , PP 9-10, 2005 Ohio App. LEXIS 6324, *7-9 (Dec. 30, 2005) (landlord liable for double damages for failing to itemize deductions from security deposit).

Budler v. Empire Mgmt. Group, 2005 Ohio 2144 (Ohio App. 2005) (because the landlord released tenants from the lease and re-leased the premises, the tenants were not further liable for rent, and while the landlord itemized deductions from the security deposit, the remaining amount was improperly withheld).

§ 39.06(b)(3) Tenant Remedies

Add:

Simpson v. Young, 2005 N.H. LEXIS 184, * 1-10 (Dec. 29, 2005) (awarding statutory damages to tenant for actions of landlord in preventing the tenant from entering the premises).

Eastside Exihibition Corp. v. 210 E. 86th St. Corp., 801 N.Y.S.2d 568, 571 (N.Y. App. Div. 2005) ("a more proportionate remedy than a total abatement of the rent may be fashioned for the compensation of a tenant who has been partially evicted") (citing *Paine & Chriscott v. Blair House Associates, 417 N.Y.S.2d 68,* *69 (N.Y. App. Div. 1979)) .

Lebrun v. Cal-Am Props., 106 P.3d 647, 651 (Or. Ct. App. 2005) (Regardless of whether tenants seek injunctive relief or termination of the lease, they are able to seek damages.) (citing Testimony, House Judiciary Committee, HB 2628, Apr 2, 1985, Ex E (statement of Michael H. Marcus)).

Masjid Usman, Inc v. Beech, LLC, 892 N.Y.S.2d 430 (2009) (upholding a preliminary injunction enjoining defendants from interfering with plaintiff's leasehold interest during pendency of action).

Correct:

Law v. Franco was not affirmed by *Committed Commmunity Assocs. v. Croswell, but Committed Community Assocs. v. Croswell (659 N.Y.S.2d 691*) was.

Add:

In re Tiny's Cafe, Inc., 322 B.R. 224, 228-229 (Bankr. D. Mass. 2005) .

Add:

605 Park Garage Assocs. LLC v. 605 Apt. Corp., 2004 U.S. Dist. LEXIS 13023 (D.N.Y. 2004) *affirmed by* 605 Park Garage Assocs. LLC v. 605 Apt. Corp., 412 F.3d 304 (2d Cir. 2005) ((because new provisions created a new lease, the notice of termination was void).

§ 39.06(b)(4) Abandonment, Surrender and Mitigation of Damages.

after the sentence "The clearest surrender is a written document signed by the parties agreeing that the lease should terminate on a specified date."

Add new footnote 170.1:

Kiehm v. Adams, 126 P.3d 339, *56 (Haw. 2005) (Under state law, "no requirement of advance notice attaches to the ending of a lease by 'mutual agreement.' ") (citing *Haw. Rev. Stat. Ann. § 52-71* (Michie 2005)).

after the sentence "Because a surrender involves the transfer of a property interest the Statute of Frauds applies, and a writing is necessary unless the surrender is implied form the actions of the parties."

Add new footnote 170.2:

Graybeal-Miller v. Graybeal, 2005 ML 561, *34, *2005 Mont. Dist. LEXIS 734,* *11 (Jan. 11, 2005) ("An agreement to terminate [a lease] need not be express, but may be implied from the conduct and language of the parties, and a written lease, including one under seal, may be terminated by a parol agreement, provided such agreement is supported by a valuable consideration, and the surrender of the premises may provide such consideration." *quoting Rodgers v. Saunders, (1964) 396 P.2d 817, 818 (Mont. 1964)* .

Add:

Aris Vision Inst., Inc. v. Wasatch Prop. Mgmt., Inc., 121 P.3d 24, 28-29 (Utah Ct. App. 2005) .

Lu v. Grewal, *30 Cal. Rptr. 3d 623, 627 (Cal. Ct. App. 2005)* (California statute changed the common law in treated abandonment as "de facto termination of the lease," which changed the landlord's "continuing right to rent under the lease into a damage claim for rent lost through the tenant's abandonment.")

United States v. Stevenson, 396 F.3d 538, 547 (4th Cir. 2005) ("At common law, 'if ... the tenant forfeits his lease or entirely abandons the premises, then the right to the possession reverts to the landlord and he may lawfully enter.' ")(alterations in original)(quoting *Chancey v. Smith, 25 W. Va. 404, 407 (1885))* .

Add:

Cal. Civ. Code § 1951.2 (2006) (tenant abandoning the premises terminates the lease; this statute lists the landlord's remedies).

Highlands Ranch Univ. Park v. Uno of Highlands Ranch, Inc., 2005 Colo. App. LEXIS 109 (Colo. App. 2005) cert. dismissed Highlands Ranch Univ. Park, LLC v. Uno of Highlands Ranch, Inc., 2005 Colo. LEXIS 335 (Mar. 30, 2005) (where the tenant unequivocally repudiated the lease agreement, he was not liable for extra costs incurred by the landlord who built a larger building than had been agreed to in the original lease).

Add:

JJ&C Realty v. Crooks, 2005 Conn. Super. LEXIS 102, *11 fn. 2 (Jan. 11, 2005) (pursuant to a state statute, if a landlord does not mitigate damages after a tenant abandons the premises, the landlord is considered to have terminated the agreement "as of the date the landlord has notice of the abandonment.") (quoting *Conn. Gen. Stat. § 47a-11a* (2004)).

Christopher Vaeth, Annotation, Landlord's Duty, on Tenant's Failure to Occupy, or Abandonment of, Premises, to Mitigate Damages by Accepting or Procuring Another Tenant, *75 A.L.R. 5th 1 (2005)* .

Matter of Lee v. Ho-Park, 16 A.D.3d 986, 793 N.Y.S.2d 214 (N.Y. App. Div. 2005) (landlord could not prove that operators had abandoned possession, nor did the landlord give notice of default or a demand for rent); *De La Concha of Hartford, Inc. v. Aetna Life Ins. Co., 269 Conn. 424 (Conn. 2004)* (although a lessor pursued its own self-interest in limiting its losses in the operation of a mall, it did not do so because of a dishonest purpose, and thus, there was no violation of the implied covenant of good faith and fair dealing).

Knudsen v. Lax, 842 N.Y.S.2d 341 (2007) (an abandonment clause in the lease permitting the landlord to charge full rent for the balance of the lease term was held unconscionable).

Add:

Manglona v. Gov't of the Commonwealth of the N. Mariana Islands, 2005 MP 15 , PP 47-62, 2005 N. Mar. I. LEXIS 13, *36-55 (Oct. 4, 2005) (discussing extensively the landlord's duty to mitigate damages).

Add:

Manglona v. Gov't of the Commonwealth of the N. Mariana Islands, 2005 MP 15 , PP 47-62, 2005 N. Mar. I. LEXIS 13, *36-55 (Oct. 4, 2005) (discussing extensively the landlord's duty to mitigate damages).

§ 39.06(b)(5) Restrictions on Termination.

Add:

Green v. Boehrig, 2005 Cal. App. Unpub. LEXIS 11309, *19 (filed Dec. 7, 2005) ("Retaliatory eviction is ... an independent tort.")

Ligia Rus Card v. Park Newpot, Ltd., 2005 Cal. App. Unpub. LEXIS 7629, *5 (filed Aug. 24, 2005) (retaliatory eviction is a valid defense against an unlawful detainer action) (quoting *Barela v. Superior Court, 178 Cal. Rptr. 618, 620 (Cal. 1981))* .

Connolly v. Powell, 118 P.3d 1232, 1233-1234 (Idaho Ct. App. 2005) (Tenant raised defense of retaliatory eviction against unlawful detainer action. Tenant had complained about "electrical rate charges" and "late fees.")

Jablonski v. Casey, 835 N.E.2d 615, 620 (Mass. App. Ct. 2005) ("where ... eviction is based on nonpayment of rent, a finding of retaliation ill not normally lie.").

Zimbovsky v. Tokar, 2005 Mass. App. Div. 100, 1005 Mass. App. Div. LEXIS 36 (Sep. 7, 2005) (The receipt of any notice of termination of tenancy, except for nonpayment of rent ... within six months after the Tenant has ... made [a] report or complaint ... shall create a rebuttable presumption that such notice ... is a reprisal against the tenant for engaging in such activities. Such presumption shall be rebutted only by clear and convincing evidence that [the Landlord's] action was not a reprisal against the tenant and that [the Landlord] had sufficient independent justification for taking such action ... [emphasis supplied].) (alterations in original) (quoting *Mass Gen. Laws. ch. 186, § 18* (2005)).

Clover Belt Farms v. Rademacher, 699 N.W.2d 253, *11 (Wis. Ct. App. 2005) ("While a landlord may terminate a month-to-month tenancy for any legitimate reason, or for no reason at all, the landlord may not terminate a tenancy for an illegal purpose, such as for retaliation.") (citing *Dickhut v. Norton, 173 N.W.2d 297, 301-302 (Wis. 1970))* .

Add:

Scarborough v. Winn Residential L.L.P./Atlantic Terrace Apts., 890 A.2d 249, *21-22 (D.C. 2006) (landlord is not required to give tenant a second chance before eviction if crimin al activity has occurred).

Camco, Inc. v. Lowery, 839 N.E.2d 655, 670 (Ill. App. Ct. 2005) (even lease prohibiting the tenant to "engage or permit" drug related activity would allow for eviction of tenant if drug related criminal activity occurred on the premises without the tenant's knowledge).

N.Y. City Hous. Auth. v. Taylor, 800 N.Y.S.2d 351, *2 (N.Y. App. Term 2005) (pursuant to a statute allowing for eviction because of an "illegal trade or business," tenant must know or have reason to know about the illegal activity

and "acquiesced therein" before eviction will be allowed).

Pultz v. Economakis, 803 N.Y.S.2d 20 (N.Y. Sup. Ct. 2005) (discussing whether plans to turn a building into a one-family home is a proper reason for terminating tenancies in a rent-stabilized building).

Seldin Co. v. Calabro, 702 N.W.2d 504, 507 (Iowa Ct. App. 2005) (tenant could not be evicted for not paying late fees).

Sarah Clinton, Note: Evicting the Innocent: Can the Innocent Tenant Defense Survive a Rucker Preemption Challenge? *85 B.U.L. Rev. 293 (2005).*

Anne C. Fleming, NOTE: Protecting the Innocent: The Future of Mentally Disabled Tenants in Federally Subsidized Housing after HUD v. Rucker, *40 Harv. C.R.-C.L.L. Rev. 197 (Winter 2005).*

Megan J. Ballard, Legal Protections for Home Dwellers: Caulking the Cracks to Preserve Occupancy, *56 Syracuse L. Rev. 277 (2006).*

Correct:

Lohman v. New York City Housing should read Lohmann v. New York City Housing.

Horizon Homes v. Nunn, 684 N.W.2d 221 (Iowa 2004) (owner of a federally subsidized housing project could not terminate a tenant's month-to-month lease, as the landlord had to show good cause and specify those grounds constituting good cause in its notice of termination).

Add:

See also AIMCO Props., LLC v. Dziewisz, 883 A.2d 310, 312-313 (N.H. 2005) (expiration of a lease is not "good cause" for termination as described in the state statute).

N.H. Rev. Stat. Ann. § 540:2 (2005).

After sentence "If the landlord is unable to increase the rent for a new tenant, then the existing tenant is less likely to face a termination." add new footnote 180.1:

Rosario v. Diagonal Realty, LLC, 803 N.Y.S.2d 343 (N.Y. Sup. Ct. 2005) (discussing tax abatement program and rent stabilization laws).

§ 39.06(b)(6) Summary Proceeding for Possession.

Add:

Underwood v. Corsino, *34 Cal. Rptr. 3d 542, 544 (Cal. Ct. App. 2005)* (the only issue for an unlawful detainer action is the right to possession; "a defendant is not permitted to file a cross-complaint or counterclaim and, 'a defense normally permitted because it 'arises out of the subject matter' of the original suit is generally excluded ... if such defense is extrinsic to the narrow issue of possession.' ") (quoting *Vasey v. California Dance Co., 139 Cal. Rptr. 72, 74-75 (Cal. Ct. App. 1977))* .

Terry v. Levens, 2005 Cal. App. Unpub. LEXIS 1004, *23 (filed Feb. 3, 2005) (summary proceedings that co-exist with other civil proceedings will not be streamlined but will be treated as normal civil proceedings) (quoting *Lynch & Freytag v. Cooper, 267 Cal. Rptr. 189, 192 (Cal. Ct. App. 1990))* .

Trinity United Methodist Church v. Levesque, 870 A.2d 1116, 1121 (Conn. App. Ct. 2005) (under state law, for summary proceedings, one only has to prove ownership of the property and then demand possession; no need to prove that individuals being ejected are tenants).

McKee Realty, LLP v. Futons Plus III, LLC, 2006 Conn. Super. LEXIS 91, *12-13, 15-16 (Jan. 9, 2006) (listing elements for commercial summary process action that is "based on nonpayment of rent"; counterclaims in summary process proceeding have to be related only to the issue of possession).

V&R Props., LLC v. Carino, 2005 Conn. Super. LEXIS 2377, *2-5 (Aug. 31, 2005) (counterclaims must relate to possession to be allowed, court did not allow counterclaim seeking monetary damages).

Perrone Realty, LLC v. J&P Enterprises of New Milford, LLC, 2005 Conn. Super. LEXIS 2053, *2-4 (July 22, 2005) .

Abrimson v. Ethel Kidd Real Estate, 2006 La. App. LEXIS 575, *5 (Jan. 18, 2006) ("When lessee's right of occupancy ceases for any reason, lessor is entitled to utilize summary eviction proceedings to obtain possession of the premises.") (emphasis added).

Matte v. Shippee Auto, Inc., 876 A.2d 167, 170 (N.H. 2005) (if landlord does not claim unpaid rent, then defendants have no right to off-set how much they owe the plaintiff).

Reade Broadway Assoc. v. Capogrosso, 9 Misc. 3d 139A (N.Y. App. Term Nov. 10, 2005) (Under state law, either a landlord or a lessor may bring summary proceedings for possession).

Graham Ct. Owners Corp. v. Powell, 804 N.Y.S.2d 530, 531 (N.Y. App. Term 2005) (counterclaim in summary proceeding will not be allowed unless it amounts to a defense) (quoting Siegel, New York Practice, § 576, at 996 (4th ed)).

Ascot Realty LLC v. Richstone, 10 A.D.3d 513 (N.Y. App. Div. 2004) appeal dismissed, Ascot Realty LLC v. Richstone, 797 N.Y.S.2d 413, 830 N.E.2d 311 (2005) (the court erred in awarding possession to landlord in a summary proceeding, because it was not proven that the apartment was not the tenant's primary residence while he was staying with a friend).

After the sentence "The procedures usually provide for the following: a shortened period for filing the tenant's

answer to the landlord's pleadings, limitations on the issues and defenses that can be raised, expedited or limited discovery, an early hearing date, non-availability of juries, and quick enforcement by local officials under some type of a writ of restitution." add new footnote 183.1:

Gallogly v. Kurrus, 2005 Conn. Super. LEXIS 1286, *34-35 (May 16, 2005) (equitable defenses may be allowed in summary proceedings if they are "properly raised") (quoting *Cumberland Farms, Inc. v. Dairy Mart, Inc., 627 A.2d 386, 390 (Conn. 1993))* .

Riverwood Commer. Park, LLC v. Standard Oil Co., 698 N.W.2d 478 (N.D. 2005) (summary procedure is not suited "to resolve complex legal and factual issues ...").

Sesko v. McConkey, 12 2005 Wash. App. LEXIS 574 (filed Apr. 5, 2005) (court may hear counterclaim in summary proceedings where it "is based on facts which excuse a tenant's breach") (quoting *Sprincin King St. Partners v. Sound Conditioning Club, 925 P.2d 217, 223 (Wash. Ct. App. 1996))* .

Andries v. Covey, 113 P.3d 483 (Wash. Ct. App. 2005) (discussing counterclaims in summary proceedings).

After the sentence "In order to qualify for the summary dispossession proceedings, the landlord must rigorously meet the procedural requirements." add new footnote 183.2:

Westview Assocs. v. Carraccini, 2005 Conn. Super. LEXIS 698, *2-4 (Mar. 10, 2005) (landlord failed to comply strictly with the statute by stating the contents of the notice or attaching the notice to his complaint and therefore the summary proceedings were dismissed).

Empire Properties, L.L.C. v. Hardy, 873 A.2d 1187, 1190-1195 (Md. 2005) (foreclosure sale purchaser could not use forcible entry and detainer statute to gain possession from the mortgagors still in possession).

Henry & Baltic Assoc. v. K & Q Food Corp., 796 N.Y.S.2d 837, 838 (N.Y. Sup. Ct. 2005) (notice was inadequate when it told tenant to contact the landlord's attorney but failed to state the attorney's name).

Brown v. Kula-Amos, Inc., 2005 Tex. App. LEXIS 2227, *5-11 (Mar. 24, 2005) (because contract provided that buyer became a tenant at sufferance upon default, there was the necessary landlord/tenant relationship to pursue a forcible detainer action in a contract for deed sale).

Spraybary v. Mallinson, 2005 Wash. App. LEXIS 2416, *8 (filed Sep. 15, 2005) (when sale did not close, the buyers became month to month tenants that were subject to an ejectment action).

After the sentence "The statutes typically provide for differing notice periods for proper termination of the tenancy depending on whether it was a periodic tenancy from month to month or year to year, or a tenancy at will or sometimes even if the holdover tenant merely has a tenancy at sufferance but has received no prior notice as required by the dispossession statute." add new footnote 183.3:

Kosa v. Legg, 2006 N.Y. Misc. LEXIS 296, *10 (N.Y. Sup. Ct. Feb. 10, 2006) ("The statutory notice requirement in a summary proceeding is not relevant to the question of whether notice is required in an ejection action or if it is required, how much notice is required.")

W. Bushwick NRP Assoc., L.P. v. Bushwick Coop. Fed. Credit Union, 10 Misc. 3d 1078A (N.Y. Civ. Ct. 2005) (must be proof that individual sending the notice to quit premises has authority to act for the landlord).

Adams v. Woods, 609 S.E.2d 429, 431 (N.C. Ct. App. 2005) (because there was no enforceable lease agreement, there was no landlord/tenant relationship and no availability of summary proceedings).

After the sentence "As a penalty for holding over beyond the legal termination of a tenant's right, the statutes typically impose treble damage liability or some other penalty amount on the tenant." add new footnote 183.4:

Aris Vision Inst., Inc. v. Wasatch Prop. Mgmt., Inc., 121 P.3d 24 (Utah Ct. App. 2005) (Treble damages for wrongful detainer, conversion, etc).

FOOTNOTES:
(n1)Footnote 122.1. *Vic's Parking Corporation v. Nash, 890 N.Y.S. 2d 803 (2009)* ("A leasehold is not created when the contract to form a leasehold fails.").

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Supp. To CHAPTER 39 Leasehold Estates

4-39 Thompson on Real Property, Thomas Editions Supp. to § 39.07

Supp. to § 39.07 Bibliography.

[Go To Main]

Add to Articles

Dick, Andrew. "Indiana Leasehold Estates: A Closer Look at Landlord-Tenant Relationships," 51 *Res Gestae* 12 (September 2007).

Gray, Robert W. "The Applicability of Constructive Eviction, Implied Warranty of Habitability, Common-Law Fraud, and the Consumer Fraud Act to Omissions of Material Fact in a Commercial Lease," 38 *John Marshall L. Rev.* 1289 (2005).

Hendrick, Will. "Pay or Play? On Specific Performance and Sports Franchise Leases," *87 N.C. L. Rev. 504* (January, 2009).

Meier, Scott W. "Issues to Consider in Drafting of Commercial Leases," 31 *Wyo Law.* 24 (April, 2008).

Merges, Robert P. "A Transactional View of Property Rights," *20 Berkeley Tech. L.J. 1477, 1487 (2005)* (discussing "precontractual liability" and "enforcement flexibility" and the nexus between contract law and property rights).

Moore, Marie A. "Indemnification Provisions in Leases: What We Ask for and What Really Matters," *22 Prob. & Prop. 33* (September/October, 2008) .

Note, "Landlord-Tenant Law: Protecting the Small Landlord's Rights During Summary Process." *37 Suffolk U. L. Rev. 1109 (2004).*

Orth, John V. "Leases Like Any Other Contract?" *12 Green Bag 2d 53* (Autumn, 2008).

Pang, Michael. "Imminent Domain": Viewpoints on Leasehold Conversion of Hawaiian Lands: Leasehold Perspective."

4 Asian-Pacific L. & Pol'y J. 547 (Summer 2003).

Smeltzer, Natalie. "Freedom to Contract in Texas--Enforceability of an 'As Is" Clause in a Commercial Lease," *61 SMU L. Rev. 509 (Spring 2008).*

White, Bruce H. and William L. Medford. "Rejection Via Sale of Real Estate: Is Your Leasehold Interest Protected?" 26 *Am Bankr. Inst. J.* 28 (September, 2007).

Zeiner, Carol L. "Establishing a Leasehold Through Eminent Domain: A Slippery Slope Made More Treacherous by Kelo," *56 Cath. U. L. Rev. 503* (Winter, 2007).

Annotations

Add:

Delete all the Annotations in the supplement and replace them with the following:

Annotation, *Character and Duration of Tenancy Created By Entry Under Invalid or Unenforceable Lease, 6 A.L.R.2d 685* .

Annotation, *Commercial Leases: Application of Rule that Lease May be Canceled only for " Material" Breach, 54 A.L.R. 4th 595* .

Annotation, *Enforceability of mechanic's lien attached to leasehold estate against landlord' s fee, 74 A.L.R.3d 330* .

Annotation, *Implied Warranty of Fitness or Suitability in Commercial Leases --Modern Status, 76 A.L.R. 4th 928.*

Annotation, *Landlord's Duty, on Tenant's Failure to Occupy, or Abandonment of, Premises, to Mitigate Damages by Accepting or Procuring Another Tenant, 75 A.L.R. 5th 1* .

Annotation, *Landlord's Liability for Damage to Tenant's Property Caused by Water, 30 A.L.R.3d 143* .

Annotation, *Leasehold estate in exempt property as subject or tax or special assessment*, 23 A.L.R. 248 .

Annotation, *Leasehold Interest as Real Property Within Tax Laws*, 59 A.L.R. 701 .

Annotation, *Lessor's Retention of Past-Due Rental Payments as Precluding Termination of Lease and Dispossession of Lessee for Nonpayment of Rent, 39 A.L.R. 4th 1204* .

Annotation , *Maintainability, by Lessee, of Action to Quiet Title to Leasehold, 51 A.L.R.2d 1227* .

Annotation, *Modern Status of Rules as to Existence of Implied Warranty of Habitability or Fitness for Use of Leased Premises, 40 A.L.R. 3d 646* .

Annotation, *Modern Status of Rules Conditioning Landowner's Liability Upon Status of Injured Party as Invitee, Licensee, or Trespasser, 22 A.L.R.4th 294* .

Annotation, *Rights and Remedies of Tenant upon Landlord's Breach of Covenant to Repair, 28 A.L.R. 2d 446* .

Annotation, Validity and Construction of Statute or Ordinance Authorizing Withholding or Payment into Escrow of Rent for Period During Which Premises are not Property Maintained by Landlord, *40 A.L.R. 3d 821 (2005)* .

Annotation, Lessor's Retention of Past-Due Rental Payments as Precluding Termination of Lease and Dispossession of Lessee for Nonpayment of Rent, *39 A.L.R. 4th 1204 (2005)* .

Roland F. Chase, Annotation, Commercial Leases: Application of Rule that Lease May be Canceled only for " Material" Breach, *54 A.L.R. 4th 595 (2005)* .

Joseph E. Edwards, Annotation, Landlord's Liability for Damage to Tenant's Property Caused by Water, *30 A.L.R.3d 143 (2005)* .

Thomas M. Fleming, Annotation, Implied Warranty of Fitness or Suitability in Commercial Leases-- Modern Status, *76 A.L.R. 4th 928 (2005)* .

Vitauts M. Gulbis, Annotation, Modern Status of Rules Conditioning Landowner's Liability Upon Status of Injured Party as Invitee, Licensee, or Trespasser, *22 A.L.R.4th 294 (2005)*

F.G. Madara, Annotation, Rights and Remedies of Tenant upon Landlord's Breach of Covenant to Repair, *28 A.L.R. 2d 446 (2005)* .

Jonathan M. Purver, Annotation, Modern Status of Rules as to Existence of Implied Warranty of Habitability or Fitness for Use of Leased Premises, *40 A.L.R. 3d 646 (2005)* .

Jonathan M. Purver, Annotation, Validity and Construction of Statute or Ordinance Authorizing Withholding or Payment into Escrow of Rent for Period During Which Premises are not Property Maintained by Landlord, *40 A.L.R. 3d 821 (2005)* .

Christopher Vaeth, Annotation, Landlord's Duty, on Tenant's Failure to Occupy, or Abandonment of, Premises, to Mitigate Damages by Accepting or Procuring Another Tenant, *75 A.L.R. 5th 1 (2005)* (superseding *21 A.L.R.3d 534 (1999)* .

T.C. Williams, Annotation, Character and Duration of Tenancy Created By Entry Under Invalid or Unenforceable Lease, *6 A.L.R.2d 685 (2005)* .

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CHAPTER 40 LANDLORD RIGHTS AND TENANT DUTIES

5-40 Thompson on Real Property, Thomas Editions 40.syn

AUTHOR: N. Gregory Smith G. Frank & Winston Purvis Professor of Law Louisiana State University

§ 40.syn Synopsis to Chapter 40: LANDLORD RIGHTS AND TENANT DUTIES

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§ 40.03(f) Mode of Payment.

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CHAPTER 40 LANDLORD RIGHTS AND TENANT DUTIES

5-40 Thompson on Real Property, Thomas Editions § 40.01

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§ 40.01 Overview of Landlord Rights and Tenant Duties.

This chapter considers both traditional and modern rules regarding landlord rights and tenant duties. The following chapter -- chapter 41 -- considers tenant rights and landlord duties. The division is admittedly somewhat arbitrary, because landlords and tenants generally have concomitant rights and duties. But the division is also defensible, because there are many areas of landlord-tenant law in which the rights or the duties of either the landlord or the tenant dominate consideration of an issue. That aside, whether one chooses to refer first to one party's rights or another party's duties is often little more than a matter of perspective.

Many of the traditional common law rules relating to landlord rights and tenant duties arose out of the concept that a lease is a conveyance of an interest in real property. The landlord conveyed a present non freehold estate to the tenant and retained a future estate -- a reversion. Because the tenant was the owner of the possessory estate, the landlord was generally prohibited from entering the premises during the term of the lease without the consent of the tenant. However, the landlord could enter the premises in some situations, including when the tenant wrongfully abandoned the property. Abandonment by the tenant presented the landlord with several options; the landlord could accept a surrender of the lease, allow the premises to remain vacant and sue for rent, or attempt to relet the premises for the benefit of the tenant.

The landlord also enjoyed a number of other important rights. One of the most important was the right to receive rent. If the tenant did not pay the rent, the landlord could seize the tenant's personal property located on the leased premises and hold it hostage for the rent, or the landlord could sue the tenant for the rent. The landlord could also terminate the lease if the landlord remembered to include a power of termination in the lease.

Upon termination of the lease, the landlord had the right to remove the tenant using self help, or the landlord could bring an ejectment action to obtain possession. At early common law, the landlord also had the right to retain personal property that the tenant had affixed to the leased premises. If the tenant held over on the premises after lease expiration, the landlord had the power to elect either to treat the tenant as a trespasser or to bind the tenant to a new lease.

As the owner of the possessory estate, the tenant was traditionally considered to bear the risk of accidental damage to improvements located on the leased premises. Even if improvements were destroyed by fire or other casualty, the landlord was entitled to continued receipt of rental payments. Unless the lease provided otherwise, if the landlord

defaulted in the performance of covenants set forth in the lease, the tenant was generally not excused from the obligation to pay rent or from other lease obligations. Under the traditional rules, the obligations of landlord and tenant were generally considered to be independent of each other, in the sense that breach of an obligation by one party did not excuse performance by the other.

In conveying the leasehold estate to the tenant, the landlord made no implied warranty that the land would be suitable for the tenant's purposes. Neither did the landlord make an implied covenant to keep the premises in repair. However, the landlord was considered to be subject to, and the tenant benefited by, other implied covenants: an implied covenant that the landlord had the power to demise the property; an implied covenant that the landlord would deliver possession of the leased premises to the tenant; and an implied covenant that the tenant's use and enjoyment of the leased premises would not be disturbed by the landlord, persons acting under the landlord's authority, or persons with paramount title. Breach of one of these implied covenants would generally excuse the tenant from performing under the lease.

Many of the traditional rules relating to landlord rights and tenant duties were changed over time, by court decision and by legislation. For example, court decisions and statutes limited the landlord's ability to engage in self help repossession of the leased premises. But the landlord was, by legislation, given access to summary proceedings for speedy judicial recovery of the premises. By means of the "trade fixtures" doctrine, commercial tenants were afforded substantial rights with respect to the removal of personal property that they affixed to the realty during the lease term. Housing codes were enacted that imposed new obligations on landlords with respect to the condition of leased urban housing. Court decisions and statutes constrained the rights of landlords with respect to security for tenant performance of lease obligations.

The pace of change accelerated rapidly in the 1960s. Many of the modern changes in landlord-tenant law can be attributed to a judicial emphasis on the contractual nature of a lease and to the statutory regulation of matters once left to private agreement or to judicial resolution. Judicial and legislative developments were, in turn, influenced by the changed nature of the modern lease. Unlike the sturdy tenant farmers of former times, many modern residential tenants are not primarily interested in renting land, but are primarily interested in renting safe, urban area apartment units that are adequately served by customary utilities and other services and that are properly maintained by landlords. Courts and legislatures considered some of the traditional landlord-tenant rules to be inappropriate in this setting.

In general, the modern changes have limited the landlord's rights and have increased the landlord's duties, both resulting in enlargement of tenant rights. As a result of judicial or statutory adoption of the implied warranty of habitability, for example, modern residential landlords generally have significant duties with respect to the condition and ongoing maintenance of leased residential premises. Moreover, breach of those duties entitles the tenant to exercise a variety of remedies, including the withholding of rent. Other changes have also occurred. If a residential tenant wrongfully abandons the premises, many courts and statutes now require residential landlords who do not wish to accept a surrender of the lease to mitigate damages by attempting to relet the premises for the benefit of the tenant. By statute and by court decision, modern landlords are frequently prohibited from retaliating against tenants who complain to government housing authorities about housing conditions that violate applicable housing code. The ancient shield of landlord tort immunity, already subject to a number of exceptions, has been altogether discarded by some courts, at least in the residential landlord-tenant context.

While modern developments have substantially changed the law relating to landlord rights and tenant duties, the changes have not altogether supplanted the traditional rules. Indeed, in the commercial leasing context, many of the traditional rules relating to landlord rights and tenant duties have continued dominance. Accordingly, a consideration of the rights of landlords and the duties of tenants must include both what is old and what is new.

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CHAPTER 40 LANDLORD RIGHTS AND TENANT DUTIES

5-40 Thompson on Real Property, Thomas Editions § 40.02

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§ 40.02 Outline of the Chapter.

The chapter begins with a consideration of fundamental landlord rights concerning rent (§ 40.03), landlords' liens (§ 40.04), and tenant deposits (§ 40.05). The next two sections of the chapter, § 40.06 and § 40.07, discuss the landlord's right to enter the leased premises during the pendency of the lease, and the landlord's rights in tenant fixtures when the lease comes to an end. The landlord's right to terminate the lease is discussed in § 40.08, and the right to recover possession of the leased premises is considered in § 40.09.

The next several sections of the chapter consider the rights of the landlord upon the occurrence of specific events. Section 40.10 discusses the rights of the landlord when a tenant wrongfully holds over on the leased premises after lease termination. Subsequent sections consider landlord rights on tenant abandonment of the leased premises (§ 40.11), the death or dissolution of the tenant (§ 40.12), bankruptcy (§ 40.13), condemnation of the leased premises (§ 40.14), and destruction of improvements located on the leased premises (§ 40.15). Section 40.16 discusses the effect on the rights of the landlord of the tenant's illegal use of the leased premises.

Landlord rights regarding casualty insurance are discussed in § 40.17. And landlord rights regarding the payment of taxes and assessments are considered in § 40.18.

Section 40.19 discusses selection of tenants, including prohibitions against discrimination in tenant selection and landlord use of tenant screening services.

A bibliography is included at the end of the chapter.

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CHAPTER 40 LANDLORD RIGHTS AND TENANT DUTIES

5-40 Thompson on Real Property, Thomas Editions § 40.03

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§ 40.03 Rent.

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§ 40.03(a) Historical Background.

One of the basic rights of a landlord is the right to receive rent. Rent is usually thought of today as a payment that the tenant is obligated by contract to make to the landlord for use of the leased premises. However, the early common law concept of rent was rather different. In earlier times, rent was considered to be a type of property; indeed, a rent reserved on a freehold estate was considered to be part of the reversion on that estate. n1 A landlord's action to recover rent was a real action, the same type of action that was used to claim an estate in land. From the standpoint of procedure and from the standpoint of the rights of the parties, rent was treated very much like an estate in the land. n2

Rent was also thought to issue out of the land itself, n3 or, in the words of Coke, to be "reserved out of the profits of the land." n4 This did not necessarily mean that rent had to be paid by delivery to the landlord of actual products of the soil; rent could be reserved and made payable in almost any medium. According to Coke, "the rent may as well be in delivery of hens, capons, roses, spurs, bows, shafts, horses, hawks, pepper, cummin, wheat, or other profit, that lieth in render, office, attendance, and such like, as in payment of money." n5

Two consequences were deduced from the common law concept that rent was something that issued out of the land. The first was that rent was not due "until the profits were taken by the lessee." n6 From this it followed that rent was not payable until the end of the term. n7 The second consequence was that, since rent was not due until the end of the term, if the lease were terminated prior to that time, no rent would be payable to the landlord. n8

These early common law concepts are the source of many modern rules regarding rent. But the modern rules regarding rent have also been significantly shaped by concepts from the realm of contract law. This section of the chapter considers the resulting legal rules relating to the landlord's right to receive rent.

§ 40.03(b) Rental Payments and Payments for Use and Occupancy.

The payment of rent is a normal, but not essential, incident to the existence of the landlord-tenant relationship. In almost all jurisdictions a valid lease may be created that does not impose a rental obligation on the tenant. n9 However, even if

there is no agreement regarding rent, the owner of the land will normally be entitled to payments for use and occupancy of the land.

The early English statute of 11 George II provided that a landowner could bring an action for the reasonable value of the use and occupation of land when there was no promise to pay rent. n10 Similar statutes have been enacted in many American jurisdictions. n11 Even in the absence of an applicable statute, however, a number of courts have concluded that a landowner is entitled to receive payment for the reasonable value of the use and occupancy of the land from an occupant, if no rent is reserved in the lease and no gift is intended by the landowner. n12 The Restatement also takes this position, which a Reporter's Note describes as well-settled by statute or by court decision. n13

Whether a gift of occupancy is intended by the landowner is determined in light of the circumstances surrounding the occupancy. Circumstances in which courts have found that no occupancy payments were intended include occupancy of the premises by an employee in connection with the employee's responsibilities to an employer landowner, n14 and occupancy by a contract purchaser prior to the closing of the sale of the property. n15

The distinction between the payment of rent and payment for the reasonable value of use and occupancy of the premises may have significant remedial consequences for the landowner. If an occupant who is obligated to do so does not pay the landowner for the value of the use and occupancy, the landowner will be entitled to bring an action to recover the amount that is owed. However, since the amount that is owed is not rent, the landlord may be barred from exercising remedies that are based on nonpayment of rent by tenants. n16 It has been held, for example, that the landowner cannot utilize the remedy of distraint n17 or have recourse to summary possession procedures when the occupant fails to pay for use and occupancy of the premises. n18

§ 40.03(c) Rent Covenants and Rent Reservation.

Normally, the parties to a lease will have an understanding regarding the amount of the rent. If the amount of the rent is set forth in a written lease, it may be subject to an express covenant on the part of the tenant to pay, or it may simply be "reserved" in the lease. The rent may be reserved, for example, if the lease agreement states that the premises are leased subject to a specified rental amount, or if the lease agreement identifies the amount of the rental without setting forth a covenant on the part of the tenant to pay. n19

The distinction between a rent covenant and a reservation of rent can represent more than a theoretical difference to a landlord. When there is only a reservation of rent, instead of a covenant to pay it, some courts have held that the assignment of the tenant's leasehold interest to a third party releases the tenant from paying rent. n20 The rationale is that, when the lease contains a covenant to pay rent, there is privity of contract between the landlord and the tenant, n21 but if the lease contains no such covenant, and rent is merely reserved in the lease, the obligation to pay rent depends on privity of estate. n22

§ 40.03(d) Rent Accrual and Rent Apportionment.

§ 40.03(d)(1) When Rent Is Payable.

The early common law concept of rent was that it issued out of the land, and that it was not payable until the "profits were taken by the lessee" at the end of the term. n23 In the modern era, the idea of the lessee taking profits at the end of the term has little application, outside the agricultural leasing context. Nonetheless, the basic common law rule still persists: in the absence of an agreement to the contrary, rent is not payable until the end of the term. n24 Indeed, it has been said that there is no obligation to pay rent until midnight of the day it is due. n25 In the case of a periodic tenancy, the rent will be due at the end of a period. n26

§ 40.03(d)(2) General Rule that Rent Is Not Apportionable.

The idea that rent is payable at the end of the term has given rise to the general rule that rent accrues on the day it is payable; it does not, like interest, accrue from day to day. n27 One consequence of this rule is that, in the absence of an agreement or statute to the contrary, no debt for payment of rent generally arises upon premature termination of the lease. In other words, the landlord may not recover pro rata rent from a tenant for the period between the date rent was last payable and the date of lease termination. n28 Another consequence of the rule is that if a tenant is required to pay the rent in advance, the landlord is generally entitled to a retain the full amount of the payment if the lease is terminated prematurely. n29 However, the potential harshness of this rule has been reduced by court decisions that prohibit the landlord from profiting by the landlord's own breach of the lease, such as when the tenant pays rent in advance and the landlord wrongfully evicts the tenant. n30 Some courts have also apportioned rent in cases when accidental destruction of the premises results in lease termination. n31 In any event, the parties are free to agree to apportion the rent. n32

§ 40.03(d)(3) The View that Rent May Be Apportioned.

The minority view, articulated in some court decisions and adopted by the Restatement, is that rent will be apportioned if the lease is terminated prematurely. n33 In the event of premature lease termination, this rule would enable a tenant to obtain a pro rata refund of advance rent or would enable a landlord to recover a pro rata portion of unpaid rent. n34 The Restatement indicates that, by analogy, the same rule should apply to monetary obligations of the tenant other than rent, such as utility costs and taxes that are not payable as rent. n35 The minority view has been justified on the ground that it is probably not the parties' intention that one of them receive a windfall in the event of premature lease termination. n36

A number of statutes provide for rent apportionment as well. n37 Some of the statutes are limited to situations in which the landlord is a life tenant, and dies before the date rent is due. Such statutes provide for proportionate recovery of rent by the landlord's estate. n38 Other statutes permit proportionate recovery of rent in residential leases. n39

§ 40.03(d)(4) Waiver of Right to Insist on Prompt Payment.

Regardless of when rent is due, the landlord may be held to have waived the right to insist on prompt payment if the landlord has previously accepted late rental payments without objection. n40 However, the result has been held to be otherwise when the lease provides that landlord acceptance of late payments does not constitute a waiver. n41 If it occurs, a waiver by the landlord need not be permanent. The landlord may regain the right to insist on prompt payment of rent by providing notice to the tenant that future rental payments must be made on time. n42

§ 40.03(e) Place of Payment.

The parties to a lease are, of course, free to agree on the place where rent is to be paid. n43 In the absence of such an agreement, the general rule is that rent is payable at the leased premises. n44 Under the general rule, then, the landlord will be obliged to call for rent at the leased premises. n45

An agreement to change the place of rental payment may be established as a result of the parties' prior practice regarding the payment of rent. n46 However, the landlord may not unilaterally change the place where rent is to be paid. n47

§ 40.03(f) Mode of Payment.

Although rent normally consists of the payment of money, the common law has long permitted a wide variety of other payments or performances, as evidenced by the statement of Coke, quoted previously. n48 The parties may agree that rent is payable in money, property, or services. n49 A farm lease, for example, may specify that rent will consist of a share of crops produced on the leased land. n50

§ 40.03(g) Amount of Payment.

The general rule with respect to the amount of rent is that it must be certain, or capable of being reduced to certainty by the time it is to be paid. n51 The rule will certainly be satisfied if the parties designate, as they commonly do in residential leases, a fixed amount that is payable on calendared dates throughout the lease term. But a number of alternatives are available to the parties. Specific methods that courts have approved include the designation of a percentage of crop production in a farm lease, n52 an agreement to change the amount of rent based on appraisals, n53 and an agreement to change the rent based on increased costs incurred by the landlord. n54 Basically, any method of computing the rent is permissible as long as it permits a determination of the rental amount. n55

Commercial leases involving retail stores often specify that some or all of the rent will be based on a percentage of tenant sales on the leased premises. A common type of percentage lease provision entitles the landlord to a fixed minimum rent, plus a percentage of tenant sales in excess of a specified amount over a defined period. Such provisions are potentially advantageous to the landlord as a hedge against inflation. They are also enforceable; indeed, courts have tended to enforce percentage rent provisions broadly in favor of landlords. n56 In cases in which the only specified rent is a percentage rent, or in which the specified minimum rent is minimal, courts have generally implied obligations on the tenant to use reasonable diligence in operating the retail business located on the leased premises, and not to divert business to another location in order to decrease the percentage rent. n57

Long term commercial leases frequently incorporate clauses providing for changes in the rental amount over the term of the lease. A rent adjustment provision may set forth a schedule of previously determined increases in the rent to take effect at specified intervals, n58 describe a procedure to adjust the rental amount at specified periods based on appraisals of the leased premises, n59 or describe a procedure to periodically modify the rent based on changes in a cost of living index, such as the Consumer Price Index. n60 Such provisions will be enforceable if the lease amount may be determined based on their application. A provision that rent will be adjusted "depending upon general business conditions" is too indefinite to be enforced. n61

Payments to third parties, such as payments for utilities, insurance, and taxes, are not usually considered to be part of the tenant's rental obligation, but they may be so considered if the parties so provide in their lease. n62 If the additional payments are not considered to be part of the rent, the landlord may be unable to use remedies applicable to the nonpayment of rent, such as distraint, for the tenant's failure to pay them. n63

A landlord might be tempted to include a provision in a lease providing for higher rent in the event that the tenant breaches the lease. Whether such a provision is enforceable could depend, among other things, on whether a court considers the provision to be one that calls for appropriate liquidated damages or a penalty. n64

§ 40.03(h) Rent Acceleration Clauses.

A rent acceleration clause permits the landlord to declare all future rent installments to be presently due and payable in the event of a tenant default in lease obligations. This result is at odds with the traditional common law concept that rent is payable only at the end of a lease term. However, most courts that have considered the question have upheld the validity of rent acceleration clauses, either as valid provisions for liquidated damages, or on the theory that since the parties can agree to an advance payment of rent, they can also agree that rent will be due on the occurrence of a default. n65 A smaller number of court decisions have declined to enforce rent acceleration clauses, reasoning that they provide for a penalty. n66

In jurisdictions that otherwise enforce rent acceleration clauses, it is sometimes said that a landlord cannot have both possession of the leased premises and accelerated rent. n67 The reasoning is that this would represent a duplication of remedies. n68 But possession by the landlord does not always prevent enforcement of an acceleration clause. Courts have allowed acceleration of rent when the landlord has taken possession for the account of the tenant following tenant abandonment. In that situation, the landlord's possession does not terminate the lease, and the tenant retains the right to occupy the premises. n69 The duplication of remedies problem arises when the landlord's possession involves lease

termination.

The issue is also addressed in the Restatement. A comment to § 12.1 of the Restatement provides that if an acceleration clause is enforced, the landlord cannot terminate the lease for the tenant's default that generated the rent acceleration. Neither can the landlord terminate the lease for any other default of the tenant, without reimbursing the tenant for the rent the tenant has paid in advance, less any damages to which the landlord may be entitled. The comment also provides that if the landlord terminates the lease before the acceleration clause is enforced, the landlord may not recover rent for the period after the termination. If the tenant abandons the premises, the Restatement would permit the landlord to enforce the acceleration clause, so long as the landlord does not terminate the lease. In this event, the landlord would be obligated to account to the abandoning tenant for any rent received from a new tenant. n70

In some circumstances, rent may be "accelerated" even in the absence of a rent acceleration clause. Many modern courts would consider a tenant's refusal to pay rent and abandonment of the premises to constitute an anticipatory breach, and permit the landlord to recover immediate damages for breach of the lease. n71 The Bankruptcy Code also permits a form of rent acceleration by allowing the landlord to recover damages based on future rent if the tenant files bankruptcy and the lease is rejected by the bankruptcy trustee or the debtor in possession. n72 In light of the availability of these remedies, it has been suggested that the main value of an acceleration clause is as a spur to encourage solvent tenants to perform their lease obligations. n73

§ 40.03(i) Late Charges.

Leases often provide for the assessment of late charges on delinquent rental payments. The late charge itself is usually expressed either as a percentage of the rental payment or as a set dollar amount. In some instances, courts have invalidated late charges on the ground that they are unreasonable, in the nature of a penalty, or excessive, n74 but late charges have also been upheld on a finding that they represent a reasonable estimate of the loss that the landlord is likely to incur because of the tenant's failure to pay rent in a timely fashion. n75 Courts have also considered the enforceability of late charges in light of tenant contentions that particular charges violate usury limits. n76 In some states, late charges are explicitly regulated by statute. A Massachusetts statute, for example, prohibits a late charge on rents that are delinquent fewer than 30 days. n77

§ 40.03(j) Agreements to Modify Rental Obligations.

The parties to a lease sometimes agree to change the amount of the stipulated rent during the term of the lease. Assuming compliance with the statute of frauds, an agreement to modify rent might be considered to give rise to a new lease and a surrender of the old. n78 But most courts do not appear to analyze rent modification agreements in this manner; instead, they typically analyze such agreements as contract modifications, and consider whether their enforceability might be limited by the doctrine of contract consideration or by application of the statute of frauds. n79

§ 40.03(j)(1) The Requirement of Consideration.

Although statutes in some jurisdictions permit rent modification agreements to be enforced even if they are not supported by consideration, n80 in the absence of such a statute, most courts require agreements to change rental amounts to be supported by consideration. n81 This rule clearly applies to the executory portion of an agreement to modify the rental amount. To the extent that a rent modification agreement has already been executed, by the payment of the modified rental amount for a period of time, most courts either do not require consideration, n82 or they consider the transaction to involve a gift or a waiver. n83

Courts have not had great difficulty finding consideration in most of the cases involving rent modification agreements. Consideration has frequently been found in an additional agreement or promise made by one of the parties. For example, agreements to reduce the rent have been supported by tenant promises to make repairs or to occupy the leased

premises when the tenant was not otherwise obligated to do so. n84 Consideration for agreements to increase the rent has been found in the landlord's promise to make improvements in the leased premises or to permit the tenant to use the leased premises for a new purpose. n85 Even in the absence of an additional covenant or promise, some courts have concluded that an agreement to reduce the rent is adequately supported by the benefit to the landlord of continued tenant occupancy. n86

§ 40.03(j)(2) Application of the Statute of Frauds.

The issue under the Statute of Frauds, of course, is whether the rent modification agreement must be in writing. Some situations involve little controversy. If the original lease is a valid oral lease, then an agreement to modify the amount of the rent for the remainder of the lease term may clearly be oral as well. n87 On the other hand, if the original lease was required to be in writing, and its remaining term exceeds the period set forth in the statute of frauds for which oral leases may be made, the rent modification agreement will also need to be in writing. n88 However, the rent modification agreement may not need to be written in every case in which the original lease term is subject to the statute of frauds. If the remaining term of the original written lease is so short that a new lease for that period would not have to be in writing, then it would seem that an agreement to modify the rent for that remaining period should not have to be written either. n89 Some courts have so held. n90 But other decisions indicate that compliance with statutory formalities in this situation is nonetheless necessary, reasoning that the rent modification agreement is simply part of a larger agreement that is subject to the statute of frauds. n91

In some instances, rent modification agreements that run afoul of the formal requirements of the statute of frauds may still be enforceable under the doctrine of part performance. This doctrine may be engaged if a party carries out substantial activities in reliance on the modification. n92

§ 40.03(k) Rent and Lease Termination.

§ 40.03(k)(1) In General.

The landlord's right to receive rent will often continue until the normal expiration of the lease. But it could be, and frequently is, ended earlier. This could happen if the parties mutually agree, prior to lease expiration, to terminate the landlord-tenant relationship and the tenant's obligation to pay rent. However, even if there is no such agreement, the lease could come to a premature end as a result of the proper exercise of rights by either the landlord or the tenant following a default by the other, or on re-entry by the landlord following tenant abandonment of the leased premises. In some instances, a party may be able to terminate the lease following the occurrence of an event, such as accidental destruction of leasehold improvements, that the applicable jurisdiction recognizes as justifying lease termination. Regardless of the basis of lease termination, once it occurs, the parties' ongoing obligations under the lease, including ongoing rental obligations, generally come to an end. n93

§ 40.03(k)(2) Survival of Monetary Obligations.

Termination of the lease does not necessarily mean that the tenant will have no obligation to make further monetary payments to the landlord. The landlord may still seek to recover unpaid rents that accrued prior to the time of lease termination. n94 In addition, the landlord may also be able to recover money from the tenant based on the existence of a lease provision specifying that the tenant's obligation to pay rent will continue after premature termination of the lease. Such a provision might provide that, following forfeiture or other premature termination of the lease based on a default by the tenant, the landlord may hold the tenant liable for subsequently accruing rents or for any deficiency in rents resulting from a reletting. n95

The prevailing rule with respect to the survival of lease obligations after forfeiture, re-entry, or dispossession by the landlord is that the parties may agree that the tenant is liable for subsequently accruing "rents." n96 However, courts tend to construe rent survival provisions against landlords. n97 And most courts limit landlord recovery under survival

provisions to a deficiency in rents if the landlord relets, or to the landlord's actual damages. n98

§ 40.03(k)(2)(i) Nature of Surviving Obligation.

Although judicial opinions do not always make clear whether the liability of the tenant under a survival provision following lease termination is for damages or for rent, n99 because the tenancy has ended, the tenant's liability is best characterized as liability for damages. n100

If the landlord does seek to recover damages under a survival provision after lease termination, the landlord may not be permitted to use remedies, such as distraint, that are considered to be applicable only to the recovery of rent. n101 Moreover, the landlord may also be barred from bringing an action to recover damages pursuant to a survival provision until after the time originally set for the expiration of the lease, on the theory that the damages will not be known until that time. n102 But courts have permitted the landlord to bring periodic actions for damages if such a right is set forth in the lease agreement. n103

The position of the Restatement is that an "obligation of the tenant to pay rent does not arise for any period after the lease is terminated." n104 While the parties to a lease may agree that the tenant will continue to make payments equal to rental payments after premature lease termination, the Restatement view is that such payments will not amount to rent, and the landlord may have to take reasonable steps to mitigate the tenant's liability by reletting the premises. n105

§ 40.03(l) Rent Control.

Governmentally imposed rent controls, where applicable, sometimes limit the landlord's ability to increase residential tenant rents. Although initially employed as emergency measures to control rents during housing shortages associated with World War I and World War II, rent controls have more recently been imposed to control peacetime inflationary rent increases. n106 Rent control ordinances typically provide a method to establish base rents and to calculate permissible subsequent rental adjustments. If the lease provides for rent in an amount greater than that permitted under a rent control statute, the lease provision will be void as to the excess amount. n107 Rent control legislation has generally survived constitutional attack, but particular statutes may be defeated if they do not allow a reasonable rate of return to the landlord. n108 Rent control issues are discussed more fully in Chapter 43.

FOOTNOTES:

(n1)Footnote 1. *See* 7 Sir William Holdsworth, A History of English Law 264, 265 (2d ed. 1937).

(n2)Footnote 2. *See* Sir William Holdsworth, A History of English Law 262, 263 (2d ed. 1937).

(n3)Footnote 3. *See* Sir William Holdsworth, A History of English Law 262 (2d ed. 1937).

(n4)Footnote 4. J.H. Thomas, 1 Systematic Arrangement of Lord Coke's First Institute of the Laws of England 344 (1986).

(n5)Footnote 5. J.H. Thomas, 1 Systematic Arrangement of Lord Coke's First Institute of the Laws of England 345 (1986) .

(n6)Footnote 6. *See* Sir William Holdsworth, A History of English Law 267 (2d ed. 1937).

(n7)Footnote 7. *See* Sir William Holdsworth, A History of English Law 267 (2d ed. 1937).

(n8)Footnote 8. *See* Sir William Holdsworth, A History of English Law 268 (2d ed. 1937).

(n9)Footnote 9. *See, e.g., Pinnell v. Woods, 121 S.W. 2d 679 (Ky. Ct. App. 1938)* ; *Najewitz v. City of Seattle, 152 P.2d 722 (Wash. 1944)* ; *Bachenheimer v. Palm Springs Management Corp., 254 P.2d 153 (Cal. Ct. App. 1953)* . In

Louisiana, however, a rent is, by statute, necessary to the existence of a lease. *See La. Civ. Code art. 2668* (lease is a contract in which the lessor binds himself to give the lessee the use and enjoyment of the thing "in exchange for a rent that the lessee binds himself to pay"); *see also La. Civ. Code art. 2675* & cmt.(d) (referring to jurisprudence, the comment states that "in the absence of rent there is no lease.")

(n10)Footnote 10. *See 11 Geo. 2,* c. 19 § 14 (1738).

(n11)Footnote 11. *See, e.g., Ala. Code § 35* 9 100; *see also* Uniform Residential Landlord and Tenant Act § 1.401(b); Model Residential Landlord-tenant Code § 2 301(1) 8.

(n12)Footnote 12. *See, e.g., Boston Housing Authority v. Hemingway, 293 N.E.2d 831 (Mass. 1973)* ; *Dwight v. Cutler, 3 Mich. 566 (1855)* ; *see also* 1 American Law of Property § 3.64 (A. James Casner ed. 1952). [hereinafter American Law of Property].

(n13)Footnote 13. *See* Restatement (Second) of Property § 12.1, cmt. b & Reporter's Note 4 (1977).

(n14)Footnote 14. *See, e.g., Najewitz v. City of Seattle, 152 P.2d 722 (Wash. 1944)* .

(n15)Footnote 15. *See, e.g., Carpenter v. United States, 84 U.S. 489 (Wall 1873)* . In the latter instance, if the sale is not consummated, the contract purchaser has been held liable to pay the reasonable rental value for the period of occupancy. *See, e.g., id.*

(n16)Footnote 16. *See* Restatement (Second) of Property § 12.1, cmt. b (1977).

(n17)Footnote 17. *See, e.g., Banta v. Carroll W. Griffith Co., 171 A. 450 (Del. Super. Ct. 1934)* .

(n18)Footnote 18. *See, e.g., Nicholas v. Howard, 459 A.2d 1039 (D.C. Ct. App. 1983)* .

(n19)Footnote 19. *See, e.g., Samuels v. Ottinger, 146 P. 638 (Cal. 1915)* ; *National Bank of Commerce v. Dunn, 78 P.2d 535 (Wash. 1938)* .

(n20)Footnote 20. *See, e.g., Springer v. DeWolf, 62 N.E. 542 (Ill. 1901)* ; *Consumers' Ice Co. v. Bixler, 35 A. 1086 (Md. 1896)* .

(n21)Footnote 21. *See, e.g., Glendale v. Barclay, 385 P.2d 230 (Ariz. 1963)* .

(n22)Footnote 22. *See, e.g., Samuels v. Ottinger, 146 P. 638 (Cal. 1915)* .

(n23)Footnote 23. *See* discussion in § 40.03(a), *above.*

(n24)Footnote 24. *See, e.g., Chicago Title & Trust Co. v. Illinois Merchants' Trust Co., 160 N.E. 597 (Ill. 1928)* ; *First Nat'l Bank of Omaha v. Omaha Nat'l Bank, 214 N.W.2d 483 (Neb. 1974)* , *Noble v. Tyler, 56 N.E. 191 (Ohio 1900)* .

(n25)Footnote 25. *See, e.g., Wolf v. Ranck, 129 N.W. 319 (Iowa 1911)* ; *Herrmeyer v. Kleeman, 251 N.W.2d 445 (Wis. 1975)* .

(n26)Footnote 26. *See, e.g., First Nat'l Bank v. Omaha Nat'l Bank, 214 N.W.2d 483 (1974)* ; *Bernard v. Triangle Music Co., 95 P.2d 43 (Wash. 1939)* .

(n27)Footnote 27. *See, e.g., Wilson v. Campbell, 425 S.W.2d 518 (Ark. 1968)* ; *Hall v. City of Baltimore, 250 A.2d 233 (Md. 1969)* ; *Bernard v. Triangle Music Co., 95 P.2d 43 (Wash. 1939)* .

(n28)Footnote 28. *See, e.g., Baker v. Eilers Music Co., 146 P. 1056 (Cal. Ct. App. 1915)* ; Annotation, *Surrender*

and Acceptance of Term as Affecting Right to Recover Rent or an Obligation Given for Rent, 58 A.L.R. 906 (1929) , supplementing 18 A.L.R. 957 (1922) .

(n29)Footnote 29. *See, e.g., Pedro v. Potter, 242 P. 926 (Cal. 1926)* ; *Lochner v. Martin, 147 A.2d 749 (Md. 1959)* ; *Friedman v. Isenbruck, 244 P.2d 718 (Cal. Ct. App. 1952)* .

(n30)Footnote 30. *See, e.g., Cottrell v. Gerson, 20 N.E.2d 74 (Ill. 1939)* ; *Johnson v. Snyder, 221 P.2d 164 (Cal. Ct. App. 1950)* .

(n31)Footnote 31. *See Calechman v. Great Atlantic & Pacific Tea Co., 180 A. 450 (Conn. 1935)* .

(n32)Footnote 32. *See, e.g., Bates v. Phinney, 8 N.W. 88 (Mich. 1881)* .

(n33)Footnote 33. *See, e.g., Deringer v. Pappas, 164 So. 2d 569 (Fla. Ct. App. 1964); Conner v. Warner, 152 P. 1116 (Okla. 1915)* ; *See* Restatement (Second) of Property § 12.1 cmt. e (1977).

(n34)Footnote 34. *See* Restatement (Second) of Property § 12.1 cmt. e (1977).

(n35)Footnote 35. *See* Restatement (Second) of Property § 12.1 cmt. e (1977).

(n36)Footnote 36. *See* Restatement (Second) of Property § 12.1, Reporter's note 6 (1977).

(n37)Footnote 37. *See* Restatement (Second) of Property § 12.1, statutory note (1977) (Lists statutes providing for rent apportionment).

(n38)Footnote 38. *See, e.g.*, N.C. Gen. Stat. §§ 42.

(n39)Footnote 39. *See, e.g.*, R.I. Gen. Laws § 34; Uniform Residential Landlord and Tenant Act § 1.401(c) (1972); Model Residential Landlord-Tenant Code § 2-301(3).

(n40)Footnote 40. *See, e.g., Cottrell v. Gerson, 20 N.E.2d 74 (Ill. 1939)* .

(n41)Footnote 41. *See, e.g., S.H.V.C., Inc. v. Roy, 450 A.2d 351 (Conn. 1982)* ; Restatement (Second) of Property § 12.1 cmt. c (1977).

(n42)Footnote 42. *See, e.g., Butterfield v. Duquesne Mining Co., 182 P.2d 102 (Ariz. 1947)* ; *A.P. Dev. Corp. v. Band, 550 A.2d 1220 (N.J. 1988)* .

(n43)Footnote 43. *See, e.g., Van Rensselaer v. Jewett, 2 N.Y. 135 (1849)* ; *Farmer v. Pitts, 187 N.W. 95 (Neb. 1922)* (tenant consent to change).

(n44)Footnote 44. *See, e.g., Williams v. Aeroland Oil Co., 20 So. 2d 346 (Fla. 1944)* ; *Parks v. Dunn, 68 N.E.2d 357 (Ohio Mun. Ct. 1946)* ; Uniform Residential Landlord and Tenant Act § 1.401(c).

(n45)Footnote 45. *See, e.g., Slothower v. Lally, 74 N.E.2d 654 (Ohio Mun. Ct. 1947)* ; *see generally* Robert S. Schoshinski, American Law of Landlord and Tenant § 5:38 (1980).

(n46)Footnote 46. *See, e.g., Lund v. Ozanne, 84 P. 710 (N.M. 1906)* .

(n47)Footnote 47. *See Farmer v. Pitts, 187 N.W. 95 (Neb. 1922)* ; *see also*, Robert S. Schoshinski, American Law of Landlord and Tenant § 5:38 (1980).

(n48)Footnote 48. According to Coke, "the rent may as well be in delivery of hens, capons, roses, spurs, bows, shafts, horses, hawks, pepper, cummin, wheat, or other profit, that lieth in render, office, attendance, and such like, as in

payment of money." J.H. Thomas, 1 Systematic Arrangement of Lord Coke's First Institute of the Laws of England 345 (1986).

(n49)Footnote 49. *See, e.g., Kuiper v. Miller, 207 N.W. 489 (N.D. 1926)* ; *Mayer v. Norton, 310 N.Y.S.2d 576 (Civ. Ct. 1970)* ; *See also Trostel v. American Life & Casualty Ins. Co., 133 F.3d 679 (8th Cir. 1998)* (court enforces lease provision requiring rent payment in gold coin).

(n50)Footnote 50. *See, e.g., Silveira v. Ohm, 201 P.2d 387 (Cal. 1949)* .

(n51)Footnote 51. *See, e.g., Walker v. Keith, 382 S.W.2d 198 (Ky. 1964)* ; *Dutcher v. Culver, 24 Minn. 584 (1877);* Restatement (Second) of Property § 12.1 cmt. a & Reporter's note 3 (1977).

(n52)Footnote 52. *See, e.g., Kandra v. Higgins, 281 P.2d 243 (Wash. 1955)* .

(n53)Footnote 53. *See, e.g., Rice v. Ritz Assoc., 460 N.Y.S.2d 510 (N.Y. 1983)* .

(n54)Footnote 54. *See, e.g., Frank B. Hall & Co. v. Orient Overseas Assocs., 401 N.E.2d 189 (N.Y. 1979)* .

(n55)Footnote 55. *See* Restatement (Second) of Property § 12.1, cmt. a (1977).

(n56)Footnote 56. *See, e.g., Professional Bldg. of Eureka, Inc. v. Anita Frocks, Inc., 2 Cal. Rptr. 914 (Cal. Ct. App. 1960)* ; *Cissna Loan Co. v. Baron, 270 P. 1022 (Wash. 1928)* ; *See* William B. Stoebuck & Dale A. Whitman, The Law of Property § 6.51 (3d ed. 2000). Additional information about percentage rent clauses is contained in chapter 44.

(n57)Footnote 57. *See, e.g., Fox v. Fox Valley Trotting Club, 134 N.E.2d 806 (Ill. 1956)* ; *Food Fair Stores, Inc. v. Blumberg, 200 A.2d 166 (Md. 1964)* ; *Marvin Drug Co. v. Couch, 134 S.W.2d 356 (Tex. Ct. App. 1939)* ; *See* William B. Stoebuck & Dale A. Whitman, The Law of Property § 6.51 (3d ed. 2000); Note, *The Percentage Lease-- Its Functions and Drafting Problems, 61 Harv. L. Rev. 317 (1948).*

(n58)Footnote 58. *See* Restatement (Second) of Property § 12.1, cmt. (1977).

(n59)Footnote 59. *See, e.g., Chicago Auditorium Ass'n v. Corporation of Fine Arts Bldg., 91 N.E. 665 (Ill. 1910)* ; *McMillan v. Great Northern Ry., 278 P.2d 316 (Wis. 1954)* .

(n60)Footnote 60. *See, e.g., Bonfanti v. Davis, 487 So. 2d 165 (La. Ct. App. 1986)* ; *Satterfield v. Layton, 669 S.W.2d 287 (Mo. Ct. App. 1984)* .

(n61)Footnote 61. *See Beal v. Dill, 252 P.2d 931 (Kan. 1953)* . Additional information regarding rent provisions in commercial leases is contained in chapter 44.

(n62)Footnote 62. *See, e.g., Allbaugh v. United States, 184 F.2d 109 (8th Cir. 1950)* ; *University Plaza Shopping Center, Inc. v. Garcia, 367 A.2d 957 (Md. 1977)* ; *but see* H.T. Tiffany, The Law of Real Property § 879 (3d ed., B. Jones 1939) (States that the proper view is that payments to third parties do not constitute rent).

(n63)Footnote 63. *See, e.g., In re Uni-Lab, Inc., 180 F. Supp. 176 (D.C. Pa. 1959); Elmira Corp. v. Bulman, 135 A.2d 645 (D.C. App. 1957)* ; Donald M. Zupanec, Annotation, *Landlord's Remedy by Way of Distress or Lien on Defaulting Tenant's Property on Leased Premises as Including Right to Collect for all Unpaid Utility Expenses, 99 A.L.R.3d 1100 (1980)* .

(n64)Footnote 64. *See Harbor Island Holdings, L.L.C. v. Kim, 132 Cal. Rptr. 2d 406 (Ct. App. 2003)* (Landlord reluctantly agreed to commercial lease extension, with greatly increased rental payments, including double rent in the event of tenant breach. When landlord sought double rent after lease expiration, court concluded that, under the circumstances of the case, the double rent provision was unenforceable as a penalty).

(n65)Footnote 65. *See, e.g., Aurora Bus. Park Assocs., L.P. v. Michael Albert, Inc., 548 N.W.2d 153 (Iowa 1996)* ; *Platt v. Johnson, 31 A. 935 (Pa. 1895)* ; John F. Taylor, Note, Landlord and Tenant: Leases: Landlord's Remedies Following Default or Repudiation by Tenant: Civil Code 3308: Rent Acceleration Clauses, *43 Cal. L. Rev. 344, 346 (1955);* Annotation, *Validity and Effect of Acceleration Clause in Lease or Bailment*, 58 A.L.R. 300 (1929) .

(n66)Footnote 66. *See, e.g., Ricker v. Rombough, 261 P.2d 328 (Cal. Ct. App. 1953)* ; 884 *West End Ave. Corp. v. Pearlman, 193 N.Y.S. 670 (Ct. App. 1922)138 N.E. 458 (N.Y. 1922); Patton v. Milwaukee Com. Bank, 268 N.W. 124 (Wis. 1936)* .

(n67)Footnote 67. *See, e.g., Gentry v. Recreation, Inc., 7 S.E.2d 63 (S.C. 1940)* ; 1 American Law of Property, § 3.74(A. James Casner ed. 1952).

(n68)Footnote 68. *See, e.g., Geiger Mut. Agency, Inc. v. Wright, 233 So. 2d 444 (Fla. Dist. Ct. App. 1970)* .

(n69)Footnote 69. *See, e.g., CB Institutional Fund VIII v. Gemballa U.S.A., Inc., 566 So. 2d 896 (Fla. Ct. App. 1990)* ; *Jimmy Hall's Morningside, Inc. v. Blackburn & Peck Enters., 235 So. 2d 344 (Fla. Ct. App. 1970)* .

(n70)Footnote 70. *See* Restatement (Second) of Property § 12.1 cmt. k (1977). The Restatement contemplates that an acceleration clause may be unconscionable if it provides for acceleration without first requiring the landlord to demand that the tenant eliminate the default, and without permitting the tenant a reasonable time in which to comply. *See id. Cf. Aurora Bus. Park Assocs., L.P. v. Michael Albert, Inc., 548 N.W.2d 153 (Iowa 1996)* (tenant abandonment case; court upholds acceleration clause as valid liquidated damages provision; citing the Restatement, court states that tenant is entitled to credit for rents received by landlord for reletting property during the remainder of the leased term).

(n71)Footnote 71. *See, e.g., Hawkinson v. Johnston, 122 F.2d 724 (8th Cir. 1941); contra, Wells v. Twenty First St. Realty Co., 12 F.2d 237 (6th Cir. 1926)* ; *See also Onal v. BP Amoco Corp., 275 F. Supp. 2d 650 (E.D. Pa. 2003)* (Tenant attempted to terminate a commercial lease. Tenant found to have breached its lease obligations. However, landlord was unable to obtain damages based on future rents, because the lease did not include a rent acceleration clause). Anticipatory breach is discussed in § 40.11(a)(3), *below.*

(n72)Footnote 72. *See* discussion in § 40.13, *below.*

(n73)Footnote 73. *See* 1 American Law of Property, § 3.74 (A. James Casner ed. 1952).

(n74)Footnote 74. *See, e.g., Hankin v. Armstrong, 451 N.Y.S.2d 334 (Sup. Ct. 1981)* ; 447 *Associates v. Miranda, 115 N.J. 522, 559 A.2d 1362 (N.J. 1989)* .

(n75)Footnote 75. *See, e.g., Oami v. Delk Interchange, Ltd., 388 S.E.2d 706 (Ga. Ct. App. 1989)* ; *Weinberg Properties v. Kenner, 498 N.Y.S.2d 144 (App. Div. 1986)* .

(n76)Footnote 76. *See, e.g., Hayes v. First Nat'l Bank, 507 S.W.2d 701 (Ark. 1974)* ; *Fellows v. National Can Co., 257 F. 970 (6th Cir. 1919); Bonfanti v. Davis, 487 So. 2d 165 (La. Ct. App. 1986)* .

(n77)Footnote 77. *See Mass. Gen. Laws Ann. ch. 186, § 15B*; *see also N.Y. Real Prop. Law § 233(r)* (limitation on late charge in mobile home lease).

(n78)Footnote 78. *See* 1 American Law of Property § 3.70 (A. James Casner ed. 1952).

(n79)Footnote 79. *See* 1 American Law of Property § 3.70 (A. James Casner ed. 1952).

(n80)Footnote 80. *See, e.g., Mich. Comp. Laws Ann. § 566.1*.

(n81)Footnote 81. *See, e.g., Green v. Millman Bros., 151 N.W.2d 860 (Mich. Ct. App. 1967)* (oral modifications);

R.H. Lockwood, Annotation, *Necessity and Nature of Consideration Supporting Landlord's Reduction of Rent, 30 A.L.R.3d 1259 (1970)* ; Annotation, *Consideration for Modification of Terms of Existing Tenancy*, 43 A.L.R. 1451 (1926) .

(n82)Footnote 82. *See, e.g., C.S. Brackett Co. v. Lofgren, 167 N.W. 274 (Minn. 1918)* ; *contra, Levine v. Blumenthal, 186 A. 457 (N.J. Sup. Ct. 1936).*

(n83)Footnote 83. *See, e.g., Hurlbut v. Butte Kansas Co., 243 P. 324 (Kan. 1926)* (waiver); *McKenzie v. Harrison, 24 N.E. 458 (N.Y. 1890)* (gift).

(n84)Footnote 84. *See, e.g., Cohen v. Homonoff, 41 N.E.2d 193 (Mass. 1942)* ; *Natelsohn v. Reich, 99 N.Y.S. 327 (Misc. 1906)* .

(n85)Footnote 85. *See, e.g., Brill v. Carsley, 84 P. 57 (Cal. Ct. App. 1905)* ; *Jensen v. Anderson, 167 P. 811 (Utah 1917)* (right to cultivate land); Annotation, *Consideration for Modification of Terms of Existing Tenancy*, 43 A.L.R. 1451 (1926) .

(n86)Footnote 86. *See, e.g., William Lindeke Land Co. v. Kalman, 252 N.W. 650 (Minn. 1934)* ; *contra, Green v. Millman Bros., 151 N.W.2d 860 (Mich. Ct. App. 1967)* .

(n87)Footnote 87. *See* Restatement (Second) of Property § 2.4, cmt. b, illus. 2 (1977).

(n88)Footnote 88. *See* Restatement (Second) of Property § 2.4 (1977).

(n89)Footnote 89. *See* Restatement (Second) of Property § 2.4, cmt. b (1977).

(n90)Footnote 90. *See, e.g., Sherman Clay & Co. v. Buffum & Pendleton, Inc., 179 P. 241 (Or. 1919)* .

(n91)Footnote 91. *See, e.g., Bonicamp v. Starbuck, 106 P. 839 (1910)* ; *Vance Lumber Co. v. Tall's Travel Shops, Inc., 142 P.2d 904 (Wash. 1943)* .

(n92)Footnote 92. *See, e.g., Nonamaker v. Amos, 76 N.E. 949 (Ohio 1905)* (additional oil exploration); *See* Restatement (Second) of Property § 2.4, cmt. c (1977).

(n93)Footnote 93. *See, e.g., Blond v. United States Fidelity & Guaranty Co., 80 S.W.2d 675 (Mo. 1935)* ; *Heuss v. Olson, 264 P.2d 875 (Wash. 1953)* ; Annotation, *Surrender and Acceptance of Term as Affecting Right to Recover Rent or on Obligation Given for Rent*, 58 A.L.R. 906 (1929) , supplementing 18 A.L.R. 957 (1922) ; Restatement (Second) of Property § 12.1, cmt. g (1977).

(n94)Footnote 94. *See, e.g., Geiger Mutual Agency, Inc. v. Wright, 233 So. 2d 444 (Fla. Dist. Ct. App. 1970)* ; *Anderson v. Ferguson, 135 P.2d 302 (Wash. 1943)* .

(n95)Footnote 95. *See, e.g., Frey v. Abdo, 441 So. 2d 1383 (Miss. 1983)* (termination of a lease generally terminates liabilities to accrue in the future, such as rent, except where, by express provision in lease, termination is not to affect the accrual of such liabilities; here, the lease provision was not clear enough to impose such liability); *International Publications v. Matchabelli, 184 N.E. 51 (N.Y. 1933)* (court construes lease to provide that even if the relationship of landlord and tenant shall have terminated the tenant will not be deemed to have been absolved of any liability under the lease); *Sunset Fuel & Engineering Co. v. Compton, 775 P.2d 901 (Or. Ct. App. 1989)* (tenant, by failing to pay rent timely, forfeits his estate in the real property, but remains liable for damages for breach of the agreement to rent the premises in the future); 49 Am. Jur. 2d *Landlord and Tenant* § 1055 (1970).

(n96)Footnote 96. *See, e.g., Rucker v. Wynn, 441 S.E.2d 417 (Ga. Ct. App. 1994)* ; *International Publications, Inc. v. Matchabelli, 184 N.E. 51 (N.Y. 1933)* ; *Hermitage Co. v. Levine, 162 N.E. 97 (N.Y. 1928)* ; Annotation, *Construction*

and Effect of Provision of Lease or Bond Saving Liability of Tenant or Sureties in Case of Forfeiture of Lease or Re-entry by Landlord, 99 A.L.R. 42 (1935) .

(n97)Footnote 97. *See, e.g., Sacher v. Taco Grande of Iowa, Inc., 313 N.W.2d 257 (Neb. 1981)* ; *Michaels v. Fishel, 62 N.E. 425 (N.Y. 1902)* ; *Walling v. Christie & Hobby, Inc., 54 S.W.2d 186 (Tex. Ct. App. 1932)* .

(n98)Footnote 98. *See, e.g., Central Investment Co. v. Melick, 108 N.E. 681 (Ill. 1915)* ; *Guthrie v. Hagen, 203 N.W. 216 (Minn. 1925)* ; Restatement (Second) of Property § 12.1, Reporter's Note 7 (1977).

(n99)Footnote 99. *See, e.g., Selts Investment Co. v. Promoters of Federated Nations, 222 N.W. 812 (Wis. 1929)* ; W.W. Allen, Annotation, *Construction and Effect of Provision of Lease or Bond Saving Liability of Tenant or Sureties in Case of Forfeiture of Lease or Re entry by Landlord*, 99 A.L.R. 42 (1935) .

(n100)Footnote 100. *See, e.g., Benderson v. Poss, 530 N.Y.S.2d 362 (App. Div. 1988)* ; *Hermitage Co. v. Levine, 162 N.E. 97 (N.Y. 1928)* .

(n101)Footnote 101. *See, e.g., Burnett v. Boukedes, 125 S.E.2d 10 (S.C. 1962)* .

(n102)Footnote 102. *See, e.g., Hermitage Co. v. Levine, 162 N.E. 97 (N.Y. 1928)* .

(n103)Footnote 103. *See, e.g., Sanders v. Kahn, 134 A.2d 107 (D.C. Ct. App. 1957)* ; *Lewyt Patchogue Co. v. Cantor, 440 N.Y.S.2d 693 (App. Div. 1981)* ; *see also Hermitage Co. v. Levine, 162 N.E. 97 (N.Y. 1928)* .

(n104)Footnote 104. *See* Restatement (Second) of Property § 12.1 cmt. g (1977).

(n105)Footnote 105. Restatement (Second) of Property § 12.1 cmt. g (1977).

(n106)Footnote 106. *See* § 43.04(a), *below*.

(n107)Footnote 107. *See, e.g., Properties of Cent. Park S., Inc., v. Romoff, 200 N.Y.S.2d 459 (Sup. Ct. App. Term. 1960)* .

(n108)Footnote 108. *See, e.g., Helmsley v. Borough of Fort Lee, 394 A.2d 65 (N.J. 1978), clarified on other grounds, 411 A.2d 203 (N.J. 1980).*

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CHAPTER 40 LANDLORD RIGHTS AND TENANT DUTIES

5-40 Thompson on Real Property, Thomas Editions § 40.04

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§ 40.04 Landlord Liens.

§ 40.04(a) Distraint.

§ 40.04(a)(1) At Common Law.

The ancient common law right of distraint, or distress, as it is often called, permitted a landlord to enter the leased premises, to seize personal property located there, and to retain the personal property until overdue rent was paid. n109 Exercising the right of distraint, the landlord could generally reach all personal property located on the leased premises, not just that belonging to the tenant. n110 However, the right did not apply to chattels that had been bailed to the tenant in the course of the tenant's trade or business; nor did it reach the tenant's own tools of trade if sufficient other property were available from which the rental obligation could be satisfied. n111

While the common law right of distraint did provide a remedy for the collection of rent, the landlord did not obtain an interest in the tenant's personal property until it was seized for failure to pay rent. n112 Nor could the landlord sell the personal property in satisfaction of the tenant's rent obligation; the landlord could only hold the property until the tenant paid the rent. n113 However, in the latter part of the 17th century, the landlord's hand was strengthened by legislation that gave the landlord the right to sell distrained property and to apply the proceeds of sale to the tenant's rent obligation. n114 In 1709, further legislation permitted the landlord to recover chattels that were removed from the leased premises for purposes of avoiding distraint, and required judgment creditors of the tenant to pay up to one year's past due rent to the landlord before they could sell the tenant's personal property under an execution. n115

§ 40.04(a)(2) Current Status of Distraint.

The distraint remedy is generally not available in its traditional common law form in the United States today. Courts in this country have not looked with favor on this form of self help because of the opportunity it affords for injustice and oppression, and because it discriminates in favor of a particular class of creditors. n116 Accordingly, courts in several states held that distraint was not part of the common law in their jurisdictions. n117 In a number of other states, distraint has been expressly abolished by statute. n118 Both the Uniform Residential Landlord and Tenant Act and the Model Residential Landlord-Tenant Code eliminate distraint as a remedy for residential tenancies. n119

Where distraint has not been abolished, it has frequently been modified by statute. n120 A number of statutes have removed the self help nature of the remedy, and have provided for a government official to control landlord access to personal property on the leased premises. n121 Under such a statute, the landlord may be required to file a claim for unpaid rent with a court or magistrate before a distress warrant may be issued and before property on the leased premises may be made subject to levy by a court officer. n122 The landlord may also be required to post a bond. n123 Concerns about potential constitutional deficiencies, discussed below, have prompted some states to adopt legislation providing tenants with notice and hearing opportunities. n124 Other statutory modifications have excepted certain property from distraint, such as the property of strangers, property held under bailment, property subject to chattel mortgage, or specific property of the tenant. n125

§ 40.04(a)(3) Consequences of Unlawful Resort to Distraint.

At common law, the landlord who unlawfully resorted to the distraint remedy, as in the case when no rent was owed, was subject to potential actions in trespass, trespass on the case, trover, or replevin. n126 Under an early statute, the landlord could also be liable in damages for seizing an excessive amount of personal property. n127 Of course, the remedies of trespass and replevin remain available to modern tenants in the case of unlawful distraint. n128 Wrongful exercise of the remedy may expose the landlord to a claim of damages, n129 perhaps including punitive damages. n130 In some instances, landlord liability is provided for by statute. n131

§ 40.04(b) Statutory Liens in Favor of Landlords.

Many jurisdictions have enacted legislation providing landlords with lien rights in tenant personal property. n132 Although statutory lien provisions are quite varied, there are some broad distinctions between the traditional common law remedy of distraint and the typical statutory lien.

§ 40.04(b)(1) Time of Attachment.

One of the principal differences concerns when the landlord acquires an interest in the personal property. In the case of common law distraint, the landlord's interest in the personal property arose at the time the property was seized for nonpayment of rent. In contrast, the statutory lien rights of the landlord generally attach at the commencement of the tenancy or at the time the particular personal property is brought onto the premises. n133

The early attachment of statutory lien rights may be advantageous to the landlord in disputes with other creditors of the tenant. A number of statutes make express provision for the priority of landlord liens. Many statutes state, in general terms, that landlord liens are preferred over other encumbrances. n134 Some statutes are more specific, and provide that the landlord's lien is prior to claims other than taxes or previously existing security interests in the subject property. n135 Even when the statutes have not expressly provided for priority, when the landlord's lien arises at the commencement of the tenancy, courts have concluded that the lien is prior to other encumbrances on the tenant's personal property that were created after the commencement of the lease. n136 However, this does not mean that the lien will survive an attack by the tenant's trustee in bankruptcy. n137

It should be noted that statutory liens in favor of landlords are not subject to the provisions of Article Nine of the Uniform Commercial Code. n138 Accordingly, landlords are generally not required to record or file notice of their statutory liens in order to preserve lien priority. n139

§ 40.04(b)(2) Property Reached.

Another difference between distraint and the typical statutory lien relates to the property that may be reached by the landlord. With some exceptions, the traditional distraint remedy at common law could be asserted against all property located on the leased premises, whether or not the property belonged to the tenant. Statutory liens, in contrast, generally do not give landlords rights in the property of third persons. n140 In addition, lien statutes often exempt tenant personal

effects n141 or limit the amount of rent that the lien may secure. n142 In a point in common with common law distraint, landlord lien statutes often exempt property that is used in the tenant's trade or business. n143

§ 40.04(b)(3) Distinctions Between Distraint and Statutory Liens.

Unlike the traditional common law right of distraint, which was a self help remedy for the landlord, most statutory liens are enforceable only through the judicial process. n144 Particular statutes may characterize the process as one in attachment, n145 or as an action for rent, n146 but resort to the courts is in any case generally required.

Statutory liens vary as to the types of tenancies to which they apply. Some statutory liens apply only to residential leases. n147 Others apply only to non residential tenancies. n148 Still other statutory liens apply only to agricultural leases. n149 Both the Uniform Residential Landlord and Tenant Act and the Model Residential Landlord-Tenant Code prohibit the application of landlord liens to residential tenancies. n150

§ 40.04(b)(4) Constitutional Issues.

A number of statutory distraint and landlord lien procedures have been invalidated for constitutional deficiencies. Court decisions invalidating such procedures have generally relied on the standards for due process of law articulated by the United States Supreme Court in *Sniadach v. Family Finance Corp.* n151 *Fuentes v. Shevin*, n152 and other cases involving prejudgment creditors' remedies. n153 In those cases, prejudgment remedial procedures that did not provide the debtor with adequate notice or adequate opportunity for hearing were found by the Supreme Court to violate Ariz. Rev. Stat. Ann. §§ 12-1171--1183 requirements for due process of law.

Courts have invalidated a number of distraint and statutory lien procedures based on the due process standards articulated in the Supreme Court cases. n154 For example, courts have invalidated procedures that: 1) permitted the sale of tenant personal property without a hearing; n155 2) allowed seizure of a third party's personal property without notice or hearing; n156 and 3) permitted a writ of attachment to be issued by a court clerk instead of by a judge, did not require prompt notice or hearing to the tenant in connection with the property seizure, and did not require the tenant to be informed of possible exemptions from attachment. n157

State action has been an issue in some of the cases. Because most distraint and statutory lien procedures provide for some involvement by judicial or other public officials, this should be sufficient to satisfy the state action element of a *Fourteenth Amendment* analysis. But if the procedures in question are of a self help variety, sufficient state action may not be present. Indeed, several courts have concluded that where no state officer is involved, the procedures are not subject to a due process attack. n158 A few courts have disagreed, reasoning that state action is present in self help cases on the ground that the landlord's actions were authorized by statute and involved delegation of a sovereign function. n159 In an analogous setting, the United States Supreme Court has held that enforcement of a warehouseman's lien by private sale pursuant to the provisions of the Uniform Commercial Code did not amount to state action, where public officials were not involved in the procedure and where the state did not compel its use. n160

§ 40.04(c) Liens Created by Lease Provision.

A landlord's lien in tenant personal property may also be created by a provision in the lease. n161 When not prohibited by statute, a consensual lien in favor of the landlord may exist independently of distraint or statutory lien rights. n162 However, statutes in a number of jurisdictions prohibit or limit the enforcement of contractual liens in the residential landlord-tenant context. n163

§ 40.04(c)(1) Applicability of Article 9 of the Uniform Commercial Code.

Several courts have considered the applicability of *Article 9 of the Uniform Commercial Code* to consensual liens in favor of landlords. Section 9-109(d)(1) of the U.C.C., like its predecessor, Section 9-104(b), expressly excludes landlord

liens from the scope of Article 9. However, the Article 9 exclusion has been regarded as referring to non consensual landlord liens. n164 Courts usually consider consensual landlord liens to be chattel mortgages, n165 to which Va. Code Ann. § 55-248.35 expressly applies. n166

Accordingly, Ariz. Rev. Stat. Ann. § 33-1375 should generally govern the perfection, priority, and enforcement of a landlord's consensual lien on tenant personal property. n167 Among other things, this means that the landlord should file a financing statement to perfect a security interest created by the lien-creating provision in the lease. n168 However, several courts have required the landlord to resort to judicial enforcement of consensual liens, even though self help remedies are permitted under Article 9. n169

§ 40.04(c)(2) Scope of the Lien.

The terms of the lease will determine the property that is covered by the lien and the lease covenants that it secures. n170 Some courts have held that a consensual landlord's lien may reach tenant property that would otherwise be exempt from a statutory lien. n171 However, other courts have concluded that an agreement giving the landlord a lien on exempt property represents an invalid waiver of the tenant's exemption rights. n172 It has also been held that a consensual lien will reach after acquired property if the lease so provides. n173 With some limitations, the Uniform Commercial Code permits security agreements to reach after acquired property. n174

A consensual lien agreement is usually considered to constitute a personal covenant between the landlord and tenant, not binding on the property of third parties, including sublessees and assignees. n175

FOOTNOTES:

(n1)Footnote 109. *See, e.g., Henderson v. Mayer, 225 U.S. 631 (1912)* ; *Jones v. Ford, 254 F. 645 (8th Cir. 1918)* ;.

(n2)Footnote 110. *See Jones v. Ford, 254 F. 645(8th Cir. 1918)* ; Annotation, *Landlord's Lien or Right of Distress on Property Sold to Tenant on Conditional Sale*, 45 A.L.R. 949 (1926) ; Annotation, *Goods Owned by Stranger or Subject to an Encumbrance in His Favor as Subject to Distraint for Rent*, 62 A.L.R. 1106 (1929) .

(n3)Footnote 111. *See* 1 American Law of Property § 9.47 (A. James Casner ed. 1952); Annotation, *Goods Owned by Stranger or Subject to an Encumbrance in His Favor as Subject to Distraint for Rent*, 62 A.L.R. 1106 (1929) .

(n4)Footnote 112. *See, e.g., Henderson v. Mayer, 225 U.S. 631 (1912)* .

(n5)Footnote 113. *See* Annotation, *Goods Owned by Stranger or Subject to an Encumbrance in His Favor as Subject to Distraint for Rent*, 62 A.L.R. 1106 (1929) .

(n6)Footnote 114. *See* Act Enabling the Sale of Goods Distrained, 2 W. & M., c. 5 § 2 (1689).

(n7)Footnote 115. *See* Act for the Better Security of Rents, 8 Anne, c. 14 § 1 (1709).

(n8)Footnote 116. *See* 1 American Law of Property § 9.47 (A. James Casner ed. 1952).

(n9)Footnote 117. *See, e.g., Heer v. Johnson, 18 P. 342 (Colo. 1888)* ; *In re Wait, 24 Mass. 100 (1828)* ; *Howland v. Forlaw, 13 S.E. 173 (N.C. 1891)* .

(n10)Footnote 118. *See, e.g., Minn. Stat. Ann. § 504B.101*; *Or. Rev. Stat. § 91.835*.

(n11)Footnote 119. *See* Uniform Residential Landlord and Tenant Act § 4.205; Model Residential Landlord-Tenant Code § 3 403(2).

(n12)Footnote 120. *See generally* Robert S. Schoshinski, American Law of Landlord and Tenant § 6:21 (1980).

(n13)Footnote 121. *See* Restatement (Second) of Property § 12.1, statutory note 5 (1977).

(n14)Footnote 122. *See, e.g., Fla. Stat. Ann. §§ 83.11-12*.

(n15)Footnote 123. *See, e.g., Fla. Stat. Ann. §§ 83.11-12*.

(n16)Footnote 124. *See, e.g., Md. Ann. Code Real Prop. §§ 8-304, 8-305, 8-314*.

(n17)Footnote 125. *See* Annotation, *Landlord's Lien or Right of Distress on Property Sold to Tenant on Conditional Sale*, 45 A.L.R. 949 (1926) ; Annotation, *Goods Owned by Stranger or Subject to an Encumbrance in His Favor as Subject to Distraint for Rent*, 62 A.L.R. 1106 (1929) ; 1 American Law of Property § 9.47 (A. James Casner ed. 1952); *but cf. Tolemac, Inc. v. United Trading, Inc., 484 S.E.2d 593 (S.C. 1997)* (South Carolina distraint statute reaches property belonging to third parties; however, notice and an opportunity for hearing must be afforded before the third party property is subject to sale).

(n18)Footnote 126. *See* 2 Herbert Thorndike Tiffany, Landlord and Tenant § 346, at 2073, 2076 & 2079 (1912).

(n19)Footnote 127. *See*, 2 Herbert Thorndike Tiffany, Landlord and Tenant § 346, at 2081 (1912).

(n20)Footnote 128. *See, e.g., Brown v. Stackhouse, 26 A. 669 (Pa. 1893)* ; *Crocker v. Mann, 3 Mo. 472 (1834)* .

(n21)Footnote 129. *See, e.g., Newman & Prichard v. Robson, 104 S.E. 127 (W. Va. 1920)* .

(n22)Footnote 130. *See Luria Bros. & Co., Inc. v. Allen, 672 F.2d 347 (3d Cir. 1982)* .

(n23)Footnote 131. *See, e.g., Pa. Stat. Ann. tit. 68 § 250.313*; *Va. Code Ann. § 55* 236.

(n24)Footnote 132. *See* statutes listed *below* § 43.06(d) note 881; *see also* Restatement (Second) of Property § 12.1, statutory note 5 (1977); Robert S. Schoshinski, American Law of Landlord and Tenant § 6:22 (1980).

(n25)Footnote 133. *See, e.g., Cal. Civ. Code § 1861a*; *Bates & Springer of Arizona, Inc. v. Friermood, 507 P.2d 668 (Ariz. 1973)* (beginning of tenancy); *Herringer v. Mercantile Bank of Jonesboro, 866 S.W.2d 390 (Ark. 1993)* (when personal property is placed on the leased premises); *Hall v. Yarbrough's Pharmacy, Inc., 493 So. 2d 814 (La. Ct. App. 1986)* (when chattels brought onto leased premises); *but see Jordan v. Wilhelm, 770 P.2d 74 (Or. Ct. App. 1989)* (lien does not attach until 20th day after rents or advances become due or when tenant attempts to remove property from leased premises while rent is due).

(n26)Footnote 134. *See, e.g.*, N.J. Stat. Ann. § 2A:18-61.1.

(n27)Footnote 135. *See, e.g., 15 U.S.C. §§ 1692*-1692o.

(n28)Footnote 136. *See, e.g., Spilman v. Geiger, 58 F.2d 890 (D.C. Cir. 1932)* ; *Lovett v. Lee, 193 So. 538 (Fla. 1940)* ; *Cf. Herringer v. Mercantile Bank of Jonesboro, 866 S.W.2d 390 (Ark. 1993)* (bank's purchase money security interest attached at the same time as landlord's lien; bank prevails against landlord).

(n29)Footnote 137. *See* discussion of bankruptcy issues in § 40.13.

(n30)Footnote 138. *See* U.C.C. § 9-109(d)(1) (article nine "does not apply to ... a landlord's lien, other than an agricultural lien.").

(n31)Footnote 139. *See, e.g., Rivenbark v. Moore, 291 S.E.2d 293 (N.C. Ct. App. 1982)* ; *but see Montgomery County Farm Bureau Cooperative Ass'n v. Deseret Title Holding Corp., 513 N.E.2d 193 (Ind. Ct. App. 1987)* (statute requires landlord desiring to hold a lien on crops to file notice of intention to do so in county recorder's office); *Bank of*

North America v. Kruger, 551 S.W.2d 63 (Tex. Ct. App. 1977) (Texas statute requires the filing of an affidavit with the country clerk if the landlord wishes to preserve priority of the lien with respect to rents more than six months past due); *cf. In re Esparza, 821 P.2d 1216 (Wash. 1992)* (en banc) (filing of landlord's lien is necessary to establish its priority against valid security interests or crop liens filed prior to the time of landlord's lien).

(n32)Footnote 140. *See, e.g., Chapman Bros. Stationery & Office Equip. Co. v. Miles Hiatt Invs., Inc., 580 P.2d 540 (Or. 1978)* ; *See* Janet Fairchild, *Annotation, Application of Statutory Landlord's Lien to Property of Third Person Used by Tenant on Rented Premises, 95 A.L.R.3d 1205 (1979)* ; *but see, State ex rel. Childers v. 2525 East Arizona Biltmore Circle Corp., 731 P.2d 1239 (Ariz. Ct. App. 1986)* (imposition of landlord's lien upon property of assignee or sublessee of tenant); *Wash. Rev. Code Ann. § 60.72.010* (reaches all property on premises, with some exceptions).

(n33)Footnote 141. *See, e.g., Okla. Stat. Ann. tit. 41 § 41*.

(n34)Footnote 142. *See, e.g., Wash. Rev. Code Ann. § 60.72.010* (lien for two months rent).

(n35)Footnote 143. *See, e.g., Okla. Stat. Ann. tit. 41 § 133*.

(n36)Footnote 144. *See* Robert S. Schoshinski, American Law of Landlord and Tenant § 6:22 (1980); *but see La. Civ. Code arts. 2709* & *3218*.

(n37)Footnote 145. *See, e.g., Wash. Rev. Code Ann. § 60.72.040*.

(n38)Footnote 146. *See, e.g., Cal. Civ. Code § 1861a*.

(n39)Footnote 147. *See, e.g., N.M. Stat. Ann. § 48-3-5*.

(n40)Footnote 148. *See, e.g., Wash. Rev. Code Ann. § 60.72.010*.

(n41)Footnote 149. *See, e.g., Kan. Stat Ann. § 58* 2524 *et seq*.

(n42)Footnote 150. *See* Uniform Residential Landlord and Tenant Act § 4.205(a); Model Residential Landlord-Tenant Code § 3.403 (1).

(n43)Footnote 151. *395 U.S. 337 (1969)* .

(n44)Footnote 152. *407 U.S. 67 (1972)* .

(n45)Footnote 153. *See Mitchell v. W.T. Grant Co., 416 U.S. 600 (1974)* ; *North Georgia Finishing, Inc. v. Di Chem, Inc., 419 U.S. 601 (1975)* .

(n46)Footnote 154. *See* cases collected in Restatement (Second) of Property § 12.1, Reporter's Note 12 (1977) and Gary D. Spivey, Annotation, *Modern Views as to Validity, Under Federal Constitution, of State Prejudgment Attachment, Garnishment, and Replevin Procedures, Distraint Procedures Under Landlords' or Innkeepers' Lien Statutes, and Like Procedures Authorizing Summary Seizure of Property, 18 A.L.R. Fed. 223 (1974).*

(n47)Footnote 155. *See Ragin v. Schwartz, 393 F. Supp. 152 (W.D. Pa. 1975)* .

(n48)Footnote 156. *See Pettigrew v. Womble, 589 F. Supp. 242 (D.S.C. 1984)* .

(n49)Footnote 157. *See McCrory v. Johnson, 755 S.W.2d 566 (Ark. 1988)* .

(n50)Footnote 158. *See, e.g., Luria Bros. & Co. v. Allen, 672 F.2d 347 (3d Cir. 1982)* ; *S.M.I. Indus., Inc. v. Lanard & Axilbund, Inc., 481 F. Supp. 459 (E.D. Pa. 1979)* ; *U.S.A. Lehndorff Vermoegensverwaltung GmbH and Cie v. Cousins Club, 348 N.E.2d 831 (Ill. 1976)* .

(n51)Footnote 159. *See, e.g., Hall v. Garson, 430 F.2d 430 (5th Cir. 1970)* ; *Adams v. Department of Motor Vehicles, 520 P.2d 961 (Cal. 1974)* ; *Culbertson v. Leland, 528 F.2d 426 (9th Cir. 1975)* .

(n52)Footnote 160. *See Flagg Brothers, Inc. v. Brooks, 436 U.S. 149 (1978)* .

(n53)Footnote 161. *See, e.g., Jordan v. Talbot, 361 P.2d 20 (Cal. 1961)* ; *Vawter v. McKissick, 159 N.W.2d 538 (Iowa 1968)* .

(n54)Footnote 162. *See, e.g., Ginsberg v. Lindel, 107 F.2d 721 (8th Cir. 1939)* ; *Vawter v. McKissick, 159 N.W.2d 538 (Iowa 1968)* .

(n55)Footnote 163. *See, e.g.*, S.D. Codified Laws § 21; *Ariz. Rev. Stat. Ann. § 33-1372*; Uniform Residential Landlord and Tenant Act § 4.205(a).

(n56)Footnote 164. *See, e.g., In re Leckie Freeburn Coal Co., 405 F.2d 1043 (6th Cir. 1969)* ; *Shurlow v. Bonthuis, 553 N.W.2d 366 (Mich. App. 1996), app. granted, 568 N.W.2d 88 (Mich. 1997), aff'd in part & rev'd in part, 576 N.W.2d 159 (Mich. 1998);* 8 William D. Hawkland et al., Uniform Commercial Code Series § 9 104:03, note 1 (1990).

(n57)Footnote 165. *See, e.g., Vawter v. McKissick, 159 N.W.2d 538 (Iowa 1968)* ; *Universal C.I.T. Credit Corp. v. Congressional Motors, Inc., 228 A.2d 463 (Md. 1967)* ; *Shurlow v. Bonthuis, 553 N.W.2d 366 (Mich. App. 1996) , appeal granted, 568 N.W.2d 88 (Mich. 1997)* , aff'd in part & rev'd in part, *576 N.W.2d 159 (Mich. 1998)* ; *Lone Oak Farm Corp. v. Riverside Fertilizer Co., 428 N.W.2d 175 (Neb. 1988)* ; *but see Marquam v. Sengfelder, 32 P. 676 (Or. 1893)* (equitable lien instead).

(n58)Footnote 166. *See* U.C.C. § 9-102(2).

(n59)Footnote 167. *But see Kuemmerle v. United New Mexico Bank, 831 P.2d 976 (N.M. 1992)* (common law governs priority).

(n60)Footnote 168. *See* U.C.C. § 9 310 (formerly §9-302); *Dallas v. S.A.G., Inc., 836 F.2d 1307 (11th Cir. 1988)* ; *In re Leckie Freeburn Coal Co., 405 F.2d 1043 (6th Cir. 1969) , cert. denied, sub nom., Foster v. Hamblin, 395 U.S. 960 (1969)* ; *United States v. Globe Corp., 546 P.2d 11 (Ariz. 1976)* . Failure to file a financing statement may have consequences beyond the mere loss of lien priority. In *Shurlow v. Bonthuis, 553 N.W.2d 366 (Mich. App. 1996) , app. granted, 568 N.W.2d 88 (Mich. 1997)* , aff'd in part & rev'd in part, *576 N.W.2d 159 (Mich. 1998)* , the Michigan Court of Appeals concluded that the landlord's failure to file a financing statement also resulted in the discharge of a guarantor of the lease. The court affirmed the conclusion of the trial court that the failure to file amounted to an impairment of collateral, which gave the guarantor a defense of discharge.

(n61)Footnote 169. *See U.C.C. § 9-609* (formerly § 9-503); *See, e.g., McCrory v. Johnson, 755 S.W.2d 566 (Ark. 1988)* ; *Jordan v. Talbot, 361 P.2d 20 (Cal. 1961)* ; *Bass v. Boetel & Co., 217 N.W.2d 804 (Neb. 1974)* ; *but see Colonial Self Storage, Inc. v. Concord Properties, 249 S.E.2d 310 (Ga. Ct. App. 1978)* .

(n62)Footnote 170. *See, e.g., Strickland Bros. v. Stiles, 33 S.E. 85 (Ga. 1899)* ; *Citizens Bank v. Elks Bldg., N.V., 663 P.2d 56 (Utah 1983)* .

(n63)Footnote 171. *See, e.g., Jordan v. Talbot, 361 P.2d 20 (Cal. 1961)* ; *Vawter v. McKissick, 159 N.W.2d 538 (Iowa 1968)* .

(n64)Footnote 172. *See, e.g., Curtiss v. Ellenwood, 59 Ill. App. 110 (1894)* ; *See* K.H. Larsen, Annotation, *Validity of Contractual Stipulation or Provision Waiving Debtor's Exemption, 94 A.L.R.2d 967 (1964)* .

(n65)Footnote 173. *See, e.g., Powell v. Daily, 45 N.E. 414 (Ill. 1896)* ; *Borden v. Croak, 22 N.E. 793 (Ill. 1889)* .

(n66)Footnote 174. *See* U.C.C. § 9 204 & cmt. 2.

(n67)Footnote 175. *See, e.g., Hill v. Morris, 186 S.W. 609 (Ark. 1916)* ; *Buhl Land Co. v. Franklin Co., 242 N.W. 772 (Mich. 1932)* (assignee); *Leckie v. Dunbar, 59 P.2d 275 (Okla. 1936)* (sublessee); *but see Foster v. Reid, 42 N.W. 649 (Iowa 1889)* .

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CHAPTER 40 LANDLORD RIGHTS AND TENANT DUTIES

5-40 Thompson on Real Property, Thomas Editions § 40.05

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§ 40.05 Rights Regarding Tenant Deposits.

Landlords frequently require an advance deposit of tenant monies at the beginning of the lease term. Several types of deposits are possible. Most often, a deposit will be made to secure the performance of tenant covenants and lease obligations. A common form of deposit, usually referred to simply as a "security deposit," is one that the landlord may draw upon and apply against losses or damages resulting from breach of lease obligations by the tenant. The landlord's recourse against the security deposit may be accomplished quickly, without application to a court of law, pursuant to the provisions of the lease. The usual expectation is that the landlord will refund the unused portion of the security deposit to the tenant at the end of the lease term. A variation on the ordinary security deposit is a deposit that is, by its terms, wholly forfeited to the landlord in the event of tenant default. In effect, this sort of deposit is one for liquidated damages, and it may be so characterized in the lease. Another type of security arrangement, frequently required of residential tenants, is an advance payment of rent. The landlord may require, for example, that the tenant deposit a sum with the landlord, at the outset of the lease, to pay the last month's rent under the lease. Still another type of tenant deposit is one that is not characterized for security purposes at all, but is instead characterized as additional consideration for signing the lease. Each type of deposit will be considered below.

§ 40.05(a) Security Deposits.

§ 40.05(a)(1) Ordinary Security Deposit.

A common tenant deposit arrangement is one in which the tenant deposits money with the understanding that, upon a tenant default, the landlord may draw against the deposit to cover losses or damages, and with the further understanding that amounts not withdrawn will be refunded to the tenant at the end of the lease term. Indeed, if the tenant fully performs under the lease, the understanding would be that tenant would be entitled to the return of all deposited funds at end of the lease term. On the other hand, if, upon tenant default, the landlord's losses or damages exceed the amount on deposit, the landlord would be entitled to apply the deposit to the losses or damages and to pursue the tenant for the balance. n176

The provisions of the lease normally identify the purpose of the security deposit. It may have a specialized purpose, such as to cover the costs of cleaning the premises if the tenant does not do so as required under the lease, or it may more generally secure the performance of rental and other tenant obligations under the lease. The purpose is important

in determining whether the landlord has a right to draw against the security deposit. If, for example, the lease provides that the deposit may be applied to defaults in the payment of rent, and does not provide that the deposit may be applied to other defaults, the landlord may not draw against the security deposit for defaults other than in the payment of rent. n177 Because of the conditional nature of the landlord's rights in a security deposit, it has been held that the deposit does not represent taxable income to the landlord until the landlord applies the deposit to a tenant default. n178

The existence of a security deposit generally imposes no obligation on the landlord to apply amounts on deposit against tenant defaults. The landlord may choose to preserve the deposit for application to some future default. n179 It has been held that, in the absence of a lease provision to the contrary, the tenant does not have a right to require the application of the security deposit to defaults in the payment of rent in order to avoid termination of the lease. n180

§ 40.05(a)(2) Security Deposit as Fund for Liquidated Damages.

The lease may also provide that the landlord is entitled to retain the entire amount of the tenant's security deposit if the tenant breaches obligations under the lease. Such a forfeitable deposit is essentially a fund to pay liquidated damages, and may be so characterized in the lease. n181 Under this view of the deposit, if the tenant fully performs the tenant's lease obligations, the landlord would be required to return the full amount of the deposit to the tenant. n182 However, if the forfeiture provision is valid, the landlord would be able to retain the entire amount of the deposit on tenant breach of a lease covenant secured by the deposit. n183 But the landlord would not be entitled to recover additional damages from the tenant beyond the amount of the liquidated damages represented by the deposit. n184

Courts have not viewed agreements providing for the forfeiture of security deposits with great enthusiasm. Such provisions have sometimes been justified as reasonable advance resolutions of questions about damages. n185 But courts have often declined to enforce the provisions on the ground that they provide for a penalty. n186 In particular, deposit forfeiture provisions have been held to be unenforceable when the actual damages resulting from the tenant's breach can be readily ascertained, when the amount of the liquidated damages is unreasonably large, or when the nature of the breach is not, in the view of the court, significant enough to justify forfeiture. n187 In this connection, some courts have observed that the damages resulting from a failure to pay rent can be readily ascertained. n188 If a forfeiture provision is invalidated, the deposit becomes a conventional security deposit, and, upon tenant default, the landlord will be able to draw against the deposit only to the extent of the landlord's actual loss or damages. n189

§ 40.05(a)(3) Relationship Between Parties with Respect to Security Deposit Funds.

Disputes regarding security deposits frequently focus on whether the landlord has a right to use or commingle the deposited funds during the tenancy, whether the tenant has a right to interest on deposited funds, or whether the tenant has any preferred claim to the deposited funds in the event of landlord insolvency. In some instances, the resolution of the dispute may be governed by statute or by the language of the lease itself. In other instances, the dispute may be resolved based on the characterization of the relationship between landlord and tenant with respect to the deposit. Courts usually characterize the relationship as involving a debt, a pledge, or a trust. n190

§ 40.05(a)(3)(i) Debt.

The most common characterization of the relationship between landlord and tenant with respect to a security deposit is that of debtor and creditor. n191 The thought here is that, by making the deposit, the tenant has made a loan to the landlord, which the landlord is to repay upon completion of the tenant's obligations under the lease. n192 If the security deposit is regarded as a loan from the tenant to the landlord, the landlord is free to commingle the deposited funds with other monies of the landlord, or to use the deposited funds as the landlord sees fit, subject to the obligation to repay the loan at the end of the lease term. n193 The deposit is also subject to the claims of creditors of the landlord. n194 In the event of landlord insolvency, the tenant's claim for a return of the deposit would be that of an unsecured creditor. n195

A lease provision that requires payment of interest on the security deposit indicates that a debtor creditor relationship was intended. n196 However, it is not necessary for the landlord to have an obligation to pay interest on the deposit in order for the deposit to be regarded as creating a debt. n197 Indeed, in the absence of an applicable statute or lease provision to the contrary, the landlord is generally regarded as having no duty to pay interest on the deposit. n198 The Restatement takes a contrary position, stating in a comment that, unless there is an agreement otherwise, the landlord "should pay the tenant the going rate of interest." n199 However, a Reporter's Note acknowledges that the interest requirement "can be supported only on the basis that various statutes dealing with security deposits so provide." n200

§ 40.05(a)(3)(ii) Pledge.

An alternative characterization of a security deposit, made by some courts, is that the deposit is a pledge made by the tenant to the landlord. n201 There is little case authority regarding the practical implications of pledge status on the parties' rights. n202 The landlord is apparently not required to segregate the deposited funds, n203 or to invest them for the benefit of the tenant; however, it has been said that if income is earned on the funds, the income belongs to the tenant. n204 Although the tenant cannot expect that the identical money deposited with the landlord will be returned, the theory of the pledge is that the tenant retains title to, n205 or some corresponding interest in, the subject matter of the pledge. n206 If a pledge relationship is found, the pledged property should not be considered part of the landlord's estate in the event of landlord insolvency. n207

§ 40.05(a)(3)(iii) Trust.

A tenant's security deposit has sometimes been said to involve a trust relationship between landlord and tenant, with the landlord serving as trustee for the deposited funds. n208 If a trust relationship were to be created between landlord and tenant, the tenant would have a beneficial interest in the deposit, and the deposit should not be considered part of the landlord's estate upon landlord insolvency. n209 As a trustee, the landlord would seem to have certain obligations with respect to the security deposit, such as the obligation to account to the tenant for trust assets, including amounts earned by the trust, at the end of the trust. n210 However, the conflict of interest inherent in the landlord's serving as a trustee for deposited funds in which the landlord also claims an interest probably prevents a security deposit from being a true trust. n211

Most of the trust cases have been decided in New York, where, for many years, a trust characterization has been required by statute. n212 However, in the absence of specific legislative direction, the New York courts have tended not to impose significant fiduciary responsibilities on the landlord. n213 The current New York legislation provides, among other things, that: 1) tenant security deposits, as well as prepaid rents, held by the landlord shall be held in trust; 2) the landlord cannot commingle tenant deposits with the landlord's personal funds; 3) the landlord is to account to the tenant for interest earned on funds deposited by the tenant; and 4) if the rental property contains six or more rental units, the landlord is to place the deposits in interest bearing accounts. n214

§ 40.05(a)(4) Obligation to Return Security Deposit to Tenant.

The landlord's obligation to return a security deposit normally arises when the lease term expires. But the obligation may also arise if the lease is prematurely terminated, such as when termination results from the parties' agreement, the exercise of rights after accidental destruction of the leased premises, n215 or the exercise of rights upon default. n216 However, if the lease is terminated following a default by the tenant, and if the security deposit is subject to an enforceable liquidated damages provision that is triggered by the default, the landlord will be able to retain the deposited funds notwithstanding the termination of the lease. n217

In some instances, the landlord may be able to retain the security deposit for a period of time after expiration or termination of the lease. The lease may provide, for example, that tenant liability for "rent" will continue if the lease is prematurely terminated on account of tenant default. In this situation, the landlord may be permitted to retain the deposit

until the liability of the tenant has been determined. n218 In addition, it has been held that when the deposit was intended to provide security against tenant waste, the deposit may be retained by the landlord for a reasonable time after lease termination to permit the landlord to determine whether waste has occurred. n219

Before returning deposited funds to the tenant, the landlord may deduct amounts equal to the losses or damages for which the tenant is responsible. n220 Of course, the landlord's deductions may be only for losses or damages resulting from breach of lease obligations that are secured by the deposit. n221 But the landlord need not wait until there is an obligation to return the security deposit before the landlord deducts amounts for damages or losses covered by the deposit; recourse may be had against the deposit when the damages or losses occur. n222

§ 40.05(a)(5) Security Deposits and Transfer of Landlord's Interest.

If the landlord conveys the reversionary interest in the leased premises to another party during the term of the lease, the landlord might or might not also transfer the tenant's security deposit to that party. In either case, the potential liability of the transferee for the return of the security deposit may become an issue if the deposit is not returned to the tenant when the tenant is entitled to receive it. In the absence of a statutory resolution, n223 or an enforceable agreement by the transferee to be bound by the obligation to return the deposit, the liability of the transferee is usually considered to depend on whether the obligation to return the tenant's security deposit is a personal covenant of the landlord, or whether it is a covenant whose burden runs with the land. The cases are in conflict on the issue.

A few cases articulate the view that a security deposit secures obligations, such as rent, that run with the land, and that a covenant to return the deposit to the tenant should also run and bind a transferee. n224 A larger number of cases state the contrary view that the obligation to return the tenant's deposit is only a personal covenant of the landlord, not binding on the transferee unless the transferee agrees to be bound. n225 Indeed, a Washington court held that a covenant to return the deposit was personal even when language in the lease stated that the covenant was to run with the land. The court reasoned that the covenant did not sufficiently "touch and concern" the land. n226 However, it has also been held that an agreement to assume the obligation to return the deposit may be implied from the transferee's receipt of the deposited funds, or from the transferor's deduction of the amount of the deposit from the transferee's purchase price of the property. n227

One explanation for the decisions concluding that the covenant to return the deposit is a personal one may be concern by courts that transferees could be unaware of the existence of the security deposit at the time of the conveyance. n228 Whether or not the transferee is obligated to return the security deposit, in the absence an agreement or statute to the contrary, the original landlord will be bound by the covenant to do so. n229

The analysis is somewhat different if the security deposit is regarded as creating a pledge relationship between the landlord and the tenant. In that case, the obligation to return the deposit to the tenant has been said to follow the pledge. n230 Under this view, transferee liability seems to arise if the transferee receives the deposited funds or if the amount of the deposit is deducted from the purchase price of the property. n231

§ 40.05(a)(6) Statutory Regulation of Security Deposits.

The perception that landlords have engaged in substantial abuses of tenant security deposits has led more than forty states to adopt regulatory legislation. n232 Although the statutes vary widely, common areas of regulation involve the amount of the security deposit, interest on deposited funds, itemization of deductions by the landlord, and penalties for non-compliance. Some statutes also impose obligations on tenants. Most of the statutes apply only to residential leases.

Statutes frequently limit the amount of the security deposit. The Uniform Residential Landlord and Tenant Act, which has been adopted in many states, provides that the landlord may not demand or receive a security deposit in an amount greater than one month's rent. n233 Other statutes contain similar limitations, but some have different limits for

different types of residential tenancies. For example, a California statute limits the amount of the deposit to two months' rent for an unfurnished residential unit and to three months' rent for a furnished residential unit. n234 A North Carolina statute provides that the maximum deposit is two weeks' rent for a week to week tenancy, one and one half month's rent for a month to month tenancy, and two months' rent for other tenancies. n235

Approximately half of the states with security deposit legislation require security deposits to be placed in special accounts. n236 The primary purpose of the requirement is to ensure the availability of the deposited funds for refund to the tenant. A minority of jurisdictions also require the landlord to pay interest on security deposits. n237 Under some statutes, the landlord's obligation to make interest payments is triggered by the size of the deposit, n238 the length of the period the deposit is to be held, n239 or the number of rental units leased by the landlord. n240

Nearly all of the security deposit statutes require the deposit to be returned within a specified time, with an accounting for any amounts that have been withheld. n241 A few statutes impose an obligation upon the landlord to make a reasonable effort to locate a tenant after unsuccessfully mailing the deposit to the tenant's last known address. n242 Some statutes also restrict the types of losses that can be deducted from tenant deposits, typically limiting the deductions to unpaid rent or to damages caused by the tenant. n243

Penalties for landlord non-compliance vary. A number of statutes provide for forfeiture of landlord rights in the security deposit if the landlord does not timely provide the tenant with a listing of deductions made. n244 Most of the statutes allow the tenant to recover a monetary penalty if the landlord wrongfully withholds a security deposit. n245 Most of the statutes also prohibit the landlord from obtaining tenant waivers of statutory protections. n246

A number of jurisdictions have enacted legislation concerning the obligation of a transferee of the landlord's reversionary interest in the property to return the tenant's deposit at lease termination. Several statutes require the transferee to return the deposit to the tenant upon termination of the tenancy, whether or not the transferee actually receives the deposit from the original landlord. These statutes also provide for the continued liability of the transferor to the tenant with respect to the return of the security deposit. n247 Other statutes provide that the transferee will be liable to return the security deposit only if the transferee receives the deposit from the original landlord. n248 Some statutes permit the original landlord to avoid liability to the tenant by giving the deposit to the tenant at the time of the conveyance of the reversion, n249 or by turning the security deposit over to the transferee and by notifying the tenant of the security deposit transfer. n250

A number of security deposit statutes also impose obligations or liabilities upon tenants. Several statutes require the tenant to provide the landlord with a forwarding address on termination of the lease. If the tenant fails to do so, the landlord may be relieved of an obligation to render a written statement of damages, n251 or may be entitled, after the passage of time, to keep the monies that are on deposit. n252 Some statutes require the tenant to object to the landlord's written statement of damages within a specified period of time, or have that statement be regarded as conclusive proof of damages. n253 A Kansas statute provides that, unless the lease states otherwise, the tenant forfeits the security deposit if the tenant applies or deducts any portion of the security deposit from the last month's rent or uses or applies the security deposit at any time in lieu of the payment of payment. n254

§ 40.05(b) Other Types of Tenant Deposits.

Not all tenant deposits are security deposits, though there is a constructional preference in their favor. n255 Other alternatives are a deposit that is described as an advance payment of rent and a deposit that is described as consideration for execution of the lease. The landlord may prefer one of these other deposit characterizations in order to avoid the restrictions on security deposits that are discussed above, but that preference, without more, will not be controlling.

§ 40.05(b)(1) Advance Payment of Rent.

A tenant deposit may be considered to be an advance payment of rent, if that is the intent of the parties. The usual agreement of this type is that the deposit is a prepayment of rent for the last rental period of the lease term. Unlike a security deposit, an advance payment of rent is generally not refundable to the tenant; it is considered to be the property of the landlord when paid. Accordingly, in the absence of a lease provision or statute to the contrary, the tenant may not recover an advance payment of rent if the lease is prematurely terminated on account of tenant default. n256 Consistent with this view of the deposit, it has been held that a deposit that represents an advance payment of rent represents taxable income to the landlord when it is received. n257

The rule that the landlord retains the advance rental deposit when the lease is terminated due to tenant default has sometimes been justified on the ground that rent is non apportionable. n258 One court reached the same result by reasoning that, although the landlord is not entitled to the deposit until the beginning of the rental period for which the deposit has been made, a tenant default that results in lease termination also accelerates the time when the advance rent becomes the landlord's property. n259

If the lease is wrongfully terminated by the landlord, courts have required the landlord to return the advance payment. n260 However, the cases are in conflict regarding the refundability of the advance rental deposit when leased improvements are accidentally destroyed. n261 Courts have permitted the landlord to retain the deposit when the lease agreement provides for that result. n262

Whether a deposit arrangement constitutes an advance payment of rent generally depends on the intent of the parties as expressed in the lease. However, courts tend to construe lease provisions as providing for a security deposit instead of an advance rental payment when such a construction is possible. n263 And some statutes that regulate security deposits treat advance rental payments as security deposits. n264 Among other things, a conclusion that the deposit is a security deposit means that the deposit is refundable to the tenant upon compliance with the tenant's lease obligations. It also means that the landlord is able to retain only the amount of the landlord's actual damages or losses in the event the tenant breaches a lease obligation secured by the deposit.

§ 40.05(b)(2) Consideration for Execution of Lease.

Some tenant deposits are characterized as representing consideration to the landlord for the execution of the lease. When the deposit is of this type, so long as the lease is executed, the deposit belongs to the landlord. n265 It is not refundable to the tenant, even if the landlord subsequently defaults in the performance of lease obligations or wrongfully terminates the lease. n266 Moreover, the landlord's receipt of the payment does not prevent the landlord from seeking damages for subsequent non performance of lease obligations by the tenant. n267 These aspects of the deposit are attractive from the landlord's point of view. A negative feature, from the landlord's point of view, is that an unconditional payment in consideration of lease execution represents taxable income to the landlord when received. n268

If the parties expressly provide that a tenant payment is made in consideration of lease execution, that intention will generally be given effect. n269 But even if the deposit is said to be in consideration for lease execution, it may be regarded as a security deposit if there are features of the lease that seem to undermine the otherwise unconditional nature of the payment. For example, if the lease provides that the payment is returnable to the tenant upon the tenant's full performance of lease obligations, or if the lease requires interest to be paid by the landlord on the amount of the payment, a court may well conclude that a security deposit was intended by the parties. n270 A few courts have considered the effect of a lease provision entitling the tenant to recover the payment in the event of accidental destruction of leasehold improvements. The cases are in conflict as to whether such a provision causes the payment to be a security deposit. n271

FOOTNOTES:
(n1)Footnote 176. *See, e.g., James S. Black & Co. v. Charron, 587 P.2d 196 (Wash. Ct. App. 1978)* ; *See generally*

James R. Wilson, *Lease Security Deposits, 34 Colum. L. Rev. 426 (1934);* Committee on Leases, Section of Real Property, Probate and Trust Law, American Bar Association, *Security Deposits and Guaranties Under Leases,* 1 Real Property, Prob & Tr. J. 405 (1966).

(n2)Footnote 177. *See, e.g., Michaels v. Fishel, 62 N.E. 425 (N.Y. 1902)* .

(n3)Footnote 178. *See Warren Service Corp. v. Commissioner, 110 F.2d 723 (2d Cir. 1940)* .

(n4)Footnote 179. *See, e.g., Evans v. McClure, 158 S.W. 487 (Ark. 1913)* ; *Barrett v. Monro, 124 P. 369 (Wash. 1912)* .

(n5)Footnote 180. *See* 6701 *Realty, Inc. v. Deauville Enter., 84 So. 2d 325 (Fla. 1955)* .

(n6)Footnote 181. *See, e.g., Caesar v. Rubinson, 67 N.E. 58 (N.Y. 1903)* .

(n7)Footnote 182. *See, e.g., Palace Theatre, Inc. v. Northwest Theatres Circuit, Inc., 243 N.W. 849 (Minn. 1932)* .

(n8)Footnote 183. *See, e.g., Wichita Eagle & Beacon Publishing Co. v. Pacific Nat'l Bank, 493 F.2d 1285 (9th Cir. 1974)* ; *Burns Trading Co. v. Welborn, 81 F.2d 691 (10th Cir. 1936)* .

(n9)Footnote 184. *See, e.g., Mon Wai v. Parks, 262 P.2d 196 (Wash. 1953)* (en banc).

(n10)Footnote 185. *See, e.g., Burns Trading Co. v. Welborn, 81 F.2d 691 (10th Cir. 1936)* ; *Stuco Corp. v. Gates, 145 So. 2d 527 (Fla. Ct. App. 1962)* ; *Mon Wai v. Parks, 262 P.2d 196 (Wash. 1953)* (en banc).

(n11)Footnote 186. *See* L.S. Tellier, Annotation, *Provision in Lease for Pecuniary Forfeiture Where Lease is Prematurely Terminated as One for Liquidated Damages,* 106 A.L.R. 292 (1937) ; 1 American Law of Property § 3.73 (A. James Casner ed. 1952).

(n12)Footnote 187. *See, e.g., Spialter v. Testa, 392 A.2d 1265 (N.J. Sup. Ct. 1978); Central Trust Co. v. Wolf, 237 N.W. 29 (Mich. 1931)* .

(n13)Footnote 188. *See, e.g., Knight v. Marks, 191 P. 531 (Cal. 1920)* ; *Roberts v. Dehn, 416 S.W.2d 851 (Tex. Ct. App. 1967)* .

(n14)Footnote 189. *See, e.g., Redmon v. Graham, 295 P. 1031 (Cal. 1931)* ; *Cunningham v. Stockton, 106 P. 1057 (Kan. 1910)* .

(n15)Footnote 190. *See* James R. Wilson, *Lease Security Deposits, 34 Colum. L. Rev. 426, 458, 464 (1934). Security Deposits and Guaranties Under Leases,* 1 Real Property, Prob & Tr. J. 405, 415 416 (1966).

(n16)Footnote 191. *See, e.g., Young v. Cobbs, 83 So. 2d 417 (Fla. 1955)* ; *Commercial Nat'l Bank v. Cutter Realty Co., 170 S.E. 139 (N.C. 1933)* ; 1 American Law of Property § 3.73 (A. James Casner ed. 1952); Restatement (Second) of Property § 12.1, cmt. l (1977) (absent manifestation of contrary intent, a debtor creditor relationship is established).

(n17)Footnote 192. *See, e.g., Korens v. R.W. Zukin Corp., 261 Cal. Rptr. 137 (Cal. Ct. App. 1989)* .

(n18)Footnote 193. *See, e.g., Jones v. Wayne Circuit County Judge, 235 N.W. 238 (Mich. 1931)* ; *Handle v. Real Estate Land Title & Trust Co., 173 A. 313 (Pa. 1934)* ; Restatement (Second) of Property § 12.1, cmt. l (1977).

(n19)Footnote 194. *See, e.g., Handle v. Real Estate Land Title & Trust Co., 173 A. 313 (Pa. 1934)* ; *Malco Trading Corp. v. Mendelson Silverman, 269 N.Y.S. 95 (App. Div. 1934).*

(n20)Footnote 195. *See, e.g., In re Banner, 149 F. 936 (S.D.N.Y. 1907)* ; Stephen A. Kalish, *Residential Tenant*

Security Deposits: A Legislative Proposal, 1974 U. Ill. L.F. 569, 598.

(n21)Footnote 196. *See Mendelson Silverman, Inc. v. Malco Trading Corp., 260 N.Y.S. 881 (App. Div. 1932)* (per curiam), *aff'd, 262 N.Y.S. 991 (App. Div. 1933), aff'd, 188 N.E. 92 (N.Y. 1933).*

(n22)Footnote 197. *See, e.g., Handle v. Real Estate Land Title & Trust Co., 173 A. 313 (Pa. 1934)* .

(n23)Footnote 198. *See, e.g., E. & S. Investment Corp. v. Richland Bowl, Inc., 216 S.E.2d 522 (S.C. 1975)* .

(n24)Footnote 199. *See* Restatement (Second) of Property § 12.1, cmt. l (1977).

(n25)Footnote 200. *See* Restatement (Second) of Property § 12.1, Reporter's Note 11 (1977).

(n26)Footnote 201. *See, e.g., Reed v. Bristol County Realty Co., 145 N.E. 455 (Mass. 1924)* ; *Kaufman v. Williams, 104 A. 202 (N.J. 1918)* . Some cases have also classified the deposit as a bailment. *See, e.g., National Corp. for Hous. Pt'ship v. Liberty State Bank, 836 F.2d 433 (8th Cir. 1988)* .

(n27)Footnote 202. *See* Robert S. Schoshinski, American Law of Landlord and Tenant § 6:32, at 469 (1980).

(n28)Footnote 203. *See Colantuoni v. Balene, 123 A. 541 (N.J. 1924)* ; *Haskel v. 60 W. Fifty Third Street Corp., 26 N.Y.S. 698 (Mun. Ct. 1929), aff'd, 246 N.Y.S. 875 (App. Div. 1930).*

(n29)Footnote 204. *See, e.g., Ingram v. Pantages, 260 P. 395 (Cal. Ct. App. 1927)* ; *See* Restatement (Second) of Property § 12.1, cmt. l (1977).

(n30)Footnote 205. *See* Stephen A. Kalish, *Residential Tenant Security Deposits: A Legislative Proposal, 1974 U. Ill. L.F. 569, 572, 598.*

(n31)Footnote 206. *See* James R. Wilson, *Lease Security Deposits, 34 Colum. L. Rev. 426, 460 (1934).*

(n32)Footnote 207. *See Partington v. Miller, 5 A.2d 468 (N.J. 1939)* ; Stephen A. Kalish, *Residential Tenant Security Deposits: A Legislative Proposal, 1974 U. Ill. L.F. 569, 572, 598;* Committee on Leases, Section of Real Property, Probate and Trust Law, American Bar Association, *Security Deposits and Guaranties Under Leases*, 1 Real Property, Prob & Tr. J. 405, 416 (1966).

(n33)Footnote 208. *See, e.g., Peterson v. Oklahoma City Hous. Auth., 545 F.2d 1270 (10th Cir. 1976)* ; *Mallory Assocs. v. Barving Realty Co., 90 N.E.2d 468 (N.Y. 1949)* .

(n34)Footnote 209. *See* Stephen A. Kalish, *Residential Tenant Security Deposits: A Legislative Proposal, 1974 U. Ill. L.F. 598, 599.*

(n35)Footnote 210. *See* Restatement (Second) of Property § 12.1, cmt. l (1977).

(n36)Footnote 211. *See* James R. Wilson, *Lease Security Deposits, 34 Colum. L. Rev. 426, 462 (1934).;* Stephen A. Kalish, *Residential Tenant Security Deposits: A Legislative Proposal, 1974 U. Ill. L.F. 569, 572.*

(n37)Footnote 212. *See Mallory Associates, Inc. v. Barving Realty Co., 90 N.E.2d 468 (N.Y. 1949)* .

(n38)Footnote 213. *See* Robert S. Schoshinski, American Law of Landlord and Tenant § 6:32 (1980).

(n39)Footnote 214. *See N.Y. Gen. Oblig. Law § 7-103*(1) and (2 a); *see also N.J. Stat. Ann. §§ 46:8-19 to 46:8-26* (statutory trust).

(n40)Footnote 215. *See, e.g., Pizzalato v. Traina, 577 So. 2d 1058 (La. Ct. App. 1991)* .

(n41)Footnote 216. *See, e.g., In re Consumers World, Inc., 160 F. Supp. 238 (D. Mass 1958)* (election to forfeit); *In re Morrison-Barnhart Motors, Inc., 142 F. Supp. 845 (N.D. Ohio 1956)* (re-entry following abandonment).

(n42)Footnote 217. *See* discussion in § 40.05(a)(2). *above.*

(n43)Footnote 218. *See, e.g., Hand v. Rifkin, 189 N.E. 476 (N.Y. 1934)* ; *Grays v. Brooks, 561 N.Y.S.2d 515 (Civ. Ct. 1990)* .

(n44)Footnote 219. *See, e.g., United Cigar Stores Co. v. Friend, 257 Ill. App. 359 (1930)* .

(n45)Footnote 220. *See, e.g., Garfinkle v. Montgomery, 248 P.2d 52 (Cal. Ct. App. 1952)* ; *Carr v. Ed Stein Realtors, 461 N.E.2d 930 (Ohio Ct. App. 1983)* .

(n46)Footnote 221. *See, e.g., S & W Holding Co. v. Kuriansky, 317 F.2d 666 (2d Cir. 1963)* ; *Miami Beach Vacations, Inc. v. Wofford, 262 So. 2d 683 (Fla. Ct. App. 1972)* (per curiam); *Michaels v. Fishel, 62 N.E. 425 (N.Y. 1902)* .

(n47)Footnote 222. *See, e.g., Partington v. Miller, 5 A.2d 468 (N.J. 1939)* .

(n48)Footnote 223. Statutory provisions relevant to the issue are discussed § 40.05(a)(6).

(n49)Footnote 224. *See, e.g., Moskin v. Goldstein, 196 N.W. 415 (Mich. 1923)* .

(n50)Footnote 225. *See, e.g., Federated Mortgage Investors v. American Sav. & Loan Assn., 47 Cal. App. 3d 917, 121 Cal. Rptr. 137 (Ct. App. 1975)* ; *Richards v. Browning, 212 N.Y.S. 738 (App. Div. 1925)* .

(n51)Footnote 226. *See Mullendore Theatres, Inc. v. Growth Realty Investors Co., 691 P.2d 970 (Wash. Ct. App. 1984)* .

(n52)Footnote 227. *See Walter H. Sullivan, Inc. v. Johnson, 3 P.2d 72 (Cal. Ct. App. 1931)* .

(n53)Footnote 228. *See* 1 American Law of Property § 3:73, at 337 (A. James Casner ed. 1952).

(n54)Footnote 229. *See, e.g., Federated Mortgage Investors v. American Sav. & Loan Assn., 47 Cal. App. 3d 917, 121 Cal. Rptr. 137 (Ct. App. 1975)* ; *Mallory Associates, Inc. v. Barving Realty Co., 90 N.E.2d 468 (N.Y. 1949)* .

(n55)Footnote 230. *See, e.g., Cummings v. Freehold Trust Co., 191 A. 782 (N.J. 1937)* ; *Kaufman v. Williams, 104 A. 202 (N.J. 1918)* .

(n56)Footnote 231. *See Four G Corp v. Ruta, 138 A.2d 18 (N.J. 1958)* ; *Cummings v. Freehold Trust Co., 191 A. 782 (N.J. 1937)* .

(n57)Footnote 232. *See* § 43.05(h), *below*; *see also* Restatement (Second) of Property § 12.1, statutory note 6 (1977).

(n58)Footnote 233. *See* Uniform Residential Landlord Tenant Act § 2 101(a).

(n59)Footnote 234. *See Cal. Civ. Code § 1950.5(c)*.

(n60)Footnote 235. *See N.C. Gen. Stat. § 42* 51. *See also Pa. Stat. Ann. tit. 68 § 250.511a* (two month's rent for first year of tenancy; one month's rent thereafter).

(n61)Footnote 236. *See* § 43.05(h)(a), *below.*

(n62)Footnote 237. *See* § 43.05(h)(a), *below.*

(n63)Footnote 238. *See, e.g., Pa. Stat. Ann. tit. 68 § 250.511(b)* (deposit over $100.00).

(n64)Footnote 239. *See, e.g.*, Ill. Comp. Stat. 710/1 (deposits held longer than six months).

(n65)Footnote 240. *See, e.g., N.Y. Gen. Oblig. Law § 7* 103(2)(a) (deposit for lease in project with six or more units).

(n66)Footnote 241. *See, e.g.*, Ill. Comp. Stat. 710/1 *Mich. Comp. Laws § 554.614*; Uniform Residential Landlord Tenant Act § 2.101.

(n67)Footnote 242. *See, e.g., Ga. Code Ann. § 44* 7 34.

(n68)Footnote 243. *See, e.g., Mich. Comp. Laws Ann. § 554.607*; *see also* Md. Real Prop. Code Ann. § 8 203(g) (utility bills may be deducted).

(n69)Footnote 244. *See, e.g.*, Ill. Comp. Stat. 710/1; *Fla. Stat. § 83.49(3). But compare Garcia v. Thong, 895 P.2d 226 (N.M. 1995)* (landlord forfeited the right to withhold portions of the security deposit to cover damages to the leased premises when landlord did not provide to tenant timely written itemization of deductions for the damages) *with Bruce v. Attaway, 918 P.2d 341 (N.M. 1996)* (landlord did not forfeit the right to withhold portions of the security deposit for application to unpaid rent by failing to provide itemized statement; court reasons that different considerations apply when the landlord applies the security deposit to a deficient rent payment).

(n70)Footnote 245. *See, e.g., Conn. Gen. Stat. Ann. § 47a-21(d)(2)* (twice the amount of the deposit); Ill. Comp. Stat. 710/1 (same); Md. Real Prop. Code Ann. § 8-203 (treble damages).

(n71)Footnote 246. *See* Robert S. Schoshinski, American Law of Landlord and Tenant § 6:43 (1980).

(n72)Footnote 247. *See, e.g.*, Md. Real Prop. Code Ann., § 8 203(e) and (f); Uniform Residential Landlord and Tenant Act §§ 2.101(e) and 2.105(a).

(n73)Footnote 248. *See, e.g., Cal. Civ. Code § 1950.5*; *Mich. Comp. Laws Ann. § 554.614*; *N.Y. Gen. Oblig. Law § 7-105*.

(n74)Footnote 249. *See, e.g., Cal. Civ. Code § 1950.5*.

(n75)Footnote 250. *See, e.g., N.Y. Gen. Oblig. Law § 7-105*.

(n76)Footnote 251. *See, e.g., Mich. Comp. Laws § 554.611*.

(n77)Footnote 252. *See, e.g., Iowa Code Ann. § 562A.12(4)*. But this was not the result in *Lae v. Householder, 789 N.E.2d 481 (Ind. 2003)* . There, the residential tenants vacated with the landlord's consent but failed to give a forwarding address. The applicable statute required the landlord to refund the security deposit or provide an itemized list of damages within 45 days. Forty-seven days after tenants vacated, they demanded return of their security deposit. The landlord declined to do this and instead filed a complaint for damages to the premises. But the landlord did not itemize the damages, and the tenants counterclaimed for their deposit, plus attorney fees. In this situation, the Indiana Supreme Court concluded that the landlord's obligations to the tenants had been extended, rather than discharged, and that, because the landlord had not itemized the damages, the tenants were able to recover their deposit and attorney fees.

(n78)Footnote 253. *See, e.g., Fla. Stat. Ann. ch. 83.49(3)*; *Mich. Comp. Laws Ann. §§ 554.612, 554.613*.

(n79)Footnote 254. *See Kan. Stat. Ann. § 58-2550* d (1976).

(n80)Footnote 255. *See, e.g., In re Frey, 26 F.2d 472 (E.D. Pa. 1928)* ; Committee on Leases, Section of Real Property, Probate, and Trust Law, American Bar Association, *Security Deposits and Guarantees Under Leases*, 1 Real Property, Prob. & Tr. J. 405, 419 (1966).

(n81)Footnote 256. *See, e.g., Lochner v. Martin, 147 A.2d 749 (Md. 1959)* ; *State v. Demarest, 503 P.2d 682 (Or. 1972)* ; H.D. Warren, Annotation, *Right of Lessor to Retain Advance Rental Payments Made Under Lease Terms Upon Lessee's Default in Rent, 27 A.L.R.2d 656 (1953)* .

(n82)Footnote 257. *See Hyde Park Realty v. Commissioner, 211 F.2d 462 (2d Cir. 1954)* .

(n83)Footnote 258. *See* 1 American Law of Property § 3.73 (A. James Casner ed. 1952).

(n84)Footnote 259. *See Schoen v. New Britain Trust Co., 150 A. 696 (Conn. 1930)* . This analysis was criticized in Comment, *Landlord and Tenant -- Lessee's Recovery of an Advance Payment of Rent*, 25 Ill. L.R. 716 (1931).

(n85)Footnote 260. *See, e.g., Sierad v. Lilly, 22 Cal. Rptr. 580 (Ct. App. 1962)* .

(n86)Footnote 261. *See, e.g., Loew v. Antonick, 310 P.2d 825 (Ariz. 1956)* (no refund); *Smith v. J. Weingarten, Inc., 120 S.W.2d 878 (Tex. Ct. App. 1938)* (no refund); *Fink v. Weinholzer, 123 N.W. 931 (Minn. 1909)* (refund); *Porter v. Tull, 33 P. 965 (Wash. 1893)* (refund).

(n87)Footnote 262. *See, e.g., Felix v. Griffiths, 45 N.E. 1092 (Ohio 1897)* .

(n88)Footnote 263. *See, e.g., Cunningham v. Stockton, 106 P. 1057 (Kan. 1910)* ; Committee on Leases, Section of Real Property, Probate and Trust Law, American Bar Association, *Security Deposits and Guaranties Under Leases*, 1 Real Property, Prob & Tr. J. 405, 419 (1966); H.D. Warren, Annotation, *Right of Lessor to Retain Advance Rental Payments Made Under Lease Terms Upon Lessee's Default in Rent, 27 A.L.R.2d 656 (1953)* .

(n89)Footnote 264. *See, e.g., Ariz. Rev. Stat. Ann. § 33-1321(A)*; *Mich. Comp. Laws Ann. § 554.601(e)*.

(n90)Footnote 265. *See, e.g., Warming v. Shapiro, 257 P.2d 74 (Cal. Ct. App. 1953)* ; *Dutton v. Christie, 115 P. 856 (Wash. 1911)* . It has been suggested that the tenant's payment should not be regarded as being given in consideration for a mere signature by the landlord, but rather for rights under a lease. *See* 2 Milton R. Friedman, Friedman on Leases § 20.3 (3d ed. 1990).

(n91)Footnote 266. *See, e.g., Wilson v. Savon Stations, Inc., 486 P.2d 816 (Ariz. Ct. App. 1971)* .

(n92)Footnote 267. *See, e.g., A 1 Garage v. Lange Investment Co., 44 P.2d 681 (Cal. Ct. App. 1935); Dutton v. Christie, 115 P. 856 (Wash. 1911)* .

(n93)Footnote 268. *See Gates v. Helvering, 69 F.2d 277 (8th Cir. 1934)* ; 1 Jacob Mertens, Jr., The Law of Federal Income Taxation 6A.77 (1994).

(n94)Footnote 269. *See, e.g., A 1 Garage v. Lange Inv. Co., 44 P.2d 681 (Cal. Ct. App. 1935), cert. denied, 296 U.S. 642 (1935).*

(n95)Footnote 270. *See Stern v. Green, 221 P. 601 (Wash. 1923)* .

(n96)Footnote 271. *See, e.g., L.B. Menefee Lumber Co. v. Abrams, 5 P.2d 709 (Or. 1931)* (consideration for lease execution); *J. & J. Food Centers, Inc. v. Selig, 456 P.2d 691 (Wash. 1969)* (same).

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CHAPTER 40 LANDLORD RIGHTS AND TENANT DUTIES

5-40 Thompson on Real Property, Thomas Editions § 40.06

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§ 40.06 Right to Enter the Leased Premises.

During the existence of the lease, the tenant owns a present possessory estate, and the landlord owns a reversion, which is a future estate. In the absence of an agreement to the contrary, the landlord generally has no right to enter the leased premises during the existence of the lease. Indeed, an unlawful entry by the landlord could subject the landlord to an action by the tenant in trespass. n272

Several exceptions to the general rule against landlord entry during the term of the lease have been recognized. At common law, if the tenant failed to pay rent on time, the landlord could enter the leased premises to distrain the tenant's personal property, thereby obtaining a possessory lien to secure the rental obligation. n273 However, the distraint remedy is generally not available today in its common law form. Under modern lien statutes, landlord access to the tenant's personal property generally depends on a court order. n274

Another exception recognized at common law has greater modern application. It has long been the rule that if the lease is silent about the place where rent is to be paid, rent is payable at the leased premises. n275 In order to collect the rent, the landlord has the right to enter the leased premises at a reasonable hour to demand payment. n276

Tenant abandonment of the leased premises gives rise to another well recognized exception to the general rule against landlord entry. If the tenant abandons the premises, leaving them vacant, the landlord may enter in order to protect the premises or to prepare them to be re let. However, if the landlord takes possession of the leased premises for the landlord's own account, a surrender and lease termination would likely result. n277

In addition to the foregoing exceptions to the general rule, some courts have held that the landlord has a right to enter the leased premises to make repairs to avoid waste, n278 to remedy dangerous conditions, n279 or to comply with governmental requirements. n280 However, it has also been held that the landlord must have tenant consent to make even necessary repairs. n281

There is some authority for the proposition that the tenant will be liable to the landlord for an unreasonable refusal to allow the landlord to exhibit the premises to prospective tenants prior to lease expiration. n282

A right to enter the leased premises may arise under statute. The Uniform Residential Landlord and Tenant Act provides that the landlord may enter without consent of the tenant in case of emergency, and that the tenant shall not unreasonably withhold consent when the landlord desires to enter to inspect the premises, to make necessary or agreed repairs or improvements, to supply necessary or agreed services, or to exhibit the premises to prospective tenants, mortgagees, or other designated parties. n283 The Uniform Act further provides that the landlord may enter if the tenant abandons or surrenders the premises, if the tenant is absent for more than seven days, if the entry is pursuant to court order, or if entry is undertaken to correct a condition materially affecting health and safety that the tenant was obligated to correct, but did not. n284 Except when there is an emergency, or unless it would be impracticable to do so, the landlord is required to provide at lease two days' notice of an intent to enter the premises, and may enter only at reasonable times. n285

A landlord who wishes to have the right to enter the leased premises during the tenancy for particular purposes would be well advised to include an agreement to that effect in the lease. Such provisions are frequently included in leases, and are generally enforced by courts. n286 Indeed, even if the lease does not expressly provide the landlord with a right of entry to make repairs, it has been held that when the landlord is obligated under the lease to make repairs, the landlord has an implied right to enter the premises in order to do so. n287

FOOTNOTES:

(n1)Footnote 272. See e.g., *North Main Street Bagel Corp., v. Duncan, 775 N.Y.S.2d 362 (App. Div. 2004)* .

(n2)Footnote 273. *See* discussion in § 40.04(a).

(n3)Footnote 274. *See* discussion in §§ 40.04(a)(2) and 40.04(b)(3).

(n4)Footnote 275. *See* discussion in § 40.03(e), *above.*

(n5)Footnote 276. *See, e.g., Smith v. Caldwell, 95 S.W. 467 (Ark. 1906)* ; *Cline v. Altose, 290 P. 809 (Wash. 1930)* .

(n6)Footnote 277. *See* discussion in § 40.11(a)(2).

(n7)Footnote 278. *See, e.g., Flanders v. New Hampshire Sav. Bank, 7 A.2d 233 (N.H. 1939)* .

(n8)Footnote 279. *See, e.g., Zwerin v. Geiss, 237 N.Y.S.2d 280 (Civ. Ct. 1963)* .

(n9)Footnote 280. *See, e.g., Dunn v. Mellon, 23 A. 210 (Pa. 1892)* .

(n10)Footnote 281. *See, e.g., Southern Bell Tel. & Tel. Co. v. Yates, 232 S.W.2d 796 (Tenn. Ct. App. 1950)* ; 1 American Law of Property § 3.38 (A. James Casner ed. 1952).

(n11)Footnote 282. *See Gronek v. Neuman, 201 N.E.2d 617 (Ill. Ct. App. 1964)* .

(n12)Footnote 283. *See* Uniform Residential Landlord and Tenant Act § 3.103.

(n13)Footnote 284. *See* Uniform Residential Landlord and Tenant Act §§ 3.103, 4.202, 4.203.

(n14)Footnote 285. *See* Uniform Residential Landlord and Tenant Act § 3.103(c).

(n15)Footnote 286. *See, e.g., Klugherz v. Sutphin Food Shop, Inc., 393 N.Y.S.2d 638 (Civ. Ct. 1977)* (agreement that landlord may enter the premises to inspect and to make repairs).

(n16)Footnote 287. *See, e.g., Appel v. Muller, 186 N.E. 785 (N.Y. 1933)* .

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CHAPTER 40 LANDLORD RIGHTS AND TENANT DUTIES

5-40 Thompson on Real Property, Thomas Editions § 40.07

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§ 40.07 Landlord Rights in Tenant Fixtures.

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§ 40.07(a) Introduction.

During the term of the lease, some tenants, usually tenants on long term commercial leases, construct improvements, or affix items of personal property to existing improvements located on the leased premises. n288 When the lease comes to an end, a dispute may arise regarding the relative rights of landlord and tenant in such tenant annexations, with the tenant claiming the right to remove them, and the landlord claiming that they have become part of the real property and pass to the landlord.

The parties' relative rights to tenant annexations may be defined by the lease. The lease may provide, for example, that tenant annexations become the property of the landlord, and that they are to be left by the tenant at the expiration of the lease. Or it may provide that the tenant may remove the annexations at the expiration of the lease so long as removal may be done without injury to an existing building. Where applicable, such lease provisions will generally determine the rights of the parties. n289 However, in the absence of applicable lease provisions, the removability of tenant annexations is generally determined in light of rules relating to fixtures.

§ 40.07(b) Fixtures and Trade Fixtures.

As discussed elsewhere in this treatise, the term "fixture" has been variously defined, and courts have identified different tests for determining whether a chattel has become a fixture. n290 In general, however, a "fixture" may be said to be a chattel that has become related to a piece of real property to such an extent that an interest in it arises under real property law. n291 Whether a chattel is considered to be a fixture has commonly been said to depend on: 1) whether there has been actual annexation of the chattel to the realty or something appurtenant to the realty; 2) whether the chattel has been adapted to the use for which the realty is devoted; and 3) whether there is an intent that the chattel become a permanent accession to the realty. n292 Intent is to be determined objectively, considering such factors as the nature of the article affixed and the mode of its annexation. n293 Although courts sometimes speak of "fixtures" as being removable by the tenant at lease expiration, for purposes of the present discussion, the conclusion that a chattel is a fixture means that the chattel becomes the property of the landlord at the termination of the lease.

In contrast, a "trade fixture" is removable by the tenant. A trade fixture is, generally speaking, a chattel that is brought onto the leased premises by the tenant and installed or affixed there for use in the tenant's trade or business. n294 English courts developed the concept to permit tenants who used fixtures in their trade to remove them from the leased premises prior to lease expiration. n295 Initially, English courts did not apply the trade fixtures concept to agricultural fixtures, on the ground that agriculture was not a "trade," n296 but this result was subsequently changed by legislation. n297 Early American cases also reflected a reluctance to extend the trade fixtures concept to agricultural fixtures, but later cases applied the concept to them. n298

A wide variety of tenant annexations may be considered to be trade fixtures, and American courts have been rather liberal in their application of the concept. It has been said, for example, that "it is difficult to conceive that any fixture, however solid, permanent and closely attached to the realty, placed there for the mere purpose of trade, may not be removed at the end of the term." n299 The concept has been applied not only to equipment that the tenant utilizes in the tenant's trade, but also to domestic and ornamental items of tenant property, n300 and even to buildings. n301

Even in the absence of lease provisions expressly permitting tenants to remove annexed personal property from the leased premises, tenants are quite likely to be permitted to do so. This result follows from the liberal application of the trade fixture concept, mentioned above. It also follows from a tendency of courts to conclude that a tenant did not intend, in attaching a chattel to the leased premises, that it become a permanent accession to the realty. In this connection, it has been said that there is a presumption that the tenant annexes chattels to the premises for the tenant's own benefit, and not for the benefit of the landlord's realty. n302

§ 40.07(c) Constraints on Removability.

While the modern tenant has a broad right to remove items of property that the tenant has affixed to the realty during occupancy, the right has been limited by at least three qualifications that benefit the landlord. One qualification is that the tenant may not remove an annexation that the tenant made in substitution for an item of property located on the leased premises and owned by the landlord. Otherwise, the tenant would leave the premises in worse condition than when the tenancy began. n303 Additional qualifications, discussed below, are that the removal be accomplished without substantial damage to the realty, and that the removal be timely.

§ 40.07(c)(1) Damage to the Realty.

The requirement that removal be accomplished without substantial damage to the realty has been articulated in many court decisions, and codified in a number of statutes. n304 Some states have enacted legislation that grants broad removal rights to tenants, conditioned on restoring the premises or reimbursing the landlord for the cost of resulting damage. n305 The Restatement rule is that, unless the parties have agreed otherwise, permissible annexations may be removed by a tenant if the leased property "can be and is restored to its former condition after removal," and if the removal and restoration are accomplished within certain time limits. n306

§ 40.07(c)(2) Timing of Removal.

The landlord's ability to relet or to utilize the leased premises after the termination of a lease may be impaired if the previous tenant is thereafter able to re-enter the leased premises to remove annexed personalty. However, if the annexation in question concerns the tenant's property, and it is otherwise removable by the tenant, there are circumstances in which it would be unreasonable not to permit the tenant to remove the annexation following lease termination. Such concerns have given rise to a somewhat confused body of law on the timing of removal.

The traditional rule with respect to the removal of tenant annexations is that, in the absence of a contrary agreement, a tenant must exercise the right to remove annexations during the term of the lease or the right to do so will be lost. n307 Although this rule has been frequently referred to in the cases, it does not address some removal situations. Moreover,

the modern tendency is to not apply the rule, at least as literally stated. In many instances, the loss of the right to remove annexations will be determined by when the tenant relinquishes possession of the leased premises, rather than by the date of lease termination. n308

It is generally recognized that a tenant may remove annexations following expiration of the lease term while the tenant remains in possession of the premises with the express or implied consent of the landlord. n309 This situation commonly arises when the tenant remains in possession during negotiations for a new lease that were not completed before lease expiration. n310 The Restatement view is that a tenant under a fixed term must remove annexations on or before lease expiration, unless "equitable considerations" justify an extension of time; n311 however, the lease is not considered to be terminated, for purposes of the tenant's removal rights, if the tenant remains on the premises with the consent of the landlord. n312

The tenant may also be able to remove annexations after expiration of a lease, when the tenant remains on the premises under the terms of a renewal lease. The old rule was that a tenant who failed to remove annexations under the original term of a lease could not remove the annexations during the period of a renewal lease, unless the tenant reserved the right to do so. n313 It was thought that the new lease resulted in a surrender of the old lease, and in an implied surrender of possession, by reason of which the right to remove annexations was terminated and the annexations became part of the realty. n314 At one time, this seems to have been the majority rule. n315 However, the rule has been rejected by a number of courts, n316 substantially limited by many others, n317 and abrogated in some states by statute. n318 The Restatement position, which reflects the modern trend, is that the tenant does not have to remove annexations prior to the end of the original lease term if, as a result of the exercise of a lease renewal right, the tenant's occupancy continues. n319

The tenant's right to remove annexations is generally not ended upon the expiration of a lease for an indefinite term. On the theory that a tenant under a lease for an indefinite term, such as a tenancy at will, is unable to foresee the end of the lease and to plan for its termination, it is well settled that the tenant will be allowed a reasonable period of time after termination of the lease to remove tenant annexations. n320

There is a division of authority regarding the tenant's right to remove annexations after premature lease termination and dispossession of the tenant due to breach of the tenant's lease obligations. Some courts apply the rule that is used for leases of uncertain duration, and allow the tenant a reasonable period of time after termination in which to remove annexations. n321 Other courts are of the view that a tenant generally loses the right to remove annexations if the lease is terminated and the tenant is dispossessed of the premises on account of a default. n322 The Restatement position is that, if the lease termination is due to a breach of the tenant's obligations, removal must be made on or before the termination of the lease, "unless equitable considerations justify some extension of time." n323 If an extension is given, the Restatement contemplates that the landlord would be entitled to recover special damages that may be sustained as a result. n324

There is some authority for the proposition that a tenant who wrongfully holds over after the expiration of a lease loses the right to remove annexations. n325 The Restatement view is that, if the landlord elects to bind such a tenant over to a new lease, the date the original lease terminated controls the right to remove tenant annexations. The reasoning is that a contrary result would "work against the goal of making it less likely a tenant would wrongfully hold over after his lease ends." n326

A tenant who surrenders possession of the leased premises is generally held to have forfeited the right to remove annexations. n327

§ 40.07(d) Third Party Claims.

Tenant annexations may also be claimed by parties such as assignees or sublessees of the tenant, or by chattel

mortgagees or other creditors of the tenant. Since the rights of such parties in tenant annexations derive from the tenant, they will generally have no greater removal rights against the landlord than the tenant would have had. n328 An exception has been recognized, however, when the tenant surrenders possession of the leased premises prior to lease expiration. Although such a surrender and vacation of the premises may bring about a forfeiture of the tenant's removal rights, it has been held that a chattel mortgagee of tenant fixtures will be given a reasonable time thereafter in which to remove the fixtures that are subject to the chattel mortgage. n329 This result has been codified in § 9 334 of the Uniform Commercial Code. n330

§ 40.07(e) Condemnation.

If the government takes the leased property under power of eminent domain, the government will be obligated to provide compensation for fixtures that are condemned along with the realty. Generally, the tenant will be entitled to compensation for fixtures so condemned if the tenant otherwise would have had a right to remove them from the leased premises. n331 However, if the tenant has no right to remove condemned fixtures, the compensation for their taking will go to the landlord. n332

FOOTNOTES:

(n1)Footnote 288. The tenant's right to make changes to the premises is subject to limitations imposed by the doctrine of waste. The law of waste is discussed in Chapter 70.

(n2)Footnote 289. *See, e.g., Holy Ghost Catholic Church v. Clinton, 211 N.W. 13 (Minn. 1926)* ; *Isman v. Hanscom, 66 A. 329 (Pa. 1907)* ; *Bolin v. Laderberg, 153 S.E.2d 251 (Va. 1967)* .

(n3)Footnote 290. *See* ch. 46, *below.*

(n4)Footnote 291. *See* U.C.C. § 9 334 & cmt. 3.

(n5)Footnote 292. *See Teaff v. Hewitt, 1 Ohio St. 511 (1853)* . The *Teaff* case is extensively discussed in chapter 46.

(n6)Footnote 293. *See Teaff v. Hewitt, 1 Ohio St. 511 (1853)* .

(n7)Footnote 294. *See, e.g., LaFarge Bldg. Materials, Inc. v. Stribling, 880 So. 2d 415 (Ala. 2003)* ; *Supervisor of Assessments of Anne Arundel County v. Hartge Yacht Yard, Inc., 842 A.2d 732 (Md. Ct. App. 2004)* ; *R & D Amusement Corp. v. Christianson 392 N.W.2d 385 (N.D. 1986)* .

(n8)Footnote 295. *See* 7 Sir William Holdsworth, A History of English Law 264, 285 (2d ed. 1937).

(n9)Footnote 296. *See Elwes v. Maw, 102 Eng. Rep. 510, 3* East 38 (K.B. 1802).

(n10)Footnote 297. *See* 7 Sir William Holdsworth, A History of English Law 264, 286 (2d ed. 1937).

(n11)Footnote 298. *See* Note, *Fixtures in the Landlord/Tenant Relationship, 34 U. Chi. L. Rev. 617 (1967).*

(n12)Footnote 299. *Wiggins Ferry Co. v. Ohio & Miss. Ry., 142 U.S. 396 (1892)* ; *see also Handler v. Horns, 65 A.2d 523 (N.J. 1949)* (examples of trade fixtures).

(n13)Footnote 300. *See, e.g., Old Line Life Ins. Co. v. Hawn, 275 N.W. 542 (Wis. 1937)* .

(n14)Footnote 301. *See, e.g., Van Ness v. Pacard, 27 U.S. (2 Pet.) 137 (1829)* ; *Cameron v. Oakland County Gas & Oil Co., 269 N.W 227 (Mich. 1936)* ; *Dickerman v. Town of Pittsford, 80 A.2d 529 (Vt. 1951)* .

(n15)Footnote 302. *See, e.g., Van Ness v. Pacard, 27 U.S. (2 Pet.) 137 (1829)* ; *Handler v. Horns, 65 A.2d 523*

(N.J. 1949) .

(n16)Footnote 303. *See, e.g., Webb v. New Haven Theatre Co., 87 Conn. 129, 87 A. 274 (Conn. 1913)* ; *Slane v. Curtis, 286 P. 372 (Wyo. 1930)* .

(n17)Footnote 304. *See, e.g., Kenneally v. Standard Elecs. Corp., 364 F.2d 642 (8th Cir. 1966)* ; *Neely v. Jacobs, 673 S.W.2d 705 (Tex. Ct. App. 1984)* ; *Cal. Civ. Code § 1019*; Restatement (Second) of Property § 12.2, statutory note 6 (1977). Some courts have added the further, questionable, requirement that the removal must be accomplished without substantial damage to the affixed item itself. *See, e.g., Della Corp. v. Diamond, 210 A.2d 847 (Del. 1965)* ; *Collamore v. Gillis, 22 N.E. 46 (Mass. 1889)* . But many courts have rejected this requirement. *See, e.g., Andrews v. Williams, 173 P.2d 882 (Colo. 1946)* ; *Frost v. Schinkel, 238 N.W. 659 (Neb. 1931)* . *See generally* Note, *Fixtures in the Landlord Tenant Relationship, 34 U. Chi. L. Rev. 617 (1967).*

(n18)Footnote 305. *See, e.g.*, W. Va. Code Ann. § 37-6-29.

(n19)Footnote 306. Restatement (Second) of Property § 12.2 (4) (1977); *cf.* § 12.2(3) (right of landlord to require tenant to restore premises to their former condition at the conclusion of the tenancy).

(n20)Footnote 307. *See, e.g., Wright v. Michelman, 141 N.E. 234 (Mass. 1923)* ; *In re Starr Street, 131 N.Y.S. 71 (Sup. Ct. 1911)* ; L.S. Tellier, Annotation, *Time Within Which Tenant's Right to Remove Trade Fixtures Must Be Exercised, 6 A.L.R.2d 322, 324 (1949)* ; *see also* William M. Howard, Time Within Which Tenant's Right to Remove Trade Fixtures Must Be Exercised, *109 A.L.R.5th 421 (2003)* (updated annotation).

(n21)Footnote 308. *See, e.g., Phelps v. Ayers, 125 N.W. 919 (Wis. 1910)* (tenant may remove annexations during the term of the lease, or during a period after lease expiration when the tenant remains in possession); Restatement (Second) of Property § 12.3, Reporter's Note 4 (1977) (Stating that the rule in most jurisdictions is that the tenant for a fixed term "must remove his annexations before the expiration of that term, or at least before he relinquishes possession of the premises.").

(n22)Footnote 309. *See, e.g., Andrews v. Williams, 173 P.2d 882 (Colo. 1946)* ; *Rothery v. Dohrse, 240 N.W. 296 (Neb. 1932)* ; *State Highway Com. v. Demarest, 503 P.2d 682 (Or. 1972)* ; *Blackwell Printing Co. v Blackwell Wielandy Co., 440 S.W.2d 433 (Mo. 1969)* ; *Henderson v. Robbins, 138 A. 68 (Me. 1927)* ; Restatement (Second) of Property § 12.3, Reporter's Note 8 (1977); *Time Within Which Tenant's Right to Remove Trade Fixtures Must Be Exercised, 6 A.L.R.2d 322, 329, 330, 338, 341 (1949).*

(n23)Footnote 310. *See, e.g., Ray v. Young, 142 N.W. 393 (Iowa 1913)* ; Restatement (Second) of Property § 12.3, cmt. k (1977).

(n24)Footnote 311. If such an extension is given, the landlord is, according to the Restatement, entitled to special damages resulting from the delay. *See* Restatement (Second) of Property § 12.3 & cmt. k (1977).

(n25)Footnote 312. *See* Restatement (Second) of Property § 12.3 & cmt. k (1977).

(n26)Footnote 313. *See, e.g., Wadman v. Burke, 81 P. 1012 (Cal. 1905)* ; *Loughran v. Ross, 45 N.Y. 792 (1871)* .

(n27)Footnote 314. *See George Bauernschmidt Brewing Co. v. McColgan, 42 A. 907 (Md. 1899)* ; *Teddy Rose Enterprises, Inc. v. Hartford Fire Ins. Co., 427 A.2d 1081 (Md. Ct. App. 1981)* ; P. H. Vartanian, Annotation, *Right to Remove Fixtures or Improvements Placed Upon Property by One Holding Under Lease as Affected by Renewal or New Lease Made to Him or His Successor Without Reservation of the Right to Remove*, 110 A.L.R. 480, 484 (1937) .

(n28)Footnote 315. *See Right to Remove Fixtures or Improvements Placed Upon Property by One Holding Under Lease as Affected by Renewal or New Lease Made to Him or His Successor Without Reservation of the Right to Remove*

, 110 A.L.R. 480, 484 (1937) (stating no one will question that this was once the majority rule); *but see* Note, *Effect of Renewal of a Lease Without Reservation of the Right to Remove Fixtures, 18 Iowa L. Rev. 527 (1933)* (questioning the majority status of the rule).

(n29)Footnote 316. *See, e.g., Handler v. Horns, 65 A.2d 523 (N.J. 1949)* ; *Blake McFall Co. v. Wilson, 193 P. 902 (Or. 1920)* .

(n30)Footnote 317. *See, e.g., Greenspan-Greenberger Co. v. Goerke Co., 111 N.J. Eq. 249, 162 A. 87 (N.J. Eq. 1932)* (limiting application of rule to structural improvements); *Ory v. Tate, 85 S.E.2d 36 (Ga. 1954)* (rule not applicable to trade fixtures); *Radey v. McCurdy, 58 A. 558 (Pa. 1904)* (rule applies to new leases rather than to lease extensions).

(n31)Footnote 318. *See, e.g., N.Y. Real Prop. Law § 226*a.

(n32)Footnote 319. *See* Restatement (Second) of Property § 12.3, cmt. j (1977).

(n33)Footnote 320. *See, e.g., McLeon v. Wells, 180 S.W.2d 325 (Ark. 1944)* ; *Henderson v. Robbins, 138 A. 68 (Me. 1927)* ; *Time Within Which Tenant's Right to Remove Trade Fixtures Must Be Exercised, 6 A.L.R.2d 322, 342 (1949)* .

(n34)Footnote 321. *See, e.g., Bergh v. Herring Hall Marvin Safe Co., 136 F. 368 (2d Cir. 1905)* ; *Shepard v. Alden, 201 N.W. 537 (Minn. 1924).*

(n35)Footnote 322. *See, e.g., Cabana, Inc. v. Eastern Air Control, Inc., 487 A.2d 1209 (Md. Ct. App. 1985)* ; *Morey v. Hoyt, 26 A. 127 (Conn. 1893)* ; *Time Within Which Tenant's Right to Remove Trade Fixtures Must Be Exercised, 6 A.L.R.2d 322, 348, 349 (1949)* .

(n36)Footnote 323. *See* Restatement (Second) of Property § 12.3 (1) & cmt. d (1977). The Reporter's Note to § 12.3 acknowledges that an extension based on equitable considerations is not consistent with the weight of authority, but refers to the rule as an expansion of a general rule favoring "relief against forfeiture in hardship cases." *Id.*, Reporter's Note (1).

(n37)Footnote 324. *See* Restatement (Second) of Property § 12.3 (2).

(n38)Footnote 325. *See, e.g., Wilson v. Davis, 153 S.W.2d 171 (Ark. 1941)* ; *but see Pearson v. Harper, 392 P.2d 687 (Idaho 1964)* (construing statute to permit holdover tenant to remove annexations while in possession).

(n39)Footnote 326. Restatement (Second) of Property § 12.3, cmt. k.

(n40)Footnote 327. *See, e.g., National Housewares Corp. v. Trahin, 444 S.W.2d 68 (Ark. 1969)* ; *Time Within Which Tenant's Right to Remove Trade Fixtures Must Be Exercised, 6 A.L.R.2d 322, 330 (1949)* .

(n41)Footnote 328. *See, e.g., Weisberg v. Loughridge, 61 Cal. Rptr. 563 (Cal. Ct. App. 1967)* ; *Tunis Lumber Co. v. R.G. Dennis Lumber Co. 34 S.E. 613 (Va. 1899)* .

(n42)Footnote 329. *See Weisberg v. Loughridge, 61 Cal. Rptr. 563 (Cal. Ct. App. 1967)* ; *see also Landmark Enterprises, Inc. v. M.I. Harrisburg Associates, 554 N.W.2d 119 (Neb. 1996)* (after lease termination, contractor hired by tenant to make improvements on the leased premises sued to foreclose a construction lien; court considered whether the termination of the lease merged the leasehold interest and the construction lien into the landlord's title; no merger found, and the foreclosure action was dismissed).

(n43)Footnote 330. North Carolina Gen. Stat. § 42 & W. Va. Code. Ann. § 37 (formerly § 9 313(5)(b)).

(n44)Footnote 331. *See, e.g., Roffman v. Wilmington Hous. Auth., 179 A.2d 99 (Del. 1962)* ; *State v. Demarest, 503 P.2d 682 (Or. 1972)* .

(n45)Footnote 332. *See, e.g., Marraro v. State, 189 N.E.2d 606 (N.Y. 1963)* ; *See* Edward L. Snitzer, *Valuation and Condemnation Problems Involving Trade Fixtures, 16 Vill. L. Rev. 467, 489 (1971).*

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CHAPTER 40 LANDLORD RIGHTS AND TENANT DUTIES

5-40 Thompson on Real Property, Thomas Editions § 40.08

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§ 40.08 Right to Terminate the Lease.

§ 40.08(a) Introduction.

This section discusses the right of the landlord to terminate a lease upon tenant breach of lease obligations. The traditional common law rule is that, unless the lease provides otherwise, the landlord is not entitled to prematurely terminate the lease based on the tenant's breach of a lease covenant. n333 Breach of a lease covenant by the tenant might permit the landlord to sue for breach of contract, but it does not enable the landlord to terminate the lease. n334 The rule is based on the concept that the tenant has an estate in land, and that the lease covenants of landlord and tenant are independent of each other.

The Restatement favors a different approach. Based on its view of the dependency of lease covenants, the Restatement would permit the landlord to terminate a lease, notwithstanding the absence of a lease termination provision, if the tenant breaches a valid lease promise, if the landlord is thereby deprived of a significant inducement to the making of the lease, and if the tenant does not perform within a reasonable time after being requested to do so. n335 However, the Restatement position is not reflective of the case law in this area. n336

The traditional common law rule has been widely modified by statute. Statutes in a majority of American jurisdictions permit the landlord to terminate a tenancy for specified tenant defaults, even if the lease does not contain a provision setting forth the landlord's right to do so. n337 However, statutory grounds for lease termination are frequently quite limited. In light of the traditional rule regarding lease termination, and the limitations on statutory lease termination rights, it is not surprising that termination provisions are commonly included in modern leases.

§ 40.08(b) Termination Based on Lease Provision.

§ 40.08(b)(1) Special Limitations and Powers of Termination.

As with any other estate in land, a leasehold estate may be limited so that it will automatically terminate upon the occurrence of a particular event. n338 Such a provision is properly referred to as a "special limitation," but it often called an "automatic termination clause." A tenancy that automatically terminates upon the occurrence of an event has traditionally been referred to as a determinable term for years, a determinable periodic tenancy, or a determinable

tenancy at will, as appropriate. n339 Examples of special limitations in the leasehold context are clauses that provide for automatic lease termination upon the death of the tenant or upon the tenant's vacation of the leased premises.

A lease that is subject to a special limitation should be distinguished from a lease that provides the landlord with the right to terminate the lease if a specified condition, such as an event of default, exists. The right of the landlord to terminate the lease is usually referred to as a "power of termination." A lease that is subject to a power of termination has traditionally been referred to as a term of years subject to a condition subsequent or a periodic tenancy subject to condition subsequent, as appropriate. n340 A tenancy at will is, by its nature, terminable at the option of either party, so there is no tenancy at will subject to a condition subsequent. n341

Whether a particular lease provision creates a special limitation or a power of termination is generally a matter of the parties' intent, as determined from the language used in the lease and from the circumstances. Durational expressions, such as "until," "during," or "so long as" are typically associated with a special limitation; and conditional expressions, such as "on condition that" and "provided that" are typically associated with a power of termination. n342 However, courts do not favor provisions in leases that seem to provide for automatic termination. While a clear special limitation may be given effect, n343 because of the potential harshness of automatic lease termination, courts prefer to construe lease language in favor of a power of termination. n344

Judicial reluctance to conclude that a lease provides for a special limitation upon the occurrence of a tenant default may seem to favor the tenant, but it could benefit the landlord as well. The effect of a valid special limitation could be to deprive the landlord of an opportunity to continue the tenancy, assuming the landlord desires to do so, notwithstanding the occurrence of a tenant default. Moreover, a tenant who desires to avoid lease obligations to the landlord might intentionally breach the lease in order to cause automatic lease termination. n345 The Restatement position is that when the language of lease is unclear as to whether automatic or optional lease termination is intended, and the termination provision relates to the performance of lease obligations by a party, there is a presumption that termination is optional. Otherwise, the party "could take advantage of his own wrong to avoid future liability under the lease." n346

In light of the foregoing, a landlord's interests are probably better served in most cases by a power of termination than by a special limitation. However, in a few instances, courts have required landlords to bring more cumbersome ejectment actions instead of summary possession actions to recover possession of the leased premises when the lease did not provide for automatic termination for the tenant's default. n347

§ 40.08(b)(2) Exercise of the Power of Termination.

The landlord who wishes to exercise a power of termination must do so by some unequivocal act. n348 At common law, the landlord exercised a power of termination by reentry or by bringing an ejectment action. n349 In more recent times, it has been recognized that a power of termination may also be exercised by bringing a summary possession action or by providing notice to the tenant of the landlord's election to terminate the lease. n350 If the landlord exercises the power of termination by giving notice, it must be unequivocal. If the landlord provides notice of a default, and also provides the tenant with an opportunity to cure the default, the landlord's acts may not constitute an unequivocal election to terminate the lease. n351 As noted below, the lease itself may set forth the procedures that the landlord must follow in order to exercise the power of termination.

Before a power of termination may be exercised by the landlord for nonpayment of rent, the landlord is generally required to make demand on the tenant for payment. n352 Indeed, the old common law rule was that the landlord had to make demand for the exact sum due at a notorious place on the leased premises between sunrise and sunset on the day the rent was due. n353 The common law demand requirement may be, and commonly is, modified in some way or even dispensed with by lease provision n354 or by statute. n355 In the absence of such a modification, however, it has been held that the common law rule is generally in force. n356

If the lease sets forth the manner in which the landlord is to exercise a power of termination, the landlord is generally held to the specified procedure. n357 But courts have sometimes excused strict compliance with termination procedures when such compliance would be meaningless. Thus, the landlord has not been required to send a certified mail notice to the leased premises, as specified in the lease, when the tenant has previously vacated them. n358 Some courts have excused the landlord's failure to send notice of lease termination by registered mail, as required in the lease, when the tenant received actual notice of termination. n359

§ 40.08(b)(3) Limitations on Landlord's Right to Terminate the Lease.

The successful exercise by the landlord of a power of termination results in the forfeiture of the tenant's interest in real property. But forfeitures are not favored in the law, and courts have used a variety of means to limit the effect or application of lease termination provisions. These include construing lease provisions to avoid forfeiture, application of the doctrines of waiver and estoppel, and refusal to enforce lease termination provisions when the result would be inequitable. In addition to the limitations imposed by courts, statutes in many jurisdictions restrict the landlord's ability to terminate a lease. Each of these limitations on the landlord's ability to terminate the lease will be considered below.

§ 40.08(b)(3)(i) Construction of Lease Provisions.

Because forfeitures are not favored in the law, courts have tended to strictly construe lease provisions permitting the landlord to terminate the lease upon tenant default. n360 It has been said, for example, that a forfeiture right must be clearly stated in order to be available to a landlord. n361 Even when the forfeiture right is clearly stated, courts have sometimes prevented a forfeiture by narrowly construing the tenant's lease obligations, thereby avoiding a conclusion that the lease has been breached. n362 Moreover, as noted above, courts have, with some exceptions, also required strict adherence by landlords to lease provisions setting forth termination procedures. n363

§ 40.08(b)(3)(ii) Waiver.

The landlord may be held to have waived the right to terminate the lease for a tenant breach when, following the breach, the landlord engages in conduct that indicates an intent to continue the landlord-tenant relationship. The issue commonly arises in connection with the landlord's acceptance of tenant rental payments. When the landlord accepts rental payments accruing after a tenant breach, with knowledge of the breach, the landlord will generally be held to have waived the right to exercise a power of termination based upon that breach. n364 The landlord's conduct is thought to acknowledge the continuing existence of the lease. n365 The result is otherwise if the landlord accepts payment of rent that accrued prior to the tenant's breach; such acceptance does not acknowledge a continuing existence of the lease, and no waiver should be found. n366

Once the lease has actually been terminated, there is no continuing landlord-tenant relationship to acknowledge, and the landlord should be able to accept payment for the rent that accrued between the time of the tenant's breach and lease termination without causing a reinstatement of the tenancy. Several courts have so held. n367 It would also seem that, without reinstating a previously terminated tenancy, the landlord could accept payment of the same rent whose nonpayment was the basis of lease termination. However, while courts have so held, n368 there is some authority to the contrary. n369 There is also some conflict in the cases on whether the landlord waives the right to terminate the lease when, after initiating procedures to terminate the lease for nonpayment of rent, but before the lease is terminated, the landlord accepts rent that accrued after the tenant's breach. n370

On the theory that waiver is a matter of intent, a number of courts have permitted the landlord to avoid a waiver by expressly reserving the right to terminate the lease when the landlord accepts rent that accrued after a tenant breach. n371 However, other courts, reluctant to enforce forfeitures, have declined to permit the landlord to qualify the acceptance of rent in this manner. n372 Similarly, courts have sometimes upheld lease provisions that purport to permit the landlord to accept tenant rent payments or other performances after a breach, without waiving a power of

termination. n373 But it is not uncommon for courts to conclude that the landlord waived the right to terminate the lease notwithstanding a lease provision to the contrary. n374

Although the issue of waiver is most commonly presented by the landlord's acceptance of rental payments after a tenant breach, it may arise whenever, following a tenant breach, the conduct of the landlord evidences an intent to continue the landlord-tenant relationship. Thus, waiver may be found when the landlord, with knowledge of a tenant breach, thereafter makes demand on the tenant for the payment of rent, brings a suit for rent, or modifies the terms of the lease. n375 Waiver has also been found when the landlord unreasonably delays exercising the power of termination following tenant default. n376

If the landlord is held to have waived the right to exercise a power of termination for a tenant breach, the waiver applies only to that breach. The waiver does not prevent the landlord from exercising the power of termination in the event of a later occurring breach, even a repetition of the same breach for which the power of termination was previously waived. n377

§ 40.08(b)(3)(iii) Estoppel.

The landlord's right to exercise a power of termination under a lease may also be limited by application of the equitable doctrine of estoppel. The doctrine is sometimes confused with waiver, and court decisions that prohibit the exercise of a power of termination do not always clarify which doctrine is involved. In general, the doctrine of estoppel could apply to prevent the exercise of a power of termination if the landlord makes a representation, expressly or impliedly, that a lease covenant or condition will not be strictly enforced, and the tenant detrimentally relies upon the representation. n378

The doctrine of estoppel is most commonly applied in connection with late rental payments. If a landlord has repeatedly accepted late rental payments, the landlord would likely be estopped from exercising a power of termination based upon late payment until the landlord notifies the tenant that strict performance will now be required. n379 The landlord has also been estopped from exercising a power of termination when the landlord is aware that the tenant is making alterations to the leased premises that are prohibited by the lease, and the landlord stands by while the alterations are made. n380

§ 40.08(b)(3)(iv) Equitable Relief from Forfeiture.

As discussed above, the doctrines of waiver and estoppel may apply in some circumstances to limit the landlord's right to exercise a power of termination. However, even if waiver and estoppel are not applicable on the facts of a particular case, the landlord's attempt to exercise a power of termination might be limited by general principles of equity. Equity, of course, "abhors a forfeiture."

If the tenant's default is the failure to pay rent or some other sum of money, equity ordinarily intervenes to prevent the exercise of a power of termination, provided that the money is paid. n381 In ordering relief from forfeiture upon the payment of the monetary obligation, courts sometimes refer to a theory, developed in English cases, that a power of termination represents security for the payment of a monetary obligation, and that enforcement of the power of termination is not required if payment will make the landlord whole. n382

If the tenant breaches a lease covenant other than for the payment of money, courts are less willing to bar landlord exercise of a power of termination on grounds of equity. In that situation, it is more difficult to condition equitable relief on a monetary payment that will make the landlord whole. n383 Nonetheless, courts have sometimes ordered relief from forfeiture, conditioned upon payment of damages to the landlord. n384

Equity might also intervene to prevent forfeiture when the tenant's default is trivial, or where it results from mistake,

accident, or misconduct on the part of the landlord. n385 On the other hand, equitable relief would be less appropriate when tenant defaults have been persistent, deliberate, or willful. n386 The court may also decline to grant equitable relief if it concludes that there is an adequate alternative remedy at law. n387 Equitable relief is in the discretion of the court, and the outcome in each case will depend on the court's view of the equities involved.

§ 40.08(c) Statutory Lease Termination Rights.

At common law, unless the lease provided otherwise, a landlord could not terminate a lease before the end of the term on account of a tenant default. This result has been modified in most states by the adoption of legislation permitting the landlord to terminate the lease for specified tenant defaults. n388 Most frequently, the statutes provide the landlord with a right to terminate the lease, or to bring a summary action for possession of the leased premises, based upon the tenant's failure to pay rent. n389 However, individual statutes also permit the landlord to terminate based upon the tenant's illegal use of the premises, n390 commission of waste, n391 or use that is contrary to a covenant in the lease. n392 A federal statute permits a public housing agency to terminate the lease of a public housing tenant based upon drug related criminal activities of the tenant, a member or the tenant's household, or a guest or other person under the tenant's control. n393 The United States Supreme Court has held that the statute permits a public housing authority to terminate the tenancy regardless of whether the tenant knew, or should have known, of the drug related criminal activity. n394 The Uniform Residential Landlord and Tenant Act permits the landlord to terminate a residential lease, subject to certain notice requirements, if the tenant fails to pay rent when due; materially defaults in the performance of lease obligations; or fails to comply with specified statutory duties regarding the condition of the leased premises, and health and safety are thereby materially affected. n395

Many of the statutes providing for lease termination rights in favor of landlords include tenant protections. Thus, statutes frequently require the landlord to provide the tenant with prior notice and an opportunity to cure a breach of the lease before the landlord may terminate. n396 When termination is sought based upon nonpayment of rent, a number of statutes provide for lease reinstatement if the tenant pays the past due rent and costs prior to the conclusion of the landlord's action for possession or prior to the execution of a writ of possession. n397 Some statutes, such as those based upon the Uniform Residential Landlord and Tenant Act, expressly adopt a requirement that the breach for which lease termination is sought be "material." n398 The Uniform Act also provides that a landlord may not recover possession of a tenant's dwelling unit "except in case of abandonment, surrender, or as permitted in this Act." n399

In the absence of clear direction from the lease or from legislation, several courts have held that the forfeiture provisions of a lease are not exclusive, and that, where both the lease provisions and the statutory provisions regarding termination could apply, the landlord could elect to take advantage of statutory termination rights. n400 But it has also been held that the termination provisions of the lease supersede statutory termination remedies. n401

As with attempts to exercise rights of termination set forth in the lease, attempts to exercise statutory rights of termination have been subject to defenses of waiver and estoppel. n402 However, general equitable relief is less likely to be granted to prevent exercise of a statutory right of termination than it is to prevent the exercise of a power of termination set forth in a lease. Such relief has been withheld on the theory that to grant it would be to defeat a legislative mandate providing for forfeiture. n403 But not all courts follow this rule. Some courts have granted equitable relief from statutory termination when the tenant's breach was trivial or where the default could be remedied by the payment of money. n404 Courts have, in any event, generally been willing to grant equitable relief from statutory forfeiture when tenant default results from fraud or mistake. n405 However, courts may be disinclined to grant equitable relief if they believe there is an adequate alternative remedy at law. n406

§ 40.08(d) The Requirement of Good Cause for Lease Termination.

There is no generally recognized requirement that a landlord have good cause in order to terminate a lease. However, such a requirement is nonetheless recognized in some circumstances. One of these circumstances arises in connection

with the retaliatory conduct doctrine. n407 Once the landlord has been barred from evicting a tenant on grounds of illegal retaliation, before the landlord can succeed with a new eviction action, the landlord may, at least in some jurisdictions, be required to establish a legitimate business justification for the eviction. n408

More frequently, a requirement of good cause for lease termination arises under statute. Rent control statutes, for example, often provide that the landlord may evict the tenant only for specified grounds, such as failure to pay rent, illegal use of the premises, or some other material violation of the lease. n409 Tenants in federally subsidized public housing are, by statute, protected against lease termination other than for material lease violation, violation of applicable law, or for other good cause. n410 New Jersey legislation permits termination or nonrenewal of most residential leases only upon a showing of good cause. n411

Some commentators have suggested that public policy and contract law considerations similar to those supporting the implied warranty of habitability for residential leases might also justify a good cause termination requirement for residential tenancies. In this instance, the public policy orientation would be on the continuity, rather than the quality, of possession. n412 It has also been suggested that a requirement of good cause for lease termination might be included within the obligation of good faith in § 1.302 of the Uniform Residential Landlord and Tenant Act. n413 There is, as yet, little evidence in the cases that the courts will adopt these suggestions.

FOOTNOTES:

(n1)Footnote 333. *See, e.g., Hyde v. Bains, 22 So. 2d 324 (Ala. 1945)* ; *Barnett v. Dooley, 212 S.W.2d 598 (Tenn. 1948)* .

(n2)Footnote 334. *See, e.g., Indian Land & Trust Co. v. Clement, 109 P. 1089 (Okla. 1908)* ; *Continental Grain Co. v. Afram Bros. Co., 151 N.W.2d 685 (Wis. 1967)* . However, lease termination could result from tenant abandonment of the leased premises. *See* discussion in § 40.11(a).

(n3)Footnote 335. *See* Restatement (Second) of Property § 13.1 & cmt. a (1977).

(n4)Footnote 336. *See* Restatement (Second) of Property § 13.1 & cmt. a (1977), reporter's n.1. For a case that adopts the Restatement approach, see *Cain Partnership, Ltd. v. Pioneer Inv. Servs. Co., 914 S.W.2d 452 (Tenn. 1996)* .

(n5)Footnote 337. *See* Restatement (Second) of Property § 12.1, statutory note (1977).

(n6)Footnote 338. *See, e.g., Sutton v. Hiram Lodge, 10 S.E. 585 (Ga. 1889)* .

(n7)Footnote 339. *See* Restatement (Second) of Property § 1.7, cmt. d (1977).

(n8)Footnote 340. *See* Restatement (Second) of Property § 1.7, cmt. e (1977).

(n9)Footnote 341. *See* Restatement (Second) of Property § 1.7, cmt. e (1977).

(n10)Footnote 342. *See, e.g., Markey v. Smith, 16 N.E.2d 20 (Mass. 1938)* .

(n11)Footnote 343. *See, e.g., Remedco Corp. v. Bryn Mawr Hotel Corp., 257 N.Y.S.2d 525 (Civ. Ct. 1965)* .

(n12)Footnote 344. *See, e.g., Markey v. Smith, 16 N.E.2d 20 (Mass. 1938)* ; Annotation, *Lease Provisions Allowing Termination or Forfeiture for Violation of Law, 92 A.L.R.3d 967, 972 (1979)* .

(n13)Footnote 345. *See Miller v. Compton, 185 S.W.2d 754 (Tex. Ct. App. 1945)* .

(n14)Footnote 346. *See* Restatement (Second) of Property § 1.7 cmt. a (1977).

(n15)Footnote 347. *See, e.g., Grabino v. Howard Stores Corp., 442 N.Y.S.2d 713 (N.Y. Civ. Ct. 1981)* ; *Morris v.*

Austraw, 152 S.E.2d 155 (N.C. 1967) .

(n16)Footnote 348. *See, e.g., Padilla v. Sais, 414 P.2d 223 (N.M. 1966)* ; *Larsen v. Sjogren, 226 P.2d 177 (Wyo. 1951)* .

(n17)Footnote 349. *See* 1 American Law of Property § 3.94 (A. James Casner ed. 1952).

(n18)Footnote 350. *See, e.g., Sandra Frocks, Inc. v. Ziff, 74 N.E.2d 699 (Ill. 1947)* (summary possession action); *Johnson v. Electric Park Amusement Co., 130 N.W. 807 (Iowa 1911)* (notice).

(n19)Footnote 351. *See, e.g., Dang v. Cox Corp., 655 P.2d 658 (Utah 1982)* .

(n20)Footnote 352. *See, e.g., Duran v. Housing Authority of Denver, 761 P.2d 180 (Colo. 1988)* ; *Lee v. Park, 793 N.Y.S.2d 214 (App. Div. 2005)* ; *Barnett v. Dooley, 212 S.W.2d 598 (Tenn. 1948)* ; *See* F.G. Madara, Annotation, *Demand of Rent Due as Prerequisite of Enforcement of Forfeiture of Termination of Lease Providing Termination for Nonpayment, 28 A.L.R.2d 803 (1953)* .

(n21)Footnote 353. *See, e.g., Indian Land & Trust Co. v. Clement, 109 P. 1089 (Okla. 1908)* .

(n22)Footnote 354. *See, e.g., Miller Dairy Products Co. v. Puryear, 310 S.W.2d 518 (Ky. 1957)* ; *Santos v. Eagle Pass, 727 S.W.2d 126 (Tex. Ct. App. 1987)* .

(n23)Footnote 355. *See* Restatement (Second) of Property § 12.1, statutory note & reporter's note 13 (1977).

(n24)Footnote 356. *See, e.g., Independence Flying Service, Inc. v. Abitz, 386 S.W.2d 399 (Mo. 1965)* ; *Chrones v. Wade, 94 A.2d 242 (R.I. 1953)* .

(n25)Footnote 357. *See, e.g., Arlen Realty, Inc. v. Dozier, 393 So. 2d 489 (Ala. Ct. App. 1980); Siegel v. Kentucky Fried Chicken, Inc., 492 N.E.2d 390 (N.Y. 1986)* (notice by a lawyer was insufficient when lease required notice by landlord); *Russell v. Park City Utah Corp., 506 P.2d 1274 (Utah 1973)* .

(n26)Footnote 358. *See, e.g., Tkach v. American Sportsman, Inc., 316 N.W.2d 785 (N.D. 1982)* .

(n27)Footnote 359. *See, e.g., Dixon v. American Indus. Leasing Co., 253 S.E.2d 150 (W. Va. 1979)* .

(n28)Footnote 360. *See, e.g., Fritts v. Cloud Oak Flooring Co., 478 S.W.2d 8 (Mo. Ct. App. 1972)* ; Annotation, *Lease Provisions Allowing Termination or Forfeiture for Violation of Law, 92 A.L.R.3d 967, 972 (1979)* .

(n29)Footnote 361. *See Schlegel v. Hansen, 570 P.2d 292 (Idaho 1977)* .

(n30)Footnote 362. *See, e.g., Bentler v. Poulson, 141 N.W.2d 551 (Iowa 1966)* ; *Realty Developing Co. v. Wakefield Ready Mixed Concrete Co., 100 N.E.2d 28 (Mass. 1951)* .

(n31)Footnote 363. *See* discussion in § 40.08(b)(2).

(n32)Footnote 364. *See, e.g., Goldberg v. Pearl, 138 N.E. 141 (Ill. 1923)* ; *See* Annotation, *Lessor's Retention of Past Due Rental Payments As Precluding Termination of Lease and Dispossession of Lessee for Nonpayment of Rent, 39 A.L.R.4th 1204 (1985)* ; J.E. O'Brien, Annotation, *Landlord's Acceptance of Rent as Waiver of Right to Forfeit Because of Tenant's Past or Future Violations of Terms of Lease,* 109 A.L.R. 1267 (1937) ; *Cf. Midland Mgmt. Co. v. Helgason, 630 N.E.2d 836 (Ill. 1994)* (landlord did not waive breach by accepting Section 8 housing assistance payments; court was of the view that such payments do not constitute "rent").

(n33)Footnote 365. *See, e.g., Riverside Development Co. v. Ritchie, 650 P.2d 657 (Idaho 1982)* .

(n34)Footnote 366. *See, e.g., Connealy v. Mueller, 319 N.W.2d 86 (Neb. 1982)* ; *Sherrill v. Harlan Theater Co., 75 S.W.2d 775 (Ky. 1934)* .

(n35)Footnote 367. *See, e.g., Myers v. Herskowitz, 165 P. 1031 (Cal. Ct. App. 1917)* ; *Schultz v. Cardwell, 253 P. 822 (Wash. 1927)* ; 1 American Law of Property § 3.95, at 393 (A. James Casner ed. 1952) ;but *see, e.g., Cuschner v. Westlake, 86 P. 948 (Wash. 1906)* (landlord waived forfeiture by accepting rent on the same day forfeiture had been declared).

(n36)Footnote 368. *See, e.g., Silva v. Campbell, 24 P. 316 (Cal. 1890)* ; *Pendill v. Union Min. Co., 31 N.W. 100 (Mich. 1887)* ; 1 American Law of Property § 3.95, at 393 (A. James Casner ed. 1952).

(n37)Footnote 369. *See Reeves v. Baker, 530 P.2d 30 (Or. 1974)* ; Robert S. Schoshinski, American Law of Landlord and Tenant § 6.2 n.42 (1980).

(n38)Footnote 370. *See, e.g., Shiflett v. Anchor Rome Mills, Inc., 50 S.E.2d 853 (Ga. Ct. App. 1948)* (waiver); *Rose & Crown, Ltd. v. Shaw Enterprises, Inc., 346 A.2d 459 (Md. Ct. App. 1975)* (no waiver); *Davidsohn v. Doyle, 825 P.2d 1227 (Nev. 1992)* (no waiver); *see generally* Robert S. Schoshinski, American Law of Landlord and Tenant § 6.2 n.42 (1980).

(n39)Footnote 371. *See, e.g., Jose v. Iglesias, 462 F.2d 214 (9th Cir. 1972)* ; *See* Annotation, *Lease Provisions Allowing Termination or Forfeiture for Violation of the Law, 92 A.L.R.3d 967 (1979)* .

(n40)Footnote 372. *See, e.g., Miller v. Reidy, 260 P. 358 (Cal. Ct. App. 1927)* ; *Girard v. Appleby, 660 P.2d 245 (Utah 1983) , abrograted on other grounds, Meadowbrook, LLC v. Flower 959 P.2d 115 (Utah 1998)* .

(n41)Footnote 373. *See, e.g., Hoffman Wall Paper Co. v. Hartford, 159 A. 346 (Conn. 1932)* ; *Haack v. Great Atlantic & Pacific Tea Co., 603 S.W.2d 645 (Mo. Ct. App. 1980)* .

(n42)Footnote 374. *See, e.g., Gonsalves v. Gilbert, 356 P.2d 379 (Hawaii 1960)* ; *Gainesville v. Charter Leasing Corp., 483 So. 2d 465 (Fla. Ct. App. 1986)* ; *TSS-Seedman's, Inc. v. Elota Realty Co., 72 N.Y.2d 1024, 534 N.Y.S.2d 925, 531 N.E.2d 646 (N.Y. 1988)* .

(n43)Footnote 375. *See, e.g., Allen v. Marshall County, 489 So. 2d 566 (Ala. 1986)* (lease modification); *Mid Continent Refrigerator Co. v. Williams, 285 So. 2d 247* (demand for rent); *Sycamore Mills, Inc. v. Hervey Veneer Co., 44 S.E.2d 531 (N.C. 1947)* (suit for rent).

(n44)Footnote 376. *See, e.g., C & A. Land Co. v. Rudolf Inv. Corp, 296 S.E.2d 149 (Ga. Ct. App. 1982)* ; *Pacific Warehouse Co. v. McKenzie Hunt Paper Co., 141 P. 1147 (Wash. 1914)* .

(n45)Footnote 377. *See, e.g., Sherrill v. Harlan Theater Co., 75 S.W.2d 775 (Ky. 1934)* ; J.E. O'Brien, Annotation, *Landlord's Acceptance of Rent as Waiver of Right to Forfeit Because of Tenant's Past or Future Violations of Terms of Lease*, 109 A.L.R. 1267 (1937) .

(n46)Footnote 378. *See, e.g., Easterling v. Peterson, 753 P.2d 902 (N.M. 1988)* ; H.D. Warren, Annotation, *Relief Against Forfeiture of Lease for Nonpayment of Rent, 31 A.L.R.2d 321 (1953)* ; Howard C. Joyce, Annotation, *Estoppel by Apparent Acquiescence In or Silence Concerning Improvements of Real Property to Assert Antagonistic Title or Interest*, 76 A.L.R. 304 (1932) .

(n47)Footnote 379. *See, e.g., Falk v. Allen, 739 F.2d 461 (9th Cir. 1984)* ; *Steinegger v. Fields, 425 A.2d 597 (Conn. Super. Ct. 1980)* ; *Entrepreneur, Ltd. v. Yasuna, 498 A.2d 1151 (D.C. Ct. App. 1985)* ; *Famous Permanent Wave Shops, Inc. v. Smith, 23 N.E.2d 767 (Ill. Ct. App. 1939)* ; 269 *Associates v. Yerkes, 113 Misc. 2d 450, 449 N.Y.S.2d 593 (1982)* .

(n48)Footnote 380. *See, e.g., D'Anna v. Rupp, 32 S.W.2d 136 (Mo. Ct. App. 1930)* ; *See* 1 American Law of Property § 3.95 (A. James Casner ed. 1952); J.E. O'Brien, Annotation, *Landlord's Acceptance of Rent as Waiver of Right to Forfeit Because of Tenant's Past or Future Violations of Terms of Lease*, 109 A.L.R. 1267 (1937) .

(n49)Footnote 381. *See, e.g., Thomas v. Given, 251 P.2d 887 (Ariz. 1952)* ; *Nicoli v. Frouge Corp., 368 A.2d 74 (Conn. 1976)* ; *Ladner v. Pigg,919 So. 2d 100 (Miss. Ct. App. 2005)* ; *Moore v. Richfield Oil Corp., 377 P.2d 32 (Or. 1962)* ; H.D. Warren, Annotation, *Relief Against Forfeiture of Lease for Nonpayment of Rent, 31 A.L.R.2d 321 (1953)* .

(n50)Footnote 382. *See, e.g., Humphrey v. Humphrey, 48 So. 2d 424 (Ala. 1950)* (dictum); *Farmer v. Pitts, 187 N.W. 95 (Neb. 1922)* .

(n51)Footnote 383. *See, e.g., Southwest Village Water Co. v. Fleming, 442 So. 2d 89 (Ala. 1983)* (breach of covenant to repair); *Cesar v. Virgin, 92 So. 406 (Ala. 1922)* (breach of prohibition against assignment without consent).

(n52)Footnote 384. *See, e.g., Bethlehem Steel Corp. v. Shonk Land Co., 288 S.E.2d 139 (W. Va. 1982)* (breach of covenant to pay royalties).

(n53)Footnote 385. *See, e.g., Thomas v. Given, 251 P.2d 887 (Ariz. 1952)* (mistake); *Paducah Home Oil Co. v. Paxton, 2 S.W.2d 650 (Ky. 1928)* (rent lost in the mail); *Antur Realty Corp. v. Rivera, 442 N.Y.S.2d 732 (Civ. Ct. 1981)* (landlord prevented rent payment in order to evict tenant and re let at higher rental).

(n54)Footnote 386. *See, e.g., Mobilia, Inc. v. Santos, 492 A.2d 544 (Conn. Ct. App. 1985)* (same); *Halliday v. Auburn Mobile Homes, 511 N.E.2d 1086 (Ind. Ct. App. 1987)* (deliberate breach); *Haddad v. Francis, 537 A.2d 174, 537 A.2d 175* (willful conduct or gross negligence).

(n55)Footnote 387. *See, e.g., Rokusek v. Jensen, 548 N.W.2d 570 (Iowa 1996)* . In the *Rokusek* case, the landlords gave a statutory notice of noncompliance to their residential tenant, advising the tenant that the lease would terminate in 30 days if the tenant did not remedy several lease-violating conditions within 14 days. The tenant brought an action to enjoin the threatened eviction. The lower court issued a broad permanent injunction that restrained the landlords from evicting the tenant and from raising the rent. But the Iowa Supreme Court subsequently dissolved the injunction. It said that adequate remedies, short of injunction, were available to the tenant to deal with the threat of eviction. In particular, the tenant could, pursuant to statute, assert defenses against eviction if the landlord brought a forcible entry and detainer proceeding, and the tenant could also bring a statutory action for declaratory relief. The Iowa Supreme Court said that the lower court's injunction "effectively created a new lease" that prevented the landlords from evicting the tenant "for any reason." This went beyond the equitable authority of the court. *But cf.* Dan B. Dobbs, Law of Remedies 2.5(3) (2d ed. 1993) (Stating that the rule regarding adequacy of legal remedies has declined in importance: it is "often ignored, sidestepped, or invoked in a way that means something else altogether").

See 42 U.S.C. § 1437d(l)(6).

(n56)Footnote 388. Statutes providing for lease termination are identified in Restatement (Second) of Property § 1.7, statutory note (1977).

(n57)Footnote 389. *See, e.g.,* N.J. Rev. Stat. § 46:8; *Nev. Rev. Stat. § 40.253*. *See* Restatement (Second) of Property § 1.7, statutory note 4 & § 12.1, statutory note 1. Summary possession statutes are discussed in § 40.09(c). Some statutes, however, are more limited. *See Cain Partnership, Ltd. v. Pioneer Inv. Servs. Co., 914 S.W.2d 452 (Tenn. 1996)* (commercial lease case in which tenant did not pay taxes as provided in the lease; the lease contained no termination provision, and the court said that the Tennessee detainer statute did not address the problem of a tenant who breaches the provisions of a lease whose term has not expired; however, the court adopted a Restatement rule that would permit lease termination if the tenant's breach deprives the landlord of a "significant inducement to the making of the lease").

(n58)Footnote 390. *See, e.g.*, N.M. Stat. Ann. § N. 1978, §§ 30-19-11--40A-19-11 (gambling); *Wis. Stats. 704.17 & 823.113(1)* (landlord who receives written notice from law enforcement agency regarding drug related nuisances of tenant may evict tenant within five days after receiving notice).

(n59)Footnote 391. *See, e.g., Wash. Rev. Code Ann. § 59.12.030(5)*.

(n60)Footnote 392. *See, e.g., Kan. Stat. Ann. § 58-2564*. Lease termination statutes are listed and briefly described in Restatement (Second) of Property § 1.7 statutory note (1977).

(n61)Footnote 393. *See 42 U.S.C. § 1437d(l)(6)*.

(n62)Footnote 394. *See Department of Housing and Urban Development v. Rucker, 535 U.S. 125 (2002)* (Federal housing statutes authorize expulsion of tenant if tenant's children or guests possess or traffic in illegal drugs, whether or not tenant had knowledge of the drug-related activity). Public housing is discussed in chapter 45.

(n63)Footnote 395. *See* Uniform Residential Landlord and Tenant Act § 4.201.

(n64)Footnote 396. *See, e.g., Pa. Stat. Ann. tit. 68 § 250.501*; Uniform Residential Landlord and Tenant Act § 4.201.

(n65)Footnote 397. *See, e.g.*, Md. Real Prop. Code Ann. § 8 401(e); *N.J. Stat. Ann. § 2A:18-55*.

(n66)Footnote 398. *See, e.g.*, Uniform Residential Landlord and Tenant Act § 4.201.

(n67)Footnote 399. *Id.*, § 4.207.

(n68)Footnote 400. *See, e.g., Fifth & Broadway Partnership v. Kimny, Inc., 162 Cal. Rptr. 271 (Cal. Ct. App. 1980)* ; *Hunter v. Porter, 77 P. 434 (Idaho 1904)* .

(n69)Footnote 401. *See In re M.J.K., Inc., 18 B.R. 76 (B.C.S.D. Fla. 1982)* ; *Ivy Hill Park Apartments v. G.N.B. Parking Corp., 566 A.2d 565 (N.J. Sup. 1989).*

(n70)Footnote 402. *See, e.g.*, 269 *Associates v. Yerkes, 113 Misc. 2d 450, 449 N.Y.S.2d 593 (Civ. Ct. 1982)* ; Uniform Residential Landlord and Tenant Act § 4.204.

(n71)Footnote 403. *See, e.g., Washington Square, Inc. v. First Lady Beauty Salons, Inc., 625 P.2d 1311 (Or. 1981)* ; *Rainey v. Quigley, 178 P.2d 148 (Or. 1947)* .

(n72)Footnote 404. *See, e.g., Foundation Dev. Corp. v. Loehmann's, Inc., 788 P.2d 1189 (Ariz. 1990)* (trivial); *Farmer v. Pitts, 187 N.W. 95 (Neb. 1922)* (technical breach: mail was delayed).

(n73)Footnote 405. *See, e.g., Thomas v. Given, 251 P.2d 887 (Ariz. 1952)* (mistake); *Caine v. Powell, 202 P.2d 931 (Or. 1948)* (fraud); *see generally* Robert S. Schoshinski, American Law of Landlord and Tenant § 6.4 (1980).

(n74)Footnote 406. *See Rokusek v. Jensen, 548 N.W.2d 570 (Iowa 1996)* (broad injunction against threatened eviction dissolved on the ground that adequate remedies were available at law). *But cf.* Dan B. Dobbs, Law of Remedies 2.5(3) (2d ed. 1993) (Stating that the rule regarding adequacy of legal remedies has declined in importance: it is "often ignored, sidestepped, or invoked in a way that means something else altogether").

(n75)Footnote 407. The doctrine is discussed in § 41.08.

(n76)Footnote 408. *See Robinson v. Diamond Hous. Corp. 463 F.2d 853 (D.C. Cir. 1972)* .

(n77)Footnote 409. *See* § 43.04(d)(2), *below.*

(n78)Footnote 410. *See 42 U.S.C. § 1437f(d)(1)(B)(ii)*.

(n79)Footnote 411. See establishment clause (Statute provides that tenants shall not be removed from leased residential premises except upon a showing of good cause); *N.J. Stat. Ann. 2A:18-61.3*(a) (Landlord may not evict residential tenant or fail to renew residential lease except for good cause). A statute also limits the ability of landlords to evict tenants in residential apartments that are being converted to condominium units. *See N.J. Stat. Ann. 2A:18-61.8*; *see also Vander Sterre Bros. Constr. v. Keating, 284 N.J. Super. 433, 665 A.2d 779 (N.J. Super. Ct. App. Div. 1995)* (Statutory restrictions apply to a residential unit that the owner originally constructed to be a condominium unit, thereafter rented to a tenant, and subsequently proposed to sell to a third party as a condominium unit). One of the provisions of the New Jersey Anti Eviction Act permits removal of a tenant when the tenant has been convicted of or pleaded guilty to a drug related offense. Focusing on this provision, a public housing tenant who had been convicted of a drug offense claimed that eviction would violate the *Double Jeopardy Clause of the Fifth Amendment*. He lost. *See Taylor v. Cisneros, 102 F.3d 1334 (3d Cir. 1996)* .

(n80)Footnote 412. *See, e.g.*, Kenneth Salzberg & Audrey Zibelman, *Good Cause Eviction, 21 Willamette L. Rev. 61 (1985).*

(n81)Footnote 413. *See* Deborah Hodges Bell, *Providing Security of Tenure for Residential Tenants: Good Faith as a Limitation on the Landlord's Right to Terminate, 19 Ga. L. Rev. 483 (1985).* Section 1.302 of the U.R.L.T.A. states: "Every duty under this Act and every act which must be performed as a condition precedent to the exercise of a right or remedy under this Act imposes an obligation of good faith in its performance or environment."

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CHAPTER 40 LANDLORD RIGHTS AND TENANT DUTIES

5-40 Thompson on Real Property, Thomas Editions § 40.09

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§ 40.09 Recovery of Possession from the Tenant.

§ 40.09(a) Introduction.

At common law, a landlord had the right to recover possession of the leased premises from an occupying tenant upon expiration of the lease term, or, if the lease was of indefinite duration, following proper notice and passage of time, as appropriate. The landlord also had the right to recover possession of the leased premises from an occupying tenant after a premature termination of the lease, including a premature termination resulting from the landlord's exercise of a valid power of termination. However, the existence of a right on the part of the landlord to take possession of the premises did not necessarily ensure tenant cooperation. In many instances, particularly in cases of tenant breach and exercise of a power of termination by the landlord, the landlord who desired to take possession of the premises was required to take some action to remove the tenant from the premises.

One option that was open to the landlord was to bring a judicial action to eject a tenant from the premises. However, ejectment was a relatively slow, complex, and expensive procedure. n414 Delay incident to the ejectment action meant that tenant could deny the landlord the right to income from the property by refusing to pay rent and by preventing sale or rental to someone else. n415 Accordingly, landlords often resorted to a second recourse that was available at common law to remove a tenant: self help. Early common law permitted a landlord having a right to possession to enter the premises and to use force, short of bodily harm or death, to expel the tenant. n416 This remedy was speedy and inexpensive, but it sometimes led to violence.

Over time, some limitations were imposed on landlord entry and self help. In 1381, the Statute of Forcible Entry made it a crime for a landlord to enter the premises by self help in other than a "peaceable and easy manner." n417 However, the enactment of the criminal statute did not necessarily mean that forcible entry was tortious, and English courts declined to use the criminal statute as a basis of liability for trespass to land. Indeed, it was thought that the landlord could not be liable to the tenant in trespass if the tenant no longer had a right to possess the land. Nonetheless, the English courts eventually ruled that the landlord's privilege of entry did not include the right to use force on the occupant: use of force could make the landlord liable to the occupant for assault or battery. n418

In 1920, the English law regarding landlord self help changed. *Newton v. Harland*, the leading case for the proposition

that the landlord could be liable for assault or battery for the use of force upon entry, was overruled. n419 The new rule permitted the landlord to expel a wrongfully possessing tenant from the property, without liability in tort, if the landlord used no more force than was reasonably necessary. This is the current English rule. n420

Given the rather confused development of English common law on self help repossession by landlords, it is not surprising that, as one commentator put it, "the state of the law in the United States is somewhat muddled." n421 The state of American law is also complicated by the widespread enactment of legislation providing for a summary possession remedy in favor of landlords and providing civil remedies to tenants who are wrongfully dispossessed as a result of the landlord's forcible entry.

§ 40.09(b) Landlord Self Help.

§ 40.09(b)(1) Availability of Self Help.

American jurisdictions are divided over whether the landlord may exercise self help to recover possession of the premises from a holdover tenant, or whether the landlord must resort to the courts. n422 An apparent majority of American jurisdictions permit self help, following the English rule that the landlord has a privilege to enter property held by a holdover tenant. n423 Under this view, a possessory remedy available to the landlord under a summary possession statute is considered to be a cumulative, not an exclusive, remedy. n424

However, an increasing number of American jurisdictions have taken the position that the landlord has no right of self help repossession against a holdover tenant. n425 Courts that prohibit landlord use of self help have focused on the importance of preserving the peace, and they have noted that modern summary possession statutes provide landlords with a means of obtaining relatively quick possession of the premises without resorting to self help. n426

The Restatement does not favor landlord self help. It provides that, if the controlling law offers a "speedy judicial remedy for recovery of possession," neither the landlord nor an incoming tenant may use self help to recover possession of the premises from a holdover tenant, unless the controlling law also preserves the right to self help. n427 Even if the controlling law does preserve the right of self help, the Restatement further prohibits the landlord from resorting to it unless a recovery by self help is accomplished: 1) within a reasonable time after lease termination; 2) without causing physical harm, or a reasonable expectation of physical harm, to the tenant or to others on the premises with the tenant's permission; and 3) by using reasonable care to avoid damage to the personal property of the tenant and others. n428

In many jurisdictions landlord self help is prohibited by legislation. Several statutes that provide a summary possession remedy for landlords also provide that a court action is the landlord's exclusive dispossession remedy for a holdover tenant, although the limitation may apply only to residential tenancies. n429 Both the Uniform Residential Landlord and Tenant Act and the Model Residential Landlord-Tenant Code require the landlord to resort to judicial action to recover the premises from a holdover residential tenant. n430 Given the large number of states that have adopted either the Uniform Act, the Model Code, or comparable legislation, as well as the jurisdictions that have otherwise prohibited self help by statute or by court decision, it is probable that, in the residential landlord-tenant context, a majority of the states do not permit landlord self help to recover possession from a holdover tenant. n431

§ 40.09(b)(2) The Requirement of Peaceable Entry.

The availability of a self help remedy in many jurisdictions does not necessarily mean that the landlord will actually be entitled to enter the premises and expel a holdover tenant. Even where self help is permitted, it is usually held that the landlord's entry must be "peaceable." n432 An entry that is other than peaceable may be found to violate an applicable forcible entry and detainer statute, entitling the tenant to regain possession of the premises. n433 It has been pointed out that this right may be of marginal utility to a tenant who, because of breach of the lease, may ultimately be subject to eviction anyway. n434 However, in a number of jurisdictions, landlord violation of the statute also entitles the tenant to

recover damages. n435

What constitutes a "peaceable" entry varies from jurisdiction to jurisdiction and from case to case. In some cases, entry achieved by unlocking a door, or by breaking down a door, have been regarded as peaceable. n436 In other cases, entry achieved by deception, by picking a lock, by threat of force, or by climbing through an open window have been said to violate the standard. n437 Landlord entry has also been found to be unlawful when objected to by the tenant. n438

Even when the entry itself has been peaceable, the landlord's subsequent exclusion of the tenant from possession may not be. In some cases, for example, the landlord has been found to have engaged in unlawful conduct by changing locks to exclude a tenant from possession, n439 or by threatening a tenant who attempts to re-enter the premises. n440 It is not always clear whether the courts consider such exclusionary actions by landlords to constitute forcible entry, forcible detainer, or assault. n441 However, it is clear that some rather nonviolent conduct by landlords has been found to be unlawful.

§ 40.09(b)(3) Landlord Civil Liability.

Even when the landlord has a right to engage in self help repossession efforts, use of force may expose the landlord to tort liability for injury to the person or property of the holdover tenant. In every American jurisdiction, the landlord will be liable for injuries to the tenant or the tenant's personal property caused by the use of more force that is reasonably necessary for the eviction. n442 However, there is a division of authority among American jurisdictions regarding the tort liability of the landlord for using reasonable force to expel a holdover tenant from the premises.

A minority of jurisdictions that permit landlord self help follow the prevailing English rule that the privilege of the landlord to repossess the premises extends to the use of reasonable force to evict the tenant and the tenant's property. n443 So long as the landlord uses no more force than is reasonably necessary to recover possession, the landlord is not liable for injury to the person or property of the tenant. Under this view, the forcible entry and detainer statute does not make the landlord civilly liable for forcibly ejecting a holdover tenant. n444 In contrast, a greater number of jurisdictions have adopted the rule, for a time in effect in England, that the landlord's privilege of entry does not extend to the use of force against the person or property of the occupant. In those jurisdictions, use of force against the person or property of the holdover tenant is tortious. n445

§ 40.09(b)(4) Effect of Lease Provisions.

The right of a landlord to engage in self help repossession may also be affected by the provisions of the lease. In jurisdictions where self help is otherwise unavailable, the view expressed in the majority of decided cases is that the tenant may consent to the landlord's use of self help. n446 The minority view is that lease clauses providing for landlord self help are void as contrary to the public policy supporting forcible entry and detainer statutes. n447 The Restatement position is that, when the controlling law does not preserve the right of self help, a lease provision purporting to give such a right to the landlord is void. n448 In some jurisdictions, such agreements may be prohibited by statute. n449

§ 40.09(c) Summary Possession by the Landlord.

§ 40.09(c)(1) Introduction.

Concerns about injuries to persons and property resulting from landlord self help prompted many American legislatures, in the second half of the 19th century, to enact statutes providing for special judicially supervised repossession remedies. n450 These special remedies, often called "summary possession" remedies or "summary procedures," were intended to be quicker and simpler than the traditional common law remedy of ejectment. Such remedies are now available, by statute, in every state, the District of Columbia, and several territories. n451

In some states, the summary possession remedy has been made a part of a "forcible entry and detainer" statute. Modern

forcible entry and detainer statutes are descendants of the English Statute of Forcible Entry, which, in 1381, made it a crime for a landlord to enter the premises by self help in other than a "peaceable and easy manner." n452 Later English legislation added a remedy for restitution of possession to tenants who had been illegally removed by landlords. n453 The remedy of restitution of possession was eventually made available to landlords whose tenants illegally held over after the end of the lease. n454 Among other things, modern forcible entry and detainer statutes typically prohibit landlord entry by force, provide a summary remedy for tenants who have been deprived of possession by forcible entry and detainer by landlords, and provide landlords with a summary remedy to take possession of the premises from tenants who are wrongfully in possession. n455

In other states, the summary possession remedy is separately provided for by statute. Separate summary possession statutes are devised exclusively to provide landlords with a judicially supervised possessory remedy that is simpler and more efficient than the common law ejectment action. n456

§ 40.09(c)(2) Nature of the Summary Possession Remedy.

The summary possession action is primarily a civil action for possession of the leased premises, although most jurisdictions also permit claims for rent to be joined with the landlord's possessory claim. n457 Some jurisdictions also provide for the recovery of monetary penalties if the tenant's holding over has been in bad faith. n458 The grounds upon which the action may be brought vary from jurisdiction to jurisdiction, but typically include nonpayment of rent and wrongful occupancy of the premises following lease termination. n459 Some summary possession statutes permit the landlord to bring an action for breach of any lease covenant. n460

The availability of a summary possession action generally does not depend upon the existence of a termination clause in the lease. Certainly a termination clause would not be required when the statutory grounds for the action include holding over by the tenant, and the tenant holds over following normal expiration of the lease. Neither is a lease termination clause required for most other tenant defaults that come within the prescribed statutory grounds for the summary possession action. Thus, in nearly all jurisdictions that permit summary possession actions based upon nonpayment of rent, the lease need not contain a power of termination in order for the landlord to exercise a summary possession remedy based upon nonpayment of rent. n461 A number of statutes permit the landlord to invoke the summary possession process for breach of any lease covenant or condition even though there is no termination clause set forth in the lease. n462 However, a few summary possession statutes require, as a predicate to the summary possession action, that the lease be terminated or forfeited by the landlord. n463 And some statutes permit the landlord to pursue a summary action based upon tenant defaults other than those expressly set forth in the statute if an applicable termination clause is set forth in the lease. n464

Before the landlord may bring a summary possession action, the landlord must generally provide a notice to the tenant that identifies the tenant's breach, and that requires the tenant either to cure the breach, if it is curable, or to vacate the premises within a specified period of time. n465 The notice period is typically quite short, usually between three and ten days for nonpayment of rent. If the tenant vacates the premises after receiving the landlord's notice, the lease will be considered to have terminated. If the tenant does not vacate, and the breach has not been cured by the end of the notice period, the tenant will usually be considered to be in unlawful detainer, and the landlord will be entitled to bring a formal summary possession action. The date for trial will usually be very soon after service of the summons, perhaps as few as two days thereafter. n466

If the landlord is successful in the summary action, a judgment for possession will be entered, and a writ of restitution will be issued for execution. A judgment for rent or monetary penalties may also be entered, depending upon the jurisdiction and the proof. The writ of restitution is usually to be executed immediately, but the applicable legislation may provide for a delay of execution to permit the tenant to vacate the premises voluntarily, or it may permit other stays of execution in the discretion of the court. Execution of the writ may also be suspended if the tenant posts an appeal bond. If the tenant's breach was nonpayment of rent, the tenant may also be permitted to cure the breach prior to

execution and to be reinstated in the tenancy. However, if the writ of execution is not otherwise stayed, and if the tenant does not timely vacate or cure, where permitted to do so, the writ of restitution will be executed by an officer of the court. n467

§ 40.09(c)(3) Issues Appropriate for Summary Proceedings.

The range of issues that may be considered in summary possession proceedings has traditionally been rather limited. Because summary proceedings were developed to provide the landlord with a quick possessory remedy, the traditional focus was on whether the tenant had committed the breach alleged by the landlord. Thus, in order to defend against the landlord's possessory claim for nonpayment of rent, the tenant could contend that the rent had actually been paid, n468 but the tenant was generally not permitted to assert affirmative defenses and counterclaims related to the nonpayment of rent. n469 Instead, the tenant was generally required to assert the affirmative claims in a separate action. n470 Restricting the issues that a tenant could raise in a summary eviction proceeding affirmed the traditional common law notion that lease covenants are independent, and that the failure by one party to perform a lease covenant does not excuse nonperformance by the other. n471

This has changed in recent years. In many jurisdictions today, residential tenants in summary possession proceedings are permitted to assert affirmative defenses and counterclaims relating to the landlord's claims for rent or possession. An example may be seen in the Illinois Supreme Court's decision in *Jack Spring, Inc. v. Little.* n472 There, some tenants were threatened with summary eviction for nonpayment of rent. The tenants conceded that rent had not been paid; however, they contended that rent had been properly withheld on the ground that their landlords had breached their obligations regarding the habitability of the leased premises. The tenants argued that the landlords should not be entitled to possession of the premises based upon nonpayment of rent when rent was being properly withheld on account of the landlords' breach. The court agreed, and ruled that the alleged breach of the habitability warranty was a proper affirmative defense to the landlords' summary possession action.

A number of other courts have concluded that breach of the implied warranty of habitability is a proper affirmative defense in a summary possession proceeding. n473 Courts have also permitted residential tenants to assert a retaliatory eviction defense. This is an affirmative defense that the summary proceeding was brought in retaliation against the tenant for reporting substandard housing conditions to governmental authorities. n474 Other affirmative claims have sometimes been permitted as well. n475 Legislation in some jurisdictions has also enabled tenants to assert affirmative claims. n476

§ 40.09(c)(4) Statutory Limitations on Landlord Possessory Remedies.

The landlord's right to evict tenants from possession is, in some instances, subject to special limitations imposed by statute. For example, before evicting tenants from federally assisted public housing, a public housing authority is required, by federal statute, to provide the tenants with an opportunity to examine documents directly related to the eviction, and to provide them with an opportunity to participate in a grievance proceeding that incorporates basic elements of due process. n477 The Soldiers' and Sailors' Civil Relief Act of 1940 provides, among other things, for a delay of eviction when the tenants are the spouse, children, or other dependents of a person in military service who occupy a dwelling for rent of $1,200 per month or less. n478

§ 40.09(c)(5) Landlord Liability for Injury to Tenant Personal Property.

If the landlord is successful in the summary possession action, the court will issue a writ of restitution, directing an officer to remove the tenant from the leased premises and deliver possession to the landlord. Removal of the tenant will usually also entail removal of the tenant's personal property. n479 Some summary possession statutes include provisions regarding the disposition of tenant personal property, n480 but others do not provide much guidance to the executing officer. n481

Sometimes, the taking of possession results in injury to the tenant's personal property. And tenants, sensitive about injury to their property, have sometimes attempted to recover damages against their former landlords. Courts typically are reluctant to impose liability on landlords in this situation, reasoning that the landlord is not responsible for the conduct of the officer n482 or that the landlord simply has no duty to safeguard the tenant's property. n483 But courts have also indicated that a landlord will be liable to the tenant if, under the facts, the landlord has assumed enough control over the tenant's personal property to be considered a bailee and the landlord has failed to satisfy the appropriate standard of care. n484

§ 40.09(c)(6) Constitutional Issues.

§ 40.09(c)(6)(i) Early Trial Requirements and Limitations on Triable Issues.

Several procedural aspects of the summary possession remedy have been challenged on constitutional grounds. The most important case to date, *Lindsay v. Normet*, n485 warrants some discussion. The residential tenants in the *Lindsay* case withheld rent from their landlord when the landlord refused to make repairs to bring the leased premises into compliance with housing code requirements. Faced with the threat of summary eviction based on nonpayment of rent, the tenants sued in federal court, contending that the Constitution was violated by provisions of the Oregon Forcible Entry and Detainer statute that: 1) required trial to be held no later than six days after service of the complaint unless security for accruing rent is provided, 2) limited the triable issues to the tenant's default and prohibited consideration of defenses based upon the landlord's breach of a duty to maintain the premises, and 3) required a tenant who appeals from an adverse judgment to post a bond in twice the amount of rent anticipated to accrue during the appeal. The tenants' contentions were based on the due process and *equal protection clauses of the Fourteenth Amendment*.

The United States Supreme Court rejected the tenants' due process claims. With respect to the short time between summons and trial, the Court observed that, in the recurring cases in which the tenant fails to pay rent or holds over after expiration of the tenancy, the issues for trial will simply be whether the tenant paid the rent or held over. Given the simplicity of issues, the court said that it could not declare that the Oregon procedures provided "an unduly short time for trial preparation," and it could not conclude that the early trial requirement was invalid on its face under the *due process clause of the Fourteenth Amendment*. n486 Regarding the statutory limitation on triable issues, the Court said that due process did not require a tenant to be able to assert all claims against the landlord in a summary possession action; it was sufficient that such claims could be raised in a separate action brought by the tenant. Neither did the Constitution require that a landlord's failure to maintain the premises be recognized as a defense in the summary possession action or as an excuse for the nonpayment of rent. The Constitution, said the Court, does not "forbid Oregon from treating the undertakings of the tenant and those of the landlord as independent rather than dependent covenants." n487

The court also rejected the tenants' equal protection arguments that the early trial requirement and the limitation on triable issues unconstitutionally discriminated against tenants. Utilizing a rational basis level of equal protection scrutiny, the Court determined that the state had a legitimate interest in quick resolution of landlord possession claims, and that the provisions for early trial and simplification of issues were closely related to the state's objective. However, the tenants fared better with their equal protection arguments regarding the requirement of a double bond for appeal. While indicating that adequate security for the landlord was appropriate during an appeal, the Court said that the required amount of the bond violated equal protection standards because it arbitrarily discriminated against tenants and did not bear a reasonable relationship to a valid state objective.

The *Lindsay v. Normet* decision supports the constitutionality of two important aspects of summary proceedings: limitation of issues and early trial procedures. When the issues for trial are simplified, a short period for trial preparation does not offend the Constitution. However, the *Lindsay v. Normet* case obviously does not prohibit states from permitting additional issues to be raised in summary proceedings. And, as discussed above, a number of jurisdictions

have permitted residential tenants to assert affirmative claims in summary proceedings, including affirmative claims based upon the landlord's breach of the implied warranty of habitability. If the triable issues are allowed to become more complex than those at issue in *Lindsay*, the Constitution may require longer periods for trial preparation.

§ 40.09(c)(6)(ii) Right to Jury Trial.

A number of courts have considered whether the parties to a summary possession action are constitutionally entitled to a jury trial. In *Pernell v. Southall Realty*, n488 the United States Supreme Court held that parties to a summary possession action in the District of Columbia were entitled to a jury trial as a matter of constitutional right. The Court reasoned that the right to a jury trial, under the *Seventh Amendment to the Constitution*, depended on whether the common law antecedent to a modern summary possession action was triable to a jury. Because the closest common law antecedent was an ejectment action, which was triable to a jury at common law, the Court ruled that the *Seventh Amendment* required that the right to jury trial be preserved in summary proceedings in federal courts. The Court rejected the argument that a jury trial right would impair the summary nature of the action.

Because the *Seventh Amendment* is not regarded as being binding upon the states, n489 the *Pernell* decision is not controlling in most summary eviction cases. However, many state constitutions have jury trial guarantees similar to that of the *Seventh Amendment*, and some state courts have concluded that a jury trial in a summary proceeding is constitutionally required. n490 It should also be noted that many summary possession statutes expressly provide for the availability of a jury trial at the request of either landlord or tenant. n491

Even when the constitution generally requires a jury trial, the outcome in a particular case may depend on the effect of a lease provision purporting to waive the right to such a trial. n492

§ 40.09(c)(6)(iii) Additional Issues.

Courts have considered the constitutionality of a number of additional summary possession procedures. For example, the California Supreme Court invalidated a procedure in which marshals, executing writs of possession, evicted all adult occupants of the leased premises, whether or not they had been named in the writ of possession. As applied to occupants not named in the writ, the court concluded that the practice could deprive occupants of property rights without notice and an opportunity to be heard, in violation of the [Go To Main]. n493 It has been held that a statutory provision requiring accruing rents to be paid into court during appeal unconstitutionally impaired an indigent's exercise of the right to an appeal. n494 Appeals bond requirements have been invalidated on equal protection grounds. n495 Additional procedures or practices that have been found to be constitutionally deficient include: a statutory procedure permitting the landlord to recover possession of the premises prior to judgment without an adequate hearing; n496 a pervasive practice of executing stale writs of possession; n497 and a moratorium on the issuance of possessory writs during the "holiday season." n498

FOOTNOTES:

(n1)Footnote 414. *See Lindsey v. Normet, 405 U.S. 56, 92 S. Ct. 862, 31 L. Ed. 2d 36 (1972)* .

(n2)Footnote 415. *See id.*

(n3)Footnote 416. *See* 1 Fowler Harper, et al., Law of Torts § 3.15, at 255 (2d ed. 1986).

(n4)Footnote 417. *5 Rich. 2*, c. 7 (1381).

(n5)Footnote 418. *See, e.g., Newton v. Harland, 133 Eng. Rep. 490 (C.P. 1840); See* P.A. Agabin, Annotation, *Right of Landlord Legally Entitled to Possession to Dispossess Tenant Without Legal Process, 6 A.L.R.3d 177 (1966)* .

(n6)Footnote 419. *See Hemmings v. Stoke Poges Golf Club, Ltd., 1 K.B. 720 (1920).*

(n7)Footnote 420. *See* Annotation, *Right of Landlord Legally Entitled to Possession to Dispossess Tenant Without Legal Process, 6 A.L.R.3d 177 (1966)* ; William B. Stoebuck & Dale A. Whitman, The Law of Property § 6.80 (3d ed. 2000).

(n8)Footnote 421. *See* Robert S. Schoshinski, American Law of Landlord and Tenant § 6:5, at 400 (1980).

(n9)Footnote 422. The question is not presented when the tenant abandons the premises. There, the landlord clearly has the right to enter the premises. *See* § 40.11, *below.*

(n10)Footnote 423. *See, e.g., Gower v. Waters, 132 A. 550 (Me. 1926)* ; *see* P.A. Agabin, Annotation, *Right of Landlord Legally Entitled to Possession to Dispossess Tenant Without Legal Process, 6 A.L.R.3d 177 (1966)* ; Restatement (Second) of Property § 14.2, Reporter's Note 2 (1977).

(n11)Footnote 424. *See, e.g., Shorter v. Shelton, 33 S.E.2d 643 (Va. 1945)* .

(n12)Footnote 425. *See Camacho v. 1440 Rhode Island Ave. Corp., 620 A.2d 242 (D.C. 1993)* ; Annotation, *Right of Landlord Legally Entitled to Possession to Dispossess Tenant Without Legal Process, 6 A.L.R.3d 177, 186 (1966)* ; William B. Stoebuck & Dale A. Whitman, The Law of Property § 6.80 (3d ed. 2000).

(n13)Footnote 426. *See, e.g., Jordan v. Talbot, 361 P.2d 20 (Cal. 1961)* ; *Adelhelm v. Dougherty, 176 So. 775 (Fla. 1937)* ; *See* Restatement (Second) of Property § 14.2, Reporter's Note 2 (1977).

(n14)Footnote 427. *See* Restatement (Second) of Property § 14.2 (1977).

(n15)Footnote 428. *See* Restatement (Second) of Property § 14.3 (1977).

(n16)Footnote 429. *See, e.g.,* [Go To Main]; *N.C. Gen. Stat. §§ 42* 25.6, 25.9 (residential tenancies); *R.I. Gen. Laws § 34* 18 17; *Cf. Cal. Civ. Code 789.3* (statute that prohibits residential landlords from, among other things, willfully cutting off utility service, changing locks, or removing windows with intent to terminate tenant's occupancy; also permits tenants to recover damages, attorneys' fees, and injunctive relief).

(n17)Footnote 430. *See* Uniform Residential Landlord and Tenant Act § 4.207; Model Residential Landlord-Tenant Code § 2 408.

(n18)Footnote 431. *See* William B. Stoebuck & Dale A. Whitman, The Law of Property § 6.80, at 398 (3d ed. 2000).

(n19)Footnote 432. *See, e.g., Malcolm v. Little, 295 A.2d 711 (Del. 1972)* ; *Kassan v. Stout, 507 P.2d 87 (Cal. 1973)* ; *See* W. Page Keeton, et al., Prosser and Keeton on the Law of Torts § 23, at 143 44 (5th ed. 1984) [hereinafter Prosser and Keeton on Torts]. P.A. Agabin, Annotation, *Right of Landlord Legally Entitled to Possession to Dispossess Tenant Without Legal Process, 6 A.L.R.3d 177, 189 (1966)* .

(n20)Footnote 433. *See, e.g., Jordan v. Talbot, 361 P.2d 20 (Cal. 1961)* (possession); *Malcolm v. Little, 295 A.2d 711 (Del. Sup. 1972)* (possession); Annotation, *Right of Landlord Legally Entitled to Possession to Dispossess Tenant Without Legal Process, 6 A.L.R.3d 177, 199 207 (1966).*

(n21)Footnote 434. *See* Robert S. Schoshinski, American Law of Landlord and Tenant § 6:8 (1980).

(n22)Footnote 435. *See, e.g., Cal. Civ. Proc. Code § 1174* (damages); *Del. Code Ann. tit 25 § 5517* (damages).

(n23)Footnote 436. *See Smith v. Detroit Loan & Bldg. Ass'n, 73 N.W. 395 (Mich. 1897)* (unlocking door); *Mussey v. Scott, 32 Vt. 82 (1859)* (breaking door).

(n24)Footnote 437. *See Karp v. Margolis, 323 P.2d 557 (Cal. Ct. App. 1958)* (picking lock); *Pelavin v. Misner, 217 N.W. 36 (Mich. 1928); Simhiser v. Farber, 71 N.W.2d 412 (Wis. 1955)* (threat); *Bank of Cal. v. Taaffe, 18 P. 781 (Cal. 1888)* (open window); Prosser and Keeton on Torts 144.

(n25)Footnote 438. *See, e.g., Spinks v. Taylor, 278 S.E.2d 501 (N.C. 1981)* , superseded by statute, according to *Stanley v. Moore 454 S.E.2d 225 (N.C. 1995)* .

(n26)Footnote 439. *See Pelavin v. Misner, 217 N.W. 36 (Mich. 1928); Ardell v. Milner, 166 So. 2d 714 (Fla. Ct. App. 1964)* .

(n27)Footnote 440. *See, e.g., Jordan v. Talbot, 361 P.2d 20 (Cal. 1961)* .

(n28)Footnote 441. *See* William B. Stoebuck & Dale A. Whitman, The Law of Property § 6.80 (3d ed. 2000).

(n29)Footnote 442. *See, e.g., Gower v. Waters, 132 A. 550 (Me. 1926)* ; *Maddix v. Gammon, 169 S.W.2d 594 (Ky. 1943)* ; *See* P.A. Agabin, Annotation, *Right of Landlord Legally Entitled to Possession to Dispossess Tenant Without Legal Process, 6 A.L.R.3d 177, 222 (1966)* ; Restatement (Second) of Property § 14.2, Reporter's Note 4 (1977).

(n30)Footnote 443. *See, e.g., Shorter v. Shelton, 33 S.E.2d 643 (Va. 1945)* ; Restatement (Second) of Property § 14.2, Reporter's Note 4 (1977); William B. Stoebuck & Dale A. Whitman, The Law of Property § 6.80 (3d ed. 2000).

(n31)Footnote 444. *See* P.A. Agabin, Annotation, *Right of Landlord Legally Entitled to Possession to Dispossess Tenant Without Legal Process, 6 A.L.R.3d 177, 182-186 (1966)* .

(n32)Footnote 445. *See, e.g., Daluiso v. Boone, 455 P.2d 811 (Cal. 1969)* ; *Maddix v. Gammon, 169 S.W.2d 594 (Ky. 1943)* ; *Nelson v. Swanson, 31 P.2d 521 (Wash. 1934)* ; *See* Restatement (Second) of Property § 14.2, Reporter's Note 4 (1977); William B. Stoebuck & Dale A. Whitman, The Law of Property § 6.80 (3d ed. 2000).

(n33)Footnote 446. *See, e.g., Goshen v. People, 44 P. 503 (Colo. 1896)* ; *Rucker v. Wynn, 441 S.E.2d 417 (Ga. Ct. App. 1994)* ; Restatement (Second) of Property § 14.2, Reporter's Note 5 (1977); P.A. Agabin, Annotation, *Right of Landlord Legally Entitled to Possession to Dispossess Tenant Without Legal Process, 6 A.L.R.3d 177, 194-198 (1966)* .

(n34)Footnote 447. *See, e.g., Jordan v. Talbot, 361 P.2d 20 (Cal. 1961)* ; Restatement (Second) of Property § 14.2 & Reporter's Note 5 (1977).

(n35)Footnote 448. *See* Restatement (Second) of Property § 14.2 (2) (1977).

(n36)Footnote 449. *See, e.g.*, Uniform Residential Landlord and Tenant Act §§ 1.403(a)(1), 4.207, and 4.302(b).

(n37)Footnote 450. *See* Gerald R. Gibbons, *Residential Landlord/Tenant Law: A Survey of Modern Problems With Reference to the Proposed Model Code, 21 Hastings L.J. 369 (1970);* Robert S. Schoshinski, American Law of Landlord and Tenant § 6:10 (1980).

(n38)Footnote 451. *See* Restatement (Second) of Property § 14.1, Statutory Note (1977).

(n39)Footnote 452. *5 Rich. 2,* c. 7 (1381).

(n40)Footnote 453. *8 Hen. 6,* c. 9 (1429).

(n41)Footnote 454. *See* Restatement (Second) of Property § 14.1, statutory note (1977).

(n42)Footnote 455. *See, e.g., Ariz. Rev. Stat. Ann. §§ 12-1171--1183*; *Iowa Code Ann. §§ 648.1 - 648.5*; Restatement (Second) of Property § 14.1, statutory note (1977) (listing of statutes).

(n43)Footnote 456. *See* Restatement (Second) of Property § 14.1, Statutory Note 2 (1977).

(n44)Footnote 457. *See, e.g., Cal. Civ. Proc. Code § 1174*; Free Exercise Clause; *See* Gerald R. Gibbons, *Residential Landlord/Tenant Law: A Survey of Modern Problems With Reference to the Proposed Model Code, 21 Hastings L.J. 369, 372 (1970).*

(n45)Footnote 458. *See, e.g., Ariz. Rev. Stat. Ann. § 33-1375* (landlord may recover the greater of 2 months rent or double actual damages); *Cal. Civ. Proc. Code § 1174* (trebling of damages for wilful holdover).

(n46)Footnote 459. *See, e.g., N.Y. Real Prop. Acts. Law § 711*; *Or. Rev. Stat. § 105.115*.

(n47)Footnote 460. *See, e.g., Cal. Civ. Proc. Code § 1161*.

(n48)Footnote 461. *See* Restatement (Second) of Property § 12.1, Statutory Note (1977).

(n49)Footnote 462. *See, e.g., Cal. Civ. Proc. Code § 1161*; *Pa. Stat Ann. tit. 68 § 250.501*.

(n50)Footnote 463. *See, e.g. Haw. Rev. Stat. §§ 521-68* & *521-69*; Restatement (Second) of Property § 12.1, Statutory Note (1977).

(n51)Footnote 464. *See, e.g., N.J. Stat. Ann. § 2A:18-61.1*.

(n52)Footnote 465. A demand that the tenant cure the breach may, of course, take the form of a demand to pay unpaid rent. The United States Second Circuit Court of Appeals recently ruled that the requirements of the federal Fair Debt Collection Practices Act, *15 U.S.C. §§ 1692-1692o*, are applicable to an attorney's rent demand notice issued to a tenant pursuant to New York summary eviction procedures. See *Romea v. Heiberger & Associates, 163 F.3d 111 (2d Cir. 1998)* .

(n53)Footnote 466. *See, e.g.*, William B. Stoebuck & Dale A. Whitman, The Law of Property § 6.79 (3d ed. 2000); Robert S. Schoshinski, American Law of Landlord and Tenant §§ 6.11-6.14 (1980); Gerald R. Gibbons, *Residential Landlord/Tenant Law: A Survey of Modern Problems With Reference to the Proposed Model Code, 21 Hastings L.J. 369, 371 (1970).*

(n54)Footnote 467. *See* Gerald R. Gibbons, *Residential Landlord/Tenant Law: A Survey of Modern Problems With Reference to the Proposed Model Code, 21 Hastings L.J. 369, 374, 380 (1970);* Robert S. Schoshinski, American Law of Landlord and Tenant §§ 6:18 6:20 (1980). *Cf. Cardenas v. Noren, 1 Cal. Rptr. 2d 367 (1991)* (tenant, who had not been served with process, and who had not been named in judgment for possession, was wrongfully evicted from the premises; however, tenant's remedy was not to seek possession by a writ of mandate against the sheriff; instead, under statute, tenant should have presented claim of possession to court or levying officer).

(n55)Footnote 468. *See, e.g., Hoover v. Israel, 68 N.E.2d 90 (Ohio Mun. Ct. 1946)* .

(n56)Footnote 469. *See, e.g., Lindsay v. Normet, 405 U.S. 56 (1972)* ; *Barela v. Superior Court, 636 P.2d 582 (Cal. 1981)* .

(n57)Footnote 470. *See, e.g., Lindsey v. Normet, 405 U.S. 56 (1972)* ; *Class v. Carter, 645 P.2d 536 (Or. 1982)* .

(n58)Footnote 471. *See Lindsey v. Normet, 405 U.S. 56, 92 S. Ct. 862, 31 L. Ed. 2d 36 (1972)* .

(n59)Footnote 472. *280 N.E.2d 208 (Ill. 1972)* .

(n60)Footnote 473. *See, e.g., Marini v. Ireland, 265 A.2d 526 (N.J. 1970)* ; *Foisy v. Wyman, 515 P.2d 160 (Wash. 1973)* . The implied warranty of habitability is discussed in § 41.06.

(n61)Footnote 474. *See, e.g., Dickhut v. Norton, 173 N.W.2d 297 (Wis. 1970)* ; Jonathon M. Purver, Annotation, *Retaliatory Eviction of Tenant for Reporting Landlord's Violation of the Law, 40 A.L.R.3d 753 (1971)* ; see also Retaliatory Eviction of Tenant for Reporting Landlord's Violation of Law *23 A.L.R.5th 140 (1994)* (updating the annotation). The retaliatory eviction doctrine is discussed in § 41.08.

(n62)Footnote 475. *See, e.g., Banke v. Community Realty Corp., 497 F. Supp. 409 (D. Md. 1980)* (landlord's action racially motivated); *Mascaro v. Hudson, 496 So. 2d 428 (La. Ct. App. 1986)* (landlord's conduct discriminatory, on the basis of national origin); *cf. Marick Real Estate, LLC v. Ramirez, 812 N.Y.S.2d 210 (N.Y. Sup. Ct. 2005)* (landlord brought proceedings to recover possession of rent stabilized apartment, claiming that tenant was using the premises for a child-care service, contrary to lease provisions; the court stated that it was the public policy of the state to promote the availability of home child care by restricting private covenants that inhibited the expansion of day care services, and it concluded that the landlord's petition failed to state a cause of action).

(n63)Footnote 476. *See, e.g., Herrell v. Seyfarth, Shaw, Fairweather & Geraldson, 491 So. 2d 1173 (Fla. Ct. App. 1986)* (statute permits all defenses at law).

(n64)Footnote 477. *See 42 U.S.C. §§ 1437d(k)* & *(l)(7)* Additional information about eviction from public housing is contained in chapter 45.

(n65)Footnote 478. *See 50 U.S.C.A. §§ 501-30*.

(N66)Footnote 479. *See e.g., Christensen v. Hoover, 643 P.2d 525 (Colo. 1982)* (Officer's duty is not only to remove the tenant, but also to remove the tenant's personal property and effects).

(n67)Footnote 480. *See e.g., Fla. Stat. 83.62* (at or after the time the writ of possession is executed, landlord or landlord's agent may remove tenant's personal property to near the property line of the leased premises); *Tex. Prop. Code 24.0061(d)* & *(e)* (writ shall instruct the tenant to remove, or allow the landlord or a person acting under the officer's direction, to remove all personal property and place it outside, but not while it is raining, sleeting, or snowing, and not so as to block a sidewalk, passageway, or street).

(n68)Footnote 481. *See e.g., Christensen v. Hoover, 643 P.2d 525 (Colo. 1982)* ; *Khan v. Heritage Property Management, 584 N.W.2d 725 (Iowa Ct. App. 1998)* .

(n69)Footnote 482. *See e.g., Iorio v. City of New York, 410 N.Y.S.2d 195 (1978)* (a party at whose initiative a warrant is duly issued is not responsible for the manner in which a sheriff or marshal executes it); *Ringler v. Sias, 428 N.E.2d 869 (Ohio App. 1980)* (two sons of landlord's employee assisted the sheriff in removing tenant's personal property from leased mobile home and in placing it outside, where the property was damaged; court said the sheriff was responsible for the restoration of the premises to the landlord, and that the assistance of the boys did not create a duty on the part of the landlord concerning the personal property).

(n70)Footnote 483. *See e.g., McCready v. Booth, 398 So. 2d 1000 (Fla. Ct. App. 1981)* (tenant's property removed from premises pursuant to writ of possession while he was away on business trip; the property was placed on the edge of the street, where it was stolen; court said that it knew of no authority permitting a lawfully evicted tenant to sue the landlord for damaged personal property, in the absence of a showing that the damage was intentionally or maliciously done); *Khan v. Heritage Property Management, 584 N.W.2d 725 (Iowa App. 1998)* (officer placed tenant's personal property outside the apartment building, where most of it was vandalized or stolen; court declined to impose a duty of care on the landlord to protect or care for an evicted tenant's personal property where the legislature had not acted to do so; court also said that, in the absence of evidence that the landlord assumed possession or control over the tenant's personal property, the law imposed no duty on the landlord to care for it or to store it); *Campos v. Investment Mgmt. Props., 917 S.W.2d 351 (Tex. Ct. App. 1996)* (under sheriff's supervision, landlord removed tenant personal property from the premises and placed it on the front lawn covered by a tarpaulin; court said tenant failed to establish any duty owed by the landlord to the tenant).

(n71)Footnote 484. *See e.g., In re Clarkson, 105 B.R. 266 (E.D. Pa. 1989)* (landlord took possession of tenant's personal property following eviction, becoming a bailee, obligated to exercise reasonable care; court concluded that landlord's sale of tenant's personal property amounted to conversion); *Christensen v. Hoover, 643 P.2d 525 (Colo. 1982)* (upon eviction, landlords placed tenant's personal property in storage and the property was damaged; although the landlords were gratuitous bailees and there was no evidence of negligence presented with respect to them, the landlords were liable to the tenant for damage to the property because the landlords had hired a moving company to transport the property; the moving company was a bailee for hire, and was burdened by a presumption of negligence that it failed to rebut, and the trial court found that an agency relationship existed between the landlords and the movers); *Banks v. Korman Associates, 527 A.2d 933 (N.J. Super. 1987)* (landlord who agreed to allow evicted tenant to temporarily leave furniture on the formerly leased premises after eviction became a gratuitous bailee; furniture was subsequently stolen; court said that gross negligence is the liability standard for a gratuitous bailee, and that the evidence fell short of establishing gross negligence on the part of the landlord).

(n72)Footnote 485. *405 U.S. 56 (1972)* .

(n73)Footnote 486. *Id. at 65* .

(n74)Footnote 487. *Id. at 68* .

(n75)Footnote 488. *416 U.S. 363 (1974)* .

(n76)Footnote 489. *See, e.g., Minneapolis & St. Louis Ry. v. Bombolis, 241 U.S. 211 (1916)* ; *Linton v. Great Lakes Dredge & Dock Co., 964 F.2d 1480 (5th Cir. 1992)* ; Daniel A. Farber et al., Constitutional Law 399 (1993).

(n77)Footnote 490. *See, e.g., Hill v. Levenson, 383 S.E.2d 110 (Ga. 1989)* ; *North School Congregate Hous. v. Merrithew, 558 A.2d 1189 (Me. 1989)* ; *but see Fowler Court Tenants, Inc. v. Young, 463 N.Y.S.2d 686 (Civ. Ct. 1983)* .

(n78)Footnote 491. *See, e.g., Cal. Civ. Proc. Code § 1171*; *Ky. Rev. Stat. Ann. § 383.210*; *See generally* .Robert S. Schoshinski, American Law of Landlord and Tenant § 6:16 (1980).

(n79)Footnote 492. *See e.g., Malan Realty Investors, Inc. v. Harris, 953 S.W.2d 624 (Mo. 1997)* . In the *Malan* case, a commercial landlord brought an action for possession and breach of contract. The lease agreement contained a jury trial waiver provision. The court held that jury trial may be waived by contract, but it said that the waiver must be "knowingly and voluntarily or intelligently waived." *953 S.W.2d at 627* . The court indicated that the waiver would not be enforced if it resulted from "overreaching as a result of unequal bargaining positions." *Id.* In this case, the waiver was prominently displayed on the last page of the lease, it featured clear and unambiguous language, and there was no evidence that the tenant was under a bargaining disadvantage, so the court enforced the waiver provision. *See generally* Jay M. Zitter, Annotation, *Contractual Jury Trial Waivers in State Civil Cases, 42 A.L.R.5th 53 (1996)* ; W.E. Shipley, Annotation, *Validity and Effect of Contractual Waiver of Trial by Jury, 73 A.L.R.2d 1332 (1960)* .

(n80)Footnote 493. *See Arrieta v. Mahon, 644 P.2d 1249 (Cal. 1982)* .

(n81)Footnote 494. *See Fickey v. Cross Creek Apartments, Ltd., 700 S.W.2d 807 (Ky. Ct. App. 1985)* .

(n82)Footnote 495. *See, e.g., Blair v. Stump, 617 P.2d 791 (Ariz. Ct. App. 1980)* (double bond); *Usher v. Waters Ins. & Realty Co., 438 F. Supp. 1215 (W.D.N.C. 1977)* (three months rent); *but see Oaks v. District Court, 631 F. Supp. 538 (D.R.I. 1986)* ($2,000 bond did not violate *Fifth* or *Fourteenth Amendments*).

(n83)Footnote 496. *See Mihans v. Municipal Court, 87 Cal. Rptr. 17 (Ct. App. 1970)* .

(n84)Footnote 497. *See Wolf Lillie v. Sonquist, 699 F.2d 864 (7th Cir. 1983)* .

(n85)Footnote 498. *See Morrison v. Lipscomb, 877 F.2d 463 (6th Cir. 1989)* .

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CHAPTER 40 LANDLORD RIGHTS AND TENANT DUTIES

5-40 Thompson on Real Property, Thomas Editions § 40.10

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§ 40.10 The Holdover Tenant.

[Go To Supp]

A person who wrongfully remains on the premises after the end of a lease is often described as "holding over." Such a person is considered a tenant at sufferance. n499 That status would change, of course, if the landlord and the holdover tenant entered into a new lease with respect to the premises. Absent such a mutual agreement, however, the landlord is generally held to have the power to elect either to treat the holdover tenant as a trespasser and seek eviction, or to bind the holdover tenant to a new tenancy on the premises. n500

§ 40.10(a) The Landlord's Election.

If the landlord chooses to treat the holdover tenant as a trespasser, the landlord may resort to the remedies that are available in the jurisdiction to recover possession of the premises. The landlord may also seek a monetary recovery based on the holdover tenant's wrongful occupancy of the premises. However, because the lease has expired, the landlord will not be able to recover rent during the period of the wrongful occupancy, n501 even though, in order to prevent the holdover tenant from benefitting from the wrongful occupancy, the holdover tenant generally will be otherwise bound by the conditions of the lease. n502 Instead, the landlord will be entitled to recover damages for the value of the holdover tenant's use and occupation of the premises, based on the fair rental value of the premises during the period of wrongful occupancy. n503 In some circumstances, the landlord may be entitled to recover special or punitive damages as well. n504

The landlord's power to elect to bind the holdover tenant to a new lease has sometimes been said to arise out of the intention of the parties, with the holding over by the tenant regarded as an offer to enter into a new lease that the landlord may accept. n505 However, the position adopted by the vast majority of courts is that, once exercised, the landlord's election to bind the holdover tenant to a new lease is operative without regard to the intention of the tenant. n506 While the application of the rule may have harsh consequences in some circumstances, the rule has been justified, in part, on account of its supposed deterrent effect: it promotes the interests of incoming tenants by deterring prior tenants from holding over. n507 The rule has also been justified on the basis that it allows landlords to be compensated, by means of a new lease with the holdover tenant, when new tenants are lost because they cannot occupy the premises. n508

The landlord's election may be exercised by express notice, but it is more often implied from conduct. Thus, a decision to treat the holdover tenant as a trespasser may be implied from conduct that is inconsistent with the creation of a new lease between the landlord and the holdover tenant. Examples include the filing of a lawsuit to evict the holdover tenant from the premises, or the creation of a new lease with a new tenant. n509 In contrast, an election to bind the holdover tenant to a new lease may be implied from conduct that is inconsistent with the termination of the landlord-tenant relationship. Examples include a demand by the landlord that the holdover tenant pay rent, or landlord acceptance of a rent payment from the holdover tenant. n510 However, the result may be otherwise when the facts indicate that the landlord does not intend to enter into a lease, such as when the landlord does not know that the lease term has expired when the landlord accepts payment, or when the landlord accepts a payment during negotiations over a possible new lease. n511

It is sometimes said that an election by the landlord is irrevocable. This means that the landlord cannot unilaterally change the election, once it has been made. n512 Neither can the landlord indefinitely avoid making an election: it is generally held that the landlord must make an election within a "reasonable" period of time. n513 This is, of course, a rather uncertain standard, and some courts have permitted the landlord to make an election after a considerable period of inaction. n514 Some statutes set forth the period of time in which the landlord must make an election, failing which the holdover tenant will be regarded as occupying with the landlord's consent. n515 In the absence of a statutory resolution, some cases indicate that landlord inaction results in an election to bind the tenant to a new lease, n516 but that has not always been the result. n517 The Restatement position is that the landlord's failure to make a decision within a reasonable time is a factor in determining whether the landlord has waived the right to bind the holdover tenant to another term. n518

§ 40.10(b) Nature of the New Lease.

A tenancy that results from the landlord's election is not a mere extension of the old expired lease; it is a new tenancy. n519 But there is a divergence of views about the nature of the resulting lease. In most jurisdictions, an election to bind the holdover tenant to a new tenancy results in the creation of a periodic tenancy. n520 In some jurisdictions, however, the election results in a term for years. n521 As a result of statutory interpretation, the landlord's election has occasionally been found to create a tenancy at will, with the tenant's rental liability equal to the reasonable value of the use and occupancy of the leased premises. n522

There is also a divergence of views regarding the length of the lease term that results from an election to bind the holdover tenant to a new lease. Many courts base the length of the new lease on the length of the old, up to a maximum of one year. Using this approach, if the old lease had a one year term, the new lease would be either a year to year periodic tenancy, or a one year term for years tenancy, depending on the jurisdiction's preference for a periodic tenancy or a fixed term. n523 A number of other courts base the term of the new lease on the period between rental payments of the prior lease, up to a maximum of a year. Under this alternative, if rent on the old lease was payable monthly, then the new lease would be a month to month periodic tenancy or a fixed term for one month, depending on whether the jurisdiction favors a periodic tenancy or a term for years. n524 The Restatement adopts this approach, and opts for periodic tenancy. n525 In some jurisdictions, the length of the new tenancy is determined by statute. n526 The foregoing discussion does not apply, of course, when the new tenancy that results from the landlord's election is a tenancy at will.

§ 40.10(c) Terms of the New Lease.

The new lease that results from the landlord's election will generally be on the same terms and conditions as the old. n527 However, as noted above, the length of the lease term may differ from that of the original lease. And there is a division of authority over whether an option to purchase the leased premises carries over to the new lease. n528

The landlord may cause the terms of the new lease to differ from the terms of the old by providing notice to the tenant that holding over after lease expiration will be on new terms, and by specifying what the new terms will be. If the tenant thereafter holds over, without objection, the tenant will normally be bound by the new terms. n529 The cases are in conflict about whether the tenant may avoid being bound by the new terms articulated by the landlord if the tenant objects to the new terms but remains on the premises following lease expiration. n530 Even if the tenant objects to a change, however, if the tenant actually submits to the change, such as by paying an increased rent, the tenant will usually be bound by it. n531

§ 40.10(d) Limitations on the Landlord's Election.

The landlord's power to bind a holdover tenant to a new lease is subject to several potential limitations. Some limitations may be statutory: as previously noted, statutes in a number of jurisdictions limit the length of the lease term that results from a landlord's election. Other limitations may arise from the terms of the parties' original lease. It has been held, for example, that the landlord could not elect a new tenancy upon tenant holdover where the original lease provided that the tenant had to pay double rent during a holdover period. n532 If the original lease contains an automatic renewal provision, a holding over by the tenant could be regarded as an exercise of the renewal option, precluding the landlord from exercising a holdover election. n533

Even in the absence of limitations imposed by statute or deriving from lease provisions, courts have sometimes acted to temper the potential harshness of a landlord's election to bind the holdover tenant to a new tenancy. Thus, courts have held that the mere leaving of a few tenant articles on the leased premises after lease expiration was insufficient to constitute holding over. n534 It has been held that the landlord may not unilaterally elect to bind a holdover tenant to a new tenancy when the parties are negotiating about the terms of a new lease. n535 Some courts have declined to enforce a landlord's election when the holdover period is of very short duration and the landlord has suffered no damages. n536 Other courts have permitted exceptions to the holdover doctrine when, due to illness or other circumstance, the tenant is not at fault for remaining on the premises after lease expiration. n537 In this connection, the Restatement contemplates that equitable considerations could justify giving the tenant an extension of time to vacate the premises when the tenant does not intend to hold over but does so due to "circumstances beyond his control." n538

FOOTNOTES:
(n1)Footnote 499. Tenancy at sufferance is discussed in chapter 39. See § 39.05(c).

(n2)Footnote 500. *See, e.g., Arnold Realty Co. v. William K. Toole Co., 115 A. 565 (R.I. 1921)* ; *Warehouse Distributors, Inc. v. Prudential Storage & Van Corp., 161 S.E.2d 86 (Va. 1968)* ; R.D. Hursh, Annotation, *Landlord's Consent to Extension or Renewal of Lease as Shown by Acceptance of Rent from Tenant Holding Over, 45 A.L.R.2d 827 (1956)* .

(n3)Footnote 501. *See, e.g., Burke v. Willard, 137 N.E. 744 (Mass. 1923)* ; *Arnold Realty Co. v. William K. Toole Co., 125 A. 363 (R.I. 1924)* .

(n4)Footnote 502. *See, e.g., Rosamond v. Mann, 80 So. 2d 317 (Fla. 1955)* ; *Lewiston Pre Mix Concrete, Inc. v. Rohde, 718 P.2d 551 (Idaho Ct. App. 1985)* ; *See* Restatement (Second) of Property § 14.7 reporter's note 2 (1977); R.D. Hursh, Annotation, *Binding Effect On Tenant Holding Over of Covenants In Expired Lease, 49 A.L.R.2d 480 (1956)* .

(n5)Footnote 503. *See, e.g., Arnold Realty Co. v. William K. Toole Co., 125 A. 363 (R.I. 1924)* ; Restatement (Second) of Property § 14.5 (1977).

(n6)Footnote 504. *See, e.g., Murphree v. Aberdeen Monroe County Hosp., 671 So. 2d 1300 (Miss. 1996)* (applies Mississippi statute providing that holdover tenant who fails to deliver the premises following notice shall be obligated to pay double rent); *Taylor v. Kaufhold, 84 A.2d 347 (Pa. 1951)* (special damages recoverable if, at the time the lease

was made, they reasonably could have been anticipated to follow from holding over at lease expiration); Restatement (Second) of Property § 14.6 and reporter's note 4 (1977) (special damages recoverable if foreseeable at the time the holdover occurs); 28 C.F.R. Pt. 36 3 8 (punitive damages if holdover is willful); Uniform Residential Landlord and Tenant Act § 4.301(c) (damages equal to the greater of three months' periodic rent or three times the actual damages sustained for willful holdover).

(n7)Footnote 505. *See, e.g., Stern v. Equitable Trust Co., 144 N.E. 578 (N.Y. 1924)* .

(n8)Footnote 506. *See, e.g., Maniatty v. Carroll Co., 41 A.2d 144 (Vt. 1945)* ; *Donnelly Advertising Corp. v. Flaccomio, 140 A.2d 165 (Md. 1958)* .

(n9)Footnote 507. *See, e.g., A.H. Fetting Mfg. Jewelry Co. v. Waltz, 152 A. 434 (Md. 1930)* .

(n10)Footnote 508. *See* Restatement (Second) of Property part 4, ch. 14, tit. B, at 24 (1977).

(n11)Footnote 509. *See, e.g., Kilbourne v. Forester, 464 S.W.2d 770 (Mo. Ct. App. 1970)* (eviction action); *Brown v. Music, Inc., 359 P.2d 295 (Alaska 1961)* (leasing to another).

(n12)Footnote 510. *See, e.g., Ochsner v. Langendorf, 115 Colo. 453, 175 P.2d 392 (Colo. 1946)* .

(n13)Footnote 511. *See, e.g., Rainwater v. Preas, 221 S.W.2d 829 (Tenn. Ct. App. 1949)* (unaware of expiration); *Rottman v. Bluebird Bakery, Inc., 88 N.W.2d 374 (Wis. 1958)* (acceptance of payment; some discussion of a new lease and consideration of sale of the premises; insufficient evidence on which to conclude landlord had elected to hold the tenant over on a year-to-year lease); *Cf. Clairton Corp. v. Geo Con, Inc., 635 A.2d 1058 (Pa. Super. Ct. 1993)* (tenant remained in possession for seven months and continued to pay monthly rent following the end of two year commercial lease; under Pennsylvania law, this would normally have resulted in a year to year tenancy; however, because the parties were engaged in negotiations for a new lease during this period, the court concludes that a month to month tenancy resulted).

(n14)Footnote 512. *See, e.g., Brown v. Music, Inc., 359 P.2d 295 (Alaska 1961)* ; *Crechale & Polles, Inc. v. Smith, 295 So. 2d 275 (Miss. 1974)* , *overruled, State v. Howie, 449 So. 2d 772 (Miss. 1984)* .

(n15)Footnote 513. *See, e.g., Millhouse v. Drainage Dist., 304 S.W.2d 54 (Mo. Ct. App. 1957)* .

(n16)Footnote 514. *See, e.g., Cairo & St. L. R.R. v. Wiggins Ferry Co., 82 Ill. 230 (1876)* (ten months).

(n17)Footnote 515. *See, e.g., Ky. Rev. Stat. § 383.160*.

(n18)Footnote 516. *See, e.g., Hobbs & Son v. Grand Trunk Ry., 108 A. 199 (Vt. 1919)* .

(n19)Footnote 517. *See Cairo & St. L. R.R. v. Wiggins Ferry Co., 82 Ill. 230 (1876)* .

(n20)Footnote 518. *See* Restatement (Second) of Property § 14.4 cmts. d and c (1977).

(n21)Footnote 519. *See Wanous v. Balaco, 107 N.E.2d 791 (Ill. 1952)* ; 1 American Law of Property § 3.35 (A. James Casner ed. 1952).

(n22)Footnote 520. *See, e.g., Maniatty v. Carroll Co., 41 A.2d 144 (Vt. 1945)* ; Annotation, *Right of Tenant Holding Over After Termination of Definite Term to Notice to Quit*, 19 A.L.R. 1405 (1922) .

(n23)Footnote 521. *See, e.g., Security Life & Accident Ins. Co., v. United States, 357 F.2d 145 (5th Cir. 1966)* ; *Spiritwood Grain Co. v. Northern Pac. Ry., 179 F.2d 338 (8th Cir. 1950)* ; Annotation, *Right of Tenant Holding Over After Termination of Definite Term to Notice to Quit*, 19 A.L.R. 1405 (1922) .

(n24)Footnote 522. *See, e.g., Townsend v. Singleton, 183 S.E.2d 893 (S.C. 1971)* .

(n25)Footnote 523. *See, e.g., Sinclair Refining Co. v. Shakespeare, 175 P.2d 389 (Colo. 1946)* ; Annotation, *Rent Period as Criterion of Term Implied by Holding Over After Expiration of Lease for a Fixed Term*, 108 A.L.R. 1464 (1937) ; *Cf. Clairton Corp. v. Geo Con, Inc., 635 A.2d 1058 (Pa. Super. Ct. 1993)* (tenant remained in possession for seven months and continued to pay monthly rent following the end of two year commercial lease; under Pennsylvania law, this would normally have resulted in a year to year tenancy; however, because the parties were engaged in negotiations for a new lease during this period, the court concludes that a month to month tenancy resulted).

(n26)Footnote 524. *See, e.g., A.H. Fetting Mfg. Jewelry Co. v. Waltz, 152 A. 434 (Md. 1930)* ; Annotation, *Rent Period as Criterion of Term Implied by Holding Over After Expiration of Lease for a Fixed Term*, 108 A.L.R. 1464 (1937) .

(n27)Footnote 525. *See* Restatement (Second) of Property § 14.4, cmt. f (1977).

(n28)Footnote 526. *See, e.g.*, N.Y. Real Prop. Laws § 232 c (month-to-month tenancy); Uniform Residential Landlord and Tenant Act §§ 4.301(c) and 1.401(d) (no more than month-to-month tenancy).

(n29)Footnote 527. *See, e.g., Krull v. Rose, 130 N.W. 272 (Neb. 1911)* ; *Warehouse Distributors, Inc. v. Prudential Storage & Van Corp., 161 S.E.2d 86 (Va. 1968)* ; *Barragan v. Munoz, 525 S.W.2d 559, 562 (Tex. Ct. App. 1975)* .

(n30)Footnote 528. *See, e.g., Straley v. Osborne, 278 A.2d 64 (Md. 1971)* (option exercisable); *Wanous v. Balaco, 107 N.E.2d 791 (Ill. 1952)* (option not exercisable); D.E. Ytreberg, Annotation, *Holding Over Under Lease, or Renewal or Extension Thereof, as Extending Time for Exercise of Option to Purchase Contained Therein, 15 A.L.R.3d 470 (1967)* .

(n31)Footnote 529. *See, e.g., David Properties, Inc. v. Selk, 151 So. 2d 334 (Fla. Ct. App. 1963)* ; *Heckman v. Walker, 167 Neb. 216 (1958)* .

(n32)Footnote 530. *See, e.g., Wilson v. Rodman, 243 Ill. App. 570 (1927)* (tenant bound, despite objections); *Abrams v. Sherwin, 112 A. 235 (Pa. 1920)* (tenant not bound to pay increased rent); W.W. Allen, Annotation, *Notice by Landlord of Change in Rent or Other Modification of Tenancy as Affecting Rights and Liabilities Incident to Tenant's Holding Over After Expiration of Term or Rent Period or Time Fixed by Notice, 109* A.L.R. 197 (1937) .

(n33)Footnote 531. *See, e.g., Abraham v. Gheens, 265 S.W. 778 (Ky. 1924)* .

(n34)Footnote 532. *See Commonwealth Bldg. Corp. v. Hirschfield, 30 N.E.2d 790 (Ill. Ct. App. 1940)* .

(n35)Footnote 533. *See, e.g., Weber v. C & C Dry Goods, Co., 69 S.W.2d 731 (Ky. 1934)* .

(n36)Footnote 534. *See Byrns v. Pierce, 136 N.Y.S. 293 (1912)* .

(n37)Footnote 535. *See, e.g., Donnelly Advertising Corp. v. Flaccomio, 140 A.2d 165 (Md. 1958)* .

(n38)Footnote 536. *See, e.g., Byrns v. Pierce, 136 N.Y.S. 293 (1912)* .

(n39)Footnote 537. *See, e.g., Herter v. Mullen, 53 N.E. 700 (N.Y. 1899)* (illness); *Feiges v. Racine Dry Goods Co., 285 N.W. 799 (Wis. 1939)* (employee strike).

(n40)Footnote 538. Restatement (Second) of Property § 14.4, cmt. i (1977).

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CHAPTER 40 LANDLORD RIGHTS AND TENANT DUTIES

5-40 Thompson on Real Property, Thomas Editions § 40.11

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§ 40.11 Landlord Rights When the Tenant Abandons the Premises.

Wrongful abandonment of the leased premises by the tenant during the term of the lease has traditionally been regarded as presenting the landlord with three choices. First, the landlord could treat the abandonment as an offer by the tenant to surrender the leasehold estate, accept the offer, and terminate the lease. Second, the landlord could permit the premises to remain vacant, and sue for rent as it comes due under the lease. Third, the landlord could attempt to relet the premises to mitigate the tenant's damages, and preserve the liability of the abandoning tenant for rent and damages. In some jurisdictions, these traditional alternatives remain available to landlords when tenants wrongfully abandon the premises. However, in many jurisdictions today, the second alternative may be unavailable to the landlord, at least in residential tenancies; in those jurisdictions the landlord must either accept the surrender, or attempt to relet the premises in an effort to mitigate damages. Each of the traditional landlord options, and modern developments that have affected their availability, will be considered below.

§ 40.11(a) Acceptance of Offer of Surrender.

One of the options traditionally available to a landlord when a tenant wrongfully abandons the leased premises is to regard the abandonment as an offer to surrender the leasehold estate, to accept the offer of surrender, and to thereby terminate the lease. n539 The surrender will extinguish the tenant's liability for future rent, but it will not extinguish the tenant's liability for previously accrued rent or for damages based on previous breach of lease covenants. n540 In some jurisdictions, the landlord may also be able to recover damages for future rent loss. n541 Following surrender, the landlord will be entitled to occupy the premises, or to rent the premises to a new tenant.

§ 40.11(a)(1) Surrender by Express Agreement.

Surrender may be accomplished by an express agreement, or it may arise by operation of law. If the surrender is accomplished by agreement, it may be subject to the requirements of the applicable statute of frauds. The American statutes are not uniform on the subject of surrender agreements. Some, based on the English Statute of Frauds, n542 require all surrenders to be in writing, except those arising by operation of law. Even where such statutes are in effect, however, some courts enforce oral surrender agreements when the remaining term of the lease is short enough to be outside the statute of frauds. Other statutes expressly except surrenders of leases with short remaining terms, or do not mention surrender agreements at all. The cases from jurisdictions whose statutes do not mention surrender agreements

are in conflict as to whether a surrender agreement must be in writing when the original lease was required to be in writing under the statute of frauds. n543

§ 40.11(a)(2) Surrender by Operation of Law.

Whether or not the parties enter into a valid written surrender agreement, a surrender may still arise by operation of law. As indicated above, surrenders by operation of law were excluded from the requirements of the original English Statute of Frauds; n544 such surrenders are generally considered to be outside of and unaffected by modern statutes of frauds as well. n545 Most authorities state that a surrender by operation of law arises by mutual agreement, but that the agreement may be implied or inferred from the conduct of the parties. n546 However, some authorities endorse a theory of estoppel, n547 or state that, regardless of the desire of the parties, a surrender by operation of law results when the landlord and the tenant engage in conduct that is inconsistent with the further existence of the lease. n548

It seems clear enough that a surrender by operation of law should result when the parties execute a new lease for the same premises before expiration of the prior lease. n549 A surrender should also result when, following tenant abandonment of the leased premises, the landlord repossesses the premises for the landlord's own use and enjoyment. n550 However, mere unilateral conduct, such as abandonment alone, will not amount to a surrender. n551

Courts have encountered some difficulties regarding the application of this doctrine. A threshold difficulty that can arise is in determining whether a tenant has, in fact, abandoned the leased premises. For example, in a Louisiana case, the tenant stopped using rented office space on a regular basis, stopped paying rent, asked the landlord for a rent reduction, and told the landlord that it was negotiating with another party to assume the lease. The landlord actually showed the premises to that party for possible rental. In the meantime, the tenant continued to store medical equipment and supplies on the premises. When the landlord leased the premises to a new tenant, the original tenant sued for breach of the lease, claiming that there had been no abandonment. The lower court concluded that there had been no abandonment, and this was affirmed on appeal. n552

Another difficulty that has been faced by courts in this area is in determining whether particular landlord actions actually amount to repossession of the premises for the landlord's own use and enjoyment, thereby resulting in a surrender by operation of law. The cases, not always consistent, turn on particular facts. By way of example, the following landlord conduct has been found not to give rise to surrender: entry to make repairs, n553 acceptance of keys to the premises, n554 and undertaking alterations to prepare the premises for reletting. n555 On the other hand, courts have concluded that a surrender resulted from the following landlord conduct, after tenant abandonment: substantial remodeling, n556 permitting the premises to be used for storage, n557 changing the locks, n558 and reletting the premises to a new tenant. n559 The circumstances under which reletting of the premises gives rise to a surrender are discussed below. n560

§ 40.11(a)(3) Effect of Surrender on Tenant Liability.

A surrender will extinguish the tenant's liability for future rent, but it will not extinguish the tenant's liability for previously accrued rent or for damages based on previous breach of lease covenants. Once surrender has occurred, of course, there is no landlord-tenant relationship, no privity of estate, on which to base continuing rental obligations. However, some courts, emphasizing the contractual nature of a lease, have concluded that, notwithstanding circumstances amounting to a surrender, the tenant who abandons the leased premises may be liable to the landlord for damages for unpaid future rent on the contract theory of anticipatory repudiation. n561 In California, this result is provided for by statute. n562

The California statute provides, in part, that "if a lessee of real property breaches the lease and abandons the property before the end of the term ... the lease terminates." But it also provides that the landlord is entitled to damages from the tenant for breach of the lease, and those damages may include amounts for loss of rental income and other amounts

"necessary to compensate the lessor for all the detriment proximately caused by the lessee's failure to perform his obligations under the lease." n563 Some of the landlord's recovery depends upon whether the lease provides for it. The landlord's recovery for loss of future rent can, in any event, be reduced to the extent that the tenant can show that the rental loss could have been avoided. n564 According to a decision by a California appellate court, the tenant may be liable for the landlord's loss of rental income even if, after lease termination, the landlord sells the property that had been subject to the lease. n565

The contract doctrine of anticipatory repudiation generally permits a promisee to bring an action for damages against a promisor when the promisor unequivocally repudiates the parties' executory contract and indicates that the promisor will not perform future contractual obligations. n566 A tenant who abandons the premises and refuses to pay rent would seem to qualify, assuming that the jurisdiction in question extends the doctrine of anticipatory repudiation to leases. Under this theory, the landlord's measure of damages would generally be the difference, if any, between the rent provided for in the original lease over the remaining lease term and the fair rental value of the premises for that period, reduced to present value. n567 However, if there is a long period remaining on the lease when the tenant abandons, the landlord is unlikely to be able to recover damages based on the entire remaining term; the court will likely limit recovery to a reasonable period of time. n568

Although a number of courts have applied the contract doctrine of anticipatory repudiation to the circumstance of tenant abandonment, courts in some jurisdictions have declined to do so. n569 Some courts have declined to apply the doctrine to leases, based on the traditional common law notion that no obligation to pay rent arises until the time stipulated for payment arrives. n570 The tenant's rental obligation has also been compared to a unilateral contract for the payment of money at fixed intervals, to which the doctrine of anticipatory repudiation does not apply. n571 In addition, it has been said that application of the doctrine, at least in the case of long term leases, would involve speculation about future rental values. n572

The Restatement position is that the landlord should be able to recover "damage caused by the abandonment," whether or not the lease is terminated. n573 Recoverable damages could include the difference, if any, between the stated rental amount and the fair rental value of the premises over the lease term, reduced to present value. n574 So long as there is a provision in the lease that permits the landlord to do so, the Restatement would also allow a landlord who accepts a surrender to notify the abandoning tenant that the landlord will hold the abandoning tenant liable in damages for the difference between what the abandoning tenant would have paid under the lease for the balance of the term and what the landlord is able to receive from a new tenant. In order to recover from the abandoning tenant, the landlord would have to undertake reasonable efforts to mitigate the abandoning tenant's damages. n575

§ 40.11(b) Landlord Election to Relet the Premises.

A second option that has traditionally been available to landlords when the tenant wrongfully abandons the leased premises is to attempt to relet the premises for the account of the abandoning tenant, holding the tenant liable for any loss of rent. n576 The option of reletting the premises for the account of the tenant continues to be generally available; indeed, many jurisdictions now require the landlord to attempt to relet the premises if the landlord seeks to recover rent from an abandoning tenant. However, by statute in some jurisdictions, the reletting of residential premises results in lease termination. n577 And, as discussed below, reletting of the premises may bring about a surrender of the lease.

There is a lack of uniformity among American jurisdictions regarding when surrender results from landlord reletting. New York cases have said that the landlord must obtain the consent of the tenant in order to preserve the tenant's liability following reletting. n578 Some jurisdictions require the landlord to provide notice to the tenant that the landlord intends to reenter in an effort to relet the premises for the account of the tenant. n579 Other jurisdictions see the abandoning tenant's liability for rental deficiency following landlord reentry and reletting as a question of fact, to be determined from the circumstances. n580

As a practical matter, a landlord who desires to avoid a surrender upon reentry and reletting will be more likely to succeed if the landlord provides notice to the tenant that the landlord does not accept a surrender and that the purpose of the re-entry is to relet the premises for the account of the tenant. n581 The landlord should also avoid actions that may indicate that the landlord is reletting for the landlord's own account. In this connection, some courts have concluded that reletting for a period longer than the original lease term results in a surrender. n582 But there is authority to the contrary. n583 Extensive landlord alterations to the leased premises could also be problematic. n584

§ 40.11(b)(1) Nature of the Abandoning Tenant's Liability.

Assuming that reletting does not result in surrender, there are some conceptual uncertainties regarding the nature of the abandoning tenant's liability to the landlord. A common theory is that the landlord, in reletting the premises, does so as an agent for the abandoning tenant, with the result that the abandoning tenant's estate remains intact, at least for purposes of continuing rent liability. n585 Under this theory, a landlord should be able to bring an action for rent deficiency as each rent installment comes due under the original lease. n586 A problem with the theory, however, is that the landlord, not the abandoning tenant, is the party who enters into the new lease, and the original lease may not empower the landlord to relet the property for the account of the abandoning tenant.

To deal with this difficulty, it has been suggested that tenant abandonment should be regarded as conferring a power upon the landlord to assign the abandoning tenant's estate. n587 However, because an assignment of a lease generally terminates the privity of estate between the landlord and the assigning tenant, it has been noted that, upon exercise of such a power, rent liability of the abandoning tenant would likely be based on privity of contract, rather than privity of estate. n588 In that case, the liability of the abandoning tenant may depend upon the existence of a covenant to pay rent in the original lease. n589

The Restatement approach is somewhat different. It simply states that a reletting by the landlord "will be deemed a sublease by the original tenant." n590 The Restatement would apply its sublease theory even if the landlord's reletting is for a period longer than the term of the original lease. n591 A sublease, of course, would preserve the privity of estate between the landlord and the abandoning tenant. The Restatement contemplates that any deficiency between the amount that the abandoning tenant is obligated to pay under the original lease and the amount received from the new tenant would be rent, not damages. n592

An alternative theory of liability for the abandoning tenant is based on privity of contract. Under this theory, the abandoning tenant's leasehold estate is considered to have been ended as a result of the reletting by the landlord, but the abandoning tenant remains liable to the landlord for damages under the lease contract. n593 This theory appears to be consistent with decisions that permit the landlord to treat tenant abandonment and failure to pay rent as constituting an anticipatory repudiation of the lease, entitling the landlord to an immediate recovery of damages.

If the theory of reletting is that the landlord acts on behalf of the abandoning tenant, and that the original leasehold estate continues, then it might be thought that the abandoning tenant should be entitled to any rent obtained upon reletting that is in excess of the amount reserved in the original lease. This is the Restatement position. It would require the landlord to account to the abandoning tenant for any excess, unless the landlord revokes any notice that the landlord is reletting for the account of the tenant and accepts a surrender. n594 But reported decisions are in disagreement on the issue, and vary widely in their approaches. n595 For example, some cases permit the tenant to have credit for the excess rent, reasoning that the landlord is entitled to recover no more than the landlord's actual losses resulting from the tenant's breach. n596 On the other hand, the abandoning tenant has been denied the benefit of the excess, on the ground that the tenant should not be permitted to benefit from the tenant's own wrongdoing. n597

§ 40.11(c) Election to Keep the Premises Vacant and Sue for Rent.

Another alternative traditionally available to a landlord whose tenant has wrongfully abandoned the leased premises is

to keep the premises vacant and to sue for rent as it becomes due. The landlord is not required, in exercising this option, to attempt to relet the premises. If the landlord takes no action to terminate the lease, the leasehold estate continues in existence, and rent continues to accrue as provided in the lease. n598 In justification of this result, it has been said that the tenant has purchased an interest in real estate and has an obligation to pay for the purchase, that abandonment by the tenant is of the tenant's own property, that the tenant should not be able to impose a duty on the landlord through the tenant's own wrongdoing, and that to require the landlord to re-enter the premises to mitigate the tenant's damages could result in an undesired surrender of the lease. n599 The Restatement justifies the result on another ground: that tenant abandonment "is an invitation to vandalism," and that the law should not encourage tenants to abandon leased premises by imposing a duty on the landlord to mitigate damages. n600

The rule that the landlord may recover rent from an abandoning tenant without attempting to relet the premises is the apparent majority rule. n601 The principle of stare decisis has sometimes been called upon to sustain it. n602 However, a substantial number of American jurisdictions have rejected this rule, and the trend is to require a landlord to attempt to relet the premises if the landlord wishes to hold an abandoning tenant liable for rent. n603 Courts that have adopted this view have emphasized the contractual nature of a lease, and have characterized the landlord's obligation, in contract terms, as one of mitigating damages. n604 Courts have also said that the mitigation requirement is supported by a public policy against allowing leasable premises to remain idle. n605

In some jurisdictions, the mitigation requirement comes from legislation. n606 For example, the Uniform Residential Landlord and Tenant Act requires the landlord, upon tenant abandonment, to undertake reasonable efforts to rent the premises at a fair rental. If the landlord fails to do so, the lease is deemed to have been terminated as of the date that the landlord had notice of the abandonment. n607 Given the number of states that have adopted a mitigation requirement by judicial decision, and the number of states that have adopted legislation, such as the Uniform Residential Landlord and Tenant Act, that impose mitigation obligations on landlords, it may be that a majority of states would, in the residential landlord-tenant context, require landlord mitigation when the landlord does not accept surrender of the premises following tenant abandonment. n608

§ 40.11(c)(1) Nature and Consequences of the Mitigation Requirement.

Courts that reject the traditional rule frequently refer to the landlord as having a "duty" to mitigate damages. However, the landlord's failure to mitigate does not provide the tenant with a claim for damages against the landlord. Instead, the landlord's failure to mitigate will affect the landlord's recovery of damages. As noted above, the rule under the Uniform Residential Landlord and Tenant Act is that the landlord's failure to use reasonable efforts to mitigate results in termination of the lease agreement. In contrast, some courts indicate that the landlord's failure to mitigate prevents the landlord from recovering damages that would have been avoided by reasonable mitigation efforts. n609 A few courts require that the landlord prove reasonable efforts at mitigation as an element of the landlord's cause of action against the abandoning tenant. n610 Under this view, failure of the landlord to carry the burden seems to bar the landlord from recovering rent subsequent to the abandonment. n611 The cases are in conflict as to who has the burden of proof on the mitigation of damages issue. n612

In jurisdictions where the landlord must mitigate in order to recover from the tenant, the landlord is generally obligated to accept a willing, suitable, substitute tenant offered by the abandoning tenant, and to otherwise undertake reasonable efforts to find a suitable substitute tenant. n613 In assessing whether the landlord has done so, courts will typically consider such factors as whether the landlord offered the premises to prospective tenants, advertised the availability of the leased premises, and offered the leased premises at a reasonable rental amount. n614

One of the difficulties with a mitigation requirement, from the landlord's perspective, is that it entails a risk of surrender. That is, the very conduct that the landlord is required to engage in to recover rent from the tenant -- reasonable efforts to re let -- may be found to constitute a surrender by operation of law. Such a result would, in turn, cut off the landlord's ability to recover rent. In recognition of the problem, some courts have simply declined to find that required mitigation

efforts give rise to a surrender. n615

The Texas Supreme Court dealt with the issue in a different fashion in a 1997 decision. In *Austin Hill Country Realty, Inc. v. Palisades Plaza, Inc.*, n616 the court recognized that commercial landlords have a duty to mitigate when the tenant abandons. But the risk of surrender also caused the court to limit the scope of the mitigation obligation. Mitigation would be required if the landlord brought a contract action for anticipatory repudiation, in which the landlord repossessed the premises and sued for "the present value of future rental reduced by the reasonable cash market value of the property for the remainder of the lease term." n617 But mitigation would not be required when the landlord simply chose to maintain the lease and sue for rent as it becomes due, because mitigation would require the landlord to reenter the premises and risk lease termination. Even so, mitigation would be required if the landlord actually does reenter, or if the lease permits the landlord to reenter "without accepting surrender, forfeiting the lease, or being construed as evicting the tenant." n618

In *McGuire v. City of Jersey City*, n619 the New Jersey Supreme Court considered how the landlord's sale of the leased premises would affect the abandoning tenant's liability in the commercial leasing context. There, a commercial landlord sold the leased premises after the tenant had abandoned. The tenant sought to avoid liability by claiming that the sale amounted to the acceptance of a surrender by the landlord. The New Jersey Supreme Court said that the mitigation rule extends to leases of commercial property, but it also said that, in view of the tendency to analogize landlord tenant law to contract doctrines, "we think it is more appropriate to consider the landlord's sale of the premises as a mitigation, rather than as an acceptance of surrender." n620 And, if the landlord received a sale price "that compensates for the value of the future rental income of the property," the court was of the view that the tenant's liability for that rental income would end at the time of sale. n621

Some statutes provide that the landlord's failure to give notice to the tenant that the property will be relet does not deprive the landlord of the right to recover from the tenant. n622 However, in the absence of clear authority otherwise, the landlord who desires to preserve tenant rent liability upon reletting should be careful to provide notice to the tenant that the reletting is for the account of the tenant.

FOOTNOTES:

(n1)Footnote 539. *See, e.g., Sagamore Corp. v. Willcutt, 180 A. 464 (Conn. 1935)* ; *Novak v. Fontaine Furniture Co., 146 A. 525 (N.H. 1929)* ; *Liberty Plan Co. v. Adwan, 370 P.2d 928 (Okla. 1962)* .

(n2)Footnote 540. *See, e.g., Morad v. Ramos, 116 N.E.2d 137 (Mass. 1953)* ; *Frisco Joes, Inc. v. Peay, 558 P.2d 1327 (Utah 1977)* .

(n3)Footnote 541. *See* discussion in § 40.11(b)(1), *below.*

(n4)Footnote 542. 29 Car. 2, c. 3 § 3 (1677).

(n5)Footnote 543. *See* W.W. Allen, Annotation, *Oral Surrender of Written Lease, 78 A.L.R.2d 933 (1961)* ; *see generally* American Law of Property § 3.99 (A. James Casner ed. 1952); William B. Stoebuck & Dale A. Whitman, The Law of Property § 6.82 (3d ed. 2000).

(n6)Footnote 544. 29 Car. 2, c. 3 § 3 (1677).

(n7)Footnote 545. *See* W.W. Allen, Annotation, *Oral Surrender of Written Lease, 78 A.L.R.2d 933 (1961)* .

(n8)Footnote 546. *See, e.g., Gordon v. Consolidated Sun Ray, Inc., 404 P.2d 949 (Kan. 1965)* ; *Bove v. Transcom Elects., Inc., 116 R.I. 210, 353 A.2d 613 (R.I. 1976)* ; Sarajane Love, *Landlord's Remedies When the Tenant Abandons: Property, Contract, and Leases, 30 Kan. L. Rev. 533, 545 (1982).*

(n9)Footnote 547. *See, e.g., Beall v. White, 94 U.S. 382 (1876)* ; *Lyon v. Reed, 153 Eng. Rep. 118 (1884).*

(n10)Footnote 548. *See, e.g., Jenkins v. Root, 112 A. 153 (Pa. 1920)* ; Charles T. McCormick, *The Rights of the Landlord Upon Abandonment of the Premises by the Tenant, 23 Mich. L. Rev. 211, 212 (1925); see generally* Sarajane Love, *Landlord's Remedies When the Tenant Abandons: Property, Contract, and Leases, 30 Kan. L. Rev. 533, 545 (1982).*

(n11)Footnote 549. *See, e.g., Capitol Funds, Inc. v. White, 306 S.E.2d 142 (N.C. Ct. App. 1983)* .

(n12)Footnote 550. *See, e.g.,* Hargrove v. Bourne, 150 P.121 (Okla. 1915) .

(n13)Footnote 551. *See, e.g., Williams v. Aeroland Oil Co., 20 So. 2d 346 (Fla. 1944)* .

(n14)Footnote 552. *See Girgis v. Macaluso Realty Co., 778 So. 2d 1210 (La. Ct. App. 2001); Cf.,* Saul Subsidiary II Limited Partnership v. Venator Group Specialty, Inc., 830 A.2d 854 (D.C. Ct. App. 2003) (tenant ceased retail operations and removed its property from the premises, but also proposed using part of the premises for a specialty store, requested modifications of the lease, and asked for an extension of the term; after the negotiations failed, the tenant announced its intention to open a temporary outlet store on the premises, but ultimately did not do so; the landlord notified the tenant that it was in default, and claimed that the tenant owed substantial "additional" rent in accordance with lease provisions that described how to calculate such rent in the event the tenant vacated the premises; the tenant claimed that it had never intended to cease business operations on the leased premises and so it had not "vacated"; the appellate court was of the view that abandonment was not the issue, and it concluded that the physical acts of closing the store and moving out amounted to "vacating" the premises for purposes of the additional rent provision; because the tenant had vacated the premises, it owed the additional rent).

(n15)Footnote 553. *See, e.g., Durbin Durco, Inc. v. Blades Mfg., Corp., 455 S.W.2d 449 (Mo. 1970)* .

(n16)Footnote 554. *See, e.g., Bumiller v. Walker, 116 N.E. 797 (Ohio 1917)* .

(n17)Footnote 555. *See, e.g., Book v. Asselstine, 203 N.W.2d 387 (Minn. 1972)* .

(n18)Footnote 556. *See, e.g., Ross v. Smigelski, 166 N.W.2d 243 (Wis. 1969)* .

(n19)Footnote 557. *See, e.g., John C. Cutler Ass'n v. De Jay Stores, Inc., 279 P.2d 700 (Utah 1955)* .

(n20)Footnote 558. *See, e.g., Ruchaber v. Short, 630 P.2d 915 (Or. Ct. App. 1981)* .

(n21)Footnote 559. *See* § 40.11(b), *below.*

(n22)Footnote 560. *See id.*

(n23)Footnote 561. *See, e.g., Sagamore Corp. v. Willcutt, 180 A. 464 (Conn. 1935)* ; *Kanter v. Safran, 68 So. 2d 553 (Fla. 1953)* ; *Grayson v. Mixon, 5 S.W.2d 312 (Ark. 1928)* ; *See* Sarajane Love, *Landlord's Remedies When the Tenant Abandons: Property, Contract, and Leases, 30 Kan. L. Rev. 533, 557, 561 (1982)*

(n24)Footnote 562. *See Cal. Civ. Code § 1951.2*.

(n25)Footnote 563. *See* N.J. Stat. Ann. 2A:42-88.

(n26)Footnote 564. The traditional way a landlord could avoid rental loss would be to relet the premises. Accordingly, if the tenant is able to show that the landlord has not been diligent about reletting the premises, the tenant could succeed in reducing the amount of the damages the landlord can recover. *See* Millikan v. American Spectrum Real Estate Services California, Inc., *12 Cal. Rptr. 3d 459 (Ct. App. 2004)* . In the *Millikan* case, a California appellate

court indicated that rental loss might also be avoided, in some cases, if the landlord sells the property that had been subject to the lease. It reasoned that the sale price ought to take into account "the capitalized value of the reasonable net rental value attributable to the land and existing improvements." If the landlord sells the property at an unreasonably low price, though, the tenant may be able to show that rental loss could have been avoided. In other words, the tenant might show that rental loss could have been avoided if the landlord had sold the property for a more reasonable price. *See id.*

(n27)Footnote 565. *See* Millikan v. American Spectrum Real Estate Services California, Inc., *12 Cal. Rptr. 3d 459 (Ct. App. 2004)* .

(n28)Footnote 566. *See generally* 4 Arthur Corbin, Contracts §§ 959 989 (1951); Charles T. McCormick, *The Rights of the Landlord Upon Abandonment of the Premises by the Tenant, 23 Mich. L. Rev. 211, 212 (1925)* (advocates application of anticipatory repudiation doctrine to leases).

(n29)Footnote 567. *See, e.g., Grayson v. Mixon, 5 S.W.2d 312 (Ark. 1928)* ; *Sagamore Corp. v. Willcutt, 180 A. 464 (Conn. 1935)* ; *but see Chapman & Cole v. Itel Container Int'l B.V., 665 F. Supp. 1283* (S.D. Tex.) , *aff'd, 865 F.2d 676 (5th Cir. 1987)* , *cert. denied, sub nom. Urquhart & Hassell v. Chapman & Cole 493 U.S. 872 (1989)* .

(n30)Footnote 568. *See Hawkinson v. Johnston, 122 F.2d 724* (8th Cir.) (recovery permitted based on 10 years, rather than 67, as the longest period for which damages could be "reasonably forecast or soundly predicted").

(n31)Footnote 569. *See, e.g., TenBraak v. Waffle Shops, Inc., 542 F.2d 919 (4th Cir. 1976)* ; *Adkins v. Hobson & Son, Inc., 666 S.W.2d 951 (Mo. Ct. App. 1984)* ; Sarajane Love, *Landlord's Remedies When the Tenant Abandons: Property, Contract, and Leases, 30 Kan. L. Rev. 533, 559, 561 (1982).*

(n32)Footnote 570. *See, e.g., Cooper v. Casco Mercantile Trust Co., 186 A. 885 (Me. 1936)* .

(n33)Footnote 571. *See, e.g., Jordon v. Nickell, 253 S.W.2d 237 (Ky. 1952)* ; *see generally* E. Allan Farnsworth, Contracts § 8.20 (2d ed. 1990).

(n34)Footnote 572. *See Reid v. Mutual of Omaha Ins. Co., 776 P.2d 896 (Utah 1989)* .

(n35)Footnote 573. *See* Restatement (Second) of Property § 12.1(3)(a) & cmt. i (1977) 3.

(n36)Footnote 574. *See* Restatement (Second) of Property § 12.1(3)(a) Reporter's Note 8 (1977).

(n37)Footnote 575. *See* Restatement (Second) of Property § 12.1, cmt. i (1977).

(n38)Footnote 576. *See, e.g., Grayson v. Mixon, 5 S.W.2d 312 (Ark. 1928)* ; *Kanter v. Safran, 68 So. 2d 553 (Fla. 1953)* ; Restatement (Second) of Property § 12.1, cmt. i (1977).

(n39)Footnote 577. *See, e.g.*, Uniform Residential Landlord and Tenant Act § 4.203(c).

(n40)Footnote 578. *See, e.g., Gray v. Kaufman Dairy & Ice Cream Co., 56 N.E. 903 (N.Y. 1900)* .

(n41)Footnote 579. *See, e.g., Bernard v. Renard, 165 P. 694 (Cal. 1917)* ; *Von Schleinitz v. North Hotel Co., 23 S.W.2d 64 (Mo. 1929)* ; *Casper Nat'l Bank v. Curry, 65 P.2d 1116 (Wyo. 1937)* .

(n42)Footnote 580. *See, e.g., McGrath v. Shalett, 159 A. 633 (Conn. 1932)* ; *Kanter v. Safran, 68 So. 2d 553 (Fla. 1953)* ; Millison v. *Clarke, 413* A.2d 198 (Md. Ct. App. 1980) ; *Liberty Plan Co. v. Adwan, 370 P.2d 928 (Okla. 1962)* ; *Abbadessa v. Tegu, 173 A.2d 581 (Vt. 1961)* .

(n43)Footnote 581. *See, e.g., Liberty Plan Co. v. Adwan, 370 P.2d 928 (Okla. 1962)* .

(n44)Footnote 582. *See, e.g., Wilson v. Ruhl, 356 A.2d 544 (Md. 1976)* ; *In re Adams' Estate, 267 N.Y.S. 910 (1933)* .

(n45)Footnote 583. *See, e.g., McGrath v. Shalett, 159 A. 633 (Conn. 1932)* ; *Treff v. Gulko, 7 P.2d 697 (Cal. 1932)* (no surrender); Millison v. *Clarke, 413* A.2d 198 (Md. 1980) ; *See* Restatement (Second) of Property § 12.1, cmt. i (1977).

(n46)Footnote 584. *See H.S. Chase & Co. v. Evans, 160 N.W. 346 (Iowa 1916)* .

(n47)Footnote 585. *See, e.g., Underhill v. Collins, 30 N.E. 576 (N.Y. 1892)* ; *See* .Sarajane Love, *Landlord's Remedies When the Tenant Abandons: Property, Contract, and Leases, 30 Kan. L. Rev. 533, 536 (1982)*

(n48)Footnote 586. *See, e.g., Phillips Hollman, Inc. v. Peerless States, Inc., 291 P. 178 (Cal. 1930)* ; *Sanders v. Kahn, 134 A.2d 107 (D.C. Ct. App. 1957)* ; Restatement (Second) of Property § 12.1, illus. 11 (1977).

(n49)Footnote 587. *See* Merrill I. Schnebly, *Operative Facts in Surrenders, 22 Ill. L. Rev. 22, 130 31 (1927).*

(n50)Footnote 588. *See* Sarajane Love, *Landlord's Remedies When the Tenant Abandons: Property, Contract, and Leases, 30 Kan. L. Rev. 533, 537, 538 (1982).*

(n51)Footnote 589. *See id. See* the discussion regarding rent covenants and rent reservation in § 40.03(c).

(n52)Footnote 590. *See* Restatement (Second) of Property § 12.1, cmt. i (1977).

(n53)Footnote 591. *See id.*

(n54)Footnote 592. *See id.*

(n55)Footnote 593. *See, e.g., Peterson v. Wilson, 303 P.2d 129 (Kan. 1956)* ; *United States Rubber Co. v. White Tire Co., 97 S.E.2d 403 (S.C. 1956)* ; *See* Clarence M. Updegraff, *The Element of Intent in Surrender by Operation of Law, 38 Harv. L. Rev. 64, 70 & 80 n.53 (1924);* Sarajane Love, *Landlord's Remedies When the Tenant Abandons: Property, Contract, and Leases, 30 Kan. L. Rev. 533, 536, 537 (1982).*

(n56)Footnote 594. *See* Restatement (Second) of Property § 12.1, cmt. i & Reporter's Note 8 (1977).

(n57)Footnote 595. *See* James T. Payne, Annotation, *Landlord and Tenant: Respective Rights in Excess Rent When Landlord Relets at Higher Rent During Lessee's Term, 50 A.L.R.4th 403 (1986)* .

(n58)Footnote 596. *See, e.g., Dalamagas v. Fazzina, 414 A.2d 494 (Conn. Ct. App. 1979)* .

(n59)Footnote 597. *See, e.g., Whitcomb v. Brant, 100 A. 175 (N.J. Ct. App. 1917)* .

(n60)Footnote 598. *But cf. Holy Properties, Ltd., L.P. v. Kenneth Cole Prods., Inc., 637 N.Y.S.2d 964 (N.Y. 1995)* . In this case, the tenant abandoned commercially leased premises. The landlord thereafter brought a summary eviction proceeding for nonpayment of rent, obtained a judgment and warrant of eviction, and then sued for rent and damages. The tenant contended, among other things, that the eviction terminated the lease, and that, as a result, the tenant should at most be liable for contract damages, not rent. The tenant also argued that the landlord had a duty to mitigate under contract law. The New York Court of Appeals held against the tenant. It said: "Although an eviction terminates the landlord-tenant relationship, the parties to a lease are not foreclosed from contracting as they please . If the lease provides that the tenant shall be liable for rent after eviction, the provision is enforceable." *See also Stonehedge Square Ltd. v. Movie Merchants, Inc., 715 A.2d 1082 (Pa. 1998)* (Court upholds the traditional rule that does not require mitigation, in part because "[l]eases have been drafted and bargained for in reliance on this rule").

(n61)Footnote 599. *See, e.g., Jordon v. Nickell, 253 S.W.2d 237 (Ky. Ct. App. 1952)* ; *Gruman v. Investors Diversified Servs., 78 N.W.2d 377 (Minn. 1956)* ; *Enoch C. Richards Co. v. Libby, 10 A.2d 609 (Me. 1940)* ; *see generally* E.L. Kellett, Annotation, *Landlord's Duty, on Tenant's Failure to Occupy, or Abandonment of, Premises, to Mitigate Damages by Accepting or Procuring Another Tenant, 21 A.L.R.3d 534 (1968)* .

(n62)Footnote 600. Restatement (Second) of Property § 12.1, cmt. i (1977).

(n63)Footnote 601. *See, e.g., Riggs v. Murdock, 458 P.2d 115 (Ariz. Ct. App. 1969)* ; *McGrath v. Shalett, 159 A. 633 (Conn. 1932)* ; *Sommer v. Kridel, 378 A.2d 767 (N.J. 1977)* ; Restatement (Second) of Property § 12.1, Reporter's Note 8 (1977).

(n64)Footnote 602. In rejecting an invitation to adopt a mitigation requirement in the commercial leasing context, the New York Court of Appeals said:

> Defendant urges us to reject this settled law and adopt the contract rationale recognized by some courts in this State and elsewhere. We decline to do so. Parties who engage in transactions based on prevailing law must be able to rely on the stability of such precedents. In business transactions, particularly, the certainty of settled rules is often more important than whether the established rule is better than another or even whether it is the "correct" rule. This is perhaps true in real property more than any other area of the law.

Holy Properties, Ltd., L.P. v. Kenneth Cole Prods., Inc., 637 N.Y.S.2d 964, 966 (N.Y. 1995) .

(n65)Footnote 603. *See, e.g., Snyder v. Ambrose, 639 N.E.2d 639 (Ill. App. 1994)* (statute imposes duty on landlord to mitigate damages); *Vawter v. McKissick, 159 N.W.2d 538 (Iowa 1968)* (court states that Iowa is committed to the doctrine that when a tenant wrongfully abandons the leased premises, the landlord is under a duty to show reasonable diligence has been used to relet the property to obviate or reduce the resulting damage); *Sommer v. Kridel, 378 A.2d 767 (N.J. 1977)* (application of the contract rule requiring mitigation of damages justified as a matter of basic fairness); E.L. Kellett, Annotation, *Landlord's Duty, on Tenant's Failure to Occupy, or Abandonment of, Premises, to Mitigate Damages by Accepting or Procuring Another Tenant, 21 A.L.R.3d 534, 540 (1968)* ; Glen Weissenberger, *The Landlord's Duty to Mitigate Damages on the Tenant's Abandonment: A Survey of Old Law and New Trends, 53 Temp. L.Q. 1 (1980).*

(n66)Footnote 604. *See, e.g., id. but see Stonehedge Square Ltd. v. Movie Merchants, Inc., 715 A.2d 1082 (Pa. 1998)* (court acknowledges the contractual aspects of a lease, but upholds the traditional non mitigation rule, giving several reasons: 1) leases have been bargained for in reliance on the traditional rule, 2) the traditional rule is simple, 3) existing legislation does not require mitigation, and 4) a mitigation requirement would be unfair to impose on a non breaching landlord).

(n67)Footnote 605. *See, e.g., MAR SON, Inc. v. Terwaho Enters., Inc., 259 N.W.2d 289 (N.D. 1977)* ; *Martin v. Siegley, 212 P. 1057 (Wash. 1923)* .

(n68)Footnote 606. *See, e.g.,* N.J. Stat. Ann. § 2A:42-88 1951.4; Uniform Residential Landlord and Tenant Act § 4.203(c); Restatement (Second) of Property § 12.1, Statutory Note 7 (1977).

(n69)Footnote 607. *See* Uniform Residential Landlord and Tenant Act § 4.203(c).

(n70)Footnote 608. *See* William B. Stoebuck & Dale A. Whitman, The Law of Property § 6.82 (3d ed. 2000). In some jurisdictions, the mitigation requirement applies only to residential leases. *See* Glen Weissenberger, *The Landlord's Duty to Mitigate Damages on the Tenant's Abandonment: A Survey of Old Law and New Trends, 53 Temp. L.Q. 1, 42, 46 (1980).* The Texas Supreme Court has ruled that commercial landlords have a duty to mitigate, but it

limited the duty in an interesting way. *See Austin Hill Country Realty, Inc. v. Palisades Plaza, Inc., 948 S.W.2d 293 (Tex. 1997)* . Mitigation would be required, said the court, if the landlord's action were a contract action for anticipatory repudiation, in which the landlord repossessed the premises and sued for "the present value of future rental reduced by the reasonable cash market value of the property for the remainder of the lease term." *Id. at 300* . But mitigation would generally not be required, said the court, when the landlord simply chose to maintain the lease and sue for rent as it becomes due, because that would require the landlord to reenter the premises and risk lease termination. *See also New Towne L. P. v. Pier 1 Imports (U.S.), Inc., 680 N.E.2d 644 (Ohio App. 1996)* (court concludes that a waiver of the landlord's duty to mitigate is enforceable when the parties to a commercial lease freely agreed on the waiver).

(n71)Footnote 609. *See, e.g., Hirsch v. Merchants Nat'l Bank & Trust Co., 336 N.E.2d 833 (Ind. Ct. App. 1975)* ; *Whitehorn v. Dickerson, 419 S.W.2d 713 (Mo. Ct. App. 1967)* ; *MAR SON, Inc. v. Terwaho, Enters., 259 N.W.2d 289 (N.D. 1977)* .

(n72)Footnote 610. *See Vawter v. McKissick, 159 N.W.2d 538 (Iowa 1968)* ; *Sommer v. Kridel, 378 A.2d 767 (N.J. 1977)* .

(n73)Footnote 611. *See id.*; *see also* Sarajane Love, *Landlord's Remedies When the Tenant Abandons: Property, Contract, and Leases, 30 Kan. L. Rev. 533, 552, 554 (1982).*

(n74)Footnote 612. *See* E.L. Kellett, Annotation, *Landlord's Duty, on Tenant's Failure to Occupy, or Abandonment of, Premises, to Mitigate Damages by Accepting or Procuring Another Tenant, 21 A.L.R.3d 534, 577 (1968)* ; *Snyder v. Ambrose, 639 N.E.2d 639 (Ill. Ct. App. 1994)* (statute imposes duty on landlord to mitigate damages; court concludes that landlord should have burden of proof on mitigation).

(n75)Footnote 613. *See, e.g., Gordon v. Consolidated Sun Ray, Inc., 404 P.2d 949 (Kan. 1965)* ; *Sommer v. Kridel, 378 A.2d 767 (N.J. 1977)* ; *Wright v. Baumann, 398 P.2d 119 (Or. 1965)* ; E.L. Kellett, Annotation, *Landlord's Duty, on Tenant's Failure to Occupy, or Abandonment of, Premises, to Mitigate Damages by Accepting or Procuring Another Tenant, 21 A.L.R.3d 534, 575 (1968)* .

(n76)Footnote 614. *See, e.g., Carpenter v. Wisniewski, 215 N.E.2d 882 (Ind. Ct. App. 1966)* ; *Vawter v. McKissick, 159 N.W.2d 538 (Iowa 1968)* ; *Ruud v. Larson, 392 N.W.2d 62 (N.D. 1986)* ; *Sommer v. Kridel, 378 A.2d 767 (N.J. 1977)* .

(n77)Footnote 615. *See Guy v. Gould, 266 P. 925 (Kan. 1928)* ; *Martin v. Siegley, 212 P. 1057 (Wash. 1923)* .

(n78)Footnote 616. *948 S.W.2d 293 (Tex. 1997)* .

(n79)Footnote 617. *948 S.W.2d at 300* .

(n80)Footnote 618. *948 S.W.2d at 300* . The Texas legislature has also adopted a mitigation statute. The statute and the Austin Hill case are discussed in Whelan, Thomas M., *Enforcement of Commercial Leases: Evictions and Dealing with a Tenant's Personal Property*, 3 Tex. Wes. L. Rev. (1997) 283.

(n81)Footnote 619. *593 A.2d 309 (N.J. 1991)* .

(n82)Footnote 620. *593 A.2d 309, 321 (N.J. 1991)* .

(n83)Footnote 621. *593 A.2d 309, 321-322 (N.J. 1991)* .

(n84)Footnote 622. *See, e.g.*, Md. Real Prop. Code Ann. § 8 207(c); *Wis. Stat. Ann. § 704.29(4)(b)*; *see generally see also* Sarajane Love, *Landlord's Remedies When the Tenant Abandons: Property, Contract, and Leases, 30 Kan. L. Rev. 533, 552, 554 (1982).*

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CHAPTER 40 LANDLORD RIGHTS AND TENANT DUTIES

5-40 Thompson on Real Property, Thomas Editions § 40.12

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§ 40.12 Death or Dissolution of Tenant.

The rights of the landlord will be significantly affected if the death of an individual tenant results in the termination of the lease. Whether or not it does so normally depends on the nature of the leasehold estate. If the tenancy is a tenancy at will, which may be terminated at any time by either party to the lease, the death of the tenant will result in lease termination. n623 However, the result is generally otherwise when the tenancy is a tenancy for years or a periodic tenancy. Upon the death of the tenant under a tenancy for years or a periodic tenancy, the leasehold generally passes to the tenant's estate, which remains liable to the landlord for the performance of lease obligations. n624

These results could be varied by agreement. The parties could agree, for example, that the lease will terminate upon the death of the tenant. n625 In a few instances, courts have also departed from the general rules and have permitted the tenant's estate to avoid continuing lease obligations on the ground that the lease was one of a personal nature. n626

It has often been held that the dissolution of a tenant corporation does not result in termination of the lease. n627 This is also said to be the rule with respect to a tenant that is a partnership. n628 Of course, this also means that, in the absence of a lease provision permitting the landlord to do so, the landlord is not free to terminate the lease upon the dissolution of a corporate tenant. n629 However, in one case a court found that the voluntary dissolution of a corporation constituted an anticipatory repudiation of the lease, providing the landlord with a cause of action in damages. n630

FOOTNOTES:
(n1)Footnote 623. *See, e.g., Hancock v. Maurer, 229 P. 611 (Okla. 1924)* ; Annotation., *Death of Lessee as Terminating Lease*, 68 A.L.R. 590 (1930) .

(n2)Footnote 624. *See, e.g., In re Estate of Conklin, 451 N.E.2d 1382 (Ill. Ct. App. 1983)* ; *Israel v. Beale, 169 N.E. 777 (Mass. 1930)* ; Annotation, *Death of Lessee as Terminating Lease*, 68 A.L.R. 590 (1930) ; *cf. Dobyns v. South Carolina Dep't of Parks, Recreation & Tourism, 480 S.E.2d 81 (S.C. 1997)* (death of tenant under term for years lease does not terminate the tenancy; however, where option to renew the lease is personal, the lease passes to the estate or heirs of the tenant only until the end of the current lease period).

(n3)Footnote 625. *See, e.g., Sutton v. Hiram Lodge, 10 S.E. 585 (Ga. 1889)* .

(n4)Footnote 626. *See, e.g., Warnecke v. Estate of Rabenau, 367 S.W.2d 15 (Mo. Ct. App. 1963)* (lease solely for the purpose of carrying out decedent's profession as an accountant).

(n5)Footnote 627. *See, e.g., Hampton v. Hampton Beach Imp. Co., 218 A.2d 442 (N.H. 1966)* ; *Perry v. Shaw, 152 Fla. 765, 13 So. 2d 811 (Fla. 1942)* .

(n6)Footnote 628. *See, e.g., Milmoe v. Sapienza, 142 A. 360 (N.J. Ch. 1928)* .

(n7)Footnote 629. *See Perry v. Shaw, 13 So. 2d 811 (Fla. 1942)* .

(n8)Footnote 630. *See South Main Akron, Inc. v. Lynn Realty, Inc., 106 N.E.2d 325 (Ohio Ct. App. 1951)* .

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CHAPTER 40 LANDLORD RIGHTS AND TENANT DUTIES

5-40 Thompson on Real Property, Thomas Editions § 40.13

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§ 40.13 Bankruptcy.

While a detailed discussion of bankruptcy issues is beyond the scope of this chapter, it is clear that the rights of parties are significantly affected by bankruptcy, and the principal bankruptcy implications should accordingly be mentioned.

One of the obvious effects of tenant bankruptcy is the automatic stay that results from the filing. While the automatic stay is in effect, it will shield the tenant from judicial and nonjudicial actions by the landlord to recover unpaid rent or to recover possession of the leased premises, notwithstanding tenant default. n631 A willful violation of the automatic stay could subject the landlord to liability for damages, costs, and attorneys' fees. n632

It should be noted that the Bankruptcy Code contains an exception from the automatic stay for a nonresidential lease whose term expires before or after the filing of bankruptcy. n633 Upon the expiration of a non residential lease, it ceases to be property of the bankruptcy estate, and the landlord may proceed to take possession. n634

Another potentially significant effect of tenant bankruptcy is lease rejection. The Bankruptcy Code permits the trustee in bankruptcy or the debtor in possession to reject an unexpired lease, subject to court approval. n635 An unexpired nonresidential real property lease will be deemed to be rejected if the trustee does not timely assume it or reject it. n636 Under the provisions of the Bankruptcy Code, rejection of the unexpired lease generally constitutes a breach of the lease, and entitles the landlord to make a claim for damages against the bankruptcy estate. n637 In effect, this allows the landlord to accelerate the tenant's future rental obligations. However, the landlord's claim for damages resulting from the breach is limited by statute. The amount of the claim for damages will be limited to the sum of: 1) the unpaid rent that accrued prior to the filing of the bankruptcy, the date that the landlord repossessed the property, or the date the property was surrendered to the landlord, whichever is earlier and; 2) later accruing rent in an amount not to exceed the rent reserved in the lease for the greater of one year or 15% of the remaining lease term, not to exceed three years. n638

In the case of a nonresidential lease, the landlord is also entitled to rental payments following the filing of the petition and until lease rejection. n639 In the case of a residential lease, the general rule is that, until the lease is assumed or rejected, the estate is not liable under the terms of the lease; however, the estate will be liable for the reasonable value of use and occupancy of the premises. n640

Instead of rejecting a lease, the trustee or the debtor in possession may elect to assume it, even if the lease is in default. In doing so, however, the trustee or the debtor in possession will be obligated to cure existing defaults in the payment of rent, to compensate the landlord for other pecuniary losses resulting from default, and to provide adequate assurance of future performance of leasehold obligations. n641 Upon assumption of the lease, the bankruptcy trustee or the debtor in possession may also be able to assign it to another party if there is adequate assurance of future performance by the assignee, even if the lease restricts assignment by the tenant. n642 In connection with the assignment, the landlord has the right to require a security deposit for the performance of the assignee's lease obligations. n643

Bankruptcy usually results in the invalidity of landlord liens, under the avoidance powers of the bankruptcy trustee. The Bankruptcy Code expressly gives the trustee power to avoid landlord liens for rent and liens of distress for rent that are created by statute or that arise at common law. n644 But this particular avoidance power has been thought to be inapplicable to consensual security interests in tenant property; n645 accordingly, a landlord with a consensual security interest for rent should be able to qualify as a secured, or partially secured, creditor. However, an unperfected consensual lien could still be defeated pursuant to the trustee's avoidance power as a judicial lien creditor. n646

Tenant bankruptcy may also have implications for tenant security deposits. If the landlord holds a security deposit, the landlord will be a secured creditor to the extent of the deposit. n647 If the landlord has a claim for damages, the security deposit apparently must be applied against the landlord's allowable claim; however, if the amount of the security deposit should exceed the amount of the landlord's allowable claim, the landlord seems to be required to pay the excess into the bankruptcy estate. n648

In an effort to avoid some of the constraints of bankruptcy, landlords have often included clauses in their leases providing for automatic lease termination in the event of tenant bankruptcy or insolvency. However such "ipso facto" clauses generally became unenforceable with the 1978 adoption of the Bankruptcy Code. n649

Leasehold issues can also arise if it is the landlord who files for bankruptcy. One of those issues arises under R.I. Gen. Laws § 45-24.2-11, which, subject to some conditions, permits sale of the property of the bankruptcy estate "free of any interest." Could that include a lease? The United States Seventh Circuit Court of Appeals answered that question in the affirmative. It held that section 363 permitted sale of land in the bankruptcy estate free of an unrecorded tenant lease. The tenant in that case argued that its interest was entitled to protection under section 365(h), which provides that when the landlord is in bankruptcy and the tenant's lease is rejected, the tenant will nonetheless be permitted to "retain its rights under such lease." But the court concluded that section 365 was not applicable to a sale of bankruptcy estate property conducted pursuant to section 363. n650

FOOTNOTES:

(n1)Footnote 631. *See* N.J. Stat. Ann. § 2A:42- 92. There are exceptions to the automatic stay. In some circumstances, for example, a residential landlord can pursue eviction proceedings based on illegal drug use or damage to the leased property notwithstanding the existence of the automatic stay. *See* 35 Pa. Stat. Ann. § 1700-1(23.)

(n2)Footnote 632. *See* 35 Pa. Stat. Ann. § 1700-1.

(n3)Footnote 633. *See 11 U.S.C. § 362(b)(10).*

(n4)Footnote 634. *See* 2 Daniel R. Cowans, Cowans Bankruptcy Law and Practice § 11.5, at 350 351 (1989).

(n5)Footnote 635. *See 11 U.S.C. § 365*; *In re Thompson, 788 F.2d 560 (9th Cir. 1986)* ; *See* 2 Daniel R. Cowans, Cowans Bankruptcy Law and Practice § 11.11, at 448 (1989).

(n6)Footnote 636. *See 11 U.S.C. § 365(d)(4).* There is some disagreement over whether, at that point, a landlord may obtain an order from the bankruptcy court to require surrender of the leased property. *See In re Elm Inn, Inc., 942 F.2d 630 (9th Cir. 1991)* (court has authority to issue order granting surrender of leased property to landlord once lease

is deemed rejected); *In re Williams, 171 B.R. 420 (Ga. 1994)* (landlord must bring appropriate adversary proceeding to recover possession of the property). There has been some uncertainty over whether court approval constitutes a condition precedent or a condition subsequent to an effective rejection of a non-residential lease. In *Thinking Machines Corp. v. Mellon Fin. Servs. Corp., 67 F.3d 1021 (1st Cir. 1995)* , the court concluded that judicial approval was a condition precedent to rejection, and determinative of its effective date. However, the court also stated that a bankruptcy court has the equitable power to make rejection retroactive to the date of the trustee's motion to reject.

(n7)Footnote 637. *See 11 U.S.C. §§ 365(g), 502(g)*; *but see In re Knight, 8 B.R. 925 (D. Md. 1981)* (rejection of a residential lease said to give rise to an abandonment of the lease by the estate, rather than a breach of the lease); *Cf. Eastover Bank for Sav. v. Sowashee Venture (In re Austin Dev. Co.), 19 F.3d 1077 (5th Cir. 1994)* , cert. denied, *115 S. Ct. 201 (1994)* (lease rejection brings about a breach, not a termination, of the lease); *see generally* Michael T. Andrew, *Executory Contracts in Bankruptcy: Understanding "Rejection," 59 Colo. L. Rev. 845 (1988).*

(n8)Footnote 638. *See 11 U.S.C. § 502(b)(6)*; *See* 2 Daniel R. Cowans, Cowans Bankruptcy Law and Practice § 12.15 (1989).

(n9)Footnote 639. *See 11 U.S.C. 365(d)(3)*. The majority view, based on statutory language, is that the landlord is entitled to the rental amount stated in the lease, and also automatically entitled to have that claim treated as an administrative expense. *See e.g., In re Pacific-Atlantic Trading Co., 27 F.3d 401 (9th Cir. 1994)* ; *In re Potomac Systems Engineering, Inc., 208 B.R. 561 (Bankr. N.D. Ala. 1997)* . But some courts have taken the position that if such payments are to be regarded as administrative expenses, they must satisfy the requirement that the payments benefit the bankruptcy estate. *See e.g., In re JAS Enterprises, Inc., 180 B.R. 210 (Bankr. D. Neb. 1995)* , aff'd, *113 F.3d 1238 (8th Cir. 1997)* . *See generally* 3 Collier on Bankruptcy 365.04[3][f][ii] (15th ed. 1998).

(n10)Footnote 640. *See* 3 Collier on Bankruptcy 365.04[7][a] (15th ed. 1998). *See 11 U.S.C. 365(d)(3). See also Thinking Machines Corp. v. Mellon Fin. Servs. Corp., 67 F.3d 1021 (1st Cir. 1995)* (dispute over when the obligation to pay rent at the contract rate terminated; the court concluded that judicial approval was a condition precedent to rejection, and determinative of its effective date; however, the court also stated that a bankruptcy court has the equitable power to make rejection retroactive to the date of the trustee's motion to reject).

(n11)Footnote 641. *See 11 U.S.C. § 365(b)(1)*. In 2005, an exception was added to this section that permits assumption notwithstanding the existence of an incurable nonmonetary default by the debtor. There is some authority for the proposition that, prior to deciding whether to accept or reject a nonresidential lease, a debtor in possession may exercise an option to renew a lease, even though the lease is in default, and even though the lease itself says that the debtor cannot be in default at the time of the renewal. *See In re Circle K Corp., 127 F.3d 904 (9th Cir. 1997).*

(n12)Footnote 642. *See 11 U.S.C. §§ 365(f)(1)*, Ga. Code § 44-7-1. Ga. Code § 44-7-13 allows a debtor to assign a lease "notwithstanding a provision that prohibits, restricts, or conditions the assignment." But there is some tension between this section and language in section 365(b)(3) that contemplates the provision of adequate assurance that an assignment is subject to lease provisions limiting the use of the leased space in a shopping center. In *In re Trak Auto Corp., 367 F.3d 237 (4th Cir. 2004)* , the court concluded that the more specific provision of 365(b)(3), regarding shopping centers, took precedence over the general prohibition against anti assignment clauses in 365(f)(1).

(n13)Footnote 643. *See* Ga. Code § 44-6-105(*l*).

(n14)Footnote 644. *See 11 U.S.C. § 545*. Section 545 states that it applies to "statutory liens," but the definition of "statutory lien" in 101 of the Code incorporates a "lien of distress for rent, whether or not statutory." *See* 5 Collier on Bankruptcy 545.01[2] (15th ed. 1998).

(n15)Footnote 645. *See* 4 William M. Collier, Collier on Bankruptcy 545.04[4] (15th ed. 1992) [hereinafter Collier on Bankruptcy]; *see also In re King Furniture City, Inc., 240 F. Supp. 453 (E.D. Ark. 1965)* (consensual lien not a lien of distress for rent).

(n16)Footnote 646. *See 11 U.S.C. §§ 544(a)*, Mont. Code Ann. §§ 70 (trustee status); U.C.C. § 9 301(1)(b) (vulnerability of unperfected security interest).

(n17)Footnote 647. *See* Benjamin Weintraub and Alan N. Resnick, Bankruptcy Law Manual 5.05[2] (1986).

(n18)Footnote 648. *See Oldden v. Tonto Realty Corp., 143 F.2d 916 (2d Cir. 1944)* ; Collier on Bankruptcy § 502.02[d].

(n19)Footnote 649. *See 11 U.S.C. § 365(e)(1)*; Collier on Bankruptcy § 365.06.

(n20)Footnote 650. *See Precision Industries, Inc. v. Qualitech Steel SBQ, LLC, 327 F.3d 537 (7th Cir. 2003)* . Subject to some conditions, 363 permits sales of estate property "free and clear of any interest in such property." On the other hand, 365(h) provides that if the trustee in bankruptcy or the debtor in possession rejects an unexpired lease of real property, the tenant will be permitted to "retain its rights under such lease." In *Precision Industries*, the court considered whether the tenant protections in 365(h) trump the provisions of 363. The court said not. It did not regard the two sections as being in conflict:

> Where estate property under lease is to be sold, section 363 permits the sale to occur free and clear of lessee's possessory interest provided that the lessee (upon request) is granted adequate protection for its interest. Where the property is not sold, and the debtor remains in possession thereof but chooses to reject the lease, section 365(h) comes into play and the lessee retains the right to possess the property. So understood, both provisions may be given full effect without coming into conflict with one another and without disregarding the rights of lessees.

327 F.3d at 548 . The result in Precision Industries was that the tenant's possessory interest was extinguished by the sale.

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CHAPTER 40 LANDLORD RIGHTS AND TENANT DUTIES

5-40 Thompson on Real Property, Thomas Editions § 40.14

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§ 40.14 Condemnation.

[Go To Supp]

Both landlord and tenant have interests in the leased property that may be affected by an eminent domain proceeding. Depending on the extent of the condemnation, and the provisions of the lease, both landlord and tenant may be entitled to a portion of the condemnation award. And, depending on the extent of the condemnation, the lease may be terminated, and the landlord's right to receive rent may be cut off, or the tenant may be entitled to a partial abatement of the rental obligation. This section of the chapter considers how condemnation affects the interests of the landlord, with emphasis on the allocation of the condemnation award between landlord and tenant and the landlord's right to receive rent.

§ 40.14(a) Total Condemnation.

There is little dispute about the effect of a total condemnation of the leased premises. When there is a total, permanent, taking of the entire fee simple interest that is subject to the lease, it is generally agreed that the lease is terminated. n651 A total taking causes the tenant's leasehold interest and the landlord's reversionary interest to be held by the condemning authority and to be merged into a new present estate in land. n652

Upon termination of the tenancy, the landlord will not be entitled to the receipt of unaccrued future rent from the tenant. Instead, the landlord will be entitled to a portion of the condemnation award based on the value of the landlord's reversionary interest in the property, which will usually be the difference between the value of the property in fee and any leasehold value allocable to the tenant. n653 Unless the tenant is a tenant at will, or a tenant at sufferance, the tenant will also be entitled to a portion of the condemnation award, based on the value of the tenant's leasehold interest. n654 While courts have described the tenant's measure of damages in different ways, n655 generally the tenant will be able to receive compensation to the extent that the rental value of the leased premises over the remaining lease term exceeds the cost of the tenant's rental obligations, discounted to present value. n656 This is sometimes referred to as "bonus value."

§ 40.14(b) Partial Condemnation.

There is significant disagreement over the consequences of a partial condemnation -- one that affects less than all of the

property subject to the lease. The prevailing view is that if only a portion of the property is taken, the tenant remains liable for the stated rent under the lease. n657 The rationale is that the tenant, as the owner of an estate in land, is entitled to compensation from the government for what is taken; however, the tenant is not entitled to be relieved from the contractual obligation to pay rent to the landlord. n658 Under this approach, the compensation award to the tenant is an amount equal to the difference between the fair market value of the leasehold before and after the taking, without diminution for the continuing rental obligation, and the landlord's award is for the loss in market value to the reversion. n659 However, since the tenant's award effectively includes the present value of future rental payments to the landlord, this result puts the landlord at risk. Once the portion of the land is taken and the award is given to the tenant, the landlord cannot repossess that portion of the land in the event the tenant fails to make rent payments; the landlord has to rely on the unsecured obligation of the tenant to pay the entire amount of the rent. The risk to the landlord could be reduced by placing the funds in trust. n660

An alternative view, represented by a minority of cases, and reflected in some statutes, considers a partial taking of the leased premises to partially end the landlord-tenant relationship, and to partially extinguish the obligation of the tenant to pay rent to the landlord. The result is a pro rata abatement of future rent. n661 As to the portion subject to the condemnation, both the reversion and the leasehold are held by the condemning authority, causing a merger. n662 Where the rent abatement rule prevails, the tenant does not receive a portion of the condemnation award based on the discounted present value of future rental payments for the property taken. Instead, the tenant's portion, if any, of the award will be based on the bonus value of the leasehold attributable to the portion taken. n663 Under this approach, the landlord receives compensation for the diminution in rent attributable to the property taken, and does not have to depend upon an unsecured obligation of the tenant to pay that rent in the future.

The Restatement takes a somewhat different approach. Although it favors rent abatement when the taking does not result in lease termination, the Restatement is also of the view that, in the absence of a valid agreement to the contrary, a lease should be terminated if a partial taking significantly interferes with the use of the property contemplated by the parties. n664 Under the Restatement approach, the tenant does not have an option to continue to lease, with an abatement of the rent, because this would compel the landlord to accept an arrangement substantially different from the one the landlord bargained for. n665 Consistent with the result advocated by the Restatement, some courts have held that the lease should be terminated when a partial taking is so substantial that the remaining portion of the property is untenantable for the purposes of the lease. n666

The Uniform Eminent Domain Code would permit the court to determine that a partial taking results in lease termination if the part taken is essential for the purpose of the lease or if the remaining portion is unsuitable for the purpose of the lease. n667

§ 40.14(c) Temporary Taking.

A taking may also be for a temporary period of time. When the temporary taking is for a period that is shorter than the remaining term of the lease, it has been held that the lease will not be terminated and the tenant's rental obligation to the landlord will be unaffected. n668 Because the condemnation does not affect the landlord's reversion, it is thought that the entire condemnation award should be allocable to the tenant. n669 But this approach again seems to place the landlord at risk, because the tenant could, following receipt of the condemnation award, fail to make lease payments to the landlord. n670

The Restatement would apply the same rule here that it applies to a partial physical taking. That is, even if the period of the taking is for a shorter period than the remaining lease term, if the taking significantly interferes with the use of the premises contemplated by the parties, the lease will be terminated. n671 Moreover, the Restatement contemplates that, unless the taking is for a "very short period of time," it will significantly interfere with the parties' contemplated use of the property. n672 If the taking is for so short a period that it would not result in lease termination, then the Restatement provides that the rent may be abated. n673 Not surprisingly, the Restatement also provides for lease termination in the

event the temporary taking of the property is for a period that includes the entire unexpired term of the lease. n674

§ 40.14(d) Effect of Lease Provisions.

The parties are generally free to agree on the leasehold consequences of condemnation. n675 They could, for example, agree that, in the case of a partial condemnation, rent will be proportionately abated, and the tenant will receive no compensation for the value of the leasehold. n676 On the other hand, they could agree that the lease will automatically terminate, or that either the landlord or the tenant will have the option to terminate, in the event that all or a portion of the leased property is condemned by governmental authority. n677

A provision stating that the lease is to terminate upon the taking of all or a portion of the leased property is usually interpreted to reflect an intention that the tenant not obtain compensation for the leasehold from the condemnation award. n678 However, disliking forfeitures, courts tend, where possible, to construe such termination clauses so as not to apply to particular condemnations. n679 There is some authority for the proposition that lease provisions concerning condemnation are subject to the contract doctrine of unconscionability. n680

FOOTNOTES:

(n1)Footnote 651. *See, e.g., Corrigan v. City of Chicago, 33 N.E. 746 (Ill. 1893)* ; *Lowell Hous. Auth. v. Save Mor Furn. Stores, Inc., 193 N.E.2d 585 (Mass. 1963)* ; Restatement (Second) of Property § 8.1 (1977); K. A. Drechsler, Annotation, *Condemnation of Premises or Part Thereof as Affecting Rights of Landlord and Tenant Inter Se*, 163 A.L.R. 679, 680 (1946) , supplementing Annotation, 43 A.L.R. 1176 (1926) .

(n2)Footnote 652. *See Leonard v. Autocar Sales & Serv. Co., 64 N.E.2d 477 (Ill. 1945) , cert. denied, 327 U.S. 804 (1946)* ; *Corrigan v. City of Chicago, 33 N.E. 746 (Ill. 1893)* ; Alan N. Polasky, *The Condemnation of Leasehold Interests, 48 Va. L. Rev. 477 (1962).*

(n3)Footnote 653. *See, e.g., Arlen of Nanuet, Inc. v. State, 258 N.E.2d 890 (N.Y. 1970)* ; 4 Nichols on Eminent Domain §§ 12.05[1], 12D.04[2] (LexisNexis Matthew Bender).

(n4)Footnote 654. *See* Nichols on Eminent Domain §§ 5.06[5], 5.06[6] ((LexisNexis Matthew Bender).

(n5)Footnote 655. *See* Annotation., *Eminent Domain: Measure and Elements of Lessee's Compensation for Condemnor's Taking or Damaging of Leasehold, 17 A.L.R.4th 337 (1982)* .

(n6)Footnote 656. *See, e.g., Alamo Land & Cattle Co. v. Arizona, 424 U.S. 295 (1976)* ; *Barnini v. Sun Oil Co., 283 A.2d 217 (Conn. 1971)* ; Alan N. Polasky, *The Condemnation of Leasehold Interests, 48 Va. L. Rev. 477, 493 (1962);* Edward D. McKirdy, How to Value a Leasehold in an Eminent Domain Case, PRAC. REAL EST. L., March 1994, at 11, 12.

(n7)Footnote 657. *See, e.g., United States v. General Motors Corp., 323 U.S. 373 (1945)* ; *Elliott v. Joseph, 351 S.W.2d 879 (Tex. 1961)* ; Annotation, *Condemnation of Premises or Part Thereof as Affecting Rights of Landlord and Tenant Inter Se*, 43 A.L.R. 1176 (1926) , supplemented, 163 A.L.R. 679 (1946) .

(n8)Footnote 658. *See, e.g., Lehigh Valley R.R. v. Metropolitan Lumber Co., 148 A. 568 (N.J. 1930)* ; *Elliott v. Joseph, 351 S.W.2d 879 (Tex. 1961)* .

(n9)Footnote 659. *See, e.g., City of Pasadena v. Porter, 257 P. 526 (Cal. 1927)* ; *Batcheller v. Iowa State Hwy. Comm'n, 101 N.W.2d 30 (Iowa 1960)* ; *Elliott v. Joseph, 351 S.W.2d 879 (Tex. 1961)* ; Alan N. Polasky, *The Condemnation of Leasehold Interests, 48 Va. L. Rev. 477, 494 (1962);* Robert S. Schoshinski, American Law of Landlord and Tenant § 10:6 (1980).

(n10)Footnote 660. *See* N.D. Cent. Code §§ 47-16-13.1; *Stubbings v. Village of Evanston, 26 N.E. 577 (Ill. 1891)* .

(n11)Footnote 661. *See, e.g., Lee v. Indian Creek Drainage Dist., 148 So. 2d 663 (Miss. 1963)* ; *Great Atl. & Pac. Tea Co. v. State, 238 N.E.2d 705 (N.Y. 1968)* ; S.D. Codified Laws §§ 43-32-8-- 43-32-10; R.I. Gen. Law Ann. § 24 3 12; *W. Va. Code Ann. § 37-6-29*.

(n12)Footnote 662. *See* Alan N. Polasky, *The Condemnation of Leasehold Interests, 48 Va. L. Rev. 477, 493 (1962);* Robert S. Schoshinski, American Law of Landlord and Tenant § 10:6 (1980).

(n13)Footnote 663. *See, e.g., Lee v. Indian Creek Drainage Dist., 148 So. 2d 663 (Miss. 1963)* .

(n14)Footnote 664. *See* Restatement (Second) of Property § 8.1(2)(a) (1977).

(n15)Footnote 665. *See* Restatement (Second) of Property § 8.1 cmt. b (1977).

(n16)Footnote 666. *See, e.g., Yellow Cab Co. v. Howard, 243 Ill. App. 263 (1927)* (73% of taxi garage taken); *Farr v. Williams, 101 S.E.2d 483 (S.C. 1957)* (taking of much of the land and a store).

(n17)Footnote 667. *See* Uniform Eminent Domain Code § 1013(b).

(n18)Footnote 668. *See, e.g., Leonard v. Autocar Sales & Serv. Co., 64 N.E.2d 477 (Ill. 1945); but see* State *ex rel. Department of Hwys. v. Cefalu, 233 So. 2d 273 (La. Ct. App. 1970)* (tenant may seek lease termination or diminution in rental payments).

(n19)Footnote 669. *See, e.g., United States v. General Motors Corp., 323 U.S. 373 (1945)* ; 2 Nichols on Eminent Domain § 5.06.

(n20)Footnote 670. *See* Nichols on Eminent Domain § 10:6Robert S. Schoshinski, American Law of Landlord and Tenant § 10:6 (1980).

(n21)Footnote 671. *See* Restatement (Second) of Property § 8.1(2)(a) (1977).

(n22)Footnote 672. *See id.* cmt. b.

(n23)Footnote 673. *See* Restatement (Second) of Property § 8.1(2)(b) (1977).

(n24)Footnote 674. Restatement (Second) of Property § 8.1(1) cmt. b (1977).

(n25)Footnote 675. *See, e.g., United States v. Petty Motor Co., 327 U.S. 372 (1946)* .

(n26)Footnote 676. *See, e.g., United Cigar Stores Co. v. Norwood, 208 N.Y.S. 420 (Sup. Ct. 1925)* .

(n27)Footnote 677. *See, e.g., Waesche v. Redevelopment Agency of New London, 229 A.2d 352 (Conn. 1967)* ; *State v. Starzinger, 179 N.W.2d 761 (Iowa 1970)* ; *Exxon Corp. v. M & Q Holding Corp., 269 S.E.2d 371 (Va. 1980)* .

(n28)Footnote 678. *See, e.g., United States v. Petty Motor Co., 327 U.S. 372 (1946)* ; *Sugarman v. City of Baltimore, 191 A.2d 240 (Md. 1963)* ; *In re Site for Library, 95 N.W.2d 112 (Minn. 1959)* ; *See* Restatement (Second) of Property § 8.2 cmt. f, Reporter's Note 9 (1977); *but see City of Vista v. W.O. Fielder, 919 P.2d 151 (Cal. 1996)* (lease provided that lease terminates if the property is condemned; court considers the meaning of this provision in light of the language of California's eminent domain legislation, and concludes that it does not deprive the tenant of any right to compensation for the taking of the leasehold or other property); *cf. Eller Media Co. v. Mississippi Transp. Com'n, 900 So. 2d 1156 (Miss. 2005)* (lease provision requiring tenant to remove billboard structure and terminate lease upon sale of property, following landlord's notice, did not apply to a condemnation; the result was the sharing of the condemnation award).

(n29)Footnote 679. *See, e.g.*, United States v. 150.29 Acres, 148 F.2d 33 (7th Cir.); *Belmont Clothes, Inc. v. Pleet, 184 A.2d 731 (Md. 1962)* ; 2 Nichols on Eminent Domain § 5.06[2].

(n30)Footnote 680. *See Honolulu v. Midkiff, 616 P.2d 213 (Haw. 1980)* ; Restatement (Second) of Property § 8.1 cmt. e (1977).

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CHAPTER 40 LANDLORD RIGHTS AND TENANT DUTIES

5-40 Thompson on Real Property, Thomas Editions § 40.15

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§ 40.15 Destruction of Improvements Located on the Leased Premises.

§ 40.15(a) The Traditional Rule.

The traditional rule at common law is that a tenancy is not terminated, and the tenant's rental obligation is unaffected, when the buildings on the leased premises are destroyed, in whole or in part, by a casualty that is not the fault of either party. n681 Courts have articulated several justifications for the rule. An English court reasoned, in an early case, that an express obligation to pay rent could only be modified by an express limitation, and that such a limitation should not be implied by the court. n682 Other courts have justified the rule on the grounds that: 1) a lease is a conveyance of real property, and that the tenant should bear the risk of casualty loss following the conveyance; n683 2) when neither landlord nor tenant cause the loss, the consequences of the loss should be divided, with the tenant losing the property for the term, and the landlord losing it thereafter; n684 3) an exemption from loss would make the tenant less careful, because the tenant would, in some cases, benefit from a destruction of the leased premises if the lease would thereby be terminated; n685 and 4) the land itself, rather than the improvements located thereon, constitutes the essential subject matter of the lease, and the destruction of improvements leaves the subject matter intact. n686

The last mentioned justification for the rule also gave rise to an important exception. American courts came to recognize that if the tenant rented only rooms in a building, and the building were totally destroyed, the tenant could claim that the subject matter of the lease itself had been destroyed, and that lease termination was justified. n687 The same rationale has been used to excuse a tenant from rent liability when the tenant rented only a storeroom in a building that was destroyed by casualty, n688 and when the tenant rented only a riverfront that was washed away by river turbulence. n689

§ 40.15(b) Departures from the Traditional Rule.

The vitality of the traditional rule has been reduced in modern times by statutory developments, judicial decisions, and by the common inclusion, at least in commercial leases, of provisions permitting the tenant to be relieved from rent liability when leasehold improvements are substantially damaged by fire or other casualty. n690

A majority of states now have statutes that, at least in some circumstances, relieve the tenant of the obligation to pay rent to the landlord when the leased premises are destroyed without fault of the tenant. n691 A number of the statutes

apply both to commercial and residential tenancies, but many apply only to residential tenancies. n692 Most of the statutes appear to relieve the tenant of rent liability only if the level of destruction makes the premises untenantable, n693 but some statutes provide for lease termination if the cost of repairs would exceed a certain amount, n694 or if the landlord is obligated to repair the premises and does not do so within a reasonable time. n695 Termination is not necessarily automatic; a number of the statutes provide the tenant with an option to terminate the lease. n696 Moreover, some statutes provide that if the premises are only partially destroyed, the rent is suspended or abated until the landlord makes the needed repairs. n697

In a few cases, the traditional rule has been rejected or abrogated by court decision, independent of statute. The Nebraska Supreme Court rejected the traditional rule many years ago, holding that destruction of improvements resulted in termination of the tenancy. n698 In more recent times, the Pennsylvania Supreme Court held that a tenant could be excused from further performance under the lease when a garage located on the leased premises was destroyed by fire. Even though the tenant had leased land as well as the garage, the Court concluded that the intended purpose of the lease had been frustrated by the destruction of the garage, and that the tenant should be relieved of rent liability. Instead of applying the traditional property based rule, the Court used a contract based frustration of purpose analysis. n699

The Restatement also rejects the traditional rule. Its position is that, absent an agreement to the contrary, the tenant should be able to terminate the lease when a non manmade force suddenly makes the leased premises unsuitable for the parties contemplated use, and the landlord does not correct the condition within a reasonable time after being requested to do so. n700 The Restatement also takes the position that the tenant's only remedy should be lease termination, because it would be unfair to burden the landlord with other remedies when the landlord is not at fault for the damage. n701

The traditional rule has also been eroded, in many states, by the statutory enactment or judicial adoption of a warranty of habitability on the part of the landlord for residential leases. n702 In these jurisdictions, the failure of the landlord to repair residential premises that are rendered uninhabitable by accidental fire or other casualty would result in a breach of the warranty of habitability, and would entitle the tenant to exercise remedies, such as rent withholding or lease termination, that are available in the particular jurisdiction.

§ 40.15(c) Effect of Lease Provisions.

Whether or not the traditional rule would otherwise apply, the parties are generally free to agree as to what effect destruction of buildings will have on the landlord-tenant relationship. n703 However, a number of the statutes that deal with destruction of buildings on leased premises do not permit the parties to enter into an agreement that is contrary to the statutory provisions. Statutes that are based on the Uniform Residential Landlord and Tenant Act, for example, permit the tenant to terminate the lease or to obtain a reduction in rent liability in the event the leased premises are destroyed or substantially damaged by fire or other casualty. n704 They also prohibit waiver of these rights. n705

In the absence of an agreement to the contrary, the common law imposed no obligation on either landlord or tenant to rebuild improvements that were destroyed by accidental fire or other casualty. n706 But lease provisions requiring one of the parties to rebuild leased improvements are common in long term commercial leases. n707 The typical difficulty concerning such lease provisions is their interpretation. One type of lease provision -- the unlimited general repair covenant -- has been a particular source of trouble. This is a covenant that requires a party to repair the premises, or to keep the premises in repair, that is otherwise unlimited by other provisions in the lease. Some courts have held that general repair covenants are sufficient to impose an obligation to rebuild improvements that have been totally destroyed by casualty. n708 Some courts have held otherwise, reasoning that a covenant to repair does not contemplate the rebuilding of a destroyed, or substantially destroyed, structure. n709

FOOTNOTES:
(n1)Footnote 681. *See, e.g., Lawson v. Taylor Hotels, 411 S.W.2d 669 (Ark. 1967)* ; *Sigal v. Wise, 158 A. 891 (Conn.*

1932) .

(n2)Footnote 682. *See Paradine v. Jane, 82 Eng. Rep. 897 (1648).*

(n3)Footnote 683. *See, e.g., Fowler v. Bott, 6 Mass. 63 (1809)* .

(n4)Footnote 684. *See Harvey v. Weisbaum, 113 P. 656 (Cal. 1911)* .

(n5)Footnote 685. *See id.*

(n6)Footnote 686. *See Baker v. Holtpzaffell, 34 Eng. Rep. 261 (1811).*

(n7)Footnote 687. *See, e.g., Stockwell v. Hunter, 52 Mass. 448 (1846)* ; *Crow Lumber and Bldg. Materials Co. v. Washington County Library Bd., 428 S.W.2d 758 (Mo. Ct. App. 1968)* ; Restatement of Property (Second) § 5.4 Reporter's Note 4 (1977).

(n8)Footnote 688. *See White v. Steele, 33 S.W.2d 224 (Tex. Ct. App. 1930)* .

(n9)Footnote 689. *See Waite v. O'Neil, 76 F. 408 (6th Cir. 1896)* .

(n10)Footnote 690. *See generally* Kristine C. Karnezis, Annotation, *Modern Status of Rule as to Tenant's Rent Liability after Injury to or Destruction of Demised Premises, 99 A.L.R.3d 738 (1980)* .

(n11)Footnote 691. *See* Restatement (Second) of Property ch. 5, Statutory Note 2 (1977).

(n12)Footnote 692. *See id.*

(n13)Footnote 693. *See, e.g., N.Y. Real Prop. Law § 227.*

(n14)Footnote 694. *See, e.g., North Carolina Gen. Stat. § 42* 12 (more than one year's rent).

(n15)Footnote 695. *See, e.g., W. Va. Code. Ann. § 37* 6 28.

(n16)Footnote 696. *See, e.g., Cal. Civ. Code § 1932(2).*

(n17)Footnote 697. *See, e.g., N.J. Rev. Stat. § 46:8* 6; *Wis. Stat. Ann. § 704.07(4)*. Further discussion of the statutes may be found in chapter 43 § 43.06(f).

(n18)Footnote 698. *See Wattles v. South Omaha Ice & Coal Co., 69 N.W. 785 (Neb. 1897)* .

(n19)Footnote 699. *See Albert M. Greenfield & Co. v. Kolea, 380 A.2d 758 (Pa. 1977)* .

(n20)Footnote 700. *See* Restatement (Second) of Property § 5.4 (1977).

(n21)Footnote 701. *See id.* cmt. f.

(n22)Footnote 702. The implied warranty of habitability is discussed in chapter 41. *See* § 41.06.

(n23)Footnote 703. *See, e.g., Standard Indus. v. Alexander Smith, Inc., 133 A.2d 460 (Md. 1957)* ; *Corbett v. Spring Garden Ins. Co., 50 N.E. 282 (N.Y. 1898)* ; *Mawardi v. Purple Potato, Ltd., 590 N.Y.S.2d 132 (N.Y. App. 1992)* ; *Flame v. Oak Lane Shopping Center, Inc., 369 A.2d 1220 (Pa. 1977)* .

(n24)Footnote 704. *See* Uniform Residential Landlord and Tenant Act § 4.106.

(n25)Footnote 705. *See id.* § 1.403.

(n26)Footnote 706. The tenant was obligated to avoid waste, but that obligation did not extend to the restoration of accidentally destroyed improvements. *See* 1 American Law of Property § 3.78 (A. James Casner ed. 1952).

(n27)Footnote 707. *See, e.g., Quinerly v. Dundee Corp., 31 So. 2d 533 (Fla. 1947)* (tenant obligation); *Burnstine v. Margulies, 87 A.2d 37 (N.J. Super. Ct. App. Div. 1952)* (landlord obligation).

(n28)Footnote 708. *See, e.g., Rose v. Freeway Aviation, Inc., 585 P.2d 907 (Ariz. Ct. App. 1978)* (landlord obligated to rebuild); *Chambers v. The North River Line, 102 S.E. 198 (N.C. 1920)* (tenant obligated to rebuild); H.D. Warren, *Landlord's Duty Under Express Covenant to Repair, Rebuild, or Restore, Where Property is Damaged or Destroyed by Fire*, Annotation, *38 A.L.R.2d 682 (1954)* .

(n29)Footnote 709. *See, e.g., Garrett v. Mayor, 216 P.2d 965 (Okla. 1950)* (landlord not obligated to rebuild); *Orr v. Vandygriff, 251 S.W.2d 573 (Tex. Ct. App. 1952)* (tenant not obligated to rebuild); *Cf. Lexington Ins. Co. v. All Regions Chem. Labs, Inc., 647 N.E.2d 399 (Mass. 1995)* (tenant is shielded from contract liability to the landlord for fire loss or damage caused by negligence under a "yield up" lease clause. The clause provided that, at the expiration of the lease, tenants would yield up the leased premises in the same condition and repair as at lease commencement, damage by fire or other casualty excepted).

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CHAPTER 40 LANDLORD RIGHTS AND TENANT DUTIES

5-40 Thompson on Real Property, Thomas Editions § 40.16

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§ 40.16 Illegal Use of Leased Premises.

Kan. Stat. Ann. §§ 58

From the perspective of the landlord, an illegal use of the leased premises is something of a two edged sword. In some circumstances, the tenant's illegal use of the leased premises will enable the landlord to recover possession of the leased premises, something that the landlord may wish to do. On the other hand, the illegal use may enable the tenant to employ the contract doctrine of illegality to avoid lease obligations to the landlord. Issues of lease illegality arise both when the tenant's use is illegal at the outset of the lease and when there is a change in the law that renders an existing tenant use illegal.

§ 40.16(a) Illegal Use at the Time of Leasing.

§ 40.16(a)(1) General Rules.

A conclusion that a lease has been made for an illegal purpose means that the lease is void and unenforceable. n710 The landlord will not be able to require the tenant to pay rent or to comply with other covenants under an illegal lease. n711 The tenant will not be able to sue, on the basis of the illegal lease, to enforce covenants of the landlord, or to retain or reacquire possession of the premises. n712 However, the landlord will be able, as landowner, to recover possession of the premises. n713 The unenforceability of the lease follows from application of the contract doctrine of illegality, rather than from traditional conveyancing concepts.

The effects of lease illegality are fairly clear. But the question remains: What makes a lease illegal? The answer generally involves both use, or proposed use, and intent. In the first place, it should be noted that lease illegality does not follow from a unilateral decision of the tenant to undertake an illegal use on the leased premises, without the knowledge of the landlord. In that situation, the lease will be enforceable. n714 The landlord may be able to recover damages resulting from the illegal use, and to enjoin that use. n715 However, the landlord will normally be unable to terminate the lease based on the tenant's unilateral illegal use unless an applicable power of termination is set forth in the lease or unless a right to terminate is otherwise provided by statute. n716 Some courts have also required, as a predicate to lease termination, that the tenant's illegal use amount to a continuous violation of the law, as opposed to isolated illegal conduct. n717

In contrast, lease illegality will be found when the tenant's proposed use is illegal, and the landlord enters into the lease intending that the premises be put to that use. n718 Of course, the lease will usually not contain language limiting the premises to an illegal use. But the landlord's intent that the premises be so used may be shown by the landlord's participation, at least to some degree, in the illegal activity, n719 or it may be indicated by the landlord's conduct in connection with the making of the lease. n720

Courts are divided over whether the landlord's mere knowledge of the intended illegal use is sufficient to render the lease illegal. Some courts are of the view that such knowledge is sufficient, but other courts take a contrary view, reasoning that mere knowledge is not equivalent to intent, and that the tenant could, in any event, have a change of mind. n721 However, when the tenant's intended use of the premises involves a "heinous" crime, it has generally been held that the landlord's knowledge of the tenant's proposed use is sufficient to render the lease illegal. n722

If the tenant's illegal use is merely "incidental," or if the premises are used for several purposes, some of which are legal, and some of which are not, the illegality doctrine will not apply. n723 A conclusion of lease illegality in these circumstances is thought to impose too great a burden on one or both of the parties to the lease. However, where the illegal use is the primary use intended by the parties, the illegality doctrine will apply. n724

§ 40.16(a)(2) Zoning Violations and Lease Illegality.

Cases in which the intended use violates applicable zoning regulations should be mentioned separately, because they often feature a somewhat different lease illegality analysis. To be sure, some courts have decided zoning violation cases based on the same principles discussed above. n725 However, a number of courts have declined to apply the illegality doctrine in cases involving a use that violates zoning restrictions when the applicable zoning ordinance allows zoning variances to be obtained or allows nonconforming uses to continue. n726

The reasoning of the courts in such cases may be illustrated by reference to the leading case of *Warshawsky v. American Automotive Prods. Co.* n727 There the court said that the circumstance of a tenant who proposes to use leased property for a purpose that is prohibited by a zoning ordinance is analogous to the case of a tenant who proposes to use the premises for a legal activity for which a license is required. In such a case, the court said that the tenant may be presumed to have contemplated that a license would be obtained, and if not, to have assumed the risk of not obtaining it. n728 With respect to the zoning issue before it, the *Warshawsky* court said that if the parties could be presumed to know that the proposed use was contrary to the zoning ordinance, then the only legitimate reason for the tenant's execution of the lease was a belief that a zoning variance could be obtained or that the operation of the premises could otherwise be legal. n729 In light of the foregoing, a tenant who wishes to avoid lease obligations in the event that zoning restrictions prohibit the intended use should include a pertinent termination provision in the lease.

§ 40.16(a)(3) Statutory Prohibitions.

States have enacted a number of statutes that prohibit landowners or occupants from granting or permitting the use of real property for illegal purposes, such as prostitution or gambling. n730 Such statutes typically provide for criminal sanctions. A few of them impose criminal liability on landlords for failing to take steps to regain possession of leased premises when they are being used for an illegal purpose. Some statutes expressly provide that leases entered into for the prohibited purpose are void; others provide for lease termination at the option of the landlord. n731

§ 40.16(b) Supervening Illegality.

The tenant's legal use of the premises may become illegal as a result of a change in the law. In this situation, the issue is not whether the lease was illegal from the outset, but whether the change in the law permits the tenant to avoid lease obligations and to terminate the lease. Most courts are of the view that if a lease restricts the tenant to a particular use of

the premises, and a change in the law prohibits that use, the tenant will be able to terminate. n732 The same result normally follows if the lease restricts the use of the property to multiple purposes, and the principal purpose becomes illegal. n733 However, if only a minor purpose is rendered illegal, the landlord may still enforce the lease. n734 If the lease does not restrict the tenant to a specified use of the premises, the general rule is that the tenant's obligations under the lease are not rendered unenforceable by later restrictions against the intended use. The tenant is thought to be free to make other uses of the premises. n735

The minority view is that a change in the law that renders the tenant's use illegal does not result in lease termination or excuse the tenant from fulfilling lease obligations. Courts that take this position typically reason that the tenant who desires to terminate the lease after the tenant's designated use becomes illegal should have included an appropriate termination provision in the lease; in the absence of such a provision, the tenant, as owner of the leasehold estate, should bear the risk of a change in the law. n736

The Restatement position is closer to the majority than to the minority view. In the absence of an agreement to the contrary, the Restatement would grant the tenant an option to terminate the lease if the tenant's use becomes illegal, without fault of the tenant, after the lease is made. n737 However, the Restatement also permits the landlord to waive a lease provision restricting the tenant to the now illegal use, and thereby avoid lease termination, unless it would be unreasonable "to place on the tenant the burdens of the lease after converting to the other use." n738 The Restatement would also permit the tenant to terminate the lease, even when other uses are permitted under the lease, if the particular use engaged in by the tenant is made illegal, and if it would be unreasonable to place the burden of the lease on the tenant after converting to a changed use. n739

Courts are not entirely consistent, or clear, in articulating reasons for the result under the majority view. Some courts state that the change in the law that makes the tenant's use illegal renders the lease void. n740 Other courts that permit the tenant to terminate the lease state that the tenant's performance has become impossible n741 or that the purpose of the lease has become frustrated. n742 What is clear is that contract principles are at work in connection with the majority view: traditional conveyancing concepts alone would not excuse the tenant from lease obligations because a change in the law impairs the tenant's purpose in leasing the property.

The view of most commentators is that the result is best explained under the rubric of frustration of purpose. n743 The change in the law is not a breach of the landlord's lease obligations that would justify rescission. Nor does a change in the law make performance of lease covenants, such as payment of rent, impossible. However, a change in the law that prevents the tenant from using the property for the only purpose, or the principal purpose, permitted under the lease, could qualify as a frustration of purpose. n744 The doctrine of frustration of purpose is discussed in the next section of this chapter.

Chapter 41 considers the application of the illegality doctrine when the leased premises violate the provisions of an applicable housing code. n745

FOOTNOTES:

(n1)Footnote 710. *See, e.g., Musco v. Torello, 128 A. 645 (Conn. 1891)* ; *Berni v. Boyer, 97 N.W. 121 (Minn. 1903)* ; *Central States Health & Life Co. v. Miracle Hills Ltd. Partnership, 456 N.W.2d 474 (Neb. 1990)* .

(n2)Footnote 711. *See, e.g., Howell v. City of Hamburg Co., 131 P. 130 (Cal. 1913)* ; *Walker v. Southern Trucking Corp., 219 So. 2d 379 (Ala. 1969)* ; *see also Sippin v. Ellam, 588 A.2d 660 (Conn. App. 1991)* (landlord could not recover use and occupancy payments).

(n3)Footnote 712. *See, e.g., Berni v. Boyer, 97 N.W. 121 (Minn. 1903)* .

(n4)Footnote 713. *See, e.g., Lozano v. Brant, 343 P.2d 177 (Cal. Ct. App. 1959)* ; *Berni v. Boyer, 97 N.W. 121*

(Minn. 1903) .

(n5)Footnote 714. *See, e.g., Kessler v. Pearson, 55 S.E. 963 (Ga. 1906)* .

(n6)Footnote 715. *See, e.g., Keating v. Preston, 108 P.2d 479 (Cal. Ct. App. 1940)* .

(n7)Footnote 716. *See, e.g., Morris v. Austraw, 152 S.E.2d 155 (N.C. 1967)* ; *McKenzie v. A.C. Carte, 385 S.W.2d 520 (Tex. Ct. App. 1965)* ; Restatement (Second) of Property § 12.5 reporter's note 2 (1977); *but see Voght v. State, 24 N.E. 680 (Ind. 1890)* (illegal use justifies rescission in equity).

(n8)Footnote 717. *See, e.g.*, 167 *East 86th Street Corp. v. Wienecke, 229 N.Y.S. 473 (N.Y. Mun. Ct. 1928)* ; *see also Gilbert v. Peck, 121 P. 315 (Cal. 1912)* .

(n9)Footnote 718. *See, e.g., Musco v. Torello, 128 A. 645 (Conn. 1925)* .

(n10)Footnote 719. *See Gorman v. Keough, 46 A. 37 (R.I. 1900)* (landlord agreed to provide alcohol for illegal sale); *Rundle Spence Mfg. Co. v. Jakopichek, 229 N.W. 550 (1930)* (receipt of unusually large consideration).

(n11)Footnote 720. *Rosenblath v. Sanders, 91 So. 252 (La. 1922)* .

(n12)Footnote 721. *See, e.g., Ashford v. Mace, 146 S.W. 474 (Ark. 1912)* (knowledge insufficient); *Musco v. Torello, 128 A. 645 (Conn. 1925)* (knowledge is sufficient); *Kessler v. Pearson, 55 S.E. 963 (Ga. 1906)* (knowledge insufficient); *see also* J.E. Macy, Annotation, *Seller's, Bailor's, Lessor's, or Lender's Knowledge of the Other Party's Intention to Put the Property or Money to an Illegal Use as Defense to Action for Purchase Price, Rent, or Loan*, 166 A.L.R. 1353 (1947) .

(n13)Footnote 722. *See, e.g., Ashford v. Mace, 146 S.W. 474 (Ark. 1912)* ; *See* Restatement (Second) of Property § 9.1 Reporter's Note 2 (1977). Courts do not always agree on what crimes will qualify. *Compare Ashford v. Mace, 146 S.W. 474 (Ark. 1912) with Dougherty v. Seymour, 26 P. 823 (Colo. 1891)* .

(n14)Footnote 723. *See, e.g., Warshawsky v. American Automotive Prods. Co., 138 N.E.2d 816 (Ill. Ct. App. 1956)* ; *Smith v. Simon, 224 So. 2d 565 (Miss. 1969)* .

(n15)Footnote 724. *See, e.g., The Stratford, Inc. v. Seattle Brewing & Malting Co., 162 P. 31 (Wash. 1916)* .

(n16)Footnote 725. *See, e.g., Walker v. Southern Trucking Corp., 219 So. 2d 379 (Ala. 1969)* (lease unenforceable); *Central States Health & Life Co. v. Miracle Hills Ltd. Partnership, 456 N.W.2d 474 (Neb. 1990)* (lease unenforceable); Erwin S. Barbre, Annotation, *Rights Between Landlord and Tenant as Affected by Zoning Regulations Restricting Contemplated Use of Premises, 37 A.L.R.3d 1018, 1026 1027 (1971)* .

(n17)Footnote 726. *See, e.g., Entrepreneur, Ltd. v. Yasuna, 498 A.2d 1151 (D.C. Ct. App. 1985)* ; *Schlesinger v. Levine, 212 N.Y.S.2d 904 (Sup. Ct. 1961)* ; *See* Erwin S. Barbre, Annotation, *Rights Between Landlord and Tenant as Affected by Zoning Regulations Restricting Contemplated Use of Premises, 37 A.L.R.3d 1018 (1971)* .

(n18)Footnote 727. *138 N.E.2d 816 (Ill. Ct. App. 1956)* .

(n19)Footnote 728. *138 N.E.2d at 821* . This is the approach taken by most courts when the contemplated use requires a license or permit. *See, e.g., Burke v. San Francisco Breweries, 131 P. 83 (Cal. Ct. App. 1913)* ; *Raner v. Goldberg, 155 N.E. 733 (N.Y. 1927)* ; *See* Sonja A. Soehnel, Annotation, *Inability to Obtain License, Permit, or Charter Required for Tenant's Business as Defense to Enforcement of Lease, 89 A.L.R.3d 329 (1979)* . A minority of cases permit the tenant to terminate if the license or permit is denied. *See, e.g., Lyke v. Pursley, 340 P.2d 709 (Cal. Ct. App. 1959)* .

(n20)Footnote 729. *138 N.E.2d at 818-819* .

(n21)Footnote 730. *See* Restatement (Second) of Property § 9.1, Statutory Note (1977). The Statutory Note catalogs various statutes according to type of illegal conduct, who may be criminally sanctioned, and impact of the illegal conduct on the lease.

(n22)Footnote 731. *See id.*; Restatement (Second) of Property § 12.5, Statutory Note (1977).

(n23)Footnote 732. *See, e.g., Greil Bros. v. Mabson, 60 So. 876 (Ala. 1912)* ; *Brunswick Balke Collender Co. v. Seattle Brewing & Malting Co., 167 P. 58 (Wash. 1917)* ; *see also Heart v. East Tennessee Brewing Co., 113 S.W. 364 (Tenn. 1908)* .

(n24)Footnote 733. *See, e.g., McCullough Realty Co. v. Laemmle Film Serv., 165 N.W. 33 (Iowa 1917)* ; *The Stratford, Inc. v. Seattle Brewing & Malting Co., 162 P. 31 (Wash. 1916)* .

(n25)Footnote 734. *See, e.g., Warm Springs Co. v. Salt Lake City, 165 P. 788 (Utah 1917)* .

(n26)Footnote 735. *See, e.g., Plaza Amusement Co. v. Rothenberg, 65 F.2d 254 (5th Cir. 1933); Jones Shutter Prods., Inc. v. Edmanuel, Inc., 168 So.2d 682 (Fla. Ct. App. 1964)* ; *Conklin v. Silver, 174 N.W. 573 (Iowa 1919)* ; Restatement (Second) of Property § 9.2, Reporter's Note 4 (1977).

(n27)Footnote 736. *See, e.g., J.J. Goodrum Tobacco Co. v. Potts Thompson Liquor Co., 66 S.E. 1081 (Ga. 1910)* ; *Imbeschied v. Lerner, 135 N.E. 219 (Mass. 1922)* .

(n28)Footnote 737. *See* Restatement (Second) § 9.2 (1977).

(n29)Footnote 738. *See* Restatement (Second) of Property § 9.2(2) cmt. b (1977).

(n30)Footnote 739. *See id.*

(n31)Footnote 740. *See, e.g., Industrial Dev. & Land Co. v. Goldschmidt, 206 P. 134 (Cal. Ct. App. 1922)* ; *Kahn v. Wilhelm, 177 S.W. 403 (Ark. 1915)* ; *Heart v. East Tenn. Brewing Co., 113 S.W. 364 (Tenn. 1908)* .

(n32)Footnote 741. *See, e.g., Greil Bros. v. Mabson, 60 So. 876 (Ala. 1912)* .

(n33)Footnote 742. *See, e.g., McCullough Realty Co. v. Laemmle Film Serv., 165 N.W. 33 (Iowa 1917)* .

(n34)Footnote 743. *See, e.g.*, 1 American Law of Property § 3.104 (A. James Casner ed. 1952); 6 Arthur L. Corbin, Corbin on Contracts §§ 1320, 1322 (1962); 18 Samuel Williston and Walter H.E. Jaeger, A Treatise on the Law of Contracts § 1955 (3rd ed. 1978); William B. Stoebuck & Dale A. Whitman, The Law of Property § 6.87 (3d ed. 2000).

(n35)Footnote 744. *See id.*

(n36)Footnote 745. See § 41.05(f).

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CHAPTER 40 LANDLORD RIGHTS AND TENANT DUTIES

5-40 Thompson on Real Property, Thomas Editions § 40.17

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§ 40.17 Casualty Insurance.

Both the landlord and the tenant have insurable property interests in the leased premises, but, in the absence of an agreement in the lease to the contrary, neither has an obligation to obtain casualty insurance with respect to the leased premises. n746 Moreover, absent a covenant in the lease to obtain casualty insurance, neither party may normally share in insurance proceeds paid out under a policy procured by the other. n747 The usual reason given is that the insurance contract is a personal contract of indemnity that does not inure to the benefit of the other party to the lease. n748 However, a few cases have required the insurance proceeds to be shared in proportion to the parties' respective interests if one of the parties to the lease voluntarily obtains a casualty insurance policy whose proceeds are payable jointly to the landlord and the tenant. n749

The foregoing rules will often be inapplicable, however, because modern leases, particularly commercial leases, frequently require a party to obtain casualty insurance on the premises, and specify how insurance proceeds are to be applied. If one party covenants to obtain casualty insurance coverage, the policy proceeds will normally be considered to be for the benefit of both landlord and tenant, whether or not the policy actually states that the proceeds are for the benefit of both parties, and both landlord and tenant will be entitled to share in the insurance proceeds in proportion to the value of their respective interests in the property. n750 To the landlord, this typically means the value of the reversion and the value of improvements that are not to be removed from the property at the conclusion of the lease. n751 A well drafted insurance clause will specify the type and amount of required insurance, to whom the insurance proceeds are to be paid, and how the insurance proceeds are to be applied. The insurance clause should also be coordinated with lease provisions regarding destruction or damage to the leased premises and provisions obligating a party to repair or restore improvements. n752

If the tenant breaches a covenant to obtain insurance, and an uninsured casualty occurs, the landlord is generally able to recover damages from the tenant in the amount of the landlord's loss, up to the amount of the insurance coverage the tenant agreed to provide. n753 In a few cases in which the landlord knew, in advance of the casualty loss, that the tenant had not obtained insurance coverage as required under the lease, the landlord's recovery has been limited to the cost of the insurance. n754 If the tenant breaches the covenant to obtain casualty insurance, the landlord may purchase the insurance coverage and recover the cost of the policy from the tenant. n755 Tenant breach of a lease covenant to obtain insurance may also entitle the landlord to exercise a lease termination right. n756

American jurisdictions are divided on whether a covenant by the tenant to provide insurance is a real covenant, whose burden runs with the land, or a personal covenant, whose burden does not. If the covenant to provide insurance does not run with the land, the landlord would not be able to enforce it against an assignee of the tenant, at least in the absence of an assumption of the covenant by the assignee. A number of courts have held that a "bare covenant" to provide insurance -- that is, one that involves no reciprocal obligation on the part of the landlord to rebuild or repair, or to use the insurance money for that purpose -- is personal and does not run with the land. n757 However, if the lease requires the proceeds of the insurance policy to be used to restore the premises, there is general agreement that the covenant is a real covenant that runs with the land. n758 The insurance covenant has also been held to be a real covenant when the lease provides that the insurance premiums are part of the tenant's rental obligation. n759

FOOTNOTES:

(n1)Footnote 746. *See, e.g., Alexander v. Security First Nat'l Bank, 62 P.2d 735 (Cal. 1936)* ; *Yoshida v. Security Ins. Co., 26 P.2d 1082 (Or. 1933)* .

(n2)Footnote 747. *See, e.g., Alexander v. Security First Nat'l Bank, 62 P.2d 735 (Cal. 1936)* ; *Yoshida v. Security Ins. Co., 26 P.2d 1082 (Or. 1933)* ; *Spires v. Hanover Fire Ins. Co., 70 A.2d 828 (Pa. 1950) , overruled on other grounds, Guy v. Liederbach, 459 A.2d 744 (Pa. 1983)* ; Annotation, *Right of Lessor or Lessee or His Privies to Benefit of Insurance Taken Out by Other or His Privies*, 66 A.L.R. 864 (1930) .

(n3)Footnote 748. *See, e.g., id.*

(n4)Footnote 749. *See, e.g., Hale v. Simmons, 139 S.W.2d 696 (Ark. 1940)* ;*See* C.T. Drechsler, Annotation, *Right to Proceeds, or to Apportionment Thereof, Where Fire Insurance Policy is Issued Jointly to Lessor and Lessee Covering Destruction of or Damage to Building, 8 A.L.R. 2d 1445 (1949)* ; *Cf. Lumber Mut. Ins. Co. v. Zoltek Corp., 647 N.E.2d 395 (Mass. 1995)* (subrogation case; commercial lease agreement required tenant to contribute to payment of casualty insurance premium; landlord advised tenant that because of its contribution to the premium payment it need not carry its own property hazard liability policy; court concludes that landlord and tenant were coinsureds).

(n5)Footnote 750. *See, e.g., Grand Forks Seed Co. v. Northland Greyhound Lines, Inc., 168 F. Supp. 882 (D. N.D. 1959)* ; *Alexander v. Security First Nat'l Bank, 62 P.2d 735 (Cal. 1936)* ; *Cambron v. Carlisle, 435 So. 2d 1216 (Ala. 1983)* ; Annotation, *Right of Lessor or Lessee or His Privies to Benefit of Insurance Taken Out by Other or His Privies*, 66 A.L.R. 864, 866 (1930) .

(n6)Footnote 751. *See, e.g., Hale v. Simmons, 139 S.W.2d 696 (Ark. 1940)* .

(n7)Footnote 752. *See* William B. Stoebuck & Dale A. Whitman, The Law of Property § 6.61 (3d ed. 2000).

(n8)Footnote 753. *See, e.g., St. Paul Fire & Marine Ins. Co. v. Cumiskey, 665 P.2d 223 (Mont. 1983)* ; *Robinson v. Janay, 253 A.2d 816 (N.J. Super. Ct. App. Div. 1969) , cert. denied, 257 A.2d 107 (N.J. 1969)* .

(n9)Footnote 754. *See, e.g., Rodriguez v. Nachamie, 395 N.Y.S.2d 51 (App. Div. 1977)* .

(n10)Footnote 755. *See, e.g., Richmond v. Kelsey, 114 N.E. 319 (Mass. 1916)* ; *Parkway Corp. v. Clark Equipment Co., 401 N.E.2d 879 (Mass. Ct. App. 1980)* .

(n11)Footnote 756. *See, e.g., Select Properties, Ltd. v. Rando, 453 So. 2d 980 (La. Ct. App. 1984)* .

(n12)Footnote 757. *See, e.g., Burton v. Chesapeake Box & Lumber Corp., 57 S.E.2d 904 (Va. 1950)* ; C.R. McCorkle, Annotation, *Covenant of Lessee to Insure as Running with the Land, 18 A.L.R.2d 1051 (1951)* .

(n13)Footnote 758. *See, e.g., Masury v. Southworth, 9 Ohio St. 341 (1859)* ; C.R. McCorkle, Annotation, *Covenant*

of Lessee to Insure as Running with the Land, 18 A.L.R.2d 1051 (1951).

(n14)Footnote 759. *See, e.g., St. Regis Restaurant, Inc. v. Powers, 219 N.Y.S. 684 (App. Div. 1927)* . It should be noted that the landlord in the *St. Regis* case was not seeking to recover for an uninsured casualty loss, but was instead seeking reimbursement for insurance payments. The lease required the tenant to pay for any increase in insurance costs resulting from the tenant's use of the property, and it provided that if the tenant did not do so, the landlord could make the payments, and the amount so paid would be added to unpaid rent. The court concluded that the covenant to pay the increased insurance costs did not itself run with the land, but the covenant to pay the rent did, and, under the language of the lease, this included an amount paid by the landlord for increased costs. *Cf. Burton v. Chesapeake Box & Lumber Corp., 57 S.E.2d 904, 908 (Va. 1950)* ("If the insurance premium constituted a part of the rent payable by defendant, it was liable only for its failure to pay the amount of the premium. An obligation to pay rent did not make the defendant liable for the fire damage.")

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CHAPTER 40 LANDLORD RIGHTS AND TENANT DUTIES

5-40 Thompson on Real Property, Thomas Editions § 40.18

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§ 40.18 Real Estate Taxes and Assessments.

In the absence of a lease agreement to the contrary, a landlord generally has no right to require the tenant to pay real estate taxes or property assessments with respect to the leased premises. Indeed, it is frequently said that the landlord has a duty to pay the taxes. n760 But it seems incorrect to say that the landlord owes a distinct duty to the tenant to pay taxes, unless the lease so provides. The tenant should not be able to sue the landlord for nonpayment of taxes; however, the tenant should be able to claim that the covenant of quiet enjoyment has been breached if the property is lost for nonpayment of taxes, and the tenant's possession is thereby disturbed. n761

Although a landlord normally has no right to require the tenant to pay taxes unless the lease provides otherwise, in some instances an obligation on the part of the tenant to pay taxes may be implied. Courts have generally concluded that the tenant is obligated to pay real estate taxes when the lease is perpetually renewable or the term of the lease is otherwise so long as to be equivalent to a fee simple estate in land. n762 A tenant obligation to pay taxes has also been implied when the tax burden increases due to the construction of improvements that the tenant has the right to remove at the end of the term or that otherwise will have no value to the landlord. n763

Many leases, particularly commercial leases, contain express covenants on the part of the tenant to pay real estate taxes. The landlord's right to require the tenant to pay taxes pursuant to lease covenant will depend on the language of the covenant. It has been held, for example, that a tenant covenant to pay "taxes," does not obligate the tenant to pay special assessments for public improvements. n764 If the tenant breaches a covenant to pay taxes, the landlord may pay the taxes and recover the amount paid from the tenant, or pursue other remedies that are available for breach of the lease. n765 Covenants to pay real estate taxes are generally held to run with the land, and to therefore bind assignees of the tenant. n766

FOOTNOTES:

(n1)Footnote 760. *See, e.g., Wycoff v. Gavriloff Motors, Inc., 107 N.W.2d 820 (Mich. 1961)* ; *City of Norfolk v. J.W. Perry Co., 61 S.E. 867 (Va. 1908)* , *aff'd, 220 U.S. 472 (1911)* ; W.C. Crais, III, Annotation, *Liability as Between Lessor and Lessee, Where Lease Does Not Specify, for Taxes and Assessments, 86 A.L.R.2d 670 (1962)* .

(n2)Footnote 761. *See, e.g., Rustin Co. v. Bowen, 30 A.2d 70 (N.J. 1943)* ; William B. Stoebuck & Dale A.

Whitman, The Law of Property § 6.60 (3d ed. 2000).

(n3)Footnote 762. *See, e.g., Piper v. Town of Meredith, 139 A. 294 (N.H. 1927)* ; Annotation, *Taxation of Land Under Perpetual Lease or Ground Rent*, 55 A.L.R. 154 (1928) .

(n4)Footnote 763. *See, e.g., Wycoff v. Gavriloff Motors, Inc., 107 N.W.2d 820 (Mich. 1961)* ; W.C. Crais, III, Annotation, *Liability as Between Lessor and Lessee, Where Lease Does Not Specify, for Taxes and Assessments, 86 A.L.R.2d 670, 674 (1962)* .

(n5)Footnote 764. *See, e.g., Crestview Bowl, Inc. v. Womer Constr. Co., 592 P.2d 74 (Kan. 1979)* ; *Blake v. Metropolitan Chain Stores, 225 N.W. 587 (Mich. 1929)* ; *see also* John D. Perovich, Annotation, *Landlord and Tenant: Construction of Provision of Lease Providing for Escalation of Rental in Event of Tax Increases, 48 A.L.R.3d 287 (1973)* .

(n6)Footnote 765. *See, e.g., Whitney v. Leighton, 30 N.W.2d 329 (Minn. 1947)* ; *Walker v. Stein, 225 N.Y.S. 209 (App. Div. 1927)* .

(n7)Footnote 766. *See, e.g., Williams v. Safe Deposit & Trust Co., 175 A. 331 (Md. Ct. App. 1934)* ; *Whitney v. Leighton, 30 N.W.2d 329 (Minn. 1947)* .

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CHAPTER 40 LANDLORD RIGHTS AND TENANT DUTIES

5-40 Thompson on Real Property, Thomas Editions § 40.19

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§ 40.19 Selection of Tenants.

§ 40.19(a) Freedom to Select or Reject Tenants.

Landlords were historically free to select or reject tenants for any reason that they chose. n767 This freedom has been said to be analogous to the individual's right not to enter into contracts. n768 It also reflects the landlord's traditional right to control property. n769 In any event, it is clear that landlord freedom with respect to tenant selection is not absolute today.

§ 40.19(b) Prohibitions Against Discrimination in Tenant Selection.

Landlords are prohibited from engaging in discrimination in tenant selection. In some instances, the United States Constitution limits discrimination by landlords. The Kan. Stat. Ann. §§ 58 guarantees equal protection of the laws, and thereby prohibits various forms of discrimination. However, the Haw. Rev. Stat. Ann. §§ 521 applies only when there is state action. n770 While state action will be found if the government is the landlord, as in forms of public housing, n771 it will generally not be found in private leasing arrangements.

The primary prohibitions against landlord discrimination in leasing are statutory. One of the federal statutes that is important in this area, *42 U.S.C. § 1982*, provides that all "citizens of the United States shall have the same right, in every State and Territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold, and convey real and personal property." This legislation, which in its original form was part of the Civil Rights Act of 1866, actually had little impact on discrimination in private housing until the United States Supreme Court held, in the 1968 case of *Jones v. Alfred H. Meyer Co.*, n772 that § 1982 prohibits race discrimination in the public or private sale or rental of property.

The Federal Fair Housing Act, originally enacted in 1968, and subsequently amended, prohibits a number of specific discriminatory housing practices, including leasing practices, based on race, color, religion, national origin, sex, handicap, and familial status. n773 The scope of the Fair Housing Act is in one sense broader than the scope of § 1982, in that it prohibits more than discrimination based on race. However, the scope of the Fair Housing Act is narrower in another sense, in that it is limited to discrimination in housing practices, while § 1982 applies to commercial as well as to residential leasing. Moreover, § 1982 is not subject to some exceptions to coverage, such as an exception for owner occupied dwellings, found in the Fair Housing Act. n774

States and municipalities have also enacted a number of statutes limiting discrimination in housing practices. n775 Depending on the provisions of particular statutes, a landlord who violates prohibitions against discrimination may be subject to administrative proceedings, private litigation, or litigation brought by governmental authorities. n776

Several state statutes have ventured beyond the scope of the Federal Fair Housing Act and have also prohibited landlords from discriminating against prospective tenants on the basis of their marital status. n777 But enforcement of such prohibitions has sometimes been challenged by landlords on constitutional grounds. Several landlords have argued, sometimes successfully, sometimes not, that their right to free exercise of religion was violated, or would be violated, by enforcement of antidiscrimination statutes against them for declining to rent to unmarried couples on religious grounds. The conflict between the landlord's right to free exercise of religion and the requirements of the antidiscrimination statute has been difficult for courts to resolve. n778

The Religious Freedom Restoration Act of 1993 n779 had begun to figure into some cases involving landlord free exercise claims. n780 But the United States Supreme Court invalidated the legislation in 1997. n781

Chapter 43 contains additional information regarding limitations on discriminatory practices by landlords.

§ 40.19(c) Landlord Use of Tenant Screening Services.

Some commercial enterprises, which may be referred to as "tenant screening services," collect the names of tenants who have been defendants in summary possession actions, and sell that information to landlords. n782 Landlords who purchase the information may use it to screen prospective tenants; that is, they may decline to rent to individuals who are listed as defendants in summary possession actions. n783 Such information may be valuable to some landlords, but inaccurate information could be unfairly harmful to some prospective tenants. Concerns about fairness have prompted some states to enact tenant protection legislation with respect to the activities of tenant screening services. n784

FOOTNOTES:

(n1)Footnote 767. *See, e.g., Corrigan v. Buckley, 299 F. 899 (D.C. Cir. 1924) , appeal dismissed, 271 U.S. 323 (1924)* ; *Alsberg v. Lucerne Hotel Co., 92 N.Y.S. 851 (App. Div. 1905)* .

(n2)Footnote 768. *See* Restatement (Second) of Property § 3.1 Introductory Note (1977).

(n3)Footnote 769. *See* § 43.03(a).

(n4)Footnote 770. *See, e.g., Moose Lodge No. 107 v. Irvis, 407 U.S. 163 (1972)* .

(n5)Footnote 771. *See, e.g., Cole v. Housing Auth., 435 F.2d 807 (1st Cir. 1970)* . Federal statutes and regulations impose a number of limitations on tenant selection for public housing by public housing authorities. Those limitations are discussed in Chapter 45.

(n6)Footnote 772. *392 U.S. 409 (1968)* .

(n7)Footnote 773. *42 U.S.C. §§ 3601- 3619. See* § 43.03(b)(1)(C).

(n8)Footnote 774. *See* § 43.03(b)(1)(B).

(n9)Footnote 775. *See* § 43.03(b)(3).

(n10)Footnote 776. *See* §§ 43.03(b)(1)(C), 43.03(b)(2).

(n11)Footnote 777. *See e.g.,* Md. Code Ann. Real Prop. § 8-211; *Cal. Gov't Code§ 12920*; *Colo. Rev. Stat. §*

24-34-502.

(n12)Footnote 778. *See Thomas v. Anchorage Equal Rights Comm'n, 220 F.3d 1134 (9th Cir. 2000)* (lower court ruled that Alaska's antidiscrimination statutes placed a substantial and unjustified burden on the landlords' observation of a central religious belief or practice, and that granting an exception to the landlords did not violate the *establishment clause*; however, the Ninth Circuit concluded that the landlords' claims were not ripe for review); *Swanner v. Anchorage Equal Rights Comm'n, 874 P.2d 274 (Alaska 1994) , cert. denied, 513 U.S. 979 (1994)* (ordinance upheld against free exercise claims under federal and state constitutions); *Smith v. Fair Employment & Hous. Comm'n, 913 P.2d 909 (Cal. 1996)* , cert. denied, *521 U.S. 1129 (1997)* (landlord was charged with violation of discrimination statute and was required to post notices that she had violated the law by refusing to rent to unmarried couples; court rejects the landlord's free exercise claim); *Attorney General v. Desilets, 636 N.E.2d 233 (Mass. 1994)* (state has burden of establishing that its interest in eliminating housing discrimination against cohabiting couples is strong enough to justify the burden placed on landlord's free exercise of religion; case remanded for such a determination); *McCready v. Hoffius, 564 N.W.2d 493 (Mich. Ct. App. 1997), rev'd, 586 N.W.2d 723 (Mich. 1998), vacated in part, 593 N.W.2d 545 (Mich. 1999)* (landlords refused to rent to unmarried couples, claiming that this would violate their religious beliefs; the Michigan Supreme Court ruled that the landlords' conduct violated the civil rights act, and that requiring landlord compliance with the act would not violate the landlords' right of free exercise of religion; subsequently, however, the Michigan Supreme Court vacated the portion of its opinion dealing with free exercise of religion and remanded for further consideration of the issue); *Cooper v. French, 460 N.W.2d 2 (Minn. 1990)* (the expression "marital status" is ambiguous; court concludes that the statute does not protect cohabiting couples; also concludes that landlord is entitled to exemption from the antidiscrimination statute because state failed to meet its burden to show a compelling state interest). *Cf. County of Dane v. Norman, 497 N.W.2d 714 (Wis. 1993)* (landlord's policy of not renting to unmarried people who intend to live together does not violate county antidiscrimination ordinance; landlord's decision is based on conduct, rather than status, of prospective tenants; to the extent the ordinance protects "cohabitants," it is inconsistent with public policy promoting the stability of marriage and family).

(n13)Footnote 779. *42 U.S.C. 2000bb*.

(n14)Footnote 780. *See Swanner v. Anchorage Equal Rights Comm'n, 874 P.2d 274 (Alaska 1994)* , cert. denied, *513 U.S. 979 (1994)* , Smith v. Fair Employment [#38] *Hous. Comm'n, 913 P.2d 909 (Cal. 1996)* , cert. denied, *521 U.S. 1129 (U.S. 1997)* .

(n15)Footnote 781. *See City of Boerne v. Flores, 521 U.S. 507 (1997)* .

(n16)Footnote 782. *See* Gary Williams, Can Government Limit Tenant Blacklisting? *24 SW. U.L. Rev. 1077, at 1079 (1995).*

(n17)Footnote 783. *See* Gary Williams, Can Government Limit Tenant Blacklisting? *24 SW. U.L. Rev. 1077, at 1079-83 (1995).*

(n18)Footnote 784. *See* W. Va. Code Ann. § 37-6-30 (prohibits consumer credit reporting agencies from including information on unlawful detainer actions in their reports, unless the landlord was the prevailing party); *Minn. Stat. Ann. § 504B.241*(requires tenant screening services to make disclosures of file information, to reinvestigate if the completeness or accuracy of information is disputed by the prospective tenant, to delete inaccurate or unverifiable information, and to permit the prospective tenant to explain unlawful detainer reports or disputed items that are not resolved by reinvestigation). Constitutional issues with respect to this type of legislation are discussed in Gary Williams, *Can Government Limit Tenant Blacklisting? 24 SW. U.L. Rev. 1077(1995).*

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CHAPTER 40 LANDLORD RIGHTS AND TENANT DUTIES

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Annotation, Sufficiency of Description of Terms and Conditions of Lease, or Lease Provision, so as to Comply with Statute of Frauds, 12 A.L.R. 6th 123.

Annotation, Surrender and Acceptance of Term as Affecting Right to Recover Rent or on Obligation Given for Rent, 58 A.L.R. 906.

Annotation, Taxation of Land Under Perpetual Lease or Ground Rent, 55 A.L.R. 154.

Annotation, Tenant's Recovery of Damages for Emotional Distress Under Uniform Residential Landlord and Tenant Act, 6 A.L.R. 4TH 528.

Annotation, Tenant's Right, Where Landlord Fails to Make Repairs, to Have Them Made and Set Off Cost Against Rent, 40 A.L.R. 3D 1369.

Annotation, Third Party Defense to Liability Under 107 of Comprehensive Environmental Response, Compensation, and Liability Act (42 USCS 9607), 105 A.L.R. FED. 21.

Annotation, Time Within Which Tenant Must Yield or Abandon Premises After Claimed Constructive Eviction, 91 A.L.R. 2D 638.

Annotation, Time Within Which Tenant's Right to Remove Trade Fixtures Must be Exercised, 109 A.L.R.5th 421, 6 A.L.R. 2D 322.

Annotation, Validity and Construction of Statute or Ordinance Authorizing Withholding or Payment into Escrow of Rent for Period During Which Premises Are Not Properly Maintained by Landlord, 40 A.L.R. 3D 821.

Annotation, Validity and Effect of Acceleration Clause in Lease or Bailment, 58 A.L.R. 300.

Annotation, Validity, Construction, and Effect of Specific Provision of Lease or Statute Relating to Rights and Compensation of Lessee in Event of Condemnation, 96 A.L.R. 2D 1140.

Annotation, Validity of Exculpatory Clause in Lease Exempting Lessor from Liability, 49 A.L.R. 3D 321.

Annotation, Waiver of Statutory Demand For Rent Due or of Notice To Quit Prerequisite of Summary Eviction of Lessee for Nonpayment of RentModern Cases, 31 A.L.R. 4TH 1254.

Annotation, What Constitutes a "Public" Use Affecting Landlord's Liability to Tenant's Invitees for Defects in Leased Premises, 17 A.L.R. 3D 873.

Annotation, What Constitutes Abandonment of Residential or Commercial LeaseModern Cases, 84 A.L.R. 4TH 183.

Annotation, What Constitutes Willfulness or Malice Justifying Landlord's Collection of Statutory Multiple Damages for Tenant's Wrongful Retention of Possession, 7 A.L.R. 4TH 589.

Annotation, Who, as Between Landlord and Tenant, Must Make, or Bear Expense of, Alteration, Improvements, or Repairs Ordered by Public Authorities, 22 A.L.R. 3D 521.

Restatements Restatement (Second) of Property (1977).

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Supp. To CHAPTER 40 LANDLORD RIGHTS AND TENANT DUTIES

5-40 Thompson on Real Property, Thomas Editions Supp. to § 40.03

Supp. to § 40.03 Rent.

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§ 40.03(h) Rent Acceleration Clauses [Go To Main]

Add the following to footnote 65, just after the citation to the Aurora Bus. Park case:

Cummings Properties, LLC v. National Communications Corp., 869 N.E.2d 617 (Mass. 2007) .

Add the following at the end of footnote 69:

But see Cummings Properties, LLC v. National Communications Corp., 869 N.E.2d 617 (Mass. 2007) (Landlord that was awarded possession of the leased premises following tenant default was also entitled to rent acceleration, as liquidated damages. The court did not directly focus on the duplication of remedies issue).

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Supp. to § 40.07 Landlord Rights in Tenant Fixtures.

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§ 40.07(b) Fixtures and Trade Fixtures. [Go To Main]

In the sentence in the main text that begins immediately after the indication of footnote 299, indicate the addition of new footnote 299.1, as follows:

The concept has been applied not only to equipment that the tenant utilizes in the tenant's trade,[299.1] but also ...

Add new footnote 299.1, as follows: n299.1

FOOTNOTES:
(n1)Footnote 299.1. *See, e.g., C.W. 100 Louis Henna, Ltd. v. El Chico Restaurants of Texas, L.P., 295 S.W.3d 748 (Tex. Ct. App. 2009)* (Rooftop HVAC units that had been installed by the tenant on the roof of a restaurant building that the tenant had constructed on the leased premises--which building became the property of the landlord at the end of the lease term - were found to be trade fixtures).

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Supp. to § 40.10 The Holdover Tenant.

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§ 40.10(a) The Landlord's Election [Go To Main]

Add the following to footnote 507, immediately after the citation to the A.H. Fetting case:

Of course, a new tenant whose possession is blocked by a holdover tenant may also have some legal options. *See, e.g., Havana Central NY2 LLC v. Lunney's Pub, Inc., 852 N.Y.S.2d 32 (App. Div. 2007)* (New tenant able to sue holdover tenant for tortious interference with new tenant's contracts rights under the new lease). For additional information regarding the rights of a new tenant in a holdover situation, see Idaho Code § 55- 2715. of this volume, which discusses the landlord's implied covenant to deliver possession of the leased premises to the tenant.

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5-40 Thompson on Real Property, Thomas Editions Supp. to § 40.14

Supp. to § 40.14 Condemnation.

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§ 40.14(d) Effect of Lease Provisions. Ariz. Rev. Stat. Ann. § 33

Add the following to footnote 677, in a new paragraph within that footnote:

In *Metropolitan Airports Commission v. Noble, 763 N.W.2d 639 (Minn. 2009)* , the lease provided for termination upon condemnation. It also provided for allocation of a portion of the award to the tenant for removal of the tenant's stock and fixtures. However, in construing this allocation provision literally in light of the nature of the condemnation award, the court concluded that it did not apply and that the tenant was entitled to no portion of the award.

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Supp. to § 40.16 Illegal Use of Leased Premises.

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§ 40.16 (a) Illegal Use at the Time of Leasing. Md. Ann. Code Real Prop. § 8-208.1(e)

§ 40.16(a)(1) General Rules.

Add the following to footnote 711, at the end:

Caldwell v. American Package Co., Inc., 866 N.Y.S.2d 275 (App. Div. 2008) (Tenants used commercial premises for residential purposes without a residential certificate of occupancy, in violation of a statutory prohibition; the court held that the landlord could not recover the value of use and occupancy; it also held that the tenants could not bring claims for breach of the covenant of quiet enjoyment).

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Supp. To CHAPTER 40 LANDLORD RIGHTS AND TENANT DUTIES

5-40 Thompson on Real Property, Thomas Editions Supp. to § 40.20

Supp. to § 40.20 Bibliography.

Haw. Rev. Stat. § 521- 74

Add the following:

Brescia, Raymond H. "Sheltering Counsel: Towards a Right to a Lawyer in Eviction Proceedings." Touro L. Rev. Vol. 5 (2009) 187.

Ferretti, Daniel J. "Eviction Without Rejection--The Tenant's Bankruptcy Dilemma: *Bankruptcy Code Sections 363(F)* AND *365(H)(1)(A)* and the Divergent Interpretations of Precision Industries, Inc, v. Qualitech Steel SBQ, LLC and In re Haskell." Cumb. L. Rev. Vol. 39 (2009) 707.

Whitehead, Roy, Jr. "Christian Landlords and the *Free Exercise Clause*: An Economic and Philosophical Analysis of Discrimination." 33 Okla. City U. L. Rev. Vol. 33 (2008) 115.

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CHAPTER 41 TENANT RIGHTS AND LANDLORD DUTIES

5-41 Thompson on Real Property, Thomas Editions 41.syn

AUTHOR: N. Gregory Smith G. Frank & Winston Purvis Professor of Law Louisiana State University

§ 41.syn Synopsis to Chapter 41: TENANT RIGHTS AND LANDLORD DUTIES

§ 41.01 Overview of Tenant Rights and Landlord Duties.

Ark. Code Ann. 18Outline of the Chapter.

Ga. Code Ann. §§ 44-7-14Implied Covenants of Landlord Relating to Tenant Possession.

§ 41.03(a) Implied Covenant of the Power to Demise.

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§ 41.03(b)(1) English and American Rules.

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§ 41.03(b)(2)(ii) Damages.

§ 41.03(b)(2)(iii) Additional Remedial Issues.

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§ 41.03(c)(2) Actual Eviction by the Landlord.

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§ 41.03(c)(3)(ii) Requirement that Tenant Vacate the Leased Premises.

§ 41.03(c)(3)(iii) Partial Constructive Eviction.

§ 41.03(c)(3)(iv) Relationship Between Constructive Eviction and the Implied Covenant of Quiet Enjoyment.

§ 41.03(c)(4) Interference by Holders of Paramount Title.

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Md. Ann. Code, Real Property § 8-105Dependency of Covenants in Commercial Leases.

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§ 41.12 Bibliography.

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CHAPTER 41 TENANT RIGHTS AND LANDLORD DUTIES

5-41 Thompson on Real Property, Thomas Editions § 41.01

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§ 41.01 Overview of Tenant Rights and Landlord Duties.

This chapter, which deals with tenant rights and landlord duties, is the counterpart of chapter 40, which deals with landlord rights and tenant duties. The division is admittedly somewhat arbitrary, because landlords and tenants generally have concomitant rights and duties. But the division is also defensible, because there are many areas of landlord-tenant law in which the rights or the duties of either the landlord or the tenant dominate consideration of an issue. That aside, whether one chooses to refer first to one party's rights or another party's duties is often little more than a matter of perspective.

Many of the traditional common law rules relating to landlord-tenant law arose out of the concept that a lease is a conveyance of an interest in real property. The landlord conveyed a present non-freehold estate to the tenant and retained a future estate -- a reversion. Because the tenant had the possessory interest, the landlord was, in general, not required to maintain or repair the leased premises and was, in general, not responsible for injuries to tenants or to others caused by dangerous conditions on the leased premises. Indeed, the landlord was thought to enjoy an immunity from tort liability.

Unless the lease provided otherwise, if the landlord defaulted in the performance of covenants set forth in the lease, the tenant was generally not excused from the obligation to pay rent or from other lease obligations. Under the traditional rules, the obligations of landlord and tenant were generally considered to be independent of each other, in the sense that breach of an obligation by one party did not excuse performance by the other.

In conveying the leasehold estate to the tenant, the landlord was not regarded as warranting that the leased premises would be suitable for the tenant's purpose. Neither was the landlord regarded as having an obligation to maintain the premises for the tenant's benefit. However, tenants were considered to have rights against the landlord under some implied covenants: an implied covenant that the landlord had the power to demise the property; an implied covenant that the landlord would deliver possession of the leased premises to the tenant; and an implied covenant that the tenant's use and enjoyment of the leased premises would not be disturbed by the landlord, persons acting under the landlord's authority, or persons with paramount title. Breach of one of these implied covenants would generally excuse the tenant from performing under the lease.

Over time, tenants were recognized as having other rights as well. For example, court decisions and statutes limited the landlord's ability to engage in self help repossession of the leased premises. And housing codes were enacted that imposed obligations on landlords with respect to the condition of leased urban housing.

The pace of change accelerated rapidly in the 1960s. Many of the modern changes in landlord-tenant law can be attributed to a judicial emphasis on the contractual nature of a lease and to the statutory regulation of matters once left to private agreement or to judicial resolution. Judicial and legislative developments were, in turn, influenced by the changed nature of the modern lease. Unlike the sturdy tenant farmers of former times, many modern residential tenants are not primarily interested in renting land, but are primarily interested in renting safe, urban area apartment units that are adequately served by customary utilities and other services and that are properly maintained by landlords. Courts and legislatures considered some of the traditional landlord-tenant rules to be inappropriate in this setting.

In general, the modern changes have limited the landlord's rights and have increased the landlord's duties, both resulting in the enlargement of tenant rights. As a result of judicial or statutory adoption of the implied warranty of habitability, for example, modern residential landlords generally have significant duties with respect to the condition and ongoing maintenance of leased residential premises. Moreover, breach of those duties entitles the tenant to exercise a variety of remedies, including the withholding of rent. Other changes have also occurred. For example, by statute and by court decision, modern landlords are frequently prohibited from retaliating against tenants who complain to government housing authorities about housing conditions that violate the applicable housing code. And the ancient shield of landlord tort immunity, already subject to a number of exceptions, has been altogether discarded by some courts, at least in the residential landlord-tenant context.

While modern developments have substantially changed the law relating to tenant rights and landlord duties, the changes have not altogether supplanted the traditional rules. Indeed, in the commercial leasing context, many of the traditional rules have continued dominance. Accordingly, a consideration of tenant rights and landlord duties must include both what is old and what is new.

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CHAPTER 41 TENANT RIGHTS AND LANDLORD DUTIES

5-41 Thompson on Real Property, Thomas Editions § 41.02

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§ 41.02 Outline of the Chapter.

Chapter 41 begins with a consideration of tenant rights, and landlord duties, arising out of some implied covenants of the landlord relating to possession of the leased premises. Specifically, § 41.03(a) discusses tenant rights arising under the landlord's implied covenant of the power to demise; § 41.03(b) discusses the landlord's implied covenant to deliver possession; and, § 41.03(c) discusses the implied covenant of quiet enjoyment.

Section 41.04 begins a consideration of rights and duties relating to the condition of the leased premises, both at the inception of the lease and during the lease term. The initial focus is on the traditional caveat emptor rule and its exceptions. It also discusses the traditional view that the landlord has no duty to repair the premises during the term of the lease. Section 41.04 goes on to consider a number of departures from the traditional rules, including those arising under housing codes and fitness and repair legislation.

Consideration of rights and duties relating to the condition of the leased premises continues in § 41.06, which deals with the implied warranty of habitability. The section discusses both judicially adopted and legislatively enacted warranties of habitability.

Rights and duties relating to the condition of the leased premises are also relevant to § 41.07, which discusses the concept, expressed in some court decisions, of dependency of lease covenants.

Section 41.08 discusses prohibitions against retaliatory conduct by landlords. The retaliatory conduct doctrine provides some protection to residential tenants who report building code violations to governmental authorities.

Tenant rights and landlord duties arising under tort law are the focus of § 41.09. The traditional rule of landlord tort immunity is discussed, and various exceptions to, and departures from, the immunity rule are considered. The section also discusses the landlord's duty to protect tenants against criminal acts of third parties, and it considers agreements by which the landlord seeks to be exculpated from tort liability. The section also discusses tenant liability for criminal acts of third parties.

Section 41.10 considers tenant rights arising under the doctrine of frustration of purpose. And § 41.11 includes a brief

discussion of environmental obligations.

A bibliography is included at the end of the chapter.

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CHAPTER 41 TENANT RIGHTS AND LANDLORD DUTIES

5-41 Thompson on Real Property, Thomas Editions § 41.03

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§ 41.03 Implied Covenants of Landlord Relating to Tenant Possession.

[Go To Supp]

The most fundamental rights of the tenant relate to possession of the leased premises. If the tenant is granted no right to possession, there is no lease. n1 There are three implied covenants by the landlord relating to tenant possession: the implied covenant of the power to demise; the implied covenant to deliver possession; and the implied covenant of quiet enjoyment. Each of these implied covenants is considered below.

§ 41.03(a) Implied Covenant of the Power to Demise.

The tenant will not be legally entitled to possess the leased premises under a lease unless the landlord has an interest in the property sufficient to enable the landlord to enter into the lease. A lease may contain an express warranty that the landlord has title; if it does, no such warranty will be implied. n2 In the absence of an express warranty, however, a covenant, or warranty, that the landlord has the legal power to demise the premises may be implied.

An implied covenant of title by the landlord has been recognized from at least the 15th century. This implied covenant, like the covenant of quiet enjoyment, discussed below, appears to have been derived from an old common law rule that there could be an implied warranty of title in a feoffment for an estate of freehold. n3 The old rule implied a warranty of title from the use of particular words, such as "demise" and "grant." n4 If such words are used in a modern lease, the law will also imply a covenant that the landlord has the power to demise the leased premises. n5 There is some authority to the effect that a landlord's covenant of title will not be implied without the use of such words in the lease n6 but it has also been indicated that the warranty will be implied from the conveyance itself. n7

The Restatement rejects any requirement that the lease contain particular words in support of a landlord's title covenant. Its position is that, unless the parties agree otherwise, a lease is subject to "an implied agreement" that the tenant does not have to begin the tenancy if there is outstanding a paramount title that could prevent the tenant from enjoying the contemplated use of the leased premises. n8

There is little authority dealing with breach of the landlord's covenant of the power to demise. The likely reason is the availability of other actions to the tenant in circumstances giving rise to a breach. n9 Thus, if the tenant is unable to

obtain possession of the premises, the tenant might bring an action for breach of the landlord's implied covenant to deliver possession. If the tenant takes possession of the premises, but is thereafter evicted under a paramount title, the tenant might bring an action for breach of implied covenant of quiet enjoyment. n10

There is some authority affirming the tenant's ability to cancel the lease and to seek damages from the landlord if the implied covenant of the power to demise is breached, and if the tenant does not take possession. n11 However, if, notwithstanding the landlord's breach, the tenant is able to take possession without suffering eviction, the tenant's damages for breach of the implied covenant will be nominal. n12

§ 41.03(b) Implied Covenant to Deliver Possession.

The overwhelming weight of authority recognizes that every lease contains an implied covenant by the landlord to deliver possession of the leased premises to the tenant at the time occupancy is to begin. n13 At a minimum, the landlord covenants to provide legal possession to the tenant. That is, the landlord covenants that the landlord will not prevent the tenant from taking possession of the leased premises, and warrants that there is no third party with paramount title that will prevent the tenant from taking possession. n14

American courts are divided over whether the landlord also impliedly covenants to provide actual physical possession of the premises. Stated another way, courts are divided over whether the landlord impliedly warrants that there will be no third person wrongfully occupying the leased premises at the time the new tenant has the legal right to take possession. The issue typically arises when a new tenant is unable to take actual possession of the leased premises at the outset of the lease because a prior tenant is wrongfully holding over. Courts have fashioned two different rules regarding the extent of the landlord's obligation when a third person is in wrongful possession.

§ 41.03(b)(1) English and American Rules.

The first rule was developed by English courts and subsequently adopted by many American jurisdictions. The English rule recognizes an implied covenant on the part of the landlord that the leased premises will be physically open to entry by the tenant at the beginning of the lease. Thus, if a holdover tenant interferes with the ability of a new tenant to obtain possession, then the landlord has the obligation to remove the holdover tenant. The English rule applies at the beginning of the lease -- the implied covenant to deliver possession to the tenant does not extend beyond the day when the tenant's term begins. Accordingly, if a trespasser interferes with the tenant's possession after the first day of the lease term, the tenant's remedy is against the trespasser, not against the landlord. n15

The second rule is known as the American rule. Under the American rule, the landlord does not impliedly covenant that the incoming tenant will receive actual possession of the premises; the landlord covenants only that the tenant will receive legal possession. If a holdover tenant wrongfully interferes with possession by the incoming tenant, the landlord is not obligated to resolve the problem, and the claim of the incoming tenant is against the wrongful occupier, not against the landlord. n16

Substantial support for both positions exists, though it appears that the English rule has been followed by a majority of American jurisdictions that have considered the question. n17 The Restatement adopts the English rule, stating that the landlord breaches its obligations to the new tenant "if a third person is improperly in possession of the leased property on the date the tenant is entitled to possession and the landlord does not act promptly to remove the person and does not in fact remove him within a reasonable period of time." The Restatement also indicates that the parties can agree that the landlord has no obligation to remove the third person. n18 The Uniform Residential Landlord and Tenant Act may be construed to adopt the English rule, but there is a difference of opinion on the issue. n19 It provides that the landlord "shall deliver possession" to the tenant at the beginning of the lease term. It permits the landlord to bring an action for possession against any person who is then wrongfully in possession. The Uniform Act also permits the tenant to obtain possession from the landlord or from any person wrongfully in possession. n20

The English rule has been principally justified on grounds of fairness and tenant expectations. Thus, it has been said that: 1) the tenant entering into a lease expects possession, not the mere "chance of a lawsuit"; n21 2) as between the landlord and the new tenant, the landlord is in a better position to know whether a tenant in possession intends to hold over; n22 and 3) because an action to expel the holdover tenant would likely have to be supported by testimony by the landlord as to the facts relating to the wrongful nature of the occupancy, the landlord instead of the new tenant should be required to bring the action for possession. n23

Several justifications have been offered in support of the American rule as well. It has been said that: 1) the incoming tenant has received a conveyance of land, and the right to possess and control the premises, and should therefore bear the responsibility for dealing with trespassers; 2) there is no substantial reason to distinguish (as does the English rule) a trespass on the first day of the lease term from a trespass on a later day of the term; and 3) the landlord should not be required to protect the tenant against a trespass by a third party absent an express covenant to do so. n24 The availability of a summary possession action may also influence the court's decision about whether to follow the English rule or the American rule. If the language of the summary possession statute permits only the incoming tenant, as the party entitled to possession, to bring the action, the American rule should be followed. n25

§ 41.03(b)(2) Consequences of Breach.

As discussed above, the scope of the landlord's implied covenant to deliver possession depends on which rule -- English or American -- has been adopted in a given jurisdiction. However, regardless of the scope of the implied covenant, a number of consequences flow from its breach. The actual consequences of the landlord's breach of the implied covenant largely depend upon the objectives of the tenant.

§ 41.03(b)(2)(i) Lease Avoidance and Lease Affirmation.

If the landlord breaches the implied covenant of possession, the incoming tenant is entitled to repudiate the lease, n26 to assert the landlord's breach as a defense to the landlord's action for rent, n27 and to sue the landlord for damages. n28 Although the issue of lease termination does not frequently arise, at least explicitly, some authorities state that the tenant is entitled to terminate the lease. n29

Alternatively, an incoming tenant who wishes to affirm the lease may bring an action for possession of the leased premises and for damages. A possessory action will be available when breach of the implied covenant results from wrongful possession by the landlord. n30 The incoming tenant may also be able to bring a possessory action, in an English rule jurisdiction, when the covenant is breached due to wrongful possession of the premises by a third party. In some English rule jurisdictions, there is authority for the proposition that only the landlord may seek possession against a wrongfully occupying third party, n31 but that is not the universal rule. n32 Of course, the incoming tenant will not be able to assert a possessory claim against a third party who is *rightfully* in possession of the leased premises; in that situation, the incoming tenant's remedy will be against the landlord.

An incoming tenant who affirms the lease will not be obligated to pay rent to the landlord for the period during which possession was denied. n33 An exception has been recognized by some courts when the incoming tenant is prevented from occupying only a portion of the leased premises, and takes possession of the remainder. In that situation, it has been held that rent will be equitably abated. n34 However, it has been held that when the landlord is the party holding the other portion of the premises, the landlord may not recover rent or occupancy payments from a tenant who occupies the remainder. n35

An incoming tenant who decides to affirm the lease may also be able to exercise another right when, in an English rule jurisdiction, the implied covenant is breached due to wrongful occupancy by a holdover tenant. This is a right to act in the capacity of a landlord, and to bind the holdover tenant to a new lease. n36 Exercise of this right would not enable

the incoming tenant to obtain immediate possession of the leased premises, but it would entitle the incoming tenant to collect rent, and to assume the status of a landlord with respect to the party in possession. The Restatement recognizes this right, reasoning that if the power to bind a holdover tenant were not transferred from the landlord to the incoming tenant, the landlord could defeat the rights of the incoming tenant by electing to hold the original tenant over for another term. n37

§ 41.03(b)(2)(ii) Damages.

It is well established that the incoming tenant is entitled to damages for breach of the landlord's implied covenant of possession. Absent a valid agreement for liquidated damages, n38 an incoming tenant who does not wish to affirm the lease is entitled to recover general damages measured by the difference, if any, between the rental value of the leased premises and the agreed rental amount over the term of the lease, discounted to present value. n39 The tenant may also recover special damages resulting from the breach, depending upon what the tenant is able to plead and prove. n40 Such a recovery might, for example, include damages for relocation costs or lost profits. n41 However, recovery of lost profits has been denied when they are considered to be speculative. n42 The Uniform Residential Landlord and Tenant Act provides that if the landlord's failure to deliver possession is "willful and not in good faith," the tenant may recover an amount equal to the greater of three months' periodic rent or threefold the actual damages sustained, plus reasonable attorney's fees. n43

An incoming tenant who decides to affirm the lease may be entitled to recover damages from the landlord for costs incurred in renting temporary alternative premises and in bringing an action for possession. n44 However, the incoming tenant should not be able both to recover the cost of temporary quarters and to receive a rent abatement, because that would amount to a double recovery. n45 In some cases, the incoming tenant has been able to recover lost profits for the period during which possession was delayed. n46

§ 41.03(b)(2)(iii) Additional Remedial Issues.

There is some authority for the proposition that the incoming tenant's rights will be affected by knowledge, at the time the incoming tenant signs the lease, that the prior tenant is likely to remain in wrongful possession of the leased premises after lease expiration. One court in an English Rule jurisdiction suggested that such knowledge would be sufficient to vitiate the landlord's implied duty to provide actual possession. n47 Another court concluded that such knowledge would prevent the incoming tenant from recovering special damages from the landlord. n48 The Restatement view is that if incoming tenant knew, at the time of lease execution, of "the impending improper possession," the landlord's duty to provide actual possession will not be breached until the landlord has been given "whatever period of time is usually required for the removal of the possessor under the actions locally available to the landlord." n49

In an American rule jurisdiction, there is no breach of the implied covenant of possession when a wrongfully occupying third party prevents the incoming tenant from obtaining possession at the beginning of the term. Accordingly, the tenant's recourse will be to bring an action against the third party trespasser. n50 Because third party occupancy does not breach the implied covenant, the incoming tenant will be obligated to pay rent to the landlord notwithstanding the inability to take possession. n51 However, it has been observed that some courts have contrived to avoid this result. n52

§ 41.03(b)(3) Comparison with the Implied Covenant of Quiet Enjoyment.

Some courts have stated that the landlord's obligation to provide possession to the new tenant arises under the covenant of quiet enjoyment -- a covenant that is discussed in the following section of this chapter. n53 In some cases, it is not clear whether the court considers the landlord's obligation to provide possession to the tenant to be distinct from the implied covenant of quiet enjoyment. n54 However, the better view is that the covenants are distinct.

The implied covenant of quiet enjoyment is an implied covenant on the part of the landlord that the tenant's possession of the leased premises will not be disturbed by the landlord, by someone acting under the landlord's authority, or by a holder of paramount title to the property. n55 Unlike the implied covenant of possession, the implied covenant of quiet enjoyment is usually breached when a tenant in possession of the leased premises is actually or constructively evicted from the leased premises. Moreover, the general rule is that the covenant of quiet enjoyment will not be breached as a result of the independent acts of third parties -- so called "strangers to title." n56 Under the English rule, however, the landlord will be in breach of the implied covenant of possession if the incoming tenant is denied actual possession by an independent third party who is in wrongful occupancy at the beginning of the lease term. n57 Accordingly, the implied covenant of possession should be regarded as a covenant that is distinct from the implied covenant of quiet enjoyment.

§ 41.03(c) Implied Covenant of Quiet Enjoyment.

§ 41.03(c)(1) Origin and Nature of the Implied Covenant.

As early as the 15th century, the common law recognized an implied covenant of quiet enjoyment in a lease for a term of years. n58 It is thought that the implied covenant of quiet enjoyment was derived from an older warranty for quiet enjoyment and title associated with a feoffment for an estate of freehold. The existence of this older warranty was dependent upon the particular words used, n59 and some English authorities indicated that the existence of the implied covenant of quiet enjoyment in a lease also depended on the inclusion of particular words, such as "demise" or "grant" in the lease. However, it has been said that the better view of the English precedents, and the view "most in accordance with historical fact," is that the creation of the landlord-tenant relationship, not the words used, gave rise to the implied covenant of quiet enjoyment. n60

The implied covenant of quiet enjoyment concerns the tenant's possession of the leased premises. It is a covenant and warranty that the landlord, and individuals claiming under or through the landlord, will not wrongfully disturb the possession of the tenant, and that the tenant's possession will not be disturbed by individuals with paramount title to the property. n61 The covenant may be breached when the tenant is actually evicted from the leased premises; however, as discussed below, it may also be breached by conduct that falls short of actual eviction. Breach of the implied covenant of quiet enjoyment exposes the landlord to a variety of potential consequences, including suspension of the tenant's obligation to pay rent and liability for damages.

Although some American cases have expressed the view that the existence of the implied covenant of quiet enjoyment depends upon the use of particular words in the lease, n62 the rule in nearly all jurisdictions today is that, in the absence of a lease provision to the contrary, n63 a covenant of quiet enjoyment will be implied from the existence of the landlord-tenant relationship itself. n64 Of course, a covenant of quiet enjoyment will not be implied when the lease contains an express covenant of quiet enjoyment. n65 The parties may provide for an express covenant that is more or less extensive than the implied covenant of quiet enjoyment. n66 It has also been held that the parties may include a provision in the lease that conditions the operation of an express covenant of quiet enjoyment upon the tenant's own performance of lease obligations. n67

§ 41.03(c)(2) Actual Eviction by the Landlord.

The landlord will be in breach of the implied covenant of quiet enjoyment if the landlord, or someone for whose acts the landlord is responsible, wrongfully ousts the tenant from the leased premises. n68 The cases refer to this conduct, which can take the form of a physical expulsion or a physical exclusion of the tenant from the leased premises, as an actual eviction. n69 Particular acts by the landlord that have been found to be sufficient to constitute actual eviction of a tenant have included changing the locks on the leased premises, n70 refusing to permit the tenant to enter a building in which space had been leased, n71 padlocking the entry to the leased premises, n72 and taking possession of the leased premises with threats of violence against the tenant or members of the tenant's family if they attempt to re-enter. n73

The cases also recognize that the landlord's eviction efforts may deprive the tenant of only a portion of the leased premises, leaving the tenant in possession of the remainder. If the landlord deprives the tenant of a significant portion of the leased premises, the landlord's conduct will generally be regarded as constituting a partial actual eviction, and a breach of the implied covenant of quiet enjoyment. n74

§ 41.03(c)(3) Constructive Eviction by the Landlord.

The earliest cases in which courts implied a covenant of quiet enjoyment were cases in which the tenant was physically dispossessed from the land. However, courts later recognized that some acts of the landlord, while not depriving the tenant of actual physical possession, could prevent the tenant from obtaining the beneficial use of the leased premises. Accordingly, the doctrine of constructive eviction was developed to provide the tenant with the same remedies that were available in the case of an actual physical eviction. n75

The earliest constructive eviction case appears to have been *Dyett v. Pendleton*, n76 a case arising out of New York. At least that is the case in which the term "constructive eviction" seems to have been coined. n77 However, some English courts had earlier indicated a willingness to relax the requirement that the tenant be actually ousted from the premises in order to obtain a suspension of the rent. n78 In one late Eighteenth Century case, for example, the court suggested that a tenant whose landlord had pulled down the roof and ceiling of a rented house might have been able to obtain a suspension of rent by pleading an eviction. n79

A constructive eviction arises not because the tenant is physically ousted from the leased premises, but because the wrongful acts of the landlord, or individuals acting under the landlord's authority, substantially interfere with the tenant's use and enjoyment of the leased premises. n80 To succeed on a constructive eviction claim, a tenant must show that there has been some wrongful act or omission by the landlord, that the landlord's wrongful act or omission resulted in a substantial interference with the tenant's use and enjoyment of the leased premises, and that, in consequence thereof, the tenant abandoned possession of the leased premises within a reasonable time. n81

§ 41.03(c)(3)(i) Landlord's Wrongful Act or Omission.

A constructive eviction claim must be supported by a showing that some wrongful act or omission by the landlord resulted in a substantial interference with the tenant's use and enjoyment of the leased premises. Many cases say that the landlord's interference must be of a "grave and permanent character." n82 But literal permanency is not required. Although a single, non-continuing interference would not support a constructive eviction claim, either a continuous or a recurring interference could do so. n83 The severity of the interference must; at least in theory, be enough to make the premises "untenantable" -- meaning that the premises are unfit for the purpose for which they are leased. n84 A minor inconvenience to the tenant will not suffice. n85

A wide variety of wrongful acts and omissions by landlords have been found to be sufficient to support constructive eviction claims. These have included repeated trespasses, n86 obstructing an access-way, n87 repeated harassment of tenant customers, n88 making declaration of default and making repeated unreasonable demands, n89 permitting a nuisance to continue on parts of the premises within the landlord's control, n90 and engaging in construction activity that deprives the tenant of the full use of the leased premises. n91

A constructive eviction claim based on a wrongful omission by the landlord depends, of course, on the existence of a landlord's duty to perform. Most of the cases in which landlord omissions have been legally sufficient to support claims of constructive eviction have involved failure to make repairs or to provide services promised under the lease. n92 But constructive eviction claims have also been based on the landlord's failure to perform other obligations relating to the leased premises. Thus, courts have permitted constructive eviction claims to be based on the landlord's failure to make repairs or alterations required by government authorities, n93 to comply with statutory obligations, n94 or to comply with other judicially recognized duties regarding the condition of the leased premises. n95

Residential tenants have sometimes attempted to base constructive eviction claims on the landlord's failure to correct conditions that render the leased premises uninhabitable. n96 Such a claim may be successful when the condition results from breach of a duty by the landlord. Even if there is no express lease provision that is violated by the uninhabitability of the premises, a constructive eviction claim would seem to be readily available in a jurisdiction that recognizes the implied warranty of habitability. n97 However, if the landlord's omission gives rise to a breach of the implied warranty of habitability, the tenant would probably prefer to assert that breach directly instead of utilizing a constructive eviction theory, because the tenant would not have to abandon the leased premises to rely on the habitability warranty. n98

Most of the constructive eviction cases involving breach of a lease obligation by the landlord are concerned with the physical condition of the leased premises. In some instances, however, successful constructive eviction claims have been based on the landlord's breach of a covenant not to rent nearby premises to an enterprise in business competition with the tenant. n99 The Restatement would also permit such a result. It adopts a "dependence of obligations doctrine" with respect to promises of the landlord, and would allow the tenant to, among other options, terminate the lease and recover damages if the landlord fails to perform a lease covenant, and, in consequence of that failure, the tenant is deprived of "a significant inducement to the making of the lease." n100

It is frequently said that the landlord must have intended to deprive the tenant of the use and enjoyment of the leased premises in order for a constructive eviction to arise. n101 However, it is clear that the landlord will be held to have intended the natural consequences of the landlord's acts and omissions. n102 To the extent that intent is required, it will generally be implied from the conduct of the landlord. n103

§ 41.03(c)(3)(ii) Requirement that Tenant Vacate the Leased Premises.

A tenant who wishes to rely on the doctrine of constructive eviction must vacate the leased premises within a reasonable time after the occurrence of the events constituting the constructive eviction, or the constructive eviction claim will be lost. n104 What constitutes a reasonable time generally depends on the facts of the case. However, courts have articulated a few standards of general applicability. A tenant cannot claim a constructive eviction if the lease term expires before the tenant vacates the premises. n105 Nor can a tenant assert constructive eviction as a defense to a landlord's claim for rent that comes due before the tenant vacates the premises. n106 It has also been held that the tenant loses the right to rely on the constructive eviction doctrine once the interference with use and enjoyment has ceased. n107

In most cases, tenant abandonment has been considered to be within a reasonable time if it occurs within a month after the occurrence of the events constituting the constructive eviction. n108 Whether the tenant has actually vacated within a reasonable time may be affected by a number of factors, including the tenant's physical condition, the difficulty of finding another rental location, and delay caused by reliance on the landlord's promise to make repairs. n109

The tenant is normally required to give the landlord notice of the interference with use and enjoyment and to provide the landlord with a reasonable opportunity to remedy the situation before vacating the premises. n110 However, notice has not been required when the landlord already has knowledge of the interference. n111 If the landlord actually does remedy the interference before the tenant vacates, the tenant's right to rely on the constructive eviction doctrine will be lost. n112

The requirement that the tenant vacate the premises can present significant difficulties for a tenant. If the tenant vacates, and if a court later concludes that the landlord's interference was not substantial enough to justify the vacation, or that the tenant did not provide the landlord with required notice of the interference before vacating the premises, or that the tenant did not vacate the premises within a reasonable time, the tenant's constructive eviction claim will fail. If the constructive eviction claim fails, and if no other valid claim, such as one for breach of an implied warranty of habitability, prevents such a result, the tenant will be liable for the rent that accrued while the tenant was not in

possession. If the tenant has entered into another lease following abandonment of the premises, the tenant will then be liable for rent to two landlords.

The risks to the tenant would be reduced, of course, if the tenant could remain in possession of the leased premises and pursue a claim based on breach of the implied covenant of quiet enjoyment. However, a number of courts have stated that a tenant cannot maintain an action for breach of the covenant of quiet enjoyment if the tenant remains in possession of the leased premises. n113 This view does not distinguish a breach of the implied covenant of quiet enjoyment from one of the remedies that a tenant might utilize for its breach. It should be possible to consider the implied covenant of quiet enjoyment to be breached by wrongful conduct of the landlord that substantially interferes with the tenant's use and enjoyment, regardless of whether the tenant vacates the premises. Whether the tenant wishes to engage the remedy of rent suspension, by vacating the premises pursuant to the doctrine of constructive eviction, can be considered separately. n114

In fact, a number of courts have permitted tenants to sue their landlords for damages for breach of the implied covenant of quiet enjoyment without requiring the tenants to vacate the premises. n115 Some courts have also permitted tenants in possession to seek equitable relief by suing to enjoin conduct in breach of the implied covenant of quiet enjoyment. n116

A few courts have permitted the tenant to remain in possession of the leased premises and to sue for a declaration that the lease is a nullity as a result of landlord conduct that violates the covenant of quiet enjoyment. n117 Following such a declaration, the tenant could abandon the premises without risk of rental liability for the period after abandonment. Even where available, however, this approach would probably not be very attractive to a short term residential tenant, who would have to bring a relatively expensive and time consuming lawsuit to test the propriety of rent abatement or lease termination. But the approach might be attractive to a longer term commercial tenant who desires to avoid the obligation to pay rent, and who would otherwise be faced with the risk of having to pay relatively expensive rental payments for the period of abandonment if a court should determine, after the fact, that the tenant were not entitled to exercise constructive eviction remedies.

Statutes in some jurisdictions may permit a tenant who remains on the premises to recover damages for landlord conduct that might otherwise support a constructive eviction claim. n118

§ 41.03(c)(3)(iii) Partial Constructive Eviction.

A few courts, mostly in New York, have permitted tenants to rely on a partial constructive eviction theory by abandoning a portion of the leased premises. n119 There is some disagreement among the reported decisions as to whether the effect of a partial constructive eviction is to abate all or only a portion of the tenant's rent during the period of the partial constructive eviction. n120

§ 41.03(c)(3)(iv) Relationship Between Constructive Eviction and the Implied Covenant of Quiet Enjoyment.

There has been some confusion about the relationship between constructive eviction and the implied covenant of quiet enjoyment. The confusion is reflected in occasional statements to the effect that a tenant who remains in possession of the leased premises cannot maintain an action for breach of the covenant of quiet enjoyment. n121 Statements like these fail to distinguish between the implied covenant of quiet enjoyment and a remedy that may be available for its breach.

A breach of the covenant of quiet enjoyment results from some act or omission of the landlord. A constructive eviction involves a response by the tenant -- vacation of the leased premises. Where applicable, the constructive eviction doctrine permits the tenant to vacate the premises and to avoid liability for later-accruing rent.

"It is probably true," wrote one commentator, "that every constructive eviction is preceded by a breach of the covenant

of quiet enjoyment, but ... every breach of covenant of quiet enjoyment does not lead to a constructive eviction." n122 As discussed in 40.22(c)(3)(ii), a number of courts have recognized the distinction and have concluded that a tenant may sue for damages or injunctive relief, n123 without abandoning the leased premises, when the landlord has breached the covenant of quiet enjoyment.

§ 41.03(c)(4) Interference by Holders of Paramount Title.

From at least the time of Henry VI, the implied covenant of quiet enjoyment was generally thought to include a warranty that the tenant's possession would not be disturbed by persons claiming the land by title paramount to that of the landlord. n124 The idea was that if the tenant's possession were disturbed by a wrongdoer, the tenant could bring an action against the wrongdoer; however, if the tenant's possession were disturbed by a someone with title paramount to that of the landlord, the tenant had no remedy of ejectment, and could therefore sue the landlord for breach of the implied covenant. n125 Although English courts later took the contrary view that the implied covenant applied only to acts of the landlord, or those claiming under the landlord, n126 it is well-established in American law that the implied covenant protects the tenant's possession against holders of paramount title.

The Restatement provides a useful definition of "paramount title." It states:

> Except to the extent an applicable recording law provides otherwise, a legal interest in the leased property held by a third party at the time the lease is made, and not terminable at the will of the landlord or by the time the tenant is entitled to possession, is paramount to the interest of the landlord, and unless the third party agrees otherwise, is an interest paramount to that of the tenant. n127

Examples of paramount interests in third parties include a previously existing remainder, where the landlord owns a life estate; a power of termination, where the landlord owns a fee simple on condition subsequent; a reversion, where the landlord owns a life estate or a sublease; the interest of a mortgagee, where the landlord has encumbered the property with a mortgage, and the leasehold interest of a prior tenant whose lease term has not ended. n128

The mere existence of a paramount title does not breach the implied covenant of quiet enjoyment. If there is to be a breach, the holder of paramount title must also disturb the tenant's possession. n129 The majority of the cases indicate that the covenant is breached only when the interference by the holder of paramount title results in dispossession of the tenant. n130 Some cases, however, have indicated that the implied covenant of quiet enjoyment may be breached without an actual dispossession of the tenant if the paramount holder asserts the paramount interest and the tenant attorns to the paramount holder. n131 The theory seems to be that there has been an ouster under the landlord's old title and a resumption of possession under the new title. n132

Based on the foregoing, it would seem that the covenant of quiet enjoyment would be breached in the case of a life estate when the landlord life tenant dies before the designated end of the tenant's lease, and the holder of the remainder or the reversion takes possession of the property. There is some English authority to the contrary, based on the reasoning that the implied covenant is an incident of the landlord-tenant relationship, and that it ends upon the death of the landlord. n133 This reasoning has been described as questionable, on the ground that the covenant is also implied from the lease itself. n134 However, more recent cases permit the tenant to sue for breach of the covenant of quiet enjoyment in this situation. n135

The paramount title issue has been considered with some frequency in connection with mortgages. The relevant situation is one in which the leased property is subject to a mortgage that is prior to the lease. If the landlord mortgagor defaults on the mortgage obligations, the mortgagee will have the right to initiate foreclosure proceedings. Mere initiation of foreclosure proceedings by the mortgagee does not result in breach of the covenant of quiet enjoyment. However, a breach of the covenant of quiet enjoyment would occur if the tenant were to be dispossessed as a result of the foreclosure. n136 It should be noted that the majority rule is that if the tenant on a junior lease is not joined in the

foreclosure action, the tenant's interest is unaffected by the foreclosure. n137

A taking of all or a portion of the leased property by the government under an eminent domain proceeding does not breach the implied covenant of quiet enjoyment. n138 Some courts have reasoned that the tenant has adequate remedy against the condemning authority, or that the impairment to the tenant's use and enjoyment does not result from an act of the landlord. n139 However, it seems sufficient to say that the interference with the tenant's possession does not result from any defect in the landlord's title, and cannot be prevented by the landlord. n140

In contrast, a breach of the covenant of quiet enjoyment may be found if a leased building is demolished on account of non compliance with municipal regulations. n141 In these instances, some fault may be attributed to the landlord. But the cases are not uniform on the issue of breach of the implied covenant. n142

If the implied covenant of quiet enjoyment is breached as a result of the actions of a holder of paramount title, the tenant's remedies will be against the landlord, rather than against the holder of paramount title.

§ 41.03(c)(5) Interference by Strangers to Title.

Although the landlord's implied covenant of quiet enjoyment may be breached when the tenant's possession is disturbed by a holder of paramount title, the general rule is that the covenant is not breached when possession is disturbed by a third party who is a stranger to title. n143 In this situation, the tenant will normally be required to proceed directly against the third party.

There are exceptions to this general rule. If the landlord expressly or impliedly authorizes conduct by a third party that substantially interferes with a tenant's use and enjoyment of the property, the third party's conduct will be chargeable to the landlord. n144 And a breach of the implied covenant of quiet enjoyment has usually been found when, with knowledge of the landlord, other tenants use their leased premises for lewd and immoral purposes that substantially interfere with a complaining tenant's use and enjoyment. n145

There is a division of authority as to whether the landlord is chargeable with other varieties of offensive conduct by tenants that the landlord is aware of, has the legal right to control, but does not control. Although a number of courts have permitted tenants to claim a breach of the covenant of quiet enjoyment in such circumstances, n146 it appears that the majority of the decided cases hold otherwise. n147 The Restatement takes the position that the landlord is chargeable with offensive conduct of other tenants that the landlord could legally control, but notes that the weight of authority is otherwise. n148

§ 41.03(c)(6) Consequences of Breach.

Conduct by the landlord that breaches the implied covenant of quiet enjoyment may expose the landlord to a variety of legal consequences, some of which arise under other law. For example, as owner of a possessory estate in land, a tenant may sue in trespass for the landlord's unlawful entry, and may sue for possession if the landlord wrongfully evicts the tenant from the land. n149 A substantial interference with the tenant's use and enjoyment of the premises may constitute a nuisance, although traditionally, the interference must originate off the leased premises. n150 And aggravated conduct by the landlord in evicting a tenant may give rise to an action for intentional infliction of emotional distress. n151

§ 41.03(c)(6)(i) Effect on Rental Obligations.

A number of other consequences may follow from breach of the implied covenant itself. These include suspension of the tenant's rent obligation, lease termination, and landlord liability for damages. With respect to the first of these, it is clear that an actual or constructive eviction of the tenant, in breach of the covenant of quiet enjoyment, suspends the tenant's obligation to pay rent during the time the tenant is out of possession. Historically, the justification for permitting

the tenant to suspend the payment of rent seems to have been based on the concept that rent issued out of the land. An eviction of the tenant deprived the tenant of the source of rent, and the landlord was not entitled to recover it. n152 American authorities confirm that the tenant's rental obligation is suspended during the period of the breach, but they generally do not discuss this result in terms of the tenant being deprived of income from the land. Instead, when they discuss the rationale at all, American courts typically do so in contractual terms, such as characterizing continued possession of the leased premises as consideration for, or as a condition to, payment of the rent. n153 The idea that the covenant to pay rent is dependent upon the landlord's performance of the covenant of quiet enjoyment represents an exception to the traditional notion that leasehold covenants are independent of each other, and that breach of a covenant by one party does not excuse non performance by the other. n154

In the case of a partial actual eviction, the majority rule is that the tenant may continue in occupancy of the remaining portion of the premises without liability for rent during the period of the deprivation, even though other covenants in the lease remain enforceable. n155 Abatement of all of the rent may be explained, at least in part, as a reflection of the traditional concept that rent issues out of the land, and is charged on every part of the land. n156 In addition, it has sometimes been said that a landlord should not be able to "apportion his own wrong." n157 A minority of jurisdictions are of the view that the tenant should be obligated to pay for the fair rental value of the portion of the premises occupied. n158 The Restatement also favors rent apportionment. n159 And it has been held that the landlord may receive a proportionate amount of rent in the case of a partial actual eviction caused by a holder of paramount title. n160 In that case, of course, the eviction does not result from a wrongful act of the landlord. n161

§ 41.03(c)(6)(ii) Lease Termination.

Although early English authorities provided that the tenant could suspend payment of rent during the period of wrongful eviction, they did not indicate that the lease itself could be terminated based on the landlord's breach. n162 The issue of lease termination has not explicitly arisen in most of the cases. In most instances, breach of the implied covenant of quiet enjoyment is asserted as a defense to the landlord's action to recover rent, or as a basis for recovering damages, following an actual or constructive eviction. In most cases, the tenant neither seeks, nor obtains, a judgment that pronounces the lease to be terminated. However, the prevailing rule is that breach of the implied covenant entitles a tenant who has been deprived of possession to recover damages based on the full remaining lease term n163 / a result that is consistent with lease repudiation by the tenant. n164 And a number of courts have explicitly recognized that such a breach permits the tenant to repudiate the lease or to treat it as terminated. n165

§ 41.03(c)(6)(iii) Damages.

The landlord may also be obligated to pay damages for breach of the implied covenant of quiet enjoyment. The prevailing rule is that, when the tenant is evicted from the premises, and the implied covenant is thereby breached, general damages will be measured by the difference between the amount of the rent specified in the lease and the fair rental value of the premises for the remainder of the lease term. n166 This general measure of damages is also normally applicable to an eviction by a holder of paramount title; however, a minority view limits the tenant's recovery to nominal damages in that situation, if the tenant has not paid rent in advance, and if the landlord is not at fault. n167

Special damages may also be awarded, if properly pleaded and proved. Courts have awarded special damages based on a variety of tenant losses or costs, including the cost of tenant relocation, loss of good will, and damage to tenant personal property. n168 Lost profits have sometimes been recoverable, n169 but courts have declined to award lost profits when they appear to be speculative. n170 Landlords have sometimes been liable for punitive damages when their conduct towards tenants has been malicious and wanton. n171

Some courts have recognized that a tenant may remain in possession of the leased premises and sue for damages based on conduct of the landlord that breaches the implied covenant of quiet enjoyment. n172 In that situation, damages have been awarded based on the difference between the value of the use of the property with and without the interference.

n173

The Restatement view is that, if the landlord interferes with the tenant's permissible use of the leased premises, and does not promptly stop the interference after being requested to do so, the tenant may terminate the lease and recover damages, or continue with the lease and obtain legal and equitable relief. n174

§ 41.03(c)(7) Current Importance of the Implied Covenant of Quiet Enjoyment.

Modern legal developments have diminished the importance of the implied covenant of quiet enjoyment, at least in the residential landlord-tenant context. A majority of jurisdictions have now adopted, either by court decision or legislative enactment, an implied warranty of habitability on the part of residential landlords. This warranty, where adopted, typically provides a residential tenant with an array of remedial options, including rent withholding, when the landlord fails to maintain the habitability of the leased premises. Because the tenant need not vacate the leased premises in order to utilize the rent withholding remedy under the habitability warranty, an informed tenant will almost always elect that remedy over constructive eviction, where both are available under the circumstances.

Nonetheless, the implied covenant of quiet enjoyment continues to be important in leasing situations. That would be particularly true in a jurisdiction that has not adopted the implied warranty of habitability. However, even where it has been adopted, the implied warranty of habitability generally does not apply to all leases. Commercial leases, for example, are generally not subject to the implied warranty of habitability. n175 And some breaches of the implied covenant of quiet enjoyment, such as wrongful eviction by the landlord, or eviction by a party with paramount title, are simply not covered by the implied warranty of habitability.

FOOTNOTES:

(n1)Footnote 1. *See, e.g., Sproul v. Gilbert, 359 P.2d 543 (Or. 1961)* ; Restatement (Second) of Property § 1.2 (1977).

(n2)Footnote 2. *See Johnson v. Missouri Kansas Texas R.R., 216 S.W.2d 499 (Mo. 1949)* .

(n3)Footnote 3. *See* Sir William Holdsworth, 7*A History of English Law* 251 (2d ed. 1925. Reprint. London: Methuen & Co., Ltd. and Sweet & Maxwell, Ltd., 1973).

(n4)Footnote 4. Sir William Holdsworth, 7*A History of English Law* 255 (2d ed. 1925. Reprint. London: Methuen & Co., Ltd. and Sweet & Maxwell, Ltd., 1973).

(n5)Footnote 5. *See, e.g., Ford v. Ball, 86 S.E. 562 (W. Va. 1915)* .

(n6)Footnote 6. *See Gano v. Vanderveer, 34 N.J. L. 293 (1870)* .

(n7)Footnote 7. *See McAlester v. Landers, 11 P. 505 (Cal. 1886)* ; *see also* Restatement (Second) of Property § 4.2 cmt. b (1977).

(n8)Footnote 8. *See* Restatement (Second) of Property § 4.2 cmts. a, b (1977).

(n9)Footnote 9. *See* James A. Casner, ed., 1 American Law of Property. § 3.46 (Little, Brown & Co., 1952).

(n10)Footnote 10. These implied warranties are discussed in §§ 41.03(b) and 41.03(c) of this chapter.

(n11)Footnote 11. *See* Mostyn v. The West Mostyn Coal & Iron Co., 1 C.P. D. 145 (1876) . In this case, the landlord was aware of the title defect, but the tenant was not.

(n12)Footnote 12. *See Harms v. McCormick, 22 N.E. 511 (Ill. 1889)* .

(n13)Footnote 13. *See* Glen Weissenberger, *The Landlord's Duty to Deliver Possession: The Overlooked Reform, 46 U. Cinn. L. Rev. 937,* note 2 (1977).

(n14)Footnote 14. *See, e.g., Snider v. Deban, 144 N.E. 69 (Mass. 1924)* ; *Hannan v. Dusch, 153 S.E. 824 (Va. 1930)* ; William B. Stoebuck & Dale A. Whitman, The Law of Property § 6.21 (3d ed. 2000); Kristine Cordier Karnezis, Annotation, *Implied Covenant or Obligation to Provide Lessee with Actual Possession, 96 A.L.R.3d 1155, 1160 (1979)* ; Annotation, *Implied Covenant by Lessor to Put Lessee in Possession,* 70 A.L.R. 151 (1931) .

(n15)Footnote 15. *See, e.g., Hannan v. Dusch, 153 S.E. 824 (Va. 1930)* ; *King v. Reynolds, 67 Ala. 229 (1880)* ; Kristine Cordier Karnezis, Annotation, *Implied Covenant or Obligation to Provide Lessee with Actual Possession, 96 A.L.R.3d 1155, 1160 (1979)* .

(n16)Footnote 16. *See, e.g., Hannan v. Dusch, 153 S.E. 824 (Va. 1930)* ; Kristine Cordier Karnezis, Annotation, *Implied Covenant or Obligation to Provide Lessee with Actual Possession, 96 A.L.R.3d 1155, 1161 (1979)* .

(n17)Footnote 17. *See* Glen Weissenberger, *The Landlord's Duty to Deliver Possession: The Overlooked Reform, 46 U. Cinn. L. Rev. 937, 966- 968 (1977).*

(n18)Footnote 18. *See* Restatement (Second) of Property § 6.2 (1977).

(n19)Footnote 19. *See* Glen Weissenberger, *The Landlord's Duty to Deliver Possession: The Overlooked Reform, 46 U. Cinn. L. Rev. 937, 957 (1977)* (noting differences of opinion among commentators regarding whether the Uniform Act adopts the English rule or the American rule and contending that the Uniform Act is neutral on the issue).

(n20)Footnote 20. *See* Uniform Residential Landlord and Tenant Act §§ 2.103, 4.102.

(n21)Footnote 21. *See King v. Reynolds, 67 Ala. 229, 231 (1880)* (quoting from *Coe v. Clay, 130 Eng. Rep. 1131 (C.P. 1829)).*

(n22)Footnote 22. *See Herpolsheimer v. Christopher, 111 N.W. 359 (Neb. 1907)* .

(n23)Footnote 23. *Id.*

(n24)Footnote 24. *See Hannan v. Dusch, 153 S.E. 824 (Va. 1930)* .

(n25)Footnote 25. *See, e.g., Gazzolo v. Chambers, 73 Ill. 75 (1874)* ; *Snider v. Deban, 144 N.E. 69 (Mass. 1924)* ; *West v. Kitchell, 68 So. 469 (Miss. 1915)* .

(n26)Footnote 26. *See, e.g., Dengler v. Michelssen, 18 P. 138 (Cal. 1888)* ; *Miller v. Ready, 108 N.E. 605 (Ind. Ct. App. 1915)* ; *Sloan v. Hart, 63 S.E. 1037 (N.C. 1909)* .

(n27)Footnote 27. *See, e.g., Wallace v. Carter, 299 P. 966 (Kan. 1931)* .

(n28)Footnote 28. *See, e.g., Sloan v. Hart, 63 S.E. 1037 (N.C. 1909)* ; *Dieffenbach v. McIntyre, 254 P.2d 346 (Okla. 1952)* .

(n29)Footnote 29. *See, e.g., Draper Mach. Works, Inc. v. Hagberg, 663 P.2d 141 (Wash. Ct. App. 1983)* ; Uniform Residential Landlord and Tenant Act § 4.102; Restatement (Second) of Property § 6.2 Reporter's Note 6 (1977).

(n30)Footnote 30. *See, e.g., Cooper v. Gordon, 164 N.W. 21 (N.D. 1917)* ; Uniform Residential Landlord and Tenant Act § 4.102(a)(2).

(n31)Footnote 31. *See, e.g., King v. Reynolds, 67 Ala. 229 (1880)* .

(n32)Footnote 32. *See, e.g., Gregory v. Pribbeno, 9 N.W.2d 485 (Neb. 1943)* (either landlord or tenant may seek possession). *See generally* Glen Weissenberger, *The Landlord's Duty to Deliver Possession: The Overlooked Reform, 46 U. Cinn. L. Rev. 937, 949 n.68 (1977).*

(n33)Footnote 33. *See, e.g., Adrian v. Rabinowitz, 186 A. 29 (N.J. 1936)* ; Uniform Residential Landlord and Tenant Act § 4.102.

(n34)Footnote 34. *See Wallace v. Carter, 299 P. 966 (Kan. 1931)* ; *Lalekos v. Manset, 47 A.2d 617 (D.C. Mun. Ct. App. 1946)* ; *see also Poston v. Jones, 37 N.C. 350 (1842)* .

(n35)Footnote 35. *See Moore v. Mansfield, 65 N.E. 398 (Mass. 1902)* .

(n36)Footnote 36. *See Mulhauser v. Conley, 186 P.2d 830 (Okla. 1947)* ; Restatement (Second) of Property § 14.4. The same right has been held to be available to an incoming tenant in an American rule jurisdiction. *See United Merchants' Realty & Imp. Co. v. Roth, 86 N.E. 544 (N.Y. 1908)* . The right of a landlord to bind a holdover tenant to a new lease is discussed in chapter 40. See § 40.10.

(n37)Footnote 37. *See* Restatement (Second) of Property § 14.4 cmt. h (1977).

(n38)Footnote 38. *See* Restatement (Second) of Property § 10.2 cmt. h (1977).

(n39)Footnote 39. *See, e.g., Foreman & Clark Corp. v. Fallon, 479 P.2d 362 (Cal. 1971)* ; *Ivy v. Argentieri, 471 P.2d 122 (Wash. Ct. App. 1970)* ; J.A. Connelly, Annotation, *Measure of Damages for Lessor's Breach of Contract to Lease or to Put Lessee Into Possession, 88 A.L.R.2d 1024 (1963)* ; *but see Panagos v. Plack, 121 A. 306 (Pa. 1923)* (landlord in good faith; damages limited to expenditures made by the tenant).

(n40)Footnote 40. *See, e.g., Darling Shops, Inc. v. Brack, 95 F.2d 135 (8th Cir. 1938)* ; *Sloan v. Hart, 63 S.E. 1037 (N.C. 1909)* .

(n41)Footnote 41. *See, e.g., Fera v. Village Plaza, Inc., 242 N.W.2d 372 (Mich. 1976)* (lost profits); Restatement (Second) of Property § 10.2(3) cmt. d (1977) (relocation costs); *see generally* J.A. Connelly, Annotation, *Measure of Damages for Lessor's Breach of Contract to Lease or to Put Lessee Into Possession, 88 A.L.R.2d 1024, 1036, 1042 (1963)* ; Robert S. Schoshinski, *American Law of Landlord and Tenant* § 3.2 (Lawyers Co Operative Publishing Co. 1980).

(n42)Footnote 42. *See, e.g., Dieffenbach v. McIntyre, 254 P.2d 346 (Okla 1952)* ; *see generally* Robert S. Schoshinski, *American Law of Landlord and Tenant* § 3.2 (Lawyers Co Operative Publishing Co. 1980).

(n43)Footnote 43. *See* Uniform Residential Landlord and Tenant Act § 4.102(b).

(n44)Footnote 44. *See* Restatement (Second) of Property § 10.2 cmts. e, g (1977).

(n45)Footnote 45. *See id.*, illus. 4, 5.

(n46)Footnote 46. *See, e.g., Vogue v. Shopping Centers, Inc., 266 N.W.2d 148 (Mich. 1978)* .

(n47)Footnote 47. *See Sloan v. Hart, 63 S.E. 1037 (N.C. 1909)* .

(n48)Footnote 48. *See Morrison v. Weinstein, 236 S.W. 585 (Ark. 1921)* .

(n49)Footnote 49. Restatement (Second) of Property § 6.2 cmt. d, at 241 (1977).

(n50)Footnote 50. *See, e.g., Southwest Drug Co. v. Howard Bros. Pharmacy of Jackson, Inc., 320 So. 2d 776*

(Miss. 1975) ; *Nodine v. State, 79 N.Y.S.2d 834 (Ct. Cl. 1948)* ; *Taylor v. Kaufhold, 84 A.2d 347 (Pa. 1951)* ; J.E. Macy, Annotation, *Remedy of Tenant Against Stranger Wrongfully Interfering with His Possession, 12 A.L.R.2d 1192 (1950)* .

(n51)Footnote 51. *See Snider v. Deban, 144 N.E. 69 (Mass. 1924)* .

(n52)Footnote 52. *See* Glen Weissenberger, *The Landlord's Duty to Deliver Possession: The Overlooked Reform, 46 U. Cinn. L. Rev. 937, 950 (1977)* (citing, e.g., *Harris v. Greenberger, 64 N.Y.S. 136 (App. Div. 1900)* .

(n53)Footnote 53. *See, e.g., Obermeier v. Mattison, 192 P. 283 (Or. 1920)* ; *Heywood v. Ogden Motor Car Co., 266 P. 1040 (Utah 1928)* .

(n54)Footnote 54. *See, e.g., King v. Reynolds, 67 Ala. 229 (1880)* .

(n55)Footnote 55. *See* discussion in § 41.03(c) of this chapter.

(n56)Footnote 56. *See* discussion in § 40.22(c)(5) of this chapter.

(n57)Footnote 57. *See*James A. Casner, ed., 1 American Law of Property. § 3.37 (Boston: Little, Brown & Co., 1952); Glen Weissenberger, *The Landlord's Duty to Deliver Possession: The Overlooked Reform, 46 U. Cinn. L. Rev. 937, 943 (1977).*

(n58)Footnote 58. .Sir William Holdsworth, 7*A History of English Law* 251 (2d ed. 1925. Reprint. London: Methuen & Co., Ltd. and Sweet & Maxwell, Ltd., 1973).

(n59)Footnote 59. Sir William Holdsworth, 7*A History of English Law* 251, 255 (2d ed. 1925. Reprint. London: Methuen & Co., Ltd. and Sweet & Maxwell, Ltd., 1973).

(n60)Footnote 60. Sir William Holdsworth, 7*A History of English Law* 251, 255 (2d ed. 1925. Reprint. London: Methuen & Co., Ltd. and Sweet & Maxwell, Ltd., 1973).

(n61)Footnote 61. *See, e.g., McDowell v. Hyman, 48 P. 984 (Cal. 1897)* ; *Hannan v. Harper, 208 N.W. 255 (Wis. 1926)* ; C.S. Parnell, Annotation, *Breach of Covenant for Quiet Enjoyment in Lease, 41 A.L.R.2d 1414, 1430, 1431 (1955)* ; William B. Stoebuck & Dale A. Whitman, The Law of Property § 6.30 (3d ed. 2000).

(n62)Footnote 62. *See, e.g., Mershon v. Williams, 44 A. 211 (N.J. 1899)* .

(n63)Footnote 63. *See* Restatement (Second) of Property § 6.1 cmt. i (1977).

(n64)Footnote 64. *See, e.g., Fifth Ave. Bldg. Co. v. Kernochan, 117 N.E. 579 (N.Y. 1917)* ; C.S. Parnell, Annotation, *Breach of Covenant for Quiet Enjoyment in Lease, 41 A.L.R.2d 1414, 1420 (1955)* . In Louisiana, the lessor has a statutory obligation to "protect the lessee's peaceful possession for the duration of the lease." *See La. Civ. Code art. 2682(3)*. The lessor also "warrants the lessee's peaceful possession of the leased thing against any disturbance caused by a person who asserts ownership, or right to possession of, or any other right in the thing." *La. Civ. Code art. 2700*. In some cases, statutes that prohibit implied covenants in real estate conveyances have been held applicable to leases. *See, e.g., Pickalo v. Mack, 186 N.W. 502 (Mich. 1922)* . But courts have held otherwise as well. *See, e.g., Fifth Ave. Bldg. Co. v. Kernochan, 117 N.E. 579 (N.Y. 1917)* .

(n65)Footnote 65. *See, e.g., Best v. Crown Drug Co., 154 F.2d 736 (8th Cir. 1946)* .

(n66)Footnote 66. *See, e.g., Vican v. Lederer Realty Corp., 110 A. 594 (R.I. 1920)* (less extensive); *Paddell v. Janes, 152 N.Y.S. 948 (Super. Ct. 1915)* (more extensive).

(n67)Footnote 67. *See Greene v. Rainbow Properties, Ltd., 496 A.2d 178 (Vt. 1985)* .

(n68)Footnote 68. *See, e.g., Barash v. Pennsylvania Term. Real Estate Corp., 256 N.E.2d 707 (N.Y. 1970)* ; *Goad v. Maxwell, 542 P.2d 488 (Or. 1975)* (en banc).

(n69)Footnote 69. *See, e.g., Barash v. Pennsylvania Term. Real Estate Corp., 256 N.E.2d 707 (N.Y. 1970)* ; *Fifth Ave. Bldg. Co. v. Kernochan, 117 N.E. 579 (N.Y. 1917)* .

(n70)Footnote 70. *See, e.g., Burdan v. Walton, 689 S.W.2d 543 (Ark. 1985)* ; *Lester v. Griffin, 108 N.Y.S. 580 (Super. Ct. 1908)* .

(n71)Footnote 71. *See Lawrence v. Edwin A. Denham Co., 109 N.Y.S. 752 (Super. Ct. 1908)* .

(n72)Footnote 72. *See, e.g., Morgan v. Short, 34 N.Y.S. 10 (N.Y. City Ct. 1895)* .

(n73)Footnote 73. *See, e.g., Foster v. Keena, 714 S.W.2d 180 (Mo. Ct. App. 1986)* .

(n74)Footnote 74. *See, e.g., Kuschinsky v. Flanigan, 136 N.W. 362 (Mich. 1912)* ; *Fifth Ave. Bldg. Co. v. Kernochan, 117 N.E. 579 (N.Y. 1917)* .

(n75)Footnote 75. *See* Note, *Constructive Eviction, 19 Harv. L. Rev. 50 (1905);* James A. Casner, ed., 1 American Law of Property. § 3.50, 351 (Boston: Little, Brown & Co., 1952).

(n76)Footnote 76. *8 Cow. 727 (N.Y. 1826)*

(n77)Footnote 77. *See* Michael Weinberg, From Contract to Conveyance: The Law of Landlord and Tenant, 1800-1920 (Part I), *1980 S. ILL. U. L.J. 29, 71 (1980).*

(n78)Footnote 78. *See* Michael Weinberg, From Contract to Conveyance: The Law of Landlord and Tenant, 1800-1920 (Part I), *1980 S. ILL. U. L.J. 29, 71 (1980).*

(n79)Footnote 79. *See Hunt v. Cope, 98 Eng. Rep. 1065 (K.B. 1775); see also Cherbourn v. Rye, 78 Eng. Rep. 590 (Q.B. 1594).*

(n80)Footnote 80. *See, e.g., Reste Realty Corp. v. Cooper, 251 A.2d 268 (N.J. 1969)* ; *City of New York v. Pike Realty Corp., 160 N.E. 359 (N.Y. 1928)* ; Sally A. Smith, Annot., "Failure of Landlord to Make, or Permit Tenant to Make, Repairs or Alterations Required by Public Authority as Constructive Eviction," *86 A.L.R.3d 352, 354 (1978)* .

(n81)Footnote 81. *See, e.g., Barash v. Pennsylvania Terminal Real Estate Corp., 256 N.E.2d 707 (N.Y. 1970)* ; *Schaaf v. Nortman, 19 Wis. 2d 540, 120 N.W.2d 654 (Wis. 1963)* ; Sally A. Smith, Annot., "Failure of Landlord to Make, or Permit Tenant to Make, Repairs or Alterations Required by Public Authority as Constructive Eviction," *86 A.L.R.3d 352, 354 (1978)* .

(n82)Footnote 82. *See, e.g., Fleming v. King, 28 S.E. 239 (Ga. 1897)* ; *Applegate v. Inland Real Estate Corp., 441 N.E.2d 379 (Ill. Ct. App. 1982)* .

(n83)Footnote 83. *See, e.g., Talbot v. Citizens Nat'l Bank of Evansville, 389 F.2d 207 (7th Cir. 1968)* (mere trespass is no constructive eviction); *Fleming v. King, 28 S.E. 239 (Ga. 1897)* (same; no constructive eviction); *Reste Realty Corp. v. Cooper, 251 A.2d 268 (N.J. 1969)* (recurring flooding; constructive eviction).

(n84)Footnote 84. *See May v. Marijo Corp., 299 N.W.2d 433 (Neb. 1980)* ; *Hannan v. Harper, 208 N.W. 255 (Wis. 1926)* . William B. Stoebuck & Dale A. Whitman, The Law of Property § 6.33 (3d ed. 2000); *cf. Wesson v. Leone Enterprises, Inc., 774 N.E.2d 611 (Mass. 2002)* (Commercial tenant contended that landlord's failure to repair a leaking roof resulted in a constructive eviction; the court rejected this claim because while the failure may have made the tenant's situation more inconvenient and expensive it did not render the premises untenantable; however, the court

allowed the tenant to terminate the lease anyway; the court used a mutually dependant covenant analysis and concluded that the landlord's breach of its covenant to keep the roof in good repair allowed the tenant to terminate the lease).

(n85)Footnote 85. *See e.g., Myers v. Western Farmers Association, 449 P.2d 104 (Wash. 1969)* (no constructive eviction when, after tenants quit the premises, landlord changed the locks; landlord did not intend to evict or to interfere with possession, and changed the locks because of a concern over "outstanding keys" that could not be accounted for; tenants were faced only with the "inconvenience" of needing to ask for a new key).

(n86)Footnote 86. *See Glyco v. Schultz, 289 N.E.2d 919 (Ohio Mun. Ct. 1972)* (landlord induced farming activities).

(n87)Footnote 87. *See Hotel Marion Co. v. Waters, 150 P. 865 (Or. 1915)* .

(n88)Footnote 88. *See Thompson v. Poirier, 420 A.2d 297 (N.H. 1980)* .

(n89)Footnote 89. *See Tenn-Tex Properties v. Brownell-Electro, Inc., 778 S.W.2d 423 (Tenn. 1989)* .

(n90)Footnote 90. *See, e.g., Ray Realty Co. v. Holtzman, 119 S.W.2d 981 (Mo. Ct. App. 1938)* .

(n91)Footnote 91. *See, e.g., Briargrove Shopping Center Joint Venture v. Vilar, Inc., 647 S.W.2d 329 (Tex. Ct. App. 1982)* .

(n92)Footnote 92. *See, e.g., Dolph v. Barry, 148 S.W. 196 (Mo. Ct. App. 1912)* (failure to make repairs); *Las Vegas Oriental, Inc. v. Sabella's of Nev., Inc., 630 P.2d 255 (Nev. 1981)* (failure to provide heating and cooling); *Fidelity Mut. Life Ins. Co. v. Kaminsky, 768 S.W.2d 818 (Tex. Ct. App. 1989)* (failure to provide promised security service; failure to respond to tenant complaints about abortion protestors who interfered with tenant's use and enjoyment). *See also Gibbons v. Hoefeld, 132 N.E. 425 (Ill. 1921)* (landlord assumed duty to make basement water tight).

(n93)Footnote 93. *See, e.g., Scott v. Prazma, 555 P.2d 571 (Wyo. 1976)* .

(n94)Footnote 94. *See, e.g., Di Massimo v. Clearwater, 805 F.2d 1536 (11th Cir. 1986)* (statutory obligation to provide water); *cf. Posnanski v. Hood, 174 N.W.2d 528 (Wis. 1970)* (administrative enforcement contemplated).

(n95)Footnote 95. *See, e.g., Johnson v. Snyder, 221 P.2d 164 (Cal. Ct. App. 1950)* (failure to eliminate nuisance); *Giddings v. Williams, 168 N.E. 514 (Ill. 1929)* (duty to supply heat); *Scudder v. Marsh, 224 Ill. App. 355 (1922)* (breach of obligation to disclose latent defect). *See also Adams v. Green, 452 N.Y.S.2d 143 (City Ct. 1982)* (implied obligation to furnish heat where heating equipment is under landlord's exclusive control).

(n96)Footnote 96. *See, e.g., Leech v. Husbands, 152 A. 729 (Del. 1930)* (insect infestation); *Higgins v. Whiting, 131 A. 879 (N.J. Super. Ct. 1926)* (failure to supply heat).

(n97)Footnote 97. The implied warranty of habitability is discussed in § 41.06 of this chapter

(n98)Footnote 98. *See Hilder v. St. Peter, 144 Vt. 150, 478 A.2d 202 (Vt. 1984)* .

(n99)Footnote 99. *See In re Consumers World, Inc., 160 F. Supp. 238 (D. Mass. 1958)* ; *Kulawitz v. Pacific Woodenware & Paper Co., 155 P.2d 24 (Cal. 1944)* .

(n100)Footnote 100. *See* Restatement (Second) of Property § 7.1 and Reporter's Note (1977). Section 7.2 of the Restatement explicitly permits the tenant to terminate the lease and to seek other relief if the landlord breaches a non competition covenant in the lease. *Id.* at § 7.2.

(n101)Footnote 101. *See, e.g., Automobile Supply Co. v. Scene In Automobile Supply Co., 340 Ill. 196, 172 N.E. 35*

(Ill. 1930) ; *Tracy v. Long, 3 N.E.2d 789 (Mass. 1936)* .

(n102)Footnote 102. *See, e.g., Applegate v. Inland Real Estate Corp., 441 N.E.2d 379 (Ill. Ct. App. 1982)* ; *Scott v. Prazma, 555 P.2d 571 (Wyo. 1976)* .

(n103)Footnote 103. *See, e.g., Scott v. Prazma, 555 P.2d 571 (Wyo. 1976)* ; *Deseret Fed. Sav. & Loan Ass'n v. United States Fid. & Guar. Co., 714 P.2d 1143 (Utah 1986)* . *See also Hotel Marion Co. v. Waters, 150 P. 865 (Or. 1915)* (landlord's intent is generally not material).

(n104)Footnote 104. *See, e.g., Automobile Supply Co. v. Scene In Automobile Supply Co., 340 Ill. 196, 172 N.E. 35 (Ill. 1930)* ; *Strupp v. Canniff, 150 N.W.2d 574 (Minn. 1967)* ; *Merritt v. Tague, 23 P.2d 340 (Mont. 1933)* ; R.W. Gascoyne, Annotation, *Time Within Which Tenant Must Yield or Abandon Premises After Claimed Constructive Eviction, 91 A.L.R.2d 638, 641, 644 (1963)* .

(n105)Footnote 105. *See Edwards v. Candy, 21 N.Y. Sup. Ct. 596 (1878).*

(n106)Footnote 106. *See, e.g., Chelten Ave. Bldg. Corp. v. Mayer, 172 A. 675 (Pa. 1934)* .

(n107)Footnote 107. *See, e.g., Gateway Co. v. Charlotte Theatres, Inc., 297 F.2d 483 (1st Cir. 1961)* (tenant brought action to rescind the lease).

(n108)Footnote 108. *See* R.W. Gascoyne, Annotation, *Time Within Which Tenant Must Yield or Abandon Premises After Claimed Constructive Eviction, 91 A.L.R.2d 638, 641 (1963)* .

(n109)Footnote 109. *See, e.g., Hartenbauer v. Brumbaugh, 220 Ill. App. 326 (1920)* (tenant had broken leg); *Rome v. Johnson, 174 N.E. 716 (Mass. 1931)* (listing several factors); *Lynder v. S.S. Kresge Co., 45 N.W.2d 319 (Mich. 1951)* (landlord assurances that defective stairway would be remedied).

(n110)Footnote 110. *See, e.g., Pague v. Petroleum Prods., Inc., 461 P. 2d 317 (Wash. 1969)* ; *Erickson v. Elliott, 31 P.2d 506 (Wash. 1934)* ; *Schaaf v. Nortman, 120 N.W.2d 654 (Wis. 1963)* .

(n111)Footnote 111. *See, e.g., Milheim v. Baxter, 103 P. 376 (Colo. 1909)* .

(n112)Footnote 112. *See, e.g., Gateway Co. v. Charlotte Theatres, Inc., 297 F.2d 483 (1st Cir. 1961)* ; R.W. Gascoyne, Annotation, *Time Within Which Tenant Must Yield or Abandon Premises After Claimed Constructive Eviction, 91 A.L.R.2d 638, 651 (1963)* .

(n113)Footnote 113. *See, e.g., Callahan v. Goldman, 103 N.E. 689 (Mass. 1913)* ; *El Paso Natural Gas Co. v. Kysar Ins. Agency, Inc., 645 P.2d 442 (N.M. 1982)* ; *Jackson v. Paterno, 108 N.Y.S. 1073* (Super. Ct.) , *aff'd, 112 N.Y.S. 924 (App. Div. 1908)* ; 401 *Boardwalk Corp. v. Gutzwiller, 368 N.Y.S.2d 122 (N.Y. City Ct. 1975)* ; C.S. Parnell, Annotation, *Breach of Covenant for Quiet Enjoyment in Lease, 41 A.L.R.2d 1414, 1423 (1955)* .

(n114)Footnote 114. *See Moe v. Sprankle, 221 S.W.2d 712 (Tenn. Ct. App. 1948)* ; James A. Casner, ed., 1 American Law of Property. § 3.50 (Boston: Little, Brown & Co., 1952).

(n115)Footnote 115. *See, e.g., Barry v. Holmesley, 210 P. 318 (Ariz. 1922)* ; *Nate v. Galloway, 408 N.E.2d 1317 (Ind. Ct. App. 1980)* ; *Kuiken v. Garrett, 51 N.W.2d 149 (Iowa 1952)* ; *Moe v. Sprankle, 221 S.W.2d 712 (Tenn. Ct. App. 1948)* ; *Northern Terminals, Inc. v. Smith Grocery & Variety, Inc., 418 A.2d 22 (Vt. 1980)* . *See also Stevan v. Brown, 458 A.2d 466 (Md. Ct. App. 1983)* ; *Echo Consult. Servs., Inc. v. North Conway Bank, 669 A.2d 227 (N.H. 1995)* . There is some authority for the proposition that the covenant of quiet enjoyment is breached when the landlord wrongfully initiates litigation that threatens to impair the tenant's possessory interest. *See Kuiken v. Garrett, 51 N.W.2d 149 (Iowa 1952)* (landlord maliciously initiated forcible entry and detainer actions); *Kohl v. PNC Bank Nat. Ass'n, 912 A.2d 237 (Pa. 2006)* (court states that suit by a landlord that substantially impairs a tenant's possessory interest, brought in bad

faith, maliciously, or otherwise without probable cause and primarily for a purpose unrelated to seeking legal redress, constitutes a breach of the landlord's covenant of quiet enjoyment).

(n116)Footnote 116. *See, e.g., Baltimore Butchers Abattoir & Live Stock Co. v. Union Rendering Co., 17 A.2d 130 (Md. 1941)* ; *Hannan v. Harper, 208 N.W. 255 (Wis. 1926)* ; *see also* Restatement (Second) of Property § 6.1 (1977) (tenant may continue with the lease and obtain legal and equitable relief); *See also Branish v. NHP Prop. Mgmt., Inc., 694 A.2d 1106 (Pa. Super. Ct. 1997)* (landlord issued "no trespassing" letter to tenant's boyfriend, stating that he was no longer permitted on the leased premises; tenant sued for a declaration that the letter was invalid; court concluded that the letter breached the landlord's implied covenant of quiet enjoyment, and it invalidated the letter).

(n117)Footnote 117. *See Charles E. Burt, Inc. v. Seven Grand Corp., 163 N.E.2d 4 (Mass. 1959) . See also Stevan v. Brown, 458 A.2d 466 (Md. Ct. App. 1983)* .

(n118)Footnote 118. *See Cal. Civ. Code § 789.3* (prohibits residential landlords from, among other things, willfully cutting off utility service, changing locks or removing windows with intent to terminate the tenant's occupancy; permits tenant to recover actual damages, additional damages for each day the landlord remains in violation, attorneys' fees, and injunctive relief).

(n119)Footnote 119. *See Dennison v. Marlowe, 744 P.2d 906 (N.M. 1987)* ; *Minjak, Co. v. Randolph, 528 N.Y.S.2d 554 (App. Div. 1988)* ; *East Haven Assocs., Inc. v. Gurian, 313 N.Y.S.2d 927 (City Ct. 1970)* .

(n120)Footnote 120. *See, e.g., East Haven Associates, Inc. v. Gurian, 313 N.Y.S.2d 927 (City Ct. 1970)* (entire rent abated); *Dennison v. Marlowe, 744 P.2d 906 (N.M. 1987)* (partial abatement).

(n121)Footnote 121. See the discussion on this point in § 41.03(c)(3)(ii) of this chapter.

(n122)Footnote 122. 3 Milton R. Friedman, Friedman on Leases 29.301 at 1485 (3d ed. 1990). The same commentator noted that the "distinction is blurred because of the few cases and many dicta that indicate that there is no remedy for breach of the covenant of quiet enjoyment without an eviction." *Id.*

(n123)Footnote 123. Of course, the tenant must prove his or her damages, and, if injunctive relief is sought, must satisfy the normal standards for the awarding of injunctive relief.

(n124)Footnote 124. *See* Sir William Holdsworth, 7A History of English Law 252 (2d ed. 1925. Reprint. London: Methuen & Co., Ltd. and Sweet & Maxwell, Ltd., 1973); 1 Lionel A. Blundell and V.G. Wellings, Woodfall's Law of Landlord and Tenant, 619 (26th ed. 1960).

(n125)Footnote 125. *See* Sir William Holdsworth, 7A History of English Law 252 (2d ed. 1925. Reprint. London: Methuen & Co., Ltd. and Sweet & Maxwell, Ltd., 1973).

(n126)Footnote 126. *See Jones v. Lavington, 1 K.B. 253 (1903);* 1 Lionel A. Blundell and V.G. Wellings, Woodfall's Law of Landlord and Tenant 619-620 (26th ed. 1960).

(n127)Footnote 127. Restatement (Second) of Property § 4.1 (1) (1977).

(n128)Footnote 128. *See id.* Illustrations; *Sandall v. Hoskins, 137 P.2d 819 (Utah 1943)* (prior tenant).

(n129)Footnote 129. *See, e.g., Bates v. Smith, 243 N.W. 829 (Mich. 1932)* .

(n130)Footnote 130. *See, e.g., Standard Live Stock Co. v. Pentz, 269 P. 645 (Cal. 1928)* ; William B. Stoebuck & Dale A. Whitman, The Law of Property § 6.31 (3d ed. 2000).

(n131)Footnote 131. *See, e.g., Casassa v. Smith, 91 N.E. 891 (Mass. 1910)* ; *In re O'Donnell, 147 N.E. 541 (N.Y.*

1925) .

(n132)Footnote 132. *See id.* It has also been indicated that such an attornment must be accompanied by notice to the original landlord. *See Mosher v. Cole, 70 N.W. 275 (Neb. 1897)* .

(n133)Footnote 133. *See Swan v. Stransham, 73 Eng. Rep. 570 (K.B. 1567).*

(n134)Footnote 134. *See* James A. Casner, ed., 1 American Law of Property. § 3.48 (Boston: Little, Brown & Co., 1952).

(n135)Footnote 135. *See, e.g., Dupree v. Worthen Bank & Trust Co., 543 S.W.2d 465 (Ark. 1976)* ; *In re O'Donnell, 147 N.E. 541 (N.Y. 1925)* ; Annotation, *Life Tenant's Death as Affecting Rights Under Lease Given By Him, 14 A.L.R.4th 1054, 1083 (1982)* .

(n136)Footnote 136. *See, e.g., Metropolitan Life Ins. Co. v. Childs Co., 130 N.E. 295 (N.Y. 1921)* ; *Walgreen Co. v. Moore, 173 A. 587 (N.J. Ch. 1934)* ; *see also Conference Cent., Ltd. v. TRC The Research Corp. of New England, 455 A.2d 857 (Conn. 1983)* (mortgagee demanded, and tenant surrendered, possession; trial ordered on whether tenant had been constructively evicted.

(n137)Footnote 137. *See, e.g., Markantonis v. Madlan Realty Corp., 186 N.E. 862 (N.Y. 1933)* ; *Metropolitan Life Ins. Co. v. Childs Co., 130 N.E. 295 (N.Y. 1921)* ; Grant S. Nelson and Dale A. Whitman, Real Estate Finance Law § 7.12 (2d ed. 1985); Annotation, *Relation and Rights Inter Se of Purchaser Under Foreclosure of Mortgage and Tenant Under Lease Subsequent to Mortgage*, 109 A.L.R. 447, 452 (1937) .

(n138)Footnote 138. *See, e.g., Cornell Andrews Smelting Co. v. Boston & P.R. Corp., 89 N.E. 118 (Mass. 1909)* ; *Dolman v. United States Trust Co., 138 N.E.2d 784 (N.Y. 1956)* .

(n139)Footnote 139. *See Cornell Andrews Smelting Co. v. Boston & P.R. Corp., 89 N.E. 118 (Mass. 1909)* ; *Ellis v. Welch, 6 Mass. 246 (1810)* .

(n140)Footnote 140. *See* James A. Casner, ed., 1 American Law of Property. § 3.54 (Boston: Little, Brown & Co., 1952).

(n141)Footnote 141. *See* Annotation, *Breach of Covenant for Quiet Enjoyment in Lease, 41 A.L.R.2d 1414, 1442 (1955)* .

(n142)Footnote 142. *Compare Burofsky v. Turner, 175 N.E. 90 (Mass. 1931)* (breach of covenant when landlord tore down building instead of making ordered repairs); with *Ripps v. Kline, 275 P.2d 381 (Nev. 1954)* (no breach of covenant where landlord compelled to demolish).

(n143)Footnote 143. *See, e.g., McDowell v. Hyman, 48 P. 984 (Cal. 1897)* ; *Blomberg v. Evans, 138 S.E. 593 (N.C. 1927)* ; *Smith v. Nortz Lumber Co., 7 N.W.2d 435 (N.D. 1943)* .

(n144)Footnote 144. *See, e.g., Bowers v. Sells, 123 N.E.2d 194 (Ind. Ct. App. 1954)* (landlord cooperated with eviction); *Hannan v. Harper, 208 N.W. 255 (Wis. 1926)* (landlord entered into land contract to sell a two family house to a fraternity).

(n145)Footnote 145. *See, e.g., Milheim v. Baxter, 103 P. 376 (Colo. 1909)* ; *Phyfe v. Dale, 130 N.Y.S. 231 (N.Y. Super. 1911)* ; Robert M. Schoenhaus, Annotation, *Landlord and Tenant: Constructive Eviction by Another Tenant's Conduct, 1 A.L.R.4th 849, 857 (1980)* .

(n146)Footnote 146. *See, e.g., Colonial Court Apartments, Inc. v. Kern, 163 N.W.2d 770 (Minn. 1968)* (excessive noise); *Gottdiener v. Mailhot, 431 A.2d 851 (N.J. Super. Ct. App. Div. 1981)* (excessive noise).

(n147)Footnote 147. *See, e.g., Thompson v. Harris, 452 P.2d 122 (Ariz. Ct. App. 1969)* (unsanitary activities of neighboring tenant); *Stewart v. Lawson, 165 N.W. 716 (Mich. 1917)* (offensive language and other offensive conduct by tenants); *see generally* Robert M. Schoenhaus, Annotation, *Landlord and Tenant: Constructive Eviction by Another Tenant's Conduct, 1 A.L.R.4th 849 (1980)* .

(n148)Footnote 148. *See* Restatement (Second) of Property § 6.1, cmt. d & Reporter's Note 3 (1977).

(n149)Footnote 149. *See, e.g., Walker v. Clifford, 29 So. 588 (Ala. 1901)* (possessory action); *Schuler v. Bordelon, 177 P.2d 959 (Cal. Ct. App. 1947)* (trespass); *Kuriger v. Cramer, 498 A.2d 1331 (Pa. Super. Ct. 1985)* (trespass).

(n150)Footnote 150. *See, e.g., Kent v. Humphries, 281 S.E.2d 43 (N.C. 1981)* (nuisance action by tenant based on noxious use by landlord of adjoining property).

(n151)Footnote 151. *See, e.g., Mauala v. Milford Management Corp., 559 F. Supp 1000 (S.D.N.Y. 1983)* ; *Danyew v. Phelps, 676 P.2d 707 (Colo. Ct. App. 1983)* .

(n152)Footnote 152. *See* William B. Stoebuck & Dale A. Whitman, The Law of Property § 6.32 (3d ed. 2000); Sir William Holdsworth, 7A History of English Law 267, 270 (2d ed. 1925. Reprint. London: Methuen & Co., Ltd. and Sweet & Maxwell, Ltd., 1973).

(n153)Footnote 153. *See, e.g., Automobile Supply Co. v. Scene In Automobile Supply Co., 340 Ill. 196, 172 N.E. 35 (Ill. 1930)* ; *Dolph v. Barry, 148 S.W. 196 (Mo. Ct. App. 1912)* ; *cf. Fifth Avenue Bldg. Co. v. Kernochan, 117 N.E. 579 (N.Y. 1917)* (eviction as a defense to claim for rent does not depend upon a covenant for quiet enjoyment; it suspends the obligation to pay rent because it involves a failure of consideration for which rent is paid).

(n154)Footnote 154. *See, e.g., Talbot v. Citizens Nat'l Bank of Evansville, 389 F.2d 207 (7th Cir. 1968)* ; *Boston Hous. Auth. v. Hemingway, 293 N.E.2d 831 (Mass. 1973)* ; 6 Samuel Williston, A Treatise on the Law of Contracts § 890 (3d ed. 1962). In discussing the rule that excuses the tenant from paying rent when the tenant is evicted by the landlord, Williston observes that the rule "serves in some degree as a substitute for dependency of covenants in leases." 6 Samuel Williston, A Treatise on The Law of Contracts 891 (3d ed. 1962). Articles that discuss the concepts of independency and dependency of covenants in leases include: Edward Chase & E. Hunter Taylor, Jr., *Landlord and Tenant: A Study in Property and Contract, 30 Vill. L. Rev. 571 (1985);* John Forrester Hicks, *The Contractual Nature of Real Property Leases, 24 BAYLOR L. REV. 443 (1972);* John A. Humbach, *The Common Law Conception of Leasing: Mitigation, Habitability, and Dependency of Covenants, 60 WASH. U. L.Q. 1213 (1983);* William M. McGovern, Jr., *Dependent Promises in the History of Leases and Other Contracts, 52 Tul. L. Rev. 659 (1978);* Stephen A. Siegel, *Is the Modern Lease a Contract or a Conveyance? A Historical Inquiry*, 52 J. Urb. L. 649 (1975). *Cf. Wesson v. Leone Enterprises, Inc., 774 N.E.2d 611 (Mass. 2002)* (court uses a mutually dependant covenant analysis and concludes that the landlord's breach of its covenant to keep roof in good repair allowed tenant to terminate the lease).

(n155)Footnote 155. *See, e.g., Talbot v. Citizens Nat'l Bank of Evansville, 389 F.2d 207 (7th Cir. 1968)* ; *Giraud v. Milovich, 85 P.2d 182 (Cal. Ct. App. 1938)* ; *Smith v. McEnany, 48 N.E. 781 (Mass. 1897)* .

(n156)Footnote 156. *See, e.g., Smith v. McEnany, 48 N.E. 781 (Mass. 1897)* ; Restatement (Second) of Property § 6.1, Reporter's Note 6 (1977).

(n157)Footnote 157. *See Fifth Ave. Bldg. Co. v. Kernochan, 117 N.E. 579, 580 (N.Y. 1917)* .

(n158)Footnote 158. *See, e.g., Warren v. Wagner, 75 Ala. 188 (1883)* .

(n159)Footnote 159. *See* Restatement (Second) of Property §§ 6.1 & cmt. b, 11.1 (1977).

(n160)Footnote 160. *See Duhain v. Mermod, Jaccard & King Jewelry Co., 105 N.E. 657 (N.Y. 1914)* .

(n161)Footnote 161. *See id.; Smith v. McEnany, 48 N.E. 781 (Mass. 1897)* .

(n162)Footnote 162. *See, e.g., Walker's Case, 76 Eng. Rep. 676 (K.B. 1587); Dalston v. Reeve, 91 Eng. Rep. 948 (K.B. 1697);* 1 J.H. Thomas, Systematic Arrangement of Lord Coke's First Institute of the Laws of England 368 (1986); William B. Stoebuck & Dale A. Whitman, The Law of Property § 6.32 (3d ed. 2000).

(n163)Footnote 163. *See* § 41.03(c)(6)(iii), *below.*

(n164)Footnote 164. Professor Max P. Rapacz has observed:

> It is submitted that speaking in terms of the obligation to pay rent being terminated is more in accord with actuality than saying that the rent is merely suspended. There seems to be no case indicating or holding that a tenant has a duty to return after an eviction, but we do have the contrary assertions that he is not obliged to return after the cause of the eviction has been removed. So it seems that the only meaning which the typical statement can have is that the tenant would be obliged to pay rent upon his voluntary return which practically never happens.

Max P. Rapacz, *Origin and Evolution of Constructive Eviction in the United States, 1 De Paul L. Rev. 69, 87-88 (1951)* (footnote omitted).

(n165)Footnote 165. *See, e.g., Gateway Co. v. Charlotte Theaters, Inc., 297 F.2d 483 (1st Cir. 1961); Kulawitz v. Pacific Woodenware & Paper Co., 155 P.2d 24 (Cal. 1944)* ; *J.C. Penney Co. v. Birrell, 32 P.2d 805 (Colo. 1934)* ; *Charles E. Burt, Inc. v. Seven Grand Corp., 163 N.E.2d 4 (1959)* ; *Scott v. Prazma, 555 P.2d 571 (Wyo. 1976)* . *See also* Restatement (Second) of Property § 6.1 & Reporter's Note 6 (1977).

(n166)Footnote 166. *See, e.g., Radinsky v. Weaver, 460 P.2d 218 (Colo. 1969)* ; *Suhr v. City of Scribner, 275 N.W.2d 596 (Neb. 1979)* ; C.S. Parnell, Annotation, *Breach of Covenant for Quiet Enjoyment in Lease, 41 A.L.R.2d 1414, 1454 (1955)* .

(n167)Footnote 167. *See, e.g., In re Strasburger, 30 N.E. 379 (N.Y. 1892)* ; C.S. Parnell, Annotation, *Breach of Covenant for Quiet Enjoyment in Lease, 41 A.L.R.2d 1414, 1455 (1955)* .

(n168)Footnote 168. *See, e.g., Thompson v. Poirier, 420 A.2d 297 (N.H. 1980)* (moving expenses); *Burdan v. Walton, 689 S.W.2d 543 (Ark. 1985)* (damages for conversion of personal property); *Queen v. Postell, 513 A.2d 812 (D.C. App. 1986)* (loss of personal property); *Johnson v. Snyder, 221 P.2d 164 (Cal. Ct. App. 1950)* (loss of goodwill); C.S. Parnell, Annotation, *Breach of Covenant for Quiet Enjoyment in Lease, 41 A.L.R.2d 1414, 1455-1459 (1955)*

(n169)Footnote 169. *See, e.g., Pierce v. Nash, 272 P.2d 938 (Cal. Ct. App. 1954)* .

(n170)Footnote 170. *See, e.g., Ciraolo v. Miller, 525 N.Y.S.2d 861 (App. Div. 1988)* ; *Pollock v. Morelli, 369 A.2d 458 (Pa. Super. Ct. 1976)* .

(n171)Footnote 171. *See, e.g., Albert Properties, Inc. v. Watkins, 237 S.E.2d 670 (Ga. Ct. App. 1977)* ; *Nate v. Galloway, 408 N.E.2d 1317 (Ind. Ct. App. 1980)* ; *Kuiken v. Garrett, 51 N.W.2d 149 (Iowa 1952)* ; *Suffolk Sports Ctr., Inc. v. Belli Constr. Corp., 628 N.Y.S.2d 952 (App. Div. 1995)* .

(n172)Footnote 172. *See* discussion in § 41.03(c)(3)(ii) of this chapter.

(n173)Footnote 173. *See City of New York v. Pike Realty Corp., 160 N.E. 359 (N.Y. 1928)* ; James A. Casner, ed., 1 American Law of Property. § 3.52 (Boston: Little, Brown & Co., 1952).

(n174)Footnote 174. *See* Restatement (Second) of Property § 6.1 (1977).

(n175)Footnote 175. Of course, the implied covenant of quiet enjoyment would take on a lesser significance, even in the commercial leasing context, if the court were willing to depart from traditional common law rules and allow tenants to terminate their leases in the event of landlord breach of a lease covenant, on the theory that lease covenants are mutually dependent. This approach was taken in *Wesson v. Leone Enterprises, Inc., 774 N.E.2d 611 (Mass. 2002)* . In that case, a commercial tenant contended that the landlord's failure to repair a leaking roof resulted in a constructive eviction. The court rejected this claim because while the failure may have made the tenant's situation more inconvenient and expensive it did not render the premises untenantable. However, the court allowed the tenant to terminate the lease anyway. It used a mutually dependant covenant analysis and concluded that the landlord's breach of its covenant to keep roof in good repair allowed the tenant to terminate the lease. *See also Richard Barton Enterprises, Inc. v. Tsern, 928 P.2d 368 (Utah 1996) 928 P.2d 368 (Utah 1996)* . (Based on a dependency of covenants concept, the court permitted a commercial tenant to obtain a rent abatement to the extent that the landlord's breach of a repair covenant resulted in a diminution in the value of the leased premises). *Cf. Matte v. Shippee Auto, Inc., 876 A.2d 167 (N.H. 2005)* (Court declines to abandon the traditional rule of independent covenants in the commercial leasing context).

Thompson on Real Property, Thomas Editions

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CHAPTER 41 TENANT RIGHTS AND LANDLORD DUTIES

5-41 Thompson on Real Property, Thomas Editions § 41.04

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§ 41.04 Rights and Duties Relating to the Condition of the Leased Premises--The Traditional Rules.

§ 41.04(a) Initial Condition of the Premises.

§ 41.04(a)(1) The Traditional Caveat Emptor Rule.

A landlord who leases real property to a tenant conveys an estate in land. The traditional common law view was that the landlord made no implied warranty in connection with this conveyance as to the initial condition of the leased property or as to its fitness for the tenant's intended purpose. In the absence of an express warranty of suitability, the risk that the premises might not be suitable for the tenant's purpose was borne by the tenant. The prevailing rule, in short, was one of caveat emptor. n176

The caveat emptor rule arose in an agrarian era, when agricultural land, not buildings, represented the essential subject matter of a lease. With increased urbanization, this changed. In recent times, the traditional caveat emptor rule has been substantially eroded in a majority of jurisdictions by statutes and by court decisions that have recognized an implied warranty of habitability for residential tenancies. However, outside of the residential landlord-tenant context, and in jurisdictions that do not recognize a warranty of habitability with respect to residential leases, the traditional rule of caveat emptor generally prevails.

A tenant who is subject to the caveat emptor rule could reduce the risk that the premises might be unsuitable for the tenant's intended purpose by making a careful inspection of the premises. The tenant could also bargain with the landlord for an express warranty of suitability in the lease. In some instances, the tenant might also be able to take advantage of recognized exceptions to the caveat emptor rule. Those exceptions are considered below.

§ 41.04(a)(2) Exceptions to the Traditional Rule.

§ 41.04(a)(2)(i) Lease of Furnished House.

A few jurisdictions have recognized an exception to the caveat emptor rule when a tenant leases a furnished residence for a short term. n177 The exception, which typically arises in connection with the seasonal rental of a vacation dwelling, is usually justified on the ground that the parties intend the tenant to take immediate occupancy, and there will

not be sufficient time for the tenant to inspect the premises to determine their suitability. n178 In jurisdictions that recognize this exception, the landlord impliedly warrants that the furnished premises will be initially suitable for tenant occupancy. n179

This "furnished house" exception to the caveat emptor rule is limited in several respects. In the first place, most jurisdictions have not adopted it. n180 Second, it applies only to short term leases. In the leading case of *Ingalls v. Hobbs*, n181 this period was described as one for "a few days, a few weeks, or months." It has also been said that the test for applying the exception is whether the lease is made for a temporary purpose. n182 The implied warranty that arises under the furnished house exception does not apply to minor inconveniences, n183 to conditions that arise after the execution of the lease, n184 or to unfurnished premises. n185

In the event the implied warranty is breached, the tenant is entitled to terminate the lease and to assert the breach as a defense in the landlord's action to recover rent. n186 It has also been held that the tenant will be able to recover money previously advanced to the landlord. n187 If a person is injured as a result of a defect covered by the warranty, the landlord may also be subject to liability in tort. n188

§ 41.04(a)(2)(ii) Fraud and Non-Disclosure.

The caveat emptor rule does not protect the landlord from a fraudulent misrepresentation to the tenant regarding the condition of the premises. n189 If the landlord misrepresents the condition of the premises, and the usual elements of actionable fraud are present, the tenant may be entitled to recover damages, to terminate the lease, or to assert the fraud as a defense to the landlord's action for rent. n190

The landlord is also under a duty to disclose latent defects or dangerous conditions on the premises, known to the landlord, that are not discoverable by ordinary inspection. n191 The landlord's failure to disclose is typically described as a fraudulent concealment, and may entitle the tenant to the same remedies mentioned above. n192 As discussed in § 41.09(b)(2) of this chapter, non-disclosure may also subject the landlord to personal injury liability.

§ 41.04(a)(2)(iii) Building Under Construction.

Another exception to the caveat emptor rule has been recognized by some courts when the lease restricts the premises to a specified use, and the lease is made before the landlord completes construction or alteration of improvements needed for that use. This circumstance has been found to give rise to an implied warranty on the part of the landlord that the premises will be suitable for the tenant's intended use. n193 The justification appears to be similar to that for the furnished house exception: the tenant is unable to fully inspect the leased premises at the time the lease is made.

§ 41.04(b) During the Lease Term.

The traditional common law rule was that, in the absence of a lease covenant to the contrary, the landlord was not obligated to maintain or repair the leased premises during the term of the lease. n194 This result was justified on the basis that the tenant had received a conveyance of a non-freehold estate that was subject to the tenant's exclusive control. n195 However, the landlord did have an obligation, sounding in tort, to maintain areas, such as common stairways and entrances, that remained within the landlord's control. n196

In the absence of a contrary agreement, it was the tenant, not the landlord, who had obligations with respect to the maintenance and repair of the leased premises during the term of the lease. These obligations arose under the doctrine of waste. n197 In order to avoid injury to the landlord's reversion, the tenant was, in general, obligated to make reasonable, ordinary, and necessary repairs to preserve the estate in the condition that existed at the beginning of the tenancy. The tenant could be required, for example, to repair dilapidated fences or structures, or to undertake efforts, such as roof repairs, to prevent deterioration of the property. However, the tenant was generally not obligated, under the doctrine of

waste, to make repairs for ordinary wear and tear, to repair defects that existed at the beginning of the tenancy, or to rebuild a building destroyed by accidents or natural forces for which the tenant was not responsible. n198

§ 41.04(b)(1) Effect of Express Covenant to Repair.

Although the common law traditionally did not impose a duty on the landlord to maintain or repair the leased premises, such a duty could arise under a lease provision. The parties could include an express covenant by the landlord in the lease to maintain the leased premises or to make specified repairs. Violation of the covenant would expose the landlord to liability for damages, and sometimes to other consequences.

The language of the lease is obviously important to a determination of the existence and scope of a landlord repair covenant. Some lease provisions relating to repairs may not involve a covenant to repair at all. For example, a lease provision that permits the landlord to enter the leased premises and make repairs has been held not to amount to a promise by the landlord to make repairs. n199 Even when a lease does contain a covenant by the landlord to make repairs, it may be restricted to repairs of a specified type. n200 And a covenant to "repair" may not require a party to make "improvements" to a building, n201 or to "replace" elements of a building that have fallen into disrepair. n202

Breach by the landlord of a repair covenant has traditionally entitled the tenant to make the repair, if minor, and to sue the landlord for reimbursement. n203 In the case of a major repair, the tenant may do the same, or simply bring an action against the landlord for damages based on breach of the repair covenant. n204 Some courts have indicated that specific performances may be available as well, n205 but most courts have declined to allow that remedy. n206

The tenant's remedies for landlord breach of a repair covenant traditionally have not included rent withholding or termination of the lease. This followed from the common law concept that lease covenants are independent of each other, and that breach of a lease covenant by one party does not excuse performance by the other. An exception to the traditional concept of independence of lease covenants has been recognized, however, when the landlord's failure to make repairs deprives the tenant of the use and enjoyment of the leased premises to such an extent that the covenant of quiet enjoyment is breached. In this case, the tenant may vacate the premises and avoid liability for future rent. n207

It is appropriate, as well, to note that the *Restatement* offers a non traditional rule that, if adopted, would, in some circumstances, permit a tenant to terminate a lease based upon breach of a lease covenant by the landlord, where that breach has deprived the tenant of a significant inducement to the making of the lease. The *Restatement* offers this formulation:

> Except to the extent the parties to a lease validly agree otherwise, if the landlord fails to perform a valid promise contained in the lease to do, or to refrain from doing, something on the leased property or elsewhere, and as a consequence thereof, the tenant is deprived of a significant inducement to the making of the lease, and if the landlord does not perform his promise within a reasonable period of time after being requested to do so, the tenant may ... terminate the lease. n208

The parties may also provide for remedies in the lease. Thus, the parties may agree that the landlord is obligated to make certain repairs, and if the landlord fails to do so, the tenant may make the repairs and deduct the cost of those repairs from rent. n209 The parties may also agree that the tenant is entitled to terminate the lease. n210

Inasmuch as the tenant is in a better position than the landlord to know the condition of the leased premises during the term of the lease, the landlord's duty under a repair covenant has generally been subject to the condition that the tenant give notice of the condition requiring repair. n211 The landlord has also been entitled to a reasonable period of time following the notice in which to make the repair. n212 However, a court may conclude that notice is unnecessary if the landlord already knows of the need for the repair. n213

Damages for breach of an express covenant of repair have normally been equal to the difference in the rental value of the leased premises with and without the repairs. n214 However, some courts have awarded damages for the cost of repairs and for losses resulting from the landlord's breach of the repair covenant. n215 In some cases, the tenant's recovery has included special damages, such as lost profits. n216

FOOTNOTES:

(n1)Footnote 176. *See, e.g., Daly v. Wise, 30 N.E. 837 (N.Y. 1892)* ; *Anderson Drive In Theatre, Inc. v. Kirkpatrick, 110 N.E.2d 506 (Ind. Ct. App. 1953)* .

(n2)Footnote 177. *See, e.g., Ingalls v. Hobbs, 31 N.E. 286 (Mass. 1892)* .

(n3)Footnote 178. *See, e.g., Young v. Povich, 116 A. 26 (Me. 1922)* ; *Pines v. Perssion, 111 N.W.2d 409 (Wis. 1961)* .

(n4)Footnote 179. *See, e.g., id.*

(n5)Footnote 180. By way of illustration, the North Carolina Supreme Court declined to recognize the exception in *Conley v. Emerald Isle Realty, Inc. 513 S.E.2d 556 (N.C. 1999)* . The *Conley* case involved personal injuries caused by a defect in an oceanfront vacation cottage that had been rented for two weeks. The court first concluded that the leased cottage was not covered by the North Carolina Residential Rental Agreements Act, which obligates landlords to keep leased premises in a "fit and habitable condition." It then said: "This Court has never adopted an implied warranty of suitability doctrine as an exception to our traditional landlord-tenant law, and we decline to do so now." *513 S.E.2d at 559* . However, after the *Conley* decision came down, the North Carolina legislature enacted a statutory warranty of habitability for the rental of vacation residential property. *See N.C. Gen. Stat. 42A-31* (2000).

(n6)Footnote 181. *31 N.E. 286 (1892)* .

(n7)Footnote 182. *See Young v. Povich, 116 A. 26 (Me. 1922)* .

(n8)Footnote 183. *See Michtom v. Miller, 178 N.Y.S. 395 (Sup. Ct. 1919)* .

(n9)Footnote 184. *See, e.g., Davenport v. Squibb, 70 N.E.2d 793 (Mass. 1947)* .

(n10)Footnote 185. *See Ingalls v. Hobbs, 31 N.E. 286 (Mass. 1892)* .

(n11)Footnote 186. *Id.*

(n12)Footnote 187. *See Young v. Povich, 116 A. 26 (Me. 1922)* .

(n13)Footnote 188. *See* discussion in § 41.09, *below.*

(n14)Footnote 189. *See, e.g., Perkins v. Marsh, 37 P.2d 689 (Wash. 1934)* ; *Anderson Drive In Theatre, Inc. v. Kirkpatrick, 110 N.E.2d 506 (Ind. Ct. App. 1953)* .

(n15)Footnote 190. *See, e.g., Highmont Music Corp. v. J.M. Hoffman Co., 155 A.2d 363 (Pa. 1959)* (damages); *Daly v. Wise, 30 N.E. 837 (N.Y. 1892)* (rescission and rent defense).

(n16)Footnote 191. *See, e.g.,* Steefel v. Rothschild, 72 N.E.112 (N.Y. 1904) ; *Perkins v. Marsh, 37 P.2d 689 (Wash. 1934)* .

(n17)Footnote 192. *See, e.g., Capitol Amusement Co. v. Anheuser Busch, Inc., 30 P.2d 264 (Colo. 1934)* (rent defense); *Service Oil Co. v. White, 542 P.2d 652 (Kan. 1975)* (damages).

(n18)Footnote 193. *See, e.g., The Hardman Estate v. McNair, 111 P. 1059 (Wash. 1910)* ; *Panagos v. Fox, 16 N.W.2d 700 (Mich. 1944)* .

(n19)Footnote 194. *See, e.g., Chambers v. Lowe, 169 A. 912 (Conn. 1933)* ; *Divines v. Dickinson, 174 N.W. 8 (Iowa 1919)* .

(n20)Footnote 195. *See* Robert S. Schoshinski, *American Law of Landlord and Tenant* § 3.13 (Lawyers Co Operative Publishing Co. 1980).

(n21)Footnote 196. *See* discussion in § 41.09(b)(1), *below.*

(n22)Footnote 197. The doctrine is discussed in chapter 70, *below.*

(n23)Footnote 198. *See* §§ 70.08(b)(3)(A) and 70.08(b)(3)(B), *below.*

(n24)Footnote 199. *See, e.g., Palimas v. Aress Realty Co., 37 A.2d 243 (Conn. 1944)* .

(n25)Footnote 200. *See, e.g., Piano & Organ Center, Inc. v. Southland Bonded Warehouse, Inc., 228 S.E.2d 615 (Ga. Ct. App. 1976)* .

(n26)Footnote 201. *See Prudential Ins. Co. v. L.A. Mart, 68 F.3d 370 (9th Cir. 1995)* . In the *Prudential* case, two engineering firms hired by the landlord had recommended seismic upgrading of an existing building. The landlord wanted the tenant to pay the costs of the upgrade. The lease contained provisions requiring the tenant to keep the premises in good condition and to make necessary repairs and replacements. But the government had not ordered a seismic upgrade, and the structure was in compliance with all applicable building and safety requirements. The court concluded that in the absence of a government order to perform specified seismic upgrades, it could not require the tenant to pay for the costs of the upgrade desired by the landlord.

(n27)Footnote 202. *See Seoane v. Drug Empor., Inc., 457 S.E.2d 93 (Va. 1995)* . The commercial lease in the Seoane case obligated the landlord to make repairs. When the landlord did not respond to tenant advice that roof and exterior heating and air conditioning units had fallen into repair and should be replaced, the tenant replaced them and then withheld rent in order to recover the costs of replacement. The Virginia Supreme Court said that the landlord's "repair" duty did not extend to "replacement" of the building elements. It also concluded that the lower court had erred in crediting the replacement costs against the tenant's liability for rent, and in denying the landlord possession of the premises. *See also Miller v. Gammon & Sons, Inc., 67 S.W.3d 613 (Mo. Ct. App. 2001)* (lease provision requiring tenant to keep premises in good repair did not require tenant to resurface the parking lot, which the court regarded as a "structural" repair).

(n28)Footnote 203. *See, e.g., Young v. Berman, 131 S.W. 62 (Ark. 1910)* .

(n29)Footnote 204. *See, e.g., id.*; *See* Annotation, *Rights and Remedies of Tenant Upon Landlord's Breach of Covenant to Repair*, 28 A.L.R. 1448 (1924) .

(n30)Footnote 205. *See, e.g., Continental & Vogue Health Studios, Inc. v. Abra Corp., 120 N.W.2d 835 (Mich. 1963)* .

(n31)Footnote 206. *See, e.g., Beck v. Allison, 56 N.Y. 366 (1874)* ; *Darnall v. Day, 37 N.W.2d 277 (Iowa 1949)* .

(n32)Footnote 207. *See, e.g., Talbott v. English, 59 N.E. 857, 860 (Ind. 1901)* .

(n33)Footnote 208. Restatement (Second) of Property 7.1 (1977). The *Restatement* approach is discussed more fully in 41.07 of this chapter.

(n34)Footnote 209. *See, e.g., Dayton Hudson Corp. v. Macerich Real Estate Co., 751 F.2d 219 (8th Cir. 1984)* ; *Edith Invest. Co. v. Fair Drug, Inc., 617 S.W.2d 567 (Mo. Ct. App. 1981)* .

(n35)Footnote 210. *See, e.g., Verges v. Life Ins. Co. of Va., 485 So. 2d 616 (La. Ct. App. 1986)* ; *Arnett v. U.S.X. Corp. 763 S.W.2d 169 (Mo. Ct. App. 1988)* .

(n36)Footnote 211. *See, e.g., Woodbury Co. v. Williams Tackaberry Co., 148 N.W. 639 (Iowa 1914)* .

(n37)Footnote 212. *See, e.g., Tyson v. Weil, 53 So. 912 (Ala. 1910)* .

(n38)Footnote 213. *See, e.g., Rittenberg v. Donohoe Constr. Co., 426 A.2d 338 (D.C. 1981)* .

(n39)Footnote 214. *See, e.g., Williams v. Fenster, 137 A. 406 (N.J. 1926)* ; *Gordon v. Reinheimer, 29 P.2d 596 (Okla. 1934)* ; Annotation *Rights and Remedies of Tenant Upon Landlord's Breach of Covenant to Repair*, 28 A.L.R. 1448 (1938) .

(n40)Footnote 215. *See, e.g., Cato Ladies Modes of N.C., Inc. v. Pope, 203 S.E.2d 405 (N.C. Ct. App. 1974)* .

(n41)Footnote 216. *See Mills v. Ruppert, 333 P.2d 818 (Cal. Ct. App. 1959)* .

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CHAPTER 41 TENANT RIGHTS AND LANDLORD DUTIES

5-41 Thompson on Real Property, Thomas Editions § 41.05

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§ 41.05 Rights and Duties Relating to the Condition of the Leased Premises--Departures from the Traditional Rules.

§ 41.05(a) Introduction.

It has been frequently observed that the traditional rules with respect to the condition and repair of leased premises arose in an agrarian society in which the use of land rather than improvements was the principal object of the lease, and in which the typical tenant, a sturdy farmer, was quite capable of making the simple repairs that might be required. Increased urbanization and technological advances have, over time, considerably changed both the principal object of the lease and the extent of the burden of repair. Modern residential tenants are more interested in adequate housing than in arable land. And the modern tenant is generally inexperienced in performing maintenance work on mechanical and electrical equipment associated with modern urban dwellings. Consequently, application of the traditional rules regarding the condition of the leased premises can have harsh results.

Changed needs and circumstances have contributed to legislative and judicial efforts to reform the traditional common law rules regarding the condition of leased premises at the outset of the tenancy, and with respect to maintenance and repair during the lease term. Statutory housing codes represented an early legislative effort to establish and enforce standards for residential dwellings. Other legislation permitted tenants to withhold rent or to make repairs to leased premises and to deduct the cost of repairs from rent when applicable housing standards were violated. A few courts utilized the contract doctrine of illegality to assist tenants who were involved in disputes with landlords over poor housing conditions. More recently, residential landlord tenant law has been revolutionized by the adoption of an implied warranty of habitability on the part of residential landlords.

But the traditional rules must not be ignored. They continue to apply, at least to some extent, to residential leases in jurisdictions that have not recognized the implied warranty of habitability. And, in the absence of lease provisions to the contrary, the traditional rules generally continue to prevail outside the residential landlord-tenant context.

§ 41.05(b) Housing Codes.

Housing codes represent a significant legislative departure from the traditional common law concept that the landlord had no obligation with respect to the condition of the leased premises. These codes generally establish minimum

standards for human habitation by regulating the following aspects of subject dwelling units: 1) structural elements, such as walls and roofs; 2) facilities, such as sinks, toilets, electrical outlets, and heating fixtures; 3) services, such as heat, electricity, water, and sewage disposal; and 4) occupancy limits. Housing codes also provide enforcement mechanisms to deal with code violations. n217

The New York Tenement House Law of 1867 is regarded as the pioneer of modern housing codes. It required lodging houses and specified multi unit dwellings in New York City to have watertight roofs, fire escapes, refuse containers, ventilators, adequate chimneys, and "good and sufficient water closets or privies." n218 The Metropolitan Board of Health was identified as the enforcement agency for compliance with the legislation, indicating that the principal purpose of the statute was to promote public health. n219 Other early housing codes were also enacted to combat the perceived threat to public health presented by dilapidated and crowded tenements. n220 Today, housing codes are in effect in thousands of communities, and several states have state wide housing codes. n221

Until recently, housing codes did not provide for enforcement by the tenants themselves. Instead, government agencies were commissioned to enforce the code provisions against landlords. These agencies were typically charged with the duty to make inspections, to issue notices of code violations, and to conduct hearings regarding violations. If the landlord did not bring the building up to code standards within a specified period, the government agency was typically authorized to bring a criminal action, or to obtain an order for the vacation or demolition of the building. Some jurisdictions provided the government agencies with additional enforcement tools. These included authorization to directly undertake needed repairs; or authorization to sue for an injunction, for the imposition of civil penalties, or for the appointment of a receiver to take over building operations. n222

It has been said that substantial success in the application of traditional modes of housing code enforcement probably would have made the 1960's and 1970's "revolution" in landlord-tenant law unnecessary. n223 However, government enforcement of housing codes has been regarded as ineffective, for a variety of reasons. One problem with many housing code administrative remedies is that they require personal jurisdiction over the owner of a non complying structure. Obtaining jurisdiction has sometimes been rendered difficult by the practice of placing title to low income apartments in corporations whose officers and places of business cannot be located and whose agents cannot identify their principals. n224 Even when personal jurisdiction can be obtained, it has been suggested that an order to vacate the premises could play into the hands of a landlord who wishes to get rid of bothersome tenants without going through the eviction process. n225

Additional reasons for the ineffectiveness of administrative housing code enforcement have been said to include: understaffing of enforcement agencies, corruption of government officials, continuances granted by courts to encourage eventual code compliance, lack of enthusiasm by prosecutors for code enforcement cases, frequent granting of variances for non compliance, and the imposition of small fines on landlords. n226

§ 41.05(c) Repairs Required by the Government.

In addition to housing codes, government units have adopted a variety of health and safety ordinances and regulations relating to the condition of commercial and residential structures. Government agencies sometimes order building repairs or alterations to be made based on legislative or regulatory requirements. Following inspection of a structure, for example, a government agency might order a roof to be repaired, a stairway to be widened, an additional exit to be created, or fire control sprinklers to be added, in order to bring the structure into compliance with applicable health or safety ordinances or regulations. When the building in question is leased, it may not be clear from the lease who, as between the landlord and the tenant, will be responsible for making the required repairs or alterations.

The allocation of the duty to make the changes or alterations generally depends on the intention of the parties, as expressed in the lease, or, if the lease is silent, upon the presumed intention of the parties determined in light of the circumstances. n227 In attempting to discern the presumed intention of the parties, courts have considered such factors

as the nature of the government ordered repair or alteration, its cost, the reason why the repair or alteration has been ordered, and the remaining length of the lease term. n228

Many of the reported cases are ones in which the tenant has generally covenanted to make repairs, but the lease covenant does not clearly deal with changes ordered by a government agency. In that situation, the tenant has usually been found to be responsible for complying with orders that involve the making of ordinary repairs. n229 However, when the changes have involved substantial alterations to a building, or repairs to structural parts of a building, the landlord, not the tenant, has generally been found to be responsible for the changes, unless the changes were ordered because of the particular use that the tenant makes of the leased premises. n230 The results have been similar when the tenant has entered into a general covenant to comply with laws and regulations applicable to the premises. n231 A few courts have indicated that the general common law rule that the landlord is not obligated to make repairs during the term of the lease applies even with respect to repairs required by public authorities. n232

A landlord who is obligated to make government-ordered repairs or alterations, and who fails to do so, may, in addition to incurring administrative or criminal penalties, violate the covenant of quiet enjoyment. Several courts have permitted the tenant to vacate the leased premises, and, on a constructive eviction theory, to avoid further liability to the landlord, when the landlord did not comply with a government order to make changes in the leased premises. n233

Landlords and tenants may also be obligated to make alterations to the premises under legislation prohibiting discrimination against physically disabled individuals. Title III of the Americans with Disabilities Act n234 requires modifications of some existing buildings to accommodate access by persons with disabilities. Among other things, the Act requires the removal of "architectural barriers" from existing places of "public accommodation," where the removal is "readily achievable." n235 A Rule implementing the Act provides that both landlords and tenants are subject to these requirements, but that the parties may allocate compliance responsibility between themselves by lease or other contract. n236 The Rule itself does not designate which party would be responsible for compliance in the absence of an agreed allocation of responsibility; however, an "Analysis of the Rule" prepared by the Department of Justice suggests that the landlord would normally be responsible for compliance with respect to common areas, while the tenant would normally be responsible with respect to "its own place of public accommodation." n237 As a practical matter, where leased premises are subject to the Act, the parties should consider how responsibilities under the Act should be allocated and provide for those allocations in their lease.

§ 41.05(d) Rent Withholding Legislation.

In an effort to improve compliance with housing codes, beginning in the 1960s, many legislatures enacted statutes that provided tenants with private remedies for landlord housing code violations. The principal remedy was an authorization for the tenant to withhold rent from the landlord. n238

Rent withholding had actually been a feature of earlier legislation, but the remedy did not have much impact in prior years. Statutes enacted in Connecticut, in 1905, and Iowa, in 1919, provided that the landlord's failure to obtain a certificate of compliance with the housing code would bar an action by the landlord to recover rent from the tenant or to evict the tenant for nonpayment of rent. However, neither statute saw much use. n239 A similar statute was enacted in New York in 1929, but it has received little use since the adoption of more effective rent withholding legislation in the 1960s. n240

Rent withholding statutes enacted in the 1960s and in later years typically authorize tenant rent withholding during the existence of substantial violations of the applicable housing code. In order to justify rent withholding, most of the statutes require the tenant to show that an official inspection of the dwelling unit has been made and that the inspector reported one or more housing code violations to the enforcement agency. n241 In addition, several statutes require a prior judicial determination of substantial code violation before rent may be withheld. n242 If a prior judicial determination is required, the statutes typically provide that the tenant or a housing code enforcement agency may bring

the action to establish the basis for rent withholding. n243 Some statutes provide that the government welfare agency that distributes housing funds to welfare recipients may withhold funds from landlords if the leased premises are in an unhealthful or unsafe condition. n244

Modern rent withholding statutes usually provide for rental payments to be escrowed in some manner. n245 Most statutes also provide that escrowed funds may be used to pay for repair of the premises. n246 The landlord normally has the right to receive unexpended funds following the making of the repairs, but this right is sometimes limited. For example, the Pennsylvania statute allows the landlord to receive unexpended funds only if the leased premises are certified to be "fit for human habitation" within six months of the initial unfitness certification. If a fitness certification is not obtained within the deadline, the funds are to be distributed to the tenant or they may be applied to leasehold repairs or payment for leasehold utility services. n247

Most statutes contain provisions protecting tenants against landlord retaliation for the assertion of statutory rights. n248 Some statutes that provide for rent withholding also provide for additional tenant remedies for substandard housing, such as rent abatement and injunctive relief. n249

Commentators have questioned the effectiveness of rent withholding legislation in improving the habitability of leased dwelling units. n250 One of the concerns is delay. As noted above, most rent withholding legislation requires, as a predicate to withholding, that the leased premises be inspected by a government official and be certified to be out of compliance with code requirements before a tenant can withhold rent. Even though the conditions of the dwelling may be unhealthy or dangerous, delay in inspection or certification, or both, will mean delay in the exercise of the tenant's rent withholding remedy. Potential problems of delay are even greater if the applicable statute requires the tenant to bring suit against the landlord before rent may be withheld. Even when rents are withheld, they may be insufficient to rectify substandard housing problems. n251

Rent withholding legislation has generally survived landlord claims that the legislation violates constitutional due process and equal protection standards, or claims that the legislation unconstitutionally impairs contracts. n252

§ 41.05(e) Receivership Statutes.

If the landlord does not fulfill the obligation to maintain the leased premises in accordance with applicable legal standards, a receivership statute may permit a tenant or a government official to petition the court to have the property operated by a receiver. The receivership remedy represents an extension of the rent withholding and escrow remedies featured in rent withholding legislation. n253

If appointed, the receiver will not take title to the landlord's property, but the receiver will manage the property, collect the rents, and apply the rent money to repairs, to rehabilitation of the property, and to other purposes in accordance with priorities specified in the statute. n254 Because rental income may be insufficient to repair or rehabilitate the property, some statutes permit the receiver to borrow money to accomplish approved purposes, and to secure the borrowing by encumbering the property. n255

While receivership has been described as a useful tool for helping to meet the housing needs of low income people, n256 its benefits for the individual tenant may be limited. Tenants may not be included within the category of individuals who can actually initiate receivership proceedings. n257 Some statutes require the petitioner to allege deficiencies that amount to a public nuisance. n258

§ 41.05(f) Judicial Application of the Illegal Lease Theory.

Another departure from traditional common law rules relating to the condition of leased premises is based on the contract doctrine of illegality. n259] The seminal case is *Brown v. Southall Realty Co.* n260 In that case, a residential

tenant asserted, as a defense to the landlord's eviction action for nonpayment of rent, that no rent was due because the leased premises had been in violation of applicable housing regulations prior to the signing of the lease, and that the landlord had known of the violations. The District of Columbia Court of Appeals agreed with this contention. Reversing a judgment in favor of the landlord, the court held that the lease was void as an illegal contract, because it violated housing regulations that, among other things, prohibited the renting of "any habitation" unless it was in a "clean, safe, and sanitary condition, in repair, and free from rodents or vermin." n261 Since the lease was illegal, and void, the landlord could not enforce it against the tenant.

Subsequent decisions by the District of Columbia courts further developed the *Brown v. Southall* doctrine. It was held that application of the doctrine did not depend on actual knowledge by the landlord of housing code violations before entering into the lease; it was enough that the landlord should have known of the violations. n262 However, application of the doctrine was limited to violations that substantially affected habitability, n263 and that were in existence at the beginning of the tenancy. n264 Although the landlord was not entitled to rent under a void lease, it was held that the landlord could recover the reasonable value of the premises when occupied. n265

Although the *Brown v. Southall* doctrine does provide a tenant with a private remedy for some housing code violations, its usefulness is somewhat limited. To the extent that the doctrine applies only when the housing code defects exist at the beginning of the tenancy, the doctrine would be of little assistance to tenants whose premises become uninhabitable after the lease commences. Moreover, the doctrine does not provide for rent withholding as such; once application of the doctrine results in a conclusion that the lease is void, the landlord should be able to evict a tenant who does not pay rent. However, the landlord's eviction ability may be limited by application of the separate doctrine of retaliatory eviction. n266

The *Brown v. Southall* doctrine has enjoyed only limited application outside of the District of Columbia. n267 The Supreme Court of Wisconsin declined to apply the doctrine in the housing code enforcement context, reasoning that the legislature had contemplated only administrative enforcement of the applicable housing code. n268 In any event, the doctrine seems to have been eclipsed by judicial recognition and statutory adoption of the implied warranty of habitability.

§ 41.05(g) 19th Century Fitness and Repair Legislation.

Several states adopted legislation in the 19th century that diverged from traditional common law concepts by requiring the landlord to deliver the leased premises in a condition fit for the tenant's intended use and to make repairs during the lease term. Statutes in Louisiana and Georgia were clearly based on civil law sources. The ultimate source for the other early legislation may have been the civil law as well. n269

§ 41.05(g)(1) The Louisiana Civil Code.

The earliest, and most expansive, American legislation of this type was adopted in Louisiana. Based on civil law sources that considered a lease to be a contract, the Louisiana Civil Code of 1808 imposed significant obligations on the lessor with respect to the initial suitability and continued maintenance of leased property. The key provisions continue to be found in the current Louisiana Civil Code.

Since 1808, the Louisiana Civil Code has required the lessor to deliver the leased property in "good condition." n270 The 1808 Civil Code also required the lessor to "maintain the thing in a condition such as to serve for the use for which it is hired." n271 It also required the lessor to guarantee the leased property against "vices and defects of the thing which may prevent its being used." n272 Since 1825, this guarantee by the lessor has clearly applied both to vices and defects that exist at the time the lease is made and to those that arise later on, with the exception of vices and defects that are the fault of the lessee. n273 The lessor has, since 1808, also been required to make necessary repairs during the continuance of the lease. n274 Some repairs, such as repairs of locks and accidentally broken window glass, were allocated to the

lessee. n275

The lessee's remedies for the lessor's breach of lease obligations have, since 1808, included damages n276 and, in some circumstances, lease dissolution. n277 The 1825 Civil Code added an important lessee remedy that continues to be available in Louisiana: if the lessor does not make all required repairs after being called upon to do so, the lessee may make the repairs and deduct the price from the rent, on proving that the price is just and reasonable and that the repairs are "indispensable." n278

The provisions of the Louisiana Civil Code referred to in this section apply to all leases, not just to leases of residential property.

§ 41.05(g)(2) Georgia Legislation.

Georgia legislation has also been influenced by civil law concepts. Since 1863, Georgia statutes have provided that, in the absence of a contrary agreement, a lease for fewer than five years is presumed to create a usufruct, and a lease for five years or longer is presumed to create an estate for years. n279 In the case of a usufruct, a civil law concept regarding repairs is applicable, with the consequence that the landlord is obligated to keep the premises in repair. n280 In the case of an estate for years, a common law concept is applicable: the tenant is liable for repairs necessary for the preservation and protection of the property. n281

The Georgia statute providing for the application of the civil law to a usufruct has long been construed to require the landlord to lease the property in a condition reasonably fit for its intended purpose, if full rent is reserved. n282 Tenant remedies for breach of the landlord's statutory obligations have been held to include damages, rent reduction or recoupment, and the right to repair the premises and deduct the cost of the repairs from rent. n283

The usufruct concept under Georgia law is not limited to residential tenancies.

§ 41.05(g)(3) Legislation in Other States.

Other states that adopted 19th century legislation imposing warranty and repair obligations on landlords were influenced, directly or indirectly, by a proposed civil code for New York drafted by David Dudley Field. n284 In 1872, California adopted legislation, based on Field Code provisions, that obligated the lessor of a building intended for human occupancy, "to put it into a condition fit for such occupation, and repair all subsequent dilapidations thereof, which render it untenantable." n285 The legislation also provided that if the lessor did not make repairs for which the lessor was responsible within a reasonable time after notice, the lessee could make the repairs and deduct the cost of doing so from the rent. n286 Statutory amendments limited the repair and deduct remedy to repair costs that did not exceed one month's rent. The lessee was also permitted to vacate the premises and to be discharged from lease obligations. n287 Early legislation in Montana, Oklahoma, North Dakota, and South Dakota was based, in turn, on the provisions of the California Civil Code referenced above. n288

Modern legislation has substantially changed many of the Field Code influenced statutes. In Montana and Oklahoma, the statutory provisions have been superseded by the adoption of comprehensive landlord-tenant legislation based on the Uniform Residential Landlord and Tenant Act. n289 In California, North Dakota, and South Dakota, the statutes have been amended to provide greater protections to residential tenants. n290 For example, the amended California legislation provides that a dwelling will be "deemed untenantable" if it substantially lacks such elements as: 1) plumbing or gas facilities, maintained in good working order; 2) an approved water supply, capable of producing hot and cold running water; 3) heating facilities, maintained in good working order; and 4) electrical lighting and related wiring and equipment, all maintained in good working order. If the premises become untenantable, and the landlord does not make needed repairs within a reasonable time after notice, the tenant may either vacate the premises, and thereby be relieved of further lease obligations, or undertake needed repairs and deduct the cost of the repairs from

future rent. The landlord is prohibited from retaliating against the tenant for the exercise of statutory rights. An agreement that waives or modifies the statutory rights of a tenant is void as contrary to public policy with respect to any condition that renders the premises untenantable. n291

The California amendments have also provided protections to landlords. The amended legislation requires a residential tenant to keep the occupied portion of the leased premises clean and sanitary; to properly use all gas, electrical, and plumbing fixtures; to properly dispose of rubbish and waste; and not to permit persons on the premises with the tenant's permission to willfully destroy or damage the premises. A substantial breach of the tenant's statutory obligations will bar the tenant from utilizing the repair and deduct remedy. It may also relieve the landlord from the obligation to make repairs. n292 The amended legislation retains the provision limiting the cost of repairs made under the repair and deduct remedy to one month's rent, and it also limits tenant recourse to the remedy to not more than twice in a twelve month period. n293 The limitation on the cost of repair, in particular, means that the repair and deduct remedy will be of little utility to a tenant faced with substantial defects in the leased premises.

FOOTNOTES:

(n1)Footnote 217. *See* Samuel Bassett Abbott, *Housing Policy, Housing Codes and Tenant Remedies: An Integration, 56 B.U.L. Rev. 1, 40, 49, 56 (1976).*

(n2)Footnote 218. *See* Samuel Bassett Abbott, *Housing Policy, Housing Codes and Tenant Remedies: An Integration, 56 B.U.L. Rev. 1, 40, 41, 42 (1976).*

(n3)Footnote 219. *See id. at 42.*

(n4)Footnote 220. *See id.*

(n5)Footnote 221. *See id. at 44.*

(n6)Footnote 222. *See* William B. Stoebuck & Dale A. Whitman, The Law of Property § 6.37 (3d ed. 2000).

(n7)Footnote 223. *See* Roger A. Cunningham, *The New Implied and Statutory Warranties of Habitability in Residential Leases: From Contract to Status, 16 Urban L. Ann. 3, 15 (1979).*

(n8)Footnote 224. *See* Roger A. Cunningham, *The New Implied and Statutory Warranties of Habitability in Residential Leases: From Contract to Status, 16 Urban L. Ann. 3, 16 (1979).*

(n9)Footnote 225. *See* Samuel Bassett Abbott, *Housing Policy, Housing Codes and Tenant Remedies: An Integration, 56 B.U.L. Rev. 1, 49, 50 (1976).*

(n10)Footnote 226. *See id.*

(n11)Footnote 227. *See, e.g.*, 4370 *Park Ave. Corp. v. Hunter Paper Co., 171 N.Y.S.2d 358 (Sup. Ct. 1958) , aff'd, 174 N.Y.S.2d 949 (App. Div. 1958)* ; *Cf. Fresh Cut, Inc. v. Fazli, 650 N.E.2d 1126 (Ind. 1995)* (court considers whether a landlord may, by written agreement, shift responsibility to a tenant for compliance with a municipal ordinance that requires an owner of commercial property to maintain a fire prevention sprinkler system; court concludes that, on the record before it, that there is no public policy impediment to such an agreement).

(n12)Footnote 228. *See, e.g., Gaddis v. Consolidated Freightways, Inc., 398 P.2d 749 (Or. 1965)* .

(n13)Footnote 229. *See, e.g., Friedman v. Le Noir, 241 P.2d 779 (Ariz. 1952)* .

(n14)Footnote 230. *See, e.g., Taylor v. Finnigan, 76 N.E. 203 (Mass. 1905)* ; *see generally* C.T. Drechsler, Annotation, *Who, As Between Landlord and Tenant, Must Make, or Bear Expense of, Alteration, Improvements, or*

Repairs Ordered by Public Authorities, 22 A.L.R.3d 521 (1968) .

(n15)Footnote 231. *See* C.T. Drechsler, Annotation, *Who, As Between Landlord and Tenant, Must Make, or Bear Expense of, Alteration, Improvements, or Repairs Ordered by Public Authorities, 22 A.L.R.3d 521 (1968)* ; *See also Brown v. Green, 884 P.2d 55 (Cal. 1994)* (states the general rule; identifies several factors relevant to the allocation of responsibility for compliance with government orders; concludes that tenant is responsible for abatement of asbestos hazard under the circumstances); *Brown v. Green, 884 P.2d 55 (Cal. 1994);. Hadian v. Schwartz, 884 P.2d 46 (Cal. 1994)* (landlord responsible for complying with seismic reconstruction order); Wolf v. 2539 Realty Assocs., 560 N.Y.S.2d 24 (App. Div. 1990) (lease provisions requiring tenant compliance with laws, regulations, and government orders do not apply to abatement of asbestos hazard).

(n16)Footnote 232. *See, e.g., Wall Estate Co. v. Standard Box Co., 128 P. 1020 (Cal. Ct. App. 1912)* .

(n17)Footnote 233. *See, e.g., Magnolia Warehouses v. Morton Realty Co., 117 S.E.2d 552 (Ga. Ct. App. 1960)* ; *Scott v. Prazma, 555 P.2d 571 (Wyo. 1976)* .

(n18)Footnote 234. *42 U.S.C. §§ 12181-12189*.

(n19)Footnote 235. *See 42 U.S.C. § 12182(b)(2)(A)(iv)*. The Act contains a long list of "private entities" that are considered "public accommodations," so long as the operations of those entities "affect commerce." The list includes, but is not limited to: places of lodging (such as hotels and motels), establishments serving food or drink (such as restaurants and bars), public gathering places (such as auditoriums and convention centers), sales or retail establishments (such as shopping centers and retail stores), and service establishments (such as banks, medical offices, and hospitals). *See 42 U.S.C. § 12181(7)*. Title III has other provisions that apply to new construction and to alterations in public accommodations and commercial facilities. *See 42 U.S.C. § 12183*.

(n20)Footnote 236. *See 28 C.F.R. § 36.201(b)* . Issues with respect to the allocation of compliance responsibility are discussed in: Karen E. Field, *The Americans with Disabilities Act "Readily Achievable" Requirement for Barrier Removal: A Proposal for the Allocation of Responsibility Between Landlord and Tenant, 15 Cardozo L. Rev. 569 (1993);* Michael F. Jones, *Commercial Leases Under the Americans with Disabilities Act*, 22 Real Est. L.J. 185 (1994); Gabrielle P. Whelan, *The "Public Access" Provisions of Title III of the Americans with Disabilities Act: A Guide for Commercial Landlords and Tenants, 34 Santa Clara L. Rev. 215 (1993).*

(n21)Footnote 237. *See 28 C.F.R. Pt. 36*, App. B § 36.201. *See also* Article 9 of the UCC, and the articles referenced in the previous footnote.

(n22)Footnote 238. *See* Roger A. Cunningham, "The New Implied and Statutory Warranties of Habitability in Residential Leases: From Contract to Status." *16 Urb. L. Ann. 3* , 25 (1979).

(n23)Footnote 239. *See 16 Urb. L. Ann. 3* , 23 (1979).

(n24)Footnote 240. *See 16 Urb. L. Ann. 3* , 24 (1979).

(n25)Footnote 241. *See 16 Urb. L. Ann. 3* , 25 (1979).

(n26)Footnote 242. *See, e.g., Mo. Ann. Stat. § 441.570*; *N.J. Stat. Ann. 2A:42-88*.

(n27)Footnote 243. *See, e.g.*, Mo. Stat. Ann. § 441.510; *N.J. Stat. Ann. § 2A:42-88*.

(n28)Footnote 244. *See, e.g., N.Y. Social Services Law § 143-b*.

(n29)Footnote 245. *See, e.g., R.I. Gen. Laws § 45-24.2-11* (code enforcement agency); Mo. Stat. Ann. § 441.570 (clerk of court).

(n30)Footnote 246. *See, e.g., N.J. Stat. Ann. § 2A:42- 92*.

(n31)Footnote 247. *See 35 Pa. Stat. Ann. § 1700-1*.

(n32)Footnote 248. *See, e.g., 35 Pa. Stat. Ann. § 1700-1*.

(n33)Footnote 249. *See, e.g., Minn. Stat. Ann. § 504B.395 et seq.* (rent abatement); *Mich. Comp. Laws Ann. § 125.536* (damages and injunctive relief).

(n34)Footnote 250. *See, e.g.*, Thomas M. Quinn and Earl Phillips, *The Law of Landlord and Tenant: A Critical Evaluation of the Past with Guidelines for the Future, 38 Fordham L. Rev. 225, 242 49 (1969); Tenant Rent Strikes*, 3 Colum. J. of Law and Social Problems 1 (1967).

(n35)Footnote 251. *See* Robert S. Schoshinski, *American Law of Landlord and Tenant* § 3.43 (Lawyers Co Operative Publishing Co. 1980).

(n36)Footnote 252. *See* Jonathan M. Purver, Annotation, *Validity and Construction of Statute or Ordinance Authorizing Withholding or Payment into Escrow of Rent for Period During Which Premises Are Not Properly Maintained By Landlord, 40 A.L.R.3d 821 (1971)* .

(n37)Footnote 253. *See* Robert S. Schoshinski, *American Law of Landlord and Tenant* § 3.44 (Lawyers Co Operative Publishing Co. 1980).

(n38)Footnote 254. *See, e.g.*, Ind. Stat. Ann. § 36-7-9-20.

(n39)Footnote 255. *See, e.g.*, Ind. Stat Ann. § 36-7-9-20; *Mich. Comp. Laws Ann. § 125.535*.

(n40)Footnote 256. *See* Albert Rosen, *Receivership: A Useful Tool for Helping to Meet the Housing Needs of Low Income People*, 3 Harv. Civ. Rights -- Civ. Lib. L. Rev. 311 (1968).

(n41)Footnote 257. *See* Albert Rosen, *Receivership: A Useful Tool for Helping to Meet the Housing Needs of Low Income People*, 3 Harv. Civ. Rights -- Civ. Lib. L. Rev. 311, 335-36 (1968)

(n42)Footnote 258. *See, e.g.*, Ind. Stat. Ann. § 36-7-9-20; Mo. Stat. Ann. § 441.530.

(n43)Footnote 259. The doctrine is discussed in chapter 40. See § 40.16.

(n44)Footnote 260. *237 A.2d 834 (D.C. 1968)* .

(n45)Footnote 261. *Id. at 836* .

(n46)Footnote 262. *See Diamond Hous. Corp. v. Robinson, 257 A.2d 492 (D.C. 1969)* .

(n47)Footnote 263. *See Reese v. Diamond Hous. Corp., 259 A.2d 112 (D.C. 1969)* .

(n48)Footnote 264. *See Saunders v. First Nat'l Realty Corp., 245 A.2d 836 (D.C. 1968)* , *rev'd on other grounds, sub nom. Javins v. First Nat'l Realty Corp., 428 F.2d 1071* (D.C. Cir.) , *cert. denied, 400 U.S. 925 (1970)* . It should be noted that the District of Columbia housing regulations have been amended to permit the illegal contract defense to apply to housing code violations that arise after the beginning of the tenancy. *See* D.C. Municipal Regulations tit. 14 § 302.1.

(n49)Footnote 265. *See William J. Davis, Inc. v. Slade, 271 A.2d 412 (D.C. 1970)* .

(n50)Footnote 266. *See Robinson v. Diamond Hous. Corp., 463 F.2d 853 (D.C. Cir. 1972)* . The retaliatory

eviction doctrine is discussed in § 41.08 of this chapter.

(n51)Footnote 267. *See, e.g., King v. Moorehead, 495 S.W.2d 65 (Mo. Ct. App. 1973)* ; *Glyco v. Schultz, 289 N.E.2d 919 (Ohio Mun. Ct. 1972)* .

(n52)Footnote 268. *See, e.g., Posnanski v. Hood, 174 N.W.2d 528 (Wis. 1970)* .

(n53)Footnote 269. *See* Roger A. Cunningham, "The New Implied and Statutory Warranties of Habitability in Residential Leases: From Contract to Status." *16 Urb. L. Ann. 3, 51 (1979).*

(n54)Footnote 270. The 1808 Code also required the thing to be delivered "free from any repairs," La. Civ. Code of 1808, p. 374 art. 18. Article 2684 of the current Civil Code requires the lessor to deliver the thing "in good condition suitable for the purpose for which it was leased."

(n55)Footnote 271. La. Civ. Code of 1808, p. 374 art. 17. Article 2691 of the current Civil Code requires the lessor to "make all repairs that become necessary to maintain the thing in a condition suitable for the purpose for which it was leased, except those for which the lessee is responsible.".

(n56)Footnote 272. La. Civ. Code of 1808, page 374 art. 19. The corresponding provision of the current Civil Code is art. 2696. It requires the lessor to warrant that the thing "is suitable for the purpose for which it was leased and that it is free of vices or defects that prevent its use for that purpose."

(n57)Footnote 273. La. Civ. Code of 1825, art. 2665. The corresponding provision of the current Civil Code is art. 2696.

(n58)Footnote 274. La. Civ. Code of 1808, page 374 Art. 18. The corresponding provision of the current Civil Code is art. 2691.

(n59)Footnote 275. La. Civ. Code of 1808, page 378 Art. 30. The current provision includes a more general obligation on the lessee to repair damage to the thing "caused by his fault or that of persons who, with his consent, are on the premises or use the thing, and to repair any deterioration resulting from his or their use to the extent it exceeds the normal or agreed use of the thing." *La. Civ. Code art. 2692*. But the underlying notion is that repairs that are not expressly assigned to the lessee are the responsibility of the lessor. *See La. Civ. Code art. 2691*, cmt. b.

(n60)Footnote 276. The relevant provision of the 1808 Civil Code was page 374 art. 19. The current provisions of the Louisiana Civil Code dealing with leases do not appear to include an express provision relating to damages, but they do include a provision stating that, with respect to matters not covered by the lease articles "the contract for lease" is governed by code articles dealing with "obligations" (contracts). *See La. Civ. Code art. 2669*. The articles on obligations contemplate that damages are available for breach. *See La. Civ. Code arts. 1758* & *1989*

(n61)Footnote 277. *La. Civ. Code art. 2719*. This has been changed somewhat from the 1808 Civil Code, but dissolution was provided for there as well. Civil Code of 1808, page 378 art. 40.

(n62)Footnote 278. La. Civ. Code of 1825, arts. 2663 2664. The corresponding provision of the current Civil Code permits the lessee to make the repairs if the lessor does not make them within a reasonable time after demand. Thereafter the lessee "may demand immediate reimbursement of the amount expended for the repair or apply that amount to the payment of rent, but only to the extent that the repair was necessary and the expended amount was reasonable." See *La. Civ. Code art. 2694*.

(n63)Footnote 279. *Ga. Code § 44-7-1*. The former provision, under the Georgia Code of 1863, was § 2261.

(n64)Footnote 280. *See Ga. Code § 44-7-13*. The former provision, under the Georgia Code of 1863, was § 2266.

(n65)Footnote 281. *See Ga. Code § 44-6-105*. The former provision, under the Georgia Code of 1863, was § 2259. *See Mayer & Crine v. Morehead, 32 S.E. 349 (Ga. 1899)* (discussing the distinction made by the Civil Code); Roger A. Cunningham, "The New Implied and Statutory Warranties of Habitability in Residential Leases: From Contract to Status." *16 Urb. L. Ann. 3, 54-55 (1979).*

(n66)Footnote 282. *See, e.g., Driver v. Maxwell, 56 Ga. 11 (1876)* .

(n67)Footnote 283. *See, e.g., Lewis & Co. v. Chisholm, 68 Ga. 40 (1881)* ; Roger A. Cunningham, "The New Implied and Statutory Warranties of Habitability in Residential Leases: From Contract to Status." *16 Urb. L. Ann. 3, 55 (1979).*

(n68)Footnote 284. *See* Roger A. Cunningham, "The New Implied and Statutory Warranties of Habitability in Residential Leases: From Contract to Status." *16 Urb. L. Ann. 3, 56 (1979).*

(n69)Footnote 285. *See Cal. Civ. Code Ann. § 1941*, Legislative History.

(n70)Footnote 286. *See Cal. Civ. Code Ann. § 1942*, Legislative History.

(n71)Footnote 287. *Id.*

(n72)Footnote 288. *See* Roger A. Cunningham, "The New Implied and Statutory Warranties of Habitability in Residential Leases: From Contract to Status." *16 Urb. L. Ann. 3, 57 (1979).*

(n73)Footnote 289. *See Mont. Code Ann. §§ 70* 24 101 - 70 24 442; *41 Okla. Stat. Ann. §§ 101 to 135*; William B. Stoebuck & Dale A. Whitman, The Law of Property § 6.39 (3d ed. 2000).

(n74)Footnote 290. *See Cal. Civ. Code Ann. §§ 1941-1942.5*; *N.D. Cent. Code §§ 47-16-13.1*; *S.D. Codified Laws §§ 43-32-8-- 43-32-10*.

(n75)Footnote 291. *See Cal. Civ. Code §§ 1941*, *1941.1*, *1942.1*, and *1942.5*.

(n76)Footnote 292. *See Cal. Civ. Code §§ 1941.2* and *1942(c)*.

(n77)Footnote 293. *See id.* § 1942(a).

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CHAPTER 41 TENANT RIGHTS AND LANDLORD DUTIES

5-41 Thompson on Real Property, Thomas Editions § 41.06

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§ 41.06 The Implied Warranty of Habitability.

[Go To Supp]

The "revolution" n294 in landlord-tenant law that occurred in the 1960s and the 1970s is best exemplified by the widespread adoption of landlord warranties with respect to the habitability of leased residential premises. As a result of judicial decision or statutory enactment, or both, over 40 states and the District of Columbia now require the landlord to maintain the habitability of residential leased premises and provide the tenant with contractual remedies if the landlord fails to do so. This portion of the chapter considers the judicially recognized implied warranty of habitability. The next portion of the chapter considers statutes that impose habitability obligations on landlords.

§ 41.06(a) The Judicially Adopted Implied Warranty of Habitability.

§ 41.06(a)(1) Judicial Development of the Implied Warranty.

The first case to recognize an implied warranty of habitability on the part of landlords in residential leases appears to have been *Delamater v. Foreman*, n295 a 1931 decision by the Minnesota Supreme Court. The court held that a landlord who leased out an apartment in a "modern" apartment building was subject to an implied covenant that the apartment would be habitable at the outset of the tenancy. The decision did not turn on whether the apartment was furnished or leased for a short term. The landlord's covenant, in other words, was broader than that recognized under the traditional "furnished house" exception to the caveat emptor rule.

Thirty years later, the concept was articulated again in the Wisconsin case of *Pines v. Perssion.* n296 In that case, the court permitted some tenants who had vacated a rented house, shortly after beginning occupancy, to avoid rental liability and to recover advance rental payments made to their landlord on the ground that the landlord had not provided them with a habitable dwelling. Although some language in the opinion can be read to indicate that the case involved the "furnished house" exception to the caveat emptor rule, other language in the opinion is substantially more expansive. Thus, the court said that the rule that no warranty of habitability would be implied was "obsolete" and inconsistent with "current legislative policy concerning housing standards." n297 Referring to the traditional concept of caveat emptor, the court also said that the need for adequate housing was "too important to be rebuffed by that obnoxious legal cliche." n298

The leading implied warranty of habitability case is *Javins v. First National Realty Corporation* n299 decided by the District of Columbia Circuit Court of Appeals in 1970. In that case, the court held that leases of urban dwelling units contain an implied warranty by the landlord that the premises are fit for occupancy at the beginning of the lease term, and that the premises will remain in habitable condition during the balance of the tenancy. The court said that the "the common law itself must recognize the landlord's obligation to keep his premises in a habitable condition." n300 It also concluded that a warranty of habitability was implied by the District of Columbia Housing Regulations.

The *Javins* court offered three reasons for its conclusion that the common law must recognize an implied warranty of habitability. First, the court said that the factual assumptions on which the old common law rule was based are no longer true. The modern residential tenant, unlike the agrarian tenant of a former day, has little interest in the land itself, but seeks a place to live. In particular, the modern tenant seeks "a well known package of goods and services" that include "adequate heat, light, and ventilation, serviceable plumbing facilities, secure windows and doors, proper sanitation, and proper maintenance." n301 The typical modern tenant also lacks both the funds and the ability to repair defects in the leased premises. Second, the court said that warranties of quality, such as implied warranties of fitness and merchantability, had become well established in modern contract law, and that the old common law rule should be abandoned in order to bring residential landlord-tenant law into harmony with modern contract concepts. Third, the court stated that the nature of the modern urban housing market dictated abandonment of the old rule. In this connection, the court referred to the inequality of bargaining power between landlord and tenant, as well as to the detrimental effect of bad housing on society as a whole.

As indicated above, the court also held that the District of Columbia Housing Regulations implied a warranty of habitability in residential leases. The court said that, in light of the *Brown v. Southall Realty Co.* decision, n302 it was clear that the housing code created privately enforceable duties with respect to the condition of the leased premises. It further stated that the purposes and structure of the housing code required that code be read into housing contracts. Citing *Pines v. Perssion*, the court concluded that to follow the traditional common law rule would be inconsistent with the policy judgment of the legislature concerning housing standards.

Although some of the arguments advanced in the *Javins* case for implying a warranty of habitability have been criticized, n303 the *Javins* opinion has been widely cited, and has clearly influenced the thinking of other courts with respect to the legal obligations of the landlord in residential tenancies.

The highest courts in at least seventeen jurisdictions have issued opinions recognizing an implied warranty of habitability in residential leases. Jurisdictions in which the highest courts have adopted the implied warranty of habitability include California, n304 the District of Columbia, n305 Hawaii, n306 Illinois, n307 Indiana, n308 Iowa, n309 Kansas, n310 Massachusetts, n311 Missouri, n312 Mississippi, n313 New Hampshire, n314 New Jersey, n315 Pennsylvania, n316 Texas, n317 Utah, n318 Vermont, n319 Washington, n320 and West Virginia. n321 Lower courts in several other jurisdictions have also recognized the implied warranty of habitability. n322

A few states have declined to adopt an implied warranty of habitability by judicial action. n323 And there is a debate about whether adoption of an implied warranty results in better or poorer housing conditions for low income tenants. n324

§ 41.06(a)(2) Leases Subject to the Implied Warranty.

In jurisdictions where it has been adopted, the implied warranty of habitability imposes substantial obligations and liabilities on the landlord. But the implied warranty of habitability does not apply to all leases in jurisdictions that recognize it. It generally does not apply in the commercial leasing context. And, at least in some jurisdictions, it does not apply to all residential housing.

§ 41.06(a)(2)(i) Commercial Leases.

Several courts have considered, and rejected, the application of the implied warranty of habitability to commercial leases. n325 This is not altogether surprising. The concept of "habitability" seems rather out of place in a non residential setting. The housing codes on which the implied warranty is often based do not regulate non residential premises. And the public policy justifications for the implied warranty in the residential landlord-tenant context are less pertinent in the commercial sphere.

Nonetheless, some courts have recognized that an implied warranty of suitability may apply to commercial leases. Indeed, the Texas Supreme Court has held that there is an implied warranty in a commercial lease that the premises are suitable for their intended purpose, and that essential lease facilities will remain in suitable condition. n326 The court has also said that the tenant's obligation to pay rent is dependent upon the landlord's performance of warranty obligations. n327 Other courts, without much analysis, have indicated that an implied warranty of fitness could be found in a commercial lease, depending upon the relationship of the landlord and tenant, the nature of the tenant's business, and the condition of the leased premises. n328 A number of commentators have called for the recognition of a warranty of suitability in commercial leases. n329

As previously mentioned, some statutes impose obligations on the landlord with respect to the initial suitability or ongoing maintenance of leased commercial premises. n330

§ 41.06(a)(2)(ii) Leases of Public Housing.

The question of the applicability of the implied warranty of habitability to public housing has received inconsistent answers in the courts. In the 1970s, several courts in jurisdictions that recognize an implied warranty of habitability for residential tenancies indicated that the implied warranty also applies to leases of public housing. n331 However, the Seventh Circuit Court of Appeals held that the applicability of an implied warranty of habitability to federally owned public housing was a federal question, and it declined to establish a federal implied warranty of habitability. The court reasoned that establishing an implied warranty of habitability in that context would constitute an affirmation that the goals of national housing policy -- to remedy unsafe and unsanitary housing conditions and the shortage of low income housing -- had been attained, and that such a determination should be left to the Congress. The court also concluded that legislation setting forth Congressional purposes for public housing did not impose warranty obligations on the federal government, when acting as landlord. n332

The Seventh Circuit's approach has been followed in some subsequent court decisions, n333 but other courts have rejected it, and, in cases involving federally owned public housing, or public housing in which the federal government acts as landlord, have adopted an implied warranty of habitability as a matter of federal common law. n334

The applicability of the implied warranty of habitability to public housing is also discussed in Chapter 45. n335

§ 41.06(a)(2)(iii) Residential Leases.

A number of courts that have recognized the implied warranty of habitability have said that it should be implied in all residential leases. n336 In some jurisdictions, however, the warranty is more limited. In New Hampshire, for example, the implied warranty is limited to residential apartment units. n337 In Kansas, the implied warranty was initially limited to urban residential property, n338 but was subsequently broadened by statute to cover substantially all property leased for residential use. n339 An Indiana court declined to apply the warranty of habitability to the rental of a single family home by a landlord who was not principally in the residential leasing business. The court said that there was no reason to believe that the landlord had any more expertise in rental matters than did the tenant, or that the landlord was any better able than the tenant to absorb the cost of maintaining the residence. n340 Some courts have held that the implied warranty applies to the leasing of a lot for a mobile home. n341

§ 41.06(a)(3) Warranty Standards.

Whether a particular condition on the leased premises causes a landlord to be in breach of the implied warranty of habitability depends on the content of the warranty itself, or, stated another way, on the standards for determining habitability. In some jurisdictions, the standards are determined by reference to applicable housing codes. For example, a District of Columbia court said that breach of the implied warranty is determined "by the standards set out in the Housing Regulations." n342 Even where the content of the implied warranty is determined by a housing code, however, not every code violation will threaten the health or safety of residential tenants. Not every violation will affect habitability. The *Javins* court put it this way: "[O]ne or two minor violations standing alone which do not affect habitability, are *de minimis.* " n343

In a number of jurisdictions, the landlord's implied warranty obligation is not to comply with the provisions of the housing code as such, but to meet a more general standard of habitability. Thus, courts have indicated that the landlord's obligation is to maintain the premises in a manner fit for "human occupation", n344 to provide premises that meet "an adequate standard of habitability," n345 or to provide and maintain "premises that are safe, clean and fit for human habitation." n346 It has also been said that the implied warranty does not require the landlord to ensure "aesthetically pleasing" conditions, but does require the landlord to meet "bare living requirements." n347 Proof of a violation of the housing code might constitute evidence, perhaps compelling evidence, of breach of the implied warranty, but other factors, such as the nature of the defect, its effect on habitability, and the length of time that the defect has persisted, will be relevant to a determination that the implied warranty has been breached. n348 Indeed, a breach of the warranty could be found whether or not there is an applicable housing code. n349

The warranty standard articulated by the Restatement is one of suitability for residential use. n350 The Restatement test for determining whether a condition renders the premises unsuitable for residential use is "if it would be unsafe or unhealthy for the tenant to enter on the leased property and use it as a residence." n351 The Restatement further indicates that a "significant violation of any controlling building or sanitary code, or similar public regulation, which has a substantial impact upon safety or health, is conclusive that the premises are unsafe or unhealthy, but other modes of proof are acceptable." n352

§ 41.06(a)(4) Defects Subject to the Implied Warranty.

The implied warranty of habitability generally covers defects that exist at the beginning of the tenancy, and those that arise later on. n353 It is true that a few implied warranty cases do not expressly state that the warranty has a continuing aspect. n354 However, in the *Javins* case, the issue was precisely whether the landlord had a duty to correct housing code violations that arose after the commencement of the lease term. In adopting the implied warranty of habitability, the *Javins* court confirmed that the landlord did have such a duty. Since the *Javins* decision, court decisions adopting the implied warranty have consistently said that the landlord has a continuing duty to maintain the habitability of the leased premises. n355

There has been more uncertainty about whether the implied warranty of habitability covers patent defects that exist at the beginning of the tenancy. In *Marini v. Ireland*, the New Jersey Supreme Court said that a residential landlord impliedly covenants "that at the inception of the lease, there are no latent defects in facilities vital to the use of the premises for residential purposes because of faulty original construction or deterioration from age or normal usage." n356 Very similar language concerning latent defects has been used by other courts that recognized the implied warranty of habitability. n357 However, the significance of the language regarding latent defects is unclear, because the cases also said that the implied warranty includes a continuing duty on the part of the landlord to maintain the leased premises in habitable condition. n358

A number of other implied warranty cases either indicate or state more directly that existing patent defects are subject to the implied warranty of habitability. For example, in *Pines v. Perssion*, n359 many of the defects in the residence were

patent, but the court did not indicate that this made a difference regarding the implied warranty. In *Boston Housing Authority v. Hemingway*, n360 the Massachusetts Supreme Court expressly included existing patent defects within the coverage of the implied warranty. The Supreme Court of Vermont said, in *Hilder v. St. Peter* n361 that the implied warranty covers both latent and patent defects in essential facilities, and that "a tenant who enters into a lease agreement with knowledge of any defect in the essential facilities cannot be said to have assumed the risk, thereby losing the protection of the warranty." Other implied warranty cases suggest no limitation on the warranty with respect to latent defects.

It is clear that the implied warranty of habitability does not cover defective conditions resulting from the wrongful conduct of the tenant. n362 In the *Javins* case, for example, the court said that "the contract principle that no one may benefit from his own wrong will allow the landlord to defend by proving the damage was caused by the tenant's wrongful action." n363

§ 41.06(a)(5) Waiver.

Several courts have considered whether the landlord's implied warranty of habitability may be waived by the tenant. The majority have prohibited waiver on public policy grounds. n364 In the portion of its opinion basing the implied warranty on the existence of a housing code, the *Javins* court said that a private agreement to shift to the tenant the duties that are imposed on the landlord by the housing code would be unenforceable as an attempt to nullify the object of the legislation. n365 In the *Hilder v. St. Peter* case, which adopted the implied warranty of habitability without reliance on the existence of a housing code, the Vermont Supreme Court stated that the tenant who enters into a lease with knowledge of a defect in essential facilities does not assume the risk of the defect, and does not thereby lose the protection of the implied warranty. The court also said that the landlord's implied warranty could not be waived by written provision of the lease or by oral agreement. n366 The California Supreme Court has stated that landlords should not be "permitted to use their superior bargaining power to negate the warranty of habitability rule." n367

Some courts have indicated that the implied warranty could be waived. n368 The Texas Supreme Court has suggested that a tenant may waive the landlord's implied warranty of habitability by express agreement. n369 In *Mease v. Fox*, n370 and in *Berzito v. Gambino*, n371 the courts said that one of the factors to be considered in testing the alleged breach of the implied warranty is whether the tenant waived the defects, or is estopped to raise the question of the breach. However, in the *Berzito* case, the court said that the scarcity of available housing precluded a waiver when the tenant had been in occupancy and paying rent for nearly a year and a half.

The Restatement contemplates that the tenant may waive the benefit of the implied warranty of habitability, but, on public policy grounds, it narrowly limits the circumstances in which waiver may occur. More specifically, the Restatement provides that the parties may agree "to increase or decrease what would otherwise be the obligations of the landlord with respect to the condition of the leased property," so long as the agreement is not "unconscionable or significantly against public policy." n372 Among the factors that the Restatement identifies as relevant to an unconscionability analysis are inequality of bargaining position between landlord and tenant, and tenant financial inability to eliminate a condition that renders the leased premises unsafe and unhealthy. n373 Those factors are, of course, likely to be present in urban residential leases by tenants of modest means. Moreover, a comment to the Restatement states that the tenant is, as a matter of law, unable to waive remedies that are available to the tenant at the time of entry, "if it would be unsafe or unhealthy to use the leased premises in the manner contemplated by the parties." n374 In this connection, a Reporter's Note states that, for public policy reasons, housing code violations may not be waived. n375 One court that adopted the Restatement position added the qualifications that any waiver would have to be express in order to be effective, and that it would be effective only as to specific defects listed as waived. n376

§ 41.06(a)(6) Consequences of Breach.

Landlords that breach a judicially established implied warranty of habitability may be subject to a variety of tenant

remedies. A number of courts have said that breach of the warranty entitles the tenant to exercise standard contract remedies of damages, rescission, and reformation. n377 A few courts have added specific performance to the list of basic contract remedies. n378 Several additional remedies have been identified as well. The most expansive catalog of potential remedies is set forth in the *Hilder v. St. Peter* case, n379 where, in addition to the standard contract remedies of rescission, reformation, and damages, the Vermont Supreme Court said that the tenant could: 1) sue for damages for discomfort and annoyance resulting from the landlord's breach; 2) withhold payment of future rent and obtain court ordered rent abatement in the landlord's later action for possession based on nonpayment of rent; 3) repair the defect and deduct the cost of repair from future rent upon proper notice to the landlord; and 4) recover punitive damages if the landlord's conduct has been of a willful, wanton, or fraudulent nature.

Not all courts that recognize the implied warranty of habitability would allow tenants to take advantage of the full panoply of remedies mentioned in the Hilder case. Moreover, even when a broad range of remedies is permitted under a judicially established implied warranty, not all of the remedies are simultaneously available to the tenant. For example, if the tenant terminates the lease, the tenant cannot also remain in possession, repair a defect, and deduct the cost of the repair from future rent. The actual remedies that the landlord encounters will depend on which remedies are available in the jurisdiction, and on what choices the tenant makes.

§ 41.06(a)(6)(i) Lease Termination.

There is general agreement among the courts that a breach by the landlord of the implied warranty of habitability entitles the tenant to terminate the lease and to avoid liability for future rent. n380 Lease termination, or "rescission," is thought to be justified on the ground that the tenant's obligation to perform under the lease and the landlord's obligation to perform under the implied warranty are mutually dependent; the landlord's breach of the implied warranty entitles the tenant to terminate the lease and to avoid additional liability for rent. n381

A tenant who wishes to terminate the lease must, of course, vacate the premises. n382 In this respect, the termination remedy resembles the remedy of constructive eviction for breach of the landlord's implied covenant of quiet enjoyment. n383 The risk to the tenant seems to be similar as well. That is, if the court subsequently determines, in the landlord's action for unpaid rent, that the landlord has not breached the implied warranty of habitability, lease termination would not have been justified, and the tenant will continue to have rental liability even though the tenant has vacated the premises. The tenant might seek to minimize the risk by bringing a declaratory judgment action regarding the tenant's rights prior to vacating the premises. n384 As a practical matter, however, a low income tenant faced with an urban housing shortage is likely to find other remedies for breach of the implied warranty, such as rent withholding, to be more attractive.

The availability of the lease termination remedy will probably depend on whether the tenant takes reasonable steps to provide prior notice to the landlord. The implied warranty cases generally have not discussed notice as a required predicate to lease termination, but several of the cases have indicated that the tenant must attempt to provide notice to the landlord before exercising other remedies for breach of the implied warranty of habitability. n385 It has also been said that the availability of basic contract remedies makes the tenant subject to basic contract duties, including the obligation "to give landlord notice of a deficiency or defect not known to the latter." n386 The Restatement requires a tenant who exercises a right to terminate a lease to take "reasonable steps to assure that the landlord has knowledge of his decision to terminate the lease and the reason therefor." n387 It should also be noted that the tenant is normally required to provide prior notice to the landlord before exercising the similar remedy of constructive eviction. n388 If the landlord actually corrects the defect before the tenant vacates the premises, it would seem that, consistent with the rule in the constructive eviction context, the tenant should not thereafter be entitled to rely on the lease termination remedy.

§ 41.06(a)(6)(ii) Damages.

Breach of the implied warranty of habitability will also expose the landlord to liability for damages, whether or not the

lease is terminated. The tenant may assert a claim for damages in a direct action against the landlord or by means of a counterclaim in the landlord's action for unpaid rent. n389 The tenant may also be able to assert a claim for damages as a defense for the landlord's action to recover possession of the leased premises based on nonpayment of rent. n390 In this instance, the courts sometimes refer to the tenant's claim as one for rent abatement. n391

Courts have developed three principal formulas for determining damages for the tenant's economic loss when there is a breach of the implied warranty of habitability. One formula measures the difference between the rental amount set forth in the lease and the fair rental value of the leased premises during occupancy by the tenant in their uninhabitable condition. n392 A second formula for damages measures the difference between the fair rental value of the leased premises if they had been as warranted and the fair rental value of the leased premises during occupancy by the tenant in their actual, defective, condition. n393 Finally, several courts have said that damages should be determined by reducing the agreed upon rent by a percentage equal to the percentage of use lost to the tenant as a result of the landlord's breach of the implied warranty. n394

Application of these different formulas can result in different monetary liabilities for landlords, depending on the circumstances. For example, the first formula mentioned above will yield a recovery for the tenant if the leased premises are in initial compliance with the implied warranty, if the agreed rental amount is based on such initial compliance, and if the leased premises become uninhabitable later on in the tenancy. But if the premises are patently uninhabitable at the outset of the lease, and if the parties have agreed to a rental amount that takes into account the uninhabitable condition of the premises, then literal application of the formula could result in a conclusion that the landlord is not liable for damages at all. n395

The second formula should yield the same result as the first when the leased premises are in compliance with the implied warranty at the outset of the lease, the agreed-to rental amount reflects that compliance, and the leased premises subsequently become uninhabitable. However, application of the second formula yields a different result than the first when the rent agreed to has been established at the beginning of the tenancy to reflect then existing patently uninhabitable conditions. In that situation, there would be a difference between the rental value of the leased premises if they had been "as warranted," and the rental value of the premises in their actual, uninhabitable, condition. Indeed, the difference could be greater than the amount of the rent agreed to by the parties, which could, at least theoretically, produce the strange result that the landlord would have to pay the tenant for occupying the residential unit. n396

The third damage formula, involving a percentage reduction in use concept, appears to have been adopted by courts to avoid problems in determining damages under the other approaches, including the problem of requiring a low-income tenant to provide expert testimony on the rental value of the leased premises. n397 This approach to calculating damages requires the trier of fact to "exercise broad discretion and some subjective judgment" in order to determine the degree to which habitability has been diminished. n398

Some courts have adopted a two tiered approach to determining damages, when the tenant vacates the leased premises based on breach of the implied warranty. Under this approach, one measure of damages, calculated according to either the first or the second formula for damages referred to above, applies during the period of tenant occupancy. However, as to the term of the lease remaining after the tenant vacates, another measure of damages applies: the difference between the fair rental value of the premises if they had been as warranted and the amount of the rent agreed to in the lease. n399 The rationale for the change is that, after the tenant vacates the premises, the tenant is unaffected by the condition of the premises, and that the new measure of damages focuses more on the potential loss of the benefit of the bargain to the tenant, assuming that the tenant had an advantageous lease. n400

Other damages may also be recoverable. A number of courts have indicated that, in addition to damages based on the diminished value of the leasehold, the tenant is also entitled to recover special damages if the usual standards for their recovery are satisfied. n401 A few courts have said that conduct by the landlord in breach of the warranty could entitle a tenant to recover damages for emotional distress. n402 It has also been said that the tenant may be entitled to recover

punitive damages if the landlord's breach of the warranty is of a willful and wanton or fraudulent nature. n403 Breach of the implied warranty of habitability may also expose the landlord to liability for personal injuries resulting from defects on the leased premises. n404

It has been recognized that a tenant who remains in possession and uses self help to correct a defect that is covered by the implied warranty may be entitled to recover the cost of correcting the defect. In *Pugh v. Holmes*, n405 for example, the court said that the tenant could assert a counterclaim against the landlord "to recover damages from already paid rents based upon expenses incurred in making repairs of defective conditions after failure of the landlord to repair within a reasonable time following proper notice." n406 The court saw little difference between this remedy and a repair and deduct remedy.

The Restatement also permits recovery of damages in the event the landlord breaches the obligation to provide premises suitable for residential use. n407 It does not adopt the traditional distinction between "general" and "special" damages. Instead, the Restatement lists a number of items of damages that are recoverable when the landlord fails to fulfill obligations under the lease, so that the court may apply them "individually or in combination to achieve the goal of proper compensation to the tenant without double recovery." n408 Recoverable items of damages include: reasonable relocation costs, if the tenant terminates the lease; reasonable costs of substituted premises, if the tenant does not terminate; losses sustained due to reasonable expenditures made by the tenant prior to the default, if the landlord could reasonably have foreseen that the expenditures would be made; reasonable costs of eliminating the default, if the tenant eliminates the default; and, if the tenant has the right to terminate the lease, and does so, the fair market value of the lease when terminated. n409 A Reporter's Note describes the latter item of damages as one for loss of the bargain, and indicates that the measure of its loss is the "difference between the fair rental value of the property and the agreed rental value." n410

§ 41.06(a)(6)(iii) Rent Withholding.

It has generally been recognized, in jurisdictions that have adopted the implied warranty of habitability, that the tenant may remain in possession following the landlord's breach of the implied warranty, cease making payments of rent, and assert the landlord's breach in a counterclaim to the landlord's action to recover rent, or as a defense to the landlord's action to recover the leased premises based on nonpayment of rent. n411 If it is determined that the landlord has breached the implied warranty of habitability, the result will be a judicially approved reduction, or abatement, of the tenant's rental obligation. n412 In most situations, this will probably be the most important remedial option available to a tenant.

The basic rationale for the availability of this remedy is set forth in the court's opinion in *Javins v. First National Realty Corporation* n413 Applying contract principles, the court said that a tenant's obligation to pay rent is dependent upon the performance of the landlord's obligations under the lease, including the landlord's obligation to maintain the leased premises in habitable condition. On that basis, the court said that breach of the implied warranty by the landlord may suspend some or all of an occupying tenant's obligation to pay rent. Further, the tenant must be given an opportunity to prove, in the landlord's action for possession based on nonpayment of rent, that the landlord breached the implied warranty. If the "entire rental obligation has been extinguished by the landlord's total breach," then the landlord's action for possession based on nonpayment of the rent would fail. n414 On the other hand, if only part of the rental obligation has been suspended, and a portion of the unpaid back rent is therefore owed to the landlord, then the court said that "no judgment for possession should issue if the tenant agrees to pay the partial rent found to be due. If the tenant refuses to pay the partial amount, a judgment for possession may then be entered." n415

The tenant's rent withholding remedy will normally be tested when the landlord brings an action for possession of the leased premises based on nonpayment of rent. Given the traditional limitations that have been placed on affirmative claims and defenses in summary possession proceedings, n416 it is not surprising that landlords have challenged the tenant's ability to assert claims based on breach of the warranty of habitability in such proceedings. However, the clear

trend in the cases is to permit the tenant to do so. n417 For example, in *Jack Spring, Inc. v. Little*, n418 the Illinois Supreme Court considered whether tenants in two consolidated cases could assert a breach of warranty claim in a summary action, in light of a statute that prohibited the introduction of issues that were not "germane to the distinctive purpose of the proceeding." The court concluded that a breach of the implied warranty was "germane." It noted that if the landlords' actions were for rent, rather than for possession, the tenants would be permitted to prove that their damages for breach of warranty equalled or exceeded the rent claimed to be due. But the landlords in the consolidated cases admittedly were not entitled to possession, said the court, unless rent remained due and unpaid after demand. As a result, the "sole and decisive issue" in the summary possession action was "whether the tenants owe the landlords rent which is due and remains unpaid." n419 Because the affirmative defenses based on breach of warranty were germane to that issue, the court held that the affirmative defenses must be allowed.

Rent withholding could appear to involve a risk to the tenant that possession will be lost if it is ultimately determined that the landlord did not breach the implied warranty, or if the landlord did breach the warranty, but the damages caused by the breach are less than the withheld rent. A few trial courts seem to have taken the harsh position that, even if the tenant is able to prove that the implied warranty of habitability has been breached, the tenant cannot escape eviction for nonpayment of rent unless the damages from the breach equal or exceed the amount of the rent that is due. n420 However, a number of appellate courts have stated that the tenant will be allowed a short period of time in which to pay the balance of rent due, and thereby avoid eviction by the landlord. n421 The same result may be required under an applicable summary possession statute. n422

Rent withholding, and the tenant's ability to assert a breach of the implied warranty as a defense in the landlord's summary eviction proceedings, do involve potential economic risks for landlords. In the first place, permitting implied warranty claims to be addressed in summary eviction proceedings means that the proceedings may proceed less summarily, postponing the time when the landlord may obtain possession, or recover the unpaid rent, assuming that the landlord is able to do so. Second, even if the landlord does prevail on the breach of warranty issue, the tenant may have no money to pay the back rent. This risk may be reduced by the use of procedures, approved in many jurisdictions, by which the tenant "escrows" all or a portion of withheld rent pending a resolution of the breach of warranty claim. n423 Some summary possession statutes also provide procedures under which the landlord may seek payment of accruing rent into the court during the pendency of the action. n424

§ 41.06(a)(6)(iv) Repair and Deduct Remedy.

Several courts have indicated that the tenant has a self help remedy for breach of the implied warranty of habitability: the tenant may repair the defect in the leased premises, and deduct the repair costs from future rent. n425 The remedy is relatively simple and effective, but its application may compel the landlord to contribute to improvements on the property that the landlord deems unwise. n426 Accordingly, it is subject to several limitations.

The remedy is available, of course, only if the defect is one that renders the leased premises uninhabitable under the standards of the implied warranty of habitability. n427 Tenant resort to the remedy generally must be preceded by notice to the landlord of the defect, and the landlord generally must be given a reasonable time in which to correct the condition. n428 Proper notice will permit the landlord to comply with warranty obligations; it will also provide the landlord with an opportunity to dispute the tenant's claim before money is allocated to the repair. n429 However, it has been said that the tenant may proceed to make the repair if the tenant is unable to provide notice to the landlord after a reasonable attempt to do so. n430

Courts have indicated that there are also monetary limits on the availability of the remedy. In *Marini v. Ireland*, for example, the court indicated that the right to offset the repair costs against the rent was conditioned on the costs being "reasonable in light of the value of the leasehold against the rent." n431 In *Pugh v. Holmes*, the Pennsylvania Supreme Court said that "[r]epairs must be reasonably priced and cannot exceed the amount of the rent available to apply against the cost, i.e., the amount of rent owed for the term of the lease." n432 If it should be determined that the repair was

actually not needed, or that the repair costs were excessive, the court said that the landlord would be entitled to recover the amount that should not have been deducted. n433

The Restatement would also permit a tenant to use a repair and deduct remedy to correct conditions that render leased residential premises unsuitable for residential use. n434 The comments to § 11.2 of the Restatement set forth guidelines for availability of the remedy. The "default" must be one that the tenant is capable of repairing, and "at a cost that does not exceed the amount of the rent that will be available to apply against the cost." The repairs should also "be commensurate with the age and overall condition of the premises, the condition of the surrounding neighborhood, and the alternate uses to which the premises might be put, in order for them to meet the test of being accomplished at a reasonable cost." n435 The comments further state that the tenant must present evidence to the landlord that the rent has actually been applied to eliminate the default. In the absence of a special situation, such as when there is a need for emergency repairs and the tenant lacks readily available funds other than rent money, the tenant is generally not entitled to make the deductions until the default has been eliminated. n436

The Restatement would, in some circumstances, actually require the tenant to use the rent application remedy. Thus, if the particular default may be eliminated by tenant resort to the remedy "without unreasonable inconvenience and at comparatively little expense compared with the damages that would accrue if the default went uncured, the tenant must do so or have his damages limited to the cost of eliminating the default." n437 This rule represents an application of the general rule requiring a party to take reasonable steps to mitigate damages arising from the other party's breach. n438

§ 41.06(a)(6)(v) Equitable Remedies.

Some courts have identified specific performance as a potential tenant remedy for breach of the landlord's implied warranty of habitability. n439 A number of other courts have stated, more generally, that basic contract remedies are available for the landlord's breach. n440 In this context, the application of a specific performance remedy would presumably require the landlord to repair a defect or to provide a service, if the defect, or the absence of the service, renders the leased premises uninhabitable. Such a remedy could be of considerable value to a tenant who desires to remain in possession of the leased premises.

Although specific performance has occasionally been sought for breach of the implied warranty, n441 and although specific performance has occasionally been approved as a remedy with respect to the performance of express covenants by landlords, n442 there does not appear to be any appellate case in which a landlord has been ordered to specifically perform an implied warranty of habitability. Indeed, in *Pugh v. Holmes*, one of the cases that identified specific performance as an available remedy, the court said that "specific performance is an equitable remedy not available as a matter of course but only in unique situations." n443 The general rule, of course, is that the equitable remedy of specific performance is available only when the party seeking relief has no adequate remedy at law. n444

§ 41.06(b) Statutory Warranties of Habitability.

§ 41.06(b)(1) Introduction.

Although a few 19th century statutes had imposed obligations on landlords with respect to the initial suitability and continued maintenance of leased premises, n445 legislative momentum to impose habitability warranties on residential landlords did not develop until the 1970s, after some courts had already adopted the implied warranty of habitability. Judicial adoption of the implied warranty of habitability provided both an impetus and a standard for the new warranty legislation.

Over 30 states have now enacted statutes that, expressly or in substance, impose a warranty of habitability on landlords in residential leases. n446 Many of the statutes were significantly influenced by the judicially created implied warranty of habitability. The influence may be seen, by way of example, in the Uniform Residential Landlord and Tenant Act,

which was promulgated in 1972, and which has become a model for legislation in many states. A comment to § 2.104 of the Uniform Act, which imposes substantial obligations on the landlord with respect to the condition of the leased premises, states that the section follows the "warranty of habitability doctrine," and cites several cases in which the doctrine was recognized. n447

Statutory warranties of habitability are similar to judicial warranties in several respects. Both warranties are typically limited to residential tenancies. Both impose obligations on landlords with respect to the initial condition and the ongoing habitability of the premises. Under both types of warranties, the landlord's breach will usually entitle the tenant to exercise remedies such as lease termination, rent withholding, and damages. However, many statutory warranties are different from most judicial warranties in one important respect: they are very detailed regarding the nature of the landlord's obligations and the remedies that are available in the event of landlord breach.

Most statutory warranties of habitability are patterned after either the Model Residential Landlord/Tenant Code or the Uniform Residential Landlord and Tenant Act. n448 Both the Model Code and the Uniform Act contain detailed listings of landlord and tenant rights and duties, including duties regarding the condition of the leased premises. Because the Uniform Act has been adopted, in some form, in about 20jurisdictions, n449 it will be the primary point of reference for discussing statutory warranties of habitability.

§ 41.06(b)(2) The Uniform Act.

The first observation that should be made about the Uniform Act is that it does not use the expression "warranty of habitability." However, the Uniform Act does impose obligations on the landlord with respect to the initial condition of leased residential premises and it imposes a continuing duty on the landlord to maintain those premises in a habitable condition. Thus, § 2.104 of the Uniform Act requires that the landlord:

> (1) comply with the requirements of applicable building and housing codes materially affecting health and safety;
>
> (2) make all repairs and do whatever is necessary to put and keep the premises in a fit and habitable condition;
>
> (3) maintain all common areas of the premises in a clean and safe condition;
>
> (4) maintain in good and safe working order and condition all electrical, plumbing, sanitary, heating, ventilating, air conditioning, and other facilities and appliances, including elevators, supplied or required to be supplied by him;
>
> (5) provide and maintain appropriate receptacles and conveniences for the removal of ashes, garbage, rubbish, and other waste incidental to the occupancy of the dwelling unit and arrange for their removal; and
>
> (6) supply running water and reasonable amounts of hot water at all times and reasonable heat [between [October 1] and [May 1]] except where the building that includes the dwelling unit is not required by law to be equipped for that purpose, or the dwelling unit is so constructed that heat or hot water is generated by an installation within the exclusive control of the tenant and supplied by a direct public utility connection. n450

These provisions generally apply to all leased dwelling units located in the state. Exceptions to coverage include, but are not limited to: residence at an institution that is incidental to the provision of medical, educational, religious, or similar services; transient occupancy in a hotel or motel; and occupancy under a rental agreement relating to premises that the

occupant uses primarily for agricultural purposes. n451

§ 41.06(b)(2)(i) Remedies.

Breach of the foregoing obligations, or breach of obligations under the lease, will subject the landlord to a variety of potential tenant remedies. The potential remedies are quite comprehensive and very detailed.

One of the principal remedies is lease termination. Section 4.101 of the Uniform Act provides that if there is a material non compliance by the landlord with the provisions of the lease, or a non compliance with § 2.104 that materially affects health and safety, the tenant may, upon proper notice, terminate the lease. The tenant's notice must set forth, in writing, the acts and omissions constituting the landlord's breach, and, in most cases, must state that the lease will terminate on a date not fewer than 30 days after receipt of the notice, if the breach is not remedied in 14 days. n452 However, the tenant will not be entitled to terminate the lease if the landlord adequately remedies the breach prior to the date specified in the tenant's notice. Nor will the tenant be entitled to terminate the lease based on a condition caused by the deliberate or negligent act or omission of the tenant, a member of the tenant's family, or another person on the premises with the consent of the tenant. If the lease is terminated, the landlord will be obligated to return prepaid rent and any security to which the tenant is entitled. n453

The Uniform Act also states, in § 4.101(b), that, except as provided elsewhere in the Act, the tenant will be entitled to recover actual damages and to obtain injunctive relief against the landlord for non compliance with the lease or with § 2.104. The tenant will be able, then, to recover damages for breach of the landlord's maintenance obligations even if the breach does not affect health and safety. If the landlord's breach is willful, the landlord will also be liable for the tenant's reasonable attorneys' fees. n454

As an alternative to the remedy for damages referred to above, the Act provides that, in some instances, the tenant may be able to use self help by repairing a defect and by deducting the cost of the repair from the rent. Section 4.103 states that this remedy is available if the landlord does not comply with the lease or with § 2.104, when the cost of required repairs is less than $100, or an amount equal to one half of the periodic rent, whichever is greater. To exercise the remedy, the tenant must notify the landlord of the tenant's intention to correct the defective condition at the landlord's expense. If the landlord fails to correct the condition within 14 days after the tenant's notice, or as promptly as conditions require in the case of an emergency, the tenant may cause the work to be done, may submit an itemized statement to the landlord, and may deduct the reasonable cost of the repairs from the rent. n455 The Uniform Act provides that this repair and deduct remedy is not available to the tenant if the defective condition is caused by the deliberate or negligent act or omission of the tenant, a member of the tenant's family, or another person on the premises with the tenant's consent. n456

Other remedies are available, under § 4.104 of the Uniform Act, if the landlord willfully or negligently fails to provide "heat, running water, hot water, electric, gas, or other essential service." In this situation, if the tenant provides a written notice to the landlord, specifying the breach, the tenant may: (1) take reasonable measures to obtain the service and deduct the actual and reasonable cost from the rent; 2) recover damages from the landlord for the diminution in fair rental value of the leased premises; or 3) obtain reasonable substitute housing during the period of landlord non compliance, in which case, the tenant will be excused from paying rent for that period. If the tenant obtains substitute housing, the tenant may also recover "the actual and reasonable cost or fair and reasonable value of the substitute housing not in excess of an amount equal to the periodic rent." In any case, the tenant will be entitled to recover reasonable attorneys' fees. n457 Again, these remedies are not available to the tenant if the condition was caused by the deliberate or negligent act or omission of the tenant, a member of the tenant's family, or another person on the leased premises with the tenant's consent. n458 They are also unavailable if the tenant elects remedies under § 4.101 or § 4.103, referred to above.

If the landlord sues the tenant for unpaid rent, or sues for possession based on nonpayment of rent, § 4.105 of the

Uniform Act permits the tenant to make a counterclaim against the landlord for any amount that the tenant may be entitled to recover under the lease or under the provisions of the Act. This would include damages for breach of the landlord's obligation to maintain the leased premises. If the tenant is in possession of the premises, the Uniform Act further provides that the court may order the tenant to pay accrued and accruing rent into court and thereafter determine the amount due to each party. If the court determines, based on the tenant's defense or counterclaim, that no rent remains due, the Uniform Act provides that judgment shall be entered for the tenant in the landlord's action for possession. However, if the tenant's defense or counterclaim is without merit, and not raised in good faith, the landlord will be entitled to recover reasonable attorneys' fees. n459 This section of the Uniform Act in effect permits the tenant to utilize a rent withholding remedy. n460

The Uniform Act also sets forth remedies that are available to the tenant if the landlord unlawfully ousts the tenant from possession or if the landlord willfully diminishes services running to the tenant. Such landlord conduct entitles the tenant to recover possession of the premises or to terminate the lease, and, in either case, to recover the greater of three months' periodic rent or treble the actual damages sustained by the tenant, plus reasonable attorney's fees. n461

§ 41.06(b)(2)(ii) Waiver of Tenant Rights.

The Uniform Act prohibits lease provisions in which the tenant agrees to "waive or forego rights or remedies" under the Act. n462 However, it does permit the landlord and the tenant of a single family residence to agree in writing, and in good faith, that the tenant may assume some of the duties regarding the leased premises that are otherwise allocated to the landlord under the Act. n463 Tenants in multifamily structures may also agree to undertake certain repairs and other tasks as well, but such an agreement is subject to greater limitations. n464 The Uniform Act provides that the landlord may not treat performance of this separate agreement "as a condition to any obligation or performance of any rental agreement." n465

§ 41.06(b)(3) Other Statutes.

While many statutes that impose habitability obligations on landlords are based on either the Uniform Act or the Model Code, several states have adopted comprehensive residential landlord-tenant statutes that are based on neither. n466 These statutes, like the Uniform Act, set forth specific obligations of the landlord with respect to the condition of the leased premises, and they set forth specific remedies that the tenant may exercise in the event of landlord breach. n467

Still other jurisdictions have enacted more limited statutes that have the effect of adding a habitability obligation to the landlord's duties under previously existing statutes or judge made law. n468 A few of these statutes include provisions taken from § 2.104 of the Uniform Act. n469 Some of the statutes do not expressly provide for tenant remedies in the event the landlord breaches the obligation to maintain the habitability of the leased premises. n470 When remedies are not set forth in the statutes, courts have nevertheless permitted tenant recourse to contractual remedies, based on the concept that the obligations of landlord and tenant are mutually dependent. n471

§ 41.06(c) Relationship Between Statutory and Judicially Adopted Warranties of Habitability.

A number of the jurisdictions that have enacted statutory warranties of habitability previously adopted an implied warranty of habitability by court decision. Comprehensive legislation that incorporates detailed habitability requirements and tenant remedies would seem to entirely or substantially supersede a judge made implied warranty of habitability. n472 Indeed, the Texas legislation expressly provides that the duties of the landlord and the remedies of the tenant are in lieu of existing common law duties, warranties, and remedies. n473 However, the judge made implied warranty may apply to tenancies that are not covered by legislation. n474

In contrast, some jurisdictions that adopted the implied warranty of habitability by court decision had previously enacted legislation providing the tenant with remedies against the landlord for failing to maintain statutory standards

regarding the condition of the leased premises. In both California and Massachusetts, for example, judicial adoption of the implied warranty of habitability provided the tenant with remedies beyond those available under previous legislation. n475

FOOTNOTES:

(n1)Footnote 294. *See* Mary Ann Glendon, *The Transformation of American Landlord-Tenant Law, 23 B.C.L. Rev. 503 (1982).* Edward H. Rabin, *The Revolution in Residential Landlord/Tenant Law: Causes and Consequences, 69 Cornell L. Rev. 517 (1984).*

(n2)Footnote 295. *239 N.W. 148 (Minn. 1931)* . The court actually used the term "covenant" instead of "warranty."

(n3)Footnote 296. *111 N.W.2d 409 (Wis. 1961)* .

(n4)Footnote 297. *See id. at 412 13.*

(n5)Footnote 298. *See id. at 413* . The continuing authority of the *Pines* case in Wisconsin may be in doubt. *See Posnanski v. Hood, 174 N.W.2d 528 (Wis. 1970)* (rejecting claim that housing code creates contractual duties on the part of the landlord); *See* Roger A. Cunningham, "The New Implied and Statutory Warranties of Habitability in Residential Leases: From Contract to Status." *16 Urb. L. Ann. 3, 75 (1979)*(suggesting that the *Pines* case may have been overruled *sub silentio* by the *Posnanski* case).

(n6)Footnote 299. *428 F.2d 1071* (D.C. Cir.) *, cert. denied, 400 U.S. 925 (1970)* .

(n7)Footnote 300. *Id. at 1077* .

(n8)Footnote 301. *Id. at 1074* .

(n9)Footnote 302. *237 A.2d 834 (D.C. 1968)* .

(n10)Footnote 303. For example, it has been said that the court was "on shaky ground" when it relied, by analogy, on U.C.C. warranties in the sale of goods to support its holding that the landlord has a continuing duty to keep the leased premises in repair. *See* Roger A. Cunningham, "The New Implied and Statutory Warranties of Habitability in Residential Leases: From Contract to Status." *16 Urb. L. Ann. 3, 76 (1979).* The U.C.C. does not provide an implied warranty "that the seller will repair defects arising from ordinary deterioration over time." *See* Samuel Bassett Abbott, *Housing Policy, Housing Codes and Tenant Remedies: An Integration, 56 B.U.L. Rev. 1, 31 (1976). See also* Olin L. Browder, *The Taming of A Duty -- The Tort Liability of Landlords, 81 Mich. L. Rev. 99, 112 (1982).* It has also been suggested that the landlord's ongoing obligation to maintain the premises during the lease term would be more properly characterized as arising under an implied promise than under a "warranty." *See id.*

(n11)Footnote 304. *Green v. Superior Ct., 517 P.2d 1168 (Cal. 1974)* .

(n12)Footnote 305. *Javins v. First Nat'l Realty Corp., 428 F.2d 1071* (D.C. Cir.) *, cert. denied, 400 U.S. 925 (1970)* .

(n13)Footnote 306. *Lemle v. Breeden, 462 P.2d 470 (Haw. 1969)* .

(n14)Footnote 307. *Jack Spring, Inc. v. Little, 280 N.E.2d 208 (Ill. 1972)* .

(n15)Footnote 308. *Johnson v. Scandia Associates, Inc., 717 N.E.2d 24 (Ind. 1999)* (In this case, the Indiana Supreme Court acknowledged the existence of an implied warranty of habitability, but said that it was "not universally imposed by law." Instead, the court stated that such a warranty may be implied in fact from the agreement between the landlord and the tenant).

(n16)Footnote 309. *Mease v. Fox, 200 N.W.2d 791 (Iowa 1972)* .

(n17)Footnote 310. *Steele v. Latimer, 521 P.2d 304 (Kan. 1974)* .

(n18)Footnote 311. *Boston Hous. Auth. v. Hemingway, 293 N.E.2d 831 (Mass. 1973)* .

(n19)Footnote 312. *Detling v. Edelbrock, 671 S.W.2d 265 (Mo. 1984)* .

(n20)Footnote 313. *O'Cain v. Harvey Freeman and Sons, Inc. of Mississippi, 603 So. 2d 824 (Miss. 1991)* , as stated in *Moorman v. Tower Management Co., 451 F. Supp.2d 846 (S.D. Miss. 2006)* .

(n21)Footnote 314. *Kline v. Burns, 276 A.2d 248 (N.H. 1971)* .

(n22)Footnote 315. *Marini v. Ireland, 265 A.2d 526 (N.J. 1970)* .

(n23)Footnote 316. *Pugh v. Holmes, 405 A.2d 897 (Pa. 1979)* .

(n24)Footnote 317. *Kamarath v. Bennett, 568 S.W.2d 658 (Tex. 1978) , court-imposed warranty superseded by statute, as stated in Garza Vale v. Kwiecien, 796 S.W.2d 500 (Tex. Ct. App. 1990)* .

(n25)Footnote 318. *Wade v. Jobe, 818 P.2d 1006 (Utah. 1992)* .

(n26)Footnote 319. *Hilder v. St. Peter, 478 A.2d 202 (Vt. 1984)* .

(n27)Footnote 320. *Foisy v. Wyman, 515 P.2d 160 (Wash. 1973)* .

(n28)Footnote 321. *Teller v. McCoy, 253 S.E.2d 114 (W. Va. 1978)* .

(n29)Footnote 322. *See Breezewood Mgt. Co. v. Maltbie, 411 N.E.2d 670 (Ind. Ct. App. 1980)* ; *Tonetti v. Penati, 367 N.Y.S.2d 804 (App. Div. 1975)* ; *Glyco v. Schultz, 289 N.E.2d 919 (Ohio Mun. Ct. 1972)* .

(n30)Footnote 323. *See Osborn v. Brown, 361 So.2d 82 (Ala. 1978)* ; *Hurst v. Field, 661 S.W.2d 393 (Ark. 1983)* ; *Blackwell v. Del Bosco, 558 P.2d 563 (Colo. 1977) . See also Worden v. Ordway, 672 P.2d 1049 (Idaho 1983)* (court declines to recognize an implied warranty of habitability where the legislature has already imposed habitability-type obligations by statute); *Bellikka v. Green, 762 P.2d 997 (Or. 1988)* (same).

(n31)Footnote 324. *See e.g.,* Allan David Heskin, The Warranty of Habitability Debate: A California Case Study, *66 Cal. L. Rev. 37, 48 (1978)* (case study said to provide tentative support for proponents of the implied warranty of habitability); Werner Z. Hirsch and Joel G. Hirsch, The Changing Landlord-Tenant Relationship in California: An Economic Analysis of the Swinging Pendulum, *14 SW. U. L. Rev. 1 (1983)* (suggests that habitability laws are counter-productive with respect to indigent black tenants); Duncan Kennedy, The Effect of The Warranty of Habitability on Low Income Housing: "Milking" and Class Violence, *15 Fla. ST. U. L. Rev. 485 (1987)* (argues that selective enforcement of the warranty of habitability can increase the supply of low income housing and exert downward pressure on rents); Charles J. Meyers, The Covenant of Habitability and the American Law Institute, *27 Stan. L. Rev. 879, 889-897 (1975)* (argues that enforcement of the Restatement's warranty will likely result in poorer conditions for low income tenants); Edward H. Rabin, The Revolution in Residential Landlord-Tenant Law: Causes and Consequences, 69 Cornell L. Rev.517, 558-578 (1984) (states that the "mainstream" view is that low-income tenants lose more than they gain from increased tenant protections; concludes that the theory is plausible, but that the evidence neither proves nor disproves it); Daniel P. Schwallie, The Implied Warranty of Habitability as a Mechanism for Redistributing Income: Good Goal, Bad Policy, 40 Case W. Res. L. Rev.525 (1989-90) (argues that the warranty of habitability results in scarcer and more expensive housing for low-income tenants). Other commentators have considered the economic implications of enforcing housing codes. See, e.g., Bruce Ackerman, Regulating Slum Housing Markets on Behalf of the Poor: Of Housing Codes, Housing Subsidies and Income Redistribution Policy, *80*

Yale L.J. 1093 (1971); Werner Z. Hirsch, et al., Regression Analysis of the Effects of Habitability Laws Upon Rent: An Empirical Observation on the Ackerman-Komesar Debate, *63 Cal. L. Rev. 1098 (1975);* Neil K. Komesar, Return to Slumville: A Critique of the Ackerman Analysis of Housing Code Enforcement and the Poor, *82 Yale L.J. 1175 (1973);* Richard S. Markovits, The Distributive Impact, Allocative Efficiency, and Overall Desirability of Ideal Housing Codes: Some Theoretical Clarifications, *89 Harv. L. Rev. 1815 (1976).*

(n32)Footnote 325. *See, e.g., B.W.S. Investments v. Mid Am Restaurants, Inc., 459 N.W.2d 759 (N.D. 1990)* ; *Golub v. Colby, 419 A.2d 397 (N.H. 1980)* ; Thomas A. Fleming, Annotation, *Implied Warranty of Fitness or Suitability in Commercial Leases Modern Status, 76 A.L.R.4th 928 (1990)* ; *see also Chausse v. Coz, 540 N.E.2d 667 (Mass. 1989)* (notes that there is no trend to apply the warranty of habitability to commercial leases; declines to do so under the circumstances of the case). The Restatement takes no position on the matter. *See* Restatement (Second) of Property § 5.5, Caveat to Subsection (1) (1977).

(n33)Footnote 326. *See Davidow v. Inwood North Prof. Group -- Phase I, Respondent, 31 Tex. Sup. Ct. J. 247, 747 S.W.2d 373 (Tex. 1988)* . A Texas appellate court found that the landlord breached the implied warranty of suitability in a commercial lease when the landlord leased property to a tenant for a use that was prohibited under a deed restriction. The lease limited the tenant's use to sale, financing, and insurance of automobiles. The deed restriction provided for residential use. The court rejected the argument that, because the deed had been recorded, the tenant had constructive notice of the deed restriction. *See Lee v. Perez, 120 S.W.3d 463 (Tex. Ct. App. 2003)* .

(n34)Footnote 327. *See Davidow v. Inwood North Prof. Group -- Phase I, Respondent, 31 Tex. Sup. Ct. J. 247, 747 S.W.2d 373 (Tex. 1988).* A subsequent Texas decision articulated some limitations on the scope of the implied warranty. *See Coleman v. Rotana, Inc., 778 S.W.2d 867 (Tex. Ct. App. 1989)* (implied warranty of suitability covers only latent physical or structural defects within the leased premises that the landlord has a duty to repair; it does not cover inadequate parking caused by co-tenants' use of their premises in a manner that violates their leases).

(n35)Footnote 328. *See* 40 *Associates, Inc. v. Katz, 446 N.Y.S.2d 844 (Civ. Ct. 1981)* (implied warranty found); *see also Four Seas Inv. Corp. v. International Hotel Tenants' Ass'n, 146 Cal. Rptr. 531 (Ct. App. 1978)* (no warranty found; dictum that implied warranty of habitability could be extended to small commercial enterprises if facts warrant).

(n36)Footnote 329. *See* Robert J. Brennan, *The Implied Warranty of Fitness in Commercial Leases and the Subrogating Insurance Company, 18 Forum 683 (1983);* Gerald G. Greenfield & Michael Z. Margolies, *An Implied Warranty of Fitness in Nonresidential Leases, 45 Alb. L. Rev. 855 (1981);* Robert A. Levinson &; Michael N. Silver, *Do Commercial Property Tenants Possess Warranties of Habitability?* 14 Real Est. L.J. 59 (1985); John A. Marley, *Note, Landlord-Tenant Should a Warranty of Fitness Be Implied in Commercial Leases?, 13 Rutgers L.J. 91 (1981);* Michael P. McCloskey, *Comment, Commercial Leases: Behind the Green Door, 12 Pac. L.J. 1067 (1981);* Paula C. Murray, *The Evolution of Implied Warranties in Commercial Real Estate Leases,* 28 U. Richmond L. Rev. 145 (1993); Donald R. Pinto, *Note, Modernizing Commercial Lease Law: The Case for an Implied Warranty of Fitness, 19 Suffolk U. L. Rev. 929 (1985);* Kenneth J. Sophie, Jr., *Comment, Landlord-Tenant: The Medieval Concepts of Feudal Property Law are Alive and Well in Leases of Commercial Property in Illinois, 10 John Marshall J. Prac. & Proc. 338 (1977);* Anthony J. Vlatas, *Note, An Economic Analysis of Implied Warranties of Fitness in Commercial Leases, 94 Colum. L. Rev. 658 (1994). But see* Fred W. Bopp, III, *Note, The Unwarranted Implication of a Warranty of Fitness in Commercial Leases An Alternative Approach, 41 Vand. L. Rev. 1057 (1988);* 3 Milton R. Friedman, Friedman on Leases 1407 & n.14 (1990) (states that the implied warranty of habitability in residential leases covers a definable and relatively restricted situation, and that a "comparable rule in business and industrial property opens a potential liability of landlords that is almost without limit").

(n37)Footnote 330. *See* § 41.05(q) *above.*

(n38)Footnote 331. *See, e.g., National Capital Hous. Auth. v. Douglas, 333 A.2d 55 (D.C. 1975)* ; *Boston Hous. Auth. v. Hemingway, 293 N.E.2d 831 (Mass. 1973)* .

(n39)Footnote 332. *See Alexander v. U.S. Dep't of Housing & Urban Development, 555 F.2d 166,* (7th Cir. 1977) , *aff'd, 441 U.S. 39 (1979)* .

(n40)Footnote 333. *See, e.g., Kingston Square Tenants' Ass'n v. Tuskegee Gardens, Ltd., 792 F. Supp. 1566 (S.D. Fla. 1992)* .

(n41)Footnote 334. *See, e.g., Conille v. Secretary of Hous. & Urban Dev., 840 F.2d 105 (1st Cir. 1988)* ; *Chase v. Theodore Mayer Bros., 592 F. Supp. 90 (S.D. Ohio 1983)* ; *Techer v. Roberts Harris, 83 F.R.D. 124 (D. Conn. 1979)* .

(n42)Footnote 335. See § 45.14(c).

(n43)Footnote 336. *See, e.g., Green v. Superior Ct., 517 P.2d 1168 (Cal. 1974)* ; *Boston Hous. Authority v. Hemingway, 293 N.E.2d 831 (Mass. 1973)* ; *Berzito v. Gambino, 308 A.2d 17 (N.J. 1973)* ; *Foisy v. Wyman, 515 P.2d 160 (Wash. 1973)* .

(n44)Footnote 337. *See Kline v. Burns, 276 A.2d 248 (N.H. 1971)* .

(n45)Footnote 338. *See Steele v. Latimer, 521 P.2d 304 (Kan. 1974)* .

(n46)Footnote 339. *Kan. Stat. Ann. §§ 58* 2541, 58 2543, 58 2553.

(n47)Footnote 340. *See Zimmerman v. Moore, 441 N.E.2d 690 (Ind. Ct. App. 1982)* (personal injury case).

(n48)Footnote 341. *See, e.g., Moorman v. Tower Management Co., 451 F.Supp. 2d 846 (S.D. Miss. 2006)* ; *Staley v. Bouril, 718 A.2d 283 (Pa. 1998)* .

(n49)Footnote 342. *See Winchester Mgt. Corp. v. Staten, 361 A.2d 187, 190 (D.C. 1976)* .

(n50)Footnote 343. *Javins v. First Nat'l Realty Corp., 428 F.2d at 1082,* note 63, (D.C. Cir. 1970) , *cert. denied, 400 U.S. 925 (1970)* . No such limitation is articulated in *Steele v. Latimer, 521 P.2d 304 (Kan. 1974)* . But Kansas subsequently adopted legislation that defines the warranty obligation to include compliance with building and housing codes requirements that materially affect health and safety. *See Kan. Stat. Ann. §§ 58* 2540 - 58 2573.

(n51)Footnote 344. *See Boston Hous. Auth. v. Hemingway, 293 N.E.2d 831, 843 (Mass. 1973)* .

(n52)Footnote 345. *See Berzito v. Gambino, 308 A.2d 17, 21 (N.J. 1973)* .

(n53)Footnote 346. *See Hilder v. St. Peter, 478 A.2d 202, 208 (Vt. 1984)* .

(n54)Footnote 347. *Green v. Superior Ct., 517 P.2d 1168, 1182 (Cal. 1974)* .

(n55)Footnote 348. *See, e.g., Boston Hous. Auth. v. Hemingway, 293 N.E.2d at 844* ; *cf. McAllister v. Boston Housing Authority, 708 N.E.2d 95 (Mass. 1999)* (Even if a natural accumulation of ice and snow violates the state sanitary code, it does not amount to a defect covered the by the implied warranty of habitability).

(n56)Footnote 349. *See Hilder v. St. Peter, 478 A.2d 202 (Vt. 1984)* .

(n57)Footnote 350. Restatement (Second) of Property § 5.1 (1977).

(n58)Footnote 351. *Id.* cmt. e.

(n59)Footnote 352. *Id. cf. McAllister v. Boston Housing Authority, 708 N.E.2d 95 (Mass. 1999)* (Even if it violates the state sanitary code, a natural accumulation of ice and snow is not a defect covered the by the implied warranty of habitability).

(n60)Footnote 353. *See, e.g., Hilder v. St. Peter, 478 A.2d 202 (Vt. 1984)* .

(n61)Footnote 354. *See, e.g., Lemle v. Breeden, 462 P.2d 470 (Haw. 1969)* . It should be noted that Hawaii has adopted legislation imposing a continuing duty on the landlord to correct defects that arise during the tenancy. See *Haw. Rev. Stat. Ann. §§ 521* 1 *et seq.*

(n62)Footnote 355. *See* Roger A. Cunningham, "The New Implied and Statutory Warranties of Habitability in Residential Leases: From Contract to Status." *16 Urb. L. Ann. 3, 92 (1979).*

(n63)Footnote 356. *265 A.2d 526, 534 (1970)* .

(n64)Footnote 357. *See Kline v. Burns, 276 A.2d 248, 252 (N.H. 1971)* ; *Mease v. Fox, 200 N.W.2d 791, 796 (Iowa 1973)* ; *Kamarath v. Bennett, 568 S.W.2d 658, 661 (Tex. 1978) court-imposed warranty superseded by statute, as stated in Garza Vale v. Kwiecien, 796 S.W.2d 500 (Tex. Ct. App. 1990)* .

(n65)Footnote 358. *See* Roger A. Cunningham, "The New Implied and Statutory Warranties of Habitability in Residential Leases: From Contract to Status." *16 Urb. L. Ann. 3, 89 (1979).*

(n66)Footnote 359. *111 N.W.2d 409 (Wis. 1961)* .

(n67)Footnote 360. *293 N.E.2d 831 (Mass. 1973)* .

(n68)Footnote 361. *478 A.2d 202, 208 (Vt. 1984)* .

(n69)Footnote 362. *See, e.g., Marini v. Ireland, 265 A.2d 526 (N.J. 1970)* ; *Wade v. Jobe, 818 P.2d 1006 (Utah 1992)* ; *Hilder v. St. Peter, 478 A.2d 202 (Vt. 1984)* ; Restatement (Second) of Property § 5.1 & cmt. i (1977).

(n70)Footnote 363. *428 F.2d at 1082 n.62* .

(n71)Footnote 364. *See, e.g., Green v. Superior Ct., 517 P.2d 1168, 1173 74 n.9 (Cal. 1974)* ; *Boston Hous. Auth. v. Hemingway, 293 N.E.2d 831, 843 (Mass. 1973)* ; *Teller v. McCoy, 253 S.E.2d 114, 130 31 (W. Va. 1978)* ; *Hilder v. St. Peter, 478 A.2d 202, 208 (Vt. 1984)* . Waiver would, in any case, be less likely to be permitted when the source of the implied warranty is a statutory duty. *See* Edward H. Rabin, *The Revolution in Residential Landlord Tenant Law: Causes and Consequences, 69 Cornell L. Rev. 517, 526 (1984).*

(n72)Footnote 365. *428 F.2d at 1082 n.58* .

(n73)Footnote 366. *478 A.2d at 208.*

(n74)Footnote 367. *Green v. Superior Ct., 517 P.2d 1168, 1173, 1174 n.9 (Cal. 1974)* .

(n75)Footnote 368. *See, e.g., Mease v. Fox, 200 N.W.2d 791 (Iowa 1972)* ; *Berzito v. Gambino, 308 A.2d 17 (N.J. 1973)* ; *P.H. Inv. v. Oliver, 818 P.2d 1018 (Utah 1991)* .

(n76)Footnote 369. *See Kamarath v. Bennett, 568 S.W.2d 658, 660 n.2 (Tex. 1978) court-imposed warranty superseded by statute, as stated in Garza Vale v. Kwiecien, 796 S.W.2d 500 (Tex. Ct. App. 1990)* .

(n77)Footnote 370. *200 N.W.2d 791, 797 (Iowa 1972)* .

(n78)Footnote 371. *308 A.2d 17, 22 (N.J. 1973)* .

(n79)Footnote 372. *See* Restatement (Second) of Property § 5.6 (1977).

(n80)Footnote 373. *Id.*, § 5.6, cmt. e.

(n81)Footnote 374. *Id.* § 5.3, cmt. c.

(n82)Footnote 375. *Id.* § 5.3, Reporter's Note 3.

(n83)Footnote 376. *See P.H. Inv. v. Oliver, 818 P.2d 1018 (Utah 1991)* .

(n84)Footnote 377. *See, e.g., Lemle v. Breeden, 462 P.2d 470, 475 (Haw. 1969)* ; *Hilder v. St. Peter, 478 A.2d 202 (Vt. 1984)* . Although the reformation remedy has been frequently mentioned, it has not been applied in a reported appellate case dealing with breach of the implied warranty of habitability, and it is not clear what benefit it would be to a tenant in such a case.

(n85)Footnote 378. *See, e.g., Javins v. First Nat'l Realty Corp., 428 F.2d 1071, 1082 n.61,* (D.C. Cir. 1970) , *cert. denied, 400 U.S. 925 (1970)* .

(n86)Footnote 379. *478 A.2d 202 (Vt. 1984)* .

(n87)Footnote 380. *See, e.g., Lemle v. Breeden, 462 P.2d 470 (Haw. 1969)* ; *Boston Hous. Auth. v. Hemingway, 293 N.E.2d 831 (Mass. 1973)* ; *Hilder v. St. Peter, 478 A.2d 202 (Vt. 1984)* .

(n88)Footnote 381. *See* William B. Stoebuck & Dale A. Whitman, The Law of Property § 6.41 (3d ed. 2000).

(n89)Footnote 382. *See, e.g., Young v. Berman, 131 S.W. 62 (Ark. 1910)* ; Restatement (Second) of Property § 10.1 (1977).

(n90)Footnote 383. Constructive eviction is discussed in § 40.22(c)(3), *above.*

(n91)Footnote 384. *See* Roger A. Cunningham, "The New Implied and Statutory Warranties of Habitability in Residential Leases: From Contract to Status." *16 Urb. L. Ann. 3, 100 (1979).*

(n92)Footnote 385. *See Marini v. Ireland, 265 A.2d 526, 535 (N.J. 1970)* ; *Pugh v. Holmes, 405 A.2d 897, 906 (Pa. 1979)* ; *Hilder v. St. Peter, 478 A.2d 202, 209 (Vt. 1984)* .

(n93)Footnote 386. *See Mease v. Fox, 200 N.W.2d 791, 797 (Iowa 1972)* .

(n94)Footnote 387. Restatement (Second) of Property § 10.1 (1977).

(n95)Footnote 388. *See* discussion in § 40.22(c)(3)(B), *above.*

(n96)Footnote 389. *See, e.g., Lemle v. Breeden, 462 P.2d 470 (Haw. 1969)* (action for damages); *Mease v. Fox, 200 N.W.2d 791 (Iowa 1972)* (counterclaim).

(n97)Footnote 390. *See, e.g., Jack Spring, Inc. v. Little, 280 N.E.2d 208 (Ill. 1972)* .

(n98)Footnote 391. *See, e.g., Wade v. Jobe, 818 P.2d 1006 (Utah. 1991)* .

(n99)Footnote 392. *See, e.g., Kline v. Burns, 276 A.2d 248 (N.H. 1971)* .

(n100)Footnote 393. *See, e.g., Green v. Superior Court, 517 P.2d 1168 (Cal. 1974)* ; *Hilder v. St. Peter, 478 A.2d 202 (Vt. 1984)* .

(n101)Footnote 394. *See, e.g., Academy Spires, Inc. v. Brown, 268 A.2d 556 (N.J. Super. 1970)* ; *Pugh v. Holmes, 405 A.2d 897 (Pa. 1979)* ; *see generally* Roger A. Cunningham, "The New Implied and Statutory Warranties of Habitability in Residential Leases: From Contract to Status." *16 Urb. L. Ann. 3* , 103-04 (1979); Debra T. Landis, Annotation, *Measure of Damages for Landlord's Breach of Implied Warranty of Habitability, 1 A.L.R.4th 1182 (1980)* .

(n102)Footnote 395. *See* Samuel Bassett Abbott, *Housing Policy, Housing Codes and Tenant Remedies: An Integration, 56 B.U.L. Rev. 1, 21 (1976).*

(n103)Footnote 396. *See* Samuel Bassett Abbott, *Housing Policy, Housing Codes and Tenant Remedies: An Integration, 56 B.U.L. Rev. 1, 22 (1976).*

(n104)Footnote 397. *See, e.g., Pugh v. Holmes, 405 A.2d at 909* ; *see generally* Roger A. Cunningham, "The New Implied and Statutory Warranties of Habitability in Residential Leases: From Contract to Status." *16 Urb. L. Ann. 3, 104 & n.459.* (1979).

(n105)Footnote 398. *See Wade v. Jobe, 818 P.2d 1006 (Utah 1991)* . As a result, the approach has been characterized as amounting to a "civil fine levied on the landlord," based on the court's judgment as to the condition of the rental unit. *See* Samuel Bassett Abbott, *Housing Policy, Housing Codes and Tenant Remedies: An Integration, 56 B.U.L. Rev. 1, 24 (1976).*

(n106)Footnote 399. *See Mease v. Fox, 200 N.W.2d 791 (Iowa 1972)* ; *King v. Moorehead, 495 S.W.2d 65 (Mo. Ct. App. 1973)* .

(n107)Footnote 400. *See Mease v. Fox, 200 N.W.2d at 797* .

(n108)Footnote 401. *See, e.g., Mease v. Fox, 200 N.W.2d 791 (Iowa 1972)* ; *Detling v. Edelbrock, 671 S.W.2d 265 (Mo. 1984)* .

(n109)Footnote 402. *See Simon v. Solomon, 431 N.E.2d 556 (Mass. 1982)* ; *Fair v. Negley, 390 A.2d 240 (Pa. Super. Ct. 1978)* ; *see also Hilder v. St. Peter, 478 A.2d 202, 209 (Vt. 1984)* (damages should be allowed for discomfort and annoyance).

(n110)Footnote 403. *See Hilder v. St. Peter, 478 A.2d 202 (Vt. 1984)* .

(n111)Footnote 404. *See* discussion in § 41.09(b)(9).

(n112)Footnote 405. *405 A.2d 897 (Pa. 1979)* .

(n113)Footnote 406. *See id. at 908* .

(n114)Footnote 407. *See* Restatement (Second) of Property §§ 5.1 5.2 (1977).

(n115)Footnote 408. *See id.* § 10.2, cmt. a.

(n116)Footnote 409. *See id.* at § 10.2.

(n117)Footnote 410. *See id.* at § 10.2, Reporter's Note 1.

(n118)Footnote 411. *See, e.g., Javins v. First Nat'l Realty Corp., 428 F.2d 1071 (D.C. Cir. 1970)* , *cert. denied, 400 U.S. 925 (1970)* ; *Green v. Superior Ct., 517 P.2d 1168 (Cal. 1974)* ; *Hilder v. St. Peter, 478 A.2d 202 (Vt. 1984)* .

(n119)Footnote 412. *See, e.g., id.*

(n120)Footnote 413. *428 F.2d 1071 (D.C. Cir. 1970)* , *cert. denied, 400 U.S. 925 (1970)* .

(n121)Footnote 414. *See id. at 1083* . The court did not explain how the entire rental obligation might be extinguished while the tenant remains in possession. It has been suggested that the court might have contemplated the possibility that the tenant could pay rent for a period of time after the occurrence of the breach, creating a rent credit in the tenant's favor. This rent credit, added to the amount of the tenant's damages for the breach, might equal or exceed

the amount of the unpaid rent. *See* Roger A. Cunningham, "The New Implied and Statutory Warranties of Habitability in Residential Leases: From Contract to Status." *16 Urb. L. Ann. 3, 116 117 n.515.* (1979).

(n122)Footnote 415. *See 428 F.2d at 1082* (footnote omitted).

(n123)Footnote 416. *See* discussion in § 40.09(c)(3).

(n124)Footnote 417. *See, e.g., Green v. Superior Ct., 517 P.2d 1168 (Cal. 1974)* ; *Berzito v. Gambino, 308 A.2d 17 (N.J. 1973)* ; *Pugh v. Holmes, 405 A.2d 897 (Pa. 1979)* .

(n125)Footnote 418. *280 N.E.2d 208 (Ill. 1972)* .

(n126)Footnote 419. *Id. at 213* .

(n127)Footnote 420. *See*, Roger A. Cunningham, "The New Implied and Statutory Warranties of Habitability in Residential Leases: From Contract to Status." *16 Urb. L. Ann. 3, 121 (1979).*

(n128)Footnote 421. *See, e.g., Javins v. First Nat'l Realty Corp., 428 F.2d 1071 (D.C. Cir. 1970) , cert. denied, 400 U.S. 925 (1970)* ; *Teller v. McCoy, 253 S.E.2d 114 (W. Va. 1978)* .

(n129)Footnote 422. *See* § 40.09(c)(2).

(n130)Footnote 423. *See, e.g., Javins v. First Nat'l Realty Corp., 428 F.2d at 1083 n.67* ; *Green v. Superior Ct., 517 P.2d 1168, 1182 (Cal. 1974)* ; *King v. Moorehead, 495 S.W.2d at 77 (Mo. Ct. App. 1973)* ; Restatement (Second) of Property, § 11.3 & cmt. e (1977).

(n131)Footnote 424. *See, e.g., Cal. Civ. Proc. Code § 1170.5*; *Ohio Rev. Code Ann. § 1923.061(B).*

(n132)Footnote 425. *See, e.g., Marini v. Ireland, 265 A.2d 526 (N.J. 1970)* ; *Jackson v. Rivera, 318 N.Y.S.2d 7 (Civ. Ct. 1971)* ; *Hilder v. St. Peter, 478 A.2d 202 (Vt. 1984)* .

(n133)Footnote 426. *See* Restatement (Second) of Property § 11.2, cmt. a (1977).

(n134)Footnote 427. *See Marini v. Ireland, 265 A.2d at 535* ; *Pugh v. Holmes, 405 A.2d 897, 908 (Pa. 1979)* .

(n135)Footnote 428. *See Marini v. Ireland, 265 A.2d at 535* ; *Hilder v. St. Peter, 478 A.2d at 209 (Pa. 1979).*

(n136)Footnote 429. *See* Restatement (Second) of Property § 11.2, cmt. a (1977).

(n137)Footnote 430. *See Marini v. Ireland, 265 A.2d at 535* .

(n138)Footnote 431. *265 A.2d at 535* .

(n139)Footnote 432. *405 A.2d at 908* .

(n140)Footnote 433. *See id.*

(n141)Footnote 434. *See* Restatement (Second) of Property §§ 5.1(2)(c) and 5.2(2)(c).

(n142)Footnote 435. *See* Restatement (Second) of Property § 11.2, cmt. c (1977).

(n143)Footnote 436. *See id.*, cmt. b.

(n144)Footnote 437. *See id.*, cmt. e.

(n145)Footnote 438. *See id.*, Reporter's Note 9; § 10.2 Comment i.

(n146)Footnote 439. *See Javins v. First Nat'l Realty Corp., 428 F.2d 1071, 1082, n.61 (D.C. Cir. 1970)* , *cert. denied, 400 U.S. 925 (1970)* ; *Pugh v. Holmes, 405 A.2d 897, 908 (Pa. 1979)* .

(n147)Footnote 440. *See, e.g., Lemle v. Breeden, 462 P.2d 470, 475 (Hawaii 1969)* ; *Hilder v. St. Peter, 478 A.2d 202 (Vt. 1984)* .

(n148)Footnote 441. *See Habib v. Thurston, 517 A.2d 1 (D.C. 1985)* (claim voluntarily dismissed); *Steele v. Latimer, 521 P.2d 304 (Kan. 1974)* (tenant sought injunction against continued housing code violations).

(n149)Footnote 442. *See, e.g., Jones v. Parker, 40 N.E. 1044 (Mass. 1895)* ; *cf. Bartley v. Walentas, 434 N.Y.S.2d 379 (App. Div. 1980)* (injunctive relief denied with respect to performance of statutory warranty).

(n150)Footnote 443. *405 A.2d at 908* .

(n151)Footnote 444. *See Tyson Breeders, Inc. v. Harrison, 940 So.2d 230 (Miss. 2006)* ; 11 *Duke Street, Ltd. v. Ryman, 721 N.Y.S.2d 502 (App. Div. 2001)* .

(n152)Footnote 445. The legislation is discussed in § 41.05(g), *above.* As noted in § 41.05(g)(1),Louisiana landlords have long been subject to extensive warranty type obligations.

(n153)Footnote 446. *See* §§ 43.05(a) & (b), *below.* Chapter 43 includes a comprehensive discussion of statutes that provide for a warranty of habitability.

(n154)Footnote 447. *See* cmt. to U.R.L.T.A. § 2.104.

(n155)Footnote 448. *See* § 43.05(a), *below.*

(n156)Footnote 449. *See id.*

(n157)Footnote 450. *See* Uniform Residential Landlord and Tenant Act § 2.104(a).

(n158)Footnote 451. *See id.* § 1.202.

(n159)Footnote 452. The notice period is shorter if the non compliance is a recurring one. *See id.* § 4.101(a)(2).

(n160)Footnote 453. *See id.* § 4.101(a) & (d).

(n161)Footnote 454. *See id.* § 4.101(b).

(n162)Footnote 455. *See id.* § 4.103(a).

(n163)Footnote 456. *See id.* § 4.103(b).

(n164)Footnote 457. *See id.* § 4.104.

(n165)Footnote 458. *See id.* § 4.104(d).

(n166)Footnote 459. *See id.* § 4.105.

(n167)Footnote 460. *See, e.g., Napolski v. Champney, 667 P.2d 1013 (Or. 1983)* (construing a corresponding Oregon statutory provision to provide for rent withholding).

(n168)Footnote 461. *See* Uniform Residential Landlord and Tenant Act § 4.107.

(n169)Footnote 462. *See id.* § 1.403.

(n170)Footnote 463. *See id.* § 2.104(c).

(n171)Footnote 464. *See id.* § 2.104(d).

(n172)Footnote 465. *See id.* § 2.104(e).

(n173)Footnote 466. *See, e.g., Md. Code Ann. Real Prop. § 8-211*; *Tex. Prop. Code Ann. §§ 92.001 et seq.*

(n174)Footnote 467. *See* § 43.05(c)(1), *below* for additional information regarding these statutes.

(n175)Footnote 468. *See, e.g., Me. Rev. Stat. Ann. tit. 14 § 6021*; *N.Y. Real Prop. Law § 235* b. The New York statute incorporates, among other things, a covenant and warranty by the landlord that the premises "are fit for the uses reasonably intended by the parties." *N.Y. Real Prop. Law 235 b*. In a 1995 case, some tenants who lived in a "fashionable" part of Manhattan pointed to this language, and claimed that the warranty should encompass "the level of services and amenities that tenants reasonably expect to be provided under the financial and other terms of their individual leases." *See Solow v. Wellner, 658 N.E.2d 1005, 1007 1008 (N.Y. 1995)* . The New York Court of Appeals said no. It said that "the implied warranty sets forth a minimum standard to protect tenants against conditions that render residential premises uninhabitable or unusable." *See id. at 1008* .

(n176)Footnote 469. *See, e.g., W. Va. Code Ann. § 37-6-30*.

(n177)Footnote 470. *Id.*

(n178)Footnote 471. *See, e.g., Fritz v. Warthen, 213 N.W.2d 339 (Minn. 1973)* .

(n179)Footnote 472. *See* William B. Stoebuck & Dale A. Whitman, *The Law of Property* § 6.39 (3d ed. 2000).

(n180)Footnote 473. *See Tex. Prop. Code Ann. § 92.061*.

(n181)Footnote 474. For example, the Washington Residential Landlord/Tenant Act exempts specified residential arrangements, such as certain farm tenancies, from statutory coverage. *See Wash. Rev. Code Ann. § 59.18.040*. In *Foisy v. Wyman, 515 P.2d 160, 164 (Wash. 1973)* , however, the Washington Supreme court held that the implied warranty of habitability applied to all contracts for the renting of premises.

(n182)Footnote 475. *See Green v. Superior Ct., 517 P.2d 1168 (Cal. 1974)* ; *Boston Housing Authority v. Hemingway, 293 N.E.2d 831 (Mass. 1973)* ; *cf. Bellikka v. Green, 762 P.2d 997 (Or. 1988)* (existing comprehensive landlord tenant legislation, which includes landlord habitability obligations, leaves no room for judicial creation of implied warranty of habitability).

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CHAPTER 41 TENANT RIGHTS AND LANDLORD DUTIES

5-41 Thompson on Real Property, Thomas Editions § 41.07

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§ 41.07 Dependency of Covenants in Commercial Leases.

As noted previously in this chapter, the traditional rule of the common law was that lease covenants were independent of each other and that breach by one party of a lease covenant did not entitle the other to terminate the lease. Some departures from the traditional rule have occurred. One would be the doctrine of constructive eviction, which, under appropriate circumstances, permits a tenant to avoid lease obligations. Another would be a statute that permits the landlord to terminate the lease for non payment of rent. Still another would be the modern implied warranty of habitability, with respect to residential leases. In the non residential context, though, it might be expected that the traditional independence of covenants rule would still be largely in place. For the most part, that appears to be true, but there have been some dependency inroads.

The *Restatement* departs from the traditional approach. It serves up a rather reformist n476 rule that is not, by its terms, limited to the residential landlord tenant context:

> Except to the extent the parties to a lease validly agree otherwise, if the landlord fails to perform a valid promise contained in the lease to do, or to refrain from doing, something on the leased property or elsewhere, and as a consequence thereof, the tenant is deprived of a significant inducement to the making of the lease, and if the landlord does not perform his promise within a reasonable period of time after being requested to do so, the tenant may ... terminate the lease. n477

Given the near universal adoption of the implied warranty of habitability, the *Restatement* formulation does not offer much in the residential landlord tenant context. However, it could offer some relief to commercial tenants, if a court were willing to depart from the traditional independence of covenants rule. An example was provided by the decision of the Massachusetts Supreme Court in *Wesson v. Leone Enterprises, Inc.* n478 In that case, a commercial tenant claimed that the landlord's failure to repair a leaking roof resulted in a constructive eviction. The court rejected the claim because, while the failure may have made the tenant's situation more inconvenient and expensive, it did not render the premises untenantable. However, the court still allowed the tenant to terminate the lease. Citing the *Restatement*, the court used a mutually dependent covenant analysis and concluded that the landlord's breach of a covenant to keep the roof in good repair allowed the tenant to terminate the lease.

Another example can be seen in the decision of the Utah Supreme Court in *Richard Barton Enterprises, Inc. v. Tsern.* n479 There, the landlord breached a covenant to put a freight elevator into "good working order." The tenant responded by withholding rent. The court adopted a dependency of covenants rule, but it said that only a "significant breach of a covenant material to the purpose for which the lease was consummated justifies a lessee in abating rent." n480 The elevator repair covenant qualified, and the court allowed rent to be abated to the extent that the value of the leased premises had been reduced by the landlord's breach.

Even if a court were disposed to adopt a dependency of covenants rule, like the one articulated by the *Restatement*, such a rule would be of assistance to a tenant, of course, only when there has been a breach of a lease covenant by the landlord. Indeed, in the Massachusetts case, the landlord sought to avoid lease termination by arguing that it was the tenant, not the landlord, who had an obligation to keep the roof in repair. However, the lower court had concluded that it was the landlord's obligation to keep the roof in repair, and the breach of that obligation opened the door to non traditional relief by the tenant.

FOOTNOTES:

(n1)Footnote 476. The Introduction to the *Restatement* indicates that what it has to say about dependency of lease covenants goes beyond "restating" existing law:

> In dealing with landlord and tenant law, the approach of the Institute has two distinct features that an introduction should disclose. The first is the extent of the rejection of the ancient dogma that the covenants of the respective parties are entirely independent, in favor of a concept of mutual dependence akin to the accepted law of contracts. The second is the extent to which it is conceived to be appropriate that courts, in assessing the continuing validity of precedents, rules and doctrines of the past, may give weight to the policies reflected in more recent, widespread legislation, though the statutes do not by their terms apply...
>
> ...
>
> ... Mutual dependence was established long ago by statute on what is certainly the most crucial point the landlord's right to terminate the lease and regain possession for non-payment of rent. Such dependence is, however, recognized by the Restatement in other situations thought to be analogous in point of policy but not thus far within the terms of any statutory mandate.

Restatement (Second) of Property vii-viii (1977).

(n2)Footnote 477. Restatement (Second) of Property 7.1 (1977).

(n3)Footnote 478. *774 N.E.2d 611 (Mass. 2002)* . For a contrary example, see *Matte v. Shippee Auto, Inc., 876 A.2d 167 (N.H. 2005)* (Court declines to abandon the traditional rule of independent covenants in the commercial leasing context).

(n4)Footnote 479. *928 P.2d 368 (Utah 1996)* .

(n5)Footnote 480. *Id. at 377* .

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CHAPTER 41 TENANT RIGHTS AND LANDLORD DUTIES

5-41 Thompson on Real Property, Thomas Editions § 41.08

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§ 41.08 Prohibitions Against Retaliatory Conduct By Landlords.

[Go To Supp]

§ 41.08(a) Introduction.

Traditionally, a landlord's motives in evicting a tenant, or in failing to renew a tenancy, were not relevant to the landlord's legal right to do so. A landlord could, for example, terminate a periodic tenancy and evict a tenant for any reason whatsoever, so long as the proper notice and other requirements were met. In recent years, however, by statute or judicial decision, a majority of jurisdictions have restricted the landlord's ability to evict residential tenants when the landlord's motive is to retaliate against tenants for reporting substandard housing conditions to governmental authorities or for exercising certain other tenant rights. In most of these jurisdictions, the landlord is also prohibited from retaliating against tenants using means other than eviction proceedings. Because the doctrine, or policy, at work here generally prohibits more than retaliatory eviction, it will be referred to as the "retaliatory conduct" doctrine.

In the landmark case of *Edwards v. Habib*, n481 the United States Court of Appeals for the District of Columbia Circuit ruled that a landlord could not evict a tenant under a periodic tenancy in retaliation for tenant reporting of housing code violations to governmental authorities. The court observed that the enactment of housing code provisions reflected a strong legislative policy in favor of safe, adequate housing, and that enforcement of housing code provisions depended to a considerable extent on private reporting of violations. Reasoning that intimidation of those who report housing code violations would inhibit the effectiveness of housing code legislation, the court stated: "[W]hile the landlord may evict for any legal reason or for no reason at all, he is not, we hold, free to evict in retaliation for his tenant's report of housing code violations to the authorities." n482 Accordingly, the court permitted the tenant to raise the landlord's retaliatory motive as a defense to the landlord's action to recover possession of the leased premises.

Courts in several states have followed the *Edwards v. Habib* decision, and have prohibited landlords from retaliating against residential tenants for reporting housing code violations to governmental authorities. n483 In addition, more than half the states, and many municipalities, have adopted statutes that prohibit landlord retaliation against tenants. n484 This area of landlord-tenant law is one of recent and rapid change.

§ 41.08(b) Protected Tenant Activities.

In *Edwards v. Habib*, the retaliatory motive of the landlord was recognized as a defense to the landlord's effort to evict tenants who report housing code violations to governmental authorities. But the retaliatory conduct doctrine has expanded to protect other tenant activities as well. Courts have applied the doctrine to prohibit landlords from retaliating against tenants for exercising rights under repair and deduct statutes and for legally withholding rent because of building code violations. n485 The Uniform Residential Landlord and Tenant Act, adopted in many jurisdictions, protects residential tenants against landlord retaliation for: 1) complaining to governmental authorities of a housing or building code violation that materially affects health and safety; 2) complaining to the landlord of the landlord's failure to maintain the premises as provided under the Act; or 3) organizing or joining a tenant's union or a similar organization. n486 Some statutes broadly protect tenants against retaliation for exercising their legal rights. n487

Courts have occasionally considered whether the retaliatory conduct doctrine should also apply to commercial tenancies. In this context, of course, the public policies related to the improvement of substandard housing that were central to the *Edwards v. Habib* case are not applicable. Indeed, several courts have rejected claims that the retaliatory conduct doctrine should apply in the commercial leasing context. n488 However, some statutes that prohibit landlord retaliatory conduct are not limited to residential tenancies. n489 And a few courts have prohibited retaliatory conduct by landlords when the public policies at issue were quite different from those involved in *Edwards v. Habib.* In particular, courts have prohibited landlord retaliation against tenants for opposing a zoning change sought by the landlord, n490 for reporting the landlord's criminal conduct, n491 for filing litigation charging the landlord with a violation of federal farm labor legislation, n492 and for refusing to perjure themselves in litigation to which the landlord was a party. n493 On the other hand, one court refused to apply the retaliatory eviction doctrine to an eviction that the tenant alleged was in retaliation for the tenant's participation in a labor strike; the court took the position that the defense must relate to activities of the tenant that are incidental to the tenancy. n494

§ 41.08(c) Prohibited Retaliatory Conduct.

Recognizing that landlords who wish to retaliate against tenants may effectively do so in ways other than bringing eviction actions, courts and legislatures have prohibited a variety of landlord retaliatory actions. Thus, court decisions have prohibited landlords from retaliating against tenants by raising the amount of the rent, by reducing the level of services provided to the tenant, or by failing to renew a residential lease. n495 One court suggested that any landlord actions are impermissible when they are motivated by a desire to punish the tenant for exercising tenant rights or to chill the exercise of rights by other tenants. n496

Although a few statutes prohibit little more than retaliatory eviction, n497 many impose greater limitations on retaliatory conduct by landlords. The Uniform Residential Landlord and Tenant Act prohibits landlords from increasing rents, decreasing services, or evicting or threatening to evict a tenant. n498 Some statutes prohibit landlords from retaliating against tenants by substantially altering the terms of the tenancy, n499 refusing to renew the lease, n500 or otherwise causing the tenant to quit possession involuntarily. n501

The Restatement position is that landlords should be prohibited from retaliating against tenants by terminating a lease, by refusing to renew a lease for a specified term, or by offering to continue a tenancy on terms more burdensome than those offered to other, similarly situated, tenants. n502 An offer to continue a tenancy on burdensome terms is, notes the Restatement, the equivalent of attempting to terminate a tenancy. n503

§ 41.08(d) Proof of Retaliatory Motive.

The landlord's motive is obviously critical in a retaliatory conduct case: if the landlord's conduct is not in retaliation for protected tenant activity, the tenant cannot prevail on the retaliatory conduct claim or defense. In the absence of a damaging admission by the landlord, however, the landlord's motive may be difficult for the tenant to prove. The outcome may well depend on whether an evidentiary presumption is available to aid the tenant, and on how the standard of proof is defined with respect to landlord motive.

In many instances, the tenant may be able to benefit from the existence of a presumption that the landlord's action is retaliatory. Statutes that prohibit retaliatory conduct commonly create a presumption of retaliatory action when the landlord's actions take place within a prescribed period of time after the tenant's protected activity. n504 For example, the Uniform Residential Landlord and Tenant Act establishes a presumption that the landlord's action is retaliatory if it is taken within one year of a complaint by the tenant of a housing code violation. If the presumption arises, the burden will then be on the landlord to show that the landlord's action was not retaliatory. However, the presumption does not arise if the tenant's complaint was made after notice by the landlord of a proposed rent increase or a diminution in services to the tenant. n505

Presumptions have also been established by court decision. For example, one court, in considering how a tenant could show that a landlord's action is retaliatory, indicated that if the tenant could show that the conduct of the landlord was "inherently destructive" of tenant rights or "unavoidably chills their exercise," a presumption would arise that the landlord intended such results. n506 The Restatement position is that a presumption of retaliatory motive arises once the tenant establishes that the landlord's exercise of rights was "discriminatory" and followed the tenant's protected activity "at the first opportunity." n507

Jurisdictions vary considerably in defining the standard of proof with respect to landlord's retaliatory motive. The most difficult standard for the tenant is one of sole motive. As articulated in by the Supreme Court of Wisconsin in *Dickhut v. Norton*, n508 this standard requires the tenant to prove by "clear and convincing" evidence that the landlord's action was taken "for the sole purpose of retaliation." n509 Some jurisdictions have adopted this standard by statute. n510 Because the landlord may be able to show that there was, at least in part, another motive for the landlord's conduct, the requirement of proving a "sole" motive is a heavy burden for a tenant to bear.

A less stringent standard requires the tenant to show that landlord's retaliatory motive was the dominant motive for the landlord's action. n511 The Restatement favors this standard; it requires the tenant to show that the landlord's action was "primarily motivated" by the tenant's protected activity. n512 As noted above, the Restatement would also allow the tenant to take advantage of an evidentiary presumption of retaliatory motive. Once the presumption arises, the burden would shift to the landlord to produce evidence that the primary motivation for the landlord's actions was non retaliatory. n513 In any event, the ultimate burden of persuasion remains with the tenant. n514

Other standards of proof have been articulated in terms of the showing that the landlord must make in order to overcome a presumption of retaliatory motive. Thus, it has been said that the landlord must show, by a preponderance of the evidence, that there was a substantial non retaliatory reason for the landlord's conduct. n515 It has also been said that the landlord must show that the landlord's conduct was motivated by "some legitimate business purpose." n516 A more difficult standard requires the landlord to prove that the decision to evict the tenant was "independent" of the tenant's protected activity. n517

§ 41.08(e) Tenant Remedies.

The most common application of the retaliatory conduct doctrine is to permit the tenant to assert the landlord's retaliatory motive as an affirmative defense in the landlord's action for possession of the leased premises. This remedy is set forth in statutes that incorporate tenant protections against retaliation. n518 It is also established by court decisions that adopt the retaliatory conduct doctrine. n519

Another potential application of the retaliatory conduct doctrine is as a basis for injunctive relief. Several courts, and the Restatement, have recognized that the tenant may obtain an injunction against the landlord's action for possession of the premises when the landlord's motive is retaliatory. n520 Injunctive relief could benefit a tenant who is a defendant in a summary possession action in a jurisdiction that does not permit tenants to raise equitable and affirmative defenses in summary possession proceedings. n521

Injunctive relief could also benefit a tenant whose landlord declines to renew a periodic tenancy, reduces the level of services to the leased premises, or raises the rent in retaliation for protected activity. However, there is not much case authority regarding the availability of injunctive relief in these situations, and most statutes that prohibit landlord retaliation do not specifically provide for injunctive relief. n522 An injunction has been ordered to prevent a landlord from retaliating against the tenant by raising the amount of the rent. n523 Courts have reached different results on whether a tenant can obtain injunctive relief against the landlord's retaliatory refusal to renew a lease. n524 The Restatement does not take a position on whether injunctive relief is available other than with respect to an eviction proceeding. n525

Damages may also be a remedial option. A number of statutes permit the tenant to terminate the lease and to recover damages, or to recover possession of the premises and damages, if the tenant is dispossessed of the premises by a landlord's retaliatory eviction. n526 Some statutes permit a tenant to recover damages in an amount equal to a multiple of the tenant's actual damages or a multiple of the rental amount. n527 The Uniform Residential Landlord and Tenant Act provides that the tenant may recover the greater of three months' rent or three times the tenant's actual damages, plus reasonable attorneys' fees, in the event that the landlord engages in prohibited retaliatory conduct. If the tenant terminates the lease, the Uniform Act also provides for recovery of prepaid rent and any security deposit that is recoverable by the tenant. n528 In the absence of an applicable statutory provision, some courts have permitted tenant recovery of damages based on the unlawful conduct of the landlord. n529 In a proper case, the landlord could also be subject to a claim for punitive damages n530 or damages for the tenant's emotional distress. n531

§ 41.08(f) Dissipation of Retaliatory Motive.

A tenant who avoids eviction on the basis that the landlord's motive was retaliatory should not be entitled to remain on the premises in perpetuity if grounds for eviction by the landlord are present. In the *Edwards v. Habib* case, the court said that the landlord could proceed with a new eviction action when the illegal motive has "dissipated." n532 But the court did not discuss how that point should be determined. Several approaches have emerged.

One approach, advanced by the District of Columbia Circuit Court of Appeals, is to require a landlord, who has been previously barred from evicting a tenant by the retaliatory eviction doctrine, to establish that the new eviction is motivated by legitimate business purposes. n533 This could be a difficult burden for the landlord to carry, once a retaliatory motive has been found in the initial eviction action.

Another alternative is to permit the landlord to proceed with eviction, assuming proper grounds, after the landlord repairs the condition that was the subject of the tenant's complaint to governmental authorities. n534 This approach would not require the landlord's retaliatory motive to be dissipated at all; however, in one case in which the court used this approach, it said that the tenant should be given sufficient time to obtain other suitable housing, and that if the landlord's motive was unlawful, the tenant should be entitled to damages, possibly including punitive damages. n535 Of course, to the extent that this approach ultimately permits the landlord to engage in deferred retaliation against the tenant by means of a later eviction, it entails a risk of deterring tenant from reporting housing code violations. n536

The Restatement regards the matter of dissipation of retaliatory motive as a matter of intent, to be determined from the weight of the evidence. n537 Factors that are relevant to determining whether the landlord's current motivation is retaliatory include the length of time that has elapsed since the time of the previous determination of retaliatory action, and whether the tenant has repeated the acts that previously caused the landlord to engage in the retaliation. n538 It should also be noted that, under the Restatement rule, a landlord will not be found to have taken retaliatory action against a tenant if the tenant is materially in default in the performance of lease obligations at the time the landlord acts. n539

A Maryland statute offers another approach to dissipation of motive. It simply permits the landlord to evict a tenant for

any reason once six months have elapsed from the time a determination has been made that the landlord's action was retaliatory. n540

§ 41.08(g) Limits to the Retaliatory Conduct Doctrine.

As noted above, the application of the retaliatory conduct doctrine has been generally limited to the residential landlord-tenant context. Additional, more specific, limitations on the doctrine are set forth in some statutes, and advocated by the Restatement.

Statutes limit the application of the retaliatory conduct doctrine in various ways. For example, statutes that are based on the Uniform Residential Landlord and Tenant Act permit the landlord to bring an action for possession, notwithstanding a retaliatory motive, if: 1) the violation of the building code complained of by the tenant was caused primarily by lack of reasonable care by the tenant, a member of the tenant's family, or another person on the premises with the tenant's consent; 2) the tenant is in default in the payment of rent; or 3) if compliance with the building code would require alterations that would effectively deprive the tenant of the use of the dwelling unit. n541 Some statutes permit the landlord to recover the premises if the tenant is committing waste or using the property for illegal purposes, or if the leased premises are in full compliance with all applicable housing codes at the time the landlord's complaint for possession is filed. n542

The Restatement limits the scope of its retaliatory action rule to landlords who are "in the business of renting residential property." Coverage is also limited to landlord actions that are in retaliation for tenant complaints made "in good faith and with reasonable cause." The Restatement rule does not apply when the tenant is materially in default in the performance of lease obligations at the time the landlord acts. n543

§ 41.08(h) Constitutional Issues.

Tenants have occasionally contended that retaliatory conduct by private landlords violated their constitutional rights of free speech or assembly, or the right to petition the government for redress of grievances. However, in order for the landlord's conduct to be subject to constitutional constraints, there must be sufficient state action to engage the provisions of the *Fourteenth Amendment to the Constitution*. In the vast majority of retaliatory conduct cases, a constitutional violation has not been found. Some courts have observed that the constitutional claims could be successful on a showing of state action, but have not resolved the issue, concluding instead that public policy prohibits the landlord's retaliatory conduct. n544 Most courts that have reached the constitutional issue have not found sufficient state involvement in the landlord's resort to summary eviction proceedings to support a constitutional violation. n545 In a few cases, however, the tenant's constitutional contentions have been successful. n546

FOOTNOTES:

(n1)Footnote 481. *397 F.2d 687 (D.C. Cir. 1968) , cert. denied, 393 U.S. 1016 (1969)* .

(n2)Footnote 482. *397 F.2d at 699* .

(n3)Footnote 483. *See, e.g., Wright v. Brady, 889 P.2d 105 (Idaho App. 1995)* ; *Building Monitoring Sys., Inc. v. Paxton, 905 P.2d 1215 (Utah 1995)* ; *Dickhut v. Norton, 173 N.W.2d 297 (Wis. 1970)* ; Jonathan M. Purver, *Retaliatory Eviction of Tenant for Reporting Landlord's Violation of Law*, Annotation, *40 A.L.R.3d 753 (1971)* .

(n4)Footnote 484. *See* chapter 43 § 43.05(e)(1), n.753 (lists state statutes that prohibit retaliatory conduct by landlords); *see also* Restatement (Second) of Property §§ 14.8 Statutory Note, 14.9 Reporter's Note 1(b) (1977).

(n5)Footnote 485. *See, e.g., Schweiger v. Superior Court, 476 P.2d 97 (Cal. 1970)* (repair and deduct); *Robinson v. Diamond Hous. Corp., 463 F.2d 853 (D.C. Cir. 1972)* (rent withholding).

(n6)Footnote 486. *See* Uniform Residential Landlord and Tenant Act § 5.101.

(n7)Footnote 487. *See, e.g., Alaska Stat. § 34.03.310*; Chapter 43 § 43.05(e)(1); Restatement (Second) of Property § 14.8 Statutory Note (1977).

(n8)Footnote 488. *See, e.g., William C. Cornitius, Inc. v. Wheeler, 556 P.2d 666 (Or. 1976)* .

(n9)Footnote 489. *See, e.g., Del. Code Ann. tit. 25 § 5516*; *Minn. Stat. Ann. § 566.03*.

(n10)Footnote 490. *See Pohlman v. Metropolitan Trailer Park, Inc., 312 A.2d 888 (N.J. Super. Ct. Ch. Div. 1973)* ; *Windward Partners v. Delos Santos, 577 P.2d 326 (Hawaii 1978)* .

(n11)Footnote 491. *See Barela v. Superior Court, 636 P.2d 582 (Cal. 1981)* .

(n12)Footnote 492. *See S.P. Growers Ass'n v. Rodriquez, 552 P.2d 721 (Cal. 1976)* .

(n13)Footnote 493. *See Custom Parking, Inc. v. Superior Court, 187 Cal. Rptr. 674 (Ct. Ct. App. 1982)* .

(n14)Footnote 494. *See Imperial Colliery Co. v. Fout, 373 S.E.2d 489 (W. Va. 1988)* .

(n15)Footnote 495. *See, e.g., E. & E. Newman, Inc, v. Hallock, 281 A.2d 544 (N.J. Super. Ct. App. Div. 1971)* ; *Schweiger v. Superior Court, 476 P.2d 97 (Cal. 1970)* ; *Golphin v. Park Monroe Assocs., 353 A.2d 314 (D.C. 1976)* .

(n16)Footnote 496. *See Robinson v. Diamond Hous. Corp., 463 F.2d 853 (D.C. Cir. 1972)* .

(n17)Footnote 497. *See, e.g., Me. Rev. Stat. Ann. tit. 14 § 6001*.

(n18)Footnote 498. Uniform Residential Landlord and Tenant Act § 5.101.

(n19)Footnote 499. *N.H. Rev. Stat. Ann. §§ 540:13* a, 540:13 b.

(n20)Footnote 500. *See Idaho Code § 55- 2715.*

(n21)Footnote 501. *See* N.Y. Unconsol. Laws §§ 8590, 8609 (rent control statute); *see generally* Restatement (Second) of Property § 14.8 Statutory Note (1977).

(n22)Footnote 502. Restatement (Second) of Property § 14.8 cmt. b (1977).

(n23)Footnote 503. *See id.*

(n24)Footnote 504. *See* chapter 43, § 43.05(e); Restatement (Second) of Property § 14.8 Statutory Note (1977).

(n25)Footnote 505. *See* Uniform Residential Landlord and Tenant Act § 5.101.

(n26)Footnote 506. *See Robinson v. Diamond Hous. Corp., 463 F.2d 853 (D.C. Cir. 1972)* .

(n27)Footnote 507. Restatement (Second) of Property § 14.8 cmt. f (1977).

(n28)Footnote 508. *173 N.W.2d 297 (Wis. 1970)* .

(n29)Footnote 509. *173 N.W.2d at 302* .

(n30)Footnote 510. *See, e.g.*, Md. Real Prop. Code Ann. § 8-208.1.

(n31)Footnote 511. *See, e.g., McQueen v. Druker, 438 F.2d 781 (1st Cir. 1971)* ; *Cal. Civ. Code § 1942.5*;

Comment, *California Common Law Defense Against Landlord Retaliatory Conduct, 22 U.C.L.A. L. Rev. 1161, 1176 1180 (1975).*

(n32)Footnote 512. Restatement (Second) of Property § 14.8(4) (1977).

(n33)Footnote 513. Restatement (Second) of Property § 14.8 cmt. f (1977).

(n34)Footnote 514. *See id.*; *see also Hillview Associates v. Bloomquist, 440 N.W.2d 867 (Iowa 1989)* (burden of persuasion remains with the tenant).

(n35)Footnote 515. *See Parkin v. Fitzgerald, 240 N.W.2d 828 (Minn. 1976)* .

(n36)Footnote 516. *See Robinson v. Diamond Hous. Corp., 463 F.2d 853, 865 (D.C. Cir. 1972)* .

(n37)Footnote 517. *See Silberg v. Lipscomb, 285 A.2d 86, 88 (N.J. Super. Ct. 1971)* .

(n38)Footnote 518. *See* chapter 43 § 43.05(e)(2); Restatement (Second) of Property § 14.9 statutory note (1977) (lists statutes based on tenant remedies).

(n39)Footnote 519. *See, e.g., Edwards v. Habib, 397 F.2d 687 (D.C. Cir. 1968) , cert. denied, 393 U.S. 1016 (1969)* .

(n40)Footnote 520. *See, e.g., E. & E. Newman, Inc. v. Hallock, 281 A.2d 544 (N.J. Super. Ct. App. Div. 1971)* ; *Markese v. Cooper, 333 N.Y.S.2d 63 (Co. Ct. 1972)* ; Restatement (Second) of Property § 14.9 Reporter's Note 3 (1977); *but see Hosey v. Club Van Cortlandt, 299 F. Supp. 501 (S.D.N.Y 1969)* (injunctive relief denied on the ground that tenant could raise a retaliatory eviction defense in the summary possession proceeding).

(n41)Footnote 521. *See* Restatement (Second) of Property § 14.9 Reporter's Note 2 (1977).

(n42)Footnote 522. *See* Restatement (Second) of Property § 14.9 Statutory Note (1977).

(n43)Footnote 523. *See E. & E. Newman, Inc. v. Hallock, 281 A.2d 544 (N.J. Super. Ct. App. Div. 1971)* .

(n44)Footnote 524. *See, e.g., Engler v. Capital Mgt. Corp., 271 A.2d 615 (N.J. Ch. Div. 1970)* (relief granted); *Lincoln Square Apts. v. Davis, 295 N.Y.S.2d 358 (Civ. Ct. 1968) , aff'd, 316 N.Y.S.2d 130 (Sup. Ct. 1969)* (no relief).

(n45)Footnote 525. *See* Restatement (Second) of Property § 14.9 caveat (1977).

(n46)Footnote 526. *See, e.g., Ariz. Rev. Stat. Ann. § 33* 1381.

(n47)Footnote 527. *See, e.g., Or. Rev. Stat. § 90.385* (two months' rent or two times actual damages).

(n48)Footnote 528. *See* Uniform Residential Landlord and Tenant Act §§ 4.107, 5.101.

(n49)Footnote 529. *See, e.g., Aweeka v. Bonds, 97 Cal. Rptr. 650 (Cal. Ct. App. 1971)* ; *Markese v. Cooper, 333 N.Y.S.2d 63 (Co. Ct. 1972)* ; *See also Murphy v. Smallridge, 468 S.E.2d 167 (W. Va. 1996)* (residential tenant does not have to continue to live on the leased premises to preserve a cause of action for retaliatory eviction; a tenant who vacates may assert an affirmative claim for relief for retaliatory eviction).

(n50)Footnote 530. *See, e.g., id.*

(n51)Footnote 531. *See, e.g., Gokey v. Bessette, 580 A.2d 488 (Vt. 1990)* .

(n52)Footnote 532. *397 F.2d 687 at 702* .

(n53)Footnote 533. *See Robinson v. Diamond Hous. Corp. 463 F.2d 853 (D.C. Cir. 1972)* .

(n54)Footnote 534. *See, e.g., Cornell v. Dimmick, 342 N.Y.S.2d 275 (City Ct. 1973)* .

(n55)Footnote 535. *See Markese v. Cooper, 333 N.Y.S.2d 63 (Co. Ct. 1972)* ; accord, *Building Monitoring Sys., Inc. v. Paxton, 905 P.2d 1215 (Utah 1995)* (once repairs have been made, landlord may serve tenant with eviction notice without proffering evidence of intent; however, the burden is on the landlord to show that the landlord has given the tenant reasonable opportunity to procure other housing).

(n56)Footnote 536. *See* Robert S. Schoshinski, *American Law of Landlord and Tenant* § 12.6 (Lawyers Co Operative Publishing Co. 1980).

(n57)Footnote 537. Restatement (Second) of Property § 14.8 Reporter's Note 7 (1977).

(n58)Footnote 538. *See id.*, cmt. i.

(n59)Footnote 539. *See id.*, § 14.8(3) cmt. e.

(n60)Footnote 540. *See Md. Ann. Code Real Prop. § 8-208.1(e).*

(n61)Footnote 541. *See* Uniform Residential Landlord and Tenant Act § 5.101.

(n62)Footnote 542. *See, e.g., Haw. Rev. Stat. § 521- 74.*

(n63)Footnote 543. *See* Restatement (Second) of Property § 14.8 (1977).

(n64)Footnote 544. *See, e.g., Edwards v. Habib, 397 F.2d 687 (D.C. Cir. 1968) , cert. denied, 393 U.S. 1016 (1969)* (extensive discussion of the constitutional issues).

(n65)Footnote 545. *See, e.g., Newby v. Alto Riviera Apts., 131 Cal. Rptr. 547 (Cal. App. 1976)* ; *Aluli v. Trusdell, 508 P.2d 1217 (Haw. 1973) , cert. denied, 414 U.S. 1040 (1973)* ; *modified on other grounds, Windward Partners v. Delos Santos, 577 P.2d 326 (Haw. 1978)* .

(n66)Footnote 546. *See, e.g., McQueen v. Druker, 438 F.2d 781 (1st Cir. 1971)* (federally assisted housing project); *Lavoie v. Bigwood, 457 F.2d 7 (1st Cir. 1972)* (§ 1983 action; landlord monopoly resulted from zoning laws); *Hosey v. Club Van Cortlandt, 299 F. Supp 501 (S.D.N.Y. 1969)* (landlord recourse to summary proceedings involved sufficient state action); *Engler v. Capital Mgt. Corp., 271 A.2d 615 (N.J. Ch. Div. 1970)* (retaliation for formation of tenant union).

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CHAPTER 41 TENANT RIGHTS AND LANDLORD DUTIES

5-41 Thompson on Real Property, Thomas Editions § 41.09

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§ 41.09 Rights and Duties Arising Under Tort Law.

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When land is leased to a tenant, the tenant acquires an estate in land, and becomes an owner and occupier of the premises. As a result, the tenant has traditionally been considered to be subject to the normal responsibilities of someone who is in possession, including the responsibility for harms caused by negligently created or maintained conditions on the leased premises. n547 The traditional approach has been to classify entrants onto the land as trespassers, licensees, or invitees, and to allocate different duties to the possessor of the land for each classification. n548 Most courts continue to apply this approach, but some have moved toward the imposition of a generalized duty of ordinary care. n549

In contrast, the landlord has traditionally enjoyed an immunity from tort liability for personal injuries that occur to the tenant, and to others, as a result of dangerous conditions on the leased property. To be sure, the traditional rule has long been subject to several important exceptions, but it has nonetheless prevailed for many years in the common law. In recent times, however, the conceptual foundations for the traditional rule have eroded to a significant degree, and the trend has been to impose tort liability on landlords.

To some extent, the increased tort liability of landlords has resulted from an expansion of the exceptions to the traditional rule. However, in a number of jurisdictions, the traditional rule has itself been repudiated and replaced by a general standard of negligence liability, at least in the residential landlord-tenant context. This section considers the traditional rule of landlord non liability in tort, the exceptions to the traditional rule, and more recent developments that have imposed tort liability on landlords under ordinary negligence and strict liability theories. It also discusses the duty of the landlord to protect tenants against the criminal conduct of third parties. The section considers whether landlords may shield themselves from tort liability by including exculpatory provisions in their leases. And it discusses the related issue of tenant liability for criminal acts of third parties.

§ 41.09(a) The Traditional Rule of Landlord Tort Immunity.

The traditional common law rule is that the landlord is immune from tort liability for physical harm resulting from dangerous conditions on the leased property. The rule has generally been rationalized on the theory that a lease is a

conveyance of real property to which the doctrine of caveat emptor applies. The landlord was thought to make no warranties, and was thought to have no duties, with respect to the condition of the leased premises at the time of their conveyance to the tenant. n550 Furthermore, in "selling" the land to the tenant, the landlord was thought to have surrendered both possession and control, retaining only a reversionary interest. The tenant, as temporary owner and occupier of the land, was regarded as being subject to the responsibilities of one in possession, including the responsibilities of maintaining the premises in a reasonably safe condition to protect persons who come upon the land. n551

§ 41.09(b) Exceptions to the Traditional Rule.

The traditional rule of landlord tort immunity persists in most jurisdictions, but it is subject to a number of exceptions. These exceptions, which have been created as a matter of social policy, are generally applicable to both residential and commercial tenancies. Modern courts are increasingly willing to impose tort liability on landlords for personal injuries to tenants or to others that result from dangerous conditions on the leased premises. In many instances, courts have imposed such liability through the application, or the expansion, of exceptions to the traditional rule. Liability issues may also be addressed by statute. n552

§ 41.09(b)(1) Dangerous Condition on a Portion of the Property Controlled by the Landlord.

It is well established that the landlord's traditional tort immunity is not available when injuries to tenants or to others result from dangerous conditions on portions of the property that are within the control of the landlord. In this situation, the position of the landlord is essentially that of a possessor of land who invites or permits others to use the property, and who thereby owes such users a duty of reasonable care to maintain the property in a reasonably safe condition for the contemplated use. n553 The landlord is therefore under an affirmative obligation to exercise reasonable care to inspect portions of the land that are within the landlord's control and to repair dangerous defects located there. The obligation extends not only to the tenant, but also to the tenant's family members, employees, invitees, and guests, and to others who are rightfully on the land. n554

§ 41.09(b)(1)(i) The Issue of Landlord Control.

One of the most frequently litigated issues regarding this exception is that of landlord control, or, more precisely, whether the personal injury in question has been caused by a dangerous condition located on property that is within the control of the landlord. The vast majority of the cases in which the exception has been found to apply are cases involving common areas or cases involving other portions of property, retained by the landlord, that are necessary for the safe use of the leased premises. Thus, the landlord's duty of reasonable care has been found to apply to common areas such as entrances, n555 stairways, n556 elevators, n557 escalators, n558 basements, n559 parking lots n560 and playgrounds. n561 The landlord has also been found to have a duty of reasonable care with respect to the condition of structural portions of the property within the control of the landlord, such as roofs n562 exterior walls, n563 and systems providing sewage disposal and other services to the leased premises. n564

In some instances, the exception has been extended to impose tort liability on landlords for injuries that have occurred within portions of the property leased to tenants. Some courts have found sufficient landlord control over such portions of the leased property based on lease provisions obligating the landlord to make repairs and providing the landlord with the right to enter the leased premises to make the repairs. n565 A few courts seem to have found sufficient landlord control from the mere reservation of a right to enter to make repairs, n566 but most courts that have considered the issue have held otherwise. n567 The Restatement, which recognizes the general exception to landlord tort immunity for areas within the landlord's control, n568 takes the sensible position that the exception "does not apply to any part of the leased property specifically transferred to the tenant under the lease with regard to which the landlord retains a right to inspect, to repair, or to enter for some other purpose." n569

Landlord control issues have arisen with some frequency when personal injuries have been caused by vicious animals owned by tenants. n570 The general rule of landlord tort immunity, where it is recognized, should provide some protection for the landlord in such cases, and landlords have, in fact, often avoided liability on the ground that the animal was under the control of the tenant, not the landlord. n571 But landlords have been found to be subject to tort liability in some cases. Most of these cases are ones in which the landlord knew about the vicious animal and had some right to "control" the presence of the animal on the premises. For example, the landlord has been exposed to tort liability when the dangerous animal has been located on common areas controlled by the landlord, n572 or kept by the landlord's on site property manager. n573 Some courts have imposed liability on landlords based, at least in part, on lease provisions that prohibit tenants from keeping animals on the premises. Here the theory seems to be that it is reasonable to impose liability on the landlord if the landlord knew of the vicious animal and had the right, under the lease, to eliminate the problem, but failed to do so. n574 A different variation on the control theme was reflected in a California case in which the landlord repeatedly renewed a month to month lease to a tenant who kept a vicious dog on the premises even though the landlord apparently knew that the dog had bitten several people. The court said that if the landlord had enough control over the premises to obviate the danger, "enlightened public policy" would impose a duty of ordinary care. n575 But the Nevada Supreme court discerned another policy reason generally not to impose liability on landlords in such cases. Requiring landlords to "evict tenants with dangerous dogs would merely result in the tenants' moving off to another location with their still dangerous animals." n576 And that, thought the court, would not solve the problem. n577

§ 41.09(b)(1)(ii) Conditions to Which the Exception Applies.

It is clear that the exception applies to dangerous artificial conditions, such as defects in stairways or heating systems. n578 The prevailing view is that the exception also reaches naturally occurring dangerous conditions, such as accumulations of ice and snow, n579 but there is some authority to the contrary. n580

The view that natural accumulations of ice and snow should be handled under the general duty of care that landlords have with respect to common areas is sometimes referred to as the "Connecticut rule," on account of the Connecticut Supreme Court's decision in *Reardon v. Shimelman.* n581 The contrary view is sometimes called the "Massachusetts rule," in reference to the Massachusetts Supreme Court's decision in *Woods v. Naumkeag Steam Cotton Co.* n582 In the *Woods* case, the court indicated that a landlord had a duty to keep common areas in safe repair, but said that the landlord had no duty to remove "naturally" accumulated patches of ice and snow. The rule has been justified, at least in part, on the ground that imposition of a landlord duty of care with respect to snow and ice accumulations would be unreasonable in areas of frequent snowfall. n583 There is also an intermediate view, reflected in New York cases, that a landlord is not liable for injuries connected with natural accumulations of ice and snow, but the landlord has a duty to remove rough and bumpy accumulations, such as hummocks or ridges, in the path of a user of a walk. n584

Even where no general common law duty to remove ice or snow accumulations may be recognized, the landlord could still be liable for resulting injuries if the landlord negligently breaches a contract or undertaking to remove such accumulations. n585

A number of courts have considered whether the landlord can be liable, under this exception to tort immunity, for failing to provide lighting to common areas. Most jurisdictions appear to adhere to the view that a landlord owes no general duty to provide artificial lighting to common areas, at least in the absence of conditions that would make the common areas peculiarly dangerous if unlighted. n586 Some courts have adopted the position that the landlord's duty to use ordinary care to keep common areas safe applies to common area illumination. n587 In actuality, landlords are often found to have a duty to provide lighting to common areas, either because a statute requires the landlord to do so, n588 or because the landlord is found to have assumed a duty to provide such lighting. n589

The vast majority of courts apply the exception to dangerous conditions that arise after the beginning of the tenancy, as well as to dangerous conditions existing at the time the tenancy began. n590

§ 41.09(b)(1)(iii) Nature of the Landlord's Duty.

The landlord's duty, under this exception to tort immunity, is one of reasonable care. The landlord will not be liable in tort, even if an injury occurs on land within the landlord's control, if no injury was reasonably to be anticipated from the condition, or if the condition was not subject to discovery by reasonable inspection. n591 It must be shown that the landlord knew of the condition that caused the injury, or that the landlord would have known of the condition had the landlord exercised reasonable care in inspecting the premises. n592 The Restatement would not impose liability on the landlord, under this exception to tort immunity, unless the landlord, "by the exercise of reasonable care could have: (1) discovered the condition and the unreasonable risk involved therein; and (2) made the condition safe." n593

§ 41.09(b)(1)(iv) Effect of Tenant's Knowledge of the Condition.

The tenant's knowledge of the dangerous condition will not prevent an injured third party from recovering from the landlord. n594 However, the tenant may be liable for injuries to a third party if the tenant had knowledge of an unsafe condition and failed to provide proper warning. n595 If the tenant is the injured party, the tenant's knowledge of the unsafe condition may give rise to a landlord defense of contributory negligence. n596

§ 41.09(b)(2) Undisclosed Dangerous Condition Known to the Landlord.

Another well recognized exception to landlord tort immunity arises when the landlord knows of a dangerous latent condition on the leased premises, but fails to disclose the existence of the condition to the tenant at the time the tenant takes possession. If an injury proximately results from the dangerous condition, the landlord may be liable in tort. n597 Landlord liability under this exception has been justified on the theory that the landlord has maintained a concealed danger or has set a trap for the tenant. n598 Liability has also been justified on grounds of deceit. n599

The landlord's duty concerning existing latent defects is generally one of disclosure, not of inspection or repair. n600 Indeed, it has been held that the landlord does not incur liability under this exception for defects that were not discovered because of a negligent inspection. n601 In some jurisdictions, however, the landlord must, in order to avoid tort liability under this exception, exercise reasonable care to discover latent defects prior to entering into a lease. n602 Even in these jurisdictions, a landlord should not be liable if the dangerous condition is not discoverable through reasonable inspection. n603

It is not necessary that the landlord have actual knowledge of a dangerous condition in order to have a duty to disclose it to the tenant. It is sufficient that the landlord be aware of facts from which a reasonable person would conclude there is a danger. n604 In this connection, it has been said that the landlord has a duty to disclose to the tenant information, already known to the landlord, that would cause a reasonably prudent landowner to suspect that a danger exists. n605 The Restatement, which recognizes this exception to landlord tort immunity, would require the landlord to disclose the dangerous condition if the landlord "knows or has reason to know of the condition, realizes or should realize the risk involved, and has reason to expect that the tenant will not discover the condition or realize the risk." n606

The landlord will not be liable, under this exception to tort immunity, if the tenant has actual knowledge of the dangerous condition, or if the condition is so obvious that the tenant cannot reasonably be expected to fail to discover it when the tenant takes possession of the leased premises. n607

The general rule appears to be that the landlord is not required to report the existence of a latent dangerous condition to the tenant if the landlord becomes aware of it after the tenant takes possession of the property. n608 An exception to this rule has been recognized when the condition is a structural defect. n609 The Restatement departs from the general rule, and would require the landlord to disclose the existence of a dangerous condition, existing at the time that the tenant takes possession, that is subsequently discovered by the landlord. n610

Landlords who are subject to liability under this exception to tort immunity have been found liable for injuries to the tenant, to members of the tenant's family, to guests and invitees of the tenant, and to others who are rightfully on the premises. n611

§ 41.09(b)(3) Conditions Dangerous to Persons Outside of the Premises.

Another exception to the general rule of landlord tort immunity arises with respect to conditions on the leased premises that involve an unreasonable risk of harm to others outside of the premises. If the landlord knows, or should know, that such a condition exists at the time possession of the leased premises is transferred to the tenant, the landlord will be liable for injuries to others, outside of the leased premises, proximately caused by the condition. n612 Liability under this exception has been said to be based on the landlord's failure to eliminate the dangerous condition when the property was within the landlord's control. n613 It has also been noted that the doctrine of caveat emptor, which supports general landlord tort immunity, has no application to individuals who are not parties to the lease and who are injured outside of the leased premises. n614

Most of the cases in which this exception has been applied are ones involving private nuisances or conditions dangerous to individuals on roadways or sidewalks that adjoin the leased premises. Examples of dangerous conditions that have been covered by the exception include explosions on the leased property, n615 a defective parapet, n616 and a dangerous awning hook. n617 In a few cases, the landlord has been liable for a nuisance created by the activities of the tenant, to which the landlord consented at the time the lease was made. n618 The Restatement provides that this exception does not apply to conditions arising from purely natural causes; however, it also provides that if human forces have contributed in an essential way to the creation of the dangerous condition, the landlord may be liable in tort. n619

It appears to be generally agreed that the landlord's lack of actual knowledge of the condition will not be a defense to tort liability under this exception. It is sufficient, for purposes of imposing tort liability, that the landlord could have discovered the dangerous condition by the exercise of reasonable care. n620 This is the Restatement position. It states that a landlord who transfers possession of leased property in a condition "which he realizes, or should realize," will involve an unreasonable risk of physical harm to persons outside of the leased property, "is subject to the same liability for physical harm subsequently caused to them by the condition as though he had remained in possession." n621

The fact that the tenant knows of the existence of the dangerous condition does not shield the landlord from liability to others outside of the leased premises. n622 Indeed, it has been held that an express agreement by the tenant to eliminate a known dangerous condition will not relieve the landlord from liability when the tenant fails to eliminate the condition and third persons outside of the premises are thereby injured. n623

§ 41.09(b)(4) Premises Leased for Public Purpose.

Courts have also recognized an exception to landlord tort immunity when the property is leased for a purpose involving admission of the public. In that situation, there is general agreement that the landlord has an affirmative duty to exercise reasonable care to inspect and make repairs on the premises, prior to the transfer of possession, in order to eliminate any unreasonable risk of harm to members of the public. n624 Landlord tort liability under this exception arises out of defects that exist prior to tenant occupancy; the landlord is not liable for the negligence of the tenant in maintaining property that is turned over to the tenant in good condition. n625

Some older cases indicated that landlord liability under this exception is justified on the basis that the landlord has impliedly "invited" members of the public to enter the leased premises. n626 However, a more persuasive justification may be that public policy requires that a landlord be held to a higher level of responsibility when the landlord knows that the purpose of the lease will involve admission of members of the public, who have the right to expect reasonably safe conditions on the property. n627

The earliest cases in which this exception to tort immunity was applied involved wharves and piers. n628 But the exception has also been applied when property has been leased for such purposes as the operation of hotels, n629 amusement parks, n630 theatres, n631 retail stores and shops, n632 restaurants, n633 business offices, n634 and public garages. n635

A number of courts have stated that the exception does not apply unless the public is expected to enter the leased premises in large numbers at a time. n636 However, the weight of authority is that the applicability of the exception does not depend on the number of public admissions expected or achieved. Instead, the nature of the use itself is determinative. n637

There has been some disagreement over whether the members of the public must pay for admission to the leased premises in order for the exception to apply. Some decisions have considered the payment of an admission price to be a basis for determining the existence of a public use and for establishing the existence of a contractual type relationship between the landlord and the injured member of the public. n638 But the weight of authority does not require paid admission in order to impose tort liability on the landlord. n639 This is the Restatement view as well. n640 However, it should be noted the payment of admission is relevant to the question of landowner tort liability under some statutes that limit the liability of landowners who make their property available for public recreational use. A number of these statutes provide that the statutory limitation on liability is not available when consideration is charged for permission to enter the property. n641

Some courts have declined to apply this exception to landlord tort immunity when the tenant is not obligated to pay rent to the landlord under the lease. n642 However, it seems to be more generally held that the tenant does not have to pay rent to the landlord in order for the exception to apply. In other words, landlord liability may arise under a gratuitous lease of real property for a purpose involving admission of the public. n643

In many instances, portions of the leased premises are intended to be open for public admission and other portions are not. The rule that has emerged is that the landlord will not be liable for injuries occurring on a non public portion of the property. n644 Moreover, landlord liability will generally be found only when the plaintiff is on the premises for the purpose for which the premises are open to the public. n645

§ 41.09(b)(5) When the Landlord Contracts to Repair.

There is substantial disagreement among courts as to whether the landlord's breach of a covenant to make repairs on the leased premises should make the landlord liable in tort for resulting injuries. The traditional view is that the landlord's breach of a repair covenant entitles the tenant to sue for breach of the covenant, but does not enable the tenant to bring a tort action for the injuries. n646 This traditional rule has been rationalized on the ground that landlord liability is based on control, and the right to enter to make repairs does not give the landlord sufficient control over the premises to justify the imposition of tort liability. n647 This is still the rule in many jurisdictions. However, there is a modern trend to the contrary, and an apparent majority of jurisdictions have now concluded that the landlord may be liable in tort for breach of a repair covenant, if the landlord fails to exercise reasonable care to perform the covenant, and personal injuries result. n648 The Restatement also recognizes this exception to landlord tort immunity. n649 And such liability may arise by statute, as well. n650

Several justifications have been advanced for this exception to tort immunity, not all of which are persuasive. One justification is that the landlord retains the right, under the repair covenant, to enter the leased premises and to inspect its condition, and that the landlord is therefore in control of the leased premises. But such "control" by the landlord has been described as a fiction, and it has been said that the landlord's privilege to enter the property does not differ in any significant respect from that of a carpenter hired to do the work. n651 It has also been suggested that the landlord's promise induces the tenant to forego making repairs, and that the landlord should be liable for the consequences of the tenant's being misled. n652 A similar, more persuasive justification, is that the peculiar relationship between landlord

and tenant gives the tenant a special reason and right to rely on the landlord's contract to make the repair, and that the responsibility for the harm should be placed on the party best able to bear it. n653

Regardless of the theory on which the exception is justified, courts that recognize the exception are agreed that the covenant to repair must be supported by consideration. n654 A gratuitous promise by the landlord to undertake repairs, made after the commencement of the lease term, would not satisfy this standard. n655 But courts have found consideration in the tenant's initial acceptance of the lease, or in the tenant's agreement to stay on for a new term. n656

The general rule is that the landlord has no duty to inspect premises occupied by the tenant unless the landlord has contracted to do so. Accordingly, the landlord is ordinarily responsible, under this exception to landlord tort immunity, only for injuries that arise after the landlord has notice of the dangerous condition and after the landlord has had a reasonable time to correct the condition. n657 It has been held that the tenant need not give notice to the landlord, however, when the landlord is already sufficiently aware of the condition requiring repair. n658

There is some difference of opinion regarding the scope of landlord liability. Some cases indicate that the injured person must be a party to the repair contract with the landlord in order to recover. n659 Where tenant guests are concerned, some decisions have limited the responsibility of the landlord to that of refraining from willful harm or from recklessly or wantonly exposing guests to danger. n660 However, recognizing that a tenant rents property with the intention of having guests or serving customers, many courts permit recovery by other persons who are lawfully on the premises. n661 The Restatement view is that landlord tort liability extends "to the tenant and others upon the leased property with the consent of the tenant or his subtenant." n662

This exception to landlord tort immunity has occasionally been applied to permit a tenant to sue for indemnification when the landlord's failure to make repairs causes personal injury to a third person who recovers damages from the tenant. n663

§ 41.09(b)(6) When the Landlord Is Negligent in Making Repairs.

If a landlord is negligent in making repairs on the leased premises, there is general agreement that the landlord is liable for resulting injuries to the tenant, to members of the tenant's family, or to others rightfully on the premises. n664 This exception to landlord tort immunity does not require the existence of an agreement or a statutory duty to repair. Even if the landlord is a volunteer, the landlord may be liable in tort for injuries resulting from negligent repair efforts. n665

Most of the cases to which the exception applies involve landlord repair efforts that make the leased premises more dangerous than before or that give the leased premises a deceptive appearance of safety. n666 Indeed, it has been held that the exception does not otherwise apply. n667 Nonetheless, a number of courts have declined to condition tort liability upon a showing that the repair efforts worsened the condition of the premises or gave the premises a deceptive appearance of safety. Instead, these courts have indicated that the exception applies when the landlord fails to exercise reasonable care in making the repairs. n668 The Restatement, which recognizes the general exception to landlord tort immunity, takes no position on whether the exception extends that far. n669

Although there is some authority to the contrary, n670 many courts, and the Restatement, have taken the position that the landlord is not liable under this exception when the tenant either knows, or should know, of the landlord's negligence in making the repairs. n671 It has been said, for example, that tenant reliance on the landlord's repair efforts is the "sine qua non" for imposing liability on the landlord. n672 Thus, tenants have been denied recovery when they were not aware of the landlord's repair efforts, n673 or were aware of the repair efforts but also were aware that defects continued to exist after the repair efforts were undertaken. n674 Recovery has also been denied to tenant guests when the landlord has partially completed a repair job, leaving the premises in a condition whose danger was obvious to the tenant. n675

There is some difference of opinion regarding the effect on landlord liability when the negligent repair work is done by an independent contractor hired by the landlord. Courts are in general agreement that the landlord will be liable for the contractor's negligence when the work is done on common areas or other areas over which the landlord has retained control, n676 or when the work is done on the leased premises pursuant to a covenant or statutory duty to repair. n677 However, there is disagreement regarding the liability of the landlord when repairs on the leased premises are undertaken gratuitously. n678 The Restatement position is that a landlord who hires an independent contractor to make repairs that the landlord is under no duty to make, is subject to the same liability for physical harm resulting from the contractor's negligence as if the repair efforts had been undertaken directly by the landlord. n679 There is growing support for this view. n680

§ 41.09(b)(7) Breach of Furnished House Warranty.

Several jurisdictions recognize the existence of an implied warranty of fitness for occupancy when a landlord enters into a short term lease of a furnished house or apartment for immediate occupancy. n681 The basis of the implied warranty is that the tenant cannot be expected to adequately inspect the premises before entering into the lease. In most instances, breach of the landlord's warranty will entitle the tenant to vacate the premises and to avoid liability for rent. n682 However, in some cases, courts have permitted tenants to sue for personal injuries resulting from landlord breach of the implied warranty. n683

§ 41.09(b)(8) Breach of Duty Under Statute or Regulation.

The violation of a statute or administrative regulation as a basis for landlord tort liability is not ordinarily mentioned as an exception to the traditional rule of landlord tort immunity. n684 It has been suggested that the reason may be that the rule of liability that is involved is not a landlord-tenant rule as such, but a rule of tort law generally. n685 In any event, it is clear that landlord tort liability may arise out of the breach of a statutory or administrative duty.

In some instances, statutes relating to the condition of leased premises directly provide for tenant recovery of damages for injuries resulting from breach of the landlord's statutory obligations. n686 Even when, as is usually the case, the statute does not directly provide the tenant with a tort remedy, courts may use statutory requirements to define a standard of conduct for purposes of tort liability. n687 Of course, many enacted requirements do not lend themselves to such treatment; those that do are likely to be requirements that are imposed not merely for the general public interest but for the protection of certain classes of persons. In the latter instance, the purpose of the enactment might be served by providing a tort remedy to persons who are injured by a violation of the enacted standard. n688 Some requirements imposed on landlords under housing codes seem to fall into this category. n689

In fact, courts have often held that landlord violation of a statute or regulation requiring the landlord to keep the leased premises in repair constitutes evidence of negligence n690 or, perhaps, negligence per se. n691 Courts have also imposed tort liability on landlords when personal injuries resulted from the violation of statutory standards for safety. n692

The Restatement position is that landlord tort liability may arise from breach of a statutory or administrative duty to make repairs to the leased premises. It provides that a landlord will be subject to liability for personal injury if the landlord fails to exercise reasonable care to repair a dangerous condition, when the existence of the condition violates a duty created by statute or administrative regulation. n693 A comment to the Restatement states that the rule is based on the assumption that the statute or regulation represents a legislative determination of a standard of conduct required of landlords, and that imposing tort liability on the landlord will increase the likelihood that the will of the legislature, as expressed in the statute or regulation, will be effectuated. n694

The Restatement also takes the position, well supported in the case law, that the landlord is subject to tort liability for breach of a statutory obligation only when the landlord knows, or should have known, of the dangerous condition on the

leased premises, and has had a reasonable opportunity to remedy the condition. n695 The Restatement further provides that the landlord is ordinarily chargeable with knowledge of a defect that exists at the time the tenant takes possession. n696

Some courts have refused to infer a tort remedy from the violation of a statutory duty when the applicable statute is silent on the subject, reasoning that the legislature did not intend to abrogate landlord tort immunity by enacting the legislation. n697

§ 41.09(b)(9) Breach of Implied Warranty of Habitability.

As a result of court decision or statute, a majority of American jurisdictions recognize an implied warranty of habitability on the part of the landlord with respect to leased residential premises. Breach of the warranty of habitability typically suspends the tenant's rental obligations and subjects the landlord to remedies for breach of contract. A number of courts have also considered whether breach of the warranty of habitability should subject the landlord to liability in tort for resulting personal injuries. Because many jurisdictions recognize that tort liability may be based on the landlord's breach of a contractual duty to make repairs on the leased premises, n698 it would seem that tort liability for personal injuries could also be based on the landlord's breach of a warranty of habitability. A number of courts have so held. Most of the cases in which courts have concluded that the landlord may be liable in tort based on a breach of the implied warranty of habitability have indicated that the plaintiff's cause of action is one in negligence. n699 But it has also been suggested that violation of a statutory warranty of habitability may give rise to a cause of action based on negligence per se. n700 And there is some authority for the proposition that the landlord may be strictly liable for injuries that result from breach of a warranty of habitability. n701

The Restatement takes the position that breach of a warranty of habitability may expose the landlord to tort liability in negligence. It provides that a landlord is subject to tort liability if the landlord fails to exercise reasonable care to repair a dangerous condition located on the leased premises, if the existence of the dangerous condition violates an implied warranty of habitability, and if the tenant, or someone on the premises with the tenant's permission, is thereby harmed. n702 In advocating this position, a reporter's note to the Restatement states:

> Once it has become socially and judicially accepted that the implied warranty of habitability imposes a duty on the landlord to provide his tenant with housing which does not subject the tenant to unreasonable danger of harm, it will be difficult to insulate the landlord from tort liability when his failure to meet his duty results in injury to the tenant or one on the leased property with his consent. It would be disconcerting if the tenant who fell through the rotten floor of his kitchen could withhold rent until the hole was repaired, but could not recover for the personal injury he had sustained. The tort liability of the landlord in this situation serves the deterrent, compensatory, and loss distribution functions of tort law. n703

Not all courts that have considered the issue have concluded that breach by the landlord of a warranty of habitability may give rise to liability in tort. In *Dapkunas v. Cagle*, n704 for example, an Illinois appellate court declined to recognize a new exception to landlord tort immunity based on the existence of the previously recognized implied warranty of habitability, reasoning that adoption of the implied warranty did not mean that the rule of caveat emptor had been "completely discarded." n705 In *Johnson v. Scandia Associates, Inc.*, n706 the Indiana Supreme Court drew a distinction between express and implied warranties of habitability for purposes of tort recovery. It stated that where the warranty of habitability is express, consequential damages for personal injury may be available as a remedy; however, where the warranty is implied in fact, consequential damages may not be awarded because personal injury is outside the parties' contemplation. n707 And in *Dexheimer v. CDS, Inc.*, n708 the court concluded that remedies for violation of Washington's Residential Landlord Tenant Act were limited to those set forth in the legislation. Those remedies did not include damages based on tort.

§ 41.09(c) Departures from the Traditional Framework for Tort Liability.

§ 41.09(c)(1) Liability Based on Ordinary Negligence.

Although the general rule in most jurisdictions is that the landlord enjoys a shield of immunity from tort liability, the foregoing discussion indicates that the shield is subject to a number of significant, and rather technical, exceptions. In some jurisdictions, however, the traditional rule and its exceptions have been superseded, at least in some circumstances, by application of general principles of negligence liability.

The leading case adopting a general negligence standard of landlord liability is *Sargent v. Ross*, n709 a 1973 decision by the New Hampshire Supreme Court. The facts were that a guest of the tenant, a four year old child whom the tenant was babysitting, was killed in a fall from an exterior stairway leading up to the tenant's second floor apartment. In a wrongful death action against the landlord, the child's mother claimed that the stairs were too steep and that the railing on the stairway was inadequate. Attempting to bring the case within one of the recognized exceptions to landlord tort immunity, the plaintiff argued that the stairway constituted a common area, and that the landlord was responsible for its negligent construction and maintenance. The landlord contended that the stairway was part of the leased premises, and was under the control of the tenant. The New Hampshire Supreme Court declined to decide the case based on the traditional rule and its exceptions, and instead announced that the proper standard for landlord liability was one of ordinary negligence: "A landlord must act as a reasonable person under all of the circumstances, including the likelihood of injury to others, the probable seriousness of such injuries, and the burden of reducing or avoiding the risk." n710 Questions of control, common areas, and hidden defects were henceforth to be considered only as they "bear on the basic tort issues such as the foreseeability and unreasonableness of the particular risk of harm." n711

Following the lead of the *Sargent* court, a number of other courts have abandoned the traditional rule of landlord tort immunity and have sanctioned application of general negligence principles instead. n712 However, some courts have also rejected application of the *Sargent* doctrine, upholding the traditional approach to landlord liability in tort. n713

Even when general negligence is the liability standard for landlords, not every injury caused by defects in the leased premises will be compensable. The normal elements of a cause of action in negligence will have to be satisfied, and the normal defenses applicable to a negligence action would be available to the landlord. For example, the landlord should not be liable if there is no duty to protect against the particular risk involved, n714 an injury is not reasonably foreseeable, n715 or if the landlord neither knew nor should have known of the existence of a dangerous defect. n716

The *Sargent* court stated that its rejection of the traditional rule of landlord tort immunity followed "naturally and inexorably" from the court's previous recognition of an implied warranty of habitability in residential leases. n717 The court did not indicate that the ordinary negligence rule also applied to commercial tenancies. And, thus far, there does not appear to be a movement to apply the rule of the *Sargent* case to commercial leases.

§ 41.09(c)(2) Strict Liability.

Application of one of the traditional exceptions to landlord tort immunity generally requires that the landlord know, or should know, of the existence of a dangerous defect, and that the landlord fail to correct it within a reasonable time, or, in some cases, that the landlord fail to warn protected persons of the existence of the defect. In other words, the traditional exceptions to landlord tort immunity generally concern liability based on negligence. However, in a few jurisdictions, courts have taken a significantly different approach to the question of landlord tort liability, and have imposed strict liability.

In *Kaplan v. Coulston*, n718 a New York court held that strict liability could follow from the landlord's breach of a warranty of habitability. The tenants in that case had been injured by a falling kitchen cabinet. Their original complaint alleged landlord negligence, but they sought permission to amend their complaint to assert a cause of action for breach

of an implied warranty of habitability, on the assumption that such a breach would result in strict liability, without proof of any notice to the landlord of a defect in the leased premises. The court granted the motion to amend. In the course of its opinion, the court acknowledged that there were a number of problems involved in the imposition of strict liability in the landlord-tenant context, including: 1) a lease is not a sale of a product; 2) the leased premises may be either new or very old; 3) some defects may exist at the time of the letting, while others may not arise until much later; and 4) the landlord may not be able to take corrective action unless the tenant notifies the landlord of a defect. But the court also identified several policy based arguments in favor of strict liability, including arguments that: 1) the landlord has superior knowledge, and is in a better position than the tenant to prevent defects in the leased premises; 2) the landlord is more able than the tenant to bear and distribute losses, because the landlord can purchase liability insurance and pass the cost on to other tenants; and 3) adoption of a strict liability standard eliminates the difficulty of having to prove negligence, including the difficulty of proving that the landlord knew or should have known of the defective condition.

The *Kaplan* case appears to have had a rather chilly reception in New York. n719 Thus far, courts in other jurisdictions have not expressed much enthusiasm for the idea of imposing strict liability on landlords based on breach of a warranty of habitability. n720

Another approach to strict liability was adopted, and later rejected, by the California Supreme Court. In the 1985 case of *Becker v. IRM Corp.*, n721 the California Supreme Court held a landlord strictly liable in tort for injuries that occurred when a tenant in a multi unit apartment complex slipped and fell against an untempered glass shower door. The court considered the untempered glass to be a latent defect, and it held that "a landlord engaged in the business of leasing dwellings is strictly liable in tort for injuries resulting from a latent defect in the premises when the defect existed at the time the premises were let to the tenant." n722 According to the court, the tenant in a modern apartment building was in no position to inspect for latent defects or to bear the cost of their repair. On the other hand, the landlord, who "markets the product," was in a better position to look for and repair latent defects. Absent a disclosure of defects, the court said that landlord made an implied representation upon renting the premises that they were fit for use as a dwelling. In these circumstances, said the court, strict liability would be applied for latent defects existing at the time of renting, "to insure that the landlord who markets the product bears the costs of injuries resulting from the defects, 'rather than the injured persons who are powerless to protect themselves.'" n723

In the years following the *Becker* decision, other California court decisions limited its scope, holding that the strict liability rule was not applicable to commercial leases, n724 or to the isolated leasing of a family residence. n725 It was also held that an apartment complex itself, as distinguished from its equipment and facilities, is not a "product" for purposes of applying the strict liability concept. n726 Finally, in 1995, the California Supreme Court took another look at the larger issue, and overruled *Becker* itself. In *Peterson v. Superior Court*, n727 the court was asked to hold a hotel proprietor strictly liable for personal injuries suffered by a hotel guest when she slipped and fell in a bathtub. The court concluded that it would be improper to impose strict liability on the proprietor under products liability principles. With respect to its earlier decision, the court said that Becker's reasoning was "flawed in several respects" n728 The court further stated:

> In the present case, for example, plaintiff's product liability claim is premised upon the assertion that the bathtub in the hotel room was defective because its surface was slippery. But a hotel owner is not a part of the chain of distribution of a bathtub that is installed in a hotel room, just as a restaurant owner is not the equivalent of a retailer of toilets simply because the restaurant provides restroom facilities to its patrons, and just as an owner of a business is not the equivalent of a retailer of ceiling fans simply because one is installed on the premises to promote the comfort of customers of the business. n729

The court said "we erred in *Becker* in applying the doctrine of strict products liability to a residential landlord that is not a part of the manufacturing or marketing enterprise of the allegedly defective product that caused the injury." n730

The *Becker* case did not generate much of a following. Indeed, a number of court decisions have expressly rejected

application of strict products liability concepts to the landlord tenant relationship. n731 In *Dwyer v. Skyline Apartments, Inc.*, n732 for example, a New Jersey appellate court stated its view that a residential landlord "is not engaged in mass production whereby he places his product the apartment in a stream of commerce exposing it to a large number of consumers." Neither did the court regard an apartment as a product in which defects can be prevented by greater care at the time of manufacture. The court thought that an apartment, which is constructed by many artisans and is subject to constant use and deterioration "is a commodity wholly unlike a product which is expected to leave the manufacturer's hands in a safe condition with an implied representation upon which the consumer justifiably relies." n733

It should be noted that Louisiana has long applied a statutory rule of strict liability to landlords for injuries caused by defects in the leased premises that were in existence at the beginning of the lease. This statutory rule, which is based on civil law antecedents, is not limited to residential tenancies. n734

§ 41.09(d) Duty to Protect Tenants Against Criminal Acts of Third Parties.

§ 41.09(d)(1) The Traditional Rule.

Landlords have traditionally not been liable to tenants or to others on the leased premises for physical injuries caused by the criminal acts of third parties. This result is consistent with the general rule at common law that an individual has no affirmative duty to protect others from the criminal activities of a third person. n735

An exception to the general common law rule was recognized in the case of a special relationship between the parties, such as that between innkeeper and guest or common carrier and passenger. In such a special relationship, a duty of protection was recognized because of the submission of one party to the control of the other. n736 However, the relationship between landlord and tenant traditionally has not been regarded as one of the special relationships on which liability could be based. n737 Reasons for applying the general rule to landlords have included:

> judicial reluctance to tamper with the traditional common law concept of the landlord-tenant relationship; the notion that the act of a third person in committing an intentional tort or crime is a superseding cause of the harm to another resulting therefrom; the oftentimes difficult problem of determining foreseeability of criminal acts; the vagueness of the standard which the landlord must meet; the economic consequences of the imposition of the duty; and conflict with the public policy allocating the duty of protecting citizens from criminal acts to the government rather than the private sector. n738

This traditional rule, like the general rule of landlord tort immunity, has increasingly come under attack. In recent years, courts have been more willing to impose tort liability on landlords based on third party criminal acts.

§ 41.09(d)(2) The Modern Movement Toward Imposition of Landlord Liability.

The case that initiated the modern movement toward landlord liability for third party criminal acts is *Kline v. 1500 Massachusetts Avenue Apartment Corporation* n739 In that case, the District of Columbia Court of Appeals considered whether a landlord should be liable for tenant personal injuries following a criminal assault in the hallway of a multi unit apartment building. The landlord had been aware of previous criminal assaults against tenants in common areas, but the landlord had diminished, not strengthened, building security measures. In holding the landlord liable in tort for the injuries suffered by the tenant, the court found that "there is a duty of protection owed by the landlord to the tenant in an urban multiple unit apartment building." The standard of care to which the landlord is bound is that of exercising "reasonable care in all the circumstances." Although the landlord is not an insurer of tenant safety, said the court, the landlord does have a "duty to take those measures of protection which are within his power and capacity to take, and which can reasonably be expected to mitigate the risk of intruders assaulting and robbing tenants." n740

The court provided several reasons for its conclusion. First, the court referred to the landlord's common law duty to use ordinary care to maintain common areas, and other areas retained in the landlord's control, in reasonably safe condition.

The court indicated that the rationale for this exception to traditional landlord tort immunity also applied to predictable criminal acts by third parties in common areas. As between the landlord and the tenant, only the landlord has control over common areas and is in a position to provide needed security. Second, based on the reasoning of its prior opinion in *Javins v. First National Realty Corporation*, n741 the court said there is "implied in the contract between landlord and tenant an obligation on the landlord to provide those protective measures which are within his reasonable capacity." In this case, the court indicated that the tenant was entitled to expect that the level of security measures in place when she began occupancy would be maintained by the landlord. Finally, the court analogized the modern landlord-tenant relationship to that of an innkeeper and guest -- a relationship in which the common law did recognize a duty on the part of the landowner to provide protection against criminal acts by third parties.

The issue of landlord tort liability for injuries resulting from third party criminal acts has arisen with considerable frequency since the *Kline* case was decided in 1970. There has been a trend to impose liability on landlords. n742 Indeed, it has been said that "[i]f one simply counts up results, far more appellate decisions have held landlords liable for injuries from criminal acts since 1970 than have denied liability." n743

Most of the cases in which tort liability has been imposed since 1970 have involved residential tenancies, but commercial landlords have also occasionally been affected. n744 Most of the cases have focused on personal injuries, but, in a few instances, loss of tenant personal property has also been involved. n745 In some cases, landlords have been held liable to tenants for injuries resulting from the criminal acts of other tenants. n746

It should be noted that there have also been a number of post-1970 court decisions, including some relatively recent court decisions, that have not imposed tort liability on landlords for third party criminal acts. n747 Not all courts have been willing to recognize a general duty on the part of landlords to protect tenants against criminal acts. n748 Some courts have said that landlords are not liable for injuries caused by third party criminal acts because there is no special relationship between landlord and tenant. n749 It has also been said that the imposition of tort liability would detract from the need to ensure affordable housing. n750

§ 41.09(d)(2)(i) Source of the Landlord's Duty.

One of the more interesting issues concerning landlord liability for third party criminal acts is the source of the landlord's duty. Most of the cases in which tort liability has been imposed are cases involving inadequate common area security arrangements. As a result, liability has often been imposed through an extension of the general rule that the landlord has a duty of reasonable care to maintain the safety of common areas. n751 However, some courts have declined to extend the landlord's common area duties this far, stating that the landlord has no general duty to provide common area security against criminal activities. n752 But even when no such general duty applies, landlord liability may still be found on another basis, such as under a duty to carry out voluntarily undertaken security arrangements, n753 or under a contractual duty to provide tenant security. n754 The landlord may also be liable for negligently selecting or supervising employees who commit criminal acts. n755 And it has been indicated that a landlord could be liable in tort based on the failure of security guards to prevent criminal acts. n756

When the security defect is located in an area leased by the tenant, as in the case of a defective lock on the door to the tenant's apartment, the landlord's general duty to maintain the safety of common areas will not apply. If it can be found at all, a duty to provide security arrangements in this situation must have another basis, such as an agreement by the landlord to make specific repairs, n757 or a statute requiring the landlord to provide specific security measures. n758 However, some courts seem to have imposed an obligation on the landlord to provide security arrangements in areas leased by tenants without much attention to the source of the duty. n759

Although legislation has sometimes been the source of a landlord's duty to provide security against third party criminal acts, courts generally have been hesitant to conclude that statutes and regulations requiring landlords to maintain leased premises in a "safe condition" also impose a duty on the landlord to provide tenant security measures against criminal

acts. n760 Courts seem more willing to impose liability if the landlord breaches a statutory obligation to provide a specific safety measure, such as door locks, and criminal activity is thereby facilitated. n761 Texas has recently adopted legislation requiring most residential landlords to equip leased dwellings with door locks, window latches, and other security devices. n762

A few courts have considered whether a duty to provide security from criminal activities may be based on an implied warranty by the landlord. One of the questions here is whether the warranty includes an obligation to provide security arrangements for tenants. The leading case of *Trentacost v. Brussel*, n763 answered this question in the affirmative. In *Trentacost*, the landlord had failed to provide a door lock for the common entrance to an apartment building, and a tenant was assaulted and robbed on a common stairway by a criminal who had apparently obtained entrance through the unlocked door. There was evidence of prior criminal activity in the area and of notice to the landlord regarding the presence of unauthorized people in the hallways. The New Jersey Supreme Court concluded that the previously recognized warranty of habitability extended to all facilities that were vital to the residential use of the premises, including facilities relating to tenant security. Accordingly, the warranty obligated the landlord to furnish reasonable safeguards to protect tenants from foreseeable criminal acts on the leased premises and common areas. n764 The court held that the landlord had breached the warranty of habitability by failing to provide adequate security and was therefore liable to the tenant for injuries attributable to the breach. n765

§ 41.09(d)(2)(ii) Foreseeability.

Even when the landlord is held to have a duty to protect tenants against criminal activities, the landlord will not be liable for injuries caused by every criminal intruder. If negligence is the applicable theory of landlord liability, the elements of a cause of action for negligence will need to be established. Among other things, this means that the landlord should not be liable unless the criminal conduct in question was reasonably foreseeable. n766

Courts have applied different standards to the foreseeability question in the landlord-tenant context. Foreseeability of criminal conduct has typically been established by evidence of previous criminal activity on the property. n767 However, in some instances, courts have considered evidence of generally rising crime rates n768 or repeatedly expressed fears of criminal assault to be sufficient. n769 Prior similar criminal acts can be relevant, but other factors can be as well. Expressing this view in a case involving the rape of a residential tenant at her apartment, the Supreme Court of Texas said:

> Whether such risk was foreseeable must not be determined in hindsight but rather in light of what the premises owner knew or should have known before the criminal act occurred. In determining whether the occurrence of certain criminal conduct on a landowner's property should have been foreseen, courts should consider whether any criminal conduct previously occurred on or near the property, how recently it occurred, how often it occurred, how similar the conduct was to the conduct on the property, and what publicity was given the occurrences to indicate that the landowner knew or should have known about them. n770

But a number of courts have said that "prior similar incidents" need not be shown to establish foreseeability, reasoning that "only the general risk of harm need be foreseen, not the specific mechanism of injury." n771

In contrast, the Georgia Supreme Court declined to find a landlord liable to a residential tenant who had been raped and robbed after parking her car beneath her residential apartment. The court affirmed summary judgment for landlord the landlord, concluding that prior property related crimes did not establish the foreseeability of the violent sexual assault at issue. n772

And in a 1993 decision involving the rape of a tenant's employee on the tenant's premises, the California Supreme Court expressed the view that a

> a high degree of foreseeability is required in order to find that the scope of a landlord's duty of care includes the hiring of security guards. We further conclude that the requisite degree of foreseeability rarely, if ever, can be proven in the absence of prior similar incidents of violent crime on the landowner's premises. To hold otherwise would be to impose an unfair burden upon landlords and, in effect, would force landlords to become the insurers of public safety, contrary to well established policy in this state. n773

§ 41.09(e) Exculpatory Agreements.

Many leases contain provisions that attempt to relieve the landlord from tort liability. Some provisions of this nature are quite broad, and attempt to cover liability for personal injury or property damage resulting from the existence of any condition on the leased premises or from any other cause. n774 Some leases also contain provisions in which the tenant agrees to hold the landlord harmless from any claim for damages. n775 Courts have traditionally enforced such exculpatory provisions, on the theory that the parties to the lease are free to enter into private contracts. n776 In recent years, however, the trend has been to invalidate exculpatory provisions in residential leases.

When they are upheld, lease provisions purporting to exculpate the landlord from tort liability generally have been strictly construed against the landlord. n777 By strictly construing an exculpatory provision, a court might limit its application to liability for property damage, and exclude liability for personal injury. n778 Or a court might limit application of the provision to future acts of negligence, and exclude existing latent defects known to landlord. n779 A court might also limit application of the provision so as not to excuse the landlord from the consequences of his or her own negligence. n780

The trend of recent decisions has been to invalidate exculpatory provisions, at least in residential leases. Courts that have invalidated exculpatory provisions have often done so on public policy grounds. Thus, courts have said that any attempt to contract away negligence liability is contrary to public policy. n781 Courts have also concluded that exculpatory clauses should not be enforced in residential leases because such clauses are inimical to the enforcement of housing codes and safety regulations. n782

Courts have also invalidated exculpatory provisions on grounds of unconscionability n783 or inequality of bargaining power. n784 In one case, it was held that an exculpatory clause was unenforceable, due to inequality of bargaining power, even though the clause provided that the tenant could eliminate the application of the provisions by paying two dollars more each month in rent. n785 Another court indicated that an exculpatory provision in the lease of a unit of a multi family dwelling is always unconscionable. n786 Of course, facts going to unconscionability will be more difficult to find in the case of a commercial lease, and, in that case, an exculpatory provision is more likely to be upheld. n787

Some courts have drawn a distinction between "active" and "passive" negligence, and have invalidated exculpatory clauses when the landlord's negligence was of the active variety. n788

Exculpatory clauses in leases may also be invalidated based on statutory provisions. A number of jurisdictions have enacted statutes that prohibit lease provisions purporting to exculpate residential landlords from tort liability. n789 For example, the Uniform Residential Landlord and Tenant Act prohibits residential lease provisions in which the tenant "agrees to the exculpation or limitation of any liability of the landlord arising under law" or in which the tenant agrees "to indemnify the landlord for that liability." n790 Any such provision contained in a residential lease is, according to the Uniform Act, unenforceable. n791 Several statutes, not based on the Uniform Act, provide that exculpatory provisions in residential leases are void. n792 A few statutes appear to apply both to commercial and residential leases. n793

In contrast, a Louisiana statute provides that the owner of premises "leased under a contract whereby the lessee assumes responsibility for their condition," is not liable for injuries caused by defects on the premises, "unless the owner knew or

should have known of the defect or had received notice thereof and failed to remedy it within a reasonable time." n794

Even when an exculpatory provision would otherwise be upheld, it may not apply if the person who is injured is not a tenant. Some courts have concluded that if the injured person was not a party to the exculpatory agreement, he or she should not be bound by it. n795 The Restatement takes the position that an exculpatory clause does not affect the landlord's liability to third persons, such as licensees or guests of the tenant, who are not parties to the lease. n796 On the other hand, some courts have concluded that persons who did not sign the lease should be in no better position than the tenant on the question of landlord liability. Under this view, if the exculpatory provision would prevent the tenant from recovering against the landlord, it would prevent the third party from recovering as well. n797

Some courts have declined to enforce exculpatory clauses in leases with public housing authorities, reasoning that enforcement would allow the housing authorities to escape their statutory obligations to provide safe housing to low income people, and that the exculpatory clauses result from unequal bargaining positions. n798

§ 41.09(f) Tenant Liability for Criminal Acts of Third Parties.

It should be noted that some of the same considerations that have contributed to the imposition of liability on landlords for third party criminal acts could lead a court to impose such liability upon a tenant. In *McClung v. Wal Mart Stores, Inc.*, n799 for example, the surviving spouse of a victim who had been kidnapped, raped and murdered, sued the anchor tenant of a shopping mall, claiming that the victim had been abducted from the mall's parking lot, and that the anchor tenant, Wal Mart, was liable in tort for failing to provide adequate security for customers who used the lot. Applying Tennessee law, the court concluded that a duty to take reasonable steps to protect customers arises if the tenant knows or has reason to know that criminal acts against customers on its premises are reasonably foreseeable. There was an issue in the case concerning the area of the parking lot from which the victim had been abducted. Wal Mart argued that its "premises" included only that portion of the lot that was subject to the specific lighting and space ratio requirements that had been set forth in its lease. However, the court concluded that Wal Mart's premises included the parking area for the entire shopping center, because Wal Mart had rights to the entire parking area and its customers were free to park anywhere on the lot.

FOOTNOTES:

(n1)Footnote 547. *See e.g., Borders v. Roseberry, 532 P.2d 1366 (Kan. 1975)* .

(n2)Footnote 548. *See* Dan B. Dobbs, The Law of Torts 232 (2000).

(n3)Footnote 549. *See* Dan B. Dobbs, The Law of Torts 232, 237 (2000).

(n4)Footnote 550. *See* Olin L. Browder, *The Taming of A Duty -- The Tort Liability of Landlords, 81 Mich. L. Rev. 99, 101 (1982).*

(n5)Footnote 551. *See Borders v. Roseberry, 532 P.2d 1366 (Kan. 1975)* ; Jean C. Love, *Landlord's Liability for Defective Premises, Caveat Lessee, Negligence, or Strict Liability?, 1975 Wis. L. Rev. 19 (1975);* It is conceivable that a qualifying landlord would enjoy immunity on another theory as well - immunity as a "governmental entity". *See e.g, O'Connell v. New Jersey Sports & Exposition Auth., 766 A.2d 786 (N.J. Super. Ct. App. Div. 2001) , cert. denied, 773 A.2d 1156 (N.J. 2001)* (spectator, who slipped and fell on ice on the steps in a football stadium, sued several defendants; landlord, which was a legislatively established sports authority, enjoyed tort immunity).

(n6)Footnote 552. *See Ark. Code Ann. 18-16-110* (landlord not liable to tenant, licensee or invitee for personal injury or property damage caused by defect or disrepair on the premises absent: 1) the landlord's consideration-supported agreement, or the assumption of a duty, to maintain or repair the leased premises; and 2) the landlord's failure to maintain or repair the leased premises in a reasonable manner).

(n7)Footnote 553. *See* Restatement (Second) of Property § 17.3, Reporter's Note 3 (1977).

(n8)Footnote 554. *See* Keeton, W. Page, Dan B. Dobbs, Robert E. Keeton & David G. Owen, *Prosser and Keeton on the Law of Torts* § 63, at 440 (5th ed. West 1984); Restatement (Second) of Property § 17.3, cmt. i, § 17.4, cmt. f (1977).

(n9)Footnote 555. *See, e.g., Weiss v. Autumn Hills Inv. Co., 395 N.W.2d 481 (Neb. 1986)* .

(n10)Footnote 556. *See, e.g., Burch v. University of Kansas, 756 P.2d 431 (Kan. 1988)* .

(n11)Footnote 557. *See, e.g., Lee v. Jerome Realty, Inc., 154 N.E.2d 126 (Mass. 1958)* .

(n12)Footnote 558. *See, e.g., Ludgin v. John Hancock Mut. Life Ins. Co., 495 N.E.2d 1237 (Ill. Ct. App. 1986)* .

(n13)Footnote 559. *See, e.g., Wright & Taylor, Inc. v. Smith, 315 S.W.2d 624 (Ky. 1958)* .

(n14)Footnote 560. *See, e.g., Hankard v. Beal, 543 A.2d 1376 (Me. 1988)* .

(n15)Footnote 561. *See, e.g., Calkins v. Cox Estates, 792 P.2d 36 (N.M. 1990)* .

(n16)Footnote 562. *See, e.g., Knapp v. Fulton County Nat'l Bank & Trust Co., 174 N.Y.S.2d 296 (App. Div. 1958)* .

(n17)Footnote 563. *See, e.g., Cornell v. Feltman, 125 N.Y.S.2d 620 (App. Div. 1953)* .

(n18)Footnote 564. *See, e.g., Boatright v. Berkley United Methodist Church, 518 P.2d 309 (Colo. Ct. App. 1974)* (heater); *Duke v. Clark, 267 N.W.2d 63 (Iowa 1978)* (sewer gas).

(n19)Footnote 565. *See, e.g., Torres v. Piggly Wiggly Shop Rite Foods, Inc., 600 P.2d 1198 (N.M. Ct. App. 1979)* ; *Jones v. Houston Aristocrat Apts., Ltd., 572 S.W.2d 1 (Tex. Ct. App. 1978)* .

(n20)Footnote 566. *See, e.g., Dalton v. Anderson, 33 S.E.2d 115 (Ga. Ct. App. 1945)* ; *Paine v. Gamble Stores, Inc., 279 N.W. 257 (Minn. 1938)* .

(n21)Footnote 567. *See, e.g., Humphrey v. Byron, 850 N.E.2d 1044 (Mass. 2006)* ; *Milne v. Pevely Dairy Co., 641 S.W.2d 158 (Mo. Ct. App. 1982)* ; *Gelardo v. ASMA Realty Corp., 525 N.Y.S.2d 334 (App. Div. 1988)* . A 2001 case shows that lease provisions that give the landlord maintenance responsibility over part of the leased premises will not necessarily be enough to divest tenant control, at least when the tenant is entitled to maintain that area if the landlord defaults, and if the tenant is otherwise able to use that area of the leased premises. *See O'Connell v. New Jersey Sports Exposition Auth., 766 A.2d 786 (N.J. Super. Ct. App. Div. 2001) , cert. denied, 773 A.2d 1156 (N.J. 2001)* (court concluded that the landlord's responsibility for maintenance of stadium does not shield the tenant from liability for injury to a third party, based on breach of a duty to exercise ordinary care, because the tenant was entitled, under the lease, to maintain the premises if the landlord failed to do so, and therefore the landlord did not have exclusive control).

(n22)Footnote 568. *See* Restatement (Second) of Property §§ 17.3 and 17.4. Although the Restatement sets forth a number of exceptions to the traditional rule of landlord tort immunity, and describes them as such, the Restatement does not actually adopt a general rule of landlord tort immunity. Indeed, the Restatement notes that the traditional rule of tort immunity has been challenged by recent developments in landlord-tenant law and by trends in tort law. *See* Restatement (Second) of Property, ch. 17, intro. note, at 155 (1977).

(n23)Footnote 569. *See* Restatement (Second) of Property § 17.3, cmt. a (1977).

(n24)Footnote 570. For a collection of cases dealing with the subject of landlord liability for injuries caused by tenant animals, *see* Danny R. Veilleux, Annotation, *Landlord's Liability to Third Person for Injury Resulting from*

Attack on Leased Premises by Dangerous or Vicious Animal Kept by Tenant, 87 A.L.R.4th 1004 (1991) .

(n25)Footnote 571. *See e.g., Denagy v. Doscher, 243 N.Y.S.2d 575 (N.Y. 1963)* ; *Frobig v. Gordon, 881 P.2d 226 (Wash. 1994)* ; *Gonzales v. Wilkinson, 227 N.W.2d 907 (Wis. 1975)* ; *cf. McDonald v. Talbott, 447 S.W.2d 84 (Ky. 1969)* (residential tenant kept vicious dog on back porch; same property also had beauty shop and real estate office "which were open for public admission" and injury occurred on publicly open portion of the premises); *Ragsdale v. Harris, 293 S.E.2d 475 (Ga. App. 1982)* (no indication that the dog was owed by a tenant; no landlord liability because tenant had complete control of the premises).

(n26)Footnote 572. *See Castillo v. County of Santa Fe, 755 P.2d 48 (N.M. 1988)* (complaint alleged that dogs ran loose in the common areas of a housing project, and that the landlord knew this).

(n27)Footnote 573. *See* Siegel v. 1536- 46 *St. John's Place Corp., 57 N.Y.S.2d 473 (N.Y. 1945)* .

(n28)Footnote 574. *See e.g., Gallick v. Barto, 828 F. Supp. 1168 (M.D. Pa. 1993)* ; *Alaskan Village, Inc. v. Smalley, 720 P.2d 945 (Alaska 1986)* ; *Matthews v. Amberwood Associates Limited Partnership, Inc., 719 A.2d 119 (Md. 1998)* .

(n29)Footnote 575. *Uccello v. Laudenslayer, 118 Cal. Rptr. 741 (Cal. Ct. App. 1975)* . It should be noted, however, that this case has been criticized by a number of courts. *See e.g., Klitzka ex rel. Teutonico v. Hellios, 348 Ill. App.3d 594 (Ill. Ct. App. 2004)* ; *Feister v. Bosack, 497 N.W.2d 522 (Mich. Ct. App. 1993)* .

(n30)Footnote 576. *Wright v. Schum, 781 P.2d 1142 (Nev. 1989)* .

(n31)Footnote 577. *See id.* But the court concluded, on the facts of the case before it, that the landlord had actually undertaken a duty to protect the injured plaintiff from harm. For a collection of cases dealing with the subject of landlord liability for injuries caused by tenant animals, *see* Danny R. Veilleux, Annotation, *Landlord's Liability to Third Person for Injury Resulting from Attack on Leased Premises by Dangerous or Vicious Animal Kept by Tenant, 87 A.L.R.4th 1004 (1991)* .

(n32)Footnote 578. *See, e.g., Menard v. Cashman, 55 A.2d 156 (N.H. 1947)* (stairway); *Levine v. Bochiaro, 59 A.2d 224 (N.J. 1948)* (heating system); Restatement (Second) of Property § 17.3, Reporter's Note 8 (1977).

(n33)Footnote 579. *See, e.g., Ross v. Heberling, 109 N.E.2d 586 (Ohio. Ct. App. 1952)* ; *Goodman v. Corn Exchange Nat'l Bank & Trust Co., 200 A. 642 (Pa. 1938)* ; *Cf. Degel v. Majestic Mobile Manor, Inc., 914 P.2d 728 (Wash. 1996)* (en banc) (Infant tenant in mobile home park injured by fall into creek on edge of the park; court holds that landowner is not excused from the duty to exercise reasonable care to protect "invitees" from potentially dangerous conditions on the land even when the dangers are inherent in a natural body of water); *McMann v. Benton County, Angeles Park Communities, Ltd., 946 P.2d 1183 (Wash. App. 1997)* (infant drowned in irrigation canal adjacent to leased premises; court distinguishes Degal case, and concludes that the landlord had no affirmative obligation to the tenant, because there was "no common area on its premises or other condition on its land which can be claimed to be unreasonably safe due to the proximity of the canal on adjacent property"). *See also* Restatement (Second) of Property § 17.3, Reporter's Note 8 (1977); Thomas J. Goger, Annotation, *Landlord Liability to Tenant's Invitees for Injury or Death Due to Ice or Snow in Areas or Passage Ways Used in Common by Tenants, 49 A.L.R.3d 387 (1973)* .

(n34)Footnote 580. *See, e.g., Rogers v. Dudley Realty Corp., 16 N.E.2d 244 (Mass. 1938)* ; Thomas J. Goger, Annotation, *Landlord Liability to Tenant's Invitees for Injury or Death Due to Ice or Snow in Areas or Passage Ways Used in Common by Tenants, 49 A.L.R.3d 387, 404 (1973)* ; *Cf. McAllister v. Boston Housing Authority, 708 N.E.2d 95 (Mass. 1999)* (Natural accumulation of ice and snow is not a defect covered the by the implied warranty of habitability).

(n35)Footnote 581. *128 A. 705 (Conn. 1925)* .

(n36)Footnote 582. *134 Mass. 357 (1883)* . The two views are discussed in *Langley Park Apartments, Sec. H., Inc. v. Lund, 199 A.2d 620 (Md. 1964)* .

(n37)Footnote 583. *See Cronin v. Brownlie, 109 N.E.2d 352, 356 (Ill. App. 1952)* . *Cf. Fuller v. Housing Authority, 279 A.2d 438 (R.I. 1971)* (adopting Connecticut rule, court says modern landlord is up to the challenge of dealing with natural accumulations of ice and snow).

(n38)Footnote 584. *See e.g., Klein v. United States, 339 F.2d 512 (2d Cir. 1964) ; Greenstein v. Springfield Development Corp., 204 N.Y.S.2d 518 (N.Y. 1960)* .

(n39)Footnote 585. *See* Thomas J. Goger, Annotation, *Landlord Liability to Tenant's Invitees for Injury or Death Due to Ice or Snow in Areas or Passage Ways Used in Common by Tenants, 49 A.L.R.3d 387, 404 (1973)* .

(n40)Footnote 586. *See, e.g., Denny v. Burbeck, 130 N.E.2d 542 (Mass. 1955)* ; *Landes v. Barone, 127 N.Y.S.2d 112 (App. Div. 1954) , aff'd, 122 N.E.2d 750 (N.Y. 1954)* ; Allan D. Korpela, Annotation, *Liability of Landlord for Personal Injury or Death Due to Inadequacy or Lack of Lighting on Portion of Premises Used in Common by Tenants, 66 A.L.R.3d 202, 210, 218 (1975)* .

(n41)Footnote 587. *See, e.g., Kay v. Cain, 154 F.2d 305 (D.C. Cir. 1946)* ; *Jones v. Bierek, 755 P.2d 698 (Or. 1988)* .

(n42)Footnote 588. *See, e.g., Turner v. Thompson, 430 N.E.2d 157 (Ill. Ct. App. 1981)* .

(n43)Footnote 589. *See, e.g., Coan v. Adams, 127 N.E.2d 198 (Mass. 1955)* ; *Sherman v. Bobrecker, 322 S.W.2d 898 (Mo. 1959)* ; Allan D. Korpela, Annotation, *Liability of Landlord for Personal Injury or Death Due to Inadequacy or Lack of Lighting on Portion of Premises Used in Common by Tenants, 66 A.L.R.3d 202, 211 (1975)* .

(n44)Footnote 590. *See, e.g., Primus v. Bellevue Apts., 44 N.W.2d 347 (Iowa 1950)* ; Restatement (Second) of Property § 17.3, Reporter's Note 8 (1977).

(n45)Footnote 591. W. Page Keeton, Dan B. Dobbs, Robert E. Keeton & David G. Owen, *Prosser and Keeton on the Law of Torts* § 63, at 441 (5th ed. West 1984).

(n46)Footnote 592. *See, e.g., Raspilair v. Bruno's Food Stores, Inc., 514 So. 2d 1022 (Ala. 1987)* ; *Pollack v. Gampel, 313 A.2d 73 (Conn. 1972)* ; *Ross v. Belzer, 85 A.2d 799 (Md. 1952)* .

(n47)Footnote 593. *See* Restatement (Second) of Property § 17.3 (1977).

(n48)Footnote 594. *See, e.g., Gibson v. Hoppman, 143 A. 635 (Conn. 1928)* ; *see also* Annotation, *Liability of Landlord for Personal Injuries Due to Defective Halls, Stairway, and the Like, for Use of Different Tenants*, 75 A.L.R. 154 (1931) .

(n49)Footnote 595. *See, e.g., Combs v. Aetna Ins. Co., 410 So. 2d 1377 (Fla. Ct. App. 1982)* ; *Cannon v. S.S. Kresge Co., 116 S.W.2d 559 (Mo. Ct. App. 1938)* ; Restatement (Second) of Property § 17.3, cmt. e (1977).

(n50)Footnote 596. *See, e.g., Sutton v. Mitchell Co., 534 So. 2d 289 (Ala. 1988)* ; Restatement (Second) of Property § 17.3, cmt. f (1977).

(n51)Footnote 597. *See, e.g., Taylor v. Leedy & Co., 412 So. 2d 763 (Ala. 1982)* ; W.E. Shipley, Annotation, *Modern Status of Rule Requiring Actual Knowledge of Latent Defect in Leased Premises as Prerequisite to Landlord's Liability to Tenant Injured Thereby, 88 A.L.R.2d 586 (1963)* .

(n52)Footnote 598. *See, e.g., Honan v. Kinney, 286 N.W. 404 (Minn. 1939)* ; overruled on other grounds, *Johnson*

v. O'Brien, 105 N.W.2d 244 (Minn. 1960) ; Restatement (Second) of Property § 17.1, Reporter's Note 3 (1977).

(n53)Footnote 599. *See, e.g., Andonique v. Carmen, 151 S.W. 921 (Ky. 1912)* ; Restatement (Second) of Property § 17.1, Reporter's Note 3 (1977).

(n54)Footnote 600. *See, e.g., Moore v. Muntzel, 642 P.2d 957 (Kan. 1982)* ; *Shinkle, Wilson & Kreis Co. v. Birney & Seymour, 67 N.E. 715 (Ohio. 1903)* ; *See* Olin L. Browder, *The Taming of A Duty -- The Tort Liability of Landlords, 81 Mich. L. Rev. 99, 103 (1982).*

(n55)Footnote 601. *See, e.g., Home Owners' Loan Corp. v. Huffman, 124 F.2d 684 (8th Cir. 1942) , cert. denied, 316 U.S. 681 (1942)* .

(n56)Footnote 602. *See, e.g., Mora v. Baker Commodities, Inc., 258 Cal. Rptr. 669 (Cal. Ct. App. 1989)* ; *Mansur v. Eubanks, 401 So. 2d 1328 (Fla. 1981)* ; *Francis v. Pic, 226 N.W.2d 654 (N.D. 1975)* ; *Glassman v. Martin, 269 S.W.2d 908 (Tenn. 1954)* ; W.E. Shipley, Annotation, *Modern Status of Rule Requiring Actual Knowledge of Latent Defect in Leased Premises as Prerequisite to Landlord's Liability to Tenant Injured Thereby, 88 A.L.R.2d 586 (1963)* .

(n57)Footnote 603. *See Fitzgerald v. Cestari, 569 So. 2d 1258 (Fla. 1990)* .

(n58)Footnote 604. *See* Keeton, W. Page, Dan B. Dobbs, Robert E. Keeton & David G. Owen, *Prosser and Keeton on the Law of Torts* § 63, at 436 (5th ed. West 1984).

(n59)Footnote 605. *See, e.g., Johnson v. O'Brien, 105 N.W.2d 244 (Minn. 1960)* ; W.E. Shipley, Annotation, *Modern Status of Rule Requiring Actual Knowledge of Latent Defect in Leased Premises as Prerequisite to Landlord's Liability to Tenant Injured Thereby, 88 A.L.R.2d 593 (1963)* .

(n60)Footnote 606. *See* Restatement (Second) of Property § 17.1(1)(b) (1977).

(n61)Footnote 607. *See, e.g., Masterson v. Atherton, 179 A.2d 592 (Conn. 1962)* ; *Hyde v. Bryant, 151 S.E.2d 925 (Ga. Ct. App. 1966)* ; *Lemley v. Penner, 630 P.2d 1086 (Kan. 1981)* .

(n62)Footnote 608. *See, e.g., Shute v. Bills, 78 N.E. 96 (Mass. 1906)* ; Restatement (Second) of Property § 17.1, Reporter's Note 8 (1977).

(n63)Footnote 609. *See, e.g., Marr v. Dieter, 109 S.E. 532 (Ga. Ct. App. 1921)* .

(n64)Footnote 610. *See* Restatement (Second) of Property § 17.1, cmt. h (1977).

(n65)Footnote 611. *See, e.g., Downs v. Powell, 108 S.E.2d 715 (Ga. 1959)* (family members); *Kraus v. Webber, 270 N.E.2d 789 (Mass. 1971)* (guests and invitees); *Smith v. Green, 260 N.E.2d 656 (Mass. 1970)* (tenant); *Harrill v. Sinclair Refining Co., 35 S.E.2d 240 (N.C. 1945)* (sub-tenants).

(n66)Footnote 612. *See, e.g., Barrett v. Stoneburg, 29 N.W.2d 420 (Iowa 1947)* ; *Whalen v. Shivek, 93 N.E.2d 393 (Mass. 1950)* .

(n67)Footnote 613. *See, e.g., Kelly v. Laclede Real Estate & Inv. Co., 155 S.W.2d 90 (Mo. 1941)* .

(n68)Footnote 614. *See Isham v. Broderick, 95 N.W. 224 (Minn. 1903)* ; *See* Restatement (Second) of Property § 18.1, Reporter's Note 3 (1977).

(n69)Footnote 615. *See Boyle v. Pennsylvania R.R., 31 A.2d 89 (Pa. 1943)* .

(n70)Footnote 616. *See Whalen v. Shivek, 93 N.E.2d 393 (Mass. 1950)* .

(n71)Footnote 617. *See Mitchell v. Foran, 53 P.2d 490 (Kan. 1936)* .

(n72)Footnote 618. *See, e.g., City of San Angelo v. Sitas, 183 S.W.2d 417 (Tex. 1944)* ; W. Page Keeton, Dan B. Dobbs, Robert E. Keeton & David G. Owen, *Prosser and Keeton on the Law of Torts* § 63 (5th ed. West 1984).

(n73)Footnote 619. *See* Restatement (Second) of Property § 18.1, cmt. i & Reporter's Note 12 (1977).

(n74)Footnote 620. *See, e.g., Whiffin v. DeTweede Northwestern & Pacific Hypotheek Bank, 12 P.2d 271 (Idaho 1932)* ; Restatement (Second) of Property § 18.1, Reporter's Note 10 (1977).

(n75)Footnote 621. *See* Restatement (Second) of Property § 18.1 (1977).

(n76)Footnote 622. *See, e.g., Mitchell v. Foran, 53 P.2d 490 (Kan. 1936)* ; Restatement (Second) of Property § 18.1, cmt. a (1977).

(n77)Footnote 623. *See, e.g., Whalen v. Shivek, 93 N.E.2d 393 (Mass. 1950)* .

(n78)Footnote 624. *See, e.g., Webel v. Yale Univ., 7 A.2d 215 (Conn. 1939)* ; *Nelson v. Hokuf, 299 N.W. 472 (Neb. 1941)* ; *Prosser and Keeton on the Law of Torts* § 63 (5th ed. West 1984); J.F. Rydstrom, Annotation, *What Constitutes a "Public" Use Affecting Landlord's Liability to Tenant's Invitees for Defects in Leased Premises, 17 A.L.R.3d 873, 882 (1968)* . Not all courts have recognized this exception to landlord tort immunity. *See Appalachian Power Co. v. Sanders, 349 S.E.2d 101 (Va. 1986)* .

(n79)Footnote 625. *See, e.g., Goodman v. Harris, 253 P.2d 447 (Cal. 1953)* ; *Rice v. Forby, 228 N.W.2d 581 (Minn. 1975)* .

(n80)Footnote 626. *See, e.g., Bunnell v. Waterbury Hosp., 131 A. 501 (Conn. 1925)* ; J.F. Rydstrom, Annotation, *What Constitutes a "Public" Use Affecting Landlord's Liability to Tenant's Invitees for Defects in Leased Premises, 17 A.L.R.3d 873, 881 (1968)* .

(n81)Footnote 627. *See Junkerman v. Tilyou Realty Co., 108 N.E. 190 (N.Y. 1915)* ; *Fitchett v. Buchanan, 472 P.2d 623 (Wis. 1970)* ; *Prosser and Keeton on the Law of Torts* § 63 (5th ed. West 1984); Restatement (Second) of Property § 17.2, Reporter's Note 3 (1977).

(n82)Footnote 628. *See, e.g., Swords v. Edgar, 59 N.Y. 28 (1874)* ; *Albert v. State, 7 A. 697 (Md. 1887)* .

(n83)Footnote 629. *See, e.g., Colorado Mtg. & Inv. Co. v. Giacomini, 55 Colo. 540, 136 P. 1039 (Colo. 1913)* .

(n84)Footnote 630. *See, e.g., Larson v. Calder's Park Co., 180 P. 599 (Utah 1919)* .

(n85)Footnote 631. *See, e.g., Lang v. Stadium Purchasing Corp., 215 N.Y.S. 502 (App. Div. 1926)* .

(n86)Footnote 632. *Turner v. Kent, 7 P.2d 513 (Kan. 1932)* .

(n87)Footnote 633. *See, e.g., Schlender v. Andy Jansen Co., 380 P.2d 523 (Okla. 1962)* .

(n88)Footnote 634. *See, e.g., Gilligan v. Blakesley, 26 P.2d 808 (Colo. 1933)* .

(n89)Footnote 635. *See, e.g., Warner v. Lucey, 201 N.Y.S. 658 (App. Div. 1923) , aff'd, 144 N.E. 924 (N.Y 1924)* ; *see generally* J.F. Rydstrom, Annotation, *What Constitutes a "Public" Use Affecting Landlord's Liability to Tenant's Invitees for Defects in Leased Premises, 17 A.L.R.3d 873, 903-927 (1968)* (groups cases by place).

(n90)Footnote 636. *See, e.g., Warner v. Fry, 228 S.W.2d 729 (Mo. 1950)* ; *Marx v. Standard Oil Co., 69 A.2d 748 (N.J. Super. Ct. App. Div. 1949)* .

(n91)Footnote 637. *See, e.g., Goodman v. Harris, 253 P.2d 447 (Cal. 1953)* ; *Webel v. Yale Univ., 7 A.2d 215 (Conn. 1939)* ; J.F. Rydstrom, Annotation, *What Constitutes a "Public" Use Affecting Landlord's Liability to Tenant's Invitees for Defects in Leased Premises, 17 A.L.R.3d 873, 885 (1968)* ; Restatement (Second) of Property § 17.2, Reporter's Note 6 (1977).

(n92)Footnote 638. *See, e.g., Gentry v. Taylor, 185 S.W.2d 521 (Tenn. 1945)* ; Restatement (Second) of Property § 17.2, Reporter's Note 5 (1977).

(n93)Footnote 639. *See, e.g., Rau v. Redwood City Woman's Club, 245 P.2d 12 (Cal. Ct. App. 1952)* ; *Bunnell v. Waterbury Hosp., 131 A. 501 (Conn. 1925)* ; *Howe v. Jameson, 13 A.2d 471 (N.H. 1940)* ; Restatement (Second) of Property § 17.2, Reporter's Note 5 (1977).

(n94)Footnote 640. Restatement (Second) of Property § 17.2, cmt. c (1977).

(n95)Footnote 641. *See, e.g., Cal. Civ. Code § 846*; Restatement (Second) of Property § 17.2, statutory note (1977).

(n96)Footnote 642. *See, e.g., Davis v. Schmitt Bros., 192 N.Y.S. 15 (App. Div. 1922)* ; *cf. Karlowski v. Kissock, 175 N.E. 500 (Mass. 1931)* (licensor situation).

(n97)Footnote 643. *See, e.g., Tulsa Entertainment Co. v. Greenlees, 205 P. 179 (Okla. 1922)* ; *See* Restatement (Second) of Property § 17.2, cmt. g (1977); J.F. Rydstrom, Annotation, *What Constitutes a "Public" Use Affecting Landlord's Liability to Tenant's Invitees for Defects in Leased Premises, 17 A.L.R.3d 873, 897 99 (1968)* .

(N98)Footnote 644. *See, e.g., Brenner v. Central Realty, 37 A.2d 230 (Conn. 1944)* ; *Strade v. Ryan, 470 N.Y.S.2d 707 (App. Div. 1983)* ; *Regan v. Seattle, 458 P.2d 12 (Wash. 1969)* ; J.F. Rydstrom, Annotation, *What Constitutes a "Public" Use Affecting Landlord's Liability to Tenant's Invitees for Defects in Leased Premises, 17 A.L.R.3d 873, 894 (1968)* .

(n99)Footnote 645. *See, e.g., Sherwood Bros. v. Eckard, 105 A.2d 207 (Md. 1954)* ; *Van Avery v. Platte Valley Land & Inv. Co., 275 N.W. 288 (Neb.1937)* ; J.F. Rydstrom, Annotation, *What Constitutes a "Public" Use Affecting Landlord's Liability to Tenant's Invitees for Defects in Leased Premises, 17 A.L.R.3d 873, 890 (1968)* .

(n100)Footnote 646. *See, e.g., Shaw v. Still, 192 S.E.2d 206 (S.C. 1972)* ; *Caudill v. Gibson Fuel Co., 38 S.E.2d 465 (Va. 1946)* .

(n101)Footnote 647. *See, e.g., Caudill v. Gibson Fuel Co., 185 Va. 233, 38 S.E.2d 465 (Va. 1946)* .

(n102)Footnote 648. *See Prosser and Keeton on the Law of Torts* § 63 (5th ed. West 1984). Prosser notes that a number of earlier decisions adopting the traditional rule have been overruled. *See id.* n.21. See Restatement (Second) of Property § 17.5, Reporter's Note §§ 4 and 5 (1977) (lists jurisdictions that recognize, and reject, this exception to landlord tort immunity); *see generally* L.S. Tellier, Annotation *Breach of Lessor's Agreement as Ground of Liability for Personal Injury to Tenant or One in Privity with Latter, 78 A.L.R.2d 1238 (1961)* .

(n103)Footnote 649. *See* Restatement (Second) of Property § 17.5 (1977).

(n104)Footnote 650. *See Ark. Code Ann. 18-16-110* (landlord not liable to tenant, licensee or invitee for personal injury or property damage caused by defect or disrepair on the premises absent: 1) the landlord's consideration-supported agreement, or the assumption of a duty, to maintain or repair the leased premises; and 2) the landlord's failure to maintain or repair the leased premises in a reasonable manner).

(n105)Footnote 651. *See Prosser and Keeton on the Law of Torts* § 63 (5th ed. West 1984).

(n106)Footnote 652. *See id.*

(n107)Footnote 653. *See id. See also* Restatement (Second) of Property § 17.5, cmt. b (1977).

(n108)Footnote 654. *See, e.g., Burdell v. Carpentier, 504 So. 2d 261 (Ala. 1987)* ; *Childress v. Bowser, 546 N.E.2d 1221 (Ind. 1989)* .

(n109)Footnote 655. *See, e.g., Metcalf v. Chiprin, 31 Cal. Rptr. 571 (Ct. App. 1963)* .

(n110)Footnote 656. *See, e.g., Deveaux v. Spekter, 190 A.2d 484 (Conn. 1963)* ; *Rampone v. Wanskuck Buildings, Inc., 227 A.2d 586 (R.I. 1967)* .

(n111)Footnote 657. *See, e.g., Vieyra v. Engineering Inv. Co., 473 P.2d 44 (Kan. 1970)* ; *See* Restatement (Second) of Property § 17.5, Reporter's Note 7 (1977).

(n112)Footnote 658. *See, e.g., La Montain v. Calvanese, 189 N.Y.S.2d 420 (App. Div. 1959)* ; *Johnson v. Dye, 230 P. 625 (Wash. 1924)* .

(n113)Footnote 659. *See, e.g., Thomas v. Lane, 109 N.E. 363 (Mass. 1915)* .

(n114)Footnote 660. *See, e.g., Tomei v. Center, 116 So. 2d 251 (Fla. Ct. App. 1959)* (guest regarded as licensee); Restatement (Second) of Property § 17.5, Reporter's Note 10 (1977).

(n115)Footnote 661. *See, e.g., Faber v. Creswick, 31 N.J. 234, 156 A.2d 252 (N.J. 1959)* ; *Rampone v. Wanskuck Bldgs., Inc., 227 A.2d 586 (R.I. 1967)* .

(n116)Footnote 662. *See* Restatement (Second) of Property § 17.5 (1977).

(n117)Footnote 663. *See, e.g., Great Atl. & Pac. Tea Co. v. Yanofsky, 380 Mass. 326, 403 N.E.2d 370 (Mass. 1980)* ; *Renfro Drug Co. v. Lewis, 235 S.W.2d 609 (Tex. 1950)* .

(n118)Footnote 664. *See Prosser and Keeton on the Law of Torts* § 63 (5th ed. West 1984).

(n119)Footnote 665. *See, e.g., Southern Apts., Inc. v. Emmett, 114 So. 2d 453 (Ala. 1959)* ; *Green v. Long, 118 So. 705 (Miss. 1928)* ; Restatement (Second) of Property § 17.7, Reporter's Note 7 (1977). Such liability may also arise by statute. *See Ark. Code Ann. 18* 16 110 (landlord not liable to tenant, licensee or invitee for personal injury or property damage caused by defect or disrepair on the premises absent: 1) the landlord's consideration supported agreement, or the assumption of a duty, to maintain or repair the leased premises; and 2) the landlord's failure to maintain or repair the leased premises in a reasonable manner).

(n120)Footnote 666. *See, e.g., Kearns v. Smith, 131 P.2d 36 (Cal. Ct. App. 1942)* ; *Good v. Von Hemert, 131 N.W. 466 (Minn. 1911)* ; *Buck v. Miller, 181 P.2d 264 (Okla. 1947)* ; *Dunnigan v. Kirkorian, 25 A.2d 221 (R.I. 1942)* ; Restatement (Second) of Property § 17.7, Reporter's Note 3 (1977).

(n121)Footnote 667. *See, e.g., Kearns v. Smith, 131 P.2d 36 (Cal. Ct. App. 1942)* ; *Kuchynski v. Ukryn, 200 A. 416 (N.H. 1938)* .

(n122)Footnote 668. *See, e.g., Marks v. Nambil Realty Co., 157 N.E. 129 (N.Y. 1927)* ; *Jordan v. Savage, 232 N.E.2d 580 (Ill. Ct. App. 1967)* ; *Bauer v. 141 149 Cedar Lane Holding Co., 130 A.2d 833 (N.J. 1957)* ; *Canada v. McCarthy, 567 N.W.2d 496 (Minn. 1997) Prosser and Keeton on the Law of Torts* § 64 (5th ed. West 1984).

(n123)Footnote 669. *See* Restatement (Second) of Property § 17.7, Caveat (1977).

(n124)Footnote 670. *See, e.g., Brewer v. Bankord, 387 N.E.2d 344 (Ill. Ct. App. 1979)* .

(n125)Footnote 671. *See, e.g., Borders v. Roseberry, 532 P.2d 1366 (Kan. 1975)* ; *Bauer v. 141 149 Cedar Lane Holding Co., 130 A.2d 833 (N.J. 1957)* ; Restatement (Second) of Property § 17.7 (1977).

(n126)Footnote 672. *See Bauer v. 141 149 Cedar Lane Holding Co., 130 A.2d 833 (N.J. 1957)* .

(n127)Footnote 673. *See, e.g., Kuchynski v. Ukryn, 200 A. 416 (N.H. 1938)* .

(n128)Footnote 674. *See, e.g., Hines v. Cielo, 35 N.E.2d 188 (N.Y. 1941)* .

(n129)Footnote 675. *See, e.g., Borders v. Roseberry, 532 P.2d 1366 (Kan. 1975)* .

(n130)Footnote 676. *See, e.g., Brown v. George Pepperdine Foundation, 143 P.2d 929 (Cal. 1943)* ; *Banaghan v. Dewey, 162 N.E.2d 807 (Mass. 1959)* ; Restatement (Second) of Property § 19.2 (1977).

(n131)Footnote 677. *See, e.g., Vitale v. Duerbeck, 62 S.W.2d 559 (Mo. 1933)* (covenant); *Rietze v. Williams, 458 S.W.2d 613 (Ky. 1970)* (statutory duty); Restatement (Second) of Property § 19.1 (1977).

(n132)Footnote 678. *See, e.g., Bains v. Dank, 74 So. 341 (Ala. 1917)* (no liability); *Schatzky v. Harber, 164 N.Y.S. 610 (App. Term. 1917)* (no liability); *Dalkowitz Bros. v. Schreiner, 110 S.W. 564 (Tex. Ct. App. 1908)* (liability); *Bancroft v. Godwin, 83 P. 189 (Wash. 1905)* (liability).

(n133)Footnote 679. *See* Restatement (Second) of Property § 19.3 (1977). A Reporter's Note to the Restatement indicates that, "on one theory or another," most jurisdictions have held that the landlord may be liable when the landlord uses an independent contractor, even when the repairs are gratuitously undertaken. *See id.* Reporter's Note 4.

(n134)Footnote 680. *See Prosser and Keeton on the Law of Torts* § 63 (5th ed. West 1984); *See, e.g., Livingston v. Essex Investment Co., 14 S.E.2d 489 (N.C. 1941)* ; *Rubin v. Girard Trust Co., 35 A.2d 601 (Pa. Super. Ct. 1944)* .

(n135)Footnote 681. This implied warranty is discussed in § 41.04(a)(2)(i), *above.*

(n136)Footnote 682. *See id.*

(n137)Footnote 683. *See, e.g., Hacker v. Nitschke, 39 N.E.2d 644 (Mass. 1942)* ; *Horton v. Marston, 225 N.E.2d 311 (Mass. 1967)* .

(n138)Footnote 684. *See, e.g., Borders v. Roseberry, 532 P.2d 1366 (Kan. 1975)* (listing various exceptions to landlord tort immunity, but omitting liability based on violation of statute or administrative regulation).

(n139)Footnote 685. *See* Olin L. Browder, *The Taming of A Duty -- The Tort Liability of Landlords, 81 Mich. L. Rev. 99, 106 (1982).*

(n140)Footnote 686. *See, e.g., Ga. Code Ann. §§ 44-7-14* (landlord responsible for damages arising from defective construction or failure to keep premises in repair).

(n141)Footnote 687. *See e.g., New Haverford Partnership v. Stroot, 772 A.2d 792 (Del. 2001)* (tenant injured by mold in apartment; court concludes that the Landlord Tenant Code imposes a duty on the part of the landlord to maintain buildings in safe and sanitary condition and that breach of the statutory duty can give rise to an action for negligence against the landlord); *Gore v. People's Sav. Bank, 665 A.2d 1341 (Conn. 1995)* (presence of lead paint, in violation of statute, amounts to negligence per se); Olin L. Browder, *The Taming of A Duty -- The Tort Liability of Landlords, 81 Mich. L. Rev. 99, 106 (1982);* Restatement (Second) of Torts § 286 (1965).

(n142)Footnote 688. *See* Olin L. Browder, *The Taming of A Duty -- The Tort Liability of Landlords, 81 Mich. L. Rev. 99, 106 (1982).*

(n143)Footnote 689. *See* Olin L. Browder, *The Taming of a Duty -- The Tort Liability of Landlords, 81 Mich. L. Rev. 99, 106, 107 (1982).*

(n144)Footnote 690. *See, e.g., Whetzel v. Jess Fisher Mgt. Co., 282 F.2d 943 (D.C. Cir. 1960)* ; *Austin v. Buettner, 124 A.2d 793 (Md. 1956)* .

(n145)Footnote 691. *See, e.g., McNally v. Ward, 14 Cal. Rptr. 260 (Cal. Ct. App. 1961)* ; *Panaroni v. Johnson, 256 A.2d 246 (Conn. 1969)* ; *Morningstar v. Strich, 40 N.W.2d 719 (Mich. 1950)* .

(n146)Footnote 692. *See, e.g., Williams v. Fontes, 417 N.E.2d 963 (Mass. 1981)* (fire safety ordinance); *Higgins v. Investments, Inc. v. Sturgill, 509 S.W.2d 266 (Ky. 1974)* (ordinance requiring two exits for safety reasons); *see also Swanberg v. O'Mectin, 203 Cal. Rptr. 701 (Cal. Ct. App. 1984)* (landlord liable for injuries to motorist whose vision was blocked by overgrown plants that violated a city ordinance); *See also Shump v. First Continental Robinwood Assocs., 644 N.E.2d 291 (Ohio 1994)* (landlord has duty, under city ordinance, to provide smoke alarms in rental units; breach of the duty renders the landlord liable in tort to persons who are lawfully on the leased premises and who are injured as a result of the breach). *Cf. Schiernbeck v. Davis, 143 F.3d 434 (8th Cir. 1998)* (South Dakota statute that imposes a duty on residential landlord to keep the leased premises "in reasonable repair and fit for human habitation and in good and safe working order" did not require landlord to equip the premises with a smoke detector); *Gore v. People's Sav. Bank, 665 A.2d 1341 (Conn. 1995)* (presence of lead paint, in violation of statute, amounts to negligence per se, but does not give rise to strict liability).

(n147)Footnote 693. *See* Restatement (Second) of Property § 17.6 (1977).

(n148)Footnote 694. *See id.* cmt. a.

(n149)Footnote 695. *See* Restatement (Second) of Property § 17.6, cmt. c (1977); *See, e.g., Abram v. Litman, 501 N.E.2d 370 (Ill. Ct. App. 1986)* ; *Altz v. Leiberson, 134 N.E. 703 (N.Y. 1922)* ; *Yoder v. Greenwald, 246 So. 2d 148 (Fla. Ct. App. 1971)* ; *but see Monsour v. Excelsior Tobacco Co., 115 S.W.2d 219 (Mo. Ct. App. 1938)* .

(n150)Footnote 696. *See* Restatement (Second) of Property § 17.6, cmt. c (1977).

(n151)Footnote 697. *See, e.g., Hatfield v. Palles, 537 F.2d 1245 (4th Cir. 1976)* ; *Hallock v. Smith, 93 So. 588 (Ala. 1922)* ; *Clarke v. Kerchner, 181 S.E.2d 787 (N.C. Ct. App. 1971) , cert. denied, 183 S.E.2d 241 (N.C. 1971)* .

(n152)Footnote 698. *See* § 40.24(b)(5), *above.*

(n153)Footnote 699. *See, e.g., Henderson v. W.C. Haas Realty Mgt., 561 S.W.2d 382 (Mo. Ct. App. 1977)* ; *Dwyer v. Skyline Apts., Inc., 301 A.2d 463 (N.J. Super. Ct. 1973) , aff'd, 311 A.2d 1 (N.J. 1973)* ; *Rivera v. Selfon Home Repairs & Imp. Co., 439 A.2d 739 (Pa. Super. 1982)* ; *see also Antwaun A. v. Heritage Mutual Ins., 596 N.W.2d 456, 468 (Wis. 1999)* (court notes that a tenant's claim for breach of the implied warranty of habitability is a breach of contract claim for contractual damages, while an injured parties' claim for personal injuries is a tort claim in negligence for compensatory damages; it states that such claims may coexist, may be caused by the same act, and may be owned by the same party if it is the tenant who was injured; court also states: "It is not the breach of warranty, however, that gives rise to the cause of action for the personal injury. Instead, it is the negligent act or omission."); *cf. Johnson v. Scandia Associates, Inc., 717 N.E.2d 24 (Ind. 1999)* (court states that where the warranty of habitability is express, consequential damages for injury may be available as a remedy; however, where the warranty is implied in fact, consequential damages may not be awarded because personal injury is outside the parties' contemplation).

(n154)Footnote 700. *See Shroades v. Rental Homes, Inc., 427 N.E.2d 774 (Ohio. 1981) , clarified, Sikora v.*

Wenzel, 427 N.E.2d 1277 (Ohio 2000) (court states that landlord violation of specified statutory duties constitutes negligence per se, but also states that landlord will be excused from liability if landlord neither knew nor should have known of the factual circumstances that caused the violation); *See also* Restatement (Second) of Torts § 288B (1965) (provides that violation of statute or regulation adopted as a standard of conduct is "negligence in itself," unless the violation is one of several "excused violations.").

(n155)Footnote 701. *See Kaplan v. Coulston, 381 N.Y.S.2d 634 (Civ. Ct. 1976)* . Strict liability is discussed in § 41.09(c)(2), *below.*

(n156)Footnote 702. *See* Restatement (Second) of Property § 17.6 (1977).

(n157)Footnote 703. Restatement (Second) of Property § 17.6, Reporter's Note 8 (1977).

(n158)Footnote 704. *356 N.E.2d 575 (Ill. Ct. App. 1976)* .

(n159)Footnote 705. The decision has been followed by other Illinois courts. *See, e.g., Cuthbert v. Stempin, 396 N.E.2d 1197 (Ill. Ct. App. 1979)* .

(n160)Footnote 706. *717 N.E.2d 24 (Ind. 1999)* .

(n161)Footnote 707. *717 N.E.2d 24 at 32* .

(n162)Footnote 708. *17 P.3d 641 (Wash. Ct. App. 2001)* .

(n163)Footnote 709. *308 A.2d 528 (N.H. 1973)* .

(n164)Footnote 710. *See id. at 534* .

(n165)Footnote 711. *See id.*

(n166)Footnote 712. *See, e.g., George Washington Univ. v. Weintraub, 458 A.2d 43 (D.C. 1983)* ; *Presson v. Mountain States Props., Inc., 501 P.2d 17 (Ariz. Ct. App. 1972)* ; *Swanberg v. O'Mectin, 203 Cal. Rptr. 701 (Cal. Ct. App. 1984)* ; *Mansur v. Eubanks, 401 So. 2d 1328 (Fla. 1981)* ; *Stephens v. Stearns, 678 P.2d 41 (Idaho 1984)* ; *Young v. Garwacki, 402 N.E.2d 1045 (Mass. 1980)* ; *Turpel v. Sayles, 692 P.2d 1290 (Nev. 1985)* ; *Collingwood v. General Elec. Real Estate Equities, Inc., 376 S.E.2d 425 (N.C. 1989)* ; *Williams v. Melby, 699 P.2d 723 (Utah 1985)* ; *Pagelsdorf v. Safeco Ins. Co., 284 N.W.2d 55 (Wis. 1979)* ; *see generally* Jean C. Love, *Landlord's Liability for Defective Premises: Caveat Lessee, Negligence, or Strict Liability?, 1975 Wis. L. Rev. 19 (1975);* W.E. Shipley, Annotation, *Modern Status of Landlord's Tort Liability for Injury or Death of Tenant or Third Person Caused by Dangerous Condition of Premises, 64 A.L.R.3d 339 (1975)* .

(n167)Footnote 713. *See Murphy v. Hendrix, 500 So. 2d 8 (Ala. 1986)* ; *Broughton v. Maes, 378 N.W.2d 134 (Minn. Ct. App. 1985)* ; *Webster v. Heim, 399 N.E.2d 690 (Ill. Ct. App. 1980)* .

(n168)Footnote 714. *See, e.g., Brooks v. Eugene Burger Mgt. Corp., 264 Cal. Rptr. 756 (Ct. App. 1989)* (no duty to provide fencing in order to keep tenant children away from adjacent street); *cf., Udy v. Calvary Corp., 780 P.2d 1055 (Ariz. Ct. App. 1989)* (finding such a duty).

(n169)Footnote 715. *See Trotter v. Chicago Hous. Auth., 516 N.E.2d 684 (Ill. Ct. App. 1987)* . Courts have struggled with the foreseeability of risks associated with lead paint on the leased premises. *Compare Kolojeski v. John Deisher, Inc., 239 A.2d 329 (Pa. 1968)* (no foreseeability; lead paint dangers are not within the common knowledge of landlords) *with Antwaun A. v. Heritage Mutual Ins., 596 N.W.2d 456 (Wis. 1999)* (dangers of lead paint poisoning are now so well known that when peeling or chipping paint is present in a pre 1978 residential structure it is foreseeable that lead paint may be present that would expose inhabitants to an unreasonable risk of harm).

(n170)Footnote 716. *See Bradley v. Wachovia Bank & Trust Co., 369 S.E.2d 86 (N.C. 1988)* ; Olin L. Browder, *The Taming of A Duty -- The Tort Liability of Landlords, 81 Mich. L. Rev. 99, 137 (1982).*

(n171)Footnote 717. *See id.*

(n172)Footnote 718. *381 N.Y.S.2d 634 (Civ. Ct. 1976)* .

(n173)Footnote 719. The *Kaplan* court's approach to strict liability has been expressly rejected by at least one New York court. *See Segal v. Justice Court Mut. Hous. Coop., Inc., 432 N.Y.S.2d 463 (1980) , aff'd per curiam, 442 N.Y.S. 686 (App. Term. 1981)* (the imposition of strict liability on the landlord would be against the best interests of the parties and would create greater problems). Another court, without mentioning the *Kaplan* decision, allowed a landlord to assert lack of notice as a defense to a tenant personal injury claim arising out of an alleged dangerous condition of the leased residential premises. *See Alharb v. Sayegh, 604 N.Y.S.2d 243 (App. Div. 1993)* . The court concluded that breach of the implied warranty of habitability did not, as a matter of law, require a finding that the landlord was strictly liable. *Id. See also Curry v. New York City Hous. Auth., 430 N.Y.S.2d 305 (N.Y.A.D. 1980)* (stating the "fundamental principle" that landlords owe a duty of reasonable care under the circumstances; questioning the propriety of a strict liability theory).

(n174)Footnote 720. *See Dwyer v. Skyline Apts., Inc., 301 A.2d 463 (N.J. 1973) , aff'd per curiam, 311 A.2d 1 (N.J. 1973)* (rejecting strict liability); *but cf. Crowell v. McCaffrey, 386 N.E.2d 1256 (Mass. 1979)* (suggesting the possibility that a landlord could be liable in tort based on breach of the warranty even if the landlord could not have discovered the defect in the exercise of reasonable care); *Shroades v. Rental Homes, Inc., 427 N.E.2d 774 (Ohio 1981)* (court concludes that violation of statutory warranty of habitability constitutes negligence per se).

(n175)Footnote 721. *698 P.2d 116 (Cal. 1985) , overruled, Peterson v. Superior Court, 899 P.2d 905 (Cal. 1995)* .

(n176)Footnote 722. *698 P.2d at 122* .

(n177)Footnote 723. *698 P.2d at 123* .

(n178)Footnote 724. *See Mora v. Baker Commodities, Inc., 258 Cal. Rptr. 669 (Cal. App. 1989)* .

(n179)Footnote 725. *See Vaerst v. Tanzman, 272 Cal. Rptr. 503 (Cal. App. 1990)* .

(n180)Footnote 726. *See Brooks v. Eugene Burger Mgmt. Corp., 264 Cal. Rptr. 756 (Cal. App. 1989)* .

(n181)Footnote 727. *899 P.2d 905 (Cal. 1995)* .

(n182)Footnote 728. *899 P.2d at 912* .

(n183)Footnote 729. *899 P.2d at 913* .

(n184)Footnote 730. *899 P.2d at 906* . The court did not decide whether "different considerations would apply in the event the landlord or hotel owner had participated in the construction of the building," but it noted that "in such circumstances strict liability would attach, if at all, based upon the landlord's status as a builder who is engaged in the business of constructing (i.e. manufacturing) rental properties." *Id. at 913-914* .

(n185)Footnote 731. *See e.g., McMichael v. United States, 856 F.2d 1026 (8th Cir. 1988)* (Arkansas strict liability and products liability statutes do not apply to the lease of a commercial building); *Armstrong v. Cione, 738 P.2d 79 (Haw. 1987)* (tenant injured by glass door of a shower; court rejects application of strict products liability theory, stating that it is "unpersuaded" by the *Becker* opinion); *Dwyer v. Skyline Apts., Inc., 301 A.2d 463 (N.J. Super. 1973) , aff'd per curiam, 311 A.2d 1 (N.J. 1973)* (tenant injured as a result of latent plumbing defect; court refuses to impose strict products liability on residential landlord; states that an apartment is not a product placed in the "stream of commerce"

by the landlord); *Young v. Morrisey, , 285 S.C. 236, 329 S.E.2d 426 329 S.E.2d 426 (S.C. 1985)* (tenant's guests died in apartment fire caused by defective wiring; court rejects strict liability claim, declining to hold that landlords are "insurers" of the safety of tenants and guests from injuries caused by latent defects); *cf. Livingston v. Begay, 652 P.2d 734 (N.M. 1982)* (motel operator is not strictly liable for defects in fixtures and furnishings of rooms that the operator holds out to the public).

(n186)Footnote 732. *301 A.2d 463 (N.J. Super. 1973) , aff'd per curiam, 311 A.2d 1 (N.J. 1973) .*

(n187)Footnote 733. *301 A.2d at 467 .*

(n188)Footnote 734. *See* La. Civ. Code §§ 2696 & 2697 ("warranty ... also encompasses vices or defects that are not known to the lessor."); *Wilson v. United States 434 F. Supp. 72 (E.D. La. 1977)* ; *Entrevia v. Hood, 427 So. 2d 1146 (La. 1983) .*

(n189)Footnote 735. *See, e.g., Walls v. Oxford Mgmt. Co., 633 A.2d 103 (N.H. 1993)* ; E.L. Kellett, Annotation, *Comment, Note. -- Private Person's Duty and Liability for Failure to Protect Another Against Criminal Attack by Third Person, 10 A.L.R.3d 619, 626 (1966) .*

(n190)Footnote 736. *See Kline v. 1500 Massachusetts Ave. Apt. Corp., 439 F.2d 477 (D.C. Cir. 1970)* ; E.L. Kellett, Annotation, *Comment, Note. -- Private Person's Duty and Liability for Failure to Protect Another Against Criminal Attack by Third Person, 10 A.L.R.3d 619, 623 (1966) .*

(n191)Footnote 737. *See, e.g., Cramer v. Balcor Prop. Mgmt., Inc., 441 S.E.2d 317 (S.C. 1994) .*

(n192)Footnote 738. *See Kline v. 1500 Massachusetts Ave. Apt. Corp., 439 F.2d 477 (D.C. Cir. 1970)* ; *See also Walther v. KPKA Meadowlands Ltd., 581 N.W.2d 527 (S.D. 1998)* (court holds that no special relationship exists between landlord and tenant, citing several cases in support of that proposition).

(n193)Footnote 739. *439 F.2d 477 (D.C. Cir. 1970) .*

(n194)Footnote 740. *439 F.2d at 487 .*

(n195)Footnote 741. *428 F.2d 1071* (D.C.) , *cert. denied, 400 U.S. 925 (1970) .*

(n196)Footnote 742. *See* William B. Stoebuck & Dale A. Whitman, The Law of Property 346 (3d ed. 2000); see generally Gary D. Spivey, Annotation, *Landlord's Obligation to Protect Tenant Against Criminal Activities of Third Persons, 43 A.L.R.3d 331 (1972) .*

(n197)Footnote 743. William B. Stoebuck & Dale A. Whitman, The Law of Property 346 (3d ed. 2000).

(n198)Footnote 744. *See, e.g., Doe v. Dominion Bank, N.A., 963 F.2d 1552 (D.C. Cir. 1992)* ; *Samson v. Saginaw Prof. Bldg. Inc., 224 N.W.2d 843 (Mich. 1975)* ; *Richmond Medical Supply Co. v. Clifton, 369 S.E.2d 407 (Va. 1988)* ; *See also McClung v. Delta Sq. Ltd. Partnership, 937 S.W.2d 891 (Tenn. 1996)* (court reverses summary judgment in favor of anchor tenant and owner of shopping center and concludes that "businesses" have a duty "to take reasonable measures to protect their customers from foreseeable criminal attacks");. *see generally* Gary D. Spivey, Annotation, *Landlord's Obligation to Protect Tenant Against Criminal Activities of Third Persons, 43 A.L.R.3d 331, 363 (1972) .*

(n199)Footnote 745. *See, e.g., Kline v. 1500 Massachusetts Ave. Apt. Corp., 439 F.2d 477 (D.C. Cir. 1970)* (damages for criminal assault and robbery); *Braitman v. Overlook Terrace Corp., 346 A.2d 76 (N.J. 1975)* (property loss); *but see Royal Neckwear Co. v. Century City, Inc., 252 Cal. Rptr. 810 (Cal. Ct. App. 1988)* (Commercial landlord has no duty to safeguard tenant property from third party criminal acts).

(n200)Footnote 746. *See e.g., Salerno v. Hart Fin. Corp., 521 So.2d 234 (Fla. App. 1988)* (landlord had prior

knowledge of previous criminal conduct). *Cf. Lew v. Superior Court, 25 Cal. Rptr. 2d 42 (Ct. App. 1993)* (landlord liable on nuisance theory to neighbors as a result of drug-related activities by non-tenants on leased premises). Theories under which a landlord may be liable for criminal acts of their tenants are discussed in B.A. Glesner, *Landlords as Cops: Tort, Nuisance [#38] Forfeiture Standards Imposing Liability on Landlords for Crime on the Premises, 42 CASE W. RES. L. REV. 679 (1992).* It should also be noted that some statutes impose criminal liability on landlords who permit their premises to be rented for illegal purposes. *See, e.g., State v. Sigman, 826 P.2d 144 (Wash. 1992)* (landlord convicted under statute that made it unlawful to knowingly lease, or make available, space for illegal drug purposes; landlord knew that tenant was growing marijuana in the basement).

(n201)Footnote 747. Relatively recent cases in this category include: *Doe v. Prudential-Bache/A.G. Spanos Realty Partners, 492 S.E.2d 865 (Ga. 1997)* (residential tenant was raped and robbed after parking her car beneath her apartment building; court affirmed summary judgment for landlord; court concluded that prior property-related crimes did not establish the foreseeability of the violent sexual assault in question); *Cramer v. Balcor Prop. Mgmt., Inc., 848 F. Supp. 1222 (D.S.C. 1994)* (landlord did not owe or assume a duty to protect tenant from criminal attack); *Bartley v. Sweetser, 890 S.W.2d 250 (Ark. 1994)* (residential tenant raped in her apartment unit; court confirms the traditional rule that the landlord does not owe a duty to protect the tenant or social guest from criminal acts); *Sharon P. v. Arman, LTD, 989 P.2d 121 (Cal. 1999) , cert. denied, 530 U.S. 1243 (2000)* (tenant sexually assaulted in underground commercial parking garage; court said that improved lighting and maintenance might have diminished the risk of criminal attacks in the garage, but, in the absence of similar incidents or other indications of a reasonably foreseeable risk of criminal assaults in the garage, it could not conclude that the landlord was required to take such measures); *Ann M. v. Pacific Plaza Shopping Center, 863 P.2d 207 (Cal. 1993)* (tenant's employee raped on tenant's premises; court concludes that violent criminal assaults were not sufficiently foreseeable to impose a duty upon the landlord to provide security guards in common areas); *Saelzler v. Advanced Group 400, 23 P.3d 1143 (Cal. 2001)* (delivery person was assaulted while attempting to make a delivery at an apartment complex; the court entered summary judgment for the property owner/landlord on a causation rationale); *Gross v. Empire State Bldg. Assocs., 4 A.D.3d 45, 773 N.Y.S.2d 354 (App. Div. 2004)* (landlord not liable for harms caused by deranged individual who fired a pistol into a crowd on the observation deck of the Empire State Building); *Miller v. Whitworth, 455 S.E.2d 821 (W. Va. 1995)* (rejecting general duty of liability on landlords for injuries caused by third party criminal acts; evidence of various police reports of crimes at the landlord's mobile home park was not sufficient to impose a duty on the landlord to protect the tenant from third party criminal activity). *See also Kuzmicz v. Ivy Hill Park Apts., Inc., 688 A.2d 1018 (N.J. 1997)* (tenant assaulted in vacant lot owned by municipal entity located next to landlord's apartment complex; court concludes that, in the absence of landlord control over an adjacent lot, or realization of significant commercial benefit from tenant use of the lot, landlord owes no duty to warn tenants of the risk of criminal assault on the lot).

(n202)Footnote 748. *See, e.g., Deem v. Charles E. Smith Mgt., Inc., 799 F.2d 944 (4th Cir. 1986)* ; *Bartley v. Sweetser, 890 S.W.2d 250 (Ark. 1994)* ; *Rodgers v. Rosen, 737 P.2d 562 (Okla. 1987)* ; *Feld v. Merriam, 485 A.2d 742 (Pa. 1984)* .

(n203)Footnote 749. *See, e.g., Pippin v. Chicago Hous. Auth. 399 N.E.2d 596 (Ill. 1979)* ; *Gulf Reston, Inc. v. Rogers, 207 S.E.2d 841 (Va. 1974)* ; *cf. Miller v. Whitworth, 455 S.E.2d 821 (W. Va. 1995)* (landlord does not have a duty to protect tenants from criminal activities of third persons merely because there is a landlord/tenant relationship; however, such a duty will be imposed if a landlord's affirmative actions or omissions have unreasonably created or increased the risk of injury to tenants from third party criminal activities).*See also Estate of Hough v. Estate of Hough, 519 S.E.2d 640 (W. Va. 1999)* (court reversed the dismissal of a wrongful death action against landlord, stating that the complaint stated a claim that the landlord's affirmative actions or omissions unreasonably created or increased the risk of injury to the tenant from the husband's criminal activity).

(n204)Footnote 750. *See Deem v. Charles E. Smith Mgt., Inc., 799 F.2d 944 (4th Cir. 1986)* .

(n205)Footnote 751. *See, e.g., Scott v. Watson, 359 A.2d 548 (Md. 1976)* ; *Samson v. Saginaw Professional Bldg., Inc., 224 N.W.2d 843 (Mich. 1975)* ; *Aaron v. Havens, 758 S.W.2d 446 (Mo. 1988)* .

(n206)Footnote 752. *See, e.g., Pippin v. Chicago Hous. Auth., 399 N.E.2d 596 (Ill. 1979)* ; *Feld v. Merriam, 485 A.2d 742 (Pa. 1984)* ; *Gulf Reston, Inc. v. Rogers, 207 S.E.2d 841 (Va. 1974)* .

(n207)Footnote 753. *See, e.g., Phillips v. Chicago Hous. Auth., 431 N.E.2d 1038 (Ill. 1982)* ; *Feld v. Merriam, 485 A.2d 742 (Pa. 1984)* But some courts have been reluctant to carry this idea too far. *See e.g.,* ; *Dailey v. Housing Auth., 639 So. 2d 1343 (Ala. 1994)* ; *Hall v. Rental Management, Inc., 913 S.W.2d 293 (Ark. 1996)* (in Hall, a 17 year old tenant was shot and killed while participating in an activity in a part of the apartment complex; the landlord had produced a tenant handbook that expressed concern for tenant safety, and had issued an employee manual that instructed its employees to be security conscious; the resident manager or a maintenance employee would sometimes patrol the premises, checking the lights, looking for security problems, and communicating with residents about suspicious activities; but the court said: "We are reluctant to hold that a landlord's use of these modest, conscientious measures imposes a full blown duty to protect tenants from third party criminal activities."

(n208)Footnote 754. *See, e.g., Lay v. Dworman, 732 P.2d 455 (Okla. 1986)* ; *Richmond Med. Supply Co. v. Clifton, 369 S.E.2d 407 (Va. 1988)* . Liability based on an agreement may not extend to those who are not parties to the agreement. *See, e.g., Taylor v. Hocker, 428 N.E.2d 662 (Ill. Ct. App. 1981)* (shopping center landlord who agreed to provide common area security personnel did not agree to protect customers from criminal assault).

(n209)Footnote 755. *See, e.g., Ponticas v. K.M.S. Inv., 331 N.W.2d 907 (Minn. 1983)* ; John H. Derrick, Annotation, *Landlord's Tort Liability to Tenant for Personal Injury or Property Damage Resulting from Criminal Conduct of Employee, 38 A.L.R.4th 240, 247 (1985)* .

(n210)Footnote 756. *See Pippin v. Chicago Hous. Auth., 399 N.E.2d 596 (Ill. 1979)* .

(n211)Footnote 757. *See, e.g., Richmond Med. Supply Co. v. Clifton, 369 S.E.2d 407 (Va. 1988)* .

(n212)Footnote 758. *See Paterson v. Deeb, 472 So. 2d 1210 (Fla. Ct. App. 1985) , review denied, 484 So. 2d 8 (Fla. 1986)* ;*cf. Walther v. KPKA Meadowlands Ltd., 581 N.W.2d 527 (S.D. 1998)* (court concludes that a statute requiring the landlord to keep leased residential premises in reasonable repair, fit for human habitation, and in good and safe working order, did not create a duty on the part of the landlord to protect tenants from criminal acts of third persons).

(n213)Footnote 759. *See, e.g., Lay v. Dworman, 732 P.2d 455 (Okla. 1986)* ; William B. Stoebuck & Dale A. Whitman, The Law of Property § 6.47 (3d ed. 2000).

(n214)Footnote 760. *See* Gary D. Spivey, Annotation, *Landlord's Obligation to Protect Tenant Against Criminal Activities of Third Persons, 43 A.L.R.3d 335 (1972)* .

(n215)Footnote 761. *See, e.g., Paterson v. Deeb, 472 So. 2d 1210 (Fla. Ct. App. 1985) , review denied, 484 So. 2d 8 (Fla. 1986)* ; *Brichacek v. Hiskey, 401 N.W.2d 44 (Iowa 1987)* . In this connection, it should be noted that an ordinance in Newark, New Jersey requires security guards to be provided for most public or private "housing buildings" that contain over 100 housing units. *See* 515 *Associates v. City of Newark, 623 A.2d 1366 (N.J. 1993)* .

(n216)Footnote 762. *See TEX. PROP. CODE92.151 et seq.*

(n217)Footnote 763. *412 A.2d 436 (N.J. 1980)* .

(n218)Footnote 764. The court also said that, since the existence of the implied warranty did not depend on landlord knowledge of any risks, the plaintiff need not prove notice to the landlord of an unsafe condition. Of course, it is not inevitable that strict liability, or something akin to it, follow from a decision to base tort liability on breach of a warranty of habitability. Most of the courts that have held landlords liable in tort for dangerous defects that violate a warranty of habitability have indicated that liability sounds in negligence. *See* § 41.09(b)(9) of this chapter.

(n219)Footnote 765. *See also Brichacek v. Hiskey, 401 N.W.2d 44 (Iowa 1987)* (implied warranty incorporates statutory requirement for secure lock); *Flood v. Wisconsin Real Estate Inv. Trust, 503 F. Supp 1157 (D. Kan. 1980)* (implied warranty to maintain same level of security existing at the beginning of the lease); *but see, e.g., Walls v. Oxford Mgmt. Co., 633 A.2d 103 (N.H. 1993)* (implied warranty of habitability does not require landlord to take affirmative measures to provide security against criminal attack); *Jack v. Fritts, 457 S.E.2d 431 (W. Va. 1995)* (neither statutory nor implied warranties of habitability impose a duty on the landlord to protect a tenant from injuries arising out of the criminal conduct of a third party); *see generally*, Caroline Hudson, Note, *Expanding the Scope of the Implied Warranty of Habitability: A Landlord's Duty to Protect Tenants From Foreseeable Criminal Activity, 33 Vand. L. Rev. 1493 (1980).*

(n220)Footnote 766. *See, e.g., Kline v. 1500 Massachusetts Ave. Apartment Corp., 439 F.2d 477 (D.C. Cir. 1970)* ; *O.H. v. Ballard Realty Co., 516 So. 2d 519 (Ala. 1987)* ; *Sharon P. v. Arman, LTD, 989 P.2d 121 (Cal. 1999)* , *cert. denied, 530 U.S. 1243 (2000)* ; *N.W. v. Amalgamated Trust & Sav. Bank, 554 N.E.2d 629 (Ill. Ct. App. 1990)* ; *C.S. v. Sophir, 368 N.W.2d 444 (Neb. 1985)* ; *but see Paterson v. Deeb, 472 So. 2d 1210 (Fla. Ct. App. 1985)* , *review denied, 484 So. 2d 8 (Fla. 1986)* (foreseeability need not be shown when landlord failed to provide security device required by a statute).

(n221)Footnote 767. *See, e.g., Scott v. Watson, 359 A.2d 548 (Md. 1976)* .

(n222)Footnote 768. *See Dick v. Great S. Bay Co., 435 N.Y.S.2d 240 (Civ. Ct. 1981)* , modified on other grounds, *442 N.Y.S.2d 348 (App. Term 1981)* .

(n223)Footnote 769. *See Samson v. Saginaw Prof. Bldg., Inc., 224 N.W.2d 843 (Mich. 1975)* ; *see generally* Olin L. Browder, *The Taming of A Duty -- The Tort Liability of Landlords, 81 Mich. L. Rev. 99, 155 (1982).*

(n224)Footnote 770. *See Timberwalk Apartments, Partners, Inc. v. Cain, 972 S.W.2d 749, 757 (Tex. 1998)* (tenant raped in her apartment; after analyzing the several listed factors, the court concluded that the rape was not foreseeable).

(n225)Footnote 771. *See, e.g., Sharp v. W.H. Moore, Inc., 796 P.2d 506, 510 (Idaho 1990)* ; *Rowe v. State Bank of Lombard, 531 N.E.2d 1358 (Ill. 1988)* ; *see also Gans v. Parkview Plaza Partnership, 571 N.W.2d 261 (Neb. 1997)* (commercial tenant was sexually assaulted in leased office building; court says that although a single prior criminal incident may not be alone sufficient to impose a duty on the landlord "the controlling question is whether, under the facts presented, one incident constitutes sufficient notice to make the criminal acts sued upon reasonably foreseeable"); *but see Knoll v. Board of Regents, 601 N.W.2d 757 (Neb. 1999)* (foreseeability is a legal question for the court; to the extent that the *Gans* case indicates otherwise, it is, to that extent, overruled).

(n226)Footnote 772. *Doe v. Prudential-Bache/A.G. Spanos Realty Partners, 492 S.E.2d 865 (Ga. 1997)* .

(n227)Footnote 773. *Ann M. v. Pacific Plaza Shop. Ctr., 863 P.2d 207* , 215-216 (Cal. 1993) .

(n228)Footnote 774. *See* Carol C. Jones, *An Exculpatory Provision that Will Protect the Lessor, 1946 Ins. L.J. 79, 93 (1946).*

(n229)Footnote 775. *See* Olin L. Browder, *The Taming of a Duty -- The Tort Liability of Landlords, 81 Mich. L. Rev. 99, 141 (1982).*

(n230)Footnote 776. *See, e.g.,* John D. Perovich, Annotation, *Validity of Exculpatory Clause in Lease Exempting Lessor from Liability, 49 A.L.R.3d 321, 325, 328 (1973)* ; Olin L. Browder, *The Taming of A Duty -- The Tort Liability of Landlords, 81 Mich. L. Rev. 99, 141 (1982).*

(n231)Footnote 777. *See, e.g., Carbone v. Cortlandt Realty Corp., 277 A.2d 542 (N.J. 1971)* ; *Kotwasinski v. Rasner, 258 A.2d 865 (Pa. 1969)* .

(n232)Footnote 778. *See, e.g., Jewett v. Rechler, 529 N.Y.S.2d 16 (App. Div. 1988)* .

(n233)Footnote 779. *See, e.g., Taylor v. Leedy & Co., 412 So. 2d 763 (Ala. 1982)* .

(n234)Footnote 780. *See, e.g., Carbone v. Cortlandt Realty Corp., 277 A.2d 542 (N.J. 1971)* ; *Federal Pac. Elec. v. Carolina Prod. Enters., 378 S.E.2d 56 (S.C. Ct. App. 1989)* .

(n235)Footnote 781. *See, e.g., Ransburg v. Richards, 770 N.E.2d 393 (Ind. Ct. App. 2002)* ; *Papakalos v. Shaka, 18 A.2d 377 (N.H. 1941)* .

(n236)Footnote 782. *See, e.g., Henrioulle v. Marin Ventures, Inc., 573 P.2d 465 (Cal. 1978)* ; *George Washington Univ. v. Weintraub, 458 A.2d 43 (D.C. 1983); Contra O'Callaghan v. Waller & Beckwith Realty Co., 155 N.E.2d 545 (Ill. 1958)* (landlord-tenant relationship does not have monopolistic features that courts have relied on in invalidating such clauses in other contexts; exculpatory clause may mean lower rent for tenant), *abrogated by statute as stated in Calef v. West 652 N.W.2d 496 (Mich. Ct. App. 2002)* .

(n237)Footnote 783. *See, e.g., Cardona v. Eden Realty Co., 288 A.2d 34 (N.J. Super. Ct. App. Div. 1972)* ; *Johnson v. Mobil Oil Corp., 415 F. Supp. 264 (E.D. Mich. 1976)* .

(n238)Footnote 784. *See, e.g., Weaver v. American Oil Co., 276 N.E.2d 144 (Ind. 1971)* ; *Galligan v. Arovitch, 219 A.2d 463 (Pa. 1966)* ; *Cardona v. Eden Realty Co., 288 A.2d 34 (N.J. Super. Ct. App. Div. 1972)* ; *see generally* Olin L. Browder, *The Taming of A Duty -- The Tort Liability of Landlords, 81 Mich. L. Rev. 99, 141-144 (1982);* John D. Perovich, Annotation, *Validity of Exculpatory Clause in Lease Exempting Lessor from Liability, 49 A.L.R.3d 321, 339, 345 (1973)* .

(n239)Footnote 785. *See Cardona v. Eden Realty Co., 288 A.2d 34 (N.J. Super. Ct. App. Div. 1972)* .

(n240)Footnote 786. *See McCutcheon v. United Homes Corp., 486 P.2d 1093 (Wash. 1971)* .

(n241)Footnote 787. *See, e.g., Price v. Amoco Oil Co., 524 F. Supp. 364 (S.D. Ind. 1981)* (commercial lease; knowledgeable lessee); *Anderson v. Union P.R. Co., 790 P.2d 438 (Kan. Ct. App. 1990)* (lessee's questions indicated understanding of lease provisions); *Bedrosky v. Hiner, 430 N.W.2d 535 (Neb. 1988)* (no inequality of bargaining power); *Princeton Sportswear Corp. v. H & M Assocs., 507 A.2d 339 (Pa. 1986)* (no inequality of bargaining power).

(n242)Footnote 788. *See, e.g., Matthews v. Mountain Lodge Apts., Inc., 388 So. 2d 935 (Ala. 1980)* ; *Armi v. Huckabee, 94 So. 2d 380 (Ala. 1957)* ; John D. Perovich, Annotation, *Validity of Exculpatory Clause in Lease Exempting Lessor from Liability, 49 A.L.R.3d 321, 342 (1973)* .

(n243)Footnote 789. *See* statutes listed in Restatement (Second) of Property § 17.3, statutory note (1977); *see generally*, Olin L. Browder, *The Taming of A Duty -- The Tort Liability of Landlords, 81 Mich. L. Rev. 99, 142-144 (1982),*

(n244)Footnote 790. *See* Uniform Residential Landlord and Tenant Act § 1.403(a)(4).

(n245)Footnote 791. *See id.*, § 1.403(b).

(n246)Footnote 792. *See, e.g., Cal. Civ. Code § 1953*; *Hawaii Rev. Stat. § 521* 33.

(n247)Footnote 793. *See Md. Ann. Code, Real Property § 8-105*; *Mass. Gen. Laws Ann. ch. 186 § 15*; *N.Y. Gen. Oblig. Law § 5* 321.

(n248)Footnote 794. *La. Rev. Stat. § 9:3221*.

(n249)Footnote 795. *See, e.g., Larson v. Santa Clara Valley Water Conservation Dist., 32 Cal. Rptr. 875 (Cal. Ct. App. 1963)* ; *Vernon Fire and Cas. Ins. Co. v. Graham, 336 N.E.2d 829 (Ind. Ct. App. 1975)* ; E.T. Tan, Annotation, *Effect, on Nonsigner, of Provision of Lease Exempting Landlord from Liability on Account of Condition of Property, 12 A.L.R.3D 958, 959 (1967).*

(n250)Footnote 796. *See* Restatement (Second) of Property § 17.3, cmt. j (1977).

(n251)Footnote 797. *See, e.g., Deen v. Holderfield, 155 So. 2d 314 (Ala. 1963)* ; *Levins v. Theopold, 95 N.E.2d 554 (Mass. 1950)* ; E.T. Tan, Annotation, *Effect, on Nonsigner, of Provision of Lease Exempting Landlord from Liability on Account of Condition of Property, 12 A.L.R.3D 958, 960 (1967).*

(n252)Footnote 798. *See, e.g., Crowell v. Housing Auth. of Dallas, 495 S.W.2d 887 (Tex. 1973)* ; *Thomas v. Housing Auth. of Bremerton, 426 P.2d 836 (Wash. 1967)* ; *contra Manius v. Housing Auth. of Pittsburgh, 39 A.2d 614 (Pa. 1944)* (court will not restrict contractual freedom).

(n253)Footnote 799. *270 F.3d 1007 (6th Cir. 2001)* .

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CHAPTER 41 TENANT RIGHTS AND LANDLORD DUTIES

5-41 Thompson on Real Property, Thomas Editions § 41.10

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§ 41.10 Frustration of Tenant's Use.

In some circumstances, the rights of the landlord may be limited by application of the contract doctrine of frustration of purpose, or commercial frustration, as it is sometimes called. Frustration of purpose arises when the performance of contractual obligations is possible, but "the expected value of performance to the party seeking to be excused has been destroyed by a fortuitous event, which supervenes to cause an actual but not literal failure of consideration." n800 In other words, the unforeseen event defeats the purpose for which the contract was made. n801 If the doctrine applies, it excuses the contract performance of the party whose purpose has been frustrated. This, in turn, affects the other parties' duties of performance under the contract in the same way that a breach of contract would: in the case of a material breach, the other party can suspend performance, and, if an appropriate time to cure has passed, terminate the contract. n802 Although many courts have recognized that the doctrine applies to real estate leases, tenants have not had much success satisfying the requirements of the frustration of purpose doctrine. n803

In order for the doctrine of frustration of purpose to apply to a real estate lease, the weight of authority requires: 1) that the use that is frustrated be the use that the parties intended for the leased premises upon entering into the lease; 2) that there be a total or near total frustration of the use; and; 3) that the event resulting in the frustration be one that was not reasonably foreseeable by the parties at the time they entered into the lease. n804 Courts have sometimes said that they will not grant relief under the doctrine unless there is extreme hardship to the tenant. n805 A loss of profits by the tenant is usually not enough. n806 Courts have also declined to find frustration of purpose if the tenant is free to put the leased premises to another use. n807 In a number of cases, tenants have been denied relief on the ground that the purpose impairing occurrence was foreseeable. n808

The majority of the cases in which the doctrine of commercial frustration has been applied to real estate leases have been cases involving governmental action or regulation. Tenants have sometimes been permitted to avoid lease obligations when the intended use of the premises is made illegal by government action. n809 Courts have also indicated that the doctrine may apply in consequence of other government action, such as when government officials lock the doors to the leased premises and seize the tenant's goods n810 or when government officials deny a tenant permits to remodel the leased premises for their intended use. n811 The Restatement indicates that other governmental actions that might frustrate the intended use of the leased premises include the rationing of items needed by the tenant in the tenant's business operations, and a freeze on prices of products produced by the tenant on the leased premises. n812

In a few instances, courts have invoked the frustration of purpose doctrine to excuse tenant performance when the frustrating occurrence was accidental destruction of leased improvements. n813 In the *Albert M. Greenfield & Co. v. Kolea*, n814 case, for example, the Pennsylvania Supreme Court excused a commercial tenant from lease obligations after a garage that had been used in the tenant's business operations had been destroyed by accidental fire. The court refused to apply traditional property based rules regarding the continuance of lease obligations following accidental destruction of improvements, and said it was obvious that the purpose of the lease had been frustrated. n815

FOOTNOTES:

(n1)Footnote 800. *Lloyd v. Murphy, 153 P.2d 47, 50 (Cal. 1944)* . The doctrine was first applied in the so called "coronation cases." *See Krell v. Henry, 2 K.B. 740 (1903)* .

(n2)Footnote 801. *See* Arthur L. Corbin, Corbin on Contracts, § 1322 (1962).

(n3)Footnote 802. *See* E. Allan Farnsworth, Contracts § 9.9, at 729 730 (2d ed. 1990).

(n4)Footnote 803. *See Perry v. Champlain Oil Co., 134 A.2d 65 (N.H. 1957)* ; E. Allan Farnsworth, Contracts § 9.7, at 725 (2d ed. 1990).

(n5)Footnote 804. *See, e.g., Maryland Trust Co. v. Tulip Realty Co., 153 A.2d 275 (Md. 1959)* ; *Perry v. Champlain Oil Co., 134 A.2d 65 (N.H. 1957)* ; *Wood v. Bartolino, 146 P.2d 883 (N.M. 1944)* ; Restatement (Second) of Property § 9.3, Reporter's Note 3 (1977); C.T. Foster, Annotation, *Modern Status of the Rules Regarding Impossibility of Performance as Defense in Action for Breach of Contract, 84 A.L.R.2d 12, 70 76 (1962)* .

(n6)Footnote 805. *See, e.g., Maryland Trust Co. v. Tulip Realty Co., 153 A.2d 275 (Md. 1959)* .

(n7)Footnote 806. *See, e.g., Lloyd v. Murphy, 153 P.2d 47 (Cal. 1944)* ; *Mel Frank Tool & Supply, Inc. v. Di Chem Co., 580 N.W.2d 802 (Iowa 1998)* .

(n8)Footnote 807. *See, e.g., Deibler v. Bernard Bros. Inc., 53 N.E.2d 450 (Ill. 1944)* ; *see also Mel Frank Tool & Supply, Inc. v. Di Chem Co., 580 N.W.2d 802 (Iowa 1998)* ; Restatement (Second) of Property § 9.3 cmt. b (1977).

(n9)Footnote 808. *See, e.g., Essex Lincoln Garage v. City of Boston, 175 N.E.2d 466 (Mass. 1961)* (tenant of parking garage not permitted to terminate based on change in traffic regulations that diminished its business); *North American Capital Corp. v. McCants, 510 S.W.2d 901 (Tenn. 1974)* (failure of government officials to approve tenant's site for a thrift institution was foreseeable).

(n10)Footnote 809. *Chapter 40 includes a discussion of the issue. See* § 40.16(b).

(n11)Footnote 810. 119 *Fifth Ave., Inc. v. Taiyo Trading Co., Inc., 73 N.Y.S.2d 774 (Sup. Ct. 1947) , aff'd, 87 N.Y.S.2d 430 (App. Div. 1949)* .

(n12)Footnote 811. *Garner v. Ellingson, 501 P.2d 22 (Ariz. Ct. App. 1972)* .

(n13)Footnote 812. *See* Restatement (Second) of Property § 9.3 cmt. b (1977).

(n14)Footnote 813. *See Albert M. Greenfield & Co. v. Kolea, 380 A.2d 758 (Pa. 1977)* ; *Smith v. Roberts, 370 N.E.2d 271 (Ill. Ct. App. 1977)* ; *Eggen v. Wetterborg, 237 P.2d 970 (Or. 1951)* .

(n15)Footnote 814. *380 A.2d 758 (Pa. 1977)* .

(n16)Footnote 815. *380 A.2d at 760* .

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CHAPTER 41 TENANT RIGHTS AND LANDLORD DUTIES

5-41 Thompson on Real Property, Thomas Editions § 41.11

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§ 41.11 Environmental Obligations.

A landlord may have obligations regarding the condition of leased premises under federal and state environmental legislation. While a detailed treatment of environmental issues is beyond the scope of this chapter, a reference to landlord liability under the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA") n816 is in order, because CERCLA has been the most important legislative vehicle for imposing environmental liability on landowners.

CERCLA establishes a strict liability scheme with respect to the release, or threatened release, of hazardous substances. Section 9607 of the Act provides that persons potentially responsible for such liability include current owners and operators of facilities where hazardous substances are released, or threatened to be released, as well as owners and operators of facilities at the time hazardous substances were disposed of. n817 A "facility" is broadly defined under the Act, n818 and has been said to include "any place where hazardous substances come to be located." n819 It is not necessary, for liability purposes, that the owner of the land actively participate in the release of hazardous substances, and courts have had no difficulty concluding that landlords are owners of facilities for purposes of CERCLA liability. n820 Of course, if the tenant is the "operator" of the facility that generates the hazardous substances, the tenant will also be subject to liability. n821

A statutory defense is available under CERCLA if the release, or threatened release, of a hazardous substance resulted from the act or omission of a third party, if the defendant establishes: 1) that the defendant exercised due care with respect to the hazardous substance, and 2) that the defendant took precautions against foreseeable third party acts or omissions. n822 But reported court decisions do not indicate that this defense has, at least thus far, been of much assistance to landlords. The Act provides that the affirmative defense does not apply when the third party "act or omission occurs in connection with a contractual relationship existing directly or indirectly, with the defendant." n823 "Contractual relationship" is defined broadly by the Act, n824 and has been construed to include leases. n825 Based on the "contractual relationship" proviso, it has been held that the third party defense is unavailable to a landlord who has an oral lease with the party who was at fault in connection with the release of a hazardous substance. n826

Issues regarding tenant liability and recovery for environmental problems have also arisen. As noted above, a tenant could incur liability as an "operator" of a facility that releases hazardous substances. Some courts have considered

whether tenants, when acting as sublessors, should be subject to liability as owners. n827 And a commentator has argued that tenants may be able to use the Resource Conservation and Recovery Act: (RCRA) to impose liability on landlords if landlord renovations of leased space generate hazardous levels of lead particles. n828.

Additional information regarding landowner environmental liability is contained in chapter 75.

FOOTNOTES:
(n1)Footnote 816. *42 U.S.C. §§ 9601 -- 9675*.

(n2)Footnote 817. *See 42 U.S.C. § 9607*.

(n3)Footnote 818. *See 42 U.S.C. § 9601(9)*.

(n4)Footnote 819. *See United States v. Bliss, 667 F. Supp. 1298, 1305 (E.D. Mo. 1987)* , *quoting United States v. Conservation Chem. Co., 619 F. Supp. 162, 185 (W.D. Mo. 1985)* .

(n5)Footnote 820. *See, e.g., United States v. Monsanto Co., 858 F.2d 160 (4th Cir. 1988)* , *cert. denied, 490 U.S. 1106 (1989)* ; *Caldwell v. Gurley Refining Co., 755 F.2d 645 (8th Cir. 1985)* ; *Weyerhaeuser Corp. v. Koppers Co., 771 F. Supp. 1406 (D. Md. 1991)* ; 4 W. Rogers, Environmental Law: Hazardous Wastes and Substances § 8.12 (1992); Anthony J. Fejfar, *Landowner Lessor Liability Under CERCLA, 53 Md. L. Rev. 157 (1994).*

(n6)Footnote 821. *See Weyerhaeuser Co. v. Koppers Co., Inc., 771 F. Supp. 1420 (D. Md. 1991)* (allocating liability between landlord as owner and tenant as operator).

(n7)Footnote 822. *See 42 U.S.C. § 9607(b)(3)*.

(n8)Footnote 823. *See id.*

(n9)Footnote 824. *See 42 U.S.C. § 9601(35)(A)* (the expression includes, but is not limited to "land contracts, deeds or other instruments transferring title or possession."

(n10)Footnote 825. *See International Clinical Laboratories, Inc. v. Stevens, 710 F. Supp. 466 (E.D.N.Y. 1989)* . For a discussion of the "contractual relationship" issue as applied to landlord tenant relationships, *see* Anthony J. Fejfar, *Landowner Lessor Liability Under CERCLA, 53 Md. L. Rev. 157 (1994).*

(n11)Footnote 826. *See United States v. Monsanto, 858 F.2d 160 (4th Cir. 1988)* .

(n12)Footnote 827. *See, e.g., U.S. v. A & N Cleaners and Launderers, Inc., 788 F. Supp. 1317 (S.D.N.Y. 1992)* (tenant that was also sublessor was "owner" for CERCLA purposes); *Commander Oil Corp. v. Barlo Equipment Corp., 215 F.3d 321 (2d Cir. 2000)* , *cert. denied, 531 U.S. 979 (2000)* (court said that some lessees may have the requisite indicia of ownership to be considered owners for purposes of CERCLA liability, but it declined to find the sublessor in question to be an owner); *Servco Pacific Inc. v. Dods, 193 F. Supp. 2d 1183 (D. Haw. 2002)* (considers tenant liability under CERCLA for chemical contamination).

(n13)Footnote 828. *See* Cappell, Shana R., *Lead Paint Poisoning and the Resource Conservation and Recovery Act: A New Partnership for the Twenty-First Century, 35 Colum. J. L. & Soc. Probs. 175 (2002).*

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CHAPTER 41 TENANT RIGHTS AND LANDLORD DUTIES

5-41 Thompson on Real Property, Thomas Editions § 41.12

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Annotation, *Landlord's Duty, on Tenant's Failure to Occupy, or Abandonment of, Premises, to Mitigate Damages By Accepting or Procuring Another Tenant, 75 A.L.R.5th 1* .

Annotation, *Landlord's Duty Under Express Covenant to Repair, Rebuild, or Restore, Where Property is Damaged or Destroyed by Fire*, 38 A.L.R. 2 D 682.

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Annotation, *Landlord's Liability To Tenant or Tenant's Invitees for Injury or Death Due to Ice or Snow in Areas or Passageways Used in Common by Tenants*, 49 A.L.R. 3 D 387.

Annotation, *Landlord's Liability To Tenant's Business Patron Injured As a Result of Defective Condition of Premises*, 17 A.L.R. 3 D 422.

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Annotation, *Liability as Between Lessor and Lessee, Where Lease Does Not Specify, for Taxes and Assessments*, 86 A.L.R. 2 D 670.

Annotation, *Liability for Breach of Farming Lease or Contract*, 35 A.L.R. 5 TH 285

Annotation, *Liability of Landlord for Personal Injuries Due to Defective Halls, Stairways, and the Like, for Use of Different Tenants*, 75 A.L.R. 154 .

Annotation, *Liability of Landlord for Personal Injury or Death Due to Inadequacy or Lack of Lighting on Portion of Premises Used in Common by Tenants*, 66 A.L.R. 3 D 202.

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Annotation, *Measure and Elements of Damages for Lessee's Breach of Covenant as to Repairs*, 45 A.L.R. 5 TH 251.

Annotation, *Measure of Damages for Breach by Lessor of Contract To Lease or To Put Lessee Into Possession*, 104 A.L.R. 132 .

Annotation, *Measure of Damages for Landlord's Breach of Implied Warranty of Habitability*, 1 A.L.R. 4 TH 1182.

Annotation, *Measure of Damages for Lessor's Breach of Contract to Lease or to Put Lessee into Possession*, 88 A.L.R. 2 D 1024.

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Annotation, *Necessity and Nature of Consideration Supporting Landlord's Reduction of Rent*, 30 A.L.R. 3 D 1259.

Annotation, *Notice by Landlord of Change in Rent or Other Modification of Tenancy as Affecting Rights and Liabilities Incident to Tenant's Holding Over After Expiration of Term or Tent Period or Time Fixed by Notice, 109* A.L.R. 197 .

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Annotation, *Provision in Lease for Pecuniary Forfeiture Where Lease is Prematurely Terminated as One for Liquidated Damages*, 106 A.L.R. 292 .

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Annotation, *Retaliatory Eviction of Tenant for Reporting Landlord's Violation of Law*, 40 A.L.R. 3 D 753.

Annotation, *Right of Landlord Legally Entitled to Possession to Dispossess Tenant Without Legal Process, 6 A.L.R. 3D 177.* Annotation, *Right of Lessor or Lessee or His Privies To Benefit of Insurance Taken Out by Other or His Privies*, 66 A.L.R. 864 .

Annotation, *Right of Lessor to Retain Advance Rental Payments Made Under Lease Terms upon Lessee's Default in Rent*, 27 A.L.R. 2 D 656.

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Annotation, *Right to Proceeds, or to Apportionment Thereof, Where Fire Insurance Policy is Issued Jointly to Lessor and Lessee Covering Destruction of or Damage to Building*, 8 A.L.R. 2 D 1445.

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Annotation, *Rights and Remedies of Tenant Upon Landlord's Breach of Covenant to Repair*, 28 A.L.R. 1448 .

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Annotation, *Strict Liability of Landlord for Injury or Death of Tenant or Third Person Caused by Defect in Premises Leased for Residential Use*, 48 A.L.R. 4 TH 638.

Annotation, Sufficiency of Description of Terms and Conditions of Lease, or Lease Provision, so as to Comply with Statute of Frauds, 12 A.L.R. 6 TH 123.

Annotation, *Surrender and Acceptance of Term as Affecting Right to Recover Rent or on Obligation Given for Rent*, 58 A.L.R. 906 .

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Annotation, *Tenant's Recovery of Damages for Emotional Distress Under Uniform Residential Landlord and Tenant Act*, 6 A.L.R. 4 TH 528.

Annotation, *Tenant's Right, Where Landlord Fails to Make Repairs, to Have Them Made and Set Off Cost Against Rent*, 40 A.L.R. 3 D 1369.

Annotation, *Third Party Defense to Liability Under 107 of Comprehensive Environmental Response, Compensation, and Liability Act (42 USCS 9607), 105 A.L.R. FED. 21* .

Annotation, *Time Within Which Tenant Must Yield or Abandon Premises After Claimed Constructive Eviction*, 91 A.L.R. 2 D 638.

Annotation, *Time Within Which Tenant's Right to Remove Trade Fixtures Must be Exercised, 109 A.L.R.5th 421*, 6 A.L.R. 2 D 322.

Annotation, *Validity and Construction of Statute or Ordinance Authorizing Withholding or Payment into Escrow of Rent for Period During Which Premises Are Not Properly Maintained by Landlord*, 40 A.L.R. 3 D 821.

Annotation, *Validity and Effect of Acceleration Clause in Lease or Bailment*, 58 A.L.R. 300 .

Annotation, *Validity, Construction, and Effect of Specific Provision of Lease or Statute Relating to Rights and Compensation of Lessee in Event of Condemnation*, 96 A.L.R. 2 D 1140.

Annotation, *Validity of Exculpatory Clause in Lease Exempting Lessor from Liability*, 49 A.L.R. 3 D 321.

Annotation, *Waiver of Statutory Demand For Rent Due or of Notice To Quit Prerequisite of Summary Eviction of Lessee for Nonpayment of RentModern Cases*, 31 A.L.R. 4 TH 1254.

Annotation, *What Constitutes a "Public" Use Affecting Landlord's Liability to Tenant's Invitees for Defects in Leased Premises*, 17 A.L.R. 3 D 873.

Annotation, *What Constitutes Abandonment of Residential or Commercial LeaseModern Cases*, 84 A.L.R. 4 TH 183.

Annotation, *What Constitutes Willfulness or Malice Justifying Landlord's Collection of Statutory Multiple Damages for Tenant's Wrongful Retention of Possession*, 7 A.L.R. 4 TH 589.

Annotation, *Who, as Between Landlord and Tenant, Must Make, or Bear Expense of, Alteration, Improvements, or Repairs Ordered by Public Authorities*, 22 A.L.R. 3 D 521.

Restatements

Restatement (Second) of Property (1977).

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5-41 Thompson on Real Property, Thomas Editions Supp. to § 41.03

Supp. to § 41.03 Implied Covenants of Landlord Relating to Tenant Possession.

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§ 41.03(b)(2)(iii) Additional Remedial Issues.

Add the following new paragraph after the first paragraph of the section:

The landlord is not the only potential defendant in a lawsuit by a new tenant whose possession has been blocked by a holdover tenant. As indicated in the earlier discussion of the American rule, the new tenant might be able to bring a possessory action against the holdover tenant.[49.1] In an appropriate case, the new tenant might be able to pursue an action against the holdover tenant for interference with the new tenant's contract rights under the new lease.[49.2]

§ 41.03(c) Implied Covenant of Quiet Enjoyment. [Go To Main]

§ 41.03(c)(3) Constructive Eviction by the Landlord.

§ 41.03(c)(3)(ii) Requirement that Tenant Vacate the Leased Premises.

Add the following at the end of the footnote:

Cf JS Properties, L.L.C. v. Brown and Filson, Inc., 914 A.2d 297 (N.J. Super. Ct. App. Div. 2006) (Court questions the advisability of recognizing a constructive eviction claim based upon the malicious filing by the landlord of an eviction suit; states that such a claim "would have a tendency to chill a landlord's right to lawfully seek possession for fear of retaliation in the form of a constructive eviction claim"; in any event, the court rejects the tenant's claim because the

tenant remained on the premises for more than six months after the landlord's eviction suit had been filed).

§ 41.03(c)(6) Consequences of Breach.

§ 41.03(c)(6)(ii) Lease Termination.

Add a second paragraph to footnote165, as follows:

The potential power of a constructive eviction claim is illustrated in *ReliaStar Life Ins. Co. of New York v. Home Depot U.S.A., Inc., 570 F.3d 513 (2d Cir. 2009)* (per curiam). There, a commercial tenant vacated the leased premises after encountering serious defects in the earthen pad that its landlord had constructed on the leased premises. The tenant sought to assert a constructive eviction claim when the landlord's mortgagee (and rent assignee) sued for rent. The trial court entered summary judgment for the mortgagee, focusing on the tenant's execution of an estoppel certificate with respect to the condition of the leased premises, and the tenant's execution of an agreement that unconditionally obligated the tenant to pay rent to the mortgagee. The Second Circuit reversed. It observed that a provision of *Article 9 of the UCC* would permit a good faith assignee for value to take a contract free of ordinary defenses, but it was of the view that a constructive eviction claim was similar to claims of fraud and duress that could be assertable against an assignee. The estoppel certificate expressed the knowledge of the tenant at the time it had been executed, and the court concluded that it did not prevent the tenant from asserting a constructive eviction claim arising out of conditions that the tenant did not know about when it signed the certificate. Although there was a provision stating an unconditional obligation to pay the rent, which the court characterized as a "hell or high water clause," the court thought that constructive eviction would nonetheless terminate the lease and relieve a tenant of rental obligations. The court remanded for, among other things, a determination whether the tenant had been constructively evicted.

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Supp. to § 41.06 The Implied Warranty of Habitability.

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N.H. Rev. Stat. Ann. § 540-A6

§ 41.06(a)(2)(i) Commercial Leases.

Add at the end of the footnote:

And the Texas Supreme Court has determined that the implied warranty can be waived by use of appropriate language in a written lease. *See Gym-N-I Playgrounds, Inc. v. Snider, 220 S.W.3d 905 (Tex. 2007)* .

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Supp. to § 41.08 Prohibitions Against Retaliatory conduct by Landlords.

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§ 41.08(b) Protected Tenant Activities. N.D. Cent. Code § 46-16-07.1

Add two new sentences at the end of the last paragraph in section 41.08(b), as follows:

Another court declined to apply the doctrine to an eviction that the tenant claimed was in retaliation for the tenant's demand for compensation following a slip and fall accident on the leased premises. The court was of the view that assertion of a personal injury claim did not amount to tenant enforcement of rights and remedies under the URLTA. n494.1

Add new footnote 494.1, as follows:

§ 41.08(g) Limits to the Retaliatory Conduct Doctrine. [Go To Main]

Add a new paragraph at the end of section 41.08(g), as follows:

It should also be noted that the tenant's claim of retaliation will not succeed when the landlord retaliates against the tenant for tenant conduct that is outside the scope of the retaliatory conduct doctrine. n543.1

Add new footnote 543.1, as follows:

FOOTNOTES:
(n3)Note 494.1. *See Helfrich v. Valdez Motel Corp., 207 P.3d 552 (Alaska 2009)* .

(n4)Note 543.1. *See, e.g., Helfrich v. Valdez Motel Corp., 207 P.3d 552 (Alaska 2009)* (Tenant claimed that he had been evicted for demanding compensation following a slip and fall accident on the leased premises; the court concluded that assertion of a personal injury claim did not amount to tenant enforcement of rights and remedies under the URLTA).

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Supp. to § 41.09 Rights and Duties Arising Under Tort Law.

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§ 41.09(b) Exceptions to the Traditional Rule. [Go To Main]

§ 41.09(b)(1)(i) The Issue of Landlord Control.

Add the following just before the citation to the Humphrey v. Byron case:

Gilley v. Kiddel, 865 N.E.2d 262 (Ill. Ct. App. 2007) ;

In the second paragraph of the subsection, add the following sentence after the third sentence (immediately after the designation of footnote 567):

In one case, a California court concluded that a commercial landlord had a duty to conduct periodic inspections of the leased premises from the time that the landlord obtained a judgment of possession in an unlawful detainer action, even though the tenant was still in possession of the leased premises.[567.1]

§ 41.09(b)(5) When the Landlord Contracts to Repair.

Add the following to footnote 657, after the reference to the Vieyra case:

Litwack v. Plaza Realty Investors, Inc., 898 N.E.2d 571 (N.Y. 2008) .

§ 41.09(b)(7) Breach of Furnished House Warranty.

Add the following to footnote 683, at the end:

Cf. Reyes v. Egner, 962 A.2d 542 (N.J. Super. Ct. App. Div. 2009) (Tenant's father was injured at a beach house rented on a short term basis for a vacation when he fell while stepping onto an allegedly defective deck; the court reversed summary judgment for the landlord, stating:

> [W]e hold that the lessors' duty should be defined consistent with the precepts of Section 358 of the *Second Restatement*. As we have noted, that provision permits liability, even in the absence of a lessor's concealment, if the plaintiff demonstrates that the lessor has failed to disclose a condition "which involves unreasonable risk of physical harm to persons on the land" if "(a) the lessee does not know or have reason to know of the condition or risk involved, and (b) the lessor knows or has reason to know of the condition, and realizes or should realize the risk involved, and has reason to expect that the lessee will not discover the condition or realize the risk."

962 A.2d at 556 .

§ 41.09(b)(9) Breach of Implied Warranty of Habitability.

Add the following sentence to the last paragraph of the section, immediately after the designation for footnote 707:

In *Isbell v. Commercial Investment Associates, Inc*.,[707.1] the Virginia Supreme Court said that, in adopting that state's version of the Residential Landlord and Tenant Act, the legislature "did not plainly manifest an intention, either through express language or by necessary implication, to abrogate the common law and make a landlord liable in tort ... as a result of the landlord's breach of duties imposed by the Act."[707.2]

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The Modern Movement Toward Imposition of Landlord Liability.

§ 41.09(d)(2)(i) Source of the Landlord's Duty.

Add the following new paragraph, just before the last paragraph of the section:

A landlord duty issue arose in a California case in which a mobile home park tenant was shot by another tenant who was a gang member.[762.1] The injured tenant claimed that the landlord had a duty not to rent to gang members and that the landlord's breach of that duty was the proximate cause of his injuries. The California Supreme Court rejected the claim. Noting that gang members typically do not advertise their gang affiliations in lease applications, the court said that the imposition of such a duty would cause landlords to decline to rent to individuals who *might* be gang members. And the "result in many cases would be arbitrary discrimination on the basis of race, ethnicity, family composition, dress and appearance, or reputation."[762.2] Absent "circumstances showing extraordinary foreseeability," the court declined to recognize such a duty.[762.3]

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Supp. to § 41.12 Bibliography.

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Articles

***Add the following*:**

La Fetra, Deborah J. "A Moving Target: Property Owners' Duty to Prevent Criminal Acts on the Premises." *28 Whittier L. Rev. 409 (2006).*

Schwemm, Robert G. "Why Do Landlords Still Discriminate (And What Can Be Done About It)? *40 J. Marshall L. Rev. 455 (2007).*

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CHAPTER 42 TRANSFER OF LANDLORD AND TENANT INTERESTS

5-42 Thompson on Real Property, Thomas Editions 42.syn

AUTHOR: by Professor Mark W. Cordes Northern Illinois University College of Law

§ 42.syn Synopsis to Chapter 42: TRANSFER OF LANDLORD AND TENANT INTERESTS

§ 42.01 Overview of Landlord and Tenant Transfers.

§ 42.02 Overview of Chapter.

§ 42.03 Transfer of Landlord's Interest.

§ 42.03(a) Landlord's Right to Transfer.

§ 42.03(b) Restrictions on Landlord's Right to Transfer.

§ 42.03(c) Rights and Obligations of Landlord-Transferor.

§ 42.03(d) Rights and Obligations of Transferee.

§ 42.03(d)(1) Rights of Transferee.

§ 42.03(d)(2) Obligations of Transferee.

§ 42.04 Transfer of Tenant's Interest.

§ 42.04(a) Overview.

§ 42.04(b) Right of Tenant to Transfer.

§ 42.04(b)(1) In General.

§ 42.04(b)(2) Restrictions On Transfer.

§ 42.04(b)(2)(i) What Constitutes a Transfer.

§ 42.04(b)(3) Consent Requirements.

§ 42.04(b)(3)(i) General Validity.

§ 42.04(b)(3)(ii) Reasonableness Requirements.

§ 42.04(b)(3)(iii) What Constitutes Unreasonable Withholding of Consent.

§ 42.04(b)(3)(iv) Waiver/Implied Consent.

§ 42.04(b)(3)(v) Effect of a Breach.

§ 42.04(b)(3)(v)(1) Breach by Tenant.

§ 42.04(b)(3)(v)(2) Breach by Landlord.

§ 42.04(c) Requirements for a Valid Transfer.

§ 42.04(d) Distinction Between Assignment and Sublease.

§ 42.04(e) Legal Effect of Assignment and Sublease.

§ 42.04(e)(1) Overview.

§ 42.04(e)(2) Assignments.

§ 42.04(e)(2)(i) Rights and Obligations of Assignee.

§ 42.04(e)(2)(ii) Rights and Obligations of Assignor.

§ 42.04(e)(3) Subleases.

§ 42.04(e)(3)(i) Rights and Obligations of Subtenant.

§ 42.04(e)(3)(ii) Rights and Obligations of Sublessor.

§ 42.05 Bibliography.

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CHAPTER 42 TRANSFER OF LANDLORD AND TENANT INTERESTS

5-42 Thompson on Real Property, Thomas Editions § 42.01

AUTHOR: by Professor Mark W. Cordes Northern Illinois University College of Law

§ 42.01 Overview of Landlord and Tenant Transfers.

The landlord-tenant relationship involves two separate interests in property: a present possessory leasehold estate held by the tenant and a reversion, usually in fee simple, held by the landlord. Absent an agreement to the contrary, both landlords and tenants are free to transfer their respective interests in the lease. Although early common law required a tenant to "attorn" or consent to a landlord transfer, both statutes and case law today provide that landlords are free to transfer their reversions without tenant consent, subject to a few exceptions.

The original lease creates both privity of contract and privity of estate between the landlord and tenant, either of which can serve as a basis of liability between the parties. After transfer of the landlord's reversion, the original landlord retains no ongoing rights against the tenant, since privity of estate ceases to exist and it is assumed that the landlord transferred contract rights to the assignee. Although the landlord no longer remains liable under privity of estate, the landlord does remain liable under privity of contract, since a party cannot unilaterally sever contractual obligations.

The transferee of the landlord's reversion takes the property subject to the existing lease, although state recording acts provide that leases of a certain duration must be recorded or are void. When a transferee takes subject to the lease, the transferee is bound by lease covenants that run with the land. Similarly, the transferee may enforce lease covenants that run with the land.

Issues of consent to transfer sometimes arise. Leases frequently provide that the tenant may not assign the tenant's interest in the land without the consent of the landlord. Courts traditionally held that, unless the lease itself provided that the withholding of consent be reasonable, landlords could refuse consent for any reason. But the trend is clearly in favor of imposing a reasonableness standard on refusing consent. Courts that impose a reasonableness standard typically emphasize the need to avoid unnecessary restraints on alienation and an implied landlord duty to engage in good faith and fair dealing. Where a reasonableness standard is implied or imposed by the lease itself, courts have examined a variety of factors to assess reasonableness, including the financial responsibility of the proposed assignee or subtenant, how the property will be used, the need for alterations, and whether the proposed assignee or subtenant would pose competition problems.

A tenant assignment or sublease that is contrary to the terms of the lease is not void, but rather is voidable at the

landlord's option. Where a landlord breaches a reasonableness standard, the tenant is entitled to consent and may proceed with the assignment or sublease. The tenant may also be entitled to recover consequential damages. Several courts have considered the reasonableness obligation under the rubric of dependency of covenants, with the consequence that the landlord's breach of the reasonableness "covenant" entitles the tenant to terminate the lease and stop paying rent.

Transfer of a tenant's interest can be either by assignment or by sublease. The distinction is an important one, since an assignment places the landlord in privity of estate with the assignee, whereas there is no privity between the original landlord and a subtenant. The traditional and still-dominant test for distinguishing between the two is that a transfer of the entire term is an assignment, whereas transfer for less than the complete term is a sublease. Most courts hold that the retention of a right of entry does not create a sublease, but a significant minority of courts hold that it does. A few courts have also applied an intent test, examining whether the parties intended an assignment or a sublease.

An assignment transfers privity of estate to the assignee, who will be liable for any covenants of the primary lease that run with the land. The assignee remains liable only as long as privity of estate continues, however, and ends with a further assignment, unless the assignee enters into an assumption agreement regarding lease obligations. The tenant remains liable to the landlord under privity of contract, unless there is a novation or agreement otherwise.

Under a sublease, both privity of contract and privity of estate remain with the original tenant, who is liable to the landlord on both grounds. Since the subtenant is not in any privity with the landlord, however, the subtenant is, in general, neither liable to nor can enforce rights against the primary landlord, unless there is an express assumption of obligations under the primary lease. But there could be liability if the requirements for an equitable servitude are satisfied.

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CHAPTER 42 TRANSFER OF LANDLORD AND TENANT INTERESTS

5-42 Thompson on Real Property, Thomas Editions § 42.02

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§ 42.02 Overview of Chapter.

This chapter examines transfers of landlord and tenant interests in property. Section 42.03 examines transfer of the landlord's reversionary interest. Section 42.03(a) examines the landlord's right to transfer, § 42.03(b) discusses restrictions on that right, § 42.03(c) discusses the rights and obligations of the landlord after transfer, and § 42.03(d) discusses the rights and obligations of the transferee.

Section 42.04 examines transfer of the tenant's interest. Section 42.04(a) provides an overview of issues regarding transfer of a tenant's interest, § 42.04(b) concerns the right of a tenant to transfer, landlord consent requirements, and the imposition of reasonableness standards. Section 42.04(c) examines the requirements for a valid transfer. Section 42.04(d) considers the distinction between an assignment and a sublease, and § 42.04(e) examines the legal effect of assignments and subleases.

A bibliography is included in § 42.05.

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CHAPTER 42 TRANSFER OF LANDLORD AND TENANT INTERESTS

5-42 Thompson on Real Property, Thomas Editions § 42.03

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§ 42.03 Transfer of Landlord's Interest.

§ 42.03(a) Landlord's Right to Transfer.

A landlord typically retains a reversion in fee simple absolute after transfer of a leasehold estate. Although a landlord's reversion is freely transferrable today, early English common law required that a tenant "attorn" or assent to the transfer of the landlord's interest for it to be valid. n1 This was likely due to the personal nature of the landlord-tenant relationship. n2 However, the requirement of attornment was eliminated in 1705 by the Statute of Anne, which provided that landlords were free to transfer their reversionary interests in property without the tenant's consent. n3

Landlords clearly have the right to transfer their reversionary interests today. More than twenty states have attornment statutes, which specifically provide that a tenant's "attornment" is unnecessary when a landlord conveys the landlord's interest, n4 thus permitting landlords to freely transfer their interests. In addition, states often have statutes that give assignees of a landlord's reversion the same rights as the landlord. Such statutes have been construed as eliminating the need for attornment. n5 Even in the absence of such statutes, courts have recognized that attornment is unnecessary and that a landlord is free to transfer the landlord's interest. n6 The policy favoring free alienability of land supports such a position, since a landlord's reversion represents a substantial property interest. n7

The alienability of the landlord's interest includes the right to mortgage the property, subject to the lease. n8 The landlord can also transfer a part of the reversion, either by another lease to commence upon termination of the current lease, n9 or by leasing the landlord's reversion itself. This latter device is often referred to as a "concurrent lease," n10 and provides the tenant with the rights of the landlord for a stated term, such as the right to collect rent and enforce terms and conditions of the lease. n11

§ 42.03(b) Restrictions on Landlord's Right to Transfer.

Although generally alienable, a landlord's right to transfer the landlord's interest could be restricted in some situations. First, courts have generally held that a landlord cannot transfer the landlord's interest in a tenancy at will. n12

Second, an inherent restriction on the landlord's right to transfer arguably exists where the landlord provides "significant personal services" that the landlord is "uniquely qualified to provide." n13 This position is taken by the Restatement of

Property which, although generally recognizing the free alienability of the landlord's reversion, states that in limited circumstances a transfer would interfere with reasonable expectations by the tenant and might be prohibited. n14 The comments suggest that this would most likely occur in connection with commercial developments, such as shopping centers, where the landlord might bring unique expertise and status. n15 This would be a rare circumstance, however, and the Restatement cites only one case for the proposition. n16

Finally, the Restatement also provides that the landlord's right to transfer can be subject to a valid tenant consent requirement. n17 Although landlord consent requirements for transfer of the tenant's interest are very common, n18 requirements that the tenant consent to a transfer of the landlord's interest are quite rare. However, the Restatement would hold such consent provisions to the same standard as landlord consent requirements for tenant transfers, meaning that consent cannot be unreasonably withheld unless the parties have freely agreed to "an absolute right to withhold consent." n19

There is virtually no case law addressing the validity of tenant consent requirements on landlord transfers. As the Restatement acknowledges, however, such restraints on alienation are more problematic than those on tenant transfers because they involve a restraint on a fee simple interest, rather than on a leasehold. n20 Courts have traditionally been unwilling to tolerate most restraints on fee simple estates because of the significant impact such restraints potentially have on productive land use, n21 even where the restraint is limited in both duration and scope. n22

Some authority exists, however, for permitting forfeiture and promissory restraints, as opposed to disabling restraints, that are reasonably limited in duration and scope. n23 This would apply to reasonable consent requirements for transfer of a landlord's reversion, which typically take the form of a "promissory restraint" n24 and are limited in duration to the length of the lease. Moreover, the requirement that the withholding of consent be reasonable would mitigate the impact of any actual restraint by limiting it to those rare instances in which the identity of the landlord is uniquely important to the tenant's interest. Courts in other contexts have been willing to permit limited restraints that are reasonable under the circumstances, n25 typically when they are tailored to serve legitimate concerns. In the same way, a reasonableness requirement would limit restraints to instances in which they would serve legitimate concerns. As a practical matter, this would be quite rare with regard to landlord transfers, since a tenant's enjoyment of the lease is rarely dependent upon a particular landlord.

§ 42.03(c) Rights and Obligations of Landlord-Transferor.

The original lease creates both privity of estate and privity of contract between the landlord and the tenant, n26 either of which can serve as a basis for liability between the parties. Privity of estate is premised on the landlord-tenant relationship itself and the shared interest in the land, while privity of contract arises from specific covenants entered into by the parties. n27 Transfer of the landlord's reversion severs privity of estate between the original parties, who remain in privity of contract. n28

A landlord generally retains no on-going rights against the tenant after transfer of the reversion, since privity of estate ceases to exist and it is assumed that the landlord transferred the contract rights to the assignee. n29 Courts have noted, however, that the intention of the parties is controlling and that the original landlord can retain rights to enforce contractual provisions of the lease. n30 Moreover, the original landlord retains the right to sue on tenant breaches that occurred prior to the transfer, n31 unless the transfer includes an express assignment of the cause of action. n32

The scope of landlord-transferor's continuing obligations under the lease is less clear. Although the assignor no longer remains liable under the privity of estate concept, courts have held that the assignor still remains liable under privity of contract, since a party cannot unilaterally sever the party's own obligations. n33 This corresponds to a tenant's continuing liability under privity of contract after an assignment. n34 Thus, the assignor remains liable under the original lease unless there is a clear intent that transfer of the reversion release the assignor from liability. n35 Merely permitting the assignee to undertake the assignor's obligations is not enough. n36

Landlords generally are not liable in tort for injuries that occur after the expiration of a reasonable period of time following transfer of the reversion. For example, where a new owner was aware of a ceiling defect and had time to remedy it, the previous owner/landlord was not held liable for injuries suffered from ceiling plaster falling and injuring a tenant. n37 Similarly, the former owner of a building was not held liable for damages to tenants after the building collapsed, since he no longer had control of the building and could not have prevented the collapse. n38

§ 42.03(d) Rights and Obligations of Transferee.

§ 42.03(d)(1) Rights of Transferee.

"The modern law of covenants running with the land" n39 has its origins in the statute of 32 Henry VIII ch. 34 and its subsequent interpretation in *Spencer's Case*. Although there is some uncertainty, it appears that prior to that time the common law did not permit the landlord to assign covenants to another. n40 Under this early view, the transferee of the landlord was considered a stranger to the lease, which precluded either suing or being sued upon covenants in the lease. n41

This posed a problem to Henry VIII, who had confiscated substantial church property, much of which was leased to tenants. In order to enforce provisions in those leases, including the obligation to pay rent, Henry passed the statute 32 Henry VIII, ch. 34 in 1541. n42 That statute provided that lessors and their assigns had the right to enforce covenants against tenants and their assigns. The statute went further, however, and also provided tenants and their assigns with comparable rights against landlords and their assigns. In essence, therefore, the statute established that both the benefit and the burden of covenants should run to assignees of both the landlord and the tenant.

Although the above statute established that covenants could run to a landlord or tenant's assignee, it was in *Spencer's Case* n43 in 1583 that requirements were set for when they would run. Perhaps most important in the landlord and tenant context, the court indicated that for a covenant to run there must be an intent that it run and that it must touch and concern the land. These were distinguished from "covenants collateral to the land," which did not run. n44

The current American law largely reflects the above principles. A majority of the states currently have statutes based on 32 Henry VII ch. 34, which similarly give assignees of the landlord's reversion the same rights as the landlord. n45 Although the statutes vary in language, the language of the North Carolina statute is typical. It states, *inter alia*, that the "grantee in every conveyance of reversion in lands, tenements or hereditaments has the like advantages and remedies by action or entry against the holders of particular estates in such real property, and their assigns, for nonpayment of rent, and for the nonperformance of other conditions and agreements contained in the instruments by the tenants of such particular estates, as the grantor or lessor or his heirs might have ...." n46 Even in the absence of a statute, courts have consistently held that transferees can sue on covenants in the primary lease that run with the land, under the principles established in *Spencer's Case*. n47

Courts have also held that covenants must meet the requirements of running with the land to be enforceable, even when grounded in a statute. Although there is some language to the contrary, suggesting that the statutes operate independent of running covenant doctrine, n48 courts in jurisdictions with statutes have generally held that, to be enforceable, the covenant must run with the land. n49 This position is consistent with the historical origins of running covenants, since the limitations on running covenants laid down in *Spencer's Case* were imposed pursuant to rights created under the Statute 32 Henry VIII, ch. 34. More importantly, it serves as a practical and common sense limitation on when covenants in the original lease can be enforced by or against subsequent parties.

There are two primary requirements for the benefit or burden of a covenant to run with the land when the landlord's reversion is transferred. n50 First, the parties must intend for the benefit or burden to run. n51 As a practical matter, courts today assume that the covenants are to run unless a contrary intent is clearly shown. n52

The second, and more critical, requirement is that the covenant touch and concern the property. n53 The gist of this requirement is to distinguish between merely personal covenants, which do not run, and those that concern the land itself. Courts have not been successful in clearly articulating a touch and concern test. At times they have suggested standards such as whether the covenant affects the value of the property, n54 that it have an "actual connection with the land," n55 or that it "relates directly to the property." n56 Other formulations require that the covenant affect the legal relations of the parties as owners of the land n57 or that "its performance directly affects the rights of the parties with respect to their interests in the land." n58

Despite the often ambiguous nature of the proffered tests, the majority of lease covenants are deemed to touch and concern the land and thus run to assignees of the reversion. n59 Indeed, courts often simply state that the rights and benefits of the landlord go to the transferee as the new landlord, without a rigorous analysis of whether they run with the land. n60 This is understandable, since typical lease provisions easily meet the requirements for touch and concern. For example, a tenant's covenant to pay rent, n61 to remove fixtures, n62 to surrender the premises in a particular condition, n63 or to make repairs n64 have all been held to touch and concern the property and are assignable to the transferee.

At times, however, it is more debatable whether a particular provision touches and concerns the land. For example, a covenant for the appointment of an agent for service of process was held to be a covenant that was personal to the original landlord, and thus not binding on transferees. n65 And it was held that a seal on a lease, which extended the statute of limitations for lawsuits on rent from three to ten years, is not a covenant at all. n66

Notice of the transfer is an issue in some cases. Where a covenant touches and concerns the land, and is therefore assignable, it has been held that the transferee of the reversion is required to give the tenant notice of the transfer. Until notice is given, the tenant is not obligated to perform the covenant for the benefit of the transferee. n67

Although transferees generally take all rights and benefits of their predecessors that run with the land, they are limited by the nature of the primary lease and can take no greater rights than their landlord had. n68 Thus, they take subject to any deficiencies in the primary lease. n69 Moreover, courts have consistently held that the transferee takes subject to waivers or modifications of lease provisions by the original landlord, of which the transferee had notice. n70

A transferee's taking subject to waivers and modifications created by the transferee's predecessor is generally assumed to require notice. Although courts often state that a tenant's possession is notice to a transferee of any rights the tenant can establish, n71 this principle is arguably limited to waivers or modifications readily apparent from an inspection of the property. n72 For example, a transferee will be deemed to have notice of any waiver of use restrictions on the property, since they would be readily apparent from inspection. Conversely, a waiver of timely rent payment is not apparent, and thus not binding on a transferee without actual notice. n73

Consistent with the above, courts have also held that a transferee takes subject to conditions of the premises at the time of the transfer. Thus, where the previous landlord allowed a tenant to occupy more space than permitted under the lease, and to install a refrigerator room and locker in that space, the transferee took subject to those conditions. n74 Similarly, a transferee cannot sue for breaches prior to transfer, but is limited to post-transfer breaches, unless there is an express assignment of a related cause of action. n75 However, a transferee can sue for a breach which, though initially occurring prior to the transfer, continues after the transfer. n76

§ 42.03(d)(2) Obligations of Transferee.

The transferee of the landlord's reversion takes the property subject to the existing lease and covenants that run with the land. n77 State recording acts, however, generally provide that leases of a certain duration, typically three years or longer, must be recorded or they will be void against subsequent bona fide purchasers without notice. n78 Although recording puts subsequent purchasers on constructive notice of a tenant's interest, a transferee is also subject to actual or

inquiry notice of any tenants in possession. Thus, even if a tenant has failed to properly record a lease, the grantee is deemed to have notice of a tenant's actual occupation of the property, and takes subject to the lease. n79

By this reasoning the purchaser at a foreclosure sale takes the property subject to a pre-mortgage lease, since the mortgage was taken on property already encumbered by the lease. n80 The reverse is generally true if the lease is junior to the mortgage -- the foreclosure will extinguish the junior lease. n81 However, if the foreclosing mortgagee does not join the junior lessee in the foreclosure action, the majority rule is that the lease is unaffected by the foreclosure. n82 Application of the majority rule gives the mortgagee an option to have the property sold subject to the junior lease (by choosing not to join the lessee in the foreclosure action), or to have the property sold free of the lease at the foreclosure sale (by choosing to join the lessee in the foreclosure action). n83 Some courts also recognize an ability in the foreclosure purchaser to choose to terminate a post-mortgage lease or to affirm the lease. n84 The post-foreclosure persistence of a lease can also be affected by subordination agreements. n85

When a transferee takes subject to a lease, the transferee is bound by lease covenants that run with the land. At least a dozen states have statutory provisions, derivative of the statute of 32 Henry VIII ch. 34, n86 that give tenants the same rights against assignees of the landlord as against the landlord. n87 Even in the absence of a statute, courts have consistently recognized that the transferee takes subject to burdens that run with the land. n88

As was discussed with the transferee's rights, covenants that impose obligations will generally run to a transferee where there is intent that they run and where they touch and concern the property. n89 Courts assume there was an intent that obligations be shifted to the transferee, unless otherwise clearly stated. Courts have also used a similar analysis for touch and concern, examining whether the obligation lessens the value of the promisor's interest in the property. n90

As was true with benefits, most lease obligations touch and concern and therefore run with the land. For example, landlord covenants to repair, n91 to restore destroyed property, n92 to furnish parking n93 and a tenant's right to renew the lease n94 have all been found to run with the land to subsequent owners.

One particularly problematic issue is whether the obligation to return security deposits runs with the land. n95 A majority of cases have held that the duty does not run with the land and therefore the grantee-landlord is not bound by the promise to return the deposit, n96 at least where the deposits were not actually transferred to the grantee. One case reasoned that unless the security deposit agreement specifically required that the moneys be used to benefit the land, which it did not, it did not touch and concern the property. n97 Often, courts have emphasized that the obligation is a personal one, and does not run to a subsequent landlord who had not received the moneys. n98

Several courts, however, have held that the promise to return the security deposit runs to a subsequent grantee, even where the funds were never transferred to the grantee. n99 In so holding, one court relied on a statute providing tenants with the same remedies against the landlord's assignee as against the landlord. It also emphasized that since the assignee received the benefits of the landlord-tenant relationship, it necessarily should incur its obligations. n100

Additionally, a number of states have statutes that impose different degrees of obligation on transferees of the reversion for return of the deposit. n101 Some statutes, including the Uniform Residential Landlord and Tenant Act, n102 provide that transferees of the reversion are bound by provisions of security deposit legislation that require that they return deposits at the end of the tenancy. n103 Other states have statutes that expressly require that the security deposits be transferred to the landlord's successor in interest who then becomes liable to the tenant for the security deposit. n104 Finally, several statutes provide that upon transfer of the landlord's interest, the landlord must either transfer the security deposit to the transferee, or return the deposit to the tenant. n105

The liability of a transferee is generally limited to breaches that arise after, rather than before, the transfer. n106 However, the transferee is liable for breaches which, though initially occurring prior to transfer, constitute a continuing violation. n107 For example, a covenant not to compete or a covenant to repair, though initially breached by the original

landlord, will also constitute a breach by the transferee if the condition continues after the transfer, with recovery against the transferee limited to that post-transfer period. n108 The transferee will also be held liable for damages and liabilities of the previous owner where there is an express assumption. n109

FOOTNOTES:

(n1)Footnote 1. *See* 1 American Law of Property § 3.60 (James Casner, ed. 1952).

(n2)Footnote 2. *See id.* Herbert T. Tiffany, The Law of Real Property § 115 (3d ed. 1939).

(n3)Footnote 3. *See* 1 American Law of Property § 3.60 (James Casner, ed. 1952).

(n4)Footnote 4. *See Ala. Code 35-4-32*; *Cal. Civ. Code § 1111*; Iowa Code Ann. § 562; Ind. Stat. Ann. § 32-31-1-10; *Kan. Stat. Ann. § 58-2513*; *Ky. Rev. Stat. Ann. § 383.100*; Md. Real Prop. Code Ann. § 8-104; *Miss. Code Ann. § 89-7-17*; *Mo. Ann. Stat. § 441.140*; *Nev. Rev. Stat. § 111.090*; *N.J. Stat. Ann. § 46:3-8*; *N.C. Gen. Stat. § 42-2*; *N.D. Cent. Code § 47-10-20*; Okla. Rev. Stat. tit. 41, § 119; *S.C. Code Ann. § 27-11-60*; S.D. Comp. Laws § 43-25-28; Tenn. Ann. § 66-5-106; *Vt. Stat. Ann. tit. 12 § 2805*; *Va. Code Ann. § 55-220*; *W. Va. Code § 37-6-3*; *Wis. Stat. Ann. § 704.13*. *See also Minn. Stat. § 504B.121* (tenant in possession of real property under a lawful lease may not deny the landlord's title in an action brought by the landlord to recover possession).

(n5)Footnote 5. *See* 1 American Law of Property § 3.60 (James Casner, ed. 1952).

(n6)Footnote 6. *See Stasyszyn v. Sutton E. Assocs., 623 N.Y.S.2d 879 (App. Div. 1995)* ; *Rafolin Constr. Corp. v. Lippman, 457 N.Y.S.2d 712 (1982)* ; *Avenue Plaza, L.L.C. v. Falgoust, 654 So. 2d 838 (La. App. 1995)* ; *cf. Westport Land Properties, Inc. v. Latham, 875 S.W.2d 630 (Mo. Ct. App. 1994)* (attornment unnecessary where tenant agreed in lease to be bound to landlord's successors and assigns).

(n7)Footnote 7. *See* Restatement of Property (Second) § 15.1 cmt. a (1977).

(n8)Footnote 8. *See Miller v. Lemon Tree Inn of Roanoke Rapids, 233 S.E.2d 69, 72 (N.C. App. 1977)* .

(n9)Footnote 9. This is commonly known as a "lease in reversion". *See* 3 Milton R. Friedman, Friedman on Leases § 36.6 (3d ed. 1990).

(n10)Footnote 10. *See* 1 American Law of Property § 3.59 (James Casner, ed. 1952); 3 Milton R. Friedman, Friedman on Leases § 36.6 (3d ed. 1990).

(n11)Footnote 11. *See* 3 Milton R. Friedman, Friedman on Leases § 36.6 (3d ed. 1990).

(n12)Footnote 12. *See* Restatement (Second) of Property § 15.1(1) (1977).

(n13)Footnote 13. *See* Restatement (Second) of Property § 15.1 (1977).

(n14)Footnote 14. *Id.*

(n15)Footnote 15. *Id.*

(n16)Footnote 16. *See* Restatement (Second) of Property § 15.1 Reporter's Note 4 (1977) (*citing Moore v. Thompson, 67 S.W.2d 680 (Mo. App. 1902))* .

(n17)Footnote 17. *See* Restatement (Second) of Property § 15.1 (1977).

(n18)Footnote 18. *See* § 42.04, *infra*.

(n19)Footnote 19. *See* Restatement (Second) of Property § 15.1 (1977).

(n20)Footnote 20. *See* Restatement (Second) of Property § 15.2 reporter's note 3 (1977).

(n21)Footnote 21. *See generally* William B. Stoebuck & Dale A. Whitman, The Law of Property § 2.2 (3d ed. 2000).

(n22)Footnote 22. *See* William B. Stoebuck & Dale A. Whitman, The Law of Property 31 (3d ed. 2000).

(n23)Footnote 23. *See* William B. Stoebuck & Dale A. Whitman, The Law of Property 31 (3d ed. 2000).

(n24)Footnote 24. *See* Restatement (Second) of Property § 15.2 cmt. d (1977).

(n25)Footnote 25. *See, e.g. , Smith v. Mitchell, 269 S.E.2d 608 (N.C. 1980)* (preemptive purchase right valid because reasonable).

(n26)Footnote 26. *See, e.g., Mrotek Enters. v. Dryer, 256 A.2d 557 (D.C. App. 1969)* ; *Italian Fisherman, Inc. v. Middlemas, 545 A.2d 1 (Md. App. 1988)* ; *see also* S. Kurtz and H. Hovenkamp, Property 540-541 (2d ed. 1993); *cf. P.S.G. v. August Income Growth Fund III, 855 P.2d 1043 (N.M. 1993)* (a lease is both a conveyance and a contract ,which results in two types of rights: property rights and contract rights).

(n27)Footnote 27. *See Italian Fisherman, Inc. v. Middlemas, 545 A.2d 1 (Md. App. 1988)* ; *see also*, S. Kurtz and H. Hovenkamp, Property 540-541 (2d ed. 1993).

(n28)Footnote 28. *See Vallely Inv., L.P. v. BancAmerica Commercial Corp., 106 Cal. Rptr. 2d 689 (Cal. Ct. App. 2001)* ; 1 American Law of Property § 3.63 (James Casner ed. 1952).

(n29)Footnote 29. *See* R. Schoshinski, American Law of Landlord and Tenant § 8.4 (1980); *see also* 3 Milton R. Friedman, Friedman on Leases § 3.64 (3d ed. 1990).

(n30)Footnote 30. *See Commonwealth Mem., Inc. v. Telophase Soc'y of Am., Inc., 134 Cal. Rptr. 58 (Cal. App. 1976)* .

(n31)Footnote 31. *See Ginsberg v. Austin, 968 F.2d 1198 (Fed. Cir. 1992)* ; *Richey v. Stop N Go Mkts. of Tex., 654 S.W.2d 430 (Tex. 1983)* .

(n32)Footnote 32. *See Cote v. A. J. Bayless Mkts., Inc., 626 P.2d 602 (Ariz. App. 1981)* ; *Richey v. Stop N Go Mkts. of Tex., 654 S.W.2d 430 (Tex. 1983)* .

(n33)Footnote 33. *See Intaglio Serv. Corp. v. J. L. Williams, 420 N.E.2d 634, 639-40 (Ill. App. 1981)* .

(n34)Footnote 34. *See* § 42.04(d)(2), *infra*.

(n35)Footnote 35. *See Vallely Inv., L.P. v. BancAmerica Commercial Corp., 106 Cal. Rptr. 2d 689 (Cal. App. 4th Dist. 2001)* (Assignor remains liable to landlord absent an express release); *Won's Cards, Inc., v. Samsondale/Haverstraw Equities, Ltd., 165 566 N.Y.S.2d 412 (1991)* (original lease clearly stated that transfer of reversion released original landlord from liability).

(n36)Footnote 36. *Montgomery Ward & Co. v. Wetzel, 423 N.E.2d 1170 (Ill. App. 1981)* (tenant agreement to accept performance of repayment obligation from assignee did not show clear intent to release original landlord).

(n37)Footnote 37. *See Levine v. 465 West End Ave. Assocs., 461 N.Y.S.2d 283 (N.Y. App. 1983)* .

(n38)Footnote 38. *See Spink v. Cohen, 548 N.Y.S.2d 460 (N.Y. App. 1989)* .

(n39)Footnote 39. Bordell, *English Property Reforms and Its American Aspects, 37 Yale L.J. 1, 18 (1927).*

(n40)Footnote 40. *See* 3 Milton R. Friedman, Friedman on Leases § 36.1 (3d ed. 1990).

(n41)Footnote 41. *See* 3 Milton R. Friedman, Friedman on Leases § 36.1 (3d ed. 1990); C. Moynihan, Introduction to the Law of Real Property 92 n.2 (2d ed. 1988); Annotation, 34 A.L.R. 782-784 (1925) .

(n42)Footnote 42. *See* Powell on Real Property(R) P 248.(3) (Michael Allan Wolf ed., LexisNexis Matthew Bender).

(n43)Footnote 43. *See* Spencer's Case, 5 Co. Rep. 16a. *77 Eng. Rep. 72 (K.B. 1583)* .

(n44)Footnote 44. *Id.* For general discussions of *Spencer's Case* as it applies to landlord and tenant law, *see* R. Schoshinski, American Law of Landlord and Tenant § 8.2 (1980).

(n45)Footnote 45. *See Ala. Code §§ 35-9-9, 35-9-65*; *Ariz. Rev. Stat. Ann. § 33-362*; *Cal. Civ. Code § 822*; *Conn. Gen. Stat. Ann. § 47-29*; *Del. Code Ann. tit. 25 § 6704*; *Ga. Code Ann. § 44-14-344*; *Idaho Code §§ 55-301 - 55-302*; *735 Ill. Comp. Stat. Ann. 5/9-215*; *Ind. Code Ann. § 32-31-1-13*; *Kan. Stat. Ann. § 58-2516*; *Md. Code Ann. Real Prop. § 8-101*; *Miss. Code Ann. § 89-7-15*; *Mo. Ann. Stat. § 441.230*; *Mont. Code Ann. § 70-26-105*; *N.H. Rev. Stat. Ann. § 540:27*; *N.J. Stat. Ann. § 46:8-2*; *N.M. Stat. Ann. § 47-1-24*; *N.Y. Real Prop. Law § 223*; *N.C. Gen. Stat. § 42-8*; *N.D. Cent. Code §§ 47-16-28, 47-16-30*; Okla. Rev. Stat. tit. 41, § 15; *Pa. Stat. Ann. tit. 68, § 250.104*; *R.I. Gen. Laws § 34-11-28*; *S.C. Code Ann. § 27-35-50*; S.D. Comp. Laws § 43-32-20; *Va. Code Ann. § 55-217*; *W. Va. Code § 37-6-1*; *Wis. Stat. Ann. § 704.09(4)*; *see also*, Restatement (Second) of Property § 16.2 statutory note 1 (1977) (citing many of above statutes).

(n46)Footnote 46. *N.C. Gen. Stat. § 42-8*.

(n47)Footnote 47. *See, e.g., Arroyo v. Rosenbluth, 454 N.Y.S.2d 610 (1982)* ; *Cote v. A. J. Bayless Mkts., Inc., 626 P.2d 602 (Ariz. App. 1982)* .

(n48)Footnote 48. *See Word v. Tiber, 491 A.2d 521 (D.C. Ct. App. 1985)* (suggesting that under statute court need not decide whether covenant runs with land, since statute gives assignee all rights of assignor).

(n49)Footnote 49. *See, e.g., Anderson v. Island Creek Coal Co., 297 F. Supp. 283 (W.D. Ky. 1969)* ; *see also Mrotek Enters. v. Dryer, 256 A.2d 557 (D.C. Ct. App. 1969)* ; *Murphrey v. Winslow, 318 S.E.2d 849 (W. Va. 1984)* , rev'd on other grounds, *327 S.E.2d 878 (N.C. 1985)* .

(n50)Footnote 50. Standard analysis for running covenants also requires that there be horizontal privity between the original parties to the covenant and vertical privity between the assignor and assignee. *See* William B. Stoebuck & Dale A. Whitman, The Law of Property §§ 8.17 - 8.18 (3d ed. 2000). The landlord-tenant relationship itself, however, provides sufficient horizontal privity, *see id.* § 8.18, and thus does not necessitate additional inquiry when discussing whether covenants run to a transferee of the landlord's reversion. Similarly, transfer of the landlord's reversion establishes the requirement of vertical privity. *See id.* § 8.17.

(n51)Footnote 51. *See generally*, Restatement (Second) of Property, §§ 15.1 - 15.2.

(n52)Footnote 52. *See Kirk Corp. v. First Am. Title Co., 270 Cal. Rptr. 24 (Cal. App. 1990)* ; *Blankenau v. Landess, 626 N.W.2d 588 (Neb. 2001)* (when land that is subject to a lease is sold the terms of the lease run with the land)*; see also MHW Ltd. Family P'ship v. Farrokhi, 693 N.W.2d 66 (S.D. 2005)* (court held that a grant of a reversion conveyed to a transferee gives the transferee the right to recover rent required by a preexisting lease; the deed provided no evidence through its words that indicated that the lessor reserved its rights to the lease.)

(n53)Footnote 53. *See, e.g., Arroyo v. Rosenbluth, 454 N.Y.S.2d 610 (N.Y. Cir. Ct. 1982)* ; *Mrotek Enters. v. Dryer,*

256 A.2d 557 (D.C. Ct. App. 1969) ; *see also Neponsit Prop. Owners' Ass'n v. Emmigrant Indus. Sav. Bank, 15 N.E.2d 793 (N.Y. 1938)* . *See generally* Restatement (Second) of Property § 16.2 (1977).

(n54)Footnote 54. *See Peters v. Stone, 79 N.E. 336 (Mass. 1905)* .

(n55)Footnote 55. *See Mrotek Enters., Inc. v. Dryer, 256 A.2d 557 (D.C. App. 1969)* .

(n56)Footnote 56. *See Smith v. Gulf Ref. Co., 134 S.E. 446 (Ga. 1926)* .

(n57)Footnote 57. *See Nicholson v. 300 Broadway Realty Corp., 164 N.E.2d 832 (N.Y. 1959)* ; *Neponsit Prop. Owners' Ass'n v. Emigrant Indus. Sav. Bank, 15 N.E.2d 793 (N.Y. 1938)* .

(n58)Footnote 58. C. Moynihan, Introduction to the Law of Real Property 96 (2d ed. 1988).

(n59)Footnote 59. *See* 3 Milton R. Friedman, Friedman on Leases § 36.4 (3d ed. 1990).

(n60)Footnote 60. *See, e.g., City of St. Petersburg v. Competition Sales, Inc., 449 So. 2d 852 (Fl. App. 1984)* ; 815 *Park Owners, Inc., v. West LB Admin., Inc., 463 N.Y.S.2d 1015, 1017 (1983)* .

(n61)Footnote 61. *See, e.g., Anderson v. Island Creek Coal Co., 297 F. Supp. 283 (W.D. Ky. 1969)* ; *Bobhic Assocs. v. Carrabba OB-GYN, 692 A.2d 826 (Conn. Ct. App. 1997)* (assignee of landlord's interest has right to rents due and payable subsequent to the conveyance); *MHW Limited Family P'ship v. Farrokhi, 693 N.W.2d 66 (S.D. 2005)* (according to statute, landlord's successor-in-interest was entitled to unpaid rent because former landlord had not reserved any rights to the lease).

(n62)Footnote 62. *See Clemente Bros., Inc. v. Peterson-Ashton Fuels, Inc., 287 N.Y.S.2d 955, 959 (1968)* .

(n63)Footnote 63. *See Griffin Grocery Co. v. McBride, 217 Ark. 949, 235 S.W.2d 38 (Ark. 1951)* .

(n64)Footnote 64. *See, e.g., Foss v. Stanton, 57 A. 942 (Vt. 1904)* ; *Bailey v. Meade, 144 N.E. 110 (Mass. 1924)* .

(n65)Footnote 65. *See Mrotek Enters. v. Dryer, 256 A.2d 557 (D.C. App. 1969)* .

(n66)Footnote 66. *See Murphrey v. Winslow, 318 S.E.2d 849 (N.C. Ct. App. 1984)* , rev'd on other grounds, *327 S.E.2d 878 (N.C. 1985)* (however, court concluded that the seal was an "advantage" or remedy by action that came within the coverage of a statute giving rights to assignees of the lessor).

(n67)Footnote 67. *See Snortland v. Olsonawski, 238 N.W.2d 215 (Minn. 1976)* ; *Mobil Oil Corp. v. First W. Sav. Ass'n, 614 P.2d 6 (Nev. 1980)* (per curiam). This is an application of the concept that, although notice to an obligor is not essential to the validity of an assignment as between an assignor and an assignee, until such notice has been given, the obligor may continue to regard the assignor as the owner of the interest or the thing assigned. *See Pillsbury Inv. Co. v. Otto, 65 N.W.2d 913 (Minn. 1954)* .

(n68)Footnote 68. *See Orange Improvements Partnership v. Cardo, Inc., 984 F. Supp. 85 (D. Conn. 1994)* ; *Turner Commun. Corp. v. Hickcox, 289 S.E.2d 260, 263 (Ga. App. 1982)* ; *Grey v. Wilson, 554 S.W.2d 867 (Ky. App. 1977)* , rev'd on other grounds, *560 S.W.2d 561 (Ky. 1978)* .

(n69)Footnote 69. *See Balram v. Etheridge, 449 N.Y.S.2d 389, 391 (N.Y. Cir. Ct. 1982)* .

(n70)Footnote 70. *See, e.g., Word v. Tiber Island Co-op Homes, Inc., 491 A.2d 521 (D.C. App. 1985)* ; *Tehan v. Thomas Peters Printing, Inc., 421 N.Y.S.2d 465 (App. Div. 1979)* ; see also *Haslacha, Inc. v. Jubilee, Inc., 801 N.Y.S.2d 777 (Civ. Ct. 2005)* (contrary to Tehan, in the present case the petitioner could not prevail on the issue in the Notice to Cure; court said in this case a painting was readily apparent and therefore the presence of the painting fits within the

rule demanding requisite notice to a new successor.)..

(n71)Footnote 71. *See, e.g., Adelson v. Sacred Assocs. Realty Corp., 183 N.Y.S. 265 (1920)* .

(n72)Footnote 72. *See Tehan v. Thomas Peters Printing, Inc., 421 N.Y.S.2d 465 (App. Div. 1979)* ; *Rocky 116 L.L.C. v. Weston, 717 N.Y.S.2d 823 (N.Y. 2000)* ("The key to the liability of the successor in interest is notice of the relevant lease provisions or waiver thereof.").

(n73)Footnote 73. *Id.*

(n74)Footnote 74. *See Laten v. Prajo, Inc., 222 A.2d 707, 708 (D.C. App. 1966)* .

(n75)Footnote 75. *See, e.g., Cote v. A.J. Bayless Mkts., Inc., 626 P.2d 602 (Ariz. Ct. App. 1982)* ; *Richey v. Stop N Go Mkts. of Tex., 654 S.W.2d 430 (Tex. 1983)* ; *Berman v. Sinclair Ref. Co., 451 P.2d 742 (Colo. 1969)* .

(n76)Footnote 76. *See Childs v. Goode, 548 S.W.2d 827 (Ark. 1977)* ; cf. *Elca Enters., Inc. v. Sisco Equip. Rental & Sales, Inc., 53 F.3d 186 (8th Cir. 1995)* (transferee of landlord's interest could be substituted as party in landlord's action against former tenants).

(n77)Footnote 77. *See, e.g., Arroyo v. Rosenbluth, 454 N.Y.S.2d 610 (1982)* ; *Financial Land Corp. v. Visible Difference, Inc., 639 N.E.2d 795 (Ohio Ct. App. 1994)* ; 3 Milton R. Friedman, Friedman on Leases § 36.4 (3d ed. 1990).

(n78)Footnote 78. *See, e.g., Ohio Rev. Code §§ 5301.08, 5301.25*; *Avenue Plaza, L.L.C. v. Falgoust, 654 So. 2d 838 (La. Ct. App. 1995)* .

(n79)Footnote 79. *See In re Fry Bros. Co., 52 B.R. 169 (S.D. Ohio 1985)* .

(n80)Footnote 80. *See* Grant S. Nelson & Dale A. Whitman, Real Estate Finance Law § 7.12 (4th ed. 2001); *DeMarco v. City of Philadelphia, 494 A.2d 875 (Pa. Comm. 1985)* .

(n81)Footnote 81. *See* Grant S. Nelson & Dale A. Whitman, Real Estate Finance Law § 7.12 (4th ed. 2001).

(n82)Footnote 82. *See* Grant S. Nelson & Dale A. Whitman, Real Estate Finance Law § 7.12 (4th ed. 2001).

(n83)Footnote 83. *See* Grant S. Nelson & Dale A. Whitman, Real Estate Finance Law § 7.12 (4th ed. 2001).

(n84)Footnote 84. *See Reilly v. Firestone Tire and Rubber Co., 764 F.2d 167 (3d Cir. 1985)* (applying Pennsylvania law); *cf. First Interstate Bank v. Tanktech, Inc., 864 P.2d 116 (Colo. 1993)* (lease extinguished).

(n85)Footnote 85. *See, e.g., HRPT Advisors v. McDonald, Levine, Jenkins & Co., 43 Mass. App. Ct. 613, 686 N.E.2d 203 (Mass. Ct. App. 1997)* (bank subordinated its mortgage to a lease); *See* Grant S. Nelson & Dale A. Whitman, Real Estate Finance Law § 12.9 (4th ed. 2001)(discussion of subordination agreements).

(n86)Footnote 86. *See* § 42.03(D)(1), *infra*.

(n87)Footnote 87. *See* & *Ala. Code 1975 § 35-9-10*; *Cal. Civ. Code § 823*; *Idaho Code Ann. § 55-303*; *735 Ill. Comp. Stat. Ann. 5/9-216*; *Ind. Code Ann. § 32-31-1-13*; *Kan. Stat. Ann. § 58-2516*; *Miss. Code Ann. § 89-7-21*; *Mont. Code Ann. § 70-26-106*; *N.J. Stat. Ann. § 46:8-3*; *N.C. Gen. Stat. § 42-8*; *N.D. Cent. Code § 47-16-29*; Okla. Rev. Stat. tit. 41 § 15; S.D. Comp. Laws § 43-32-21.

(n88)Footnote 88. *See, e.g., Arroyo v. Rosenbluth, 454 N.Y.S.2d 610 (1982)* .

(n89)Footnote 89. *See Neponsit Property Owners' Ass'n v. Emigrant Indus. Sav. Bank, 15 N.E.2d 793 (N.Y. 1938)* ;

Mullendore Theaters, Inc., v. Growth Realty Invs. Co., 691 P.2d 970 (Wash. App. 1984) .

(n90)Footnote 90. *See Arroyo v. Rosenbluth, 454 N.Y.S.2d 610 (1982)* ; *see also Nicholson v. 300 Broadway Realty Corp., 164 N.E.2d 832 (N.Y. 1959)* .

(n91)Footnote 91. *See City of St. Petersburg v. Competition Sails, Inc., 449 So.2d 852 (Fla. Ct. App. 1984)* .

(n92)Footnote 92. *See Arroyo v. Rosenbluth, 454 N.Y.S.2d 610 (1982)* .

(n93)Footnote 93. *See Bank of New York v. Hirschfeld, 45 A.D.2d 670, 361 N.Y.S.2d 54, 56 (1974)* .

(n94)Footnote 94. *See Bickford v. Dillon, 71 N.E.2d 611 (Mass. 1947)* .

(n95)Footnote 95. For an in-depth discussion, *See generally*, R. Schoshinski, American Law of Landlord and Tenant § 6.35 (1980).

(n96)Footnote 96. *See Federated Mtg. Invs. v. American S & L Ass'n, 121 Cal. Rptr. 137 (Cal. 1975)* ; *McDonald's Corp. v. Blotnik, 328 N.E.2d 897 (Ill. App. 1975)* ; *Central Savings Bank v. Fashoda, Inc., 463 N.Y.S.2d 335 (1983)* ; *Mauro v. Alvino, 90 Misc. 328, 152 N.Y.S. 963 (1915)* ; *Kaufman v. Williams, 104 A. 202 (N.Y. 1918)* ; *Tuteur v. P. & F. Enters., 21 Ohio App. 2d 122, 50 Ohio Op. 2d 219, 255 N.E.2d 284 (Ohio App. 1970)* ; *Mullendore Theaters, Inc. v. Growth Realty Invs. Co., 691 P.2d 970 (Wash. Ct. App. 1984)* .

(n97)Footnote 97. *See Mullendore Theaters, Inc. v. Growth Realty Invs. Co., 691 P.2d 970 (Wash. App. 1984)* .

(n98)Footnote 98. *See, e.g., McDonald's Corp. v. Blotnik, 328 N.E.2d 897 (Ill. App. 1975)* .

(n99)Footnote 99. *See Moskin v. Goldstein, 196 N.W. 415 (Mich. 1923)* ; *Bay View State Bank v. Liber, 148 N.W.2d 122 (Wis. 1967)* .

(n100)Footnote 100. *See Bay View State Bank v. Liber, 148 N.W.2d 122 (Wis. 1967)* .

(n101)Footnote 101. *See generally* R. Schoshinski, American Law of Landlord and Tenant § 6.35 (1980).

(n102)Footnote 102. *See* U.R.L.T.A. §§ 2.101(a), 2.105(a).

(n103)Footnote 103. *See Alaska Stat. § 34.03.070*; *Ariz. Rev. Stat. § 33-1321*; *Hawaii Rev. Stat. § 521-44*; *Idaho Code § 6-321*; *765 Ill. Comp. Stat. Ann. 710/1.1*; *Ind. Code Ann. § 32-31-3-12*; Md. Real Prop. Code § 8-203; *Neb. Rev. Stat. § 76-1416*; *N.D. Cent. Code § 47-16-07.1*; *Or. Rev. Stat. § 90.300*; *R.I. Gen. Laws § 34-18-19*; *S.C. Code Ann. § 27-40-410*; *Tex. Prop. Code § 92.105*; *Va. Code Ann. § 55-248.15:1*.

(n104)Footnote 104. *See Conn. Gen. Stat. Ann. § 47a-21*; *Fl. Stat. Ann. § 83.49*; La. Civ. Code Ann. § 3251; First Amendment; First Amendment; First Amendment; First Amendment; *Vt. Stat. Ann. tit. 9 § 4461*; Article III of the Constitution.

(n105)Footnote 105. *See* Article III of the Constitution; *Colo. Rev. Stat. § 38-12-103*; *Me. Rev. Stat. Ann. tit. 14 § 6035*; *Minn. Stat. Ann. § 504B.178*; *N.C. Gen. Stat. § 42-54*; Okla. Rev. Stat. tit. 41 § 115.

(n106)Footnote 106. *See e.g., Berman v. Sinclair Ref. Co., 451 P.2d 742 (Colo. 1969)* ; *Regency Advantage Ltd. Partnership v. Bingo Idea-Watauga, Inc., 936 S.W.2d 275 (Tex. 1996)* ; *Richey v. Stop N Go Mkts. of Tex., 654 S.W.2d 430 (Tex. 1983)* .

(n107)Footnote 107. *See Childs v. Goode, 548 S.W.2d 827, 828 (Ark. 1977)* .

(n108)Footnote 108. *See Won's Cards, Inc. v. Samsondale Equities, Ltd., 566 N.Y.S.2d 412* (App, Div. 1991) .

(n109)Footnote 109. *See Ames v. George Victor Corp., 424 N.W.2d 106 (Neb. 1988)* .

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CHAPTER 42 TRANSFER OF LANDLORD AND TENANT INTERESTS

5-42 Thompson on Real Property, Thomas Editions § 42.04

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§ 42.04 Transfer of Tenant's Interest.

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§ 42.04(a) Overview.

Courts have long held that, absent an agreement to the contrary, tenants are free to transfer, in whole or part, their possessory interests in the lease. Such transfers can take two forms: assignments or subleases. Courts have historically found an assignment where the tenant transfers the entire term to an assignee, and retains no reversionary interest. n110 A sublease is found where the tenant retains some reversionary interest in the leasehold, n111 although a slight majority of courts require that it be more than a mere right of entry. n112

Although tenants are generally free to transfer their interests, courts have consistently held that the right to transfer can be made subject to the landlord's prior consent. n113 Although such a consent requirement is a restraint on alienation, the on-going and personal nature of the landlord-tenant relationship justifies recognition of consent requirements. The traditional and still majority position does not require that withholding consent be reasonable, but permits arbitrary refusals. n114 A significant and near-equal number of cases now require that a refusal to consent be reasonable. n115 Several courts have held that a refusal to consent must be reasonable, unless the lease expressly provides that the landlord may withhold consent for any reason. n116

Where a reasonableness standard is imposed, courts have usually applied a good faith commercial reasonableness standard in evaluating a landlord's refusal to consent to a transfer. n117 Factors include the financial responsibility of the proposed tenant, the type of business, and the suitability of the proposed use for the premises. n118 Courts typically place the burden on the tenant to show that the tenant offered a willing and able transferee. n119

An assignment places the landlord and assignee in privity of estate and terminates privity of estate with the original tenant. n120 The assignee becomes liable for any covenants that run with the land, and can similarly enforce such covenants against the landlord. n121 Although no longer in privity of estate, the original tenant remains liable to the landlord under privity of contract, unless expressly released. n122 Under a sublease both privity of estate and privity of contract remain with the original tenant, who is liable on both grounds. n123 The subtenant is neither liable to nor can enforce rights against the primary landlord, unless there is a specific assumption of obligations under the original lease. n124 However, the result may be otherwise if an equitable servitude is found to exist. n125

§ 42.04(b) Right of Tenant to Transfer.

§ 42.04(b)(1) In General.

Courts universally recognize that, absent an agreement to the contrary, a tenant has the right to either assign or sublet the tenant's interest in land. n126 In this respect courts have noted that a leasehold interest is assignable like any other contract right, and that the law encourages the free alienability of land. Of course, a tenant cannot transfer or assign a greater interest than he or she has. Thus, a month-to-month tenant can transfer only an interest in a month-to-month tenancy. n127

There are several exceptions to the general right to transfer. First, courts have held that a tenancy at will is not transferable, noting that the nature of the tenancy at will is that it exists only with respect to the original parties. n128 Second, a tenant might be prohibited from transferring where the terms or circumstances of a transfer are inconsistent with the purpose or intent of the original lease. For example, where the lease requires performance of personal services by the tenant, there might be an implied consent requirement. n129 Some courts have indicated that a percentage rental provision could impliedly prohibit transfer without the landlord's consent, n130 noting that the identity of the tenant is central to the landlord's decision whether to accept the risks inherent in a percentage lease. n131 Most courts, however, have held that absent an express consent provision, the tenant of a percentage lease has the right to transfer the lease without the landlord's consent. n132

§ 42.04(b)(2) Restrictions On Transfer.

Although tenants normally have the right to assign or sublet their interests, leases frequently impose restrictions or conditions on a tenant's right to transfer. n133 Most common is the requirement that the tenant cannot transfer an interest without the landlord's consent. Before discussing the parameters of consent requirements, this section will consider what qualifies as a transfer of an interest.

§ 42.04(b)(2)(i) What Constitutes a Transfer.

Most instances of transfer involve a tenant who either assigns or sublets his or her interest to another tenant. In such cases, there is little doubt that a transfer has occurred. Questions occasionally do arise, however, whether a particular tenant activity or transaction constitutes an assignment that requires prior landlord consent.

One common situation in which this issue arises is in connection with a change in the tenant's form of business ownership, with the leasehold interest being technically transferred to a new business entity. Courts have usually held that changes in the form of ownership do not constitute an assignment. For example, courts have held that a tenant's sale of its own stock to a purchaser does not constitute an assignment, n134 even where the stock is transferred to a party previously rejected by the landlord as an assignee. n135 Similarly, neither a change in form of a medical practice from a partnership to a corporation n136 or a tenant's transfer of the lease to a corporation wholly owned by the tenant constituted assignments. n137 In a Colorado case, the landlord contended that a withdrawing partner's assignment of an interest in a partnership caused a breach of a clause prohibiting assignment of the lease. The court rejected the claim, noting that even if continued occupancy by the partnership after the partner's withdrawal was an assignment in breach of the lease, the landlord had waived any objection by accepting rent for over two years. n138

On the other hand, some changes in corporate form that go beyond the mere transfer of stock constitute an assignment of a lease. For example, it was held that transferring a lease from a subsidiary to its corporate parent as part of a dissolution plan for the subsidiary constituted an assignment. n139 Similarly, a corporate tenant's creation of a subsidiary that took over a lease constituted an assignment, since it went beyond a mere change in the form of ownership. n140 Courts have also found assignments where a corporate tenant's assets, including the leasehold interest, were transferred to a new corporation designed to carry on the same business. n141 Despite the close connection

between the various corporate entities in these cases, courts have reasoned that separate corporate entities were involved and thus the lease was necessarily assigned from one to the other.

Courts have differed, however, on whether the merger of a corporate tenant with another corporation constitutes an assignment of a lease. n142 Noting that a merged corporation succeeds to a corporate tenant's assets, including the leasehold, by operation of a statute, several decisions have turned on whether the non-assignment provisions included prohibitions against transfer by operation of law. On that ground the Missouri Supreme Court in a leading case, *Dodier Realty v. St. Louis Nat'l Baseball Club*, n143 held that since the leasehold was transferred by operation of law pursuant to statute when corporations merged, rather than by voluntary actions, it could not be considered an assignment under the lease. In a subsequent decision following the logic of *Dodier*, however, a court held that transfer by corporate merger violated the non-assignability provision of the lease, when the lease specifically included within its prohibitions assignments by operation of law. n144 A 1988 decision specifically rejected the rationale that a corporate merger involving the tenant constitutes an assignment of a tenancy, even where the lease specifically includes a prohibition against assignments by operation of law. n145

Finally, courts have also held that granting a license or another type of limited use does not constitute an assignment or sublease. n146 For example, a concession agreement for vending machines, though labeled a "concession lease," did not constitute a sublease of the property, since no exclusive right to possession was transferred. n147 Similarly, a corporate tenant's permitting an affiliate to hold concerts on the premises did not constitute a sublease, where the tenant retained possession and control of the property. n148

§ 42.04(b)(3) Consent Requirements.

Although tenants are free to transfer their interests in absence of a contrary agreement, leases frequently prohibit a tenant from assigning or subletting without the consent of the landlord. Some states also have statutes that require the landlord's consent before the tenant can assign or sublet the leasehold. n149 These statutes typically apply only to leases of short duration, such as less than two or five years. n150

§ 42.04(b)(3)(i) General Validity.

Prohibitions on assignments or subleases without the landlord's consent constitute restraints on alienation, which the law generally disfavors. The reasons for disfavor are substantial, but primarily concern the inefficiencies they place on land use by prohibiting transfer from less to more desirable uses. This concern obviously applies to transfer of tenant interests, since permitting a tenant to assign or sublet the lease will typically permit more productive uses of the property.

Despite these concerns, courts have recognized that the nature of the landlord-tenant relationship justifies some restraints. Unlike transfers of fee simple estates, where the grantor typically does not retain an interest in the land, landlords retain significant reversionary interests in the property which can be adversely affected by a tenant. Moreover, tenants and landlords perform on-going covenants, such as the duty to pay rent or to make repairs, which create a continuing relationship between the parties. For these reasons courts have recognized that landlords may impose consent requirements despite their restraining affect. n151 In doing so, however, they have emphasized that such provisions will be strictly construed. n152

§ 42.04(b)(3)(ii) Reasonableness Requirements.

Consent provisions at times expressly provide that any withholding of consent must be reasonable. In such cases the only question is whether withholding consent was, in fact, reasonable. Leases often contain "silent consent" clauses, however, which do not impose any standard for refusing consent. n153 A significant body of case law has development on whether a reasonableness standard is implied in such cases.

The traditional majority rule has been that unless the lease expressly imposes a reasonableness standard, the landlord has an absolute right to withhold consent and may arbitrarily do so for any reason, or for no reason. n154 This rule is based on two grounds. The first is the supposed intent of the parties, as expressed in the lease, which did not impose a reasonableness standard. Courts have interpreted "silent consent" provisions as an indication that the parties intended to provide the landlord with an absolute right to withhold consent. Noting that tenants could have bargained for a reasonableness provision, courts are reluctant to overturn the perceived intent of the parties. n155

Second, courts have also emphasized that landlords have exercised a personal choice in the selection of a tenant, which would be interfered with if the landlord did not have an absolute right to withhold consent. n156 It has also been noted that protecting the landlord's right to select who will use and occupy the property outweighs concerns over any resulting restraint on alienation, which is often viewed as minor because it affects only a leasehold interest. n157

A growing number of decisions, as well as the Restatement of Property, reject this traditional position and instead impose a reasonableness standard, at least in the absence of a freely-negotiated absolute right to withhold consent. n158 The Restatement provides:

> A restraint on alienation without the consent of the tenant of the landlord's interest in the leased property is valid, but the tenant's consent to an alienation by the landlord cannot be withheld unreasonably, unless a freely negotiated provision in the lease gives the tenant an absolute right to withhold consent. n159

Courts rejecting the majority position and imposing a reasonableness standard have done so for several reasons. First, they have emphasized that consent requirements impose restraints on alienation and should be strictly construed. n160 Several courts and commentators have emphasized the need for free alienation of residential and commercial space in the face of shortages. n161 In this sense, the minority position represents a balance between the competing policy concerns of avoiding unreasonable restraints on alienation and still protecting the landlord's property interest. To the extent that valid reasons for rejecting an assignee or subtenant exist, such as financial concerns or problems with the proposed use of the property, the minority position permits withholding of consent. n162 Thus, the primary purpose supporting the majority rule, protection of the landlord's property interest, is preserved. It is only where the restraint is gratuitous, imposing costs on society without concomitant benefits to the landlord, that the minority position prohibits the withholding of consent.

A second reason articulated for a reasonableness standard is the recognition of a good faith and fair dealing standard inherent in every contract. n163 Whereas the policy of avoiding restraints on alienation is based on the lease as a conveyance, this rationale arises from the growing recognition of the lease as a contract. n164 Thus, where the lease provides the landlord discretion, as with a consent provision, it must be exercised in good faith and in fair dealing. This, in turn, requires that landlords have a reasonable basis for refusal to consent, and prohibits arbitrary refusals. n165

Finally, several courts have questioned the majority assumption that, in the absence of an express reasonableness requirement, the parties intended the landlord to have an absolute right to refuse. Instead, courts have noted that tenants might assume landlords would act in a reasonable manner. Similarly, inherent in a clause permitting assignments and subleasing with the landlord's consent is the idea that such transfers are possible, which is largely negated if landlords can arbitrarily withhold consent. For these reasons courts have noted that the clauses are at least ambiguous and even create tenant expectations of a right to assign or sublet. n166

Although imposition of a reasonableness standard remains a minority position, n167 it most certainly represents the modern trend. To date, approximately 15 states have adopted the position. Importantly, a clear majority of courts that have addressed the issue in the past 20 years have adopted the minority position, with 14 states following the minority position n168 and only 7 holding to the majority position. n169

The exact scope of the minority position is unclear, however, with regard to whether the tenant can expressly waive the reasonableness requirement. Although states adopting the minority position clearly impose a reasonableness standard where the clause itself is silent, most cases have not clearly decided whether the lease itself can expressly give the landlord an absolute right to withhold consent. As noted earlier, the Restatement imposes a reasonableness standard on landlord consent, but would recognize "a freely negotiated provision in a lease [giving] the landlord an absolute right to withhold consent." n170

A number of courts have approvingly cited the Restatement in adopting the minority position. n171 In doing so, however, they have not usually considered whether the reasonableness standard may be expressly waived, as provided by the Restatement. Although not altogether clear, most decisions suggest that the holding is limited to "silent consent" leases, and do not address whether consent can be waived. n172 Several decisions, however, have clearly adopted the Restatement as the controlling standard, n173 apparently including the ability to expressly waive the reasonableness standard.

The validity of an express provision giving the landlord an absolute right to withhold consent in part turns on the policy rationale for imposing a reasonableness requirement. To the extent that a reasonableness requirement is based on tenant expectations and recognition of a good faith and fair dealing standard inherent in contracts, an express waiver provision would be acceptable. Tenant expectations would be formed by the lease itself, permitting an absolute right to withhold consent, and a landlord would be acting in a fair manner consistent with the terms of the contract. n174 On the other hand, an express waiver provision would arguably contravene the policy against restraints on alienation. Although reasonable promissory restraints are generally tolerated, granting a landlord an absolute right to withhold consent arguably fails to further significant concerns that would justify the resulting restraint.

Finally, at least three states statutorily impose a reasonableness standard on landlord consent provisions. n175 The California statute, enacted in 1989, in effect codifies the previous recognition of a reasonableness standard by that state's Supreme Court in *Kendall v. Ernest Pestana, Inc.* n176 The statute also adopts the Restatement position, however, providing that the lease may give the landlord an absolute right to prohibit transfer, n177 a question left open in *Kendall*. The Alaska statute, which applies only to residential tenancies, in effect imposes a reasonableness standard by providing that a landlord can withhold consent only for the seven justifications set forth in the statute, including insufficient credit or financial responsibility, the number of people or the number of children that would be in the house, the unwillingness of the proposed transferee to accept the terms of the primary lease, proposed maintenance of pets, proposed commercial activity, or a written statement by a previous landlord of prior abuses by the proposed transferee. n178

§ 42.04(b)(3)(iii) What Constitutes Unreasonable Withholding of Consent.

Where a reasonableness requirement is implied by law or expressly stated in the lease, courts have generally applied a good faith commercial reasonableness standard in evaluating a landlord's refusal to consent to a tenant transfer. n179 Courts have noted that the reason for refusal must be objectively sensible, often articulating a reasonable person standard. n180 Conversely, the reason must not be based on subjective grounds, n181 such as personal taste or sensitivity. n182 The Restatement comments state that to be reasonable a refusal "must be objectively sensible and of some significance and not based on mere caprice or whim or personal prejudice." n183

The burden of showing that the withholding of consent is unreasonable is on the tenant. n184 On that basis, some courts have held that the tenant has a duty to tender to the landlord a person who is ready, willing and able to accept the lease and meets commercial standards, and in the absence of any such tender a refusal is reasonable. n185 Similarly, courts have noted that withholding consent is reasonable where the tenant fails to provide sufficient financial information or fails to inform the landlord of the transferee's proposed use of the property. n186

Courts have indicated that a number of factors can be considered in assessing reasonableness, including the financial responsibility of the proposed assignee or subtenant, how the property will be used, the need for alterations, and whether the proposed assignee or subtenant would pose competition problems. n187 These, of course, are not exhaustive factors nor are they to be applied with mathematical precision. n188 Rather, they are to be assessed in terms of the legitimate purpose of consent requirements, generally viewed as protection of the landlord's interest in the property in question. n189 For this reason, a determination of whether a refusal is reasonable might turn on the cumulative weight of several factors, making generalizations even more difficult.

Probably the most common factor identified by courts is the financial responsibility of the proposed assignee or subtenant. Courts have noted that where the transferee is of dubious financial stability n190 or has a poor payment record, n191 the landlord has reasonable grounds to withhold consent. Similarly, prospective receipts from the proposed use relative to rent owed can be considered. n192 At the same time, courts have emphasized the financial stability of the proposed assignee or subtenant in finding the withholding of consent to be unreasonable. n193

It can be argued that the financial status of the transferee should not be relevant at all, since the current tenant remains liable to the landlord in any event under privity of contract. Courts have generally looked beyond this guaranty, however, implicitly recognizing that a financially unstable assignee is problematic despite the original tenant's continuing liability. For this reason, assurances of payment from the current tenant are generally not an effective substitute for a financially responsible transferee, since the tenant would be liable in any event. n194 Some courts have considered the current tenant's secondary liability as an additional reason for permitting a transfer when the transferee is financially responsible, however. n195 Others have also indicated that a tenant's willingness to guarantee all lease covenants is a factor in assessing whether a refusal is reasonable. n196

Conditioning consent on compliance with a demand for higher rent might be permitted where it is expressly provided for in the original lease. California has a statute that permits this outcome. It provides: "A restriction on transfer of a tenant's interest in a lease may provide that the transfer is subject to any express standard or condition, including, but not limited to, a provision that the landlord is entitled to some or all of any consideration the tenant receives from a transferee in excess of the rent under the lease." n197 The statute's legislative history clearly indicates this was to permit landlords to participate in the appreciated value of property when an assignment or sublease occurs, if the original lease so provided. n198

Although a landlord can reject a tenant of questionable financial stability, courts have held it unreasonable to refuse consent simply to improve the landlord's economic position. This often occurs where a landlord conditions consent on an increase in rent without a showing of additional risk or expense. In such circumstances the landlord is, in effect, conceding the suitability of the proposed assignee and is only seeking additional economic gain. Courts have consistently held refusals in such situations to be unreasonable, n199 noting that seeking such additional gain has nothing to do with the purpose of the consent provision, which is protecting the landlord's property interest, and thus cannot serve to justify withholding consent. n200

Courts have noted, however, that a demand for additional rent is reasonable where the proposed assignee or subtenant poses additional risk or expense. n201 For example, where rent is primarily based on gross sales and the proposed assignee would not generate sales equivalent to those of the current tenant, a landlord can condition the assignment on a rent increase sufficient to put the landlord in the same position as with the current tenant. n202

Courts have also usually found a refusal unreasonable where the landlord was willing to lease directly to the rejected assignee or sublessee, n203 often for the purpose of receiving a higher rent. As was true with conditioned consent, the landlord's willingness to lease the property to the proposed assignee strongly suggests the person's suitability. On that basis, courts have usually noted that the apparent reason for rejection of the party as an assignee, but acceptance as a direct tenant, was to increase the rent. As was true with conditioned consent, the landlord cannot improve the landlord's economic condition in this manner, at the tenant's expense.

Although landlords may not be able to withhold consent to improve their economic position, refusal is reasonable in order to avoid potential economic harm to the rental property. This implicates not only the financial instability of transferees, but also uses that would decrease a landlord's return from current levels. For example, refusal is reasonable where rent is in part based on a percentage of sales, and the proffered assignee is likely to generate a smaller rent than the current tenant. n204 This was situation in a case in which the lessee of a women's apparel store wanted to assign its lease to a hobby antique store, which would have generated substantially less income. n205 Similarly, where the proposed assignee was an inexperienced business manager and the current tenant was the most profitable store in the landlord's malls, the landlord's refusal to consent was reasonable where a percentage lease was involved. n206

Withholding consent is also reasonable where the proposed transferee's use would compete with the landlord's use. n207 Although the harm in such a situation is not to the rental property as such, courts have nevertheless found refusal to be reasonable. This makes sense if reasonableness is determined by reference to the original tenant, since a landlord would likely have rejected the original tenant on that basis as well. However, it has been held that a landlord cannot refuse consent because the proposed subtenant is a tenant of the same landlord in another building. Although the landlord will lose the person as a tenant if the sublease is approved and thereby suffer a loss, consent provisions are not for a landlord's general economic protection. n208

The nature of the proposed use might be a reasonable ground for withholding consent where it would disadvantage the landlord or be inconsistent with the purposes of the original lease. For example, in *Warmack v. Merchants National Bank*, n209 the court found a landlord's refusal to consent to a sublease reasonable where the tenant mix in a shopping mall was critical to the mall's success, and where the substitution of a savings and loan for a bank would have changed the mix. Courts have also held that where the primary lease expressly provides that the property is to be used only for a limited purpose, it is reasonable to refuse consent to an assignment or sublease involving a use different from that permitted in the primary lease. For example, where the lease limited use to the practice of general dentistry, the landlord's refusal to consent to a sublease to an orthodontist was reasonable. n210 Similarly, where a lease limited use to a roller rink and evidence indicated that the proposed sublease would be a "bar/dance concert hall," refusal was reasonable. n211 However, a New York decision held that relying solely on the purpose clause in the lease as a basis to withhold consent was not reasonable, in the absence of other objective factors. n212

Finally, considerations of personal taste or sensibility are not reasonable grounds for refusing consent to an assignment or sublease. n213 Thus, refusal is unreasonable where a transferee is rejected because she is a widow, n214 because of the landlord's personal dislike for the assignee, n215 or where the landlord personally objects to a tavern on the premises. n216 Similarly, it was held that a religious organization unreasonably refused consent of a sublease to a planned parenthood organization, despite the potentially controversial nature of the activity and religious objections of the landlord. n217 In so holding, the court said that because the institution was engaged in a commercial enterprise, it would be held to standards of commercial reasonableness. n218

§ 42.04(b)(3)(iv) Waiver/Implied Consent.

A landlord may waive a consent provision by conduct suggesting acquiescence in an assignment or sublease. n219 The most common evidence of waiver is where a landlord accepts rent payments knowing that they come from an assignee or subtenant. Almost all courts have held that this constitutes waiver of the consent requirement, since the landlord has, in effect, elected to treat the lease as transferred. n220

Courts have noted, however, that waiver is an intentional relinquishment of a right, and therefore knowledge of the assignment is a necessary prerequisite to any waiver. n221 Notice might come from actual knowledge of the assignment or be implied from an assignee's possession of the property together with tender of rent. n222 However, where the landlord does not have notice of the assignment, there is no waiver even when rent has been accepted from a proposed assignee. For example, there was no waiver in a case in which a landlord had accepted rent payment from an assignee

bank when the bank had earlier informed the landlord that it would be making payments on behalf of the tenant from an escrow account to protect the bank's security interest. n223 Since no actual notice of the assignment had been given, subsequent payments were consistent with the previous understanding. Similarly, there was no waiver despite acceptance of rent payments in a case in which a tenant had told the landlord that the payments from a third party were being made on behalf of the tenant. n224

Although acceptance of rent is the primary factor in finding waiver, other factors may also be relevant. For example, the lack of any reasonable grounds to object to a subtenant has been seen as additional support for the conclusion that acceptance of rent constitutes waiver. n225 Similarly, where a tenant told the landlord that he was renewing a sublease and sent a confirmation letter with no objection by the landlord, there was a waiver of the requirement for written consent. n226

One final issue is whether a landlord, by giving express consent to an assignment, thereby impliedly waives consent to all future assignments. According to *Dumpor's Case*, n227 once a landlord consents to an assignment, the lease condition requiring consent is destroyed. n228 The tenant is thereafter free to transfer the property without the landlord's consent.

Although the rule in *Dumpor's Case* was abolished by statute in England more than a century ago, n229 American cases discussing it have often purported to recognize the rule, n230 and it is generally considered to be the majority position. n231 The rule has been frequently criticized by courts, n232 however, and it has been made subject to some exceptions. Thus, the rule has been applied to assignments, and not subleases, n233 and it does not apply when consent occurs by waiver. n234 Moreover, the rule does not apply if the landlord expressly reserves the right to consent to future assignments. n235 Several courts have rejected the rule outright. n236

Commentators universally criticize the rule, n237 and it is rejected by the Restatement. n238 The rule does not comply with the intent of the parties and is inconsistent with the purpose of a consent provision, which is to protect landlords against unsuitable assignees. It also discourages knowledgeable landlords from granting permission to appropriate assignments, since they thereby waive further control.

Even though the rule in *Dumpor's Case* is still generally recognized as the prevailing position, n239 its current status is questionable. Most case law supporting it is quite old, and few cases have addressed the issue in recent years. Considering the significant criticism of the rule and the lack of sound policy supporting it, it should no longer have the support of American courts.

§ 42.04(b)(3)(v) Effect of a Breach.

§ 42.04(b)(3)(v)(1) Breach by Tenant.

A tenant assignment or sublease contrary to the terms of the lease does not void the transfer, but renders it voidable at the landlord's option. n240 The landlord may therefore declare a forfeiture and dispossess the assignee or subtenant, or conversely can elect to treat the transfer as valid. n241 The apparent reasoning behind this position is that consent requirements are for the benefit of the landlord, and are therefore not enforceable by the transferee. n242

Courts that treat unpermitted transfers as voidable have held that only the landlord can void the transfer, and not the assignee or subtenant. Thus, an assignee or subtenant generally cannot assert as a defense to an action by the landlord the landlord's lack of consent to the assignment. n243 Although courts have sometimes stated that an assignment without required consent is invalid or a nullity, suggesting that either party could raise the lack of consent as a claim or defense, they have applied the concept when the landlord elected not to accept the transfer. n244

Even if the jurisdiction imposes a reasonableness requirement on the exercise of the landlord's consent under a consent

clause in the lease, a tenant who undertakes a transfer without seeking the consent of the landlord will be found to have breached the lease. n245 In an Alaska case, the court stated that, in this situation, it "need not consider whether there were reasonable grounds for withholding consent to the assignment." n246 The court remanded for a determination whether the breach justified termination of the lease. However, as noted earlier, a landlord waives the consent requirement when the landlord acquiesces in accepting the new tenant. n247

§ 42.04(b)(3)(v)(2) Breach by Landlord.

Tenants have several basic forms of relief when a landlord breaches a lease by unreasonably withholding consent. The first is that the tenant is entitled to the consent, thus permitting the tenant to proceed with the assignment or sublease. n248

Second, courts have held that tenants can recover consequential damages as typically permitted for breach of a contract provision. n249 A preliminary issue regarding a tenant's right to damages is whether a reasonableness requirement imposed on the consent provision is a covenant by the landlord or merely a qualification to the tenant's own covenant to obtain consent before transfer. n250 Several older decisions before the mid-century mark held that the reasonableness requirement is not a covenant, and only a qualification of the tenant's covenant. n251 An unreasonable withholding of consent is therefore not a breach of a promise for which money damages can be recovered, but only the violation of a condition, with the tenant's remedy being performance of the assignment or sublease. n252

More recent decisions that have addressed the issue have held that the reasonableness requirement represents a covenant from the landlord to the tenant. n253 As such, it is the same as any other contract provision and can be a basis of a claim for damages if breached. n254

Courts that take this view will apply normal contract principles in assessing the scope of possible damages, including consequential damages. n255 In this regard, tenants can recover damages that arise naturally and are of the nature contemplated by the parties at the time the contract was made. n256 The parties need not contemplate the specific act or injury, but rather that it is the type that might naturally occur from a breach of the contract. n257 Thus, a tenant can recover the difference between the rent the rejected assignee would have paid and the lesser rent obtained by another sublessee. n258 Courts have also permitted recovery for lost profits, n259 damages sustained when a tenant was forced to liquidate his business, n260 and the amount that a rejected subtenant was willing to pay for fixtures. n261

A final issue is whether a tenant can terminate the lease and be released from owing rent when a landlord unreasonably refuses to consent. This, in effect, turns on whether the covenants are considered independent or dependent. The common law treated leases as conveyances and their covenants as independent, n262 which would preclude termination as a remedy. This reasoning was adopted in several earlier decisions, in which courts held that tenants were not free to vacate and stop paying rent for a landlord's unreasonable refusal. For example, the Wisconsin Supreme Court held that since, under Wisconsin law, leases longer than three years were considered conveyances, the covenants were not necessarily to be treated as independent. n263 A New York decision similarly held that a tenant was not relieved of the duty to pay rent, but did indicate that the tenant could counterclaim in the landlord's action for back rent. n264

Several more recent decisions, however, have treated the covenants as dependent and held that the landlord's breach of the reasonableness standard permits a tenant to terminate the lease and stop paying rent. In one leading decision, *Ringwood Associates v. Jack's of Route 23*, n265 a New Jersey appellate court noted the erosion of independent covenant doctrine in commercial leases, and said that covenants should be treated as dependent where the landlord breaches a "substantial and material element of the contract." Noting that the right to assign is an important and valuable component of commercial leases and that other remedies were inadequate, the court held that the landlord's breach of a reasonableness requirement in the lease permitted the tenant to vacate and stop paying rent. At least two other decisions, n266 as well as the Restatement, n267 support this position. A California statute also permits tenants to terminate the lease when a landlord unreasonably withholds consent. n268

§ 42.04(c) Requirements for a Valid Transfer.

Assignments and subleases, as transfers of interests in land, are subject to the Statute of Frauds in the same manner as leases. A number of states have statutes that specifically require that a transfer of the tenant's interest be in writing. Most of these statutes refer to "assignments" of the lease, n269 although some refer to "transfers" of the tenant's interest. n270 A few of the statutes require a writing for an assignment of any duration. n271 Most, however, require a writing for transfers longer than a year, n272 with Pennsylvania requiring it for assignments longer than three years. n273

Even in the absence of an express statutory provision on transfer of a tenant's interest, the more general Statute of Frauds provisions should apply to transfers. Subleases are by nature leases, and therefore subject to statutory requirements that leases beyond certain lengths be in writing. n274 Similarly, assignments are transfers of interests that fall under the Statute of Frauds. n275 At the same time, courts have recognized that standard exceptions to the Statute of Frauds, such as part performance and estoppel, apply to leasehold transfers. n276

In addition to the Statute of Frauds, assignments and subleases are subject to other requirements for the transfer of property, most notably delivery and acceptance. Thus, where an assignment agreement was never delivered or accepted, the attempted assignment is ineffective. n277

§ 42.04(d) Distinction Between Assignment and Sublease.

Whether a particular transfer constitutes an assignment or a sublease has significant effects on the rights of the parties. Conceptually, of course, an assignment is the transfer of the existing lease, whereas a sublease is the creation of a new tenancy between the original tenant and the subtenant. An assignment will therefore bind the assignee to all covenants that run with the land in the primary lease, including rent, and permit the landlord to directly enforce those covenants against the assignee. On the other hand, a subtenant is bound only to the sublease itself, and is not directly liable to the landlord. n278

The traditional and still dominant approach for determining whether an agreement is an assignment or a sublease is that transfer of the tenant's entire interest, with no reversion, is an assignment, while a transfer for less than the entire term is a sublease. n279 This distinction traces back to English feudal law, at least as far back as 1371, n280 but was not solidified in English law until the mid-19th century. n281 Although the origins of the rule are not entirely clear, it appears to rest in part on principles drawn from the Statute *Quia Emptores*, which required retention of some interest for tenure to remain between a grantor and grantee. n282 Otherwise, the grantee merely stepped into the grantor's shoes. Similarly, courts have noted that an essential element of a lease is retention of a property interest. n283 Thus, a sublease, which is considered a separate lease between the tenant and the tenant's transferee, cannot exist without the retention of some property interest by the tenant.

A West Virginia case considered the assignment/sublease distinction in a situation involving a tenant's retention of lease renewal options. n284 The original lease provided for four lease renewal options of five years each. One of these had been exercised prior to the transfer in question. The tenant n285 transferred the remainder of the current term to another party, but retained three renewal options. The court concluded that this created a sublease. It reasoned that the "subtenant" had not received the full term available under the head lease, because the tenant had retained renewal options for three additional five-year terms. n286

Although most courts follow the traditional distinction, courts have differed regarding what qualifies as retention of a reversionary interest sufficient to avoid an assignment. Courts have consistently noted that the retention of any specific reversion period, no matter how short, creates a sublease rather than an assignment. n287 Thus, reserving a one-day reversion at the end of the tenancy creates a subtenancy rather than an assignment. n288 This, of course, provides a relatively simple way for knowledgeable parties to create a sublease.

More problematic is whether the original tenant's right of entry for condition broken, such as nonpayment of rent, is a sufficient reversionary interest to create a sublease. The apparent majority position is that a right of entry does not create a sublease, since at common law it was treated only as a chose in action. n289 A substantial number of courts, however, following what is known as the Massachusetts rule, n290 have held that a right of entry is a sufficient reversionary interest to create a sublease. n291 In doing so, these courts often state that the right of entry is a "contingent reversionary interest," n292 although it has been noted this would not qualify as a common-law reversion. n293 A few courts have gone even further and have held or suggested that the retention of any rights by the original tenant, such as an increase in rent n294 or new covenants or terms advantageous to the tenant, n295 create a sublease rather than an assignment. These decisions apparently have reasoned that variations from the original lease indicate that the original lease was not assigned, but rather that a separate tenancy was created. The clear majority of cases, however, have treated a transfer of the entire term, even with changed provisions, as an assignment.

A second approach to the assignment/sublease distinction, expressly advocated by a few courts and arguably present when courts recognize more tenuous reversionary interests under the traditional test, is to focus on the intent of the parties. Under this test, courts ask whether the parties intended to assign the primary lease to the transferee, or intended to create a separate tenancy. This approach was perhaps most strongly stated in *Jaber v. Miller*, n296 where the Arkansas Supreme Court rejected the traditional approach in favor of one based on the intent of the parties. In doing so, the court stated that the traditional rule was based on feudal considerations no longer relevant today. It also emphasized the potential unfairness of the traditional rule, since it might impose on transferees unintended obligations to the primary landlord when they actually intended to create a separate tenancy.

Where less than the entire term is transferred, an intent analysis as articulated in *Jaber* would reach the same result as does the traditional rule -- that the transfer is a sublease. By transferring less than the original term, the tenant clearly would be creating a separate tenancy, rather than assigning the current one, even where terms and conditions otherwise remain the same. Indeed, no case has suggested, including those articulating an intent analysis, that retention of a reversion is anything other than a sublease.

The potential difference between an "intent" analysis and the traditional rule would therefore only exist when the original tenant has transferred the entire term. Whereas the traditional rule would treat this as an assignment, and thus establish privity of estate between the landlord and the assignee, an intent analysis would consider whether the agreement was simply an assignment of the primary lease, or, even though for the same duration, was a separate tenancy. In particular, courts would assess whether the parties intended to be bound to the original lease or whether they created a new lease between themselves. The length of the lease, the creation of new covenants, retention of higher rent, and form of the agreement have all been identified as potential factors in discerning intent. n297

It has been suggested that the intent approach adds little to the traditional analysis, since courts will typically discern intent by looking to see whether a reversion or right of entry has been retained. n298 As noted above, that would certainly be true when a reversion is retained, since that would be a clear indication that a separate tenancy was created. The test might well lead to different results, however, where the entire term is transferred but the agreement contains significant differences in terms. The intent test goes to the real distinction that is involved, that is, that an assignment is the transfer of the existing lease, whereas a sublease is the creation of a new tenancy. n299

Most courts have properly held that the transfer of a portion of the premises for the complete term is a partial assignment and not a sublease, n300 although a few older decisions labeled it a sublease. n301

It is conceivable that a proposed arrangement by the tenant will be regarded as not creating either an assignment or a sublease. In an Oregon case, a retail tenant complained that the landlord had declined to consent to some proposed "subleases." n302 However the court concluded that the "subleases" were different from the existing lease in a number of significant respects, including the use that the "sublessees" could make of the property and the percentage rent that would be paid. The court noted, too, that a provision releasing the tenant from any liability for rent was inconsistent

with the nature of a sublease, in which the original lessee remains fully liable on the existing lease. Although the court observed that the landlord had a duty to act reasonably with respect to the matter of consent to assignments or subleases by the tenant, that duty applied only when the tenant produced a true assignment or sublease. Because, in the court's view, the tenant never presented the landlord with a proposal that satisfied the basic requirements of an assignment or a sublease or that substantially complied with the requirements of the existing lease, the court held that the landlord was under no obligation to consent to the proposed arrangement. n303

§ 42.04(e) Legal Effect of Assignment and Sublease.

§ 42.04(e)(1) Overview.

The rights and liabilities between landlords and "parties with a leasehold interest" are normally based on the concept of privity. n304 The original lease creates both privity of contract and privity of estate between the landlord and tenant. n305 The lease agreement itself creates privity of contract. Privity of estate results from the landlord's right to possession upon termination of the tenancy. n306

An assignment of the lease transfers privity of estate to the assignee, since the landlord will succeed to the property upon termination of the assignee's interest. n307 The tenant remains liable to the landlord under privity of contract, however, unless there is a novation or an agreement to the contrary. n308 Since the assignee is in privity of estate with the landlord, the assignee will be liable for any covenants of the primary lease that run with the land. n309 The assignee remains liable only as long as privity of estate continues, however, and ends with a further assignment, unless the assignee assumed the lease obligations. n310

Under a sublease, both privity of contract and privity of estate remain with the original tenant, who is liable to the landlord on both grounds. n311 Since the subtenant is not in any privity with the landlord, however, the subtenant is neither liable to nor can enforce rights against the primary landlord, unless there has been a specific assumption of obligations of the original lease. n312 But enforcement in equity may be possible if the requirements for an equitable servitude have been satisfied. n313

The effect of an assignment is to place the landlord and assignee in privity of estate and to terminate privity of estate between the landlord and the original tenant. As such, the assignee is liable for any "real covenants" that run with the land, and can similarly enforce such covenants against the landlord. n314 Although the original tenant is no longer in privity of estate with the landlord, that tenant remains in privity of contract and thus liable on that basis. n315

§ 42.04(e)(2) Assignments.

§ 42.04(e)(2)(i) Rights and Obligations of Assignee.

As noted, an assignment places the landlord and the assignee in privity of estate. n316 On that basis, courts frequently state that the assignee takes all rights and obligations of the assignor. n317 More precisely, the assignee receives the benefits and the burdens of all covenants that run with the land. n318 Since the privity requirements for running covenants are clearly met with regard to an assignment, n319 the primary limitation on whether covenants run to the assignee is whether they touch and concern the land. n320 A covenant will be deemed to "touch and concern" the land if "its performance directly affects the rights of the parties with respect to their interests in the land," n321 rather than being collateral to it.

As a practical matter, most lease covenants touch and concern the land and therefore run with the land. Perhaps the most common source of contention, the duty to pay rent, has been consistently held to run to the assignee, providing the landlord with the right to bring a direct cause of action. n322 Courts have also recognized the burden of other types of covenants such as a covenant to arbitrate n323 or a tenant covenant to repair, n324 as running to the assignee. The assignee's liability is limited to the period of the assignment, however, and does not include liability for breaches that

occurred prior to the assignment. n325

Although an assignment imposes liability on an assignee, it also grants the assignee the right to enforce running covenants against the landlord. Thus, an assignee can sue the landlord for constructive eviction and breach of the covenant of quiet enjoyment, n326 and breach of a landlord's covenant to repair. n327 Courts have also held that options to renew and purchase run to an assignee. n328

An assignee who subsequently sublets the property remains in privity of estate with the landlord and thus liable with respect to covenants that run with the land. n329 However, because an assignee's liability is based on privity of estate, a subsequent assignment by the assignee terminates the privity of estate and, absent an assumption of obligations, releases the original assignee from liability. n330 However, where the original assignee assumes obligations under the original lease, the assignee remains liable under privity of contract theory even after assigning the lease and terminating privity of estate. n331

For example, if the original tenant assigns to the original assignee, who assumes the lease obligations, and who in turn assigns to another assignee, then the original tenant and original assignee remain liable under privity of contract theory, while the subsequent assignee is liable under privity of estate. Where the original assignee did not assume obligations under the primary lease, that assignee would not be liable since neither privity of estate nor privity of contact would exist. n332

A significant issue, therefore, is whether particular language in an assignment agreement constitutes an assumption of the lease contract. An assumption is not implied by acceptance of an assignment. n333 Further, mere reference to covenants in the lease, n334 or even providing that the assignment is "subject" to the lease covenants, n335 have generally not been found sufficient to demonstrate an assumption. On the other hand, where the assignee expressly binds or obligates itself to the lease, courts have found an assumption. n336

§ 42.04(e)(2)(ii) Rights and Obligations of Assignor.

The original tenant to a lease is in both privity of estate and privity of contract with the landlord. Although the tenant/assignor is no longer in privity of estate with the landlord after an assignment, the tenant/assignor and landlord remain in privity of contract. n337 The tenant therefore remains liable under the contract, even when the assignee assumes obligations under the lease, unless there is a novation or release by the landlord. n338

In such a situation, the tenant/assignor is generally treated as a surety or guarantor of the assignee, and thus is secondarily liable after the assignee. n339 The landlord can hold the assignor directly liable, in which case the assignor can seek indemnification from the assignee. However, the assignor typically cannot retake the property upon the assignee's default, since that is a remedy limited to a landlord-tenant relationship. n340

A tenant/assignor's continuing liability under privity of contract can be terminated in two ways. The first occurs when the landlord releases the tenant from liability. n341 Any such release must be expressly stated, and will not be implied merely by the landlord's consent to an assignment. n342 Similarly, the assignee's assumption of performance under the lease does not constitute a novation unless the primary lease so provides. n343

The tenant/assignor can also be released from liability when the landlord and assignee materially change the terms of the lease. The idea here is that a new lease has been created. n344 This generally applies only when the changes impose additional burdens upon the assignee and were not contemplated by the original lease. n345 Thus where, as a condition to assignment, rent is increased beyond increases contemplated in the lease, or where the assignee's right to use the property is significantly limited compared to the use by the assignor, a novation occurs. n346 Minor changes, or those that do not disadvantage the assignor, however, do not give rise to a release of the assignee's liability. n347 Courts have also noted that an assignee's exercise of an option to renew a lease does not release the assignor from liability during the

renewal period, since it was contemplated by the original lease. n348

Finally, the effect of an assignment is to relieve the assignor of any on-going interest in the property; n349 unless a right of entry is specifically retained. Thus, even though the assignor remains liable to the landlord under privity of contract, the assignor cannot assert a possessory right to the property. For example, when an assignee abandoned the lease, the landlord was free to accept the surrender and terminate the lease, and was not required to accept a check from the assignor. n350 Similarly, the assignor is not entitled to possession after the assignee defaults in rent, n351 unless the assignor has expressly reserved a right of entry.

§ 42.04(e)(3) Subleases.

§ 42.04(e)(3)(i) Rights and Obligations of Subtenant.

A sublease, as compared to an assignment, does not create privity of estate between landlord and subtenant, since the property reverts to the original tenant upon completion of the subtenancy. Rather, the original tenant remains in both privity of estate and privity of contract with the landlord. n352 The sublease itself creates a new landlord-tenant relationship between the original tenant and the subtenant with the normal rights and obligations that such a relationship entails. n353

Because a subtenant shares neither privity of estate nor privity of contract with the original landlord, the subtenant cannot enforce any covenants in the primary lease against the landlord. n354 Rather, the subtenant's rights are determined by the sublease itself, and can only be enforced against the tenant/sub-landlord. n355

Similarly, courts often state that the lack of privity precludes the landlord from enforcing lease covenants against the subtenant. n356 It has been noted, however, that the lack of privity only prohibits enforcing covenants as real covenants, but not as equitable servitudes. n357 Under an equitable servitude theory the landlord should be able to enforce covenants that touch and concern the land against a subtenant who took with notice of the covenant. n358 Recovery would be limited to equitable relief, however, and would not include damages. Although this would not necessarily preclude enforcement of a rent provision, n359 courts have generally stated that a subtenant is obligated to pay only rent reserved in the sublease, and is not liable to the primary landlord for rent. n360 However, a subtenant will be directly liable to the landlord on a third-party beneficiary basis where the subtenant has assumed the obligations in the primary lease. n361

Even when a landlord cannot directly enforce the primary lease against the subtenant, the sublease agreement cannot adversely affect or limit the rights of the landlord established in the primary lease. Any rights granted the subtenant in the sublease are in effect measured or limited by those of the original tenant in the primary lease. n362 For example, breach of the original lease, such as failure to pay rent, will give the landlord grounds to terminate the primary lease, and thereby terminate the sublease. n363

Courts have held, however, that the rights of a subtenant cannot be affected by the voluntary surrender of the primary lease, n364 at least in the absence of clear language to that effect. In effect, courts have reasoned that the tenant/sublessor is disabled from surrendering to the landlord an interest already conveyed to the subtenant. Additionally the subtenant should be protected from a tenant's attempts to destroy rights the tenant granted to the subtenant. n365 A tenant's voluntary surrender of the primary lease is therefore a transfer of the tenant's reversionary interest in the sublease, resulting in the landlord becoming the subtenant's immediate landlord. n366

This rule does not apply, however, where the sublease itself clearly provides that a voluntary surrender terminates the sublease. n367 Courts have generally required that such a provision must be clearly stated. Thus, merely providing that the property should revert to the primary landlord upon termination of the primary lease was insufficient to terminate the sublease in the case of a voluntary surrender. n368 Further, it has been held that a tenant/sublessor could not

voluntarily surrender the lease and thereby terminate the sublease even though the sublease spoke of termination for any reason, where the sublease also granted the subtenant the same renewal rights as the tenant. n369 Conversely, it was held that, where the sublease stated that if the "overlease terminated for any reason whatsoever" the sublease would also terminate, the language permitted the tenant/sublessor voluntarily to surrender the primary lease and thereby terminate the sublease. n370

A related issue is whether the sublessor must exercise options to renew. As noted above in the case of an assignment, such options are typically viewed as running with the land to the assignee, who is then capable of exercising them. n371 With a sublease, however, any option to renew remains with the sublessor. As with the issue of voluntary termination, courts have typically answered the issue by reference to the parties' intent as expressed in the sublease.

Generally, courts have held that sublessors are not required to exercise options for the benefit of subtenants. n372 However, where circumstances of the sublease indicate an intent to exercise the option for the subtenant, courts have held that the option must be exercised. For example, a sublessor was required to exercise the option where the sublease extended beyond the normal period but would be covered by the option, the court noting that the subtenant's knowledge of the option provision together with the extended sublease created an expectation that the option would be exercised. n373

§ 42.04(e)(3)(ii) Rights and Obligations of Sublessor.

Since a sublease does not transfer privity of estate to the subtenant, the original tenant remains in both privity of estate and in privity of contract with the landlord. n374 The tenant therefore remains liable to the landlord for the full terms of the original lease, including rent reserved in the lease. n375 The original tenant also remains liable to the landlord for actions of the subtenant that constitute breach of the primary lease or waste. n376

The sublease itself creates a separate landlord-tenant relationship between the original tenant and the subtenant that forms the basis of rights and obligations between those parties. n377 The subtenant is, of course, obligated to pay any rent reserved in the sublease, as well as to comply with other sublease provisions. And the tenant/sublessor may utilize normal landlord remedies, such as an unlawful detainer action, for subtenant breaches. n378

FOOTNOTES:

(n1)Footnote 110. *See, e.g. In re Service Merchandise Co., 256 B.R. 755 (M.D. Tenn. 2000)* ; *Italian Fisherman, Inc. v. Middlemas, 545 A.2d 1 (Md. 1988)* ; *Middle Village Assoc. v. Pergament Home Centers, 708 N.Y.S.2d 840 (Sup. Ct. 2000)* ; *Berkeley Dev. v. Great Atl. & Pac. Tea Co., 518 A.2d 790 (N.J. Super. 1986)* ; *OTR v. Flakey Jake's, Inc., 112 Wn.2d 243, 770 P.2d 629 (Wash. 1989)* .

(n2)Footnote 111. *See, e.g., Joseph Bros. Co. v. F.W. Woolworth Co., 641 F. Supp. 822 (N.D. Ohio 1985)* ; *Warnert v. MGM Properties, 362 N.W.2d 364 (Minn. App. 1985)* ; *Carolina Place Jt. Venture v. Flamers Charburgers, Inc., 552 S.E.2d 647 (N.C. Ct. App. 2001)*

(n3)Footnote 112. *See, e.g., Rocklen, Inc. v. Radulesco, 10 Conn. App. 271, 522 A.2d 846 (Conn. App. 1967)* ; *Jensen v. O.K. Inv. Corp., 507 P.2d 713 (Utah 1973)* .

(n4)Footnote 113. *See, e.g., Kendall v. Ernest Pestana, Inc., 709 P.2d 837, 839 (Cal. 1985)* ; *Funk v. Funk, 633 P.2d 586 (Idaho 1981)* ; see also *Harara v. Conoco Phillips Co., 377 F. Supp. 2d 779 (N.D. Cal. 2005)* (stating that the California legislature limited the holding in *Kendall* case).

(n5)Footnote 114. *See, e.g. Honig v. St. George Tower & Grill, 217 A.D.2d 572, 629 N.Y.S.2d 285 (App. Div. 1995)* ; *Dobyns v. South Carolina Dep't of Parks, Recreation and Tourism, 454 S.E.2d 347 (S.C. Ct. App. 1995)* ; *Reynolds v. McCullough, 739 S.W.2d 424 (Tex. App. 1987)* ; *B & R Oil Co., Inc. v. Ray's Mobile Homes, Inc., 422 A.2d 1267 (Vt. 1980)* .

(n6)Footnote 115. *See, e.g., Homa-Goff Interiors, Inc. v. Cowden, 350 So. 2d 1035 (Ala. 1977)* ; *Hendrickson v. Freericks, 620 P.2d 205 (Alaska 1980)* ; *Warmack v. Merchants Nat'l Bank of Fort Smith, 612 S.W.2d 733 (Ark. 1981)* ; *Kendall v. Ernest Pestana, Inc., 709 P.2d 837 (Cal. 1985)* ; *Julian v. Christopher, 575 A.2d 735 (Md. 1990)* ; *Pacific First Bank v. New Morgan Park Corp., 876 P.2d 761 (Or. 1994)* .

(n7)Footnote 116. *See Warmack v. Merchants Nat'l Bank of Fort Smith, 612 S.W.2d 733 (Ark. 1981)* ; *Julian v. Christopher, 575 A.2d 735 (Md. 1990)* .

(n8)Footnote 117. *See, e.g., Jack Frost Sales v. Harris Trust and Sav. Bank, 433 N.E.2d 941 (Ill. App. 1982)* .

(n9)Footnote 118. *See Newman v. Hinky-Dinky Omaha-Lincoln, Inc., 427 N.W.2d 50 (Neb. 1988)* .

(n10)Footnote 119. *See Funk v. Funk, 633 P.2d 586 (Idaho 1981)* .

(n11)Footnote 120. *See, e.g., First Am. Nat'l Bank of Nashville v. Chicken System of America, Inc., 616 S.W.2d 156 (Tenn. App. 1980)* .

(n12)Footnote 121. *See Italian Fisherman, Inc. v. Middlemas, 545 A.2d 1 (Md. App. 1985)* .

(n13)Footnote 122. *See Jedco Dev. Co., v. Bertsch, 441 N.W.2d 664 (N.D. 1989)* ; *OTR v. Flakey Jake's, Inc., 112 Wn.2d 243, 770 P.2d 629 (Wash. 1989)* .

(n14)Footnote 123. *See First Am. Nat'l Bank v. Chicken Sys. of Am., Inc., 510 S.W.2d 906 (Tenn. App. 1974)* .

(n15)Footnote 124. *See Employees Consumer Organization, Inc. v. Gorman's, Inc., 395 S.W.2d 162 (Mo. App. 1965)* .

(n16)Footnote 125. See the discussion on this point in § 42.04(e)(3)(i) of this chapter.

(n17)Footnote 126. *See, e.g., Julian v. Christopher, 575 A.2d 735 (Md. 1990)* ; *Collia v. McJunkin, 178 W. Va. 158, 358 S.E.2d 242 (W. Va. 1987)* ; *Homa-Goff Interiors, Inc., 350 So. 2d 1035, 1037 (Ala. 1977)* ; *cf.* 718 *Associates, Ltd. v. Sunwest N.O.P., Inc. 1 S.W.3d 355* (Tex. Ct. App. 1999 (in the absence of a clear agreement, as a matter of public policy a provision requiring prior consent of landlord to assign a lease for real property is incorporated into all leases by operation of law).

(n18)Footnote 127. *See Dickens v. Hall, 718 P.2d 683 (N.M. 1986)* .

(n19)Footnote 128. *See, e.g., Ferrigno v. O'Connell, 53 N.E.2d 384 (Mass. 1944)* ; *Randolph v. Koury Corp., 312 S.E.2d 759 (W. Va. 1984)* . *See also* Restatement (Second) of Property § 15.1 (1977).

(n20)Footnote 129. *See* Restatement (Second) of Property § 15.1 (1977).

(n21)Footnote 130. *See Rowe v. Great Atl. & Pac. Tea Co. 402 N.Y.S.2d 593 (1978) , rev'd, 385 N.E.2d 566 (N.Y. 1978)* ; *Nassau Hotel Co. v. Barnett & Barse Corporation 147 N.Y.S. 283 (App. Div. 1914) , aff'd, 106 N.E. 1036 (N.Y. 1914)* . *Lippman v. Sears, Roebuck & Co., 280 P.2d 775 (Cal. 1955)* (implied covenant from percentage lease that tenant engage in particular use).

(n22)Footnote 131. *See Rowe v. Great Atl. & Pac. Tea Co. 402 N.Y.S.2d 593 (1978) , rev'd, 385 N.E.2d 566 (N.Y. 1978)* ; *Nassau Hotel Co. v. Barnett & Barse Corporation 147 N.Y.S. 283 (App. Div. 1914) , aff'd, 106 N.E. 1036 (N.Y. 1914)* .

(n23)Footnote 132. *See Williams v. Safeway Stores, Inc., 424 P.2d 541 (Kan. 1967)* ; *Crestwood Plaza, Inc. v. Kroger Co., 520 S.W.2d 93 (Mo. App. 1974)* ; 1 M. Friedman, Friedman on Leases § 7.302(e) (3d ed. 1990).

(n24)Footnote 133. *See also Shakey's Inc. v. Caple, 855 F. Supp. 1035 (E.D. Ark. 1994)* (dissolution of corporation and assignment of all assets, including lease, to sole shareholder, not considered assignment of lease requiring landlord's consent).

(n25)Footnote 134. *See, e.g., In re Ames Dep't Stores, Inc., 127 B.R. 744 (N.Y. 1991)* ; *Richardson v. La Rancherita La Jolla, Inc., 159 Cal. Rptr. 285 (Cal. 1979)* ; National Bank of Albany Park in *Chicago v. S.N.H., Inc., 336 N.E.2d 115 (Ill. App. 1975)* .

(n26)Footnote 135. *See Burrows Motor Co. v. Davis, 76 A.2d 163 (D.C. App. 1950)* ; *Rubinstein Bros. v. Ole of 34th St., Inc., 101 Misc. 2d 563, 421 N.Y.S.2d 534 (N.Y. Civ. Ct. 1979)* ; *see also* Dennis' Natural Mini-Meals, Inc. v. 91 Fifth Ave. Corp., 568 N.Y.S.2d 740 (N.Y. App. 1991) (dictum).

(n27)Footnote 136. *See Aiello v. Austrian, 479 A.2d 1234 (Conn. App. 1984)* .

(n28)Footnote 137. *See Sexton v. Nelson, 39 Cal. Rptr. 407 (Cal. App. 1964)* ; contra, Guardia v. 250 West Street Corp., 613 N.Y.S.2d 10 (App. Div. 1994) (an assignment of lease to a wholly owned subsidiary is invalid without landlord's consent where the lease requires consent); *see also, Pacific First Bank v. New Morgan Park Corp., 876 P.2d 761 (Or. 1994)* (tenant's merger into wholly owned subsidiary constitutes transfer by operation of law requiring landlord consent).

(n29)Footnote 138. *See Webster & Co. v. Nestle, 669 P.2d 1046 (Colo. App. 1983)* .

(n30)Footnote 139. *See Lord Baltimore Filling Stations, Inc. v. Hoffman, 117 A.2d 397 (D.C. App. 1955)* .

(n31)Footnote 140. *See Reston Rec. Ctr. Assocs. v. Reston Prop. Investors Ltd. P'ship, 384 S.E.2d 607 (Va. 1989)* .

(n32)Footnote 141. *See H. P. Hood & Sons v. Perry, 142 N.E. 794 (Mass. 1924)* ; *White v. Huber Drug Co., 157 N.W. 60 (Mich. 1916)* .

(n33)Footnote 142. *See generally* Annotation, "Merger or Consolidation of a Corporate Lessee," *39 A.L.R.4th 879 (1983)* .

(n34)Footnote 143. *238 S.W.2d 321 (Mo. 1951)* .

(n35)Footnote 144. *See Citizens Bank & Trust Co. v. Barlow Corp., 456 A.2d 1283 (Md. App. 1983)* .

(n36)Footnote 145. *See Standard Operations, Inc. v. Montague, 758 S.W.2d 442 (Mo. 1988)* (en banc).

(n37)Footnote 146. *See, e.g., Mann Theatres Corp. v. Mid-Island Shopping Plaza Co., 94 A.D.2d 466, 464 N.Y.S.2d 793 (N.Y. App. 1983)* (license not an assignment or a sublease); *Young v. Riley, 365 P.2d 769 (Wash. 1961)* (permitting adult sons to pay rent and live in home is not a subletting in violation of lease).

(n38)Footnote 147. *See Armendariz v. Mora, 553 S.W.2d 400, 404 (Tex. App. 1977)* .

(n39)Footnote 148. *In re Babylon Ltd. P'ship, 76 B.R. 270 (S.D.N.Y. 1987)* .

(n40)Footnote 149. *See Alaska Stat. § 34.03.060*; *Ariz. Rev. Stat. Ann. § 33-1454*; *Ark. Code Ann. § 18-16-102*; *Cal. Civ. Code § 1995.310*; *Iowa Code Ann. § 562* B.21; *Kan. Stat. Ann. § 58-2511*; *Ky. Rev. Stat. § 383.180*; Mo. Stat. Ann. 441.030; *N.M. Stat. Ann. § 48-6-14*; *N.Y. Real Prop. Law § 226-b*; *S.C. Code Ann. § 27-35-60*; *Tex. Prop. Code Ann. § 91.005*; *Wash. Rev. Code Ann. § 59.20.073* (mobile homes); *Wis. Stat. Ann. § 704.09*.

(n41)Footnote 150. *See, e.g., Kan. Stat. Ann. § 58-2511*; *see generally* R. Schoshinski, American Law of Landlord and Tenant § 8.18 (1980); *see also In re Estate of David, 714 N.Y.S.2d 175 (App. Div. 2000)* (statute governing the

landlord's consent that was enacted after the lease was executed did not apply to the lease).

(n42)Footnote 151. *See, e.g., Kendall v. Ernest Pestana, Inc., 709 P.2d 837 (Cal. 1985)* (reasonableness requirement); *Julian v. Christopher, 575 A.2d 735 (Md. 1990)* (reasonableness requirement); 200 *Eighth Avenue Restaurant Corp. v. Daytona Holding Corp., 740 N.Y.S.2d 330 (App. Div. 2002)* (assignee is without recourse to challenge the landlord's withholding of consent to an assignment); *Rakowsky v. Excelsior 57th Corp., 635 N.Y.S.2d 920 (Civ. Ct. 1995)* (subletting fee may be imposed); *Honig v. St. George Tower & Grill Owners Corp., 217 A.D.2d 572, 629 N.Y.S.2d 285 (App. Div. 1995)* (cooperative-housing corporation could withdraw permission for a tenant-shareholder to continue subletting apartment); *Nexsen v. Haddock, 576 S.E.2d 183 (S.C. 2002)* (lease agreement providing that tenant could "use and occupy the premises as desired," did not give tenant the right to sublease the property without landlord's written consent); *Dobyns v. South Carolina Dep't of Parks, Recreation & Tourism, 454 S.E.2d 347 (S.C. Ct. App. 1995)* (under anti-assignment clause of leases, leases could be transferred only after written consent by the lessor); *Reynolds v. McCullough, 739 S.W.2d 424 (Tex. App. 1987)* (no reasonableness requirement); *B & R Oil Co. v. Ray's Mobile Homes, Inc., 422 A.2d 1267 (Vt. 1980)* (no reasonableness requirement); *see also Waterside Redevelopment Co., L.P. v. Department of Housing Preservation and Development of City of New York, 704 N.Y.S.2d 63 (App. Div. 2000)* (tenant's conduct in repeatedly subletting portion of apartment without express written approval justified eviction); *Yochim v. McGrath, 165 Misc. 2d 10, 626 N.Y.S.2d 685 (City Ct. 1995)* (subtenant forced to vacate because tenant was not authorized to sublet was able to recover damages from tenant) .

(n43)Footnote 152. *See, e.g., Jung v. Zemel, 545 N.E.2d 242 (Ill. App. 1989)* ; *American Community Stores Corp. v. Newman, 441 N.W.2d 154 (Neb. 1989)* ; *Julian v. Christopher, 575 A.2d 735, 739 (Md. 1990)* .

(n44)Footnote 153. "In a 'silent consent' clause requiring a landlord's consent to assign or sublease, there is no standard governing the landlord's decision." *Julian v. Christopher, 575 A.2d 735, 738 (Md. 1990)* .

(n45)Footnote 154. *See, e.g., Abrahamson v. Brett, 21 P.2d 229 (Or. 1933)* ; *Dobyns v. South Carolina Dep't of Parks, Recreation and Tourism, 454 S.E.2d 347 (S.C. Ct. App. 1995)* ; *Reynolds v. McCullough, 739 S.W.2d 424 (Tex. App. 1987)* ; *B & R Oil Co. v. Ray's Mobile Homes, Inc., 422 A.2d 1267 (Vt. 1980)* ; *Johnson v. Yousoofian, 930 P.2d 921 (Wash. Ct. App. 1996)* ; *see generally* 1 American Law of Property § 3.58 (J. Casner, ed. 1952); 3 Milton R. Friedman, Friedman on Leases § 7.304(a) (3d ed. 1990); *cf. Giordano v. Miller, 733 N.Y.S.2d 94 (App. Div. 2001)* (example of express reasonableness provision).

(n46)Footnote 155. *See First Fed. Sav. Bank of Ind. v. Key Mkts., Inc., 559 N.E.2d 600 (Ind. 1990)* ; *Reynolds v. McCullough, 739 S.W.2d 424 (Tex. App. 1987)* ; *B & R Oil Co. v. Ray's Mobile Homes, Inc., 442 A.2d 1267 (Vt. 1980)* .

(n47)Footnote 156. *See First Fed. Sav. Bank of Ind. v. Key Mkts., Inc., 559 N.E.2d 600 (Ind. 1990)* ; *Gruman v. Investors Diversified Servs., 78 N.W.2d 377 (Minn. 1956)* .

(n48)Footnote 157. *See Jacobs v. Klawans, 169 A.2d 265 (Md. 1961) , overruled, Julian v. Christopher, 575 A.2d 735 (Md. 1990)* .

(n49)Footnote 158. *See Homa-Goff Interiors, Inc. v. Cowden, 350 So. 2d 1035 (Ala. 1977)* ; *Hendrickson v. Freericks, 620 P.2d 205 (Alaska 1980)* ; *Tucson Medical Ctr. v. Zoslow, 147 Ariz. 612, 712 P.2d 459 (Ariz. 1985)* ; *Warmack v. Merchants Nat'l Bank of Fort Smith, 612 S.W.2d 733 (Ark. 1981)* ; *Kendall v. Ernest Pestana, Inc., 709 P.2d 837 (Cal. 1985)* ; *Cafeteria Operators L.P. v. AMCAP/Denver Ltd. Partnership,972 P.2d 276 (Colo.Ct. App. 1998)* ; *Basnet v. Vista Village Mobile Home Park, 699 P.2d 1343 (Colo. App. 1984) , rev'd on other grounds, 731 P.2d 700 (Colo. 1987)* ; 1010 *Potomac Assocs. v. Grocery Mfrs., 485 A.2d 199 (D.C. 1984)* ; *Fernandez v. Vazquez, 397 So. 2d 1171 (Fla. App. 1981)* ; *Funk v. Funk, 633 P.2d 586 (Idaho 1981)* ; *Jack Frost Sales v. Harris Trust and Sav. Bank, 433 N.E.2d 941 (Ill. App. 1982)* ; *Julian v. Christopher, 575 A.2d 735 (Md. 1990)* ; *Newman v. Hinky-Dinky Omaha-Lincoln, Inc., 427 N.W.2d 50 (Neb. 1988)* ; *Boss Barbara, Inc. v. Newbill, 638 P.2d 1084 (N.M. 1982)* ; *Pacific First Bank v. New Morgan Park Corp., 876 P.2d 761 (Or. 1994)*

(n50)Footnote 159. *See* Restatement (Second) of Property § 15.2 (1977).

(n51)Footnote 160. *See, e.g., Julian v. Christopher, 575 A.2d 735, 738-739 (Md. 1990)* .

(n52)Footnote 161. *See, e.g., Kendall v. Ernest Pestana, Inc., 709 P.2d 837, 843-844 (Cal. 1985)* ; *Homa-Goff Interiors, Inc. v. Cowden, 350 So. 2d 1035 (Ala. 1977)* .

(n53)Footnote 162. *See Kendall v. Ernest Pestana, Inc., 709 P.2d 837, 845 (Cal. 1985)* ; *Ernst Home Ctr., Inc. v. Sato, 910 P.2d 486 (Wash. Ct. App. 1996)* .

(n54)Footnote 163. *See Kendall v. Ernest Pestana, Inc., 709 P.2d 837, 844-845 (Cal. 1985)* ; *Julian v. Christopher, 575 A.2d 735, 738-739 (Md. 1990)* .

(n55)Footnote 164. *See Fernandez v. Vazquez, 397 So. 2d 1171 (Fla. App. 1981)* .

(n56)Footnote 165. *See Julian v. Christopher, 575 A.2d 735, 738-739 (Md. 1990)* ; *Newman v. Hinky-Dinky Omaha-Lincoln, Inc., 427 N.W.2d 50 (Neb. 1988)* ; *Rosenberg v. Park Avenue Corp., 679 N.Y.S.2d 56 (App. Div. 1998)* .

(n57)Footnote 166. *See Kendall v. Ernest Pestana, Inc., 709 P.2d 837, 846-847 (Cal. 1985)* ; *Julian v. Christopher, 575 A.2d 735, 738 (Md. 1990)* .

(n58)Footnote 167. Both courts and commentators consistently represent the traditional position to be that landlords have an absolute right to withhold consent, even arbitrarily, as the majority position. *See, e.g., B & R Oil Co., Inc. v. Ray's Mobile Homes, Inc., 422 A.2d 1267 (Vt. 1980)* ; Restatement (Second) of Property § 15.2 reporters note 7 (1977); 3 Milton R. Friedman, Friedman on Leases § 7.304(a) (3d ed. 1990). Even courts imposing a reasonableness standard indicate it is a minority position, although noting it is a growing one. *See, e.g., Fernandez v. Vazquez, 397 So. 2d 1171 (Fla. App. 1981)* ; *Julian v. Christopher, 575 A.2d 735 (Md. 1990)* . *But see* Powell on Real Property(R) P 248.(1) (Michael Allan Wolf ed., LexisNexis Matthew Bender) (suggesting that validity of traditional rule is questionable today).

(n59)Footnote 168. *See Homa-Goff Interiors, Inc. v. Cowden, 350 So. 2d 1035 (Ala. 1977)* ; *Hendrickson v. Freericks, 620 P.2d 205 (Alaska 1980)* ; *Tucson Medical Ctr. v. Zoslow, 147 Ariz. 612, 712 P.2d 459 (Ariz. 1985)* ; *Warmack v. Merchants Nat'l Bank of Fort Smith, 612 S.W.2d 733 (Ark. 1981)* ; *Kendall v. Ernest Pestana, Inc., 709 P.2d 837 (Cal. 1985)* ; *Cafeteria Operators L.P. v. AMCAP/Denver Ltd. Partnership,972 P.2d 276 (Colo.Ct. App. 1998)* ; *Basnett v. Vista Village Mobile Home Park, 699 P.2d 1343 (Colo. App. 1984) , rev'd on other grounds, 731 P.2d 700 (Colo. 1987)* ; 1010 *Potomac Assocs. v. Grocery Mfrs., 485 A.2d 199 (D.C. 1984)* ; *Fernandez v. Vazquez, 397 So. 2d 1171 (Fla. App. 1981)* ; *Funk v. Funk, 633 P.2d 586 (Idaho 1981)* ; *Jack Frost Sales v. Harris Trust and Sav. Bank, 433 N.E.2d 941 (Ill. App. 1982)* ; *Julian v. Christopher, 575 A.2d 735 (Md. 1990)* ; *Newman v. Hinky-Dinky Omaha-Lincoln, Inc., 427 N.W.2d 50 (Neb. 1988)* ; *Boss Barbara, Inc. v. Newbill, 638 P.2d 1084 (N.M. 1982)* ; *Pacific First Bank v. New Morgan Park Corp., 876 P.2d 761 (Or. 1994)* .

(n60)Footnote 169. *See First Fed. Sav. Bank of Ind. v. Key Mkts., Inc., 559 N.E.2d 600 (Ind. 1990)* ; *Reynolds v. McCullough, 739 S.W.2d 424 (Tex. App. 1987)* ; *B & R Oil Co., v. Ray's Mobile Homes, Inc., 422 A.2d 1267 (Vt. 1980)* .

(n61)Footnote 170. *See* Restatement (Second) of Property § 15.2 (1977).

(n62)Footnote 171. *See, e.g., Warmack v. Merchants Nat'l Bank of Fort Smith, 612 S.W.2d 733, 735 (Ark. 1981)* ; *Kendall v. Ernest Pestana, Inc., 709 P.2d 837, 844 (Cal. 1985)* ; *Julian v. Christopher, 575 A.2d 735-737 (Md. 1990)* .

(n63)Footnote 172. *See Kendall v. Ernest Pestana, Inc., 709 P.2d 837, 844 n.14 (Cal. 1985)* (expressly not deciding waiver issue; but California statute later adopted Restatement position); *Newman v. Hinky-Dinky*

Omaha-Lincoln, Inc., 427 N.W.2d 50, 55 (Neb. 1988) (expressly not deciding waiver issue); *Homa-Goff Interiors, Inc. v. Cowden, 350 So. 2d 1035 (Ala. 1977)* (does not address issue); *Fernandez v. Vazquez, 397 So. 2d 1171 (Fla. App. 1981)* (does not address issue).

(n64)Footnote 173. *See Warmack v. Merchants Nat'l Bank of Fort Smith, 612 S.W.2d 733, 735 (Ark. 1981)* ; *Julian v. Christopher, 575 A.2d 735, 740 (Md. 1990)* .

(n65)Footnote 174. *See, e.g, Pacific First Bank v. New Morgan Park Corp., 876 P.2d 761 (Or. 1994)* (reasonable contractual expectations of the parties are shown by the unambiguous terms a lease provision encompassing the landlord's right to withhold consent, at its discretion, to a "transfer" of the lease; under that provision, the parties expressly agreed to a unilateral, unrestricted exercise of discretion by Landlord).

(n66)Footnote 175. *See Alaska Stat. § 34.03.060*; *Cal. Civ. Code § 1995.250*; Del. Code Ann. § 25-5512.

(n67)Footnote 176. *709 P.2d 837 (Cal. 1985)* .

(n68)Footnote 177. *See Cal. Civ. Code § 1995.220*.

(n69)Footnote 178. *See* Conn. Gen. Stat. Ann. §§ 46a.

(n70)Footnote 179. *See, e.g., Homa-Goff Interiors, Inc., v. Cowden, 350 So. 2d 1035, 1038 (Ala. 1977)* ; *Rowley v. City of Mobile, 676 So. 2d 316 (Ala. Ct. App. 1995)* ; *Kendall v. Ernest Pestana, Inc., 709 P.2d 837 (Cal. 1985)* ; *Newman v. Hinky-Dinky Omaha-Lincoln, Inc., 427 N.W.2d 50 (Neb. 1988)* .

(n71)Footnote 180. *See, e.g., Funk v. Funk, 633 P.2d 586 (Idaho 1981)* ; *Ernst Home Center, Inc. v. Sato, 910 P.2d 486 (Wash. Ct. App. 1996)* .

(n72)Footnote 181. *See Maxima Corp. v. Cystic Fibrosis Found., 568 A.2d 1170, 1175 (Md. 1990)* .

(n73)Footnote 182. *See, e.g., Stowe v. 19 East 88th Street, Inc., 683 N.Y.S.2d 60 (App. Div. 1999)* ; *Kruger v. Page Mgt. Co., 432 N.Y.S.2d 295 (Sup. Ct.1980)* ; *Ernst Home Ctr., Inc. v. Sato, 910 P.2d 486 (Wash. Ct. App. 1996)* ; *Stern v. Taft, 361 N.E.2d 279 (Ohio Ct. App. 1976)* .

(n74)Footnote 183. *See* Restatement (Second) of Property, § 15.2, cmt. g (1977).

(n75)Footnote 184. *See Rowley v. City of Mobile, 676 So. 2d 316 (Ala. Ct. App. 1995)* ; *Funk v. Funk, 633 P.2d 586 (Idaho 1981)* ; *Jack Frost Sales v. Harris Trust & Sav. Bank, 433 N.E.2d 941, 949 (Ill. App. 1982)* ; *Newman v. Hinky-Dinky Omaha-Lincoln, Inc., 512 N.W.2d 410 (Neb. Ct. App. 1994)* .

(n76)Footnote 185. Id.

(n77)Footnote 186. *See, e.g., Rowley v. City of Mobile, 676 So.2d 316 (Ala. Ct. App. 1995)* ; *D'Oca v. Delfakis, 636 P.2d 1252 (Ariz. App. 1981)* ; *Fairchild Realty Co. v. Spiegel, Inc., 98 S.E.2d 871 (N.C. 1957)* .

(n78)Footnote 187. *See, e.g., Kendall v. Ernest Pestana, Inc., 709 P.2d 837, 845 (Cal. 1985)* ; *Julian v. Christopher, 575 A.2d 735, 739 (Md. 1990)* ; *Newman v. Hinky-Dinky Omaha-Lincoln, Inc., 427 N.W.2d 50, 54 (Neb. 1988)* .

(n79)Footnote 188. *See, e.g., Kendall v. Ernest Pestana, Inc., 709 P.2d 837, 845 (Cal. 1985)* ; *Julian v. Christopher, 575 A.2d 735, 739 (Md. 1990)* ; *Newman v. Hinky-Dinky Omaha-Lincoln, Inc., 427 N.W.2d 50, 54 (Neb. 1988)* .

(n80)Footnote 189. *See Kendall v. Ernest Pestana, Inc., 709 P.2d 837, 845 (Cal. 1985)* ; *Ringwood Assocs. v.*

Jack's of Route 23, Inc., 379 A.2d 508, 512 (N.J. Super. 1977) .

(n81)Footnote 190. *See Pakwood Industries, Inc. v. John Galt Associates, 466 S.E.2d 226 (Ga. Ct. App.1995)* ; *Julian v. Christopher, 575 A.2d 735, 739 (Md. 1990)* .

(n82)Footnote 191. *See Riggs v. Murdock, 458 P.2d 115 (Ariz. App. 1969)* .

(n83)Footnote 192. *See Newman v. Hinky-Dinky Omaha-Lincoln, Inc., 427 N.W.2d 50, 54 (Neb. 1988)* .

(n84)Footnote 193. *See, e.g., Tollius v. Dutch Inns of Am., 244 So. 2d 467 (Fl. App. 1970)* .

(n85)Footnote 194. *See Warmack v. Merchants Nat'l Bank of Fort Smith, 612 S.W.2d 733 (Ark. 1981)* ; *Johnson v. Jaquith, 189 So. 2d 827 (Fla. 1966)* ; *Basse Truck Line v. Strickland Transp. Co., 359 S.W.2d 477 (Tex. 1962)* .

(n86)Footnote 195. *See Arlington Dev. v. Maxima Corp., 573 A.2d 1337 (Md. App. 1990)* .

(n87)Footnote 196. *See Johnson v. Jaquith, 189 So. 2d 827 (Fla. 1966)* ; *Ringwood Assocs. v. Jack's of Route 23, 379 A.2d 508 (N.J. Super. 1977)* .

(n88)Footnote 197. *Cal. Civ. Code 1995.240*.

(n89)Footnote 198. *See Ilkhchooyi v. Best, 45 Cal. Rptr. 2d 766 (Cal. Ct. App. 1995)* .

(n90)Footnote 199. *See, e.g., Magna Inv. & Dev. Corp. v. Brooks Fashion Stores, Inc., 669 P.2d 1024 (Ariz. Ct. App. 1981)* , *overruled on other grounds, DVM Co. v. Stag Tobacconist, Ltd., 671 P.2d 907 (Ariz. 1983)* ; *Funk v. Funk, 633 P.2d 586 (Idaho 1981)* ; *National Union Fire Ins. Co. v. Rose,760 N.E.2d 791 (Mass. Ct. App. 2002)* ; *Julian v. Christopher, 575 A.2d 735, 739 (Md. 1990)* ; *cf. Winslow v. First Union Nat. Bank of Florida, 639 So. 2d 86 (Fla. Ct. App. 1994)* (landlord refused consent to alterations in context of lease assignment).

(n91)Footnote 200. *See Kendall v. Ernest Pestana, Inc., 709 P.2d 837, 845 (Cal. 1985)* ; *see also D.L. Dev. v. Nance, 894 S.W.2d 258 (Mo. Ct. App. 1995)* (conditioning consent on renegotiation of underlying lease for landlord's benefit unreasonable).

(n92)Footnote 201. *See Julian v. Christopher, 575 A.2d 735, 739 (Md. 1990)* .

(n93)Footnote 202. *See John Hogan Enters. v. Kellogg, 231 Cal. Rptr. 711 (Cal. 1986)* .

(n94)Footnote 203. *See, e.g., Homa-Goff Interiors, Inc. v. Cowden, 350 So. 2d 1035 (Ala. 1977)* ; *Cowan v. Chalamidas, 644 P.2d 528 (N.M. 1982)* .

(n95)Footnote 204. *See John Hogan Enters. v. Kellogg, 231 Cal. Rptr. 711 (Cal. 1986)* ; *Haack v. Great Atl. & Pac. Tea Co., 603 S.W.2d 645 (Mo. App. 1980)* ; *Newman v. Hinky Dinky Omaha-Lincoln, Inc., 512 N.W.2d 410 (Neb. Ct. App. 1994)* ; *Jonas v. Prutaub Joint Venture, 567 A.2d 230 (N.J. 1989)* ; *Jones v. Andy Griffith Prods., Inc., 241 S.E.2d 140 (N.C. 1978)* .

(n96)Footnote 205. *See John Hogan Enters. v. Kellogg, 231 Cal. Rptr. 711 (Cal. 1986)* .

(n97)Footnote 206. *See Jonas v. Prutaub Joint Venture, 567 A.2d 230 (N.J. 1989)* .

(n98)Footnote 207. *See* Pay '*N Pak Stores, Inc. v. Superior Ct., 258 Cal. Rptr. 816 (Cal. 1989)* ; *Medinvest Co. v. Methodist Hosp., 359 N.W.2d 714 (Minn. App. 1984)* .

(n99)Footnote 208. *See Krieger v. Helmsley-Spear, Inc., 302 A.2d 129 (N.J. 1973)* .

(n100)Footnote 209. *612 S.W.2d 733 (Ark. 1981)* .

(n101)Footnote 210. *See Van Geffen v. Herbert, 439 So. 2d 1257 (La. Ct. App. 1983)* ; *see also Tenet HealthSystem Surgical, L.L.C. v. Jefferson Parish Hosp. Serv. Dist. No. 1, 426 F.3d 738 (La. Ct. App. 2005)* (holding that the assignee's proposed use of the premises did not exceed the permitted use under the lease and that the lessor's reason for denying the use was personal to the lessee and did not relate to any objective evaluation).

(n102)Footnote 211. *See Commack Roller Rink v. Commack Arena Mktg., Inc., 545 N.Y.S.2d 804 (App. Div. 1989)* ; *see also Lincoln Place LLC v. RVP Consulting, Inc., 791 N.Y.S.2d 31 (App. Div. 2005)* (refusal was not unreasonable where the proposed use of the assignment was materially different from that specified in the lease).

(n103)Footnote 212. *See Astoria Bedding, Mr. Sleeper Bedding Center Inc. v. Northside Partnership, 657 N.Y.S.2d 796 (App. Div. 1997)* .

(n104)Footnote 213. *See, e.g., Chanslor-Western Oil & Dev. Co. v. Metropolitan San. Dist., 266 N.E.2d 405 (Ill. App. 1970)* ; *American Book Co. v. Yeshiva Univ. Dev. Found., 297 N.Y.S.2d 156 (1969)* .

(n105)Footnote 214. *See Stern v. Taft, 361 N.E.2d 279 (Ohio App. 1976)* .

(n106)Footnote 215. *See* Restatement (Second) of Property § 15.2 cmt. g (1977).

(n107)Footnote 216. *See Roundup Tavern, Inc. v. Pardini, 413 P.2d 820 (Wash. 1970)* .

(n108)Footnote 217. *See American Book Co. v. Yeshiva Univ. Dev. Found., Inc., 297 N.Y.S.2d 156 (1969)* .

(n109)Footnote 218. *Id.*

(n110)Footnote 219. *See, e.g. LaSalle Nat'l Bank v. Bachmann, 108 B.R. 1013 (N.D. Ill. 1989)* ; *Holman v. Halford, 518 So. 2d 442 (Fla. Ct App. 1988)* ; *American Nat. Trust Co. of Chicago v. Kentucky Fried Chicken of Southern California, Inc., 719 N.E.2d 201 (Ill. Ct. App. 1999)* .

(n111)Footnote 220. *See, e.g., Sarete, Inc. v. 1344 U Street Ltd. Partnership 871 A.2d 480* (D.C. Cir. 2005; *American Dairy Queen Corp. v. Brown-Port Co., 621 F.2d 255 (7th Cir. 1980)* ; *LaSalle Nat'l Bank v. Bachmann, 108 B.R. 1013 (Ill. 1989)* ; *Lewiston Pre-Mix Concrete, Inc. v. Rohde, 718 P.2d 551 (Idaho App. 1980)* ; *Batson v. Clark, 980 S.W.2d 566 (Ky. Ct. App. 1998)* .

(n112)Footnote 221. *See Amjems, Inc. v. F. R. Orr Constr. Co., 617 F. Supp. 273 (S.D. Fla. 1985)* ; *Centerre Bank of Independence, N.A. v. Bliss, 765 S.W.2d 276 (Mo. App. 1989)* .

(n113)Footnote 222. *See Hendrickson v. Freericks, 620 P.2d 205 (Alaska 1980)* (noting that assignee in possession of property 5 years); *Lewiston Pre-Mix Concrete, Inc. v. Rohde, 718 P.2d 551 (Idaho App. 1989)* (noting assignee in possession of property 7 years).

(n114)Footnote 223. *See Centerre Bank of Independence v. Bliss, 765 S.W.2d 276 (Mo. App. 1989)* .

(n115)Footnote 224. *See Mattas Motors v. Heritage Homes of Neb., Inc., 749 P.2d 458 (Colo. App. 1987)* .

(n116)Footnote 225. *See Jung v. Zemel, 545 N.E.2d 242 (Ill. App. 1989)* .

(n117)Footnote 226. *See Holman v. Halford, 518 So. 2d 442 (Fl. App. 1988)* .

(n118)Footnote 227. Dumpor's Case, 4 Coke 119b, *76 Eng. Rep. 1110 (K.B. 1603)* .

(n119)Footnote 228. *Id. See generally* 1 American Law of Property § 3.58 (James Casner ed. 1952); 1 Friedman on

Leases § 7.304 e (3d ed. 1990).

(n120)Footnote 229. Law of Property Amendment Act of 1859, 22 & 23 Vict. C. 35, § 1 C, *cited in* American Law of Property § 3.58 (James Casner, ed. 1952).

(n121)Footnote 230. *See, e.g., German-American Sav. Bank v. Gollmer, 155 Cal. 683, 102 P. 932 (Cal. 1909)* ; *Reid v. John F. Weissner Brewing Co., 40 A. 877 (Md. 1898)* ; *Aste v. Putnam's Hotel Co., 141 N.E. 666 (Mass. 1923)* ; *Lipster v. Billings Boot Shop, 129 Mont. 420, 288 P.2d 660 (Mont. 1955)* ; *Barber v. Hyder, 200 P.2d 717 (N.M. 1949)* ; *Gillette Brothers v. Aristocrat Restaurant, Inc., 145 N.E. 748 (N.Y. 1924)* ; *Easley Coal Co. v. Brush Creek Coal Co., 112 S.E. 512 (W. Va. 1922)* .

(n122)Footnote 231. *See, e.g.,* 1 American Law of Property § 3.58 (James Casner, ed. 1952); 3 Milton R. Friedman, Friedman on Leases § 7.304 (3d ed. 1990); Restatement (Second) of Property § 16.1, reporter's note 7 (1977); *see also* William B. Stoebuck & Dale A. Whitman, The Law of Property § 6.71 (3d ed. 2000) (noting that it is said to be the majority rule); *but see* Powell on Real Property(R) P 248[1] (Michael Allan Wolf ed., LexisNexis Matthew Bender).

(n123)Footnote 232. *See, e.g., Reconstruction Fin. Corp. v. Kentucky River Coal Corp., 114 F.2d 942 (6th Cir. 1940)* ; *Investors' Guaranty Corporation v. Thomson, 225 P. 590 (Wyo. 1924)* .

(n124)Footnote 233. *See Kendis v. Cohn, 90 Cal. App. 41 p. 844 (1928); Fay v. Klots, 199 N.Y.S. 49 (1923)* .

(n125)Footnote 234. *See Gazlay v. Williams, 210 U.S. 41 (1903)* .

(n126)Footnote 235. *See, e.g., Merritt v. Kay, 295 F. 973 (D.C. Cir. 1924)* ; *Springer v. Chicago Real Estate, Loan & Trust Co., 66 N.E. 850 (Ill. 1903)* ; *Italian Fisherman, Inc. v. Middlemas, 545 A.2d 1 (Md. App. 1988)* .

(n127)Footnote 236. *See Investors' Guaranty Corporation v. Thomson, 225 P. 590 (Wyo. 1924)* .

(n128)Footnote 237. *See, e.g.,* 1 American Law of Property § 3.58 (James Casner, ed. 1952); Coskran, *Assignment and Sublease Restrictions: The Tribulations of Leasehold Transfers, 22 Loyola L.A. L. Rev. 405, 552 (1989). see also* R. William B. Stoebuck & Dale A. Whitman, The Law of Property § 6.71 (3d ed. 2000).

(n129)Footnote 238. *See* Restatement (Second) of Property § 16.1, reporters' note 7 (1977).

(n130)Footnote 239. *See, e.g.,* 3 Milton R. Friedman, Friedman on Leases § 7.304(C) (3d ed. 1990)); Restatement (Second) of Property § 16.1, reporter's note 7 (1977); *but see* Powell on Real Property(R) P 248[1] (Michael Allan Wolf ed., LexisNexis Matthew Bender).

(n131)Footnote 240. *See, e.g., Page v. U.S. 51 Fed.Cl. 328 (2001)* ; *Lewiston Pre-Mix Concrete, Inc. v. Rohde, 718 P.2d 551 (Idaho App. 1985)* ; *Bolingbrook Equity I Ltd. Partnership v. Zayre of Illinois, Inc., 624 N.E.2d 1287 (Ill. Ct. App. 1993)* ; *Reynolds v. McCullough, 739 S.W.2d 424 (Tex. App. 1987)* ; *OTR v. Flakey Jake's, Inc., 112 Wn.2d 243, 770 P.2d 629, 631 (Wash. 2d 1989)* .

(n132)Footnote 241. *See Reynolds v. McCullough, 739 S.W.2d 424 (Tex. App. 1987)* ; *see also Lampasas v. Spring Center, Inc., 988 S.W.2d 428 (Tex. Ct. 1999)* (subtenant without the consent of the landlord is merely a trespasser).

(n133)Footnote 242. *See OTR v. Flakey Jake's, Inc., 112 Wn.2d 243, 770 P.2d 629, 631 (Wash. 1989)* .

(n134)Footnote 243. *Id.*

(n135)Footnote 244. *See, e.g., B & R Oil Co., Inc. v. Ray's Mobile Homes, Inc., 422 A.2d 1267 (Vt. 1980)* .

(n136)Footnote 245. *See Hendrickson v. Freericks, 620 P.2d 205 (Alaska 1980)* .

(n137)Footnote 246. *See Hendrickson v. Freericks, 620 P.2d 205 (Alaska 1980)* .

(n138)Footnote 247. *See Jung v. Zemel, 545 N.E.2d 242 (Ill. Ct. App. 1989)* .

(n139)Footnote 248. *See, e.g., American Book Co. v. Yeshiva Univ. Dev. Found., Inc., 297 N.Y.S.2d 156 (1969)* .

(n140)Footnote 249. *See, e.g., Passaic Distributors, Inc. v. Sherman Co., 386 F. Supp. 647 (S.D.N.Y. 1974)* ; 1401 *Brickell Assocs. v. Stinson, Lyons, & Schuette, D.A., 522 So. 2d 459 (Fl. App. 1988)* ; *Vranas & Assocs. v. Family Pride Finer Foods, Inc., 498 N.E.2d 333 (Ill. App. 1986)* ; *see also, Cal. Civ. Code § 1995.310* (providing for damage remedy when landlord unreasonably withholds consent); *but cf. WHTR Real Estate Ltd. Partnership v. Venture Distributing, Inc. 825 N.E.2d 105 (Mass. Ct. App. 2005)* (landlord is not in default for failure to consent unless the tenant produces a candidate ready, willing, and able to fulfil the tenant's obligations under the sublease).

(n141)Footnote 250. *See generally*, Annotation, 54 A.L.R.3 d 679 (1972).

(n142)Footnote 251. *See Mann v. Steinberg, 188 Misc. 652, 64 N.Y.S.2d 68 (1946)* ; *Butterick Pub. Co. v. Fulton & Elm Leasing Co., 132 Misc. 366, 229 N.Y.S. 86 (1928)* ; *Fairchild Realty Co. v. Spiegel, Inc., 98 S.E.2d 871 (N.C. 1957)* (dictum); *Hedgecock v. Mendel, 263 P. 593 (Wash. 1928)* ; *see generally*, Annotation, 54 A.L.R.3 d 679 (1972).

(n143)Footnote 252. *See Mann v. Steinberg, 64 N.Y.S.2d 68 (1946)* .

(n144)Footnote 253. *See Chanslor-Western Oil and Dev. Co. v. Metropolitan San. Dist., 266 N.E.2d 405 (Ill. App. 1970)* ; *Adams, Harkness & Hill, Inc. v. Northeast Realty Corp., 281 N.E.2d 262 (Mass. 1972)* ; *Broad & Branford Place Corp. v. J. J. Hockenjos Co., 39 A.2d 80 (N.J. 1944)* ; *Arlu Associates, Inc. v. Rosner, 14 A.D.2d 272, 220 N.Y.S.2d 288 (1961)* ; *Singer Sewing Mach. Co. v. Eastway Plaza, Inc., 158 N.Y.S.2d 647 (1957)* ; *Rock County Sav. & Trust Co. v. Yost's Inc., 153 N.W.2d. 594 (Wis. 1967)* ; *see also Mitchell's, Inc. v. Nelms, 454 S.W.2d 809 (Tex. App. 1970)* ; *see generally*, Annotation, 54 A.L.R.3 d 679 (1972).

(n145)Footnote 254. *See Passaic Distributors, Inc. v. Sherman Co., 386 F. Supp. 647 (S.D.N.Y. 1974)* ; *Vranas & Associates, Inc. v. Family Pride Finer Foods, Inc., 498 N.E.2d 333 (Ill. Ct. App. 1986)* ; *Rock County Sav. & Trust Co. v. Yost's, Inc., 153 N.W.2d 594 (Wis. 1967)* . Of course, the landlord will have to be found in breach of the covenant for that to be the result. *See WHTR Real Estate Ltd. Partnership v. Venture Distributing, Inc. 825 N.E.2d 105 (Mass. Ct. App. 2005)* (landlord is not in default for failure to consent unless the tenant produces a candidate ready, willing, and able to fulfil the tenant's obligations under the sublease).

(n146)Footnote 255. *See, e.g., Passaic Distributors, Inc. v. Sherman Co., 386 F. Supp. 647 (S.D.N.Y. 1974)* ; 1401 *Brickell Assocs. v. Stinson, Lyons, & Schuette, D.A., 522 So. 2d 459 (Fl. App. 1988)* ; *Vranas & Associates, Inc. v. Family Pride Finer Foods, Inc., 498 N.E.2d 333 (Ill. Ct. App. 1986)* .

(n147)Footnote 256. *See, e.g., Passaic Distributors, Inc. v. Sherman Co., 386 F. Supp. 647 (S.D.N.Y. 1974)* ; *Vranas & Assocs. v. Family Pride Finer Foods, Inc., 498 N.E.2d 333 (Ill. App. 1986)* .

(n148)Footnote 257. *Id.*

(n149)Footnote 258. *See Passaic Distributors, Inc. v. Sherman Co., 386 F. Supp. 647 (S.D.N.Y. 1974)* .

(n150)Footnote 259. *See Vranas & Assocs. v. Family Pride Finer Foods, Inc., 498 N.E.2d 333 (Ill. App. 1986)* .

(n151)Footnote 260. *See Haritas v. Goveia, 345 Mass. 774, 188 N.E.2d 854 (Mass. 1963)* .

(n152)Footnote 261. *See Wasserman v. N.R.G. Realty Corp., 500 N.Y.S.2d 109 (1986)* .

(n153)Footnote 262. *See generally* William B. Stoebuck & Dale A. Whitman, The Law of Property § 6.10 (3d ed. 2000).

(n154)Footnote 263. *See Rock County Sav. & Trust Co. v. Yost's, Inc., 153 N.W.2d 594 (Wis. 1967)* .

(n155)Footnote 264. *See 601 West 26 Corp. v. John Wiley and Sons, Inc., 298 N.Y.S.2d 1018 (App. Div.1969)* .

(n156)Footnote 265. *398 A.2d 1315 (N.J. Super. 1979)* .

(n157)Footnote 266. *See The Maxima Corp. v. Cystic Fibrosis Found., 568 A.2d 1170 (Md. App. 1990)* ; *Adams, Harkness & Hill, Inc. v. Northeast Realty Corp., 281 N.E.2d 262 (Mass. 1972)* .

(n158)Footnote 267. *See* Restatement (Second) of Property § 15.1 cmt. h (1977) (permitting termination remedy only when the parties have expressly covenanted for a reasonableness standard).

(n159)Footnote 268. *See Cal. Civ. Code § 1995.310*.

(n160)Footnote 269. *See* Ark. Stat. Ann. § 4-59-102; N.H. Rev. Stat. Ann. § 354; *Idaho Code § 9-503*; 775 Ill. Comp. Stat. 775; *Mich. Comp. Laws Ann. § 566.106*; *Minn. Stat. Ann. § 573.04*; *Neb. Rev. Stat. § 36-103*; *N.Y. Gen. Oblig. Law § 5-703*; *Md. Ann. Code Real Prop. § 5-103*; *Mass. Gen. Laws Ann. ch. 183, § 3*; 775 Ill. Comp. Stat. 775; *N.H. Rev. Stat. Ann. § 477:15*; *Ohio Rev. Code Ann. § 1335.04*; *S.C. Code Ann. § 32-3-10*; *Utah Code Ann. § 25-5-1*; *Vt. Stat. Ann. tit. 27, § 304*; *Pa. Stat. Ann. tit. 68, § 250.203*.

(n161)Footnote 270. *See Alaska Stat. § 09.25.010(12)(b)*; *Cal. Civ. Code § 1091*; *Iowa Code Ann. § 622.32(3)*; *Mont. Rev. Code Ann. § 70-20-101*; *N.D. Cent. Code § 47-10-01*; Const. Art. 1, § 19; S.D. Comp. Laws Ann. § 43-25-1.

(n162)Footnote 271. *See Md. Ann. Code Real Prop. § 5-103*.

(n163)Footnote 272. *See, e.g.,* Ark. Stat. Ann. § 4-59-102; *Colo. Rev. Stat. Ann. § 38-10-106*; *Mont. Rev. Code Ann. § 70-20-101*.

(n164)Footnote 273. *See Pa. Stat. Ann. tit. 68, § 250.203*.

(n165)Footnote 274. *See Millicom, Inc. v. Breed, Abbott & Morgan, 554 N.Y.S.2d 160, 162 (1990)* .

(n166)Footnote 275. *See Herring v. Volume Merchandise, Inc., 106 S.E.2d 197 (N.C. 1958)* .

(n167)Footnote 276. *See Abbott v. Bob's U-Drive, 352 P.2d 598 (Or. 1960)* .

(n168)Footnote 277. *See Jones v. Inn Keepers, Inc., 676 S.W.2d 761 (Ark. App. 1984)* ; *Nedick's Stores, Inc. v. T.S.N.Y. Realty Corp., 548 N.Y.S.2d 172 (App. Div. 1989)* .

(n169)Footnote 278. *See Vallely Investments, L.P. v. BancAmerica Commercial Corp., 106 Cal. Rptr.2d 689 (Cal. Ct. App. 2001)* ; *Siragusa v. Park, 913 S.W.2d 915 (Mo. Ct. App. 1996)* & § 42.04(c) of this chapter.

(n170)Footnote 279. *See, e.g., Haynes v. Eagle-Picher Co., 295 F.2d 761 (1961)* ; *Estate of Basile v. Famest, Inc., 718 So. 2d 892 (Fla. Ct. App. 1998)* ; *Siragusa v. Park, 913 S.W.2d 915 (Mo. Ct. App. 1996)* ; *Twelve Oaks Tower I, Ltd. v. Premier Allergy, Inc., 938 S.W.2d 102 (Tex. Ct. App. 1996)* ; *L&M Corp. v. Loader, 688 P.2d 448 (Utah 1984)* ; *Warnert v. MGM Props., 362 N.W.2d 364 (Minn. App. 1985)* ; *see generally* 1 The American Law of Real Property § 5.07(1)(C) (A. Gaudio ed. 1993).

(n171)Footnote 280. *See* Ferrier, *Can There be a Sublease for the Entire Term?, 18 Cal. L. Rev. 1 (1929).*

(n172)Footnote 281. *Id.*

(n173)Footnote 282. *See Langford v. Selmes, 3 K. & J. 220, 69 Eng. Reprint 1089 (1853);* Ferrier, *Can There be a Sublease for the Entire Term?, 18 Cal. L. Rev. 1 (1929); See also Jaber v. Miller, 239 S.W.2d 760 (Ark. 1951)* .

(n174)Footnote 283. *See Smiley v. Van Winkle, 6 Cal. 605 (1856)* ; *see also Salmat Pizza Enterprises, Inc. v. Dezzara Restaurant Corp., 643 N.Y.S.2d 890 (City Ct. 1996)* (noting that subleases are crafted to end prior to the expiration of tenant's term).

(n175)Footnote 284. *Burgess Pic-Pac, Inc. v. Fleming Companies, Inc., 437 S.E.2d 742 (W. Va. 1993)* .

(n176)Footnote 285. This tenant was actually an assignee of the original tenant.

(n177)Footnote 286. *Burgess Pic-Pac, Inc. v. Fleming Companies, Inc., 437 S.E.2d 742 (W. Va. 1993)* .

(n178)Footnote 287. *See, e.g., Warnert v. MGM Props., 362 N.W.2d 364 (Minn. App. 1985)* .

(n179)Footnote 288. *See, e.g., Joseph Bros. Co. v. F. W. Woolworth Co., 641 F. Supp. 822 (N.D. Ohio 1985)* ; *Warnert v. MGM Props., 362 N.W.2d 364, 367 (Minn. App. 1985)* .

(n180)Footnote 289. *See, e.g., Rocklen, Inc. v. Radulesco, 522 A.2d 846 (Conn. App. 1987)* ; *Nedick's Stores, Inc. v. T.S.N.Y. Realty Corp., 548 N.Y.S.2d 172 (App. Div. 1989)* ; *Jensen v. O.K. Inv. Corp., 507 P.2d 713 (Utah 1973)* .

(n181)Footnote 290. *See* 1 American Law of Property § 3.57 (James Casner, ed. 1952).

(n182)Footnote 291. *See American Community Stores Corp. v. Newman, 441 N.W.2d 154 (Neb. 1989)* ; *Novosad v. Clary, 431 S.W.2d 422 (Tex. Ct. App. 1968)* ; *Dunlap v. Bullard, 131 Mass. 161 (1881)* .

(n183)Footnote 292. *See, id.*

(n184)Footnote 293. *See* 1 American Law of Property § 3.57 (James Casner, ed. 1952).

(n185)Footnote 294. *See D.A.C. Uranium Co. v. Benton, 149 F. Supp. 667, 677-78 (D. Colo. 1956)* ; *Collamer v. Kelley, 12 Iowa 319, 12 Iowa 318 (1881)* .

(n186)Footnote 295. *See Morrisville Shopping Ctr. v. Sun Ray Drug Co., 112 A.2d 183 (Pa. 1955)* . *See* Wallace,*Assignment and Sublease, 8 Ind. L.J. 359 (1933).*

(n187)Footnote 296. *239 S.W.2d 760 (Ark. 1951)* .

(n188)Footnote 297. *See id.* R. Schoshinski, American Law of Landlord and Tenant § 8.11 (1980).

(n189)Footnote 298. *See* 1 The American Law of Real Property § 5.07(1)(c) (A. Gaudio, ed. 1993).

(n190)Footnote 299. *See Jaber v. Miller, 239 S.W.2d 760 (Ark. 1951)* .

(n191)Footnote 300. *See, e.g., Entroth Shoe Co. v. Johnson, 260 Ky. 309, 85 S.W.2d 686 (Ky. 1935)* ; *Stacy v. Midstates Oil Corp., 36 So. 2d 714 (La. 1947)* .

(n192)Footnote 301. *See Fratcher v. Smith, 62 N.W. 832 (Mich. 1895)* ; *see generally,* 1 American Law of Property § 3.57 (James Casner, ed. 1952).

(n193)Footnote 302. *Lamonts Apparel, Inc. v. SI-Lloyd Associates, 967 P.2d 905 (Or. Ct. App. 1998)* .

(n194)Footnote 303. *Lamonts Apparel, Inc. v. SI-Lloyd Associates, 967 P.2d 905 (Or. Ct. App. 1998)* .

(n195)Footnote 304. 3 Milton R. Friedman, Friedman on Leases § 7.501a (3d ed. 1990).

(n196)Footnote 305. *See* S. Kurtz and H. Hovenkamp, Property 559 (2d ed. 1993).

(n197)Footnote 306. *Id.*

(n198)Footnote 307. *See, e.g. Sarete, Inc. v. 1344 U Street Ltd. Partnership, 871 A.2d 480 (D.C. Cir. 2005)* ; *Siragusa v. Park, 913 S.W.2d 915 (Mo. Ct. App. 1996)* ; *Employees Consumer Org., Inc. v. Gorman's, Inc., 395 S.W.2d 162 (Mo. 1965)* .

(n199)Footnote 308. *See Vallely Investments, L.P. v. BancAmerica Commercial Corp., 106 Cal. Rptr.2d 689 (Cal. Ct. App. 2001)* ; *Peiser v. Mettler, 328 P.2d 953 (Cal. 1958)* ; *Italian Fisherman, Inc. v. Middlemas, 545 A.2d 1, 4 (Md. App. 1988)* ; *Jenkins v. John Taylor Dry Goods Co., 179 S.W.2d 54 (Mo. 1944)* ; *Jedco Dev. Co. v. Bertsch, 441 N.W.2d 664, 666 (N.D. 1989)* ; *OTR v. Flakey Jake's, Inc., 112 Wn.2d 243, 770 P.2d 629 (Wash. 1989)* .

(n200)Footnote 309. *See, e.g., Employees Consumer Org., Inc. v. Gorman's, Inc., 395 S.W.2d 162 (Mo. 1965)* .

(n201)Footnote 310. *See Gateway Co. v. DiNoia, 654 A.2d 342 (Conn. 1995)* ; *Bornel, Inc. v. City Prods. Corp., 432 P.2d 489 (Wyo. 1967)* .

(n202)Footnote 311. *See First Am. Nat'l Bank v. Chicken Sys. of Am. Inc., 510 S.W.2d 906 (Tenn. 1974)* .

(n203)Footnote 312. *See Rittenberg v. Donohoe Constr. Co., 426 A.2d 338 (D.C. App. 1981)* ; *Regency Advantage Ltd. Partnership v. Bingo Idea-Watauga, Inc.,936 S.W.2d 275 (Tex. 1996)* ; *Amco Trust, Inc. v. Naylor, 317 S.W.2d 47 (Tex. 1958)* .

(n204)Footnote 313. See the discussion on this point in § 42.04(e)(3)(i) of this chapter.

(n205)Footnote 314. *See Italian Fisherman, Inc. v. Middlemas, 545 A.2d 1, 4 (Md. App. 1988)* .

(n206)Footnote 315. *See OTR v. Flakey Jake's, Inc., 112 Wn.2d 243, 770 P.2d 629, 632 (Wash. 1989)* .

(n207)Footnote 316. *See Flynn v. Mikelian, 25 Cal. Rptr. 138 (Cal. App. 1962)* ; *Baehr v. Penn-O-Tex Oil Corp., 104 N.W.2d 661* (Minn.) ; *Twelve Oaks Tower I, Ltd. v. Premier Allergy, Inc.,938 S.W.2d 102 (Tex. Ct. App. 1996)* .

(n208)Footnote 317. *See, e.g., Stenke v. Masland Dev. Co., 394 N.W.2d 418 (Mich. App. 1986)* ; *Twelve Oaks Tower I, Ltd. v. Premier Allergy, Inc., 938 S.W.2d 102 (Tex. Ct. App. 1996)* .

(n209)Footnote 318. *See Italian Fisherman, Inc. v. Middlemas, 545 A.2d 1, 4 (Md. App. 1988)* ; *Mrotek Enterprises v. Dryer, 256 A.2d 557 (D.C. App. 1969)* ; Spivak v. Madison - 54th *Realty Co., 303 N.Y.S.2d 128 (Sup. Ct. 1969)* .

(n210)Footnote 319. Traditional covenant doctrine requires that for a burden to run with land there must be both horizontal and vertical privity. Horizontal privity, between the original covenanting parties, is met by the landlord-tenant relationship itself. Vertical privity is met by the assignor's transfer of interest to the assignee.

(n211)Footnote 320. *See, e.g., Abbott v. Bob's U-Drive, 352 P.2d 598, 603 (Or. 1960)* ; *Twelve Oaks Tower I, Ltd. v. Premier Allergy, Inc., 938 S.W.2d 102 (Tex. Ct. App. 1996)* .

(n212)Footnote 321. C. Moynihan, Introduction to the Law of Real Property 96 (2d ed. 1988).

(n213)Footnote 322. *See, e.g., Kelly v. Tri-Cities Broadcasting, Inc., 195 Cal. Rptr. 303, 310 (Cal. 1983)* ; *Paul v.*

Kanter, 172 So. 2d 26, 27 (Fla. App. 1965) ; *Rauch v. Circle Theatre, 176 Ind. App. 130, 374 N.E.2d 546, 549-550 (Ind. 1978)* ; *Abbott v. Bob's U-Drive, 352 P.2d 598, 604 (Or. 1960)* ; *Amco Trust, Inc. v. Naylor, 317 S.W.2d 47 (Tex. 1958)* .

(n214)Footnote 323. *See Kelly v. Tri-Cities Broadcasting, Inc., 195 Cal. Rptr. 303, 311 (Cal. 1983)* ; *Abbott v. Bob's U-Drive, 352 P.2d 598, 604 (Or. 1960)* .

(n215)Footnote 324. *See McFerran v. Heroux, 269 P.2d 815 (Wash. 1954)* .

(n216)Footnote 325. *See* 3 Milton R. Friedman, Friedman on Leases § 7.501c1 (3d ed. 1990).

(n217)Footnote 326. *See Infinity Broadcasting Corp. of Ill. v. Prudential Ins. Co. of Am., 869 F.2d 1073 (7th Cir. 1989)* .

(n218)Footnote 327. *See Income Props. Inv. Corp. v. Trefethen, 284 P. 782 (Wash. 1930)* .

(n219)Footnote 328. *See McIntyre v. Coker, 150 So. 2d 220, 224 (Ala. 1963)* ; *Stenke v. Masland Dev. Co. 394 N.W.2d 418 (Mich. App. 1986)* ; *see also Twelve Oaks Tower I, Ltd. v. Premier Allergy, Inc., 938 S.W.2d 102 (Tex. Ct. App. 1996)* (right to terminate).

(n220)Footnote 329. *See Siragusa v. Park, 913 S.W.2d 915 (Mo. Ct. App. 1996)* ; *O.T.R. v. Flakey Jake's, Inc., 770 P.2d 243 (Wash. 1989)* .

(n221)Footnote 330. *See First Am. Nat'l Bank of Nashville v. Chicken System of America, Inc., 616 S.W.2d 156 (Tenn. App. 1980)* ; *Bornel, Inc. v. City Prods. Corp., 432 P.2d 489 (Wyo. 1967)* .

(n222)Footnote 331. *See Gateway Co. v. DiNoia, 654 A.2d 342 (Conn. 1995)* ; *Leitch v. New York C. R. Co., 388 Ill. 236, 58 N.E.2d 16, 18-19 (Ill. 1944)* ; *Broida v. Hayashi, 464 P.2d 285 (Haw. 1970)* ; *Bornel, Inc. v. City Prods. Corp., 432 P.2d 489 (Wyo. 1967)* .

(n223)Footnote 332. *See First Am. Nat'l Bank of Nashville v. Chicken System of America, Inc., 616 S.W.2d 156 (Tenn. App. 1980)* .

(n224)Footnote 333. *See First Am. Nat'l Bank of Nashville v. Chicken System of America, Inc., 616 S.W.2d 156 (Tenn. App. 1980)* ; *Packard-Bamberger & Co. v. Maloof, 214 A.2d 45 (N.J. Super. 1965)* .

(n225)Footnote 334. *See Hart v. Socony-Vacuum Oil Co., 50 N.E.2d 285 (N.Y. 1943)* .

(n226)Footnote 335. *See Dassori v. Zarek, 75 N.Y.S. 841 (1902)* ; *Consolidated Coal Co. v. Peers, 46 N.E. 1105 (Ill. 1896).*

(n227)Footnote 336. *See American Nat'l Bank & Trust v. Hoyne Indus., 738 F. Supp. 297 (N.D. Ill. 1990)* ; *Gateway Co. v. DiNoia, 654 A.2d 342 (Conn. 1995)* ; *Sander v. Piggly Wiggly Stores, Inc., 95 S.W.2d 1266 (Tenn. App. 1936)* ; 1 American Law of Property § 3.61 (James Casner, ed. 1952).

(n228)Footnote 337. *See Vallely Investments, L.P. v. BancAmerica Commercial Corp., 106 Cal. Rptr.2d 689 (Cal. Ct. App. 2001)* ; *Peiser v. Mettler, 328 P.2d 953 (Cal. 1958)* ; *Siragusa v. Park, 913 S.W.2d 915 (Mo. Ct. App. 1996)* ; *Lincoln Place LLC v. RVP Consulting, Inc., 791 N.Y.S.2d 31 (App. Div. 2005)* ; *Jones v. Dokos Enters., Inc., 357 S.E.2d 203 (Va. 1987); O.T.R. v. Flakey Jake's, Inc., 770 P.2d 629 (Wash. 1989)* .

(n229)Footnote 338. *See Siragusa v. Park, 913 S.W.2d 915 (Mo. Ct. App. 1996)* .

(n230)Footnote 339. *See Kendall v. Ernest Pestana, Inc., 709 P.2d 837, 845 (Cal. 1985)* ; *Lincoln Place LLC v.*

RVP Consulting, Inc., 791 N.Y.S.2d 31 (App. Div. 2005) ; *Twelve Oaks Tower I, Ltd. v. Premier Allergy, Inc., 938 S.W.2d 102 (Tex. Ct. App. 1996)* .

(n231)Footnote 340. *See* 3 Milton R. Friedman, Friedman on Leases § 7.501d (3d ed. 1990).

(n232)Footnote 341. *See Vallely Investments, L.P. v. BancAmerica Commercial Corp., 106 Cal. Rptr.2d 689 (Cal. Ct. App. 2001)* ; *Shadeland Dev. Corp. v. Meek, 489 N.E.2d 1192 (Ind. Ct. App. 1986)* .

(n233)Footnote 342. *See Jedco Dev. Co. v. Bertsch, 441 N.W.2d 664 (N.D. 1989)* ; *OTR v. Flakey Jake's, Inc., 112 Wn.2d 243, 770 P.2d 629 (Wash. 1989)* .

(n234)Footnote 343. *See Shadeland Dev. Corp. v. Meek, 489 N.E. 1192 (Ind. App. 1986)* ; R. William B. Stoebuck & Dale A. Whitman, The Law of Property § 6.69 (3d ed. 2000).

(n235)Footnote 344. *See J.G.M.C.J. Corp. v. Sears, Roebuck & Company 391 F.3d 364* (1st Cir. 2004) ; *Jedco Dev. Co., Inc. v. Bertsch, 441 N.W.2d 664, 667 (N.D. 1989)* ; *Rauch v. Circle Theatre, 176 Ind. App. 130, 374 N.E.2d 546 (Ind. App. 1976)* .

(n236)Footnote 345. *See Jedco Dev. Co. v. Bertsch, 441 N.W.2d 664 (N.D. 1981)* (rent increase permissible where contemplated by original lease).

(n237)Footnote 346. *See Keeley v. Beenblossom, 183 Iowa 861, 167 N.W. 638 (Iowa 1918)* .

(n238)Footnote 347. *See Jedco Dev. Co. v. Bertsch, 441 N.W.2d 664 (N.D. 1981)* ; 1 American Law of Property § 3.61 (James Casner, ed. 1952).

(n239)Footnote 348. *See Jedco Dev. Co. v. Bertsch, 441 N.W.2d 664 (N.D. 1981)* ; 3 Milton R. Friedman, Friedman on Leases § 7.501b (3d ed. 1990).

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(n243)Footnote 352. *See First Am. Nat'l Bank v. Chicken Sys. of Am., Inc., 510 S.W.2d 906 (Tenn. App. 1974)* .

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(n246)Footnote 355. *See Rittenberg v. Donohoe Constr. Co., 426 A.2d 338 (D.C. App. 1981)* ; *Christensen v. Tidewater Fibre Corp. 616 S.E.2d 583 (N.C. Ct. App. 2005)* ; *Neal v. Craig Brown, Inc., 356 S.E.2d 912 (N.C. Ct. App. 1987)* .

(n247)Footnote 356. *See, e.g., American Community Stores Corp. v. Newman, 441 N.W.2d 154 (Neb. 1989)* ; *LaVack v. National Shoes, Inc., 507 N.Y.S.2d 293, 295 (1986)* ; *Christensen v. Tidewater Fibre Corp., 616 S.E.2d 583 (N.C. Ct. App. 2005)* ; *Neal v. Braun Craig Brown, Inc., 356 S.E.2d 912 (N.C. Ct. App. 1987)* .

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(n249)Footnote 358. *See* William B. Stoebuck & Dale A. Whitman, The Law of Property § 6.70 (3d ed. 2000).

(n250)Footnote 359. *See* William B. Stoebuck & Dale A. Whitman, The Law of Property § 6.70 (3d ed. 2000)(suggesting that the tenant's covenant to pay rent money could be enforced as an equitable servitude).

(n251)Footnote 360. *See J. E. Martin, Inc. v. Interstate 8th St., 582 P.2d 299 (Colo. App. 1978)* ; *Riverbend Investors v. Progressive Surface Preparation, L.L.C., 660 N.W.2d 373* (Mich. Ct. App.,2003) .

(n252)Footnote 361. *See C.R. Anthony Co. v. Wal-Mart Properties, Inc., 54 F.3d 514* (8th Cir. 1995) .

(n253)Footnote 362. *See, e.g., Johnson Lakes Development, Inc. v. Central Nebraska Public Power & Irrigation District, 568 N.W.2d 573 (Neb. Ct. App. 1997)* ; 231 *Centre Street Associates v. Post Bros. Service Stations, Inc., 675 N.Y.S.2d 92 (App. Div. 1998)* ; *Spanish Oaks, Inc. v. Hy-Vee, Inc., 655 N.W.2d 390 (Neb. 2003)* ; *First Federal Sav. and Loan Ass'n of Rochester v. Moore, 599 N.Y.S.2d 410 (City Ct. 1993)* ; *Hawley Corp. v. West Virginia Broadcasting Corp., 197 S.E.2d 628 (W. Va. 1938)* .

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(n256)Footnote 365. *See Warnert v. MGM Props., 362 N.W.2d 364 (Minn. App. 1985)* .

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(n263)Footnote 372. *See Minister, Elders & Deacons of the Reformed Protestant Dutch Church of N.Y. v. 198 Broadway, Inc., 451 N.E.2d 164 (N.Y. 1983)* .

(n264)Footnote 373. *See Texas Co. v. Adelman, 99 P.2d 874 (Okla. 1939)* ; *see also Burgess Pic-Pac, Inc. v. Fleming Companies, Inc., 437 S.E.2d 742 (W. Va. 1993)* (tenant/sublessor liablto sublessee for damages if fails to renew option in head lease after granting an option to renew in the sublease).

(n265)Footnote 374. *See Broida v. Hayashi, 464 P.2d 285 (Haw. 1970)* ; *First Am. Nat'l Bank v. Chicken Sys. of Am., Inc., 510 S.W.2d 906 (Tenn. App. 1974)* .

(n266)Footnote 375. *See* Herbert T. Tiffany, The Law of Real Property § 124 (3d ed. 1939).

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(n268)Footnote 377. *See Marcellus v. K.O.V., Inc., 615 P.2d 170, 172 (Kan. App. 1980)* .

(n269)Footnote 378. *See* R. Schoshinski, American Law of Landlord and Tenant § 8.13 (1980).

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CHAPTER 42 TRANSFER OF LANDLORD AND TENANT INTERESTS

5-42 Thompson on Real Property, Thomas Editions § 42.05

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§ 42.05 Bibliography.

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Note. "Release of Assignee After Assignment Over from Covenant to Pay Rent to Assignor." *Va. L. Rev.* Vol. 20 (1934) 382.

Note. "Release of Lessee Implied from Assignment of Long-term Lease." *Va. L. Rev.* Vol. 23 (1937) 838.

Note. "Release or Lessee by Agreement Between Lessor and Assignee of Lease." *Yale L.J.* Vol. 41 (1932) 1239.

Note. "Rule in Dumpor's Case." *Cal. L. Rev.* Vol. 14 (1926) 328.

Note. "Sublease and Assignment, Underlease of Part of Premises." *Fordham L. Rev.* Vol. 5 (1936) 177.

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Note. "Transfer by Lessee as Sublease, Not Assignment." *Mich. L. Rev.* Vol. 50 (1952) 946.

Note. "Assignment of Commercial Leases The Reasonableness Standard and Withholding Consent: Kendall v. Ernest Pestana, Inc." *DePaul L. Rev.* Vol. 36 (1987) 285.

Note. "Assignment or Sublease-Nature of Reversionary Interest." *Or. L. Rev.* Vol. 27 (1948) 251.

Note. "Assignment of Lease, Liability of Assignee After Reassignment." *Tex. L. Rev.* Vol. 14 (1935) 108.

Note. "Assignment and Subletting, Assignee's Liability on a Covenant." *Harv. L. Rev.* Vol. 43 (1930) 1310.

Note. "Covenant Not to Sublease or Assign-Liability of Landlord for Unreasonably Withholding Consent." *Fordham L. Rev.* Vol. 26 (1957) 352.

Note. "When an Assignment May Be a Sublease." *St. John's L. Rev.* Vol. 1 (1926) 62.

Note. "Withdrawing Partner's Transfer of Lease to Remaining Partner Not a Breach of Covenant Forbidding Assignment." *N.Y.L.F.* Vol. 7 (1961) 118.

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Annotation, Assignee's Right to Enforce Lessor's Covenant to Renew or Extend Lease, *29 A.L.R. 2D 837* .

Annotation, *Breach of Covenant For Quiet Enjoyment in Lease, 41 A.L.R.2d 1414 (2005)* .

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Annotation, *Continued Possession of Tenant as Constructive Notice to Third Person of Unrecorded Transfer of Title of Original Lessor*, 1 A.L.R. 2 D 322.

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Annotation, *Grazing or Pasturage Agreement a Violation of Covenant in Lease or Provision of Statute Against Assigning or Subletting Without Lessor's Consent, 71 A.L.R.4th (1983) 188.*

Annotation, *Landlord's Duty, On Tenant's Failure to Occupy, or Abandonment of Premises, to Mitigate Damages by Accepting or Procuring Another Tenant, 75 A.L.R.5th 1 (2005) .*

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Annotation, *Liability for Interference With Lease, 96 A.L.R.3d 862 (2005) .*

Annotation, *Merger or Consolidation of Corporate Lessee as Breach of Clause in Lease Prohibiting, Conditioning, or Restricting Assignment or Sublease, 39 A.L.R.4th (1985) 879.*

Annotation, *Relief Against Forfeiture of Lease for Nonpayment of Rent, 31 A.L.R.2d 321 (2005) .*

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Annotation, *Right to Recover Exaction by Lessor as Condition of Consent to Assignment or Sublease*, 40 A.L.R. (1926) 553.

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Annotation, *Sufficiency as to Method of Giving Oral or Written Notice Exercising Option to Renew or Extend Lease, 29 A.L.R.4th 903 (2005) .*

Annotation, *Time Limits on Assumption or Rejection of Executory Contract or Lease Under 365 of Bankruptcy Code (11 U.S.C.A. 365), 137 A.L.R. Fed. 137 (2005) .*

Annotation, *What Constitutes Abandonment of Residential or Commercial Lease Modern Cases, 84 A.L.R.4th 183*

(2005) .

Annotation, *What is Objectionable Purpose Within Provision of Lease Against Assigning or Subletting for Objectionable Purpose*, 61 A.L.R. (1929) 708.

Annotation, *When Lessor May Withhold Consent Under Unqualified Provision in Lease Prohibiting Assignment or Subletting of Leased Premises Without Lessor's Consent, 21 A.L.R.4th 188 (2005)* .

Annotation, *Validity and Effect, As Between Assignor and Assignee or Claimants Under Them, of Assignment by Purchaser Under Land Contract, or by Tenant Under Lease, as Affected by Provision of Contract or Lease Restricting or Prohibiting Assignment*, 148 A.L.R. (1944) 1361.

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Supp. To CHAPTER 42 TRANSFER OF LANDLORD AND TENANT INTERESTS

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§ 42.04(b)(3)(i) General Validity.

Add:

New Stadium LLC v. Greenpoint-Goldman Corp., 843 N.Y.S.2d 290 (2007) (lessor refused to comply with contractual obligation to consent to an assignment of the lease, which gave rise to a claim for tortious interference with business relations).

Cement Shoes, Inc. v. Mak, 859 N.Y.S.2d 65 (2008) (landlord who delayed in consenting to proposed assignment was liable for damages from abandonment of proposed assignment deal).

§ 42.04(b)(3)(ii) Reasonableness Requirements.

Line 5 of subsection

Change "development" to "developed"

Darin, LLC v. StratEdge Corp., 2008 Mass. App. Div. 91 (Mass. App. Div. 2008) (withholding of landlord's consent was not unreasonable).

Add:

Seedway SuperAmerica, LLC v. Tropic Enterprises, Inc., 966 So. 2d 1 (Fla. App. 2007) (the lease provision on government assignments is subject to an implied covenant of good faith).

§ 42.04(b)(3)(iii) What Constitutes Unreasonable Withholding of Consent.

Add:

Van Sloun v. Agans Bros., Inc., 778 N.W.2d 174 (Iowa 2010) (landlord reasonably withheld consent to sublease, because proposed subtenant would unduly compete with other existing tenants).

Add:

140 *East 46th Street LLC v. Murray, 895 N.Y.S.2d 813 (2010)* (landlord's failure to ask additional information of tenant rendered withholding of consent unreasonable).

Add:

See also Van Sloun v. Agans Bros., Inc., 778 N.W.2d 174 (Iowa 2010) (landlord reasonably withheld consent to sublease, because proposed subtenant would unduly compete with other existing tenants).

§ 42.04(b)(3)(iv) Waiver/Implied Consent.

Add:

Homeland Training Center, LLC v. Summit Point Auto. Research Center, 594 F.3d 285 (4th Cir. 2010) (lessor waived right to claim breach of lease by the assignment by never expressing any opposition to the assignment).

§ 42.04(b)(3)(v)(1) Breach of Tenant.

Add:

NP Anderson Cotton Exchange, L.P. v. Potter, 230 S.W.3d 457 (Tex. App. 2007) (assignment of lease did not result in automatic termination of the lease; written consent had been signed by former landlord).

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§ 42.04(e)(2)(i) Legal Effect of Assignment and Sublease.

Add:

Katherine R. Napleton Revocable Self-Declaration of Trust v. Vatterott Educational Centers, Inc., 745 N.W.2d 325 (Neb. 2008) (assuming assignee was not liable for property tax obligations arising prior to the assignment).

§ 42.04(e)(2)(ii) Rights and Obligations of Assignor.

Add:

But see, Herricks Fore Plan, Inc. v. State, 870 N.Y.S.2d 173 (2009) (assigning tenant did not assign rights to possible condemnation award).

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Articles

Add the following:

"Leases: Sublease and Assignment Distinguished," 36 *Real Est. L. Rep.* 4 (March 2007).

Annotations

Add the following:

Annotation, *Assignment of Lease as Breach of Covenant Against Subletting*, 79 A.L.R. 1379 .

Annotation, *Consideration for Assumption of Obligation of Lease by Assignee Thereof*, 100 A.L.R. 1232 .

Annotation, *Statute of Frauds: Validity of Lease or Sublease subscribed by One of the Parties Only, 46 A.L.R.3d 619.*

Annotation, *What Agreement or Conduct Subsequent to Assignment of Lease Amounts to Assumption by Assignee of Covenants of Lease, or Estoppel to Deny Such Assumption*, 148 A.L.R. 393 .

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CHAPTER 43 STATUTORY MODIFICATIONS OF LANDLORD-TENANT LAW

5-43 Thompson on Real Property, Thomas Editions 43.syn

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§ 43.11 Bibliography.

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CHAPTER 43 STATUTORY MODIFICATIONS OF LANDLORD-TENANT LAW

5-43 Thompson on Real Property, Thomas Editions § 43.01

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§ 43.01 Overview of Statutory Modifications.

Although largely a creation of the common law, landlord and tenant law in recent years has undergone significant statutory modification. These statutory enactments fall into several categories. First are those statutes that codify common law rules, sometimes with only minor modifications. Most states today have general landlord and tenant statutes that codify the basic provisions of landlord and tenant law.

Second, and the primary focus of this chapter, are statutory modifications that have substantially changed the nature of the landlord-tenant relationship. The last quarter of the Twentieth Century witnessed what has been described as a "revolution" in landlord-tenant law. n1 Although much of this revolution has been judicial, statutory change has been a fundamental component of the realignment of the landlord-tenant relationship.

The primary beneficiaries of these changes have been tenants. n2 Although statutes typically accommodate some landlord concerns, such as "fair return" standards in rent control, n3 the undeniable impact of most statutory modifications has been to significantly limit a landlord's ability to control the terms of the lease. Traditional landlord prerogatives, such as selection of tenants, determination of rent, and bargaining for repairs and services, have become subject to substantial constraints.

There had been, of course, some earlier statutory modifications of the landlord-tenant relationship in these areas. A few states passed legislation in the 19th century required landlords to deliver the leased premises in a condition fit for the tenant's intended use and to make repairs during the lease term. n4 Rent control legislation was adopted during and after both World Wars in a number of American cities and states. n5 And several states enacted some form of fair housing legislation in the 1950s and 1960s. As a practical matter, however, these did not have the same widespread and revolutionizing impact as events during the last quarter of the Twentieth Century.

The first widespread and significant statutory impact came in 1968, when the federal Fair Housing Act was enacted n6 and the Supreme Court held that § 1982 of the federal Civil Rights Act of 1866 applied to private persons. n7 The effect was to prohibit landlord discrimination in selecting tenants, most importantly with respect to race. In more recent years anti-discrimination protections have been extended to discrimination based on gender, handicap, and familial status.

A second significant development beginning in the early 1970s has been the adoption of statutory warranties of habitability. Warranty adoption began in the courts, but over 30 states have now enacted statutory warranty provisions. Often based on comprehensive legislation such as the Uniform Residential Landlord and Tenant Act, many statutes provide detailed landlord obligations and tenant remedies. A number of states have also adopted legislation prohibiting retaliatory actions against tenants and regulating security deposits.

Finally, the 1970s saw re-emergence of rent control in a number of American cities. In contrast to the widespread impact of anti discrimination statutes and habitability requirements, rent control is practiced in only about a dozen states. Those states include many of the nation's population centers, however, so the resulting impact on traditional landlord-tenant law has been significant.

FOOTNOTES:

(n1)Footnote 1. *See* Rabin, *The Revolution in Residential Landlord Tenant Law: Causes and Consequences, 69 Cornell L. Rev. 517 (1984).*

(n2)Footnote 2. *See id. at 517, 521.*

(n3)Footnote 3. *See* § 43.04(d)(4) of this chapter.

(n4)Footnote 4. *See* Roger Cunningham, *The New Implied and Statutory Warranties of Habitability in Residential Leases: From Contract to Status, 16 Urb. L. Ann. 3, 51-58 (1979)* (discussing Louisiana, Georgia, California, Montana, Oklahoma, North Dakota and South Dakota statutes).

(n5)Footnote 5. *See infra* § 43.04(b)(1).

(n6)Footnote 6. *See 42 U.S.C. §§ 3601-3619.*

(n7)Footnote 7. *See Jones v. Alfred H. Mayer Co., 392 U.S. 409 (1968)* .

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CHAPTER 43 STATUTORY MODIFICATIONS OF LANDLORD-TENANT LAW

5-43 Thompson on Real Property, Thomas Editions § 43.02

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§ 43.02 Overview of the Chapter.

This chapter examines statutory modifications of landlord-tenant law, with a primary emphasis on the fundamental changes described above. Statutory attempts to prohibit various forms of discrimination in leasing are examined in § 43.03. Section 43.04 discusses rent control. Section 43.05 considers statutory warranties of habitability. The next four sections, §§ 43.06 through 43.09, take up retaliatory conduct statutes, repair and deduct legislation, rent escrow statutes, and legislation regarding security deposits. Finally, § 43.10 briefly summarizes examples of other statutory modifications of traditional landlord-tenant law.

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CHAPTER 43 STATUTORY MODIFICATIONS OF LANDLORD-TENANT LAW

5-43 Thompson on Real Property, Thomas Editions § 43.03

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§ 43.03 Anti Discrimination.

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§ 43.03(a) Traditional Right of Landlord to Select Tenants.

Landlords traditionally have been free to select or reject tenants on any grounds they choose. There is relatively little authority on the issue, presumably because a landlord's right to refuse to rent was generally assumed. Where courts did address the issue, usually in dicta, they consistently noted that private landlords were free to reject tenants for any reason, including reasons of racial and religious discrimination. n8 Thus, when a landlord rejected an applicant because of religion, a court noted that the landlord had simply exercised the right of every landlord "to make his own selection of tenants." n9 Similarly, when the New York Court of Appeals held that a corporation organized under a state redevelopment law was not an agency of the state and therefore not subject to constitutional restraints, it concluded that the corporation had the same rights as any private landlord to reject tenants on the basis of race. n10

This traditional right to select tenants arguably corresponded to a person's freedom not to enter into contracts. n11 It also reflected a landlord's traditional right to control and dispose of property. In other contexts, such as restraints on tenant assignments, courts noted the on going and personal nature of the landlord-tenant relationship as a reason to permit landlords to control who is on their property. n12

As will be discussed below, this traditional right to discriminate in the selection and retention of tenants was radically changed in the 1960s and since, with federal and state statutes prohibiting discrimination against various classes of people. It is important to remember, however, that these statutory modifications create only specific limitations on a landlord's otherwise broad and traditional right to select tenants. Modern decisions often note that landlords remain free to select and discriminate to the extent that a particular action does not fall within a statutory prohibition. n13 For example, a landlord was permitted to reject an applicant because she was a lawyer, since that was not a protected class under applicable local, state and federal statutes. n14

§ 43.03(b) Erosion of Traditional Right to Select Tenants.

Most early limitations on the traditional right to select tenants involved public housing. Several states enacted legislation in the 1940s that prohibited racial or religious discrimination in public housing. n15 Moreover, courts began

to recognize that the *equal protection clause* applied to public housing. n16 Although most courts initially held that "separate but equal" public housing did not violate the *equal protection clause*, n17 *Brown v. Board of Education* n18 and other Supreme Court decisions clearly established that public facilities could not be segregated. n19

Some state restrictions on private discrimination also began to emerge during this period. Although Illinois prohibited discrimination against children in housing as early as 1909, n20 it was during the 1950s and 1960s that a significant number of states began to enact legislation limiting discriminatory housing practices. n21

Clearly the most important change took place in 1968 with two events. First, Congress passed the federal Fair Housing Act, which prohibited various discriminatory housing practices, including those involving leases, when based on race, color, religion or national origin. n22 Second, the Supreme Court recognized that § 1982 of the Civil Rights Act of 1866 prohibited private as well as public housing discrimination. n23 Although protections under the Fair Housing Act and under state legislation have significantly expanded since that time, those two events established the current framework for prohibiting discrimination in the landlord-tenant relationship. n24

§ 43.03(b)(1) Federal Law.

§ 43.03(b)(1)(i) Constitutional Limitations.

The primary federal constitutional limitation on discriminatory action is the *equal protection clause of the Fourteenth Amendment*. The limitations of the *Fourteenth Amendment* apply only if there is state action. n25 This is clearly met where the government is the landlord, such as in various forms of public housing. n26 Courts have also found state action in private housing that was government-subsidized, n27 but have been split on whether it exists in certain housing programs with other forms of government participation. n28 State action does not exist for most forms of private housing, however, making the *equal protection clause* inapplicable.

Courts have used a three-level analysis to assess discriminatory actions when state action is present. At the first level, courts have applied strict scrutiny to discrimination involving suspect classes, such as race, or where a fundamental right is implicated. n29 At this level, the usual analysis is whether the restriction is narrowly tailored to serve a compelling governmental interest. n30 For discriminatory restrictions on semi suspect classifications, such as gender, courts have applied an intermediate standard of review requiring that the regulation be substantially related to an important or significant governmental interest. n31 For most other discriminatory restrictions courts require only that the restriction meet a rationality standard, which requires that the restriction be rationally related to a legitimate governmental purpose. n32

Although the Supreme Court has held that housing is not a fundamental right, n33 the *equal protection clause* clearly requires heightened scrutiny of discriminatory actions involving suspect and semi suspect classifications. Thus it has been held that the government cannot discriminate for racial reasons in the site selection for public housing. n34 And at least one court has also held that discrimination against families with children infringes on the fundamental right of privacy and therefore is subject to strict scrutiny. n35 Apart from classifications on the basis of suspect or semi suspect classes, courts have generally permitted other forms of discriminatory classifications. n36

Constitutional standards play a rather limited role in anti discrimination efforts. Not only are they inapplicable to private housing discrimination, but the federal Fair Housing Act provides statutory protection against discrimination in public housing. Whereas a constitutional violation requires a showing of intent, n37 the Fair Housing Act is usually interpreted to require only evidence of discriminatory effect. n38

§ 43.03(b)(1)(ii) Section 1982.

Section 1982 of the Civil Rights Act of 1866 provides that "[a]ll citizens of the United States shall have the same right,

in every State and Territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold, and convey real and personal property." n39 Although § 1982 was long thought to apply only to government action, in 1968 the Supreme Court held in *Jones v. Alfred H. Mayer Co.* n40 that it applied to private discrimination in the sale and rental of homes. n41 Since that time, § 1982 has been the basis for a number of challenges to racial discrimination in housing rentals. n42

The major limitation of a § 1982 action is that it applies only to racial discrimination and does not prohibit discrimination on other grounds, such as sex, handicap, or religion. n43 It does not cover some of the acts prohibited by the Fair Housing Act, such as discrimination in advertising. Nor does it provide the same enforcement provisions as the Fair Housing Act, including the assistance of the federal government.

Where applicable, however, § 1982 provides broader protection than the Fair Housing Act and many state statutes. First, unlike the Fair Housing Act and some state statutes, § 1982 applies to commercial as well as to residential real property. n44 Second, it is not subject to the exceptions found in the Fair Housing Act and state statutes, such as for owner occupied dwellings. n45 Finally, prior to the 1988 amendment of the Fair Housing Act, courts often held that § 1982 had a longer statute of limitations than the Fair Housing Act and was not subject to the punitive damage cap found in the Fair Housing Act. n46

For these reasons § 1982 has played an important role against racial discrimination. Although in many cases of racial discrimination both § 1982 and the Fair Housing Act apply, n47 there have been a number of cases where § 1982 provided protection beyond that found in the Fair Housing Act. For example, courts have held landlords liable under § 1982 when the landlords fell within an exemption to the Fair Housing Act. n48 Courts have also found § 1982 violations when Fair Housing Act claims were time barred, n49 and they have granted punitive damages beyond those permitted under the Fair Housing Act. n50 However, the 1988 amendments to the Fair Housing Act greatly reduced the relative advantages of § 1982 by lengthening the statute of limitations for Fair Housing Act claims to two years and by removing the cap on punitive damages. n51

It should be noted, in connection with this discussion of § 1982, that courts have tended to give a fairly broad reading to the concept of race. The meaning of "race" arose in a pair of 1987 decisions by the United States Supreme Court. In the first of these, *Saint Francis College v. Al Khazraji*, n52 the Court considered whether individuals of Arabic descent were entitled to protections against discrimination under § 1981. That statute gives "persons within the jurisdiction of the United States" the same legal protections with respect to contracts and some other matters "as is enjoyed by white citizens." n53 the Court said:

> Based on the history of § 1981, we have little trouble in concluding that Congress intended to protect from discrimination identifiable classes of persons who are subjected to intentional discrimination solely because of their ancestry or ethnic characteristics. Such discrimination is racial discrimination that Congress intended § 1981 to forbid, whether or not it would be classified as racial in terms of modern scientific theory. n54

Subsequently, the Court considered whether the protections of § 1982, which is also one of the post-Civil War civil rights statutes, applied to Jews. As noted above, Section 1982 provides all citizens of the United States with the same right to "inherit, purchase, lease, sell, hold, and convey real and personal property" "as is enjoyed by white citizens." n55 In*Shaare TeFila Congregation v. Cobb*, n56 the Court referred to the *Saint Francis College* decision and rejected the contention that Jews could not assert a claim under § 1982. The Court stated: "It is evident from the legislative history of the section reviewed in *Saint Francis College*, a review that we need not repeat here, that Jews and Arabs were among the peoples then considered to be distinct races and hence within the protection of the statute." n57

The Supreme Court has thus given a broad reading to the coverage of § 1982. And it should be noted that lower courts have held that whites have standing to sue under § 1982 for harms suffered as a result of discrimination against non

whites. n58

Courts have also given a broad construction to § 1982 with respect to the types of discriminatory conduct that it prohibits. Not only does it prohibit refusals to rent, n59 it also prohibits refusals to negotiate, n60 and discrimination in the terms, conditions, and services of a lease. n61 Landlord toleration of racial harassment of one tenant by another has also been held actionable under § 1982. n62 However, § 1982 does not reach some conduct, such as discriminatory advertising, that is covered by the Fair Housing Act. n63

Most courts have applied the same standards for establishing a prima facie case for a § 1982 violation that they apply to establishing a prima facie case for Fair Housing Act violations, at least in disparate treatment cases. n64

§ 43.03(b)(1)(iii) The Fair Housing Act.

The Fair Housing Act of 1968 n65 is comprehensive anti discrimination legislation that forms the primary basis for prohibiting discrimination in housing sales and rentals. As originally enacted in 1968, the statute prohibited discrimination on the basis of race, religion, national origin, and color. The statute was expanded in 1974 to prohibit discrimination on the basis of sex. n66 It was amended in 1988 to prohibit discrimination on the basis of handicap and familial status. n67

Like § 1982, the Fair Housing Act applies to private actions and therefore reaches the broad spectrum of landlord-tenant relationships. The Act specifies a number of prohibited acts, including the refusal to rent or negotiate a rental; discrimination in the terms, conditions, or privileges of a lease; discrimination in the provision of services; discrimination in the content of advertising; and discrimination in representing to any person that any dwelling is not available for inspection, sale, or rental when such dwelling is, in fact, so available. n68 The Act also prohibits various types of against handicapped tenants. n69

Although the coverage of the Fair Housing Act is more expansive, in some respects, than the *equal protection clause* or § 1982, it is also subject to several important limitations. First, it applies only to "dwellings," which the Act defines as buildings intended for occupancy as a residence. n70 Second, even dwellings are subject to several exemptions, including a single family house rented without the aid of a broker. n71 Neither does the legislation apply to a "Mrs. Murphy" boarding house situation, in which rooms or units in dwellings are occupied or intended to be occupied by no more than four families, and in which the owner occupies one of the living quarters as his or her own residence. n72

The Fair Housing Act provides three basic enforcement methods for violations of the act. First, an aggrieved party may file a complaint with the Secretary of Housing and Urban Development to seek administrative abatement of the alleged discriminatory practice. n73 Second, an aggrieved party may file a complaint in local, state, or federal court without first seeking administrative relief. n74 Civil remedies under the Fair Housing Act include actual damages, punitive damages, and injunctive relief. Finally, the Attorney General may bring a federal suit when there has been a "pattern or practice" of discrimination or when a denial of rights "raises an issue of general public importance." n75

§ 43.03(b)(2) State Statutes.

All states and the District of Columbia have enacted some form of fair housing legislation that prohibits discrimination in leases of property. In many instances these state provisions preceded the federal Fair Housing Act--some of them were enacted in the 1950s and early 1960s. n76 In some instances, states responded to and were influenced by the federal legislation. n77

Although these statutes vary, they share some features common to each other and to the federal Fair Housing Act. First, all of the statutes prohibit discrimination on the basis of race, religion, national origin, and sex. n78 This essentially reflects the protected classes under the Fair Housing Act after 1974 and before the 1988 amendments. Second, the

statutes generally prohibit types of conduct comparable to those prohibited under the Fair Housing Act, including discriminatory refusal to rent or negotiate; discrimination in the terms, conditions or privileges of services; and discrimination in advertising for housing. n79

Although varying in details, state enforcement schemes resemble the federal scheme and each other in several respects. First, all states provide for some administrative mechanism to receive, investigate, and possibly resolve discrimination complaints. n80 In most states this includes a commission or some other body to conduct hearings and order appropriate relief. n81 Second, states typically provide for a private civil action for alleged discriminatory conduct. n82

Some state statutes include protections that go beyond those of the Fair Housing Act. Some state statutes, unlike the Fair Housing Act, extend coverage to all real property and not just to residential dwellings. n83 Some jurisdictions have extended protection to classes beyond those covered by the federal scheme. Thus, individual jurisdictions have legislated prohibitions against discrimination based on classifications such as marital status, n84 age, n85 sexual orientation, n86 military status, n87 source of income, n88 and personal appearance. n89 In addition, some jurisdictions include more descriptive language relating to disabilities than does the federal legislation. n90

It should be noted that provisions of a state's constitution may also be relevant to housing discrimination. For example, the Illinois Constitution includes a provision stating, in part, that "[a]ll persons with a physical or mental handicap shall be free from discrimination in the sale or rental of property." n91

§ 43.03(b)(3) Local Law.

In addition to state regulation, a large number of local governments, both municipalities and counties, have enacted fair housing legislation. n92 The coverage of most local laws is similar in scope to those of states, but in some instances the local laws have expanded the types of protected classes.

§ 43.03(c) Protected Classes.

§ 43.03(c)(1) Race.

Discrimination on the basis of race is at the heart of the Fair Housing Act and other fair housing legislation. It was the original impetus for fair housing legislation. The majority of fair housing cases have involved claims of racial discrimination. Although problems of proof often exist, where racial discrimination has been established, courts have consistently prohibited discrimination on the basis of race in the landlord-tenant context. n93

Although most claims of racial discrimination in reported cases have alleged discrimination against African Americans, some have involved alleged discrimination against Hispanics n94 and Asians. n95 Courts have also held that whites have standing to sue if they have been harmed by discrimination against non whites. n96

And some decisions have held that whites have standing to sue under the Fair Housing Act if they themselves have been discriminated against on the basis of race. n97

As discussed in an earlier section of this chapter, the United States Supreme Court has given a broad construction to "race" for purposes of the application of § 1982. n98 In particular, the Court has indicated that the meaning of race is broad enough to include all "identifiable classes of persons who are subjected to intentional discrimination solely because of their ancestry or ethnic characteristics." n99 Before the decisions of the United States Supreme Court in *Francis College v. Al Khazraji*, n100 and *Shaare TeFila Congregation v. Cobb*, n101 courts had generally held that § 1982 did not apply to claims relating to national origin, n102 although there had been suggestions to the contrary where there was a racial element to the claim. n103 That changed as a result of the Supreme Court's opinions.

A particularly problematic issue with regard to racial discrimination is whether integration quotas or other race based efforts to integrate housing violate the Fair Housing Act. These race conscious efforts are aimed at racial integration, which is an acknowledged purpose behind the Fair Housing Act. At the same time, however, the selection of tenants based on race seems to violate the clear language of the Act. n104

An early case in which use of such quotas was approved was *Otero v. New York City Housing Authority*. n105 There, the Second Circuit held that the New York City Housing Authority could use an integration quota that imposed a limit on the percentage of minority tenants. The purpose of the quota was to avoid racial "tipping" -- the point at which the percentage of minority residents in a complex will cause white residents to leave. In upholding the quota, the court emphasized that integration was a primary purpose of fair housing, and therefore such quotas were valid if essential to "promote a racially balanced community" and avoid loss of existing racial integration. n106

Subsequent decisions have generally struck down such quotas, however, suggesting they are subject to strict scrutiny and permitted only where they are temporary and are essential to integration goals. For example, in *Williamsburg Fair Housing Committee v. New York City Housing Authority* n107 the court held the use of racial quotas invalid, since it was not shown that they were essential to achieve racial balance. Similarly, in *Burney v. Housing Authority of Beaver County*, n108 a federal district court held that use of quotas to avoid "tipping" violated both the *equal protection clause* and the Fair Housing Act. Despite the "benign" purpose of the discrimination, the court said it would be subject to strict scrutiny and would be valid only if narrowly tailored to avoid tipping, which it was not. n109

A more recent decision involving race-based housing quotas, *United States v. Starrett City Associates*, n110 appears to go even further. The court in that case indicated that a "race conscious affirmative action plan does not necessarily violate federal constitutional or statutory provisions." n111 But it also said that a race conscious plan cannot be "ageless in [its] reach into the past, and timeless in [its] ability to affect the future." n112 Such a plan, in order to be valid, "must be temporary in nature with a defined goal as its termination point." n113 The court observed that societal discrimination alone seemed "'insufficient and over expansive'" as the basis for adopting so called 'benign' practices with discriminatory effects 'that work against innocent people,'" n114 Instead, some history of racial discrimination or imbalance within the entity seeking to employ quotas should generally be required. Finally, the court noted that measures designed to increase or ensure minority participation, in the nature of "access" quotas have generally been upheld, while programs designed to maintain integration by limiting minority participation, were of "doubtful validity." n115 In the case before it, the court said that none of these standards had been met. So it struck down a longstanding quota system designed to maintain a balance of 64% white, 22% black, and 8% Hispanic in a housing complex. The court distinguished its previous decision in *Otero*, stating that the quota there had been temporary and designed to establish an initial racial balance. n116

It appears that use of racial quotas, especially those that operate as a ceiling on minorities, are highly suspect and are not likely to be tolerated. However, courts may be more likely to approve "race conscious" criteria that satisfy the standards referenced in the *Starrett City Associates* case. n117

§ 43.03(c)(2) National Origin.

Discrimination on the basis of national origin is prohibited under the Fair Housing Act and under all state fair housing provisions. Only a limited number of national origin claims have been brought under the Fair Housing Act, often by people of eastern or middle eastern origin. n118 As noted above, although § 1982 does not expressly apply to claims of discrimination based on national origin, in the *Saint Francis College* case, n119 the Supreme Court interpreted "race" broadly enough to include what might be viewed as national origin claims. n120

§ 43.03(c)(3) Religion.

Religious discrimination has been prohibited under the Fair Housing Act since its inception in 1968 and is currently

included in all state statutes. Despite this longstanding and widespread status, there have been few reported cases claiming religious discrimination.

Even when a housing decision imposes a burden on religious practice, it will not necessarily violate the Fair Housing Act. For example, some New York tenants were unsuccessful in claiming that their landlord violated the Fair Housing Act, and state and city prohibitions against religious discrimination, by installing electric door locks on the front entrances to their building. As orthodox Jews, the tenants were prohibited from breaking electrical circuits on the Sabbath and on religious holidays. The court held for the landlord. It observed: "Undoubtedly, the act of installing electric locks placed an added burden upon the plaintiffs in the exercise of their religious observations. However, merely because an act creates a burden does not, in our pluralistic society, mean that it is a discriminatory act." n121 In this case, the court thought that it was reasonable to assume that the act of installing electric locks was done for the sole purpose of deterring crime, rather than with a discriminatory intent. Moreover, the court did not consider the allegations to be sufficient to establish a prima facie case of discriminatory effect. The inconvenience to the plaintiffs, said the court, was "not of such a nature as to be deemed discriminatory." n122

One important issue in this area is the extent to which an exemption might apply to accommodate the preferences of religious groups. The Fair Housing Act and most comparable state statutes provide an exemption for religious groups or non profit organizations operated or controlled by religious groups. The exemption permits them to limit rentals of property to persons of the same faith, provided that membership is not limited on the basis of race, color, or national origin. n123 Courts have found the exemption to be applicable when a religious body refuses to lease to those outside the faith. n124 However, one case held that the exemption did not apply to a private country club that was involved in renting homes and that required its members to be Catholic. The court held that despite the emphasis on Catholicism, the club itself was not a religious organization. Neither was it controlled by, nor operated in conjunction with, the Catholic Church. Accordingly, it was not entitled to an exemption. n125

A court has also noted that the "existence of the limited exemption for religious organizations demonstrates that charitable agencies not embraced by the exemption are covered by the Act." n126

§ 43.03(c)(4) Sex.

Although not included in the original Fair Housing Act, a prohibition against sex discrimination was added to the Fair Housing Act in 1974. n127 All states with fair housing legislation also prohibit discrimination on the basis of sex.

As with other protected classes, the Fair Housing Act and state statutes protect against sex discrimination in the renting; terms, conditions, and privileges; provision of services; and advertising of rentals. Thus, placing special conditions on women tenants, such as a car ownership requirement, constitutes a discriminatory housing practice. n128 Similarly, a refusal to rent to applicants because of their gender, either male or female, is illegal. n129

The mere reference to gender, however, without some unequal treatment or impact, does not constitute sex discrimination. For example, in *Braunstein v. Dwelling Managers, Inc.*, n130 the court held that a policy that single parents with a child of the same sex received one bedroom apartments, while single parents with a child of the opposite sex received two bedroom apartments, did not violate the Fair Housing Act. Looking to employment cases under Title VII of the 1964 Civil Rights Act, the court held that sex discrimination is premised on disparate treatment of gender. Thus, even though apartment allocations were based on sex distinctions, males and females were treated equally and therefore the policy was not discriminatory. n131

Courts have also rejected sex discrimination claims based on distinctions with an arguably disparate impact on women. In *Harris v. Capital Growth Investors*, n132 the California Supreme Court held that a landlord's policy of requiring that a tenant have income of three times the rent was not sex discrimination, even though it had a disparate impact on women because of their generally lower incomes. Similarly, in *United States v. Aubine*, n133 the court held that a

landlord's practice of considering only the higher of a married couple's incomes when assessing rent eligibility did not discriminate against women, even though, in most cases, this would result in the woman's income being ignored.

A growing area of sex discrimination claims under the Fair Housing Act and state statutes involves sexual harassment, usually by landlords against women tenants. Initially looking to Title VII of the 1964 Civil Rights Act for guidance, courts have held that sexual harassment constitutes sex discrimination under both the Fair Housing Act and state laws. n134

As with employment discrimination, courts have recognized two forms of sexual harassment. One form is where a landlord's actions or remarks create "an intimidating, hostile or offensive environment." n135 The essence of this type of sexual harassment involves landlord actions that are pervasive and persistent and that make "the tenancy burdensome and significantly less desirable than if the harassment were not occurring." n136 Courts have found this to exist when a landlord made repeated offensive comments of a sexual nature to the tenant, n137 and where several offensive comments were made, together with a death threat. n138 However, one court has held that two requests for sexual favors in three months did not create a "hostile environment." n139 And another court held that a one time incident of touching and requested sexual favors did not create a hostile environment. n140

The second type of sexual harassment is "conditioned tenancy" or quid pro quo situation, in which a landlord conditions the tenancy or terms of the tenancy on sexual favors. n141 For example, in *Shellhammer v. Lewallen*, n142 the court held that a landlord's eviction of a tenant for refusing sexual favors constituted sexual harassment and therefore sex discrimination. Similarly, in *Grieger v. Sheets*, n143 the court held that conditioning a term or privilege, such as a landlord's obligation to make repairs, on sexual favors constitutes sexual harassment.

Several state statutes include specific provisions regarding sexual harassment. For example, a Minnesota statute defines sexual harassment to include "unwelcome sexual advances, requests for sexual favors, sexually motivated physical contact or other verbal or physical conduct or communication" when "submission to that conduct or communication is made a term or condition ... of housing," when "submission to or rejection of that conduct or communication by an individual is used as a factor in decisions affecting that individual's ... housing," or when "that conduct or communication has the purpose or effect of substantially interfering with an individual's ... housing, or creating an intimidating, hostile, or offensive ... housing environment." n144 Several other state statutes similarly include specific prohibitions against sexual harassment in housing. n145

§ 43.03(c)(5) Familial Status.

The 1970s and 1980s saw a rapid rise in restrictions prohibiting children in rental units. The reasons for such restrictions varied, but studies indicated that landlords could charge higher rents for adult only units because of their desirability to many tenants. One commentator's summary of an Atlanta study said that "[v]acancy rates were lower, rents higher, and waiting lists longer for adults only units than for those who accepted children." n146 Whatever its benefit to landlords, the trend posed considerable problems for families with children.

Although families with children had been given protection against discrimination in public housing and in federally-subsidized housing prior to 1988, it was not until that year that the Fair Housing Act was amended to prohibit discrimination against families with children in the private housing arena. n147 But protection was available in some states before 1988, usually on the basis of express statutory provisions. n148

During this period, California was the leading state in extending protection to families with children. Although California did not have a specific provision prohibiting discrimination against families with children, in *Marina Point Ltd. v. Wolfson* n149 the California Supreme Court held that the state's civil rights act prohibited an apartment owner from discriminating against children. The court's view was that the act's reference to specific types of discrimination -- "sex, color, race, religion, ancestry or national origin" -- was only illustrative, and that the act barred all types of

arbitrary discrimination. The court held that the landlord could not justify a restriction against children on the basis that children are "noisier, rowdier, more mischievous and more boisterous" than adults, stating that exclusions based on such generalizations were impermissible under the act. n150

However, in the absence of legislative provisions dealing with the matter, other state courts had declined to prohibit discrimination against children. For example, in *Department of Civil Rights v. Beznos*, n151 the Michigan Court of Appeals held that a prohibition on age discrimination did not prohibit discrimination against children. n152 Similarly, in *White Egret Condominium v. Franklin*, n153 the Florida Supreme Court held that a condominium could bar minor children from apartments. n154 Both courts were more sympathetic than the California court to the justifications supporting such restrictions, noting that age restrictions were reasonable means to accommodate varying tenant desires. n155

The 1988 amendments to the Fair Housing Act Amendments responded to this growing national problem by prohibiting discrimination on the basis of familial status. n156 Familial status was defined to refer to one or more individuals under 18 who are domiciled with a parent, a person with legal custody, or with a designee of one of those parties. The protections afforded by the legislation against discrimination on the basis of familial status were also made applicable "to any person who is pregnant or is in the process of securing legal custody of any individual who has not attained the age of 18 years." n157 At the same time, the 1988 amendments provided that the legislation did not limit "the applicability of any reasonable local, State, or Federal restrictions regarding the maximum number of occupants permitted to occupy a dwelling." n158

Claims that landlords violated the familial status provision of the Fair Housing Act have been raised in a number of cases, with varying results. Cases in which such claims have been successful, at least to some extent, include a case in which it was alleged that the landlord refused to rent upper story apartment units to applicants with children; n159 a case in which the tenants alleged that the landlord had engaged in discrimination by prohibiting children from playing outdoors in the grounds immediately adjacent to the tenants' dwellings, but allowed adults to "congregate" there; n160 and a case in which the owners of mobile home parks imposed rules that denied or limited the access of children to recreational facilities and limited their ability to engage in activities, such as bicycle riding, on streets and in common areas. n161

In contrast, some tenants failed in their claim that their landlord's decision to charge more rent based on the number of persons occupying the apartment, when some of the occupants were children, was discriminatory on the basis of familial status. n162 The court was of the view that treating children like adults for this purpose did not constitute impermissible discrimination. And the federal government was unsuccessful in challenging the decision of some landlords to impose a four-person occupancy limit on a small rental house in order to preserve the property's value. n163 The United States Ninth Circuit Court of Appeals concluded that the Department of Housing and Urban Development had acted unfairly in requiring the landlords to show a compelling business necessity to justify the occupancy limitation, and it dismissed the discrimination charge. n164

In several cases, courts have recognized that a disparate impact approach can be used to establish a prima facie case that occupancy limits discriminate against families with children. n165 They have also indicated that a landlord may rebut the prima facie case with a showing of business necessity, though there has been disagreement about the extent of the landlord's burden. n166

Some of the case law regarding the "familial status" provision has been concerned with a "housing for older persons" exemption contained in the Fair Housing Act. According to the legislation, "housing for older persons" refers to housing that is operated under approved state or federal programs that is "intended for and solely occupied by persons 62 year of age or older," or, in some instances, housing "intended and operated for occupancy by " by person 55 years of age or older. n167 To qualify for the "55 years of age or older" exemption, at least 80 percent of the occupied units in the housing program must be occupied by at least one person who is 55 years of age or older, the relevant housing facility

or community must publish and adheres to policies and procedures that demonstrate the intent to assist elderly persons, and the housing facility or community must comply with rules issued by the Secretary of Housing and Urban Development for verification of the occupancy. n168

In some cases, housing has not qualified for the exemption. For example, in one case in which the issue arose, fewer than 80% of the units were occupied by qualifying occupants. n169 In another case, the owner failed to show compliance with then-applicable requirements n170 that there be significant facilities and services for seniors. n171

A decision of the United States Ninth Circuit Court of Appeals upheld the "housing for older persons" exemption against an equal protection attack. n172 The court employed a rational basis level of equal protection scrutiny, and concluded that the exemption bears a rational relationship to the federal government's legitimate interest in preserving and promoting housing for older persons. The court observed that Congress had reasonably determined that "older persons have a particular need for an affordable 'safe, supportive environment.'" n173 It also concluded that the exemption permits older persons to obtain housing at lower cost and to obtain housing with facilities more appropriate for older persons than for children.

There also have been some challenges to the constitutionality of the familial status provision of the Fair Housing Act. Although the litigants claiming unconstitutionality of the familial status provision have asserted various arguments, including arguments based on privacy, freedom of association, vagueness, equal protection, due process, and the *commerce clause*, the courts have had little difficulty in upholding the constitutionality of the provision. n174

§ 43.03(c)(6) Age.

In theory, age discrimination in leasing could occur when a landlord imposed minimum or maximum age requirements on tenants or prospective tenants. The Fair Housing Act does not directly prohibit discrimination on the basis of age; however, the prohibition against familial discrimination acts as a form of age protection by prohibiting discrimination against children. n175 However, at the same time, the Fair Housing Act makes it clear that, in some circumstances, housing can be limited to "older persons," which implicates a form of age discrimination. n176

A number of state statutes prohibit some form of age discrimination in housing. n177 By way of example, the Rhode Island statute includes a definition of "age" that refers to "anyone over the age of eighteen." n178 This presumably means that the age discrimination protections do not extend to children. However, the Rhode Island statute also provides protection against discrimination based on "familial status." n179

§ 43.03(c)(7) Handicap.

In addition to extending protection to families with children, the 1988 amendments to the Fair Housing Act also prohibited discrimination on the basis of "handicap." n180 By way of definition, the Act states:

> "Handicap" means, with respect to a person"--
>
> (1) a physical or mental impairment which substantially limits one or more of such person's major life activities,
>
> (2) a record of having such an impairment, or
>
> (3) being regarded as having such an impairment,
>
> but such term does not include current, illegal use of or addiction to a controlled substance. n181

HUD regulations provide additional details regarding the meaning of "physical or mental impairment." n182 The

following are specifically included:

> (1) Any physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: Neurological; musculoskeletal; special sense organs; respiratory, including speech organs; cardiovascular; reproductive; digestive; genito urinary; hemic and lymphatic; skin; and endocrine; or
>
> (2) Any mental or psychological disorder, such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities. The term physical or mental impairment includes, but is not limited to, such diseases and conditions as orthopedic, visual, speech and hearing impairments, cerebral palsy, autism, epilepsy, muscular dystrophy, multiple sclerosis, cancer, heart disease, diabetes, Human Immunodeficiency Virus infection, mental retardation, emotional illness, drug addiction (other than addiction caused by current, illegal use of a controlled substance) and alcoholism. n183

HUD regulations have also given a broad reading to the term "impairment," and have included "physical or mental impairment that substantially limits one or more major life activities only as a result of the attitudes of others toward such impairment." n184 The Fourth Circuit Court of Appeals concluded that this provision was applicable to individuals who were involved in an alcohol and drug rehabilitation program. n185

Several courts have held that the Fair Housing Act protects elderly individuals with various physical or mental impairments. n186

As indicated above, the HUD regulations include AIDS as a handicap warranting protection under the Fair Housing Act. n187 Although the Fair Housing Act provides that housing can be denied if a health or safety threat is posed, n188 there is some authority for the proposition that persons with AIDS do not present such a threat. n189

In addition to the general forms of prohibited conduct under the Fair Housing Act, such as refusing to rent and discrimination in the terms, conditions and provision of services, the legislation gives a more detailed description of prohibited conduct against the handicapped. n190 In particular, it requires that landlords be willing to make reasonable modifications of the dwelling, at the expense of the tenant, if such modifications are necessary for the enjoyment by the tenant. n191 The landlord is, however, permitted to "condition permission for a modification on the renter agreeing to restore the interior of the premises to the condition that existed before the modification, reasonable wear and tear excepted." n192

The Fair Housing Act requires the landlord to make "reasonable accommodations in rules, policies, practices, or services, when such accommodations may be necessary" to afford a handicapped person "equal opportunity to use and enjoy a dwelling." n193 It also requires that new construction must meet various design standards set out in the Act that will create more accessible and usable facilities for handicapped tenants. n194

The majority of the states also prohibit discrimination on the basis of handicap in housing. Most of these statutes predated the 1988 amendments to the Fair Housing Act. Prior to 1988, then, state legislation provided the primary source of protection in this area. n195

§ 43.03(c)(8) Marital Status.

Landlords have sometimes engaged in discrimination on the basis of marital status, such as refusing to rent to unwed mothers, divorced people, or unmarried couples. The Fair Housing Act does not prohibit discrimination on the basis of marital status as such. Although the 1988 amendments to the Fair Housing Act added protection against discrimination on the basis of familial status, the definition of "familial status" refers to

one or more individuals (who have not attained the age of 18 years) being domiciled with --

(1) a parent or another person having legal custody of such individual or individuals; or

(2) the designee of such parent or other person having such custody, with the written permission of such parent or other person. n196

This language of the Act, then, does not focus on situations involving discrimination against unwed mothers, divorced people, or unmarried couples.

However, many states and the District of Columbia prohibit discrimination on the basis of marital status. n197 The Illinois legislation defines "marital status" to be "the legal status of being married, single, separated, divorced or widowed." n198 This would appear to be the common-sense meaning of the term.

Courts have held that protections against discrimination under the label of marital status also apply to two single people of the same gender. n199 However, the prohibition has been held not to apply to discrimination on the basis of sexual orientation. n200 Of course, some state statutes prohibit discrimination on that basis as well.

The primary issue regarding a prohibition against discrimination on the basis of marital status is whether it applies to cohabitation of unmarried couples. Courts have been divided on the issue. For example, in *State of Minnesota v. French*, n201 the Minnesota Supreme Court held that the state's policy against fornication and in favor of marriage supported an interpretation of the term that did not include unmarried couples. n202 Courts in other states have taken a similar position. n203

A number of courts have concluded that marital status provisions prohibit discrimination against unmarried couples. n204 For example, in *Foreman v. Anchorage Equal Protection Commission* n205 the Alaska Supreme Court held that the plain meaning of the statute would appear to include unmarried couples. n206 A similar interpretation was given in *Donahue v. Fair Employment and Housing Commission*, n207 in which the California Court of Appeals held that a California statute prohibiting discrimination on the basis of marital status extended to cohabitation by unmarried couples. n208 The court based this conclusion, in part, on the plain meaning of the term, the absence of criminal penalties for cohabitation, and legislative history. n209 But the court also concluded that the landlords in question were exempt from liability because their refusal to rent was based on sincerely held religious beliefs protected by the California Constitution. n210 Conflicts between the landlord's right to free exercise of religion and statutory prohibitions against discrimination on the basis of marital status have been difficult for courts to resolve. n211

The Religious Freedom Restoration Act of 1993 n212 had begun to figure into some cases involving landlord free exercise claims. n213 But the United States Supreme Court invalidated the legislation in 1997. *n214*

§ 43.03(c)(9) Sexual Orientation.

Although the Fair Housing Act does not extend anti-discrimination protection to sexual orientation, the District of Columbia and a growing number of states and units of local government have done so. n215

Statutory provisions relating to marital status have been found not to prohibit discrimination on the basis of sexual orientation. n216 However, a lower California court has held a landlord's refusal to rent on the basis of sexual orientation violated that state's civil rights law. n217 And a New York court declined to enforce a clause in a residential lease that limited occupancy "to the tenant and immediate family of tenant and to no others." n218 In doing so, the court stated:

In the housing field, these are not ordinary times and "strict adherence to technical concepts of landlord and tenant law" which might have justified eviction in the past is now to be avoided... It is

> simply no longer feasible or desirable to mechanically impose eviction for breach of the "immediate family" clause, nor do we think it productive to spend judicial time conjuring up artificial distinctions among various types of sexual, fraternal, and economic relationships. n219

§ 43.03(c)(10) Other.

Some state statutes include protected classes beyond those identified in the previous parts of this subsection. Many states prohibit discrimination on the basis of ancestry, which appears to be comparable to national origin. n220 A few states prohibit discrimination on the basis of source of income. n221 A limited number of states prohibit discrimination against persons receiving public assistance. n222 A few prohibit discrimination on the basis of military status. n223 The District of Columbia legislation includes prohibitions relating to "personal appearance," "gender identity or expression," "family responsibilities," "matriculation," "political affiliation," and "place of residence or business of any individual." n224

It should be noted that, in a 1982 decision, the California Supreme Court stated that the state's Unruh Civil Rights Act, which then prohibited discrimination on the basis of "sex, race, color, religion, ancestry or national origin," n225 was only illustrative of the categories of protected classes, and that the Act bars all arbitrary discrimination by a business establishment. n226 On that basis the court invalidated restrictions against families with children. n227 And lower courts in California have used this reasoning in other cases, including a case involving a refusal to rent an apartment on account of sexual orientation. n228 More recently, however, the California Supreme Court gave a narrower reading to the Unruh Act, as amended, and permitted a landlord to impose minimum income requirements on prospective tenants even though the imposition allegedly had disparate impact on female tenants. n229

§ 43.03(d) Proving Discrimination.

The Fair Housing Act prohibits certain discriminatory conduct "because of race, color, religion, sex, familial status, or national origin." n230 State and local enactments include similar language. The language indicates that a plaintiff must show that the landlord's action was "because of" one of the listed reasons.

Although rare, sometimes landlords have admitted their intent to discriminate against a protected class in the legal proceedings themselves. n231 More common are instances in which extrajudicial statements indicate a discriminatory motive or in which landlords have instructed managers to discriminate. n232 Because landlords typically deny having made such statements, the issue often turns on the credibility of the witnesses.

Direct evidence of discriminatory intent can also be established by policies or rules that, on their face, discriminate against a protected class. For example, rules stating that female tenants must have a car or that the landlord will not consider alimony or child support payments for female applicants for purposes of financial qualification, obviously treat women differently from men. They are discriminatory. n233

But proof of discriminatory intent is often not so easy to produce. Landlords can hide discriminatory intent behind neutral-seeming facades. And a landlord might have several motives for a particular action, only one of which involves discriminatory intent. Finally, a landlord's action might not have any discriminatory intent but could still result in a disparate impact, with a discriminatory effect. n234

Courts have been sensitive to these concerns, often noting the difficulty or impossibility of proving subjective intent or motive. n235 They have responded by articulating standards of proof of discrimination, primarily utilizing standards established by the Supreme Court for analyzing employment discrimination claims under Title VII of the 1964 Civil Rights Act. The following sections will discuss these standards.

§ 43.03(d)(1) The Plaintiff's Burden of Proof.

§ 43.03(d)(1)(i) The Fair Housing Act.

The Supreme Court has not decided a Fair Housing Act case involving a burden of proof issue, and therefore has not directly addressed the standard of proof for establishing a violation. The Court has, however, decided several important cases involving employment discrimination under Title VII of the 1964 Civil Rights Act. And the language of Title VII resembles the Fair Housing Act's prohibition. Thus, Title VII prohibits employers from taking certain actions relating to employees "because of such individual's race, color, religion, sex, or national origin." n236 Lower courts have consistently applied the Supreme Court standards for Title VII cases to Fair Housing Act claims. n237

In deciding employment discrimination cases under Title VII of the 1964 Civil Rights Act, the Supreme Court has articulated two general theories that lower courts have applied to the Fair Housing Act cases. First, for a case involving the rejection of an individual applicant, the Court has articulated a "disparate treatment" theory. Second, where a rule or regulation results in a statistical impact against a protected class, the Court has applied a "disparate impact" theory.

Lower courts have generally applied some form of these two theories in deciding Fair Housing Act cases. They have not always articulated them as such, and in some instances courts have unnecessarily mixed the theories. Nevertheless, the theories reflect the basic analytical approaches courts typically take. The next two subsections will discuss each of these theories and their applicability to housing discrimination cases. n238

§ 43.03(d)(1)(i)(A) Disparate Treatment.

Most Fair Housing Act cases involve rejection of, or discrimination against, an individual applicant. Most of the cases, then, are disparate treatment cases. The Supreme Court first identified the test for this type of discrimination, in the employment context, in the 1973 case of *McDonnell Douglas Corp. v. Green*. n239 The case involved the rejection of an individual job applicant. The Court noted that the case was not one in which a rule imposed a statistical impact on a certain group, but rather was one in which there was an instance of a single applicant being rejected, allegedly for discriminatory reasons. In such a case, the appropriate standard was not one of "disparate impact" identified two years earlier in *Griggs v. Duke Power Co*, n240 but one of actual disparate treatment. n241

In establishing a standard, the Court noted that the essence of the claim was one of discriminatory intent on the part of the employer. The Court recognized the difficulty in proving subjective intent, and therefore said that a plaintiff could establish a prima facie case by showing:

1 - That the plaintiff belonged to a protected class;

2 - That the plaintiff applied for and was qualified for the job;

3 - That the plaintiff was rejected;

4 - That the position remained open, and the employer continued to seek applications from persons with the plaintiff's qualifications. n242

The Court said that, if these elements of a prima facie case were established, the burden would shift to the defendant "to articulate some legitimate, nondiscriminatory reason for the employee's rejection." n243 If the defendant meets that burden, the plaintiff must then be given an opportunity to prove that the defendant's asserted rationale was only a pretext. n244

Lower courts have consistently held that this same three part burden of proof formula applies to "disparate treatment" cases under the Fair Housing Act. n245 A typical case applying the formula is *Asbury v. Broughman*, n246 in which a black was denied an apartment. The Tenth Circuit Court of Appeals began its analysis by noting that the three part *McDonnell Douglas* burden of proof analysis, as described above, had been widely applied to both the Fair Housing Act

and § 1982 claims and supplied the appropriate analytical framework for the case. n247 The court then stated that, to establish her prima facie case, the plaintiff would need to show that

1 - she was a member of a racial minority;

2 - she applied for and was qualified to rent the apartment;

3 - she was denied the opportunity to rent or to inspect or to negotiate for the rental;

4 - the housing opportunity remained available. n248

Courts have noted that this three-part test is premised on the realization that direct proof of discrimination is often hard to obtain. n249 The scheme therefore serves the purpose of allowing the plaintiff to make an initial showing that raises a presumption of discriminatory intent. In most cases this is relatively easy to do.

Similarly, the initial burden of the defendant should not be difficult to meet. The Supreme Court has noted, with regard to employment discrimination cases, that, when the burden shifts to the defendant, he or she is required only to articulate "legitimate, non discriminatory" reasons for his or her actions. The defendant is not required to persuade the court, but rather to offer admissible evidence that raises a genuine issue of fact. n250

This burden shifting approach is designed to "expeditiously and fairly" focus attention on the ultimate issue of intent. n251 As a practical matter, neither the initial prima facie case nor the defendant's burden are difficult to establish, but they serve to focus attention on the intent question. At the third stage, the plaintiff can persuade the court by producing direct evidence of discrimination, or by persuading the court that the defendant's asserted reason is pretextual, or by using a combination of the two. n252

As suggested by the above, the essence of a "disparate treatment" claim is that the plaintiff was the victim of discriminatory intent. n253 Therefore, despite the fact that courts have sometimes indicated that intent is unnecessary for a Fair Housing Act claim, even when discussing disparate treatment claims, n254 the test is in fact designed to establish whether intentional discrimination has occurred. A more accurate characterization is that, under a "disparate treatment" analysis, the plaintiff is not required to prove subjective intent. Instead, intent can be inferred from establishment of the prima facie case and other supporting facts.

§ 43.03(d)(1)(i)(B) Disparate Impact.

The second type of case under the Fair Housing Act is one in which an ostensibly non discriminatory or neutral rule results in a "disparate impact" on a protected class. n255 The Supreme Court first expressed this theory in *Griggs v. Duke Power Co.*, n256 a 1971 employment discrimination case under Title VII of the 1964 Civil Rights Act. There, the Court held that Title VII of the Act did not require a showing of discriminatory intent, but that a discriminatory "effect" was enough to establish a prima facie case. The Court concluded, in that case, that the prima facie case had been met by a showing that the use of a standardized intelligence test and the requirement of a high school diploma had a statistically disparate impact on racial minorities. Once the prima facie case had been met, the burden shifted to the defendant to justify the practice by a showing of business necessity. n257

Although the United States Supreme Court has not held that the "disparate impact" theory is applicable to cases under the Fair Housing Act, there is widespread agreement among lower federal courts that it is. n258 For example, courts have utilized the theory to analyze decisions, such as zoning-related decisions, that have had a disparate housing impact on racial minorities. n259 In such cases, a substantial majority of federal circuits have held that discriminatory effect alone is enough to establish a prima facie case. n260

Although the "disparate impact" standard, and the consequent "effect" versus "intent" analysis, have generated

significant discussion, the standard is not as likely to apply to situations in the landlord-tenant context as it is in the employment context. The majority of cases in the landlord-tenant context involve individual instances of alleged discrimination that are more suitable to "disparate treatment" analysis. The disparate impact analysis is appropriately applied, however, when a landlord's neutral rule or policy has a disparate impact on a protected class.

An early case in which the disparate impact test was considered and rejected was *Boyd v. Lefrak*, n261 in which the Second Circuit Court of Appeals held that a rule that tenants have a weekly income equal to 90% of the monthly rental amount for an apartment did not violate either the Fair Housing Act or § 1982 because it was not racially motivated. The plaintiffs had argued that the rule had a disparate impact on minorities, since a relatively larger number of minorities were on public assistance. The court specifically rejected the *Griggs* "disparate impact" analysis, however, and instead held that it was necessary to show discriminatory intent, which the plaintiff had failed to do. n262 However, a subsequent Second Circuit decision indicated that a showing of discriminatory effect would be enough to establish a prima facie case of discrimination. n263

Other cases also indicated that courts will consider a disparate impact analysis, where appropriate, in the landlord-tenant context. n264

An example is the Fourth Circuit's decision in *Betsey v. Turtle Creek Associates*. n265 There, the landlord instituted an all adult rental policy, requiring that eviction notices be sent to all tenants with children. The court found that the rule had a "disparate impact" on blacks who were current tenants in the complex, and thus established a prima facie case. n266 The court remanded the case to the district court for a determination of business necessity. n267

A similar analysis was used in *Bronson v. Crestwood Lake*, n268 in which a federal district court held that a landlord's rental policy barring use of income vouchers and requiring an annual income at least three times the annual rent had a disparate impact on minorities, and established a prima facie case under the Fair Housing Act. The landlord failed to meet its burden of showing that its policy was reasonably necessary to ensure the payment of rent.

Several courts have indicated that a disparate impact analysis could be used to show occupancy limits had a discriminatory impact on families with children. n269

In contrast, the California Supreme Court declined to apply the disparate impact analysis under a state public accommodations statute. n270

§ 43.03(d)(1)(i)(C) Mixed Motives.

Landlords may have several reasons for rejecting or otherwise unfavorably treating a particular tenant, only one of which might be discriminatory. Although discrimination against a tenant on racial or other protected grounds is illegal, courts have noted that landlords can reject tenants for reasons that are not prohibited. n271 When the motives are mixed, the analysis becomes more problematic.

Although there are expressions in cases indicating that, for a plaintiff to succeed, a discriminatory motive must be the sole reason for a housing decision n272 the vast majority of lower court cases decided under both the Fair Housing Act and § 1982 have held that it need only be one reason, or a significant reason, for the decision. n273 As a practical matter, once a discriminatory intent has been found, courts have also found a Fair Housing Act violation.

Although the Supreme Court has not addressed the issue under the Fair Housing Act, in *Price Waterhouse v. Hopkins* it analyzed a "mixed motives" case under Title VII of the 1964 Civil Rights Act. n274 In that case, a plurality of the Court stated that once a plaintiff proves that gender played a motivating part in the employment decision, the defendant can avoid liability only by proving by a preponderance of the evidence that it would have reached the same decision even if it had not taken gender into account. n275 Justice O'Connor's concurring opinion in essence agreed that such an analysis

is appropriate when discriminatory intent is based on direct evidence. n276

Price Waterhouse suggests that a discriminatory purpose need not be the sole reason for a decision in order to have a violation of the Fair Housing Act, but it also suggests that a discriminatory motive does not automatically result in a violation. Several decisions after *Price Waterhouse* have held that the standard is applicable to claims under the Fair Housing Act. For example, in *Miko v. Commission on Human Rights and Opportunities*, n277 the Connecticut Supreme Court held that the *Price Waterhouse* analysis applied when a showing of discrimination was based on direct evidence. The Court held that when direct evidence shows a discriminatory motive, the defendant must establish by a preponderance of the evidence that legitimate reasons would have led to the same decision. The Seventh Circuit had also stated in dictum that *Price Waterhouse* established a "but for" test for "mixed motive" fair housing cases. n278

In 1991, Congress in effect overruled *Price Waterhouse* by amending Title VII of the 1964 Civil Rights Act to state that "except as otherwise provided in this title, an unlawful employment practice is established when the complaining party demonstrates that race, color, religion, sex or national origin was a motivating factor for any employment practice, even though other factors also motivated the practice." n279 Because the Title VII analytical framework has so often been adapted to Fair Housing Act cases, it might be wondered whether the 1991 amendment to Title VII should affect mixed-motive cases brought under the Fair Housing Act. But there are indications that the *Price Waterhouse* approach continues to have vitality in the Fair Housing Act context.

For example, in a 1992 decision, the Chief Administrative Law Judge for the Department of Housing and Urban Development ruled that the *Price Waterhouse* analysis remains appropriate for mixed-motive cases under the Fair Housing Act. n280 The judge emphasized that Congress amended only the equal employment opportunity provisions in Title VII of the 1964 Civil Rights Act, not the Fair Housing Act. He expressed the view that while Congress overruled the specific result in *Price Waterhouse*, the amendment did not address the *Price Waterhouse* analysis for determining liability in a mixed motive case involving statutory language that proscribes conduct "because of" certain unlawful factors. n281 And the judge distinguished prior fair housing cases that held that a discriminatory motive need only be a factor for a violation to occur, stating that those cases involved § 1982 claims as well as claims under the Fair Housing Act.

In any event, several post-1991 Fair Housing Act cases have referenced the *Price Waterhouse* analysis in discussions of the mixed-motive issue. n282

As a practical matter, application of the *Price Waterhouse* standard probably would not change most results under a disparate treatment test, which involves an analysis of motives. When a finder of fact determines that the plaintiff has established that asserted justifications for a housing decision are pretextual, it is unlikely that it will also conclude that the defendant would have made the same housing decision in any event. The *Price Waterhouse* analysis would appear to be most relevant in rare situations in which discriminatory intent is based on direct evidence, such as statements or admissions, but there is also objective evidence that the tenant would not have qualified for the tenancy in any event.

§ 43.03(d)(1)(ii) Section 1982.

Most courts have held that the *McDonnell Douglas* standards, including prima facie case standards, apply to § 1982 actions as well as to claims brought under the Fair Housing Act. n283 Courts are divided, however, on whether intent is required for a § 1982 action. Although earlier courts had often said that intent was unnecessary, n284 more recent cases have pointed to the Supreme Court's decision in *General Building Contracts Association v. Pennsylvania*, n285 as indicating intent is required. n286 This arguably would preclude a "disparate impact" claim under § 1982, since it is based on effect rather than intent. It does not affect the more common "disparate treatment" test, however, which is designed to establish discriminatory intent.

§ 43.03(d)(1)(iii) State Law.

State courts have generally applied the analysis used in Fair Housing Act cases to actions brought under state fair housing statutes. Thus, state courts typically apply the *McDonnell Douglas* three-part burden analysis, including its four-part standard for establishing a prima facie case. In doing so they have at times noted the similarity of the statutes as a rationale for using a comparable analysis. At least one decision has applied the *Price Waterhouse* analysis to a mixed-motive case. n287

State courts do sometimes depart from the federal analysis, based on the particular characteristics of the state statute. For example, a North Carolina court required that racial discrimination be a landlord's sole motive in order to establish a discriminatory housing practice, noting the statutory use of the term "sole." n288 The California Supreme Court also declined to apply a disparate impact analysis to discrimination under the Unruh Civil Rights Act, noting not only conflicts among differing federal court decisions, but also the different nature of the state statute. n289

§ 43.03(d)(2) Evidence of Discrimination.

As noted above, the three part *McDonnell Douglas* analysis is primarily a means of focusing on the ultimate question of discriminatory intent. In most instances, a Fair Housing Act case ultimately turns on whether the plaintiff can establish direct evidence of discrimination or convince the court that the defendant's asserted justifications are pretextual.

One common type of evidence in racial discrimination cases is evidence resulting from the use of testers. n290 In this context, testers are people sent to "test" whether a landlord is willing to rent an apartment. They are typically whites who are sent to an apartment after a black applicant has been rejected, or, more commonly, has been told that the apartment is unavailable. The tester will pose as an interested applicant with a background and qualifications comparable to the rejected minority applicant. n291

Testers play several important roles in housing discrimination cases. First, a landlord's willingness to rent to a tester helps establish the fourth element for a disparate treatment prima facie case by showing that the apartment was still available. Second, the tester also helps establish that asserted reasons for rejecting the minority applicant are pretextual, by showing a willingness to rent to someone of a different race but with comparable qualifications.

Courts have not only accepted the evidence from testers and accepted the credibility of their testimony, n292 but have often emphasized the important role that they play in enforcing fair housing legislation. n293 Courts have noted that in addition to establishing violations, they also protect good faith landlords by eliminating false claims of discrimination. n294 For these reasons, courts have rejected attempts to discredit their testimony. n295 Courts have also struck down several state laws that attempted to prohibit the use of testers. n296

In addition to considering evidence resulting from the use of testers, courts have evaluated other types of evidence in determining whether a discriminatory housing practice has occurred. Most relevant are admissions of discrimination or statements indicating an intent to discriminate. In this regard evidence has been introduced that landlords instructed apartment managers not to rent to minorities, n297 or that the landlord made statements that he or she would not do so. n298

Courts have also viewed statistics as significant, not only in establishing a prima facie "disparate impact" case, but also in assessing evidence in disparate treatment cases. Although noting that statistics alone are not enough, they have recognized that a poor track record of renting to minorities is evidence that supports discrimination. n299 This is particularly true when there have been no previous minority tenants. Thus, one court noted that "nothing is as emphatic as zero." n300 Similarly, a strong record of renting to blacks is supportive evidence there was no discriminatory intent. n301

At the same time, however, courts have stated that statistics are not dispositive. Thus, a history of renting to blacks will

not necessarily negate other evidence of discrimination, since a landlord might want to limit minority tenants to a certain number. n302

Courts have also indicated that, when evaluating a landlord's justifications for a housing decison, they will scrutinize subjective rationales. n303 Although they have recognized that landlords can legitimately reject a tenant for subjective reasons, such as personality, demeanor, or appearance, n304 they recognize that such reasons can be pretextual and have generally viewed them with skepticism. Thus, courts have rejected or showed skepticism toward defenses that an applicant did not "fit in," n305 was "belligerent appearing," n306 had an offensive odor, n307 or showed animosity in the application process. n308

Courts have said that a landlord can consider factors such as credit, n309 standing in the community, reputation, and age. n310 Thus, an applicant can be rejected for nonpayment of rent at a former residence or negative information about his or her finances. n311 In relying upon such justifications, however, landlords must treat all applicants in a comparable manner. n312 Moreover, a landlord cannot assert such factors without making an attempt to ascertain how they actually would apply to an applicant. n313

As a general matter, courts will also give substantial attention to whether a plaintiff has received similar or different treatment from other applicants. Courts are more willing to accept justifications based on rules or policies applied in an even manner. Conversely, where rules are applied unevenly, there is more likely to be a violation. n314 As noted earlier, testers have played a crucial role in determining whether an applicant is being singled out for discriminatory treatment.

§ 43.03(e) Prohibited Conduct.

§ 43.03(e)(1) Refusal to Rent or Negotiate.

The most basic form of prohibited conduct under the Fair Housing Act, § 1982, and state statutes is the refusal to rent or negotiate a rental. Section 3604(a) of the Fair Housing Act prohibits refusing to rent or negotiate on the basis of a person's protected status. n315 In addition, § 3604(d) prohibits a landlord from representing to any person, on account of his or her protected status, that an available housing unit is unavailable. n316

These provisions are violated, of course, when a landlord directly refuses to rent or negotiate a lease. n317 Courts have emphasized, however, that this prohibition includes not only direct refusals, but also instances in whch a landlord indirectly refuses to negotiate a lease. n318 Perhaps the most typical fair housing violation occurs when a landlord represents to a minority applicant that no vacancies exist when, in fact, they do. When such evidence is established, usually by a tester, courts have held that this constitutes both a refusal to rent under § 3604(a) and a representation of unavailability under § 3604(d). n319

Courts have held that other indirect methods of refusing to negotiate also constitute a violation of § 3604(a). For example, the imposition of burdensome procedures, the use of delaying tactics, and the failure to provide an applicant with necessary and correct information have all been held to constitute refusals to negotiate. n320

"Steering" of prospective applicants has also been held to be a violation of § 3604(a). n321 Steering occurs when a landlord deliberately directs or steers applicants away from some units and toward others. n322 This is often done by not showing particular units or by telling an applicant that no units are available in certain complexes. Although the landlord is willing to rent some unit to the applicant in such situations, courts have appropriately held that this practice violates § 3604(a) when there are some units the landlord is unwilling to rent because of a person's protected status. n323

§ 43.03(e)(2) Terms, Conditions, Privileges, and Provision of Services.

Section 3604(b) of the Fair Housing Act makes it unlawful to discriminate "in the terms, conditions, or privileges of sale or rental of a dwelling, or in the provision of services" because of a person's protected status. n324 Section 1982 has also been held to prohibit discrimination in terms, conditions and services. n325

Courts have found violations of § 3604(b) by the imposition of various terms or conditions that have the effect of making it more difficult to rent the property, such as different security deposit requirements n326 or higher rents. n327 They have also held invalid the imposition of different qualification requirements, such as credit reports n328 or previous lease experience. n329 Courts have emphasized, however, that § 3604(b) is not limited to terms designed to make apartments unavailable, and have held that it also applies to discrimination in the provision of services once a tenancy has commenced, n330 and to discriminatory renewal policies. n331 Section 3604(b) has also been violated when a white tenant was prohibited from having black guests in her apartment. n332 Courts have also held that sexual harassment by a landlord constitutes a violation of § 3604(b) when the terms or conditions of the tenancy are conditioned on sexual favors. n333

§ 43.03(e)(3) Advertising.

Section 3604(c) provides that it is unlawful

> [t]o make, print, or publish, or cause to be made, printed, or published any notice, statement, or advertisement, with respect to the sale or rental of a dwelling that indicates any preference, limitation, or discrimination based on race, color, religion, sex, handicap, familial status, or national origin, or an intention to make any such preference, limitation, or discrimination. n334

Unlike other forms of prohibited conduct in § 3604, this prohibition on statements and advertising is not subject to exemptions for the rental of a single-family home or for the rental of rooms or units in an owner-occupied dwelling that is occupied or intended to be occupied by no more than four families. n335 Thus, § 3604(c) might be violated by advertising a discriminatory restriction that itself might be exempt under the Act. n336

The language of § 3604(c) prohibits statements expressing preference based on race -- the types of statements that can be used as evidence of discriminatory intent in refusing to rent or negotiate. Although courts generally have not used a violation of this provision as a sole basis for liability under the Fair Housing Act, they have noted that the making of such statements constitutes a violation of § 3604(c). n337

Some litigants have contended that enforcement of the advertising provisions of § 3604(c) violates the free speech guaranty of the *First Amendment*. But courts generally have rejected those claims, emphasizing the commercial character of the speech.

For example, in *Ragin v. New York Times Co.*, n338 the Second Circuit held that discriminatory advertising is outside the protection of the *First Amendment*. The court relied on *Pittsburgh Press Co. v. Human Relations Commission*, n339 in which the Supreme Court rejected a *First Amendment* challenge to a Pittsburgh ordinance that prohibited any advertisement involving sex discrimination. In that decision the Supreme Court held that the advertising related to illegal activity, and was therefore unprotected commercial speech. n340 The Second Circuit in *Ragin* reasoned that a comparable analysis applied to discriminatory housing advertising, which is illegal under the Fair Housing Act. n341 The court also stated that it was not circular to determine the speech's illegality by reference to the statute under challenge, since Congress clearly had power to prohibit discriminatory housing advertisements. n342

The Sixth Circuit, however, in *Housing Opportunities Made Equal, Inc. v. Cincinnati Enquirer, Inc.*, n343 held that such speech was protected in some circumstances. That case involved a Fair Housing Act challenge to real estate advertising in a newspaper by different advertisers over a twenty year period that, in almost every instance, pictured

only white human models. The court concluded that a complaint alleging a violation of section 3604(c) based on the single publication of an advertisement that used a small number of all white models does not, without more, state a cognizable claim under section 3604(c). It also rejected the plaintiff's contention that the aggregate message created and sent by the publication of multiple advertisements violates section 3604(c) notwithstanding the legality of each advertisement. In this connection, the court noted that the plaintiff was not attacking "an advertisement, or a message derived by an ordinary reader from a particular advertisement, but a message separate from and incidental to the individually placed advertisements." n344 The court was of the view that the claim went beyond the language of the Fair Housing Act. It also thought that the claim suffered from "constitutional infirmity." n345 In this connection, the court observed that commercial speech was at issue, and that the speech was entitled to some constitutional protection. It stated:

> At the outset, we must determine whether the expression is protected by the *First Amendment*. For commercial speech to come within that provision, it at least must concern lawful activity and not be misleading. Next, we ask whether the asserted governmental interest is substantial. If both inquiries yield positive answers, we must determine whether the regulation directly advances the governmental interest asserted, and whether it is not more extensive than is necessary to serve that interest. n346

In this instance, the court concluded that the speech in question was lawful and not misleading, and that the government interest in avoiding discrimination in housing was substantial. However, the court thought that holding a newspaper liable for the impact of advertising would do little to promote the governmental interest in eradicating housing discrimination, but it would impose significant burdens on publishers. In light of the nominal promotion of the asserted governmental interest and the significant burden imposed upon the press, the court determined that the construction of the Fair Housing Act urged by the plaintiff was "constitutionally infirm." n347

Constitutional issues aside, a court must determine whether a challenged advertisement falls within the prohibitions of the Fair Housing Act. Starting with the Fourth Circuit decision in *United States v. Hunter* n348 courts have consistently applied an "ordinary reader" test, which states that the statute is violated if an advertisement suggests to an ordinary reader that a particular race is preferred. n349 In that case the court held that an advertisement for an apartment in a "white home" indicated such a preference, and therefore violated § 3604(c). n350

More recent cases have focused on whether advertising that exclusively or predominately uses white models indicates a preference under the ordinary reader test. In *Saunders and HOME v. General Services Corp.*, n351 the court held that the management of apartment complexes engaged in discriminatory advertising when it used no black models in a brochure containing sixty eight photographs. The court applied the "ordinary reader" standard, concluding that a preponderance of the evidence indicated a preference for white residents. n352

In *Ragin v. New York Times Co.*, n353 the Second Circuit recognized that, in certain circumstances, the use of white models might constitute a violation under the ordinary reader test:

> An ad depicting a single model or couple of one race that is run only two or three times would seem, absent some other direct evidence of an intentional racial message, outside Section 3604(c)'s prohibitions as a matter of law. A housing complex that runs ads several times a week for a year depicting numerous white models as consumers and black models as doormen or custodial employees would have difficulty persuading a trier of fact that its ads did not facially indicate a racial preference. It thus seems inevitable that the close questions of liability will involve advertisers that either use a large number of models and/or advertise repetitively. n354

In stating that such advertisements might violate § 3604(c), the court indicated that the statute applied only to individual advertisers and that liability cannot be based on an aggregation of advertisements by different advertisers. n355 This same result was reached in *Housing Opportunities Made Equal, Inc. v. Cincinnati Enquirer* n356 in which the Sixth

Circuit dismissed a complaint that alleged that a newspaper's twenty-year history of publishing real estate advertisements in which fewer than one percent of the models were non white violated § 3604(c). The court held that the plaintiffs did not show that any advertisement was discriminatory, and that the newspaper was not liable for the possible aggregate message of the advertisements. n357

§ 43.03(e)(4) Intimidation and Interference.

Section 3617 of the Fair Housing Act makes it unlawful to coerce, intimidate, threaten or interfere with any person in the exercise of rights under the Act, on account of the exercise of rights, or on account of having aided or encouraged another person in the exercise of his or her rights. n358 This section has been used in cases outside the landlord-tenant context in which protected classes, usually racial minorities, have been the subject of threats and acts of violence. n359

Most applications of § 3617 to landlord-tenant relationships have involved landlord interference with a person's exercise of rights or interference with the encouragement of the exercise of another's rights. For example, it has been held that § 3617 is violated when an apartment manager is fired for renting to racial minorities, since it constitutes an interference with encouraging another person's exercise of protected rights. n360

Courts have also indicated that threats by a landlord can violate § 3617. For example, in a sexual harassment case, the court noted that § 3617 might be violated by the landlord's threat to shoot a husband if he interfered with the landlord's demand of sexual favors from the wife. n361

§ 43.03(f) Enforcement and Remedies.

§ 43.03(f)(1) The Fair Housing Act.

The Fair Housing Act creates three primary enforcement mechanisms in cases of housing discrimination. First, an "aggrieved party" may file a complaint with the Secretary of Housing and Urban Development for administrative relief. n362 Second, an aggrieved party may bring a civil suit independent of administrative action. n363 Third, the attorney general may bring a suit where there is a "pattern or practice" of discrimination or where the case is one of general public importance. n364

§ 43.03(f)(1)(i) Administrative Enforcement.

Sections 3610 to 3612 of the Fair Housing Act permit a party to file a complaint with the Secretary of Housing and Urban Development for administrative relief. As originally enacted, these sections basically provided a mechanism for conciliation of disputes, with any relief being ultimately voluntary. n365 If conciliation efforts were unsuccessful, an aggrieved party's only recourse was to pursue litigation. The 1988 amendments to the Fair Housing Act significantly strengthened administrative enforcement by authorizing the Department of Housing and Urban Development to institute and prosecute proceedings before an administrative law judge. n366

Under the current provisions, an aggrieved party has one year from the occurrence or termination of a discriminatory housing practice to file a complaint with the Secretary of Housing and Urban Development. n367 When a complaint has been filed, the Secretary is generally required to investigate the alleged discrimination and complete the investigation within 100 days. The Secretary is to prepare a final investigative report at the end of the investigation, which is to be available to both the complainant and any respondents named in the complaint. n368

The Act provides that if the complaint is made within the jurisdiction of a state or local government agency that has been certified by the Secretary as operating under a fair housing scheme that is "substantially equivalent" to the Fair Housing Act, the Secretary must refer the complaint to the state or local agency. n369 In determining whether to certify a state or local agency, the Secretary is to consider the substantive rights protected by the agency, the procedures the agency follows, the remedies that are available to the agency, and the availability of judicial review. n370 The Secretary

is also to consider the current performance and past practices of the agency. n371 When the matter is referred to a certified agency, the Secretary cannot take further action without the consent of the agency, unless the agency fails to initiate proceedings within 30 days, fails to proceed with reasonable promptness after having commenced proceedings, or the Secretary determines that the agency no longer qualifies for certification. n372

Where a complaint is retained by the Secretary, the Act provides that the Secretary is to "engage in conciliation" to the extent that is feasible. n373 Unless a conciliation agreement has been reached, the Secretary is generally required, within 100 days after the filing of the complaint, to determine whether reasonable cause exists to believe that a discriminatory housing practice has occurred or is about to occur. n374 If reasonable cause exists, the Secretary is to "immediately" issue a "charge" on behalf of the aggrieved person for further proceedings under *42 U.S.C. § 3612*. n375

Once a charge is filed, § 3612 provides that a complainant, a respondent, or an aggrieved person on whose behalf a complaint has been filed, may elect within twenty days to have the claims decided in a civil action. n376 If such an election is not made, the Secretary of Housing and Urban Development is to "provide an opportunity for a hearing on the record" with respect to the charge before an administrative law judge. n377 Unless it is impracticable to do so, the hearing is to commence within 120 days of the issuance of a charge, and the administrative law judge is to issue findings of fact and conclusions of law within 60 days after the hearing. n378 If the administrative law judge finds that the respondent has engaged in a discriminatory housing practice, or is about to do so, the judge is to promptly issue an order for such relief as may be appropriate. The relief could include actual damages, injunctive or other equitable relief, and civil penalties. n379 The decision of the administrative law judge is subject to review by the Secretary of Housing and Urban Development, and any party may seek judicial review of the decision. n380

§ 43.03(f)(1)(ii) Civil Action.

As an alternative to administrative relief, the Fair Housing Act has two provisions under which a civil action may be pursued. First, § 3612(a) provides that when a charge has been filed under § 3610, a complainant, a respondent, or an aggrieved party on whose behalf a complaint has been filed, may elect to file a civil action in lieu of an administrative hearing. n381 Second, § 3613 provides that an aggrieved party may altogether bypass efforts at administrative relief under § 3610 and instead bring a civil action in federal district court. Section 3613 further provides that an aggrieved person may commence a civil action whether or not a complaint has been filed under section 3610 and without regard to the status of any such complaint. n382 However, a lawsuit cannot be brought on the discrimination charge if a conciliation agreement has been reached or if an administrative hearing has begun. n383

Prior to the 1988 amendments to the Fair Housing Act, the statute of limitation for commencement of a § 3613 suit was 180 days from the occurrence of the alleged discriminatory housing practice. n384 This resulted in a number of the Fair Housing Act cases being dismissed as time barred. n385 In many cases, however, the plaintiff was still able to proceed with a § 1982 claim, which typically had a longer statute of limitations based on comparable state law. n386 The 1988 amendments lengthened the statute of limitations for commencement of a civil suit to two years. n387

Courts were in some disagreement prior to 1988 with respect to the running of the statute of limitations after administrative relief had been pursued under § 3610. The earlier legislation had provided that an aggrieved party had 180 days to file a complaint with HUD. If HUD had not secured compliance within 30 days of filing the complaint, the party had an additional 30 days to initiate a civil suit. Most courts held that this gave a party 60 additional days from the filing of an administrative complaint, beyond the initial 180 day period, in which to file a lawsuit. Several courts, however, held that filing an administrative complaint did not affect the requirement that a civil action be initiated no later than 180 days from the alleged discriminatory act. n388 Thus, under that interpretation, the statute of limitations for administrative relief and filing a civil suit ran concurrently. The 1988 amendments resolved this issue by providing a two-year statute of limitations for commencing a civil action, and stating that the statute of limitations does not run during the pendency of administrative relief. n389

If the court finds that a discriminatory housing practice has occurred, or is about to occur, it may award both actual and punitive damages, and, where appropriate, injunctive or other relief as well. n390 Actual damages can include recovery for humiliation, emotional distress, and embarrassment. n391 Punitive damages may also be available in cases of housing discrimination. n392 Prior to 1988, there was a $1,000 cap on punitive damages under the Fair Housing Act, although courts sometimes awarded larger amounts pursuant to § 1982. n393 The 1988 amendments removed the cap on punitive damages. A court may also allow the prevailing party reasonable attorney fees and costs. n394

As indicated above, courts may grant injunctive relief or other relief. This includes ordering "such affirmative action as may be appropriate." n395 The granting of a preliminary injunction before trial has been found to be appropriate upon a showing of discrimination, on the theory that irreparable harm is almost certain to occur. n396 One form of injunction that has been employed by courts upon finding a discriminatory refusal to rent is a prohibition against continued refusal to rent. n397 Courts have also ordered broad prohibitions on future discriminatory practices. n398

In addition to enjoining future discriminatory practices, courts have sometimes ordered landlords to implement affirmative programs, such as establishing objective standards and criteria for processing applications n399 conducting a "fair housing seminar" at a shareholder meeting, n400 and placing advertisements in newspapers serving minority communities. n401 Courts have also mandated record keeping to facilitate monitoring of compliance. n402

§ 43.03(f)(1)(iii) Enforcement by the Attorney General.

The third Fair Housing Act enforcement mechanism permits the United States Attorney General to bring a civil action in federal district court. The Attorney General can do so whenever the Attorney General "has reasonable cause to believe that any person or group of persons is engaged in a pattern or practice of resistance to the full enjoyment of any of the rights granted" by the Fair Housing Act, "or that any group of persons has been denied any of the rights granted" by the Act, and the denial "raises an issue of general public importance." n403

Courts have considered what constitutes a "pattern or practice" for purposes of Act. They have said that the expression was intended to encompass more than a single or isolated event, and that, in order to be actionable, an act must be part of a regular practice or procedure. n404 Thus, if there is no reason to believe there were more incidents, courts have not found a pattern or practice. n405

At the same time, courts have recognized the difficulty of proving repeated violations and have thus looked to other evidence to indicate a pattern or practice. Particularly significant are extrajudicial admissions n406 and instructions to employees to discriminate. n407 These things can strongly suggest that a discriminatory act is part of a larger pattern.

When a pattern or practice is shown, a court may award preventive relief, including permanent or temporary injunctions, n408 and issue other orders necessary to assure full enjoyment of rights protected by the Fair Housing Act. n409 Such relief may include affirmative duties designed to rectify past practices, such as special marketing plans and record-keeping. n410

One issue related to actions brought by the Attorney General is whether the federal district court can award monetary damages to the victims of discrimination. The United States Fifth Circuit Court of Appeals answered that question in the negative. It said that the Attorney General was empowered to seek only equitable remedies. n411 But Congress amended the Fair Housing Act to permit the court to award such other relief as the court deems appropriate in actions brought by the Attorney General, "including monetary damages to persons aggrieved." n412

§ 43.03(f)(2) Section 1982.

Where applicable, § 1982 of the Civil Rights Acts of 1866 generally permits enforcement and remedies that are comparable to enforcement and remedies under the Fair Housing Act. Courts have recognized that, under § 1982, a

plaintiff can obtain injunctive relief, compensatory damages, and punitive damages. n413 Prior to the 1988 amendments to the Fair Housing Act, this was particularly important, since, up to that time, the Fair Housing Act had a $1,000 cap on an award of punitive damages. In a number of cases, courts awarded substantial punitive damages under § 1982. n414

Of course, as discussed previously in this chapter, the scope of § 1982 is both broader and narrower than the scope of the Fair Housing Act. n415

§ 43.03(f)(3) State Laws.

Although varying considerably in the details, most states have enforcement mechanisms similar to the federal scheme. Indeed, prior to the 1988 amendments thirty eight states were certified as having "substantially equivalent" procedures. n416

In addition to providing an opportunity to file a civil action, most states provide for some form of administrative procedure to deal with claims of housing discrimination. The government entity that handles the administrative process is often a civil rights or human rights commission that also deals with employment discrimination claims, and other claims of discrimination, in addition to those arising in the housing context. n417 In all such schemes, an aggrieved party may file a complaint with the appropriate commission, triggering administrative action. n418 As with the federal scheme, the commission or appropriate body is empowered to investigate the alleged activity and to provide notice and an opportunity for the respondent to answer. n419 All statutes provide that the commission is to seek conciliation if possible. n420

If the investigation indicates a basis for a violation, the state statutes offer different options. Most provide that the commission can bring an action for relief in civil court. n421 Most statutes also provide for some form of hearing, either by the commission, a panel of the commission, a hearing examiner, or an administrative law judge. n422 Hearing procedures vary, but typically include a right to subpoena and to call witnesses. n423

Various forms of relief are available if the hearing results in a finding that a discriminatory housing practice has occurred. All states with a hearing procedure provide that the commission may issue a "cease and desist," or comparable order, restraining future conduct. n424 Statutes often also provide that affirmative action or relief may be ordered as needed, including ordering the rental of property in question and imposing reporting requirements. n425

Most states also empower the commission to order payment of damages, sometimes specifying that the award includes recovery for humiliation and embarrassment. n426 The commission can also order recovery of attorney fees and costs. n427 Some states permit punitive damages, and some permit the commission to assess civil penalties. n428

State statutes typically provide that an action can be brought in civil court for violation of the state fair housing law. In some states, complainants must seek administrative relief before filing an action. If a charge is not filed, the aggrieved parties may then bring suit in court. In other states, however, as with the federal scheme, the right to bring a suit for discriminatory housing practices is independent of administrative remedies. n429

§ 43.03(g) Practice and Procedure.

§ 43.03(g)(1) Jurisdiction.

The Fair Housing Act includes jurisdictional provisions. Section 3613 states that any aggrieved person may file a lawsuit in an appropriate federal district court or state court. n430 Section 3614 provides that a "pattern or practice" case may be brought in an appropriate federal court. n431 And § 3612 provides that if, after a complaint has been filed with the Secretary of Housing and Urban Development, a party elects to have a case decided in court, the Attorney General

may commence an action in federal district court. n432

§ 43.03(g)(2) Standing.

Standing is a necessary prerequisite for challenging a discriminatory housing practice under federal or state law. Although it is clear that those who have been directly discriminated against have standing to sue under fair housing statutes, standing for others who may want to challenge a discriminatory practice is more problematic. At a minimum, plaintiffs must meet the standing requirements of *Article III of the Constitution*, which the United States Supreme Court has said requires an "injury in fact." n433 Litigants must meet any other standing requirements related to the applicable statute.

The Supreme Court addressed the basic principles for standing under the Fair Housing Act in a series of three cases. In the first case, *Trafficante v. Metropolitan Life Insurance Co.* , n434 the Court held that current tenants of an apartment complex had standing under § 3610 of the Fair Housing Act to challenge their landlord's discriminatory housing practices, even though they themselves were not specifically discriminated against. In that case, the tenants claimed that they had been injured by the loss of the social benefits of living in an integrated community, by the loss of business opportunities that would accrue from living with minorities, and by being stigmatized as residents of a "white ghetto." n435

The Court began its analysis by noting that the definition of "persons aggrieved" under § 3610 was "broad and inclusive." Since complaints by private persons are the primary enforcement mechanism for the Act, the Court concluded that Congress intended to define standing as broadly as *Article III of the Constitution* permits. Article III requires that there be a palpable injury in fact. n436 The Court held that the alleged injuries, arising out of the loss of benefits from interracial associations, clearly met that standard. n437

In the second case, *Gladstone Realtors v. Bellwood*, n438 the Court examined whether a town and several individuals residing there had standing to challenge alleged steering by local realty firms, even though they themselves had not been steered. Although the suit had been brought under former § 3612, n439 which did not refer to "aggrieved persons," as did § 3610, the Court held that the legislative history, purpose, and language of § 3612 suggested a construction as broad as § 3610. As such, the alleged injury to the individual residents was very similar to that recognized in *Trafficante*, in that they had been denied the benefits of associating with racial minorities. n440 The Court held that the town also had standing, based on the injury to the real estate market resulting from the effects discrimination. n441

In the third case, *Havens Realty Corp. v. Coleman*, n442 the Court addressed whether black and white "testers," and a civil rights organization that had sponsored them, had standing to sue. The Court began by stating that the sole requirement for standing under § 3612 was the Article III requirement that a plaintiff allege a distinct and palpable injury. n443

The Court considered the standing of the testers. Because a black tester had been rejected for an apartment, the Court held she had standing. However, the Court held that a white tester did not have standing, because he had been offered the apartment. n444 The Court proceeded to hold, however, that both testers had standing in their capacity as residents of the community under the analysis recognized in *Gladstone* and *Trafficante*. n445

The Court also held that HOME, the civil rights organization that had sponsored the testers, had standing to sue. The Court found that HOME had alleged an "injury in fact" by claiming that the defendants' racial steering practices had frustrated its efforts to increase equal housing access and had forced it to devote significant resources to combat such practices. n446 The Court did not reach the issue of whether the group had standing to sue for its members.

The three Supreme Court decisions indicate that plaintiffs must meet only minimum injury in fact requirements in order to have standing in Fair Housing Act cases.

Lower courts have followed the Supreme Court's lead. n447 Even so, not every plaintiff will be found to have standing to bring a claim under the Fair Housing Act. For example, in *Arkansas ACORN Fair Housing, Inc. v. Greystone Development, Ltd. Co.*, n448 the United States Eighth Circuit Court of Appeals determined that a fair housing advocacy organization lacked standing to bring a discriminatory advertising lawsuit against a developer. ACORN, the plaintiff, had presented evidence that it had devoted resources to monitoring advertisements of a broad base of housing providers and had worked to counteract the effects of discriminatory advertising. However, the court said that ACORN had presented no facts to quantify the resources that it has expended to counteract the effects of a single, allegedly discriminatory, advertisement by the defendant. The court stated: "Absent specific facts establishing distinct and palpable injuries fairly traceable to [the defendant's] advertisements, ACORN cannot satisfy its burden at the summary judgment stage to establish the injury in fact requirement for standing under the FHA." n449

And in *Hack v. President and Fellows of Yale College*, n450 some Yale students were found to lack standing to complain that their university had engaged in discrimination by denying their request to live off campus. The students were Orthodox Jews who objected, on religious grounds, to the co-educational arrangements at Yale's on-campus residence halls, where, subject to two exemptions, all first-year and second-year undergraduates were required to reside. The court concluded that the students' complaint set forth no factual allegations that satisfied the injury in fact element of the standing requirement. It noted that Yale had neither refused to provide residence hall accommodations to the plaintiffs nor denied the plaintiffs rooms in the residence halls. Yale did allow exemptions from its on-campus residency requirements, but the students did not qualify for them. The students argued that Yale should have provided exemptions for them based on religion, but the court was of the view that this would have amounted to an accommodation, and it observed that the "reasonable accommodations" provision of the Act applied only to handicap discrimination claims.

Standing requirements are also relevant to lawsuits brought under § 1982. Courts have tended to employ somewhat relaxed standing requirements in that context, as well. n451

§ 43.03(g)(3) Parties Defendant.

The question of who may be a defendant in a fair housing case is largely determined by the words of the applicable statute. When discrimination occurs with regard to rentals, the defendants have most commonly been landlords. And courts have held that landlords will be liable for the acts of agents under the doctrine of *respondeat superior*. n452 They have also held that landlords can be liable even where they did not instruct an agent to discriminate and were ignorant of the discriminatory acts. n453 At the same time, however, an apartment manager can be individually liable for discriminatory acts even if done pursuant to the instructions of the landlord. n454

FOOTNOTES:

(n1)Footnote 8. *See Corrigan v. Buckley, 299 F. 899 , appeal dismissed, 271 U.S. 969 (1924)* (landlord free to refuse to lease property to individual or group of individuals).

(n2)Footnote 9. *See Alsberg v. Lucerne Hotel Co., 92 N.Y.S. 851 (1905)* .

(n3)Footnote 10. *See Dorsey v. Stuyvesant Town Corp., 87 N.E.2d 541 , cert. denied, 339 U.S. 981, 70 S. Ct. 1019, 94 L. Ed. 1385 (1950)* .

(n4)Footnote 11. *See* Restatement (Second) of Landlord and Tenants § 3.1 (introductory note).

(n5)Footnote 12. *See generally* 2 Richard Powell on Real Property, § 248[1] (1991).

(n6)Footnote 13. *See, e.g., Wilson v. Glenwood Intermountain Properties, Inc., 98 F.3d 590 (10th Cir. 1996)* (landlord free to prefer college students over non college students); *Ryan v. Ramsey, 936 F. Supp. 417 (S.D. Tex. 1996)* ; *Bush v. Kaim, 297 F. Supp. 151 (N.D. Ohio 1969)* .

(n7)Footnote 14. *See Kramarsky v. Stahl Mtg., 401 N.Y.S.2d 943 (Sup. Ct. 1977)* .

(n8)Footnote 15. *See 14 A.L.R.2d 153, 158-159 (1950)* .

(n9)Footnote 16. *See Favors v. Randall, 40 F. Supp. 743 (D.C. Pa. 1941)* ; *Housing Auth. of Dallas v. Higginbotham, 143 S.W.2d 95 (Tex. Ct. App. 1990)* .

(n10)Footnote 17. *See Denard v. Housing Auth. of Ft. Smith, 159 S.W.2d 764 (Ark. 1942)* .

(n11)Footnote 18. *347 U.S. 483 (1954)* .

(n12)Footnote 19. *See* Robert Schwemm, Housing Discrimination Law and Litigation § 3-9 (1990).

(n13)Footnote 20. *See Rackow v. Illinois Human Rights Comm'n, 504 N.E.2d 1344 (Ill. Ct. App. 1987)* (citing 1909 Illinois statute that made exclusion of families with children from housing a crime).

(n14)Footnote 21. *See* U.S. Commission on Civil Rights, 1961 Commission on Civil Rights Report 198-99 (1961) (listing 17 states with some form of fair housing legislation).

(n15)Footnote 22. *42 U.S.C. §§ 3601-3619*.

(n16)Footnote 23. *See Jones v. Alfred H. Mayer Co., 392 U.S. 409 (1968)* .

(n17)Footnote 24. For in depth analysis of Fair Housing law issues, *see* James Kushner, Fair Housing (1983); Robert Schwemm, Housing Discrimination Law and Litigation (1990).

(n18)Footnote 25. *See Moose Lodge No. 7 v. Irvis, 407 U.S. 163 (1972)* ; *United States v. Nelson, 277 F.3d 164 (2d. Cir. 2002)* ; *Ponticelli v. Zurich American Ins. Group, 16 F. Supp. 2d 414 (S.D. N.Y. 1998)* .

(n19)Footnote 26. *See, e.g., Cole v. Housing Auth. of the City of Newport, 435 F.2d 807 (1st Cir. 1970)* .

(n20)Footnote 27. *See Halet v. Wend Inv. Co., 672 F.2d 1305 (9th Cir. 1982)* ; *Male v. Crossroads Assocs., 469 F.2d 616 (2nd Cir. 1972)* ; *Braunstein v. Dwelling Managers, Inc., 476 F. Supp. 1323, 1328-1331 (S.D. N.Y. 1979)* .

(n21)Footnote 28. *See Miller v. Hartwood Apts., Ltd., 689 F.2d 1239, 1242-1244 (5th Cir. 1982)* ; *Jeffries v. Georgia Residential Fin. Auth., 678 F.2d 919 (11th Cir. 1982)* , *cert. denied, 459 U.S. 971 (1982)* ; *Swann v. Gastonia Hous. Auth., 675 F.2d 1342, 1346 (4th Cir. 1982)* .

(n22)Footnote 29. *See* John Nowak and Ronald Rotunda, Constitutional Law § 14.3 (1991).

(n23)Footnote 30. *See Grutter v. Bollinger, 539 U.S. 306 (2003)* ; *City of Cleburne v. Cleburne Living Center, 473 U.S. 432 (1985)* ("suitably tailored" formulation).

(n24)Footnote 31. *See Reed v. Reed, 404 U.S. 71 (1971)* .

(n25)Footnote 32. *See City of Cleburne v. Cleburne Living Center, 473 U.S. 432 (1985)* ; *Male v. Crossroads Assocs., 469 F.2d 616 (2d Cir. 1972)* .

(n26)Footnote 33. *See Lindsey v. Normet, 405 U.S. 56 (1972)* .

(n27)Footnote 34. *See Hills v. Gautreaux, 425 U.S. 284 (1976)* .

(n28)Footnote 35. *See Halet v. Wend Inv. Co., 672 F.2d 1305 (9th Cir. 1982)* .

(n29)Footnote 36. *See, e.g., Daubner v. Harris, 514 F. Supp. 856 (S.D.N.Y. 1981)* (preference for performing artists upheld under rational relationship standard); *but see Male v. Crossroads Assocs., 469 F.2d 616 (2d Cir. 1972)* (refusal to rent to welfare recipients not rationally related to legitimate government interest).

(n30)Footnote 37. *See Village of Arlington Heights v. Metropolitan Housing Development Corp., 429 U.S. 252 (1977)* ; *Metropolitan Housing Development Corp. v. Village of Arlington Heights, 558 F.2d 1283 (7th Cir. 1977)* , *cert. denied, 434 U.S. 1025 (1978)* .

(n31)Footnote 38. *See, e.g., Huntington Branch NAACP v. Town of Huntington, 844 F.2d 926 (2nd Cir. 1988)* ; *Homeowner/Contractor Consultants Inc. v. Ascension Parish Planning & Zoning Commission, 32 F. Supp. 2d 384, 395 (M.D. La. 1999)* (violation of Fair Housing Act may be shown either by proof of discriminatory intent or by a showing of significant discriminatory effect); *United States v. Lorantffy Care Center, 999 F. Supp. 1037, 1042 (N.D. Ohio 1998)* (impermissible discrimination under Fair Housing Act may take two forms: intentional discrimination or discriminatory effect); *Schanz v. Village Apartments, 998 F. Supp. 784, 788 (E.D. Mich. 1998)* (plaintiff may prove discrimination under FHA by showing (1) discriminatory effect; (2) intentional discrimination; or (3) failure to provide reasonable accommodation). *See also* David A. Thomas, "Fixing Up Fair Housing Laws: Are We Ready for Reform?" *53 S.C. L. Rev. 7 (2001)* (criticizing enactment of original Fair Housing Act on constitutional grounds).

(n32)Footnote 39. *42 U.S.C. § 1982*.

(n33)Footnote 40. *392 U.S. 409 (1968)* .

(n34)Footnote 41. *Id. at 413* .

(n35)Footnote 42. *See, e.g., Asbury v. Brougham, 866 F.2d 1276 (10th Cir. 1989)* ; *Smith v. Anchor Bldg. Corp., 536 F.2d 231 (8th Cir. 1976)* ; *Marable v. Walker & Assocs., 644 F.2d 390 (5th Cir. 1981)* . *See also* James Kushner, Fair Housing § 1.02.

(n36)Footnote 43. *See Jones v. Alfred H. Mayer Co., 392 U.S. 409, 413 (1968)* ; *Collins v. Differ, 456 U.S. 1008 (1979)* (does not apply to sex discrimination); *Halet v. Wend Inv. Co., 672 F.2d 1305, 1308 (9th Cir. 1982)* (§ 1982 does not apply to discrimination against family); *see also Williamson v. Hampton Mgt. Co., 339 F. Supp. 1146 (N.D. Ill. 1972)* (does not apply to sex discrimination).

(n37)Footnote 44. *See Phiffer v. Proud Parrot Motor Hotel, 648 F.2d 548 (9th Cir. 1980)* .

(n38)Footnote 45. *See, e.g., Johnson v. Zaremba, 381 F. Supp. 165 (N.D. Ill. 1973)* ; *Warren v. Norman Realty Co., 513 F.2d 730 (8th Cir. 1975)* ; *Bush v. Kaim, 297 F. Supp. 151 (N.D. Ohio 1969)* ; *Fred v. Kokinokos, 347 F. Supp. 942 (E.D.N.Y. 1972)* .

(n39)Footnote 46. *See, e.g., SternJohn v. Kreisler, 238 F. Supp. 2d 1104 (D. Minn. 2003)* (Minnesota's six year statute of limitations for personal injury claims applies to § 1982 claims).

(n40)Footnote 47. *See, e.g., Asbury v. Brougham, 866 F.2d 1276 (10th Cir. 1989)* ; *Smith v. Anchor Bldg. Corp., 536 F.2d 231 (8th Cir. 1976)* .

(n41)Footnote 48. *See, e.g., Warren v. Norman Realty Co., 375 F. Supp. 478 (D. Neb. 1974)* , *aff'd 513 F.2d 730 (8th Cir. 1975)* ; *Johnson v. Zaremba, 381 F. Supp. 165 (N.D. Ill. 1973)* ; *Fred v. Kokinokos, 347 F. Supp. 942 (E.D. N.Y. 1972)* ; *Bush v. Kaim, 297 F. Supp. 151 (N.D. Ohio 1969)* .

(n42)Footnote 49. *See* Johnson v. Ganino, 11 EOHC P 13,1701 (N.D. Cal. 1972); James v. Stratford Hill Gen. P'ship, 1 EOHC P 13,532 (M.D. N.C. 1975).

(n43)Footnote 50. *See Miller v. Apartments & Homes of N.J., Inc., 646 F.2d 101 (3rd Cir. 1981)* (Title VIII $1,000

cap on punitive damages does not apply to § 1982; $25,000 award upheld).

(n44)Footnote 51. *See* establishment clause.

(n45)Footnote 52. *481 U.S. 604 (1987)* .

(n46)Footnote 53. *42 U.S.C. § 1981*.

(n47)Footnote 54. *481 U.S. at 613* .

(n48)Footnote 55. *42 U.S.C. § 1982*.

(n49)Footnote 56. *481 U.S. 615 (1987)* .

(n50)Footnote 57. *481 U.S. at 617* .

(n51)Footnote 58. *See Walker v. Pointer, 304 F. Supp. 56 (N.D. Tex. 1970)* .

(n52)Footnote 59. *See, e.g., Asbury v. Brougham, 866 F.2d 1276, 1279 (10th Cir. 1989)* ; *Smith v. Anchor Bldg. Corp., 536 F.2d 231, 234 (8th Cir. 1976)* ; *Marable v. Walker & Assocs., 644 F.2d 390, 397 (5th Cir. 1981)* .

(n53)Footnote 60. *See, e.g., Asbury v. Brougham, 866 F.2d 1276, 1279 (10th Cir. 1989)* .

(n54)Footnote 61. *See Concerned Tenants Ass'n of Indian Trails Apts. v. Indian Trails Apts. 496 F. Supp. 522 (N.D. Ill. 1980)* .

(n55)Footnote 62. *See Bradley v. Carydale Enters., 707 F. Supp. 217 (E.D. Va. 1989)* .

(n56)Footnote 63. *See Ragin v. The New York Times, 726 F. Supp. 953, 965 (S.D. N.Y. 1989)* , *aff'd, 923 F.2d 995 (2d Cir. 1991)* , *cert. denied, 502 U.S. 821,* (1991) ; *Saunders v. General Servs. Corp., 659 F. Supp. 1042, 1063 (E.D. Va. 1987)* .

(n57)Footnote 64. *See, e.g., Asbury v. Brougham, 866 F.2d 1276, 1279-1280 (10th Cir. 1989)* ; *Phiffer v. Proud Parrot Motor Hotel, 648 F.2d 548 (9th Cir. 1980)* .

(n58)Footnote 65. 775 Ill. Comp. Stat. 775. *See* David A. Thomas, "Fixing Up Fair Housing Laws: Are We Ready for Reform?" *53 S. C. L. Rev. 7-61 (2001).*

(n59)Footnote 66. *See* Pub. L. 93-383, § 808, *88 Stat. 633.*

(n60)Footnote 67. *See* Pub. L. 100-430, *102 Stat. 1619.*

(n61)Footnote 68. *42 U.S.C. § 3604(a) (d). See Jancik v. Department of Housing and Urban Development, 44 F.3d 553* (7th Cir. 1995) ; *Cousins v. Bray 297 F. Supp. 2d 1027 (S.D. Ohio 2003)* .

(n62)Footnote 69. *42 U.S.C. § 3604(f)*; *see Ryan v. Ramsey 936 F. Supp. 417 (S.D. Tex. 1996)* (a person with AIDS is considered handicapped within the meaning of the Fair Housing Act).

(n63)Footnote 70. *42 U.S.C. § 3602(b)*.

(n64)Footnote 71. *42 U.S.C. § 3603(b)(1).*

(n65)Footnote 72. *42 U.S.C. § 3603(b)(2).*

(n66)Footnote 73. *42 U.S.C. § 3610*. If a state or local statute provides equivalent protection and procedures, then HUD must refer the complaint to the appropriate state or local agency.

(n67)Footnote 74. Wis. Stat. Ann. § 101.22(1). *See Mitchell v. Cellone, 389 F.3d 86 (3d Cir. 2004)* (dual enforcement scheme of the Fair Housing Act allows aggrieved party to pursue both private and administrative enforcement until such time as either avenue has achieved resolution of the claim).

(n68)Footnote 75. *42 U.S.C. § 3614*.

(n69)Footnote 76. *See* Robert Schwemm, Housing Discrimination Law and Litigation § 3.5 (1990).

(n70)Footnote 77. *See North Carolina Human Relations Council v. Weaver Realty Co., 340 S.E.2d 766 (N.C. App. 1986)* (stating that North Carolina Fair Housing legislation was modeled after the federal Fair Housing Act).

(n71)Footnote 78. *See, e.g., Ariz. Rev. Stat. § 41-1491.14*; Conn. Gen. Stat. § 46a.

(n72)Footnote 79. *See, e.g.*, Conn. Gen. Stat. § 46a.; *Va. Code Ann. § 36-96.3*.

(n73)Footnote 80. *See, e.g.*, Wis. Stat. Ann. § 101.22(1).

(n74)Footnote 81. *See, e.g., Hawaii Rev. Stat. § 368-14*.

(n75)Footnote 82. *See, e.g., Idaho Code § 67-5908*.

(n76)Footnote 83. *See, e.g., Alaska Stat. § 18.80.240*; *Conn. Gen. Stat. Ann. §§ 46a* 58; *Hawaii Rev. Stat. § 515-3*; *Kan. Stat. Ann. § 44-1016*; *Minn. Stat. § 363.03*; *N.H. Rev. Stat. Ann. § 354* A:8; *Or. Rev. Stat. § 659.033*;S.D. Comp. Laws § 20-13-20.

(n77)Footnote 84. *See, e.g., 775 Ill. Comp. Stat. 775* 5/1-103 & 5/3-102; *N.Y. Exec. Law § 296*.

(n78)Footnote 85. *See e.g., Mich. Comp. Laws Ann. § 37.2502*; *Mont. Code Ann. § 49-2-305*; *N.Y. Exec. Law § 296*; *R.I. Gen. Laws § 34-37-4*.

(n79)Footnote 86. *See, e.g., D.C. Code § 2-1402.21*; *775 Ill. Comp. Stat. 775* 5/1-103 & 5/3-102; *Mass. Gen. Laws ch. 151B § 4*; *N.H. Rev. Stat. § 354-A:8*.

(n80)Footnote 87. *See e.g., 775 Ill. Comp. Stat. 5/1-103* & *5/3-102*; *Mass. Gen. L. Ann ch. 151B § 4*; *N.Y. Exec. Law § 296*.

(n81)Footnote 88. *See*, e.g., *Conn. Gen. Stat. Ann. § 46a-64c* ("lawful source of income"); *Utah Code Ann. § 57-21-5*.

(n82)Footnote 89. *See D.C. Code § 2-1402.21*. The District of Columbia Code also lists "matriculation," and "political affiliation," as prohibited bases of discrimination. *See id.*

(n83)Footnote 90. *See, e.g., Conn. Gen. Stat. Ann. § 46a-64c* (refers to discrimination based on "learning disability or physical or mental disability"); *Mont. Code Ann. § 49-2-305* (refers to "physical or mental disability").

(n84)Footnote 91. Ill. *Const. Art. 1, § 19*.

(n85)Footnote 92. As of 1987, approximately 75 cities had been certified as having substantially equivalent laws, with a number of others not certified. *See 52 Fed. Reg. 41, 419* .

(n86)Footnote 93. *See, e.g., Fair Housing of Marin v. Combs, 285 F.3d 899 (9th Cir. 2002)* ; *Janick v. HUD, 44*

F.3d 553 (7th Cir. 1995) ; *Marable v. Walker & Assocs., 644 F.2d 390 (5th Cir. 1981)* ; *Smith v. Anchor Bldg. Corp., 536 F.2d 231(8th Cir. 1976)* ; *United States v. Lorantffy Care Center, 999 F. Supp. 1037,* (N.D. Ohio 1998) .

(n87)Footnote 94. *See Jiminez v. Southridge Coop., Section I, Inc., 626 F. Supp. 732 (E.D. N.Y. 1985)* .

(n88)Footnote 95. *See Wang v. Lake Maxinhall Estates, Inc., 531 F.2d 832 (7th Cir. 1976)* .

(n89)Footnote 96. *See Wilkey v. Pyramid Constr. Co., 619 F. Supp. 1453 (D. Conn. 1985)* .

(n90)Footnote 97. *See Jordan v. Khan, 969 F. Supp. 29 (N.D. Ill 1997)* (white tenants state race discrimination claim under the Fair Housing Act if denied services provided to tenants of other racial groups); *Miller v. Towne Oaks East Apts., 797 F. Supp. 557 (E.D. Tex. 1992)* (white tenant who was victim of discriminatory eviction proceeding was entitled to recover damages under the Fair Housing Act).

(n91)Footnote 98. See the discussion on this point in § 43.03(b)(1)(ii) of this chapter.

(n92)Footnote 99. *See Saint Francis College v. Al Khazraji, 481 U.S. 604 (1987)* ; *see also Shaare TeFila Congregation v. Cobb, 481 U.S. 615 (1987)* and the discussion in § 43.03(b)(1)(i) of this chapter.

(n93)Footnote 100. *481 U.S. 604 (1987)* .

(n94)Footnote 101. *481 U.S. 615 (1987)* .

(n95)Footnote 102. *See Patel v. Holley House Motels, 483 F. Supp. 374 (S.D. Ala. 1979)* .

(n96)Footnote 103. *See Khawaja v. Wyatt, 494 F. Supp. 302 (W.D. N.Y. 1980)* (§ 1981 action).

(n97)Footnote 104. *See generally* Robert Schwemm, Housing Discrimination Law and Litigation § 11.2(2) (1990); *Note The Legality of Integration Maintenance Quotas: Fair Housing or Forced Housing? 53 Brooklyn L. Rev. 197 (1989).*

(n98)Footnote 105. *484 F.2d 1122 (2d Cir. 1973)* .

(n99)Footnote 106. *Id. at 1132-1137* ; 1140.

(n100)Footnote 107. *493 F. Supp. 1225 (S.D. N.Y. 1980)* .

(n101)Footnote 108. *551 F. Supp. 746 (W.D. Pa. 1982)* .

(n102)Footnote 109. *Id. at 764* .

(n103)Footnote 110. *840 F.2d 1096 (2d Cir. 1988)* , *cert. denied, 488 U.S. 946 (1988)* .

(n104)Footnote 111. *840 F.2d at 1101* .

(n105)Footnote 112. *840 F.2d at 1101* .

(n106)Footnote 113. *840 F.2d at 1101* .

(n107)Footnote 114. *840 F.2d at 1102* .

(n108)Footnote 115. *840 F.2d at 1102* .

(n109)Footnote 116. *Id. at 1102-1103* .

(n110)Footnote 117. One court has held that targeting a particular racial mix in such situations is permissible, but the court noted that such a target should not be interpreted as a strict quota. *See Jaimes v. Lucas Metro. Hous. Auth., 833 F.2d 1203 (6th Cir. 1987)* .

(n111)Footnote 118. *See, e.g., Khawaja v. Wyatt, 494 F. Supp. 302 (W.D. N.Y. 1980)* ; United States v. Dittmar Co., 1 EOHC P 13,730 (P H) (E.D. Va. 1975). *See also Ohana v. 180 Prospect Place Realty Corp., 996 F. Supp. 238 (E.D. N.Y. 1998)* (Jewish national origin).

(n112)Footnote 119. *Saint Francis College v. Al-Khazraji, 481 U.S. 604 (1987)* .

(n113)Footnote 120. *See* § 43.03(c)(1) *above*.

(n114)Footnote 121. *Siegel v. Blair Hall, Inc., 615 N.Y.S.2d 937, 938 (App. Div. 1994)* .

(n115)Footnote 122. *Siegel v. Blair Hall, Inc., 615 N.Y.S.2d 937 (App. Div. 1994)* .

(n116)Footnote 123. *42 U.S.C. § 3607.*

(n117)Footnote 124. *See Cowen v. Lily Dale Assembly, 354 N.Y.S.2d 269 (1974)* .

(n118)Footnote 125. *See United States v. Columbus Country Club, 915 F.2d 877 (3d Cir. 1990) , cert. denied, 501 U.S. 1205 (1991)* .

(n119)Footnote 126. *See United States v. Hughes Mem. Home, 396 F. Supp. 544, 550 (W.D. Va. 1975)* .

(n120)Footnote 127. *See* Pub. L. 93-383, § 808, *88 Stat. 633.*

(n121)Footnote 128. *United States v. Reece, 457 F. Supp. 43 (D. Mont. 1978)* .

(n122)Footnote 129. *See Baumgardner v. HUD , 960 F.2d 572 (6th Cir. 1992)* (landlord violated Fair Housing Act when he refused to negotiate for the rental of dwelling unit to a group of males, but had shown the same property to females); *cf. Cavalieri Conway v. Butterman & Assoc., 992 F. Supp. 995, 1004 (N.D. Ill. 1998) , aff'd, 172 F.3d 52 (7th Cir. 1999) , cert. denied, 528 U.S. 847, 120 S. Ct. 121, 145 L. Ed. 2d 103 (1999)* (female apartment tenant failed to provide direct evidence that refusal of landlord to negotiate new lease resulted from discrimination based on her sex in violation of Fair Housing Act).

(n123)Footnote 130. *476 F. Supp. 1323 (S.D. N.Y. 1979)* .

(n124)Footnote 131. *Id. at 1327* .

(n125)Footnote 132. *52 Cal. 3d 1142, 278 Cal. Rptr. 614, 805 P.2d 873 (Cal. 1991)* .

(n126)Footnote 133. *Id. at 1170-1175; 278 Cal. Rptr. at 630-634.*

(n127)Footnote 134. *See Krueger v. Cuomo, 115 F.3d 487 (7th Cir. 1997)* ; *Grieger v. Sheets, 689 F. Supp. 835 (N.D. Ill. 1989)* ; Shellhammer v. Lewallen, Fair Hous. Fair Lend. (P H) 15,472 (N.D. Ohio 1983) *aff'd without opinion, 770 F.2d 167 (6th Cir. 1985)* ; *Gnerre v. Massachusetts Comm'n Against Discrimination, 524 N.E.2d 84 (Mass. 1988)* ; *Chomicki v. Wittekind, 381 N.W.2d 561 (Wis. App. 1985)* . *See generally* Robert Schwemm, Housing Discrimination Law and Litigation § 11.4(2) (1990).

(n128)Footnote 135. *See Grieger v. Sheets, 689 F. Supp. 835 (N.D. Ill. 1988)* ; Shellhammer v. Lewallen, 1 Fair Hous. Fair Lend. (P H) 15,472 (N.D. Ohio 1983), *aff'd without opinion, 770 F.2d 167 (6th Cir. 1985)* .

(n129)Footnote 136. Shellhammer v. Lewallen, 1 Fair Hous. Fair Lend. (P H) 15,472 at 136 (N.D. Ohio 1983).

(n130)Footnote 137. *Gnerre v. Massachusetts Comm'n Against Discrimination, 524 N.E.2d 84 (Mass. 1988)* .

(n131)Footnote 138. *See Grieger v. Sheets, 689 F. Supp. 835 (N.D. Ill. 1988)* .

(n132)Footnote 139. *See* Shellhammer v. Lewallan, 1 Fair Hous. Fair Lend. (P-H) 15,472 (N.D. Ohio 1983), *aff'd without opinion, 770 F.2d 167 (6th Cir. 1985)* .

(n133)Footnote 140. *DiCenso v. Cisneros, 96 F.3d 1004* (7th Cir. 1996) .

(n134)Footnote 141. *See U.S. v. Koch, 352 F. Supp. 2d 970 (D. Neb. 2004)* .

(n135)Footnote 142. 1 Fair Hous. Fair Lend. (P H) 15,472 (N.D. Ohio 1983)*aff'd without opinion, 770 F.2d 167 (6th Cir. 1985)* .

(n136)Footnote 143. *689 F. Supp. 835 (N.D. Ill. 1988)* .

(n137)Footnote 144. *Minn. Stat. Ann. § 363A.03*.

(n138)Footnote 145. *See, e.g., Mich. Comp. Law Ann. § 37.2103*; *N.D. Cent. Code § 14-02.4-02*.

(n139)Footnote 146. Note *Why Johnny Can't Rent -- An Examination of Laws Prohibiting Discrimination Against Families in Rental Housing, 94 Harv. L. Rev. 1829, 1836 (1981).*

(n140)Footnote 147. *See* Michael P. Seng, Discrimination Against Families with Children and Handicapped Persons Under the 1988 Amendments to the Fair Housing Act, *22 J. Marshall L. Rev. 541 (1989).*

(n141)Footnote 148. *See Alaska Stat. § 18.80.200*; *Ariz. Rev. Stat. Ann. § 33-1317(A)*; *Conn. Gen. Stat. Ann. § 47a-2a*; *Del. Code Ann. tit. 25, § 5116*; *775 Ill. Comp. Stat. Ann. 5/3-102*; *Me. Rev. Stat. Ann. tit. 14, § 6024*.

(n142)Footnote 149. *640 P.2d 115 (Cal. 1982)* .

(n143)Footnote 150. *Id. at 124-129* .

(n144)Footnote 151. *336 N.W.2d 494 (Mich. Ct. App. 1983)* .

(n145)Footnote 152. *Id. at 496* .

(n146)Footnote 153. *379 So. 2d 346 (Fla. 1979)* .

(n147)Footnote 154. *Id. at 348* .

(n148)Footnote 155. *Id. at 350-351, 336 N.W.2d at 496.*

(n149)Footnote 156. Pub. L. No. 100-430, *102 Stat. 1619.*

(n150)Footnote 157. *42 U.S.C. § 3602(K).*

(n151)Footnote 158. *42 U.S.C. § 3607 (b)(1). See also City of Edmonds v. Oxford House, Inc., 514 U.S. 725,735 n.9 (1995)* ("Section 3607(b)(1) makes it plain that, pursuant to local prescriptions on maximum occupancy, landlords legitimately may refuse to stuff large families into small quarters."); Tim Iglesias, "Clarifying the Federal Fair Housing Act's Exemption for Reasonable Occupancy Restrictions." 31 *Ford. Urb. L.J.* 1211 (Oct. 2004).

(n152)Footnote 159. *United States v. Garden Homes Mgmt., Corp., 156 F. Supp. 2d 413 (D. N.J. 2001)* (issue of fact on the claim precluded summary judgment).

(n153)Footnote 160. *Khalil v. Farash Corp., 260 F. Supp.2d 582,* (W.D. N.Y. 2003) (summary judgment for landlord denied).

(n154)Footnote 161. *U.S. v. Plaza Mobile Estates, 273 F. Supp.2d 1084 (C.D. Cal. 2003)* (partial summary judgment for the federal government).

(n155)Footnote 162. *Maki v. Laakko, 88 F.3d 361 (6th Cir. 1996) , cert. denied, 519 U.S. 1114 (1997)* .

(n156)Footnote 163. *Pfaff v. United States HUD, 88 F.3d 739* (9th Cir. 1996) .

(n157)Footnote 164. *See Pfaff v. United States HUD, 88 F.3d 739* (9th Cir. 1996) ; *cf. Norville v. Department of Human Rights, 792 N.E.2d 825 (Ill. Ct. 2003)* (occupancy limit in Illinois statute upheld against claim of familial status discrimination).

(n158)Footnote 165. *See Fair Housing Council of Orange County, Inc. v. Ayres 855 F. Supp. 315 (C.D. Cal. 1994)* ; *U.S. v. Weiss, 847 F. Supp. 819 (D. Nev. 1994)* ; *Snyder v. Barry Realty, Inc., 953 F. Supp. 217 (N.D. Ill. 1996)* but see *Hispanics United of DuPage County v. Village of Addison, Ill., 988 F. Supp. 1130 (N.D. Ill. 1997)* (expressing disagreement with *Snyder*).

(n159)Footnote 166. *See Fair Housing Council of Orange County, Inc. v. Ayres, 855 F. Supp. 315 (C.D. Cal. 1994)* (court adopts "least restrictive means" standard to cases of housing discrimination based on familial status, and concludes that landlord failed to rebut the prima facie case); *U.S. v. Weiss, 847 F. Supp. 819 (D. Nev. 1994)* (discussing the issue; concluding that landlord demonstrated compelling business justification for its decision); *Snyder v. Barry Realty, Inc., 953 F. Supp. 217 (N.D. Ill. 1996)* ("in order for the court to grant summary judgment in the instant case, [the landlord] must produce sufficient unrebutted evidence of its business necessity or the [prospective tenants] must unequivocally demonstrate that [the landlord's] non-discriminatory reason is more restrictive than necessary). *See also Hispanics United of DuPage County v. Village of Addison, Ill., 988 F. Supp. 1130 (N.D. Ill. 1997)* (expressing disagreement with *Snyder*).

(n160)Footnote 167. *42 U.S.C. § 3607(b)(2).*

(n161)Footnote 168. *42 U.S.C. § 3607(b)(2).*

(n162)Footnote 169. United States v. Keck, 2 Fair Hous. Fair Lend. (P H) 15,673 (W.D. Wash. 1990).

(n163)Footnote 170. The specific requirements at issue were later eliminated from the legislation. *See Taylor v. Rancho Santa Barbara, 206 F.3d 932* (9th Cir. 2000) , *cert. denied, 531 U.S. 874 (2000)* (holding that amendment to Fair Housing Act that eliminated a requirement that the housing community provide significant services and facilities for older persons in order to qualify for an exemption allowing discrimination based on familial status did not violate equal protection).

(n164)Footnote 171. *See Park Place Home Brokers v. P K Mobile Home Park, 773 F. Supp. 46 (N.D. Ohio 1991)* .

(n165)Footnote 172. *Taylor v. Rancho Santa Barbara, 206 F.3d 932* (9th Cir. 2000) , *cert. denied, 531 U.S. 874 (2000)* .

(n166)Footnote 173. *206 F.3d at 936* .

(n167)Footnote 174. *See Seniors Civil Liberties Ass'n, Inc. v. Kemp, 965 F.2d 1030 (11th Cir. 1992)* (per curiam) (rejecting arguments based on the *commerce clause*, due process, privacy, freedom of association, and vagueness); *United States v. Tropic Seas, Inc. 887 F. Supp. 1347 (D. Haw. 1995)* (court rejects argument that the Fair Housing Act is void for vagueness, in light of the language of the occupancy limit provision); Park Place Home Brokers v. P K Mobile Home Park, 773 F. Supp. (N.D. Ohio 1991)(court rejects due process and equal protection challenges).

(n168)Footnote 175. *See generally* Robert G. Schwemm and Michael Allen, "For the Rest of Their Lives: Seniors and the Fair Housing Act." *90 Iowa L. Rev. 121 (Oct. 2004).*

(n169)Footnote 176. *42 U.S.C. § 3607(b)*. This exemption is discussed in § 43.03(c)(5) of this chapter.

(n170)Footnote 177. *See e.g., Mich. Comp. Laws Ann. § 37.2502*; *Mont. Code Ann. § 49-2-305*; *N.Y. Exec. Law § 296*; *R.I. Gen. Laws § 34-37-4*.

(n171)Footnote 178. *R.I. Gen. Laws § 34-37-3*.

(n172)Footnote 179. *R.I. Gen. Laws 34-37-4*. Some exemptions are set forth in Alaska Stat. §§ 18.80.10 - 80.145.

(n173)Footnote 180. *See 42 U.S.C. § 3604*

(n174)Footnote 181. *42 U.S.C. § 3602(h)*. Although the legislation does not protect current drug users, former drug use presents a different situation. *See United States v. Southern Mgmt. Corp., 955 F.2d 914 (4th Cir. 1992)* (persons perceived as being drug users or addicts are covered under the Fair Housing Act's definition of handicap if they can demonstrate they are impaired and are not currently using illegal drugs).

(n175)Footnote 182. See Conn. Gen. Stat. Ann. §§ 46a.

(n176)Footnote 183. *24 C.F.R. § 100.201*.

(n177)Footnote 184. *See* Ind. Code Ann. § 22-9-1.

(n178)Footnote 185. *See U.S. v. Southern Management Corp.,955 F.2d 914, 918* (4th Cir. 1992) .

(n179)Footnote 186. *See Association of Relatives & Friends of AIDS Patients v. Regulations & Permits Admin., 740 F. Supp. 95 (D. Puerto Rico 1990)* ; *see also* " K Care" v. *Town of Lac du Flambeau, 510 N.W.2d 697 (Wis. App. 1993)* (elderly residents of group home requiring assistance with daily living because of disabilities commonly affecting the elderly qualify as handicapped persons under Fair Housing Act).

(n180)Footnote 187. *See also Ryan v. Ramsey, 936 F. Supp. 417 (S.D. Tex. 1996)* .

(n181)Footnote 188. Iowa Code Ann. §§ 601A.1 - 601A.19.

(n182)Footnote 189. *See Baxter v. City of Belleville, Ill., 720 F. Supp. 720* (S.D. Ill.,1989) ; *cf. Giebeler v. M & B Associates, 343 F.3d 1143* (9th Cir. 2003) (landlord must make reasonable accommodation regarding rent payment arrangement of prospective tenant with AIDS, rather that inflexibly apply policy refusing cosigners on the rent).

(n183)Footnote 190. *See 42 U.S.C. § 3604(f)(3) - (8)*.

(n184)Footnote 191. *See 42 U.S.C. § 3604(f)(3)(a)*.

(n185)Footnote 192. *See 42 U.S.C. § 3604(f)(3)(a)*. At least "where it is reasonable to do so." *See Ocean Gate Assocs. v. Dopico, 441 N.Y.S.2d 34 (Civ. Ct. 1981)* .

(n186)Footnote 193. *See 42 U.S.C. § 3604(f)(3)(B). See also Shapiro v. Cadman Towers, Inc., 51 F.3d 328 (2d Cir. 1995)* (Owner of cooperative apartment, who was afflicted with multiple sclerosis brought action against cooperative complex and president of its board of directors, alleging that the refusal to provide her with immediate indoor parking space violated antidiscrimination provisions of Fair Housing Amendments Act; preliminary injunction ordered in favor of plaintiff); *cf., Congdon v. Strine, 854 F. Supp. 355 (E.D. Pa. 1994)* (although a handicapped tenant had been unable to reach her apartment without assistance during elevator breakdowns, court found no proof of

discriminatory effect based on landlord's elevator policies; neither did court find discriminatory intent).

(n187)Footnote 194. *See* Iowa Code Ann. § 601A.15.

(n188)Footnote 195. *See Department of Civil Rights v. Beznos, 336 N.W.2d 494 (Mich. App. 1983)* .

(n189)Footnote 196. *42 U.S.C. § 3602(k)*. "The protections afforded against discrimination on the basis of familial status [also] apply to any person who is pregnant or is in the process of securing legal custody of any individual who has not attained the age of 18 years." *Id*.

(n190)Footnote 197. *See, e.g., Colo. Rev. Stat. § 24-34-502*; Iowa Code Ann. § 601A.15 & *5/3-102*; *Mass. Gen. Laws Ann. ch. 151B, § 4*; *N.Y. Exec. Law § 296*; *Or. Rev. Stat. 659.033*; Iowa Code Ann. § 601A.15.

(n191)Footnote 198. 775 Ill. Ann. Stat. 5/1-103(J).

(n192)Footnote 199. *See Zahorian v. Russell Fitt Real Estate Agency, 301 A.2d 754, 757 (N.J. 1973)* ; *Loveland v. Leslie, 583 P.2d 664 (Wash. App. 1978)* ; *Bachman v. State Div. of Human Rights, 481 N.Y.S.2d 858, 860 (N.Y. App. Div. 1984)* .

(n193)Footnote 200. *See* Avest Seventh Corp. v. Ringelheim, Eq. Opp. Hous. Cases (P H) 16,618 (N.Y. Civ. Ct. 1981).

(n194)Footnote 201. *460 N.W.2d 2 (Minn. 1990)* .

(n195)Footnote 202. *Id. at 6-7* .

(n196)Footnote 203. *See State v. French, 460 N.W.2d 2 (Minn. Sup. Ct. 1990)* ; *Mister v. A.R.K. P'ship, 197 Ill. App. 3d 105, 143 Ill. Dec. 166, 553 N.E.2d 1152, 1157 (Ill. App. 1990)* , *said to have been superseded by statute in Jasniowski v. Rushing, 678 N.E.2d 743 (Ill. Ct. App. 1997)* , *but Jasniowski was vacated in 685 N.E.2d 622 (Ill. 1997)* ; *Maryland Comm'n on Human Relations v. Greenbelt Homes, Inc., 49 Md. App. 314, 431 A.2d 745, 747-748 (Md. App. 1981)* ; *McFadden v. Elma Country Club, 613 P.2d 146, 148 (Wash. App. 1980)* ; *Hudson View Props. v. Weiss, 450 N.E.2d 234-235 (Ct. App. N.Y. 1983)* .

(n197)Footnote 204. *See Foreman v. Anchorage Equal Rights Comm'n, 779 P.2d 1199 (Alaska 1989)* ; *Donahue v. Fair Employment and Housing Commission, 2 Cal. Rptr. 2d 32 (Cal. Ct. App. 1991)* , *review dismissed, 23 Cal. Rptr. 2d 591, 859 P.2d 671 (Cal. 1993)* ; *Housing Auth. v. Commission Against Discrimination, 547 N.E.2d 43 (Mass. 1989)* .

(n198)Footnote 205. *779 P.2d 1199 (Alaska 1989)* .

(n199)Footnote 206. *Id. at 1201-1202* .

(n200)Footnote 207. *2 Cal. Rptr. 2d 32 (Cal. App. 1991)* , *review dismissed, 859 P.2d 671 (Cal. 1993)* .

(n201)Footnote 208. *Id. at 38* .

(n202)Footnote 209. *Id. at 36-38* .

(n203)Footnote 210. *Id. at 46* .

(n204)Footnote 211. *See Thomas v. Anchorage Equal Rights Comm'n, 220 F.3d 1134 (9th Cir. 2000)* (en banc), *cert. denied, 531 U.S. 1143 (2001)* (lower court ruled that Alaska's antidiscrimination statutes placed a substantial and unjustified burden on the landlords' observation of a central religious belief or practice, and that granting an exception to the landlords did not violate the *establishment clause*; however, the Ninth Circuit concluded that the landlords' claims

were not ripe for review); *Swanner v. Anchorage Equal Rights Comm'n, 874 P.2d 274 (Alaska 1994) , cert. denied, 513 U.S. 979 (1994)* (ordinance upheld against free exercise claims under federal and state constitutions); *Smith v. Fair Employment & Hous. Comm'n, 913 P.2d 909 (Cal. 1996) , cert. denied, 521 U.S. 1129 (1997)* (landlord was charged with violation of discrimination statute and was required to post notices that she had violated the law by refusing to rent to unmarried couples; court rejects the landlord's free exercise claim); *Attorney General v. Desilets, 636 N.E.2d 233 (Mass. 1994)* (state has burden of establishing that its interest in eliminating housing discrimination against cohabiting couples is strong enough to justify the burden placed on landlord's free exercise of religion; case remanded for such a determination); *McCready v. Hoffius, 564 N.W.2d 493 (Mich. Ct. App. 1997) , rev'd, 586 N.W.2d 723 (Mich. 1998) , vacated in part, 593 N.W.2d 545 (Mich. 1999)* (landlords refused to rent to unmarried couples, claiming that this would violate their religious beliefs; the Michigan Supreme Court ruled that the landlords' conduct violated the civil rights act, and that requiring landlord compliance with the act would not violate the landlords' right of free exercise of religion; subsequently, however, the Michigan Supreme Court vacated the portion of its opinion dealing with free exercise of religion and remanded for further consideration of the issue); *Cooper v. French, 460 N.W.2d 2 (Minn. 1990)* (the expression "marital status" is ambiguous; court concludes that the statute does not protect cohabiting couples; also concludes that landlord is entitled to exemption from the antidiscrimination statute because state failed to meet its burden to show a compelling state interest). *Cf. County of Dane v. Norman, 497 N.W.2d 714 (Wis. 1993)* (landlord's policy of not renting to unmarried people who intend to live together does not violate county antidiscrimination ordinance; landlord's decision is based on conduct, rather than status, of prospective tenants; to the extent the ordinance protects "cohabitants," it is inconsistent with public policy promoting the stability of marriage and family).

(n205)Footnote 212. *42 U.S.C. 2000bb*.

(n206)Footnote 213. *See Swanner v. Anchorage Equal Rights Comm'n, 874 P.2d 274 (Alaska 1994)* , cert. denied, *513 U.S. 979 (1994) , Smith v. Fair Employment & Hous. Comm'n, 913 P.2d 909 (Cal. 1996)* , cert. denied, *521 U.S. 1129 (U.S. 1997)* .

(n207)Footnote 214. *See City of Boerne v. Flores, 521 U.S. 507 (1997)* .

(n208)Footnote 215. *See e.g., Haw. Rev. Stat. § 368-1*; Conn. Gen. Stat. Ann. § 46a 5/1-103 & 5/3-102; *Mass. Gen. Laws ch. 151B § 4*; *5 Me. Rev. Stat. Ann. § 4553*; *N.H. Rev. Stat. § 354-A:8*; Conn. Gen. Stat. § 46a; *R.I. Gen. Laws 34-37-2* ; *Vt. Stat. Ann. tit. 9 § 4503*; *Wis. Stat. Ann. § 101.22(1)*; *D.C. Code, § 2-1402.21*.

(n209)Footnote 216. *See* 420 *East 80th Co. v. Chin, 455 N.Y.S.2d 42 (Sup. Ct. 1982)* (per curiam), *aff'd, 468 N.Y.S.2d 9 (App. Div. 1983)* .

(n210)Footnote 217. *See Hubert v. Williams, 184 Cal. Rptr. 161 (Cal. 1982)* .

(n211)Footnote 218. *See* 420 *East 80th Co. v. Chin, 455 N.Y.S.2d 42,43 (Sup. Ct. 1982)* (per curiam), *aff'd, 468 N.Y.S.2d 9 (App. Div. 1983)* (however, the court held against the landlord on another ground).

(n212)Footnote 219. *455 N.Y.S.2d at 44* .

(n213)Footnote 220. *See, e.g., Colo. Rev. Stat. § 24-34-502*; Conn. Gen. Stat. Ann. § 46a 64c.

(n214)Footnote 221. *See Conn. Gen. Stat. § 46a* 64c (lawful source of income); *Utah Code Ann. § 57-21-5*; *Wis. Stat. Ann. § 101.22(1). See also Knapp v. Eagle Property Mgmt. Corp., 54 F.3d 1272 (7th Cir. 1995)* (interpreted phrase "source of income" under Wisconsin statute as not including section 8 vouchers) and *Godinez v. Sullivan Lackey, 52 Ill. App.3d 87 (2004)* (declining to follow Knapp).

(n215)Footnote 222. *See Minn. Stat. Ann. § 363.03*; *N.D. Cent. Code § 14-02.4-01*.

(n216)Footnote 223. *See e.g., 775 Ill. Comp. Stat. 5/1-103* & *5/3-102*; *Mass. Gen. L. Ann ch. 151B § 4*; *N.Y. Exec.*

Law § 296.

(n217)Footnote 224. *See D.C. Code § 2-1402.21*.

(n218)Footnote 225. *See Marina Point Ltd. v. Wolfson, 640 P.2d 115, 120 n.4 (Cal. 1982) , cert. denied, 459 U.S. 858 (1982)* The language of the Act was changed to refer to "sex, color, race, religion, ancestry, national origin, disability, medical condition, marital status, or sexual orientation." *See Cal. Civ. Code § 51*.

(n219)Footnote 226. *See, e.g., Marina Point Ltd. v. Wolfson, 640 P.2d 115, 116-17 (Cal. 1982) , cert. denied, 459 U.S. 858 (1982)* .

(n220)Footnote 227. *See Marina Point Ltd. v. Wolfson, 640 P.2d 115(Cal. 1982) , cert. denied, 459 U.S. 858 (1982)*

(n221)Footnote 228. *See Hubert v. Williams, 184 Cal. Rptr. 161 (Cal. 1982)* .

(n222)Footnote 229. *See Harris v. Capital Growth Investors XIV, 805 P.2d 873 (Cal. 1991)* .

(n223)Footnote 230. *42 U.S.C. § 3604(a)*.

(n224)Footnote 231. *See, e.g., Oliver v. Shelly, 538 F. Supp. 600 (S.D. Tex. 1982)* (admission in deposition).

(n225)Footnote 232. *See, e.g.*, Todd v. Lutz, 2 EOHC (P H) P 13,787 (W.D. Pa. 1976) (instruction to manager); *United States v. L & H Land Corp., Inc., 407 F. Supp. 576 (S.D. Fl. 1976)* (told white tenants that corporation would not rent to blacks); United States v. Dittmar, 1 EOHC (P H) P 13,730 (E.D. Va. 1975) (memorandum to manager not to rent to foreign nationals); *Bush v. Kaim, 297 F. Supp. 151 (N.D. Ohio 1969)* (statement).

(n226)Footnote 233. *See United States v. Reece, 457 F. Supp. 43 (D. Mont. 1978)* .

(n227)Footnote 234. *See* James Kushner, Fair Housing (1983); Robert Schwemm, Housing Discrimination Law and Litigation § 3.01 (1990).

(n228)Footnote 235. *See, e.g., Robinson v. 12 Lofts Realty, Inc., 610 F.2d 1032, 1040 (2d Cir. 1979)* .

(n229)Footnote 236. *See 42 U.S.C. § 2000e et seq.*

(n230)Footnote 237. *See, e.g., Asbury v. Brougham, 866 F.2d 1276, 1279 (10th Cir. 1989)* ; *Selden Apartments v. United States Dep't of Housing & Urban Dev., 785 F.2d 152, 159 (6th Cir. 1986)* .

(n231)Footnote 238. For a thorough discussion of these theories as applied to housing discrimination, *see* Robert Schwemm, Housing Discrimination Law and Litigation §§ 10.2-10.4 (1990).

(n232)Footnote 239. *411 U.S. 792 (1973)* .

(n233)Footnote 240. *401 U.S. 424 (1971)* .

(n234)Footnote 241. *411 U.S. at 806* .

(n235)Footnote 242. *Id. at 802* .

(n236)Footnote 243. *411 U.S. at 802* .

(n237)Footnote 244. *411 U.S. at 804* .

(n238)Footnote 245. *See, e.g., Asbury v. Brougham, 866 F.2d 1276, 1279 (10th Cir. 1989)* ; *Selden Apartments v. United States Dep't of Housing & Urban Dev., 785 F.2d 152, 159 (6th Cir. 1986)* ; *Robinson v. 12 Lofts Realty, Inc., 610 F.2d 1032, 1038 (2d Cir. 1979)* ; *Llanos v. Estate of Coehlo, 24 F. Supp. 2d 1052, 1056 (E.D. Cal. 1998)* (plaintiffs made out prima facie case of discrimination on the basis of familial status under the Fair Housing Act by showing facially discriminatory rules regarding swimming pool access that treated children, and families with children, differently and less favorably than adults only households; defendants did not assert any reasonable and nondiscriminatory reasons justifying the rules; court granted plaintiffs' motion for partial summary judgment).

(n239)Footnote 246. *866 F.2d 1276 (10th Cir. 1989)* .

(n240)Footnote 247. *Id. at 1279* .

(n241)Footnote 248. *Id. at 1279-1280* .

(n242)Footnote 249. *See, e.g., Robinson v. 12 Lofts Realty, Inc., 610 F.2d 1032 (2d Cir. 1979)* .

(n243)Footnote 250. *Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 254-255 (1981)* .

(n244)Footnote 251. *Id.*

(n245)Footnote 252. *Id. at 254-256* .

(n246)Footnote 253. *Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 253, 101 S. Ct. 1089, 67 L. Ed. 2d 207 (1981)* ("The ultimate burden of persuading the trier of fact that the defendant intentionally discriminated against the plaintiff remains at all times with the plaintiff."); *see also Teamsters v. United States, 431 U.S. 324, 335 n.15 (1977)* (disparate treatment test requires discriminatory motive).

(n247)Footnote 254. *See, e.g., Robinson v. 12 Lofts Realty, Inc., 610 F.2d 1032, 1038 (2d Cir. 1979)* .

(n248)Footnote 255. *See generally* James Kushner, Fair Housing (1983); Robert Schwemm, Housing Discrimination Law and Litigation § 10.4 (1990).

(n249)Footnote 256. *401 U.S. 424 (1971)* .

(n250)Footnote 257. *Id. at 431-432* .

(n251)Footnote 258. *See* 2922 *Sherman Ave. Tenants' Ass'n v. District of Columbia, 444 F.3d 673 (D.C. Cir. 2006)* . In that case, the court stated:

> The Supreme Court has yet to consider the availability of disparate impact claims under the FHA. Significantly, however, the FHA's language prohibiting discrimination--"because of ... race ... or national origin"--is identical to Title VII's, and since *Griggs*, every one of the eleven circuits to have considered the issue has held that the FHA similarly prohibits not only intentional housing discrimination, but also housing actions having a disparate impact.

444 F.3d at 679 . (citing John F. Stanton, *The Fair Housing Act and Insurance: An Update and the Question of Disability Discrimination, 31 Hofstra L.Rev. 141, 174 n. 180 (2002)).*

(n252)Footnote 259. *See, e.g., Keith v. Volpe, 858 F.2d 467 (9th Cir. 1988)* ; *Huntington Branch NAACP v. Town of Huntington, 844 F.2d 926, 933-934 (2d Cir. 1988)* ; *Resident Advisory Bd. v. Rizzo, 564 F.2d 126, 147-148 (3d Cir. 1977)* ; *Metropolitan Hous. Dev. Corp. v. Village of Arlington Heights, 558 F.2d 1283, 1289-90 (7th Cir. 1977) , cert. denied, 434 U.S. 1025 (1978)* .

(n253)Footnote 260. *See, e.g., Huntington Branch NAACP v. Town of Huntington, 844 F.2d 926, 934 (2d Cir. 1988)* ; *Resident Advisory Board v. Rizzo, 564 F.2d 126, 147-148 (3d Cir. 1977)* ; *Metropolitan Hous. Dev. Corp. v. Village of Arlington Heights, 558 F.2d 1283, 1289-1290 (7th Cir. 1977) , cert. denied, 434 U.S. 1025 (1978)* ; *United States v. City of Black Jack, 508 F.2d 1179, 1184-1185 (8th Cir. 1974)* ; *cert. denied, 422 U.S. 1042 (1975)* ; *see generally* Robert Schwemm, Housing Discrimination Law and Litigation § 10.4 (1990).

(n254)Footnote 261. *509 F.2d 1110 (2d Cir. 1975)* .

(n255)Footnote 262. *Id.* at 114-115.

(n256)Footnote 263. *See Robinson v. 12 Lofts Realty, Inc., 610 F.2d 1032, 1038 (2d Cir. 1979)* .

(n257)Footnote 264. *See e.g., Salute v. Stratford Greens Garden Apartments, 136 F.3d 293 (2d Cir. 1998)* (court mentions that a violation of the Fair Housing Act may be premised on a theory of disparate impact, but declines to find such an impact in the case before it); *Villas West II of Willowridge v. McGlothin, 841 N.E.2d 584 (Ind. Ct. App. 2006)* (court concludes that a subdivision restriction that prohibited the leasing of residences violated the Fair Housing Act); *Llanos v. Estate of Coehlo, 24 F. Supp. 2d 1052 (E.D. Cal. 1998)* (to establish a prima facie disparate impact claim in the housing context, a plaintiff must show at least that the defendant's actions had a discriminatory effect; the elements of a prima facie disparate impact case include: "(1) the occurrence of certain outwardly neutral practices, and (2) a significantly adverse or disproportionate impact on persons of a particular type produced by defendant's facially neutral acts or policies."); *cf. United States v. Weiss, 847 F. Supp. 819 (D. Nev. 1994)* (court applies disparate impact theory, but concludes that policy limiting occupancy based on limited hot water supply constitutes a compelling business necessity).

(n258)Footnote 265. *736 F.2d 983 (4th Cir. 1984)* .

(n259)Footnote 266. *Id. at 987-988* .

(n260)Footnote 267. *Id. at 989* .

(n261)Footnote 268. *724 F. Supp. 148 (S.D. N.Y. 1989)* .

(n262)Footnote 269. *See Snyder v. Barry Realty, Inc., 953 F. Supp. 217 (N.D. Ill. 1996)* ; *Fair Housing Council of Orange County, Inc. v. Ayres, 855 F. Supp. 315 (C.D. Cal. 1994)* ; *cf. United States v. Weiss, 847 F. Supp. 819 (D. Nev. 1994)* (court applies disparate impact theory, but concludes that policy limiting occupancy based on limited hot water supply constitutes a compelling business necessity); *see also Hispanics United of DuPage County v. Village of Addison, Ill., 988 F. Supp. 1130 (N.D. Ill. 1997)* (expressing disagreement with the *Snyder* decision).

(n263)Footnote 270. *See Harris v. Capital Growth Investors, 805 P.2d 873 (1991)* .

(n264)Footnote 271. *See, e.g., Normal v. St. Louis Concrete Pipe Co., 447 F. Supp. 624 (E.D. Mo. 1978)* ; *Bush v. Kaim, 297 F. Supp. 151, 46 Ohio Op. 2d 329 (N.D. Ohio 1969)* .

(n265)Footnote 272. *See Bush v. Kaim, 297 F. Supp. 151 (N.D. Ohio 1969)* (section 1982 action; plaintiffs were successful).

(n266)Footnote 273. *See, e.g., Asbury v. Brougham, 866 F.2d 1276, 1279 (10th Cir. 1988)* ; *Marable v. Walker & Assocs., 644 F.2d 390, 395 (5th Cir. 1981)* ; *Williams v. Matthews, 499 F.2d 819, 826 (8th Cir. 1974)* .

(n267)Footnote 274. *490 U.S. 228 (1989)* . For an analysis of *Price Waterhouse* in the context of Title VIII, *see* Robert Schwemm, Housing Discrimination Law and Litigation § 10.3 (1990).

(n268)Footnote 275. *Id. at 244-245* .

(n269)Footnote 276. *See id. at 276-277* (O'Connor, J., concurring).

(n270)Footnote 277. *596 A.2d 396 (1991)* .

(n271)Footnote 278. *See Bachman v. St. Monica's Congregation, 902 F.2d 1259, 1262-63 (7th Cir. 1990)* .

(n272)Footnote 279. Civil Rights Act of 1991, § 107, Pub. L. No. 102-166, § 107(a), codified at *42 U.S.C. § 2000e* 2(m).

(n273)Footnote 280. *See* HUD v. Denton, 2 Fair Hous. Fair Lend (P H) 25,024 (HUD ALJ 1992).

(n274)Footnote 281. For example, *42 U.S.C. § 3604(a)* makes it illegal "[t]o refuse to sell or rent after the making of a bona fide offer, or to refuse to negotiate for the sale or rental of, or otherwise make unavailable or deny, a dwelling to any person *because of* race, color, religion, sex, familial status, or national origin." (emphasis added).

(n275)Footnote 282. *See United States v. Big D. Enters., 184 F.3d 924* (8th Cir. 1999) , *cert. denied, 529 U.S. 1018, 120 S. Ct. 1419, 146 L. Ed. 2d 311 (2000)* (claim of race discrimination against apartment owner; court refers to Price Waterhouse formula, but states that evidence of a legally-permissible motive was insufficient to justify a mixed-motive jury instruction); *Cabrera v. Jakabovitz, 24 F.3d 372,* (2d Cir. 1994) , *cert. denied, 513 U.S. 876 (1994)* (discussion of the propriety of giving a jury instruction incorporating *Price Waterhouse* approach to dual motive housing decision); *Texas v. Crest Asset Management, Inc., 85 F. Supp.2d 722 (S.D. Tex. 2000)* (stating that if the plaintiff produces direct evidence of discrimination, the *Price Waterhouse* mixed-motives theory of discrimination comes into play).

(n276)Footnote 283. *See, e.g., Asbury v. Brougham, 866 F.2d 1276 (10th Cir. 1989)* .

(n277)Footnote 284. *See Phiffer v. Proud Parrot Motor Hotel, Inc., 648 F.2d 548 (9th Cir. 1980)* .

(n278)Footnote 285. *458 U.S. 375 (1982)* .

(n279)Footnote 286. *See, e.g., Hamilton v. Svatik, 779 F.2d 383 (7th Cir. 1985)* .

(n280)Footnote 287. *See Miko v. Commission on Human Rights & Opportunities, 596 A.2d 396 (1991)* .

(n281)Footnote 288. *See North Carolina Human Relations Council v. Weaver Realty Co., 340 S.E.2d 766 (N.C. App. 1986)* .

(n282)Footnote 289. *See Harris v. Capital Growth Investors XIV, 805 P.2d 873 (1991)* .

(n283)Footnote 290. *See, e.g., Hamilton v. Svatik, 779 F.2d 383 (7th Cir. 1985)* ; *Smith v. Anchor Bldg. Corp., 536 F.2d 231, 234 (8th Cir. 1976)* ; *Davis v. Mansards, 597 F. Supp. 334 (N.D. Ind. 1984)* .

(n284)Footnote 291. *See, e.g., Davis v. Mansards, 597 F. Supp. 334 (N.D. Ind. 1984)* .

(n285)Footnote 292. *See Richardson v. Howard, 712 F.2d 319 (7th Cir. 1983)* ; *Wharton v. Knefel, 562 F.2d 550 (8th Cir. 1977)* ; *Smith v. Anchor Bldg. Corp., 536 F.2d 231, 234 n.2 (8th Cir. 1976)* ; *United States v. Lorantffy Care Center, 999 F. Supp. 1037 (N.D. Ohio 1998)* .

(n286)Footnote 293. *See* Education -- Instruccion Inc. v. Copley Mgt. & Dev. Corp., 3 EOHC (P H) P 15,453 (D.C. Mass. 1982); *Zuch v. Hussey, 394 F. Supp. 1028, 1051 (E.D. Mich. 1975)* , *aff'd and remanded, 547 F.2d 1168 (6th Cir. 1977)* .

(n287)Footnote 294. *See Richardson v. Howard, 712 F.2d 319 (7th Cir. 1983)* .

(n288)Footnote 295. *See Wharton v. Knefel, 562 F.2d 550 (8th Cir. 1977)* .

(n289)Footnote 296. *See* Education -- Instruccion Inc. v. Copley, 3 EOHC (P H) P 15,453 (D.C. Mass. 1982) (striking down Massachusetts law that made testers liable for the tort of misrepresentation); *United States v. Wisconsin, 395 F. Supp. 732 (W.D. Wis. 1975)* (striking down Wisconsin statute that prohibited testers).

(n290)Footnote 297. *See United States v. Reddoch, 467 F.2d 897, 898-899 (5th Cir. 1972)* ; Todd v. Lutz, 2 EOHC (P H) P 13,787 (W.D. Pa. 1976); Riddick v. Hill, (N.D. Cal. 1973); United States v. Worrell, 1 EOHC (P H) P 13,727 (S.D. Ga. 1974); United States v. Hilton Sykes Rental Agency, 1 EOHC P 13,727 (P H) (M.D. Ill. 1975); United States v. Dittmar, 1 EOHC (P H) P 13,730 (E.D. Va. 1975).

(n291)Footnote 298. *See, e.g., Young v. Parkland Village, 460 F. Supp. 67 (D. Md. 1978)* ; *Lamb v. Sallee, 417 F. Supp. 282 (E.D. Ky. 1976)* ; *United States v. L & H Land Corp., Inc., 407 F. Supp. 576 (S.D. Fla. 1976)* ; *United States v. Youritan Constr. Co., 370 F. Supp. 643 (N.D. Cal. 1973)* ; *Walker v. Pointer, 304 F. Supp. 56 (N.D. Tex. 1970)* .

(n292)Footnote 299. *See Marable v. Walker & Assocs., 644 F.2d 390, 397 (5th Cir. 1981)* ; *United States v. Reddoch, 467 F.2d 897, 899 (5th Cir. 1972)* ; *Young v. Parkland Village, 460 F. Supp. 67 (D. Md. 1978)* ; *Bishop v. Pecsok 431 F. Supp. 34(N.D. Ohio 1976)* ; *United States v. Youritan Constr. Co., 370 F. Supp. 643 (N.D. Cal. 1973)* .

(n293)Footnote 300. United States v. Reddoch, 1 EOHC (P H) P 13,569 (S.D. Ala. 1972), *aff'd, 467 F.2d 897 (5th Cir. 1972)* .

(n294)Footnote 301. *See Lee v. Minnock, 417 F. Supp. 436 (W.D. Pa. 1976)* (87% percent of units rented to blacks); *cf. Soules v. HUD, 967 F.2d 817 (2d Cir. 1992)* (landlord's attempt to rent apartment to another family with children was evidence that refusal to rent to plaintiff was not based on her familial status), *aff'd, 104 F.3d 349 (2d Cir. 1996)* .

(n295)Footnote 302. *See Asbury v. Brougham, 866 F.2d 1276, 1281-1282 (10th Cir. 1988)* ; *Davis v. Mansards, 597 F. Supp. 334, 345 (N.D. Ind. 1984)* .

(n296)Footnote 303. *See Robinson v. 12 Lofts Realty, Inc., 610 F.2d 1032, 1040 (2d Cir. 1979)* ; *Portee v. Hastava, 853 F. Supp. 597 (E.D. N.Y. 1994)* ; Irizarry v. *120 West 70*th Owner's Corp., 1 Fair Hous. Fair Lend. (P.H.) 15,551 (S.D. N.Y. 1986).

(n297)Footnote 304. *See Soules v. HUD, 967 F.2d 817 (2d Cir. 1992)* ; *Hamilton v. Miller, 477 F.2d 908, 910 (10th Cir. 1973)* (rejected because believed would be a "troublesome" tenant); *Normal v. St. Louis Concrete Pipe Co., 447 F. Supp. 624 (E.D. Mo. 1978)* (rejected because of harassing and rude telephone calls); *Bush v. Kaim, 297 F. Supp. 151 (N.D. Ohio 1969)* .

(n298)Footnote 305. *See United States v. Youritan Constr. Co., 370 F. Supp. 643, 650 (N.D. Cal. 1973)* .

(n299)Footnote 306. *See United States v. West Peachtree Tenth Corp., 437 F.2d 221, 223-224 (5th Cir. 1971)* .

(n300)Footnote 307. *See Stevens v. Dobs, Inc., 483 F.2d 82, 83 (4th Cir. 1973)* .

(n301)Footnote 308. *See Robinson v. 12 Lofts Realty, Inc., 610 F.2d 1032, 1041 (2nd Cir. 1979)* .

(n302)Footnote 309. *Schanz v. Village Apartments, 998 F. Supp. 784 (E.D. Mich. 1998)* . *Gentry v. Northeast Mgt. Co., 472 F. Supp. 1248 (N.D. Tex. 1979)* (poor credit history)

(n303)Footnote 310. *United States v. Grooms, 348 F. Supp. 1130 (M.D. Fla. 1972)* ; *Bush v. Kaim, 297 F. Supp. 151 (N.D. Ohio 1969)* .

(n304)Footnote 311. *See Kaplan v. 442 Wellington Coop. Bldg. Corp., 567 F. Supp. 53 (N.D. Ill. 1983)* ; *Gentry v. Northeast Mgt. Co., 472 F. Supp. 1248 (N.D. Tex. 1979)* .

(n305)Footnote 312. *See Davis v. Mansards, 597 F. Supp. 334, 345 (N.D. Ind. 1984)* ; *Bishop v. Pecsok, 431 F. Supp. 34 (N.D. Ohio 1976)* ; *Walker v. Pointer, 304 F. Supp. 56 (N.D. Tex. 1970)* (late payments cannot justify eviction because accepted late payments from white tenants); *Hall v. Freitas, 343 F. Supp. 1099 (N.D. Cal. 1972)* .

(n306)Footnote 313. *See Hall v. Freitas, 343 F. Supp. 1099 (N.D. Cal. 1972)* .

(n307)Footnote 314. *See Marable v. Walker & Assocs., 644 F.2d 390, 397 (5th Cir. 1981)* ; Johnson v. Ganino, 1 EOHC (P H) P 13,532 (N.D. Cal. 1972); *United States v. Gilman, 341 F. Supp. 891 (S.D.N.Y. 1972)* .

(n308)Footnote 315. *42 U.S.C. § 3604(a)*.

(n309)Footnote 316. *42 U.S.C. § 3604(d)*.

(n310)Footnote 317. *See, e.g., Hamilton v. Svatik, 779 F.2d 383, 388 (7th Cir. 1985)* ; *Marable v. Walker & Assocs., 644 F.2d 390* (5th Cir. 1981; *Villegas v. Sandy Farms, Inc., 929 F. Supp. 1324 (D. Or. 1996)* ; *cf. Van Den Berk v. Missouri Commission on Human Rights, 26 S.W.3d 406 (Mo. 2000)* (refusal to negotiate constituted a prima facie case of discrimination under state human rights statute).

(n311)Footnote 318. *See Asbury v. Brougham, 866 F.2d 1276, 1279 (10th Cir. 1988)* (failure to provide information about availability).

(n312)Footnote 319. *See, e.g., Smith v. Anchor Bldg. Corp., 536 F.2d 231 (8th Cir. 1976)* ; *Fort v. White, 383 F. Supp. 949 (D. Conn. 1974)* , *modified, 530 F.2d 1113 (2d Cir. 1976)* ; *United States v. Youritan Constr. Co., 370 F. Supp. 643 (N.D. Cal. 1973)* .

(n313)Footnote 320. *See Asbury v. Brougham, 866 F.2d 1276, 1279 (10th Cir. 1988)* ; *United States v. Youritan, 370 F. Supp. 643 (N.D. Cal. 1973)* ; United States v. Reddoch 1 EOHC (P H) P 13,569 (S.D. Ala. 1972), *aff'd, 467 F.2d 897 (5th Cir. 1972)* ; *see also Cabrera v. Jakabovitz, 24 F.3d 372, 390 (2d Cir. 1994)* (court states: "As long as a plaintiff can prove that a defendant afforded an African American person fewer housing opportunities than a similarly situated White person on account of race, the plaintiff has made out a case under Title VIII").

(n314)Footnote 321. *See United States v. Mitchell, 580 F.2d 789, 791 (5th Cir. 1978)* ; *United States v. Henshaw Bros., 401 F. Supp. 399 (E.D. Va. 1975)* ; *Zuch v. Hussey, 394 F. Supp. 1028 (E.D. Mich. 1975)* , *aff'd, 547 F.2d 1168 (6th Cir. 1977)* .

(n315)Footnote 322. *Llanos v. Estate of Coehlo, 24 F. Supp. 2d 1052, 1057 (E.D. Cal. 1998)* .

(n316)Footnote 323. *See United States v. Mitchell, 580 F.2d 789, 791 (5th Cir. 1978)* .

(n317)Footnote 324. *42 U.S.C. § 3604(b)*.

(n318)Footnote 325. *See Khalil v. Farash Corp., 260 F. Supp. 2d 582 (W.D. N.Y. 2003)* ; *Concerned Tenants Ass'n v. Indian Trails Apts., 496 F. Supp. 522 (N.D. Ill. 1980)* ; McGraw v. Oliver 1 Fair Hous. Fair Lend. (P H) 15,539 (E.D. Va. 1985).

(n319)Footnote 326. *See* United States v. Long, 1 EOHC P 13,631 (C.D. S.C. 1974); *Brown v. Lo Duca, 307 F. Supp. 102 (E.D. Wis. 1969)* .

(n320)Footnote 327. *See City of Pittsburgh Commission on Human Relations v. DeFelice, 782 A.2d 586 (Pa. Commw. Ct. 2001)* ; *Brown v. Lo Duca, 307 F. Supp. 102 (E.D. Wis. 1969)* .

(n321)Footnote 328. *See U.S. v. Balistrieri, 981 F.2d 916 (7th Cir. 1992)* (dispensing with usual credit check for a white applicant); United States v. Long, 1 EOHC (P H) P 13,631 (C.D.S.C. 1974).

(n322)Footnote 329. McGraw v. Oliver, 1 Fair Hous. Fair Lend. (P H) 13,539 (E.D. Va. 1985).

(n323)Footnote 330. *Khalil v. Farash Corp., 260 F. Supp. 2d 582 (W.D. N.Y. 2003)* (claim that landlords prohibited children from congregating in areas where adults were allowed to congregate); *Concerned Tenants Ass'n v. Indian Trails Apts., 496 F. Supp. 522 (N.D. Ill. 1980)* .

(n324)Footnote 331. *United States v. Gilman, 341 F. Supp. 891 (S.D. N.Y. 1972)* .

(n325)Footnote 332. *See United States v. L & H Land Corp., 407 F. Supp. 576 (S.D. Fla. 1976)* .

(n326)Footnote 333. *See Grieger v. Sheets, 689 F. Supp. 835 (N.D. Ill. 1988)* ; Shellhammer v. Lewallen, 1 Fair Hous. Fair Lend. (P H) 15,472 (N.D. Ohio 1983) .

(n327)Footnote 334. *42 U.S.C. § 3604(c)*.

(n328)Footnote 335. *See 42 U.S.C.§ 3603(b)*.

(n329)Footnote 336. *See United States v. Hunter, 459 F.2d 205 (4th Cir. 1972)* .

(n330)Footnote 337. *See, e.g., Jancik v. HUD, 44 F.3d 553 (7th Cir. 1995)* (statements that landlord did not want families with children and did not want teenagers violated the Fair Housing Act); United States v. Long, 1 EOHC P 13,631 (D. S.C. 1974), *remanded, 537 F.2d 1151 (4th Cir. 1975)* , *cert. denied, 429 U.S. 871 (1976)* ; *United States v. L & H Land Corp., Inc., 407 F. Supp. 576 (S.D. Fla. 1976)* .

(n331)Footnote 338. *923 F.2d 995 (2d Cir. 1991)* , *cert. denied, 502 U.S. 821 (1991)* .

(n332)Footnote 339. *413 U.S. 376 (1973)* .

(n333)Footnote 340. *Id. at 389* .

(n334)Footnote 341. *923 F.2d at 1003* .

(n335)Footnote 342. *Id.*

(n336)Footnote 343. *943 F.2d 644 (6th Cir. 1991)* .

(n337)Footnote 344. *943 F.2d at 650* .

(n338)Footnote 345. *943 F.2d at 650* .

(n339)Footnote 346. *943 F.2d at 652* .

(n340)Footnote 347. *943 F.2d at 653* .

(n341)Footnote 348. *459 F.2d 205 (4th Cir. 1972)* , *cert. denied, 409 U.S. 934 (1972)* .

(n342)Footnote 349. *Ragin v. Harry Macklowe Real Est., 6 F.3d 898 (2d Cir. 1993)* ; *United States v. Hunter, 459 F.2d 205, 215 (4th Cir. 1972)* , *cert. denied, 409 U.S. 934 (1972)* .

(n343)Footnote 350. *Id.*

(n344)Footnote 351. *659 F. Supp. 1042 (E.D. Va. 1987)* .

(n345)Footnote 352. *Id. at 1058* ; *see also Ragin v. Harry Macklowe Real Est., 6 F.3d 898 (2d Cir. 1993)* (Fair Housing Act violated by exclusive use of white models in ads).

(n346)Footnote 353. *923 F.2d 995 (2d Cir. 1991)* , *cert. denied, 502 U.S. 821 (1991)* .

(n347)Footnote 354. *923 F.2d at 1002* .

(n348)Footnote 355. *Id. at 1001-1002* .

(n349)Footnote 356. *943 F.2d 644 (6th Cir. 1991)* .

(n350)Footnote 357. *Id. at 650-651* .

(n351)Footnote 358. *42 U.S.C. § 3617*.

(n352)Footnote 359. *See, e.g., Marshall v. Bramer, 828 F.2d 355 (6th Cir. 1987)* ; *Whisby Myers v. Kiekenapp 293 F. Supp.2d 845 (N.D. Ill. 2003)* ; *Stirgus v. Benoit, 720 F. Supp. 119 (N.D. Ill. 1989)* .

(n353)Footnote 360. *See* Tokaji v. Toth, 1 EOHC (P H) P 13,679 (N.D. Ohio 1974); *see also Nevels v. Western World Ins., 359 F. Supp 2d 1110 (W.D. Wash. 2004)* (interference by insurer); *cf. Lawrence v. Courtyards at Deerwood Ass'n, 318 F. Supp. 2d 1133 (S.D. Fla. 2004)* (court rejects claim that homeowners' association and property manager violated the Act by failing to prevent neighbors from creating a hostile housing environment).

(n354)Footnote 361. *See Grieger v. Sheets, 689 F. Supp. 835 (N.D. Ill. 1988)* .

(n355)Footnote 362. *See 42 U.S.C. §§ 3610-3612*.

(n356)Footnote 363. *See 42 U.S.C. § 3613*.

(n357)Footnote 364. *See 42 U.S.C. § 3614*.

(n358)Footnote 365. *See* James Kushner, Fair Housing (1983); Robert Schwemm, Housing Discrimination Law and Litigation 411-412 (1990).

(n359)Footnote 366. *42 U.S.C. § 3612*.

(n360)Footnote 367. *42 U.S.C. § 3610(a)(1)(A)*.

(n361)Footnote 368. *42 U.S.C. § 3610*.

(n362)Footnote 369. *42 U.S.C. § 3610(f)*.

(n363)Footnote 370. *42 U.S.C. § 3610(f)(3)*.

(n364)Footnote 371. *42 U.S.C. § 3610(f)(3)*.

(n365)Footnote 372. *42 U.S.C. § 3610(f)(2)*.

(n366)Footnote 373. *42 U.S.C. § 3610(b)*.

(n367)Footnote 374. *42 U.S.C. § 3610(g)*. *See also United States v. Beethoven Assocs. Ltd. Partnership, 843 F. Supp. 1257 (N.D. Ill. 1994)* (failure to strictly adhere to requirement that HUD complete investigations within 100 days

or notify parties of reasons for failing to do so does not give rise to a jurisdictional barrier to a subsequent lawsuit on the discrimination claim).

(n368)Footnote 375. *42 U.S.C. § 3610(g)(2)(A)*.

(n369)Footnote 376. *42 U.S.C. § 3612(a)*.

(n370)Footnote 377. *42 U.S.C. § 3612(b)*.

(n371)Footnote 378. *42 U.S.C. § 3612(g)(1)(2)*.

(n372)Footnote 379. *42 U.S.C. § 3612(g)(3)*. The amount of any civil penalty is limited by statute. *See id.*

(n373)Footnote 380. *42 U.S.C. §§ 3612 (h)* & 1K.

(n374)Footnote 381. *42 U.S.C. § 3612(a)*.

(n375)Footnote 382. *See 42 U.S.C. § 3613(a)*.

(n376)Footnote 383. Vt. Stat. Ann. tit. 9 §§ 4451-4468. But a lawsuit may be brought to enforce the terms of a conciliation agreement. *See id.*

(n377)Footnote 384. The 180-day period was set forth in the pre-amendment version of *42 U.S.C. § 3612*. *See Hickman v. Fincher, 483 F.2d 855, 856 n.3 (4th Cir. 1973)* .

(n378)Footnote 385. *Hickman v. Fincher, 483 F.2d 855 (4th Cir. 1973)* ; *Hampton v. Roberts, 386 F. Supp. 609 (W.D. Va. 1974)* ; *Smith v. Woodhollow, 463 F. Supp. 16 (W.D. Okla. 1978)* ; *James v. Hafler, 320 F. Supp. 397 (N.D. Ga. 1970)* .

(n379)Footnote 386. *Hampton v. Roberts, 386 F. Supp. 609 (W.D. Va. 1974)* ; *Smith v. Woodhollow, 463 F. Supp. 16 (W.D. Okla. 1978)* ; *James v. Hafler, 320 F. Supp. 397 (N.D. Ga. 1970)* .

(n380)Footnote 387. *42 U.S.C. § 3613(a)(1)(A)*.

(n381)Footnote 388. *See* James Kushner, Fair Housing (1983); Robert Schwemm, Housing Discrimination Law and Litigation § 802 (1990).

(n382)Footnote 389. *42 U.S.C. §§ 3613(a)(1)(A)* & *(B)*.

(n383)Footnote 390. *42 U.S.C. § 3613(c)*. The court does not have to award damages in the event that discrimination is found. *See U.S. v. Southern Management Corp.,955 F.2d 914 (4th Cir. 1992)* .

(n384)Footnote 391. *See, e.g., Steele v. Title Realty Co., 478 F.2d 380 (10th Cir. 1973)* ; *Parker v. Shonfeld, 409 F. Supp. 876 (N.D. Cal. 1976)* ; *Bishop v. Pecsok, 431 F. Supp. 34 (N.D. Ohio 1976)* .

(n385)Footnote 392. *See Lincoln v. Case, 340 F.3d 283 (5th Cir. 2003)* (court upholds award of punitive damages in Federal Housing Act case, stating that the question for the availability of punitive damages is whether the defendant acted with malice or reckless indifference that his actions might violate a federal statute of which he was aware); *Alexander v. Riga, 208 F.3d 419 (3d Cir. 2000)* , cert. denied, *531 U.S. 1069 (2001)* (discussing standards of punitive damages; stating that jury could award punitive damages even if no actual damages awarded).

(n386)Footnote 393. *See, e.g., Miller v. Apartments & Homes of N.J., Inc., 646 F.2d 101 (3rd Cir. 1981)* ; *Parker v. Shonfeld, 409 F. Supp. 876 (W.D. Cal. 1976)* ($10,000 punitive damage award).

(n387)Footnote 394. *42 U.S.C. § 3613(c).*

(n388)Footnote 395. *See 42 U.S.C.§ 3613(c).*

(n389)Footnote 396. *See Gresham v. Windrush Partners Ltd., 730 F.2d 1417 (11th Cir. 1984) , cert. denied, 469 U.S. 882 (1984) .*

(n390)Footnote 397. *See, e.g., Hall v. Freitas, 343 F. Supp. 1099 (N.D. Cal. 1972)* (against continued refusal); *Williamson v. Hampton Mgt. Co., 339 F. Supp. 1146 (N.D. Ill. 1972)* (order to rent).

(n391)Footnote 398. *See, e.g.,* Guillory v. Bryan 1 EOHC (P H) P 13,642 (S.D. Tex. 1974).

(n392)Footnote 399. *See United States v. West Peachtree Tenth Corp., 437 F.2d 221 (5th Cir. 1971) .*

(n393)Footnote 400. *See* Rogers v. 66- 36 *Yellowstone Blvd. Coop. Owners, 599 F. Supp. 79 (E.D. N.Y. 1984) .*

(n394)Footnote 401. *See Cabrera v. Fischler, 814 F. Supp. 269 (E.D. N.Y 1993) , aff'd in part, rev'd in part, 24 F.3d 372 (2d Cir. 1994) , cert. denied, 513 U.S. 876 (1994) .*

(n395)Footnote 402. *See United States v. Youritan Constr. Co. 370 F. Supp. 643 (N.D. Cal. 1973) .*

(n396)Footnote 403. *42 U.S.C. § 3614.*

(n397)Footnote 404. *See, e.g., United States v. Hunter, 459 F.2d 205 (4th Cir. 1972)* ; *United States v. Grooms, 348 F. Supp. 1130 (M.D. Fla. 1972) .*

(n398)Footnote 405. *See United States v. Saroff, 377 F. Supp. 352 (E.D. Tenn. 1974) , aff'd, 516 F.2d 902 (6th Cir. 1975) .*

(n399)Footnote 406. *United States v. West Peachtree Tenth Corp., 437 F.2d 221, 227 (5th Cir. 1971)* ; *United States v. L & H Land Corp., 407 F. Supp. 756 (S.D. Fla. 1976)* ; United States v. Long, 1 EOHC (P H) P 13,618 (M.D. Fla. 1973).

(n400)Footnote 407. *See United States v. Youritan Constr. Co., 370 F. Supp. 643 (N.D. Cal. 1973)* ; United States v. Reddoch, 1 EOHC (P H) P 13,569 (S.D. Ala. 1972), *aff'd, 467 F.2d 897 (5th Cir. 1972) .*

(n401)Footnote 408. *42 U.S.C. § 3614(d).*

(n402)Footnote 409. *See 42 U.S.C. § 3614(d).*

(n403)Footnote 410. *See* United States v. Reddoch, 1 EOHC (P H) P 13,569 (S.D. Ala. 1972).

(n404)Footnote 411. *See United States v. Mitchell, 580 F.2d 789 (5th Cir. 1978) , superseded by statute, as stated* in *U.S. v. City of Jackson, Miss., 359 F.3d 727 (5thCir. 2004).*

(n405)Footnote 412. *See 42 U.S.C. § 3614(d). See also U.S. v. City of Jackson, Miss., 359 F.3d 727 (5thCir. 2004)* (discussing the legislative history and the effect of the amendment).

(n406)Footnote 413. *See Jones v. Alfred H. Mayer Co., 392 U.S. 409 (1968)* ; *Phiffer v. Proud Parrot Motor Hotel, Inc., 648 F.2d 548 (9th Cir. 1980)* ; *Elliott v. Sherwood Manor Mobile Home Park, 947 F. Supp 1574 (M.D. Fla. 1996)* .

(n407)Footnote 414. *See, e.g., Miller v. Apartments & Homes of N.J., Inc., 646 F.2d 101 (3rd Cir. 1981) .*

(n408)Footnote 415. See the discussion in § 43.03(b)(1)(ii) of this chapter.

(n409)Footnote 416. *See 52 Fed. Reg. 41, 419 (1987)* .

(n410)Footnote 417. *See, e.g., Alaska Stat. §§ 18.80.10 - 80.145* (Commission on Human Rights); *Colo. Rev. Stat. Ann. §§ 24-34-301 - 308, 24-34-501 - 510* (Civil Rights Commission); *Conn. Gen. Stat. Ann. §§ 46a* 64b, 46a-64c & 46a 82 (Commission on Human Rights and Opportunities); *Idaho Code §§ 67-5901 - 5912* (Commission on Human Rights); *Ind. Code Ann. § 22-9-1* (Civil Rights Commission); *Iowa Code Ann. §§ 601A.1 - 601A.19* (Civil Rights Commission); *Kan. Stat. Ann. § 44-1003* (Commission on Civil Rights).

(n411)Footnote 418. *See, e.g., Alaska Stat. § 18.80.100*; *Colo. Rev. Stat. Ann. § 24-34-306*; *Idaho Code § 67-5907*; *Iowa Code Ann. § 601A.15*; *Kan. Stat. Ann. § 44-1005*.

(n412)Footnote 419. *See, e.g., Colo. Rev. Stat. Ann. § 24-34-306*; *Iowa Code Ann. § 601A.15*; *Kan. Stat. Ann. § 44-1005*.

(n413)Footnote 420. *See, e.g., Alaska Stat. § 18.80.110*; *Colo. Rev. Stat. Ann. § 24-34-306*; *Idaho Code § 67-5907*; *Iowa Code Ann. § 601A.15*; *Kan. Stat. Ann. § 44-1005*.

(n414)Footnote 421. *See, e.g., Fla. Stat. Ann. § 760.34*; *cf.* La. Rev. Code. Ann. §51:2614 (action by attorney general).

(n415)Footnote 422. *See, e.g., Colo. Rev. Stat. Ann. § 24-34-306*; *Conn. Gen. Stat. Ann. § 46a* 84.

(n416)Footnote 423. *See, e.g., Colo. Rev. Stat. Ann. § 24-34-305*; *Del. Code Ann. tit. 6, § 4609*.

(n417)Footnote 424. *See, e.g., Colo. Rev. Stat. Ann. § 24-34-306(a)*; *Conn. Gen. Stat. § 46a* 86.

(n418)Footnote 425. *See Alaska Stat. § 18.80.130*; *Haw. Rev. Stat. § 368-17*; *Kan. Stat. Ann. § 44-1005(K)*.

(n419)Footnote 426. *See Ky. Rev. Stat. Ann. § 344.230*; *Minn. Stat. § 363.071* (damages for mental anguish and suffering).

(n420)Footnote 427. *See Conn. Gen. Stat. Ann. § 46a* 86.

(n421)Footnote 428. *See Minn. Stat. § 363.071*; *Neb. Rev. Stat. § 20-337*; *Ohio Rev. Code Ann. § 4112.05(G)*; *S.C. Code Ann. § 31-21-130(L)*.

(n422)Footnote 429. *See, e.g., Ariz. Rev. Stat. Ann. § 41-1491.31*.

(n423)Footnote 430. *42 U.S.C. § 3613*.

(n424)Footnote 431. *42 U.S.C. § 3614*.

(n425)Footnote 432. *42 U.S.C. §§ 3612(a)* & *(o)*. *See generally* Robert Schwemm, Housing Discrimination Law and Litigation § 31.1 (1990).

(n426)Footnote 433. *See Baker v. Carr, 369 U.S. 186 (1962)* .

(n427)Footnote 434. *409 U.S. 205 (1972)* .

(n428)Footnote 435. *Id. at 208* .

(n429)Footnote 436. *Id. at 208-209* .

(n430)Footnote 437. *Id. at 209-210* .

(n431)Footnote 438. *441 U.S. 91 (1979)* .

(n432)Footnote 439. The former § 3612 was changed to the current § 3613 by the 1988 amendments to the Fair Housing Act.

(n433)Footnote 440. *Id. at 114* .

(n434)Footnote 441. *Id. at 110-111* .

(n435)Footnote 442. *455 U.S. 363 (1982)* .

(n436)Footnote 443. *Id. at 372* .

(n437)Footnote 444. *Id. at 374-375* .

(n438)Footnote 445. *Id. at 376-377* .

(n439)Footnote 446. *Id. at 379* .

(n440)Footnote 447. *See, e.g., Smith v. Pacific Properties and Development Corp.,358 F.3d 1097* (9th Cir. 2004) (testers and civil rights organization have standing to allege disability discrimination in violation of the Fair Housing Act); *Lincoln v. Case, 340 F.3d 283 (5th Cir. 2003)* (noting that the "Supreme Court has held that the sole requirement for standing under the FHA is the Article III minima;" but also stating:

> First, the plaintiff must have suffered an injury in fact-an invasion of a legally protected interest that is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical. Second, there must be a causal connection between the injury and the conduct complained of... Third, it must be likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision.

340 F.3d at 289).

(n441)Footnote 448. *160 F.3d 433* (8th Cir.1998) .

(n442)Footnote 449. *160 F.3d at 435* .

(n443)Footnote 450. *16 F. Supp.2d 183 (D. Conn. 1998) , aff'd, 237 F.3d 81 (2d Cir. 2000) , cert. denied, 534 U.S. 888 (2001)* .

(n444)Footnote 451. *See, e.g., Lamb v. Sallee, 417 F. Supp. 282 (E.D. Ky. 1976)* ; *Walker v. Pointer, 304 F. Supp. 56 (N.D. Tex. 1970)* (whites have standing to sue for eviction for having black guests).

(n445)Footnote 452. *See*, e.g., *Cleveland v. Caplaw Enterprises, 448 F.3d 518 (2d Cir. 2006)* ; *Jankowski Lee & Associates v. Cisneros, 91 F.3d 891 (7th Cir. 1996)* ; *Cabrera v. Jakabovitz, 24 F.3d 372 (2d Cir. 1994) , cert. denied, 513 U.S. 876 (1994)* .

(n446)Footnote 453. *See Cabrera v. Jakabovitz, 24 F.3d 372 (2d Cir. 1994) , cert. denied, 513 U.S. 876 (1994)* ; Collins v. Spasojcevic, 1 EOHC (P H) P 13,654 (N.D. Ill. 1974).

(n447)Footnote 454. *See Jeanty v. McKey & Poague, Inc., 496 F.2d 1119 (7th Cir. 1974)* .

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CHAPTER 43 STATUTORY MODIFICATIONS OF LANDLORD-TENANT LAW

5-43 Thompson on Real Property, Thomas Editions § 43.04

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§ 43.04 Rent Control.

[Go To Supp]

§ 43.04(a) In General.

Rent controls are a significant limitation on the traditional right of landlords and tenants to set rent by agreement. Although initially imposed as emergency measures during the First and Second World Wars, modern rent controls became popular in the 1970s as a means to control inflationary rent increases. In the 1990s, however, some states adopted legislation that prohibited or significantly limited rent controls.

As the name suggests, rent controls are governmentally imposed limitations on the amount of the rent that can be charged to a tenant. Although taking various forms, most rent control arrangements share some common features. First, and most important, is a method to set a base rent and to calculate subsequent adjustments to ensure landlords a fair return. In many instances this is done by a rent control board, which also has authority to review hardship petitions and other matters. Rent control ordinances often contain other features, including eviction controls, vacancy decontrol provisions, removal restrictions, and provisions for exemption. n455

Imposition of rent controls is subject to several limitations. First, a municipality must have authority to enact controls. n456 In some states this is established by special enabling legislation that authorizes municipalities to impose rent controls. In the absent of such a statute, municipalities have looked to their general municipal powers, often under home rule statutes, for the authority to control rents. Courts are divided on whether this is a sufficient basis, with decisions often turning on the particular language granting general municipal power.

Despite numerous challenges, rent controls have been upheld as constitutional and not violative of antitrust laws. Although in early cases courts required rent controls to be justified by a housing emergency, that is no longer the case. Courts today generally recognize rent controls as a legitimate form of economic regulation. To be valid, however, the controls must allow landlords a "fair and reasonable" return.

Rent controls have long been controversial. n457 Proponents of rent control argue that they are a necessary response to housing shortages that would otherwise lead to excessive and unfair rents. However, critics argue that controls lead to an inefficient and improper allocation of housing resources. They also contend that controls create disincentives to

housing investment and therefore tend to exacerbate the very problem that they were intended to remedy.

§ 43.04(b) History of Rent Control.

§ 43.04(b)(1) Early War-Created Emergencies.

Early rent control efforts were in response to housing shortages during World War I. n458 These controls initially involved the formation of citizen committees designed to direct attention to, and bring pressure upon, rent profiteering. n459 These committees were promoted by the Federal Bureau of Industrial Housing and Transportation. They were located in a number of American cities, where they were instrumental in combatting price gouging. n460

During the war, several states and the District of Columbia passed rent control measures. n461 Voluntary efforts at controlling rent became less effective after the end of the war, and more cities and states passed formal rent control laws to address continued housing shortages brought on by the war. n462 The impact of rent control was especially great in the state of New York, which passed legislation in 1920 to combat more than 100,000 pending dispossession proceedings in New York City alone. n463

The constitutionality of rent control laws was addressed by the Supreme Court in a series of decisions beginning with *Block v. Hirsh* n464 and *Marcus Brown Holding Co. v. Felding*, n465 in 1924. In two five-to-four decisions, the Court upheld the validity of rent control laws in New York and the District of Columbia. In doing so, the Court emphasized the emergency nature of the laws, designed to address critical housing shortages following the war. n466 Three years later, the Court observed, in a case about rent controls: "A law depending upon the existence of an emergency or other certain state of facts to uphold it may cease to operate if the emergency ceases or the facts change even though valid when passed." n467

Rent control emerged again with the United States' entry into World War II. The Federal Emergency Price Control Act of 1942 authorized the imposition of rent controls as part of its wartime price control program, permitting the Office of Price Administration to stabilize or reduce rents in designated rental areas. n468 By 1942 the entire nation had been designated as a defense rental area, although not all areas were eventually brought under regulation. n469

The federal rent control provisions were continued after the end of the war until 1952 through a series of temporary renewals. These renewals reaffirmed the continued existence of housing shortages in the post war years, but they also had the purpose of gradually phasing out controls. n470 Unlike earlier rent controls, these post war controls provided that landlords were to receive adjustments if rents were inadequate. The Supreme Court upheld the validity of these post war controls in 1948, stating that they were justified by war-created housing shortages. n471

As federal controls came to an end during the late 1940s and early 1950s, a number of state and local governments enacted legislation to replace them. n472 These laws typically were adopted to become effective upon the termination of the federal controls and were designed to be of a temporary nature. For example, the New Jersey statute took effect when federal controls terminated in 1953, for the stated purpose of continuing rent controls in needed areas. The controls were annually renewed until 1956, at which time the statute permitted municipalities to continue them for one additional year. n473

A number of local governments also imposed some form of rent control during this post war period. At times these were pursuant to state statutes, but in other cases they were enacted in the absence of explicit state authorization. A number of these provisions were challenged, with courts divided on whether municipalities had authority to impose rent controls in the absence of enabling legislation. n474

By the mid-1950s most rent controls from the World War II era had come to an end. One notable exception was in New York City, which has had a unique rent control history. Rent controls were first imposed there in 1921 and have been in

continuous existence except between 1929 and 1942. n475

§ 43.04(b)(2) Modern Rent Control Laws.

Modern rent control laws, often referred to as "second generation" rent control, began in the late 1960s and early 1970s in response to inflationary rent increases. n476 An early and short lived experiment involved federal price controls from August 15, 1971 to January 12, 1973. This began with a 90-day rent freeze on rents, wages and prices. That was followed by rent regulation that limited annual rent increases to 2.5%, with some additional specified increases. n477

Apart from this short federal effort, modern rent controls have been imposed by state and local governments. Beginning in 1969, a number of states and municipalities began to enact new rent control legislation. n478 In a few instances, state legislation imposed state wide controls independent of local implementation. n479 More common have been state statutes that authorize local controls pursuant to specified guidelines. n480 The majority of actual controls are developed and imposed at the local level, either pursuant to state enabling legislation or under a general grant of municipal power.

Today rent controls are found or permitted in some ten states. n481 Historically, rent control has been most widely practiced in California, Massachusetts, New Jersey, and New York. One commentator estimated that, as of 1983, about 10% of rental housing stock nationally was subject to rent controls. n482 However, in the 1990s several states adopted legislation that prohibited or limited rent controls. n483

Although varying considerably, rent control laws today commonly include several basic components. Most fundamental are rent adjustment provisions to ensure landlords a fair return. These provisions, which are quite varied, will be considered in a later section of this chapter. n484 Probably most typical are provisions for an automatic rent increase and additional adjustments under special circumstances. Most legislation also creates a rent control board, with the authority to set increases and to act on special petitions.

Another central feature of most modern rent control ordinances are eviction controls to ensure that landlords cannot defeat rent control objectives by evicting tenants. Other common components are rollback provisions to offset rent increases made in anticipation of controls, exemptions for certain buildings, code compliance requirements, and enforcement provisions. Finally, some ordinances also include restrictions on conversion of rent control property to other uses.

§ 43.04(b)(3) The Emergence of Statutory Prohibitions on Rent Control.

In the 1990s, several states enacted legislation that prohibited rent controls to one degree or another. This section of the chapter references statutory prohibitions in California, Illinois, Massachusetts, and New Jersey. The legislation represents something of a modern trend to do away with existing rent control arrangements.

California adopted the "Costa Hawkins Rental Housing Act" in 1995. n485 In enacting the legislation, the California legislature included the following statement: "It is the intent of the Legislature to streamline and improve the efficiency of state housing policy efforts by repealing various obsolete, outmoded, and inoperative housing programs and statutes." n486 One of the principal provisions of the legislation states that, "[n]otwithstanding any other provision of law, an owner of residential real property may establish the initial and all subsequent rental rates" for a qualifying "dwelling" or "unit." n487

Initially, the qualifying dwellings or units generally included those that had a certificate of occupancy issued after February 1, 1995; were already exempt from rent control ordinances on or before February 1, 1995, on account of a local exemption for newly constructed units; or were alienable separate from the title to any other dwelling unit or were a subdivided interest in a subdivision, under a provision of the California Business and Professions Code. n488 But the

legislation also included provisions for ending rent controls for other dwellings or units, as time passed and as new tenancies were created. n489

However, the legislation includes some exceptions. Dwellings or units that will not be free from otherwise applicable rent controls include: 1) dwellings or units for which the owner has agreed otherwise in a contract with a public entity in consideration for financial assistance, and 2) dwellings or units that contain "serious health, safety, fire, or building code violations, excluding those caused by disasters for which a citation has been issued by the appropriate governmental agency and which has remained unabated for six months or longer preceding the vacancy." n490

Illinois adopted a "Rent Control Preemption Act" in 1997. n491 The legislation prohibits units of local government from enacting, maintaining, or enforcing "an ordinance or resolution that would have the effect of controlling the amount of rent charged for leasing private residential or commercial property." n492 A separate provision makes it clear that home rule units of government "may not regulate or control the amount of rent charged for leasing private residential or commercial property." n493 But it also provides that the legislation does not "impair the right of a unit of local government to manage and control residential property in which the unit of local government has a property interest." n494

In 1997, Massachusetts adopted a Rent Control Prohibition Act, n495 that prohibits most forms of rent control state-wide. The legislation includes the following statement of purpose:

> The purpose of this chapter is to establish a uniform statewide policy that broadly prohibits any regulatory scheme based upon or implementing rent control, except where, following an initial six month period, compliance with such a scheme is voluntary and uncoerced on the part of property owners. Even when voluntary, rent control should be severely restricted in scope. This policy is based on the belief that the public is best served by free market rental rates for residential properties and by unrestricted home ownership. The terms of this chapter shall be liberally construed to effect this purpose. n496

The operative provisions of the Massachusetts legislation generally prohibit cities or towns from enacting, maintaining, or enforcing rent controls of any kind, other than voluntary controls that take effect six months after the adoption of a rent control regulation. n497 In addition, the legislation provides that a municipality adopting such a regulation is to compensate owners of rent-controlled units for the difference between the unit's fair market rent and the unit's below-market, rent-controlled rent, with the compensation coming from the municipality's general funds, so that the cost of rent controls will be borne by all taxpayers of a municipality and not just by the owners of regulated units. n498

The definition of "rent control" under the Massachusetts legislation excludes "the regulation of, or agreements affecting, publicly owned housing, publicly subsidized housing, federally assisted housing, or mobile homes." n499

In 1999, New Jersey adopted legislation that made permanent a 1987 "experimental" program n500 that had generally abolished rent controls for newly constructed "multiple dwellings" for the lesser of 30 years after completion of construction or the amortization period of the mortgage on the building. n501 The definition of "multiple dwelling" applies to "any building or structure and land appurtenant thereto containing four or more dwelling units, other than dwelling units constructed for occupation by senior citizens, rented or offered for rent to four or more tenants or family units." n502

A New Jersey landlord who is entitled to the exemption provided by the legislation is required to furnish prospective tenants with a written statement that the multiple dwelling is exempt from rent controls, and to include a provision to that effect in the lease as well. n503

§ 43.04(c) Limits to Rent Control.

§ 43.04(c)(1) Municipal Authority.

The initial limitation on rent controls is the requirement that there be governmental authority to regulate rents. When controls are imposed at the state level this is not an issue, since rent control clearly falls within a state's general police powers. n504 Such state wide controls have occurred at various times, especially after World War II. n505

But most modern rent control legislation has been enacted by municipalities. It is a well established principle of municipal law that cities are governments of limited power whose existence is dependent on the state. n506 For that reason, courts have long held that municipalities can exercise only those powers that are granted by the state. n507 In the absence of some grant, therefore, municipalities are without authority to impose rent controls.

Some states have enacted rent control enabling legislation that specifically grants such power to cities. n508 Some states permit rent controls to be adopted by municipalities under home rule authorization. n509

In the absence of a specific enabling statute, courts have been evenly divided on whether a general grant of power to local governments includes the authority to impose rent controls. In making this determination, courts have looked at several factors, foremost among which are the granting language of the statute itself and a state's basic position on how broadly grants of power to local governments should be construed.

When the statutory language provides that a municipality may exercise power to the same extent as the state, courts have usually held that this permits rent controls. Thus, when a home rule act provided that a city could exercise power "to the full extent that the General Assembly may legislate in reference thereto," the city clearly could impose rent controls. n510 Also, when a grant provided that a municipality "may exercise any power or . . . function" that is not denied to it, there is a broad grant of authority sufficient to impose rent controls. n511

Courts have split on whether a statute conferring on municipalities the right to legislate for the general health, safety, or welfare authorizes rent control. This primarily turns on a jurisdiction's view of municipal power and on whether such a grant is an independent source of municipal power or only gives auxiliary power relating to specific grants. n512 In several decisions, courts have held that such a general grant was insufficient to authorize rent controls without a more specific delegation of authority. n513 Some of these decisions also pointed to other considerations, such as the termination of state rent controls, as evidence that local governments were not intended to exercise rent control power. n514

Several courts, however, have held that such "general welfare" clauses are independent sources of power sufficient to support rent control. In so holding, these courts have indicated that they viewed home rule legislation as granting cities police powers of considerable breadth as long as they were consistent with state law. n515 The California Supreme Court emphasized this in holding that municipalities could impose rent controls, stating that the California Constitution granted municipalities authority "as broad as the police powers exercisable by the legislature itself." n516

Decisions permitting municipal rent controls recognize that they must be consistent with and not preempted by state laws. n517 Courts that have otherwise found municipal authority to enact rent controls have held that they do not conflict with general state landlord-tenant laws. n518 They have noted that these state laws do not touch on the specific subject of rent regulation, and therefore do not preempt municipal rent controls. n519 One court, however, which held that a municipal grant did not include the power to impose rent controls, also stated that the general landlord-tenant law was evidence that the legislature did not intend municipalities to have rent control authority. n520

Even though a municipality might have authority to impose rent controls generally, particular components of a rent control ordinance might be preempted by state law. Whether a rent control provision conflicts with and is therefore preempted by state law obviously turns on the particular ordinance and statute involved. As a general matter, most courts have not found a conflict or preemption based only on a general landlord-tenant statute, n521 but only when rent

control provisions touch on specific statutory subject matter.

One particular area of conflict has concerned eviction control components of rent control laws. Several courts have invalidated such controls as being in conflict with state eviction law. n522 For example, the Maryland Supreme Court struck down a rent control provision that prohibited eviction of tenants in good standing, stating that it conflicted with a state statute permitting such evictions. n523 Conversely, the California Supreme Court found no conflict with rent control provisions that limited the substantive grounds for eviction, since the California statutory scheme was procedural in nature. n524 For that reason, however, it invalidated a requirement that landlords obtain an eviction certificate, finding that it conflicted with the procedures of a California statute. n525

§ 43.04(c)(2) Declaration of Housing Emergency.

Until somewhat recently, most courts assumed that, to be valid, rent controls must be in response to a housing emergency. This requirement, which was first stated by the Supreme Court in several decisions in the 1920s that addressed the constitutionality of post World War I controls, was consistent with the economic substantive due process jurisprudence prevalent at the time. Despite a change in the Court's own jurisprudence in the 1930s, the emergency requirement continued to find its way into almost all rent control decisions until the 1970s, at which time it was largely rejected. n526

The emergency requirement was first suggested in 1924 in *Block v. Hirsh*, n527 and *Marcus Brown Holding Co. v. Felding*, n528 in which the Supreme Court upheld the constitutionality of District of Columbia and New York rent control laws. In a 5-4 decision for the Court, Justice Holmes in *Block* emphasized the "exigency" of the housing shortage facing the District and brought on by the war. n529 He stated that controls were "justified only as a temporary measure," noting that "[a] limit in time, to tide over a passing trouble, well may justify a law that could not be upheld as a permanent change." n530 The Court confirmed the emergency requirement three years later in *Chastleten Corp. v. Sinclair*, n531 in which it indicated that the District of Columbia's controls would be invalid, if, upon remand, the emergency conditions upon which they had been initially based were found no longer to exist. n532

These early Supreme Court decisions clearly premised the validity of rent controls on war-created emergencies. They arose during a period in which the Court regularly struck down forms of economic regulation under the guise of substantive due process, n533 including minimum wages for women and children, n534 the regulation of employment agency fees, n535 and controls on dairy n536 and gasoline prices. n537 Thus, the existence of an emergency was a permissible and even necessary basis on which to regulate rents in an era when such regulation would otherwise have been viewed as impermissible economic regulation.

Economic substantive due process was repudiated in a series of decisions in the 1930s. Beginning with *Nebbia v. New York* n538 in 1934, the Supreme Court replaced its former scrutiny of economic legislation with a deferential standard of review, and stated that states were free to regulate a business in all its aspects, including its prices. n539 Indeed, the regulation upheld in *Nebbia* was a New York statute fixing retail milk prices. The Court held that such regulation was valid if it had a "reasonable relation to a proper legislative purpose." n540

Despite the demise of substantive due process, in *Woods v. Cloyd W. Miller Co.* n541 the Court again relied on war-created housing shortages to justify post World War II rent controls. In holding that such controls after the cessation of hostilities were constitutional, the Court stated that the war power continued to be a basis to sustain the controls, noting: "Since the war effort contributed heavily to that [housing] deficit, Congress has the power even after the cessation of hostilities to act to control the forces that a short supply of the needed article created." n542 The Court's reliance on a war-created emergency likely contributed to the perception that an emergency was required in order to sustain rent controls.

For the next twenty years courts proceeded on the assumption that an "emergency" was necessary to justify rent control

legislation, but they applied the requirement with varying degrees of rigor. In *Warren v. City of Philadelphia*, n543 for example, the Pennsylvania Supreme Court upheld a Philadelphia rent control ordinance that declared the existence of an emergency related to housing. But the case came to the court following a judgment on the pleadings, and, in that context, the court said that the facts pleaded by the city concerning "an emergency housing shortage, affecting the public health, safety and welfare," had to be taken to be true. n544 The court upheld the ordinance as a valid exercise of the police power.

Other courts during this time accepted the requirement of an emergency, but applied a strong presumption in favor of any legislative declaration of emergency. The New Jersey Supreme Court, although indicating it would not accept legislative findings as conclusive, said they only needed to be supported by a "rational basis." n545 A series of New York decisions in the 1950s and 1960s also took this position. Although the decisions acknowledged the requirement of an emergency, they also upheld the findings of emergency, at times in a very deferential fashion. n546

On the other hand, in some cases, courts struck down, in whole or in part, rent control provisions because of the absence of a declaration of emergency, n547 or because the emergency conditions no longer existed. n548

In more recent years, courts have rejected the emergency requirement altogether. The first court to express such a view was the Second Circuit in *Eisen v. Eastman* n549 in 1969. Relying on the Supreme Court's rejection of economic substantive due process in *Nebbia*, the court noted in dictum that rent controls were a form of price controls and therefore did not need to be premised on an emergency. n550 In the mid-1970s the supreme courts of New Jersey, n551 California, n552 and Maryland n553 all took similar positions, holding that an emergency was no longer required to support rent controls. All of these decisions viewed the emergency requirement as being a byproduct of *Lochner* -era substantive due process, and thus obsolete after *Nebbia*. They considered rent controls indistinguishable from other forms of price regulation and therefore subject only to the reasonable relationship standard now used for review of economic regulation. n554

The United States Supreme Court decision in *Pennell v. San Jose* n555 confirms this position. Although the Court did not specifically address the question as to whether there must be an emergency to support rent controls, it analyzed the rent controls at issue there as a form of price controls and subjected them to the deferential standard established in *Nebbia*. n556 Implicit in the analysis was a rejection of an emergency requirement for rent controls. Therefore, although rent control ordinances may continue to contain declarations of emergency, n557 an emergency no longer appears to be necessary for their validity.

§ 43.04(c)(3) Federal Preemption.

Municipalities have never applied rent controls to housing owned and operated by the Department of Housing and Urban Development. But some municipalities did, however, apply rent controls to various forms of federally subsidized housing. Courts tended to upheld the application of rent controls to subsidized housing, rejecting arguments based on preemption and impairment of contact. n558 In 1975, however, the Department of Housing and Urban Development issued an administrative regulation that preempted rent controls for federally subsidized housing, but permitted their application to federally insured but unsubsidized units. n559

Current federal regulations provide that HUD will generally not interfere in the regulation of rents by a rent control board or agency with respect to unsubsidized housing projects with mortgages insured or held by HUD. n560 However, the regulations provide that HUD will preempt the regulation of rents under certain conditions. In particular, preemption may occur if HUD determines that a decision of a rent control board prevents a mortgagor from achieving a level of residential income necessary to adequately maintain and operate the housing project, which includes an inability to meet financial obligations under the mortgage. n561 The regulations contemplate that the mortgagor will initiate the effort to obtain this preemption. n562

The situation is different with respect to housing projects with mortgages insured or held by HUD that also benefit from designated federal subsidies. The subsidy programs include those for interest reduction payments under section 236 of the National Housing Act, below market interest rates under section 221(d)(3) and (5) of the National Housing Act, direct loans at below market interest rates under section 202 of the Housing Act of 1959, and some assistance payments under Sections 8 and 23 of the United States Housing Act of 1937. n563 HUD has determined that "it is necessary and desirable to minimize defaults by the mortgagor in its financial obligations" with respect to these projects, and to assist mortgagors to preserve the continued viability of the projects as a housing resource for low income families. n564 Accordingly, the regulations preempt "the entire field of rent regulation" with respect to these projects. n565 The regulations provide that a mortgagor can apply to HUD for an increase in rental charges and that HUD will notify the rent control board or entity that it is processing the application and that HUD has "preempted the entire field of rent regulation by a board acting pursuant to state or local law as it affects the project." n566

HUD regulations also make preemptive provision for housing projects that are owned by HUD itself. Not surprisingly, the regulations provide that HUD has "exclusive jurisdiction over the rents of all projects which it owns, irrespective of the existence, or the provisions, of any State or local rent control law or ordinance." n567 They also provide that HUD will notify the local rent control board that it is considering an increase in rent and that it will provide the board with a schedule of any new rents. n568

§ 43.04(c)(4) Antitrust.

By their very nature, rent controls constitute a form of price fixing, which, under certain circumstances, is prohibited conduct under federal antitrust laws. n569 For a number of years, however, it appeared that municipal rent controls would be exempt from antitrust laws under the state action exemption first recognized in 1945 in *Parker v. Brown*. n570 Beginning in 1978, however, the Supreme Court, in a series of decisions, established that the state action exemption applies to municipalities only if they are acting pursuant to a clearly articulated and affirmatively expressed state policy. n571 Although this exemption standard would seem to be met when controls are imposed pursuant to state enabling legislation, it is less certain when they are enacted in the absence of such a statute.

Based on those decisions, the issue of whether local rent controls violate federal antitrust law became a viable one and was brought before the Supreme Court in *Fisher v. City of Berkeley*. n572 There the Court held that rent controls, as enacted in a Berkeley ordinance, did not violate antitrust laws. In so holding, the Court did not address the issue of immunity, but rather held that the city's unilateral imposition of rent controls lacked the element of concerted action that was necessary for an antitrust violation.

Initially, the Court noted that a state statute "should be struck down on pre emption grounds 'only if it mandates or authorizes conduct that necessarily constitutes a violation of the antitrust laws in all cases, or if it places irresistible pressure on a private party to violate the antitrust laws in order to comply with the statute.'" n573 The Court acknowledged that had "the owners of residential rental property in Berkeley voluntarily banded together to stabilize rents in the city, their activities would not be saved from antitrust attack by claims that they had set reasonable prices out of solicitude for the welfare of their tenants." n574 However, it stated that the Court had long required that price fixing be the result of concerted activity. Thus, the city's unilateral imposition of rents did not violate the antitrust laws. n575

The Court also noted that this was not a "hybrid" form of restraint, previously recognized as impermissible, in which some degree of participatory power to set price levels is given to market participants. While tenants under a rent control ordinance have some power to trigger enforcement, the actual rent ceilings themselves were exclusively set by a rent board. This avoided the "hybrid" nature of regulations invalidated in previous cases. n576

§ 43.04(c)(5) Substantive Due Process.

Since the Supreme Court's 1934 decision in *Nebbia v. New York*, n577 it has applied a deferential standard of review for economic legislation, stating that it must be reasonably related to a proper legislative purpose. n578 The Supreme Court has reaffirmed this standard in the context of rent control. n579

Lower courts have also evaluated rent controls from a substantive due process standpoint. In doing so, they have in essence articulated two prongs to the due process analysis. First, as established by *Nebbia*, regulations must be rationally or reasonably related to a legitimate purpose. Second, the regulation must not be confiscatory, but must allow for a "just and reasonable return." n580

The first prong of due process protection requires that both the ordinance in general, and the particular components of the controls, constitute rational means to a legitimate end. Although the constitutionality of rent control in general is well established, any particular ordinance itself must serve legitimate purposes. n581 Rent control ordinances typically state that their purpose is to alleviate problems attendant to housing shortages. Courts have held that facts supporting such an asserted purpose will be presumed in the absence of any showing to the contrary. n582 However, they have also indicated that the nonexistence of such facts can be established. n583

Even when an ordinance in general serves legitimate purposes, courts will consider whether particular provisions of the ordinance reasonably serve those purposes. Again, a deferential standard will typically apply, and courts will not require mathematical precision. For this reason, courts have usually upheld challenges to specific components of rent control programs. For example, the New Jersey Supreme Court upheld, against a due process challenge, a rent control adjustment method that limited rent increases to a percentage of a general economic index, rather than to actual increases in a landlord's operating costs. The court stated that the scheme needed only to be a rational means of achieving a fair return, which it was. n584

The deferential due process assessment of particular components of rent control laws is also illustrated by the Supreme Court's decision in *Pennell v. San Jose*. n585 Although the legitimacy of the rent control statute as a whole was not challenged, the plaintiff argued that a tenant hardship provision was facially invalid since it served no purpose but to transfer wealth from landlords to tenants. The Supreme Court rejected the challenge, stating that a "legitimate and rational goal of price . . . regulation is the protection of consumer welfare," which was clearly served by the provision. n586

The second and more significant dimension of the due process inquiry engaged in by state courts is that the regulation not be confiscatory. Courts have equated this with the requirement that rent control measures provide landlords with a "just and reasonable return." n587 This standard appears to have been derived from cases involving price controls for public utilities, in which the Supreme Court stated that, to be constitutional, rates must not be confiscatory -- a term it contrasted with "just and reasonable." n588 The requirement that rent controls not be confiscatory, but permit a just and reasonable return, is similar to a formulation that appears in the regulatory takings context. n589

Two leading cases from the mid-1970s illustrate the basic focus of the "just and reasonable" return requirement. In *Hutton Park Gardens v. West Orange*, n590 the New Jersey Supreme Court established that, to be constitutional, price controls must permit an efficient landlord to obtain a just and reasonable return on the investment; otherwise they would be deemed confiscatory and invalid. In making this determination, the court emphasized that the rate of the return need not be as high as before regulation, nor provide as high a return as investing the money elsewhere. Rather, the return should be commensurate with levels of return in an enterprise with similar risks. n591

The court stated that, in most instances, the issue of reasonable return is a mixed question of law and fact and will turn on the actual operation of the controls. For this reason an ordinance will be confiscatory on its face only when it is so restrictive as to preclude any possibility of a fair return. n592 The ordinance in question, which permitted landlords to obtain annual increases as a matter of course, and to obtain special increases under certain conditions, was not facially invalid. n593

The California Supreme Court applied a similar analysis in *Birkenfeld v. City of Berkeley*. n594 There, the court stated that an ordinance was valid if it was reasonably calculated to eliminate excessive rents and provided landlords with a just and reasonable return. n595 The court stated that whether an ordinance was confiscatory must usually be assessed by actual results, and that an ordinance is facially confiscatory if it cannot avoid confiscatory results when administered. n596

Under that standard, the court held the Berkeley ordinance, which prohibited any adjustments in rents except under a unit by unit method, invalid. The court observed that a scheme that retained rent at the same level, without a means of adjustment, would necessarily be confiscatory. n597 It indicated that an adjustment mechanism was constitutionally necessary to provide for changes in circumstances and special situations when base rent does not reflect market conditions. Although the ordinance had an adjustment method, the court found it to be extremely cumbersome and would inevitably result in unreasonable delays. The effect of the delays would be to deny a reasonable return. n598

In most cases, courts have upheld rent control provisions against constitutional due process challenges, finding that provisions provide for just and reasonable returns. n599 This is not surprising, since almost all rent control ordinances provide for some form of rent adjustments. n600

§ 43.04(c)(6) Takings.

The Wis. Stat. Ann. § 704-07(4) prohibits the taking of private property for public use without just compensation. The Supreme Court has held that this requires just compensation not only when the government explicitly and intentionally takes property, but also when government actions, though not explicitly involving a taking of property, effectively result in a taking.

The Supreme Court has articulated different standards for cases in which it is alleged that government regulation has resulted in a taking. One involves a physical invasion, or physical occupation, of the property in question. Cases of this type are ones in which the government physically invades a landowner's possessory interest or authorizes others to do so. n601 A physical invasion will always result in a taking. The Supreme Court has explained that the reason for the distinction is that a physical invasion of a person's property "is a government intrusion of an unusually serious character." n602

Other standards for takings resulting from government regulation focus more on the economic harm to the landowner. Thus, in *Lucas v. South Carolina Coastal Council*, n603 the Court stated that a taking would occur if the regulation deprives an owner of all economically beneficial use of the land. Short of that, in *Penn Central Transportation Co. v. City of New York*, n604 the Court said that a takings analysis would involve an evaluation of several factors, including the character of the government action, the economic impact of the regulation on the claimant, and the extent to which the regulation has interfered with distinct investment backed expectations.

In *Lingle v. Chevron U.S.A. Inc.*, n605 the Court noted that, in earlier cases, it had stated that a taking might be found if a regulation does not substantially advance a legitimate state interest. But in *Lingle*, the Court departed from that formulation. It stated that the "substantially advances" inquiry

> reveals nothing about the magnitude or character of the burden a particular regulation imposes upon private property rights. Nor does it provide any information about how any regulatory burden is distributed among property owners. In consequence, this test does not help to identify those regulations whose effects are functionally comparable to government appropriation or invasion of private property. n606

The Court concluded that the test was not a valid method of determining whether a regulatory taking has occurred. n607

Rent controls are certainly subject to scrutiny under a takings analysis. Such controls have an economic impact on the landowner, and could be evaluated in light of the multi-factor balancing formula articulated in the *Penn Central* case. However, application of that formula in cases outside of the rent control context often does not result in a conclusion that there has been a taking. And the separate takings standard from the *Lucas* case will probably be difficult to meet when a rent control ordinance is at issue. n608 Nonetheless, if a rent control scheme does not permit a landlord to obtain any rate of return on the landlord's investment, a taking could be found. n609

In a 1997 decision, *Richardson v. City and County of Honolulu*, n610 Ninth Circuit Court of Appeals concluded that a Honolulu rent control ordinance was constitutionally infirm because it failed to substantially further its stated goal of creating affordable housing. n611 The ordinance applied to condominium units that were built on leased land. It did limit the ability of the ground lessor to increase the rents, but it did not prevent the lessee-condominium owner from obtaining a premium from a transferee. The court said, of this arrangement:

> The absence of a mechanism that prevents lessees from capturing the net present value of the reduced land rent in the form of a premium, means that the Ordinance will not substantially further its goal of creating affordable owner occupied housing in Honolulu. Incumbent owner occupants who sell to those who intend to occupy the apartment will charge a premium for the benefit of living in a rent controlled condominium. The price of housing ultimately will remain the same. The Ordinance thus effects a regulatory taking. n612

The case provides support for the idea that a rent control ordinance can effect a taking. However, it should be observed that Ninth Circuit employed the takings test that the United States Supreme Court rejected in the *Lingle* decision. n613

In some instances, the effect of a rent control law, particularly where it restricts the termination of a leasehold, might arguably constitute a physical invasion. Indeed, in the late 1980s, several federal appellate courts struck down rent controls involving mobile homes as physical invasions. The Supreme Court subsequently rejected this position; but it suggested that extreme forms of control might constitute physical takings.

The genesis of the physical invasion analysis for rent control laws was in the Supreme Court's 1982 decision in *Loretto v. Teleprompter Manhattan Cable CATV Co.* , n614 in which it held that a New York law that permitted cable television companies to install cable on private buildings and pay owners one dollar a year was a physical invasion and thus a taking. The Court acknowledged that it had permitted substantial regulation of private property in other contexts, but stated that it had long treated physical invasions differently. Such an invasion interferes with the power to exclude, "one of the most treasured strands in an owner's bundle of rights." n615 The Court held that the New York law contributed to such a physical invasion, since it gave a cable company a legal right to physically occupy the owner's land. n616

According to the Court, it was irrelevant that the occupation was by a third party rather than the state, since the invasion was authorized by state law. It also said that its decision was consistent with cases in which it had upheld regulation of the landlord-tenant relationship, since none of those decisions involved a physical invasion of property. n617

The *Loretto* holding provided an analytical springboard to challenge certain rent control laws. In particular, rent control provisions, such as eviction controls, that limit a landlord's ability to terminate a leasehold arguably constitute a physical invasion and a taking.

A landlord sought to bring the issue before the Supreme Court in *Fresh Pond Shopping Center, Inc. v. Callahan*. n618 There, a rent control ordinance required landlords to obtain permission before removing rental property from the market. The rent control board denied permission to an owner who wanted to demolish an apartment building for a parking lot. The ordinance was upheld as constitutional by a Massachusetts trial court and affirmed without opinion by an equally divided Massachusetts Supreme Court.

The United States Supreme Court dismissed the appeal for lack of a substantial federal question. Dissenting, Justice Rehnquist argued that refusing to let a landlord demolish a building and forcing the landlord to keep it as an apartment was analogous to the physical invasion in *Loretto*. He said that it constituted a transfer of the property's reversionary interest from the landlord to the tenant. n619

Notwithstanding the Supreme Court's action in the *Fresh Pond Shopping Center* case, two federal circuits used the *Loretto* analysis to strike down rent controls involving mobile home parks. In the first case, *Hall v. City of Santa Barbara*, n620 the Ninth Circuit addressed a rent control ordinance that required tenants to be offered leases of unlimited duration, terminable at will by the tenant but terminable by the landlord only for good cause. Tenants could also sell their leasehold interest when they moved, thus giving them, rather than the landlord, the right to select successors to the tenancy. The ordinance also permitted an indexed rent increase a year, and a ten percent increase when the space became vacant. n621

The court held that the facts set forth in the pleadings amounted to a taking under the *Loretto* analysis. The court noted that a right to occupy property in perpetuity is the type of interest protected by the *takings clause*, and that the ordinance in effect transferred that interest to the tenants. Particularly significant here was the fact that tenants could transfer their interest indefinitely to others, which distinguished the case from *Fresh Pond Shopping Center*. n622 In sum, "the landlord has no meaningful say as to who will live on the property, now or in the future." n623 The court concluded that the ordinance thus authorized a physical occupation by a third party, as in *Loretto*.

A similar result was reached several years later by the Third Circuit in *Pinewood Estates v. Barnegat Township Leveling Board*. n624 Relying on *Loretto*, the court held that a rent control ordinance, when operating in concert with a state law that imposed eviction controls and permitted tenants to sell their leaseholds, constituted a physical invasion. Employing an analysis similar to that used in *Hall*, the court concluded that the combined effect of the laws was to grant tenants an interest in perpetuity. n625

Although the cases involved rent controls for mobile homes, the *Hall* and *Pinewood Estates* decisions raised broader questions regarding when rent controls might constitute a taking. As a practical matter, to be effective, rent controls must place some limitations upon a landlord's ability to evict tenants or convert the premises to other uses. The *Hall* and *Pinewood Estates* decisions suggested that in more extreme forms such restrictions might be perceived as authorizing physical invasion by third parties.

In a 1992 decision, however, *Yee v. Escondido*, n626 the United States Supreme Court rejected a physical invasion claim involving a mobile home rent control ordinance. In *Yee* the Court reviewed a rent control ordinance very similar to those struck down in the *Hall* and *Pinewood Estates* decisions. As in those decisions, a rent control ordinance was combined with a state statute permitting a landlord to terminate the lease only for nonpayment of rent or when the owner desired to convert the property to another use. The statute gave tenants, rather than the landlord, the right to transfer the leasehold interest when the tenant moved. n627 The landlords argued that, as in *Hall* and *Pinewood Estates*, this in effect granted to tenants and their successors the right to permanently occupy the land, which amounted to a physical invasion under *Loretto*.

In a unanimous decision, the Supreme Court disagreed, holding that this did not constitute a taking by physical invasion. The Court began its analysis by noting that a physical taking occurs "only where it *requires* the landowner to submit to the physical occupation of land." n628 The Court said that, in this case, the landlords had voluntarily rented their property to mobile home owners. The tenants were not forced upon them by the government. The Court also emphasized that the state law provided that an owner who wished to change the use of the property could evict tenants with six months notice. n629 Thus, landlords were not required to keep tenants and were not deprived of their right to exclude others.

The Court did state, however, that a different case would be presented if the statute on its face, or as applied, "compelled a landlord over objection to rent his property or to refrain in perpetuity from terminating a tenancy." n630 Here, though, the statute only regulated the *use* of property by regulating the landlord-tenant relationship, which was something that the government could do.

Yee effectively overruled *Hall* and *Pinewood Estates*, both of which involved statutory schemes almost identical to that in *Yee*. At the same time, however, the Court did indicate that extreme forms of controls might constitute a taking. At a minimum this would require significant restrictions on removal of rental property, which did not exist in *Yee*. n631

An example of an extreme form of rent control that was found to create a taking is provided by *Aspen Tarpon Springs Limited Partnership v. Stuart*, n632 a 1994 decision by the Florida Court of Appeals. At issue there was an ordinance that required mobile home park owners desiring to change the use of their property either to purchase the tenant's mobile homes or to pay to have their tenants' mobile homes moved to other mobile home parks. The court noted that the evidence that had been presented to the trial court had demonstrated that neither option was economically feasible. As a result, the court concluded that the ordinance effectively authorized a permanent physical occupation of the owner's property and an unconstitutional taking. n633 This holding appears to be consistent with the Supreme Court's discussion in *Yee*, which stated that legislation that compelled an owner to rent the property would constitute a taking.

It may also be appropriate to refer, in this context, to a 1994 decision of the New York Court of Appeals. In *Manocherian v. Lenox Hill Hospital*, n634 some apartment building owners challenged the constitutionality of a "rent-stabilization" n635 statute that required the landowners to provide renewal leases to non-private hospitals, for the benefit of their employees. Under the legislation, the hospital had the right to sublease apartments to affiliated employees without first obtaining the landowners' consent. The subleases were "durationally unrestricted and open ended." n636 Because the rents were subject to "stabilization," the landowners were not able to charge rents at the level that a free market would permit. And the arrangement could last as long as the corporate existence of the hospital.

The underlying purpose of rent stabilization legislation is to "ameliorate the dislocations and risk of widespread lack of suitable dwellings." n637 But the court perceived the legislation at issue here as being "designed essentially to subsidize the nonprofit hospital's special fringe benefit to some of its special health care employees." n638 And it concluded that the arrangement amounted to a taking. It stated:

> A proffered State interest, which by definition should serve and protect the general populace on a fairly and uniformly applied basis, should not be countenanced when, as occurs here, the statute instead benefits one special class for an essentially unrelated economic redistribution and societal relationship ... Moreover, the employer [the hospital] here is transformed into the de facto landlord and receives a benefit directly related to conserving its capital or operating expenditures. As a health care provider, it would otherwise have to recoup those costs by direct expense reimbursement formulas or charges, like others similarly situated, for the true, full cost of medical services rendered in its community. This statute thus diverts and subverts that equal treatment regime. It does not even really protect housing for the subtenant employees as such, and certainly provides no benefit to the citizenry at large on a fair opportunity and equal access basis. Rather, it bestows a State enacted indirect gift to a preferred supplicant, the nonoccupying prime tenant, underwritten by the improperly burdened property owners...
>
> ...
>
> We conclude that the peripheral and generalized State interests offered as justification for the regulatory mandates of [the legislation] fail to sustain the legislation, as constitutionally required for such State action. n639

The court also indicated that it found support for its analysis in the argument that the statute had effected a taking of the

landowners' reversion, but it did not consider that to be "dispositive by itself in this case." n640 It ended up basing its conclusion that there had been a taking on the failure of the legislation to substantially advance a legitimate state interest. n641

§ 43.04(d) Overview of Rent Control Provisions.

§ 43.04(d)(1) Coverage and Exemptions.

Although World War II rent controls regulated all forms of housing, modern ordinances usually regulate only multi family residential units. Thus, hotels, rooming houses, and single family homes are usually not subject to rent controls. n642

Ordinances also typically exempt various categories of multi family dwellings. Common exemptions are buildings of fewer than three or four units, luxury units, and charitable housing. n643 New construction is also usually exempt from rent controls, so that controls do not discourage new construction. This sort of exemption might take several forms, including a permanent exemption for a new development; an initial exemption that permits establishment of a base rent, but that provides for regulation of subsequent increases; or an exemption that applies for a specified period. n644

There has been considerable litigation over whether particular dwellings fall within an exemption. n645 Such cases typically turn on the intent behind the exemption. Exemptions have been upheld against legal challenges, including equal protection challenges. n646

§ 43.04(d)(2) Eviction Controls.

Almost all rent control ordinances include provisions limiting a landlord's ability to evict tenants. n647 These limitations are critical when an ordinance has vacancy decontrol, n648 since a landlord could otherwise defeat rent control objectives by frequently evicting tenants. Even under ordinances that do not have vacancy decontrols, eviction controls are important to guarantee the security of rent tenure.

Eviction control provisions take various forms, but usually impose substantive limits on the ability to evict tenants. Ordinances typically permit eviction only for "good cause," such as nonpayment of rent; conduct that constitutes a nuisance; illegal use of the premises; or some other material violation of the lease. n649 Eviction is also generally permitted when a landlord seeks to permanently remove the property from the housing market or when a landlord or close relatives of the landlord intends to occupy the property. n650

The initial issue presented by local eviction controls is whether they are preempted by state laws. In New Jersey, for example, state law sets out grounds for tenant eviction, and this has been held to preempt eviction controls in rent control ordinances. n651 Courts are divided, however, on whether statutes that provide landlords with the right to evict holdover tenants preempt eviction control provisions. Several courts have held they do, reasoning that the state statutes created a substantive right for landlords to terminate leases at the end of a term, which cannot be denigrated by rent control provisions. n652

It has also been held, however, that such statutes are procedural, rather than substantive, in nature, and therefore do not conflict with substantive rent control provisions. n653 Under this view, a statute permitting eviction at the end of a term provides the landlords with a way to exercise property rights once the consensual basis for a tenant's occupancy comes to an end. n654 From there, some courts have reasoned that the statute did not prohibit municipalities from imposing substantive limits on the landlord's right to end the tenancy.

In *Birkenfeld v. City of Berkeley*, n655 the California Supreme Court noted that state eviction statutes were procedural in nature and generally did not preempt substantive eviction controls in a rent control regime. However, the court held

that the state's summary eviction scheme did preempt a rent control requirement that a landlord first obtain an eviction certificate from the rent control board. The court held that requiring landlords to obtain a certificate of eviction would raise procedural barriers between the landlord and judicial relief. In particular, the elaborate procedures for obtaining a certificate would defeat the summary nature of the reposses a certificate would defeat the summary nature of the repossession procedure. n656

§ 43.04(d)(3) Vacancy Decontrols.

Vacancy decontrols, which exist in some form in about half of all rent control ordinances, provide that, when a unit becomes vacant, rent controls are temporarily or permanently removed. Most common are ordinances that provide that the initial rent for a new tenant will be set by the market, which initial rent will then operate as the new base for calculating subsequent rent increases subject to rent control provisions. Some ordinances permit the market to set new rents, but place a ceiling on the amount. In a few extreme forms, units become exempt altogether from rent controls. n657

What constitutes a vacancy for decontrol purposes will, of course, depend on the statute involved. Several courts have held that when the dwelling remains occupied despite a nominal change in tenants, there is no vacancy. For example, one court held that no vacancy occurred when there was a change in tenants, but the same subtenant never left the property. n658 The court reasoned that the purpose of the decontrol provision, which permitted a ten percent rent increase upon vacancy, was to permit recovery of "vacancy loss," that would not occur if the property were never unoccupied. It has also been held that there is no vacancy when a subtenant replaces the tenant. n659

Another issue relating to vacancy decontrols concerns whether particular persons may succeed to a tenant's interest in the property. Most ordinances with decontrol provisions provide that certain persons, usually family members, who have lived in the unit with the tenant, may succeed to the tenant's interest. The effect of such a succession is to avoid the effects of decontrol, in particular the landlord's right to charge a higher rent. These provisions operate in different ways, but most require that the successor be related to the tenant and have lived in the unit prior to the end of the tenancy. Ordinances often provide for succession when the previous tenant has either died or voluntarily vacated the apartment, although the requirements might be more rigorous in the latter instance. n660

The question of who qualifies as "family" and successor is therefore an important question. New York courts in particular have struggled with succession rights under New York City's rent control scheme, which permits rent control apartments to become rent-stabilized (which is a less onerous classification) upon a tenant's death. However, a landlord may not dispossess a member of the deceased's family who had been living with him or her. Although lower courts initially interpreted "family" in a traditional sense, limiting succession rights to blood relatives, in more recent years several courts have recognized less traditional relationships. n661 For example, in *Zimmerman v. Burton* the court held that the surviving partner of an unmarried, cohabiting couple qualified as immediate family, analogizing it to marriage under the particular facts. n662

In *Braschi v. Stahl Associates Co.* , n663 the New York Court of Appeals went further and held that the surviving partner in a long term homosexual relationship could qualify as a family member for successor rights. The plurality decision stated that successor rights should be extended to relationships having "all of the normal family characteristics." n664 The court emphasized that this would serve the purposes of decontrol provisions by distinguishing between family like relationships deserving protection and those of mere roommates or distant relatives. n665

It should be noted that vacancy decontrol arrangements can also give rise to constitutional issues. In 1997, a federal district court rejected an equal protection challenge to a New Jersey vacancy decontrol provision. n666 The claim in that case was that it was an equal protection violation to permit vacancy decontrol for owners of single units but not to permit it for owners of multiple units. The court found the distinction to be rationally related to the goal of affordable housing, noting that there was testimony that large scale landlords tended to be "less caring" and to be "rent

maximizers," and that vacancy decontrol, in that context, could lead to landlord harassment of tenants in order to cause them to vacate units and bring about an increase in rents. n667

§ 43.04(d)(4) Rent Adjustments.

The central and most problematic aspect of rent controls is the matter of adjustments for rent increases. This typically involves establishing an initial base rent, often by rollback provisions, and providing for annual rent increases, on either a general or individual basis. Finally, almost all rent control ordinances also provide landlords with a right to petition for an individual adjustment to ensure a "fair return."

Ordinances typically establish the initial base rent by a rollback provision, which sets the rent at the level charged at an earlier point in time. n668 The purpose of the rollback provision is to offset rent increases that took place in anticipation of rent controls. n669 Rollback provisions have been upheld by courts against various challenges, including challenges based on impairment of contract, equal protection, and due process. n670

Once a base rent has been established, almost all controls provide for periodic adjustments in rent. These increases are the central and most complicated component of rent control laws and have generated substantial litigation and controversy. The methods and formulas used are quite diverse, and the actual computations are often very complex.

As a general matter, however, rent adjustment mechanisms fall into some overlapping categories and share some common features. Most adjustment provisions include some method for making an annual across-the-board adjustment, as well as a procedure permitting landlords to petition for an individual "fair return" adjustment. n671

Two basic methods have been used to determine across-the-board rent increases. One method involves a form of individualized return on investment in property. The ordinance will generally set out criteria, guidelines, or factors that a rent control board or administrator is to use. n672 An example of this was a Massachusetts rent control scheme, under which local boards calculated a "fair net operating income." n673 Although this method typically confers substantial authority on the board or administrator, it has been upheld in court decisions. n674

Second, and more common, are forms of general percentage increases using either a fixed percentage or a percentage tied to an index. n675 The most common indexes used are the Consumer Price Index or Cost of Living Index. n676 The obvious advantage of fixed percentage or index systems is that unlike investment-based increases, they require minimal calculation and administration. On the other hand, they lack the precision of a more individualized approach.

For this reason, controls that use a percentage approach also provide for some individual adjustment for certain costs. n677 Permissible costs typically include property taxes and utility costs, which are largely unavoidable and objective in their determination. n678 To encourage investment and housing quality, most rent control ordinances also permit landlords to recover the cost of capital improvements. n679

In addition to the annual across the board rent increases described above, almost all rent control ordinances permit landlords to petition for individual adjustments to ensure a "fair return." Ordinances use a variety of formulae in determining what constitutes "fair return," including return on value, return on investment, maintenance of net operating income, and combinations of the same. n680

The above rent adjustment mechanisms, both across the board increases and provisions for "fair return" adjustments, have produced substantial litigation. Courts have held that rent controls may not be confiscatory, and must provide for a "just and reasonable" return. n681 The primary issue therefore has been whether a particular method meets that basic standard. Despite numerous challenges, courts have struck down rent control schemes in only a few cases.

Courts have generally said that the constitutionally mandated "fair and reasonable" return standard does not require any

particular form or formula, as long as there is assurance of a just return. n682 For this reason courts have held that various formulae are permissible, including fixed percentages or index percentages, n683 as long as provision is made for fair return in individual or hardship cases. Courts have also held that across the board increases need not be based on actual operating expenses or even a general inflation index. n684 In so holding, they have emphasized that more generalized standards are neither arbitrary nor capricious, and provide a much less burdensome method for adjusting rents.

Most courts have suggested that the validity of generalized increases is premised on the availability of individual "fair return" increases where necessary. The New Jersey Supreme Court has indicated that, to be valid, controls must provide for such individual increases. A New Jersey court has also held that limiting increases to a maximum 25% a year was unconstitutional, since it did not provide for landlord hardships that might surpass that amount. n685

Courts have also held unconstitutional individual adjustment mechanisms that involve unreasonable delays. For example, in *Birkenfeld v. City of Berkeley* n686 the California Supreme Court invalidated a rent control ordinance that provided no across the board increase and instead permitted landlords to petition for increases on an individual basis. The court reasoned that the volume of potential petitions was so great that time delays in processing applications would result in denials of a "fair and reasonable" return. n687

The New Jersey Supreme Court applied a similar analysis in *Helmsley v. Ft. Lee*, n688 in which a rent control arrangement provided for a fixed across the board increase of 2.5% and the right to petition individually for a "fair return." The court found that the 2.5% increase was clearly insufficient to cover operating expenses and that the individual adjustment provisions would result in several years' delay. The court concluded that the combined effect of the two provisions, neither of which was unconstitutional in itself, was invalid because it would result in an erosion of income. n689

At the same time, however, courts have held that an ordinance does not need to provide general adjustments if individual adjustment petitions will not result in unreasonable delay. In *Fisher v. City of Berkeley* n690 the California Supreme Court upheld a revised Berkeley ordinance that permitted landlords to consolidate petitions in the same building and provided sufficient administrative support to process petitions. Similarly, the court held that a mobile home ordinance that provided only for individual petitions was not unconstitutional since it involved a far smaller number of units than in *Birkenfeld* and required that petitions be processed within 105 days. n691

Despite general judicial recognition that ordinances must provide a "fair return," courts have encountered difficulties in assessing individual formulas for determining how a"fair return" is to be achieved. In part this reflects conceptual and practical difficulties inherent in almost any fair return standard.

Landlords have often argued that they are entitled to a fair return based on the value of their property, which, with appreciating property values, would tend to result in higher increases than under other standards. Although some early rent control decisions reflected the view that a return on value standard was constitutionally required, n692 more recent decisions have rejected that position. n693 In doing so, courts have suggested that the test is circuitous, since value turns on a property's income potential, which would be based on value. At least one court has suggested that this makes the test itself infirm, n694 although most courts would apparently find it permissible but not mandatory.

Courts have generally upheld return on investment standards, often in response to arguments that a return on value standard is required. n695 A return on investment approach can take various forms, but typically permits recovery of operating expenses and mortgage payments plus some percentage return on the landlord's original cash equity in the property. A variation on this would be to adjust the original cash investment for inflation.

§ 43.04(d)(5) Maintenance Requirements.

Rent control ordinances typically include some form of landlord maintenance requirements. n696 One form of maintenance requirement permits tenants to petition for rent reductions if there has been a decline in services provided by landlords or if there are substantial defects in the dwelling. The purpose of such a provision is to avoid a backdoor increase in rent by a decrease in services. n697 For this reason courts have indicated that the primary issue is whether the decrease in services reflects a diminution in value of the rental. n698

Cases involving rent reduction petitions have usually arisen in the context of decreases in services. For example, the closing of a swimming pool has been held to be a substantial decrease in services, justifying a rent reduction. n699 It was also held that the loss of a live in supervisor, together with a decrease in heat, water and janitorial services, justified a rent reduction. n700 And a District of Columbia court ordered a rent refund in a case involving a 45 day loss of air conditioning. n701 On the other hand, a court has indicated that temporary interruptions, not the fault of the landlord, do not justify a rent reduction. n702

Some courts have permitted local rent control boards to decrease rent levels for substantial defects or decreases in services. The idea is that, since a board is empowered to deny an increase due to defects, it may also effect a rent reduction. n703

The second type of maintenance requirement typically found in rent control ordinances provides for denial of rent increases unless the dwelling meets applicable housing code requirements and there has been no decrease in services. This not only helps prevent backdoor rent increases, but it also serves the goal of preventing deterioration of rental units. Thus, courts have upheld denials of rent increases when a landlord failed to provide adequate security measures or when a unit violated local housing codes. n704

The validity of such code compliance requirements has been challenged on several occasions. In one early case, *Modular Concepts v. South Brunswick*, n705 a New Jersey appellate court struck down a code compliance provision that conditioned rent increases on compliance with all state, county, and local health and building codes. The court said that the provision was unrelated to the stated rent leveling purposes of the ordinance and might deny the owner a fair return on investment. Further, the provision might result in excessive penalties, because the amount of the denied rent increase might exceed the statutory penalties for noncompliance. Finally, requiring proof of compliance from three levels of government was unreasonable and impracticable, since even the most trivial violation might be used to deny a rent increase. n706

Several years later, however, the New Jersey Supreme Court upheld the validity of a provision that prohibited rent increases for units lacking a certification that the dwelling was in "substantial compliance" with municipal housing codes. n707 Only the landlord's certification was required in the case of periodic rent increases. For hardship petitions or capital improvement petitions, however, the landlord needed to obtain a certification from a municipal department. n708

The court held that the certification provision was valid, carefully distinguishing, rather than overruling, the previous *Modular Concepts* decision. The court emphasized that the certification requirement was clearly related to the rent control ordinance, noting that its goal was to provide tenants "decent housing within their means." The court also noted that the certification requirement was less burdensome than the requirements in *Modular Concepts*, since it required only one, rather than three, approvals. The court also held that denial of rent increases was not a penalty, since its purpose was regulatory and not punitive. n709

§ 43.04(d)(6) Removals.

Landlords often have a strong incentive to remove property from the rental market and devote it to other purposes. Most rent control ordinances, however, are premised on the assumption that a housing shortage exists, and that rents would be excessive if they not regulated. Removal of property from the rental market would exacerbate the underlying problem.

For this reason, removal of rental property presents potential problems for effective rent controls.

Municipalities take different approaches to removals. Many do not attempt to restrict them, and provide in their ordinances that removal of property from the rental market provides a justification for eviction of tenants. A number of municipalities, however, restrict removals of rent-controlled property in some manner. In some instances, ordinances prohibit removal for the purpose of condominium conversion. n710 These provisions address what is perhaps the most common motivation behind removals. Moreover, rent-controlled property is often subject to more general state or local restrictions on condominium conversion. n711

A few ordinances have gone further and regulate removals for any purpose, including demolition of the structure. These ordinances typically require that the owner obtain a permit from the rent control board before removal can occur. An example of this is a Cambridge, Massachusetts ordinance that conditioned permit approval on consideration of factors that included the hardship to the tenants and the impact of the removal on the shortage of decent housing accommodations. n712

Removal restrictions have met with mixed reception in the courts. The Massachusetts Supreme Court indicated that because removal restrictions are not within the normal scope of municipal power, they would be valid only if deemed necessary to implement rent control objectives. The court concluded that this standard had been met in *Flynn v. City of Cambridge*, n713 in which it upheld a removal regulation that did not prohibit condominium conversion, but did require that converted units remain within the rental market. n714 In other decisions, however, the court held that particular removal restrictions were not authorized by rent control enabling statutes. n715 For example, in *Greater Boston Real Estate Bd. v. Boston*, n716 the court held that a removal restriction that prohibited condominium conversion even when no tenant was evicted and no units were removed from the rental market was not authorized by the enabling statute.

Removal restrictions can also draw the attention of the state legislature. In *Nash v. City of Santa Monica*, n717 the California Supreme Court upheld the constitutionality of a removal control that, in effect, prohibited any removals of rental property. Thereafter, the California legislature enacted legislation that prohibited public bodies from compelling an owner of residential property to continue in the rental market. The statute specifically declared its intent to overrule the *Nash* decision to the extent that it prohibited landlords from going out of business. n718 In subsequent decisions, California appellate courts held that removal controls that required a permit before any removal were preempted by the statute. n719

Removal restrictions, when combined with eviction controls, raise potential takings concerns. It could be contended, for example, that such restrictions amount to a physical occupation of the property. As previously discussed, this argument has its genesis in the Supreme Court's decision in *Loretto v. Teleprompter Manhattan CATV Corp.*, n720 in which it stated that government-required occupation of property by third parties constitutes a physical taking. n721 This has led to arguments that removal prohibitions result in physical occupations.

To date, such arguments have met with little success. In *Fresh Pond Shopping Center v. Callahan*, n722 the United States Supreme Court dismissed an appeal, n723 involving a challenge to an ordinance that prohibited an owner from removing rent controlled property from the market. In that case, an owner had purchased a rent controlled apartment to demolish it and to replace it with a parking lot. The Cambridge rent control ordinance required a removal certificate, which was denied. In dismissing the appeal, the Supreme Court declined to overturn the lower court decision that there was no taking. Justice Rehnquist wrote a dissent to the dismissal, in which he said that the effect of the ordinance was to impose a physical occupation of the property similar to that recognized in *Loretto*. n724

The California Supreme Court upheld the constitutionality of a similar ordinance the following year. n725 Although the landlord did not make a takings argument, in dicta the California court suggested that *Fresh Pond* established that a removal prohibition would not constitute a taking. n726

The United States Supreme Court's 1992 decision in *Yee v. Escondido* n727 further demonstrates the difficulty of establishing that a rent control ordinance results in a physical taking. Unlike *Fresh Pond* and *Nash*, however, *Yee* did not involve a removal restriction. Indeed, the landowner's right to remove property and change to another use was central to the Court's conclusion that there was no physical taking. The Court observed that neither the city nor the state compelled the landowners, after having rented their property to tenants, to continue doing so. "To the contrary," noted the Court, "the Mobilehome Residency Law provides that a park owner who wishes to change the use of his land may evict his tenants, albeit with 6 or 12 months notice." n728 The Court acknowledged that it would be a different question if the statute were to "compel a landowner over his objection to rent his property or to refrain in perpetuity from terminating a tenancy." n729

Yee would therefore suggest that an extreme removal provision, which compelled a landowner to continue to rent to tenants in something like perpetuity, might constitute a taking. n730 How this squares with *Fresh Pond*, where the statute arguably came close to doing so, is unclear.

§ 43.04(e) Critique of Rent Control.

Rent control has long been controversial from a policy perspective. A comprehensive discussion of the pros and cons of rent controls is beyond the scope of this chapter. Rather, a short summary of the basic arguments for and against rent controls will be presented.

Rent controls are usually justified as a necessary response to housing shortages that contribute to excessive rents. n731 Proponents argue that, in the absence of regulation, landlords will take advantage of the low housing supply to charge exorbitant rents. Controls are therefore a way to stabilize rents and ensure tenant security while providing landlords with a fair return on their investment.

Next to landlords, the most critical group of rent control opponents consists of economists. Economists commonly condemn rent controls as contributing to an inefficient and improper allocation of housing resources. n732 Most of the arguments against rent controls reflect a theoretical economic analysis of problems inherent in any rent control scheme.

Perhaps the most fundamental criticism leveled against rent controls are that they create disincentives to investment and will exacerbate the very housing shortages that was the impetus for their imposition. n733 Economists state that in an unregulated market the supply of housing will naturally rise to meet demand. By their very nature, rent controls place rents below market price, which in turn will lead suppliers to invest elsewhere, thus leading to housing shortages. n734 A related criticism is that controls will also discourage maintenance of property. n735

Critics further argue that the conditions necessary to justify price controls for public utilities do not exist for the rental market and therefore cannot be justified on that basis. n736 Because public utilities exist in markets with monopoly potential, controls are viewed as necessary. The housing market, however, is usually viewed as competitive and characterized by a large number of smaller suppliers.

Finally, critics assert that rent controls are nothing but a tenant subsidy scheme, and a very inequitable one at that. n737 They claim that rent controls primarily benefit existing tenants, some of whom are well to do and have little need of protection. Conversely, potential tenants are harmed by exclusion from units and low income tenants are harmed by poor maintenance. In the long run, it is argued, rent controls harm tenants as well as landlords.

Proponents of rent control have offered some counter arguments. They note that rent controls address investment concerns by assuring landlords a "fair and reasonable" return on investments, providing for pass-throughs of capital improvement costs, and often exempting new construction from controls. n738 They have also challenged some of the underlying assumptions of the economic critique, including the competitiveness of housing markets. n739

Perhaps the most significant response by rent control proponents is their claim that criticisms of rent control tend to be only theoretical, and that there is a paucity of empirical data to support the critics' position. n740 In particular they argue that studies do not support the thesis that rent controls decrease housing supply or that they result in decreased maintenance of units. n741 Significant new construction often exists in rent controlled cities, and, when decreases in housing stock occur, they are often attributable to other factors that are not unique to cities practicing rent control. n742

The economic arguments appear to have had some impact. In 1997, for example, Massachusetts adopted the "Massachusetts Rent Control Prohibition Act," n743 which significantly limited the ability to impose rent controls in that state. One of the provisions of the legislation states that the prohibition policy "is based on the belief that the public is best served by free market rental rates for residential properties and by unrestricted home ownership." n744 Other states have also adopted legislation prohibiting or limiting rent controls. n745

FOOTNOTES:

(n1)Footnote 455. *See generally* Baar, *Guidelines for Drafting Rent Control Laws: Lessons of a Decade*, *35 Rutgers L. Rev. 723 (1983).*

(n2)Footnote 456. *See* § 43.04(c)(1) of this chapter.

(n3)Footnote 457. *See* the discussion in § 43.04(e) of this chapter.

(n4)Footnote 458. *See* M. Lett, Rent Control 1 (1976); Baar and Keating, *The Last Stand of Economic Substantive Due Process -- The Housing Emergency Requirement for Rent Control*, 7 Urb. L. 447, 456-461 (1975). *See also, Block v. Hirsh, 256 U.S. 135 (1921)* .

(n5)Footnote 459. *See* M. Lett, Rent Control 1 (1976); Baar and Keating, *The Last Stand of Economic Substantive Due Process -- The Housing Emergency Requirement for Rent Control*, 7 Urb. L. 447, 456-461 (1975); Baar and Keating, *The Last Stand of Economic Substantive Due Process -- The Housing Emergency Requirement for Rent Control*, 7 Urb. L. 447, 456 (1975).

(n6)Footnote 460. M. Lett, Rent Control 1 (1976).

(n7)Footnote 461. *Id.*

(n8)Footnote 462. Rent controls were adopted in Washington, D.C., New York, Wisconsin, New Jersey, Massachusetts, Illinois, Arizona, Delaware, Maine, and Oregon, as well as in Baltimore, Denver and Los Angeles. *See* M. Lett, Rent Control 20 (1976).

(n9)Footnote 463. *See* Baar and Keating, *The Last Stand of Economic Substantive Due Process -- The Housing Emergency Requirement for Rent Control*, 7 Urb. L. 447, 457 (1975).

(n10)Footnote 464. *256 U.S. 135 (1924)* .

(n11)Footnote 465. *256 U.S. 170 (1924)* .

(n12)Footnote 466. *256 U.S. at 157 & 198-199.*

(n13)Footnote 467. *Chastleton Corp. v. Sinclair, 264 U.S. 543, 547-548 (1927)* .

(n14)Footnote 468. *See* M. Lett, Rent Control 4 (1976).

(n15)Footnote 469. *See* Baar and Keating, *The Last Stand of Economic Substantive Due Process -- The Housing Emergency Requirement for Rent Control*, 7 Urb. L. 447, 473-474 (1975).

(n16)Footnote 470. *See* M. Lett, Rent Control 3-4 (1976).

(n17)Footnote 471. *Woods v. Miller, 333 U.S. 138 (1948)* .

(n18)Footnote 472. *See* M. Lett, Rent Control 4 (1976) (listing Connecticut, Illinois, Maryland, Minnesota, Missouri, New Jersey, New York, Rhode Island, Virginia and Wisconsin as having rent control laws during this period).

(n19)Footnote 473. *See Inganamort v. Ft. Lee, 303 A.2d 298 (N.J. 1973)* (discussing the evolution of New Jersey's post war rent control provisions).

(n20)Footnote 474. *Compare, e.g., Warren v. Philadelphia, 115 A.2d 218 (Pa. 1955)* (authority to impose rent controls within home rule power) with *Tietjens v. St. Louis, 222 S.W.2d 70 (Mo. 1949)* (no authority to impose rent controls in absence of specific enabling legislation). *See also* § 43.04(c)(1) of this chapter.

(n21)Footnote 475. For a discussion of New York City's rent control laws, *see* M. Lett, Rent Control 10-12 (1976).

(n22)Footnote 476. *See* Robert Schoshinski, American Law of Landlord and Tenant 503 (1980).

(n23)Footnote 477. *See* M. Lett, Rent Control 5 (1976).

(n24)Footnote 478. The Massachusetts legislature passed special enabling legislation in 1969 authorizing Boston to undertake rent control. 1969 Mass. Acts ch. 797. By 1975, rent controls had been "adopted in Boston, Washington, D.C., Miami Beach, Berkeley, and other localities." Baar, *Guidelines for Drafting Rent Control Laws: Lessons of a Decade, 35 Rutgers L. Rev. 723, 727-728 (1983).* More recently, however, Massachusetts has adopted legislation expressing a state-wide policy in favor of free rental markets and imposing significant limitations on rent controls. *See* Mass. Gen. Laws Ann. 40P §§ 1 - 5. Other states also adopted legislation in the 1990s that prohibited or limited rent controls. These developments are discussed in § 43.04(b)(3) of this chapter.

(n25)Footnote 479. Maryland enacted a state wide statute in 1973, which took effect upon termination of federal controls. Md. Ann. Code art. 53 § 45 (1973). The controls expired in 1975. Alaska enacted legislation in 1975 authorizing state wide controls.

(n26)Footnote 480. *See* § 43.04(c)(1) of this chapter.

(n27)Footnote 481. Rent control is practiced or expressly permitted by statute in Alaska, California, Connecticut, Florida, Maine, Massachusetts, Maryland, New Jersey, New York, and Washington, D.C. It should be noted, however, that, in 1997, Massachusetts adopted legislation expressing a state-wide policy in favor of free rental markets and imposing significant limitations on rent controls. *See* Mass. Gen. Laws Ann. 40P §§ 1 - 5.

(n28)Footnote 482. Baar, *Guidelines for Drafting Rent Control Laws: Lessons of a Decade, 35 Rutgers L. Rev. 723, 725 (1983).*

(n29)Footnote 483. These developments are discussed in § 43.04(b)(3)of this chapter.

(n30)Footnote 484. *See* § 43.04(d)(4) of this chapter.

(n31)Footnote 485. *See Cal. Civ. Code §§ 1954.50, et seq* .

(n32)Footnote 486. *See* 1995 Cal. Stat. ch. 331 § 2. (A.B. 1164).

(n33)Footnote 487. *See Cal. Civ. Code § 1954.52*

(n34)Footnote 488. *See Cal. Civ. Code § 1954.52*.

(n35)Footnote 489. *See* Wis. Stat. Ann. § 704-07(4).

(n36)Footnote 490. *See* Conn. Gen. Stat. Ann. § 47a.

(n37)Footnote 491. Ill. Laws 90-313 (1997). The legislation is codified at *50 Ill. Comp. Stat. 825/1 - 825/99*.

(n38)Footnote 492. *See 50 Ill. Comp. Stat. 825/5*.

(n39)Footnote 493. *See 50 Ill. Comp. Stat. 825/10*.

(n40)Footnote 494. *See 50 Ill. Comp. Stat. 825/5*.

(n41)Footnote 495. 1997 Mass. Acts, ch. 19, § 10.

(n42)Footnote 496. *See Mass. Gen. Laws Ann. ch. 40P § 2*.

(n43)Footnote 497. *See Mass. Gen. Laws Ann. ch. 40P § 4*.

(n44)Footnote 498. *See Mass. Gen. Laws Ann. ch. 40P § 4*.

(n45)Footnote 499. *See* Okla. Stat. Ann. tit. 41, §§ 101-135.

(n46)Footnote 500. *See* 21A N.J. Practice Series § 41:15.

(n47)Footnote 501. *See N.J. Stat. Ann. § 2A:42-84.2*.

(n48)Footnote 502. *See N.J. Stat. Ann. 2A:42-84.1*.

(n49)Footnote 503. *See N.J. Stat. Ann. 2A:42-84.3*.

(n50)Footnote 504. *See, e.g., Warren v. Philadelphia, 115 A.2d 218 (Pa. 1955)* .

(n51)Footnote 505. *See* M. Lett, Rent Control 3-4 (1976).

(n52)Footnote 506. *See, e.g., Old Colony Gardens, Inc. v. Stamford, 147 Conn. 60, 156 A.2d 515 (Conn. 1959)* ; *Hardy v. Housing Mgt. Co., 444 A.2d 457 (Md. Ct. App. 1982)* ; *Tietjens v. St. Louis, 222 S.W.2d 70 (Mo. 1949)* ; *Wagner v. City of Newark, 132 A.2d 794 (N.J. 1957)* .

(n53)Footnote 507. *See, e.g., Hardy v. Housing Mgt. Co., 444 A.2d 457 (1982)* ; *Wagner v. City of Newark, 24 N.J. 467, 132 A.2d 794 (1957)* .

(n54)Footnote 508. *See Conn. Gen. Stat. Ann. § 7-148b* f; N.Y. Unconsolidated Laws §§ 8601 - 8617; Fla. Ann. St. § 125.0103, 166.043.

(n55)Footnote 509. Maine, for example, repealed its rent control legislation in 1995, but the legislation provided:

> The Legislature intends to permit municipalities to continue to adopt and enforce rent control ordinances under home rule authority. A municipality that adopted rent control under the Maine Revised Statutes, Title 30-A, former chapter 167 may continue to operate a rent control program.

1995 Me. Laws ch. 194, § 2.

(n56)Footnote 510. *See Warren v. Philadelphia, 115 A.2d 218, 221 (Pa. 1955)* ; *see also Heubeck v. Baltimore,*

107 A.2d 99 (Md. 1954) ; *but see, Girard v. Town of Allenstown, 428 A.2d 488 (N.H. 1981)* (language applied only to procedural considerations).

(n57)Footnote 511. *Hardy v. Housing Mgt. Co., 444 A.2d 457 (1982)* .

(n58)Footnote 512. *See Inganamort v. Borough of Ft. Lee, 303 A.2d 298, 306 (N.J. 1973)* .

(n59)Footnote 513. *See Old Colony Gardens, Inc. v. Stamford, 147 Conn. 60, 156 A.2d 515 (Conn. 1959)* ; *City of Miami Beach v. Fleetwood Hotel, Inc., 261 So. 2d 801 (Fla. 1972)* ; *Ambassador East v. City of Chicago, 77 N.E.2d 803 (Ill. 1948)* ; *Tietjens v. City of St. Louis, 222 S.W.2d 70 (Mo. 1949)* ; *Wagner v. City of Newark, 132 A.2d 794 (N.J. 1957)* .

(n60)Footnote 514. *See Old Colony Gardens, Inc. v. Stamford, 147 Conn. 60, 156 A.2d 515 (Conn. 1959)* ; *see also Wagner v. City of Newark, 132 A.2d 794 (N.J. 1957)* .

(n61)Footnote 515. *See Birkenfeld v. City of Berkeley, 550 P.2d 1001, 1009-1010 (Cal. 1976)* ; *Inganamort v. Ft. Lee, 303 A.2d 298, 306 (N.J. 1973)* .

(n62)Footnote 516. *Birkenfeld v. City of Berkeley, 550 P.2d 1001, 1009 (Cal. 1976)* .

(n63)Footnote 517. *See generally* Robert Schoshinski, American Law of Landlord and Tenant § 7.2 (1980).

(n64)Footnote 518. *See Birkenfeld v. City of Berkeley, 550 P.2d 1001, 1010-1011 (Cal. 1976)* ; *Inganamort v. Ft. Lee, 303 A.2d 298, 307 (N.J. 1973)* ; *Warren v. Philadelphia, 115 A.2d 218 (Pa. 1955)* .

(n65)Footnote 519. *See Birkenfeld v. City of Berkeley, 550 P.2d 1001, 1010-1011 (Cal. 1976)* ; *Inganamort v. Ft. Lee, 303 A.2d 298, 307 (N.J. 1973)* .

(n66)Footnote 520. *See Wagner v. City of Newark, 132 A.2d 794 (N.J. 1957)* .

(n67)Footnote 521. *See, e.g., Inganamort v. Ft. Lee, 303 A.2d 298 (N.J. 1973)* .

(n68)Footnote 522. *See Birkenfeld v. City of Berkeley, 550 P.2d 1001, 1016-1018 (Cal. 1976)* ; *Lifschitz v. Miami Beach, 339 So. 2d 232 (Fla. Ct. App. 1972)* ; *Heubeck v. Baltimore, 107 A.2d 99, 102 (Md. 1954)* ; *Brunetti v. Borough of New Milford, 350 A.2d 19, 32-33 (N.J. 1975)* .

(n69)Footnote 523. *Heubeck v. Baltimore, 107 A.2d 99, 102 (Md. 1954)* .

(n70)Footnote 524. *Birkenfeld v. City of Berkeley, 550 P.2d 1001, 1015-1016 (Cal. 1976)* .

(n71)Footnote 525. *Id. at 1016-1018* .

(n72)Footnote 526. For an in depth examination of the emergency requirement for rent controls and its relationship to economic substantive due process, *see* Baar and Keating, *The Last Stand of Economic Substantive Due Process -- The Housing Emergency Requirement for Rent Control*, 7 Urb. L. 447 (1975). *See also* Robert Schoshinski, American Law of Landlord and Tenant 513-516 (1980).

(n73)Footnote 527. *256 U.S. 135 (1924)* .

(n74)Footnote 528. *256 U.S. 170 (1924)* .

(n75)Footnote 529. *256 U.S. at 156* .

(n76)Footnote 530. *Id. at 157* .

(n77)Footnote 531. *264 U.S. 543 (1927)* .

(n78)Footnote 532. *Id. at 548-549* .

(n79)Footnote 533. For a general discussion of *Lochner* era substantive due process, *see* Baar and Keating, *The Last Stand of Economic Substantive Due Process -- The Housing Emergency Requirement for Rent Control*, 7 Urb. L. 447 (1975).

(n80)Footnote 534. *Adkins v. Children's Hosp., 261 U.S. 525 (1923)* .

(n81)Footnote 535. *Ribnik v. McBride, 277 U.S. 350 (1928)* .

(n82)Footnote 536. *Fairmont Creamery v. Minnesota, 274 U.S. 1 (1927)* .

(n83)Footnote 537. *Williams v. Standard Oil Co., 278 U.S. 235 (1928)* .

(n84)Footnote 538. *291 U.S. 502 (1934)* .

(n85)Footnote 539. *Id. at 539* .

(n86)Footnote 540. *Id.*

(n87)Footnote 541. *333 U.S. 138 (1948)* .

(n88)Footnote 542. *333 U.S. at 143* .

(n89)Footnote 543. *115 A.2d 218 (Pa. 1955)* .

(n90)Footnote 544. *115 A.2d at 220* .

(n91)Footnote 545. *Jamouneau v. Harner, 109 A.2d 640 (N.J. 1954) . See also, Russell v. Treasurer and General Receiver, 120 N.E.2d 388 (Mass. 1954)* .

(n92)Footnote 546. *See, e.g., Lincoln Bldg. Assocs. v. Barr, 135 N.E.2d 801 (N.Y. 1956) , appeal dismissed, 355 U.S. 12 (1957)* ; *see generally* Baar and Keating, *The Last Stand of Economic Substantive Due Process -- The Housing Emergency Requirement for Rent Control*, 7 Urb. L. 447, 481-485 (1975)..

(n93)Footnote 547. *Miami Beach v. Fleetwood Hotel, Inc., 261 So. 2d 801 (Fla. 1972)* ; *cf. City of Miami Beach v. Forte Towers, Inc.,305 So.2d 764 (Fla. 1974)* (sufficient declaration of emergency present at inception of rent control ordinance, but ordinance found to be constitutionally infirm on account of an improper delegation of legislative power).

(n94)Footnote 548. *See Kress, Dunlap, and Lane, Ltd. v. Downing, 193 F. Supp. 874 (D. V.I. 1961)* (emergency justifying rent control legislation continued only with respect to low and medium rental housing accommodations, and did not have application to high rental housing accommodations or business accommodations).

(n95)Footnote 549. *421 F.2d 560 (2nd Cir. 1969)* .

(n96)Footnote 550. *Id. at 567* .

(n97)Footnote 551. *Hutton Park Gardens v. Town Council of West Orange, 350 A.2d 1, 12 (N.J. 1975)* .

(n98)Footnote 552. *Santa Monica Beach, Ltd. v. Superior Court, 968 P.2d 993, 1005-06 (Cal. 1999) , cert. denied, 526 U.S. 1131 (1999) . Birkenfeld v. City of Berkeley, 550 P.2d 1001, 1022-1023 (Cal. 1976)* .

(n99)Footnote 553. *Westchester West No. 2 Ltd. P'ship v. Montgomery County, 348 A.2d 856, 865 (Md. 1975)* .

(n100)Footnote 554. *See, e.g.,* 440 *Co. v. Borough of Fort Lee, 950 F. Supp. 105 (D. N.J. 1996)* , *aff'd, 129 F.3d 1254 (3d Cir. 1997)* , *cert. denied, 523 U.S. 1020 (1998)* . *Birkenfeld v. City of Berkeley, 550 P.2d 1001, 1019-1022 (Cal. 1976)* .

(n101)Footnote 555. *485 U.S. 1 (1988)* .

(n102)Footnote 556. *Id. at 11* .

(n103)Footnote 557. *See* Robert Schoshinski, American Law of Landlord and Tenant 513 (1980).

(n104)Footnote 558. *See, e.g., Columbia Plaza Ltd. Partnership v. Cowles, 403 F. Supp 1337 (D.C. 1975)* . *See generally* Robert Schoshinski, American Law of Landlord and Tenant 509-513 (1980)..

(n105)Footnote 559. *40 FR 49* , 318, Oct. 22, 1975.

(n106)Footnote 560. *See 24 C.F.R. § 246.5*.

(n107)Footnote 561. *See 24 C.F.R. § 246.5*.

(n108)Footnote 562. *See 24 C.F.R. § 246.6*

(n109)Footnote 563. Other programs are identified in the pertinent regulation. *See 24 C.F.R. § 246.20*.

(n110)Footnote 564. *See 24 C.F.R. § 246.21*.

(n111)Footnote 565. *See 24 C.F.R. § 246.21*.

(n112)Footnote 566. *See* Conn. Gen. Stat. Ann. § § 47a.

(n113)Footnote 567. *See 24 C.F.R. § 246.30*.

(n114)Footnote 568. *See 24 C.F.R. § 246.31*.

(n115)Footnote 569. *See Arizona v. Maricopa County Med. Soc'y, 457 U.S. 332, 344-348 (1982)* .

(n116)Footnote 570. *317 U.S. 341 (1943)* .

(n117)Footnote 571. *See Community Communications Co. v. City of Boulder, 455 U.S. 40 (1982)* ; *City of Lafayette v. Louisiana Power & Light Co., 435 U.S. 389 (1978)* .

(n118)Footnote 572. *475 U.S. 260 (1986)* .

(n119)Footnote 573. *Id. at 264* .

(n120)Footnote 574. *Id. at 266* .

(n121)Footnote 575. *Id. at 266-267* .

(n122)Footnote 576. *Id. at 267-269* .

(n123)Footnote 577. *291 U.S. 502 (1934)* .

(n124)Footnote 578. *Id. at 539* .

(n125)Footnote 579. *See Pennell v. San Jose, 485 U.S. 1 (1988)* , in which the Court held that rent controls are a form of price control subject to the rational basis test applied to other forms of economic regulation. *Id. at 11* .

(n126)Footnote 580. *See, e.g., Birkenfeld v. City of Berkeley, 550 P.2d 1001, 1027 (Cal. 1976)* ; *Hutton Park Gardens v. West Orange, 350 A.2d 1, 12-13 (N.J. 1975)* .

(n127)Footnote 581. See *Hutton Park Gardens v. West Orange, 350 A.2d 1, 12-13 (N.J. 1975)* .

(n128)Footnote 582. See *Birkenfeld v. City of Berkeley, 550 P.2d 1001, 1024 (Cal. 1976)* .

(n129)Footnote 583. *Id.*

(n130)Footnote 584. *Hutton Park Gardens v. West Orange, 350 A.2d 1, 17-18 (N.J. 1975)* .

(n131)Footnote 585. *485 U.S. 1 (1988)* .

(n132)Footnote 586. *Id. at 12-13* .

(n133)Footnote 587. *See, e.g., Hutton Park Gardens v. West Orange, 350 A.2d 1, 14 (N.J. 1975)* .

(n134)Footnote 588. *See, e.g.*, Federal Power commission v. *Texaco, Inc., 417 U.S. 380 (1974)* ; *Permian Basin Area Rate Cases, 390 U.S. 747 (1968)* ; *FPC v. Hope Nat. Gas Co., 320 U.S. 591 (1944)* .

(n135)Footnote 589. *See Penn Cent. Transp. Co. v. New York, 438 U.S. 104 (1978)* ; *cf. Richardson v. City and County of Honolulu, 759 F. Supp. 1477 (D. Hawaii 1991)* (discusses takings law and rent control ordinance). Takings are discussed in the next section of this chapter.

(n136)Footnote 590. *350 A.2d 1 (N.J. 1975)* .

(n137)Footnote 591. *Id. at 15-16* .

(n138)Footnote 592. *Id. at 16* .

(n139)Footnote 593. *Id.*

(n140)Footnote 594. *550 P.2d 1001 (Cal. 1976)* .

(n141)Footnote 595. *Id. at 1027* ; The California Supreme Court confirmed this analysis for rent control regulations in *Kavanau v. Santa Monica Rent Control Board, 941 P.2d 851 (Cal. 1997)* , *cert. denied, 522 U.S. 1077 (1998)* . There, the court stated that "the essential inquiry in due process cases involving price controls is whether the regulatory scheme's result is just and reasonable." *941 P.2d at 683.*

(n142)Footnote 596. *Id.*

(n143)Footnote 597. *550 P.2d at 1030* .

(n144)Footnote 598. *Id.*

(n145)Footnote 599. *See* § 43.04(d)(4) of this chapter.

(n146)Footnote 600. *See* Baar, *Guidelines for Drafting Rent Control Laws: Lessons of a Decade, 35 Rutgers L. Rev. 723, 728 (1983).* However, in the absence of an emergency, freezing rent levels will be unconstitutional. *See Richardson v. Honolulu, 759 F. Supp. 1477 (D.C. Haw. 1991)* .

(n147)Footnote 601. *See, e.g., Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419 (1982)* (state law authorizing cable company to place cable on private property a taking); *Kaiser Aetna v. United States, 444 U.S. 164 (1979)* (imposition of navigational servitude a taking); *United States v. Causby, 328 U.S. 256 (1946)* (overhead flights a taking).

(n148)Footnote 602. *Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 433 (1982)* .

(n149)Footnote 603. *505 U.S. 1003 (1992)* .

(n150)Footnote 604. *438 U.S. 104 (1978)* .

(n151)Footnote 605. *544 U.S. 528 (2005)* .

(n152)Footnote 606. *544 U.S. at 542* .

(n153)Footnote 607. *544 U.S. at 545* .

(n154)Footnote 608. *See Rent Stabilization Ass'n of New York City, Inc. v. Higgins, 630 N.E.2d 626 (N.Y. 1993)* (applying *Lucas* standard, but stating that the regulations do not affect the owner's right to receive the regulated rents, unchallenged as a reasonable return, and that because tenancies are not made perpetual the owners are not deprived of their reversionary interest).

(n155)Footnote 609. *See, e.g.*, 152 *Valparaiso Associates v. City of Cotati, 65 Cal. Rptr. 2d 551 (Ct. App. 1997)* .

(n156)Footnote 610. *124 F.3d 1150 (9th Cir. 1997) , cert. denied, 525 U.S. 871 (1998), 525 U.S. 921 (1998), 525 U.S. 1018 (1998)* .

(n157)Footnote 611. *See Richardson v. City and County of Honolulu, 124 F.3d 1150 (9th Cir. 1997) , cert. denied, 525 U.S. 871 (1998), 525 U.S. 921 (1998), 525 U.S. 1018 (1998)* .

(n158)Footnote 612. *124 F.3d at 1166* .

(n159)Footnote 613. *Cf. Manocherian v. Lenox Hill Hosp. 643 N.E.2d 479 (N.Y. 1994) , cert. denied, 514 U.S. 1109 (1995)* (court concludes that rent control statute did not substantially advance a legitimate state interest; the court thought that the statute vested lease renewal rights in an entity of "unlimited" existence).

(n160)Footnote 614. *458 U.S. 419 (1982)* .

(n161)Footnote 615. *Id. at 435-436* .

(n162)Footnote 616. *Id. at 438* .

(n163)Footnote 617. *Id. at 440* .

(n164)Footnote 618. *464 U.S. 875 (1983)* .

(n165)Footnote 619. *Id.*

(n166)Footnote 620. *833 F.2d 1270 (9th Cir. 1986)* .

(n167)Footnote 621. *Id. at 1273-1274* .

(n168)Footnote 622. *Id. at 1278-1279* .

(n169)Footnote 623. *Id. at 1276* .

(n170)Footnote 624. *898 F.2d 347 (3rd Cir. 1989)* .

(n171)Footnote 625. *Id. at 355* .

(n172)Footnote 626. *503 U.S. 519 (1992)* .

(n173)Footnote 627. *Id.* at 163.

(n174)Footnote 628. *Id.* at 165 (emphasis in original).

(n175)Footnote 629. *Id.*

(n176)Footnote 630. *Id.* at 166.

(n177)Footnote 631. *See also Rent Stabilization Ass'n of New York City, Inc. v. Higgins, 630 N.E.2d 626 (N.Y. 1993)* (rejecting claim that enlarging the definition of family members who could succeed to rent controlled apartment did not constitute a taking, in part because landlords could always convert to another use).

(n178)Footnote 632. *635 So.2d 61 (Fla. Ct. App. 1994)* .

(n179)Footnote 633. *635 So. 2d at 68* .

(n180)Footnote 634. *643 N.E.2d 479 (N.Y. 1994) , cert. denied, 514 U.S. 1109 (1995)* .

(n181)Footnote 635. *643 N.E.2d 479 (N.Y. 1994) , cert. denied, 514 U.S. 1109 (1995)* .

(n182)Footnote 636. *643 N.E.2d at 481* .

(n183)Footnote 637. *643 N.E.2d at 484* .

(n184)Footnote 638. *643 N.E.2d at 484* .

(n185)Footnote 639. *643 N.E.2d at 484-85* .

(n186)Footnote 640. *643 N.E.2d at 485* .

(n187)Footnote 641. This basis for the court's conclusion is subject to question, at least from the standpoint of *federal* takings law, in light of the Supreme Court's decision in *Lingle v. Chevron U.S.A. Inc., 544 U.S. 528 (2005)* , discussed earlier in this section of the chapter.

(n188)Footnote 642. *See* Baar, *Guidelines for Drafting Rent Control Laws: Lessons of a Decade, 35 Rutgers L. Rev. 723, 757 (1983).*

(n189)Footnote 643. *Id. at 757-759* .

(n190)Footnote 644. *Id. at 759-760* .

(n191)Footnote 645. *See generally* Robert Schoshinski, American Law of Landlord and Tenant § 7.6 (1980).

(n192)Footnote 646. *See id.*

(n193)Footnote 647. *See* Baar, *Guidelines for Drafting Rent Control Laws: Lessons of a Decade, 35 Rutgers L. Rev. 723, 833 (1983).*

(n194)Footnote 648. Vacancy decontrols are discussed in the next section of this chapter.

(n195)Footnote 649. *See id.* at 833-34 .

(n196)Footnote 650. *Id.* at 833 .

(n197)Footnote 651. *Brunetti v. New Milford, 350 A.2d 19, 33 (N.J. 1975)* (statute that sets forth specific grounds of eviction preempts rent control eviction controls).

(n198)Footnote 652. *See Miami Beach v. Fleetwood Hotel, Inc., 261 So. 2d 801 (Fla. 1972)* ; *Heubeck v. Baltimore, 107 A.2d 99, 102 (Md. 1954)* .

(n199)Footnote 653. *See Birkenfeld v. City Berkeley, 550 P.2d 1001, 1015-1016 (Cal. 1976)* ; *Warren v. Philadelphia, 115 A.2d 218 (Pa. 1956)* .

(n200)Footnote 654. *See Birkenfeld v. City of Berkeley, 550 P.2d 1001, 1015 (Cal. 1976)* .

(n201)Footnote 655. *550 P.2d 1001 (Cal. 1976)* .

(n202)Footnote 656. *Id. at 1016-1018* .

(n203)Footnote 657. *See* Baar, *Guidelines for Drafting Rent Control Laws: Lessons of a Decade, 35 Rutgers L. Rev. 723 (1983).*

(n204)Footnote 658. *See Guerra v. District of Columbia Rental Hous., 501 A.2d 786 (D.C. App. 1985)* .

(n205)Footnote 659. *See Little v. Guadron, 232 Cal. Rptr. 516 (1986)* .

(n206)Footnote 660. *See* Note, *Braschi v. Stahl Assocs. Co.*: *Much Ado About Nothing? 35 Villanova L. Rev. 361 (1990)* (discussing New York City ordinance).

(n207)Footnote 661. *See id. at 371-377.*

(n208)Footnote 662. *434 N.Y.S.2d 127 (City Ct. 1980)* .

(n209)Footnote 663. *543 N.E.2d 49 (N.Y. 1989)* .

(n210)Footnote 664. *544 N.Y.S.2d at 789-790.*

(n211)Footnote 665. *543 N.E.2d at 49 .See also Rent Stabilization Association of New York City, Inc. v. Higgins, 630 N.E.2d 626 (N.Y. 1993) , cert. denied, 512 U.S. 1213 (1994)* (upholding new rent control regulations that enlarged definition of family to include certain nontraditional relationships beyond marriage or blood).

(n212)Footnote 666. 440 *Co. v. Borough of Fort Lee, 950 F. Supp. 105 (D. N.J. 1996) , aff'd, 129 F.3d 1254 (3d Cir. 1997) , cert. denied, 523 U.S. 1020 (1998)* .

(n213)Footnote 667. *950 F. Supp. at 110* .

(n214)Footnote 668. *See Birkenfeld v. City of Berkeley, 550 P.2d 1001, 1015 (Cal. 1976)* .

(n215)Footnote 669. *Id.*

(n216)Footnote 670. *See* Robert Schoshinski, American Law of Landlord and Tenant § 7.7 (1980).

(n217)Footnote 671. *See* Baar, *Guidelines for Drafting Rent Control Laws: Lessons of a Decade, 35 Rutgers L. Rev. 723, 728 (1983).*

(n218)Footnote 672. *See* Robert Schoshinski, American Law of Landlord and Tenant § 7.7 (1980).

(n219)Footnote 673. *See Marshal House, Inc. v. Rent Control Bd. of Brookline, 266 N.E.2d 876 (Mass. 1971)* .

(n220)Footnote 674. *See, e.g., Carson Mobilehome Park Owners' Ass'n v. City of Carson, 672 P.2d 1297 (Cal. 1983)* .

(n221)Footnote 675. *See* Robert Schoshinski, American Law of Landlord and Tenant § 7.7 (1980).

(n222)Footnote 676. *See* Robert Schoshinski, American Law of Landlord and Tenant 520 (1980).

(n223)Footnote 677. *See* Baar, *Guidelines for Drafting Rent Control Laws: Lessons of a Decade, 35 Rutgers L. Rev. 723, 774-775 (1983)..*

(n224)Footnote 678. *Id.*

(n225)Footnote 679. *See* M. Lett, Rent Control 10-12 (1976); Baar, *Guidelines for Drafting Rent Control Laws: Lessons of a Decade, 35 Rutgers L. Rev. 723, 817-826 (1983).*

(n226)Footnote 680. Baar, *Guidelines for Drafting Rent Control Laws: Lessons of a Decade, 35 Rutgers L. Rev. 723, 784-817 (1983)..*

(n227)Footnote 681. *See* § 43.04(c)(5) of this chapter.

(n228)Footnote 682. *See, e.g., Hutton Park Gardens v. West Orange, 350 A.2d 1, 15 (N.J. 1975)* .

(n229)Footnote 683. *Id. at 17-18* .

(n230)Footnote 684. *Id.*

(n231)Footnote 685. *See Cromwell Assocs. v. Newark, 511 A.2d 1273 (N.J. 1985)* .

(n232)Footnote 686. *550 P.2d 1001 (Cal. 1976)* .

(n233)Footnote 687. *Id. at 1016-1018* .

(n234)Footnote 688. *394 A.2d 65* .

(n235)Footnote 689. *Id. at 86* .

(n236)Footnote 690. *693 P.2d 261 (Cal. 1984)* .

(n237)Footnote 691. *See Carson Mobilehome Park Owners Ass'n v. City of Carson, 35 Cal. 3d 184, 197 Cal. Rptr. 284, 672 P.2d 1297 (Cal. 1983)* .

(n238)Footnote 692. *See Karrick v. Cantrill, 277 F. 578, 51 App. D.C. 176 (D.C. Cir. 1922)* ; *Olin J. Stephens, Inc. v. American Real Estate Co., 279 F. 435 (S.D. N.Y. 1921)* .

(n239)Footnote 693. *See Fisher v. City of Berkeley, 693 P.2d 261, 293 (Cal. 1984)* ; *Mayes v. Jackson Township Rent Leveling Bd., 511 A.2d 589 (N.J. 1986)* ; *Helmsley v. Borough of Ft. Lee, 394 A.2d 65 (N.J. 1978)* .

(n240)Footnote 694. *See Helmsley v. Borough of Ft. Lee, 394 A.2d 65, 71 (N.J. 1978)* .

(n241)Footnote 695. *See Carson Mobilehome Park Owners' Ass'n v. City of Carson, 672 P.2d 1297 (Cal. 1983).*

(n242)Footnote 696. *See generally* Baar, *Guidelines for Drafting Rent Control Laws: Lessons of a Decade, 35 Rutgers L. Rev. 723, 830-832 (1983).*

(n243)Footnote 697. *See Doric Realty Co. v. Union City Rent Leveling Bd., 442 A.2d 652, 655 (N.J. 1981)* .

(n244)Footnote 698. *Id.*

(n245)Footnote 699. *See Midstate Mgt. Corp. v. New York City Conciliation & Appeals Bd., 491 N.Y.S.2d 634 (1985)* .

(n246)Footnote 700. *See* 230 *East 52nd Street Assocs. v. State Div. of Hous. & Community Renewal, 517 N.Y.S.2d 2 (1987)* .

(n247)Footnote 701. *Interstate General Corp. v. District of Columbia Rental Hous. Comm'n, 501 A.2d 1261 (D.C. Ct. App. 1985)* .

(n248)Footnote 702. *See Doric Realty Co. v. Union City Rent Leveling Bd., 442 A.2d 652, 655-656 (N.J. 1981)* .

(n249)Footnote 703. *Sterling v. Santa Monica Rent Control Bd., 214 Cal. Rptr. 71 (Cal. 1985)* .

(n250)Footnote 704. *See Altschuler v. Boston Rent Control Board, 438 N.E.2d 73 (Mass. 1982)* .

(n251)Footnote 705. *369 A.2d 32 (N.J. 1977)* .

(n252)Footnote 706. *Id. at 35-37* .

(n253)Footnote 707. *See Orange Taxpayers Council, Inc. v. Orange, 416 A.2d 353 (N.J. 1980)* .

(n254)Footnote 708. *Id. at 355-356* .

(n255)Footnote 709. *Id. at 359-361* .

(n256)Footnote 710. *See, e.g., N.J. Stat. Ann. § 2A:18-61, 1K*; Greater Boston Real Estate Bd. v. Boston, *cited 494 N.E.2d 1301 (Mass. 1986)* (citing Boston ordinance).

(n257)Footnote 711. *See generally* Schlein, *Government Regulation of Condominium Conversion*, 8 B.C. Envir. L. Rev. 919 (1980).

(n258)Footnote 712. *See Flynn v. City of Cambridge, 418 N.E.2d 335, 337 n.4 (1981)* (quoting Cambridge ordinance).

(n259)Footnote 713. *418 N.E.2d 335 (1981)* .

(n260)Footnote 714. *Id. at 338* .

(n261)Footnote 715. *See Greater Boston Real Estate Bd. v. Boston, 494 N.E.2d 1301 (Mass. 1986)* ; *Zussman v. Rent Control Bd., 326 N.E.2d 876 (Mass. 1975)* .

(n262)Footnote 716. *494 N.E.2d 1301 (Mass. 1986)* .

(n263)Footnote 717. *688 P.2d 894 (Cal. 1984)* .

(n264)Footnote 718. *See Cal. Gov. Code § 7060 et seq* . In a 2003 decision, the California Supreme Court held that the provisions of the statute were subject to separate statutory provisions protecting tenants from retaliatory eviction. *See Drouet v. Superior Court, 73 P.3d 1185 (Cal. 2003)* . Retaliatory eviction is discussed in § 43.06 of this chapter.

(n265)Footnote 719. *See Javidzad v. City of Santa Monica, 251 Cal. Rptr. 350 (Ct. App. 1988)* ; *City of Santa Monica v. Yarmark, 249 Cal. Rptr. 732 (Ct. App. 1982)* .

(n266)Footnote 720. *458 U.S. 419 (1982)* .

(n267)Footnote 721. *See* § 43.04(c)(6) of this chapter.

(n268)Footnote 722. *464 U.S. 875, 104 S. Ct. 218, 78 L. Ed. 2d 215 (1983)* .

(n269)Footnote 723. The Court dismissed the appeal for lack of a substantial federal question.

(n270)Footnote 724. *Id. at 876-877* (Rehnquist, J., dissenting).

(n271)Footnote 725. *Nash v. City of Santa Monica, 688 P.2d 894 (Cal. 1984) , appeal dismissed, 470 U.S. 1046 (1985)* .

(n272)Footnote 726. *Id. at 901-902* .

(n273)Footnote 727. *503 U.S. 519(1992)* .

(n274)Footnote 728. *503 U.S. at 528* .

(n275)Footnote 729. *503 U.S. at 528* .

(n276)Footnote 730. *Cf. Aspen-Tarpon Springs Limited Partnership v. Stuart, 635 So.2d 61 (Fla. Ct. App. 1994)* (requiring mobile home park owners desiring to change use of their property either to pay tenants' cost of moving to other parks or to buy tenants' mobile homes constituted a taking of property; the court reasoned that since evidence established that neither option was economically feasible, the statute in effect authorized a permanent physical occupation of the property).

(n277)Footnote 731. *See, e.g.*, Keating, *Commentary on Rent Control and the Theory of Efficient Regulation, 54 Brooklyn L. Rev. 1223, 1224-1225 (1989).*

(n278)Footnote 732. *See* Frey et al., *Consensus and Dissension Among Economists: An Empirical Inquiry, 74 Am. Econ. Rev. 986 (1984)* ; Epstein, *Rent Control and the Theory of Efficient Regulation, 54 Brooklyn L. Rev. 741, 759-760 (1988); but see* Guy McPherson, *It's the End of the World as We Know it (and I Feel Fine): Rent Regulation in New York City and the Unanswered Questions of Market and Society, 72 Fordham L. Rev. 1175 (2004)* (discusses the pros and cons of rent controls and ultimately concludes that rent control does more good than harm and the traditional discussion should be scrapped)..

(n279)Footnote 733. *See, e.g.*, Epstein, *Rent Control and the Theory of Efficient Regulation, 54 Brooklyn L. Rev. 741, 767 (1988);* T. Downs, Rental Housing in the 1980's 140-141 (1983); Comment, *Challenges to Rent Control: Strategies for Attack, 34 UCLA L. Rev. 149-150 (1986).*

(n280)Footnote 734. *See, e.g.*, Epstein, *Rent Control and the Theory of Efficient Regulation, 54 Brooklyn L. Rev. 741, 767 (1988).*

(n281)Footnote 735. *Id. at 766.*

(n282)Footnote 736. *See* Epstein, *Rent Control and the Theory of Efficient Regulation, 54 Brooklyn L. Rev. 741, 769-770 (1988);* Comment, *Challenges to Rent Control: Strategies for Attack, 34 UCLA L. Rev. 149, 154 (1986).*

(n283)Footnote 737. *See, e.g.*, Epstein, *Rent Control and the Theory of Efficient Regulation, 54 Brooklyn L. Rev. 741, 761-770 (1988);* Salins, *Reflection on Rent Control and the Theory of Efficient Regulation, 54 Brooklyn L. Rev. 775, 775 (1988).*

(n284)Footnote 738. *See* Keating, *Commentary on Rent Control and the Theory of Efficient Regulation, 54 Brooklyn L. Rev. 1223, 1228-1229 (1989);* Mandel, *Does Rent Control Hurt Tenants?: A Reply to Epstein, 54 Brooklyn L. Rev. 1267, 1268-1271 (1989).*

(n285)Footnote 739. *See* Keating, *Commentary on Rent Control and the Theory of Efficient Regulation, 54 Brooklyn L. Rev. 1223, 1228-1229 (1989).*

(n286)Footnote 740. *See, e.g.*, Baar, *Would the Abolition of Rent Controls Restore a Free Market, 54 Brooklyn L. Rev. 1231, 1232 (1989)* (critics of rent control fail to provide "one iota of data on new apartment construction in rent controlled jurisdictions"); Keating, *Commentary on Rent Control and the Theory of Efficient Regulation, 54 Brooklyn L. Rev. 1223, 1228-1229 (1989).*

(n287)Footnote 741. *See* Baar, *Would the Abolition of Rent Controls Restore a Free Market, 54 Brooklyn L. Rev. 1231, 1232-1233 (1989)* (listing studies that suggest that rent controls do not have a negative impact on housing supply).

(n288)Footnote 742. *See* Baar, *Would the Abolition of Rent Controls Restore a Free Market, 54 Brooklyn L. Rev. 1231, 1234-1237 (1989);* Berger, *Home Is Where the Heart Is: A Brief Reply to Professor Epstein, 54 Brooklyn L. Rev. 1239, 1246-1247 (1989).*

(n289)Footnote 743. Mass. Gen. Laws Ann. 40P § 1.

(n290)Footnote 744. Mass. Gen. Laws Ann. 40P § 2.

(n291)Footnote 745. See the discussion on this point in § 43.04(b)(3) of this chapter.

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CHAPTER 43 STATUTORY MODIFICATIONS OF LANDLORD-TENANT LAW

5-43 Thompson on Real Property, Thomas Editions § 43.05

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§ 43.05 Statutory Warranties of Habitability.

§ 43.05(a) Overview and Relationship to Judicial Reform.

Until fairly recently, the common law view of a lease as a conveyance of an estate in land dominated the rules governing the landlord-tenant relationship. n746 Landlords were generally under no obligation to repair or maintain the premises, since the estate belonged to the tenant. n747 Moreover, any obligations that did exist were considered independent of a tenant's own duties to continue the lease and pay the rent. n748

This common law view underwent substantial changes in the 1970s as a result of judicial and statutory developments. n749 The initial impetus for change came primarily through the courts. The first significant judicial initiative was *Javins v. First National Realty Group, Inc.*, n750 in which the District of Columbia Court of Appeals recognized an implied warranty of habitability in residential leases and found it to be interdependent with the tenant's duty to pay rent. n751 A number of state court decisions in the early 1970s followed *Javins* in recognizing an implied warranty of habitability. n752

Despite the significant attention given to these judicial developments, in most states the implied warranty of habitability has been created by statute. Although some earlier statutes granted tenant rights, n753 significant statutory change began in the mid-1970s. The most important development was the issuance of the Uniform Residential Landlord and Tenant Act (URLTA) in 1972, n754 which has now been adopted in some form in twenty states. n755 Several other states have adopted comprehensive landlord-tenant legislation, n756 and others have enacted individual statutory warranties of habitability. n757 In a few instances, statutes were enacted in states that had already recognized the implied warranty of habitability as a result of a court decision, n758 but, in most states, the statutes were enacted without prior judicial recognition.

Judicial reform therefore preceded and was an important impetus to statutory reform. Indeed, the comment to the URLTA's section on the landlord's duty to maintain fit premises states that it follows the implied warranty of habitability doctrine previously recognized in several states. n759 Judicially created warranties have also continued to be a source for resolving issues not addressed in habitability statutes.

In many respects the nature and scope of the statutory warranties are similar to those of the judicial warranties. Both typically apply only to residential tenancies and are premised on changes in the nature of residential tenancies. Both adopt an interdependent view of landlord-tenant covenants, in which breach of a landlord's obligation to maintain the premises can release a tenant from certain obligations. Both statutory and judicial warranties also often recognize some of the same fundamental remedies for a landlord breach, including termination, damages, and rent withholding.

At the same time, however, there are some important differences between statutory reforms and judicial reforms. This is particularly true with regard to comprehensive statutes, such as the URLTA, that describe in detail a landlord's duty to maintain the premises and specify remedies for a violation. The URLTA provides a list of six landlord duties, including compliance with "housing codes materially affecting health and safety," maintaining the premises in a "fit and habitable condition," maintaining common areas in a "safe and clean condition," and provision of essential services. Although the list is rather expansive, in all instances the duty concerns issues related to health, safety, or habitability.

§ 43.05(b) Uniform Residential Landlord and Tenant Act.

The Uniform Residential Landlord and Tenant Act (URLTA) was drafted by the National Conference of Commissions on Uniform State Laws in 1972. It has been enacted in some form by about twenty states and comprises the largest single influence on statutory landlord-tenant reforms. Because of its substantial influence, an overview of the URLTA is beneficial.

As its title indicates, the URLTA applies only to residential tenancies. The Act itself states that two of its purposes are to "simplify, clarify, modernize and revise" landlord-tenant law, and to "encourage landlords to maintain and improve the quality of housing." n760 The comments state that the Act rejects the earlier "conveyance" view of landlord-tenant law as inappropriate for modern conditions, and that it adopts an interdependent, or contract, view of lease covenants. n761

The URLTA imposes duties on and grants remedies to both landlords and tenants. At the heart of the Act, however, are the duties imposed on landlords and the remedies provided to tenants. The Act imposes several general obligations on landlords, including obligations related to the handling of security deposits, disclosure to tenants, and delivery of possession. n762 Most important, however, is a duty to maintain the premises. Among other things, the ULRTA requires the landlord to comply with housing codes that "materially affect health and safety;" make repairs to keep the premises in "fit and habitable condition;" keep common areas "clean and safe;" maintain electrical, plumbing, heating, sanitary, air-conditioning, and other services in good and safe working order; and supply running water and reasonable amounts of hot water. n763

The URLTA provides tenants with various remedies for landlord breaches, including termination, damages, and injunctive relief. n764 It offers two forms of self help relief, one for remedying minor defects n765 and one relating to essential services. n766 In the latter instance, a tenant, after giving notice to the landlord, may procure such services and deduct the cost from rent. Perhaps the most significant remedy is what amounts to rent withholding. It permits tenants to raise the breach of a landlord's duty as a counterclaim in an eviction action for nonpayment of rent. n767 The tenant must give the landlord notice of the breach in order to access the remedies referenced here. In any event, the remedies will not be available if the problem was caused by the tenant.

Tenant duties under the Act include maintenance of the dwelling unit, compliance with reasonable rules, and permitting the landlord and other specified parties reasonable access to the dwelling. n768 Landlords may terminate the lease for nonpayment of rent or noncompliance with duties materially affecting health and safety. n769 In both instances the landlord must first give the tenant notice and an opportunity to cure. n770 The landlord may also recover actual damages and obtain injunctive relief for a tenant's noncompliance with the rental agreement or the tenant's failure to comply with applicable maintenance requirements. n771

Finally, the URLTA also prohibits retaliatory conduct and eviction on the part of landlords. It prohibits landlords from increasing rent, decreasing services or evicting tenants in retaliation for the assertion of various rights. The Act also creates a presumption of retaliation if the landlord pursues such conduct within a year after a tenant complains to a government agency or to the landlord regarding the landlord's noncompliance with relevant obligations regarding the condition of the premises. n772

It should be noted that a Model Residential Landlord-Tenant Code n773 published in 1969 has apparently influenced statutes in Delaware and Hawaii. n774 Although differing in details, the Model Code creates duties and remedies comparable to those of the URLTA and shares the same fundamental objectives. These statutes are quite similar to those following the URLTA, and are often included in lists as URLTA statutes. n775

§ 43.05(c) Adoption of Statutory Warranties of Habitability.

§ 43.05(c)(1) Statutory Warranties Based on Uniform or Model Acts.

Over twenty states have enacted comprehensive landlord-tenant statutes that impose a duty upon landlords to maintain the leased premises. Almost all of these statutes are based on the URLTA, which imposes the following six duties on residential landlords:

> (1) comply with the requirements of applicable building and housing codes materially affecting health and safety;
>
> (2) make all repairs and do whatever is necessary to put and keep the premises in a fit and habitable condition;
>
> (3) keep all common areas of the premises in a clean and safe condition;
>
> (4) maintain in good and safe working order and condition all electrical, plumbing, sanitary, heating, ventilating, air conditioning, and other facilities and appliances, including elevators, supplied or required to be supplied by him;
>
> (5) provide and maintain appropriate receptacles and conveniences for the removal of ashes, garbage, rubbish, and other waste incidental to the occupancy of the dwelling unit and arrange for their removal; and
>
> (6) supply running water and reasonable amounts of hot water at all times and reasonable heat [between [October 1] and [May 1]] except where the building that includes the dwelling unit is not required by law to be equipped for that purpose, or the dwelling unit is so constructed that heat or hot water is generated by an installation within the exclusive control of the tenant and supplied by a direct public utility connection. n776

Most URLTA states have enacted all six duties, but some have deleted or modified provisions. For example, Alaska does not include number (1), n777 Tennessee does not include numbers (4) and (6), n778 and Kentucky does not include number (5). n779 Florida and Kansas do not include number (2), n780 regarding provision of "a fit and habitable condition," while New Mexico simply requires a "safe condition." n781 The Mississippi version includes only number (1) and a modified version of number (3). n782

The most substantial variation of landlord duties is in the Washington statute, which states that a landlord must at all times "keep the premises fit for human habitation," and then states ten detailed requirements. Those include control of pest infestation, keeping the dwelling weather tight, and providing locks and keys. n783 Nevada also imposes a general requirement that the dwelling be in a habitable condition, which is then defined by reference to a detailed list. n784

Despite these modifications, the habitability requirements created by these statutes appear to be quite broad. As previously indicated, the initial language of the Washington statute states: "The landlord will at all times during the tenancy keep the premises fit for human habitation." n785 The Nevada statute includes similar language. n786

State statutes provide that the landlord's duties regarding the condition of the premises cannot be waived. However, the URLTA provides that, in the case of a single family residence, the parties may agree that the tenant will perform the landlord's duties under numbers (5) and (6). n787 The agreement must be in writing and be entered into in good faith. n788 Most of the state statutes that are based on the URLTA include this provision, although, in some states, it is expanded to include two or three dwelling units. n789

In addition to URLTA based statutes, several other states have comprehensive residential landlord-tenant statutes that include habitability requirements. Two sets of statutes, Hawaii's and Delaware's, are based on the Model Residential Landlord-Tenant Code, and contain landlord obligations very similar to those found in the URLTA. n790 In contrast, Maryland has enacted legislation that is based on neither the URLTA nor the Model Code, but obligates the landlord to repair and eliminate conditions and defects that constitute, or, if unremedied, will constitute, a fire hazard or a serious and substantial threat to the life, health or safety of occupants. n791 Similarly, Vermont has legislation under which landlords warrant residential premises to be "safe, clean and fit for human habitation" and in compliance with "applicable building, housing and health regulations." n792

§ 43.05(c)(2) Other Statutory Warranties.

At least ten states have enacted statutory warranties of habitability that are not part of comprehensive landlord and tenant legislation. n793 Several states, including North Carolina, North Dakota, Utah, and West Virginia, have enacted provisions based on § 2.104 of the URLTA. The North Dakota statute adopts it in full. n794 North Carolina n795 and West Virginia n796 have enacted modified versions, while the Utah statute appears to be loosely based on the URLTA. n797

At least ten other states, including Idaho, Maine, Michigan, Minnesota, New York and Wisconsin, have enacted separate statutory warranties of habitability imposing duties on landlords. The Maine n798 and New York n799 statutes offer very clear examples of a habitability requirement. Both use nearly identical language, stating that in every residential lease "the landlord shall be deemed to covenant and warrant that the dwelling is fit for human habitation." n800

The Michigan n801 and Minnesota n802 statutes are similar to each other. They impose covenants on the lessor that the premises "are fit for the use intended by the parties," covenants "to keep the premises in reasonable repair," and to comply with health and safety codes. Although not directly using habitability language, the expression "fit for the use intended by the parties" in effect creates a residential habitability requirement. A Texas statute imposes an obligation on the landlord to remedy conditions that materially affect the physical health or safety of an ordinary tenant, after the landlord has received proper notice from the tenant. n803 Finally, the Idaho n804 and Wisconsin n805 statutes do not directly impose habitability requirements, but specify certain types of repairs that landlords must make, and require that plumbing, electrical, heating, cooling, and comparable services be in good working order.

Of the states referenced above, the Idaho, Maine, Texas, Utah, and Wisconsin statutes specify remedies for a breach. The Idaho statute provides that a tenant may recover damages and seek specific performance. n806 The Maine statute provides comparable remedies, stating that a court can issue an injunction ordering repair and that a tenant can recover a rebate of the amount by which the rent the tenant paid exceeded the use and occupancy value of the premises. n807 The Texas statute incorporates a number of remedies, including lease termination, repair and deduct, and separate judicial remedies. n808 The Wisconsin statute provides that the tenant may, in some cases, "remove" from the premises and avoid rent liability or the tenant may remain and obtain a rent abatement to the extent the breach deprives the tenant of the full normal use of the premises. n809 The Utah statute provides that a tenant may seek damages and injunctive

relief, which includes possible judicial termination of the lease. n810

These statutes take varying positions on whether the landlord's obligations can be waived. The Minnesota, New York, and Wisconsin statutes prohibit waiver, n811 and Michigan permits the statutory obligations to be modified if the current term of the lease is at least one year. n812 The Maine statute permits waiver of specified conditions in exchange for a stated reduction of rent or other fair consideration. n813 The North Carolina provision permits the parties to enter into a "subsequent written contract" under which the tenant agrees to perform work on the premises. However, this contract must be supported by consideration, and cannot be made for the purpose of avoiding the landlord's obligations regarding the condition of the premises. n814 The North Dakota statute permits good faith agreements in which the tenant takes on obligations of the landlord regarding trash removal, water, and heat. n815 The statute also provides that, outside of the single-family residential context, agreements with respect to other matters may also be made, if they are in good faith, in writing, supported by adequate consideration, and do not diminish the landlord's obligations to other tenants. n816 Some of the statutes appear to be silent as to waiver. n817 However, a court could still conclude, as did the West Virginia Supreme Court, that the implied warranty of habitability cannot be waived. n818

As with warranties based on comprehensive statutes, courts have given these warranties a broad interpretation. For example, the New York Court of Appeals has interpreted New York's statutory warranty as including the following three warranties: "first, that the premises are fit for human habitation; second, that the condition of the premises is in accord with the uses reasonably intended by the parties; and third, that the tenants are not subjected to any conditions endangering or detrimental to their life, health, or safety." n819

§ 43.05(d) Remedies for Breach of Statutory Warranties.

The URLTA provides five basic remedies for breach of the landlord's duties: termination of the lease, damages, repair and deduct, rent withholding, and injunctive relief. Individual states have enacted statutes that incorporate these remedies as well. n820 In some instances, states had adopted legislation providing for rent withholding and repair and deduct remedies before the promulgation of the URLTA.

Before discussing remedies that are available to the tenant for breach of the implied warranty of habitability, it is important to note two important qualifications that run throughout the URLTA and most other schemes. First, the remedies are unavailable if the tenant was responsible for the problem. n821 Second, in order to access the remedies, the tenant generally must give the landlord prior notice of the condition at issue. n822 In most instances the landlord is also provided a period of time after notice to respond. However, where essential services are involved, the tenant, after giving notice, can immediately engage in a form of repair and deduct relief. n823

§ 43.05(d)(1) Termination.

All states with comprehensive landlord-tenant legislation provide that tenants may terminate the lease for a landlord's material noncompliance with a duty that materially affects health and safety. Under the URLTA the tenant must first give notice that the tenancy will terminate in 30 days if the problem is not remedied within 14 days. The Act also provides that if there had been a prior noncompliance within six months, the tenant can terminate the agreement within 14 days. n824 Although all URLTA states include the notice and opportunity to remedy provision, some have shortened the time periods for notice and repair. n825 Termination does not preclude recovery of damages. n826

Some other state statutes also include a lease termination remedy. For example, a Wisconsin statute states that the tenant may vacate the leased premises, if occupancy becomes untenable for various reasons, including a condition hazardous to health. n827 Utah provides that a court may judicially terminate the lease. n828 Some state statutes are silent on termination, but judicial interpretations of these statutes have generally recognized that breach of the landlord's duties gives rise to normal contract remedies for breach, including rescission. n829

§ 43.05(d)(2) Damages.

All comprehensive statutes provide tenants with a right to recover damages for a landlord's breach. n830 Under the ULRTA, a tenant's right to terminate is contingent on a material breach that materially affects health and safety. In contrast, recovery of damages is permitted for noncompliance with the lease or statutory duties. n831 Most states that pattern their legislation on the URLTA use the language of "actual damages," but several say only "damages."

Provisions for damages also appear in the legislation of other states. An Idaho statute provides that a tenant may recover damages. n832 A statute in Maine provides that a tenant can recover what amounts to diminution in value for uninhabitable conditions, but specifically precludes recovery for consequential damages. n833 Wisconsin permits rent abatement for violation of the landlord's obligation. n834 Some state statutes that include simple warranty provisions are silent as to the availability of damages, but they have been construed to provide that remedy. n835

Although providing for damages, the URLTA and most states are silent as to what is included in damages and how damages are to be calculated. Courts have generally recognized that the primary recovery for damages is for diminution in value of the rental property, which is a loss of the bargain concept.

Commentators have identified three formulas for calculating loss of bargain damages under judicially adopted warranties of habitability. n836 It will be useful to mention them here. First, damages are the difference between the value of the building as warranted and the value in its defective condition, with the agreed rent being evidence of the value as warranted. Second, damages are equal to "the difference between agreed rent and the fair rental value of the premises" in a defective condition. Third, "the agreed rent is reduced by a percentage equal to the percentage of use lost by the tenant because of the landlord's breach." n837

Courts that have applied statutory warranties have generally adopted one of the first two formulas, or a combination of the two. Perhaps most common has been an approach that measures diminution in value by the difference between the fair market value of the property as warranted and the fair market value in its defective condition. n838 Several courts have, in essence, equated the two standards, stating that the fair market value is measured by the agreed rent. n839

In addition to recovering damages for diminution in value, most courts have also held that tenants can recover consequential damages. n840 At least one court has indicated that this can include damages for annoyance and inconvenience resulting from the breach. n841

Some courts have indicated that tenants can recover for emotional distress. n842 In a case arising under the Arizona Residential Landlord and Tenant Act, an Arizona appellate court observed:

> A tenant who is not provided with necessary services and maintenance of the leased premises as required under the Act suffers property damage because the value of his leasehold is decreased by the absence of adequate water, heat, cooling or proper maintenance of the building. However, the more immediate damage that he suffers is the annoyance and discomfort of living in inadequate housing... Whether this condition was intentionally or negligently caused by the landlord is not relevant to the actual damages suffered by the tenant. n843

But courts have disagreed about whether tenants can recover damages for personal injury based on landlord breach of the implied warranty of habitability. n844 Additional information regarding landlord tort liability is contained in Chapter 41. n845

Courts are also divided on whether punitive damages can be recovered for violations of statutory provisions. Some courts have, in essence, precluded their availability under URLTA-based statutes, on the basis that allowing such damages would be "inconsistent with the attention given to the choice of noncompensatory measures of damages

elsewhere" in the legislation. n846 Elaborating on this point, the Oregon Supreme Court noted that sometimes the drafters of the legislation had selected the sum of three months' rent beyond actual damages, sometimes twice the otherwise relevant amount, and sometimes the stated measure of damages was compensatory in a purely financial sense. "When a statute includes such differentiated provisions for compensatory and for more than compensatory damages for specified violations we find no justification for superimposing upon the statutory scheme an additional remedy of punitive damages, unlimited in amount, for violations of the act." n847

Other courts, however, have held that punitive damages may be awarded for intentional and malicious violations of landlord obligations regarding the condition of the premises. n848

§ 43.05(d)(3) Rent Withholding.

The URLTA does not provide for rent withholding as such, but permits a tenant to raise the landlord's noncompliance as a counterclaim in an eviction proceeding based on nonpayment of rent. It provides that the court may order the tenant to pay all or part of the rent, and determine the amount owed each party. If no rent remains due after any necessary payments are made, judgment in the eviction action is entered for the tenant. n849 This in effect permits a tenant to withhold rent for a landlord's noncompliance. n850

Almost all URLTA states have enacted § 4.105 in this form. n851 Virginia, however, limits its use to noncompliance that poses a serious threat to a tenant's health and safety and requires that payments be made to a court even before eviction proceedings are commenced. n852 Florida also requires that payments be made to a court. n853 New Mexico requires that even though a tenant can counterclaim, the tenant must continue to pay rent while in possession. n854 Ohio, whose statute is loosely based on the URLTA, provides a procedure whereby tenants, upon a landlord's breach, may deposit rent with the clerk of a court. n855

A number of statutes that are not based on the URLTA do not expressly provide for rent withholding. However, courts in these jurisdictions typically hold that tenants may raise a landlord's breach of the habitability requirement as a defense to nonpayment of rent in an action for possession. n856 North Carolina's provision expressly states that landlord-tenant obligations are "mutually dependent," but also declares that tenants cannot withhold rent without judicial approval. n857 The North Carolina Court of Appeals has held that, although tenants cannot withhold rent, they can remain on the premises and bring an affirmative action for rent abatement. n858

Courts have noted that a tenant can withhold rent only for substantial noncompliance with the landlord's statutory duties. Withholding is not authorized for every complaint; neither is it authorized for claims unrelated to the landlord's statutory warranty of habitability. n859 When the diminution in value because of breach of the landlord's duty is less than the rent withheld, the tenant can retain possession by paying the landlord any additional rent owed. n860

§ 43.05(d)(4) Repair and Deduct.

A repair and deduct remedy permits a tenant to make needed repairs and then deduct that amount from the rent. In effect it is a forced application of the landlord's rent proceeds to make required repairs. n861

Although not identified as such, the URLTA provides two forms of repair and deduct remedies. First, § 4.103 provides that a tenant may make minor self help repairs and deduct the cost from the rent. As with other remedies, the tenant must first give the landlord notice of the problem and time to make repairs. n862 The second and more substantial repair and deduct remedy is found in § 4.104. It provides that if a landlord willfully or negligently fails to supply "heat, running water, hot water, electric, gas or other essential service" the tenant, after giving notice, may procure the essential service and deduct the cost from the rent. n863 Alternatively, the tenant may procure "reasonable substitute housing" and be excused from paying rent for the period of landlord noncompliance. n864 If the tenant selects this last option, the tenant will also be able to recover "the actual and reasonable cost or fair and reasonable value of the

substitute housing not in excess of an amount equal to the periodic rent." n865

A majority of the URLTA states have adopted these provisions, with some variations. However, New Mexico and Oklahoma n866 do not include either provision, and Alaska, Iowa, and Oregon do not include self help for minor repairs. n867 Several states have modified the essential service provision, limiting it to willful deprivations of service. n868 The ability to use self help is less certain in other states with statutory warranties. But New York has recognized that tenants have a repair and deduct remedy for breaches of the statutory warranty. n869 And Maine provides tenants with a repair and deduct remedy for conditions that endanger or impair a tenant's health or safety. n870

FOOTNOTES:

(n1)Footnote 746. *See* Quinn & Phillips, *The Law of Landlord -- Tenant: A Critical Evaluation of the Past with Guidelines for the Future, 38 Fordham L. Rev. 225 (1969).*

(n2)Footnote 747. *Id. at 228.*

(n3)Footnote 748. *Id. at 234.*

(n4)Footnote 749. *See* Cunningham, *The New Implied and Statutory Warranties of Habitability in Residential Leases: From Contract to Status, 16 Urb. L. Ann. 3 (1979).*

(n5)Footnote 750. *428 F.2d 1071* (D.C. Cir.) , *cert. denied, 400 U.S. 925 (1970)* .

(n6)Footnote 751. *Id. at 1072-73* , 1082-1083.

(n7)Footnote 752. *See Green v. Superior Court, 517 P.2d 1168 (Cal. 1974)* ; *Jack Spring, Inc. v. Little, 280 N.E.2d 208 (Ill. 1972)* ; *Mease v. Fox, 200 N.W.2d 791 (Iowa 1972)* ; *Boston Hous. Auth. v. Hemingway, 293 N.E.2d 831 (Mass. 1973)* ; *Kline v. Burns, 276 A.2d 248 (N.H. 1971)* ; *Foisy v. Wyman, 515 P.2d 160 (Wash. 1973)* .

(n8)Footnote 753. *See* Cunningham, *The New Implied and Statutory Warranties of Habitability in Residential Leases: From Contract to Status, 16 Urb. L. Ann. 3, 51-59 (1979)* (discussing 19th century legislation based on civil law sources).

(n9)Footnote 754. 7B Uniform Laws Annotated 289 (2006).

(n10)Footnote 755. *See* 7B Uniform Laws Annotated 285 (2006) (table of jurisdictions that have adopted the URLTA).

(n11)Footnote 756. *See e.g.*, 2 *Del. Code Ann. tit. 25, §§ 5101-5517*; Md. Code, Real Property § 8-201 et seq.; *Vt. Stat. Ann. tit. 9 §§ 4451-4468*.

(n12)Footnote 757. *See Idaho Code § 6-320*; *14 Me. Rev. Stat. Ann. § 6021*; *Mich. Comp. Laws Ann. § 554.139*; N.Y. - McKinney's Real Prop. Law § 235-b; *N.C. Gen. Stat. § 42-32*; *N.D. Cent. Code § 47-16-13.1*; *Utah Code Ann. §§ 57-22-1 - 57-22-6*; *W. Va. Code § 37-6-30*; *Wis. Stat. Ann. § 704.07*.

(n13)Footnote 758. *See* N.J. Stat. § 2A; *Wash. Rev. Code Ann. §§ 59.18.010-59.18.900*.

(n14)Footnote 759. *See* Comment to URLTA § 2.104.

(n15)Footnote 760. URLTA § 1.102.

(n16)Footnote 761. URLTA, comment to § 1.102.

(n17)Footnote 762. URLTA §§ 2.101 - 2.103.

(n18)Footnote 763. URLTA § 2.104(a).

(n19)Footnote 764. URLTA § 4.101.

(n20)Footnote 765. URLTA § 4.103.

(n21)Footnote 766. URLTA § 4.104.

(n22)Footnote 767. URLTA § 4.105.

(n23)Footnote 768. URLTA §§ 3.101 - 3.103.

(n24)Footnote 769. URLTA § 4.201.

(n25)Footnote 770. *Id.*

(n26)Footnote 771. URLTA § 4.201(c).

(n27)Footnote 772. URLTA at § 5.101.

(n28)Footnote 773. Model Residential Landlord Tenant Code (American Bar Foundation 1969).

(n29)Footnote 774. Conn. Gen. Stat. §§ 47a-56a; *Hawaii Rev. Stat. §§ 521-1 - 521-77 .See* Cunningham, *The New Implied and Statutory Warranties of Habitability in Residential Leases: From Contract to Status, 16 Urb. L. Ann. 3, 67 (1979)* (indicating that the Delaware and Hawaii Statutes are based on the Model Code rather than the URLTA).

(n30)Footnote 775. Indeed, a table published in the volume that includes the URLTA lists Hawaii as a state that has adopted the URLTA. *See* 7B Uniform Laws Annotated 285 (2006).

(n31)Footnote 776. URLTA § 2.104.

(n32)Footnote 777. *See Alaska Stat. § 34.03.160*.

(n33)Footnote 778. *Tenn. Code § 66-28-304*.

(n34)Footnote 779. *Ky. Rev. Stat. § 383.595*.

(n35)Footnote 780. *Fla. Stat. Ann. § 83.51*; *Kan. Stat. Ann. § 58-2553*.

(n36)Footnote 781. *N.M. Stat. Ann. § 47-8-20*.

(n37)Footnote 782. *See Miss. Code Ann. § 89-8-23*. As of this writing, there is some proposed legislation to add an obligation to provide and maintain the dwelling unit in a habitable condition. *See* 2007 Miss. H.B. 1257.

(n38)Footnote 783. *Wash. Rev. Code Ann. § 59.18.060*.

(n39)Footnote 784. *Nev. Rev. Stat. § 118A.290*.

(n40)Footnote 785. *See Wash. Rev. Code Ann. § 59.18.060*.

(n41)Footnote 786. *See Nev. Rev. Stat. § 118A.290*.

(n42)Footnote 787. URLTA § 2.104(c).

(n43)Footnote 788. *See* URLTA § 2.104(c)

(n44)Footnote 789. *See, e.g.*, Mont. Rev. Codes Stat. § 70-24-303 (applies to one, two or three family residence).

(n45)Footnote 790. *See Del. Code Ann. tit. 25 § 5303*; *Haw. Rev. Stat. § 521-51*.

(n46)Footnote 791. *See* Md. Code Real Prop. § 8-211.

(n47)Footnote 792. *See Vt. Stat. Ann. tit. 9 § 4457*.

(n48)Footnote 793. *See generally* William B. Stoebuck & Dale A. Whitman, The Law of Property (2000). *See also* Restatement (Second) of Property, Landlord & Tenant, ch. 5.

(n49)Footnote 794. *N.D. Cent. Code § 47-16-13.1*.

(n50)Footnote 795. *N.C. Gen. Stat. § 42-42*.

(n51)Footnote 796. Conn. Gen. Stat. § 47a.

(n52)Footnote 797. *Utah Code Ann. § 57-22-4*.

(n53)Footnote 798. *14 Me. Rev. Stat. Ann. § 6021*.

(n54)Footnote 799. N.Y. McKinney's Real Prop. Law § 235-b.

(n55)Footnote 800. *Me. Rev. Stat. Ann. tit. 14 § 6021*.

(n56)Footnote 801. Wis. Stat. Ann. § 823.22.

(n57)Footnote 802. *Minn. Stat. Ann. § 504B.161*.

(n58)Footnote 803. *Tex. Prop. Code Ann. § 92.056*.

(n59)Footnote 804. Wis. Stat. Ann. § 823.22.

(n60)Footnote 805. *Wis. Stat. Ann. §§ 704.07*.

(n61)Footnote 806. *Idaho Code § 6-320*.

(n62)Footnote 807. *Me. Rev. Stat. Ann. tit. 14 § 6021*.

(n63)Footnote 808. *Tex. Prop. Code § 92.056*.

(n64)Footnote 809. *Wis. Stat. Ann. § 704.07*.

(n65)Footnote 810. *Utah Code Ann. § 57-22-6*.

(n66)Footnote 811. Me. Rev. Stat. Ann. tit. 14, §§ 6031-6038; N.Y. McKinney's Real Prop. Law § 235-b; Iowa Code Ann. § 562.A.12. The Wisconsin statute would permit waiver in the case of a nonresidential tenancy, if the waiver is in writing. *See Wis. Stat. Ann. § 704.07*.

(n67)Footnote 812. *Mich. Comp. Laws Ann. § 554.139*.

(n68)Footnote 813. Mich. Comp. Laws Ann. §§ 554.601-554.616.

(n69)Footnote 814. *N.C. Gen. Stat. § 42-42*.

(n70)Footnote 815. *N.D. Cent. Code § 47-16-13.1*.

(n71)Footnote 816. Me. Rev. Stat. Ann. tit. 14 §§ 6031-6038.

(n72)Footnote 817. *See Idaho Code § 6-320*; Conn. Gen. Stat. Ann. § 47a; *W. Va. Code § 37-6-30*.

(n73)Footnote 818. *See Teller v. McCoy, 253 S.E.2d 114, 130-31 (W. Va. 1978)* .

(n74)Footnote 819. *Park West Mgt. Corp. v. Mitchell, 391 N.E.2d 1288, 1293 (N.Y. 1979) , cert. denied, 444 U.S. 992 (1979)* .

(n75)Footnote 820. For the Restatement position, *see* Restatement (Second) of Property, §§ 5.2-5.4.

(n76)Footnote 821. *See, e.g.*, URLTA §§ 4.01(a)(3); 4.103(b)& 4.104(d) (remedies do not arise if the condition was caused "by the deliberate or negligent act or omission of the tenant, a member of his family, or other person on the premises with his consent."

(n77)Footnote 822. *See, e.g.*, URLTA §§ 4.101(a); 4.103(a) & 4.104(d). It does not appear that the URLTA requires the tenant to provide prior notice to the landlord if the tenant decides to bring an action for damages or injunction. *See* URLTA § 4.101(b) & 4.103(a).

(n78)Footnote 823. *See, e.g.*, URLTA § 4.104.

(n79)Footnote 824. URLTA § 4.101.

(n80)Footnote 825. *See, e.g.*, N.H. Rev. Stat. Ann. § 540 (will terminate in 20 days if not remedied in 10).

(n81)Footnote 826. *See, e.g., Alaska Stat. § 34.03.160*; URLTA § 4.101.

(n82)Footnote 827. *Wis. Stat. Ann. § 704-07(4)*.

(n83)Footnote 828. *Utah Code Ann. § 57-22-6*.

(n84)Footnote 829. *See Teller v. McCoy, 253 S.E.2d 114 (W. Va. 1978)* .

(n85)Footnote 830. *See, e.g., Iowa Code Ann. § 562A.21*; URLTA § 4.101. *See also* Restatement (Second) of Property, Landlord and Tenant, § 10.2.

(n86)Footnote 831. *See* URLTA § 4.101(b).

(n87)Footnote 832. *See Idaho Code § 6-320(a)*.

(n88)Footnote 833. *14 Me. Rev. Stat. Ann. § 6021(4)*.

(n89)Footnote 834. Mich. Comp. Laws Ann. §§ 554.601-554.616.

(n90)Footnote 835. *See, e.g., Park West Mgt. Corp. v. Mitchell, 391 N.E.2d 1288 (N.Y. 1979)* ; *Teller v. McCoy, 253 S.E.2d 114 (W. Va. 1978)* .

(n91)Footnote 836. *See* William B. Stoebuck & Dale A. Whitman, The Law of Property 336-337 (2000). *See also*, Restatement (Second) of Property, Landlord and Tenant, § 11.1.

(n92)Footnote 837. *Id.*

(n93)Footnote 838. *See, e.g., Roeder v. Nolan, 321 N.W.2d 1 (Iowa 1982)* .

(n94)Footnote 839. *See, e.g., Lane v. Kelley, 643 P.2d 1375 (Or. 1981)* .

(n95)Footnote 840. *See, e.g., Roeder v. Nolan, 321 N.W.2d 1 (Iowa 1982)* ; *Love v. Monarch Apts., 771 P.2d 79 (1989)* .

(n96)Footnote 841. *See Teller v. McCoy, 253 S.E.2d 114 (W. Va. 1978)* .

(n97)Footnote 842. *See Thomas v. Goudreault, 786 P.2d 1010 (Ariz. Ct. App. 1989)* ; *Brewer v. Erwin, 600 P.2d 398 (Or. 1979)* .

(n98)Footnote 843. *Thomas v. Goudreault, 786 P.2d 1010 (Ariz. Ct. App. 1989)* .

(n99)Footnote 844. *See, e.g., Schuman v. Kobets, 760 N.E.2d 682 (Ind. Ct. App. 2002)* (no recovery as a matter of law); *Tucker v. Hayford, 75 P.3d 980 (Wash. Ct. App. 2003)* (recovery permitted).

(n100)Footnote 845. See § 41.09.

(n101)Footnote 846. *See Brewer v. Erwin, 600 P.2d 398 (Or. 1979)* .

(n102)Footnote 847. *600 P.2d at 443.*

(n103)Footnote 848. *See Pleasant East Assocs. v. Cabrera, 480 N.Y.S.2d 693 (1984)* (landlord failed to provide services to an apartment with the clear intent to cause one or both of the tenants to vacate).

(n104)Footnote 849. *See* URLTA § 4.105.

(n105)Footnote 850. *See also* Restatement (Second) of Property, Landlord and Tenant, § 11.3 (regarding rent withholding).

(n106)Footnote 851. *See, e.g.*, R.I. § 34-18-32; *but see Conn. Gen. Stat. Ann. § 47a* 12 (does not include); *Miss. Code Ann. §§ 89-8-1 - 89-8-27*. The Mississippi statute does not include any form of § 4.105.

(n107)Footnote 852. *See Va. Code § 55-248.25*.

(n108)Footnote 853. *See Fla. Stat. Ann. § 83.60*.

(n109)Footnote 854. *See* Vt. Stat. Ann. tit. 9 § 4661.

(n110)Footnote 855. *See Ohio Rev. Code Ann. § 5321.07*.

(n111)Footnote 856. *See Park West Mgt. Corp. v. Mitchell, 391 N.E.2d 1288 (N.Y. 1979)* ; *Teller v. McCoy, 253 S.E.2d 114 (W. Va. 1978)* ; *Fritz v. Warthen, 213 N.W.2d 339 (Minn. 1973)* .

(n112)Footnote 857. *See N.C. Gen. Stat. § 42-44(c)*.

(n113)Footnote 858. *See Miller v. C. W. Myers Trading Post, Inc., 355 S.E.2d 189 (N.C. App. 1987)* .

(n114)Footnote 859. *See Napolski v. Champney, 667 P.2d 1013 (Or. 1983)* .

(n115)Footnote 860. *Id.*

(n116)Footnote 861. *See* Restatement (Second) of Property, Landlord and Tenant § 11.2.

(n117)Footnote 862. URLTA § 4.103.

(n118)Footnote 863. URLTA § 4.104.

(n119)Footnote 864. *Id.*

(n120)Footnote 865. URLTA § 4.104(b).

(n121)Footnote 866. *See N.M. Stat. Ann. §§ 47-8-1* -47-8-52; *Okla. Stat. Ann. tit. 41, §§ 101-135*.

(n122)Footnote 867. *See Alaska Stat. §§ 34.03.010-34.03.380*; *Iowa Code Ann. §§ 562A.1-562A.37*; *Ore. Rev. Stat. §§ 90.360 - 90.361*.

(n123)Footnote 868. *See, e.g., Kan. Stat. Ann. § 58-2563*.

(n124)Footnote 869. *See Katurah Corp. v. Wells, 454 N.Y.S.2d 770 (1982)* .

(n125)Footnote 870. *Me. Rev. Stat. tit. 14 § 6026*.

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CHAPTER 43 STATUTORY MODIFICATIONS OF LANDLORD-TENANT LAW

5-43 Thompson on Real Property, Thomas Editions § 43.06

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§ 43.06 Retaliatory Conduct Statutes.

[Go To Supp]

§ 43.06(a) Prohibitions Against Retaliatory Conduct.

Landlord-tenant reforms are of little utility if a landlord can evict or otherwise punish tenants for asserting their rights. This is particularly true if there are housing shortages and if comparable defective conditions exist at alternative housing sites. For that reason, most jurisdictions prohibit retaliatory conduct by landlords.

Prohibitions against retaliatory eviction emerged at the very beginning of the landlord-tenant reform movement. At least fourteen states had statutory prohibitions even before the URLTA was issued in 1972. n871 The URLTA, which includes a retaliatory conduct provision, has been adopted in some form in some 20 states, though a few of them had already adopted a prohibition against landlord retaliation. n872 As a result of these, and other, statutory enactments, a clear majority of states have some statutory provisions prohibiting retaliatory conduct by landlords.

Retaliatory conduct statutes are designed to prohibit landlords from retaliating against tenants for asserting their rights or joining tenant groups. For example, the URLTA protects tenants who: 1) complain to a government agency concerning a housing code violation applicable to the premises that materially affects health and safety; 2) complain to the landlord about a violation of the landlord's statutory obligations to maintain the premises; and 3) have organized or become members of a tenants' union or similar organization. n873

Anti-retaliation statutes typically prohibit landlords from retaliating against a tenant in specified ways. Thus, the URLTA prohibits landlords from increasing rents, decreasing services, or evicting or threatening to evict a tenant after the tenant has engaged in one of the activities protected by the Act. n874

The prohibition against retaliatory eviction could apply even if the landlord seeks to evict the tenant while claiming that he or she intends to take the rental unit off the market. n875 In *Drouet v. Superior Court*, n876 a tenant contended that a landlord who sought to do this should be compelled to prove not merely that the landlord had a bona fide intent to go out of business but also that the bona fide intent was not motived by the tenant's exercise of rights protected under the retaliatory conduct legislation. The California Supreme Court rejected the tenant's contention, and stated:

> We therefore hold that where a landlord has complied with [legislation permitting removal of a rental unit from the market] and has instituted an action for unlawful detainer, and the tenant has asserted the statutory defense of retaliatory eviction, the landlord may overcome the defense by demonstrating a bona fide intent to withdraw the property from the market. If the tenant controverts the landlord's bona fide intent to withdraw the property, the landlord has the burden to establish its truth at the hearing by a preponderance of the evidence.

Id. at 1196 .

The purpose of retaliatory conduct statutes is to prohibit retaliatory actions by landlords. Accordingly, the statutes do not prohibit particular conduct of the landlord in all instances, but only if the conduct has a retaliatory motive behind it. The most problematic aspect of these statutes is establishing whether there is retaliatory motive.

A number of statutes address the concern by creating a presumption of retaliatory motive if a landlord's conduct occurs within a specified period after designated tenant activities. For example, the URLTA creates a presumption of retaliation if the landlord's conduct occurs within a year of a complaint by the tenant that comes within the protection of the Act. n877 The burden then shifts to the landlord to introduce evidence that the landlord's conduct was not retaliatory. n878 Some URLTA have not included this provision in their statutes, or have modified it in some way. n879 By way of example, the Virginia statute states that the tenant has the burden of proof in establishing retaliatory motive. n880

Finally, a number of state statutes include exceptions to retaliatory conduct prohibitions, under which a landlord may evict a tenant notwithstanding a retaliatory motive. These fall into two general groups. First, some states incorporate exceptions similar to those in the Model Residential Landlord-Tenant Code. n881 These include exceptions if the tenant is committing waste or using the property illegally, if the tenant caused the problem forming the basis of the complaint, and if the leased premises are in full compliance with applicable codes. n882

A second group of state statutes, based on the URLTA, provide that, notwithstanding retaliatory motive, a landlord may evict a tenant: 1) if the violation of the building or housing code was caused by the tenant, a member of the tenant's family, or a person on the leased premises with the tenant's consent; 2) if the tenant is in default in rent; and 3) if compliance with applicable codes would require alterations that would effectively deprive the tenant of the use of the leased premises. n883 Most states that have adopted the URLTA include these exceptions in their legislation.

§ 43.06(b) Remedies.

If established, retaliatory conduct is a defense to eviction actions by landlords. It can also be a basis of additional remedial assistance.

The URLTA provides that, in addition to providing the tenant with an affirmative defense against eviction, retaliatory conduct by the landlord may allow the tenant to recover up to three months' rent or three times the tenant's actual damages, whichever is greater. n884 This provision has been adopted in most URLTA states, although most of those statutes have modified the amount of recovery. For example, in Kansas a tenant can recover up to one and a half times rent or actual damages. n885 Virginia limits recovery to actual damages. n886

Most other states also permit retaliatory conduct to be the basis for recovery of damages. For example, Massachusetts permits a minimum recovery of one month's rent and a maximum recovery of three months' rent. n887

FOOTNOTES:
(n1)Footnote 871. *See* Comment to URLTA § 5.101.

(n2)Footnote 872. *See* 7B Uniform Laws Annotated 285 (2006) (table of jurisdictions where URLTA has been adopted); URLTA § 5.101, Comment.

(n3)Footnote 873. *See* URLTA § 5.101(a).

(n4)Footnote 874. *See* URLTA § 5.101(a).

(n5)Footnote 875. *See Drouet v. Superior Court, 73 P.3d 1185 (Cal. 2003)* .

(n6)Footnote 876. *73 P.3d 1185 (Cal. 2003)* .

(n7)Footnote 877. *See* URLTA § 5.101(b). However, the presumption does not arise if the tenant "made the complaint after notice of a proposed rent increase or diminution of services." *See id.*

(n8)Footnote 878. *See* URLTA § 5.101(b).

(n9)Footnote 879. *See, e.g., Neb. Rev. Stat. § 76-1439*; *N.M. Stat. Ann. § 47-8-39*; *Tenn. Code Ann. § 66-28-514*.

(n10)Footnote 880. *See Va. Code § 55-248.39*.

(n11)Footnote 881. *See Conn. Gen. Stat. Ann. § § 47a* 20a; *Del. Code Ann. tit. 25 § 5516*; *Haw. Rev. Stat. § 521-74*. Of these statutes, the one in Delaware includes the most extensive list of exceptions.

(n12)Footnote 882. *See* Model Residential Landlord Tenant Code § 2-407 (American Bar Foundation).

(n13)Footnote 883. *See* URLTA § 5.101.

(n14)Footnote 884. *See* URLTA §§ 5.101(b) & 4.107.

(n15)Footnote 885. *See Kan. Stat. Ann. § 58-2572*.

(n16)Footnote 886. *See Va. Code Ann. § 55-248.39*.

(n17)Footnote 887. *See* Conn. Gen. Stat. Ann. § 47a-21.

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CHAPTER 43 STATUTORY MODIFICATIONS OF LANDLORD-TENANT LAW

5-43 Thompson on Real Property, Thomas Editions § 43.07

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§ 43.07 Repair and Deduct Statutes.

At least five states have special repair and deduct statutory provisions. Several of these trace their roots to the Field Code, portions of which were adopted in California in 1872. n888 The current California statute contains several sections, the first of which imposes a duty upon landlords of residential property to put the property into a condition fit for human occupation and to repair "all subsequent dilapidations thereof, which render it untenantable." n889 A subsequent section identifies particular conditions that will render the dwelling untenantable. n890 The legislation also provides that if a landlord fails to remedy defects, the tenant may repair and deduct or may vacate the premises. However, the tenant can only deduct one month's rent and can exercise this remedy only once every twelve months. n891

North Dakota and South Dakota have similar statutes. The South Dakota statute first imposes a duty on landlords to keep the premises in good repair and fit for human habitation. n892 It further provides that if a landlord breaches the duty the tenant may repair and deduct or vacate the premises. n893 The legislation also provides that if the cost of necessary repairs exceeds a month's rent, the tenant may, after notice, withhold payment of the rent. n894 The North Dakota statute gives tenants a repair and deduct remedy, without stated limitations, and the right to vacate the premises. n895

Louisiana has a repair and deduct statute based on the civil law. Under the provisions of the Louisiana Civil Code, the "lessor is bound to make all repairs that become necessary to maintain the thing in a condition suitable for the purpose for which it was leased, except those for which the lessee is responsible." n896 If the lessor fails to perform the obligation to make the necessary repairs within a reasonable time after demand by the lessee, the lessee may cause the repairs to be made. Thereafter, the lessee may demand immediate reimbursement for the amount of the repair, or the lessee may apply that amount to the payment of the rent. n897 However, these rights are available only to the extent that the repair was necessary and the expended amount was reasonable. n898

FOOTNOTES:

(n1)Footnote 888. *See generally* Cunningham, *The New Implied and Statutory Warranties of Habitability in Residential Leases: From Contract to Status, 16 Urb. L. Ann. 3, 51-59 (1979).*

(n2)Footnote 889. *See Cal. Civ. Code § 1941*.

(n3)Footnote 890. *See Cal. Civ. Code § 1941.1*.

(n4)Footnote 891. *See* N.H. Rev. Stat. Ann. § 540-A6.

(n5)Footnote 892. *See* S.D. Comp. Laws Ann. § 43-32-8.

(n6)Footnote 893. *See* S.D. Comp. Laws Ann. § 43-32-9.

(n7)Footnote 894. *See* S.D. Comp. Laws Ann. § 43-32-9.

(n8)Footnote 895. *See N.D. Cent. Code § 47-16-13*.

(n9)Footnote 896. N.D. Cent. Code § 46-16-07.1. Another article imposes obligations on the lessee to repair damage caused by the lessee's fault or by the fault of persons who are on the premises with the consent of the lessee, as well as to repair deterioration resulting from excessive use. *See La. Civ. Code art. 2692*.

(n10)Footnote 897. *La. Civ. Code art. 2694*.

(n11)Footnote 898. *La. Civ. Code art. 2694*.

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CHAPTER 43 STATUTORY MODIFICATIONS OF LANDLORD-TENANT LAW

5-43 Thompson on Real Property, Thomas Editions § 43.08

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§ 43.08 Rent Escrow Statutes.

§ 43.08(a) General Provisions.

In addition to rent withholding for breach of statutory remedies, a number of states have enacted special rent withholding and escrow statutes for housing code violations. Several such statutes date back to the early part of this century. n899 A 1905 Connecticut statute, for example, required a landlord to obtain a certification of housing law compliance in order to collect rents or to evict a tenant for nonpayment of rent. n900 The majority of these statutes, however, were enacted in the 1960s and 1970s. Although varying in form, they generally give tenants the right to place rent payments into an escrow account until a landlord remedies substantial housing code violations.

These statutes take several approaches on what triggers the right to suspend rent. n901 First, a number of statutes require a judicial determination that there has been a housing code violation before a tenant can suspend rent payments. n902 These statutes typically provide that either tenants or a code enforcement agency can bring the action. n903 The statutes typically require that a substantial housing code violation be found. n904 However, the Delaware statute premises withholding on a lack of specified essential services, or "other conditions imminently dangerous to the life, health, or safety of the tenant." n905 At least two states require a court determination that defects constitute a "nuisance." n906

Second, several statutes provide that rent withholding is triggered by a governmental agency determination that a building is unfit for habitation. n907 Under the Pennsylvania statute, for instance, a tenant's duty to pay rent is suspended if an appropriate government agency certifies that a building is "unfit for human habitation." n908 Similarly, the Michigan statute provides that rent may be placed into escrow if a certificate of housing code compliance has been suspended. n909 The Rhode Island statute states that rent is suspended if a housing code enforcement officer determines that the dwelling poses a "serious hazard or imminent peril to the health, safety, or welfare" of the tenants. n910

Almost all statutes require that tenants place rent payments into an escrow account. n911 When statutes first require a judicial determination of defects, the escrow is often set up by the clerk of the court. n912 In other states the escrow is set up with the code enforcement agency, n913 or with a bank or trust company. As discussed below, a number of statutes also provide that a receiver may be appointed to collect rents.

Most statutes provide that rent placed into escrow is available to the landlord to fund repairs of the leased premises. n914 Statutes often provide that, once defects are corrected, any surplus goes to the landlord. n915 Thus, although withholding serves as an incentive for repair, it does not necessarily provide tenants with rent abatement for the diminished value of the property. Several states, however, provide for forms of rent abatement. For example, the Delaware statute provides that a receiver may use collected rents to compensate tenants for "deprivations" caused by the poor conditions. n916 Similarly, the Minnesota statute provides that a court may order rent abatement for impaired use and enjoyment of the property. n917 The Pennsylvania statute does not directly provide for rent abatement, but does state that if defects are not remedied within six months deposited rents are to be returned to the tenants. n918

Some statutes authorize other forms of relief. The Michigan statute, for example, provides that tenants may seek damages and injunctive relief. n919 Several other statutes provide that a court may order injunctive relief. n920 And a number of statutes provide for the appointment of a receiver. n921

Finally, several states have rent withholding statutes applicable only to buildings occupied by welfare recipients. An Illinois statute, for example, authorizes welfare agencies to withhold rent allowances and direct payments to landlords when there are substantial housing code violations in buildings occupied by welfare recipients. n922 The statute also prohibits tenant eviction as a result of withholding. Several other states have similar statutes. n923

§ 43.08(b) Receivership Provisions.

Some rent withholding statutes authorize a court to appoint a receiver to collect rents and to supervise repairs. n924 Under most statutes, receivership is one of several options available to a court, although, in some instances, the receivers may be appointed only upon judicial determination of substantial housing code violations.

The primary purpose of the receivership is to facilitate the repair of the property and to remedy housing code violations. n925 To this end, receivers are usually given broad management powers, including collection of rents, payment of taxes and other management costs, and general management of the property. n926 They may apply collected rents n927 or borrow funds n928 to make repairs. Some receivership provisions permit the receiver to compensate tenants or abate the rent for diminished value of the property. n929

§ 43.08(c) Constitutional Challenges.

Rent withholding statutes of the kind described here have been challenged for invalidity. The most common challenge has been that they violate due process, with landlords asserting that the statutes are arbitrary and capricious and constitute an unconstitutional deprivation of property. Courts have held, however, that the statutes are a legitimate exercise of the police power. n930 Courts have noted that the purpose of these statutes is to ensure an adequate supply of decent and safe housing, n931 and that permitting rent withholding is substantially related to that purpose.

Courts have rejected arguments that such statutes are an unduly oppressive means of seeking to meet otherwise legitimate goals. In this regard, they have emphasized that the statutes do not relieve a tenant of the duty to pay rent, but rather require rent payments to be made in a manner that encourages landlord repairs. n932

Courts have also rejected various other challenges to the validity of the statutes. For example, the Pennsylvania Supreme Court has held that permitting a code enforcement agency to determine if rent can be withheld is not an unconstitutional delegation of legislative power, since the statute provides adequate standards with respect to the withholding decision. n933 Courts have also held that the statutes do not deny equal protection n934 and do not unconstitutionally impair contracts. n935

FOOTNOTES:

(n1)Footnote 899. *See* Cunningham, *The New Implied and Statutory Warranties of Habitability in Residential Leases: From Contract to Status, 16 Urb. L. Ann. 3, 23-25 (1979)* (listing Connecticut 1905; Iowa 1919; and New York 1929 as having early statutes).

(n2)Footnote 900. Cunningham, *The New Implied and Statutory Warranties of Habitability in Residential Leases: From Contract to Status, 16 Urb. L. Ann. 3, 23 (1979).*

(n3)Footnote 901. *See generally* Robert Schoshinski, American Law of Landlord and Tenant § 3.40 (1980).

(n4)Footnote 902. *See, e.g.*, Mo. Stat. Ann. § 441.570; *N.J. Stat. Ann. 2A:42-92*.

(n5)Footnote 903. *See, e.g.*, Mo. Stat. Ann. § 441.570; *N.J. Stat. Ann. § 2A:42-88*.

(n6)Footnote 904. *See, e.g., N.J. Stat. § 2A*: 42-88.

(n7)Footnote 905. *See Del. Code Ann. tit. 25, § 5901*.

(n8)Footnote 906. See *Conn. Gen. Stat. §§ 47a-56a*; Mo. Stat. Ann. § 441.570. The Connecticut statute defines "nuisance" as a serious fire hazard or other threat to the life, health, or safety of the tenants.

(n9)Footnote 907. *See, e.g., Minn. Stat. Ann. § 504B.385*.

(n10)Footnote 908. *See Pa. Stat. Ann. tit. 35, § 1700-1*; *cf. Notre Dame Leasing, LLC v. Rosario 761 N.Y.S.2d 292 (App. Div. 2003) , aff'd, 812 N.E.2d 291 (N.Y. 2004)* (state welfare officials may exercise the power to withhold rent for the general good of the public, but individual welfare recipients cannot).

(n11)Footnote 909. *See* Utah Code Ann. § 78-36-6.

(n12)Footnote 910. *See R.I. Gen. Laws § 45-24.2-11*.

(n13)Footnote 911. *See, e.g., Minn. Stat. Ann. § 504B.385*; *R.I. Gen. Laws § 45-24.2-11*.

(n14)Footnote 912. *See, e.g.*, Mo. Stat. Ann. § 441.570; *N.J. Stat. § 2A:42-92*.

(n15)Footnote 913. *See R.I. Gen. Laws § 45-24.2-11*.

(n16)Footnote 914. *See, e.g., Pa. Stat. Ann. tit. 35, § 1700-1*.

(n17)Footnote 915. *See, e.g.*, Mo. Stat. Ann. § 441.570; *R.I. Gen. Laws § 45-24.2-11*.

(n18)Footnote 916. *Del. Code Ann. tit. 25 § 5901*.

(n19)Footnote 917. *See* Conn. Gen. Stat. Ann. § 47a.

(n20)Footnote 918. *See Pa. Stat. Ann. tit. 35, § 1700-1*.

(n21)Footnote 919. *Mich. Comp. Laws Ann. § 125.536*.

(n22)Footnote 920. *See, e.g., Minn. Stat. Ann. § 566.25*.

(n23)Footnote 921. Receivership provisions are discussed in the following section of this chapter.

(n24)Footnote 922. *See* Ill. Ann. Stat. ch. 23 § 11-23.

(n25)Footnote 923. *See N.Y. Soc. Serv. Law § 143(b)*; *R.I. Gen. Laws Ann. § 40-6-14*.

(n26)Footnote 924. *See Conn. Gen. Stat. § 47a* 56a; Ind. Code Ann. § 32-7-1-7; *Mich. Comp. Laws Ann. § 125.535*; Mo. Stat. Ann. § 441.570; *N.J. Stat. § 2A:42-93*; *Wis. Stat. Ann. § 823.22*.

(n27)Footnote 925. *See Mich. Comp. Laws Ann. § 125.535*.

(n28)Footnote 926. *See, e.g., Del. Code Ann. tit. 25 § 5906*.

(n29)Footnote 927. *See, e.g., id.*

(n30)Footnote 928. *See Wis. Stat. Ann. § 823.22*.

(n31)Footnote 929. *See Del. Code Ann. tit. 25 § 5906*; Utah Code Ann. § 78-36-3.

(n32)Footnote 930. *See, e.g., Second Nat'l Bank v. Loftus, 185 A. 423 (Conn. 1936)* ; *DePaul v. Kauffman, 272 A.2d 500 (Pa. 1972)* .

(n33)Footnote 931. *See, e.g., DePaul v. Kauffman, 272 A.2d 500 (Pa. 1972)* .

(n34)Footnote 932. *Id.*

(n35)Footnote 933. *See DePaul v. Kauffman, 272 A.2d 500 (Pa. 1972)* .

(n36)Footnote 934. *See Schaeffer v. Montes, 233 N.Y.S.2d 444 (1962)* .

(n37)Footnote 935. *See Farrell v. Drew, 227 N.E.2d 824 (N.Y. 1967)* .

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CHAPTER 43 STATUTORY MODIFICATIONS OF LANDLORD-TENANT LAW

5-43 Thompson on Real Property, Thomas Editions § 43.09

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§ 43.09 Security Deposit Statutes.

Almost all residential landlords require tenants to provide a security deposit, often equal to one month's rent, at the commencement of the lease. Although varying in form, lease agreements typically permit landlords to apply the deposit to unpaid rent, damages caused by the tenant, and other breaches. Any remaining funds are to be returned to the tenant at the end of the lease.

The actual use of security deposits in practice has been subject to substantial abuse. It is frequently asserted that landlords abuse the use of security deposits either by simply keeping the money or by fabricating claims of tenant breach. Since the landlord has the money in hand, this places a substantial burden on tenants to recover moneys rightfully owed to them.

The perception of substantial landlord abuse of security deposits has led over forty states to enact statutes regulating the use of security deposits. One fundamental restriction imposed by all statutes is in the amount of the deposit, with most limitations ranging from one to two months' rent. n936 Most statutes impose itemization and use requirements. And a number of statutes impose deposit and interest requirements as well.

§ 43.09(a) Deposit and Interest Requirements.

Approximately half of the states with security deposit legislation require that security deposits be placed into special accounts. In most instances the money must be placed into an escrow or trust account, with statutes often specifying the nature of the bank and that it be federally insured. n937 For example, the Maine statute requires that security deposits be placed into a bank or other financial institution account. n938 Similarly, the Iowa statute requires that moneys be deposited into a federally insured bank account. n939 Several statutes provide that the landlord can post a bond in lieu of placing the money into an account. n940

The primary purpose of such deposit requirements is to insure that the tenant's money be available for refunds. To this end, several statutes also prohibit commingling of security deposits with other landlord assets. n941 But the statutes usually permit landlords to place security deposits together into a single account.

A number of states also require that landlords pay interest on the amount on deposit. n942 In some states, the interest payment requirement applies only in particular situations. For example, in Illinois, interest must be paid if the landlord has 25 or more dwelling units in a single building or complex of buildings on contiguous parcels and if the deposits are held more than six months. n943 Similarly, both New Hampshire n944 and New Mexico n945 require payment of interest on deposits held more than a year, and Pennsylvania requires payment on accounts held longer than two years. n946 In contrast, Iowa's statute specifically provides that any interest belongs to the landlord. n947 Many statutes are silent on the payment of interest.

§ 43.09(b) Itemization and Use Requirements.

Perhaps the primary concern raised by use of security deposits is landlord abuse in their retention at lease end. Security deposit legislation addresses this concern in several ways. First, almost all statutes require that landlords return the security deposit within a specified period and provide an itemized list to the tenant that supports any amounts withheld. For example, the URLTA provides that the landlord must return the deposit with an itemized list supporting amounts withheld within fourteen days of termination of the lease and demand by the tenant. n948 Most statutes provide a comparable scheme, with return within 30 days being the most common period. n949

Second, almost all statutes limit the reasons for which a landlord may retain a security deposit. Most statutes provide that landlords may apply the security deposit to accrued rent and to damages caused by a tenant's breach of a lease obligation. n950 The URLTA for example, provides that a landlord may apply the security deposit to payment of accrued rent and to damages suffered as a result of a tenant's noncompliance with applicable duties to maintain the dwelling. n951

Statutes provide other grounds for retention as well. These include the payment of cleaning charges, n952 unpaid utility bills, n953 or expenses incurred in removing articles the tenant left behind. n954 The Colorado statute, for example, provides that the landlord can apply the security deposit to nonpayment of rent, nonpayment of utility bills, repairs, and cleaning costs. n955 A number of statutes specifically state, however, that a landlord cannot apply the security deposit to repairs caused by ordinary wear and tear. n956

§ 43.09(c) Remedies.

Almost all statutes provide that if a landlord wrongfully withholds a security deposit a tenant may recover the money owed plus a specified amount. n957 Most common are statutes that provide that the tenant may recover twice the amount wrongfully withheld. n958 Several statutes provide that the tenant can recover treble damages. n959 Some statutes provide for punitive damages. n960

§ 43.09(d) Transfer of the Landlord's Interest.

A number of states have statutes that impose different degrees of obligation on transferees of the landlord's reversion for return of the deposit. n961 Some statutes, including the Uniform Residential Landlord and Tenant Act, n962 provide that transferees of the reversion are bound by provisions of security deposit legislation that require that they return deposits at the end of the tenancy. n963 Other states have statutes that expressly require that the security deposits be transferred to the landlord's successor in interest who then becomes liable to the tenant for the security deposit. n964 Several statutes provide that, upon transfer of the landlord's interest, the landlord must either transfer the security deposit to the transferee, or return the deposit to the tenant. n965

Some statutes include provisions that give special protections to transferees. For example, the Iowa statute provides that, upon termination of the landlord's interest in the dwelling unit, the landlord's successor in interest will have all the rights and obligations of the landlord with respect to rental deposits. However, the successor can send the tenant a written notice stating the amount of the deposit. If the tenant does not object to the stated amount within twenty days,

the obligation of the successor to return the deposit will be limited to the amount contained in the notice. n966

Additional information relating to security deposits and transfer of the landlord's reversion is contained in Chapter 42. n967

FOOTNOTES:
(n1)Footnote 936. *See, e.g., Alaska Stat. § 34.03.070* (two months); *Kan. Stat. Ann. §§ 58-2550 - 58-2559* (one month).

(n2)Footnote 937. *See, e.g., Alaska Stat. § 34.03.070* (shall deposit in trust or escrow account); *Iowa Code Ann. § 562A.12* (shall hold in an insured savings account).

(n3)Footnote 938. *See Me. Rev. Stat. Ann. tit. 14, §§ 6031-6038*.

(n4)Footnote 939. *See Iowa Code Ann. § 562.A.12*.

(n5)Footnote 940. *See Fla. Stat. Ann. § 83.49(3)(a)*; *Ga. Code Ann. § 8-3-202*; *Mich. Comp. Laws Ann. §§ 554.601-554.616*.

(n6)Footnote 941. *See Fla. Stat. Ann. § 83.49(3)(a)*; *Iowa Code Ann. § 562A.12*; *Me. Rev. Stat. Ann. tit. 14 §§ 6031-6038*; *Tenn. Code Ann. § 66-28-301*.

(n7)Footnote 942. *See, e.g., Conn. Gen. Stat. Ann. § 47a* 21; Md. Real Prop. Code § 8-203.

(n8)Footnote 943. *See 765 Ill. Comp. Stat. Ann. 715/1*.

(n9)Footnote 944. *See N.H. Rev. Stat. Ann. § 540* A:6.

(n10)Footnote 945. *See N.M. Stat. Ann. § 47-8-18*.

(n11)Footnote 946. *See Pa. Stat. Ann. tit. 68 §§ 250.511a* 250.512.

(n12)Footnote 947. *See Iowa Code Ann. § 562A.12* ("Any interest earned on a rental deposit during the first five years of a tenancy shall be the property of the landlord.").

(n13)Footnote 948. *See* URLTA § 2.101.

(n14)Footnote 949. *See, e.g., Ga. Code Ann. § 8-3-202*; *Idaho Code Ann. § 6-321*.

(n15)Footnote 950. *See, e.g., La. Rev. Stat. Ann. 9:3251*; *Mich. Comp. Laws Ann. §§ 554.601-554.616*.

(n16)Footnote 951. *See* URLTA § 2.101.

(n17)Footnote 952. *See Colo. Rev. Stat. § § 38-12-101 - 38-12-104*; *Mont. Code Ann. §§ 70-25-201 - 70-25-206*.

(n18)Footnote 953. *See Colo. Rev. Stat. §§ 38-12-101 - 38-12-104*; *N.C. Gen. Stat. §§ 42-50 - 42-57*; *Vt. Stat. Ann. tit. 9 § 4661*.

(n19)Footnote 954. *See Vt. Stat. Ann. tit. 9 § 4461*.

(n20)Footnote 955. *See Colo. Rev. Stat. §§ 38-12-101 - 38-12-104*.

(n21)Footnote 956. *See, e.g., Idaho Code Ann. § 6-321*; Md. Real Prop. Code § 8-203.

(n22)Footnote 957. Issues can arise, however, with respect to when the time starts to run on the landlord's obligation to return the deposit. *See, e.g., Mitchell v. First Real Estate Equities, Inc., 671 A.2d 621 (N.J. Sup. Ct. 1996)* .

(n23)Footnote 958. *See, e.g., Mont. Code Ann. §§ 70-25-201 - 70-25-206*. Of course, the landlord might have claims to assert against the tenant as well. *See, e.g., Granberry v. Islay Investments, 889 P.2d 970 (Cal. 1995)* , *cert. denied, 516 U.S. 866 (1995)* (landlords who failed to timely return security deposit permitted to assert setoff against amounts on deposit).

(n24)Footnote 959. *See, e.g., Ga. Code Ann. §§ 44-7-30 - 44-7-36*; Md. Real Prop. Code § 8-203.

(n25)Footnote 960. *See Iowa Code Ann. § 562A.12*.

(n26)Footnote 961. *See generally* Robert Schoshinski, American Law of Landlord and Tenant § 6.35 (1980).

(n27)Footnote 962. *See* URLTA §§ 2.101(a), 2.105(a).

(n28)Footnote 963. *See Alaska Stat. § 34.03.070*; *Ariz. Rev. Stat. § 33-1321*; *Hawaii Rev. Stat. § 521-44*; *Idaho Code § 6-321*; *765 Ill. Comp. Stat. Ann. 710/1.1*; *Ind. Code Ann. § 32-31-3-12*; Md. Real Prop. Code § 8-203; *Neb. Rev. Stat. § 76-1416*; *N.D. Cent. Code § 47-16-07.1*; *Or. Rev. Stat. § 90.300*; *R.I. Gen. Laws § 34-18-19*; *S.C. Code Ann. § 27-40-410*; *Tex. Prop. Code § 92.105*; *Va. Code Ann. § 55-248.15:1*.

(n29)Footnote 964. *See Conn. Gen. Stat. Ann. § 47a-21*; *Fl. Stat. Ann. § 83.49*; La. Civ. Code Ann. § 3251; *Mass. Gen. Laws Ann. ch. 186 § 15b*; *N.H. Rev. Stat. Ann. § 540-A6*; *N.J. Stat. Ann. § 46:8-20*; *N.D. Cent. Code § 46-16-07.1*; *Vt. Stat. Ann. tit. 9 § 4461*; *Wash. Rev. Code § 59.18.270*.

(n30)Footnote 965. *See Cal. Civ. Code § 1950.5*; *Colo. Rev. Stat. § 38-12-103*; *Me. Rev. Stat. Ann. tit. 14 § 6035*; *Minn. Stat. Ann. § 504B.178*; *N.C. Gen. Stat. § 42-54*; Okla. Rev. Stat. tit. 41 § 115.

(n31)Footnote 966. *See Iowa Code Ann. § 562A.12*.

(n32)Footnote 967. *See* § 42.03(d)(2).

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CHAPTER 43 STATUTORY MODIFICATIONS OF LANDLORD-TENANT LAW

5-43 Thompson on Real Property, Thomas Editions § 43.10

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§ 43.10 General Statutory Modifications and Enactments.

Almost all states have statutory landlord-tenant enactments beyond those described above. The nature, scope, and extent of these statutes vary substantially. In some instances they are rather modest modifications of common law principles. More typical, however, are statutes that cover a variety of subjects relating to landlord-tenant law, often including both codification of common law principles and enactment of more modern landlord-tenant provisions.

All states have some form of summary eviction statute, often as part of a forcible entry and unlawful detainer scheme. These statutes typically prohibit unlawful possession of or forcible entries onto premises and list grounds for which a landlord can recover possession of the property. The main import of these statutes today, however, is to provide a summary eviction proceeding by which the landlord may recover possession of the property in an expedited fashion. The statutes vary, but they typically include the basis for invoking summary proceedings, notice and service requirements, pleading provisions, jurisdiction requirements, and limitations on joining unrelated claims. n968 These statutes will occasionally also include other provisions, such as notice requirements for termination of leases n969 and distress for rent provisions. n970 In most states, however, summary proceeding statutes are separate from other landlord-tenant statutory provisions.

Almost half the states have also adopted some form of the Uniform Residential Landlord and Tenant Act (URLTA) or the Model Residential Landlord-Tenant Code. n971 To the extent that they track the model statutes, these state statutes include the warranties and remedies, security deposit provisions, and retaliatory conduct provisions discussed in § 43.06 of this chapter. Moreover, to the extent that they track the model statutes, the state statutes also include provisions dealing with landlord-tenant obligations, n972 creation and termination of periodic tenancies, n973 tenant rights when the leased premises are damaged or destroyed by fire or casualty, n974 landlord remedies for holdover tenants, n975 abolition of distraint for rent, n976 prohibition of landlord exculpatory clauses, n977 regulation of tenant abandonment, n978 the landlord's duty to mitigate damages, n979 the landlord's obligation to deliver possession of the premises, n980 limitations on recovery of possession, n981 and other matters.

Most URLTA states have statutory provisions in addition to the URLTA. Several states have separate commercial leasing statutes. n982 A number of states also have separate statutory provisions concerning agricultural leases. n983 Finally, some states have separate statutes for mobile home leases. n984

The variety and total number of statutory provisions is substantial, and a detailed discussion of such provisions is beyond the scope of this work. For this reason the discussion will be limited to the areas discussed below, which represent some of the common areas of statutory enactments.

§ 43.10(a) Creation and Termination of Tenancies.

Most states have statutes that concern the creation and termination of tenancies. If the type of tenancy is not specified, the statute typically provide for creation of either a tenancy at will, n985 or a periodic tenancy based on the payment period. n986

A significant number of states have statutes that codify the common law rule that a tenancy for years terminates automatically at the end of its term. n987 There is, however, some variation in notice requirements for tenancies that can be terminated with notice. The common law requirement of six months' notice for termination of a year to year periodic tenancy has been reduced in most states to three months, n988 although a number establish shorter periods. n989 Week to week tenancies typically require seven days' notice, but that is not always the case. n990 Most month to month tenancies require thirty days' notice, n991 although some statutes provide shorter periods, n992 and a few longer. n993

The common law rule that tenancies at will can be terminated without prior notice has also been modified in some states by requiring notice, though there are variations in the required notice period. n994

Some statutes impose different notice periods for the landlord and the tenant. n995 Several statutes also have different notice periods for residential and nonresidential tenancies. n996

§ 43.10(b) Holdover Tenants.

Most states provide tenants with a statutory right to evict holdover tenants and to collect damages. Most common are recovery of double rent for the time retained, n997 although a few limit recovery to actual damages, n998 and several provide for treble rent recovery. n999 The URLTA provides that, for willful tenant holdovers, the landlord can recover three months' periodic rent or threefold actual damages, whichever is greater. n1000 However, statutes often provide that landlord acceptance of rent after the termination of a tenancy creates a periodic tenancy. n1001

§ 43.10(c) Distress for Rent.

The common law distress for rent remedy gave landlords the right to seize and retain a tenant's property on the premises in return for rent owed. n1002 Several statutes recognize distress for rent but modify the common law by eliminating self help and instead requiring issuance and service of a distress warrant by a public official. n1003 Several such statutes have been held unconstitutional. n1004

A greater number of states, as well as the URLTA, abolish the remedy altogether. n1005 A few states, such as Delaware, abolish distress for rent for residential tenancies, but retain it for other tenancies. n1006

§ 43.10(d) Landlord Liens.

A number of states have statutes that provide landlords with liens on tenants' property. n1007 Many have special provisions for crop liens, n1008 while others have more general lien provisions. n1009 Although generalizations are difficult, such statutes typically grant landlords a lien on the tenant's property when rent is unpaid. Some statutes also provide procedures for lien enforcement, such as foreclosure and sale. At the same time, however, several states, as well as the URLTA, have specifically abolished landlord liens on a tenant's property. n1010 The abolition is often stated in conjunction with abolishing the remedy of distress for rent.

§ 43.10(e) Abandonment and Mitigation.

Many states have statutes that address the parties' rights when a tenant abandons the property. Some statutes provide landlords with the right, under some circumstances, to claim property left after abandonment. n1011 For example, the Vermont statute provides that a landlord is required to notify the tenant of property left on the premises and to store the property for 45 days if its value is less than $1,000 and for six months if its value is greater. If the property is unclaimed, it becomes the property of the landlord. n1012 Some states also provide that the landlord may seize crops when a tenant has abandoned the premises. n1013

Some statutes reject the common law rule that a landlord has no duty to mitigate damages when a tenant abandons the leased premises. These statutes, many of which apply to residential leases, typically require that the landlord make reasonable efforts to rent the property upon abandonment, or they provide that if the landlord fails to make reasonable efforts it is assumed the landlord has accepted an offer of surrender and terminated the lease. n1014 Several statutes also impose duties on both landlords and tenants to mitigate damages when possible. n1015

§ 43.10(f) Destruction of Premises.

Two types of statutory provisions cover destruction of leased premises by fire or other casualty. First, one type provides that a tenant's covenant to repair does not include a duty to rebuild premises that have been destroyed. n1016 Second, several states, generally following the URLTA, provide that a tenant may vacate the premises and be released from rent if the premises have been destroyed. n1017 A Georgia statute, however, states that the destruction of a tenement by fire or the loss of possession by a casualty not caused by the landlord will not abate the rent. n1018 Most statutes dealing with destruction of the premises apply when the premises have been substantially destroyed, although a few also deal with partial destruction. n1019

§ 43.10(g) Tort Liability.

A large number of states statutorily prohibit landlord exculpatory clauses for tort liability, usually as part of a broader list of prohibited clauses. n1020 Some states also modify common law principles of landlord-tenant tort liability. Illinois, for example, abolishes the common law distinction between invitees and licensees and provides that the standard of care for entrants is that of reasonable care under the circumstances. n1021 A Georgia statute provides that landlords are not liable in tort for injuries or damages resulting from the tenant's negligent use of the premises, but is liable in damages for defective construction or for failing to keep the premises in repair. n1022

§ 43.10(h) Transfers of Landlord-Tenant Interests.

Many states have statutes addressing transfer of landlord/tenant interests. Some state statutes codify the common law rule that "attornment" is unnecessary when a landlord's interest is conveyed, or provide that a tenant's attornment to a stranger is void. n1023 The effect of these statutes is to provide that landlords may transfer their reversionary interests without the consent of the tenant.

Other state statutes address a tenant's ability to transfer an interest in property. Some statutes provide that a tenant can assign or sublet without the landlord's consent, unless the parties agree otherwise. n1024 An equal number, however, provide that tenants cannot assign or sublet without the landlord's consent. n1025 In some instances, this is limited only to tenancies of a limited duration, such as one that is shorter than two years. n1026 Some statutes provide that consent to transfer cannot be unreasonably withheld. n1027

Finally, statutes often provide that whatever rights the landlord has against a tenant, the landlord has those same rights against an assignee of the tenant. n1028 Similarly, by statute, tenants retain their basic remedies against assignees of their landlords. n1029

§ 43.10(i) Removal of Fixtures.

Several states have statutes regulating removal of fixtures by a tenant, typically providing that the tenant may remove fixtures unless their removal would cause injury to the premises or they have become a permanent part of the business. n1030

§ 43.10(j) Statute of Frauds.

All fifty states have statutes, based on the English Statute of Frauds, that require that voluntary transfers of land, including leaseholds, be in writing. n1031 Whereas the English statute applied only to leases exceeding three years, most American jurisdictions require a writing for leases exceeding one year. n1032 A few states follow the English statute and require a writing only for leaseholds exceeding three years, n1033 while several others appear to require a writing for all leases. n1034 The majority of statutes state that the effect of violating the statute is to void or make the lease ineffectual. n1035 A few states provide that the effect of violating the statute is to create a tenancy at will. n1036

FOOTNOTES:

(n1)Footnote 968. *See, e.g., Iowa Code Ann. §§ 648.1 - 648.23*.

(n2)Footnote 969. *See Colo. Rev. Stat. § 13-40-107*; *Utah Code Ann. § 78-36-6*.

(n3)Footnote 970. *See, e.g., 735 Ill. Comp. Stat. Ann. § 5/9-301 et seq* .

(n4)Footnote 971. *See* § 43.05(b) of this chapter.

(n5)Footnote 972. *See* URLTA §§ 2.101-2.105, 3.101-3.104.

(n6)Footnote 973. *See* URLTA § 4.301.

(n7)Footnote 974. *See* URLTA § 4.106.

(n8)Footnote 975. *See* URLTA § 4.301.

(n9)Footnote 976. *See* URLTA § 4.205.

(n10)Footnote 977. *See* URLTA § 1.403.

(n11)Footnote 978. *See* URLTA § 4.203.

(n12)Footnote 979. *Id.*

(n13)Footnote 980. *See* URLTA § 2.103.

(n14)Footnote 981. URLTA § 4.207.

(n15)Footnote 982. *See, e.g., Fla. Stat. Ann. §§ 83.001 et seq.* (non residential); §§ 83.40 *et seq*. (residential); *R.I. Gen. Laws §§ 34-18-1 - 34-18-56* (residential); 34-18-1 - 34-18-20 (non residential).

(n16)Footnote 983. *See, e.g.*, Ark. Stat. Ann. §§ 18-41-101 - 108; *Ga. Code Ann. §§ 44-7-100 - 44-7-103*.

(n17)Footnote 984. *See, e.g., Colo. Rev. Stat. §§ 38-12-201 - 38-12-220*.

(n18)Footnote 985. *See Fla. Stat. Ann. § 83.01*; *Ga. Code Ann. § 44-7-6*; *N.H. Rev. Stat. Ann. § 540:1*.

(n19)Footnote 986. *See Conn. Gen. Stat. Ann. § 47a* 3b; *Del. Code Ann. tit. 25 § 5107(b)*; Mo. Stat. Ann. §

441.060; *S.C. Code Ann. § 27-35-30*; *Wash. Rev. Code Ann. § 59.04.020*.

(n20)Footnote 987. *See e.g.*, *Ariz. Rev. Stat. Ann. § 33-341*; *Cal. Civ. Code § 1933*; *Colo. Rev. Stat. Ann. § 13-40-107*; *Ind. Code Ann. § 32-7-1-7*; *Kan. Stat. Ann. § 58-2509*; *Miss. Code Ann. § 89-7-23*; *Mo. Ann. Stat. § 441.070*; *Nev. Rev. Stat. § 40.250*; *N.Y. Real Prop. Law § 232* b; *N.D. Cent. Code § 47-16-14*; Okla. Rev. Stat. tit. 41 § 8; *Or. Rev. Stat. § 91.080*; S.D. Comp. Laws § 43-32-22; *Utah Code Ann. § 78-36-3*; *Va. Code Ann. § 55-222*; *Wash. Rev. Code § 59.04.030*; *W. Va. Code § 37-6-5*.

(n21)Footnote 988. *See Colo. Rev. Stat. § 13-40-107*; *N.H. Rev. Stat. Ann. § 540:3*; Okla. Rev. Stat. tit. 41 § 5; *R.I. Gen. Laws § 34-18-37*; *W. Va. Code § 37-6-5*.

(n22)Footnote 989. *Miss. Code Ann. § 89-7-23* (two months); *Mo. Ann. Stat. § 441.050* (60 days); *N.C. Gen. Stat. § 42-14* (one month); *N.D. Cent. Code § 47-16-15* (30 days); S.D. Comp. Laws § 43-32-15; *Mich. Comp. Laws Ann. § 554.134* (one year's notice).

(n23)Footnote 990. *See Fla. Stat. Ann. § 83.03*; *Haw. Rev. Stat. § 521-77* (10 days); *Kan. Stat. Ann. § 58-2570*; *Neb. Rev. Stat. § 76-1437*; *N.C. Gen. Stat. § 42-14* (two days); *Ohio Rev. Code Ann. § 5321.17*; *Or. Rev. Stat. § 91.070* (10 days); *R.I. Gen. Laws § 34-18-37*; *Tenn. Code Ann. § 66-28-512* (10 days).

(n24)Footnote 991. *See Colo. Rev. Stat. § 13-40-107*; *Haw. Rev. Stat. § 521-71* (28 days for tenant); *Kan. Stat. Ann. § 58-2570*; *Mich. Comp. Laws Ann. § 554.134*; Md. Real Prop. Code § 8-402(b); *Neb. Rev. Stat. § 76-1437*; *N.Y. Real Prop. Law § 232* b; *N.D. Cent. Code § 47-16-15*; *Ohio Rev. Code Ann. § 5321.17*; Okla. Rev. Stat. tit. 41 § 4; *Or. Rev. Stat. § 91.070*; *R.I. Gen. Laws § 34-18-37*; *S.C. Code Ann. § 27-35-120*; S.D. Comp. Laws § 43-32-13; *Tenn. Code Ann. § 66-28-512*; *W. Va. Code § 37-6-5*.

(n25)Footnote 992. *See Fla. Stat. Ann. §§ 83.03, 83.57* (15 days).

(n26)Footnote 993. *See Del. Code Ann. tit. 25 § 5107*; *Haw. Rev. Stat. § 521-71* (60 days for landlord); *Vt. Stat. Ann. tit. 9 § 4467* (60 days unless written agreement for 30 days).

(n27)Footnote 994. *See Ga. Code Ann. § 44-7-7* (60 days for landlord, 30 days for tenant); *Kan. Stat. Ann. § 58-2504*; Mo. Stat. Ann. § 441.060; Okla. Rev. Stat. tit. 41 § 4; *S.C. Code Ann. § 27-35-120* (20 days); *but see N.H. Rev. Stat. Ann. § 540:2* (may terminate by mere notice). *See also* Restatement (Second) of Property, Landlord and Tenant § 1.6.

(n28)Footnote 995. *See Ga. Code Ann. § 44-7-7* (60 days notice from landlord, 30 days notice from tenant to terminate a tenancy at will); *Haw. Rev. Stat. § 521-71* (45 days notice for landlord, 28 days notice from tenant to terminate a month to month tenancy).

(n29)Footnote 996. *See, e.g.*, *Fla. Stat. Ann. § 83.03* (three months notice for non residential year to year); § 83.57 (two months notice for residential year to year).

(n30)Footnote 997. *See Ala. Code § 6-6-314*; *Alaska Stat. § 34.03.290*; Ark. Stat. § 18-16-106; *Del. Code Ann. tit. 25 § 5509(c)*; *Fla. Stat. Ann. §§ 83.06, 83.58*; *Haw. Rev. Stat. § 521-71*; *Kan. Stat. Ann. § 58-2570(c)* (11/2 rent or 11/2 actual damages); *Mo. Ann. Stat. § 441.080*; *S.C. Code Ann. § 27-35-170*.

(n31)Footnote 998. *See Ariz. Rev. Stat. Ann. § 12-1271*; *Wash. Rev. Code § 59.18.290*.

(n32)Footnote 999. *See Neb. Rev. Stat. § 76-1437*; *R.I. Gen. Laws § 34-18-38*.

(n33)Footnote 1000. *See* URLTA § 4.301.

(n34)Footnote 1001. *See, e.g.*, *Cal. Civ. Code § 1945*; *N.J. Stat. Ann. § 46:8-10*; *N.Y. Real Prop. Law § 232* C;

Wis. Stat. Ann. § 704.25 (residential tenancies). *See also Haw. Rev. Stat. § 521-71* (if landlord fails to evict tenant within 60 days, then month to month tenancy established); *See also* Restatement (Second) of Property, Landlord and Tenant §§ 14.1-14.7 (regarding holdover tenants).

(n35)Footnote 1002. *See* William B. Stoebuck & Dale A. Whitman, The Law of Property § 6.57 (2000).

(n36)Footnote 1003. *See Fla. Stat. Ann. § 83.08* (non residential); *Ga. Code Ann. § 44-7-70*; *S.C. Code Ann. §§ 27-39-210 to 27-39-360*.

(n37)Footnote 1004. *See* Restatement (Second) of Property, § 12.1, statutory note 5 (1977) (listing Florida, Illinois, Kentucky, New Jersey, Pennsylvania, and West Virginia as having distress statutes that were declared unconstitutional).

(n38)Footnote 1005. *See Alaska Stat. §34.03.250*; *Del. Code Ann. tit. 25 § 6301* (except pursuant to rental agreement for commercial unit); *Kan. Stat. Ann. § 58-2567*; *Minn. Stat. Ann. § 504B.101*; *Neb. Rev. Stat. § 76-1434*; *N.C. Gen. Stat. § 42-25.7*; *Or. Rev. Stat. § 90.420*; *R.I. Gen. Laws § 34-18-42*; *Wash. Rev. Code Ann. § 59.18.230*; *Wis. Stat. Ann. § 704.11*; URLTA § 4.205.

(n39)Footnote 1006. *See Del. Code Ann. tit. 25 § 6301*.

(n40)Footnote 1007. *See Ala. Code § 35-9-60*; Ark. Stat. §§ 18-41-101 - 18-41-108; *Fla. Stat. Ann. § 83.08*; *Miss. Code Ann. § 89-7-51*; Mo. Stat. Ann. §§ 441.280-441.300; *N.C. Gen. Stat. § 42-15*; Okl. Rev. Stat. tit. 41 § 133; *Tenn. Code Ann. § 66-28-509* (if perfected under UCC); *Utah Code Ann. §§ 38-3-1 - 38-3-8*; *W. Va. Code § 37-6-17*.

(n41)Footnote 1008. *See, e.g., Ala. Code § 35-9-30*; Ark. Stat. §§ 18-4-101 - 18-4-108; *N.C. Gen. Stat. § 42-15*; Okla. Rev. Stat. tit. 41 § 27.

(n42)Footnote 1009. *See, e.g., Ala. Code § 35-9-60*; *Fla. Stat. Ann. § 83.08*; *Utah Code Ann. §§ 38-3-1 - 38-3-8*.

(n43)Footnote 1010. *See Kan. Stat. Ann. § 58-2567*; *Neb. Rev. Stat. § 76-1434*; URLTA § 4.205.

(n44)Footnote 1011. *See Haw. Rev. Stat. § 521-56*.

(n45)Footnote 1012. *See Vt. Stat. Ann. tit. 9 § 4462(c)*.

(n46)Footnote 1013. *See, e.g., 735 Ill. Comp. Stat. Ann. 5/9-318*.

(n47)Footnote 1014. *See Ala. Code 1975 § 35-9A-423*; *Ariz. Rev. Stat. Ann. § 33-1370* (residential leases); *Cal. Civ. Code §§ 1951.2, 1951.4*; *Haw. Rev. Stat. § 521-70*; *Ky. Rev. Stat. Ann. § 383.670*; Md. Real Prop. Code § 8-207 (residential leases); Okla. Rev. Stat. tit. 41 § 129; *Or. Rev. Stat. § 90.410*; *R.I. Gen. Laws § 34-18-40*; *S.C. Code Ann. § 27-40-730*; *Tenn. Code Ann. § 66-28-507* (residential leases); *Wash. Rev. Code Ann. § 59.18.310*; *Wis. Stat. Ann. § 704.29*; Restatement (Second) of Property, Landlord and Tenant § 12.1 (no duty to mitigate when tenant abandons).

(n48)Footnote 1015. *See Neb. Rev. Stat. § 76-1405*; *N.D. Cent. Code § 47-16-13.5*.

(n49)Footnote 1016. *See Ky. Rev. Stat. Ann. § 383.170*; Md. Real Prop. Code § 8-113; *Mo. Ann. Stat. § 441.010*; *N.C. Gen. Stat. § 42-9*; *Va. Code Ann. § 55-226*.

(n50)Footnote 1017. *See Alaska Stat. §§ 34.03.040, 34.03.200*; *Ariz. Rev. Stat. Ann. § 33-343*; *Cal. Civ. Code § 1932*; *Del. Code Ann. tit. 25 § 5308*; *Fla. Stat. Ann. § 83.56*; *Haw. Rev. Stat. § 521-65*; *Kan. Stat. Ann. § 58-2562*; Md. Real Prop. Code § 8-112; *Mich. Comp. Laws Ann. § 554.201*; *Neb. Rev. Stat. § 76-1429*; *N.J. Stat. Ann. § 46:8-7*; *N.C. Gen. Stat. § 42-12*; *N.D. Cent. Code § 47-16-17*; *Ohio Rev. Code Ann. § 5301.11*; *R.I. Gen. Laws § 34-18-33*; *S.C. Code Ann. § 27-40-650*; S.D. Comp. Laws § 43-32-19; *Tenn. Code Ann. § 66-28-503*; *Va. Code Ann. § 55-226*; *W. Va. Code § 37-6-28*; *Wis. Stat. Ann. § 704.07*. *See also* Restatement (Second) of Property, Landlord and Tenant §

5.2.

(n51)Footnote 1018. *See Ga. Code Ann. § 44-7-15*.

(n52)Footnote 1019. *See, e.g., Ky. Rev. Stat. Ann. § 383.170*; Article 9 of Uniform Commercial Code; *N.J. Rev. Stat. § 46:8-7*.

(n53)Footnote 1020. *See 43 U.S.C.S. 1427* et seq.; Conn. Gen. Laws § 47a-7; *Del. Code Ann. tit. 25 § 5515*; *Fla. Stat. Ann. § 83.47*; *Haw. Rev. Stat. § 521-33*; *Kan. Stat. Ann. § 58-2547*; Md. Real Prop. Code § 8-105; *Mass. Gen. Laws Ann. ch. 186 § 15*; *Neb. Rev. Stat. § 76-1415*; *N.M. Stat. Ann. § 70-7-16*; *Ohio Rev. Code Ann. § 5321.13*; *Or. Rev. Stat. § 90.245*; *Va. Code Ann. § 55-248.9*; *Wash. Rev. Code Ann. § 59.18.230*.

(n54)Footnote 1021. *See 740 Ill. Comp. Stat. Ann. § 130/2*; *see also Best v. Taylor Mach. Works 689 N.E.2d 1057 (Ill. 1997)* (reform amendments held unconstitutional).

(n55)Footnote 1022. *See Ga. Code Ann. § 44-7-14*.

(n56)Footnote 1023. *See Cal. Civ. Code § 1111*; *Idaho Code § 55-610*; *Ky. Rev. Stat. Ann. § 383.100*; *Miss. Code Ann. § 89-7-17*; *Mo. Ann. Stat. § 441.150*; *Nev. Rev. Stat. § 111.090*; *N.C. Gen. Stat. § 42-2*; *N.D. Cent. Code § 47-10-20*; Okla. Rev. Stat. tit. 41 § 119; *S.C. Code Ann. § 27-35-80*; S.D. Comp. Laws § 43-32-17; *Va. Code Ann. § 55-220*; *W. Va. Code § 37-6-3*; *cf. Wis. Stat. Ann. § 704.13*.

(n57)Footnote 1024. *See Del. Code Ann. tit. 25 § 5512(a)*; *Haw. Rev. Stat. § 521-37*; *La. Civ. Code art. 2713*.

(n58)Footnote 1025. *See Alaska Stat. § 34.03.060*; *Kan. Stat. Ann. § 58-2511*; *Ky. Rev. Stat. Ann. § 383.180(2)*; *Mo. Ann. Stat. § 441.030*; Okla. Rev. Stat. tit. 41 § 10; *S.C. Code Ann. § 27-35-60*; *Wis. Stat. Ann. § 704.09(1)*.

(n59)Footnote 1026. *See, e.g., Kan. Stat. Ann. § 58-2511* (two years or less); *Ky. Rev. Stat. Ann. § 383.180(2)* (two years or less); Okla. Rev. Stat. tit. 41 § 10 (two years or less); *Wis. Stat. Ann. § 704.09(1)* (less than a year to year tenancy).

(n60)Footnote 1027. *See Del. Code Ann. tit. 25 § 5512(b)* (if landlord requires consent it cannot be unreasonably withheld).

(n61)Footnote 1028. *See Cal. Civ. Code §§ 821, 822*; *Conn. Gen. Stat. Ann. § 47-29*; *Del. Code Ann. tit. 25 § 6704*; *Idaho Code § 55-302*; *Kan. Stat. Ann. § 58-2516*; Md. Real Prop. Code § 8-101; *Miss. Code Ann. § 89-7-15*; *N.J. Stat. Ann. § 46:8-2*; *N.C. Gen. Stat. § 42-8*; *N.D. Cent. Code § 47-16-30*; Okla. Rev. Stat. tit. 41 § 15; S.D. Comp. Laws § 43-32-20; *Va. Code Ann. § 55-217*; *W. Va. Code § 37-6-1*; *Wis. Stat. Ann. § 704.09*.

(n62)Footnote 1029. *See Cal. Civ. Code § 823*; *Idaho Code Ann. § 55-303*; *Kan. Stat. Ann. §§ 58-2515 - 58-2516*; *Miss. Code Ann. § 89-7-21*; *N.J. Stat. Ann. § 46:8-3*; *N.C. Gen. Stat. § 42-8*; *N.D. Cent. Code § 47-16-29*; Okla. Rev. Stat. tit. 41 § 15; S.D. Comp. Laws § 43-32-21; *Va. Code Ann. § 55-218*. *See generally* Restatement (Second) of Property, Landlord and Tenant §§ 15.1-15.2 (regarding transfer of interests).

(n63)Footnote 1030. *See Cal. Civ. Code § 1019*; *Ga. Code Ann. § 44-7-12*; *Idaho Code § 55-308*; Md. Real Prop. Code § 8-114; *N.D. Cent. Code § 47-06-04*; *Wis. Stat. Ann. § 704.05*.

(n64)Footnote 1031. *See generally* Restatement (Second) of Property, Landlord and Tenant §§ 2.1-2.5.

(n65)Footnote 1032. *See, e.g., Ala. Code § 8-9-2*; *Cal. Civ. Code § 1624*; First Amendment; First Amendment of the United States Constitution; *Mo. Ann. Stat. § 432.010*; *Or. Rev. Stat. § 41.580*; *Va. Code Ann. § 11-2*.

(n66)Footnote 1033. *See Ind. Code § 32-21-1-1*; *N.J. Stat. Ann. § 25:1-12* (but can prove by clear and convincing

evidence); *N.C. Gen. Stat. § 22-2*; *Pa. Stat. Ann. tit. 33 § 1*.

(n67)Footnote 1034. *See Me. Rev. Stat. Ann. tit. 33 § 51*; *Mass. Gen. Laws Ann. ch. 259 § 1*; *N.H. Rev. Stat. Ann. § 477:15*; *Ohio Rev. Code Ann. §§ 1335.04 - 1335.05*.

(n68)Footnote 1035. *See, e.g., Del. Code Ann. tit. 25 § 5107*; *S.C. Code Ann. § 27-35-20*.

(n69)Footnote 1036. *See, e.g., Fla. Stat. Ann. § 83.01*; *Pa. Stat. Ann. tit. 33 § 1*.

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§ 43.03(b)(1)(iii) The Fair Housing Act.

add:

Human Resource Research and Management Group, Inc. v. County of Suffolk, 687 F. Supp. 2d 237 (E.D. N.Y. 2010) (action challenging regulation of substance abuse recovery houses as in violation of the Fair Housing Act).

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§ 43.03(c)(3) Religion.

add:

Intermountain Fair Housing Council v. Boise Rescue Mission Ministries, 655 F. Supp. 2d 1150 (D. Idaho 2009) (action accusing operator of homeless shelter and alcohol recovery program of violating Fair Housing Act on the basis of religion and sex).

§ 43.03(c)(4) Sex.

Add:

Quigley v. Winter, 584 S. Supp. 2d 1153 (N.D. Iowa 2008) (action against landlord for sex discrimination by harassment).

§ 43.03(c)(7) Handicap.

Add:

Elmowitz v. Executive Towers at Lido, LLC, 2008 U.S. Dist. LEXIS 88967 (E.D.N.Y. July 22, 2008) (tenant suffering from bi-polar disorder, depression and anxiety stated a claim for retaliation against landlord who refused to renew lease).

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§ 43.03(e)(1) Refusal to Rent or Negotiate.

Add:

Villas West II of Willowridge Homeowners Ass'n, Inc. v. McGlothin, 885 N.E.2d 1274 (Ind. App. 2008) (a no-lease covenant did not violate the Fair Housing Act).

§ 43.03(e)(2) Terms, Conditions, Privileges, and Provisions of Service.

add:

Bloch v. Frischholz, 587 F.3d 771 (7th Cir. 2009) (action by Jewish condominium owners challenging, as a violation of the Fair Housing Act, a condominium association rule prohibiting placing objects outside of unit entrance doors).

add:

Quigley v. Winter, 598 F.3d 938 (8th Cir. 2010) (action by female tenant alleging discrimination on the basis of sex in violation of the Fair Housing Act).

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Supp. to § 43.04 Rent Control.

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§ 43.04(c)(6) Takings.

add:

Guggenheim v. City of Goleta, 582 F.3d 996 (9th Cir. 2009) (rent control ordinance that effectively transferred 90% of the property value from the mobile home park owners to the tenants was ruled a regulatory taking).

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§ 43.04(d)(6) Removals.

add:

Osoria v. West New York Rent Control Bd., 982 A.2d 1185 (N.J. Super. 2009) (following conversion, the tenant did not have a right to continue rent control protection).

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Supp. to § 43.06 Retaliatory Conduct Statutes.

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§ 43.06(a) Prohibitions Against Retaliatory Conduct [Go To Main]

Add:

Pendergrass v. Fagan, 180 P.3d 110 (Or. App. 2008) (the landlord's refusal to renew the lease after the lease had expired did not constitute retaliatory eviction).

Add:

Perdergrass v. Fagan, 218 Or. App. 533, 180 P.3d 110 (Or. App. 2008) (a tenant's action for retaliatory eviction was not rendered moot when the tenant vacated the premises).

§ 43.06(a)(1) Remedies.

Add:

2132- 38 *Wallace Ave. Corp. v. Gibson, 876 N.Y.S.2d 33 (2009)* (discrimination by landlord against tenant on the basis of the tenant's disability).

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CHAPTER 44 COMMERCIAL LEASING

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CHAPTER 44 COMMERCIAL LEASING

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§ 44.01 Introduction to Commercial Leasing.

Perhaps more than other chapters of this work, this chapter is addressed to the practical concerns of those who negotiate and draft commercial leases on behalf of landlords and tenants. As aptly expressed by a leading commercial leasing practitioner in the Washington, D.C. metropolitan area, "[W]hen your client hands you a 20- to 40-page single-spaced lease ... and asks you to negotiate the best possible deal, in the shortest possible time, and, of course, at the least possible expense, you need a checklist of the basic issues to consider." n1

Accordingly, these materials address issues that have traditionally been of the greatest concern in lease negotiations, discuss strategies and tactics for representing clients in commercial leasing transactions, and suggest approaches to resolving differences that balance the legitimate needs and rights of both parties. Liberal use is made of sample lease provisions. Where appropriate, the materials also discuss how courts and legislatures have addressed legal issues relating to commercial leasing. n2

In order to avoid duplication, the chapter focuses on topics unique to commercial lease transactions. Issues that arise in both commercial leasing and residential leasing generally are not considered separately in this chapter. Reference should be made to appropriate sections elsewhere in Volume 5 of this work for a discussion of such topics as the nature and duration of the landlord-tenant relationship, formalities required for creation of the landlord-tenant relationship, and the basic rights and obligations of landlords and tenants.

FOOTNOTES:
(n1)Footnote 1. Kenneth L. Samuelson, *The Retail Lease: What to Look For, Bargain For*, Legal Times, Apr. 7, 1986, at 23.

(n2)Footnote 2. It must be understood that, in a subject of this complexity and scope, these materials represent a survey of the field and a starting point for research. A good source of information for current developments in the law is the ABA Real Estate *Quarterly Report* sponsored by the American Bar Association Section on Real Property, Probate & Trust Law.

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CHAPTER 44 COMMERCIAL LEASING

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§ 44.02 Leased Premises.

§ 44.02(a) Description of Property.

An adequate description of the leased premises is essential to the validity of a lease agreement. n3 "The usual judicial formula is that a description is adequate though it is not a formal legal description or even a complete informal one, if it gives a clue that, with extrinsic evidence, identifies the intended premises. Street addresses and nicknames have been held adequate. In some jurisdictions, stricter standards for descriptions may be the rule, possibly even requiring a legal description. A saving principle, in its nature apt to save many questionable descriptions, is that an inadequate description is cured if the tenant takes possession." n4

In the case of a building not yet completed, the lease should contain a formula for precise identification of the location of the leased premises by the time of occupancy, typically by reference to a site plan attached as an exhibit to the lease and initialled by the parties at the time of execution.

Even if the lease is silent on the subject, easements will be implied, affording tenant the right of access over the common areas of the property for itself, its customers, and its employees. n5 A carefully drafted lease, from the tenant's perspective, will expressly grant tenant easements for use of the parking area as it existed on the lease commencement date, as well as walkways, malls, restrooms, lobbies, elevators, sewer and water conduits, utilities and the like. The landlord should consider the potential effect of any such easements on possible future expansion of the property. n6 A shopping center tenant facing a less attractive location may assert easement rights in seeking to prevent the landlord from building additional structures. n7

§ 44.02(b) Size of Premises.

Because the rent in a commercial lease is generally a function of the size of the leased premises, the lease will typically make reference to the size of the space and the method of rent calculation. In the case of a building not yet completed, the lease should contain an agreed mechanism for determining the size of the premises with precision, and for memorializing the result in a certificate signed on the lease commencement date. Subject to negotiation by the parties, the area for which a tenant will be charged rent (the so-called "rentable square footage") under local real estate custom may exceed the usable square footage within the actual boundaries of the demised premises. n8

§ 44.02(c) Construction of Leased Area.

If the leased premises are located in a new building, the landlord should be obligated to complete the shell, core, central systems, and common areas by a date certain or within a certain number of months following issuance of a building permit, subject to delays in the landlord's construction timetable for causes beyond the landlord's reasonable control, such as weather, strikes, shortages of material, and the like. n9

The lease should allocate responsibility for making improvements to the leased premises to accommodate the tenant's business needs and the cost of leasehold improvements. The tenant will typically receive an allowance toward the cost of such improvements in a fixed dollar amount per square foot of leased space. Alternatively, the landlord may agree, at the landlord's own expense, to furnish so-called "building standard" improvements, such as ceiling, wall, window and floor coverings, lighting, entrance and interior doors and hardware, of uniform quality to all tenants of the building. The tenant would be responsible for the cost of leasehold improvements in excess of the allowance or building standard.

Where the tenant is responsible for making improvements to the leased premises, the landlord will want the right to approve the tenant's contractors, protection against mechanic's liens, and proof of insurance coverages. n10

Leases for new space should provide a triggering mechanism for the tenant's obligation to move in and begin paying rent. Where the landlord is obligated to deliver the space on a turnkey basis, ready for installation of the tenant's fixtures, the lease commencement date is typically the date the landlord's architect certifies that the leased premises (and essential common areas, e.g., lobby, elevators, hallways, parking) are substantially complete so that the tenant can use the premises for the intended purpose, subject only to insubstantial "punch-list" items (e.g., mechanical adjustments, touch-up plastering and painting) to be completed after occupancy. n11 The tenant should be entitled to receive adequate prior written notice of the date the landlord intends to deliver possession of the space. n12 Where the tenant is responsible for making improvements, the lease commencement date will be the date the landlord delivers the premises to the tenant in condition for tenant improvements. n13

§ 44.02(d) Substitute Premises.

What once was a clear sign of a particularly overreaching landlord's form lease is a clause that is becoming increasingly common, n14 reserving to the landlord the right to relocate the tenant, against its will, to comparable substitute premises in the subject property (grandly, at the landlord's expense) n15 in the event the tenant's space might more profitably be rented as part of a larger block of space to another tenant. n16 Although not unheard of in leases for shopping centers, relocation clauses are generally found in leases for office buildings and other commercial contexts in which location is perceived as being less important to the tenant. n17 Large tenants often successfully negotiate for the elimination of this clause.

Courts have tended to reject the theoretical argument that the identification of particular premises of which the tenant has the exclusive right to possession for the duration of the term is one of the essential attributes of a valid lease, and that reservation of the right to relocate the tenant transforms the lease into a license. n18

§ 44.02(e) Lease Expansion Rights.

An option to expand the size of the premises anticipates the tenant's possible future growth without binding the tenant to pay more than necessary to meet its current space requirements. n19 The flexibility to lease additional space in the subject property during the term of the lease is particularly valuable during uncertain economic conditions, for start-up ventures, and for established businesses moving to new locations where success is uncertain. n20 For these reasons, lease expansion rights might perhaps be more appropriately considered in connection with the discussion of concession clauses. n21

From the landlord's perspective, expansion options limit the landlord's flexibility in leasing the expansion space to third party tenants, and they can negatively affect the amount that the landlord receives for rent. n22

The issues to be addressed in an expansion option clause include the location of the additional space, whether the tenant will accept the expansion space "as is" or the allocation of responsibility for making improvements, the notice period for tenant exercise of its expansion option (including whether time is of the essence), and whether or not the expansion space will be subject to all of the terms and conditions of the lease with respect to rent, services, and the like. Provision should be made for adjusting the tenant's proportionate share of common area expenses. n23 It is typically a condition of exercise of the expansion option that the tenant not be in default under any of the terms of the lease. n24

The expansion option may be expressed as a right of first refusal, by which the landlord agrees not to enter into any lease with a third party for space that becomes available in the building without first offering an existing tenant the right to lease such space on the same terms and conditions as the proposed third party lease.

Issues sometimes arise with respect to the manner in which a tenant has attempted to exercise an expansion option. A tenant that does not give notice in the form prescribed in the lease might be able to take advantage of the doctrines of waiver or estoppel. n25

FOOTNOTES:

(n1)Footnote 3. William B. Stoebuck & Dale A. Whitman, The Law of Property § 6.13 (3d ed. 2000). "Specificity of description in leases is equally as important as it is for deeds. An inadequate legal description can vitiate the entire instrument. Nonetheless, legal descriptions in leases are chronically deficient." Theodore H. Hellmuth, Missouri Practice -- Real Estate Law § 444 (1985).

(n2)Footnote 4. *Id.*

(n3)Footnote 5. Robert Kratovil, Modern Real Estate Documentation § 631 (1975).

(n4)Footnote 6. *See M.N.S. Brandell, Inc. v. Roosevelt Nassau Oper. Co., 345 N.Y.S.2d 608 (1973)* .

(n5)Footnote 7. The following example of a legal description, making extensive use of exhibits, attempts to accommodate the legitimate interests of both parties:

> Suite 703 as outlined in red on the attached floor plan marked Exhibit "A' and incorporated herein by reference, located on the 4th floor of premises having a legal description as shown on the attached Exhibit "B', together with non-exclusive right to use all elevators, stairs, restrooms, halls, common areas and access points servicing such Suite 703, as reasonably modified by Landlord from time to time, provided that no such modification shall materially interfere with convenient use and access by Tenant, its licensees and invitees of such Suite, and together with exclusive possession of Parking Spaces outlined in red on attached Exhibit "C', together with access thereto. All of the foregoing shall be hereinafter referred to as the Leased Premises.

Theodore H. Hellmuth, Missouri Practice -- Real Estate Law § 444 (1985).

(n6)Footnote 8. "[L]andlord will allocate a percentage of the common areas and non-rentable space in the building (e.g., mechanical areas, lavatories, and staircases) to the usable square footage in order to arrive at rentable square footage. This formula should be identified in the lease along with the resulting square footage in which both base rent and additional charges are determined." Alan M. DiSciullo, *Negotiating a Commercial Lease from the Tenant's Perspective*, 18 Real Est. L.J. 27, 30 (1989).

(n7)Footnote 9. The lease should also provide for tenant remedies, if possession is delayed through no fault of the tenant, ranging from money damages (measured by the difference between the rent at the tenant's present location and the agreed rent under the lease), in the case of a short delay, to cancellation at the tenant's option if construction is delayed beyond some predetermined limit. *See Bates Advertising USA, Inc. v. 498 Seventh, LLC, 850 N.E.2d 1137 (N.Y. 2006)* (lease provision entitling tenant to rent abatement if landlord did not complete improvements by a particular date, was enforceable liquidated damages provision, rather than an unenforceable penalty). If the lease is silent on the subject, or even if it provides that the lease shall remain in effect despite lengthy delays in completion, the court may grant the tenant rescission after a reasonable time has passed.*See* Hartwig v. 6465 Realty Co., 324 N.Y.S.2d 567 (Sup. Ct. 1971) (allowing tenant recovery of prepaid rent and security deposit after delay of eight months).

(n8)Footnote 10. A typical lease provision on the subject states as follows:

> All entry on the Leased Premises by Tenant and all work done by Tenant shall be at Tenant's sole risk. Tenant shall furnish to owner all certificates and approvals with respect to work done by Tenant or on Tenant's behalf that may be required from an authority for the issuance of a certificate of occupancy, and Owner shall have no responsibility or liability whatsoever for any loss or damage to any fixtures or equipment installed or left in the Leased Premises. Owner may require Tenant, before entering on the Leased Premises for any purpose or at any time prior to the completion of Tenant's Work, to furnish Owner for the benefit of Owner and its designees a bond in an amount satisfactory to Owner written by a surety company licensed and authorized to issue such bonds in the State of _____, guaranteeing the payment and performance of Tenant's Work, free of mechanics' or other liens. In addition, Owner may require Tenant to deposit with Owner a sum equal to One Dollar for each square foot of Floor Area or the sum of Two Thousand Dollars, whichever amount is greater, guaranteeing the same to be held by Owner without liability for interest until Tenant has completed Tenant's Work in conformance with the Working Plans, has received its final occupancy permit and has opened for business in the Leased Premises. Should Tenant fail to so complete Tenant's Work, Owner may, in addition to any other remedies available, retain said deposit.

See generally Milton R. Friedman, Friedman on Leases § 22.8 (3d ed. 1990).

(n9)Footnote 11. Alternatively, if available in the jurisdiction, the issuance of a permanent certificate of occupancy by the local municipality may provide the trigger.

(n10)Footnote 12. The landlord will require protection against tenant change orders causing delay in completion of the leased premises. Typically the lease commencement date will be the earlier of the date the premises are substantially complete, or the date the landlord proves (or the landlord's architect certifies) the premises would have been substantially complete but for delays caused by tenant-requested change orders. The lease should provide that disputes over this, or any other issue in connection with construction of the premises, should be resolved by arbitration.

(n11)Footnote 13. In the shopping center context the lease commencement date is more likely to be the later of such date or the grand opening date for the anchor tenant(s). Kenneth L. Samuelson, *The Retail Lease: What to Look For, Bargain For*, Legal Times, Apr. 7, 1986, at 24.

(n12)Footnote 14. Gary Goldman, *How to Draft a Fair Office Relocation Clause*, 6 Prac. Real Est. Law. 49 (November 1990).

(n13)Footnote 15. It may be questioned whether the tenant under these circumstances could ever be completely made whole in terms of lost goodwill and business.

(n14)Footnote 16. Relocation clauses are enforceable by the landlord. *See Mosley & Mosley Builders, Inc. v. Landin Ltd., 361 S.E.2d 608 (N.C. Ct. App. 1987)* . If the proposed substitute space is truly comparable to the demised

premises, failure to comply with the landlord's exercise of the reserved right to relocate the tenant may justify termination of the lease. *See Camalier & Buckley-Madison, Inc. v. Madison Hotel, Inc., 513 F.2d 407 (D.C. Cir. 1975)* . However, if the substitute space is not comparable, the landlord will be in breach. *See e.g., Kite v. Gus Kaplan Inc., 747 So. 2d 503 (La. 1999)* .

(n15)Footnote 17. One particularly outrageous version of this clause went so far as to provide that the tenant could be relocated "to alternate space in the Building or another building in the area of Houston, Texas in which the Building is located." Gary Goldman, *How to Draft a Fair Office Relocation Clause*, 6 Prac. Real Est. Law. 58 (November 1990).

(n16)Footnote 18. *See, e.g., City of Tacoma v. Smith, 750 P.2d 647 (Wash. Ct. App. 1988)* .

(n17)Footnote 19. The alternative of leasing more space than currently required and subleasing the excess until it is needed to accommodate the tenant's future growth is less satisfactory for several reasons: The tenant may not be able to sublease the space at the same rent it is paying under its lease. The tenant may not wish to incur the obligations and responsibilities of a landlord. The lease itself may restrict subleasing. *See* § 44.08 of this chapter.

(n18)Footnote 20. In a rising real estate leasing market an expansion option may be a valuable source of potential profit for a tenant. In a jurisdiction that requires the landlord to act in a commercially reasonable manner in consenting to proposed subleases, the landlord will be unable to prevent the tenant from exercising its expansion option for the sole purpose of subleasing the expansion space to a third party at a profit. *See* 1010 *Potomac Associates v. Grocery Manufacturers of America, Inc., 485 A.2d 199 (D.C. Ct. App. 1984)* .

(n19)Footnote 21. *See* § 44.04(d) of this chapter.

(n20)Footnote 22. Neil N. Gluck & Ray B. Gliner, *Negotiating Expansion Rights in Multi-Tenant Projects*, Real Est. Fin., 59, 62 (Spring 1992):

> Options to expand will generally narrow the field of prospective tenants to those willing to lease the subject space for restricted lease terms (and perhaps with less beneficial tenant improvement packages), with limited and subordinate rights to extend their lease terms and often limited or no expansion rights. As a result, landlords will generally receive less effective rent on an interim basis for space encumbered with a fixed option to expand than they could have received for space unencumbered by the expansion right.

(n21)Footnote 23. *See* § 44.06 of this chapter.

(n22)Footnote 24. *See* § 44.12 of this chapter.

(n23)Footnote 25. *See, e.g., Kenyon & Kenyon v. Logany, LLC, 823 N.Y.S.2d 72 (App. Div. 2006)* .

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CHAPTER 44 COMMERCIAL LEASING

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§ 44.03 Restrictions On Tenant's Use of Premises.

§ 44.03(a) Specificity of Commercial Uses.

Unless the lease provides to the contrary, the tenant is free to use the demised premises for any lawful purpose, n26 subject only to common law prohibitions against committing waste and engaging in nuisance. A leasehold covenant restricting the tenant's use negates this rule by describing and limiting the range of permitted business activities that commercial tenants can conduct at the leased premises.

Courts typically enforce restrictive use provisions by awarding damages and issuing orders for injunctive relief. n27 and less frequently by forfeiture and rescission. n28 Typical in this regard is *Anzalone v. Normant Drugs, Inc.* n29 Pursuant to a lease clause restricting use of the premises for a drug store, the tenant removed a video game that was on the premises, but refused the landlord's demand to refrain from the display, sale, rental, and repair of video tapes and equipment. The court granted the landlord's request to enjoin these activities, rejecting the tenant's contention that such items should be considered incidental to the operation of a drug store.

However, because the lease will be construed against the landlord as the drafting party and because the common law disfavors burdens on land, ambiguities and doubts as to the meaning of restrictive use covenants are generally resolved against enforcement. n30 For example, in *Cox v. Ford Leasing Development Co.*, n31 the lease recited the tenant's intention that the demised premises be used and occupied for the automobile dealership business. The tenant sought to sublease the property to a third party for an unrelated use. Because the lease did not expressly limit the use of the premises, the court held that a lease for a specific purpose is regarded as permissive rather than restrictive. Accordingly, the tenant had the right to sublease the property for any lawful purpose for which it was adapted.

The importance of a restrictive use clause is to a large extent a function of the length of the term of the lease. In the context of a long-term commercial lease, the extent of the tenant's use rights is among the most important "non-economic" considerations of the transaction, n32 and often is the subject of intense negotiation. From the tenant's perspective, the use clause should protect its interest in responding to changing consumer tastes during the term of the lease by expanding into new product or service lines. The ideal pro-tenant use clause would broadly provide for the tenant to use the premises for any lawful purpose. n33 "Each tenant would love to have the right to sell anything and use

its store for any legal purpose. The love of a tenant for the right to use its store without restriction is exceeded only by the same tenant's burning ambition to avoid competition by restricting the use of every other store in the shopping center." n34

Assuming that it satisfies the common law requirements for covenants running with the land, the restrictive use clause will bind potential subtenants and assignees. n35 Accordingly, a long-term tenant's focus in negotiating use rights should be wider than merely seeking to protect its own current and projected future business activities. As a developing minority of jurisdictions begin to imply a requirement that the landlord act reasonably in consenting to assignments and subleases, n36 the use clause takes on increased importance as a backstop to protect the landlord against transfers of the tenant's interest. n37 For these reasons, the use and transfer clauses should be negotiated in tandem.

§ 44.03(b) Hazardous Use Restrictions.

The typical commercial lease will prohibit the tenant from causing or permitting any hazardous material to be stored, used or disposed on or about the premises. A broad definition of "hazardous material" will generally include radioactive and toxic substances, asbestos, petroleum products, polychlorinated biphenyls, and other substances identified as hazardous by various environmental statutes and regulations. n38 The use clause may include a more general provision prohibiting the tenant from engaging in a use of the premises that would cause the landlord's fire or extended coverage insurance to be canceled or its premium to be increased.

Even if such uses are not expressly prohibited by the terms of the lease, the law of nuisance could provide relief in the case of a tenant whose activities are hazardous. n39

§ 44.03(c) Noise Level, Floor Load Restrictions.

The weight of, and the noise and vibration emanating from, heavy machinery may interfere with the business activities of other tenants, threaten damage to the subject property, and increase the cost to the landlord for insurance coverage. Even in the case of office tenants, the weight of a safe or other heavy equipment might exceed the floor load. Accordingly, the typical commercial lease will reserve for the landlord the right to prescribe the weight and position of heavy equipment and fixtures located in the leased premises.

In leasing to retailers, the landlord desires protection against the attraction of potential shoppers through the use of loudspeakers or music systems operated at a level that causes annoyance to other tenants of the subject property. Other advertising media that are exposed outside the premises, such as flashing lights and searchlights, may also be prohibited.

FOOTNOTES:

(n1)Footnote 26. Restatement (Second) of Property, Landlord & Tenant § 12.5 (1977). *But see McKenzie v. Carte, 385 S.W.2d 520 (Tex. Ct. App. 1964)* ("At common law, the lessee does not forfeit his lease by using the demised premises for illegal purposes in the absence of a provision in the lease contract for a forfeiture in such cases.").

(n2)Footnote 27. 49 52A C.J.S. *Landlord and Tenant* §§ 761 & 762 (2003). *But see Ray-Ron Corp. v. DMY Realty Co., 500 N.E.2d 1163 (Ind. 1986)* (permitting use of leased premises beyond those expressly permitted in lease after finding the intended use would not cause harm to landlord).

(n3)Footnote 28. *Stroup v. Conant, 520 P.2d 337 (Or. 1974)* (affirming rescission of lease providing that premises were to be used "for the sale of gifts, novelties, etc." where retail store tenant's inventory consisted solely of "adult" magazines and books).

(n4)Footnote 29. *519 N.Y.S.2d 601 (Sup. Ct. 1987)* .

(n5)Footnote 30. *See, e.g., Sky Four Realty Co. v. C.F.M. Enters., Inc., 513 N.Y.S.2d 546 (Appl Div. 1987)* (lease restricting use of space to the operation of a convenience food market not violated by sale of New York State Lottery tickets); *Boyd v. Shell Oil Co., 311 A.2d 616 (Pa. 1973)* (lease to tenant for construction and operation of two automobile service stations not violated by tenant converting the third bay of each service station into automatic car wash); *see also Serfecz v. Jewel Food Stores, 67 F.3d 591* (7th Cir. 1995) , *cert. denied, 516 U.S. 1159 (1996)* (court does not believe that a use restriction as to the sale of groceries restricts the tenant from leaving the store vacant; it reasons that allowing a store to remain vacant is different from opening a hardware or music store on the leased premises).

(n6)Footnote 31. *316 S.E.2d 182 (Ga. Ct. App. 1984)* .

(n7)Footnote 32. "How an occupant can use its premises and the extent of activity that can be conducted from that locale may be one of the most important determinants of a tenant's profitability in a particular location." Alan M. DiSciullo, *Negotiating a Commercial Lease from the Tenant's Perspective*, 18 Real Est. L.J. 27, 38 (1989) .

(n8)Footnote 33. Even that clause should not be construed as granting the tenant an unlimited right to use the leased premises. Besides the lease itself, other sources of restrictions often overlooked by tenants include the certificate of occupancy for the subject property, restrictive covenants, zoning ordinances and subdivision restrictions affecting the subject property.

(n9)Footnote 34. Emanuel B. Halper, *Can You Find a Fair Lease?*, 14 Real Est. L.J. 99, 111 (1985).

(n10)Footnote 35. Assuming that the requirements are otherwise met for a covenant to run, assignees would be subject to covenants that run at law or that run in equity. Subtenants would be subject to covenants that constitute equitable servitudes. The issue is discussed in chapter 42.

(n11)Footnote 36. *See* § 44.08(c)(2) of this chapter.

(n12)Footnote 37. "For instance, if a medical office lease expressly provides that space only be used by medical doctors practicing conventional medicine and prohibits performance of abortions on the premises, it is less likely that a lessee will attempt to assign his lease to an abortion clinic, which might cause unwanted disturbances and controversy to other tenants." Theodore H. Hellmuth, Missouri Practice -- Real Estate Law § 516 (1985).

(n13)Footnote 38. Authoritative compilations hazardous materials, and other information relating to the regulation of such materials, may be found in the United States Department of Transportation Hazardous Materials Table (*49 C.F.R. § 172.101*, App. A); regulations promulgated by the Environmental Protection Agency (*40 C.F.R. § 61.01* and *40 C.F.R. § 302.4*); §§ 301 and 307 of Clean Water Act, *33 U.S.C. §§ 1251* & *1317*; §§ 1002 and 1004 of the Resource Conservation and Recovery Act, *42 U.S.C. § 6901* & *6903*; and § 101 of the Comprehensive Environmental Response, Compensation and Liability Act, *42 U.S.C. § 9601*.

(n14)Footnote 39. *See See Graham Oil Co. v. BP Oil Co., 885 F. Supp. 716 (W.D. Pa. 1994)* ; *Arawana Mills Co. v. United Technologies Corp., 795 F. Supp. 1238 (D. Conn. 1992)* .

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CHAPTER 44 COMMERCIAL LEASING

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§ 44.04 Rental Clauses.

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Commercial tenants generally pay as rent a minimum or fixed base rent which often escalates during the course of the term pursuant to a ladder of fixed amounts agreed to in advance and set forth in the lease, or in accordance with changes in an index that is external to the lease, such as the Consumer Price Index. Retail tenants usually pay an additional or bonus rent constituting a percentage of the gross sales generated at the demised premises.

§ 44.04(a) Fixed Rent Clause.

The fixed (or minimum base) rent is a specific U.S. dollar amount generally paid in advance in successive monthly installments on the same calendar day of each month. The fixed rent will typically be expressed both as an annual rental amount and as a monthly rental. Unlike the percentage rent described below, n40 fixed rent does not depend on the volume of tenant sales generated at the leased premises. The rent clause of the lease should provide the location at which the rent is payable, n41 the acceptable form of payment, and for proration if the first and last months of occupancy are less than full calendar months. n42

Although the typical commercial lease will specify that minimum base rent is payable without notice or prior demand, commercial tenants will seek to negotiate for grace periods (anywhere from five to 30 days is customary) and written notice before sanctions (i.e., late fees, penalties, acceleration and other default remedies) can be imposed. n43

The rent clause will provide that fixed rent is payable "without offset or deduction" in an attempt to preserve the traditional common law separation and independence of the tenant's covenant to pay rent from any express or implied promises by the landlord, and to negate any modern common law or statutory remedy entitling commercial tenants to deduct the cost of unperformed repairs or services omitted to be provided by the landlord with respect to the premises.

A sophisticated pro-landlord lease form will define as "additional rent" all sums of money required to be paid by the tenant under the lease. The purpose of this characterization is to make sure that the landlord's summary right of eviction and other remedies under the lease or at common law for nonpayment of rent are available to enforce all monetary obligations of the tenant.

It has become increasingly common for commercial landlords in metropolitan areas to protect against enactment of rent control ordinances by requiring that tenants pay the maximum lawful rent for the duration of any period that the agreed rent cannot be collected, with the balance to accrue. n44

Inadequacy of the fixed minimum annual base rent is an argument for implication of a covenant of continuous operation at the leased premises. n45

§ 44.04(b) Percentage Rent Clause.

The percentage rent clause provides protection against inflation for the landlord in shopping center and other retail store leasing by entitling the landlord to some percentage of the sales receipts generated by the tenant from the leased premises. In theory the percentage rent feature affords considerable flexibility for accommodating start-up ventures by allowing the landlord to charge a lower fixed rent in the early years of the lease in exchange for a higher percentage of the tenant's sales from the premises during this period.

In practice, however, the landlord's hands are tied by the requirements of institutional lenders who tend to regard percentage rents with suspicion. In order to obtain financing for construction of the center, the landlord must be able to furnish the lender with a *pro forma* rent roll demonstrating that fixed minimum base rentals will be sufficient to satisfy debt service on the mortgage loan, and pay operating costs. Percentage rent, if any, is the landlord's profit. n46

The percentage rent rate paid by retail tenants varies by region, by line of merchandise or type of service, and by the market's perception of the value of the site. It is not unusual for grocers and other high volume, low profit-margin, retailers to pay as little as one percent of gross sales. At the other extreme, restaurants, piano and organ stores, and other high-margin tenants pay as much as 15% of sales. n47

Tenants offering multiple lines of merchandise, such as drug stores, may pay varying percentage rental rates on sales of different products. For example, restaurants often pay different percentage rental rates on food and liquor, and movie theaters pay different levels of percentage rent on admission tickets, popcorn and candy, and video games. Alternatively, the lease may provide for a sliding scale of percentage rental rates on different levels of gross sales (e.g., five percent on the first $1 million of sales, 4% on the next $2 million, and 2% on sales in excess of $3 million).

Although it might be thought that a percentage rent arrangement converts the landlord-tenant relationship into a partnership of sorts, substantial common law and statutory authority negates any inference that the "sharing" of profits creates a partnership relationship as a matter of law, n48 particularly in the typical situation where the percentage rent clause is based on the tenant's gross sales rather than net profits. n49 The boilerplate clause by which both landlord and tenant disclaim general partner liability for each other's debts is harmless but probably superfluous. n50

One implication that would seem to logically follow from a legal partnership relationship, but which has been consistently rejected by most courts, would be an implied obligation of the tenant to generate percentage rent. n51

§ 44.04(b)(1) Gross Sales Basis.

The definition of gross sales for purposes of the percentage rent clause is often the subject of heated negotiation between sophisticated landlords and tenants. n52

The landlord seeks to include the gross proceeds of all sales (including sales by subtenants and concessionaires) less the sum of all returns.

Sales taxes, commissions paid to third-party credit card issuers, significantly discounted sales to employees, charges for

delivery, installation and service, and sales of fixtures, equipment and other items not part of tenant's inventory are generally regarded as appropriate items for exclusion. n53 Tenants might claim that because the location of the demised premises did not stimulate telephone and mail order sales, the landlord in fairness should claim no share of the profit from off-premises sales. Landlords will not only resist this claim, but might react by expanding the use clause to prohibit use of the premises for purposes that do not generate sales upon which the tenant is required to pay percentage rent. Sales from vending machines owned by third parties, pay telephones, and lottery tickets should be included only to the extent of the tenant's income therefrom. n54 The need to thoroughly understand the tenant's business before drafting the percentage rent clause may be illustrated by contemplating the percentage rent payable by a florist located in a St. Louis shopping center who takes a February order for $75 of long-stem red roses for Florists' Transworld Delivery to the customer's valentine in New Orleans.

Percentage rent tenants are required to keep accurate records of all sales at the leased premises, and to certify periodic sales reports to the landlord. n55 The tenant's records must be available for audit by the landlord for a specified period of time. Understatement of gross sales typically subjects the tenant to liability for reimbursement of the cost of the landlord's audit, as well as payment of the shortfall plus interest. The uncovering of material or chronic discrepancies will constitute an event of default. n56

§ 44.04(b)(2) "Breakpoint" Provisions.

Although a lease could very simply require the tenant to pay as percentage rent a fixed percentage of all defined sales at the leased premises, it is far more common to provide for a threshold or "breakpoint" level of sales before the tenant's obligation to pay percentage rent arises. The so-called "natural" breakpoint is calculated by dividing the fixed minimum annual base rent figure by the percentage of gross sales the tenant has agreed to pay. n57 The lease might provide that failure to achieve a minimum level of sales after some initial period of time gives the landlord the right to terminate the lease and recapture the premises. n58

Commercial landlords consider seasonal fluctuations in retail sales in structuring percentage rental arrangements. For example, retail store tenants typically record a disproportionately large percentage of their business for the year during the fourth calendar quarter. n59 Accordingly, the percentage rental clause commonly prorates the breakpoint by requiring the tenant to pay percentage rent to the extent gross receipts for the month or quarter exceed 1/12 or 1/4 of the breakpoint amount. The tenant may be surprised to discover that the landlord is entitled to percentage rent even during years when gross sales do not exceed the breakpoint on an annualized basis. n60

§ 44.04(c) Escalations in Rent.

Except for short-term (i.e., one to three year) leases and leases providing for percentage rental, n61 commercial leases will provide for some method of periodically adjusting the fixed rent so that the landlord's purchasing power is maintained at approximately the same level as at lease commencement. This may be accomplished either by a provision for specific increases in the fixed rent, for increases tied to an authoritative and readily available external measurement of the general cost of living, or for periodic re-evaluation of the fair market rental value of the premises.

§ 44.04(c)(1) Fixed Increases.

Although not as common among sophisticated parties as adjustments to reflect changes in the cost of living, n62 provisions for periodic specific increases (decreases would be extremely rare indeed) or step-ups in the fixed rental are not unusual in commercial leases. The abandonment of fixed increases in rent for cost of living escalation was probably a function of the inflationary period of the 1970s and early 1980s that victimized landlords who were unable to pass along their rapidly increasing operating expenses and real estate taxes.

Unlike the cost of living escalation clauses, provisions for specific dollar increases at stated intervals during the lease

term are relatively straightforward to draft, n63 explain to tenants, and implement. From the perspective of both parties, fixed increases are predictable and make it possible to budget with confidence. The certainty of fixed increases appeals to risk-averse tenants. Start-up business tenants find the idea of lower rent during early lease years particularly attractive. The disadvantage of fixed step-ups is the lack of precision in matching escalations to changes in the landlord's costs. At best the fixed increases reflect the landlord's best estimate of the fair market rental value of the premises at various times during the term of the lease.

§ 44.04(c)(2) CPI Based Increases.

Annual rental escalations linked to the percentage of increase in the Consumer Price Index have become something of a fixture of commercial leases in modern times. n64 The Consumer Price Index is actually a family of statistical measurements of the average change in the prices of goods and services purchased for everyday living by consumers. Both an aggregate index and separate indices for the largest metropolitan areas are published monthly by the Bureau of Labor Statistics of the United States Department of Labor.

The two indices most frequently used for purposes of calculating rental escalations are the Consumer Price Index for All Urban Consumers ("CPI-U") and the Consumer Price Index for Wage Earners and Clerical Workers ("CPI-W"). Reasonable persons differ and have spilled considerable ink over whether either index favors one party over the other, and whether it makes any difference which index is used. n65

From the tenant's perspective, inflation indexation suffers from two basic defects. First, unless the increases are capped at a stated percentage per year, the risk of sharply higher rents may threaten the viability of start-up business ventures. Second, the economic assumption underlying CPI based increases (that tenants will keep pace with inflation by steadily increasing prices for their products and services, so that rent increases will simply be passed through to customers and clients) overlooks the fact that the basket of goods and services measured by the Consumer Price Index does not necessarily have any relevance to any particular tenant or to the fair market value of any particular premises. n66

A competently drafted CPI escalator clause will (a) identify with specificity the particular index to be used in calculating the increase, n67 (b) state the initial rent adjustment date and intervals for subsequent rent adjustments, (c) state whether the rent will *decrease* in the unlikely event of a decline in the index, (d) provide the formula for calculating increases (including a numerical example illustrating operation of the formula), n68 (e) provide for any limitation on the allowable annual increase, and (f) provide a method for handling a revision or discontinuation of the governmental index during the term of the lease. n69

§ 44.04(c)(3) Rent Review/Re-evaluation.

Appraisal may be used to establish the fair market rental value of the demised premises in connection with the exercise of a renewal option, or at periodic intervals of long-term leases as an alternative method of escalation. The procedural elements of re-evaluation include the method of selecting appraisers, their qualifications, and how to reconcile divergent valuations. A typical appraisal clause calls for the landlord and the tenant to each appoint an appraiser, who jointly select a third appraiser. The fair market rental value is determined by averaging the valuations submitted by the three appraisers. n70 The clause should provide for the allocation of the substantial cost of the appraisers.

In the shopping center context, expansion of the center to include additional anchor tenants may be the occasion for an escalation of the fixed minimum annual rental payable by satellite tenants. n71

§ 44.04(d) Rent Concession Clauses.

Abatement of rent and similar rent concession clauses are common inducements to attract tenants in over-built and otherwise depressed real estate markets. Consideration should be given in negotiation and drafting to whether rent-free

occupancy applies to the fixed rent only, or other tenant charges for utilities, real estate taxes, and operating expenses. The concession typically will expire in the event of tenant default. n72

In a rare example of landlord-tenant mutuality of interest, both parties tend to prefer rent abatement to a reduction in the fixed rental rate over the entire term of the lease, even when the economic effect would be identical. Landlords are highly reluctant to lower the stated rental rate. Once the abatement period expires, appraisers will use the higher fixed rate to value the property for purposes of sale and refinancing. Tenants prefer up-front concessions to offset initial moving and fixturization expenses, and other start-up costs of doing business at the new premises. n73

Although the rent abatement period generally coincides with the commencement of the term of the lease, there is no reason why it could not be structured differently. Many landlords have experienced the marginal or unscrupulous tenant who takes advantage of the free rent period only to default immediately thereafter. Such landlords soon discover that it is safer to abate rent for the last month(s) of the term, or perhaps allocate free rent to the first month of each lease year.

§ 44.04(e) Tenant Equity Clauses.

Department store and other anchor tenants believe (or at least claim) that their very presence in a retail project adds value to the property that entitles them to participate in any appreciation through the ownership of an equity interest. In the over-built and under-leased commercial real estate markets of the early 1990s, competition among landlords to attract key tenants included the offering of so-called "equity leases" by which the tenant was to receive a share of the benefits of ownership of the entire subject property, including the cash flow generated by the property and the proceeds of any future refinancing or sale. Equity interests may be offered in lieu of rent abatement or other concessions. Such participation by the tenant may take the form of a limited partnership interest or stock in the ownership entity, or an off-set against rent. n74

FOOTNOTES:

(n1)Footnote 40. *See* § 44.04(b) of this chapter.

(n2)Footnote 41. If the lease fails to specify the landlord's mailing address, the common law place of payment is the leased premises. *See Chrones v. Wade, 94 A.2d 242 (R.I. 1953)* .

(n3)Footnote 42. A fairly common mistake made both by inexperienced drafters and landlords who complete the blanks in a form lease is to express the rent as a *condition* of the tenant's right to occupy the premises. What the landlord really wants and intends (but often fails to express) is the tenant's express *promise* to pay rent in the specified amount ("Tenant covenants and agrees to pay $ _____ as rent."). One practical effect of the distinction is that the tenant's obligation to pay rent in the former situation would not survive assignment of the lease.

(n4)Footnote 43. *See* § 44.12 of this chapter.

(n5)Footnote 44. A typical lease clause on the subject provides as follows:

> In the event that any law, decision, rule or regulation of any governmental body having jurisdiction shall have the effect of limiting for any period of time the amount of rent or other charges payable by Tenant to any amount less than that otherwise provided pursuant to this Lease, the following amounts shall nevertheless be payable by Tenant: (a) throughout such period of limitation, Tenant shall remain liable for the maximum amount of rent and other charges that are legally payable; (b) at the termination of such period of limitation, Tenant shall pay to Landlord, on demand but only to the extent legally collectible by Landlord, any amounts that would have been due from the Tenant during the period of limitation but that were not paid because of such limiting law, decision, rule or regulation; and (c) for the remaining term of this Lease following the period of limitation, Tenant shall pay to Landlord all amounts due for such portion of the term of this Lease in accordance with the terms hereof calculated as though

there had been no intervening period of limitation.

(n6)Footnote 45. *See* § 44.14(f)(2)of this chapter.

(n7)Footnote 46. Or, as one expert on the subject of shopping center leases has described it, "a delicious dessert to be consumed after a belly full of minimum rent." Emanuel B. Halper, Shopping Center and Store Leases § 5.03 (1990).

(n8)Footnote 47. For a summary of percentage rental rates charged for various businesses in various locales, *see* Milton R. Friedman, Friedman on Leases § 6.3 (3d ed. 1990).

(n9)Footnote 48. For example, the Revised Uniform Partnership Act provides that a "person who receives a share of the profits of a business is presumed to be a partner in the business, unless the profits were received in payment ... of rent." Revised Uniform Partnership Act § 202(c) (2006). *See also* Milton R. Friedman, Friedman on Leases § 6.101 (3d ed. 1990).

(n10)Footnote 49. Joseph E. Browdy, *Rent, Escalations and Other Economic Terms of a Lease,* Commercial Leases 155, 159 (ALI/ABA January 1991).

> Leases rarely provide for percentage rent based on net, as opposed to gross, income. One reason for this is that computation of net income is extremely difficult -- how does one account for home office overhead, or for the price of goods purchased from an affiliate? Another even more compelling reason is that certain types of institutions, such as Real Estate Investment Trusts, cannot share in net income of their tenants, and therefore cannot acquire an interest in a center which has any leases with percentage rents based on net.

(n11)Footnote 50. The typical lease clause on the subject states as follows:

> Nothing contained in this Lease shall be deemed or construed by the parties hereto or by any third person to create the relationship of partnership or of joint venture or of any association between Landlord and Tenant, and neither the method of computation of rent nor any other provision contained in this Lease nor any acts of the parties hereto shall be deemed to create any relationship between Landlord and Tenant other than the relationship of landlord and tenant.

(n12)Footnote 51. *See* § 44.14(f)(2) of this chapter. Where, however, the lease does contain an express covenant on the tenant's part to operate its business "with due diligence in an effort to produce all of the gross sales" it can produce by employing that "manner of operation ... during the customary days and hours for such type of business in the city or trade area in which the demised premises are located," the tenant may not close its sales operations and devote the leased premises to storage. *See United Dominion Realty Trust v. Wal-Mart Stores, Inc., 413 S.E.2d 866 (S.C. Ct. App. 1992) . Compare Mayfair Operating Corp. v. Bessemer Properties, Inc., 7 So. 2d 342 (Fla. 1942)* (movie theater tenant having covenanted to use its best efforts to obtain and maintain the highest volume of business on the leased premises could not suspend operations during summer months but was required to operate continuously) *with Diltz v. J & M Corp., 381 So. 2d 272 (Fla. Ct. App. 1980)* (where lease did not require fast-food restaurant tenant to use best efforts to operate business on demised premises, tenant did not breach lease by discontinuing business and locating elsewhere).

(n13)Footnote 52. An example of a definition of "gross sales" appears in the percentage rent clause of a form lease for a regional shopping center in suburban St. Louis:

> The term "Gross Sales' means: (i) the entire amount of the actual sales price as of the date of the transaction, regardless of when or whether the payment is actually made, whether wholly or partly for

cash or on credit, or for any other consideration, of all goods and merchandise sold, leased, licensed or otherwise transferred, including all financing charges by Tenant or anyone on Tenant's behalf, including, but not limited to, all subtenants, assignees, licensees and concessionaires for the rendition of services of any kind whatsoever, and all other receipts of all business conducted in, at or from the Demised Premises; (ii) all deposits not refunded to purchasers; (iii) orders taken in, at or from the Demised Premises whether the orders are made by telephone, mail or any electronic device although the orders may be filled elsewhere; (iv) all uncollected or uncollectible credit accounts; and (v) gross receipts from all vending or similar machines or devices, whether coin operated or otherwise in the Demised Premises or under any arrangement. All sales and orders originally made in, at or from the Demised Premises shall be considered as made and completed therein, even though payment of the account may be transferred to some other office of Tenant for collection, or although delivery of goods or merchandise sold or the performance of service ordered in, at or from the Demised Premises be made from or at a place other than the Demised Premises. The term "Gross Sales" shall not include (or if included, there shall be deducted to the extent of such inclusion) only the following:

(a) Sums collected and paid out for any sales, excise or similar tax based upon the sale of merchandise and required by law, whether now or hereafter in force, to be paid by Tenant or collected from its customers;

(b) Transfers or exchanges of merchandise between stores or warehouses of Tenant, or between Tenant and stores affiliated with Tenant, where such transfers or exchanges of merchandise are made solely for the convenient operation of the business of Tenant and not for the purpose of consummating a sale which has heretofore been made in, at or from the Demised Premises or for the purpose of depriving Landlord of the benefit of a sale which otherwise would be made in, at or from the Demised Premises;

(c) The amount of returns to shippers or manufacturers;

(d) The sales price of all merchandise returned by customers and accepted for full credit;

(e) The sales price of trade fixtures, machinery or equipment which Tenant has the right to remove from the Demised Premises after use thereof in the conduct of Tenant's business in the Demised Premises;

(f) Sums and credits received in the settlement of claims for loss of or damage to merchandise;

(g) Alteration workroom charges and delivery charges paid to third parties;

(h) Receipts from public telephones, stamp machines, or vending machines installed solely for the use of Tenant's employees.

(n14)Footnote 53. *See, e.g., Washington Nat'l Corp. v. Sears, Roebuck & Co., 474 N.E.2d 116 (Ind. Ct. App. 1985)* .

(n15)Footnote 54. *See, e.g., In re Circle K Corp., 98 F.3d 484* (9th Cir. 1996) ("gross sales" in percentage rent term did not include total sales price of state lottery tickets but, rather, included only commissions that tenant received in exchange for its services in selling the tickets); *Anest v. Bellino, 503 N.E.2d 576,* (Ill. Ct. App. 1987) , *appeal denied,*

508 N.E.2d 725 (Ill. 1987) (gross sales did not include entire amount received by tenant from sale of lottery tickets but, rather, only the five percent commission received by tenant); *Cloverland Farms Dairy, Inc. v. Fry, 587 A.2d 527 (Md. Ct. App. 1991)* (tenant not required to include gross receipts from the sale of lottery tickets in gross sales; only tenant's 5% commission from such sales need be included).

(n16)Footnote 55. In the case of a tenant with multiple locations, the landlord should reserve the right to inspect the books and records of sales at locations other than the leased premises in order to detect possible diversion of sales by a percentage rent paying tenant to a warehouse or other location with lower or perhaps no percentage rent.

(n17)Footnote 56. A record-keeping provision appears in the percentage rent clause of a form lease for a regional shopping center in suburban St. Louis:

> Tenant agrees to record all sales and all revenue derived from the conduct of business in, at or from the Demised Premises in accordance with generally accepted accounting principles, which records shall be preserved by Tenant for thirty-six (36) months, either at the Demised Premises or at the home or regional offices of Tenant. Tenant shall, for each sale or other transaction, issue and keep duplicate sales slip, invoice, or non-resettable cash register receipt, serially numbered, whether the sale or other transaction is for cash, credit or otherwise. Landlord may inspect or audit any or all of Tenant's sales records and those of Tenant's assignees, subtenants, licensees and concessionaires, if any, which shall in any manner relate to Gross Sales; and Tenant, on twenty-four (24) hours' notice, from time to time from Landlord, shall make all such data available for such examination where Tenant keeps the data at such times as Landlord shall specify in such written request. Landlord's right to commence an audit or inspection with respect to any Lease Year shall expire thirty-six (36) months after receipt by Landlord of Tenant's Annual Gross Sales Statement for such Lease Year. If Landlord determines by any such audit or inspection that any statement previously delivered by Tenant to Landlord was not accurate, an adjustment shall be made and one party shall pay to the other upon demand such sum as may be necessary so that the correct amount of rent will have been paid by Tenant to Landlord. If the Gross Sales shown by Tenant's Annual Gross Sales Statement for any Lease Year are found to be understated by Two Percent (2%) or more, Tenant shall pay to Landlord the cost of such audit or inspection. If the Gross Sales shown by Tenant's Annual Gross Sales Statement for any Lease Year are found to be understated by Six Percent (6%) or more, Landlord may, at its option, terminate this Lease in addition to any other rights and remedies available under this Lease, in law or in equity.

(n18)Footnote 57. For example, assuming a minimum annual base rent of $2,000 per year and a percentage rental rate of two percent of gross revenues, the natural breakpoint is $100,000. The tenant would not be required to pay percentage rent until sales reached $100,000, and would pay percentage rent only on sales in excess of $100,000.

(n19)Footnote 58. Tenants seek to modify this provision by reserving the right to keep the lease in effect by simply paying extra percentage rent as if the specified minimum level of sales had been achieved. Although this may seem equitable at first glance, landlords of multi-tenant properties tend to resist on the ground that each retail tenant's success in generating sales brings business into the center. Increased shopper traffic produces spill-over benefits for other tenants. *See* I. Aaron Cohen, *Advice for Landlords and Tenants on Percentage Rent*, 5 Prac. Real Est. Law, 13, 26-27 (November 1989).

(n20)Footnote 59. Also the weeks before Easter and Labor Day, in the case of clothing stores, and before Mother's Day, in the case of jewelers. Emanuel B. Halper, Shopping Center and Store Leases § 5.03(a)(i) (1990).

(n21)Footnote 60. Using the figures in the foregoing example, a tenant with quarterly sales of $15,000, $7800, $10,000 and $40,000 does not reach the $100,000 breakpoint on an annualized basis. However, if the lease provides for quarterly percentage rental payments with the breakpoint figure amortized ratably, the landlord would be entitled to

$300 as percentage rent.

(n22)Footnote 61. *See* § 44.04(b) of this chapter.

(n23)Footnote 62. *See* § 44.04(c)(2)of this chapter.

(n24)Footnote 63. A typical lease clause on the subject provides as follows:

> During the term of this Lease, Tenant covenants and agrees to pay to Landlord a fixed minimum rent (the "minimum rent"), in lawful money of the United States of America, in equal monthly installments on the first day of each and every month in advance, at the office of Landlord, or such other place as Landlord may designate, without set-off or deduction, as follows:
>
> > (1) Commencing on and terminating on _____, an annual minimum rent of $_____ payable in equal monthly installments of $_____; and
> >
> > (2) Commencing on and terminating on _____, an annual minimum rent of $_____ payable in equal monthly installments of $ _____.

(n25)Footnote 64. Rent typically increases by some negotiated percentage (*e.g.*, 30% - 40%) of the increase in the CPI.

(n26)Footnote 65. *Compare, e.g.*, David A. Rahm, *Escalation Clauses In Urban Office Leases*, 12 Real Est. Rev. 55 (Summer 1982) (no significant difference between the CPI-U and the CPI-W for lease applications) *with* Thomas J. Coyne, *The CPI and Escalator Clauses In Commercial Leases: Additional Considerations*, 19 Real Est. Rev. 21 (Summer 1989) (selection of index can effect significant differences in rental payments over time). *See also* Alan M. DiSciullo, *Negotiating a Commercial Lease from the Tenant's Perspective*, 18 Real Est. L.J. 27, 34 (1989).

> ("Generally speaking, based on the findings of a number of one-to five-year surveys, the CPI-W typically favored tenants, since the change in that index is considerably lower than its counterpart. For example, in San Diego between November 1982 and November 1985, the percentage change in the CPI-W was only 7.5 percent whereas the CPI-U was 17.8 percent. Between 1986 and 1987, the change in the CPI-U was 4.3 percent whereas the increase in CPI-W was considerably lower.").

(n27)Footnote 66. It is also possible for the real estate market to be depressed during inflationary times. Nancy Ann Connery, Leasehold Mortgage Financing, 479 PLI/Real 575, 594 (2002).

(n28)Footnote 67. For example, the provision should identify whether the index to be used is the average for all U.S. cities or one of the regional indices published for specific local areas.

(n29)Footnote 68. There are two basic methods of calculating the CPI increase. If the rent increase is 100% of the increase in the cost-of-living index, it makes no difference which method is used because the result will be identical. However, in the far more typical situation where the rent increase is some percentage of the CPI increase, the differences in rent depending upon which method is used can be significant over the term of the lease. *See, e.g.*, David E. Kaplan and Robert J. Gage, *Hold That Line*, Wash. Law. 32, 34 (January/February 1992); David M. Gilson, *The CPI Clause -- Read It Carefully*, Wash. Law. 24 (May/June 1987).

Under the so-called "prior year" method, the base rent in effect during the immediately preceding lease year is escalated by adding to the prior year's base rent the product of the prior year's base rent times a fraction, the numerator

of which is the difference between the applicable consumer price index published immediately before the increase is to go into effect and the index published one year earlier, and the denominator of which is the index published one year earlier. The prior year method has been expressed by the following formula: New Base Rent = Base Rent in Prior Year + Percentage of CPI Increase X Base Rent in Prior Lease Year X Current CPI - Prior Year CPI/Prior Year CPI. *See* Victoria Eve De Ganon, Playing the Leasing Numbers Game: A Tenant's Analysis of Rent, Escalation, and Operating Expense Provisions, 21 Real Estate L.J. 239, 245 (Winter 1993).

Under the so-called "base year" method, the new base rent each year equals the initial base rent escalated by the agreed percentage of the aggregate increase in the CPI since the lease commencement date. This version yields greater increases, particularly in the latter years of a long-term lease. The base year method has been expressed by the following formula: New Base Rent = Original Base Rent + Percentage of CPI Increase X Original Base Rent X Current CPI - Base Year CPI/Base Year CPI. *See* Victoria Eve De Ganon, Playing the Leasing Numbers Game: A Tenant's Analysis of Rent, Escalation, and Operating Expense Provisions, 21 Real Estate L.J. 239, 245 (Winter 1993).

"Some lease formulas have become so complicated that no one understands them. This is not merely a cynical remark, it is rather a truism." Theodore H. Hellmuth, Missouri Practice -- Real Estate Law § 450 (1991 Supp.).

(n30)Footnote 69. A typical lease clause on the subject provides as follows:

> If the index shall be discontinued with no comparable successor index, the parties shall attempt to agree upon a substitute formula. If the parties are unable to agree upon a substitute formula, then the matter shall be determined by arbitration in accordance with the then prevailing rules of the American Arbitration Association.

(n31)Footnote 70. A variant of the clause counteracts the potential skewing effect on the average of an appraiser whose valuation differs radically from the other two by providing that the middle of the three valuations shall govern.

(n32)Footnote 71. A typical lease clause on the subject provides as follows:

> If at any time during the term of this Lease, the Center shall contain any Large User that operates retail facilities containing more than fifty thousand (50,000) square feet of Floor Area in addition to those Large Users of retail facilities that are operating in the Center on the Commencement Date, the Minimum Rent shall be increased by Ten Percent (10%), commencing on the date when each such Large User of a retail facility containing more than fifty thousand (50,000) square feet of Floor Area first opens for business.

(n33)Footnote 72. *See* § 44.12 of this chapter.

(n34)Footnote 73. *See generally* Joseph Viola, Jr., *Alternate Structures for Rental Abatements*, Real Est. Fin. 27 (Winter 1990) (demonstrating a methodology for quantifying the effects of upfront rental abatement compared with a flattened-out rental rate).

(n35)Footnote 74. Lewis R. Kaster, *Tax and Securities Implications of Tenant Equity Participations*, Real Est. Rev., 36-37 (Spring 1989):

> During the heyday of tax shelters, the prospective tenant's prime inducement for acquiring an equity participation was to share in the property's tax losses (losses that usually were based on substantial depreciation write-offs) and thus to reduce its taxable income, its tax liability, and, effectively, its rent... The advent of the passive loss limitations introduced by the 1986 Tax Reform Act has significantly narrowed the ability of individuals and closely held corporations to offset losses from real estate

> operations against portfolio income and earned income... However, there do exist a substantial number of individuals and corporations that seek appreciation and cash flow benefits and that have been significant investors in real estate. These entities discover that, despite the passive loss restrictions on tax deductibility and despite reduced income tax rates that diminish the tax loss value of depreciation losses, the benefits of equity ownership, particularly the tenant's participation in the residual value of the building and occasionally in cash flow, make such equity arrangements attractive.

Mr. Kaster warns that the offer of a limited partnership interest in consideration for tenant entry into a lease constitutes the sale of a security under federal and state securities laws. However, the investment is likely to qualify for exemption from registration. *Id.* at 37.

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CHAPTER 44 COMMERCIAL LEASING

5-44 Thompson on Real Property, Thomas Editions § 44.05

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§ 44.05 Taxes.

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In the unlikely event that the lease is silent on the subject, the landlord is obligated to pay real estate taxes with respect to the building and land within which the demised premises are located. n75 Modern commercial leases transfer all or a portion of this obligation to the tenant.

§ 44.05(a) Real Estate Taxes Defined.

The definition of real estate taxes in the typical commercial lease covers general real estate taxes on the land and improvements, sewer and water taxes, special assessments, and interest on assessments payable over time. n76 Reasonable attorneys' fees and actual costs incurred in cotesting and appealing increases in real estate tax assessments (regardless of whether any reduction is obtained) are commonly included in the definition.

Commonly excluded from the definition of real estate taxes are federal and state income taxes, inheritance, estate, succession, transfer, gift and similar taxes imposed upon the landlord. Tenants also seek to limit their exposure to increases in tax rates in light of the condition of the premises at the time the lease was executed by excluding increases caused by the expansion or improvement of the property, increases in value of the property. n77

Sophisticated tenants seek to limit their exposure to dramatic increases in assessments immediately following (and probably generated by) the reporting of a sale of the property to the local taxing jurisdiction. This has become a hotly contested issue in commercial office lease negotiations in major metropolitan areas. Compromise on this issue may take the form of an exclusion if the property is sold during the first five years of the lease, a stretch-out of the obligation to pay such increases, thereby reducing the budget-busting implications for tenants, or a limitation based on the percentage increase in real estate taxes incurred in a basket of comparable buildings in the same locale.

Commercial landlords worry that, some day, the real property taxation system as we know it may be abolished. In its place governmental units may decide to impose a tax on rents, or some other substitute form of raising revenue, to finance governmental functions, particularly the cost of public education. Long-term leases commonly provide sufficient flexibility in the definition of real estate taxes to protect the landlord against this risk. n78

§ 44.05(b) Tenant's Real Estate Tax Burden.

In recent years, the most significant type of increased operating cost for commercial landlords has been real estate taxes. Most leases, therefore, seek to protect the landlord's profit against erosion by passing along to tenants responsibility for payment of increases in real estate taxes imposed during the lease term, whether resulting from increases in the rate of tax or from an increase in the valuation of the property. In a multi-tenant building, this involves a proration of the increase so that all tenants pay a proportionate share based upon the relative size of their premises. Alternatively, "net" leases impose on the tenant the entire obligation for the payment of real estate taxes (rather than merely the increase experienced during the term). An amount equal to one-twelfth of the tenant's share of real estate taxes is generally payable each month as additional rent.

It is common for commercial tenants with significant negotiating strength to seek a "cap" on increases in real estate taxes that may be passed through to them. The lease should assign to the tenant its share of any real estate tax refund resulting from a successful contest or appeal, even after the term of the lease has expired.

§ 44.05(b)(1) Proportional Share.

For multi-tenant buildings in which the tenant's premises are not separately assessed for real estate tax purposes, each tenant's share of such taxes (or the increase in such taxes during the term of the lease, as the case may be) is prorated. Each tenant's proportional share of such taxes (or increase) is based on the ratio that the square footage of such tenant's premises bears to the total number of square feet of leasable space in the subject property.

§ 44.05(b)(2) Tax Increases in Excess of a Given Base.

The typical commercial lease makes the landlord responsible for real estate taxes during the first full calendar year of the term (the "base year"). The tenant bears the burden of increases in real estate taxes above the level in existence during the base year.

A common concern of tenants' counsel is that the typical commercial landlord would appear to have very little incentive to vigorously resist increased assessments, because it knows that it can simply pass them on to its tenants. n79 As a result, commercial tenants expend precious negotiating capital, and add considerably to the length of the real estate tax clause, by reserving the right to contest increased assessments on the landlord's behalf and in the landlord's name if the landlord fails or refuses to do so. There is little basis, either in fact or economics, for this concern. Except in a mythical fully-leased real estate market, landlords who most successfully restrain increases in operating costs (of which real property taxes is the largest single component) will be able to charge the highest rents and earn the most profits.

FOOTNOTES:

(n1)Footnote 75. *See Valencia Ctr., Inc. v. Publix Super Mkts., Inc., 464 So. 2d 1267 (Fla. Ct. App. 1985)* (dramatic increase in real estate taxes over term of lease does not release lessor under either the doctrine of commercial frustration or impossibility).

(n2)Footnote 76. Commercial leases often use the term "impositions" to collectively describe real estate taxes and other governmental charges.

(n3)Footnote 77. In *Blackstar Publishing Co. v. 460 Park Associates, 520 N.Y.S.2d 922 (N.Y. Sup. Ct. 1987)* , a New York appellate court relieved an existing tenant from being charged a pro-rata share of dramatic real estate tax increases caused by the landlord's renovation of the lobby and six floors of the building that were leased to a major new tenant. The existing tenant successfully argued that it did not intend to be responsible for tax increases due to unanticipated renovations. Similarly, *in Gold Medal Stamp Co. v. Carver, 270 N.E.2d 834 (Mass. 1971)* , the Supreme Judicial Court of Massachusetts held that where the building renovation amounted to an extraordinary permanent improvement not contemplated by the parties at the time of lease execution, the tenant would not be liable for the

resulting increased tax assessment.

(n4)Footnote 78. A typical lease clause on the subject provides as follows:

> Landlord and Tenant recognize and acknowledge that there may be changes in the current real property tax system and that there may be imposed new forms of taxes, assessments, charges, levies or fees, or there may be an increase in certain existing taxes, assessments, charges, levies or fees placed on, or levied in connection with the ownership, leasing, occupancy or operation of the demised premises. All such new or increased taxes, assessments, charges, levies or fees that are imposed or increased as a result of any changes in the structure of the real property tax system or any limitations on the real property taxes that can be assessed on real property including, but not limited to, any and all taxes, assessments, charges, levies and fees assessed or imposed due to the existence of this Lease (including any surcharge on the income directly derived by Landlord therefrom) or for the purpose of funding special assessment districts of the type funded by real property taxes, shall also be included within the meaning of "Taxes".

(n5)Footnote 79. It is also assumed that landlords lack incentive to seek to minimize assessments because of the fear that a contest or appeal may result in an increase in the assessment.

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CHAPTER 44 COMMERCIAL LEASING

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§ 44.06 Common Area Maintenance (CAM) Fees.

Commercial landlords seek to pass through to and recover from tenants as additional rent the expenses that relate directly to maintaining and operating the subject property. Alternatively, the lease may provide for tenants to pay only the increase in the owner's costs over a specified floor or base amount, which may be the operating expenses during the first lease year or the initial year of occupancy of the property. n80 Such expenses are typically described as common area maintenance (CAM) fees. Along with the rent and tax provisions, CAM fee provisions are among the most important economic provisions of the lease. n81

Each tenant's share of CAM expenses is generally based upon the proportion that the size of the leased premises bears to the total number of rentable square feet of space in the subject property. Landlords generally seek to collect monthly, together with the rent, an amount equal to 1/12 of the tenant's estimated annual CAM obligation (usually based on the experience for the previous year plus an adjustment to reflect the increase in the cost of living), with a reconciliation after the end of each year when a final calculation of expenses becomes available.

Care must be taken by tenants to exclude from the definition of CAM expenses such items as mortgage payments, capital improvements, n82 leasing commissions, depreciation, works of art, defective construction, landlord negligence and costs incurred with respect to a specific tenant such as renovation and eviction expenses. n83 Tenants should also negotiate for the right to audit within a fixed period of time the landlord's records of CAM costs. n84 Tenants with considerable negotiating leverage will seek a limit on the maximum amount of annual increases in their operating expense pass-through obligations.

Particular care must be taken by tenants in mixed-used projects (i.e., developments that combine a mix of office, retail, hotel and residential uses) to avoid paying for operating expenses with respect to facilities or services that exclusively or disproportionately benefit tenants in other portions of the complex, n85 rather than expenses attributable to the property generally, such as real estate taxes, exterior maintenance, public area utilities, and insurance. n86

FOOTNOTES:
(n1)Footnote 80. The base amount for operating expenses should reflect the expenses for a fully occupied and operational building. If not, these expenses may rise dramatically when the building becomes fully occupied as

additional tenants increase demand on building systems and services. *See* Alan M. DiSciullo, *Negotiating a Commercial Lease from the Tenant's Perspective*, 18 Real Est. L.J. 27, 36 (1989).

(n2)Footnote 81. "In a downtown Washington office building, 1992 operating expenses will range from $10 to $15 per square foot, or 30 to 50 percent of the total rent." David E. Kaplan and Robert J. Gage, *Hold That Line*, Wash. Law. 32 (January/February 1992).

(n3)Footnote 82. Capital improvements and items of equipment that serve to reduce operating expenses or that effect other economies in the operation or maintenance of the property (*e.g.*, energy and labor saving devices) should be amortized over a reasonable period and included to that extent in CAM expenses.

(n4)Footnote 83. "Certain costs of operating a building should be considered part of the cost of doing business. These costs should be included in the base rent rather than recovered through operating expense passthroughs." David E. Kaplan and Robert J. Gage, *Hold That Line*, Wash. Law. 32, 34 (January/February 1992).

(n5)Footnote 84. "Such a provision allows the tenant to make judgments about efficiency and economy as well as to have the opportunity to uncover improper line-item expenses, such as snow removal for a southern Florida mall or miscellaneous expense allowance for cigars for a mall manager and his 100 closest friends." Jeffrey H. Newman, *Common Area Costs -- The Hidden Rent*, Real Est. Rev. 65, 66 (Winter 1990).

(n6)Footnote 85. "One example would be the landscaping and maintenance costs of a pool area located within the complex grounds but accessible only by, say, the condominium residents. Another example would be the heating, air conditioning and other utility costs incurred by the retail and restaurant tenants." David M. Gilson, *Mixing Up Operating Costs in Those Mixed-Used Projects*, Wash. Law. 12 (January/February 1988).

(n7)Footnote 86. "If there has not been a proper allocation of responsibility for the cost of those services, then one or another use within the project -- usually the office components -- will find itself bearing an unfair share of those costs without receiving the commensurate benefit." *Id*.

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CHAPTER 44 COMMERCIAL LEASING

5-44 Thompson on Real Property, Thomas Editions § 44.07

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§ 44.07 Maintenance and Repair.

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§ 44.07(a) Placing the Duty to Repair.

The traditional common law rule was that, in the absence of a lease covenant to the contrary, the landlord was not obligated to maintain or repair the leased premises during the term of the lease. n87 This result was justified on the basis that the tenant had received a conveyance of a non-freehold estate that was subject to the tenant's exclusive control. n88 In the absence of a contrary agreement, it was the tenant, not the landlord, who traditionally had obligations with respect to the maintenance and repair of the leased premises during the term of the lease. These obligations arose under the doctrine of waste. n89

In the residential landlord-tenant arena, these traditional rules regarding maintenance and repair of the leased premises have been largely eclipsed by the adoption of the implied warranty of habitability. n90 However, with some exceptions, n91 the traditional rules persist in the commercial leasing sphere. But those rules frequently do not apply, because the parties to commercial leases usually include provisions about maintenance and repair in their written leases. As a result, the resolution of disputes about maintenance and repair obligations often depends on the interpretation of lease provisions. n92

Issues sometimes arise regarding structural repairs. n93 A tenant generally would be responsible for making such repairs only if the lease specifically and unambiguously allocates such responsibility to the tenant. n94 On the other hand, the tenant is customarily responsible for repairs required to be made to interior portions of its premises, exclusive of structural elements, such as pipes and conduits. The potentially staggering cost of remediation in the event of discovery of asbestos and hazardous wastes has become a major issue in contemporary commercial lease negotiation. n95

§ 44.07(b) Remedies for Failure to Repair.

§ 44.07(b)(1) Self-help.

Refusal by the landlord to fulfill its duty to make repairs after adequate notice and demand may entitle the tenant to

make the repairs itself and offset the reasonable cost against later rents. n96 Tenants seeking to assure themselves of this remedy by attempting to negotiate for a "repair and deduct" clause in the lease should be prepared to encounter resistance from the landlord, ostensibly on behalf of the landlord's institutional mortgage lender. n97 Counsel advising tenants contemplating the exercise of self-help should anticipate objections that would be expected to be raised by the landlord and protect against the likelihood of disputed issues of fact. n98

§ 44.07(b)(2) Constructive Eviction.

There is an implied covenant of quiet enjoyment in commercial real estate leases. The implied covenant of quiet enjoyment is breached when a material act or omission of the landlord, or those acting for the landlord or with its permission, or someone with paramount title, permanently deprives the tenant of the ability to make commercial use of the premises. n99 Under the doctrine of constructive eviction, such a breach relieves the tenant of any further obligation to pay rent if the tenant abandons the premises within a reasonable period of time after the act or omission. n100

When the actions allegedly constituting constructive eviction are by third parties without the landlord's authority or permission, as a general proposition the tenant cannot complain that the landlord breached the covenant of quiet enjoyment. However, in *Fidelity Mutual Life Insurance Co. v. Robert P. Kaminsky, M.D., P.A.*, n101 a gynecologist tenant successfully claimed constructive eviction after anti-abortion protestors repeatedly picketed the medical office building in which tenant leased space. The jury heard testimony that the landlord was aware that singing and chanting demonstrators would occupy the stairs leading to the tenant's office and prevent patients from entering by blocking the doorway, but took no effective action to respond to the problem. The tenant finally abandoned the building and successfully defended against the landlord's action for rent for the balance of the lease term.

The landlord's failure to perform its repair and maintenance obligations under the terms of the lease may constitute a partial constructive eviction when the tenant is forced to temporarily abandon its business operations. n102

§ 44.07(b)(3) Retaliatory Eviction.

The tenant may be able to prevent the landlord from terminating the tenancy, increasing rent, decreasing services, or perhaps refusing to renew a tenancy following good faith complaints or other action by a tenant based on the condition of the premises, if the tenant is able to prove that the landlord's conduct was in retaliation against the tenant. Although a majority of states have adopted some form of retaliatory eviction doctrine in the residential landlord-tenant context by legislation or judicial rule, or both, n103 few jurisdictions recognize retaliatory eviction of commercial tenants. n104 The *Restatement of Property* expressly declines to take a position on whether the doctrine of retaliatory eviction should be extended to commercial leases. n105

§ 44.07(c) Implied Warranty of Suitability.

During the 1970s and 1980s virtually all states adopted an implied warranty of habitability, either by judicial opinion or by statute, in the residential landlord-tenant context. n106 However, the extension of this doctrine to commercial leasing has been slow. The implied warranty does not travel well from residential to commercial leasing for several reasons. First, its founding father, the late Judge J. Skelly Wright of the United States Court of Appeals for the District of Columbia Circuit, relied heavily upon principles derived from consumer protection cases recognizing a cause of action against manufacturers for breach of implied warranties of fitness and merchantability, where serious defects rendered mass-produced chattels unfit for the ordinary purposes for which such goods are used. n107 According to Judge Wright, the need for an implied warranty in part arose from the great disparity between the residential landlord and tenant in terms of their respective opportunity, incentive, and capacity to inspect and maintain the condition of the property. Judge Wright was also influenced by the existence of the District of Columbia's housing code, which he thought required a warranty of habitability to be implied in the leases that it covers. Housing codes do not apply to non-residential leases.

One of the earliest decisions to recognize an implied warranty by a commercial landlord that the leased premises are suitable for their intended commercial purpose, *Davidow v. Inwood North Professional Group*, n108 arose in what is likely to be the most attractive context for importing an implied warranty from the residential setting in which it was born to the commercial arena. *Davidow* involved the short-term lease of medical office space in a multi-tenant building. The landlord agreed to provide air conditioning, electricity, hot water, maintenance, and security. After experiencing air conditioning breakdowns, a leaking roof, rodent and pest infestation, no hot water, vandalism, burglary, and a temporary deprivation of electricity, the tenant vacated the premises.

At trial Dr. Davidow successfully defended against the landlord's action to collect unpaid rent by raising the affirmative defense of the breach of implied warranty of suitability of the premises for use as a medical office. The court of appeals reversed the trial court judgment, holding that the implied warranty of habitability does not extend to commercial leaseholds. The Texas Supreme Court reversed. Finding that many of the same disparities exist between the parties to a short-term commercial lease of space in a multi-tenant medical office building that Judge Wright had observed in the residential landlord-tenant context, n109 the court saw no valid reason to justify limiting the implied warranty of habitability to residential leases.

In what is still a minority view, *Davidow* holds that commercial landlords impliedly warrant that their premises are suitable for their intended commercial purpose. n110 This warranty means that at the inception of the lease there are no latent defects in facilities, both within the leased premises and common areas, that are essential to the use of the premises for their intended commercial purpose, and that the essential facilities will remain in a suitable condition throughout the term. Whether the implied warranty has been breached depends upon the nature of the defect and its effect on the tenant's beneficial enjoyment of the space, whether the defect resulted from any unusual or abnormal use by the tenant, the amount of the rent, and the age of the structure. n111

Most courts that have faced the issue have rejected an implied warranty of suitability for commercial leaseholds, n112 sometimes without analyzing whether the distinctions between residential and commercial leases justify limiting the warranty to the residential context. n113 Some courts base rejection on the argument that commercial tenants do not occupy inferior bargaining positions to their landlords. n114 Sometimes, of course, they will.

Unlike the residential implied warranty of habitability, which generally cannot be effectively waived, n115 the implied warranty of suitability for leased commercial space apparently can be waived if, for example, the parties expressly agree that tenant will repair certain defects. n116

§ 44.07(d) Exculpation Clauses.

Landlords seek to limit their personal liability for damages to third parties through the use of indemnification provisions. n117 Landlords also attempt to exculpate themselves from liability to their tenants.

Exculpation in commercial leasing takes several principal forms. The first method is the express contractual allocation to the tenant of all responsibility for damages or injuries to persons or property arising from the use of the premises and common areas, including damage and injury caused by the landlord's own negligence. Although such clauses have been enforced in the commercial context, n118 even in jurisdictions where they would not be enforced in residential leases, n119 they are strictly construed against the landlord. n120 In a number of jurisdictions, both as a matter of common law and statute, it is considered contrary to public policy for landlords to exempt themselves from liability for their own negligence. n121

Another method of denying the tenant an effective remedy against the landlord is to limit the tenant's recourse to the landlord's interest in the premises, or the office building or other structure in which the premises are located. n122

By regularly refinancing the property to the full extent of its value, the landlord can effectively drain any equity in the property. n123

A provision establishing a short limitations period for filing an action against the landlord may effectively limit the tenant's recourse. n124

Finally, landlords sometimes seek to limit their exposure by holding title to rental property in separate limited liability entities, such as corporations or limited partnerships.

FOOTNOTES:
(n1)Footnote 87. *See, e.g., Chambers v. Lowe, 169 A. 912 (Conn. 1933)* ; *Divines v. Dickinson, 174 N.W. 8 (Iowa 1919)* .

(n2)Footnote 88. *See* Robert S. Schoshinski, American Law of Landlord and Tenant § 3.13 (1980).

(n3)Footnote 89. The doctrine is discussed in chapter 70.

(n4)Footnote 90. This implied warranty is discussed in chapter 41.

(n5)Footnote 91. *See, e.g., Davidow v. Inwood North Professional Group-- Phase I, 747 S.W.2d 373 (Tex. 1988)* (implied warranty of suitability in commercial leases); *see also Wesson v. Leone Enterprises, Inc., 774 N.E.2d 611 (Mass. 2002)* (dependency of covenants rule applies to commercial leases); *Richard Barton Enterprises, Inc. v. Tsern,928 P.2d 368 (Utah 1996)* (dependency of covenants analysis in commercial lease).

(n6)Footnote 92. *See, e.g., Hadian v. Schwartz, 884 P.2d 46 (Cal. 1994)* . *See also* Todd D. Ruggiero. note, *Brown v. Green and Hadian v. Schwartz: Determining Who Is Responsible for Major Structural Repairs in Commercial Leases*, Pac. L. J. 28 (Winter, 1997) 417 (urges that the lessor should be held liable for all major structural repairs and that an implied warranty of fitness should be incorporated within commercial leases).

(n7)Footnote 93. Structural elements of a building include the footings, foundation, load-bearing walls, columns, beams, roof and the components of the electrical and mechanical building systems serving more than one tenant, such as conduits, wires and pipes.

(n8)Footnote 94. *Sandelman v. Buckeye Realty, Inc., 576 N.E.2d 1038 (Ill. App. Ct. 1991)* ; 428 *Camera Corp. v. Tandy Corp., 707 N.Y.S.2d 101 (App. Div. 2000)* (landlord obligated to provide heat; landlord also obligated to repair heating system); *but see Washington Univ. v. Royal Crown Bottling Co., 801 S.W.2d 458 (Mo. Ct. App. 1990)* (tenant under long-term, net lease responsible for cost of structural repairs). "However, even though primary responsibility for performing or doing repairs shifts over to the lessor, the tenant should remember that the costs for performing these obligations usually end up being passed through to the tenant as an operating expense." Alan M. DiSciullo, *Negotiating a Commercial Lease from the Tenant's Perspective*, 18 Real Est. L.J. 27, 41 (1989). *See also* § 44.06, of this chapter.

(n9)Footnote 95. *See* Alan M. DiSciullo, *Negotiating a Commercial Lease from the Tenant's Perspective*, 18 Real Est. L.J. 27, 42 (1989). *See* § 44.10 of this chapter.

(n10)Footnote 96. *See* Milton R. Friedman, Friedman on Leases § 10.501a2 (3d ed. 1990).

(n11)Footnote 97. Emanual B. Halper, Shopping Center and Store Leases III-19 -- III-20 (Rev. ed. 1991):

> Rights to make deductions from rent are a big problem. Mortgage lenders can be quite concerned about the integrity of the income stream if tenants have this right. Why shouldn't they be? It's easy to fantasize about a tenant *claiming* that the landlord owes him so much money that no rent is payable at all for the balance of the term of the lease. If no rent is payable, there's nothing in the kitty to be applied to

the principal and interest due on the mortgage, the real estate taxes, and the operating expenses.

What's to be done? Although the tenant *should* have the right to make deductions from rent in case of a default by the landlord (assuming, of course, that the landlord actually has agreed to perform some obligation under the lease), the draftsman should consider the possibility of disputes. Perhaps the tenant will *claim* that the landlord has failed to reimburse the tenant for expenses incurred pursuant to the self-help clause but, in the landlord's opinion, this claim is not justified. Under these circumstances, the tenant should be permitted to cure the default but should not have the right to make deductions from rent until the dispute is resolved. The tenant can be protected against interminable delays if the lease requires that proceedings to resolve the dispute be started promptly and the proceedings be prosecuted diligently.

(n12)Footnote 98. Milton R. Friedman, Friedman on Leases § 10.501a2 (3d ed. 1990):

The landlord may deny there was any need for the repair, may claim that any need therefor was due to the tenant's fault, that the repairs went beyond the scope of the tenant's authority and were in fact improvements, and that the claimed cost of the work was excessive. It is therefore advisable for the tenant to make a clear and complete record showing conditions existing before the work was begun, possibly with photographs, the work thereafter done, and a justification of the expenses.

(n13)Footnote 99. Additional information about the implied covenant of quiet enjoyment is found in chapter 41.

(n14)Footnote 100. *Reste Realty v. Cooper, 251 A.2d 268 (N.J. 1969)* (successful constructive eviction defense to landlord's claim for rent); *Shaker and Associates, Inc. v. Medical Technologies Group, Ltd., 733 N.E.2d 865 (Ill. Ct. App. 2000)* (tenant waived constructive eviction claim by not vacating within a reasonable time); *Winrock Inn Co. v. Prudential Ins. Co. of America, 928 P.2d 947 (N.M. Ct. App. 1996)* (constructive eviction occurs when landlord's actions substantially deprive tenant of beneficial use of leased premises and tenant vacates, or when landlord acts maliciously and landlord's actions are so severe as to interfere with tenant's peaceful enjoyment of premises); *ARE-100/800/ ARE-100/800/801 Capitola, LLC v. Triangle Laboratories, Inc., 550 S.E.2d 31 (N.C. Ct. App. 2001)* (commercial tenant who did not abandon leased property was precluded from arguing that he was constructively evicted as a result of the landlord's failure to make repairs).

(n15)Footnote 101. *768 S.W.2d 818 (Tex. Ct. App. 1989)* .

(n16)Footnote 102. *Manhattan Mansions v. Moe's Pizza, 561 N.Y.S.2d 331 (City Ct. 1990)* (pizza parlor tenant deprived of beneficial use of leased premises by landlord's failure to repair recurrent water leak in grill area); *see also Echo Consulting Services, Inc. v. North Conway Bank, 669 A.2d 227 (N.H. 1995)* (construction interfered with use of the leased premises; court concludes that evidence supported constructive eviction claim).

(n17)Footnote 103. Jesse Dukeminier & James E. Krier, Property 538 (3d ed. 1993).

(n18)Footnote 104. *Compare* 1266 *Apartment Corp. v. New Horizon Deli, Inc., 847 A.2d 9 (N.J. Super. Ct. 2004)* (equitable defense of retaliatory eviction does not apply to commercial leases); *William C. Cornitius, Inc. v. Wheeler, 556 P.2d 666 (Or. 1976)* (limiting retaliatory eviction doctrine to situations in which the landlord's alleged violations deal with conditions on residential premises affecting safety and health) *with Custom Parking, Inc. v. Superior Court, 187 Cal. Rptr. 674 (Cal. Ct. App. 1982)* (extending retaliatory eviction defense to commercial tenancies).

(n19)Footnote 105. Restatement (Second) of Property, Landlord & Tenant, § 14.8 *Caveat* at 50 (1977).

(n20)Footnote 106. Sandra H. Johnson, et al., Property Law 347 (1992).

(n21)Footnote 107. *Javins v. First Nat'l Realty Corp., 428 F.2d 1071 (D.C. Cir. 1970)* , *cert. denied, 400 U.S. 925 (1970)* (*citing Henningsen v. Bloomfield Motors, Inc., 161 A.2d 69 (N.J. 1960)* to support the proposition that "the buyer of goods and services in an industrialized society must rely upon the skill and honesty of the supplier to assure that the goods and services purchased are of adequate quality").

(n22)Footnote 108. *747 S.W.2d 373 (Tex. 1988)* .

(n23)Footnote 109. *Davidow v. Inwood North Professional Group, 747 S.W.2d 373, 376 (Tex. 1988):*

> It cannot be assumed that a commercial tenant is more knowledgeable about the quality of the structure than a residential tenant. A businessman cannot be expected to possess the expertise necessary to adequately inspect and repair the premises, and many commercial tenants lack the financial resources to hire inspectors and repairmen to assure the suitability of the premises... Additionally, because commercial tenants often enter into short-term leases, the tenants have limited economic incentive to make any extensive repairs to their premises... Consequently, commercial tenants generally rely on their landlords' greater abilities to inspect and repair the premises.

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(n24)Footnote 110. Wisconsin has imposed significant duties on commercial landlords with respect to the condition of the leased premises by statute. *See Wis. Stat. Ann. § 704.07*. However, these statutory obligations may be waived. *See id.* Louisiana, with its civil law tradition, imposes obligations on landlords with respect to the condition of the premises in both residential and non-residential leases. *See*, e.g., *La. Civ. Code art. 2696* ("The lessor warrants the lessee that the thing is suitable for the purpose for which it was leased and that it is free of vices or defects that prevent its use for that purpose.").

(n25)Footnote 111. *Davidow v. Inwood North Professional Group, 747 S.W.2d at 377*.

(n26)Footnote 112. *E.P. Hinkel & Co. v. Manhattan Co., 506 F.2d 201 (D.C. Cir. 1974)* ; *J.B. Stein & Co. v. Sandberg, 419 N.E.2d 652 (Ill. App. Ct. 1981)* ; *McArdle v. Courson, 402 N.E.2d 292 (Ill. App. Ct. 1980)* ; *Yuan Kane Ing v. Levy, 326 N.E.2d 51 (Ill. App. Ct. 1975)* ; *Knapp v. Simmons, 345 N.W.2d 118 (Iowa 1984)* ; *Chausse v. Coz, 540 N.E.2d 667 (Mass. 1989)* ; *Mobil Oil Credit Corp. v. DST Realty, Inc., 689 S.W.2d 658 (Mo. Ct. App. 1985)* ; *Gehrke v. General Theatre Corp., 298 N.W.2d 773 (Neb. 1980)* ; *Truetried Service Co. v. Hager, 691 N.E.2d 1112 (Ohio Ct. App. 1997)* .

(n27)Footnote 113. Sandra H. Johnson, et al., Property Law 356 (1992).

For an analysis of the justifications for distinguishing between residential and commercial leaseholds with respect to the implied warranty of fitness for use, *see* Note, *The Unwarranted Implication of a Warranty of Fitness In Commercial Leases -- An Alternative Approach, 41 Vand. L. Rev. 1057 (1988)* (commercial tenants are better able to make a meaningful inspection of the premises, effect necessary repairs, pass the cost of repairs and inspections along to customers, and bargain for express warranties). Additional writings on this topic are referenced in § 41.06, in chapter 41.

(n28)Footnote 114. *Service Oil Co. v. White, 542 P.2d 652 (Kan. 1975)* .

(n29)Footnote 115. *Hilder v. St. Peter, 478 A.2d 202 (Vt. 1984)* .

(n30)Footnote 116. *Davidow v. Inwood North Professional Group Davidow, 747 S.W.2d 373, 377 (Tex. 1988). See also Gym-N-I Playgrounds, Inc. v. Snider, 158 S.W.3d 78 (Tex. Ct. App. 2005)* (warranty waived when lessee accepted the premises "as is").

(n31)Footnote 117. *See* § 44.09(d) of this chapter.

(n32)Footnote 118. *J.B. Stein & Co. v. Sandberg, 419 N.E.2d 652 (Ill. Ct. App. 1981)* ; *Fena v. Wickstrom, 348 N.W.2d 389 (Minn. Ct. App. 1984)* ; *Princeton Sportswear Corp. v. H & M Assoc., 484 A.2d 185 (Pa. Super. Ct. 1984) , rev'd on other grounds, 507 A.2d 339 (Pa. 1986)* .

(n33)Footnote 119. The distinction drawn by courts in such jurisdictions is that while a residential tenant must be protected against unfair disparity in bargaining power, no such inequality of position exists in a commercial setting. Compared with residential tenants, commercial lease tenants are considered to have a better opportunity to "shop around" and negotiate terms with a landlord. *Bedrosky v. Hiner, 430 N.W.2d 535 (Neb. 1988)* ; *Kuzmiak v. Brookchester, Inc., 111 A.2d 425 (N.J. Ct. App. 1955)* .

(n34)Footnote 120. *See, e.g.,* Burnett v. Chimney Sweep, *20 Cal. Rptr.3d 562 (Cal. Ct. App. 2004)* (agreement that seeks to limit liability generally without mentioning negligence is construed to shield a party only for passive negligence, not for active negligence); *Galligan v. Arovitch, 219 A.2d 463 (Pa. 1966)* (landlord held liable for injuries on lawn notwithstanding leasehold exculpation of landlord from liability for injuries on sidewalk); *see also Parkside Center., Ltd. v. Chicagoland Vending, Inc., 552 S.E.2d 557 (Ga. Ct. App. 2001)* (exculpatory clause in commercial lease was not enforceable for landlord's failure to make clause explicit, prominent, clear, and unambiguous).

(n35)Footnote 121. *See, e.g., SRH, Inc. v. Millard Refrigerated Services, Inc., 339 F.3d 738 (8th Cir. 2003)* (lease provision exempting lessor from ordinary negligence is not contrary to public policy); *Barnes v. Pearman, 294 S.E.2d 619 (Ga. Ct. App. 1982)* ; *Vermes v. American Dist. Tel. Co., 251 N.W.2d 101 (Minn. 1977)* ; Md. Real Prop. Code Ann. § 8-105 (1988).

(n36)Footnote 122. A typical lease clause on the subject provides as follows:

> Landlord shall be under no personal liability with respect to any of the provisions of this Lease, and if Landlord is in breach or default with respect to Landlord's obligations or otherwise under this Lease, Tenant shall look solely to the equity of Landlord in the premises for the satisfaction of Tenant's remedies. It is expressly understood and agreed that Landlord's liability under the terms, covenants, conditions, warranties and obligations of this Lease shall in no event exceed the loss of Landlord's equity interest in the premises.

(n37)Footnote 123. However, following the landlord's sale of the property, the tenant may have recourse against the proceeds of the sale notwithstanding an exculpatory provision limiting the landlord's liability to its equity in the property. *See Won's Cards, Inc. v. Samsondale/Haverstraw Equities, Ltd., 566 N.Y.S.2d 412 (App. Div. 1991)* .

(n38)Footnote 124. *See West v. Henderson, 278 Cal. Rptr. 570 (Cal. Ct. App. 1991)* (rejecting tenant's argument that a six-month limitation period for claims against landlord was unconscionable).

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CHAPTER 44 COMMERCIAL LEASING

5-44 Thompson on Real Property, Thomas Editions § 44.08

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§ 44.08 Assignment/Subletting.

§ 44.08(a) Landlord's Objectives.

Assignment and subletting both involve the transfer of the tenant's right to use the leased premises to a third party. An assignment is said to occur when the tenant transfers its entire interest or estate in the demised premises to a third party. The transfer of anything less than the tenant's entire interest or estate results in a sublease, with the original tenant retaining a reversion.

The original tenant remains liable to the landlord following a sublease or assignment based on privity of contract, unless the landlord expressly releases the original tenant from liability for further obligations by entering into a novation. However, the direct liability of the transferee to the landlord *is* affected by the form of transfer. Following an assignment, the assignee effectively steps into the shoes of the original tenant and is considered to be in privity of estate (though not in privity of contract) with the landlord, who thus may enforce its rights under the lease directly against the transferee. n125 The sublessee, being neither in privity of estate nor in privity of contract with the prime landlord, is not directly liable to the prime landlord.

Although the tenant's right to transfer its interest in the leased premises might be "the most highly contested legal clauses in a negotiation," n126 commercial landlords generally require the unrestricted discretionary right to approve any transfer by the tenant to a third party. n127

A majority of jurisdictions enforce the commercial landlord's absolute discretion to arbitrarily withhold consent to transfers by the tenant. n128 A minority of jurisdictions, by case law authority or by statute, require commercial landlords to act reasonably and in good faith in granting such consent, particularly where the lease is silent on the subject of the standard for the landlord's exercise of its approval power. n129 In such jurisdictions, a denial of consent based on personal taste, convenience, sensibility, or in order to extract a higher rent than originally reserved would likely be considered unreasonable, arbitrary, and in bad faith. n130 In applying a standard of commercial reasonableness, the landlord may properly consider such factors as the financial responsibility of the proposed transferee, the nature of the proposed use by the transferee, and the need for alterations to the demised premises. n131

A secondary objective from the landlord's perspective is the ability to claim for itself any profit realized by the tenant upon a transfer of its interest in the premises. n132 Parties to a commercial lease should be free to agree among themselves upon the allocation of the consideration attributable to the value of the leased premises in the case of a transfer by tenant. n133 The lease may also provide for the landlord to "recapture" the premises by giving the landlord the right to cancel the lease as an alternative to consenting to assignment, or to re-enter the proposed sublease space as an alternative to consenting to a sublease. n134 In either event, the original tenant is thereafter discharged from liability with respect to the premises recaptured by the landlord.

§ 44.08(b) Tenant's Objectives.

For a variety of business reasons it may become necessary or desirable for a commercial tenant to transfer all or a portion of the leased premises before the expiration of the term of the lease. n135 For most commercial tenants, the ability to transfer is a specific example of the flexibility they require to conduct business without interference from the landlord.

A secondary objective from the tenant's perspective is the ability to resist recapture by the landlord of any profit the tenant might be in a position to realize if the market rental value of the demised premises should appreciate during the term of the lease, or if the tenant managed to negotiate for a bargain rental rate under the original lease.

§ 44.08(c) Landlord's Right to Refuse Consent.

§ 44.08(c)(1) Common Law Approach.

If a lease is totally silent on the subject, n136 the common law gave the tenant absolute freedom to assign or sublease without the consent of the landlord. . n137 However, the typical commercial space lease drafted from the landlord's perspective is likely to negate this rule and provide instead that the tenant does not have the right to assign the lease or sublet the premises without the landlord's prior written consent. A more sophisticated variant of the clause will go on to provide that such consent may be granted or withheld at the landlord's sole and absolute discretion. n138

Courts in a majority of jurisdictions enforce either version of the consent clause as written, n139 by not requiring the landlord to act reasonably or in good faith in determining whether to grant its consent to proposed transfers of the tenant's interest, or even to give the tenant any explanation for its refusal. n140 Such courts reason that requiring landlords to act reasonably would contradict the apparent intent of the parties in the case of the former clause, and their express intent in the case of the latter. They reject the tenant's argument that arbitrary withholding of consent constitutes an illegal restraint on alienation.

§ 44.08(c)(2) Modern Judicial and Legislative Approaches.

When the lease contains a clause prohibiting the tenant from subletting or assigning without the consent of the landlord, a growing minority of jurisdictions, by case law or statutory authority, require commercial landlords under long-term leases to act in a commercially reasonable manner in consenting to assignments and subleases, even if the lease does not expressly require the landlord to do so. n141 This requirement is usually based upon some combination of the common law property aversion to unreasonable restraints on alienation and contract law principles of implied covenants of good faith and fair dealing, n142 and by reasoning that allowing a landlord to arbitrarily refuse consent would virtually nullify the right to assign or sublease suggested by the clause, thus defeating the legitimate expectations of the tenant. n143

Absent a statutory provision to the contrary, it would not appear that this requirement is such a burning issue of public policy that it could not be knowingly and voluntarily contracted away by a commercial tenant of relatively equal bargaining strength, expressly agreeing that the landlord may act arbitrarily in withholding consent to transfers, n144 although this remains an open question in most jurisdictions. n145 It is recommended that such a clause be initialled to

indicate that it was read by the tenant and that it include a statement to the effect that the clause was freely negotiated by legal counsel on behalf of the tenant. It is further recommended that such a clause expressly provide that the landlord's consent to any assignment or sublease does not dispense with the necessity for seeking the landlord's consent to subsequent transfers by the tenant. n146

Within the minority of jurisdictions that imply a requirement of commercial reasonableness, the landlord's refusal to consent tends to be measured against an objective standard, i.e., that of a reasonably prudent person in the position of owning and leasing similar property and exercising reasonable commercial responsibility. n147 Under such a standard, the landlord's legitimate interest is limited to determining that the prospective transferee is comparable in quality to, will use the space for purposes comparable to, and will pay the same rent that the landlord contemplated receiving at the commencement of the term from the original tenant.

Commercial landlords may reasonably consider such criteria as (i) the identity, business character, and financial condition of the proposed transferee; (ii) the nature and legality of the proposed transferee's use of the demised premises and its suitability for the subject property; and (iii) the necessity of altering the premises to suit the proposed transferee's business. n148 Denying consent solely on the basis of idiosyncratic reasons of "personal whim or taste," or personal ... convenience or sensibility" would not be considered commercially reasonable. n149

It has generally not been considered commercially reasonable for a landlord to deny consent in order to extract higher rental payments than originally reserved in the lease. n150 And it has been held not to be commercially reasonable to deny consent because the proposed transfer would create a vacancy in another building owned by the landlord. n151

However, if there are reasonable commercial objections to a proposed transfer, it could be commercially reasonable for the landlord to demand all or part of the premium the tenant receives from a transferee in excess of the rent reserved under the lease as a condition for consenting to the transfer. n152 It should be considered within the realm of commercial reasonableness for the landlord to limit the number of subtenants. n153 And it would appear to be commercially reasonable to prohibit the tenant from assigning or subletting to an existing occupant in the building if similar space is available elsewhere in the building itself. n154

In *American Book Company v. Yeshiva University Development Foundation, Inc.*, n155 the court considered the reasonableness of the landlord in refusing to consent to a proposed sublease on the basis that the landlord was affiliated with a religion whose orthodox branch opposes most forms of birth control and the proposed transferee (an affiliate of Planned Parenthood) advocated birth control. The court held that personal taste, sensibility, and convenience could not form the basis for refusal to consent to the proposed transfer, nor could greater weight be given to ideological and philosophical inconsistency. However, the impact of the decision may be tempered by two facts: First, Yeshiva University was itself the transferee of the original landlord, thus suggesting that the tenant was entitled to rely upon the objective reasonableness of a secular landlord in making decisions affecting its freedom to transfer. Second, Albert Einstein College of Medicine, the medical school affiliated with Yeshiva University, offered instruction in birth control, thus suggesting that the landlord was already tolerating a degree of controversy or potential source of embarrassment on the family planning issue.

The landlord must be given adequate time to respond to requests for consent to sublet. Occupancy by a proposed subtenant without affording the landlord sufficient time to determine whether the proposed subtenancy meets commercially reasonable standards is a breach of the prohibition against subleasing without the prior written consent of the lessor. n156

Whether the landlord's consent has been unreasonably withheld in a particular case is a question of fact on which the tenant has the burden of proof. The tenant may satisfy its burden of proof by showing that, in response to the tenant's written request for a statement of reasons for withholding consent, the landlord has failed, within a reasonable time, to state in writing its reasonable objection to the transfer. n157

A limitation of the tenant's remedies for the landlord's refusal to exercise its power of consent in a commercially reasonable manner is another form of restriction on transfer. If the landlord specifically covenants and agrees not to unreasonably withhold or delay consent, failure to act reasonably subjects the landlord to liability for damages. However, if the landlord's agreement is merely a qualification or condition to the tenant's covenant not to assign or sublet, n158 then the tenant's only remedy is a declaratory judgment.

Assume, after extensive negotiation, the landlord finally concedes the point of not unreasonably withholding consent, but asks in return for the tenant's agreement not to sue for damages for breach. n159 If the tenant agrees to this seemingly modest request, it has won the battle but may have lost the war. A declaratory judgment that the landlord unreasonably withheld consent, or specific performance, may provide scant solace to the tenant seeking to assign the leased premises because, during the litigation delay, the typical office or retail space assignee is likely to rent elsewhere. n160

FOOTNOTES:

(n1)Footnote 125. The direct liability of the assignee to the landlord is limited to matters arising subsequent to the date of assignment. Absent an express assumption of liability, the transferee has no liability for breaches that occurred prior to the assignment.

(n2)Footnote 126. Alan M. DiSciullo, *Negotiating a Commercial Lease from the Tenant's Perspective*, 18 Real Est. L.J. 27, 39 (1989).

(n3)Footnote 127. Among the most common justifications typically advanced by landlords for this position are the following: (i) unlike the tenant, the landlord, being in the real estate business, is entitled not only to any profit realized upon the leasing of space in the property, but also to exercise unrestricted control over all leasing decisions; (ii) the existence of a percentage rent feature, by which the rental is based in part on a percentage of the tenant's gross receipts generated at the demised premises, makes the identity of any transferee, its line of business and competence, and its financial ability and experience, of critical economic significance to the landlord; (iii) maintaining a consistent quality and style of retail operations at the subject property, and an appropriate "mix" of tenants, is crucial for the success of the subject property and of all tenants; (iv) the landlord must have the right to approve transfers to protect exclusivity clauses negotiated by other tenants of the subject property; and (v) the tenant should be prevented from competing with the landlord in the leasing of space in the subject property.

In some instances, however, the lease will provide that the landlord's consent "shall not be unreasonably withheld." *See, e.g., Ernst Home Center, Inc. v. Sato, 910 P.2d 486 (Wash. Ct. App. 1996)* .

(n4)Footnote 128. *See* § 44.08(c)(1) of this chapter.

(n5)Footnote 129. *See* § 44.08(c)(2)of this chapter.

(n6)Footnote 130. *See* the discussion in § 44.08(c)(2) of this chapter.

(n7)Footnote 131. *See* the discussion in § 44.08(c)(2) of this chapter.

(n8)Footnote 132. A typical lease clause on the subject provides as follows:

> _____% of any sums received by Tenant as a result of any assignment or subleasing which exceed the total sums which Tenant is obligated to pay Landlord under this Lease shall be payable to Landlord as additional rent under this Lease.

(n9)Footnote 133. Dicta to this effect in *Kendall v. Ernest Pestana, Inc., 709 P.2d 837 (Cal. 1985)* , has since been

codified in California. *Cal. Civ. Code § 1995.240*.

(n10)Footnote 134. *In Carma Devs. v. Marathon Dev., 826 P.2d 710 (Cal. 1992)* , the California Supreme Court upheld the landlord's right to enforce a recapture clause in a commercial lease giving the landlord an absolute right to terminate the lease upon the tenant's request for permission to sublet a portion of the premises. The tenant unsuccessfully argued that a clause giving the landlord the right to cancel the lease if the tenant attempted to transfer its interest constituted an unreasonable restraint on alienation, a breach of the implied covenant of good faith and fair dealing, and a violation of public policy.

(n11)Footnote 135. For example, the tenant may desire to transfer its interest if the location becomes unprofitable, if the business becomes so profitable as to result in the need for larger quarters than are available at the subject property, or because of changes incident to a merger or incident to the retirement, death, or disability of a principal.

(n12)Footnote 136. However, because an assignment or sublease generally gives the transferee tenant no greater rights than those held by the original tenant, some provisions of the lease may significantly limit the tenant's practical ability to assign or sublease the space to a third party, regardless of how favorable the lease provision on transferability or how liberal the jurisdiction in restricting the landlord's right to refuse consent to transfer. For example, the transferee could be bound by a narrow and restrictive use clause:

> ("The premises shall be used and occupied solely for the purpose of the retail sale of men's shoes and for no other purpose whatsoever. The specific character of Tenant's business, the anticipated use of the premises and the relationship between such use and other uses within the Shopping Center were a material inducement and pre-condition to Landlord's agreement to execute this Lease with Tenant. Any change in the character of Tenant's business or use shall constitute a material default under this lease."),

a minimum sales requirement:

> ("Landlord has entered into this Lease for the rental reserved herein in reliance on Tenant's representation that it will generate gross sales of not less than $_____ per year during each year of the Term. If Tenant fails to achieve gross sales of $_____ during any calendar year then, in addition to all other rights and remedies of Landlord herein, Landlord shall have the right at its election to terminate this Lease upon not less than thirty (30) days notice."),

or a clause requiring the use of a designated trade name:

> ("Tenant's business in the demised premises shall be conducted under the trade name _____. Tenant shall not use or permit the premises to be used under any other trade name without the Landlord's prior written consent, which consent may be withheld at Landlord's sole and absolute discretion.").

Restrictive alteration, signage, and hours of operation provisions will similarly limit the practical transferability of the tenant's interest by requiring a proposed transferee to seek further consents or approvals from the landlord.

(n13)Footnote 137. *See, e.g., Randolph v. Koury Corp., 312 S.E.2d 759 (W. Va. 1984)* . However, a tenancy at will at common law is terminable at the will of either party and is an exception to the general rule permitting the tenant to transfer its interest. The traditional rules can, of course, be altered by statute. *See Trinity Professional Plaza Associates v. Metrocrest Hosp. Authority, 987 S.W.2d 621 (Tex. Ct. App. 1999)* (discussing Texas statute that bars tenants from assigning or subleasing without the consent of the landlord).

(n14)Footnote 138. A typical lease clause on the subject provides as follows:

> Tenant shall not voluntarily, involuntarily or by operation of law assign, transfer, mortgage, or otherwise hypothecate or encumber this lease, in whole or in part, or any interest therein, nor sublet all or any part of the Leased Premises or permit any other persons to occupy same without the prior written consent of Owner in each instance, any references elsewhere herein to assignees, subtenants or other persons notwithstanding. In the event that Tenant so requests Owner's consent, Owner may in its sole and absolute discretion elect to give or withhold consent. Any attempted transfer, assignment, subletting, mortgage, hypothecation or encumbrance without Owner's written consent shall be void, shall confer no rights upon any third person, and shall, at the option of Owner, terminate this lease.

(n15)Footnote 139. However, covenants against assignments and subleases by the tenant constitute restraints on alienation and, as such, are disfavored and must be construed strictly against the landlord. For example, there is substantial authority that subleasing does not violate a lease clause prohibiting assignment, and vice versa. *See, e.g., American Community Stores v. Newman, 441 N.W.2d 154 (Neb. 1989)* (upholding tenant's restructuring of form of transfer as sublease after landlord exercised its right under lease to refuse permission for proposed assignment to same transferee); Dennis' Natural Mini-Meals, Inc. v. 91 Fifth Ave. Corp., 568 N.Y.S.2d 740 (N.Y. App. Div. 1991) (absent express reference to stock transfers by corporate tenant, sale to third party of stock of tenant corporation does not constitute breach of lease restriction against assignments); *Aiello v. Austrian, 479 A.2d 1234 (Conn. Ct. App. 1984)* (change in lessee's form of business, from medical partnership to professional corporation, but without change in personnel, does not violate lease provision against assignment); *cf. Zona, Inc. v. Soho Centrale LLC., 704 N.Y.S.2d 38 (App. Div. 2000)* (court enforces lease provision stating that "the transfer or other disposition of in excess of twenty-five percent ... of the beneficial ownership of Tenant ... shall constitute an assignment of this lease ....").

The landlord can protect itself against an indirect transfer of the lease by a corporate or partnership tenant by inserting a clause along the following lines:

> If Tenant or its guarantor is a corporation, partnership, or other business entity and if at any time during the term of this lease any part or all of such corporation's shares shall be transferred by sale, assignment, bequest, inheritance, dissolution, merger, consolidation or other reorganization, by operation of law or other disposition, so as to result in a change in the present effective voting control of such corporation by a person or persons owning a majority of said corporate shares on the date of this lease, or if twenty-five percent (25%) of the interest in such partnership or business entity is transferred, assigned, sold or otherwise disposed of, or if by any transfer of interest in such partnership or business entity a change in the effective control results, Tenant shall promptly notify Owner in writing of such change. Any such change in the ownership or control of Tenant's business shall be deemed to be an assignment for purposes of this lease, and Owner may terminate this lease at any time after such change in control by giving Tenant ninety (90) days' prior written notice of such termination.

(n16)Footnote 140. *See, e.g., Carleno v. Vollmert Tire Co., 540 P.2d 1149 (Colo. Ct. App. 1975) . But see Bert Bidwell Inv. v. LaSalle & Schiffer, 797 P.2d 811 (Colo. Ct. App. 1990)* ; *Friedman v. Thomas J. Fisher, 88 A.2d 321 (D.C. 1952)* ; *Tap Room, Inc. v. Peachtree-Tsg Associates, LLC., 606 S.E.2d 13 (Ga. Ct. App. 2004)* ; *Vaswani v. Wohletz, 396 S.E.2d 593 (Ga. Ct. App. 1990)* ; *Food Pantry, Ltd. v. Waikiki Bus. Plaza, Inc., 575 P.2d 869 (Haw. 1978)* ; *First Fed. Sav. Bank of Ind. v. Key Mkts., Inc., 559 N.E.2d 600 (Ind. 1990)* ; *Hill v. Rudd, 35 S.W. 270 (Ky. Ct. App. 1896)* ; *Merchants Row Corp. v. Merchants Row, Inc., 587 N.E.2d 788 (Mass. 1992)* ; *White v. Huber Drug Co., 157 N.W. 60 (Mich. 1916)* ; *Gruman v. Investors Diversified Servs., 78 N.W.2d 377 (Minn. 1956)* ; *Stephenson v. Morrissey, 230 S.W.2d 124 (Mo. Ct. App. 1950)* (dicta); *Segre v. Ring, 170 A.2d 265 (N.H. 1961)* ; *Brower v. Glen Wild Lake Co., 206 A.2d 899 (N.J. Ct. App. 1965)* ; *Caridi v. Markey, 539 N.Y.S.2d 404 (App. Div. 1989)* ; *Isbey v. Crews, 284 S.E.2d 534 (N.C. Ct. App. 1981)* ; *F & L Center Co. v. Cunningham Drug Stores, 482 N.E.2d 1296 (Ohio Ct. App. 1984)* ;

Reynolds v. McCullough, 739 S.W.2d 424 (Tex. Ct. App. 1987) ; *B & R Oil Co. v. Ray's Mobile Homes, Inc., 422 A.2d 1267 (Vt. 1980)* ; *Coulos v. Desimone, 208 P.2d 105 (Wash. 1949)* .

See also Milton R. Friedman, Friedman on Leases § 7.304a (3d ed. 1990) ("An absolute prohibition against assignment and subletting has traditionally authorized a landlord to refuse permission for any reason or no reason."); James C. McLoughlin, Annotation, *When Lessor May Withhold Consent Under Unqualified Provision In Lease Prohibiting Assignment or Subletting of Leased Premises Without Lessor's Consent, 21 A.L.R.4th 188 (1983)* .

(n17)Footnote 141. *Homa-Goff Interiors v. Cowden, 350 So. 2d 1035 (Ala. 1977)* ; *Hendrickson v. Freericks, 620 P.2d 205 (Alaska 1981)* ; *Campbell v. Westdahl, 715 P.2d 288 (Ariz. Ct. App. 1985)* ; *Tucson Med. Ctr. v. Zoslow, 712 P.2d 459 (Ariz. Ct. App. 1985)* ; *Warmack v. Merchants Nat'l Bank of Ft. Smith, 612 S.W.2d 733 (Ark. 1981)* ; *Kendall v. Ernest Pestana, Inc., 709 P.2d 837 (Cal. 1985)* ; *Cal. Civ. Code § 1995.260* (codifying the rule of *Kendall v. Ernest Pestana, Inc.*, for leases executed on or after September 23, 1983); *Bert Bidwell Inv. v. LaSalle & Schiffer, 797 P.2d 811 (Colo. Ct. App. 1990)* ; *Warner v. Konover, 553 A.2d 1138 (Conn. 1989)* ; *Del. Code Ann. tit. 25, § 5508*; *Fernandez v. Vazquez, 397 So. 2d 1171 (Fla. Ct. App. 1981)* ; *Stern's Gallery of Gifts, Inc. v. Corporate Prop. Investors, Inc., 337 S.E.2d 29 (Ga. Ct. App. 1985)* (dicta); *Funk v. Funk, 633 P.2d 586 (Idaho 1981)* ; *Golf Mgt. Co. v. Evening Tides Waterbeds, 572 N.E.2d 1000 (Ill. Ct. App. 1991)* ; *Jack Frost Sales v. Harris Trust & Sav. Bank, 433 N.E.2d 941 (Ill. Ct. App. 1982)* ; *Associates Commercial Corp. v. Bayou Mgt., Inc., 426 So. 2d 672 (La. Ct. App. 1982)* ; *Julian v. Christopher, 575 A.2d 735 (Md. Ct. App. 1990)* ; *Underwood Typewriter Co. v. Century Realty Co., 119 S.W. 400 (Mo. 1909)* (dicta); *Newman v. Hinky Dinky Omaha-Lincoln, Inc., 427 N.W.2d 50 (Neb. 1988)* ; *Boss Barbara, Inc. v. Newbill, 638 P.2d 1084 (N.M. 1982)* . Not all statutes favor the tenant. See, e.g., *Trinity Professional Plaza Associates v. Metrocrest Hosp. Authority, 987 S.W.2d 621 (Tex. Ct. App. 1999)* (discussing Texas statute that bars tenants from assigning or subleasing without the consent of the landlord).

(n18)Footnote 142. *Kendall v. Ernest Pestana, Inc., 709 P.2d 837 (Cal. 1985)* . For a criticism of the wholesale importation of arguably incompatible contract principles into the interpretation of long-term commercial leases, *see* Alex M. Johnson, *Correctly Interpreting Long-Term Leases Pursuant to Modern Contract Law: Toward a Theory of Relational Leases, 74 Va. L. Rev. 751 (1988).*

(n19)Footnote 143. *Julian v. Christopher, 575 A.2d 735, 738 (Md. Ct. App. 1990)* :

> Because most people act reasonably most of the time, tenants might expect that a landlord's consent to a sublease or assignment would be governed by standards of reasonableness. Most tenants probably would not understand that a clause stating "this lease may not be assigned or sublet without the landlord's written consent" means the same as a clause stating "the tenant shall have no right to assign or sublease."

(n20)Footnote 144. *E.g.*, "Landlord's refusal of consent shall be final and binding on Tenant, without citing any reason or ground for such refusal."

(n21)Footnote 145. Restatement (Second) of Property, Landlord & Tenant § 15.2(2) (1977) (emphasis added):

> A restraint on alienation without the consent of the landlord of the tenant's interest in the leased property is valid, but the landlord's consent to an alienation by the tenant cannot be withheld unreasonably, unless a freely negotiated provision in the lease gives the landlord an absolute right to withhold consent.

Tucson Med. Ctr. v. Zoslow, 712 P.2d 459 (Ariz. Ct. App. 1985) ; *Warmack v. Merchants Nat'l Bank of Ft. Smith, 612 S.W.2d 733 (Ark. 1981)* ; *Cal. Civ. Code § 1995.230*; *Basnett v. Vista Village Mobile Home Park, 699 P.2d 1343 (Colo. Ct. App. 1984) , rev'd on other grounds, 731 P.2d 700 (Colo. 1987)* ; *Julian v. Christopher, 575 A.2d 735 (Md. Ct. App.*

1990) ; *Newman v. Hinky Dinky Omaha-Lincoln, Inc., 427 N.W.2d 50 (Neb. 1988)* ; *Leeirv Corp. v. S & E Realty Co., 577 N.Y.S.2d 106 (App. Div. 1991)* .

(n22)Footnote 146. Otherwise, under the common law rule in *Dumpor's Case*, the consent to one assignment constitutes a total waiver of the requirement of consent and makes the lease freely assignable. Milton R. Friedman, Friedman on Leases § 7.304e (3d ed. 1990); 1 American Law of Real Prop. § 5.07 (1992); Restatement (Second) of Property, Landlord & Tenant § 16.1, Reporter's Note 7 (1977).

(n23)Footnote 147. *First Am. Bank of Nashville v. Woods, 781 S.W.2d 588 (Tenn. Ct. App. 1989)* .

(n24)Footnote 148. *Kendall v. Ernest Pestana, Inc., 709 P.2d 837 (Cal. 1985)* ; *Fernandez v. Vazquez, 397 So. 2d 1171 (Fla. Ct. App. 1981)* ; *Julian v. Christopher, 575 A.2d 735 (Md. Ct. App. 1990)* ; *First Am. Bank of Nashville v. Woods, 781 S.W.2d 588 (Tenn. Ct. App. 1989)* .

(n25)Footnote 149. *First Am. Bank of Nashville v. Woods, 781 S.W.2d 588 (Tenn. Ct. App. 1989)* .

(n26)Footnote 150. 1010 *Potomac Assoc. v. Grocery Manufacturers of America, 485 A.2d 199 (D.C. Ct. App. 1984)* (unreasonable for a landlord to withhold consent to a sublease solely to extract an economic concession or to improve its economic position); *Chanslor-Western Oil & Dev. Co. v. Metropolitan San. Dist., 266 N.E.2d 405 (Ill. App. Ct. 1970)* (where lease provided for rent increases based on increase in value of property); *Associates Commercial Corp. v. Bayou Mgt., Inc., 426 So. 2d 672 (La. Ct. App. 1983)* (landlord rejected proposed sublease, then leased vacated space to the proposed sublessee); *Julian v. Christopher, 575 A.2d 735 (Md. Ct. App. 1990)* (refusal to consent solely for the purpose of securing a rent increase would be unreasonable unless the new subtenant would necessitate additional expenditures by, or increased economic risk to, the landlord).

(n27)Footnote 151. *See Krieger v. Helmsley-Spear, Inc., 302 A.2d 129 (N.J. 1973)* (consent clause was for the protection of the landlord in its ownership and operation of the particular property-not for its general economic protection; otherwise the landlord could refuse consent if it had vacancies in its other building).

(n28)Footnote 152. *See John Hogan Enters., Inc. v. Kellogg, 231 Cal. Rptr. 711 (Cal. Ct. App. 1986)* (when lessor has reasonable commercial objections to a lease assignment, it does not breach the lease by requiring a new lease be entered into or that the premium paid lessee for the assignment be paid to lessor, where lessor would be justified in an outright refusal without further negotiations). *See also Cal. Civ. Code§§ 1995.240 - 1995.260* cmts.

(n29)Footnote 153. "This prevents excessive subdivision of the premises, which require, among other things, additional landlord approvals, alterations and strain on building services." Gary A. Lieberman, *Assignment and Subletting: When May an Owner Withhold Consent?*, Real Est. Fin.,33, 35 (Winter 1990).

(n30)Footnote 154. *See* Gary A. Lieberman, *Assignment and Subletting: When May an Owner Withhold Consent?* Real Est. Fin.,33, 35 (Winter 1990).

(n31)Footnote 155. *297 N.Y.S.2d 156 (Sup. Ct. 1969).*

(n32)Footnote 156. *Losurdo Bros. v. Arkin Distrib. Co., 465 N.E.2d 139 (Ill. Ct. App. 1984)* .

(n33)Footnote 157. *Cal. Civ. Code § 1995.260*.

(n34)Footnote 158. *E.g.*, "Tenant's right to sublet or assign shall be subject to its having first obtained the prior written consent of Landlord, which may be withheld by Landlord in the good faith exercise of its reasonable business judgment."

(n35)Footnote 159. *E.g.*, "Tenant shall have no right or claim to damages against Landlord by reason of its refusal to grant consent or approval, and Tenant's only remedy therefor shall be specific performance to compel consent or

approval."

(n36)Footnote 160. Sandra H. Johnson, et al., Property Law 330 (1992).

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CHAPTER 44 COMMERCIAL LEASING

5-44 Thompson on Real Property, Thomas Editions § 44.09

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§ 44.09 Insurance/Indemnity Clauses.

Both landlord and tenant have an insurable interest in a leased building, although the tenant's interest is limited to the demised premises, and in the tenant's personal property and fixtures located therein. The appropriate allocation of responsibility to carry insurance may depend more on the type of property than on the relative bargaining power of the parties.

The lease may afford either party able to demonstrate sufficient net worth the option to satisfy its insurance obligations under the lease through a program of self-insurance, although the lease may require reinsurance for losses over a stated amount.

§ 44.09(a) Landlord Insurance.

Except in the case of a building occupied by a single tenant, property damage and public liability insurance are generally carried by the landlord, although the expense of such insurance is often passed through to the tenant as part of the common area maintenance fee. Liability coverage insures against loss arising from bodily injury and property damage to third parties with respect to the leased premises. Property damage coverage insures against damage to the building, as well as to the personal property, equipment, and fixtures of the landlord and the tenant as a result of fire or other casualty. n161 Because the landlord's duty to restore the building in the event of fire or other casualty is generally limited to the proceeds of the landlord's insurance policy, the tenant should require the landlord to carry property damage insurance in an amount equal to the full replacement cost of the building, as opposed to its insurable value, which may be significantly less, depending upon the age of the building.

Because the tenant's duty to pay rent is likely to be abated during the period required to repair the building following a fire or other casualty, n162 the landlord should carry rent loss insurance to assure sufficient income to satisfy its fixed expenses for mortgage debt service and real estate taxes.

§ 44.09(b) Tenant Insurance.

The landlord will require the tenant to maintain various insurance coverages in effect throughout the term of the lease at the tenant's own expense, in prescribed minimum amounts and with licensed insurance carriers having a satisfactory

financial rating. The landlord will request to be named as an additional insured under the tenant's policies. The tenant will be required to produce certificates of insurance on the lease commencement date, and paid premiums or other proof of renewal thereafter. Cancellation or failure to maintain such insurance will constitute a material event of default entitling the landlord to terminate the lease. n163

The tenant is typically required to carry at its sole cost and expense insurance covering physical damage to its trade fixtures, merchandise, and other personal property from time to time located in the demised premises, and all leasehold improvements to the premises, on a replacement cost basis.

The tenant should also carry business interruption insurance to protect against the inability to use the demised premises during the period required to restore the property following a fire or other casualty. Notwithstanding the abatement of rent provided by the lease, n164 such insurance would seem to be advisable to protect the tenant against lost profits.

Commercial general liability coverage protects the tenant n165 against liability for damages the insured is required to pay third parties arising from bodily injury, property damage, and personal injury in the nature of false arrest or defamation with respect to the tenant's operation of the business conducted at the demised premises.

§ 44.09(c) Waiver of Subrogation.

Subrogation involves the substitution of one party in place of another with respect to a claim, demand, or right. In this context, subrogation describes the process by which an insurance carrier that pays an insured loss to the landlord arising from damage to a leased building caused by the negligence of the tenant in effect acquires the landlord's right to recover from the tenant for negligently causing the damage. Conversely, an insurance carrier that pays an insured loss to the tenant arising from the negligence of the landlord similarly acquires the tenant's right to recover from the landlord by way of subrogation.

The lease may require the parties to obtain waivers of the right of subrogation in any insurance coverages required under the terms of the lease. n166 An insurer waives its right of subrogation by agreeing in its policy, perhaps in return for an additional premium, not to proceed against the negligent landlord or tenant, as the case may be, after paying an insured loss to the other.

A waiver of subrogation provision, by itself, does not prevent one party to the lease from suing the other over a loss that is not required to be covered by insurance. n167

§ 44.09(d) Indemnity Clauses.

The typical pro-landlord commercial lease provides for the tenant to broadly indemnify the landlord and hold the landlord harmless against any and all claims, actions, damages, liabilities, and expenses that the landlord may experience in connection with personal injury or property damage arising out of the tenant's occupancy of the demised premises. n168 A more narrow and less satisfactory form of indemnity is limited to judgments against the landlord. Some jurisdictions by statute or case law prohibit indemnification of the landlord for its own negligence outside of areas controlled exclusively by the tenant. n169

The tenant should seek a comparable level of indemnification from the landlord with respect to liabilities the tenant may incur arising out of the landlord's operation of the common areas of the property under the landlord's control.

FOOTNOTES:
(n1)Footnote 161. The other perils insured against by typical forms of property damage coverage include lightning, explosion, windstorm, hail, riot and civil unrest, vandalism, volcanic eruption, falling objects, and damage from snow, ice, and water.

(n2)Footnote 162. *See* § 44.11(b)of this chapter.

(n3)Footnote 163. *Bowman v. Drum, 389 S.E.2d 125 (N.C. Ct. App. 1990)* (refusing to enjoin landlord's recovery of possession of space leased to child day care center that carried liability insurance in the amount of $300,000 in violation of a lease provision requiring coverage of $500,000); *but see Metropolitan Transportation Authority v. Kura River Management, Ltd., 739 N.Y.S.2d 668 (N.Y. App. Div. 2002)* (landlord could not terminate lease because of tenant's alleged failure to acquire and maintain required kind of insurance).

(n4)Footnote 164. *See* § 44.11(b) of this chapter.

(n5)Footnote 165. It also protects the landlord, as additional insured, against vicarious liability as owner of the property.

(n6)Footnote 166. *See May Dept. Store v. Center Developers, Inc., 471 S.E.2d 194 (Ga. 1996)* (upholding waiver of subrogation clause).

(n7)Footnote 167. *See Reade v. Reva Holding Corp., 818 N.Y.S.2d 9 (App. Div. 2006)* .

(n8)Footnote 168. A typical lease clause on the subject provides as follows:

> Tenant shall save and hold Owner harmless from and hereby indemnifies Owner against all Claims to or by Tenant, Tenant's agents, customers, invitees or any other person or persons whomsoever for or on account of any death or injury to persons, any damage to property or any business interruption in or about the Leased Premises or any improvements thereon or any part thereof, or for or on account of any death or injury to persons or any damage to property that may result by reason of any condition or present or future lack of repair of the Leased Premises or Improvements thereon or any part thereof or caused by or resulting from any acts of God or the elements, or the wiring, equipment, furnishings, utilities, fixtures, apparatus or any sign, advertising or display device, awning or other like covering therein or thereof, or by or from plumbing, gas, water, steam, snow, ice or other pipes, or any sewerage, leakage, or by or from the use, misuse or disuse of the Leased Premises or improvements thereon or any part thereof, or any equipment, furnishings or fixtures therein or apparatus thereof, or by or from any person or persons lawfully or unlawfully upon the Leased Premises or any part thereof, including Tenant, Tenant's agents, customers and invitees, or by or from any act, omission or neglect of any such person, or in any manner whatsoever growing out of the past, present or future condition or use of the Leased Premises or improvements thereon or any part thereof. Tenant shall save and hold Owner harmless from and hereby indemnifies Owner against all Claims to or by Tenant, Tenant's agents, customers and invitees or any other person or persons whosoever for or on account of any death or injury to person or any damage to property of any nature or sort or any business interruption in or about the common areas herein described or any part thereof due directly or indirectly to the act, negligence or omission of Tenant, Tenant's agents, customer or invitees. Tenant shall at its cost defend any Claims against Owner with respect to the foregoing or in which Owner may be impleaded. Tenant shall pay, satisfy and/or discharge any judgments, orders and decrees that may be rendered against Owner in connection with the foregoing. As used herein, Claims shall mean all claims, suits, proceedings, actions, demands, causes of action, responsibility, liability, judgments, executions, damages, loss and expense.

(n9)Footnote 169. *See, e.g., Prince Philip Partnership v. Cutlip, 582 A.2d 992 (Md. Ct. App. 1990)* .

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CHAPTER 44 COMMERCIAL LEASING

5-44 Thompson on Real Property, Thomas Editions § 44.10

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§ 44.10 Environmental Considerations in Commercial Leases.

§ 44.10(a) Environmental Laws Affecting Commercial Leases.

§ 44.10(a)(1) Comprehensive Environmental Response, Compensation and Liability Act (CERCLA or Superfund).

In the wake of the Love Canal scandal in the 1970s, the Comprehensive Environmental Response, Compensation and Liability Act of 1980 n170 was enacted in the hectic final days of the lame duck 96th Congress, immediately prior to the first inauguration of President Reagan, under a suspension of the rules that precluded amendments, and with no conference report or other significant legislative history to resolve ambiguities and unaddressed issues. n171

CERCLA imposes broad liability on owners or operators of facilities n172 for releases of hazardous substances. n173 But the legislation also sets forth some "innocent landowner" defenses. n174

§ 44.10(a)(2) Other Environmental Laws.

Potential environmental liabilities are created for landlords and tenants by numerous environmental management statutes besides CERCLA. At the federal level, such statutes include:

-- The Clean Air Act, n175 which prohibits the discharge of hazardous air pollutants, including asbestos;

-- The Occupational Safety and Health Act, n176 which requires the monitoring of asbestos concentrations in the workplace and regulates employee exposure to airborne concentrations of asbestos fibers exceeding certain specified levels; and

-- The Federal Water Pollution Prevention and Control Act, n177 which prohibits the discharge of pollutants into navigable waters and imposes liability for cleanup costs on owners and operators of discharging facilities.

§ 44.10(a)(3) Environmental Laws Regulating Development.

Federal statutes limit or regulate development in such environmentally sensitive areas as shorelines and coastal areas, n178 wetlands and floodplains, n179 seismically active and geologically unstable areas, n180 land that supports endangered species, n181 and historically and archaeologically significant property. n182 Counterparts to these federal statutes exist in many states.

§ 44.10(b) Landlord Liability.

§ 44.10(b)(1) Responsibility Based on Ownership.

In order to fully understand the broad reach of the federal environmental laws, one need only imagine the most passive of real estate investments, e.g., the acquisition for cash at fair market value of a parcel of vacant land zoned for retail development and intended to be leased on a long-term, triple-net basis for the operation of a convenience store. Hazardous waste may have been deposited at the site more than 40 years before. Property ownership may have changed hands several times since then.

Under CERCLA the current owner of this property, merely by virtue of such ownership, is strictly liable for the entire cost to remedy the contamination without regard to lack of causation. n183 Courts have had no difficulty concluding that landlords are owners of facilities for purposes of CERCLA liability. n184 Of course, if the tenant is the "operator" of the facility that generates the hazardous substances, the tenant will also be subject to liability. n185

An "innocent landowner" defense is available if the property owner can prove that the release or threatened release of hazardous substances was caused by an act of God or by an act of war. n186 Such a defense is also available if the property owner can establish that the release or threatened release was caused by the act or omission of a third party, that the owner exercised due care with respect to the hazardous substance, and that the owner took precautions against foreseeable acts or omissions of the third party and the consequences that could foreseeably result from such acts or omissions. n187 But reported court decisions do not indicate that the third party defense has, at least thus far, been of much assistance to landlords. The Act provides that the affirmative defense does not apply when the third party "act or omission occurs in connection with a contractual relationship, existing directly or indirectly, with the defendant" n188"Contractual relationship" is defined broadly by the Act, n189 and has been construed to include leases. n190 Based on the "contractual relationship" proviso, it has been held that the third party defense is unavailable to a landlord who has an oral lease with the party who was at fault in connection with the release of a hazardous substance. n191 In short, conduct by a tenant that leads to contamination of the property can create liability for the landlord. n192

Additional information regarding landowner environmental liability is contained in chapter 75.

§ 44.10(b)(2) Minimizing Landlord Liability.

Assuming that the tenant has substantial net worth, the contractual allocation of environmental risk within the lease itself provides the most effective mechanism to minimize the landlord's environmental liability. The lease should contain a specific provision affirmatively obligating the tenant to comply, at its sole cost and expense, with all applicable environmental laws, regulations, and orders of federal, state, county, and municipal authorities. It should include a power of termination applicable for a violation of this provision. And it should include an indemnification (which survives lease termination) against any loss, cost, damage or expense (including attorney fees) to which the landlord may be subject by reason of the tenant's failure to so comply. Because of the magnitude of the potential liability in the event environmental remediation is required, the landlord should not rely upon a court's willingness to enforce a general covenant requiring the tenant to comply with laws or governmental regulations, or to repair and maintain the leased premises. n193

Consideration should be given, particularly in net leases with long-term tenants, to the allocation of responsibility for

repairs, replacements and improvements caused by environmental laws and regulations. The tenant insurance provision should include a specific requirement for insurance coverage against environmental hazards, to the full extent available.

§ 44.10(c) Tenant Liability.

§ 44.10(c)(1) Responsibility As Operator.

The commercial tenant is also subject to liability under CERCLA. The same clause that renders the landlord potentially responsible as owner subjects the tenant to liability as an "operator." n194 It is unclear whether a defense comparable to the innocent landowner defense is available to a tenant who could prove that it leased the premises after the toxic discharge, and neither knew nor had reason to know that the property was contaminated. However, a small space tenant in an office building or other commercial property might be able to escape liability as operator by demonstrating lack of practical control over the property.

§ 44.10(c)(2) Responsibility As Owner.

Although a tenant can become liable under CERCLA as the operator of a facility, courts have also considered, in some instances, whether they can be held liable as owners. The issue has occasionally arisen in connection with subleases. Although the reasoning has varied, in that context, courts have indicated, n195 and have sometimes held, n196 that a tenant can be considered an owner of a facility under CERCLA.

For example, in *Commander Oil Corp. v. Barlo Equipment Corp., n197* the United States Second Circuit Court of Appeals considered whether a sublessor was liable as an owner. The court was of the view that the typical lessee should not be held liable as owner; however it stated that some lessees may have the requisite indicia of ownership vis-a-vis the record owner to be de facto owners and therefore liable under CERCLA. The court listed the following factors as relevant to the determination:

> (1) whether the lease is for an extensive term and admits of no rights in the owner/lessor to determine how the property is used; (2) whether the lease cannot be terminated by the owner before it expires by its terms; (3) whether the lessee has the right to sublet all or some of the property without notifying the owner; (4) whether the lessee is responsible for payment of all taxes, assessments, insurance, and operation and maintenance costs; and (5) whether the lessee is responsible for making all structural and other repairs. n198

In the case before it, the court concluded that the sublessor did not have sufficient indicia of ownership to be considered as the owner of the facility in question.

In *United States v. South Carolina Recycling & Disposal, Inc.*, n199 a federal district court held that a sublessor was an owner of a facility for purposes of CERCLA liability. It stated in part:

> The fact that during part of its leasehold [the tenant] sublet a portion of the site does not diminish its responsibility. If anything, it strengthens the case against [the tenant]. As a general rule, a lessor or sublessor who allows property under his control to be used by another in a manner which endangers third parties or which creates a nuisance, is, along with the lessee or sublessee, liable for the harm...
>
> Thus, this court concludes that by virtue of its lessee/sublessor interest in the ... facility at a time during which hazardous substances were disposed of at the facility, [the tenant] can be held liable as an "owner" pursuant to Section 107(a)(2) of CERCLA, *42 U.S.C. § 9607(a)(2)*. n200

§ 44.10(c)(3) Minimizing Tenant Liability.

Short-term tenants will, of course, object to being required to make repairs, replacements, and improvements for environmental law compliance purposes, or to finance such compliance indirectly through the common area maintenance expense pass-through provision. n201 A tenant may negotiate for the right to terminate the lease as an alternative to complying with environmental requirements that necessitate making costly alterations to the leased premises. The landlord may compromise by offering a cancellation provision if the useful life of improvements for environmental law compliance arising during the term of the lease would extend beyond the expiration of the balance of the term.

In order to protect against liability for activities by previous owners or tenants, receipt by the tenant of a satisfactory audit of the environmental condition of the subject property should be made a condition precedent to the tenant's obligation to occupy the premises. Such an audit should include an inspection of the leased premises and common areas n202 for asbestos-containing material. Similarly, an environmental audit conducted at the expiration of the term will help refute any subsequent claim by evidencing the satisfactory condition of the property at the conclusion of the tenancy.

The lease should contain the landlord's representation and warranty that there have been no hazardous waste discharges at the subject property, and that the property is in compliance with all applicable environmental laws, regulations, and orders of federal, state, county, and municipal authorities. The environmental indemnification provision described above should be made mutual. Care should be taken to assure that substantial resources support the landlord's indemnity. For example, it may be necessary to carve out a specific exception from any general leasehold exculpation provision or from any provision limiting the landlord's liability to its equity in the building. n203 The landlord also may be required to carry insurance against environmental liability.

FOOTNOTES:

(n1)Footnote 170. Comprehensive Environmental Response, Compensation and Liability Act, *as amended by* the Superfund Amendments and Reauthorization Act of 1986 (collectively known as "CERCLA"), *42 U.S.C. § 9601*.

(n2)Footnote 171. Sandra H. Johnson, et al., Property Law 616 (1992); *United States v. Maryland Bank & Trust Co., 632 F. Supp. 573 (D. Md. 1986)* .

(n3)Footnote 172. A "facility" includes a "building, structure, installation, equipment, pipe or pipeline ..., well, pit, pond, lagoon, impoundment, ditch, landfill, storage container, motor vehicle, rolling stock, or aircraft, or ... any site or area where a hazardous substance has been deposited, stored, disposed of, or placed, or otherwise come to be located." *42 U.S.C. § 9601*.

(n4)Footnote 173. *See 42 U.S.C.A. § 9607(a)*.

(n5)Footnote 174. *See 42 U.S.C.A. § 9607(b)*.

(n6)Footnote 175. *42 U.S.C. § 7401, et seq.*

(n7)Footnote 176. *29 U.S.C. § 651, et. seq.*,

(n8)Footnote 177. *33 U.S.C. § 1251, et seq.*,

(n9)Footnote 178. The Coastal Zone Management Act, *16 U.S.C. § 1451, et. seq.*

(n10)Footnote 179. National Environmental Policy Act, *42 U.S.C. § 4321*; Clean Water Act, *33 U.S.C. § 1251 et seq.*

(n11)Footnote 180. National Earthquake Hazards Reduction Program Reauthorization Act, 478

(n12)Footnote 181. Endangered Species Act, *16 U.S.C. § 1531 et seq.*

(n13)Footnote 182. Historic Sites, Buildings, Objects and Antiquities Act, *16 U.S.C. § 461 et seq.*

(n14)Footnote 183. *42 U.S.C. § 9607(a)*. Current property ownership, without more, has been held sufficient to create liability. *See United States v. Moore, 698 F. Supp. 622, 624 n.1 (E.D. Va. 1988)* ; *United States v. Maryland Bank & Trust Co., 632 F. Supp. 573 (D. Md. 1986)* .

(n15)Footnote 184. *See, e.g., United States v. Monsanto Co., 858 F.2d 160 (4th Cir. 1988); Weyerhaeuser Corp. v. Koppers Co., 771 F. Supp. 1406 (D. Md. 1991)* ; 4 W. Rogers, Environmental Law: Hazardous Wastes and Substances§ 8.12 (1992); Anthony J. Fejfar, *Landowner-Lessor Liability Under CERCLA, 53 MD. L. Rev.. 157 (1994).*

(n16)Footnote 185. *See Weyerhaeuser Co. v. Koppers Co., Inc., 771 F. Supp. 1420 (D. Md. 1991)* (allocating liability between landlord as owner and tenant as operator).

(n17)Footnote 186. *See 42 U.S.C. § 9607(b).*

(n18)Footnote 187. *See 42 U.S.C. § 9607(b)*. A defense is also available if "any combination" of the foregoing three situations applies. *See id.*

(n19)Footnote 188. *See 42 U.S.C. § 9607(b).*

(n20)Footnote 189. *See 42 U.S.C. § 9601(35)(A)* (the expression includes, but is not limited to "land contracts, deeds or other instruments transferring title or possession").

(n21)Footnote 190. *See International Clinical Laboratories, Inc. v. Stevens, 710 F. Supp. 466 (E.D. N.Y. 1989)* . For a discussion of the "contractual relationship" issue as applied to landlord-tenant relationships, *see* Anthony J. Fejfar, *Landowner-Lessor Liability Under CERCLA, 53 MD. L. Rev. 157 (1994).*

(n22)Footnote 191. *See United States v. Monsanto, 858 F.2d 160 (4th Cir. 1988)* .

(n23)Footnote 192. By way of contrast, the landlord's lack of knowledge of the tenant's allegedly illegal activity in connection with operation of a landfill has been held to constitute a valid defense to a state claim that, by failing to terminate the lease, the landlord had sanctioned the violation of environmental laws and the maintenance of a public nuisance on the leased premises. *See Director of Dep't of Nat. Resources v. Acme Disposal Co., 473 N.W.2d 824 (Mich. Ct. App. 1991)* .

(n24)Footnote 193. *See* Wolf v. 2539 Realty Assocs., 560 N.Y.S.2d 24 (App. Div. 1990) (tenant repair and governmental compliance clauses ineffective to require tenant to remove asbestos-containing material).

(n25)Footnote 194. *See 42 U.S.C. § 9607(a).*

(n26)Footnote 195. *See Commander Oil Corp. v. Barlo Equipment Corp., 215 F.3d 321 (2d Cir. 2000)* , *cert. denied, 531 U.S. 979 (2000)* .

(n27)Footnote 196. *See United States v. A & N Cleaners and Launderers, Inc., 788 F. Supp. 1317 (S.D. N.Y. 1992)* (sublessor exercised a degree of site control over the property that it was an owner for purposes of CERCLA liability); *United States v. South Carolina Recycling & Disposal, Inc., 653 F. Supp. 984, 1003 (D. S.C. 1984)* , *aff'd in part and vacated in part, sub nom., United States v. Monsanto Co., 858 F.2d 160 (4th Cir. 1988)* , *cert. denied, 490 U.S. 1106 (1989)* (sublessor regarded as owner for CERCLA purposes).

(n28)Footnote 197. *215 F.3d 321 (2d Cir. 2000)* , *cert. denied, 531 U.S. 979 (2000)* .

(n29)Footnote 198. *215 F.3d at 330-331* .

(n30)Footnote 199. *653 F. Supp. 984, 1003 (D. S.C. 1984) , aff'd in part and vacated in part, sub nom., United States v. Monsanto Co., 858 F.2d 160 (4th Cir. 1988) , cert. denied, 490 U.S. 1106 (1989)* .

(n31)Footnote 200. *653 F. Supp. at 1003.*

(n32)Footnote 201. *See* § 44.06 of this chapter.

(n33)Footnote 202. The presence of asbestos in the common areas of the subject property, such as the roof, boiler room, pipes and tile flooring, presages a potentially significant expense for removal or encapsulating. Because most commercial leases apportion common area maintenance expenses among all space tenants, the inspection report can provide a basis for the tenant to negotiate a shift of liability to the landlord for remediation expenses, or at least to accurately forecast and budget for such costs.

(n34)Footnote 203. *See* § 44.07(d) of this chapter.

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CHAPTER 44 COMMERCIAL LEASING

5-44 Thompson on Real Property, Thomas Editions § 44.11

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§ 44.11 Major Damage, Destruction, and Condemnation.

§ 44.11(a) Defining Major Damage and Destruction.

Various definitional methods are used for purposes of triggering a party's option to terminate the lease in the event of damage to the leased premises. Probably least satisfactory are attempts to condition the rights of the parties on such subjective criteria as untenantability or similar concepts. More common approaches seek to measure the extent of the damage objectively in terms of the percentage of space destroyed, the time required to restore, or the replacement cost. An enhanced level of objectivity might be provided by requiring that the determination of damage or destruction be made by the landlord's licensed architect.

§ 44.11(b) Rent Abatement.

In the event the tenant is unable to use the demised premises, in whole or in part, following a fire or other casualty, the tenant's duty to pay rent is typically abated to the extent of such loss of use, assuming that the fire or other casualty was not caused by the tenant's own negligence. Rent is abated during the period that the demised premises are unfit for commercial use. The term of the lease may likewise be extended for the period of restoration.

§ 44.11(c) Right to Terminate Lease.

In the event of major damage or destruction, most commercial leases grant the landlord the option of restoring the premises or terminating the lease. Such an option is exercisable by the landlord sending written notice to the tenant promptly following the fire or other casualty.

Destruction of the premises by fire or other casualty is not an excuse for the tenant to terminate the lease at common law, unless the right to terminate is expressly reserved in the lease. n204 Notwithstanding the provision for rent abatement and the availability of business interruption insurance, the tenant should also have the flexibility to terminate the lease in the event the time to restore or rebuild the premises would be disproportionate to the unexpired term of the lease, or in the event of unreasonable delays in the restoration past the time indicated in the landlord's notice of election to restore, as extended by acts of God and other conditions beyond the landlord's control.

§ 44.11(d) Use of Insurance Policy Proceeds.

The landlord's ability to use the proceeds of insurance to repair the building following fire or other casualty depends upon whether the landlord's mortgage lender is required to make insurance proceeds available for restoration under the terms of its mortgage. Standard form financing documentation generally directs that such proceeds be paid to the lender and applied by the lender, at its option, either to restoration or to reduce the unpaid principal balance secured by the mortgage.

Most institutional lenders will agree in advance of a casualty to disburse insurance proceeds (undertaking to serve in effect as a construction lender) to the borrower for repair, so long as the proceeds are sufficient for restoration and the borrower is not otherwise in default. A prudent tenant will determine in advance of leasing space that the landlord's mortgage contains such a provision (or that the landlord has obtained a side letter from its lender to this effect), and the lease should require the landlord to obtain such a provision in connection with any subsequent financing.

Because the landlord's duty to restore the building following a fire or other casualty is generally limited to the proceeds of insurance received under the landlord's casualty insurance policy, the tenant should require that the landlord carry fire and extended coverage insurance in an amount equal to the full replacement cost of the building.

§ 44.11(e) Duty to Restore.

Knowledgeable landlords disclaim any obligation to repair or rebuild the building in the event of fire or other casualty. Rather, the restoration of the building generally is at the landlord's option and is limited to the proceeds of insurance received by the landlord under its casualty insurance policy. Although the need to preserve flexibility with respect to restoration is primarily a function of the landlord's mortgage financing with respect to the property, n205 there are a variety of other legitimate reasons why the landlord would be unwilling to incur the unrestricted duty to restore. n206

In the case of a long-term lease of a building to a single tenant, it may be appropriate to allocate the duty to repair casualty damages to the tenant. The tenant also may be required to restore the property at its expense in the event of damage or destruction caused by the tenant's own negligence, or the negligence of its employees or agents, in which event rent will not be abated.

§ 44.11(f) Condemnation.

A competently drafted condemnation clause will address two issues: the effect of condemnation of the leased premises or essential common area (*e.g.*, parking areas) in whole or in part, on the continuing responsibility of the parties to perform their obligations under the lease, and the method of allocating the condemnation award between landlord and tenant.

§ 44.11(f)(1) Total Condemnation.

In the unlikely event of total condemnation, it is in the landlord's best interest that the lease be terminated as of the date of the taking without further obligation under the lease for either party, and with the landlord entitled to receive the entire award payable by the condemnor, except for any separately stated award for the tenant's trade fixtures and leasehold improvements made by tenant. The tenant may require the flexibility to terminate the lease at an earlier date -- between the time that notice of condemnation is given and the actual taking. Also, the tenant may realize that there is not likely to be a separately stated award for leasehold improvements but rather a single award to be allocated between the parties as provided by the lease.

§ 44.11(f)(2) Partial Condemnation.

A balanced lease clause would give either party the right, exercisable at its option, to cancel the lease in the event of

condemnation involving more than a specified minimum percentage of the demised premises. The clause would proceed to allocate responsibility for restoration of the remaining portion of the premises using the condemnation proceeds for financing. n207 The clause would also provide for abatement of rent to the extent that the tenant is unable to conduct business at the leased premises during the restoration period, and for diminution of rent for the balance of the term in proportion to the space taken.

FOOTNOTES:

(n1)Footnote 204. *But see Albert M. Greenfield & Co. v. Kolea, 380 A.2d 758 (Pa. 1977)* (destruction of improvements by fire excused tenant from obligation to pay rent, applying contract law doctrine of impossibility of performance).

(n2)Footnote 205. *See* § 44.11(d) of this chapter.

(n3)Footnote 206. Reasonable landlords would not likely obligate themselves to restore the property if an anchor tenant's space was destroyed, if the casualty was uninsured, or if only a year or so remained on the tenant's lease.

(n4)Footnote 207. As in the case of insurance proceeds, the landlord's mortgage lender may have the right to require, at its option, that condemnation award proceeds be applied to the mortgage debt.

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CHAPTER 44 COMMERCIAL LEASING

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§ 44.12 Default and Related Issues.

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Under the terms of a typical pro-landlord commercial lease, even a non-material event of default, which would not trigger the landlord's right to terminate the lease, n208 nevertheless exposes the tenant to adverse consequences. A defaulting tenant will be responsible for paying the landlord's costs of enforcement, including attorneys' fees. Various rights of the tenant, such as the right to transfer its interest and to exercise options for expansion space and renewal, may be exercisable only if the tenant remains in good standing. Rent concessions may only be available so long as the tenant is not in default.

One of the tenant's lease negotiation objectives, therefore, should be the limitation of landlord remedies upon tenant default. The tenant should obtain notice and cure periods, which may vary in length depending upon the monetary and non-monetary nature of the default. As a practical matter, some non-monetary defaults may not be capable of being cured within a specific period of time, in which event the tenant's grace period should extend for a reasonable time as the tenant is making diligent efforts in good faith to cure the default. n209

§ 44.12(a) Materiality of Breach.

Most jurisdictions by statute confer a right of re-entry and termination upon the landlord for tenant breach of a commercial lease. Most commercial leases contain a contractual provision to the same effect, often providing for written notice and cure periods. Judicial enforcement of such statutes and leasehold provisions is tempered by the interplay between property and contract law.

At early common law, neither landlord nor tenant was empowered to terminate a leasehold by reason of the other's breach in the absence of a power of termination provision in the lease. n210 Today, by statute in most jurisdictions and by contractual provision in most commercial leases, a material breach of lease by tenant is a ground for the landlord to terminate the lease and recover possession of the premises. Material defaults include the failure to pay rent and other monetary obligations, bankruptcy, abandonment, and transfers without consent.

Equitable abhorrence of forfeiture combined with discretionary common sense are likely to influence the modern court's

decision whether to permit a commercial landlord to terminate a lease. Commercial landlords may be denied the right to terminate the lease and recover possession of the premises for tenant defaults that the court considers technical, inadvertent, non-prejudicial, immaterial, or trivial. n211 In making this determination, the court is likely to consider such factors as the tenant's history of previous breaches; whether the landlord suffered loss, injury, or damage by reason of the tenant's breach; the relative amount of a monetary default in comparison with the annual rental; and the extent of the tenant's investment in fixtures and leasehold improvements. Even a material provision of the lease, including the obligation to pay rent, n212 may be breached in such a trivial manner that to enforce a forfeiture would be unconscionable and inequitable. n213 In such event, the landlord will be relegated to bringing an action for damages, if any, for the breach.

Materiality in this context refers to the manner of the breach as well as the nature of the provision. In other words, breach of the rent clause, which obviously is a material provision of the lease, may be material or trivial depending upon the particular facts and circumstances, thus complicating the identification of a workable standard of evaluation. Failure to carry required insurance coverages has been held to constitute a material breach by the tenant. n214 Both the *Restatement of Contracts* n215and the *Restatement of Property* n216 provide analytical frameworks for determining the materiality of a particular breach in the landlord-tenant context.

§ 44.12(b) Eviction.

Eviction proceedings have the legal effect of terminating the tenant's estate in the real property and restoring possession of the premises to the landlord. Unless the lease provides otherwise, following eviction, the tenant may be released from liability for damages based on the lease but accruing after its termination, including unpaid rent. n217 In a minority of jurisdictions, eviction and termination of the leasehold estate does not impair the tenant's contractual obligation or liability for anticipatory breach of the covenant to rent the premises in the future. n218

In some jurisdictions, following eviction or abandonment, the landlord cannot stand idly by and look to the tenant for damages in the amount of the rent that would accrue during the remainder of the term. In such jurisdictions, the measure of damages for breach of the covenant to pay rent would be the difference between the stipulated rent and the fair rental value of the premises, which is the amount the law presumes the landlord could obtain by making a reasonable effort to re-let the premises, or the entire amount of the rent at the agreed rate if a reasonable effort is made but the landlord is unable to re-let the premises. n219

Commercial landlords in most jurisdictions are permitted, under an express provision in the lease, to utilize self-help eviction for nonpayment of rent. n220 However, a number of states preclude commercial landlords from self-help and have adopted the rule that landlords must, in all cases, resort to the courts for possession of the premises, even if the lease expressly grants the landlord the right to re-enter and even if it can do so peacefully. n221

§ 44.12(c) Landlord's Duty to Mitigate.

The issue of whether a landlord has a duty to mitigate the damages of a tenant can arise in at least two situations. The first situation involves lease termination. Termination of a lease normally ends a tenant's obligation to pay rent. However, the lease could provide otherwise. n222 If it does, the *Restatement of Property* provides: "If there is such a provision, the landlord is required to take reasonable steps to obtain a new tenant on terms that will mitigate the original tenant's liability as much as is feasible under the circumstances. The cost to the landlord of mitigation is chargeable to the original tenant." n223

The Massachusetts Supreme Court considered a commercial landlord's obligation to mitigate in a situation involving such a lease provision. n224 After referring to the above-quoted language from the *Restatement*, the court indicated that there was more than one way to satisfy the mitigation requirement:

> The landlord and defendants here had just such an agreement in their lease. No provision is made for any form of mitigation beyond reletting the premises to a new tenant; however, it is clear that the purpose of the common-law rule and the lease provision is that the renter's liability be mitigated as much as is feasible, or, in the language of the lease, "commercially reasonable." A landlord can mitigate damages in other ways, and selling the property is one such way... When the landlord sold the property, it was compensated for the rental value of the property through the end of the defendants' lease term and beyond. n225

The issue of mitigation has arisen more frequently in connection with tenant abandonment of the leased premises. Commercial landlords have traditionally not been obligated to plead and prove mitigation of the tenant's damages in actions for nonpayment of rent following tenant abandonment. n226 This may still be the majority view. n227

However, in recent years, a number of jurisdictions, borrowing from contract law, have held that a commercial landlord has an obligation to take reasonable steps to mitigate damages by finding a suitable replacement tenant following tenant abandonment of the leased premises. n228 The landlord's failure to mitigate should not give rise to a cause of action in favor the tenant, but it does provide the tenant with a defense to the landlord's action for unpaid rent. n229

There is a division of authority on the issue of who should bear the burden of proof on the question of whether the landlord has made reasonable efforts to mitigate damages. n230

It remains an open issue in many jurisdictions whether a commercial landlord's obligation to mitigate the tenant's damages is a waivable. n231

§ 44.12(d) Estoppel Certificates.

The stream of income generated by tenant leases is the key determinant of the value of commercial real estate for purposes of sale or refinancing. The landlord will represent and warrant to a potential purchaser or lender that the leases are in good standing and have not been amended or modified except as specified, that there are no options to renew, options to purchase, or rights of first refusal except as specified, that rent has not been prepaid for more than one month in advance, that no concessions are due except as expressly provided by the terms of the written leases, and that no event of default by either party has occurred. However, it is essential that the potential purchaser or mortgage lender be able to verify these facts directly from the tenants themselves.

Accordingly, the typical commercial lease requires the tenant, promptly upon request, to certify the status of the lease to any purchaser or mortgage lender. n232

The purpose of the requirement is to prevent the tenant from contradicting statements made in the certification by later claiming, for example, that rent had been prepaid or that the landlord had promised to make improvements to the premises.

Because the inability to produce these so-called "estoppel certificates" from all tenants may prevent the timely closing of a sale or refinancing, unscrupulous tenants have sought to take advantage of the occasion to extract concessions from landlords as a condition to delivering their certificates. Knowledgeable landlords provide in the lease that failure to execute estoppel certificates is an event of default by tenant. n233 The lease may appoint the landlord as attorney-in-fact to execute and deliver an estoppel certificate on behalf of a recalcitrant tenant.

§ 44.12(e) Subordination.

Foreclosure of a mortgage or deed of trust (both referred to herein as a "mortgage") terminates subordinate leases of the premises within the property encumbered by the mortgage. The leasehold estates of tenants are extinguished by the

foreclosure. The mortgagee or other purchaser at the foreclosure sale will take title to the secured property free of subordinate leases. On the other hand, leases that are superior to the mortgage survive foreclosure. The mortgagee or other foreclosure sale purchaser remains liable to tenants under such leases for all obligations of the landlord that satisfy the requirements for covenants that run with the land.

A lease will be deemed subordinate to the mortgage in one of three circumstances: if the mortgage was properly recorded prior to execution of the lease, n234 if the lease contains a provision stating that it is automatically subordinate to a later recorded mortgage, or if the tenant executes a subordination agreement and delivers it to the mortgagee. n235

From the perspective of the secured party, the termination of subordinate leases may be a mixed blessing. On the one hand, the ability to rid the property of below-market-rent tenants may be essential to restoring the foreclosed property to economic viability. On the other hand, the last thing that a foreclosing lender needs is to wind up owning a commercial property without tenants.

Ideally, the landlord's mortgage lender would like the option to pick and choose among subordinate leases by naming as parties to the foreclosure, and thereafter evicting, only those tenants with below-market rental rates or that have other concessions that impact adversely on cash flow from the property. n236 By intentionally omitting to name tenants as parties to the foreclosure, the landlord's mortgage lender seeks to leave tenants with market-rent leases intact after the foreclosure dust settles.

Some courts have thwarted this attempt by manipulative mortgage lenders to have their cake and eat it too. Omitted subordinate lessees have been held to be entitled to elect whether to consider their leases terminated by the foreclosure or to recognize the purchaser at the foreclosure sale as their new landlord under the terms of the original lease. n237 Real estate-secured lenders must take steps, therefore, to assure themselves that valuable subordinate leases will remain in effect following foreclosure. n238

From the commercial tenant's perspective, the risk presented by subordination is catastrophic and unacceptable. Long-term tenants will be reluctant to make significant investments in leasehold improvements and advertising to develop goodwill if an event entirely beyond their control -- default by the landlord under the mortgage -- could result in the premature termination of the subordinate lease as a consequence of foreclosure.

Through a complex set of three agreements, which are typically combined into a single subordination, non-disturbance, and attornment agreement, it is possible to structure the relationship among tenant, landlord, and lender to meet the legitimate objectives of all parties. n239 Each aspect of this agreement is described separately below.

§ 44.12(e)(1) Subordination Agreement.

A lease is deemed to be subordinate to a mortgage if the lease was created after the mortgage was recorded. n240 If the mortgage was properly recorded in the public land records before the lease was executed, it is assumed that the tenant entered into the lease with notice that the lease will be subordinate. If, however, the lease had been executed prior to recordation of the mortgage, the lien of the mortgage would be junior to the estate of the tenant. n241

A lease that would otherwise be prior in interest to a mortgage by virtue of having been executed prior to recordation of the mortgage may nevertheless be made subordinate to a later recorded mortgage by the terms of a subordination agreement. n242 In this sense, a subordination agreement reverses the relative priorities between the tenant and mortgagee of the property.

The subordination agreement may be contained within the lease itself. It is typical for a commercial lease to provide that it shall be subordinate to any mortgage that may thereafter be placed upon the premises. A tenant who executes a lease containing such an agreement is assumed to be aware of the possibility that its leasehold estate will be subject to

extinction by foreclosure of its landlord's mortgage. n243

§ 44.12(e)(2) Non-disturbance Agreement.

The tenant under a subordinate lease can obtain protection against the premature termination of its lease following the foreclosure of a mortgage encumbering the leased premises by requiring its landlord to obtain a non-disturbance agreement from any lender under a mortgage to which the lease is subordinate. n244 Under the terms of a non-disturbance agreement, the mortgagee agrees that, as long as tenant performs all of its obligations under the lease, the mortgagee will recognize the tenant's leasehold estate and the tenant may remain in possession of its premises for the duration of the lease term notwithstanding foreclosure of the landlord's mortgage. n245

§ 44.12(e)(3) Attornment Agreement.

Attornment refers to the agreement by a tenant to attorn to, or recognize, a successor in interest to the original landlord (typically, the real estate-secured lender or other purchaser at a foreclosure sale) as the tenant's new landlord, and to remain contractually bound by the terms of the original lease notwithstanding the new landlord's succession to the interest of the original landlord. n246

Lenders generally require that tenants agree that, after the mortgagee becomes owner of the leased premises following foreclosure or delivery of a deed in lieu of foreclosure, the mortgagee will not be liable to the tenant for lease defaults by the original landlord, be subject to any offsets or defenses that the tenant may have had against the original landlord, be responsible for rent concessions granted by the predecessor landlord, or be bound by the tenant's prepayment of rent for more than one month in advance.

FOOTNOTES:

(n1)Footnote 208. *See* § 44.12(a) of this chapter.

(n2)Footnote 209. Commercial leases will typically provide that successive breaches of the same type (*e.g.*, if the tenant's records respecting gross sales for purposes of calculating percentage rent are erroneous on more than one occasion) are sufficient evidence of intentional misconduct by the tenant to constitute automatic default without provision for notice or cure. *But see* Jeffrey H. Newman, *The Defaultless Lease*, Real Est. Rev. 78, 80 (Fall 1989).

(n3)Footnote 210. William B. Stoebuck & Dale A. Whitman, The Law of Property § 6.78 (3d ed. 2000).

(n4)Footnote 211. *See Foundation Dev. Corp. v. Loehmann's, 788 P.2d 1189 (Ariz. 1990)* (notwithstanding time of the essence clause in lease, delay of three days in paying common area maintenance charge held not to be a material breach of long-term commercial lease so as to permit forfeiture); *Garland v. Titan West Assocs., 543 N.Y.S.2d 56 (App. Div. 1989)* (cosmetic alterations, including installing light fixtures and wall coverings, replacing a vinyl floor, and removing two partitions, held not to constitute a material breach of lease clause prohibiting alterations by tenant without landlord's prior written consent).

(n5)Footnote 212. *See Barraclough v. Atlantic Ref. Co., 326 A.2d 477, 489 (Pa. Super. Ct. 1974)* (denying forfeiture where tenant defaulted on rental payment for two months because of clerical error 15 years into lease term).

(n6)Footnote 213. *Smith v. Winn-Dixie Stores, Inc., 448 So. 2d 62 (Fla. Ct. App. 1984)* (tenant's default constituted excusable neglect on account of the long-term nature of the lease, tenant's prompt willingness to cure its default, as evidenced by tender, and the size and complexity of tenant's corporate structure).

(n7)Footnote 214. *See Bowman v. Drum, 389 S.E.2d 125 (N.C. Ct. App. 1990)* (refusing to enjoin landlord's recovery of possession of space leased to child day care center that carried liability insurance in the amount of $300,000 in violation of lease requiring coverage of $500,000).

(n8)Footnote 215. The Restatement of Contracts requires the factfinder to consider the following factors:

> (a) the extent to which the injured party will be deprived of the benefit which he reasonably expected;
>
> (b) the extent to which damages will adequately compensate the injured party for the part of that benefit of which he will be deprived;
>
> (c) the extent to which the party failing to perform will suffer forfeiture;
>
> (d) the likelihood that the party failing to perform will cure his failure, taking account of all the circumstances including any reasonable assurances; and
>
> (e) the extent to which the behavior of the party failing to perform comports with standards of good faith and fair dealing.

Restatement (Second) of Contracts § 241 (1979).

(n9)Footnote 216. The Restatement of Property provides that if a tenant fails to perform a valid promise contained in the lease, the landlord may terminate the lease if he is deprived of a significant inducement to the making of the lease and if the tenant does not perform his promise within a reasonable time after being requested to do so. Restatement (Second) of Property, Landlord & Tenant, § 13.1 (1977).

(n10)Footnote 217. Restatement (Second) of Property, Landlord & Tenant, § 12.1, cmt. (g) and Reporter's Note at 423-424 (1977).

(n11)Footnote 218. *See Sunset Fuel & Engineering Co. v. Compton, 775 P.2d 901 (Or. Ct. App. 1989)* .

(n12)Footnote 219. *See* § 44.12(c) of this chapter.

(n13)Footnote 220. *See Watson v. Brown, 686 P.2d 12 (Haw. 1984)* .

(n14)Footnote 221. *See Berg v. Wiley, 264 N.W.2d 145 (Minn. 1978)* . Additional information about self-help is included in § 40.09, of chapter 40.

(n15)Footnote 222. For more discussion on the survival of the tenant's rent obligation following lease termination, see § 40.03(k) in this volume.

(n16)Footnote 223. Restatement (Second) of Property, Landlord and Tenant § 12.1 comment i (1977). Comment g discusses the principal rules applicable to this situation, but it refers to comment i for elaboration on the mitigation requirement.

(n17)Footnote 224. *Krasne v. Tedeschi and Grasso, 762 N.E.2d 841 (Mass. 2002)* .

(n18)Footnote 225. *Krasne v. Tedeschi and Grasso, 762 N.E.2d 841 (Mass. 2002)* (footnote omitted).

(n19)Footnote 226. *See, e.g., MRI Northwest Rentals Invs. I, Inc. v. Schnucks-Twenty-Five, Inc., 807 S.W.2d 531 (Mo. Ct. App. 1991)* ; *Holy Properties Ltd., L.P. v. Kenneth Cole Productions, Inc. 661 N.E.2d 694 (N.Y. 1995)* ; *Liberty Plan Co. v. Adwan, 370 P.2d 928 (Okla. 1962)* ; *Pennsylvania No. Stonehedge Square L. P. v. Movie Merchants, Inc., 685 A.2d 1019 (Pa. Super. Ct. 1996) , aff'd, 715 A.2d 1082 (Pa. 1998)* .

Traditionally, if a tenant "wrongfully abandons leased premises before the expiration of the terms, the landlord may, at his election: (a) At once enter and terminate the contract and recover the rent due up to the time of abandonment; or (b) he may suffer the premises to remain vacant and sue on the contract for the entire rent; or (c) he may give notice to the tenant of his refusal to accept a surrender, when such notice can be given, and sublet the premises for the unexpired term for the benefit of the lessee to reduce his damages." *Liberty Plan Co. v. Adwan, 370 P.2d 928, 930 (Okla. 1962)* . Additional discussion of tenant abandonment may be found in § 40.11 of this volume.

(n20)Footnote 227. It is difficult to know.

> A recent survey published in Commercial Leasing Law & Strategy charted the law in all states-as well as the District of Columbia-on the duty to mitigate when a tenant abandons the property. The score was 21 "yes," 16 "no" and 14 "uncertain." The survey made no distinction between residential and commercial leases. While similar factors should apply, the courts in some states, like Pennsylvania, may favor mitigation only with residential tenants.
>
> At the time of the survey, Pennsylvania was listed in the "uncertain" column with a footnote stating, "Issue addressed only in dicta with inconsistent positions taken." Probably, Pennsylvania should now be moved into the "no" column.

Ominsky, Harris, Duties to Mitigate Vary State by State, National L.J., vol. 19, No. 34, B9 (April 21, 1997) (footnotes omitted).

The Restatement of Property offers the following rationale for its position against imposing a duty to mitigate damages: "Abandonment of property is an invitation to vandalism, and the law should not encourage such conduct by putting a duty of mitigation of damages on the landlord." Restatement (Second) of Property, Landlord & Tenant, § 12.1, cmt. (i) at 392 (1977). However, a persuasive argument could be made that the problem of vacancy inviting vandalism cuts in favor of a mitigation requirement to discourage landlords from allowing property to lie idle following abandonment by tenants.

(n21)Footnote 228. *Consolidated AG of Curry, Inc. v. Rangen, Inc., 912 P.2d 115 (Idaho 1996)* (duty to mitigate applies when tenant refuses to pay rent *and* abandons the premises); *Bert Bidwell Inv. v. LaSalle & Schiffer, 797 P.2d 811 (Colo. Ct. App. 1990)* ; *S.N. Mart, Ltd. v. Maurice's Inc., 451 N.W.2d 259 (Neb. 1990)* ; *H.L. Grays v. Brooks, 561 N.Y.S.2d 515 (N.Y. Civ. Ct. 1990)* ; *United States Nat'l Bank of Or. v. Homeland, Inc., 631 P.2d 761 (Or. 1981)* ; *Austin Hill Country Realty, Inc. v. Palisades Plaza, Inc.,948 S.W.2d 293 (Tex. 1997)* (listing jurisdictions that have adopted a mitigation requirement).

(n22)Footnote 229. *See Austin Hill Country Realty, Inc. v. Palisades Plaza, Inc.,948 S.W.2d 293 (Tex. 1997)* .

(n23)Footnote 230. *Compare Sommer v. Kridel, 378 A.2d 767 (N.J. 1977)* ("While generally in contract actions the breaching party has the burden of proving that damages are capable of mitigation, here the landlord will be in a better position to demonstrate whether he exercised reasonable diligence in attempting to re-let the premises.") *with MAR-SON, Inc. v. Terwaho Enters., Inc., 259 N.W.2d 289 (N.D. 1977)* (tenant must prove landlord acted unreasonably).

(n24)Footnote 231. *See* Note, *8 Seton Hall L. Rev. 736, 759-761 (1977).* In a 1997 decision recognizing a duty of mitigation on the part of commercial landlords, the Texas Supreme Court stated: "We therefore recognize that a landlord has a duty to make reasonable efforts to mitigate damages when the tenant breaches the lease and abandons the property, unless the commercial landlord and tenant contract otherwise." *Austin Hill Country Realty, Inc. v. Palisades Plaza, Inc.,948 S.W.2d 293, 299 (Tex. 1997) . See also New Towne L.P. v. Pier 1 Imports (U.S.), Inc., 680 N.E.2d 644 (Ohio Ct. App. 1996)* (enforcing lease term that negated duty to mitigate).

(n25)Footnote 232. A typical lease provision on the subject states as follows:

> Within ten days after request therefor by Owner, or in the event that upon any sale, assignment or hypothecation of the Leased Premises and/or the land thereunder by Owner, an estoppel certificate shall be required from Tenant, Tenant agrees to deliver in recordable form a certificate to any proposed mortgagee or purchaser, or to Owner, certifying (if such be the case) that Owner has completed construction of the Leased Premises, that this lease is in full force and effect, and that there are no defenses or offsets thereto (or stating those claimed by Tenant) and the dates, if any, to which any rent or charges have been paid in advance. Tenant shall also, upon request by Owner, deliver to Owner:
>
> > (i) such financial information concerning Tenant and/or any Guarantor hereof and their business operations as may be requested by any mortgagee, purchaser, prospective mortgagee or prospective purchaser of the fee of the Leased Premises (any financial information and any statement delivered pursuant thereto may be relied upon by any mortgagee, purchaser, prospective mortgagee or prospective purchaser of the fee of the Leased Premises); provided, however, that any such financial information and any such statement shall be utilized only for bona fide business reasons related to such mortgage and/or purchase; and
> >
> > (ii) an executed and acknowledged instrument amending this lease in such respects as may be required by any mortgagee or prospective mortgagee under any said first mortgage, provided that any such amendment shall not materially alter or impair any of the rights and remedies of Tenant under this lease.

(n26)Footnote 233. Intentional submission of false claims of landlord's default to landlord's mortgage lender has been held to constitute tortious interference with a contractual relationship, entitling the landlord to recover punitive damages. *See John A. Henry & Co. v. T. G. & Y. Stores Co., 941 F.2d 1068 (10th Cir. 1991)* .

(n27)Footnote 234. Lenders have argued unsuccessfully that the lien of their mortgages should have priority over leases that, although executed prior to acquisition by the lender of its security interest, were unrecorded, on the ground that the lender was without constructive notice of the tenant's leasehold estate. The standard judicial response to this argument has been that the tenant's possession and occupancy of the leased premises places the lender on inquiry notice of the tenant's interest in the property and charges the lender with knowledge of the lease's terms to the same extent as if the lease had been recorded among the public land records. *See Ontiveros v. Mbank Houston, N.A., 751 F. Supp. 128 (S.D. Tex. 1990)* .

(n28)Footnote 235. *See* § 44.12(e)(1) of this chapter.

(n29)Footnote 236. The mortgagee similarly may seek to selectively extinguish the subordinate lease of a tenant who has pre-paid substantial rent to the landlord/borrower.

(n30)Footnote 237. *See* Grant S. Nelson and Dale A. Whitman, Real Est. Fin. Law § 7.12 (3d ed. 1994).

(n31)Footnote 238. For the method by which this is accomplished *see* § 44.12(e)(3) of this chapter.

(n32)Footnote 239. *See Principal Mut. Life Ins. Co. v. Vars, Pave, McCord & Freedman, 77 Cal. Rptr. 2d 479 (Cal. Ct. App. 1998)* .

(n33)Footnote 240. *See Dover Mobile Estates v. Fiber Form Prods., Inc., 270 Cal. Rptr. 183 (Cal. Ct. App. 1990)* .

(n34)Footnote 241. *See Dover Mobile Estates v. Fiber Form Prods., Inc., 270 Cal. Rptr. 183 (Cal. Ct. App. 1990)* .

(n35)Footnote 242. *See Dover Mobile Estates v. Fiber Form Prods., Inc., 270 Cal. Rptr. 183 (Cal. Ct. App. 1990)* .

(n36)Footnote 243. *T. D. Bickham Corp. v. Hebert, 432 So. 2d 228 (La. 1983)* .

(n37)Footnote 244. It potentially makes a significant difference whether the landlord is required to obtain a non-disturbance agreement or merely obligated to use its "best efforts" to obtain a non-disturbance agreement.

(n38)Footnote 245. *See Principal Mut. Life Ins. Co. v. Vars, Pave, McCord & Freedman, 77 Cal. Rptr. 2d 479 (Cal. Ct. App. 1998)* .

(n39)Footnote 246. *See Principal Mut. Life Ins. Co. v. Vars, Pave, McCord & Freedman, 77 Cal. Rptr. 2d 479 (Cal. Ct. App. 1998)* . A typical lease provision on the subject states as follows:

> Tenant shall, in the event any proceedings are brought for the foreclosure of, or in the event of exercise of the power of sale under any mortgage made by Owner covering the Leased Premises, or upon the sale or other transfer of Owner's interest in this lease, attorn to the transferee upon any such foreclosure, sale or transfer and recognize such transferee as the Owner under this lease. Tenant further agrees upon request to execute and deliver a recordable instrument setting forth the provisions of this Section.

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CHAPTER 44 COMMERCIAL LEASING

5-44 Thompson on Real Property, Thomas Editions § 44.13

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§ 44.13 Special Types of Commercial Leases and Their Related Issues.

§ 44.13(a) Ground Leases.

In many ways ground leasing bears a closer relationship to the fee purchase of real property than to the short-term commercial lease transaction considered elsewhere in this chapter. Indeed, the ground lease has traditionally been used to acquire the functional equivalent of fee simple ownership of property for development in situations in which an owner was reluctant to relinquish title to land that had been in the family for generations, or unwilling to incur the tax consequences of conveying the fee interest in property with a low basis.

The estate created by a ground lease is for a relatively long period. The typical ground lease extends for at least the term of the mortgage used to finance the tenant's development of the property; 99-year ground leases are not uncommon. The tenant pays all property taxes, utilities, insurance, and other costs of property ownership so that the rent is fully net to the landlord. Unlike a short-term lease in which the landlord's consent is required for such things as improvements, subleases, and changes in use, the tenant under a long-term ground lease generally has the same unqualified freedom with respect to the property as a fee simple owner. Because the tenant is the owner of the improvements, it is entitled to tax deductions for depreciation.

The most significant issues in ground leasing concern provisions enabling the tenant to obtain leasehold financing. In order to finance the construction of improvements on the property, the tenant requires the freedom to encumber its interest as collateral security. Considerable attention must be given in structuring the ground lease to anticipate and satisfy the predictable requirements of leasehold mortgage lenders.

Ideally, the lender would prefer that the landlord agree to subordinate its fee interest in the property. n247 Then, in the event of default and foreclosure, the lender would acquire fee simple title to the land and improvements, free of the ground lease. n248 Lenders offer more favorable economic terms for loans secured by subordinated ground leases, such as lower interest rates, longer terms, and higher loan-to-value ratios. This enables ground lessees in turn to offer higher rentals to landlords that are willing to subordinate.

A subordinated ground lease will seek to protect the landlord by imposing strict limitations on the maximum size of the

loan, the interest rate, and the use of loan proceeds. Notice provisions afford the landlord the ability to protect the fee by alerting the landlord to the tenant's financial problems in sufficient time to terminate the lease, regain control of the property, and avert foreclosure by curing defaults under the leasehold mortgage.

Notwithstanding such protections, many ground lessors find subordination simply too risky to justify even in return for higher rent. n249 Lenders willing to make mortgage loans on the security of unsubordinated leasehold interests require provisions to protect against termination of the lease and extinction of the security for their loans in the event of a default by the tenant under the ground lease. Such provisions include lengthy notice and cure rights enabling the lender to discover the default in sufficient time to foreclose the mortgage, acquire the tenant's position under the lease, and remedy the default. Lenders then require the ability to enter into a new lease directly with the ground lessor for the balance of the lease term, on the same terms and conditions as the lease with the tenant. n250 A financeable unsubordinated ground lease will protect the lender against unlimited rental escalations tied to inflation in the event the lender takes over the tenant's leasehold interest following mortgage default and foreclosure. n251

§ 44.13(b) Sale and Leaseback Arrangements.

The sale and leaseback arrangement is a mortgage substitute. It is used to free capital invested in real property for more productive uses in the owner's business. n252 The owner of a parcel of real property sells it to a life insurance company or other investor for cash. The investor simultaneously leases the property back to the original owner under the terms of a long-term, net lease. Thus, the seller-tenant pays rent to the buyer-landlord and continues to operate the property as before. For federal income tax purposes, if the arrangement is structured properly, the buyer-landlord is entitled to depreciate the property, and the seller-tenant is entitled to deduct rent as an ordinary and necessary business expense.

The sale and leaseback offers several advantages over more traditional mortgage financing. From the tenant's perspective, rent payments should be fully deductible as compared with mortgage payments, which are deductible only with respect to the interest component. Also, the fair market value sale and leaseback may yield the seller more cash than mortgage financing because the investor may not be subject to institutional or regulatory lending limits. n253 For the investor, the ability to take depreciation deductions is the principal comparative advantage of the sale and leaseback over traditional mortgage financing.

The leasing aspects of the transaction are functionally identical to the long-term ground lease discussed above. n254 All costs for insurance, utilities, property taxes, and other operating expenses are paid by the tenant so that the rent is absolutely net to the investor. The tenant's interest closely resembles fee title, with minimal limitations on the tenant's freedom to use or improve the property, or to transfer or encumber its interest, including as collateral security for additional financing.

The Internal Revenue Service has sought to recharacterize sales and leasebacks as disguised mortgages, thereby denying the investor the tax benefits of the depreciation deduction. The Service has tended to focus its attack on sales and leasebacks on the existence of leasehold repurchase options as evidence that investors possessed none of the risks or benefits of owners of real property as a matter of economic reality. n255 Such attacks are more likely to be successful if the repurchase price is fixed in advance at an amount equal to the original selling price rather than fair market value determined by appraisal at the time of exercise of the repurchase option.

FOOTNOTES:
(n1)Footnote 247. Care must be taken in properly documenting the transaction in order to accomplish a valid subordination of the landlord's reversion in the fee simple estate. For example, one court has held that an attempted subordination was ineffective because the landlord had not formally executed the mortgage. The landlord's promise to subordinate was not sufficient to subject its fee to the mortgage lien. *See Old Stone Capital Corp. v. John Hoene Implement Corp., 647 F. Supp. 916 (D. Idaho 1986)* .

(n2)Footnote 248. The landlord should be expected to execute the mortgage only for the limited purpose of effectuating the valid subordination of the fee. The landlord should not assume or agree to perform any of the covenants of the mortgage or deed of trust, including without limitation the promise to repay the secured debt. It should go without saying that the landlord should not be required to sign the promissory note evidencing the debt.

(n3)Footnote 249. It should be understood that the lessor under a long-term, net ground lease has effectively given up a real estate investment in return for what is essentially a fixed-return investment, comparable to a bond. Ground leases thus tend to attract the most risk-averse investors.

(n4)Footnote 250. Martin Kobren, *Three Perspectives on Ground Lease Negotiations*, 19 Real Est. L.J. 40, 56-57 (1990).

(n5)Footnote 251. Wallace Boothby, Jr., *The Ground Swell in Ground Leasing*, Real Est. Rev. 94, 96 (Winter 1980):

> As a general rule, it is extremely dangerous, from a financing point of view, to seek to vary the minimum rent according to an inflation indicator like the Consumer Price Index... The lessee whose rentals are tied to such an escalator may find great difficulty in obtaining a leasehold mortgage. A lender that wishes to underwrite a leasehold mortgage must try to determine what the rental and other charges that are payable pursuant to the ground lease will be. Unless the rental is firmly fixed in an amount certain for the entire period of the leasehold mortgage, it is possible that the mortgagee may decide that the risk of inflationary cost increases is so great that it is reluctant to make a commitment.

(n6)Footnote 252. Marvin Milich, *The Real Estate Sale-Leaseback Transaction: A View Toward the 90s*, 21 Real Est. L.J. 66, 67-68 (1992).

(n7)Footnote 253. Marvin Milich, *The Real Estate Sale-Leaseback Transaction: A View Toward the 90s*, 21 Real Est. L.J. 66, 67-68 (1992):

> By obtaining 100 percent financing of the property, the seller-lessee can realize a greater amount of that needed working capital than would be possible in a conventional mortgage, in which typically lenders and/or applicable law rarely allow the loan-to-value ratio to exceed 75 percent to 80 percent of the property's true market value.

(n8)Footnote 254. *See* § 44.13(a) of this chapter.

(n9)Footnote 255. *See, e.g., Frank Lyon Co. v. United States, 435 U.S. 561 (1978)* (rejecting attempt by Service to recharacterize a sale-leaseback as a financing transaction based on such highly individual facts and circumstances as the potential for economic risk and benefit on the part of the buyer/landlord, and the existence of a tax-independent business purpose for entering into the transaction).

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CHAPTER 44 COMMERCIAL LEASING

5-44 Thompson on Real Property, Thomas Editions § 44.14

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§ 44.14 Shopping Center Leases.

Although shopping center leasing involves most of the same legal issues and techniques discussed previously in this chapter, the context is considered separately because of its complexity n256 and enormous contemporary social significance. n257

§ 44.14(a) Shopping Center Layout.

The success of a shopping center is measured by the dollar volume generated by all tenants (but particularly the non-anchor or so-called "satellite tenants" for reasons discussed below), and is a function of the frequency with which shoppers visit the center combined with the duration of average visit. Shopping center developers truly believe that the things they do to design and continuously update the design of their properties, n258 to create the proper mix of retail merchants, n259 and even to control the emotions of customers, n260 all contribute directly both to the frequency of visits and also to the length of time spent per visit. n261 The location of anchor tenants in relation to specialty shops is strategically designed to maximize customer traffic flow through the mall. n262

§ 44.14(a)(1) Key or Anchor Tenants.

Established supermarkets and major pharmacies are the indispensable magnets that draw shoppers from the immediate vicinity to the neighborhood shopping center on a weekly basis to purchase grocery, drugstore, and other convenience items, and to take advantage of the services of dry cleaners, barbers, shoe repairers, and cinemas. Self-service general merchandisers, such as K-mart and Wal-Mart, anchor the discount shopping centers that have become increasingly successful in recent years. Major department stores draw shoppers from surrounding communities to regional shopping centers. n263 It is the promise of such shoppers that in turn attracts smaller stores to lease space in the center, n264 and institutional lenders to finance the development of the center.

Use of the term "anchor tenant" may be inappropriate because the anchor may not be a tenant. It is common for the department store anchors to own the parcels underlying their stores either in fee simple or pursuant to the terms of favorable long-term ground leases. Accordingly, anchor stores do not contribute directly to profit for the shopping center developer to the same extent as the higher rents per square foot paid by the satellite tenants that are attracted to the center by their presence. n265 Operation of the respective parcels owned by the anchors and the mall developer is

integrated pursuant to a complex reciprocal set of operating covenants and easements. n266

§ 44.14(a)(2) Satellite Tenants.

Clustered around the anchor tenants and dependent upon their drawing power are the smaller satellite tenants offering retail merchandise and services. Satellite tenants will offer merchandise and services in a price range and at a level of quality (e.g., fashion, discount, etc.) that are consistent with the anchors. n267 Early regional shopping centers usually had a department store at each end to stimulate shopping traffic past the smaller retailers located in between. Stores selling similar lines of merchandise tend to be located as far apart as possible to encourage comparison shopping traffic back and forth throughout the center in the hope of stimulating impulse purchases.

In order to satisfy the underwriting requirements of the institutional lender providing permanent financing for the shopping center, the lion's share of satellite space must be occupied by high credit national chain retailers with established track records. This explains why shopping centers in all regions of the country closely resemble one another.

§ 44.14(b) Use Restrictions.

Restrictions on the use of the demised premises in commercial leases have been discussed previously. n268 Such restrictions are common in the shopping center context. The shopping center landlord's objectives in drafting a restrictive use provision include:

-- Honoring leases granting to existing tenants of the center exclusive privileges to engage in particular types of operations; n269

-- Preserving flexibility in leasing other space in the center by limiting the lines of business in which the tenant may compete with future tenants; and

-- Seeking to achieve synergy through an optimal tenant mix, n270 and to influence shopper traffic patterns through the location of each store in relation to others, the key tenants, and the layout of the entire property.

§ 44.14(c) Easements and Appurtenances.

Harmonious integration of the separate parcels owned by shopping center anchor tenants and the developer is accomplished by a comprehensive reciprocal set of covenants and easements that is recorded among the land records and governs all aspects of the operation of the center. Among its provisions are covenants running with the land requiring that all improvements be compatible as to exterior architectural decor and signage; that each owner construct and maintain sufficient parking to achieve a prescribed parking ratio, together with appropriate lighting facilities, driveways, walkways, perimeter roads, sidewalks, curbs, truck loading docks and landscaping; that their respective portions of common electrical, telephone, water, gas, drainage, sewer and other utility lines be maintained in good operating condition and repair; that all stores be open for business, and customer ingress and egress, during standard operating hours; and that anchor tenants affirmatively covenant to operate full-line stores continuously under their established trade names and merchandising policies for a specified period of time.

A reciprocal series of easements granted by and to each owner allows for the use in common by each owner, and their respective employees and customers of the parking lots, driveways, perimeter roads, walkways, and other common areas, and assures the unrestricted flow of traffic by foot and vehicle among the parcels. Easements of support may be necessary if a building or portion thereof depends for its foundation on another parcel.

§ 44.14(d) Shopping Center Common Areas.

The reciprocal operating and easement agreement described above will limit the areas where buildings may be constructed by each party on its respective parcel, and the extent to which a building may be expanded. The remaining areas within the shopping center are available for common use by all tenants, their employees and customers. The common areas include the parking areas, malls, roadways, sidewalks, landscaped areas, loading docks, and the like.

The description of the leased premises in each space tenant's lease should make reference to the common areas described on the site plan exhibit, and expressly grant the tenant a non-exclusive easement to use the common areas for itself, its employees, customers, and suppliers. n271

The shopping center developer and anchor tenants are each responsible for the maintenance of the shopping center common areas located on their respective parcels, including paving, cleaning, snow removal, lighting of parking areas, security, and maintenance of common reciprocal utility easements. Alternatively, the shopping center developer may be responsible for common area maintenance, with each owner of a parcel contributing a proportionate share of the costs.

Although the landlord is likely to retain flexibility with respect to use of the common areas, the tenant should seek protection against the location of kiosks or other obstructions in the vicinity of the leased premises, as well as a requirement that demonstrations that may tend to block visibility or impede access by shoppers be restricted to other areas of the center. n272

§ 44.14(e) Covenants Against Competition.

A provision prohibiting the landlord from permitting space in the remainder of the shopping center to be used by any third party in the same line of business as the tenant is in partial restraint of trade. Nevertheless, the covenant against competition will be enforced if it is sufficiently limited in geographic area and type of business covered, and if it is not perceived as having been designed to prevent competition with any particular competitor. n273 An exclusivity clause will be invalidated only when the court finds that alternative sites in the relevant geographic market are unavailable, that a site within the shopping center in question is the only place from which a third party could effectively compete in the market, and that the exclusion of a competitor from the center would have a significant anti-competitive impact given the total competition extant in the relevant market. n274

A clause granting the tenant an exclusive right to sell a particular type of merchandise in the center will contain an exception for supermarket, department store, and full-line chain drug store anchor tenants that tend to require the right to sell anything they desire.

An exclusive use clause may be enforced not only against the landlord for damages and injunctive relief, but also against another tenant selling the same items with knowledge of the restriction in the original tenant's lease. n275

More broadly, the tenant should consider negotiating for a restriction against the landlord leasing space in the center (or at least in the vicinity of the tenant) for categories of uses that would be inconsistent with the tenant's business operation (e.g., pool hall, video arcades, and adult bookstores), and other uses that would be likely to monopolize available parking spaces for long periods of time without generating business for other tenants of the center. n276

§ 44.14(f) Operating Covenants.

§ 44.14(f)(1) Express.

As noted above, n277 the anchor tenant has a critical impact on the shopping center's success in obtaining financing, attracting satellite tenants, and insuring the financial viability of the center by generating the necessary volume of customer traffic. n278 Accordingly, the anchor tenant's lease will typically include an express covenant that the tenant

will occupy the premises and thereafter continuously operate during prescribed business hours. Leases with satellite tenants generally require that they operate during all hours that the anchor tenants are open for business. Because chain stores tend to have the bargaining clout to resist such provisions, a customary compromise position is to limit the duration of the express operating covenant to, for example, the first five years of the term.

Express operating covenants will often go into great detail by requiring that the tenant operate for a minimum number of hours per week, adequately stock the premises, employ sufficient labor, advertise, and take such other steps as are reasonably required to promote business activities at the premises. n279

The continuous operating clause is likely to provide for exceptions due to causes beyond the tenant's reasonable control (e.g., strikes, weather, and casualties), during periods of major repairs and alterations, during closures by the anchor tenant(s), and designated holidays. n280

Because the landlord's damages for breach will be difficult to calculate with precision, enforcement of express operating covenants is problematic. n281 An agreement to pay a fixed sum as liquidated damages is enforceable when it bears some reasonable relation to what the parties at the time the lease was drafted could have reasonably forecast as the damages that would be suffered by the landlord, regardless of the landlord's actual damages. n282 The landlord will claim that breach of an express operating covenant causes irreparable injury because each tenant is carefully selected for its unique contribution to the total tenant mix. n283 Nevertheless, judicial reluctance to become involved in the business of managing a shopping center is likely to prevent most courts from specifically enforcing continuous operating covenants. n284

§ 44.14(f)(2) Implied.

Whether or not the tenant occupies its space makes little or no difference to the office building or warehouse landlord. For the shopping center landlord, however, it is critical that all tenants remain open for business during normal shopping hours, and continuously offer their goods or services throughout the term of their respective leases. Faced with supermarket chain anchors and other key tenants "going dark" (i.e., closing low-volume stores rather than operating at a loss, but continuing to pay minimum annual base rent to avoid default), shopping center landlords have besieged courts in many jurisdictions to require tenants to occupy and operate their premises for the purpose described in the use clause without interruption throughout the lease term.

Absent an express covenant of continuous operation, a successful action to enforce an implied covenant to use and operate requires substantial evidence of the landlord's economic interest in the tenant's continuous active operation of the premises beyond the mere payment of fixed monthly rent. n285 For example, if there is no minimum base rental, or if the minimum rental is nominal, a covenant of continuous operation may be implied. n286 Otherwise, courts have consistently refused landlords' invitations to construe the typical restrictive use clause as an affirmative covenant requiring the tenant to continuously occupy the premises throughout the lease term, or to conduct any particular business from the leased premises without interruption in order to generate percentage rent, n287 or to refrain from diverting business from the demised premises by opening a competing location in the vicinity. n288

§ 44.14(f)(3) Radius Clause.

Radius clauses are of two types. The first is the landlord's agreement that none of the property owned by the landlord within the specified radius of the tenant's premises will be occupied during the term of the lease by any other store that carries the same line of merchandise or renders the same services as the tenant. Although it is intended to protect the tenant if the landlord incorporates adjacent land into the center during the lease term and attempts to introduce competing users into the expansion space, n289 its application is broader. n290 Assuming that the lease so provides, a radius clause that is reasonable in terms of its duration and extent is binding on the landlord's successors and assigns (including a mortgagee in the event of foreclosure), and enforceable by the tenant's transferees. n291

The second category of radius clauses involves the tenant's duty to refrain from opening another retail operation within a specified distance from the center. Such a clause is a necessary corollary to the percentage rent clause in that the tenant is prevented from opening a site so close to the shopping center that it would necessarily divert customers from the center and thereby reduce the percentage rent that would otherwise be payable.

Courts will enforce such clauses by injunctive relief when they are perceived as being no broader in terms of time and distance than necessary to protect the landlord's enjoyment of the benefits of the lease and the interest of other tenants of the center in the flow of traffic to their stores. n292 Because of the difficulty in establishing how much income the landlord lost by reason of a tenant's breach of the radius clause, the lease may provide, as liquidated damages, that sales by the tenant at other operations within the prescribed radius shall be deemed to have occurred at the leased premises for purposes of calculating percentage rent.

The antitrust implications of radius clauses in commercial leases have been explored in several court decisions and scholarly publications. The consensus of these authorities appears to be that such clauses, while not per se violations of the antitrust laws, are subject to a rule-of-reason analysis of such factors as the duration and geographic area of the restrictions, and whether the beneficiary of the restrictions already enjoys such a dominant position in the market as to evidence an anticompetitive effect or purpose. n293 Because such clauses are at least partial restraints of trade, they will be strictly construed. n294

§ 44.14(g) Merchants' Association.

The merchants' association is a cooperative organization established by the shopping center to provide advertising and promotional events designed to generate increased sales for the benefit of the center as a whole. n295 Although the landlord attempts to require all tenants to become dues-paying members of the merchants' association, the department stores and other anchor tenants often use their negotiating clout to gain exemption from participation. n296 Dues levels for tenants typically vary by size or sales volume. Knowledgeable tenants bargain for a cap on the maximum contribution requirement. n297 The association typically has its own corporate entity, and is governed by a committee (often consisting of a representative of the landlord, participating anchor tenants, and smaller tenants) that determines the level of assessments necessary to support its marketing activities. The lease may also impose minimum advertising requirements on tenants, in addition to required membership in the merchants' association. n298

FOOTNOTES:

(n1)Footnote 256.

> Space leases must be structured with care, for the shopping center is a complex organism and depends for its health on the deft coordination of use clauses, covenants not to compete and percentage rent clauses as well as reciprocal operating covenants tying the anchor stores into the life of the center.

Paul Goldstein & Gerald Korngold, Real Est. Transactions 952 (3d ed. 1993).

(n2)Footnote 257. Daniel L. Feldman, The Logic of American Government 98-99 (1990).

> American suburban life has changed over the past few decades. The shopping mall has arisen, quite visibly, as a new physical and social institution. In 1950 there were fewer than 100 in the United States; by 1985 there were 25,000. This has had some real and potentially enormous impact on the exercise of *First Amendment* rights by those without the funds necessary to engage in paid advertising. To a significant extent, these malls have replaced the downtown or "Main Street" commercial business districts, where leafleters could cheaply and effectively communicate their message to the public.

(n3)Footnote 258. *See, e.g.*, Gary Hinsche, *Reviving a Shopping Center to Attract Customers*, J. of Prop. Mgt. 14

(September/October 1987).

(n4)Footnote 259. There is considerable art involved in striking the proper balance between avoiding duplication, while still providing the consumer the opportunity for comparative shopping. Because the developer's leases call for percentage rent to be paid based on individual store volumes, the developer's success in this regard greatly influences the total income it will derive from the center.

(n5)Footnote 260. William S. Kowinski, The Malling of America 359 (1985).

(n6)Footnote 261. Early industry studies showed that the average shopper went to the center for one item and returned home, spending less than one-half hour per visit. Later research demonstrated that people spend an average of 1-11/2 hours per visit. The difference in length of visit data reflect changed consumer habits that developers attribute in part to the broad range of activities provided by the center (e.g., blood pressure and cholesterol testing, flower and antique shows, meet-the-candidates nights, and the like). *See* Lynn N. Woodward, *Modern Shopping Center Design: Psychology Made Concrete*, Real Est. Rev. 52 (Summer 1978).

(n7)Footnote 262. *See Massachusetts Mut. Life Ins. Co. v. Associated Dry Goods Corp., 786 F. Supp. 1403, 1413 (N.D. Ind. 1992)* .

(n8)Footnote 263. The West Edmonton Mall in Edmonton, Alberta is the largest mall in North America, with 800 stores, 110 restaurants, 21 theaters,, a five-acre water park, man-made lake complete with anchored replica of the Santa Maria, 18-hole miniature golf course and 354-room hotel, all spread over 5.3 million square feet. *See* http://www.westedmall.com/home/default.asp. The largest U.S. shopping mall, at least in total area, is the Mall of America in Bloomington, Minnesota, a suburb of Minneapolis. Built on 4.2 million square feet, it contains 520 stores and the largest indoor amusement park in the nation. *See* http://www.easternct.edu/depts/amerst/MallsWorld.htm and http://www.mallofamerica.com. As of 2006, the world's largest shopping mall was the South China Mall, located in Dongguan, China, with 9.6-million square feet and 1500 stores. *See* http://www.easternct.edu/depts/amerst/MallsWorld.htm

(n9)Footnote 264. Indeed, the addition of another anchor tenant may be the occasion for escalation of the fixed minimum annual rental payable by satellite tenants. *See* § 44.04(c)(3) of this chapter. Conversely, the closure by an anchor tenant, or the destruction of an anchor tenant's premises by fire or other casualty, or the condemnation of an anchor tenant's premises, if not replaced by a comparable customer attraction within a reasonable period of time, may constitute grounds for termination of the lease at a satellite tenant's option. *See, e.g., Massachusetts Mut. Life Ins. Co. v. Associated Dry Goods Corp., 786 F. Supp. 1403, 1412 (N.D. Ind. 1992)* .

> However, just as legitimate is the landlord's need to keep up the appearance of a fully leased, viable retail complex when negotiating with a new anchor tenant or draw. For the most part, the landlord's concern will override the tenant's and termination rights will not be granted in such circumstances, although a rent concession may be.

Kenneth L. Samuelson, *The Retail Lease: What to Look For, Bargain For*, Legal Times, Apr. 7, 1986, at 25.

(n10)Footnote 265. Because the satellite tenants tend to generate a higher volume of sales per square foot than the anchors, they also yield higher percentage rentals.

(n11)Footnote 266. *See* § 44.14(c) of this chapter.

(n12)Footnote 267. *Bankruptcy Reform: Hearing Before the Subcommittee on Courts of the Senate Committee on the Judiciary on Shopping Center Tenancy Amendments*, 98th Cong., 1st Sess. 381-91 (1983) (statement of Nathan B. Feinstein), *quoted in In re Federated Dep't Stores, Inc., 135 B.R. 941 (Bankr. S.D. Ohio 1991)* :

> Consider a shopping center such as the Water Tower Shopping Center in Chicago, Illinois, which has as its anchor stores a Marshall Fields Department Store and a Lord & Taylor Department Store. The character of that shopping center is established by those stores as a "high-end' shopping center, attractive to smaller boutiques, relatively expensive men's clothing stores, fashion shoe stores and similar uses. Depending upon the character of the anchor stores, the other tenants have entered into long-term leases.

Bankruptcy Reform: Hearing Before the Subcommittee on Courts of the Senate Committee on the Judiciary on Shopping Center Tenancy Amendments, 98th Cong., 1st Sess. 381-91 (1983) (statement of Nathan B. Feinstein), *quoted in In re Federated Dep't Stores, Inc., 135 B.R. 941 (Bankr. S.D. Ohio 1991)* .

(n13)Footnote 268. *See* § 44.03 of this chapter.

(n14)Footnote 269. Although not *per se* unlawful, leasehold "exclusive" clauses are subject to challenge by both government and private parties under state and federal antitrust laws as constituting an unreasonable restraint of trade. *See, e.g., Recetas Por Menos, Inc. v. Five Development Corp., 368 F. Supp. 2d 124 (D. P.R. 2005)* ; *Child World, Inc. v. South Towne Centre, Ltd., 634 F. Supp. 1121 (S.D. Ohio 1986)* ; *Optivision, Inc. v. Syracuse Shopping Ctr. Assocs., 472 F. Supp. 665 (N.D. N.Y. 1979)* ; *Hibbett Sporting Goods, Inc. v. Biernbaum, 391 So. 2d 1027 (Ala. 1980)* ; *Winrock Enters. v. House of Fabrics of N.M., 579 P.2d 787 (N.M. 1978)* ; Adrienne J. Marsh, *The Federal Antitrust Laws and Radius Clauses in Shopping Center Leases, 32 Hastings L.J. 839 (1981);* Alan M. DiSciullo, *Geographic and Product Markets for Radius Clauses Under the Rule of Reason*, 19 Real Est. L.J. 121 (1990).

(n15)Footnote 270. Tenants need not accept this rationale uncritically. *See, e.g.*, .Emanuel B. Halper, *Can You Find a Fair Lease?*, 14 Real Est. L.J. 99, 114 (1985).

> Some landlords claim that the selection of tenants for a shopping center and the types of businesses that will be conducted in a shopping center is an advanced science. These landlords claim that they choose tenants on the basis of the quality and kinds of merchandise the tenants sell and that the choice [known in the trade as the "tenant mix'] is the main ingredient to success in the shopping center business. I'm less than enthusiastic when asked to endorse these claims. I'm convinced that some landlords actually try to do this. But the pattern I see most often is that landlords lease vacant space to somebody who's willing to pay rent, and, if more than one merchant is interested, the space is usually leased to the merchant who's willing to pay a higher rate of rent.

(n16)Footnote 271. *See* § 44.02(a) of this chapter.

(n17)Footnote 272. Under the *First Amendment of the United States Constitution*, as interpreted by the Supreme Court in *Lloyd Corp. v. Tanner, 407 U.S. 551 (1972)* , shopping centers may enforce a uniform, content-neutral policy excluding petitioning, distribution of leaflets, and other forms of free speech activities of a political nature. A minority of states interpret the freedom of speech rights granted under their own constitutions more expansively to require that shopping center owners allow free speech activities on their premises. *See, e.g., Pruneyard Shopping Ctr. v. Robins, 447 U.S. 74 (1980)* (rejecting shopping center owner's arguments that such interpretation of the California Constitution effected a taking of property without due process); New Jersey Coalition Against War in the *Middle East v. J.M.B. Realty Corp., 650 A.2d 757 (N.J. 1994) , cert. denied, 516 U.S. 812 (1995)* (discussing the cases; stating that New Jersey constitutional protections are broader than those under the federal constitution); cf. *United Food and Commercial Workers Union, Local 919, AFL-CIO v. United Food and Commercial Workers Union, Local 919, AFL-CIO v. Crystal Mall Associate, L.P., 852 A.2d 659 (Conn. 2004)* (discussing the cases; emphasizing state action requirement). Even in states that protect free speech activities in this context, shopping center owners are permitted to impose reasonable time, place, and manner restrictions on speech. *See, e.g., Westside Sane/Freeze v. Ernest W. Hahn, 274 Cal. Rptr. 51 (Cal. Ct. App. 1990)* .

(n18)Footnote 273. *See Parkside Center, Ltd. v. Chicagoland Vending, Inc., 552 S.E.2d 557 (Ga. Ct. App. 2001)* ; *Hibbett Sporting Goods, Inc. v. Biernbaum, 391 So. 2d 1027 (Ala. 1980)* .

(n19)Footnote 274. *See Optivision, Inc. v. Syracuse Shopping Ctr. Assocs., 472 F. Supp. 665 (N.D. N.Y. 1979)* (upholding clause providing that landlord would not rent space in enclosed regional mall to another optical store unless center was expanded to include a third department store).

(n20)Footnote 275. *Won's Cards, Inc. v. Samsondale/Haverstraw Equities, Ltd., 566 N.Y.S.2d 412 (App. Div. 1991)* .

(n21)Footnote 276. Kenneth L. Samuelson, *The Retail Lease: What to Look For, Bargain For,* Legal Times, Apr. 7, 1986, at 25.

(n22)Footnote 277. *See* § 44.14(a)(1) of this chapter.

(n23)Footnote 278. Leases with satellite tenants are often dependent upon the anchor tenant's remaining in business. As noted previously, failure by the anchor to continuously occupy its space may constitute an event of default by the landlord, entitling satellite tenants to cancel their leases. *See* § 44.14(a)(1) of this chapter.

(n24)Footnote 279. A typical lease clause on the subject provides as follows:

> Tenant shall continuously and uninterruptedly use, occupy and operate all of the Leased Premises during the entire term of this lease for the use(s) permitted herein with due diligence and efficiency and in a high grade and reputable manner so as to produce all of the Gross Sales which may be produced by such manner of operation, unless prevented from doing so by causes beyond Tenant's control. Subject to inability by reason of strikes or labor disputes, Tenant shall provide adequate personnel and shall carry at all times in said premises a full and complete stock of seasonable merchandise of such size, character and quality as shall be reasonably designed to produce the maximum return to Owner. Tenant shall conduct its business in the Leased Premises during the regular customary days and hours for such type of business in the city or trade area in which the Shopping Center is located and will keep the Leased Premises open for business during the same days, nights and hours as the majority of the department stores located in the Shopping Center are open and for such further days and hours as may be designated by Owner from time to time. Tenant shall install and maintain at all times displays of merchandise in the display windows (if any) of the Leased Premises. Tenant shall keep the display windows and the signs on the Leased Premises well lighted during the hours from 9:00 A.M. to 10:00 P.M., unless prevented by causes beyond the control of Tenant. Tenant shall not, during business hours, lock, barricade or otherwise prevent access into the Leased Premises through any door opening onto the mall or sidewalk adjacent to the Leased Premises. If Tenant fails to keep the Leased Premises open each and every business day during the hours specified herein or to operate 100% of the Leased Premises, or to adequately stock or staff the Leased Premises, then Tenant shall pay as minimum rent an amount equal to double the minimum rent provided for in Article II hereof calculated for each and every day that the Leased Premises are not open or are not fully operated or in which such hours are not maintained. Said amount represents the agreed liquidated damages to Owner, as the exact amount of damages to Owner cannot be ascertained with certainty.

(n25)Footnote 280. Kenneth L. Samuelson, *The Retail Lease: What to Look For, Bargain For,* Legal Times, Apr. 7, 1986, at 24.

(n26)Footnote 281. *But see Hornwood v. Smith's Food King No. 1, 772 P.2d 1284 (Nev. 1989)* (reversing lower court refusal to award damages for anchor tenant's breach of lease by ceasing operations, and remanding with instructions to determine and award landlord damages measured by the difference in value of the shopping center with

anchor tenant lease and without, plus attorney fees and costs provided under terms of lease to the prevailing party).

(n27)Footnote 282. *See W & G Seafood Assoc. v. Eastern Shore Mkts., 714 F. Supp. 1336 (D. Del. 1989)* .

(n28)Footnote 283. 2 Richard R. Powell et al., Powell on Real Property § 257[3] 1992.

(n29)Footnote 284. *See* 800 *Assoc. v. Wearguard Corp., 737 F. Supp. 44 (E.D. Mich. 1990)* ; *Lorch, Inc. v. Bessemer Mall Shopping Ctr., Inc., 310 So. 2d 872 (Ala. 1975)* (citing the knowledge, skill and judgment involved in selecting and investing in inventory, selecting, training and compensating personnel, and innumerable other day-to-day business decisions as grounds for denial of specific performance); *CBL Assoc., Inc. v. McCrory Corp., 761 F. Supp. 807 (M.D. Ga. 1991)* ; *New Park Forest Assoc. II v. Rogers Enters., 552 N.E.2d 1215 (Ill. Ct. App. 1990)* (noting the numerous detailed leasehold provisions for hours, signs, displays, painting, common areas, and other operational requirements, including one requiring the operation of the premises for the sale and repair of "better quality" jewelry); *Security Builders v. Southwest Drug Co., 147 So. 2d 635 (Miss. 1962)* ; *Price v. Herman, 81 N.Y.S.2d 361 (Sup. Ct. 1948)* , *aff'd, 87 N.Y.S.2d 221 (App. Div. 1949)* ; *Grossman v. Wegman's Food Mkts., Inc., 350 N.Y.S.2d 484 (App. Div. 1973)* ; *Summit Towne Centre, Inc. v. Shoe Show of Rocky Mount, Inc., 828 A.2d 995 (Pa. 2003)* .

But see Massachusetts Mut. Life Ins. Co. v. Associated Dry Goods Corp., 786 F. Supp. 1403 (N.D. Ind. 1992) ("Courts ordinarily do not enter injunctions that will require the court's long-term involvement, but frequent court involvement is unlikely in light of the Scottsdale Ayres store's eighteen-year history and the defendant's interest in its stores' reputation."); *Lincoln Tower Corp. v. Richter's Jewelry Co., 12 So. 2d 452 (Fla. 1943)* ; *Dover Shopping Ctr., Inc. v. Cushman's Sons, 164 A.2d 785 (N.J. Ct. App. 1960)* (landlord waived any judicial supervision with respect to the method of operating the business or the quality of the products sold, stating it would rely solely on tenant's self-interest in maintaining a good business reputation).

(n30)Footnote 285. *See First Am. Bank & Trust v. Safeway Stores, Inc., 729 P.2d 938 (Ariz. Ct. App. 1986)* ; *M.H. Stein v. Spainhour, 521 N.E.2d 641 (Ill. Ct. App. 1988)* ; *Massachusetts Mut. Life Ins. Co. v. Associated Dry Goods Corp., 786 F. Supp. 1403 (N.D. Ind. 1992)* ; *Slidell Inv. Co., Inc. v. City Prod. Corp., 202 So. 2d 323 (La. Ct. App. 1967)* ; *Hornwood v. Smith's Food King No. 1, 772 P.2d 1284 (Nev. 1989)* ; *Ingannamorte v. Kings Super Mkts., Inc., 260 A.2d 841 (N.J. 1970)* ; *Slater v. Pearle Vision Ctr., Inc., 546 A.2d 676 (Pa. Super. Ct. 1988)* .

(n31)Footnote 286. *See, e.g., East Broadway Corp. v. Taco Bell Corp., 542 N.W.2d 816 (Iowa 1996)* (base rent insubstantial compared to percentage rent); *Mercury Inv. Co. v. F.W. Woolworth Co., 706 P.2d 523 (Okla. 1985)* .

(n32)Footnote 287. *See College Block v. Atlantic Richfield Co., 254 Cal. Rptr. 179 (Cal. Ct. App. 1988)* (remanding for further factual determination trial court's "premature" ruling that a covenant of continuous operation should be implied as a matter of law where service station lease provided for monthly minimum base rent of $1,000). *See also Rothe v. Revco D.S., Inc., 148 F.3d 672* (7th Cir. 1998) ; *Allen v. Nash-Finch Co., 927 F.2d 420 (8th Cir. 1991)* ; *Hamilton West Development, Ltd. v. Hills Stores Co., 959 F. Supp. 434 (N.D. Ohio 1997)* ; *Center Dev. Venture v. Kinney Shoe Corp., 757 F. Supp. 34 (E.D. Wis. 1991)* ; *Evans v. Grand Union Co., 759 F. Supp. 818 (M.D. Ga. 1990)* ; *Congressional Amusement Corp. v. Weltman, 55 A.2d 95 (D.C. 1947)* ; *Piggly Wiggly Sourthern, Inc. v. Heard, 405 S.E.2d 478 (Ga. 1991)* ; *DPLM, Ltd. v. J.H. Harvey Co., 526 S.E.2d 409 (Ga. Ct. App. 1999)* ; *Chicago Title & Trust Co. v. Southland Corp., 443 N.E.2d 294 (Ill. Ct. App. 1982)* ; *Gerardi v. Vaal, 523 N.E.2d 1327 (Ill. Ct. App. 1988)* ; *Casa D'Angelo, Inc. v. A & R Realty Co., 553 N.E.2d 515 (Ind. Ct. App. 1990)* ; *Burns & Schaffer Amusement Co. v. Conover, 168 A. 304 (N.J. 1933)* ; *Dickey v. Philadelphia Minit-Man Corp., 105 A.2d 580 (Pa. 1954)* ; *Baron Bros. v. National Bank, 155 N.W.2d 300 (S.D. 1968)* ; *Kroger Co. v. Chemical Sec. Co., 526 S.W.2d 468 (Tenn. 1975)* ; *Weil v. Ann Lewis Shops, 281 S.W.2d 651 (Tex. Ct. App. 1955)* ; *Nalle v. Taco Bell Corp., 914 S.W.2d 685 (Tex. Ct. App. 1996)* ; *Davis v. Wickline, 135 S.E.2d 812 (Va. 1964)* ; *Bradlees Tidewater, Inc. v. Walnut Hill Inv., Inc., 391 S.E.2d 304 (Va. 1990)* ; *Thompson-Development Inc. v. Kroger Co., 413 S.E.2d 137 (W. Va. 1991)* .

(n33)Footnote 288. *See, e.g., Kauder, Klotz & Venitt v. Rose's Stores, Inc., 359 F. Supp. 1280 (E.D. N.C. 1973)* .

Downtown Assocs., v. Burrows Bros. Co., 518 N.E.2d 564 (Ohio Ct. App. 1986) .

(n34)Footnote 289. This phenomenon is quite common because developers tend to "stage" construction of the shopping center to avoid the problem of building a larger project than the area can support in the early years. The center expands in phases as the market grows and the institutional lender becomes increasingly comfortable with the project.

(n35)Footnote 290. *See, e.g., Child World, Inc. v. South Towne Centre, Ltd., 634 F. Supp. 1121 (S.D. Ohio 1986)* (federal and state antitrust laws do not prevent issuance of injunction to enforce six-mile radius restriction in toy retailer's lease against landlord's sale of property one-half mile from the leased premises to Toys "R' Us, the largest toy supermarket retailer in the United States).

(n36)Footnote 291. Some controversy exists over whether a restrictive covenant against competing businesses "touches and concerns" the land to support the common law requirement for a burden to run with the land. *See, e.g., Whitinsville Plaza, Inc. v. Kotseas, 390 N.E.2d 243 (Mass. 1979)* . However, courts of equity will enforce, as an equitable servitude, a radius restriction that the original parties intended to bind their successors in interest, so long as the party to be charged had notice of the covenant. The purchaser or mortgagee of the landlord's interest in a shopping center should be charged with inquiry or constructive notice of the terms of tenant leases.

(n37)Footnote 292. *See Winrock Inn Co. v. Prudential Ins. Co. of America, 928 P.2d 947 (N.M. Ct. App. 1996)* . An attempt to restrict the tenant from operating the type of business conducted at the demised premises within a two-block radius of the premises for one year following expiration of the lease was held to be unenforceable. *See American Nat'l Bank & Trust of Chicago v. Tufano, 584 N.E.2d 400 (Ill. Ct. App. 1991)* .

(n38)Footnote 293. *See, e.g., Harold Friedman, Inc. v. Thorofare Mkts., Inc., 587 F.2d 127 (3d Cir. 1978)* ; *Dunafon v. Delaware McDonald's Corp., 691 F. Supp. 1232 (W.D. Mo. 1988)* ; *Drabbant Enters. v. Great Atl. & Pac. Tea Co., 688 F. Supp. 1567 (D. Del. 1988)* ; *National Super Mkts., Inc. v. Magna Trust Co., 570 N.E.2d 1191 (Ill. Ct. App. 1991)* ; Alan M. DiSciullo, *Negotiating a Commercial Lease from the Tenant's Perspective*, 18 Real Est. L.J. 27, 30 (1989).

(n39)Footnote 294. *See, e.g., Marriott Corp. v. Combined Props. Ltd. Pt'ship, 391 S.E.2d 313 (Va. 1990)* (covenant in lease to Marriott for operation of a Hot Shoppes Restaurant prohibiting drive-in restaurant within 2000 feet of demised premises was not violated by lease to McDonald's for operation of fast food restaurant).

(n40)Footnote 295. In some shopping centers the merchants' association may take on additional responsibilities, such as determining the required hours of operation, and regulating employee parking.

(n41)Footnote 296. Anchor tenants argue persuasively that their very presence and reputation serve as the functional equivalent of advertising for the center and satellite tenants, and that shoppers drawn into the center by the anchor's own print and broadcast media advertising will patronize the satellites.

(n42)Footnote 297. "If the tenant does a lot of its own advertising, it may be able to obtain a corresponding discount for the merchants' association fees or the advertising fund contributions." Kenneth L. Samuelson, *The Retail Lease: What to Look For, Bargain For*, Legal Times, Apr. 7, 1986, at 23.

(n43)Footnote 298. A typical lease provision on the subject states as follows:

> Tenant agrees to advertise, with a display type advertisement of a size not less than one-quarter page of tabloid section or one-eighth page of full section in the printed media or on television or radio up to eight (8) times during each calendar year in conjunction with events sponsored by Owner. Tenant understands that this covenant is a material consideration to Owner and agrees that in the event that Tenant shall fail or refuse to comply with such minimum advertising requirements, Tenant will pay to the Owner an amount equal to the cost of one-quarter page tabloid section advertisement in such printed

media for each time or times, up to a maximum of eight (8) per fiscal year, which Tenant shall have failed or refused to advertise as provided herein, such amount to be payable to Owner upon demand and to be considered as Additional Rent for the purpose of this lease. In the event that Tenant shall continuously fail or refuse to comply with such minimum advertising requirements, Owner shall be entitled to terminate this lease.

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CHAPTER 44 COMMERCIAL LEASING

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Annotation, *Negligence, Inattention, or Professional Incompetence of Attorney in Handling Client's Affairs in Matters Involving Real Estate Transactions as Ground for Disciplinary Action --Modern Cases, 65 A.L.R. 4TH 24.*

Annotation, *Provision in Lease as to Purpose for which Premises Are to be Used as Excluding Other Uses, 86 A.L.R. 4TH 259.*

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Annotation, *Shopping Center Lease Restrictions on Type of Business Conducted by Tenant, 1 A.L.R. 4TH 941.*

Annotation, *Sufficiency as to Method of Giving Oral or Written Notice Exercising Option to Renew or Extend Lease, 24 A.L.R. 4TH 903.*

Annotation, *Sufficiency of Provision of Lease to Effect Second or Perpetual Right of Renewal, 29 A.L.R. 4TH 172.*

Annotation, *Validity of Exculpatory Clause in Lease Exempting Lessor From Liability, 49 A.L.R. 3d 321.*

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*Assignment of Debtor's Leases by Bankruptcy Trustee (**11 U.S.C.S. 365(b)(3)**), 117 A.L.R. FED. 321.*

Annotation, *When Lessor May Withhold Consent Under Unqualified Provision in Lease Prohibiting Assignment or Subletting of Lease Premises Without Lessor's Consent, 21 A.L.R. 4TH 188.*

Annotation, *Who, as between Landlord and Tenant, must make, or Bear Expense of, Alterations, Improvements, or Repairs Ordered by Public Authorities, 22 A.L.R. 3d 521.*

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Supp. to § 44.04 Rental Clauses.

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§ 44.04(a) Fixed Rent Clause. [Go To Main]

Add:

Brunswick Ltd. Partnership v. Feudo, 870 N.E.2d 804 (Ohio App. 2007) (a provision of the commercial lease imposing double rent during a holdover tenancy was an enforceable liquidated damages provision).

§ 44.04(b) Percentage Rent Clause. [Go To Main]

Add:

Giessow Restaurants, Inc. v. Richmond Restaurants, Inc., 232 S.W.2d 576 (Mo. App. 2007) (the commercial lease agreement did not contain an implied covenant of continuous business activity).

CHANGE Giessow Restaurants, Inc. v. Richmond Restaurants, Inc., 232 S.W.2d 576 (Mo. App. 2007) TO Giessow Rests., Inc. v. Richmond Rests., Inc., 232 S.W.3d 576 (Mo. App. 2007).

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§ 44.05(a) Real Estate Taxes Defined. [Go To Main]

in the second sentence of the second paragraph on the page:

CHANGE cotesting TO contesting.

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§ 44.07(b)(3) Retaliatory Eviction.

Add:

See also Nelson v. Johnson, 778 N.W.2d 773 (N.D. 2010) .

§ 44.07(c) Implied Warranty of Suitability. [Go To Main]

Add:

at the end of the Gym-N-I citation

aff'd, 220 S.W.3d 905 (Tex. 2007) .

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Supp. to § 44.12 Default and Related Issues.

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§ 44.12(a) Materiality of the Breach [Go To Main]

Add:

Gardner v. Ebeneezer, 190 N.C. App. 432, 660 S.E.2d 172 (N.C. App. 2008) (commercial lease terminated when tenants failed to pay rent within ten days after demand).

§ 44.12(c) Landlord's Duty to Mitigate. [Go To Main]

in the second sentence of the first paragraph on the page:

CHANGE "cause of action in favor the tenant" TO "cause of action in favor of the tenant".

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Supp. to § 44.15 Bibliography.

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Articles

Add the following:

Bogart, Daniel B. "Good Faith and Fair Dealing in Commercial Leasing: The Right Doctrine in the Wrong Transaction," *41 J. Marshall L. Rev. 275 (Winter 2008).*

McKinney, Jerald Clifford II. "Are You Trying to Imply Something?: Understanding the Various State Approaches to Implied Covenants of Continuous Operation in Commercial Leases," *31 U. Ark. Little Rock L. Rev. 427 (Spring 2009).*

Meier, Scott W. "Issues to Consider in Drafting of Commercial Leases," 31 *Wyo Law.* 24 (Apr. 2008).

Smeltzer, Natalie. "Freedom to Contract in Texas-Enforceability of An 'As Is' Clause in a Commercial Lease: Gym-N-I Playgrounds, Inc. v. Snider," *61 SMU L. Rev. 509 (Spring 2008).*

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CHAPTER 45 PUBLIC HOUSING

5-45 Thompson on Real Property, Thomas Editions 45.syn

AUTHOR: N. Gregory Smith G. Frank & Winston Purvis Professor of Law Louisiana State University

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CHAPTER 45 PUBLIC HOUSING

5-45 Thompson on Real Property, Thomas Editions § 45.01

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§ 45.01 What Is Public Housing?

A good place to begin this chapter is with a definitional question: what is public housing? Many individuals and families reside in housing that might be viewed as public housing from one perspective or another. For example, if one considers public housing to be housing that is owned by a governmental entity, one might include dormitory rooms on the campus of a state university and various forms of military housing owned by the military services of the United States. One might even consider prison and jail accommodations to be a form of public housing.

Another perspective on public housing might focus on government subsidies, and consider public housing to be housing that receives some form of subsidy from a governmental entity. But "some form of subsidy" might be broad enough to cover housing units whose owners deduct mortgage loan interest payments on their tax returns. If that type of housing were considered to be public housing, most housing in the United States would probably qualify.

Usually, however, when one thinks of public housing, one thinks of housing in which the tenants are low-income individuals and the landlord is the government. The traditional model for this type of housing involves a state-chartered public housing authority that owns or operates the housing. In the typical situation, the public housing authority receives federal financial assistance and is subject to the significant constraints of federal legislation and federal regulation.

The principal focus of this chapter will be on traditional public housing, including the federal statutory and regulatory provisions under which it is operated. There are low-income housing programs that do not receive federal funds. n1 They would not be subject to the United States Housing Act and related federal regulations that are discussed in this chapter. There are also a number of other federally sponsored housing programs, including programs that provide housing subsidies for low-income families who reside in privately owned dwelling units, that are not within the scope of traditional public housing. n2 A section of this chapter provides some information about some of these federal programs, n3 but a complete discussion of them is beyond the scope of this chapter.

FOOTNOTES:
(n1)Footnote 1. A website sponsored by the New York State Division of Housing and Community Renewal states that "New York's Public Housing Law of 1939 launched the country's first state-subsidized public housing program." http://www.dhcr.state.ny.us/ohm/progs/public/ohmprgpu.htm. The website states that some of this housing has now

been "federalized," but other housing units remain "under State Supervision." *See id.* It should be noted, however, that state-funded low-income housing could be subject to some federal legislation. *See, e.g., Andover Housing Authority v. Shkolnik, 820 N.E.2d 815 (Mass. 2005)* (Court refers to public housing for elderly and disabled persons as "state-assisted," but it analyzes the plaintiff's housing-related discrimination claims in light of, among other things, the provisions of the federal Fair Housing Act).

(n2)Footnote 2. The difficulty of precisely defining public housing is suggested in some language in the United States Housing Act:

> The term "public housing" means low-income housing, and all necessary appurtenances thereto, assisted under this chapter other than under section 1437f of this title. The term "public housing" includes dwelling units in a mixed finance project that are assisted by a public housing agency with capital or operating assistance. When used in reference to public housing, the term "low-income housing project" or "project" means (A) housing developed, acquired, or assisted by a public housing agency under this chapter, and (B) the improvement of any such housing.

42 U.S.C. § 1437a(b)(1). A "mixed finance project" could be owned by a private entity. *See* § 45.05(e) of this chapter. Section 1437f focuses on "low income housing assistance" rather than public housing as such. It provides for tenant-based assistance, such as vouchers, and project-based assistance to private owners of dwelling units.

A HUD regulation offers this definition: "*Public housing* means housing assisted under the 1937 Act, other than under Section 8." *24 C.F.R. § 5.100* (italics in original). Section 8 housing programs are briefly discussed in § 45.22 of this chapter.

(n3)Footnote 3. *See* § 45.22 of this chapter.

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CHAPTER 45 PUBLIC HOUSING

5-45 Thompson on Real Property, Thomas Editions § 45.02

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§ 45.02 Outline of Chapter.

This chapter is principally concerned with legal issues relating to traditional public housing, in which a state-chartered public housing authority is the landlord and low-income residents are the tenants. n4 It begins, in § 45.03, with some history--the history of federally assisted public housing in the United States. Then, in § 45.04, it discusses the public housing authority itself, including its nature, composition, and powers. Examples of state enabling legislation are discussed by way of illustration.

Financing and development issues related to the activities of public housing authorities are discussed in § 45.05. That section also considers related issues of cooperation between public housing authorities and units of local government, and contributions contracts between public housing authorities and the federal government.

Issues of accountability and management are considered in § 45.06, including federally imposed planning requirements, federal assessment of performance, and changes in housing project management.

Section 45.07 is concerned with tenant eligibility and selection. Standards of income eligibility as well as other eligibility standards are discussed, including standards related to criminal activity and substance abuse. Procedural issues relating to tenant eligibility and admission to public housing are also considered.

The public housing lease is quite different, in many respects, from traditional residential leases. Section 45.08 considers the public housing lease. Due process issues are relevant here, and they are discussed in the early part of the section. Legislation and regulations related to public housing leases are also considered, including legislation and regulations relating to tenant grievance procedures and the content of public housing leases.

Affordable rent is an important matter to most tenants, but it is especially critical to low-income tenants. Section 45.09 considers different types of public housing rental structures and statutory and regulatory provisions that relate to them.

Charges for utilities are also important to public housing tenants, and there are statutes and regulations that relate to them as well. Section 45.10 discusses legal rules and issues related to the provision of utility services to public housing tenants.

As with other aspects of the landlord-tenant relationship, the matter of tenancy termination is highly regulated in the public housing context. Public housing tenancies are not terminable at the will of the landlord at the end of the "term." Tenants in public housing can be evicted, but only for good cause. However, some public housing tenancies have been terminated based on the conduct of family members. These, and related issues, are discussed in § 45.11.

To reduce criminal activity in public housing projects, some public housing authorities have engaged in efforts to restrict undesirable visitors. Legal issues related to such restrictions are discussed in § 45.12. Crime-reduction has also been behind the "sweeps" in public housing that are discussed in § 45.13.

The revolution in conventional landlord-tenant law has resulted in implied warranties of habitability and other rules relating to housing quality. Housing quality issues have also been a concern in the public housing context, and a number of statutory and regulatory provisions relate to the matter. Housing quality issues are discussed in § 45.14.

Federal legislation and regulation have imposed community service and economic self-sufficiency requirements on many public housing residents. Those requirements are discussed in § 45.15.

Section 45.16 discusses legal issues related to tenant displacement from public housing, whether the displacement comes as a result of damage to a public housing unit, the demolition of a building, or the sale of all or part of a public housing project.

Federal legislation and regulations include provisions for tenant purchase of public housing units. They also include provisions relating to the conversion of existing public housing tenancies into voucher-based tenancies that permit low-income tenants to have more flexibility in the rental housing marketplace. Legal issues relating to these matters are discussed in §§ 45.17 and 45.18.

There are some federally adopted rules relating to pets in public housing. They are briefly considered in § 45.19.

Public housing authorities and the Department of Housing and Urban Development have sometimes been defendants in cases arising out public housing disputes. Issues relating to their potential liability are discussed in § 45.20.

Section 45.22 includes some information about federally sponsored housing programs other than traditional public housing. One of the programs mentioned there is the Section 8 voucher program.

The final section of the chapter, § 45.23, is a bibliography.

FOOTNOTES:
(n1)Footnote 4. For additional discussion of "traditional public housing," *see* § 45.01 of this chapter.

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CHAPTER 45 PUBLIC HOUSING

5-45 Thompson on Real Property, Thomas Editions § 45.03

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§ 45.03 Historical Background.

The federal government has provided funding for construction of low-income housing since the mid-1930s. This was the Depression era, a time when many Americans who had not been poor, now were. There were vacant apartments, but many of the poor could not afford them. n5 In an effort to alleviate the problem, New Deal agencies purchased land, cleared slums, and constructed nearly 22,000 housing units. n6 However, in *United States v. Certain Lands in Louisville, Jefferson County, Ky.*, n7 a 1935 decision, the United States Sixth Circuit Court of Appeals held that the federal government could not use its power to condemn sites for public housing projects. The court stated: "The taking of one citizen's property for the purpose of improving it and selling or leasing it to another, or for the purpose of reducing unemployment, is not, in our opinion, within the scope of the powers of the federal government." n8 But courts had upheld the power of local governments to condemn property for public housing purposes. n9

In 1937, Congress enacted the United States Housing Act of 1937, n10 which established a national public housing program. n11 In this chapter, the legislation, as amended, will be referred to as the "United States Housing Act" or the "1937 Act."

Instead of providing for construction of housing by the federal government, the 1937 Act called for public housing to be constructed by local public housing authorities. n12 The main objective was to provide federal financial aid to public housing authorities in order to provide decent, sanitary, and safe housing for low-income families. n13 The legislation contemplated that the federal government and local housing authorities would enter into contracts under which the federal government would subsidize low-income housing projects and the housing authorities would administer them, subject to federal rules and regulations. The constitutionality of the 1937 Act was tested, but the United States Supreme Court determined that the legislation was within the power of Congress to provide for the general welfare. n14

The 1937 legislation called for public housing to be built by local public housing authorities. The housing authority would fund the purchase of the land and the construction of the housing units by issuing bonds. The federal government would provide a capital subsidy by making debt service payments on the bonds. n15 The housing authority and the federal government would execute an annual contributions agreement setting out the parties' rights and obligations. The housing authority would be obligated to operate the housing consistent with federal statutes and regulations while the annual contributions agreement was in effect. The municipality where the housing was located would be required to

exempt the housing from real property taxes. n16

Public housing projects were originally intended to be for temporary occupancy by the "submerged middle class." n17 When occupants became better off, they were expected to move elsewhere. But these expectations became increasingly difficult to meet. In the 1950s, government programs and policies, such as tax breaks for home ownership and highway construction subsidies, encouraged the growth of suburbs and the movement of moderate-income families out of the inner city. This took place at a time of increasing migration of African-American families from southern states to northern cities. The central cities increasingly became home to low-income households. n18 Public housing became the permanent home of many poor, nonwhite, residents. n19

The public housing program has not been static. In the years since 1937, Congress has amended the United States Housing Act on several occasions, sometimes making very significant changes. For example, in the Housing and Community Development Act of 1974, n20 Congress substantially revised the original legislation. Among other changes, and in contrast to earlier housing legislation, the 1974 legislation required public housing authorities to establish tenant-selection criteria aimed at achieving a broad range of incomes and at avoiding concentrations of families with low incomes. n21 The 1974 legislation also added a new housing program--the Section 8 program--which is referenced in a later section of this chapter. n22

In the Quality Housing and Work Responsibility Act of 1998, n23 Congress substantially revised the public housing legislation again, this time emphasizing property management matters, and including provisions to encourage the economic self-sufficiency of low-income residents of public housing. It encouraged public housing authorities to enter into public-private partnerships to transform public housing into mixed-income communities. n24 The legislation also consolidated federal assistance for public housing authorities into a capital fund and an operating fund. n25

Although other low-income housing programs, such as the housing choice voucher program, n26 have received increasing attention in recent years, the traditional public housing program remains a very significant housing program that presents distinct legal issues. Today, there are nearly 14,000 public housing developments in the United States, containing more than 1 million housing units, that provide homes for several million people. n27

FOOTNOTES:

(n1)Footnote 5. *See* Lawrence M. Friedman, Public Housing and the Poor: An Overview, *54 Cal. L. Rev. 646 (1966).* Earlier, some public housing had been constructed and operated by the Works Progress Administration. This proved to be expensive. The Housing Act of 1937 gave primary responsibility to local authorities, apparently with the expectation that costs could be better controlled at that level. *See* George Lefcoe, *HUD's Authority to Mandate Tenant's Rights in Public Housing, 80 Yale L. J. 463, 477 (1971)* (referring to 81 Cong. Rec. 7968 (1937) (remarks of Senator Wagner)).

(n2)Footnote 6. *See* Michael H. Schill, Privatizing Federal Low Income Housing Assistance: The Case of Public Housing, *75 Cornell L. Rev. 878, 894 (1990).*

(n3)Footnote 7. *78 F.2d 684* (6th Cir. 1935) , *cert. granted, 296 U.S. 567 (1935)* , *appeal dismissed, 297 U.S. 726 (1936)* .

(n4)Footnote 8. *See 78 F.2d 684 at 688* .

(n5)Footnote 9. *See e.g., New York City Housing Authority v. Muller, 1 N.E.2d 153 (N.Y. 1936)* ; Shelby D. Green, *The Public Housing Tenancy: Variations on the Common Law That Give Security of Tenure and Control, 43 Cath. U. L. Rev. 689 (1994).*

(n6)Footnote 10. Pub. L. No. 75-412, *50 Stat. 888 (1937).* This was also called the Wagner-Steagall Act. *See* William Ebenstein, *The Law of Public Housing, 23 Minn. L. Rev. 880, 886 (1939).*

(n7)Footnote 11. *See* Michael H. Schill, Privatizing Federal Low Income Housing Assistance: The Case of Public Housing, *75 Cornell L. Rev. 878, 894 (1990).*

(n8)Footnote 12. *See* Michael H. Schill, *Privatizing Federal Low Income Housing Assistance: The Case of Public Housing, 75 Cornell L. Rev. 878, 894 (1990);* Shelby D. Green, The *Public Housing Tenancy: Variations on the Common Law That Give Security of Tenure and Control, 43 Cath. U. L. Rev. 689 (1994).*

(n9)Footnote 13. *See* Pub. L. No. 75-412, *50 Stat. 888 (1937); See* William Ebenstein, *The Law of Public Housing, 23 Minn. L. Rev. 880, 887 (1939).* The current version of the legislation provides, among other things, that

> "[i]t is the policy of the United States ... to assist States and political subdivisions of States to remedy the unsafe housing conditions and the acute shortage of decent and safe dwellings for low-income families; [and] to assist States and political subdivisions of States to address the shortage of housing affordable to low-income families."

42 U.S.C. § 1437(a). The legislation also provides that "our Nation should promote the goal of providing decent and affordable housing for all citizens through the efforts and encouragement of Federal, State, and local governments, and by the independent and collective actions of private citizens, organizations, and the private sector." *Id.*

(n10)Footnote 14. *See City of Cleveland v. United States, 323 U.S. 329 (1945)* .

(n11)Footnote 15. *See* Michael H. Schill, Privatizing Federal Low Income Housing Assistance: The Case of Public Housing, *75 Cornell L. Rev. 878, 895 (1990).*

(n12)Footnote 16. *See* Michael H. Schill, Privatizing Federal Low Income Housing Assistance: The Case of Public Housing, *75 Cornell L. Rev. 878, 895 (1990).*

(n13)Footnote 17. Members of this group have been described as "poor but honest workers." *See* Lawrence M. Friedman, Public Housing and the Poor, *54 Calif. L. Rev. 642, 648 (1966),* quoted in Michael H. Schill, Privatizing Federal Low Income Housing Assistance: The Case of Public Housing, *75 Cornell L. Rev. 878, 896, n. 66.* (1990).

(n14)Footnote 18. *See* Michael H. Schill, Privatizing Federal Low Income Housing Assistance: The Case of Public Housing, *75 Cornell L. Rev. 878, 896 (1990).*

(n15)Footnote 19. *See* Michael H. Schill, Privatizing Federal Low Income Housing Assistance: The Case of Public Housing, *75 Cornell L. Rev. 878, 896 (1990).*

(n16)Footnote 20. Pub. L. No. 93-383, *88 Stat. 653 (1974).*

(n17)Footnote 21. *See* Michael H. Schill, Distressed Public Housing: Where Do We Go From Here? *60 U. Chi. L. Rev. 497, 512 (1993).*

(n18)Footnote 22. See § 45.22 of this chapter.

(n19)Footnote 23. Pub. L. No. 105-276, *112 Stat. 2518 (1998).*

(n20)Footnote 24. *See* Charles E. Daye, et al., Housing and Community Development 54 (3d ed. 1999).

(n21)Footnote 25. *See* Charles E. Daye, et al., Housing and Community Development 93 (3d ed. 1999).

(n22)Footnote 26. This program, and some other government-assisted housing programs, are discussed in § 45.22 of this chapter.

(n23)Footnote 27. *See* Public Housing in National Low Income Housing Coalition, 2006 Advocates' Guide to Housing and Community Development. This is available on the web at http://www.nlihc.org/detail/article.cfm?article_id=2798&id=46. A HUD performance report indicates that, as of the end of fiscal year 2006, there were 1,172,204 HUD-assisted units/households in the public housing program. *See* U.S. Department of Housing and Urban Development, Performance and Accountability Report, FY 2006. This publication is available on HUD's website at http://www.hud.gov/offices/cfo/reports.

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CHAPTER 45 PUBLIC HOUSING

5-45 Thompson on Real Property, Thomas Editions § 45.04

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§ 45.04 The Public Housing Authority.

§ 45.04(a) Introduction.

Under the 1937 Act, a local public housing authority, rather than the federal government, generally constructs, owns, and operates public housing for low-income households. n28 State enabling legislation typically authorizes the creation of public housing authorities and delegates governmental power to them. n29 The enabling legislation generally sets forth the powers, composition, and operations of the public housing authority. n30 A public housing authority is usually governed by a board of commissioners selected by the mayor and the city council, and is usually administered by a manager or executive director. n31

The 1937 Act uses the term "public housing agency" instead of "public housing authority." According to the legislation, a "public housing agency" generally means "any State, county, municipality, or other governmental entity or public body (or agency or instrumentality thereof) which is authorized to engage in or assist in the development or operation of public housing." n32 A reference in this chapter to a "public housing agency" should be understood to have the meaning set forth in the legislation.

§ 45.04(b) State Enabling Legislation.

It will be helpful to illustrate the general propositions about housing authorities mentioned above by referring to some specific statutory provisions in a few states.

§ 45.04(b)(1) California.

A California statute provides that "[i]n each county and city there is a public body corporate and politic known as the housing authority of the county or city." n33 But the statute also provides that the "authority shall not transact any business or exercise its powers unless, by resolution, the governing body of the county or city declares that there is need for an authority to function in it." n34 The governing body may adopt a resolution declaring such a need if it finds that "insanitary or unsafe inhabited dwelling accommodations exist in the county or city," or that there is a shortage of safe or sanitary dwelling accommodations affordable to persons of low income. n35

When the mayor of a city receives notice of the adoption of the resolution, subject to the confirmation of the governing body, he or she is to appoint five commissioners of the authority. The mayor is to appoint two additional commissioners who are tenants of the authority, if the authority has tenants. One of the tenant appointees is to be over 62 years of age if the authority has tenants of that age. n36 Initial appointees are to serve for staggered terms. Thereafter, the terms are for four years, except in the case of tenant-commissioners, who serve for two. n37 The mayor also selects the initial chairman of the authority. n38 Comparable provisions apply when the resolution is adopted by the governing body of a county. n39

Governing bodies of cities or counties are permitted to enter into agreements to form area housing authorities as well. n40

According to the pertinent California legislation, a housing authority "is a corporate and politic public body, exercising public and essential governmental functions," and having the powers necessary or convenient to carry out the purposes for which it was established. n41 Specific powers are also set forth in statute, including the powers to sue and be sued; n42 to make and execute contracts; n43 to acquire, lease, and operate housing projects for persons of low income; to provide for the construction, improvement or repair of a housing project; to provide financing for the acquisition, development, or construction of low-income dwelling accommodations; to provide security for the protection of a project and its residents; n44 to issue bonds and make loans relating to housing projects; n45 to own, hold, and improve real and personal property; to purchase or lease real and personal property; to acquire property by eminent domain; n46 to investigate housing and living conditions and ways to improve those conditions; n47 to conduct investigations, hear testimony, and take proof at public or private hearings; n48 to borrow money or accept financial assistance from the federal government; and to take over or manage a housing project owned by the federal government. n49

California legislation also includes some provisions prohibiting the housing authority from undertaking particular acts or from obligating the housing authority to do particular things. Thus, for example, the housing authority is prohibited from evicting a tenant without reasonable cause. n50 And the housing authority is required to covenant in its leases to repair the premises to comply with building ordinances effective at the time of construction. n51

§ 45.04(b)(2) Illinois.

In Illinois, local governing bodies of counties, or of communities with populations greater than 25,000, are authorized to establish housing authorities. n52 Housing authorities may also be established "for more than one county." n53

Upon adoption of a resolution regarding the need for a housing authority, and upon obtaining a certificate from the state, the local presiding officer, with the approval of the local governing body, appoints housing authority commissioners for staggered terms and designates one of them as the chairman of the housing authority. n54 The number of commissioners varies with the size of the community. In municipalities larger than one million inhabitants, two commissioners are to be appointed from a list of housing authority residents generated by tenants' associations and another is to be appointed from among the officers of tenants' associations. n55

The housing authority is a municipal corporation, and a body "both corporate and politic, exercising public and essential government functions." n56 It has general powers to carry out its functions, as well as a number of enumerated powers. n57 Among these are powers to investigate housing conditions and needs; n58 to acquire property by purchase, lease, or by eminent domain; n59 to borrow, lend, or invest money; n60 to issue bonds; n61 to enter into contracts; n62 to sue and be sued; n63 to establish a police force; n64 to act as an agent for the federal government in connection with the acquisition, construction, and management of a housing project; n65 and to act as an agent for other governments regarding matters related to housing, including the clearing and redevelopment of blighted areas and the assembly of land for development or redevelopment. n66 Some of the enumerated powers, like that for establishing a police force, are tied to the size of the municipality. n67 Others, like the power to acquire real property for a conservation area, are subject to written approval of a department of state government. n68

Additional statutory provisions restrict the powers of the housing authority. For example, the housing authority is required to comply with federal statutes and regulations related to the determination of tenant income. n69 And the housing authority is prohibited from accepting a person as a tenant if the persons who would dwell in the project have an aggregate annual income that equals or exceeds an amount that the authority determines to be necessary to secure safe and uncongested dwelling accommodations and to provide an adequate standard of living. n70

§ 45.04(b)(3) Louisiana.

Louisiana housing authorities can be either local (meaning that they are established by a municipality or a parish) or regional or consolidated (meaning that they are established by two or more political subdivisions of the state). n71 For purposes of illustration, this discussion will focus on local housing authorities.

A local housing authority is defined as "a public body, corporate and politic ... exercising necessary and essential governmental functions." n72 A state statute provides that in each municipality and parish where one has not previously been established "there is hereby created a local housing authority." However, the authority will not be deemed to be established until the local governing body adopts a resolution declaring that there is a need for a local housing authority and finding that there exists a shortage of decent, safe, and sanitary dwelling accommodations or that such accommodations are not available and affordable to all residents regardless of income. n73 The powers of the local housing authority are vested in commissioners, n74 which are appointed by the chief elected official of the municipality or parish. n75 At least five commissioners are to be appointed, but more are required in larger communities. Depending on the circumstances, one or more of the additional commissioners must be selected from among public housing tenants. n76 The initial commissioners have staggered appointments; thereafter the term of office is for five years. n77

A local housing authority is, by statute, possessed of all powers necessary, convenient, or desirable in carrying out the purposes of the enabling legislation. n78 A number of specific powers are also enumerated, including the powers to sue and be sued; to adopt rules and regulations; to enter into contracts and intergovernmental agreements; n79 to conduct examinations and investigations, n80 to make investments; n81 to conduct studies of living and housing conditions and the means for their improvement; n82 to develop, construct, manage, own, and lease housing projects or developments; n83 to acquire interests in real or personal property by purchase, lease, or other means; n84 to borrow money or accept financial and other assistance from the local, state, or federal government; n85 and to issue bonds and other debt instruments. n86 However, a local housing authority is not permitted to consider net income to be "profit." n87

§ 45.04(b)(4) New York.

In New York, a municipal housing authority is a public corporation, and an agency and instrumentality of the state for the purposes for which it was created. n88 It is established by a special act of the legislature. n89 The mayor, or the town board, files a certificate with the state Commissioner of Housing and Community Renewal setting forth the date of the special legislation, the name of the authority, and the names of the members, specifying one of them as chairman. n90 Housing authorities having supervision of one hundred or more occupied dwelling units are required to include two tenants, elected by residents, as members. n91 The initial members serve for staggered terms, thereafter for five years. n92 When the office of the initial chairman becomes vacant, the new chairman is selected by the housing authority from among its members. n93

New York statutes list a number of powers of a housing authority, including the powers to borrow money, to issue notes, and to issue bonds; n94 to investigate living conditions and the means of improving them; to prepare plans for, carry out, and operate housing projects; to construct, reconstruct, or repair any project; to act as an agent for, or enter into contracts with, the federal government in connection with a federal or municipal project or a federally aided low-income housing program; to acquire or contract to acquire real or personal property; to own, hold, clear and improve real or personal property; to lease, purchase, or otherwise acquire, manage, or operate all or any part of a

housing project undertaken or completed by any government or housing company; to make and execute contracts and other instruments; to sue or be sued; and to conduct examinations and investigations, hear testimony and take proof at public or private hearings. n95

§ 45.04(c) Composition of the Public Housing Authority's Governing Body.

The 1937 Act includes a provision about the composition of the governing body of the public housing agency. Subject to some exceptions, the legislation provides that the membership of the board of directors or similar governing body of a public housing agency "shall contain" not less than one member "(A) who is directly assisted by the public housing agency; and (B) who may, if provided for in the public housing agency plan, be elected by the residents directly assisted by the public housing agency." n96

It is possible for the federal requirement to mandate the appointment of a public housing resident to the board of directors in a situation in which state enabling legislation does not. This situation arose in an Ohio case, n97 in which the plaintiffs, acting on behalf of the board of directors of a public housing authority, challenged the mayor's appointment of a board member who was not a public housing resident. At the time of the appointment, no one on the board resided in housing operated by the housing authority.

The applicable Ohio legislation contained a provision requiring a member of a metropolitan housing authority board to be a resident of a dwelling unit owned or managed by the housing authority, but the provision applied only to housing authorities in districts containing more than a million persons. The housing authority in this case was not in such a district. But the court concluded that the appointment violated the federal requirement for tenant representation.

After the litigation had commenced, another member of the board resigned his position, creating a vacancy. The federal district court ordered the mayor to appoint a resident of the housing authority's public housing to fill the vacancy. It also issued an order requiring the mayor to continue to appoint public housing residents "to that seat" as long as the federal requirement remained in force.

FOOTNOTES:

(n1)Footnote 28. *See* Michael H. Schill, Distressed Public Housing: Where Do We Go From Here? *60 U. Chi. L. Rev. 497, 499 (1993).* However, in *Shimkus v. Hickner, 417 F. Supp.2d 884 (E.D. Mich. 2006)* , the court concluded that a county government could itself operate public housing. The issue arose in that case because the county government had taken no action to form a housing commission after the county government has been reconstituted in 1979. But the court concluded that there was no state or federal impediment to having the county itself operate the public housing.

(n2)Footnote 29. *See* Charles E. Daye, et al., Housing and Community Development 180 (3d ed. 1999).

(n3)Footnote 30. *See* Charles E. Daye, et al., Housing and Community Development 180 (3d ed. 1999).

(n4)Footnote 31. *See* Michael H. Schill, Privatizing Federal Low Income Housing Assistance: The Case of Public Housing, *75 Cornell L. Rev. 878, 894 n. 53 (1990).*

(n5)Footnote 32. *See 42 U.S.C. § 1437a(b)(6)*. There is a separate definition of "public housing agency" with respect to the tenant-based Section 8 housing program. *Id.* That program is discussed in § 45.22(d)(2) of this chapter, but it is not a traditional public housing program as such.

(n6)Footnote 33. *See Cal. Health and Safety Code § 34240*.

(n7)Footnote 34. *See Cal. Health and Safety Code § 34240*.

(n8)Footnote 35. *See Cal. Health and Safety Code § 34242*.

(n9)Footnote 36. *See Cal. Health and Safety Code § 34270*. The appointments are to be made by the governing body if the office of mayor is not elective.

(n10)Footnote 37. *See Cal. Health and Safety Code § 34272*.

(n11)Footnote 38. *See Cal. Health and Safety Code § 34277*.

(n12)Footnote 39. *See Cal. Health and Safety Code § 34271*. Two additional commissioners ma be appointed based on a county's size. *See Cal. Health and Safety Code § 34271.5*.

(n13)Footnote 40. *See Cal. Health and Safety Code § 34240.1*.

(n14)Footnote 41. *See Cal. Health and Safety Code § 34310*.

(n15)Footnote 42. *See Cal. Health and Safety Code § 34311*.

(n16)Footnote 43. *See Cal. Health and Safety Code § 34311*.

(n17)Footnote 44. *See Cal. Health and Safety Code § 34312*.

(n18)Footnote 45. *See Cal. Health and Safety Code § 34312.3*.

(n19)Footnote 46. *See Cal. Health and Safety Code § 34315*.

(n20)Footnote 47. *See Cal. Health and Safety Code § 34317*.

(n21)Footnote 48. *See Cal. Health and Safety Code § 34318*.

(n22)Footnote 49. *See Cal. Health and Safety Code § 34327*.

(n23)Footnote 50. *See Cal. Health and Safety Code § 34331*.

(n24)Footnote 51. *See Cal. Health and Safety Code § 34332*.

(n25)Footnote 52. *See* Ill. Ann. Stat. ch. 310 § 10/3.

(n26)Footnote 53. *See* Ill. Ann. Stat. ch. 310 § 10/3. In that case, the provisions of the "Housing Authorities Act" applies to them "[e]xcept as otherwise provided." *See id.*& § 10/1.

(n27)Footnote 54. *See* Ill. Ann. Stat. ch. 310 § 10/3.

(n28)Footnote 55. *See* Ill. Ann. Stat. ch. 310 § 10/3. This applies where such associations exist.

(n29)Footnote 56. *See* Ill. Ann. Stat. ch. 310 § 10/8.

(n30)Footnote 57. *See* Ill. Ann. Stat. ch. 310 § 10/8.

(n31)Footnote 58. *See* Ill. Ann. Stat. ch. 310 § 10/8.1.

(n32)Footnote 59. *See* Ill. Ann. Stat. ch. 310 § 10/8.3.

(n33)Footnote 60. *See* Ill. Ann. Stat. ch. 310 § 10/8.4.

(n34)Footnote 61. *See* Ill. Ann. Stat. ch. 310 § 10/8.4a.

(n35)Footnote 62. *See* Ill. Ann. Stat. ch. 310 § 10/8.5.

(n36)Footnote 63. *See* Ill. Ann. Stat. ch. 310 § 10/8.5.

(n37)Footnote 64. *See* Ill. Ann. Stat. ch. 310 § 10/8.1a.

(n38)Footnote 65. *See* Ill. Ann. Stat. ch. 310 § 10/8.2.

(n39)Footnote 66. *See* Ill. Ann. Stat. ch. 310 §§ 10/8.1a & 8.15.

(n40)Footnote 67. *See* Ill. Ann. Stat. ch. 310 § 10/8.1a.

(n41)Footnote 68. *See* Ill. Ann. Stat. ch. 310 §§ 10/8.1 - 8.8.

(n42)Footnote 69. *See* Ill. Ann. Stat. ch. 310 § 10/8.21.

(n43)Footnote 70. *See* Ill. Ann. Stat. ch. 310 § 10/25(a).

(n44)Footnote 71. *See La. Rev. Stat. Ann. § 40:384*.

(n45)Footnote 72. *See La. Rev. Stat. Ann. § 40:384*.

(n46)Footnote 73. *See La. Rev. Stat. Ann. § 40:392*.

(n47)Footnote 74. *See La. Rev. Stat. Ann. §§ 40:401*.

(n48)Footnote 75. *See La. Rev. Stat. Ann. §§ 40:531*. If there is no chief elected official, the governing body makes the appointments. *See id.*

(n49)Footnote 76. *See La. Rev. Stat. Ann. §§ 40:531*.

(n50)Footnote 77. *See La. Rev. Stat. Ann. § 40:532*.

(n51)Footnote 78. *See La. Rev. Stat. Ann. § 40:431*.

(n52)Footnote 79. *See La. Rev. Stat. Ann. § 40:431*.

(n53)Footnote 80. *See La. Rev. Stat. Ann. § 40:432*.

(n54)Footnote 81. *See La. Rev. Stat. Ann. § 40:434*.

(n55)Footnote 82. *See La. Rev. Stat. Ann. § 40:435*.

(n56)Footnote 83. *See La. Rev. Stat. Ann. § 40:436*.

(n57)Footnote 84. *See La. Rev. Stat. Ann. § 40:440*.

(n58)Footnote 85. *See La. Rev. Stat. Ann. § 40:453*.

(n59)Footnote 86. *See La. Rev. Stat. Ann. §§ 40:468* & *478*.

(n60)Footnote 87. *See La. Rev. Stat. Ann. § 40:482*.

(n61)Footnote 88. *See N.Y. Pub. Hous. Law §§ 2* & *3*.

(n62)Footnote 89. *See N.Y. Pub. Hous. Law § 30*.

(n63)Footnote 90. *See N.Y. Pub. Hous. Law § 30*.

(n64)Footnote 91. *See N.Y. Pub. Hous. Law § 30*.

(n65)Footnote 92. *See N.Y. Pub. Hous. Law § 30*.

(n66)Footnote 93. *See N.Y. Pub. Hous. Law § 32*.

(n67)Footnote 94. *See N.Y. Pub. Hous. Law § 41*.

(n68)Footnote 95. *See N.Y. Pub. Hous. Law § 37*.

(n69)Footnote 96. *See 42 U.S.C. § 1437(b)*. The exceptions relate to situations in which: 1) the state requires the members of the board to be salaried and to serve full-time; and 2) the housing authority operates fewer than 300 housing units, and, after giving reasonable notice of an opportunity to have a resident serve on the board, the housing authority has not been notified of the intention of any resident to participate. *See 42 U.S.C. § 1437(b)*. The first exception was applicable in a 2006 Michigan case. *See Shimkus v. Hickner, 417 F. Supp. 2d 884 (E.D. Mich. 2006)* .

(n70)Footnote 97. *State ex rel. Lorain Metropolitan Housing Authority Board of Commissioners v. Mayor of City of Lorain, 145 F. Supp. 2d 926 (N.D. Ohio 2001)* .

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CHAPTER 45 PUBLIC HOUSING

5-45 Thompson on Real Property, Thomas Editions § 45.05

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§ 45.05 Development and Financing of Public Housing.

§ 45.05(a) In General.

Federal financial assistance has been critical to the traditional public housing program. Originally, program sponsors sought a one-time grant for project construction costs, but the budgetary impact rendered that inadvisable. n98 Instead, the program was set up to have the public housing authority fund the purchase of land and the cost of public housing by issuing long-term bonds, normally with a forty-year maturity. n99 The bonds, which are tax-exempt, are purchased by private investors. For its part, in accordance with the terms of an annual contributions contract between HUD and the housing authority, the federal government pays the annual principal and interest costs over the life of the bonds. n100 In 1987, Congress authorized the Department of Housing and Urban Development to use one-time development grants in the financing of public housing. Under this approach, HUD and the housing authority still enter into a contributions contract with terms and conditions that remain in effect for 40 years. n101

At the commencement of the public housing program, only construction and financing costs were paid by the federal government, which left operating and maintenance costs to be covered by rents paid by project tenants. n102 However, in the 1960s, increases in operating and maintenance costs frequently prompted housing authorities to defer maintenance, and there was deterioration in the physical condition of much of the nation's public housing. Congress responded by authorizing operating subsidies to public housing authorities. n103

Subject to a number of requirements, the 1937 Act also permits grants to be made available to public housing authorities for the revitalization of severely distressed public housing. n104

§ 45.05(b) Local Cooperation.

The 1937 Act requires that there be local cooperation between the public housing authority and the local government as a precondition to HUD involvement in the development of federally assisted public housing. The Secretary of Housing and Urban Development is not permitted to enter into a contract with a public housing agency for preliminary loans or planning with respect to a low-income housing project unless the governing body of the locality has approved the housing agency's application for a preliminary loan, and unless the public housing agency has demonstrated that there is need for low-income housing that is not being met by private enterprise. n105

In addition, before the Secretary enters into a contract for contributions with a public housing agency, the governing body of the locality must have entered into an agreement with the public housing agency providing for "local cooperation." n106 This agreement must provide that, before making amounts under a contract for contributions available for the development of public housing, the public housing agency is to notify the chief executive officer of the locality of that use, and provide such information regarding the public housing as may reasonably be requested by the locality. n107 Once a valid local cooperation agreement is made, it is binding on the unit of local government, and can be enforced by the housing authority. n108

An issue relating to local cooperation came before the United States Supreme Court in *James v. Valtierra.* n109 The California constitution had been amended to provide that no low-rent housing project could be developed in a city, town, or county unless it had been approved by a majority vote of the qualified electors voting in an election. The plaintiffs, who were from counties in which low-cost housing proposals had been defeated in elections, sought a declaration that the California provision violated the federal constitution. But the Supreme Court rejected arguments that the California provision violated the *Supremacy Clause*, the Privileges and Immunities Clause, and the *Equal Protection Clause*, and, in the course of its opinion, the Court stated: "By the Housing Act of 1937 the Federal Government has offered aid to state and local governments for the creation of low-rent public housing. However, the federal legislation does not purport to require that local governments accept this or to outlaw local referendums on whether the aid should be accepted." n110

§ 45.05(c) Contributions Contract Between HUD and the Public Housing Authority.

The public housing agency and the Secretary of Housing and Urban Development execute a contract that identifies the parties' rights and obligations. n111 This could take the form of a contract regarding grant contributions, if grants are used in the development of the public housing project, or an annual contributions contract, if the funding approach involves annual contributions to the housing agency. n112 In either case, the contract will set forth the terms and conditions under which the federal assistance is being provided. The Secretary of Housing and Urban Development may include any provisions deemed necessary to "insure the lower income character of the project." n113

Every contract for contributions is to provide, among other things, that no contributions will be made unless the housing project n114 is exempt from all real and personal property taxes. n115 In addition, the contract is required to include provisions, that, among other things: 1) require the public housing agency to determine that each family in the project was admitted in accordance with duly adopted regulations and approved income limits; n116 2) require the public housing agency to promptly notify any applicant determined to be ineligible for admission of the basis for the determination and to provide the applicant, upon timely request, with an opportunity for an informal hearing on the determination; n117 3) require the public housing agency to promptly notify any applicant determined to be eligible for admission of the approximate date of occupancy; n118 4) require the public housing agency to comply with such procedures and requirements as the Secretary of Housing and Urban Development may prescribe to assure that sound management practices will be followed in the operation of the project; n119 5) require the public housing agency to maintain the public housing in a condition that complies with standards for safety and habitability established by the Secretary of Housing and Urban Development; n120 and 6) permits the Secretary of Housing and Urban Development, and other designated public officials, to have access to the books and records of the public housing agency in order to audit its operations. n121

Contributions under an annual contributions contract are not to exceed the amount of principal and interest that are payable on obligations issued by the public housing agency to finance the development and acquisition of the housing project. The contributions are to be paid over a period of time that is not to exceed 40 years. n122 The Secretary of Housing and Urban Development is permitted to pledge the annual contributions as security for the obligations that are issued by the public housing agency to finance the development or acquisition of the housing project. n123

If a "substantial default" occurs under the terms of the contact for contributions, n124 the public housing agency is obligated, at the option of the Secretary of Housing and Urban Development, to convey either title to the housing project or possession of the project to the Secretary. n125 The Secretary, in turn, is obligated to reconvey title or possession to the public housing agency or its successor if the Secretary is satisfied that all defaults have been cured and that the project will thereafter be operated in accordance with the terms of the contract for contributions. n126

In *United States v. Barrett*, n127 there was a challenge to HUD's authority to take over a housing project following a claimed "substantial default." There, some individuals had filed a state court action challenging the legal existence of the public housing authority, and its ability to enter into contracts, after the contributions contract and a turnkey contract had been executed. n128 The plaintiffs sought an injunction against construction of the housing project. The contributions contract included a provision stating that a legal challenge to the housing authority's right to enter into the turnkey contract constituted a substantial default. The federal government brought an action in federal court, seeking to confirm its authority to take over the housing project, and seeking to enjoin the state court litigation. The United States Fourth Circuit Court of Appeals ruled in favor of the federal government. It concluded that HUD had the authority to include, in the annual contributions contract, a provision making a legal challenge to the housing authority's existence a substantial default, and it upheld the federal government's right to take over the project. In enjoining the state court litigation, the federal court noted that the state court litigation had impaired the "financial responsibility" of the housing authority from the perspective of creditors and subcontractors. n129

The issue of whether HUD could terminate a contributions contract based upon lack of diligence by a housing authority arose in *Silva v. East Providence Housing Authority.* n130 In that case, there was significant local opposition to the housing project, and no dwelling units were constructed during a five-year period. HUD decided to terminate the contributions contract, but some prospective tenants sued to prevent that result. The United States First Circuit Court of Appeals concluded that HUD had the statutory authority to include a termination provision in the contributions contract, and that its decision to terminate the contract could be overturned only if arbitrary or capricious. However, First Circuit remanded the case to the district court for a determination as to whether HUD had considered any alternatives that were less severe than termination.

§ 45.05(d) Turnkey Development.

The original model for federally assisted public housing involved construction of housing by the public housing authority. Since the mid-1960s, however, it has been common for the housing authority to agree to buy a completed structure from a private developer, who "turns the keys over" to the housing authority. n131 A housing authority using this approach will receive a reservation of funds from the Secretary of Housing and Urban Development, advertise for proposals from developers, and select the best proposal. n132

When the development arrangements are approved, the housing authority and HUD execute a contributions contract, and the housing authority and the developer execute a turnkey contract. The developer is responsible for obtaining construction financing, but is permitted to use the turnkey contract as part of the security for the loan. When the project is completed, the housing authority obtains title and pays for the project with funds from bond sales. n133

§ 45.05(e) Mixed-Finance Public Housing.

As part of the Quality Housing and Work Responsibility Act of 1998, n134 public housing authorities were permitted to own, operate, assist, or otherwise participate in "mixed-finance projects." n135 A "mixed-finance project" refers to a project that is financially assisted by private resources, including low-income housing tax credits, as well as assistance provided under the provisions of the 1937 Act. n136 Some, or all, of the housing units in the project will be public housing, but other housing units may not be. n137 Indeed, an increasing number of public housing authorities have entered into partnerships with other entities to build and manage developments in which a portion of the dwelling units are public housing units, while other units qualify for the low-income housing tax credit, and still others are occupied by

families that can afford market rate rents. n138

Mixed-finance projects may include projects that are developed by a public housing agency, an entity affiliated with a public housing agency, or a partnership, limited liability company, or other entity in which the public housing agency, or an affiliated entity, is a general partner, managing member, or otherwise participates. n139

Housing units that are assisted with capital or operating assistance from the housing agency are to be developed, operated, and maintained in accordance with the requirements for public housing set forth in the 1937 Act. n140 A provision of that Act states that, for purposes of the legislation, "any reference to public housing owned or operated by a public housing agency shall include dwelling units in a mixed finance project that are assisted by the agency with capital or operating assistance." n141

The legislation includes provisions with respect to the number of public housing units in the project. It requires either: 1) that the ratio of public housing units to the total number of housing units be approximately the same as the ratio of the financial commitment provided by the public housing agency to the total financial commitment involved in the project; or 2) that the number of public housing units not be less than the number of units that could have been developed by conventional financing of public housing. n142

FOOTNOTES:
(n1)Footnote 98. *See* Charles E. Daye, et al., Housing and Community Development 180 (3d ed. 1999).

(n2)Footnote 99. *See* Michael H. Schill, Distressed Public Housing: Where Do We Go From Here? *60 U. Chi. L. Rev. 497 (1993).*

(n3)Footnote 100. *See* Charles E. Daye, et al., Housing and Community Development 180 (3d ed. 1999).

(n4)Footnote 101. *See* Charles E. Daye, et al., Housing and Community Development 180 (3d ed. 1999). The statutory authorization is set forth in *42 U.S.C. § 1437(a)(2).*

(n5)Footnote 102. *See* Shelby D. Green, The Public Housing Tenancy: Variations on the Common Law That Give Security of Tenure and Control, *43 Cath. U. L. Rev. 694-95 (1994).*

(n6)Footnote 103. *See* Shelby D. Green, The Public Housing Tenancy: Variations on the Common Law That Give Security of Tenure and Control, *43 Cath. U. L. Rev. 694-95 (1994).* The section of the 1937 Act that provides for operating funds is *42 U.S.C. § 1437g*.

(n7)Footnote 104. *See 42 U.S.C. § 1437v*.

(n8)Footnote 105. *See 42 U.S.C. § 1437c(e).*

(n9)Footnote 106. *See 42 U.S.C. § 1437c(e).*

(n10)Footnote 107. *See 42 U.S.C. § 1437c(e).*

(n11)Footnote 108. *See Cuyahoga Metropolitan Housing Authority v. Harmody, 474 F.2d 1102* (6th Cir. 1973) (court states that "the policies underlying the national and state legislation under which the Cooperation Agreement in this case was made and entered into necessarily protect the Agreement against cancellation at the mere will of the city.").

(n12)Footnote 109. *402 U.S. 137 (1971)* .

(n13)Footnote 110. *See 402 U.S. at 140* .

(n14)Footnote 111. *See* Michael H. Schill, Privatizing Federal Low Income Housing Assistance: The Case of Public Housing, *75 Cornell L. Rev. 878, 895 (1990).*

(n15)Footnote 112. *See 42 U.S.C. § 1437c*.

(n16)Footnote 113. *See 42 U.S.C. § 1437d(a)*.

(n17)Footnote 114. Excluding any portion of the project not assisted by HUD contributions.

(n18)Footnote 115. *See 42 U.S.C. § 1437d(d)*. The housing agency is required, however, to make some payments in lieu of taxes. *Id.*

(n19)Footnote 116. *See 42 U.S.C. § 1437d(c)(2)*.

(n20)Footnote 117. *See 42 U.S.C. § 1437d(c)(4)*.

(n21)Footnote 118. *See 42 U.S.C. § 1437d(c)(4)*.

(n22)Footnote 119. *See 42 U.S.C. § 1437d(c)(5)*.

(n23)Footnote 120. *See 42 U.S.C. § 1437d(f).*

(n24)Footnote 121. *See 42 U.S.C. § 1437c(h)*.

(n25)Footnote 122. *See 42 U.S.C. § 1437c(a)*.

(n26)Footnote 123. *See 42 U.S.C. § 1437c(a)*. *See also 42 U.S.C. § 1437c(g)*.

(n27)Footnote 124. According to *42 U.S.C. § 1437d(g)(1)*, "substantial default" is to be defined in the contract for contributions.

(n28)Footnote 125. *See 42 U.S.C. § 1437d(g)(1).*

(n29)Footnote 126. The Secretary will also be obligated to do so "after the termination of the obligation to make annual contributions available unless there are any obligations or covenants of the public housing agency to the Secretary which are then in default." *See id.*

(n30)Footnote 127. *442 F.2d 642* (4th Cir. 1971) .

(n31)Footnote 128. Turnkey contracts are discussed in § 45.05(d) of this chapter.

(n32)Footnote 129. *See 442 F.2d at 645* .

(n33)Footnote 130. *565 F.2d 1217* (1st Cir. 1977) .

(n34)Footnote 131. *See* Charles E. Daye, et al., Housing and Community Development 181 (3d ed. 1999). There are other possible development approaches. According to a HUD regulation, a "PHA may use any generally accepted method of development including, but not limited to, conventional, turnkey, acquisition with or without rehabilitation, mixed-finance, and force account." *See 24 C.F.R. § 941.102*. The regulation includes definitions for each of these approaches.

(n35)Footnote 132. *See* Charles E. Daye, et al., Housing and Community Development 181 (3d ed. 1999).

(n36)Footnote 133. *See* Charles E. Daye, et al., Housing and Community Development 182 (3d ed. 1999). *See also*

24 C.F.R. § 941.102(a)(2).

(n37)Footnote 134. Pub. L. No. 105-276, title V. § 539, *112 Stat. 2594 (1998)*.

(n38)Footnote 135. *See 42 U.S.C. § 1437z-7*.

(n39)Footnote 136. *See 42 U.S.C. § 1437z-7(d)*.

(n40)Footnote 137. *See 24 C.F.R. § 941.600(a)(1)*. This regulation includes some helpful information about the nature of a mixed-finance project.

(n41)Footnote 138. *See* Charles E. Daye, et al., Housing and Community Development 200 (3d ed. 1999).

(n42)Footnote 139. *See* Charles E. Daye, et al., Housing and Community Development 200 (3d ed. 1999).

(n43)Footnote 140. *See 42 U.S.C. § 1437z-7(c)*.

(n44)Footnote 141. *See 42 U.S.C. § 1437z-7(c)*.

(n45)Footnote 142. *See 42 U.S.C. § 1437z-7(e)*.

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CHAPTER 45 PUBLIC HOUSING

5-45 Thompson on Real Property, Thomas Editions § 45.06

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§ 45.06 Public Housing Accountability and Management.

§ 45.06(a) Introduction.

Federal financial assistance of public housing comes with federal oversight. Public housing authorities that receive federal funds are required to submit plans to the Department of Housing and Urban Development. They are also subject to regular assessment of their performance. Management changes may be required in case of unsatisfactory performance. Independent of issues regarding performance, federal legislation has encouraged tenant involvement in the management of public housing projects.

§ 45.06(b) Plans.

The provisions of the 1937 Act require public housing agencies to submit annual and five-year plans to the Secretary of Housing and Urban Development with respect to federally assisted public housing projects.

A five-year plan is to set forth a mission statement on serving the needs of low-income and very low-income families and to include goals and objectives with respect to serving those needs. n143 The plan must also include goals, policies, or programs that "will enable the housing authority to serve the needs of child and adult victims of domestic violence, dating violence, sexual assault, or stalking." n144 The housing agency is required to submit an initial five-year plan in the first year it receives assistance. Thereafter, the agency is required to submit a new plan at least every five years. n145

In addition to the five-year plan, the public housing agency is required to submit an annual plan to the Secretary of Housing and Urban Development for each year it receives financial assistance. Once the initial annual plan has been submitted, annual updates can satisfy the requirement. n146

The annual plan is required to include, among other things: 1) information about housing needs and how the housing agency intends to address them; 2) a statement of the housing agency's financial resources and plans for their use; 3) a statement of the housing agency's policies for tenant eligibility, selection, and admission; 4) a statement regarding the rules, standards, and policies of the public housing agency regarding the maintenance and management of the housing; 5) a statement of the public housing agency's grievance procedure; 6) a plan describing capital improvements needed to

ensure long-term viability of the housing project; 7) a description of any housing for which the housing agency will apply for demolition or other disposition, together with a timetable for the demolition or disposition; 8) a description of projects that the housing agency has designated, or will seek designation, for occupancy by elderly or disabled families; 9) a description of any building that is to be converted to tenant-based assistance, together with information about assistance that will be used in connection with the conversion; 10) a description of policies and programs related to the enhancement of the economic and social self-sufficiency of assisted families; 11) a description of activities, services, or programs of the public housing agency to prevent, and to assist the victims of, domestic violence, dating violence, sexual assault, or stalking; 12) a plan to prevent crime and to ensure the safety of public housing residents; 13) the results of the most recent audit of the public housing agency; and 14) information about how the public housing agency will plan for the long-term operation, rehabilitation, and modernization of its housing inventory. n147

The public housing agency is required to seek input from residents and the public on its proposed plans before submitting them to the Secretary of Housing and Urban Development. More particularly, the public housing agency is required to establish one or more resident advisory boards, and to consult with the board, or boards, regarding the development of the public housing agency's plans. n148 In developing the plan, the public housing agency is required to conduct a public hearing to discuss the plan and to invite public comment. n149

The Secretary of Housing and Urban Development may disapprove a plan if it does not comply with the applicable standards. n150 If a public housing agency has been designated as "troubled," n151 or is at risk of being so designated, the Secretary may require more extensive information to be included in the plan. n152 On the other hand, if the public housing agency is determined to be "high performing," the Secretary may streamline the requirements for plan submission. n153

§ 45.06(c) Assessment of Performance.

Pursuant to federal legislation, the Secretary of Housing and Urban Development is required to develop and publish "indicators" to assess the management performance of public housing agencies. n154 To the extent it is practicable, the Secretary is required, by statute, to use indicators that include such things as: the number and percentage of vacancies; the percentage of uncollected rents; the repair and turn-around time on vacant units; the proportion of maintenance work orders that are outstanding; the extent to which the housing agency implements effective screening, eviction policies, and other anti-crime strategies; the extent to which the housing agency promotes the economic self-sufficiency of public housing residents and provides residents with opportunities for involvement in administration of public housing; and the extent to which the public housing agency provides acceptable basic housing conditions. n155

HUD regulations refer to the assessment system as the "Public Housing Assessment System," and state that it is a system for measuring a public housing agency's "essential housing operations." n156 The regulations also state that the purpose is to improve the delivery of public housing services and to improve trust in the public housing system. n157

In implementing the statutory requirements, HUD's regulations provide that public housing agencies will be assessed based on four indicators: 1) the physical condition of their properties; 2) their financial condition; 3) their management operations; and 4) resident service and satisfaction feedback. n158 "Rewards" are provided to "high performers" and "consequences" come to "poor performers." n159

The regulations provide for the way in which performance "scores" are determined. n160 A public housing agency that achieves a score of at least 60% of the points available under each of the four indicators, and at least 90% of the points available overall, is designated as a "high performer." n161 High performers get relief from some reporting and other requirements. n162 Public housing agencies that receive less than 60% of the available points overall, or that receive less than 60% of the points under more than one of the first three indicators, are designated as "troubled." n163 A score of less than 60% of the points in one of the first three indicators is characterized as "substandard." n164 Troubled or substandard public housing authorities incur greater regulatory oversight and other consequences. However, even

"standard" performers are, in some cases, required to submit plans for improvement and to correct deficiencies. n165

A provision of the 1937 Act indicates that a public housing authority is "troubled" when it "fails on a widespread basis to provide acceptable basic housing conditions for its residents." n166 Such a designation leads to an independent on-site assessment and efforts to reach an agreement with the housing agency to improve its performance. n167

A troubled housing agency that is subject to an agreement to improve performance is also subject to some deadlines for the improvements. According to the relevant legislation, the housing agency must, within a year after being notified of its troubled status, improve its performance "by at least 50 percent of the difference between the most recent performance measurement and the measurement necessary to remove that agency's designation as troubled." n168 And within two years of being notified of its troubled status, the housing agency must improve its performance to the extent that it is no longer designated as troubled. n169 If the housing agency does not achieve these levels of performance, the Secretary of Housing and Urban Development is required to petition for the appointment of a receiver or take possession and appoint an administrator. n170

The statutory provisions describing the assessment process also provide that if there is a "substantial default" by the housing agency with respect to the covenants or conditions to which it is subject, the Secretary of Housing and Urban Development may, among other things, solicit proposals from other public housing agencies to manage all or part of the subject housing; petition for the appointment of a receiver; or take possession of all or part of the housing agency, including all or any part of any housing project. n171 These options appear to be in addition to those that are available in the event of a substantial default under the contributions contract between HUD and the housing agency. n172

In addition to the other rights and remedies available to the Secretary of Housing and Urban Development referenced above, if the Secretary finds that a public housing agency that is receiving capital or operating funds from HUD has failed to comply substantially with its statutory obligations relating to the public housing program, the Secretary of Housing and Urban Development may terminate the assistance payments, withhold amounts, or reduce or the amounts of future payments. n173 Normal payments are to resume when the Secretary determines that the housing agency will comply with its obligations. n174

Additional details regarding these matters are set forth in HUD regulations. n175

§ 45.06(d) Housing Project Management.

Typically, a public housing project will be managed by the public housing authority, but other forms of management are possible. For example, as discussed in another section of the chapter, there are circumstances in which HUD itself will take over operation of a public housing project. n176

Since the mid-1980s, the United States Department of Housing and Urban Development has increasingly encouraged tenant involvement in the management of public housing projects. n177 Indeed, resident councils have been authorized to form resident management corporations and to enter into contracts with public housing authorities to manage individual projects. n178 Advocates of resident management in public housing have contended that it can improve the efficiency, safety, and quality of life at public housing developments, and that it can empower local residents to take control of their lives. n179

The 1937 Act permits the Secretary of Housing and Urban Development to provide financial assistance to resident management corporations that manage public housing developments, if some conditions are satisfied. It also provides that, if such financial assistance is given, "the public housing agency shall not be responsible for the actions of the resident management corporation." n180

Independent of the provisions on resident management, federal legislation provides that the Secretary of Housing and

Urban Development may transfer management of a public housing project from a public housing agency to another management entity in some circumstances. n181 This can occur if there are physical deficiencies in the housing caused by mismanagement by the public housing agency, the housing is located in an area subject to recurrent vandalism and criminal activity, and the residents can demonstrate that the problems can be remedied by transfer of management to another entity. n182 A majority of the residents must vote to request the transfer. n183

FOOTNOTES:

(n1)Footnote 143. *See 42 U.S.C. § 1437c-1(a)*.

(n2)Footnote 144. *See 42 U.S.C. § 1437c-1(a)*.

(n3)Footnote 145. *See 42 U.S.C. § 1437c-1(a)*.

(n4)Footnote 146. *See 42 U.S.C. § 1437c-1(b)*.

(n5)Footnote 147. *See 42 U.S.C. § 1437c-1(d)*.

(n6)Footnote 148. *See 42 U.S.C. § 1437c-1(e)*. The Secretary of Housing and Urban Development may waive the requirement of establishing a resident advisory board if the public housing agency can demonstrate that there are existing resident councils or other resident organizations that can fulfil the advisory role. *Id.*

(n7)Footnote 149. *See 42 U.S.C. § 1437c-1(f)*.

(n8)Footnote 150. *See 42 U.S.C. § 1437c-1(i)*.

(n9)Footnote 151. *See 42 U.S.C. § 1437d(j)(2)*.

(n10)Footnote 152. *See 42 U.S.C. § 1437c-1(i)*.

(n11)Footnote 153. *See 42 U.S.C. § 1437c-1(k)*.

(n12)Footnote 154. *See 42 U.S.C. § 1437d(j)(1)*.

(n13)Footnote 155. *See 42 U.S.C. § 1437d(j)(1)*.

(n14)Footnote 156. *See 24 C.F.R. § 902.3*.

(n15)Footnote 157. *See 24 C.F.R. § 902.1*.

(n16)Footnote 158. *See 24 C.F.R. § 902.1(c)*.

(n17)Footnote 159. *See 24 C.F.R. § 902.1(a)*.

(n18)Footnote 160. *See 24 C.F.R. § 902.9 et seq.*

(n19)Footnote 161. *See 24 C.F.R. § 902.67(a)*.

(n20)Footnote 162. *See 24 C.F.R. § 902.67(a)*.

(n21)Footnote 163. *See 24 C.F.R. § 902.67(c)*.

(n22)Footnote 164. *See 24 C.F.R. § 902.67(c)*.

(n23)Footnote 165. *See 24 C.F.R. § 902.73*.

(n24)Footnote 166. *See 42 U.S.C. § 1437d(j)(2)(A)(i)*.

(n25)Footnote 167. *See 42 U.S.C. § 1437d(j)(2)(B)* & *(C)*.

(n26)Footnote 168. *See 42 U.S.C. § 1437d(j)(3)(B)(ii)(I)*.

(n27)Footnote 169. *See 42 U.S.C. § 1437d(j)(3)(B)(ii)(II)*.

(n28)Footnote 170. *See 42 U.S.C. § 1437d(j)(3)(B)(ii)(III)*. The Secretary is required to seek a receiver if the public housing agency is one with 1,250 or more units. *Id.* However, the statute also includes a sentence that says that the portion of the statute just referenced "shall not be construed to limit the courses of action available to the Secretary under subparagraph (A)." *See id.* Subparagraph A is the one, discussed next in the text, that lists the Secretary's options in the event of a substantial default.

(n29)Footnote 171. *See 42 U.S.C. § 1437d(j)(3)(A)*.

(n30)Footnote 172. *See 42 U.S.C. § 1437d(j)(3)(A)*; *see also 42 U.S.C. § 1437d(g)*.

(n31)Footnote 173. *See 42 U.S.C. § 1437d(j)(4)*.

(n32)Footnote 174. *See 42 U.S.C. § 1437d(j)(4)*.

(n33)Footnote 175. *See 24 C.F.R. § 902.67 et seq.*

(n34)Footnote 176. See § 45.06(c) of this chapter.

(n35)Footnote 177. *See* Michael H. Schill, Distressed Public Housing: Where Do We Go From Here? *60 U. Chi. L. Rev. 497, 549 (1993)*. The relevant provision of the 1937 Act is *42 U.S.C. § 1437r*.

(n36)Footnote 178. *See* Michael H. Schill, Distressed Public Housing: Where Do We Go From Here? *60 U. Chi. L. Rev. 497, 549 (1993)*.

(n37)Footnote 179. *See* Michael H. Schill, Distressed Public Housing: Where Do We Go From Here? *60 U. Chi. L. Rev. 497, 550 (1993)*. Michael H. Schill wrote that '[i] is difficult to evaluate these claims." *Id.*

(n38)Footnote 180. *See 42 U.S.C. § 1437r(e)(3)*.

(n39)Footnote 181. *See 42 U.S.C. § 1437w(a)*.

(n40)Footnote 182. *See 42 U.S.C. § 1437w(a)*.

(n41)Footnote 183. *See 42 U.S.C. § 1437w(b)*.

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CHAPTER 45 PUBLIC HOUSING

5-45 Thompson on Real Property, Thomas Editions § 45.07

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§ 45.07 Tenant Eligibility and Selection.

§ 45.07(a) Introduction.

Millions of people live in federally assisted public housing. Others hope to live in such housing and are on waiting lists for admission. In order to be admitted, prospective tenants must satisfy some eligibility requirements. But public housing authorities are limited, by statute and by regulation, with respect to procedural and substantive aspects of public housing eligibility determinations and the admission of new tenants to public housing.

§ 45.07(b) Family and Income Eligibility.

According to a provision of the 1937 Act, "[d]welling units assisted under this chapter shall be rented only to families who are low-income families at the time of their initial occupancy." n184 A HUD regulation provides that, "at a minimum, the applicant must be a family ... and must be income-eligible." n185

The qualification that an applicant be a "family" is not difficult to satisfy. That is because the applicable definition of "family" is very broad, and includes, among other possibilities, a single person, a family with children, a family without children, and two or more persons living together who are either disabled or at least 62 years of age. n186 It also includes a "remaining family member" -- which a HUD publication states "is a member who was listed on the lease of a public housing unit and is the only family member still remaining in the unit." n187

Income eligibility is more complex. It should be remembered, however, that the basic idea behind the 1937 Act was to assist the states and their political subdivisions in addressing the shortage of decent, safe, and affordable housing for low-income families. n188 In keeping with that idea, a HUD regulation provides: "No family other than a low income family is eligible to a PHA's public housing program. n189 A "low income family" is defined as follows:

> A family whose annual income does not exceed 80 percent of the median income for the area, as determined by HUD with adjustments for smaller and larger families, except that HUD may establish income ceilings higher or lower than 80 percent of the median income for the area on the basis of HUD's findings that such variations are necessary because of unusually high or low family incomes. n190

The regulations include a number of provisions on how to determine "annual income." n191

The natural effect of an income qualification has been the concentration of low-income families in public housing. This has come with a price. As one observer wrote:

> The concentration of poor people in public housing underlies much of the distress experienced by public housing residents in large American cities. Rather than alleviating poverty and enhancing social mobility, as its early adherents had hoped, distressed public housing developments have magnified the problems faced by poor families and kept them out of the economic mainstream. n192

Perhaps, in part, to avoid "concentration" problems of this sort, housing authorities sometimes sought to avoid admission of the poorest of low-income families. However, it was held that a housing authority cannot categorically exclude applicants from the lowest income ranges from subsidized housing projects. n193

§ 45.07(c) Income Targeting, Mixing, and Deconcentration.

Income qualifications are important to public housing eligibility. But admission is not automatically given to applicants of the lowest income level. There are considerations of "targeting," "income mixing," and "deconcentration" that are relevant to admission decisions.

A provision of the 1937 Act requires that, with respect to

> the public housing dwelling units of a public housing agency made available for occupancy in any fiscal year by eligible families, not less than 40 percent shall be occupied by families whose incomes at the time of commencement of occupancy do not exceed 30 percent of the area median income." n194

The implementing regulations characterize these families as "extremely low income families." n195 And the legislation refers to the concept of focusing on them as "targeting." n196 It also provides that the housing agency can receive "credit" that can be applied against the 40% target if the housing agency manages to exceed a separate target for providing "tenant-based" assistance to extremely low income families. n197

In addition to "targeting," the 1937 Act requires "income mixing." The legislation provides, in this connection, that "[a] public housing agency may establish and utilize income-mix criteria for the selection of residents for dwelling units in public housing projects." n198 This is expressed as an elective option. However, a separate section of the legislation provides that in complying with the targeting requirement for extremely low income families, the public housing agency may not "concentrate very low-income families (or other families with relatively low incomes) in public housing dwelling units in certain public housing projects or certain buildings within projects." n199 And the 1937 Act also requires the public housing agency to include, in its annual plan, a tenant admission policy that provides for "deconcentration of poverty" and "income-mixing." n200 According to the legislation, the idea involves "bringing higher income tenants into lower income projects and lower income tenants into higher income projects." n201

HUD regulations list some exceptions to income-mixing requirements that should be noted. While stating that the requirements are applicable to "general occupancy, family public housing developments," n202 the regulations provide that the requirements do not apply to, among other things, public housing developments with fewer than 100 public housing units, that house only elderly persons or persons with disabilities, or that are approved for demolition or conversion to tenant-based assistance. n203

It should also be noted that federal legislation permits public housing agencies, "for good cause" and with the approval of the Secretary of Housing and Urban Development, to establish and implement admission standards that vary from the statutory requirements for income targeting, mixing, and deconcentration. n204

There has been litigation over issues related to income mixing. In *Gholston v. Housing Authority of City of Montgomery*, n205 for example, a class of public housing applicants claimed that a housing authority had categorically denied admission to applicants with no incomes, or extremely low incomes, and preferred applicants with greater incomes. The Eleventh Circuit Court of Appeals stated that, in complying with congressionally established income-mixing requirements, "a local housing authority must not categorically exclude applicants from the lowest income ranges." n206 It remanded the case for a factual determination as to whether the housing authority had a policy or practice of doing so.

An income-mixing issue also arose with respect to the use of waiting lists for public housing applicants. In *Paris v. United States Department of Housing and Urban Development*, n207 some prospective tenants challenged a HUD-approved tenant selection scheme that sought a broad economic mix of tenants by permitting higher income families to "skip" over "very low income" families who were senior to them on the waiting list. The First Circuit Court of Appeals rejected the claim that the policy violated the then-existing provisions of the United States Housing Act or implementing regulations.

The decision was controversial at the time, and Congress subsequently prohibited public housing agencies from adopting or implementing policies that passed over very low-income families in favor of higher-income families. n208 However, the current version of the 1937 Act provides that public housing agencies may offer incentives to eligible higher income families to occupy dwellings in projects predominately occupied by lower-income families. n209 It also provides that the "skipping of a family on a waiting list to reach another family" in order to implement the deconcentration and income-mixing policy will "not be considered an adverse action." n210 HUD regulations also permit "skipping" in order to further the goals of the housing agency's deconcentration policy. n211 In contrast, such skipping is prohibited in connection with Section 8 housing. n212

§ 45.07(d) Local Preferences.

The 1937 Act provides for some flexibility in tenant eligibility standards for public housing by permitting public housing authorities to establish "local preferences." These are preferences for "families having certain characteristics" that are based on local housing needs and priorities, as determined by the public housing agency." n213 Local preferences were apparently permitted, in part, as one way to deal with the problem of poverty concentration in public housing.

The implementing regulations include some details about permissible local preferences, and procedures related to their use. Thus, they permit public housing agencies to adopt preferences for working families; persons with disabilities; n214 victims of domestic violence; and single persons who are elderly, displaced, homeless, or disabled. n215 Subject to some limitations, they are also permitted to adopt preferences based on residency, but not residency requirements. n216

The preference for "working families," in particular, appears to be a preference that might tend to help achieve an income-mix in public housing. In any event, the regulations provide that the establishment and implementation of local preferences are subject to HUD requirements concerning income-targeting, income-mixing, and deconcentration. n217

The regulations also require public housing agencies to inform applicants about the local preferences and to give them an opportunity to show that they qualify. n218 At the same time, the regulations state that housing agencies "may limit the number of applicants that qualify for any local preference." n219

§ 45.07(e) Written Admission Policies and HUD Regulations.

HUD regulations require public housing agencies to adopt written policies for the admission of tenants. n220 The

regulations also require the policies to deal with a number of substantive admission matters.

For example, the regulations require admission policies to provide for targeting, income-mixing, and deconcentration of poverty. n221 They must provide for the preclusion from admission "of applicants whose habits and practices reasonably may be expected to have a detrimental effect on the residents or the project environment. n222 The policies must provide "[o]bjective and reasonable policies for selection by the PHA among otherwise eligible applicants, including requirements for applications and waiting lists ... and for verification and documentation of information relevant to acceptance or rejection of an applicant." n223 The policies must also be consistent with federal fair housing and equal opportunity provisions listed in HUD's regulations. n224

The regulations further require that tenant selection criteria "be reasonably related to individual attributes and behavior of an applicant and shall not be related to those which may be imputed to a particular group or category of persons of which an applicant may be a member." n225 Applicants to public housing have been able to use the concept as a basis on which to defeat categorical admission rules. n226

§ 45.07(f) Undesirable Public Housing Applicants.

§ 45.07(f)(1) Background.

In the years following the Great Depression, some housing authorities adopted policies to screen out undesirable residents. n227 Housing authorities implemented policies against illegitimacy, denying admission to families if a member had had a child out of wedlock. n228 They adopted eligibility requirements that required applicants to have been residents of the community for a period of time, such as two years. n229 Prospective tenant were sometimes excluded based on a history of unpaid rent n230 or felony convictions. n231

As time went on, courts did not always give the eligibility restrictions a good reception. n232 Some courts disapproved the automatic rejection of applicants based upon a history of unpaid rent n233 or felony convictions. n234 Exclusion on the basis of illegitimacy was disapproved for inflexibility and disharmony with the spirit and aim of the low rent housing program. n235 It was also held that due process protections apply in tenant selection, n236 but this view was not unanimous. Some courts were of the view that applicants to public housing did not have a property interest that was entitled to full due process protection. n237

Over time, legislative and regulatory provisions were adopted that dealt with a number of tenant eligibility issues other than family income. In particular, federal statutes and regulations include a number of provisions relating to admission to public housing of individuals who have been engaged in criminal activities and substance abuse. They also include some protections for victims.

§ 45.07(f)(2) Commission of Criminal Activities that Adversely Affect other Residents.

Public housing agencies are generally n238 permitted to deny admission to an applicant if the agency determines that the applicant, or any member of his or her household is or, within a reasonable period of time, was "engaged in any drug-related or violent criminal activity or other criminal activity which would adversely affect the health, safety, or right to peaceful enjoyment of the premises by other residents." n239

§ 45.07(f)(3) Commission of Drug Crimes.

Public housing agencies are required by statute to establish "standards for occupancy" in public housing dwelling units that permanently prohibit occupancy by any person who has been convicted of manufacturing or producing methamphetamine on the "premises" in violation of law. n240 In addition, the regulations require the public housing agency to establish eligibility standards that "permanently prohibit admission to the PHA's public housing program if any household member has ever been convicted of drug-related criminal activity for manufacture or production of

methamphetamine on the premises of federally assisted housing." n241

A separate statutory provision states that a tenant who has been evicted from federally assisted housing n242 for drug-related criminal activity n243 will be ineligible for federally assisted housing for three years, unless the person successfully completes an approved rehabilitation program. n244 In addition to the exception for rehabilitation, federal regulations indicate the housing agency could still admit the household if the circumstances leading to the eviction have changed, such as when the offender is in prison or has died. n245

§ 45.07(f)(4) Drug Users and Alcohol Abusers.

As a result of federal statute and regulation, public housing agencies are required to establish admission standards relating to drug use and alcohol abuse. As to the first of these, they must adopt standards prohibiting admission of any household in which a member is determined by the housing agency to be illegally using a controlled substance. n246 Public housing agencies are also required to adopt standards prohibiting the admission of a household if the public housing agency determines that it has reasonable cause to believe that a household member's illegal use of a controlled substance, or abuse of alcohol, "may interfere with the health, safety, or right to peaceful enjoyment of the premises by other residents." n247 The public housing agency may consider evidence of rehabilitation in connection with its decision to deny admission. n248

§ 45.07(f)(5) Sex Offenders.

A federal statute that is applicable to various types of federally assisted housing, including public housing, n249 provides that, "[n]otwithstanding any other provision of law, an owner of federally assisted housing shall prohibit admission to such housing for any household that includes any individual who is subject to a lifetime registration requirement under a State sex offender registration program." n250

The same statute requires public housing agencies to conduct criminal background checks on applicants and to make inquiries with state and local agencies to determine whether an applicant is subject to such a registration program. n251 If the public housing agency obtains information confirming that an individual is a registered sex offender, the agency is required to provide a copy of the information to the applicant and to give the applicant an opportunity to dispute its accuracy or its relevance. n252 The public housing agency is also required to have a system of records management that ensures that information regarding registered sex offenders is kept confidential and not misused. n253

§ 45.07(g) Protections for Crime Victims.

The 1937 Act includes a provision on admission of tenants that gives special protection to victims of some criminal activities. It prohibits a housing agency from denying admission to a housing project on the basis that an otherwise qualified applicant is or has been a victim of domestic violence, dating violence, or stalking. n254

§ 45.07(h) Procedures Relating to Eligibility Determinations and Admission.

§ 45.07(h)(1) Background.

Historically, there has been uncertainty over some procedural matters relating to the determination of eligibility for public housing and the admission of new tenants. Some of the uncertainty related to considerations of due process of law. Although due process of law issues are discussed more extensively in another section of this chapter, n255 it should be noted here that, in the 1970s, some courts had held that applicants to public housing were entitled to an evidentiary hearing in connection with a denial of their applications. n256 But this was not the universal view. In a 1972 case, for example, the New York Court of Appeals affirmed a lower court decision that had distinguished eviction from public housing from an eligibility determination and concluded that a full evidentiary hearing was not required. n257 The court stated that "a party aggrieved by loss of a pre-existing right or privilege may enjoy procedural rights not

available to one denied the right or privilege in the first instance." n258

§ 45.07(h)(2) Legislation.

In the Housing and Community Development Act of 1974, n259 the United States Housing Act was amended to include some provisions regarding procedures that housing agencies are to follow in the event they deny eligibility to an applicant. n260 The amended legislation requires every contract for contributions between a housing agency and HUD to include a provision obligating the housing agency to give prompt notification to the applicant of the basis for a determination of ineligibility. In addition, the contract for contributions must require the housing agency, upon the applicant's timely request, to provide the applicant "with an opportunity for an informal hearing" on the determination. n261

The legislation also includes a provision relating to notice if the housing agency determines that the applicant *is* eligible for admission. It states that the contributions contract is to include a provision requiring the housing agency to notify the applicant of the approximate date of occupancy. n262

The 1937 Act further requires that the contributions contract contain a provision requiring the public housing agency to determine that each family in the project was admitted in accordance with duly adopted regulations and approved income limits, and to so certify to the Secretary of Housing and Urban Development. n263

§ 45.07(h)(3) Regulations.

HUD regulations include significant provisions relating to procedures on eligibility determination and admission of tenants to public housing. They require, in the first instance, that public housing agencies adopt written policies for the admission of tenants, post the policies in the office where applications are received, and furnish the policies to applicants or tenants upon request. n264

When a unit becomes available for occupancy, HUD regulations require the public housing agency to select the new tenant from among applicants "with the same priority for admission" by using either the date and time of application or by using a "drawing or other random choice technique." n265 The regulations also require a "clear audit trail," so that use of a proper selection method can be verified. n266

The regulations provide that the housing agency may "match characteristics of the family with the type of unit available," including, for example, the number of bedrooms in a unit. n267 If the dwelling unit has special accessibility features for persons with disabilities, the housing agency is required to first offer the unit to families that include persons with disabilities. n268 If a single person is not elderly, displaced, or disabled, he or she may not be placed in a dwelling unit with two or more bedrooms. n269

It has been held, however, that an applicant for public housing does not have a right to be placed high on housing authority's waiting list or a right to be placed in a particular apartment unit. n270

With respect to the matter of criminal offenses, HUD regulations provide that, before a public housing agency denies admission to a public housing program on the basis of a criminal record, the housing agency is required to notify the household of the proposed action, provide the applicant and the offender with a copy of the criminal record, and provide an opportunity to dispute the accuracy and relevance of the record." n271

Regulations relating to tenant eligibility also include provisions relating to "screening." They state that the public housing agency is "responsible for screening family behavior and suitability for tenancy." n272 The housing agency is expressly permitted to consider "all relevant information," including: 1) the applicant's record in meeting financial obligations, "especially rent;" 2) a record of disturbing neighbors, property destruction, or habits that "may adversely

affect the health, safety or welfare of other tenants;" and 3) "[a] history of criminal activity involving crimes of physical violence to persons or property and other criminal acts which would adversely affect the health, safety or welfare of other tenants." n273

With respect to this last criterion, the regulations provide that the housing agency could require an applicant to exclude a member of his or her household from occupancy, in order to qualify the rest of the household for admission, where that member has been involved in activities, generally of a drug-related type, that would justify denial of the application. n274

If the housing agency does receive "unfavorable" information relating to an applicant, the regulations state that the agency shall consider the time, nature, and extent of the applicant's conduct, including, where applicable, the seriousness of the offense. n275 This could include evidence of rehabilitation. n276

Screening issues are relevant to the assessment procedures that HUD uses to evaluate the performance of public housing agencies. n277 Housing agencies that can "document that they successfully screen out and deny admission to certain applicants with unfavorable criminal histories receive points" in the assessment process. n278 It is a plus, then, at least for assessment purposes, if the housing agency successfully screens out undesirable applicants. n279

Screening procedures might involve such basic elements as use of an application form, an interview with the applicant, and use of verification forms sent to third parties. n280 They might also be more elaborate. In a 1999 case, involving a screening issue, the housing authority required applicants to complete an application, which included a questionnaire and release forms giving the housing authority access to the applicant's criminal history and chemical-dependency treatment records. The housing authority also required a thirty-six-month rental history or three letters of reference. n281

§ 45.07(h)(4) Cases on Procedural Issues.

In some cases, housing authorities have been found to have violated procedural requirements of federal legislation or regulations regarding tenant admission. n282

By way of example, in a case arising in Wisconsin, a housing authority's procedures regarding rejected applicants were held not to comply with federally mandated notice and hearing requirements. The rejection forms that were sent to public housing applicants gave no factual basis for the rejection, and the same person who had made the determination to reject an application acted as one of two persons conducting the hearing. n283

In a Fifth Circuit case, the court found that the housing authority's rejection notice was inadequate because it merely parroted the broad language of HUD regulations. And a subsequent meeting did not qualify as a required "informal hearing" because no impartial hearing officer was present. n284

In contrast, a public housing applicant who had been denied admission to public housing met with less success in challenging an aspect of a housing authority's screening procedures. n285 The applicant claimed that the housing authority use of a question on its application form about drug and alcohol use, and its requirement that applicants sign medical record release forms, violated federal and state anti-discrimination laws and local ordinances. The question at issue was: ""Have you or any member of your family intending to live with you in public housing EVER been in a detoxification center or a chemical dependency treatment program? ... If yes, where?" n286 Based on provisions of the 1937 Act relating to use of illegal drugs, the Eighth Circuit Court of Appeals upheld the housing authority's use of the question and the related medical release requirements. However, it determined that the record on appeal was too incomplete for it to determine whether the applicant had been properly excluded from public housing, so it remanded the case to the district court.

FOOTNOTES:
(n1)Footnote 184. *See 42 U.S.C. § 1437a(a)(1).*

(n2)Footnote 185. *See 24 C.F.R. § 960.201*. There are some exceptions that permit the admission of "over-income families" in limited circumstances and admission of police officers who are not otherwise eligible for public housing on terms and conditions determined by the public housing agency. *See 42 U.S.C. § 1437a(a)(4)* & *(5).*

(n3)Footnote 186. *See 42 U.S.C. § 1437a(b)(3)*; *24 C.F.R. § 5.403*. The regulation lists several "family" configurations, but states that the definition of "family" is not limited to those in the list. *See id.* However, it has been held that a policy of not renting to minors does not run afoul of federal regulations. *See Rodriguez v. Reading Housing Authority, 8 F.3d 961 (3d Cir. 1993)* ; *cf., Swann v. Finkel, 742 N.Y.S.2d 824 (App. Div. 2002)* (court concludes that it was arbitrary and capricious to deny, without a hearing, a 16 year old daughter's right to succeed to her father's tenancy as a remaining family member and her request for a lease in her own name solely because she was a minor).

(n4)Footnote 187. One's status as a remaining family member is not a guarantee that he or she will be able to succeed to the tenancy of a deceased relative. *See e.g., Castanon v. Franco, 736 N.Y.S.2d 337 (App. Div. 2002)* (son of deceased public housing tenant failed to meet the requirements to succeed to a public housing lease as a remaining family member because his incarceration within five years of his succession application rendered him "not otherwise eligible" for a public housing tenancy); *Faison v. New York City Housing Authority, 726 N.Y.S.2d 23 (App. Div. 2001)* (son of deceased public housing resident rejected as a tenant; court concludes that federal statutes and regulations did not preclude applicability of housing authority regulations denying leases to persons with criminal records).

(n5)Footnote 188. *See 42 U.S.C. § 1437(a)(1).*

(n6)Footnote 189. *See 24 C.F.R. § 960.201(a)(2).* "PHA" stands for "Public Housing Agency," and refers to a "State, county, municipality, or other governmental entity or public body, or agency or instrumentality of these entities, that is authorized to engage or assist in the development or operation of low-income housing under the 1937 Act." *24 C.F.R. § 5.100*.

(n7)Footnote 190. *24 C.F.R. § 5.603(b)*. A public housing agency may terminate the tenancy of families who are "over income." *See 24 C.F.R. § 960.261* However, there are some exceptions that permit the admission of "over-income families" in limited circumstances and admission of police officers who are not otherwise eligible for public housing on terms and conditions determined by the public housing agency. *See 42 U.S.C. § 1437a(a)(4)* & *(5)*. The only restrictions on admission of police officers seems to be that it be done in accordance with the public housing agency plan and that it be done for the purpose of increasing security for the residents of the public housing project. *See 42 U.S.C. § 1437a(a)(4).*

(n8)Footnote 191. *See 24 C.F.R. § 5.609.*

(n9)Footnote 192. Michael H. Schill, Distressed Public Housing: Where Do We Go From Here? *60 U. Chi. L. Rev. 497, 552 (1993)* (footnote omitted). *See also Fletcher v. Housing Authority of Louisville, 525 F.2d 532* (6th Cir. 1975) (housing authorities contended that an income-mix was essential to the creation of economically viable housing and a healthy social environment).

(n10)Footnote 193. *See Gholston v. Housing Authority of City of Montgomery, 818 F.2d 776* (11th Cir. 1987) .

(n11)Footnote 194. *42 U.S.C. § 1437n(a)(2).*

(n12)Footnote 195. *See 24 C.F.R. § 5.603*; *24 C.F.R. § 960.202(b)(I).*

(n13)Footnote 196. *See 42 U.S.C. § 1437n(a)(2).*

(n14)Footnote 197. *See 42 U.S.C. §§ 1437n(a)(4)* & *(b). 42 U.S.C. § 1437f(f)* distinguishes "project-based assistance" from "tenant-based assistance." Project-based assistance refers to rental assistance "that is attached to the structure," while tenant-based assistance refers to rental assistance "that is not project-based assistance and that provides for the eligible family to select suitable housing and to move to other suitable housing." *Id. 42 U.S.C. §§ 1437f(f)*6 &7. Section 8 program certificates or vouchers that permit tenants to move to other apartments, operated by private landlords, are examples of tenant-based assistance. The Section 8 program is discussed in § 45.22(d) of this chapter.

(n15)Footnote 198. *See 42 U.S.C. § 1437n(a)(1).*

(n16)Footnote 199. *See 42 U.S.C. § 1437n(a)(3).*

(n17)Footnote 200. *See 42 U.S.C. § 1437n(a)(3)(B)(I).* However, the legislation states that this requirement "may not be construed to impose or require any specific income or racial quotas for any project or projects." *Id. See also 24 C.F.R. § 903.2(a)(2).*

(n18)Footnote 201. *See 42 U.S.C. § 1437n(a)(B)(i). See also 24 C.F.R. § 903.2(a).*

(n19)Footnote 202. *See 24 C.F.R. § 903.2(b)(1).*

(n20)Footnote 203. *See 24 C.F.R. § 903.2(b)(2). 42 U.S.C. § 1437f(f)* distinguishes "project-based assistance" from "tenant-based assistance." Project-based assistance refers to rental assistance "that is attached to the structure," while tenant-based assistance refers to rental assistance "that is not project-based assistance and that provides for the eligible family to select suitable housing and to move to other suitable housing." *Id. 42 U.S.C. §§ 1437f(f)*6 &7. Demolition of public housing units is discussed in § 45.16(c) of this chapter. Conversion to tenant-based assistance is discussed in § 45.18.

(n21)Footnote 204. *See 42 U.S.C. § 1437n(d).*

(n22)Footnote 205. *818 F.2d 776* (11th Cir. 1987) ; *see also Fletcher v. Housing Authority of Louisville, 491 F.2d 793* (6th Cir. 1974) , *vacated and remanded, 419 U.S. 812 (1974)* , reinstated, *525 F.2d 532* (6th Cir. 1975) (court concluded that a housing authority's "rent-range" formula violated the 1937 Act; the Act was subsequently amended to permit rent-ranges, but the court, on remand, concluded that the change was not retroactive).

(n23)Footnote 206. *See 818 F.2d at 782* .

(n24)Footnote 207. *843 F.2d 561* (1st Cir. 1988) .

(n25)Footnote 208. *See* Pub. L. No. 100-628 § 1001, *102 Stat. 3224, 3263 (1988)* (amending *42 U.S.C. §§ 1437d(c)(4)(A)* & *1437n(c)*). The Conference Report on the legislation states that the "anti-skipping language" was necessary in light of the decision in the *Paris* case. *See* H.R. Conf. Rep. No 100-718(I)100th Cong. 2d Sess. 91-92 (1988), *reprinted in* 1988 U.S.C.C.A.N.4395, 4475-76. *See also* Shelby D. Green, The Public Housing Tenancy: Variations on the Common Law That Give Security of Tenure and Control, *43 Cath. U. L. Rev. 681, 738 (1994).*

(n26)Footnote 209. *See 42 U.S.C. § 1437n(a)(2)(B).*

(n27)Footnote 210. *See 42 U.S.C. § 1437n(a)(B)(iii). See also 24 C.F. R. § 903.2(c)(v)(D).*

(n28)Footnote 211. *See 24 C.F.R. § 903.2(c)(1)(v)(D).*

(n29)Footnote 212. *See 42 U.S.C. § 1437n(c)(4)*).

(n30)Footnote 213. *See 42 U.S.C. § 1437d(c)(5).*

(n31)Footnote 214. However, housing agencies are not permitted to adopt preferences targeting specific disabilities. *See 24 C.F.R. § 960.206(b)*.

(n32)Footnote 215. *See 24 C.F.R. § 960.206(b)*. Housing agencies are permitted to give preferences to "single persons who are age 62 or older, displaced, homeless, or persons with disabilities over other single persons." *Id.*

(n33)Footnote 216. *See 24 C.F.R. § 960.206(b)*. *Cf., Hess v. Ward, 497 F. Supp. 786 (E.D. Pa. 1980)* (Housing authority's policy of granting preferences in filling public housing vacancies based upon the duration of residency was contrary to then-existing HUD regulations).

(n34)Footnote 217. *See 24 C.F.R. § 960.206(a)(3)*.

(n35)Footnote 218. *See 24 C.F.R. § 960.206(a)(4)*.

(n36)Footnote 219. *See 24 C.F.R. § 960.206(a)(2)*.

(n37)Footnote 220. *See 24 C.F.R. § 960.202(c)*.

(n38)Footnote 221. *See 24 C.F.R. § 960.202(a)*.

(n39)Footnote 222. *See 24 C.F.R. § 960.202(a)*.

(n40)Footnote 223. *See 24 C.F.R. § 960.202(a)*.

(n41)Footnote 224. *See 24 C.F.R. § 960.202(a)*. These are listed in *24 C.F.R. § 5.105*. The list include statutes, regulations, and executive orders relating to discrimination on the basis of race, color, religion, sex, familial status, national origin, age, and disability.

(n42)Footnote 225. *See 24 C.F.R. § 960.203(a)*.

(n43)Footnote 226. *See James v. New York City Housing Authority, 622 F. Supp. 1356 (S.D. N.Y. 1985)* (court struck down court struck down "duration-of-family composition" requirements; applicants who had been living apart from an unrelated adult or family member, but who sought to be united with that adult or family member, were automatically disqualified for public housing unless they lived together for one year before their application was filed; conversely, applicants who had been living with an unrelated adult or family member were automatically disqualified from public housing until they lived apart for at least six months). *See also Atkisson v. Kern County Housing Authority, 130 Cal. Rptr. 375 (Cal. Ct. App. 1976)* (based, in part, on the provisions of a HUD circular that prohibited automatic exclusion of a particular class of persons defined by their marital status, the court struck down a housing authority rule that forbade tenants from living with anyone of the opposite sex--other than individuals related to the tenants by blood, marriage or adoption).

However, it has been held that a policy of not renting to minors does not run afoul of federal regulations prohibiting automatic denial of admission to category of otherwise eligible applicants, because the regulations also allow admission criteria to be reasonably related to individual attributes and behavior. *See Rodriguez v. Reading Housing Authority, 8 F.3d 961 (3d Cir. 1993)* ; *see also Rivera v. Reading Housing Authority, 819 F. Supp. 1323 (E.D. Pa. 1993)* (court upholds housing authority requiring minor applicants to provide judicial decree of emancipation); *cf., Swann v. Finkel, 742 N.Y.S.2d 824 (App. Div. 2002)* (court concludes that it was arbitrary and capricious to deny, without a hearing, a 16 year old daughter's right to succeed to her father's tenancy as a remaining family member).

(n44)Footnote 227. *See* Shelby D. Green, The Public Housing Tenancy: Variations on the Common Law That Give Security of Tenure and Control, *43 Cath. U. L. Rev. 681, 735 (1994).*

(n45)Footnote 228. *See Thomas v. Housing Authority of Little Rock, 282 F. Supp. 575 (E.D. Ark. 1967)* .

(n46)Footnote 229. *See Cole v. Housing Authority of Newport, 435 F.2d 807* (1st Cir. 1970) (two-year residency requirement); *but see Lane v. McGarry, 320 F. Supp. 562 (D. N.Y. 1970)* (housing authority regulation that required residence in state for one year immediately prior to application was not unconstitutional). Current HUD regulations, it should be noted, permit preferences based on residency, but not residency requirements. *See 24 C.F.R. § 982.207(b).*

(n47)Footnote 230. *See Neddo v. Housing Authority of Milwaukee, 335 F. Supp. 1397 (E.D. Wis. 1971)* .

(n48)Footnote 231. *See Maningo v. New York City Housing Authority, 273 N.Y.S.2d 1003 (App. Div. 1966)* .

(n49)Footnote 232. *See, e.g, Thomas v. Housing Authority of Little Rock, 282 F. Supp. 575 (E.D. Ark. 1967)* ("unwed" mother status); *Neddo v. Housing Authority of Milwaukee, 335 F. Supp. 1397 (E.D. Wis. 1971)* (unpaid rent); *Maningo v. New York City Housing Authority, 273 N.Y.S.2d 1003 (App. Div. 1966)* (felony conviction). Some courts struck down residency requirements as interfering with the right to travel. *See, e.g., King v. New Rochelle Municipal Housing Authority, 442 F.2d 646 (2d Cir. 1971)* , *cert. denied, 404 U.S. 863 (1971)* (invalidation of five-year residency requirement); *Cole v. Housing Authority of Newport, 435 F.2d 807* (1st Cir. 1970) (two-year residency requirement). But this was not the universal view. *Cf., Fayerweather v. Town of Narragansett Housing Authority, 848 F. Supp. 19 (D. R.I. 1994)* (Housing authority's use of a local residency preference was upheld); *Lane v. McGarry, 320 F. Supp 562 (N.D. NY 1970)* (one-year residency requirement upheld).

(n50)Footnote 233. *Neddo v. Housing Authority of Milwaukee, 335 F. Supp. 1397 (E.D. Wis. 1971)* .

(n51)Footnote 234. *See Maningo v. New York City Housing Authority, 273 N.Y.S.2d 1003 (App. Div. 1966)* .

(n52)Footnote 235. *See Thomas v. Housing Authority of Little Rock, 282 F. Supp. 575 (E.D. Ark 1967)* . The court said that the "desirability" rule in that case failed to account for "the circumstances of the illegitimate birth or births, the age, knowledge, training or experience of the mother, or the possibility or likelihood of future illegitimate births." *Id. at 580* .

(n53)Footnote 236. *See Holmes v. New York City Housing Authority, 398 F.2d 262 (2d Cir. 1968)* ; *but see Phelps v. Housing Authority of Woodruff, 742 F.2d 816* (4th Cir. 1984) (expressing disagreement with the *Holmes* decision).

(n54)Footnote 237. *See Phelps v. Housing Authority of Woodruff, 742 F.2d 816* (4th Cir. 1984) (applicant preference provisions in the Housing Act do not create a constitutionally cognizable property interest). *See also Sumpter v. White Plains Housing Authority, 328 N.Y.S.2d 649 (N.Y. 1972)* (rejected applicant was entitled only to be informed of the reason or reasons for rejection at a personal interview, and was not entitled to a full evidentiary hearing; the court stated: "It has long been settled that a party aggrieved by loss of a pre-existing right or privilege may enjoy procedural rights not available to one denied the right or privilege in the first instance.").

(n55)Footnote 238. *See 42 U.S.C. § 13661(c)*. The statute references exceptions relating to specific criminal activities, it acknowledges the possibility of rehabilitation. *See id.*

(n56)Footnote 239. *See 42 U.S.C. § 13661(c).*

(n57)Footnote 240. *See 42 U.S.C. § 1437n(f). See also 24 C.F.R. § 960.204(a)(3).* The regulation refers to conviction of "drug-related criminal activity for manufacture or production of methamphetamine on the premises of federally assisted housing." *Id.*

(n58)Footnote 241. *See 24 C.F.R. § 960.204(a)(3).*

(n59)Footnote 242. This includes public housing. *See 42 U.S.C. § 13664(a)(2).*

(n60)Footnote 243. As defined in *42 U.S.C. 1437a(b).*

(n61)Footnote 244. *See 42 U.S.C. § 1366(a). See also 24 C.F.R. § 960.204(a).*

(n62)Footnote 245. *See 24 C.F.R. § 960.204(a).*

(n63)Footnote 246. *See 42 U.S.C. § 13661(b). See* also *24 C.F.R. § 960.204(a)(2).*

(n64)Footnote 247. *See 42 U.S.C. § 13661(b). See* also *24 C.F.R. § 960.204(a)(2).*

(n65)Footnote 248. *See 42 U.S.C. § 13661(b)(2).*

(n66)Footnote 249. *See 42 U.S.C. § 13664(a)(2).*

(n67)Footnote 250. *See 42 U.S.C. § 13663(a). See also 24 C.F.R. § 960.204(a)(4).*

(n68)Footnote 251. *See 42 U.S.C. § 13663(b).*

(n69)Footnote 252. *See 42 U.S.C. § 13663(d).*

(n70)Footnote 253. *See 42 U.S.C. § 13663(f)*

(n71)Footnote 254. *See 42 U.S.C. § 1437d(c)(3).*

(n72)Footnote 255. See § 45.08(b) of this chapter.

(n73)Footnote 256. *See, e.g., Neddo v. Housing Authority of Milwaukee, 335 F. Supp. 1397 (E.D. Wis. 1971)* ; *Davis v. Toledo Metropolitan Housing Authority, 311 F. Supp. 795 (N. D Ohio 1970)* .

(n74)Footnote 257. *See e.g., Sumpter v. White Plains Housing Authority, 278 N.E.2d 892 (N.Y. 1972)* , *cert. denied, 406 U.S. 928 (1972)* .

(n75)Footnote 258. *See 278 N.E.2d at 894* .

(n76)Footnote 259. Pub. L. No. 93-383, *88 Stat. 659 (1974).*

(n77)Footnote 260. Pub. L. No. 93-383, tit. II §201; *88 Stat. 659 (1974).*

(n78)Footnote 261. *See 42 U.S.C. § 1437d(c)(4). See also 24 C.F.R. § 960.208.*

(n79)Footnote 262. *See 42 U.S.C. § 1437d(c)(4). See also 24 C.F.R. § 960.208.*

(n80)Footnote 263. *See 42 U.S.C. § 1437d(c)(2).*

(n81)Footnote 264. *See 24 C.F.R. § 960.202(c).*

(n82)Footnote 265. *See 24 C.F.R. § 960.206(e).*

(n83)Footnote 266. *See 24 C.F.R. § 960.206(e).*

(n84)Footnote 267. *See 24 C.F.R. § 960.206(c).*

(n85)Footnote 268. *See 24 C.F.R. § 960.206(c).*

(n86)Footnote 269. *See 24 C.F.R. § 960.206(d).*

(n87)Footnote 270. *See Hanrahan v. Housing and Redevelopment Authority of Duluth, Minn. 912 F. Supp. 428 (D.*

Minn. 1995) , aff'd , 86 F.3d 1159 (8th Cir. 1996) .

(n88)Footnote 271. *See 24 C.F.R. § 960.204(a)(4)(c)*.

(n89)Footnote 272. *See 24 C.F.R. § 960.203(c)*.

(n90)Footnote 273. *See 24 C.F.R. § 960.203(c)*.

(n91)Footnote 274. *See 24 C.F.R. § 960.203(c)(3)(i)*. The specific criminal activities referred to are set forth in *24 C.F.R. § 960.204*.

(n92)Footnote 275. *See 24 C.F.R. § 960.203(d)*.

(n93)Footnote 276. *See 24 C.F.R. § 960.203(d)(1)(i)*.

(n94)Footnote 277. Assessment procedures are discussed in § 45.06(c) of this chapter.

(n95)Footnote 278. *See 24 C.F.R. § 960.203(b)*; *see also* See *24 C.F.R. § 902.43(a)(5)*.

(n96)Footnote 279. The regulation goes on to observe: "This policy takes into account the importance of screening to public housing communities and program integrity, and the demand for assisted housing by families who will adhere to lease responsibilities." *24 C.F.R. § 960.203(b)*.

(n97)Footnote 280. *See* United States Department of Housing and Urban Development, Public Housing Occupancy Guidebook 49-50 (2003).

(n98)Footnote 281. *See Campbell v. Minneapolis Public Housing Authority ex rel. City of Campbell v. Minneapolis Public Housing Authority ex rel. City of Minneapolis, 168 F.3d 1069, 1071* (8th Cir. 1999) .

(n99)Footnote 282. *See, e.g., Billington v. Underwood, 613 F.2d 91* (5th Cir. 1980) ; *McNair v. New York City Housing Authority, 613 F. Supp. 910 (S.D. N.Y. 1985)* ; *Singleton v. Drew, 485 F. Supp. 1020* (D.C. Wis. 1980.

(n100)Footnote 283. *See Singleton v. Drew, 485 F. Supp. 1020 (D.C. Wis. 1980)* .

(n101)Footnote 284. *See Billington v. Underwood, 613 F.2d 91* (5th Cir. 1980) .

(n102)Footnote 285. *See Campbell v. Minneapolis Public Housing Authority ex rel. City of Campbell v. Minneapolis Public Housing Authority ex rel. City of Minneapolis, 168 F.3d 1069* (8th Cir. 1999) .

(n103)Footnote 286. *See 168 F.3d at 1071* .

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CHAPTER 45 PUBLIC HOUSING

5-45 Thompson on Real Property, Thomas Editions § 45.08

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§ 45.08 The Public Housing Lease.

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§ 45.08(a) Introduction.

In the early days of public housing, public housing authorities "operated essentially like private landlords." n287 Most leases of public housing units were periodic tenancies, of a month-to-month variety. n288 It was thought that a housing authority could terminate a lease in accordance with normal landlord-tenant rules, without a showing of cause. Project managers typically "enjoyed considerable discretion over the admission, placement, and eviction of tenants, as well as responsibility for day-to-day management and maintenance of public housing." n289 Local housing authorities developed "desirability" requirements that included social and behavioral criteria that could be used to refuse admission to public housing applicants. n290 Project managers had "almost unchecked power to evict tenants." n291 There was little in the way of procedural protection for tenants threatened with eviction. n292 But this state of affairs did not continue unchanged.

§ 45.08(b) Due Process and the Public Housing Lease.

§ 45.08(b)(1) Background Developments.

In a relatively early case involving due process issues, *Rudder v. United States*, n293 the United States Court of Appeals for the District of Columbia Circuit denied the government the landlord's traditional power to evict tenants on 30 days' notice for any reason or no reason at all, stating: "The government as landlord is still the government. It must not act arbitrarily, for, unlike private landlords, it is subject to the requirements of due process of law. Arbitrary action is not due process." n294

Due process issues were in the background in a subsequent public housing case that came before the United States Supreme Court. In *Thorpe v. Housing Authority of the City of Durham*, n295 the Court was asked to consider whether a public housing tenant on a month-to-month lease was entitled to procedural safeguards prior to eviction. The tenant's lease permitted the tenant to automatically renew for successive one-month terms, provided that the tenant maintained the same income level and family composition and otherwise complied with the terms of the lease. However, the lease also provided that either the tenant or the housing authority could terminate the lease by providing notice at least fifteen

days prior to the end of a monthly term.

The day after the tenant had been elected president of a tenants' organization, the executive director of the housing authority notified the tenant that her lease would terminate at the end of the month. The housing authority offered no reasons for its action. While the termination proceedings were pending, HUD issued a circular requiring that, prior to evicting a tenant, a public housing authority had to provide a tenant with the specific reasons for the action and an opportunity to respond. The Supreme Court held that the HUD circular was binding on the housing authority and that the tenant could not be evicted unless the housing authority complied with the HUD requirements. The Court rejected the housing authority's argument that application of the HUD circular would unconstitutionally interfere with the housing authority's rights under its annual contributions contract with HUD and would also unconstitutionally interfere with its lease with the public housing tenant.

A year after its decision in the *Thorpe* case, the Supreme Court issued its opinion in *Goldberg v. Kelly*. n296 Goldberg involved a challenge to the termination of welfare benefits. The Court said, of those benefits:

> Such benefits are a matter of statutory entitlement for persons qualified to receive them. Their termination involves state action that adjudicates important rights. The constitutional challenge cannot be answered by an argument that public assistance benefits are "a 'privilege' and not a 'right.'" n297

The Court also observed: "It may be realistic today to regard welfare entitlements as more like 'property' than a 'gratuity.'" n298 It concluded that a pre-termination hearing was required before such benefits could be terminated. This did not have to take the form of a "judicial or quasi-judicial trial." n299 But a welfare recipient was entitled to "timely and adequate notice detailing the reasons for a proposed termination, and an effective opportunity to defend by confronting any adverse witnesses and by presenting his own arguments and evidence orally." n300

Goldberg was not a public housing case. It was left to other courts to apply the teachings of *Goldberg* to public housing benefits.

§ 45.08(b)(2) *Escalera*.

One of the most influential of these cases was *Escalera v. New York City Housing Authority*. n301 It was class-action suit in federal court, brought by some month-to-month public housing tenants who claimed, among other things, that certain practices of the New York City Housing Authority violated the *Due Process Clause of the Fourteenth Amendment*. The tenants challenged the procedures of the housing authority relating to: (1) termination of the tenancy on the ground of "non-desirability;" (2) termination of tenancy for violation of housing authority rules and regulations; and (3) assessment of "additional rent" charges based on undesirable tenant acts. n302

The housing authority's leases could be terminated on grounds of non-desirability with one-month's notice. n303 A tenant family was considered to be non-desirable if it constituted

> a detriment to health, safety or morals of its neighbors or the community; an adverse influence upon sound family and community life; a source of danger or a cause of damage to the property of the Authority; a source of danger to the peaceful occupation of other tenants, or a nuisance. n304

If a tenant's undesirable acts reached a level where the manager of the housing project decided to recommend termination of the tenancy, the manager would have a meeting with the tenant at which the manager would inform the tenant of his or her proposed recommendation, review with the tenant the information in the tenant's folder, and discuss the undesirable activity. The tenant would be given a chance to explain his or her activity. If, after this meeting, the project manager still wished to recommend termination, the tenant would be notified that he or she could submit a written statement that would be sent, along with the project manager's recommendation, to the housing authority's

tenant review board.

The tenant review board consisted of eight officers of the housing authority. The board would consider the tenant's folder and the project manager's recommendation. If the board made a preliminary determination of tenant non-desirability, it would inform the tenant in writing that it was "considering a recommendation" of termination, and that, if the tenant requested an appearance within ten days, the tenant would be notified of the conduct under consideration and could appear before the board to tell the tenant's side of the matter. If the tenant did not make the request within the ten-day period, the recommendation of the project manager would become final. n305 If the tenant made a timely request, he or she would be given notice of the time and place of the hearing, the general definition of a non-desirable tenant, a short statement of the nature of the non-desirable conduct under consideration, and the fact that the tenant could bring any person to represent the tenant at the hearing. n306 At the hearing, one of the members of the hearing panel would normally read a summary of the entries in the tenant's folder, the tenant would be permitted to comment, or to question witnesses who might be present. The tenant would generally not be permitted to see the contents of the folder, the names of those who had complained of the tenant's non-desirable activity, or the summary of the entries. The rules and regulations governing these procedures would not be made available to the tenant, even upon request. No transcript would be generated from the hearing. n307

The hearing panel could decide the non-desirability issue on the basis of the tenant's entire folder, including entries that were not referenced in the notice to the tenant or at the hearing itself. If the panel decided that the tenant was non-desirable, the tenant would be given one-month's notice for termination. But the tenant would not be given findings or reasons for the panel's decision. n308

Violation of "Tenant Rules and Regulations" also constituted a ground for terminating the lease of a tenant. In this situation, the project manager would meet with the tenant, inform the tenant of the alleged violation and the possibility of termination, and give the tenant an opportunity to tell the tenant's side of the story. If, after the meeting, the project manager decided that the tenancy should be terminated, the manager would forward the tenant's folder and a recommendation to terminate to the central office of the housing authority. If the central office approved the recommendation, a notice to vacate after one month would be sent to the tenant. n309

According to the "Tenant Rules and Regulations," the housing authority could charge "additional rent" to tenants for repair of damage to the leased premises, for additional services that were provided for a tenant, or for "liquidated damages" resulting from the tenant's violation of rules and requirements established for protection of the housing authority's property and of other tenants. The amount of any additional rent would be within the project manager's discretion. The project manager could impose additional rent after giving notice to the tenant. If the tenant failed to pay the additional rent, the housing authority could sue in civil court. n310

The case actually implicated several tenant leases. In one situation, the housing authority sought to terminate a family's lease based on an allegation that a son in that family had committed statutory rape. The authority sought to terminate another lease because of a tenant's arrest on a narcotics charge. It sought to terminate other leases for failure to pay "additional rent" based on undesirable acts. The tenants requested hearings. One tenant demanded other things, including advance notice of the charge, a hearing transcript, the opportunity to confront and to cross-examine witnesses, and to have an impartial hearing examiner. The tenant review board permitted the tenant's lawyer to inspect the tenant's file, but it did not grant the other requests, and the tenant refused to participate in the "hearing." Another tenant participated in a hearing but was not permitted to inspect the file.

The United States Court of Appeals for the Second Circuit distinguished the rules and procedures mandated by the HUD circular, at issue in the *Thorpe* case, from the rules and procedures required by the *Due Process Clause of the Fourteenth Amendment*. Although the court considered the lease termination provisions on non-desirability to comport with the standards of the HUD circular, this was not determinative of the constitutional issue.

The court concluded that the "one-sentence notices" sent to the tenants were insufficient to apprise them of the conduct at issue. Moreover, the meeting with the manager did not cure the problem, because the manager did not divulge all entries in the folder, and some of them could influence the board's decision. Denying the tenants access to the material in their folders was also problematic, when the entire folder was considered by the board. And the hearing before the board was of questionable value when the board could base its decision on matters in the tenant's folder of which the tenant had no knowledge. The court also discerned constitutional deficiencies in the board's failure to set forth reasons for its decision, the inability of the tenant to confront and cross-examine individuals who supplied information on which the board's action was based, and the inability of the tenant to obtain the rules applicable to the termination proceedings. n311

The court found similar deficiencies in the procedures for terminating a tenancy for violation of the housing authority's rules and regulations and for the imposition of additional rent. With respect to the latter, the court observed that the fact that additional rent was contemplated in the lease was not "dispositive of the question of the fairness of the procedures under which said charges are imposed." n312 And the court had the following to say about the nature of the hearing that would be required in these situations: "Although a full-fledged adversary hearing need not be afforded in all cases, the tenant must be adequately informed of the nature of the evidence against him and accorded an adequate opportunity to rebut the evidence." n313

Because the plaintiffs' claims had been dismissed at the pleadings stage, the court was unable to make final determinations about the actual facts related to the tenants' claims, or what procedures would be required in each instance. However, the court was clear in stating that "[c]ertain aspects of the alleged ... procedures cannot stand without a convincing showing at trial that the [the housing authority] has a compelling need for procedural expedition." n314

§ 45.08(b)(3) Other Cases.

Other cases followed the *Escalera* lead. In *Caulder v. Durham Housing Authority*, n315 the housing authority advised a month-to-month tenant that her lease would be terminated because of complaints from neighbors. At a termination hearing, the hearing commissioners denied the tenant's request to learn the nature of the specific allegations that had been made against her, the names of those who had complained about her, and the procedural rules that governed the hearing. A judge heard the evidence of the complaining witnesses in camera, and the tenant did not have an opportunity to challenge or cross-examine them. The tenant challenged the termination of her lease on the ground that she had been denied due process of law. n316

The United States Court of Appeals for the Fourth Circuit stated that "[w]hatever question there might have been in the application of the due process clause or the scope of the protection which it affords with regard to the eviction of tenants in public housing has been laid to rest by the decision in *Goldberg v. Kelly*." n317 The court also agreed with the *Escalera* decision, and it ruled that the tenants were entitled to specific procedural safeguards, including timely and adequate notice stating the reasons for the proposed termination, the right to cross-examine adverse witnesses, the right to be represented by counsel, the right to a hearing decision based on evidence actually presented, the right to have the reasons for the hearing decision set forth in writing, and the right to a nonpartisan decision-maker. n318

Other courts held that tenants should receive notice and an opportunity to be heard with respect to actions with potentially adverse consequences, such as rent increases, capital improvements, or demolition or sale of housing units. n319 In *Burr v. New Rochelle Municipal Housing*, n320 for example, the court said that tenants should have had notice and the opportunity to challenge a service charge (rent increase) of $2.00 per unit, which was intended to offset increasing utility costs. The court did not impose a requirement for an "oral presentation," in connection with the challenge, but it did insist that tenants be able to file written objections. It also required the final decision to be evidenced by a written statement giving reasons for the decision. n321

The issue of whether a public housing tenant should have a right to court-appointed counsel in public housing cases has not been the subject of much judicial treatment. However, the issue arose in a New York case in which public housing tenants sued to prevent the housing authority from evicting them based on the conduct of their non-resident adult children. n322 The court concluded that appointment of counsel for an indigent tenant was not required by the Constitution. The tenant had the right to be heard, but due process was satisfied, said the court "[a]s long as a tenant is afforded the opportunity to be heard either pro se or by a retained attorney." n323

§ 45.08(c) Legislation and Regulations Relating to Lease Provisions.

§ 45.08(c)(1) Introduction.

In 1971, in the aftermath of some court decisions supporting due process protections for public housing tenants, the Department of Housing and Urban Development issued two circulars that imposed significant obligations on public housing authorities. n324 One of the circulars required public housing authorities to integrate a number of specific provisions into tenant leases, including provisions stating that the lease could be terminated only for good cause, requiring the housing authority to give the tenant the reasons for an eviction, and providing the tenant with an opportunity to reply at a hearing.

The other circular required housing authorities to adopt grievance procedures consistent with due process requirements. n325 The circulars were challenged by a number of housing authorities as contrary to a provision of the 1937 Act stating that it was the "policy of the United States to vest in the local public housing agencies the maximum amount of responsibility in the administration of the low-rent housing program." n326 However, in *Housing Authority of the City of Omaha, Nebraska v. United States Housing Authority*, n327 the Eighth Circuit Court of Appeals concluded that HUD had "the ultimate supervision and authority in carrying out the objectives of the Housing Act," n328 and it upheld the issuance of the circulars.

In 1983, Congress enacted legislation relating to the legal issues referenced in the circulars. In the Housing and Urban-Rural Recovery Act of 1983, n329 Congress directed HUD to develop regulations requiring local housing authorities to implement administrative grievance procedures that provide due process protections to tenants. It also required local housing authorities to use leases that included substantive provisions protective of tenants. n330 In more recent times, legislation has required additional lease provisions relating to the behavior of public housing residents and other matters. n331

§ 45.08(c)(2) Grievance Procedures.

Pursuant to congressional action, the Secretary of Housing and Urban Development was directed to issue regulations requiring public housing agencies to establish and implement administrative grievance procedures for the benefit of tenants. n332 The legislation states that such a procedure must provide for public housing tenants to: 1) be advised of the specific grounds of any proposed adverse action by the public housing agency; 2) have an opportunity for a hearing before an impartial party upon timely request; 3) have an opportunity to examine any documents, records, or regulations related to the proposed action; 4) be entitled to representation by another person of their choice at any hearing; 5) be entitled to question witnesses and have others make statements on their behalf; and 6) be entitled to receive a written decision by the public housing agency with respect to the proposed action. n333

The legislation permits the establishment of expedited grievance procedures in cases in which the grievance concerns an eviction or tenancy termination for activities that threaten the health, safety, or right to peaceful enjoyment of the premises of other tenants or public housing agency employees. Expedited procedures are also appropriate if the grievance concerns any violent or drug-related criminal activity or any activity resulting in a felony conviction. n334 However, the Secretary of Housing and Urban Development is permitted to exclude such a grievance from the grievance procedure in a jurisdiction that requires that, prior to eviction, a tenant be given a court hearing that the

Secretary determines provides the basic elements of due process. n335

In some instances, it should be noted, court-available procedures have been found to be inadequate to protect the interests of public housing tenants. n336 And it was held in one case that a housing authority was not permitted to avoid the administrative grievance procedure in a case involving an alleged assault on a public housing authority employee, because the housing authority had not included sufficient provisions in the lease about the grievance procedure and when it would, and would not, apply. n337

Additional details regarding grievance procedures are set forth in HUD regulations. n338 These include provisions for informal settlement of disputes, procedures for obtaining a hearing, and hearing procedures. The regulations state that the procedures apply to "all individual grievances" between the tenant and the public housing authority. n339

According to the regulations, a grievance is to be presented to the office of the public housing agency, or to the office of the project where the tenant lives, so that the grievance can be discussed informally and settled without a hearing. n340 No hearing is required if the grievance is settled after informal discussion. If an informal resolution does not take place, and if the tenant timely requests a hearing, a hearing will be conducted before an impartial person or persons appointed by the public housing agency. If the tenant does not timely request a hearing, the housing authority's disposition of the grievance becomes final. n341 If the grievance involves the amount of the rent, the family is required to make rent deposits with the housing authority while the grievance is pending. n342

The decision of the hearing officer, or panel, is binding upon the public housing agency, unless the agency's board of commissioners timely determines that the matter did not amount to a grievance in the first place or if the decision was contrary to applicable law, regulations, or the provisions of the contributions contract with HUD. n343

Tenants have sometimes been successful in asserting claims that housing authorities failed to provide them with grievance procedures required under the 1937 Act and related regulations. n344 However, in one case, involving a claim by the tenant that the housing authority had not provided a proper hearing in connection with its refusal to allow her husband to become a tenant in her dwelling unit, the court concluded that the housing authority's failure was not actionable, because the husband's criminal record was so extensive that he would not have been permitted to have become a tenant in any event. n345

In a New York case, a public housing resident, who had lived in public housing with his tenant-mother, was held to be not entitled to a grievance proceeding on the question of his status as a "remaining family member." The housing authority had already terminated his mother's tenancy on account of her previous arrest for a drug infraction. n346 The court reasoned that, in such a case, there were no succession rights to the tenancy to consider, so no grievance proceeding was required.

§ 45.08(c)(3) Other Public Housing Lease Provisions.

Congress has also mandated significant additional content requirements for public housing agency leases. Many of the mandated provisions are protective of individual tenants. Others are for the benefit of the housing project itself, or the other tenants in the housing project, rather than for the benefit of the individual tenants whose conduct or status is called into question. Required lease provisions on rent, eviction, and the obligations of the housing authority with respect to the quality of the leased premises, are discussed in greater detail in other sections of this chapter. n347 But there are other lease provisions that are required by statute and by regulation that indicate the unique nature of a public housing lease.

Among other things, federal legislation requires public housing agencies to use leases that: 1) have a term of 12 months and are automatically renewable; n348 2) do not contain unreasonable terms and conditions; 3) obligate the public housing agency to maintain the housing project in a decent, safe, and sanitary condition; 4) require the public housing

agency to give adequate written notice of lease termination; n349 5) prohibit the public housing agency from terminating the tenancy "except for serious or repeated violation of the terms or conditions of the lease or for other good cause;" n350 6) specify that, with respect to any notice of eviction or termination, a public housing tenant shall be informed of the opportunity, prior to any hearing or trial, to examine documents, records, or regulations directly related to the eviction or termination; and (7) provide that it will be a cause for immediate lease termination if a tenant is fleeing prosecution, custody, or confinement after conviction, or if the tenant is violating a condition of probation or parole. n351

The legislation also mandates that public housing agencies use leases that provide for lease termination for certain kinds of criminal activities, including drug-related crimes or criminal acts that threaten the safety of other tenants, that are engaged in by the tenant, members of the tenant's household, or any guest or other person under the tenant's control. n352

HUD regulations deal with a variety of lease-content matters as well. Some of them echo the statutory provisions just discussed. However, the regulations also include detailed provisions on a number of additional matters.

Some of the regulations concern payments due under the lease. For example, the regulations require the lease to provide for charges for repairs beyond normal wear and tear, and for charges for consumption of "excess utilities." n353 They permit the lease to provide for the assessment of late charges and security deposits. n354 The regulations also require the lease to provide for a periodic redetermination of rent and family composition. n355

The regulations require the lease to provide that the tenant will have the right to exclusive use and occupancy of the leased unit by members of the household, as well as the right to provide reasonable accommodation of guests. n356 But they also require the lease to include provisions that impose limitations or obligations on the tenant. These include provisions prohibiting subleasing or assignment; prohibiting tenants from providing accommodations for boarders or lodgers; prohibiting the use of the dwelling unit for purposes other than a private dwelling; requiring tenants to keep the dwelling unit in a clean and safe condition; requiring tenants to comply with reasonable and necessary regulations promulgated by the housing authority for the well-being of the housing project and other tenants; requiring tenants to pay reasonable charges for damages to the dwelling unit caused by the tenant, a household member or guest; n357 and requiring tenants to request housing agency approval to add any other family member as an occupant of the unit. n358

The regulations require the lease to set forth the circumstances under which the housing agency may enter the tenant's dwelling unit. The lease is to provide, for example, that upon reasonable advance notice, the housing agency may enter during reasonable hours to do routine inspections and maintenance, to make repairs, or to show the dwelling unit to others for re-leasing. n359 It is also to provide that the housing agency "may enter the dwelling unit at any time without advance notification when there is reasonable cause to believe that an emergency exists." n360 Abuse of this kind of lease provision will probably not receive a good reception in the courts. In a case arising out of Florida, a federal district court ruled that neither the housing authority, nor local law enforcement officers, could use a comparable paragraph in public housing leases "as a substitute for consent or probable cause to search the public housing apartments" of a housing authority. n361

Other regulations require the lease to set forth obligations of the public housing agency. Thus, the lease is required to include provisions that, among other things, require the housing agency to maintain the dwelling unit and the project in decent, safe, and sanitary condition; to comply with applicable codes and regulations materially affecting health and safety; to make necessary repairs to the dwelling unit; to keep buildings, facilities, and common areas that are not under the tenant's control in a clean and safe condition; and to maintain in good working order the electrical, sanitary, and other facilities that the housing agency is required to provide. n362

HUD regulations also identify some provisions that are not permitted in public housing leases. In particular, the regulations prohibit clauses confessing judgment in favor of the landlord; allowing the landlord to take property of the

tenant and hold it as security for the performance of tenant obligations; agreeing not to hold the landlord or the landlord's agents liable for acts or omissions; agreeing that the landlord can bring a lawsuit without notice to the tenant that suit has been filed; authorizing the landlord to evict the tenant or hold or sell the tenant's possessions whenever the landlord determines that a lease default has occurred, without notice to the tenant or without a court determination of the rights and liabilities of the parties; authorizing the landlord's lawyer to appear in court for the tenant and to waive a trial by jury; authorizing the landlord's lawyer to waive the right to appeal or the right to file suit to prevent execution of a judgment; and agreeing that the tenant will pay attorneys' fees or costs even if the court determines that the tenant has prevailed. n363

Public housing agencies can include provisions in their leases that are in addition to those that are specified in statute or regulation, but the provisions cannot be unreasonable. n364

A public housing agency that desires to change the form of lease that it uses for public housing tenants is required to provide at least thirty days' notice to tenants and resident organizations, and to provide them with an opportunity to present written comments concerning the proposed changes. n365

§ 45.08(d) The Nature of a Public Housing Lease.

Public housing leases are, in many ways, quite different from private residential leases. Although private residential tenants may benefit from protections available under housing codes, warranties of habitability, and other legal protections articulated in statute or case law, the landlord-tenant relationship is still largely a matter of agreement between landlord and tenant. There is not a tremendous amount of governmental oversight of the landlord-tenant relationship. And, unless an anti-retaliation doctrine applies, a landlord is generally free to terminate a private residential tenancy in accordance with traditional rules applicable to non-freehold estates.

Public housing leases are much different. The content of the leases is largely mandated by statute or regulation. There is significant regulatory oversight. Changes and adverse actions are subject to significant due process limitations. And, absent good cause, and compliance with various procedures, tenant leases are not subject to termination by landlords.

These differences provide considerable protection to vulnerable tenants, and they hold public housing agencies accountable for the financial benefits they receive from public coffers. However, they do come with a price. For example, it has been suggested that the price of various due process protections available to public housing tenants, as calculated in terms of a housing authority's ability to combat crime and promote order in public housing, has been too high. n366 Of course, the beneficiaries of due process protections would see things differently.

FOOTNOTES:

(n1)Footnote 287. Robyn Minter Smyers, High Noon In Public Housing: The Showdown Between Due Process Rights and Good Management Practices In the War On Drugs and Crime, *30 Urb. Law. 573, 578 (1998)* (citing Richard Scobie, Problem Families and Public Housing 2 (1975)).

(n2)Footnote 288. *See* Shelby D. Green, The Public Housing Tenancy: Variations on the Common Law That Give Security of Tenure and Control, *43 Cath. U. L. Rev. 681, 720 (1994).*

(n3)Footnote 289. *See* Robyn Minter Smyers, High Noon In Public Housing: The Showdown Between Due Process Rights and Good Management Practices In the War On Drugs and Crime, *30 Urb. Law. 573, 578 (1998).*

(N4)Footnote 290. *See* Robyn Minter Smyers, High Noon In Public Housing: The Showdown Between Due Process Rights and Good Management Practices In the War On Drugs and Crime, *30 Urb. Law. 573, 579 (1998).* The criteria might exclude, for example, applicants with illegitimate children or applicants with a history of arrest, incarceration, or drug or alcohol addiction. *See id.*

(n5)Footnote 291. *See* Robyn Minter Smyers, High Noon In Public Housing: The Showdown Between Due Process Rights and Good Management Practices In the War On Drugs and Crime, *30 Urb. Law. 573, 581 (1998).*

(n6)Footnote 292. *See* Robyn Minter Smyers, High Noon In Public Housing: The Showdown Between Due Process Rights and Good Management Practices In the War On Drugs and Crime, *30 Urb. Law. 573, 581-82 (1998).*

(n7)Footnote 293. *226 F.2d 51 (D.C. Cir. 1955)* . The case is discussed in Florence Wagman Roisman, The Right to Public Housing, *39 Geo. Wash. L. Rev. 691, 693 (1971).*

(n8)Footnote 294. *226 F.2d at 53* .

(n9)Footnote 295. *393 U.S. 268 (1969)* .

(n10)Footnote 296. *397 U.S. 254 (1970)* .

(n11)Footnote 297. *397 U.S. at 262* (footnote omitted) (quoting from *Shapiro v. Thompson, 394 U.S. 618, 627 n. 6 (1969)* .

(n12)Footnote 298. *397 U.S. at 262,* footnote 8 .

(n13)Footnote 299. *397 U.S. at 267* .

(n14)Footnote 300. *397 U.S. at 267* .

(n15)Footnote 301. *425 F.2d 853 (2d Cir.1970) , cert. denied, 400 U.S. 853 (1970)* .

(n16)Footnote 302. *See 425 F.2d at 857* .

(n17)Footnote 303. *See 425 F.2d at 857* .

(n18)Footnote 304. *See 425 F.2d at 858 n. 1* .

(n19)Footnote 305. *See 425 F.2d at 858 n. 1* .

(n20)Footnote 306. *See 425 F.2d at 858* .

(n21)Footnote 307. *See 425 F.2d at 858* .

(n22)Footnote 308. *See 425 F.2d at 858* .

(n23)Footnote 309. *See 425 F.2d at 859* .

(n24)Footnote 310. *See 425 F.2d at 860* .

(n25)Footnote 311. *See 425 F.2d at 862-63* .

(n26)Footnote 312. *See 425 F.2d at 864* .

(n27)Footnote 313. *See 425 F.2d at 863* .

(n28)Footnote 314. *See 425 F.2d at 861* .

(n29)Footnote 315. *433 F.2d 998 (4th Cir. 1970) ,cert. denied, 401 U.S. 1003 (1971)* .

(n30)Footnote 316. *See 433 F.2d at 1000-01*

(n31)Footnote 317. *See 433 F.2d at 1002* .

(n32)Footnote 318. *See 433 F.2d at 1003* . The case is discussed in Shelby D. Green, The Public Housing Tenancy: Variations on the Common Law That Give Security of Tenure and Control, *43 Cath. U. L. Rev. 681, 725-726 (1994).*

(n33)Footnote 319. *See* Robyn Minter Smyers, High Noon In Public Housing: The Showdown Between Due Process Rights and Good Management Practices In the War On Drugs and Crime, *30 Urb. Law. 573, 597 (1998).*

(n34)Footnote 320. *479 F. 2d 1165 (2d Cir. 1973)* .

(n35)Footnote 321. *See 479 F.2d at 1170* . Additional cases in which rent increases and due process considerations are discussed are referenced in § 45.09(e) of this chapter.

(n36)Footnote 322. *Tyson v. New York City Housing Authority, 369 F. Supp. 513 (D. N.Y. 1974)* .

(n37)Footnote 323. *See 369 F. Supp. at 521* .

(n38)Footnote 324. The background is discussed in *Housing Authority of the City of Omaha, Nebraska v. U.S. Housing Authority, 468 F.2d 1* (8th Cir. 1972) , *cert. denied, 410 U.S. 927 (1973)* .

(n39)Footnote 325. *See Housing Authority of the City of Omaha, Nebraska v. U.S. Housing Authority, 468 F.2d 1* (8th Cir. 1972) , *cert. denied, 410 U.S. 927 (1973)* .

(n40)Footnote 326. *See 468 F.2d at 5* .

(n41)Footnote 327. *468 F.2d 1* (8th Cir. 1972) , *cert. denied, 410 U.S. 927 (1973)* .

(n42)Footnote 328. *468 F.2d at 7* .

(n43)Footnote 329. House and Urban-Rural Recovery Act of 1983, Pub L. No. 98-181 § 204, *97 Stat. 1153, 1178 (1983)* (codified at *42 U.S.C. § 1437d(k)*).

(n44)Footnote 330. *See* House and Urban-Rural Recovery Act of 1983, Pub L. No. 98-181 § 204, *97 Stat. 1153, 1178 (1983)* (codified at *42 U.S.C. § 1437d(k)*).

(n45)Footnote 331. *See 42 U.S.C. § 1437d(k)*. But the legislation also provides:

> Such elements of due process shall not include a requirement that the tenant be provided an opportunity to examine relevant documents within the possession of the public housing agency. The agency shall provide to the tenant a reasonable opportunity, prior to hearing or trial, to examine any relevant documents, records, or regulations directly related to the eviction or termination.

Id.

(n46)Footnote 332. *See 42 U.S.C. § 1437d(k)*.

(n47)Footnote 333. *See 42 U.S.C. § 1437d(k)*.

(n48)Footnote 334. *See 42 U.S.C. § 1437d(k)*.

(n49)Footnote 335. *See 42 U.S.C. § 1437d(k)*. *See also 24 C.F.R. § 966.51(a)(2)*. But the legislation also provides:

> Such elements of due process shall not include a requirement that the tenant be provided an opportunity to examine relevant documents within the possession of the public housing agency. The agency shall provide to the tenant a reasonable opportunity, prior to hearing or trial, to examine any relevant documents, records, or regulations directly related to the eviction or termination.

42 U.S.C. § 1437d(k).

(n50)Footnote 336. *See, e.g., Simmons v. Kemp, 751 F. Supp. 815 (D.C. Minn. 1990)* (Minnesota discovery rules inadequate to protect due process rights of public housing tenant); *Housing Authority of Jersey City v. Jackson, 749 F. Supp. 622 (D. N.J. 1990)* (summary eviction procedures do not provide adequate discovery protections for public housing tenants). *See also Yesler Terrace Community Council v. Cisneros, 37 F.3d 442* (9th Cir. 1994) (HUD's determination that Washington State's eviction procedures satisfied basic elements of due process was flawed because HUD made the determination without giving tenants notice and an opportunity to comment).

(n51)Footnote 337. *See Housing Authority of County of Salt Lake v. Snyder, 44 P.3d 724 (Utah 2002)* .

(n52)Footnote 338. *See 24 C.F.R. § 966.50 et seq.*

(n53)Footnote 339. *See 24 C.F.R. § 966.51(a)*. A definitional provision states that a grievance means "any dispute which a tenant may have with respect to PHA action or failure to act in accordance with the individual tenant's lease or PHA regulations which adversely affect the individual tenant's rights, duties, welfare or status." *See 24 C.F.R. § 966.53(a)*.

(n54)Footnote 340. *See 24 C.F.R. § 966.54*.

(n55)Footnote 341. *See 24 C.F.R. § 966.55(c)*.

(n56)Footnote 342. *See 24 C.F.R. § 966.55(e)*.

(n57)Footnote 343. *See 24 C.F.R. § 966.57*.

(n58)Footnote 344. *See, e.g., Samuels v. District of Columbia, 770 F.2d 184 (D.C. Cir. 1985)* (tenants stated cause of action for relief under § 1983); *Conway v. Housing Authority of City of Asheville, 239 F. Supp.2d 593 (W.D. N.C. 2002)* (tenant entitled to § 1983 action); *Housing Authority of City of Jersey City v. Jackson, 749 F. Supp. 622 (D. N.J. 1990)* (New Jersey summary eviction proceedings did not meet due process standards; tenant entitled to administrative grievance proceedings).

(n59)Footnote 345. *See Saxton v. Housing Authority of City of Tacoma, 1 F.3d 881* (9th Cir. 1993) .

(n60)Footnote 346. *Figueroa v. Hernandez, 753 N.Y.S.2d 669 (Sup. Ct. 2002)* .

(n61)Footnote 347. See §§ 45.09, 45.11 & 45.14 of this chapter.

(n62)Footnote 348. *See 42 U.S.C. § 1437d(l)*. There is an exception for non-compliance with community service requirements. *Id. See 42 U.S.C. § 1437j(c)*.

(n63)Footnote 349. The statute states that the notice "shall not be less than" the following:

> (A) a reasonable period of time, but not to exceed 30 days--
>
> > (i) if the health or safety of other tenants, public housing agency employees, or persons residing in the immediate vicinity of the premises is threatened; or

(ii) in the event of any drug-related or violent criminal activity or any felony conviction;

(B) 14 days in the case of nonpayment of rent; and

(C) 30 days in any other case, except that if a State or local law provides for a shorter period of time, such shorter period shall apply.

See 42 U.S.C. § 1437d(l)(4).

(n64)Footnote 350. *See 42 U.S.C. § 1437d(l)(5)*. The statute provides, however,

> that an incident or incidents of actual or threatened domestic violence, dating violence, or stalking will not be construed as a serious or repeated violation of the lease by the victim or threatened victim of that violence and will not be good cause for terminating the tenancy or occupancy rights of the victim of such violence.

Id.

(n65)Footnote 351. *See 42 U.S.C. § 1437d(l)*.

(n66)Footnote 352. *See 42 U.S.C. § 1437d(l)(6)*. Additional information about this justification for lease termination, and other criminally-connected justifications for lease termination, are contained in § 45.11 of this chapter.

(n67)Footnote 353. *See 24 C.F.R. § 966.4(b)*.

(n68)Footnote 354. *See 24 C.F.R. § 966.4(b)*.

(n69)Footnote 355. *See 24 C.F.R. § 966.4(c)*.

(n70)Footnote 356. See *24 C.F.R. § 966.4(d)*.

(n71)Footnote 357. *See 24 C.F.R. § 966.4(f)*.

(n72)Footnote 358. *See 24 C.F.R. § 966.4(a)(v)*. This provision was relevant to the court's analysis in *McFarlane v. New York City Housing Authority, 780 N.Y.S.2d 135 (App. Div. 2004)* . There, two grandchildren of deceased public housing tenants claimed entitlement to their grandparents' dwelling unit. The grandparents had never requested that the housing authority permit the grandchildren to be recognized as family members for purposes of occupancy under their lease. The court concluded that application of the regulation "precluded the Housing Authority from permitting petitioners to be treated as additions to the tenant families in the absence of any such request." *Id. at 136* .

(n73)Footnote 359. *See 24 C.F.R. § 966.4(j)(1)*.

(n74)Footnote 360. *See 24 C.F.R. § 966.4(j)(2)*.

(n75)Footnote 361. *Noble v. Tooley, 125 F. Supp. 2d 481, 486 (M.D. Fla. 2000)* .

(n76)Footnote 362. *See 24 C.F.R. § 966.4(e)*.

(n77)Footnote 363. *See 24 C.F.R. § 966.6*.

(n78)Footnote 364. *See 42 U.S.C. § 1437d(l). See also Allegheny County Housing Authority v. Morisset, 651 A. 2d 632 (Pa. Comm. Ct. 1994)* .

(n79)Footnote 365. *See 24 C.F.R. § 966.3*.

(n80)Footnote 366. *See* Robyn Minter Smyers, High Noon In Public Housing: The Showdown Between Due Process Rights and Good Management Practices In the War On Drugs and Crime, *30 Urb. Law. 573, 576 (1998).* Citing Amitai Etzioni, The Spirit of Community: Rights, Responsibilities and the Communitarian Agenda 7 (1993), the author writes:

> This proliferation of process rights stemmed ostensibly from a desire to protect public housing tenants. Yet, arguably these rights have contributed to the difficulties facing large urban PHAs. Indeed, important questions worth asking are: Do the benefits of due process in public housing exceed the costs? Are public housing residents better off because of due process rights? Has society been well served by these changes? Does the administrative reality of due process reflect and further the purposes of public housing?
>
> Sadly, after nearly three decades of due process advocacy, it is hard to answer these questions in the affirmative... The pendulum has swung too far toward the individualistic pole and it is time to hurry its return to a point where rights and responsibilities are better balanced.

30 Urb. Law. at 576. See also Michael H. Schill, Distressed Public Housing: Where Do We Go From Here? *60 U. Chi. L. Rev. 497, 516-17 (1993)* ("Even when a PHA believes it has evidence to justify eviction, it must accord tenants hearings prior to bringing a court action for eviction. During this potentially lengthy period of administrative hearings and court proceedings, undesirable tenants usually may remain in possession of their homes, where they continue to engage in practices destructive to the community.")

In recent years, Congress has adopted legislation intended to assist public housing authorities in combating crime, including provisions of the Anti-Drug Abuse Act of 1988. *See* Pub. L. No. 100-690 §§ 5121 *et seq.*, *102 Stat 4181, 4301 (1988),* codified at *42 U.S.C. § 11901, et seq.*

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CHAPTER 45 PUBLIC HOUSING

5-45 Thompson on Real Property, Thomas Editions § 45.09

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§ 45.09 Public Housing Rent.

§ 45.09(a) Introduction.

The federal subsidy associated with the public housing program was originally designed to cover capital and financing costs. Tenants were expected to make rental payments that would cover the operating expenses and administrative costs of the housing project. n367 However, as time went on, the tenant composition of public housing changed, from a population of predominately moderate-income families to a population of families of low and very-low incomes, who were less able to afford higher rent. At the same time, public housing authorities needed more rental income in order to deal with higher maintenance costs as buildings aged. n368

In 1969, Congress intervened with the adoption of what came to be known as the Brooke Amendment. n369 It limited tenant rent payments to 25% of household income. Later, this was changed to 30%. n370 These rent restrictions naturally resulted in increased financial pressures on public housing authorities. Many housing authorities elected to defer maintenance on their buildings. n371 Congress eventually responded by authorizing the Department of Housing and Urban Development to make operating funds available to housing authorities. n372

§ 45.09(b) Types of Rent.

The 1937 Act provides that families residing in public housing are to pay a monthly rent. n373 HUD regulations require public housing leases to specify the initial amount of tenant rent at the beginning of the lease term. n374

Two basic types of rental structures are available for families residing in public housing--one is flat rent, the other is income-based rent. n375 The public housing authority is required to provide both options to resident families, and to do so on an annual basis once the tenancy begins. n376 Subject to a separate provision for a minimum monthly rental amount, discussed below, the family can then select which of the two types of rent it wishes to pay.

§ 45.09(b)(1) Flat Rent.

A flat rent is an amount that is based on the rental value of housing unit, as determined by the public housing agency. n377 The public housing agency is required to establish the amount of the flat rent for each dwelling unit and to

maintain records showing how it does so. n378 According to HUD regulations, the amount of the flat rent is to be based on the market rent charged for comparable units in the private unassisted rental market. n379 In establishing the amount of the rent, the housing agency must consider the location, quality, size, unit type and age of the unit, as well as any amenities, housing services, maintenance, and utilities that are provided by the housing agency. n380 The public housing agency is also required to consider that flat rent is designed so as to not create disincentives for continued residency in public housing by families that are attempting to become economically self-sufficient. n381

HUD regulations provide that, for families paying flat rent, the public housing agency must conduct an annual reexamination of family composition, and conduct a reexamination of family income at least every three years. n382 The results of the reexamination may cause the housing agency to require the family to move to a housing unit of more appropriate size. n383 Although the amount of the flat rent is not income-based, income information is relevant to another issue: the public housing agency may terminate the tenancy of families who are "over income." n384

§ 45.09(b)(2) Income-Based Rent.

The amount of an income-based rent is an amount, determined by the public housing agency, that does not exceed the highest of the following:

(A) 30 per centum of the family's monthly adjusted income;

(B) 10 per centum of the family's monthly income; or

(C) if the family is receiving payments for welfare assistance from a public agency and a part of such payments, adjusted in accordance with the family's actual housing costs, is specifically designated by such agency to meet the family's housing costs, the portion of such payments which is so designated. n385

Subject to the foregoing limitation, the public housing agency has discretion to implement a rent structure that, among other things, adopts income exclusions, imposes ceiling rents, or requires that a portion of the rent be deposited into an escrow or savings account. n386

Application of the limitations referenced above depends on the how "income" and "adjusted income" are defined. The 1937 Act provides some guidance. "Income," as defined in the legislation, generally refers to "income from all sources of each member of the household." n387 HUD regulations elaborate by providing that income includes, among other things, wages and other compensation for personal services, net income from a business, interest and dividends, and welfare assistance payments. n388

The regulations also specify that some amounts are to be excluded from income. Among other things, the following are excluded: income from employment of children under eighteen years of age; payments received for the care of foster children or foster adults who are unable to live alone; lump-sum additions to family assets, such as inheritances and insurance payments; amounts in reimbursement of the cost of medical expenses for any family member; gifts; and amounts received under training programs funded by HUD. n389

"Adjusted income" refers to the income of family members residing in a dwelling unit, or the persons on a lease, after excluding some amounts. Some exclusions are mandatory; others are at the discretion of the public housing agency. The list of mandatory exclusions includes a specified amount for an elderly or disabled family; a specified amount for resident minors, students, and individuals with disabilities; unreimbursed medical expenses that exceed a specified level; child support payments, up to a limit for each child; spousal support payments, up to a limit for each person so supported; and the amount of any earned income of a minor. n390 Permissive exclusions include amounts for "excessive" employment-related or education-related travel expenses, subject to a weekly limit; the amount of a family's

earned income; and other amounts established by the public housing agency. n391

In some circumstances, the 1937 Act encourages family self-sufficiency by temporarily suspending, and then phasing in, the inclusion of new earned income into income-based rental calculations. n392 As an alternative, upon the request of an eligible family, the housing agency may establish an individual savings account for the family. Under this arrangement, the family pays the full amount of the rent resulting from the increased income, but the housing agency makes deposits into the account that can be withdrawn for the purchase of a home, the payment of education costs or costs of moving out of public housing, or the payment of other expenses authorized by the public housing agency to promote economic self-sufficiency. n393

Rent issues can arise regarding who is part of the household. In a New York case, for example, the court held that a housing authority had the right to make a determination whether the tenant's spouse was a member of the household, for purposes of calculating the amount of the rent. n394 In that case, an alleged three-month absence from public housing by the tenant's husband unit was found to be a mere temporary absence that did not prevent the housing authority from considering the husband's income in calculating the rental amount.

HUD regulations provide that, for families paying income-based rent, the public housing agency must conduct an annual reexamination of family income and composition, and make appropriate rent adjustments after consulting with the family and verifying the information. n395 As in the case of families paying flat rent, the results of an annual reexamination may also cause the housing agency to require the family to move to a housing unit of more appropriate size. n396

Utility allowances can have an impact on the amount of tenant rent, or on the amount public housing tenants pay for utilities. These allowances are discussed in § 45.10 of this chapter.

§ 45.09(b)(3) Minimum Rent.

Public housing tenants are also subject to a minimum monthly rental amount requirement. Notwithstanding the provisions regarding flat rent and income-based rent, a family living in public housing is required to pay a minimum monthly rental amount that is established by the public housing agency. That amount cannot exceed $50 per month. n397 However, this requirement is subject to a hardship exception. n398

§ 45.09(c) Rent and Change in Tenant Circumstances.

As noted above, the public housing agency is required to give each family an opportunity to elect to pay either a flat rent or an income-based rent. However, if a family has elected to pay a flat rent, and a change in circumstances, such as a decrease in family income or an increase in family expenses, renders the family unable to pay the flat rent, the public housing agency is required to permit the family to pay income-based rent. n399

§ 45.09(d) Rent Adjustments.

As indicated previously in the discussion of due process, courts have held that a rent increase implicates a property interest, and that prior notification of the increase and a procedure for tenant involvement in the process are required. n400 There was some uncertainty about much tenant involvement would be required, but the prevailing view from the cases was that a rent increase did not require a full-blown adversary hearing. n401

Current HUD regulations require public housing leases to include provisions regarding the redetermination of the rental amount, including the frequency with which regular redeterminations will be made and the basis on which they will be made. n402 The lease must include an agreement by the tenant to furnish information that the public housing agency needs in order to make rent and eligibility determinations. n403 The regulations also provide that if the public housing

agency redetermines the amount of the rent, the housing agency is required to notify the tenant that the tenant may request an explanation of the change, and if the tenant does not agree with the redetermination, the tenant will have the right to request a hearing under the public housing agency's grievance procedure. n404

Rent adjustments based on changes in family income are discussed in an earlier section of this chapter. n405

§ 45.09(e) Rent Challenges.

Public housing tenants have sometimes challenged rent level determinations. Tenants have had some success with claims that their income-based rents were wrong because they were based on incorrect computations of family income. n406 Tenants have also been successful, in some cases, with claims that rent levels were not reduced quickly enough following reported decreases in income. n407

In one case, a class of tenants successfully challenged a housing authority's practice of adding an arbitrary sum to the income levels of tenants based upon their accumulated savings and investments. n408 The class was also successful on a claim that the housing authority had not complied with federal requirements regarding income deductions for spouses and medical expenses.

On the other hand, in a Tenth Circuit case, tenants were unsuccessful in claiming that the imposition of a security deposit caused tenant rent to exceed the level permitted by the Brooke Amendment. n409

Tenants have litigated some rent-related issues involving payments for utilities. Issues regarding utilities are discussed in the next section of this chapter.

FOOTNOTES:

(n1)Footnote 367. *See* Charles E. Daye, et al., Housing and Community Development 194 (3d ed. 1999); Michael H. Schill, Distressed Public Housing: Where Do We Go From Here? *60 U. Chi. L. Rev. 497, 505 (1993).*

(n2)Footnote 368. *See* Charles E. Daye, et al., Housing and Community Development 194 (3d ed. 1999); Michael H. Schill, Distressed Public Housing: Where Do We Go From Here? *60 U. Chi. L. Rev. 497, 505 (1993).*

(n3)Footnote 369. *See* Charles E. Daye, et al., Housing and Community Development 194 (3d ed. 1999); Michael H. Schill, Distressed Public Housing: Where Do We Go From Here? *60 U. Chi. L. Rev. 497, 505 (1993). See also* Housing and Urban Development Act of 1969, Pub. L. No. 91-152, § 213(a), *83 Stat 379, 389 (1969).* The current version of the provision is found in *42 U.S.C. § 1437a(a)(1)*. For a discussion of the Brooke Amendment, see Roisman, Florence Wagman. "The Right to Public Housing." *39 Geo. Wash. L. Rev. 691, 695-699 (1971).*

(n4)Footnote 370. *See* Charles E. Daye, et al., Housing and Community Development 194 (3d ed. 1999).

(n5)Footnote 371. *See* Charles E. Daye, et al., Housing and Community Development 194 (3d ed. 1999); Michael H. Schill, Distressed Public Housing: Where Do We Go From Here? *60 U. Chi. L. Rev. 497, 505 (1993).*

(n6)Footnote 372. *See* Charles E. Daye, et al., Housing and Community Development 194-95 (3d ed. 1999).

(n7)Footnote 373. *See 42 U.S.C. § 1437a(a)(2)(A)*.

(n8)Footnote 374. *See 24 C.F.R. § 966.4(b)*

(n9)Footnote 375. *See 42 U.S.C. § 1437a(a)(2)*. The legislation also provides for the continuation of certain flat rents or ceiling rents administered by housing agencies prior to the effective date of the Quality Housing and Work Responsibility Act of 1998. *See id.*

(n10)Footnote 376. *See 42 U.S.C. § 1437a(2)(A)(i)*; *24 C.F.R. § 960.253(a)*.

(n11)Footnote 377. *See 42 U.S.C. § 1437a(2)(A)(i)*; *24 C.F.R. § 960.253(a)*.

(n12)Footnote 378. *See 42 U.S.C. § 1437a(2)(B)(i)*; *24 C.F.R. § 960.253(b)*.

(n13)Footnote 379. *See 24 C.F.R. § 960.253(b)*.

(n14)Footnote 380. *See 24 C.F.R. § 960.253(b)*.

(n15)Footnote 381. *See 42 U.S.C. § 1437a(a)(2)(B)*; *24 C.F.R. § 960.253(b)*.

(n16)Footnote 382. *See 24 C.F.R. § 960.257(a)*.

(n17)Footnote 383. *See 24 C.F.R. § 960.257(a)(4)*.

(n18)Footnote 384. *See 24 C.F.R. § 960.261(a)*.

(n19)Footnote 385. *See 42 U.S.C. §§ 1437a(2)(B)(ii)* & *1437a(1)*.

(n20)Footnote 386. *See 42 U.S.C. § 1437a(2)(B)(ii)*.

(n21)Footnote 387. *See 42 U.S.C. § 1437a(b)(4)*.

(n22)Footnote 388. *See 24 C.F.R. § 5.609(b)*. There are some limitations on the inclusion of welfare assistance payments, and a provision regarding receipt of Social Security payments is qualified by an exclusion relating to deferred periodic amounts from supplemental security income and social security benefits. *See id.*

(n23)Footnote 389. *See 24 C.F.R. § 5.609(c)*. An exclusion of deferred periodic amounts from supplemental security income and social security benefits qualifies the entry, in the earlier portion of the regulation, relating to the inclusion of periodic payments, such as Social Security payments, in income. Cases that have considered whether particular Social Security payments should be included in income include *Garvey v. Worcester Housing Authority, 629 F.2d 691* (1st Cir. 1980) , *cert. denied, sub nom., Larose v. Worcester Housing Authority, 450 U.S. 925 (1980)* ; *Head v. Jellico Housing Authority, 870 F.2d 1117* (6th Cir. 1989) ; and *Flowers v. Smith, 726 F. Supp. 141 (S.D. Miss.1988) ,aff'd, 891 F.2d 903 (5th Cir. 1989)* .

(n24)Footnote 390. *See* Bill of Rights. *See also 24 C.F.R. § 5.611*. Litigation sometimes arises over the application of exclusions. *See, e.g., Jeffreys v. Housing Authority of City of Winston-Salem, 44 F. Supp.2d 749 (M.D. N.C.1998)* (tenant claimed entitlement to rent reduction based on disabilities).

(n25)Footnote 391. *See* First Amendment. *See also* First Amendment.

(n26)Footnote 392. *See* First Amendment.

(n27)Footnote 393. *See* First Amendment.

(n28)Footnote 394. *See Watertown Housing Authority v. McCormick, 546 N.Y.S.2d 929 (City Ct. 1989)* .

(n29)Footnote 395. *See* First Amendment.

(n30)Footnote 396. *See* First Amendment.

(n31)Footnote 397. *See* First Amendment; First Amendment. The statutory language refers to a "minimum monthly rental amount (which amount shall include any amount allowed for utilities) of not more than $50 per month."

First Amendment. The regulation simply references $50 per month. First Amendment.

(n32)Footnote 398. *See 42 U.S.C. § 1437a(3)(B).*

(n33)Footnote 399. *See 42 U.S.C. § 1437a(2)(C).*

(n34)Footnote 400. See § 45.08(b)(iii) of this chapter. *See also Burr v. New Rochelle Municipal Housing Authority, 479 F.2d 1165 (2d Cir. 1973)* ; *Braxton v. Poughkeepsie Housing Authority, 382 F. Supp. 992 (S.D. N.Y. 1974)* .

(n35)Footnote 401. *See, e.g., Burr v. New Rochelle Municipal Housing Authority, 479 F.2d 1165, 1169 (2d Cir. 1973)* (notice required, but not formal adversary hearing); *Thompson v. Washington, 497 F.2d 626, 639 - 41 (D.C. Cir. 1973)* (notice and right to submit written objections to proposed general rent increase). *See also* Shelby D. Green, The Public Housing Tenancy: Variations on the Common Law That Give Security of Tenure and Control, *43 Cath. U. L. Rev. 681, 730-31 (1994).*

(n36)Footnote 402. *See 24 C.F.R. § 966.4(c).*

(n37)Footnote 403. *See 24 C.F.R. § 966.4(c).*

(n38)Footnote 404. *See 24 C.F.R. § 966.4(c)(4).* In *Beckham v. New York City Housing Authority, 755 F.2d 1074 (2d Cir. 1985)* , the court permitted the public housing authority to raise the rent level of tenants who failed to provide timely information regarding the recertification of family income.

(n39)Footnote 405. *See* § 45.09(c) of this chapter.

(n40)Footnote 406. *See* Christopher Bello, Substantive Issues Relative to Rent Levels and Termination of Benefits Under United States Housing Act of 1937 (*42 USCS § 1437 et seq.*), *77 ALR Fed. 884, 891, 892 (1986)* .

(n41)Footnote 407. *See* Christopher Bello, Substantive Issues Relative to Rent Levels and Termination of Benefits Under United States Housing Act of 1937 (*42 USCS § 1437 et seq.*), *77 ALR Fed. 884, 891, 902 (1986)* .

(n42)Footnote 408. *See Bloom v. Niagara Falls Housing Authority, 430 F. Supp. 1183 (D. N.Y. 1977)* .

(n43)Footnote 409. *See Peterson v. Oklahoma City Housing Authority, 545 F.2d 1270* (10th Cir. 1976) . HUD regulations permit housing authorities to include provisions for security deposits in their leases. *See 24 C.F.R. § 966.4(b).*

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CHAPTER 45 PUBLIC HOUSING

5-45 Thompson on Real Property, Thomas Editions § 45.10

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§ 45.10 Utilities: Charges, Surcharges, and Allowances.

§ 45.10(a) Introduction.

Low-income families who live in public housing benefit from legal requirements that are designed to keep rents affordable. They also benefit from legal requirements regarding charges for utilities. There are different legal incidents depending on whether the charges for utilities are paid for by the family or whether they are paid for by the public housing agency.

§ 45.10(b) Payment by Residents.

If residents pay the cost of utilities directly to the utilities provider, and pay income-based rent, they are entitled to have their rent reduced by an allowance established by the public housing agency. A separate allowance is established for each utility. n410 However, if they pay flat rent, they receive no allowance and are responsible for individually metered utilities charges. n411

If residents who pay income-based rent incur utility charges that are higher than the amount of the allowance, they are responsible to pay the excess charges. n412 On the other hand, if the utility charges are lower than the amount of the allowance, the residents receive the benefit of their conservation, because their rent is still reduced by the amount of the allowance. n413 If the amount of the allowance is larger than the amount of the rent, the residents are entitled to a reimbursement in that amount. n414 The public housing agency may, in this situation, pay the excess amount to the family, to the utility supplier, or to pay the utility bill on the family's behalf. n415 If the public housing agency pays the utility bill, it must notify the family. n416

No reimbursement is made if the family pays flat rent. n417

§ 45.10(c) Payment by the Public Housing Authority.

If the utilities are paid by the public housing agency, there is a difference in approach based on whether there are checkmeters n418 that show consumption by individual units or whether there are not.

If there are no checkmeters, the residents do not receive an allowance for utilities, even if they pay income-based rent. n419 The cost of utilities is considered to be part of the rent. However, residents are subject to the payment of surcharges for excess usage. In particular, the public housing agency is able to impose surcharges for estimated consumption of utilities attributable to resident-owned major appliances or for "optional functions of PHA-furnished equipment." n420 In order to impose surcharges, the public housing agency is required to establish schedules that show the appliances, equipment, and functions for which surcharges will be made, and that also show the applicable dollar amounts. n421

If there are checkmeters, the public housing agency may still impose surcharges, but the procedure is different. In this case, the housing agency establishes allowances for utilities that it furnishes, n422 but the amount of an allowance is not applied against the rent. Instead, the housing agency is able to impose a surcharge for consumption of utilities that is in excess of the allowance. n423

§ 45.10(d) Conversion to Individual Metering.

HUD regulations generally require public housing agencies to convert their buildings to individual metering, but provide for exceptions where this would be impractical, as in the case of a centrally heated building, or not financially advantageous for the housing agency, taking into account rates for the different systems and the cost of changing the system. n424 Housing agencies that plan to convert from a system in which utilities are paid for by the housing agency to one in which utilities are paid for by residents, are required to provide appropriate allowances, give notice to residents, work with resident organizations to plan the conversion, change tenant leases to account for the conversion, and, in the case of checkmeter installation, undertake a transition period with no surcharges. n425

In a case involving public housing in Tampa Bay, Florida, some public housing residents sought to enjoin their housing authority's conversion from a system of checkmetering to one in which tenants would directly pay for retail electrical service. n426 The tenants claimed, among other things, that the change would increase their rents in violation of the Brooke Amendment. n427 In particular, they objected to requirements that they pay a deposit and connection fee to initiate service with the utility companies, and that they pay arrearages attributable to earlier electrical service. The trial court denied the tenants' application for a preliminary injunction, and the Eleventh Circuit affirmed. In the course of its opinion, the court observed that the new charges did not constitute rent, because they were to be paid to the utility company, rather than to the housing authority.

§ 45.10(e) Establishment of Allowances.

HUD regulations require public housing agencies to establish utility allowances for checkmetered utilities that are furnished by the housing agency and for utilities that are purchased by residents directly from suppliers. n428

The amount of an allowance is supposed to take into account the size of a dwelling unit and to "approximate a reasonable consumption of utilities by an energy-conservative household of modest circumstances consistent with the requirements of a safe, sanitary, and healthful living environment." n429 In establishing an allowance, the public housing agency is to consider such things as the equipment and functions intended to be covered by the allowance, the climate, the energy efficiency of appliances and equipment intended to be covered, and the housing project's physical condition. n430

The public housing agency is required to give advance notice to residents of proposed allowances, scheduled surcharges, and revisions to either. It is also required to provide residents with a description of the basis for their determination, and to give residents an opportunity to submit written comments before they are adopted. n431 The public housing agency is required to maintain a record that shows the basis on which allowances, surcharges, and revisions are made, and to make this record available for inspection by residents. n432

HUD regulations provide that the public housing agency's determinations of allowances, scheduled surcharges, and revisions are final and valid unless the determinations are found to be arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law. n433

§ 45.10(f) Litigation Relating to Utilities.

Public housing authorities have been permitted to sue tenants for utilities charges, and for other amounts, such as late fees, that have been assessed against tenants in accordance with applicable statutes and regulations. n434 However, it has been held that charges that are not part of the rent cannot be the basis for a summary dispossession action for nonpayment of rent. n435

Public housing tenants, in turn, have been permitted to sue public housing authorities when the housing authorities have overcharged them for utilities, or not provided them with an appropriate allowance for utilities. n436

In *Wright v. Roanoke Redevelopment & Housing Authority*, n437 the United States Supreme Court recognized that public housing tenants have a private right of action to sue housing authorities that overbill them for utility services. n438

FOOTNOTES:
(n1)Footnote 410. *See 24 C.F.R. § 965.503*.

(n2)Footnote 411. *See* United States Department of Housing and Urban Development, *Public Housing Occupancy Guidebook* 136 (2003). This Guidebook states:

> There is no utility allowance or reimbursement with flat rents. Instead, the PHA takes the utility payment into consideration in setting the flat rents. In two otherwise identical properties, the flat rent would be higher for the property with PHA supplied utilities and lower for the property with tenant-paid utilities.

Id. at 136 . *See also 24 C.F.R. § 960.253* (describing how flat rent is determined).

(n3)Footnote 412. *See* United States Department of Housing and Urban Development, *Public Housing Occupancy Guidebook* 171 (2003).

(n4)Footnote 413. *See* United States Department of Housing and Urban Development, *Public Housing Occupancy Guidebook* 171 (2003).

(n5)Footnote 414. *See 24 C.F.R. § 5.632(b)*. *See also 24 C.F.R. § 960.253(c)(3)* ("The income-based tenant rent must not exceed the total tenant payment (§5.628 of this title) for the family minus any applicable utility allowance for tenant-paid utilities."). Section 5.628 is a section that tells how the amount of the rent is determined for a family that elects to pay income-based rent.

(n6)Footnote 415. *See 24 C.F.R. § 960.253(c)(3)*. "Total tenant payment" is the amount of the rent payable by a family paying an income-based rent. It includes minimum rent, if that is applicable. *See 24 C.F.R. § 5.628*.

(n7)Footnote 416. *See 24 C.F.R. § 960.253(c)(3)*.

(n8)Footnote 417. *See 24 C.F.R. §§ 5.632* & *960.253(b)(4)*.

(n9)Footnote 418. A checkmeter is a device that measures the utility usage for an individual dwelling unit. The use of checkmeters is discussed in *Crochet v. Housing Authority of City of Tampa, 37 F.3d 607* (11th Cir. 1994) (per

curiam).

(n10)Footnote 419. *See 24 C.F.R. § 965.501(b)*.

(n11)Footnote 420. *See 24 C.F.R. § 965.506(b)*.

(n12)Footnote 421. *See 24 C.F.R. § 965.506(b)*.

(n13)Footnote 422. *See 24 C.F.R. § 965.502(a)*.

(n14)Footnote 423. *See 24 C.F.R. § 965.506(a)*.

(n15)Footnote 424. *See 24 C.F.R. §§ 965.401 - 407*.

(n16)Footnote 425. *See 24 C.F.R. § 965.405*.

(n17)Footnote 426. *See Crochet v. Housing Authority of City of Tampa, 37 F.3d 607* (11th Cir. 1994) (per curiam).

(n18)Footnote 427. The Brooke Amendment is discussed in § 45.09(a).

(n19)Footnote 428. *See 24 C.F.R. § 965.502(a)*.

(n20)Footnote 429. *See 24 C.F.R. § 965.505(a)*.

(n21)Footnote 430. *See 24 C.F.R. § 965.505(c)*. Special provisions apply to air conditioning. *See 24 C.F.R. § 965.505(e)*.

(n22)Footnote 431. *See 24 C.F.R. § 965.502(c)*.

(n23)Footnote 432. *See 24 C.F.R. § 965.505(b)*.

(n24)Footnote 433. *See 24 C.F.R. § 965.505(e)*.

(n25)Footnote 434. *See Binghamton Housing Authority v. Douglas, 630 NYS2d 144 (App. Div. 1995)* .

(n26)Footnote 435. *See Housing Authority & Urban Redevelopment Agency of City of Atlantic City v. Taylor, 796 A.2d 193 (2002)* (state law permitted designation of attorneys' fees and late charges as "additional rent," but this designation was in conflict with the Brooke Amendment's limit on public housing tenant rent, and the matter was preempted by federal law; however, housing authority could pursue these other charges in a separate proceeding).

(n27)Footnote 436. *See, e.g., Wright v. Roanoke Redevelopment & Housing Authority, 479 U.S. 418 (1987)* ; *Dorsey v. Housing Authority of Baltimore City, 984 F.2d 622* (4th Cir. 1993) (private right of action to challenge allowances); *Brown v. Housing Authority of the City of McRae, Georgia, 802 F.2d 405* (11th Cir. 1986) . This could include an action for violation of the provisions of the lease. *See Nelson v. Greater Gadsden Housing Authority, 802 F.2d 405* (11th Cir. 1986) . *But see Hill v. Ogburn, 812 F.2d 679* (11th Cir. 1987) (no claim against HUD).

(n28)Footnote 437. *479 U.S. 418 (1987)* .

(n29)Footnote 438. *See 479 U.S. at 421* .

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CHAPTER 45 PUBLIC HOUSING

5-45 Thompson on Real Property, Thomas Editions § 45.11

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§ 45.11 Tenant Eviction and Termination of the Tenancy.

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§ 45.11(a) Introduction.

As discussed in another section of this chapter, the public housing lease is rather different from a conventional residential lease. n439 Under the 1937 Act, the lease is required to be for a term of twelve months. And, subject to an exception for tenant non-compliance with congressionally mandated community service requirements, the lease is automatically renewable. n440 Even so, the lease is subject to termination for good cause, provided that the public housing authority follows the appropriate procedures.

Of course, there is still the problem of determining whether a particular justification for lease termination satisfies the good cause standard. Some specifics are set forth in the 1937 Act and related regulations. But many justifications have had to be tested in the courts.

§ 45.11(b) Justifications for Tenant Eviction and Termination of the Tenancy.

The 1937 Act provides that a public housing agency "may not terminate the tenancy except for serious or repeated violation of the terms or conditions of the lease or for other good cause." n441 Obviously, then, the provisions of the lease itself are important to the matter of lease termination. And, as discussed in another section of this chapter, federal legislation and regulations have a considerable amount to say about the content of the lease. n442

But there are also some specific statutory requirements, related to criminal activity, that apply to tenant eviction and termination of the tenancy. One of these, which is subject to some qualifications, mandates that public housing agencies use leases that provide

> that any criminal activity that threatens the health, safety, or right to peaceful enjoyment of the premises by other tenants or any drug-related criminal activity on or off such premises, engaged in by a public housing tenant, any member of the tenant's household, or any guest or other person under the tenant's control, shall be cause for termination of tenancy. n443

The principal qualification involves criminal activity directly relating to domestic violence, dating violence, or stalking, where the victim is the tenant or an immediate member of the tenant's family. n444 In that instance, the criminal conduct is not a cause for lease termination. That is, the victim's lease rights are not to be terminated on account of the criminal conduct of a household member, guest, or other person under the tenant's control.

The qualification is itself subject to qualifications, including one that permits the housing agency to "bifurcate" the lease, or remove a household member from a lease, in order to terminate occupancy rights or assistance payments to a person who engages in criminal acts of violence against family members or others, without penalizing the victim who is also a tenant or lawful occupant. n445 An additional qualification permits termination of the tenancy "of any tenant if the public housing agency can demonstrate an actual and imminent threat to other tenants or those employed at or providing service to the property if that tenant's tenancy is not terminated." n446

Other provisions of the legislation also identify criminally connected grounds for tenancy termination. Thus, the 1937 Act provides that it will be a cause of termination if there is any occupancy that violates a statutory provision relating to ineligibility for public housing by drug users or alcohol abusers. n447 It will also be a cause for termination if false or misleading information is furnished pursuant to a statutory provision relating to the termination of the tenancy of illegal drug users or alcohol abusers. n448

The legislation also states that it shall be cause for "immediate termination" of a tenancy if the tenant is "fleeing to avoid prosecution, or custody or confinement after conviction" for a crime that is a felony, or, "in the case of the State of New Jersey, is a high misdemeanor under the laws of such State." n449 And it is also a cause for "immediate termination" of a tenancy if a tenant "is violating a condition of probation or parole imposed under Federal or State law." n450

HUD regulations include additional information regarding justifications for termination of the tenancy. They set forth, for example, a non-exclusive list of "serious or repeated violation[s] of material terms of the lease" that will justify termination, including failure to make payments due under the lease, failure to fulfill household obligations set forth in HUD regulations, and being over the income limit for the program. n451

The regulations also set out some grounds for termination that will satisfy the "other good cause" provision of the 1937 Act. These include specified criminal activity or alcohol abuse; discovery of facts, subsequent to admission to public housing, that made the tenant ineligible; discovery of material false statements or fraud made by the tenant in connection with the public housing application or in connection with a reexamination of income; the failure of a family member to comply with community service requirements for public housing residents; and the failure to accept the public housing agency's offer of a lease revision that is made in compliance with applicable procedures. n452

One of the specific provisions dealing with termination for criminal activities states that the public housing agency "must immediately terminate the tenancy if the PHA determines that any member of the household has ever been convicted of drug-related criminal activity for manufacture or production of methamphetamine on the premises of federally assisted housing." n453

§ 45.11(c) Procedures for Terminating a Tenancy.

HUD regulations require public housing leases to state the procedures to be followed by the public housing agency and by the tenant in order to terminate the tenancy. n454 But procedural aspects of termination are largely governed by statute and by regulation.

The 1937 Act requires public housing authorities to give adequate written notice of termination. n455 The requirements vary, depending on the circumstances. If the cause of termination is nonpayment of rent, the legislation requires the housing authority to provide 14 days' notice. A more flexible notice period applies, however, if there is a threat to the

health or safety of other tenants, public housing agency employees, or persons residing in the immediate vicinity of the premises. In that case, the notice requirement is for "a reasonable period of time, but not to exceed 30 days." n456 The same timing is required if the termination is in connection with a "drug-related or violent criminal activity or any felony conviction." n457 In all other cases, the notice is to be 30 days, "except that if a State or local law provides for a shorter period of time, such shorter period shall apply." n458

In addition to the requirements on the timing of the notice, the federal legislation requires public housing agencies to use leases that specify that "notwithstanding any State law," a public housing tenant shall be informed "of the opportunity, prior to any hearing or trial, to examine any relevant documents, records, or regulations directly related to the eviction or termination." n459 HUD regulations require the notice to state specific grounds for termination, and to inform the tenant of his or her right to reply. When the housing agency is required to provide the tenant with the opportunity for a grievance hearing, the notice must also inform the tenant of the tenant's right to request such a hearing. n460

The 1937 Act also requires public housing agencies to use leases that permit the public housing to "bifurcate a lease" or remove a household member from a lease, in order to evict, remove, or terminate the occupancy rights of any tenant or lawful occupant who engages in criminal acts of physical violence against family members or others, without evicting, removing, or otherwise penalizing the victim of the violence who is a tenant or a lawful occupant of public housing. n461

Public housing agencies are required to establish and implement an administrative grievance procedure for the benefit of public housing tenants. n462 The legislation regarding the grievance procedure requires, among other things, that public housing tenants be advised of the specific grounds of any proposed adverse action by the public housing agency; have an opportunity for a hearing before an impartial party upon timely request; and be entitled to receive a written decision by the public housing agency with respect to the proposed action. n463 The grievance procedure would, of course, be applicable to the termination of a tenancy. Additional information about grievance procedures is contain in § 45.08(c)(2) of this chapter.

When the public housing agency is required to provide the tenant with an opportunity for a hearing under the grievance procedure, HUD regulations provide that the tenancy may not be terminated until the time for the tenant to request a hearing has expired, or, if the tenant has timely requested a hearing, until the grievance process has been completed. n464 If the housing agency is not required to provide an opportunity for a hearing under the grievance procedure, and the housing agency decides to exclude the matter from the grievance procedure, the notice of lease termination must state that the tenant is not entitled to a grievance hearing, must specify the judicial eviction procedure that will be used, and must state that the Department of Housing and Urban Development has determined that the eviction procedure provides the opportunity for a court hearing that contains the basic elements of due process. n465

HUD regulations also provide that the public housing agency may evict a tenant from a housing unit by bringing a court action or, in a jurisdiction that permits eviction by a "due process" administrative action, by bringing such an action. However, in order to evict a tenant without bringing a court action, the housing agency must afford the tenant the opportunity for a pre-eviction hearing under the housing agency's grievance procedure. n466

§ 45.11(d) Eviction and Tenancy Termination Cases.

Courts have approved the termination of public housing tenancies for, among other things: failing, neglecting, or refusing to provide information about the tenant's income, as required under the lease; n467 being repeatedly late in the payment of rent, n468 failing to ensure that a guest, who engaged in violent criminal acts, did not disturb or endanger others; n469 failing to comply with an agreement to permanently exclude a son from the residence who been dealing drugs on the grounds of the housing project; n470 failing to comply with a stipulation to ensure that an undesirable friend did not visit the tenant's apartment; n471 possessing illegal drugs on the leased premises; n472 having a resident

son whose conduct posed a serious threat to other residents; n473 and making excessive noise. n474

In a Pennsylvania case, an appellate court determined that the housing authority was justified in terminating the tenancy of a public housing tenant who had:

> 1) repeatedly played loud music at all hours of the night; 2) banged on the doors of other residents; 3) caused damage to another resident's door; 4) permitted his nephew to reside with him in excess of fourteen days without written consent from [the housing authority]; 5) allowed his nephew to engage in fighting, arguing, and creating loud noise during his stay; 6) engaged in disruptions requiring police intervention ... ; and 7) left the stove jets and oven pilot running, thereby causing the evacuation of his floor. n475

In a New York case, the court approved eviction of an individual from a public housing unit on the ground that he did not qualify as a "remaining family member" entitled to remain in public housing. He had never received written approval of the housing authority to be considered a permanent member of the then-authorized tenant family. n476

In a number of cases, tenants have been able to avoid eviction for nonpayment of rent. A tenant was able to avoid eviction in one case by showing that an administrative hearing officer, who had been evaluating an eviction claim based on chronic nonpayment of rent, had interrupted her testimony and had precluded her from offering evidence in mitigation. n477 In another case, the tenants were able to show by way of equitable defense, that they lacked the means to pay the rent. n478 A disabled tenant was able to avoid eviction for nonpayment of rent by showing that the amount of the rent claimed to be owing was incorrect. In that case, the housing authority had not reduced the amount of the rent to reflect a decrease in income, in accordance with the requirements of a HUD circular that was binding on the housing authority. n479

Tenants have had success in other cases as well. These include cases in which: the housing authority employed notice of termination forms that did not comply with federal requirements; n480 the tenant, who had been found to have had marijuana in his apartment, showed that the housing authority had waived the breach of the lease by continuing to accept rental payments for seven months after it had learned of the violation; n481 the tenant, who had allegedly assaulted a child with a clothes hanger, showed that the eviction order had been issued on incompetent evidence and without examination of the parties and witnesses as required by applicable law; n482 the housing authority, which had initiated termination proceedings after the tenant's son had been found on the premises in violation of an agreement, did not follow its own procedures in terminating the tenancy; n483 the housing authority did not hold an administrative hearing before bringing a state court eviction action based upon the tenant's alleged assault against the complex manager; n484 the court considered eviction to a shockingly excessive response to the tenant's confrontation with a housing authority representative who had come to inspect her apartment for repairs; n485 and in which the housing authority's decision to terminate the tenancy of a mentally incapacitated tenant was based upon unfounded conclusions and was reached after a hearing that did not provide adequate due process protections for the incapacitated tenant. n486

§ 45.11(e) Illegal Drugs, the "One-Strike" Rule, and Tenant Eviction.

Although other sections of this chapter reference public housing issues related to illegal drugs, there is more that ought to be included on the subject, especially in this section on eviction and tenancy termination. There have been some significant drug-related legal developments relating to eviction from public housing.

One author described the background here as follows:

> The increased use and sale of controlled substances in public housing developments has dramatically worsened the lives of tenants. In addition to lives destroyed by addiction, drugs are responsible for much of the violent crime that victimizes tenants. Battles between rival suppliers of drugs claim innocent

> victims and cause residents to fear leaving their apartments. In addition, the need for money to purchase drugs has led to increased levels of robberies and burglaries. n487

Congress responded to drug-related problems in public housing by including provisions relating to public housing in the Anti-Drug Abuse Act of 1988. n488 Among the findings set forth in the legislation were the following:

> (1) the Federal Government has a duty to provide public and other federally assisted low-income housing that is decent, safe, and free from illegal drugs;
>
> (2) public and other federally assisted low-income housing in many areas suffers from rampant drug-related or violent crime;
>
> (3) drug dealers are increasingly imposing a reign of terror on public and other federally assisted low-income housing tenants;
>
> (4) the increase in drug-related and violent crime not only leads to murders, muggings, and other forms of violence against tenants, but also to a deterioration of the physical environment that requires substantial government expenditures. n489

The legislation, which has been amended since its initial adoption, provides, among other things, that public housing agencies must include in their leases a clause providing that "any drug-related criminal activity on or off such premises, engaged in by a public housing tenant, any member of the tenant's household, or any guest or other person under the tenant's control, shall be cause for termination of tenancy." n490

Concerns over drug problems also came into focus during President Bill Clinton's State of the Union Message on January 23, 1996. On that occasion, the President said: "I challenge local housing authorities and tenant associations: Criminal gang members and drug dealers are destroying the lives of tenants. From now on, the rule for residents who commit crime and peddle drugs should be one strike and you're out." n491 HUD itself referred to its program for implementing the legislation as a "one-strike policy." n492

One of the important issues presented by the legislation was whether a public housing tenant has to have knowledge of the illegal activity in order to be evicted. Some courts interpreted the provision, and provisions in analogous statutes, as requiring that tenants have some knowledge of the prohibited activities, but other courts had taken the opposite view. n493

The legislation and HUD's implementing regulations were challenged in *Department of Housing and Urban Development v. Rucker*. n494 There, some tenants of the Oakland Housing Authority became subject to eviction proceedings for allegedly violating lease provisions that obligated them to assure that neither they, any member of their households, nor any guest or other person under their control would engage in any drug-related criminal activity on or near the premises. The housing authority claimed, in the eviction proceedings, that the grandsons of two tenants had been caught smoking marijuana in the apartment complex parking lot, that the daughter of a tenant had been found with cocaine and a crack cocaine pipe three blocks from the tenant's apartment, and that, on three instances, a care-giver and two other individuals had been found with cocaine in the apartment of a tenant. The affected tenants responded to the eviction proceedings by filing suit in federal district court against the housing authority, its director, and the Department of Housing and Urban Development. The federal district court entered an order enjoining the evictions, and the Ninth Circuit affirmed.

Before the United States Supreme Court, HUD and the other defendants argued that the federal legislation required "lease terms that allow a local public housing authority to evict a tenant when a member of the tenant's household or a guest engages in drug-related criminal activity, regardless of whether the tenant knew, or had reason to know, of that

activity." n495 The tenants challenged HUD's interpretation of the statute, arguing that the legislation did not require lease terms authorizing the eviction of "innocent" tenants, and, that, if it did, the statute was unconstitutional.

The Supreme Court reversed the Ninth Circuit, and held that "*42 U.S.C. § 1437d(l)(6)* unambiguously requires lease terms that vest local public housing authorities with the discretion to evict tenants for the drug-related activity of household members and guests whether or not the tenant knew, or should have known, about the activity." n496

The Court noted that,"[r]egardless of knowledge, a tenant who 'cannot control drug crime, or other criminal activities by a household member which threaten health or safety of other residents, is a threat to other residents and the project.'" n497 However, the Court also observed that the legislation did not *require* the eviction of a tenant who violates the lease provision; "[i]nstead, it entrusts that decision to the local public housing authorities, who are in the best position to take account of, among other things, the degree to which the housing project suffers from 'rampant drug-related or violent crime,' 'the seriousness of the offending action,' and 'the extent to which the leaseholder has ... taken all reasonable steps to prevent or mitigate the offending action.'" n498

The Ninth Circuit had been persuaded that HUD's interpretation of the legislation presented "serious questions under the *Due Process Clause of the Fourteenth Amendment*," because that interpretation permitted "tenants to be deprived of their property interest without any relationship to individual wrongdoing." n499 But the Supreme Court concluded that this was not a case in which the government was "attempting to criminally punish or civilly regulate respondents as members of the general populace. It is instead acting as a landlord of property that it owns, invoking a clause in a lease to which respondents have agreed and which Congress has expressly required." n500

The Court acknowledged that the tenants did have a property interest in their tenancies. But it noted that if the tenants were to be deprived of that interest, the deprivation would occur in the state court where the eviction proceedings had been brought, and there was no indication that those proceedings were procedurally deficient.

As indicated in the *Rucker* opinion, HUD regulations do not provide for automatic eviction of tenants, even when there are proper grounds for terminating the tenancy. The public housing authority has discretion whether to evict. According to the applicable regulation:

> [T]he PHA may consider all circumstances relevant to a particular case such as the seriousness of the offending action, the extent of participation by the leaseholder in the offending action, the effects that the eviction would have on family members not involved in the offending activity and the extent to which the leaseholder has shown personal responsibility and has taken all reasonable steps to prevent or mitigate the offending action. n501

At the same time, housing authorities are evaluated by HUD based on a number of criteria, including whether they implement effective eviction policies and other anti-crime strategies. n502 Thus, there is some incentive on the part of the housing authority to undertake evictions.

FOOTNOTES:

(n1)Footnote 439. See § 45.08(d) of this chapter.

(n2)Footnote 440. *See 42 U.S.C. § 1437d(l)*.

(n3)Footnote 441. *See 42 U.S.C. § 1437d(l)(5)*. The statute provides, however,

> that an incident or incidents of actual or threatened domestic violence, dating violence, or stalking will not be construed as a serious or repeated violation of the lease by the victim or threatened victim of that violence and will not be good cause for terminating the tenancy or occupancy rights of the victim of such violence.

Id.

(n4)Footnote 442. See § 45.08(c) of this chapter.

(n5)Footnote 443. *See 42 U.S.C. § 1437d(l)(6)*. The term "drug-related criminal activity" refers to "the illegal manufacture, sale, distribution, use, or possession with intent to manufacture, sell, distribute, or use, of a controlled substance (as defined in section 802 of Title 21)." The quote is found at the end of *42 U.S.C. § 1437d(l)*.

(n6)Footnote 444. *See 42 U.S.C. § 1437d(l)(6)*. There are additional provisions giving protection to the victims of domestic violence, dating violence, or stalking. *See 42 U.S.C. § 1437d(l)(5)* & *(6)*.

(n7)Footnote 445. *See 42 U.S.C. § 1437d(l)(6)*.

(n8)Footnote 446. *See 42 U.S.C. § 1437d(l)(6)*.

(n9)Footnote 447. *See 42 U.S.C. § 1437d(l)(7)*. The statutory provision in question is *42 U.S.C. § 13661(b)*. It provides, in part:

Notwithstanding any other provision of law, a public housing agency or an owner of federally assisted housing, as determined by the Secretary, shall establish standards that prohibit admission to the program or admission to federally assisted housing for any household with a member-

(A) who the public housing agency or owner determines is illegally using a controlled substance; or

(B) with respect to whom the public housing agency or owner determines that it has reasonable cause to believe that such household member's illegal use (or pattern of illegal use) of a controlled substance, or abuse (or pattern of abuse) of alcohol, may interfere with the health, safety, or right to peaceful enjoyment of the premises by other residents.

The housing authority is permitted to consider evidence of rehabilitation. *See id.*

(n10)Footnote 448. *See 42 U.S.C. § 1437d(l)(7)*. The statutory provision in question is *42 U.S.C. § 13662*. It provides, in part:

Notwithstanding any other provision of law, a public housing agency or an owner of federally assisted housing (as applicable), shall establish standards or lease provisions for continued assistance or occupancy in federally assisted housing that allow the agency or owner (as applicable) to terminate the tenancy or assistance for any household with a member--

(1) who the public housing agency or owner determines is illegally using a controlled substance; or

(2) whose illegal use (or pattern of illegal use) of a controlled substance, or whose abuse (or pattern of abuse) of alcohol, is determined by the public housing agency or owner to interfere with the health, safety, or right to peaceful enjoyment of the premises by other residents.

The statute also includes provisions allowing the housing agency to consider evidence of rehabilitation. *See id.* It appears that the false or misleading information that is relevant to lease termination could relate either to information about the drug or alcohol abuse or the rehabilitation.

(n11)Footnote 449. *See 42 U.S.C. § 1437d(l)(9)*.

(n12)Footnote 450. *See 42 U.S.C. § 1437d(l)(9)*.

(n13)Footnote 451. *See 24 C.F.R. § 966.4(l)(2)*.

(n14)Footnote 452. *See 24 C.F.R. § 966.4(l)(2)(iii)*.

(n15)Footnote 453. *See 24 C.F.R. § 966.4(l)(5)(A)*.

(n16)Footnote 454. *See 24 C.F.R. § 966.4(l)(1)*.

(n17)Footnote 455. *See 42 U.S.C. § 1437d(l)(4)*.

(n18)Footnote 456. *See 42 U.S.C. § 1437d(l)(4)*.

(n19)Footnote 457. *See 42 U.S.C. § 1437d(l)(4)*.

(n20)Footnote 458. *See 42 U.S.C. § 1437d(l)(4)*.

(n21)Footnote 459. *See 42 U.S.C. § 1437d(l)(7)*.

(n22)Footnote 460. *See 24 C.F.R. § 966.4(l)(3)*.

(n23)Footnote 461. *See 42 U.S.C. § 1437d(l)(6)*.

(n24)Footnote 462. See § 45.08(c)(2) of this chapter.

(n25)Footnote 463. *See 42 U.S.C. § 1437d(k)*.

(n26)Footnote 464. *See 24 C.F.R. § 966.4(l)(3)(iv)*.

(n27)Footnote 465. *See 24 C.F.R. § 966.4(l)(3)(v)*.

(n28)Footnote 466. *See 24 C.F.R. § 966.4(l)(4)*.

(n29)Footnote 467. *See Newton v. Municipal Housing Authority for City of Yonkers, 342 N.E.2d 491 (N.Y. 1976)* .

(n30)Footnote 468. *See Baker v. Housing Authority of City of Waynesboro, 601 S.E.2d 350 (Ga. Ct. App. 2004)* .

(n31)Footnote 469. *See Chavez v. Housing Authority of City of El Paso, 973 F.2d 1245* (5th Cir. 1992) . In this case, the guest happened to be the tenant's son, but he was a guest all the same.

(n32)Footnote 470. *See Jimenez v. Popolizio, 180 A.D.2d 590, 580 N.Y.S.2d 302 (App. Div. 1992)* ; *Wooten v. Finkle, 728 N.Y.S.2d 152 (App. Div. 2001)* .

(n33)Footnote 471. *See Sanchez v. Martinez, 740 N.Y.S.2d 314 (App. Div. 2002)* .

(n34)Footnote 472. *See City of Phoenix v. Bellamy, 736 P.2d 1175* (Ariz. App. 1987; *see also Boston Housing Authority v. Guirola, 575 N.E.2d 1100 (Mass. 1991)* (the drugs were apparently kept there by an "occupant" of the

premises rather than by the tenant).

(n35)Footnote 473. *See Featherstone v. Franco, 720 N.Y.S.2d 93 (N.Y. 2000)* . The tenant had been given the option to exclude her son from the dwelling unit, as a "mitigated sanction," but she had declined to do so.

(n36)Footnote 474. *See Andover Housing Authority v. Shkolnik, 820 N.E.2d 815 (Mass. 2005)* . This was state-assisted public housing. The court rejected a claim that the housing authority had an obligation to accommodate the medical condition of one of the elderly tenants by providing acoustical carpeting and a sound-absorbing drop-down ceiling.

(n37)Footnote 475. *Allegheny County Housing Authority v. Johnson, 908 A.2d 336, 342-43 (Pa. Super. 2006)* (footnote omitted) (there was also other misconduct involving the nephew).

(n38)Footnote 476. *See Powell v. Franco, 714 N.Y.S.2d 77 (App. Div. 2000) . See also McFarlane v. New York City Housing Authority, 780 N.Y.S.2d 135 (App. Div. 2004)* (Grandchildren of deceased public housing tenants claimed entitlement to their grandparents' dwelling unit, but the grandparents had never requested that the housing authority permit the grandchildren to be recognized as family members for purposes of occupancy under their lease; the court concluded that application of *24 C.F.R. § 966.4(a)(1)(v)*, requiring a request to approve the addition of a family member as an occupant of the unit, "precluded the Housing Authority from permitting petitioners to be treated as additions to the tenant families in the absence of any such request.").

(n39)Footnote 477. *See Robertson v. Popolizio, 579 N.Y.S.2d 153 (App. Div. 1992)* .

(n40)Footnote 478. *See City of Albuquerque v. Brooks, 844 P.2d 822 (N.M. 1992) . See also Maxton Housing Authority v. McLean, 328 S.E.2d 290 (N.C.1985)* (tenant occupying public housing rebutted presumption that good cause existed to terminate lease by proving lack of fault on tenant's part in nonpayment of rent); *but see Charlotte Housing Authority v. Patterson, 464 S.E.2d 68 (N.C. App. 1995)* (noting that the North Carolina legislature had, subsequent to the *Maxton* case, provided for termination of public housing lease for nonpayment of rent whether or not tenant was at fault).

(n41)Footnote 479. *See Housing Authority of City of Passaic v. Torres, 362 A.2d 1254 (N.J. Super. 1976)* .

(n42)Footnote 480. *See Staten v. Housing Authority of City of Pittsburgh, 469 F. Supp. 1013 (W.D. Pa. 1979) , but cf., Ferguson v. Housing Authority of Middlesboro, 499 F. Supp. 334,* (E.D. Ky. 1980) (Similar notice procedure found to be acceptable).

(n43)Footnote 481. *See Cuyahoga Metropolitan Housing Authority v. Hairston, 790 N.E.2d 828 (Cleveland Mun. Ct. 2003)* .

(n44)Footnote 482. *See Housing Authority of City of Pasco and Franklin County v. Pleasant 109 P.3d 422 (Wash. Ct. App. 2005)* .

(n45)Footnote 483. *See Robinson v. Finkel, 748 N.Y.S.2d 448 (Sup. Ct. 2002)* .

(n46)Footnote 484. *See Housing Authority of the County of Salt Lake v. Snyder, 44 P. 3d 724 (Utah 2002)* .

(n47)Footnote 485. *See Peoples v. New York City Housing Authority, 723 N.Y.S.2d 6 (App. Div. 2001)* .

(n48)Footnote 486. *See Padilla v. Martinez, 752 N.Y.S.2d 28 (App. Div. 2002)* .

(n49)Footnote 487. Michael H. Schill, Distressed Public Housing: Where Do We Go From Here? *60 U. Chi. L.*

Rev. 497, 543 (1993) (footnotes omitted).

(n50)Footnote 488. Pub. L. No. 100-690 §§ 5121 *et seq., 102 Stat. 4181, 4301 (1988),* codified at *42 U.S.C. § 11901, et seq.*

(n51)Footnote 489. *42 U.S.C. § 11901*.

(n52)Footnote 490. *See 42 U.S.C. § 1437d(l)(6)*; *see also 42 U.S.C. § 13662*.

(n53)Footnote 491. President Bill Clinton, State of the Union, January 23, 1996, quoted in Directive Number: 96-16, U.S. Department of Housing and Urban Development, Office of Public and Indian Housing, "One Strike and You're Out" Screening and Eviction Guidelines for Public Housing Authorities (Has) (April 112, 1996). This publication may be viewed at http://www.hudclips.org/sub_nonhud/cgi/nph-brs.cgi?d=PIHA&s1=@docn&l=100&SECT1=TXTHLB&SECT5=HEHB&u=./hudclips.c

(n54)Footnote 492. *See* the HUD directive referenced in the immediately-preceding footnote.

(n55)Footnote 493. Cases requiring the tenant to know or have reason to know of the misconduct include *Rucker v. Davis, 237 F.3d 1113* (9th Cir. 2001) , *rev'd, Department of Housing and Urban Development v. Rucker, 535 U.S. 125 (2002)* ; *Charlotte Housing Authority v. Patterson, 464 S.E.2d 68 (N.C. Ct. App. 1995)* ; and *Housing Opportunities Commission of Montgomery County v. Lacey, 585 A.2d 219 (Md. 1991)* . Cases taking the opposite view include *City of South San Francisco Housing Authority v. Guillory, 49 Cal. Rptr. 2d 367 (Cal. Ct. App. 1995)* and *Minneapolis Public Housing Authority v. Lor, 591 N.W.2d 700 (Minn.1999)* . *See generally* Charles E. Daye, et al., Housing and Community Development 386-390 (3d ed. 1999); Michael H. Schill, Distressed Public Housing: Where Do We Go From Here? *60 U. Chi. L. Rev. 497, 544 (1993).*

(n56)Footnote 494. *535 U.S. 125 (2002)* . The *Rucker* case and the "one-strike" policy have been the focus of considerable commentary, much of it negative. *See, e.g*, Regina Austin, "Step on a Crack, Break Your Mother's Back": Poor Moms, Myths of Authority, and Drug-Related Evictions from Public Housing, 14 Yale Journal of Law and Feminism 273 (2002); Amy R. Bowser, "One Strike and You're Out - or Are You?: Rucker's Influence on Future Eviction Proceedings for Section 8 and Public Housing," *108 Penn St. L. Rev. 611 (2003);* Castle, Caroline, You Call That A Strike? A Post-*Rucker* Examination of Eviction From Public Housing Due to Drug-Related Criminal Activity of a Third Party, *37 Ga. L. Rev. 1435 (2003);* Corinne A. Carey, No Second Chance: People with Criminal Records Denied Access to Public Housing, *36 U. Tol. L. Rev. 545 (2005);* Paul Stinson, Restoring Justice: How Congress Can Amend the One-Strike Laws in Federally-Subsidized Public Housing to Ensure Due Process, Avoid Inequity, and Combat Crime, 11 Geo. J. Pov. L. & Pol'y 435 (2004).

(n57)Footnote 495. *See 535 U.S. at 127-28* .

(n58)Footnote 496. *See 535 U.S. at 130* .

(n59)Footnote 497. *See 535 U.S. at 134* (citing *56 Fed. Reg., at 51567).*

(n60)Footnote 498. *See 535 U.S. at 134* (citations omitted from quotation; the Court cited *42 U.S.C. § 11901(2) (1994 ed. and Supp. V)*).

(n61)Footnote 499. *See 535 U.S. at 135* .

(n62)Footnote 500. *See 535 U.S. at 135* .

(n63)Footnote 501. *See 24 C.F.R. § 966.4(l)(5)(vii)(B)*.

(n64)Footnote 502. *See 42 U.S.C. 1437d(j)(1)(I)*; *24 C.F.R. § 902.43(a)(5)(i)*. *See also* Note, You Call That A

Strike? A Post-*Rucker* Examination of Eviction From Public Housing Due to Drug-Related Criminal Activity of a Third Party, *37 Ga. L. Rev. 1435, 1454* (2002-2003).

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CHAPTER 45 PUBLIC HOUSING

5-45 Thompson on Real Property, Thomas Editions § 45.12

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§ 45.12 Restricting Individuals from Visiting Public Housing Projects.

[Go To Supp]

§ 45.12(a) Introduction.

In order to combat crime in public housing developments, some housing authorities have implemented procedures to restrict unwanted individuals from visiting housing projects. These approaches have sometimes been found to be in violation of applicable law.

§ 45.12(b) Prior Approval Requirements.

One approach has been to require tenants to obtain prior approval from the housing authority before inviting guests onto the premises. This approach has received a chilly reception in some court decisions.

For example, in *McKenna v. Peekskill Housing Authority*, n503 the Second Circuit Court of Appeals was of the view a prior permission policy violated tenant rights of privacy and freedom of association. The court acknowledged that housing authorities have a legitimate interest in maintaining the safety of public housing, but it was of the opinion that they could satisfy that interest using less intrusive means.

In *Lancor v. Lebanon Housing Authority*, n504 the First Circuit held that a tenant was entitled to a preliminary injunction against the housing authority's practice of requiring advance written permission in order to have overnight guests. The practice was supported by language in the lease, but the court was not persuaded that the practice was "necessary and reasonable" within the meaning of a HUD regulation requiring the tenant to abide by necessary and reasonable regulations promulgated by public housing agency. The court also observed that the policy appeared to violate HUD regulations requiring housing agencies to allow for reasonable accommodation of guests.

It should be noted, in this context, that current HUD regulations require public housing leases to provide that the tenant "shall have the right to exclusive use and occupancy of the leased unit by the members of the household authorized to reside in the unit in accordance with the lease, including reasonable accommodation of their guests." n505

§ 45.12(c) No-Trespass Policies.

In another approach to the problem, some housing authorities developed lists of individuals who were prohibited from entering the premises, notified the individuals that they were prohibited from entry, and brought trespassing charges against violators. n506 Provisions permitting the practice typically have been incorporated into a lease or the rules of the housing authority. n507 Housing authorities have used different standards to determine who should be added to the list. n508 There are some indications that the use of no-trespass lists has tended to reduce crime rates. n509

Legal issues regarding no-trespass policies have been considered in several cases, with mixed results. For example, in *Thompson v. Ashe*, n510 a person (Thompson) who had been arrested for trespass after he had been included on the housing authority's "no trespass list," brought a putative class action under § 1983 challenging the no trespass program on several grounds. The trial court granted summary judgment to the defendants, and denied the motion to certify the class. The United States Sixth Circuit affirmed. The court held that Thompson had not shown that he had been invited to the premises, and therefore he lacked standing to claim that the Tennessee criminal trespass statute did not apply to arrests of invited guests. Similarly, the court was of the view that Thompson lacked standing to claim that the policy violated the right of a tenant to entertain guests in their homes. He had not been invited to be a guest in anyone's home.

Thompson also contended that the no-trespass policy infringed his *Fourteenth Amendment* rights to "freedom of movement" and intimate association. The Sixth Circuit concluded that the freedom of movement claim was without merit. It said that to the extent the argument was based on the "right to travel," that right "is essentially a right of interstate travel." n511 The no trespass policy did not restrict Thompson's travel to other states; it only restricted his ability to be present on housing authority premises in Knoxville, Tennessee.

The court considered Thompson's intimate association claim under the substantive due process component of the *Fourteenth Amendment*. It noted that the Supreme Court "has recognized that the freedom to enter into and carry on certain intimate or private relationships is a fundamental element of liberty protected by the *Bill of Rights*." n512 But it also noted that the Supreme Court has not extended constitutional protection to "mere visitation with family members." n513 The Sixth Circuit said that "Thompson lives separately from his family members and there is no indication in the record that during the years he has been on the no-trespass list he has ever lived, or intended to live with any of them in [housing authority] properties." n514 It concluded that Thompson had no fundamental right to visit his family members on the housing authority's property. Applying a rational basis level of scrutiny, the court said that banning individuals with criminal histories from entering onto housing authority property reasonably advances the legitimate goal of crime prevention in public housing. Accordingly, the court rejected the substantive due process claim.

Thompson also claimed that procedural defects in the administration of the no-trespass program violated his *Fourteenth Amendment* right to procedural due process. The Sixth Circuit noted, in this connection, that individuals are entitled to notice and a hearing if the government deprives them of an interest in liberty or property. But it did not find that Thompson had a liberty interest that was entitled to such protection. Thompson claimed an interest in visiting public housing residents "in the absence of any showing that his visits are welcome, and in the absence of any showing that his ability to visit with these individuals will be substantially limited if he cannot visit them in that particular place." n515 This interest was not sufficient to require procedural due process protection.

In *City of Bremerton v. Widell*, n516 the Washington Supreme Court considered some challenges to a housing authority's anti-trespassing policy that arose in connection with the prosecution of two defendants for criminal trespass. The policy provided that any non-resident would be directed to leave and would be barred from returning to any city housing authority common areas if the nonresident were found to be engaging in specified criminal and offensive conduct, including the making of "unreasonable noise" and "fighting." Initially, the court observed that the defendants should not have been convicted of trespassing for times when they were present on the premises in response to the invitation of a resident. But in several instances the evidence was sufficient to support a conclusion that they were not present with permission. The defendants also claimed that the policy unconstitutionally infringed upon their rights of "intimate association," because they were on the premises to visit with their fiances. However, the court concluded that

"an engaged couple who is not cohabitating is not entitled to constitutional protection" under the intimate association concept. n517 The defendants also contended that the policy was overbroad and void for vagueness. But the court concluded that no *First Amendment* considerations were presented on the facts, and it rejected the argument.

Another perspective on no-trespass policies is provided by *Diggs v. Housing Authority of City of Frederick.* n518 There, some residents and some guests of residents of properties owned by a city housing authority brought a §1983 action against the housing authority, alleging, among other things, that the housing authority's trespass policy violated residents' rights under the United States Housing Act and under the United States Constitution. Under the policy, local police officers, or private security guards, were authorized to issue citations to non-residents who loitered in the public housing "community." They were also warned that they would be arrested and charged with criminal trespass if they returned. The housing authority maintained a "trespass log" of individuals who had been issued citations.

The plaintiffs claimed that the no-trespass policy violated the United States Housing Act's statutory mandate that public housing leases not contain any "unreasonable terms and conditions," n519 and HUD's implementing regulation requiring that public housing leases "shall" provide for "reasonable accommodation" of tenants' guests. n520 The federal district court found that the policy, as enforced, was "a virtually permanent bar to a tenant's right to invite a guest into her own home, no matter how close a friend or relative that potential guest might be." n521 It also noted that tenants had been told that they would face eviction if they invited persons known to be on the trespass log into their homes. The court said that the harms caused by the policy were substantial; at the same time there was no evidence that the trespass policy was the only, or most effective, drug- and crime-fighting measure available to local authorities. The court concluded that the plaintiffs had shown a sufficient likelihood of success on the merits that they were entitled to a preliminary injunction against the housing authority's continuation of the no-trespass policy.

An issue regarding no-trespass policies also came before the United States Supreme Court, in *Virginia v. Hicks.* n522 In 1991, Kevin Hicks was arrested for trespassing on the sidewalk of the Witcomb Court public housing project in Richmond, Virginia. The area was described in court papers as "open-air drug market." n523 In an effort to combat crime and drug dealing by nonresidents, the housing authority had adopted a policy authorizing the Richmond police to serve notice on any person lacking "a legitimate business or social purpose" for being on the premises and to arrest for trespassing any person who remains or returns after having been so notified. n524 Hicks, a nonresident of the housing project, had been arrested twice before for trespassing at the housing project and one other time for damaging property there. He had also been the recipient of a notice that had been hand-delivered by a Witcomb Court manager that stated:

> This letter serves to inform you that effective immediately you are not welcome on Richmond Redevelopment and Housing Authority's Whitcomb Court or any Richmond Redevelopment and Housing Authority property. This letter is an official notice informing you that you are not to trespass on RRHA property. If you are seen or caught on the premises, you will be subject to arrest by the police. n525

After receiving this notice, Hicks came onto the premises again, and was arrested and convicted of trespass. He told the arresting officer that he was there to "to bring pampers for his baby." n526

At trial, Hicks maintained that the housing authority's policy limiting access to Whitcomb Court was unconstitutionally overbroad and was void for vagueness. He was convicted, but the Virginia Supreme Court vacated the conviction, concluding that the policy was unconstitutionally overbroad. While it acknowledged that the policy was "designed to punish activities that are not protected by the *First Amendment*," the court held that "the policy also prohibits speech and conduct that are clearly protected by the *First Amendment*." n527 It also said that the policy gave the project manager unreviewable authority to determine what constituted a "legitimate business or social purpose," and allowed the manager to "prohibit speech that she finds personally distasteful or offensive even though such speech may be protected by the *First Amendment*." n528

The United States Supreme Court granted certiorari to consider the overbreadth issue. It reversed, holding that the trespass policy did not represent an overbroad speech restriction under the appropriate constitutional standard. It observed:

> As for the written provision authorizing the police to arrest those who return to Whitcomb Court after receiving a barment notice: That certainly does not violate the *First Amendment* as applied to persons whose postnotice entry is not for the purpose of engaging in constitutionally protected speech. And Hicks has not even established that it would violate the *First Amendment* as applied to persons whose postnotice entry is for that purpose. Even assuming the streets of Whitcomb Court are a public forum, the notice-barment rule subjects to arrest those who reenter after trespassing and after being warned not to return - regardless of whether, upon their return, they seek to engage in speech. Neither the basis for the barment sanction (the prior trespass) nor its purpose (preventing future trespasses) has anything to do with the *First Amendment*. Punishing its violation by a person who wishes to engage in free speech no more implicates the *First Amendment* than would the punishment of a person who has (pursuant to lawful regulation) been banned from a public park after vandalizing it, and who ignores the ban in order to take part in a political demonstration. Here, as there, it is Hicks' nonexpressive conduct - his entry in violation of the notice-barment rule - not his speech, for which he is punished as a trespasser. n529

The Court also concluded that Hicks had not shown that the policy prohibited a substantial amount of protected speech in relation to its many legitimate applications. n530

More recently, the Fifth Circuit largely rejected *First Amendment*-based challenges to some earlier and amended trespassing policies of an El Paso housing authority. n531 The litigation had its inception in the claims of a political candidate, who was not a public housing resident, that the policies of the housing authority unconstitutionally infringed upon his ability to distribute political literature and to campaign door-to-door at a public housing facility, and the claims of a resident that the policies infringed upon his *First Amendment* rights. The court concluded that public housing was not a public forum and that content-neutral and viewpoint-neutral restrictions applicable to visitors were permissible. However, the court remanded for a determination whether one of the earlier policies had been used in a manner that discriminated on the basis of viewpoint.

§ 45.12(d) Stipulations Restricting Visits By Non-Desirable Family Members.

In several cases, tenants have been faced with eviction for violating the terms of stipulations prohibiting visits by family members who had engaged in illegal conduct on housing authority property. n532 Such stipulations have been used, on at least some occasions, as an alternative to immediate eviction of a tenant in cases in which a member of the tenant's family had engaged in criminal conduct on the premises.

In some instances, courts have upheld the eviction of tenants for violating the stipulations, n533 while, in other cases, that remedy has been adjudged to be too harsh. n534 In *Romero v. Martinez*, n535 a New York appellate court generally upheld the enforcement of such stipulations, but it acknowledged that, in some circumstances, strict enforcement could be unfair. It stated: "Accordingly, although it may be unfair to construe such an exclusion agreement as violated by a visit which occurred without the tenant's knowledge, there is no practical or policy-based reason why the tenant should not be bound by the visitation exclusion under appropriate circumstances." n536

In another New York case, a tenant's refusal to enter into a stipulation to exclude her teenage son from her dwelling unit, where the son represented a serious threat to the safety of other public housing tenants, resulted in the tenant's eviction from public housing. n537

FOOTNOTES:

(n1)Footnote 503. *647 F.2d 332 (2d Cir. 1981)* .

(n2)Footnote 504. *760 F.2d 361* (1st Cir. 1985) .

(n3)Footnote 505. *See 24 C.F.R. § 966.4(d)(1).*

(n4)Footnote 506. *See* Note, Gregory A. Beck, Ban Lists: Can Public Housing Authorities Have Unwanted Visitors Arrested? *2004 U. Ill. L. Rev. 1223, 1225-26, 1234-35.* The lists go by different names, including "ban lists," "no-trespass lists," and "barment notices." *Id. at 1225-26.*

(n5)Footnote 507. *See, e.g., Williams v. Nagel, 643 N.E.2d 816 (Ill. 1994)* .

(n6)Footnote 508. *See, e.g., City of Bremerton v. Widell, 51 P.3d 733 (Wash. 2002)* (eleven grounds for being barred from the property); *Diggs v. Housing Authority, 676 F. Supp. 2d 522 (D. Md. 1999)* (notices issued to non-residents who are on the property for no apparent reason); *See also State v. Blair, 827 P.2d 356 (Wash. Ct. App. 1992)* (housing authority entered into agreement with police department authorizing the police to warn and arrest anyone trespassing on the premises; the agreement allowed a police officer to "admonish" any person believed to have engaged in illegal activity, or who was arrested on the premises, not to return or he or she would be arrested for trespassing; the court said that the policy of excluding those engaging in illegal activities on the premises serves to further the legislative mandate of providing decent, safe, and sanitary dwellings for low-income individuals).

(n7)Footnote 509. *See* Gregory A. Beck, Ban Lists: Can Public Housing Authorities Have Unwanted Visitors Arrested? *2004 U. Ill. L. Rev. 1223, 1239-40.*

(n8)Footnote 510. *250 F.3d 399* (6th Cir. 2001) .

(n9)Footnote 511. *See 250 F.3d at 406* . The court cited *Saenz v. Roe, 526 U.S. 489 (1999)* .

(n10)Footnote 512. *See 250 F.3d at 406* .

(n11)Footnote 513. *See 250 F.3d. at 407* .

(n12)Footnote 514. *See 250 F.3d. at 407* .

(n13)Footnote 515. *See 250 F.3d. at 408* .

(n14)Footnote 516. *51 P.3d 733 (Wash. 2002)* .

(n15)Footnote 517. *See 51 P.3d at 577.*

(n16)Footnote 518. *67 F. Supp. 2d 522 (D. Md. 1999)* .

(n17)Footnote 519. *See 42 U.S.C. § 1437d(1)(2).*

(n18)Footnote 520. *See 24 C.F.R. § 966.4(d)(1).*

(n19)Footnote 521. *See 67 F. Supp. 2d at 533* .

(n20)Footnote 522. *539 U.S. 113 (2003)* .

(n21)Footnote 523. *See Commonwealth v. Hicks, 563 S.E.2d 674, 676 (Va. 2002)* .

(n22)Footnote 524. *See 539 U.S. at 113* .

(n23)Footnote 525. *See Commonwealth v. Hicks, 563 S.E.2d 674, 677 (Va. 2002)* .

(n24)Footnote 526. *See Hicks v. Commonwealth, 535 S.E.2d at 680.*

(n25)Footnote 527. *See Commonwealth v. Hicks, 563 S.E.2d 674, 680 (2002)* .

(n26)Footnote 528. *563 S.E.2d at 680-81* .

(n27)Footnote 529. *539 U.S. at 123* .

(n28)Footnote 530. *See 539 U.S. at 124* . The Court did not consider whether the application of the policy interfered with the freedom of association. *See* Gregory A. Beck, Ban Lists: Can Public Housing Authorities Have Unwanted Visitors Arrested? *2004 U. Ill. L. Rev. 1223, 1257* (arguing that the freedom of intimate association is implicated by ban list policies).

(n29)Footnote 531. *See de la O v. Housing Authority of City of El Paso, Texas, 417 F.3d 495* (5th Cir. 2005) .

(n30)Footnote 532. *See, e.g., Wooten v. Finkle, 728 N.Y.S.2d 152 (App. Div. 2001)* ; *Romero v. Martinez, 721 N.Y.S. 2d 17 (App. Div. 2001)* ; *Jimenez v. Popolizio, 180 A.D.2d 590, 580 N.Y.S.2d 302 (App. Div. 1992)* .

(n31)Footnote 533. *See, e.g., Wooten v. Finkle, 728 N.Y.S.2d 152 (App. Div. 2001)* .

(n32)Footnote 534. *See e.g., Holiday v. Franco, 709 N.Y.S.2d 523 (App. Div. 2000)* .

(n33)Footnote 535. *721 N.Y.S.2d 17 (App. Div. 2001)* .

(n34)Footnote 536. *See 721 N.Y.S.2d at 20* .

(n35)Footnote 537. *See Featherstone v. Franco. 720 N.Y.S.2d 93 (App. Div. 2000)* .

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CHAPTER 45 PUBLIC HOUSING

5-45 Thompson on Real Property, Thomas Editions § 45.13

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§ 45.13 Sweeps.

In order to combat drug and crime problems in public housing, some housing authorities have conducted what have been called "sweeps." These are door-to-door searches for drugs, weapons, and squatters. One writer described them in this way:

> During sweeps, inspectors, lawyers, police, security guards, and construction workers would converge on a single project unannounced. Every apartment would then be searched for drugs, weapons, and squatters. Identification was issued to tenants and new security systems were installed. n538

The constitutionality of sweeps was considered by a federal district court in *Pratt v. Chicago Housing Authority*, n539 There, several tenants who objected to sweeps conducted by their housing authority, sued for declaratory and injunctive relief, claiming that the sweeps violated their civil rights. The sweeps were conducted, without search warrants, if "appropriate preconditions" were met, including random gunfire and intimidation by weapons. n540 The court ordered a preliminary injunction against the program, on the basis that there was a substantial likelihood that the sweep activity violated the *Fourth Amendment* rights of housing project residents. The court observed that, in order to overcome the presumption that warrantless searches are unconstitutional, the housing authority had to show that it had both probable cause for the search and exigent circumstances that excused its failure to obtain a warrant. However, in this case, sweeps had been ordered when there was no probable cause to believe that a search of any particular apartment would prevent the commission of a crime, unveil evidence of a crime, or lead to an arrest. Moreover, because the sweeps usually took place several days after shooting activity, and in no instance within forty-eight hours after the precipitating gunfire, the requirement of exigent circumstances was also unmet.

In a subsequent case, the United States Court of Appeals for the Seventh Circuit observed that the *Pratt* decision had precipitated some consideration of whether public housing residents who would like to improve their own security might agree to permit sweeps by means of waivers or advance consent clauses in their leases. n541 However, the court offered no opinion on whether such consents or waivers were either necessary or sufficient for *Fourth Amendment* purposes. "It is enough for present purposes, " said the court, "to note that no court has yet held that the police may search any apartment in a public housing project whenever they want, without a warrant, simply because they believe that drugs may plague that particular project." n542

FOOTNOTES:

(n1)Footnote 538. Robyn Minter Smyers, High Noon In Public Housing: The Showdown Between Due Process Rights and Good Management Practices In the War On Drugs and Crime, *30 Urb. Law. 573, 609 (1998). See also* Michael H. Schill, Distressed Public Housing: Where Do We Go From Here? *60 U. Chi. L. Rev. 497, 546 (1993).*

(n2)Footnote 539. *848 F. Supp. 792 (N.D. Ill. 1994)* .

(n3)Footnote 540. *See 848 F. Supp. at 794* .

(n4)Footnote 541. *U.S. v. Johnson, 170 F.3d 708* (7th Cir.1999) .

(n5)Footnote 542. *See 170 F.3d at 719-720* . Consent clauses are discussed in Jason S. Thaler, Public Housing Consent Clauses: Unconstitutional Condition or Constitutional Necessity?, *63 Ford. L. Rev. 1777 (1995)* .

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CHAPTER 45 PUBLIC HOUSING

5-45 Thompson on Real Property, Thomas Editions § 45.14

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§ 45.14 Housing Quality.

§ 45.14(a) Introduction.

Much had been written about the poor quality of much of the nation's public housing. For example, one commentator wrote, in a 1993 article:

> Public housing increasingly commands public attention. Scarcely a day goes by without reports in the media about the physical, managerial, and social problems that plague some publicly-owned housing developments. Accounts of appalling apartment conditions, corrupt administrators, and innocent bystanders killed by gang warfare are commonplace. Negative images of public housing have even found their way into popular culture. Bestsellers have recounted the hardships of life in public housing, while films depict life in public housing as a horror story. n543

Some things have changed since 1993, but housing quality remains a concern. It is a concern that finds expression in legislation, regulation, and court decision.

§ 45.14(b) Legislation and Regulations.

The 1937 Act includes a number of provisions relating to the quality of public housing. In the first place, the legislation requires that each contract for contributions between HUD and a public housing agency include a requirement that the housing agency maintain its public housing in accordance with standards that "meet or exceed" standards established by the Secretary of Housing and Urban Development to ensure that "public housing dwelling units are safe and habitable." n544

The legislation further provides that the Secretary's standards "shall include requirements relating to habitability, including maintenance, health and sanitation factors, condition, and construction of dwellings." n545 And it states that the "Secretary may determine whether the laws, regulations, standards, or codes of any State or local jurisdiction meet or exceed these standards." n546

The 1937 Act also requires public housing agencies to use leases that "obligate the public housing agency to maintain

the project in a decent, safe, and sanitary condition." n547 The legislation further requires public housing agencies to conduct an annual inspection of each of their housing projects to determine whether they are maintained in accordance with applicable quality standards. n548

HUD regulations include provisions relating to housing quality as well. In particular, the regulations relating to the "Public Housing Assessment System," n549 include a number of detailed provisions regarding physical requirements for public housing. For example, the "Physical Condition Indicator" is used to determine whether a public housing agency is meeting the standard of providing public housing that is "decent, safe, sanitary, and in good repair." n550 The regulations set forth specific conditions relating to the following "inspectable areas of public housing": site, building exterior, building systems, dwelling units, and common areas. n551 One of the provisions regarding dwelling units states:

> Each dwelling unit within a building must be structurally sound, habitable, and in good repair. All areas and aspects of the dwelling unit (for example, the unit's bathroom, call-for-aid, ceiling, doors, electrical systems, floors, hot water heater, HVAC (where individual units are provided), kitchen, lighting, outlets/switches, patio/porch/balcony, smoke detectors, stairs, walls, and windows) must be free of health and safety hazards, functionally adequate, operable, and in good repair. n552

The regulations include specific requirements relating to health and safety matters, as well. n553

§ 45.14(c) Applicability of the Implied Warranty of Habitability.

An implied warranty of habitability is generally recognized in private residential leases. The warranty typically obligates the landlord to provide the tenant with residential premises that are safe, clean, and fit for human habitation. The landlord is also generally obligated to maintain the leased premises in that condition throughout the tenancy. n554 Does the implied warranty of habitability also apply to leases of public housing? n555

The issue came up *Ford ex rel. Pringle v. Philadelphia Housing Authority*, n556 a case in which the Philadelphia Housing Authority was sued for lead paint injuries to a child that were allegedly caused by the condition of a public housing unit. The plaintiff prevailed at the trial court level. One of the issues on appeal was whether the implied warranty of habitability applicable to private residential leases applied in the public housing context. The appellate court said that it did not.

The court was influenced by the reasoning of *Alexander v. U. S. Department of Housing and Urban Development*, n557 an older decision of the Seventh Circuit, in which the court had rejected a claim that HUD itself was subject to an implied warranty of habitability in a situation in which it had taken over the operation of a low-income housing development following default by the private owner. In that case, the Seventh Circuit had said:

> [We] are not persuaded that such warranties should be implied in leases of dwelling units constructed and operated as public housing projects. In contrast to housing projects in the private sector, the construction and operation of public housing are projects established to effectuate a stated national policy "to remedy the unsafe and insanitary housing conditions and the acute shortage of decent, safe, and sanitary dwellings for families of low income"... As such, the implication of a warranty of habitability in leases pertaining to public housing units is a warranty that the stated objectives of national policy have been and are being met. We feel that the establishment of any such warranty that national policy goals have been attained or that those goals are being maintained is best left to that branch of government which established the objectives. n558

Quoting this language with approval, the Pennsylvania court said, in the *Pringle* case:

> [E]ven though the Authority owns the housing project, the federal government controls the

> relationship, including what is in the lease: its terms, the price of rent and even who can be a tenant. Moreover, the federal government funds the Authority and provides it with detailed regulations on how it operates. What is involved here is not a marketplace lease entered into by two bargaining parties as envisioned by *Pugh* [the Pennsylvania case that recognized the implied warranty of habitability], but a public government program in which the Authority, under federal law, is required to provide safe and habitable housing. Because the concept of "warranty of habitability" was adopted to address the inequities in the marketplace and public housing is anything but marketplace housing, the reasoning set forth in *Alexander* is equally applicable, and we hold that the contract action for warranty of habitability does not apply to public housing. n559

A pre-*Pringle* Pennsylvania case had applied an implied warranty of habitability in a public housing context without apparent consideration of the larger issues addressed by *Alexander*. n560 But the court in *Pringle* said, of the earlier case: "All that was addressed in that case was whether the breach of the implied warranty of habitability could be brought under tort law, constituting a separate claim from negligence and making it inapplicable to whether such a claim exists as a contract claim in a public housing situation." n561

The *Alexander* case, which was important to the court in *Pringle*, was not a public housing case, as such. As indicated previously, it was a case in which HUD had taken over operation of a privately owned, but government-subsidized, housing development. In a similar situation that came up a few years later, the United States First Circuit Court of Appeals concluded that HUD was subject to an implied warranty of habitability.

The First Circuit case, *Conille v. Secretary of Housing and Urban Development*, n562 involved a suit by a individual who had vacated an allegedly uninhabitable HUD-subsidized apartment. The plaintiff claimed that HUD had breached an implied warranty of habitability and should be liable for damages for the period that started when HUD had assumed management of the building until the tenant vacated.

The court observed that federal law was applicable to the dispute, but it indicated that where contractual obligations of the United States were not addressed by statute, but were resolvable under state law without any conflict with federal policy, it was appropriate to incorporate state law as the federal rule of decision. Disagreeing with *Alexander*, the court said that it was appropriate to incorporate an implied warranty of habitability. But this was not the same warranty that applied in the private landlord-tenant arena. Because the federal legislation then applicable to this situation only required the Secretary to "seek" to provide decent housing, and did not require the Secretary to provide it, the court said that HUD would meet its warranty obligation if it takes reasonable affirmative steps to bring the housing into habitable condition. n563

Some other cases have followed *Alexander*, and others have not. n564 A 1997 bankruptcy case questioned whether *Alexander* should have much influence in any event. In *In re Day*, n565 the court said:

> In *Alexander* the court decided, as a matter of federal common law, that there was no warranty of habitability implied in the leases of tenants in a federally-owned housing project. The underlying issues in the case were federal preemption of state law and the content of federal common law... A far different question is presented in the subsequent cases, and in the instant case, than was addressed in *Alexander*, *i.e.*, whether a state-chartered housing authority is subject to a state law implied warranty of habitability. *Alexander* does not address this question and contains no guidance on this issue. n566

The court concluded that it would be appropriate to recognize an implied warranty of habitability; however, it also observed that the that the public housing leases at issue included provisions amounting to an express warranty of habitability.

Although the case law on the implied warranty issue is mixed, the observation of the court in *Day* about an express

warranty deserves some elaboration in the present context. Current federal statutes and regulations, which are discussed in the preceding section of this chapter, impose substantial obligations on public housing agencies with respect to the condition of leased public housing. They include habitability requirements, including a requirement that public housing agencies use leases that "obligate the public housing agency to maintain the project in a decent, safe, and sanitary condition." n567 In light of these requirements, the issue of whether a public housing agency should be subject to an implied warranty of habitability may be less than pressing, at least if the housing agency includes the required habitability provisions in its leases, because the lease would be a contract with the tenant. A housing agency that does not include such provisions in its leases would violate its contributions contract with HUD, and could be subject to HUD-imposed sanctions. It might also be subject to lawsuits by tenants who claim entitlement to a private right of action under federal law. Private rights of action are discussed in another section of this chapter. n568

FOOTNOTES:

(n1)Footnote 543. Michael H. Schill, Distressed Public Housing: Where Do We Go From Here? *60 U. Chi. L. Rev. 497-98 (1993).*

(n2)Footnote 544. *See 42 U.S.C. § 1437d(f).*

(n3)Footnote 545. *See 42 U.S.C. § 1437d(f)(2).*

(n4)Footnote 546. *See 42 U.S.C. § 1437d(f)(2).*

(n5)Footnote 547. *See 42 U.S.C. § 1437d(l).*

(n6)Footnote 548. *See 42 U.S.C. § 1437d(f)(3).*

(n7)Footnote 549. The assessment system is discussed in § 45.06(c) of this chapter.

(n8)Footnote 550. *See 24 C.F.R. § 902.20(a).*

(n9)Footnote 551. *See 24 C.F.R. § 902.20(b).*

(n10)Footnote 552. *See 24 C.F.R. § 902.20(b)(4)(i).*

(n11)Footnote 553. *See 24 C.F.R. § 902.20(c).*

(n12)Footnote 554. The implied warranty of habitability is discussed in chapter 41.

(n13)Footnote 555. For an law review piece arguing that it should, *see* Rachel Camber, The Incorporation of the Implied Warranty of Habitability In Public Housing Programs, *38 Wash. U. J. Urb. & Contemp. L. 205 (1990).*

(n14)Footnote 556. *848 A.2d 1038 (Pa. Commw. Ct. 2004) .*

(n15)Footnote 557. *555 F.2d 166 (7th Cir.1977) , aff'd, Alexander v. U. S. Dept. of Housing and Urban Development, 441 U.S. 39 (1979) .*

(n16)Footnote 558. *555 F.2d at 170 .*

(n17)Footnote 559. *848 A.2d at 1057 .*

(n18)Footnote 560. *See McIntyre ex rel. Howard v. Philadelphia Housing Authority, 816 A.2d 1204 (Pa. Commw. Ct. 2003) .*

(n19)Footnote 561. *See 848 A.2d at 1058 .*

(n20)Footnote 562. *840 F.2d 105* (1st Cir. 1988) .

(n21)Footnote 563. The current statutory provision with respect to maintenance of HUD-owned or HUD-possessed housing states, in part, that:

> In the case of multifamily housing projects that are owned by the Secretary (or for which the Secretary is mortgagee in possession), the Secretary shall-
>
> (A) to the greatest extent possible, maintain all such occupied projects in a decent, safe, and sanitary condition and in compliance with any standards under applicable State or local laws, rules, ordinances, or regulations relating to the physical condition of the housing and any such standards established by the Secretary.

12 U.S.C. § 1701z-11.

(n22)Footnote 564. Cases that follow *Alexander* include *Kingston Square Tenants Ass'n v. Tuskegee Gardens, Ltd., 792 F. Supp. 1566 (S.D. Fla.1992)* and *Gibson v. Gary Housing Authority 754 F.2d 205 (7th Cir.1985)* . Cases that do not follow *Alexander* include *In re Day, 208 B.R. 358 (E.D. Pa. 1997)* and *Techer v. Roberts-Harris, 83 F.R.D. 124 (D. Conn. 1979)* .

(n23)Footnote 565. *In re Day, 208 B.R. 358 (E.D. Pa. 1997)* .

(n24)Footnote 566. *See 208 B.R. 358 at 372* .

(n25)Footnote 567. *See 42 U.S.C. § 1437d(l)(3)*.

(n26)Footnote 568. See § 45.20(d) of this chapter.

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CHAPTER 45 PUBLIC HOUSING

5-45 Thompson on Real Property, Thomas Editions § 45.15

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§ 45.15 Community Service and Economic Self-Sufficiency Requirements.

In 1998, the United States Housing Act was amended to impose some community service and economic self-sufficiency requirements on residents of public housing. n569 According to the legislation, adult residents of public housing projects are required to contribute eight hours per month of community service or to participate in an economic self-sufficiency program for eight hours per month. n570 Political activities do not count against the eight hour requirement. n571

An "economic self-sufficiency program" refers to a program designed to encourage, assist, train, or facilitate the economic independence of participants and their families or to provide work for participants. Among the programs that would qualify would be ones for job training, employment counseling, work placement, basic skills training, education, workfare, financial or household management, and apprenticeship. n572

Some public housing residents are exempt from the community service and economic self-sufficiency requirements. These include residents who are 62 years of age or older, blind or disabled, or already engaged in a "work activity." n573

The legislation provides that, within 30 days before the expiration of a non-exempt resident's lease term, the public housing agency is to determine whether the resident is in compliance. The determination is to be done "in accordance with the principles of due process and on a nondiscriminatory basis." n574 If the public housing agency determines that the resident is not in compliance, the housing agency is to notify the resident of its determination, inform the resident that the determination is subject to the administrative grievance procedure, and inform the resident that unless he or she enters into an agreement with the public housing agency providing for compliance within twelve-month term of the lease, the resident's lease will not be renewed. n575

The legislation further provides that the public housing agency may not renew or extend the lease of a resident who is found to be out of compliance with the community service or economic self-sufficiency requirements, and instead must take action to terminate the tenancy, unless, before the lease term expires, the public housing agency and the resident enter into an agreement providing for the resident to cure the noncompliance. n576

Public housing agencies are also prohibited from entering into a new public housing lease with any household that includes a person who was subject to, but did not comply with, the community service or economic self-sufficiency requirements. n577

FOOTNOTES:

(n1)Footnote 569. Quality Housing and Work Responsibility Act of 1988, Pub. L. 105-276, § 501, *112 Stat. 2518, 2539 (1998)* (codified at *42 U.S.C. § 1437j(c)*).

(n2)Footnote 570. *See 42 U.S.C. § 1437j(c)*.

(n3)Footnote 571. *See 42 U.S.C. § 1437j(c)*.

(n4)Footnote 572. *See 42 U.S.C. § 1437j(g)*.

(n5)Footnote 573. *See 42 U.S.C. § 1437j(c)(2)*. The legislation references a definition for "work activity" in section 407(d) of the Social Security Act (*42 U.S.C. 607(d)*).

(n6)Footnote 574. *See 42 U.S.C. § 1437j(c)(3)(B)*.

(n7)Footnote 575. *See 42 U.S.C. § 1437j(c)(3)(C)*.

(n8)Footnote 576. *See 42 U.S.C. § 1437j(c)(3)(C)*.

(n9)Footnote 577. *See 42 U.S.C. § 1437j(c)(4)*.

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CHAPTER 45 PUBLIC HOUSING

5-45 Thompson on Real Property, Thomas Editions § 45.16

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§ 45.16 Tenant Displacement from Public Housing.

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§ 45.16(a) Introduction.

In addition to eviction for good cause, which is discussed in another section of this chapter, n578 public housing tenants could be displaced from public housing on account of damage to the building where their apartments are located; demolition of the building, or the part of the building, in which they live; or sale of the building to a purchaser who has different plans for its use. Statutes or regulations have some things to say about each of these situations. They offer significant protections to affected tenants.

§ 45.16(b) Damage to the Housing Unit.

Tenant displacement could occur as a result of damage to a public housing unit. According to HUD regulations, if the housing unit is damaged to the extent that conditions are hazardous to the "life, health, or safety of the occupants", n579 the tenant is to immediately notify project management of the damage. n580 The housing authority is responsible for making repairs, unless the damage was caused by the tenant, the tenant's household or the tenant's guests. In that case, the "reasonable cost of the repairs shall be charged to the tenant." n581 If the repairs cannot be made within a reasonable time, the housing authority "shall offer standard alternative accommodations, if available." n582 The regulations also provide for rent abatement if the repairs are not made or if alternative accommodations are not provided. n583

Significant damage to a building might also cause a housing authority to consider its demolition. Demolition is discussed in the next section.

§ 45.16(c) Demolition.

§ 45.16(c)(1) Statutory Provisions.

Public housing tenants also enjoy some protections against indirect termination of their tenancies through demolition of the housing project. n584 During the 1980s, some public housing authorities demolished housing projects instead of

undertaking repairs. n585 Congress responded by adding some restrictions on demolition to the provisions of the 1937 Act. n586

Subject to an exception for "de minimis" types of demolition, n587 a housing agency that wishes to demolish all or part of a public housing project must submit an application to the Secretary of Housing and Urban Development and comply with a number of statutory requirements. n588 The application must be developed in consultation with affected public housing residents, resident advisory boards, resident councils, and "appropriate government officials." n589 If the application complies with statutory requirements, the Secretary is to approve the application; if it does not, the Secretary is to deny the application. n590 Courts have held that if the housing agency does not satisfy the applicable requirements, a tenant is entitled to bring suit to prevent the demolition. n591

The key provisions about demolition are found in *42 U.S.C. § 1437p*, a section of the 1937 Act entitled "Demolition and disposition of public housing." The legislation provides that a housing authority must certify, in its application for demolition, that "the public housing project is obsolete as to physical condition, location, or other factors, making it unsuitable for housing purposes," and that "no reasonable program of modifications is cost-effective to return the public housing project or portion of the project to useful life." n592 If only a part of the housing project is proposed for demolition, the housing agency is required to certify that the partial demolition "will help to ensure the viability of the remaining portion of the project." n593

Other certifications are required as well. One deals with planning. The housing agency must certify to the Secretary of Housing and Urban Development that it has "specifically authorized" the demolition in its "public housing agency plan," and that the actions contemplated in the plan comply with requirements of the 1937 Act. n594

More significantly, insofar as the tenants are concerned, are legislative provisions that require the housing authority to certify that it will provide advance notice to the residents of the demolition, assuring the residents that the demolition will not commence until each resident of the building has been relocated and that each family will be offered comparable housing in an area. n595 In addition, the housing agency must certify to the Secretary of Housing and Urban Development that it will pay the family's actual and reasonable relocation expenses, that it will provide comparable housing in accordance with its notice to the family, that it will provide necessary counseling for displaced tenants, and that it will not commence demolition until all residents have been relocated. n596

§ 45.16(c)(2) De Facto Demolition.

In some instances, tenants have brought lawsuits claiming that a housing authority engaged in "de facto" demolition by permitting the project to become demolished through neglect. A number of courts have recognized a cause of action for de facto demolition. n597 Some courts have said that tenants have to show that the housing authority intended to allow housing units to deteriorate in order to establish a claim for de facto demolition. n598 But this has not been universally held. n599

Velez v. Cisneros n600 provides an example of the application of the de facto demolition doctrine. The plaintiffs in that case filed a class action on behalf of public housing tenants of the Chester Housing Authority ("CHA") against several defendants, including CHA, HUD, and the Secretary of Housing and Urban Development. The tenants asserted various violations of federal housing law, the Administrative Procedure Act, civil rights laws, and the annual contributions contract between CHA and HUD. The parties agreed to attempt to resolve the claims in mediation. While those efforts were under way, HUD declared CHA a "Troubled Housing Authority" that was in substantial breach of its obligations under the annual contributions contract, and assumed control of the assets and management of CHA.

When mediation failed, the case went to trial. The plaintiffs claimed that the defendants had "caused constructive demolition ('de facto demolition') of CHA housing by failure to fill vacant units, maintain occupied units in a habitable condition, train maintenance workers, perform routine inspections, and respond promptly to tenant complaints." n601

Following a non-jury trial, the court made findings of fact concerning the condition of the five housing projects at issue. Among other things, the court found that there had been an increasing number of vacant housing units at project locations; that many of the vacant units were unsecured, in poor condition, and open to vandalism and rain damage; that significant numbers of other units evidenced health and safety problems; and that maintenance of units was very poor. n602 The court also found that, after HUD had taken over the projects, the "availability of large HUD grants for modernization and reconstruction resulted in a decision not to rehabilitate vacant units for immediate occupancy," n603 and that vacancy rates continued to rise. n604 While some units were rehabilitated, the court found that "CHA/HUD believed it would be fiscally and managerially more efficient to allow units to remain vacant pending a large-scale modernization and reconstruction program than to perform interim repairs to rehabilitate vacant apartments for immediate occupancy." n605 CHA and HUD planned to reconstruct some of the residential buildings, using a "phased" reconstruction in which residents would be relocated within the development in order to vacate one or more buildings. When an empty building had been reconstructed, tenants would be moved there, and other buildings would be available for reconstruction. n606

The court concluded that a private right of action could be available to enforce the demolition requirements of the 1937 Act. It quoted language from a congressional conference report stating that the purpose of an amendment to the 1937 Act was to clarify that no public housing authority

> shall take any steps toward demolition and disposition without having satisfied the statutory criteria. This provision is intended to correct a erroneous interpretation of the existing statute by the United States Court of Appeals for the D.C. Circuit in *Edwards v. District of Columbia and shall be fully enforceable by tenants of and applicants for the housing that is threatened.* n607

Because there was a private right of action available to the tenants, the court concluded that they could enforce it under *42 U.S.C. § 1983*. n608

As to the more particular issue of de facto demolition, the court noted that while the provisions of the 1937 Act prohibited a housing authority from taking any action to demolish public housing units without HUD approval, the legislation did not define "demolition." n609 But the court was of the view that the "clear purpose of § 1437p is to preserve the number of available public housing units." n610 HUD's position was that demolition occurred when a building was "razed." But the court thought that this was too narrow a view. It stated:

> It is arbitrary to distinguish housing that is "demolished" because the entire physical structure is destroyed from housing that is "demolished" because extensive interior reconstruction leaves only the exterior walls standing. In both cases, the inventory of public housing is diminished for a substantial period of time. HUD's definition cannot be sustained as a reasonable interpretation of the statute. n611

In this instance, the policies of the housing authority, and of HUD as operator of the project, had resulted in the removal of a substantial number of housing units from use as they became vacant. So the court concluded: "Because the total number of available housing units has been and will be greatly diminished for a substantial period, housing units have been de facto demolished." n612

There was a separate issue as to whether HUD itself could be a defendant in such an action. The court did not think that HUD, in its "general oversight capacity" should be liable for de facto demolition. But in this case, HUD had taken over operation of the housing projects in question, and it could be liable.

§ 45.16(c)(3) Consolidation.

After some de facto demolition cases had come down, Congress amended the 1937 Act to provide that certain types of residential "consolidation" do not violate the statute's prohibitions. Thus, *42 U.S.C. § 1437p(e)* provides:

e) Consolidation of occupancy within or among buildings

Nothing in this section may be construed to prevent a public housing agency from consolidating occupancy within or among buildings of a public housing project, or among projects, or with other housing for the purpose of improving living conditions of, or providing more efficient services to, residents.

Where activities of the housing authority can be found to come within the scope of this provision, those activities should not be found to constitute a violation of the 1937 Act.

§ 45.16(d) Sale or Transfer of the Housing Project.

The same section of the 1937 Act that imposes limitations on the demolition of public housing also limits the ability of a public housing authority to sell or transfer a public housing project. n613 Before conducting such a sale or transfer, a public housing authority is required to submit an application to the Secretary of Housing and Urban Development and to satisfy a number of statutory requirements. n614 As in the case of a proposed demolition, the application must be developed in consultation with affected public housing residents, resident advisory boards, resident councils, and "appropriate government officials." n615 If the application complies with statutory requirements, the Secretary is to approve the application; if it does not, the Secretary is to deny the application. n616

In the case of a sale or transfer, the public housing agency is required to certify that the retention of the property is not in the best interests of the residents or the public housing agency. n617 This can be because conditions in the area of the project adversely affect the health or safety of the residents or the feasible operation of the project. n618 It can also be because the sale or transfer permits the development of other properties that will be more efficiently or effectively operated as low-income housing. n619

In addition, the housing agency is to certify that it has determined that the disposition is appropriate for reasons that are in the best interests of the public housing residents and of the public housing agency, are consistent with the goals of the housing agency and its plan, and are otherwise consistent with the legislation. n620 If the property to be disposed of consists of something other than dwelling units, the housing authority must certify that the subject property is "excess to the needs" of the housing project or that the disposition "is incidental to, or does not interfere with, continued operation" of the project. n621

The housing agency is required to certify to the Secretary of Housing and Urban Development that the housing agency has authorized the disposition in its public housing agency plan and that actions contemplated in the plan comply with statutory requirements. n622

The housing agency is also required to make certifications regarding the relocation of existing tenants that mirror those discussed above in the case of project demolition. n623 As in the case of a demolition, the housing agency is required to certify , among other things, that it will not dispose of the project until each tenant has been relocated to appropriate alternative housing, that it will cover the actual and reasonable costs of tenant relocation, and that it will provide tenants with needed counseling. n624

There are also some certifications that must be made by the public housing agency that do not mirror certifications that are required in the case of demolition. In particular, the housing agency must certify that the proceeds of the sale or disposition will be used to retire debt incurred to finance or modernize the housing project. The housing agency must also certify that, if there are remaining proceeds, they will be used to provide low-income housing, to benefit the residents of the housing agency, or to secure on site commercial enterprises to serve the needs of the residents. n625

In addition to these requirements, the legislation provides that, "in appropriate circumstances, as determined by the Secretary," the housing agency will

> initially offer the property to any eligible resident organization, eligible resident management corporation, or nonprofit organization acting on behalf of the residents, if that entity has expressed an interest, in writing, to the public housing agency in a timely manner, in purchasing the property for continued use as low-income housing. n626

If one of these entities expresses interest in purchasing the housing project, the housing agency must give the entity time to obtain a firm commitment for financing the purchase. n627

FOOTNOTES:
(n1)Footnote 578. See § 45.11 of this chapter.

(n2)Footnote 579. *See 24 C.F.R. § 966.4(h)*.

(n3)Footnote 580. *See 24 C.F.R. § 966.4(h)*.

(n4)Footnote 581. *See 24 C.F.R. § 966.4(h)(2)*.

(n5)Footnote 582. *See 24 C.F.R. § 966.4(h)(3)*.

(n6)Footnote 583. *See 24 C.F.R. § 966.4(h)(4)*.

(n7)Footnote 584. *See* Shelby D. Green, The Public Housing Tenancy: Variations on the Common Law That Give Security of Tenure and Control, *43 Cath. U. L. Rev. 681, 733 (1994)*.

(n8)Footnote 585. *See* Shelby D. Green, The Public Housing Tenancy: Variations on the Common Law That Give Security of Tenure and Control, *43 Cath. U. L. Rev. 681, 734 (1994)*.

(n9)Footnote 586. *See* Housing and Community Development Act of 1987, Pub. L. No. 100-242, § 121, *101 Stat. 1815, 1837-39 (1988)* (codified as amended at *42 U.S.C. §§ 1437p, 1437p(b)(3)(A)(v), 1437p(b)(3)(B)*); Shelby D. Green, The Public Housing Tenancy: Variations on the Common Law That Give Security of Tenure and Control, *43 Cath. U. L. Rev. 681, 734 (1994)*.

(n10)Footnote 587. The language of the exception is as follows:

f) De minimis exception to demolition requirements

Notwithstanding any other provision of this section, in any 5-year period a public housing agency may demolish not more than the lesser of 5 dwelling units or 5 percent of the total dwelling units owned by the public housing agency, but only if the space occupied by the demolished unit is used for meeting the service or other needs of public housing residents or the demolished unit was beyond repair.

42 U.S.C. § 1437p(f).

(n11)Footnote 588. *See 24 C.F.R. § 970.4*; *42 U.S.C. § 1437p(b)*.

(n12)Footnote 589. *See 42 U.S.C. § 1437p(b)(2)*.

(n13)Footnote 590. *See 42 U.S.C. § 1437p(a)* & *(b)*.

(n14)Footnote 591. *See, e.g., Concerned Tenants Association v. Pierce, 685 F. Supp. 316 (D. Conn. 1988)* (court ruled that *42 U.S.C. § 1437p* created an enforceable right in the tenants' favor), *but cf., Benavides v. Housing Authority of City of San Antonio, Texas, 238 F.3d 667* (5th Cir. 2001) (claims of former residents, who were seeking to enjoin the demolition, that the demolition was in violation of the National Historic Preservation Act was moot when housing project had already been substantially demolished).

(n15)Footnote 592. *See 42 U.S.C. § 1437p(a)(1)(A).*

(n16)Footnote 593. *See 42 U.S.C. § 1437p(a)(1)(B).*

(n17)Footnote 594. *See 42 U.S.C. § 1437p(a)(1)(B).*

(n18)Footnote 595. *See 42 U.S.C. § 1437p(a)(4)(A).* Assistance to the displaced family may be either "tenant-based" or "project-based" assistance." *Id.*

(n19)Footnote 596. *See 42 U.S.C. § 1437p(a)(4)(B), (C), (D)* & *(E).*

(n20)Footnote 597. *See, e.g., Henry Horner Mothers Guild v. Chicago Hous. Auth., 780 F. Supp. 511, 515 (N.D. Ill. 1991)* (holding that the legislation should be construed to include both actual and de facto demolition); *Tinsley v. Kemp, 750 F. Supp. 1001, 1012 (W.D. Mo. 1990)* (holding that plaintiffs' claims can be based on either actual or de facto demolition); *Concerned Tenants Ass'n v. Pierce, 685 F. Supp. 316, 319 -21 (D. Conn. 1988)* (stating that the legislation applies to either actual or de facto demolition); *Velez v. Cisneros, 850 F. Supp. 1257 (E. D. Pa. 1994)* (tenants may bring § 1983 action for de facto demolition against the housing authority and against HUD, in its capacity as operator of the project); *but see Dessin v. Housing Authority, 783 F. Supp. 587 (M.D. Fla. 1990)* rev'd in part, *948 F. 2d 730* (11th Cir. 1991) (court rejected cause of action, said the statute was ambiguous and that HUD's interpretation of demolition as razing should be given considerable weight); *See* Shelby D. Green, The Public Housing Tenancy: Variations on the Common Law That Give Security of Tenure and Control, *43 Cath. U. L. Rev. 681, 733-34 (1994).*

(n21)Footnote 598. *See Gomez v. Housing Authority, 805 F. Supp. 1363 (W.D. Tex. 1992) ,aff'd sub nom., 20 F. 3d 1169* (5th Cir. 1994) , *cert. denied, 513 U.S. 873 (1994)* .

(n22)Footnote 599. *See Henry Horner Mothers Guild v. Chicago Housing Authority, 780 F. Supp. 511 (N.D. Ill. 1991)* (tenants need not prove intent to demolish); *Velez v. Cisneros, 850 F. Supp. 1257 (E. D. Pa. 1994)* (tenants not required to prove that housing authority had a plan or intent to demolish the project; court concluded that high number of vacancies, the long period of the vacancies, the absence of a plan to make interim repairs amounted to de facto demolition).

(n23)Footnote 600. *850 F. Supp. 1257 (E.D. Pa. 1994)* .

(n24)Footnote 601. *See 850 F. Supp. at 1260* .

(n25)Footnote 602. *See 850 F. Supp. at 1261-63* .

(n26)Footnote 603. *See 850 F. Supp. at 1264* .

(n27)Footnote 604. *See 850 F. Supp. at 1264* .

(n28)Footnote 605. *See 850 F. Supp. at 1264* .

(n29)Footnote 606. *See 850 F. Supp. at 1268* .

(n30)Footnote 607. *See 850 F. Supp. at 1270* (italics in court's quotation from the conference report). The court identified the conference report as H.R. Conf. Rep. No. 426, 100th Cong., 1st Sess. (1987), reprinted in 1987

U.S.C.C.A.N. 3317, 3469.

(n31)Footnote 608. *See 850 F. Supp. at 1270* .

(n32)Footnote 609. *See 850 F. Supp. at 1270* .

(n33)Footnote 610. *See 850 F. Supp. at 1270* .

(n34)Footnote 611. *See 850 F. Supp. at 1271* .

(n35)Footnote 612. *See 850 F. Supp. at 1273* . The court also found that CHA/HUD had "acted with the intent to make some units functionally unavailable for housing purposes and engaged in intentional de facto demolition of those units." *Id.*

(n36)Footnote 613. *See 42 U.S.C. § 1437p*.

(n37)Footnote 614. *See 42 U.S.C. § 1437p(a)*.

(n38)Footnote 615. *See 42 U.S.C. § 1437p(b)(2)*.

(n39)Footnote 616. *See 42 U.S.C. § 1437p(a)* & *(b)*.

(n40)Footnote 617. *See 42 U.S.C. § 1437p(a)(2)*.

(n41)Footnote 618. *See 42 U.S.C. § 1437p(a)(2)*.

(n42)Footnote 619. *See 42 U.S.C. § 1437p(a)(2)*.

(n43)Footnote 620. *See* (b).

(n44)Footnote 621. *See 42 U.S.C. § 1437p(a)(2)(C)*.

(n45)Footnote 622. *See 42 U.S.C. § 1437p(a)(3)*.

(n46)Footnote 623. *See 42 U.S.C. § 1437p(a)(4)*.

(n47)Footnote 624. *See* Ind. Code Ann. §§ 32-30-3.1 - 32-30-3.1-12.

(n48)Footnote 625. *See 42 U.S.C. § 1437p(a)(5)*.

(n49)Footnote 626. *See* Ind. Code Ann. § 32-30-3.1.

(n50)Footnote 627. *See* Article 9 of the U.C.C..

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CHAPTER 45 PUBLIC HOUSING

5-45 Thompson on Real Property, Thomas Editions § 45.17

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§ 45.17 Tenant Purchase of Dwelling Units.

The Quality Housing and Work Responsibility Act of 1998 amended the 1937 Act to require that low-income families residing in public housing projects be provided with the opportunity to purchase their dwelling units. n628 Purchases by residents can be done through "a qualifying resident management corporation," n629 in accordance with the requirements set forth in the legislation.

The legislation contemplates that the resident management corporation will purchase, from a public housing agency, one or more multifamily buildings in a public housing project, and that it will thereafter be able to sell units in the building, or buildings, to public housing tenants. n630 There are a number of requirements that the resident management corporation will need to satisfy in order to do this. n631 These include obtaining a certification from HUD that the resident management corporation is prepared to undertake the ownership, management, and maintenance of the building or buildings with continued HUD assistance; and obtaining a certification from the public housing agency that it has and will implement a plan to replace public housing units thus sold within 30 months of the sale. n632

After the resident management corporation acquires the ownership of a building, it may sell a dwelling unit or ownership rights in a dwelling unit to a lower-income family residing in, or eligible to reside in, public housing, upon a determination by the Secretary of Housing and Urban Development that the purchase will not interfere with the rights of other families residing in the housing project or harm the efficient operation of the project, and that the family will be able to purchase and maintain the property. n633 If the family should later wish to resell its interest in the dwelling unit, it must resell it to the resident management corporation, to another eligible lower-income family, or to the public housing agency. n634

Low-income families that wish to purchase dwelling units might find it difficult to obtain financing. The legislation provides that if financing is not otherwise available, the resident management corporation may make a loan based on the security of the property involved. n635

There are separate statutory provisions that permit public housing agencies to carry out approved home ownership programs to make public housing units available for purchase by low-income families for use as their principal residence. n636

FOOTNOTES:

(n1)Footnote 628. Pub. L. No. 105-276, Title V, § 501(a), § 563, *112 Stat. 2518, 2586 (1998).* The provisions on ownership are codified in *42 U.S.C. § 1437s*.

(n2)Footnote 629. *See 42 U.S.C. § 1437s(a)*.

(n3)Footnote 630. *See 42 U.S.C. § 1437s(a)(1)-(4)*.

(n4)Footnote 631. *See 42 U.S.C. § 1437s(a)(1)-(4)*.

(n5)Footnote 632. *See 42 U.S.C. § 1437s(a)(3)*.

(n6)Footnote 633. *See 42 U.S.C. § 1437s(a)(4)*.

(n7)Footnote 634. *See 42 U.S.C. § 1437s(a)(4)(C)*.

(n8)Footnote 635. *See 42 U.S.C. § 1437s(a)(4)(D)(6)*.

(n9)Footnote 636. *See 42 U.S.C. § 1437z-4*.

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CHAPTER 45 PUBLIC HOUSING

5-45 Thompson on Real Property, Thomas Editions § 45.18

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§ 45.18 Conversion to a Voucher Program.

In the Quality Housing and Work Responsibility Act of 1998, Congress included provisions permitting public housing agencies to convert any public housing project, or portion of a housing project, owned by the housing agency to tenant-based assistance. n637 "Tenant-based assistance" is portable housing assistance that permits the tenant to select suitable housing. n638 The Section 8 voucher program is a tenant-based assistance program. n639

A conversion must be preceded by an assessment by the public housing agency. n640 The assessment must demonstrate that the conversion will not be more expensive than continuing to operate the housing as public housing; that the conversion will benefit public housing residents, the housing agency, and the community; and that the conversion will not adversely affect the availability of affordable housing in the community. n641 The housing agency must also develop a conversion plan that is consistent with the assessment and obtain HUD's approval for the plan. n642

Families residing in public housing that will be affected by the conversion are to be notified 90 days prior to the "displacement date" that the housing will be removed from the inventory of public housing, but that each family displaced by the conversion will be offered comparable housing. n643 The conversion plan must require that if the project is used for housing after the conversion, families that would like to remain in their units, but under tenant-based assistance, will be permitted to do so. n644 The plan must also provide for actual and reasonable relocation expenses for families displaced by the conversion. n645

FOOTNOTES:
(n1)Footnote 637. Pub. L. No. 105-276, Title V, § 501(a), *112 Stat. 2518 (1998).* The provisions on conversion are codified in *42 U.S.C. § 1437t*.

(n2)Footnote 638. *See* (e) and § *42 U.S.C. § 1437(o). 42 U.S.C. § 1437f(f)* distinguishes "project-based assistance" from "tenant-based assistance." Project-based assistance refers to rental assistance "that is attached to the structure," while tenant-based assistance refers to rental assistance "that is not project-based assistance and that provides for the eligible family to select suitable housing and to move to other suitable housing." *Id. 42 U.S.C. §§ 1437f(f)*6 &7. Section 8 program certificates or vouchers that permit tenants to move to other apartments, operated by private landlords, are examples of tenant-based assistance. The Section 8 program is discussed in § 45.22(d) of this chapter.

(n3)Footnote 639. The Section 8 program is discussed in § 45.22(d) of this chapter.

(n4)Footnote 640. *See 42 U.S.C. § 1437t(b)*. The legislation generally required public housing agencies to undertake such an assessment of each of its public housing projects within two years of the effective date of the legislation. *42 U.S.C. § 1437t(b)(2)*.

(n5)Footnote 641. *See 42 U.S.C. § 1437t(c)*.

(n6)Footnote 642. *See 42 U.S.C. §§ 1437t(c), (d)* & *(e)*.

(n7)Footnote 643. *See 42 U.S.C. § 1437t(d)(4)*.

(n8)Footnote 644. *See 42 U.S.C. § 1437t(d)(4)(C)*.

(n9)Footnote 645. *See 42 U.S.C. § 1437t(d)(4)(D)*.

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CHAPTER 45 PUBLIC HOUSING

5-45 Thompson on Real Property, Thomas Editions § 45.19

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§ 45.19 Pets.

As a result of a 1998 amendment to the United States Housing Act, public housing residents are permitted to have one or more common household pets in their dwelling units, subject to state and local legal requirements relating to animals, and subject to the reasonable requirements of the public housing agency. n646 The public housing agency may impose requirements based on the size and type of the building, or other relevant considerations. It can also limit the number of animals in a unit; prohibit dangerous animals or other animals based on factors such as size and weight; and require a nominal fee, or a pet deposit, or both. n647

FOOTNOTES:
(n1)Footnote 646. *See 42 U.S.C. § 1437z-3*.

(n2)Footnote 647. *See 42 U.S.C. § 1437z-3*.

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CHAPTER 45 PUBLIC HOUSING

5-45 Thompson on Real Property, Thomas Editions § 45.20

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§ 45.20 Liability of the Public Housing Authority.

[Go To Supp]

§ 45.20(a) Introduction.

Public housing authorities that engage in tortious conduct, violate statutory obligations, or breach contracts (including leases), could be subject to liability claims. In some instances, however, issues of immunity can arise. And there are other considerations that could be relevant to liability.

§ 45.20(b) Tort Liability.

Public housing authorities are potentially subject to tort liability by individuals injured as a result of their tortious conduct, including negligent conduct. However, in some instances, public housing authorities will be entitled to raise a shield of tort immunity.

Although most states have enacted tort claims statutes waiving blanket common law tort immunity for the state and its agencies, immunities still persist in many situations. n648 Many states have abolished tort immunity generally, but have retained immunity in particular circumstances. n649 Other states have retained general immunity, but have abolished it in particular circumstances. n650 These differences are reflected in cases dealing with the tort liability of public housing authorities.

For example, in *Wheeler v. Boston Housing Authority*, n651 the plaintiff, who had been visiting a friend at a housing project, filed suit against a housing authority after she had been shot during an exchange of gunfire between persons on the rooftop of the housing project and persons in the housing project's parking area. She claimed that her personal injuries had been caused by the negligence of the housing authority in failing to take adequate security measures to protect persons lawfully on the premises. The housing authority sought summary judgment, on the ground that it was a "public employer" and that, as such, it was exempt from liability under a discretionary function exception to the Massachusetts Tort Claims Act. The trial court granted the motion, and it was affirmed on appeal, with the court stating that the housing authority's decision as to what security measures it would employ amounted to a discretionary function. n652

A housing authority was found to be immune from liability in a case in which a father had been shot and his daughter beaten by gang members at a public housing development. n653 The applicable tort immunity legislation included provisions exempting public entities and employees from liability for failing to provide police protection or, if such protection were provided, for failing to provide adequate protection. However another provision of the legislation stated that a public employee is not liable for an act or omission in the execution or enforcement of any law unless "such act or omission constitutes willful and wanton conduct." n654 In this case, the plaintiffs argued that the public housing authority should be liable on a theory of willful and wanton misconduct for failing to protect an invitee on housing authority property from criminal attack by a third party. But the court rejected this claim, noting that a public housing authority was not a public *employee.* The court also rejected the plaintiffs' arguments based on other provisions of the immunity legislation.

In an Illinois case, a housing authority was able to take advantage of a tort immunity defense to a claim arising out of an injury to a child on a playground used by public housing tenants and owned by the housing authority. n655 The plaintiff claimed that the housing authority had been negligent in the operation and maintenance of the playground. At issue was a provision of the Illinois Tort Immunity Act providing immunity for a local public entity with respect to injuries arising out of the existence of a condition on public property used as a park or playground, unless the entity were guilty of willful and wanton negligence. In this case, the playground was for the exclusive use of housing project residents and their guests. The court rejected the plaintiff's argument that the operation of the playground was a proprietary function, and it was therefore outside the purview of the Tort Immunity Act. "There can be no question," said the court, " that the providing of a playground is a governmental activity." n656 The court also rejected the plaintiffs' claim that the immunity protection should be available only if the playground were open to use by the general public. The court noted that the legislation defining public property did not require it to be open for public use.

No tort immunity was available, however, in *Bligen v. Jersey City Housing Authority*, n657 where the injured housing project tenant sued the housing authority for negligent snow removal. Tort immunity was available to a public housing authority for negligent snow removal from streets. In this case, however, the snow was on a driveway internal to the housing project.

Nor was immunity available in *Moore v. Wilmington Housing Authority*, n658 a case in which a guest who was visiting a relative at a housing unit leased by a housing authority was injured by the collapse of a ceiling. The Delaware Supreme Court concluded that the building where the injury occurred was a "public building," and that, as a result, the housing authority came within the scope of an exception to tort immunity applicable to public buildings.

An older Delaware case, decided under a different statutory regime for tort liability, had concluded that a provision of the enabling legislation permitting a housing authority to "sue or be sued" amounted to a waiver of tort immunity. n659 The same view has been expressed by other courts, in cases dealing with housing authorities and other governmentally created entities. n660 But this is not a universally accepted notion. n661 The contrary position is reflected in *Self v. City of Atlanta*, n662 a case in which the Georgia Supreme Court changed its mind about whether "sue or be sued" language waived tort immunity, and overruled a decision concerning a housing authority in which it had previously held otherwise:

> The list of opinions interpreting language of this type is long, and for our present purposes we need not recapitulate and analyze them. It is sufficient to say that, after careful reconsideration of those cases, we are now of the opinion that the correct view is that such language should be read as providing an entity with the status and capacity to enter courts, and not as waiving sovereign immunity. n663

A housing authority that otherwise would be entitled to tort immunity might be found to have waived the immunity protection by purchasing liability insurance, at least if the insurance covers the risk in question. n664

A housing authority that is found liable in tort will likely be faced with the matter of paying a judgment. A California

housing authority had that problem, when it became subject to a $12 million judgment arising out of the deaths of persons in a fire at a housing development. The housing authority claimed that it could pay no more than the amount that it had received from an insurance company. However, the court concluded that the housing authority was obligated to satisfy the judgment, and that nothing in the annual contributions contract with HUD or in HUD regulations prohibited the housing authority from doing so, or from using HUD-obtained funds for the purpose. n665

§ 45.20(c) Contract Liability.

Public housing authorities enter into contracts in order to provide public housing for low-income families. These include contracts with the Secretary of Housing and Urban Development, such as contributions contacts, and leases with public housing tenants. A housing authority that violates its obligations to the Department of Housing and Urban Development may be subject to particular remedies set forth in statute or regulation. n666 However, a housing authority that breaches its contractual obligations would also subject to contractual remedies. These remedies might be sought, for example, by tenants who are suing for breach of a lease covenant.

By way of illustration, in *Turner v. Chicago Housing Authority*, n667 two tenants, representing a class, claimed that the housing authority had violated the provisions of their leases by terminating their leases based on criminal activities committed by their sons. The acts of the sons were apparently committed outside of the leased dwelling units, but on property owned by the housing authority. The housing authority relied on a lease provision that required the tenant to "conduct himself and cause other persons who are on the premises with his consent to conduct themselves in a manner which will not disturb his neighbors' peaceful enjoyment of their accommodations and will be conducive to maintaining the development in a decent, safe and sanitary condition." n668 The court interpreted the reference to "premises" as referring to the tenant's individual dwelling unit. It also concluded that lease termination based on criminal acts by non-tenants occurring outside the leased dwelling unit was contrary to the terms of the lease. n669 One of the named plaintiffs was entitled to injunctive relief. But there was a factual dispute about whether the son of the other named plaintiff might be a resident of the leased premises, which precluded summary disposition of that plaintiff's claim. Class members were entitled to injunctive relief where there was undisputed evidence of lease termination based on the conduct of non-residents outside of the leased dwelling unit.

By way of further illustration, in *Nelson v. Greater Gadsden Housing Authority*, n670 some public housing tenants were successful in obtaining injunctive relief and monetary damages based on a claim that their housing authority had violated lease provisions requiring it to comply with HUD regulations on utility allowances. n671

Of course, if a housing authority is to be subject to liability for breach of a contract, the requirements for the existence of a contract -- such as offer, acceptance, and consideration -- should be satisfied. n672

It should also be noted that contract liability is not a one-way proposition. If there is a valid contract between the housing authority and another party, a material breach by that other party will entitle the housing authority to assert its rights arising under the contract. n673

There have been a number of instances in which public housing tenants have sued public housing authorities, claiming that they were third-party beneficiaries of the contributions contract between their housing authorities and the Department of Housing and Urban Development. The results have been mixed. In a number of cases, courts have concluded that the terms of the contributions contract demonstrated that the purpose of the contract was to benefit public housing tenants, entitling them to claim third-party beneficiary status. n674 In other cases, courts have rejected the tenants' third-party beneficiary claims, concluding that they were only incidental beneficiaries of the contributions contract between HUD and the housing authority. n675

§ 45.20(d) Liability Based Upon Breach of a Statutory Obligation.

In a number of cases, plaintiffs have sued public housing authorities, seeking remedies based on alleged violation of federal statutory obligations. One of the issues in such cases is whether the breach of a statutory obligation gives rise to a private cause of action.

Federal statutes may include provisions permitting private parties to sue to redress harms resulting from statutory violation. In the absence of express provisions allowing such lawsuits, a federal court might conclude that the right to sue is nonetheless implied. n676 While a full discussion of this area of the law is beyond the scope of this chapter, there have been cases in which courts have considered whether public housing tenants have an implied right of action to enforce provisions of federal legislation related to public housing. The results have been mixed. To some extent, the different results have reflected differences in the statutory provisions under consideration. To some extent, the different results have also reflected somewhat different formulas for the recognition of an implied right of action.

The United States Supreme Court considered whether some public housing tenants had a private right of action against a housing authority in *Wright v. Roanoke Redevelopment and Housing Authority.* n677 There, the tenants brought a § 1983 action challenging the housing authority's imposition of a surcharge for utilities. They claimed that the surcharge violated rent ceilings imposed by federal legislation and HUD regulations. The court of appeals held that the 1937 Act and the Brooke Amendment, which included the ceilings, clearly manifested a congressional intent to vest in HUD the exclusive power to enforce the benefits due housing project tenants, so there was an intention to foreclose both a private cause of action under the 1937 Act and any private enforcement under § 1983. n678 But the United States Supreme Court reversed.

The Supreme Court indicated that § 1983 actions are available to enforce violations of federal statutes by agents of the state, but not where Congress had foreclosed such enforcement in the enactment itself or where the statute did not create enforceable rights, privileges, or immunities within the meaning of § 1983. n679 In this instance, however, the Court was of the view that the Brooke Amendment and its legislative history were devoid of any express indication that exclusive enforcement authority was vested in HUD. It also said that congressional and agency actions had indicated that enforcement authority was not centralized and that private actions were anticipated. For example, the Court noted that, in 1981, Congress had changed the maximum percentage of income that could be paid as "rent" from 25 percent to 30 percent. When it made the change, Congress gave the Secretary of Housing and Urban Development discretion to raise tenants' rent incrementally over a 5-year period. Congress also made the Secretary's decisions effectuating the phase-in immune from judicial review. The Court noted that at congressional hearings in which this exception to judicial review was discussed, HUD representatives explained that the exception "had no effect on tenants' ability to enforce their rights under the Housing Act in federal court other than the limited exception concerning the phase-in." n680 Thereafter, observed the Court, Congress repealed the provision precluding judicial review.

The Court stated that it found nothing in the Brooke Amendment or elsewhere in the 1937 Act setting forth a private judicial remedy, "thereby evidencing congressional intent to supplant the § 1983 remedy." n681 The legislation provided for a grievance procedure; however, the Court noted that the procedure was not open to class grievances. Even if the tenants could have used it to complain about the housing authority's utility allowance schedule, the Court observed that the existence of a state administrative remedy did not ordinarily foreclose resort to § 1983. n682

The Court also concluded that a regulatory provision for a "reasonable" allowance for utilities was not too vague and amorphous to confer enforceable rights on tenants. There was a rent ceiling based on 30% of income; a reasonable allowance for utilities was to be included in rent; and there were regulatory guidelines regarding the establishment of utility allowances. The Court thought that the benefits that Congress intended to confer upon tenants were sufficiently specific and definite to be enforceable under § 1983.

In other instances, courts have approved federal lawsuits against housing authorities or units of local government for failing to establish allowances for utilities in accordance with the provisions of the 1937 Act, n683 adopting a public housing revitalization plan that did not "affirmatively further fair housing," n684 failing to provide grievance

procedures to tenants as required by the 1937 Act and accompanying regulations, n685 and failing to comply with the results of a grievance proceeding regarding the condition of the premises. n686

Not all public housing tenants have been successful in raising § 1983 claims. n687 In *Johnson v. City of Detroit*, n688 for example, a plaintiff brought a § 1983 action against the City of Detroit and City of Detroit Housing Commission, seeking damages for lead-based paint poisoning allegedly suffered by her minor son while he was a tenant at a public housing project. Relying on *Gonzaga University v. Doe*, n689 a 2002 decision of the United States Supreme Court, the Sixth Circuit Court of Appeals said that a key consideration in determining whether to recognize an implied right of action was whether "the statutory provision contains 'rights-creating' language critical to showing the requisite congressional intent to create new rights." n690 The court considered language from different provisions of the 1937 Act, including a provision stating that each annual contributions contract with a public housing agency requires the agency to maintain its public housing in a condition that is "safe and habitable." n691 But the court said: "Nothing in these provisions establishes a clear and unambiguous intent by Congress to create privately enforceable rights under § 1983 to ensure compliance with housing quality standards." n692 The court acknowledged that "residents of public housing undoubtedly 'benefit' from the statutory provisions at issue," but it also observed that "the language of § 1437f has an aggregate focus on the entity being regulated, thereby belying any intent to create rights enforceable by individual tenants." n693

In *Hill v. San Francisco Housing Authority*, n694 some plaintiffs brought a §1983 action after two of them had been injured and a relative had been killed as a result of a fire at their housing project. They had also brought claims in state court. In the federal action, the plaintiffs alleged that the city housing authority had violated provisions of the 1937 Act and HUD regulations providing for housing quality standards, and that the statute and related regulations created an enforceable federal right. The court rejected the claim. It said that the housing legislation reflected congressional intent to ensure that federal public monies are distributed to public housing agencies that maintain public housing in accordance with certain quality standards, but that the legislation and the regulations did not create an individual entitlement to a public housing unit in a particular condition. The court also said that the asserted "right" was too vague, because it would have varied depending on the content of local housing codes.

FOOTNOTES:

(n1)Footnote 648. *See* Dan B. Dobbs, The Law of Torts 722 (2000).

(n2)Footnote 649. *See* Dan B. Dobbs, The Law of Torts 722 (2000*).*

(n3)Footnote 650. *See* Dan B. Dobbs, The Law of Torts 722 (2000*).*

(n4)Footnote 651. *606 N.E.2d 916 (Mass. Ct. App. 1993) , review denied, 609 N.E.2d 89 (Mass.1993)* .

(n5)Footnote 652. *But cf. Ford v. Boston Housing Authority, 773 N.E.2d 471 (Mass. Ct. App. 2002)* (a visitor, who had been injured in a fire, sued a housing authority that had locked a door of egress from the building; the housing authority relied on the discretionary act exception, but the court ruled that the exception did not apply in a case where the building code required another means of egress and the governmental actor had no discretion because a course of action was prescribed by a statute).

(n6)Footnote 653. *See Barnes v. Chicago Housing Authority, 761 N.E.2d 283 (Ill. Ct. App. 2001)* .

(n7)Footnote 654. *See 761 N.E.2d at 290* .

(n8)Footnote 655. *See Davis v. Chicago Housing Authority, 555 N.E.2d 343 (Ill. 1990)* .

(n9)Footnote 656. *See 555 N.E.2d at 345* .

(n10)Footnote 657. *See 619 A.2d 575 (N.J. 1993)* .

(n11)Footnote 658. *619 A.2d 1166 (Del. 1993)*

(n12)Footnote 659. *See Wilmington Housing Authority v. Williamson, 228 A.2d 782 (Del. 1967)* . The Delaware legislature later enacted legislation providing that "sue or be sued" language in a charter or enabling legislation cannot be regarded as waiving tort immunity. *See Sandt v. Delaware Solid Waste Authority, 640 A.2d 1030 (Del. 1994)* .

(n13)Footnote 660. *See e.g., Housing Authority of Birmingham Dist. v. Morris, 244 Ala. 557, 14 So. 2d 527 (Ala. 1943)* ; *see also Federal Housing Administration, Region No. 4 v. Burr, 309 U.S. 242 (1940)* (discussing "sue and be sued" language).

(n14)Footnote 661. *See, e.g., Nelson v. Maine Turnpike Authority, 170 A.2d 687 (Me.1961)* ("sue or be sued" language insufficient to waive immunity) *see generally* W. E. Shipley, Liability and Suability, In Negligence Action, of State Highway, Toll Road, or Turnpike Authority *62 A.L.R.2d 1222 (1958)* (stating: "Statutes creating state highway departments, commissions or authorities very commonly provide that such agencies may 'sue or be sued,' but such provisions have usually been held to authorize only such actions as are necessary to carry out the business of the agency, and not to authorize negligence actions."); 57 Am. Jur. 2d *Municipal, County, School, and State Tort Liability* § 45 (2001) (referring to the split in jurisdictions).

(n15)Footnote 662. *377 S.E.2d 674 (Ga. 1989) , overruling Knowles v. Housing Authority of City of Columbus, 95 S.E.2d 659 (Ga. 1956)* .

(n16)Footnote 663. *See 377 S.E.2d at 676* .

(n17)Footnote 664. *See Evans v. Housing Authority of City of Raleigh, 602 S.E.2d 668 (N.C. 2004)* (public housing tenant injured by lead paint; court remands for consideration of liability insurance coverage); *see also Pippin v. Chicago Housing Authority, 374 N.E.2d 1055 (Ill. Ct. App. 1978)* (wrongful death action brought by mother after son stabbed in lobby of housing project building; court concludes that housing authority waived immunity by purchasing liability insurance).

(n18)Footnote 665. *See* Joseph v. San Francisco Housing Authority, *25 Cal. Rptr. 3d 179 (Cal. Ct. App. 2005)* .

(n19)Footnote 666. *See, e.g., 42 U.S.C. § 1437d(g)* regarding a "substantial default" regarding the covenants or conditions in the contract for contributions. HUD remedies are discussed in § 45.06 of this chapter.

(n20)Footnote 667. *760 F. Supp. 1299 (N.D. Ill. 1991)* .

(n21)Footnote 668. *See 760 F. Supp. at 1306* .

(n22)Footnote 669. It should be noted that current legislation requires public housing leases to include a clause providing that "any drug-related criminal activity on or off such premises, engaged in by a public housing tenant, any member of the tenant's household, or any guest or other person under the tenant's control, shall be cause for termination of tenancy." *42 U.S.C. § 1437d(l)(6)*. This provision, and the "one strike" policy, are discussed in § 45.11(e) of this chapter.

(n23)Footnote 670. *802 F.2d 405* (11th Cir. 1986) .

(n24)Footnote 671. *See Nelson v. Greater Gadsden Housing Authority, 802 F.2d 405* (11th Cir. 1986) .

(n25)Footnote 672. *See Brown v. Philadelphia Housing Authority 159 F. Supp.2d 23 (E.D. Pa. 2001)* (court concludes that there was no consideration for a promise by the housing authority not to evict the tenant).

(n26)Footnote 673. *See, e.g., Allegheny County Housing Authority v. Morrissey, 651 A.2d 632 (Pa. Commw. Ct. 1994)* (public housing authority entitled to evict tenant based on tenant's breach of a then permissible no-pet provision

of the lease; the court stated: "Under contract principles, unless there are federal or state regulations prohibiting specific terms in a lease agreement, the lease agreement is a valid contract when both parties agree to its terms and conditions").

(n27)Footnote 674. *See, e.g., Gomez v. Housing Authority of City of El Paso, 805 F. Supp. 1363 (W.D. Tex. 1992)* (public housing tenants and applicants are third-party beneficiaries of annual contributions contract); *Hurt v. Philadelphia Housing Authority, 806 F. Supp. 515 (E.D. Pa. 1992)* (low-income tenants, complaining of lead paint problems, entitled to sue housing authority under third-party beneficiary concept); *Henry Horner Mothers Guild v. Chicago Housing Authority, 780 F. Supp. 511 (N.D. Ill.1991)* (tenants claimed that housing authority's failure to maintain a housing project violated the terms of the annual contributions contract requiring the housing authority to maintain public housing in a safe and sanitary condition in exchange for receipt of HUD funds); *Curtis v. Housing Authority of the City of Oakland, 746 F. Supp. 989 (N.D. Cal.1990)* (housing authority breached its annual contributions contract with HUD concerning the provision of stoves in dwelling units, entitling tenants to seek relief against housing authority); *Concerned Tenants Ass'n of Father Panik Village v. Pierce 685 F. Supp. 316 (D. Conn. 1988)* (tenants have enforceable rights as intended beneficiaries to obtain compliance with the obligations under the annual contributions contract to provide decent and safe housing).

(n28)Footnote 675. *See e.g., Perry v. Housing Authority of City of Charleston, 664 F.2d 1210* (4th Cir.1981) (court states that tenants, who sought relief from terrible housing conditions, were, at best, "incidental beneficiaries" of the annual contract for contributions between the housing authority and HUD); *Kingston Square Tenants Ass'n v. Tuskegee Gardens, Ltd., 792 F. Supp. 1566 (S.D. Fla. 1992)* (court rejects application of third-party beneficiary theory, stating that there was no indication that Congress intended to afford public housing tenants such a remedy).

(n29)Footnote 676. A good discussion of the issue may be found in Richard H. Fallon, Jr., et al., *Hart and Wechsler's The Federal Courts and the Federal System* 758-825 (5th ed. 2003).

(n30)Footnote 677. *479 U.S. 418 (1987)* .

(n31)Footnote 678. In *42 U.S.C. § 1983*, Congress created an express private remedy for violations of federal law that are committed "under color of" state law. *See* Richard H. Fallon, Jr., et al., Hart and Wechsler's The Federal Courts and the Federal System 787 (5th ed. 2003).

(n32)Footnote 679. *See 479 U.S. at 423* .

(n33)Footnote 680. *See 479 U.S. at 425* .

(n34)Footnote 681. *See 479 U.S. at 427* .

(n35)Footnote 682. *See 479 U.S. at 427-28* .

(n36)Footnote 683. *See Hill v. Ogburn, 812 F.2d 679* (11th Cir. 1987) . *See also McDowell v. Philadelphia Housing Authority, 23 F.3d 233 (3d Cir. 2005)* (Public housing tenants brought § 1983 action, alleging that the housing authority had deprived them of their federal rights by failing to factor rising gas rates into their gas allowances; following a settlement, the tenants sought to enforce a consent decree; the court determined that the tenants were entitled to damages).

(n37)Footnote 684. *See Reese v. Miami-Dade County, 210 F. Supp. 2d 1324 (S.D. Fla. 2002)* .

(n38)Footnote 685. *See Samuels v. District of Columbia, 770 F.2d 184 (D.C. Cir. 1985)* .

(n39)Footnote 686. *See Farley v. Philadelphia Housing Authority, 102 F.3d 697 (3d Cir. 1996)* .

(n40)Footnote 687. *See, e.g., Johnson v. City of Detroit, 446 F.3d 614* (6th Cir. 2006) (court concludes that provisions of the United States Housing Act did not create rights enforceable in § 1983 action by a tenant whose child

suffered from lead poisoning allegedly caused by paint in a public housing unit); *Bullard v. Inkster Housing and Re-Development Com'n 126 Fed. Appx. 718* (6th Cir. 2005) (tenant, who was raped in her apartment, did not establish a violation of her civil rights from a state-created danger); *Perry v. Housing Authority of City of Charleston, 664 F.2d 1210* (4th Cir. 1981) (Public housing tenants have no private right of action for injunctive and declaratory relief from poor housing conditions); *L.B. III v. Housing Authority of Louisville, 345 F. Supp.2d 725 (W.D. Ky. 2004)* (no private right of action under § 1983 based on alleged failure of housing authority to comply with the requirements of the Lead-Based Paint Hazard Reduction Act and the Residential Lead-Based Paint Hazard Reduction Act); *Hill v. San Francisco Housing Authority, 207 F. Supp. 2d 1021 (N.D. Cal. 2002)* (No federal private right of action regarding condition of the premises).

(n41)Footnote 688. *446 F.3d 614* (6th Cir. 2006) . The case appears not to have involved traditional public housing, as such, because the court indicates that assistance for project came through Section 8, but the court refers to the housing as public housing, and its analysis is relevant to the present discussion.

(n42)Footnote 689. *536 U.S. 273 (2002)* . In the *Gonzaga University* case, the Supreme Court referred to some confusion regarding the requirements for private enforcement of rights under § 1983, and stated: "We now reject the notion that our cases permit anything short of an unambiguously conferred right to support a cause of action brought under § 1983." *Id. at 283* .

(n43)Footnote 690. *See 446 F.3d at 621* .

(n44)Footnote 691. *See 446 F.3d at 626* (referring to *42 U.S.C. § 1437d(f)(2)*. The court also considered provisions in *42 U.S.C. §§ 1437* and *1437f*).

(n45)Footnote 692. *See 446 F.3d at 626* .

(n46)Footnote 693. *See 446 F.3d at 627* .

(n47)Footnote 694. *207 F. Supp. 2d 1021 (N.D. Cal. 2002)* .

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CHAPTER 45 PUBLIC HOUSING

5-45 Thompson on Real Property, Thomas Editions § 45.21

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§ 45.21 HUD Liability.

As a result of federal statute, the Secretary of Housing and Urban Development may sue and be sued "with respect to its functions under the United States Housing Act of 1937." n695 However, there are some constraints on federal court litigation that, in particular circumstances, might affect the ability of a plaintiff to succeed in HUD-focused litigation arising out of a public housing context. These include requirements associated with standing to sue n696 and the doctrine of exhaustion of administrative remedies. n697 And if the claim in question is brought under the Administrative Procedure Act, n698 the court might deny review of an agency action if it concludes that the action in question has been "committed to agency discretion." n699

In some cases, plaintiffs have attempted to bring tort actions against the federal government based on injuries that occurred on public housing premises. n700 For example, in *Perez v. United States*, n701 the parents of child claimed that the United States should be liable, under the Federal Tort Claims Act, for injuries sustained by the child when she fell from the balcony of her parents' third-floor apartment in a public housing project. They alleged that the balcony railing had been defectively designed. But the First Circuit rejected the claim. It noted that HUD was not the owner of the project, and could not be liable as a landowner. It also concluded that the federal government could not be held liable for any negligence on the part of the housing authority; and that HUD's rights, under the annual contributions contract, to review the plans for the project and to inspect the construction, did not burden it with an affirmative duty to guarantee the safety of project tenants.

Public housing tenants that attempt to assert contract claims against HUD could have some difficulties, because they will typically have to demonstrate that they are third-party beneficiaries of a contract between HUD and the housing authority. However, there have been some instances in which courts have permitted public housing tenants to proceed against HUD. One of these situations arises when HUD has become the landlord. In *National Tenants Organization, Inc. v. Department of Housing and Urban Development*, n702 for example, a class of public housing tenants obtained summary judgment against HUD, as landlord, for its failure to comply with congressionally established requirements regarding deductions in the computation of family income.

In an appropriate case, HUD could be subject to liability for not complying with applicable provisions of the Administrative Procedure Act. An example is provided by *Committee For Fairness v. Kemp.* n703 There, some public

housing authorities brought an action against the Secretary of Housing and Urban Development, challenging his implementation of a new method for calculating their operating subsidies. On a motion for summary judgment, the federal district court held that, in implementing the changes, HUD had improperly failed to comply with the notice and comment procedures of the Administrative Procedure Act. The court also ruled that the housing authorities were entitled to an injunction against retroactive recapture of subsidy funds, and a recalculation of the subsidy amount.

Plaintiffs who assert statutory claims against HUD may need to demonstrate that there is a implied right of action in their favor. n704 In *Howard v. Pierce*, n705 for example, there was an issue as to whether a public housing tenant could bring an action against the Secretary of Housing and Urban Development seeking to enjoin an alleged violation of the Brooke Amendment to the 1937 Act regarding the amount she could be charged for rent. n706 Citing *Cort v. Ash*, n707 the Sixth Circuit said that this was a matter of congressional intent. It referred to four factors from the *Court v. Ash* case to evaluate the claim: 1) whether the plaintiff was among the class of persons that Congress intended to benefit by enactment of the statute; 2) whether there was any legislative intent either to deny or to provide a private remedy; 3) whether the existence of a private remedy would be consistent with the underlying purposes of the legislative scheme; and 4) whether the action was one more appropriately a concern of state rather than federal law. n708

The court concluded, as to the first factor, that lower-income families who reside in public housing are the intended beneficiaries of the Brooke Amendment. Regarding the second factor, the court noted that Congress had included a waiver of sovereign immunity against HUD in the legislation providing for low income housing. n709 This, together with the absence of any other relevant expression of legislative intent, caused the court to conclude that Congress had not intended to deny a private cause of action to the intended beneficiaries of the Brooke Amendment. As to the third factor, the court thought that implying a private cause of action would further the purpose of the Brooke Amendment, which it said was to deal with a concern that the neediest families were being excluded from the public housing program. The court also noted the absence from the legislation of private enforcement mechanisms, and it indicated that recognition of a private cause of action would help avoid frustration of the purpose of the United States Housing Act to provide decent housing for low-income families. The court also thought that allowing declaratory and injunctive relief to be available would further the purpose of the legislation without adversely affecting HUD's primary enforcement responsibilities. n710 On the last factor, the court said that the case did not present "merely a question concerning landlord-tenant law" which would have been more appropriate for state regulation. n711

As something of a footnote, it should be noted that the court was not inclined to recognize a private right of action against the local housing authority. It said, in this connection, that the "policy of providing decent and affordable housing is federal in nature and, as a municipal corporation, [the housing authority] is not required to adopt such a policy." n712 And the court saw no evidence of congressional intent to allow an implied right of action against a local public housing authority.

Finally, it is possible that a plaintiff may have a claim arising under the Constitution. By way of illustration, a claim that HUD had engaged in race discrimination in the operation of the public housing program was recognized in *Young v. Pierce*. n713 There, some black applicants and residents of east Texas public housing brought an action against the Department of Housing and Urban Development, alleging that HUD had knowingly maintained, and continued to maintain, a system of racially segregated housing in violation of the Constitution and the laws of United States. According to the court:

> (1) the vast majority of projects are predominately one race; (2) the percentage of one-race sites is highest in the low rent projects; (3) blacks participate disproportionately in older insured-assisted projects; (4) whites participate disproportionately in Section 8 new construction projects; and (5) the races have roughly equivalent needs for public housing. n714

The court also said that the "history of public housing in the class action counties is simply that of HUD allowing PHA's to construct segregated housing projects and selectively enforcing its regulations in a way calculated to insure that these

projects remained segregated." n715

On motions for summary judgment, the federal district court, held that HUD's funding, regulation, and assistance of local public housing authorities amounted to unconstitutional support of racial segregation; that the relationship between local public housing authorities and HUD was sufficient to give rise to HUD liability; and that the action against HUD was not barred by doctrine of sovereign immunity.

FOOTNOTES:
(n1)Footnote 695. *See 42 U.S.C. § 1404a*.

(n2)Footnote 696. *See, e.g., Boston Public Housing Tenants' Policy Council, Inc. v. Lynn, 388 F. Supp. 493 (D. Mass. 1974)* (no standing to sue under Administrative Procedure Act). *See also* Charles E. Daye, et al., Housing and Community Development 112 (3d ed. 1999).

(n3)Footnote 697. *See* Charles E. Daye, et al., Housing and Community Development 112, 120 (3d ed. 1999).

(n4)Footnote 698. *5 U.S.C. §§ 701 et seq.*

(n5)Footnote 699. *See, e.g., Boston Public Housing Tenants' Policy Council, Inc. v. Lynn, 388 F. Supp. 493 (D. Mass. 1974)* ("Absent a duty owed by HUD to insure that federally funded low-cost housing be decent, safe, and sanitary, it is inconceivable that HUD's responsibilities in this case are anything but discretionary.") *See also* Richard H. Fallon, Jr., et al., Hart and Wechsler's The Federal Courts and the Federal System 943 (5th ed. 2003).

(n6)Footnote 700. *See e.g, Perez v. U.S., 594 F.2d 280* (1st Cir. 1979) .

(n7)Footnote 701. *594 F.2d 280* (1st Cir. 1979) .

(n8)Footnote 702. *358 F. Supp. 312 (D. D.C. 1973)* .

(n9)Footnote 703. *791 F. Supp. 888 (D. D.C. 1992)* .

(n10)Footnote 704. Such a claim would, however, not arise under § 1983, because that legislation does not apply to federal actors. *42 U.S.C. § 1983* provides, in pertinent part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress ...

(n11)Footnote 705. *738 F.2d 722* (6th Cir. 1984) .

(n12)Footnote 706. She was being charged an amount that was greater than the amount of the public assistance that she was receiving for her rent payment.

(n13)Footnote 707. *422 U.S. 66 (1975)* .

(n14)Footnote 708. *See 738 F.2d at 724* .

(n15)Footnote 709. The court cited "sue or be sued" language in *42 U.S.C. §1404a*.

(n16)Footnote 710. But the court also indicated that the prospect of an award for damages would have been

different: "[W]e doubt seriously that an implied action for damages would be appropriate." *Id. at 730* . *See also Bronston v. Kemp, 722 F. Supp. 372 (S.D. Ohio 1989)* (tenants in HUD-owned housing have implied right of action for declaratory and injunctive relief regarding rental payments).

(n17)Footnote 711. *See 738 F.2d at 730,* footnote 15 .

(n18)Footnote 712. *See 738 F.2d at 731* .

(n19)Footnote 713. *628 F. Supp. 1037 (E.D. Tex. 1985)* .

(n20)Footnote 714. *See 628 F. Supp. at 1044* (footnote omitted).

(n21)Footnote 715. *See 628 F. Supp. at 1047* .

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CHAPTER 45 PUBLIC HOUSING

5-45 Thompson on Real Property, Thomas Editions § 45.22

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§ 45.22 Other Federal Housing Programs that Benefit Low-Income Families.

As indicated in a previous section of this chapter, n716 the traditional public housing program is by no means the only housing program that is intended to benefit low-income families. Over time, a number of other government-sponsored programs have been created to assist low-income families with rental housing. Some programs have involved supply oriented assistance to private developers. Other programs have involved demand-oriented assistance to low-income tenants. n717 Because the focus of this chapter is on traditional public housing, rather than on privately owned, government-assisted housing, an in-depth discussion of these other programs is not warranted here; however, some of the major federal programs will be briefly mentioned. n718

§ 45.22(a) Section 221(d)(3) and Section 236.

Some housing assistance programs have featured mortgage subsidies. For example, under the Section 221(d)(3) n719 and Section 236 n720 programs, FHA-insured loans were provided to private developers, accompanied by below-market interest rate arrangements, to facilitate the development of low- and moderate-income housing. n721

Under the Section 221(d)(3) Below Market Interest Rate mortgage insurance program, below-market loans were made by private lenders that were, in turn, purchased by the federal government. In the Section 236 program, FHA mortgage insurance on private loans was combined with an interest rate subsidy to effectively lower the interest rate on the mortgage to 1%. n722

In exchange for participating in these programs, owners were required to make units available to low- and moderate-income families at HUD-approved rents for the term of the mortgage. In 1973, President Richard Nixon imposed a "moratorium" on new funding for housing subsidy programs. n723 Thereafter, the much of the impetus for housing subsidies shifted to the Section 8 program, which is discussed below. However, HUD continues to operate a Section 221(d)(3) mortgage insurance program to finance rental or cooperative family housing for households of moderate income. n724

§ 45.22(b) Section 202.

The Section 202 program was originally created by the Housing Act of 1959 n725 to provide affordable housing for

elderly households in developments owned by nonprofit organizations. n726 Under this program, capital advances are made available to finance building construction or rehabilitation. The capital advances bear no interest, and repayment is not required so long as the housing remains available for very low-income elderly persons for not fewer than 40 years. The program also provides for project rental assistance, meaning that funds are available to cover the difference between the HUD-approved operating cost for the project and the tenants' contribution towards the rent. n727

§ 45.22(c) Section 811.

The Section 811 housing program n728 is similar to the Section 202 program, but its focus is on persons with disabilities. Capital advances, which have interest and repayment terms like those made under the Section 202 program, are available under this program to assist private nonprofit sponsors with the acquisition, construction, or rehabilitation of housing for persons with disabilities. As in the case of the Section 202 program, project rental assistance is available to owners of assisted housing units. n729

§ 45.22(d) Section 8.

The Section 8 housing program originated with the adoption of the Housing and Community Development Act of 1974. n730 The program was intended to provide a subsidy comparable to that offered by public housing, but applicable to privately developed, privately owned housing. n731

§ 45.22(d)(1) Project-Based Assistance.

The original Section 8 program included several sub-programs. Some, such as the ones for new construction and substantial rehabilitation, n732 involved "project-based assistance." n733 Under this form of assistance, long-term subsidies were provided to participating landlords who built or renovated low-income housing. n734 The owners of Section 8 projects were entitled to receive a subsidy equivalent to the difference between thirty percent of their tenants' adjusted incomes and a federally prescribed fair market rent for their units. n735 As a result of further legislation, n736 no additional units were approved for the program after 1983; however, over 800,000 housing units were developed under this program from 1974 to 1983. n737

§ 45.22(d)(2) Tenant-Based Assistance.

The 1974 legislation that enacted the Section 8 housing program provided for a sub-program for "existing housing." n738 This involved "tenant-based" assistance. HUD regulations state that "[w]ith tenant-based assistance, the assisted unit is selected by the family." n739 Landlords who participate in the program agree to select tenants from among those who have been issued certificates of eligibility or vouchers by a public housing authority. The public housing authority designates qualified tenants for participation, and the tenants choose their landlords and their dwelling units. The public housing authority makes subsidy payments to participating landlords, with HUD-derived funds. n740 It is also responsible to undertake inspections of dwelling units, approve leases, and administer the program. n741

§ 45.22(d)(2)(i) Certificates and Vouchers.

Under the certificate program, participating households are given certificates enabling them to rent dwellings from private landlords. n742 If the dwellings meet certain quality standards and do not cost more than the federally prescribed maximum "fair market rent" for the area, participating households generally pay no more than thirty percent of their income in rent, and the balance is subsidized. n743

Under the voucher program, there is greater flexibility, in that landlords can charge more than the federally prescribed maximum for rent, and tenants can pay more than 30% of their income for rent. n744

Both the certificate and the voucher programs operated side by side until, in 1999, they were merged into the "housing

choice voucher" program. n745 HUD regulations provide that post-merger contracts between public housing agencies and landlords must be under the voucher program rather than under the certificate program. n746 HUD's website describes the "housing choice voucher program" as "the federal government's major program for assisting very low-income families, the elderly, and the disabled to afford decent, safe, and sanitary housing in the private market." n747

§ 45.22(e) Section 515.

The United States Department of Agriculture operates a multi-family housing program, referred to as the Section 515 program, that provides for very low interest rate loans for the development of rural rental housing. n748 The program authorizes loans to private or cooperative sponsors to provide rental housing in rural areas for low and moderate-income families, and for elderly and disabled persons.

§ 45.22(f) Low Income Housing Tax Credit.

Beginning in the mid-1980s, the Low Income Housing Tax Credit n749 began to have a significant supply oriented impact on the development of low-income housing. n750 Developers who agree to reserve units for low-income tenants are permitted to earn tax credits based on the cost of project construction or renovation. n751 Participating developers agree to maintain their units as affordable housing units for at least fifteen years. n752

FOOTNOTES:
(n1)Footnote 716. See § 45.01.

(n2)Footnote 717. For a discussion of demand-oriented and supply-oriented programs see Michael H. Schill, Distressed Public Housing: Where Do We Go From Here? *60 U. Chi. L. Rev. 497, 524 (1993).*

(n3)Footnote 718. A number of housing programs are described in U.S. Department of Housing and Urban Development, Programs of HUD (Major Grant, Assistance, and Regulatory Programs) (2005). It is available on line through the HUD website at http://www.hud.gov/funds/index.cfm.

(n4)Footnote 719. *See* Housing Act of 1961, Pub. L. No. 87-70, *75 Stat. 149 (1961)* (amended the National Housing Act to allow private developers to participate in the mortgage subsidy program).

(n5)Footnote 720. This program was established under the Housing and Urban Development Act of 1968, Pub. L. No. 90-448, § 201(a), *82 Stat. 476, 498 (1968).*

(n6)Footnote 721. *See* National Low Income Housing Coalition, 2006 Advocates' Guide to Housing and Community Development Policy, Project-Based Rental Assistance. This publication may be found at http://www.nlihc.org/detail/article.cfm?article_id=2797&id=46. Additional information about these programs may be found in National Housing Trust, Overview of Federally-Assisted Multifamily Housing Programs: Historical Perspective and Status of Legislation and Regulations. This publication may be found on the National Housing Trust's website at http://www.nhtinc.org/policy/legoverview.asp.

(n7)Footnote 722. *See* National Low Income Housing Coalition, 2006 Advocates' Guide to Housing and Community Development Policy, Project-Based Rental Assistance . This publication may be found at http://www.nlihc.org/detail/article.cfm?article_id=2797&id=46.

(n8)Footnote 723. *See* National Low Income Housing Coalition, 2006 Advocates' Guide to Housing and Community Development Policy, Project-Based Rental Assistance . This publication may be found at http://www.nlihc.org/detail/article.cfm?article_id=2797&id=46. More information on the moratorium can be found in *See* Orlebeke, Charles J. "The Evolution of Low-Income Housing Policy, 1949-1999." Federal National Mortgage Association, Office of Housing Policy Research, 11 *Housing Policy Debate* 489, 505 (2000).

(n9)Footnote 724. The program is available to public, non-profit, and cooperative entities. A separate Section 221(d)(4) program is available to profit-motivated entities. *See* U.S. Department of Housing and Urban Development, Programs of HUD (Major Grant, Assistance, and Regulatory Programs 62 (2005). The statutory authority for the program is set forth in U.C.C. Article 9. Additional information may be found under "Descriptions of Multifamily Programs" on the HUD website at http://www.hud.gov/offices/hsg/mfh/progdesc/progdesc.cfm.

(n10)Footnote 725. Pub. L. No. 86-372, § 202, *73 Stat. 654, 667 (1959)* (codified as amended at *12 U.S.C. § 1701q*.

(n11)Footnote 726. *See* Fred Fuchs, Introduction to HUD-Public and Subsidized Housing Programs: A Handbook for the Legal Services Advocate 194 (1989).

(n12)Footnote 727. *See* HUD Handbook 4571.3 REV-1, Section 202 Supportive Housing for the Elderly 1-1, 1-5 (1993). The handbook may be found through http://www.hudclips.org/sub_nonhud/cgi/hudclips.cgi#congrec. Additional information about the Section 202 Program may be found on the HUD website at http://www.hud.gov/offices/hsg/mfh/progdesc/eld202.cfm.

(n13)Footnote 728. The program name is derived from Section 811 of the Cranston-Gonzales National Affordable Housing Act of 1990, Pub. L. No. 101-625, *104 Stat. 4324 (1990),* which is codified at *42 U.S.C. § 8013*.

(n14)Footnote 729. *See* HUD Handbook 4571.2, Section 811 Supportive Housing for Persons with Disabilities 1-1, 1-2,1-10 (1991). The handbook may be found through http://www.hudclips.org/sub_nonhud/cgi/hudclips.cgi#congrec. Additional information about the program may be found on the HUD website at http://www.hud.gov/offices/hsg/mfh/progdesc/disab811.cfm.

(n15)Footnote 730. Pub. L. No. 93-383, *88 Stat. 633, 748 (1974).*

(n16)Footnote 731. *See* Charles E. Daye, et al., Housing and Community Development 210 (3d ed. 1999).

(n17)Footnote 732. *See* Charles E. Daye, et al., Housing and Community Development 210 (3d ed. 1999). In 1978 another sub-program, the Section 8 Moderate Rehabilitation program came into being. This program involved agreements with local housing authorities. *See* National Low Income Housing Coalition, 2006 Advocates' Guide to Housing and Community Development Policy, Project-Based Rental Assistance . This publication may be found at http://www.nlihc.org/detail/article.cfm?article_id=2797&id=46.

(n18)Footnote 733. *See* National Low Income Housing Coalition, 2006 Advocates' Guide to Housing and Community Development Policy, Project-Based Rental Assistance . This publication may be found at http://www.nlihc.org/detail/article.cfm?article_id=2797&id=46.

(n19)Footnote 734. The subsidies could last from twenty to forty years. *See* Michael H. Schill, Distressed Public Housing: Where Do We Go From Here? *60 U. Chi. L. Rev. 497, 524 (1993). See generally* Kevin M. Cremin, The Transition to Section 8 Housing: Will the Elderly Be Left Behind? *18 Yale L. & Pol'y Rev. 405 (2000).*

(n20)Footnote 735. *See* Michael H. Schill, Distressed Public Housing: Where Do We Go From Here? *60 U. Chi. L. Rev. 497, 524 (1993).*

(n21)Footnote 736. Housing and Urban-Rural Recovery Act of 1983, Pub. L. No. 98-181, *97 Stat. 1157, 1183 (1983).*

(n22)Footnote 737. *See* National Low Income Housing Coalition, 2006 Advocates' Guide to Housing and Community Development Policy, Project-Based Rental Assistance . This publication may be found at http://www.nlihc.org/detail/article.cfm?article_id=2797&id=46.

(n23)Footnote 738. *See* Charles E. Daye, et al., Housing and Community Development 210 (3d ed. 1999).

(n24)Footnote 739. *See 24 C.F.R. § 982.1(b)*.

(n25)Footnote 740. *See* Charles E. Daye, et al., Housing and Community Development 216-17 (3d ed. 1999).

(n26)Footnote 741. *See* Charles E. Daye, et al., Housing and Community Development 217 (3d ed. 1999).

(n27)Footnote 742. *See* Michael H. Schill, Distressed Public Housing: Where Do We Go From Here? *60 U. Chi. L. Rev. 497, 525 (1993).*

(n28)Footnote 743. *See* Michael H. Schill & Susan M. Wachter, The Spatial Bias of Federal Housing Law and Policy: Concentrated Poverty in Urban America, *143 U. Pa. L. Rev. 1285, 1335 (1995); See 42 U.S.C. § 1437f(o)(2)*.

(n29)Footnote 744. *See* Michael H. Schill, Distressed Public Housing: Where Do We Go From Here? *60 U. Chi. L. Rev. 497, 525-26 (1993);See 42 U.S.C. § 1437f(o)(2)*. Under the voucher program, the public housing authority determines a payment standard for rents in the area, and the family is generally required to pay 30% of its monthly adjusted gross income for rent. But the landlord may charge more than the payment standard, and, if the landlord does so, the tenant family is required to pay the additional amount. *See* Housing Choice Vouchers Fact Sheet, at http://www.hud.gov/offices/pih/programs/hcv/about/fact_sheet.cfm

(n30)Footnote 745. *See* Orlebeke, Charles J. "The Evolution of Low-Income Housing Policy, 1949-1999." Federal National Mortgage Association, Office of Housing Policy Research, 11 *Housing Policy Debate* 489, 505 (2000). Program regulations may be found at *24 C.F.R. § 982.1 et. seq.*

(n31)Footnote 746. *24 C.F.R. § 982.502*.

(n32)Footnote 747. Housing Choice Vouchers Fact Sheet, at http://www.hud.gov/offices/pih/programs/hcv/about/fact_sheet.cfm.

(n33)Footnote 748. Section 515 was added to the Housing Act of 1949 in 1962. *See* Pub. L. No. 87-723, §4(b), *76 Stat. 671 (1962)*. It is codified at *42 U.S.C. § 1485(a)*.

(n34)Footnote 749. *See* Tax Reform Act of 1986, Pub. L. No. 99-514, §252, *100 Stat. 2085, 2189 (1986).* The legislation was codified in *§ 42 of the Internal Revenue Code, 26 U.S.C. § 42*.

(n35)Footnote 750. *See* Michael H. Schill, Distressed Public Housing: Where Do We Go From Here? *60 U. Chi. L. Rev. 497, 524-5 (1993).*

(n36)Footnote 751. *See* Michael H. Schill, Distressed Public Housing: Where Do We Go From Here? *60 U. Chi. L. Rev. 497, 525 (1993); Internal Revenue Code § 42(b)*.

(n37)Footnote 752. *See* Michael H. Schill, Distressed Public Housing: Where Do We Go From Here? *60 U. Chi. L. Rev. 497, 525 (1993).* For additional information on the tax program, see Kirk McClure, *The Low-Income Housing Tax Credit as an Aid to Housing Finance: How Well Has It Worked?* 11 Housing Policy Debate 91 (2000). This publication is available online through http://www.fanniemaefoundation.org/programs. A pdf version is posted at http://www.fanniemaefoundation.org/programs/hpd/pdf/hpd_1101_mcclure.pdf.

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CHAPTER 45 PUBLIC HOUSING

5-45 Thompson on Real Property, Thomas Editions § 45.23

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Annotation, *Substantive Issues Relative to Rent Levels and Termination of Benefits Under United States Housing Act of 1937 (42 USCS §§ 1437 et seq.), 77 A.L.R. Fed 884 (1986)*

Annotation, *Tenants' Rights, Under Due Process Clause of Federal Constitution, to Notice and Hearing Prior to Imposition of Higher Rents or Additional Service Charges for Government-Owned or Government-Subsidized Housing, 28 A.L.R. Fed 739 (1976)* .

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Supp. To CHAPTER 45 PUBLIC HOUSING

5-45 Thompson on Real Property, Thomas Editions Supp. to § 45.08

Supp. to § 45.08 The Public Housing Lease.

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§ 45.08(c) Legislation and Regulations Relating to Lease Provisions. [Go To Main]

§ 45.08(c)(3) Other Public Housing Lease Provisions.

Add the following sentence to the end of the paragraph that currently ends with footnote 352, immediately after the indication for that footnote:

Failure to include the provision in the lease might affect lease termination rights.[352.1]

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5-45 Thompson on Real Property, Thomas Editions Supp. to § 45.11

Supp. to § 45.11 Tenant Eviction and Termination of the Tenancy.

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§ 45.11(b) Justifications for Tenant Eviction and Termination of the Tenancy. [Go To Main]

Qualifications aside, questions can arise as to whether particular tenant conduct constitutes the kind of "criminal activity" for which the tenancy should be terminated.[446.1]

§ 45.11(d) Eviction and Tenancy Termination Cases. [Go To Main]

Add the following to the text, immediately after the indication of footnote 472:

> having a resident son who had committed an armed robbery, in violation of the "zero tolerance" provision of the lease; n472.1

Add new footnote 472.1, as follows:

Add the following new paragraph, immediately after the block quote in the second paragraph of the section from the Allegheny County Housing Authority case:

The Massachusetts Supreme Court concluded that a public housing authority could evict a tenant who committed a

violent crime about a mile from his leased apartment.[475.1] The public housing lease included a provision permitting the public housing authority to terminate the lease for "any criminal activity that threatens the health, safety, or right to peaceful enjoyment" of other public housing residents. The tenant did not dispute his involvement in violent criminal behavior, but he contended that it took place so far from the public housing development that the lease provision did not apply. Rejecting this contention, the court observed that

> certain criminal activity, such as assault by means of a dangerous weapon and armed robbery, is so physically violent, or associated with violence, that one who engages in it normally would pose a threat to, or reasonably inspire a significant level of fear on the part of, tenants forced to live in close proximity to the offending tenant.[475.2]

Add the following new paragraph, after the paragraph that ends with the indication for footnote 476:

An Illinois court rejected the contention of a public housing tenant that the exclusionary rule should apply in a forcible entry and detainer action. n476.1 The tenant had been arrested for possession of marijuana. Although the criminal charges were eventually dropped, the public housing authority sent a termination notice and filed a complaint for possession. The tenant sought to suppress the evidence of drug possession by means of the exclusionary rule. But the state appellate court rejected the tenant's argument that the forcible entry and detainer action was "quasi-criminal" in nature. It also concluded that application of the exclusionary rule to forcible entry and detainer proceedings involving public housing tenants would hinder the housing authority's "ability to enforce lease agreements designed to promote safety and deter illegal conduct in public housing communities." n476.2

Add the following new footnotes:

Add the following sentence to the end of the paragraph that ends with the indication for footnote 479:

A federal court ruled that an anti-discrimination provision of the Bankruptcy Code--*11 U.S.C. § 525(a)* n479.1--prohibits eviction of a public housing tenant for non-payment of pre-petition rent that had been discharged in bankruptcy. n479.2

Add the following new footnotes:

Add the following to the last paragraph in § 45.11(d), immediately after the reference to footnote 485:

in which the housing authority sought to terminate the tenancy of a disabled tenant who had criminally assaulted another public housing tenant, without undertaking an "individualized assessment" as to whether the risk to others could

have been eliminated by a reasonable accommodation;[485.1]

§ 45.11(e) Illegal Drugs, the "One-Strike" Rule, and Tenant Eviction. [Go To Main]

Add a new paragraph at the end of the section, as follows:

An issue that was not explicitly addressed in the *Rucker* decision was the preemptive effect of the federal legislation permitting "innocent" public housing tenants to be evicted based on illegal activities by household members. That issue arose in a post-*Rucker* case in which a Massachusetts public housing tenant sought to avoid eviction for the drug-related misconduct of her sons.[502.1] The tenant pointed to a 1982 decision of the Massachusetts Supreme Court, in which the court had concluded that a state requirement that tenant eviction be for "cause" permitted "relief from termination when special circumstances indicate that the tenant could not have foreseen the misconduct or was unable to prevent it by any available means."[502.2] The housing authority contended that the Massachusetts "special circumstances" rule had been preempted by the federal legislation. The Massachusetts Supreme Court agreed. It observed that the purposes of the federal legislation were to reduce drug-related crime in public housing and to ensure that such housing was decent, safe, and free from illegal drugs. It noted that Congress and HUD had required housing authorities to use clauses in their leases that permitted lease termination for crimes committed by household members, even when the tenant had no knowledge of and was not at fault for a household member's criminal activity. And it further noted that "the lodging of such discretionary authority with the housing authorities is integral to the accomplishment of the congressional objective because "[s]trict liability maximizes deterrence and eases enforcement difficulties.' "[502.3] Stating that application of the "special circumstances" defense would substantially interfere with congressional objectives, the court concluded that the defense was preempted.

FOOTNOTES:

(n13)Note 472.1. *See Bishop v. Housing Authority of South Bend, 920 N.E.2d 772 (Ind. Ct. App. 2010)* .

(n16)Note 476.1. *See* U.S. Residential Management and Development, LLC v. Head,

922 N.E.2d 1 (Ill. Ct. App. 2009) .

(n17)Note 476.2. *Id. at 5* .

(n18)Note 479.1. The provision prohibits governmental units from discriminating against persons who have sought bankruptcy relief in connection with licenses, permits, charters, franchises, similar grants, and employment.

(n19)Note 479.2. *See In re Stoltz, 315 F.3d 80 (2d Cir. 2002)* (the Court concluded that a public housing lease was a "grant" for purposes of the anti-discrimination provision of the bankruptcy code; it concluded that the anti-discrimination provision protected the tenant from eviction for nonpayment of pre-petition rent; and it concluded that, to the extent that *sections 525(a)* and *365 of the Bankruptcy Code* were in conflict, the rules of statutory construction and sound bankruptcy policy dictated that section 525(a) must prevail); *but see, Housing Authority of New Orleans v. Eason, 12 So. 3d 970 (La. 2009)* (per curiam) (the Court concluded that *11 U.S.C. § 525(a)* was inapplicable to a case in which the housing authority sought to evict a tenant for failure to make rent payments that had been discharged in bankruptcy; the court indicated that post-petition tenders of rent were not a proper basis for denying the housing authority the right to evict the tenant for violating the terms of his lease; it stated that classification of pre-petition rent as discharged did not render the right of the housing authority to evict the tenant "non-existent," and it concluded that there was no legal support for the notion that an individual was "allowed to live rent-free for a period of two years without the lessor having eviction as an available avenue of recourse.").

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Supp. to § 45.12 Restricting Individuals from Visiting Public Housing Projects.

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§ 45.12(c) No-Trespass Policies. [Go To Main]

In the second paragraph of the text of section 45.12(c), at the end of the fifth sentence (the one that begins with "The court held that Thompson had not shown that he had been invited to the premises ... "), indicate the addition of a new footnote 509.1.

Add the following new footnote 509.1: n509.1

FOOTNOTES:
(n1)Footnote 509.1. Whether or not a person is present on the premises at the invitation of a public housing resident can make a difference. *See, e.g., Commonwealth v. Nelson, 909 N.E.2d 42 (Mass. Ct. App. 2009)* (Public housing tenant had invited a person to visit her; she had not known that the housing authority had previously forbidden her guest from entering the premises; the guest was charged with criminal trespass; the court concluded that a trespass conviction could not stand against a defendant who had been found to be passing through the halls of housing authority property in order to reach a tenant's apartment at the tenant's invitation).

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Supp. To CHAPTER 45 PUBLIC HOUSING

5-45 Thompson on Real Property, Thomas Editions Supp. to § 45.16

Supp. to § 45.16 Tenant Displacement from Public Housing.

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§ 45.16(c) Demolition. [Go To Main]

§ 45.16(c)(1) Statutory Provisions.

Add the following new paragraphs, at the end of subsection § 45.16(c)(1):

Whether public housing tenants have a private right of action to prevent demolition of public housing developments was an issue in *Anderson v. Jackson*.[596.1] There, some New Orleans public housing tenants sought, among other things, to enjoin the demolition of four public housing developments. The court noted that some other courts had concluded that § 1437p created privately enforceable rights regarding demolition, but it also observed that many of those decisions had interpreted an earlier version of the statute, or had relied on cases that had done so. The court said that its initial task was to "consider whether § 1437p indicates that Congress has unambiguously conferred a right on individuals."[596.2] Concluding that Congress had not done so, the court held that *42 U.S.C. § 1437p* does not create any private rights in public housing tenants to prevent demolition of public housing.[596.3]

§ 45.16(c)(2) De Facto Demolition.

Add the following new paragraph at the end of the subsection:

In its 2009 decision in *Anderson v. Jackson*,[612.1] the United States Fifth Circuit Court of Appeals held that *42 U.S.C. § 1437p* does not create any private rights in public housing tenants to prevent the demolition of public housing. There, some public housing tenants in New Orleans sought to prevent the demolition of four public housing developments. Although the case was not a de facto demolition case, its consideration of the private right of action issue is relevant to the larger issue discussed here. The case is discussed at the end of the preceding subsection.

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Supp. to § 45.20 Liability of the Public Housing Authority.

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§ 45.20 (b) Tort Liability. [Go To Main]

Add the following at the end of footnote 650:

See, e.g., Moore v. Lorain Metropolitan Housing Authority, 905 N.E.2d 606 (Ohio 2009) (In a wrongful death suit resulting from a fire in a public housing unit, the Ohio Supreme Court concluded that the unit was a building used in connection with a governmental function, but it remanded for a determination whether the housing authority is liable under a negligence exception to tort immunity).

§ 45.20(d) Liability Based Upon Breach of a Statutory Obligation. [Go To Main]

Add the following at the end of footnote 687:

Delgado v. New York City Housing Authority, 888 N.Y.S.2d 19 (App. Div. 2009) (Public housing residents and a labor union sued to compel the housing authority to comply with the city's maintenance code requirement to repaint apartments and common areas every three years; the court rejected the claim, reasoning that, although the 1937 Act obligates housing authorities to maintain public housing in a decent, safe, and sanitary condition, it does not create a private right of action enforceable under § 1983 for proper maintenance of the housing project).

Add the following new paragraph at the end of subsection § 45.20(d):

Some additional discussion of the private right of action issue is included in §§ 45.16(c)(1) and 45.16(c)(2) of this chapter.

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Articles

Add the following:

Kelly, Sarah N. "Separating the Criminal from the Community: Procedural Remedies for 'Innocent Owners' in Public Housing Authorities." *51 N.Y.L. Sch. L. Rev. 379* (2006/2007).

Rooney, Martin J. "The Public Forum Doctrine and Public Housing Authorities: Can You Say That Here?" 21 *B.Y.U. J. P.L.* 323 (2007).

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CHAPTER 46 FIXTURES

5-46 Thompson on Real Property, Thomas Editions 46.syn

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§ 46.syn Synopsis to Chapter 46: FIXTURES

§ 46.01 History.

§ 46.01(a) Introduction.

§ 46.01(b) The Physical Aspects of the Doctrine.

§ 46.01(c) The Roman Origin of the Doctrine.

§ 46.01(d) The Early Landlord/Tenant Cases.

§ 46.01(e) The Contribution of the Mortgagor/Mortgagee Cases.

§ 46.01(f) Current Trends.

§ 46.02 Current Law.

§ 46.02(a) In General.

§ 46.02(b) The Three-Part Test of Teaff v. Hewitt.

§ 46.02(b)(1) The Physical Annexation Requirement.

§ 46.02(b)(2) Adaptation to the Use of the Real Estate.

§ 46.02(b)(3) The Intent of the Annexor.

§ 46.02(c) The Vendor/Vendee.

§ 46.02(d) The Mortgagor/Mortgagee.

§ 46.02(e) The Bona Fide Purchaser.

§ 46.02(f) The Landlord/Tenant.

§ 46.02(g) The Licensor/Licensee.

§ 46.02(h) The Trespasser/Owner.

§ 46.02(i) The Uniform Commercial Code.

§ 46.03 Bibliography.

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CHAPTER 46 FIXTURES

5-46 Thompson on Real Property, Thomas Editions § 46.01

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§ 46.01 History.

§ 46.01(a) Introduction.

In texts published during the latter part of the Nineteenth Century, the discussion of the fixtures concept usually begins with a caveat such as one of the following: the law of fixtures is confusing, n1 "often contradictory," n2 or "the most uncertain title in the entire body of American jurisprudence." n3 While the subject has received a great deal of attention by writers, courts, and legislatures in the ensuing decades, it is still necessary to commence any discussion of the subject with the same kind of caveat. It is still not a well understood concept, and there is considerable question as to whether it remains a vital one. It does, however, continue to receive attention in judicial opinions, law review articles, and texts, few of which reflect any better understanding of the collection of problems and policies that they purport to resolve than do those of preceding eras.

The fixtures concept is one that purports to transfer ownership of a chattel, or create a lien thereon, to the person who owns the land or has a mortgage on it. n4 The doctrine supposedly operates in situations in which the chattel has been used in connection with a tract of land, or building thereon, in such a way as to suggest that the ownership of the chattel has been merged with that of the land. In some situations it results in a non-volitional transfer. That is true when, for example, a trespasser erects a building or adds a chattel owned by the trespasser to an existing building, and the landowner is held to have acquired the title to the addition as soon as it acquired the requisite physical relationship to the land. It is also true when a tenant, mortgagee, licensee or other person adds something to the land of another. When one is deprived of property non-volitionally in these situations, the justification must, of course, be sought in some policy of the law that requires that result. In other situations the object of the doctrine is, apparently, to determine the intention of the parties or to impute to them the intention that reasonable persons would have under the circumstances. n5 In the latter situation, of course, the doctrine is simply an aid in construing a document or a basis for supplying a rule of fairness to govern a relationship.

In every situation in which the doctrine operates, it purports, according to existing as well as ancient authority, to transfer title to the landowner the moment the requisite physical facts occur and to do so because those facts have occurred regardless of the actual intention of the parties or the unfairness that may result therefrom. Thus the moment the trespasser or tenant or other person unites the disputed personal property to the real estate it belongs to the

landowner. The same principle, strangely, purports to give to a vendee or mortgagee title to items on the land because of a status that item acquired at the time it was physically united to the land.

When the cases are examined more closely, however, it becomes clear that there are different policies and expectations that are being given effect in each of these situations and that the physical facts do not have the mystical quality that the doctrine purports to give them. It also becomes apparent, with respect to most relationships in which the doctrine operates, that it is seldom used to deprive a party of title to an item unfairly. The one possible exception to this last statement arises, as will be developed later, in the mortgagor/mortgagee relationship.

In fact, despite many statements to the contrary, there is no single fixtures doctrine or concept, but there are several situations, involving parties to many different relationships and varying policy considerations, in which the courts have purported to impose a single set of rules. The many areas in which the fixtures rules have been said to operate, however, have little in common other than the physical facts that usually involve the adaptation of a chattel for use in connection with land. The policies and expectations that grow out of those recurring physical fact patterns, in the many relationships that the doctrine is said to govern, are very different, however; and the results are not consistent from one relationship to another, regardless of what the cases may say. Indeed, it is arguable that the only remnants of the doctrine that survive today are those that serve as a cover for the implementation of otherwise unarticulated policies and biases.

§ 46.01(b) The Physical Aspects of the Doctrine.

The origin of the effort to force several distinct legal problems into a single doctrinal mold is not entirely clear. The recurrence of the same physical facts in disputes involving the many different relationships has undoubtedly been primarily responsible for the assumption that a single doctrine will suffice to decide all such disputes. This tendency to reduce legal analysis to the physical operates at several levels in the fixtures cases, and at each level it seems to add to the confusion that surrounds the area. In addition to the similarity of the physical facts in the many different disputes, those facts usually involve a physical relationship between the chattel and the land to which it is said to have become a part; and that physical relationship would have loomed large in the medieval legal minds in which the doctrine originated. n6 To such minds ownership was itself a physical concept, as evidenced by the ceremony of livery of seisin by which ownership was passed, and as evidenced by the fact that seisin, an almost purely physical concept, was then the equivalent of ownership. n7 Furthermore, the concept seems to have come out of feudal relationships or the pre-commercial landlord/tenant relationship in which the lord or landlord was clearly the superior party and the ownership of land was far more important than ownership of personal property. In fact the villeins, who were probably the first to suffer loss of property by the operation of the doctrine, were themselves the property of the lord. n8 It is little wonder that in such a situation the Latin phrase *quicquid plantatur solo, solo cedit* n9 (that which is attached to the land cedes to the land) would be used to justify giving ownership of anything physically attached to the land to the overlord.

The physical concept of ownership is a part of a reification process that has even further implications with respect to the fixtures concept, however. Not only does it give great significance to the physical attachment of the structure to the land, it insists that legal consequences flow from and come into being at the moment the physical relationship is established. It seems to conceive of legal rights as coming into being, in an almost physical sense, the instant the chattel assumes a physical relationship to the land despite the fact that the same person may own both the land and the chattel. This aspect of the reification process is found, even today, in the cases in which it is frequently stated, even when the annexor owns both the land and the chattel, that the fixtures determination depends upon the intent of the annexor at the time of the annexation and that the character of the item as a fixture is acquired at that instant. n10 It is as though the courts were regarding the act of making the physical connection between the fixture and the land as a ceremony that has legal significance. It is obvious, however, that nothing of legal consequence has occurred in such a situation. The owner of the land and chattel may remove the chattel from the land, and no one can complain of such action. Furthermore the unsoundness of such an approach is apparent when one considers that the fixtures doctrine is a rule of law that, supposedly, results in a change in, or determination of, ownership. It is manifestly absurd to apply it to a situation in

which the same person owns both the land and the chattel.

§ 46.01(c) The Roman Origin of the Doctrine.

Another aspect of the fixtures doctrine that has contributed to the confusion surrounding it is that it has attempted to blend into this chaotic body of law, in which there is such an emphasis on the physical, a policy and set of rules derived from the Roman doctrine of accessio. n11 In the common law this is known as the accessions doctrine but it has not been as well developed in the common law as it had been by the Romans. n12 The recurring factual patterns dealt with by this doctrine involve situations in which an article of property belonging to one person is combined with something belonging to another in such a way as to make it inconvenient, or economically wasteful, to attempt to separate the two. n13 The doctrine usually involves two items of personal ("movable") property, but the Roman Law apparently used the same set of principles to resolve disputes in which one of the items was real ("immovable") property. n14

The policy questions in this situation relate to the economic inefficiency of attempting to separate the parts of the new product because of the fact that the sum of the values of the separated parts would be less than the value of the combined whole. Indeed, in many cases the effort to separate would result in the total destruction of the value of one or both of the parts. Thus if a person steals some paint from one person and a canvas from another and uses the two items to paint a masterpiece, it would be ridiculous to allow the owners of the two items to separate them in order to give effect to their ownership rights. The same kind of problem can exist if one steals building materials from one person and uses them to construct or improve a structure on the land of another. In the personal property situations, the accessions doctrine would generally attempt to avoid economic waste by giving ownership of the new product to that person whose contribution was the greater and relegating the other to an action for damages. In the painting hypothetical it might even be the thief who obtains title on the theory that the skill and labor of the thief was the major component of the final product. n15

The Roman doctrine of accessio seems to be the source for the common law rule embodied in the Latin phrase *quicquid plantatur solo, solo cedit* n16 which is the basic fixtures principle; and, while many of the fixtures cases do involve the economic waste policies on which the accessions principle is based, n17 the common law cases seldom distinguish between situations in which that principle is being applied and those in which the decision is based upon other policies or principles. As a result the accession principle is one of many principles and policies that are irrationally thrown together in an effort to find a universal rule to apply to the recurring physical fact patterns that are said to be governed by the fixtures doctrine.

§ 46.01(d) The Early Landlord/Tenant Cases.

While the fixtures principle was initially applied primarily to the landlord/tenant relationship n18 (and there in all its rigor), n19 there was, at a very early time, an exception developed in regard to trade fixtures. By the time of the 1703 decision in *Poole's Case*, n20 which became the leading authority in regard to the exception, the proposition had already become well-established to the effect that items placed on the land by a tenant for the purpose of carrying on a trade or business could be removed upon the expiration of the term. n21 The exception has been frequently justified on the basis of the desirability of encouraging trade or business, but some doubt has been expressed as to the validity of that rationale because of the fact that it was being applied "before England had become trade conscious"; n22 and it has been suggested that some of the early cases that allowed tenant removal of items affixed to the real estate did not involve trade tenants at all but, rather, reflected a broader exception in favor of all tenants. n23

The trade fixtures exception for a time appeared to be spreading beyond the landlord/tenant relationship to encompass any addition to property by a commercial enterprise. Ironically, the movement to expand the trade fixtures exception had its origin in what is probably the most regressive decision in the area -- that of Lord Ellenborough in *Elwes v. Maw*, n24 in which the court refused to extend the trade fixtures exception to agricultural tenants. The language of Lord Ellenborough, which gave rise to the belief that the trade fixtures exception would be extended to include all

commercial relationships was: "Where the fixed instrument ... was an accessory to a matter of a personal nature then it should be considered a personalty." n25 The inference from this dictum was that commercial fixtures should be considered to be personal property regardless of the relationship of the parties. n26 If such a movement had been allowed to run its course, the fixtures doctrine might have developed along more rational lines in that it would have been freed, at least in the commercial cases, of the fixation on the physical aspects of the doctrine. Indeed a similar exception with regard to noncommercial landlord/tenant cases was also developed that related to ornamental fixtures. n27 It was not until *Fisher v. Dixon* in 1845 n28 that the House of Lords put an end to the idea that all trade fixtures were exempt from the doctrine and restricted the trade fixtures exception to the landlord/tenant cases.

Elwes v. Maw, was not the only major regressive decision in the cases dealing with the trade fixtures exception. Another such decision dealt with the right of the tenant to remove items after the end of the term. The trade fixtures doctrine had allowed the tenant to remove fixtures, but only if they were removed prior to the end of the term. n29 Fixtures left on the property beyond the end of the term became the property of the landlord. The implementation of this limitation on the trade fixtures exception spawned another major regressive fixtures decision, which was that if the tenant took a renewal lease that did not expressly reserve the right to remove fixtures placed on the premises during the prior term, the right of removal was lost. The leading American case to this effect was the New York case of *Loughran v. Ross*, n30 Fortunately, this rule is seldom followed today even in New York. n31

§ 46.01(e) The Contribution of the Mortgagor/Mortgagee Cases.

While the fixtures doctrine seems to have developed primarily with respect to the landlord/tenant relationship, in more recent years it has found its major application in mortgagor/mortgagee cases, with the leading American cases being decided in the early 19th century. n32 Before the present doctrine became settled, some of the early cases seemed to be developing an approach that de-emphasized the physical annexation requirement in favor of a test that looked for the extent to which the item was adapted for use in connection with the real estate. n33 The test was apparently designed to favor the mortgagee by including almost anything brought onto the land by the mortgagor within the coverage of the mortgage. n34

One justification for the doctrine, other than a simple commercial bias, may have been the policy of keeping a going business from being dismantled by the creditors levying on the equipment and machinery. Such a policy has played a role in areas other than the landlord/tenant cases. n35 The promising aspect of this line of authority was the extent to which it, similar to the ill-fated expanded trade fixtures exception, freed the area of the emphasis on the physical; but that promise was short-lived here also, as a result of the decision in *Teaff v. Hewitt*, in 1853, n36 in which the requirement of physical annexation was reasserted. That decision has become the leading case in the entire fixtures area, and it lays down a test that most courts purport to follow even today.

Teaff, involved an effort by a mortgagee of a woolen mill to enjoin the general creditors of the mortgagor from removing the machinery of the mill. The suit was premised upon the fixtures principle, which would have resulted in the machinery being covered by the mortgage executed subsequent to the machinery being placed on the property by the mortgagor. The court held for the mortgagee as to a steam engine and boilers that were attached to timbers embedded in the land or set upon brickworks, but it held for the creditors as to lighter machines that were fixed in place only by cleats that were attached to the floor. In doing so it established a three-point test for determining whether an item is a fixture: (1) actual annexation to the realty, (2) appropriation to the use of the realty to which it is connected, and (3) the intention of the annexor to make the article a permanent accession to the freehold. n37

The court went to great lengths to emphasize that by "annexation" it meant an actual physical connection to the land. n38 In doing so it rejected the line of authority that dispensed with the physical annexation requirement n39 and, instead, based the fixtures characterization upon "an adaptation to the use or purpose to which the realty is appropriated." n40 When this strict emphasis upon the physical annexation requirement is combined with requirement (3), which refers to the intention of the annexor at the time of the annexation, it becomes clear that this court viewed the

fixtures concept as essentially a physical phenomenon. It viewed the legal incidents that flow from the fixtures concept as occurring at the time the physical events occur, if the annexor, at that time, has the requisite intent.

This physical approach is underscored when the court later indicates, by way of dictum, that the same test applies to resolve all disputes that may arise out of any of the various relationships that may be referred to the fixtures doctrine. n41 Thus, if the article became a fixture because of meeting the three requirements of the test at the time of annexation, it will be so regarded not only as to the parties who may have interests in the article or the realty at that time but also as to parties who may enter into such relationships at a later time.

Insofar as the test gives content to relationships existing at the time of the annexation, it may make some sense. In that context, it might seem rational to determine the intent of the annexor at the time of annexation and to fix consequences of annexation at that time. Thus if a tenant or mortgagor places a building on the land and the landlord or mortgagee claims an interest in it, it might be reasonable to examine the intent of the annexor. Even there the inquiry is misdirected, however, because it should seek the intent and weigh the expectations of both parties to the relationship.

When it is applied to relationships not in existence at that time, however, the test makes no sense at all. Physical facts and intent, on the part of the annexor, that occur at the time of annexation, cannot have legal consequences with respect to relationships that do not yet exist. If a landowner erects a structure on his or her land, nothing of legal consequence has occurred. Legal relationships exist between people, not between people and things. If title to the structure is to pass to a subsequent vendee because it is characterized as a fixture, that result must follow because the structure is so situated as to raise expectations on the part of the vendee at the time of the sale. It is the intent and expectations of the two parties at the time they establish their relationship from which legal consequences should flow. If the parties do not expressly agree as to the disposition of an item that is located on the land at the time of the sale, it should be characterized as a fixture, for purposes of that relationship, only if it is so situated with relation to the land that reasonable persons dealing with the land would expect it to pass with the land. The only intent, on the part of the vendor, that should be relevant is the intent to include or not include it in the sale. The fact that the item is located on the land in such a way as to mislead a purchaser may be relevant; but its relevance is as to its tendency to mislead, and it would have that tendency regardless of what intention the annexor may have had when it was placed there. If the intention of the vendor in this regard is relevant at all, it would be his or her intention to leave it in a position where it could mislead a prospective purchaser.

Much of what the court said in *Teaff*, is dictum because the dispute there arose out of a mortgagor/mortgagee relationship, and the fixtures were on the property at the time the mortgage was executed. It was the intention of the parties to include or not include the fixtures in the coverage of the mortgage that was important. As a matter of fact the court expressly recognized that the latter intention was the important one, rather than the intention at the time of annexation, when it went on to state that a chattel mortgage on the items in dispute, given by the mortgagor at the time of the execution of the real estate mortgage, was an indication that the parties did not intend the disputed items to be regarded as a part of the real estate. n42 There was no apparent recognition, however, that this latter statement was inconsistent with the main portion of the opinion, which would have fixed the character of the annexed items at the time of annexation based upon the annexor's intent at that time.

Further indication that even the *Teaff*, court did not believe that intention at the time of annexation was important is found in the way the court describes that intent. It is described as being "inferred from the nature of the article affixed, the relation and situation of the party making the annexation, the structure and mode of annexation, and the purpose for which the annexation has been made." n43 While subsequent writers have referred to the intention described by the court as an objective intent, rather than a subjective one, n44 it is clear that the reference is not to intent at all but to appearances that are being created by the annexor. The relevance of those appearances, at least as to their effect on subsequently formed relationships, is the extent to which they might cause expectations to be developed by the parties to such relationships. Insofar as the content of those subsequently formed relationships being dependent upon intention, it would be the intention that the parties might have formed at the time of entering those relationships, not the intention

that one of the parties may have had when the chattels were fixed in place on the real estate.

While subsequent courts and scholars have occasionally recognized that the rationale of the *Teaff*, case is not valid insofar as it purports to lay down a principle that can be used to sort out all of the relationships in which the fixtures principle may be invoked, n45 it nevertheless provides the analytical basis for nearly all of the decisions on the subject; n46 and even the most insightful of its critics seem, invariably, to accept the *Teaff*, error of assuming that legal consequences flow from, and arise at the time of, the mere physical act of annexation to the real estate. n47

§ 46.01(f) Current Trends.

Despite the almost universal acceptance of the fixtures doctrine and the *Teaff v. Hewitt* n48 test for applying it, there is reason to question the continued vitality of the doctrine. The results in the cases in more recent years have, in fact, tended to reduce it to its accessions component in that, except in the mortgagor/mortgagee cases where it finds wide application, it is seldom applied in situations in which it would bestow a windfall on the owner of land and then only to prevent economic waste or to protect a bona fide purchaser. As will be demonstrated in the discussion of each of the relationships in which the doctrine purports to be applied, the courts seldom give it the effect of depriving one of property -- an effect that, on its face, it would seem to produce as a matter of course. In the landlord/tenant relationship, for example, the trade fixtures and ornamental fixtures exceptions result in the tenant being able to remove most items placed on the property unless there is evidence of a contrary intent between the parties. n49 To the same effect, the licensee-owner cases nearly always allow the licensee to retain ownership of items placed on the property unless a bona fide purchaser has intervened; n50 and in the trespasser/owner situation, an area where the principle may have at one time produced the harshest results, the more recent cases have been liberal in their efforts to prevent the unjust enrichment that would result from application of the rule even to the point of permitting the trespasser to remove structures placed upon the land. n51 Even if the principle operates to deprive a trespasser of title to a structure, the cases, or a commonly adopted form of statute, n52 require that the trespasser be compensated. In the vendor/vendee situation, the fixtures principle was probably never anything but an aid to construing the agreement between the parties or the basis for imputing to them an intent based upon that which reasonable people would have had under the circumstances. n53 This trend toward stripping the fixtures doctrine of its vitality is carried forward in the Uniform Commercial Code in which, as between the holder of a security interest in the chattel and the owners of interests in the land, the chattel security holder will prevail, providing the recording provisions have been complied with. n54 The one exception to the last statement is in regard to building materials that have been incorporated into an improvement on land, n55 and that, of course, is the situation in which an accession has clearly occurred. It is to be noted that the situation that is most commonly dealt with by the Uniform Commercial Code is that in which the holder of a security interest in the chattel is opposed to a mortgagee of the land, and the Code therefore disrupts the operation of the fixtures principle in the one area in which it still has vitality in the common law.

FOOTNOTES:

(n1)Footnote 1. John W. Hill, A Manual of the Law of Fixtures 2 (2d ed. 1871).

(n2)Footnote 2. Marshall D. Ewell, A Treatise on the Law of Fixtures 1 (1876).

(n3)Footnote 3. Ransom H. Tyler, A Treatise on the Law of Fixtures 34 (1877).

(n4)Footnote 4. At one time there was disagreement as to the meaning of the word "fixture" (*See* Marshall D. Ewell, A Treatise on the Law of Fixtures 4, 5 (1876); and, in fact, it was sometimes given an opposite meaning in which it was said to be an item that, although used in connection with the real estate, had not become a part of the land and was removable without the consent of the landowner. Charles A. Ferard & W. Howland Roberts, Amos and Ferard on the Law of Fixtures 2 (3d ed. 1883) [hereinafter cited as Amos & Ferard]. As to this latter definition, it has been said: "A removable fixture as a term of general application, is a solecism -- a contradiction in words." *Teaff v. Hewitt, 1 Ohio St. 511, 524 (1853)* .

Although the currently accepted definition is as stated in the text, the word is sometimes used, in special situations, to describe that which is removable without the consent of the landowner, as in "trade fixtures" -- which actually describes an exception to the fixtures doctrine.

A leading commentary on the U.C.C. defines "fixture" by distinguishing among things "that remain 'pure goods', those so substantially integrated into real estate as to become real estate themselves, i.e., 'pure realty", and those in the gray area that would pass in a deed to the real estate yet remain personal property." James J. White and Robert S. Summers, Uniform Commercial Code, 853 (5th ed. 2000). The treatise refers to the things in the latter group as fixtures. *See id.* Such a definition, while correct if limited to transactions covered by Article 9 of the Code, sounds a great deal like the Amos and Ferard definition.

The 1999 version of the U.C.C. states that "[f]ixtures means goods that have become so related to particular real property that an interest in them arises under real property law." *See U.C.C. § 9-102(41)*. A comment to § 9-334, which deals, in part, with fixture filings, adds:

> Thus, this section recognizes three categories of goods: (1) those that retain their chattel character entirely and are not part of the real property; (2) ordinary building materials that have become an integral part of the real property and cannot retain their chattel character for purposes of finance; and (3) an intermediate class that has become real property for certain purposes, but as to which chattel financing may be preserved.

U.C.C. § 9-334, Official Comment 3. The U.C.C. offers little guidance on the question of what makes something a fixture.

(n5)Footnote 5. *See, e.g., Stibor v. Farrell, 129 N.W.2d 449 (1964)* , in which vendee was given title to a grain bin that was on the property at the time of the sale. The court was clearly giving effect to the intention of the parties even though the conveyance did not mention the item. *See also Commonwealth v. Bundza, 763 N.E.2d 545 (Mass. Ct. App. 2002)* ; *Martin v. Pilaczynski, 25 N.E.2d 362 (Ohio Ct. App. 1939)* ; *McCraw Oil Co., Inc. v. Pierce, 83 P.3d 907 (Okla. Ct. App. 2003)* .

(n6)Footnote 6. For a discussion of the antiquity and origin of the doctrine, *See* 7 Sir William Holdsworth, A History of English Law 485 (2d ed. 1937).

(n7)Footnote 7. *See* Percy Bordwell, *Seisin and Disseisin, 34 Harv. L. Rev. 592 (1921);* 2 Sir Frederick Pollock and Frederic W. Maitland, History of English Law 29 (2d ed. 1968).

(n8)Footnote 8. *See* C.A. Tuttle, *The Law of Fixtures, Its Historical Development and Present State, 3 Alb. L.J. 407, 408 (1871);* 2 W. S. Holdsworth, A History of English Law 167 (1909); Harrison A. Bronson, The Law of Fixtures, 10 (1904).

(n9)Footnote 9. The spelling of the first word of the phrase is sometimes *quidquid*. *See Teaff v. Hewitt, 1 Ohio St. 511, 525 (1853)* .

(n10)Footnote 10. *See, e.g., Marsh v. Spradling, 537 S.W.2d 402 (Mo. 1976)* .

(n11)Footnote 11. 5 American Law of Property § 19.2 at 6 (A. James Casner ed. 1952).

(n12)Footnote 12. *See* Russell Denison Niles, *The Intention Test in the Law of Fixtures, 12 N.Y.U. L.Q. Rev. 66, 76 (1935).*

(n13)Footnote 13. *Capitol Chevrolet Co. v. Earheart, 627 S.W.2d 369 (Tenn. Ct. App. 1981)* , in which purchaser

of the stripped-down hull of a stolen auto was given title to it because of the addition by him of material and labor, which converted it into a more valuable automobile.

(n14)Footnote 14. The Roman concept of *accessio* was applied to both movable and immovable property because the Romans did not emphasize the difference between the two.*See generally*, 2 Patrick M.C. De Colquhoun, A Summary of the Roman Law §§ 979-993 (1988); Walter Warwick Buckland, A Textbook of Roman Law from Augustus to Justinian §§ 208-214 (3d ed. 1966); Max Radin, Handbook of Roman Law, §§ 346-349 (1927).

(n15)Footnote 15. *But cf. Fanderlik-Locke Co. v. United States, 285 F.2d 939 (10th Cir. 1960)* ; under the law of accession, the title to paint transferred from subcontractor to general contractor after the paint had been applied.

(n16)Footnote 16. Russell Denison Niles, *The Rationale of the Law of Fixtures: The English Cases, 11 N.Y.U. L.Q. Rev. 560, 561 (1934);* In 7 Sir William Holdsworth, A History of English Law 485 (2d ed. 1937), however, the phrase is said to have come from the Roman principle *cujus est solum ejus est usque ad coelum.*

(n17)Footnote 17. *See, e.g., Fike v. Riddle, 677 S.W.2d 722 (Tex. Ct. App. 1984)* , in which the court refused to allow an oil and gas lessee to remove the casing in a well, even though given that right in the lease, because to do so would destroy a producing well.

(n18)Footnote 18. There were also many early cases involving the heir/executor and life tenant/remainderman situations. *See* Charles A. Ferard and W. Howland Roberts, Amos and Ferard on the Law of Fixtures 41 (3d ed. 1883).

(n19)Footnote 19. For example, in one of the earliest cases, it was held that it was waste for a tenant to build a house on the property and then waste again to tear it down. Sir Edward Coke, Commentaries on Littleton *53a.

(n20)Footnote 20. 1 Salk Rep. 367, *91 Eng. Rep. 320 (K.B. 1703)* in which the tenant was allowed to remove soap vats that he had placed on the premises for the furtherance of his trade.

(n21)Footnote 21. Charles A. Ferard & W. Howland Roberts, Amos and Ferard on the Law of Fixtures 40-49 (3d ed. 1883).

(n22)Footnote 22. *See* Russell Denison Niles, *The Rationale of the Law of Fixtures: The English Cases, 11 N.Y.U. L.Q. Rev. 560, 564 (1934).*

(n23)Footnote 23. *See* Charles A. Ferard & W. Howland Roberts, Amos and Ferard on the Law of Fixtures 44 (3d ed. 1883).

(n24)Footnote 24. 3 *East 38, 102 Eng. Rep. 510 (K.B. 1802).*

(n25)Footnote 25. *Id.* at 53, 102 Eng. Rep. at 516.

(n26)Footnote 26. *See* Russell Denison Niles, *The Rationale of the Law of Fixtures: The English Cases, 11 N.Y.U. L.Q. Rev. 560, 580 (1934).*

(n27)Footnote 27. For a discussion of the ornamental fixtures exception, *See* Charles A. Ferard & W. Howland Roberts, Amos and Ferard on the Law of Fixtures 97-126 (3d ed. 1883); and 2 James Kent, Commentaries on American Law 344 (5th ed. 1844).

(n28)Footnote 28. *12 Cl. & F. 311, 8 Eng. Rep. 1426,* as *cited in* Russell Denison Niles, *The Rationale of the Law of Fixtures: The English Cases, 11 N.Y.U. L.Q. Rev. 560, 581 (1934).*

(n29)Footnote 29. *See, e.g., Blackwell Printing Co. v. Blackwell-Wielandy Co., 440 S.W.2d 433 (Mo. 1969)* . There is a line of contrary authority. It gives the tenant a reasonable time after expiration of the lease to remove the fixtures.

Towne v. Sautter, 326 N.W.2d 694 (N.D. 1982) ; *see also* Annotation, *Time Within Tenant's Right to Remove Trade Fixtures Must Be Exercised, 109 A.L.R.5th 421 (2003)* (discussing varying approaches for dealing with the removal of trade fixtures).

(n30)Footnote 30. *45 N.Y. 792 (1871)* .

(N31)Footnote 31. This decision came under rather sharp criticism early on. In *Lewis v. Ocean Nav. & Pier Co., 26 N.E. 301 (1891)* , the court said, "The decision in that case [*Loughran v. Ross, 45 N.Y. 792 (1871)]* was placed upon quite technical reasoning, supported, it is true, by some authorities, but it is not one of those cases whose principle should be extended." *Id.* at 350, 26 N.E. at 304. *See also* P. H. Vartanian, Annotation, *Right to Remove Fixtures or Improvements Placed Upon Property by One Holding Under Lease as Affected by Renewal or New Lease Made to Him or His Successor Without Reservation of the Right to Remove*, 110 A.L.R. 480 (1937) . The final blow to the Loughran rule in New York came in 1959, when the State Legislature specifically abrogated this rule. *N.Y. Real Prop. Law § 226-a*.

(n32)Footnote 32. *See, e.g., Teaff v. Hewitt, 1 Ohio St. 511 (1853)* ; *Voorhis v. Freeman, 2 W. & S. (Pa.) 116, 37 Am. Dec. 490 (1841)* .

(n33)Footnote 33. *See, e.g., Voorhis v. Freeman, 2 W. & S. (Pa.) 116, 37 Am. Dec. 490 (1841) . See also, Farrar v. Stackpole, 6 Greenl. (Me.) 154, 19 Am. Dec. 201 (1829)* , in which the same trend was developing with respect to the vendor/vendee relationship.

(n34)Footnote 34. The Pennsylvania Supreme Court explained the development as follows:

> Due to the demands and requirements of our changing economic order, we early developed in this State the principle of an 'industrial mortgage' which included, as part of the freehold, personal property in and about a manufactory. This principle became more important as our industrial life expanded, so that the necessary credits to sustain and finance manufactories and other like industries could be obtained with some degree of certainty that the security offered would be continued.

Roos v. Fairy Silk Mills, 5 A.2d 569, 571 (Pa. 1939) . See also Russell Denison Niles, *The Rationale of the Law of Fixtures: The English Cases, 11 N.Y.U. L.Q. Rev. 560, 561 (1934),* and Alphonse M. Squillante, *The Law of Fixtures: Common Law and the Uniform Commercial Code Part I, 15 Hofstra L. Rev. 191, 212 (1987).*

(n35)Footnote 35. Between heir and executor, an early English case held that salt pans that were removable without damaging them or the building went to the heir as against the executor. Lord Mansfield reasoned that the intent of the owner was to increase the value of the inheritance by affixing the salt pans. The full enjoyment of the inheritance was not possible without them. *Lawton v. Salmon, 1 H. Bl. 259, 126 Eng. Rep. 151 (1793)* .

(n36)Footnote 36. *1 Ohio St. 511 (1853)* .

(n37)Footnote 37. *Id. at 530* .

(n38)Footnote 38. *Id. at 543* .

(n39)Footnote 39. *See, e.g., Voorhis v. Freeman, 2 W. & S. (Pa.) 116, 37 Am. Dec. 490 (1841) . See also, Farrar v. Stackpole, 6 Greenl. (Me.) 154, 19 Am. Dec. 201 (1829)* , in which the same trend was developing with respect to the vendor/vendee relationship.

(n40)Footnote 40. *Teaff v. Hewitt, 1 Ohio St. 511, 528 (1853)* .

(n41)Footnote 41. *Id. at 531* .

(n42)Footnote 42. *Id. at 543* .

(n43)Footnote 43. *Id. at 530* .

(n44)Footnote 44. Walter B. Raushenbush, Brown on Personal Property, § 16.8 at 545 (3d ed. 1975) [hereinafter cited as Brown]; Russell Denison Niles, *The Intention Test in the Law of Fixtures, 12 N.Y.U. L.Q. Rev. 66, 72 (1935);* Bingham, *Some Suggestions Concerning the Law of Fixtures, 7 Colum. L. Rev. 1, 16-17 (1907). See also, Rayl v. Shull Enters., 108 Idaho 524, 700 P.2d 567 (Idaho 1984)* . The intention sought is not the undisclosed purpose but rather the intention gathered from surrounding circumstances. This is the overwhelming view of the courts. *See Snedeker v. Warring, 12 N.Y. 170 (1854)* .

(n45)Footnote 45. For a discussion on this point *See* Bingham, *Some Suggestions Concerning the Law of Fixtures, 7 Colum. L. Rev. 1, 15-16 (1907).*

(n46)Footnote 46. *See* Squillante, *The Law of Fixtures: Common Law and the Uniform Commercial Code, 15 Hofstra L. Rev. 191, 195 (1987);* Thomas W. Coffey, *Foreword* to Alphonse M. Squillante, The Law of Fixtures at x (1992), where it is said: "The legal rule announced in Teaff ... has remained substantially unchanged to this day, and it is the foundation of modern fixtures law." *See also K & L Distributors, Inc. v. Kelly Elec., Inc., 908 P.2d 429 (Alaska 1995)* ; . *Pledger v. Halvorson, 921 S.W.2d 576 (Ark. 1996)* (setting forth the three-part test).

(N47)Footnote 47. *See* Russell Denison Niles, *The Intention Test in the Law of Fixtures, 12 N.Y.U. L.Q. Rev. 66, 76 (1935),* where he seems to contradict himself without realizing it:

> Therefore that passes which the average buyer or mortgagee would be justified in expecting under the circumstances. Not to be confused are the cases where the grantor intends to include personal property in the transaction, even though not mentioned in the writing, and where there is a change of possession. Such an intention will be presumed if articles of a doubtful nature are delivered with the realty.

Russell Denison Niles, *The Intention Test in the Law of Fixtures, 12 N.Y.U. L.Q. Rev. 66, 72-73 (1935).* He then goes on to say, "[I]t is not the bargain or an agreement which makes a chattel a fixture. It is the unilateral 'act of the annexor.'" Russell Denison Niles, *The Intention Test in the Law of Fixtures, 12 N.Y.U. L.Q. Rev. 66, 74 (1935).* Another commentator has been trapped by this same inconsistency. Brown is less emphatic than Niles, but he makes the same conceptual error:

> A landowner's testimony that he intended not a permanent annexation to the freehold but a retention and subsequent removal of the articles as personalty is ineffective to prevent a finding of fixture from objective evidence... . Undoubtedly, where the article in question is clearly by objective tests either realty or personalty, the intent of the owner to treat it otherwise is ineffective. Where, however, the article in question is of an ambiguous nature, not clearly one or the other, then *the actual intent with which the article was placed on the ground may well be material and decisive* (emphasis added).
>
> Walter B. Raushenbush, Brown on Personal Property, § 16.5 at 537 (3d ed. 1975).

(n48)Footnote 48. *1 Ohio St. 511 (1853)* .

(n49)Footnote 49. *See* § 46.02(f) of this chapter.

(n50)Footnote 50. *See* §§ 46.02(e) and 46.02(g) of this chapter.

(n51)Footnote 51. *See Duncan v. Akers, 262 N.E.2d 402 (1970)* ; *Pull v. Barnes, 350 P.2d 828 (1960)* ; and other authorities *cited in* § 46.02(h) of this chapter.

(n52)Footnote 52. *See* Dickinson, *Mistaken Improvers of Real Estate, 64 N.C. L. Rev. 37, 42 (1985),* for a detailed discussion of "betterment" statutes.

(n53)Footnote 53. *See* § 46.02(c) of this chapter.

(n54)Footnote 54. *U.C.C. § 9-334(e)*; for a more detailed discussion *See* § 46.02(i) of this chapter.

(n55)Footnote 55. *U.C.C. § 9-334(a)*.

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CHAPTER 46 FIXTURES

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§ 46.02 Current Law.

§ 46.02(a) In General.

The fixtures concept purports to apply a single doctrinal set of rules to resolve disputes between parties to many different kinds of relationships; but, because it is obvious that past efforts to generalize across the entire range of fact patterns that deal with the concept have failed, fixtures cases are sometimes organized into two groups for analysis. n56 In the first group are those cases in which an item is placed upon the land by the owner thereof prior to the sale of the land or an interest therein to another. This group consists almost entirely of the vendor/vendee cases and is the simplest and most straightforward of all the fixtures cases in that the inquiry is simply that of finding the intent of the parties or that intent that will be imputed to them on the basis of reasonableness and fairness. The second group are those cases in which the item is placed on the land by one who does not own the land or who owns only a limited interest in the land. This group includes the landlord/tenant, licensor/licensee, mortgagor/mortgagee, and trespasser/owner cases.

The appeal of such an organization would seem to be that each group has common factors that permit generalizing within the group. Thus the first group would involve relationships formed after the item is placed upon the property and, therefore, represents a situation in which the parties had an opportunity to bargain with respect to the character of the item. The second group would involve those situations in which the item was placed on the property by one of the parties after the relationship had already been established and the opportunity to bargain with respect to the character of the item was, therefore, not necessarily present. The theory seems to be that, in the former situation, the relationship between the parties with respect to the thing is clearly volitional, whereas in the latter it is not. The problem with such an organization, however, is that it doesn't work. Each of the many relationships in which the fixtures concept is used has its own particular mix of expectations and policy considerations; and it is, for the most part, not possible to generalize to any degree with respect to any two of them. To the extent that generalization is possible the general principle, which imputes to the parties the intentions of reasonable people, applies to all volitional relationships regardless of whether the item was attached to the land before or after the establishment of the relationship.

The mortgagor/mortgagee cases, for example, should, if the volitional/non-volitional organization were used, be included in both categories, depending upon whether the mortgage was executed before or after the item was annexed to the land. If the item was annexed to the land by the mortgagor before the execution of the mortgage, a simple

transferor-transferee fact pattern would be presented; but, if it was annexed after the execution of the mortgage, the case would fall into the second category. In fact, however, the mortgagor/mortgagee cases are, because of policies, expectations, and judicial biases unique to the area, analyzed the same regardless of when the mortgage was executed with respect to the annexation of the item to the land; n57 and the holdings in such cases bear little relationship to the results reached in situations involving other relationships.

Similarly the landlord/tenant cases would be grouped along with such clearly non-volitional relationships as the trespasser/owner cases even though the landlord/tenant cases bear a closer relationship to the vendor/vendee transactions in that the courts are generally, in both situations, seeking to adjust the rights of the parties to volitional relationships based upon fairness or imputed intent and are seldom required to deal with the kind of policy problems that are present in the trespasser cases. n58

Rather than attempt to organize this discussion on the basis of dividing the cases into subgroups, therefore, each of the several relationships will be treated separately. Such an organization recognizes that each of the recurring fact patterns represents a distinct mix of policies, expectations, and reasoning, and that there is no single fixtures doctrine. Since the cases purport to generalize across the entire area based upon the three-part test laid down in *Teaff v. Hewitt*, however, some consideration must be given to the validity of that approach and the application of that test.

§ 46.02(b) The Three-Part Test of *Teaff v. Hewitt.*

The problem with the analysis in *Teaff v. Hewitt*, n59 which is the analysis that most courts utilize in deciding fixtures cases, n60 is that it purports to establish three distinct factors that, when found to exist, will mechanically classify an item as a fixture with the result that it will belong to the owner of the land or be covered by a lien on the land. Despite the mechanical nature of the test, the only part of it that purports to isolate a concrete fact and give unambiguous significance to it is the first of the three requirements, which requires physical annexation; and even that results in an almost metaphysical inquiry when any attempt is made to apply it to the varying fact situations in which it is said to have significance. n61 The other two parts of the test refer vaguely to the relationship between the thing and the real estate and the intention of the party who created that physical relationship. Not only are these latter two parts of the test incapable of making the kind of precise measurement that the test suggests is being made, their relevance to any particular objective is unclear; and, furthermore, they are redundant in relation to each other and to the first. Their redundancy becomes apparent when one considers that the intention referred to in the third part of the test is not actual intention but rather to the appearance that is being created with respect to the relationship of the thing to the land. n62 In addition, the search for intention, to the extent that it is the intention at the time of annexation, is unrelated to the objectives of the doctrine in most of the cases in which it is said to be applicable.

§ 46.02(b)(1) The Physical Annexation Requirement.

The first of the three parts of the test, the physical annexation requirement, suggests that a precise determination can be made as to the existence of a physical fact and that, once made, this part of the test will have been satisfied. Since the test is stated in the conjunctive, it is clear, also, that the physical connection must exist in order for the item to be characterized as a fixture. n63 The cases in which the test has supposedly been applied, however, make it clear that there is no distinct line between what is physically connected to the land and what is not and that, furthermore, the test will be held to have been satisfied in many situations in which there is absolutely no physical connection between the thing and the land. Thus, while buildings will generally be considered to be fixtures without question, n64 there are many cases in which buildings are not held to be such. n65 Most buildings are, of course, simply sitting on foundations and are thus attached only by their own weight. The fact that the status of buildings as fixtures is seldom questioned obviously has more to do with customs and attitudes than it does with the physical attachment of the building to the land. Other cases in which extremely heavy items are attached only by their own weight sometimes result in a finding that the item is a fixture and sometimes that it is not. n66 There are also many cases in which items not attached at all are considered to be fixtures. n67

While many courts and writers frankly recognize that physical attachment is not an absolute requirement, despite the contrary statement in the three-part test that they almost uniformly purport to apply, they nevertheless continue to treat it as a fact of independent significance; n68 and, for that reason, it causes mischief in the adjudicatory process. For example, in a case in which two identical machines were on the premises and both were to be permanently attached but only one had been attached at the time the issue was raised, the attached one was held to be a fixture and pass with the land and the other was not; the physical attachment requirement was apparently the only basis for distinguishing between the two. n69

Even though physical attachment should not be considered a fact of independent significance in fixtures cases, the degree to which an item is mobile and the customs and attitudes about its mobility are facts to be considered in measuring the reasonableness of the expectations of the parties in any given factual situation. n70 They are only a few of the many facts that may bear upon the question of reasonableness in any given situation, however.

§ 46.02(b)(2) Adaptation to the Use of the Real Estate.

The second part of the test, which refers to the extent to which the thing has been adapted to the use of the land, probably in a general way sends the inquiry in a proper direction in that it refers to the relationship between the thing and the human activities being conducted on the land that have given a particular value to the land. n71 To the extent that the parties were bargaining for that value, in a transferor-transferee situation, or that it may have contributed to the expectations that each developed, such an inquiry is, of course, a proper one. Thus, in a case in which the parties bargained for the sale of land on which a sawmill was located and the dispute concerned a log chain that was used in the operation of that mill, n72 it would be relevant to inquire into the extent to which a log chain was an integral part of the sawmill operation. But even if it were to be concluded that the log chain did bear such a relationship to the sawmill, that conclusion should not be given the kind of controlling significance that is suggested by the *Teaff v. Hewitt*, test. There would undoubtedly be other factors that would be relevant to the expectations the parties might have developed in that situation. Such factors might include: the cost of log chains, the custom of the sawmill industry with respect to the extent to which log chains are moved from operation to operation, the extent to which log chains might have utility and value apart from their use in saw mills and particularly the extent of their utility in other activities of the vendor, and the extent to which any of these factors might have been known to the parties.

The *Teaff v. Hewitt*, test suggests, however, that the factor of adaptation to the use of the land can be determined with certainty and that, once the item has been determined to bear the requisite relationship to the land, one of the three parts of the test that will determine its ownership has been satisfied. If the other two parts of the test are satisfied, the ownership of the item has been determined.

§ 46.02(b)(3) The Intent of the Annexor.

The third part of the *Teaff v. Hewitt*, test is that which refers to the intent of the annexor at the time of annexation; and it is the part of the test which is still given the most credibility n73 and which, because of its misdirected thrust (in that it seeks the intention of only one party to any given transaction and that only at the time of the annexation rather than at the time of the transaction) is likely to cause the most mischief.

If intention is to be a factor in giving content to volitional relationships, it should be the intention that was shared by the parties to the relationship at the time the relationship was entered and not the intention that one of them may have had at the time of an event that preceded or followed the formation of the relationship. Or, if the parties formed no intention or, having formed one, failed to communicate such intention to the other in an effective manner, the dispute should be resolved on the basis of an intention that is imputed to them based upon what reasonable persons would have intended under the circumstances.

The usual analysis in the fixtures cases, however, instead of framing the issue in the foregoing manner, seeks, based on the test in *Teaff v. Hewitt*, the intention of the annexor at the time of annexation. Such an inquiry is, of course, absolutely irrelevant to the ultimate issue involved in such disputes. Nothing of legal consequence occurs when one who is the owner of land annexes to it an article of personal property also owned by such a person, and neither can the intention that may accompany such an act have any legal significance. Such an owner may at will, and any time, remove any annexed article or leave it attached. If the property is later sold, the parties to that transaction may treat the attached item as a part of the land or not, as they wish. It is only when such an owner enters into a relationship with another person concerning the land, and they do not deal with the matter, that the question arises as to whether ownership of the attached item is affected by the transaction; and, to the extent that intention is a factor in making such a determination, it must be an intention that is common to the parties to the relationship.

To the extent that the *Teaff*, rule actually does seek the intent of the annexor at the time of the annexation, it is misdirected. It purports to seek intent with respect to the permanence of the attachment of the item to the land. While such an inquiry might seem to have relevance to the proper issues in that the expectations of the parties may have been affected by the extent to which the item has, or appears to have, permanence at the time of the transaction, it is the latter appearance, rather than intent of one of the parties at the time of annexation, that is important to the resolution of the issue. Furthermore, since the *Teaff v. Hewitt*, test does not even refer to the intent of the parties at the time of the transaction, and since that should be the primary focus in most disputes, the search for intent at another time is confusing.

The emphasis in these kinds of cases upon intention at the time of annexation would seem to be the product of several errors in the reasoning process. It is first of all a result of the supposed need for a single rule to govern the several situations that have a common set of physical facts; they all involve an article of personal property that has been adapted to use in connection with real estate. By fixing the character of the property at the time of annexation, a single rule can supposedly be fashioned that will answer any questions that might thereafter arise between parties to any of the various relationships that may thereafter be entered into with respect to the property. The fallacy of this kind of thinking is the conclusion that these physical facts implicate the same policies and expectations in the various relationships in which they occur. That is, of course, not true. A second factor that may have tended to produce such an analysis is the continued influence of the primitive thought process in which people have legal relationships to things. Thus, when an article of personal property is annexed to the land by the owner of both, this thought process would conclude that the owner has a new and different relationship to the now united articles of property than existed before. A third may be the mystic quality that has always been thought to inhere in the ownership of land.

Although there appears to be near uniform acceptance of the *Teaff*, treatment of the intention factor, it is doubtful that the cases that have purported to apply a test based upon intention at the time of annexation have actually done so. n74 In fact, the statement of the test in *Teaff v. Hewitt*, itself, indicates that something more rational was intended. It is there made clear that the intent that is being sought is an "objective" intent and that the actual, or "subjective," intent of the annexor is irrelevant. The opinion does not use the phrase "objective intent," but it does make clear that the intention it describes is that which is apparent from the conduct of the annexor. n75 Subsequent writers and courts have, however, labeled the concept described in and derived from the opinion in *Teaff* as "objective intent." n76 The concept of "objective" intent is obviously borrowed from contract doctrine in which the purpose of the law is to find the common intent of the two parties and where it is used, to ensure that expectations that are raised by a party's conduct are not defeated because of a secret unexpressed mental state of that party as to the content of the relationship. Except for situations in which one's conduct is inconsistent with the actual intent, however, the inquiry in contract law is with respect to the actual intent of the parties. Actual intent is only ignored when necessary to protect the other party to the relationship from what amounts to deceit.

To attempt to apply the "objective" intent concept to fixtures, in the situations under discussion at this point, however, results in the absurdity that the intent of the only party to a transaction is being sought; and yet the actual intent of that party is considered irrelevant. It is, of course, a one-party transaction to the extent that the transaction consists of

nothing more than the annexation of the item to the land, and that is the assumption in the *Teaff*, test.

It is apparent that the court in *Teaff v. Hewitt*, and decisions that have followed it, are not referring to intent at all but are describing a situation in which the owner of property has created an appearance that an item of personal property has become a functional part of the real estate. n77 To the extent that that appearance is a factor in determining the rights of parties to subsequently formed relationships, it may make some sense to inquire into the intent of the party creating it; but, even if the "intent" inquiry in *Teaff*, is so understood, it is still beside the mark because it insists that that intention be established, and that the appearance is important, at the time of annexation rather than at the time the relationship is entered into.

§ 46.02(c) The Vendor/Vendee.

The vendor/vendee cases represent the simplest and most straightforward of the several groups of fixtures cases in that they are generally simple two-party transactions that are unencumbered by policy considerations or judicial biases. n78 The issue in these cases is simply that of determining which of the two parties to the transaction has the most reasonable expectations with regard to the item in question. Since the parties were free to dispose of the item as they wished, had they dealt with the matter expressly, the problem is that of imputing to them the intent that most reasonable people would have had under the circumstances. It adds little to this analysis to phrase the result in terms of the item having become, or not become, a fixture.

The circumstances that may bear upon the reasonableness of party expectations can, of course, be as variable as human experience itself. They would include: custom; cultural attitudes; industry practices; the physical relationship between the contested item and the structures or activities being conducted upon the land; the mobility of the item; the situation of the parties, including their business and other activities and the extent to which the item has utility to them as a part of the land or separated from it; the relationship of the thing to the subject matter of the bargain; the knowledge that each party has or should have of the expectations of the other; and anything else that might have played a role in the development of party expectations. Expectations will depend upon not only the physical evidence but upon the customs of people in the area or those engaged in the business at that time. Expectations can vary with time and technology. There are cases in the last century, for example, holding that a bathtub was not a fixture. n79 Such a holding would be unthinkable today. n80

While physical attachment may play a role in the expectations that vendees may develop with respect to whether an item is a fixture, there are many cases in which items which would normally be considered to be fixtures are temporarily detached when the issue is raised; and such items will probably be held to be fixtures even though there is no physical attachment at all. For example, storm windows that were detached and stored before the property was sold, n81 or a heavy machine that had been disassembled for repairs and may not even be on the land at the time n82 may be held to be fixtures. Similarly, items that are intended for permanent attachment but that have not yet been put in place when the land is sold -- such as building materials intended for incorporation into a structure that is under construction on the premises, n83 or machines that were purchased for permanent installation but that have not yet been installed n84 -- are sometimes characterized as fixtures and sometimes not. Lastly, some items that have never been attached in any way, and never will be, such as keys, n85 are held to be fixtures.

The functional adaptation of an item to the land or to an activity being conducted on the land that gives special value to land may also be important. This is particularly true if the parties were bargaining for that special value even though the contract of sale or deed may describe only the land. One of the early American fixtures cases, *Farrar v. Stackpole*, n86 for example, held that a log chain passed with a sale of the land on which a sawmill was located. The sawmill was apparently what the parties had bargained for, and the chain was used to draw the logs into the mill.

§ 46.02(d) The Mortgagor/Mortgagee.

To the extent that a disputed item is located on the land at the time the mortgage is executed, and the question is whether the mortgage covers it, the question should be the same as that involved in the vendor/vendee cases. It should be simply a matter of determining whether most reasonable people would have thought the item to be one which would pass with the land in the absence of being expressly excluded. On the other hand, when the item is placed upon the property by the mortgagor after execution of the mortgage, and the mortgage does not expressly cover such additions to the property, n87 the mortgage should not cover the item unless its removal would damage the security of the mortgagee (the accessions principle). To include such items in the mortgage security is to increase the security of the mortgagee beyond that which is bargained for. n88

The mortgagor/mortgagee cases do not follow the pattern suggested above, however. The result will generally be the same in the mortgagor/mortgagee cases whether the mortgage was executed before or after the item was placed upon the property. n89 In the questionable cases in either category, the item will generally be held to have been covered by the mortgage; n90 and seldom is it based upon a holding that the removal of the item would damage the security of the mortgagee. n91 It is rather, nearly always, based upon an application of the three-point test of *Teaff v. Hewitt*, and a finding that it was the intent of the annexor (the mortgagor) at the time of the annexation to make the item a permanent part of the real estate. n92

It is not clear why the mortgage cases seem to so uniformly take what is rather clearly an illogical position and one that is seemingly unfair with respect to the automatic inclusion of items that are placed on the property after execution of the mortgage. Some part of the problem may be due to the factors that have confused fixtures law generally -- such as the use of outmoded thought processes, blind adherence to precedent, and the tendency to regard the concept as a purely physical one. One of the historical difficulties that may have played a role in the illogical approach to the fixtures question in the mortgagor/mortgagee cases is the need to classify everything as either realty or personalty. Thus, if a fixture is classified as real property, the mortgage, which is a lien on the real estate, must logically cover it. That reasoning has been used in some of the cases in which the mortgagee was preferred to a conditional vendor of the item that later became a fixture. n93 Such reasoning, however, amounts to nothing more than a restatement of the fixtures principle (i.e., that which is attached to the land becomes a part of the land and belongs to the owner thereof). There is no apparent reason, however, why it should retain more vitality here than in any of the other relationships where the fixtures concept plays a role.

That these factors have had a more disruptive effect in this area than others may be due, at least in part, to the fact that at the time the mortgage is executed; there is generally no occasion for the parties to form an intent with respect to which items on the land are fixtures and which are personal property. If the mortgage transaction takes its normal course there will never be such an occasion since the payment of the debt will free the land of the obligation and the mortgagor will have been the only person interested in both the land and the personal property for the whole time. It is only when the mortgage goes into default that the fixtures decision must be made. At that point the relationship becomes an adversary one with both parties seeking to salvage as much as possible from a losing situation. It is, perhaps, not surprising that the courts would be inclined to decide the question as a matter of law at that point and seek to apply a universal rule of fixtures that would supposedly be based on giving the items their character at the time of annexation. Such an explanation might, perhaps, explain the approach of including all questionable items within the coverage of the mortgage in those cases in which the item is on the property at the time the mortgage is executed, but it would not explain why the same approach is taken with respect to those added after execution of the mortgage. In the latter situation there would seldom seem to be an intent by the annexor to gratuitously bestow a benefit on the mortgagee. In fact, even in those cases in which the mortgagor clearly had no such intent, the item is often held to be a part of the mortgage security. n94

The accessions principle would probably justify extending the security of the mortgage in many situations, but there would seem to be no more reason for it having that effect in these cases than in the vendor/vendee situation. That would at least be true with respect to those items that were on the property at the time the mortgage was executed. If an item were so situated that a reasonable mortgagee would not assume that it would pass with the land, then such a mortgagee

should anticipate whatever damage would occur in the removal process. If the item were situated, however, so that a reasonable mortgagee would assume that it was included, then it will be included without the aid of the accession principle. The same would perhaps not be true with respect to items added after the execution of the mortgage because the mortgagee was neither a party to the addition of the item to the realty nor in a position to protect the security of the mortgage at that point via the bargaining process; but then the cases do not seem to utilize the accessions principle and, in fact, include just about every questionable item in the coverage of the mortgage regardless of whether its removal would damage the land or structures which are covered by the mortgage.

A policy objective that may be influencing the courts in some of the mortgage cases, and that may explain results that otherwise seem to be unfair or illogical, is that of preserving a business as a going concern. n95 It is similar to the policy involved in the accession principle. In such cases the unsecured creditors will often be attempting to seize the component parts of the factory or mill and have them sold as personal property. If they are successful the business will be shut down. The mortgagee, who perhaps loaned money on the basis of the value of the property as the site of a going business, will lose part of the security of the mortgage if the creditors are successful. Again, however, if the business was on the property at the time the mortgage was executed, or the mortgage was executed for the purpose of obtaining the capital to create the business, the mortgagee, as a reasonable person, would have known that some items would not be included in a mortgage that simply covered the land and should have taken care to expressly include them within the security exacted of the mortgagor. If the business was not on the property at the time the mortgage was executed, the mortgagee did not lend money on the basis of the value that the business adds to the land.

In the absence of any satisfactory explanation for the tendency of the courts to include all questionable items within the coverage of the mortgage, it must be assumed that these cases are simply a manifestation of a bias in favor of creditors. n96 Such a bias, in favor of commercial interests, would not be the only one operating in the fixtures area. It will be recalled that the oldest exception in the fixtures area was in relation to trade fixtures in which the policy, clearly articulated by the courts, was that of favoring commercial tenants. n97 The commercial bias in the landlord/tenant cases, however, led the courts in the opposite direction from that taken in the mortgagor/mortgagee area. In the trade fixtures cases, the commercial bias resulted in the disruption of the tendency to give to the landowner the ownership of everything attached to the land. In the mortgagor/mortgagee cases it has reinforced that tendency. These diverse results are even more remarkable in light of the fact that, in both situations, the annexation is a result of the unilateral act of the annexor after the relationship has already been established and the parties, therefore, probably never bargained with respect to the item. The effect is, perhaps, to underscore the fact that the most important factor operating in both situations is the commercial bias.

If there is a policy favoring commercial interests, which explains the approach in the mortgage cases, the rationale of *Teaff v. Hewitt*, with its misdirected inquiry that seeks the intent of the annexor at the time of annexation, provides a perfect cover for the advancement of such a policy.

A couple of cases from Connecticut n98 illustrate several aspects of the approach taken by the courts to the fixtures question in mortgagor/mortgagee cases. Both cases involved the question of the extent to which bowling alleys were to be considered fixtures, and most of the facts were identical in the two cases. The common facts were that there was a first mortgage on the premises when the alleys were installed, and the alleys were sold to the mortgagor on a conditional sales contract that specified that they were to remain personalty. A second mortgagee was contending that the alleys were covered by a second mortgage and could be removed when the second mortgage was foreclosed. In both cases the alleys had been paid off by the time of litigation and the conditional vendor was therefore out of the picture. The first of the two cases n99 was a suit between the second mortgagee and the first mortgagee, and the court held that the alleys were fixtures as a matter of law and covered by the first mortgage, with the result that the second mortgagee could not dismantle and remove them. The second case n100 was between the second mortgagee and the mortgagor, and the court held that the alleys remained personal property and were not covered by the second mortgage and therefore could not be removed by the second mortgagee.

The court in the first case recognized that as long as the conditional sales contract remained unpaid the alleys would have remained personal property and would not have been covered by the first mortgage, but it said that when the conditional sales contract was paid off the items reverted to their status as realty and were covered by the mortgage. In that case the first mortgagee had not expressly subordinated its interest to the conditional sales contract. The second case accepted the continued validity of that reasoning and in fact relied upon it by holding that, because the conditional sales contract had not yet been paid off when the second mortgage was executed, the property was still personal property at that time and not covered by the second mortgage. n101

The position of the Connecticut Supreme Court in both of the cases thus seems to be that an item brought onto mortgaged premises will be considered realty and covered by an existing mortgage unless to do so would prejudice the interests of a conditional vendor of the item who has retained a security interest therein; and in its earlier case it held that, once the interests of the conditional vendor are removed from consideration and the dispute is between the mortgagor and mortgagee, the normal bias in favor of the mortgagee will be given effect. In its later decision, the Connecticut Supreme Court failed to extend that bias to a second mortgagee. It may be that the failure was because second mortgagees are less favored commercial interests or, perhaps, because the second mortgagee's interest, in the later case, ran counter to the policy of keeping a going business together and the latter policy was allowed to prevail, or a combination of the two. It will be noted that in the earlier case the policy of keeping a going business together coincided with the interest of the first mortgagee.

The creditor bias, which almost uniformly results in questionable items being classified as fixtures and given to the mortgagee when the litigation is between the mortgagor and mortgagee, will, apparently, with almost the same uniformity, be disregarded when it is canceled out by another commercial interest or policy consideration that competes for the courts' attention. Thus the Connecticut cases indicated that the bias would be canceled out when in conflict with the interests of a conditional vendor of the fixture. The existence of the bias was further emphasized by the statement, in those cases, that the cancelling out effect would last only as long as the conditional vendor's interest. In one of those cases the bias was held to have been canceled out when in conflict with the policy that discourages the dismantling of a going business.

Similarly, there is an almost uniform holding that if the items are placed on the property by a commercial tenant they will not be classified as fixtures in a dispute between the commercial tenant and the mortgagee of the landlord even though the same kind of item would probably be so classified if placed there by a mortgagor. n102 The mortgagee bias will, in this situation, be canceled out by the bias in favor of commercial tenants. Thus in *Standard Oil Co. v. La Crosse Super Auto Service*, n103 the mortgagor leased the property to an oil company for the operation of a service station. The oil company installed pumps and tanks. When the mortgage went into default the oil company, in a suit against the mortgagee, was allowed to remove the items installed by it. Such items would undoubtedly have been held to be fixtures covered by the mortgage if the litigation had been between the mortgagee and the mortgagor. n104

§ 46.02(e) The Bona Fide Purchaser.

Even if an item is held not to be a fixture as between the annexor and the party holding the residual interest in the property, such as the landlord or mortgagee, and there is, therefore, a right of removal in the annexor, it may, nevertheless, be held to pass with a conveyance of the land by such a residual owner to a bona fide purchaser. n105 Such a situation might occur upon foreclosure of a mortgage or a transfer by a landlord. The reason for that result might simply appear to be the same as that which applies in the vendor/vendee cases (i.e., the ownership of the item would appear to most reasonable persons dealing with the land to have been merged with that of the land, and that appearance was created or allowed to exist until the time of the sale by the owner of the item). In the vendor/vendee cases, however, the result follows because the transaction is regarded as a volitional transfer of the item, with the intent to make the transfer being imputed to the vendor; and there is no question of the vendor being deprived of title by a bona fide purchaser. In the cases under consideration, on the other hand, the owner of the item is not a party to the transaction; and the transfer, as to that person, cannot be regarded as volitional. If title to the item is to be lost to the bona fide

purchaser it must be because of a policy or rule that allows the transferor of the land to pass title to the fixture even though that transferor had no title. Such a bona fide purchaser doctrine does operate in these cases, but it is not clear whether it grows out of the recording act or a common law doctrine developed with respect to personal property. n106

At any rate the bona fide purchaser will generally be held to acquire title in these situations. That result has been obtained in situations in which the annexor was a mortgagor n107 as well as those in which he was a tenant n108 or a licensee. n109 In any of such cases, of course, the same result would follow if the items were held to have become a fixture as between the annexor and the residual owner of the land because the transfer is by the residual owner. A court can, therefore, avoid the bona fide purchaser problem by simply so holding. In fact, the traditional fixtures approach, which insists that the character of the item is acquired at the time of annexation and focuses upon the intent of the annexor at that time, rather than the intent or expectations of the parties to the immediate transaction, probably results in many bona fide purchaser issues being disposed of in that manner. Thus in a case n110 in which a farm was purchased at a foreclosure sale and there was located on the land at the time of the sale a grain storage facility called a Harvestore, which has as one of its component parts a slurry pump, the purchaser was held to have acquired the slurry pump as against one claiming through the mortgagor/annexor. The decision simply recited the three-point test of *Teaff v. Hewitt*, and held that the pump became a fixture at the time of annexation. n111 By so doing the court avoided the necessity of examining the bona fide purchaser doctrine that operates in this area. Even if the pump had not been covered by the mortgage, however, because it was placed on the property subsequent to the mortgage, the purchaser should still have prevailed if reasonable persons dealing with the property would have assumed that the ownership thereof had been merged with that of the land and the purchaser had no knowledge of the rights of the mortgagor/annexor.

Cases in which the bona fide purchaser is opposed to a tenant/annexor are rare because the possession of the land by the tenant will be enough to put the purchaser on inquiry as to ownership of the fixture located on the land. n112 There was, however, a case n113 in which the tenant had left the property before removing trade fixtures, although reserving the right to do so as against the landlord, and the property was sold to a bona fide purchaser before removal. It was there held that the bona fide purchaser prevailed. The same holding prevails with respect to fixtures annexed to the property by a licensee. n114 Although the licensee may have a right of removal as against the licensor, that right will be lost if the land is sold to a bona fide purchaser.

§ 46.02(f) The Landlord/Tenant.

If the fixtures principle were applied to the landlord/tenant relationship in its pure form, or even in a manner similar to that which operates in regard to the mortgagor/mortgagee relationship, items adapted by the tenant for use in connection with the land or buildings located on it, would instantly become the property of the landlord. n115 From a very early time, however, those items installed by a commercial tenant have been excepted from the operation of the fixtures principle. n116 The exception has been rationalized, also from very early times, as being necessary to encourage commercial tenants to make the best use of their property. n117 As a result the commercial tenant will be allowed to remove, at the end of the lease, most items brought onto the property.

The trade fixtures exception does not, however, give the tenant an unlimited right of removal, but the effort to articulate the limitations upon the right of removal have been made more difficult by the fixtures doctrine with its insistence upon a single rule to cover all the various relationships and the attendant emphasis upon the intent of the annexor at the time of annexation. Efforts to analyze the cases on that basis have obscured the relatively simple principles that operate in the area. One of those principles is that which is involved in the accessions doctrine, n118 and another is the same as that involved in the vendor/vendee cases n119 (i.e., the intent of the parties so far as it can be ascertained from their expressions or that intent that will be imputed to reasonable persons under the circumstances).

The accession principle would limit the right of the tenant to removal of fixtures when removal would destroy or unreasonably damage that which clearly belongs to the landlord. The removal of items clearly integrated into the structures that belong to the landlord, for example, will not be permitted. Thus in a very early case the trade tenant was

permitted to remove vats that were a part of his soap-making business but was not permitted to remove items that were installed to "complete the house, as hearths and chimney pieces." n120

It is when dealing with the cases in which the accessions principle is apparently involved that traditional fixtures doctrine creates confusion. This is particularly true when the item installed by the tenant is a building. Buildings can generally be removed without any serious damage to the land, but the trade tenant will generally meet resistance if an attempt is made to remove a building. n121 It is here that the courts begin to emphasize the intent of the annexor at the time of annexation and, in the absence of evidence to the contrary, the conclusion sometimes seems inescapable that anyone erecting a building is intending to make a permanent accession to the real estate. The proper inquiry should be, of course, the intent of both parties to the relationship, n122 if that can be ascertained, and, if not, the intent that would be imputed to reasonable persons under the circumstances. n123 In this situation, as in any other, the circumstances that might bear upon the ultimate issue are infinitely variable but might include such things as the cost of the structure, the amount of rent reserved in the lease, the length of the term of the lease, the mobility of the structure, and the utility of the structure to the parties. In fact the cases, while seemingly inconsistent if traditional fixtures doctrine is the only measure applied to them, can probably be explained only on this basis.

Another limitation on the trade fixtures exception is that which requires that the items be removed prior to the end of the tenancy. If the tenant departs from the premises leaving the items on the property they become the property of the landlord. n124 This rule has also been set out in statute. n125 There have been alternative rationalizations for this limitation. It has been argued that the items became a part of the real estate when annexed, as a result of the fixtures principle, but that the tenant, because of the trade fixtures exception, was given a limited right of removal. n126 If the tenancy ends without that right being exercised, it terminates. The other rationale, which is based on the theory that the trade fixtures exception prevented the items from becoming a part of the real estate, is that there is a presumed gift of the items to the landlord upon the tenant's departure from the premises leaving the disputed items. n127 In fact, apart from theory, this limitation can probably be justified on a policy basis today, in many cases, because of the need for the landlord to be able to re-rent the premises as quickly as possible to another tenant and the consequent need to quickly settle the ownership of such items. n128

Not only has the analysis of the cases involving the trade fixtures exception been burdened by traditional fixtures doctrine, there have also been a couple of notable backsliding cases that seem to reflect a judicial discomfort at having so completely freed the commercial landlord/tenant cases from the physical aspects of the traditional fixtures doctrine. In the first of these, Lord Ellenborough refused to extend the trade fixtures exception to the agricultural landlord/tenant cases. n129 In the second, the Court of Appeals of New York held, in*Loughran v. Ross*, n130 that a trade tenant who takes a renewal lease without expressly reserving the trade fixtures will be deemed to have lost the right to them.

As a result of Lord Ellenborough's decision in *Elwes v. Maw*, agricultural tenants in England were treated much the same as mortgagors are in the United States today; and the situation remained that way until the decision was overruled by Parliament in 1841. n131 While the decision had some following in the early decisions in the United States, n132 it never gained a firm foothold; and today agricultural tenants are treated in the same way as commercial tenants. n133

The mischievous decision of the New York Court of Appeals in *Loughran v. Ross*,, n134 however, has had a longer-lasting effect. In that case the tenant had erected buildings that were subject to a right of removal under the lease. When the original lease expired, a new lease was entered into that did not mention the right of removal. The court held that the right of removal that existed under the first lease was lost when that tenancy ended and the right was not renewed in the new lease. The theory was simply that the right of removal must be exercised prior to the end of the tenancy or the right is lost and the items become the property of the landlord, and that theory was extended to include the situation in which there was a renewal lease that did not expressly include the right of removal. The apparent logic of the decision appealed to several other courts, n135 but the tendency of most courts has been to reject it or to limit it as narrowly as possible. n136

Apart from the trade fixtures exception, one might assume that the law of fixtures would be applied in its purest form in the landlord/tenant area; but such an assumption would be false. In the non-commercial landlord/tenant cases, the disputes have centered around ornamental items that the tenant has brought onto the premises; and another exception has been made for them. n137 In the application of this exception, as was true with respect to trade fixtures, the accessions principle is a limitation. n138 If the item is held to have been made an integral part of the structure, the exception does not apply and the item becomes the property of the landlord. n139

As a result of the exceptions for trade fixtures and ornamental fixtures, the landlord/tenant cases have largely limited the operation of the fixtures principle to situations in which an accession has occurred or there is a basis for holding that the parties intended the property to pass to the landlord. n140 In the latter case, of course, it is not the fixtures principle but a volitional transfer that has resulted in the property passing to the landlord.

§ 46.02(g) The Licensor/Licensee.

There are occasional cases in which a structure is placed upon land by one who has no greater right than that of a licensee. n141 Such situations usually involve family members and might be created, for example, by a parent giving a child permission to build a structure on land owned by the parent. n142 Litigation in such cases is usually between the licensee and a successor in interest to the licensor, and the licensee is nearly always favored. n143 It is generally held that the buildings never become the property of the licensor and remain the personal property of the licensee. Furthermore, the right of removal by the licensee is not lost if the buildings are left on the property after revocation of the license. n144

The justification given for the favorable treatment accorded the licensee is sometimes based upon evidence that the parties intended that the structure remain the property of the licensee; but in situations in which there is no such evidence, the courts are apt to presume the intention to have been such. n145 The result, of course, is simply that the fixtures principle does not operate in this area.

§ 46.02(h) The Trespasser/Owner.

The litigation in the trespasser/owner cases has generally involved the erection of structures, often under mistake as to ownership, on the land of another; and the issue is whether the annexor can remove the structures when forced to vacate the premises. It was in this area that the fixtures principle was formerly applied with a vengeance to the end that the improvements were held to belong to the owner of the land. n146 Such a result was justified on the basis that, while exceptions had been made to the fixtures principle for tenants and others, the trespasser, being a wrongdoer, was in no position to seek an exception. n147 Such an argument does not, of course, seek justification beyond the fixtures principle itself except to the extent that there is implicit in it a policy in favor of punishing the wrongdoer, and that aspect of the rule is sometimes openly articulated. n148

As the validity of the fixtures principle is eroded and in view of the fact that most of the trespasser cases do not involve knowing or intentional trespasses and, therefore, any policy that involves punishment is inoperative, it is not surprising that results in these cases, in recent years, have tended to be less severe with respect to the trespasser than formerly.

A type of statute that has been adopted in many states, called the "Occupying Claimant's Acts" n149 or "Betterment Statutes," n150 represents a fairly long-standing break with the traditional harsh treatment of the trespassing improver. Such statutes do not challenge the fixtures principle. In fact they seem to accept its premise that the structures erected by the trespasser belong to the land owner in that they do not include a right of removal as one of the remedies available to the trespasser, but they generally provide a scheme for compensating the trespassing improver for the value of the improvements. Typically they condition the landowner's right to recover possession upon payment to the trespasser of the value that the improvements have added to the property; and, if the landowner does not elect to do so, the trespasser may be given the right to acquire the land by paying its value. Generally such statutes will operate only in favor of

innocent trespassers or those whose possession was under color of title. n151

Interestingly, while such statutes, adopted in the last century while the fixtures principle had a firm place in the legal system, recognized the validity of the fixtures principle and provided only limited relief from its severity, the common law subsequently began to abandon the fixtures principle, with the result that those trespassers who do not qualify for the relief provided by the statute today may get even more favorable treatment than those who do. The Indiana statute limits relief, for example, to those who were in possession of the property under color of title. n152 The Indiana Court of Appeals n153 held, however, that a trespasser who mistakenly built a house on the wrong lot and did not have color of title was entitled to relief even though not qualified for the protection of the statute. The court further indicated that the "trial court is not limited in respect to the relief afforded," n154 and in its previous discussion had indicated that such relief could include either a lien on the land or a right of removal of the structure. n155 Other courts have reached a similar result without the aid of a statute. n156

Despite the liberalization of the fixtures principle with respect to the rights of trespassers, there are still some areas where the trespasser is given little consideration. The oil and gas developer, for example, who drills a producing well on land on which he has no lease, or on which his lease has expired, will generally be held to have lost title to the equipment installed on the well. Furthermore, if such a lessee is determined to be a bad faith trespasser, and the difference between bad faith and good faith is not marked by a clear bright line, credit will not be given for the cost of such equipment in the accounting for rents and profits. n157 Strangely the courts dealing with such disputes seldom recognize that this fact situation bears any relationship to the situations covered by the "Occupying Claimant" or "Betterment Acts." n158 While the accessions principle may explain the results in these cases to the extent that removal of the equipment would destroy a producing well, there is seldom any effort to distinguish between removable and non-removable equipment.

Apart from the producing well situation, the oil developer will apparently be treated as favorably as other trespassers. In a case, n159 for example, in which an oil developer laid a buried pipeline on land in which he had no interest, it was held that the pipeline could be removed.

A special group of trespasser cases, which perhaps has its own policy/expectations mix, is that involving a trespass by an entity that has a right of eminent domain. In such cases the entity may take possession of, and improve, property without having first taken the necessary steps to acquire it by eminent domain. When eminent domain proceedings are subsequently commenced, the owner claims a right to be compensated for the improvements placed on the property by the then trespassing entity on the theory that, under the fixtures principle, such improvements became the property of the owner the moment they were attached to the land. Compensation is generally denied in such cases. n160

The fixtures principle would thus seem to have retained little vitality in the one area -- the trespasser/owner area -- where one would expect it to have held most firm.

§ 46.02(i) The Uniform Commercial Code.

The Uniform Commercial Code is primarily concerned with transactions involving personal property and does not generally cover those involving real property. One of the exceptions to the foregoing statement is in relation to items that may trigger the application of the fixtures doctrine. n161 In such cases, the interests of a personal property security holder may conflict with those of owners of interests in the real property to which the item has been annexed. The Code attempts to work out the conflicts that may arise in the area. In doing so, and without defining the term "fixture," but rather leaving that to local law, n162 it sets up a system in which items are classified according to the degree to which they have become a part of the real estate. From that classification flow several consequences, including whether or not a security interest can be obtained in the item separate from the real estate n163 and where the security holder must file to protect the security interest. n164 Under this system, priorities will generally depend upon order and place of recording.

The classification system that is created by the Code recognizes several categories of fixtures. n165 The first category consists of building materials that are incorporated into an improvement on land. n166 Such items clearly invoke the accessions principle because of the waste that would be involved in attempting to separate them from the structure into which they have been incorporated. No separate security interest can exist in them under the Uniform Commercial Code. n167

The second category consists of the so-called "hard" fixtures. These are things that are firmly affixed to, or are clearly adapted for use in connection with, the realty. n168 Most states would include these in their definition of fixtures.

The third category consists of what can be called "soft" fixtures, and consists of "readily removable ... factory or office machines," "equipment that is not primarily used or leased for use in the operation of the real property," and "replacements of domestic appliances that are consumer goods." n169 These are the sorts of things that many states would not include within the fixtures definition.

A fourth category, which is new to the 1999 version of Article 9, consists of manufactured homes in manufactured-home transactions. n170 A "manufactured home" refers to a structure that, among other things, "is built on a permanent chassis and designed to be used as a dwelling without or without a permanent foundation when connected to the required utilities." n171 A "manufactured-home transaction" refers to a secured transaction that creates a purchase-money security interest in a manufactured home or in which a manufactured home is the primary collateral. n172

The different treatment of the second, third, and fourth categories largely relates to the place where the security interest holder files in order to perfect the interest.

The Code includes several provisions on the methodology of filing. In the present context, it may be best to begin with the concept of "fixture filing." This refers to "the filing of a financing statement covering goods that are or are to become fixtures" and that satisfies filing requirements referenced in *U.C.C. § 9-502(a)* and *(b)*. n173 Section 9-502(b) states, that, in order to be sufficient, a financing statement that is filed as a fixture filing, with respect to goods that are or are to become fixtures, must:

(1) indicate that it covers this type of collateral;

(2) indicate that it is to be filed [for record] in the real property records;

(3) provide a description of the real property to which the collateral is related [sufficient to give constructive notice of a mortgage under the law of this State if the description were contained in a record of the mortgage of the real property]; and

(4) if the debtor does not have an interest of record in the real property, provide the name of a record owner. n174

Although § 9-502(b) requires the financing statement to indicate that it is to be filed in the real property records, it does not include a requirement that the filing actually be done. For that, recourse must be had to another section of the Code.

Section 9-501 sets out the rules regarding where to "file." Both the text of the section and a comment indicate that there are two ways to file with respect to goods that are or are to become fixtures. In the words of the comment:

> There are two ways in which a secured party may file a financing statement to perfect a security interest in goods that are or are to become fixtures. It may file in the Article 9 records, as with most other goods... Or it may file the financing statement as a "fixture filing," defined in Section 9-102, in the office in which a record of a mortgage on the related real property would be filed. n175

The reference to "Article 9 records" is to the records that are maintained in an office, such as the office of the Secretary of State, where secured creditors file standard financing statements to perfect security interests in goods. n176 Thus, there are, in general, two places to file a financing statement relating to fixtures.

In considering where to file, a prudent secured creditor will take into account the parties against whom the secured creditor wishes his or her security interest to be protected. For example, if the secured creditor wishes to obtain a perfected security interest that is good against others that have claims to "goods," the secured creditor will wish to file the financing statement in the standard "Article 9 records." If the secured creditor wishes to obtain a perfected security interest that is good against others that claim an interest in the debtor's real property, the secured creditor will wish to file a fixture filing in the real property records. n177 In some circumstances, the U.C.C. permits secured creditors who file in the standard "Article 9 records" to defeat the interests of real property claimants. n178 However, given some of the uncertainties that can arise when dealing with fixtures, a secured creditor may simply decide to file in both places. n179

A security interest that is properly perfected by a "fixture filing" (which, as indicated above, is filed in the real property records), will have priority against later recorded interests of encumbrancers or owners of the real property. n180 It will also have priority against liens on the real property obtained by legal or equitable proceedings. n181 Accordingly, where "hard" fixtures are involved, a secured creditor should undertake a fixture filing in the real property records.

Where "soft" fixtures are involved, the situation is somewhat different. Provided that perfection occurs "before the goods become fixtures," that is, before "they have become so related to particular real property that an interest in them arises under real property law," n182 and provided that the fixtures are "readily removable," a security interest in these thing may be perfected "by any method permitted by this article." n183 A security interest that is thus perfected has priority over the conflicting interest of an owner or encumbrancer of the real property. n184

The last category of "fixtures" includes manufactured homes n185 in manufactured-home transactions. n186 The Code provides that security interests in these will have priority against conflicting interests of encumbrancers or owners of real property if the security interests are perfected pursuant to a statute described in § 9-311(a)(2). n187 That section contemplates that an adopting state would list a certificate-of-title statute "covering automobiles, trailers, mobile homes, farm tractors, and the like, which provides for a security interest to be indicated on the certificate as a condition or result of perfection, and any non-Uniform Commercial Code filing statute." n188 This provision gives complying secured creditors priority against those who have prior or subsequent interests in the land on which the manufactured home rests.

Priority of security interests generally depends on the time they are filed. However, as indicated in the discussion of manufactured homes and "soft" fixtures, the priority of the secured creditor's interest against another claimant is not always so determined. In both cases, a complying secured creditor can generally defeat a previously recorded interest in the real property. The U.C.C. also contains a general provision that gives priority to purchase-money security interests in fixtures. That provision, § 9-334(d), states that, subject to an exception applicable to construction mortgages, n189 a perfected security interest in fixtures has priority against the conflicting interest of an encumbrancer or owner of the real property, if the security interest is a purchase-money security interest and if the security interest is perfected by a fixture

filing before the goods become fixtures or within twenty days thereafter. n190

For all categories of fixtures in which a security interest may be had, the U.C.C. provides that "a perfected security interest in fixtures" has priority against "a lien on the real property obtained by legal or equitable proceedings after the security interest was perfected by any method permitted by this article." n191 A comment to *U.C.C. § 9-334* explains:

> Judgment creditors generally are not reliance creditors who search real-property records. Accordingly, a perfected fixture security interest takes priority over a subsequent judgment lien or other lien obtained by legal or equitable proceedings, even if no evidence of the security interest appears in the relevant real-property records. Subsection (e)(3) thus protects a perfected fixture security interest from avoidance by a trustee in bankruptcy under *Bankruptcy Code Section 544(a)*, regardless of the method of perfection. n192

This is a useful status.

FOOTNOTES:

(n1)Footnote 56. 5 American Law of Property § 19.1 (A. James Casner ed. 1952). *See also* Walter B. Raushenbush, Brown on Personal Property, § 16.1 (3d ed. 1975), where the author adds a third category in which neither the chattel nor land is owned by the annexor, or the annexor has only a partial interest in one or both. This third category contains cases that are largely dealt with by the Uniform Commercial Code, or that are a variation on one of the first two categories.

(n2)Footnote 57. *See* .Russell Denison Niles, *The Intention Test in the Law of Fixtures, 12 N.Y.U. L.Q. Rev. 66, 73 (1935).*

(n3)Footnote 58. One policy present in trespasser cases that is not present in any other situation is that of punishing the trespasser. *Smith Dev., Inc. v. Flood, 403 S.E.2d 249 (Ga. App. 1991)* . *See also* § 46.02(h) *below*.

(n4)Footnote 59. *1 Ohio St. 511 (1853)* .

(n5)Footnote 60. *See* Squillante, *The Law of Fixtures: Common Law and the Uniform Commercial Code, 15 Hofstra L. Rev. 191, 195 (1987);* Thomas W. Coffey, *Foreword* to Alphonse M. Squillante, The Law of Fixtures at x (1992), where it is said: "The legal rule announced in Teaff ... has remained substantially unchanged to this day, and it is the foundation of modern fixtures law." *See also K & L Distributors, Inc. v. Kelly Elec., Inc., 908 P.2d 429 (Alaska 1995)* ; . *Pledger v. Halvorson, 921 S.W.2d 576 (Ark. 1996)* (setting forth the three-part test).

(n6)Footnote 61. *See* § 46.02(b)(1) of this chapter.

(n7)Footnote 62. *See* § 46.02(b)(3) of this chapter.

(n8)Footnote 63. *1 Ohio St. 511, 530 (1853)* .

(n9)Footnote 64. *See, e.g., Dutton v. Ensley, 51 N.E. 380 (Ind. Ct. App. 1898)* (home found to be fixture even though it was merely resting on skids); *Williams v. Kirby Sch. Dist., 181 S.W.2d 488 (1944)* (school building found to be fixture reverting back to grantor at the end of a fee simple determinable); *In re Sasinouski, 52 B.R. 67 (Bankr. D. Idaho 1985)* (mobile home placed on permanent foundation and had a garage attached held to be a fixture).

(n10)Footnote 65. *Miller v. Waddingham, 27 P. 750 (Cal. 1891)* (home resting upon timber blocks held not to be fixture based on intent of annexor); *First Nat'l Bank of Aberdeen v. Jacobs, 273 N.W.2d 743 (S.D. 1978)* (barn placed on concrete foundation found not to be fixture due to lease agreement that stated the barn was to remain personal property); *Sutton v. Frost, 432 A.2d 1311 (Me. 1981)* (manufactured home placed on land by tenant in possession held to be personal property against subsequent purchaser of real estate).

(n11)Footnote 66. *Carpenter v. Walker, 5 N.E. 160 (Mass. 1886)* (engine and boiler weighing 5,600 pounds resting on timbers and bricks in an enclosure found to be personal property); *Supervisor of Assessments of Anne Arundel County v. Hartge Yacht Yard, Inc., 842 A.2d 732 (Md. Ct. App. 2004)* (mooring buoys, with 100-300 pound anchors, found not to be fixtures); *Prichard Petr. Co. v. Farmers Co-op, 161 P.2d 526 (Mont. 1945)* (two 12,000-gallon water tanks held fixture, but two 15,000 gallon water tanks held not to be fixture when encumbered by chattel mortgage); *M. P. Moller, Inc. v. Wilson, 63 P.2d 818 (Cal. 1936)* (gravity is insufficient attachment to constitute fixture status); *see also Nextel of New York, Inc. v. Assessor for Village of Spring Valley, 771 N.Y.S.2d 853 (Sup. Ct. 2004)* (cell tower base station and its antennae, coaxial cables, and 40,000 pound communications shed are sufficiently "permanent" to be fixtures).

(n12)Footnote 67. *See* cases *cited in* § 46.02(c) of this chapter.

(n13)Footnote 68. *See* Russell Denison Niles, *The Intention Test in the Law of Fixtures, 12 N.Y.U. L.Q. Rev. 66, 76 (1935),* where he seems to contradict himself without realizing it:

> Therefore that passes which the average buyer or mortgagee would be justified in expecting under the circumstances. Not to be confused are the cases where the grantor intends to include personal property in the transaction, even though not mentioned in the writing, and where there is a change of possession. Such an intention will be presumed if articles of a doubtful nature are delivered with the realty.

Russell Denison Niles, *The Intention Test in the Law of Fixtures, 12 N.Y.U. L.Q. Rev. 66, 72-73 (1935).* He then goes on to say, "[I]t is not the bargain or an agreement which makes a chattel a fixture. It is the unilateral 'act of the annexor.'" Russell Denison Niles, *The Intention Test in the Law of Fixtures, 12 N.Y.U. L.Q. Rev. 66, 74 (1935).* Another commentator has been trapped by this same inconsistency. Brown is less emphatic than Niles, but he makes the same conceptual error:

> A landowner's testimony that he intended not a permanent annexation to the freehold but a retention and subsequent removal of the articles as personalty is ineffective to prevent a finding of fixture from objective evidence... . Undoubtedly, where the article in question is clearly by objective tests either realty or personalty, the intent of the owner to treat it otherwise is ineffective. Where, however, the article in question is of an ambiguous nature, not clearly one or the other, then *the actual intent with which the article was placed on the ground may well be material and decisive* (emphasis added).
>
> Walter B. Raushenbush, Brown on Personal Property, § 16.5 at 537 (3d ed. 1975).

(n14)Footnote 69. *Geppelt v. Middle W. Stone Co., 146 P. 1157 (Kan. 1915)* .

(n15)Footnote 70. *See, e.g., In re Robert W. Metzgar, 242 B.R. 226 (W.D. N.Y. 1999)* (where gas tanks provided on land during construction were considered fixtures as improvements to real property); *Hyman v. Wellman Enterprises, 522 S.E.2d 150,* (S.C. Ct. App. 1999) (where items physically attached to property and not removable were considered fixtures); *Appeal of Town of Pelham, 736 A.2d 1223 (N.H. 1999)* (truck trailer used as storage shed was not a fixture, because it was readily movable and transportable); *Dinsmore v. Lake Electric Company, Inc., 719 N.E.2d 1282 (Ind. Ct. App. 1999)* (piece of equipment called a "bagger" was not a fixture where it was portable equipment that could be detached from control center and moved in a truck); *Schwend v. Schwend, 983 P.2d 988 (Mont. 1999)* (irrigation pipe was not a fixture, because it was used only during irrigation season and detached and stacked when not in use); *Kipps v. Susquehanna County Board of Assessment, 743 A.2d 539 (Pa. Commw. Ct. 1999)* (hay storage structure considered fixture); *Noll v. Harrisburg Area YMCA, 643 A.2d 81(Pa. 1994)* (diving board not fixture where easily removable without tools); *see also, Vargo v. Koppers Co., Inc., Engineering and Const. Div., 715 A.2d 423 (Pa. 1998)* (although

door machine is very large and not easily removed from the coke works, it is not attached to the real property in any way, and it can can be moved without damaging the coke oven batteries that it services; court concludes that it it is not a fixture).

(n16)Footnote 71. *See e.g., Christ v. Prater Indus., 67 F. Supp. 2d 491 (E.D. Penn. 1999)* (grass seed mixer not fixture where found not an integral and necessary part of the real estate); *In re Town of Pelham, 736 A.2d 1223 (N.H. 1999)* (truck trailers found not fixtures where used as storage sheds and they could be equally useful elsewhere and not adapted to land); *A and A Market, Inc. v. Pekin Insurance Co., 713 N.E.2d 1199 (Ill. Ct. App.. 1999)* (gas pumps were fixtures where incorporated into the property and integral part of real estate operation); *Amoco Production Co. v. Wyoming State Bd. of Equalization, 15 P.3d 728 (Wyo. 2001)* (court concluded that underground oil flow lines did not benefit the land, and were not fixtures).

(n17)Footnote 72. *Farrar v. Stackpole, 6 Greenl. (Me.) 154, 19 Am. Dec. 201 (1829)* .

(n18)Footnote 73. *See, e.g., In re Northern, 294 B.R. 821 (E.D. Tenn. 2003)* (intent controls whether an item is a fixture); *In re Banks, 259 B.R. 848 (E.D. Va. 2001)* (when an owner of land annexes chattels, any doubt as to the owner's intention to annex them permanently to the land will usually be resolved in favor of such intent); *In re Rolle, 218 B.R. 636 (S.D. Fla. 1998)* (in determining whether personal property has become a fixture, intention of party making the annexation is the primary criterion, while the method of annexation and character of article annexed are factors to determine intent); *Pledger v. Halvorson, 921 S.W.2d 576 (Ark. 1996)* (courts apply objective test and arrive at person's intention by looking to outward acts rather than to inner workings of the mind); *Ford v. Venard, 340 N.W.2d 270 (Iowa 1983)* (intent is "paramount" factor in determining fixture status; *Rothermich v. Union Planters Nat. Bank, 10 S.W.3d 610 (Mo. Ct. App. 2000)* (intent of the annexor controls when determining whether an item is a fixture or not); *Kerman v. Swafford, 680 P.2d 622 (N.M. 1984)* (adaptation and annexation are indicators of intent); *Mastrangelo v. Manning, 793 N.Y.S.2d 94 (App. Div. 2005)* (in determining whether an item constitutes a fixture, permanency of attachment to real property does not depend so much upon the degree of physical force with which the thing is attached as upon the motive and intention of the party in attaching it; and the intent that is controlling is determined from all of the circumstances); *Oldham v. Fanno, 7 P.3d 672 (Or. Ct. App. 2000)* (intent of the annexor is the most important factor in determining if an item is a fixture); *Lehmann v. Keller, 684 A.2d 618 (Pa. Super. 1996)* (a chattel's status as a fixture or as personalty depends upon the objective intent of the owner to the chattel permanently incorporate into real property, as evidenced by the proven facts and surrounding circumstances entered into evidence.); *W.H.V., Inc. v. Assocs. Hous. Fin., LLC, 43 S.W.3d 83 (Tex. Ct. App. 2001)* (intent is the most important factor; however, even if intention is established as a matter of law, it will not prevail over undisputed physical facts to the contrary). *See also* Alphonse M. Squillante, The Law of Fixtures, § 3.03[4] at 3-39 (1992).

(n19)Footnote 74. While the courts purport to be applying a test involving intent at the time of annexation, it is clear that by defining that intent as "objective" they are really shifting the time at which intent becomes material to the time of the formation of the relationship between the parties. Thus, in *Hughes v. Young, 444 S.E.2d 248 (N.C. 1994)* , the court indicated that the intention of the annexor at the time of annexation was to be determinative, but it went on to say that "the status of an item as realty or personalty may depend on the relation of the parties claiming an interest in the item to each other and to the land, as this relation is often indicative of the reasonably presumable intention of the annexor at the time he made the annexation... That is, the same item that may be considered personal property in one situation may be considered real property where a different relationship exists." In *Vic Bernacchi & Sons, Inc. v. Loxas, 170 B.R. 647 (N.D. Ind. 1994)* , however, the court went to great lengths to state that the intention was not that at the time of the transaction establishing the relationship between the parties, but was that at the time of annexation. On that basis it found some items, which were not as permanently attached as others, to be personal property, even though the parties to the transaction probably intended to include such items to be fixtures. *See, e.g., Christ v. Prater Indus., 67 F. Supp. 2d 491 (E.D. Pa. 1999)* (conduct of the party and whether it evinces an intent to permanently attach an object to the realty is a consideration; court concludes that there was no evidence of objective intention to incorporate the a grass seed mixer into the physical plant as to render it an actual part of the facility); *In re Claxton, 239 B.R. 598 (N.D. Okla. 1999)* (the determination as to whether the owner intended to create a fixture must be made by objectively examining

the chattel's affixation to real property; court has little difficulty concluding that a residence was intended to be a fixture under the objective test); *Dinsmore v. Lake Electric Co., 719 N.E.2d 1282 (Ind. Ct. App 1999)* (intention may be determined by the nature of the article, relation and situation of the parties making the annexation, and the structure, use, and mode of annexation; in this case, piece of equipment was not a fixture); *Rothermich v. Union Planters Nat'l Bank, 10 S.W.3d 610 (Mo. Ct. App. 2000)* (lease agreement and subsequent transactions confirmed intent that pinspotters were to remain personal property).

(n20)Footnote 75. Thus, the court states:

> And whether articles are personal property or fixtures must be determinable and plainly appear from an inspection of the property itself, taking into consideration its nature, mode of attachment, purpose for which used, and the relation of the party making the annexation, and in some instances, perhaps, other attending circumstances, indicating the intention to make it a temporary attachment or a permanent accession to the realty... [T]he intention to make the article a permanent accession to the realty must affirmatively and plainly appear... But where the attachment is but slight, and does not enter into the physical structure of the realty, this intention must be gathered from the nature of the article and the other attending circumstances.

Teaff v. Hewitt, 1 Ohio St. 511, 533-534 (Ohio 1853) .

(n21)Footnote 76. *See* § 46.01(e) *above*.

(n22)Footnote 77. "[T]he question is not so much the actual subjective intention of the party making the annexation, but his intention reasonably apparent to such third person as manifested by physical facts and outward appearances." *Little by Davis v. National Serv. Indus., 340 S.E.2d 510, 513 (N.C. Ct. App. 1986)* .

(n23)Footnote 78. *See Hyman v. Wellman Enterprises, Inc., 522 S.E.2d 150 (S.C. Ct. App. 1999)* (court notes that, in general, it is considered more probable that an improvement, placed on the premises by the owner of the fee, was placed there for the betterment of his estate and during its continuance, while it is considered more probable that an improvement, placed on the premises by one who did not own the fee, was placed there for his personal convenience and during the limited term of his estate).

(n24)Footnote 79. *Philadelphia Mtg. & Trust Co. v. Miller, 56 P. 382 (Wash. 1899)* ; *Hall v. Law Guar. & Trust Soc'y, 60 P. 643 (Wash. 1900)* .

(n25)Footnote 80. *Strain v. Green, 172 P.2d 216 (Wash. 1946)* .

(n26)Footnote 81. *Roderick v. Sanborn, 76 A. 263 (Me. 1909)* . *See also Fisher v. Baronti, 761 N.Y.S.2d 820 (City Ct. 2003)* (detachable hose and accessories for central vacuum system in a residence were fixtures that should have been left with the property when the home was sold); *E.M. Fish & Co. v. Young, 106 N.W. 795 (Wis. 1906)* (window screens held fixtures).

(n27)Footnote 82. "... because the severance of a fixture while in process of repair cannot vary its nature or deprive it of the character which annexation has conferred upon it...." *Wadleigh v. Janvrin, 41 N.H. 503, 513* ; *77 Am. Dec. 780, 782 (1860)* (cider mill that had been disassembled for the season and parts of a barn that had been taken down for repair were still fixtures despite the severance). As long ago as the time of Henry VIII, this doctrine was recognized in *Wistow's Case at Gray's Inn, 14 Hen. VIII 25b (1522)* as *quoted in* Liford's Case, 11 Coke Rep. 46b (K.B. 1614).

(n28)Footnote 83. *Byrne v. Werner, 101 N.W. 555 (Mich. 1904)* (stone work and steel specially designed for the building project held fixture even though they were not yet incorporated into the building). *But see Blue v. Gunn, 87 S.W. 408 (Tenn. 1904)* (materials left at construction site not fixtures).

(n29)Footnote 84. *Commonwealth Trust Co. of Pittsburgh v. Harkins, 167 A. 278 (Pa. 1933)* ; *but cf. Planter's Bank v. Lummus Cotton Gin Co., 132 S.C. 16, 128 S.E. 876 (S.C. 1925)* .

(n30)Footnote 85. "The same law of keys; although they are distinct things, yet they pass with the house." Liford's Case, 11 Coke Rep. 46b (K.B. 1614).

(n31)Footnote 86. *6 Greenl. (Me.) 154, 19 Am. Dec. 201 (1829)* .

(n32)Footnote 87. While mortgages do generally contain clauses that seek this result, *See, e.g.*, Grant S. Nelson & Dale A. Whitman, Real Estate Finance Law § 9.3 (2001), the problem is not a simple one. In the first place, "there is no clear consensus as to their validity." *See id.* Second, the mortgage covers real estate, and any clause drafted for this purpose likely would have to describe "additions" or "improvements" to the real estate. Defining such terms would involve problems similar to those involved in determining whether an item is a fixture. *See, e.g., White v. Murtha, 343 F.2d 831 (5th Cir. 1965)* ; *General Synod of Reformed Church v. Bonac Realty Corp., 75 N.E.2d 841 (1947)* .

(n33)Footnote 88. This rule, which would include the item in the coverage of the mortgage despite the fact that the mortgagee's security has been increased beyond that bargained for, has come under intense criticism from several commentators. *See, e.g.*, 5 American Law of Property § 19.7 at 30 (A. Casner ed. 1952); Richard R. Powell, Law of Real Property § 652[4] at 57-42 (1992); David Cohen and Albert B. Gerber, *The After-Acquired Property Clause , 87 U. Pa. L. Rev. 635 (1939). But see* , Russell Denison Niles, *The Intention Test in the Law of Fixtures, 12 N.Y.U. L.Q. Rev. 66, 72-73 (1935)*who believes the rule is justified. *See also, Westmore Supply Co. v. Frum, 44 N.E.2d 949 (Ill. 1942)* (abstract opinion only) (prior mortgagee of real estate has no claim to chattels subsequently annexed to realty); *In re Highland Silk Co., 41 F.2d 405 (3d Cir. 1930)* (bargain made by the parties is what the court would look to); *First Nat'l Bank of Mount Carmel v. Reichneder, 91 A.2d 277 (Pa. 1955)* (Musmanno, J., dissenting). In an early Massachusetts case, the court indicated in dicta that this should be the proper rule; unfortunately the court failed to follow up on it: "And in the case before us, had the defendant, after making the mortgage deed, put this kettle into the mill, we should have considered him authorized to remove it before delivering possession to the plaintiffs." *Union Bank v. Emerson, 15 Mass. 159 (1818)* .

(n34)Footnote 89. *See* Walter B. Raushenbush, Brown on Personal Property, § 19.7 at 543 (3d ed. 1975). The vendee in possession under a long-term installment contract will generally be treated in the same manner as a mortgagee. *See Clore v. Lambert, 78 Ky. 224 (1879)* , which equated the two relationships and reflected a Kentucky position that was favorable to the mortgagor in that it did not generally include subsequently added fixtures within the coverage of the mortgage. The soundness of the latter holding was later questioned in *First State Bank of Eubank v. Crab Orchard Banking Co., 75 S.W.2d 517 (Ky. 1934)* .

(n35)Footnote 90. *See, e.g., In re Ladd, 21 B.R. 579 (Bankr. D. Me. 1982)* (manufactured home went to prior mortgagee even though there was no showing the mortgage had been given in contemplation of the home being placed on the land).

(n36)Footnote 91. *See, e.g., Tifton Corp. v. Decatur Fed. Sav. & Loan Ass'n, 222 S.E.2d 115 (Ga. 1975)* (court gave stoves to mortgagee regardless of whether or not the items could be removed without damaging the premises).

(n37)Footnote 92. *Id.*

(n38)Footnote 93. *See* .Russell Denison Niles, *The Intention Test in the Law of Fixtures, 12 N.Y.U. L.Q. Rev. 66, 91 (1935).*

(n39)Footnote 94. *See, e.g., In re Shelton, 35 B.R. 505 (Bankr. E.D. Va. 1983)* . The mortgagor built a truck stop with proceeds from the mortgage but installed fuel tanks under agreement with the oil company that they would remain personal property for as long as the owner continued to purchase gas from the oil company. The mortgagor later decided to switch oil companies and purchased the tanks from the oil company. When the mortgagee foreclosed on the

mortgage, the bankruptcy court awarded the tanks to the mortgagee even though the mortgagee did not extend any money on the basis of the fuel tanks.

(n40)Footnote 95. *See, e.g., Voorhis v. Freeman, 2 W. & S. (Pa.) 116, 37 Am. Dec. 490 (1841)* . This opinion developed into the "Pennsylvania assembled plant doctrine." This doctrine allows for a chattel to attain fixture status without actual annexation as long as it is integral to the operation of a manufacturing concern. New Jersey also developed a type of industrial doctrine theory. In the leading case of *Feder v. Van Winkle, 53 N.J. Eq. 370, 33 A. 399 (N.J. 1895)* , the intention of the annexor is decided by the fact that a chattel is involved in the business. The New Jersey courts require annexation to some extent, *Knickerbocker Trust Co. v. Penn Cordage Co., 58 A. 409 (N.J. 1904)* . Many courts have followed these two courts. *See generally*, 5 American Law of Property § 19.4 (A. James Casner ed. 1952).

(n41)Footnote 96. For an attempt to rationalize the bias, *See Roberts v. The Dauphin Deposite Bank, 19 Pa. 71, at 76 (1852)* where the court said:

> It is insisted, however, that because the engine, &c., were put up after the giving of the mortgage, therefore, they constituted no part of the mortgage security, and might be removed without doing any wrong to the mortgagee. But this is not so. As the mortgagee may suffer by the depreciation of the property, arising from fluctuations in value, from accident and neglect, so he may be benefited by its appreciation, whether the same arises from the proper cultivation and improvement of the property, or from any other cause. No other rule could be at all practical.

(n42)Footnote 97. "[But] in modern times the leaning has always been the other way in favour of the tenant, in support of the interest of trade which is become [sic] the pillar of the state." *Penton v. Robart, 2 East 88, 102 Eng. Rep. 302 (1801)* .

(n43)Footnote 98. *Lesser v. Bridgeport City Trust, 198 A. 252 (Conn. 1938)* ; *Merritt-Chapman & Scott Corp. v. Mauro, 368 A.2d 44 (Conn. 1976)* .

(n44)Footnote 99. *Lesser v. Bridgeport City Trust, 198 A. 252 (Conn. 1938)* .

(n45)Footnote 100. *Merritt-Chapman & Scott Corp. v. Mauro, 368 A.2d 44 (Conn. 1976)* .

(n46)Footnote 101. In this case the first mortgagee had expressly subordinated its interest to the conditional sales contract and, in that subordination agreement, had acquiesced in the characterization of the alleys as personal property. Presumably, the alleys would not have reverted to their character as realty and been covered by the first mortgage as in the first case. This does not explain why they did not revert to realty for purposes of the second mortgage when paid off and to this extent the two cases are inconsistent on this point. The court in the second case attempts to explain this difference on the basis of the intention of the parties to the relationship involved in the litigation and the differing evidence of the intention in the two cases.

(n47)Footnote 102. 35A Am. Jur. 2d, *Fixtures* § 39 (2001).

(n48)Footnote 103. *258 N.W. 791 (Wis. 1935)* .

(n49)Footnote 104. *See, e.g., In re Shelton, 35 B.R. 505 (Bankr. E.D. Va. 1983)* (court gave fuel tanks to the mortgagee over the mortgagor even though mortgagee did not make mortgage on strength of the fuel tanks); *cf. In re Hot Shots Burgers & Fries, Inc.,169 B.R. 920 (E.D. Ark. 1994)* (court found against the mortgagee and in favor of the officers of the mortgagor corporation as to a modular commercial building located on the land at the time of the execution of the mortgage; the building was owned by the officers of the corporation; this was so despite the fact that the building could only be moved by breaking up the concrete pad on which it was situated).

(n50)Footnote 105. 35A Am. Jur. 2d, *Fixtures* §§ 42 & 54 (2001).

(n51)Footnote 106. Russell Denison Niles, *The Intention Test in the Law of Fixtures, 12 N.Y.U. L.Q. Rev. 66, 81-82 (1935).*

(n52)Footnote 107. *Betz v. Verner, 19 A. 206 (N.J. 1890).*

(n53)Footnote 108. *See, e.g., Joslin v. Linder, 26 S.D. 420, 128 N.W. 500 (S.D. 1910)* (tenant had rented pasture land for grazing purposes and was not in possession).

(n54)Footnote 109. *See, e.g., Schmuck v. Beck, 234 P. 477 (Mont. 1925)* .

(n55)Footnote 110. *Lau v. Indiana Nat'l Bank, 506 N.E.2d 70 (Ind. Ct. App. 1987)* .

(n56)Footnote 111. *Id. at 71* . In *Rochman v. Cape Mercantile Bank & Trust Co., 156 B.R. 794 (S.D. Ill. 1993)* , a similar reasoning process was used to hold that a tax purchaser obtained title to a mobile home placed on the premises by the taxpayer after the tax sale but before the issuance of the tax deed. Again, the issue should have been based upon the reasonable expectations of the purchaser at the tax sale, but the traditional fixtures analysis led the court astray.

(n57)Footnote 112. *Sutton v. Frost, 432 A.2d 1311 (Me. 1981)* .

(n58)Footnote 113. *Anglo American Mill Co. v. Wisconsin Hydro Electric Co., 189 Wis. 120, 207 N.W. 276 (Wis. 1926)* .

(n59)Footnote 114. *Rowand v. Anderson, 33 Kan. 264, 52 Am. Rep. 529 (1885) . But see Bond Inv. Corp. v. Dynasty Oil Co., 715 F. Supp. 1445 (W.D. Ark. 1989)* in which equipment left on the land for three years after expiration of an oil and gas lease was sold by the landowner to a second lessee. The court held that the first lessee had not lost title and that the second lessee could not be a bona fide purchaser because the equipment had not become part of the land. While the opinion refers to the equipment as "drilling equipment," the attorney for the first lessee (in a telephone conversation with the author of this chapter) indicated that it was equipment dedicated to a well located on the property and included tubing in the ground at the time of the sale to the second lessee.

(n60)Footnote 115. "If a tenant build a new house, it is waste, and if he suffered it to be wasted, it is a new waste." Sir Edward Coke, Commentaries on Littleton *53a.

(n61)Footnote 116. Charles A. Ferard & W. Howland Roberts, Amos and Ferard on the Law of Fixtures 40-97 (3d ed. 1883), argue that the "trade fixture" exception from earliest time was actually a right to remove domestic fixtures. But, as the rule came down in history, it was narrowed to include only commercial tenants. *See also* Russell Denison Niles, *The Rationale of the Law of Fixtures: The English Cases, 11 N.Y.U. L.Q. Rev. 560, 564 (1934).* and § 46.01(d) *above*.

(n62)Footnote 117. *See* Poole's Case, 1 Salk. 368, *91 Eng. Rep. 320 (1703),* where Chief Justice Holt gives the rationale for trade fixtures as one to encourage industry.

(n63)Footnote 118. *See, e.g., Roberts v. Yancey, 165 S.E.2d 399 (Va. 1969)* (tenant liable for removing false ceilings and sheet rock the tenant had installed when the removal damaged the property).

(n64)Footnote 119. *See, e.g., City of Greenville v. Washington Am. League Baseball Club, 32 S.E.2d 777 (S.C. 1944)* , where the tenant tried to remove stadium lights but the court held they were not removable trade fixtures because the court found the parties to have intended all improvements to go to the lessor based on the terms of the lease; *Batson v. Clark, 980 S.W.2d 566 (Ky. Ct. App. 1998)* , in which the court concluded that the parties had intended a "pole barn" to be a temporary structure. *See also Supervisor of Assessments of Anne Arundel County v. Hartge Yacht Yard, Inc., 842 A.2d 732 (Md. Ct. App. 2004)* (court states that the touchstone for the trade fixtures test is intent)

(n65)Footnote 120. Poole's Case, 1 Salk. 368, 368; *91 Eng. Rep. 320, 321 (1703)* .

(n66)Footnote 121. *See, e.g., Simmons v. Bank of Miss., 593 So. 2d 40 (Miss. 1992)* ; *Goff v. Case 17 S.W.3d 574,* (Mo. Ct. App. 2000) (presumption in landlord/tenant context that a building has become part of the realty). The strength of the notion that buildings erected by the tenant should belong to the landlord is illustrated by an English statute found in 15 Vict. ch. 25 which gave the tenant the right to remove buildings erected by him with the written consent of the landlord but only after giving the landlord notice and an option to buy the same.

(n67)Footnote 122. The parties might include a provision about their intent in the lease. *See Lilenquist v. Pitchford's, Inc., 525 P.2d 93 (Or. 1974)* (en banc).

(n68)Footnote 123. *See Ariz. Dep't of Revenue v. Ariz. Outdoor Advertisers, Inc., 202 Ariz. 93, 41 P.3d 631 (Ariz. Ct. App. 2002)* (court adopts a reasonable person test for determining the existence of a fixture in a tax dispute case; the issue arose out of a landlord/tenant context, involving the construction of outdoor billboards by the tenant; even though the written agreements stated that the billboards were fixtures, and even though the billboards were connected to the realty with support poles that went deep into the ground, the court, stressing the parties' agreement that the tenant would remain the owner of the billboards and had the right to remove them, and that the that the billboards were constructed for easy disassembly, concludes that the billboards were personal property rather than fixtures).

(n69)Footnote 124. *See, e.g., Revzen Bus. Interiors, Inc. v. Carrane, 391 N.E.2d 24 (Ill. Ct. App. 1979)* (Illinois follows the rule that a tenant must remove fixtures prior to the expiration of the lease); *cf. Dutchmen Mfg., Inc. v. Reynolds, 849 N.E.2d 516 (Ind. 2006)* (scaffolding installed by tenant did not become landlord's property at lease termination; tenant had right to remove it, landlord demanded that tenant do so, but then agreed to allow it to remain for use of new tenant; under the circumstances, title to scaffolding passed to new tenant, and, when employee of new tenant was injured by scaffolding, original tenant was liable in tort for injury caused by defective chattel); *Locke v. Palmore, 215 S.W.2d 544 (Ky. Ct. App. 1948)* (lease permitted removal of fixtures at any time; court concludes that tenant had to remove them within a reasonable time after lease termination).

(n70)Footnote 125. *See Chouinard v. Leah Enterprises, Inc., 422 S.E.2d 204 (Ga. Ct. App. 1992)* (statute provided that any trade fixtures remaining after lease term and possession ended will be regarded as abandoned for the use of the landlord and will become the landlord's property; court rejects tenant's claim for conversion by landlord of trade fixtures after lease termination).

(n71)Footnote 126. *See, e.g., Neely v. Jacobs, 673 S.W.2d 705 (Tex. Ct. App. 1984)* .

(n72)Footnote 127. Chief Justice Holt called fixtures left by a tenant "a gift in law to [the lessor] in reversion." Poole's Case, 1 Salk. Rep. 368, *91 Eng. Rep. 320 (1703)* .

(n73)Footnote 128. *See, e.g., Kerr v. Kingsbury, 39 Mich. 150, 33 Am. Rep. 362 (1878)* .

(n74)Footnote 129. Elwes v. Maw, 3 East 38 (1802).

(n75)Footnote 130. *45 N.Y. 792 (1871)* .

(n76)Footnote 131. *See* Russell Denison Niles, *The Rationale of the Law of Fixtures: The English Cases, 11 N.Y.U. L.Q. Rev. 560, 567-568 (1934).*

(n77)Footnote 132. *See Carver v. Gough, 25 A. 1124 (Pa. 1893)* .

(n78)Footnote 133. Walter B. Raushenbush, Brown on Personal Property, § 16.9 at 550-551 (3d ed. 1975); *See also Van Ness v. Pacard, 27 U.S. (2 Pet.) 137 (1829)* .

(n79)Footnote 134. *45 N.Y. 792 (1871)* .

(n80)Footnote 135. *See* § 46.01(d) *above*.

(n81)Footnote 136. The leading case opposed to *Loughran is Kerr v. Kingsbury, 39 Mich. 150, 33 Am. Rep. 362 (1878)* . Of course, the parties to the lease can always enter into an agreement, on renewing the lease, regarding the ultimate disposition of fixtures. *See, e.g., Pocahontas Mining Ltd. Liability Co. v. Jewell Ridge Coal Corp., 556 S.E.2d 769 (Va. 2002)* (tenant agreed to leave behind "an operational plant complete with equipment necessary for its operation.").

(n82)Footnote 137. *See generally* Charles A. Ferard & W. Howland Roberts, Amos and Ferard on the Law of Fixtures 105-126 (3d ed. 1883); 2 James Kent, Commentaries on American Law 344 (5th ed. 1844); Walter B. Raushenbush, Brown on Personal Property, § 16.10 at 552 (3d ed. 1975), who states that this exception is more restrictive than the trade fixture exception because a non-commercial tenant probably could not remove a building erected by him.

(n83)Footnote 138. *See, e.g., Wright v. Du Bignon, 40 S.E. 747 (Ga. 1902)* (tenant was not allowed to take away a cement walk, plumbing, water spigots, and servants' quarters installed by him).

(n84)Footnote 139. *But cf. Commonwealth v. Bundza, 763 N.E.2d 545 (Mass. Ct. App. 2002)* (residential tenant removed parlor gas stove, glass shower doors, a shower head, medicine cabinet, vanity, ceiling lights and fans in the dining and living rooms, and a dishwasher; court states that the bias is toward the tenant's right of removal unless the parties by action, speech, or writing have demonstrated a different intent; in this case, there was nothing in the evidence from which it could reasonably be inferred that the personal property belonged to someone other than the tenant).

(n85)Footnote 140. But the situation would be different in a case in which the chattel is affixed to the leasehold property by the *landlord*. *See Lehmann v. Keller, 684 A.2d 618 (Pa. Sup. Ct. 1996)* (court concludes that "general fixture principles, rather than the trade fixture rule," should determine the rights of the parties to chattels that are affixed to the leasehold estate by the lessor).

(n86)Footnote 141. 35A Am. Jur. 2d, *Fixtures* § 61 (2001).

(n87)Footnote 142. *See, e.g., Forbes v. Forbes, 46 A.2d 62 (N.J. Ch. 1946)* (mother allowed her son to build a restaurant on her property).

(n88)Footnote 143. See, e.g., *Hill v. Eads, 970 S.W.2d 882 (Mo. Ct. App. 1998)* . *See* 5 American Law of Property § 19.10 (A. James Casner ed. 1952).

(n89)Footnote 144. Harrison Bronson, Law of Fixtures § 106 (1904).

(n90)Footnote 145. *Id.*

(n91)Footnote 146. *See, e.g., Pargas of Longview, Inc. v. Jones, 573 S.W.2d 571 (Tex. Ct. App. 1978)* .

(n92)Footnote 147. *See* 5 American Law of Property § 19.9 at 35 (A. James Casner ed. 1952); Walter B. Raushenbush, Brown on Personal Property, § 16.8 at 545 (3d ed. 1975), § 16.15 at 569.

(n93)Footnote 148. *See, e.g., Smith Dev., Inc. v. Flood, 403 S.E.2d 249 (Ga. App. 1991)* . Another policy present is to protect the landowner's right to enjoyment and possession of the land. *Crest v. Jack, 3 Watts 238 (Pa. 1834)* . *See also* Russell Denison Niles, *The Intention Test in the Law of Fixtures, 12 N.Y.U. L.Q. Rev. 66, 79 (1935)* (*quoting* Robert Brooke, La Graunde Abridgement, Trespass pl. 23), where it is said that the trespasser loses his property by his "fraud or folly." To show the hostility of the courts to trespassers, an interesting case came out of the civil war. During the war the government rebuilt, without the owner's permission, some railroad bridges that had been destroyed. The government then tried to offset the costs of repair against money it owed to the railroad. The Supreme Court did not

allow the offset. *United States v. Pacific R.R., 120 U.S. 227 (1887)* .

(n94)Footnote 149. *See, e.g., Ind. Code Ann. §§ 32-30-3.1 - 32-30-3.1-12*.

(n95)Footnote 150. *See, e.g., N.C. Gen. Stat. §§ 1-340 - 1-351*.

(n96)Footnote 151. *See generally* Dickinson, *Mistaken Improvers of Real Estate, 64 N.C. L. Rev. 37, 42 (1985).*

(n97)Footnote 152. *Ind. Code Ann. § 32-30-3.1*.

(n98)Footnote 153. *Duncan v. Akers, 262 N.E.2d 402 (Ind. 1970)* .

(n99)Footnote 154. *Id.* at 522, 262 N.E.2d at 407.

(n100)Footnote 155. *Id.* at 521-522, 262 N.E.2d at 407.

(n101)Footnote 156. *Pull v. Barnes, 350 P.2d 828 (Colo. 1960)* .

(n102)Footnote 157. 1 Howard R. Williams & Charles J. Meyers, Oil and Gas Law § 226.1 (1992).

(n103)Footnote 158. Ronald W. Polston, *Oil and Gas Law Developments*, 10 Eastern Minn. L. Inst. § 21.02 at 21-2 to 21-8 (Matthew Bender & Co., 1989).

(n104)Footnote 159. *Fuel Exploration v. Novotny, 374 N.W.2d 838 (Neb. 1985)* .

(n105)Footnote 160. *See generally* Alphonse M. Squillante, The Law of Fixtures, § 3.04[3] (1992).

(n106)Footnote 161. *Article 9 of the U.C.C.* also applies to other real property situations. *See U.C.C. § 9-109(b)* and Official Comment 7 (pledge of a note secured by real property); § 9-301(4) and Official Comment 5(d) (security interest in minerals); § 9-102(44) (defines uncut timber and growing crops as goods). References to the U.C.C. in this chapter are to the 1999 version.

(n107)Footnote 162. *U.C.C. §§ 9-102(41)* & *9-334* Official Comment 3.

(n108)Footnote 163. *U.C.C. § 9-334(a)* and Official Comment 3 (security interest cannot be retained in "ordinary building materials").

(n109)Footnote 164. *U.C.C. § 9-501*.

(n110)Footnote 165. The Code does not define "fixtures" but, rather, leaves that to local law; however, the Code does recognize distinct situations in which goods, if fixtures under local law, will be treated differently. *See U.C.C. § 9-334* and Official Comment 3.

(n111)Footnote 166. *U.C.C. § 9-334(a)*.

(n112)Footnote 167. *See U.C.C. § 9-334(a)*.

(n113)Footnote 168. *See U.C.C. §§ 9-102(41), 9-334(a)*&*(e)* & Official Comment 3.

(n114)Footnote 169. *See U.C.C. § 9-313(4)(c)* and Official Comment 3.

(n115)Footnote 170. *U.C.C. § 9-334(e)(4)*.

(n116)Footnote 171. *See U.C.C. § 9-102(53)*.

(n117)Footnote 172. *See U.C.C. § 9-102(54)*. Manufactured homes held as inventory do not qualify. *See id.*

(n118)Footnote 173. *See U.C.C. § 9-102(40)*. "Fixture filing" also refers to "the filing of a financing statement covering goods of a transmitting utility which are or are to become fixtures." *See id.*

(n119)Footnote 174. *See U.C.C. § 9-502(b)*. The article also provides that a "record of mortgage" can serve as a financing statement if it satisfies several requirements. *See U.C.C. § 9-502(c)*.

(n120)Footnote 175. *U.C.C. § 9-501*, Official Comment 4. The text of § 9-501 confirms that a fixture filing is to be filed in the office designated for recording a mortgage. The section includes additional details, including a specialized provision, in 9-501(b), dealing with perfection of security interests in the fixtures of a transmitting utility.

(n121)Footnote 176. *See U.C.C. § 9-501* & Legislative Note.

(n122)Footnote 177. *See U.C.C. § 9-501(e)*. Of course, the debtor will have to have an interest in the real property for this to work. The Code requires that the debtor have "an interest of record in the real property" or be "in possession of the real property and the security interest." *See id.*

(n123)Footnote 178. An example would be a filing with respect to readily removable factory or office machines that have not yet become fixtures. *See* U.C.C. § 334(e). The issue is discussed more fully below.

(n124)Footnote 179. A comment to the Code suggests that if there is uncertainty over whether a particular thing is or will be a fixture, a secured creditor may undertake a fixture filing as a "precaution." *See U.C.C. § 9-334*, Official Comment 3. The Comment also states: "Courts should not infer from a fixture filing that the secured party concedes that the goods are or will become fixtures." *Id.*

(n125)Footnote 180. *See U.C.C. § 9-334(e)*.

(n126)Footnote 181. *See U.C.C. § 9-334(e)*.

(n127)Footnote 182. *See U.C.C. § 9-102(41)*.

(n128)Footnote 183. *U.C.C. § 9-334(e)*. For most non-consumer goods, the rule is that perfection occurs upon the filing of the financing statement with the Secretary of State, or other comparable office designated in the relevant state's version of the U.C.C. *See U.C.C. § 9-310*.

(n129)Footnote 184. *See U.C.C. § 9-334(e)*.

(n130)Footnote 185. "Manufactured home" is defined in *U.C.C. § 9-102(53)*.

(n131)Footnote 186. "Manufactured-home transaction" is defined in *U.C.C. § 9-102(54)*.

(n132)Footnote 187. *See U.C.C. § 9-334(e)*.

(n133)Footnote 188. *See U.C.C. § 9-311(a)(2)*.

(n134)Footnote 189. *See U.C.C. § 9-334(h)*.

(n135)Footnote 190. *See U.C.C. § 9-334(d)*. Of course, the debtor will have to have an interest in the real property for the fixture filing to work. *See id.* (debtor must have interest of record or be in possession of the real property).

(n136)Footnote 191. *See U.C.C. § 9-334(e)*.

(n137)Footnote 192. *See U.C.C. § 9-334*, Official Comment 9.

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CHAPTER 46 FIXTURES

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Annotation, *Appliances, Accessories, Pipes, or Other Articles Connected with Plumbing as Fixtures, 52 A.L.R.2 D 222.*

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Annotation, *Estoppel to Assert that Article Annexed to Realty Is or Is Not a Fixture, 60 A.L.R.2 D 1209.*

Annotation, *Flagpole or other ornament in garden, yard, or park as fixture*, 50 A.L.R. 640

Annotation, *Garage as fixture*, 36 A.L.R. 1519

Annotation, *Heating plant as a fixture, or as a part of or attached to realty*, 126 A.L.R. 599

Annotation, *Installation of fixtures as part performance which will take parol lease out of statute of frauds*, 10 A.L.R. 1495

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Annotation, *Liability of Owner or Operator of Store or Similar Place of Business for Injury to Child Climbing or Playing on Furniture, Fixtures, Displays, or the Like, 50 A.L.R.3 D 1227.*

Annotation, *Measure of Damages Where Vendor, After Execution Of Contract Of Sale But Before Conveyance Of Property, Removes Part Of Property Contracted For, 97 A.L.R.3 D 1220.*

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Annotation, *Pavement, flooring, platform, walks, and the like as fixtures*, 13 A.L.R. 1454

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Annotation, *Time Within Which Tenant's Right to Remove Trade Fixtures Must Be Exercised*, 109 A.L.R.5 th 421.

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§ 46.02(b)(1) The Physical Annexation Requirement.

Add:

Harris County Flood Control Dist. v. Roberts (252 S.W.3d 667 (Tex. App. 2008) (billboard sign structure was a fixture); *Milnes v. Milnes, 175 P.3d 1164 (Wyo. 2008)* (manufactured home was a fixture); *Sun Life Assur. Co. of Canada v. Schrock Rd. Mkts., Inc., 883 N.E.2d 1107 (Ohio App. 2008)* (door sensors/openers and rooftop units were not fixtures).

Add:

Copple Construction, L.L.C. v. Columbia National Insurance Company, 776 N.W.2d 503 (Neb. 2009) (a tarp was considered a fixture for the purpose of a loss under an insurance policy).

Add:

High Concrete Technology, LLC v. Korolath of New England, Inc., 665 F. Supp. 2d 883 (S.D. Ohio 2009) (plastic shims installed in construction projects did not become fixtures upon installation).

§ 46.02(b)(2) Adaptation to the Use of the Real Estate.

Add:

Harris County Flood Control Dist. v. Roberts, 252 S.W.3d 667 (Tex. App. 2008) (billboard sign structure was a fixture); *Milnes v. Milnes, 175 P.3d 1164 (Wyo. 2008)* (manufactured home was a fixture).

Add:

City of Englewood v. Miami Valley Lighting, L.L.C., 911 N.E.2d 913 (Ohio App. 2009) (a street lighting system was not a fixture, even though there was a high degree of attachment, because they were intended to be removed if the provider's contract was not renewed).

§ 46.02(b)(3) The Intent of the Annexor.

Add:

Sun Life Assur. Co. v. Canada v. Schrock Rd. Mkts. Inc., 883 N.E.2d 1107 (Ohio App. 2008) (door sensors and openers were not fixtures under a lease provision that items attached to property by tenant remained property of the tenant); *Freeman v. Barrs, 237 S.W.3d 285 (Mo. App. 2007)* (cattle scale was a fixture and was included in the sale of the underlying land).

Add:

City of Englewood v. Miami Valley Lighting, L.L.C., 911 N.E.2d 913 (Ohio App. 2009) (a street lighting system was not a fixture, even though there was a high degree of attachment, because they were intended to be removed if the provider's contract was not renewed).

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CHAPTER 47 AGRICULTURE AND FARM LAW

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CHAPTER 47 AGRICULTURE AND FARM LAW

6-47 Thompson on Real Property, Thomas Editions § 47.01

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§ 47.01 Introduction.

Every nation desires to have a sufficient land base to meet its perceived national needs. Indeed, the history of many nations, including ours, is largely the history of its struggle to acquire, control and occupy the space perceived as necessary to sustain the quality of life commonly sought in that nation. That struggle is ongoing. Some land will always be needed for the production of food and fiber. Other land will be needed for residential occupancy or for industrial uses. Some land will be needed for recreational use and some for defense purposes. Much land will be dedicated to transportation or power production and so forth. Since the same land cannot always be used for more than one use at a time, all of these various uses must compete with each other for space. The availability of land for agricultural purposes has been and will always be a significant issue as national and local public policy regarding the use of the land is developed.

In our nation, we have historically taken the position that it is the patterns of use rather than the exercise of individual choices that predominantly determine whether the particular public interest objectives of having enough land available for such purposes as food production, defense, residential and commercial use may be efficiently accomplished. Nevertheless, great deference is typically given to the role of individual choice in the process of determining those basic patterns of land use and which specific parcels may be used for which particular purposes to meet those national and local needs. These rights of choice are generally protected within the *law of property* in our system and are regarded as highly valued rights of the landowner. Because of the significant concern to the public at large that such choices be made wisely and collectively meet national land use needs, the nature, extent and content of those rights may be limited from time to time in order to achieve the greater public interest.

Thus, historically, our system generally has preferred to influence patterns of use rather than mandate particular choices. To a considerable extent this has focused regulatory efforts specifically on the individual land use choice decision only to the extent necessary to achieve the desirable pattern. Thus, limitations in the individual rights are generally avoided, if possible, but are most likely to arise when the nature of the right is considered to be in conflict with the larger public purposes and interest in use patterns.

Reconciling the public need for desirable patterns with our legal system's predilection for unrestricted individual land use choice has always been a difficult matter. Whether a particular landowner gets to decide if a certain parcel of land is

used for particular purposes is an intriguing issue and a difficult legal question that consumes much time and energy in our legal system. The issue of control over the land use decision making reflects our concerns with several dimensions of agriculture and cannot be understood without some reference to both the social and legal context of agriculture. The ultimate concern of this chapter is the extent to which governments at both the federal and state or local levels have the power to control land use decision making and the extent to which an individual landowner may be compelled to dedicate a particular parcel of land to a particular use in order to create a particular pattern of use.

There has been a growing national concern in recent years that the trend in agriculture toward fewer and larger farms may jeopardize the long-term ability of our farmers to adequately feed and clothe the nation. It has been recently announced that the number of farms in the United States has now dropped below 2 million. According to the Census Bureau, there are now 1.925 million farms, which is the lowest number since 1850. The trend toward fewer but larger farms has been going on for most of this century. The national highpoint in terms of numbers of farms occurred in 1935 when there were 6.8 million farms. n1

FOOTNOTES:
(n1)Footnote 1. *See News Briefs,* Doane's Agric. Rep., 1 (Nov. 11, 1994).

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CHAPTER 47 AGRICULTURE AND FARM LAW

6-47 Thompson on Real Property, Thomas Editions § 47.02

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§ 47.02 The Social Context of Agriculture.

Agriculture is generally and broadly thought to comprise the production of food, fiber and certain fuels such as gasohol, and the related activities of those who participate in the production, processing, storage or marketing of agricultural commodities. As such, although there are relatively few individual farmers, n2 the agricultural sector of the economy is enormous and constitutes one of the most significant features of our nation.

The law, of course, has a considerable interest in the activities of this sector. In some respects, this has resulted in the creation of a regulatory framework that is rarely, if at all, exceeded elsewhere. n3

Although no area of the law can be completely understood separate from its cultural and social context, this is particularly the case with regard to agriculture. First, most people in this country know little about agriculture, even though they are, at most, probably not more than a generation or two removed from the farm. n4 This has given rise to much misunderstanding regarding the needs and practices of the farm sector which, on occasion, has become the basis for particular, albeit arguably inappropriate, legal responses. n5

Second, as a nation, we have become essentially an urban oriented and dominated society. Even in rural areas, the non-farm rural typically outnumber the farm-rural by an eight-to-one (or more) margin. This quite clearly has had the effect of lodging control over most of the legal policy making and decision making that occurs with respect to agriculture in the hands of urban interests which, in the perception of many farmers, may tend to be more interested in the production of abundant but cheap supplies of food and fiber than they are in the stability or long-term viability of the agricultural sector. This has given rise to an interesting ambivalence toward agriculture that at once suggests both a need to protect and a need to regulate.

Finally, one must note the social role of farming. Although farming is certainly an economic enterprise, it is also a social institution, a way of life and even an attitude toward the universe. n6 One might argue, for example, that farming, at some level, may actually represent the key to national social well-being. n7 Similarly, one might note the strong national psychological needs associated with ownership and self-sufficiency that are expressed in the family farm concept of land tenure. n8

This social and cultural background has generated an interesting and unique relationship between the law and agriculture that probably doesn't have a counterpart anywhere else in our society.

FOOTNOTES:
(n1)Footnote 2. U.S.D.A. estimates that there are approximately 2 million farmers in the United States today. For a discussion of the U.S.D.A. measurement criteria, *see* James Wadley, *Small Farms: The USDA, Rural Communities and Urban Pressures, 21 Washburn L.J. 478 (1982).*

(n2)Footnote 3. *See Cuismano v. Block, 652 F.2d 11025 (5th Cir. 1982)* where the court observed that the business of marketing perishable agricultural commodities was so pervasively regulated that there could be no reasonable expectation of privacy that would shield someone who was subject to the federal record-keeping requirements from the risks of unannounced and warrantless searches and seizures.

(n3)Footnote 4. The average American takes his food and fiber supply very much for granted. He gives little, if any thought to the process by which foods and fibers make their seemingly miraculous appearance in supermarkets and boutiques. When some thought is given to the human element in the production of these items, the 'farmer' is vaguely and inconsistently conceived of as a cross between a noble visionary worthy of residence on the banks of Walden Pond and a country bumpkin growing fat on government subsidies. This popular view ... is patently false but nonetheless revealing of the ill-defined role and self-image of those who produce America's unequalled quantities of food and fiber.

John Wershow and Julian Juergensmeyer, *Agriculture and Changing Legal Concepts in an Urbanized Society, 27 U. Fla. L. Rev. 78 (1974).*

(n4)Footnote 5. *See generally* James Wadley & Pamela Falk, *Lucas and Environmental Land Use Controls in Rural Areas: Whose Land is it Anyway? 19 Wm. Mitchell L. Rev. 331 (1993).*

See Zeigler, K., *Who Will Teach Our Farmers: Learning the Value of Mentor Programs from State & Private Programs, 5 Drake J. Agric. L. 279 (2000).*

(n5)Footnote 6. *See, e.g.*, Ranching Traditions (Kathleen Ryan ed. 1989); Elroy Bode, *Our South in Words and Pictures*, Southern Living, Jan. 1990, at 31.

(n6)Footnote 7. Rural areas have been described, from a quality of life viewpoint, as better than urban areas in many respects and as having more effective socializing institutions. *See* James Wadley, *Small Farms: The USDA, Rural Communities and Urban Pressures, 21 Washburn L.J. 478 (1982).* As such, they may also represent a source of insight into how similar, but arguably failing urban institutions might be strengthened.

Myers, Ruark & Backiel, *Developing an Enduring American Agriculture, 12 Nat. Resources & Env't. 110 (1997).*

(n7)Footnote 8. James Wadley & Pamela Falk, *Lucas and Environmental Land Use Controls in Rural Areas: Whose Land Is It Anyway? 19 Wm. Mitchell L. Rev. 331 (1993).*

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CHAPTER 47 AGRICULTURE AND FARM LAW

6-47 Thompson on Real Property, Thomas Editions § 47.03

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§ 47.03 The Legal Context of Agriculture.

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The law tends to relate to agriculture in one of three ways. n9 First, the law may apply to agricultural enterprise in the same fashion as it applies to any other enterprise. Thus, contracts involving agriculture operate on the same principles as do other kinds of contracts, without any particular distinction resulting from the fact that agriculture is involved. Similarly, it matters little to the law of torts that it may be a farmer who assaults another or who is assaulted. In either case, the incident may be considered actionable within tort law, without any additional consideration for the fact that agriculture is somehow involved. This body of law operates on the assumption that agriculture is no different from any other enterprise insofar as the law is concerned.

Second, there is a vast body of law that is specifically designed to address agricultural problems. This body of law has little or no application elsewhere and usually owes its existence to the perception that agriculture is indeed different from other kinds of enterprises. For example, federal market orders, n10 which may be imposed upon handlers without their consent under certain circumstances, may determine the amount of a particular product that those handlers may lawfully distribute into the marketplace at any particular point in time. Reparation orders, which are conceptually the equivalent of a civil judgment in an administrative proceeding, protect producers of perishable agricultural commodities n11 and certain livestock growers. n12 These, of course, are somewhat unique to agricultural situations. Other examples, while operating on the basis of legal principles that are not unique to agriculture, are nonetheless part of a body of law that has no application to anything else. These include such specialized regulations as the federal price support program for feed and foodgrains; n13 the use of Payment-in-Kind-Certificates as money in lieu of cash to satisfy government payment obligations; n14 sodbuster and swampbuster regulations; n15 and the conservation reserve program. n16 Collectively, this body of law is highly specialized and specifically focused on agriculture.

Third, there is a significant number of situations in which agriculture is considered sufficiently different from other enterprises that general legal rules are deemed inappropriate. As a general rule, these areas are not collectively or individually the subject of specialized rules but rather have come about in response to the need for exceptions to the general rules in order to accommodate the perceived differences in agriculture. n17 Since these are "carved out" for particular situations, their existence and scope typically will vary widely from jurisdiction to jurisdiction n18 (unless the

exception is federal in nature). n19 For example, in many states, farmers are excluded from workers' compensation laws. n20 Similarly, farm products may be treated differently under Article 9 of the Uniform Commercial Codes (UCC); n21 a farmer may not be considered a merchant under Article 2 of the UCC; n22 farm taxpayers may be given elections or treatment not available to others, etc. n23

These different responses of the law certainly suggest that the law not only has a keen, but a varied, interest in agriculture. Those who deal with this area of the law must be well versed in not only the general law but also the specialized and the exceptional law.

It should be understood that the focus of this chapter is upon how agricultural land is regulated and managed. Obviously, there is much more than that involved within the general topic of government's relation to agriculture, regardless of the level of government that is considered. Notwithstanding the narrowness of the focus of this chapter, from time to time, cases or decisions pertaining to other concerns are pertinent to dealing with governmental actions regarding land. For example, in the case of *Kirby Produce Company v. U.S.D.A., 256 F. 3d. 830 (D.C. 2001),* the court addressed the extent to which Federal agency decisionmaking could be considered arbitrary or capricious. When matters involving governmental agencies are appealed to the courts, the courts are required to uphold the decisions of the Judicial Officer unless the Court finds that the decision was arbitrary, capricious, an abuse of discretion, not in accordance with law or unsupported by substantial evidence. In this case, the officer's decision was based on an arbitrary and capricious conclusion that the merchant, by requesting a continuance of the hearing, had admitted that it could not make a payment, as required by statute, within the time frame required by the statute.

FOOTNOTES:

(n1)Footnote 9. *See* Julian Juergensmeyer and James Wadley, Agricultural Law § 2.1 (1982).

(n2)Footnote 10. *7 U.S.C. § 602 et seq*.

(n3)Footnote 11. *7 U.S.C. § 499g*(a).

(n4)Footnote 12. *See, e.g., Sullivan v. Union Stockyards Co., 26 F.2d 60 (8th Cir. 1928).*

(n5)Footnote 13. *7 U.S.C. § 601 et seq*.

(n6)Footnote 14. *See generally* Paul Rasor and James Wadley, *The Secured Farm Creditor's Interest in Federal Price Supports: Policies and Priorities, 73 Ky. L.J. 595 (1984).*

(n7)Footnote 15. So-called sodbuster and swampbuster programs were introduced as part of the conservation title of the Food Security Act of 1986 (§§ 1201-1245) and were designed to cause farmers to forfeit federal price support entitlements if certain fragile or highly erodible lands were converted to crop production.

(n8)Footnote 16. *See* A. Roger McEowen and Neil Harl, *A Look at the Conservation Reserve Program (CRP) and How It Affects Owners and Tenants of Marginal Land*, 12 J. Agric. Tax'n & L. 121 (1990).

(n9)Footnote 17. *See* Sam Brownback and James Wadley, *Farming as an Exception to the Rules, in* Kansas Agricultural Law, ch. 2 (1989).

(n10)Footnote 18. For example, several states limit or prohibit most corporations from owning farmland or engaging in agriculture. *See, e.g.*, Kan. Stat. Ann. § 17-5901 et seq.

(n11)Footnote 19. For example, farmers may not be forced into involuntary bankruptcy and may be the beneficiaries of separate, special bankruptcy rules. *See* J. David Aiken, *Chapter 12 Family Farmer Bankruptcy, 66 Neb. L. Rev. 632 (1987).*

(n12)Footnote 20. *See, e.g., Cueto v. Stahmann Farms, Inc., 608 P.2d 535 (N.M. App. 1980); Hammond v. Hager, 399 P.2d 52 (Mont. 1972).*

(n13)Footnote 21. Kirk Fjelstul, *Iowa's Ever-changing Farm Products Exception -- Where Will it End? 38 Drake L. Rev. 657* (1988-89).

(n14)Footnote 22. *See Decatur Cooperative Ass'n v. Urban, 547 P.2d 323 (1976).*

(n15)Footnote 23. Zoel Daughtrey, et al., *Recent Tax Legislation Results in a New Crop of Tax Changes for Farmers*, 12 J. Agric. Tax'n & L. 99 (1990).

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CHAPTER 47 AGRICULTURE AND FARM LAW

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§ 47.04 The Law and Agricultural Land Generally.

The law approaches agricultural land in the much same fashion as it approaches agriculture as an enterprise. That is, in some instances, general law will apply. In others, there may be exceptions to those rules that must be dealt with. Finally, in certain circumstances, there may be a specialized body of rules that applies only to agricultural land. For example, the sale of agricultural land will typically be subject to the same rules that apply to the sale of any other real property (general law). The land may be valued for tax purposes quite differently from other properties, however (exceptional law). Finally, how the land is actually used may be conditioned upon the presence or absence of an approved conservation plan mandated by federal price support legislation (specialized law). Although this chapter is not organized around these differences in how the law reacts to agricultural land, one is well advised to be aware of them as particular situations are addressed.

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CHAPTER 47 AGRICULTURE AND FARM LAW

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§ 47.05 Definitions.

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§ 47.05(a) In General.

An understanding of a few basic terms appears useful in order to appreciate how the law deals with agricultural land. How "agriculture" or "agricultural land" is defined for purposes of statutes and ordinances will generally be a critical issue in determining what permissible uses may be made of the land. n24 These and other terms such as farming, farmers and farmland may be given specialized definitions. In many instances, agriculture and agricultural land will be considered the terms of art whereas farmers, farming and farmland tend to be a part of common parlance. It must be noted, however, that on occasion, even these terms will have particular legal significance. n25 Certainly the list of terms identified here is not exhaustive.

One of the major difficulties that must be addressed with respect to law and agriculture is the variety of definitions that are found for these terms in the many cases and statutes. These vary from those that focus on the production of specifically defined products to those that consider agriculture to be any enterprise that involves the tillage of the soil. Even within the same jurisdiction, the terms may have a variety of meanings, depending upon the purpose associated with their use. n26 Nevertheless, the definitions may determine whether a particular situation is subject to certain rules or qualifies for an available exemption. Although one might suspect that law, as it relates to "agriculture," covers "farming" done by a "farmer" on "agricultural land," the specificity of the various definitions might not produce such a neat, convenient statement of coverage.

Finally, it should be noted that in many cases the terms will be used without any specific definition. In such a case, a court may have to determine the common meanings of the terms and the extent to which they were intended to be used. n27 Typically, where no specific definition is included in the ordinance or statute, courts have tended to give the terms "farming" and "agriculture" their usual and generally accepted meaning. n28

Agriculture is often thought of as involving the raising of livestock. However, what constitutes "livestock" is often uncertain or may vary from statute to statute. For example, Kan. Stat. Ann. § 47-1001, Kan. Stat. Ann. § 65-6a18, and Kan. Stat. Ann. § 47-607 were amended to include "rarities" (ostriches, emus, etc.) within the definition of "livestock." This undoubtedly reflects a growing interest in raising such animals for food or fiber and may call into question some

local animal control ordinances that presently deal with such animals as "exotics" or as pets. An example of such an ordinance is that of the City of Topeka which generally makes it unlawful to keep "cattle, sheep, goats, or other food producing animals" in the city on the ground that they are "livestock." (§ 8-101 *et seq).* The ordinance prohibits "ostriches, emus, rheas, and cassowaries" under its more recently enacted "exotic or captive wild animals" provisions (§ 8-9). It is interesting to note that despite the prohibition against "livestock" in § 8-101, the "exotic pets" part of the ordinance, § 8-9, specifically permits the keeping of "domestic hoofstock." The issue of how to reconcile pet and livestock provisions of the ordinance came up in a case involving a citation issued against a person who allegedly kept a Vietnamese Potbellied Pig in violation of the "livestock" provisions of the statute. The person claimed that the pig was being kept lawfully as a pet under the "domestic hoofstock" provisions of § 8-9. The city preferred to dismiss the case rather than risk a judicial determination that the livestock provisions of the ordinance had been implicitly repealed by the more recent adoption of the section expressly permitting the keeping of domestic hoofstock as pets. "Domestic hoofstock" is not defined in the ordinance. n29 In a 1994 case involving a farm program contract, a farmer argued that the term "producer" was too vague to support a conviction for violating *15 U.S.C. § 714m*(a), which makes it a crime to cause others to represent that they were producers in Commodity Credit Corporation contracts. The farmer argued that differences in the definition of "producer" as used in the farm program regulations, in the farm program contract and as used in testimony in the prosecution demonstrated that the term was fatally vague. The court rejected that argument n30 without resolving the definitional dispute, holding that the individuals involved did not satisfy any of the definitions used. In an Attorney General opinion regarding whether swine finishing facilities constituted "farming" under the Kansas statute restricting the ability of certain corporations to own farmland in the state, the Attorney General ruled that finishing facilities were commercial feedlots and therefore not engaged in farming as defined in *Kan. Stat. Ann.* § 17-5903(h). The opinion cited as authority, T-Bone Feeders, Inc. v. Martin, n31 held that there was a distinction between a commercial feedlot and farming. The commercial feedlot was a specialized agri-business that was engaged in an agricultural endeavor but not engaged in farming. n32

§ 47.05(b) Agriculture.

"Agriculture" tends to be broadly defined in most jurisdictions in terms of the general activities, such as the growing of crops, raising of livestock and the processing and marketing associated therewith. Where a specific definition has been developed, the purpose to be served generally dictates the content of the definition. For example, at one point in time, Kansas narrowly defined agriculture for purposes of its statutes restricting corporate ownership of farmland to include only the "planting, raising, harvesting or gathering of wheat, corn, grain sorghums, barley, oats, rye or potatoes or the milking of cows for dairy purposes." n33 Noticeably excluded from this definition are such things as the raising of sugar beets, alfalfa, hay and native grass pasture, timber, livestock, including cattle, sheep, hogs, poultry and fish, and the raising of fruits, nuts and vegetables (except potatoes), fur-bearing animals and nursery plants. This definition was changed in response to a court decision n34 in which that definition was challenged as arbitrary. The legislature repealed the statute and replaced the definition of agriculture with one which does not define agriculture at all but does define "farming" quite broadly to include "the cultivation of land for the production of agricultural crops, the raising of poultry, the production of eggs, the production of milk, the production of fruit or other horticultural crops, grazing of and the production of livestock." n35 Still specifically excluded are such activities as "the production of timber, forest products, nursery products or sod." Similarly, farming does not include "a contract to provide spraying, harvesting or other farm services." n36

It may be necessary to determine whether a particular activity is included within a broad definition of *agriculture*. Where the definition itself is silent as to a particular activity, the following factors tend to be given significant consideration:

a. The product of the enterprise

b. The resources used in the process

c. The economic organization

d. The technical methods of production

e. The role of the "operator"

f. The relationship between the operator and the resources used in the organization of the enterprise.

In some instances, presumptions may be indulged. For example, for purposes of the Federal Fair Labor Standards Act, n37 "agriculture" is defined as "farming in all its branches" as well as "any practices ... performed by a farmer on a farm or as an incident or in conjunction with such farming operations." n38 This was construed n39 to create a two alternative test for agriculture: (1) some things would be considered agricultural *per se* based on the primary definition of agriculture and (2) some things would be deemed agriculture *as a matter of fact* based upon whether they were performed by a farmer in conjunction with a farming operation. In the former category would fit such activities as the cultivation and tillage of the soil, dairying, the production, cultivation, growing and harvesting of crops, the raising of bees, livestock, fur-bearing animals and poultry. n40 In the latter category are such things as preparation for market, delivery to the market or delivery to storage *provided the activity is done by a farmer or on a farm in conjunction with or as an incident to* farming. n41 In this situation, no matter how closely connected a practice might be to a farming operation, if the activity is not agricultural per se, it will not be presumed to qualify as agricultural unless the other alternative definition is satisfied.

The construction of definitions of "agriculture" or "agricultural" tend to be somewhat broader than definitions of "farming." n42 Under these definitions, courts tend to focus on what is *customary and normal* in agricultural enterprise unless a more specific ordinance definition is applicable. n43

In a 1994 case in Kansas, the Court of Appeals held that a dog kennel was not an agricultural operation so as to be exempt from zoning regulations. The court found that the raising of greyhounds did not constitute the raising of livestock under any definition in the Kansas statutes and hence would not be considered to be an agricultural activity. n44 Agriculture has been defined to include the growing or raising of horticultural and agricultural crops, hay, poultry and livestock for commercial purposes. n45 The Attorney General in Kansas has ruled that swine finishing facilities do not constitute "farming" under the Kansas statute restricting the ability of certain corporations to own farmland in the state. The opinion cited as authority, T-Bone Feeders, Inc. v. Martin, n46 held that there was a distinction between a commercial feedlot and farming. The commercial feedlot was a specialized agri-business that was engaged in an agricultural endeavor but not engaged in farming. n47

§ 47.05(c) Agricultural Land.

In contrast to the specificity with which "agriculture" is defined, "agricultural land" is generally very simply defined as land that is "available" or "suitable" or "actually used" for agricultural purposes. n48

This definition may be construed broadly or narrowly. Broad definitions are likely to be found where agricultural land is considered to be synonymous with open space or rural areas. n49 Narrow or specific definitions are possibly more likely where the concern is with particular practices that might occur on the land or with particular parcels of land. n50 As a result, it is somewhat difficult to predict whether a particular parcel of land will be considered agricultural or not. Where the activity is susceptible of various classifications, the decision tends to be made on the basis of whether the agricultural activity is the "principal" or "dominant" activity that occurs on the land. n51 Even so, curious decisions sometimes result. For example, a cattle lease without any evidence of actual cattle grazing was sufficient in one case to deny an "agricultural land" classification to an uncultivated, overgrown parcel of land. n52 In contrast, active cattle grazing has been held sufficient to allow the land to be considered agricultural despite considerable preparatory activities to engage in mining on the same parcel. n53

In some jurisdictions, land may be considered to be agricultural in nature either on the basis of the land's potential for such a use or upon the intentions of the landowner in making such a use. The difficulty with any definition that does not depend upon any actual, present use, is that of showing the true potential of the land for agricultural purposes. Where such potential can be shown, the lands may be treated as agricultural even though no agricultural activity takes place. This is often the case under zoning or subdivision regulations that tend to equate "undeveloped" with "agricultural" lands.

Jurisdictions which have attempted to define agricultural use on the basis of the landowner's intent are similarly problematic. Since these definitions typically require that a "bona fide" agricultural use be made before particular benefits may be claimed, n54 it is necessary to somewhat subjectively qualify the intent of the landowner, which is usually a difficult task. Some courts have responded to this by considering the good faith of the landowner despite the lack of objective criteria that might establish that the land is used for agricultural purposes. n55

In jurisdictions where tax statutes give a preference to agricultural use, determining whether land is actually being used for agricultural purposes has been a particular problem. This is because a developer may wish to acquire land some time in advance of the actual development and then hold that in some kind of "agricultural use" until that future development date in order to avoid the increases in land taxes that may result from development. Such tax savings may be substantial where the land is valued according to its "use" value as opposed to its "fair market value." In a Kansas case, n56 the Court of Appeals construed broadly the statutory definition of "agricultural land" and rejected arguments that the intent of the land owner was relevant to the determination of whether the land was actually being used for agricultural purposes. In this case, the land was located within the city limits, was completely enclosed by a fence and was exclusively seeded to fescue and cut periodically as hay. There were no farm or rural homesites associated with the land. The local appraiser had classified the land as "vacant" and had taxed it accordingly. The board of tax appeals found that the land was devoted to agricultural use. It found that there was no requirement that the land owner make a profit from the land, and it did not matter what the surrounding landowners did with their land. Further, it did not matter what the landowner eventually intended to do with the land. The County argued that the statutory phrase "devoted to agriculture" required a serious and good faith undertaking of agricultural activity and precluded any temporary agricultural activity that was designed to avoid tax liability. The Court of Appeals upheld the board of tax appeals.

The issue of whether land qualifies as agricultural may be the predicate to claiming particular benefits under the law. This is critical, for example, where the land may be valued at a different rate if it is "agricultural land" or where the liability of the landowner may be different because the land is devoted to agriculture. In one case, n57 a church argued that its "vacant" land should be considered to be "agricultural land" for purposes of a state statute that shielded the landowner from liability for harm suffered by recreational users of agricultural land. The court held that the legislature had deliberately narrowed the definition of land to which the protection of the statute applied and ruled against the church.

§ 47.05(d) Farming.

In some ordinances and statutes, the term "farming" will be used instead of the term "agriculture." In most cases, this term will be strictly defined to mean only the raising of crops or animals. Such a construction may exclude related commercial, industrial or residential enterprises from being considered a part of farming. n58 A common definition of "farm" is a parcel of land of a fixed number of acres which is used primarily to raise or produce agricultural products. This definition may include the customary or essential buildings such as barns, storage facilities, and equipment sheds which accompany such activities. n59 In fact, at least one jurisdiction has held that such a structure cannot be prohibited from an area merely because it is possibly detrimental to the neighborhood when it is included within the definition of "agriculture" or "farming." n60

Farming is not necessarily synonymous with agriculture, nor may it be synonymous with ranching. n61 For example,

farming may be used to distinguish horticulture from the raising of livestock as in the notion that farmers are not ranchers. n62 It might also be considered a narrow subset of agriculture, as where those who raise timber or process farm products are sometimes not considered to be farmers even though they arguably are engaged in agriculture.

Farming may also be considered as requiring active participation in the agricultural operation. One court, for example, held that a corporation was not engaged in farming because, although it held an interest in the land, it had leased the land to the individual who actually farmed the land and since the lease was a cash rent lease, the corporation was not involved in any of the daily decision making that was necessary to run the operation. n63 In a similar fashion, for federal income and certain estate tax purposes, an individual taxpayer must "materially participate" in the operation before claiming the status of being a farmer. n64

§ 47.05(e) Farmer.

The definition of a farmer is one of considerable variation. A farmer may simply be "one who earns his living by farming." n65 A farmer may also be much less or even much more. For example, at the federal level, the Treasury Department generally limits "farmer" status to those that receive a particular portion (such as two-thirds) of their income from a farming (though farming is not defined in the Internal Revenue Code). n66 Similarly, the Justice Department has taken the position that "the bearing of the risk of loss of the agricultural product distinguishes farmers from non-farmers..." n67 Finally, in the Fifth Circuit decision n68 which was affirmed in *United States v. National Broiler Marketing Association*, n69 the judge held that "whatever else farming may mean, an irreducible minimum must be either husbandry of animals or crops or farm ownership." n70

Under federal price support laws, n71 farmers may be limited in the amount of particular payments they may receive. n72 Under current regulations, each farmer may receive only $50,000. n73 On the other hand, there may be more than one "farmer" per farm and as a result, each farm may receive more than the minimum amount. To be considered a "farmer" for payment purposes, one has to fit the definition of a "person."

According to the current regulations, n74 one is a "person" if one is "an individual, joint stock company, corporation, association, trust, estate, or other legal entity." In addition, one must: n75

1) have a separate and distinct interest in the land or the crop involved;

2) exercise separate responsibility for each interest; and

3) be responsible for the cost of farming related to such interest.

This generally means that one is actively engaged in the production of agricultural products, though one is not required to do all the work, provide all of the capital, assume all of the risk, etc. Farmers have sometimes considered the possibility of restructuring the farm operation to increase the number of "persons" involved and thereby increase the amount of payments to which they may be entitled. Indeed, the law permits some changes that will have the effect of increasing the number of "persons" entitled to payments so long as the changes are bona fide and substantive. n76 A substantive change includes a substantial increase or decrease in the size of the farm by purchase or sale or lease or a substantial increase or decrease in the size of the allotment by purchase, sale or lease, a change from a cash lease to a share lease and vice versa, and so forth. n77 The determination of one's status as a "person" and any changes thereto is made by the county committee of the Agricultural Stabilization and Conservation Service (A.S.C.S).. The 10th Circuit considered whether a change in the nature of a farm partnership could constitute a bona fide and substantial change. n78

§ 47.05(f) Farmland.

Definitions of farmland tend to parallel those of agricultural land and will often be used interchangeably with

agricultural land. Such definitions may be narrow n79 or broad or may not distinguish at all between agricultural land and farmland. n80 The United States Department of Agriculture's Soil Conservation Service uses soil type and other characteristics to distinguish "prime farmland" from other kinds of farmland. Prime farmland tends to be defined as land that has the best combination of physical and chemical characteristics for producing food, feed, forage, fiber, and oilseed crops, and is also available for those uses. Like definitions of agricultural land, it may not be necessary to make an actual farming use of the land in order to qualify as farmland. Further, farming activities which do not constitute the dominant or primary use of the land may not be sufficient to bring the land within the jurisdiction's particular definition of farmland.

FOOTNOTES:

(n1)Footnote 24. For further discussion of agricultural definitions in a land use context, *see* Annotation, *Construction and Application of Terms "Agricultural", "Farm" or the Like in Zoning Regulations, 97 A.L.R.2d 702 (1964).*

(n2)Footnote 25. *See, e.g.*, Kan. Stat. Ann. § 2-3203 which grants protection against nuisance actions to certain agricultural activities conducted on *farmland*. Kan. Stat. Ann. § 2-116-118 authorizes the creation of *farmers'* institutes within the several counties of the state.

(n3)Footnote 26. For example, for purposes of the Kansas statute dealing with the protection of farmland and agricultural activities from nuisance liability, "agricultural" is defined as "the growing or raising of horticultural and agricultural crops, hay, poultry and livestock, and livestock, poultry and dairy products for *commercial purposes*." (emphasis added.) In contrast, in the same jurisdiction, a statute dealing with development of land near water impoundments defines "agriculture" in terms of activities that involve the use of the land for "growing crops or pasture and functions related thereto, and the feeding of livestock by *a resident on the land*." (emphasis added.)

(n4)Footnote 27. For example, although the planning and zoning statutes exempt "land used for agricultural purposes" and "the erection and maintenance of buildings" on agricultural land "for such purposes," the statute does not define what constitutes an agricultural purpose. *See* Kan. Stat. Ann. § 12-758.

(n5)Footnote 28. *Fidler v. Zoning Bd. of Adj. of Upper Macungie Twp., 182 A.2d 692 (Pa. 1962):*

"Since the township ordinance failed to define 'agriculture' or 'agricultural' the term must be interpreted and applied in accordance with its usual and generally accepted meaning."

In *Town of Lincoln v. Murphy, 49 N.E.2d 453 (Mass. 1943),* the court gave these guidelines for interpreting the term "farm":

> We need not pause to discuss the different shades of meaning the word has acquired under the statutes involved in these decisions for we are of the opinion that, in the instant case, the word should be given its usual and commonly understood significance. There is nothing in either by-law indicating that any special or peculiar meaning was intended.

When the issue is the meaning of the term in authorizing legislation, it may be necessary to consider definitions found in other portions of the statutes. It is interesting how many different ways "agriculture" may be defined in a particular jurisdiction to reflect subtle differences in statutory purposes. For example, the Kansas Farm Corporation statute, Kan. Stat. Ann. § 17-5903(g), defines farming as:

the *cultivation of land* for the production of agricultural crops; the raising of poultry, the production of fruit or other horticultural crops, grazing or the production of livestock. Farming *does not* include a contract to provide spraying, harvesting or other farm services. (emphasis added)

The Kansas Cooperative Marketing statute, Kan. Stat. Ann. § 17-1600 *et seq.* provides in 17-1602(a): "(a) The term 'agricultural products' shall include horticultural, viticultural, forestry, dairy, livestock, poultry, bee, and farm and ranch products." The Kansas Farm Nuisance Law, Kan. Stat. Ann. § 2-3201 *et seq.* defines agricultural activity in § 2-3203: "(a) 'Agricultural activity' means the growing or raising of horticultural and agricultural crops, hay, poultry and livestock, and livestock, poultry and dairy products for *commercial* purposes." (emphasis added)

The statute regulating development around water impoundments, Kan. Stat. Ann. § 65-185(d), defines "agricultural use" as: "... use for growing crops or pasture and functions related thereto, and the feeding of livestock by a *resident on the land*." (emphasis added)

Care should be taken, of course, to insure that when other statutes are relied upon for definition purposes, the term is not be taken out of context.

(n6)Footnote 29. For an interesting case in which a domestic pig was considered to be a "pet" rather than "livestock" under a zoning ordinance that prohibited "livestock," *see Foster Village Community Ass'n v. Hess, 667 P.2d 850 (Haw. App. 1983).*

(n7)Footnote 30. *United States v. Huntsman, 17 F.3d 1136* (8th Cir., 1994); *United States v. Huntsman, 595 F.2d 1429* (8th Cir)., *cert. denied, 113 S. Ct. 201 (1992).*

(n8)Footnote 31. *236 Kan. 641 (1985).*

(n9)Footnote 32. Att'y Gen. Op. 97-72 (Sept. 15, 1997). In contrast, in two cases in Iowa, the courts have eliminated such a distinction. In *Thompson v. Hancock County, 539 N.W.2d 181 (Iowa 1995),* and *Keuhl v. Cass County, 555 N.W.2d 686* (Iowa, 1996), the Iowa Supreme Court determined that large commercial hog facilities were engaged in agriculture for purposes of zoning laws. In so doing, the court overturned the long-standing precedent, *Farmegg Prods., Inc. v. Humboldt County, 190 N.W.2d 454 (Iowa 1971).* The rule in Iowa had been that agricultural use was to be defined in terms of "traditional" activities.

(n10)Footnote 33. Kan. Stat. Ann. § 17-5901 (now repealed).

(n11)Footnote 34. Kansas v. E.I. Du Pont de Nemours, 80 Civil 893 (Shawnee County, Kan., 18 Feb. 1981).

(n12)Footnote 35. Kan. Stat. Ann. § 17-5903(h).

(n13)Footnote 36. Kan. Stat. Ann. § 17-5903(h).

(n14)Footnote 37. *29 U.S.C. §§ 201*-219.

(n15)Footnote 38. 29 C.F.R. § 780.107.

(n16)Footnote 39. *Farmers Reservoir & Irrig. Co. v. McComb, 227 U.S. 755 (1949).*

(n17)Footnote 40. *See* 29 C.F.R. §§ 780.110-780.129.

See Palmer v. Board of Equalization, Eagle County 957 P.2d 348 (Colo. App. 1998) (grazing of pleasure horses not agricultural use for tax purposes).

See also Marzullo v. Kahl, 738 A. 2d 169 (Md. 2001), holding that the business of breeding, raising and selling snakes and reptiles was not a farming activity and therefore not permitted in an area zoned for resource conservation and watershed protection. In *Vlasic Farms Inc. v. Pennsylvania Labor Relations Board, 777 A.2d 80 (Pa. 2001),* the court found that mushroom workers did not come within the agricultural laborer exclusion of the Pennsylvania Labor

Relations Act. In contrast, in *Simons v. Longbranch Farms, Inc, 547 S.E.2d 500 (App. S.C. 2001),* the court found that a minor who operated a forklift without proper instruction, supervision and safety features was an agricultural employee for purposes of the Workers Compensation Act in a wrongful death action.

In *Williamson v. McCall, 19 P.3d. 766 (Id. 2001),* the court held that basically unused land from which timber had been sporadically harvested was not considered agricultural land for purposes of separating the land from city limits. Apparently the excavation of a pond to supply water to a turf farm was considered sufficiently agricultural in nature in *Town of North Kingston v. Albert, 767 A. 2d 659 (R.I. 2001),* to justify holding that dust therefrom fell within a section of the Right to Farm law that specifically exempted dust created during plowing or cultivation operations from becoming either private or public nuisances.

(n18)Footnote 41. 29 C.F.R. §§ 780.130-780.214.

(n19)Footnote 42. *Carp v. Board of County Comm'rs of County of Sedgwick, 373 P.2d 153 (Kan. 1962)* (holding "agriculture" included husbandry of hogs). *See also Blauvelt v. Board of Leavenworth County Comm'rs, 605 P.2d 132 (Kan. 1980). See also Jackson v. Building Inspector of Brocton, 221 N.E.2d 736 (Mass. 1966).* Whether the cutting of trees constituted farming was at issue in State v. Spithaler, No. 98-*T-0197, 2000 Ohio App. LEXIS 809* (Ohio App. Mar. 3, 2000). The court held that the trial court abused its discretion in holding that it was not.

(n20)Footnote 43. *See* Clan Crawford, *Defending The Farmer From the "Country Gentlemen*", Zoning and Planning Law Report 2, No. 5 (1979).

(n21)Footnote 44. *See Weber v. Franklin County Comm'rs, 20 Kan. App. 2d 152 (1994).*

(n22)Footnote 45. *See Weber v. Franklin County Comm'rs, 20 Kan. App. 2d 152 (1994).*

(n23)Footnote 46. *236 Kan. 641 (1985).*

(n24)Footnote 47. Att'y Gen.Op 97-72 (Sept. 15, 1997). The Iowa Supreme Court eliminated the distinction between traditional and commercial agriculture. In *Thompson v. Hancock County, 539 N.W.2d 181 (Iowa 1995),* and *Keuhl v. Cass County, 555 N.W.2d 686* (Iowa, 1996), the Iowa Supreme Court determined that large commercial hog facilities were engaged in agriculture for purposes of zoning laws. In so doing, the court overturned the long-standing precedent, *Farmegg Prods., Inc. v. Humboldt County, 190 N.W.2d 454 (Iowa 1971).* The rule in Iowa had been that agricultural use was to be defined in terms of "traditional" activities.

(n25)Footnote 48. *See, e.g.*, Kan. Stat. Ann. § 17-5903(g): ' "Agricultural land' means land suitable for use in farming."

In *Stewart v. Washington State Boundary Review Board for King County, 996 P. 2d 1087 (Wash. App. 2000),* the court held that the Board did not have the authority to determine whether the County's designation of the property as "Agricultural" was correct. In *Thares v. Brown County Bd. of Equalization, 616 N.W. 2d 380 (S.D. 2000),* the court ruled that it was proper to define property as nonagricultural for tax purposes if the property had nonagricultural income that exceeded 150 percent of its agricultural income value. In *Brandon Charter Township v. Tippett, 616 N.W. 2d 243 (Mich. App. 2000),* the court upheld an exemption under the zoning ordinance which prohibited the parking and storing of commercial equipment within a rural estate district. Here, the owner of the equipment used it on his property to perform farming operations outside the township. In *Riggs v. Douglas County, 1 P. 3d 1042 (Or. App. 2000),* the court construed and upheld a definition of "agricultural land" that included land that could be considered part of a "farm unit." The court held that land is considered to be part of a "farm unit" if it is under common ownership, is adjacent to or intermingled with lands in specified agricultural capability classes. That land is in a farm unit is presumed to be agriculture but the determination is subject to factual rebuttal. For further discussion, see Bower, J. *Hogs and their Keepers: Rethinking Local Power on the Iowa Country Side, 4 Great Plains Nat. Resources J. 261 (2000).*

(n26)Footnote 49. *See Boehm v. Burleigh County, 130 N.W.2d 170 (N.D. 1964)* holding that all unplatted land and land outside the city limits was agricultural land. *See also Eisensimmer v. Bell, 32 N.W.2d 891 (N.D. 1948)* holding that the term agricultural land was used as a generic term merely to distinguish rural from urban property.

(n27)Footnote 50. "Agricultural lands" are lands currently used to produce agricultural commodities, including forest products, or lands that have the potential for such production. These lands have a favorable combination of soil quality, growing season, moisture supply, size and accessibility.

National Agricultural Lands Study, Final Report (1981) at p. XX.

(n28)Footnote 51. *See, e.g., Baker Maritime Co. v. Perkins, 493 So. 2d 494 (Fla. App. 1986)* where the court held that a 1,057 acre mining site was an "incidental" to the primary agricultural use.

(n29)Footnote 52. *Markham v. June Rose, 495 So. 2d 865 (Fla. App. 1986).*

(n30)Footnote 53. *Ridgewood Phosphate Corp. v. Perchance, 487 So. 2d 40 (Fla. App. 1986).*

(n31)Footnote 54. *See, e.g.*, Fla. Stat. Ann. § 193.461 which identifies the following as the objective criteria to determine whether the agricultural use is bona fide: 1) the length of time the land has been so used; 2) the continuity of the use; 3) the relation of the land size to the use; 4) whether the land has been managed according to acceptable agricultural practices; 5) the ownership status of the freehold and non-freehold interests in the land; 6) the presence of dwellings on the land. By statute, an appraiser may also consider "any factor" that from time to time becomes applicable. *See Greenwood v. Oates, 251 So. 2d. 665 (Fla. 1971)* for a detailed list of such factors.

(n32)Footnote 55. *See Straughn v. K & K Land Mgt., Inc., 347 So. 2d 724 (Fla. App. 1977), aff'd, Roden v. K & K Land Mgt., Inc., 368 So. 2d 588 (Fla. 1978).*

(n33)Footnote 56. *Board of County Comm'rs v. Smith, 857 P.2d 1386 (Kan. App. 1993).*

See also In the matter of the *Appeal of Briarfield Farms, 555 S.E.2d 621 (N.C. 2001).* In *Wagner v. Wagner, 259 B.R. 694 (8th Cir. 2001),* the court held that mortgaged land qualified as "agricultural land" for purposes of the homestead exemption statute.

See M. Chertok, *Federal Regulation of Wetlands,* SF 97 ALI-ABA 1149 (2001).

(n34)Footnote 57. *Tijerina v. Cornelius Christian Church, 539 P.2d 634 (Or. 1975).*

(n35)Footnote 58. In *Blauvelt v. Board of Leavenworth County Comm'rs, 605 P.2d 132 (Kan. 1980),* the court held that the farm dwelling constituted an agricultural purpose and therefore was exempt, under Kansas law, from zoning restrictions altogether. The Kansas statute, Kan. Stat. Ann. § 19-2929 provides: No regulations shall apply to the use of land for agricultural purposes nor for the erection or maintenance of buildings thereon as long as such buildings are used for strictly agricultural purposes. *See also* Kan. Stat. Ann. §§ 19-2921, 19-2908, 12-715b.

What constitutes agricultural use is not defined in any of the zoning statutes though Kan. Stat. Ann. § 19-2960, dealing with zoning districts and classifications in counties designated as "urban" counties was adopted in 1984 to provide that:

no zoning regulations shall apply to the use of land for agricultural purposes nor for the erection or maintenance of agricultural buildings as long as such agricultural buildings are used for agricultural purposes and no other. *Dwellings, garages and other similar accessory buildings shall not be considered as agricultural buildings. All buildings, including agricultural buildings, may be regulated as to setback requirements from public roads so as to protect the future use and improvement of such roads.* [emphasis added]

See also State v. Scherer, 721 P.2d 743 (Kan. 1986).

(n36)Footnote 59. In *Lincoln v. Murphy, 49 N.E.2d 453 (Mass. 1943),* the court stated:

> One of the chief characteristics of a farm ordinarily is the use of the land for the production of crops by the cultivation of the soil, but farming activities are not confined to the tilling of the land and the harvesting of crops. Land may be utilized for grazing by livestock, or in raising hay for cows for the production of milk and other dairy products. A part of the land may be profitably employed in the raising of poultry and the sale of chickens and eggs. There may be an orchard upon the premises which would yield enough fruit to warrant the expenditure of labor in caring for the trees and collecting and marketing the fruit. What branches of these farming operations will be undertaken will depend upon whether they can be conducted at a profit, and that, in turn, depends upon the size of the farm, the nature of the soil, its capacity to produce sufficient crops to pay for their cultivation, the demand for different kinds of farm products, the availability of the markets, the practice of good husbandry, and other factors that must be considered in determining what use should be made of the land.

In *Moulton v. Building Inspector of Milton, 43 N.E.2d 662 (Mass. 1942),* the court stated:

> The question to be decided is therefore simply whether the new silo represents what would commonly be understood and regarded as an agricultural use of land. It is difficult to think of the ordinary silo apart from agriculture. A silo is a structure or vat for the storage of fodder harvested from the field and for its conversion into ensilage to be used as food for livestock. It is a part of the regular equipment of most farms that support any considerable amount of stock and is an important instrument in the ordinary process of industry. Confusion seems to us to have crept into this case because of the extraordinary scattering of the Manning's landholdings. According to the findings, however, all their parcels wherever situated, are employed in a single enterprise, and that enterprise is an agricultural one. If all their lands were joined in one tract it would immediately become apparent that they were operating a dairy farm not essentially different from a multitude of dairy farms. The tilling of the soil, the raising and storing of forage crops, and the feeding of them to cattle to produce milk constitute essentially an agricultural operation. Dictionary definitions of agriculture include stockraising and dairying.

The court also noted that:

> [t]he character of the use of the silo as being agricultural or otherwise is in no way affected by the concentration or dispersion of the parcels of land upon which the fodder is grown or by their nearness or distance, or by the fact that no cultivation takes place in the immediate vicinity of the silo. It follows that the use of lot 43 for the silo was permissible under the by-law.

43 N.E.2d 662, 664-665 (Mass. 1942).

(n37)Footnote 60. *Moulton v. Building Inspector of Milton, 42 N.E.2d 662 (Mass. 1942).* In this case, the issue was whether a new silo represented an agricultural use of the land. The court stated:

> We are not to seek for any particular, abstruse, or constricted signification. These words include all uses of land that in common speech and acceptation would be described as agricultural, no matter how injurious they may be to a neighborhood of homes. The test is whether the use is agricultural and not whether it is detrimental. Nor are we here concerned with the qualification as to selling only produce raised on the premises, since nothing at all is sold at the new silo. If the selling on the adjoining Thatcher

> Farm of some vegetables raised elsewhere could be thought material in this connection, that was protected as a use existing when the by-law went into effect, and the existence of the silo does not extend such use. And we cannot interpret the words 'selling only produce raised on the premises' as requiring the actual raising of a crop on every piece of land in a farm.

(n38)Footnote 61. *But see* Ga. Code Ann. § 41-1-7 (1982):

No *agricultural or farming* operation, place, establishment, or facility or any of its appurtenances, or the operation thereof, shall be or shall become a nuisance, either public or private, as a result of changed conditions in or around the locality of such *agricultural or farming* operation, place, establishment, or facility if such *agricultural or farming* operation, place, establishment, or facility has been in operation for one year or more. (emphasis added)

In *R.L. Hexum & Associates, Inc. v. Rochester Township, Bd. of Supervisors, 609 N.W. 2d 271 (Minn. 2000),* the court held that zoning law, rather than the state's statute relating to corporate and partnership farming, governed a dispute as to whether the operation constituted a farm under the zoning ordinance. Here the court upheld the board's conclusion that the activity was "similar to" what happened on a farm and was therefore reasonable. What constitutes a "family farmer" for purposes of Chapter 12 of the Bankruptcy code is discussed in *In re In re Koppes, 2000 Bankr. LEXIS 1898* (Bankr, N.D. Iowa, 2000). In this case, debtors were denied access to Chapter 12 because they were not "engaged in a farming operation" and failed to receive at least 50 percent of their income from farming activities. For further discussion, see Bower, J. *Hogs and their Keepers: Rethinking Local Power on the Iowa Country Side, 4 Great Plains Nat. Resources J. 261 (2000).*

(n39)Footnote 62. *See, e.g.*, Donald Kelley and David Ludke, Estate Planning for Farmers and Ranchers (1980). *See also 7 U.S.C. § 291* (Capper-Volstead Act) relating to rights of cooperatives relative to antitrust concerns: "Persons engaged in the production of agricultural products as farmers, planters, ranchmen, dairymen, nut and fruit growers may act together... ."

(n40)Footnote 63. Kansas v. E.I. Du Pont de Nemours, 80 Civil 893 (Shawnee County, Kan., 18 Feb. 1981).

(n41)Footnote 64. *See, e.g.*, Martin Begleiter, *Material Participation Under § 2032A: It Didn't Save the Family Farm But It Sure Got Me Tenure, 94 Dick. L. Rev. 561 (1990).*

(n42)Footnote 65. Webster's New World Dictionary (Collins/World 2d College Ed. 1976).

(n43)Footnote 66. *See, e.g.*, Janet Flaccus, *Taxes, Farmers, and Bankruptcy and the 1986 Tax Changes: Much Has Changed, But Much Remains the Same, 66 Neb. L. Rev. 459 (1987).* This approach may have the effect of excluding many small farmers, who are dependent upon off-farm jobs, from being considered "farmers."

(n44)Footnote 67. Charles Brown, *United States v. National Broiler Marketing Association: Will The Chicken Lickin' Stand?, 56 N.C. L. Rev. 29 (1978).*

(n45)Footnote 68. *550 F.2d 1380 (5th Cir. 1977).*

(n46)Footnote 69. *436 U.S. 816 (1978).*

(n47)Footnote 70. *550 F.2d 1380, 1386 (5th Cir. 1977).* The Supreme Court essentially adopted that view holding that any member of the National Broiler Marketing Association that owned neither a breeder flock nor a hatchery, and that maintained no grow-out facility at which the flocks to which it holds title are raised, were not among those Congress intended to protect by the Capper-Volstead Act.

(n48)Footnote 71. *See 7 U.S.C. §§ 1441,* 1442, 1444 and 1445.

(n49)Footnote 72. *7 U.S.C. § 1308.*

(n50)Footnote 73. *7 U.S.C. § 1308.*

(n51)Footnote 74. 7 C.F.R. § 795.3.

(n52)Footnote 75. 7 C.F.R. § 795.3.

(n53)Footnote 76. 7 C.F.R. § 795.14 provides that "a person may exercise his or her right heretofore existing under law, to divide, sell, transfer, rent, or lease his or her property if such division, sale, transfer, rental arrangement, or lease is legally binding as between the parties thereto ... . Any change in farming operations that would otherwise serve to increase the number of persons for application of payment limitations must be bona fide and substantive."

(n54)Footnote 77. 7 C.F.R. § 795.14.

(n55)Footnote 78. *Val Farms v. Espy, 29 F.3d 1470 (10th Cir. 1994).* In that case, the farmer claimed that the dissolution of a limited partner that had served as a general partner in an agricultural partnership was such a change. In this case, it resulted in an increase in the total number of general partners which, in turn, entitled the farm entity to an increase in the number of "persons" entitled to receive deficiency payments under the price support program. The court held that this change was not a bona fide and substantive change in the farming operation since it did not change the manner in which the farming operation was conducted. The nature of the change was to subdivide one general partner (the limited partner) into a higher number of general partners.

(n56)Footnote 79. *See, e.g.*, Kan. Stat. Ann. § 17-5903(g).

(n57)Footnote 80. *See, e.g.*, Patrick Rohan, *Agricultural Zoning*, 3 Zoning and Land Use Cont. (1978): "Farmland" is "a piece of land consisting of a fixed number of acres which is used primarily to raise or produce agricultural products, and the customary buildings which accompany them." *See also* Comment, *Preservation of Florida's Agricultural Resources Through Land Use Planning, 27 U. Fla. L. Rev. 130,* which quotes the United States Census definition for farming thusly: "all land contained within the physical boundaries of a farm including cropland, woodland and pasture." In *Brandon Charter Township v. Tippett, 616 N.W. 2d 243 (Mich. App. 2000),* the court upheld an exemption under the zoning ordinance which prohibited the parking and storing of commercial equipment within a rural estate district. The owner of the equipment used it on his property to perform farming operations outside the township. The court held that the township had no authority to regulate farming activities outside its jurisdiction.

For further discussion, see Bower, J. *Hogs and their Keepers: Rethinking Local Power on the Iowa Country Side, 4 Great Plains Nat. Resources J. 261 (2000).*

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CHAPTER 47 AGRICULTURE AND FARM LAW

6-47 Thompson on Real Property, Thomas Editions § 47.06

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§ 47.06 Agriculture as a Commercial Activity.

[Go To Supp]

§ 47.06(a) In General.

Land use law may classify and treat agricultural uses and commercial uses differently. Zoning restrictions, for example, commonly designate areas as "commercial" that are not particularly intended for agricultural use. Thus, it may make a great deal of difference for purposes of land use regulation whether agriculture is considered to be a commercial activity as opposed to merely the husbandry of animals or the cultivation of the soil. This is a difficult, but often unstated, problem with definitions of agriculture. n81

In a 1994 case in Kansas, it was held that a dog kennel was not an agricultural operation so as to be exempt from zoning regulations. The court found that the raising of greyhounds did not constitute the raising of livestock under any definition in the Kansas statutes and, hence, would not be considered to be an agricultural activity. n82 The Iowa Supreme Court eliminated the distinction between commercial and traditional methods of agriculture in reference to exceptions to zoning laws. n83

§ 47.06(b) Agriculture as Non-Commercial Use.

Even though agriculture is indisputably an economic enterprise, as a general rule, agriculture will not be considered to be a commercial activity for most types of land use regulation that operate on the basis of traditional use classifications. This is the case for several reasons.

First, most land use regulations have a built in "development" bias that tends to treat agricultural land as essentially undeveloped land and commercial land as highly developed land. This is clearly seen in the propensity to view agricultural land as "open space" in many zoning ordinances.

Second, although an agricultural operation is normally conducted as a form of commercial enterprise, it has become very commonplace to find that small to mid-sized farming operations (which constitute the largest group of farms) are not conducted as the primary occupation of the farmer. n84 This is largely because a farm of that size is typically not economically capable of completely supporting the farmer and the farmer's family. As such, it is generally not

considered to be of the same category as more traditional businesses which are operated as the primary occupation of the proprietor.

Finally, agricultural land is susceptible of more changes in use than most other kinds of land use because the agricultural use does not tend to make many irreparable alterations in the land itself. Thus it may logically be considered a residual developmental base rather than a terminal developmental activity.

§ 47.06(c) Agriculture as Commercial Use.

Many land use statutes and ordinances do appear to take the position that "farming" may be sufficiently "commercial" that it should not coexist with more "preferred" kinds of uses, such as residential uses. In these ordinances, whether something is perceived as "agricultural" as opposed to "commercial" is a question of size or nature of the activity in relation to the general character of the area. n85 In these situations "agriculture" is typically perceived as a low to moderate density use by nature that involves some arguable "agricultural activity" and is located in a "countryside" area. More intensive activity, even of a similar nature, will often be considered "commercial" in these areas. n86

Some courts have considered large farming operations to be "agricultural" rather than "commercial" despite their size or intensity on the ground that agriculture is a particular kind of commercial enterprise that has been singled out for treatment different from that accorded other commercial activities. n87 This appears most often to be the case where the agricultural activity involves the confined raising of livestock.

In a 1995 products liability case, the court considered whether a turf farm was traditional agriculture or a commercial activity. In Ward v. Northwest Texas Farmers Coop Elevator, n88 the court dealt with a claim that the elevator coop should be liable for harm caused by the application of too much of a particular pesticide by an independent contractor. The allegation in specific was that the coop should be responsible because its labeling of the pesticide failed to comport with federal and state requirements and that should constitute negligence per se. The court held that the labeling requirements were different if the pesticide was to be applied in the course of a commercial operation than if they were to be used in any other context. Here, the turf farm was considered to be a commercial operation and that the labeling standards for such as required by both the federal and the state statutes were not violated. In another pesticide application case, the court suggested an alternate rationale for finding that the operation may be commercial in nature rather than a traditional agricultural one. In Fender v. Adams Exterminators, Inc., n89 the court dealt with a claim for harm caused by the misapplication of the pesticide. In this case, the court characterized the claim as one of "professional malpractice" and dismissed for failure to file, contemporaneously with the petition, an expert affidavit. Although this case did not involve an agricultural operation, to the extent that the farmer applicator is licensed by the state and is facing potential liability for the misapplication of the pesticide, he may be considered a "professional" by virtue of the single fact that he has been licensed by the state. This would facilitate the argument that he should be treated more like a commercial venture than like historical agriculture. In a 1994 case in Kansas, it was argued that a dog kennel should be considered to be an agricultural operation so as to be exempt from zoning regulations. The court found that the raising of greyhounds did not constitute the raising of livestock under any definition in the Kansas statutes and, hence, would not be considered to be an agricultural activity. n90 A building inspector was denied a building permit to renovate a barn on an existing farm for slaughtering animals because such an activity allegedly violated zoning laws. The landowner brought action to the Land Court and prevailed. The appellate court affirmed in Modern Continental Construction Co. v. Building Inspector of Natick, n91 reasoning that slaughtering animals raised on the premises constituted "agricultural use" and is not subject to regulation as a commercial enterprise. The court pointed out that an activity that is reasonably or necessarily related to an existing agricultural use is itself agricultural in nature, even if it would be a commercial activity if it were removed from the agricultural setting. In another case, a county determined that fourteen acres of land should be re-classified for purposes of property taxes. The land had been used for growing alfalfa since the 1930s, but was not sufficient to support the owners. According to Minnesota law, land that has no identifiable use or is vacant shall be assessed according to the land's most valuable use. In this case the land was re-classified from agricultural to vacant and commercial land, thereby denying the owners any favorable tax

arrangement. However, the Tax Court found that the land satisfied the quantitative test of the Minnesota statute, requiring agricultural land to be a minimum of ten acres of contiguous land, and that the growing, cutting, and sale of the vegetation constituted agricultural use of land. Hence, the land should be classified as agricultural land, and should be given the favorable tax treatment. n92

§ 47.06(d) Classification Issues.

The problem of whether agricultural land should be considered commercial seems most significant in situations where there is a strong need to regulate a particular kind of agricultural activity or when it is necessary to address the issue of external impacts on neighboring lands from the activity itself. If the activity is considered to be commercial in nature rather than agricultural, it might be subjected to more intensive regulation because of the exceptional status agriculture holds in some jurisdictions. Agriculture is sometimes exempted from the normal rules but commercial activity is generally not so treated. n93 A number of factors used by the courts may be identified where such a classification is necessary.

§ 47.06(e) Classification: Size of the Operation.

The need to regulate is frequently argued when one of two conditions occur: (1) the farming operation is so big that its impacts beyond its boundaries (often in the form of odor or dust) become a concern to other residents (who often are not involved in agricultural activities themselves); or (2) it is too small to be a profitable enterprise in its own right (such as the keeping of a horse or two for recreational use) so that it may be considered a "hobby" that is perceived as sufficiently out of place for the particular neighborhood by enough neighbors that complaints are generated.

In these situations, it seems that in the minds of many non-agricultural landowners in the neighborhood, what should be tolerated as "agriculture" is the middle-sized operation that is typically not conducted as a full-time enterprise nor on a scale that can affect the status of the area as scenic or open space. This approach seems to be grounded on nothing more than the popular perception that the countryside should be attractive and aesthetically pleasing to visit, or, if one actually lives there, it should be fraught with bucolic serenity and nostalgic picturesqueness else it becomes overrun with the evils attendant to intensive agriculture, such as animals on the loose, dust and odors in the air, herbicides and pesticides in the air and water and large equipment on the roads.

In 1935, there were approximately 6.8 million farms in the United States. That number has now dwindled to less than 2 million. n94 Nevertheless, farming still accounts for 2.3 percent of all jobs, approximately 9 million, and produces 1.4 percent of the gross domestic product. n95 This is being done, however, by increasingly larger farms. Trade magazine lists of large farms suggest that the largest farms dominate the agricultural sector. n96 The largest 400 farms, for example, represent only .002% of the nation's two million farms yet account for approximately 15% of the total farm income. n97 Tyson Foods is listed as the largest farm with $1.7 billion in sales of agricultural products. ConAgra is second with $1.45 billion. (ConAgra is reported by Forbes to have total sales of $18.7 billion but much of that does not come from the sale of agricultural products). What is more significant, in terms of classifying farms as agricultural as opposed to commercial, is that among the smaller farms, off-farm employment tends to be a more important source of income to farmers than farm income. It has been reported that only half (56%) of U.S. farm operators now claim farming as their major occupation. Most of the income of an average farmer now comes from off-farm wages and salaries. n98

§ 47.06(f) Classification: General Character of the Area.

Some ordinances deal with the issue from the perspective of the general character of the area alone. This is particularly the case where the area is seen as not suitable or desirable for most other, particularly residential, activities. "Agriculture" and any use of an arguably "agricultural "nature will be considered "agriculture" rather than "commercial" regardless of its size or intensity essentially because it is not inconsistent with the character of the area. In these areas,

large-scale commercial agriculture will normally not be considered "commercial" uses, perhaps so as not to attract "true" commercial activities to the area. n99

Under this view, the use is considered "agriculture" rather than "commerce" primarily because it does not adversely impact on the value of the area for other protected uses, such as residential use, or adversely affect the area as scenic, open space. Where this is the case, the designation actually attempts to avoid characterizing the area as one suitable for what might be considered "commercial agriculture." Unfortunately, in many of these cases, agricultural operations are likely to end up with incompatible neighbors such as heavy industry. n100

On the other hand, if the area is not considered suitable for commercial activity of any type, any kind or level of agriculture may be characterized as "commercial" despite its "agricultural" nature in order to exclude it.

§ 47.06(g) Classification: Off-Farm Impacts.

If the activity, albeit agricultural in nature, is too intense for the area, it will most likely be considered "commercial" and not permitted or be closely regulated. n101 This is most likely when the "off-farm" impacts generate nuisance-type complaints from established non-agricultural uses. In these cases, courts sometimes strain to find ways to deal with the activity as if it were not agricultural in nature. n102

FOOTNOTES:

(n1)Footnote 81. For a general discussion regarding the construction and application of terms such as "agriculture," "agricultural," "farm," or "farming" in zoning regulations and statutes, *see 38 A.L.R. 5th 357 (1996).*

(n2)Footnote 82. *See Weber v. Franklin County Comm'rs, 20 Kan. App. 2d 152 (1994).*

(n3)Footnote 83. In *Thompson v. Hancock County, 539 N.W.2d 181 (Iowa 1995),* and *Keuhl v. Cass County, 555 N.W.2d 686* (Iowa, 1996), the Iowa Supreme Court determined that large commercial hog facilities were engaged in "agriculture" for purposes of zoning laws notwithstanding the size of the operations. In so doing, the court overturned the long-standing precedent, *Farmegg Prods., Inc. v. Humboldt County, 190 N.W.2d 454 (Iowa 1971).* The rule in Iowa had been that agricultural use was to be defined in terms of "traditional" activities.

(n4)Footnote 84. *See* James Wadley, *Small Farms: The USDA, Rural Communities and Urban Pressures, 21 Washburn L.J. 478, 490-491 (1982);* James Wadley, *The Future of Government Regulation of Agriculture: Biting the Hand that Feeds Us? 3 N. Ill. U. L. Rev. 299, 317-318 (1983).*

See also, Palmer v. Board of Equalization, Eagle County 957 P.2d 348 (Colo. App. 1998) (grazing of pleasure horses not agricultural use for tax purposes).

(n5)Footnote 85. *See, e.g., Town of Mount Pleasant v. Van Tassell, 166 N.Y.S.2d 458 (N.Y. 1957),* which held that a piggery was not farming since farming was

> the act or business of cultivating and using the land and the soil thereof for production of crops for the use of man and animals and incidental purposes. Incidental purposes may include animal husbandry, stock raising or dairying. But the raising of pigs or other animals as a business, with their confinement all or most if the time in buildings or pens occupying a small part of a large tract of land, with the raising thereof not being incidental to the use of the tract for agricultural purposes, is not farming.

(n6)Footnote 86. *Town of Mount Pleasant v. Van Tassell, 166 N.Y.S.2d 458 (N.Y. 1957).*

In *Coope v. Zoning Board of Appeals, 2000 Conn. Super. LEXIS 3264* (Conn. Super. Dec. 1, 2000), the court upheld a

determination that a pheasant breeding facility was "farm use." The appeal was from the reversal of an earlier determination that the activity constituted a "commercial animal farm," which was to be treated as a commercial activity under the zoning ordinances.For further discussion, see Bower, J. *Hogs and their Keepers: Rethinking Local Power on the Iowa Country Side, 4 Great Plains Nat. Resources J. 261 (2000).*

(n7)Footnote 87. In *Cumberland Farms of Conn., Inc. v. Zoning Bd. of Appeals, 267 N.E.2d 906 (Mass. 1971),* the court, after reviewing legislative history of amendments to the State statute, concluded that the legislature had intended the term "agriculture" to have broad meaning. It therefore held that an expansion of a dairy did not cease to be agricultural because of commercial impacts associated with the expansion.

(n8)Footnote 88. *909 S.W.2d 143 (Tex. App. 1995).*

(n9)Footnote 89. *460 S.E.2d 528 (Ga. App. 1995).*

(n10)Footnote 90. *See Weber v. Franklin County Comm'rs, 20 Kan. App. 2d 152 (1994). See also* In the matter of the *Appeal of Briarfield Farms, 555 S.E 2d 621 (N.C. 2001).*

(n11)Footnote 91. *674 N.E.2d 247 (Mass. App. 1997).*

(n12)Footnote 92. *Thorfinnson v. Hennepin, No. TC-23450, 1996 Minn. Tax LEXIS 54* (Minn. Tax); for a general discussion regarding exemptions for agricultural activities from business taxes and fees, *see 38 A.L.R.4th 1074 (1985).*

(n13)Footnote 93. For example, agricultural use is exempted from zoning regulation under Kan. Stat. Ann. § 19-1960:

No zoning regulation shall apply to the use of land for agricultural purposes nor for the erection and maintenance of agricultural buildings so long as such agricultural buildings are uses for agricultural purposes and no other. Dwellings, garages and other similar accessory buildings shall not be considered as agricultural buildings. All buildings, including agricultural buildings, may be regulated as to setback requirements from public roads so as to protect the future use and improvement of such roads.

The same activity might be subject to land use regulation if the activity was considered to be commercial. See *Field v. Anderson Cattle Co., 396 P.2d 276.* (Kan. 1964).

(n14)Footnote 94. *News Briefs*, Doane's Agric. Rep., Nov. 11, 1994, at 1.

(n15)Footnote 95. *Farm Broadcasters Letter*, United States Dep't of Agric., June 17, 1994, at 2.

(n16)Footnote 96. Successful Farming magazine, 1716 Locust St., Des Moines, Iowa, has generated a list of what it considers the largest 400 farms in the United States. In order to be on that list, the farm had to produce at least $10 million in farm income.

(n17)Footnote 97. *400 Farms*, Successful Farming, April 1992, at 20.

(n18)Footnote 98. *News Briefs*, Doane's Agric. Rep., Nov. 11, 1994, at 1.

This suggests that these farms will normally not be considered "commercial" operations because of the traditional view that agriculture is not conducted on the same scale as big businesses.

(n19)Footnote 99. *See, e.g., Fidler v. Zoning Bd. of Adj. of Upper Macungie Twp., 182 A.2d 692 (Pa. 1962)* upholding the use as a turkey farm as "agricultural" rather than "commercial." The court said that "[t]he use contemplated is definitely 'commercial.' Whether or not it is 'agricultural' as well, is the perplexing problem."

See also Field v. Anderson Cattle Co., 396 P.2d 276 (Kan. 1964), holding that two feedlots for cattle and sheep located within 700 feet of the city limits were "agricultural" uses rather than "commercial" uses.

(n20)Footnote 100. Rock quarries have been permitted in agricultural areas as an "agricultural" use. *See Vangundy v. Lyon County Zoning Bd., 699 P.2d 442 (Kan. 1984).*

An archery range was permitted in an agricultural zone in *Hoffarth v. County of St. Clair, 366 N.E.2d 365 (Ill. App. 1977).*

(n21)Footnote 101. *See, e.g., Valley Poultry Farm, Inc. v. Preece, 406 S.W.2d 413 (Ky. 1966); Botsch v. Leigh Land Co., 239 N.W. 841 (Neb. 1976).*

(n22)Footnote 102. *See, e.g., Carpenter v. Double R. Cattle Co., Inc., 669 P.2d 643 (Idaho 1983).*

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CHAPTER 47 AGRICULTURE AND FARM LAW

6-47 Thompson on Real Property, Thomas Editions § 47.07

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§ 47.07 Agricultural Land Availability.

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§ 47.07(a) In General.

If agricultural use is broadly defined, in terms of size, most of the private land in this country is presently available for and is being used for agricultural purposes. On the other hand, in terms of value, agricultural land is typically worth less, per acre, for agricultural uses than it would be for most other kinds of uses that could be made of the same land. This poses problems for agricultural interests since the land base of the nation is physically limited and there is much competition in many places between agricultural uses and non-agricultural uses for the same space. n103

Land is clearly a *sine qua non* for most kinds of agricultural activities. Agriculture is a "space intensive" type of land use and cannot survive without access to large "undeveloped" areas. Large, open fields, for example, are necessary for both the cultivation of crops and the grazing of livestock. Even intensive, concentrated operations, such as feed lots or nurseries, tend to require surrounding areas to shield, isolate or buffer the particular agricultural operation from surrounding uses. Finally, agriculture as an industry requires what might be described as a "critical mass" of land in similar uses in a particular area in order to sustain the multitude of support uses, such as feed mills, implement dealers, transportation terminals and so forth, that are necessary to a viable community of activity. In this sense, an adequate agricultural land base is necessary for a stable food and fiber production base for the nation.

Thus, the question whether the land is available and will be protected for agriculture or some other use is an important question.

There has been a concern in some jurisdictions that land that is truly suitable for agricultural purposes not be used for other uses. In *King County v. Central Puget Sound Growth Management Hearings Board, 14 P. 3d 133 (Wash. 2000),* the court dealt with a proposal to designate an area for active recreational use as athletic fields within an area that had been designated as agriculture in the growth management plan. The Board granted the request, which was upheld on appeal to the Superior Court. The Supreme Court reversed, holding that the proposal was inconsistent with the Growth Management Plan in that the areas designated did not have poor soil nor were they otherwise unsuitable for agricultural purposes. The court did suggest that the designation could have been effective had it been undertaken under the Growth Management Act's "innovative zoning techniques" provision had it been adopted to protect and conserve farm land.

§ 47.07(b) Agricultural Land and Land Development.

Land is typically considered as "undeveloped" or "developed" for purposes of dealing with land use regulation. In our system, land seems to be considered to be "developed" when it is devoted to uses or activities which make irreversible changes in the land or irrevocably alter its availability for other uses. As a result, land used for housing or commercial use is considered to be developed. In contrast, land that is reasonably available for a multitude of alternative uses is generally considered to be "undeveloped." Farmland, woodlands and open space areas are therefor generally seen as "undeveloped."

There appears to be an informal hierarchy in which "developed" lands are given a higher and more protected status than are "undeveloped" lands. It appears that such lands are regarded as more valuable economically and are perhaps even considered to represent the "highest and best use" to which land may be put. This hierarchy influences land use patterns by rewarding shifts in use from lower, or less valuable, uses to higher, more valuable, uses. As a result, there is an inclination for agricultural land to ultimately shift to non-agricultural uses.

There is undoubtedly a perception that is held by many that agricultural land may and should be considered a resource for the process of more intense or "higher" land development. Indeed, over time, there has been a pattern of shifting agricultural land to the economically more valuable uses to meet the needs of urban growth and expansion. This has generated some fear that the nation may eventually run out of prime farmland for agricultural purposes and some concern that agricultural uses are inherently at a competitive disadvantage when faced with the prospect of use for non-agricultural purposes.

§ 47.07(c) The Agricultural Land Use Dilemma.

Since the same land that is used for agricultural uses may well also be important for significant non-agricultural uses as well, there seems to be constant pressure in the land use laws of various jurisdictions to "keep the land available" for non-agricultural development purposes or to "upgrade the use of the land to a more developed use." This land may be also viewed as the logical repository for non-agricultural uses, such as cement plants, heavy industry, sand and gravel operations and the like that are considered to be incompatible with "more respectable" development. Finally, agricultural land may be required to adequately satisfy important cultural, psychological and aesthetic needs such as recreation and open space. It may even be the location of historic sites or the habitat for endangered species of fauna and flora. As a result, agricultural land is typically viewed as a major source of land for "development" purposes such as housing, shopping centers, industrial and manufacturing facilities, schools, water impoundments and so forth and as a place where other important social amenities may be secured. All of these alternative use possibilities compete with agricultural use for the right to occupy the particular space. As a result, the question of availability of land for agricultural use is significantly colored by the manner in which the law reacts to and adjusts this competition.

The difficult dilemma for the system is how to keep land in agriculture and available for other uses without interfering with the role and value that land plays regarding both agricultural and non-agricultural lands and uses. This problem is often addressed in purely economic terms as a conflict between the need for high-density economic development and the need for low-density agricultural and open space land use. The dilemma is much more complicated than that.

Farmers, as a group, tend to feel a need to control the decision as to how the land should be used in order to effectively manage agricultural land and often claim the right to do so as a fundamental right associated with land ownership. n104 It, therefore, might be more appropriate to view the land use dilemma as a conflict between the need to maximize individual private ownership opportunities and the need to insure that private ownership itself is meaningful on the one hand and the need to mandate socially necessary land use patterns and public benefits on the other. This is by far a more difficult dilemma to deal with as it forces the legal system to come to grips with two fundamentally opposed concepts: the sanctity of individual ownership and the necessity of public control without regard to ownership. Unfortunately, rural and urban interests tend to polarize around these opposing concepts. Nevertheless, recognizing this as the ultimate

focus of the dilemma may serve to assist in developing regulatory approaches that are acceptable to both interests. It may be useful to consider, however, how urban and agricultural interests may differ on this issue.

§ 47.07(d) General Social Concerns Regarding Agricultural Land Use.

It is difficult to deal effectively with the problem of regulating agricultural land use without noting that some, if not most, of the resulting agricultural land use regulations are likely to be received with less than lukewarm enthusiasm by the farmers themselves. Several explanations may be offered for this phenomenon. These concern the objectives that are typically pursued in the course of regulating agricultural land.

It may make one a little uncomfortable to observe that there is significant polarization in our society between urban and rural interests as that relates to primary aspects of land use decision making. Nevertheless, it must be recognized that the interests and viewpoints of the urban sector and those of the rural sector may be quite divergent and in many cases, are very deeply held. As the nation becomes increasingly urbanized, there is a serious risk that the interests of the dominant sector will completely ignore those of the other.

It must be recognized that many of the objectives that are sought to be achieved through the regulation of agricultural land use are essentially urban in nature. These include the maintenance of an adequate agricultural base which will ensure satisfaction of projected societal food and fiber needs, the preservation of open space and other environmental amenities for our cities and the encouragement of efficient, orderly and fiscally sound urban development.

This is not entirely surprising since there seems to be an unstated assumption in most efforts to regulate agricultural land use that the issue is essentially one of urban land use planning. That is, the primary critical concern is to promote development of the urban fringe area in ways that minimize the harmful consequences of urban sprawl, leap frog development patterns and buckshot urbanization. n105 This tends to cast the issue as a resolution of conflict between the need for economic growth and development in the community and the need to save a low density, low economic value use of land. In fact, most urban opposition to these efforts appears to result from the fear that controlling growth will result in preventing growth. As a result, even though the issue may be posed in terms of regulating or not regulating agricultural use of land, it is more often discussed in terms of which lands should be open to continued urban growth development and expansion. This approach cannot help but communicate to the agricultural interests that their concerns are secondary to the more pressing economic question of urban community development.

Much agricultural land use regulation fails to consider some social aspects of farming that influence the land use decision but which have nothing to do with the more common regulatory purposes involved. For example, because of the nature of farming as an industry, farmers often have nothing to fall back on to take care of their retirement needs beyond the sale of their farmlands, and many farmers in the fringe areas have been consciously planning for that disposition for years. To be deprived of that opportunity is not only frustrating, it often leaves them with no viable retirement options.

Similarly, farmers often may perceive the efforts to regulate agricultural land use, even when done for ostensibly agricultural purposes, as interfering with what they consider to be their basic right to make their own land use decisions. This issue of whether control over the land use decision should be vested in an urban oriented decision-making body is particularly troublesome from the farmer's perspective because the ability to determine what is done with the land may be one of the few aspects of farming that the farmers feel they have any significant measure of control over. n106

Perhaps less significantly, in many efforts to regulate agricultural land use, proponents of keeping the land available for agricultural use frankly tend to argue from the urban interest side that protection of farmland is "required" in order to maintain open space, keep recreational areas proximate to the cities, achieve an aesthetically pleasing ambience around residential areas, eliminate environmental degradation that may result from uncontrolled development, and to secure ownership opportunities for urban escapees that might give them a measure of independence and self-sufficiency. Often

omitted from such debate is any concern that erosion of the farmland base may jeopardize the critical mass required for a viable agricultural industry and an adequate support sector, and that a large agricultural land area may be necessary to secure to smaller communities the economic and social benefits that flow from a viable local agricultural industry. All of this serves to generate a legislative history that the regulations were adopted to serve other than agricultural interests and concerns.

§ 47.07(e) Divergent Urban and Rural Viewpoints Regarding How Agricultural Land Use Should Be Regulated. n107

While any generalization is difficult, it is sometimes difficult to determine which of two competing explanations better describes the typical urban view of what is rural--condescension or nostalgia. Each undoubtedly has shaped the urban view of how rural land, including agricultural land should be used.

To many within the urban sector, "rural" is simply a place. Indeed, for some statistical and governmental reporting purposes, "rural" may be technically described as the area outside of metropolitan areas of a particular size. In this sense, "rural" is the 20th century sociologist's and demographer's term to describe the countryside and all the small towns and isolated villages and all of the scattered houses and farmsteads that dot our land from coast to coast in terms of land use density. Although the term "rural" is supposedly content-neutral, when an effort is made to describe what this "rural" looks like, technical accuracy gives way to nostalgia, with images straight out of a Normal Rockwell or Andrew Wyeth painting, of "unpaved dusty lanes and cane-bottom rocking chairs, of purple-flowering wisteria and white magnolias, clear-water swimming holes and Sunday chicken dinners around a large kitchen table, long puffed rows of summer cotton, roasting ears and cane-pole catfishing in pine-shadowed ponds, lightning bug nights and barefoot days." n108 Such a "rural" area, of course, is a myth in that, for most urban and suburban people, it is only a memory or it is something seen as one was passing through. It is not that such places don't exist, it's that the only politically significant group that lives there is for the most part composed of urban refugees. The typical urban dweller no longer understands how it is to live there and can only wish or remember.

To others, "rural" may be a somewhat esoteric concept. In an increasingly urbanized society, "rural" is sometimes considered the antithesis of large scale "development" and as such encompass the large expanse of "undeveloped" America. This "rural" area may be conceptualized as a place to escape to and indeed escapism appears to dictate the images: the woods, the rolling expanse of farmland and the clustered enclaves of human habitation known as small towns; "open space" where nature is unsullied by human activity and where humankind can commune with one's innermost aspirations and escape the stress and turmoil of urban living; space on a grandiose scale and ripe and unspoiled, laden with potential. This kind of "rural" area may be the dream of what the entire country should look like -- if it can be kept unspoiled; a place where life is lived at a slower pace, where there is less stress. Again, for most people, this is a mythical place but one that has considerable attraction if one wants to be a "tourist."

Rural is also considered by many in the urban sector to be an attitude. In this context, "rural" is most often used as a condescending social pejorative, a view that rural folk are less adept at dealing with the intricacies of modern life; n109 simple, uncultured -- "redneck" -- but certainly not urbane, or sophisticated. Rural is also seen as low-key, laid-back, not driven. Rural, in this sense, is a place to escape from, not to.

In contrast, it is quite impossible to accurately describe what it is like to be truly rural to someone who has not lived there for a protracted length of time. Even those that have actually moved to rural areas to escape the problems and stress of the city will find that it is hard to give up transplanted urban expectations, and therefore those rural residents will have a distorted view of things. n110

There is considerable disparity between the popular urban and the rural viewpoints regarding the concept of land ownership and the role land plays in rural areas. The urban mindset will probably always have a difficult time fully and accurately comprehending the significance of land ownership and control to the rural farm or ranch owner. This is so for

a variety of reasons. First, in ways that almost defy description, there is an inseparable relationship between owning a "thing" such as the land and the "way of life" that ownership makes possible that is not found at all in urban areas. n111 This relationship forges a unique "connectedness" to the land that governs much of the decision making which occurs regarding land use. Second, the space the land occupies tends to be perceived as serving a wholly different function in rural areas than it does in urban areas. In urban areas, space separates whereas in rural areas, space unites. n112 Finally, the land with all its abilities and disabilities often becomes the primary variable that governs the success of the enterprise in ways that the urban dweller does not contend with but which indelibly shape the rural mindset.

The rural view of "rural" as an attitude is markedly different from the typical urban view. The attitude is one of confidence, of independence and interdependence, of self-sufficiency and of making do with less than what the cutting edge of technology might offer. n113 Most in this country perhaps wish to ignore this view of rural and tend to opt for the more derogatory view since, although it might be said to be the embodiment of the "American Dream," it is the social antithesis to the reality of the hustle and bustle of modern economic, cultural and political life (from which most cannot escape though they may wish to do so). Here, perhaps sadly, since it cannot be said to describe the rest of the country, the image is one of effective socialization, of cooperation and oneness. n114

Because of the close connection between attitude and behavior, the ability to control how the land is used underwrites the attitude of self-sufficiency and independence. Effective use of the land insures the continuation of a way of life. The ability to enjoy and occupy land is a vital variable relating to the quality of that life. n115

The rural view of "rural" will and must contain a spatial dimension that is significantly tied to and cannot be separated from the fundamental connotation of the term. "Rural" simply cannot be defined without some feeling or reference to the interrelation between mankind and space. Indeed, the need for space and the ability to enjoy that spatial component of "ruralness" is inextricably linked in the minds of many in rural areas to well-being itself.

It is also impossible to accurately describe farming or ranching without any reference to the land. At the very least, the land is where these activities occur. At best, the land is a supporting, but selfish partner in the venture. Despite popular opinion to the contrary, there is little room in the rural mind for romance in describing the significance of land to the farmer or rancher and, indeed, even the activities which occur on the land do not merit particular exaltation. Animal operations generate flies and odors, farming generates dust and noise, and nature itself can be very harsh. Crops and animals die. Seasons come and go. Yet the land remains as perhaps the only constant in a fragile enterprise. Nevertheless, it is a fact of rural life that land with all its vagaries is something that must be accepted before much else associated with farm or ranch life can go on.

There appears to be a stronger correlation between property ownership and social behavior in rural areas than in urban areas. This is perhaps due to traditional views regarding property. It might also be attributable to the stronger feelings of independence and self-sufficiency that seem more prevalent in rural areas than in urban areas which would seem to suggest that it matters more whether one has the ability to control particular facets of land use. n116

The rural view of land use planning law, even as it may affect the use of agricultural land is that it is essentially an urban oriented institution, designed to accommodate the growth, development and expansion needs of cities. Few would deny that urbanization involves intensive use of the land, and that as cities grow, that intensive use of land will tend to move outward from the center of the cities. Further, since cities in this nation have demonstrated an historical propensity for low density settlement, much of the extension outward from the cities themselves into the surrounding countryside will consume enormous amounts of land. This intrusion into the countryside is perhaps excused on such diverse grounds as the need of people for a place to live or in the need to keep heavy industrial development away from where people live. In this context, the rural mindset tends to view the planning process as operating on the assumption that rural and especially agricultural lands represent essentially "undeveloped" lands and are therefore a "resource" for those interested in more intensive land development.

There appears to be a strong sentiment among farm and ranch landowners that they are losing control over the land use decision itself, which they see as being subtly shifted to and exercised by and on behalf of urban-oriented interests. The rural farm and ranch landowners appear troubled, for example, that the rationale for much land use and environmental control seemingly is the necessity to effectively "rescue" the rural land that is affected by such regulations from the consequences of harmful rural oriented uses and practices and to keep rural areas pure and unspoiled essentially for urban purposes. n117 This is perceived as giving those who develop and implement those programs the power to essentially dictate particular land use practices. Even if one concedes the necessity for some public restriction on land use, such as to prevent one landowner from using the land in a way that may cause harm to another landowner, the farm and ranch landowner may wonder to what extent non-rural interests should have the power to make the determinations regarding which kinds of harm should be proscribed.

The serious problem this view of land use regulation poses from the perspective of the farm or ranch landowner is that most restrictions or regulations will be perceived as not being in their best interest and therefore not particularly acceptable. This, of course, calls into question the credibility and legitimacy of the laws themselves. n118

FOOTNOTES:

(n1)Footnote 103. *See, e.g. Murphy v. Spokane County, 2001 Wash. App. LEXIS 410 (Wash. App. 2001)* dealing with the classification of land that had never been used as agricultural property but which was nevertheless in a general agricultural use zone; *Merritt v. City of Pleasanton, 107 Cal. Rptr 2d. 675 (Cal. App. 2001)* dealing with the extent to which zoning must be consistent with the city's general plan; *Mount Olive Complex v. Township of Mount Olive, 774 A. 2d 704 (N. J. Super. 2001)* dealing with lot size and the issue of affordable housing.

In *Township of Franklin v. Hollander, 769 A. 2d 427 (N.J. Super. 2001),* the court held that the Right to Farm Act preempted municipal land use authority over operations.

For further discussion, see J. Nolon, *Local Land Use Controls that Achieve Smart Growth, 31 ELR 11025 (2001).*

(n2)Footnote 104. *See generally*, James Wadley and Pamela Falk, *Lucas and Environmental Land Use Controls in Rural Areas: Whose Land Is it Anyway? 19 Wm. Mitchell L. Rev. 331 (1993).*

(n3)Footnote 105. *See generally*, William Ellingson, *Differential Assessment and Local Government Controls to Preserve Agricultural Land, 20 S.D. L. Rev. 549, 550 (1975).*

(n4)Footnote 106. There appears to be an implicit assumption in many of these regulatory efforts that if only the land can be maintained for agricultural use, there will readily and always be farmers there to farm it. Such an assumption is naive at best and frankly dangerous at worst. If too much public control is asserted over the agricultural land use decisions, it may be discovered that farmers are not willing to stay on the land even if it remains in agriculture; they simply may not be willing to farm under those conditions. If the individual farmers do not foresee a future that will meet their needs as well as those of the city, the only way to keep the land in farming may be to turn it over to corporate or other entities. This may further exacerbate the existing rural ownership problem and may have some effect on national food concerns as well.

(n5)Footnote 107. The following section is adapted from the author's work which appears as *Lucas and Environmental Land Use Controls in Rural Areas: Whose Land Is It Anyway? 19 Wm. Mitchell L. Rev. 331 (1993)* and, as such, represents the author's views and not necessarily those of the publisher of this work.

See also David Callies, *The Quiet Revolution Revisited: A Quarter Century of Progress, 26 Urb. Law. 197 (Spring 1994).*

(n6)Footnote 108. Jerry Flemmons, in *Our South in Words and Pictures*, 25 Southern Living 74 (Jan. 1990).

(n7)Footnote 109. *See, e.g.*, Profile, *Roger Welch -- A Story Teller Gives Rural Folks a Place to Live*, 107 Progressive Farmer 16 (Nov. 1992).

> America has a great secret.
>
> It's called rural America. In popular American culture, this vast, forgotten expanse is the home of hayseeds, hicks, and rednecks -- a place to be from, not a place to live. "Some people are embarrassed by overalls and the town band playing in a small park," says [Roger] Welch. "Rural life has been the butt of jokes. If in a movie you wanted to say this person is a dumb bumpkin, you said he was from Iowa, Kansas, Nebraska, or South Dakota." Or Mississippi, or Alabama, or Georgia.

Rural America is not some great cultural desert[.] The technology associated with modern farming is quantum leaps past the understanding a factory worker must have about his craft. The quilts and the cooking are real. The humor is sharp and often telling. The art is living, not artificial pieces hung on a museum wall.

(n8)Footnote 110. *See, e.g.*, Trebilock, *Rural Hot Spots ... Cold Spots*, Country J. (June 1987) at 32; *America's Small Town Boom*, Newsweek (July 6, 1981) at 26.

(n9)Footnote 111. Regardless of the debate about whether farming or ranching constituted a "way of life" or a business for public policy purposes, see James Wadley, *Small Farms: The USDA, Rural Communities and Urban Pressures, 21 Washburn L.J. 478 (1982).* It is undisputable that the business of farming or ranching requires a lifestyle that differs markedly from the lifestyles of any urban counterpart.

See Zeigler, K., *Who Will Teach Our Farmers: Learning the Value of Mentor Programs from State & Private Programs. 5 Drake J. Agric. L. 279 (2000);* Frug, Gerald E., *Euphemism and a Policy Strategy 30 Envtl. L. Rep. 11189 (2000).*

(n10)Footnote 112. *See, e.g.*, Gretel Erlich, *The West of True Myth, in* Ranching Traditions (Ryan ed. 1989) at p. 50: "In the West, it is our solitude that unites us. The farther apart we are in miles, the closer we feel."

(n11)Footnote 113. Describing life on the contemporary Western ranch, one prominent writer noted that life there

> is a democratizing process. So much in American life has had a corrupting influence on or requirements for social order. Traditionally, ranch life... [has] stood for the achievements of man and nature, man and animal, not the machine... . [What is] instructive to us? Though we all feel a sadness that no uncharted land is left, no true wilderness, we've learned from the good and bad experiences ... the meaning of freedom, heroism, wildness, and something about the process of civilization. It's not the myths that are wrong, but our versions of reality. From the open space still surrounding us, we learn spiritual equivalents: that personal liberation is a kind of psychic space that represents clear-headedness and the ability to act without fraudulence, ... that heroism isn't power play but an act of submission -- a communion of the human and the natural. [It] reminds us to behave, to be disciplined, to be good neighbors; it teaches us the basics of compassion. From the inclemencies of weather we learn humor and humility, how to be coresidents, not conquerors, in the world.

Gretel Ehrlich, *The West of True Myth in* Ranching Traditions 50-51, 58 (Ryan ed. 1989).

(n12)Footnote 114. Teresa Jordan, author of the award-winning video production, *Cowgirls: Women of the American West*, wrote the following about the effective socialization which occurs among children on farms and ranches:

Ranch children as young as eight or nine often do their jobs alone. Although they start out with instructions, the nature of the work means that they frequently need to revise their plans. On a roundup, for instance, riders fan out over a pasture to gather the herd. A child may be asked to ride the far east ridge and push whatever cattle she finds toward the corral. With luck, everyone riding the pasture will arrive with their cattle at the corral at the same time. But she rides the east ridge and doesn't see anything. She wonders if she should leave the ridge and try and help someone else, or should she stick with the original plan. Or she finds a hole in the fence and sees fifty pair in the neighbor's pasture. If she rides after them, she will get to the corral later than anyone else. If she doesn't, someone will have to come back for them later. Many young ranch kids I know talk about these moments of uncertainty with dread. But they make some sort of decision, and they act on it. If they live in a supportive family where the fact that they made a decision is applauded even when the outcome isn't perfect, they grow into decisive and confident adults.

Children who grow up in agriculture have a chance, from an early age, to learn skills and gain recognition for them. Ranch work requires such aptitudes as horse training, sheep shearing, roping, and harness repair, not to mention knowledge of veterinary medicine, auto mechanics, plumbing, electricity, irrigation, carpentry, and bookkeeping. As a child gravitates toward those areas that interest him and masters them, he earns that most coveted of designations -- he makes a good hand. Organizations like High School Rodeo, 4-H, and Future Farmers of America add further reward for those skills, which are not only personally satisfying but intimately involved with the family's welfare.

All this sounds like a lot of responsibility from a young age, and it is. But with that responsibility comes an independence, a freedom and mobility... .

If the cattle industry offers no greater guarantee of golden childhood than city life, it at least has the potential to provide fundamentally different familial relationships. A ranch provides an almost preindustrial structure to family. Home and workplace are one and the same. Not all rural families work together: some wives work in town; some husbands work for wages at a nearby coal mine or neighboring ranch while wives take care of the home place; some kids, for a variety of reasons, don't participate at all, but when a ranch is a shared endeavor, real partnership is possible.

Teresa Jordan, *Ranch Family in* Ranching Traditions 103-105, 106 (Ryan ed. 1989).

(n13)Footnote 115. As a contemporary writer observed, land and the ability to enjoy the land are very losely linked to well-being in rural areas.

Yes, there are state-of-the-art computers, compact discs, VCRs -- technological toys and marvels -- but I can live without them. I cannot live, however, without the land.

Give me masses of live oaks, and the wind in their leaves like a messenger from the gods -- the branches lifting and bending like old men nodding at the timeless receipt of timeless news. Give me the stretches of ranchland grass; give me fence line weeds and small yellow flowers.

Give me cattle that stand and chew during midday heat and then, as shadows lengthen, head out to graze. Give me the sky -- the whole uninterrupted sweep and glare of it -- and beneath it, on a rise of ground, a windmill. Let me stand beside it and drink a cup of well water at sundown. Let the bullbats begin to swoop down toward the water troughs; let me sit for awhile after dark; let me sleep with moonlight in the doorway and katydids pulsing in the trees; and then let me begin another state-of-the-art day in the Texas Hill Country.

Elroy Bode, in *Our South in Words and Pictures*, 25 Southern Living 74 (Jan. 1990).

(n14)Footnote 116. Loren Kruse, editor of Successful Farming Magazine, reported that there is a "strong relationship between emotional depression and stressed financial conditions among farmers" and a "growing perception of a two-tiered society." He also reported that the "farm crisis is not past tense at all for many families in rural America" and, indeed, economically, there are actually now "two rural Americas."

> One rural America includes those who are financially secure and believe things are generally in good shape. The other rural America includes those who range from financially struggling to absolute poverty (25% of all rural children live in economic poverty)... .
>
> There is a weight of guilt on many farmers who came through the 1980s largely unscathed by financial scars. It is one reason financially successful farmers may have great difficulty visiting a farmer in financial stress. The successful farmers often believe their own secure financial condition is a reminder of hurt to those in trouble. Thus, many troubled farmers and farm families are still "isolated" by their neighbors, just as they were during the worst of the farm crisis... .

Loren Kruse, *Across the Editor's Desk*, Successful Farming 1 (Sept. 1990).

(n15)Footnote 117. It is easy to suggest that the situation may be one of ineffective communication, in which the urban sector has not clearly articulated the reasons for the controls. It is also easy to argue that it may be that the urban sector has not asked for rural input nor has the rural sector done a very good job in making its position known. To the extent any of that is so, the matter may be remedied. On the other hand, the rural farm and ranch landowner attitude appears to be that the land is theirs and as a result, the non-rural sector has no business dictating how it is used. That attitude will not be easy to change simply by further or better communication. It is easy to imagine the rural response to the rejoinder that "the land is actually not that of the farm or ranch landowner; rather those parties are stewards of the land for society." Rebellion is likely. Likewise, the assertion that what is going on doesn't actually constitute "telling anyone what can or can't be done with their own land" most assuredly will fall on deaf ears because their experience has told them otherwise.

(n16)Footnote 118. *See* Comment, *The Acquisition, Abandonment, and Preservation of Rail Corridors in North Carolina: A Historical Review and Contemporary Analysis, 75 N.C. L. Rev. 1989 (1997);* Wright, *Private Rights and Public Ways: Property Disputes and Rails-to-trails in Indiana, 30 Ind. L. Rev. 723 (1997);* Myers, Ruark & Backiel, *Developing an Enduring American Agriculture, 12 Nat. Resources & Env't 110 (1997).*

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CHAPTER 47 AGRICULTURE AND FARM LAW

6-47 Thompson on Real Property, Thomas Editions § 47.08

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§ 47.08 Factors Affecting Governmental Regulation of Agricultural Land.

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§ 47.08(a) In General.

Historically, the law has given great deference to the role of individual choice in the process of determining which parcels may be used for which particular purposes to meet national needs. A number of particular factors seem relevant to the land use decision making process as it affects how individuals choose to use agricultural land as well as the bases upon which governments may choose to regulate agricultural land.

§ 47.08(b) The Need for Desirable Land Use Patterns.

For the most part, regulation of land use is designed to promote or maintain desirable land use patterns rather than to restrict the exercise of individual choices as to how land is used. To a considerable extent, this has focused regulatory efforts specifically on the individual land use choice decision only to the extent necessary to achieve the desirable pattern. Thus, limitations upon individual rights are generally avoided, if possible, but are most likely to arise when the nature of the right is considered to be in conflict with the larger public purposes and interest in use patterns.

Reconciling the public need for desirable patterns with our legal system's predilection for unrestricted individual land use choice has always been a difficult matter and whether a particular landowner gets to decide if a certain parcel of land gets used for particular purposes is an intriguing issue and a difficult legal question that consumes much time and energy in our legal system.

The law generally recognizes that considerable control may be exercised by the public authority over the overall distribution of land use patterns within the jurisdiction. n119 While it may not be possible to eliminate entirely particular uses that may be deemed undesirable, significant control over the location of uses and the density or intensity of such uses seems to be clearly and legitimately within the scope of police power regulation.

Control may be either direct or indirect. Zoning, for example, directly deals with the question of use location by designating where within the jurisdiction particular uses may lawfully occur. Growth management planning, on the other hand, indirectly influences patterns by regulating how and at what rate municipalities or towns grow and develop.

The control over use patterns will often be somewhat subtle. A particular jurisdiction may exercise considerable control over the actual distribution of particular land uses within the jurisdiction simply by *determining* and *designating* which uses are appropriate for particular areas. For example, designating a particular area as appropriate for residential use may bring tremendous pressure upon nonconforming uses, such as agricultural uses, to ultimately leave the area.

Where an existing or proposed use is considered undesirable, or the consequences thereof threaten the health or safety interests of the jurisdiction, pressure may be more direct in that the offending use may be enjoined or special permission be required to continue or to make the use.

§ 47.08(c) Role of Cultural Attitudes Toward Land Use.

Cultural attitudes regarding the relationship between man and the land play an important role in shaping how the law deals with agricultural land since the legitimacy of the law is directly dependent upon its correspondence to the popular weal. Relevant cultural attitudes are derived in part from our cultural heritage and, in this case, become reflected in our notions of private property and governmental responsibility.

The history of how our country was settled has had a considerable impact on cultural attitudes toward land development, occupation or density of use and the role government should play in the land use decision making process. For example, as settlers moved west, the notion that our country contained seemingly endless amounts of land shaped our views that land should be reduced to the control and dominion of the settlers who would then enjoy a species of ownership sovereignty over the land. n120 This appears to have given rise to an attitudinal predilection in our culture that emphasizes the independence of the landowner and sanctity of private ownership and the desirability of large units of open space. As a result, there is an identifiable cultural attitude that tends to shun high density development and appears to express a very deeply seated desire to "control one's own space," a need to have lots of "elbow room" and a propensity to simply "go over the next hill to escape (rather than solve) one's problems." This attitude has also helped shape agricultural land use patterns through its relatively strong pro-individualist cultural notion, and its emphasis on the cultural and psychological need for space.

Remnants of this cultural attitude remain in large measure in what is often considered to be the typical rural view of property ownership: that the landowner should be largely immune from governmental supervision and that any exercise of governmental authority over the development process represents an unacceptable intrusion into the realm of private property rights.

The farmland owners as a general group appear to consider the right to determine how their land is used not only to be among their property ownership rights but also to be a fairly absolute right. n121

The fact that this view is not always that taken by the law itself explains much of the friction between the rural landowners and the typically more urban oriented official land use decision making bodies of a jurisdiction. The law of property appears to have evolved considerably in the direction of granting governmental bodies the authority to restrict substantially the private rights of individuals. Early in our legal history, it was recognized that the use of one's property should not cause unreasonable harm to another's ability to use and enjoy land. n122 This doctrine, generally referred to as the law of nuisance, has been justified on the ground that such a rule is necessary in order to maintain public order. In most cases, the determination of whether a particular use is a nuisance turns on a "balancing of equities" in which a court seeks to determine "how much inconvenience and disturbance a land owner must endure as an incident of modern life." n123 While the importance of the law of nuisance has been diminished somewhat in recent years as greater authority over land use decision making has been exercised by legislative bodies throughout the country, the underlying principle, that one's authority to use one's own land may be adjusted to reflect or accommodate another's interest in other land, is still very much at the heart of broadened public control over land use. It is under the guise of this type of concern than our system asserts an interest in and control over land use activities that have adverse consequences on

lands beyond the property itself.

This has given rise to a cultural attitude toward property rights within the urban sector that is somewhat opposed to the traditional rural view of land ownership. This is the view that all landowners are duty bound to act as careful and prudent stewards in how their privately owned land is or should be used. This position seems to subsume at least a minimal socially imposed limitation on the property rights of private land owners. n124

As our national land needs have changed, particularly in response to growing public appreciation of the consequences of environmental land abuse, the law appears to have become more sensitive to the long-term consequences of land misuse, particularly with respect to industrial and rural land and it has become increasingly evident that the law more closely reflects the urban rather than the rural cultural attitude. Particularly at the local government control level, the public interest tends to be defined in ways which require some sensitivity from landowners with regard to the external impacts of individual land use decisions. Further, there is a growing sense in the law that posits that landowners may properly be required to act in particular pro-social ways regarding the use of land in order to protect the present and intergenerational public interest in the land.

This shifting in cultural attitudes toward an individual's right to use land and the corresponding power of government to regulate has generated a conflict, in a cultural sense, between the urban and rural attitudes as to how rural land use decisions should be made. This conflict helps explain much of the tension and resistance present on the rural side when jurisdictions seriously begin to consider land use planning programs that affect agricultural land. The conflict in attitudes also directly pits the traditional rural landowners' view that they should fairly absolutely control the decision as to how the land should be used against the urban and to some extent, legal, view that it is proper to supervise the manner and the extent to which private land uses choices are made. This conflict juxtaposes the need for individual independence and control over the land against the public interest of having landowners collectively make decisions that serve larger societal needs and objectives and is a matter that is far from being conclusively resolved. Finally, land developers often look to rural land for large sites for their development purposes. The cultural attitude if this group toward land ownership and the role of governmental regulation tends to approximate that of the traditional rural resident. This, in turn, has led to legal conflicts between would-be land developers and urban-oriented decision making bodies that may get played out in ways that may affect land use activities in rural areas although the groups in conflict really have no other cultural connection with those areas.

Clearly, agricultural use of land is the single largest particular use of land in the United States. Nevertheless, because agriculture requires so much land, areas are often judged as "agricultural" or not based upon the presence of agricultural land use patterns. As a result, many states will be considered "agricultural" states even though agriculture as an economic enterprise actually contributes a relatively small part of the total state economy. For example, Kansas is commonly considered an agricultural state by the rest of the nation. As a matter of fact, agriculture contributes only 3.7% of the total state income. Agricultural services contribute an additional 0.5%. In contrast, services contribute 22%, government 17.6%, manufacturing 19.1%, retail trade 9.6%, transportation and utilities 8.4%, wholesale trade 7.1%, finance, insurance and real estate 5.5%, and construction 5.4%. The only industry that is outranked by agriculture is mining, which contributes 1.1%. n125 Nevertheless, much political decision making tends to occur within the state as if agriculture were the major industry. n126

§ 47.08(d) Conservation and Resource Preservation.

One of the major factors driving increased governmental regulation of land use decision making involves the conservation and preservation of natural resources. We have reached a point in the evolution of the concepts of property and ownership where the law appears to be giving substantial consideration to some of the more significant intergenerational consequences of land use and abuse. The most notable example of this, perhaps, is seen in the area of soil and natural resources conservation. n127 Various kinds of governmental control measures have been utilized here. It has been a long-standing practice of the law, for example, to condition governmental entitlements upon the

occurrence of certain land-protecting practices, or to directly influence landowners to engage in activities of this type by public participation in the cost of such efforts. n128 Alternatively, a jurisdiction may mandate certain management practices regarding the land that are designed io insure that the land is protected n129

In a similar vein, the susceptibility of particular lands to harm resulting from certain kinds of uses is starting to be formally recognized as requiring attention in land use decision making. Environmentally sensitive or fragile lands have particularly merited this type of attention. Laws have been enacted that protect wetlands and the habitat lands of endangered or threatened species of plants and animals. n130 Further, major federal projects significantly affecting the environment must make a particularized assessment of adverse environmental impacts before land or other resources can be irretrievably committed to such projects. n131 In some states as well, permission to develop even private land may be conditioned upon the presence or absence of adverse environmental consequences.

Several cases suggest an additional strategy in the effort to protect natural resources. In the case of environmental harm, there has been an interest in collecting monetary damages from those who are responsible, particularly where the harm is to natural resources owned by the public. Exxon agreed to pay the United States and the State of Alaska $900 million to compensate for damage to the natural resources of Prince William Sound. n132 This is money in addition to any owed for the cleanup or as a result of tort liability for nuisance or negligence and appears to represent a trend in environmental litigation cases. n133

Recent changes in the Internal Revenue Code may encourage a greater use of conservation easements as a means by which fragile farmland may be protected. I.R.C. § 170 now treats "qualified conservation contributions" as charitable contributions for which the donor is allowed to take a deduction for income tax purposes. For further discussion, see Richardson, *Maximizing Tax Benefits to Farmers and Ranchers Implementing Conservation and Environmental Plans, 48 Okla.L. Rev. 449 (1995).*

Similarly, Section 508 of the Taxpayer Relief Act allows the executor of the estate of a farm decedent dying after Dec. 31, 1997, to exclude from the decedent's gross estate up to 40% of the value of land subject to qualified conservation easements. I.R.C. § 2301(c). For further discussion, see Bowman, *New Tax Laws Could Aid Land Trusts,* Richmond Times Dispatch, pp B1, B4, (Sept 9, 1997). To qualify, the land must be located in or within 25 miles of a metropolitan area, or in or within 25 miles of a national park or wilderness area, or in or within 10 miles of an Urban National Forest. The land must also have been owned by the decedent or a member of the decedent's family for the three years preceding decedent's death. Finally, an easement must have been granted by the decedent or a member of decedent's family. This easement may be granted post-mortem so long as it is done no later than the date of election. The election is irrevocable and is made on the estate tax return.

§ 47.08(e) Environmental Concerns.

A growing area of the law that relates significantly to land use is that of environmental law which has as its objective the two great concerns of protecting man and nature. To a considerable extent, these concerns are inseparable and defy compartmentalization but it might be suggested that environmental law embraces such diverse concerns as pollution, conservation, energy and population control. Much has been written about the environmental impacts of farming. n134

Legislative enactments largely at the federal level have become the primary basis for recognizing and protecting environmentally related values and interests. While many of these statutes have been enacted to deal with particular environmental problems such as air and water quality and problems of hazardous and toxic waste, n135 it is possible to identify an emerging environmental perspective that may be brought to bear on the formulation of public policy regarding both the human and the natural environment. This perspective is influenced by values and ideas drawn from such diverse sources as biology, economics, engineering and psychology and recognizes a significant interrelationship between the physical state of the environment and quality of life. This, in turn, has focused attention on the issue of how land is used as a factor regarding the protection of environmental values. The effect of linking land management to such

traditional environmental concerns as conservation and natural resources protection has given rise to a branch of land use control law that is somewhat loosely labeled environmental land use law.

In Chandis Securities Co. v. City of Dana Point, n136 the plaintiff/landowner argued that the city electorate's rejection by referendum of a land development plan, approved by the city council, amounted to an unconstitutional taking of the land. The Trial Court disagreed and granted a summary judgment for the defendant. On appeal, the Court of Appeals cited the Planning and Zoning Law, enacted to further California's "goals and policies directed to land use, population growth and distribution, development, open space, resource preservation and utilization, air and water quality, and other related physical, social and economic development factors." n137 This law requires the adoption of a general long-term plan for and by each city regarding the physical growth and development of the area. The referendum is part of the adoption of such plans, and the council cannot not reject the electorate's votes. The court held that judicial review of the electorate is limited to whether their decision was arbitrary or capricious. Hence, the Trial Court's summary judgment was affirmed.

The primary object of environmental land use law is to help structure how a jurisdiction approaches the issues involved in effective land use management so that it is consistent with protection of the several environmental values likely implicated in the course of land use decision making. As such, private property rights must inevitably be balanced against the larger social environmental interests and concerns of the jurisdiction. Striking a workable balance is not always an easy task but necessarily calls into focus both concerns over how land is used and the external consequences of land use practices. The Court may more clearly define the powers of government over landowners' uses of their property that have potentially adverse environmental impacts. The federal Court of Claims has ruled n138 that provisions of market orders that required that a portion of the crop for a given year must be placed in a reserve for disposition in a non-competitive market such as school lunch programs, charities or animal feeds did not deprive the farmers of any property interest because the farmers had failed to show that they had a proprietary right to dispose of their crop free of regulatory controls.

In contrast, the United States Supreme Court n139 held that a city had exceeded its authority when it required the landowner to dedicate a portion of her property to greenway purposes as a precondition to receiving city permission to redevelop her property. The court held that the city must show an "essential nexus" between the legitimate public interest and the permit condition and then satisfy that the interest taken from the landowner was "roughly proportional" to the benefit to be achieved. This, the court said, required that the city make some sort of individualized determination that the required dedication was related both in nature and extent to the impact of the proposed development.

In a third "takings" case, n140 it was held that the denial of a permit to dredge and fill areas designated as wetlands deprived the landowner of a property interest in that land where the effect of the denial was to render that land useless for any economically viable purpose. The court held that it was proper to look at the impact of the denial of the application on the specific land that was the object of the application to determine whether the denial deprived the landowner of *all* use of the property rather than to look to the entire tract of land owned by the landowner. In this case, the landowner owned approximately 250 acres but the permit application was for only 12.5 acres.

The Second Circuit has held that the spreading of liquid manure from a dairy farm may constitute a "point source" of pollution for purposes of the Clean Water Act. n141 In this case, the dairy operation was classified as a "concentrated animal feeding operation" and as such was therefore considered to be a point source of pollution -- primarily because run-off from the areas where the fertilizer was applied was collected to a single point at which it ran off into a stream. The court noted that the vehicles used to apply the manure could, themselves, be classified as point sources. As a general rule, if a source of pollution is identified as a "point source," it is subject to the permit provisions of the statute. In contrast, if the source is considered to be a "non-point source," it is generally subjected to regulation only through appropriate management practices. Thus, this case is significant to the agricultural sector in that it characterizes an activity, diffused surface run-off, that generally would be considered to be a non-point source of pollution, as a point source. This suggests that where it is possible to specifically identify the source of particular agricultural pollutants, the

permit provisions of the statute may be invoked. This decision reversed a decision at the District Court level that had held that there was insufficient evidence to establish the existence of a "point source" of pollution. n142

In a somewhat similar case, the Ohio Court of Appeals considered whether the application of septic tank contents to farmland can be prohibited as waste under township regulations. The court held that the use of such material as fertilizer is "well-recognized" and commonplace and therefore could not be prohibited under the ordinance. n143

In a Massachusetts case, n144 the court held that a razed chicken coop constituted a solid waste disposal facility. "Facility" was defined in the Mass. General Laws, Ch. 111, § 150A as a "dumping ground for Refuse." The court rejected the farmer's argument that the refuse was simply debris from an on-site farming operation. Finally, in a case that is of peripheral interest to agriculture, the United States Supreme Court has ruled that even though a municipal waste treatment facility is exempted from stringent hazardous waste regulations by virtue of the so-called "household waste" exception, the resulting ash may still be hazardous and therefore subject to stringent regulation. n145 Although the case involves the extent to which "resource recovery facilities" are subject to particular hazardous waste management regulations, and therefore has no direct application to agriculture, the rationale of the decision bears watching, given the high level of public interest in farm chemicals. The decision turns upon an important distinction between the status of the facility and the status of the product generated and might serve as the basis in the future for an argument that even though agricultural operations are normally not considered to be "generators," "processors" or "transporters" under federal toxic or hazardous waste statutes, the end product of the handling of hazardous chemicals on the farm may well be the disposition of a hazardous material and subject particular activities to regulation where there is presently an understood exemption.

Farmers and ranchers in 20 states have been authorized to participate in U.S.D.A.'s Wetland Reserve Program. Under the program, the farmers and ranchers could sell permanent easements to U.S.D.A.'s Agricultural Stabilization and Conservation Service to restore cropland. Seventy-five thousand acres would be chosen from the 590,000 acres offered on the basis of their ability to produce the highest environmental benefits in the most cost-effective manner. n146

In a Fifth Circuit case, n147 the Court upheld the power of the Farmer's Home Administration (FmHA) to impose wetland conservation easements on lands that are repurchased from FmHA by the former owners who have lost the lands to FmHA through foreclosure. The court also upheld the designation of the lands as "wetlands" and the inclusion of "wetland buffer areas" within the easements. The easements were imposed under authority of an Executive Order, No. 11990, issued by President Carter pursuant to the National Environmental Policy Act of 1969 which generally required federal agencies to "take action to minimize the destruction, loss or degradation of wetlands." n148 One of the arguments in the case was that Congress had not codified FmHA's authority to impose the easements. The court held that Congress had no need to do that since the Executive Order obligated the agency to take that action. n149

It should also be noted that U.S.D.A. has taken an expanded view of its responsibility to provide the farm sector with information designed to assist farmers in reducing the public health and environmental risks associated with the use of farm chemicals. U.S.D.A. and E.P.A. signed a Memorandum of Understanding on August 15, 1994, committing the two agencies to providing the agricultural community with improved pest management techniques and tools that are designed to reduce health and environmental risks. The agreement establishes a joint process to identify where pest management control alternatives are limited. In those areas, U.S.D.A. would increase research and technology transfer efforts to develop new materials. E.P.A. would then expedite the approval and registration process to ensure that these alternatives are available for field use as quickly as possible. n150

The 9th Circuit has upheld the requirement that the government impose a conservation easement to protect wetlands on all land sold from the inventory of the Farmer's Home Administration (FmHA). In National Wildlife Federation v. Espy, n151 the land was conveyed by a quitclaim deed to a bank which held a senior lien. FmHA argued that the conveyance failed to trigger the easement requirement since it had, through the quitclaim deed, "abandoned" the property. The court held otherwise and a subsequent sale of the property without the easement was to be voided unless the purchasers took

title in good faith and without notice of FmHA's obligation to create the easement.

There has been an interest in collecting monetary damages from those who are responsible for causing harm to the environment, particularly where the harm is to natural resources owned by the public. For example, Exxon agreed to pay the United States and the State of Alaska $900 million to compensate for damage to the natural resources of Prince William Sound. n152 This is money in addition to any owed for the cleanup or as a result of tort liability for nuisance or negligence and appears to represent a trend in environmental litigation cases. n153

A number of cases have dealt with the problem of converting wetlands to some form of agricultural activity. Under provisions of the 1985 federal farm program, a farmer loses eligibility for federal price support payments if land that was formerly considered wetlands is converted to agricultural production. In Von Eye v. United States, n154 the farmer wanted to continue to drain wetlands on his farm but not lose program eligibility. Plaintiff had commenced the conversion of the wetlands prior to the effective date of the 1985 farm bill and it had been ruled by the National Appeals Division (NAD) that the wetlands fell within the "commenced conversion" provisions of the statute. Problems began when the farmer experienced problems with a township-owned culvert and he replaced it with a bigger one that was set lower into the ground. The result was to drain more wetlands than had been previously converted. The Soil Conservation Service notified the farmer that the culvert caused a conversion of wetlands in violation of the statute. Plaintiff sued to obtain permission to complete the project and to remain eligible for the program benefits. The court ruled that his approved conversion ended in 1986 and 1987 and that the present activity constituted an unauthorized new activity that could not relate back to before the effective date of the 1985 Farm Bill.

In United States v. Johansen, n155 the U.S. Fish and Wildlife Service (USFWS) claimed three wildlife-protection easements that covered 102 acres. Recent years with higher-than-normal precipitation had expanded the land claimed to more than 200 acres and the landowner wanted to drain the area back to its former size. The USFWS refused to define the boundaries of the easements and plaintiffs proceeded to drain water off areas they believed to be outside the easements. USFWS filed charges of illegal drainage and claimed the easements gave them the full 200 acres. The court held that only the potholes that existed at the time of the easement conveyance were covered by the easements and criticized the government for refusing the request to define the easements and then prosecuting the landowner for making his own determination.

In Gunn v. U.S.D.A., n156 the court considered the extent to which "farmed wetland" provisions of the 1985 Farm Bill allowed the maintenance of conditions or improvement of the land for crop production purposes. Here, the landowner, in 1992, replaced a tile drain that had been installed in 1906 by the county conservation district with an open ditch. The court found that the conversion did not commence until after the effective date of the statute and therefore constituted an illegal conversion notwithstanding that the farmer had been farming that land continuously for 85 years.

The court, in United States v. Reaves, n157 held that a five-year statute of limitations applicable to wetland violations of § 404 of the Clean Water Act *(33 U.S.C. § 1344)* did not apply to a civil enforcement action brought by the U.S. Army Corps of Engineers more than 13 years after the claimed violation. The rationale of the court was that the discharge of dredged or fill material into wetlands constituted an ongoing violation so long as the fill remained. n158

In two cases involving the definition of "discharge of dredged material," the Circuit Court for the District of Columbia has invalidated an Environmental Protection Agency and U.S. Army Corps of Engineers rule that included within the definition material that is characterized as "incidental fallback material." This is material that inadvertently falls back into the water as a result of activities such as ditching and land clearing. The rule was the result of the settlement of the case in *North Carolina Nat'l Wildlife Fed'n v. Tulloch*. n159 The rule has been popularly called the *Tulloch* rule and was alleged to have the effect of requiring a permit under § 404 of the Clean Water Act *(33 U.S.C. 1344)* any time land disturbing activities occur near water because incidental fallback is almost always associated with such activities. The court held that the rule exceeded the agencies' statutory authority in *American Mining Congress v. United States Army Corps of Engineers*. n160 Subsequently, the court refused to limit its injunction against the enforcement of the rule only

to the plaintiffs in the litigation. n161

The fourth in a series of cases dealing with damages from the underground storage of salt water has been decided with farmers getting a judgment of more than $1 million dollars. The farmers won the previous three suits as well, collecting more than $19 million in the first case. The problem concerns the storage of salt water from brine wells that allegedly escaped to pollute the aquifer, making the water unusable for irrigation. The defendant company was using salt caverns for storage. n162

§ 47.08(f) Taxation and Fiscal Policy.

The need to generate money to support governmental activity has given rise to broad taxing authority at all levels of government. This ability to generate income has also been used for other purposes and, as a matter of fact, it has helped shape the approach taken by many jurisdictions on the issue of control over land use decision making. Since the manner in which land is valued can affect and be affected by the use to which the land is put, tax policy can be used to encourage shifts in use patterns or to maintain existing patterns. n163 For example, land that is valued on the basis of its actual use will likely be taxed less where agriculture is the use of land at issue than it will if the basis for taxation is fair market value and the land has considerable potential for development. n164 In the former case, the valuation policy may encourage the land owner to keep the land in agricultural use in order to minimize taxes whereas in the latter, the landowner may be encouraged to convert the land to a use that reflects the taxes levied. Similar outcomes may be encouraged by policies that vary the tax rate to reflect the kind of use occurring on the land.

According to Kansas law, some personal property tax liens take priority over all other claims against the property. In High Plains Oil, Ltd. v. National City Bank of Cleveland, n165 the court held that priority did not apply to proceeds from the partition of an oil and gas lease. Thus, the court held that a judgment in favor of the county for unpaid taxes was superior to the interest of a secured creditor in the proceeds of the sale.

The Kansas Supreme Court held, in In re Kaul, n166 that Indian lands generally were not subject to ad valorem taxation but that the specific determination must be made in reference to particular treaties. The county had taken the position that all land within the Potawatomi Indian Reservation and owned in fee by an enrolled member of the tribe was subject to taxation. The Board of Tax Appeals (BOTA) disagreed and held that the state had no authority to tax at all since the lands were not considered to be part of the state. The Supreme Court disagreed with both the county and BOTA. It interpreted the act admitting Kansas to the Union and the 1854 Organic act as generally excluding the land unless Congress specifically included them or they were included by Treaty. It therefore remanded the case for that determination. n167

§ 47.08(g) Family Farms and Farm Economics.

Agriculture is a significant part of our nation's economic picture. Agricultural land use is the single largest use of land in the country. A large measure of public resources is committed at the national level to insure that agriculture as an industry remains stable and viable. This insures that agricultural concerns will always be a part of the national regulatory agenda. Agriculture is also vital to local economies throughout the country. In these areas, agricultural issues also play a significant role in regulatory policy formulation.

Economists have suggested that, due to the concept of critical mass, the economic viability of a particular farming operation is inextricably connected to the viability of other similar operations in the immediate area. This suggests that the welfare of agriculture in the aggregate as well as the welfare of individual farmers is an important part of the land regulation picture.

It is therefore beyond dispute that land must be available for agricultural use both from a local and from a national perspective for agriculture to remain healthy as an industry and for it to meet the food and fiber needs of the country.

Farming as an industry is practically polarized between a small group of large farms that produce most of the food and fiber consumed in the country and a numerically large group of relatively unproductive small farms. n168 The small farms, of course, appear to be the most vulnerable to shifts in the economic climate of the nation and seem to be the group most seriously affected by competition from non-farm interests for the land for non-farm uses.

Some believe there is probably little risk that the country will run out of food as a result of any economic demise of the large or the small farms. The large farms generally are strong enough to compete effectively and survive; the small farms contribute relatively little to the nation's food and fiber picture. Although it may be hard to economically justify the small farms, they do serve a vital social function in that they appear to be the expression of deeply held national values regarding land tenure and the opportunity for individual self-sufficiency and appear to be inseparably connected to the question of rural community well-being. Others favor some national commitment to the small farm as the preferred farm land tenure regime. n169

§ 47.08(h) Farm Economics: The Role of Small Farms.

The small farm does not make particular economic sense. Most small farms do not produce enough income to entirely support the farmer and the farmer's family. Most such farmers therefore depend upon non-farm employment for most of their livelihood. This shift to non-farm income is a relatively recent phenomenon, however. Most such farmers therefore have not worked off the farm long enough to have a significant retirement package through their off-farm jobs. Further, most of these farmers are nearing retirement age and tend to see their land as a significant asset in their retirement planning. They therefore must be seen as wearing several hats: that of the farmer, that of the non-farm employee (who may be dependent upon the presence of farming for that particular non-farm job) and that of the would-be developer or subdivider who would like to convert the land to a non-farm use in order to comfortably retire.

On the other hand, the small farm occupies a position of significant cultural and social importance. n170 This role stems from the position the concept of the "family farm" occupies in general property law as the epitome of farm land tenure. It is analogically equivalent to the idea of single-family residential use in the hierarchy of land use planning. Since the time of Thomas Jefferson, the family farm has been regarded as the ideal land tenure for American farming. Even though the definition has been modified in recent years, n171 and plays a somewhat less significant role in federal farm policy development, the family farm is still regarded as the American farming ideal and still exerts an important influence on the law as it relates to agriculture. n172

§ 47.08(i) Farm Economics: Link Between Small Farms and Community Welfare.

There are few detailed economic or sociologic studies of the impact of small farms on rural quality of life. n173 The studies that do exist are generally consistent on the point that the welfare of the predominantly rural areas appears to be directly linked to what is happening in the agricultural sector and that as the number of farms declines, predictable consequences result throughout the community. n174 The most direct impact is probably on local non-farming businesses n175 and the non-farm employment sector n176 which suffer because they exist primarily to serve and service the farm sector. n177 Next, there appears to be an identifiable change in the quality of life. This is followed by changes in the availability of community services which affect such basic socializing institutions as schools, churches, and newspapers. Similarly affected are such community amenities as parks and playgrounds. At about this point, there seems to be an exit migration of professionals such as dentists, doctors and lawyers, who leave and move to larger cities or seek to serve a more regional clientele. n178 Dry goods establishments then tend to close or must compete on a regional basis. All of this stimulates an "increase in the level of differentiation in social organization of the regional community and of the larger society but a decrease in the differentiation, particularly as regards public services, in the restricted original community." n179

It has been reported that in the last 30 years, seven out of every 10 people engaged in farming have left agriculture. This

exodus has significantly affected rural America in many respects. It has forced the consolidation of business and social institutions that served the rural communities where these former farmers once lived. Schools, shopping centers, churches and so forth have tended to become regional. Social patterns and the level of political participation as well as the character of political institutions have been affected. n180

The most recent reorganization of the United States Department of Agriculture was criticized as not being sensitive to the needs of small farms, particularly with regard to their financial needs. The reorganization plan has eliminated the Farmer's Home Administration (FmHA) which was a "lender of last resort" for farmers, typically in the small to mid-size range. n181

§ 47.08(j) Farm Economics: Family Farms and Land Use Planning.

The small, or family farm, problem is difficult from a land use planning perspective. On the one hand, the use of the land for family farm purposes is hard to justify economically if there is much competition for the land for other purposes. Small farms simply do not produce much of the total national need for food and fiber. On the other hand, too much erosion of the family farm land base of a rural community may have significant adverse economic impacts on the community itself. The social value of the family farm, however, has been difficult to clearly articulate in terms that the land use legal structure can respond to. It has been, therefore, and probably will continue to be, difficult to justify keeping major areas of land in agricultural albeit economically unproductive uses largely on the ground that they are socially important. The dilemma is difficult: to seek to keep the land in farming may fly in the face of the economics of the land use decision and in the face of the about-to-retire farmer; to let the land move into a non-farm use may be detrimental to the social and economic welfare of the entire community.

§ 47.08(k) Other Variables.

Many of the particular land use regulatory techniques that are often employed to manage agricultural land, even those that are specifically designed to insure that the land remain available for agricultural use, are not always very popular with the agricultural landowners. There are various reasons for this. In many cases, the farmland owners simply decide that the economic gain to be derived from converting the land to non-agricultural use will be greater than that which will result from leaving the land in agriculture. In other cases, the regulatory approaches are resisted on political or cultural grounds. n182 In some cases, there may be dissatisfaction with the programs that reflects the reluctance of the land owner to relinquish control over the land use decision making process to what are perceived to be urban dominated decision making bodies. A number of factors may be identified that influence these attitudes of resistance that may not be readily apparent to land use planners and decision makers.

§ 47.08(l) Variables: The Ownership Factor.

Sstudies have suggested that ownership of land has a more direct bearing on community land use patterns and growth than do either land use regulations or market decisions. n183 Even well-conceived beneficial land use or environmental control regulations may be rejected by those who are in fact the actual beneficiaries simply because they are inconsistent with pre-established patterns or because they do not comport with the owners' basic interests. n184 This appears to be the case for at least two significant reasons.

First, there appears to be a deep human need and desire to possess property that constitutes an extremely powerful emotional impulse and political tradition and which causes land owners to resist regulation unless the regulation is considered absolutely necessary. n185 Agricultural landowners may therefore see landownership as part of the cultural heritage of self-determination and not simply as a tool for achieving economic success. These landowners tend to consider whether particular land use control programs are in their interest based on their impact on the issue of independence and self-sufficiency rather than on the economic significance of the programs.

Second, land has historically been considered to be a particularly effective social weapon by which its possessors protect their own economic, political and other interests -- largely at the expense of the landless or less landed. n186 Many agricultural landowners thus see themselves as vulnerable to those with control over the land and see landownership as perhaps one of the few remaining opportunities to have economic power over others.

§ 47.08(m) Variables: Psychological Values of Independence and Self-Reliance.

In a society that becomes more and more complex with each passing day, most of us find that we are also becoming increasingly dependent upon or servient to others for what we have and what we are able to do. Indeed, there may be little left, in many cases, about our lifestyle that we can truly control. For many, the opportunity to own land represents perhaps the last opportunity to be independent and self-sufficient (or at least go through the motions of such, for whatever psychological benefits that may yield). This psychological need to own and therefore control land is a powerful force, not always recognized by the law, that motivates many individual land use decisions. n187 To the extent to which the law does not support this perceived value, alienation and frustration with the system may result.

§ 47.08(n) Variables: The Role of Single Large Ownership Changes.

Policy decisions that are insensitive to the psychological and cultural importance of land ownership may result in concentrated ownership patterns that may become established before anything meaningful or popularly acceptable can be done about them. n188 This is because a comparatively small number of transactions between large outside landed interests can quickly overwhelm local governments and permanently change community land use patterns for the worse despite the best efforts of the communities.

This is often hidden from view because a decision by an individual farmer to convert the land to non-farm use typically does always immediately result in the sale of lots of individual parcels, one at a time, to new individual owners. Instead, the land may be sold to others, who, as investors, will then "develop" the land over a period of time and, in the process, subdivide it. This type of disposition and development of large tracts of land may overwhelm the local jurisdictions because the decision to sell and to convert occurs far in advance of the actual ultimate non-agricultural use. For example, it has been reported that the explosive urbanization of the Pasco County area of Florida, north of Tampa, resulted largely from the sale of a single large ranch. n189 The same may be said about the development of the Irvine ranch in Orange County, California. n190

FOOTNOTES:

(n1)Footnote 119. *Village of Euclid v. Ambler Realty Co, 272 U.S. 365 (1926).*

(n2)Footnote 120. *See* The World of the American Indian (Billard ed. 1974):

> In the contrast between red man and white, perhaps no concepts so differed as those concerning ownership of land. Western settlers felt little guilt about taking the soil from "savages who never worked it." But to the indian the earth was for the use of all and belonged to none. He could no more sell the land, said the Shawnee chief Tecumseh, than he could the sea or the air he breathed. But in the clash of cultures in a changing world, not always was the Indian able to sustain old concepts and honored traditions.

Id. at 16.

(n3)Footnote 121. Private property interests in land are frequently described as analogous to sticks in a bundle of sticks. This accurately suggests that the concept that ownership is actually comprised of a multiplicity of specific rights, such as the right to use, the right to enjoy, the right to develop, the right to sell and so forth. Unfortunately, in the typical discussion of such a bundle, there is much vagueness as to the precise identity of particular "sticks" and it is generally

not noted that many, if not most of them, have "strings attached" that represent some authority on the part of external parties or the state to control how the particular stick is used.

With respect to land use, the "sticks" of most concern are those that represent the rights to use the land, to dispose of the land and to profit from the development potential of the land. All of these sticks may now be significantly controlled by public authority or by interests granted to other private parties. Of concern to us here is the extent to which the public authority is likely to exercise its power to control the exercise of the particular rights.

The farmland owner seems to generally ascribe to a more conservative view of these sticks than has just been described. This is largely because of the connection between land and wealth. Indeed, land has been recognized as a primary source of wealth and those who own land are perceived to have somewhat greater opportunities to generate some kinds of wealth than others. An investment in land may be substantial and as a result, there may be great interest in the protection accorded by the legal system to that investment. The expectation of value and wealth associated with the investment in property has frequently been encouraged and protection has been justified on the rationale that such investments actually advance social well being in addition to providing financial rewards to the landowners. Indeed, the presence of "investment backed expectations" has long been identified as a constraint upon the exercise of restrictive governmental authority over private land use decision making. To the extent that such investments serve a vital public function, they may be protected, even as part of the property right itself. On the other hand, where the investment has negative public impacts, the right to make such an investment may not be protected.

(n4)Footnote 122. This is based on the old Latin maxim *sic utere tuo ut alienum non laedas* (use your own property in such a manner as not to injure that of another). *See also Village of Euclid v. Ambler Realty Co., 272 U.S. 365 (1926).*

(n5)Footnote 123. John Cribbett, Principles of the Law of Property 292 (1962). "It is clear that the urban dweller cannot expect the peace and quiet of the countryside and if he prefers the advantages of community living he must experience some of the inconvenience." *Id.*

(n6)Footnote 124. *Consider Keystone Bituminous Coal Ass'n v. DeBenedictis, 480 U.S. 470 (1978)* which involved essentially the same factual problem as the earlier Pennsylvania Coal Co. case but in which, in direct contrast to the earlier case, the court upheld the state statute that compelled the company to leave sufficient coal underground to support the surface. The distinguishing factor between the cases appears to be that in the latter case, the court considered the public interest to dominate and the private landowner was under a duty to manage the property so that the public interest could be achieved.

(n7)Footnote 125. *See* Wichita State University Center for Economic Development and Business Research (1994).

(n8)Footnote 126. For further discussion, *see* Neil Hamilton, *Tending the Seeds: The Emergence of a New Agriculture in the United States, 1 Drake J. Agric. L. 7 (1996);* Neil Hamilton, *Plowing New Ground: Emerging Issues in a Changing Agriculture, 2 Drake J. Agric. L. 181 (1997);* Comment, *The Acquisition, Abandonment, and Preservation of Rail Corridors in North Carolina: A Historical Review and Contemporary Analysis, 75 N.C. L. Rev. 1989 (1997);* Wright, *Private Rights and Public Ways: Property Disputes and Rails-to-trails in Indiana, 30 Ind. L. Rev. 723 (1997).*

(n9)Footnote 127. *Consider Just v. Marinette Co., 201 N.W.2d 761 (Wis. 1972)* where the jurisdiction denied permission to develop partly on the following rationale.: Is the ownership of a parcel of land so absolute that man can change its nature to suit any purpose? ... An owner of land has no absolute and unlimited right to change the essential natural character of his land so as to use it for a purpose for which it is unsuited in its natural state and which injures the rights of others... The changing of wetlands and swamps to the damage of the general public by upsetting the natural environment and the natural relationship is not a reasonable use of that land which is protected from police power regulation ...at 17-18, of *Wis. 2d, 201 N.W.2d at 768*

The decision in *Just v. Marinette Co., 201 N.W.2d 761 (Wis. 1972),* was followed by the court in *Zealy v. City of Waukesha, 548 N.W.2d 528 (Wis. 1996).* In another case, the United States Forest Service (USFS) adopted a ten-year plan in 1988, pursuant to the National Forest Management Act (The Act), under which 7.5 million board feet of timber would be cut each year from an area of 130,000 acres in Ohio. The timbering technique utilized for eighty percent of the harvest would be "even-aged" management, with the intention of regenerating trees of essentially the same age. However, the even-aged management would involve removing all trees in areas extending from fifteen to thirty acres. The Sierra Club opposed the plan, and appealed a summary judgment granted the USFS. The Act resulted from congressional concerns over USFS's cleancutting practices and that, if left unregulated, the USFS regarded the national forests as monocultural tree farms. The Act provides that even-aged cleancutting may only take place if "such cuts are carried out in a manner consistent with the protection of soil, watershed, fish, wildlife, recreation, and esthetic resources, and the regeneration of the timber resource." *16 U.S.C. § 1604*(g) (3) (F) (v). In this case, the Court of Appeals held that the ten-year plan violated The Act, and remanded the case to the *District Court. The Sierra Club v. Thomas, 105 F.3d 248 (6th Cir. 1997).*

The Water Bank Act, *16 U.S.C. § 1301* (1988) says that "it is in the public interest to preserve, restore, and improve the wetlands of the Nation, and thereby to conserve the surface waters, to preserve and improve habitat for migratory waterfowl and other wildlife resources, to reduce run-off, soil and wind erosion, and to contribute to flood control, to contribute to improved water quality and reduce stream sedimentation, to contribute to improved subsurface moisture, to reduce acres of new land coming into production and to retire lands now in agricultural production, to enhance the natural beauty of the landscape, and to promote comprehensive and total water management planning."

Native American Treaties and Regulations for purposes of conservation and resource preservation:

> In several cases Native Americans maintain that their usufructuary rights under a treaty with the U.S. government are violated when states attempt to conserve and preserve land and resources through regulations. In *Mille Lacs Band of Chippewa Indians v. State of Minnesota, 952 F. Supp. 1362 (D. Minn. 1997),* the District Court quoted the court in So happy v. *State of Oregon, 302 F. Supp. at 899 (D. Or. 1969),* which relied on the decisions in *Puyallup Tribe v. Department of Game, 391 U.S. 392 (1968)* and *Tulee v. Washington, 315 U.S. 681 (1942),* where the United States Supreme Court held that a "state has the authority to regulate fishing by non-Indians to achieve a wide variety of management conservation objectives, but that as to regulating the federal right of Indians to take fish at their usual and accustomed places it does not have the same latitude in prescribing the management objectives and the regulatory means of achieving them.'"

(n10)Footnote 128. *See, e.g.,* Title XII -- Conservation, Food Security Act of 1985, Pub. L. 99-198, *99 Stat. 1354,* codified in various sections of § 7 U.S.C., which requires that farmers of highly erodible land establish an approved conservation plan as a prerequisite to receiving various price supports and other government entitlements. *See also* Linda Malone, A Historical Essay on the Conservation Provisions of the 1985 Farm Bill: Sodbusting, Swampbusting, and the Conservation Reserve, *34 Kan. L. Rev. 577 (1986).*

(n11)Footnote 129. See, e.g., *Woodbury County Soil Conserv. Dist. V. Ortner, 279 N.W.2d 276 (Iowa 1979).* At least one jurisdiction has defined ownership of certain lands to include the idea of responsibility to protect against loss. Kan. Stat. Ann. § 2-2002: To conserve the natural resources of the state, and to prevent the injurious effects of the dust storms, it is hereby made the duty of the owner of real property in this state to prevent dust, plant or weed blowing therefrom, as nearly as that can be done, by planting of perennial grasses, shrubs, trees, annual or biennial crops, or by cultivation at such times and in such manner as will prevent or minimize erosion of the soil and dust, plant or weed blowing therefrom.

For further discussion, see Rudolph, M. and Gosch, A., *A Practitioner's Guide to Drafting Conservation Easements and the Tax Implications, 4 Great Plains Nat. Resources J. 143 (2000);* Lindstrom, C. Timothy, *The Tax Benefits of Conservation Easements, 79 Mich. B.J. 690 (2000).*

(n12)Footnote 130. *See. e.g.*, Jon Kusler, Our National Wetland Heritage, Environmental Law Institute (1983); Alexandra Dawson, Wetlands Regulation, 6 Zoning & Planning L. Rep. 154 (1983).

See also Zealy v. City of Waukesha, 548 N.W.2d 528 (Wis. 1996).

(n13)Footnote 131. *See* National Environmental Policy Act of 1969, *42 U.S.C. § 4321* et seq.

See also Standing of Entity, Other than Governmental or Environmental Entity, to Challenge Omission or Adequacy of Environmental Impact Statement Required by § 102(2) (C) of National Environmental Policy Act of 1969 (NEPA), *42 U.S.C. § 4332*(2)(C), *61 A.L.R. Fed. 657 (1983); Necessity and Sufficiency of Environmental Impact Statements under § 102(2)(C) of NEPA in Cases Involving Water and Waterworks Projects, 67 A.L.R Fed. 54 (1996); Necessity and Sufficiency of Environmental Impact Statements Under § 102(2) (C) of NEPA in Cases Involving Logging, Mining, and Related Projects, 74 A.L.R. Fed. 702 (1985).*

(n14)Footnote 132. United States v. Exxon, No. A91-082-CIV (D. Alaska).

(n15)Footnote 133. *See also Idaho v. M.A. Hanna Co., 819 F. Supp. 1474 (D. Idaho 1994); In Re* Gulf USA Corp., No. 93-02987 (Bankr. D. Idaho); *In re* National Gypsum Co. Bk., No. 390-37213-SAF-11 (Bankr. N.D. Texas 1992); *Idaho v. Southern Refrigerated Transp., Inc., 1991 U.S. Dist. Lexis 1869 (D. Idaho 1991).* For further discussion of the harm to natural resources, *see* Katharine K. Baker, *Consorting with Forests: Rethinking Our Relationship to Natural Resources and How We Should Value Their Loss, 22 Ecology L.Q. 677 (1995).*

See also Davidson, *State Soil Erosion Control Laws, Conservation Plans and Nonpoint Pollution, 1 Great Plains Nat. Resources J. 421 (1996); see* Comment, *The Acquisition, Abandonment, and Preservation of Rail Corridors in North Carolina: A Historical Review and Contemporary Analysis, 75 N.C. L. Rev. 1989 (1997);* Wright, *Private Rights and Public Ways: Property Disputes and Rails-to-trails in Indiana, 30 Ind. L. Rev. 723 (1997);* Caputo, *A Job Half Finished: The Clean Water Act after 25 Years,* 27 Envtl. L. Rep. 110574 (1997); Davidson, *Ecosystem Management in the Smaller Watershed, 2 Great Plains Nat. Resources J. 68 (1997);* Grossman, *Some Legal Issues Concerned with Agriculture and Environment*, Law in Motion 545 (R. Blanplain, ed., Kluwer Law Int'l, 1997); Myers, Ruark & Backiel, *Developing an Enduring American Agriculture, 12 Nat. Resources & Env't 110 (1997);* Reppar, *A Survey of Environmental Law and Agriculture: Is Interest Sprouting?* 8 Envtl. L. In N.Y. 168 (1997).

(n16)Footnote 134. *See, e.g.*, N. William Hines, *The Land Ethic and American Agriculture*, part of a symposium on Twenty-five years of Environmental Regulation, *27 Loy. L.A. L. Rev. 841 (Apr. 1994);* Marla E. Mansfield, *When "Private" Rights meet "Public" Rights: The Problems of Labeling and Regulatory Takings, 65 U. Colo. L. Rev. 193 (1994);* Richard Barnes, *The U.C.C.'s Insidious Preference for Agronomy over Ecology in Farm Lending Decisions, 64 U. Colo. L. Rev. 457 (1993);* Carol Dinkins, *Regulatory Obstacles to Development and Redevelopment in the U.S.: Wetlands and Other Essential Issues*, (ALI-ABA) (Oct. 6, 1994); Zyqmont Plater, *From the Beginning, A Fundamental Shift of Paradigms: A Theory and Short History of Environmental Law, 27 Loy. L.A. L. Rev. 891 (1994);* Thomas Fahey, Jr. & Richard T. Roznoy, *Aquifer Protection in Connecticut: Environmental Land Use Restrictions Run Deep, 68 Conn. B.J. 98 (1994);* Jeanne S. White, Beating Plowshares into Townhomes: The Loss of Farmland and Strategies for Slowing its Conversion to Nonagricultural Uses, *28 Envtl. L. 113 (1998);* Sara M. Dunn, From Flav'r Sav'r to Environmental Saver? Biotechnology and the Future of Agriculture, International Trade, and the Environment. *9 Colo. J. Int'l Envtl. L & Pol'y 145 (1998);* John Charles Kluge, Farming by the Foot: How Site-Specific Agriculture Can Reduce Nonpoint Source Water Pollution, *23 Colum. J. Envtl. L. 89 (1998);* Alia S. Miles, Searching for the Definition of "Discharge": Section 401 of the Clean Water Act, *28 Envtl. L. 191 (1998).* Gail S. Shane, "Concentrated Animal Feeding Operations: Will Increased Enforcement and More Stringent Regulations under the Clean Water Act

Adequately Protect the Public Health and Environment?" 13 No. 3 NAAG Nat'l Envtl. Enforcement J. 1 (1998).

(n17)Footnote 135. *See, e.g.*, Comprehensive Environmental Response, Compensation, and Liability Act of 1980, *42 U.S.C. §§ 9601*-9675; Clean Water Act, *33 U.S.C. §§ 1251*-1378; Clean Air Act, *42 U.S.C. §§ 7401*-7642.

See Charles W. Abdalla and John C. Becker, *Jurisdictional Boundaries*: *Who Should Make the Rules of the Regulatory Game? 3 Drake J. Agric. L. 7 (1998);* Sara M. Dunn, *From Flav'r Sav'r to Environmental Saver? Biotechnology and the Future of Agriculture, International Trade, and the Environment. 9 Colo. J. Int'l Envtl. L & Pol'y 145 (1998);* John Charles Kluge, *Farming by the Foot: How Site-specific Agriculture can Reduce Nonpoint Source Water Pollution. 23 Colum. J. Envtl. L. 89 (1998);* Alia S. Miles, *Searching for the Definition of "Discharge"*: Section 401 of the Clean Water Act, *28 Envtl. L. 191 (1998).*

See also Goddell v. Humboldt County, 575 N.W.2d 486 (Iowa 1998) (local ordinances relating to treatment of animal waste and groundwater protection held to conflict with state statutes).

For further discussion, see Rudolph, M. and Gosch, A., *A Practitioner's Guide to Drafting Conservation Easements and the Tax Implications, 4 Great Plains Nat. Resources J. 143 (2000);* Lindstrom, C. Timothy, *The Tax Benefits of Conservation Easements, 79 Mich. B.J. 690 (2000);* Boyd, James, Caballero, Kathryn, and Simpson, David R. *The Law and Economics of Habitat Conservation: Lessons from an Analysis of Easement Acquisitions. 19 Stan. Envtl. L.J. 209 (2000).*

(n18)Footnote 136. *60 Cal. Rptr. 481 (Cal. App. 1997).*

(n19)Footnote 137. Cal. Gov. Code § 65030.1.

(n20)Footnote 138. *Cal-Almond, Inc. v. United States, 30 Fed. Cl. 244 (1994).*

(n21)Footnote 139. *Dolan v. Tigard, 114 S. Ct. 2309,* (1994). For a discussion regarding Dolan v. Tigard, *see also* Michael Allan Wolf, *Fruits of the "Impenetrable Jungle:" Navigating the Boundary Between Land-Use Planning and Environmental Law, 50 Wash. U. J. Urb. & Contemp. L. 5 (1996).*

(n22)Footnote 140. *Loveladies Harbor, Inc. v. United States, 27 F.3d 1545 (Fed. Cir. 1994). See also* Tirso M. Carreja, *Adding a Statutory Stick to the Bundle of Rights: Florida's Ability to Regulate Wetlands Under Current Takings Jurisprudence and Under the Private Property Rights Protection Act of 1995*, 11 J. Land Use & Envtl. L. 423 (Spring 1996).

(n23)Footnote 141. *Concerned Area Residents for the Environment v. Southview Farm, 34 F.3d 114 (2d Cir. 1994).*

(n24)Footnote 142. *Concerned Area Residents v. Southview Farm, 843 F. Supp. 1410 (W.D. N.Y. 1993).*

(n25)Footnote 143. *Board of Trustees of Allen Township v. Chasteen, 646 N.E.2d 542 (Ohio App. 1994).*

(n26)Footnote 144. *Board of Health of Wrentham v. Hogopian, 638 N.E.2d 48 (Mass. App. 1994).*

(n27)Footnote 145. *City of Chicago v. Environmental Defense Fund, 114 S. Ct. 1488 (1994).*

(n28)Footnote 146. According to a Memo of Agreement (MOA) between the Environmental Protection Agency, the Corps of Army Engineers, the Fish and Wildlife Service and the United States Department of Agriculture's Natural Resources Conservation Service (formerly the Soil Conservation Service), a five-year review of all wetland delineations and mapping procedures is planned. A big potential loophole in the MOA is that it does not exempt wetlands converted to farm production prior to December 23, 1985. Another concern expressed by farmers who operate on lands that flood

only about once in five years since a determination could be made that the flooding has made a wetland out of an area that is usually dry in areas with normal rainfall. *The Washington Report*, Doane's Agric. Rep., January 20, 1995, at 4.

(n29)Footnote 147. *Harris v. United States, 19 F.3d 1090 (5th Cir. 1994).*

(n30)Footnote 148. *42 Fed. Reg. 26,962 (1977).*

(n31)Footnote 149. *42 Fed. Reg. 26,962 (1977).*

(n32)Footnote 150. *Broadcasters Letter*, United States Department of Agriculture, August 19, 1994, at 1.

(n33)Footnote 151. *41 F.3d 1337 (9th Cir. 1995).*

(n34)Footnote 152. United States v. Exxon, No. A91-082-CIV (D. Alaska).

(n35)Footnote 153. *See, e.g., Idaho v. M.A. Hanna Co., 819 F. Supp. 1474 (D. Idaho 1994); In Re* Gulf USA Corp., No. 93-02987 (Bankr. D. Idaho); *In re* National Gypsum Co., Bk. No. 390-37213-SAF-11 (Bankr. N.D. Texas 1992); *Idaho v. Southern Refrigerated Transp., Inc., 1991 U.S. Dist. Lexis 1869 (D. Idaho 1991).* For further discussion of the harm to natural resources, *see* Katharine K. Baker, *Consorting with Forests: Rethinking Our Relationship to Natural Resources and How We Should Value Their Loss, 22 Ecology L.Q. 677 (1995).*

(n36)Footnote 154. *92 F.3d 681 (8th Cir. 1996).*

(n37)Footnote 155. *93 F.3d 459 (8th Cir. 1996).*

(n38)Footnote 156. *118 F.3d 1233 (8th Cir. 1997).*

(n39)Footnote 157. *923 F. Supp. 1530 (M.D. Fla. 1996).*

(n40)Footnote 158. *But see United States v. Telluride Co., 884 F. Supp. 404 (D. Colo. 1995).*

(n41)Footnote 159. Civ. No, C90-713-CIV-5-BO (E.D.N. C. 1992).

(n42)Footnote 160. *951 F. Supp. 267 (D.D. C. 1997).*

(n43)Footnote 161. *See American Mining Congress v. United States Army Corps of Engineers, 962 F. Supp. 2 (D. D.C. 1997). See also United States v. Wilson, 133 F.3d 251 (4th Cir. 1997)* where the court held that the regulation definition of "waters of the United States" as used in the Clean Water Act exceeded Congressional authorization and was therefore invalid. The regulations purported to reach any dredging or filling activity in waters whose degradation "could affect" interstate commerce. The court viewed this as a limitless view, far more expansive than the standard announced in *United States v. Lopez, 514 U.S. 549, 115 S. Ct. 1624 (1995).* The court found that the waters subject to the regulation neither had a substantial effect on interstate commerce nor any sort of nexus with navigable or even interstate water.

(n44)Footnote 162. "Farmers win lawsuit against underground storage company," U.S. Water News (Feb. 1998) p 16.

For a discussion of the environmental concerns associated with emerging biotechnology, *see* Barton, *Biotechnology, the Environment, and International Agricultural Trade, 9 Geo. Int'l Envtl. L. Rev. 95 (1996);* Comment, *Guiding the Hand that Feeds: Towards Socially Optimal Appropriability in Agricultural Biotechnology, 84 Cal. L. Rev. 1395 (1996);* Comment, *The Bioprospecting Question: Should the United States Charge Biotechnology Companies for the Commercial Use of Public Wild Genetic Resources? 24 Ecology L. Q. 131 (1997);* Note, *Are Environmental Challenges to Biotechnology Too Difficult? (Stauber v. Shalala, 895 F. Supp. 1178, W.D. Wis. 1995), 4 Wis. Envtl. L.J. 41 (1997).*

For a discussion of general environmental concerns regarding agriculture, *see* Note, *The Food Quality Protection Act of 1996: Replacing Old Impracticalities With New Uncertainties in Pesticide Regulation, 75 N.C. L. Rev 1369 (1997);* Comment: *Do Isolated Wetlands Substantially Affect Interstate Commerce? 46 Am. U. L. Rev. 931 (1997);* Davidson & Weeks, *Drainage in South Dakota: Wetlands, Lucas, Watersheds, and the 1995 Drainage Legislation, 42 S. D. L. Rev. 111 (1997);* McBeth, *Wetlands Conservation and Federal Regulation: Analysis of the Food Security Act's "Swampbuster" Provisions As Amended By the Federal Agriculture Improvement and Reform Act of 1996, 21 Harv. Envtl. L. Rev. 201 (1997);* Note, *Combating the Non-Native Species Invasion of the United States, 2 Drake J. Agric. L. 259 (1997);* Note, *2001: The Sunset Year for Non-Federally Regulated Farm and Residential Underground Storage Tanks, 4 Wis. Envtl. L. J. 65 (1997);* Vaupel, *Advising Producers of Organic Crops, 2 Drake J. Agric. L. 137 (1997)* Caputo, *A Job Half Finished: The Clean Water Act after 25 Years*, 27 Envtl. L. Rep. 110574 (1997); Davidson, *Ecosystem Management in the Smaller Watershed, 2 Great Plains Nat. Resources J. 68 (1997);* Grossman, *Some Legal Issues Concerned with Agriculture and Environment*, Law in Motion 545 (R. Blanplain, ed., Kluwer Law Int'l, 1997); Myers, Ruark & Backiel, *Developing an Enduring American Agriculture, 12 Nat. Resources & Env't 110 (1997);* Reppar, *A Survey of Environmental Law and Agriculture: Is Interest Sprouting?* 8 Envtl. L. In N.Y. 168 (1997).

Liability of one landowner to another for misapplication of pesticides was addressed in 1900 *Partnership v. Bubber, 662 So. 2d 808 (La. App. 1995)* in which the court allowed recovery for damages to the cotton crop resulting from crop dusting but denied any recovery on the part of the manager for his mental anguish.

For a discussion of the taking question regarding wetland matters, *see* S. Mattox, *Regulatory Obstacles to Development and Redevelopment of Wetlands and other Essential Issues*, SG029 ALI-ABA 853 (2001).

See Arizona Cattle Growers Association v. United States Fish and Wildlife, 273 F.3d 1229 (9th Cir. 2001) challenging the extent to which the Endangered Species act precludes ranchers from grazing their livestock in certain areas of potential habitat. Judgment for ranchers was, for the most part, upheld.

(n45)Footnote 163. *See, e.g.*, Richard Dunford, *A Survey of Property Tax Relief Programs for the Retention of Agricultural Land and Open Space Lands, 15 Gonz. L. Rev. 675 (1980).*

See, e.g., Palmer v. Board of Equalization, Eagle County 957 P.2d 348 (Colo. App. 1998) (grazing of pleasure horses not agricultural use for tax purposes).

See also William L. Norton, 1 Norton Bankruptcy Law and Practice, § 3:14 (1998); Susan S. Schneider, *The Family Farmer in Bankruptcy: Recent Developments in Chapter 12, 3 Drake J. Agric. L. 161 (1998).*

For further discussion, see Rudolph, M. and Gosch, A., *A Practitioner's Guide to Drafting Conservation Easements and the Tax Implications, 4 Great Plains Nat. Resources J. 143 (2000);* Lindstrom, C. Timothy, *The Tax Benefits of Conservation Easements, 79 Mich. B.J. 690 (2000).*

(n46)Footnote 164. For a general discussion regarding the validity, construction, and effects of state statutes granting preferential tax treatment to land used for agricultural activities, *see 98 A.L.R.3d 916 (1980).*

(n47)Footnote 165. *925 P.2d 846 (Kan. App. 1996).*

(n48)Footnote 166. *933 P.2d 717 (Kan. 1997)*

(n49)Footnote 167. *See also* Comment, *Weighing the Costs and Benefits of Property Tax Exemption: Nonprofit Organization Land Conservation, 49 Me. L. Rev. 399 (1997).*

(n50)Footnote 168. *See* James Wadley, *Small Farms: The USDA, Rural Communities and Urban Pressures, 21*

Washburn L.J. 478 (1982).

Trade magazine lists of large farms suggest that the largest farms dominate the agricultural sector. Successful Farming magazine, 1716 Locust St., Des Moines, Iowa, has generated a list of what it considers the largest 400 farms in the United States. In order to be on that list, the farm had to produce at least $10 million in farm income. These 400 farms represent only .002% of the nation's two million farms yet account for approximately 15% of the total farm income. *See, e.g., 400 Farms*, Successful Farming, April 1992, at 20. Tyson Foods is listed as the largest farm with $1.7 billion in sales of agricultural products. ConAgra is second with $1.45 billion. (ConAgra is reported by Forbes to have total sales of $18.7 billion but much of that does not come from the sale of agricultural products).

(n51)Footnote 169. *See* discussion of family farm tenure, *infra*.

See also Richard F. Prim, *Minnesota's Anti-Corporate Farm Statute Revisited: Competing Visions in Agriculture, and the Legislature's Recent Attempt to Empower Minnesota Livestock Farmers, 18 Hamline L. Rev. 431 (Spring 1995);* Richard F. Prim, *Saving the Family Farm: Is Minnesota's Anti-Corporate Farm Statute the Answer?, 14 Hamline J. Pub. L. & Pol'y 203 (Fall 1993).*

See also Neil Hamilton, *Tending the Seeds: The Emergence of a New Agriculture in the United States, 1 Drake J. Agric. L. 7 (1996);* Neil Hamilton, *Plowing New Ground: Emerging Issues in a Changing Agriculture, 2 Drake J. Agric. L. 181 (1997);* Bahls, *Preservation of Family Farms-- The Way Ahead, 45 Drake L. Rev. 311 (1997);* Neil Hamilton, *Reaping What We Have Sown: Public Policy Consequences of Agricultural Industrialization and the Legal Implications of a Changing Production System, 45 Drake L. Rev. 289;* Chen & Adams, *Feudalism Unmodified: Discourses on Farms and Films, 45 Drake L. Rev. 361 (1997);* Myers, Ruark & Backiel, *Developing an Enduring American Agriculture, 12 Nat. Resources & Env't 110 (1997).*

(n52)Footnote 170. *See* Staff of Senate Comm. On Agriculture, Nutrition and Forestry, 96thCong., 2D Sess., Changes in the Family Farm Concept, Farm Structure: A Historical Perspective on Change in the Number and Size of Farms (Comm. Print 1980).

(n53)Footnote 171. *See* James Wadley, *Small Farms: The USDA, Rural Communities and Urban Pressures, 21 Washburn L.J. 478 (1982).* Thomas Jefferson suggested that three basic assumptions were implicit in the family farm concept: 1) that the farmer was basically a subsistence operator; 2) that he did his own work and made his own managerial decisions; and 3) that he owned his land in fee simple. *Id. p. 481.* It is obviously no longer necessary that a farm be self-contained and non-commercial to qualify as a family farm according to current definitions.

U.S.D.A. has taken the position that:

> The essential characteristics of a family farm are not to be found in the kind of tenure, or in the size of sales, acreage or capital investment, but in the degree to which productive effort and its reward are vested in the family.

The family farm is a primary agricultural business in which the operator is a risk-taking manager, who with his family does most of the farmwork and performs most of the managerial activities.

See Staff of Senate Comm. On Agriculture, Nutrition and Forestry, 96thCong. 2d Sess., Changes in the Family Farm Concept, Farm Structure: A historical Perspective on Change in the Number and Size of Farms (Comm. Print 1980).

(n54)Footnote 172. *See, e.g., California Agrarian Action Project, Inc. v. Regents of the Univ. of Cal., 258 Cal. Rptr. 769 (1989),* which held that government sponsored research at Land Grant Universities must be targeted to benefit family farms.

For further discussion, *see* Bahls, *Preservation of Family Farms-- The Way Ahead, 45 Drake L. Rev. 311 (1997);* Hamilton, *Reaping What We Have Sown: Public Policy Consequences of Agricultural Industrialization and the Legal Implications of a Changing Production System, 45 Drake L. Rev. 289 (1997);* Myers, Ruark & Backiel, *Developing an Enduring American Agriculture, 12 Nat. Resources & Env't 110 (1997).*

(n55)Footnote 173. *See, e.g.*, Statement by W. Goldschmidt, Family Farm Antitrust Act of1979; Hearings on S. 334 Before the Subcomm. On Antitrust, Monopoly and Business rights Of the Senate Comm. On the Judiciary, 96th Cong., 1st Sess. (1979).

(n56)Footnote 174. *See* James Wadley, *Small Farms: The USDA, Rural Communities and Urban Pressures, 21 Washburn L.J. 478 (1982).*

(n57)Footnote 175. It is estimated that for every 5 farms that go out of business, one non-farm business ceases. James Wadley, *The Future of Government Regulation of Agriculture: Biting the Hand that Feeds Us? 3 N. Ill. U. L. Rev. 299 (1983).*

(n58)Footnote 176. *Id.*

(n59)Footnote 177. These losses occur because the farm sector, even though numerically smaller than other rural sectors, serves as the primary reason for the existence of many rural communities, which exist primarily to support the agricultural activities of the farm sector. A viable farming industry requires ready and economically attractive access to a minimum amount of supporting industries such as feed mills, transportation terminals, fertilizer outlets and farm equipment dealers. If the farmer has to travel too far for these services or inputs, the cost may be prohibitive. If that minimum quantum of services isn't available, the farming operation becomes more difficult and eventually may go out of business. On the other hand, for a feed mill or implement dealer to maintain a viable operation, a minimum service area is required which can be depended upon to generate a regular and adequate amount of business. If that minimum service area isn't there, the business will either fold or relocate. Thus, farming operations create a need for the supporting industries which often supply the bulk of rural non-farm jobs in the area.

James Wadley, *Small Farms, supra* p. 498.

(n60)Footnote 178. *Id.*

(n61)Footnote 179. *Id.*

(n62)Footnote 180. *See, e.g., Transition in Rural Economy weeds out Farms,* Successful Farming, August 1992, at 66; Mindy Petrulis, *Effect of U.S. Farm Policy on Rural America*, RuraL DevelopmenT Perspectives (United States Dep't of Agric). June 1985, at 31.

(n63)Footnote 181. *See USDA Reorganization -- What it Means to the Small Farmer,* Land Loss Prevention Project News and Update, May 1994, p. 1.

For further discussion, *see* Neil Hamilton, *Tending the Seeds: The Emergence of a New Agriculture in the United States, 1 Drake J. Agric. L. 7 (1996);* Neil Hamilton, *Plowing New Ground: Emerging Issues in a Changing Agriculture, 2 Drake J. Agric. L. 181 (1997);* Bahls, *Preservation of Family Farms-- The Way Ahead, 45 Drake L. Rev. 311 (1997);* Hamilton, *Reaping What We Have Sown: Public Policy Consequences of Agricultural Industrialization and the Legal Implications of a Changing Production System, 45 Drake L. Rev. 289;* Chen & Adams, *Feudalism Unmodified: Discourses on Farms and Films, 45 Drake L. Rev. 361 (1997).*

(n64)Footnote 182. *See* discussion of urban/rural conflicts, *supra*.

(n65)Footnote 183. Frank Popper, *What's the Hidden Factor in Land Use Regulation?* Urban Land, 4 (Dec. 1978).

(n66)Footnote 184. *Id.* at 4.

(n67)Footnote 185. *Id.*

See also Myrl L. Duncan, *Property as a Public Conversation, not a Lockean Soliloquy: A Role for Intellectual and Legal History in Takings Analysis, 26 Envtl. L. 1095 (Winter 1996).*

For further discussion, *see* Joan L. McGregor, *Property Rights and Environmental Protection: Is This Land Made for You and Me?, 31 Ariz. St. L.J. 391 (1999);* Michael A. Heller, *The Boundaries of Private Property, 108 Yale L.J. 1163 (1999);* Virginia Albrecht, *Regulatory Takings and Wetlands: What are the Constitutional Limits?* "Inverse Condemnation and Related Government Liability," SB14 ALI-ABA 531 (Oct. 17, 1996); Virginia Albrecht, *Regulatory Takings Issues in the Context of Federal Wetlands, Endangered Species, and Surface Mining Regulation*, "Inverse Condemnation and Related Government Liability," C997 ALI-ABA 307 (May 5, 1995).

(n68)Footnote 186. *Id.* at 6.

For a discussion of the extent to which a farm wife may be deemed to have an ownership interest in the farm based upon her contribution to the operation of the farm, *see* Susan Schneider, *The Property Rights of Farm Wives: Who Owns the Family Farm, In Depth*, 12 Agric. Law Update Nov. 1994, at 4.

> Many instances of the land weapon being employed to harm the landless and the less landed, sometimes unintentionally, sometimes not, could be cited. These cases occur even when ownership appears to be more dispersed than it was in Rock Springs or Pasco County. The second-homes boom of the late 1960s and early 1970s, which damaged many of the rural communities it hit, is an example. So is the long-term rise of agribusiness and the resulting decline of the family farm. The sustained constriction of public access to coasts and shorelines is a particularly poignant example.

(n69)Footnote 187. *See, e.g.*, Frank Popper, *What's the Hidden Factor in Land Use Regulation?* Urb. Land 4 (Dec. 1978).

(n70)Footnote 188. *Id.* at 5. This insensitivity to ownership patterns has facetiously (but perhaps truly) been attributed to the essence of land use planning itself, which has been described as a device or artifice by which those who do not own land impose their ideas upon those who do.

(n71)Footnote 189. *Id.* at 4.

(n72)Footnote 190. *Orange, A Most California County*, 160 National Geographic 751, 752-753 (1981).

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CHAPTER 47 AGRICULTURE AND FARM LAW

6-47 Thompson on Real Property, Thomas Editions § 47.09

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§ 47.09 Governmental Authority to Regulate Agricultural Land Use.

[Go To Supp]

Government at all levels is generally considered to have the legal authority to control or limit individual land use decisions where such decisions are likely to harm the general public. This has enabled jurisdictions to limit and supervise land use decision making where the exercise of the private right is likely to result in land use patterns that are inconsistent with the larger public needs. The impact of such governmental control on private land use decision making has been extensive and significant. The legitimacy of such efforts to control particular decisions has been a much litigated matter.

§ 47.09(a) Police Power.

Most land use control laws and efforts to regulate the external impacts of land use are justified under the authority of the police power, which has been construed rather broadly to generally support a significant measure of public control over private land use decisions and activities. n191

The "police power," or the power of government to promote and protect the general welfare of the community, is considered to be an inherent power of government and the chief constitutional source of the state's power to regulate private land use. The traditionally enumerated powers embraced by the police power include the ability to protect the health, safety, morals and general welfare of the community. n192 Most courts appear to consider these several particular purposes as synonymous with the need to protect the general public interest. The exercise of the police power is limited in that it may not invade personal or property rights unnecessarily or unreasonably; it must not deny due process or equal protection of law; it must not impair obligations of contracts; it must be consistent with the general laws of the state; it must not discriminate unreasonably, arbitrarily or capriciously; and it must not constitute an unlawful delegation of legislative, executive or administrative authority.

The variety of particular interests subsumed within the notion of "public interest" assures that governments at all levels have an extensive interest in and considerable authority to deal with the adverse consequences of an individual's land use activities. This may result in an effort to mandate corrective action or to actually transfer a measure of the control over the land use decision to the public decision-making body. Whether such power may lawfully be exercised depends

upon the nature of the land, the nature and extent of the particular land uses involved, the nature of the public interest that is likely to be affected and the nature of the consequences that may result from particular land use choices.

§ 47.09(b) Social Order and Nuisance.

Historically, our system has taken the view that the use of one's property should not cause unreasonable harm to another's ability to use and enjoy land. n193 This doctrine, generally referred to as the law of nuisance, has been justified on the ground that such a rule is necessary in order to maintain public order. In most cases, the determination of whether a particular use is a nuisance turns on a "balancing of equities" in which a court seeks to determine "how much inconvenience and disturbance a land owner must endure as an incident of modern life." n194 While the importance of the law of nuisance has been diminished somewhat in recent years as greater authority over land use decision making has been exercised by legislative bodies throughout the country, the underlying principle, that one's authority to use one's own land may be adjusted to reflect or accommodate another's interest in other land, is still very much at the heart of broadened public control over land use. Further, it is under the guise of this type of concern that our system asserts an interest in and control over land use activities that have adverse consequences on lands beyond the property itself.

In a Kansas Attorney General Opinion, the question of whether corporate ownership of farmland was detrimental to the public welfare was addressed. By statute, most corporations are barred from owning an interest, directly or indirectly, in farmland. Amendments have given counties the option of permitting dairy and swine corporations to locate within the county. The issue before the Attorney General was whether the county could rescind such a grant of permission and, if the county did so, whether it would constitute a "taking" of a property interest from the corporation. The Attorney General found that the state may exercise its police power to totally prohibit persons from engaging in occupations or businesses that are detrimental to the public welfare. n195

§ 47.09(c) Power of Eminent Domain.

Under the federal n196 and most state constitutions, governmental bodies will be considered to have the power to take private property for public purposes. This power is subject to two important limitations: the property must be taken for a *public purpose* and *just compensation* must be paid. A discussion of this power is beyond the scope of this chapter and is dealt with elsewhere in this treatise. n197 It should be noted that the power of eminent domain differs significantly from the police power in that when the power of eminent domain is exercised, compensation must be paid whereas in the case of the exercise of the police power, no compensation is required. n198

§ 47.09(d) "Takings."

Property has long received the special attention of the law because of its connection to wealth. Indeed, land has been recognized as a primary source of wealth and those who own land are perceived to have somewhat greater opportunities to generate some kinds of wealth than others. An investment in land may be substantial and as a result, there may be great interest in the protection accorded by the legal system to that investment. The expectation of value and wealth associated with the investment in property has frequently been encouraged and protection has been justified on the rationale that such investments actually advance social well-being in addition to providing financial rewards to the landowners. Indeed, the presence of "investment backed expectations" has long been identified as a constraint upon the exercise of restrictive governmental authority over private land use decision making. To the extent that such investments serve a vital public function, they may be protected, even as part of the property right itself. On the other hand, where the investment has negative public impacts, the right to make such an investment may not be protected.

The interrelationship between private rights and public authority is generally adjusted through the use of the "takings" doctrine. It has been held that when public authority goes "too far" in the direction of restricting private rights, the law will consider that those rights have been taken by the public authority and the private right holder who has lost the

rights will therefore be entitled to just compensation. n199 Of course, the great difficulty with the doctrine is determining when the exercise of public authority has gone "too far." The Supreme Court has taken the position that there is no "'set formula' for determining when 'justice and fairness' require that economic injuries caused by public action be compensated by the government rather than remain disproportionately concentrated on a few persons." n200 Factors which seem to influence the determination include such matters as the extent to which the regulation (1) interferes with recognized property rights, (2) interferes with investment-backed expectations, (3) causes economic injury, (4) promotes historical, traditional or legitimate public policies and interests, (5) results in a permanent physical invasion of the property, or (6) causes the private right holder to bear a disproportionate burden in supplying a public benefit. n201

Several recent cases have been considered of interest to farmers concerned about the extent of governmental power over land use. The Federal Court of Claims has ruled n202 that provisions of market orders that required that a portion of the crop for a given year must be placed in a reserve for disposition if a non-competitive market such as school lunch programs, charities or animal feeds did not deprive the farmers of any property interest because the farmers had failed to show that they had a proprietary right to dispose of their crop free of regulatory controls.

In contrast, n203 the United States Supreme Court held that the City had exceeded its authority when it required the landowner to dedicate a portion of her property to greenway purposes as a precondition to receiving City permission to redevelop her property. The court held that the City must show an "essential nexus" between the legitimate public interest and the permit condition and then satisfy that the interest taken from the landowner was "roughly proportional" to the benefit to be achieved. This, the court said, required that the city make some sort of individualized determination that the required dedication was related both in nature and extent to the impact of the proposed development.

In another case, n204 the court held that the denial of a permit to dredge and fill areas designated as wetlands constituted a "taking" because it deprived the landowner of a property interest in that land where the effect of the denial was to render that land useless for any economically viable purpose. The court held that it was proper to look at the impact of the denial of the application on the specific land that was the object of the application to determine whether the denial deprived the landowner of *all* use of the property rather than to look to the entire tract of land owned by the landowner. In this case, the landowner owned approximately 250 acres but the permit application was for only 12.5 acres, which, because of the denial of the permit, could not be used for any meaningful economic activity.

The law of "takings" has been a fruitful one for commentators. For further discussion, there are many articles one may wish to consult. n205

The question whether a "taking" occurred as the result of changes in county ordinances affecting corporate swine farming has been addressed in an opinion by the Kansas Attorney General. By statute, most corporations are barred from owning an interest, directly or indirectly, in farmland. Amendments have given counties the option of permitting dairy and swine corporations to locate within the county. The question at issue was whether a county could rescind such a grant of permission and, if the county did so, whether it would constitute a "taking" of a property interest from the corporation. The Attorney General found that the state may exercise its police power to totally prohibit persons from engaging in occupations or businesses that are detrimental to the public welfare. Citing Mugler v. Kansas, n206 the Attorney General found that the adoption of the restrictions against corporations was well within the bounds of law and that "there was no vested right in carrying on a business that was legislatively declared detrimental to the public, and that the property owner was not entitled to compensation or a stay on the law's application." n207 Accordingly, the rescission of permission would not necessarily result in a "taking" of property even where the corporation had begun activities within the county. Specifically, the county was not required to "grandfather in" those operations since, but for the permission of the county, their existence was considered detrimental to the public welfare. n208

In Kim v. City of New York, n209 the court found there was no taking when the city enforced an obligation of a property owner to maintain lateral support of public highways. In this case, the city had changed the "legal grade" of the

roadway in 1978, prior to the purchase of the property by the plaintiff. Nothing was done to change the actual grade of the road until 1990 when the city raised the road by 5 feet and placed side fill on 2400 square feet of plaintiff's property. The court, with a strong dissent, found no taking on the ground that the common law obligation to maintain lateral support of public highways was the prevailing rule of the state at the time the property owners acquired the land. Any "taking" would have occurred at the time the legal grade was changed and the right to seek compensation would have belonged to a predecessor in interest rather than the plaintiff. The court considered the impact of the grade change to have been reflected in a reduction in price that the plaintiff should have enjoyed when the land was purchased. n210

Several cases have explored the impact of existing environmental regulations as takings. In Gazza v. N.Y.S. Dep't of Environmental Conservation, n211 the court held that where a parcel is already subject to state environmental regulations at the time of its purchase, the state's decision not to grant a variance to those restrictions does not constitute a "taking."

In Basile v. Town of Southampton, n212 the court held that when the parcel is already subject to environmental regulations and the state subsequently condemns the parcel, the compensation due to the owner is equal to the value of the land subject to the restrictions. In Matter of Anello v. Bd. Of Zoning Appeals, n213 the court held that where the landowner was denied a variance to the land use regulations that were enacted prior to the acquisition of the property, the original enactment of those regulations will not be considered a "taking."

In Suitum v. Tahoe Regional Planning Agency, n214 the Court dealt with a claim that the denial of permission to develop the property constituted a taking. The Regional Authority argued that the landowner was entitled to valuable "Transferable Development Rights" (TDR's) and until those were exercised, it could not be determined whether there was an "taking" of property in violation of constitutional protections. The Court held that the matter was ripe for determination notwithstanding that she had not attempted to sell her TDR's and remanded the case for a "takings" determination. The Court argued that the issues associated with the taking claim and uncertainty of the value of the TDR's were susceptible of resolution. The agency had made a final determination because it had found that her land lies entirely within the zone in which development is not permitted. Any uncertainty as to the value of the TDR's was considered a simple issue of market determinations which courts routinely make. As a result, the matter was remanded. n215

§ 47.09(e) Specific Regulatory Objectives: Control Over the Geographical Distribution on Land Use Patterns.

As our system has come to recognize greater authority to intervene in what historically might have been viewed as private land use decisions in order to promote particular public interests, it has become possible to identify a number of objectives that are typically sought as this control tends to be exercised.

The law generally recognizes that considerable control may be exercised by the public authority over the overall distribution of land use patterns within the jurisdiction. n216 While it may not be possible to eliminate entirely particular uses that may be deemed undesirable, significant control over the location of uses and the density or intensity of such uses seems to be clearly and legitimately within the scope of police power regulation.

Control over land use patterns may be either direct or indirect. Zoning and subdivision control laws, for example, deal directly with the question of use location by carving the jurisdiction into use districts and then determining which uses may lawfully occur in each particular district. Comprehensive land use plans similarly address the issue of overall or area-wide use distribution and density. Growth management planning indirectly influences patterns by regulating how and at what rate municipalities or towns grow and develop. Sign control ordinances and architectural design review ordinances similarly can indirectly influence land use patterns as a result of their focus on the aesthetic character of a jurisdiction. Likewise, historic preservation acts and ordinances more directly influence use patterns as a result of their purpose to maintain socially significant historic areas or structures.

The control over land use patterns can also be somewhat subtle. A particular jurisdiction may exercise considerable control over the actual distribution of particular land uses within the jurisdiction simply by determining and designating which uses are appropriate for particular areas. For example, if a specific use, such as residential use, is designated as appropriate for a particular area, tremendous pressure may be brought to bear upon nonconforming uses, such as agricultural uses, to ultimately leave the area. Pressure results from the diminished likelihood that new farms will be created in the area in the future. Pressure also results from limitations on the extent to which the existing farms can expand or change. Finally pressure comes from the fact that some farmers will decide to change uses that become the preferred use for the area (residential land uses), which will put economic pressure on the remaining farms to likewise change to more protected uses. Within a period of time, it is quite likely that the use pattern of the area will conform to the use designation -- without the need to mandate that any particular land owner specifically alter how the land is used!

Efforts to control land use patterns tend be more direct where the offending existing use or the proposed use is considered undesirable, or the consequences thereof threaten the health or safety interests of the jurisdiction. In these situations, it is common to either directly enjoin the undesirable use or to require that special permission be secured in order to commence or continue the use.

§ 47.09(f) Specific Regulatory Objectives: Protection of Particular Uses.

While all different kinds of land uses may be considered important and enrich our quality of life in their own unique ways, from time to time there has been great fascination with certain particular uses. Single family residential uses, for example, have long been considered the "highest" use under most traditional zoning schemes. These uses are given developmental priority under such schemes and tend to be sheltered in their particular zoning districts from uses that are considered incompatible. Likewise, unspoiled wilderness areas have become a national treasure and are guarded from the adverse consequences of popular use and enjoyment. n217 Similarly, historic districts have been created in a number of cities and have become a mecca of sorts to those who want to explore first hand their historic roots and heritage. n218

The long-term availability of land for farming use is perhaps one of the more surprising land use issues that has captured national attention. Serious concern has been expressed that this kind of land use has been adversely pressured by incompatible urban uses nearly to a point of threatening our national welfare. While this may be disputed as a matter of fact, a tremendous number of jurisdictions have adopted a very large variety of land use planning or control measures that are intended to address the problem of farmland conversion. n219 These approaches vary from designating particular areas of the jurisdiction as set aside exclusively for agricultural use to allowing the public decision-making body to acquire from the landowner the right to develop the property. Even at the federal level, the consideration of the adverse impacts on farmland use has become an important part of federal land use planning and decision making. n220 Many of these efforts are discussed below in more detail.

§ 47.09(g) Specific Regulatory Objectives: Prevention of Harmful Uses.

Historically, the law of nuisance has allowed a landowner to enjoin others from using their land in ways that harmed the landowner in the use and enjoyment of land. n221 The notion of public nuisance extends this concept to protect the public at large. n222 It is usually not disputed that government has the power to prevent the harmful use of the land but it was somewhat unsettled until recently whether it must pay compensation if it does. n223 Prior to the decision in *Lucas v. South Carolina Coastal Council*, n224 it was argued that if the harm resulted from a nuisance, compensation need not be paid. This view found support in a line of Supreme Court decisions. n225 Standing in opposition was the possibly more expansive view found in Justice Brennan's observation in a footnote in *Penn Central Transportation Co. v. New York* n226 that the validity of the regulation depended more on the reasonableness of the relation between the policy and the public benefits to be derived than it did on the "noxious quality of the prohibited uses." The court in *Lucas* clearly rejected the argument that governments may avoid the need to compensate simply because the regulated

use constitutes a nuisance.

There are still several unanswered questions are at the core of this debate. Can a particular use cause harm to the public without, at the same time, constituting a nuisance? If harm is required, and is defined as broader than nuisance, what kind of "harm" is required and how much "harm" must there be? Must the public pay for every benefit it receives from particularly ordained land uses that do not cause nuisance-type harms if they result in some restriction or limitation on the use of the land? Reason would suggest the need for some flexibility in the law here on behalf of government which would suggest that in perhaps more cases than not, government will be permitted to regulate nuisances without the burden of just compensation. Likewise, the growing sense that ownership serves a social as well as a private function suggests that governmental power may generally be exercised in pro-social ways. n227

§ 47.09(h) Impacts on Agricultural Land.

The effect of considerable governmental authority over land use decision making has the potential for an extensive and varied impact upon individual landowners. Agriculture may be both the beneficiary and the object of much of this regulation -- largely because of external consequences of particular land use activities such as the farming of environmentally sensitive lands or the confined raising of animals. Some of these specific impacts will be discussed in more detail below in this chapter.

Although government has a right and responsibility to intervene in private land use decision making, in a real and practical sense, the intrusion into the private right is most intense where the harm to the public interest is perceived to be the greatest. Agricultural land use therefore tends to be largely unaffected except where environmental or intergenerational values are involved (such as with conservation or resource preservation issues) or where food and fiber production activities raise concerns relative to the health, safety or welfare of the community at large.

Doubtless, some regulatory authority may be directed toward controlling the availability of agricultural land for alternative uses. A jurisdiction may effectively influence or control individual land use decisions simply by confining the exercise of the right to a specific choice array that is incorporated into its land use regulation program. This may confine agricultural uses to particular geographic areas within the jurisdiction and may have the effect of eliminating entirely the opportunity to make an undesirable land use choice as well as the effect of encouraging choices which the system approves.

Other regulation may range from officially encouraging or actually permitting a particular desired use, on the one hand, to limiting its extent or intensity or to explicitly prohibiting it altogether on the other. This may be the case, for example, where the agricultural land owner proposed to locate a concentrated animal feeding lot near land used for residential purposes.

In some cases, jurisdictional control over land use may actually enhance the use opportunities of particular landowners. This may be done by protecting particular use choices with which the landowner may be in agreement, such as the designation of the area as an agricultural use district. Conversely, if the contemplated use is inconsistent with existing or contemplated patterns, the extent of governmental control recognized in our system may be sufficient to prevent the proposed use from being established. This would occur, perhaps, where an individual wishes to keep horses for recreational use within a residential area against the wishes of the neighbors.

The police power is generally considered sufficient to prevent the establishment of uses that cause harm to others or to enjoin uses which interfere unreasonably with the use and enjoyment of property by others. n228 This may be the case where the farmland is heavily sprayed by aerial application of pesticides and there is a significant risk that the spray will drift over non-agricultural lands or will cause harm to other agricultural lands. On the other hand, because the system still limits the extent to which private property rights may be "taken" to secure a public benefit, existing uses which are considered undesirable but are otherwise not harmful to the public health, safety, welfare or morals of the community

may be protected. This may allow for the continuation of long-standing agricultural uses that are no longer compatible with the rest of the neighborhood but are not of a particularly offensive nature. Nevertheless, it still may be possible to impose limits on the extent to which the uses may change in nature or intensity or to require that the uses be terminated after a reasonable amortization period. n229

The ability to control also includes the ability to supervise and, in many cases, government will be able administratively to affect the manner in which the use is undertaken or the conditions under which the use occurs. For example, before particular uses, such as concentrated animal feeding operations, may be undertaken, it may be necessary to secure specific permission from the jurisdiction to undertake the use. Similarly, it may be necessary to demonstrate compliance with particular use criteria, such as the existence of an approved conservation plan, before the use may be started.

It may also be that while the use itself is not prohibited or regulated, the landowner may be held accountable for the adverse consequences of the use. This is the case, for example, as a result of federal hazardous waste statutes which impose upon the landowner the liability for costs associated with remedial actions taken to correct damage or threatened damage to the environment. n230

§ 47.09(i) Agricultural Land as the Environmental Battleground.

One of the notable developments in the history of this nation is that it has become a highly urbanized society. While farmers and ranchers own and use the bulk of the nation's private land, they have clearly become a political and cultural minority. Given the "one man-one vote" rule of political representation, the position of farmers and ranchers today is such that their only meaningful opportunity to influence policy decision making tends to be confined largely to lobbying, rather than to any effective representational process. Few would question that in our republican form of government, the wishes of the majority and the concerns of society as a whole should dominate. Few would also question the need of the majority to be sensitive to the needs of minorities and not act in an oppressive fashion. Unfortunately, there appears to be a growing concern among farm and ranch landowners that the relationship between them and the urban majority is becoming more custodial than cooperative, and that the urban interests are pursuing an agenda regarding the use of rural land that is designed to shape rural land use patterns and activity to fit an urban vision of what the countryside should be and be like. n231

Much has been written regarding the impacts of agricultural land use upon environmental concerns. n232

This view seems to be giving rise to a feeling that government itself has assumed a discernible urban orientation that is insensitive to their interests and concerns. n233 With respect to the growing national concern over the environment, this orientation seems to suggest a significant shifting of control over individual land use decisions and practices away from the farm and ranch landowner to urban dominated or controlled public decision making bodies. The consequences of such a shift, they complain, is that they are being deprived of some of the most meaningful attributes of property ownership itself.

Most of the recent concern regarding environmental issues and land use seems to be focused on the impact of land use activity on environmentally sensitive lands. Rural lands are a logical target for such concerns for a variety of reasons. First, urban conversion pressures are likely to change the land from "natural" to a more intensive use, and therefore to a use that is perceived as more environmentally degrading. Second, a number of particular agricultural land use practices, such as the application of pesticides or herbicides or simply the plowing of the land for crop production are seen as likely to cause irreparable damage to natural resources such as the water or wetlands. Finally, since lands which are used for agricultural purposes tend to be seen as having been less corrupted by environmentally threatening activity, they tend to be perceived as being closer to their natural state and as such, the most susceptible of protection and more likely to be "saved" from future harm if properly regulated. All of these factors appear to persuade many agricultural landowners that their lands are the primary target of such regulations.

It would generally not seem to be the case that agricultural landowners disagree with the objectives of most of the current efforts to restrict land use for purposes of environmental protection. The problem with both environmental and land use regulations for the most part seems to turn on a question of the particular values that drive the regulations. Both land use regulation and environmental controls tend to be areas of the law which are driven by values which are not universally shared. While it is possible to point to a number of specific health or safety threats associated with environmentally sensitive land use practices, the ultimate objectives of a particular regulatory approach may be nothing more than a concern with aesthetics or perhaps social convenience. Many agricultural landowners, like any other minority, fear that the values that underwrite regulatory approaches will be the values of the majority rather than their own.

There also appears to be a widespread perception that most restrictions of either an environmental or land use nature operate on the assumption that it is entirely socially and culturally acceptable for urban interests to shape rural areas essentially to fit the urban vision of what they should be like without regard to the wishes or needs of the rural farm and ranch land owners. Because of concerns with environmental issues and with the need to make sure societal interests in land use patterns are achieved, agricultural landowners increasingly have been expressing concern that since their lands tend to be the ones that can be regulated with the least amount of hassle from other urban concerns, the focus of most environmental and land use programs will be on rural lands.

In some respects, this viewpoint has a ring of truth to it. The current controversy over "wetlands" reveals that concern is almost exclusively focused on rural areas. Likewise, the soil and water conservation efforts of the nation have historically been targeted toward rural areas.

Many on the urban side would argue that such an approach makes eminent good sense since rural lands are not yet "developed" and they are therefore more amenable to sound management if it is imposed now. Similarly, many would argue that rural lands tend to be "unspoiled," they can be shielded from the harmful consequences of developmental activity only if they are properly managed now.

It is unlikely that rural, and particularly agricultural areas will cease to be the primary targets for land use restriction that is primarily designed to protect against environmental harms. It is also unlikely that agricultural landowners will cease to perceive these regulations as unwarranted intrusions and as further evidence of urban domination of the land use planning and control agenda. It is also unlikely that the law will be particularly sympathetic to the concerns of the agricultural landowners.

In the case of Board of Health of Wrentham v. Hagopian, n234 a Massachusetts Appeals Court held that razed chicken coops constituted a solid waste disposal site, under Mass. Gen. L. ch. 111, § 150A, as a "facility." In this case, the farmer had demolished two four-story chicken coops on his land but had not removed approximately 900 cubic yards of the waste.

In a similar vein, the court in Concerned Area Residents for the Environment v. Southview Farm, n235 considered a liquid manure spreading operation within the meaning of a "point source" of pollution under the Clean Water Act. n236 The manure was applied through a center pivot irrigation system, a hard hose that could spray manure 150 feet, and conventional manure spreaders pulled by tractors. The problem was that manure was entering streams as runoff from the fields.

A concern in Kansas has been the impact of the Kansas Air Quality Control Act n237 on open burning of pasturelands. Historically, farmers and ranchers have burned the prairie as a means of establishing new grass stands for their cattle and to recycle plant nutrients. Indeed, courts in that jurisdiction have long recognized that farmers have the right to conduct open burning on their premises for agricultural purposes. n238 Under the Kansas Air Quality Control Act, the Secretary of the Kansas Department of Health and Environment (K.D.H.E.) promulgated regulations that prohibit the open burning of wastes or any item for the purpose of salvage or the burning of vegetation, structures or other

combustible materials. n239 The regulations exempt agricultural burning for crop management purposes from the general proscription against open burning, though there are important restrictions regarding the time of day and of the year in which a particular parcel may be burned, and prohibit burning on cloudy or foggy days. n240 The validity of these regulations was challenged and upheld in an administrative proceeding. n241 Where burning may cause harm to others, courts have long held that the standard of care to which the farmer must adhere is that of reasonable care under all the circumstances. n242 Some tax changes seem designed to reward farmers and ranchers for making some decisions regarding conservation activities on their land, particularly where that is undertaken through conservation easements. I.R.C. § 170 now treats "qualified conservation contributions" as charitable contributions for which the donor is allowed to take a deduction for income tax purposes. n243 Similarly, Section 508 of the Taxpayer Relief Act allows the executor of the estate of a farm decedent dying after Dec. 31, 1997, to exclude from the decedent's gross estate up to 40% of the value of land subject to qualified conservation easements. n244 Despite the increase in measures adopted to protect the environment, there seems to be some reluctance on the part of courts to consider these laws as modifying the law of nuisance. In Superior Farm Management, L.L.C. v. Montgomery, n245 the court held the proposed hog breeding operation to be a nuisance. It was argued that the interest of those adversely affected had been properly addressed in the environmental laws of the jurisdiction. The court responded by noting that "such laws do not attempt to alter general rules of law with regard to private nuisances and will not aid or impede a private individual in an action to enjoin a nuisance." n246 The rationale for this view is that "to constitute a nuisance, it is not necessary that the noxious trade or business should endanger the health of the neighborhood. It is sufficient if it produces that which is offensive to the senses and which renders the enjoyment of life and property uncomfortable." n247

FOOTNOTES:

(n1)Footnote 191. *See Woodbury County Soil Conserv. Dist. v. Ortner, 279 N.W.2d 276 (Iowa 1979); Graham v. Estuary Props., Inc., 339 So. 2d 1374 (Fla. 1981), cert. denied, 454 U.S. 1083 (1981).*

See also Northwestern Selecta, Inc. v. Munoz, 105 F. Supp. 2d 223 (D. Puerto Rico 2000).

For further discussion, see Centner, T., *Anti-Nuisance Legislation: Can the Derogation of Common Law Nuisance be a Taking? 30 Envtl. L. Rep. 10253 (2000);* Lauck, J., *After Deregulation: Constructing Agricultural Policy in the Age of "Freedom to Farm Act." 5 Drake J. Agric.L. 3 (2000).*

In *West Chester Township Zoning v. Fromm, 762 N.E.2d 400 (Ohio App. 2001)* the court upheld the conviction of a homeowner regarding a fence that was erected in violation of the zoning ordinance. The landowner's argument was that the fence restrictions did not have any meaningful relation to health, safety and moral concerns.

For further discussion, see B. Schwartz, *Development Agreements: Contracting for Vested Rights, 28 B. C. Envtl. Aff. L. Rev. 719 (2001);* N. Lee, *McQueen v. South Carolina Coastal Council: Misinterpreting Lucas, 52 S. C. L. R. 815 (2001);* R. Damstra, *Don't Fence Us Out: The Municipal Power to Ban Gated Communities and the Federal Takings Clause, 35 Val. U. L. R. 525 (2001),* M. Tunick, *Constitutional Protections of Private Property: Decoupling the Takings and Due Process Clauses, 3 U. Pa. J. Const. L. 885 (2001);* J. Stanley, *Keeping Big Brother Out of Our Backyard: Regulatory Takings as Defined in International Law and Compared to American Fifth Amendment Jurisprudence, 15 Emory Int'l L. Rev. 2001);* J. Deprez, *Risk, Uncertainty, and Nonergodicity in the Determination of Investment-Backed Expectations: A Post Keynesian Alternative to Posnerian Doctrine in the Analysis of Regulatory Takings, 34 Loy. L.A. L. Rev. 1221 (2001).*

(n2)Footnote 192. *Nectow v. City of Cambridge, 277 U.S. 183 (1928).*

(n3)Footnote 193. This is based on the old Latin maxim *sic utere tuo ut alienum non laedas* (use your own property in such a manner as not to injure that of another. *See also Village of Euclid v. Ambler Realty Co., 272 U.S. 365 (1926).*

(n4)Footnote 194. John Cribbet, Principles in the Law of Property 292 (1962). "It is clear that the urban dweller cannot expect the peace and quiet of the countryside and if he prefers the advantages of community living he must experience some of the inconvenience." *Id.*

See also In re Nehemiah Associates, Inc., 719 A.2d 34 (Vt. 1998) (involving inclusion of a waiver of a right to sue farmers over nuisance in subdivision deeds and requirement that some land be retained in agricultural use as open, cleared, uncluttered and unencumbered land); *Goddell v. Humboldt County, 575 N.W.2d 486 (Iowa 1998)* (local ordinances relating to treatment of animal waste and groundwater protection held to conflict with state statutes).

For further discussion, *see* Charles W. Abdalla and John C. Becker, *Jurisdictional Boundaries: Who Should Make the Rules of the Regulatory Game? 3 Drake J. Agric. L. 7 (1998). See also Superior Farm Management, L.L.C. v. Montgomery, 513 S.E. 2d 215 (Ga. 1999),* holding a proposed hog breeding facility to be a nuisance under the particular circumstances of the case.

For further discussion of environmental issues in agriculture, *see* Note, *Fighting Corporate Pigs: Citizen Action and Feedlot Regulation in Minnesota, 83 Minn. L. Rev. 1893 (1999);* Note, *Cattle Ranch with Park Rangers: The Battle for a Tallgrass Prairie National Park in Kansas, 18 Stan. Envtl. L.J. 211 (1999);* Barton H. Thompson, *People or Prairie Chickens: The Uncertain Search for Optimal Biodiversity, 51 Stan. L. Rev. 1127 (1999);* Comment, *Old McDonald had a Government-Regulated-Confined-Swine-Operation; A Substitute for H.B. 2950, 38 Washburn L.J. 655 (1999);* Johnathan H. Adler, *Wetlands, Waterfowl, and the Menace of Mr. Wilson: Commerce Clause Jurisprudence and the Limits of Federal Wetland Protection, 29 Envtl. L. 1 (1999);* Comment, *The National Grasslands and Disappearing Biodiversity: Can the Prairie Dog Save Us from An Ecological Desert? 29 Envtl. L. 213 (1999);* Jan Lewandrowski and Kevin Ingram, *Policy Considerations for Increasing Compatibilities between Agriculture and Wildlife*, 39 Nat. Resources J. 229 (1999); David J. Akin, *Balancing Endangered Species Protection and Irrigation Water Rights: The Platte River Cooperative Agreement, 3 Great Plains Nat. Resources J. 119 (1999);* Rebecca Fink, *We're From the Government and We're Here to Help: Farmers' and Ranchers' Reliance on Voluntary Governmental Programs May Open the Door to Governmental Control of Private Property through Expanding Scope of Wetlands Regulation*, 30 Texas Tech. L Rev. 1157 (1999); Joan L. McGregor, *Property Rights and Environmental Protection: Is This Land Made for You and Me?, 31 Ariz. ST. L.J. 391 (1999);* Michael A. Heller, *The Boundaries of Private Property, 108 Yale L.J. 1163 (1999);* Virginia Albrecht, *Regulatory Takings and Wetlands: What are the Constitutional Limits?* "Inverse Condemnation and Related Government Liability," SB14 ALI-ABA 531 (Oct. 17, 1996); Virginia Albrecht, *Regulatory Takings Issues in the Context of Federal Wetlands, Endangered Species, and Surface Mining Regulation*, "Inverse Condemnation and Related Government Liability," C997 ALI-ABA 307 (May 5, 1995).

(n5)Footnote 195. *Citing Mugler v. Kansas, 123 U.S. 623 (1887),* the Attorney General found that the adoption of the restrictions against corporations was well within the bounds of law and that "there was no vested right in carrying on a business that was legislatively declared detrimental to the public, and that the property owner was not entitled to compensation or a stay on the law's application." Att'y Gen. Op. 96-21 (March 5, 1996). This view was reaffirmed in Att'y Gen. Op. 97-92 (Sept. 15, 1997).

(n6)Footnote 196. *See* U.S. Const. amend. V.

(n7)Footnote 197. *See* ch. 80, *infra*.

(n8)Footnote 198. *See Candlestick Props., Inc. v. San Francisco Bay Conserv. & Dev. Comm'n, 89 Cal. Rptr. 897 (1970):*

Under the power of eminent domain property cannot be taken for public use without just compensation. However, under the police power property is not taken for use by the public; its use by private persons is regulated or prohibited where necessary for the public welfare.

For further discussion, *see* Joan L. McGregor, *Property Rights and Environmental Protection: Is This Land Made for You and Me?, 31 Ariz. St. L.J. 391 (1999);* Michael A. Heller, *The Boundaries of Private Property, 108 Yale L.J. 1163 (1999);* Virginia Albrecht, *Regulatory Takings and Wetlands: What are the Constitutional Limits?* "Inverse Condemnation and Related Government Liability," SB14 ALI-ABA 531 (Oct. 17, 1996); Virginia Albrecht, *Regulatory Takings Issues in the Context of Federal Wetlands, Endangered Species, and Surface Mining Regulation,* "Inverse Condemnation and Related Government Liability," C997 ALI-ABA 307 (May 5, 1995).

See also Centre Lime and Stone Co., Inc. v. Spring Township Board of Supervisors, 798 A.2d 1291 (Pa. Commw. 2001) dealing with the exclusion of quarrying from a county.

See In the interest of *Forrester, 773 A.2d 219 (Pa. Commw. 2001),* where the court held that protected farmland could be condemned for purposes of granting an easement to a landlocked landowner. In *Hallauer v. Spectrum Properties, 18 P. 3d 540 (Wash. 2001),* the court held that the standard of proof to support the condemnation of an easement to transport water for a beneficial use is not as high as that required for the condemnation of an easement of necessity.

Evidence of environmental contamination and remediation costs was held relevant to the determination of compensation in *Northeast Ct. Economic Alliance, Inc. v. ATC Partnership, 776 A. 2d 1068 (Conn. 2001).* Valuation was also an issue in *United States v. Certain Land Situated in the City of Detroit, 148 F. Supp. 2d 863 (E.D. Mich. 2001).* The specific question was the extent to which governmental discretionary power over how the property was used could bear on valuation of the property. The court rejected an argument that the fact that only certain properties could be used in the way this particular property was being used enhanced its value and avoided normal valuation.

For further discussion, see B. Schwartz, *Development Agreements: Contracting for Vested Rights, 28 B. C. Envtl. Aff. L. Rev. 719 (2001);* N. Lee, *McQueen v. South Carolina Coastal Council: Misinterpreting Lucas 52 S. C. L. R. 815 (2001);* R. Damstra, *Don't Fence Us Out: The Municipal Power to Ban Gated Communities and the Federal Takings Clause, 35 Val. U. L. R. 525 (2001),* M. Tunick, *Constitutional Protections of Private Property: Decoupling the Takings and Due Process Clauses, 3 U. Pa. J. Const. L. 885 (2001);* J. Stanley, *Keeping Big Brother Out of Our Backyard: Regulatory Takings as Defined in International Law and Compared to American Fifth Amendment Jurisprudence, 15 Emory Int'l L. Rev. 2001);* J. Deprez, *Risk, Uncertainty, and Nonergodicity in the Determination of Investment-Backed Expectations: A Post Keynesian Alternative to Posnerian Doctrine in the Analysis of Regulatory Takings, 34 Loy. L.A. L. Rev. 1221 (2001).*

(n9)Footnote 199. *Pennsylvania Coal Co. v. Mahon, 260 U.S. 349 (1922).*

In January, 2000, the Seventh Circuit decided a case that has tremendous significance regarding the liability of the federal government for "takings" of property under federal farm programs. In *United States v. Dierckman, 201 F.3d 915 (2000),* the court considered a challenge to an overpayment determination by the Department of Agriculture. It was claimed that the regulation of certain activity affecting wetlands violated the landowner's due process rights because the land to be regulated did not fall within the scope of interstate commerce. The Court held that the Food Security Act was not enacted under the auspices of the Commerce Clause of the Constitution but rather under the spending power. It held that the government is therefore not limited by the enumeration of Congressional powers in Article 1, Section 8 of the Constitution. As a result, the government may engage in indirect regulation of matters that would not fall within the scope of interstate commerce.

See also Bradshaw v. United States, 47 Ct. Cl. 549 (2000), holding that neither the grazing permit nor the historical grazing preferences constituted property under the Fifth Amendment. Likewise, the failure of the government to prevent feral horses from causing damage to the ranch and forage did not result in a taking.

For further discussion, see Centner, T., *Anti-Nuisance Legislation: Can the Derogation of Common Law Nuisance be a Taking? 30 Envtl. L. Rep. 10253 (2000);* Kendall, Douglas T. *Preserving South Carolina's Beaches: The Role of*

Local Planning in Managing Growth in Coastal South Carolina. 1 S.C. Envtl L. J. 61 (2000).

(n10)Footnote 200. *Penn Cent. Transp. Co. v. New York City, 438 U.S. 104, 125 (1978).*

(n11)Footnote 201. *Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419 (1982); Penn Cent. Transp. Co. v. New York City, 438 U.S. 104 (1978); United States v. Willow River Power Co., 324 U.S. 499 (1945).*

For further discussion, *see* Lawrence Watters, *The Taking Issue in the Ninth Circuit after Lucas, 24 Envtl. L. 1185 (July 1994);* David Callies, *The Quiet Revolution Revisited: A Quarter Century of Progress,* 26 Urb. Law., Spring 1994, at 197; James Wickersham, *The Quiet Revolution Continues: Emerging New Model for State Growth Management Statutes, 18 Harv. Envtl. L. Rev. 345 (1994);* Joan L. McGregor, *Property Rights and Environmental Protection: Is This Land Made for You and Me?, 31 Ariz. ST. L.J. 391 (1999);* Michael A. Heller *The Boundaries of Private Property, 108 Yale L.J. 1163 (1999);* Peabody, Payson R., *Will the 104th Congress Revolutionize Fifth Amendment Takings Law? An analysis of the Private Property Protection Act of 1995,* 5 FEDCBJ 1999 (1995); Virginia Albrecht, *Regulatory Takings and Wetlands: What are the Constitutional Limits? "Inverse Condemnation and Related Government Liability,"* SB14 ALI-ABA 531 (Oct. 17, 1996); Virginia Albrecht, *Regulatory Takings Issues in the Context of Federal Wetlands, Endangered Species, and Surface Mining Regulation, "Inverse Condemnation and Related Government Liability,"* C997 ALI-ABA 307 (May 5, 1995).

In *Palazzolo v. Rhode Island, 121 S. Ct. 248 (2001),* the United States Supreme Court held that the fact that the land was acquired after the effective date of the regulations at issue did not bar regulatory taking claims. In contrast, the court in the State of California, in *County of San Luis Obispo v. Superior Court, 108 Cal. Rptr, 2d 753 (Cal. App. 2001),* held that after a deed of trust divested a landowner of any interest in the property and a foreclosure sale purchaser settled the dispute with the county, the landowner was held to be without standing to challenge the regulations as causing a taking.

In *Klump v. United States, 50 Fed. Cl. 268 (2001),* the court rejected a taking claim regarding water rights that were enjoyed by the cattle rancher. The rights were deemed lost when the grazing rights were cancelled. The Government petitioned the State to transfer the water rights to it. The Court held that there could be no taking if the government was not acting in its sovereign capacity. Here the Government merely petitioned as an adverse title claimant rather than acting in any sovereign capacity.

In *MC Associates v. Town of Cape Elizabeth, 773 A. 2d 439 (Me. 2001),* the court held that state and federal takings claims do not need to be brought in separate proceedings. Nevertheless, the plaintiff failed to prove that the wetlands at issue were buildable before the enactment of the ordinance in question.

For a discussion of the taking question regarding wetland matters, see S. Mattox, *Regulatory Obstacles to Development and Redevelopment of Wetlands and other Essential Issues,* SG029 ALI-ABA 853 (2001). For a discussion of taking issues generally, see L. Cohen, *Historical Preservation and the Force of Law,* SG040 ALI-ABA 621 (2002). *See also R & Y, Inc. v. Municipality of Anchorage, 34 P.3d 289 (Ala. 2001),* holding that the requirement of a setback in order to protect wetlands did not constitute a taking.

See also Maritrans Inc. United States, 51 Fed. Cl. 277 (2001), addressing the issue of categorical takings; *Animas Valley Sand and Gravel, Inc. v. Board of County Commissioners of the County of La Plata, 38 P.3d 59 (Colo. 2001),* dealing with the extent to which a taking can occur despite some retained economically viable use; *Centre Lime and Stone Co., Inc. v. Spring Township Board of Supervisors, 798 A.2d 1291 (Pa. Commw. 2001),* dealing with the exclusion of quarrying from a county. In *Laguna Gatuna, Inc. v. United States, 2001 U.S. Claims LEXIS 175 (Fed. Cl. 2001),* the court held that an Environmental Protection Order requiring the land owner to cease using a dry lake bed for the disposal of oil field brine constituted a taking of a property interest held by a lessee.

In *Schroder v. Bush, 263 F.3d 1169 (10th Cir. 2001),* the court rejected a claim that the failure of the government to maintain favorable market conditions constituted a taking. Rather, this was held to be a nonjusticiable political question.

A challenge to a minimum lot size zoning ordinance was upheld in *Pheasant Bridge Corporation v. Township of Warren, 777 A. 2d 334,* (N.J. 2001), although the court refused to find a taking during the interval in which the ordinance was being successfully challenged.

In *Daniels Cablevision, Inc, v. San Elijo Ranch, Inc, 158 F. Supp. 2d 1178 (S.D Cal. 2001)* the court held that there was no right of access under the Cable Television Act apart from that which was available under formal dedications. Thus, the company could not lay cable in a utility trench without paying for the privilege. However, the extension to leased property of a rule prohibiting restrictions on direct-to-home satellite broadcasts did not constitute a taking.

For further discussion, see B. Schwartz, *Development Agreements: Contracting for Vested Rights, 28 B. C. Envtl. Aff. L. Rev. 719 (2001);* N. Lee, *McQueen v. South Carolina Coastal Council: Misinterpreting Lucas 52 S. C. L. R. 815 (2001);* R. Damstra, *Don't Fence Us Out: The Municipal Power to Ban Gated Communities and the Federal Takings Clause, 35 Val. U. L. R. 525 (2001),* M. Tunick, *Constitutional Protections of Private Property: Decoupling the Takings and Due Process Clauses, 3 U. Pa. J. Const. L. 885 (2001);* J. Stanley, *Keeping Big Brother Out of Our Backyard: Regulatory Takings as Defined in International Law and Compared to American Fifth Amendment Jurisprudence, 15 Emory Int'l L. Rev. 2001);* J. Deprez, *Risk, Uncertainty, and Nonergodicity in the Determination of Investment-Backed Expectations: A Post Keynesian Alternative to Posnerian Doctrine in the Analysis of Regulatory Takings, 34 Loy. L.A. L. Rev. 1221 (2001);* S. Abraham, *Williamson County Fifteen Years Later: When is a Takings Claim (Ever) Ripe? 36 Real Prop. Prob. & Tr. J. 101 (2001);* A Bell & G. Parchomovsky, *Takings Reassessed, 87 Va. L. Rev. 277 (2001);* B. Perron, *When Tribal Treaty Fishing Rights Become A Mere Opportunity to Dip One's Net into the Water and Pull it Out Empty: The Case for Money Damages When Treaty -Reserved Fish Habitat is Degraded, 25 Wm & Mary Envtl. L & Pol'y Rev. 783 (2001);* S. Eagle, *Just Compensation for Permanent Takings of Temporal Interests,* 10 Fed. Cir. B. L. 485 (2001).

For a case involving local authority to designate land as wetland, held not to constitute a taking, *see Bode v. Minnesota Department of Natural Resources, 594 N.W. 2d 257 (Minn. 1999).*

Landowners' ability to sue federal and state defendants may be limited by the doctrine of sovereign immunity. In *Michigan Peat v. United States Environmental Protection Agency, 175 F.3d 422 (6th Cir. 1999),* the state and its department of environmental quality were held entitled to Eleventh Amendment immunity in a suit involving the conditions of a proposed discharge permit for the plaintiff's peat mining operation.

In *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency, 34 F. Supp. 2d 1226 (D. Nev. 1999),* the court found that an ordinance that temporarily prohibited most construction and a resolution that temporarily suspended all permit approvals deprived land owners of all economically viable uses of the land. On the other hand, the newly adopted regional plan did not deprive the landowners of all economically viable use of the land.

(n12)Footnote 202. *Cal-Almond, Inc. v. United States, 30 Fed. Cl. 244 (1994).*

(n13)Footnote 203. *Dolan v. Tigard, 114 S. Ct. 2309 (1994).*

(n14)Footnote 204. *Loveladies Harbor Inc. v. United States, 27 F.3d 1545 (1994).*

(n15)Footnote 205. *See, e.g.,* J. Goldman-Carter, *Protecting Wetlands and Reasonable Investment Backed Expectations in the* Wake of Lucas v. South Carolina Coastal Council, *16 Fordham Int'l L.J. 848 (1994);* Marla E. Mansfield, *When 'Private' Rights meet 'Public' Rights: The Problems or Labeling and Regulatory Takings, 65 U. Colo. L. Rev. 193 (1994);* D. Lee, Note, *Constitutional Law-Fifth Amendment-Regulatory Takings Depriving All Economically Viable Use of a Property Owner's Land Require Just Compensation Unless the Government Can Identify*

Common Nuisance Law or Property Principles Furthered, 23 Seton Hall L. Rev. 1840 (1993).

See also John J. Delaney et al., *Using the Administrative Process to Protect and Establish a Taking*, SB14 ALI-ABA 133 (American Law Institute 1996); Gideon Kanner et al., *Pinpointing The Beginning and Ending Of A Temporary Regulatory Taking*, SB14 ALI-ABA 423 (American Law Institute 1996); George E. Grimes, Jr., *Texas Private Real Property Rights Preservation Act: A Political Solution to the Regulatory Takings Problem, 27 ST. Mary's L.J. 557 (1996);* Daryn McBeth, *Public Need and Private Greed -- Environmental Protection and Property, 1 Drake J. Agric. L. 112 (Spring 1996);* Alan E. Brownstein, *Constitutional Wish Granting and the Property Rights Genie, 13 Const. Comment. 7 (Spring 1996);* and Robert Brauneis, *The Foundation of our "Regulatory Takings" Jurisprudence": The Myth and Meaning of Justice Holmes's Opinion in* Pennsylvania Coal Co. v. Mahon, *106 Yale L.J. 613 (December 1996).*

For a discussion of the taking question regarding wetland matters, see S. Mattox, *Regulatory Obstacles to Development and Redevelopment of Wetlands and other Essential Issues,* SG029 ALI-ABA 853 (2001).

(n16)Footnote 206. *123 U.S. 623 (1887).*

(n17)Footnote 207. Att'y Gen. Op. 96-21 (March 5, 1996).

(n18)Footnote 208. This view was reaffirmed in Att'y Gen. Op. 97-92 (Sept. 15, 1997).

(n19)Footnote 209. *681 N.Y.S.2d 312 (1997).*

(n20)Footnote 210. *See also Hoover v. Pierce County, 903 P.2d 464 (Wash. App. 1995)* where the court held that there was no compensable taking resulting from flooding from a culvert installed as part of a county road project. There, the culvert was installed prior to the landowner's acquisition of the property but the flooding occurred after. The court held that the "taking" occurred at the time the culvert was installed. *But see Saunders v. State Hwy. Comm'n, 508 P.2d 981 (Kansas 1981)* holding that the right to lateral and subjacent support applies to the land itself and that it cannot be taken by the state without payment to the owner.

In *Schreiner Farms, Inc. v. Smitch, 940 P.2d 274 (Wash. App. 1997),* the court held that an elk owner did not suffer a "taking" when the state adopted a law that made it unlawful to "import, hold, possess, propagate, offer for sale, sell, transfer or release elk." The court reasoned that the landowner could sell the elk out of state and could use his land for other uses.

(n21)Footnote 211. *657 N.Y.S.2d 555 (1997).*

(n22)Footnote 212. *89 N.Y.2d 974 (1997).*

(n23)Footnote 213. *678 N.E.2d 870, 656 N.Y.S.2d 184 (N.Y. 1997).*

(n24)Footnote 214. *520 U.S. 725, 117 S. Ct. 1659, 137 L. Ed. 2d 980 (1997).*

(n25)Footnote 215. For a discussion of the "takings" question in the context of recreational use of abandoned railroad beds, *see* Comment, *The Acquisition, Abandonment, and Preservation of Rail Corridors in North Carolina: A Historical Review and Contemporary Analysis, 75 N.C. L. Rev. 1989 (1997);* Wright, *Private Rights and Public Ways: Property Disputes and Rails-to-trails in Indiana, 30 Ind. L. Rev. 723 (1997).* For a discussion of the taking question regarding wetland matters, see S. Mattox, *Regulatory Obstacles to Development and Redevelopment of Wetlands and other Essential Issues,* SG029 ALI-ABA 853 (2001).

(n26)Footnote 216. *Village of Euclid v. Ambler Realty Co., 272 U.S. 365 (1926).*

See also Chemical Waste Management of Indiana, L.L.C. v. City of New Haven, 755 N.E.2d 624 (Ind. App. 2001). See also Murphy v. Spokane County, 2001 Wash. App. LEXIS 410 (Wash. App. 2001) dealing with the classification of land that had never been used as agricultural property but which was nevertheless in a general agricultural use zone.

See also Rouse-Fairwood Development Limited Partnership v. Supervisor of Assessments for Prince Georges County, 773 A. 2d 535 (Md. App. 2001) where three parcels of property lost their agricultural status for tax purposes because of a more intensive use of one of the parcels.

For further discussion, see J. Nolon, *Local Land Use Controls that Achieve Smart Growth, 31 ELR 11025 (2001).*

(n27)Footnote 217. Wilderness Act of 1964, *16 U.S.C. §§ 1131*-1136.

(n28)Footnote 218. *See, e.g.*, La. Const., art. XIV, § 22A (1936), creating the Vieux Carre in New Orleans, La.

(n29)Footnote 219. Donald Hagman and Julian Juergensmeyer, Urban Planning and Land Development Control Law, 478-504 (1985).

(n30)Footnote 220. *See* the Farmland Protection Policy Act which was adopted as part of the Food and Agricultural Act of 1981, Pub. L. 97-98, *7 U.S.C. § 4201 et seq.*

(n31)Footnote 221. *See Village of Euclid v. Ambler Realty Co., 272 U.S. 365 (1926).*

See also Superior Farm Management, L.L.C. v. Montgomery, 513 S.E. 2d 215 (Ga. 1999).

For further discussion of environmental issues in Agriculture, *see* Note, *Fighting Corporate Pigs: Citizen Action and Feedlot Regulation in Minnesota, 83 Minn. L. Rev. 1893 (1999);* Note, *Cattle Ranch with Park Rangers: The Battle for a Tallgrass Prairie National Park in Kansas, 18 Stan. Envtl.. L.J. 211 (1999);* Barton H. Thompson, *People or Prairie Chickens: The Uncertain Search for Optimal Biodiversity, 51 Stan. L. Rev. 1127 (1999);* Comment, *Old McDonald Had a Government-Regulated-Confined-Swine-Operation; A Substitute for H.B. 2950, 38 Washburn L.J. 655 (1999);* Johnathan H. Adler, *Wetlands, Waterfowl, and the Menace of Mr. Wilson: Commerce Clause Jurisprudence and the Limits of Federal Wetland Protection, 29 Envtl. L. 1 (1999);* Comment, *The National Grasslands and Disappearing Biodiversity: Can the Prairie Dog Save us from An Ecological Desert? 29 Envtl. L. 213 (1999);* Jan Lewandrowski and Kevin Ingram, *Policy Considerations for Increasing Compatibilities between Agriculture and Wildlife*, 39 Nat. Resources J. 229 (1999); David J. Akin, *Balancing Endangered Species Protection and Irrigation Water Rights: The Platte River Cooperative Agreement, 3 Great Plains Nat. Resources J. 119 (1999);* Rebecca Fink, *We're From the Government and We're Here to Help: Farmers' and Ranchers' Reliance on Voluntary Governmental Programs May Open the Door to Governmental Control of Private Property through Expanding Scope of Wetlands Regulation*. 30 Texas Tech. L Rev. 1157 (1999); Joan L. McGregor, *Property Rights and Environmental Protection: Is This Land Made for You and Me?, 31 Ariz.St. L.J. 391 (1999);* Michael A. Heller, *The Boundaries of Private Property, 108 Yale L.J. 1163 (1999);* Virginia Albrecht, *Regulatory Takings and Wetlands: What are the Constitutional Limits? "Inverse Condemnation and Related Government Liability,"* SB14 ALI-ABA 531 (Oct. 17, 1996); Virginia Albrecht, *Regulatory Takings Issues in the Context of Federal Wetlands, Endangered Species, and Surface Mining Regulation, "Inverse* Condemnation and Related Government Liability," C997 ALI-ABA 307 (May 5, 1995).

See also Bolsa Chica Land Trust v. Superior Court, 83 Cal. Rptr. 2d 850 (1999).

See also People ex rel. Lockyer v. Sun Pacific Farming, Co., 92 Cal. Rptr. 2d 115 (2000).

For further discussion, see Centner, T., *Anti-Nuisance Legislation: Can the Derogation of Common Law Nuisance be a Taking? 30 Envtl. L. Rep. 10253 (2000);* Lauck, J., *After Deregulation: Constructing Agricultural Policy in the Age of "Freedom to Farm Act." 5 Drake J. Agric.L. 3 (2000);* Redick, Thomas and Bernstein, C. *Nuisance Law and the*

Prevention of "Genetic Pollution:" Declining a Dinner Date with Damocles. 30 Envtl. L. Rep. 10328 (2000); Richardson, Jesse J., and Feishans, Theodore A. *Nuisance Revisited after Buchanan and Borman 5 Drake J. Agric. L. 121 (2000).*

(n32)Footnote 222. *See, e.g., City of Ft. Smith v. Western Hide & Fur Co., 239 S.W. 724 (Ark. 1922).*

See Flo-Sun, Inc. v. Kirk, 783 So. 2d 1029 (Fla. 2001), holding that the federal Air and Water Pollution Control Act did not impliedly repeal the public nuisance statutes as they relate to pollution of air and water. This case abrogates *State v. SCM Glidco Organics Corp., 592 So. 2d 710 (Fla App. 1991).*

In *City of Erie v. Stelmack, 780 A.2d 824 (Pa. Commw. 2001),* the court upheld the demolition of an apartment building as necessary to abate a nuisance. The court opined that when abating a public nuisance, the remedy devised should be no harsher than the minimum necessary to abate the nuisance.

An allegation of illegal drug activity on the premises was deemed sufficient to support an action to abate a public nuisance in *State v. Zuckerman, No. CV010742845, 2001 Conn. Super. LEXIS 1743* (Jun. 20, 2001). In contrast, it was held in *City of St. Louis v. Varahi, Inc, 39 S.W. 3d 531 (Mo. App. 2001)* that maintaining a house of prostitution did not support a nuisance judgment.

(n33)Footnote 223. In *Lucas v. South Carolina Coastal Council, 112 S. Ct. 2886 (1992),* the Supreme Court held that the so-called "nuisance exception" to the taking doctrine did not exist. For further discussion of this case in the context of agricultural land, *see* James Wadley and Pamela Falk, *Lucas and Environmental Land Use Controls in Rural Areas: Whose Land Is This Anyway? 19 Wm. Mitchell L. Rev. 331 (1993).*

(n34)Footnote 224. *Id.*

(n35)Footnote 225. *See, e.g., Mugler v. Kansas, 123 U.S. 623 (1887); Keystone Bituminous Coal Ass'n v. DeBenedictus, 480 U.S. 470 (1987).*

(n36)Footnote 226. *438 U.S. 104 at 134 n.30.*

(n37)Footnote 227. *See* James Wadley, *The Emerging "Social Function" Context for Land Use Planning in the United States: A Comparative Introduction to Recurring Issues, 28 Washburn L.J. 22 (1988).*

(n38)Footnote 228. *See generally* Donald Hagman and Julian Juergensmeyer, *supra* n.29, at 554-568. It is often the consequences of the misuse, such as erosion, or chemical contamination that serve as the basis for restricting the use.

(n39)Footnote 229. *See, e.g., Woodbury County Soil Conserv. Dist. v. Ortner, 279 N.W.2d 276 (Iowa 1979)* upholding the authority of the jurisdiction to enforce soil loss limits against the farmer/landowner. *See also Harbison v. Buffalo, 152 N.E.2d 42 (N.Y. 1958).*

(n40)Footnote 230. *See, e.g., 42 U.S.C. § 9607.*

(n41)Footnote 231. *See* James Wadley and Pamela Falk, *Lucas and Environmental Land Use Controls in Rural Areas: Whose Land is This Anyway? 19 Wm. Mitchell L. Rev. 331 (1993).*

For further discussion, see John Charles Kluge, *Farming by the Foot: How Site-specific Agriculture can Reduce Nonpoint Source Water Pollution. 23 Colum. J. Envtl. L. 89 (1998);* Alia S. Miles, *Searching for the Definition of "Discharge": Section 401 of the Clean Water Act, 28 Envtl. L. 191 (1998);* Gail S Shane, *Concentrated Animal Feeding Operations: Will Increased Enforcement and More Stringent Regulations under the Clean Water Act Adequately Protect the Public Health and Environment?* 13 NO. 3 NAAG Nat'l Envtl. Enforcement J. 1 (1998).

See also Goddell v. Humboldt County, 575 N.W.2d 486 (Iowa 1998) (local ordinances relating to treatment of animal waste and groundwater protection held to conflict with state statutes); *Amundson v. Travis, 962 P.2d 970 (Colo 1998)* (challenge to ballot initiative that would impose additional environmental regulations on certain swine feeding operations because of deficiencies in notice procedure. Held objectors failed to establish that they were cognizably harmed by the shortness of time, given that they had actual notice).

For a discussion of the taking question regarding wetland matters, see S. Mattox, *Regulatory Obstacles to Development and Redevelopment of Wetlands and other Essential Issues,* SG029 ALI-ABA 853 (2001).

See Arizona Cattle Growers Association v. United States Fish and Wildlife, 273 F.3d 1229 (9th Cir. 2001) challenging the extent to which the Endangered Species act precludes ranchers from grazing in certain areas of potential habitat. Judgment for ranchers was, for the most part, upheld. See also *Coalition v. Bosworth, 180 F. Supp. 2d. 124 (D.D.C. 2001),* dealing with the extent to which the Secretary must consider environmental impacts of federal grazing permits when they are renewed. In this case, the defendant Forest Service moved to transfer the case to the District of Montana. That motion was denied.

(n42)Footnote 232. *See, e.g.,* Charles W. Abdalla and John C. Becker, *Jurisdictional Boundaries: Who Should Make the Rules of the Regulatory Game? 3 Drake J. Agric. L. 7 (1998);* Sara M. Dunn, *From Flav'r Sav'r to Environmental Saver? Biotechnology and the Future of Agriculture, International Trade, and the Environment. 9 Colo. J. Int'l Envtl. L & Pol'y 145 (1998);* N. William Hines, *The Land Ethic and American Agriculture,* part of a symposium on Twenty-five Years of Environmental Regulation, *27 Loy. L.A. L. Rev. 841 (Apr. 1994);* Marla Mansfield, *When 'Private' Rights meet 'Public' Rights: The Problems of Labeling and Regulatory Takings,* 65 U. Colo. L.R. 193 (1994); Richard Barnes, *The U.C.C.'s Insidious Preference for Agronomy over Ecology in Farm Lending Decisions,* 64 U. Colo. L.R. 457 (1993); Carol Dinkins, *Regulatory Obstacles to Development and Redevelopment in the U.S.: Wetlands and Other Essential Issues,* ALI-ABA (Oct. 6, 1994); Zygmut Plater, *From the Beginning, A Fundamental Shift of Paradigms: A Theory and Short History of Environmental Law, 27 Loy. L.A. L. Rev. 891 (1994);* Thomas Fahey, Jr. & Richard Roznoy, *Aquifer Protection in Connecticut: Environmental Land Use Restrictions Run Deep, 68 Conn. B.J. 98 (1994).*

(n43)Footnote 233. *See, e.g.,* Gene Johnson, *Business,* Successful Farming (Oct. 1992) at p. 13:

> One interesting finding from a Successful Farming survey last year concerned your views on the government. "Does the federal government care if you make a profit?" was the question. Over 90% of you said "No!"
>
> I think we have more reason to feel this way in this election year. Am I just missing it, or is it not true that in the political debates dominating our country now, there's precious little discussion of farm issues?
>
> Maybe it's understandable in the presidential race. Farmers do make up only two or three percent of the population. But where I live in the heart of the Corn Belt, there's a Senate race going on, along with several House contests, and they're not talking about farm issues either. More and more, politicians seem to live by the creed that what you don't say can't hurt you... .
>
> Which leads to another point: Government numbers can be deceiving. The National Farmers Union was having trouble understanding how net farm income reported by USDA could be setting new records. In 1988, for example, net farm income was said to be $42 billion.
>
> With a little checking, it was discovered that IRS numbers for that year reflected a total taxable income at $527 million. The enormity of that discrepancy is illustrated by calculating the average income of all 2 million farms in the U.S. According to the USDA number, the average farm had a net income of

about $21,000; the IRS number said the average farm had taxable income of $263. Now that would give the public quite a different view of the state of things on the farm...

(n44)Footnote 234. *638 N.E.2d 48, aff'd 641 N.E.2d 1351 (Mass. 1994).*

(n45)Footnote 235. *34 F.3d 114 (2d Cir. 1994).*

(n46)Footnote 236. *33 U.S.C. § 1251,* 1342.

(n47)Footnote 237. Kan. Stat. Ann. § 65-3001 *et seq.*

(n48)Footnote 238. *See* Johnson v. Venemann, 89 P.677 (Kan. 1907).

(n49)Footnote 239. Kan. Adm. Regs. § 28-19-45.

(n50)Footnote 240. Kan. Adm. Regs. § 28-29-47(E).

(n51)Footnote 241. KDHE v. Bailey, No. 94E-0616 (Sept. 28, 1994).

(n52)Footnote 242. *See Sweeney v. Merrill, 16 P. 454 (Kan. 1888); Interstate Galloway Cattle Co. v. Kline, 32 P. 628 (Kan. 1893); Hines v. Leach, 512 P.2d 103 (Kan. 1973).*

For further discussion, *see* James S. Carpenter, *Farm Chemicals, Soil Erosion, and Sustainable Agriculture, 13 Stan. Envtl L.J. 190 (Jan. 1994);* Christopher R. Kelley & James Loeoen, *Federal Farm Conservation Initiatives: Past, Present and Future, 9 Nat. Resources & Env't. 17 (Winter 1995);* Larry C. Farey, Ron James & Staci J. Pratt, *Conservation Districts as the Foundation for Watershed Based Programs to Prevent and Abate Polluted Agricultural Runoff, 18 Hamline L. Rev. 151 (Winter 1994);* Margaret Grossman, *Agriculture and the Environment in the United States, 42 Am. J. Comp. L. 291 (1994);* Michael S. Nagy, *The Definition of "Wetlands" under Section 404 of the Clean Water Act: Past, Present and Future,* 3 Balt. J. Envtl. L. 92 (Summer 1993); Hope M. Babcock, *Has the United States Supreme Court Finally Drained the Swamp of Takings Jurisprudence? The Impact of Lucas v. South Carolina Coastal Council on Wetlands and Coastal Barrier Beaches, 19 Harv. Envtl. L. Rev. 1 (Winter 1995);* Eric T. Freyvogle, *The Owning and Taking of Sensitive Lands, 43 UCLA L. Rev. 77 (Oct. 1995);* John A. Leman, *The Birds: Regulation of Isolated Wetlands and the Limits of the Commerce Clause, 28 U.C. Davis L. Rev. 1237 (Summer 1995).*

(n53)Footnote 243. For further discussion, see Richardson, *Maximizing Tax Benefits to Farmers and Ranchers Implementing Conservation and Environmental Plans, 48 Okla. L. Rev. 449 (1995).*

(n54)Footnote 244. I.R.C. § 2301(c). For further discussion, see Bowman, *New Tax Laws Could Aid Land Trusts,* Richmond Times Dispatch, pp B1, B4, (Sept 9, 1997). To qualify, the land must be located in or within 25 miles of a metropolitan area, or in or within 25 miles of a national park or wilderness area, or in or within 10 miles of an Urban National Forest. The land must also have been owned by the decedent of a member of the decedent's family for the three years preceding decedent's death. Finally, an easement must have been granted by the decedent or a member of decedent's family. This easement may be granted post-mortem so long as it is done no later than the date of election. The election is irrevocable and is made on the estate tax return.

For a discussion of environmental concerns regarding the use of abandoned railroad beds, see Comment, *The Acquisition, Abandonment, and Preservation of Rail Corridors in North Carolina: A Historical Review and Contemporary Analysis, 75 N.C. L. Rev. 1989 (1997);* Wright, *Private Rights and Public Ways: Property Disputes and Rails-to-trails in Indiana, 30 Ind. L. Rev. 723 (1997);* Caputo, *A Job Half Finished: The Clean Water Act after 25 Years,* 27 Envtl. L. Rep. 110574 (1997); Davidson, *Ecosystem Management in the Smaller Watershed,* 2 Great Plains Nat. Resource J. 68 (1997); Grossman, *Some Legal Issues Concerned with Agriculture and Environment, R. Blanplain*

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(n55)Footnote 245. *513 S.E. 2d 215 (Ga. 1999).*

(n56)Footnote 246. *Id. at 218.*

(n57)Footnote 247. *Id.* For further discussion of environmental issues in Agriculture, *see* Note, *Fighting Corporate Pigs: Citizen Action and Feedlot Regulation in Minnesota, 83 Minn. L. Rev. 1893 (1999);* Note, *Cattle Ranch with Park Rangers: The Battle for a Tallgrass Prairie National Park in Kansas, 18 Stan. Envtl. L.J. 211 (1999);* Barton H. Thompson, *People or Prairie Chickens: The Uncertain Search for Optimal Biodiversity, 51 Stan. L. Rev. 1127 (1999);* Comment, *Old McDonald had a Government-Regulated-Confined-Swine-Operation; A Substitute for H.B. 2950, 38 Washburn L.J. 655 (1999);* Johnathan H. Adler, *Wetlands, Waterfowl, and the Menace of Mr. Wilson: Commerce Clause Jurisprudence and the Limits of Federal Wetland Protection, 29 Envtl. L. 1 (1999);* Comment, *The National Grasslands and Disappearing Biodiversity: Can the Prairie Dog Save us from An Ecological Desert? 29 Envtl. L. 213 (1999);* Jan Lewandrowski and Kevin Ingram, *Policy Considerations for Increasing Compatibilities between Agriculture and Wildlife*, 39 Nat. Resources J. 229 (1999); David J. Akin, *Balancing Endangered Species Protection and Irrigation Water Rights: The Platte River Cooperative Agreement, 3 Great Plains Nat. Resources J. 119 (1999);* Rebecca Fink, *We're From the Government and We're Here to Help: Farmers' and Ranchers' Reliance on Voluntary Governmental Programs May Open the Door to Governmental Control of Private Property through Expanding Scope of Wetlands Regulation*, 30 Texas Tech. L Rev. 1157 (1999); Joan L. McGregor, *Property Rights and Environmental Protection: Is This Land Made for You and Me?, 31 Ariz. ST. L.J. 391 (1999);* Michael A. Heller, *The Boundaries of Private Property, 108 Yale L.J. 1163 (1999);* Virginia Albrecht, *Regulatory Takings and Wetlands: What are the Constitutional Limits?* "Inverse Condemnation and Related Government Liability," SB14 ALI-ABA 531 (Oct. 17, 1996); Virginia Albrecht, *Regulatory Takings Issues in the Context of Federal Wetlands, Endangered Species, and Surface Mining Regulation*, "Inverse Condemnation and Related Government Liability," C997 ALI-ABA 307 (May 5, 1995).

See also Bolsa Chica Land Trust v. Superior Court, 71 Cal. App. 4th 493, 83 Cal. Rptr. 2d 850 (1999).

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CHAPTER 47 AGRICULTURE AND FARM LAW

6-47 Thompson on Real Property, Thomas Editions § 47.10

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§ 47.10 Agricultural Land Tenure Issues.

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§ 47.10(a) In General.

Land tenure describes the ownership relation between man, the land and the government. In feudal times, it designated a relation that existed between the lord and the tenant, being based on a grant from the lord of the land which was to be held by the tenant on the condition that certain services be rendered to the lord. n248 The kind of relation between the tenant and the lord described the particular tenure under which the lands were held. Those lords, in turn, held the land "of the King." Today, although land is considered to be "held of the King" in the sense that title is ultimately traced to a grant from the sovereign, n249 it is generally recognized that the owner of a fee simple holds title free of any tenure relationship -- at least in the feudal sense. n250

Nevertheless, the issue of tenure is important to an understanding of the regulation of agricultural land use for at least three reasons. First, there is a strong national sense that certain forms of ownership are more acceptable than others with respect to agricultural land. If one does not hold the land "the right way," agricultural activity may be limited or even prohibited. For example, family farms are typically preferred over corporately owned farms which may be severely restricted in the kinds of agricultural activity in which they may engage. n251

Second, there is a growing sense that those who own farmland do so with some implied management obligations that are owed to society at large. n252 While these obligations do not require the rendering of specific services to the lord as conditions upon which the right to hold the land may be predicated, these obligations of stewardship are conceptually not too unlike feudal service requirements in that the ability of individual farmers to farm the land effectively may be predicated upon satisfactory performance of these stewardship duties. n253 For example, farmers must abide conservation and environmental protection constraints that are rationalized on the basis of their import to society as a whole rather than on the basis of their impact on the farming operation. n254 These constraints may alter how farming is conducted or whether the farmer is eligible to participate in public entitlement programs. n255

Finally, within the agricultural sector itself, much farming occurs on land to which the farmer does not hold title. The kind and intensity of the land use activity that is permitted and the extent to which the law will protect that activity often depend on the tenure arrangement under which an interest in the land is held. n256

§ 47.10(b) The Family Farm as the Preferred National Farmland Tenure.

The roots of the family farm concept go back to the beginnings of our history as a nation. How the family farm emerged as the national ideal is not clear, but it has been suggested that it was the result of political and policy choices involving the plantation system of the Southeast, the hacienda system of the Southwest and the family farm of the Northeast. n257 One view is that the family farm of the Northeast prevailed because it was successfully linked to particular values associated with our emerging democracy. n258 Thomas Jefferson, for example, argued that small farms were necessary to maximize participation in electoral politics since land ownership was a requirement in order to vote and the smaller the landholdings of each individual, the greater the number of voters in a given area. n259

Initially, Jefferson proposed that for a farm to be considered a family farm, it was necessary to satisfy three conditions: n260

1) the farmer was basically a subsistence operator, buying and selling as little as possible;

2) he did his own work and made his own managerial decisions; and

3) he owned his land in fee simple.

By the 1860s the family farm concept of small farms was formally codified in the Homestead Act of 1862 which became a primary vehicle for promoting the settlement and occupation of much of the nation. n261 This was continued through the National Reclamation Act of 1902 n262 and still is, at least theoretically, a part of federal land and agricultural policy today. n263

Jefferson's definition has undergone considerable evolution since the early days of our history, n264 but the concept of the family farm is still considered significant as witnessed by the following statement which has appeared as a formal part of federal farm program legislation:

> Congress reaffirms the historical policy of the United States to foster and encourage the family farm system of agriculture in this country. Congress believes that the maintenance of the family farm system of agriculture is essential to the social well-being of the Nation and the competitive production of adequate supplies of food and fiber. Congress further believes that any significant expansion of non-family owned large-scale corporate farming enterprises will be detrimental to the national welfare. It is neither the policy nor the intent of Congress that agricultural and agriculture-related programs be administered exclusively for family farm operations, but it is the policy and the express intent of Congress that no such program be administered in a manner that will place the family farm operation at an unfair economic disadvantage. n265

§ 47.10(c) Justifying Concern over the Family Farm.

Our present and historical concern over the family farm is somewhat mythical. The ability to believe that most farms in the United States are family farms, which, as a matter of fact is true, allays deeply held popular fears about the ability of agriculture to provide adequate supplies of cheap food and fiber. An examination of anti-farm corporation statutes n266 suggests that the consumers of agricultural produce deeply fear two kinds of farm enterprise: those that are headquartered *outside* the particular jurisdiction (probably because of the risk that domestic production will be diverted to satisfy food needs elsewhere) and large enterprises (that are possibly seen as able to manipulate either supplies or prices to the detriment of the consumers.) n267 It is interesting that these concerns are greatest in midwest states in which agriculture is a major industry, but not in such states as California, Arkansas, Texas and Florida, which actually produce most of the vegetables and much of the meat consumed in the country. n268

One author has outlined arguments for and against corporate owned hog farms in Kansas. n269

Acceptance of the family farm as the farming ideal assumes, however, that most of these small, family-held farms, produce most of the food and fiber that is used or consumed, which, as a matter of fact, is not true. n270 Herein is the difficult policy problem for government -- how to allay the popular fears regarding food supply and cost without undermining the ability of agriculture to meet the nation's food and fiber needs. The paradox is that family farms must be promoted to allay fear but to meet food needs, family farms are largely irrelevant.

How is policy developed in such a situation? It is quite clear that the national espousal of the family farm as the farming ideal is "symbolic" more than real. n271 By affirming that the family farm is important, government says what the public wants to hear and fear is thereby reduced. On the other hand, efforts to promote the family farm are probably not serious. n272

§ 47.10(d) Implications for Agricultural Land Use Regulation.

Numerically, most farms are in the small farm category. Economically, most small farms do not contribute much to the national food and fiber picture. Middle- and smaller-sized farms are clearly difficult to justify in terms of their collective contribution to the food and fiber supplies of the country. Nevertheless, there are several reason to consider small farm agriculture an important social issue that merits attention in the context of land planning and regulation efforts.

First, small farms should be recognized as an access vehicle for individuals who wish to enter farming but who cannot afford to get in on a massive scale. This is important to the nation *if* there is serious interest in keeping agriculture from becoming the domain of large commercial institutions simply because the present median age of farmers is steadily rising. n273 It is hard to interest land planners in concerns of this type because while consumers generally fear corporate control of agriculture, they basically do not seem to care where their food comes from as long as it is abundant and cheap. n274 Hence, there is little popular or even national policy n275 pressure to protect or encourage small farms except as that relates to food production concerns. n276

Second, the stability and quality of life in rural communities appears to be directly linked to the presence of a large number of individual farmers actively engaged in the affairs of rural communities. A growing body of data suggests that there is a vital connection between the presence of a large number of small farms and the viability of rural communities. n277 Without these farms, rural communities suffer decline and disappear. The following impacts are suggested as a result of the loss of small farms: n278

1. Rural communities lose families engaged in agriculture which support schools, libraries and other institutions.

2. Main street business dependent upon the purchasing power of farm/ranch families may face bankruptcy. n279

3. Consumers experience higher "administered" food prices due to concentration of market power in corporations. n280

4. Urban areas face increased demands for housing, sewage disposal, welfare and other service programs due to farmers relocating to the cities. n281

5. Enhanced environmental concerns resulting from efforts to artificially enhance production by remaining farmers with chemicals and pesticides.

The rural community role played by small farms has historically been of little concern to land planners beyond those in the rural communities themselves. It has also been difficult to generate interest in rural communities as part of land use planning efforts because land use and land use planning have generally been approached as an urban or as a city land use matter.

Finally, but perhaps most significantly, there is substantial evidence that consolidation of farms into fewer and fewer large production units will have impacts on land ownership and land ownership opportunities that reach far beyond the rural communities and will affect anyone who wishes to own land in rural areas. n282 Past patterns suggest that as farmers leave farming (for whatever reason) the fewer farmers that remain tend to be larger. n283 This, in turn, is leading to the concentration of rural land ownership into fewer and fewer hands and if current trends continue, it is conceivable that a very few farmers could actually control not only the supply and price of food but could essentially control all land use activity outside of the cities. n284 This, of course, is frightening to the urban consumer, but in a more meaningful sense, it also offends a deep American sense of proprietorship over agriculture which seems to be of little concern to virtually everyone involved with rural land use issues, including land developers and others who may wish to move out from the cities. n285

It has been difficult to develop an acceptable conceptualization of the role of small farm ownership as part of land use regulation because the role of the small farm has been so engrafted into the question of farm economics and food production. What is needed, perhaps, is a recognition that there may be a need to both extend ownership opportunities and broaden the popular control base of rural land use. n286 What has typically been lacking is a persuasive and socially acceptable articulation of the desirability of small scale agricultural holdings and their associated ownership opportunities, and an effective conceptualization of how such patterns can fit into future land use desires and needs. As a minimum, there must be an understanding that the small farm has rural land use value beyond that of a mere producer of food and fiber.

§ 47.10(e) Farmland Tenure Problems: Fee Simple Ownership.

§ 47.10(e)(1) Fee Simple Ownership

Most farmland is still held in fee simple absolute ownership. This gives the landowner the same rights and privileges associated with ownership generally without regard to whether the land is used for agriculture. As such, the farmland owner is situated like any other landowner with respect to such concerns as the ability to use, profit from or dispose of the land. It is conventional to refer to these rights as sticks in a bundle. This is done very imprecisely and most landowners do not know the nature of the individual sticks in the bundle.

In very few situations does it make a difference in the quantum of rights (or number of sticks) possessed by the owner of the land that the land is held for agricultural use. There are, however, some circumstances under which the fact that the land is used for agricultural use has a definite limiting impact on the ability of the landowner to use the land for some other purpose. One might analogize these to either the attachment of strings to the sticks, such that the enjoyment of particular rights can be manipulated or controlled by someone else -- usually a public body, or, in some cases to the actual removal of sticks from the bundle itself. Restrictions on such rights are often quite subtle.

In some jurisdictions, it is possible to sever the right to develop the land from the fee itself and transfer that right to someone else or to another parcel. n287 These programs are often designed expressly to keep the land in agricultural use. Once the right is severed and transferred, the remaining fee is limited in terms of development opportunities. The

purchaser of such a limited fee may find that the land is relegated to a future of agricultural use only.

A similar result may occur where the fact that the land was used for agricultural purposes has resulted in preferential tax valuation. n288 Here, the promise to use the land for agricultural purposes may be binding on a subsequent generation n289 lest the owner suffer adverse economic consequences. A similar outcome may result from placing the land in the Conservation Reserve Program. n290 These particular programs are designed to induce the landowner to keep the land in agricultural use over a protracted period of time without changing the nature of the title interest held. However, when land subject to such limitations is purchased, the promises that limit the use are generally automatically extended to the new owner.

In a more subtle fashion, the status of the land as wetland or as fragile or highly erodible land may expose the agricultural landowner to use restrictions that are not normally imposed upon non-agricultural lands. While these restrictions are not considered to be part of the fee to the land because they represent a regulatory overlay regardless of the underlying ownership status, they conceptually should be considered a part of the ownership package because the mere purchase of the land exposes the owner to the potential restriction.

§ 47.10(e)(2) Spousal and Children Interests.

Under the federal price support legislation that has governed farming since the mid-1980s, there have been payment limitations respecting the amount of federal entitlements that can be received by farmers. n291 These regulations were phrased in terms of amounts that could be paid "per person" rather than "per farm." n292 This has generated considerable interest in devising ways in which the number of persons a single farm could claim in order to maximize the payments. Initially, by regulation in 1988, both the husband and wife were considered to be a single person. n293 This was modified to allow the spouse to claim separate person status provided that person contributed a separable entity (that was owned by that person previous to the marriage) to the farm and that they continue to operate those entities as separate and distinct from each other.

Apart from the matter of qualifying as a "separate person" for purposes of receiving federal support payments, the question of whether the spouse or children hold a separate interest in the farm has arisen in other areas including divorce and bankruptcy. One important variable is whether the state is a community property state or a non-community property state.

In community property jurisdictions, the issue will generally be resolved on the basis of whether the property is in the matrimonial domicile or whether it is located in a community property jurisdiction. In non-community property jurisdictions, the property acquired after marriage may be either separately or jointly owned and will generally be determined by who has the recorded title interest. In one case to the contrary, it was held that ownership was more a function of enjoyment or possession than bare paper title. n294 In divorce or marriage dissolution situations, equitable concerns often motivate courts to make distributions that are inconsistent with legal ownership. Where the assets of the farm may be required to continue the operation of the farm, which, in turn, is necessary for the long-term financial well being of all parties, it may be necessary to divide ownership without breaking up the farm.

Bankruptcy seems to have posed the most difficult issues regarding the division of ownership. In In re Wolsky, n295 the court rejected dissolution case law as neither persuasive nor controlling since it dealt with the "equitable distribution of property and not the issue of legal ownership of property." Such courts often consider the level of involvement of the spouse in the farming operation to determine whether the spouse should have an interest in such items as crops, livestock, farm machinery and so forth. n296

In some cases, the court has required an express agreement before it would recognize an ownership interest in the other spouse's property in exchange for services. n297 Finally, some courts have considered the question one of whether a partnership existed. n298

§ 47.10(f) Farmland Tenure Problems: Leaseholds.

An increasing amount of land is being farmed subject to leases. n299 Farm leases are like other kinds of leases involving real property n300 in that they create non-freehold estates in the land n301 and thereby are distinguished from such lease alternatives as employer-employee relations (such as cropper contracts and custom farming), n302 tenancies in common, partnerships and joint ventures. Farm leases may be for a period of years, from year to year or even terminable at will. Most of the law has developed around the leasing of land for the production of crops. Leases are possible, however, and in some locations, increasingly prevalent for such other purposes as raising livestock, grazing, hunting, recreational use and pasture.

A variety of leases are commonly used in farming operations. These include:

Straight-cash leases -- rent is either a fixed sum per acre or a fixed amount for the entire farm, often payable in installments.

Flexible-cash leases -- the amount of rent varies according to the production conditions or crop prices.

Crop-share leases -- the rent is determined as a particular fraction of the crop produced. In such leases, various expenses may also be fractioned.

Hybrid-cash lease -- contains elements similar to those found in crop share leases. That is, rent is set as a fraction of the crop or as a particular number of production units (such as bushels). Variations of this type may guarantee a particular amount by a particular date or may only establish a minimum number of units up to a particular fraction (e.g., 10,000 bushels or 1/3 of the crop whichever is greater).

Livestock-share -- rent is measured in terms of animals produced. Landlord typically shares in the expenses of production.

Irrigation crop-share -- rent is usually a certain portion of the crop produced by irrigation; expenses are shared, perhaps in a different fraction.

Labor-share lease -- this is typically used in a parent-child operation where the parent bears most of the management responsibility and the child provides labor.

§ 47.10(g) Leases: Statute of Frauds.

Since leases involve the transfer of an interest in the land from the landlord to the tenant, the statute of frauds of most jurisdictions will govern. Typically, the statute requires that leases exceeding one year in duration must be in writing, signed by the party to be bound. n303 The period may be measured from the time the agreement is entered into even though the term of the lease may begin at a later date and possession may actually be granted at that time. It has been held that an oral promise made in June to rent the land for a year beginning in August was unenforceable under the statute. n304

In Keppy v. Lilientahll, n305 the plaintiff sued the lessor to prevent the removal of hogs from a feeder pig operation. There was an oral agreement to lease the hogs in order to replenish the hog operation. The defendant argued that the lease was with the operator of the land, not with the plaintiff. Notwithstanding, it was held that the plaintiff was entitled to keep possession of the hogs by virtue of a herder's lien.

§ 47.10(h) Leases: Holdover Tenants.

Many farm leases are oral and are for periods exceeding one year. n306 These might be thought to be unenforceable

under most statutes of frauds. However, many jurisdictions have statutes n307 which treat holdover tenants as having year to year tenancies which are not in violation of the statute of frauds. n308 One becomes a holdover tenant when one remains in possession after the expiration of the lease term and acts in accordance with the terms of the lease with the consent of the landlord. n309 The lease then appears to be continued on the same terms as in the initial lease. n310 One court has indicated that unusual terms may not be carried over. n311

In F & F Ltd, v. Schields, n312 the court determined that the farm tenant was not entitled to federal price support payments after the written lease had expired and was not entitled to reimbursement for preparatory expenses incurred after the expiration of the lease. In this case, the tenant farmed seven quarter sections of land but the lease terminated as to five of those sections on July 31, 1992. The tenant did not honor the expiration date and refused to relinquish possession of the five sections of the land. Although the tenant may have been considered a hold-over tenant for some purposes, the issue before the court was whether the lease contemplated the receipt by the tenant of federal payments after the expiration of the written lease regardless of that status. The court found that the lease did not intend to continue the right to the payments after it expired.

In Jansen v. Pobst, n313 the court dealt with the impact of lease terminations on crops growing at the time of termination. Here, the lease was terminated by notice given in May, 1994 which set termination as of June 1, 1994. The trial court effectively considered the tenant to be a holdover tenant because the landowner had accepted some lease payments after the effective termination date of the notice and therefore construed the lease as a year-to-year lease. It further found that even though the notice was given seven months prior to the end of the lease year, it was effective. Missouri law required that notice be given not less than 60 days prior to the end of the lease year for year-to-year leases. The lessee continued in possession until after the 1995 crop was planted and the court awarded the 1995 crop to the tenant, subject to payment of one-third to the owners of the land, less the cost of harvest. The appellate court remanded the case on the issue of the amount owed to the owner of the land because the court failed to give any authority or findings of fact to support its conclusion. It also reversed the trial court on the termination holding.

§ 47.10(i) Leases: Part Performance.

The writing requirement of the statute of frauds may possibly be circumvented by the equitable doctrine of part performance. n314 Traditionally, part performance is satisfied by: 1) the payment of consideration; 2) possession by the lessee; and 3) the making of valuable improvements. n315 At least one court, however, has required that the tenant must do something more than "the ordinary use of the land for cropping" n316 in order to establish part performance. There, the planting activity involved alfalfa as opposed to wheat. The alfalfa was considered sufficient to remove the lease from the statute of frauds. n317 This is arguably consistent with the view that the purpose of the doctrine is not simply to show that the terms of the agreement have been partially satisfied, but to identify circumstances that unequivocally show that someone has an interest in the land other than the record owner.

§ 47.10(j) Leases: Lease Terms.

The rent may be paid by the tenant in cash or with a share of the crop, or in some combination of the two. n318 Cash leases may be either straight cash or flexible cash leases. Straight cash leases typically involve the payment of a fixed sum, either calculated for the entire farm or on a per acre basis. Flexible cash leases vary the amount due on the basis of crop prices when the crop is sold. In crop share leases, the landlord receives a portion of the crop as rent. The expenses associated with raising the crop are typically shared between the landlord and the tenant under crop share leases; the tenant typically pays all expenses under a cash lease. n319

§ 47.10(k) Leases: Termination of Farm Leases.

As a general rule, farm leases may be terminated in the same fashion as other leases. Generally, a lease will terminate at the end of the agreed term whether the lease is oral or written. n320 The common law traditionally required six months'

notice before a year-to-year tenancy could be terminated. This period has often been shortened by statute, typically to thirty days. n321

Notice generally must be in writing and must be properly delivered to the tenant. n322 Some statutes provide considerable flexibility in the manner in which the notice is given and consider delivery proper if the notice is served personally, is left at the normal residence of the tenant, is left with a person of a certain age or older, is posted on the premises or is sent by registered mail. n323 It is necessary to consider the particular requirements of a jurisdiction to insure that the delivery is acceptable.

It may be necessary to give the notice in a timely fashion as well. n324 Typically, the notice must be given a certain period in advance of the scheduled termination date. Notice thirty days prior to the expiration of the term appears common. n325

Typically, the tenant is under no obligation to give notice. n326 Similarly, no notice may be required where the lease has been breached. n327

Termination problems arise when the lease has been extended beyond the initial term or if a particular form of termination is required by statute. If the farm tenant is a holdover tenant, the fact that the law recognizes a particular kind of tenancy may require that the arrangement be terminated differently, even if it is written. Some jurisdictions have special rules relating to the termination of farm tenancies under these circumstances. n328 These rules may apply to both oral and written leases and must strictly be complied with in order to terminate the tenancy. n329

In Sherwood v. Panhandle Eastern Pipeline Co., n330 the landlord sued to have a lease terminated because of an unauthorized assignment of a natural gas lease. Although the lease provided that there could be no assignment of the lease without the written permission of the lessor, the lease did not otherwise prohibit the granting of the lease. The court held that the lease was not terminated because the breach did not involve an essential part of the lease and the lease did not contain a forfeiture provision. The lessor was entitled to recover damages for the breach but had not been able to demonstrate any.

In Jansen v. Pobst, n331 the court dealt with the impact of lease terminations on crops growing at the time of termination. Here, the lease was terminated by notice given in May, 1994 which set termination as of June 1, 1994. The trial court construed the lease as a year-to-year lease and found that even though the notice was given seven months prior to the end of the lease year, it was effective. Missouri law required that notice be given not less than 60 days prior to the end of the lease year for year-to-year leases. The lessee continued in possession until after the 1995 crop was planted and the court awarded the 1995 crop to the tenant, subject to payment of one-third to the owners of the land, less the cost of harvest. The appellate court remanded the case on the issue of the amount owed to the owner of the land because the court failed to give any authority or findings of fact to support its conclusion. It also reversed the trial court on the termination holding.

§ 47.10(l) Leases: Landlord Liens.

Although the title to the crop is normally in the tenant, many states recognize a lien in favor of the landlord on the crop to secure the payment of rent. n332 These liens are created by statute n333 and automatically arise in favor of the landlord. They typically attach as soon as the crop comes into existence, n334 and prevail over prior perfected security interests. n335 The duration of the lien may be limited to a specified time n336 or pertain only to the crops of a particular year. n337 It may also be confined to crops grown on the leased premises. n338

A purchaser of the crop without notice of the lien generally takes free of the landlord's claim. n339 Similarly, these liens may be waived by the landlord, either expressly or by implication. n340

As statutory liens, landlord liens for rent may be avoided by a farm tenant's trustee in bankruptcy. n341

§ 47.10(m) Leases: Improvements.

Under the common law, a tenant could not make substantial changes in the leased premises without the landlord's consent even though the changes improved or enhanced the property. n342 The general rule regarding fixtures also applied such that the tenant could not remove any improvements so attached to the land as to cause material injury to the landlord's estate.

It is recognized that the parties may modify the common law rules by so providing in the lease. n343 Similarly, several states have addressed the issue statutorily with respect to farm tenancies. n344 These statutes may require the landlord to compensate the tenant for certain longterm improvements n345 or may require that the improvements be removed while the tenant is still in possession. n346

§ 47.10(n) Leases: Emblements.

Generally, the tenant was considered under the common law to own the crop grown under a lease. n347 As a general rule, even under a cropshare lease where the landlord was given a fractional share of the crop as rent, title to the crop was not deemed under the common law to pass to the landlord until the crop was divided. n348 These rules are subject to modification by the terms of the lease and may actually vest title in the landlord in whole or in part. n349

It has been held that where a tenant has planted a crop and has every expectation that the crop may be harvested within the term of the tenancy, the tenant may claim and harvest the crop after a termination of the tenancy where harvest is delayed for reasons beyond the control of the tenant. n350 Conversely, if the crop is planted with knowledge that the lease will expire prior to harvest, or where the lease is surrendered before its expiration, the landlord should be entitled to the crop. n351

Vegetative products of the earth which are the result of annual labor of the person in possession of the land are called *fructus industriales*, or "emblements." n352 The doctrine of emblements is designed to determine title to such things growing on the land when a tenancy comes to an end at a time that is beyond the control or that cannot be foreseen by the tenant. n353 In most such circumstances, title to such products (usually the crop itself) will belong to the tenant. n354 Where the termination of the tenancy can be foreseen, as in the case of tenancies for years, the tenant is not entitled to emblements because the termination of the lease is considered to be certain and the tenant can take steps to insure that planting and harvest are done in a timely fashion (in advance of termination). n355 An exception to this rule is that a tenant from year to year may claim the crop where the tenancy is terminated by notice but the crops have been planted before the notice was given. n356

The claim to the crop by the tenant under the doctrine of emblements appears also to be defeated where the tenant terminates the tenancy by the tenant's own acts, or by acts which constitute breach of the lease. n357

Where the tenant dies before the expiration of the tenancy, title to the crop passes to the personal representative of the tenant. n358

In Taggart v. Battaglia, n359 the plaintiff had purchased land subject to a lease under which Christmas trees were being grown by the tenant. The lease allowed for the termination after 30 days notice given on or before January 30 each year. As a result of concerns over the lease expressed by the purchaser in negotiations over the sale of the property, the lessee signed a quit claim deed relinquishing all rights in the property. The lessee continued to care for the trees and removed 190 of them several months after the sale. The lessee argued that the doctrine of emblements allowed the removal of the trees because the lease was for an uncertain period of time and the trees were planted prior to the termination of the lease. The court held that the granting of the quit claim deed was a voluntary conveyance and it passed all the lessee's

rights in the trees.

In Jansen v. Pobst, n360 the court dealt with the impact of lease terminations on crops growing at the time of termination. Here, the lease was terminated by notice given in May, 1994 which set termination as of June 1, 1994. The trial court construed the lease as a year-to-year lease and found that even though the notice was given seven months prior to the end of the lease year, it was effective. Missouri law required that notice be given not less than 60 days prior to the end of the lease year for year-to-year leases. The lessee continued in possession until after the 1995 crop was planted and the court awarded the 1995 crop to the tenant, subject to payment of one-third to the owners of the land, less the cost of harvest. The appellate court remanded the case on the issue of the amount owed to the owner of the land because the court failed to give any authority or findings of fact to support its conclusion. It also reversed the trial court on the termination holding.

§ 47.10(o) Leases: Waste.

As a general rule, a tenant may not cause waste to the premises. n361 Waste is typically not precisely defined but seems to connote some sort of permanent harm or substantial injury to the premises. n362 This was considered to be a breach of a lease term for which damages, injunctive relief or specific performance may be sought. These wrongs would normally not result in termination of the lease. It has been recognized that termination may be provided as a remedy in the lease n363 or by statute. n364

There has been a growing sense that the tenant must affirmatively practice good stewardship as well. n365 This may be specifically provided in the lease n366 or implied by law. n367 Some courts have distinguished between breaches of *conditions*, which justify termination of the lease, and breaches of *covenants* which are remedied by an award of damages. n368 The obligation to farm in a good husbandlike manner has been held to be a covenant as opposed to a condition. n369

§ 47.10(p) Farmland Tenure Problems: Corporate Ownership of Farmland.

A number of states n370 in the Midwest have adopted statutes that restrict corporate ownership of farmland or otherwise limit that farming activities of corporations. n371 Many of these statutes date back to the Depression n372 or earlier n373 and probably grew out of efforts to keep banks from acquiring the farmland during difficult economic times. n374 On the other hand, the recency of legislative activity in several states suggests that the concerns are still being actively enforced. n375 For the most part, these statutes reflect the policy of protecting small or family farms and to some extent codify the fear of "outside" ownership and control by "large" operations.

States that have imposed farming restrictions on corporations must decide whether limited liability companies are subject to the farming restrictions. It would appear that these entities do not differ from corporations in ways that are relevant to the concerns which have motivated the adoption of restrictions. Kansas has determined that the entities are subject to such restrictions. n376 These business entities offer the limited liability advantages of corporations without the loss of other advantages that may come from partnerships or other business formats. It is yet to be decided in most states that have restrictions on corporations whether these new forms of businesses are subject to the farming restrictions imposed on corporations though most such states will probably include the new entities. It would appear that these entities do not differ from corporations in ways that are relevant to the concerns which have motivated the adoption of restrictions. Kansas has determined that the entities are subject to such restrictions. n377 The Kansas Corporate Farming Law has been amended to provide that limited liability agricultural companies can include family farm corporations, family farm limited liability agricultural companies, and natural persons. n378 On the other hand, Nebraska is attempting to prevent limited liability partnerships from owning farmlands, unless the partners are family members or persons who reside on or actively engage in working or managing the farm. The question as to whether limited liability companies can own farms is also argued by legal practitioners. n379

In related actions, several states have considered legislation to relax restrictions on corporations that may be engaged in agriculture. n380 Kansas adopted legislation to permit county commissioners to allow hog and dairy corporations. n381 Minnesota has relaxed restrictions on livestock production, except dairy operations. Missouri considered a bill to repeal all restrictions on corporations but it was withdrawn because of extensive popular opposition. n382 In Iowa, corporate farming was a big issue in the local elections in the 1990s and because of problems with huge corporate hog farms, the state has also considered lifting restrictions on corporate farming. n383

§ 47.10(q) Corporations: Impact on Farming Operation Structure.

Most of these statutes do not deny farmers the opportunity to organize their businesses in a corporate format. n384 Rather, they condition the availability of the corporate form of business upon such factors as the size or nature of the business, the family status of the incorporators, or activity of a particular agricultural nature. n385 In addition, the statutes typically exempt interests taken for security purposes, or land acquired in the process of debt collection, land operated for research or experimental purposes, acreage needed for normal non-farm business n386 expansion purposes, and so forth. n387 There may be a requirement that land acquired by corporations even pursuant to stated exceptions cannot be held beyond or must be disposed of within a certain period of time. n388 If the land is not disposed of during that time, the jurisdiction can have the land sold at public sale. n389 In a 1988 case, the North Dakota three-year holding period n390 was challenged on the ground that it was different from and therefore preempted by a longer n391 (five year) federal holding period of the National Bank Act. n392 The court held that there was no preemption. n393 The court reasoned that both provisions essentially served the same function to prevent the accumulation of farmland and ranchland by corporations and that the state law actually enhances the primary purpose of the federal law. n394

§ 47.10(r) Corporations: Interpreting Restrictions.

Some statutes seek to restrict corporate *ownership* n395 of farmland whereas others seek to discourage corporations from engaging in *farming activities*. n396 In the latter case, there may be serious questions as to what constitutes farming. In at least one case, a court has held that land leased on a cash rent basis did not constitute "farming" since there was no control over or involvement with any of the farming activities. n397 On the other hand, it has been argued that a contract between a farmer and a corporation to raise hogs for the corporation constituted an indirect acquisition of an interest in agricultural land. n398

Farming is typically defined fairly broadly under these statutes to include the cultivation of and for the production of agricultural crops, the raising of poultry, the production of eggs, the production of milk, the production of fruit or other horticultural crops, grazing or the production of livestock. n399 Farming may not include the production of timber, forest products, nursery products or sod or include contracts to provide spraying, harvesting or other farm services. n400

The requirement in some statutes n401 that the corporations be founded for the purpose of farming seems designed to exclude corporations, such as insurance companies and banks, from investing in farming and thereby removing the land from availability to individual farmers. Even though the land may be leased to individuals for farming purposes, and perhaps actually farmed, the statute seems more concerned that farmers not be denied an opportunity to own the land than it is that the land actually be used for farming purposes.

A recurring issue in Kansas has been the extent to which corporations can raise swine. The statute was amended in 1988 to expressly prohibit processors of pork or partnerships in which the processor holds shares from contracting for the production of hogs of which the processor is the owner. n402 The rationale of the provision was to prevent monopolies and to protect consumers. The provision, however, probably effectively eliminated the use of pork production contracts in Kansas where the contract is with a processor.

There has long been an exemption in the statute in favor of feedlots, which was popularly understood to apply to cattle though the statute itself was silent as to feedlots or confinement facilities of anything other than rabbits and poultry.

In 1993, the legislature adopted a measure that would have expanded the opportunities for swine producers to engage in agriculture in Kansas but it was vetoed by the Governor.

In 1994, the legislature revisited the area and passed legislation n403 that was signed by the governor which amends the corporation statute to permit the establishment of swine production facilities owned or leased by a corporation or limited liability company. This may occur if the county in which the facility is to be located has adopted a resolution, subject to notification and protest petition, admitting the establishment of a swine production facility in the county. In the alternative, qualified voters may petition the board of county commissioners requesting the establishment of such a facility.

The law also specifically protects the use of swine production contracts n404 from being considered a violation of the corporation statute by providing that such contracts "shall not be construed to mean the ownership, acquisition, obtainment or lease, either directly or indirectly, of any agricultural land."

Similarly, the legislature permitted the establishment of dairy facilities in counties where the board of county commissioners has adopted resolutions permitting such facilities. n405 A dairy facility is defined to mean the structures, the land and related equipment for housing, breeding, raising, feeding or milking dairy cows. The term also includes such land as may be necessary for the proper disposal of liquid and solid wastes and for the isolation of the facility to protect the cows from exposure or disease.

In local elections in the 1990s, corporate hog farming proposals were defeated in six of the seven counties in which the issue was on the ballot. n406 In an unpublished opinion, the Minnesota Court of Appeals held that the state anti-corporation statute does not create a private cause of action to enforce the statue. In Hommerding v. The Travellers Insurance Co., n407 the court dealt with the aftermath of a foreclosure of a mortgage held by Travelers. Travelers sold the farm to a third party and Hommerding sued, alleging a violation of the state statute. The court found no express grant of a private cause of action to enforce the statute within the statute itself and declined to imply one on the grounds that Hommerding was not a part of the class for whose benefit the statute was adopted; that the legislature did not intend to create a private remedy for the violation of the statute; and that implying such a remedy would not be consistent with the underlying purpose of the statute. n408

An opinion by the Attorney General in Kansas has ruled that swine finishing facilities do not constitute "farming" under the Kansas statute restricting the ability of certain corporations to own farmland in the state. The opinion cited as authority T-Bone Feeders, Inc. v. Martin, n409 which held that there was a distinction between a commercial feedlot and farming. The commercial feedlot was considered to be a specialized agri-business that was engaged in an agricultural endeavor but not engaged in farming. n410

Another Kansas Attorney General Opinion addressed the question of whether corporate ownership of farmland was detrimental to the public welfare. By statute, most corporations are barred from owning an interest, directly or indirectly, in farmland. Amendments gave counties the option of permitting dairy and swine corporations to locate within the county. The issue before the Attorney General was whether the county could rescind such a grant of permission and, if the county did so, whether it would constitute a "taking" of a property interest from the corporation. The Attorney General found that the state may exercise its police power to totally prohibit persons from engaging in occupations or businesses that are detrimental to the public welfare. Citing Mugler v. Kansas, n411 the Attorney General found that the adoption of the restrictions against corporations was well within the bounds of law and that "there was no vested right in carrying on a business that was legislatively declared detrimental to the public, and that the property owner was not entitled to compensation or a stay on the law's application." n412

In 1988, the Attorney General had ruled that hog production contracts between farmers and corporations resulted in the creation of an interest in farmland on the part of the corporation that violated the Kansas corporation statute. In

response, the Kansas legislature enacted K.S.A. § 17-5904(b) which provides:

Production contracts entered into by a corporation, trust, limited liability company, limited partnership or corporate partnership and a person engaged in farming for the production of agricultural products shall not be construed to mean ownership, acquisition, obtainment or lease, either directly or indirectly, of any agricultural land in this state. n413

In 1994, the legislature adopted Kan. Stat. Ann. § 17-5908 which permitted swine production facilities to locate in counties upon approval of a local ordinance authorizing the same. The question whether a production contract that involves the raising of swine constitutes a "production contract" under § 17-5904(b), which is exempt from the statute, or constitutes a "swine production facility" under 17-5908, which can be permitted only by local option. In the case at issue, the land, structures and related equipment would be owned by the farmer and the nursery pigs would be owned by the corporation. The Attorney General ruled that under those circumstances, the facility was not a swine production facility nor is it subject to the general prohibition against corporate farming because of § 17-5904(b). n414 In a related opinion, the Attorney General held that "swine finishing facilities" were not even considered "farming" for purposes of the corporate farm statute. In that opinion, the Attorney General ruled that finishing facilities were commercial feedlots and therefore not engaged in farming as defined in Kan. Stat. Ann. § 17-5903(h). n415

In an opinion relating to the procedures necessary to allow hog corporations to locate in a particular county under Kan. Stat. Ann. § 17-5908, the Kansas Attorney General has ruled that timely publication is jurisdictional in nature. Thus, an ordinance adopted by the county will not be effective until it has been published as required by the statute. The Statute requires that a notice be published twice, in consecutive weeks, after the ordinance has been enacted. In a case arising in Hodgeman County, a local option was adopted in 1994 but the notice was only published once at that time. In January 1997, the ordinance was published again, this time two consecutive times as required by statute. The Attorney General ruled that that publication was valid and resulted in the institution of the ordinance, notwithstanding that more than two years had passed between the time of the adoption of the ordinance and the publication. The ordinance did not lapse because of that delay, nor was the defect cured by the passage of time because the statute did not set a time frame within which publication must occur. n416 As a result of the fact that the ordinance took affect upon publication in 1997, a statutory 60-day period in which opponents could protest began to run. As a result of a timely protest petition, an election was held pursuant to the statute and the county residents voted against the resolution. According to the terms of the statute, that rendered the county ordinance invalid.

The Kansas corporate farming statute allows for a protest election, after the adoption of an ordinance permitting hog farms to locate in a particular county. n417 Whether or not such a protest is held, the Attorney General has ruled that the county may rescind its own resolution giving that permission. n418 The question has arisen whether the question of rescission may be delegated to the electorate by placing the matter on the ballot and making the outcome dependent upon the outcome of the vote. Here, the Attorney General has ruled that home rule powers will only permit an advisory election rather than a binding one since the matter at law is not a charter resolution. n419

§ 47.10(s) Corporations: Legality of the Restrictions.

The limitations on corporate ownership or farming activity have survived a variety of legal challenges. At the state level, there has been a long history of approval. n420 In at least one case, n421 a very restrictive corporation landownership statute has been upheld by the United States Supreme Court against a challenge that the restrictions violated due process guarantees of the Constitution. Similar challenges have been rebuffed including those relating to equal protection, n422 privileges and immunities clauses, n423 preemption by Federal Banking Laws n424 and violations of interstate commerce protection. n425

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The Nebraska farm corporation restrictions have also survived another challenge. The Nebraska Supreme Court reversed the Lancaster County District Court and held that a cooperative is prohibited from owning farmland and breeding feeder pigs under Article XII, section 8 of the Nebraska Constitution. In Pig Pro Nonstock Cooperative v. Moore, n430 the court held that notwithstanding language in the amendment that appeared to exempt "non-profit corporations" from the prohibitions, the coop did not fit the definition of that term the restriction intended. The court concluded that the non-profit language in section 8 was unclear and therefore open to judicial interpretation. Looking to the intent of the voters, the court found that the language of the constitutional amendment as a whole "reflects an intent to prohibit individuals who are not members of the same family ... from forming and utilizing a corporation to own and operate a farm or ranch land for their personal economic gain." In that context, "non-profit" was construed to mean "a corporate entity which does not distribute or otherwise confer any form of economic benefit upon its members, directors, or officers." The court found that the nature of a coop was such that it did confer economic benefits on its members in the form of cost savings and in the form of patronage refunds and thus operated with a profit motive. Further, the court seemed concerned that neither the act under which the cooperative was organized nor the by-laws of the corporation required that any of its members reside on its premises or personally conduct its operations. "It is precisely this type of absentee ownership and operation of farm and ranch land by a corporate entity which the plain language of article XII, section 8 prohibits." n431

§ 47.10(t) Farmland Tenure Problems: Foreign Ownership of Farmland.

At various times throughout our history, n432 there has been serious concern that investors from foreign countries might acquire too much farmland in the United States and somehow divert production from those lands to the foreign nations to our detriment. n433 This fear has supported a host of federal n434 and state restriction n435 on foreign ownership and a variety of federal reporting requirements. n436

Nevertheless, the data suggest that the amount of agricultural land held by foreign interests is small and appears to be quite stable and interest in further restrictions has waned since the mid-1980s. It is presently estimated that approximately 1% of privately owned agricultural land in the United States, or about 14.8 million acres, is held by foreign interests. This level has remained constant since 1981. Further, much of the land is actually held by U.S. corporations that are partly owned by foreigners. Federal Reporting Law requires that a corporation be identified as foreign if as little as 10% of the stock is held by foreign investors. Only 47% of all foreign held land is actually owned by investors not affiliated with domestic firms. n437

The most restrictive statutes relating to foreign ownership tend to operate in much the same fashion as restrictions on corporations in that they tend to exclude a particular group or class n438 from the ownership privilege. n439

§ 47.10(u) Farmland Tenure Problems: Split Fees.

The title to real property may be fractioned horizontally as well as vertically. That is to say, it can be shared with others sequentially over time, in the form of life estates, remainders, determinable fees and so forth. Likewise, it may be shared by others at the same time, in the form of joint tenancies, tenancies in common and the like. In each of these cases, it may be said that the fee has been split between various holders, each of whom has specific rights in the land. The extent to which one may use and enjoy the land varies with each of these different interests in land but for the most part, there is little difference between agricultural land and other land with respect to these estates.

There are a few situations where agricultural land may be significantly affected by the nature of the split fee. Examples include land held under the Stock-raising Homestead Act, land subject to a severance of mineral rights and possibly acquired from railroads under certain railroad land grants.

§ 47.10(v) Split Fees: Stock-Raising Homestead Act.

Under the Stock-raising Homestead Act of 1916, n440 unsettled public lands that were designated as chiefly valuable for grazing could be entered and acquired by individuals in parcels of up to 640 acres. Much of the large unsettled grazing areas of the West were broken up as a result of this act, with the title to the land passing to private ownership. Little actual cultivation of the land was required in order to acquire title, which came after Department of Interior approval of an application for a land patent. n441 Significantly, in granting the title to these lands, the federal government reserved the subsurface coal and mineral rights. As a result, landowners who hold title under the Stock-Raising Homestead hold the surface rights but do not own the mineral rights.

§ 47.10(w) Split Fees: School Land Grants and Rural Credit Act Lands.

Each of the Enabling Acts of public land states admitted to the Union since 1802 has included grants of designated sections of federal land for the purpose of supporting public schools. n442 Upon completion of an official survey, title to four numbered sections in each public land township passed to the state. n443 However, the federal government was free to dispose of the designated lands in any manner consistent with applicable federal statutes prior to the survey. If the particular sections had already been sold or otherwise disposed of pursuant to any other act of Congress, other lands equivalent thereto would be granted to the states. These other lands are identified as "indemnity lands." n444

Although the school land grants gave the states a somewhat random selection of land which could then be disposed of to generate money to support schools, these land grants did not include any numbered sections known to be mineral in character (that is, contain valuable mineral deposits). n445 Similarly, the "indemnity lands" were limited to "unappropriated, surveyed public land, not mineral in character." n446

The present practice appears to be that when the school lands are sold or leased, the state retains the mineral rights that may be present under those lands. Thus an individual who acquired an interest in such lands does not acquire the full fee.

§ 47.10(x) Split Fees: Railroad Land Grants.

As a means to encourage settlement and to finance the building of railroads, Congress began the practice of granting rights-of-way up to 100 feet wide through its public lands. n447 By 1859, the grants included the even-numbered sections within six miles of the line. Later, odd-numbered sections would be granted so that the railroads would not lose sections 16 and 36 which were designated as school lands. n448

The extent to which some of the railroad land grant statutes passed the full fee to the railroads was litigated in a case involving access to the railroad right-of-way for purposes of constructing a coal slurry pipeline. n449 The railroad in this case held its rights-of-way under two different statutes, the Pacific Railroad Acts of 1862 n450 and 1864. n451 The

court held that if the railroad claimed the lands under § 2 of those Acts, it acquired 200 feet right-of-way on either side of the railroad which consisted of surface rights only and all rights incident to use for railroad purposes. n452 The servient estate in such cases was reserved by the federal government and could be passed by homestead patent to individuals. n453 One case has held that these grants were also subject to the mineral lands exception such that the railroad did not receive any rights to oil or gas under the right-of-way. n454

With respect to title to the alternate odd-numbered sections which the railroad received under § 3 of the Act, and which the railroad could sell, the court held that the railroad acquired not only the surface but the servient estate under the right-of-way as well. n455 And while the section lands and the servient estate could be disposed of, the railroad could not alienate the right-of-way itself. Section 3, however, also contains an exception for mineral lands. n456 Thus, one who acquired lands from a railroad may or may not have a full fee interest in the land. If the lands are not designated as mineral lands, and were acquired from the railroad, or from the government under a homestead patent, the individual landowner will generally hold full title (including the mineral estate) except for any reserved railroad rights-of-way.

§ 47.10(y) Split Fees: Mineral Estates.

The mineral estate is a legally recognized interest in land that is considered part of the fee. This interest may be severed and be separately conveyed, thus splitting the fee. n457 This may be done with a mineral deed n458 if the severance is permanent or with a mineral lease or a determinable or defeasible fee arrangement if the separation is temporary or conditional. n459

Where the mineral estate is separated from the surface estate, the holder of the mineral estate will have certain rights to use the surface of the land to the extent necessary to exploit, develop and beneficially use the mineral estate. n460 In some jurisdictions, the mineral estate may be referred to as the "dominant" estate and the surface estate as the "servient" estate. n461

The ability of the holder of the mineral estate to use the surface is typically limited to only those activities that may be "reasonable." While that term is difficult to define, it generally contemplates that there may be some inconvenience, damage or disruption to the surface of the land and that some surface area may actually be occupied as part of the mineral estate development activity. n462

The relative importance of the mineral estate with respect to the surface interest may alter the extent to which the land may be used for agricultural activity. In one case, n463 the court dealt with a complaint from the owner of the land that the pumping activities of the oil company interfered with a rotary irrigation system that had been previously installed by the landowner. The oil company argued that the right to use the surface was absolute and that the consequences to the landowner were of no legal effect. The court disagreed but refused to hold that the landowner's rights were superior. The court found that the surface landowner had little or no alternative means of developing the surface of the land whereas the oil company had at least two reasonable pumping alternatives. In such a case, the court held that the landowner may not be denied an opportunity to establish the unreasonableness of the activity of the mineral estate holder. The test, according to this court, was whether the method and manner of using the mineral estate was reasonable as "measured by what are the usual, customary and reasonable practices in the industry under like circumstances of time, place and servient estate use." n464 The burden of showing unreasonableness was placed on the surface landowner.

One of the complications with which the holder of a mineral estate must contend is the so-called "lapsing" statutes that many states have adopted. n465 These statutes typically cover "mineral interests" which are generally broadly defined to include any interest in the minerals of virtually any kind. n466 These statutes cover both the leasing of the mineral estate as well as the actual severance of the minerals from the rest of the fee. Typically, the statutes reach any interest in minerals that is "created by an instrument transmitting, by grant, assignment, reservation or otherwise." n467

The statutes cause the mineral estate to "lapse" and revert to the current surface owner if the estate is "unused" for a stipulated period. n468 The statutes typically define "use" of the mineral estate to cover various types of activities that involve the development or exploitation of the minerals as well as the payment of taxes on the mineral interest or the inclusion of the interest as part of an operation that is developing the minerals elsewhere in the unit or pool.

These statutes appear to function somewhat like Marketable Title statutes in that they treat the unused mineral interest as a "stale" claim against the land that is subject to being extinguished by the mere passage of time. Generally, interests subject to Marketable Title statutes may be preserved from extinction by filing notice of some kind in the record that the interest is claimed. This, of course, must be done periodically. Many mineral lapse statutes follow this pattern, requiring that a statement of claim be filed prior to the end of the requisite period. Generally, these statements must be filed with the registrar of deeds in the county in which the land is located. n469

On the other hand, unlike Marketable Title Statutes, it is generally required that notice of some kind be filed by the potential successor to the interest or that other appropriate action be taken before the interest will be terminated. n470

§ 47.10(z) Farming and Ranching on the Public Domain.

There has been a strong sense that the public land should be available for private agricultural use. Ranchers in the West have long felt that they had an implied right to graze their animals on the public domain, n471 a position that was supported in at least one judicial decision. n472 Abuse of this privilege, together with drought and a failure of the states to adequately protect the range led to the general closing of the public domain to private acquisition and the adoption of a statutory framework in which grazing and other agricultural uses could be managed. n473

The first major legislation that affected grazing rights was the Taylor Grazing Act of 1934. n474 This was followed by authority to comprehensively manage the public domain resources of the nation found in the Federal Land Policy and Management Act of 1976, n475 the Public Rangeland Improvement Act of 1978 n476 and the National Forest Management Act of 1976. n477 Under these statutes, ranchers may secure the right to graze animals on the public domain for a portion of the year subject to public land use plans. n478

The right to graze on the public domain has several interesting land tenure features. It is notable that the nature of the precise interest acquired by the livestock owner is not clear. The statute and cases describe the rights involved variously as allotments, n479 preferences, n480 leases, n481 and permits. n482 Unlike a lease, however, the lessee does not have exclusive possession to the premises (as might be the case with a lease) since the land is subject to the statutorily mandated principle of multiple use n483 which opens public land to such uses as outdoor recreation, range, timber, watershed, wildlife and fish purposes in the "combination that will best meet the needs of the American People, making the most judicious use of the land...". n484

Further, unlike other property interests, grazing permits do not create in the holder thereof "any right, title or interest or estate in or to the lands" held by the United States. n485 In this context, it has been held that the permit rights are not even "property" for purposes of protection under the Constitution. n486

On the other hand, the grazing rights seem to attach to particular tracts of public land as well as land held by private landowners n487 in much the same way as appurtenant property rights. n488 For example, the grazing right may be passed with the "base" n489 acreage to a subsequent purchaser of such lands or will remain with such lands in the event that the individual loses ownership or control of the base property. n490 Similarly, the right may be "severed" in whole or in part from the base property and transferred to other base property. n491 Finally, permit rights seem to have protected status akin to equitable property rights based on use over time n492 and may not arbitrarily be canceled by the government. n493

Conceptually, grazing permit rights share much in common with usufructuary interests in that they represent a right to

use property of another. It might be argued that the language of the statute which expressly disavows any creation of any property interest in the federal lands is not necessarily inconsistent with this view. The history of the Act suggests that Congress was clearly attempting to close the public domain to individuals who may have wished to acquire private title thereto. In this sense, the Act was an effort to end the public land distribution policies that the nation had pursued since its founding as the way to secure the large land areas that had been acquired. Read in that fashion, it is arguable that Congress did not intend so much to determine that the grazing rights were not property as it intended to make clear that the acquisition of a grazing right was not part of any homesteading or other title acquisition process.

Alternatively, it might be argued that the permit is part of what Charles A. Reich has described as "new property." n494 This kind of property is largely an economic phenomenon and it is clear that the right not only has value but gives value to the base land to which it is attached. n495

There has been considerable controversy over the amount charged to ranchers for the use of the public domain. In 1994, the Secretary of the Interior Bruce Babbitt proposed to raise the fees from $1.98 per animal unit month to make it comparable to the approximately $9.70 that is charged per animal unit month on private land. This was met by vociferous resistance from Western livestock interests. n496 The proposal was actually more modest than the popular press reported and would have raised the fee to $3.96 over a three-year period. Nevertheless, the proposal died. n497

FOOTNOTES:

(n1)Footnote 248. Herbert Tiffany, Outlines of Real Property 7 (1929).

(n2)Footnote 249. *Id.*

(n3)Footnote 250. *Id.*

(n4)Footnote 251. *See, e.g.*, Kan. Stat. Ann. § 17-5902 *et seq.*

(n5)Footnote 252. *See* James Wadley, *The Emerging "Social Function" Context for Land Use Planning in the United States: A Comparative Introduction to Recurring Issues, 28 Washburn L.J. 22 (1988).*

(n6)Footnote 253. *See, e.g.*, the requirements regarding conservation plans that are required under federal farm program statutes as a predicate to participation in a variety of federal programs. For further discussion, *see* § 47.12, *infra*.

(n7)Footnote 254. *See, e.g., Woodbury County Soil Conserv. Dist. v. Ortner, 279 N.W.2d 276 (Iowa 1979).*

(n8)Footnote 255. *See* discussion of "swampbuster" and "sodbuster" provisions of the federal farm program, *infra*.

(n9)Footnote 256. Much farmland is leased from other landowners. See discussion of farm leases *infra*. Many jurisdictions have adopted particular rules that apply uniquely to farm leasing arrangements. *See, e.g.*, Kan. Stat. Ann. §§ 58-2506 and 58-2506(a). In these jurisdictions, oral farm leases may be considered valid despite Statutes of Frauds requirement. Further, in order to lawfully terminate an oral farm lease, the landowner may need to abide specific statutorily ordained conditions or requirements. Kan. Stat. Ann. § 58-2506a.

Some land is held on a split fee basis with the private landowner only having rights in and to the surface estate. This may be the result of a severance of the mineral estate. See discussion of split fees, *infra*.

Some of the land used by farmers and ranchers is public land and subject to specialized federal regulation. *See, e.g.*, Taylor Grazing Act, *43 U.S.C. § 315 et seq.*; Federal Land Policy and Management Act, *43 U.S.C. § 1701 et seq.* Here, the farmer may have acquired a right to graze cattle on the public domain by permit which can be secured only if the applicant owns the requisite amount of "base" acres. However, the right to use the public domain for grazing purposes

even under a federally issued grazing permit is not treated as a property right of the farmer or rancher. *See* discussion, *infra*.

For further discussion, *see* Neil D. Hamilton, *Agriculture Without Farmers? Is Industrialization Restructuring American Food Production and Threatening the Future of Sustainable Agriculture? 14 N. Ill. U. L. Rev. 613,* (Summer 1994).

(n10)Footnote 257. *See* Paul Taylor, *Public Policy and the Shaping of Rural Society, 20 S.D. L. Rev. 475 (1975).*

(n11)Footnote 258. Fred Morrison, *State Corporate Farm Legislation, 7 U. Tol. L. Rev. 961 (1976);* J. Mark Kirkendall, *Up to Now: A History of American Agriculture from Jefferson to Revolution to Crisis*, 4 Agric. & Hum. Values 1 (1987). *See also* James Wadley, *Small Farms: The USDA, Rural Communities and Urban Pressure, 21 Washburn L.J. 478 (1982):* "[T]he primary reasons for preserving small farms are largely non-economic and relate to the quality of life made possible by rural communities."

(n12)Footnote 259. *See* Jacobson, The Development of American Political Thought: A Documentary History 274 (1932).

(n13)Footnote 260. *See* Staff of Senate Comm. On Agriculture, Nutrition and Forestry, 96th Cong., 2d Sess., changes in the Family Farm Concept, Farm Structure: A Historical Perspective on Change in the Number and Size of Farms 18-12 (Comm. Print 1980).

(n14)Footnote 261. R. Schickele, Objectives of Land Policy, Land Problems and Policies, 75-76 (1950).

(n15)Footnote 262. *Id.*

(n16)Footnote 263. *See California Agrarian Action Project, Inc. v. The Regents of the Univ. of Cal., 58 Cal. Rptr. 769 (Cal. App. 1989),* holding that the Federal Land Grant program required that agricultural research be expressly directed to benefit the family farm.

See Zeigler, K., *Who Will Teach our Farmers: Learning the Value of Mentor Programs from State & Private Programs, 5 Drake J. Agric. L. 279 (2000).*

(n17)Footnote 264. Staff of Senate Committee on Agriculture, Nutrition and Forestry, 96 Cong.. 2d Sess., Changes in the Family Farm Concept, Farm Structure: A Historical Perspective on Change in the Number and Size of Farms 19 (Comm. Print 980) (statement of David Brewster).

Family farms are defined thusly by the United States Department of Agriculture:

> The essential characteristics of a family farm are not to be found in the kind of tenure, or in the size of sales, acreage or capital investment, but in the degree to which the productive effort and its reward are vested in the family.
>
> The family farm is a primary agricultural business in which the operator is a risk-taking manager, who with his family does most of the farmwork and performs most of the managerial activities.

Id.

(n18)Footnote 265. *See, e.g.,* Agriculture and Food Act of 1981, Pub. L. No. 97-98, § 102 (a), *95 Stat. 213 (1981).*

For further discussion *see* Neil Hamilton, *Tending the Seeds: The Emergence of a New Agriculture in the United*

States, 1 Drake J. Agric. L. 7 (1996); Neil Hamilton, *Plowing New Ground: Emerging Issues in a Changing Agriculture, 2 Drake J. Agric. L. 181 (1997);* Bahls, *Preservation of Family Farms-- The Way Ahead, 45 Drake L. Rev. 311 (1997);* Hamilton, *Reaping What We Have Sown: Public Policy Consequences of Agricultural Industrialization and the Legal Implications of a Changing Production System, 45 Drake L. Rev. 289;* Chen & Adams, *Feudalism Unmodified: Discourses on Farms and Films, 45 Drake L. Rev. 361 (1997);* Myers, Ruark & Backiel, *Developing an Enduring American Agriculture, 12 Nat. Resources & Env't 110 (1997).*

(n19)Footnote 266. *See* Brian Stayton, *A Legislative Experiment in Rural Culture: The Anti-Corporate Farming Statutes, 59 UMKC L. Rev. 680 (1991)* for an analysis of statutes in Kansas, Oklahoma, North Dakota, Minnesota, South Dakota, Missouri, Iowa, Nebraska and Wisconsin.

(n20)Footnote 267. One commentator has traced the history of this fear and its impact on very divergent policies. *See* Ken Cook, *Loathing Suburbia: Views on Farmland Preservation from A West Virginia Limestone Ridge*, American Land Forum Magazine 70 (1983); It is interesting that while the fear has remained constant, policy has changed greatly. It might be argued that during the early decades of this century, it was popularly feared that if farms got too large, they would be too efficient and could therefore control supplies and prices. Therefore, the public demanded and government responded with policies that were designed the keep the farms small. After World War II, however, it was feared that if farms remained too small, they would be inefficient producers and thereby manipulate supplies and prices. The public therefore demanded and Government responded with policies that encouraged the consolidation of farms.

(n21)Footnote 268. *See* Jennifer Erickson, *Tyson Foods is Still on Top (The 400 Largest Farms in the U.S.)*, Successful Farming 20 (April 1992).

(n22)Footnote 269. Eric Voogt, *Pork, Pollution, and Pig Farming: The Truth about Corporate Hog Production in Kansas, 5 Kan. J.L. & Pub. Pol'y 219 (Spring 1996).*

(n23)Footnote 270. Most of the food and fiber produced in this country is produced by a relatively few, large farms. The largest 400 farms, for example, produce between 15 and 16% of our food despite constituting only .002% of the nation's farms. *See* Jennifer Erickson, *Tyson Foods is Still on Top (The 400 Largest Farms in the U.S.)*, Successful Farming, 20 (April 1992). For further discussion, *see* James Wadley, *Small Farms: The USDA, Rural Communities and Urban Pressures, 21 Washburn L.J. 478 (1982).*

(n24)Footnote 271. *See* discussion of symbolic outputs in the context of bureaucratic activity in our system, James Wadley, *Small Farms: The USDA, Rural Communities and Urban Pressures, 21 Washburn L.J. 478, 502-509 (1982).*

(n25)Footnote 272. *See, e.g.*, Howard Scher, Robert Catz and Gregory Matthews, *USDA: Agriculture at the Expense of Small Farmers and Farmworkers, 7 U. Tol. L. Rev. 837, at 861-62:*

> In sum, USDA has relegated both the small farmer and the farmworker to an outsider status in developing its agricultural policies. While small farms have been recognized, generally, as efficient agricultural producing units, they have fallen out of USDA's plans and policies simply because they don't contribute to the economy in a significant statistical way.

See also Fred Morrison, *State Corporate Farm Legislation, 7 U. Tol. L. Rev. 961 at 994 (1976)* where the author argues that farm-corporation statutes offer more of a symbolic, than a real, protection for the small family farms.

For further discussion see Neil Hamilton, *Tending the Seeds: The Emergence of a New Agriculture in the United States, 1 Drake J. Agric. L. 7 (1996);* Neil Hamilton, *Plowing New Ground: Emerging Issues in a Changing Agriculture, 2 Drake J. Agric. L. 181 (1997);* Bahls, *Preservation of Family Farms-- The Way Ahead, 45 Drake L. Rev. 311 (1997);* Hamilton, *Reaping What We Have Sown: Public Policy Consequences of Agricultural Industrialization and the Legal Implications of a Changing Production System, 45 Drake L. Rev. 289;* Chen & Adams, *Feudalism*

Unmodified: Discourses on Farms and Films, 45 Drake L. Rev. 361 (1997).

See Zeigler, K., *Who Will Teach our Farmers: Learning the Value of Mentor Programs from State & Private Programs. 5 Drake J. Agric. L. 279 (2000).*

(n26)Footnote 273. *See generally* James Wadley, *Small Farms: The U.S.D.A. Rural Communities Land Urban Pressures, 21 Washburn L.J. 478 (1982).*

See Zeigler, K., *Who Will Teach our Farmers: Learning the Value of Mentor Programs from State & Private Programs. 5 Drake J. Agric. L. 279 (2000).*

(n27)Footnote 274. One observer has suggested:

> The gradual disappearance of the small family [farm] has serious implications for our entire country. I would raise the question whether large-scale farming consolidation, further concentration of power in the diminished number of farms, and increased specialization do not diminish flexibility in our agricultural economy. Small farmers have traditionally played the role of a kind of shock absorber to carry the country through adverse economic conditions. There exists a certain resilience, continuity, and flexibility in the small family farm. The basic structure of family farms -- high equity, self-employment, lower operating costs, and the fact that once crops are in the costs of continuing the process until harvest are extremely low -- serve as an incentive to maintain output even if product prices fall to disastrously low levels. The existence of the small family farm thus helps to provide a constant food supply at affordable prices.

Sen. Gaylord Nelson, Family Farm Entry Assistance Act,Hearings on S. 2582 Before Subcommittee on Agricultural Credit and RuralElectrification of Senate Comm. On Agriculture, Nutrition and Forestry, 96 Cong., 1st Sess. at 48 (1979).

(n28)Footnote 275. It has been suggested that USDA has taken the position that:

> Agricultural policy should be directed toward maintaining agriculture as a viable industry and not as a way of life. The numbers of farms or farm population size is irrelevant except as these influence performance of the agricultural industry. There is no objective evidence to support the argument that there would be a net social benefit if the farm population were to increase or if its present size were maintained.

Howard Scher, Robert Catz and Gregory Matthews, *USDA: Agriculture at the Expense of Small Farmers and Farmworkers, 7 U. Tol. L. Rev. 837, at 844-45* [Quoting U.S. Dep't of Agric. Young Executives Comm., New Directions for the U.S. Agricultural Policy, 118 Cong. Rec. 21, 737 (1972)].

(n29)Footnote 276. *See, e.g.*, York, *We Need New Food and Farmland Policies*, Maine Organic Farmer & Gardener 15 (Sept. 1978).

(n30)Footnote 277. *See, e.g.*, Family Farm Antitrust Act of 1979: Hearings on S. 334 Before the Subcomm. On Antitrust, Monopoly and Business Rights of the Senate Comm. On the Judiciary, 96th Cong., 1st Sess. (1979), particularly statements by Walter Goldschmidt relating to his studies of Arvin and Dinuba; Wilkinson, Social Well-Being and Rural Community Development: Issues in Policy and Theory (1974); James Wadley, Small Farms: The USDA, Rural Communities and Urban Pressures, *21 Washburn L.J. 478 (1982).*

(n31)Footnote 278. Robert Mullins, Family Farm Antitrust Act of 1979: Hearings on S. 334 Before the Subcomm.

On Antitrust, Monopoly and Business Rights of the Senate Comm. On the Judiciary, 96th Cong., 1st Sess. 361.

(n32)Footnote 279. It has been discovered that for every five farms that go out of business, one rural business closes. James Wadley, *The Future of Government Regulation of Agriculture: Biting the Hand that Feeds Us? 3 N. Ill. U. L. Rev. 299, 317 (1983).* This is problematic because over 70% of the farmers are dependent upon these off-farm enterprises for supplemental employment and in the absence of such opportunities, rural poverty necessarily increases. *See, e.g.,* T. Carlin and B. Green, *Farm Structure and Nearby Communities, Rural Development Perspectives*, (Feb. 1989); M. Drabenstott, *Developing the Farm-Dependent Rural Economy: Policy Choices in* The Future of Rural America (Kenneth E. Prigg ed. 1991); P. Bartlett, *Part-time Farming: Saving the Family Farm or Saving a Life-Style?* 51 Rural Sociology 289 (1986); J. Belden, Dirt Rich, Dirt Poor (1986).

(n33)Footnote 280. *See* Jennifer Erickson, *Tyson Foods is Still on Top (The 400 Largest Farms in the U.S.)*, Successful Farming 20 (April 1992).

(n34)Footnote 281. T. Parker and L. Whitener, Farmers and Their Search for Off-Farm Employment 27, United States Dep't of Agric. Econ. Res. Serv. (1989).

(n35)Footnote 282. Concentrations of land ownership have reached a point where the individual opportunity to achieve independence and self-sufficiency (if that is still part of the American Dream at all) is possibly in serious jeopardy or at least beyond the reach of so many that present landholding patterns are generally accepted as, if not desirable, at least inevitable. It has been suggested that in many respects, our land tenure structure is in more urgent need of reform than that of Africa, Asia or Latin America:

> Land reform is also needed to increase the number of people in the United States who are free. This may sound silly in a country that presumes to be a breeder of free men. Yet ever-increasing numbers of Americans are not really free to assume responsibilities or to make major decisions affecting their lives. They work for large corporations or government bureaucracies or on assembly lines. They are not their own bosses, not proud of their work, and are not motivated to exercise their full rights as citizens. Farming has traditionally been a bastion of the independent small businessman who won't take guff from anybody and who prides himself on the quality of his work... .
>
> American land police should have as its higher priority the building of a society in which human beings can achieve dignity. This includes the easing of present social ills, both rural and urban, and the creation of a lasting economic base for democracy. A second priority should be to preserve the beauty and fertility of the land. Production of abundant food should be a third goal, but it need not be paramount and is not, in any case, a problem.

Peter Barnes, *Land Reform in America, in* Radical Agriculture at 30 (R. Merrill, ed., N.Y.U. Press, 1976).

(n36)Footnote 283. *See generally* James Wadley, *The Future of Government Regulation of Agriculture: Biting the Hand that Feeds Us? 3 N. Ill. U. L. Rev. 299 (1983);* Peter Barnes, *Land Reform in America* 26-38 *in* Radical Agriculture (R. Merrill, ed., 1976); James Wadley, *Small Farms: The U.S.D.A., Rural Communities Land Urban Pressures, 21 Washburn L.J. 478 (1982).*

(n37)Footnote 284. Another observer has suggested:

> The effects of local monopolies of rural lands in the lands of a few large agribusiness firms will not be confined to the consumer's food budget. It is in his role as user of rural land for non-food purposes that the consumer may feel the impact of rural land ownership concentrated most keenly. Food can be imported. The consumer can go abroad in search of cheaper recreation or residential amenities, but we cannot import the sights. The effects of concentration in agriculture are quite likely to drive up the

relative price of food in the long run. They are certain to drive up the cost of non-food producing uses of the land.

Richard Rodefeld, Family Farm Anti-Trust Act: Hearings on S. 334 Before the Subcommittee on Anti-Trust Monopoly and Business Rights of the Senate Committee on the Judiciary, 96 Cong., 1st Sess. at 435 (1979).

(n38)Footnote 285. Historically, the small farm has been promoted as the ideal land tenure system, as much because it enhanced access to land ownership for a maximum number of people as because it insured abundant food supplies. As the number of small farms has declined, the resulting land ownership patterns have been such that most Americans have been cut off from that ownership opportunity except as it may present itself through movement into expanding suburbia. Peter Barnes, *Land Reform In America* 26-38 in Radical Agriculture (R. Merrill ed., 1976); *Who Will Eventually Own America?* Town & Country 95 (June 1983).

(n39)Footnote 286. *See* Ken Cook, *Loathing Suburbia: Views on Farmland Preservation from a West Virginia Limestone Ridge*, American Land Forum Magazine 70 (Spring 1983). *See also* Karl Geier, *Agricultural District and Zoning: A State-Local Approach to a National Problem*, 8 Ecol. L.Q. at 676 (1980).

It has been predicted that in the near future, if current trends continue, land ownership will be concentrated such that only one percent of the remaining farm operators will possess half of the nation's arable land and food supply capacity. John Klein, *The Embattled Independent Farmer*, N.Y. Times Magazine at 139 (Nov. 29, 1981).

For a discussion of the impact of cash leasing on estate tax liability, *see* Harl, *Post-Death Cash Rent Leasing: One More Time, 75 Tax Notes, 1671 (1997);*

In *Hohenstein v. Commissioner, T.C. Memo 1997-56*, a qualified heir received the property from a farmer decedent and farmed the property for eight years, then became physically incapacitated and sold a portion of the farm and leased the remainder to unrelated parties on a cash basis. The heir reported the sale and paid the recapture tax but argued that the land should not lose its qualified status because he had materially participated for the period of eight years. The court held that the material participation and qualified use tests were separate tests and that the post-death cash lease was not a qualified use.

In an interesting case involving the effect of diseased premises on animals, the court in Wilcox v. Cappel, A-95-798 (Neb. App. Dec. 3, 1996, unpublished) held that the tenant had taken the premises "as is" and therefore could not recover for damages suffered by cattle that had grazed on the land. In this case, the landlord had an oral year-to-year agreement with the tenant permitting the tenant to graze his cattle on the landlord's cornstalks each fall after the harvest. The tenant had to fence the animals away from irrigation pumps, center pivots, electrical boxes and so forth. The tenant did not fence the animals away from a run-down building that neither party had inspected since 1979 and which had not ever been used under the lease. The cattle ingested nitrogen fertilizer stored in the building so the tenant lost 130 newborn calves and additional calves were aborted. Total losses claimed were approximately $130,000 in actual damages. The court held that the landowner was not obligated to remove obvious sources of danger that a reasonable inspection would have revealed. Even though the tenant was not required to fence off the building, the tenant knew the building was part of the lease and that the cattle were near the building.

For a discussion of the extent to which production contracts are distinguished from leases and regulated as part of corporate restrictions or otherwise, *see* Hamilton, *State Regulation of Agricultural Production Contracts, 25 U. Mem. L. Rev. 1051 (1995);* Hamilton, *Why Own the Farm if You can Own the Farmer (and the Crop)? Contract Production and Intellectual Property Protection of Grain Crops, 73 Neb. L. Rev. 48 (1994).*

Several states have statutes that specifically regulate production contracts in agriculture. See, e.g. Minn. Stat. Ann. §§

17.90-.98, 514.995; Wis. Adm. Code. § Ag. 101; Kan. Stat. Ann. § 16-1501-1506.

(n40)Footnote 287. *See, e.g., Penn Cent. Transp. Co. v. New York City, 438 U.S. 104 (1978).*

(n41)Footnote 288. *See, e.g., Sierra Club v. City of Hayward, 623 P.2d 180 (Cal. 1981).*

(n42)Footnote 289. *See* Internal Revenue Code § 2032A.

(n43)Footnote 290. *See* discussion, *infra*.

(n44)Footnote 291. *See 7 U.S.C. § 1308.*

(n45)Footnote 292. *See* 7 C.F.R. Part 795.

(n46)Footnote 293. 7 C.F.R. § 795.11.

(n47)Footnote 294. *See Wall v. Department of Revenue, 458 N.W.2d 814 (Wis. App. 1990).*

(n48)Footnote 295. *53 B.R. 751 (Bankr. D. N.D. 1985). For further discussion, see* William L. Norton, *1 Norton Bankruptcy Law and Practice*, § 3:14 (1998); Susan S. Schneider, *The Family Farmer in Bankruptcy: Recent Developments in Chapter 12, 3 Drake J. Agric. L. 161 (1998).*

(n49)Footnote 296. *See, e.g., Matter of Slagle, 78 B.R. 570 (Bankr. Neb. 1987); Farmers Sec. State Bank of Zumbrota v. Voegele, 386 N.W.2d 760 (Minn. App. 1986); In re Kobs, 163 B.R. 368 (Bankr. D. Kan. 1994); In re Meckfessel, 67 B.R. 277 (Bankr. D. Kan. 1986); In re Schroeder, 62 B.R. 604 (Bankr. D. Kan. 1986).*

(n50)Footnote 297. *See Farmers & Merchants Nat'l Bank v. Schulz, 63 B.R. 168 (Bankr. Neb. 1986).*

(n51)Footnote 298. *See In re Oetinger, 49 B.R. 41 (Bankr. D. Kan. 1985); In re Lapp, 66 B.R. 67 (Bankr. D. Colo. 1986).* For further discussion, *see* Susan A. Schneider, *Who Owns the Family Farm? The Struggle to Determine the Property Rights of Farm Wives,* 14 N. Ill. L. Rev. 689 (Summer 1994).

(n52)Footnote 299. One estimate is that forty percent of all farmland is being operated by persons other than the owner. Issue Briefing Paper 3, Office of Governmental and Public Affairs, No. 16, USDA (July 6, 1979).

The endorsement of a check given for a land lease was considered sufficient to avoid statute of frauds problems in Lindeman v. Johns, Mich. App. LEXIS 2559 (Mich. App. 2001).

In *Riddle v. Elk Creek Salers, Ltd, 52 S.W. 3d 644 (Mo. App. 2001),* the court held that a lessee was not entitled to abatement for the loss of a farmhouse that was destroyed by fire upon the exercise of an option to purchase the property under the lease where the option was not exercised until after the farmhouse had been destroyed.

The court, in *Geren v. Geren, 29 P. 3d 448 (Kan. App. 2001)* held that although someone acting as an attorney in fact did not have authority to terminate an oral farm lease, the successor trustee for the estate did have the authority. In this case, it was also held proper to post the notice of termination on the leased premises, rather than on the residence of the tenant, if the tenant refused service by certified mail.

(n53)Footnote 300. Farm leases may not be assignable without the written consent of the landlord in some jurisdictions. See Kan. Stat. Ann. § 58-2511. *See also Keefer v. Spoher, 273 P.2d 230 (Kan. 1949).*

See also Harting v. Barton, 6 P. 3d 91 (Wash. App. 2000) (mediation clause); *Land v. Wahl, 6 P. 3d 621 (Wash App. 2000)* (slander of title); *K & M Enterprises of Slaughter, Inc. v. C. P. Pennington, 764 So. 2d 1089 (La. App. 2000)* (risk of loss for deer damaging crop).

For further discussion, see Miller, Cynthia A. *Reasonable Options for Those Who do not Want to Sell the Farm: Farm Leases and Farm Management Companies. 5 Drake J. Agric. L. 251 (2000).*

(n54)Footnote 301. It is increasingly popular to lease items other than the land, such as equipment or livestock. These are not addressed here since they involve personal property as opposed to real property.

(n55)Footnote 302. For a discussion of when someone who farms the land is a cropper as opposed to a tenant, *see* Comment, *Landlord/Tenant-Termination of Agricultural Tenancy -- "Cropper" Defined, 42 Iowa L. Rev. 650 (1957);* Comment, *Cropper & Tenant Distinguished in Missouri, 24 Mo. L. Rev. 30 (1959); Farmland Cultivation Arrangement as Creating Status of Landlord/Tenant or Landowner-Cropper, 95 A.L.R.3d 1013 (1979). See also Sach v. United States, 422 F. Supp. 1092 (N.D. Ohio 1976).*

Resolution of the issue generally depends on the extent to which the one who does the actual farming has control over the operation, is at risk in the venture and is the one to whom the success or failure of the endeavor may be attributed, and is the one upon whom the activity is dependent in terms of knowledge and expertise.

(n56)Footnote 303. *See, e.g.*, Kan. Stat. Ann. § 33-105:

No leases, estates or interests of, in or out of lands, exceeding one year in duration, shall at any time hereafter be assigned or granted, unless it be by deed or note, in writing, signed by the party so adding or granting the same, or their agents thereunto lawfully authorized by writing, or by act and operation of law.

For further discussion, *see* Barbara Slotnik, *Avoidance of Statute: Effect of Performance Under Oral Agreement,* 41 TX Jur. 3d Frauds, Statute of, § 174 (1998). *See also Caballero v. Hymel, 713 So. 2d 1277 (La. App. 1998)* (suit over value of stubble left in field at end of lease. The court held that the public-records doctrine did not relieve landlord of obligation to honor oral lease).

The endorsement of a check given for a land lease was considered sufficient to avoid statute of frauds problems in Lindeman v. Johns, Mich. App. LEXIS 2559 (Mich. App. 2001).

(n57)Footnote 304. *Daniel v. Leben, 362 P.2d 634 (Kan. 1961). See also Bell v. Vaughn, 53 P.2d 61 (Ariz. 1935).*

(n58)Footnote 305. *524 N.W.2d 436 (Iowa App. 1994).*

(n59)Footnote 306. Jake Looney, *Legal and Economic Considerations in Drafting Arkansas Farm Leases, 35 Ark. L. Rev. 395, 396 (1981).*

(n60)Footnote 307. *See, e.g.*, Kan. Stat. Ann. § 58-2502.

(n61)Footnote 308. *See Skinner v. Davis, 104 Kan. 467 (1919).*

(n62)Footnote 309. "Ordinarily, possession taken and acts done in execution of an oral lease void under the statute of frauds will convert the tenancy into one from year to year." *Id. at 468.*

(n63)Footnote 310. *Becker v. McFadden, 561 P.2d 416, 419 (Kan. 1977):* "The general rule is that when a tenant holds over his term with the consent of the landlord, express or implied, the law implies a continuation of the original tenancy upon the same terms and conditions."

(n64)Footnote 311. *Butz v. Butz, 299 N.E.2d 728 (Ill. App. 1973),* excluding an option to purchase which was contained in the original lease. The court suggested that only essential terms relating to basic landlord or tenant duties would be continued and terms that created additional obligations, such as the making of improvements or bonuses for

high yields would not be continued.

(n65)Footnote 312. No. 70,226 (unpublished opinion of the Kansas Court of Appeals, May 13, 1994),

(n66)Footnote 313. *922 S.W.2d 43 (Mo. App. 1996).*

(n67)Footnote 314. *See, e.g., Hooks v. Bridgewater, 229 S.W. 1114 (Tex. 1921).* It has been held that since part performance is an equitable doctrine, it is not applicable where legal damages are sought. *Trollope v. Koerner, 470 P.2d 91 (Ariz. 1970).*

See also *Pattelli v. Bell, 721 N.Y.S. 2d 734 (N Y. App. 2001).*

(n68)Footnote 315. *See Teague v. Roper, 526 S.W. 2291 (Tex. App. 1975).*

(n69)Footnote 316. *Stuber v. Sowder, 213 P.2d 989 (Kan. 1950).*

(n70)Footnote 317. "Here the parties were not dealing with an ordinary crop. One of the principle purposes of growing alfalfa is to fertilize the land. The preparation of the seedbed for the growing of alfalfa requires much more labor than for the growing of wheat, and the seed and phosphates are expensive." *Id.*

(n71)Footnote 318. Jake Looney, *Legal and Economic Considerations in Drafting Arkansas Farm Leases, 35 Ark. L. Rev. 395 (1981).* Common hybrid combinations and variations of crop and cash rent include:

> crop share cash: rent is paid as a share of the crops with a fixed sum for certain acreage or for buildings. Cash is paid for that portion of the farm over which the tenant has sole control.
>
> livestock share: the landlord furnishes the land, buildings, fences and so forth and owns a share of the livestock, feed operation and equipment. Expenses are shared and the tenant typically supplies all the labor. Landlord receives a share of the increase in the livestock herd or flock.
>
> irrigation crop share: rent is paid as a portion of the crop and tenant also pays a share of the irrigation costs.
>
> guaranteed bushel: tenant agrees to pay a fixed number of bushels regardless of the total amount grown. The crop is typically delivered to the landlord who then can control when and for what price it is sold.
>
> minimum cash or crop share: the land is rented for a specified amount or a particular fractional share of the crop, whichever is larger.

See Luvaas Family Farms v. Ferrell Family Farms, 23 P. 3d 1111 (Wash App. 2001), ability of co-tenant to lease property to a third party.

See Kettle, Inc. v. Caraway, 2001 Tex. App. LEXIS 3619 (Tex. App. 2001) where the issue was the failure to pay rent. The tenant did not plant a crop because of alleged misrepresentation of the amount of available irrigation water and because the landlord did not properly repair a pump. In the case, it was held that both the landlord and the tenant had breached obligations under the lease.

(n72)Footnote 319. *See Tiegs v. Watts, 954 P.2d 877 (Wash. 1998)* (tenant recovery against landlord for breach of lease and for creating a nuisance by contaminating a well upheld); *Caballero v. Hymel, 713 So. 2d 1277 (La. App. 1998)* (suit over value of stubble left in field at end of lease. The court held that the crop stubble were "movables by anticipation." In addition, the court held that the public-records doctrine did not relieve landlord of obligation to honor

oral lease. Tenant had no restoration obligation in absence of lease for loss of acres in cultivation between beginning and end of lease. As a result, the court held that the tenant was equitably entitled to compensation for the cane roots left in the field at the end of the lease); *Schumacher v. Stephens, 956 P.2d 76 (Mont. 1998)* (conversion of crop, breach of crop-share lease; harvest was actually less than estimated amount).

(n73)Footnote 320. *See, e.g.*, Kan. Stat. Ann. § 2509.

(n74)Footnote 321. *See, e.g.*, Kan. Stat. Ann. § 58-2505 shortening the notice requirement for year-to-year tenancies to thirty days. *See also* Kan. Stat. Ann. § 2504 which shortens the notice period to thirty days for tenancies at will. Three days' notice is required for tenancies of less than three months, Kan. Stat. Ann. § 2508, whereas ten days' notice is required for tenancies of longer than three months, Kan. Stat. Ann. § 2507.

(n75)Footnote 322. In some jurisdictions, no notice may be required to terminate particular kinds of tenancies. For example, in *Morling v. Schmidt, 299 N.W.2d 480* (Iowa, 1980) the farm lease termination statute was construed to apply only to land under cultivation and as a result did not apply to leases of pasture. *See also* Kan. Stat. Ann. § 58-2506 which applies only to leases involving tenants who occupy and cultivate farms and pertain to spring and fall crops.

(n76)Footnote 323. Kan. Stat. Ann. § 58-2510.

(n77)Footnote 324. *See, e.g., Becker v. McFadden, 561 P.2d 416 (Kan. 1977),* requiring timely notice of termination even to change the terms of the lease. In this case, the court observed that if proper notice is given and new terms are specified, the tenant will be subject to the new terms if he "either remains silent with reference to the notice or fails to express his non-assent to the terms." *Id.* at 555. *Denton v. Moser, 214 N.W.2d 28 (Iowa 1976)* suggests that the notice requirement may be waived by specific provisions in the lease, which may govern over the statutory provisions.

The court, in *Geren v. Geren, 29 P. 3d 448 (Kan. App. 2001)* held that although someone acting as an attorney in fact did not have authority to terminate an oral farm lease, the successor trustee for the estate did have the authority. In this case, it was also held proper to post the notice of termination on the leased premises, rather than on the residence of the tenant, if the tenant refused service by certified mail.

But see *Garnas v. Bone, 637 N.W. 2d 114 (Ia. 2001)* holding that in this case, a lease was mutually abandoned when the land was enrolled in the Conservation Reserve Program. Hence, no notice to terminate the lease was required.

In R.K. Richards v. Bockes, Iowa App. LEXIS 405 (Ia. App. 2001), the court awarded as part of the damages for wrongful termination of a farm lease the value of a government payment to which the tenant was no longer entitled because of the absence of the lease.

(n78)Footnote 325. *See, e.g.*, Kan. Stat. Ann. § 58-2505.

(n79)Footnote 326. *Nelson v. Ware, 47 P. 541 (Kan. 1897). But see Pollock v. Pollock, 72 N.W.2d 483 (Iowa 1955)* construing a statute that required notice to be given "by either party to the other." Iowa Code § 562.6.

(n80)Footnote 327. *See* Kan. Stat. Ann. § 2509:

Where the time for termination of a tenancy is specified in the contract or where a tenant at will commits waste, or in the case of a tenant by sufferance, and in any case where the relation of landlord and tenant does not exist, no notice to quit shall be necessary.

(n81)Footnote 328. *See, e.g.*, Iowa Code § 562.6.

(n82)Footnote 329. The Kansas farm tenancy termination statute, Kan. Stat. Ann. § 2506, is particularly interesting. The manner of termination varies depending upon whether the lease is written or oral and upon whether the

land is seeded to fall or spring crops. Generally, notice must be given thirty days in advance of March 1 and must fix the termination to take place on March 1. If the notice is not timely or otherwise valid, it will not be considered effective and the tenant may remain in possession for another year. In most cases, this notice procedure will be used to terminate leases involving spring seeded crops.

Fall seeded crops must be noticed for termination in the same manner as spring seeded crops, but the lease will not actually terminate at the date set in the notice. If the notice is given after fall seeded crops have been planted, the notice must be given in advance of March 1 and must set the termination date in the notice as March 1. The statute, however, will extend the lease until the day following the last day of harvesting such crops or on August 1, whichever comes first. Further, if the notice is given after March 1 and before a fall seeded crop has been planted, the law will terminate the tenancy after the last day of harvest or August 1 *of the succeeding year*.

The rationale for giving an additional year where the notice is not timely appears to be at least threefold. First, the legislature has established that holdover leases run, as a matter of statute, from March 1 to March 1. This is apparently so that tenants will be given adequate time to plan for the next crop year or for landlords to find a new tenant if one is needed for either spring or fall crops. Second, the legislature has established only a limited "window period" that ends 30 days in advance of March 1 as the time in which to give notice to terminate. This is apparently because due process requires adequate notice to terminate the relationship and if it occurs after 30 days before March 1, the tenant is likely to be harmed because efforts should be underway at that point to prepare for the next crop season. Finally, if there are no serious consequences associated with not strictly abiding the "window," landlords could give notice at any time and tenants would be evicted without an opportunity to complete the harvest or, if they were given an opportunity to harvest despite the lateness of the notice, the same result as under § 58-2506(b) would occur without any incentive to abide by § 2506(a). Thus, to insure that § 2506(a) is followed, defective notice or untimely notice must be considered void and the tenancy will continue until the next cycle. This result is necessary to insure that the land does not lie idle a full season. Subpart (c) codifies this position and clarifies that the full cycle is given (until harvest) not just until the subsequent March 1. (It is noted that the full cycle expires March 1 for other than fall seeded crops.) As noted above, subpart (b) is included to insure equity where needed even though the notice is timely and proper.

Where the tenant holds over from a written lease, and spring seeded crops are involved, notice must be given at least thirty days prior to the date set for termination in the lease and must set termination to occur on that date.

If the harvesting of the crops is delayed beyond the date at which the statute would terminate the tenancy, by reason of forces beyond the control of the tenant, the law will still allow the tenant to harvest the crop. *See Horne v. Oller, 615 P.2d 791 (Kan. App. 1980). See also Chamberlain v. Evans, 591 P.2d 237 (Mont. 1979).*

(n83)Footnote 330. No. 96-1331-*WEB, 1997 U.S. Dist. LEXIS 448 (D.C. Kan. Jan 8 1997).*

(n84)Footnote 331. *922 S.W.2d 43 (Mo. App. 1996).*

(n85)Footnote 332. *See* Solberg, Legal Aspects of Farm Tenancy in Arkansas, Bull 468, Arkansas Experiment Station (1946); Jake Looney, *Legal and Economic Considerations in Drafting Arkansas Farm Leases, 35 Ark L. Rev. 395 (1981);* Margaret Grossman, Property Rights in Farm Bankruptcy: Treatment of Crops and Livestock Under the Farm Lease, 6 J. Agric. Tax'n & L. 579 (1984); H.W. Hannah, *Illinois Farm Tenancy Law -- Static or Evolving 1977,* So. Ill. U. L. J. 359 (1970).

See, e.g., Kan. Stat. Ann. § 2524: "Any rent due for farming land shall be a lien on the crop growing or made on the premises. Such lien may be enforced by action and attachment therein, as hereinafter provided."

(n86)Footnote 333. 217. *See, e.g.*, Ark. Stat. Ann. § 51-201; Iowa Code Ann. § 570.1; Mo. Stat. Ann. § 441.280.

(n87)Footnote 334. *See, e.g., Murphy v. Myar, 128 S.W. 359 (Ark. 1910).*

(n88)Footnote 335. *See, e.g.*, Ala. Code § 35-9-30; S.C. Code Ann. § 29-13-20; Wash. Rev. Code Ann. § 60.23.060.

See also Sam Brownback and James Wadley, Kansas Agricultural Law 250-251 (1989).

But see Meyhoeffer v. Wallace, 792 So. 2d 851 (La. App. 2001), holding that the landlord's lien was not superior to that of the bank because the lease was not filed in the Louisiana Agricultural Central Registry as required by statute.

In *Wedemeier v. Habbo G. Fokkena, 237 F.3d 938 (8th Cir. Bankr. 2001),* the court allowed a trustee in bankruptcy to avoid liens claimed by landlords and held that awarding the landlords rent as administrative expenses based on reasonable rental values unjustly enriched the bankruptcy estate.

(n89)Footnote 336. *See:* Ark. Stat. Ann. § 51-201, extending the lien for 6 months after the rent becomes due; 735 Ill. Comp.. Stat Ann 5/9-316, lien extends for six months; Iowa Code Ann., § 570.1, lien extends for one year after the year's rent falls due, but in no case over six months after the expiration of the lease term.

(n90)Footnote 337. *See* Ala. Code § 35-9-30.

(n91)Footnote 338. 735 Ill. Comp.. Stat Ann 5/9-316.

(n92)Footnote 339. *See, e.g., Holmes v. Riceland Foods, Inc., 546 S.W.2d 414 (Ark. 1977); Knapp v. Hipes, 152 P.2d 805 (Kan. 1952).*

(n93)Footnote 340. *See, e.g., Martin v. Leflore Bank & Trust Co., 70 So. 2d 66 (Miss. 1954).*

(n94)Footnote 341. *See* Richard Levin, *An Introduction to the Trustee's Avoiding Powers, 53 Am. Bankr. L.J. 173 (1979).*

(n95)Footnote 342. *See, e.g., Melms v. Pabst Brewing Co., 79 N.W. 738 (Wis. 1899).* The rationale for this rule is that the improvements are made for the benefit of the tenant and as a result, the tenant cannot recover the cost thereof at the termination of the lease. *See National Housewares Corp. v. Traikum, 444 S.W. 2d 68 (Ark. 1969).*

In *Hendrickson v. Wagners, Inc, 598 N.W.2d 507 (S.D. 1999),* the lessees of land adjacent to that of the plaintiffs dug drainage ditches which resulted in the discharge of the water onto the adjoining land. The court found that the ditches were intentionally dug and a permanent injunction was issued requiring the leaseholders to fill in the drainage ditches.

(n96)Footnote 343. *Cockrum v. McCallie, 488 S.W.2d 717 (Ark. 1973).* Kan. Stat. Ann. § 58-2501 imposes interesting but significantly narrowed limitations on the landlord's right to restrict the tenant with regard to improvements:

Any person in the possession of real property with the assent of the owner is presumed to be a tenant at will, unless the contrary is shown except as herein otherwise provided. *Where the landlord is renting farms in large numbers and a total acreage in excess of five thousand acres, and has tenants in excess of ten or more, and by the lease requires such tenants to erect or own and maintain substantially all of the buildings and improvements on the farm, such lease shall contain just and fair provisions for the free sale and transfer of such buildings and improvements, or the purchase thereof by the landlord, without requiring the tenant to remove the same from the land.* [emphasis supplied]

(n97)Footnote 344. 228. *See, e.g.*, Kan. Stat. Ann., § 58-2501a.

(n98)Footnote 345. 229. *See, e.g.*, Kan. Stat. Ann. § 58-2506a:

(a) When a notice of termination is given by the landlord pursuant to subsection (a) or (c) of Kan. Stat. Ann. § 58-2506, and the tenant prior to receiving such notice has (1) performed customary tillage practices or has applied or furnished fertilizers, herbicides or pest control substances and (2) has not planted the ground, the landlord shall pay the tenant the fair and reasonable value of the services furnished and the fertilizers, herbicides or pest control substances furnished.

(b) Where the tenancy is terminated by the landlord on March 1 pursuant to subsection (a) of Kan. Stat. Ann. § 58-2506, and the tenant planted and obtained a satisfactory stand of alfalfa the preceding fall, the landlord shall pay the tenant the fair and reasonable value of all services performed in preparing and planting the alfalfa and for all of the tenant's expenditures for deed, fertilizer, herbicide or pest control substances.

See Caballero v. Hymel, 713 So. 2d 1277 (La. App. 1998) (suit over value of stubble left in field at end of lease. The court held that the stubble from the crops were "movables by anticipation." The court also held that the tenant had no restoration obligation in absence of lease for loss of acres in cultivation between beginning and end of lease. As a result, the court held that the tenant was equitably entitled to compensation for the cane roots left in the field at the end of the lease).

(n99)Footnote 346. 735 Ill. Comp.. Stat Ann 5/9-316.

(n100)Footnote 347. *See, e.g., Riddle v. Dow, 66 N.W. 1066 (Iowa 1896).*

For further discussion, *see* Herbert G. Feuerhake, *Agriculture and Crops,* 2 NY Jur 2d Agriculture and Crops § 3 (1998); J A, Bryant, Jr., *Rights in Respect of Crops as Between Estate of Life Tenant and Remainderman,* 47 A.L.R 784 (1998).

(n101)Footnote 348. *Id.*

(n102)Footnote 349. *See, e.g., Cox v. Miller, 59 P.2d 628 (Cal. App. 1936).*

(n103)Footnote 350. *See, e.g., Horner v. Oller, 5 Kan. App. 2d 236 (1980).*

(n104)Footnote 351. *See, e.g., Florala Sawmill Co. v. Parrish, 46 So. 462 (Ala. 1908); Nash v. Thomas, 110 N.W.2d 355 (Ind. App. 1953); Soppel v. Mastin, 556 P.2d 394 (Kan. 1976).*

(n105)Footnote 352. Herbert Tiffany, Outlines of Real Property § 189 (1929). *Fructus naturales* are treated as part of the land until they are severed and as such tend to belong to the owner of the land, rather than the possessor. In that sense, emblements are generally considered to be personal property.

See Caballero v. Hymel, 713 So. 2d 1277 (La. App. 1998) (suit over value of stubble left in field at end of lease. The court held that the crop stubble were "movables by anticipation." Therefore, the tenant had no restoration obligation in absence of lease for loss of acres in cultivation between beginning and end of lease. However, the tenant was equitably entitled to compensation for the remaining stubble).

In *Heinold v. Siecke, 598 N.W. 2d 58 (Neb. 1999),* the court determined that the law of emblements governed the determination of ownerships of crops upon the death of a life tenant. The court ruled that the crops growing at the time of the life tenant's death became property of the estate, not property of the remainderman. The crops were subject to a sharecropping agreement and were harvested after the death of the life tenant. The court distinguished this case from an earlier case over a life estate that was held in joint tenancy. There it was held that crops growing on the land were not subject to claims of creditors but passed with the land to the surviving joint tenant. That difference between the cases

was that in the joint tenancy case, each joint tenant was considered to own the whole of the property from the time the interest was created. In contrast, when a remainderman ultimately succeeds to the possession of the life tenant, the remainderman does not succeed to the title but instead gets the title from another, independent source, from the time of the death of the life tenant.

(n106)Footnote 353. *Id.*

(n107)Footnote 354. *See, e.g., Finley v. McClure, 567 P.2d 851 (Kan. 1977); Rewerts v. Whittington, 571 P.2d 58 (Kan. App. 1971); Wood v. Trenchard, 550 P.2d 490 (Wyo. 1976).*

(n108)Footnote 355. *Sopple v. Mastin, 556 P.2d 394 (Kan. 1976).*

(n109)Footnote 356. *Id.*

(n110)Footnote 357. *See, e.g., Opheide v. Schoeppner, 163 N.W.2d 360 (Iowa 1968); John v. Babb, 461 P.2d 775 (Kan. 1969); Meyer v. Roberts, 89 P. 1051 (Or. 1907).*

(n111)Footnote 358. *See, e.g., Finley v. McClure, 567 P.2d 851 (Kan. 1977).*

(n112)Footnote 359. *915 P.2d 1001 (Or. App. 1996).*

(n113)Footnote 360. *922 S.W.2d 43 (Mo. App. 1996).*

(n114)Footnote 361. *See, e.g.*, Neil Harl, Agricultural Law § 8.04[2]. *See also* ch. 70, this treatise.

(n115)Footnote 362. *See Moser v. Thorp Sales Corp., 312 N.W.2d 881 (Iowa 1981).*

(n116)Footnote 363. *See, e.g., McElwee v. DeVault, 120 N.W.2d 541 (Iowa 1963).*

(n117)Footnote 364. *See, e.g.*, Kan. Stat. Ann. § 58-2509 (providing that no notice to quit is required where tenant commits waste).

(n118)Footnote 365. *See Moser v. Thorp Sales Corp., 312 N.W.2d 881 (Iowa 1981).*

(n119)Footnote 366. *See, e.g., McElwee v. DeVault, 120 N.W.2d 541 (Iowa 1963):*

> I. The second party covenants to farm said premises in a good farm-like manner, and to raise the greatest amount of grain thereon, the nature of the soil and season will permit... .
>
> II. The second party covenants to care for the property and for all growing crops in good and husbandlike manner, and to harvest all crops in proper season... .

(n120)Footnote 367. *See, e.g., Schultz v. Ramey, 328 P.2d 937 (N.M. 1958):*

> We agree that in the case of a farming lease with a share-the-crop provision, the law implies a covenant on the part of the tenant to farm the land in a husbandlike manner... . In our opinion such an implied covenant is an incident of the landlord/tenant relationship; it arises even though a standard printed form is used and, as here, the good husbandry covenant is deleted.

(n121)Footnote 368. *Id. See also* Neil Hamilton, *Adjusting Farm Tenancy Practices to Support Sustainable Agriculture*, 12 J. Agric. Tax'n & Law 227, 230-231 (1989).

(n122)Footnote 369. *Id.*

(n123)Footnote 370. Although federal legislation has been proposed from time to time, none has been adopted. *See, e.g.*, The Family Farm Antitrust Act OF 1979, S. 334, which would have limited corporate investment in farmland, banned foreign ownership of U.S. farms and would have mandated periodic reporting requirements; H.R. 941 (1977); H.R. 6526 (1975).

For further discussion, *see* Brian Stayton, *A Legislative Experiment in Rural Culture: The Anti-Corporate Farming Statutes, 59 UMKC L. Rev. 679 (1991);* Smart & Hoberg, Corporate Farming in the Anti-Corporate Farming States, Nat'l Center for Agric. L. Res. & Info. (1989).

(n124)Footnote 371. These include Iowa, Kansas, Michigan, Minnesota, Missouri, Nebraska, North Dakota, Oklahoma, South Dakota, and Wisconsin.

In 1982, the voters in Nebraska adopted a constitutional amendment in a statewide referendum that restricted corporate ownership of farmland.

In addition, a number of states considered but did not adopt such legislation: Colorado, Illinois, Indiana, Tennessee, Montana and Kentucky. Virginia and Oregon have had minor restrictions.

Some states, such as California, Kentucky, Michigan, Mississippi, and Texas, limit the length of time farmland can be owned, leased or farmed.

For further discussion, *see* Edmonson & Kenneth Krause, State Regulation of Corporate Farming, Agricultural Economic Report No. 419, Economics, Statistics & Cooperative Service, U.S. Dept. of Agriculture (1978); Note, *An Equal Protection Analysis of the Classifications in Initiative 300: The Family Farm Amendment to the Constitution of the State of Nebraska, 62 Neb. L. Rev. 770 (1983);* Fred Morrison, *State Corporate Farm Legislation, 7 U. Tol. L. Rev. 961 (1976),* William Phelps, *Corporate Farming Statutes*, 2 Whitter L. Rev. 441 (1980); Note, *The Family Farm: Regulating Farm Act Avoidance Techniques Through Restrictions on Vertical Integration and Production Contracting, 16 Val. U. L. Rev. 277 (1981),* Note, *North Dakota's Corporate Farming Statute: An Analysis of the Recent Change in the Law, 58 N.D. L. Rev. 282 (1982);* Brian Stayton, *A Legislative Experiment in Rural Culture: The Anti-Corporate Farming Statutes, 59 UMKC L. Rev. 679 (1991).*

(n125)Footnote 372. Kansas (1931), North Dakota (1935).

(n126)Footnote 373. Nebraska (1881), and Minnesota (1891).

(n127)Footnote 374. *See* Philip Ridenour, *Kansas Farm Corporations: Some Observations and Recommendations*, 44 J. Kan. B.A. 241 (1975).

(n128)Footnote 375. *See, e.g.:*

> *Iowa:* In 1987, adopted amendments to Chapter 172C which further limit the land holdings of authorized farm corporations and trusts. In 1988, the legislature further restricted corporate farming by imposing a 1500 acre cap on land ownership for limited partnerships and limited contract feeding of swine by processors. *See* Hamilton, *State Roundup*, Agricultural Law Update 7 (Aug. 1988).
>
> *Kansas:* The legislature repealed existing, but narrow, farm corporation legislation and replaced it with broad restrictions. *See* Kan. Stat. Ann. § 17-5902 *et seq.*
>
> *Nebraska:* In 1982, voters in a state-wide referendum adopted Initiative 300 as an amendment to the

state constitution which imposes major restrictions on corporate ownership of farmland. *See* Neb. Const., art. XII, § 8.

See, e.g., Hall v. Progress Pig, Inc., 575 N.W.2d 369 (Neb. 1998) (Failure of county attorney to prosecute pork producer under constitutional provision limiting corporate farming operations gave citizens standing to bring action for injunction); *Hoogestraat v. Barnett, 583 N.W.2d 421 (S.D. 1998)* (action to remove Attorney General's ballot explanation that proposed constitutional amendment that placed restrictions on farm ownership might lead to successful lawsuits against the state. Held: statement exceeded authority).

See *Hall v. Progress Pig, Inc. 610 N.W. 2d 420 (Neb. 2000)* where citizens were allowed to bring an action which sought to enjoin a corporate pork producer's operation which was alleged to be in violation of the state's constitutional provisions limiting corporate farming operations. The constitutional provision was challenged as vague but the court upheld the provision against the challenge.

For further discussion, see Miller, Cynthia A. *Reasonable Options for Those Who do not Want to Sell the Farm: Farm Leases and Farm Management Companies. 5 Drake J. Agric. L. 251 (2000).*

(n129)Footnote 376. *See* Kan. Stat. Ann. § 7601 *et seq.* and Kansas Senate Bill 582 (effective July 1, 1994).

(n130)Footnote 377. *See* Kan. Stat. Ann. § 17-5904.

(n131)Footnote 378. Ron Smith, *1996 Legislative Update*, 65 J. Kan. B.A. 16 (Aug. 1996).

(n132)Footnote 379. M. Shaun McGaughey, *Limited Liability Partnerships: Need Only Professionals Apply?, 30 Creighton L. Rev. 105 (December 1996).*

(n133)Footnote 380. *Corporate Farming*, Doane's Agric. Rep., July, 29, 1994, at 1.

(n134)Footnote 381. *See* for instance Eric Voog, *Pork, Pollution, and Pig Farming: The Truth About Corporate Hog Production in Kansas, 5 Kan. J.L. & Pub. Pol'y 219 (Spring 1996).*

(n135)Footnote 382. Mike Hendricks, *Farms causing a stink*, Kansas City Star, Tuesday, November 29, 1994, at A-1.

(n136)Footnote 383. Edward Walsh, *Iowa grapples with huge corporate hog farms*, Topeka Capital-Journal, Thursday, Oct. 1994, at E-5.

(n137)Footnote 384. *See, e.g.*, amendments to the Oklahoma corporate farming statute, 18 Okla. Stat. §§ 951 and 954 which effectively broaden exemptions and make the corporate form of business more accessible to corporations engaged in agriculture. § 951 increased the number of shareholders permitted for horse breeding businesses from ten to twenty-five. Section 954 adds operating hatcheries and providing supervisory, technical and other assistance to exempt activities under the poultry and swine exemption.

(n138)Footnote 385. *See, e.g.*, Kan. Stat. Ann. § 17-5904(a):

No corporation, trust, limited partnership or corporate partnership, *other than a family farm corporation, authorized farm corporation, limited agricultural partnership, family trust, authorized trust or testamentary trust shall, either directly or indirectly, own, acquire or otherwise obtain or lease any agricultural land in this state*. (emphasis added)

Family farm corporations are defined to include only those operations that are founded for the purpose of farming, and in which the majority of voting stock is held by natural persons related to each, all of whom have a common ancestor

within the third degree of relation, either by blood or adoption, or are the spouses or stepchildren of such persons. At least one of the stockholders must reside on the farm or be actively engaged in the labor or management of the farming operation. § 17-5903(j).

> Authorized farm corporations are defined as corporations founded for the purpose of farming, other than family farm corporations, in which all of the incorporators (which must be natural persons and cannot exceed 15 in number) are Kansas residents. At least 30% of the stockholders must be persons residing on the farm or actively engaged in the day-to-day labor or management of the farm. § 17-5903(k).
>
> Limited agricultural partnerships are defined as partnerships founded for the purpose of farming which do not involve more than 10 partners, who must be natural persons and at least one of which must reside on the farm or be actively engaged in the labor or management of the farming operation. § 17-5903(d).
>
> Family trusts are trusts in which a majority of the equitable interest is held by and the majority of the beneficiaries are natural persons related to each other, all of whom have a common ancestor within the third degree of relation, either by blood or adoption, or are the spouses or stepchildren of such persons. § 17-5903(m).
>
> Authorized trusts are trusts, other than family trusts, in which the beneficiaries are natural persons, not exceeding 15 in number, and the income thereof is not exempt from taxation under either state or federal law. § 17-5903(n).
>
> Testamentary trusts is a trust created by bequeathing or devising property in a will.

See, e.g., Hall v. Progress Pig, Inc., 575 N.W.2d 369 (Neb. 1998) (Failure of county attorney to prosecute pork producer under constitutional provision limiting corporate farming operations gave citizens standing to bring action for injunction); *Hoogestraat v. Barnett, 583 N.W.2d 421 (S.D. 1998)* (action to remove Attorney General's ballot explanation that proposed constitutional amendment that placed restrictions on farm ownership might lead to successful lawsuits against the state. Held: statement exceeded authority).

(n139)Footnote 386. *See* Op. Att'y Gen. 88-170 (Dec. 20, 1988), holding that land an insurance company wished to purchase that was located adjacent to farmland acquired through foreclosure in order to enhance the value of the foreclosed land was not "necessary to the operation of the business and therefore prohibited by the act.

(n140)Footnote 387. *See, e.g.,* Kan. Stat. Ann. § 17-5904; Minn. Stat. Ann. § 500.24 Subd. 3; Neb. Const., art XII, § 8 (1).

(n141)Footnote 388. *See, e.g., Asbury Hosp. v. Cass County, 7 N.W.2d 438 (N.D. 1943), aff'd, 326 U.S. 207 (1945),* upholding forced divestiture against a due process challenge. The rationale for the holding was that due process did not guarantee a return on the investment, only a fair opportunity for the same and that the time provided by the statute, during which the owner could enjoy the land and seek a buyer, gave the owner an ample time in which to seek to maximize the return from the property.

(n142)Footnote 389. *See, e.g.,* Minn. Stat. Ann. § 500.25 subd. 5.

(n143)Footnote 390. N.D. Cent. Code § 10-06-13(5).

(n144)Footnote 391. *12 U.S.C. § 29.*

(n145)Footnote 392. *12 U.S.C. § 21 et seq.*

(n146)Footnote 393. *State v. Liberty Nat'l Bank & Trust Co., 427 N.W.2d 307 (1988).*

(n147)Footnote 394. *Id. See also National Bank v. Matthews, 98 U.S. 621 (1878).*

For further discussion, see Kenneth D. Esch, *Limited Liability Companies as an Alternative Choice for Farming and Ranching Operations in the State of Nebraska, 28 Creighton L. Rev. 19 (Dec. 1994);* Richard F. Prim, *Minnesota Anti-Corporate Farm Statute Revisited: Competing Visions in Agriculture and the Legislature's Recent Attempt to Empower Minnesota Livestock Farmers, 18 Hamline L. Rev. 431 (Spring 1995);* Neil D. Hamilton, *Agriculture without Farmers? Is Industrialization Restructuring American Food Production and Threatening the Future of Sustainable Agriculture?* 14 N. Ill. L. Rev. 613, (Summer 1994).

(n148)Footnote 395. *Id.*

A Kansas Attorney general opinion considered whether the acquisition of farmland by an insurance company constituted land "necessary for the operation of the business." Att'y Gen. Op. 88-170 (Dec. 20, 1988). In this case, an insurance company had acquired farmland as a result of the foreclosure of a loan. The company understood that under Kansas law, that land had to be disposed of within 10 years. (K.S.A. § 17.5904(4)) It determined that the value of the land could be enhanced if additional land was added to it. It therefore wanted to purchase adjacent property to sell with the foreclosed land. The Attorney General ruled that that later acquisition was not essential to the company's non-farm business purposes and would be barred by the statute.

(n149)Footnote 396. Compare Minn. Stat. Ann. § 500.24 Subd. 3:

No corporation or pension or investment fund *shall engage in farming;* nor shall any corporation or pension fund, directly or indirectly, own, acquire or otherwise obtain an interest, whether legal, beneficial or otherwise, in any title to real estate used for farming or capable of being used for farming in this state... .

See also Neil D. Hamilton, *State Regulation of Agricultural Production Contracts, 25 U. Mem. L. Rev. 1051 (Spring 1995).* The article identifies the nine states that have enacted corporate farming laws through either legislation or constitutional amendment (South Dakota, North Dakota, Minnesota, Wisconsin, Nebraska, Iowa, Missouri, Kansas, and Oklahoma), and the author distinguishes between laws that restrict corporate involvement in farming and corporate ownership of agricultural land.

Further, *see* Richard F. Prim, *Minnesota's Anti-Corporate Farm Statute Revisited: Competing Visions in Agriculture, and the Legislature's Recent Attempt to Empower Minnesota Livestock Farmers, 18 Hamline L. Rev. 431 (Spring 1995).*

(n150)Footnote 397. *See* Kansas *ex rel.* Stephan v. E.I. DuPont de Nemours & Co., #80 Civil 893 Dist. Ct. Shawnee County, Kan., Feb. 18, 1981).

(n151)Footnote 398. Op. Att'y Gen. 87-160 (Kan., Oct. 30, 1987).

(n152)Footnote 399. Kan. Stat. Ann. § 17-5903(h).

(n153)Footnote 400. *Id.*

(n154)Footnote 401. *See, e.g.,* Kan. Stat. Ann. § 17-5904.

See, e.g., Hall v. Progress Pig, Inc., 575 N.W.2d 369 (Neb. 1998) (Failure of county attorney to prosecute pork producer under constitutional provision limiting corporate farming operations gave citizens standing to bring action for injunction); *Hoogestraat v. Barnett, 583 N.W.2d 421 (S.D. 1998)* (action to remove Attorney General's ballot

explanation that proposed constitutional amendment that placed restrictions on farm ownership might lead to successful lawsuits against the state. Held: statement exceeded authority).

(n155)Footnote 402. Kan. Stat. Ann. § 17-5905(a).

(n156)Footnote 403. S.B. 554, as amended by H.B. 3096.

(n157)Footnote 404. For a very detailed analysis of a pork production contract, *see American Nat'l Bank v. Joy, 169 B.R. 931 (Bankr. D. Neb. 1994).*

(n158)Footnote 405. H.B. 2584 (amended by H.B. 3096). This law became effective on April 28, 1994.

(n159)Footnote 406. *News Briefs,* Doane's Agric. Rep., p. 1 (November 11, 1994).

(n160)Footnote 407. *1995 Minn. App. LEXIS 37* (Minn. App. Jan. 10, 1995).

(n161)Footnote 408. For further discussion, *see* Neil D. Hamilton, *Agriculture without Farmers? Is Industrialization Restructuring American Food Production and Threatening the Future of Sustainable Agriculture?* 14 N. Ill. L. Rev. 613 (Summer 1994); Richard F. Prim, *Minnesota Anti-Corporate Farm Statute Revisited: Competing Visions in Agriculture and the Legislature's Recent Attempt to Empower Minnesota Livestock Farmers, 18 Hamline L. Rev. 431 (Spring 1995).*

(n162)Footnote 409. *236 Kan. 641 (1985).*

(n163)Footnote 410. Att'y Gen. Op. 97-72 (Sept. 15, 1997).

(n164)Footnote 411. 275.10. *123 U.S. 623 (1887).*

(n165)Footnote 412. Att'y Gen. Op. 96-21 (March 5, 1996). This view was reaffirmed in Att'y Gen. Op. 97-92 (Sept. 15, 1997).

(n166)Footnote 413. K.S.A. § 17-5904(b).

(n167)Footnote 414. Att'y Gen. Op. 96-42 (April 29, 1996).

(n168)Footnote 415. Att'y Gen. Op. 97-72 (Sept. 15, 1997).

(n169)Footnote 416. Att'y Gen. Op. 97-27.

(n170)Footnote 417. Kan Stat. Ann. § 17-5908.

(n171)Footnote 418. Att'y Gen. Op. 97-83 (Oct. 8, 1997).

(n172)Footnote 419. Att'y Gen Op. 97-72 (Sept. 15, 1997).

(n173)Footnote 420. *See, e.g., State v. Wheat, 137 Kan. 697 (1933); State v. Fisher, 140 Kan. 544 (1934); Coal Harbor Stock Farms, Inc. v. Meier, 191 N.W.2d 583 (N.D. 1971);* State v. Liberty Nat'l Bank & Trust Co., 427 N.W. 3d 307 (N.D. 1988); *Allegheny Corp. v. Richardson, 463 N.W.2d 678 (S.D. 1990).*

See Hall v. Progress Pig, Inc., 610 N.W. 2d 420 (Neb. 2000) where the state's constitutional provision limiting corporate farming operations was challenged as vague. The court upheld the provision against the challenge.

In *R.L. Hexum & Associates, Inc. v. Rochester Township, Board of Supervisors, 609 N.W. 2d 271 (Minn. 2000),* the court held that zoning law, rather than the state's statute relating to corporate and partnership farming, governed a

dispute as to whether the operation constituted a farm under the zoning.

(n174)Footnote 421. *Asbury Hosp. v. Cass County, 7 N.W.2d 438 (N.D. 1943), aff'd, 326 U.S. 207 (1945).*

(n175)Footnote 422. *Id.*

(n176)Footnote 423. *Id.*

(n177)Footnote 424. State v. Liberty Nat'l Bank & Trust Co, 427 N.W.3d 307 (N.D. 1988).

(n178)Footnote 425. *MSM Farms, Inc. v. Spire, 927 F.2d 330 (8th Cir. 1991).*

See also Hall v. Progress Pig, Inc., 575 N.W.2d 369 (Neb. 1998) (Failure of county attorney to prosecute pork producer under constitutional provision limiting corporate farming operations gave citizens standing to bring action for injunction); *Hoogestraat v. Barnett, 583 N.W.2d 421 (S.D. 1998)* (action to remove Attorney General's ballot explanation that proposed constitutional amendment that placed restrictions on farm ownership might lead to successful lawsuits against the state. Held: statement exceeded authority).

(n179)Footnote 426. *236 Kan. 641 (1985).*

(n180)Footnote 427. Att'y Gen. Op. 97-72 (Sept. 15, 1997).

(n181)Footnote 428. *123 U.S. 623 (1887).*

(n182)Footnote 429. Att'y Gen. Op. 96-21 (March 5, 1996). This view was reaffirmed in Att'y Gen. Op. 97-92 (Sept. 15, 1997).

(n183)Footnote 430. *568 N.W.2d 217 (Neb. 1997).*

(n184)Footnote 431. For further discussion of the extent to which production contracts are regulated as part of corporate restrictions or otherwise, *see* Hamilton, *State Regulation of Agricultural Production Contracts, 25 U. Mem. L. Rev. 1051 (1995);* Hamilton, *Why Own the Farm if You can Own the Farmer (and the Crop)? Contract Production and Intellectual Property Protection of Grain Crops, 73 Neb. L. Rev. 48 (1994).*

Several states have statutes that specifically regulate production contracts in agriculture. *See, e.g.,* Minn. Stat. Ann. §§ 17.90-.98, 514.995; Wis. Adm. Code. § Ag. 101; Kan. Stat. Ann. § 16-1501-1506.

(n185)Footnote 432. *See* Julian Juergensmeyer and James Wadley, Agricultural Law 131-164 (1982). *See also* ch. 79, *infra*, this treatise. *See also* Joshua Weisman, *Restrictions on the Acquisition of Land by Aliens, 28 Am. J. Comp. L. 39 (1980);* William Fisch, *State Regulation of Alien Land Ownership, 43 Mo. L. Rev. 407 (1978);* Charles Sullivan, *Alien Land Laws: A Re-Evaluation, 36 Temp. L. Q. 15 (1962);* Luttrell, The "Danger" from Foreign Ownership of U.S. Farmland, 61 Fed. Res. Bank, St. Louis Rev. 2 (1979).

For further discussion, *see* James Mason, Jr., *Pssst, Hey Buddy, Wanna Buy a Country? An Economic and Policy Analysis of Federal and State Laws Governing Foreign Ownership of United States Real Estate, 27 Vand. J. Transnat'l L. 453 (1994);* Sarah Fandell, *Foreign Investment, Logging, and Environmentalism in Developing Countries: Implications of Stone Container Corporation's Experience in Honduras, 35 Harv. Int'l L.J. 499 (1994).*

(n186)Footnote 433. For further discussion, *see* Comment, *Alien Ownership of South Dakota Farmland: A Menace to the Family Farm? 23 S.D. L. Rev 735 (1978);* Fred Morrison & Kenneth Krause, *State and Federal Legal Regulation of Alien and Corporate Land Ownership and Farm Operation,* U.S. Dep't of Ag., Econ. Rep. No. 284 (1975); William Fisch, *State Regulation of Alien Land Ownership, 43 Mo. L. Rev. 407 (1978);* James Wadley and Myrl Duncan,

Constitutionality of Foreign Ownership of Farmland Statutes, Wichita Business 19 (May-June 1983).

Foreign owners do not appear to be taking the land out of agricultural production and no change has occurred in 94 percent of the acres. Agriculture Fact Book: 1998, United States Department of Agriculture, Office of Communications. Chapter 2-H. *See also* Charles Barnard, *Foreign Ownership of U.S. Agricultural Land Through December 1, 1996*, Economic Research Service, United States Department of Agriculture, SD #941, July 1998.

(n187)Footnote 434. Under federal mining law, certain mineral claims located on public domain land cannot be owned by foreign interests. *See 30 U.S.C. § 22:*

Except as otherwise provided, all valuable mineral deposits in lands belonging to the United States, both surveyed and unsurveyed, shall be free and open to exploration and purchase, and the lands in which they are found to occupation and purchase, by citizens of the United States and those who have declared their intention to become such, under regulations prescribed by law, and according to the local customs or rules of miners in the several mining districts, so far as the same are applicable and not inconsistent with the laws of the United States.

(n188)Footnote 435. Approximately thirty states are reported to have restrictions of some kind relating to foreign ownership of land. These include Arkansas, California, Connecticut, Florida, Georgia, Idaho, Illinois, Indiana, Iowa, Kansas, Kentucky, Maryland, Minnesota, Mississippi, Missouri, Montana, Nebraska, Nevada, New Jersey, New York, North Carolina, North Dakota, Oklahoma, Oregon, Pennsylvania, South Carolina, South Dakota, Virginia, Wisconsin and Wyoming.

(n189)Footnote 436. *See, e.g.*, Agricultural Foreign Investment Disclosure Act of 1978, *7 U.S.C. § 3501 et seq.*; International Investment Survey Act of 1976, *22 U.S.C. 3103 et seq.* For further discussion, *see* ch. 79, *infra*.

See also David K.Y. Tang and Aaron T. McGrath, *Special Concerns of Foreign Investors in Sophisticated Real Estate Transactions*, 430 PLI/Real 241 (1998). For a further discussion of tax advantages and disadvantages of foreign investments by investors in countries with which there exist no applicable treaties with the United States, *see* Irwin D. Segal, Eli Fink and Craig Stern, *Foreign Investment in U.S. Real Estate: Structuring for Non-treaty Country Foreign Investors, 25 J. Real Est. Tax'n 211 (1998).*

See Douglas Woodward and Douglas Nigh, eds., Foreign Ownership and the Consequences of Direct Investment in the United States: Beyond Us and Them, Quorum Books, Westport Conn. 1998; David K. Y. Tang., *Special Concerns of Foreign Investors in Sophisticated Real Estate Transactions*, 453 PLI/Real 473 (2000).

(n190)Footnote 437. Peter DeBraal, *Foreign Ownership of U.S. Ag Land in '91*, AGRICULTURAL LAW UPDATE 6 (April 1992).

For specific data on foreign investment in agricultural land, see *Foreign Ownership of U.S. Agricultural Land Through December 1997: County-Level Data.* (Department of Agriculture, Economic Research Service). This information is available on diskette. Number ERS-98005INC. The data shows approximately 14.3 million acres in 1,938 of the nations 3,041 counties. A summary of the data is available online at www.ers.usda. gov/publications/summaries/SB943.HTM.

In a 2000 case, the Immigration and Naturalization Service denied a petition for preferred visa status as a foreign investor. This denial was upheld against challenges that INS abused its discretion and that the action violated the Administrative Procedures Act. The reason the petition was denied was because the alien refused to document the source of his capital. See *R.L. Investment Limited Partners v. Immigration and Naturalization Service. 86 F. Supp. 2d 1014 (2000).*

The law requires that corporations in which foreign holdings amount to 10 percent or more must register their land

ownership. As a result, approximately 61 percent of reported foreign holdings are actually held by U.S. corporations. Only 39 percent of the foreign-held land is owned by investors that are not affiliated with United States firms. When the 14.3 million acre total is adjusted for these partial interests, the amount drops to approximately 13.1 million acres. Agriculture Fact Book: 1998, United States Department of Agriculture, Office of Communications. Chapter 2-H. *See also* Charles Barnard, *Foreign Ownership of U.S. Agricultural Land Through December 1, 1996* Economic Research Service, United States Department of Agriculture, SD #941, July 1998. Most (57 percent) of the investors in United States farmland are from the countries of Canada, the United Kingdom, Germany and France, in that order. Agriculture Fact Book: 1998, United States Department of Agriculture, Office of Communications. Chapter 2-H. *See also* Charles Barnard, *Foreign Ownership of U.S. Agricultural Land Through December 1, 1996*, Economic Research Service, United States Department of Agriculture, SD #941, July 1998. Maine is the state that continues to have the largest number of acres owned by foreign persons: 3,037,198. This amounts to 17 percent of the state's privately owned agricultural land and 21 percent of all the reported foreign holdings of agricultural land nationwide. Ninety-one percent of the foreign holdings in Maine are owned by four companies. Two of these companies are Canadian, one that is a combined United States-French venture and one that is a combined United States-Canadian enterprise. Agriculture Fact Book: 1998, United States Department of Agriculture, Office of Communications. Chapter 2-H. *See also* Charles Barnard, *Foreign Ownership of U.S. Agricultural Land Through December 1, 1996*, Economic Research Service, United States Department of Agriculture, SD #941, July 1998.

According to the Agriculture Fact Book: 1998 published by the U.S. Department of Agriculture, Office of Communications, the level of foreign ownership of U.S agricultural land has remained relatively steady from 1981 through 1997 and has been slightly above or below 1 percent of the privately owned agricultural land in the United States. The total currently stands at 14.3 million acres, up 199,419 from 1996. Id. Chapter 2-H. *See also* Charles Barnard, *Foreign Ownership of U.S. Agricultural Land Through December 1, 1996*, Economic Research Service, United States Department of Agriculture, SD #941, July 1998. At the end of the reporting period, foreign persons owned 14.3 million acres. Forest lands account for approximately 45 percent of this ownership, cropland 17 percent, pasture and other agricultural uses 35 percent and nonagricultural land for 3 percent. Agriculture Fact Book: 1998, United States Department of Agriculture, Office of Communications. Chapter 2-H. *See also* Charles Barnard, *Foreign Ownership of U.S. Agricultural Land Through December 1, 1996*, Economic Research Service, United States Department of Agriculture, SD #941, July 1998.

Corporations own 79 percent of foreign held acreage, partnerships own 12 percent and individuals own 6 percent. The remaining 3 percent is held by trusts, institutions and associations. Agriculture Fact Book: 1998, United States Department of Agriculture, Office of Communications. Chapter 2-H.

(n191)Footnote 438. In *Lehndorff Geneva Inc., v. Warren, 246 N.W.2d 815 (Wis. 1976)* the court stated that it is constitutional to exclude non-resident aliens from land ownership since non-residents are not a "suspect" class.

(n192)Footnote 439. *See, e.g.*, Iowa Code Ann. §§ 567.1-567.11, which is generally regarded as the most restrictive of the state statutes. This statute excludes non-resident aliens, foreign businesses and foreign governments from acquiring any interest in agricultural land in Iowa. If such land is acquired, it must be divested within two years or it will escheat to the state. Land acquired for non-agricultural purposes in limited to 320 acres and must be put to such use within five years.

See Luna "*Agricultural Underdogs" and International Agreements: The Legal Context of Agricultural Workers within the Rural Economy, 26 N.M. L. Rev. 9 (1996);* Shuler, Ruhlin & Karr, *Obstacles to Foreign Investment in U.S. Agriculture*, 7 Cal. Int'l Pract. 36 (1996); Setiz, *Avoiding the 35% Penalty of Failure to Report Outbound Transfers to Foreign Entities under Sec. 1491(c)*, 28 Tax Adviser 294 (May 1997); Bewer, *Reigning in the Terror of Section 1491, 74 Tax Notes 1725* (Mar. 31, 1997); Gardner, *Ten Traps for the Unwary in International Transactions*, 60 Ky. Bench & Bar 26 (Fall 1996); Gerson, *Recent Ruling Highlights Potential Pitfall in Corporate Reorganizations Involving Foreign Investors of U.S. Real Estate*, 24 J. Real Est. Tax 223 (1997).

(n193)Footnote 440. *43 U.S.C. §§ 291*-301 (repealed 1976).

See Hughes v. MWCA, Inc. 12 Fed. App. 875 (10th Cir. N.M. 2001), holding that the reservation of the mineral interest to the government was broad enough to include coria (volcanic cinder) deposits.

(n194)Footnote 441. *See, e.g., Stewart v. Penny, 238 F. Supp. 821 (D.C. Nev. 1965).*

(n195)Footnote 442. *Andrus v. Utah, 446 U.S. 500 (1980).* For further discussion, *see* Dragoo, *The Impact of the Federal Land Policy and Management Act Upon Statehood Grants and Indemnity Land, 21 Ariz. L. Rev. 395 (1979).* Current legislation codifying these provisions is found at *43 U.S.C. § 851 et seq.*

See Lipscomb v. Columbus Municipal Separate School District, 269 F.3d 494 (5th Cir. 2001), involving school land leases executed before the ratification of the Mississippi Constitution in 1890. *See also Brotman v. East Lake Creek Ranch, L.L.P. 31 P. 3d 886 (Colo. 2001)* regarding the standing of a landowner as a beneficiary of the federal trust over school lands.

(n196)Footnote 443. *Id.*

(n197)Footnote 444. *Id.*

(n198)Footnote 445. *United States v. Sweet, 245 U.S. 563 (1918).*

(n199)Footnote 446. *26 Stat. 796-797.* In 1927, Congress changed its policy to allow grants of school lands that were mineral in character but still prohibited the states from claiming indemnity lands that were mineral. Finally, in 1958, Congress gave the states the right to select mineral lands to replace lost school land grant lands. *43 U.S.C. § 852.* Grants now pass the full fee. *See 43 U.S.C. § 859.*

(n200)Footnote 447. Sheldon Greene, *Promised Land: A Contemporary Critique of Distribution of Public Land by the United States, 5 Ecology L.Q. 707 (1976).*

(n201)Footnote 448. *See* text at notes 140-142, *supra. The railroads were allowed to exchange their lands within reserved federal lands for lands outside federal reservations under the Forest Lieu Exchange Act of 1897. If the railroads made such exchanges, they would be released from certain rate limitations. See 49 U.S.C. § 65*(b). *See also Neuhoff v. Secretary of the Interior, 578 F.2d 810 (9th Cir. 1978).*

(n202)Footnote 449. *Energy Transp. Sys. v. U. Pac. R.R., 606 F.2d. 934 (10th Cir. 1979).*

(n203)Footnote 450. Act of July 1, 1862, *12 Stat. 489.*

(n204)Footnote 451. Act of July 2, 1864, *13 Stat. 356.*

(n205)Footnote 452. *Id.* relying on *Northern Pac. R.R. Co. v. Townsend, 190 U.S. 267 (1903).*

See also Wyoming v. Udall, 379 F.2d 635 (10th Cir. 1967).

(n206)Footnote 453. Without belaboring the point, we are convinced, as was the trial court, that the grant to Union Pacific's predecessor pursuant to § 2 of the Pacific Railroad Act of 1862 was just what the statute said it was, the grant of the right-of-way, and did not convey title to the servient estate underlying the right-of-way. Such being the case, the servient estate remained with the United States and later passed under the homestead patent to *Maggie Majors, 606 F.2d at 937.*

(n207)Footnote 454. *United States v. Union Pac., 353 U.S. 112 (1957).*

(n208)Footnote 455. *606 F.2d at 938.*

(n209)Footnote 456. *United States v. Union Pac., 353 U.S. 112 (1957).*

(n210)Footnote 457. *See, e.g., Zaskey v. Farrow, 154 P.2d 1013 (Kan. 1945)* holding that a conveyance of the mineral interest separately from the surface interest creates two different property interests, a "surface estate" and a "mineral estate."

See Howard v. Arhopulos, Tex. App. LEXIS 3238 (Tex. App. 2001) regarding reverter rights in the mineral estate.

(n211)Footnote 458. *See, e.g., Hickey v. Dirks, 133 P.2d 107 (Kan. 1943).*

(n212)Footnote 459. *Classen v. Federal Land Bank of Wichita, 627 P.2d 1255 (Kan. 1980).*

(n213)Footnote 460. *Mai v. Youtsey, 646 P.2d 475 (Kan. 1982).*

(n214)Footnote 461. *See, e.g., Getty Oil Co. v. Jones, 470 S.W.2d 618 (Tex. 1971).*

(n215)Footnote 462. *See, e.g., Monfort v. Layton, 571 P.2d 80 (Kan. 1977); Humble Oil & Ref. Co. v. Kishi, 276 S.W. 190 (Tex. 1925); 291 S.W. 538 (1927).*

(n216)Footnote 463. *Jones v. Getty Oil Co., 470 S.W.2d 618 (Tex. 1971).*

(n217)Footnote 464. *Id.*

(n218)Footnote 465. *See, e.g.,* Kan. Stat. Ann. § 55-1601 *et seq.*

(n219)Footnote 466. The Kansas statute covers "an interest of any kind in coal, oil, gas or other mineral." Kan. Stat. Ann. § 55-1601.

(n220)Footnote 467. *Id.*

(n221)Footnote 468. Kansas requires 20 years. Kan. Stat. Ann. § 55-1602.

(n222)Footnote 469. Kan. Stat. Ann. § 55-1604. It has been held that if such notice of claim is not properly given, the interest will lapse. *See Scully v. Overall, 840 P.2d 1211 (Kan. App. 1992).*

(n223)Footnote 470. The Kansas statute requires that notice be given by publication in a newspaper of general circulation in the county where the land is located and, if the address of the owner is shown in the record, notice must be sent by restricted mail 10 days after publication. If such notice is not properly given, the interest will not lapse.

(n224)Footnote 471. It has been suggested that a major part of the reason for the so-called Sagebrush Rebellion was the issue of access to the public domain for grazing purposes. *See* Gary Liebcap, Locking up the Range (1981); *Baden v. Stroup, Political Economy Perspectives on the Sagebrush Rebellion*, 3 Pub. Land L. Rev. 103 (1982).

(n225)Footnote 472. *See Buford v. Houtz, 133 U.S. 320 (1890)* wherein the court commented:

> We are of the opinion that there is an implied license, growing out of the custom of nearly a hundred years, that the public lands of the United States, especially those in which the grasses are adapted to the growth and fattening of domestic animals, shall be free to the people who seek to use them where they are left open and unenclosed, and no act of government forbids this use.

(n226)Footnote 473. *See generally* Peffer, The Closing of the Public Domain (1951); Hibbard, A History of Public

Land Policies (1924); Paul Gates, History of Public Land Law Development (1968); Roy Robbins, Our Landed Heritage, (1960); Valerie Scott, *The Range Cattle Industry: Its Effects on Western Land, 28 Mont. L. Rev. 155 (1967);* David Cox, Deterioration of Southern Arizona's Grasslands: Effects of New Federal Legislation Concerning Grazing Public Lands, *20 Ariz. L. Rev. 697 (1979).*

(n227)Footnote 474. Act of June 28, 1934, *48 Stat. 1269,* currently codified in *43 U.S.C. § 315 et seq.* For a discussion of grazing rights generally, see George Coggins & Margaret Lindeberg-Johnson, *The Law of Public Rangeland Management II: The Commons and the Taylor Act, 13 Envtl. L. 1 (1982);* George Coggins, *The Law of Public Rangeland Management IV: FLPMA, PRIA, and the Multiple Use Standard, 14 ENVTL. L. 1 (1983);* Julian Juergensmeyer and James Wadley, 1 Agricultural Law §§ 6.4.2 to 6.4.2; Hugh Kingerly, *The Public Grazing Lands, 43 Denver L.J. 329 (1966);* Calvin Ragsdale, *§ 3 Rights Under the Taylor Grazing Act*, 4 Land and Water L. Rev. 399 (1969).

(n228)Footnote 475. *43 U.S.C. § 1701 et seq.*

(n229)Footnote 476. *43 U.S.C. § 1901 et seq.*

(n230)Footnote 477. *16 U.S.C. § 1600 et seq.*

(n231)Footnote 478. *43 U.S.C. § 1732*(a) requires that the Department of the Interior shall manage the public lands under its jurisdiction "in accordance with" the land use plans developed under § 1712 of the Federal Land Policy and Management Act and consistent with the principles of multiple use and sustained yield. *16 U.S.C § 1604*(i) requires that the Secretary of Agriculture manage the Forest Service lands "consistent with" such land use plans. See also *Natural Resources Defense Council v. Hodel, 618 F. Supp. 848 (E.D. Cal. 1985); Natural Resources Defense Council v. Hodel, 624 F. Supp. 1045,* D.C. Nev. 1986); *National Wildlife Fed'n v. Burford, 23 ERC 1609 (1985).*

(n232)Footnote 479. *Hinsdale Livestock Co. v. U.S., 501 F. Supp. 773 (D. Mont. 1980).*

(n233)Footnote 480. 43 C.F.R. § 4110.2-2.

(n234)Footnote 481. *43 U.S.C. § 315m.* 43 C.F.R. § 4130.2 (a) provides that "grazing permits or leases shall be issued to authorize livestock grazing on the public lands and other lands under the administration of the Bureau of Land Management... ."

(n235)Footnote 482. *43 U.S.C. § 315b.*

(n236)Footnote 483. *16 U.S.C. § 528 et seq.*

(n237)Footnote 484. *Id.* at 531(a).

(n238)Footnote 485. *43 U.S.C. § 315b.*

(n239)Footnote 486. *United States v. Fuller, 409 U.S. 488 (1973); Pankey Land & Cattle Co. v. Hardin, 427 F.2d 43 (10th Cir. 1970). See also United States v. Cox, 190 F.2d 293, 296 (10th Cir. 1951), cert. denied, 342 U.S. 867 (1951):* "Although the permits are available to the ranchers, they are not an interest protected by the Fifth Amendment against the taking by the Government who granted them with the understanding that they could be withdrawn at any time without the payment of compensation."

See also Bradshaw v. United States, 47 Ct. Cl. 549 (2000), holding that neither the grazing permit nor the historical grazing preferences constituted property under the Fifth Amendment. Likewise, the failure of the government to prevent feral horses from causing damage to the ranch and forage did not result in a taking.

In *Public Lands Council v. Babbitt, 120 S. Ct. 1815 (2000),* the Supreme Court upheld the authority of the Secretary to define the scope of a "grazing preference" and to eliminate thereby the requirement that a holder be engaged in the livestock business.

For further discussion, see Feller, Joseph M. and Brown, David E. *From Old Growth Forests to Old Growth Grasslands: Managing Rangelands for Structure and Function. 42 Ariz. L. Rev. 319 (2000);* Baas, Mark J., *Diamond Bar Cattle Co. v. United States: State Water Rights on Federal Lands for not Hold Property Interest to Graze on those Lands, 4 Great Plains Nat. Res. J. 296 (2000).*

(n240)Footnote 487. 43 C.F.R. § 4110.2-2(b): "The grazing preference specified shall attach to the base property supporting the grazing permit or grazing lease." "Grazing preference" is defined as the total number of animal unit months of livestock grazing on public lands apportioned and attached to base property owned and controlled by a permittee or a licensee. 43 C.F.R. § 4100.0-5. In essence, a grazing permit authorizes the grazing of a specified number of animals for a specified period of time, measured in animal unit months. The grazing preference, then, is the quantified substance of the grazing permit.

(n241)Footnote 488. *See 43 U.S.C. § 315b;* 43 C.F.R. §§ 4130.2, 4130.3.

(n242)Footnote 489. [B]ase property is defined as privately held land that (1) has the capacity to produce crops or forage that can be used to support authorized livestock for a specified period of the year (when the animals are not on the public domain) or (2) water that is suitable for consumption by livestock and is available and accessible to the livestock when they are on the public domain.

43 C.F.R. § 4100.0-5.

(n243)Footnote 490. 43 C.F.R. § 4110.2-1(d) provides the permit or lease will automatically terminate if the permittee or lessee loses ownership or control of all or part of the base property unless the permit holder requests in writing, in advance of losing ownership, that the permit be extended to the end of the grazing season or grazing year. The regulations then provide that:

[w]hen a permit or lease terminates because of a loss of ownership or control of a base property, the grazing preference shall remain with the base property and be available through application and transfer procedures at 43 CFR § 4110.2-3, to the new owner or person in control of that base property.

(n244)Footnote 491. 43 C.F.R. § 4110.2-3.

(n245)Footnote 492. *See, e.g., Red Canyon Sheep Co. v. Ickes, 98 F.2d 308 (D.C. Cir. 1938).* There, the court dealt with a proposed trade of land to a third party if land upon which the appellants claimed a grazing right on the basis of an interim license would normally be converted into a permit under the act for other land which could not be grazed. The trade would have had the effect of extinguishing the possibility of securing a grazing permit. The Secretary defended the exchange on the ground that the permit holders "lacked any interest to maintain the suit in that they had no vested interest in the lands and did not show themselves entitled to a patent." *Id. at 312.* The court enjoined the exchange:

> Therefore in view of the allegations in the bill that appellants have such adjacent land holdings, water rights, and other facilities as to bring them within a preferred class under the regulations, we are of the view that the interim licenses which have been temporarily issued to them must, under the Act, ripen into permits, provided that Grazing District No. 4, which has been set up so as to include the lands upon which the appellants have been running their sheep, continues to exist and to include such lands.

(n246)Footnote 493. *See Hinsdale Livestock Co. v. United States, 501 F. Supp. 773 (D. Mont. 1980)* holding that drought conditions did not create an emergency that would enable the Bureau of Land Management to evict ranchers

from grazing allotments before the expiration of their permits.

> We recognize that the rights under the Taylor Grazing Act do not fall within the conventional category of vested rights in property. Yet, whether they be called rights, privileges, or bare licenses, or by whatever name, while they exist they are something of real value to the possessors and something which have their source in an enactment of the Congress. The jurisdiction of equity is flexible and should not be confined to rigid categories so that the granting of an injunction will depend on nomenclature rather than substance.
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> * * *
>
> We rule that the valuable nature of the privilege to graze which arises in a licensee whose license will in the ordinary course of administration of the Taylor Grazing Act ripen into a permit, makes that privilege a proper subject of equitable protection against an illegal act. To hold that appellants' rights are not of sufficient dignity to be entitled to equitable protection would be inconsistent with the cases discussing other analogous subjects of equitable protection within the purposes of the Act itself.

Id.

See Coalition v. Bosworth, 180 F. Supp. 2d 124 (D.D.C. 2001), dealing with the extent to which the Secretary must consider environmental impacts of federal grazing permits when they are renewed. In this case, the defendant Forest Service moved to transfer the case to the District of Montana. That motion was denied. See also *Arizona Cattle Growers Association v. United States Fish and Wildlife, 273 F.3d 1229 (9th Cir. 2001)* challenging the extent to which the Endangered Species act precludes ranchers from grazing their livestock in certain areas of potential habitat. Judgment for ranchers was, for the most part, upheld.

See also Central South Dakota Cooperative Grazing District v. Secretary of the United States Department of Agriculture, 266 F.3d 889 (8th Cir. 2001), regarding the authority of the Secretary to set maximum stocking levels for grasslands.

In *Anchustegui v. Department of Agriculture, 257 F.3d 1124 (9th Cir. 2001),* it was held that the Secretary could not cancel a grazing permit where the notice of cancellation did not provide the permit holder an opportunity to achieve compliance or to demonstrate that he had achieved compliance before the institution of the agency proceedings.

For further discussion, see A. Adams, *Administrative Law (Annual Survey of Caselaw), 23 U. Ark. Little Rock L. Rev. 1017 (2001);* E. Schlenker-Goodrich, *Moving Beyond Public Lands Council v. Babbitt: Land Use Planning and the Range Resource, 16 J. Envtl. L. & Litig. 139 (2001);* S. Rigsby, *Public Lands Council v. Babbitt, Secretary of the Interior: Challenging the Evolution of Public Lands Grazing Regulations (Case note), 5 Great Plains Nat. Res. J. 161 (2001);* J. Feller, *Recent Developments in Public Land Law: National Monuments, Forest Roadless Areas, and BLM Rangeland Management,* SF56 ALI-ABA 179 (2001).

(n247)Footnote 494. Reich, *The New Property, 73 Yale L.J. 733 (1964).*

(n248)Footnote 495. Comment, *U.S. v. Fuller -- Eminent Domain-Taylor Grazing Permits As An Element Of Compensation For Condemned Land, 1973 Utah L. Rev. 75, 85-86.*

(n249)Footnote 496. For further discussion, *see* H. Meyers *Curiosities in Babbitland,* Western Styles, June 1994 at 8; G. Whitley, *Range War,* Western Styles, June 1994, at 78-84.

Todd M. Olinger, Public Rangeland Reform: New Prospects for Collaboration and Local Control Using the Resource

and Advisory Councils, *69 Colo. L. Rev. 633 (1998).*

(n250)Footnote 497. *See The Washington Report*, Doanes' Agric. Rep., Dec. 30, 1994, at 4.

For further discussion, *see* Comment, *The Bioprospecting Question: Should the United States Charge Biotechnology Baldwin, Livestock Water on Federal Rangelands, 1 Great Plains Nat. Resources J. 351 (1997);* Note, *Where's the Beef? Allocating the Burden of Proof in Bailment Agreements Involving Missing Cattle Grazed on Public Rangeland (Cornia v. Wilcox, 898 P.2d 1379,* Utah 1995*), 1996 Utah L. Rev. 1031;* Smith, *Livestock Production: The Unsustainable Environmental and Economic Effects of an Industry Out of Control, 4 Buff. Envtl. L. J 45 (1996);* Pierson, *The Bureau of Land Management: A Half-century of Challenges and Change, 32 Land & Water L. Rev. 345 (1997);* Sullivan, *Fifty Years of Rhetoric on the Range: Reframing the Debate on Public Land Management, 32 Land & Water L. Rev. 339 (1997);* Armstrong, *Our Federal Public Lands, 12 Nat. Resources & Env't 2 (1997);* Comment, *Disputes Over Timber Removal from National Forests (Mountain States Legal Found. v. Glickman, 92 F.3d 1228, D.C.* Cir. 1996), 12 J. Nat. Resources & Envtl. L. 189 (1996); Mondou, *Our Land is What Makes Us Who We Are: Timber Harvesting on Tribal Reservations after the NIFRMA, 21 Am. Indian L. Rev. 259 (1997);* Padilla, *The Mouse that Roared: How the National Forest Management Act Diversity of Species Provision is Changing Public Timber Harvesting, 15 U.C.L.A. J. Envtl. L. & Pol'y, 113 (1996).*

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CHAPTER 47 AGRICULTURE AND FARM LAW

6-47 Thompson on Real Property, Thomas Editions § 47.11

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§ 47.11 State and Local Agricultural Land Use Issues.

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§ 47.11(a) In General.

State and local governments have traditionally been the units of government most actively involved in the regulation of agricultural land use. Historically, the most extensive efforts at regulation have occurred in cities and towns and it has been only in recent decades that the need for land use planning beyond the fringes of the cities has been recognized. The result has been an increase in regional or state-wide land use planning and regulation. n498 This has had a notable impact on agricultural land not only on the fringes of cities and towns but, in some cases, throughout the state.

A variety of concerns have motivated jurisdictions to adopt land use regulatory measures that affect agricultural land. These range from concerns regarding the loss of prime farmlands to agriculture uses as a result of urban development pressures to concerns regarding the availability of agricultural land for recreational and aesthetic purposes. Similarly, there is growing concern that the use of land for agricultural purposes has significant environmental implications that need to be addressed as part of the land use planning process. All of these, and other concerns have raised a number of land use issues that particularly affect agricultural land. n499

§ 47.11(b) Agriculture as a Nuisance.

The law of nuisance is designed to adjust problems between neighbors. Its foundation premise is that one should not act in a way that harms another. n500 Agricultural activity has inherent characteristics which may lead to "neighbor" type problems -- especially if the neighbor is non-agricultural in nature. Smells, dust, noise, flies, manure, heavy machinery and the like are all an integral part of crop and livestock production and are often considered offensive to others. Unfortunately, many "neighbors" have moved to the countryside with aspirations of forming a placid, bucolic relationship with nature only to discover that farming is neither placid nor bucolic. n501

As a general rule, reasonable farming activities will not be considered to be nuisances *per se*. n502 Generally, the determination that something is a nuisance therefore will depend upon a variety of factors pertinent to the particular situation, such as the type of neighborhood, the nature of the thing or wrong complained of, its proximity to those alleging harm or damage, its frequency or continuity, and the nature and extent of the injury, damage or annoyance.

n503 Clearly, these and similar particular facts govern in each case. As a result, it is possible for agricultural operations to constitute a nuisance depending on the manner in which they are conducted. n504

A Kansas Attorney General Opinion addressed the question of whether corporate ownership of farmland was detrimental to the public welfare. By statute, most corporations are barred from owning an interest, directly or indirectly, in farmland. Local amendments have given counties the option of permitting dairy and swine corporations to locate within the county. The issue before the Attorney General was whether the county could rescind such a grant of permission and, if the county did so, whether it would constitute a "taking" of a property interest from the corporation. The Attorney General found that the state may exercise its police power to totally prohibit persons from engaging in occupations or businesses that are detrimental to the public welfare. Citing Mugler v. Kansas, n505 the Attorney General found that the adoption of the restrictions against corporations was well within the bounds of law and that "there was no vested right in carrying on a business that was legislatively declared detrimental to the public, and that the property owner was not entitled to compensation or a stay on the law's application." n506

In Yoder et al. v. Showalter, n507 a number of individuals sued a hog farmer on a nuisance theory, claiming damages in excess of $6 million. The jury found that no nuisance had occurred with respect to seven of the thirteen plaintiffs. Of the remaining plaintiffs, the jury awarded $3000 to four, $100 to one and nothing to the sixth, even though it found a nuisance existed. Evidence in the case established that there were 17 large hog farms in the county and that the plaintiffs had no desire to move from the vicinity. Further, it was found that none of the plaintiffs were claiming any loss of property value.

In one case, the relationship between nuisance law and nonconforming status under the zoning laws was considered. In City of Glendale v. Aldabbagh, n508 the court dealt with a nonconforming use and the question of whether the right to continue that use had been lost as a result of nonuse for more than the permitted period, where the nonuse was the result of a public order. Here, the nonconforming use was an adult entertainment business. The owner was the subject of a restraining order that had been imposed because of allegations that the business constituted a public nuisance (due to unproven claims of prostitution). The owner argued that since he was never successfully prosecuted for the misconduct, the fact that the business had not been in operation in the interim should not constitute abandonment for purposes of losing the right to continue the nonconforming use. The court found otherwise even though the owner had no intent to abandon. The court held that "the termination of a nonconforming use does not require a decision by the property owner to discontinue the use. A nonconforming use may be lost through negligence or inadvertence. A use may also be lost if a person engages in civil or criminal misconduct that the property owner knows or should know could lead to involuntary closure and indeed does lead to closure." In this case, the court held that the cessation was brought about by the City's public nuisance action even though that action was dismissed by agreement of both sides. This case would seem to have important implications for farmers near urban areas who continue their operations as nonconforming uses. If the active use is interrupted by litigation over nuisance matters, the nonconforming status may be in jeopardy.

Liability of one landowner to another for misapplication of pesticides was addressed in 1900 Partnership v. Bubber, n509 in which the court allowed recovery for damages to the cotton crop resulting from crop dusting but denied any recovery on the part of the manager for his mental anguish. n510

§ 47.11(c) Laws Protecting Farming Against Nuisance Actions.

Virtually all states have adopted statutes, n511 usually called "Right to Farm" laws, which are specifically designed to give agricultural operations a measure of protection against nuisance actions. These statutes tend to be one of three major types: 1) those that establish a specific time after which an agricultural operation may not be declared a nuisance because of changed conditions in the area; n512 2) laws which create a rebuttable presumption that the operation is not a nuisance, n513 and 3) those which exempt particular kinds of operations from nuisance claims. n514

a. Statute of Limitations Approaches.

Statutes of this type typically provide that if the agricultural operation has been in existence for more than a year, n515 it may not be declared a nuisance because of changed conditions within the locality. n516 To establish that an agricultural operation is immune under the statute, it is necessary to establish: 1) that the only basis for the nuisance claim is changes in the neighborhood; 2) that the agricultural enterprise has been in existence for the required statutory period; 3) that the operation was not a nuisance when it began, and 4) the nuisance does not result from negligent or improper agricultural practices. In one case, n517 a court held that a hog operation simply was not a nuisance because it existed before plaintiffs moved into the area and was not operated in a negligent manner. The court stated:

> The policy of the legislation is clear. People may not move to an established agricultural area and then maintain an action for nuisance against farmers because their senses are offended by the ordinary smells and activities which accompany agricultural pursuits. Exceptions exist where there are changes in the activities, the activities were a nuisance in the first place without consideration of the changed conditions, and negligence... . We must observe that pork production generated odors which cannot be prevented, and so long as the human race consumes pork, someone must tolerate the smell. Indiana Code 34-1-52-4 addresses that fundamental fact and protects pork production when it is confined to its natural habitat, that is rural farm communities. n518

It has been held that "changed circumstances" refers only to "the extension of non-agricultural land uses, residential or otherwise, into existing agricultural areas." n519 Some jurisdictions appear to apply this requirement strictly and literally. In *Flansburg v. Coffee*, n520 the court held that Right-to-Farm statutes were not available because the hog operation in question was developed subsequent to plaintiff's ownership of the land and affirmed an award of damages and a permanent injunction against the operation. Agricultural operations will probably receive little additional protection from Right-to-Farm statutes in jurisdictions of this type.

The time period has been construed as running against the complaining neighbor rather than simply referring to the time in which the agricultural operation has been in existence. Thus, if the neighbor does not bring the action within the time allowed, the neighbor is barred from bringing the suit. n521 The time typically begins to run when the operation commences but a change in the operation may constitute a new operation. n522

b. Rebuttable Presumption Approaches.

A number of states have created a presumption that agricultural operations are not nuisances. n523 For the presumption to be invoked, these statutes typically require that: 1) the operation be established before surrounding non-agricultural uses, and 2) that the activity be conducted according to good farming practices. The presumption is rebuttable but to do so typically requires a showing that the activity has an adverse effect on public health or safety or that the operation is not farming according to restrictions imposed by law.

The extent to which statutes of this type go beyond the traditional common law position that agricultural operations do not constitute nuisances *per se* is also somewhat speculative in jurisdictions that have adopted this type of Right to Farm law. It is arguable that these statutes simply codify existing common law regarding nuisance and do not give agriculture any meaningful additional protection. The converse argument is that the statutes raise the threshold of proof required of claimants to prove the existence of a nuisance. In addition, they may relieve the agricultural operator of the obligation to affirmatively defend the operation as acceptable if it can be shown that the farming practices are consistent with law.

c. Specific Practices Approaches.

A few n524 states have addressed the nuisance problem in the context of particular kinds of agricultural operations and have limited nuisance actions with respect to those operations. These statutes typically address the problem of feedlots, dairy farms or poultry and egg production facilities and often do so in the context of specific regulations directed toward

those particular enterprises. n525

d. Impact on Farming Operations.

The Right-to-Farm statutes do not appear to have radically altered the law of nuisance as it relates to farming. In situations where the nature of the activity causes harm for which the law offers some redress, courts have found ways to avoid the impact of the statutes. n526 Some courts have focused on the fact that the farm arrived or was changed after the complaining landowners arrived in the neighborhood. n527 Others have considered such factors as the agricultural nature of the neighborhood and the timing of the non-agricultural uses as only among the various factors to be considered rather than determinative of the issue. n528 Others have found that the issue involves opposing rights of equal merit or dignity to those claimed by the farming operations. n529

On the other hand, at least one court has ignored the application of the statute entirely to find that no nuisance existed. n530 There, a nuisance action was brought against the owners of a feedlot. The feedlot argued that they were shielded by the state's Right-to-Farm-Act. n531 The Appellate Court assumed, without deciding, that the feedlot constituted an "agricultural operation" under the act. It then held that the act precluded a finding of nuisance only with respect to an activity which would not have been a nuisance but for a change in surrounding non-agricultural uses more than one year after the activity began. Here, the operation was alleged to be a nuisance because of an expansion in the operation itself, not because of changes in surrounding nonagricultural uses. As a result, the court held that the statute did not apply. The feedlot operators argued to no avail that the act codified a policy of protecting agricultural uses but the court characterized the act as simply a statutory adaptation of the common law "coming to the nuisance" defense. Then, the court ruled that "coming to the nuisance" was not a total bar to relief but a factor to be considered in evaluating the seriousness of the harm done by the defendant. On appeal, the Idaho Supreme Court did not address whether the Right-to-Farm statute applied at all. It reversed the Court of Appeals on an alternative policy basis that Idaho was a sparsely populated state and its economy depended on the benefits provided by the development of agriculture, lumber and mining industries and that to eliminate the complained conduct on the basis that it constituted a nuisance would place an unreasonable burden on these industries.

The nuisance statutes seem to be designed to shield farm operations from nuisance claims that may arise from non-farm neighbors who are likely to be oversensitive to the more "noxious" aspects of farming. This is particularly the case where the non-farm neighbors have moved into a traditionally farming area. On the other hand, where a farm neighbor, who has long been in the area, complains about nuisance-type activities of another farming operation, the statutes may be less suited to deal with the dispute. That has been the holding in a Court of Appeals decision in Kansas. n532 There, the Court ruled that the trial court erred in holding that the farm was shielded from the nuisance claim primarily because the activities of the party complaining about the nuisance were not of an non-agricultural nature.

Two cases illustrate the extent to which jurisdictions have split on the question of constitutionality of the protective statutes. In *Borman v. Board of Supervisors, 584 N.W.2d 309 (Iowa 1998),* the court held that the right to bring a nuisance action against someone else was a property right. The impact of the statutory immunity from nuisance actions deprived those landowners of that right without compensation. As a result, it declared the statute unconstitutional as a taking. In *Pure Air and Water Inc. of Chemung County, 668 N.Y.S.2d 248 (N.Y. App. 1998),* the right-to farm law was upheld against a claim that it denied a landowner due process on the ground that there was no property interest in having the courts determine the merits of a private nuisance suit.

§ 47.11(d) Keeping Land in Farming.

There has been considerable concern that the agricultural land base surrounding many cities is seriously threatened by urban and development pressures which have caused much agricultural land to be converted to non-agricultural uses. Much discussion n533 has occurred regarding this loss of farmland, how such losses should be measured and whether agricultural technology can possibly boost production on the remaining acreage to compensate for the loss of the best

farmland. n534

Much of the concern over the loss of farmland seems to be the result of a perceived threat posed by the loss of significant amounts of prime farmlands to the nation's ability to produce adequate food supplies. n535 The loss of land for farming, coupled with consumers' awareness that the agricultural sector has been beset by enormous financial problems has undoubtedly generated considerable fear that the agricultural sector may not be able to meet the long-term food production demands of the nation. n536

The other side of the coin, of course, is that farmlands are often needed for other purposes, such as urban expansion and development. Frederick Jackson Turner observed that the nation's frontier was a "safety valve" for urban discontent. n537 It would appear that much of the pressure on farmland in the urban fringe area is the result of urban residents who wish to escape what are possibly perceived as virtually insoluble urban problems. In this sense, the fringe areas around many growing cities have become something of a land use frontier, in which the needs of the agricultural sector must be delicately balanced against those of an increasingly number of urban oriented "refugees." n538 In many cases, the agricultural use must give way to other kinds of land use activity. The long-term consequences of such changes are largely understood and involve impacts on land ownership, land use patterns and may even have significant individual psychological impacts. Most jurisdictions have approached the problem as a matter involving the availability of land for a variety of competing uses, including agriculture.

Whether the popular fears regarding the threat to our nation's food supply are founded in fact or not, and whether all of the land that is taken for non-farming purposes is actually needed for those purposes, concern over the stability of the agricultural land base has focused a lot of attention on the issue of agricultural land conversion, particularly within the urban fringe area, as an important land use planning and regulation question.

Jurisdictions have developed a variety of approaches to the farmland loss/conversion problem. These programs vary widely throughout the nation. n539 Some jurisdictions emphasize effective planning as the key to accommodating the conflicting urban and rural interests. n540 Others tend to focus on the economic inability of the farmer to compete with a high land use density marketplace. n541 Still other jurisdictions seek to spread the risks of restricted development and the windfalls of permitted development evenly so that those who are not allowed to develop may still enjoy some of the economic advantages that may come from converting agricultural land to high-value urban uses. n542 A number of the more popular approaches will be briefly examined here.

In Napa County, California, voters adopted Measure J which essentially requires voter approval of changes in the designation of agricultural land and open space in the general plan and map of the county. This measure, which is effective for thirty years, allows redesignation without voter approval only under the following circumstances:

1. the land is redesignated in conjunction with annexation to a city;

2. the county board of supervisors makes specified findings that the land is physically unsuited for agriculture, that it is likely to be annexed in the future and that the proposed use is compatible with agriculture;

3. the land is redesignated as a site for a solid waste disposal facility;

4. that the redesignation avoids an unconstitutional taking of the property.

This measure was upheld against a challenge that the measure unconstitutionally ties the hands of future board of county supervisors and that the general plans cannot be amended by county initiative. n543

§ 47.11(e) Zoning as a Common Regulatory Approach to Keep Land in Agriculture.

Traditional, cumulative or *Euclidian* n544 zoning typically establishes districts in which certain uses are permitted as a matter of right or on a special exception or permit basis. n545 The general land use patterns of the jurisdiction are established and regulated primarily through the allocation of types of specific land uses to these districts. In addition to the regulation of basic land use activities within the several districts, zoning ordinances also typically control or regulate height, bulk and setback of structures, authorize variations and special exceptions, and control development density.

As a general rule, traditional zoning ranks land uses in a hierarchical scheme that typically considers single family dwellings as the highest priority use. Then, for the most part, the less preferred uses will not be permitted in areas or districts designated for higher priority uses. In the lower priority districts, higher priority uses will be permitted even though lower priority uses will be excluded. n546 The higher uses are said to cumulate in the lower districts.

Under this zoning approach, agricultural use typically is considered to be a lower priority use and may even be designated as "undeveloped" or "unused" land or as "open space." This results in permitting any uses ranked higher than agriculture to locate in agricultural zones, albeit often on a special exception basis, n547 no matter how inconsistent those uses may be with the agricultural uses. This cumulative location of higher priority uses in lower priority districts may well result in the location of uses which are actually incompatible with agriculture in the agricultural districts. For example, uses such as junkyards and cement plants may be "exiled" on this basis to agricultural areas. n548

The hierarchical scheme of traditional zoning is quite clearly biased in favor of development and typically treats agricultural land as a primary land resource for such development. This bias makes it relatively easy to get the district designation changed to permit proposed uses which are developmental in the sense of involving higher uses. This may leave existing agricultural uses in such areas vulnerable to the pressures of further development. It must therefore be said that in terms of keeping land in farming, traditional zoning typically affords little protection to agricultural uses in the long run and does not effectively deter the conversion of agricultural lands to so-called uses of higher priority.

The developmental bias against agriculture has motivated some jurisdictions to modify non-traditional zoning approaches to make them more protective of agriculture and more effective as farmland preservation devices. n549 These approaches are often called *non-euclidean* or *exclusive zoning*.

Like traditional zoning, non-euclidian zoning establishes areas or districts as the primary means of regulating land patterns. Unlike traditional zoning, however, these districts are devoted exclusively n550 or primarily to particular designated uses. n551 In these districts, even so called higher uses are excluded.

Non-euclidian agricultural zoning districts may be either exclusive and non-exclusive in nature. In exclusive agricultural zones, only agricultural use is permitted. In these districts, many kinds of development that are incompatible with agricultural use will not be permitted. If a non-agricultural use is proposed, it will typically be necessary to secure a change in the zoning itself. n552

In non-exclusive agricultural zones, uses other than agriculture may take place provided the proposed uses can satisfy relevant, restrictive criteria. These criteria may include minimum lot size restrictions, area-based allocations combined with small building lot sizes, sliding scale area-based allocations combined with small building lot sizes, or conditional use approval. n553 The purpose of these requirements, of course, seems to be to weed out the kind and size of used that are most problematic for agriculture or at least establish a buffer around the non-agricultural uses. In most zoning plans of this type currently in effect, large minimum lot sizes appear to be the most popular restrictive device by which non-agricultural use is excluded. n554

Where agricultural land loss is considered a significant problem, and where zoning is the land use planning regime of choice, non-traditional zoning of some type seems to be the most popular zoning form. However, most non-traditional zoning schemes appear to be non-exclusive in nature. n555 This means that there is still a likelihood in most jurisdictions that non-agricultural and agricultural uses may be found in the same location.

Zoning is sometimes undertaken with the particular objective of controlling development density or intensity. Zoning ordinances typically establish an overall density pattern for the jurisdiction. However, it may be possible to cluster or arrange the development in ways which facilitate greater densities than would otherwise be permissible in certain areas while at the same time arranging for other areas to be developed at less than the normally permitted density.

Cluster zoning groups development in a specific minimum area which, in turn, will leave the rest of the area undeveloped or dedicated to minimum density uses. n556 This is generally done to preserve open space around developments, but it may be that some of this open space may actually be used for agricultural purposes or at least serve as a buffer between the development and agricultural uses.

The *Planned Unit Development* (PUD) and *Planned Unit Residential Development* (PURD) approaches are common refinements of the clustering concept. Under these zoning approaches, the development plan is considered as a unit in which residential, non-residential, commercial and open space needs are all combined in order to maximize the size or area of low density development. n557 An advantage of this approach is that it may be used to structure the development so as to minimize the need to use adjacent farmland for support services that inevitably accompany development while at the same time establishing a buffer zone between the agricultural uses and the development.

Open space zoning seeks to structure or channel development so that space is maintained between the urban development area and the agricultural area. n558 This approach is more akin to exclusive zoning in that areas are typically designated in which only agricultural, forestry or recreational uses may be conducted and in which permanent structural uses may be prohibited.

It should be noted that the designation of a particular zone as "agricultural" typically will not prevent non-agricultural uses in the zone unless "agriculture" is designated as the exclusive use permitted in that zone. n559 In fact, under euclidean-style zoning ordinances, many non-agricultural land uses such as home occupations, government buildings, single family residential dwellings, neighborhood recreation facilities and churches might well be permitted as of right while such uses as cemeteries, hospitals, schools, utilities, and industrial activities might be permitted on a special exception or special permit basis. n560 This is largely because of the inherent bias in favor of development and the breadth of the definition of agriculture in most ordinances. n561

§ 47.11(f) Zoning: Agriculture as a Nonconforming Use.

Zoning typically considers land uses to be "nonconforming" when they do not agree with the uses permitted in particular zoning districts. This term is ordinarily used to refer to uses which are allowed to continue despite the fact they may not be permitted in that particular district. n562 Nonconforming use status may result for agricultural land uses when development essentially takes over an area formerly devoted to agricultural use. The remaining agricultural uses are now "out of place" because of the changes in zoning that have accompanied the development.

This status is particularly problematic for agricultural uses because the irreversible changes that have already occurred in the area have probably doomed the agricultural use in the long run. n563 As a practical matter, from a purely economic perspective, it is virtually inevitable that the agricultural use will cease, probably in the not too distant future, n564 unless it is of such a small scale that it can be maintained as an accessory or hobby use to some other activity. n565

The difficult question, therefore, will be how to allow the agricultural use to continue as long as the user wishes. This is because once the farming operation is considered to be a nonconforming use, it must constantly confront the problems associated with maintenance and improvement without running afoul of zoning limitations on changes in the intensity and nature of the nonconforming use. If substantial capital improvements are required to keep the operation competitive or even economically viable, the farmer may have a very difficult task of convincing the zoning authorities that the

proposed changes are sufficiently minimal that they do not alter either the intensity, nature or extent of the nonconforming use. n566 Farmers in some jurisdictions have been exempted from zoning regulations altogether. n567 In at least one case, this exempt status was the basis for the holding that a jurisdiction cannot use nonconforming status to accomplish zoning regulation of agricultural uses where state law generally exempts agricultural buildings and land from such zoning regulation by a county. n568

§ 47.11(g) Zoning: Treatment of Residential Dwellings on Farmland.

The application of zoning restrictions to residential dwellings on agricultural land is primarily a concern in jurisdictions which have exempted agricultural uses from zoning authority. One argument in favor of exempting the dwelling as well as the land from zoning regulation is that it the dwelling is clearly an incidental and accessory use to the actual farm use of the land and therefore should not be dealt apart from the "agricultural" use with which it is associated. n569 The corresponding contrary argument is that the use of the dwelling is for primarily residential rather than agricultural purposes and therefore, as to the structure itself, it is the dominant use and may be regulated as a residential use. At least one state has adopted this position by statute in regard to farm dwellings in urban counties. n570

Treating the dwelling as part of the farm seems preferable in most cases, since it effectively encourages individuals to live on the land that they farm which is consistent with the general predilection of the law and policy in this country. Unfortunately, it does not deal effectively with the situation in which a child, or children, of the farm parents wishes to construct a separate residence, or residences, on the farm premises. It may be appropriate to treat this activity as an additional development, rather than as an accessory use. If it can be shown that the additional dwellings are needed in relation to the viability of the farm operation, they should partake of the same status as is enjoyed by the primary farm dwelling.

Some jurisdictions appear to be more interested in regulating particular kinds of residential dwellings in agricultural area and are less interested in the farm dwelling itself. In these jurisdictions, the most common target seems to be the mobile or manufactured home. While it is difficult to argue that mobile homes constitute an agricultural use, it has been argued that the presence of a significant number of mobile homes in an agricultural area is one of the earliest signs that the area is changing from agricultural to residential. n571 In this context, it may be reasoned that mobile homes present a particular threat to agricultural areas because of their relative low cost and the fact that their location is often unregulated in undeveloped areas. Jurisdictions which have sought to exclude such dwellings from agricultural areas through their zoning ordinances, however, have not had much success. n572

In two cases in Iowa, the courts have eliminated the distinction between commercial farming and "traditional" farming. In Thompson v. Hancock County, n573 and Keuhl v. Cass County, n574 the Iowa Supreme Court determined that large commercial hog facilities were engaged in agriculture for purposes of zoning laws. In so doing, the court overturned the long-standing precedent, *Farmegg Prods., Inc. v. Humboldt County*. n575 The rule in Iowa had been that agricultural use was to be defined in terms of "traditional" activities before the activity would be exempt from zoning.

In City of Glendale v. Aldabbagh, n576 the court dealt with a nonconforming use and the question of whether the right to continue that use had been lost as a result of nonuse for more than the permitted period, where the nonuse was the result of a public order. Here, the nonconforming use was an adult entertainment business. The owner was the subject of a restraining order that had been imposed because of allegations that the business constituted a public nuisance (due to unproven claims of prostitution). The owner argued that since he was never successfully prosecuted for the misconduct, the fact that the business had not been in operation in the interim should not constitute abandonment for purposes of losing the right to continue the nonconforming use. The court found otherwise even though the owner had no intent to abandon. The court held that "the termination of a nonconforming use does not require a decision by the property owner to discontinue the use. A nonconforming use may be lost through negligence or inadvertence. A use may also be lost if a person engages in civil or criminal misconduct that the property owner knows or should know could lead to involuntary closure and indeed does lead to closure." In this case, the court held that the cessation was brought about by

the City's public nuisance action even though that action was dismissed by agreement of both sides. This case would seem to have important implications for farmers near urban areas who continue their operations as nonconforming uses. If the active use is interrupted by litigation over nuisance matters, the nonconforming status may be in jeopardy.

Farmers who sell their own produce from their premises and advertise the availability of the same through the use of signs located near roadways may be interested in the outcome in the case of *Schultz v. City of Rochester Hills*. n577 There the court dealt with a homeowner who sold beauty products from her home in an area zoned for single family use. She attached a large sign to a tree in her front yard to advertise the availability of her merchandise. The city ordinance permitted in-home businesses but prohibited signs. The court found that the restriction was an impermissible regulation of commercial speech where the ordinance merely regulates but does not prohibit other types of commercial advertising.

§ 47.11(h) Zoning: Agricultural Activity as an Appurtenance to Other Uses.

In addition to the farm dwelling itself, other structures may raise a question as to the extent to which they should share the same "agricultural" or "farming" status as the land with respect to zoning regulations. Here again, this is a more critical question in jurisdictions which exempt agricultural uses from zoning restrictions. In most cases, the outcome appears to depend upon the extent to which the structures and improvements are considered an integral part of the agricultural activity or whether they are merely incidental. n578 Greenhouses may be held to be commercial structures depending on their purpose and their relation to the general agricultural activity which occurs on the land. n579 Silos are generally considered to be agricultural in nature n580 as are roadside stands in which produce from the particular farm is sold. n581 On the other hand, sawmills n582 have not been considered accessory uses to farming operations.

§ 47.11(i) Zoning: Agricultural Use as an Accessory Use.

Because of the hierarchical nature of traditional zoning, it is probable that agricultural uses may be mixed with potentially incompatible non-agricultural uses even in designated "agricultural" use zones. n583 This, of course, has placed junkyards, cement plants and the like lawfully in agricultural areas. n584 On the other hand, it may be argued that what is normally an agricultural use, for example the keeping of horses or a farm animal in a residential area, albeit for recreation or as a pet, is contrary to zoning restrictions in any area not zoned for agriculture at all and therefore should be enjoined. Similarly, there may be an activity, such as the making of ice cream at a dairy, that occurs in conjunction with an agricultural land use but which appears to be nonagricultural in nature and in violation of zoning restrictions. In these cases, it will be necessary to determine whether the allegedly incompatible use can be permitted as a valid accessory use to uses that are permitted in the particular district.

Where the issue is the permissibility of the supposedly non-agricultural activity in areas zoned for agriculture, courts tend to focus on whether the goods were produced on the farm, n585 whether the activity is clearly incidental to the agricultural activity, n586 or whether the activity is customarily associated with farm use. n587

Where the issue is the maintenance of arguably agricultural uses (such as the keeping of horses) in an area not zoned for agricultural activity (such as a residential district), courts have approached the problem with less uniformity. Some courts have allowed the activity as an accessory use, n588 while others have disallowed such uses. n589 In many cases, courts are concerned that the activity may constitute a nuisance or may have an adverse impact on the character of the neighborhood. n590 In other cases, the distance from existing agricultural uses and the particularity of specific language n591 in the relevant ordinance seem to be the dominant factors in the decision. n592

§ 47.11(j) Zoning: Regulation of Lot Size.

Zoning may influence the size of the tract of land upon which a particular activity occurs. It has been popular in some jurisdictions to require a large minimum lot size before the land use could be changed from agricultural use to residential use. It has been thought that this approach would deter residential development which might seriously erode

the agricultural land base of the jurisdiction. n593 It has been reported that when used for this purpose, minimum lot sizes range from as little as three acres to as much as 640 acres. n594 At least one jurisdiction has upheld requirements of 160 acres. n595

Large lot zoning has been upheld by a number of courts where it was considered necessary to preserve the agricultural nature of the area. n596 In a few cases, courts have refused to uphold minimum lot requirements where such a requirement has had the impact of preventing agricultural use in areas where agriculture was otherwise permitted or encouraged. n597

As a practical matter, lot sizes smaller than ten acres are not likely to be very effective in preserving farmland since it is generally not feasible to conduct a successful agricultural operation on acreage that small. n598 Jurisdictions that are interested in minimum lot sizes of that dimension and smaller appear to be more interested in dispersing development and achieving lower use densities than in keeping the land meaningfully in agriculture. In these jurisdictions, it may be difficult to engage in lawful agricultural activities on the smaller tracts. n599

§ 47.11(k) Agricultural Districts.

Agricultural districting is a form of land use regulation that combines contractual obligations and land use planning. n600 Under this approach, the agricultural landowners who qualify voluntarily enter into a binding agreement between themselves and local authorities to create special districts. The land owner contracts to keep the land in a farming or agricultural use and the local authority makes reciprocal promises regarding special tax treatment and protection from certain types of government regulations, including special assessments and the exercise of the power of eminent domain. These agreements are binding for a specified period of time n601 and are enforced through heavy tax penalties which may be incurred if the landowners make unacceptable use of their land. n602

§ 47.11(l) Taxation.

Some jurisdictions have sought to induce farmers to keep their land in agriculture through preferential reductions in *ad valorem* taxes. n603 These tax concessions are designed to tax the land at a value that reflects its agricultural production potential rather than at a higher value which reflects its development potential. In most cases, this is described as using the "use value" of the land as opposed to the "fair market value" of the land. This approach is specifically designed to deter speculation in land values which significantly increases the cost of farming because it raises the cost of farmland which may be required to expand the farming operation in order to keep it economically viable. n604 It is notable that it does not take much of an increase in land value before the urban development value of the land may soon exceed the agricultural productive value of the land. When this occurs, an increasingly larger portion of the farmer's net agricultural income must be allocated to taxes, which rise accordingly. By restructuring the method by which taxes are determined, it may be possible to create an economic incentive for owners of agricultural land to retain that land in agricultural use. n605

Pure differential taxation or assessment approaches assess agricultural land for *ad valorem* property tax purposes solely on the basis of its present agricultural use value rather than its fair market value. n606 In most cases, this is based on a determination that the land is being used for bona fide agricultural purposes. n607 This type of preferential assessment is thought to reduce the farm's taxes by the difference between taxes imposed on the basis of fair market value and taxes based on the agricultural or current use value of the property. This, it is hoped, will provide a sufficient economic incentive to the farmer to keep the land in agricultural use. The biggest weakness of this approach is that the tax reduction pertains only while the land is "used" for "agricultural purposes." Not only is that somewhat difficult to define, n608 it does not seem to deter development where the cost of the increased taxes can be shifted to the developer or can be offset by greater income from the development itself.

Like pure differential assessment, *deferred taxation* requires that the land be assessed at its current use value rather than

its fair market value. Unlike pure deferential assessment, however, deferred taxation approaches require that some or all of the tax savings derived from the preferential assessment be paid if the land ceases to be used for agricultural purposes. n609 This recapture or "rollback" will vary from jurisdiction to jurisdiction and typically ranges between two and ten years. n610 This feature has not been particularly popular with the agricultural sector because it increases development costs. It is also administratively more complex than pure differential assessment because of the need to maintain records of both the agricultural use value of the land and the fair market value of the land. n611 Nevertheless, deferred taxation has been a surprisingly popular approach, being used in more than half the states. n612

In some jurisdictions, *restrictive agreements* are combined with preferential tax assessment techniques to implement the tax valuation approach as part of a contractual agreement between the landowners and the appropriate governmental unit. In exchange for the special tax considerations, the agricultural landowners agree by contract to form special districts in which their land will be maintained in agricultural use and taxed accordingly. These arrangements have not been particularly popular with the agricultural land owners because, once the districts are created, cancellation or withdrawal may be very difficult and may require the giving of notice often far in advance of termination, which may result in immediate reimposition of higher tax rates and other penalties. n613 It should also be noted that by the time development pressure on agricultural land becomes acute, it is probably too late to generate much support among the farmers, many of whom will likely already have decided to convert their land to non-agricultural uses, for this kind of restriction unless the tax savings is very large. As a result, this approach tends to be used where pressure to develop is less pronounced.

In jurisdictions where tax statutes give a preference to agricultural use, determining whether land is actually being used for "agricultural" purposes has particularly been a problem. This is because a developer may wish to acquire land some time in advance of the actual development and then hold that in some kind of "agricultural use" until that future development date in order to avoid the increases in land taxes that may result from development. Such tax savings may be substantial where the land is valued according to its "use" value as opposed to its "fair market value." In a Kansas case, n614 the Court of Appeals construed broadly the statutory definition of "agricultural land" and rejected arguments that the intent of the land owner was relevant to the determination of whether the land was actually being used for agricultural purposes. In this case, the land was located within the city limits, was completely enclosed by a fence and was exclusively seeded to fescue and cut periodically as hay. There were no farms or rural homesites associated with the land. The local appraiser had classified the land as "vacant" and had taxed it accordingly. The board of tax appeals found that the land was devoted to agricultural use. It found that there was no requirement that the land owner make a profit from the land and it did not matter what the surrounding landowners did with their land. Further, it did not matter what the landowner eventually intended to do with the land. The County argued that the statutory phrase "devoted to agriculture" required a serious and good faith undertaking of agricultural activity and precluded any temporary agricultural activity that was designed to avoid tax liability. The Court of Appeals upheld the board of tax appeals.

§ 47.11(m) Miscellaneous.

A variety of other approaches have been attempted to keep land in farming with varying degrees of success. The more common of these include land banking, n615 service and capital improvement districts n616 and scenic or conservation easements. n617

§ 47.11(n) Dealing with the Problem of Potentially Unfair Allocation of Development Opportunities.

Typically, the decision to keep land in agricultural use is also a decision not to "develop" that land. That, of course, means that other lands will be available for development and the owners thereof will reap the rewards associated therewith. Where a decision is made to limit the area available for development, difficult choices must be made regarding the particular lands that are available and unavailable for such uses. A very difficult issue in any land use planning scheme is deciding who gets the windfall that might result from such restricted development. Those who are required to keep their land in agricultural use for a protracted period of time typically share less in the largess that

comes from development than do others who own land that is susceptible of development and therefore tend to resist efforts that appear to unfairly deny them the economic benefits of development. A variety of approaches have been developed to address this problem.

§ 47.11(o) Allocation: Development Rights Plans.

A number of jurisdictions have developed approaches which involve the severance of the right to develop from the fee ownership of the land. Under these approaches, the severed "development right" may be either acquired by the jurisdiction, transferred to another individual landowner or limited in such a way that inconsistent uses are no longer possible. Two variations of this approach have been most popular.

The transferrable development rights (TDR) approach involves the designation of certain lands within a geographic area as those subject to developmental restriction and other lands within the area as those into which development is to be directed. n618 The owners of the restricted lands typically are permitted to sever and sell or transfer their rights to develop to other tracts of land or to the owners of land in the designated development areas. This transfer is promoted by the typical requirement that those proposing development must deliver to the permitting authority more rights than will have been assigned to their own lands. Thus, they will be required to purchase development rights from restricted landowners if they wish to develop the property at a greater density than would otherwise be permitted. In this manner, the restricted landowner shares in the economic return that comes from development through the sale of the rights necessary to facilitate the development itself. n619

The purchase of development rights (PDR) approach involves the direct purchase of the right to develop the land from owners of specific parcels by the governmental body or public land planning authorities. n620 These severed rights are then sold to potential developers, usually on the open market. n621 The purchase price of the rights is generally calculated on the basis of the diminution in the market value of the land as a result of the removal of the development rights and will thus be the difference between the value of the land when used for agricultural purposes or open spaces and its current market value. In return for the payment, the owner is restricted to agricultural and open space uses of the land in perpetuity. The land owner still retains all other rights of ownership.

As with the TDR schemes, the cash payment received by the landowner in exchange for the sale of the development right is seen as not only an incentive to remain in farming but as an opportunity to share in the increases in land values triggered by urban development in agricultural areas. Unlike TDR approaches, the public bears the cost of purchasing the development rights, which may be substantial.

§ 47.11(p) Allocation: Condemnation of the Right to Develop.

Both TDR and PDR schemes assume a voluntary severance of the right to develop the property or at least acceptance of the proposition that the payment is adequate compensation for the loss of the right to develop the property. It may be that some individual landowners will choose not to participate in such a program even if it is available. Where such lands pose serious threats to the agricultural preservation objectives or where transferable rights programs have not been adopted, a jurisdiction may need to acquire the right to develop the property through formal condemnation proceedings and the use of the power of eminent domain. Here, it may be necessary to "show that the proposed higher density development will create harms that the community may proscribe under the police power." n622

§ 47.11(q) Allocation: Compensable Regulation.

Compensable regulation preservation programs seek to specifically compensate the landowner for decreases in land value or loss of development potential due to development restrictions. Where this is undertaken, the jurisdiction typically establishes a fair market value for each parcel and then undertakes to guarantee that value. Then, if regulation is undertaken, "the landowner is immediately compensated if, and to the degree that, the regulation reduces the value of

the land for uses actually being made at the time the regulation is imposed." n623 In addition, the owner may be compensated if the land is sold at a price less than the pre-regulation guaranteed value. As with the PDR programs, a major drawback to this approach is the cost associated with the compensation which is borne by the public, funded through assessments imposed upon those within the planning district who have been benefitted from the regulations. n624 These assessments are generally characterized as benefit recapture approaches which then result in distributions to those who have suffered losses due to the regulation. n625

§ 47.11(r) Resource Management.

Agricultural activities require adequate resources for the operations to be successful. These requirements include adequate space, fertile soil, water and perhaps such production inputs as fertilizers, herbicides and the like. n626 If such resources are not readily available, it may be necessary to change particular agricultural activities, or change the use of the land to other uses (or, in some cases, cease using the land for any productive endeavor at all). The ability of a jurisdiction to control the availability of these resources in turn determines both the nature and the intensity of the agricultural use of the land. Where controls are intensive, agricultural use tends to be discouraged. Perhaps the most critical of these resources, in terms of the agricultural land use implications, are water and the land itself.

State law generally determines the conditions under which one is entitled to water. n627 In some jurisdictions, the state exercises substantial control over water availability. As a general rule, policy decisions regarding water availability tend to be made on the basis of what will promote the widest access to the water and facilitate the broadest possible uses thereof.

Nevertheless, in many places, there simply is not enough water to satisfy all demands. In these areas, the ability of the agricultural sector to meet food and fiber demands is directly affected by whether the agricultural users have sufficient water available of water for their activities. Historically, agriculture has required massive amounts of water, which have not always been wisely used. n628 Likewise, agricultural use of water has enjoyed a significant measure of protection under the water allocation laws of the states. However, as urban demands for water increase, difficult choices may become necessary with respect to water allocation. In the worst cases, it may be necessary in some places to choose between agricultural and urban uses, and to divert water from agricultural uses to what might be perceived as more "life sustaining" uses. Although no such choices have been made to date, such an allocation will require fundamental changes in agriculture as well as in the water right regime of the jurisdiction.

As a matter of history, the *soil* conservation problems of our nation have been enormous. n629 For years, states have been actively involved in dealing with the problem of soil loss and have even mandated that farmers engage in corrective practices where soil losses exceed established guidelines. n630 Some judicial decisions suggest that this type of control over actual farming practices is properly within the police power of the states. n631 As a practical matter, this view codifies the notion that the land owner is a steward of the land and has some measure of intergenerational responsibility regarding how the land is managed. This position also shifts a significant measure of control over the land use decision away from the land owner and vests it in the relevant (and possibly urban oriented) decision-making body.

There appears to be an interesting agriculture versus urban land use dimension to the agricultural soil loss problem. First, it has been suggested that in recent years the most significant cause of current erosion problems is the economic pressure to use fragile lands for production, which is most acute where there is intense competition for the land. n632 Although there have been changes in the national farm program to eliminate some of the economic incentives associated with government programs that perhaps have been an incentive to convert some fragile lands to crop production, n633 studies suggest that erosion on fragile lands in urbanizing areas is not being abated as a result, and actually is, on the average, significantly higher than erosion in other areas. n634

§ 47.11(s) Availability of Agricultural Land for Recreational Use.

An increasingly important issue to urban interests is the availability of an adequate amount of reasonably proximate land which can serve as the locus for recreational activity. As the amount of leisure time has increased, many have found that there is simply not enough public land available in many parts of the country to support even the existing level of demand for recreational use. Unfortunately, the public coffers in most places cannot bear the cost of acquiring the land needed. As a result, pressure is brought to bear on private "open space," which is typically agricultural land, to meet these needs. n635

Conventional concepts of real property law generally preclude a land owner from being compelled to open the land to public recreational use without compensation. Further, the law of trespass protects the landowner from uninvited intrusion. As a result, it has been necessary for most states to develop a program of inducement by which the private land would be opened voluntarily for recreational use, without the need for compensation and without jeopardizing the protection landowners receive from the trespass laws. n636 These statutes, often called "Recreational Use" statutes typically reduce the liability of the landowner for injuries suffered by recreational use entrants. n637

Under conventional laws of most states, the liability a landowner owes to others who may enter upon his or her land has historically depended upon the status of the entrant. If the entrant was there for purposes of the landowner, the entrant was considered to be an *invitee* and a high duty of care was imposed to warn and protect the entrant from known dangers. If the entrant was permitted to enter for purposes of the entrant, a lower status was imposed, that of a *licensee*, and a lower standard of care was required. *Trespassers* were owed very little protection. Indeed, in many states, the landowner was obligated only to refrain from intentionally inflicting harm. *Public entrants*, such as policemen, firemen, postmen and health inspectors, were treated as either invitees or licensees.

Most Recreational Use statutes appear to assume that the landowner may owe a duty of care that needs to be moderated in some way as an inducement to opening the land to recreational use. That is, under most statutes, the landowner is offered what would amount to a reduction in the duty of care by requiring only that the landowner treat all entrants as if they were trespassers. Thus, even though the landowner has ostensibly "invited" the entrant onto the land, the landowner does not need to act as if the entrant were an invitee or even a licensee.

A number of years ago, states began to move away from the *status* of the entrant as a basis for liability toward a standard of care governed by the actions of the landowner and the conditions of the premises. California led the way n638 with the adoption of the rule that the test to be applied to the landowner was "whether in the management of his property he has acted as a reasonable man in view of the probability of injury to others ..." n639 This decision has been followed in a growing number of jurisdictions. n640 *Mile High Fence v. Radovich, 474 P.2d 796 (Colo. App. 1970).*

Nebraska has abolished the common law classification of licensee and invitee in favor of a duty of reasonable care for all nontrespassers on the property. *See Heins v. Webster County,220 Neb. 750, 552 N.W.2d 51 (1996).*

For a discussion of recreational use of abandoned railroad beds, see Comment, "The Acquisition, Abandonment, and Preservation of Rail Corridors in North Carolina: A Historical Review and Contemporary Analysis," *75 N.C. L. Rev. 1989 (1997);* Wright, "Private Rights and Public Ways: Property Disputes and Rails-to-trails in Indiana," *30 Ind. L. Rev. 723 (1997).* Some jurisdictions have characterized the test as one of determining whether the landowner acted reasonably under the circumstances. n641

A 1993 decision in Kansas now moves that state away from the status based approach to the reasonable care approach. n642 This case changes the basic law in Kansas regarding licensees and invitees, replacing the distinctions involved in those classifications with the need to act reasonably under the circumstances. The decision in the case should not change the duty owed by a landowner to a recreational entrant under its Recreational Use statute n643 since that statute expressly makes irrelevant the status of the entrant in two ways. First, the statute provides n644 that an owner of land who directly or indirectly invites or permits any person to use the property for recreational purposes does not thereby "confer upon such person the legal status of an invitee or licensee to whom a duty of care is owed." Second, the statue

provides that the landowner does not incur any liability based on any act or omission of the entrant. n645 It may be arguable that the landowner now, since *Jones v. Hansen*, may be liable for his or her own omission (which would be the case under the "reasonable care" standard) since the statute says that the act, in no way, limits any liability which otherwise exists. n646 Arguably, the statute eliminates that possibility by defining the only other apparent basis for liability: willfully and maliciously failing to guard or warn of a dangerous condition, use, structure, or activity. n647

In states that adopted their Recreational Use statutes at a time when the traditional status based rules were followed, but which since have shifted to a reasonable use paradigm may need to consider whether their statutes effectively eliminate any change in the standard of care because the underlying status based regime upon which the statute was initially dependent no longer exists. If the recreational statutes are to continue to induce landowners to open their lands to recreation, a reduction in liability would still seem to be needed. One possibility would be to construe the statutes as retaining or imposing the old "trespasser" status limitation for recreational entrants only while all other liability issues outside the scope of the statutes would be resolved on the basis of the reasonable care standard. Another possibility would be to read the statutes as providing a different definition of what constitutes "reasonable" care within and without the context of recreational use. That is, under the statute, the landowner may still be deemed to have acted reasonably even though he or she does less than might be expected in the absence of a recreational entrant.

§ 47.11(t) Recreation: "Land" Open for Recreation.

Each statute defines the land covered. In some jurisdictions, "land" may be broadly defined to include land, roads, water, watercourses, private ways and buildings, structures, and even machinery and equipment when it is attached to realty. n648 In other jurisdictions, the statute may be interpreted strictly or narrowly and may limit "land" to "agricultural" n649 land or open space. n650 In some jurisdictions, the statute has been construed to apply only to private land and not to public land. n651 In other jurisdictions, the term has included both public and private land. n652 Some jurisdictions have limited the application of the statute to "rural," undeveloped or non-residential lands or have considered the size or location of the tract to be critical. n653

§ 47.11(u) Recreation: Defining "Recreational Use."

Recreation may be broadly defined to include hunting, fishing, swimming, boating, camping, picnicking, hiking, pleasure driving, nature study, water skiing, winter sports and viewing historical, archeological, scenic or scientific sites. n654 Courts have also considered motorcycle riding n655 and educational field trips, n656 to be recreational use. In one case, sitting on the beach watching others swim was held to be a recreational activity. n657 Some jurisdictions have required the activity to be one that can or must take place in the true outdoors n658 as opposed to indoors n659 or at least take place as a matter of fact in the true outdoors. n660 One state has construed its statute to apply to activities that more often than not are physical, outdoor and non-spectator activities. n661 On the other hand, walking a bike across a bridge has been held not to constitute "hiking." n662 Similarly, it has been held that the state's recreational use act did not cover an accident that fortuitously occurred in a city park simply because the truck was driving through the park. n663

It is not clear that the entrant must be on the land to engage in any particular activity or that the activity for which the entrant is there is, in the mind of the entrant, recreational in nature for the statute to be invoked. n664 Policy would suggest that the intention of the entrant is largely irrelevant in order to avoid endless problems of intent as to the entrant and to avoid entry into "a thicket entangled with speculation as to the motives of the landowner in permitting the use of the land." n665

§ 47.11(v) Recreation: Status of the Entrant.

The measure of responsibility owed by the landowner to a recreational entrant is approximately the same as is owed to a trespasser. n666 The landowner remains liable for willful or malicious failure to warn against a dangerous use,

structure, activity or condition. n667 Nevertheless, the theory of such statutes is that the entrant has been invited to the premises for purposes of engaging in recreational activity and hence will not be a trespasser. The 1979 Model Act proposes that the mere unexplained presence of an individual on the land of another raised at least a rebuttable presumption that the person was there for recreational activity and with the land owner's permission, such that the statute would apply and the landowner would be shielded against damage claims resulting from that presence. n668

Most state statutes do not appear to explicitly address the issue of permission to enter. n669 Some statutes ground the immunity from liability upon directly or indirectly either "inviting" or "permitting" the entrant to the property. n670 These terms are generally undefined in the statutes, however. Several courts have addressed the question whether an invitation must be specifically granted and reached divergent answers. In *Friedman v. Grand Central Sanitation, Inc.*, n671 a court held that the landowner was protected under the statute despite having deliberately fenced the property to exclude the public from using the land. In this case, the court held that there were alternative bases in the statute for protecting the landowner. Either the land was open to the public or under the rule that the landowner has no duty of care to keep the premises safe for entry or to warn of a dangerous use, condition or structure. Similarly, in *Johnson v. Stryker Corp.*, n672 the court held that the statute applied whether permission, express or implied, had been granted since the legislature had intended that at least part of the statute would be applied regardless of whether the land was open to the public for use.

In contrast, courts have held that a public invitation is required for the statute to apply n673 and a landowner's efforts to fence the public out or to post "no trespassing signs" would seem to avoid the statute. n674

It would seem that to require the landowner to specifically invite the public would deter many landowners from opening their lands to recreational use, which, in turn, would defeat the ultimate purpose of the statutes. Similarly, it would seem that landowners might be likely, if required to give such notice, to specify which activities were permitted and which were not, thereby limiting public recreational access, or would be reluctant to open their land for any purpose at all if the consequence was that the lands would be opened for all purposes. On the other hand, the unstated thrust of these statutes seems to be to shift a measure of control over how the land is used from the landowner to the public in exchange for the possible reduction in liability. If an act of the landowner is not required as part of this reciprocal arrangement, the acts become liability limiting measures only and the public is not assured of any greater access than it otherwise might have.

Nebraska has abolished the common law classification of licensee and invitee in favor of a duty of reasonable care for all nontrespassers on the property. n675

§ 47.11(w) Recreation: Imposition of Entry Charges.

Most statutes state or assume that the public must have access to the land for recreational use without charge. n676 There has been much litigation as to what constitutes a "charge" under the statutes. It would seem that the charge should directly relate to the question of access to the land for the purpose of recreational use in that if the charge is not paid, access would be denied. Courts that agree have held that the term "charge" connotes a quid pro quo in the sense that there is an exchange of something in return for the permission to enter. n677 In this sense, the payment of a fee to rent an inner tube did not constitute a charge to use the recreational facility. n678 Likewise, it has been held that the purchase of gasoline, food and canoe rental did not constitute a charge. n679 In one case, it was held that the fee charged to enter a cave was not a fee charged to use other recreational facilities on the site. n680

The payment may be made indirectly to the landowner. That was held to be the case where a payment of part of the receipts from concessions was made by a lessee to the landowner. This was considered at least an indirect charge for the use of the facility. n681 In perhaps the most extreme case, it was held in *Kinsner v. Trenton*, n682 that allowing people to swim free encouraged people to come to the marina site and thereby increased the proprietor's sales. Thus, it was held that the marina operator had imposed a charge on the user.

Some jurisdictions have broadly construed the meaning of charge to apply to the opportunity to utilize the overall benefits of an area. One court held that the fee to park a camping trailer was such a charge. n683

The popularity of the concept of "fee hunting" has led some states to exempt charges for that activity from those that might render the recreational use statutes inapplicable where the activity occurs on agricultural land. n684 The rationale for this is to encourage recreational access to agricultural land but also to allow farm operators to capitalize on an opportunity to supplement their income without jeopardizing their protected status under the recreational use statutes. n685

§ 47.11(x) Fence Laws.

Boundaries determine the geographic extent of one's title to land. As such, boundary issues are not directly related to the issues discussed in this chapter. n686 Nevertheless, a most rudimentary understanding of boundaries is useful in order to understand the unique features of fence laws as they relate to the keeping of animals on the premises and the liability that may result from their escape.

Fences are often considered by agricultural landowners to be the boundaries between properties. As a matter of law, however, the actual boundary will be an imaginary line that is located according to the description of the property in the deeds. Thus, the fence will usually only be considered evidence of where that imaginary boundary line is. In such a case, it is of little importance whether the fence is permanent.

On the other hand, it is possible that the fence has been used as part of the description of the land that has been used as the property has changed hands. For example, in what are called "metes and bounds descriptions," the land is located by a series of directions that trace the perimeter of the land. These descriptions indicate the direction and distance one moves in mapping the perimeter through a series of "calls" that rely upon identifiable landmarks. The description might include calls which include fences as landmarks. For example, such a description might read "begin at the intersection of Highway K-4 and County Road 1029 and go West 1000 feet along the existing fence to a point. Follow the fence South for 1000 feet..." In such a case, the boundary of the farm will be the physical boundary where the land abuts an adjoining tract of land and might well be marked by an existing fence, which the parties intend to use as the boundary marker. In such a case, the fence may actually be considered to be a permanent marker of the boundary for the land. If the fence deteriorates in later years or even is removed, it may be necessary to "relocate" or "recreate" the fence line in order to precisely determine the location of the boundary to the property.

In the more usual situation, the property will be described in a way that requires the mapping of survey lines. In such a case, a fence may not be built exactly on a boundary line and, indeed, may actually be deliberately built on one side of the line or the other in order to facilitate maintenance or avoid particular problems. This is normally of little concern since the fence is not, nor is it intended to be, the boundary line.

Problems may arise when fences have been in existence for a long time and the adjoining landowners have come to think of them as marking the boundary, regardless of whether they actually do. An important question then is whether, and if so, under what circumstances such a fence line can be substituted for the actual boundary line when it is not built exactly on the line. n687

It should be noted that the mere passage of time will generally not cause the fence to be substituted for the property description boundary. Thus, the fact that the fence has been there a hundred years, or more, means little by itself. On the other hand, patterns of use of the land on each side of the fence may cause the fence to become fixed as the boundary and have the legal effect of changing the boundary set out in the deed. Under the doctrine of adverse possession, n688 one may acquire title to property not one's own by making an open, notorious use of the property for a specified period of time. However, for adverse possession to accomplish this, it typically must be known that the property claimed does

not originally belong to the claimant. Where it is unknown where the actual boundary is, courts look to the intent of the party holding beyond the true line. If the occupation is by mere mistake and someone occupies land of another with no intent to claim that land as the occupant's own land, but rather intends to hold only up to the true line, wherever that line may be, it may be difficult to get a court to consider such occupation to be adverse.

The parties may agree that the fence actually constitutes the boundary in one of several ways. First, the parties may settle the boundary dispute on the basis of a written agreement and through the issuance of corrective deeds. In such an approach, the property descriptions of the adjoining tracts can be changed to reflect the fence line. This may require the execution of one or more deeds from one party to the other to transfer the area of adjustment.

Second, the parties may generate a memorandum of understanding that designates the fence line as the boundary, which then can be recorded in the land records and which will thereafter bind the present owners of the property and their successors. n689 Third, the doctrine of practical location or, as it is sometimes called, the doctrine of boundaries by acquiescence, may also be used to establish the fence as the actual boundary. n690

In Gravert v. Nebergall, n691 the Iowa Supreme Court ruled that the state fence statute was not unconstitutional, either on its face or as applied to plaintiffs, nor was it preempted by the grant of home rule powers to cities in a case in which the town trustees required the plaintiffs to pay part of the cost of maintaining a fence between plaintiffs and defendants.

In Graham v. Lambeth, n692 the court resolved a boundary dispute involving a fence. In the land sales transaction in 1964, the seller represented that an existing fence delineated the northern boundary of the property. The plaintiff (purchaser) had occupied the land up to the fence since that time. The defendants in this case purchased their property on the other side of the fence by a sheriff's deed. Defendant's predecessor in title was the same individual who sold the land to the plaintiff. Defendant subsequently ordered a survey which determined that the fence was located ten feet within the described boundaries of their property. The court held that the defendant could only acquire whatever interest was held by the previous owner and since the plaintiff had acquired title to the disputed land prior to the sheriff's sale, the sheriff was incapable of transferring title to the disputed strip. Since adverse possession does not give notice to the county tax assessor, failure to pay taxes on the disputed land did not affect the title.

In Palmer Ranch Ltd. v. Suwansawasdi, n693 plaintiffs had maintained a perimeter fence around a parcel of land and had grazed sheep and cattle thereon and on surrounding land for the past 18 years. The plaintiff claimed title to the surrounding land on the basis of adverse possession. The trial court disagreed and awarded title to the defendant. On appeal, the court reversed, holding that the occupation was not limited to the fenced portion since the occupation and use had occurred uniformly on all the land and that plaintiff had not fenced off the particular parcel for any particular purpose. No fencing of the disputed land was required to achieve adverse possession.

In Rafael v. Dale, n694 plaintiff's land bordered on defendant's land on three sides, with the fourth side being bordered by Forest Service land. The only access to defendant's land was over plaintiff's land. Plaintiff sought judgment to prevent defendant from crossing that land. The trial court held that defendants had a prescriptive easement to one route over the land. Plaintiff had argued that the use was not adverse because plaintiff's predecessor in title had prohibited defendant from crossing the land except at the route for which the easement was claimed. The appeal court found that evidence was presented to the trial court that the predecessor had actually sought to prohibit all crossing of the land by defendant made that use adverse. It held that the trial court had the discretion to determine whether that evidence was credible and that finding was not appealable.

§ 47.11(y) Fences: General Relation to Liability for Animals.

In addition to whatever role fences may play with respect to boundaries, fences in rural areas are typically used to confine or exclude animals to or from one's property. The effectiveness of the fence often makes the difference whether the animals stay on the property or roam freely. If animals get out, they often cause harm to others, who, in turn, may

seek legal recourse from the animal owners. Whether one may be judged liable for the harm done by animals which escape depends in large measure on the fence laws of the jurisdiction. In some jurisdictions, the owner of the animals is required to fence the animals in; in others, the potential victim may be required to fence the animals out. n695 The character of the fence laws, in turn, reflects the general preferences of the jurisdiction regarding how the agricultural land is used. n696 Those that favor fencing animals in tend to favor urban-type uses of the land or farming types of agriculture. Those that favor imposing the obligation to fence on those who would have the animals excluded from their lands tend to favor range-type agriculture and open space uses of land.

Many jurisdictions resolve the question of liability of the owner of the animal that has escaped a fence on the basis of the adequacy of the fence itself. n697 These jurisdictions tend to have specific laws that determine what constitutes an adequate n698 or lawful fence. n699 Some statutes are very detailed as to the construction and composition of such fences. n700 Some jurisdictions even impose criminal liability on anyone who interferes with such a fence or leaves a gate open. n701 The determination as to what constitutes a lawful fence may be delegated to what are called "fence viewers." n702 The decision of the fence viewers n703 may be final, and not subject to judicial review. n704 In these jurisdictions, if the owner of the animals has not erected a lawful or sufficient fence, and an animal escapes, the law may presume that the animals are out as a result of fault on the part of the owner of the animals and therefore impose liability for any damage done. n705

In many states, a land owner who does not wish to enclose his or her land may not be compelled to do so. This may also include not being compelled to pay one's share of a partition fence. Nevertheless, an unfenced boundary may preclude recovery for damages caused by trespassing animals. n706 In Bryant v. Purnam, n707 the court dealt with a problem of dogs that were owned by a tenant. The primary issue in the case was the extent to which the landlord could be held responsible for dogs that were loose in violation of a leash law. The court noted that fences were not the only means by which the requirements of the leash law could be satisfied.

§ 47.11(z) Fences: "Fence In" Jurisdictions.

At common law, the owner of animals had a duty to fence animals in and no duty was imposed on adjoining animals to fence them out. n708 Jurisdictions which continue this rule are sometimes called "fence in" jurisdictions. The common law also imposed a strict rule of liability on the owners of the animals which escaped, holding them responsible for the damage done regardless of whether the land to which they strayed was enclosed or not. n709 Many jurisdictions which still impose the obligation on the owner of the animals to fence them in now ground liability on a showing of negligence, which may be presumed from the fact that the animals are out. n710 The effectiveness or legality of the fence may be considered as a defense as may facts which suggest contributory negligence on the part of the victim. n711

§ 47.11(aa) Fences: "Fence Out" Jurisdictions.

Western cattle jurisdictions historically typically rejected the common law rule and held that the roaming livestock committed no trespass when they strayed onto unenclosed private land. n712 These jurisdictions placed the burden on the potential victim to fence the roaming animals out. These jurisdictions are sometimes referred to as "fence out" jurisdictions. n713 Here, liability will generally depend upon some affirmative failure to keep the animals in. n714 Negligence on the part of the animal owner will suffice. n715

§ 47.11(bb) Fences: Relation of Fence Laws to Other Statutes.

Many jurisdictions have other statutes that govern the question of liability for roaming animals. These statutes, sometimes called "roaming at large" statutes, n716 herd laws, n717 drover laws n718 and stray laws, n719 may need to be applied together with the fence laws to finally resolve liability issues. n720 These laws tend to ground liability on tort principles and are beyond the scope of this chapter.

§ 47.11(cc) Fence Repair Responsibilities.

Jurisdictions vary in the means employed to apportion the responsibility of adjacent landowners for the maintenance of border fences. Statutes in some states are silent as to how the cost is to be shared. n721 In some jurisdictions, the cost is to be apportioned evenly so long as both parties continue to occupy or improve such lands, unless otherwise agreed. n722 In others, the requirement is that each farmer face the fence at the middle and each will be responsible for the half to their right. n723 It should be noted that in some jurisdictions in which the statute speaks only of dividing the cost evenly, the precise means by which that is to be done will not be set forth. In those states, the practice has often developed to stand and face the fence at the middle and to maintain the portion to the right-hand side. In such cases, whether by practice or by statute, the custom is to maintain both sides of such a fence for the length for which that particular landowner is responsible. In apportioning the cost of the fencing, it appears common not to include needless expenses. n724

It is one thing to divide the cost of maintenance between the landowners; it is another to insure that each maintains the fence at an acceptable level. Jurisdictions again seem to vary in their responses. In some, a refusal to maintain may effectively convert the jurisdiction into a "fence-out" jurisdiction as far as liability is concerned. That is, if one landowner refuses to maintain his or her portion of the fence and animals of the other landowner escape through that area, there may be no recourse against the owner of the animals for damages done. Another option would be to allow the one landowner to do the entire repair and then allow for recovery from the other of his or her share. n725 A third alternative that appears to be fairly common is to invoke the authority of an independent third party to resolve the matter. In these states, this third party is often referred to as a "fence viewer." In Kansas, by statute, the county commission is constituted as the fence viewers who, upon application, will examine the situation and render a decision, from which there is no appeal specified, to the courts. n726

In Harry v. Smith, n727 a child was bitten by a dog, which had escaped from a yard through a fence that was improperly maintained. The dog was owned by a couple who had been permitted, by a tenant, to stay temporarily at the house. The court recognized the general rule that the landlord did not have any responsibility to protect third parties from injuries occurring off the premises, where the landlord simply had knowledge of the dangerous condition or passively permitted it to continue. However, the court remanded the case for findings regarding the degree to which the landlord/tenant relationship actually existed and whether the landlord had assumed an obligation to maintain the premises.

§ 47.11(dd) General Liability for Animals Kept on the Farm Premises.

In many respects, the issue of liability for the harm that may be caused by animals is not a proper part of the topic of this work since it tends to involve questions of personal tort liability and the focus here is on agricultural land. n728 Nevertheless, there has been a considerable amount of concern regarding the extent to which the owner of the premises may be subjected to liability for harm that may result from the escape of animals from the premises. In these cases, the issue is less the integrity of the fencing, but more what is known about the animals themselves and whether they are domestic or wild animals. This seems particularly the case near urban areas where animals, such as dogs and horses, may be kept as much for recreational as for farming purposes. This discussion is not intended to be exhaustive on the issues of liability for animals but is intended to address some of the more common problems associated with the keeping of animals that are associated with farming and ranching operations.

The general rules regarding liability for harm caused by animals seem fairly well settled. The first distinction that tends to be made is whether the animal is "wild" or "domestic." If the animal is wild, the owner or keeper will generally be held strictly liable for the harm so long as the harm is the result of the animal's normally dangerous propensities. "Known dangerous propensities" tend to be defined as any characteristic of the animal which a reasonable person should understand as posing a threat to human life or limb or serious damage to property. If the harm is not the result of such a propensity, it generally must be shown that the owner or keeper failed to exercise ordinary care to prevent injuries that could reasonably and foreseeably be anticipated. n729 Thus, if a bear falls on someone rather than biting

him, the owner would not be strictly liable unless the bear had exhibited a propensity for falling on people. It has been held that wild animals, "reduced to possession from a wild state in compliance with applicable law," are treated as personal property of the owner or keeper. n730

Domestic animals with known dangerous propensities tend to be subject to the strict liability rules. Animals without known dangerous propensities are generally subject to the reasonable care rules. In Pearson v. Jones Co., Ltd., n731 the plaintiff was injured as a result of being thrown from a horse while judging a hunting dog competition. The suit was filed against the horse's owner, who had provided the same for use at the competition. The court found that the owner had no knowledge of any dangerous propensity of the animal to throw riders and had recently allowed riders as young as 7 years old to ride without incident. Although there was evidence that the horse had bucked in the past, the owner did not know that at the time of the injury to the plaintiff. As a result, the owner was found not to be liable. In contrast, in Thornhill v. Deka-Di Riding Stables, n732 the plaintiff was thrown from a horse during a trail ride and sued the riding stable that had sponsored the ride and provided the horse. Here, the court held that the injury was sufficiently foreseeable to impose upon the owner of the stable a duty to provide safe trail rides. Then, invoking the rule that the owner or keeper of the animal may be liable for known dangerous propensities, the court held that the owner is bound to know the natural propensities of a particular class to which the animal belongs. However, there were sufficient issues of fact regarding whether there were such dangerous propensities, whether the owner knew of them and whether the rider had assumed any of the risk, that the summary judgment in favor of the stable was vacated and the case remanded.

Determining whether a particular animal is a wild or domestic animal has sometimes been problematic. In Munn v. Commonwealth, n733 the defendant had been charged with cruelty to animals for engaging in cockfighting. The lower court dismissed on the ground that the cruelty statute did not apply to birds. The Appellate Court reversed, holding that the term "animal" included all warm-blooded living creatures except human beings. In Thornhill v. Deka-Di Riding Stables, n734 the court found that horses were domestic animals and required some specific knowledge of dangerous propensities. In Jivden v. Law, n735 a case where the horse kicked and killed the decedent, the court found that although horses are domestic animals, the fact that this horse was known to be rambunctious and frisky did not constitute sufficiently dangerous traits for the imposition of the strict liability rule.

Fence laws may be relevant to resolving the issue of liability. In "fence in" jurisdictions, the failure to maintain a legal fence may result in the imposition of liability on a strict liability theory in the event animals escape and cause harm. Likewise, in "fence out" jurisdictions the failure to have a legal fence may effectively eliminate the possibility for any recovery for damage done by animals which enter the land. In Kansas, the law was changed recently from that of "fence out" to that of "fence in." In so doing, the legislature needed to deal with case law which provided that in the event an animal trespassed upon land protected by a legal fence, the owner of the animal would be liable for damage without proof of fault. The legislature adopted § 29-108 which provides that although animals are to be enclosed by a legal fence, strict or absolute liability will not arise for damages for injury to any person or property resulting from domestic animal trespass and, in all cases, the principles of ordinary negligence shall apply.

In Suddath v. Parks, n736 a farmhand, who was injured by a bull, brought an action against his employer, arguing that he should have been warned about the danger posed by the bull. The court considered whether the employer knew of dangers that were not obvious or apparent to the employee. Both seemed to know of the natural propensities of bulls to butt from time to time, and hence, the court found no need to warn.

In Roberts v. Weber and Sons, Inc., n737 the court considered the relevance of the doctrine of *res ipsa loquitur* to escaped animal situations. In this case, cattle had escaped from a pen and were hit by a truck driver. The truck driver sued for damages as a result of the injuries. The court held that, as a general rule, the owner of the animals owes a duty of ordinary care to travellers using abutting highways. Nevertheless, the doctrine of *res ipsa loquitur* may apply even where the landowner or animal owner is held to the ordinary care standard.

In an interesting case involving the effect of diseased premises on animals, the court in Wilcox v. Cappel, n738 held

that the tenant had taken the premises "as is" and therefore could not recover for damages suffered by cattle that had grazed on the land. In this case, the landlord had an oral year-to-year agreement with the tenant permitting the tenant to graze his cattle on the landlord's cornstalks each fall after the harvest. The tenant had to fence the animals away from irrigation pumps, center pivots, electrical boxes and so forth. The tenant did not fence the animals away from a run-down building that neither party had inspected since 1979 and which had not ever been used under the lease. The cattle ingested nitrogen fertilizer stored in the building so the tenant lost 130 newborn calves and additional calves were aborted. Total losses claimed were approximately $130,000 in actual damages. The court held that the landowner was not obligated to remove obvious sources of danger that a reasonable inspection would have revealed. Even though the tenant was not required to fence off the building, the tenant knew the building was part of the lease and that the cattle were near the building. n739

§ 47.11(ee) Liability for Animals "At Large."

Although noted in the text that this topic is also one perhaps more appropriate to a treatise on tort liability, in view of decisions regarding the association of fencing to the question, it is useful to include at least a brief overview of the area. n740

Liability for animals may depend upon where they are when they cause harm. If the animal is on the premises of the animal's owner and, therefore, still ostensibly under the owner or keeper's control, the general rules of liability based on domestic or wild status and the knowledge of the owner or keeper of any dangerous propensities should govern. This is discussed *supra* § 47.11(cc). If the animal is off the owner's premises, liability may depend upon how the animal got out or whether the animal is upon another's land (in which case, fence laws may be relevant). In some jurisdictions, particularly if the animal is in a public place, such as upon the highway, when it causes the harm, the resolution of the liability issues may also depend upon whether the animal is considered to be "running at large" for purposes of statutes that have been enacted to prevent the same.

The "running at large" statutes seem to have evolved after the general rejection in the United States of the common law rule of strict liability for harm caused by animals that were out. In that sense, they seem designed to shift responsibility away from the victim (as was the case in "fence-out" jurisdictions) to the animal owner. Liability is the result of having the animal "at large" rather than the consequence of any trespass of the animal onto the property of another. In that sense, these statutes would address the liability situation where the animal was on the highway and was hit by a car. Historically, such animals would not be affected by the fencing laws since no one could be said to have the duty to fence them out from their property. Today, most statutes do not appear to distinguish between animals that are out in public places, such as upon the highways, and those that are upon the land of another. If they are considered to be "running at large," liability may be imposed on the owner of the animal.

Statutes may be broad and general, such as § 47-122: "It shall be unlawful for any domestic animal, other than dogs or cats, to run at large." In some jurisdictions, the statutes may identify only certain animals that may not be allowed to run at large. For example, until recently, in Kansas, statutes ordained that bulls and boars, stags, stallions or jacks, swine and neat cattle could not run at large. n741 Dogs and cats are often the object of separate running at large statutes (often local) or leash laws.

The critical issue, of course, is what is meant by "running at large" since that term is rarely defined. In some jurisdictions, it has meant "not under the care of the herder." n742 In other jurisdictions, there has been an inquiry into why the animal is out and no liability will be imposed without some fault on the part of the animal owner. n743

In a 1995 case, Schneider v. Strigert, n744 the jurisdiction had an ordinance that made it unlawful for dogs to be at large. The court held that a violation of the ordinance was evidence of negligence but would not constitute negligence *per se.*

In Williams v. Hill, n745 the court found inapplicable the provisions of the running at large statute. In this case, a motorcyclist and a passenger were injured in a collision with a dog that was on a public highway. The court held that the owner of the dog could not be held liable under the statute in the absence of evidence that he knowingly or willfully placed the dog in the road. The statute provides:

The owner of such livestock or animal being or running at large upon the premises of another or upon the public lands, roads, highways or streets in the state of Alabama ... shall not be liable for any damages to any motor vehicle or any occupant thereof suffered, caused by or resulting from a collision with such stock or other animal, unless it be proven that such owner knowingly or willfully put or placed such stock upon such public highway, road or street where such damages were occasioned. n746

In Sybesma v. Sybesma, n747 the court held that there were no statutes in the state that make the owner of animals liable for personal injuries which result from allowing domestic animals to run at large on the highways. Therefore, common law principles govern and the plaintiff has alternative theories upon which to bring the case. Liability may arise either from the principles of strict liability or of negligence. If strict liability is used, the law requires knowledge of dangerous propensities; if negligence, there must be some breach of a duty of care. In this case, the plaintiff chose to sue in negligence.

In some places in the West, areas may be designated as "open range." This may alter the legal relationship between landowners, animal owners and the general public who may be traveling on public roads through those areas. In a 2000 case, *Larson-Murphy v. Steiner, 15 P.2d 209 (Mont. 2000),* the courts considered these relationships. Here, a motorist struck a bull which was standing in the middle of a highway within a herd district. An action was brought against the livestock owner and against landowners who had leased property to the livestock owners. The livestock owner and the landowner moved for summary judgment which was granted to the landowner and denied to the livestock owner. On appeal, the court affirmed in part and reversed in part, holding that the open range doctrine of "no duty" did not apply to the relationship between the livestock owner and the motorist. Likewise, it held that any assertion of legal duties arising from the legal relationship between the livestock owners and the motorist was beyond the scope of the "open range doctrine." In both cases, the court overruled prior law. The court also held that the fence laws of the jurisdiction did not require that the livestock owner fence the bull in. The court reversed the granting of summary judgment to the landowner because of questions regarding whether the landowner knew of or consented to the livestock owner's activity and whether he realized risks associated with that activity. The test in this case, apparently, is one of negligence.

Genuine issues of fact also precluded the granting of summary judgment to the livestock owner. The court held that the jury must determine whether the bull unlawfully obstructed the road and whether the bull's escape resulted from lack of reasonable care by its owners. The court determined that the animal owner and the motorist had an equal right to use the public highway under the laws of the state and must exercise care commensurate with the danger implicit in each's activity. The court determined that the rights were somewhat less equal in herd districts than they were in open range areas. The test to be applied in determining whether each has acted appropriately is to test the actions within the totality of the circumstances.

In *Palmer v. Hinders,2000 Tex. App. LEXIS 3657* (Tex. App. Amarillo, June 1, 2000), suit was brought to recover for injuries suffered when the plaintiff struck a cow owned by defendants. The court held that, under Texas law, an owner of livestock has no common-law duty to fence the animals in. Rather, the duty is statutory and responsibility is imposed only to the extent that one knowingly permits the animal to traverse or roam at large, unattended, on the right-of-way of a highway. "Knowingly" was interpreted to require an actual awareness by the actor of the nature of his conduct or the existence of the circumstances in question. In this case, the critical fact, of which the animal owner was unaware, was that the electrical fence used to confine the animals was inoperative despite having been repaired the day prior to the accident.

§ 47.11(ff) Liability for Harm to Animals.

The wild/domestic distinction has also been relevant in questions involving "dog kill" statutes. Many jurisdictions have statutes in which an owner of domestic animals may lawfully kill dogs which threaten or harm such animals. For example, *Kan. Stat. Ann.* § 47-646 provides n748

47-646.

Killing dog lawful, when. It shall be lawful for any person at any time to kill any dog which may be found injuring or attempting to injure any cattle, hogs, or sheep.

In such jurisdictions, the owner of the dog may also be subject to liability for any harm done to domestic animals. For example, *Kan. Stat. Ann.* § 47-945.

§ 47-645.

Liability of owner of dog for damages. If any dog shall kill, wound or worry any domestic animal the owners of such dog shall be liable to the owner of such animal for all damages that may be sustained, thereby to be recovered by the parties so injured before any court having competent jurisdiction.

A 1995 Washington case illustrates how far liability for harm caused by an animal may be extended. In Schneider v. Strigert, n749 the plaintiff was a motorcyclist who was injured when he struck a dog that was lying crosswise in the road after having been hit by an automobile. The dog had apparently tunneled its way out of a chicken pen. The lower court issued a summary judgment in favor of the dog owner. This was reversed on appeal and remanded to resolve factual issues regarding whether the escape of the dog was foreseeable and the reasonableness of the means by which the owner of the dog had sought to confine the dog. In this case, the jurisdiction had an ordinance that made it unlawful for dogs to be at large. The court held that a violation of the ordinance was evidence of negligence, but would not constitute negligence *per se*.

In McKinney v. Robbins, n750 a dog attacked a kitten. The owner of the kitten killed the dog and claimed that the killing was lawful under the dog-kill statutes of the jurisdiction. The lower court, on that basis, rendered judgment for the owner of the kitten. Reversing that decision, the Supreme Court found that kittens were not domestic animals for purposes of those statutes. The primary rationale for the holding was that the statute listed only livestock examples (sheep, goats, cattle, swine, poultry) and did not list domestic pets. Indeed, the legislative history suggested that the goal of the statutes was to protect livestock-type animals. In a similar vein, in Bueckner v. Hamil, n751 the dog in question had been shot as a result of attacking deer. The court found that "domestic animals" were only those that were "habituated to live in and about the habitations of men, or that contribute to the support of the family." This ordinance was a little broader than that in the *McKinney* case, *supra*, in that it listed "sheep, goats, calves or other domestic animals." Nevertheless, the court considered that the deer were not "domestic animals" within the purposes of such statutes. This focus may pose an interesting anomaly: it would be lawful to kill a dog that threatened one's cattle but not a dog that threatened one's children since children would not be domestic animals under any definition extant.

The issue has been raised whether the landlord could be held liable for the harm caused by the dogs in question. In Bryant v. Putnam, n752 the plaintiff was attacked by dogs owned by the landlord's tenant. The court held that the landlord owed no duty regarding the dogs. Similarly, in Mathes v. Nolan, n753 the plaintiff had been mauled by the dog owned by a tenant of the landlord who was sued. The court held that the landlord did not "possess" the land upon which the dog was located and could not be said to "harbor" the dog. The court defined harboring very narrowly as "allowing a member of his family, including servants ..., to keep the animal in the house or on the premises that are occupied as the home of the family group of which he is the head." Thus, since the tenant was not a member of the landlord's family and the location of the dog was not the landlord's residence, the landlord could not be said to be harboring the dog.

In Harry v. Smith, n754 a child was bitten by a dog that had escaped from a yard through a fence that was improperly maintained. The dog was owned by a couple that had been permitted to stay temporarily at the house by a tenant. Although the court recognized the general rule that the landlord did not have any responsibility to protect third parties from injuries occurring off the premises where the landlord simply had knowledge of the dangerous condition or passively permitted it to continue, the court remanded the case for findings regarding the degree to which the landlord/tenant relationship actually existed and whether the landlord had assumed an obligation to maintain the premises.

Cruelty to animals may also be the basis upon which liability for harm to animals may be predicated. In most jurisdictions, this activity is criminalized and is, in most respects, not within the scope of this work. True property concerns have been raised in at least one case, however. In Tiller v. State, n755 an individual was charged with cruelty to animals as the result of not properly feeding and caring for horses. The defendant raised as defenses that there was no proof the animals suffered pain, that the defendant did not own the animals in question and that the defendant did not own the land upon which the animals were being kept. All these defenses were rejected by the court as not within the elements required to be proved to establish the commission of the crime.

§ 47.11(gg) Agricultural Production Contracts.

One of the important developments in the area of production agriculture has been the use of production contracts. In many cases, this has been driven by the vertical integration of particular industrial segments of agriculture, most notably the production of chickens and the production of hogs. Because of the environmental and business structure impacts associated with these kinds of production, production contracts have suggested possible ways to maximize farm markets and profits. On the other hand, production contracts have changed the way that many on-farm decisions are made and present new financial and legal risks to farmers that they have not encountered before.

Production contracts are typically entered into between farmers who act as the growers of particular crops of livestock and a vertically integrated corporation. The contract typically arranges for the use of facilities, owned by the grower, to nurture a product or animals, owned by the corporation. The grower is compensated for the task of raising the product and is guaranteed a market for it.

States have taken an active interest in these contracts and in at least one state, it was ruled that the contract creates an indirect interest in farmland such that the relationship was subject to the state's restrictions on corporate farming. In response, the legislature enacted K.S.A. § 17-5904(b) which provides:

> Production contracts entered into by a corporation, trust, limited liability company, limited partnership or corporate partnership and a person engaged in farming for the production of agricultural products shall not be construed to mean ownership, acquisition, obtainment or lease, either directly or indirectly, of any agricultural land in this state.

In 1994, the legislature adopted K.S.A. § 17-5908 which permitted swine production facilities to locate in counties upon approval of a local ordinance authorizing the same. The question is whether a production contract that involves the raising of swine constitutes a "production contract" under § 17-5904(b), which is exempt from the statute, or constitutes a "swine production facility" under § 17-5908, which can be permitted only by local option. In the case at issue, the land, structures and related equipment would be owned by the farmer and the nursery pigs would be owned by the corporation. The Attorney General ruled that under those circumstances, the facility was not a swine production facility nor is it subject to the general prohibition against corporate farming because of § 17-5904(b). n756

Elsewhere around the country, states have taken a similar interest. Regulations relating to chicken production have been considered in several states, including North Carolina, Oklahoma, Alabama, Mississippi, Florida and Louisiana. Changes in the extent to which packers could engage in the production of livestock were considered in South Dakota

and Indiana, where measures were defeated which would have prohibited the packers from owning livestock for contract feeding purposes. In Missouri and Oklahoma, the statutes were amended to permit greater corporate ownership of livestock feedlots and confinement facilities. n757 In some states, the matter is regulated under statutes designed to deal with dealers or other middlemen and which may require licensing, bonding or record keeping. n758

FOOTNOTES:

(n1)Footnote 498. *See, e.g.*, Myrl Duncan, *Toward a Theory of Broad-based Planning for the Preservation of Agricultural Land*, 24 Nat. Resources J. 62 at 66-68 (1984).

(n2)Footnote 499. For further discussion, see W. Oemichen, "State Government Service to the Agriculture of Tomorrow," *2 Drake J. Agric. L. 247 (1997);* J. Looney, "Serving the Agricultural Clients of Tomorrow," *2 Drake J. Agric. L. 225 (1997).*

(n3)Footnote 500. *See Wilburn v. Boeing Airplane Co., 366 P.2d 246 (Kan. 1961):*

> Briefly stated, the word "nuisance" while perhaps incapable of precise definition, generally is held to be something which interferes with the rights of citizens, whether in person, property or enjoyment of property or comfort, and also has been held to mean an annoyance, and that which annoys or causes trouble or vexation, that which is offensive or noxious, or anything that works hurt, inconvenience or damage.

In *Township of Franklin v. Hollander, 769 A. 2d 427 (N.J. Super. 2001),* the court held that the Right to Farm Act preempted municipal land use authority over operations. See also *Ammirata v. Zoning Board of Appeals of the Town of Redding, 786 A.2d 425 (Ct. 2001)* holding that the agricultural nuisance statute did not bar the requirement that the operation conform to the land management plan of the area.

(n4)Footnote 501. *See, e.g., Spur Indus. v. Del E. Webb Dev. Co., 494 P.2d 700 (Ariz. 1972).*

(n5)Footnote 502. *See, e.g., Vana v. Grain Belt Supply Co., 8 N.W.2d 837 (Neb. 1943):*

> As one man's enjoyment of property must be considered in connection with the reasonable and lawful use of other property by his neighbors, where pigs are raised under conditions as clean and sanitary as can reasonably be obtained, considering the characteristics of the animal and the necessity of confinement to close quarters, the fact that odors from these quarters are carried over the premises of the summer residence of another will not make an actionable nuisance.

Courts have specifically held that the following are not nuisances per se:

dairies: *Crump v. Carnahan, 99 So. 493 (La. 1924).*

cotton gins: *Rouse v. Martin, 75 Ala. 510 (1883).* fertilizer factories: *Northwest Fertilizing Co. v. Hyde Park, 70 Ill. 634, aff'd, 97 U.S. 569 (1879).*

horse stables: *Dallas v. Halbert, 246 S.W.2d 686 (Tex. Civ. App. 1952).*

feedlots: *Dill v. Excel Packing Co., 331 P.2d 539 (Kan. 1958).*

(n6)Footnote 503. *See Steifer v. City of Kansas City, 267 P.2d 474 (Kan. 1954).*

For more information, *see Nuisance Entitling Owner or Occupant of Real Estate to Recover Damages for Personal Inconvenience, Annoyance, Anguish, and/or Depreciation in Value of Property, 25 A.L.R.5th 568; Keeping Poultry as Nuisance, 2 A.L.R.3d 965;* and *Keeping Pigs as Nuisance, 2 A.L.R.3d 931.*

For further discussion, *see* Neil D. Hamilton, *Right-to-Farm Laws Reconsidered: Ten Reasons Why Legislative Efforts to Resolve Agricultural Nuisances May be Ineffective, 3 Drake J. Agric. L. 103 (1998); Keeping Pigs as a Nuisance, 2 A.L.R. 3d 931 (1998).*

(n7)Footnote 504. *See Higgins v. Decorah Produce Co., 242 N.W.2d 109 (Iowa 1932):*

> If, however, [a poultry plant] is so located, maintained, and operated as to emit noxious odors or give off noises so as essentially to interfere with the comfortable enjoyment of the property of others, it may constitute a nuisance. A perfectly lawful business, operated under some circumstances and in some locations, may so interfere with the comfortable enjoyment of private property as to constitute a private nuisance, and, when this occurs, it is subject to abatement as such.

Among cases that have dealt with the problem of agriculture as a nuisance are the following: *Tiegs v. Watts, 954 P.2d 877 (Wash. 1998)* (tenant recovery against landlord for breach of lease and for creating a nuisance by contaminating a well upheld); *Buchanan v. Simplot Feeders Limited Partnership, 952 P.2d 610 (Wash. 1998)* (nuisance immunity allowed only where nuisance suit arises because of urban encroachment into agricultural area and applies to both those seeking damages and injunctive relief); *Kirk v. United States Sugar Corp., 726 So. 2d 822 (Fla. App. 1999)* (court reversed dismissal of complaint alleging that defendants maintained a nuisance by the manner in which they raised sugar cane); *Pure Air and Water Inc. of Chemung County, 668 N.Y.S.2d 248 (N.Y.A.D. 1998)* (right-to farm law upheld against claim that denied landowner due process because there was no property interest in having the courts determine the merits of a private nuisance suit); *In re Nehemiah Associates, Inc., 719 A.2d 34 (Vt. 1998)* (involving inclusion of a waiver of a right to sue farmers over nuisance in subdivision deeds and requirement that some land be retained in agricultural use as open, cleared, uncluttered and unencumbered land); *Parker v. Barefoot, 502 S.E.2d 42 (N.C. App. 1998)* (judgment in favor of landowners in nuisance action against hog farmer reversed because judge failed to instruct jury that farmer used best technical knowledge available at the time to avoid the nuisance); *Borman v. Board of Supervisors, 584 N.W.2d 309 (Iowa 1998)* (Iowa) (statutory immunity from nuisance actions declared unconstitutional as a taking. Rationale: the statute imposes an easement on neighboring lands without compensation).

For further discussion of animal waste as a nuisance, *see* Martha Noble and J.W. Looney, *The Emerging Legal Framework For Animal Agricultural Waste in Arkansas, 47 Ark. L. Rev. 159 (1994).*

See also Superior Farm Management, L.L.C. v. Montgomery, 513 S.E. 2d 215 (Ga. 1999) (Hog operation as a nuisance. Where evidence shows with reasonable certainty that irreparable harm and damage will occur from the operation of an otherwise lawful business, equity will restrain the construction, maintenance and operation of such lawful business.)

For further discussion of environmental issues in agriculture, *see* Note, *Fighting Corporate Pigs: Citizen Action and Feedlot Regulation in Minnesota, 83 Minn. L. Rev. 1893 (1999);* Comment, *Old McDonald had a Government-Regulated-Confined-Swine-Operation; A Substitute for H.B. 2950, 38 Washburn L.J. 655 (1999).*

See also Crea v. Crea, 16 P.3d 922 (Idaho 2000). There the court held that an expanded farrow-to-finish hog operation could be a nuisance. In *Belvedere Township v. Heinze, 615 N.W. 2d 250 (Mich App. 2000),* the court found that whether a large-scale hog facility constituted a nuisance depended on the impact of the state's right to farm statute as well as the fact that it was not protected as a cognizable preexisting nonconforming use. The case had to be remanded for the determination relating to the right to farm statute. In *Zink v. Khwaja, 608 N.W. 2d 394 (Wis. App. 2000),* the

court awarded attorney fees to the landowner under the right-to-farm statute where the plaintiff failed to establish a nuisance existed as a result of flooding from a commercial cranberry farm.

For further discussion, see Centner, T, *Anti-Nuisance Legislation: Can the Derogation of Common-Law Nuisance be a Taking? 30 Envtl. L. Rep. 10254 (2000);* Lauck, J., *After Deregulation: Constructing Agricultural Policy in the Age of "Freedom to Farm Act." 5 Drake J. Agric.L. 3 (2000);* Redick, Thomas and Bernstein, C. *Nuisance Law and the Prevention of "Genetic Pollution:" Declining a Dinner Date with Damocles. 30 Envtl. L. Rep. 10328 (2000);* Head, Thomas R. III, *Local Regulations of Animal Feeding Operations: Concerns, Limits and Options for the Southeastern States, 6 Envtl. Law 503 (2000);* Richardson, Jesse J., and Feishans, Theodore A. *Nuisance Revisited after Buchanan and Borman 5 Drake J. Agric. L. 121 (2000).*

(n8)Footnote 505. *123 U.S. 623 (1887).*

(n9)Footnote 506. Att'y Gen. Op. 96-21 (March 5, 1996). This view was reaffirmed in Att'y Gen. Op. 97-92 (Sept. 15, 1997).

(n10)Footnote 507. No. 95-C-392 (Reno Co. Dist. Ct., Reno County Kan. Aug 6, 1996).

(n11)Footnote 508. *939 P.2d 418 (Ariz. 1997).*

(n12)Footnote 509. *662 So. 2d 808 (La. App. 1995).*

(n13)Footnote 510. For further discussion, see Meimert, *Keeping Pigs out of Parlors: Using Nuisance Law to Affect the Location of Pollution, 27 Envtl. L. 403 (1997);* Organ & Perry, *Controlling Externalities Associated with Concentrated Animal Feeding Operations: Evaluating the Impact of H.B. 1207 and Continuing Zoning and the Common Law on Nuisance, 3 Mo. Envtl. L. & Pol'y Rev. 183 (1996).*

(n14)Footnote 511. Neil Hamilton & David Bolte, *Nuisance Laws and Livestock Production in the United States: A Fifty-State Analysis,* 10 J. Agric. Tax'n & L. 99 (1988); Jacqueline Hand, *Right-to-Farm Laws: Breaking New Ground in the Preservation of Farmland, 45 Pitt. L. Rev. 289 (1984).* South Dakota appears to be the only state presently without such a statute.

See also Weinhold v. Wolff, No. 94-1589, 555 N.W.2d 454 (Iowa 1996) (right to farm statute did not protect commercial hog feeder), citing to Neil D. Hamilton, A Livestock Producer's Legal Guide to: Nuisance, Land Use Control, and Environmental Law 21 (1992); Kathleen Roth, *A Landowners' Remedy Laid to Waste: State Preemption of Private Nuisance Claims Against Regulated Pollution Sources, 20 Wm. & Mary Envtl. L. & Pol'y Rev. 401 (Summer 1996)* (arguing that state statutes protect sources of pollution that operate within approved standards, far exceeding protection afforded polluters by permit-shield provisions and limitations on citizen suits); and John D. Burns, *The Eight Million Little Pigs -- A Cautionary Tale: Statutory and Regulatory Responses to Concentrated Hog Farming, 31 Wake Forest L. Rev. 851 (Fall 1996)* (analysis of federal and North Carolina statutes governing hog farming).

In *Ammirata v. Zoning Board of Appeals of the Town of Redding, 786 A.2d 425 (Ct. 2001)* the agricultural nuisance statute did not bar the requirement that the operation conform to the land management plan of the area.

In *Holubec v. Brandenburger, 58 S.W.3d 201 (Tex. App. 2001)* the defendant sheep feedlot owner failed to establish the affirmative defense against a nuisance claim that was available under the statute.

In *Travis v. Preston, 635 N.W.2d 632 (Mich App. 2001),* the court refused to apply retrospectively amendments that would shield farms from being treated as nuisances based on the violation of zoning laws. The statute was therefore not considered to present a defense to suits filed to enforce the zoning ordinance.

In *Town of North Kingston v. Albert, 767 A. 2d 659 (R.I. 2001),* the court held that dust from the excavation of a pond to supply water to a turf farm fell within a section of the Right to Farm law that specifically exempted dust created during plowing or cultivation operations from becoming either private or public nuisances.

In *Flo-Sun, Inc. v. Kirk, 783 So. 2d 1029 (Fla. 2001),* the court held that the Air and Water Pollution Control Act did not impliedly repeal the public nuisance statutes.

See also G. Torres, *Who Owns the Sky? 18 Pace Envtl. L. Rev. 227 (2001);* J.B. Ruhl, *The Environmental Law of Farms: 30 Years of Making a Mole Hill out of a Mountain, 31 Envtl. L. Rep. 10203 (2001).*

(n15)Footnote 512. *See, e.g.,* Ala. Code § 6-5-127(a); Del. Code Ann. tit. 3, § 1401; Ky. Rev. Stat. § 413.072.

Other states having this type of statute include Arkansas, Colorado, Connecticut, Florida, Georgia, Idaho, Illinois, Indiana, Lousiana, Maryland, Mississippi, New Hampshire, New Mexico, North Carolina, North Dakota, South Carolina, Texas and Virginia.

(n16)Footnote 513. *See, e.g.,* Mich. Stat. Ann. § 12:122(3). Other states with legislation of this type include Arizona, Connecticut, Kansas, Maine, Massachusetts, New York, Oklahoma, Vermont and Washington.

(n17)Footnote 514. *See, e.g.,* Kan. Stat. Ann. § 47-1505 which provides in part that:

Any feed lot operated in compliance with such standards [as mandated by the state], and in compliance with the regulations made and promulgated by the commissioner shall be deemed to possess prima facie evidence that a nuisance does not exist.

Tiegs v. Watts, 954 P.2d 877 (Wash. 1998) (tenant recovery against landlord for breach of lease and for creating a nuisance by contaminating a well upheld); *Buchanan v. Simplot Feeders Limited Partnership, 952 P.2d 610 (Wash. 1998)* (nuisance immunity allowed only where nuisance suit arises because of urban encroachment into agricultural area and applies to both those seeking damages and injunctive relief); *Pure Air and Water Inc. of Chemung County, 668 N.Y.S. 2d 248 (N.Y.A.D. 1998)* (right-to farm law upheld against claim that denied landowner due process because there was no property interest in having the courts determine the merits of a private nuisance suit); *In re Nehemiah Associates, Inc., 719 A.2d 34 (Vt. 1998)* (involving inclusion of a waiver of a right to sue farmers over nuisance in subdivision deeds and requirement that some land be retained in agricultural use as open, cleared, uncluttered and unencumbered land); *Parker v. Barefoot, 502 S.E.2d 42 (N.C. App. 1998)* (judgment in favor of landowners in nuisance action against hog farmer reversed because judge failed to instruct jury that farmer used best technical knowledge available at the time to avoid the nuisance).

For further discussion, *see* Gail S. Shane, *Concentrated Animal Feeding Operations: Will Increased Enforcement and More Stringent Regulations under the Clean Water Act Adequately Protect the Public Health and Environment?* 13 NO. 3 NAAG Nat'l Envtl. Enforcement J. 1 (1998).

For a somewhat novel approach, *see In re Nehemiah Associates, Inc., 719 A.2d 34 (Vt. 1998)* (involving inclusion of a waiver of a right to sue farmers over nuisance in subdivision deeds and requirement that some land be retained in agricultural use as open, cleared, uncluttered and unencumbered land).

(n18)Footnote 515. Utah and California have a three-year period. *See* Cal. Civ. Code § 3481.5(a); Utah Code Ann. § 78-38-7(1).

(n19)Footnote 516. *See* S.C. Code Ann. § 46-45-30:

Operations Not to be Deemed a Nuisance Due to Changed Conditions. No agricultural operation or any of its

appurtenances shall be or become a nuisance, private or public, by any changed conditions in or about the locality of the operation after it has been in operation for more than one year when such operation was not a nuisance when it began. The provisions of this section shall not apply whenever a nuisance results from the negligent operation of any such agricultural operation or its appurtenances.

(n20)Footnote 517. *Shatto v. McNulty, 509 N.E. 897 (Ind. App. 1987).*

(n21)Footnote 518. *Id. at 899.*

(n22)Footnote 519. *Herrin v. Opatut, 281 S.E.2d 575 (Ga. 1981). But see Beam v. Birmingham Slag Co., 10 So. 2d 162 (Ala. 1942),* where the court refused to catalogue "changed conditions" and preferred a "case-by-case" approach to the problem.

But see Crea v. Crea, 16 P.3d 922 (Idaho 2000). There the court held that an expanded farrow-to-finish hog operation could be a nuisance despite a "right to farm" law. The court interpreted the changed circumstances of the statute to apply to expansions in the farming operation itself, rather than changes in the surrounding non-agricultural uses.

For further discussion, see Centner, T, *Anti-Nuisance Legislation: Can the Derogation of Common-Law Nuisance be a Taking? 30 Envtl L. Rep 10254 (2000);* Lauck, J., *After Deregulation: Constructing Agricultural Policy in the Age of "Freedom to Farm Act." 5 Drake J. Agric.L. 3 (2000);* Redick, Thomas and Bernstein, C. *Nuisance Law and the Prevention of "Genetic Pollution:" Declining a Dinner Date with Damocles. 30 Envtl. L. Rep. 10328 (2000);* Richardson, Jesse J., and Feishans, Theodore A. *Nuisance Revisited after Buchanan and Borman 5 Drake J. Agric. L. 121 (2000).*

See also In re Conditional Use Permit Denied to Meier, 613 N.W. 2d 523 (S.D. 2000).

(n23)Footnote 520. *370 N.W.2d 127 (Neb. 1985).*

(n24)Footnote 521. *Born v. Exxon Corp., 388 So. 2d 933 (Ala. 1980).*

(n25)Footnote 522. *See Laux v. Chopin Land Assocs., 550 N.E.2d 100 (1990),* holding that a change from grain farming to hog raising constituted a significant change in the type of the operation and the right to farm protection afforded the grain operation did not apply to the hogs. However, an increase in the number of hogs from 29 to 300 did not constitute a significant change and if raising 29 hogs was protected, so was raising 300.

(n26)Footnote 523. *See, e.g.,* Kan. Stat. Ann. § 2-3202:

Certain agricultural activities not a nuisance. Agricultural activities conducted on farmland, if consistent with good agricultural practices and established prior to surrounding non-agricultural activities, are presumed to be reasonable and do not constitute a nuisance, public or private, unless the activity has a substantial adverse effect on the public health and safety.

If such agricultural activity is undertaken in conformity with federal, state, and local laws and regulations, it is presumed to be good agricultural practice and not adversely affecting the pubic health and safety.

(n27)Footnote 524. *See* Iowa Code § 172D.1; Wyo. Stat. Ann. § 11-39-101.

(n28)Footnote 525. *See, e.g.,* Kan. Stat. Ann. § 47-1505:

Any feed lot operated in compliance with such standards, and in compliance with the regulations made and promulgated by the commissioner shall be deemed to possess prima facie evidence that a nuisance does not exist.

For further discussion, see Denis Burke, *Common Scents: An Analysis of the Law of Feed Lot Odor Control, 10 Creighton L. Rev. 539 (1977);* Marcus McCarty & Stephan Matthews, *Foreclosing Common Law Nuisance for Livestock Feed Lots: The Iowa Statute, 2 AGRIC. L.J. 186 (1980);* Neil Hamilton & David Bolte, *Nuisance Laws and Livestock Production in the United States: A Fifty-State Analysis*, 10 J. AGRIC. TAX'N & L. 99 (1988).

(n29)Footnote 526. *See, e.g., Atkinson v. Herrington Cattle Co., 436 P.2d 816 (Kan. 1968); Botsch v. Leigh Land Co., 232 N.W.2d 481 (Neb. 1976).*

(n30)Footnote 527. *See, e.g., Beam v. Birmingham Slag So., 243 Ala. 313, 10 So. 2d 162 (1942)* where the court refused to catalogue "changed conditions" and preferred a "case-by-case" approach to the problem; *Herrin v. Opatut, 281 S.E.2d 575 (Ga. 1981); Flansburg v. Coffee, 370 N.W.2d 127 (Neb. 1985).*

(n31)Footnote 528. *See, e.g., Carpenter v. Double R. Cattle Co., Inc., 669 P.2d 643 (Idaho App. 1983), rev'd, 701 P.2d 222 (Idaho 1985); Scott v. Jordan, 661 P.2d 59 (N.M. 1983).*

(n32)Footnote 529. *See, e.g., Botsch v. Leigh Land Co., 232 N.W.2d 481 (Neb. 1976)* where the nuisance was alleged to emanate from the odor of a hog raising operation, the court stated that:

> The consumption of the atmosphere by the exercise of any trade or by any use of property that impregnates it with noisome stenches has ever been regarded as among the worst classes of nuisances. The right to have the air floating over one's premises free from noxious and unnatural impurities is a right as absolute as the right to the soil itself.

Id. at 484-85.

(n33)Footnote 530. *Carpenter v. Double R. Cattle Co., 669 P.2d 643 (Idaho App. 1983), rev'd, 701 P.2d 222 (Idaho 1985).*

(n34)Footnote 531. Idaho Code § 22-4501 *et seq.*

(n35)Footnote 532. *Finlay v. Finlay, 854 P.2d 315 (Kan. App. 1993).*

For further discussion, *see* Meimert, *Keeping Pigs out of Parlors: Using Nuisance Law to Affect the Location of Pollution, 27 Envtl. L. 403 (1997);* Organ & Perry, *Controlling Externalities Associated with Concentrated Animal Feeding Operations: Evaluating the Impact of H.B. 1207 and Continuing Zoning and the Common Law on Nuisance, 3 Mo. Envtl. L. & Pol'y Rev. 183 (1996).*

See also Buchanan v. Simplot Feeders Limited Partnership, 952 P.2d 610 (Wash. 1998) (nuisance immunity allowed only where nuisance suit arises because of urban encroachment into agricultural area and applies to both those seeking damages and injunctive relief).

(n36)Footnote 533. *See, e.g.*, Myrl Duncan, *Toward a Theory of Broad-based Planning for the Preservation of Agricultural Land*, 24 Nat. Resources J. 61 (1984); Julian Juergensmeyer, *Farmland Preservation: A Vital Agricultural Issue for the 1980's, 21 Washburn L.J. 443 (1982);* Myrl Duncan, *Agriculture as a Resource: Statewide Land Use Programs for the Preservation of Farmland, 14 Ecology L. Q. 401 (1987);* R. Blobaum, *The Loss of Agricultural Land*, Report to the Citizens Advisory Committee on Environmental Quality (Wash. 1974); J. Park, *Background Paper: Conserving the Nation's Farmland*, N.E. Midwest Inst. (Wash. 1979); M. Cotner, *Land Use Policy and Agriculture: A State and Local Perspective*, U.S. Dept. Of Agriculture Economic Research Service (Wash. 1974); G. Fuiguitt, P. Voss and J. Doherty, *Growth and Change in Rural America*, Urban Land Inst. (Wash. 1979): Charles Little, *Land and Food: The Preservation of U.S. Farmland*, American Land Forum (Wash. 1979); Charles Little, *Middleground Approaches to*

the Preservation of Farmland, National Agricultural Lands Study, 1980; D. Minor, *Agricultural Retention: An Emerging Issue, in* Environmental Comment, Urban Land Inst. (Wash., May 1975); National Association of Counties Research Foundation, Disappearing Farmlands: A Citizen's Guide to Agricultural Land Preservation (2d Ed. 1980); Real Estate Research Corporation, The Costs of Sprawl (U.S. Govt. Printing Office, Wash. 1974); U.S. General Accounting Office Report to Congress, Preserving American's Farmland: A Goal the Federal Government Should Support (Wash. 1979); Urban Land Institute Policy Statement, *The Agricultural Land Preservation Issue: Recommendations for Balancing Urban and Agricultural Land Needs*, Urban Land 18 (July 1982).

See also David Callies, *The Quiet Revolution Revisited: A Quarter Century of Progress, 26 Urb. Law. 197 (Spring 1994);* James Wickersham, *The Quiet Revolution Continues: The Emerging New Model for State Growth Management Statutes, 18 Harv. Envtl. L. Rev. 345 (1994);* Terence Centner, *Preserving Rural-Urban Fringe Areas and Enhancing the Rural Environment: Looking at Selected German Institutional Responses*, 11 Ariz. J. Int'l & Comp. L. 27 (1994); Jeanne S. White, *Beating Plowshares into Townhomes: The Loss of Farmland and Strategies for Slowing its Conversion to Nonagricultural Uses, 28 Envtl. L. 113 (1998).*

(n37)Footnote 534. *See, e.g.*, Edward Thompson, Jr., *Defining and Protecting the Right to Farm*, 5 Zoning &Planning Law Report 57 (Sept. 1982).

However, note the following text of the Water Bank Act, *16 U.S.C. § 1301* (1988) (originally at Pub. L. No. 91-559, § 2, *84 Stat. 1468):*

The Congress finds that it is in the public interest to preserve, restore, and improve the wetlands of the Nation, and thereby to conserve the surface waters, to preserve and improve habitat for migratory waterfowl and other wildlife resources, to reduce run-off, soil and wind erosion, and to contribute to flood control, to contribute to improved water quality and reduce stream sedimentation, to contribute to improved subsurface moisture, to reduce acres of new land coming into production and to retire lands now in agricultural production, to enhance the natural beauty of the landscape, and to promote comprehensive and total water management planning. The Secretary of Agriculture ... is authorized and directed to formulate and carry out a continuous program to prevent the serious loss of wetlands, and to preserve, restore, and improve such lands, which program shall begin on July 1, 1971.

Under the Agricultural Stabilization and Conservation Service, farmers may receive subsidies, one of which is payments for retiring agricultural land. *35 A.L.R.5th 285 (1996).*

(n38)Footnote 535. *See generally* Ken Cook, *Loathing Suburbia: Views on Farmland Preservation From a West Virginia Limestone Ridge*, American Land Forum Mag. 70-76 (Spring 1983).

The data suggests that approximately five million acres a year is lost to agricultural production. *See, e.g., Final Report*, National Agricultural Lands Study 27 (1981); H.R. Rep. No. 1400, 95th Cong., 2d Sess. 7 (1978).

(n39)Footnote 536. This is undoubtedly exacerbated by the fear, primarily among consumers who know little about agriculture and food production, that the high cost of government programs for agriculture and the fact that millions of acres of farmland have been withdrawn from production to be placed in the Conservation Reserve Program, suggests a trend in the direction of a national policy that favors a smaller agricultural production base which may further erode our ability to cheaply meet the nation's food and fiber needs.

(n40)Footnote 537. Peter Barns, *Land Reform in America in* Radical Agriculture, at 29 (R. Merrill, ed., N.Y.U. Press, 1976).

(n41)Footnote 538. In this context, it has been remarked that it is "vital that the farmland preservation movement become a force for democratic, graceful, ecologically sound dispersion of those who choose such a future. Preservation policies that uncritically accept and protect commercial agriculture may become the neutral or possibly regressive

fixtures of a land management apparatus that caters increasingly to the landed and the wealthy... ." Ken Cook, *Loathing Suburbia: Views on Farmland Preservation From a West Virginia Limestone Ridge*, American Land Forum Magazine 70 at 75 (Spring 1983).

(n42)Footnote 539. The wide range of programs is largely the result of two factors: the obvious complexity of the farmland loss problem and the extent to which the jurisdiction is willing to assert its authority over the fundamental land use problems involved. With respect to the former, it has been observed that four general factors must be considered:

> (1) *Demographic factors* such as a farmer's choice to sell his land due to his age, his health, because he is near retirement, or because he has no offspring who wish to continue farming.
>
> (2) *Economic factors* such as involving areas, usually on the fringe of urban areas, that have greatly increased in value due to metropolitan expansion, highway construction, commercial and industrial relocation, natural resources development and recreational use. Also included here is the farmer's reduced net returns on farming, higher property taxes and increased transportation costs.
>
> (3) *Transitional factors* such as the farmer's desire to farm elsewhere or, more often than not, to not farm at all.
>
> (4) *Secondary factors* such as complaints of residential neighbors, air and water pollution from nearby industries, other nuisance elements, and the decrease in the availability of farm labor and farm support businesses.

See Julian Juergensmeyer, *Farmland Preservation: A Vital Agricultural Law Issue for the 1980's, 21 Washburn L.J. 443 (1982).*

For further discussion, *see Untaxing Open Space: An Evaluation of the Effectiveness of Differential Assessment of Farms and Open Space* 49-56, Regional Science Research Inst. (1976).

With respect to the latter concern, the following factors have been identified as likely to stimulate stronger governmental or public intervention in land use decision making and hence would tend to explain when and if a particular jurisdiction is likely to consider a farmland preservation measure:

> 1. When there are problems that cross the boundaries of existing levels of jurisdictions, and do not confine themselves neatly to municipal or county entities.
>
> 2. Where there are problems created from the actions of a local body which may result in a negative impact on the interest of the broader public.
>
> 3. When there are lands which have limited local controls that do not effectively protect the land resource of the state.
>
> 4. Problems or conflicts involving implementation of state policies or funds.

For further discussion, *see* Richard H. Jackson, Land Use in America 64 (V. H. Winston and Sons, 1981).

See In re Nehemiah Associates, Inc., 719 A.2d 34 (Vt. 1998) (involving inclusion of a waiver of a right to sue farmers over nuisance in subdivision deeds and requirement that some land be retained in agricultural use as open, cleared, uncluttered and unencumbered land).

(n43)Footnote 540. *See, e.g.*, Myrl Duncan, *Toward a Theory of Broad-based Planning for the Preservation of Agricultural Land*, 24 Nat. Resources J. 61 (1984).

(n44)Footnote 541. *See, e.g.*, Julian Juergensmeyer, *Farmland Preservation: A Vital Agricultural Law Issue for the 1980's, 21 Washburn L.J. 443 (1982).*

(n45)Footnote 542. *See, e.g.*, 1 J. Juergensmeyer & James Wadley, Agricultural Law 69-70 (1982).

(n46)Footnote 543. *DeVita v. County of Napa, 9 Cal. 4th 763, 38 Cal. Rptr. 2d 699, 889 P.2d 1019 (Cal. 1995).* For further discussion, *see* John R. Nolon, *The Stable is Open: New York's Statutes to Protect Farmland, 67 N.Y. ST. B.J. 36 (Feb. 1995).*

Comment, *Preserving our Heritage: Tool to Cultivate Agricultural Preservation in New York State, 17 Pace L. Rev. 591 (1997);* Comment, *New Jersey's Farmland Assessment: Welfare to New Jersey's Landed Gentry or Beneficial Open Space Program? 15 Temp. Envtl. L. & Tech J. 83 (1996).*

In *Suitum v. Tahoe Regional Planning Agency, 520 U.S. 725, 117 S. Ct. 1659, 137 L. Ed. 2d 980 (1997),* the Court dealt with a claim that the denial of permission to develop the property constituted a taking. The Regional Authority argued that the landowner was entitled to valuable "Transferrable Development Rights" (TDR's) and until those were exercised, it could not be determined whether there was a "taking" of property in violation of constitutional protections. The Court held that the matter was ripe for determination notwithstanding that she had not attempted to sell her TDR's and remanded the case for a "takings" determination. The Court argued that the issues associated with the taking claim and uncertainty of the value of the TDR's were susceptible of resolution. The agency had made a final determination because it had found that her land lies entirely within the zone in which development is not permitted. Any uncertainty as to the value of the TDR's was considered a simple issue of market determinations which courts routinely make. As a result, the matter was remanded.

(n47)Footnote 544. So named because of *Village of Euclid v. Ambler Realty Co., 272 U.S. 365 (1926)* which generally upheld local authority to adopt zoning ordinances.

(n48)Footnote 545. *See generally* Julian Juergensmeyer, *Farmland Preservation: A Vital Agricultural Law Issue for the 1980's, 21 Washburn L.J. 443, 451 (1982).*

(n49)Footnote 546. *See* Julian Juergensmeyer, *Farmland Preservation: A Vital Agricultural Law Issue for the 1980's, 21 Washburn L.J. 443, at 451 (1982):*

> Even those traditional zoning ordinances that allow only agricultural and other specific uses in agricultural zones allow a mix of potentially inconsistent uses which can exist in agricultural use zones: (1) citrus and other fruit crops cultivation, production and horticulture; (2) truck farms; (3) plant nurseries and greenhouses not involved with retail sales to the general public; (4) poultry and livestock production excluding swine raising; (5) grazing and pasturing of animals; (6) home occupations wherein products sold have been produced in major part by the permanent occupants thereof; (7) roadside stands of a temporary nature for the sale of fruits, vegetables and similar products produced on the premises, provided such stand is placed no closer than twenty-five feet to a property line; (8) government owned or operated building or use excluding public utility and service structures; (9) fish hatcheries or fish pools when approved in accordance with all applicable federal, state and county regulations and laws; (10) publicly owned or controlled parks and recreation areas; (11) bait production not involving retail sales; (12) stables, barns, sheds, silos, granaries, windmills and related agricultural structures; (13) dairies; (14) agriculture; (15) silviculture including timber production where such operation is first approved by the County Urban Forester; (16) single family dwelling and customary accessory uses including docks and boat houses; (17) neighborhood recreation areas when approved as part of a subdivision plat; (18)

prefabricated or modular housing when approved by the state as complying with applicable building codes; and (19) churches and other structures appurtenant thereto.

(n50)Footnote 547. *See* Julian Juergensmeyer, *Farmland Preservation: A Vital Agricultural Law Issue for the 1980's, 21 Washburn L.J. 443 at 452 (1982):*

The following is a fairly typical list of special exception uses that may be permitted in an agricultural district: (1) cemeteries, mausoleums; (2) kennels, including the commercial raising or breeding of dogs; (3) hospitals, sanitariums and convalescent homes, veterinary clinics; (4) private nursery schools, kindergartens, primary schools, secondary schools and colleges; (5) temporary asphalt plants for the purpose of specific public road construction; (6) sawmills; (7) public utility and service structures; (8) fraternal clubs when chartered by the state; (9) borrow operations complying with all applicable county ordinances; (10) country and golf clubs, fishing clubs, fishing camps, marinas, gun clubs or other similar enterprises or clubs when located on lands comprising five or more acres and making use of land in its predominantly natural state; (11) privately owned and operated recreational facilities open to the paying public, such as athletic fields, stadiums, racetracks and speedways.

(n51)Footnote 548. 3 Julian Juergensmeyer & James Wadley, Zoning: The Law in Florida § 2-9 (1980). *See also Desler v. Lane County Bd. of Comm'rs, 27 Or. App. 709, 557 P.2d 52 (1976).* In this case, a 40-acre tract of land was designated "agricultural" in the county's comprehensive plan. The court held a zoning classification as not contrary to the plan which conditionally permitted gravel operations and parks in the area. The court considered that the term "agricultural" had no rigid meaning but denoted land primarily reserved for agricultural and related activities although some localized areas might be considered rural. The ordinance recognized the potential need to place gravel operations and parks in agricultural areas. The ordinance, however, also acknowledged that these uses can only be permitted if they will not be unreasonably incompatible with the type of uses permitted in surrounding areas.

(n52)Footnote 549. *See* National Agricultural Lands Study, Final Report (1981).

For a case in which a residential subdivision was located in an agricultural district, see *Stevenson v. Blaine County, 9 P.3d 1222 (Id. 2000).* In Zickefoose v. Board of Zoning Appeals, Green Township, Ohio App. LEXIS 4122 (Ohio App. Sept 7, 2000), the court upheld the issuance of a variance for a cabinetmaking business that was to be located on land within an agricultural district. In *Brandon Charter Township v. Tippett, 616 N.W. 2d 243 (Mich. App. 2000),* the court upheld an exemption under the zoning ordinance which prohibited the parking and storing of commercial equipment within a rural estate district. Here, the owner of the equipment used it on his property to perform farming operations outside the township.

In *Dayton Prairie Water Association v. Yamhill County, City of Dayton, 11 P.3d 671 (Or. App. 2000),* the court upheld a county's decision to install water intake wells and other facilities for a water system in an exclusive agricultural use zone.

For further discussion, see Head, Thomas R. III., *Local Regulations of Animal Feeding Operations: Concerns, Limits and Options for the Southeastern States, 6 Envtl. Law 503 (2000);* Frug, Gerald E., *Euphemism and a Policy Strategy 30 Envtl. L. Rep. 11189 (2000).*

(n53)Footnote 550. In *McCord v. Pineway Farms, 569 S.W.2d 690 (Ky. App. 1978),* a subdivision was barred from an agricultural district even though it otherwise satisfied the minimum lot requirements on grounds that it was an unpermitted residential use.

In *Utsey v Coos County, 32 P. 3d 933,* (Or. App. 2001), the court considered the issuance of a permit to operate

off-highway vehicle trails and racetrack on land zoned for exclusive agricultural use to be a nonjusticiable controversy.

See Centre Lime and Stone Co., Inc. v. Spring Township Board of Supervisors, 787 A.2d 1105 (Pa. Commw. 2001) dealing with the exclusion of quarrying from a county. *See also* N & G. Construction, Inc. v. City of Pataskala, Ohio App. LEXIS 5216 (Ohio App. Dist 5 2001) dealing with statutes of limitations that apply to minimum lot zoning for agricultural uses.

Landowners were denied a conditional use permit that would have effectively divided their parcel of agricultural land so that an additional residence could be constructed that would have allowed the landowners to live closer to their daughter and grandchildren. *Trent v. German Township Board of Zoning Appeals, 759 N.E.2d 421 (Ohio App. 2001).*

(n54)Footnote 551. Julian Juergensmeyer, Introduction, *State and Local Land Use Planning and Control in the Agricultural Context, 25 S.D. L. Rev. 463 (1980).*

(n55)Footnote 552. *See generally*, National Agricultural Lands Study, The Protection of Farmland: A Reference Guidebook for State and Local Governments 110-112 (1981).

(n56)Footnote 553. *See* Note, *Agricultural Zoning in Pennsylvania: Will Growth Pressures Prevail? 91 Dick. L. Rev. 289, 296-298 (1986).*

(n57)Footnote 554. *See, e.g., Gisler v. County of Madera, 112 Cal. Rptr. 919 (1974)* (requiring 18 acres). This approach has the advantage of minimizing the impact of development on surrounding areas which in turn promotes some stability in the land use patterns of agricultural areas. On the other hand, it has been criticized as seriously affecting the economic value of the land and possibly excluding otherwise desirable development. From a purely agricultural point of view, most minimum lot sizes are too small to be conducive to effective continued agricultural use on the lots. This suggests that large lot zoning is perhaps a better buffer between agricultural areas and other development than it is a way to specifically keep the land in agricultural use.

(n58)Footnote 555. *See, e.g.*, Note, *Agricultural Zoning in Pennsylvania: Will Growth Pressure Prevail?, 91 Dick. L. Rev. 289, 296 (1986).*

(n59)Footnote 556. House, *Policy Instruments for Shaping Land Use Choices*, 3 Land Resources Today 4 (1974).

(n60)Footnote 557. *See* Frank Schniderman, *Transferable Development Rights: An Idea in Search of Implementation, 11 Land & Water L. Rev. 339 (1976);* Symposium, *Planned Unit Development*, 114 Pa. L. R. 1 (1965).

(n61)Footnote 558. Julian Juergensmeyer, *Farmland Preservation: A Vital Agricultural Law Issue for the 1980's, 21 Washburn L.J. 443, 455 (1982).*

(n62)Footnote 559. *See Byrd v. Stringer, 666 P.2d 1332 (Or. 1983)* holding that an ordinance allowing for a house in a farm use zone is not inconsistent with the state agricultural land preservation objectives.

(n63)Footnote 560. *See* 3 Julian Juergensmeyer & James Wadley, *Zoning: The Law in Florida*, §§ 2-9, 2-10.

(n64)Footnote 561. *See, e.g., Fidler v. Zoning Bd. of Adj. of Upper Macungie Twp., 182 A.2d 692 at 695 (Pa. 1962):*

> It is fundamental that restrictions imposed by zoning ordinances are in derogation of the common law and must be strictly construed. Such restrictions must not be so construed as to fetter the use of the land by implication. The permissive widest use of the land is the rule and not the exception, unless specifically restrained in a valid and reasonable exercise of the police power. [citations omitted]

(n65)Footnote 562. The primary legal justification for the continued presence of the nonconforming use is that it lawfully pre-existed the current classification which does not permit it. To permit the use to continue avoids the argument that termination of the use constitutes a "taking."

(n66)Footnote 563. The events that precede conversion of land in urban fringe areas from agricultural use to non-agricultural use has been described as generally following a predictable sequence. *See* 3 Julian Juergensmeyer & James Wadley, Zoning: The Law in Florida, § 3-6, n.3:

> A number of events tend to occur as urbanization intrudes into agricultural land that bear on the decision to remove land from agricultural production. First, as urbanization pressures focus on a particular area, cost of land begins to rise and speculation enters the picture as an important factor. As the cost of farmland rises, so do property taxes and estate and inheritance taxes. As a result, the urban development value of the land soon exceeds the agricultural productive value of the land.
>
> Second, as development occurs near or adjacent to farmland, pilfering and destruction of crops and machinery may occur caused by neighboring people; increased population makes effective use of pesticides difficult; increased traffic makes use of farm machinery hazardous on roads; complaints by neighbors as to dust, manure, etc. begin to come in to the local government, all of which generate increasing pressure for political action to be taken against the agricultural users.
>
> Third, once the farmer becomes convinced the area will inevitably become urbanized, there is a tendency to stop investing in improvements to the farm. Then, as rising taxes take their toll on adjacent farms, as support industries (such as seed and feed dealers, machinery suppliers, etc.) leave the area due to declining business, and as farm labor becomes expensive and scarce due to higher paying 'city' jobs, the farmer realizes that the return on investment already made will soon shrink. At this point, the decision usually is made to move the operation elsewhere and sell the property, or change its use to something more intensive.

(n67)Footnote 564. This is because by the time the agricultural use has assumed the status of a nonconforming use, further investment in the operation will typically have stopped or will have been severely limited by the restrictions against changing the intensity or nature of the use that are imposed on nonconforming uses.

(n68)Footnote 565. *See generally* James Wadley, *Small Farms: The USDA, Rural Communities and Urban Pressures, 21 Washburn L.J. 478 (1982).*

(n69)Footnote 566. *See Township of Bloomfield v. Beardslee, 84 N.W.2d 537 (Mich. 1957); Durning v. Summerfield, 235 S.W.2d 761 (Ky. 1951).* Where the need to change, expand or alter the nonconforming farm operation is the result of action taken by the municipality, at least one case suggests the possibility of getting a variance to accommodate the change without affecting the nonconforming status. *See Monterey Dev. Corp. v. Stuart Marine Ctr., Inc., 305 So. 2d 245 (Fla. App. 1974).*

See also Belvedere Township v. Heinze, 615 N.W. 2d 250 (Mich App. 2000), where the court found that a large-scale hog facility was not protected as a cognizable preexisting nonconforming use.

(n70)Footnote 567. *See, e.g.,* Kan. Stat. Ann. § 715b:

Cities are hereby authorized to adopt zoning regulations affecting all or any designated portion of the land located outside the city but within three miles thereof under the following conditions. Except for flood plain regulations in areas designated as a flood plain, nothing in this act shall be construed as authorizing a city to adopt regulations applying to or affecting any land in excess of three acres under one ownership which is used for agricultural purposes... (emphasis supplied)

(n71)Footnote 568. *See Lake County v. Cushman, 353 N.E.2d 399 (Ill. App. 1976):*

> Under the provisions of the ordinance any lot less than 200,000 square feet in size in an area zoned Agriculture is a non-conforming lot. The only principal permitted use on a non-conforming lot in an Agricultural zone is a single family dwelling; in other words despite the clear language of the statute, the ordinance attempts to bar any and all agricultural uses if the lot is less than five acres in size. This cannot be done. No rights exist and no powers are conferred with respect to zoning except by statute and the county board is bound by the powers, conditions and restrictions contained in the Act. The County argues that the statute is silent as to whether acreage limitations may be imposed on agricultural uses. But in fact the contrary is true. The statute clearly provides that there can be no regulation of any land or buildings used for agricultural purposes except that building or set back lines may be regulated. Nor can the power to impose such a limitation be read into the statute on the theory that the legislature only meant the term 'agriculture' to apply to large farms. [Citations omitted]

(n72)Footnote 569. *See Blauvelt v. Board of Leavenworth County Comm'rs, 605 P.2d 132 (Kan. 1980)* holding that it was improper to enjoin the construction of a farmhouse for failure to comply with zoning restrictions where the dwelling was on land used for agricultural purposes.

(n73)Footnote 570. *See* Kan. Stat. Ann. § 19-2960:

No zoning regulation shall apply to the use of land for agricultural purposes nor for the erection and maintenance of agricultural buildings so long as such agricultural buildings are used for agricultural purposes and no other. Dwellings, garages and other similar accessory buildings shall not be considered as agricultural buildings. All buildings, including agricultural buildings, may be regulated as to setback requirements from public roads so as to protect the future use and improvement of such roads.

Spot zoning: "An area is spot zoned when it is singled out for treatment different from that of similar surrounding land which cannot be justified on the bases of health, safety, morals or general welfare of the community and which is not in accordance with a comprehensive plan." *Bosse v. City of Portsmouth, 226 A.2d 99 (N.H. 1967).* The mere fact that an area is small and is zoned at the request of a single owner and is of greater benefit to him than to others does not make out a case of spot zoning 'if there is a public need for it or a compelling reason for it.'" *Edgewood Civic Club v. Blaisdell, 61 A.2d 517, 518 (N.H. 1948).*

(n74)Footnote 571. *See* Note, *Agricultural Zoning in Pennsylvania: Will Growth Pressure Prevail? 91 Dick. L. Rev. 289, 308-310 (1986).*

(n75)Footnote 572. *See, e.g., Hillsborough County v. Twin Lakes Mobile Homes Village, 153 So. 2d 64 (Fla. App. 1963)* where the court found that it was unreasonable to zone an agricultural area for residential use to exclude mobile homes and held that the zoning restriction had no substantial relation to public health, safety, morals, or general welfare and was arbitrary, unreasonable and unconstitutional.

See also Edwards v. Township of Montrose, 171 N.W.2d 555 (Mich. 1969), where the court held there was no showing of a reasonable relationship between the zoning of property as residential suburban agricultural and the proper exercise of the police power in refusing to permit the development of a mobile home park. The proposed park would have been located on land that was not suitable for general crop farming and was surrounded by undeveloped land bordered by a gravel pit operation and a commercial orchard.

See also Smith v. Building Inspector of Twp. of Plymouth, 77 N.W.2d 332 (Mich. 1956), where it was held that a permit should have been granted for the construction of buildings and facilities for use is a trailer park in an area of a rural township which was largely agricultural and open county despite a prohibition in the township zoning ordinance

against trailer camps.

See also Janas v. Town Bd. & Zoning Bd. of Appeals, Flemming, 51 A.2d 473 (N.Y.S. 1976), where the zoning ordinance exclusion of mobile homes was held unconstitutional.

But see Town of Pompey v. Parker, 53 A.2d 125, 959 (N.Y.S. 1976), holding that the restriction on mobile homes was based on a rational relationship to a permissible state objective.

In *Stevenson v. Blaine County, 9 P.3d 1222 (Id. 2000),* the court considered a request to locate a residential subdivision in an agricultural district zone.

The court held that the landowner's appeal from the county's approval of the plat was not timely.

(n76)Footnote 573. *539 N.W.2d 181 (Iowa 1995).*

(n77)Footnote 574. *555 N.W.2d 686* (Iowa, 1996).

(n78)Footnote 575. *190 N.W.2d 454 (Iowa 1971).*

(n79)Footnote 576. *939 P.2d 418 (Ariz. 1997).*

(n80)Footnote 577. *568 N.W.2d 832 (Mich. App. 1997).*

(n81)Footnote 578. *See, e.g., Parrish v. Board of Appeal, 223 N.E.2d 81 (Mass. 1967).*

(n82)Footnote 579. *See e.g., Town of Needham v. Winslow Nurseries, Inc., 111 N.E.2d 453 (Mass. 1953); Suburbia Gardens Nursery, Inc. v. County of St. Louis, 377 S.W. 2d 266 (Mo. 1964).*

(n83)Footnote 580. *See Moulton v. Building Inspector, 43 N.E.2d 662 (Mass. 1942).*

(n84)Footnote 581. *See e.g., Parrish v. Board of Appeal, 223 N.E.2d 81 (Mass. 1967); Kimball v. Blanchard, 7 A.2d 394 (N.H. 1939).*

(n85)Footnote 582. *Town of Lexington v. Menotomy Trust Co., 23 N.E.2d 559 (Mass. 1939).*

(n86)Footnote 583. *See, e.g., Desler v. Lane County Bd. of Comm'rs, 557 P.2d 52 (Or. App. 1976).*

(n87)Footnote 584. *See, e.g., Smith v. Miller, 239 A.2d 900 (Md. 1968)* (loam stripping business).

(n88)Footnote 585. In *Deutschmann v. Board of Appeal, 90 N.E.2d 313 (Mass. 1950),* the court stated, at 315:

> The fact that the products are not in their natural state does not mean that they cease to be products raised on the farm of their owner, who seeks there to sell them. We believe that the nature of the article to be sold is not the sole test, but where, by whom and in what fashion the article is produced are considerations of importance. We do not believe that the one who on his premises processes milk and cream from cows thereby ceases to be a farmer, selling his farm products there raised.

See also State v. Christensen, 137 P.2d 512 (Wash. 1943).

In *Kimball v. Blanchard, 7 A.2d 394 (N.H. 1939),* the court held that:

> The owners of farms are permitted, as an accessory use, to sell "farm produce on the premises." This

> is the only provision in the ordinance relating to the sale of farm products. The fact that ice cream is a "manufactured article" (*Syracuse Ice Cream Co. v. Cortland, 153 N.Y. App. Div. 456, 138 N.Y.S. 338, 339)* is not decisive on the controversy. Cheese and butter, though produced at factories and creameries, have been held to be "dairy farm products," within the meaning of a motor vehicle tax statute containing a provision exempting from its operation motor vehicles used exclusively in transporting dairy or other farm products between the point of production and the primary market. *State ex rel. Wisconsin Truck Owners' Ass'n v. Commission, 207 Wis 664, 242 NW 668... .*
>
> With these considerations in mind, we conclude it could not have been the purpose of the provision in question to prohibit a farmer, wherever his farm might be located, from selling on his own land a commodity composed primarily of agricultural material there produced. The interpretation for which the defendants contend would place under the ban such common farm 'manufactured' products as cider, maple syrup, butter and cheese. If there had been any intention to restrict the farmer's sales to farm produce in its natural state, the qualifying phrase could easily have been employed.

See also Parrish v. Board of Appeal, 223 N.E.2d 81 (Mass. 1967); DiPonio v. Cockrum, 128 N.W.2d 544 (Mich. 1964) holding that produce grown in an adjacent county could not be sold by a farmer on a produce stand located on the agriculturally zoned property.

(n89)Footnote 586. *Jackson v. Building Inspector of Brocton, 221 N.E.2d 736 (Mass. 1966):* "The meaning of the relevant, everyday terms used in the ordinance, viz. '[f]arming' and '[a]ccessory uses customarily incident to' farming is to be determined 'according to the common and approved usages of the language.'"

(n90)Footnote 587. *Moulton v. Building Inspector of Milton, 43 N.E.2d 662 (Mass. 1942)* (permitting silo); *Kimball v. Blanchard, 7 A.2d 394 (N.H. 1939)* (Sale of ice cream in connection with a dairy); *Southard v. Biddle, 305 S.W.2d 762 (Ky. 1957)* (Crop storage, even though crop storage was defined as "commercial" under the ordinance); *Earle v. McCarthy, 560 P.2d 665 (Or. 1977);* (Sale of burlap and string from a hops warehouse); *Gaspari v. Muhlenberg Twp. Bd. of Adj., 139 A.2d 544 (Pa. 1958)* (Production of artificial compost for sale).

(n91)Footnote 588. *See Foster Village Community Association v. Hess, 667 P.2d 850 (Haw. App. 1883)* (keeping a pig as a pet held to be a valid accessory use in residential district). The court reasoned, at 854-855, that:

> [t]he C[omprehensive] Z[oning] C[ode] does not define 'livestock,' and does not specifically provide for 'pets.' Although appellants concede that a pet is an accessory use, they argue that the clear import of the word livestock includes a solitary pig, even kept as a pet, and that a pig cannot be an accessory use because it is not a customary use in a residential district. The real thrust of appellants' argument is that since a pig is a very unusual pet, it is not customarily found in a residential district and, since a pig is livestock by definition, the keeping of a pig in the instant case is a violation of the CZC...
>
> We think appellants' argument is too strained and does not reflect the true intent of the city council. Under appellants' argument, the only animals permitted as pets in residential areas would be those that are customarily found in a residential neighborhood, such as dogs and cats or birds. The practical effect of appellants' position would be an extension of the zoning ordinance in derogation of the common-law, because under their interpretation every householder desiring to keep an unusual pet (we are aware of monkeys, skunks, white rats, snakes and iguanas) would first have to determine if such pets are usually and customarily kept in his neighborhood and, perhaps, other neighborhoods. Clearly this would be in derogation of every property owner's right to use his property in a lawful manner... .

The clear intent of CZC § 21-5.2(a) and (b) is in fact to allow the keeping of an animal which may be classified as

livestock in a residential district but only in accordance with the 'provisions relating to accessory uses.' CZC § 21-5.2(a)(1) is not an absolute prohibition of all livestock in all residential districts. Rather, the keeping of an animal normally considered to be livestock can be permitted if its maintenance comes within the provisions of CZC § 21-1.10. It follows then, as in this case, that it is the nature of the use that is determinative not the nature of the animal.

[Citations omitted. In oral argument, appellants conceded that geese may be allowed as pets in residential neighborhoods. *See* n.8, p. 855.]

(n92)Footnote 589. *See, e.g., Commonwealth v. Proctor, 246 N.E.2d 454 (Mass. 1969); Berry v. Recorder's Court, 124 N. J. Law. 385, 11 A.2d 743 (1940)* (riding academy denied).

(n93)Footnote 590. 3 Julian Juergensmeyer & James Wadley, Zoning: The Law in Florida § 3-6.

See Hagenburger v. City of Los Angeles, 124 P.2d 345 (Cal. 1942) (permitting raising of plants and flowers in a residential district that permitted use of any lot for "farming").

(n94)Footnote 591. *See Charlestown Twp. v. Fuguet, 366 A.2d 1386 (Pa. 1976)* where the court allowed a landowner to keep a horse and a pony in a garage despite not meeting minimum lot size requirements for agricultural use because the actions did not constitute "raising, maintenance, or breeding of livestock" within the meaning of the ordinance.

(n95)Footnote 592. *Id.*

(n96)Footnote 593. *See Codorus Twp. v. Rodgers, 492 A.2d 73 (Pa. 1985)* where the court described large lot zoning as part of "a nationwide legislative trend toward using zoning as one of the tools for the preservation of agricultural land." (at 76).

(n97)Footnote 594. Robert Coughlin & Keene, *The Protection of Farm Land: An Analysis of Various State and Local Approaches*, 33 Land Use Law & Zoning 270 (1981).

(n98)Footnote 595. *See Wilson v. County of McHenry, 416 N.E.2d 426 (Ill. App. 1981).*

(n99)Footnote 596. *See, e.g., Gisler v. County of Madera, 112 Cal. Rptr. 919 (1974)* (upholding a minimum 18 acre parcel size.): "While there is apparently no case directly passing upon exclusive agricultural zoning with a minimum 18-acre parcel size, most zoning ordinances provide for minimum lot sizes and they have been held valid."

See also Wilson v. County of McHenry, 416 N.E.2d 426 (Ill. App. 1981) (upholding a 160 acre minimum lot size); *Joyce v. City of Portland, 546 P.2d 1100 (Or. App. 1976).*

(n100)Footnote 597. *See, e.g., Lake County v. Cushman, 353 N.E.2d 399 (Ill. App. 1976); Meeker v. Board of County Comm'rs, 585 P.2d 1138 (Or. App. 1978),* where the court permitted the subdivision of an 82 acre parcel into smaller part-time farms on the ground that such development was actually more consistent with the policy of encouraging agricultural use and would more effectively insure the preservation of agricultural land than would the retention of the acreage in a single idle parcel; *Township of Marple v. Lynam, 30 A.2d 208 (Pa. 1943); Charlestown Twp. v. Fuguet, 366 A.2d 1376 (Pa. 1976).*

See also Eller v. Board of Adj. of London Britain Twp., 198 A.2d 863 (Pa. 1964) where the court held that a limitation of 69 acres for a mushroom farm in a residential and farming district was arbitrary and unreasonable. Evidence showed that a mushroom farm could be operated upon a much smaller tract of land even though such farms may give off unpleasant odors and present sanitation problems.

(n101)Footnote 598. *But see Eller v. Board of Adj. of London Britain Twp., 198 A.2d 863 (Pa. 1964)* where the

court held that an arbitrary 69 acre minimum lot size for a mushroom farm was unreasonable, largely because evidence showed that such an activity could be conducted on a much smaller tract of land.

(n102)Footnote 599. *See, e.g., Township of Marple v. Lynam, 30 A.2d 203 (Pa. 1943)* where the court held that since the township intended, by means of a zoning ordinance, to permit a land owner to use vacant land as a farm, that, by implication permitted the use of the land for such agricultural specialty as the size of the lot would permit. In this case, the land was used as a nursery.

See also Lake County v. Cushman, 40 Ill. App. 3d 1045, 353 N.E.2d 399 (1976) where the court held that, given the general exemption of agriculture from zoning ordinances found in state statutes, a county could not bar any and all agricultural uses where the lot in the agricultural zone was less than five acres.

(n103)Footnote 600. *See, e.g.*, John Keene, *A Review of Government Policies and Techniques for Keeping Farmers Farming*, 19 Nat. Resources J. 119, 131-32 (1979); Karl Geier, *Agricultural Districts and Zoning: A State-Local Approach to a National Problem, 8 Ecology L.Q. 655, 695 (1980).*

(n104)Footnote 601. *See, e.g., Sierra Club v. City of Hayward, 623 P.2d 180 (Cal. 1981).*

(n105)Footnote 602. Julian Juergensmeyer, *Farmland Preservation: A Vital Agricultural Law Issue for the 1980's, 21 Washburn L.J. 443 at 455-456 (1982).*

(n106)Footnote 603. All jurisdictions now have some form of provision in their laws by which the burden of real estate taxes for farm land is reduced. *See, e.g.*, Dunford, *A Survey of Property Tax Relief Programs for the Retention of Agricultural and Open Space, 15 Gonz. L. Rev. 675 (1980).*

Michigan and Wisconsin have developed so-called circuit breaker tax credits as part of their restrictive agreement plans. These credits essentially authorize an eligible owner of farmland to apply some or all of the property taxes as a tax credit against the farmer's state income tax.

See also Fla. Stat. § 193.461(3)(b); Minn. Stat. Ann. § 273.111; N.H. Rev. Stat. Ann. § 79-A.

K. Layne Morrill, *Politics, Purpose, and Principle in Taxation of Agricultural Property*, 30, Ariz. Att'y 14 (1994).

For further discussion, see Roger A. McEowen, *Recent Caselaw and Legislative Developments Concerning Special Use Valuation of Farm and Ranch Property, 3 Drake J. Agric. L. 119 (1998);* Dennis I. Belcher, *Estate Planning for Family Business Owners: Section 2032a, Section 6166, and Section 303,* SC75 ALI-ABA 1327 (1998); Terence Floyd Cuff, *Tax-Free Real Estate Transactions 25 J. Real Est. Tax'n. 363 (1998);*

For recent cases, see Denny v. Coweta County, 502 S.E.2d 297 (Ga. App. 1998) (tractor used for family garden and solely for the direct support of the family held to be exempt property); *Sartori v. Dept. of Revenue, 714 So. 2d 1136 (Fla. App. 1998)* (action to compel reclassification of pollution control equipment on dairy farm); *Palmer v. Board of Equalization, Eagle County 957 P.2d 348 (Colo. App. 1998)* (grazing of pleasure horses not agricultural use for tax purposes).

(n107)Footnote 604. 3 Julian Juergensmeyer & James Wadley, Zoning, The Law in Florida § 3-6 (1980).

(n108)Footnote 605. For further discussion, *see* Richard Dunford, *A Survey of Property Tax Relief Programs for the Retention of Agricultural and Open Space Land, 15 Gonz. L. Rev. 675 (1980);* Duncan, *Toward a Theory of Broad-based Planning for the Preservation of Agricultural Land*, 24 Nat. Resources J. 61 at 85 (1984).

(n109)Footnote 606. *Id.*

(n110)Footnote 607. *See* Barry Currier, *An Analysis of Differential Taxation as a Method of Maintaining Agricultural and Open Space Land Use*, U. Fla. L. Rev. 821 (1978); Note, *Differential Assessment For Agricultural Land Creates a Tax Haven for Speculators, 34 U. Fla. L. Rev. 848 (1982).*

See also S. Klein, *Agricultural Land Preservation*, National Conference of State Legislators, Denver, Co. (Jan. 1982) at 31.

A variety of methods have been used by which the agricultural value of land may be determined. The most widely-used method appears to be the income approach where property value is estimated by dividing the expected annual net income from the land by the rate of return that the owner should expect to receive on his investment. 2 Julian Juergensmeyer & James Wadley, Florida Land Use Restrictions, § 21.04 at p. 7 (1979). Typically, an average based on a period of years is used to determine yields, prices, expenses and interest rates which are used to compute both the net income and the capitalization rates.

Alternatively, the so-called market approach may be used in which the value of the land is determined by comparing the property in question with other similar properties that have been sold recently. 2 Julian Juergensmeyer & James Wadley, Florida Land Use Restrictions § 21.04 (1979); *See also* Shawn Rader, *The Use Standard for Ad Valorem Agricultural Classification of Property and F.S. § 193.461(4), 60 FLA. B. J. 27 (Jan. 1986).*

A third method sometimes used is the cost approach whereby the classified use value of the land is determined in reference to replacement costs. Note, *Differential Assessment for Agricultural Land Creates a Tax Haven for Speculators, 34 Fla. L. Rev. 848 at n.14 (1982).*

(n111)Footnote 608. For a good discussion of the construction problem as it relates to the Florida statute, *see* Shawn Rader, *The Use Standard for Ad Valorem Classification of Property and F.S. § 193.461(4), 60 Fla. B.J. 27 (1986).*

(n112)Footnote 609. John Keene, *Agricultural Land Preservation: Legal and Constitutional Issues, 15 Gonz. L. Rev. 621 at 661-662 (1980).*

(n113)Footnote 610. *See, e.g.*, Haw. Rev. Stat. § 246.12 (rollback tax up to ten years, plus ten percent per annum penalty); Minn. Stat. Ann. § 273.111(9) (three-year rollback).

(n114)Footnote 611. Some jurisdictions recapture the tax savings simply by levying a "conveyance tax" at the time the land is converted or transferred for non-agricultural uses. *See, e.g.*, N.H. Rev. Stat. Ann. § 79-a:7 (1981). Other jurisdictions have dealt with the recapture issue through the imposition of a high capital gains tax. *See, e.g.*, Vt. Stat. Ann. tit. 32, §§ 10001 to 10010 (1981).

(n115)Footnote 612. *See* Julian Juergensmeyer, *Farmland Preservation: A Vital Agricultural Law Issue for the 1980's, 21 Washburn L.J. 443, 455 (1982).*

(n116)Footnote 613. For further discussion *see* Julian Juergensmeyer, *Farmland Preservation: A Vital Agricultural Law Issue for the 1980's, 21 Washburn L.J. 443 at 469-470 (1982). See also Sierra Club v. City of Hayward, 623 P.2d 180 (Cal. 1981).*

(n117)Footnote 614. *Board of County Comm'rs v. Smith, 857 P.2d 1386 (Kan. App. 1993).*

See generally Developments, Agriculture: 1996, 49 Tax Law 1006 (1996); Comment, *Weighing the Costs and Benefits of Property Tax Exemption: Nonprofit Organization Land Conservation, 49 Me. L. Rev. 399 (1997);* Harl, *Self-Employment Tax Issues Affecting Farmers and Ranchers, 87 J. Tax'n 45 (1997);* Harl, *AMT and Farmers: A Rejoinder, 75 Tax Notes 1470 (1997);* Harl, *Post-Death Cash Rent Leasing: One More Time, 75 Tax Notes 1671*

(1997); Harl, *The Family-Owned Business Exclusion: In Need of Repairs, 76 Tax Notes 1219 (1997).*

In *Farm Credit Servs. v. Arkansas, 76 F.3d 961 (8th Cir. 1996),* the court held that production credit associations (PCA's) were immune from state taxation as federal instrumentalities, as a result of such designation under the Federal Farm Credit Act. *12 U.S.C. § 2077.* The state had argued that notwithstanding that act, PCA's resembled private corporations because of their structure and the manner in which they functioned under the Farm Credit Act.

The court held that for PCA's to be subject to state taxation, Congress must enact a clear waiver of their exemption.

(n118)Footnote 615. Land banking generally involves the purchase of agricultural land by a governmental body or by a private trust. The land may then be kept in agricultural use without regard to pressures to develop the land to non-agricultural uses. This approach has been popular in Europe and Canada. *See* Young, *The Saskatchewan Land Bank, 40 Sask. L. Rev. 1 (1975).* It has been used in the United States primarily in the context of private trusts. *See* American Farmland Trust, Statement of Purpose (1980).

(n119)Footnote 616. These approaches seek to regulate development by controlling the availability of such needed services as electrical power and sewer services. For further discussion, *see* John Keene, *Agricultural Land Preservation: Legal and Constitutional Issues, 15 Gonz. L. Rev. 621 (1980).*

(n120)Footnote 617. *See* Julian Juergensmeyer, *Farmland Preservation: A Vital Agricultural Issue for the 1980's, 21 Washburn L.J. 443 at 459 (1982).* The landowner typically burdens the land in the form of a negative restriction giving up the right to use the property in a manner inconsistent with the easement. All other customary interests in the land are retained by the grantor. The result is to give the participating public or private agency a dominant tenement under the easement without requiring any affirmative act upon the parcel. Since the easements work as a conveyance of development rights, the negative restriction will generally bind all future owners of the land with respect to non-agricultural development of that parcel.

For further discussion, *see* Vivian Quinn, *Preserving Farmland with Conservation Easements,* 1992/*93 Ann. Surv. Am. L. 235 (1994). See also* mandated voter approval or land redesignation from agricultural use to other uses, as upheld in the case of *DeVita v. County of Napa, 889 P.2d 1019 (Cal. 1995).* For a discussion of Transferable Development Rights generally, see National Trust for Historic Preservation, *A Review of Transferable Development Rights (TDR) Programs in the United States,* SG040 ALI-ABA 409 (2001).

(n121)Footnote 618. *See* D. Merriam & A. Merriam, *Bibliography of the Transfer of Development Rights,* Council of Planning Librarians Exchange Bibliography No. 1338 (1977); Donald Carmichael, *Transferable Development Rights as a Basis for Land Use Control, 1 Fla. St. U. L. Rev. 35 (1974);* John Costonis, *The Chicago Plan: Incentive Zoning and the Preservation of Urban Landmarks, 85 Harv. L. Rev. 574 (1972);* John Costonis, *Development Rights Transfer: An Exploratory Essay, 83 YALE L.J. 75 (1973);* John Keene, *A Review of Governmental Policies and Techniques for Keeping Farmers Farming,* 19 Nat. Resources J. 119 (1979).

Four commonly described methods for TDR plans are generally identified as (1) the New York Plan which allows transfers of unused development rights only to adjacent parcels; (2) the Chicago plan which allows transfers of unused rights within a designated district; (3) the Puerto Rico and New Jersey plans which permit transfers of rights from non-urban areas to urban areas and (4) the so-called uniform plan which allows the assignment of rights to all lands in the jurisdiction.

For a discussion of Transferable Development Rights generally, see National Trust for Historic Preservation, *A Review of Transferable Development Rights (TDR) Programs in the United States,* SG040 ALI-ABA 409 (2001). See also J. Nolon, *Local Land Use Controls that Achieve Smart Growth, 31 ELR 11025 (2001);* W. Flemming & J. Rivera, *Transfer of Development Rights as an Option for Land Preservation in a Historic New Mexico Community: La Cienega Valley, Santa Fe County, New Mexico,* 41 Nat. Resources J. 427 (2001).

(n122)Footnote 619. For an interesting judicial discussion of the TDR concept, *see Penn. Cent. Transp. Co. v. City of New York, 438 U.S. 104 (1978).*

(n123)Footnote 620. S. Klein, *Agricultural Land Preservation*, National Conference of State Legislatures (Denver, Co. Jan. 1982) at p. 11.

(n124)Footnote 621. National Agricultural Lands Study, Final Report (1981) at 63-66. *See also* Randall Hanna, "*Right To Farm" Statutes--The Newest Tool in Agricultural Land Preservation, 10 Fla. St. U. L. Rev. 416 at 419. See also Louthan v. King County, 617 P.2d 977 (Wash. 1980).*

(n125)Footnote 622. John J. Costonis, *Development Rights Transfer: An Exploratory Essay, 83 Yale L.J. 75 at 76 (1973).*

(n126)Footnote 623. Charles Roe, *Innovative Techniques to Preserve Rural Land Resources*, 5 Environmental Affairs 419 at 428 (1976).

(n127)Footnote 624. E. Mark Lapping, Robert Bevins & Paul Hurbes, *Differential Assessment and Other Techniques to Preserve Missouri's Farmland, 42 Mo. L. Rev. 369 at 390 (1977).*

(n128)Footnote 625. A notable variation of this approach is Zoning by Special Assessment Financed Eminent Domain (ZSAFED). According to this approach, because the police power of the jurisdiction is exercised to an excessive degree, compensation must be paid to the restricted landowner even though in the traditional sense the power of eminent domain has not been used. Money for the payments comes from assessments levied on those who benefit from the regulation. For a detailed discussion of how this approach works, *see* Donald Hagman, *Zoning by Special Assessment Financed Eminent Domain (ZSAFED), 28 U. Fla. L. Rev. 655 (1976);* Julian Juergensmeyer, *Farmland Preservation: A vital Agricultural Law Issue for the 1980's, 21 Washburn L.J. 443 at 460-461 (1982). See also Kansas City v. Kindle, 446 S.W.2d 807 (Mo. 1969).*

(n129)Footnote 626. Myrl Duncan, *Toward a Theory of Broad-based Planning for the Preservation of Agricultural Land*, 24 *Nat. Resources J.* 62 at 66 (1984).

(n130)Footnote 627. For further discussion, *see* ch. 50, this treatise.

(n131)Footnote 628. Currently, it must be recognized that agricultural consumption of water is far and away the single largest use of water. The U.S. Water Resources Council has estimated that of the 106 billion gallons of water that are consumed each day in this country, agriculture uses 87.7 billion. In contrast, manufacturing requires 8.2 billion, power generation 1.4 billion, and domestic use 7.3 billion.

(n132)Footnote 629. For example, it has been estimated that the annual soil loss by way of sheet and rill erosion is two billion tons per year on the 413 million acres we designate as cropland. *See generally* R. Neil Sampson, Farmland or Wasteland: A Time to Choose 110-152 (1981). Although technically most soil that has been eroded is eventually deposited on another site, qualitative changes occur on both the eroded lands and recipient lands which may affect productivity on both sites. It has been discovered that there are places where the entire topsoil layer has been lost either through use or erosion in only 50 to 100 years of cultivation. *Id.* at 110-152. *See also* Frederick Swader, *Soil Productivity and the Future of American Agriculture, in* The Future of American Agriculture as a Strategic Resource 79-115 (Sandra Batie and Robert Healy, eds., 1980). USDA estimated that if current levels of erosion continue for the next 50 years, erosion would cause a reduction in the production capacity of the cropland of the nation equivalent to the loss of 23 million acres or eight percent of the total land base used for agriculture. It has also been suggested that wind erosion alone in the ten Great Plains States would cause a loss of productivity equivalent to the loss of another 62 million acres over the next 50 years. This loss in productivity is equivalent to a loss of between 50 and 75 million metric tons of grain, or approximately half the total exported from the United States in 1980. *See R. Sampson 126-131, supra.*

(n133)Footnote 630. *See, e.g.*, Kan. Stat. Ann. § 2-2002:

To conserve the natural resources of the state, and to prevent the injurious effects of dust storms, it is hereby made the duty of the owner of real property in this state to prevent dust, plant or weed blowing therefrom, as nearly as that can be done, by planting of perennial grasses, shrubs, trees, annual or biennial crops, or by cultivation at such times and in such manner as will prevent or minimize erosion of the soil and dust, plant or weed blowing therefrom.

(n134)Footnote 631. *See, e.g., Woodbury Soil Conserv. Dist. v. Ortner, 279 N.W.2d 276 (Iowa 1979).*

(n135)Footnote 632. One such pressure has been the floating of the U.S. dollar during the 1970s which made our agricultural production attractive abroad. *See, e.g.*, Philip Raup, *Competition for Land and the Future of American Agriculture, in* The Future of American Agriculture as a Strategic Resource 41-77 at 42-43 (Sandra Batie & Robert Healy, eds., 1980). *See also Who Will Eventually Own America?*, Town & Country 95-96 at 96 (June 1983). The result of the remarkable expansion in export demand during the 1970s stimulated farmers to plant "fence row to fence row." The pressure to generate a substantial exportable surplus, not only to meet world food needs but to assist with our own balance of trade problems, persists and is likely to increase as future demands for food expand and with the current market situation, the only real price flexibility for farmers is likely to be in the export marketplace.

(n136)Footnote 633. *See* Bickers, *Getting Closer: No Supports for Sodbusters*, Progressive Farmer 11 (Oct. 1983); Legislation which prohibits the payment of certain agricultural incentives to individuals who raise agricultural commodities on specific highly erodible lands -- called sodbusters -- and in wetlands -- called swamp busters was included in the Food Security Act of 1985, Pub. L. No. 99-198, *99 Stat. 3556* (codified as amended in scattered sections of 7, 12, & 16 U.S.C.). For a further discussion of the soil erosion problem, see James Arts & William Church, *Soil Erosion -- The Next Crisis? 1982 Wis. L. Rev. 535 (1982);* Sandra Batie, Soil Erosion: Crisis in America's Croplands? (1983).

(n137)Footnote 634. R. Neil Samson, Farmland or Waste Land: A Time to Choose at 120-122 (1981).

It has been suggested that one reason for this is the "impermanence syndrome" which results from the pressure generated by urban interests to convert the land to a non-agricultural use. Farmers may be induced to slow down their investments on the land as a result of feelings that the land will soon be lost to agricultural use and that it is therefore useless to invest in soil conservation practices that will soon be nullified by the impending urbanization. It has also been suggested that farmers in the urbanizing areas may already be farming poor soils due to the fact that urban growth has taken the better soils already and thereby pushed farmers on to the more marginal lands. *Id.* This may be because:

> as erosion eats away the land's productivity, affecting the marginal acres first, it forces more reliance on the nation's prime farmlands. Yet these are lands burdened with a disproportionate share of the urbanization and related development, so the competition for them is growing from two directions. As good land become urbanized and unavailable for food production, it forces agriculture on to more marginal land, which signals a new round of soil erosion and new pressures on the land and water base.

R. Neil Samson, The Ethical Dimension of Farmland Protection in Farmland Food and The Future 89-98 at 94 (M. Schnepf ed.).

(n138)Footnote 635. An interesting exception is the national "Rails to Trails" program of converting abandoned railroad beds into biking and hiking trails. This program is the result of a 1983 amendment to National Trails System Act, Pub. L. 98-11, codified at *16 U.S.C. § 1247*(d) and provides that any railroad wishing to abandon operations along a particular route may enter into an agreement that allows state agencies, local agencies or private interests to manage the right-of-way as recreational trails. This agreement must be approved by the Interstate Commerce Commission. This statute was challenged and upheld in *Preseault v. Interstate Commerce Comm'n, 110 S. Ct. 914 (1990).*

In *King County v. Central Puget Sound Growth Management Hearings Board, 14 P. 3d 133 (Wash. 2000)* the court dealt with a proposal to designate athletic fields within an area designated as agriculture. The Board granted the request and this was upheld on appeal to the Superior Court. The Supreme Court reversed because the proposal was inconsistent with the Growth Management Plan in that the areas designated did not have poor soil nor was otherwise unsuitable for agricultural purposes.

For further discussion, see Centner, Terrence J. *Tort Liability for Sports and Recreational Activities: Expanding Statutory Immunities for Protected Classes and Activities, 26 J. Legis. 1 (2000).*

In *Utsey v Coos County, 32 P.3d 933 (Or. App. 2001),* the court considered the issuance of a permit to operate off-highway vehicle trails and racetrack on land zoned for exclusive agricultural use to be a nonjusticiable controversy.

(n139)Footnote 636. At least two model acts have been proposed. In 1965, The Council of State Governments developed one proposal which encouraged landowners to open their lands in exchange for a limitation on the owner's liability toward persons who enter as a result. *See* Council of State Governments, *Public Recreation on Private Lands: Limitations on Liability*, 24 Suggested State Legislation 150 (1965). In 1979, the National Association of Conservation Districts commissioned a study of landowner liability and trespass laws which resulted in an updated model act. *See* William L. Church, Report on Private Lands and Public Recreation (1979). The 1979 proposal also limits liability for harm to recreational entrants but tends to define land and recreational use broader than the 1965 act and generally absolves the landowner of liability where the entrant is on the land without express or implied consent. Indeed, the acts consider presence on the land without further explanation to be prima facie evidence that the entrant is there for recreational purposes. For a further discussion of these model acts, *see* John Becker, *Landowner or Occupier Liability for Personal Injuries and Recreational Use Statutes: How Effective is the Protection?, 24 Ind. L. Rev. 1587 (1991).*

For further discussion, *see* Richard Krohn, *Recreational Use of Agricultural Lands*, 23 Colo Law. 529 (Mar. 1994); James DeAno, *Governmental Immunity for Recreational Injuries, 88 ILL. B.J. 28 (Jan. 1994);* Cathy Hanson & Steve Duerr, *Recreational Injuries and Inherent Risks: Wyoming's Recreation Safety Act, 28 Land & Water L. R. 149 (1994);* Catherine Decker, *In Re Banning: The Hawaii Supreme Court Keeps Hawaiian Beaches Accessible, 1 Ocean & Coastal L.J. 97 (1994);* Karen Vieira, *'Fore!' May be just Par for the Course* (Comment), *4 Seton Hall J. Sport L. 181 (1994).*

(n140)Footnote 637. Included among the states which have recreational use statutes are Alabama, Arkansas, California, Colorado, Delaware, Georgia, Hawaii, Idaho, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maine, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, Montana, Nebraska, Nevada, New Hampshire, New Jersey, North Dakota, Ohio, Oklahoma, Oregon, Rhode Island, South Carolina, South Dakota, Tennessee, Texas, Utah, Washington, West Virginia, Wisconsin and Wyoming. North Carolina repealed its statute because of concerns that it might be unconstitutional. *See* B. Van Der Smissen, Recreational User Statutes (1987). *See* Session Laws 1980, C. 830, § 1.

See, e.g., Cal. Civ. Code § 846; Kan. Stat. Ann. § 58-3201 *et seq.*; Minn. Stat. Ann. §§ 87.01-87.03; Pa. Stat. Ann. tit. 68, §§ 477-1-477-8.

Note, Jeffrey C. Kastenband, *Conway v. Town of Wilton: Statutory Construction, Stare Decisis, Public Policy in Connecticut's Recreational Use Statute, 30 Conn. L. Rev. 1091 (1998);* Paul F. Clark, *Into the Wild: A Review of the Recreational Use Statute*, 70-Aug N.Y. ST. B. J. 22 (1998).

(n141)Footnote 638. *Roland v. Christian, 443 P.2d 561 (Cal. 1968).*

(n142)Footnote 639. *Id.*; *443 P.2d at 568.*

(n143)Footnote 640. *See, e.g.,*

(n144)Footnote 641. *See, e.g., Peterson v. Balach, 199 N.W.2d 639 (Minn. 1972).*

(n145)Footnote 642. *Jones v. Hansen, 254 Kan. 499 (1993).*

(n146)Footnote 643. Kan. Stat. Ann. § 58-3201.

(n147)Footnote 644. Kan. Stat. Ann. § 58-3204(b).

(n148)Footnote 645. *Id.*

(n149)Footnote 646. *Id.* at § 3206(a).

(n150)Footnote 647. *Id.*

(n151)Footnote 648. Kan. Stat. Ann. § 58-3202(a).

Note, Jeffrey C. Kastenband, *Conway v. Town of Wilton: Statutory Construction, Stare Decisis, Public Policy in Connecticut's Recreational Use Statute, 30 Conn. L. Rev. 1091 (1998);* Paul F. Clark, *Into the Wild: A Review of the Recreational Use Statute,* 70-Aug N.Y. ST. B. J. 22 (1998).

Recent cases include: United States v. 194.08 Acres of Land, More or Less, Situated in St. Martin Parish, State of Louisiana, 135 F.3d 1025 (5th Cir. 1998) (held that deer hunting servitude was within interest condemned by United States government for floodway system); *McCarthy v. New York State Thruway Authority, 675 N.Y.S.2d 254 (N.Y. App. 1998)* (Whether immunity for personal injury from fall from a sea wall was provided by recreational use statute. The victim in the case was assisting an individual who was fishing, which was a listed activity); *Craig v. Sepulvado, 709 So. 2d 229 (La. App. 1998)* (Injured hunter's father filed action against landowner. Landowner not entitled to recreational use immunity where landowner allowed grandchildren to use land for hunting but no evidence that she intended public to use her land for hunting. The court held the landowner was not strictly liable to hunter to whom she had given permission to hunt on the land nor was there any breach of duty to a young hunter who was shot while hunting on land without supervision or training in use of firearms); *Jenkins v. Arkansas Power & Light Co. 140 F.3d 1161 (8th Cir. 1998)* (Recreational use statute applied to lake owned by utility. Swimmer was severely injured when dove into submerged island in utility's reservoir that was open to the public. The court held that failure to mark submerged island was not malicious conduct given obvious danger associated with diving into water without first testing its depth. Shallow nature of water was not ultra-hazardous condition. Failure to warn was at most negligence).

See *Davis v. State, 6 P. 3d 1191 (Wash. 2000)* where a motorcyclist was injured when his motorcycle overturned after reaching a steep drop-off on sand dunes at a state-owned recreation area. The court held that the plaintiff failed to establish that the dune was not an "artificial condition" or that the state had actual knowledge of the injury causing condition sufficient to trigger an exception to state immunity. The court did find that there was a factual issue that needed to be resolved regarding whether the condition was a latent defect for purposes of the immunity exception.

For further discussion, see Centner, Terrence J. *Tort Liability for Sports and Recreational Activities: Expanding Statutory Immunities for Protected Classes and Activities, 26 J. Legis. 1 (2000).*

(n152)Footnote 649. Kan. Stat. Ann. § 58-32-1 *et seq.* expressly applies to "agricultural and non-agricultural land."

(n153)Footnote 650. *See Tijerina v. Cornelius Christian Church, 539 P.2d 634 (Or. 1975),* construing Or. Rev. Stat. § 105.655. There, an action was brought to recover for injuries suffered while playing baseball on the church's land. The church claimed the land was "agricultural land" for purposes of the statute but the court construed the statute narrowly and denied immunity under the statute to the church.

(n154)Footnote 651. *See, e.g., Pensacola v. Stam, 448 So. 2d 39 (Fla. App. 1986); Hovert v. City of Bagley, 325*

N.W.2d 813 (Minn. 1982), holding that the purpose of the Minnesota statute was to encourage the use of private land for public recreational purposes and therefore the legislature did not intend to include public land within the scope of the statute.

Note, Jeffrey C. Kastenband, *Conway v. Town of Wilton: Statutory Construction, Stare Decisis, Public Policy in Connecticut's Recreational Use Statute, 30 Conn. L. Rev. 1091 (1998).* (The Conway case involved the application of statute to publicly owned (municipal) land. The case reversed a four year old precedent to hold that public lands were not covered by statute. The rationale for the court's decision was a perceived legislative intent to the contrary).

(n155)Footnote 652. *See, e.g., Fisher v. United States, 534 F. Supp. 514 (D. Mont. 1982),* allowing the federal government to claim immunity under the statute for injuries suffered on public land; *Hubbard v. Brown, 785 P.2d 1183 (Cal. 1990),* holding that a holder of a federal grazing permit was protected under the statute against injuries suffered by a recreational user on the federal land grazed under the permit.

Miller v. United States, 442 F. Supp. 555 (N.D. Ill. 1976); Gonzales v. Board of Shawnee County Comm'rs, 799 P.2d 491 (Kan. 1990); Pennsylvania v. Auresto, 511 A.2d 815 (Pa. 1986).

(n156)Footnote 653. *See, e.g., Colvin v. Southern Cal. Edison Co., 240 Cal. Rptr. 142 (1987).* Act applies only to land that is intended or suitable for recreational use; *Ratcliff v. Town of Mandeville, 502 So. 2d 566 (La. 1987).* Statute applies only to underdeveloped, nonresidential, and rural and semi-rural land; *Wymer v. Holmes, 412 N.W.2d 213 (Mich. 1987).* Statute applies only to large, open or vacant tracts which are in a relatively natural state; *Harrison v. Middlesex Water Co., 403 A.2d 910 (N.J. 1979).* Statute does not apply to residential or populated neighborhoods.

(n157)Footnote 654. Kan. Stat. Ann. § 58-3202(c). This provision approximates the definition found in the 1965 proposed Model Act. *See* Council of State Governments, *Public Recreation on Private Lands: Limitations on Liability,* 24 Suggested State Legislation 150 at § 2 (1965).

McCarthy v. New York State Thruway Authority, 675 N.Y.S.2d 254 (N.Y. App. 1998) (Extending immunity for personal injury to fall from a sea wall was provided by recreational use statute. The victim in the case was assisting an individual who was fishing, which was a listed activity); *Craig v. Sepulvado, 709 So. 2d 229 (La. App. 1998)* (Injured hunter's father filed action against landowner. Landowner not entitled to recreational use immunity where landowner allowed grandchildren to use land for hunting but no evidence that she intended public to use her land for hunting. The court held the landowner was not strictly liable to hunter to whom she had given permission to hunt on the land nor was there any breach of duty to a young hunter who was shot while hunting on land without supervision or training in use of firearms); *Jenkins v. Arkansas Power & Light Co. 140 F.3d 1161 (8th Cir. 1998)* (Recreational use statute applied to lake owned by utility. Swimmer was severely injured when dove into submerged island in utility's reservoir that was open to the public. The court held that failure to mark submerged island was not malicious conduct given obvious danger associated with diving into water without first testing its depth. Shallow nature of water was not ultra-hazardous condition. Failure to warn was at most negligence).

(n158)Footnote 655. *Hubbard v. Brown, 785 P.2d 1183 (Cal. 1990).*

See Davis v. State, 6 P. 3d 1191 (Wash. 2000) where a motorcyclist was injured when his motorcycle overturned after reaching a steep drop-off on sand dunes at a state-owned recreation area.

For further discussion, see Centner, Terrence J. *Tort Liability for Sports and Recreational Activities: Expanding Statutory Immunities for Protected Classes and Activities, 26 J. Legis. 1 (2000).*

(n159)Footnote 656. *Fisher v. United States, 534 F. Supp. 514 (D. Mont. 1982).*

(n160)Footnote 657. *Fetherolf v. Ohio Dep't of Nat. Resources, 454 N.E.2d 564 (Ohio App. 1982).*

(n161)Footnote 658. *Ratcliff v. Mandeville, 502 So. 2d 566 (La. 1987).*

(n162)Footnote 659. *Rivera v. Philadelphia Theological Sem. of St. Charles Borromeo, Inc., 507 A.2d 1 (Pa. 1986).*

(n163)Footnote 660. *See Bolieu v. DeCecco, 310 A.2d 497 (N.J. 1973),* holding that although swimming is considered to be a recreational activity, the act applied only to swimming done in the true outdoors, not in a backyard pool.

(n164)Footnote 661. *Villanova v. American Fed'n of Musicians, 301 A.2d 467 (N.J. 1973).*

(n165)Footnote 662. *Gerkin v. Santa Clara Valley Water Dist., 157 Cal. Rptr. 612 (1979).*

(n166)Footnote 663. *Smith v. Southern Pac. Transp. Co., 467 So. 2d 70 (La. 1985).*

See also Harrison v. Middlesex Water Co., 403 A.2d 910 (N.J. 1979), holding that an injury suffered as a result of attempting to rescue someone who had fallen through the ice on a pond did not constitute recreational use.

(n167)Footnote 664. *See Friedman v. Grand Cent. Sanitation, Inc., 571 A.2d 373 (Pa. 1990)* where the entrant was a hunter who had inadvertently wandered onto the premises of the defendant and was overcome by fumes from a sanitation landfill.

(n168)Footnote 665. *Id.*

In *Fisher v. United States, 534 F. Supp. 514 (Mont. 1982)* the court noted that:

> [t]he only purpose of the recreational use statue is to encourage landowners to make their lands freely available to the public by limiting the landowner's tort liability. While the general purpose of a law may not control the specific unambiguous language of it, policy does give guidance in cases where interpretation is needed... . In this case I think the policy of the law is served and the words of it are not violated if it be held that the statute is applicable in any case where the entry is made for what could reasonably be regarded by the general public as a recreational purpose regardless of some different purpose in the mind of the particular user.

(n169)Footnote 666. *See, e.g.,* Kan. Stat. Ann. § 58-3204:

[A]n owner of land who either directly or indirectly invites or permits without charge any person to use such property for recreational purposes does not thereby: (a) Extend any assurance that the premises are safe for any purpose. (b) Confer upon such person the legal status of an invitee or licensee to whom a duty of care is owed. (c) Assume responsibility for any injury to person or property caused by an act o[r] (sic) omission of such persons.

McCarthy v. New York State Thruway Authority, 675 N.Y.S.2d 254 (N.Y. App. 1998) (Extending immunity for personal injury to fall from a sea wall was provided by recreational use statute. The victim in the case was assisting an individual who was fishing, which was a listed activity); *Craig v. Sepulvado, 709 So. 2d 229 (La. App. 1998)* (Injured hunter's father filed action against landowner. Landowner not entitled to recreational use immunity where landowner allowed grandchildren to use land for hunting but no evidence that she intended public to use her land for hunting. The court held the landowner was not strictly liable to hunter to whom she had given permission to hunt on the land nor was there any breach of duty to a young hunter who was shot while hunting on land without supervision or training in use of firearms).

(n170)Footnote 667. *See, e.g.,* Kan. Stat. Ann. § 58-3206: "Nothing in this act limits in any way any liability which

otherwise exists: (a) For willful or malicious failure to guard or warn against a dangerous condition, use, structure, or activity."

See also Hogg v. Clatsop County, 610 P.2d 1248 (Or. App. 1980), holding the County liable for injuries caused as a result of diving into shallow water and hitting submerged logs and debris despite a sign in the area warning people not to dive. In this case, the County had refused to remove known submerged hazards.

See also Gard v. United States, 594 F.2d 1230 (9th Cir. 1979) cert. denied, 444 U.S. 866, holding that the simple failure to post a warning sign and to fence or patrol an area may constitute willful and malicious failure to warn.

See also Mandel v. United States, 719 F.2d 963 (8th Cir. 1983), later app., 793 F.2d 964 (8th Cir. 1986).

But see Davis v. United States, 716 F.2d 418 (1983), holding that the "willful and malicious failure to warn" under the act was a higher standard than "willful and wanton" under normal tort law.

See: Craig v. Sepulvado, 709 So. 2d 229 (La. App. 1998) (Injured hunter's father filed action against landowner. Landowner not entitled to recreational use immunity where landowner allowed grandchildren to use land for hunting but no evidence that she intended public to use her land for hunting. The court held the landowner was not strictly liable to hunter to whom she had given permission to hunt on the land nor was there any breach of duty to a young hunter who was shot while hunting on land without supervision or training in use of firearms); *Jenkins v. Arkansas Power & Light Co. 140 F.3d 1161 (8th Cir. 1998)* (Recreational use statute applied to lake owned by utility. Swimmer was severely injured when dove into submerged island in utility's reservoir that was open to the public. The court held that failure to mark submerged island was not malicious conduct given obvious danger associated with diving into water without first testing its depth. Shallow nature of water was not ultra-hazardous condition. Failure to warn was at most negligence).

See Davis v. State, 6 P. 3d 1191 (Wash. 2000) where a motorcyclist was injured when his motorcycle overturned after reaching a steep drop-off on sand dunes at a state-owned recreation area. The court held that the plaintiff failed to establish that the dune was not an "artificial condition" or that the state had actual knowledge of the injury causing condition sufficient to trigger an exception to state immunity. The court did find that there was a factual issue that needed to be resolved regarding whether the condition was a latent defect for purposes of the immunity exception. In *Snilsberg v. Lake Washington Club, 614 N.W. 2d 738 (Minn. 2000),* the court found there was no duty on the part of the club to warn against the obvious risk of diving head-first into shallow water nor was there a special relation with the club's guests that would give rise to a duty to prevent guests from diving under those conditions. There were material issues yet to be resolved, however, regarding whether the caretaker at the club was negligent in serving alcoholic beverages to under-age guests and then failing to warn of dangers from diving off the dock.

For further discussion, see Centner, Terrence J. *Tort Liability for Sports and Recreational Activities: Expanding Statutory Immunities for Protected Classes and Activities, 26 J. Legis. 1 (2000).*

(n171)Footnote 668. *See* William L. Church, Report on Private Lands and Public Recreation (1979). *See also* note 463, *supra*.

(n172)Footnote 669. *But see* Miss. Code Ann. § 89-2-7 which requires a landowner to publish annually a notice of availability of the land for public recreational purposes.

Rhode Island requires that the landowners notify the Director of the Department of Environmental Management that the lands are open. *See* R.I. Gen. Laws § 32-6-7.

In Ryan v. Harrison & Harrison Farms, Mont. LEXIS 192 (Mont. Aug. 3, 2001), the court denied the plaintiff access to a man-made lake on the farm. The farm had allowed the public to use the lake on a limited permission only basis . In

the past, plaintiff had received permission to fish on the lake but at some point that permission was withdrawn. The court held that the recreational use statute did not authorize passage across private land to access the lake.

In *Lonergan v. May, 53 S.W. 3d 122 (Mo. App. 2001),* the court upheld the application of the Recreational Use Act to extend immunity to an electric utility in an accident in which a passenger in a boat was killed on a lake owned by the utility.

In *Davis v. State, 30 P. 3d 460 (Wash. 2001),* the court found that the tire tracks leading to the top of a sand dune where motorcyclist was injured when he reached the drop-off did not alter the natural condition of the drop-off to such an extent as to transform it into an artificial state within the immunity provisions of the recreational use statute.

In *Waters v. Pertzborn, 627 N.W. 2d 497 (Wis. 2001)* the court refused to allow separate trials to separate juries on the issues of liability and damages where a child was injured when he sledded down a hill on landowner's property onto a street where a car struck him. The case was remanded for consideration as to whether the social guest exception to recreational immunity applied.

In *Cooper v. Cooper III, 786 So. 2d 240 (La. App. 2001),* the court granted summary judgment on the grounds that the recreational use statute barred recovery where an individual was injured while helping others erect a deer hunting stand and the stand fell on him and injured him.

(n173)Footnote 670. *See, e.g.*, Kan. Stat. Ann. § 58-3204(a).

(n174)Footnote 671. *571 A.2d 373 (Pa. 1990).*

(n175)Footnote 672. *388 N.E.2d 932 (Ill. App. 1979).*

(n176)Footnote 673. *Gibson v. Keith, 492 A.2d 241,* (Del. Super. Ct. 1985).

(n177)Footnote 674. *Smith v. Dosier, 29 Pa. D. & C. 3d 660 (Pa. 1984).*

(n178)Footnote 675. *See Heins v. Webster County, 220 Neb. 750, 552 N.W.2d 51 (1996).*

See also Hannah, *Uncertainty About the Premises Liability of Illinois Farmers, 21 S. Ill. U. L.J. 61 (1996).*

For further discussion, see Centner, T, *Anti-Nuisance Legislation: Can the Derogation of Common-Law Nuisance be a Taking? 30 Envtl L. Rep 10254 (2000);* Lauck, J., *After Deregulation: Constructing Agricultural Policy in the Age of "Freedom to Farm Act." 5 Drake J. Agric.L. 3 (2000);* Redick, Thomas and Bernstein, C. *Nuisance Law and the Prevention of "Genetic Pollution:" Declining a Dinner Date with Damocles. 30 Envtl. L. Rep. 10328 (2000);* Head, Thomas R. III., *Local Regulations of Animal Feeding Operations: Concerns, Limits and Options for the Southeastern States, 6 Envtl. Law 503 (2000);* Richardson, Jesse J., and Feishans, Theodore A. *Nuisance Revisited after Buchanan and Borman 5 Drake J. Agric. L. 121 (2000).*

(n179)Footnote 676. *See, e.g.*, Kan. Stat. Ann. § 58-3206(b).

(n180)Footnote 677. *Livingston v. Pennsylvania Power & Light Co., 609 F. Supp. 643 (E.D. Pa. 1985),* holding that a one time easement fee to provide lot owners in a development with access to a lake was a charge.

(n181)Footnote 678. *Jones v. United States, 693 F.2d 1299 (9th Cir. 1983).*

(n182)Footnote 679. *Moss v. Department of Nat. Resources, 404 N.E.2d 742 (Ohio 1980).*

(n183)Footnote 680. *Zachery v. Crystal Cave Co., 571 A.2d 464 (Pa. 1990).*

(n184)Footnote 681. *Ducy v. United States, 713 F.2d 504 (9th Cir. 1983).*

(n185)Footnote 682. *216 S.E.2d 880 (W. Va. 1975).*

(n186)Footnote 683. *Huth v. Ohio Dep't of Nat. Resources, 413 N.E.2d 1201 (Ohio 1980). But see Hogue v. Stone Mtn. Mem. Ass'n, 358 S.E.2d 852 (Ga. 1987).*

(n187)Footnote 684. *See, e.g.*, Kan. Stat. Ann. § 58-4206(b).

(n188)Footnote 685. For further discussion, *see* Huffman, *Can Farmers and Hunters Coexist: Fee Hunting and Other Alternatives*, 6 Agricultural Law Update 4 (Oct. 1988).

(n189)Footnote 686. In *West Chester Township Zoning v. Fromm, 762 N.E.2d 400 (Ohio App. 2001)* the court upheld the conviction of a homeowner regarding a fence that was erected in violation of the zoning ordinance. The landowner's argument was that the fence restrictions did not have any meaningful relation to health, safety and moral concerns.

(n190)Footnote 687. Where the true property boundary location is uncertain because of conflicting surveys, a different principle comes into play. It is well established that the boundaries and markers established by the first survey of the land control in case there is a conflict with a subsequent survey. This is the case irrespective of any errors made in the original survey. In the case of a resurvey, the issue is not where an entirely accurate survey would locate the boundary lines but where the original survey in fact located them. The object is to locate the lost lines, not to dispute the location of them. This rule has been held to apply to both government and private surveys but is often overlooked by the subsequent surveyors who take the view that the line should be located with the most accurate survey possible. The theory behind the rule is that it is necessary to protect the rights of parties who have purchased, occupied and enjoyed the land in reliance upon the original survey. Where the reason for the rule does not exist, there is no need to apply it and in such a case, if the original survey is in error, it may be corrected with an accurate new survey. In a boundary dispute involving a disagreement between surveys, it is necessary to consider how the use of the land has been affected by the location of the boundary by the original survey. If the fence was erected along the old, but erroneous survey line, and the parties have actively farmed to the fence line, the fence should not be moved. If the fence does not follow either the original survey nor the later survey, the true boundary line may need to be designated. Whether the fence will need to be moved as a result will depend on the application of the other principles and doctrines discussed above.

See Hovendick v. Ruby, 10 P.3d 1119 (Wyo. 2000), where the court found that a mistaken belief that a fence constituted a boundary fence did not establish adverse possession, but merely a presumption of adverse possession. Issue of material fact to be resolved included whether the fence was actually a boundary fence or only a fence of convenience and whether the parties had entered into any oral agreements to divide the land. *See also* Hurst v. Baker, Ohio App. LEXIS 3872 (Ohio App., Aug. 22, 2000); *Heer v. Thola, 613 N.W. 2d 658 (Ia. 2000).* Adverse possession was allowed in *Cheatham v. Stokes, 760 So. 2d. 795 (Miss. 2000)* where occupation beyond an old fence line to a new fence was considered adverse.

See also Hargis v. H.G. Graham Farms, Inc., Ark. App. LEXIS 620 (Ark. App. 2001) involving old fence row as boundary.

(n191)Footnote 688. *See generally* Percy Bordwell, Disseisin and Adverse Possession, *33 Yale L.J. 1 (1923);* Percy Bordwell, *Seisin and Disseisin, 34 Harv. L. Rev. 592 (1921).*

(n192)Footnote 689. *See, e.g., McQueen v. Black, 168 Mich. App. 641, 425 N.W.2d 203 (1988).* For such a memorandum to be enforceable, the boundary must be uncertain or in dispute. Even though such agreements, called parol agreements, are not regulated by the statutes regulating conveyances, it is a good practice for the memorandum to accurately describe the land to be affected and be signed by the parties. The agreement should then be followed by

occupation to the line established by the agreement. It might well be that such an agreement has been reached sometime in the past between the adjoining landowners but was never reduced to writing nor recorded. The boundary may nevertheless be relocated accordingly, provided the agreement can be proved.

See Garretson v. McMurry, Ark. App. LEXIS 366 (Ark. App. 2001), finding a boundary by acquiescence on the facts of the case.

See also Larson-Murphy v. Steiner, 15 P.3d 1205 (Mont. 2000) where the court held that a violation of fencing laws did not give rise to negligence *per se* and whether one owed liability to a motorist who was harmed as a result of striking a bull in the middle of the highway was affected by the fact that the accident occurred in an area designated as "open range." In *Morris v. Florida Power and Light Co., 753 So. 2d 153 (Fla. App. 2000)* the plaintiff was injured by cows owned by a tenant of the power company. The animals escaped because of a defective fence but it was not clear to the court whether the power company had retained any duty to maintain the fence under the terms of its agreement with the tenant. The initial petition for relief against the power company was dismissed with prejudice. This was reversed to permit an inquiry into the terms of the lease. In Blaylock v. Nash, Tenn. App. LEXIS 614 (Tenn. App. 2000), the court upheld a finding of no negligence on the part of a stockyard operator from whom the cow that caused the injury supposedly escaped. The court held that the lawsuit was not frivolous despite evidence that the plaintiff had been compensated by his insurance carrier for property damage to the car but had elected not to have the car repaired. The car was then traded in on a newer vehicle for the same value as received from the insurance carrier.

(n193)Footnote 690. *Compare Bailey v. Hagler, 575 So. 2d 679 (Fla. App. 1991),* with *Goff v. Lever, 566 So. 2d 1274 (Miss. 1990).* Here, as a result of a dispute, one party typically occupies to the fence line and the other party acquiesces in that occupation for the same period of time as is required for adverse possession. The result is that the fence is then considered to be the true boundary.

For further discussion, *see* David S. Steward, *Iowa Agricultural Fence Law: Good Fences Make Good Neighbors, 43 Drake L. Rev. 709 (Mar. 1995);* Craig R. Heidemann, *Fencing Laws in Missouri: Confusion, Conflict, Ambiguity and a Need for Change, 63 Mo. L. Rev. 537 (1998).*

(n194)Footnote 691. *539 N.W.2d 184 (Iowa 1995).*

(n195)Footnote 692. *921 P.2d 850 (Kan. App. 1996).*

(n196)Footnote 693. *920 P.2d 870 (Colo. App. 1996).*

(n197)Footnote 694. *924 P.2d 242 (Mont. 1996).*

(n198)Footnote 695. In some jurisdictions, local jurisdictions have had the option of electing to require animals to be fenced in or out.

See:

Idaho: Benewah County Cattleman's Ass'n v. Board of County Comm'rs of Benewah County, 668 P.2d 85 (Idaho 1983). (County ordinance imposing liability upheld.)

Kansas: Walborn v. Stockton, 10 Kan. App. 2d 597 (1985). (Statute authorizing local elections subsequently repealed.)

Utah: Bastain v. King, 661 P.2d 953 (1983). (Utah law places liability on the owners of trespassing livestock unless the county enacts a fence law.)

(n199)Footnote 696. *See Maguire v. Yanke, 590 P.2d 85 (Idaho 1979).* For further discussion of fence laws, *see* 1 Neil Harl, Agricultural Law, ch. 3.

(n200)Footnote 697. *See, e.g.*, Kan. Stat. Ann. § 29-101:

All domestic animals, other than cats and dogs, shall be enclosed with a fence sufficiently close, composed of posts and rails, posts and palings, posts and planks or palisades, posts and wire, rails alone, laid up in the manner commonly called a worm fence, or turf, with ditches on each side, of stone, or a hedge in existence on July 1, 1986, composed of either thorn or Osage orange.

For further discussion, see Leonard Carlman, *Wildlife-Private Property Damage Law -- Once Upon a Time in Wyoming There was Room for Millions of Cattle and Enough Habitat for Every Species of Game to Find Room*, 29 Land and Water L.Rev. 89 (1994); Craig R. Heidemann, *Fencing Laws in Missouri: Confusion, Conflict, Ambiguity and a Need for Change, 63 Mo. L. Rev. 537 (1998).*

See also Harlow v. Hayes, 991 S.W.2d 24 (Tex. App., 1998) (This case involved a suit by passenger in auto for collision with horse after the horse broke free from owner's fenced property. The court held that the jurisdiction's fencing requirements did not establish minimum standard for enclosures built to confine livestock).

See Duncalf v. Ritscher Farms, Inc., 627 N.W. 2d 906 (Ia. 2001), affirming, on appeal from the decision of the fence-viewers, the mutual obligation to maintain the fence although one landowner did not keep livestock on his property.

(n201)Footnote 698. *See, e.g.*, Or. Rev. Stat. § 607.007(2):

"Adequate fence" means a continuous barrier consisting of natural barriers, structures, masonry, rails, poles, planks, wire or the combination thereof, installed and maintained in a condition so as to form a continuous guard and defense against the ingress or egress of livestock into or from the lands enclosed by said fence. Such natural barriers shall include hedges, ditches, rivers, streams, ponds or lakes.

(n202)Footnote 699. *See, e.g.*, Kan. Stat. Ann. § 29-104:

Fences of the material and of the height and sufficiency aforesaid, and all brooks, rivers, creeks, ditches and constructions which shall be equivalent thereto ... shall be deemed legal and sufficient fences.

(n203)Footnote 700. *See, e.g.*, Kan. Stat. Ann. § 29-102:

All fences composed of posts and rails, posts and palings, posts and planks, or palisades, or of stone, or composed of posts and wires, or of those composed of turf, shall be at least four feet high. Those composed of rails, commonly called worm fence, shall be at least four and one-half feet high to the top of the rider, and shall be thoroughly staked and ridered, or if not staked and ridered shall have the corners locked with strong rails, stakes or posts. Those composed of stone shall be at least 18 inches wide at the bottom and 12 inches wide at the top. Those composed of turf shall be thoroughly staked and ridered, and shall have a ditch on the outside not less than two feet wide at the top and three feet deep. With respect to fences composed of rails or lumber, the bottom rail, board or plank shall not be more than two feet from the ground. All such fences shall be substantially built and sufficiently close to prevent domestic animals, other than cats and dogs from going through. All hedge fences shall be of such height and thickness as will be sufficient to enclose domestic animals other than cats and dogs.

See also Ky. Rev. Stat. Ann. § 256.010(i).

(n204)Footnote 701. *See, e.g.*, Kan. Stat. Ann. § 29-107.

See State v. Blom, 45 S.W. 3d 519 (Mo. App. 2001), conviction for misdemeanor count of animal abuse for knowingly failing to provide adequate control of defendant's cattle.

(n205)Footnote 702. *See* Kan. Stat. Ann. § 292-104.

(n206)Footnote 703. Fence viewers are often local or county governmental officials, such as the county commissioners of the particular county in which the fence is found. Alternatively, they may be private individuals selected by the parties.

See:

Illinois: Ill. Rev. Stat. ch. 54, § 9; Kan. Stat. Ann. § 29-201; (selected by the parties).

Kansas: Kan. Stat. Ann. § 29-201 (county commissioners)

(n207)Footnote 704. *See, e.g., Swanson v. Wolstenholm, 293 N.E.2d. 461 (Ill. App. 1973).*

(n208)Footnote 705. *See Wendt v. Latare, 200 N.W.2d 862 (Iowa 1972).*

(n209)Footnote 706. *See, e.g.*, Kan. Stat. Ann. § 29-401.

(n210)Footnote 707. *908 S.W.2d 338 (Ark. 1995).*

(n211)Footnote 708. *Animals*, § 49, 4 Am. Jur. 2D.

(n212)Footnote 709. *See, e.g.*, William Prosser, Handbook of Law of Torts 496 (4th ed. 1971).

(n213)Footnote 710. *See, e.g., Wendt v. Latare, 200 N.W.2d 862 (Iowa 1972).*

(n214)Footnote 711. *See* 1 Neil Harl, Agricultural Law, ch. 3.

(n215)Footnote 712. *See* Scott, *Range Cattle Industry: Its Effect on Western Land Law, 28 Mont. L. Rev. 115 (1967).*

(n216)Footnote 713. *See, e.g., Kelly v. Easton, 207 P. 129 at 130 (Idaho 1922):*

> The common-law rule that every man must confine his own cattle to his own land does not obtain in this state, and in *Strong v. Brown, 26 Idaho 1, 140 P 773,* it is held that under our statute, if a landowner fails to fence out cattle lawfully at large, he may not recover for loss caused by such cattle straying upon unenclosed land.

See also Larson-Murphy v. Steiner, 15 P.3d 1205 (Mont. 2000).

(n217)Footnote 714. *See, e.g., Lazarus v. Phelps, 152 U.S. 81 (1894),* holding that one who deliberately drives his livestock onto the lands of another and grazes them there without the permission of the landowner, is liable in damages for trespass.

(n218)Footnote 715. *See, e.g.: Hazelwood v. Mendenhall, 156 P. 696 (Kan 1916); Molton v. Young, 204 S.W.2d 636 (Tex. Civ. App. 1947).*

It has been held that the standard of negligence required is generally not "criminal negligence." *See Schwerdt v. Myers, 669 P.2d 1147 (Or. App. 1983).*

(n219)Footnote 716. *See, e.g.:* Kan. Stat. Ann. § 47-122; Wash. Rev. Code. § 16.13.010 *et seq.*

Craig R. Heidemann, Fencing Laws in Missouri: Confusion, Conflict, Ambiguity and a Need for Change, *63 Mo. L. Rev. 537 (1998).*

(n220)Footnote 717. Kan. Stat. Ann. § 47-301 (now repealed).

(n221)Footnote 718. Kan. Stat. Ann. § 47-104.

(n222)Footnote 719. Kan. Stat. Ann. § 47-201 *et seq.*

In *Watson v. Thomas, 646 So. 2d 84 (Ala. App. 1994),* the plaintiff sued for conversion for the sale of 26 head of cattle. The cattle had apparently strayed upon the land of the defendant who took them to auction at the direction of the investigator of the State of Alabama Department of Stockyards and Brands. The court held that the jury made a reasonable inference that the cattle belonged to the plaintiff and, therefore, were unlawfully converted by the defendant based on evidence that the defendant did not check with any neighbors to ascertain whether they were missing any cattle and defendant admitted that he had a feeling that the cattle belonged to the plaintiff.

See In the Matter of: A Partition Fence between Donald Howell and James Leas, 2000 Ohio App. LEXIS (Oh. App. Mar 29, 2000). There, the court required that before adjoining landowners can be compelled to construct a partition fence, the landowners must receive benefits exceeding their expenses from the construction and maintenance of the fence. A landowner cannot be compelled to construct such a fence if the cost of construction exceeds the value of the land before and after the installation of the fence. Here, there was credible evidence that the cost of the fence would be greater than the increase in the value of the land.

(n223)Footnote 720. *See, e.g.: Wilson v. Rule, 219 P.2d 690 (Kan. 1950); Overby v. Poteat, 332 S.W. 2d 197 (Tenn. 1960); State v. Dear, 638 P.2d 85 (Wash. 1981); Decker v. McSorley, 86 N.W. 554 (Wis. 1901).*

(n224)Footnote 721. *See, e.g.,* Va. Code Ann. § 55-317.

For a general discussion, see Craig R. Heidemann, *Fencing Laws in Missouri: Confusion, Conflict, Ambiguity and a Need for Change, 63 Mo. L. Rev. 537 (1998);* Caralyn Miller Ross, *Injuries to Animals,* 3 NY Jur. 2d Animals, §§ 132-144 (1998).

See also Harlow v. Hayes, 991 S.W.2d 24 (Tex. App. 1998) (This case involved a suit by passenger in auto for collision with horse after the horse broke free from owner's fenced property. The court held that the jurisdiction's fencing requirements did not establish minimum standard for enclosures built to confine livestock).

(n225)Footnote 722. *See, e.g.,* Kan. Stat. Ann. § 29-301.

(n226)Footnote 723. *See* N.D. Cent. Code, § .47-26-18; Okla. Stat. Ann. § 147; Ky. Rev. Stat. § 256.020.

(n227)Footnote 724. *See Griffith v. Carrothers, 119 P. 548 (Kan. 1911).*

(n228)Footnote 725. *See* Kan. Stat. Ann. § 29-305. (Providing that the court will ascertain what that share will be and that amount shall be a lien upon the other's land until it is paid).

(n229)Footnote 726. *See* Kan. Stat. Ann. § 29-201.

(n230)Footnote 727. *893 P.2d 372 (Nev. 1995).*

(n231)Footnote 728. For further discussion, see Craig R. Heidemann, *Fencing Laws in Missouri: Confusion, Conflict, Ambiguity and a Need for Change, 63 Mo. L. Rev. 537 (1998);* Caralyn Miller Ross, *Injuries to Animals,* 3 NY Jur. 2d Animals, §§ 132-144 (1998); Caralyn Miller Ross, *Injuries to Animals,* 3 NY Jur. 2d Animals, § 11 (1998); Caralyn Miller Ross, *Injuries to Animals,* 3 NY Jur. 2d Animals, § 160 (1998); Keith A. Cutler, *When Man's Best Friend Bites 54 J. Mo. B. 24 (1998).*

See also: Burnaman v. Louisiana Farm Bureau Ins. Co. 714 So. 2d 799 (La. App. 1998). In this case, a farrier brought suit against owner of horse for injuries sustained while providing services. The court held there was no unreasonable risk of harm sufficient to establish strict liability claim. The animal owner was held to owe no duty to inform farrier that one horse had been chasing another horse one or two weeks prior to the accident. In *Diaz v. Coyle, 953 P.2d 773 (Ore. App. 1998)* suit was brought against the owner of dog that killed livestock. When owner admitted liability, jury awarded damages which were doubled. The matter was appealed to determine whether award was compensatory or punitive. The court held the award to be compensatory. In *Domenghini v. Evans, 70 Cal. Rptr 2d. 917 (1998)* a rancher injured in a cattle roundup of his and other's cattle on a cattle ranch owned by his mother and grandmother brought suit against owner of the calf that caused the injury. The court held no liability because of assumption of risk.

(n232)Footnote 729. *Jivden v. Law, 461 S.W.2d 451 (W. Va. 1995).*

(n233)Footnote 730. *Animal Protect v. Friends of the Zoo, 891 S.W.2d 1777 (Mo. App. 1005).* In *Schreiner Farms, Inc. v. Smitch, 940 P.2d 274 (Wash. App. 1997),* the court held that an elk owner did not suffer a "taking" when the state adopted a law that made it unlawful to "import, hold, possess, propagate, offer for sale, sell, transfer or release elk." The court reasoned that the landowner could sell the elk out of state and could use his land for other uses.

(n234)Footnote 731. *898 S.W.2d 329 (Tex. App. 1994).*

(n235)Footnote 732. *643 N.E.2d 983 (Ind. App. 1994).*

(n236)Footnote 733. *889 S.W.2d 49 (Ky. App. 1994).*

(n237)Footnote 734. *643 N.E.2d 983 (Ind. App. 1994).*

(n238)Footnote 735. *461 S.W.2d 451 (W. Va. 1995).*

(n239)Footnote 736. *914 S.W.2d 90 (Tenn. App. 1995).*

(n240)Footnote 737. *533 N.W.2d 664 (Neb. 1995).* The court noted that jurisdictions were nearly evenly split on the issue and identified the following jurisdictions as being those that allow the use of the doctrine. Idaho: *O'Connor v. Block, 326 P.2d 386 (Id. 1958);* New York: *Loeffer v. Rogers, 523 N.Y.S.2d 660 (N.Y. 1988);* Oregon: *Watzig v. Tobin, 642 P.2d 651 (Or. 1982);* Washington: *Scanlan v. Smith, 404 P.2d 776 (Wash. 1965);* and Louisiana: *Anderson v. McCarty, 519 So. 2d 324 (La. 1988)* (noting that the court did not directly affirm the use of *res ipsa*, but rather suggested that the fact that animals are out raises a presumption of negligence). Jurisdictions not allowing *res ipsa* include Utah: *Vanderwater v. Hatch, 835 F.2d 239 (10th Cir. 1987)* (applying Utah law); Colorado: *Barnes v. Frank, 472 P.2d 745 (Colo. App. 1970);*Indiana: *Taylor Bros. v. Sork, 348 N.E.2d 42 (Ind. App. 1976);* Kansas:*Wilson v. Rule, 219 P.2d 690 (Kan. 1950)* and *Walborn v. Stockman, 706 P.2d 465 (Kan. App. 1985);* Mississippi: *Hughes v. W & S Constr. Co., 196 So. 2d 339 (Miss. 1967);* Ohio: *Reed v. Molnar, 423 N.E.2d 140 (Ohio 1981);* and Washington: *Brauner v. Peterson, 557 P.2d 359 (Wash. App. 1976)* (apparently contradicting *Scanlan*). *See also Schneider v. Strigert, 888 P.2d 1284 (Wash. App. 1995),* in which the court construed an ordinance that made it unlawful for dogs to be at large. The court held that a violation of the ordinance was evidence of negligence but would not constitute negligence *per se*.

In Colgazier v. Fisher, No A-95-858 (Neb. App. Nov. 5, 1996 unpublished) the court held that while a plaintiff need not plead the doctrine of *res ipsa loquitur* to utilize the doctrine, its availability depends on whether plaintiff can establish the elements of the doctrine. Thus, plaintiff must prove that the occurrence is one which would not, in the ordinary course of things, happen in the absence of negligence. Further, the plaintiff must prove that the instrumentality which produced the occurrence was under the exclusive control and management of the defendant. In this case, the animal owner could explain how the animals were out -- there was a short in the electric fence surrounding the area where the animals were kept. As a result, the doctrine was deemed not to apply.

In contrast, in Landkamer v. Sherbek, No. 3528-63-97 (Custer County Dist. Ct. May 2, 1997), the jury returned a verdict in excess of one million dollars against a rancher for the death of a passenger in an automobile that had collided with one of the rancher's steers. The theory of the case involved the application of the doctrine of *res ipsa loquitur*. Here, the farmer had constructed a very sound fence and could offer no explanation as to why the animals got out. The jury apparently felt that they could not have gotten out except for some negligence somewhere and applied the doctrine.

These cases create an interesting dilemma for the farmer or rancher. The more effective the steps taken by the landowner to keep the livestock confined, the more difficult it will be to explain why they are on the highway, which may actually assist the plaintiff in establishing the prerequisites to a *res ipsa* case. On the other hand, if the landowner does not take such steps, it is easier for the plaintiff to establish negligence. The bottom line is that either the animal owners will be effectively treated as strictly liable for the animals that get out or will consider the desirability of minimally effective fences so that they can more easily offer an explanation as to why the animals are out.

(n241)Footnote 738. No A-95-785 (Neb. App. Dec. 3, 1996, unpublished).

For a discussion of concerns over the livestock industry generally, *see* Smith, *Livestock Production: The Unsustainable Environmental and Economic Effects of an Industry Out of Control, 4 Buff. Envtl. L. J 45 (1996).*

Head, Thomas R. III, *Local Regulations of Animal Feeding Operations: Concerns, Limits and Options for the Southeastern States, 6 Envtl. Law 503 (2000).*

(n242)Footnote 739. For further discussion, see Craig R. Heidemann, *Fencing Laws in Missouri: Confusion, Conflict, Ambiguity and a Need for Change, 63 Mo. L. Rev. 537 (1998);* Caralyn Miller Ross, *Injuries to Animals,* 3 NY Jur. 2d Animals, §§ 132-144 (1998); Keith A. Cutler, *When Man's Best Friend Bites 54 J. Mo. B. 24 (1998).*

See also Harlow v. Hayes, 991 S.W.2d 24 (Tex. App., 1998) (a suit by passenger in auto for collision with horse after the horse broke free from owner's fenced property. The court held that the jurisdiction's fencing requirements did not establish minimum standard for enclosures built to confine livestock. Fact that fence was insufficient under requirements did not require instructed verdict for plaintiff. In absence of statutory provision, animal owner allowed to let animals run at large unless known by him to be vicious in the matter of fence breaking or are infected with a contagious disease. List of types of fences that were sufficient under statute not held to be exclusive); *Kallage v. Alvidrez, 969 P.2d 743 (Colo. App. 1998)* (motorist injured in collision with horses on road sued county and snowplow operator for negligently filling cattle guard that allowed horses to escape. Held: area covered by waiver provisions of Governmental Immunity Act, C.R.S. § 24-10-101 et seq); *Johnson v. Waugh 672 N.Y.S.2d 148 (N.Y. App. 1998)* (damage to truck caused by race horse that bolted onto road. Held no liability unless negligence); *Estate of Shuck v. Perkins County, 577 N.W.2d 584 (S.D. 1998)* (motorist injured as a result of accident caused by cattle on a gravel road. Held: no breach of duty of reasonable care. No statutory authority to require landowner to fence pasture); *Soloco, Inc. v Dupree 707 So. 2d 12 (La. 1998)* (vehicle owner sued owner of race horse for damages resulting from collision with horse. Statute limiting liability of owners of thoroughbred horses when horses are in care and custody or control of third person held constitutional because rationally related to state's purpose of encouraging thoroughbred racing in state).

(n243)Footnote 740. For further discussion, see Craig R. Heidemann, *Fencing Laws in Missouri: Confusion, Conflict, Ambiguity and a Need for Change, 63 Mo. L. Rev. 537 (1998);* Caralyn Miller Ross, *Injuries to Animals,* 3 NY Jur. 2d Animals, §§ 132-144 (1998); Keith A. Cutler, *When Man's Best Friend Bites 54 J. Mo. B. 24 (1998).*

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(n244)Footnote 741. Kan. Stat. Ann. §§ 47-105, 107, 106, 112, now all repealed.

(n245)Footnote 742. *See State v. Dear, 638 P.2d 85 (Wash. 1981),* construing Wash. Rev. Code Ann. § 16.13.010.

(n246)Footnote 743. *See Wilson v. Rule, 219 P.2d 640 (Kan. 1950); Abbott v. Howard, 169 Kan. 305 (1950),* holding that the plaintiff has the burden of proving that "the horse with which plaintiff collided was unattended upon the highway because its owner had failed to exercise due care in enclosing it, under all the surrounding facts and circumstances."

(n247)Footnote 744. *888 P.2d 1284 (Wash. App. 1995).*

(n248)Footnote 745. *658 So. 2d 381 (Ala. 1995).*

(n249)Footnote 746. Ala. Code § 3-5-3(a).

(n250)Footnote 747. *534 N.W.2d 353 (S.D. 1995).*

(n251)Footnote 748. For further discussion, see Caralyn Miller Ross, *Injuries to Animals,* 3 NY Jur. 2d Animals, § 11 (1998).

See also Diaz v. Coyle, 953 P.2d 773 (Ore. App. 1998).

(n252)Footnote 749. *888 P.2d 1284 (Wash. App. 1995).*

(n253)Footnote 750. *892 S.W.2d 502 (Ark. 1995).*

(n254)Footnote 751. *886 S.W.2d 368 (Tex. App. 1994).*

(n255)Footnote 752. *908 S.W.2d 338 (Ark. 1995).*

(n256)Footnote 753. *904 S.W.2d 353 (Mo. App. 1995).*

(n257)Footnote 754. *893 P.2d 372 (Nev. 1995).*

(n258)Footnote 755. *461 S.E.2d 572 (Ga. App. 1995).*

For further discussion, *see* Comment, *Taking Aim at Canned Hunts without Catching Game Ranches in the Crossfire, 30 Loy. L. A. L. Rev. 893 (1997);* Note, *Caught in a Trap: The European Union Leghold Trap Debate, 6 Minn. J. Global Trade 355 (1997); see also* Council for Agricultural Science and Technology, *The Well-being of Agricultural Animals* (Task Force Report No. 130, September 1997); National Agricultural Law Library -- Animal Welfare Center, *Compendium of Animal Resources* (CD-Rom, 1997) (contains statutes, regulations, guidelines relating to the Animal Welfare Act. *7 U.S.C. § 2131 et. seq*)..

In an interesting case involving the effect of diseased premises on animals, the court in Wilcox v. Cappel, No. A-95-798 (Neb. App. Dec. 3, 1996, unpublished) held that the tenant had taken the premises "as is" and therefore could not recover for damages suffered by cattle that had grazed on the land. In this case, the landlord had an oral year-to-year agreement with the tenant permitting the tenant to graze his cattle on the landlord's cornstalks each fall after the harvest. The tenant had to fence the animals away from irrigation pumps, center pivots, electrical boxes and so forth. The tenant did not fence the animals away from a run-down building that neither party had inspected since 1979 and which had not ever been used under the lease. The cattle ingested nitrogen fertilizer stored in the building so the tenant lost 130 newborn calves and additional calves were aborted. Total losses claimed were approximately $130,000 in actual damages. The court held that the landowner was not obligated to remove obvious sources of danger that a reasonable inspection would have revealed. Even though the tenant was not required to fence off the building, the tenant knew the building was part of the lease and that the cattle were near the building.

(n259)Footnote 756. Att'y Gen. Op. 96-42 (April 29, 1996). In a related opinion, the Attorney General held that "swine finishing facilities" were not even considered "farming" for purposes of the corporate farm statute. In that opinion, the Attorney General ruled that finishing facilities were commercial feedlots and therefore not engaged in farming as defined in Kan. Stat. Ann. § 17-5903(h). The opinion cited as authority *T-Bone Feeders, Inc. v. Martin, 236 Kan. 641 (1985),* which held that there was a distinction between a commercial feedlot and farming. The commercial feedlot was a specialized agri-business that was engaged in an agricultural endeavor but not engaged in farming. Att'y Gen. Op. 97-72 (Sept. 15, 1997). In conjunction with changing the corporate rules relating to swine production generally, the legislature also adopted, in 1994, Kan. Stat. §§ 16-1501-1506 which was designed to regulate production contracts regarding swine production.

(n260)Footnote 757. *See* Mo. Ann. Stat. § 350.016 and Okla. Stat. Ann. tit. 18, § 954). Several states now have statutes that specifically regulate production contracts in agriculture. *See, e.g.* Minn. Stat. Ann. §§ 17.90-.98, 514.995 (adopted in 1990); Wis. Adm. Code. § Ag. 101 (adopted in 1993); Kan. Stat. Ann. § 16-1501-1506 (adopted in 1994).

(n261)Footnote 758. *See, e.g.,* Idaho Code § 22-1301; Wash. Rev. Code §§ 20.01.038, 20.01.040; Fla. Stat. § 601.61; Ga. Code § 2-9-2 and Va. Code §§ 3.1-722.8, 3.1-722.14. In other states, the matter may be addressed under statutes that focus on specific aspects of the performance, such as payment. *See, e.g.,* Cal. Food & Agric Code § 56701; Tenn. Code § 43-15-101.

In at least one case, producers have been successful in challenging particular practices under the contracts. *See Brasswell v. ConAgra, Inc. 926 F.2d 1169 (11th Cir. 1991)* where the court upheld a judgment rendered in favor of growers on a fraud and breach of contract basis. In some other cases, plaintiffs have successfully invoked provisions of the federal Agricultural Fair Practices Act of 1967 *(7 U.S.C. § 2302). See Baldree v. Cargill, Inc. 785 F. Supp. 704 (M.D. Fla. 1990).* For a discussion of the various legal issues involved with production contracts, *see* Hamilton, *State Regulation of Agricultural Production Contracts, 25 U. Mem. L. Rev. 1051 (1995);* Hamilton, *Why Own the Farm if You can Own the Farmer (and the Crop)? Contract Production and Intellectual Property Protection of Grain Crops, 73 Neb. L. Rev. 48 (1994);* Randi Roth, *Contract Farming Breeds Big Problems for Growers,* 7 Farmers' Legal Action Rep. 12 (1992); Randi Roth, *Redressing Unfairness in the New Agricultural Labor Agreements: An Overview of Litigation Seeking Remedies for Contract Poultry Growers, 25 U. Mem. L. Rev. 1207 (1995);* Charles Johnson, *Ruffled*

Feathers: Littered with Problems, The Poultry Industry Can Teach Us Plenty About Contract Production, Farm J. May/June 1994 at. p 14.

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CHAPTER 47 AGRICULTURE AND FARM LAW

6-47 Thompson on Real Property, Thomas Editions § 47.12

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§ 47.12 Federal Policy Issues Relevant to Agricultural Land.

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§ 47.12(a) General Concerns.

For many years, the regulation of private land use was viewed as primarily a local governmental function. This regulation tended to focus on how the land was used and on the establishment of acceptable land use patterns within the particular local jurisdiction. In recent decades, however, a "quiet revolution" has occurred that has shifted some land use control power from local governments to state governments. n759 Focus at this level has tended to be area-wide in nature and has been grounded on the general notion that the larger concerns of the area are more important than the private interests of individual landowners. Regulation of land use activities at this level therefore tends to seek to conform land use patterns to state or area-wide goals and concerns.

Historically, the regulation of agricultural activity has been considered predominantly the province of the federal government. n760 Federal regulation has encouraged and discouraged particular agricultural activities in order to keep national feed and fiber production goals of supply and demand in balance. More precisely, national agricultural policy has tended to pursue the following specific goals: 1) to raise farm level incomes; 2) to more efficiently allocate resources; 3) to increase national self-sufficiency in food and fiber; 4) to reduce price and income instability; and 5) to generate abundant, low cost food and fiber supplies for the nation's consumers. n761 Very little concern was given to the question of how agricultural land was used except in the context of soil conservation. n762

Historically, the Department of the Interior has managed the public lands of the nation. With the adoption of the Endangered Species Act of 1973, n763 the Department assumed responsibility for the protection of plant and animal species that were threatened or endangered. Until recently, there was some uncertainty as to whether the regulations that have been adopted to protect habitat of such species could be imposed upon private landowners. Under § 9 of the Endangered Species Act, it is unlawful to "take" an endangered species. The Act defines "take" to include harass, harm, pursue, hunt, shoot, wound, kill, trap, capture or collect or attempt to engage in any such conduct. n764 By regulation, the Department defined harm to include habitat modification or degradation that actually kills or injures wildlife by significantly impairing essential behavioral patterns, including the breeding, feeding or sheltering. n765 In earlier case law, n766 it had been held that habitat modification could "take" an endangered species though that case involved state action on public (albeit state) land. In Babbitt v. Sweet Home Chapter of Communities for a Greater Oregon, n767 the

power to regulate habitat, even if located on private land, has been recognized under the statute. The Court found that the Secretary's definition of harm was reasonable and within the ordinary definition of "harm" so long as actual injury or harm results to the endangered species. In addition, the Court found that the central purpose of the Endangered Species Act includes the conservation of ecosystems upon which the endangered species depend and that Congress intended that the statute provided comprehensive protection. Finally, the court found that Congress, in authorizing permits for the incidental taking of species, evidenced an intent to protect habitat. In a concurring opinion, Justice O'Connor indicated that liability for a taking would not be imposed unless it was foreseeable that the activities which modified the habitat would result in death or injury to the species. Further, Justice O'Connor suggested that the way the Court resolved the matter did not compel the Secretary to include habitat modification in the regulatory scheme, only that it was not unreasonable to do so. Thus, either Congress or the Secretary could narrow the scope of the "harm" issue.

The national focus on environmental concerns and land use problems during the decade of the 1970s had a significant impact on federal farm policy. As a result, the national farm program has assumed an additional role regarding agricultural land use. It is now an established part of the national farm program that farmers who wish to participate must adopt and implement approved conservation plans, and they may not convert certain fragile lands or wetlands to agricultural production. In addition, other federal-level concerns regarding resources use have had an influence on the development of nationally acceptable agricultural land use patterns. The Federal Farmland Protection Policy Act, n768 for example, requires federal agencies to assess the impact of their proposed programs on the conversion of farmland to non-agricultural uses. Similarly, the Surface Mining Control and Reclamation Act n769 mandates particular protection for "prime farmlands." The Conservation Reserve Program n770 is designed to encourage the removal of over 40 million acres of farmland from agricultural production. These and other programs have injected an element of land use concern into federal farm policy and policy has been modified as a result to increasingly promote an emerging national agricultural land use stewardship concept that posits that how and where agriculture occurs is a fundamental national concern.

The lead federal agency for dealing with agricultural land and policy issues has long been the United States Department of Agriculture (U.S.D.A.). In 1994, Congress adopted a proposal for a major reorganization of U.S.D.A. n771 This reorganization pares the number of agencies within the department from 42 to 29 and consolidates a number of farmer services such as crop insurance, price supports and farm credit into a single agency. The plan also authorizes the closing or merging of a significant number of county or area field offices and should reduce the number of employees within the Department by 7500 over five years. Among other things of relevance to the matter of agricultural land use, the plan provides for the creation of an undersecretary for food safety which would assume most of the duties of that type presently found in the Agricultural Marketing Service. Another new undersecretary would oversee food programs, such as food stamps and school lunches. Farmer's Home Administration "loans of last resort" programs are eliminated. The Soil Conservation Service is renamed the Natural Resources Conservation Service. Finally, the bill created a new appeals division to expand the National Appeals Division of A.S.C.S. to apply throughout the Department. One important issue is whether the federal government or the states will control activity on public lands. Although "the public lands" of the United States tend to be thought of as federal lands, state-owned land is also public land. One such kind of state land located within the federal public domain are the numbered sections that were historically given to the states to be managed as "school lands." These typically are not fenced or otherwise separated from the federal lands and will often be considered by the public as susceptible to the same uses as the federal land. In a case involving the adequacy of royalty payments under a coal lease, the court held that the state had an irrevocable duty to manage the school lands for the sole benefit of common schools and to receive "full value" from any dispositions of such lands. n772

§ 47.12(a)(1) Regulation of Biotechnology.

There has been a growing interest in the ability of technology to meet growing feed and fiber needs. This interest raises difficult questions as to the role government should play and the extent to which governmental regulatory authority can direct or redirect the future of agriculture. In recent years, the use of technology has resulted in the patenting of new

mice and oysters and the development of quite a range of disease-resistant bacteria. n773 A number of very difficult legal and ethical issues are raised by these developments that, while they may not directly affect questions of agricultural land, certainly affect the long-term nature of the industry. For example, will safety and ethical concerns result in "new" or just "more" regulation? n774 Will the new technology pose risks that cannot be readily dealt with? n775 Are risk management procedures adequate to deal with known and unknown risks posed by biotechnology and the release of biotech material? That is, will biotechnology cause untreatable diseases, radically alter the balance of nature within ecosystems, develop new strains of super pests, etc? Which products should be regulated? Is there a defensible basis for distinguishing between regulation of human as opposed to animal related biotechnology -- particularly food additives and hormone implants? Will ethical considerations play a significant role in regulation? Will biotechnology have a sufficient impact on agriculture to cause any fundamental restructuring of the industry? The current regulatory framework involves a number of agencies outside of agriculture. These include National Institutes of Health (N.I.H.) and The National Science Foundation (N.S.F.) which promote basic research. N.I.H. regulates bio-medical research and recombinant D.N.A. research financed either by federal funds or at institutions or facilities that receive N.I.H. monies. N.S.F. monitors environmental research and finances research with grants which are subject to N.I.H. regulations and guidelines which prohibit some types of experiments and mandate physical containment. Private company research compliance with N.I.H. guidelines is presently voluntary. The Food and Drug Administration (F.D.A.) regulates the development of new drugs, vaccines, food additives, medical devices, etc. These are reviewed for both safety and effectiveness. Finally, the Environmental Protection Agency (E.P.A.) reviews primarily non-food and non-drug biotechnology products to assess risks and benefits to society. In addition, the United States Department of Agriculture (U.S.D.A.) regulates some research, testing and production of agricultural biotech products. There is very little statutory authority in place to regulate biotechnology. Statutes include the National Environmental Policy Act (N.E.P.A.), n776 the Federal Food, Drug and Cosmetics Act (F.F.D.C.A.), n777 the Occupational Safety and Health Act (O.S.H.A.), n778 the Federal Insecticide, Fungicide and Rodenticide Act (FIFRA), n779 the Toxic Substances Control Act (T.S.C.A.) n780 and the Resource Conservation and Recovery Act (R.C.R.A.). n781 As a result, most efforts at regulation occur under a coordinated framework for regulating biotechnology that is administered under the auspices of the Office of Science and Technology Policy, n782 and policy statements promulgated by various agencies n783 and revisions and amendments thereto. There has been surprisingly little litigation involving biotechnology. Most cases have been concerned with the basic direction research should take n784 or with compliance with environmental impact statement (E.I.S.) requirements. n785

§ 47.12(a)(2) Regulation of Farm Chemical Use.

Chemicals play a major role in most contemporary agricultural production. These include fertilizers which encourage the growth of crops and other desirable plants, herbicides which inhibit growth of undesirable plants; insecticides, fungicides and other pesticides which kill insects and other plant and animal pests which threaten the crops; hormone implants which stimulate animal growth, and fuels, solvents and other chemicals that are used to maintain or use farm equipment. Many of these chemicals are sufficiently dangerous that they are considered toxic or hazardous. Studies of pesticide levels in ground water and of carcinogens in corn, apples, tomatoes and peaches have raised much concern that the use of such chemicals on the farm can have devastating effects off the farm. n786 Until relatively recently, the law primarily addressed these concerns as a question of civil liability between the chemical user and the individual harmed. Federal statutes have been adopted which focus specifically on hazardous or toxic chemicals. These statutes typically have not had a serious impact on many agricultural producers though many are concerned that a framework has been erected that could at some future date be used to restrict farm use of these chemicals. The major thrust of governmental regulation of hazardous chemicals has been expressed through licensing procedures that were either imposed on the manufacturer n787 or on the chemical applicator. n788 The major reason for this approach seems to have been the view that the party at greatest risk was the actual chemical user or applicator who most likely would be harmed as a result of mislabeling or misapplication of the chemicals. It seems to have been comfortably assumed that if a particular chemical was properly registered, labeled and applied, there was little risk of causing harm to anyone else. However, many of these chemicals have been discovered to be inherently dangerous or at least capable of long-term or far-reaching adverse impacts and that their mere *presence* on the premises, in the soil or in the groundwater, rather than

mislabeling or *misapplication*, posed considerable risks to society at large. As a result, in addition to regulation of the manufacture and application of the chemicals, the law now addresses such additional concerns as the manner in which the chemicals are stored, how they are transported, how the residues and empty containers are discarded, n789 how the public should be informed of the composition of chemicals kept on the premises, n790 and whether the chemicals are likely to be present in such places as public water supplies. n791 The federal acts that address hazardous and toxic chemicals may be classified as acts which focus primarily on the existence or availability of certain chemicals (which are considered hazardous by nature), those which focus on specific impacts that flow from chemical use (which are deemed harmful by virtue of where that impact is felt, how high the level of use, whether they are in underground storage tanks, etc)., and those which require the public disclosure of the presence or composition of such chemicals. n792

§ 47.12(a)(3) Protection of New Varieties of Plants.

Since the 1930s, patent law has permitted the protection of sexually reproducible plants. n793 This protection was available to "whoever invents or discovers and asexually reproduces any distinct and new variety of plant, including cultivated sports, mutants, hybrids, and new found seedlings, other than a tuber propagated plant of a plant found in an uncultivated state." n794 Such applications are treated the same as any other application and must conform to the requirements of the law of patents, including novelty and non-obviousness. Sexually reproducible plants may possibly be protected under the general utility patent provisions. n795 According to the holding in the case of Diamond v. Chakrabarty, n796 which upheld the grant of a patent for a particular strain of bacteria that had been developed to consume oil, a developer of a new sexually reproducible plant might treat the discovery as simply a new "composition of matter." The rationale of this approach is that the patent laws are not limited to protecting only non-living things and if the inventor can show that the new plant satisfies the applicable legal requirements, the patent laws do not expressly or implicitly prevent the issuance of a patent.

Sexually reproducible plants are more likely to be protected under the provisions of the Plant Variety Protection Act (P.V.P.A.). n797 This statute, adopted in 1970, grants patent-like protection through a certificate to the developer of "any novel variety of sexually reproducible plant (other than fungi, bacteria, or first generation hybrids) who has so reproduced the variety ... ." n798 This protection is not administered through the Patent Office but rather through the Department of Agriculture. Under the statute, it is an infringement of the exclusive rights granted by P.V.P.A. to sell or use for propagation the novel variety without the permission of the P.V.P.A. certificate. Farmers have long enjoyed an important exception to the Plant Variety Protection Act limitation on sales. This was the so-called "brown bag" sale provision which enabled farmers to plant and then save a portion of the seed produced for use in seeding the next year's crop. Under certain circumstances, this exception also authorized the farmer to sell the seed to other farmers for their seeding needs. Of course, it is not a violation of the statute for the farmer to sell the crop that is produced from the protected seed. Seed companies have been concerned that farmers were using this exception to compete with them in ways that seriously threatened their businesses. The United States Supreme Court has now decided a case which explored the limitations in the statute on the farmer's exception. In Asgrow Seed Co. v. Winterboer, n799 the court reviewed a decision by the Federal Circuit Court of Appeals n800 which upheld, almost without limitation, the right of the farmer to sell to other farmers protected varieties of seed without violating the provisions of the Plant Variety Protection Act. The Supreme Court reversed, construing the exception as applying only to seed that the farmer has saved for his or her own replanting but then has changed his or her mind about replanting it. That seed may be sold to other farmers. As a result, there is no general right of farmers to sell protected seed to other farmers for planting purposes. After the Federal Circuit decision, Congress passed legislation that significantly amends the Plant Variety Protection Act. The amendments retain the exemption for the farmer to save seed for replanting but eliminate the exemption for "brown bag" sales to other farmers. n801

§ 47.12(a)(4) Herbicides and Pesticides.

As part of the Federal Government's effort to oversee the introduction of herbicides and pesticides into the ambient

environment and to ensure that farmers and ranchers have adequate resources to deal with plant pests, Congress adopted the Federal Insecticide, Fungicide and Rodenticide Act (FIFRA). n802 Under this statute, any composition that is used as a pesticide must be registered with the Environmental Protection Agency before it can be sold or distributed. In order to secure registration, the applicant must submit required data regarding the effects of the pesticide on the environment. n803 As part of the registration process, the pesticides are classified as being of general or restricted use. n804 If the pesticide is classified as restricted, it may be applied only by or under the direct supervision of a certified applicator. n805 States are specifically authorized to administer an approved applicator certification program. n806 Under the statute, it is unlawful for the pesticides to be misbranded. n807 Something is considered misbranded if the label bears any statement that is false or misleading, does not bear the registration number, does not contain proper instructions regarding directions for use, appropriate warnings, etc. n808 There has been some concern regarding the effect to which state law regarding implied warranties of fitness for particular purposes where the pesticide or herbicide does not perform as specified on the product label. The act provides that states are not to impose or continue in effect any requirements for labeling or packaging in addition to or different from those required under the federal law. n809 The question has been whether the state law of sales constitutes such an addition. This has been particularly critical since there is no remedy available to the farmer against the pesticide manufacturer under FIFRA in the event that harm is suffered as a result of the failure to properly label the product. In several cases, courts have held that FIFRA preempts both state statutory and common law damage claims where the claim is based on the label. See *Andrus v. Agrevo U.S.A. Co.*; n810 Cipollone v. Liggett Group, Inc. n811 Welchert v. American Cyanamid, Inc. n812 Taylor AG Indus. v. Pure-Gro. n813 Not only that, misrepresentations, and even advertising, point-of-sale signs and other informational materials, made by the company or agents separate from the label are also preempted where they merely repeat information contained in the label. *Kuiper v. American Cyanamid Co*. n814 To the extent that the label makes assertions that the herbicide was reasonably fit for the purposes stated in the label, the label has been held to create an express warranty of merchantability. This includes statements that the product will not harm the crop to which it is applied. FIFRA has been held to preempt these express warranties as well. *See Gooch v. E.I. Du Pont De Nemours & Co*. n815 In contrast, where the action is entirely grounded in state common law, no preemption issues arise. n816 State law-based claims by workers for the consequences of being exposed to cancer-causing products have not been held preempted. n817 In Hawkins v. Leslie's Pool Mart, Inc., n818 the court addressed a damage claim brought by owners of a swimming pool against the manufacturer of chlorinator tablets, alleging that she was injured when she ingested gaseous fumes after opening the container of tablets. The court held that the state law claims that the manufacturer failed to adequately warn of risk of sudden decomposition and sudden reactivation of the tablets or provide adequate directions for opening, closing and storing the container were preempted by FIFRA. The FIFRA preemption of the packaging claim was limited to the area of child-resistant packaging since the EPA has not specifically considered the particular packaging in dispute in this case. Thus, the specific claim that the manufacturer had negligently failed to safely package the tablets was not preempted.

§ 47.12(b) Federal Preemption.

The federal interest in agricultural land use poses potential problems from a land use planning point of view because the particular kinds of land use that are promoted or protected by the various federal agricultural programs may differ from the uses actually permitted or encouraged by the state and local planning schemes. Federal and state policies have already come into conflict regarding the interrelationship between agricultural use and environmental concerns. n819 The nature of these conflicts may vary from disagreements over something as fundamental as the extent to which land may be defined as "agricultural" in order to secure particular benefits that might be derived from such status. Conflicts may likewise arise because the underlying policies of federal programs are very different from local land use programs or regulations with respect to ultimate preferences regarding land use patterns. Finally, federal agricultural policies may limit the content and the context of the local program choices regarding goals and objectives.

State and local authority typically is preempted any time it conflicts with federal policy or stands as an obstacle to the accomplishment of federal program objectives. n820 Similarly, preemption occurs when it is clear that the federal regulation is intended to be pervasive or seeks to occupy the field. n821

Perhaps the most subtle and difficult form of preemption occurs where the effect of the local restriction simply deters someone from participating in a federal program and thereby frustrates the ability of the federal program to achieve its particular objectives. The growing pervasiveness of the federal presence with respect to the interrelation between agricultural land use and farm production makes it possible to argue that any local land use regulation that has the effect of deterring a farmer from participating in federal farm programs must give way to the federal regulation because the local plan actually constitutes an obstacle to the accomplishment of the federal objectives. n822

It has already been held that the federal interest in land use regulation prevails over state authority regarding private land use activities conducted on federal public lands. n823 Likewise, the federal interest has been held to dominate with respect to the private use and cultivation of private agricultural lands within federal reservations. n824 Federal statutes have specifically sought to influence the use of private, agricultural land throughout the nation where the particular use implicated national conservation and stewardship policies, goals or objectives. n825

As a result, consideration should be given to federal agricultural policy as an integral part of local and state land regulation and planning in order to minimize as well as to manage the potential for conflict between the two.

§ 47.12(c) Particular Federal Program Objectives: Agricultural Production Reduction.

Since the early 1930s, the federal government has played a major role in shaping the national patterns of agricultural production. n826 These programs were developed primarily in response to the economic crisis in Agriculture during the Depression. n827 Although the initial act was declared unconstitutional, n828 it was largely reenacted in the Agricultural Adjustment Act of 1937 and has served as the general pattern for farm programs since that time.

The primary purpose of the farm programs was to stabilize agriculture by leveling out severe swings in commodity prices. n829 It has been thought that if the historic "boom and bust" cycles of agriculture could be avoided, the nation could enjoy abundant supplies of food and fiber and farmers would enjoy higher incomes. n830 The key to controlling price swings, of course, has been the ability to control production and avoid the large scale overproduction which depresses farm commodity prices. Since the decision in *Wickard v. Filburn*, n831 there has been a strong national sentiment that participation in federal programs should be voluntary.

The dilemma for government has been how to effectively induce farmers to participate in order to control production without imposing controls that destroy farm income levels. The answer has been to separate national food production goals from farm income goals and to orient the programs toward production reduction while at the same time offering the farmers an "income supplement" as an inducement to participate. n832 That way, the level of a farmer's income is not threatened by participation in the program but the government can still achieve a measure of control over crop production.

The way that scheme works is that the farmer is induced to participate in the programs by the promise of minimal price floors. n833 Deficiency payments may be made if prices do not reach established market levels. Farm income may be further increased as a result of direct income supplementation. Post-harvest non-recourse loans from the government guarantee that the crop will bring a certain minimal return.

In exchange for these "guarantees," the farmer contracts with the government to produce the crop subject to governmental restriction. For example, it may be required that the farmer not plant more than his historic base acreage for particular program crops. It may be that the farmer will be required to idle a particular portion of the land in order to participate. It is through restrictions of this type that government manages production.

The impacts of federal farm programs on land use patterns is little understood. In the past, the size of the farm's acreage base for program crops n834 determined the price support income that the farmer received. This resulted in farms

specializing in a single crop or at least in a limited number of commodities. To plant anything else jeopardized the base. This also contributed significantly to the reluctance of farmers to rotate crops. This resulted in very rigid land use patterns.

In recent years, farmers have been given much more flexibility in terms of how many other crops may be raised without permanently reducing the base for particular program crops. This has given the farmer a larger measure of control over how the land would actually be used for crop production. On the other hand, changes in the federal farm program have required farmers to adopt approved conservation plans where the land could be described as "highly erodible."

The federal price support program is considered to be voluntary and farmers participate through contracts entered into with the Commodity Credit Corpora-tion and administrated through the Agricultural Stabilization and Conservation Service. Thus it is possible and indeed probable that many farmers will elect not to participate in the federal programs, despite what many consider to be significant economic pressures to participate. A census of agriculture revealed that in 1987 and 1988, fully two-thirds of all farms, or 1.4 million farms, did not receive direct support from government programs. n835 These farms which did not receive program payments account for approximately one-half of the land in farming in the United States and approximately one-half of the sales of farm products. n836 In 1996, Congress enacted the Federal Agriculture Improvements and Reform Act of 1996, commonly referred to as the 1996 Farm Bill. This makes major changes in federal farm programs and is designed to phase out the existing price support structure in the next seven years. It essentially freezes enrollment and then gradually reduces the support rate until it is eliminated. The goal of these changes is to give the farmers more flexibility in planting decisions. The new act retains most of the conservation compliance programs that have been incorporated into the farm program since 1985, including the swampbuster and sodbuster programs. In addition, it extends the Wetlands Reserve Program, gives the Conservation Reserve Program more of an environmental focus and places a greater emphasis on crop insurance than upon governmental assistance in emergencies. n837 This, in turn, has limited farmer control over land use decision making somewhat.

Because of the nature of the compliance conditions (acreage reduction, conservation compliance and so forth), it must be observed that farmers who wish to participate in federal programs have less control over how the farmland is used than farmers who do not participate. There are significant public costs associated with these federal programs which has caused much criticism. Congress has apparently determined, however, that the need to reduce overproduction and its attendant costs is greater than these program costs and there has been little in the way of serious effort to change the basic nature of these programs. Indeed, on the positive side, it may be said that there is a significant public benefit in the sense that without the farm programs, despite their cost, much of the conservation activity that has occurred in the last 8 years would not have occurred. Perhaps unfortunately, since the programs are voluntary, the government cannot achieve its production reduction objectives unless a significant number of farmers participate. Therefore, the inducement must be sufficiently valuable to attract more farmers than not. This has seemingly been the case. The economics of the farm marketplace and the "sweetness" of the inducement to participate appear to be such that most moderate or larger farm operators judge that the return from participation, despite the relinquishment of some control over how the land is farmed, is greater than the return would be without such participation.

§ 47.12(d) Particular Federal Program Objectives: Protecting Land for Agriculture -- Federal Farmland Protection Policy Act.

Primarily as a result of the conclusions reached by the National Agricultural Lands Study, n838 Congress adopted the Farmland Protection Policy Act of 1981 n839 as part of the Agriculture and Food Act of 1981. n840 Under the Act, the federal government, through U.S.D.A., is required to monitor the conversion of agricultural lands to non-agricultural uses and each department is required to develop a means by which adverse impacts on farmland that result from programs of each department may be identified. These impacts are to be considered by each department as a part of programmatic development and to the extent to which it is possible, adverse impacts are to be avoided or lessened. n841

The concern of the Act is clearly with the impact federal programs have on the conversion of agricultural land to non-agricultural uses. The Act expressly states that it "does not authorize the federal government to regulate the use of private or nonfederal land." n842

The Act nevertheless may have a significant impact on local land use planning and objectives. The Act was asserted, in one case, n843 as justification for an action by the Department of Transportation to locate a federally funded highway project in a historic site which contained a wildlife sanctuary and protected parkland. One of the Secretary's arguments in the case was that it would be inconsistent with the objectives of this federal Act to locate the project elsewhere because that would result in the irreversible conversion of farmland. n844

Although the Act is concerned with the impact of federal program decisions on agricultural land availability, in 1985, the Act was amended to require greater consideration of state farmland protection policies by the federal agencies in those locations in which federal projects are to be undertaken in agricultural areas. The Act does not require the federal government to defer to the state policies or to alter the project to accommodate the state interest. n845 Unfortunately, if the federal agency is not cooperative, all the Act insures is that the federal agency give some "consideration" to the state policies and then only in the context of the required identification of the adverse impacts of the project and consideration of alternatives. The Act expressly provides that it not be deemed to provide a basis for any action, either legal or equitable, by any person or class of persons, to challenge any federal project, program or activity that may affect farmland. n846 The Act was amended, however, to provide that the Governor of an affected State, where a State policy or program exists to protect farmland, may bring an action in the Federal District Court of the district where the federal program is proposed to enforce the requirements of the Act that require the federal agency to identify adverse impacts and consider alternatives that might more favorably protect the farmland. n847

The Act has been described as a "scarecrow of farmland protection -- a feeble attempt to scare away the conversion of agricultural land to non-agricultural uses, with no real force behind it." n848 Nevertheless, the Act represents an official policy position that federal agencies must increase their sensitivity to the issue of farmland conversion and at least formally consider the impacts of their own programs in that issue. In terms of the impact of federal policy on local land use activities and planning, even a "scarecrow" can have an impact and the mere presence of the federal statute may deter some development that otherwise might occur.

§ 47.12(e) Particular Federal Program Objectives: Protecting Land for Agriculture -- "Prime Farmlands."

In 1977, Congress adopted the Surface Mining Control and Reclamation Act n849 to deal with environmental concerns raised by strip mining of coal. The Act is significant with respect to agricultural land for two important reasons. First, in order to implement the Act, the Soil Conservation Service was charged with the development of a land classification scheme that could be used to identify the most important lands that were likely to be adversely affected by the strip mining. This resulted in the development of the "prime farmland" concept which has subsequently become a cornerstone of most local land use efforts to preserve and protect the "best" of the nation's farmlands for agricultural use.

Second, the Act provided that when the surface mining of coal occurred in areas designated as "prime farmland," special requirements relating to the restoration of the land were imposed on the mine operator who must demonstrate a "technological capacity" to restore the area, within a reasonable time, such that it was capable of producing the equivalent or higher crop yield as un-mined farmland in the area under equivalent levels of management. n850 In most cases, this has meant that the mine operator had to remove the soil layers separately, segregate and stockpile them, properly replace and regrade the soil and establish that soil productivity was returned to the same levels of crop yield as un-mined soil of the same soil type in the same area. n851 The special restoration provisions were challenged in *Hodel v. Indiana* n852 and were upheld by the Supreme Court. n853

The *Hodel* case is significant for an additional reason. With respect to the interrelationship between federal agricultural

land policy and state and local governmental regulatory authority, it was argued in the case that the Act abrogated state authority under the Tenth Amendment by mandating particular land use planning policies and controls since the state was required to essentially define "prime farmlands" in the same way the Secretary of Agriculture does under the Act. n854 The court responded by refusing to classify the Act as similar to a zoning ordinance typically enacted by state and local governments. In contrast, the Act was considered to be concerned with regulating conditions and effects of surface coal mining and therefore the restrictions on land use were seen as only temporary and incidental to that purpose. Further, the court held that the federal government is precluded, under the Tenth Amendment, from regulating states only where the state is being regulated as a state, where the regulation addresses matters that are indisputably attributes of state sovereignty and where it is apparent that the state's compliance with the federal law would directly impair its ability to structure integral operations in areas of traditional functions. Since none of those conditions could be satisfied in the case, the court found there was federal authority to protect the production capability of farmland if that was deemed to be in the interest of the federal government. Although the federal government has not sought to assert that authority directly beyond the area of surface mining, the fact that farmer participation in federal farm programs is conditioned upon the adoption and implementation of approved conservation plans suggests that the federal government has an interest in protecting the productive capacity of agricultural land and will assert that interest by exercising a significant measure of control over how the land is used or farmed.

According to data released by the Soil Conservation Service (now called the Natural Resources Conservation Service), the states with the most prime farmland are Texas with 38.8 million acres, Kansas with 23.4 million, Illinois with 21 million, Minnesota with 20.6 million, and Iowa with 18.6 million. n855 Since 1982, Kansas has lost 122,700 acres of prime farmland to urban development. In contrast, Texas has lost nearly a million acres in that same time. n856

§ 47.12(f) Particular Federal Program Objectives: Protecting Land for Agriculture -- Estate Planning Land Valuation.

Because farms and ranches represent a substantial investment in land, equipment and buildings, farmers and ranchers are very concerned with the impact of land-related taxes. Where such taxes are of concern, experience suggests that farmers are encouraged to keep the land available for agricultural use as a result of programs which minimize land valuation tax impacts.

As a general rule, federal estate taxes, when in effect, are calculated on the basis of the fair market value of the assets, including the land, in the estate at the time of death. This may cause problems for farmers or ranchers which can only be dealt with through effective advance planning since, in many cases, the fair market value of the land will reflect its nonfarm development value which is generally higher than its farm use value. This, in turn, may force the sale off part of the farm to satisfy the tax.

The Tax Reform Act of 1976 introduced some estate tax relief for farmers and ranchers by permitting actual agricultural use valuation of the farm property instead of valuation based on highest and best use. n857 This use value option is particularly useful to farmers situated on the urban fringe or in areas pressured by development where the value of the land as a development site for a new subdivision or shopping center is likely to greatly exceed the value of the land for agricultural production purposes. Congress apparently realized that reliance upon highest and best use for purposes of valuation was in fact forcing many farm estates to sell out in order to pay death taxes. Section 2032A was therefore adopted to provide an incentive to farmers to keep their land in agricultural use from generation to generation.

A number of criteria must be satisfied to take advantage of this exception to the general rule of valuation. First, the taxpayer must be engaged in farming or a small business. n858 Second, separate requirements must be met by both the decedent's estate and by the real property that is to be valued by the section. For the estate to qualify under § 2032A, the decedent must have been, at the time of death, a citizen or resident of the United States. The estate must meet two percentage composition tests: the adjusted value of the real and personal property used in the farm or closely-held business must comprise 50% or more of the adjusted value of the decedent's gross estate; and "the qualified real

property" must comprise at least 25% of the adjusted value of the gross estate of the decedent. n859

Third, a pre-death period of use requirement must be satisfied. The real property that is used in satisfying the 25% test noted above must have been owned and used as a farm for farming purposes by the decedent or a member of the decedent's family for at least five of the eight years ending at the decedent's death. n860 The requirements of ownership and devotion to a qualified use do not appear to have to be continuous, but merely have to total five years in the eight-year period. Also the real property does *not* have to have been used for a qualified use on the date of the decedent's death as is the case with the 50% test.

Fourth, for the estate to satisfy the 25% requirement under § 2032A(b)(1)(B), a "material participation" test must also be met by the decedent or a member of the decedent's family for the five of eight years period prior to decedent's death or date of retirement. A number of important factors have been identified in the government regulations that can be used in determining if the material participation requirement have been met:

1. Physical work and participation in management decisions are required. These include such things as consultation and decision making.

2. Involvement in a substantial number of decisions.

3. Regular inspections.

4. Financial exposure and investment responsibility.

5. Utilization of equipment and machinery.

6. The place of residence.

7. Any other relevant factors.

Since 1981, the requirement of material participation for a surviving spouse has been considered satisfied by a somewhat lesser involvement standard of "active management." Special rules also relate to the satisfaction of the material participation requirement by a decedent who is or disabled.

Fifth, the property in the estate must be passed from the decedent to a qualified heir of the decedent upon death. n861 The definition in the Code further provides that if a qualified heir disposes of any interest in the property to any member of the heir's family then that person shall become the qualified heir with respect to that interest. n862 If the property is transferred from one "qualified heir" to another, the latter steps into the shoes of the former and the latter is deemed to have received the property from the decedent.

The material participation and use requirements continues beyond death and must continue for a period of three years or more during the eight years following decedent's death or there is a recapture of the tax savings. Since 1981, § 2032A(c) allows for a two year grace period in which the qualified heir may wrap up his or her own affairs before beginning material participation in the farm of the estate without affecting the requirements of § 2032A.

The intent of Congress in enacting § 2032A appears to be to tax real property used in farming on the basis of its agricultural use value. Since the application of § 2032A may reduce the value of the land up to 60% and may result in a tax saving of up to $750,000, n863 there appears to be a significant incentive to keep the land in an agricultural use from one generation to the next.

The conservation easement is another estate planning tool that is being developed and increasingly utilized, allowing the landowner to sever the right to preserve the land's natural habitat. The landowner may transfer this right to a trust or

other public interest entity, which becomes a protector of such transferred rights. The landowner may continue to use all retained rights, unless contrary to the conservation easement. The diminution in value of the property that may result from creating a conservation easement is deductible from the property taxes in several jurisdictions. Two goals realized in creating a conservation easement are (1) lightening the landowner's tax burden and (2) ensuring the conservation of the biological condition of the land. n864

Recent changes in the Internal Revenue Code may encourage a greater use of conservation easements as a means by which fragile farmland may be protected. I.R.C. § 170 now treats "qualified conservation contributions" as charitable contributions for which the donor is allowed to take a deduction for income tax purposes. n865

Similarly, Section 508 of the Taxpayer Relief Act allows the executor of the estate of a farm decedent dying after Dec. 31, 1997, to exclude from the decedent's gross estate up to 40% of the value of land subject to qualified conservation easements. n866

§ 47.12(g) Particular Federal Program Objectives: Protecting Land for Agriculture -- Influencing Particular Use Patterns by Requiring Land to Remain Idle.

From time to time, the federal government has required that farmers idle a portion of their land in order to participate in federal price support programs. These requirements are variously described as "set aside" or "acreage reduction program (ARP)" lands. In essence, the acreage constitutes a specified portion of the farmer's lands which is not to be used to produce crops. The policy reason for such a requirement is the desire of the federal program to limit overproduction of certain commodities. Since the requirement is imposed in any given year as a result of a determination of the Secretary of Agriculture that it is needed, in some years there will be an acreage reduction requirement while in others there will not. n867 This, of course, encourages the farmer to keep the land available for agricultural use and not convert the set aside acres to a permanent non-agricultural use. Once the land is set aside for program purposes, it is most difficult for the farmer to use that land for anything else. Even use of the land for grazing is severely restricted. This feature of the program, as a practical matter, insures that the affected acreage will essentially be idle. In recent years, acreage reduction requirements have been as high as 15% of the program acres for some commodities. It is doubtful that this kind of requirement causes much land to be shifted from agricultural use to non-agricultural use. However, it does limit the kind of activity that may occur on significant portions of the farmer's lands.

§ 47.12(h) Particular Federal Program Objectives: Protecting Land for Agriculture -- Influencing Particular Use Patterns Through Allotments for Particular Uses.

Although production allotments have been a major part of the federal farm program, n868 these have never been popular with the agricultural sector because they are thought to grant too much control to the government over the actual farming operation. There are two areas of agricultural production where allotments or quotas still have some currency n869 and, while they have a relatively minor effect on agricultural land use as a whole, they do have a significant impact on the production of these two commodities.

Tobacco production is subject to national marketing quotas which are apportioned among the several states in which tobacco is produced. n870 The Secretary has authority to convert the marketing quota into specific acreage allotments, n871 or into production poundage quotas. n872 Tobacco allotments run with the land n873 and are transferrable, n874 provided a copy of the lease or sale agreement is filed with the local county committee. n875 The allotment program makes it very difficult for a non-allotment or quota holder to use the land for the production of tobacco, even though the land may otherwise be ideally suited to such an activity.

Peanuts are raised under an allotment program as well. Here, the federal government established a national poundage quota which is then allocated to states and, in turn, to individual farms. n876 Like tobacco allotments, these quotas are transferrable, either by sale or lease, from one farm to another. n877 Specific quotas may be reduced as a result of

non-production and, as a result, the additional production capacity may be allocated to other farms. n878 Quotas are particularly important in terms of limiting agricultural land use because the sale of any peanuts that are not represented by a quota or that exceed the farm's quota are subject to penalty. n879 This creates the interesting result that while the statute does not directly prohibit anyone from raising peanuts, only those with quotas may market them.

§ 47.12(i) Particular Federal Program Objectives: Requiring Conservation Compliance.

Since the mid-1980s, the federal price support law has mandated that all farmers who wish to participate in the federal programs but who farm "highly erodible" lands must have an approved conservation plan in place on the farm. n880 If such a plan is not developed by January 1, 1990 or within two years after the Soil Conservation Service has completed a soil survey for the particular farm, the farmer is declared ineligible for federal program benefits. n881 Because of the importance of participation in federal farm programs, these plans significantly influence the kind of farming practices a farmer may engage in and hence structure as well as limit the kind of agricultural activity that may occur on the land.

The determination of what constitutes "highly erodible" land is made by the Soil Conservation Service based on the average annual erosion rate and the soil type of the land, typically as a result of normal soil surveys. It may, however, be made without an on-site inspection. n882 A determination may be requested, where one has not previously been made, and the Service must respond in writing, within 15 days of receipt of the request, if possible. n883

Two significant land use impacts associated with these conservation plans have been little noticed and only time will tell whether the concerns they raise are significant. First, the economic cost of many of these plans may encourage a significant number of farmers, particularly those farming marginal lands, on a small scale, in urban fringe areas, to convert their lands to non-farm use or simply not participate in federal programs at all. This may frustrate not only the federal conservation objectives but local farmland preservation objectives as well. Second, it may be discovered that farmers in such areas who can afford to fund the plan may be reluctant to invest in conservation improvements where the local planning authorities are not willing to "hold the line" against non-agricultural development in the general area at least long enough for the farmers to get an acceptable return on their investment.

The 1996 farm legislation, The Federal Agricultural Improvement and Reform Act (F.A.I.R.) extended the Conservation Reserve Program through the year 2002 at a maximum acreage of 36.4 million acres. The 1996 farm legislation also extended the Wetland Reserve Program through the year 2002 at a maximum acreage of 975,000 acres divided equally among permanent easements, 30-year easements and restoration cost-share agreements. Congress adopted what is popularly called the Environmental Conservation Acreage Program. This program has two principal parts. One, *16 U.S.C. §§ 3837*-3837f, is called the Wetlands Reserve Program. Farmers who have historically farmed wetlands or have properly converted wetlands can offer to sell a wetland conservation easement to U.S.D.A. and follow a conservation plan that will restore and protect those lands in the future. The easements will range from permanent or thirty years to the maximum allowed by state law. Payments will represent the difference in value between the fair market value of the land with the easement and the land without the easement. The other part of the program, *16 U.S.C. § 3831*(b), supplements the existing conservation reserve program by providing new opportunities for owners of eligible land to enter into contracts with the federal government to conserve and protect the land. The farmers will agree to take the land out of intensive agricultural production and convert it to less intensive uses. A new program, called the Environmental Quality Incentive Program (E.Q.I.P.), has been approved primarily to assist livestock producers address environmental issues on farms and ranches. n884 In January, 2000, the Seventh Circuit decided a case that has tremendous significance regarding the liability of the federal government for "takings" of property under federal farm programs. In *United States v. Dierckman, 201 F.3d 915 (2000),* the court considered a challenge to an overpayment determination by the Department of Agriculture. It was claimed that the regulation of certain activity affecting wetlands violated the landowner's due process rights. The Court held that the Food Security Act was not enacted under the auspices of the Commerce Clause of the Constitution but rather under the spending power. The government is therefore not limited by the enumeration of Congressional powers in Article 1, Section 8 of the Constitution. As a result, the government may engage in indirect regulation of matters that would not fall within the scope of interstate commerce.

For further discussion, see Lauck, J., *After Deregulation: Constructing Agricultural Policy in the Age of "Freedom to Farm Act." 5 Drake J. Agric.L. 3 (2000).*

§ 47.12(j) Particular Federal Program Objectives: Conservation Reserve Program.

As part of the major reorientation of the national farm program to focus on environmental issues, the 1985 version included authority to contract with farmers on a long-term basis to remove land from agricultural production and convert it to conservation uses. n885 This program, known as the Conservation Reserve Program (CRP) has been designed to ultimately result in the withdrawal of 45 million acres of highly erodible land from production, n886 on a bid basis. n887 That is, farmers who own qualified land offer the land to the Reserve Program and if the land is accepted, the landowner and the Secretary enter into a contract in which the Secretary agrees to pay, on an annual basis, the bid "rental." The Secretary is prohibited from accepting more than 25% of the land in any county unless the Secretary determines that to do so will not adversely affect the economy of the county. n888 The contracts run for not less than ten and not more than fifteen years. n889 The land withdrawn from active agriculture must be dedicated to an approved conservation use and cannot be used for crop production for a protracted period.

Because the statute describes the annual payments as "rental payments," it may be tempting to view the arrangement as a lease. It is actually more similar to the conveyance to the federal government of a temporary conservation easement in which the landowner relinquishes the right to develop the land but promises to maintain the land in an approved conservation use. A lease normally conveys a possessory estate to the tenant, which is not the case with the CRP land. Similarly, the tenant assumes specific obligations regarding the care and protection of the premises. Under the terms of the CRP contract, the landowner must bear most of those burdens. The contract provides that the landowner or operator must: n890

1. implement a plan approved by the local conservation district for converting the land to a less intensive use such as pasture, permanent grass, legumes, forbs, shrubs, or trees;

2. place highly erodible cropland in the conservation reserve;

3. not use the land for agricultural purposes, except as permitted by the Secretary nor produce any agricultural commodity on the land;

4. establish approved vegetative cover, or water cover for the enhancement of wildlife on the land; n891

5. not conduct any harvesting or grazing or make commercial use of the forage;

6. not plant trees, such as Christmas trees or nursery stock, on the land for commercial purposes; n892

If the land subject to the contract is transferred before the end of the contract period, the landowner agrees in the contract to forfeit all rights to receive rental and cost sharing payments n893 and to possibly refund all payments, plus interest, received, unless the transferee agrees to assume all obligations of the contract and modifications thereto. n894

Tenants of land placed in the CRP may retain an interest in, and be entitled to a share of the CRP payments for the duration of the CRP contract. This is because, although the CRP contract is considered to terminate the existing lease because it is inconsistent with the lease, the tenant's rights to payments under the CRP contract arise from the CRP contract, not the lease, and are therefore contractual in nature. n895

A similar reserve program is being established for wetlands. The goal of this program is to place 1 million acres in a Wetlands Reserve Program by the end of 1995. Up to 50,000 acres may be accepted before September 30, 1992 from nine states n896 and it is expected that the program will be offered nationwide in 1993. n897

Between 1985 and 1995, the Conservation Reserve Program (C.R.P.) entered into contracts with farmers to remove approximately 36 million acres from agricultural production in all states except Arizona, Vermont, and Rhode Island. This is done at an annual cost of $1.6 billion. n898 The first of the C.R.P. contracts expired in 1995. In late 1994, former Secretary of Agriculture, Mike Espy, extended the contracts an additional year and announced that C.R.P. contract holders could enroll new land and extend contracts another 10 years or terminate their contracts, so long as the acreage would not exceed the CRP maximum. Participation would be subject to appropriation of funds to pay for such contracts. n899 The Clinton Administration announced that as 10-year contracts expired, some of the program's funding would be withdrawn from acreage where conservation benefits were determined to be marginal and redirected to lands where the conservation impact would be higher. n900

The 1996 farm legislation, The Federal Agricultural Improvement and Reform Act (F.A.I.R.) extended the Conservation Reserve Program through the year 2002 at a maximum acreage of 36.4 million acres. Some farmers of less environmentally sensitive lands could terminate their contracts early with written notice to the Secretary of Agriculture. New enrollments would be allowed up to the statutory limit. n901

§ 47.12(k) Particular Federal Program Objectives: General Restrictions on Sodbusting and Swampbusting.

Although federal farm program price supports and entitlements have been a well-intentioned mechanism by which the federal government could address the difficult problems of overproduction and low farm level incomes, the lure has been sufficient to induce some farmers to plant crops on fragile lands. In an effort to deter such activity, the farm program was altered in 1985 to specifically deny eligibility for farm program supports to farmers that convert highly erodible land or wetlands to crop production. In the popular vernacular, conversion of highly erodible soils is referred to as "sodbusting" while conversion of wetlands is termed "swampbusting." n902

The agricultural land use implications of these restrictions are significant. On the one hand, they restrict farming practices where the result would be to convert particular lands to cropland use. In other words, they remove, as a practical matter, certain lands from the possibility of crop land use if the land is to remain in agriculture.

On the other hand, these provisions of the price support laws might well encourage the non-agricultural development of lands which cannot otherwise be farmed without jeopardizing price support eligibility for the entire farm. n903 This may accelerate the movement of some lands out of agriculture.

Since the restrictions have meaning only in the context of eligibility for federal programs, the fact that federal programs are voluntary may mean that some farmers will continue to farm highly erodible lands or convert wetlands to farm production and withdraw from the federal programs.

The federal farm program legislation declares that any farmer who plants predominantly highly erodible land or converts wetlands to cropland use shall be ineligible for: n904

1. any type of price support payment (including loans, deficiency payments and direct payments);

2. farm storage loans made by the Commodity Credit Corporation;

3. crop insurance made under the Federal Crop Insurance Act;

4. federal disaster payments;

5. any loan made, insured or guaranteed under the Consolidated Farm and Rural Development Act or made by the Farmers Home Administration that is used for any purpose that will contribute to excessive erosion of highly erodible

land.

These provisions virtually eliminate any program benefits. Further, failure to comply may eliminate the prospect that at some future date, the farmer may reenter the federal program. The importance of farm program entitlements is such that this gives the federal government considerable leverage over conservation activities on the farm.

Restrictions on planting for conservation purposes, as well as restrictions that are designed to reduce agricultural production have been popular with environmental groups but unpopular with many in the agricultural sector. Many of these land-idling programs have been criticized in a study released by the National Grain and Feed Association. It is argued in the study that returning 38.5 million acres to production would dramatically improve farm income and create the equivalent of 225,000 new jobs. The study calls for the elimination of acreage reduction programs and paid land diversions that have been a part of the price support programs of the government. n905 The 1996 farm legislation, The Federal Agricultural Improvement and Reform Act (F.A.I.R.) extended the Wetland Reserve Program through the year 2002 at a maximum acreage of 975,000 acres divided equally among permanent easements, 30-year easements and restoration cost-share agreements. In a 1998 case, United States v. Dierckman, n906 the court found that the wetland in particular was subject to the provisions of the Food Security Act even if it does not affect interstate commerce. The rationale for this is that the Food Security Act, by its terms, clearly does not limit itself to wetlands that affect interstate commerce. Further, the Act was passed pursuant to the Spending Clause of the Constitution, not the Commerce clause. As such, Congress has broad power that reaches beyond its other enumerated Constitutional powers to promulgate regulations that advance the general welfare. The wetlands provisions have been held to focus on protecting the status quo of the wetlands that existed at the effective date of adoption of the Food Security Act. n907

§ 47.12(l) Sodbusting Specifically Considered.

The exclusion from benefits under the sodbuster rules arises as a result of "production" of an "agricultural commodity" on "highly erodible land." Agricultural commodities are defined in the Act to include "any agricultural commodity planted and produced in a State by annual tilling of the soil, including tilling by one-trip planters." n908 This definition excludes perennial crops and would seem to exclude production of much forage, suggesting that the real focus of the statute is to prevent soil loss that occurs as a result of recurring disturbance of the soil. "Production" is not defined but would seem to be suggested by the definition of agricultural commodities as referring to the practice of raising a crop rather than of harvesting or marketing a crop. This, in turn, suggests that no crop actually must be raised for the statutory exclusion to attach. This is significant because entitlements under the federal programs are generally measured in terms of acres planted (and the historic or average yields from those acres) rather than on the basis of bushels actually harvested.

"Highly erodible" land is defined in the statute in terms of soil types in reference to the Soil Conservation Service land capability classification system. If the lands are classified as class IV, VI or VII under that system, they are deemed to be "highly erodible." Alternatively, if the lands have not been classified, they must have an annual soil loss tolerance level, as established by the Secretary, on the basis of the universal soil loss equation and wind erosion equation, adjusted for such factors as climate, soil erodibility and field slope. The final regulations further define "soil loss tolerance" to require that the soil have an "erodibility index" of eight or more. n909 The "erodibility" index is a "numerical value that expresses the potential erodibility of a soil in relation to its soil loss tolerance value without consideration of applied conservation practices or management." n910 In essence, the determination is based on inherent characteristics of the soil itself in its natural context rather than upon the farming context in which the soil is actually tilled.

There is an exception to the exclusion. If the farmer is planting pursuant to and in compliance with an approved conservation plan for the highly erodible land, program benefits will not be excluded. n911 This plan must be in place as of January 1, 1990 or within 2 years after the Soil Conservation Service has completed a soil survey of the farm, whichever is later. n912 Finally, the farmer must be actively applying the conservation plan, which must be based on

the local Soil Conservation Service technical guide, and have the plan in place by January 1, 1995. n913

It is interesting that the Department has declined to do a Takings Implications Analysis n914 that is required for sodbuster or swampbuster rules on the ground that participation in federal programs is voluntary. n915

§ 47.12(m) Swampbusting Specifically Considered.

Swampbusting refers to the conversion of wetlands to crop production. Although the Act originally predicated the exclusion from federal farm program benefits upon the "production" of a crop on such converted land, recent changes now ground the restriction on the Act of conversion. n916 This is a significant change because this shifts the focus of the restriction from planting to the actual drainage activity.

The statute defines "wetlands" in terms of soil types and vegetation. Land that has a predominance of hydric soils n917 or that supports a prevalence of hydroponic vegetation n918 is defined as wetlands. The Secretary is charged with the development of criteria to determine the presence of such soils and vegetation.

Considerable controversy has surrounded attempts to precisely make those determinations. Environmental groups have been concerned that the criteria will so narrowly be drawn that many "true" wetlands will not be covered by the restriction. This fear, in part, has been fueled by the approach taken in the Act that "already farmed" wetlands will not be considered as triggering the exclusion from program benefits, which suggests that Congress has specifically determined that some wet areas can be farmed. Agricultural groups have been concerned that much of the land that is actually farmed each year will be drawn into the definition and as a result, they will jeopardize or lose their eligibility for federal farm program benefits. This matter had not been resolved as of 1992. n919 Part of the concern and confusion results from the potential overlap in concern and regulatory authority derived from § 404 of the Clean Water Act which requires a federal permit prior to engaging in certain activities in or on wetlands. n920 Although § 404 contains an exemption for farming activities, n921 compliance with swampbusting regulations does not exempt the farmer from potential liability under § 404. For example, while the farmer may not be excluded from program benefits because of activities conducted on "farmed wetlands," there is no assurance that such lands will not qualify as wetlands under § 404. Similarly, the fact that lands are considered wetlands for purposes of the swampbusting restrictions does not, in and of itself, determine that the lands are wetlands for § 404. n922

The Secretary is required to delineate wetlands on wetland delineation maps and shall make "a reasonable effort" to make an on-site determination before lands are listed whenever requested by an owner or operator. n923 Before the map may be certified as effective for making wetland determinations affecting program eligibility, notice must be given to affected landowners or operators. n924

The Act provides several significant exceptions. The most important is that a farmer will not be excluded from program benefits on the basis of wetlands conversion where the crop production occurs on: n925

1. wetlands where conversion commenced or occurred prior to December 23, 1985;

2. an artificial lake, pond or wetland created by diking non-wetland to collect or retain water for livestock, irrigation, fish production, flood control etc.;

3. a wet area caused by a water delivery system or irrigation system;

4. wetland where crop production is possible as a result of natural conditions which destroy the wetland characteristics of the land without any action by the farmer;

5. converted wetlands where the Action of the farmer is such that it is deemed by the Soil Conservation Service to have

minimal impact on the hydrologic or biologic aspect of the wetlands; and

6. converted wetlands which were converted by someone else and where the conversion was not part of a scheme to avoid compliance with the applicable regulations.

The Act contains an exception that is based on good faith n926 and mitigation of harm by reconversion or replacement. n927 Satisfaction of the requirements relating to good faith may result in graduated penalties rather than total exclusion from program benefits. n928

The Secretary is required to make an on-site inspection before any federal farm benefits may be denied. n929

For a case in which the isolated nature of the wetland was sufficient to deny E.P.A. authority to regulate, see *Hoffman Homes, Inc. v. E.P.A.* n930 In this case, the tract was less than an acre and was at least 750 feet from the nearest body of water that could be considered a creek under the general definition of "waters of the United States."

Congress adopted what is popularly called the Environmental Conservation Acreage Program. This program has two principal parts. One, *16 U.S.C. §§ 3837*-3837f, is called the Wetlands Reserve Program. Farmers who have historically farmed wetlands or have properly converted wetlands can offer to sell a wetland conservation easement to U.S.D.A. and follow a conservation plan that will restore and protect those lands in the future. The easement will range from permanent or thirty years to the maximum allowed by state law. Payments will represent the difference in value between the fair market value of the land with the easement and the land without the easement. The other part of the program, *16 U.S.C. § 3831*(b) supplements the existing conservation reserve program by providing new opportunities for owners of eligible land to enter into contracts with the federal government to conserve and protect the land. The farmers will agree to take the land out of intensive agricultural production and convert it to less intensive uses. Farmers may be exempt from the wetlands provisions § 404 of the Clean Water Act if they are engaged in "normal farming activities." In United States v. Brace, n931 the court rejected a farmer's claim that he was engaged in normal farming activities when he purchased the land in question from his father for the purpose of converting it to cropland. The court found that the activity was not a part of the farmer's "established" farming operations because his activities, intentions and result were to convert land that otherwise was not suitable for farming into a site that was suitable for farming. As a result, the farmer was considered to have "brought an area into farming use." The court also noted that even if the land had been in pasture, it would not be considered an "ongoing farming operation" if the change in use required modifications to the hydrological regime. Finally, the court considered the dredging necessary to the laying of drainage tile, the levelling and clearing of a wooded area and his spreading of the dredged material were not part of the normal farming activities. The 9th Circuit has upheld the requirement that the government impose a conservation easement to protect wetlands on all land sold from the inventory of the Farmer's Home Administration (FmHA). In National Wildlife Federation v. Espy, n932 the land was conveyed by a quitclaim deed to a bank which held a senior lien. FmHA argued that the conveyance failed to trigger the easement requirement since it had, through the quitclaim deed, "abandoned" the property. The court held otherwise and a subsequent sale of the property without the easement was to be voided unless the purchasers took title in good faith and without notice of FmHA's obligation to create the easement.

In the 1996 farm legislation, The Federal Agricultural Improvement and Reform Act (F.A.I.R.), Congress extended the Wetland Reserve Program through the year 2002 at a maximum acreage of 975,000 acres divided equally among permanent easements, 30-year easements and restoration cost-share agreements. n933 A number of cases have dealt with the problem of converting wetlands to some form of agricultural activity. Under provisions of the 1985 federal farm program, a farmer loses eligibility for federal price support payments if land that was formerly considered wetlands is converted to agricultural production. In Von Eye v. United States, n934 the farmer wanted to continue to drain wetlands on his farm but not lose program eligibility. Plaintiff had commenced the conversion of the wetlands prior to the effective date of the 1985 farm bill and it had been ruled by the National Appeals Division (NAD) that the wetlands fell within the "Commenced conversion" provisions of the statute. Problems began when the farmer experienced problems with a township-owned culvert and he replaced it with a bigger one, that was set lower into the

ground. The result was to drain more wetlands than had been previously converted. The Soil Conservation Service notified the farmer that the culvert caused a conversion of wetlands in violation of the statute. Plaintiff sued to obtain permission to complete the project and to remain eligible for the program benefits. The court ruled that his approved conversion ended in 1986 and 1987 and that the present activity constituted an unauthorized new activity that could not relate back to before the effective date of the 1985 Farm Bill. In United States v. Johansen, n935 The U.S.. Fish and Wildlife Service (USFWS) claimed three wildlife-protection easements that covered 102 acres. Recent years with higher-than-normal precipitation had expanded the land claimed to more than 200 acres and the landowner wanted to drain the area back to its former size. The USFWS refused to define the boundaries of the easements and plaintiffs proceeded to drain water off areas they believed to be outside the easements. USFWS filed charges of illegal drainage and claimed the easements gave them the full 200 acres. The court held that only the potholes that existed at the time of the easement conveyance were covered by the easements and criticized the government for refusing the request to define the easements and then prosecuting the landowner for making his own determination. In Gunn v. U.S.D.A., n936 the court considered the extent to which "farmed wetland" provisions of the 1985 Farm Bill allowed the maintenance of conditions or improvement of the land for crop production purposes. Here, the landowner, in 1992, replaced a tile drain that had been installed in 1906 by the county conservation district with an open ditch. The court found that the conversion did not commence until after the effective date of the statute and therefore constituted an illegal conversion notwithstanding that the farmer had been farming that land continuously for 85 years. The court in United States v. Reaves n937 held that a five-year statute of limitations applicable to wetland violations of § 404 of the Clean Water Act did not apply to a civil enforcement action brought by the U.S. Army Corps of Engineers more than 13 years after the claimed violation. The rationale of the court was that the discharge of dredged or fill material into wetlands constituted an ongoing violation so long as the fill remained. n938

§ 47.12(n) Regulating Private Agricultural Use of the Public Domain.

Nearly one-third of the land in the nation is held under public title. This land contains much of the nation's natural resources and scenic attractions. This public land has become an important location for many activities, such as recreation, mining, timber harvesting and even agriculture. It has been difficult to accommodate all of the demands that are made of the public domain. A number of statutes have been enacted to regulate many of these various competing uses and to give protection to the important public interests that the public land represents. There has been a major effort to develop plans that complement the statutory framework to guide the overall use of public lands n939

The private use of federal land is presently governed primarily by the land planning requirements of the Federal Land Policy and Management Act of 1976, n940 The Multiple Use, Sustained Yield Act of 1960, n941 The National Forest Management Act of 1976, n942 The General Mining Law of 1872, n943 The Mineral Leasing Act of 1920, n944 and the Wilderness Act. n945 These statutes envision a comprehensive classification of public lands. Activities on these lands are then to be adapted to the nature of the lands but governed by the goal of maximizing the use of the land without destroying its value or character for future generations.

The most significant agricultural n946 activity that occurs on public land is livestock grazing. This is regulated primarily by federal statute, n947 in conformity with the land use plans required by the Federal Land Policy and Management Act of 1976, n948 The Multiple Use, Sustained Yield Act of 1960, n949 and The National Forest Management Act of 1976. n950 Grazing rights are secured by permit n951 which typically allows the permit holder to graze a specified number of livestock for a particular period on an identified portion of the public domain.

Not only is the public domain an important source of grazing for farmers and ranchers, public land is important as a site for other kinds of uses as well. n952 It is also an important source of revenue for states in which significant areas of public lands are located. U.S.D.A. distributed approximately $299 million to 43 states and Puerto Rico from national forests and grasslands in 1994. This money was collected from land use fees and sale of resources on 191 million acres of national forests and grasslands. States are required to use their share of this money for public schools and roads. Payments are made twice a year -- 75% in October and the balance in December. n953 There has been considerable

controversy over the amount charged to ranchers for grazing use of the public domain. In 1994, the Secretary of the Interior Bruce Babbitt proposed to raise the fees from $1.98 per animal unit month (A.U.M). to $3.96 over a three-year period. The objective of this proposed change was to make grazing costs comparable to the approximately $9.70 that is charged per animal unit month on private land. This proposal was met by vociferous resistance from Western livestock interests n954 and the proposal died. n955 One important issue is whether the federal government or the states will control activity on public lands. Although most land in the public domain is federal, various states own or control significant amounts. Historically, for example, states were given specifically numbered sections within the public domain to be managed for school purposes. A case involving the adequacy of royalty payments under a coal lease raises some questions about the need of states to more aggressively seek to protect such lands and supervise activities that occur thereon. In Consolidated Coal v. Division of State Lands, n956 the court held that the state had an irrevocable duty to manage the school lands for the sole benefit of common schools and to receive "full value" from any dispositions of such lands. Another important issue is whether the lands in question are still in the public domain. Two cases address interesting problems of this type. In Keener v. State, n957 land was granted from the public land for the purpose of a road. The Department of the Interior regulations called for 50-foot wide rights-of-way for local roads. When the patent was issued, only a 33-foot wide right-of-way was described. The State claimed ownership to the land located within such a 50-foot right-of-way despite the patent language and sought to quiet title to such a width. The court ruled in favor of the state on the ground that the defense of laches did not bar assertion of the right to the greater width nor did estoppel preclude the state's claim. In Board of County Comm'rs v. Ritchey, n958 a landowner had had his land resurveyed and, as a result, had moved his fence onto an area the county claimed under an 1887 ordinance that had declared all land overlying section lands to be public land. The facts showed that the land in question had been a part of a railroad grant and that the railroad had conveyed the land prior to 1887, even though nothing in the official land records indicated such a conveyance. The court held that the railroad grant took the land out of the public domain prior to the adoption of the ordinance. Therefore, the lands overlying the section line were not public lands by virtue of that ordinance. On the other hand, the lands had been used as a road for a sufficient period of time to support the county claim that in the alternative, the county had acquired title to the disputed lands by adverse possession. n959

§ 47.12(o) Private Agricultural Activity: Grazing on Forest Service Lands.

Forest Service permits are of two types: permits with priority for renewal, which are issued for 10 years or less, n960 and permits with no priority, which are essentially temporary permits of one year or less. n961 Term permit holders have first priority for a new (or renewal) permit provided the holder has fully complied with the terms and conditions of the expiring permit. n962

Fees are charged for these permits n963 on the basis of animal unit months. "Animal Unit Months" (AUM's) are defined as one unit of grazing or use for one month. An animal unit is considered to be each cow, bull, steer, heifer, horse or mule 6 months of age or older at the time of entering the National Forest System lands or which becomes 12 months of age during the time of use, each weaned cow, bull, steer, heifer, horse or mule regardless of age. n964 Five adult sheep or goats or five weaned sheep or goats of any age are considered to constitute a single animal unit and to be the equivalent to one cow, bull, steer, heifer, horse or mule. n965 No additional charge is made for lambing on Forest Service lands. n966

The manner of establishing fees differs depending on whether the forest lands are in the 16 Western States n967 or are in the East. n968 In the west, the fee is determined to reflect the economic value of the use of the land. This is done through a complex formula that multiplies a base fair market value by an annual Forage Value Index, added to the sum of the Beef Cattle Price Index minus the Prices Paid index and divided by 100. n969 In the East, the value is determined through a "noncompetitive fee method" that is adjusted annually by a hay price index n970 or on the basis of competitive bidding. n971

The Chief of the Forest Service is authorized to cancel, modify or suspend grazing and livestock permits, in whole or in part if the permittee fails to comply with restrictions, including state and federal laws relating to protection of air, water,

soil and vegetation, fish and wildlife and other environmental values n972 and where the land is to be devoted to other public purposes. n973 Except in the case of an emergency, however, the Service must give two years prior notification. n974

Grazing may be conducted on National Grasslands on essentially the same basis as upon National Forests, n975 wilderness or primitive areas within the National Wilderness Preservation system only to the extent that grazing was established prior to the inclusion of the lands within the system. n976

§ 47.12(p) Private Agricultural Activity: Grazing on Bureau of Land Management Lands.

Grazing of Bureau of Land Management lands occurs under the auspices of the Taylor Grazing Act. n977 This act was adopted to "stop injury to public grazing lands by preventing over-grazing and soil deterioration, to provide for their orderly use, improvement and development, to stabilize the livestock industry dependent upon the public range" n978 and to "provide for inventory and categorization of public rangelands on the basis of range conditions and trends; consistent with land use plans, multiple use, sustained yield, environmental values, economic and other stated values." n979

Most permits are issued for livestock grazing in grazing districts n980 on the basis of preferences. Preference is given to those within or near grazing districts who are "landowners engaged in the livestock business, bona fide occupants or settlers, or owners of water or water rights, as may be necessary to permit the proper use of lands, water or water rights owned, occupied or leased by them...". n981 This preference attaches to a designated base property which will support the animals while they are not on the public domain. n982

Permits are issued for a term not to exceed 10 years and are subject to modification resulting from range depletion, range conditions and other causes. n983 The permits specify the time and season during which the animals may be grazed and the number of animals that may use the land. These privileges are expressed in terms of "animal unit months" n984 Grazing fees are established annually by the Secretary using a stipulated formula that is designed to determine the forage value of the land use. n985

Non-renewable grazing permits may be issued to qualified applicants where forage is temporarily available provided the use is consistent with multiple use objectives and does not interfere with existing livestock operations on the public lands. n986

One important issue is whether the federal government or the states will control activity on public lands. Although "the public lands" of the United States tend to be thought of as federal lands, state-owned land is also public land. One such kind of state land located within the federal public domain is the numbered sections that were historically given to the states to be managed as "school lands." These typically are not fenced or otherwise separated from the federal lands and will often be considered by the public as susceptible to the same uses, including grazing, as the federal land. A case involving the adequacy of royalty payments under a coal lease raised some questions about the need of states to more aggressively seek to protect such lands and supervise activities that occur thereon. In Consolidated Coal v. Division of State Lands n987 the court held that the state had an irrevocable duty to manage the school lands for the sole benefit of common schools and to receive "full value" from any dispositions of such lands. In Matter of Kalfell Ranches, Inc n988 the court considered the obligation of a grazing district to apportion grazing preferences after the sale of some of the land that was subject to those preferences. In the past, the district had changed from a policy of grazing in common to the use of individually fenced units. It was held that the district had to reduce grazing preferences proportionately in order to accommodate those who had lost their areas in the sale. This duty, it was held, was not abrogated by the shift to individually fenced areas. n989

§ 47.12(q) Private Agricultural Activity: Property Nature of the Grazing Permit.

The precise nature of the interest acquired by the livestock owner under grazing permits is not clear. The statute and cases describe the rights involved variously as allotments, n990 preferences, n991 leases, n992 and grazing permits n993 and livestock use permits. n994 In many respects, the privilege is similar to that of a conventional real property lease. Unlike a lease, however, the grazing permit or lease does not grant exclusive possession to the premises since the land is subject to the statutorily mandated principle of multiple use n995 which opens public land to such uses as outdoor recreation, range, timber, watershed, wildlife and fish purposes in the "combination that will best meet the needs of the American People, making the most judicious use of the land...". n996

By statute and regulation, grazing permits do not create in the holder thereof "any right, title or interest or estate in or to the lands" held by the United States. n997 In this context, it has been held that the permit rights are not even "property" for purposes of protection under the Constitution. n998

On the other hand, the grazing rights seem to attach to particular tracts of public land as well as land held by private landowners n999 in much the same way as appurtenant property rights. n1000 For example, the grazing right may be passed with the "base" n1001 acreage to a subsequent purchaser of such lands or will remain with such lands in the event that the individual loses ownership or control of the base property. n1002 Similarly, the right may be "severed" in whole or in part from the base property and transferred to other base property. n1003 Finally, permit rights seem to have protected status akin to equitable property rights based on use over time n1004 and may not arbitrarily be canceled by the government. n1005

A California case gave an interesting interpretation to the nature of the right in order to sustain an exemption for landowners for liability resulting in harm to recreational entrants. n1006 In that case the plaintiff was injured when the plaintiff's motorcycle struck an unmarked barbed wire fence that had been erected on Forest Service Land pursuant to a grazing permit. Under the terms of the permit, the defendant was responsible for the maintenance of all fences in the permit area. The court applied a California statute n1007 which provides that the "owner of any estate or any other interest in real property" "owes no duty of care to keep the premises safe for entry or use by others for any recreational purpose" to shield the defendant from liability. The court construed the term "interest in real property" to include defendant's interest under the grazing permit despite the express language of the regulations n1008 on the ground that the permit was not unlike a license or easement. The court dismissed the language of the statute as having application essentially only where there is a question of compensation in a taking context under the Fifth Amendment. n1009 For other purposes, the interest may be deemed a property interest.

Conceptually, grazing permit rights arguably share much in common with usufructuary interests in that they represent a right to use property of another. It might be argued that the language of the statute which expressly disavows any creation of any property interest in the federal lands is not necessarily inconsistent with this view. The history of the Act suggests that Congress was clearly attempting to close the public domain to individuals who may have wished to acquire private title thereto. In this sense, the Act would appear to be an effort to end the public land distribution policies that the nation had pursued since its founding as the way to secure the large land areas that had been acquired. Read in that fashion, it is arguable that Congress did not intend so much to determine that the grazing rights were not property as it intended to make clear that the acquisition of a grazing right was not part of any homesteading or other title acquisition process. It may also be argued, as the court did in *Hubbard*, that a major concern was with liability for compensation in a takings context. This position arguably was required in order to give the respective administrative officers of the Forest Service and the Bureau of Land Management the flexibility they need to adapt the grazing opportunity to changing grazing conditions. Unfortunately, the legislative history is largely silent on either of these arguments.

A final approach might be to characterize the permit as a species of what Charles A. Reich has described as "new property." n1010 This kind of property is largely an economic phenomenon and it is clear that the right not only has value but gives value to the base land to which it is attached. n1011

§ 47.12(r) Private Agricultural Activity: State Land Use Controls on Federal Land.

The case of California Coastal Commission v. Granite Rock Co., n1012 is interesting with respect to the authority states may have regarding state control over land use activities conducted on federal land. n1013 In that case, the Supreme Court considered whether the state of California could impose a state environmental protection scheme on a corporation that was authorized to engage in an activity on federal land. The state program required a state permit prior to implementing environmentally threatening activities; the corporation had secured federal permission to mine limestone in a highly scenic area of the Los Padres National Forest of the public domain. The court held that a state has power to enforce its "environmental" laws by requiring such permits. The decision suggests that these requirements can be enforced by injunctive relief. n1014 On the other hand, the court appears to assume, without specifically deciding, that a state is preempted from imposing "land use" regulations on the same activities. n1015 Despite the nature of the holding, the court appears to consider this still to be an open question. n1016

While federal statutes envision considerable coordination of federal and state interests with respect to land use planning by federal agencies in regard to federal lands, n1017 it has been difficult to achieve both state and federal objectives in all cases. The *Granite Rock* case suggests that there may be some parallel authority on the part of the state to accomplish the state's land use objectives on public lands that is independent of the federal authority.

FOOTNOTES:
(n1)Footnote 759. *See* Fred Bosselman & David Callies, The Quiet Revolution in Land Use Control (1972).

See 43 U.S.C. § 1701 *et seq.* (1994) (Federal Land Policy and Management).

(n2)Footnote 760. *See Wickard v. Filburn, 317 U.S. 111 (1942).*

(n3)Footnote 761. *See* Paul Rasor and James Wadley, *The Secured Farm Creditor's Interest in Federal Price Supports: Policies and Priorities, 73 Ky. L.J. 595 (1984).*

(n4)Footnote 762. *See, e.g.*, New Directions in Farm, Land and Food Policies (Belden, Edwards, Guyer & Webb, eds., 1979).

(n5)Footnote 763. *16 U.S.C. §§ 1531*-1544.

(n6)Footnote 764. *16 U.S.C. § 1532*(19).

(n7)Footnote 765. 50 C.F.R. § 17.3.

(n8)Footnote 766. *Palila v. Hawaii Dep't of Land and Nat. Resources, 649 F. Supp. 1070 (D. Haw. 1986), aff'd, 852 F.2d 1106 (9th Cir. 1988).*

(n9)Footnote 767. *115 S. Ct. 2407 (1995).*

(n10)Footnote 768. Pub. L. 97-98, *95 Stat. 1341, 7 U.S.C. § 4201*.

(n11)Footnote 769. *30 U.S.C. §§ 1201*-1328.

(n12)Footnote 770. Title XII, Food Security Act of 1985, Pub. L. 99-198.

The Conservation Reserve (CRP) program authorizes contracts with farmers to remove their land from agricultural production for a period of ten years. During that time, the land may be used for conservation kinds of uses and possibly timber production. In exchange for the agreement to keep the land out of production, the farmers are paid a "rental fee." Approximately 36 million acres have been enrolled in the program at an annual cost of $1.6 billion. This includes land

in all states except Arizona, Vermont, and Rhode Island. William Stevens, *U.S. Effort to Return Farm Land to Natural State Wins Praise, The Environment*, N. Y. Times, Tuesday, January 20, 1995, at B7.

The first of the CRP contracts were to expire in 1995. In late 1994, the then Secretary of Agriculture, Mike Espy, extended the contracts an additional year. He also announced that CRP contract holders could enroll new land and extend contracts another 10 years or terminate their contracts, so long as the acreage would not exceed the CRP maximum. Participation would be subject to appropriation of funds to pay for such contracts. This position was sharply criticized in Congress. *See The Washington Report*, Doane's Agric. Rep., December 30, 1994, at 4. Espy then resigned. The Clinton Administration announced that as 10-year contracts expire, some of the program's funding would be withdrawn from acreage where conservation benefits are determined to be marginal and redirected to lands where the conservation impact will be higher. William Stevens, *U.S. Effort to Return Farm Land to Natural State Wins Praise*, The Environment, N. Y. TIMES, Tuesday, January 20, 1995, at B7.

(n13)Footnote 771. *The Washington Report*, Doane's Agric. Rep. 4, Oct. 7, 1994, at 4.

(n14)Footnote 772. *See Consolidated Coal v. Division of State Lands, 886 P.2d 514 (Utah 1994).* For further discussion, *see* Neil D. Hamilton, *Agriculture without Farmers? Is Industrialization Restructuring American Food Production and Threatening the Future of Sustainable Agriculture?* 14 N. Ill. L. Rev. 613, (Summer 1994); Christopher R. Kelley, *Rethinking the Equities of Federal Farm Programs,* 14 N. Ill. L. Rev. 695 (Summer 1994); Christopher R. Kelley, *Recent Developments in Federal Farm Program Litigation, 25 U. Mem. L. Rev. 1107 (Spring 1995);* Christopher R. Kelley and James Loeoen, *Federal Farm Conservation Initiatives: Past, Present and Future, 9 Nat. Resources & Env't. 17 (Winter 1995);* Raymond D. Watson, *Conservation Reserve Programs: What Happens to the Land When the Contracts End? 14 N. Ill. U. L. Rev. 733 (Summer 1994).*

It should be understood that the focus of this chapter is upon how agricultural land is regulated and managed. Obviously, there is much more than that involved within the general topic of government's relation to agriculture, regardless of the level of government that is considered. For example, this work does not specifically nor intensively deal with such matters as the Perishable Commodities Act, *7 U.S.C. § 499a* et seq.; the Packers and Stockyards Act, *7 U.S.C. § 181* et seq.; the United States Grain Standards Act, *7 U.S.C. § 71* et seq.; the Agricultural Marketing Agreement Act of 1937, *7 U.S.C. § 601* et seq.; the various acts administered under the auspices of the Animal and Plant Health Inspection Service; the various Rural Development programs; or the programs of the Food and Nutrition Service. All of these affect agriculture and even agricultural land in vital and fundamental ways. Nevertheless, they are beyond the scope of the inquiry here regarding the use of agricultural land. Notwithstanding the narrowness of the focus of this chapter, from time to time, cases or decisions pertaining to other concerns cut sufficiently across the entire spectrum of governmental relations to agriculture that they become pertinent to dealing with governmental actions regarding land. For example, in the 2001 case of *Kirby Produce Company v. U.S.D.A., 256 F.3d 830 (D.C. 2001),* the court addressed the extent to which Federal agency decisionmaking could be considered arbitrary or capricious. When matters involving governmental agencies are appealed to the courts, the courts are required to uphold the decisions of the Judicial Officer unless the Court finds that the decision was arbitrary, capricious, an abuse of discretion, not in accordance with law or unsupported by substantial evidence. In this case, the officer's decision was based on an arbitrary and capricious conclusion that the merchant, by requesting a continuance of the hearing, had admitted that it could not make a payment, as required by statute, within the time frame required by the statute. Another such case is *Livestock Marketing Association v. U.S.D.A., 132 F. Supp. 2d. 817 (D. So. Dak. 2001)* dealing with the extent to which farmers and ranchers can be compelled to make mandatory contributions toward the promotion of particular agricultural products. In this case, what was specifically at issue were contributions mandated by the Beef Promotion and Research Act. Here, the court ruled that the particular spending involved by the board violated the act and the First Amendment to the United States Constitution. The court distinguished the expenditures here from those upheld in *Glickman v. Wileman Bros. & Elliott, Inc., 521 U.S. 457 (1997).* There, the expenditures were for generic advertising whereas in the Livestock Marketing case, they were for "producer communications." In both cases, the programs involving mandatory contributions for product promotion had been authorized by referendum among the producers.

(n15)Footnote 773. For further discussion, *see* Sara M. Dunn, *From Flav'r Sav'r to Environmental Saver? Biotechnology and the Future of Agriculture, International Trade, and the Environment, 9 Colo. J. Int'l Envtl. L & Pol'y 145 (1998). See also* Benjamin N. Gutman, *Ethical Eating: Applying the Kosher Food Regulatory Regime to Organic Food, 108 Yale L.J. 2351 (1999);* Paul E. Hagen, and John B. Weiner, *The Proposed Biosafety Protocol to the Convention on Biological Diversity*, *International Environmental Law*, SD66 ALI-ABA 139 (April 15, 1999), Carla Mattix, *The Debate over Bioprospecting on the Public Lands*, 13 SPG Nat. Resources & Env't 537 (1999).

(n16)Footnote 774. The position taken recently by regulatory agencies appears to be that most, if not all, biotech products can be effectively regulated within existing statutory frameworks. *See, e.g.*:

"The USDA policy position is that products of genetic engineering fundamentally are no different than those produced by conventional methods and therefore, existing statutes are adequate for regulating the products of agricultural biotechnology." (Sarah Muirhead, *Views differ on federal approach to regulation of biotechnology*, Nutrition & Health, Foodstuffs, May 23, 1988 at 11).

(n17)Footnote 775. *See, e.g.*, report by Office of Technological Assessment: "None of the small-scale field tests proposed or probable within the next several years are likely to result in an environmental problem that would be widespread or difficult to control" (*Report Boosts Biotechnology Experiments*, Washington Post, May 5, 1988, at E1, col. 2).

(n18)Footnote 776. *43 U.S.C. §§ 4321*-4370a.

(n19)Footnote 777. *21 U.S.C. §§ 301*-392.

(n20)Footnote 778. *29 U.S.C. §§ 651*-678.

(n21)Footnote 779. *7 U.S.C. §§ 136*-136y.

(n22)Footnote 780. *15 U.S.C. §§ 2601*-2629.

(n23)Footnote 781. *42 U.S.C. §§ 6901*-6987 (*See 49 Fed. Reg. 50,867*, where E.P.A. identified this act as a potential source of regulatory authority).

(n24)Footnote 782. *51 Fed. Reg. 23,301.*

(n25)Footnote 783. *See, e.g.*, F.D.A. Final Policy Statement for Regulating Biotechnological Products, *51 Fed. Reg. 23,309;* U.S.D.A. Final Policy Statement for Research and Regulation of Biotechnology Processes and Products, *51 Fed. Reg. 23,340;* E.P.A. Statement of Policy for Regulating Biotechnological Products, *51 Fed. Reg. 23,343.*

(n26)Footnote 784. *California Agrarian Action Project, Inc. v. The Regents of the Univ. of Cal., 258 Cal. Rptr. 769 (Cal. App. 1989).* Held: that Hatch Act *(7 U.S.C. § 361 et seq)* . funding of agricultural research not properly directed to small family farm system of agriculture.

For a discussion of the environmental concerns associated with emerging biotechnology, see Barton, *Biotechnology, the Environment, and International Agricultural Trade, 9 Geo. Int'l Envtl. L. Rev. 95 (1996);* Comment, *Guiding the Hand that Feeds: Towards Socially Optimal Appropriability in Agricultural Biotechnology, 84 Cal. L. Rev. 1395 (1996);* Comment, *The Bioprospecting Question: Should the United States Charge Biotechnology Companies for the Commercial Use of Public Wild Genetic Resources? 24 Ecology L. Q. 131 (1997);* Note, *Are Environmental Challenges to Biotechnology Too Difficult?* (*Stauber v. Shalala, 895 F. Supp. 1178*, W.D. Wis. 1995), *4 Wis. Envtl. L. J. 41 (1997);* Angelo, *Genetically Engineered Plant Pesticides: Recent Developments in EPS's Regulation of Biotechnology*, 7 U. Fla. J. L. & Pub. Pol'y 257 (1996); Comment, *The FDA and the Biotechnology Industry: A Symbiotic Relationship? 71 Wash. L. Rev. 821 (1996);* Malinowski, *Globalization of Biotechnology and the Public Health Challenges*

Accompanying It, 60 Alb. L. Rev. 119 (1996); Note, *FIFRA's Preemption of Common Law Tort Actions involving Genetically Engineered Pesticides, 38 Ariz. L. Rev. 763 (1996);* Crespi, *Recombinant DNA Patents in Litigation -- A Comparative Study of Some EPO and UK National Court Decisions,* 28 Int'l Rev. Indust. Prop. & Copyright 603 (1997); Olsen, *The Biotechnology Balancing Act: Patents for Gene Fragments, and Licensing the "Useful Arts," 7 Alb. L. J. Sci. & Tech. 295 (1997);* Redick, Reavey & Michels, *Private Legal Mechanisms for Regulating the Risks of Genetically Modified Organisms: an Alternative Path Within the Biosafety Protocol, 4 ENVTL. L. 1 (1997).*

(n27)Footnote 785. *See, e.g., Foundation on Econ. Trends v. Heckler, 587 F. Supp. 753 (D.D.C. 1984), aff'd, 756 F.2d. 143 (D.C. Cir. 1985)* where the court held that a preliminary injunction was warranted to prevent the deliberate release of genetically altered bacteria into environment in field test sponsored by N.I.H. because of failure to compile environmental impact statement (E.I.S.) required by N.E.P.A.; *Laurel Heights Improvement Ass'n v. University of Cal., 238 Cal. Rptr. 451 (1987),* which held that the environmental impact report for proposed relocation of University's biomedical research facilities was inadequate because, *inter alia,* it did not adequately address the question of release of toxic chemicals, carcinogens and radioactive substances; *Foundation on Econ. Trends v. Lyng, 680 F. Supp. 10 (D.D.C. 1988),* which held that plaintiffs lacked standing to challenge issuance of a license under the Virus-Serum-Toxin Act, *21 U.S.C. §§ 151*-158; *5 U.S.C. § 702,* which permitted marketing of pseudorabies vaccine containing genetically altered virus. Further, U.S.D.A. finding that licensing would not have a significant impact on environment was not arbitrary or capricious; *Foundation on Econ. Trends v. Thomas, 661 F. Supp. 713 (D.D.C. 1986),* which held there was a lack of standing to challenge E.P.A. procedures by which genetically engineered pesticides may be released; *Foundation on Econ. Trends v. Johnson, 661 F. Supp. 107 (D.D.C. 1986),* which held there was a lack of standing to challenge operation of Coordinated Framework for Regulation of Biotechnology; Foundation on Econ. Trends v. Block, Civ. No. 84-3045 D.D.C. (Slip Opinion, Apr. 26, 1986), which granted summary judgment to USDA on a suit challenging the extent to which N.E.P.A. and A.P.A. affect U.S.D.A. animal productivity research; *Foundation on Econ. Trends v. Weinberger, 610 F. Supp. 829 (D.D.C. 1985),* which upheld an injunction against proposed construction of aerosol and toxic agent test facilities until the Department of Defense prepared an adequate EIS.

(n28)Footnote 786. *See, e.g.,* Thomas Fahey, Jr. & Richard Roznoy, *Aquifer Protection in Connecticut: Environmental Land Use Restrictions Run Deep, 68 Conn. B.J. 98 (1994);* Dich, Jan and Kerstin Wiklund, *Prostate Cancer in Pesticide Applicators in Swedish Agriculture,* The Prostate 34(2): 100-112 (Feb. 1, 1998); Christina S. Chen, *Persistent Organic Pollutants: Regime Formation and Norm Selection, 13 Conn. J. Int'l L. 119 (1998). See Harris v. Cropmate Company, 706 N.E. 2d 555 (Ill. App. 1999),* involving a suit by a farm operator who suffered damage to crops as a result of spraying on adjacent tracts. In cases of this type, issues of proof tend to require competent scientific proof regarding causation. Courts in these cases, since the Supreme Court's decision in *Daubert v. Merrell Dow Pharmaceuticals, Inc, 509 U.S. 579 (1993),* have struggled with the question of whether to continue to follow the "generally accepted" standard articulated by the D.C. Circuit Court in *Frye v. United States, 293 F. 1013 (D.C. Cir. 1923),* the rule set forth in Federal Rules of Evidence 702, or long standing state rules of evidence. In this case, acknowledging that *Daubert* held that *Frye* no longer applied to federal cases, the *Harris* court declined to adopt that test for Illinois actions and instead followed the *Frye* test. State law-based claims by workers for the consequences of being exposed to cancer-causing products have not been held preempted by the Federal Insecticide, Fungicide and Rodenticide Act FIFRA. *See DiPetrillo v. Dow Chemical Co., 729 A. 2d 677 (R.I. 1999).* In *Hawkins v. Leslie's Pool Mart, Inc., 184 F.3d 244 (5th Cir. 1999),* the court addressed a damage claim brought by owners of a swimming pool against the manufacturer of chlorinator tablets, alleging that she was injured when she ingested gaseous fumes after opening the container of tablets. The court held that the state law claims that the manufacturer failed to adequately warn of risk of sudden decomposition and sudden reactivation of the tablets or provide adequate directions for opening, closing and storing the container were preempted by FIFRA. The FIFRA preemption of the packaging claim was limited to the area of child-resistant packaging since EPA has not specifically considered the particular packaging in dispute in this case. Thus, the specific claim that the manufacturer had negligently failed to safely package the tablets was not preempted.

(n29)Footnote 787. *See, e.g.,* Federal Insecticide, Fungicide, and Rodenticide Act, *7 U.S.C. §§ 136*-136y.

(n30)Footnote 788. This is, for the most part, state level regulation, authorized under *7 U.S.C. §§ 136b* and 136v. See, e.g., Kan. Stat. Ann. § 2-2438a et seq. Misapplication can also be the basis for civil liability to those harmed by the application or use.

(n31)Footnote 789. *See, e.g.,* Toxic Substances Control Act, *15 U.S.C. §§ 2601*-2654; Solid Waste Disposal Act, *42 U.S.C. §§ 6901*-6991i; Comprehensive Environmental Response, Compensation and Liability Act, *42 U.S.C. §§ 9601*-9675.

(n32)Footnote 790. Emergency Planning and Community Right to Know Act, *42 U.S.C. §§ 11001*-11050.

(n33)Footnote 791. Federal Water Pollution Control Act, *33 U.S.C. §§ 1251*-1387; Safe Drinking Water Act (Public Health Service Act) *42 U.S.C. §§ 300f*-300j-11.

(n34)Footnote 792. STATUTES WHICH REGULATE THE EXISTENCE OF CHEMICALS:

Federal Insecticide, Fungicide, and Rodenticide Act (F.I.F.R.A.), *7 U.S.C. §§ 136*-136y. This act focuses on the manufacturing and distribution stages of production and has relied heavily on registration and proper labeling as the primary regulatory devices. In 1972, Congress adopted the Environmental Pesticide Control Act which made major changes in how registration was handled and injected the consideration of "unreasonable adverse impacts on the environment" into that process. Since 1972, registered pesticides are considered available for either "general" or "restricted" use. If the use is restricted, the chemical can only be applied by someone who has received special training and has been certified to use that chemical. Under the Act, farmers may be exposed to liability for civil and criminal fines for the unauthorized or uncertified application or resale of restricted chemicals though farmers will not likely be individually punished under this act for any pollution resulting from the chemical use.

Toxic Substances Control Act (T.S.C.A.), *15 U.S.C. § 2601 et seq*. The Toxic Substances Control Act was enacted to insure that as much as possible be known about chemicals which pose serious risks to the environment before they are manufactured, distributed or used. Under the act, the Administrator of the E.P.A. can order testing of existing and newly developed chemicals if there is a basis for concern that they pose unreasonable risks to the environment. Like F.I.F.R.A., this act may affect the availability of chemicals that might be of use in the course of farming operations and insure that they are adequately labeled. On the other hand, the Administrator may also prohibit or regulate the commercial use and disposal of residues and order the seizure of imminently hazardous chemical substances or mixtures if they are deemed to present "an unreasonable risk of injury to health or the environment." *15 U.S.C. § 2605.* These impacts obviously only affect individual farmers indirectly. If the farmer's use poses unreasonable risks, the Administrator may prohibit or limit the manufacture, distribution or manner of use of the particular chemical but the Act is not likely to impose direct liability on the farmer for any pollution consequences that may flow from the actual use of the chemicals. It is possible, however, for the Administrator to take action against a chemical user to seize the chemical or enjoin use or disposition of the chemical if the activity poses an imminent hazard to health or the environment. *Id.*

STATUTES THAT DEAL WITH POSSIBLE POLLUTION IMPACTS OF FARM CHEMICAL USE:

Clean Water Act (C.W.A.) also known as the Federal Water Pollution Control Act (F.W.P.C.A.), *33 U.S.C. §§ 1251*-1387, more directly addresses the pollution consequences of farm chemical use. The regulatory approach of this act is to trace pollution to its "source" and then impose restrictions on the source that are designed to eliminate or "filter out" the harmful discharges. The act classifies sources of pollution as "point sources" or "non-point sources." "Point sources" are those to which specific discharges may be traced and the point of pollution discharge thereby identified and regulated. The regulations include larger confined animal feeding units as point sources. The statute requires that point sources secure a National Pollution Discharge Elimination System (N.P.D.E.S.) permit before pollutants may be discharged into the "waters of the United States." Most pollution from agricultural activities cannot be precisely traced and is therefore typically considered to be "non-point source" pollution. Under this approach, the Act has settled on the

use of "best management practices" (B.M.P.'s) as the control technology to be used to deal with non-point sources of pollution. The B.M.P.'s that farmers are to adopt, of course, are not defined in the statute which defers such detailing to the states. The Regulations, 40 C.F.R. § 35.1521-4(c), define B.M.P.'s as "those methods, measures, or practices to prevent or reduce water pollution and include but are not limited to structural and non-structural controls, and operation and maintenance procedures. B.M.P.'s can be applied before, during and after pollution-producing activities to reduce or eliminate the introduction of pollutants into receiving waters." The statute itself uses "conservation practices" as the suggested approach. *33 U.S.C. § 1288*(j)(2). Under this approach, farmers are encouraged to voluntarily implement B.M.P.'s and the statute authorizes the use of cost-sharing contracts to accomplish this. *33 U.S.C. § 1288*(j)(1). One problem with this approach has been that many farmers have been unwilling to implement any practice that would increase the costs of farming unless there is a direct return benefit. Many B.M.P.'s do not generate such a return. As a result, in 1987, Congress mandated that the states do an "Assessment of Non-point Source Pollution" to review the development and implementation of pollution control mechanisms in their states. *See 33 U.S.C. § 319.* Interim reports suggest that states may be beginning to consider stronger measures of "encouragement" to enlist farmer participation. *See, e.g.,* Kansas Department of Health and Environment, Bureau of Water Protection, *Kansas Non-point Source Assessment, Interim Report.* Draft Mar. 4, 1988. It should be noted that other state statutes may require more than just using BMP's to control or prevent farm-based pollution. One state, for example, makes it unlawful to "discard or store any pesticide or pesticide container in such a manner as to cause injury to humans, vegetation, crops, livestock, wildlife, pollinating insects or waterways and wildlife therein." *See, e.g.,* Kan. Stat. Ann. § 2-2453(b).

Safe Drinking Water Act (S.D.W.A.) *42 U.S.C. §§ 300f*-300j-11 authorizes the establishment of maximum contamination levels for public water systems, including those that rely on groundwater sources. These levels are set at a level at which no known or anticipated adverse effects on human health will occur and which allows for an adequate margin of safety. The act requires the adoption of feasible treatment techniques which will insure that the required levels are achieved. These techniques are determined by considering the quality of source waters, protection afforded by watershed management, treatment practices and other relevant factors. States, for the most part, have the primary enforcement burden and do so through their own rules and regulations. Most of the act, of course, is targeted toward operators of public water supply systems in order to compel them to maintain a system that delivers safe drinking water. In such an approach, individual farmers are not directly affected. However, under the act, *42 U.S.C. § 300h-7,* states are required to develop a plan to protect wellhead areas (which means the surface and subsurface surrounding a water well or wellfield which supplied public drinking water through which contaminants are likely to move toward and reach the water well or wellfield). In these areas, the state is to insure that the wells are protected from contamination. As part of such a plan, a state may consider action designed to eliminate the source of the contamination -- which might be seepage of farm chemicals into the groundwater. Such an action obviously could affect the individual farm chemical user.

Solid Waste Disposal Act (S.W.D.A.), as amended by the Resource Conservation and Recovery Act (R.C.R.A.), 42. U.S.C. §§ 6901-6991, is the primary federal legislation dealing with the disposition of waste products. The regulatory approach here is first to identify specific contaminants and then to identify those who engage in specific activities involving those contaminants, such as generation of wastes, handling, treatment, storage, transportation of wastes, operation of dump sites and landfills, and so forth. Those engaged in the identified activities are the ones primarily regulated by the act and by plans promulgated under the act. This act is likely to reach many farm chemicals as well as such activities as the disposition of unused or leftover quantities of covered chemicals and their containers. By express provision of the regulations, however, farmers have been considered exempt from the act if they dispose of the wastes in the prescribed manner. 40 C.F.R. § 262.51. This requires that the farmer triple rinse the emptied hazardous chemical container, dispose of the residue on his or her own farm, and do so in a manner consistent with the disposal directions on the label. This act also regulates underground storage tanks which undoubtedly affects many farmers. A tank is considered to be an underground storage tank (U.S.T.) if more than 10% of its volume (including piping) is below grade. Excluded are certain small tanks including septic tanks, home heating oil tanks, tanks in basements and tanks that hold less than 110 gallons. U.S.T.s of 1,100 gallons or larger will generally have to be registered. Without registering, the farmer cannot use state funds for cleanup in the event of a spill. If the tank is installed after December

23, 1988, the installation must be properly certified and the tank must have proper overflow and spill prevention protection, corrosion protection and leak detection. The federal regulations call for a phase-in based on the number of tanks owned. For example, if the farmer owns less than 12 and passes less than 10,000 gallons through the tanks monthly, the farmer has until 1990 to show financial responsibility to cover at least $500,000 of cleanup costs per leak or spill and $1 million of annual aggregate coverage. All existing tanks must be retrofitted with corrosion, spill and overflow protection. Leak detection must be installed on tanks installed before 1988. Approved leak detection methods will vary with the tank's age. An approved leak detection method must be installed on all tanks built before 1965. By December 1998 or 10 years after retrofitting, monthly leak detection capability must be installed using approved technology.

Comprehensive Environmental Response, Compensation and Liability Act (C.E.R.C.L.A.), *42 U.S.C. §§ 9601*-9675 is primarily concerned with the cleaning up of inactive or abandoned toxic or hazardous chemical dumpsites. It is popularly called the Superfund Act because massive amounts of federal monies have been appropriated for this purpose where the cost of cleanup cannot be passed back to the original contaminator. As such, the act poses little direct threat to the farmer. On the other hand, a farmer might be affected because the act considers the presence of the hazardous chemicals rather than the act of disposition to be the problem. Therefore, mere ownership of the land or dump site is enough to bring an individual under the act even though that owner had nothing to do with putting the chemicals there. Farmer landowners may be fully liable for the cleanup costs and would not be able to pass that on to a third party (in this case, whoever actually put the chemicals there) unless the landowner can show 1) no knowledge of the prior use, 2) that the third party is the sole cause of the problem and 3) that the owner made a commercially reasonable site assessment that did not disclose the waste prior to the purchase.

STATUTES WHICH REQUIRE THE DISCLOSURE OF CERTAIN CHEMICALS:

Emergency Planning and Community Right-to-Know Act (E.P.C.R.T.K.A.), *42 U.S.C. §§ 11001*-11050, seeks to identify where hazardous chemicals are being generated and are being stored, require local jurisdictions to anticipate that those chemicals might be discharged into the environment and then develop a plan to deal with that emergency. The Administrator of E.P.A. publishes a list of hazardous chemicals covered by the act and establishes minimum amount levels that can be held, used or stored without having to be reported. Any facility that has any chemical on the list on the premises in amounts greater than that minimum amount is subject to the act. Facilities covered by the act must notify the E.P.A. of any release of the listed chemicals. They must also make available to the local planning committee and the public (on request) material safety data sheets (M.S.D.S.) which describe the contents of the hazardous chemicals held or used on the premises. This information must be submitted to the appropriate local emergency planning committee, to the state emergency response committee and to the fire department with jurisdiction over the facility. Some of this information must be made available to the public on request by the state committee. Failure to comply with these requirements subjects the violator to civil and criminal penalties.

In *Kuiper v. American Cyanamid Co., 913 F. Supp. 1236 (E.D. Wis. 1996),* the court rejected claims that the manufacturer had negligently misrepresented claims regarding a pesticide through deceptive advertising and the failure to include on the label cautions regarding the impact of the chemical after crop rotation. The court held that these tort claims were preempted by FIFRA, following an earlier court's conclusions in *Worm v. American Cyanamid, 5 F.3d 744 (4th Cir. 1993)* and *Welchert v. American Cyanamid, 59 F.3d 69 (8th Cir. 1995).* The court, however, opined that FIFRA may not preempt all tort claims for negligence or strict liability associated with the manufacture of the chemical and negligent misrepresentation where the claims are substantially different from information required to be on the label. Another case finding preemption of tort claims by *FIFRA is Grenier v. Vermont Log Bldgs., Inc., 96 F.3d 559 (1st Cir. 1996),* where the court held that FIFRA preempts label claims couched in terms of breach of warranty, misdesign or manufacturing defect.

In *United States v. Olin Corp., 927 F. Supp. 1502 (S.D. Ala. 1996),* the court invalidated portions of the Comprehensive Environmental Response, Compensation and Liability Act as an unconstitutional violation of the

commerce clause. The court held that these provisions regulated contamination which was purely a local matter and which did not "substantially affect" interstate commerce. This decision was reversed in *United States v. Olin Corp., 107 F.3d 1506 (S.D. Ala. 1997).*

For further discussion *see* Angelo, *Genetically Engineered Plant Pesticides: Recent Developments in EPS's Regulation of Biotechnology*, 7 U. Fla. J. L. & Pub. Pol'y 257 (1996); Comment, *The FDA and the Biotechnology Industry: A Symbiotic Relationship? 71 Wash. L. Rev. 821 (1996);* Malinowski, *Globalization of Biotechnology and the Public Health Challenges Accompanying It, 60 Alb. L. Rev. 119 (1996);* Note, *FIFRA's Preemption of Common Law Tort Actions Involving Genetically Engineered Pesticides, 38 Ariz. L. Rev. 763 (1996);* Note, *In Defense of FIFRA Preemption Failure to Warn Claims*, 12 J. Nat. Resources & Envtl. L. 123 (1996).

(n35)Footnote 793. *35 U.S.C. §§ 161*-164.

(n36)Footnote 794. *Id.*

(n37)Footnote 795. *35 U.S.C. § 101 et seq.*

(n38)Footnote 796. *100 S. Ct. 2204 (1980).*

(n39)Footnote 797. *7 U.S.C. §§ 2321*-2538.

(n40)Footnote 798. *7 U.S.C. § 2402*(a).

(n41)Footnote 799. *513 U.S. 179 (1995).*

(n42)Footnote 800. *982 F.2d 486 (1992).*

(n43)Footnote 801. *See* S.B. 1406, 103rd Congress, signed by President Clinton on October 6, 1994.

For further discussion, *see* Roberts, *Patenting Plants Around the World*, 18 Eur. Intell. Prop. Rev. 531 (1996); Note, *Patents Claiming Genetically Engineered Inventions: A Few Thoughts on Obtaining Broad Property Rights, 30 New Eng. L. Rev. 1019 (1996).*

(n44)Footnote 802. *7 U.S.C. §§ 136* to 136y.

(n45)Footnote 803. *7 U.S.C. § 136a*

(n46)Footnote 804. *7 U.S.C. § 136a*(d)(1)(A).

(n47)Footnote 805. *7 U.S.C. § 136a*(d)(1)(C)

(n48)Footnote 806. *7 U.S.C. § 136i*

(n49)Footnote 807. *7 U.S.C. § 136*(q).

(n50)Footnote 808. *Id.*

(n51)Footnote 809. *7 U.S.C. § 136v*(b).

(N52)Footnote 810. *178 F.3d 395 (5th Cir. 1999).*

(n53)Footnote 811. *505 U.S. 504 (1992).*

(n54)Footnote 812. *59 F.3d 69 (8th Cir. 1995).*

(n55)Footnote 813. *54 F.3d 555 (9th Cir. 1995).*

(n56)Footnote 814. *131 F.3d 656 (7th Cir. 1997).*

(n57)Footnote 815. *40 F. Supp. 2d. 863 (W.D. Ky. 1999).*

(n58)Footnote 816. *See, e.g., Harris v. Cropmate Company, 706 N.E. 2d 555 (Ill. App. 1999),* involving a suit by a farm operator who suffered damage to crops as a result of spraying on adjacent tracts. In cases of this type, issues of proof tend to require competent scientific proof regarding causation. Courts in these cases, since the Supreme Court's decision in *Daubert v. Merrell Dow Pharmaceuticals, Inc, 509 U.S. 579 (1993),* have struggled with the question of whether to continue to follow the "generally accepted" standard articulated by the D.C. Circuit Court in *Frye v. United States, 293 F. 1013 (D.C. Cir. 1923),* the rule set forth in Federal Rules of Evidence 702, or long standing state rules of evidence. In this case, acknowledging that *Daubert* held that *Frye* no longer applied to federal cases, the *Harris* court declined to adopt that test for Illinois actions and instead followed the *Frye* test.

(n59)Footnote 817. *See DiPetrillo v. Dow Chemical Co., 729 A. 2d 677 (R.I. 1999).*

(n60)Footnote 818. *184 F.3d 244 (5th Cir. 1999).*

(n61)Footnote 819. *See California Coastal Comm'n v. Granite Rock Co., 480 U.S. 572 (1987).*

(n62)Footnote 820. *See, e.g., Florida Lime & Avocado Growers, Inc. v. Paul, 373 U.S. 132 (1963); Hines v. Davidowitz, 312 U.S. 52 (1941).*

(n63)Footnote 821. *See, e.g., Pacific Gas & Elec. Co. v. State Energy Resources Conserv. & Dev. Comm'n, 461 U.S. 190 (1983).*

(n64)Footnote 822. *See* Rasor and James Wadley, *The Secured Farm Creditor's Interest in Federal Price Supports: Policies and Priorities, 73 Ky. L.J. 595 (1984)* and the discussion therein of *United States v. Kimbell Foods, 440 U.S. 715 (1979).*

(n65)Footnote 823. Public domain land is susceptible of private use in a variety of ways ranging from mining and extraction of minerals to fishing and hunting. In many cases, a major use of public areas is for private recreation. Important agricultural use of the public domain is commonly made in the form of grazing of livestock and harvesting timber. For a comprehensive exploratory overview of the general area of private use of the public domain *see* Coggins and Wilkinson, Federal Public Land and Resources Law (2d ed. 1986).

For an example of how extensive federal control over local land use regulation can be in the context of mining on public domain land, *see California Coastal Comm'n v. Granite Rock Co., 480 U.S. 572 (1987)* where the court seems to assume, though without specifically holding, that the Federal Land Policy and Management Act and the National Forest Management Act preempt the extension of state land use plans onto unpatented mining claims in national forest areas of the public domain.

See also Board of County Comm'rs v. Roger Kaul, No. 87 C. 84, (Jackson Cty. Dist Ct., Kan., Decided 3 May, 1988), where the State District Court held that the Jackson County zoning ordinance had no application to land located within the boundaries of an Indian reservation within the county.

In a 1990 decision by the 9th *Circuit, State of Nevada v. Watkins, 914 F.2d 1545 (9th Cir. 1990),* the Court upheld the power of Congress to designate a single state as the national high-level nuclear waste depository site. The primary rationale for the decision was grounded in the property clause and the fact that the site was located on federal land. The holding that Congress had the power to select the site was held to effectively preempt Nevada's attempt to veto this action. The court also ruled that the state's rights under the 10th Amendment were not violated. For further discussion of

the case, *see* James Davenport, *The Federal Structure: Can Congress Commandeer Nevada to Participate in its Federal High Level Waste Disposal Program? 12 Va. Envtl. L. J. 539 (1993).* For a discussion of *Nevada v. Watkins* in the context of public land law, *see 68 Tulane L. Rev. 1047.* In contrast, the United States Supreme Court held in a case decided after the Nevada decision that Congress could not, without violating the Tenth Amendment, compel the state of New York to take title to waste for which they had not provided a means of disposal. In *New York v. United States, 112 S. Ct. 2408 (1992),* the Court considered a challenge to a federal act that provided "incentives" to states to provide disposal sites for low-level nuclear waste generated in state. Although the Court upheld two of these incentives, it ruled that the provision that required the state to take title to waste for which it had not provided for disposition violated the Tenth Amendment. Another case has explored the extent to which state regulation of an area must give way to federal authority over the same subject matter. In *West Lynn Creamery, Inc. v. Healy, 114 S. Ct. 2205 (1994),* the United States Supreme Court invalidated Massachusetts milk pricing orders as contrary to minimum milk prices set pursuant to federal authority under the Agricultural Marketing Agreement Act. The Massachusetts program required dealers of milk in Massachusetts to make monthly payments into a state fund that was then distributed to producers in proportion to their contribution to the State's total production of raw milk. The court held that the Massachusetts program specifically imposed an impermissible burden on interstate commerce. In contrast, in an earlier case, *Medo-Bel Creamery v. State of Oregon, 673 P.2d 537 (Or. App. 1983),* a court held that the federal Milk Marketing Agreement Act did not preempt the state from setting higher minimum prices for milk. There, the court found that both the state and the federal statutes were designed to accomplish the same purpose, namely, to insure an adequate supply of milk by protecting the farmers who produce milk. The court said that "nothing in the statutes ... specifically or impliedly bars state action in setting minimum prices that are higher than those set under the federal statute. The purpose of the federal statutory scheme of establishing milk prices that are high enough to support producers and to continue a uniform supply of milk would not be adversely affected by state action setting prices higher than those set by the federal government. There is no impossibility of dual compliance with the federal and state regulatory bodies." "We therefore hold that Congress did not intend to preempt the field of setting milk prices. The states are preempted only from setting milk prices lower than those established by the federal government ... ." For a discussion of the preemptive effect of the labeling requirements of the Federal Insecticide, Fungicide and Rodenticide Act (FIFRA) *(7 U.S.C. §§ 136*-136y) on state Uniform Commercial Code implied warranties of fitness for particular purposes, *see Andrus v. Agrevo USA Co., 178 F.3d 395 (5th Cir. 1999); Cipollone v. Liggett Group, Inc, 505 U.S. 504 (1992); Welchert v. American Cyanamid, Inc., 59 F.3d 69 (8th Cir. 1995);* Taylor AG Indus. v. Pure-Gro 54 F.3dd 555 (9th Cir. 1995); and *Kuiper v. American Cyanamid Co. 131 F.3d 656 (7th Cir. 1997).* Express warranties of merchantability have also been held preempted. *See Gooch v. E.I. Du Pont De Nemours & Co., 40 F. Supp. 2d 863 (W.D. Ky. 1999).* In contrast, state law-based claims by workers for the consequences of being exposed to cancer-causing products have not been held preempted. *See DiPetrillo v. Dow Chemical Co., 729 A. 2d 677 (R.I. 1999).*

"Failure to warn" claims by consumers who were harmed by chemicals subject to FIFRA were barred as preempted in *Younger v. Spartan Chemical Co., 686 N.Y.S. 2d 152 (N.Y. App. 1999).* This case involved disinfectants. Larvicide claims were apparently beyond the preemptive reach of FIFRA, although the court did not directly address the issue in *Koch v. Shell Oil Co., 49 F. Supp. 2d 1262 (D. Kan. 1999).* In *Babalola v. Crystal Chemicals, Inc., 685 N.Y.S. 2d 679 (N.Y. App. 1999),* the court barred as preempted by FIFRA a claim against a distributor that there was a failure to properly inspect and test the product. However, the court did not bar as preempted a negligent testing claim against the manufacturer.

(n66)Footnote 824. In Board of County Comm'rs v. Roger Kaul, No. 87 C 84, (Jackson Co. Dist. Ct. Decided 3 May, 1988), the court held that the zoning ordinance of Jackson County did not apply to land located within an Indian reservation within the county. The court relied heavily on the decision in Confederated Tribes & Bands of the Yakima Nation v. County of Yakima, 828 F.2d (9th Cir. 1987) where the court held that the Yakima Tribe had authority to zone non-Indian fee land within the reservation boundaries based on the sovereignty of the Indian tribes. *See also Santa Rosa Band of Indians v. Kings County, 532 F.2d 655 (9th Cir. 1975).*

(n67)Footnote 825. *See, e.g.,* the Food Security Act of 1985, Pub. L. 99-198, *99 Stat. 1354,* § 1201 *et seq.,* which

mandates that any person who raises any agricultural commodity for which federal price supports are available on any land that is defined as "highly erodible" must have an approved conservation plan in place on that land by 1990 or such person shall be ineligible for federal price supports.

(n68)Footnote 826. Present programs relating to agricultural production began with the Agricultural Adjustment Act of 1933, Act of May 12, 1933, c. 25, tit. I, *48 STAT. 31*.

(n69)Footnote 827. *See* Why Farm Programs, Agricultural Stabilization and Conservation Service, United States Department of Agriculture (1979).

(n70)Footnote 828. *United States v. Butler, 297 U.S. 1 (1936).*

(n71)Footnote 829. *Parker v. Brown, 317 U.S. 341 (1943); Wickard v. Filburn, 317 U.S. 111 (1942).*

(n72)Footnote 830. *See* Paul Rasor and James Wadley, *The Secured Farm Creditor's Interest in Federal Price Supports: Policies and Priorities, 73 Ky. L.J. 595, 605-627 (1984).*

(n73)Footnote 831. *317 U.S. 111 (1942).*

(n74)Footnote 832. Paul Rasor and James Wadley, supra, n.19.

In 1996, in a radical departure from the historic approach to regulating farm production, Congress enacted the Federal Agricultural Improvement and Reform Act (FAIR). This was intended to constitute the basis for the federal farm program until the year 2002. (The act does not repeal the Agricultural Act of 1949, Pub. L. 81-439, *63 Stat. 1051*, as the permanent basis for the farm program. This approach gave farmers more flexibility as to how their land is used as the current approach is gradually phased out. Eventually, the decision of what to plant will be dictated more by market forces than by participation requirements of the federal farm program. Under the new program, there will be a one time sign up. If the farm is not enrolled during this period, it may not be enrolled at any time during the seven years of the program. Forms are available from the local Farm Service Agency. Eligible acres include wheat, feedgrains, upland cotton, and rice. Eligible farms must have at least one crop acreage base on the farm. Once enrolled, the farm is eligible to receive payments for seven years. The payments will be reduced each year until the end of seven years. The farmers who enroll in the program must comply with existing conservation compliance rules for their farms including those relating to wetlands. The Conservation Reserve Program is extended through the year 2002, but the acreage is limited to the currently enrolled 36.4 million acres. A maximum of 975,000 acres is permitted to be enrolled in the Wetland Reserve Program, divided equally between permanent easements, 30-year easements, and restoration cost-share agreements. A new program, called the Environmental Quality Incentive Program (EQIP), has been approved primarily to assist livestock producers address environmental issues on farms and ranches. The new approach allows any commodity to be grown on the contract acreage, with some restrictions for fruit and vegetable crops. On noncontract acreage, any crop, including fruits and vegetables can be grown and harvested. For further discussion, *see* Christopher R. Kelley, *Rethinking the Equities of Federal Farm Programs*, 14 N. Ill. L. Rev. 695 (Summer 1994); Christopher R. Kelley, *Recent Developments in Federal Farm Program Litigation, 25 U. Mem. L. Rev. 1107 (Spring 1995);* Christopher R. Kelley and James Loeoen, *Federal Farm Conservation Initiatives: Past, Present and Future, 9 Nat. Resources & Env't. 17 (Winter 1995);* Raymond D. Watson, *Conservation Reserve Programs: What Happens to the Land When the Contracts End? 14 N. Ill. U. L. Rev. 733 (Summer 1994).* For a discussion of the impact of the failure to comply with provisions of the federal statutes relating to "swampbusting" on eligibility to receive crop subsidies, *see United States v. Dierckman, 41 F. Supp. 2d 870 (S.D. Ind. 1998).*

(n75)Footnote 833. 551. For further discussion, *see* 1 Julian Juergensmeyer and James Wadley, Agricultural Law, 245-279 (1981); Paul Rasor and James Wadley, *The Secured Farm Creditor's Interest in Federal Price Supports: Policies and Priorities, 73 KY. L. J. 595, 605-627 (1984).*

(n76)Footnote 834. The following crops are covered by farm programs of the type described herein:

Feed grains: corn, grain sorghum, barley and oats;

Food grains: wheat, rye and rice;

Oilseeds: flaxseed, cottonseed, soybeans and tung nuts;

Fibers: wool, mohair, upland cotton and extra long staple cotton;

Miscellaneous: manufactured milk, honey, gum naval stores, tobacco, peanuts, dry edible beans and sugar.

(n77)Footnote 835. *Farms without Program Payments,* Farm Broadcaster's Letter (August 30, 1991) 2.

(n78)Footnote 836. *Id.*

(n79)Footnote 837. For further discussion, *see* Grassley, *The Federal Agricultural Improvement and Reform Act of 1996: Reflections on the 1996 Farm Bill, 1 DRAKE J AGRIC L. 1 (1996);* Roth, *The Government Changes the Rules MidGame: An Explanation of the Credit Provisions of the FAIR Act -- Part One: Direct Loan and Primary Loan Servicing Program Changes,* 11 Farmer's Legal Action Rep. 3-25 (No. 1 & 2, 1996); Hayes, *The Government Changes the Rules MidGame: An Explanation of the Credit Provisions of the FAIR Act -- Part Two: Preservation Loan Servicing Program and Inventory Property Changes,* 11 Farmer's Legal Action Rep. 26-33 (No. 1 & 2, 1996).

(n80)Footnote 838. *See* Myrl Duncan, *Toward a Theory of Broad-based Planning for the Preservation of Agricultural Land*, 24 Nat. Resources J. 61, 68 (1984).

The National Agricultural Lands Study (NALS) was issued on January 17, 1981. It was primarily the work of the United States Department of Agriculture and the Council on Environmental Quality. It also involved the assistance of the Department of Defense, Department of Energy, Department of Housing and Urban Development, Department of the Interior, Department of State, Department of Transportation, Department of the Treasury, Environmental Protection Agency and the Water Resources Council. The study sought to determine as accurately as possibly the extent of private agricultural land in the nation and identify how and where those lands were held.

(n81)Footnote 839. *7 U.S.C. § 4201 et seq.*

(n82)Footnote 840. Pub. L. 97-98, *95 Stat. 1343 (1981).*

(n83)Footnote 841. *7 U.S.C. § 4202.*

Section 4201(b) provides that the purpose of the act is

to minimize the extent to which federal programs contribute to the unnecessary and irreversible conversion of farmland to non-agricultural uses, and to assure that federal programs are administered in a manner that, to the extent practicable, will be compatible with State, unit of local government, and private programs and policies to protect farmland.

The act does not grant any specific authority to the Secretary of Agriculture to enforce or oversee procedures in other federal agencies. The success of the act as a measure to protect land for agricultural use therefore depends upon the extent to which each agency is willing to consider farmland preservation as a priority objective. *See* Frank Schindman, *The Evolving Federal Role in Agricultural Land Preservation, 18 Urb. Law. 423 (1986).*

(n84)Footnote 842. *7 U.S.C. § 4208. See also* Richard Dunford, *The Evolution of Federal Farmland Protection Policy,* 37 J. Soil & Water Conservation 133, 136 (1982).

(n85)Footnote 843. *Wade v. Dole, 631 F. Supp. 1100 (N.D. Ill. 1986), aff'd sub nom., Eagle Found., Inc. v. Dole, 813 F.2d 798 (7th Cir. 1987).*

(n86)Footnote 844. *Id.* The Secretary indicated that if the highway was to be located in a farmland area, at least two adverse effects would follow:

> One is that farms will be split into two, causing farmers to travel substantial distances to bridges over the highway in the course of working the fields; the other is that a diagonal cut of a highway across a farm presents complications for the farm's mechanical operation. The diagonal cut skews rows, and in triangular intersections machines operate less effectively or break down more often. Some of these effects may be alleviated by selling land so that each farm lies on one side of the road (the farmer whose "south 40" now lies on the other side of the highway may swap with the farmer whose "north 40" got cut off). But the creation of triangular rather than square corners cannot be dealt with by changing the orientation of the furrows.

631 F. Supp. at 1113.

(n87)Footnote 845. The regulations provide that, if, after consideration of the adverse impacts a particular project may have on agricultural land, the agency wishes to proceed with an activity that results in the conversion of farmland to a non-agricultural use, the agency is not permitted to refuse to proceed with the project. *See 49 Fed. Reg. 27, 725 (1984)* codified at 7 C.F.R. § 658.

See also Strycker's Bay Neighborhood Council, Inc. v. Karlen, 444 U.S. 223 (1980) dealing with the extent to which the federal agency must "study, develop, and describe appropriate alternatives to recommended courses of action" under similar environmental legislation, holding that legislation required "consideration" but subject to the agency's discretion as to the choice of action to be taken.

(n88)Footnote 846. *7 U.S.C. § 4209,* as amended by Pub. L. 99-198, subtitle F, § 1255 (b), *999 Stat. 1518).*

(n89)Footnote 847. *Id.*

(n90)Footnote 848. Linda Malone, *A Historical Essay on the Conservation Provisions of the 1985 Farm Bill: Sodbusting, Swampbusting, and the Conservation Reserve, 34 Kansas L. Rev. 577, 581 (1986).*

(n91)Footnote 849. *30 U.S.C. §§ 1201*-1328.

(n92)Footnote 850. *30 U.S.C. § 1260*(d)(1).

(n93)Footnote 851. *30 U.S.C. § 1269*(c)(2).

(n94)Footnote 852. *452 U.S. 264 (1981).*

(n95)Footnote 853. For a discussion on penalties under *30 U.S.C. § 1268* for violating Surface Mining Control and Reclamation Act, *see 82 A.L.R. Fed. 218 (1996). See Vogel v. Foth and Van Dyke Associated, Inc. 266 F.3d 838 (8th Cir. 2001)* regarding the devaluation of land for residential purposes occasioned by locating a landfill on farmland adjacent to the would-be residential land. *See also* W. Funk, *The Court, The Clean Water Act, and the Constitution: SWANCC and Beyond, 31 Envtl. L. Rep. 10741 (2001).*

(n96)Footnote 854. *See Brief for Appellees at 1, Hodel v. Indiana, 101 S. Ct. 2376 (1981).*

(n97)Footnote 855. *See* Matt Moline, *Urban Sprawl Eats Into Farmland,* Topeka Capital-Journal (Mon., Jan 16, 1995), at A-1.

(n98)Footnote 856. *Id.*

(n99)Footnote 857. I.R.C. § 2032a.

See also Roger A. McEowen, *Recent Caselaw and Legislative Developments Concerning Special Use Valuation of Farm and Ranch Property, 3 Drake J. Agric. L. 119 (1998);* Dennis I. Belcher, *Estate Planning for Family Business Owners: Section 2032a, Section 6166, and Section 303,* SC75 ALI-ABA 1327 (1998).

(n100)Footnote 858. That means that:

1. The taxpayer must be farming with an intent to realize a profit and not recreation or pleasure;

2. The taxpayer cultivates, operates and manages a farm, either as an owner or tenant. A taxpayer who leases land for a fixed fee (not based on production) and who does not participate in management is not generally considered to be "engaged in the business of farming." ("Farming" includes the following activities: stock, diary, poultry, fish, fruit and truck farms and also plantations, ranches, ranges and orchards. Farming does not include forestry or the growing of timber. A nursery engaged in raising ornamental plants, however, is considered a farm for purposes of the elections.)

The term "farm" is defined in § 2032A to include "stock, dairy, poultry, fruit, furbearing animal, and truck farms, ranches, plantations, nurseries, ranges, greenhouses or other similar structures used primarily for the raising of agricultural or horticultural commodities, and orchards and woodlands."

(n101)Footnote 859. "Adjusted value", as it is used in this context, means the value of the property determined *without* reference to § 2032A. That is, the fair market value minus the deductions allowed under I.R.C. § 2053(a)(4). Section 2053(a)(4) allows deductions for unpaid mortgages and indebtedness. "Qualified use" refers to the devotion of the property to "... use as a farm for farming purposes...".

(n102)Footnote 860. "Farming Purposes," as defined in I.R.C. § 2032A(e)(5), includes cultivating the soil or raising or harvesting of any agricultural commodity, handling, or storing any agricultural or horticultural commodity (but only if the operator regularly produces more than one-half of the commodity so treated) and planting, cultivating, caring for, or cutting of trees or preparation of trees for market.

(n103)Footnote 861. The term "qualified heir" means a member of the decedent's family who acquired such property (or to whom such property passed) from the decedent.

(n104)Footnote 862. The phrase "member of the family" is defined in § 2032A(e)(2) to include:

1) an ancestor of such individual,

2) the spouse of such individual,

3) a lineal descendant of such individual, of such individual's spouse, or of a parent of such individual, or

4) the spouse of any lineal descendant described in subparagraph (C).

The definition also provides that a legally adopted child shall be treated as a child by blood. Similarly, if the property passes to a trust, it is deemed to pass to a "qualified heir" if a "qualified heir" has a present interest. *Id.*

(n105)Footnote 863. For further discussion, *see* Donald Uchtmann, *Agricultural Estate Planning and the Economic Recovery Tax Act of 1981, 27 S.D. L. Rev. 422 (1982);* Note, *Taxation: Valuation of Farmland for Estate Tax Purposes, Qualifying for I.R.C. Sec. 2032a Special Use Valuation, 23 Washburn L.J. 638 (1984).*

(n106)Footnote 864. John F. Rohe, *Conservation Easement and Plain English, 74 Mich. B.J. 402 (May 1995).*

(n107)Footnote 865. For further discussion, *see* Richardson, *Maximizing Tax Benefits to Farmers and Ranchers Implementing Conservation and Environmental Plans, 48 Okla. L. Rev. 449 (1995).*

(n108)Footnote 866. I.R.C. § 2301(c). For further discussion, see Bowman, *New Tax Laws Could Aid Land Trusts,* Richmond Times Dispatch, pp B1, B4, (Sept 9, 1997). To qualify, the land must be located in or within 25 miles of a metropolitan area, or in or within 25 miles of a national park or wilderness area, or in or within 10 miles of an Urban National Forest. The land must also have been owned by the decedent or a member of the decedent's family for the three years preceding decedent's death. Finally, an easement must have been granted by the decedent or a member of decedent's family. This easement may be granted post-mortem so long as it is done no later than the date of election. The election is irrevocable and is made on the estate tax return.

A number of decisions have interpreted various aspects of special valuation under § 2032A. Following are some of the more significant decisions. In *Estate of Clara K. Hoover v. Commissioner, 69 F.3d 1044 (1995),* the court allowed the estate to claim a minority discount to arrive at the fair market value of the decedent's interest in the estate prior to reducing the value of the estate through the application of the special use valuation principles of § 2032A. Similarly, in *Estate of Luton v. Commissioner, T.C. Memo, 1994-539, supp. by T.C. Memo 1996-181,* the estate was allowed a 20% discount for minority interest and a 15% discount for lack of marketability. In *Estate of Bonner v. United States, 84 F.3d 196 (5th Cir. 1996),* the estate was allowed a fractional interest discount.

In *Hohenstein v. Commissioner, T.C. Memo 1997-56,* a qualified heir who received the property from a farmer decedent and farmed the property for eight years then became physically incapacitated and sold a portion of the farm and leased the remainder to unrelated parties on a cash basis. The heir reported the sale and paid the recapture tax but argued that the land should not lose its qualified status because he had materially participated for the period of eight years. The court held that the material participation and qualified use tests were separate tests and that the post-death cash lease was not a qualified use. In *Sass v. Hanson, 554 N.W.2d 642 (Neb. 1996),* a legal malpractice claim was filed against an attorney who had represented an estate electing special use valuation but eventually paying a recapture tax. The estate argued that the recapture tax would not have been assessed had proper legal advice been given. The court of appeals upheld a lower court decision that the action was barred by the statute of limitations. The court held that the statute was triggered at the time the party knew of the injury, not when the party obtained a legal right to seek redress in court. As a result, the cause of action accrued when letters were sent by the attorney to the heirs describing their options, not when the IRS assessed the recapture tax. These letters were sent at the time of death and did not warn the heirs to avoid cash leases. For further discussion, *see* Meints, *Farm Estate Planning Issues, Trends, and Concerns involved with Special Use Valuation,* 14 Agric. L. Update 4 (Jan 1997).

(n109)Footnote 867. For example, there is no ARP for wheat in 1993. Doanes Agricultural Report 1 (June 5, 1992).

(n110)Footnote 868. *See Wickard v. Filburn, 317 U.S. 111 (1942).*

(n111)Footnote 869. Marketing quotas have been in effect from time to time for cotton and sugar which function in a loosely analogous fashion to the allotments. Quotas are not presently in effect for cotton but are in effect for sugar. *See 7 U.S.C. § 1342* (cotton), § 1359bb (sugar).

(n112)Footnote 870. *7 U.S.C. § 1313.*

(n113)Footnote 871. *7 U.S.C. § 1313*(g).

(n114)Footnote 872. These must be established pursuant to a referendum in which two-thirds of the farmers engages in the production of tobacco assent. *7 U.S.C. § 1314e.*

(n115)Footnote 873. *Bryant v. Peckingpaugh, 400 S.E.2d 201 (Va. 1991).*

(n116)Footnote 874. There are limits on the amount of Burley tobacco quota that can be transferred to any one farm. *Tobacco, Background from 1985 Farm Legislation,* Agric. Info. Bul. 468, U.S. Dep't of Agric., Econ. Res. Serv. 25 (1984). *See also 7 U.S.C. § 1314e*(g), (h) and (k).

(n117)Footnote 875. *7 U.S.C. § 1314b.*

(n118)Footnote 876. *7 U.S.C. § 1358-1.*

(n119)Footnote 877. *7 U.S.C. § 1358-1*(b)(1)(C); § 1358a.

(n120)Footnote 878. *7 U.S.C. § 1358-1*(b)(3).

(n121)Footnote 879. *7 U.S.C. § 1359.*

(n122)Footnote 880. *See* the Food Security Act of 1985, Pub. L. 99-198, *99 Stat. 1354,* § 1201 *et seq.*

See also D. Salmonsen, *The New Congress: Legislative Initiative for Agriculture and Wetlands,* SF92 ALI-ABA 169 (2001); P. Morrisette, *Conservation Easements and the Public Good: Preserving the Environment on Private Lands,* 41 Nat. Resources J. 373 (2001).

(n123)Footnote 881. These benefits include any type of price support payment, including post-harvest Commodity Credit Corporation loans and deficiency payments, farm storage facility loans, disaster payments, crop insurance indemnity payments and farm loans made or guaranteed by the Farmers Home Administration for any purpose related to a purpose that would contribute to erosion on such lands. *16 U.S.C. § 3801.*

(n124)Footnote 882. 7 C.F.R. § 12.6(c)(4)(i). An on-site inspection is necessary where the landowner is in disagreement with the determination of the Service and where no adequate information about the property, such as existing soil surveys, exists. *Id.* at (iii).

(n125)Footnote 883. 7 C.F.R. § 12.6(c)(4).

(n126)Footnote 884. For further discussion, *see* James S. Carpenter, *Farm Chemicals, Soil Erosion, and Sustainable Agriculture, 13 Stan. Envtl. L.J. 190 (Jan. 1994);* Christopher R. Kelley & James Loeoen, *Federal Farm Conservation Initiatives: Past, Present and Future, 9 Nat. Resources & Env't. 17 (Winter 1995);* Larry C. Farey, Ron James & Staci J. Pratt, *Conservation Districts as the Foundation for Watershed Based Programs to Prevent and Abate Polluted Agricultural Runoff, 18 Hamline L. Rev. 151 (Winter 1994);* Margaret Grossman, *Agriculture and the Environment in the United States,* 42 Am. J. Com. L. 291 (1994); Raymond D. Watson, *Conservation Reserve Programs: What Happens to the Land When the Contracts End? 14 N. Ill. U. L. Rev. 733 (Summer 1994);* John H. Davidson, *Conservation Agriculture: An Old New Idea, 9 Nat. Resources & Env't. 20 (Winter 1995).*

(n127)Footnote 885. Food Security Act of 1985, tit. XII, subt. D, Pub. L. No. 99-198, *99 Stat. 1354, at 1509.*

For further discussion of the Conservation Reserve Program in the context of farm bankruptcies, *see* Christine Bakeis, *The Conservation Reserve Program and Its Effect on Farmers Filing Bankruptcy, 43 Drake L. Rev. 157 (1994).*

(n128)Footnote 886. The Secretary is authorized to accept land that is not deemed highly erodible provided the

land poses an off-farm environmental threat if the lands remained in production or poses a threat to the continued degradation of productivity due to soil salinity. *Id.* § 1231(c)(1)(A), *99 STAT. 1509.*

(n129)Footnote 887. The statute provides that land may not be accepted into the CRP if there has been an ownership change within the prior three years. *16 U.S.C. § 3835*(a)(1). This prohibition can be avoided if the Secretary determines that the land was not acquired for purposes of placing it in the program. In State of North Dakota *ex rel. Board of Univ. and School Lands v. Yeutter, 711 F. Supp. 517 (D. ND. 1989),* the adequacy of the secretary's determination regarding the presumption raised by a purchase within three years of the application. The court held that it was arbitrary, capricious and an abuse of discretion to rely solely on the date of purchase.

(n130)Footnote 888. *Id.*

(n131)Footnote 889. *Id.*

(n132)Footnote 890. *16 U.S.C. § 3832.*

(n133)Footnote 891. The water cover cannot include ponds for the purpose of watering livestock, irrigating crops or raising fish for commercial purposes. *Id.*

In *Strong v. Glickman, 50 F. Supp. 2d 1 (D. D.C. 1999),* plaintiff had been awarded a CRP contract for the ten year period beginning in 1988 and continuing through 1997. The contract was awarded as a result of the County Committee reversing an earlier decision that denied the contract on the ground that the plaintiff had not established that an agricultural commodity had been grown on the land. In 1991, the USDA Office of Inspector General (OIG) began a review of various offices in response to allegations that programs were not being administered according to applicable regulations. OIG determined that plaintiff's contract had been improperly awarded and the contract was canceled. This was appealed through USDA and to the courts. Plaintiffs were allowed to retain all CRP payments already issued plus a 1992 payment. Plaintiffs appealed to the courts alleging that the government had violated the Administrative Procedure Act by canceling the contract. The primary arguments were that, by regulation, determinations regarding conformity with applicable regulations were to be deemed "final" and that USDA based the cancellation on provisions of the ASCS Handbook which had not been duly promulgated as regulations. The court rejected plaintiff's arguments in each case. First, the language regarding finality *(7 U.S.C. § 1385)* does not preclude USDA from reviewing its own decisions. (There is a later adopted rule that provides that when state and county committees make decisions in good faith and in the absence of misrepresentation, false statements, fraud or willful misconduct, unless otherwise appealed under that section, such decision shall be final unless otherwise modified within 90 days. *See 7 U.S.C. § 1433e.* The court held that this particular provision did not govern the matter before it.) Further, the court noted that finality limitations are only applicable to official determinations that are made in conformity with the applicable regulations and here, the evidence suggested that the decisions were not made in conformity with the regulations. Second, regarding the use of the Handbook, the court noted there is no clear line distinguishing substantive rules which must be promulgated with notice and comment, and interpretive rules, which have no such requirement. Interpretive rules are those which 1) are not determinative of issues or rights addressed; 2) express the agency's intended course of action; 3) express its tentative meaning of particular statutory terms; and 4) do not foreclose alternative courses of action or conclusively affect rights of private parties. In this case, regardless of how the handbook was characterized, it did not constitute the sole authority for depriving the plaintiffs of their contract.

(n134)Footnote 892. The Secretary may approve a tree planting plan as part of the approved vegetative cover where that is necessary to maintain adequate erosion control on the eligible cropland. 7 C.F.R. 704.2(23).

(n135)Footnote 893. Some of the expenses associated with the conservation plan may be eligible for cost share participation by either the federal or the state government.

(n136)Footnote 894. The refund provisions do not apply where the land is purchased by or for the United States

Fish and Wildlife Service, § 3832(6).

(n137)Footnote 895. *Major v. Strube, 797 P.2d 173 (Kan. App. 1990)* (Unpublished Disposition). *See also*: *Weimerskirch v. Leander, 764 P.2d 663 (Wash. App. 1988). See also Thomas v. Dudrey, 404 P.2d 1039 (Kan. 1972)* (involving analogous impact of changes in soil bank contracts on tenant).

But see *Garnas v. Bone, 637 N.W. 2d 114 (Ia. 2001)* holding that in this case, a lease was mutually abandoned when the land was enrolled in the Conservation Reserve Program. Hence, no notice to terminate the lease was required. See also D. Salmonsen, The New Congress: Legislative Initiative for Agriculture and Wetlands, SF92 ALI-ABA 169 (2001); M. Taylor, The Emerging Merger of Agricultural and Environmental Policy: A New Vision for the Future of American Agriculture, *20 Va. Envtl. L. J. 169 (2001).*

(n138)Footnote 896. California, Iowa, Louisiana, Minnesota, Mississippi, Missouri, New York, North Carolina and Wisconsin.

(n139)Footnote 897. *See* Doane's Agricultural Report 4 (June 5, 1992).

(n140)Footnote 898. William Stevens, *U.S. Effort to Return Farm Land to Natural State Wins Praise,* The Environment, N. Y. Times (January 20, 1995) at B7.

(n141)Footnote 899. *See The Washington Report,* Doane's Agric. Rep., Dec. 30, 1994, at 4.

(n142)Footnote 900. William Stevens, *U.S. Effort to Return Farm Land to Natural State Wins Praise,* The Environment, N.Y. Times(Jan. 20, 1995) at B7.

(n143)Footnote 901. For further discussion, *see* James S. Carpenter, *Farm Chemicals, Soil Erosion, and Sustainable Agriculture, 13 Stan.Envtl. L.J. 190 (Jan. 1994);* Raymond D. Watson, *Conservation Reserve Programs: What Happens to the Land When the Contracts End? 14 N. Ill. U. L. Rev. 733 (Summer 1994);* John H. Davidson, *Conservation Agriculture: An Old New Idea,* 9 Nat.Resources &Env't. 20 (Winter 1995); Christopher R. Kelley & James Loeoen, *Federal Farm Conservation Initiatives: Past, Present and Future, 9 Nat. Resources & Env't. 17 (Winter 1995);* Margaret Grossman, *Agriculture and the Environment in the United States, 42 Am.J. Comp. L. 91 (1994).*

(n144)Footnote 902. For a discussion of the history behind this legislation, *see* Linda Malone, *A Historical Essay on the Conservation Provisions of the 1985 Farm Bill: Sodbusting, Swampbusting, and the Conservation Reserve, 34 Kansas L. Rev. 577, 581 (1986).*

For further discussion of the issue of wetlands generally, *see*: Michael Blumm, *The Clinton Wetlands Plan: No Net Gain in Wetlands Protection,* 9 J. Land Use & Envtl. L. 603 (1994); Michael Lenetsky, *President Clinton and Wetlands Regulation: Boon or Bane to the Environment?* 13 Temp. Envtl. L. & Tech. 81 (1994). *See also* Linda A. Malone, *Conservation at the Crossroads: Reauthorization of the 1985 Farm Bill Conservation Programs, 8 Va. Envtl. L.J. 215 (1989)* (discussing reforms that would be most effective and efficient in preserving wetlands and highly erodible land); Alia S. Miles, *Searching for the Definition of "Discharge:" Section 401 of the Clean Water Act, 28 Envtl. L. 191 (1998).* In response to the requirement in the Clean Water Act that there should be "no net loss" of wetlands, and the stricter U.S. Army Corps of Engineers policy which requires mitigation for destroyed wetlands larger than 1/3 acre (rather than the previous 1 acre), some jurisdictions have been experimenting with "wetlands banking." Under these approaches, those who operate the banks create wetlands in areas that are not otherwise wetlands. Then developers who destroy wetlands elsewhere can purchase wetlands from the "banks" to mitigate the damage. For further discussion, *see* Kyra Epstein, *Private Wetland Banking Comes to Colorado Front Range,* U.S. Water News, p. 10 (Jan. 2000). For a case involving local approval of wetland replacement plans, *see Board Order, Kells v. City of Rochester, 597 N.W. 2d 332 (Minn. 1999).* For a case involving local authority to designate land as wetland, *see Bode v. Minnesota Department of Natural Resources, 594 N.W. 2d 257 (Minn. 1999).* For further discussion of the law relating to wetlands, see Johnathan

H. Adler, Wetlands, Waterfowl, and the Menace of Mr. Wilson: Commerce Clause Jurisprudence and the Limits of Federal Wetland Protection, *29 Envtl. L. 1 (1999);* Rebecca Fink, We're From the Government and We're Here to Help: Farmers' and Ranchers' Reliance on Voluntary Governmental Programs May Open the Door to Governmental Control of Private Property through Expanding Scope of Wetlands Regulation, 30 Texas Tech. L Rev. 1157 (1999); Virginia Albrecht, Regulatory Takings and Wetlands: What are the Constitutional Limits? "Inverse Condemnation and Related Government Liability," SB14 ALI-ABA 531 (Oct. 17, 1996); Virginia Albrecht, Regulatory Takings Issues in the Context of Federal Wetlands, Endangered Species, and Surface Mining Regulation, "Inverse Condemnation and Related Government Liability," C997 ALI-ABA 307 (May 5, 1995).

In *United States v. Dierckman, 201 F.3d 915 (2000),* the court held that the Food Security Act was not enacted under the auspices of the Commerce Clause of the Constitution but rather under the spending power. The government is therefore not limited by the enumeration of Congressional powers in Article 1, Section 8 of the Constitution. As a result, the government may engage in indirect regulation of matters that would not fall within the scope of interstate commerce. In *Prokop v. United States, 91 F. Supp. 2d 1301 (D. Neb. 2000),* the court upheld a USDA determination that portions of the farmer's land were "farmed wetland pasture" subject to the restrictions of the Act against allegations that the determination was arbitrary and capricious and denied the landowner due process.

(n145)Footnote 903. Food Security Act of 1985, §§ 1211, 1221, Pub. L. 99-198, *99 Stat. 1354 (1985)* codified as *16 U.S.C. §§ 3811,* 3821.

See Branstad v. Veneman, 145 F. Supp. 2d 1011 (N.D. Ia. 2001), regarding farmers' rights during appeal where it is alleged that the farmers improperly converted wetlands by repairing a tile drainage system on their farmland. *See* M. Chertok, Federal Regulation of Wetlands, SF 97 ALI-ABA 1149 (2001); *See also* D. Salmonsen, The New Congress: Legislative Initiative for Agriculture and Wetlands, SF92 ALI-ABA 169 (2001); M. Taylor, The Emerging Merger of Agricultural and Environmental Policy: A New Vision for the Future of American Agriculture, *20 Va. Envtl. L. J. 169 (2001);* J. Davidson, Conservation Plans in *Agriculture, 31 Envtl. L. Rep. 10501 (2001).*

(n146)Footnote 904. *16 U.S.C. § 3811.*

(n147)Footnote 905. *Washington Report,* Doane's Agric. Rep., May 27, 1994, at 4.

(n148)Footnote 906. *41 F. Supp. 2d 870 (S.D. Ind. 1998).*

(n149)Footnote 907. *See Barthel v. United Stated Department of Agriculture, 181 F.3d 934 (8th Cir. 1999).* Since preexisting changes are not affected by the Act, a farmer was held entitled to the best water and farming regime that existed prior to the adoption of the Act. For further discussion, *see* Johnathan H. Adler, *Wetlands, Waterfowl, and the Menace of Mr.Wilson: Commerce Clause Jurisprudence and the Limits of Federal Wetland Protection, 29 Envtl. L. 1 (1999);* Rebecca Fink, *"We're From the Government and We're Here to Help: Farmers' and Ranchers' Reliance on Voluntary Governmental Programs May Open the Door to Governmental Control of Private Property through Expanding Scope of Wetlands Regulation.* 30 Texas Tech. L Rev. 1157 (1999).

(n150)Footnote 908. Pub. L. 99-198, § 1201(a).

(n151)Footnote 909. *52 Fed. Reg. at 35201.*

(n152)Footnote 910. *Id.*

(n153)Footnote 911. 7 C.F.R. 12.5(b).

(n154)Footnote 912. *Id.*

(n155)Footnote 913. *Id.*

(n156)Footnote 914. Exec. Order No. 12630, Governmental Actions and Interference With Constitutionally Protected Property Rights, *53 Fed. Reg. 8859 (1988).*

(n157)Footnote 915. Hal Hamilton, *USDA Issues Final Regulations Implementing 1990 Farm Bill Changes in the Conservation Enforcement Programs,* 8 Agric. L. Update 4 (June 1991).

(n158)Footnote 916. *See id.*

(n159)Footnote 917. Hydric soils are soils that, in their undrained state, are saturated, flooded or ponded long enough during a growing season to develop anaerobic conditions that support the growth and regeneration of hydroponic vegetation. Pub. L. 99-198, § 1201(a)(8).

In one federal case, *United States v. Dierckman, 41 F. Supp. 2d 870 (S.D. Ind. 1998),* the court found that the wetland in particular was subject to the provisions of the Food Security Act even if it does not affect interstate commerce. The rationale for this that the Food Security Act, by its terms, clearly does not limit itself to wetlands that affect interstate commerce. Further, the Act was passed pursuant to the Spending Clause of the Constitution not the Commerce clause. As such, Congress has broad power that reaches beyond its other enumerated Constitutional powers to promulgate regulations that advance the general welfare. For further discussion, *see* Johnathan H. Adler, Wetlands, *Waterfowl, and the Menace of Mr. Wilson: Commerce Clause Jurisprudence and the Limits of Federal Wetland Protection, 29 Envtl. L. 1 (1999);* Rebecca Fink, *We're From the Government and We're Here to Help: Farmers' and Ranchers' Reliance on Voluntary Governmental Programs May Open the Door to Governmental Control of Private Property through Expanding Scope of Wetlands Regulation,* 30 Texas Tech. L Rev. 1157 (1999); Virginia Albrecht, *Regulatory Takings and Wetlands: What are the Constitutional Limits? "Inverse Condemnation and Related Government Liability,"* SB14 ALI-ABA 531 (Oct. 17, 1996); Virginia Albrecht, *Regulatory Takings Issues in the Context of Federal Wetlands, Endangered Species, and Surface Mining Regulation, "Inverse Condemnation and Related Government Liability,"* C997 ALI-ABA 307 (May 5, 1995). For a discussion of the taking question regarding wetland matters, see S. Mattox, Regulatory Obstacles to Development and Redevelopment of Wetlands and other Essential Issues, SG029 ALI-ABA 853 (2001). In *MC Associates v. Town of Cape Elizabeth, 773 A. 2d 439 (Me. 2001),* the court held that state and federal takings claims do not need to be brought in separate proceedings. Nevertheless, the plaintiff failed to prove that the wetlands at issues were buildable before the enactment of the ordinance in question. See also D. Salmonsen, The New Congress: Legislative Initiative for Agriculture and Wetlands, SF92 ALI-ABA 169 (2001).

(n160)Footnote 918. Hydroponic vegetation is defined to mean a plant that grows in water or in a substrate that is at least periodically deficient in oxygen during the growing season as a result of excessive water content. *Id.*

In one federal case, *United States v. Dierckman, 41 F. Supp. 2d 870 (S.D. Ind. 1998),* the court found that the wetland in particular was subject to the provisions of the Food Security Act even if it does not affect interstate commerce. The rationale for this is that the Food Security Act, by its terms, clearly does not limit itself to wetlands that affect interstate commerce. Further, the Act was passed pursuant to the Spending Clause of the Constitution, not the Commerce clause. As such, Congress has broad power that reaches beyond its other enumerated Constitutional powers to promulgate regulations that advance the general welfare.

(n161)Footnote 919. *See* 7 C.F.R. Part 12.

(n162)Footnote 920. *33 U.S.C. § 1334.*

Alia S. Miles, Searching for the Definition of "Discharge": Section 401 of the Clean Water Act, *28 Envtl. L. 191 (1998).* For further discussion, *see* Robert Sokolove, *The Future of Wetland Regulation in Here,* Real Est. L.J., (Summer 1994); J. Goldman-Carter, *Protecting Wetlands and Reasonable Investment Backed Expectations in the* Wake of Lucas v. South Carolina Coastal Council, *28 Land & Water L. Rev. 425 (1993);* W. Cohen, *Practical Considerations in Litigating Cases Under the National Environmental Policy Act, National Environmental Policy Act NEPA,*

Ecosystem Analysis, and Environmental Impact Assessment, ALI-ABA, Cosponsored by the Envtl. Law Inst. And the Smithsonian Inst., April 21, 1994, and Feb. 17, 1994.

(n163)Footnote 921. *33 U.S.C. § 1334*(f)(1)(A) exempts the discharge of dredged or fill material "from normal farming, silviculture, and ranching activities such as plowing, seeding, cultivating, minor drainage, harvesting for the production of food, fiber, and forest products, or upland soil and water conservation practices."

(n164)Footnote 922. For a further discussion of the implications of § 404 on agricultural land, *see* Gerald Torres, *Wetlands and Agriculture: Environmental Regulation and the Limits of Private Property, 34 Kan. L. Rev. 539 (1986).*

Robert Sokolove, *The Future of Wetland Regulation is Here,* 23 Real Est. L. J. 78 (1994); Holly Dolbey, *Wetland Permitting Under Section 404 of the Clean Water Act: Do Proposals for an Administrative Appeals Process Have Any Appeal? 13 Va. Envtl. L.J. 936 (1994);* (Michael Blumm, *The Clinton Wetlands Plan: No Net Gain in Wetlands Protection,* 9 J. Land Use & Envtl. L. 603 (1994); Michael Lenetsky, *President Clinton and Wetlands Regulation: Boon or Bane to the Environment? 13 Temp. Envtl. L. & Tech J. 81 (1994).* In *United States v. Dierckman, 41 F. Supp. 2d 870 (S.D. Ind. 1998),* the court found that the wetland in particular was subject to the provisions of the Food Security Act even if it does not affect interstate commerce. The rationale for this is that the Food Security Act, by its terms, clearly does not limit itself to wetlands that affect interstate commerce. Further, the Act was passed pursuant to the Spending Clause of the Constitution, not the Commerce clause. As such, Congress has broad power that reaches beyond its other enumerated Constitutional powers to promulgate regulations that advance the general welfare. In this, the Food Security Act differs from the Clean Water Act, which does contain a limitation regarding interstate waterways. Further, even though there is a Memorandum of Agreement signed by USDA that provides that wetlands should be identified under the Food Security Act consistently with the Swampbuster provisions and the Clean Water Act, the court here said that that Memorandum did not address the question of whether the Swampbuster provisions should include an additional requirement that the wetland affect interstate commerce. For further discussion, *see* Johnathan H. Adler, *Wetlands, Waterfowl, and the Menace of Mr. Wilson: Commerce Clause Jurisprudence and the Limits of Federal Wetland Protection, 29 Envtl. L. 1 (1999);* Rebecca Fink, *We're From the Government and We're Here to Help: Farmers' and Ranchers' Reliance on Voluntary Governmental Programs May Open the Door to Governmental Control of Private Property through Expanding Scope of Wetlands Regulation,* 30 Texas Te ch. L Rev. 1157 (1999); Virginia Albrecht, *Regulatory Takings and Wetlands: What are the Constitutional Limits? "Inverse Condemnation and Related Government Liability,"* SB14 ALI-ABA 531 (Oct. 17, 1996); Virginia Albrecht, *Regulatory Takings Issues in the Context of Federal Wetlands, Endangered Species, and Surface Mining Regulation, "Inverse Condemnation and Related Government Liability,"* C997 ALI-ABA 307 (May 5, 1995).

(n165)Footnote 923. *16 U.S.C. § 3822*(a).

(n166)Footnote 924. *Id.*

(n167)Footnote 925. 7 C.F.R. § 12.5(b).

(n168)Footnote 926. *16 U.S.C. § 3822*(h).

(n169)Footnote 927. *16 U.S.C. § 3822*(f).

(n170)Footnote 928. *16 U.S.C. § 3822*(h)(2).

(n171)Footnote 929. *16 U.S.C. § 3822*(c); 7 C.F.R. § 12.30(c), (d).

(n172)Footnote 930. *999 F.2d 256 (7th Cir. 1993).*

(n173)Footnote 931. *41 F.3d 117 (3d Cir. 1994).*

(n174)Footnote 932. *45 F.3d 1337 (9th Cir. 1995).*

(n175)Footnote 933. For further discussion, *see* Michael S. Nagy, *The Definition of "Wetlands" under Section 404 of the Clean Water Act*: *Past, Present and Future,* 3 Balt. J. Envtl. L. 92 (Summer 1993); Hope M. Babcock, *Has the United States Supreme Court Finally Drained the Swamp of Takings Jurisprudence? The Impact of* Lucas v. South Carolina Coastal Council on Wetlands and Coastal Barrier Beaches, *19 Harv.Envtl.L. Rev. 1 (Winter 1995);* Eric T. Freyvogle, *The Owning and Taking of Sensitive Lands, 43 U.C.L.A. L. Rev. 77 (Oct. 1995);* John A. Leman, *The Birds: Regulation of Isolated Wetlands and the Limits of the Commerce Clause, 28 U.C. Davis L. Rev. 1237 (Summer 1995);* James J.S. Johnson and William L. Logan, *How an Uncodified Appropriations Act has Partially Cured a Constitutional Problem about how Wetlands are Defined for Regulatory Purposes,* 13 Temple Envtl. L. & Tech. J. 173 (Fall, 1994); Dennis J. Priolo, *Section 404 of the Clean Water Act: The Case for Expansion of Federal Jurisdiction over Isolated Wetlands,* 30 Land and Water L. Rev. 91 (Winter 1995); Richard C. Ausness, *Regulatory Takings and Wetland Protection in the Post Lucas Era,* 30 Land and Water L. Rev. 349 (Summer, 1995).

In response to the requirement in the Clean Water Act that there should be "no net loss" of wetlands, and the stricter U.S. Army Corps of Engineers policy which requires mitigation for destroyed wetlands larger than 1/3 acre (rather than the previous 1 acre), some jurisdictions have been experimenting with "wetlands banking." Under these approaches, those who operate the banks create wetlands in areas that are not otherwise wetlands. Then developers who destroy wetlands elsewhere can purchase wetlands from the "banks" to mitigate the damage. For further discussion, *see* Kyra Epstein, *Private Wetland Banking Comes To Colorado Front Range,* U.S. Water News, p. 10 (Jan. 2000).

(n176)Footnote 934. *92 F.3d 681 (8th Cir. 1996).*

(n177)Footnote 935. *93 F.3d 459 (8th Cir. 1996).*

(n178)Footnote 936. *118 F.3d 1233 (8th Cir. 1997).* The focus of the wetlands provisions has been held to focus on protecting the status quo of the wetlands that existed at the effective date of adoption of the Food Security Act. *See Barthel v. United Stated Department of Agriculture, 181 F.3d 934 (8th Cir. 1999).* Since preexisting changes are not affected by the Act, a farmer was held entitled to the best water and farming regime that existed prior to the adoption of the Act. In response to the requirement in the Clean Water Act that there should be "no net loss" of wetlands, and the stricter U.S. Army Corps of Engineers policy which requires mitigation for destroyed wetlands larger than 1/3 acre (rather than the previous 1 acre), some jurisdictions have been experimenting with "wetlands banking." Under these approaches, those who operate the banks create wetlands in areas that are not otherwise wetlands. Then developers who destroy wetlands elsewhere can purchase wetlands from the "banks" to mitigate the damage. For further discussion, *see* Kyra Epstein, *Private Wetland Banking Comes to Colorado Front Range,* U.S. Water News, p. 10 (Jan. 2000).

(n179)Footnote 937. *923 F. Supp. 1530 (M.D. Fla. 1996).*

(n180)Footnote 938. *But see United States v. Telluride Co., 884 F. Supp. 404 (D. Colo. 1995).*

For a further comment regarding federal authority to regulate wetlands, see: *Do Isolated Wetlands Substantially Affect Interstate Commerce? 46 Am. U. L. Rev. 931 (1997);* McBeth, *Wetlands Conservation and Federal Regulation: Analysis of the Food Security Act's "Swampbuster" Provisions As Amended By the Federal Agriculture Improvement and Reform Act of 1996, 21 Harv. Envtl. L. Rev. 201 (1997).*

(n181)Footnote 939. For further discussion, *see* Scott Hardt, *Federal Land Management in the Twenty-First Century: From Wise Use to Wise Stewardship, 18 Harv. Envtl. L. Rev. 345 (1994);* Beth Brennan, *The National Forest Management Act: Judicial Interpretation of a Substantive Environmental Statute,* 15 Pub. Land L. Rev. 53 (1994); Todd M. Olinger, *Public Rangeland Reform: New Prospects for Collaboration and Local Control Using the Resource and Advisory Councils, 69 Colo. L. Rev. 633 (1998). See also* Note, *Cattle Ranch with Park Rangers: The Battle for a Tallgrass Prairie National Park in Kansas, 18 Stan. Envtl. L.J. 211 (1999);* Barton H. Thompson, *People or Prairie*

Chickens: The Uncertain Search for Optimal Biodiversity, 51 Stan. L. Rev. 1127 (1999); Comment, *The National Grasslands and Disappearing Biodiversity: Can the Prairie Dog Save Us from An Ecological Desert? 29 Envtl. L. 213 (1999);* Jan Lewandrowski and Kevin Ingram, Policy *Considerations for Increasing Compatibilities between Agriculture and Wildlife*, 39 Nat. Resources J. 229 (1999); J. David Akin, *Balancing Endangered Species Protection and Irrigation Water Rights: The Platte River Cooperative Agreement, 3 Great Plains Nat. Resources J. 119 (1999);* Michael Aline, *Federal Lands and Invisible Hands, 25 Ecology L. Q. 611 (1999);* Michael McClosky, *Local Communities and the Management of Public Forests, 25 Ecology L. Q. 624 (1999);* Sally K. Fairfax, Louise P. Fortman, Ann Hawkins, Lynn Huntzinger, Nancy Lee Peluso, and Steven A. Wolf, *Federal Forests are Not What they Seem: Formal and Informal Claims to Federal Lands, 25 Ecology L.Q. 630 (1999);* Samuel Adams, *Supreme Court Denies Review of Challenges Made to Forest Management Plan, 19 J. Land Resources & Envtl. L. 104 (1999);* Johanna H. Wald, Joseph M. Feller, Recent *Developments in the Law of Grazing on Federal Lands, Environmental Law (Co-sponsored by the Environmental Institute and The Smithsonian Institution)*, SD47.ALI-ABA 151 (Feb. 10, 1999); Pamela Baldwin, *Public Lands Study Materials Environmental Law* (Co-sponsored by the Environmental Institute and The Smithsonian Institution) SD47.ALI-ABA 347 (Feb. 10, 1999).

(n182)Footnote 940. *43 U.S.C. §§ 1701*-1784.

(n183)Footnote 941. *16 U.S.C. §§ 528*-531.

(n184)Footnote 942. *16 U.S.C. §§ 1600*-1614.

See Beth Brennan, *The National Forest Management Act: Judicial Interpretation of a Substantive Environmental Statute*, 15 Pub. Land L. Rev. 53 (1994).

(n185)Footnote 943. *30 U.S.C. §§ 21*-42.

(n186)Footnote 944. *30 U.S.C. §§ 181* - 287.

(n187)Footnote 945. *16 U.S.C. §§ 1131*-1136.

(n188)Footnote 946. Timber production, or silviculture, is typically not considered to be an agricultural activity.

(n189)Footnote 947. Grazing on lands administered by the Bureau of Land Management is regulated under the Taylor Grazing Act, Act of June 28, 1934, *48 Stat. 1269, 43 U.S.C. § 315*-315r. Grazing on Forest Service lands is regulated by 36 C.F.R. § 222.3(a). Grazing public lands in Alaska is regulated by *43 U.S.C. § 316.*

(n190)Footnote 948. *43 U.S.C. §§ 1701*-1784.

(n191)Footnote 949. *16 U.S.C. §§ 528*-531.

(n192)Footnote 950. *16 U.S.C. §§ 1600*-1614.

(n193)Footnote 951. *43 U.S.C. § 315b;* 36 C.F.R. § 222.3(a).

(n194)Footnote 952. *See* James Cunningham & Gary Greer, *Term Special Use Permits, Ski Area Permits, and Special Use Permits Under 16 U.S.C. § 497, § 496b and § 551*, Resort Real Est. And Clubs (ALI-ABA) (1994); David Lazerwitz, *Bones of Contention: The Regulation of Paleontological Resources on the Federal Public Lands, 69 Ind. L.J. 601 (1994).*

(n195)Footnote 953. Farm Broadcasters Letter, United States Dep't Agric., July, 1994, at 1.

(n196)Footnote 954. For further discussion, *see* Harry Meyers *Curiosities in Babbitland*, Western Styles, June 1994, at 8; Glenna Whitley, *Range War*, Western Styles, June 1994, at 78-84.

(n197)Footnote 955. *See* The Washington Report, Doane's Agric. Rep., Dec. 30, 1994, at 4.

(n198)Footnote 956. *886 P.2d 514 (Utah 1994).*

(n199)Footnote 957. *889 P.2d 1063 (Alaska 1995).*

(n200)Footnote 958. *888 P.2d 298 (Colo. App. 1994).*

(n201)Footnote 959. For further discussion, *see* Shirley Baty, *Right to Farm-La Plata County,* 1995 Mineral Law Series: Rocky Mtn. Mineral Law Found. 12C (July 1995); John M. Evans, *Right to Farm Private Property*, 1995 Mineral Law Series: Rocky Mtn. Mineral Law Found. 12B (July 1995).

One interesting development is the use of the public domain as a resource for new genetic material. For a discussion of some of the issues involved, see Comment, *The Bioprospecting Question: Should the United States Charge Biotechnology Companies for the Commercial Use of Public Wild Genetic Resources? 24 Ecology L.Q. 131 (1997).*

For a discussion of management issues affecting public or tribal lands, see Comment, *Disputes Over Timber Removal from National Forests (Mountain States Legal Found. V. Glickman, 92 F.3d 1228, D.C. Cir. 1996),* 12 J. Nat. Resources & Envtl. L. 189 (1996); Mondou, *Our Land is What Makes Us Who We Are: Timber Harvesting on Tribal Reservations after the NIFRMA, 21 AM. Indian L. Rev. 259 (1997);* Padilla, *The Mouse that Roared: How the National Forest Management Act Diversity of Species Provision is Changing Public Timber Harvesting, 15 U.C.L.A. J. Envtl. L. & Pol'y, 113 (1996).* For further general discussion of public land issues relating to agriculture, see Arruda & Watson, *The Rise and Fall of Grazing Reform, 32 Land & Water L. Rev. 413 (1997);* Landever, *Whose Home on the Range? Equal Footing, the New Federalism and State Jurisdiction on Public Lands, 47 Fla. L. Rev. 557 (1995);* Note, *Three Congressional Mandates, An Environmental Impact Statement, and the Bureau of Land Management: Can an Old Dog be Taught New Tricks? 2 Drake J Agric. L. 297 (1997);* Pendery, *Utah's School Trust Lands: Constitutional Single-purpose Land Management,* 16 J. Energy Nat. Resources and Envtl. L. 319 (1996); Pierson, *The Bureau of Land Management: A Half-century of Challenges and Change, 32 Land & Water L. Rev. 345 (1997);* Sullivan, *Fifty Years of Rhetoric on the Range: Reframing the Debate on Public Land Management, 32 Land & Water L. Rev. 339 (1997);* Armstrong, *Our Federal Public Lands,* 12 Nat. Resources & Env't L. 2 (1997); Wilkinson, *The National Forest Management Act: The Twenty Years Behind, The Twenty Years Ahead, 68 U. Colo. L. Rev. 659 (1997).* Newly enacted Section 508 of the Taxpayer Relief Act allows the executor of the estate of a farm decedent dying after Dec. 31, 1997, to exclude from the decedent's gross estate up to 40% of the value of land subject to qualified conservation easements. I.R.C. § 2301(c). For further discussion, *see* Bowman, *New Tax Laws Could Aid Land Trusts,* Richmond Times Dispatch, pp B1, B4, (Sept 9, 1997). To qualify, the land must be located in or within 25 miles of a metropolitan area, or in or within 25 miles of a national park or wilderness area, or in or within 10 miles of an Urban National Forest. The land must also have been owned by the decedent or a member of the decedent's family for the three years preceding decedent's death. Finally, an easement must have been granted by the decedent or a member of decedent's family. This easement may be granted post-mortem so long as it is done no later than the date of election. The election is irrevocable and is made on the estate tax return. This may encourage farmers who have inholdings in the public domain to create conservation easements that may make the use of that land more compatible with the manner in which the surrounding public domain land is managed.

(n202)Footnote 960. 36 C.F.R. § 222.3(c)(1).

See Beth Brennan, *The National Forest Management Act: Judicial Interpretation of a Substantive Environmental Statute,* 15 Pub. Land L. Rev. 53 (1994). For further discussion, *see* Johanna H. Wald and Joseph M. Feller, *Recent Developments in the Law of Grazing on Federal Lands, Environmental Law* (Co-sponsored by the Environmental Institute and The Smithsonian Institution) SD47.ALI-ABA 151 (Feb. 10, 1999); Pamela Baldwin, *Public Lands Study Materials* Environmental Law (Co-sponsored by the Environmental Institute and The Smithsonian Institution) SD47.ALI-ABA 347 (Feb. 10, 1999); Michael Aline, *Federal Lands and Invisible Hands, 25 Ecology L. Q. 611 (1999);*

Michael McClosky, *Local Communities and the management of Public Forests, 25 Ecology L. Q. 624 (1999);* Sally K. Fairfax, Louise P. Fortman, Ann Hawkins, Lynn Huntzinger, Nancy Lee Peluso, and Steven A. Wolf, *Federal Forests are Not What they Seem: Formal and Informal Claims to Federal Lands, 25 Ecology L.Q. 630 (1999);* Samuel Adams, *Supreme Court Denies Review of Challenges Made to Forest Management Plan, 19 J. Land Resources & Envtl L. 104 (1999).*

(n203)Footnote 961. *Id.* § 222.3(c)(2).

(n204)Footnote 962. 36 C.F.R. § 222.3(c)(1)(ii).

(n205)Footnote 963. Fees are generally not charged for grazing of animals involved in certain research or administrative studies on National Forest Service lands, for grazing by persons who reside on lands within or contiguous to Nation Forest Service lands provided the use does not exceed 10 animals and the products are used or consumed directly by the family who distinctly needs those lands to support the family, and for casual grazing by animals of campers and travellers while the campers or travellers are on the public lands. *Id.* § 222.50.

(n206)Footnote 964. 36 C.F.R. § 222.50(c).

(n207)Footnote 965. *Id.*

(n208)Footnote 966. *Id.*

(n209)Footnote 967. These states include Arizona, California, Colorado, Idaho, Kansas, Montana, Nebraska, Nevada, New Mexico, North Dakota, Oklahoma, Oregon, South Dakota, Utah, Washington, and Wyoming. *Id.* § 222.51(a).

(n210)Footnote 968. Eastern States are designated by subcategory:

Corn Belt: Illinois, Indiana, Missouri and Ohio;

Lake States: Michigan, Minnesota, and Wisconsin;

Northeast: Maine, New Hampshire, New York, Pennsylvania, and Vermont;

Appalachia: Kentucky, North Carolina, Tennessee, Virginia, and West Virginia;

Southeast/Delta: Alabama, Arkansas, Georgia, Louisiana, Mississippi, South Carolina and Texas; Florida.

Id. § 223.53(c)(1).

(n211)Footnote 969. *Id.* § 222.51.

(n212)Footnote 970. *Id.* § 222.53.

(n213)Footnote 971. *Id.* § 222.54.

(n214)Footnote 972. *Id.* § 222.4.

The discretion of the Commissioner to deny an application from a grazing leaseholder who wanted to lease the land for a non-grazing purpose was upheld in *Forest Guardians v. Wells, 4 P. 3d 1054 (Az. App. 2000).* In *Southwest Center for Biological Diversity v. United States Forest Service, 82 F. Supp. 2d 1070 (D. Az. 2000),* an environmental group challenged the issuance of livestock grazing permits without first consulting with the United States Fish and Wildlife

Service. The court held that the group had standing to intervene during remedial but not the declaratory merits phase of the action but that the action was moot. For further discussion, see Feller, Joseph M. and Brown, David E. From Old Growth Forests to Old Growth Grasslands: Managing Rangelands for Structure and Function. *42 Ariz. L. Rev. 319 (2000);* Baas, Mark J., Diamond Bar Cattle Co. v. United States: State Water Rights on Federal Lands for not Hold Property Interest to Graze on those Lands, *4 Great Plains Nat. Res. J. 296 (2000).*

(n215)Footnote 973. *Id.* § 222.4(a)(1).

(n216)Footnote 974. *Id.*

(n217)Footnote 975. *Id.* § 222.52.

(n218)Footnote 976. 36 C.F.R. § 293.7. This provision seemingly recognizes a property right of some sort in the pre-existing grazers and appears to have been included to avoid a "taking" argument. However, The regulations expressly state that the permit conveys no right, title or interest in the public lands. *Id.* § 222.3(b).

For further discussion of the significance of natural resources on public land and how they should be valued, see Katharine Baker, Consorting with Forests: Rethinking Our Relationship to Natural Resources and How We Should Value Their Loss, *22 Ecology L.Q. 677 (1995).* For further general discussion, see Joseph M. Feller, 'Til the Cows Come Home: The Fatal Flaw in the Clinton Administration's Public Land Grazing Policy, *25 Envtl. L. 703,* (Summer 1995); Anita P. Miller, The Western Front Revisited, *26 Urb. Law. 845 (Fall 1995);* Edmund C. Baird III, The Use of Qui Tam Actions to Enforce Federal Grazing Permits, *72 Wash. L.Q. 1407 (Fall 1994).* For a discussion of the relation between grazing and forest activities, *see* Endter-Wada & Dennis-Perez, *Protection or Infringement of Property Rights? Addressing Concerns Regarding Nonfederal Forest Lands in Utah*, 17 J. Land, Resources & Envtl. L. 11 (1997); McIntosh, *National Forest Management: A New Approach Based on Biodiversity,* 16 J. Energy Nat. Resources & Envtl. L. 257 (1996); Wilkinson, *The National Forest Management Act: The Twenty Years Behind, The Twenty Years Ahead, 68 U. Colo. L. Rev. 659 (1997).*

(n219)Footnote 977. Act of June 28, 1934, *48 Stat. 1269, 43 U.S.C. §§ 315*-315r.

(n220)Footnote 978. *48 Stat. 1269.*

(n221)Footnote 979. 43 C.F.R. § 4100.0-2.

(n222)Footnote 980. *43 U.S.C. § 315.*

(n223)Footnote 981. *43 U.S.C. § 315b.*

(n224)Footnote 982. 43 C.F.R. § 4110.2-2(b).

See Coalition v. Bosworth, 180 F. Supp. 2d 124 (D.D.C. 2001), dealing with the extent to which the Secretary must consider environmental impacts of federal grazing permits when they are renewed. In this case, the defendant Forest Service moved to transfer the case to the District of Montana. That motion was denied. *See also Guardians v. Wells, 34 P. 3d. 364 (Az. 2001)* regarding a state proposal to lease school trust lands. In *Klump v. United States, 50 Fed. Cl. 268 (2001),* the court rejected a taking claim regarding water rights that were enjoyed by the cattle rancher. The rights were deemed lost when the grazing rights were cancelled. The Government petitioned the State to transfer the water rights to it. The Court held that there could be no taking if the government was not acting in its sovereign capacity. Here the Government merely petitioned as an adverse title claimant rather than in any sovereign capacity. *See also Central South Dakota Cooperative Grazing District v. Secretary of the United States Department of Agriculture, 266 F.3d 889 (8th Cir. 2001),* regarding the authority of the Secretary to set maximum stocking levels for grasslands. In *Anchustegui v. Department of Agriculture, 257 F.3d 1124 (9th Cir. 2001),* it was held that the Secretary could not cancel a grazing permit where the notice of cancellation did not provide the permit holder an opportunity to achieve compliance or to

demonstrate that he had achieved compliance before the institution of the agency proceedings. For further discussion, see A. Adams, Administrative Law (Annual Survey of Caselaw), *23 U. Ark. Little Rock L. Rev. 1017 (2001);* E. Schlenker-Goodrich, Moving Beyond Public Lands Council v. Babbitt: Land Use Planning and the Range Resource, *16 J. Envtl. L. & Litig. 139 (2001);* S. Rigsby, Public Lands Council v. Babbitt, Secretary of the Interior: Challenging the Evolution of Public Lands Grazing Regulations (Case note), *5 Great Plains Nat. Res. J. 161 (2001);* J. Feller, Recent Developments in Public Land Law: National Monuments, Forest Roadless Areas, and BLM Rangeland Management, SF56 ALI-ABA 179 (2001).

(n225)Footnote 983. 43 C.F.R. § 4130.2.

(n226)Footnote 984. Animal unit month is defined as the amount of forage necessary for the sustenance of 1 cow or equivalent. 43 C.F.R. § 4100.0-5.

(n227)Footnote 985. 43 C.F.R. § 4130.7-1(a)(1).

See Arizona Cattle Growers Association v. United States Fish and Wildlife, 273 F.3d 1229 (9th Cir. 2001) challenging the extent to which the Endangered Species act precludes ranchers from grazing their livestock in certain areas of potential habitat. Judgment for ranchers was, for the most part, upheld. *See also Central South Dakota Cooperative Grazing District v. Secretary of the United States Department of Agriculture, 266 F.3d 889 (8th Cir. 2001),* regarding the authority of the Secretary to set maximum stocking levels for grasslands. In *United States v. State Engineer, 27 P. 3d 51 (Nev. 2001),* the court reversed the state denial of a federal application for stockwater permits on public lands. The government's argument was that either the state statute on its face permitted BLM to hold the permits or else the statute was unconstitutional. The court avoided the constitutional issue by finding that the statute was unambiguous and that it allowed BLM to hold the permits in the name of the United States. For further discussion, see A. Adams, Administrative Law (Annual Survey of Caselaw), *23 U. Ark. Little Rock L. Rev. 1017 (2001),* E. Schlenker-Goodrich, Moving Beyond Public Lands Council v. Babbitt: Land Use Planning and the Range Resource, *16 J. Envtl. L. & Litig. 139 (2001);* S. Rigsby, Public Lands Council v. Babbitt, Secretary of the Interior: Challenging the Evolution of Public Lands Grazing Regulations (Case note), *5 Great Plains Nat. Res. J. 161 (2001);* J. Feller, Recent Developments in Public Land Law: National Monuments, Forest Roadless Areas, and BLM Rangeland Management, SF56 ALI-ABA 179 (2001); S. Parent, Ranching Without Reason, *5 Great Plains Nat. Resources J. 153 (2001);* K. Glover, Managing Wild Horses on Public Lands: Congressional Action Agency Response, *79 N.C.L.Rev. 1108 (2001);* J. Leshy, The Babbitt Legacy at the Department of the Interior: A Preliminary View *31 Envtl. L. 199 (2001).*

(n228)Footnote 986. 43 C.F.R. § 4130.4-2.

For an interesting case in which the individual rancher's share of the animal unit months within a grazing district were apportioned among all of the remaining grazing preferences after the sale of land leased to the district, see *Kalfell Ranch, Inc. v. Prairie County Cooperative State Grazing District, 15 P.3d 888 (Mont. 2000).* In *Southwest Center for Biological Diversity v. United States Forest Service, 82 F. Supp. 2d 1070 (D. Az. 2000),* an environmental group challenged the issuance of livestock grazing permits without first consulting with the United States Fish and Wildlife Service. The court held that the group had standing to intervene during remedial but not the declaratory merits phase of the action but that the action was moot. In *Public Lands Council v. Babbitt, 120 S. Ct. 1815 (2000),* the Supreme Court upheld the authority of the Secretary to define the scope of a "grazing preference" and to eliminate thereby the requirement that a holder be engaged in the livestock business. For further discussion, see Feller, Joseph M. and Brown, David E. *From Old Growth Forests to Old Growth Grasslands: Managing Rangelands for Structure and Function. 42 Ariz. L. Rev. 319 (2000);* Baas, Mark J., *Diamond Bar Cattle Co. v. United States: State Water Rights on Federal Lands for not Hold Property Interest to Graze on those Lands, 4 Great Plains Nat. Res. J. 296 (2000).*

(n229)Footnote 987. *886 P.2d 514 (Utah 1994).*

(n230)Footnote 988. *887 P.2d 241 (Mont. 1994).*

(n231)Footnote 989. For further discussion, *see* Joseph M. Feller, *'Til the Cows Come Home: The Fatal Flaw in the Clinton Administration's Public Land Grazing Policy, 25 Envtl. L. 703,* (Summer 1995); Anita P. Miller, *The Western Front Revisited, 26 Urb. Law. 845 (Fall 1995);* Edmund C. Baird III, *The Use of Qui Tam Actions to Enforce Federal Grazing Permits, 72 Wash. L.Q. 1407 (Fall 1994).* For an interesting discussion in the popular press of the effort on the part of the federal government to obtain "full value" for the leasing of grazing rights on public land, *see* Glenna Whitley, *Range War*, 2 Western Styles 78 (1994). For a legal discussion of the significance of natural resources on public land and how they should be valued, *see* Katharine Baker, *Consorting with Forests: Rethinking Our Relationship to Natural Resources and How We Should Value Their Loss, 22 Ecology L.Q. 677 (1995).*

See generally Blumm & Lovvorn, *The Proposed Transfer of BLM Timber Lands to the State of Oregon: Environmental and Economic Questions, 32 Land & Water L. Rev. 353 (1997);* Baldwin, Livestock Water on Federal Rangelands, *1 Great Plains Nat. Resources J. 351 (1997);* Note, *Where's the Beef? Allocating the Burden of Proof in Bailment Agreements Involving Missing Cattle Grazed on Public Rangeland (Cornia v. Wilcox, 898 P.2d 1379, Utah 1995) 1996 Utah L. Rev. 1031;* Smith, *Livestock Production: The Unsustainable Environmental and Economic Effects of an Industry Out of Control, 4 Buff. Envtl L.J 45 (1996);* Pierson, *The Bureau of Land Management: A Half-century of Challenges and Change, 32 Land & Water L. Rev. 345 (1997);* Sullivan, *Fifty Years of Rhetoric on the Range: Reframing the Debate on Public Land Management, 32 Land & Water L. Rev. 339 (1997);* Armstrong, *Our Federal Public Lands, 12 Nat. Resources & Env't 2 (1997).*

For further discussion, *see* Johanna H. Wald and Joseph M. Feller, *Recent Developments in the Law of Grazing on Federal Lands,* Environmental Law (Co-sponsored by the Environmental Institute and The Smithsonian Institution) SD47.ALI-ABA 151 (Feb. 10, 1999); Pamela Baldwin, *Public Lands Study Materials* Environmental Law (Co-sponsored by the Environmental Institute and The Smithsonian Institution) SD47.ALI-ABA 347 (Feb. 10, 1999); Michael Aline, *Federal Lands and Invisible Hands, 25 Ecology L. Q. 611 (1999);* Note, *Regulating Hardrock Mining: To What Extent Can the States Regulate Mining on Federal Lands? 19 J. Land Resources & Envtl. L. 249 (1999);* Roger Flynn, *The 1872 Mining Law as an Impediment to Mineral Development on the Public Lands: A 19th Century Law Meets the Realities of Modern Mining, 34 Land & Water L. Rev. 301 (1999).*

(n232)Footnote 990. *See, e.g., Hinsdale Livestock Co. v. U.S., 501 F. Supp. 773 (D. Mont. 1980).*

(n233)Footnote 991. *See, e.g.,* 43 C.F.R. § 4110.2-2.

(n234)Footnote 992. *See, e.g., 43 U.S.C. § 315m.* 43 C.F.R. § 4130.2(a) provides that "grazing *permits* or *leases* shall be issued to authorize livestock grazing on the public lands and other lands under the administration of the Bureau of Land Management... ."

(n235)Footnote 993. *See, e.g., 43 U.S.C. § 315b;* 36 C.F.R. § 222.3.

(n236)Footnote 994. *See, e.g.,* 36 C.F.R. § 222.3(a).

(n237)Footnote 995. *16 U.S.C. § 528 et seq.*

(n238)Footnote 996. *Id.* at 531(a).

(n239)Footnote 997. *43 U.S.C. § 315b. See also* 36 C.F.R. § 222.3(b); 43 C.F.R. § 4130.2(b).

(n240)Footnote 998. *United States v. Fuller, 409 U.S. 488 (1973); Pankey Land & Cattle Co. v. Hardin, 427 F.2d 43 (10th Cir. 1970).*

See also United States v. Cox, 190 F.2d 293, 296 (10th Cir. 1951), cert. denied, 342 U.S. 867 (1951): "Although the permits are available to the ranchers, they are not an interest protected by the Fifth Amendment against the taking by the Government who granted them with the understanding that they could be withdrawn at any time without the payment of

compensation."

See also Kalfell Ranch, Inc. v. Prairie County Cooperative State Grazing District, 15 P.3d 888 (Mont. 2000) where the district was required to apportion grazing rights among remaining members of a cooperative grazing district when land leased to the district was sold. In this case, the apportionment resulted in the allotment of scattered lands that could not qualify for a grazing permit. Here the court found that the member was not entitled to an equitable award of monetary damages despite the fact that the member had sustained a large loss of animal unit months.

For further discussion, see Feller, Joseph M. and Brown, David E. From Old Growth Forests to Old Growth Grasslands: Managing Rangelands for Structure and Function. *42 Ariz. L. Rev. 319 (2000);* Baas, Mark J., Diamond Bar Cattle Co. v. United States: State Water Rights on Federal Lands for not Hold Property Interest to Graze on those Lands, *4 Great Plains Nat. Res. J. 296 (2000).*

See also Bradshaw v. United States, 47 Ct. Cl. 549 (2000), holding that neither the grazing permit nor the historical grazing preferences constituted property under the Fifth Amendment. Likewise, the failure of the government to prevent feral horses from causing damage to the ranch and forage did not result in a taking.

For further discussion, see Feller, Joseph M. and Brown, David E. From Old Growth Forests to Old Growth Grasslands: Managing Rangelands for Structure and Function. *42 Ariz. L. Rev. 319 (2000);* Baas, Mark J., Diamond Bar Cattle Co. v. United States: State Water Rights on Federal Lands for not Hold Property Interest to Graze on those Lands, *4 Great Plains Nat. Res. J. 296 (2000).*

(n241)Footnote 999. 43 C.F.R. § 4110.2-2(b): "The grazing preference specified shall attach to the base property supporting the grazing permit or grazing lease." "Grazing preference" is defined as the total number of animal unit months of livestock grazing on public lands apportioned and attached to base property owned and controlled by a permittee or a licensee. 43 C.F.R. § 4100.0-5. In essence, a grazing permit authorizes the grazing of a specified number of animals for a specified period of time, measured in animal unit months. The grazing preference, then, is the quantified substance of the grazing permit.

(n242)Footnote 1000. *See 43 U.S.C. § 315b;* 43 C.F.R. §§ 4130.2, 4130.3.

(n243)Footnote 1001. "Base property" is defined as privately held land that: (1) has the capacity to produce crops or forage that can be used to support authorized livestock for a specified period of the year (when the animals are not on the public domain) or (2) water that is suitable for consumption by livestock and is available and accessible to the livestock when they are on the public domain. 43 C.F.R. § 4100.0-5.

(n244)Footnote 1002. 43 C.F.R. § 4110.2-1(d) provides the permit or lease will automatically terminate if the permittee or lessee loses ownership or control of all or part of the base property unless the permit holder requests in writing, in advance of losing ownership, that the permit be extended to the end of the grazing season or grazing year. The regulations then provide that:

[w]hen a permit or lease terminates because of a loss of ownership or control of a base property, the grazing preference shall remain with the base property and be available through application and transfer procedures at 43 CFR § 4110.2-3, to the new owner or person in control of that base property.

(n245)Footnote 1003. 43 C.F.R. § 4110.2-3.

(n246)Footnote 1004. *See, e.g., Red Canyon Sheep Co. v. Ickes, 98 F.2d 308 (D.C. Cir. 1938).* There, the court dealt with a proposed trade of land to a third party if land upon which the appellant claimed a grazing right on the basis of an interim license which would normally be converted into a permit under the act for other land could not be grazed. The trade would have had the effect of extinguishing the possibility of securing a grazing permit. The Secretary

defended the exchange on the ground that the permit holders "lacked any interest to maintain the suit in that they had no vested interest in the lands and did not show themselves entitled to a patent." *Id. at 312.* The court enjoined the exchange:

> Therefore in view of the allegations in the bill that appellants have such adjacent land holdings, water rights, and other facilities as to bring them within a preferred class under the regulations, we are of the view that the interim licenses which have been temporarily issued to them must, under the Act, ripen into permits, provided that Grazing District No. 4, which has been set up so as to include the lands upon which the appellants have been running their sheep, continues to exist and to include such lands.
>
> * * *
>
> We recognize that the rights under the Taylor Grazing Act do not fall within the conventional category of vested rights in property. Yet, whether they be called rights, privileges, or bare licenses, or by whatever name, while they exist they are something of real value to the possessors and something which have their source in an enactment of the Congress. The jurisdiction of equity is flexible and should not be confined to rigid categories so that the granting of an injunction will depend on nomenclature rather than substance.
>
> * * *
>
> We rule that the valuable nature of the privilege to graze which arises in a licensee whose license will in the ordinary course of administration of the Taylor Grazing Act ripen into a permit, makes that privilege a proper subject of equitable protection against an illegal act. To hold that appellants' rights are not of sufficient dignity to be entitled to equitable protection would be inconsistent with the cases discussing other analogous subjects of equitable protection within the purposes of the Act itself.

Id.

(n247)Footnote 1005. *See Hinsdale Livestock Co. v. United States, 501 F. Supp. 773 (D.Mont. 1980)* holding that drought conditions did not create an emergency that would enable the Bureau of Land Management to evict ranchers from grazing allotments before the expiration of their permits.

(n248)Footnote 1006. *Hubbard v. Brown, 785 P.2d 1183 (Cal. 1990).*

(n249)Footnote 1007. Cal. Code § 846.

(n250)Footnote 1008. 36 C.F.R. § 222.3(b).

(n251)Footnote 1009. Citing *United States v. Cox, 190 F.2d 293 (10th Cir. 1951); Placer County Water Agency v. Jonas, 80 Cal. Rptr. 252 (1969).*

(n252)Footnote 1010. Charles Reich, *The New Property, 73 Yale L.J. 733 (1964).*

(n253)Footnote 1011. Comment, *U.S. v. Fuller -- Eminent Domain -- Taylor Grazing Permits As An Element Of Compensation For Condemned Land, 1973 Utah L. Rev. 75, 85-86.*

For further discussion, *see* Joseph M. Feller, *'Til the Cows Come Home: The Fatal Flaw in the Clinton Administration's Public Land Grazing Policy, 25 Envtl. L. 703,* (Summer 1995); Anita P. Miller, *The Western Front Revisited, 26 Urb. Law. 845 (Fall 1995);* Edmund C. Baird III, *The Use of Qui Tam Actions to Enforce Federal Grazing Permits, 72 Wash. L.Q. 1407 (Fall 1994).*

See also Sally K. Fairfax, Louise P. Fortman, Ann Hawkins, Lynn Huntzinger, Nancy Lee Peluso, and Steven A. Wolf, *Federal Forests are not What they Seem: Formal and Informal Claims to Federal Lands, 25 Ecology L.Q. 630 (1999).*

(n254)Footnote 1012. *480 U.S. 572 (1987).*

(n255)Footnote 1013. For further discussion *see* John Leshy, *Granite Rock and the States' Influence Over Federal Land Use, 18 ENVTL. L. 99 (1987).*

For further discussion, *see* Note, *Regulating Hardrock Mining: To What Extent Can the States Regulate Mining on Federal Lands? 19 J. Land Resources & Envtl. L. 249 (1999);* Michael McClosky, *Local Communities and the Management of Public Forests, 25 Ecology L. Q. 624 (1999);* Viki Nadol, *Aquatic Invasive Species in the Coastal West: An Analysis of State Regulation within a Federal Framework, 29 Envt. L. 339 (1999).*

(n256)Footnote 1014. *See, e.g.*, dissenting opinion of *Justice Powell, 107 S. Ct. at 1436-37.*

(n257)Footnote 1015. Justice O'Connor, in the majority opinion, neither defined "land use" nor "environmental" in order to clearly distinguish between environmental regulation and land use regulation but did make the following observation:

> Land use planning in essence chooses particular uses for the land; environmental regulations, at its core, does not mandate particular uses of land but requires only that, however land is used, damage to the environment is kept within prescribed limits.

Id. at 1428. *See also Ventura County v. Gulf Oil Corp. 601 F.2d 1080 (9th Cir. 1979), aff'd mem., 445 U.S. 947 (1980)* where the court held that the state was prevented from imposing an open space zoning permit requirement on a federal mineral lessee in a national forest.

(n258)Footnote 1016. *See 107 S. Ct. at 1427.*

(n259)Footnote 1017. *See, e.g.*, Federal Land Policy and Management Act, *43 U.S.C. § 1701 et seq.*, the National Forest Management Act, *16 U.S.C. §§ 1600*-1614 and the Coastal Zone Management Act, *16 U.S.C. § 1451 et seq.*

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Supp. To CHAPTER 47 AGRICULTURE AND FARM LAW

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Supp. to § 47.03 The Legal Context of Agriculture.

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add new footnote 23.1 after *Kirby Produce Company v. U.S.DA., 256 F. 3d. 830 (D.C. 2001):* n23.1

FOOTNOTES:
(n1)Footnote 23.1. *See also, Kleiman & Hochberg, Inc. v. U.S. Dept. of Agric., 497 F.3d 681, 686 (C.A.D.C. 2007)* (stating that judicial decisions are upheld unless they are arbitrary, capricious, an abuse of discretion, not in accordance with law, or unsupported by substantial evidence.)

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Supp. To CHAPTER 47 AGRICULTURE AND FARM LAW

6-47 Thompson on Real Property, Thomas Editions Supp. to § 47.05

Supp. to § 47.05 Definitions.

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§ 47.05(a) In General. [Go To Main]

Add:

Wallack v. Zoning Bd. of Review of the Town of Little Compton, 2003 R.I. Super LEXIS 131 (No. NC 2002-0515, Oct. 22, 2003) (agriculture is the art or science of cultivating land and management of livestock).

§ 47.05(b) Agriculture. [Go To Main]

Add:

In *Rodriguez v. Whiting Farms, 360 F.3d 1180 (10th Cir. 2004)* , the court construed the federal Fair Labor Standards Act agricultural exemption to find that employees who skinned and trimmed chickens to gather feathers to be used in fly-tying constituted agriculture. A Christmas tree farm was considered agriculture under the definition of the Fair Labor Standards Act in *United States Department of Labor v. North Carolina Growers Assoc. Inc. 377 F.3d 345 (4th Cir. 2004)* .

Add:

Braden Trust v. The County of Yuma, 69 P.3d 510 (Ariz. App. 2003) (home located on the farm and occupied by the

farmer is considered a structure for agricultural purposes under zoning law).

§ 47.05(c) Agricultural Land. [Go To Main]

Add:

Duane Donald Hebert, Debtor, 301 B.R. 19 (N.D. Iowa, 2003) (Iowa cases require at minimum a stipulation in documents saying homestead will be liable for a debt in order to held liable); *Iowa State Bank & Trust Co. v. Michel, 2004 Iowa Sup. LEXIS 158* (No. 28/02-1055, May 12, 2004) (agricultural land does not have to be used for but must only be suitable for farming).

§ 47.05(d) Farming. [Go To Main]

Add to Fn. 53:

In *Vicwood Meridian Partnership v. Skagit Sand and Gravel, 98 P. 3d 1277 (Wash. App. 2004)* , the court held that "farming" included a composting operation and rejected the argument that mushroom growing was an industrial activity.

Add:

In *Johnecheck v. Bay Township, 119 Fed. Appx. 707 (2004)* , the plaintiffs argued that placing wind turbine generators on their property was a type of "wind farming" under provisions of the Agricultural Zoning ordinance dealing with "specialized farming" which could be allowed without a permit from the Township Zoning Board. This argument was rejected. The plaintiffs challenged the ordinance as unconstitutionally exclusionary because it did not allow them to erect their turbines. This argument was rejected by the court.

Add:

Vincent W. Michels, Debtor, 2003 Bankr. LEXIS 367 (No. 03-00316, Chapter 12, N. D. Iowa, Apr. 14, 2003) (Farming operation is defined in part by the tillage of soil, dairying, raising of animals for sale all in an unmanufactured state).

Add:

In *State ex. rel Nixon v. Premium Standard Farms, Inc. 100 S.W.3d 157 (Mo. App. 2003)* , the court held that cattle grazing was an integral part of swine production and therefore permitted under an exception to the corporate farming prohibition. The farm argued that the cattle were used to graze on the land as a means to remove the nitrogen from

effluent applied to the land.

A question was raised and answered in the affirmative in *Borough of Closter v. Abram Demaree Homestead, inc. 839 A.2d 110 (N.J. Super. 2004)* whether a not-for-profit organic farming operation could be considered a farm for purposes of protecting the farm under the nuisance laws of the state. The court held that the particular statute, which applied only to commercial farming operations applied, to the activity in question even though all the produce from the farm was donated to feed the area's poor. The court reasoned that it was the fact that the produce had the required minimum value, rather than whether it was sold that determined that the operation was a commercial farm.

In *Department of Transportation v. Sunnyside Partnership, L. P. 785 N.E. 2d 1018 (Ill. App. 2003)* , the court held that a nursery was not a farm that qualified for protection under the jurisdiction's Farmland Preservation Act with respect to the exercise of taking authority of the Department for the construction of a road.

Add:

In *Richardson v. Zoning Com'n of Town of Redding, 944 A.2d 360 (Conn. App. 2008)* , the court held that the raising, breeding, and training of horses could not reasonably fall within the definition of farming.

§ 47.05(f) Farmland. [Go To Main]

Add to Fn. 79.

Davis v. Taylor, 132 P.3d 783 (Wash. App. 2006) , the court refused to protect a farming operation that had been in existence for more than 50 years from complaints raised by a neighbor who moved in after the farm had been established. In this case, the farm started out as an apple orchard. It was converted into a cherry orchard after the complainant built a house near the farm. The problem complained of was the use of propane cannons that were used to scare birds away from the cherries. This activity began after the complainants built their house. Although for other purposes, the law allows a conversion of farmland to other crops without jeopardizing its status as farmland, the nuisance statute requires that the conversion occur prior to local development. Thus, new or expanded activities are not immune from nuisance liability. As a result, it may be necessary to distinguish between that was historically done on the land compared with what is presently done there.

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Supp. to § 47.06 Agriculture as a Commercial Activity.

[Go To Main]

§ 47.06(c) Agriculture as Commercial Use. [Go To Main]

Add:

Amanda R. Wishin, "Soy and the City: The Protection of Indiana's Agricultural Land in Light of Biofuel Issues," *42 Val. U. L. Rev. 1017* (Spring, 2008).

Add:

In *Borough of Closter v. Abram Demaree Homestead, inc. 839 A.2d 110 (N.J. Super. 2004)* the Court held that a not-for-profit organic farming operation could be considered a farm for purposes of protecting the farm under the nuisance laws of the state. The court held that the particular statute, which applied only to commercial farming operations, applied to the activity in question even though all the produce from the farm was donated to feed the area's poor. The court reasoned that it was the fact that the produce had the required minimum value, rather than whether it was sold that determined that the operation was a commercial farm.

See also United States Department of Labor v. North Carolina Growers Assoc. Inc., 377 F.3d 345 (4th Cir. 2004) .

§ 47.06(g) Classification: Off-Farm Impacts. [Go To Main]

Add:

Upchurch v. Cumberland Cnty. Fiscal Ct., 2003 Ky. App. LEXIS 22 (No. 2000-CA-002607-MR, Jan. 31, 2003) (Courts have not been inclined to find poultry farms to be a per se nuisance despite their attendant smells, insects, and waste).

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Supp. to § 47.07 Agricultural Land Availability.

[Go To Main]

§ 47.07(a) In General. [Go To Main]

Add:

Borough of Closter v. Abram Demaree Homestead, Inc., 839 A.2d 100 (N.J. Super. 2003) (It is the CAB who must make the initial decision whether an activity is a generally accepted agricultural practice).

add new footnote 103.1 after *King County v. Central Pugent Sound Growth Management Hearings Board, 14 P.3d 133 (Wash. 2000):* n103.1

FOOTNOTES:
(n2)Footnote 103.1. In *Feil v. Eastern Washington Growth Management Hearing Board, 220 P.3d 1248 (Wash. App. 2009)* , the court refused to follow King County to prohibit the construction of a recreation trail on designated agricultural land.

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Supp. to § 47.08 Factors Affecting Governmental Regulation of Agricultural Land.

[Go To Main]

§ 47.08(b) The Need for Desirable Land Use Patterns. [Go To Main]

Add:

See Florida Wildlife Federation v. Collier County, 819 So. 2d 200 (Fla. App. 2002) for a discussion of the extent to which agricultural use of land is subject to intensity-of-use standards under amendments to the county comprehensive plan.

§ 47.08(d) Conservation and Resources Preservation. [Go To Main]

Add:

State of Wisc. v. Waushara Cnty. Bd. of Adjustment, 2004 Wisc. LEXIS 416 (No. 02-2400, May 18, 2004) (Lands adjacent to or near navigable water exist in a special relationship to the state); *State of Wisc. v. Wash. Cnty. Bd. of Adjustment, 661 N.W.2d 884* (Wis. App., 2003) (an owner of land does not have unlimited right to change the use of land to a purpose for which it is unsuited in its natural state).

Gregory A. Hicks, "Managing State Trust Lands for Ecosystem Health: The Case of Washington State's Range and Agricultural Lands," 14 *Hastings W.-N.W. J. Envtl. L. & Pol'y* 1019 (Winter 2008).

Add:

See Simmons, K. *Chapter 16, Authority to Acquire under Agricultural Area Security Law.* PA Jur. Mun. Law § 16.5 regarding the use of conservation easements in Pennsylvania.

§ 47.08(e) Environmental concerns. [Go To Main]

Add:

In *Johnecheck v. Bay Township, 119 Fed. Appx. 707 (2004)* , the plaintiffs argued that placing wind turbine generators on their property was a type of "wind farming" under provisions of the Agricultural Zoning ordinance dealing with "specialized farming" which could be allowed without a permit from the Township Zoning Board. This argument was rejected. The plaintiffs challenged the ordinance as unconstitutionally exclusionary because it did not allow them to erect their turbines. This argument was rejected by the court.

§ 47.08(f) Taxation and fiscal policy. [Go To Main]

Add:

Alex E. Snyder, *Saving the family Farm Through Federal Tax Policy: Easier Said than Done.* 62 Washington and Lee L. R. 729 (2005); Jayashree B. Gokhale. *Hedge to Arrive Contracts: Futures or Forwards. 53 Drake L. Rev. 44 (2004);* Amanda Stokes, *Selling out the Farm? The Impact of the Farm Security and Rural Investment Act of 2002 on Lending Institutions and the Small Farmer. 9 N.C. Banking Inst. 243 (2005).*

Add:

In *Dairy Farmers of America v. Wilkins, 802 N.E. 2d 627 (Ohio 2004) , the court held that cooperatives were engaged in agriculture or rendering agricultural services for others for purposes of sales and tax statutes.*

Much recent litigation has explored the use of use value taxation as a means of encouraging landowners to keep land in agricultural use. *See e.g. Jones v. Department of Forests, Parks and Recreation, 857 A.2d 271 (Vt. 2004)* , holding that the use value appraisal program is designed to provide a tax incentive for landowners to maintain the property in agricultural uses; *Carmel Hollow Associates Ltd. Partnership v. Town of Bethlehem, 269 Conn. 120 (2004)* ; *Alexandria Tp. v. Orban 21 N.J. Tax 298 (2004)* ; *Cecarelli v. Board of Assessment Appeals of the Town of North Branford, 272 Conn. 485 (2005)* ; *Golf Trust of Alerica, L.P. v. Soat, 822 N.E.2d 562 (Ill. App. 2005)* ; *ENF Family Patrtnership v. Erie County Bd. of Assessment Appeals, 861 A.2d 438 (Pa. App. 2004)* ; *Jicarilla Apache Nation v. Rodarte, 103 P.3d 554 (N.M. 2004)* ; *R.H. Resorts Ltd. v. Donegan,* 29 Fla. Weekly D1691 (Fla. App. 2004); *Raisanen v. County of Hennepin, 678 N.W.2d 669 (Minn. 2004)* ; *Township of Monroe v. Gasko, 21 N.J. Tax 391 (2004)* .

In *Wetland Resource Ctr. v. Marion Cty., 809 N.E. 2d 1202 (Ohio App. 2004)* , the court held that the fact that the land qualified for compensation under federal wetlands mitigation programs because of contractual obligations, the land was

entitled to reduced property tax valuation as agricultural land.

In *Randall v. Bd. of Review for City of Ames, 682 N.W.2d 83, 2004 Iowa App. LEXIS 461 (Iowa App. 2004)* , the court held that land lost its agricultural classification for tax purposes when half the land was used for a golf course and there was no clear showing that the remaining land was used primarily for agriculture.

§ 47.08(g) Family Farms and Farm Economics. [Go To Main]

Add:

Alex E. Snyder, *Saving the family Farm Through Federal Tax Policy: Easier Said than Done.* 62 Washington and Lee L. R. 729 (2005; Jayashree B. Gokhale. *Hedge to Arrive Contracts: Futures or Forwards. 53 Drake L. Rev. 44 (2004);* Amanda Stokes, *Selling out the Farm? The Impact of the Farm Security and Rural Investment Act of 2002 on Lending Institutions and the Small Farmer. 9 N.C. Banking Inst. 243 (2005).*

§ 47.08(h) Farm Economics: The Role of Small Farms.. [Go To Main]

add:

The 2002 Census of Agriculture reported that individuals or families own almost 90% of farms in the United States. U.S. Dept. Agric. Natl. Agric. Statistics Serv., 2002 Census of Agriculture (June, 2004).

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Supp. to § 47.09 Governmental Authority to Regulate Agricultural Land Use.

[Go To Main]

§ 47.09(a) Police Power. [Go To Main]

Add:

Molamphy v. Town of Southern Pines, 2004 U.S. Dist. LEXIS 3594 (No. 97-30176-FHF, D. Mass., March 8, 2004) (to show a substantive deprivation in a zoning decision one must show that the decision does not have any foundation in reason, meaning that it does not reasonably relate to the public health, safety, morals, or welfare).

§ 47.09(b) Social Order and Nuisance. [Go To Main]

add:

In *Clajon Production Corp. v. Petera, 70 F.3d 1566 (10th Cir. 1995)* , the court held that a Wyoming provision which limited hunting licenses, reducing potential income of large land owners who sold out of state hunting services, did not constitute a "taking." It reasoned that there was a sufficient state interest in affording the opportunity to hunt to all residents and that the state did not destroy all beneficial use of the property.

§ 47.09(c) Power of Eminent Domain. [Go To Main]

Add:

The Court in *Star-Glo Associates v. United States, 59 Fed. Cl. 724 (2004)* , the court addressed the need to compensate citrus growers for the destruction of trees in order to control citrus canker. The Court held that the United States Department of Agriculture was bound by a provision in the Marketing Appropriations for Agriculture, Rural Development, Food and Drug Administration and Related Agencies Act of 2001 which placed a cap of $58,000,000 on the amount of available funds that could be used for citrus canker payments and once the cap was reached, the USDA had no further obligation to compensate plaintiffs and no relief was available. In a related case, *Fla. Dep't of Agric. & Consumer Servs. v. Haire, 865 So. 2d 610 (Fla App. 2004), 865 So. 2d 610* the court addressed administrative appeal requirements in an effort to prevent the destruction of trees exposed to citrus canker.

§ 47.09(d) "Takings." [Go To Main]

Add:

For Honesty and Integrity in *Regional Planning v. Cnty. of San Diego, 258 F. Supp. 2d 1132 (S.D. Calif. 2003)* (spending power allows Congress to indirectly regulate intrastate wetlands).

Add:

Terence J. Centner, *Governments and Unconstitutional Takings: When do Right-to-farm Laws Go Too Far? 33 B.C. Envt'l. Aff. L. Rev. 87 (2006).* See also *Walker v. United States, 69 Fed. Cl. 222 (2005)* .

In *Johnecheck v. Bay Township, 119 Fed. Appx. 707 (2004)* , the plaintiffs argued that placing wind turbine generators on their property was a type of "wind farming" under provisions of the Agricultural Zoning ordinance dealing with "specialized farming" which could be allowed without a permit from the Township Zoning Board. This argument was rejected. The plaintiffs challenged the ordinance as unconstitutionally exclusionary because it did not allow them to erect their turbines. This argument was rejected by the court. The matter was also argued to constitute a taking on the ground that the ordinance did not substantially advance a legitimate state interest. The court also rejected that argument. Notably, the United States Supreme Court shortly thereafter effectively eliminated the "substantially advances" test as a basis for a takings challenge. See *Lingle v. Chevron U.S.A. Inc. 544 U.S. 528, 125 S. Ct. 2074 (2005)* , arguing that the test came into existence in the case of *Agins v. City of Tiburon, 447 U.S. 255 (1980)* where it was treated primarily as a due process test and therefore did not apply to regulatory takings cases.

Add:

Spinell Homes Inc. v. Municipality of Anchorage, 78 P.3d 692 (Ak. 2003) (a per se taking will not be found when there is no physical invasion unless all economic value of a parcel of property has been destroyed).

Change citation from *681 N.Y.S.2d 312 (1997)* to *659 N.Y.S.2d 145 (N.Y. 1997).*

Add:

Gunstone v. Jefferson Cnty., 2004 Wash. App. LEXIS 499 (No. 29-709-4-II, Mar. 23, 2004) (municipality may be liable when property damage results from a street that diverts water onto another's property).

Add:

Friedenburg v. N.Y. State Dept. of Environ. Conserv., 767 N.Y.S.2d 451 (2003) (any person may obtain judicial review by denial or revocation of a permit which may constitute a taking).

Add:

Pascoag Reservoir & Dam, LLC v. State of R.I., 337 F.3d 87 (1st Cir. 2003) (plaintiff must usually seek compensation via inverse condemnation proceedings before initiating a takings suit in federal court).

add:

In *Resource Investments, Inc. v. U.S., 85 Fed.Cl. 447 (2009)* , the court held that the Government's denial of landowner's permit to construct and operate a landfill could support a takings claim.

Add:

See, e.g., Board of Directors of Richland Township v. Kenoma LLC, 284 S.W.3d 672 (Mo. App. S.D. 2009) (holding that a township could not pass zoning regulations restricting hog feeding farms).

§ 47.09(g) Specific Regulatory Objectives: Prevention of Harmful Uses. [Go To Main]

Add:

City of Tulsa v. Tyson Foods, Inc., 258 F. Supp. 2d 1263 (N.D. Okla. 2003) (if an annoyance is sufficient to become common to all persons within its influence, then it may be classified as of a public nature).

Add:

See also Star-Glo Associates v. United States, 59 Fed. Cl. 742 (2004) , where the court held that the United States Department of Agriculture was bound by a provision in the Marketing Appropriations for Agriculture, Rural Development, Food and Drug Administration and Related Agencies Act of 2001 which placed a cap of $58,000,000 on the amount of available funds that could be used for citrus canker payments and once the cap was reached, the USDA had no further obligation to compensate plaintiffs and no relief was available.

§ 47.09(i) Agricultural Land as the Environmental Battleground. [Go To Main]

Add:

See Bishop v. Veneman, 283 F. Supp. 2d 1207 (D. Kan. 2003) regarding the ability of USDA to reduce farm payments because of the farmer's failure to control weeds on land withheld from production. *See also Florida Wildlife Federation v. Collier County, 819 So. 2d 200 (Fla. App. 2002)* for a discussion of the extent to which agricultural use of land is subject to intensity-of-use standards under amendments to the county comprehensive plan and with respect to the protection of habitat for the Florida panther; *Fla. Dep't of Agric. & Consumer Servs. v. Haire, 865 So. 2d 610 (Fla App. 2004)* for a discussion of administrative appeal requirements in an effort to prevent the destruction of trees exposed to citrus canker.

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Supp. to § 47.10 Agricultural Land Tenure Issues.

[Go To Main]

§ 47.10(b) The Family Farm as the Preferred National Farmland Tenure. [Go To Main]

Add:

Alex E. Snyder, *Saving the family Farm Through Federal Tax Policy: Easier Said than Done.* 62 Washington and Lee L. R. 729 (2005).

Add at end of section:

Two recent court decisions have called into question somewhat the ability of states to protect family farms by shielding them from competition posed by large corporate farms. *See South Dakota Farm Bureau, Inc. v. Hazeltine, 340 F.3d 583* (8th Cir. 2003) and *Smithfield Foods v. Miller, 241 F. Supp. 2d 978* (S.D. Iowa) , where the courts struck down anti-farm corporation statutes as violating the dormant *commerce clause*. In *Hazeltine*, the Court recognized that protecting the family farm was a legitimate purpose but held the state had failed to demonstrate that it had no other effective alternative. The Court did note that the federal government had made a compelling case for preserving the family farm in a 1998 report from USDA entitled *A Time to Act: Report of the USDA National Comm'n on Small Farms (1998)* but held that the state had not demonstrated that the measures proposed by the federal government were likely to be ineffective. For further discussion, *see* Choster, James, *Buying the Farm: The Eighth Circuit declares South Dakota's Anti-corporate Farming Amendment violates the Dormant Commerce Clause , 11* Mo. Envtl. L. & Pol'y Rev. 184 (2004); Redlin, M. and Redlin B., *Amendment E, Rural Communities and the Family Farm, 49 S.D. L. Rev. 7878 (2004);* Banks, J., *The Past, Present and Future of Anti-Corporation Farming Laws in South Dakota: Purposeful Discrimination or Permissive Protectionism. 49 S.D. L. Rev. 804 (2004).*

§ 47.10(c) Justifying Concern over the Family Farm. [Go To Main]

Add:

Alex E. Snyder, *Saving the family Farm Through Federal Tax Policy: Easier Said than Done.* 62 Washington and Lee L. R. 729 (2005).

§ 47.10(f) Farmland Tenure Problems: Leaseholds. [Go To Main]

Add:

In *County of Kendall v. Rosenwinkel, 818 N.E. 2d 425 (Ill. App. 2004)* , the court found that an agricultural structure (a grain bin) violated zoning setback requirements. In this case, the structure had been constructed by a tenant. The court found that the landlord was not liable for the tenant's zoning violation.

§ 47.10(g) Leases: Statute of Frauds. [Go To Main]

Add:

In *Mark v. Long, 907 N.E.2d 759 (Ohio App. 2009)* a court held that an oral lease was voidable under the statute of frauds and accordingly the landlord was not required to give a year's notice before terminating the lease.

§ 47.10(j) Leases: Lease Terms. [Go To Main]

Add:

In *Myers v. Leedy, 915 N.E. 2d 133 (Ind. 2009)* a farmer entered into a crop year lease agreement with a purchaser of the farm property. The purchaser then breached his contract with the seller of the land and the seller of the land ordered the farmer lessee off the land. The farmer lessee brought an action against the seller for not allowing him to complete the farming of the property. The court held in favor of the farmer lessee, reasoning that a lessee's interest does not expire where the vendor knew the lessee was farming the land.

§ 47.10(o) Leases: Waste [Go To Main]

Add:

In *Keller v. Bolding, 678 N.W. 2d 578 (N.D. 2004)* , the landlord had abruptly fired the tenant and argued that the firing was justified for failure on the part of the tenant to remove Canada thistle from the land. Despite finding that the failure to remove the thistle violated lease requirements regarding good husbandry, the court found that the firing was wrongful and awarded damages for lost profits to the lessee.

§ 47.10(s) Corporations: Legality of Restrictions. [Go To Main]

Add:

But see S.D. Farm Bureau, Inc. v. Hazeltine, 340 F.3d 583 (8th Cir. 2003) (Amendment E is unconstitutional unless defendants can show that there is no other method to advance their legitimate local interests).

Add at end of section:

In 2003, two courts held state farm-corporation statutes to be unconstitutional under the dormant *Commerce Clause*. In *South Dakota Farm Bureau, Inc. v. Hazeltine, 340 F.3d 583* (8th Cir. 2003) the court held that when state enactments are challenged as violative of the dormant *commerce clause*, the state law is subject to a two-tiered analysis. First, the court must determine whether the challenged law discriminates against interstate commerce. If so, it is *per se* invalid unless the state can demonstrate, under rigorous scrutiny that the state has no other means to advance a legitimate local interest. If the law is not deemed discriminatory, the provision will be struck down only if the burden it imposes on interstate commerce is clearly excessive in relation to the local or state benefits to be secured. In this case, the court found that the provision was intended to discriminate against out-of-state businesses and hence, was *per se* invalid. In this case, the provision was adopted by the voters of the state as an Amendment to the state constitution. The court found that it was impossible to ascertain the intent of the individual voters. Nevertheless, the court was satisfied that the drafters intended to discriminate and that intent was sufficient. In *Smithfield Foods v. Miller, 241 F. Supp. 2d 978* (S.D. Iowa) , the court also invalidated the statute because of its facially discriminatory intent. Here, the court refused to sever the part of the statute that was deemed discriminatory from the rest of the statute. Commentary discussing these cases can be found in Choster, James, *Buying the Farm: The Eighth Circuit declares South Dakota's Anti-Corporate Farming Amendment Violates the Dormant Commerce Clause* , *11* Mo. Envtl. L. & Pol'y Rev. 184 (2004); Redlin, M. and Redlin B., *Amendment E, Rural Communities and the Family Farm, 49 S.D. L. Rev. 787 (2004);* Banks, J., *The Past, Present and Future of Anti-Corporation Farming Laws in South Dakota: Purposeful Discrimination or Permissive Protectionism. 49 S.D. L. Rev. 804 (2004).*

In *State ex. rel Nixon v. Premium Standard Farms, Inc. 100 S.W. 3d 157 (W.D. Mo.2003)* , the court held that cattle grazing was an integral part of swine production and therefore permitted under an exception to the corporate farming prohibition. The farm argued that the cattle were used to graze on the land as a means to remove the nitrogen from effluent applied to the land.

In the case of *Jones v. Gale, 405 F. Supp. 2d 1066 (D. Neb. 2005)* , the provision in the Nebraska Constitution, popularly known as Initiative 300, was examined against a variety of constitutional challenges. In that case, the plaintiffs challenged the Nebraska provision of the state constitution as violating the *Commerce Clause*, the Privileges and Immunities Clause and the *Equal Protection Clause of the Constitution* as well as the Americans with Disabilities Act. The state contested the standing of the plaintiffs to bring the action, primarily because the corporations involved were out-of-state corporations. These arguments were rejected. The court did, however, find that the provision was discriminatory, on its face, against interstate commerce because it burdened out of state economic interests while benefitting instate economic interests. The court also found that the defendants failed to carry their burden of demonstrating that the restriction was the exclusive means of advancing legitimate local interests. See also *South Dakota Farm Bureau, Inc. v. Hazeltine, 340 F. 3d 583* (8th Cir. 2003) ; South Dakota Farm Bureau, Inc. v. Hazeltine, 202 F. Supp. 2d (D.S.D. 2002).

Two other challenges survived court scrutiny. The privileges and immunities challenge was based on the impact of the fact that the plaintiff was a citizen of Colorado and therefore could not participate on a daily basis in the operation of the farm as required under the restriction. The court noted that that consequence was faced by Nebraska residents as well and therefore did not constitute discrimination as required by the Constitution. As a matter of equal protection, the restriction was upheld primarily on the basis of established law (principally *MSM Farms, Inc. Spire, 927 F. 2d 330 (8th Cir. 1991)* .

The Americans with Disabilities Act challenge was grounded in a claim that because of the physical disabilities of two of the plaintiffs, they were unable to materially participate in the operation of the farm as required by the restriction. The court found that the restriction stood as an obstacle to the accomplishment of Congress= purposes in enacting the Disabilities act and therefore was invalid under the *Supremacy Clause of the United States Constitution*.

Despite the conclusion that aspects of the restriction did not fail constitutional challenges, the court found that the language that gave rise to the complaint that "at least one of whom is a person residing on or actively engaged in the day to day labor and management of the farm or ranch"--could not be severed from the restriction because the judge could not determine with certainty that the language constituted an inducement to the passage of the remaining portions of the enactment. Hence, the court concluded that the entire restriction failed.

§ 47.10(x) Split Fees: Railroad Land Grants. [Go To Main]

Add:

Whipps Land & Cattle Co., Inc. v. Level 3 Communications, LLC, 658 N.W.2d 258 (Neb. 2003) (rights of way are only easements and not fee interests).

§ 47.10(z) Farming and Ranching on the Public Domain. [Go To Main]

Add:

Arctic King Fisheries, Inc. v. United States, 59 Fed. Cl. 360 (Ct. Cl. 2004) (fishing licenses and permits are not freely

transferable and are not property).

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Supp. to § 47.11 State and Local Agricultural Land Use Issues.

[Go To Main]

§ 47.11(a) In General. [Go To Main]

Add:

For a discussion on preemptive state regulations and their relation to local laws see Nancy D. Perkins, "Principled Preemption in an Age of Interest Convergence: Preserving the Distinction between Pennsylvania's Environmental Regulation and Local Land Use Regulation," *47 Duq. L. Rev. 27 (2009).*

§ 47.11(b) Agriculture as a Nuisance. [Go To Main]

Add:

Terence J. Centner, *Governments and Unconstitutional Takings: When do Right-to-farm Laws Go Too Far? 33 B.C. Envt'l. Aff. L. Rev. 87 (2006).*

Fn. 502, add

Vana v. Grain Belt Supply has been criticized in a case in Nebraska: See Hall v. Phillips, 436 N.W. 3d 139 (1989).

Add to Fn 504:

In *Vicwood Meridian Partnership v. Skagit Sand and Gravel, 98 P. 3d 1277 (Wash. App. 2004)* , the court dealt with the problems posed by a composting activities that existed in association with a mushroom growing operation. While the composting did not constitute the growing of mushrooms, the court treated it as a necessary component of the mushroom operation and hence entitled to the benefit of the protective statute. It was argued that the composting was a new or expanded activity because it occurred in a new building. The court rejected this claim on the ground that the activity predated the facility.

§ 47.11(c) Laws Protecting Farming against Nuisance Actions. [Go To Main]

Add:

Terence J. Centner, *Governments and Unconstitutional Takings: When do Right-to-farm Laws Go Too Far? 33 B.C. Envt'l. Aff. L. Rev. 87 (2006).*

Change:

"South Dakota appears to be the only see state presently without such a statute" to "All fifty States have some version of a 'Right to Farm' statute. *See* Springsteen, Elizabeth R. "States' Right-To-Farm Statutes," available at www.nationalaglawcenter.org/assets/righttofarm/index.html. (South Dakota adopted such a statute; see *S.D. Codified Laws §§ 21-10-25.1 to 21-10-25.6.*)

Add;

For a discussion of Right to Farm Statutes see Dowell, Tiffany, Comment, "Daddy Won't Sell the Farm: Drafting Right to Farm Statutes to Protect Small Family Producers," 18 *San Joaquin Agric. L. Rev.* 127 (2009).

Add:

In *Borough of Closter v. Abram Demaree Homestead, inc. 839 A.2d 110 (N.J. Super. 2004)* the Court held that a not-for-profit organic farming operation could be considered a farm for purposes of protecting the farm under the nuisance laws of the state. The court held that the particular statute, which applied only to commercial farming operations, applied to the activity in question even though all the produce from the farm was donated to feed the area's poor. The court reasoned that it was the fact that the produce had the required minimum value, rather than whether it was sold that determined that the operation was a commercial farm.

Add:

In *Lindsey v. DeGroot, 898 N.E.2d 1251 (Ind. App. 2009)* , the court held that the Indiana Right to Farm Act was not unconstitutional because it did not constitute a taking.

§ 47.11(c) Laws Protecting Farming Against Nuisance Actions.
[Go To Main]

a. Statute of Limitations Approaches.

Add to Fn. 519:

The statutes have been described as "codifying the common law 'coming to the nuisance' defense." See *Vicwood Meridian Partnership v. Skagit Sand and Gravel, 98 P. 3d 1277 (Wash. App. 2004)* . Nevertheless, in *Davis v. Taylor, 132 Wn. App. 515, 132 P.3d 783 (Wash. App. 2006)* , the court refused to protect a farming operation that had been in existence for more than 50 years from complaints raised by a neighbor who moved in after the farm had been established. In this case, the farm started out as an apple orchard. It was converted into a cherry orchard after the complainant built a house near the farm. The problem complained of was the use of propane cannons that were used to scare birds away from the cherries. This activity began after the complainants built their house. Although for other purposes, the law allows a conversion of farmland to other crops without jeopardizing its status as a farm, the nuisance statute requires that the conversion occur prior to local development. Thus, new or expanded activities are not immune from nuisance liability.

Add to Fn 522.

The time is generally treated as beginning to run when the farming operation begins or from the date of a substantial change in the operation. *See Horne v. Haladay, 728 A. 2d 954 (Pa. 1999)* . Alternatively, the plaintiff must base the complaint on a violation of any Federal, State or local statute or regulation. *Id.* In cases where the existence of the farming operation predates the arrival of the complainant, the burden appears to be on the complainant to establish that the operation is conducted in violation of the law or that the complaint is filed in a timely manner with regard to a substantial change in the operation. There appears to be a presumption that farming operations that are not considered nuisances when they commence do not become such simply because someone later moves near the operation.

Add to Fn 523:

See *Horne v. Haladay, 728 A. 2d 954 (Pa. 1999)* .

Fn. 526.

Correct citation for Botsch: 239 N.W.2d 481 .

Add

For further information, see **Annotation, *Validity, Construction, and Application of Right-to-Farm Acts,* 8 A.L.R. 6 th 465 (2005).**

In *Vicwood Meridian Partnership v. Skagit Sand and Gravel, 98 P. 3d 1277 (Wash. App. 2004)* , the court considered whether a claim of negligence would replace a failed attempt to show that a farming operation was not protected by the jurisdiction's statute. In that case, the plaintiff argued that the harm done by the farming operation (noise, smell, flies, etc.) were governed by the doctrine of res ipsa loquitur. The court rejected the argument based on a lack of "palpable negligence" that could be shown by the complainant. The case arguably leaves open the res ipsa door provided a proper negligence foundation can be shown.

Correct citation for Botsch: *239 N.W.2d 481* .

§ 47.11(d) Keeping Land in Farming. [Go To Main]

Add to Fn. 533:

For further information, see J. Richardson, **Downzowning, Fairness and Farmland Protection**, 19 J. *Land Use and Envtl. Protection* (Fall 2003.)

Add:

Safran, J., *Contracting For Preservation: An Overview of State Agricultural District Programs.* 27 Zoning and Planning Law Report 1 (2004).

Add:

In *Department of Transportation v. Sunnyside Partnership, L.P. 785 N.E. 2d 1018 (Ill. App. 2003)* , the court held that a nursery was not a farm that qualified for protection under the jurisdiction's Farmland Preservation Act with respect to the exercise of taking authority of the Department for the construction of a road.

§ 47.11(e) Zoning as a Common Regulatory Approach to Keep Land in Agriculture. [Go To Main]

Add:

In *Inter-Lakes Health, Inc. v. Town of Ticonderoga Town Board, 786 N.Y.S.2d 643 (2004)* , the court the state's Agriculture and Markets Law preempted local zoning ordinances regarding agricultural activities on property located in agricultural districts. In *Ladner v. Hancock County, 899 So. 2d 899 (Miss. Ct. App. 2004)* , the court upheld the authority of the county to regulate the construction of a residence on unincorporated agricultural county land even though the landowner planned to use the residence as part of the agricultural purposes on the property.

In *County of Kendall v. Rosenwinkel, 818 N.E.2d 425 (Ill. App. 2004)* , the court found that an agricultural structure, a grain bin) violated zoning setback requirements.

In *Timoney v. Upper Merion Township, 2004 U.S. Dist. LEXIS 24678* (No. 01-1622, Dec. 8, 2004), the court addressed a claim that in zoning the property agricultural, the property was being treated differently from surrounding, similarly situated properties. The claim was treated by the court as a "class of one" equal protection argument. The basis for the claim was that the state Supreme Court had held that the continued agricultural zoning of the property constituted an unlawful and arbitrary exercise of police power and constituted reverse spot zoning. The federal district court refused to rely upon the Supreme Court's opinion as finding that the property was indeed similarly situated to other land in order to deny a motion for partial summary judgment.

In *Whidbey Envtl. Action v. Island County, 122 Wn. App. 156, 93 P.3d 885 (Wash. App. 2004)* the court found that the agricultural exemption in the zoning ordinance was overbroad because the county included all R zone lands within the exemption but without the support necessary to demonstrate that the exemption was necessary to protect agricultural activities.

M. Cordes, Agricultural Zoning : Impacts and Future Directions. 22 *Northern Illinois U. L. Rev.* 419 (2002).

§ 47.11(g) Zoning: Treatment of Residential Dwellings on Farmland. [Go To Main]

Add:

In *Ladner v. Hancock County, 899 So. 2d 899 (Miss. Ct. App. 2004)* , the court upheld the authority of the county to regulate the construction of a residence on unincorporated agricultural county land even though the landowner planned to use the residence as part of the agricultural purposes on the property.

§ 47.11(k) Agricultural Districts. [Go To Main]

Add:

Safran, J., *Contracting For Preservation: An Overview of State Agricultural District Programs*, 27 Zoning and Planning Law Report 1 (2004). *See also* Salkin, P., *Agricultural Districts*, 1 N.Y. Zoning Law & Prac. § 14:03, (2004)

In *Inter-Lakes Health, Inc. v. Town of Ticonderoga Town Board, 786 N.Y.S.2d 643 (2004)* , the court the state's Agriculture and Markets Law preempted local zoning ordinances regarding agricultural activities on property located in

agricultural districts.

§ 47.11(l) Taxation. [Go To Main]

Add:

Much recent litigation has explored use value taxation as a means of encouraging landowners to keep land in agricultural use. *See e.g. Jones v. Department of Forests, Parks and Recreation, 857 A.2d 271 (Vt. 2004)* , holding that the use value appraisal program is designed to provide a tax incentive for landowners to maintain the property in agricultural uses; *Carmel Hollow Associates Ltd. Partnership v. Town of Bethlehem, 269 Conn. 120 (2004)* ; *Alexandria Tp. v. Orban 21 N.J. Tax 298 (2004)* ; *Cecarelli v. Board of Assessment Appeals of the Town of North Branford, 272 Conn. 485 (2005)* ; *Golf Trust of Alerica, L.P. v. Soat, 822 N.E.2d 562 (Ill. App. 2005)* ; *ENF Family Patrtnership v. Erie County Bd. of Assessment Appeals, 861 A.2d 438 (Pa. App. 2004)* ; *Jicarilla Apache Nation v. Rodarte, 103 P.3d 554 (N.M. 2004)* ; *R.H. Resorts Ltd. v. Donegan,* 29 Fla. Weekly D1691 (Fla. App. 2004); *Raisanen v. County of Hennepin, 678 N.W.2d 669 (Minn. 2004)* ; *Township of Monroe v. Gasko, 181 N.J. 545 (2004)* .

In *Wetland Resource Ctr. v. Marion Cty., 809 N.E.2d 1202 (Ohio App. 2004)* , the court held that the fact that the land qualified for compensation under federal wetlands mitigation programs because of contractual obligations, the land was entitled to reduced property tax valuation as agricultural land.

In *Randall v. Board of Review for City of Ames, 20004 Iowa App. LEXIS 461 (Iowa App. 2004)* , the court held that land lost its agricultural classification for tax purposes when half the land was used for a golf course and there was no clear showing that the remaining land was used primarily for agriculture.

Add:

In *Osborn v. Tax Com'n, 217 P.3d 274 (Utah App. 2009)* the court examined different methodologies for calculating value for purposes of ad valorem taxation. It relied on *Beaver v. Utah State Tax Comm'n, 916 P.2d 344, 355 (Utah 1996)* in which the Utah Supreme Court explained that "[v]aluation is an art, not a science."

§ 47.11(o) Allocation: Development Rights Plans. [Go To Main]

Add:

For a discussion of the TDR approach see Rick Pruetz, *Beyond Takings and Givings: Saving Natural Areas, Farmland and Historic Landmarks with Transfer of Development Rights and Density Transfer Charges* (2003).

§ 47.11(r) Resource Management. [Go To Main]

Add:

For an example of how water acts can interact with farm acts see *In re Agricultural, Aquacultural, and Horticultural Water Usage Certification Rules, 981 A.2d 99 (N.J. Super A.D. 2009)* , in which a farmer's organization challenged the New Jersey Department of Environmental Protection's amendment of the Water Supply Management Act.

Add:

See Florida Wildlife Federation v. Collier County, 819 So. 2d 200 (Fla. App. 2002) for a discussion of the extent to which agricultural use of land is subject to intensity-of-use standards under amendments to the county comprehensive plan and the fact that Florida panthers frequented areas not included within the approved natural resource protection area.

§ 47.11(s) Availability of Agricultural Land for Recreational Use. [Go To Main]

Add to fn 639:

See also C. Butcher, The Forgotten Intent of the Williamson Act: The Regulation of Non Contracted Lands, 12 *Hastings West Northwest J. Envtl. L. and Pol'y* 37 (2005).

§ 47.11(u) Recreation: Defining "Recreational Use". [Go To Main]

Add:

For a discussion on how off-road vehicles have been treated see Kahr, Byron, "The Right to Exclude Meets the Right to Ride: Private Property, Public Recreation, and the Rise of Off-Road Vehicles," *28 Stan. Envtl. L.J. 51 (2009).*

Add to Fn. 660:

In *Leet v. City of Minot, 721 N.W. 2d 398 (2006)* , the court held that the legislature had intended to define "recreational purposes" broad enough to "cover all recreational activities." Nevertheless, where, as in this case, the individual had been injured by a falling curtain while he was on the premises as a employee of a vendor preparing for an activity at the facility the following day, "the plain language of the statute is not so broad as to include a person present on the property for purposes of the person's employment." Therefore, despite the conclusion that the statute was to be interpreted broadly, it could not encompass all activities. Thus, the injured party was on the premises of employment and not for a recreational purpose.

§ 47.11(x) Fence Laws. [Go To Main]

Add:

See e.g., Guenther v. Praest, 2004 Neb. App. LEXIS 258 (No. A-03-121, Sep. 28, 2004), where the court found that neither adverse possession nor acquiescence resolved the problem and that the title had to be quieted in the plaintiffs and that the defendants be enjoined from trespassing.

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6-47 Thompson on Real Property, Thomas Editions Supp. to § 47.12

Supp. to § 47.12 Federal Policy Issues Relevant to Agricultural Land

[Go To Main]

§ 47.12(a) General Concerns [Go To Main]

Add:

Susan A. Schneider, *Who Gets the Check: Determining When Federal Farm Program Payments Are Property of the Bankruptcy Estate. 84 Neb. L. Rev. 469 (2005);* Amanda Stokes, *Selling out the Farm? The Impact of the Farm Security and Rural Investment Act of 2002 on Lending Institutions and the Small Farmer. 9 N.C. Banking Inst. 243 (2005).*

§ 47.12(a)(1) Regulation of Biotechnology.

Add:

See e.g., Cooper, Steve, "Crop Insurance in the Age of Biotechnology: Should Federal Crop Insurance Endorse Biotechnology?" *15 Conn. Ins. L.J. 495 (2009).*

§ 47.12(a)(2) Regulation of Farm Chemical Use.

Add:

In *National Pork Producers Council v. Jackson, 638 F.Supp.2d 1020* (W.D.Wis., 2009) , the court held that owners and operators of farms must report the release of hazardous chemicals to the EPA in accordance with federal law.

§ 47.12(b) Federal Preemption. [Go To Main]

Add:

For a discussion on the effectiveness of various federal regulations including FIFRA, CWA, and NPDES see Risberg, Micheal, Note, "Plain Language Interpretation Gone Awry: The New Paradigm of Pesticides, Water Pollution, and the Inefficient, Ineffective Overlap of Statutory Schemes," *16 Mo. Envtl. L. & Pol'y Rev. 711 (2009).*

§ 47.12(c) Particular Federal Program Objectives: Agricultural Production Reduction. [Go To Main]

Add:

For a discussion of the Federal Milk Income Loss Contract Program *see Fullenkamp v. Veneman, 383 F.3d 478* (6th Cir. 2004) . For a discussion of the impact of the Organic Foods Production Act, *see Harvey v. Veneman, 297 F. Supp. 2d 344 (D. Maine 2004)* , holding that the act did not prevent crop rotation of wild crop lands.

Add:

Susan A. Schneider, *Who Gets the Check: Determining When Federal Farm Program Payments Are Property of the Bankruptcy Estate. 84 Neb. L. Rev. 469 (2005).*

§ 47.12(f) Particular Federal Program Objectives: Protecting Land for Agriculture: Estate Planning Land Valuation [Go To Main]

Add:

Alex E. Snyder, *Saving the family Farm Through Federal Tax Policy: Easier Said than Done.* 62 Washington and Lee L. R. 729 (2005).

§ 47.12(g) Particular Federal Program Objectives: Protecting Lands for Agriculture-Influencing Particular Use Patters by Requiring Land to Remain Idle. [Go To Main]

Add:

See Bishop v. Veneman, 283 F. Supp. 2d 1207 (D. Kan. 2003) regarding the ability of USDA to reduce farm payments because of the farmer's failure to control weeds on land withheld from production.

§ 47.12(j) Particular Federal Program Objectives: Conservation Reserve Program. [Go To Main]

Add:

Angelo, Mary J. "Corn, Carbon, and Conservation: Rethinking U.S. Agricultural Policy in a Changing Global Environment," *17 Geo. Mason L. Rev. 593 (2010).*

§ 47.12(m) Swampbusting Specifically Considered. [Go To Main]

Add:

See B & D Land and Livestock Co. v. Veneman, 332 F. Supp. 2d 1200 (N.D. Iowa 2004) regarding the rights of a landowner to challenge a determination of "conversion" as well as a designation of "wetlands." In *Horn Farms, Inc., v. Veneman, 319 F. Supp. 2d 902 (N.D. Ind. 2004)* , the court addressed the constitutionality of the Swampbuster provisions of the Food Security Act, upholding the act as an exercise of Congressional authority under the Spending Clause but finding the agency's interpretation of an exemption for "prior converted wetlands" to be unreasonable.

Add:

In *Big Meadows Grazing Association v. United States, 344 F. 3d 940 (9th Cir 2003)* the landowner had conveyed an easement to the United States pursuant to the Wetlands Reserve Program. The government subsequently developed a conservation plan for the land to which the landowner objected. The government then unilaterally began implementing the plan. The court found that the law does not require the landowner's agreement to the plan. The court read the statute as requiring that the landowner agree to "a" wetland plan, not a particular plan. This assent may be inferred from the terms of the easement rather from a need for a separate contract of agreement. The fact that the government did not follow the program manual was of no consequence because the manual was nonbinding since it was not promulgated according to the Administrative Procedures Act and therefore was not a substantive document.

§ 47.12(n) Regulating Private Agricultural Use of the Public Domain. [Go To Main]

Add:

In *Public Lands Council v. Bruce Babbit, 529 U.S. 728 (2000)* , ranching organizations brought an action challenging

the Department of the Interior's regulations on grazing livestock on public lands. The Supreme Court found that the Secretary of the Interior did not exceed the scope of his authority by redefining the term "grazing preference" or by eliminating the requirement that applicants be engaged in livestock business.

§ 47.12(o) Private Agricultural Activity: Grazing on Forest Service Lands. [Go To Main]

Add:

For a discussion of the history of BLM's regulation of grazing on public lands see Hoffmann, Hillary M. "A Changing of the Cattle Guard: The Bureau of Land Management's New Approach to Grazing Qualifications," *24 J. Envtl. L. Litig. 243 (2009).*

§ 47.12(q) Private Agricultural Activity: Property Nature of the Grazing Permit. [Go To Main]

Add:

But see Walker v. United States, 69 Fed. Cl. 222 (2005) where the court held that although there may not be a property right in the grazing permit, the claimant is not barred from asserting a property right in water, access and forage rights. See also *Sacramento Grazing Association, Inc. v. United States, 66 Fed. Cl. 211 (2005)* . In *Goodrich v. United States, 434 F. 3d 1329 (Fed. Cir. 2006)* , the court held that the statute of limits for asserting a takings claim against the government for authorizing another rancher to use water on his allotment began to run at the time the Forest Service adopted an alternative Environmental Impact Statement which permitted the other rancher to use the water.

In *Colvin Cattle Co., Inc. v. United States, 67 Fed. Cl. 568 (2005)* , the court held that the presence of a state granted water right did not create a property right to graze cattle on federal lands.

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Chen, Jim, "Filburn's Legacy" *52 Emory L.J. 1719.*

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Hamilton, Neil D. "Feeding the World's Future: Agrarian Justice and the Rule of Law," *13 Drake J. Agric. L. 545 (Spring 2008).*

Lewis, Tory H. "Managing Manure: Using Good Neighbor Agreements to Regulate Pollution from Agricultural Production," *61 Vand. L. Rev. 1555* (October, 2008).

Maxted, Brian E. "Developing Wind Power in the Commonwealth: No Longer a Quixotic Quest to Build Wind Farms in Virginia," 33 *Wm. & Mary Envtl. L. & Pol'y Rev.* 319 (Fall, 2008).

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Merrill, Benjamin R. "What Stinks ... The Animal Feeding Operations Consent Agreement and Final Order or EPA Involvement in the Area?" *13 Drake J. Agric. L. 285 (Spring 2008).*

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Annotation, Construction and Application of Terms "Agricultural," "Farm," "Farming," or the Like, in Zoning Regulations, *38 A.L.R.5th 357* .

Annotation, Hog Breeding, Confining, or Processing Facility as Constituting Nuisance, *93 A.L.R.5th 621* .

Annotation, Liability for Breach of Farming Lease or Contract, *35 A.L.R.5th 285* .

Annotation, Public Nuisance as a Mass Products Liability Tort, *47 A.L.R.3d 784* .

Annotation, Validity, Construction, and Effect of State Statutes Affording Preferential Property Tax Treatment to Land Used for Agricultural Purposes, *98 A.L.R.3d 916* .

Annotation, What Constitutes Reasonably Necessary Use of the Surface of the Leasehold by a Mineral Owner, or Driller Under an Oil and Gas Lease or Drilling Contract, *53 A.L.R.3d 16* .

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CHAPTER 48 MINES AND MINERALS

6-48 Thompson on Real Property, Thomas Editions 48.syn

AUTHOR: Professor Marla E. Mansfield College of Law University of Tulsa

§ 48.syn Synopsis to Chapter 48: MINES AND MINERALS

§ 48.01 Introduction and Overview.

§ 48.02 Definition of "Mineral."

§ 48.02(a) Interpreting Private Conveyances.

§ 48.02(a)(1) Ejusdem Generis.

§ 48.02(a)(2) Parol Evidence: Circumstances of Transaction.

§ 48.02(a)(3) Parol Evidence: Community Knowledge.

§ 48.02(a)(4) Intrinsic Value.

§ 48.02(a)(5) Ordinary and Natural Meaning.

§ 48.02(a)(6) Manner of Enjoyment.

§ 48.02(a)(7) Surface Destruction.

§ 48.02(a)(8) Texas Experience.

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§ 48.04(a) Ownership of Minerals in Place.

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§ 48.05 Right of Parties to Develop, Produce or Lease Minerals.

§ 48.05(a) Concurrent Owners.

§ 48.05(b) Successive Owners.

§ 48.05(b)(1) General Prohibition of Waste.

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§ 48.05(b)(3) Allocation of Benefits.

§ 48.05(c) Rights of Other Interest Holders.

§ 48.06 Rights Against Trespass.

§ 48.06(a) Innocent Trespass.

§ 48.06(b) Willful Trespass.

§ 48.07 Severance of Surface and Minerals.

§ 48.07(a) Nature of the Mineral Estate.

§ 48.07(b) Nature of a Royalty.

§ 48.07(c) The Special Case of Louisiana.

§ 48.08 Relationship Between Surface and Mineral Owners.

§ 48.08(a) Rights of Mineral Owner to Use Surface.

§ 48.08(b) Rights of Surface Owners.

§ 48.08(b)(1) Subjacent Support.

§ 48.08(b)(2) Lateral Support.

§ 48.08(c) Pennsylvania: Support Estate.

§ 48.08(d) Adverse Possession by Surface Owner.

§ 48.09 Right to Mine by Strip, Surface or Long Wall Methods.

§ 48.09(a) Waiver of Right to Support.

§ 48.09(b) Authorization of Surface Mining.

§ 48.09(c) "Broad Form Deed" Controversy.

§ 48.09(d) Government Regulation.

§ 48.10 Ownership of Minerals Under Roads and Other Rights-of-Way.

§ 48.11 Voluntary Transfer of Right: Requirements for a Conveyance of Minerals.

§ 48.12 Involuntary Transfer of Mineral Interests: Adverse Possession.

§ 48.12(a) Minerals Not Severed When Adverse Party Enters.

§ 48.12(b) Minerals Severed When Adverse Party Enters.

§ 48.12(b)(1) Elements of Adverse Possession Applied to Minerals.

§ 48.12(b)(2) Extent of Minerals Adversely Possessed.

§ 48.13 Involuntary Transfer of Mineral Interests: Dormant Mineral Acts.

§ 48.13(a) Ways to Preserve Mineral Interest from Dormancy.

§ 48.13(b) Party Benefitted from Dormancy.

§ 48.14 Leases.

§ 48.15 Profits.

§ 48.16 Sale of Coal in the Ground.

§ 48.17 Acquisition of Federally Owned Minerals.

§ 48.18 Acquisition of State-Owned Minerals.

§ 48.19 Mining Partnerships.

§ 48.20 Multiple Mineral Development and Correlative Rights.

§ 48.21 Coalbed Methane.

§ 48.22 Bibliography.

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CHAPTER 48 MINES AND MINERALS
I. Introduction, Basic Ownership Concepts, and Protection of Rights.

6-48 Thompson on Real Property, Thomas Editions § 48.01

AUTHOR: Professor Marla E. Mansfield College of Law University of Tulsa

§ 48.01 Introduction and Overview.

This chapter considers the law of private rights to own and develop mineral resources. The focus is coal, metals, and other hardrock minerals. Chapter 49 covers the peculiarities of oil and gas development.

The first portion of this chapter deals with basic ownership concepts and protection of rights. n1 The words "mineral" and "mine" are defined. n2 The rights of concurrent n3 and successive owners n4 are explored, as are remedies for trespass to minerals. n5 The second portion of the chapter covers the types of interests created from a landowner's rights, concentrating on the result of a severance of surface and minerals. n6 This portion looks at the relationship between surface and mineral owners n7 and the right to mine by strip, surface or long wall methods. n8 The chapter then turns to transfers of interests in minerals. Voluntary transfers are first examined, n9 including the ownership of minerals under rights-of-ways. n10 Involuntary transfers explored include adverse possession n11 and the impact of dormant mineral acts. n12 Finally, methods of developing minerals are explored. n13 Problems of mining partnerships n14 and multiple mineral development are considered, n15 as is the peculiar problem of coalbed methane development. n16

FOOTNOTES:
(n1)Footnote 1. § 48.02, *infra*.

(n2)Footnote 2. §§ 48.02 and 48.03, *infra*.

(n3)Footnote 3. § 48.05(a), *infra*.

(n4)Footnote 4. § 48.05(b), *infra*.

(n5)Footnote 5. § 48.06, *infra*.

(n6)Footnote 6. § 48.07, *infra*.

(n7)Footnote 7. § 48.08, *infra*.

(n8)Footnote 8. § 48.09, *infra*.

(n9)Footnote 9. § 48.10, *infra*.

(n10)Footnote 10. § 48.11, *infra*.

(n11)Footnote 11. § 48.12, *infra*.

(n12)Footnote 12. § 48.13, *infra*.

(n13)Footnote 13. §§ 48.14 (Leases), 48.15 (Profits), 48.16 (Sale of Coal in the Ground), 48.17 (Acquisition of Federally Owned Minerals), and 48.18 (Acquisition of State-Owned Minerals), *infra*.

(n14)Footnote 14. § 48.19, *infra*.

(n15)Footnote 15. § 48.20, *infra*.

(n16)Footnote 16. § 48.21, *infra*.

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CHAPTER 48 MINES AND MINERALS
I. Introduction, Basic Ownership Concepts, and Protection of Rights.

6-48 Thompson on Real Property, Thomas Editions § 48.02

AUTHOR: Professor Marla E. Mansfield College of Law University of Tulsa

§ 48.02 Definition of "Mineral."

[Go To Supp]

The word "mineral" must be defined in several settings. n17 First, the owner of land in fee simple may sever, or separate, the surface from the minerals. n18 Similarly, some statutes require a state or federal government to reserve "minerals" when granting private rights to land. n19 Interpretation of the word "mineral" determines who owns specific substances. n20 In addition to ownership questions, another setting for disputes exists because some tax statutes refer to separate taxation of "minerals." n21 Finally, a specialized use of the word is in the Mining Law of 1872, which allows a person to locate a mining claim for a "valuable mineral deposit." n22

§ 48.02(a) Interpreting Private Conveyances.

The question of ownership arises when a conveyance simply refers to "minerals" or to a specified mineral or minerals with the addition of the words "other minerals." n23 Generally, the addition of the words such as "all" or "of every kind" will not expand the reference to minerals to cover any substance that could arguably be a mineral in nature. n24 Similarly, the terms "in," "on," or "under" will not be determinative of the conveyance's meaning.

All courts ostensibly seek the intent of the parties and attempt to determine this intent from the document at issue. Courts, however, split on whether the term "minerals" itself is ambiguous. Some declare the word ambiguous and thus allow extrinsic evidence to assist in determining intent. n25 Other courts use many rules of construction to resolve the dilemma and thereby declare the term "unambiguous." n26

The results of most of these judicial endeavors are often contradictory and unsatisfactory. This occurs partly because most rules seek to find the specific intent of the parties concerning a substance unnamed in the conveyance. Most often this is futile: if there were a specific intent, the substance most likely would have been named. n27 In determining how to define the term minerals, courts should seek predictability, require as little extrinsic evidence as possible, and give credence to expressed intent. These goals may be mutually exclusive at times. The following details some of the approaches.

COMPUTER-ASSISTED RESEARCH

LEXIS: interpret! w/30 convey! w/15 mineral!

§ 48.02(a)(1) *Ejusdem Generis*.

Courts have used the doctrine of *ejusdem generis* when the phrase "and other minerals" has followed specified minerals; n28 the generic term would only include substances "of the same kind, class or nature" as the named minerals. n29 This approach creates its own problems, namely determining what characteristic makes one mineral similar to another. n30 For example, minerals could be "like" oil and gas because they are hydrocarbons, n31 are sources of energy, n32 or are developed through wells. n33 Coal would be included under the first two formulations; salt water brine under the last. n34 Oklahoma uses this test to interpret the phrase "oil and gas and other minerals" and only includes minerals that are produced as a constituent of the oil or gas stream. n35

One formulation sometimes encountered is a reservation or conveyance of "oil and gas and other sources of petroleum." Some courts have found coal to be included. n36

COMPUTER-ASSISTED RESEARCH

LEXIS: ejusdem generis w/30 mineral!

§ 48.02(a)(2) Parol Evidence: Circumstances of Transaction.

Some courts acknowledge the ambiguity of the term "minerals" and allow parol evidence of the specific intent of the parties about whether a particular substance was to be included. n37 For example, the nature of the purchaser's business may be relevant. An oil and gas company would not have been interested in minerals that required a strip mine to develop. n38 The particular characteristics of the land may also be important. n39 Evidence of intent and circumstances surrounding the deed, however, would not be admissible if the instrument was unambiguous. n40

COMPUTER-ASSISTED RESEARCH

LEXIS: circumstanc! or intent! w/15 parol w/1 evidence w/30 mineral!

§ 48.02(a)(3) Parol Evidence: Community Knowledge.

Another use of parol evidence to counter the ambiguity of the word mineral is to look at whether the community at large had knowledge of the substance at the time of the conveyance and whether it was considered to be a mineral. n41 For example, if coal was known to exist but was not viewed as commercially recoverable, coal would not have been intended to be included in "minerals." n42 Other cases looked to what was known about the mineral character of particular substances. n43 Naturally, not all courts concur on the importance of such evidence.

COMPUTER-ASSISTED RESEARCH

LEXIS: community w/5 kn*w! w/15 parole w/1 evidence w/30 mineral!

§ 48.02(a)(4) Intrinsic Value.

An additional approach to ascertaining the scope of "minerals" is to declare that anything with intrinsic value separated from the soil is part of the mineral estate. To be a mineral, the substance must have "rare or exceptional character." n44 Under this interpretation, the term mineral generally will not include substances such as sand, gravel, clay, or limestone. n45 Some rather common materials, however, may have different values if put to specialized uses rather than simply

being used as fill. This could influence whether they are considered to be minerals. n46 Use of this method raises the question of whether to judge value at the date of the conveyance or the date of the dispute. The result could change: uranium might not be included if the conveyance date is chosen.

COMPUTER-ASSISTED RESEARCH

LEXIS: intrinsic w/1 value! w/30 mineral! mineral! w/30 charact! w/5 rare or exceptional!

§ 48.02(a)(5) Ordinary and Natural Meaning.

Courts have stated that anything would be a mineral if it were such in the "ordinary and natural meaning" of the word mineral. n47 This formulation, however, does not include everything that would be mineral in the familiar division of the world into "animal, vegetable or mineral"; to do so would make the very soil part of the mineral estate. n48 Although it can be argued that the word "mineral" has no "ordinary and natural meaning," courts employing this test seem to look at what has a special value removed from the soil. n49 For example, sand and gravel may not be minerals unless the deposits were rare, exceptional, or had a special value because of a peculiar characteristic. n50 Courts also may look at scientific n51 and other non-legal definitions. These include how the word minerals is used in the mining industry, the commercial world, and by landowners. n52

COMPUTER-ASSISTED RESEARCH

LEXIS: mineral! w/30 meaning! w/5 ordinary or natural

§ 48.02(a)(6) Manner of Enjoyment.

The manner of enjoyment test may be traced to an influential article by Professor Eugene Kuntz. n53 Recognizing that a search for the specific intent of the parties was not fruitful, he substituted an acknowledgment that the parties had a general intent to separate ownership into two estates. The ownership of resources would be determined in accordance with the means by which the resources are enjoyed. Thus, the mineral estate would "own" and be entitled to remove all resources that obtain their value from severance from the soil. If removal destroyed the surface, however, the mineral owner should compensate the surface owner for the damage. n54

This test, however, would not be used if a specific intent could be found in a particular transaction. For example, a reservation that contemplated mining metallic ores would not include sand and gravel. n55 One court adopted the approach with a variation. It required compensation if the surface was destroyed and the recovered substance, rather than being unnamed in the deed, was not at the time of the conveyance known to be commercially valuable. n56

COMPUTER-ASSISTED RESEARCH

LEXIS: mineral! w/30 manner w/2 employment

§ 48.02(a)(7) Surface Destruction.

The surface destruction test also makes certain general assumptions about the intent of the parties. If there was a reservation or conveyance of the surface estate apart from the mineral estate, this test presumes that the parties did not intend that the mineral estate would subsume the surface estate totally. n57 Therefore, if a substance was not named in the grant and could only be removed by methods that would destroy the surface, it would not be included in the mineral estate unless there was some other evidence of specific intent to include it. n58 Some courts examine a general intent more closely to see whether the parties contemplated deep mining rather than strip-mining. n59

COMPUTER-ASSISTED RESEARCH

LEXIS: mineral! w/30 surface w/2 destruction

§ 48.02(a)(8) Texas Experience.

After employing various tests, the Texas Supreme Court sought the general intent of the parties in Acker v. Guinn. n60 It concluded that a conveyance encompassing "all minerals" or specific minerals and "all other minerals" did not contemplate destruction of the surface. Therefore, "near surface minerals" were excluded from the mineral estate. In later cases, the court further defined "near surface minerals." n61 They were minerals within 200 feet of the surface, which would require destruction of the surface by any reasonable method of extraction from the date of the deed to the date ownership was being determined. If any of the resource met this definition, the resource would belong to the surface estate regardless of what other depths it may be found. Obviously, this test made ownership unascertainable from the county records.

In Moser v. United States Steel Corp., n62 the Texas Supreme Court prospectively overruled *Acker*. Under its latest test, any resource that falls within the "ordinary and natural meaning" of the term "mineral" belongs to the mineral estate. If removal of the substance destroys the surface and the substance was not directly named, however, the mineral owner must pay damages. Despite the new test, the court will only apply it prospectively n63 and some minerals were declared "by law" to be part of the surface estate. These include building stone, limestone, caliche, surface shale, sand, gravel, near surface lignite, coal and iron. n64

§ 48.02(b) Interpreting Government Conveyances.

When the federal government or state government conveys land and reserves "all minerals" or named minerals and "other minerals," in addition to the general construction aids, some additional doctrines impact interpretation. First, because the reservations often are made pursuant to statute, the intent of the legislative body is important. n65 Second, conveyances from a governmental agency generally are construed in favor of the government. n66

Federal reservations of minerals have been construed broadly. n67 Reservations of "all minerals" under the Stock-Raising Homestead Act of 1916 n68 include gravel n69 and geothermal rights. n70 Other federal statutes, which dealt with rights of Native Americans, generally also were construed liberally. n71

COMPUTER-ASSISTED RESEARCH

LEXIS: mineral! w/30 government w/2 convey! or reserv!

§ 48.02(c) Distinction Between Lease and Deed.

The term "other minerals" is found not only in deeds, but may also be part of a lease of specific minerals. n72 Arguably, the same rules of construction used to interpret a deed could apply to a lease. Some jurisdictions, however, do not do this. For example, North Dakota applies opposite presumptions to deeds and leases. All conveyances of mineral rights are construed as granting "all minerals of any nature whatsoever except those minerals excluded by name" but leases are construed as granting only "those minerals specifically included and set forth by name." n73 Similarly, in Kansas, a reservation of "all of the oil, gas and other minerals in and under" the land was ambiguous as to commercial clay n74 but a lease of "natural gas, petroleum, and other minerals substance" unambiguously excluded clay. n75 One rationale for the difference is that by the time a lease is issued, more evidence of the specific intent of the parties is present. n76 For example, leases may refer to development methods common to oil and gas production, and thus be interpreted as not encompassing "minerals" recoverable by other mining methods. n77

§ 48.02(d) Taxation.

Various states tax "minerals" separately from the land. In theory, definitions for the purpose of interpreting tax statutes need not conform to those used to interpret private conveyances. n78

FOOTNOTES:

(n1)Footnote 17. *Bumpus v. United States, 325 F.2d 264, 266 (10th Cir. 1963)* ("mineral" not a word of art but subject to differing meanings in particular instruments or statutes).

(n2)Footnote 18. *See* § 48.07, *infra*.

(n3)Footnote 19. *See, e.g., 43 U.S.C. § 1719* (reservation of minerals in grants of public lands required absent special circumstances).

(n4)Footnote 20. *See generally*, George Reeves, *The Meaning of the Word "Minerals," 54 N.D. L. Rev. 633 (1976);* John S. Lowe, *What Substances Are Minerals?, 30 Rocky Mtn. Min. L. Inst. 2-1 (1984);* Annotation, *What Are "Minerals" Within Deed, Lease, or License*, 17 A.L.R. 156 (1922), supplemented, 86 A.L.R. 903. *O'Connor v. Rolfes, 899 P.2d 227 (Colo. App. 1994)* (peat moss is not a mineral within reservation of all minerals and mineral rights; what state mining board believes about its jurisdiction over mining of peat moss is immaterial).

(n5)Footnote 21. *See* § 48.02(d), *infra.*

(n6)Footnote 22. *30 U.S.C. § 22.* This meaning will not be discussed in this chapter. *See generally*, Michael Braunstein, *All That Glitters: Discovering the Meaning of Mineral in the Mining Law of 1872, 21 Land & Water L. Rev. 297 (1986)* and § 55.03, *infra*.

(n7)Footnote 23. For whether or not oil and gas is included in the word "mineral," *see* § 49.08(b), *infra*. *Rosette, Inc. v. United States, 64 F. Supp. 2d 1116 (D.N.M. 1999)* (geothermal resources included in "other minerals").

(n8)Footnote 24. *See West v. Godair, 538 So. 2d 322 (La. App. 1989), rev'd, 542 So. 2d 1386.* (La. 1989) (does not remove ambiguity). *Amoco Prod. Co. v. Southern Ute Indian Tribe, 526 U.S. 865 (1999)* (SRHA used as an illustration of broad mineral reservation).

(n9)Footnote 25. *Morrison v. Socolofsky, 600 P.2d 121 (Colo. App. 1979)* (allowing evidence of vernacular meaning).

(n10)Footnote 26. *Spurlock v. Santa Fe P. R.R., 694 P.2d 299 (Ariz. Ct. App. 1984), cert. denied, 742 U.S. 1032 (1985)* (holding term unambiguous, but summarizing other approaches). *See also West v. Aetna Life Ins. Co., 536 P.2d 393 (Okla. App. 1975)* (term unambiguous because of use of *ejusdem generis*).

(n11)Footnote 27. *See generally, Spurlock v. Santa Fe P. R.R., 694 P.2d 299 (Ariz. Ct. App. 1984), cert. denied, 742 U.S. 1032 (1985).*

(n12)Footnote 28. At least one court has required more than one specified mineral in order to use the doctrine. *Shell Oil Co. v. Dye, 135 F.2d 365 (7th Cir. 1943).*

(n13)Footnote 29. *See, e.g., West v. Aetna Life Ins. Co., 536 P.2d 393 (Okla. App. 1975); Wulf v. Shultz, 508 P.2d 896 (Kan. 1973)* (interpreting a lease); *West Va. Dep't of Hwys. v. Farmer, 226 S.E.2d 717 (W. Va. 1976).*

(n14)Footnote 30. *Luse v. Boatman, 217 S.W. 1096 (Tex. Civ. App. 1919).*

(n15)Footnote 31. *Waugh v. Thompson Land & Coal Co., 137 S.E. 895 (W. Va. 1927); Shell Oil Co. v. Dye, 135 F.2d 365 (7th Cir. 1943).*

(n16)Footnote 32. *Cf. Christman v. Emineth, 212 N.W.2d 543 (N.D. 1973)* (not using *ejusdem generis* but noting similarity of oil, gas, and coal as to use despite other differences).

(n17)Footnote 33. *Huie Hodge Lumber Co. v. Railroad Lands Co., 91 So. 676 (La. 1922)* (oil and gas not within "iron, coal, and other minerals" because they require different methods of production); *accord, River Rouge Minerals, Inc. v. Energy Resources of Minn., 331 So. 2d 878 (La. App. 1976)* (interpreting lease).

(n18)Footnote 34. *See generally*, Annotation, *Grant, Lease, Exception, or Reservation of "Oil, Gas, and Other Minerals" or the Like, as Including Coal or Metallic Ores, 59 A.L.R.3d 1146 (1974). See also*, Annotation, "Grant, Lease, Exception of Oil and/or Gas Rights as Including Oil Shale," *61 A.L.R.3d 1109 (1975).*

(n19)Footnote 35. *Oklahoma ex rel. Commissioners of Land Office v. Butler, 753 P.2d 1334 (Okla. 1987), cert. denied, 488 U.S. 993. See also Griffith v. Cloud, 764 P.2d 163 (Okla. 1988)* (limestone not included even if parties changed conveyance's title from "mineral deed" to "royalty deed").

(n20)Footnote 36. *Lazy D. Grazing Ass'n v. Terry Land & Livestock Co., 641 F.2d 844 (10th Cir. 1981)* (phrase covers all minerals similar to petroleum or which may be converted into petroleum).

(n21)Footnote 37. Even a subsequent letter was admissible. *United States v. 1,253.14 Acres of Land, 455 F.2d 1177 (10th Cir. 1972). McCormick v. Union Pac. Resources Co., 14 P.3d 226 (Colo. 2000).* In a concurring opinion, the court indicates that this case is inconsistent with later Tenth Circuit cases that have determined that the term minerals is unambiguous as a matter of law.

(n22)Footnote 38. *Cf. Monon Coal Co. v. Riggs, 56 N.E.2d 672, reh'g denied, 57 N.E.2d 598 (Ind. App. 1944)* (evidence that grantee was a coal company admitted to show oil and gas not included in grant of "all the coal and fireclay and minerals"); *Wulf v. Shultz, 508 P.2d 896 (Kan. 1973)* (noting active oil and gas wells on property when leased for "natural gas, petroleum, and other mineral substances"; coal, clay, limestone, gravel, and other material not included). *See also Richardson v. Citizens Gas & Coke Util., 422 N.E.2d 704 (Ind. App. 1981). But see Shell Oil Co. v. Dye, 135 F.2d 365 (7th Cir. 1943)* (fact purchaser was coal company irrelevant if company also authorized to purchase oil and gas).

(n23)Footnote 39. *Farrell v. Sayre, 270 P.2d 190 (Colo. 1954)* (gravel not included in reservation of "all mineral and mineral rights" when entire surface of area was sand and gravel); *Distinguished by McCormick v. Union Pac. Resources Co., 14 P.3d 226 (Colo. 2000)* (oil and gas have the settled meaning of being included as "minerals" in Colorado deeds reserving "other minerals"). *Morrison v. Socolofsky, 600 P.2d 121 (Colo. App. 1979)* (nature and use of surface relevant).

(n24)Footnote 40. *New Mexico & Ariz. Land Co. v. Elkins, 137 F. Supp. 767 (D.N.M. 1956), appeal dismissed, 239 F.2d 645 (10th Cir. 1956)* (deed unequivocally established uranium and thorium as included in grant of "all oil, gas and minerals" and thus immaterial that substance was unknown at date of conveyance). *Moore v. Pennsylvania Castle Energy Corp., 89 F.3d 791 (11th Cir. 1996)* (extrinsic evidence not admissible where language of contract contains no latent ambiguity); *White Log Jellico Coal Co., Inc. v. Zipp, 32 S.W.3d 92 (Kan. App. 2000)* (deed unambiguously severed the surface rights from the mineral rights, excluding the latter from the transfer, and thus, parol evidence was not admissible to explain the intention of the parties).

(n25)Footnote 41. This approach is sometimes referred to as the *Strohacker* doctrine. *Missouri Pac. Ry. v. Strohacker, 152 S.W.2d 557 (Ark. 1941). See also Ahne v. Reinhart & Donovan Co., 401 S.W.2d 565 (Ark. 1966); Richardson v. Citizens Gas & Coke Util., 422 N.E.2d 704 (Ind. 1981); Morrison v. Socolofsky, 600 P.2d 121 (Colo. App. 1979). But see Spurlock v. Santa Fe Pac. R.R., 694 P.2d 299 (Ariz. 1984)* (criticizing technique for being fact intensive).

(n26)Footnote 42. *Besing v. Ohio Valley Coal Co. of Ky., 293 N.E.2d 510 (Ind. App. 1973); White v. Sayers, 45*

S.E. 747 (Va. 1903).

(n27)Footnote 43. *Southern Title Ins. Co. v. Oller, 595 S.W.2d 681 (Ark. 1980)* (chalk or limestone); *Missouri Pac. Ry., 152 S.W.2d 557 (Ark. 1941)* (oil and gas). *See also McDonald v. Snyder Constr. Co., 744 S.W.2d 550 (Mo. App. 1988)* (collecting cases).

(n28)Footnote 44. *Farrell v. Sayre, 270 P.2d 190 (Colo. 1954) see also, McCormick v. Union Pacific Resources Co., 14 P.3d 346 (Colo. 2000); State ex rel. State Hwy. Comm'n v. Trujillo, 487 P.2d 122, 124 (N.M. 1971),* holding on scope of federal reservation overruled, *Watt v. Western Nuclear, Inc., 462 U.S. 36 (1983).* Cited in dissenting opinion of *Circuit City Stores, Inc. v. Adams, 532 U.S. 105 (2001)* (using *ejusdem generis* to establish that the text is so clear that legislative history is irrelevant). *Champlin Petroleum Co. v. Lyman, 708 P.2d 319 (N.M. 1985); Bogle Farms v. Baca, 925 P.2d 1184 (N.M. 1996).*

(n29)Footnote 45. *Beck v. Harvey, 164 P.2d 399 (Okla. 1944)* (gravel); *Atwood v. Rodman, 355 S.W.2d 206 (Tex. Civ. App. 1962)* (*writ refused*) (limestone). *See generally* Annotation, *Clay, Sand or Gravel as "Minerals" Within Deed, Lease, or License, 95 A.L.R.2d 843 (1964). Farley v. Booth Bros. Land and Livestock Co., 890 P.2d 377 (Mont. 1995)* (gravel, clay and scoria fail "rare and exceptional" test).

(n30)Footnote 46. *Bambauer v. Menjoulet, 214 Cal. App. 2d 871,* (1963) (gravel may be mineral if it contains valuable materials, such as gold in placer deposits); *State Land Bd. v. State Dep't of Fish & Game, 408 P.2d 707 (Utah 1965)* (statutory reservation could include sand and gravel when scarce in area); and *Hendler v. Lehigh Valley R.R., 58 A. 486 (Pa. 1904)* (distinctive qualities made deposit a mineral) *overruled on other grounds, Hall v. Delaware, Lackawanna & W. R.R., 113 A. 669 (Pa. 1921). Leisnoi, Inc. v. Stratman, 154 F.3d 1062 (9th Cir. 1998)* (mineral rights transferred under the Alaska Native Claims Settlement Act include right to sand and gravel).

(n31)Footnote 47. *Elkhorn City Land Co. v. Elkhorn City, 459 S.W.2d 762 (Ky. 1970).*

(n32)Footnote 48. *Northern Pac. Ry. v. Soderbeg, 188 U.S. 526 (1903).*

(n33)Footnote 49. *Compare Miller Land & Mineral Co. v. Wyoming State Hwy. Comm'n, 757 P.2d 1001 (Wyo. 1988)* (sand and gravel not within ordinary and natural meaning) *with Moser v. United States Steel Corp., 676 S.W.2d 99 (Tex. 1984)* (uranium within ordinary and natural meaning).

(n34)Footnote 50. *Heinatz v. Allen, 217 S.W.2d 994 (Tex. 1949)* (sand suitable for making glass or limestone suitable for cement manufacture may be minerals). *See generally*, Annotation, *Clay, Sand or Gravel as "Minerals" Within Deed, Lease, or License, 95 A.L.R.2d 843 (1964). Bedroc LTD. v. United States, 50 F. Supp. 2d 1001 (D. Nev. 1999); River Springs Ltd. Liability Co. v. Board of County Comm'rs of County of Teton, 899 P.2d 1329 (Wyo. 1995)* (adhering to "ordinary and natural meaning" test to define minerals).

(n35)Footnote 51. *Atwood v. Rodman, 355 S.W.2d 206 (Tex. Civ. App. 1960)* (whether substance has a definite chemical composition). *But see Heinatz v. Allen, 217 S.W.2d 994 (Tex. 1949)* (rejecting scientific definition).

(n36)Footnote 52. *Fleming Found. v. Texaco Inc., 337 S.W.2d 846 (Tex. Civ. App. 1960)* (water not mineral); *Mack Oil Co. v. Laurence, 389 P.2d 955 (Okla. 1964)* (water not ordinarily considered to be a mineral). On the mineral nature of water, *see also Andrus v. Charleston Stone Prods. Co., 436 U.S. 604 (1978)* (not a "valuable mineral deposit" under Mining Law of 1872), *but see* La. Rev. Stat. Ann. § 31:4 (subterranean water a mineral). Feriancek, Jean. "What Constitutes a 'Mineral'?" *15 Nat. Resources & Env't 261* (Spring, 2001).

(n37)Footnote 53. Eugene Kuntz, *The Law Relating to Oil and Gas in Wyoming, 3 Wyo. L.J. 107 (1949). See also Amoco Prod. Co. v. Guild Trust, 461 F. Supp. 279 (D. Wyo. 1978), aff'd, 636 F.2d 261 (10th Cir. 1980); Pariani v. State, 164 Cal. Rptr. 683 (Cal. App. 1980); Spurlock v. Santa Fe Pac. R.R., 694 P.2d 299 (Ariz. Ct. App. 1984); Watt v. Western Nuclear, Inc., 462 U.S. 36 (1983).*

(n38)Footnote 54. Eugene Kuntz, *The Law Relating to Oil and Gas in Wyoming, 3 Wyo. L.J. 107, 115 (1949).*

(n39)Footnote 55. *Fisher v. Keweneeaw Land Ass'n, 124 N.W.2d 784 (Mich. 1963).*

(n40)Footnote 56. *Spurlock v. Santa Fe Pac. R.R., 694 P.2d 299 (Ariz. Ct. App. 1984).*

(n41)Footnote 57. *Harper v. Talladega County, 185 So. 2d 388 (Ala. 1966)* (sand and gravel); *Christensen v. Chromalloy Am. Corp., 656 P.2d 844 (Nev. 1983)* (barite; case remanded for extrinsic evidence on whether parties contemplated strip-mining); *Heinatz v. Allen, 217 S.W.2d 994 (Tex. 1949)* (limestone). *See also McDonald v. Snyder Constr. Co., 744 S.W.2d 550 (Mo. App. 1988)* (collecting cases). *Plainsmen Trading Co. v. Crews, 898 S.W.2d 786 (Tex. 1995)* (uranium deposits too close to surface to be included in mineral estate).

See generally Garcia, Richard J. and Paula K. Manis. "Across The Great Divide: Surface Owners v. Severed Mineral Owners--What Is 'Reasonable Use'"? *78 Mich. B.J. 140* (February, 1999).

(n42)Footnote 58. *Rysavy v. Novotny, 401 N.W.2d 540 (S.D. 1987).*

(n43)Footnote 59. *See* § 48.09 *infra*.

(n44)Footnote 60. *464 S.W.2d 348 (Tex. 1971). But see Crews v. Plainsman Trading Co., 827 S.W.2d 455 (Tex. Ct. App 1992).*

(n45)Footnote 61. *Reed v. Wylie, 597 S.W.2d 743 (Tex. 1980); Reed v. Wylie, 554 S.W.2d 169 (Tex. 1977). But see, Crews v. Plainsman Trading Co., 827 S.W.2d 455 (Tex. Ct. App 1992).*

(n46)Footnote 62. *676 S.W.2d 99 (Tex. 1984).*

(n47)Footnote 63. Applied to deeds executed after June 8, 1983. *Friedman v. Texaco, Inc., 691 S.W.2d 586 (Tex. 1985)* (declining to apply to deed executed in 1959).

Plainsmen Trading Co. v. Crews, 898 S.W.2d 786 (Tex. 1995).

(n48)Footnote 64. *Moser v. United States Steel Corp., 676 S.W.2d 99 (Tex. 1984).*

Farm Credit Bank of Texas v. Colley, 849 S.W.2d 825 (Tex. App. 1993) (near surface lignite would not be included in the "other minerals" to which a royalty interest applied because it is part of the surface estate while a royalty is part of the mineral estate); *Plainsman Trading Co. v. Crews, 875 S.W.2d 416 (Tex. App. 1994)* (uranium part of surface because open pit mining was technically or economically feasible and thus a reasonable mining method); *Landreth v. Melendez, 948 S.W.2d 76 (Tex. App. 1997)* (interpretation and construction of mineral reservation in deed is controlled by intention expressed by language used in instrument; if language can be given certain or legal meaning or interpretation, it is not ambiguous).

(n49)Footnote 65. *Watt v. Western Nuclear, Inc., 462 U.S. 36 (1983)* (Congress intended to give homesteaders surface rights to raise crops and families, reserving all minerals to the federal government). *See also Schwarz v. Texas, 703 S.W.2d 187 (Tex. 1986)* (distinguishing private precedent so as to include lignite in state's reservation of lignite in land sold for agricultural purposes); *Pariani v. State, 164 Cal. Rptr. 683 (1980)* (geothermal resources reserved to state). *See also* the dissent in *Oklahoma ex rel. Commissioners of Land Office v. Butler, 753 P.2d 1334, 1341-42 (Okla. 1987)* (criticizing majority for not taking more liberal approach because of statutes authorizing sales of state lands).

(n50)Footnote 66. *Watt v. Western Nuclear, Inc., 462 U.S. 36 (1983); Schwarz v. Texas, 703 S.W.2d 187 (Tex. 1986).*

Del Rio Drilling Programs, Inc. v. United States, 35 Fed. Cl. 186 (1996) (reserving surface access, prospecting rights and rights to build and maintain buildings, roads, telephone lines, pipelines, reservoirs and "all other structures necessary to the full enjoyment" of the United States' mineral rights), *opinion withdrawn, 37 Fed. Cl. 157 (1997), rev'd, 146 F.3d 1358 (Fed. Cir. 1998).*

(n51)Footnote 67. *Chugach Natives, Inc. v. Doyon, Ltd., 588 F.2d 723 (9th Cir. 1979)* (sand and gravel part of subsurface in Alaska Native Claims Act under which federal government reserved "subsurface" of lands in the Alaska National Wildlife Refuge).

(n52)Footnote 68. *43 U.S.C. §§ 291*-301.

Repealed: 43 U.S.C. §§ 291-298 were repealed. Pub. L. No. 94-579, *90 Stat. 2787 (1976).*

(n53)Footnote 69. *Watt v. Western Nuclear, Inc., 462 U.S. 36 (1983).*

(n54)Footnote 70. *United States v. Union Oil Co., 549 F.2d 1271 (9th Cir. 1977).*

Rosette, Inc. v. United States, 64 F. Supp. 2d 1116 (D.N.M. 1999) revd, 526 U.S. 865 (1999).

(n55)Footnote 71. *Millsap v. Andrus, 717 F.2d 1326 (10th Cir. 1983)* (reservation of "oil, coal, gas, or other minerals" in deed under Osage Allotment Act included limestone-dolomite); *Tyoneck Native Corp. v. Cook Inlet Region, Inc., 853 F.2d 727 (9th Cir. 1988)* (sand and gravel part of "subsurface" estate where regional corporation owns subsurface and village corporation owns surface under Alaska Native Claims Settlement Act).

Southern Ute Indian Tribe v. Amoco Prod. Co., 151 F.3d 1251 (10th. Cir.) (reservation of coal as used in Coal Land Acts of 1909 and 1910 construed to include CBM, coalbed methane gas), *reversed by MOCO Prod. Co. v. Southern Ute Indian Tribe, 526 U.S. 865, 144 L. Ed. 2d 22, 119 S. Ct. 1719 (1999). But see Whittle v. Wolfe, 437 P.2d 114 (1968)* (reservation of "all minerals" in conveyances under Klamath Termination Act does not include sand and gravel).

(n56)Footnote 72. *See* § 49.31(b), *infra*.

(n57)Footnote 73. N.D. Cent. Code § 47-10-24.

(n58)Footnote 74. *Hans v. Great Bend Brick & Tile Co., 241 P.2d 475 (Kan. 1952).*

(n59)Footnote 75. *Wulf v. Shultz, 508 P.2d 896 (Kan. 1973).*

(n60)Footnote 76. *Wulf v. Shultz, 508 P.2d 896 (Kan. 1973)* (acknowledging title of instrument as "oil and gas lease" did not intend surface destruction).

(n61)Footnote 77. *Wulf v. Shultz, 508 P.2d 896 (Kan. 1973)* (no rights to coal, clay, gypsum, or limestone). *See also Praeletorian Diamond Oil Ass'n v. Garvey, 15 S.W.2d 698 (Tex. Civ. App. 1929)* (no rights to gravel).

(n62)Footnote 78. *But see Gifford-Hill & Co., Inc. v. Wise County Appraisal Dist., 827 S.W.2d 811 (Tex. 1991)* (using "ordinary and natural meaning" test from private conveyance to determine if limestone could be assessed separate from the surface).

Some states impose a severance tax on the continuing privilege of extracting minerals from the state. *See, Petra Energy, Inc. v. Dept. of Revenue, 6 P.3d 1267 (Wyo. 2000); see also, Total Minatome Corp. v. Union Texas Products Corp., 766 So. 2d 685 (La. Ct. App. 2000).*

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CHAPTER 48 MINES AND MINERALS
I. Introduction, Basic Ownership Concepts, and Protection of Rights.

6-48 Thompson on Real Property, Thomas Editions § 48.03

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§ 48.03 Definition of "Mine" and Status of Mine Tailings.

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Private conveyances sometimes refer to a grant of "mines." n79 Because of this, the issue sometimes raised is what methods could be used to remove minerals. n80 The term "mine" is not necessarily limited to underground mines. If the grant also refers broadly to minerals, including oil and gas and clay, the term may include any method of getting minerals out of the ground. n81 Open pits may or may not be within the contemplation of the parties. n82

A second question raised in one case was whether conveying "mines of salt" included a grant of the empty chamber from which salt had been removed. Partially because the grant also referred to veins, the court concluded the deed conveyed a fee interest in the salt itself and not the empty spaces; "mine" described the mode of occurrence, not the place in which salt was found. n83

The term mine also is defined statutorily in certain worker safety n84 and other regulatory acts. n85 Often, these definitions go beyond what is commonly thought of as a mine and include connected areas, such as places from which minerals are extracted, appurtenant roads, and, more broadly, all lands, facilities and equipment or other property used in, to be used in, or resulting from the work of extracting or milling or the work of preparing coal or other minerals. n86 Because these statutes are remedial, their provisions are interpreted broadly. n87

Mine tailings are the waste product of mining and milling. Despite the term "waste," tailings may contain minerals recoverable by advancing technology. Therefore, title to the tailings can become an issue. n88 Upon initial extraction of minerals, tailings are considered personal property. n89 However, tailings may be deemed real property if that was the intent of the parties when they were placed on the land, n90 or if the tailings become embedded in the earth, n91 or if the tailings had been abandoned n92 or considered fill or waste. n93

COMPUTER-ASSISTED RESEARCH

LEXIS: mine or mines w/15 convey! w/30 mineral!

mine w/2 tailing! w/30 mineral!

FOOTNOTES:
(n1)Footnote 79. *See* Annotation, *What Is Included Within Term "Mine" as Used in Written Instrument, 92 A.L.R.2d 868 (1963).*

(n2)Footnote 80. *Redman v. Ohio Dep't Indus. Relations, 662 N.E.2d 352 (Ohio 1996)* (mines include land from which minerals would be extracted in the future).

(n3)Footnote 81. *Rudd v. Hayden, 97 S.W.2d 35 (Ky. 1936).*

(n4)Footnote 82. *Compare, Coleman v. Coleman, 1 Pearson 670, aff'd, 62 Pa. 252 (1858)* (holding them included and rejecting English precedent to the contrary), *with Sovereign Camp W.W. v. Arthur, 222 S.W. 729 (Ark. 1920)* (distinguishing a mine from a quarry). *See generally* § 48.09(b), *infra*.

(n5)Footnote 83. *International Salt Co. v. Geostow, 878 F.2d 570 (2d Cir. 1989).* The case acknowledges the normal rule, namely that the owner of the salt has a right to use the chamber for mineral production until the mine is abandoned or the mineral is exhausted. *Cf.*, § 49.08(d), "Ownership of Depleted Formations for Gas Storage."

(n6)Footnote 84. Federal Mine Safety and Health Act of 1977, *30 U.S.C. § 802*(h)(1). The National Coal Museum. OSHRC Docket No. 99-2240 (Aug. 17, 2001).

(n7)Footnote 85. Surface Mining Control and Reclamation Act of 1977, *30 U.S.C. § 1291*(28) (defining "surface coal mining operations"). Herman v. Commonwealth Edison, No. 98 C 3308, *1999 U.S. Dist. LEXIS 8306 (N.D. Ill. 1999)* (definition used in subchapter I of the Federal Mine Safety and Health Act *(30 U.S.C. § 801*-25)).

(n8)Footnote 86. Federal Mine Safety and Health Act of 1977, 48.12(b)(2)*30 U.S.C. § 802*(h)(1).

(n9)Footnote 87. *Donovan v. Carolina Stalite Co., 734 F.2d 1547 (D.C. Cir. 1984). See generally* Annotation, *What Is "Mine" under Federal Mine Safety and Health Act of 1977, 63 A.L.R. Fed. 415 (1983).*

(n10)Footnote 88. Annotation, *Mine Tailing as Real or Personal Property, 75 A.L.R.4th 965 (1990).*

(n11)Footnote 89. *Gilberton Coal Co. v. Schuster, 169 A.2d 44 (Pa. 1961). But see Ginter Coal Co. v. Environmental Hearing Bd., 306 A.2d 416 (Pa. Commw. 1973)* (digging into culm is "surface mining" under statutory scheme).

(n12)Footnote 90. *Hayes v. Alaska Juneau Forest Indus., 748 P.2d 332 (Alaska 1988).*

(n13)Footnote 91. *In re Appropriation of Easements for Hwy. Purposes, 190 N.E.2d 446 (Ohio St. 1963).*

(n14)Footnote 92. *Gilberton Contr'g Co. v. Hook, 255 F. Supp. 687 (E.D. Pa. 1966); Hayes v. Alaska Juneau Forest Indus., 748 P.2d 332 (Alaska 1988).*

(n15)Footnote 93. *Hayes v. Alaska Juneau Forest Indus., 748 P.2d 332 (Alaska 1988)* (calling tailings "disposed"); *Kerr v. Australia Pac. Resources, Ltd., 841 P.2d 401 (Colo. App. 1992)* (placed on property as waste, tailings deemed annexed to real estate over time).

Hayes v. A.J. Assoc. Inc., 960 P.2d 556 (Alaska 1998) (in action where tailings were dumped on land of third party, and property formed was deemed submerged lands, state has reserved interest in lands where surface estate has been conveyed to third party, and this "state land" is open to mineral location).

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CHAPTER 48 MINES AND MINERALS
I. Introduction, Basic Ownership Concepts, and Protection of Rights.

6-48 Thompson on Real Property, Thomas Editions § 48.04

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§ 48.04 Ownership.

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§ 48.04(a) Ownership of Minerals in Place.

Minerals in the ground are considered real property. Spanish and British precedent reserved some mineral ownership to the crown. n94 In the United States, however, the owner of the soil generally has title to minerals. The common-law maxim, *cujus est solum, ejus est usque ad coleum et ad infernos* (to whomever the soil belongs, he owns to the sky and to the depths) governs ownership. n95

Oil and gas, however, are not necessarily subject to this ownership rule. n96 Another exception to the *ad coleum* principle is the doctrine of extralateral rights, which is a feature of the Mining Law of 1872 applicable to the public domain. n97 Extralateral rights allow owners of lode mining claims to follow certain veins outside the side boundaries of the claim. n98

COMPUTER-ASSISTED RESEARCH

LEXIS: mineral! w/15 own! w/30 real w/2 property

§ 48.04(b) Ownership of Produced Minerals.

Once produced, minerals are personal property. If the person who had owned the minerals in the ground had not granted the right to produce to another, the produced minerals would also belong to the mineral owner.

COMPUTER-ASSISTED RESEARCH

LEXIS: produce! w/5 mineral! w/15 own! w/30 personal w/2 property

FOOTNOTES:
(n1)Footnote 94. England retains title to fuel minerals and Spanish law has influenced the law of Texas. *See* § 49.15,

infra.

(n2)Footnote 95. *Del Monte Mining & Milling Co. v. Last Chance Mining & Milling Co., 171 U.S. 55 (1898).* Ronald W. Polston, *Mineral Ownership Theory: Doctrine in Disarray, 70 N.D. L. Rev. 541 (1994).*

(n3)Footnote 96. *See* § 49.02(c), *infra*.

(n4)Footnote 97. *See generally*, § 55.03, *infra*.

(n5)Footnote 98. If the vein's apex is within the claim, the miner may follow it outside the claim's side lines. *30 U.S.C. § 26. Gold, Silver & Tungsten, Inc. v Wallace, 91 P.2d 975 (Colo. 1939), cert. denied, 309 U.S. 612 (1939), reh'g denied, 308 U.S. 639 (1939).* (The vein is continuous if miner can trace it through the surrounding rocks. Slight interruptions of mineral bearing rock do not destroy the continuity of the vein). *But see Tom Reed Gold Mines Co. v United E. Mining Co. 209 P. 283 (Ariz. 1922)* (Claimant may not follow vein where minerals are not found in that direction or are found at a great distance). Bennett, Jared C. "Ownership of Transmigratory Minerals, Utah and Zebras: Proof That Oil and Gas Ownership Law Needs Reform," *21 J. Land Resources & Envtl. L. 349 (2001).*

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CHAPTER 48 MINES AND MINERALS
I. Introduction, Basic Ownership Concepts, and Protection of Rights.

6-48 Thompson on Real Property, Thomas Editions § 48.05

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§ 48.05 Right of Parties to Develop, Produce or Lease Minerals.

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§ 48.05(a) Concurrent Owners.

In the large majority of jurisdictions, each cotenant may independently develop minerals because each cotenant has a right to possess the concurrently owned property; minerals are only possessed through development. n99 The developing cotenant, however, cannot oust the remaining tenants and must account to them. n100 For oil and gas, the basic measure of accounting is on the basis of net profits, computed as a proportionate share of the value of production minus a proportionate share of expenses of extracting and marketing. n101 This is perhaps also the preferred modern measure when other minerals are involved. n102 Earlier cases, however, used a rental, n103 royalty, n104 or value in place standard. n105 A customary royalty has also been used to compensate the non-developing cotenant when there is no proof of the market value of the produced mineral. n106

COMPUTER-ASSISTED RESEARCH

LEXIS: concurrent! w/2 own! w/30 mineral!

§ 48.05(b) Successive Owners.

§ 48.05(b)(1) General Prohibition of Waste.

Neither a life tenant nor the owner of a remainder interest may develop minerals independently. For the life tenant to do so would be waste; the holder of the remainder would be in trespass. n107

§ 48.05(b)(2) "Open Mine" Doctrine.

The exception to the statement that a life tenant cannot authorize mining is the "open mine doctrine." If the mineral interest was being mined or was leased for mineral development at the time the life estate became possessory, mining may continue and the benefits will inure to the life tenant. n108 This is, however, a rule of construction that may be

rebutted. n109

COMPUTER-ASSISTED RESEARCH

LEXIS: life w/1 tenant! w/50 open w/1 mine w/1 doctrine

§ 48.05(b)(3) Allocation of Benefits.

If both the life tenant and owner of the remainder interest authorize mineral development, the life tenant generally has the right to the equivalent of income and the corpus is owed to the remainder. With some exceptions, royalty is principal and rents as well as interest on royalties are income. n110

COMPUTER-ASSISTED RESEARCH

LEXIS: life w/1 tenant! w/30 remainder w/30 income or benefit!

§ 48.05(c) Rights of Other Interest Holders.

Holders of defeasible fees generally can develop minerals. Holders of security interests may not, but the terms of the security agreement as well as the terms of restrictive covenants on property may forbid development by the mineral owner. n111

FOOTNOTES:
(n1)Footnote 99. *Lichentenfels v. Bridgeview Coal Co., 496 A.2d 782 (Pa. Super. 1985), but see Chosar Corp. v. Owens, 370 S.E.2d 305 (Va. 1988)* (each co-tenant may enjoin other co-tenants). *See also* § 49.05, *infra*.

(n2)Footnote 100. *See generally,* Annotation, *Basis of Computation of Cotenant's Accountability for Minerals and Timber Removed From the Property, 5 A.L.R.2d 1368 (1949).*

(n3)Footnote 101. *See* § 49.05(d), *infra*.

(n4)Footnote 102. *Black Crystal Coal Co. v. Garland Coal & Mining Co., 267 F.2d 569 (10th Cir. 1959); White v. Smyth, 214 S.W.2d 967 (Tex. 1948)* (allowing reasonable compensation for producing owner's labor and equipment).

(n5)Footnote 103. *Appeal of Nancy Neel, 3 Pennyp. 66 (Pa. 1882).*

(n6)Footnote 104. *Mercur v. State Line & Sullivan R. Co., 32 A. 1126 (Pa. 1895).*

(n7)Footnote 105. *Memphis Stone & Gravel Co. v. Archer, 102 So. 390 (Miss. 1925).*

(n8)Footnote 106. *Taylor v. Bradford, 244 S.W.2d 482 (Ky. 1951).*

(n9)Footnote 107. For cases, *see* § 49.06(a). *See also* Annotation, *Life Tenant's Death as Affecting Rights and Lease Given by Him, 14 A.L.R.4th 1054 (1982).*

Montgomery v. Browder, 930 S.W.2d 772 (Tex. App. 1996).

(n10)Footnote 108. *See* § 49.06(b), *infra*.

Riley v. Riley, 972 S.W.2d 149 (Tex. App. 1998). Hynson v. Jeffries, 697 So. 2d 792 (Miss. Ct. App. 1997) (Life tenant was able to collect royalties from producing oil and gas properties that were operational when she became a life tenant).

(n11)Footnote 109. *Doverspike v. Chambers, 516 A.2d 392 (Pa. Super. 1986).*

(n12)Footnote 110. *See* § 49.06(c), *infra*. *See also* Annotation, *Rights of Tenant for Life or for Years and Remainderman Inter Se in Royalties or Rents Under Oil, Gas, Coal, or other Mineral Lease, 18 A.L.R.2d 98 (1951).*

(n13)Footnote 111. *See* § 49.07, *infra*.

In re Appointment of Trustee for Purpose of Securing an Oil and Gas Lease, 897 P.2d 1150 (Okla. App. 1995) (mineral royalties delivered to trustee for benefit of remaindermen); *Hynson v. Jeffries, 697 So. 2d 792 (Miss. App. 1997).*

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CHAPTER 48 MINES AND MINERALS
I. Introduction, Basic Ownership Concepts, and Protection of Rights.

6-48 Thompson on Real Property, Thomas Editions § 48.06

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§ 48.06 Rights Against Trespass.

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§ 48.06(a) Innocent Trespass.

A developer of minerals commits a non-willful, good faith or innocent trespass when the non-owner has a reasonable belief in the lawfulness of the development. n112 The measure of damages for an innocent trespass is sometimes a customary royalty for coal and hardrock minerals, n113 although the oil and gas measure is also used. Under this theory, damages are the fair market value of the produced mineral, less reasonable expenses, so long as those expenses benefitted the true owner. n114 In the solid mineral context, this translates to the value of the mineral at the mine mouth, less costs of mining, processing and transportation. n115

COMPUTER-ASSISTED RESEARCH

LEXIS: innocent! w/2 trespass! w/30 mineral!

§ 48.06(b) Willful Trespass.

If a trespass is found to be willful or in bad faith, the trespasser will be liable for the full market value of the minerals wrongfully removed. n116 This is the value of the mineral at the mine mouth with no deduction of costs of mining and processing. Courts differ on whether there can be a deduction for transportation costs. n117 Pennsylvania has also allowed compensation for the loss of the incidents of ownership, such as the right to determine the pace and terms of development. n118

COMPUTER-ASSISTED RESEARCH

LEXIS: willful! w/2 trespass! w/30 mineral!

FOOTNOTES:
(n1)Footnote 112. *See* § 49.04(f), *infra*.

Smith, G. Thomas and Hume F. Coleman. Florida Real Property Complex Transactions Oil, Gas, and Minerals. RPCT FL-CLE 7-1 (2000).

(n2)Footnote 113. *Alaska Placer Co. v. Lee, 553 P.2d 54 (Alaska 1976).*

Hayes v. A.J. Assoc. Inc., 960 P.2d 556 (Alaska 1998) (where mineral explorer/trespasser did not obtain landowner's permission or post bond as required by statute, proper remedy was not ejectment but was financial indemnification); *Mallon Oil Co. v. Bowen/Edwards Assoc., Inc., 965 P.2d 105 (Colo. 1998)* (where Tribe retained right to explore for coal and discovered large coalbed methane gas deposit, it was not deemed a trespass to oil and gas holder's right to explore when the knowledge of coalbed methane gas was acquired incidentally by virtue of the coal exploration).

(n3)Footnote 114. *Reynolds v. Pardee & Curtin Lumber Co., 310 S.E.2d 870 (W. Va. 1983).* For further delineation, *see* § 49.04(a)(3), *infra*.

See also, Natural Gas Pipeline Co. of America v. Pool, 30 S.W.3d 639 (Tex. Ct. App. 2000).

(n4)Footnote 115. *Dethloff v. Zeigler Coal Co., 412 N.E.2d 526 (Ill. 2d 1980) cert. denied sub nom., 451 U.S. 910 (1981); Reynolds v. Pardee & Curtin Lumber Co., 310 S.E.2d 870 (W. Va. 1983).*

(n5)Footnote 116. For a complete discussion, *see* § 49.04(a)(2) *infra*.

Gerrity Oil & Gas Corp. v. Magness, 946 P.2d 913 (Colo. 1997) (trespass occurs when mineral rights holder exceeds scope of implied easement to use surface in reasonable and necessary manner); *Mallon Oil Co. v. Bowen/Edwards Assoc., Inc., 965 P.2d 105 (Colo. 1998)* (a geophysical trespasser is one who conducts geophysical operations upon the lands of another without permission or consent, or an explorer may be deemed a trespasser where the consent or permission obtained is for any reason ineffectual, or where operations conducted are in excess of consent or permission granted); *Conner v. U.S. Dept. of the Interior, 73 F. Supp. 2d 1215 (D. Nev. 1999)* (The Federal Government was entitled to injunctive relief based on the willful trespass on Federal lands).

(n6)Footnote 117. Compare *Dethloff v. Zeigler Coal Co., 412 N.E.2d 526 (Ill. 2d 1980), cert. denied sub nom., 451 U.S. 910 (1981)* (can recover cost of moving minerals to mine mouth), with *Reynolds v. Pardee & Curtin Lumber Co., 310 S.E.2d 870 (W. Va. 1983)* (cannot recover).

(n7)Footnote 118. *Smith v. Benjamin Coal Co., 420 A.2d 754 (Pa. Super. 1980).*

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CHAPTER 48 MINES AND MINERALS
II. Types of Mineral Interests Created from a Landowner's Rights.

6-48 Thompson on Real Property, Thomas Editions § 48.07

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§ 48.07 Severance of Surface and Minerals.

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Unless otherwise stated, a conveyance of the land includes the minerals in the land. A deed, however, may convey minerals separately or by reservation or exception seek to remove them from a grant. n119 When one of these activities has taken place, it is said that the minerals are severed from the surface.

§ 48.07(a) Nature of the Mineral Estate.

Generally, if the minerals are truly severed, then two estates in land are created. n120 The owner of a mineral estate has the right to develop the minerals, the right of access and use of the surface for this purpose, and the right to lease the minerals and receive the proceeds of a mineral lease. n121 The mineral interest will be in the nature of a corporeal fee. n122

The wording of a grant or reservation, however, may create an incorporeal hereditament in the nature of a profit, n123 or easement, n124 or personal privilege. n125 For example, in a grant of all coal, the grantor reserved "the upper vein of coal and a sufficient quantity of lower veins for farm and domestic use, together with the right to dig and sell coal from the said upper 3-foot vein, for farm and domestic use and all rights to operate for oil, gas, and other minerals." n126 The court determined that the grantor retained the fee in the upper vein, but only a right of use of the other coal. n127

COMPUTER-ASSISTED RESEARCH

LEXIS: mineral! w/5 sever! w/15 estate!

§ 48.07(b) Nature of a Royalty.

A royalty interest is a right to a share of minerals when produced. n128 A royalty interest does not bear the costs of production. A royalty may be free-standing or reserved in a lease as compensation for the mineral lessor. Generally, an unaccrued royalty interest is an interest in real property, n129 even if it is incorporeal. n130 However, in some instances

a lease of minerals is actually a complete sale of minerals in place. n131 In such situations, the royalty is the consideration or price for the conveyance and is personalty. n132

§ 48.07(c) The Special Case of Louisiana.

In Louisiana, a separate estate in minerals cannot be created in fee, although two separate ownerships in the same property may be created. n133 A severance creates a servitude in the nature of an easement. n134 This servitude is defeasible; it will end or "prescribe" for non-use.

FOOTNOTES:
(n1)Footnote 119. For problems with exceptions and reservations, *see* § 49.18, *infra*.

Lewis v. Sac and Fox Tribe of Okla. Hous. Auth., 896 P.2d 503 (1995), cert. denied, 516 U.S. 975 (1995) (conveyance of "house and grounds" was equivalent to conveying "land" or "real property" and included the minerals; it was not a conveyance of just the surface).

Machipongo Land and Coal Co., Inc. v. Department of Envtl. Resources, 719 A.2d 19 (Pa. 1998) (there are three estates in land: surface, coal/mineral, and the right to support); *Ely v. Briley, 959 S.W.2d 723 (Tex. App. 1998)* (Under Texas law, the owner of a mineral estate possesses a bundle of interests, including the right to execute oil, gas, and mineral leases, and the right to receive bonuses, rentals and royalties. Each is a property right that can be separately conveyed or reserved. An unqualified reservation of the mineral estate reserves the entire bundle of property rights accorded a mineral estate. An unqualified reservation of a riparian mineral estate reserves the right to future accretion).

(n2)Footnote 120. *But see* § 48.07(c), *infra*.

Although severance creates two separate estates, a mineral owner, who has the right to use the surface to exploit the minerals, has sufficient interest in the surface to redeem it after a tax sale under a statute allowing redemption by "any person having a legal or equitable claim therein..." *Elliott v. Notch Mtn. Corp., 881 P.2d 434 (Colo. App. 1994); Pawnee Oil and Gas, Inc. v. County of Wayne, 751 N.E.2d 1268* (Ill. App. 5 Dist. 2001), *rev'd, Notch Mtn. Corp. v. Elliott, 898 P.2d 550* (Colo.), *reh'g denied*, (1995). *See generally*, Brown, Richard F. Oil, Gas, and Mineral Law. *54 SMU L. Rev. 1521* (Summer, 2001). *See generally* Hand, M. Kristeen and Kyle R. Smith. "The Deluge: Potential Solutions To Emerging Conflicts Regarding On- Lease and Off-Lease Surface Damage Caused By Coal Bed Methane Production," *1 Wyo. L. Rev. 661 (2001).*

(n3)Footnote 121. For further elaboration, *see* § 49.09, *infra*.

Dunn v. Patton, 307 Ill. App. 3d 375 (5th Dist. Ct. 1999) (the court found that the mineral rights had not been severed completely from the surface estate; thus the plaintiff had no right to partition).

(n4)Footnote 122. Annotation, *Grant, Reservation or Exception as Creating Separate and Independent Legal Estate in Solid Minerals or as Passing Only Incorporeal Privilege or License, 66 A.L.R.2d 978 (1959).* For oil and gas, not all states find the interest to be corporeal, see § 49.02(d)(1), *infra*.

(n5)Footnote 123. *Woodside v. Ciceroni, 93 F. 1 (9th Cir. 1899); Miller v. State, 183 A. 17 (Conn. 1936). See also Radke v. Union Pac. R.R., 334 P.2d 1077 (Colo. 1959)* (grant of "exclusive right to prospect for coal and other minerals" created revocable license).

(n6)Footnote 124. *McMillin v. Pritt, 138 S.E. 384 (W. Va. 1927), see also McMillin v. Matheny, 140 S.E. 10 (W. Va. 1927).*

(n7)Footnote 125. *Bates v. Gayheart, 205 S.W. 559, 560 (Ky. 1918)* (grantor could not later convey right retained

to "any ... coal upon said land that the ... [grantor] may want to use during his lifetime").

(n8)Footnote 126. *Freeport Coal Co. v. Valley Point Mining Co., 90 S.E.2d 296, 297 (W. Va. 1955).*

(n9)Footnote 127. *Ely v. Briley, 959 S.W.2d 723 (Tex. App. 1998)* (deed conveying tract, with reservation of right to minerals, retained in grantor right to increase of reserved mineral estate by accretion of river); *Enron Oil & Gas Co. v. Worth, 947 P.2d 610 (Okla. App. 1997)* (mineral interest owner may separately convey right of reasonable ingress and egress upon surface for limited purpose of conducting geophysical exploration).

(n10)Footnote 128. *See* § 49.10, *infra*.

Watts v. Atlantic Richfield Co., 115 F.3d 785 (10th Cir. 1997) (in a production-type lease, royalties are only payable when product is produced and sold, as opposed to an amount-realized lease, where royalties are payable on the amount realized from the sale).

(n11)Footnote 129. *Weinacht v. Phillips Coal Co., 673 S.W.2d 677 (Tex. App. 1984)* (agreement to raise royalty subject to Statute of Frauds); *In re Shailer's Estate, 266 P.2d 613 (Okla. 1954); Eastern Minerals Int'l, Inc. v. United States, 36 Fed. Cl. 541 (1996); see also, Beluga Min. Co. v. State Dept. of Natural Resources, 973 P.2d 570 (Alaska 1999).*

(n12)Footnote 130. Annotation, *Solid Mineral Royalty as Real or Personal Property, 68 A.L.R.2d 728 (1959).*

Uisdean R. Vass and Margaret A. Nunnery, *Estoppel of the Government to Collect Mineral Royalties: A Blind Alley, 28 Tulsa L.J. 409 (1993);* David E. Pierce, *The Missing Link in Royalty Analysis: An Essay on Resolving Value-Based Royalty Disputes, 5 Tex. Wesleyan L. Rev. 185 (1999).*

(n13)Footnote 131. *See* § 48.16, *infra*.

(n14)Footnote 132. *Dougherty v. Greene, 67 So. 2d 297 (Miss. 1953); Mullins v. Evans, 308 S.W.2d 494 (Tenn. App. 1957)* (concluding transaction was not a sale); *In re Essex Coal Co., 192 A.2d 675 (Pa. 1963); but see Smith v. Glenn Alden Coal Co., 32 A.2d 227 (Pa. 1943)* (real property for judgment lien purposes).

(n15)Footnote 133. *Steele v. Denning, 456 So. 2d 992 (La. 1984).*

(n16)Footnote 134. *See* § 49.14, *infra. See generally* Annotation, *Validity and Construction of Statutes Providing for Reversion of Mineral Estates for Abandonment or Non-use, 16 A.L.R.4th 1029 (1982);* Luther L. McDougal, *Louisiana Mineral Servitudes, 61 Tul. L. Rev. 1097 (1987).*

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CHAPTER 48 MINES AND MINERALS
II. Types of Mineral Interests Created from a Landowner's Rights.

6-48 Thompson on Real Property, Thomas Editions § 48.08

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§ 48.08 Relationship Between Surface and Mineral Owners.

[Go To Supp]

§ 48.08(a) Rights of Mineral Owner to Use Surface.

The owner of a severed mineral estate has the right to use so much of the surface as is reasonably necessary for the production of minerals. n135 This is an implied right, one which exists even without an express grant in the document severing the mineral estate. n136 Implied rights, however, may be expanded or contracted by agreement of the parties. n137 The rights also may respond to new technology. n138

COMPUTER-ASSISTED RESEARCH

LEXIS: mineral! w/2 own! w/5 right! w/5 use! w/5 surface

The mineral estate is deemed dominant over the surface estate. n139 Therefore, the mineral owner is generally only liable for damages caused by negligence or unreasonable use of the surface. n140 Nevertheless, some doctrines have evolved at common law n141 and by statute n142 to protect the surface owner.

§ 48.08(b) Rights of Surface Owners.

A surface owner does not merely own the soil covering the surface. The surface estate includes all rights not part of the mineral estate. n143 Therefore, the owner of the surface may make such uses of it that do not unreasonably interfere with the extraction of minerals. n144 Some states statutorily require the miner to post security for the benefit of the surface owner before commencing surface disturbance. n145 Additionally, two common-law doctrines--the doctrines of subjacent support n146 and lateral support n147--temper the right of the mineral owner if the owner tries to extract all the minerals beneath or in the property. n148

COMPUTER-ASSISTED RESEARCH

LEXIS: surface w/2 own! w/15 right!

§ 48.08(b)(1) Subjacent Support.

If there has been a severance of mineral from surface estates, the surface owner has a right to have the surface supported in its natural state by the underlying mineral estate. n149 Therefore, subjacent support looks at property as if physically divided on a horizontal plane. The right to subjacent support is an absolute right: the mineral estate owner would be liable for subsidence n150 even if its mining operations were not negligent. n151 Explanations of the right include a natural right theory, a nuisance law analogue that requires property owners to not use their property to the detriment of others, and an easement theory. n152 A cause of action for subsidence generally does not arise until the supporting earth begins to fall and cause damage. n153

The right to support initially protected land in its natural state; to recover for damage to buildings required proof of negligent mining operations. n154 Nevertheless, because the weight of buildings is small compared to the weight of the overlying earth, courts determined that the miner would have to prove that the land would not have subsided but for the added building weight to avoid liability for consequential damages to the buildings as a result of the breach to support in a natural state. n155 Some courts avoided this exercise by finding that the "natural" state of the land included those buildings that reasonably could be anticipated either at the date of severance n156 or the date of mineral extraction. n157

Additionally, because of the absolute nature of the right to subjacent support, some cases have granted injunctions against proposed mining. n158 Others, however, have limited the cause of action to damages, at least in the absence of threats of appreciable damage to the surface. n159 The right to subjacent support however, may be waived, as discussed in § 48.09.

COMPUTER-ASSISTED RESEARCH

LEXIS: right! w/5 subjacent w/2 support! w/30 mineral!

§ 48.08(b)(2) Lateral Support.

The surface estate also has a right to lateral support. Lateral, or side, support looks to property as if physically divided vertically. Property must support adjoining property. Removal of minerals cannot make adjoining property subside because of sideward and downward movement. n160

The lateral support doctrine retains the distinction between land in the natural and improved state in some jurisdictions. Absolute liability in those jurisdictions only exists for damage to land in its natural state. In order to obtain damages for injury to buildings, negligence must be proven. n161 Other jurisdictions follow what has been identified as the majority view n162 and adopt variants of the rules for subjacent support, namely that recovery will be allowed if the buildings did not add to the problem n163 or if the land in its natural state could support the buildings. n164 Additionally, English courts allow rights to lateral support for buildings to be acquired by prescription if the buildings existed for sufficient time. n165 Courts in the United States, however, generally reject negative prescriptive easements. n166

COMPUTER-ASSISTED RESEARCH

LEXIS: right! w/5 lateral w/2 support w/30 mineral!

§ 48.08(c) Pennsylvania: Support Estate.

Pennsylvania views the right of subjacent support to be a separate right that could be owned by the surface estate or the mineral estate. n167 Additionally, the support estate may adhere to individual veins of coal, creating rights and duties between competing coal companies. n168 In theory, the separate right could be owned by a party without either the

surface or mineral estate, but in practice this does not occur. n169 In the event this type of ownership existed, the holder of the right to subjacent support would have a right violated if support is removed, but no damages.

§ 48.08(d) Adverse Possession by Surface Owner.

When a surface owner holds a severed mineral estate, acquired from a common grantor, the surface owner is considered a trustee of the mineral estate. Because of this relationship, the surface owner cannot obtain title by adverse possession until first repudiating the trust. Repudiation must be unequivocal and may be performed by "acts or words which clearly bring home to the mineral holder the knowledge that the surface owner is claiming the minerals adversely." n170 The surface owner who carries out such a repudiation and holds the mineral estate adversely for the required statutory period can obtain title to the mineral estate. The repudiation requirements are intended to provide additional protection to owners of mineral estates from surface owners. Under Texas law, it is impossible for a surface owner to acquire subsurface mineral rights through adverse possession. n171 For a discussion of adverse possession of mineral rights by persons other than surface owners, see § 48.12 *infra*.

FOOTNOTES:
(n1)Footnote 135. *See* § 49.08(c)(1), *infra*.

Del Rio Drilling Programs, Inc. v. United States, 35 Fed. Cl. 186 (1996), opinion withdrawn, 37 Fed. Cl. 157 (1997), rev'd, 146 F.3d 1358 (Fed. Cir. 1998); Notch Mtn. Corp. v. Elliott, 898 P.2d 550 (Colo. 1995), rev'd, Notch Mtn. Corp. v. Elliott, 898 P.2d 550 (Colo.), *reh'g denied,* (1995); *Phillips v. Fox, 458 S.E.2d 327 (W. Va. 1995); Enron Oil & Gas Co. v. Worth, 947 P.2d 610 (Okla. App. 1997)* (mineral interest owners allowed to use seismic exploration for oil and gas; mineral interest owner has right of reasonable ingress and egress upon surface for limited purpose of conducting geophysical exploration); *Leisnoi, Inc. v. Stratman, 154 F.3d 1062 (9th Cir. 1998)* (although subsurface estate's mining of sand and gravel may damage the surface estate and destroy Native American artifacts buried in the ground, court holds for subsurface estate and does not rule on whether Alaska property law precludes mining activity that unreasonably interferes with rights of surface-estate owners); *Shelby Operating Co. v. City of Waskom, 964 S.W.2d 75 (Tex. Ct. App. 1997)* (the mineral estate holder owns the dominant estate and the surface estate holder owns a subservient estate and may not unreasonably interfere with the mineral estate). *See generally* Garcia, Richard J. and Paula K. Manis. "Across The Great Divide: Surface Owners v. Severed Mineral Owners--What Is 'Reasonable Use'"? *78 Mich. B.J. 140* (February, 1999).

(n2)Footnote 136. *Hunt Oil Co. v. Kerbaugh, 283 N.W.2d 131 (N.D. 1979); Carbon County v. Union Reserve Coal Co., 898 P.2d 680 (Mont. 1995).*

(n3)Footnote 137. The lessee will not impliedly have the right to use additional land not mined or within the lease. *Wright v. Carrolton Gravel & Sand Co., 242 S.W.2d 751 (Ky. 1951);* Annotation, *Right of Mineral Lessee to Deposit Topsoil, Waste Materials and the Like Upon Lessor's Additional Land Not Mined, 26 A.L.R.2d 1453 (1952).*

(n4)Footnote 138. *Buffalo Mining Co. v. Martin, 267 S.E.2d 721 (1980); Lowe v. Guyan Eagle Coals, Inc., 273 S.E.2d 91 (1980).*

(n5)Footnote 139. Louisiana statutorily defines what rights the mineral servitude owner has. *See, e.g.*, La. Rev. Stat. Ann. § 31:22.

(n6)Footnote 140. *See* § 49.08(c)(1), *infra*. *Stephenson v. United States, 33 Fed. Cl. 63 (1995)* (United States' intentional flooding of surface not deemed unreasonable interference with mineral owner's surface rights) *mandamus denied, In re Stephenson, 66 F.3d 345 (Fed. Cir. 1995).*

(n7)Footnote 141. *See* §§ 49.08(c)(2) and 48.08(b), *infra*.

(n8)Footnote 142. § 49.08(c)(3).

(n9)Footnote 143. *Cf. Stucki v. Parker, 703 P.2d 693 (1985)* (conveyance of "surface" grants title to top surface of land, together with the ancillary use of the undersurface for drainage, domestic water, foundations, and other uses as will render it suitable for the purposes intended). Annotation, *Meaning of Term "Surface" as Employed in Conveyance or Devise*, 31 A.L.R. 1530.

See generally DeLaughter, Cynthia. "Priming The Water Industry Pump," *37 Hous. L. Rev. 1465* (Winter, 2000).

(n10)Footnote 144. *Getty Oil Co. v. Royal, 422 S.W.2d 591 (Tex. Ct. App. 1967); Wray v. Goeglein, 1998 Ohio App. LEXIS 5979* (Ohio App. 4 Dist. Dec. 2, 1998) (the surface owner has the right to use the surface even if this may result in incidental damage to the mineral owner).

(n11)Footnote 145. Colo. Rev. Stat. Ann. § 34-48-106; Idaho Code § 47-609; N.D. Cent. Code § 38-02-10; S.D. Codified Laws Ann. § 45-4-13; Wyo. Stat. § 30-1-119.

(n12)Footnote 146. Discussed in Section 48.08(b)(1) *infra*.

(n13)Footnote 147. Discussed in Section 48.08(b)(2) *infra*.

(n14)Footnote 148. *See generally* Timothy W. Gresham & Monroe Jamison, *Do Waivers of Support and Damage Authorize Full Extraction Mining?, 92 W. Va. L. Rev. 912 (1990);* and Comment, *The Common Law Rights to Subjacent Support and Surface Preservation, 38 Mo. L. Rev. 234 (1973).*

(n15)Footnote 149. *Harris v. Ryding, 151 Eng. Rep. 27 (1839); Humphries v. Brogden, 12 Q.B. 739, 116 Eng. Rep. 1048 (1850); Antco, Inc. v. Dodge Fuel Corp., 550 S.E.2d 622 (Wy. 2001).*

(n16)Footnote 150. Subsidence is the downward movement of earth that results from removal of lower strata that had supported the subsided earth. *See Keystone Bituminous Coal Co. v. DeBenedictis, 480 U.S. 470 (1987); Schultz v. Consolidation Coal Co., 475 S.E.2d 467 (W. Va. 1996)* (right to subjacent support is waivable by contract terms that clearly express surface owner's intent to waive), *cert. denied, 117 S. Ct. 767 (1997).*

(n17)Footnote 151. *Ohio Collieries Co. v. Cocke Nat'l Coal Co., 140 N.E. 356 (Ohio 1923); Haseman v. Orman, 680 N.E.2d 531 (Ind. 1997)* (surface owner has the right to subjacent support).

(n18)Footnote 152. Timothy W. Gresham & Monroe Jamison, *Do Waivers of Support and Damage Authorize Full Extraction Mining?, 92 W. Va. L. Rev. 912, 915 (1990). Travelers Indem. Co. of Ill. v. City of Redondo Beach, 34 Cal. Rptr. 2nd 337 (1994)* (common-law action only applies between adjacent landowners).

(n19)Footnote 153. *Nida v. The American Rock Crusher Co., 855 P.2d 81 (Kan. 1993).*

(n20)Footnote 154. Annotation, *Liability of Miner Operator for Damage to Surface Structure by Removal of Support, 32 A.L.R.2d 1309 (1953).*

(n21)Footnote 155. Restatement (Second) of Torts §§ 820-821 (1979). *Breeding v. Coch Carbon Inc., 726 F. Supp. 645 (W.D. Va. 1989); Winnings v. Wilpen Coal Co., 59 S.E.2d 655 (W. Va. 1950); Marin Mun. Water Dist. v. Northwestern Pac. R.R., 253 Cal. App. 2d 83,* (1967); *Ohio Collieries Co. v. Cocke Nat'l Coal Co., 140 N.E. 356 (Ohio 1923).*

(n22)Footnote 156. *Collins v. Gleason Coal Co., 115 N.W. 497 (Iowa 1908).*

(n23)Footnote 157. *Island Creek Coal Co. v. Rodgers, 644 S.W.2d 339 (Ky. Ct. App. 1982).*

(n24)Footnote 158. *Marquette Cement Mining Co. v. Oglesby Coal Co., 253 F. 107 (N.D. Ill. 1918); Trowbridge v. True, 52 Conn. 190 (1884); McGurn v. Reichel, 268 S.W. 399 (Mo. App. 1925).*

(n25)Footnote 159. *Large v. Clinchfield Coal Co., 387 S.E.2d 783 (Va. 1990)* ("absolute right" to support; no need to prove negligence).

(n26)Footnote 160. *Sanders v. State Hwy. Comm'n, 508 P.2d 981 (Kan. 1973). Travelers Indem. Co. of Ill. v. City of Redondo Beach, 34 Cal. Rptr. 2nd 337 (1994)* (common-law action only applies between adjacent landowners); *Schooler v. State of California, 102 Cal. Rptr. 2d 343* (Cal. App. 4 Dist. 2000); *L. B. Corp. v. Schweitzer-Mauduit Intern., Inc., 121 F. Supp.2d 147 (D. Mass. 2000).*

(n27)Footnote 161. *Scranton Coal Co. v. Graff Furnace Co., 289 F. 305 (3d Cir. 1923); McCabe v. City of Parkersburg, 79 S.E.2d 87 (W. Va. 1953), questioned in Noone v. Price, 298 S.E.2d 218 (W. Va. 1982).*

(n28)Footnote 162. Restatement (Second) of Torts § 817 cmt. h (1979).

(n29)Footnote 163. *Gladin v. Von Engeln, 575 P.2d 418 (Colo. 1978).*

(n30)Footnote 164. *Noone v. Price, 298 S.E.2d 218 (W. Va. 1982).*

(n31)Footnote 165. *Brown v. Robins, 157 Eng. Rep. 809 (1859).*

(n32)Footnote 166. *Cf., Fountainbleau Hotel Corp. v. Forty-Five Twenty-Five, Inc., 114 So. 2d 357 (Fla. 1959)* (prescriptive right to "ancient lights" rejected) and *Tunstall v. Christian, 80 Va. 1 (1885).*

(n33)Footnote 167. *Charnetski v. Miner's Mill Coal Mining Co., 113 A. 683 (Pa. 1921); Lichentenfels v. Bridgeview Coal Co., 496 A.2d 782 (Pa. Super. 1985); In re Laurel Run Corp., 166 B.R. 242 (Bankr. M.D. Pa. 1994)* (agreement transferred surface and right to surface support).

(n34)Footnote 168. *Cf. Bridgeview Coal Co. v. Burchinal, 193 A.2d 755 (Pa. Super. 1963).*

(n35)Footnote 169. *Keystone Bituminous Coal Co. v. DeBenedictis, 480 U.S. 470 (1987).*

(n36)Footnote 170. *Great Western Land Mgmt., Inc. v. Slusher, 939 S.W.2d 865 (Ky. 1996); Diedrich v. Ware, 288 S.W.2d 643 (Ky. 1956).*

(n37)Footnote 171. *Stephenson v. United States, 33 Fed. Cl. 63 (1995); Legget v. Church of St. Pius, 619 S.W.2d 191 (Tex. App. 1981).*

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CHAPTER 48 MINES AND MINERALS
II. Types of Mineral Interests Created from a Landowner's Rights.

6-48 Thompson on Real Property, Thomas Editions § 48.09

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§ 48.09 Right to Mine by Strip, Surface or Long Wall Methods.

[Go To Supp]

Mining may proceed by several methods. Room and pillar mining may have a relatively small subsidence impact on the surface; support pillars of coal are left behind after mining, with only 35-50% of the coal removed. This type of mining does cause subsidence, but generally only many years after the mining. Other techniques have more intrusive aftermaths. Some room and pillar mining operations use an "advance and retreat" technique, in which coal pillars are removed after the mine has been developed. Another technique, long wall mining, also extracts more of the coal seam than basic room and pillar mining. This underground mining method begins like a room and pillar mine, but then uses special extraction equipment to completely remove a very large panel of coal. Hydraulic jacks only support the roof where mining is taking place. n172 Both long wall mining and mining that removes pillars inevitably cause subsidence. Additionally, strip and surface mining destroy subjacent and lateral support for the surface because they consume the surface. n173

Because of the impact of some mining methods, courts must consider whether the document creating severed mineral interests authorized the technique. At one level, the issue is whether or not the surface owner waived the right to demand subjacent and lateral support. n174 Nevertheless, for surface and strip mining concerns, because the surface is rendered totally unusable, some courts treat whether it is authorized as an issue separate from whether the right to support has been waived. n175

COMPUTER-ASSISTED RESEARCH

LEXIS: right! w/5 min! w/15 strip or surface or long w/1 wall

§ 48.09(a) Waiver of Right to Support.

For the surface owner to have waived or released the right to support, courts require a deed to have either express waiver language n176 or, in order to imply a waiver, the deed must have clear and unequivocal language showing the intention of the parties. n177 A release of the right to subjacent support might not include a release of the right to lateral

support. n178 There may be distinct waivers of damage to the surface and to superjacent minerals. n179

Whether wording other than an express waiver creates a waiver of the right is fact-specific. n180 In West Virginia, and only West Virginia, a grant of "all the coal" and the right to remove it creates a waiver, n181 but even in West Virginia, references to a different amount of coal granted will not create the waiver. n182 In many jurisdictions, a grant of the right to mine "free of damages" also can work a waiver. n183 Nevertheless, there are cases to the contrary. n184 Stipulated damages for land "used" have variously been found sufficient or insufficient to cover land "damaged." n185

Courts differ on the extent of a waiver. At one extreme, some early cases state that only strict liability for removal of support is waived. Others include negligent acts within the waiver, n186 only allowing recovery for willful and intentional acts. n187 At the other extreme, some courts have found a waiver to include all potential causes of action. n188

Some surface owners assert that a waiver of subjacent support is not sufficient to authorize long wall mining, arguing that the amount of subsidence damage it causes was not within the contemplation of the parties. They have met with little success. Courts reject the argument, finding that longwall mining, unlike surface mining, produces damages similar in kind to underground mining. n189

COMPUTER-ASSISTED RESEARCH

LEXIS: waiv! w/5 right! w/2 support w/30 surface w/1 own!

§ 48.09(b) Authorization of Surface Mining.

Because of the impact on the surface, if a deed severing minerals does not expressly authorize surface or strip mining, courts generally require a clear indication that such mining was within the contemplation of the parties. n190 There is no formulation or single factor that consistently meets this test, although in individual cases single factors have been determinative. n191

For example, some courts have concluded that a grant of "all" minerals indicates a right to surface mine, n192 while others have reached the opposite result. n193 Cases similarly have differed on the import of a waiver of surface damages n194 and the presence of terms that imply underground mining. n195 References to the use the surface owner will make of the property are interpreted variously, n196 as is the importance of the quality and nature of the surface. n197 Additionally, the non-existence of alternative ways to develop the minerals may n198 or may not n199 indicate authorization of surface mining. Finally, some courts place importance on whether surface mining was known or customary at the time and place of conveyance. n200 Courts, however, sometimes do find surface mining authorized when broad mining rights are granted together with conveyances of "all" minerals and waivers of damages. n201

COMPUTER-ASSISTED RESEARCH

LEXIS: authoriz! w/15 mining w/2 surface or strip

§ 48.09(c) "Broad Form Deed" Controversy.

Kentucky has a long history of examining deeds to ascertain if surface mining was authorized. n202 In the early 1900s, deeds referred to as "broad form" or "Mayo" deeds came into use. These deeds employ great detail and grant "all" the minerals together with the right to use so much of the surface as the mineral owner deems "necessary or convenient." Typically, the surface owner also waives all damages that might occur because of mineral extraction and agrees that surface use will be limited to such uses which are consistent with the mineral rights conveyed. n203

Kentucky consistently found that these deeds authorized surface mining despite the fact that surface mining was not contemplated at the time of the deed. n204 Up until the 1987 case of Akers v. Baldwin, n205 Kentucky also upheld the damage waiver even if the surface were destroyed. In *Akers*, however, the Kentucky Supreme Court required damage payments if surface mining proceeded, but not for deeds or other mining authorizations that relied on the 1956 *Buchanan* n206 decision, namely those executed between the date of that decision and the *Akers* decision.

This case law provoked two responses. A statute attempted to create a rebuttable presumption that a conveyance only contemplated methods of removal common in the community at the deed's execution. This was held to violate the Kentucky constitution's provisions on separation of powers. n207 Thereafter, the Kentucky Constitution was amended to provide the same rebuttable presumption. n208

COMPUTER-ASSISTED RESEARCH

LEXIS: broad w/1 form w/1 deed! w/30 surface w/2 min!

§ 48.09(d) Government Regulation.

Various states regulate impacts from mining, but the most wide-reaching legislation is federal. n209 In 1977, Congress passed the Surface Mining Control and Reclamation Act. n210 This statute provides a regulatory program that states can administer or, if the state does not so desire, the federal government will administer the program. n211 The Act is designed to temper the surface effects of both surface and underground coal mining. n212 Mine permits are required n213 and mining is prohibited in certain areas. n214 In certain respects, the Act provides additional protection for the surface owner. n215

Some cases have intimated that regulatory requirements may modify private contractual arrangements. For example, a surface mining act may create private rights not covered by a pre-existing waiver of damages. n216 However, other cases warn that federal law might not preempt state common law n217 or that new requirements may violate state constitutional protections. n218

COMPUTER-ASSISTED RESEARCH

LEXIS: surface mine control w/1 reclamation act

FOOTNOTES:

(n1)Footnote 172. *See Large v. Clinchfield Coal Co., 387 S.E.2d 783 (Va. 1990).* Thomas Lane, *Fire in the Hole to Longwall Shears: Old Law Applied to New Technology and Other Longwall Mining Issues, 96 W. Va. L. Rev. 577 (1994).*

(n2)Footnote 173. *Smith v. Moore, 474 P.2d 794 (Colo. 1970).* For the distinction between strip and surface mining, see Annotation, *Validity and Construction of Statutes Regulating Strip Mining, 86 A.L.R.3d 27,* § 2[a] (1978). *G.A. Resources, Inc. v. Laurel Run Corp., 166 B.R. 242* : (Bankr. M.D. Pa. 1994) (surface owner may not authorize strip-mining if surface owner does not own minerals).

(n3)Footnote 174. *Bridgeview Coal Co. v. Burchinal, 193 A.2d 755 (Pa. Super. 1963).*

(n4)Footnote 175. *Skivolocki v. East Ohio Gas Co., 313 N.E.2d 374 (Ohio St. 1974). See generally* Annotation, *Grant, Reservation, or Lease of Minerals and Mining Rights as Including, Without Expressly Providing, the Right to Remove the Minerals by Surface Mining, 70 A.L.R.3d 383 (1976). Graham v. Drydock Coal Co., 667 N.E.2d 949 (Ohio 1996)* (right to subjacent support released); *Empire Coal Mining & Dev., Inc. v. Department of Envtl Resources, 678 A.2d 1218 (Pa. Commw. Ct. 1996)* (right to support retained).

(n5)Footnote 176. *Eastwood Lands, Inc. v. United States Steel Corp., 417 So. 2d 164, 168 (Ala. 1982)* (express waiver when deed reserved "right ... to mine and remove coal and other minerals contained in said land without leaving supports necessary for sustaining the surface of said land or for preventing damages thereto..."); *Landreth v. Melendez, 948 S.W. 2d 76 (Tex. App. 1997)* (mineral reservation in prior deed unambiguously absolved mineral owners from liability for damage to surface if all usual, necessary and convenient means were used, although surface owner claimed that low-profile pumping units would have permitted surface owner to reasonably irrigate and make use of surface estate).

(n6)Footnote 177. *Russell v. Island Creek Coal Co., 389 S.E.2d 194 (W. Va. 1989); Schultz v. Consolidation Coal Co., 475 S.E.2d 467 (W. Va. 1996), cert. denied, 117 S.Ct. 767 (1997).*

(n7)Footnote 178. *Scranton Coal Co. v. Graff Furnace Co., 289 F. 305 (3d Cir. 1923).*

(n8)Footnote 179. *Cf., Porter v. Consolidation Coal Co., 870 F.2d 651 (3d Cir. 1989).*

(n9)Footnote 180. *See generally* Timothy W. Gresham & Monroe Jamison, *Do Waivers of Support and Damage Authorize Full Extraction Mining?, 92 W. Va. L. Rev. 912 (1990).*

(n10)Footnote 181. *Stamp v. Windsor Power House Coal Co., 177 S.E.2d 146 (W. Va. 1970).*

(n11)Footnote 182. *Winnings v. Wilpen Coal Co., 59 S.E.2d 655 (W. Va. 1950)* (collecting cases and finding grant of "said coal" insufficient to waive).

(n12)Footnote 183. *Mason v. Peabody Coal Co., 51 N.E.2d 285 (Ill. App. 1943)* (*cert. denied*); *Paull v. Island Coal Co., 88 N.E. 959 (Ind. App. 1909). See also Rush v. Sines Bros. & Co., 170 N.E. 379 (Ohio App. 1929); Atherton v. Clearview Coal Co., 110 A. 298 (Pa. 1920).*

(n13)Footnote 184. *Stilley v. Pittsburgh-Buffalo Co., 83 A. 478 (Pa. 1912)* (contrasting waiver of damages resulting from proper exercise of mining privileges with waiver of damages from removal of coal; only latter is waiver of subjacent support).

(n14)Footnote 185. *Sheker v. Jensen, 41 N.W.2d 679 (Iowa 1950)* (sufficient).

(n15)Footnote 186. *Atherton v. Clearview Coal Co., 110 A. 298 (Pa. 1920); Mason v. Peabody Coal Co., 51 N.E.2d 285 (Ill. App. 1943); Republic Steel Corp. v. Payne, 132 So. 2d 581 (Ala. 1961); Stamp v. Windsor Power House Coal Co., 177 S.E.2d 146 (W. Va. 1970)* (also not allowing recovery for gross negligence).

(n16)Footnote 187. *Smerdell v. Consolidation Coal Co., 806 F. Supp. 1278 (N.D. W. Va. 1992); Elkhorn Coal Corp. v. Johnson, 249 S.W.2d 745 (Ky. 1952).*

(n17)Footnote 188. *Holmes v. Alabama Title Co., Inc., 507 So. 2d 922 (Ala. 1987). See also Rose v. Oneida Coal Co., 375 S.E.2d 814 (W. Va. 1988)* (no liability for willful and wanton acts on facts of particular case).

(n18)Footnote 189. *Wells v. American Elec. Power Co., 548 N.E.2d 995 (Ohio App. 1988);* Porter v. Consolidation Coal Co., No. 88-3637 (W.D. Pa. 1988), *aff'd, 870 F.2d 651 (3d Cir. 1989); Ball v. Island Creek Coal Co., 722 F. Supp. 1370 (W.D. Va. 1989); Large v. Clinchfield Coal Co., 387 S.E.2d 783 (Va. 1990); Smerdell v. Consolidation Coal Co., 806 F. Supp. 1278 (N.D. W. Va. 1992).*

(n19)Footnote 190. *See generally* Annotation, *Grant, Reservation, or Lease of Minerals and Mining Rights as Including, Without Expressly Providing, the Right to Remove the Minerals by Surface Mining, 70 A.L.R.3d 383 (1976). See also Skivolocki v. East Ohio Gas Co., 313 N.E.2d 374 (Ohio St. 1974)* (mere reservation of "right to use" surface cannot authorize surface mining or basic purpose of two estates perverted). Many of the cases discussed in § 48.02(a)(7), *supra*, also may be relevant. *Molinary v. Power Mountain Coal Co., 892 F. Supp. 136 (W.D. Va. 1995),*

vacated, 125 F.3d 231 (4th. 1997), cert. denied, 118 S. Ct. 1056 (1998).

(n20)Footnote 191. *See Commerce Union Bank v. Kinkade, 540 S.W.2d 861 (Ky. 1976)* (authority to strip mine requires more than general implied rights of a mineral owner but determination is case-by-case).

(n21)Footnote 192. *Commonwealth v. Fitzmartin, 102 A.2d 893 (Pa. 1954).*

(n22)Footnote 193. *Skivolocki v. East Ohio Gas Co., 313 N.E.2d 374 (Ohio St. 1974); Compass Coal Co. v. Commonwealth of Pa., 454 A.2d 1167 (Pa. Commw. 1983).*

(n23)Footnote 194. *Compare Commonwealth v. Fitzmartin, 102 A.2d 893 (Pa. 1954)* (indicative of surface mining), *with Carson v. Missouri P. R.R., 209 S.W.2d 97 (Ark. 1948)* (surface mining not allowed). *Compare also Victor-American Fuel Co. v. Wiggins, 746 P.2d 58 (Colo. App. 1987)* (mere reservation of right to use surface for specified damage payment insufficient to authorize stripmining), *with Alpine Constr. Co. v. Fenton, 764 P.2d 1340 (Okla. 1988)* (enforcing damage provision when deed specific).

(n24)Footnote 195. *Compare Phipps v. Leftwich, 222 S.E.2d 536 (Va. 1976)* and *Stewart v. Chernicky, 266 A.2d 259 (Pa. 1970)* (surface mining prohibited), *with Department of Forests & Parks v. Georges Creek Coal & Land Co., 242 A.2d 165, cert. denied, 393 U.S. 935 (Md. 1968)* and *Clearfield Bank & Trust Co. v. Shaffer, 553 A.2d 455 (Pa. Super. 1989)* (surface mining permitted).

(n25)Footnote 196. In regard to agricultural use being specified in deed, *compare Franklin v. Callicoat, 119 N.E.2d 688 (Ohio 1954)* (surface mining prohibited); *with Martin v. Kentucky Oak Mining Co., 429 S.W.2d 395 (Ky. 1968) superseded*, (surface mining permitted), *overruled on whether damages required*, Akers v. *Baldwin, 736* S.W.2d 294 (1977). *Taylor v. Coal-Mac, Inc., 864 S.W.2d 302 (Ky. Ct. App. 1992)* (superseding *Akers*); *see also, Ward v. Harding, 860 S.W.2d 280 (Ky. 1993)* (stating that *Akers* had been superseded by Constitutional amendment); *Karst-Robbins Coal Co., Inc. v. Arch of Kentucky, Inc., 964 S.W.2d 419 (Ky. Ct. App. 1997).*

(n26)Footnote 197. *Buchanan v. Watson, 290 S.W.2d 40 (Ky. 1956)* (low value of surface and price paid for coal indicated right to surface mine), *overruled*, Akers v. *Baldwin, 736* S.W.2d 294, (Ky. 1987); *superseded, Taylor v. Coal-Mac, Inc., 864 S.W.2d 302 (Ky. Ct. App. 1992)* (superseding *Akers*); *see also, Ward v. Harding, 860 S.W.2d 280 (Ky. 1993)* (stating that *Akers* had been superseded by Constitutional amendment); *Karst-Robbins Coal Co., Inc. v. Arch of Kentucky, Inc., 964 S.W.2d 419 (Ky. Ct. App. 1997). Department of Forests & Parks v. Georges Creek Coal & Land Co., 242 A.2d 165 (Md. 1968), cert. denied, 393 U.S. 935 (1968)* (remoteness and unsuitability for agriculture indicated right to surface mine). *But see Stewart v. Chernicky, 266 A.2d 259 (Pa. 1970)* (surface quality irrelevant). *Cf., Belville Mining Co. v. U.S., 763 F. Supp. 1411 (S.D. Ohio 1991) affd in part, revd in part, 999 F.2d 989 (6th Cir. 1993).*

(n27)Footnote 198. *Bridgeview Coal Co. v. Burchinal, 193 A.2d 755 (Pa. Super. 1963); Benton v. U.S. Manganese Corp., 313 S.W.2d 839 (Ark. 1958)* (requiring compensation for surface mining). *Cf., Consolidated Coal Co. v. Mutchman, 565 N.E.2d 1074, reh'g denied, 589 N.E.2d 1163 (Ind. App. 1991)* (question is whether stripmining is reasonable and necessary for exercise of mineral rights) (low price paid for surface showed reserved coal estate had right to surface mine), *aff'd, 999 F.2d 989 (6th Cir. 1993). Phillips v. Fox, 458 S.E.2d 327 (W. Va. 1995)* (right to surface mine implied when no other means of extracting is available, does not substantially burden the surface owner, and surface mining is known as a common and acceptable method in the locality).

(n28)Footnote 199. *Franklin v. Callicoat, 119 N.E.2d 688 (Ohio 1954); West Virginia-Pittsburgh Coal Co. v. Strong, 42 S.E.2d 46 (W. Va. 1947).*

(n29)Footnote 200. *Western Energy Co. v. Genie Land Co., 635 P.2d 1297 (Mont. 1981); Croley v. Round Mtn. Coal Co., 374 S.W.2d 852 (Ky. 1964); Christman v. Emineth, 212 N.W.2d 543 (N.D. 1973); Bank v. Tennessee Mineral Prods. Corp., 163 S.E. 108 (N.C. 1932).* For cases finding the fact that surface mining was not known as indicating no authorization, *see Doochin v. Rackley, 610 S.W.2d 715 (Tenn. 1981); Phipps v. Leftwich, 222 S.E.2d 536 (Va. 1976);*

Smith v. Moore, 474 P.2d 794 (Colo. 1970); Skivolocki v. East Ohio Gas Co., 313 N.E.2d 374 (Ohio St. 1974); Stewart v. Chernicky, 266 A.2d 259 (Pa. 1970); Brown v. Crozer Coal & Land Co., 107 S.E.2d 777 (W. Va. 1959). But see Merrill v. Manufacturers Light & Heat Co., 185 A.2d 573 (Pa. 1953) (strip mining impermissible under deed even if method known).

(n30)Footnote 201. *See* § 49.09(b), *infra*.

(n31)Footnote 202. *See generally* Carolyn S. Bratt and Karen J. Greenwell, *Kentucky's Broad Form Deed Amendment: Constitutional Considerations*, 5 J. Min. L. & Pol'y 9 (1989-90).

(n32)Footnote 203. For examples, see *Watson v. Kenlick Coal Co., 498 F.2d 1183, 1185-86 (6th Cir. 1974);* and *Case v. Elkhorn Coal Corp., 276 S.W. 573, 574 (Ky. 1925). Compare United States v. Stearnes Co., 949 F.2d 223 (6th Cir. 1991)* (deed found to not be a broad form deed). *See generally Columbia Gas Transmission Corp. v. Consol of Kentucky, Inc., 15 S.W.3d 727 (Ky. 2000).*

(n33)Footnote 204. *Buchanan v. Watson, 290 S.W.2d 40 (Ky. 1956) overruled,* Akers v. *Baldwin, 736* S.W.2d 294, (Ky. 1987); *superseded, Taylor v. Coal-Mac, Inc., 864 S.W.2d 302 (Ky. Ct. App. 1992)* (superseding *Akers*); *see also, Ward v. Harding, 860 S.W.2d 280 (Ky. 1993)* (stating that *Akers* had been superseded by Constitutional amendment); *Karst-Robbins Coal Co., Inc. v. Arch of Kentucky, Inc., 964 S.W.2d 419 (Ky. Ct. App. 1997).*

(n34)Footnote 205. *736 S.W.2d 294 (Ky. 1987).*

(n35)Footnote 206. *290 S.W.2d 40 (Ky. 1956).*

(n36)Footnote 207. Akers v. *Baldwin, 736* S.W.2d 294 (Ky. 1987) (invalidating Ky. Rev. Stat. § 381.940).

(n37)Footnote 208. Ky. Const. § 19.2, described as "merely adopting a rule of construction," *Taylor v. Coal-Mac, Inc., 864 S.W.2d 302 (Ky. App. 1992). Compare* Tennessee statute declaring that surface mining only authorized if the severance contained express language to that effect or if it was common, declared to be only a codification of accepted rule of construction, *Doochin v. Rackley, 610 S.W.2d 715 (Tenn. 1981). Ward v. Harding, 860 S.W.2d 280 (Ky. 1993), cert. denied, 114 S. Ct. 1218 (1994)* (Kentucky constitutional amendment requiring broad form deeds to be construed to only permit extraction methods known on date of deed did not violate U.S. Constitution's contract clause or act as a taking of private property). *See also*, Leah A. Gatch, Note, *Kentucky Strips Miners of Dominant Rights, Burying a Century of Litigation, 21 N. Ky. L. Rev. 649 (1994).*

See also Robert H. Eardley, *The Broad Form Deed Amendment: Does It Still Have A Purpose? An Analysis of the Broad Form Deed Amendment in Light of* Ward v. Harding, 12 J. Nat. Resources & Envtl L. 101 (1997); *Karst Robbins Coal Co., Inc. v. Arch of Kentucky, Inc., 964 S.W.2d 419 (Ky. App. 1997)* (although longwall mining was not in use at time of signing of deed, court held that modern longwall mining was not separate method of mining and was permitted under 1926 deed); Hill Rivkin, *Lawyering, Power, and Reform: The Legal Campaign to Abolish the Broad Form Mineral Deed, 66 Tenn. L. Rev. 467 (1999).*

(n38)Footnote 209. *See generally Validity and Construction of Statutes Regulating Strip Mining, 86 A.L.R.3d 27 (1978).*

(n39)Footnote 210. *30 U.S.C. §§ 1201*-1328. *Molinary v. Powell Mtn. Coal Co., Inc., 125 F.3d 231 (4th Cir. 1997)* (Section 520(f) of the Surface Mining Control and Reclamation Act of 1997 (SMCRA) provides a federal cause of action for the recovery of damages resulting from violation of state regulations that are a part of the state's surface coal mining and reclamation regulatory program approved by the United States Secretary of the Interior), *vacated, 125 F.3d 231 (4th. 1997), cert. denied, 118 S. Ct. 1056 (1998).*

(n40)Footnote 211. *See Hodel v. Virginia Surface Mining & Reclamation Ass'n, 452 U.S. 264, 288 (1981)*

("SMRCA relies on program of cooperative federalism that allows states, within limits established by federal minimum standards, to enact and administer their own regulatory programs, structured to meet their own particular needs.")

(n41)Footnote 212. *See 30 U.S.C. § 1291*(28).

(n42)Footnote 213. *30 U.S.C. § 1256. Indiana Dep't of Natural Resources v. United Minerals, Inc., 686 N.E.2d 851 (Ind. Ct. App. 1997)* (new regulation can be applied retroactively to existing permits). *See 30 U.S.C. 1268*(a) (Civil penalties may be assessed against permittees who violate any permit condition or who violate any other provision of Subchapter V); *30 U.S.C. 1268*(e) (Permittees who "willfully and knowingly" commit violations may be punished by a fine or imprisonment, or both).

(n43)Footnote 214. *30 U.S.C. § 1272*(e). *Machipongo Land and Coal Co, Inc. v. Department of Envtl. Resources, 719 A.2d 19 (Pa. 1998)* (Environmental Quality Board regulation designating property as unsuitable for surface mining of coal challenged under regulatory takings theory. After analyzing Supreme Court takings holdings, court summarized the test to determine regulatory takings based on following factors: whether the public interest requires regulatory interference with the property right, whether the regulation is reasonably related to that goal, whether the amount of property taken deprives an owner of all economically viable uses of the property, measured by what was taken (the numerator) against what was left (the denominator), and whether property owner's actions or proposed actions would cause a nuisance.)

(n44)Footnote 215. *See, e.g., 30 U.S.C. § 1266*(b)(1) (referring to subsidence control); *30 U.S.C. § 1265*(b)(2) (reclamation requirements); *30 U.S.C. § 1307. See also* provisions of the Energy Policy Act of 1992, to be codified at *30 U.S.C. § 13099a* (requiring compensation for subsidence of buildings or replacement of water supplies contaminated or interfered with by underground mining). *See* Robert E. Beck, *Protecting the Public Interest or Surface Owners from Their Own Folly?: A Close Look at "Preventing" Subsidence under the Surface Mining Control and Reclamation Act of 1977 (SMCRA), 21 S. Ill. U. L.J. 391 (1997).*

(n45)Footnote 216. *Rose v. Oneida Coal Co., 375 S.E.2d 814 (W. Va. 1988); Melvin v. Old Ben Coal Co., 612 F. Supp. 1204 (S.D. Ill. 1985); Shell Oil Pipe Line Corp. v. Old Ben Coal Co., 677 F. Supp. 572 (S.D. Ill. 1988); Patton v. Republic Steel Corp., 492 A.2d 411 (Pa. Super. 1985)* (statutory duties may be in addition to those waived).

(n46)Footnote 217. *Smerdell v. Consolidation Coal Co., 806 F. Supp. 1278 (N.D. W.Va. 1992). But see South Dakota Mining Assoc. v. Lawrence Cty., 977 F. Supp. 1396 (W.D. S.D. 1997)* (county ordinance forbidding surface mining preempted by Mining Act of 1872).

Matter of Town of Parishville v. Contore Co., Inc., 237 A.D.2d 67 (N.Y.A. D. 1998) (local building permit ordinances not superseded by Mined Land Reclamation Law when ordinances are of general applicability and do not attempt to regulate mining activities).

(n47)Footnote 218. *Western Energy Co. v. Genie Land Co., 737 P.2d 478 (Mont. 1987)* (requiring surface owner consent when right to strip mine exists and impairs contracts and takes property).

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CHAPTER 48 MINES AND MINERALS
III. Transfer of Interests in Minerals: Voluntary and Involuntary Transfers.

6-48 Thompson on Real Property, Thomas Editions § 48.10

AUTHOR: Professor Marla E. Mansfield College of Law University of Tulsa

§ 48.10 Ownership of Minerals Under Roads and Other Rights-of-Way.

Often disputes arise between a governmental agency and abutting landowners over who should be credited with minerals beneath a road. Basically, the question is answered by determining whether the public entity received a fee interest or an easement in the road. n219 If the road was a fee, the minerals inure to the owner of the roadway. n220 If, however, the road was an easement, the minerals would remain with the ownership of the underlying fee. n221 Generally, the road will have a right to subjacent support. n222

In some circumstances, the fact that a fee grant was for a specific purpose may not preclude its use for mineral production. n223 However, one case held that when a statute vests the fee in the municipality for use as a street and no other use whatsoever, the city will not receive the minerals except as is needed to maintain and utilize the land as a street. n224

Similar questions emerge in interpreting whether a railroad has received a fee or a right-of-way easement. n225

COMPUTER-ASSISTED RESEARCH

LEXIS: mineral! w/15 road! w/2 beneath or under
mineral! w/30 right! w/1 way

FOOTNOTES:
(n1)Footnote 219. *See generally*, Annotation, *Relative Rights as Between Municipality and Abutting Landowners to Minerals, Oil & Gas Underlying Streets, Alleys, or Parks, 62 A.L.R.2d 1311 (1958).*

(n2)Footnote 220. *Cf., Taylor v. Continental S. Corp., 280 P.2d 514 (Cal. App. 1954)* (interpreting grant for a park).

(n3)Footnote 221. *Town of Moorcroft v. Lang, 779 P.2d 1180 (Wyo. 1989); Lambach v. Mason, 53 N.E.2d 601 (Ill. 1944); Oklahoma City v. State, 145 P.2d 418 (Okla. 1944).*

(n4)Footnote 222. *See* § 48.08(b)(1), *supra; see also City of Northglenn v. Grynberg, 846 P.2d 175 (Colo. 1993). but see, McKay v. United States, 199 F.3d 1376 (Fed. Cir. 1999).*

(n5)Footnote 223. *Keaton v. Oklahoma City, 102 P.2d 938, cert. denied, 311 U.S. 616 (Okla. 1940).*

(n6)Footnote 224. *Kalkaska v. Shell Oil Co., 403 N.W.2d 474 (Mich. 1986), decision after vacation, 403 N.W.2d 267, aff'd en banc, 446 N.W.2d 91.*

(n7)Footnote 225. Annotation, *Deed to Railroad Company as Conveying Fee or Easement*, 132 A.L.R. 142.

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CHAPTER 48 MINES AND MINERALS
III. Transfer of Interests in Minerals: Voluntary and Involuntary Transfers.

6-48 Thompson on Real Property, Thomas Editions § 48.11

AUTHOR: Professor Marla E. Mansfield College of Law University of Tulsa

§ 48.11 Voluntary Transfer of Right: Requirements for a Conveyance of Minerals.

[Go To Supp]

The general requirements for a conveyance of real property apply to a conveyance of minerals. Therefore, there must be a writing, which must be signed by the party to be charged, contain words of grant, and aptly describe the land involved. Generally, recording is not required except in limited situations, but recording is advisable to protect the interest from the claims of creditors and bona fide purchasers. n226

FOOTNOTES:
(n1)Footnote 226. *See* § 49.16, *infra*.

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CHAPTER 48 MINES AND MINERALS
III. Transfer of Interests in Minerals: Voluntary and Involuntary Transfers.

6-48 Thompson on Real Property, Thomas Editions § 48.12

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§ 48.12 Involuntary Transfer of Mineral Interests: Adverse Possession.

[Go To Supp]

Adverse possession not only bars a true owner from suing to regain title, but creates a new title in the adverse possessor. Adverse possession requires the claimant to enter property and remain thereon openly, notoriously, hostilely, exclusively and continuously for the requisite statutory period. n227 Some jurisdictions also require a "claim of right or ownership," n228 which is variously defined as simple hostility or as requiring a subjective belief in the possessor's claim. Adverse possession can apply to minerals. n229

COMPUTER-ASSISTED RESEARCH

LEXIS: adverse possession w/30 mineral!

§ 48.12(a) Minerals Not Severed When Adverse Party Enters.

If the minerals are owned by the surface owner when the adverse possessor enters the property, the adverse possessor need do nothing special to adversely possess the minerals. Adverse possession of the surface will bring with it all that the true owner actually owned. n230 If the true owner severs minerals by grant or exception after the adverse possessor entered, it will not affect the adverse possessor. n231 This comports with general adverse possession law, which requires an ouster to interrupt possession.

Similarly, if the adverse possessor purports to sever the minerals after entry but before the statute of limitations has run, the surface adverse possession will inure to the benefit of the purported mineral grantee of the adverse possessor. n232 When full title is gained, the minerals will pass to the adverse possessor's grantee under one of two theories: either because the acquisition of title by adverse possession relates back to the first entry n233 or because the severance is deemed ineffectual. n234 The surface adverse possessor gains the minerals on behalf of the possessor's grantee. Moreover, if the adverse possessor claims under color of title and purports to sever the minerals before actual entry onto the surface, some cases reach the same result and the minerals will pass. n235

Naturally, if the true owner is possessing some of the minerals without interfering with the adverse possessor's surface occupancy, the minerals will not be adversely possessed along with the surface. n236

COMPUTER-ASSISTED RESEARCH

LEXIS: adverse possession w/30 mineral! w/5 sever!

§ 48.12(b) Minerals Severed When Adverse Party Enters.

If the minerals had been severed from the surface at the time the adverse possessor enters the property, n237 acts sufficient to adversely possess the surface will not be sufficient to also gain title to the minerals. The rationale behind this rule is that entry on to the surface would not be adverse to the mineral owner nor would it provide notice to that owner. n238 The two separate estates are as distinct as two different parcels. n239 Therefore, if the minerals had been severed, the adverse possessor must actually possess the minerals to adversely possess them. n240 This is true even if the surface adverse possessor had color of title to the severed minerals n241 or had no notice of the severance. n242 A mineral owner, however, may adversely possess the surface if it uses the surface for non-mining purposes and otherwise meets the test of adverse possession. n243

§ 48.12(b)(1) Elements of Adverse Possession Applied to Minerals.

All of the elements of adverse possession must be satisfied in regard to the minerals. n244 To possess minerals adversely, however, requires actual commercial exploitation of the minerals. n245 Prospecting for ore n246 or exploratory drilling for oil or gas n247 is not possession. Additionally, mere leasing of minerals n248 or use of minerals for domestic purposes will not be sufficient. n249

The possession must be open and notorious. Mine entries and oil derricks and pumps on the property appear to give notice. n250 However, there will be no adverse possession if the minerals are accessed from outside of the property. n251 In other words, there must be some surface evidence of the possession. n252

The remaining criteria similarly track general adverse possession law. The requirement of continuous possession, like that in other situations, does not necessarily require that the minerals be worked each day of the limitations period. The adverse possessor must act as a reasonable true owner would in diligently developing minerals. n253 Taking minerals "from time to time," however, will not be sufficient. n254 Additionally, the possession in all instances must be exclusive n255 and the true owner must not interrupt the possession. Finally, the possession must be hostile and not permissive. n256 Therefore, if the minerals are owned in cotenancy, there must be an actual ouster for one cotenant to adversely possess against another cotenant because each cotenant has the right to develop. n257

Some jurisdictions have statutes that allow confirmation of title after a shorter time period if the adverse possessor paid taxes on the land. Generally, if the minerals have been severed, the adverse claimant must pay separately assessed taxes to take advantage of these statutes. n258

COMPUTER-ASSISTED RESEARCH

LEXIS: mineral! w/15 possess! w/15 open w/2 notorious
mineral! w/15 possess! w/15 reasonable w/2 owner
mineral! w/15 possess! w/15 exclusive!
mineral! w/15 possess! w/15 hostile
mineral! w/15 possess! w/15 continuous

§ 48.12(b)(2) Extent of Minerals Adversely Possessed.

How much minerals will be adversely possessed at the end of the statutory period may depend on two factors: the state of true title to the minerals and whether the adverse possessor claimed under color of title. Color of title is a document that purports to grant title but cannot do so because of the grantor's lack of title.

The first factor, the actual ownership of minerals, may determine what type of minerals will pass to the adverse possessor. If the adverse possessor claimed one mineral that was owned separately from other minerals, the possessor would only receive the mineral possessed. n259 For example, if oil and gas were developed and the owner of the oil and gas did not own the coal rights, the adverse possessor would not receive title to the coal. If one party, however, actually owned all the minerals, then adverse possession of one mineral may gain the adverse possessor title to the entire mineral estate, n260 although some courts separate out the minerals. n261

The result reached from looking at actual mineral ownership might change, however, if the adverse possessor's color of title was limited to specific minerals; the possessor would not have constructive possession of unnamed minerals and would only have actual possession of those developed.

Color of title also plays a role in the second issue, namely how much of the adversely possessed mineral the adverse possessor will receive. If the adverse possessor was claiming under color of title, n262 the possessor may gain title to the minerals throughout the land described, n263 provided certain conditions are met. The additional minerals must have been actually owned by the owner of the minerals that were actually possessed. n264 Moreover, the constructive possession that arises from color of title will not apply if the true owner or another n265 possessed a portion of the land or minerals.

If there was no color of title, the answer to the question of how much minerals pass is less clear. Some cases say the adverse possessor would only receive the minerals actually worked and possessed. Because the severed minerals have become personalty, this view would give the adverse possessor no minerals in the ground. n266 A slightly more expansive reading would give the adverse possessor the exposed workface. n267 Perhaps the most equitable solution when there is no color of title is for the adverse possessor to gain title to those minerals that could reasonably be developed from the investment made by the adverse possessor on the ground during the relevant statutory period. n268

COMPUTER-ASSISTED RESEARCH

LEXIS: adverse! w/1 possess! w/15 mineral! w/5 actual! w/2 own!
adverse! w/1 possess! w/15 mineral! w/15 color w/1 title

FOOTNOTES:

(n1)Footnote 227. *Spurlock v. Santa Fe Pac. R.R., 694 P.2d 299 (Ariz. Ct. App. 1984). Hope Land Mineral Corp. v. Christian, 570 N.W.2d 268 (Mich. App. 1997)* (shorter 5-year period of adverse possession upheld when performed under color of sheriff's deed).

(n2)Footnote 228. *See Schaneman v. Wright, 470 N.W.2d 566 (Neb. 1991).*

(n3)Footnote 229. *See generally* William B. Stoebuck, *Adverse Possession of Severable Minerals, 68 W. Va. L. Rev. 274 (1966);* Paul N. Bowles, Adverse Possession of Subsurface Minerals, *71 Ky. L.J. 83* (1982-83); Annotation, Acquisition of Title to Mines or Minerals By Adverse Possession, *35 A.L.R.2d 124 (1954).*

Caryl A. Yzenbaard, *Kentucky Real Property Law in Review: Three Cases, Taxes, and a "Non-Closing," 25 N. Ky. L. Rev. 407 (1998).*

Natural Gas Pipeline Co. of America v. Pool, 30 S.W.3d 618 (Tex. App. Amarillo 2000). See generally, Brown,

Richard F. Oil, Gas, and Mineral Law. *54 SMU L. Rev. 1521* (Summer, 2001).

(n4)Footnote 230. *Hurst v. Southwest Mississippi Legal Services, 610 So. 2d 374 (Miss. 1992). overruled, Rains v. Gardner, 731 So. 2d 1192 (Miss. 1999). Boshwell v. Keith, 418 So. 2d 89 (Ala. 1982)* (one-half of minerals severed by deed in 1937; title to surface and unsevered portion of minerals acquired by adverse possession in 1953); *Hellier Coal & Coke Co. v. Bowling, 272 S.W.2d 651 (Ky. 1954). See* Annotation, *35 A.L.R.2d 124 (1954). Bryant v. Palmer Coking Coal Co., 936 P.2d 1163 (Wash. App. 1997)* (adverse possessor was given mineral right because mineral interests were not severed at the time of entry); *Kromisco v. Pettit, 968 P.2d 345 (Okla. 1998)* (adverse possession of non-severed minerals follows or goes with the adverse possession of the surface; the fact that the petitioner participated in an oil and gas well on the site did not sever the mineral estate from the surface estate). *See N.A.S. Holdings v. Pafundi, 736 A.2d 780 (Vt. 1999)* (where there is no severence of the mineral estate from the surface estate, adverse possession through quarrying activities establishes title to the surface and the minerals beneath).

(n5)Footnote 231. *Ates v. Yellow Pine Land Co., 310 So. 2d 772 (Fla. App. 1975); Hurst v. Southwest Miss. Legal Services, 610 So. 2d 374 (Miss. 1992). Rains v. Gardner, 731 So. 2d 1192 (Miss. 1999).* Annotation, *35 A.L.R.2d 124. But see Perkins v. Southern Coal Corp., 96 F. Supp. 8 (S.D. W. Va. 1951), aff'd, 190 F.2d 692 (4th Cir. 1951).*

(n6)Footnote 232. *Houston Oil Co. v. Moss, 284 S.W.2d 131 (Tex. 1955); American Petrofina, Inc. v. Warren, 156 So. 2d 729 (Miss. 1963). But see Northcut v. Church, 188 S.W. 220 (Tenn. 1916).*

(n7)Footnote 233. *Pierson v. Case, 133 So. 2d 239 (Ala. 1961).*

(n8)Footnote 234. *Pierson v. Case, 133 So. 2d 239 (Ala. 1961).*

(n9)Footnote 235. *Kilpatrick v. Gulf Prod. Co., 139 S.W.2d 653 (Tex. Ct. App. 1940)* (holding severance to be ineffectual).

(n10)Footnote 236. *Brennan v. Pine Hill Collieries, Inc., 167 A. 776 (Pa. 1933)* (when true owner possessed part of coal through mine accessed by tunnel from other property, adverse possessor only received surface).

(n11)Footnote 237. *Kanahawha & Hocking Coal & Coke Co. v. Carbon County, 535 P.2d 1139 (Utah 1975). See* §§ 49.23(a)(2), 49.23(a)(3), *infra*.

(n12)Footnote 238. *United Fuel Gas Co. v. Dyer, 185 F.2d 99 (4th Cir. 1950).* In Kentucky, the surface owner is deemed to hold the minerals as "trustee" for the true subsurface owner. Ky. Rev. Stat. § 381.430; *Brockman v. Jones, 610 S.W.2d 943 (Ky. App. 1980). Oehmig v. Johnson, 638 So. 2d 846 (Ala. 1994)* (rule of repose not usable by one without title against one with legal title; mineral owners had no notice of purported claim against their estate and need not constantly search records to see if anyone purported to convey the minerals).

(n13)Footnote 239. *United Fuel Gas Co. v. Dyer, 185 F.2d 99 (4th Cir. 1950). See also Ohio Oil Co. v. Wyoming Agency, 179 P.2d 773 (Wyo. 1947)* (discussing extent of lien).

(n14)Footnote 240. *Witt v. Graves, 787 S.W.2d 681 (Ark. 1990);* and *Schaneman v. Wright, 470 N.W.2d 566 (Neb. 1991).*

(n15)Footnote 241. *Uphuff v. Trustees of Tufts College, 184 N.E. 213 (Ill. 1932); Jackson v. Reed, 448 N.E.2d 226 (Ill. App. 1983). Kriss v. Mineral Rights, Inc., 911 P.2d 711 (Colo. App. 1996)* (title to minerals denied; adverse possessor held void deed conveying both surface and mineral ownership to a parcel that had been previously severed).

(n16)Footnote 242. *United Fuel Gas Co. v. Dyer, 185 F.2d 99 (4th Cir. 1950).*

(n17)Footnote 243. *Hughes v. Cowan Stone Co., 766 S.W.2d 188 (Tenn. Ct. App. 1988).*

(n18)Footnote 244. *Letcher County Coal & Imp. Co. v. Marlowe, 398 S.W.2d 870 (Ky. 1965); Mohoma Oil Co. v. Ambassador Oil Corp., 474 P.2d 950 (Okla. 1970). Cornelius v. Moody Bible Institute of Chicago, 18 P.3d 1081 (Okla Civ. App. 2000)* (claimant's receipt of royalties and payment of taxes was not sufficient to divest ownership from record owner through adverse possession). *See generally,* Bennett, Jared C. "Ownership Of Transmigratory Minerals, Utah and Zebras: Proof That Oil and Gas Ownership Law Needs Reform," *21 J. Land Resources & Envtl. L. 349 (2001).*

(n19)Footnote 245. *Lundy v. Lakin, 215 P.2d 61 (Cal. App. 1950); Medusa Portland Cement Co. v. Lamantina, 44 A.2d 244 (Pa. 1945); Diederich v. Ware, 288 S.W.2d 643 (Ky. 1956). Stephenson v. United States, 33 Fed. Cl. 63 (1995).*

(n20)Footnote 246. *Davis v. Federal Land Bank, 13 S.E.2d 417 (N.C. 1941).*

(n21)Footnote 247. *Harkins v. Keith, 102 S.W.2d 5 (Tex. 1936); Lyles v. Dodge, 228 S.W. 316 (Tex. Civ. App. 1921).*

(n22)Footnote 248. *Schaneman v. Wright, 470 N.W.2d 566 (Neb. 1991); Hale v. Horn, 97 S.W.2d 402 (Ky. 1936). See also* § 49.23(b)(1), *infra*.

(n23)Footnote 249. *Hassell v. Texaco, Inc., 372 P.2d 233 (Okla. 1962); Vance v. Clark, 252 F. 495 (4th Cir. 1918).*

(n24)Footnote 250. *Kinder v. La Salle County Carbon Coal Co., 141 N.E. 537 (Ill. 1923).*

(n25)Footnote 251. *Stark v. Pennsylvania Coal Co., 88 A. 770 (Pa. 1913)* (driving mine tunnel from shaft on adjoining property not notorious). *See also* § 49.23(b)(1), *infra*.

(n26)Footnote 252. *Gerhard v. Stephens, 442 P.2d 692, 720 (Cal. 2d 1968)* (need "actual and visible physical enjoyment of subject rights essential to place true owners on notice of claim."); *Brizzolara v. Powell, 218 S.W.2d 728 (Ark. 1949)* (drainage from adjoining land insufficient).

(n27)Footnote 253. *Pollard v. Simpson, 199 So. 560 (Ala. 1940); Medusa Portland Cement Co. v. Lamantina, 44 A.2d 244 (Pa. 1945).*

(n28)Footnote 254. *Spurlock v. Santa Fe Pac. R.R., 694 P.2d 299 (Ariz. Ct. App. 1984).*

(n29)Footnote 255. *Woodside v. Ciceroni, 93 F. 1 (9th Cir. 1899). See generally* Darin, Thomas F., "The Bureau of Land Management's Proposed Surface Management Regulations for Locatable Mineral Operations: Preventing Or Allowing Degradation of the Public Lands?," *35 Land & Water L. Rev. 309 (2000).*

(n30)Footnote 256. *Gerhard v. Stephens, 442 P.2d 692,* (Cal. 2d 1968) (actual possession of portion to which one has title will not give constructive adverse possession of remainder in color of title).

See generally, Bennett, Jared C., "Ownership of Transmigratory Minerals, Utah and Zebras: Proof That Oil and Gas Ownership Law Needs Reform," *21 J. Land Resources & Envtl. L. 349 (2001).*

(n31)Footnote 257. *Nelson v. Christianson, 343 N.W.2d 375 (N.D. 1984); Medusa Portland Cement Co. v. Lamantina, 44 A.2d 244 (Pa. 1945).*

(n32)Footnote 258. *Utah Copper Co. v. Eckman, 152 P. 178 (Utah 1915); Jones v. Brown, 199 S.W.2d 973 (Ark. 1947). McCoy v. Lowrie, 253 P.2d 415 (Wash. 1953); Mitchell v. Espinosa, 243 P.2d 412 (Colo. 1942). See also Dubbers-Albrecht v. Nathan, 356 S.E.2d 205 (Ga. 1987)* (paying estate taxes not sufficient under statute preserving interest from adverse possession if taxes paid; must pay ad valorem taxes). *See related issue,* Annotation, *Applicability of Tax Redemption Statutes to Separate Mineral Estates, 56 A.L.R.2d 621 (1957).*

(n33)Footnote 259. *Kentucky Block Cannel Coal Co. v. Sewell, 249 F. 840 (6th Cir. 1918)* (*in dicta*).

(n34)Footnote 260. *Hollman v. Johnson, 80 S.E. 249 (N.C. 1913).*

(n35)Footnote 261. *Kentucky Block Cannel Coal Co. v. Sewell, 249 F. 840 (6th Cir. 1918)* (oil and gas not adversely possessed by coal mining); *Kinder v. La Salle County Carbon Coal Co., 141 N.E. 537 (Ill. 1923).*

(n36)Footnote 262. If the color of title does not purport to cover minerals, it will not assist the adverse possessor. *McCoy v. Lowrie, 253 P.2d 415 (Wash. 1953).*

(n37)Footnote 263. *Lundy v. Lakin, 215 P.2d 61 (Cal. App. 1950); Blacksburg Mining & Mfg. v. Bell, 100 S.E. 806 (Va. 1919); But see Laney v. Monsanto Chem. Co. 348 S.W.2d 826 (Ariz. 1961)* and *Adams v. Bruder, 627 S.W.2d 12 (Ark. 1982).*

(n38)Footnote 264. *Vance v. Guy, 31 S.E.2d 766 (N.C. 1944), rev'g 27 S.E.2d 117 (N.C. 1943).*

(n39)Footnote 265. *Collins v. Smith, 372 P.2d 878 (Okla. 1962).*

(n40)Footnote 266. *See White v. Miller, 139 N.Y.S. 660 (1912).*

(n41)Footnote 267. *White v. Miller, 139 N.Y.S. 660 (1912).*

(n42)Footnote 268. *Cf., Piney Oil & Gas Co. v. Scott, 79 S.W.2d 394 (Ky. 1934); Kinder v. La Salle County Carbon Coal Co., 141 N.E. 537 (Ill. 1923); Diederich v. Ware, 288 S.W.2d 643 (Ky. 1956)* (oil and gas subject to drainage through well); *Mohoma Oil Co. v. Ambassador Oil Corp., 474 P.2d 950 (Okla. 1970)* (hinting that lease for quarter-section may have been gained).

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CHAPTER 48 MINES AND MINERALS
III. Transfer of Interests in Minerals: Voluntary and Involuntary Transfers.

6-48 Thompson on Real Property, Thomas Editions § 48.13

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§ 48.13 Involuntary Transfer of Mineral Interests: Dormant Mineral Acts.

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Often, either because of inheritance or speculative purchases of mineral rights, the ownership of severed minerals becomes fractionated. This can make development difficult if mineral owners disagree or are unlocatable. n269 Outstanding mineral interests can also impede surface development. n270 Abandonment is difficult to prove at common law. Non-use alone is not sufficient; there must be proof of an intent to abandon. n271 Some marketable title statutes, which are designed to remove stale title claims generally, do not apply to mineral interests either expressly n272 or by court interpretation. n273 Other general marketable title statutes may apply to minerals, n274 but interests could be preserved without actual use under these statutes. n275 Many states have turned to dormant mineral statutes to clear titles. n276

Dormant mineral statutes operate either by creating a presumption of abandonment in specified circumstances or by simply deeming an interest lapsed in certain situations. n277 State courts have found some of these statutes to be unconstitutional. n278 The Supreme Court, however, upheld the Indiana statute against claims that it violated due process and the Takings Clause. n279 Dormant mineral statutes differ on what is necessary to preserve an interest and in whose favor the lapse operates. n280

COMPUTER-ASSISTED RESEARCH

LEXIS: dorman! w/5 mineral! w/5 interest!

§ 48.13(a) Ways to Preserve Mineral Interest from Dormancy.

The various state statutes may require the owner of a severed mineral interest to take different actions to preserve an interest. The statutes also can vary on the time frame in which the interest owner must act. Requirements for action range from 7 years n281 to 25 years. n282 Generally, the necessary actions are either use of the minerals, payment of separate taxes, or registration of an intent to hold the minerals. Some statutes, however, provide other compliance avenues and not all statutes allow the most common three actions. Additionally, the statutes often also require initial

registration of severed interests. n283

Registration of an intent to hold the interest should be a straightforward requirement. n284 Because the Indiana statute had this feature as a way to avoid a lapse, the Supreme Court felt the requirements of Indiana's act were not onerous. The owner's failure to comply caused the loss of property, in a manner analogous to a statute of limitations. n285 Georgia does not provide this avenue of preservation, but its statute nevertheless passed constitutional muster. n286 If use is required, or claimed to be the saving act, there can be litigation over whether appropriate use has occurred.

A severed mineral interest obviously is used if there is actual production of the mineral. If use is the only avenue claimed, there can be disputes over whether exploratory or other activity will suffice. n287 Some statutes expressly acknowledge exploratory actions, n288 including activities on land unitized with the land in question. n289 Mere leasing n290 or conveyance n291 of the minerals has not been considered "use" under the Indiana statute. Some statutes, however, expressly rebut dormancy if there is a recorded conveyance of the minerals; n292 this would also make leasing appear to suffice. n293 Additionally, filing of a mineral deed during an act's grace period after the act's enactment was sufficient to preserve a mineral interest holder's right without filing a "claim of interest." n294

Other ways to avoid the lapse of an interest exist. Payment of separate taxes on the severed mineral may also be sufficient under most statutes. n295 Some statutes except from their requirements certain types of mineral owners, such as licensed mining operators, and courts have upheld these exclusions. n296 Georgia also excludes leases for specific number of years. n297 A presumption that development is more likely in these situations justifies both of these exclusions. n298 Attempts to exclude mineral interests in certain areas of a state from the operation of a state's act, however, were found unconstitutional under state law. n299

Some statutes are in theory self-operative; the mineral interest is deemed lapsed at the expiration of the time period without one of the actions that rebut dormancy. Therefore, no notice or hearing is required, n300 although the factual questions may necessitate a quiet title action from a practical viewpoint. Other statutes require that the person claiming the benefit of the lapse file in court. n301 In addition, some statutes allow the mineral owner to make a late filing of intent to hold the minerals and thereby preserve the interest. n302 The Kansas court has stated that if the late filing is made, it was immaterial whether or not non-use had continued for the statutory period; filing meets the purpose of the statute. n303

COMPUTER-ASSISTED RESEARCH

LEXIS: preserv! w/5 interest! w/15 mineral!
avoid! w/5 lapse! w/15 mineral! w/5 interest!

§ 48.13(b) Party Benefitted from Dormancy.

The statutes differ on the party who will be able to take advantage of the dormancy of a mineral interest. Most declare that the surface owner will benefit; the interest deemed dormant will inure to the benefit of the surface owner. n304 Some statutes, however, refer to the "owner of the real property subject to a mineral right." n305 If the particular statute defines "mineral right" as including royalties and fractional interests, n306 this means that the owner of an encumbered mineral fee may benefit. In another variation, the Minnesota statute terminates title in favor of the state. n307

FOOTNOTES:
(n1)Footnote 269. For the difficulties of developing when less than all cotenants concur, see § 49.05(d).

(n2)Footnote 270. For rationales behind dormant mineral statutes, see *Energetics, Ltd. v. Whitmill, 497 N.W.2d 497 (Mich. 1993).*

(n3)Footnote 271. *Gerhard v. Stephens, 442 P.2d 692 (Cal. 2d 1968). Nelson v. Miller, 479 S.E.2d 737 (Ga. 1997)* (owner of mineral interest lost his interest by not paying taxes or working the mine for seven years).

(n4)Footnote 272. Okla. Stat. Ann. tit. 16, § 76; Utah Code Ann. § 57-9-6; Wyo. Stat. § 34-10-108(a)(iv).

(n5)Footnote 273. *Northern Pac. Ry. v. Advance Realty Co., 78 N.W.2d 705 (N.D. 1976)* (party claiming benefit of act must possess real estate, requiring actual use of severed mineral estate); *Sickler v. Pope, 326 N.W.2d 86 (N.D. 1982).*

(n6)Footnote 274. *South Fla. Water Mgt. Dist. v. Muroff, 508 So. 2d 510 (Fla. App. 1987);* Fla. Stat. Ann. § 712.01 *et seq*. *See also* Fla.Stat. Ann. at § 704.05 (limits duration of easements for mining, drilling, exploring, or developing); *but see Williston Highlands Dev. Co. v. Hogue, 277 So. 2d 260 (Fla. 1973)* (statute before amendment only operated prospectively); *Tvedt v. Bork, 414 N.W.2d 11 (S.D. 1987)* (interpreting S.D. Codified Laws Ann. § 43-30-8.1, which was repealed). *See also* Unif. Simplification of Land Transfers Act, §§ 3-301-309, 14 U.L.A. 253-57.

(n7)Footnote 275. Generally, the marketable title statutes, with some exceptions, extinguish interests that predate a certain time if there is no recordation of a notice of claim within the relevant time frame. Some statutes will preserve the interest if it is referred to in a document recorded during the time span. *See, e.g.*, Ind. Code Ann. § 32-1-5-2; Mich. Comp. Laws Ann. § 565.101; Iowa Code Ann. § 614.32(1).

(n8)Footnote 276. Cal. Civil Code §§ 883.10-883.270; Conn. Stat. Ann. § 47-33m-t, Fla. Stat. Ann. § 704.05; Ga. Code Ann. § 85-407.1, 44-5-168 (held constitutional in *Hayes v. Howell, 308 S.E.2d 170 (1983)* and *Mixon v. One Newco, Inc., 863 F.2d 846 (11th Cir. 1989);* Ind. Code §§ 32-5-11.1-32-5-11.8 (held constitutional in *Texaco, Inc. v. Short, 454 U.S. 516 (1982));* Kan. Stat. Ann. §§ 55-1601-55-1607; Ky. Stat. Ann. §§ 353.460-353.476; La. Civ. Code Ann. art. 753; Mich.Comp. Laws § 554.291 (held constitutional in *Van Slooten v. Larsen, 299 N.W.2d 704 (1980), appeal dismissed, 455 U.S. 901 (1982));* Minn. Stat. Ann. §§ 93.52-93.58; Neb. Rev. Stat. §§ 57.228-57.231; Or. Rev. Stat. § 517.180; N.C. Gen. Stat. §§ 1-42.1-1-42.3; Tenn. Code Ann. § 66-7-103; Va. Code §§ 55-154-55-155 (held constitutional in *Love v. Lynchburg Nat'l Bank & Trust Co., 140 S.E.2d 650 (1965)* (but partially repealed in 1990); Wis. Stat. Ann. § 700.30. *repealed by,* 1983 Act 455.2. In Michigan and Illinois, the statutes only apply to oil and gas, not solid minerals. *See also Boshell v. Keith, 418 So. 2d 89 (Ala. 1981)* (twenty-year rule of "repose" after which no claim may be raised to unused minerals). *See also, Jolyne Corp. v. Michels, 446 S.E.2d 494 (W. Va. 1994)* (West Virginia's statutory presumption of abandonment from a failure to produce for twenty-four months not rebutted by one attempt to sell gas in 1979, well servicing in 1982, and later attempt to sell interest).

(n9)Footnote 277. *See generally* 1 P. Martin & B. Kramer, Williams & Meyers Oil and Gas Law § 216.1 (Matthew Bender) and Annotation, *Validity and Construction of Statutes Providing for Reversion of Mineral Estates for Abandonment or Non-use, 16 A.L.R.4th 1029 (1982). But see Begley v. Peabody Coal Co., 978 F. Supp. 861,* (S.D. Ind. 1997) (Dormant Minerals Act supplements but does not displace common-law rules developed for termination of leasehold interests in minerals).

(n10)Footnote 278. *Wilson v. Bishop, 412 N.E.2d 522 (Ill. 2d 1980); Contos v. Herbst, 278 N.W.2d 732 (Minn. 1979), appeal dismissed sub nom, Prest v. Herbst, 444 U.S. 804 (1979); Wheelock v. Heath, 272 N.W.2d 768 (Neb. 1978)* (holding retroactive application unconstitutional); *Chicago & N.W. Transp. Co. v. Pederson, 259 N.W.2d 316 (Wis. 1977).* West v. Wilson, C.A. No. 03*A01-9409-CH-00348, 1995 Tenn. App. LEXIS 143 (Tenn. App. 1995)* (statute survives Constitutional contracts clause challenge).

(n11)Footnote 279. *Texaco, Inc. v. Short, 454 U.S. 516 (1982).* Because the Indiana statute allowed owners of ten or more mineral interests to reclaim their interests under certain circumstances, there also was an equal protection challenge, which failed. *See also United States v. Locke, 471 U.S. 84 (1985)* (upholding termination of unpatented mining claim for failure to make statutorily required filing).

(n12)Footnote 280. The 1986 Uniform Dormant Mineral Interests Act, 7A U.L.A. 51 (1992), has only been adopted by Connecticut. *See* Townsend, *The Model Dormant Mineral Interest Act: Limited Practicality,* 8 Eastern

Mineral L. Inst. 210-1 (1987).

(n13)Footnote 281. Georgia's "adverse possession" time frame, Ga. Code Ann. § 44-5-168, *see Mixon v. One Newco, Inc., 863 F.2d 846 (11th Cir. 1989)* (statute is actually a lapse statute; surface owner not required to possess the minerals to use). *See* Cal. Civil Code §§ 883.10-883.270; Conn. Stat. Ann. § 47-33m-t, Fla. Stat. Ann. § 704.05; Ga. Code Ann. § 85-407.1, 44-5-168 (held constitutional in *Hayes v. Howell, 308 S.E.2d 170 (1983)* and *Mixon v. One Newco, Inc., 863 F.2d 846 (11th Cir. 1989);* Ind. Code §§ 32-5-11.1-32-5-11.8 (held constitutional in *Texaco, Inc. v. Short, 454 U.S. 516 (1982));* Kan. Stat. Ann. §§ 55-1601-55-1607; Ky. Stat. Ann. §§ 353.460-353.476; La. Civ. Code Ann. art. 753; Mich.Comp. Laws § 554.291 (held constitutional in *Van Slooten v. Larsen, 299 N.W.2d 704 (1980), appeal dismissed, 455 U.S. 901 (1982));* Minn. Stat. Ann. §§ 93.52-93.58; Neb. Rev. Stat. §§ 57.228-57.231; Or. Rev. Stat. § 517.180; N.C. Gen. Stat. §§ 1-42.1-1-42.3; Tenn. Code Ann. § 66-7-103; Va. Code §§ 55-154-55-155 (held constitutional in *Love v. Lynchburg Nat'l Bank & Trust Co., 140 S.E.2d 650 (1965)* (but partially repealed in 1990); Wis. Stat. Ann. § 700.30. *repealed by,* 1983 Act 455.2. *Fisch v. Randall Mill Corp., 426 S.E.2d 883 (Ga. 1993), cert. denied, 510 U.S. 824 (1993)* (to meet Georgia's code requirement of working or attempting to work mineral rights, the owner of the mineral interests must carry on an operation to explore for, use, produce, or extract minerals in the land -- the owner must do more than conduct geological research and pick up rock samples to meet this standard); *James F. Nelson, Jr. Family Ltd. Partnership v. Miller, 479 S.E.2d 737 (Ga. 1997)* (nothing in ga. Code Ann. § 44-5-168 precludes the holder of record title from acquiring title to mineral rights if the holder is aware of the mineral right owner's failure to use the rights or to pay taxes during a seven-year period).

(n14)Footnote 282. Illinois. Nebraska: 23 years; Virginia has a presumption that no minerals exist in a tract after 35 years of non-use.

(n15)Footnote 283. *Riddel v. Layman, 656 N.E.2d 1300 (Ohio App. 1995)* (making mineral interest in question part of a filed title transaction prevents dormancy under Ohio statute); *Tengasco, Inc. v. Eastern American Energy Corp., 1997 Tenn. App. LEXIS 555 (Tenn. App. 1997)* ("shut-in" rent payments to lessors did not constitute "production" of natural gas within the meaning of T.C.A. § 66-7-103(a)(1)).

(n16)Footnote 284. Nevertheless, North Dakota muddies the water by excusing "inadvertent" failures to file. N.D. Cent. Code § 38-18.1-06.

(n17)Footnote 285. *Texaco, Inc. v. Short, 454 U.S. 516 (1982).*

(n18)Footnote 286. *Mixon v. One Newco, Inc., 863 F.2d 846 (11th Cir. 1989).*

(n19)Footnote 287. *Southwestern Oil Co. v. Wolverine Gas & Oil Co., 450 N.W.2d 1 (Mich. App. 1989)* (gas storage operations conducted by one interest owner protects its interest, but not interest of other mineral owners not in possession).

(n20)Footnote 288. Cal. Civ. Code § 883.220(a).

(n21)Footnote 289. Cal. Civ. Code § 883.220(a).

(n22)Footnote 290. *Kirby v. Ashland Oil, Inc., 463 N.E.2d 1127* (Ind. App. 1984, *transfer denied*) (statute anticipates active use); *McCoy v. Richards, 771 F.2d 1108 (7th Cir. 1985).*

(n23)Footnote 291. *McCoy v. Richards, 581 F. Supp. 143 (S.D. Ind. 1983), aff'd, McCoy v. Richards, 771 F.2d 1108 (7th Cir. 1985).*

(n24)Footnote 292. *See, e.g.,* Cal. Civ. Code § 883.220(c).

(n25)Footnote 293. *Walch v. Crandall, 416 N.W.2d 375 (Mich. App. 1987).* Michigan's statute expressly allows

either leasing or a "transfer" of an interest in oil and gas to rebut dormancy. "Transfer" has been interpreted as including the transfer back to the lessor of the lessor's reversionary interest at the end of an oil and gas lease. *Energetics, Ltd. v. Whitmill, 497 N.W.2d 497 (Mich. 1993)* (new twenty-year period begins at end of oil and gas lease without necessity of recording new interest).

(n26)Footnote 294. *Oberlin v. Wolverine Gas & Oil Co., 450 N.W.2d 68 (Mich. App. 1989).*

(n27)Footnote 295. *See, e.g.*, Cal. Civ. Code § 883.220(b); Ind. Code § 32-5-11-3. *See also Dubbers-Albrecht v. Nathan, 356 S.E.2d 205 (Ga. 1987)* (payment of estate taxes insufficient) and *Georgia Marble Co. v. Whitlock, 392 S.E.2d 881 (Ga. 1990)* (taxes must be on individual property, not lump sum for all minerals owned).

(n28)Footnote 296. *Hinson v. Loper, 304 S.E.2d 722 (Ga. 1983). Cf. Texaco, Inc. v. Short, 454 U.S. 516 (1982)* (holding Indiana statute's allowance for owners of ten or more mineral interests to reclaim their interests under certain circumstances did not violate equal protection).

(n29)Footnote 297. *Parker v. Reynolds Metals Co., 747 F. Supp. 711 (M.D. Ga. 1990)* (50-year lease with right to extend if producing is lease for fixed term).

(n30)Footnote 298. *Mixon v. One Newco, Inc., 863 F.2d 846 (11th Cir. 1989).*

(n31)Footnote 299. *Riddleberger v. Chesapeake W. Ry., 327 S.E.2d 663 (Va. 1985)* (unconstitutional to except mineral rights west of the Blue Ridge).

(n32)Footnote 300. *See Texaco, Inc. v. Short, 454 U.S. 516, 533 (1982).*

(n33)Footnote 301. *See, e.g.*, Cal. Civil Code § 883.240; Kan. Stat. Ann. § 55-1601 *et seq.*

(n34)Footnote 302. Cal. Civil Code § 883.250; *Scully v. Overall, 840 P.2d 1211 (Kan. App. 2d 1992).*

(n35)Footnote 303. *Scully v. Overall, 840 P.2d 1211 (Kan. App. 2d 1992).*

(n36)Footnote 304. *See, e.g.*, Section 7 of the Uniform Dormant Mineral Act, 7A U.L.A. 51 (court order terminating mineral interest merges interest with surface estate in shares proportionate to ownership of surface estate). *See also Larkin v. Laster, 334 S.E.2d 158 (1985)* (right to seek termination passes with succession and cannot be set up as a separate interest).

(n37)Footnote 305. Cal. Civil Code § 883.210.

(n38)Footnote 306. Cal. Civil Code § 883.110.

(n39)Footnote 307. Minn. Stat. Ann. §§ 93.52-93.58. The Minnesota statute also allows the lapsed owner to recover the fair market value of the interest if suit is filed within six months.

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CHAPTER 48 MINES AND MINERALS
IV. Methods of Obtaining and Exploiting Rights to Mineral Resources

6-48 Thompson on Real Property, Thomas Editions § 48.14

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§ 48.14 Leases.

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A common method of developing minerals is through leasing. No specialized forms exist, but because of the investment required to open a mine, lessees generally want a long term or the right to continue the lease if the lessee is producing in commercial quantities. n308 Generally, royalties are a set amount per unit of mineral produced, but some leases use a percentage of value as is done with oil and gas.

FOOTNOTES:
(n1)Footnote 308. *Dethloff v. Zeigler Coal Co., 412 N.E.2d 526 (Ill. 2d 1980). See also* Annotation, *Right of Lessee to Minerals Extracted During the Lease but Remaining on the Premises After Its Termination, 51 A.L.R.2d 1121 (1957).*

Patrick H. Martin, *Unbundling the Executive Right: A Guide to Interpretation of the Power to Lease and Develop Oil and Gas Interests*, 37 Nat. Resources J. 311 (1997).

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CHAPTER 48 MINES AND MINERALS
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§ 48.15 Profits.

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A *profit a prendre* is the right to go upon the land of another and remove a product. n309

FOOTNOTES:
(n1)Footnote 309. *Woodside v. Ciceroni, 93 F. 1 (9th Cir. 1899). Caron Const. & Environmental, Inc. v. Bruso, 2000 Mass. Super. LEXIS 180 (Mass. Super. 2000). Lobato v. Taylor, 13 P.3d 821 (Colo. App. 2000).*

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CHAPTER 48 MINES AND MINERALS
IV. Methods of Obtaining and Exploiting Rights to Mineral Resources

6-48 Thompson on Real Property, Thomas Editions § 48.16

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§ 48.16 Sale of Coal in the Ground.

Some jurisdictions, most notably Pennsylvania, consider a lease that allows the lessee to continue mining until the mineral is exhausted to actually be a sale of the coal in the ground rather than a lease. n310 The purchaser must have the exclusive right to mine and must have either paid the stipulated consideration or be compelled to mine or pay for coal if not mined. The finding of a sale can impact taxation, inheritance, n311 and other allocations of benefits.

FOOTNOTES:
(n1)Footnote 310. *Lichtenfels v. Bridgeview Coal Co., 496 A.2d 782 (Pa. Super. 1985); Smith v. Glenn Alden Coal Co., 32 A.2d 227 (Pa. 1943).*

(n2)Footnote 311. *In re Estate of Walter, 265 A.2d 368 (Pa. 1970)* (testator's interest as "lessor" was in personalty).

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CHAPTER 48 MINES AND MINERALS
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6-48 Thompson on Real Property, Thomas Editions § 48.17

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§ 48.17 Acquisition of Federally Owned Minerals.

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Mineral development and exploration on the public lands are governed by several laws. Hardrock minerals are obtained under the Mining Law of 1872. n312 Rights under this Act are primarily self-initiated: Lands are "free and open to exploration and purchase." n313 If a private person "discovered" a "valuable mineral deposit," a claim could be "located" and worked without further ado or, at the claimant's option, "patent" or fee title sought. n314

Statutes other than the Mining Law of 1872 apply to minerals other than hardrock. Congress removed common varieties of minerals from the operation of the mining law n315 and subjected them to sale provisions. n316 Earlier, the Mineral Lands Leasing Act of 1920 modified the Mining Law of 1872 so that patents would not be available for certain minerals, commonly referred to as the fuel and fertilizer minerals. n317 A leasing regime gave the Secretary greater control and discretion over development of these minerals. Although some of the impetus for the 1920 Act was a desire to protect producers and prevent overproduction, the Secretary's discretion included the right to protect non-mineral, as well as mineral, values of the lands. n318 Recent amendments to the Act underscore this concern:

> the Secretary of the Interior, or for National Forest lands, the Secretary of Agriculture, shall regulate all surface-disturbing activities conducted pursuant to any lease... and shall determine reclamation and other actions as required in the interest of conservation of surface resources. n319

FOOTNOTES:
(n1)Footnote 312. *30 U.S.C. §§ 21*-42.

(n2)Footnote 313. *30 U.S.C. § 22.* Acquired lands, however, are not open for mineral entry unless expressly made so. Additionally, lands not held for disposal are also not open to entry. *Oklahoma v. Texas, 258 U.S. 574 (1922).*

(n3)Footnote 314. *30 U.S.C. §§ 29,* 35-38. To be valid, minerals must be found in sufficient kind and quantity so that a reasonably prudent person would be justified in expending time and money with the reasonable prospect of developing a paying mine. *Castle v. Womble, 19 Pub. Lands Dec. 455 (1896).* A refinement of this test requires the

minerals be marketable at a profit. *United States v. Coleman, 390 U.S. 599 (1968).*

(n4)Footnote 315. *30 U.S.C. § 611. See* Annotation, *What Constitutes "Common Varieties" Within Meaning of Federal Statute Providing that No Deposit of Common Varieties of Sand, Stone, Gravel, Pumice, or Cinders Shall be Deemed "Valuable Mineral Deposit," 38 A.L.R. Fed. 456.*

(n5)Footnote 316. *30 U.S.C. §§ 601*-604.

(n6)Footnote 317. Leasing replaced patenting for the non-metalliferous fuel minerals (oil, gas, oil shale, coal, native asphalt and bituminous rock) and the fertilizer and chemical minerals (phosphate, potash, and sodium). Codified, as amended, at *30 U.S.C. §§ 181*-287. To coordinate leasing and patenting authorities required the Multiple Mineral Development Act of 1954, *30 U.S.C. §§ 521*-31.

(n7)Footnote 318. *Boesche v. Udall, 373 U.S. 472, 480-83 (1963).*

(n8)Footnote 319. *30 U.S.C. § 226*(g), as amended by the Federal Onshore Oil and Gas Leasing Reform Act of 1987, Title V of P.L. 100-203.

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CHAPTER 48 MINES AND MINERALS
IV. Methods of Obtaining and Exploiting Rights to Mineral Resources

6-48 Thompson on Real Property, Thomas Editions § 48.18

AUTHOR: Professor Marla E. Mansfield College of Law University of Tulsa

§ 48.18 Acquisition of State-Owned Minerals.

States have diverse methods to dispose of their mineral resources. n320

FOOTNOTES:
(n1)Footnote 320. *See generally* 4 W.L. Summers, The Law of Oil and Gas §§ 851-866 (1962).

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6-48 Thompson on Real Property, Thomas Editions § 48.19

AUTHOR: Professor Marla E. Mansfield College of Law University of Tulsa

§ 48.19 Mining Partnerships.

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A mining partnership is a special type of relationship with some, but not all, of the characteristics of a common partnership. n321 Two of the most important differences from a general partnership are that the mining partnership is not deemed a separate entity and parties to a mining partnership must jointly own a mineral property. Some states statutorily define a mining partnership. n322 Other states also recognize the concept and may apply it to both hard minerals and oil and gas. n323

There is, however, a difference in what is necessary to create a mining partnership in various states. Some states simply require common ownership and joint operation of the property for mineral development. n324 Others also require evidence of an intent to share the costs and profits of development, n325 which in some instances can be inferred from a development agreement n326 and in some instances must be expressed. n327 A mining partnership does not require a written partnership agreement or express oral agreement if the requisite elements are present. Often, parties attempt to make non-operators under a joint operating agreement liable as mining partners, n328 but there will not be a mining partnership n329 unless a party has sufficient control that a court could find "joint operation." n330

If a mining partnership exists, each partner is personally liable for activities necessary or usual in the conduct of mining operations. n331 A partner has a limited ability to bind other partners; they are bound only to the extent authority to bind is expressly granted or for such dealings that appear necessary and usual in the management and conduct of the business of mining. n332 Each partner owes the others a duty of good faith in regard to partnership business, which borders on a fiduciary relationship. n333 In one important respect, mining partnerships differ from other partnerships. They will not dissolve upon the death of a partner and the interest in the mining partnership can be assigned by conveyance of the co-owned mineral. n334 Mining partnerships arise out of the need to develop jointly owned minerals, not out of any particular trust in or recognized skill of individual partners.

COMPUTER-ASSISTED RESEARCH

LEXIS: mining w/5 partner!

FOOTNOTES:

(n1)Footnote 321. *See generally* 4 W.L. Summers, The Law of Oil and Gas §§ 721-734 (1962). *See also* the specialized "grubstake partnership," which governs prospecting, Annotation, *Mining Grubstake Contracts, 70 A.L.R.2d 915 (1960).* Smith, G. Thomas and Hume F. Coleman. Florida Real Property Complex Transactions Oil, Gas, and Minerals. RPCT FL-CLE 7-1 (2000).

(n2)Footnote 322. Idaho Code §§ 53-401-53-412; and Mont. Code Ann. §§ 63-1001-63-1010.

(n3)Footnote 323. *See generally* 4 W.L. Summers, The Law of Oil and Gas § 721 (1962).

(n4)Footnote 324. *See* Idaho Code §§ 53-401-53-412; Mont. Code Ann. §§ 63-1001-63-1010; and *Mud Control Labs. v. Covey, 269 P.2d 854 (1954)* (emphasizing that joint operation does not require equal work).

(n5)Footnote 325. *Sparks Bros. Drilling Co. v. Texas Moran Exploration Co., 829 P.2d 951 (Okla. 1991); Yeager v. Graham, 94 P.2d 317 (Kan. 1939); State v. Harrington, 407 S.W.2d 467 (Tex. 1966), cert. denied, 386 U.S. 944; Blocker Exploration Co. v. Frontier Exploration, Inc., 740 P.2d 983 (Colo. 1987).*

(n6)Footnote 326. *Premier Inv. Co. v. Williams Iron Works Co., 63 P.2d 705 (Okla. 1936).*

(n7)Footnote 327. *Neill v. Shamburg, 27 A. 992 (Pa. 1893).*

(n8)Footnote 328. For definition of joint operating agreement, see § 49.66, *infra*.

(n9)Footnote 329. *See* Tex. Rev. Civ. Stat. Ann. art. 6132b § 7(5) ("operation of a mining property under a joint operating agreement does not of itself establish a partnership"), *discussed* in *Johnston v. American Cometra, Inc., 837 S.W.2d 711 (Tex. App. 1992)* (*writ error denied*); *Bolivar v. R & H Oil & Gas Co., 789 F. Supp. 1374 (S.D. Miss. 1991); Berchelman v. Western Co., 363 S.W.2d 875 (Tex. Civ. App. 1963); Home-Stake Prod. Co. v. Tri-State Pipe Co., 415 P.2d 377 (Kan. 1966). See also Jenkins v. Pappas, 383 P.2d 645 (Okla. 1963)* (arrangement a farmout, not mining partnership).

(n10)Footnote 330. *Blocker Exploration Co. v. Frontier Exploration, Inc., 740 P.2d 983 (Colo. 1987)* (collecting cases). *Compare Dresser Indus. Inc. v. Crystal Exploration & Prod. Co., No. 84-1160, 1985 U.S. App. LEXIS 27084 (10th Cir. 1985)* (non-operator whose employee examined operations and offered advice to operator was a mining partner), *with Sparks Bros. Drilling Co. v. Texas Moran Exploration Co., 829 P.2d 951 (Okla. 1991)* (mere observation of work and examination of bills not a mining partner but part of non-operator's rights).

(n11)Footnote 331. *Matter of Estate of Griffin, 501 N.E.2d 1021 (Ill. Dec. 1986). Clint Hurt & Assoc., Inc. v. Rare Earth Energy, Inc., 480 S.E.2d 529 (W. Va. 1996).*

(n12)Footnote 332. *Smaller v. Leach, 316 P.2d 1030 (Colo. 1951). Clint Hurt & Assoc., Inc. v. Rare Earth Energy, Inc., 480 S.E.2d 529 (W. Va 1996).*

(n13)Footnote 333. *Lundgaard v. Baxter, 849 P.2d 421 (Okla. App. 1992).*

(n14)Footnote 334. *Smaller v. Leach, 316 P.2d 1030 (Colo. 1951). See also* Idaho Code §§ 53-401-53-412; and Mont. Code Ann. §§ 63-1001-63-1010.

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CHAPTER 48 MINES AND MINERALS
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6-48 Thompson on Real Property, Thomas Editions § 48.20

AUTHOR: Professor Marla E. Mansfield College of Law University of Tulsa

§ 48.20 Multiple Mineral Development and Correlative Rights.

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The relationship between surface and mineral estates generally is considered to be one in which the mineral estate is dominant. n335 If different minerals, however, are owned by two separate parties, the relationship between these owners is often described as one of "correlative rights." n336 This is a term used to refer to co-equal rights in a common resource, and was originally applied to rights in common pools of oil and gas. n337 Under this doctrine, each competing estate deserves protection; neither owner may exercise rights without due regard for the other. A neutral rule of reason governs. n338

One important aspect of correlative rights is whether the owner of a deeper mineral should have a right of access to the lower strata and, conversely, if the upper mineral interest has a right to support. These duties are considered reciprocal. n339 Balancing is required. n340 Some courts imply an easement of access to lower strata through the higher. n341

COMPUTER-ASSISTED RESEARCH

LEXIS: correlative w/2 right! w/30 mineral!

FOOTNOTES:
(n1)Footnote 335. *See* § 48.08, *supra*.

(n2)Footnote 336. *Hunt Oil Co. v. Kerbaugh, 283 N.W.2d 131 (N.D. 1979).* Bennett, Jared C., "Ownership of Transmigratory Minerals, Utah and Zebras: Proof That Oil and Gas Ownership Law Needs Reform," *21 J. Land Resources & Envtl. L. 349 (2001).* O'Day, Sean E. San Carlos Apache Tribe v. Superior Court: Rejecting Legislative Favoritism In Water Right Allocations. *4 U. Denv. Water L. Rev. 29* (Fall, 2000).

(n3)Footnote 337. *See Ohio Oil Co. v. Indiana, 177 U.S. 190, 210 (1900). Brumark Corp. v. State, 924 P.2d 296 (Okla. App. 1996); Fransen v. Conoco, Inc., 64 F.3d 1481 (10th Cir. 1995), cert. denied, 516 U.S. 1166 (1996), decl. to extend, Watts v. Atlantic Richfield Co., 115 F.3d. 785* (10th Cir.), *reh'g and suggestion for reh'g on banc denied,* (1997);

Adkins v. Board of Oil, Gas & Mining, 926 P.2d 880 (Utah 1996) (Originally, the correlative right protected by the Oil and Gas Act was nothing more than the opportunity to produce a just and equitable share of oil and gas without waste).

(n4)Footnote 338. *Mid-America Term., Inc. v. Owensboro River Sand & Gravel Co., 532 S.W.2d 437 (Ky. 1975).*

(n5)Footnote 339. *Chartiers Block Coal Co. v. Mellon, 25 A. 597 (Pa. 1893).*

(n6)Footnote 340. *Pyramid Coal Corp. v. Pratt, 99 N.E.2d 427 (Ind. 1951);* Annotation, *Surface Owner's Right of Access Through Solid Mineral Seam or Vein Conveyed to Another or Through Space Left by Removal to Reach Underlying Strata, Water, Oil, 25 A.L.R.2d 1250 (1952).*

(n7)Footnote 341. *Richardson v. Citizens Gas & Coke Util., 422 N.E.2d 704 (Ind. App. 1981)* (requiring sufficient coal to remain around well to meet federal regulations).

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CHAPTER 48 MINES AND MINERALS
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§ 48.21 Coalbed Methane.

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Methane in coal seams may bring a danger of explosion to miners, requiring venting for protection, or the methane may itself be a developable source of natural gas. n342 Two questions arise. The first concerns ownership. If gas rights are held in separate ownership from coal, who owns the coalbed methane? The second question centers on how to reconcile the needs of two developers.

Not many jurisdictions have ruled on the first question, namely who owns the methane. Those who have ruled favor the coal estate as owner. n343 In order to facilitate development pending resolution in other jurisdictions, Congress in the Energy Policy Act of 1992 provided for development in escrow. n344 The second question will most likely be answered by employing the correlative rights concept or through legislative responses. n345

COMPUTER-ASSISTED RESEARCH

LEXIS: coalbed w/1 methane w/30 separate! w/5 own!

FOOTNOTES:
(n1)Footnote 342. *See Vines v. McKenzie Methane Corp., 619 So. 2d 1305 (Ala. 1993).*

(n2)Footnote 343. *United States Steel Corp. v. Hoge, 468 A.2d 1380 (Pa. 1983)* (owned by coal estate); *Vines v. McKenzie Methane Corp., 619 So. 2d 1305 (Ala. 1993)* (owned by owner of coal and other minerals); Rayburn v. U.S.X. Corp., No. 85-6-2261-w (July 28, 1987) (N.D. Ala), *aff'd, 844 F.2d 796 (11th Cir. 1988)* (not part of gas estate). *But see NCNB Texas Nat'l Bank v. West, 631 So. 2d 212 (Ala. 1994)* (methane that migrates from coal seam belongs to owner of gas). Lee Davidson, *Oil and Gas Law: Ownership of Coalbed Methane Gas, 33 Washburn L.J. 911 (1994);* Jeff L. Lewin, *Coalbed Methane: Recent Court Decisions Leave Ownership "Up in the Air," But New Federal and State Legislation Should Facilitate Production*, 96 W. Wa. L. Rev. 631 (1994).

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673 (1998); Katina L. Francis, *Mining Law -- Ownership of Coalbed Methane -- A Judicial Step Toward Efficient CBM and Coal Development. Southern Ute Tribe v. Amoco Production Company, 119 F.3d 816 (10th Cir. 1997), 33 Land & Water L. Rev. 469 (1998);* Misha Ylette Mullins, *Alabama Oil and Gas Law: Ownership or Nonownership After NCNB?, 48 Ala. L. Rev. 1065 (1997); Carbon County v. Union Reserve Coal Co., 898 P.2d 680 (Mont. 1995)* (ownership to holder of coal lease); *Amoco Prod. Co. v. Southern Ute Indian Tribe, 526 U.S. 865 (1999)* (The term "coal," as used in Coal Lands Acts of 1909 *(30 U.S.C. § 81)* and 1910 *(30 U.S.C. §§ 83*-85), does not encompass coalbed methane gas); *In re Hillsborough Holdings Corp., 207 B.R. 299 (Bankr. M.D. Fla. 1997)* (applying Alabama law, location of coalbed methane gas at time of capture determined ownership -- here owned by coal owner, not gas right owner); *Mallon Oil Co. v. Bowen/Edwards Assoc., Inc., 965 P.2d 105 (Colo. 1998)* (where Tribe retained right to explore for coal and discovered large coalbed methane gas deposit; it was not deemed a trespass to oil and gas holder's right to explore when the knowledge of coalbed methane gas was acquired incidentally by virtue of the coal exploration).

(n3)Footnote 344. Ownership of coalbed methane, *42 U.S.C. § 13368* (1998).

(n4)Footnote 345. *42 U.S.C. § 13368* (1998). The federal statute also provides for unitization and other operational regulations unless states pass their own programs.

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V. Bibliography.

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Annotation, *What Is "Mine" Under Federal Mine Safety and Health Act of 1977, 167 A.L.R. Fed. 293 (2001).*

Annotation, *Who Is "Operator" of Coal Mine Within the Meaning of the Federal Coal Mine Safety and Health Act (30 U.S.C.S. § 802(d)), 54 A.L.R. Fed. 792.*

Annotation, *Clay, Sand or Gravel as "Minerals" Within Deed, Lease, or License, 95 A.L.R.2d 843 (1964).*

Annotation, *What Is Included Within Term "Mine" as Used in Written Instrument, 92 A.L.R.2d 868 (1963).*

Annotation, *What Is "Mine" Under Federal Mine Safety and Health Act of 1977, 63 A.L.R. Fed. 415 (1983).*

Annotation, *Tailing as Real or Personal Property, 75 A.L.R.4th 965 (1990).*

Annotation, *Basis of Computation of Cotenant's Accountability for Minerals and Timber Removed From the Property, 5 A.L.R.2d 1368 (1949).*

Annotation, *Tenant's Death as Affecting Rights and Lease Given by Him, 14 A.L.R.4th 1054 (1982).*

Annotation, *Rights of Tenant for Life or for Years and Remainderman Inter Se in Royalties or Rents Under Oil, Gas, Coal, or other Mineral Lease, 18 A.L.R.2d 98 (1951).*

Annotation, *Grant, Reservation or Exception as Creating Separate and Independent Legal Estate in Solid Minerals or as Passing Only Incorporeal Privilege or License, 66 A.L.R.2d 978 (1959).*

Annotation, *Solid Mineral Royalty as Real or Personal Property, 68 A.L.R.2d 728 (1959).*

Annotation, *Validity and Construction of Statutes Providing for Reversion of Mineral Estates for Abandonment or Nonuse, 16 A.L.R.4th 1029 (1982).*

Annotation, *Right of Mineral Lessee* to Deposit Topsoil, Waste Materials and the Like Upon Lessor's Additional Land not Mined, *26 A.L.R.2d 1453 (1952).*

Annotation, *Meaning of Term "Surface" as Employed in Conveyance or Devise*, 31 A.L.R. 1530 (1924).

Annotation, *Liability of Miner Operator for Damage to Surface Structure by Removal of Support, 32 A.L.R.2d 1309 (1953).*

Annotation, *Validity and Construction of Statutes Regulating Strip Mining, 86 A.L.R.3d 27 (1978).*

Annotation, *Grant, Reservation, or Lease of Minerals and Mining Rights as Including, Without Expressly Providing, the Right to Remove the Minerals by Surface Mining, 70 A.L.R.3d 383 (1976).*

Annotation, *Relative Rights as Between Municipality and Abutting Landowners to Minerals, Oil & Gas Underlying Streets, Alleys, or Parks, 62 A.L.R.2d 1311 (1958).*

Annotation, *Deed to Railroad Company as Conveying Fee or Easement*, 132 A.L.R. 142 (1941).

Annotation, *Acquisition of Title to Mines or Minerals By Adverse Possession, 35 A.L.R.2d 124 (1954).*

Annotation, *Applicability of Tax Redemption Statutes to Separate Mineral Estates, 56 A.L.R.2d 621 (1957).*

Annotation, *Validity and Construction of Statutes Providing for Reversion of Mineral Estates for Abandonment or Nonuse, 16 A.L.R.4th 1029 (1982).*

Annotation, *Right of Lessee to Minerals Extracted During the Lease but Remaining on the Premises After its Termination, 51 A.L.R.2d 1121 (1957).*

Annotation, *What Constitutes "Common Varieties" Within Meaning of Federal Statute Providing that No Deposit of Common Varieties of Sand, Stone, Gravel, Pumice, or Cinders Shall be Deemed 'Valuable Mineral Deposit,' 38 A.L.R. Fed. 456 (1976).*

Annotation, *Mining Grubstake Contracts, 70 A.L.R.2d 915 (1960).*

Annotation, *Surface Owner's Right of Access Through Solid Mineral Seam or Vein Conveyed to Another or Through Space Left by Removal to Reach Underlying Strata, Water, Oil, 25 A.L.R.2d 1250 (1952).*

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Supp. To CHAPTER 48 MINES AND MINERALS

6-48 Thompson on Real Property, Thomas Editions Scope

Scope

I. Basic Ownership Concepts and Protections of Rights.

Thompson on Real Property, Thomas Editions

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Supp. To CHAPTER 48 MINES AND MINERALS

6-48 Thompson on Real Property, Thomas Editions Supp. to § 48.02

Supp. to § 48.02 Definition of "Mineral".

[Go To Main]

Add:

Florman v. MEBCO Ltd. P'ship, 207 S.W.3d 593 (Ky. App. 2006) (clay and limestone are not minerals, regardless of their value).

Carrier v. Salt Lake County, 2004 UT 98 (Utah 2004) (according to county zoning ordinances, gravel was not a mineral, and therefore gravel pit could not expand).

In re Pilgrim's Pride Corp., 421 B.R. 231, 242 (Bankr. N.D. Tex. 2009)

§ 48.02(a) Interpreting Private Conveyances. [Go To Main]

Add:

Caballo Coal Co. v. Fid. Exploration & Prod. Co., 84 P.3d 311 (Wyo. 2004) (dispute over whether deed that granted "all materials contained in or associated" with coal included grantor's interest in Coalbed Methane).

Add:

Bixler v. Oro Mgmt., L.L.C., 2004 WY 29, 86 P.3d 843 (Wyo. 2004) (district court found that agreement was ambiguous regarding what was intended by a "net mineral interest," but appellate court disagreed).

Add:

L. Michele McCain and Bernard H. Booth, IV, "Lignite Coal: A 'Mineral' under Mississippi Law," *28 Miss. C. L. Rev. 255, 259 (2009).*

§ 48.02(a)(1) Ejusdem Generis

Add:

L. Michele McCain and Bernard H. Booth, IV, "Lignite Coal: A 'Mineral' under Mississippi Law," *28 Miss. C. L. Rev. 255, 260 (2009).*

Add:

L. Michele McCain and Bernard H. Booth, IV, "Lignite Coal: A 'Mineral' under Mississippi Law," *28 Miss. C. L. Rev. 255, 260 (2009).*

Add:

James L. Ryan, *Sand Wars: Mineral Reservation Policies Lead the Supreme Court to Determine Whether Sand Is a Valuable Mineral in the Nevada Desert, 37 Loy. U. Chi. L.J. 213 (2005)* (discussing how the Stock-Raising Homestead Act of 1916 (SRHA) and the Pittman Underground Water Act of 1919 adopted a bifurcated approach to land patents and how the government issued a patent for surface lands but retained mineral rights); *Kinney v. Keith, 128 P.3d 297 (Colo. App. 2005)* (discussing that generally a mineral estate did not include sand and gravel).

Add:

Cent. Natural Res., Inc. v. Davis Operating Co., 201 P.3d 680 (Kan. 2009)

§ 48.02(a)(2) Parol Evidence: Circumstances of Transaction.

Add:

First American Kickapoo operations v. *Multimedia, INC., 412 F.3d 1166 (2005)* ; *Kinney v. Keith, 128 P.3d 297 (Colo. App. 2005)* .

Add:

In re Excel Laminates, Inc., (2005); *New West Materials v. Interior Bd. of Land Appeals, 398 F. Supp. 2d 438 (2005)* .

Add:

Bixler v. Oro Mgmt., L.L.C., 86 P.3d 843 (Wyo. 2004) (district court erred when it relied upon parole evidence that directly contradicted unambiguous deed).

Ray v. Edwards, 2010 U.S. Dist. LEXIS 11834 (Okla. 2010) (court cannot look outside the four corners of the document when the contract language clearly and unambiguously expresses the mineral interest); *Cent. Natural Res., Inc. v. Davis Operating Co., 201 P.3d 680 (Kan. 2009)* .

§ 48.02(a)(3) Parol Evidence: Community Knowledge.

Add:

Griffis v. Anadarko E&P Co. LP, 2009 U.S. Dist. LEXIS 75124 (Ark. 2009) (applying Strohacker, the court determined the mineral interest lease contained rights to the oil and natural gas); *Robertson v. Union Pac. R.R. Co., 2009 U.S. Dist. LEXIS 106449 (Ark. 2009)* (applying Strohacker, the court determined that summary judgment was not appropriate because there was a genuine issue of material fact concerning the meaning of "mineral interests" in the county when the deed was first created).

Add:

Am. Land Holdings of Ind., LLC v. Jobe, 655 F. Supp. 2d 882 (S.D. Ind. 2009) (holding that although the deed said "all coal" could be mined, it did not allow for surface mining for the coal since surface mining was unknown to the county at the time the deed was drafted and consequently there would not have been the requisite intent for surface mining to occur); *Cimarron Oil Corp. v. Howard Energy Corp., 909 N.E.2d 1115 (Ind. 2009)* (an interest to mine "gas" did not include coal bed methane gas because at the time of conveyance it was not a common practice of the area).

Add:

Cent. Natural Res., Inc. v. Davis Operating Co., 201 P.3d 680 (Kan. 2009) (understood at time deed was created that coal and methane gas were two separate minerals because one was a gas and one was a solid; consequently, only the coal was deeded, and not the gas).

Add:

Coleman v. Regions Bank, 364 Ark. 59, 216 S.W.3d 569 (Ark. 2005) .

§ 48.02(a)(4) Intrinsic Value.

Add:

James L. Ryan, *Sand Wars: Mineral Reservation Policies Lead the Supreme Court to Determine Whether Sand Is a Valuable Mineral in the Nevada Desert, 37 Loy. U. Chi. L.J. 213 (2005); New West Materials v. Interior Bd. of Land Appeals, 398 F. Supp. 2d 438 (2005)* ; *Home on the Range v. AT&T, 386 F. Supp. 2d 999 (2005)* ; *S. Utah Wilderness Alliance v. Bureau of Land Management, 425 F.3d 735 (2005)* ; *Hash v. United States, 403 F.3d 1308 (2005)* ; *Beres v. United States, 64 Fed. Cl. 403 (2005)* ; John Vaterlaus, Note, *Stuck Between A Rock and a Hard Place: The United States Supreme Court Misapplies Statutory Construction Precedent in* Bedrock Ltd. v. United, *38 Creighton L. Rev. 1263 (2005);* Ben Clark, Note, Bedroc Ltd. v. United States, *Sand and Gravel, Changing Value in Changing Times, 9 Great Plains Nat. Resources J. 78 (2005);* Albert C. Lin, *Erosive Interpretation of Environmental Law in the Supreme Court's 2003-04 Term,* 42 Hous. L. Rev. 565 (2005); *Zurich Am. Ins. Co. v. A.B.M. Indus. Inc., 397 F.3d 158 (2d Cir. 2005)* .

Hart v. Craig, 216 P.3d 197 (Mont. 2009) (to be a mineral, it must have special value); *In re Pilgrim's Pride Corp., 421 B.R. 231, 242 (Tex. 2009)* ("water is a natural inorganic substance with a definite chemical composition. Water has value--as evidenced by the price charged for bottled water." Thus water meets the definition of 'mineral'); Owen L. Anderson, "Geologic CO[2] Sequestration: Who Owns The Pore Space?" *9 Wyo. L. Rev. 97 (2009).*

Add:

Kinney v. Keith, 128 P.3d 297 (Colo. App. 2005) . *Bed Roc Ltd., L.L.C v. United States, 124 S. Ct. 1587 (2004)* (sand and gravel in Nevada were essentially worthless and not considered valuable minerals subject to a statutory reservation).

Hart v. Craig, 216 P.3d 197 (Mont. 2009) (sandstone is not rare or exceptional simply because it can be sold commercially).

§ 48.02(a)(5) Ordinary and Natural Meaning.

Add:

Kinney v. Keith, 128 P.3d 297 (Colo. App. 2005) .

Add:

Hart v. Craig, 216 P.3d 197 (Mont. 2009) (using the ordinary and natural meaning test to determine sandstone was not a mineral); L. Michele McCain and Bernard H. Booth, IV, "Lignite Coal: A 'Mineral' under Mississippi Law," *28 Miss. C. L. Rev. 255, 259 (2009)* (ordinary and natural meaning has been used to determine the meaning of "other minerals").

Add:

In re Pilgrim's Pride Corp., 421 B.R. 231, 242 (Tex. 2009)

Add:

Bed Roc Ltd., LLC v. United States, 124 S. Ct. 1587 (2004) (sand and gravel in Nevada were essentially worthless and not considered valuable minerals subject to a statutory reservation, reversing the lower court decision).

Add:

BLACK'S LAW DICTIONARY 1084 (9th ed. 2009) (defines "mineral" as "any natural inorganic matter that has a definite chemical composition and specific physical properties that give it value."); *Rando v. Anco Insulations Inc., 16 So. 3d 1065 (La. 2009)* (evaluating an educational definition of mineral that states a mineral is "an element or chemical compound that is normally crystalline and that has been formed as a result of geological processes"); L. Michele McCain and Bernard H. Booth, IV, "Lignite Coal: A 'Mineral' under Mississippi Law," *28 Miss. C. L. Rev. 255, 260 (2009)* (defining mineral generally as "a naturally occurring inorganic element or compound having an orderly internal structure and characteristic chemical composition, crystal form, and physical properties").

Add:

Cent. Natural Res., Inc. v. Davis Operating Co., 201 P.3d 680 (Kan. 2009) (court analyzed the use and understanding of two minerals within the mining industry to determine the meaning of the mineral conveyance); but see *In re Pilgrim's Pride Corp., 421 B.R. 231, 242 (Tex. 2009)* (since water is a natural inorganic substance with a definite chemical composition and has value "as evidenced by the price charged for bottled water" it is considered a mineral).

§ 48.02(a)(5) Ordinary and Natural Meaning

Add:

New West Materials v. Interior Bd. of Land Appeals, 398 F. Supp. 2d 438 (2005) .

Add:

Grable & Sons Metal Prods. v. Darue Eng'g and Mfg., 125 S. Ct. 2363 (2005) ; *New West Materials v. Interior Bd. of Land Appeals, 398 F. Supp. 2d 438 (2005)* ; *Kinney v. Keith, 128 P.3d 297 (Colo. App. 2005)* ; John Vaterlaus, Note, *Stuck Between A Rock and a Hard Place: The United States Supreme Court Misapplies Statutory Construction Precedent in* Bedrock Ltd. V. United, *38 Creighton L. Rev. 1263 (2005);* Albert C. Lin, *Erosive Interpretation of Environmental Law in the Supreme Court's 2003-04 Term*, 42 Hous. L. Rev. 565 (2005); James L. Ryan, *Sand Wars: Mineral Reservation Policies Lead the Supreme Court to Determine Whether Sand Is a Valuable Mineral in the Nevada Desert, 37 Loy. U. Chi. L.J. 213 (2005).*

Add:

New West Materials v. Interior Bd. of Land Appeals, 398 F. Supp. 2d 438 (2005) ; *Kinney v. Keith, 128 P.3d 297 (Colo. App. 2005)* .

Carrier v. Salt Lake County, 2004 UT 98 (Utah 2004) (according to county zoning ordinances, gravel was not a mineral, and therefore gravel pit could not expand).

Kinney v. Keith, 128 P.3d 297 (Colo. App. 2005) ; John Vaterlaus, Note, *Stuck Between A Rock and a Hard Place: The United States Supreme Court Misapplies Statutory Construction Precedent in* Bedrock Ltd. V. United, *38 Creighton L. Rev. 1263 (2005);* Katherine Daniels Ryan, Brief, *The Supreme Court Modifies Homestead Claimants' Property Rights* in BedRoc Ltd. v. United States, *32 Ecology L.Q. 683 (2005);* Ben Clark, Note, Bedroc Ltd. v. United States, *Sand and Gravel, Changing Value in Changing Times, 9 Great Plains Nat. Resources J. 78 (2005);* Albert C. Lin, *Erosive Interpretation of Environmental Law in the Supreme Court's 2003-04 Term*, 42 Hous. L. Rev. 565 (2005); James L. Ryan, *Sand Wars: Mineral Reservation Policies Lead the Supreme Court to Determine Whether Sand Is a Valuable Mineral in the Nevada Desert, 37 Loy. U. Chi. L.J. 213 (2005).*

Add:

James L. Ryan, *Sand Wars: Mineral Reservation Policies Lead the Supreme Court to Determine Whether Sand Is a Valuable Mineral in the Nevada Desert, 37 Loy. U. Chi. L.J. 213 (2005).*

§ 48.02(a)(6) Manner of Enjoyment.

Add:

Caballo Coal Co. v. Fid. Exploration & Prod. Co., 84 P.3d 311 (Wyo. 2004) (in determining meaning of language within the deed, the court focuses on the general intent of the parties, concentrating on purposes of the grant in terms of respective manner of enjoyment of surface and mineral estates); *Hickman v. Groves, 71 P.3d 256, 258 (Wyo. 2003)* (dispute over whether seller had reserved right to CBM, court stated that manner of enjoyment should also be considered when reservations of rights are involved).

Minard Run Oil Co. v. United States Forest Serv., 2009 U.S. Dist. LEXIS 116520 (Pa. 2009) (reasoning that "the mineral estate owner must exercise his right of occupancy with due regard for the surface owner and, as such, may only occupy so much of the surface estate as reasonably necessary to remove his minerals and must take steps to mitigate and minimize damage to the surface estate"); *O'Brien Oil, L.L.C. v. Norman, 2010 OK CIV APP 23 (Okla. 2010)* (Oklahoma has the "Surfaces Damages Act" which requires compensation to surface owners for damages caused by mining of the mineral interests); *Belden & Blake Corp. v. Dep't of Conservation & Natural Res., 969 A.2d 528 (Pa. 2009)* (holding that a mineral estate owner has an absolute right to access and extract the minerals without consent of the surface estate owner and that the surface owner "cannot unilaterally impose extra conditions on the subsurface owner.").

COMPUTER-ASSISTED RESEARCH: Change "employment" to "enjoyment"

Add:

New West Materials v. Interior Bd. of Land Appeals, 398 F. Supp. 2d 438 (2005) .

§ 48.02(a)(7) Surface Destruction.

Add:

Calvert Joint Venture #140 v. Snider, 816 A.2d 854 (Md. 2003) (court held that grantors couldn't use property's surface to prospect for minerals because any implied reservation to access the surface would be unreasonable considering that when the grantors made the agreement they were aware of grantee's plans to use the land for a subdivision, and because the grantors had access to the minerals through adjacent property).

Boswell Energy Corp. v. Arrowhead Homes, Inc., 2004 OK Civ. App. 83 (Okla. App. 2004) (the intent of the grantor and grantee of the deeds was that the landowner's predecessor conveyed only the surface rights and the landowner's predecessor reserved the mineral rights with express words).

L. Michele McCain and Bernard H. Booth, IV, "Lignite Coal: A 'Mineral' under Mississippi Law," *28 Miss. C. L. Rev. 255, 260 (2009) (2009)* (unless the contrary intention is affirmatively and fairly expressed a grant or reservation of "minerals" or "mineral rights" should not be construed to include a substance that must be removed by methods that will, in effect, consume or deplete the surface estate); *Desoto Gathering Co., LLC v. Smallwood, 2010 Ark. 5, 6 (Ark. 2010)* (the owner of a mineral estate has only the right to reasonable use of the surface for developing minerals).

Add:

Calvert Joint Venture #140 v. Snider, 816 A.2d 854 (Md. 2003) (court held that grantors couldn't use property's surface to prospect for minerals because any implied reservation to access the surface would be unreasonable considering that when the grantors made the agreement they were aware of grantee's plans to use the land for a subdivision, and because the grantors had access to the minerals through adjacent property).

New West Materials v. Interior Bd. of Land Appeals, 398 F. Supp. 2d 438 (2005) ; *Kinney v. Keith, 128 P.3d 297 (Colo. App. 2005)* .

Am. Land Holdings of Ind., LLC v. Jobe, 655 F. Supp. 2d 882 (S.D. Ind. 2009) (court reasoned that although the deed stated "all coal" could be mined from the property, it did not mean that surface mining could be used to mine the coal on the surface because the extent of the damage to the surface would be greater than intended by the parties).

Add:

Am. Land Holdings of Ind., LLC v. Jobe, 655 F. Supp. 2d 882 (S.D. Ind. 2009) (the intent of the deed was to limit the amount of surface damage; additionally, deep mining was the only type of mining used in the county at the time of drafting and that implies intent for deep mining only).

§ 48.02(a)(8) Texas Experience

Add:

L. Michele McCain and Bernard H. Booth, IV, "Lignite Coal: A 'Mineral' under Mississippi Law," *28 Miss. C. L. Rev. 255, 260 (2009).*

Add:

L. Michele McCain and Bernard H. Booth, IV, "Lignite Coal: A 'Mineral' under Mississippi Law," *28 Miss. C. L. Rev. 255, 260 (2009).*

§ 48.02(b) Interpreting Government Conveyances. [Go To Main]

Add:

Osage Nation v. State ex rel. Okla. Tax Comm'n, 597 F. Supp. 2d 1250 (N.D. Okla. 2009) (court looked to congressional intent at the time the act was passed to determine that the surface estate was terminated at time of reservation).

Add:

Energy Mgmt. Servs. v. Shaw, 2005 UT App 90 . But see Bed Roc Ltd., LLC v. United States, 124 S.Ct. 1587 (2004) (reservation construed against the government because sand and gravel weren't considered valuable minerals).

Add:

SunriseValley, LLC v. Kempthorne, 528 F.3d 1251 (10th Cir. 2008) (sand, rock and gravel included in minerals reserved to federal government from a patent to a private owner).

Add:

John Vaterlaus, Note, *Stuck Between A Rock and a Hard Place: The United States Supreme Court Misapplies Statutory Construction Precedent in* Bedrock Ltd. V. United, *38 Creighton L. Rev. 1263 (2005);* James L. Ryan, *Sand Wars: Mineral Reservation Policies Lead the Supreme Court to Determine Whether Sand Is a Valuable Mineral in the Nevada Desert, 37 Loy. U. Chi. L.J. 213 (2005).*

Add:

N.M. ex rel. Richardson v. BLM, 565 F.3d 683 (10th Cir. 2009) .

Add:

New West Materials v. Interior Bd. of Land Appeals, 398 F. Supp. 2d 438 (2005) ; John Vaterlaus, Note, *Stuck Between A Rock and a Hard Place: The United States Supreme Court Misapplies Statutory Construction Precedent in* Bedrock Ltd. V. United, *38 Creighton L. Rev. 1263 (2005). But see United States v. Hess, 348 F.3d 1237 (10th Cir. 2003)* (where an exchange patent reserved all minerals to the U.S. for the benefit of an Indian tribe, the reservation didn't include gravel based on the extent of the gravel and the intent of the parties).

Jicarilla Apache Nation v. United States, 88 Fed. Cl. 1 (Fed. Cl. 2009) (memo from a field solicitor from the US Department of Interior indicates that gravel and sand should be included in the mineral estate of the native American tribe).

§ 48.02(c) Distinction Between Lease and Deed [Go To Main]

Add:

L. Michele McCain and Bernard H. Booth, IV, "Lignite Coal: A 'Mineral' under Mississippi Law," *28 Miss. C. L. Rev. 255, 260 (2009)* (in Mississippi a lease with the words "all other minerals" did not contain the right to strip mine for lignite, but later held that in a deed with the language "all mineral rights" allowed for strip mining of lignite).

Add:

In re Excel Laminates, Inc., (2005).

§ 48.02(d) Taxation. [Go To Main]

Add:

Groome v. Donlin Corp., 908 N.E.2d 330 (Ind. Ct. App. 2009) (since the mineral interest is subject to taxation, the interest must be created by deed and must be duly recorded).

Add:

Matagorda County Appraisal Dist. v. Coastal Liquids Partners, L.P., 165 S.W.3d 329 (Tex. 2005) ; *Williams Prod. Co. v. Wyoming Dep't of Revenue, 2005 WY 28* ; Ricky Turner, Note, *Royalty Dethroned: Wyoming's Approach to Gathering Costs,* Cabot Oil & Gas Corp. v. Followwill, *5 Wyo. L. Rev. 665 (2005).*

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6-48 Thompson on Real Property, Thomas Editions Supp. to § 48.03

Supp. to § 48.03 Definition of Mine and Status of Mine Tailings

[Go To Main]

Add:

Fiore v. County of Allegheny, 2009 Pa. Dist. & Cnty. Dec. LEXIS 274 (Pa. 2009) (although the deed stated the grantee may "mine and remove all and any part of the coal, without being required to provide for the support of the overlying strata or surface, and without being liable for any injury to the same, or to anything thereon or therein" it did not allow for strip mining because it was not contemplated by the parties); *Am. Land Holdings of Ind., LLC v. Jobe, 2010 U.S. App. LEXIS 9271 (Ind. 2010)* .

Add:

Sec'y of Labor v. Nat'l Cement Co. of Cal., Inc., 573 F.3d 788 (D.C. Cir. 2009) (the Secretary of Labor interpreted the statutory definition under § 802(h)(1)(B) to include the main private roads leading to a mine as part of the mine, but not the trucks that drive on them); Kristin E. Hickman and Claire A. Hill, "Concepts, Categories, and Compliance in the Regulatory State," *94 Minn. L. Rev. 1151, 1182 (2010).*

Add:

See generally Monica Hobson Braun, "Rock of Ages: Why Kentucky's Use of the Abandonment Test in Deciding the Ownership of Mineral Refuse Is Inadequate," *97 Ky. L.J. 293 (2009).*

Add:

Thomas W. Merrill, "Accession and Original Ownership," 1 *J. of Legal Analysis* 459 (2009).

Add:

Griffis v. Anadarko E&P Co. LP, 2009 U.S. Dist. LEXIS 75124 (Ark. 2009) ; Thomas W. Merrill, "Accession and Original Ownership," 1 *J. of Legal Analysis* 459 (2009) (fugacious minerals such as oil, gas, and groundwater are prohibitively expensive to determine which minerals are prominently connected with which surface rights; this is because changes in pressure continually cause these minerals to shift around in underground cavities, where they cannot be directly observed).

Add:

K.K. DuVivier, "Animal, Vegetable, Mineral--Wind? The Severed Wind Power Rights Conundrum," *49 Washburn L.J. 69 (2009).*

Add:

Hogan v. United States, 407 F.3d 778 (6th Cir. 2005) ; *Proctor v. CNL Income Fund, IX, Ltd., 2005 Ohio 1223 (Ohio Ct. App. 2005)* .

Samson Res. Co. v. Abraxas Wamsutter LP, 117 Fed. Appx. 641 (10th Cir. 2004) (the court determined that liability for the gross product tax under a Wyoming statute attached when the mineral was extracted).

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Supp. to § 48.04 Ownership.

[Go To Main]

§ 48.04(a) Ownership of Minerals in Place. [Go To Main]

Add:

United States v. Fennell, 381 F. Supp. 2d 1300 (D. N.M. 2005) . *Rigsby v. Rigsby, 2004 Ark. LEXIS 129* (No. 03-318, Feb. 26, 2004) (court's division of property under the theory of parole evidence included mineral rights, since plaintiff wasn't able to prove those rights had been severed).

§ 48.04(b) Ownership of Produced Minerals. [Go To Main]

Add new footnote 98.1 at end of subsection:: n98.1

FOOTNOTES:
(n1)Footnote 98.1. *Carr v. Clark (In re Clark), 289 BR. 474 (Bank. M.D. Fla. 2003)* (accrued royalty interests in minerals severed from the land are considered personal property).

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Supp. To CHAPTER 48 MINES AND MINERALS

6-48 Thompson on Real Property, Thomas Editions Supp. to § 48.05

Supp. to § 48.05 Right of Parties to Develop, Produce or Lease Minerals.

[Go To Main]

§ 48.05(a) Concurrent Owners [Go To Main]

Add:

Johnson v. Envtl. & Pub. Prot. Cabinet, 289 S.W.3d 216 (Ky. 2009) (reasoning that a "cotenant can enter into a valid mineral lease without the consent of other cotenants, and the lessee may, as a new cotenant, mine and remove minerals from the subject property").

Add:

Mills v. Mills, 2009 Ky. App. Unpub. LEXIS 999 (Ky. 2009) ; *Drake v. Waco Oil & Gas Co., 678 S.E.2d 301 (W. Va. 2009)* (holding that a cotenant is entitled to a portion of royalty payments in proportion to his/her share of the property).

Add:

BoMar Oil & Gas, Inc. v. Loyd, 298 S.W.3d 832 (Tex. 2009)

§ 48.05(b)(2) "Open Mine" Doctrine

Add:

Majeski v. Estate of Majeski, 163 S.W.3d 102 (Tex. App. 2005) .

§ 48.05(b)(3) Allocation of Benefits.

Add:

But see Singleton v. Donalson, 117 S.W.3d 516 (Tex. App. 9th Dist. 2003) (holder of a life estate had a right to dispose of royalties and bonuses from the estate property and wasn't required to preserve the corpus of the estate for the remaindermen).

§ 48.05(c) Rights of Other Interest Holders. [Go To Main]

Add:

Saddle Mt. Minerals, L.L.C. v. Joshi, 152 Wash. 2d 242 (Wash. 2004) (landowners were entitled to utilize the surface soil in developing the site, provided they compensated the estate owners if they exported sand and gravel from the site).

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Supp. to § 48.06 Rights Against Trespass.

[Go To Main]

§ 48.06(a) Innocent Trespass. [Go To Main]

Add:

Dvorken Family L.P. v. Martin Marietta Materials, Inc., 2004 US Dist LEXIS 422 (No. SA-03-CA-0031, Jan. 6, 2004) (dispute over whether lessees' transport of off-site materials across the leased property constituted trespass); *Swepi, L.P. v. Camden Resources, Inc., 2004 Tex. App. LEXIS 3309* (No. 04-03-00067-CV, Apr. 14, 2004) (in dispute over instance of sub-surface trespass, court found that the rule of capture doesn't limit actions for trespass and conversion of oil and gas).

Desoto Gathering Co., LLC v. Smallwood, 2010 Ark. 5, 6 (Ark. 2010) (no trespass occurred because the mining company entered the land pursuant to a right-of-way and a partnership right to reasonably use the surface to extract the minerals).

Add:

Stitching Pensionfonds v. Qwest Communications International, Inc., 387 F. Supp. 2d 1130 (D. Colo. 2005) ; Kimberly D. Krawiec & Kathryn Zeiler, *Common-law Disclosure Duties and the Sin of Omission: Testing the Meta-Theories, 91 Va. L. Rev. 1795 (2005)* (discussing a duty to disclose information about mineral content when information is discovered while trespassing).

§ 48.06(b) Willful Trespass. [Go To Main]

Add:

Villarreal v. Grant Geophysical, Inc., 2004 Tex. App. LEXIS 2559 (No. 04-03-00541-CV, Mar. 24, 2004) (in geophysical trespass case, since trespass didn't occur, mineral company didn't wrongfully secure benefit).

Caudill v. Ritchie, 2009 U.S. Dist. LEXIS 37452 (Ky. 2009) (in Kentucky, an owner of surface rights is able to maintain an action for trespass against an owner of mineral or sub-surface rights who has exercised those rights "arbitrarily, maliciously, oppressively, or wantonly"); *Zeiler Farms, Inc. v. Anadarko E & P Co., LP, 2009 U.S. Dist. LEXIS 26886 (Colo. 2009)* (under accommodation doctrine of Colorado, if using the surface is not reasonable and necessary to the development of the mineral interest, the conduct is a trespass).

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Supp. To CHAPTER 48 MINES AND MINERALS

6-48 Thompson on Real Property, Thomas Editions Supp. to § 48.07

Supp. to § 48.07 Severance of Surface and Minerals.

[Go To Main]

Add:

Hornsby v. Slade, 854 So. 2d 441, 445 (La. App. 1st Cir. 2003) (court found that sand and gravel were known mineral deposits that were inseparable parts of the land unless segregated as mineral rights, and thus they should have been considered in the sale price); *Harrison v. County of Stevens, 61 P.3d 1202* (Wash. App. Div. 3, 2003) (court held that because the mineral rights had been severed from the surface rights, the mineral rights owner couldn't affect passing of title or subdivision of the surface estate).

Swaim v. Stephens Prod. Co., 2004 Ark. LEXIS 588 (Ark. 2004) (according to the plain language of the Arkansas code, title vested in the riparian landowners by virtue of the land emerging by accretion, and thus the landowners owned the unsevered surface and mineral interests).

[Go To Main]

New West Materials v. Interior Bd. of Land Appeals, 398 F. Supp. 2d 438 (2005) ; *Abraham v. Sklar Exploration Co., 408 F. Supp. 2d 244 (S.D. Miss. 2005)* ; *Kinney v. Keith, 128 P.3d 297 (Colo. App. 2005)* ; Noblin v. Harbor Hills Dev., L.P., *Et Al* (Fla. Dist. St. 2005) (recognizing in this State that mineral rights may be severed from the surface rights and conveyed separately, and that two estates are thus created in the land); *Wedel v. American Electric Power Service Corp., 839 N.E.2d 1236 (Ind. Ct. App. 2005)* (discussing a situation in which a mineral estate is leased to a lessee who plans to severe the minerals and pay the lessor compensation); *Garza v. Prolithic Energy Co., L.P., 195 S.W.3d 137 (Tex. App. 2006)* (defining the essential attributes of a severed mineral estate as: (1) the right to develop (the right of ingress and egress); (2) the right to lease (the executive right); (3) the right to receive bonus payments; (4) the right to receive delay rentals; and (5) the right to receive royalty payments); Angela Neese, Comment, The Battle Between the Colorado Oil and Gas Conservation Commission and Local Governments: A Call for a New and Comprehensive Approach, *76 U. Colo. L. Rev. 561 (2005) ;*

John Vaterlaus, Note, *Stuck Between A Rock and a Hard Place: The United States Supreme Court Misapplies Statutory Construction Precedent in* Bedrock Ltd. V. United, *38 Creighton L. Rev. 1263 (2005);* James L. Ryan, *Sand Wars: Mineral Reservation Policies Lead the Supreme Court to Determine Whether Sand Is a Valuable Mineral in the Nevada Desert, 37 Loy. U. Chi. L.J. 213 (2005);* Christopher M. Alspach, *Adverse Possession of Severed Mineral Interests and the Need for Statutory Guidance, 37 Tex. Tech L. Rev. 1073 (2005)* (discussing the courts approach that after the mineral and surface estates have been severed, an adverse possessor of the surface estate cannot accomplish adverse possession of the mineral estate unless he takes actual possession).

Add:

Cent. Natural Res., Inc. v. Davis Operating Co., 201 P.3d 680 (Kan. 2009) ; *Pounds v. Jurgens, 296 S.W.3d 100 (Tex. 2009)* ; *Dick Props., LLC v. Paul H. Bowman Trust, 221 P.3d 618, 621 (Kan. 2010)* (after severance, two separate estates exist, each held by separate and distinct titles in severalty; consequently, the estate is then a freehold estate, the inheritance of which is independent of the other).

Add:

Veterans Land Bd. v. Lesley, 281 S.W.3d 602 (Tex. 2009) (mineral estate owner may use portions of the surface for drilling, storing, pumping, and transporting incidental to the full enjoyment of the mineral interest); *Dick Props., LLC v. Paul H. Bowman Trust, 221 P.3d 618, 621 (Kan. 2010)* (owner of the mineral estate has the right to explore, develop and produce oil and gas deposits and can also transfer these rights to another party by executing an oil and gas lease); *XTO Energy, Inc. v. Schmidt, 2009 U.S. Dist. LEXIS 105530 (2009)* ; *Desoto Gathering Co., LLC v. Smallwood, 2010 Ark. 5 (Ark. 2010)* .

§ 48.07(a) Nature of the Mineral Estate [Go To Main]

Add:

Veterans Land Bd. v. Lesley, 281 S.W.3d 602 (Tex. 2009) (mineral estate owner may use portions of the surface for drilling, storing, pumping, and transporting incidental to the full enjoyment of the mineral interest); *Dick Props., LLC v. Paul H. Bowman Trust, 221 P.3d 618, 621 (Kan. 2010)* (owner of the mineral estate has the right to explore, develop and produce oil and gas deposits and can also transfer these rights to another party by executing an oil and gas lease); *XTO Energy, Inc. v. Schmidt, 2009 U.S. Dist. LEXIS 105530 (2009)* ; *Desoto Gathering Co., LLC v. Smallwood, 2010 Ark. 5 (Ark. 2010)* .

§ 48.07(b) Nature of a Royalty. [Go To Main]

Add:

Maralex Resources Inc. v. Gilbreath, 76 P.3d 626 (N.M. 2003) (shut-in royalty clause covers situations when lessee stops producing because of market; the lessee can hold the lease by paying a pre-determined amount as substitute for royalty).

Swaim v. Stephens Prod. Co., 2004 Ark. LEXIS 588 (Ark. 2004) (landowner's royalty interests granted under a lease were applicable to accreted land).

Abraham v. Sklar Exploration Co., 408 F. Supp. 2d 244 (S.D. Miss. 2005) ; *Noblin v. Harbor Hills Dev., L.P., Et Al, 896 So. 2d 781 (Fla. Dist. St. 2005)* ; *EOG Res. Inc. v. Turner, 908 So. 2d 848 (Miss. Ct. App. 2005)* (discussing the well-established rights of the owner of the mineral estate to use the surface of the land); *Tex. Genco L.P. v. Valence Operating Co., 187 S.W.3d 118 (Tex. Ct. App. 2006)* (discussing how the accommodation doctrine preserves the mineral owner's absolute right to use the surface, but if there is only one means of surface use by which to produce the minerals, then the mineral owner has the right to pursue that use, regardless of surface damage); *Trenolone v. Cook Exploration Co., 166 S.W.3d 495 (Tex. Ct. App. 2005)* (discussing means to balance the rights of the surface owner and the mineral owner when there is an existing use by the surface owner which would otherwise be precluded).

Northup Props., Inc. v. Chesapeake Appalachia, L.L.C., 567 F.3d 767 (Ky. 2009) (there is a strong public policy against a lessee not developing a mineral interest for an unreasonable length of time simply for speculative purposes or because of lack of due diligence where the lessor's only revenue is from royalty payments on that interest); *In re Estate of Slaughter, 305 S.W.3d 804 (Tex. 2010)* (discussion and definitions of the terms "bonus," "royalty," and "rentals" in the mineral right context); *City of Alvin v. Zindle, 2009 Tex. App. LEXIS 9304, 6-7 (Tex. 2009)* (only a partial severance of the mineral estate occurs when the lessor reserves only a royalty interest in an oil, gas, and mineral lease); *Reichmann Petroleum Corp. v. Goen, 399 B.R. 463 (Tex. 2009)* (general discussion and application of a shut-in royalty clause to a mineral contract).

§ 48.07(c) The Special Case of Louisiana. [Go To Main]

Add:

Petro-Hunt, L.L.C. v. United States, 90 Fed. Cl. 51 (Fed. Cl. 2009) ; *Devon Energy Prod. Co., L.P. v. Am. Int'l Specialty Lines Ins. Co., 2009 U.S. Dist. LEXIS 38092 (Tex. 2009)* ; *La. R.S. 31:20* (the period of prescription on mineral servitudes begins to run on the date a servitude is created, and is interrupted only by "good faith operations for the discovery and production of minerals.").

Add new footnote 134.1: n134.1

FOOTNOTES:
(n2)Footnote 134.1. *Cent. Pines Land Co. v. United States, 61 Fed. Cl. 527 (Ct. Cl. 2004)* (the United States did not engage in any action that would constitute a taking of plaintiffs' mineral rights; rather, those rights reverted to the United States as surface owner by operation of Louisiana prescription law).

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Supp. To CHAPTER 48 MINES AND MINERALS

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Supp. to § 48.08 Relationship Between Surface and Mineral Owners.

[Go To Main]

§ 48.08(a) Rights of Mineral Owner to Use Surface. [Go To Main]

Add:

Dvorken Family L.P. v. Martin Marietta Materials, Inc., 2004 US Dist. LEXIS 422 (No. SA-03-CA-0031, Jan. 6, 2004) (dispute over whether lessees' transport of off-site materials across the leased property constituted trespass); *Burkett v. Amoco Prod. Co., 85 P.3d 576 (Colo. App. 2003)* (the question of what is reasonable and necessary can't be resolved until the site selection of potential well is made and reasonable alternatives are identified).

Ainbinder v. White Ash Land Ass'n, 363 F. Supp. 2d 762 (D. Pa. 2005) (mineral holders, who owned a separate mineral estate of the disputed land, did not need surface owner's consent to apply for a backfill and reclamation permit); *W. Atlas Int'l v. Randolph, 2005 Tex. App. LEXIS 2199 (Tex. App. 2005)* (as a matter of law, the mineral lessee had authority to enter the property; thus the seismic company's failure to seek permission before entering the land did not constitute a trespass); *Davis v. Devon Energy Prod. Co., L.P., 136 S.W.3d 419 (Tex. App. 2004)* (a permanent injunction was issued against the owners of land, who were interfering with the lessee's operations on the property). *But see Kysar v. Amoco Prod. Co., 379 F.3d 1150 (10th Cir. 2004)* (lessee was not empowered by virtue of the agreement to access a well by using portions of the back gate road that crossed the owners' land).

Zeiler Farms, Inc. v. Anadarko E & P Co., LP, 2009 U.S. Dist. LEXIS 26886 (Colo. 2009) ; *Greeley-Rothe LLC v. Anadarko E & P Co. LP, 2010 U.S. Dist. LEXIS 32253 (Colo. 2010)* (directional drilling of oil wells, rather than vertical drilling of oil wells, was required to meet the reasonably necessary requirement); *XTO Energy, Inc. v. Schmidt, 2009 U.S. Dist. LEXIS 105530 (2009)* (mineral interest owners may use surface for geophysical operations including seismographic surveys); *Pinnacle Gas Res., Inc. v. Diamond Cross Props., LLC, 201 P.3d 160 (Mont. 2009)* (surface owner does not have the power or right to prohibit the mineral holder from entering the property as long as the mineral holder's actions are necessary and reasonable).

Add:

But see Calvert Joint Venture #140 v. Snider, 816 A.2d 854 (Md. 2003) (court held that grantors couldn't use property's surface to prospect for minerals because any implied reservation to access the surface would be unreasonable considering that when the grantors made the agreement they were aware of grantee's plans to use the land for a subdivision, and because the grantors had access to the minerals through adjacent property).

Terrebonne Parish Sch. Bd. v. Castex Energy, Inc., 893 So. 2d 789 (La. 2005) (where a mineral lease granted the lessee the right to alter the surface in a reasonable manner and was silent regarding restoration, the statute only imposed a duty to restore the surface to its original condition where there was evidence of unreasonable or excessive use).

Desoto Gathering Co., LLC v. Smallwood, 2010 Ark. 5 (Ark. 2010)

Add:

Johnson v. Envtl. & Pub. Prot. Cabinet, 289 S.W.3d 216 (Ky. 2009) ; *Veterans Land Bd. v. Lesley, 281 S.W.3d 602 (Tex. 2009)* .

§ 48.08(b) Rights of Surface Owners [Go To Main]

Add:

New West Materials v. Interior Bd. of Land Appeals, 398 F. Supp. 2d 438 (2005) ; *Abraham v. Sklar Exploration Co., 408 F. Supp. 2d 244 (S.D. Miss. 2005)* ; *Kinney v. Keith, 128 P.3d 297 (Colo. App. 2005)* ; *EOG Res. Inc. v. Turner, 908 So. 2d 848 (Miss. Ct. App. 2005)* ; *Consolidation Coal Co. v. White, 875 A.2d 318 (Pa. Super Ct. 2005)* (discussing how under Pennsylvania law that it is the owner of the surface land who has the proprietary right to support of the surface, but the owner of the surface estate may by waiver, relinquish the right of subjacent support); *Tex. Genco L.P. v. Valence Operating Co., 187 S.W.3d 118 (Tex. Ct. App. 2006)* .

Pounds v. Jurgens, 296 S.W.3d 100 (Tex. 2009) ; *Veterans Land Bd. v. Lesley, 281 S.W.3d 602 (Tex. 2009)* : *Fiore v. County of Allegheny, 2009 Pa. Dist. & Cnty. Dec. LEXIS 274 (Pa. 2009)* ; *Desoto Gathering Co., LLC v. Smallwood, 2010 Ark. 5 (Ark. 2010)* (surface estate is depicted as the subservient estate that cannot reasonably interfere with the mineral estates interest in mineral extraction).

Add:

Broussard v. Hilcorp Energy Co., 998 So. 2d 946 (La. App. 2008) (action by landowners against mineral lessees for contamination of property allegedly resulting from negligent operation of the leases).

§ 48.08(b)(1) Subjacent Support.

Add:

Saddle Mt. Minerals, L.L.C. v. Joshi, 152 Wash. 2d 242 (Wash. 2004) (the estate owners could extract sand and gravel as long as it did not raise the issue of subjacent support).

Unified Gov't of Wyandotte County/Kansas City v. Inland Quarries, 2005 U.S. Dist. LEXIS 32503 (D. Kan. 2005) , Slip op. (D. Kan. 2005) (discussing an arbitration agreement that includes plaintiff's duty to maintain the road and defendant's exception to liability for damages or injunctive relief for vertical or lateral support); *Home on the Range v. AT&T, 386 F. Supp. 2d 999 (2005)* .

Hancock v. Island Creek Coal Co., 2009 U.S. Dist. LEXIS 30841 (Ky. 2009) ; *Ambrosia Land Invs., LLC v. Heritage Coal Co., LLC, 2009 U.S. Dist. LEXIS 48584 (Ill. 2009)* (there is an absolute right to subjacent support and a mining company will be strictly liable for failing to provide subjacent support, whether or not there was negligence involved, absent a release or waiver from the surface owner); LoValerie Mullins, "The Equity Illusion of Surface Ownership in Coalbed Methane Gas; The Rise of Mutual Simultaneous Rights in Mineral Law and The Resulting Need for Dispute Resolution in Split Estate Relations." *16 Mo. Envtl. L. & Pol'y Rev. 109, 144 (2009)* (the right of subjacent support imposes strict liability on mineral owners who damage surface lands by failing to support surface structures from under the ground).

§ 48.08(b)(2) Lateral Support

Add:

Home on the Range v. AT&T, 386 F. Supp. 2d 999 (2005) .

Randall Bezanson & Andrew Finkelman, "Trespassory Art," *43 U. Mich. J. L. Reform 245, 282 (2009)* (property owner may not mine or otherwise disturb the earth so as to cause adjacent land to subside).

§ 48.08(d) Adverse Possession by Surface Owner [Go To Main]

Add:

Gulley v. Davis, 2010 Tex. App. LEXIS 2710 (Tex. 2010) (possession of the surface estate that commences after a severance of the mineral estate is not sufficient to constitute adverse possession of the mineral estate, but when adverse possession commences before a severance of the mineral estate, the adverse possession includes both the surface and mineral estate).

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Supp. To CHAPTER 48 MINES AND MINERALS

6-48 Thompson on Real Property, Thomas Editions Supp. to § 48.09

Supp. to § 48.09 Right to Mine by Strip, Surface or Long Wall Methods.

[Go To Main]

Add:

Citizens Coal Council v. Norton, 330 F.3d 478 (D.C. Cir. 2003) (deals with the Secretary of the Interior's interpretation of the Surface Mining Control and Reclamation Act, which interpretation excluded subsidence from regulation); *Evaline Cmty. Ass'n v. Good, 2003 Wash. App. LEXIS 1847* (No. 28805-2-II, Aug. 20, 2003) (rock quarry operator's surface mining use vested in 1997, when his application was approved against later enacted county regulations, and the permit didn't violate the Surface Mining Act).

Am. Land Holdings of Ind., LLC v. Jobe, 2010 U.S. App. LEXIS 9271 (Ind. 2010) (strip mining destroys the surface, making it completely unusable by the owner of the surface unless and until it is restored; consequently, some courts create a presumption against interpreting a grant of mineral rights to convey a right to strip mine the grantor's land); *Fiore v. County of Allegheny, 2009 Pa. Dist. & Cnty. Dec. LEXIS 274 (Pa. 2009)* (four factors to consider in determining whether strip mining is appropriate: (1) the general language in the grant is broad enough to include strip mining, (2) there is no prohibition against strip mining, nor limitation to strip mining, (3) the owner clearly has the right to mine all the coal, together with a release of the right of support and all damages to the surface, and (4) the nature of the land is unimproved terrain); *Ky. S. Coal Corp. v. Ky. Energy, 2009 Ky. App. Unpub. LEXIS 1035 (Ky. 2009)* (Kentucky requires a written statement from the surface owner allowing strip mining or a copy of the conveyance that expressly grants or reserves the right to extract coal by surface mining methods before strip mining may commence).

§ 48.09(a) Waiver of Right to Support [Go To Main]

Add:

Consolidation Coal Co. v. White, 875 A.2d 318 (Pa. Super Ct. 2005) .

Add:

Ky. S. Coal Corp. v. Ky. Energy, 2009 Ky. App. Unpub. LEXIS 1035 (Ky. 2009) ; LoValerie Mullins, "The Equity Illusion of Surface Ownership in Coalbed Methane Gas; The Rise of Mutual Simultaneous Rights in Mineral Law and The Resulting Need for Dispute Resolution in Split Estate Relations," *16 Mo. Envtl. L. & Pol'y Rev. 109, 144 (2009)* (legal protection is rare for surface owners who have waived their rights to subjacent support).

Add:

LoValerie Mullins, "The Equity Illusion of Surface Ownership in Coalbed Methane Gas; The Rise of Mutual Simultaneous Rights in Mineral Law and The Resulting Need for Dispute Resolution in Split Estate Relations," *16 Mo. Envtl. L. & Pol'y Rev. 109, 144 (2009)* (in West Virginia a party may effectively waive rights to subjacent support when the deed permits mining "without leaving any support for the overlying strata").

§ 48.09(b) Authorization of Surface Mining [Go To Main]

Add:

Pennsylvania federation of sportsman clubs v. *Norton, 413 F. Supp. 2d 358 (M.D. Pa. 2006)* ; *Ohio River Valley Envtl. Coalition, Inc. v. Norton, 2005 U.S. Dist. LEXIS 22265 (D. W. Va. 2005)* .

Am. Land Holdings of Ind., LLC v. Jobe, 2010 U.S. App. LEXIS 9271 (Ind. 2010) (strip mining not allowed because it was not within the intention of the parties at the time of drafting the deed); *Ky. S. Coal Corp. v. Ky. Energy, 2009 Ky. App. Unpub. LEXIS 1035 (Ky. 2009)* (Kentucky requires a written statement from the surface owner allowing strip mining or a copy of the conveyance that expressly grants or reserves the right to extract coal by surface mining methods before strip mining may commence to insure that requisite intent for strip mining is present).

Add:

L. Michele McCain and Bernard H. Booth, IV, "Lignite Coal: A 'Mineral' under Mississippi Law," *28 Miss. C. L. Rev. 255, 260 (2009)* (court looked at the best mining practice for coal removal, strip mining, at the time of conveyance and interpreted the deed to allow for strip mining).

§ 48.09(c) Broad Form Deed Controversy [Go To Main]

Add:

Johnson v. Envtl. & Pub. Prot. Cabinet, 289 S.W.3d 216, 221 (Ky. 2009) (the "Broad Form Deed" amendment to the Kentucky Constitution does not change the laws governing mineral and mining rights under cotenancy).

§ 48.09(d) Government Regulation. [Go To Main]

Add:

Citizens Coal Council v. Norton, 330 F.3d 478 (D.C. Cir. 2003) (deals with the Secretary of the Interior's interpretation of the Surface Mining Control and Reclamation Act, which interpretation excluded subsidence from regulation); *W. Va. Highlands Conservancy v. Norton, 238 F. Supp. 2d 761 (S.D.W. Va. 2003)* (environmental organization is granted summary judgment regarding the Office of Suface Mining's approval of state program amendments inconsistent with the Surface Mining Control and Reclamation Act).

Add:

Hancock v. Island Creek Coal Co., 2009 U.S. Dist. LEXIS 30841 (Ky. 2009) .

Add:

Greenbelt Advocates v. Div. of Mineral Resources Mgt., 893 N.E.2d 230 (Ohio App. 2008) (proposed mining operation was not incompatible with land-use plans or programs; lands unsuitable petition (LUP) denied).

Mt. St. Helens Mining & Recovery Ltd. P'ship v. United States, 384 F.3d 721 (9th Cir. 2004) (the Forest Service, according to the Monument Act, offered to exchange land outside Mt. St. Helens National Volcanic Monument to a partnership owning mineral interests inside the monument, and was not required to make a like kind exchange).

Glover v. Union Pacific R. Co., 187 S.W.3d 201 (Tex. App. 2006) (persons who bought land next to railroad right of way, including mineral rights, do not have claim to mineral rights within the railroad right of way).

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Supp. to § 48.11 Voluntary Transfer of Right: Requirements for a Conveyance of Minerals.

[Go To Main]

Add:

Bixler v. Oro Mgmt., L.L.C., 86 P.3d 843 (Wyo. 2004) (dispute over whether parole evidence should be allowed to show equal mineral rights were conveyed).

See also Groome v. Donlin Corp., 908 N.E.2d 330 (Ind. Ct. App. 2009) (since the mineral interest is subject to taxation, the interest must be created by deed and must be duly recorded for tax purposes).

Add:

Natural Gas Pipeline Co. of Am. v. Pool, 124 S.W.3d 188 (Tex. 2003) (mineral lessees obtained a fee simple determinable in the mineral estates by adverse possession where their claim of title to oil and gas production was open, notorious, and hostile to the lessor's claims).

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6-48 Thompson on Real Property, Thomas Editions Supp. to § 48.12

Supp. to § 48.12 Involuntary Transfer of Mineral Interests: Adverse Possession.

[Go To Main]

Add:

James Rasband, *Questioning the Rule of Capture Metaphor for Nineteenth Century Public Land Law: A Look at R.S. 2477, 35 Envtl. L. 1005 (2005)* (discussing adverse possession in 19th Century land use law); Patrick S. Ottinger, *Production in "Paying Quantities" --A Fresh Look, 65 La. L. Rev. 635 (2005);* Richard White, J. Kenneth Kopf & Allan S. Katz, *Annual Survey of Texas Law: Real Property, 58 Smu L. Rev. 1077 (2005) ;* Christopher M. Alspach, *Adverse Possession of Severed Mineral Interests and the Need for Statutory Guidance, 37 Tex. Tech L. Rev. 1073 (2005); Rocket Oil and Gas Co. v. Donabar, 127 P. 3d 625 (Okla. Civ. App. 2005)* ; *Glover v. Union Pac. R.R. Co., 2006 Tex. App. LEXIS 1345 (2006)* ; *Freeman v. Stephens Prod. Co., 171 S.W.3d 651 (Tex. App. 2005)* ; *EOG Res. v. Wall, 160 S.W.3d 130 (Tex. App. 2005)* .

Add:

Pace v. Chesapeake Panhandle L.P., 2004 U.S. Dist. LEXIS 9887 (D. Tex. 2004) (lessee's possession was hostile and gave constructive notice since it continued to claim rights under the leases after the alleged lapses in production, and thus acquired a gas leasehold estate through adverse possession on the same terms and conditions as the original leases).

Gulley v. Davis, 2010 Tex. App. LEXIS 2710 (Tex. 2010) .

§ 48.12(a) Minerals Not Severed When Adverse Party Enters [Go To Main]

Add:

Rocket Oil and Gas Co. v. Donabar, 127 P.3d 625 (Okla. Civ. App. 2005) .

Leblanc v. EPA, 310 Fed. Appx. 770 (6th Cir. 2009) ; see generally Abraham Bell, "Private Takings." *76 U. Chi. L. Rev. 517 (2009).*

§ 48.12(b) Minerals Severed When Adverse Party Enters [Go To Main]

Add:

Gulley v. Davis, 2010 Tex. App. LEXIS 2710 (Tex. 2010) .

§ 48.12(b)(1) Elements of Adverse Possession Applied to Minerals.

Add:

Natural Gas Pipeline Co. of Am. v. Pool, 124 S.W.3d 188 (Tex. 2003) (mineral lessees obtained a fee simple determinable in the mineral estates by adverse possession where their claim of title to oil and gas production was open, notorious, and hostile to the lessor's claims).

Glover v. Union Pac. R.R. Co., 2006 Tex. App. LEXIS 1345 (2006) ; *Home on the Range v. AT&T, 386 F. Supp. 2d 999 (2005)* ; *Rocket Oil and Gas Co. v. Donabar, 127 P.3d 625 (Okla. Civ. App. 2005)* ; Christopher M. Alspach, *Adverse Possession of Severed Mineral Interests and the Need for Statutory Guidance, 37 Tex. Tech L. Rev. 1073 (2005).*

§ 48.12(b)(2) Extent of Minerals Adversely Possessed

Add;

Gulley v. Davis, 2010 Tex. App. LEXIS 2710 (Tex. 2010) .

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Supp. to § 48.13 Involuntary Transfer of Mineral Interests: Dormant Mineral Acts.

[Go To Main]

Add:

Am. Land Holdings of Ind., LLC v. Jobe, 655 F. Supp. 2d 882 (Ind. 2009) .

Add:

Rio Grande Silvery Minnow v. Bureau of Reclamation, 2010 U.S. App. LEXIS 6369 (10th Cir. 2010) .

Add:

Am. Land Holdings of Ind., LLC v. Jobe, 655 F. Supp. 2d 882 (Ind. 2009) .

Add:

Maralex Resources Inc., v. Gilbreath, 76 P.3d 626 (N.M. 2003) (lease ended after operations didn't resume in 60 days).

Miller v. Weber, 839 N.E.2d 204 (Ind. Ct. App. 2005) ; *Rocket Oil and Gas Co. v. Donabar, 127 P.3d 625 (Okla. Civ. App. 2005)* ; Martin J. Foncello, Comment, *Adverse Possession and Takings Seldom Compensation for Chance Happenings, 35 Seton Hall L. Rev. 667 (2005).*

Add:

Am. Land Holdings of Ind., LLC v. Jobe, 655 F. Supp. 2d 882 (Ind. 2009) .

§ 48.13(a) Ways to Preserve Mineral Interests from Dormancy [Go To Main]

Add:

Miller v. Webber, 839 N.E.2d 204 (Ind. Ct. App. 2005) ; Rocket Oil and Gas Co. v. Donabar, 127 P.3d 625 (Okla. Civ. App. 2005) .

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6-48 Thompson on Real Property, Thomas Editions Supp. to § 48.14

Supp. to § 48.14 Leases.

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Add:

Maralex Resources Inc. v. Gilbreath, 76 P.3d 626 (N.M. 2003) (lease was terminated when lessees failed to tender shut-in royalty payments and failed to resume operations within 60 days).

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Devon Energy Prod. Co., L.P. v. Am. Int'l Specialty Lines Ins. Co., 2009 U.S. Dist. LEXIS 38092 (Tex. 2009) ; *Wirth v. Sierra Cascade, LLC, 234 Ore. App. 740 (Or. 2010)* .

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Supp. to § 48.17 Acquisition of Federally Owned Minerals

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Add:

Ernest K. Lehmann & Associates of Montana, Inc. v. Salazar, 602 F. Supp. 2d 146 (D.C. Cir. 2009) (government agency determination that the claimant had not made a valid discovery of a valuable mineral deposit before the land was withdrawn from claim activity).

Add:

Mount Royal Joint Venture v. Kempthorne, 477 F.3d 745 (D.C. Cir. 2007) (Bureau of Land Management voided private claims on federal lands segregated from eligibility for mineral location and entry).

Add:

Osage Nation v. State ex rel. Okla. Tax Comm'n, 597 F. Supp. 2d 1250 (N.D. Okla. 2009) .

Add:

New West Materials LLC v. Interior Bd. of Land Appeals, 216 Fed. Appx. 385 (4th Cir. 2007) (federal government reservation of "oil, gas, and all other mineral deposits" in a land patent issued under the Small Tract Act included sand and gravel within the reservation). *See Mines and Minerals: Gravel Not Reserved to U.S.*, 37 Real Est. L. Rep. 6 (March 2008).

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Add:

Hall v. TWS Inc., 113 P.3d 1207 (Alaska 2005) ; Charlesworth v. Reyns, 113 P.3d 1031 (Utah Ct. App. 2005) .

Add:

Beckham Res., Inc. v. Mantle Res., L.L.C., 2010 Tex. App. LEXIS 1323 (Tex. 2010) .

Add;

Fries v. Chesapeake La., L.P., 2010 U.S. Dist. LEXIS 28491 (La. 2010) (reasoning no joint venture was established because the agreement explicitly stated that it was not a mineral partnership).

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Supp. to § 48.20 Multiple Mineral Development and Correlative Rights

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Add;

Desoto Gathering Co., LLC v. Smallwood, 2010 Ark. 5 (Ark. 2010) .

Add;

Johnson v. Envtl. & Pub. Prot. Cabinet, 289 S.W.3d 216 (Ky. 2009) .

Add:

JP Morgan Trust Co. v. Mid-Am. Pipeline Co., 413 F. Supp. 2d 1244 (D. Kan. 2006) ; *Dore Energy Corp. v. Carter-Langham, Inc., 901 So. 2d 1238 (La. Ct. App. 2005)* ; Bruce M. Kramer & Owen L. Anderson, The Rule of Capture--Oil & Gas Perspective, *35 Envtl. L. 899 (2005).*

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6-48 Thompson on Real Property, Thomas Editions Supp. to § 48.21

Supp. to § 48.21 Coalbed Methane.

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Add:

Cimarron Oil Corp. v. Howard Energy Corp., 909 N.E.2d 1115 (Ind. Ct. App. 2009) (CBM under the "Eastern rule" remains part of the mineral coal interest, but under the "Western rule" it is part of the mineral gas interest; court held that the CBM belongs to coal owner); but see *Cent. Natural Res., Inc. v. Davis Operating Co., 201 P.3d 680 (Kan. 2009)* (CBM that migrates from the coal seam belongs to the gas owner unless explicitly stated or intended otherwise in the lease); See generally L. Michele McCain and Bernard H. Booth, IV, "Lignite Coal: A 'Mineral' under Mississippi Law," *28 Miss. C. L. Rev. 255, 260 (2009);* LoValerie Mullins, The Equity Illusion of Surface Ownership in Coalbed Methane Gas; The Rise of Mutual Simultaneous Rights in Mineral Law and The Resulting Need for Dispute Resolution in Split Estate Relations *16 Mo. Envtl. L. & Pol'y Rev. 109 (2009).*

Caballo Coal Co. v. Fid. Exploration & Prod. Co., 84 P.3d 311 (Wyo. 2004) (held that grantors intended to convey everything within the coal stream, including coalbed methane, when they granted interest in the coal); *Hickman v. Groves, 71 P.3d 256, 258 (Wyo. 2003)* (dispute over whether seller had reserved right to CBM, court stated that manner of enjoyment should also be considered when reservations of rights are involved); *McGee v. Caballo Coal Co., 69 P.3d 908 (Wyo. 2003)* (court stated that under deed's terms, grantors didn't intend to include coalbed methane as a mineral "extracted in association of coal operations" as its "mining" wasn't economically feasible at the time the deeds were signed); *Energy Dev. Corp. v. Moss, 591 S.E.2d 135 (W. Va. 2003)* (lessor granting lessee all oil and gas under certain real property didn't grant a right to develop coalbed methane, as such a grant wasn't contemplated by all parties); *Harrison-Wyatt, L.L.C. v. Ratliff, 593 S.E.2d 234 (Va. 2004)* (surface owners who conveyed all coal in and under land didn't pass title in coalbed methane, as that was a gas that wasn't part of the coal itself).

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CHAPTER 49 PETROLEUM AND PIPELINES

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AUTHOR: Professor Maria E. Mansfield College of Law University of Tulsa

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CHAPTER 49 PETROLEUM AND PIPELINES
I. Preliminary Matters.

6-49 Thompson on Real Property, Thomas Editions § 49.01

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§ 49.01 Introduction and Overview.

The law regulating property interests in and development of petroleum, more commonly referred to as oil and gas, draws upon familiar property concepts but has grown into a law unto itself. n1 One reason for the divergence is the physical characteristics of oil and gas. Another reason is their unique economic value. Therefore, appraising the legal venue requires a short excursion into science and history.

§ 49.01(a) Outline of Chapter.

The chapter following this introductory section has fifteen parts. The first three parts deal with problems of ownership and conveyances of oil and gas. "Basic Ownership Concepts and Protection of Rights" (§§ 49.02-49.07) considers the nature of the landowner's interest in oil and gas both in place and once produced, protection of interests in oil and gas, and development rights of co-tenants, successive owners, and other interest holders. "Types of Interests Created from a Landowner's Rights" (§§ 49.08-49.15) examines the severance of minerals from the surface, including the relationship between the two estates. This part also details the nature of various interests such as a mineral interest, a royalty, a non-executive mineral interest, and a term interest. Finally, some peculiarities of Texas and Louisiana law are considered. The third part, "Transfer of Interests in Oil and Gas: Conveyancing and Involuntary Transfers," (§§ 49.16-49.24) covers general conveyancing matters before examining problems such as how to distinguish between leases and mineral interests and between royalties and mineral interests. Conveyancing of fractional interests and interests subject to an oil and gas lease also are examined. Finally, the third part also surveys involuntary transfers such as those by adverse possession.

The next eight parts of the chapter detail the oil and gas lease. The introductory part, "Leasing the Oil and Gas Property Interest," (§§ 49.25-49.31) examines the basic premises behind leasing, who may lease, and the lease's granting clause. The next section, "Habendum Clause: Duration," (§§ 49.32-49.33) defines the primary and secondary term of a lease, with particular attention to defining what is "production" sufficient to maintain the lease in the secondary term. Next, "Drilling-delay Rental Clause: Primary Term Maintenance," (§§ 49.34-49.37) explains how a lessee may maintain the lease by either commencing drilling or paying delay rentals. The next two parts both examine substitutes for production: "Dry Hole, Cessation of Production and Drilling Operations Clauses" (§§ 49.38-49.41) and "Shutin Royalty, Pooling,

and *Force Majeure* Clauses" (§§ 49.42-49.45). If production is achieved, compensation for the lessor is at issue; "The Lease Royalty Clause" (§§ 49.46-49.50) details how royalties are computed and paid. Next, "Miscellaneous Lease Clauses" (§§ 49.51-49.53) looks at provisions that deal with lands and interests subject to lease, the lessee's administrative protections, and the lessor's additional compensation. The final part dealing with the oil and gas lease, "Implied Covenants in Oil and Gas Leases," (§§ 49.54-49.60) explains the nature and rationale behind supplementing the oil and gas lease and details the common administrative, developmental, and protective requirements. The lessor's obligations are also defined.

Two parts then cover activities of the oil and gas lessee other than those that directly relate to the lessor. "Lease Transfers by Lessee" (§§ 49.61-49.63) examines the lessee's right to transfer, a transfer's effect on the lessor, and the relationship between the lessee and transferee. The next part, "Oil and Gas Contracts by Lessee," (§§ 49.64-49.71) explains common contracts such as support agreements, farmouts, joint operating agreements, drilling contracts, unitization agreements, division orders, gas balancing agreements, and area of mutual interest provisions.

Problems relating to transportation are examined in "Pipelines: Regulation and Acquisition" (§§ 49.72-49.78). The final part is the Bibliography (§ 49.79).

§ 49.01(b) Definition of "Petroleum."

In popular parlance, the term "petroleum" often is applied to oil, which is the liquid phase of combustible hydrocarbons. Nevertheless, "petroleum" technically encompasses combustible hydrocarbons of the bitumen family in the gaseous, liquid, or solid state. At times the phases tend to co-exist, n2 although the amount of heat at the time of creation appears to determine whether gas or oil will be formed. Generally, the gaseous state is chemically shorter than the liquid or solid states. n3 The chemical formulas for petroleum range from the simple gaseous methane (CH[4]) to the more complex octane (C[8]H[1]8), a component of crude oil. Additionally, the chemical make-up of petroleum varies from field to field, with different associated impurities. A common impurity is sulphur, which makes oil or gas "sour" and requires treatment for removal.

§ 49.01(c) Petroleum Geology and Engineering.

Petroleum geology and engineering are two distinct specialties. The petroleum geologist finds oil or gas in the ground; the petroleum engineer determines how to bring it to the surface. Two topics are important to their tasks: petroleum formation and reservoir mechanics.

The predominant theory of petroleum formation is the organic theory. n4 According to it, pressure and its attendant heat, together with chemical and bacterial reactions, transformed organic matter from marine life in sedimentary rocks into petroleum. n5 The petroleum in these "source rocks" then migrated in a generally upward movement through "carrier" rocks, which were necessarily porous and permeable. A rock is "porous" if there are spaces between the rock material into which a fluid may go. A rock is "permeable" if the pores are connected so that fluid may be transmitted through the rock. Petroleum cannot migrate through rock that is impermeable, that is, a rock in which the pore spaces are isolated from one another.

An impermeable feature that stops petroleum migration is a "trap." Two types of traps exist, stratigraphic and structural. A change in rock type during disposition causes stratigraphic traps. Structural traps occur when folding or faulting moves impermeable rock over permeable rocks. When a trap stops migration, a reservoir is formed. The petroleum geologist looks for signs that conditions favorable to forming a petroleum reservoir exist, but without drilling, cannot confirm the presence of an oil or gas reservoir.

Despite its name, an oil or gas reservoir or "pool" does not resemble an underground lake or stream. The oil and gas does not gather into a body of fluid in a carved out area of rock. The fluids fill the interstices or pores of the reservoir

rock. This rock may be the carrier rock or rock adjacent to it. Important reservoir rocks are sandstones, limestones, and dolomites. In addition to being porous, reservoir rock must be permeable. Porosity allows the oil or gas to accumulate and permeability allows it to be recovered. Despite the lack of an oil or gas "lake," significant amounts of petroleum can be in the reservoir. If a rock is 10 feet thick, covers an acre, and has a porosity of 20% n6 there would be 15,553 barrels of oil if the only fluid present was oil and it totally filled or "saturated" the reservoir. Reservoir rocks are often thicker and of greater area than in this example.

Oil, however, will not normally be the only fluid in a reservoir. Water often is present, either as connate water in pores along with oil or separate from the oil. n7 Gas may also be in the reservoir. If all three fluids are present, they can layer in order of weight, with water on the bottom and oil and then gas above. Not all reservoirs will have a freestanding "gas cap" on top. Nevertheless, gas will almost always be present in solution in the oil. This makes classification of wells as oil or gas wells problematic at times, n8 and the classification can have legal importance because regulators treat oil and gas wells differently. n9 The presence of gas or water may also be relevant to the petroleum engineer.

The petroleum engineer deals with recovery of oil and gas. The resource is only recoverable through wells. Although a mechanical pump may move oil to the surface from the bottom of a well, only reservoir energy will move the oil or gas through the permeable reservoir rock to the wellbore. Contrary to prior belief, once the reservoir is reached, oil and gas are static and no longer migrate. However, if a well is drilled, a low pressure area forms at the wellbore and the petroleum will begin to move from areas of high pressure to low pressure. Reservoir energy provides the pressure differential. Three natural or "primary" energy drives exist. In descending order of efficiency, they are the water encroachment drive, the gas-cap drive, and the solution gas drive. No natural drive is sufficient to recover all the oil in a reservoir. n10

Avoiding wasteful dissipation of this reservoir energy, however, is a major concern of both private petroleum engineers and those employed by a governmental conservation agency. Additionally, artificial means can increase the energy drive's recovery potential. Before a drive has significantly dissipated, maintenance activities may consist of re-injecting gas. As the primary drive force dissipates, secondary and tertiary recovery activities will add substances to the reservoir such as water, gas, carbon dioxide, or even fire or microbes, all to increase pressure away from the recovery wells.

§ 49.01(d) Historical Development of Law of Oil and Gas; Necessity of Separate Treatment of Oil and Gas Rights from Solid Mineral Rights.

Several factors have influenced the history of oil and gas law and its current form. These include petroleum geology and petroleum engineering, the economic importance of oil and gas, and the problems of transporting the fluids. Courts quickly determined that oil and gas could not be treated as other minerals were treated. n11

The peculiarities of petroleum first influenced ownership rights. Although in some countries the crown owned minerals, American common law gave the owner of the surface the minerals beneath the land. Under the so-called *ad coleum* doctrine, ownership was *cujus est solum, ejus est usque ad coleum et infernum*, translated as "To whomever the soil belongs, he owns also to the sky and to the depths" n12 -- from heaven to the core of the earth. This doctrine works well with stationary hard rock minerals that are easily identified and associated with a particular tract of land. Oil and gas did not behave so predictably.

Early courts analogized oil and gas to wild animals or percolating waters. Ownership of these objects was not tied directly to ownership of land, but required "capture" to perfect possession. As late as 1921, one Texas case referred to oil and gas as "percolat[ing] restlessly about under the surface of the earth, even as the birds fly from field to field and the beasts roam from forest to forest." n13 This was, of course, incorrect. Oil and gas in a reservoir remain static until disturbed by man. Nevertheless, as discussed in § 49.02(a) *infra*, the "Rule of Capture" pervaded the law of oil and gas ownership.

Despite this geological error about undeveloped oil and gas, oil and gas do act differently than solid minerals because of reservoir mechanics. A well in the reservoir creates a low pressure area to which oil and gas will migrate. In popular parlance, people say the well will "drain" the reservoir. Oil or gas can in this manner be "drained" from beneath another's land. Experts may dispute the exact area any well could drain and the interrelationship between specific wells. Nevertheless, activities by one party owning interests in a reservoir will affect others who own interests in the reservoir. Additionally, because reservoir energy is so important for production, the greatest ultimate recovery of the resource may require coordinating the efforts of those who own interests in the common pool. Therefore, oil and gas law had to accommodate the realities of petroleum engineering.

The limitations of petroleum geology also made their mark on legal developments. The geologist combines knowledge of the surface with inferences about the subsurface from geophysical exploration to ascertain whether there are anomalies likely to contain oil or gas. Nevertheless, only drilling an expensive well can confirm the presence of the resource. Potential developers want to control when and where development dollars are spent and often desire to spread their risks. Many of the contracts that evolved in the oil and gas industry, including the basic oil and gas lease, reflect this reality.

Oil and gas law also responded to oil and gas's status as a limited resource of important economic consequence, not only because of its use as an energy source, but also as a feedstock for the petrochemical industry. Therefore, the public has an interest in wise development of oil and gas. Producing states have passed conservation laws to protect the public's interest in preventing waste of the resource. First concerned with physical waste, many of these statutes now also are concerned with economic waste. Similarly, federal statutes have been enacted to supplement state law. n14

Finally, the difficulties of transporting the product influence oil and gas law Pipelines are the most efficient way to transport oil, but oil may be stored on site in tanks and be moved by train or truck. The marketing and transportation problem is more acute for gas. Natural gas in the open air diffuses and escapes upward because it is lighter than air. Storage above ground is difficult. Additionally, natural gas only may be moved by pipeline. Marketing considerations have affected not only the regulation of pipelines, but also the duties of the lessee under an oil and gas lease.

Because of these practical influences, oil and gas law is a separate field of law. Both private and public law responded to the unique characteristics of petroleum. The legal regime that evolved differs from both general property law and the law governing hard rock minerals.

FOOTNOTES:

(n1)Footnote 1. It also has its own language, not only legal but technical. The only comprehensive annotated reference for defining this terminology is the Manual of Oil and Gas Terms, contained within P. Martin & B. Kramer, Williams & Meyers Oil and Gas Law (Matthew Bender). The same material is also available in a separate volume as P. Martin & B. Kramer, Williams & Meyers Manual of Oil and Gas Terms (11th ed.).

(n2)Footnote 2. For a summary of early recognition of these problems, *see Gilbraith v. States Oil Corp., 4 F.2d 232 (5th Cir. 1925).*

(n3)Footnote 3. Because rights to gas and oil sometimes are separated, characterizing the various products of a well becomes important. Note, *Phase Severance of Gas Rights from Oil Rights, 63 Tex. L. Rev. 133 (1984); Amarillo Oil Co. v. Energy-Agri Prods., Inc., 794 S.W.2d 20 (Tex. 1990)* (ownership); *REO Indus. v. Natural Gas Pipeline Co. of Am. 932 F.2d 447 (5th Cir. 1991)* (rights of operators if unowned product in well).

(n4)Footnote 4. A second theory of formation is the inorganic theory, which posits that hydrogen and carbon joined deep in the earth and then migrated as petroleum to where currently located. If this is true, oil and gas could be found in places currently deemed unfavorable for their discovery.

(n5)Footnote 5. For the following material, *see generally* American Petroleum Institute, Introduction to Oil and

Gas Production 1-6 (1983); Bill D. Berger & Kenneth E. Anderson, Modern Petroleum, A Basic Primer of the Industry (3d. ed. 1992); Arville I. Levorsen, Geology of Petr. (2d ed. 1967); Interstate Oil Compact Commission, Oil and Gas Production (1951); and American Institute of Mining and Metallurgical and Petroleum Engineers, Petroleum Conservation (1951).

(n6)Footnote 6. Meaning 20% of the area by volume is available for fluids because it is pore space.

(n7)Footnote 7. Because all the water in the rock pores has not been displaced by oil, an oil well will often also produce salt water, which must be disposed of in an environmentally sound manner.

(n8)Footnote 8. For example, in Oklahoma a well is considered an oil well if it produces less than 15,000 mcf (thousand cubic feet) of gas per barrel of oil. It is a gas well if more than 15,000 mcf of gas is produced per barrel. Okla. Reg. 165:10-13-2.

(n9)Footnote 9. *See, e.g., Hufo Oils v. Railroad Comm'n of Texas, 717 S.W.2d 405* (Tex. Civ. App. 1986, *writ refused* n.r.e. (oil wells more densely drilled and casinghead gas produced from oil wells given priority for pipeline purchase).

(n10)Footnote 10. Typical recoveries are: water drive -- 30-50%, with recovery under the best conditions approaching 70% (average -- exceeding 50%); gas cap drive -- 25-50% (average less than 50%); and solution gas drive -- 10-25% (average 20%). Factors that influence recovery include the physical nature of the rock and oil, the care taken in completing and producing wells, the rate of production from the reservoir as a whole, and gas/oil and water/oil ratios. Rate of production is less of a variable for solution gas drives. American Petr. Institute, *supra* note 5, at 7; Levorsen, *supra* note 5, at 462-466.

(n11)Footnote 11. *See, e.g., Wettengel v. Gormley, 28 A. 934 (Pa. 1894)* (differences between solids and fluids and methods of producing solid minerals and oil or gas necessitate different treatment).

(n12)Footnote 12. *See Edwards v. Sims, 24 S.W.2d 619 (Ky. Ct. App. 1929).*

(n13)Footnote 13. *Medina Oil Dev. Co. v. Murphy, 233 S.W. 333 (Tex. Civ. App. 1921).*

(n14)Footnote 14. *E.g.*, Connally Hot Oil Act of 1935, *15 U.S.C. § 715b* (prohibits interstate shipment of oil produced in violation of state prorationing requirements).

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CHAPTER 49 PETROLEUM AND PIPELINES
II. Basic Ownership Concepts and Protection of Rights.

6-49 Thompson on Real Property, Thomas Editions § 49.02

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§ 49.02 Nature of Landowner's Interest in Oil and Gas in Place.

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§ 49.02(a) Theories of Ownership.

The Rule of Capture is the overriding principle defining the rights of a landowner or mineral owner to oil and gas in place. States have, however, developed two distinct theories to explain the nature of these rights. n15

§ 49.02(a)(1) Non-Ownership Theory.

The logical extension of the Rule of Capture would be to declare that the owner of the land (or owner of the minerals if severed) would have no rights to the oil and gas in place at all. Ownership would come to fruition only upon production or "capture." This view is espoused in several major producing states, including Oklahoma, n16 California, n17 Louisiana, n18 and Wyoming. n19 Other states also follow this theory but it is, nevertheless, the minority view. n20

The non-ownership theory does not mean that the landowner or mineral owner is devoid of rights to the oil and gas prior to production. An owner has the exclusive right to explore for, develop and produce the oil and gas from specified lands. Therefore, the theory is also referred to as the "exclusive right to take" theory. Many courts characterize these rights as a *profit a prendre*, which is a right to go upon land and take some part of the land or a product of the land. The owner's right is an interest in land to be protected from interference by others.

§ 49.02(a)(2) Ownership in Place Theory.

A majority of states adopt the theory of ownership that begins with the *ad coleum* doctrine and considers oil and gas part of the real property. Under the *ad coleum* doctrine, the owner of the soil owns the oil and gas while they are a part of it. In addition to ownership, the landowner (or owner of the minerals if severed) would have the exclusive right to explore for, develop and produce the oil and gas from the lands. The ownership in place theory has been adopted by Texas, n21 Colorado, n22 Kansas, n23 and New Mexico, n24 among others. n25

The ownership in place theory recognizes a fee simple estate in the land, but physical reality tempers the ownership

rights. The owner of the oil and gas rights owns the right to oil and gas in place and will be protected from trespassers. The owner, however, does not receive an absolute right to each molecule of oil or gas that is present beneath the land either prior to initial disturbance by man or at any particular time. "Ownership in place" is subject to the rights of others to divest the ownership by capturing the oil and gas. If the oil or gas migrates from the land, ownership ceases. In other words, rights are subject to the Rule of Capture and its non-liability function.

§ 49.02(b) Rule of Capture.

The Rule of Capture is an overriding concept that colors ownership rights to oil and gas in place. Its origin lies in an error about the nature of oil and gas. n26 Because early courts believed oil and gas to be constantly moving, courts analogized oil and gas to wild animals or subterranean water. n27 Rights to possess wild animals -- *ferae naturae* -- only become fixed upon "capture." n28 Moreover, a wild animal, once it escaped from the possessor back to its natural habitat, would become unowned and subject to capture again. n29 The one restraint on this system of ownership which recognized a landowner's rights was that it was trespass to enter another's property to capture a wild animal. n30

The analogy was the first stirring of oil and gas law, but oil and gas differ from wild animals. Oil and gas do not move without some human intervention and, even more importantly for a property regime, oil and gas exist in a closed system. A reservoir is finite in area and underlies a finite amount of surface acreage. Owners of mineral rights in lands not overlying the reservoir could not recover oil or gas by drilling vertically upon their own lands. They could only enter into the reservoir through trespass. As between parties with mineral rights to lands overlying the reservoir, the activities of one party in the reservoir can affect oil or gas originally beneath the land of another. Human interference causes drainage as reservoir energy drives oil and gas to areas of lower pressure. Therefore, the reservoir is physically a "common pool" beneath the lands. A well could "capture" oil and gas and potentially drain any area of the common pool.

The Rule of Capture, which was adopted from other settings, has been translated in some jurisdictions into a direct rule of real property. n31 However, the Rule of Capture has another aspect, one which is relevant in all jurisdictions. The "Rule of Capture" is a negative rule of liability: the owner of an interest in the common pool will have no liability for draining oil or gas from beneath the land of another through a well on the interest-owner's property. The draining well cannot bottom on lands to which the developer does not have mineral rights or it would be a trespass. n32 If the well is properly located, however, the drainage is *damnum absque injuria*, which cannot be the subject of an action. n33 The drained owner's recourse is self-help, namely to drill a well. n34 This is so even if artificial stimulation increased drainage. n35

The non-liability provided by the Rule of Capture influences property rights regardless of what theory of oil and gas ownership is adopted. Because of it, anyone with mineral rights in land overlying the reservoir may develop the reservoir from such land. The draining mineral developer gains ownership of the produced oil or gas. Many potentially may own the oil and gas while it is in the reservoir; oil and gas until produced are the "common" property of those with the right to develop the reservoir. The undeveloped reservoir is thus not only a common pool physically, but also from a legal perspective. Every owner of a right to the common pool has a right to produce the oil or gas and cannot prevent others from exercising similar rights. Therefore, a race to develop the minerals ensues. n36

Historically, this race induced mass production that not only lowered the price of the product, but forced expenditures on wells that were not required to drain the reservoir efficiently. n37 Moreover, when the only concern of any particular developer is speedy recovery to avoid oil or gas "capture" by another, reservoir energy was not conserved. Recovery of the maximum amount of the resource was therefore impossible. n38 Because of these examples of both physical and economic waste, limitations on the Rule of Capture arose.

§ 49.02(c) Legal Consequences Resulting from Nature of Interest.

§ 49.02(c)(1) Corporeal/Incorporeal Classification.

Ownership theories may influence whether an oil and gas interest is deemed corporeal or incorporeal. One result of the corporeal and incorporeal distinction is whether or not interests may be abandoned. n39 Another effect is on the causes of actions available to protect the interest.

If an interest in oil and gas is corporeal, it carries the right to possession and hence is possessory. Such interests are not subject to abandonment. However, if an interest in oil and gas is incorporeal, then, as a non-possessory interest similar to an easement or *profit a prendre*, it could be abandoned. Generally, jurisdictions adopting the non-ownership theory will find some interests in oil and gas subject to abandonment. n40 Leasehold interests will be abandonable n41 and, according to some precedent, so will fee interests in the oil and gas that are held separately from the surface because they, too, are mere profits a prendre. n42

In jurisdictions following the ownership in place theory, oil and gas interests held in fee, separate from the surface, would be corporeal and incapable of abandonment. Oil and gas leases in these jurisdictions can be classified as either corporeal or incorporeal. n43 The difference in result is often whether the lease is worded as a grant of the minerals in place or as a transfer of the exclusive right to develop the oil and gas. In Texas, however, regardless of any wording, the lessee's interest in an oil and gas lease is corporeal; it is described as a fee simple determinable. n44

In practice, whether or not an interest is subject to abandonment does not make a large difference in clearing titles of dormant interests. Proving non-use will not be sufficient to prove abandonment. An intent to abandon the oil and gas interest must also be shown. n45

A second effect of the classification of interests in oil or gas as corporeal or incorporeal is that it might influence the forms of action available to protect the interests. n46 Under traditional common law, the following remedies were only available to owners of possessory interests: trespass, ejectment, and compulsory partition. Therefore, in states following traditional rules, only owners of corporeal interests created under the ownership in place theory could employ these remedies. Other jurisdictions disavow the traditional distinction or treat rights in oil and gas as being of a special nature and allow all forms of action regardless of the classification. In jurisdictions following the traditional rule, however, substitute forms of action will protect the nonpossessory rights. If ejectment is unavailable, the remedy of quiet title will substitute.

§ 49.02(c)(2) Real Property/Personalty Classification.

Interests in oil and gas are generally deemed to be interests in land. Nevertheless, jurisdictions differ on whether these interests are real property or personalty. n47 The distinctions do not follow a jurisdiction's ownership theory. At common law, the classification depended on the duration of the interest, not its possessory nature. Interests that were freeholds were real property. These include fee estates and life estates. Other interests were personalty.

Employing the common law distinction, most oil and gas interests would be considered real property; even oil and gas leases have the possibility of lasting perpetually because they are granted for a specified time and "for so long thereafter as oil or gas are produced." n48 Nevertheless, where oil and gas are involved, the distinctions generally are made in specific contexts, such as taxation or inheritance. Therefore, the classification as realty or personalty depends on statutory interpretation.

§ 49.02(d) Limitations on Rule of Capture.

Under a pure Rule of Capture, there are no controls on the number and location of wells that a mineral interest owner may drill in the common pool. Limitations on the Rule of Capture, however, do exist. They are of two types: judge-made and statutory. The first restraints primarily adjust private rights. The second type of limits has dual

objectives. Statutes protect private rights and preserve public interests in the finite resource.

§ 49.02(d)(1) Correlative Rights.

The Rule of Capture emphasized individual action to the detriment of the common good. Although the rule enables individuals to acquire ownership of produced substances without accounting to others for the production, courts recognized that each owner of rights must exercise them with due regard to the rights of others with similar rights in the common pool. The term "correlative rights" generally describes the judicially recognized rights and duties. n49 The doctrine has both a negative and affirmative aspect; it forbids some activities in order to protect each party's right to an opportunity to gain their fair share.

The classic case used to illustrate correlative rights is *Elliff v. Texon Drilling Co.* n50 Texon negligently allowed a well to blow-out on its property, causing a loss of gas from Elliff's property because gas had migrated to Texon's out of control well. Texon claimed to have no liability for draining Elliff's property under the Rule of Capture. The court disagreed. Because Texon was wasting and not marketing the gas, it was liable. Its actions were not "legitimate" drainage and thus title to the gas remained with Elliff. n51 The Rule of Capture only negates liability when operations are non-negligent and legitimate. Each owner of rights in the common pool may expect others to refrain from harmful actions. n52

The converse of the duty to refrain from negligent action is a common-law right: each owner has a right to a reasonable opportunity to produce a fair share of the oil and gas. n53 This leads to a second limitation on the Rule of Capture. In order to be "legitimate," draining operations must be in conformity with the rules and regulations of the relevant conservation agency. The interrelationship of statutory and judge-made tenets is obvious in *Elliff*:

> These laws and regulations are designed to afford each owner a reasonable opportunity to produce his proportionate part of the oil and gas from the entire pool and to prevent operating practices injurious to the common reservoir. In this manner, if all operators exercise the same degree of skill and diligence, each owner will recover in most instances his fair share of the oil and gas. n54

§ 49.02(d)(2) Conservation Regulation.

The second major limitation on the Rule of Capture is that drilling must conform with the rules and regulations of the relevant oil and gas conservation agency. These restraints are justified partially as protection of correlative rights. n55 Therefore, a conservation statute does not divest private property without compensation but rather is a statute "protecting private property and preventing it from being taken by one of the common owners without regard to the enjoyment of the others." n56 A second rationale of such statutes is to prevent waste, not only because waste would impact correlative rights, but because waste injures the public. Oil and gas is a limited, but necessary resource.

Generally, waste of oil and gas refers to production techniques or practices that fail to maximize the natural reservoir forces necessary to obtain the greatest ultimate recovery of oil and gas. n57 It is thus concerned with physical waste of the hydrocarbons by not allowing for their recovery, by damaging reservoir energy, or by otherwise not conforming with proper engineering practices. Waste can take place underground or on the surface. Surface waste occurs by spillage, venting or flaring of gas, or by evaporation.

"Waste" is further defined in the various statutes of producing states. Statutory definitions may also seek to prevent "waste" of the surface itself through unnecessary drillsites. "Economic" waste may also be an element of concern. There are two aspects to economic waste. First, economic waste comes from allowing the resource to be sold for too low a price, which encourages overproduction and improvident use of the resource. n58 A second aspect of economic waste is forcing an operator to unnecessarily expend funds. n59

Common techniques authorized by the various statutes to protect correlative rights and prevent waste may be summarized as follows: n60

1. **Regulation of drilling through well permits.** Operators are required to obtain a permit that will specify proper drilling, completion, and abandonment techniques. After drilling, subject to some confidentiality rights, pertinent information about the subsurface will have to be filed with the agency.

2. **Regulation of drilling through well spacing.** Limiting the number of wells in a reservoir is one of the primary ways to moderate the effects of the Rule of Capture. One method is to specify the distance generally to be allowed between wells and from the boundaries of individual tracts. n61 A second method, more specific to the geology of a particular field, is to specify the size of a drilling or spacing unit. Ideally, the unit size should be that area which one well can efficiently and effectively drain. Only one well is allowed per unit. Because the drillsite is also specified, this technique controls both the number and location of wells and creates an orderly pattern of development. However, to prevent waste and protect correlative rights, exceptions will allow wells in different locations if necessary. n62 Additionally, to develop small tracts that do not equal the minimum unit size, almost all producing states allow "forced pooling," which is a statutory method for combining interests to share both the costs of drilling and proceeds of production. n63

3. **Regulation of Production and Marketing Through Market Demand Prorationing and Ratable Taking.** One controversial technique to prevent overproduction is to limit total state-wide production to the amount set by either statute or the conservation agency. n64 In the latter situation, production amounts would be based on specified criteria, often the amount of market demand as determined by the agency or by nominations by purchasers. The total statewide demand for various categories of oil and gas would then be prorated among the various producing reservoirs. Each producer in the field would receive an "allowable" enabling it to produce its fair share. n65 In order to assure a market for each producer, purchasers in a field are ordered to "ratably take" from each producer in order to meet the purchaser's demand. n66

4. **Regulation of Production Through Water/Oil and Gas/Oil Ratios.** Gas or water is often the drive mechanism in a reservoir. Both may be produced along with oil. In order to preserve the reservoir energy, a conservation agency may specify the amount of water or gas that may be produced per barrel of oil. In combination with limitations on oil production known as "allowables," production is further limited if the gas or water production will exceed what would have been produced at the specified ratio. n67

5. **Regulation of Unitization.** Secondary and tertiary recovery techniques require substances to be injected into the formation to enhance recovery when primary energy has dissipated. In order to do so efficiently, an entire reservoir or a sufficiently large portion of one must be operated as a "unit" without regard to lease or individual tract boundaries. If parties cannot voluntarily agree on such development, many conservation statutes allow for forced unitization. n68

This list is illustrative, not exhaustive. Moreover, not all conservation agencies can employ all the techniques.

FOOTNOTES:

(n1)Footnote 15. Some commentators posit a third: the qualified ownership theory. Under it, oil and gas are a part of the land and belong to the owner of the land so long as they remain in or on the land. When or if the oil and gas migrates, the ownership is lost. *See* 1 Walter Lee Summers, the Law of Oil and Gas § 62 (1954), citing *Ohio Oil Co. v. Indiana, 177 U.S. 190 (1900);* and *Rich v. Doneghey, 177 P. 86 (Okla. 1918);* and P. Martin & B. Kramer, Williams & Meyers Oil and Gas Law § 203.2 (Matthew Bender). This theory is actually a variant of the non-ownership theory. It might, however, help account for the viability of correlative rights in these jurisdictions. *See* Richard W. Hemingway,

The Law of Oil and Gas § 1.3 (2d ed. 1983).

(n2)Footnote 16. *Rich v. Doneghey, 177 P. 86 (Okla. 1918).*

(n3)Footnote 17. *Gerhard v. Stephens, 442 P.2d 692 (Cal. 1968).*

(n4)Footnote 18. *Frost-Johnson Lumber Co. v. Nabors Oil & Gas Co., 88 So. 723 (La. 1920).*

(n5)Footnote 19. *Denver Joint Stock Land Bank of Denver v. Dixon, 122 P.2d 842 (Wyo. 1942).*

(n6)Footnote 20. Illinois, Indiana, and Kentucky. For cases, see Richard W. Hemingway, The Law of Oil and Gas § 1.3 (2d ed. 1983). *See also* P. Martin & B. Kramer, Williams & Meyers Oil and Gas Law § 203.1 (Matthew Bender) (adding Alabama, New York, and Ohio).

(n7)Footnote 21. *Texas Co. v. Daugherty, 176 S.W. 717 (Tex. 1915).*

(n8)Footnote 22. *Simson v. Langholf, 293 P.2d 302 (Colo. 1956).*

(n9)Footnote 23. *Froelich v. United Royalty Co., 290 P.2d 93 (Kan. 1956), modified, 297 P.2d 1106 (Kan. 1956).*

(n10)Footnote 24. *Sachs v. Board of Trustees, 557 P.2d 209 (N.M. 1976), appeal after remand, 592 P.2d 961 (N.M. 1978).*

(n11)Footnote 25. Alabama, Arkansas, Maryland, Michigan, Mississippi, Montana, Ohio, Pennsylvania, West Virginia. For case citations, see Richard W. Hemingway, The Law of Oil and Gas § 1.3 (2d ed. 1983). *See also* P. Martin & B. Kramer, Williams & Meyers Oil and Gas Law § 203.3 (Matthew Bender) (adding North Dakota, Tennessee, and Washington to list). They list Alabama under the non-ownership theory. *Id.* at § 203.1.

(n12)Footnote 26. Current cases reject the analogies to wild animals or water. *See, e.g., Lone Star Gas Co. v. Murchinson, 353 S.W.2d 870 (Tex. Civ. App. 1962).* Nevertheless, the idea's imprint remains.

(n13)Footnote 27. To wild animals, *see, e.g., Hammonds v. Central Kentucky Natural Gas Co., 75 S.W.2d 204 (Ky. 1934); Westmoreland & Cambria Natural Gas Co. v. De Witt, 18 A. 724 (Pa. 1889).* To subterranean water, *see, e.g., Peoples Gas Co. v. Tyner, 31 N.E. 59 (Ind. 1892); Jones v. Forest Oil Co., 44 A. 1074 (Pa. 1900).*

(n14)Footnote 28. *Pierson v. Post, 3 Cai. R. 175, 2 Am. Dec. 264 (N.Y. 1854)* (rights to a fox).

(n15)Footnote 29. *E.A. Stephens & Co. v. Albers, 256 P. 15 (Colo. 1927)* (exceptions when animal has habit of return or is far from natural habitat).

(n16)Footnote 30. *State v. Repp, 73 N.W. 829 (Iowa 1898).*

(n17)Footnote 31. In some jurisdictions no "rights" to oil and gas exist until the landowner (or mineral interest owner if the rights have been severed) "captures" the oil or gas by bringing it to the surface. *See* § 49.02(a), *infra*.

(n18)Footnote 32. *Alphonzo E. Bell Corp. v. Bell View Oil Syndicate, 76 P.2d 167 (Cal. App. 1938).* For other cases, *see* 1 Kuntz, Lowe, Anderson, Pierce, and Smith, Oil and Gas Law § 4.2 (Anderson); Richard W. Hemingway, The Law of Oil and Gas § 4.2 (2d ed. 1983); 1 Walter Lee Summers, the Law of Oil and Gas § 61 (1954). Similarly, the Texas Supreme Court first held that the rule of capture does not apply to oil recovered through "fracing" (stimulating production through fracturing the formation) on the lands of another. It vacated this decision without confirming the lower court's rejection of this finding. *Geo-Viking, Inc. v. Tex-Lee Operating Co., 839 S.W.2d 797 (Tex. 1992).*

The Rule of Capture will not apply to pooled land; production must go to those who own interests in the pooled unit,

not simply to those producing. *Thornton v. City of Bryan, 846 S.W.2d 389 (Tex. App. 1992).*

(n19)Footnote 33. *Peoples Gas Co. v. Tyner, 31 N.E. 59 (Ind. 1892).*

However, when production occurs upon land within a pooled unit, the rule of capture is abrogated where two or more landowners or lessees are obligated to share production from a given well. *See Riley v. Riley, 972 S.W.2d 149 (Tex. App. 1998); Browning Oil Co. v. Luecke, 38 S.W.3d 625 (Tex. App. 2000)* (where the court stated that the rule of capture does not entitle the owner of a tract with a horizontal well to royalties on all gas and oil produced by the well).

(n20)Footnote 34. An early case aptly sums up the rule:

> [E]very landowner or his lessee may locate his wells wherever he pleases, regardless of the interests of others ... . He may crowd the adjoining farms so as to enable him to draw the oil and gas from them. What then can the neighbor do? Nothing; only go and do likewise. He must protect his own oil and gas. He knows it is wild and will run away if it finds an opening and it is his business to keep it at home.

Barnard v. Monongahela Natural Gas Co., 65 A. 801, 802 (Pa. 1907).

Browning Oil Co. v. Luecke, 38 S.W.3d 625 (Tex. App. 2000) (where the court noted that a natural consequence of the rule of capture is overdrilling resulting in physical and economic waste).

(n21)Footnote 35. *People's Gas Co. v. Tyner, 31 N.E. 59 (Ind. 1892)* (simulation of well through nitroglycerin).

(n22)Footnote 36. When each owner has a right to maximize the individual's self interest while imposing costs on another for which the actor does not have to account, external costs arise. In the presence of external costs, society overall might lose as each individual gains. *Cf.* Garrett Hardin, *The Tragedy of the Commons*, 162 Science 1243 (1968).

(n23)Footnote 37. *See* Northcutt Ely, *The Conservation of Oil, 51 Harv. L. Rev. 1209 (1938).*

(n24)Footnote 38. One result was the ratification in 1935 of the Interstate Compact to Conserve Oil and Gas by Kansas, Texas, Oklahoma, California, and New Mexico. Ch. 194, *57 Stat. 383 (1943).* Current signatories include, in addition, Michigan, Arkansas, Louisiana, New York, Pennsylvania, Kentucky, Ohio, West Virginia, Alabama, Florida, Tennessee, Indiana, Alaska, Nevada, Utah, Arizona, Colorado, Wyoming, Montana, North Dakota, South Dakota, Nebarska, and Georgia. The Compact calls upon member states to enact laws to prevent the waste of oil and gas. *See generally* 1 Walter Lee Summers, the Law of Oil and Gas § 105 (1954).

(n25)Footnote 39. *See generally* Annotation, *Abandonment of Oil or Gas Lease by Parol Declaration, 13 A.L.R.2d 951 (1941).*

(n26)Footnote 40. *Gerhard v. Stephens, 442 P.2d 692 (Cal. 1968).*

(n27)Footnote 41. *Hinds v. Phillips Petr. Co., 591 P.2d 697 (Okla. 1979)* and *Dabney v. Edwards, 53 P.2d 962 (Cal. 1935). But see Updike v. Smith, 39 N.E.2d 325 (Ill. 1942)* (lease is corporeal for some purposes).

(n28)Footnote 42. *Gerhard v. Stephens, 442 P.2d 692 (Cal. 1968).*

(n29)Footnote 43. *See generally* 2 Kuntz, Lowe, Anderson, Pierce, and Smith, Oil and Gas Law § 26.2 (Anderson) and M.K. Woodward, *Ownership of Interests in Oil and Gas, 26 Ohio St. L.J. 353 (1965).*

(n30)Footnote 44. *Cherokee Water Co. v. Forderhause, 641 S.W.2d 522 (Tex. 1982). See* Agesilaus Wilson Walker Jr., *The Nature of Property Interests Created by an Oil and Gas Lease in Texas, 7 Tex. L. Rev. 539 (1942).*

Although Texas does not recognize an abandonment of title, under a second, distinct theory, a leasehold may terminate because the purpose of the lease was abandoned. This triggers an implied limitation on the lessee's estate because it was granted for the purpose of oil and gas production. *Rogers v. Ricane Enters., Inc., 884 S.W.2d 763 (Tex. 1994),* citing *Texas Co. v. Davis, 254 S.W. 304 (1923)* (doctrine does not apply to terminate an assignment of a portion of a lease when the assignment does not specify a purpose for the assignment or limit the assignment to "as long as" oil or gas is produced).

(n31)Footnote 45. *Gerhard v. Stephens, 442 P.2d 692 (Cal. 1968).*

(n32)Footnote 46. The distinction between possessory and non-possessory interests may also affect the availability of partition. *See* § 49.05(f), *infra*.

(n33)Footnote 47. *See generally* P. Martin & B. Kramer, Williams & Meyers Oil and Gas Law §§ 212-213 (Matthew Bender).

(n34)Footnote 48. *See* § 49.33, *infra*.

F.D.I.C. v. Hulsey, 22 F.3d 1472 (10th Cir. 1994) (oil and gas lease is interest in real property and governed by real property rules, but security agreements covering extracted oil and gas under Article 9 may be recorded in real estate records under Oklahoma's version of the U.C.C.).

(n35)Footnote 49. First enunciated in *Ohio Oil Co. v. Indiana, 177 U.S. 190 (1900)* (upholding statute that forbade flaring of natural gas because other private parties had interests in the reservoir worthy of protection).

(n36)Footnote 50. *210 S.W.2d 558 (Tex. 1948).*

(n37)Footnote 51. *210 S.W.2d 558, 563 (Tex. 1948).*

(n38)Footnote 52. Annotation, *Rights and Remedies of Owner or Lessee of Oil and Gas Land or Mineral Royalty Interests, Therein, in Respect of Waste of Gas or Oil through Operations on Other Lands, 4 A.L.R.2d 198 (1948).*

(n39)Footnote 53. The Interstate Oil Compact Commission in its Model Conservation Act defines protection of correlative rights as an action or regulation by an oil and gas conservation commission which affords "a reasonable opportunity to each Operator to recover or receive without causing waste his Just and Equitable Share of the Production." A Form For an Oil and Gas Conservation Statute, § 1.1.15 (I.O.C.C. 1981). In turn, "Just and Equitable Share" is "that part of the authorized production from a reservoir that the amount of recoverable Oil and Gas under the Developed Areas of the separately owned tract or tracts bears to the recoverable Oil or Gas in the total of the Developed Areas in the Reservoir." *Id.* at § 1.1.8. *See also Kingwood Oil Co. v. Corporation Comm'n, 396 P.2d 1008 (Okla. 1964):* "The right of the individual owner to take oil and gas from the reservoir in lawful operations is limited only by a duty to other owners (1) not to injure the source of supply and (2) not to take a disproportionate part of the oil and gas." *Id. at 1010.*

(n40)Footnote 54. *Elliff, 210 S.W.2d at 562.*

(n41)Footnote 55. *Id.*

(n42)Footnote 56. *Ohio Oil Co. v. Indiana, 177 U.S. 190, 210 (1900). See* Annotation, *Constitutionality of Statute Limiting or Controlling Exploitation or Waste of Natural Resources,* 78 A.L.R. 834.

(n43)Footnote 57. *Id.*

(n44)Footnote 58. *See Golsen v. ONG Western, Inc., 756 P.2d 1209 (Okla. 1988).*

(n45)Footnote 59. *But see Schlacter v. Railroad Comm. of Texas, 825 S.W.2d 737 (Tex. Civ. App. 1992)* (in determining whether a Rule 37 exception is needed to prevent waste, economic cost to operator may be considered but will not be sole justification).

(n46)Footnote 60. *See generally* Robert E. Sullivan, Handbook of Oil and Gas Law §§ 135-225 (1955) and Rocky Mtn. Min. L. Foundation, Special Institute Manual on Oil and Gas Conservation Law and Practice (1985).

(n47)Footnote 61. "Rule 37" of the State of Texas is the most famous example of this technique. R.R. Comm'n, 16 Tex. Admin. Code § 3.37.

Browning Oil Co. v. Luecke, 38 S.W.3d 625 (Tex. App. 2000) (where wells drilled to the same reservoir were requested to be at least 1,200 feet apart and at least 467 feet from any property line, lease line or subdivision line).

(n48)Footnote 62. *Pattie v. Oil & Gas Conservation Comm'n, 402 P.2d 596 (Mont. 1965)* (authority to grant exceptions to protect correlative rights implied in statute).

For a general understanding of drilling units, *see Union Pacific Resources Co. v. Texaco, 882 P.2d 212 (Wyo. 1994).*

(n49)Footnote 63. Kansas is the sole state without forced pooling. It adjusts well allowables in accordance with the size of a tract. *See Mobil Oil Corp. v. State Corp. Comm'n, 608 P.2d 1325 (Kan. 1980).* Texas was a latecomer and its pooling statute is limited. Tex. Nat. Res. Code Ann., §§ 102.001-102.112. *See* 3 Ernest E. Smith and Jacqueline Weaver, Texas Law of oil and Gas § 12 (1990). Hence, Texas dealt with the problems of small tracts through "Rule 37 Exceptions." *See generally* 1 Summers, *supra* note 32, at § 86.

Browning v. Exxon Corp., 848 F. Supp. 1241 (M.D.La. 1994) (only forced pooling gives owner of land found to overlie the pool the right to a share of the proceeds with a correlative obligation of paying their share of the costs) *aff'd, 43 F.3d 668 (5th Cir. 1999).*

(n50)Footnote 64. Texas, Oklahoma and Kansas allow this technique. Among states that expressly or impliedly prohibit market demand prorationing are California, Colorado, Illinois, Kentucky, Mississippi, Montana, Ohio, Utah, and Wyoming. *See generally* 1 Summers, *supra* note 32, at §§ 87-97.

(n51)Footnote 65. *See generally* Robert E. Sullivan, Handbook of Oil and Gas Law § 163 (1955).

(n52)Footnote 66. *See generally* Summers, *supra* note 32, at § 103.1.

(N53)Footnote 67. For example, if the normal allowable for a well is 100 barrels of oil per day and the gas/oil ratio is set at 2,000 cubic feet of gas per barrel, the well must cease production when either 100 barrels of oil or 200,000 cubic feet of gas is produced. Therefore, a well producing 4,000 cubic feet of gas per barrel of oil will only be able to produce 50 barrels of oil per day.

(n54)Footnote 68. More exhaustive treatment may be found in Bruce M. Kramer and Patrick martin, the Law of Pooling & Unitization (Matthew Bender).

Cook v. Wyoming Oil and Gas Comm'n, 880 P.2d 583 (Wyo. 1994).

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CHAPTER 49 PETROLEUM AND PIPELINES
II. Basic Ownership Concepts and Protection of Rights.

6-49 Thompson on Real Property, Thomas Editions § 49.03

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§ 49.03 Nature of Landowner or Mineral Interest Owner's Interest in Produced Oil and Gas.

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All jurisdictions agree that once a person having the right to do so extracts oil or gas, it is capable of absolute ownership. The Rule of Capture does not apply to extracted oil or gas because it is a rule of real property law, and, once produced, oil and gas become tangible personal property. Produced oil and gas are subject to personal property rules. For example, misappropriation would be conversion.

Additionally, if produced oil or gas escapes by leakage, ownership remains with the producer unless the oil or gas is abandoned. n69 As with other personal property, a party claiming abandonment must prove the prior owner intended to abandon the oil or gas. A desire to recover the hydrocarbon upon learning of the leakage would negate this intent.

A more difficult question is ownership of gas that is re-injected into the ground for storage purposes. n70 An early case held that, as with a wild animal that returns to its natural habitat, the gas is again subject to the Rule of Capture. n71 With more commercial use of natural gas, the difficulties of storing it became more apparent. Natural gas is stored most efficiently in the ground. Some later cases therefore find that title remains with the original owner after ejection into a well-defined storage formation unless the gas is abandoned. n72 To formalize arrangements, parties generally seek gas storage agreements and various states have passed statutes to authorize condemnation of such rights. n73

FOOTNOTES:
(n1)Footnote 69. *Champlin Exploration Inc. v. Western Bridge & Steel Co., Inc., 597 P.2d 1215 (Okla. 1979).*

(n2)Footnote 70. *See* Annotation, *Rights and Liabilities with Respect to Natural Gas Reduced to Possession and Subsequently Stored in Natural Reservoir, 94 A.L.R.2d 529 (1964).*

(n3)Footnote 71. *Hammonds v. Central Kentucky Natural Gas Co., 75 S.W.2d 204 (Ky. 1934), but see Texas Am. Energy Corp. v. Citizens Fidelity Bank & Trust Co., 736 S.W.2d 25 (Ky. 1987)* (previously extracted gas, stored in a confined reservoir, is personal property governed by the Uniform Commercial Code).

(n4)Footnote 72. *Lone Star Gas Co. v. Murchison, 353 S.W.2d 870 (Tex. Civ. App. 1962); White v. New York State Natural Gas Corp., 190 F. Supp. 342 (W.D. Pa. 1960); see also Texas Am. Energy Corp. v. Citizens Fidelity Bank & Trust Co., 736 S.W.2d 25 (Ky. 1987). But see Anderson v. Beech Aircraft Corp., 699 P.2d 1023 (Kan. 1985)* (property owner overlying a gas storage area could exercise their right of capture to produce injected gas). *See generally* Annotation, *Gas Storage in Natural Reservoirs, 94 A.L.R.2d 543 (1962).*

Reese Exploration, Inc. v. Williams Natural Gas Co., 983 F.2d 1514 (10th Cir. 1993) (under Kansas law, the Rule of Capture only applies to injected gas when there is no natural gas public utility involved, no certificate of necessity authorizing underground storage, and where the prior owner of injected gas uses the property of another for storage without authorization); *Beck v. Northern Natural Gas Co., 170 F.3d 1018 (10th Cir. 1999)* (reinjected natural gas vertically migrated from the formation intended to a formation directly beneath. Owner of formation recovered for trespass and unjust enrichment based upon the fair rental value of the formation).

(n5)Footnote 73. *See, e.g.*, Okla. Stat. Ann. §§ 36.1-36.7.

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CHAPTER 49 PETROLEUM AND PIPELINES
II. Basic Ownership Concepts and Protection of Rights.

6-49 Thompson on Real Property, Thomas Editions § 49.04

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§ 49.04 Protection of Rights to Oil and Gas.

[Go To Supp]

Various theories protect ownership rights to oil and gas. When rights to explore are usurped or there is damage to the leasing value of the lands, remedies such as assumpsit and slander of title are used. If substantial wrongful production occurs, ejection and conversion remedies protect the true owner.

§ 49.04(a) Trespass Resulting in Production.

Regardless of the theory of ownership, a jurisdiction adopts concerning oil and gas in place, a party producing oil and gas without an ownership right will be guilty of conversion of oil and gas. If entry onto the mineral estate was made, trespass also may be alleged and ejectment sought as part of the remedy. The trespasser will be liable for all oil and gas recovered through a trespassing well, even oil and gas drained from beneath the trespasser's land. n74 This is because the true owner could have so drained under the Rule of Capture.

With oil and gas, the entry into the mineral estate may happen either through a well on the overlying land's surface that vertically reaches the reservoir or through a wellbore deviating from vertical and entering the minerals on a "slant" from a wellsite off the surface. Although both forms of trespass impact on the subsurface, only the second will be referred to as a subsurface trespass.

§ 49.04(a)(1) Good Faith Trespass Distinguished from Bad Faith Trespass.

Both subsurface trespass and trespass on the surface may be of two types: good faith or bad faith. In a majority of jurisdictions, all trespasses are presumed willful and thus in bad faith. Good faith is a matter of affirmative defense. n75 Oklahoma takes the converse view because the measure of damages for a bad faith trespass is punitive in nature; the plaintiff therefore must prove that the trespass was in bad faith. n76 Because of the distinction in damages available, categorizing a trespass as good faith or bad faith is of more than theoretical consequence. n77

A good faith trespasser acts upon an honest and reasonable belief in superiority of right. n78 The test to determine this

is both subjective and objective. Motive may be important in determining good faith, n79 but what a prudent person would have believed under the circumstances is also important. n80 The trespasser must not act with culpable negligence or willful disregard for the rights of others. n81 Notice of another's claim is often an element in determining good faith. n82 Because not all asserted claims are valid, however, mere knowledge of an outstanding interest should not automatically make a trespass willful. n83 Often courts distinguish between a party who peacefully entered before notice of a claim and those who enter only after being so informed; the latter situation is more indicative of bad faith. n84 Although not conclusive of bad faith, entering property initially during the pendency of litigation would be a sign of bad faith. n85 Acting upon the advice of an attorney who has been given all the facts and who was consulted in good faith rather than for a tactical advantage is a sign of good faith. n86

Many of the problems encountered in the oil and gas situation are similar to those existing when other minerals are involved. n87 One facet may differ. If a dispute arises over solid minerals, there is no physical urgency with the timing of mining. The coal, gold, or other substance will be there when the dispute is settled. With oil and gas, however, the hydrocarbon may be drained by another and irretrievably lost if a well is not drilled. Therefore, the presence of drainage is another factor to consider in determining the good faith of the trespassing driller. It will not, however, be conclusive of good faith. n88

COMPUTER-ASSISTED RESEARCH

LEXIS: (trespass w/15 good faith or unintentional! or nonwillful! or non-willful!) and oil or gas or (trespass! or unauthorized w/5 bad faith or willful! or wilful! or intentional!) w/30 (oil or gas)

§ 49.04(a)(2) Measure of Damage for Bad Faith Trespass.

As with solid minerals, n89 if a trespass is in bad faith or willful, damages will be the full value of the oil and gas removed. All improvements to the property and income from the well will belong to the true owner. This measure is punitive in nature; it exceeds the actual damage of the true owner because the oil or gas could not have been produced without expense. n90 In some circumstances, moreover, the owner will be able to collect the highest value of the oil or gas from the time of severance until the time of filing suit or at trial. n91 Interest may also be assessed.

COMPUTER-ASSISTED RESEARCH

LEXIS: (trespass! w/15 bad faith or willful! or wilful! or intentional!) w/50 (oil or gas) and (damage! or liabil!)

§ 49.04(a)(3) Measure of Damage for Good Faith Trespass.

A good faith trespasser who produces oil or gas is not required to account for the full value of the removed hydrocarbon. As with solid minerals, the measure is the value of the oil and gas in place. The royalty measure often used for solid minerals, n92 however, is seldom used for oil and gas. n93 Damages are computed as the value of the produced oil or gas less reasonable expenses for discovery and production. These expenses can include costs of drilling and completing a well in addition to standard operating costs. In Arkansas, a landowner who is without opportunity or equipment to develop the materials lost through a good faith conversion is limited in damages to anticipated lease proceeds or royalty value. n94

Three principles, however, limit credits for expenses. Costs charged against the value of production cannot exceed three measures: 1) customary and reasonable costs, 2) amounts the trespasser actually incurred, and 3) the benefit that was gained by the true owner. The first two limitations do not require extensive elaboration. They are designed to remove any potential economic gain to the trespasser. Limiting credits to expenses that benefit the true owner bears examination.

As one court phrased it, "benefit to the rightful owner -- not cost to the trespasser is the test of improvement." n95

Certain costs, such as lifting costs n96 and severance tax payments, n97 if expended, will always benefit the true owner because they always are incurred for production. n98 Seemingly, the cost of drilling a well also will always be necessary. While it is true that a well is needed to produce oil and gas, it does not follow that the well the trespasser drilled was required. If the true owner had another well that could have drained the same oil or gas, the cost of drilling the trespassing well would not have benefitted the true owner. No credit for the cost of drilling the producing well would be allowed in that circumstance. n99 Conversely, the trespasser could possibly recover the cost of drilling a dry hole if valuable geological information was gained and the drilling was part of an exploration plan that a reasonable and prudent operator in a good faith search for oil and gas would have undertaken. n100 In this regard, the questions are similar to those asked when a co-tenant seeks credit for costs upon accounting to a non-producing co-tenant. n101

Naturally, the trespasser can recoup costs only out of production. Additionally, only costs incurred during trespass may be recovered. n102 The true owner cannot be compelled to contribute. Additionally, the trespasser will be ejected from the land. Depending on timing, this can impact the good faith trespasser's ability to recoup costs. If production had continued long enough, the costs would be recovered by a credit against the damages due to the true owner. If production had not yet reached the pay-out point, courts have employed various techniques to keep the damages at the value of the mineral in place. These include using improving trespasser statutes to force the true owner to purchase the well or granting the trespasser a lien on the production to secure repayment of costs. n103 When the true owner proceeded on the theory that the unauthorized party was unjustly enriched by including nonowned lands in a pooling agreement, however, there was no recovery for unrecouped drilling expenses. n104

COMPUTER-ASSISTED RESEARCH

LEXIS: (trespass! w/15 good faith or unintentional or nonwillful! or
non-wilful!) w/50 (oil or gas) and (credit or recover! w/15 cost* or expense* or expenditure*)

§ 49.04(a)(4) Special Problems with Subsurface Trespass Through Slant Drilling.

If a party is drilling on the surface of lands, the person with the right to develop the oil and gas beneath the lands will be on notice. If, however, the trespass occurs because a well is drilled on the slant and bottoms in trespass, the fact of the trespass may not be readily apparent. Some jurisdictions therefore apply the discovery rule to the statute of limitations for a subsurface trespass. n105 The time to file suit is tolled until the true owner knows or should have known of the trespass. n106 Procedures exist to compel a directional survey and ascertain where the well is located. n107

Most often, a subsurface trespass is considered willful or in bad faith. To intentionally drill a slant well requires special equipment called a "whipstock." If one was used for a legitimate purpose, such as avoiding a fault, the operator should employ a directional survey to chart the well. If the well deviated from vertical unintentionally because the drill bit hit an unusually hard rock plane, the operator should have been aware of the incident and investigated. n108

COMPUTER-ASSISTED RESEARCH

LEXIS: (oil or gas w/50 trespass!) and underground or subsurface or slant w/2 drilling or well)

§ 49.04(b) Trespass Caused by Underground Intrusion of Injected Substances.

In order to perform secondary or tertiary recovery, n109 substances are added to the reservoir to increase reservoir pressure. It is not possible to control precisely where in the formation the substances will travel.

Therefore, unitization is the normal method to proceed with these activities. In Bumgartner v. Gulf Oil Co., n110

Bumgartner refused to join a unit and sued for trespass to recover the value of the oil the injected water "washed" out from under his lands. The court found that, so long as Bumgartner was given a fair and reasonable opportunity to join the unit, no willful trespass will result from enhanced recovery activities approved by the relevant conservation commission. n111 If the Rule of Capture authorizes a party to capture oil and gas that might migrate to a lawful well, a "negative rule of capture" allows the injection of substances into the formation even if the substances will migrate across borders and displace oil. Technical trespass rules should not inhibit necessary recovery techniques if done without injury to producing formations. n112 Some courts, however, have found liability for waterflood displacement under nuisance theories. n113

§ 49.04(c) Usurpation of Geophysical Information.

Until a well is drilled, no one conclusively can attest to the presence or absence of oil or gas beneath any specific property. Nevertheless, various geophysical exploratory techniques can ascertain the likelihood of its presence. These include magnetometers, n114 gravimeters, n115 and the more useful seismic devices. n116

§ 49.04(c)(1) Right to Explore.

The right to explore minerals, either by drilling for information n117 or by use of geophysical means, is a valuable right separate from the right to develop minerals. An oil or gas company wants to concentrate its drilling funds on areas with the greatest potential for production and will pay for exploratory data.

The right to authorize exploration of the mineral estate is a right of the mineral owner because it helps fix the estate's value. n118 This is true even if the mineral estate has been severed from the surface estate and surface entry is required to perform the exploration. n119 An owner of severed minerals has the right to use so much of the surface as is reasonably necessary to develop the minerals, which includes reasonable exploratory activities. n120

Generally, an oil and gas lease will grant the lessee the right to explore for minerals. This grant, however, will not necessarily be exclusive unless the lease expressly so states. n121 If the grant was not exclusive, the lessor will be able to authorize others to explore because, based on the reversionary interest, the lessor retains a stake in knowing the value of the minerals. Unlike production, exploration can be done more than once.

§ 49.04(c)(2) Cause of Action with Physical Invasion.

The hallmark of a trespass is unlawful physical invasion of the lands of another. If an unauthorized explorer places "shot holes" or other equipment for a seismographic survey on property, then there will be a physical entry not only of the surface, but of the minerals. However, if the waves from a non-negligently performed seismographic survey merely reverberate through minerals, there is no physical invasion and no trespass. n122 The analogy is to the lack of a cause of action for concussions from a neighbor's non-negligent blasting on the neighbor's own property or from non-excessive airplane overflights. Therefore, many companies will simply "shoot" on the periphery of lands for which they cannot gain authorization. In the oft-cited case for this proposition, however, the seismic information was not readable. Therefore, recovering data from the shooting may not be legitimate. n123

If there is a physical entry on the property and hence the minerals, a trespass action will lie. Although surface entry is required for the cause of action, normally damage to the surface will not be the damages sought. Loss of information or loss of the right to sell the explorative right is the true damage. Therefore, in some jurisdictions the owner may "waive the tort" in the case of a geophysical trespass and seek damages based on assumpsit. n124 Under this theory, the damage is the reasonable market value of the exploratory right taken. The court will create the contract the parties should have entered into for a prudent exploratory program. Other jurisdictions will allow the owner to proceed based on conversion. The damage on this theory is the value of the personal property taken, namely the seismic information itself. n125

§ 49.04(c)(3) Cause of Action When No Physical Invasion.

If there has been an usurpation of geophysical information without entry unto the property, trespass will not lie. Various theories have been suggested to compensate the mineral owner, including trade secret appropriation, invasion of privacy or interference with prospective advantage, the right to employ, or the right to lease. n126 None of these theories are well-developed because of the paucity of case law. One area that might be broached is slander of title. However, because results of geophysical surveys are not often broadcast, the element of publication may be missing. n127

§ 49.04(d) Loss of Leasing Value as Element of Damage.

Until drilling, the value of any tract for oil and gas production is speculative. Nevertheless, oil and gas companies do pay upfront money for the right to lease. n128 The market value of any particular tract will rise and fall based on several factors, which include the price of oil generally and the information available about both the particular land and lands surrounding the tract. If a tract of land is proven unproductive, however, the leasing value of the tract will fall despite what neighboring owners might receive as bonuses. The question arises whether this loss should be compensable.

Courts have taken divergent views. In *Humble Oil & Refining Co. v. Kishi*, n129 the court concluded loss of leasing value was a compensable damage. The defendant had wrongfully entered and drilled a dry hole in trespass. The owner, without proving the loss of a specific sale, could show that the land no longer commanded its earlier market value. The court noted that if the defendant had purchased the right to enter, it would have had to pay that market price. The opposite conclusion was reached in Martel v. Hall Oil Co. n130 The *Martel* court concentrated on the fact that the lands were shown to be valueless for oil; it could not condone preserving the right of the owner to sell "nothing" for "something." One commentator suggests that the debate should not be about whether a new "wrong" is recognized, but whether the loss was a foreseeable element of damage resulting from an otherwise unlawful act. n131

§ 49.04(e) Slander of Title.

A cause of action for slander of title requires proof of five elements: (1) the uttering and publishing to a third person, (2) of slanderous, that is false and injurious, words regarding title to property, (3) in which the plaintiff possessed an interest, (4) which words caused special damages, and (5) which acts were done by the defendant with malice. n132 Malice is an important element of the cause of action because, especially in the case of speculative property that is subject to fluctuations in value, any disparaging remark can impact the property's value. Moreover, parties must be able to pursue reasonable claims of title. n133 The special damage requirement demands proof that a specific sale was lost. n134

Two separate fact patterns seem to generate most slander of title claims: a trespasser drills a dry hole n135 or a lessee refuses to release a terminated oil and gas lease. The latter situation may result from a difference in opinion as to the current validity of a lease or from a simple refusal to execute a release. In both situations, a special bargain may be lost during the period title is clouded.

A classic case of slander of title is Kidd v. Hoggett. n136 A lessee argued that payment of shut-in royalties preserved a lease and was justified by the existence of a well capable of producing in paying quantities. Sales were not made from the well when possible and the lessor became suspicious. He leased to a third party on the condition that the original lessee execute a release. When this was not done, the second lease was not finalized. In fact, the well purportedly holding the first lease was not capable of production in paying quantities and the lessee knew it. In finding liability for slander of title, the court emphasized that the malice necessary to obtain actual damages, as opposed to punitive damages, means that the act or refusal to act was deliberate conduct without reasonable cause. n137

At common law, the lessee was not obligated, absent a contractual provision, to execute a release of an expired oil and gas lease. n138 The only exception was in Texas. n139 Therefore, many states have passed statutes making it the duty

of an oil and gas lessee, upon notice and demand by the lessor, to release of record leases that have terminated. n140 Such a failure will justify statutory damages and, if done with malice, will enable recovery of special damages that might be proven.

COMPUTER-ASSISTED RESEARCH

LEXIS: (slander w/3 title) w/50 (oil or gas)

FOOTNOTES:
(n1)Footnote 74. *Edwards v. Lachman, 534 P.2d 670 (Okla. 1974).*

(n2)Footnote 75. *United States v. Wyoming, 331 U.S. 440, 458 (1947), reh'g denied, 332 U.S. 787 (1947); Swiss Oil Corp. v. Hupp, 69 S.W.2d 1037 (Ky. Ct. App. 1934). See generally*

Annotation, *Right of Trespasser to Credit for Expenditures in Producing, 21 A.L.R.2d 380, 395 (1953).*

(n3)Footnote 76. In fact, the plaintiff must prove malice, wanton action, or gross negligence sufficient to be the equivalent of intent. *Edwards v. Lachman, 534 P.2d 670 (Okla. 1974), appeal after remand, 567 P.2d 73 (Okla. 1977).*

(n4)Footnote 77. *See generally* Annotation, *Right of Trespasser to Credit for Expenditures in Producing, 21 A.L.R.2d 380 (1953).*

(n5)Footnote 78. *See Gulf Prod. Co. v. Spear, 84 S.W.2d 452 (Tex. 1935).*

(n6)Footnote 79. This is more so in Louisiana than any other jurisdiction, *see Mason v. United States, 260 U.S. 545 (1923)* (trespasser entitled to credit for costs if went into possession in moral good faith even if in technical bad faith).

(n7)Footnote 80. *Swiss Oil Co. v. Hupp, 69 S.W.2d 1037 (Ky. Ct. App. 1934)* (intent, being a state of mind, may generally only be proven by looking at circumstances to see if a reasonably prudent man would have so acted).

(n8)Footnote 81. *Id.*

(n9)Footnote 82. *See Guffey v. Smith, 237 U.S. 101 (1915)* (good faith trespass transformed into bad faith after notice).

(n10)Footnote 83. This is especially true in the oil and gas situation where many controversies arise not because an oil and gas lessee leased from the wrong party, but because the lessor believes that a once valid lease had terminated. *See generally* P. Martin & B. Kramer, Williams & Meyers Oil and Gas Law § 226.3 (Matthew Bender) for a comprehensive listing of factors and cases.

(n11)Footnote 84. *Alaska Placer Co. v. Lee, 553 P.2d 54 (Alaska 1976).* Most courts treat an oil and gas lessee who remains after a lease terminates as a trespasser. *Hunt v. HNG Oil Co., 791 S.W.2d 191 (Tex. App. 1990), writ denied. But see Imperial Colliery Co. v. Oxy U.S.A. Inc., 912 F.2d 696 (4th Cir. 1990)* (West Virginia law would address oil and gas lessee in possession after lease ends under contract law, not trespass).

Continental Resources v. Ferrar Oil Co., 559 N.W.2d 841 (N.D. 1997) (the North Dakota Industrial Commission's forced pooling order precluded any claim by plaintiff for subsurface trespass).

(n12)Footnote 85. *Whelan v. Killingsworth, 537 S.W.2d 785 (Tex. Civ. App. 1976)* (drilling during litigation not in good faith as matter of law but some suggestion outcome could differ if had been prior peaceful possession). *But see Davis v. Cramer, 793 P.2d 605 (Colo. 1990)* (during pendency of litigation trespass bad faith as matter of law) judgment reversed on other grounds, *Davis v. Cramer, 808 P.2d 358 (Colo. 1991)* (whether or not lease terminated) and

Davis v. Cramer, 837 P.2d 218 (Colo. App. 1992).

(n13)Footnote 86. *Alaska Placer Co. v. Lee, 553 P.2d 54 (Alaska 1976); LeBow v. Cameron, 394 S.W.2d 773 (Ky. 1965); but see Dethloff v. Zeigler Coal Co., 412 N.E.2d 526 (Ill. 1980), cert. denied, 451 U.S. 910 (1981).*

(n14)Footnote 87. *See* general discussion at § 48.06(a), *supra*.

(n15)Footnote 88. *Barnes v. Winona Oil Co., 200 P. 985 (Okla. 1921); Houston Prod. Co. v. Mecom Oil Co., 62 S.W.2d 75 (Tex. App. 1933).*

(n16)Footnote 89. *See* § 48.06(b), *supra*.

(n17)Footnote 90. *Deltic Timber Corp. v. Great Lakes Chemical Corp., 2 F. Supp. 2d 1192 (W.D. Ark. 1998)* (the court endorsed the harsh measure of damages in which costs of production are not deducted from the value of the mineral at the surface as a penalty for intentional conduct, willfulness or bad faith).

(n18)Footnote 91. *Champlin Ref. Co. v. Aladdin Petr. Corp., 238 P.2d 827 (Okla. 1951)* (obtainable if due diligence used in pursuing suit).

(n19)Footnote 92. *See* § 48.06(a), *supra*.

(n20)Footnote 93. *But see Killam v. Texas Oil & Gas Corp., 798 S.W.2d 419 (Ark. 1990)* (royalty measure appropriate because plaintiff did not actively drill wells at time of trespass).

(n21)Footnote 94. *Deltic Timber Corp. v. Great Lakes Chemical Corp., 2 F. Supp. 2d 1192 (W.D. Ark. 1998).*

(n22)Footnote 95. *Greer v. Stanolind Oil and Gas Co., 200 F.2d 920 (10th Cir. 1952).*

(n23)Footnote 96. *Carter Oil Co. v. McCasland, 207 F.2d 728 (10th Cir. 1953); Edwards v. Lachman, 534 P.2d 670 (Okla. 1974).*

(n24)Footnote 97. *United States v. Standard Oil Co. of Cal., 21 F. Supp. 645 (S.D. Cal. 1937), aff'd, 107 F.2d 402 (9th Cir. 1939), cert. denied, 309 U.S. 654 (1940), 309 U.S. 673 (1940), reh'g denied, 309 U.S. 697 (1940).*

(n25)Footnote 98. Credits for depreciation and overhead are more troublesome. *See* 1 Kuntz, Lowe, Anderson, Pierce, and Smith, Oil and Gas Law § 11.6 (Anderson).

(n26)Footnote 99. *Carter Oil Co. v. McCasland, 207 F.2d 728 (10th Cir. 1953).*

(n27)Footnote 100. *Compare, Champlin Ref. Co. v. Aladdin Petr. Corp., 238 P.2d 827 (Okla. 1951)* (benefit found when recompleted well) and *Joyce v. Zavhary, 434 S.W.2d 659 (Ky. Ct. App. 1968)* (benefit as part of overall profitable field development), with *Greer v. Stanolind Oil and Gas Co., 200 F.2d 920 (10th Cir. 1952)* (no benefit) and *Pan Am. Petr. Corp. v. Candelaria, 403 F.2d 351 (10th Cir. 1968)* (no benefit proven).

(n28)Footnote 101. *See* discussion in § 49.05(d), *infra*.

(n29)Footnote 102. *Hunt v. HNG Oil Co., 791 S.W.2d 191 (Tex. App. 1990)* (cannot recover costs incurred when lease was valid).

(n30)Footnote 103. *Belcher v. Elliot, 312 F.2d 245 (6th Cir. 1962).*

(n31)Footnote 104. *Pan Am. Petr. Corp. v. Candelaria, 403 F.2d 351 (10th Cir. 1968)* (to do so would force true owner into pooling).

(n32)Footnote 105. *Alphonso E. Bell Corp. v. Bell View Oil Syndicate, 76 P.2d 167 (Cal. App. 1938); but see* current statute of limitations, Cal. Civ. Proc. Code § 349 3/4 (6 Month Statute Of Limitations For Subsurface Trespass), Applied in *Stafford v. Union Oil Co. of California, 343 P.2d 380 (Cal. 1959).* For a more complete discussion of statutes of limitation in various states, see 2 American Law of Property, A Treatise on the Law of Property in the United States, § 10.10 (A. James Casner ed. 1952).

(n33)Footnote 106. *See Pan Am. Petr. Corp. v. Orr, 319 F.2d 612 (5th Cir. 1963)* (production by slant well for five years fraudulently concealed but plaintiff should have discovered it; damages limited to production for period of statute of limitations).

(n34)Footnote 107. *Union Oil Co. v. Reconstruction Oil Co., 51 P.2d 81 (Cal. 1935)* (inherent power of court); *Williams v. Continental Oil Co., 215 F.2d 4 (10th Cir. 1954), cert. denied, 348 U.S. 928 (1955)* (under Fed. R. Civ. P. 34); *Hastings Oil Co. v. Texas Oil Co., 234 S.W.2d 389, 393 (Tex. 1950)* (under Tex. R. Civ. P. Ann. r. 737). *See* additional cases, Summers, *supra* note 32, at § 26, n.85.1.

(n35)Footnote 108. *Continental Resource v. Ferrar Oil Co., 559 N.W.2d 841 (N.D. 1997)* (the North Dakota Industrial Commission's forced pooling order precluded any claim by plaintiff for subsurface trespass).

(n36)Footnote 109. For definitions, see § 49.01(b), *supra*.

Deltic Timber Corp. v. Great Lakes Chemical Corp., 2 F. Supp. 1192 (W.D. Ark. 1998) (court describes the secondary recovery methods for virgin brine after initial removal through production wells. When courts refused to extend the law of capture to brine displaced by secondary recovery processes, Ark. Code Ann. §§ 15-76-301 *et seq.* was enacted to provide unitization procedures to brine production in an effort to balance the interests of landowners and brine producers).

(n37)Footnote 110. *168 N.W.2d 510 (Neb. 1969), cert. denied, 397 U.S. 913 (1970).*

(n38)Footnote 111. *Id.* Damages could only be the value of the oil in place recoverable by Bumgartner through primary and secondary recovery without unit activities.

(n39)Footnote 112. *See also*, P. Martin & B. Kramer, Williams & Meyers Oil and Gas Law § 204.5 (Matthew Bender), on which the court in *Bumgartner* relied. *See generally, Annotation, Rights and Obligations, With Respect to Adjoining Landowners, Arising Out of Secondary Recovery of Gas, Oil, and Other Fluid Minerals, 19 A.L.R.4th 1182 (1983).*

(n40)Footnote 113. *Greyhound Leasing & Financial Corp. v. Joiner City Unit, 444 F.2d 439 (10th Cir. 1971); Boyce v. Dundee Healdton Sand Unit, 560 P.2d 234 (Okla. App. 1975);* and *Mowre v. Ashland Oil & Ref. Co., 518 F.2d 659 (7th Cir. 1975).*

(n41)Footnote 114. Devices to measure the intensity of the earth's magnetic field and help locate subsurface sedimentary rock.

(n42)Footnote 115. Also referred to as gravity meters, they measure the earth's gravitational pull to determine the density of subsurface rocks.

(n43)Footnote 116. A seismograph records the velocity and character of the earth's vibrations created by a shock. Seismic surveys are performed by generating shock waves, either through explosives in "shot holes" or by use of compressional wave vibrators. The shock waves travel into the earth and reflect off the various rock layers. "Geophones" detect and time the waves, turning them into electrical impulses and the seismograph records the data. Interpretation yields a picture of the subsurface rock structure and types of rocks encountered.

(n44)Footnote 117. Even a dry hole provides invaluable clues to help locate hydrocarbons. Coring and logging information allows geologists to correlate the subsurface location of various formations.

(n45)Footnote 118. *Phillips Petr. Co. v. Cowden, 241 F.2d 586 (5th Cir. 1957).*

Mallon Oil Co. v. Bowen/Edwards Assocs., 965 P.2d 105 (Colo. 1998), 940 P.2d 1055 (Colo. App. 1996) (where an oil and gas exploration company had no right to information concerning a methane gas discovery by a geologist lawfully exploring for coal. The methane gas information was coincidentally obtained without any geophysical trespass and the general rule of "no duty to disclose" was applied).

(n46)Footnote 119. By custom, many oil companies do contact the surface owner and offer surface damages. Some states require advance notification of geophysical activities. *See, e.g.*, N.D. Cent. Code §§ 38.08.1-04-08.1-05.

(n47)Footnote 120. *See* § 48.08, *supra* and § 49.08(c), *infra*.

(n48)Footnote 121. *Mustang Prod. Co. v. Texaco, Inc., 754 F.2d 892 (10th Cir. 1985); Roye Realty & Developing, Inc. v. Southern Seismic, 711 P.2d 946 (Okla. App. 1985).*

(n49)Footnote 122. *Kennedy v. General Geophysical Co., 213 S.W.2d 707 (Tex. Civ. App. 1948), writ refused* n.r.e.

(n50)Footnote 123. *Id.* Extrapolation will still be possible if the surrounding lands have been surveyed.

(n51)Footnote 124. *Phillips Petr. Co. v. Cowden, 241 F.2d 586 (5th Cir. 1957). See also Gulf Coast Real Estate Auction Co. v. Chevron Indus., Inc., 665 F.2d 574 (5th Cir. 1982)* (aerial reconnaissance with landing on subject land).

(n52)Footnote 125. 1 Kuntz, Lowe, Anderson, Pierce, and Smith, Oil and Gas Law § 12.7 (Anderson). Conversion is not available in Texas because conversion is a personal property doctrine and in Texas, oil and gas are part of the realty and owned in place. *Shell Petr. Corp. v. Moore, 46 F.2d 959 (5th Cir. 1931).*

(n53)Footnote 126. Thomas M. Warner, Jr. Comment, *Oil and Gas Recovery for Geophysical Exploration -- Catching Up with Technology, 23 Washburn L.J. 107, 118-126 (1983).* James W. Griffin, Comment, *Protectable Property Rights, Trade Secrets, and Geophysical Data, 71 Denv. U. L. Rev. 527 (1994).*

(n54)Footnote 127. *Thomas v. Texas Co., 12 S.W.2d 597 (Tex. Civ. App. 1928).* One case had held that a failure to lease after it was known that a company had conducted a seismic survey was equivalent to publication. The problem is discussed in P. Martin & B. Kramer, Williams & Meyers Oil and Gas Law § 230 (Matthew Bender). For slander of title generally, see § 49.04(e), *infra*.

(n55)Footnote 128. Referred to as "bonus payments." *See* § 49.09(c), *infra*.

(n56)Footnote 129. *276 S.W. 190 (Tex. Com. App. 1925). See also Matheson v. Placid Oil Co., 33 So. 2d 527 (La. 1947).* A later case limited *Kishi* to entries under a "wrongful claim by a lessee against its lessor after termination of the right to enter." *Byrom v. Pendley, 717 S.W.2d 602 (Tex. 1986).*

(n57)Footnote 130. *253 P. 862 (Wyo. 1927).*

(n58)Footnote 131. 1 Kuntz, Lowe, Anderson, Pierce, and Smith, Oil and Gas Law § 12.10 (Anderson). *See also* P. Martin & B. Kramer, Williams & Meyers Oil and Gas Law § 229 (Matthew Bender) (concluding neither case is satisfactory but favoring *Kishi* if limited to its facts: drilling occurred and specific lost sale proven). *Kishi* criticized, Summers, *supra* note 32, at § 25.

(n59)Footnote 132. *See generally* P. Martin & B. Kramer, Williams & Meyers Oil and Gas Law § 232 (Matthew Bender) and Richard W. Hemingway, The Law of Oil and Gas § 4.3 (2d ed. 1983).

Santa Fe Energy Oper. Partners v. Carrillo, 948 S.W.2d 780 (Tex. App. 1997) (where lessors had no record title to 33 out of 640 acres claimed, it was not slander of title for the lessee to enter into leases with the record owners. No malice was present since the lessee reasonably believed that the record owners held title).

(n60)Footnote 133. For cases giving definitions of malice, *see* Richard W. Hemingway, The Law of Oil and Gas § 4.3 (2d ed. 1983), P. Martin & B. Kramer, Williams & Meyers Oil and Gas Law § 232 (Matthew Bender) and Eugene Kuntz, *Liability for Clouding Title to Oil and Gas Interests*, 8th Annual Institute on Oil and Gas Taxation 331 (Southwestern Legal Foundation 1957).

Scott-Kinnear, Inc. v. Eberly & Meade, Inc., 879 P.2d 838 (Okla. App. 1994); Morford v. Eberly & Meade, Inc., 879 P.2d 841 (Okla. App. 1994) (malice requires showing of lack of good faith and lack of probable cause; notice of *lis pendens* privileged).

(n61)Footnote 134. *Kidd v. Hoggett, 331 S.W.2d 515 (Tex. Civ. App. 1959); Pampell Interests, Inc. v. Wolle, 797 S.W.2d 392 (Tex. App. 1990).*

Duncan Land & Exploration v. Littlepage, 984 S.W.2d 318 (Tex. App. 1998) (special damages were shown by the withdrawal of serious investors willing to provide immediately $40,000 for a 3/8 interest as a result of an affidavit to terminate a gas well lease made by the lessor without adequate investigation of whether the lessee had breached by failing to produce in commercial quantities).

(n62)Footnote 135. *Humble Oil & Ref. Co. v. Kishi, 276 S.W.2d 190 (Tex. Com. App. 1925),* discussed *supra* at § 49.04(d), may more accurately be a slander of title case rather than a trespass action: the dry hole which caused injury was drilled under the false statement that the leasehold was valid. However, under slander of title theory, the plaintiff would have had to have shown frustration of a specific sale. *See, e.g.*, Richard W. Hemingway, The Law of Oil and Gas § 4.2(A) (2d ed. 1983)

(n63)Footnote 136. *331 S.W.2d 515 (Tex. Civ. App. 1959).*

(n64)Footnote 137. *331 S.W.2d at 518.*

(n65)Footnote 138. *Solberg v. Sunburst Oil & Gas Co., 246 P. 168 (Mont. 1926); Draper v. J.B. & R.E. Walker, Inc., 204 P.2d 826 (Utah 1949).*

(n66)Footnote 139. *Kidd, 331 S.W.2d 515. See also Williams v. Jennings 255 S.W.2d 874 (Tex. App. 1988)* (failure to release lease when lessor's mineral interest was void is classic slander of title).

(n67)Footnote 140. *See* 2 Summers, *supra* note 32, at § 472 for a comprehensive listing.

See Mills v. Davis Oil Co., 11 F.3d 1298 (5th Cir. 1994) (interpreting Louisiana's statute).

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CHAPTER 49 PETROLEUM AND PIPELINES
II. Basic Ownership Concepts and Protection of Rights.

6-49 Thompson on Real Property, Thomas Editions § 49.05

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§ 49.05 Concurrent Owners: Right of Cotenant to Develop, Produce, or Lease.

Several parties often hold oil and gas interests in co-tenancy. The situation may arise from inheritance or by conveyance. Because of the speculative nature of oil and gas development, purchasing undivided interests in several tracts spreads risk. Disputes, however, can arise when one party desires to develop and another cotenant does not. Additionally, if a cotenant is unlocatable, whether the oil and gas may be leased or developed without that owner's consent becomes a question.

§ 49.05(a) Majority Rule: Independent Rights.

In a majority of jurisdictions, each owner of an undivided interest in oil and gas may independently develop it or authorize others to develop the oil and gas. The rationale behind this view is that only through development is the oil and gas estate "possessed" and each cotenant has equal rights to possess the jointly owned property. The rule is the law in Alabama, Arkansas, California, Florida, Georgia, Kansas, Kentucky, Missouri, Montana, North Dakota, Oklahoma, Pennsylvania, and Texas. n141

Under this rule, individual development may occur so long as one cotenant does not exclude another from doing the same. n142 A developing cotenant will have to account to the non-developing cotenant. n143 As noted below, not all costs will necessarily be recoverable. Therefore, oil companies generally do not desire to rely upon the majority rule to develop a particular property. n144 Non-leasing cotenants can later ratify a lease and share in benefits proportionately. n145

§ 49.05(b) Minority Rule: No Independent Rights.

Under the minority rule, no individual cotenant may independently develop the oil and gas. This rule's rationale is that unproduced oil and gas is an interest in real property which should not be transformed into an interest in personal property, that is, produced oil and gas, without the consent of the owner. For one cotenant to produce would be waste. n146 Although a lease from one cotenant will not authorize development, it will bind the interest of that party and create development rights if the other cotenants later ratify it. n147

West Virginia adopted this position. The problem with the rule is it authorizes extortion by small interest owners refusing to consent. n148 Louisiana, Illinois and Michigan also follow the rule, but with statutory modifications that militate against "hold outs." n149

§ 49.05(c) Exception to Minority Rule: Drainage.

An exception exists to the minority rule. If drainage by wells on adjacent property is imminent, one cotenant may develop without the consent of the remaining cotenants. n150

§ 49.05(d) Accounting to a Non-Joined Cotenant by a Producing Cotenant.

A producing cotenant must account to the non-producers for their proportionate share of the proceeds minus a proportionate share of the costs of development, production and marketing. Accounting is a personal right and will not pass impliedly with a conveyance of the undivided interest. n151 Various rules governing accounting make development difficult if less than all cotenants agree to the activity, either by signing a lease or entering into a joint operating agreement. Therefore, most instances requiring accounting arise from an inadvertent failure to join all interests. Three factors lead to this conclusion.

First, the developing cotenant shoulders all the risk. For example, if the owner of 90% of the undivided interests produced, the producer would owe the other 10% of proceeds minus 10% of costs. n152 The developing cotenant may recover the non-producer's share of the cost of drilling and completing the well before it need account. No proceeds need be paid before recoupment of these costs. When that point is reached, the developer will account for 10% of the proceeds minus 10% of future production costs. In no event, however, are costs recoupable other than out of production. n153 The developer therefore bears the full cost of failure but must share the proceeds of a successful well. Only extremely favorable prospects with small outstanding interests would knowingly be developed in this manner.

Another reason to hesitate from knowingly entering into an accounting situation is that arguments can arise about what costs are chargeable. Naturally, only reasonable and necessary costs may be recouped. Cases have variously treated items such as overhead, interest on capital, and depreciation of equipment. n154

The third cautionary note is that the unit chosen as the basis for an accounting can also profoundly affect what costs are shared. If an accounting is done on a well-by-well basis, the developing co-tenant could not recover for a dry hole even if its drilling was part of a reasonable drilling plan. n155 Additionally, costs such as those for road development are difficult to apportion to individual wells in a field. Therefore, accounting should be on a per tract basis. The test for deductibility should be whether a reasonable and prudent operator would have incurred the costs in a good faith effort to recover oil and gas. n156

COMPUTER-ASSISTED RESEARCH:

LEXIS: (co-tenan! or cotenan! w/50 oil or gas) and (credit or recover! or account or accounting w/15 cost* or expense! or expenditure! or proceed*)

§ 49.05(e) Relationship Between Lessees of Cotenants.

If each cotenant leases to separate oil and gas companies, the respective lessees will step into the shoes of their lessors and become cotenants. Each will have the right to develop, but must acknowledge the others' similar rights. n157 The act of one lessee, however, will not automatically benefit the other. In other words, drilling or production by one lessee will not satisfy the drilling or production requirements of the other lessee. n158 If the lessees enter into a joint operating agreement, however, actions performed under the agreement will suffice for all leases. n159

If only one lessee develops, that lessee will have to pay two parties: 1) royalties to its lessor pursuant to the lease, and 2) proportionate net proceeds to the non-developing lessee pursuant to the rules of accounting between cotenants. The non-developing cotenant will have to pay its lessor pursuant to its lease. This contractual requirement can create practical difficulties because the non-developing lessee will not receive proceeds until the developing lessee recoups the costs of drilling the well. Its lessor, however, is entitled to royalties from first production. Some jurisdictions avoid the problem of forcing the lessee to pay before receiving proceeds by allowing royalties to be held in suspense until proceeds are received. The lessee will not be entitled to any proceeds until after its lessor has received all accrued royalties. n160 The more straight-forward approach is for the two lessees to execute an operating agreement under which they share expenses and proceeds as each are incurred. n161

§ 49.05(f) Partition.

One way to avoid the difficulties cotenancy presents is to seek partition. n162 A partition may be voluntary or involuntary. General rules regarding partition apply to partitions of undivided interests in minerals. n163 Because oil and gas may not be evenly dispersed throughout the jointly owned tract, however, the basic preference is to partition by sale rather than in kind. n164

In almost all jurisdictions, tenants in common may seek partition as a matter of right. Equity may only enter into a decision about the manner of partition. n165 The exceptions are Kansas n166 and Oklahoma, n167 which allow oppression and other equitable considerations to be pled as defenses to a partition action. n168 An Oklahoma statute also requires that a mineral interest owner show that co-owners are frustrating the petitioning cotenant's development objectives. n169 There are three additional general caveats on the availability of partition.

The first two center on ownership interests. First, partition is a possessory action. This leads to several conclusions and questions. Because owners of non-possessory interests in oil and gas cannot seek partition, all jurisdictions agree that owners of royalty interests cannot independently seek partition. n170 There is disagreement about whether or not it is necessary for a leasehold to be categorized as possessory to allow joint lessees to seek partition. Additionally, courts differ on whether the presence of a possessory leasehold will foreclose a co-tenant in the oil and gas estate from seeking partition. n171 The second limit on partition tied to ownership concepts is that the interests to be partitioned must be of equal dignity. Hence, a lessee cannot force partition upon the lessor and the owner of the remaining undivided interest. n172

The third limit on partition is that express and implied agreements to not partition will be enforced if they are limited to reasonable time periods. n173 A mere mining partnership will not be sufficient to imply such an agreement. n174 A more specific agreement to conduct join development operations, such as a drilling program, may be sufficient to imply an agreement to forego partition. n175

COMPUTER-ASSISTED RESEARCH

LEXIS: partition w/2 (oil or gas or mineral!)

§ 49.05(g) Other Methods to Avoid Cotenancy Problems.

Other methods exist to counter obstacles to development. n176 One is to "force pool" the non-consenting undivided interest. Forced pooling is the compulsory joinder of property interests in a proposed well spacing unit for the purposes of accounting for costs and proceeds of a well. Most forced pooling statutes either expressly or by interpretation allow for forced pooling of undivided interests. n177

In some jurisdictions, statutes govern leasing of the interests of unknown or unlocatable interest holders. n178 By subjecting the interest to a lease, the developer is bound only to pay proportionate royalties, not proportionate net

proceeds.

FOOTNOTES:
(n1)Footnote 141. For cases, *see* 2 Summers, *supra* note 32, at § 222 and *Fife v. Thompson, 708 S.W. 2d 611 (Ark. 1986).*

(n2)Footnote 142. *Earp v. Mid-Continent Petr. Corp., 27 P.2d 855 (Okla. 1933).*

(n3)Footnote 143. *See Prairie Oil & Gas Co. v. Allen, 2 F.2d 566 (8th Cir. 1924).*

South Central Petroleum, Inc. v. Long Bros. Oil Co., 974 F.2d 1015 (8th Cir. 1992).

(n4)Footnote 144. Some use statutory provisions for leasing interests of unknown or unlocatable interest holders. *See* §§ 49.05 (g) and 49.07(a), *infra* and 2 Summers, *supra* note 32, at § 222.

(n5)Footnote 145. *See, e.g., Texas & P. Coal & Oil Co. v. Kirtely, 288 S.W. 619 (Tex. Civ. App. 1926), writ refused* n.r.e.

(n6)Footnote 146. *Law v. Heck Oil Co., 145 S.E. 601 (W. Va. 1928).* For remedies available to the non-producing cotenant, *see* P. Martin & B. Kramer, Williams & Meyers Oil and Gas Law § 504.2 (Matthew Bender).

(n7)Footnote 147. *Freeman v. Egnor, 79 S.E. 824 (W. Va. 1913).*

(n8)Footnote 148. In *Law v. Heck Oil Co., 145 S.E. 601 (W. Va. 1928),* an owner of an undivided 1/768 interest enjoined development the remaining owners desired.

(n9)Footnote 149. La. Rev. Stat. Ann. §§ 31:174-31:177 (majority rule governs if 90% of interest owners agree); 765 Ill. Comp. Stat. 520-1 - 520-2. (owners of majority may seek court order to authorize drilling for benefit of all); and Mich. Comp. Laws Ann. § 319.101 (similar to Illinois but co-owners opt to contribute costs or be treated as royalty holders).

(n10)Footnote 150. *Law v. Heck Oil Co., 145 S.E. 601 (W. Va. 1928).*

(n11)Footnote 151. *Weiser-Brown Oil Co. v. Samson, 966 F.2d. 431 (5th Cir. 1992).*

reh'g denied, en banc, 1992 U.S. App. Lexis 17546 (8th Cir. July 31, 1992).

(n12)Footnote 152. *Prairie Oil & Gas Co. v. Allen, 2 F.2d 566 (8th Cir. 1924). But see* Kentucky position, *Petro. Exploration Corp. v. Hensley, 284 S.W.2d 828 (Ky. Ct. App. 1955)* (only remedy for non-developer prior to suit is share of customary royalty; net proceeds only available after filing suit).

(n13)Footnote 153. *Krug v. Cities Serv. Petr. Co., 618 P.2d 323 (Kan. App. 1980).* The developing cotenant's interest is thus referred to as "cost bearing" and the non-developing interest called the "non-cost-bearing" or "carried" interest.

(n14)Footnote 154. *See* Richard W. Hemingway, The Law of Oil and Gas § 5.1(B) (2d ed. 1983), P. Martin & B. Kramer, Williams & Meyers Oil and Gas Law § 504.1 (Matthew Bender).

(n15)Footnote 155. *Compare Connette v. Wright, 98 So. 674 (La. 1923)* and *Moody v. Wagner, 23 P.2d 633 (Okla. 1933)* (costs of dry or marginal well shared because benefits from overall program shared), with *Burnham v. Hardy Oil Co., 147 S.W. 330, aff'd, 195 S.W. 1139 (Tex. 1917)* (no right to recoup dry hole cost).

(n16)Footnote 156. P. Martin & B. Kramer, Williams & Meyers Oil and Gas Law § 504.3 (Matthew Bender).

Alternatively, the question could be framed as whether it would unjustly enrich the non-developing cotenant to not share the costs. Richard W. Hemingway, The Law of Oil and Gas § 5.1(B) (2d ed. 1983). This formulation subtly differs from the prudent operator standard. Looking for unjust enrichment employs hindsight where the prudent operator standard looks at the situation at the time the development plan is undertaken.

(n17)Footnote 157. *Earp v. Mid-Continent Petr. Corp., 27 P.2d 855 (Okla. 1933)* (right to enter, not fact of entry, important).

Enron Oil & Gas Co. v. Worth, 947 P.2d 610 (Okla. App. 1997) (an undivided mineral interest owner can separately convey the right of reasonable ingress and egress upon the surface for the limited purpose of conducting seismic operations to test for oil and gas formations; joinder of the other interest owners is not required).

(n18)Footnote 158. *Id.* (non-producing lessee's lease not propelled into secondary term and expires; contrary to the general rule, because of the peculiar wording of leases and actions of parties, drilling by other lessee satisfied requirement to either drill or pay delay rentals); *Mattison v. Trotti, 262 F.2d 339 (5th Cir. 1959).*

(n19)Footnote 159. *Wilson v. Superior Oil Co., 274 S.W.2d 947 (Tex. Civ. App. 1955).*

(n20)Footnote 160. *Earp v. Mid-Continent Petr. Corp., 27 P.2d 855 (Okla. 1933)* (right to enter, not fact of entry, important).

(n21)Footnote 161. *Wilson v. Superior Oil Co., 274 S.W.2d 947 (Tex. Civ. App. 1955).*

(n22)Footnote 162. *See* Annotation, *Partition of Undivided Interests In Minerals (Including Oil and Gas) In Place*, 173 A.L.R. 854 and Annotation, *Right to Partition in Kind of Mineral or Oil and Gas Land*, 143 A.L.R. 1092.

See also Dunn v. Patton, 718 N.E.2d 264 (Ill. App. 1999) (partition action barred where court found parties were not tenants in common).

(n23)Footnote 163. For complete discussions, see Richard W. Hemingway, The Law of Oil and Gas § 3.3 (2d ed. 1983), 1 Kuntz, Lowe, Anderson, Pierce, and Smith, Oil and Gas Law §§ 6.1-6.6 (Anderson); 3 Summers, *supra* note 32, at §§ 535-538 and P. Martin & B. Kramer, Williams & Meyers Oil and Gas Law §§ 506-507 (Matthew Bender).

(n24)Footnote 164. *Fortney v. Tope, 247 N.W. 751 (Mich. 1933)* (allocating unproductive land a greater inequity than forcing sale). *See generally* P. Martin & B. Kramer, Williams & Meyers Oil and Gas Law § 506.3 (Matthew Bender). There is some precedent for "checkerboarding" mineral distribution to counter possible inequities in partitions in kind. *Phillips v. Phillips, 104 N.W.2d 52 (Neb. 1960).* One commentator suggests that partitions in kind could be practical. If an area is not known to be valuable for oil and gas, partition could be in kind with the presumption that oil and gas distribution, if present at all, would be uniform. If oil and gas is likely or known in the area, expert testimony could be had on its distribution. 1 Kuntz, Lowe, Anderson, Pierce, and Smith, Oil and Gas Law § 6.4 (Anderson).

(n25)Footnote 165. *Moseley v. Hearrell, 171 S.W.2d 337 (Tex. 1943)* (equities immaterial). Because a joint tenant may sever the relationship and turn it into a tenancy in common, that type of interest is generally subject to partition. A tenancy by the entirety may not be partitioned.

(n26)Footnote 166. *Strait v. Fuller, 334 P.2d 385 (Kan. 1959).*

(n27)Footnote 167. *Cox v. Lasley, 639 P.2d 1219 (Okla. 1981).*

(n28)Footnote 168. Arkansas and Mississippi may also take this view. *Schnitt v. McKellar, 427 S.W.2d 202 (Ark. 1968); Stern v. Great Southern Land Co., 114 So. 739 (Miss. 1927).*

(n29)Footnote 169. 12 Okla. Stat. Ann. § 1501. The party must also show that a compulsory pooling order would not remedy the difficulty.

(n30)Footnote 170. *DeMik v. Cargill, 485 P.2d 229 (Okla. 1971).* A royalty interest granted on one co-tenant's undivided interest may be affected if the cotenant's interest is partitioned. The royalty will attach only to those lands granted to the cotenant in severalty, with an increase in size to compensate for the lesser areal extent. P. Martin & B. Kramer, Williams & Meyers Oil and Gas Law § 506.5 (Matthew Bender). *See also*, Annotation, *Right to Partition of Overriding Royalty Interest in Oil and Gas Leasehold, 58 A.L.R.3d 1052.*

(n31)Footnote 171. *See* 3 Summers, *supra* note 32, at § 537.

(n32)Footnote 172. *Medina Oil Dev. Co. v. Murphy, 233 S.W. 333 (Tex. Civ. App. 1921).* For other examples of the problem, see Richard W. Hemingway, The Law of Oil and Gas § 3.3B (2d ed. 1983) (also identifying ownership of minerals throughout the land to be partitioned as a requirement). *See* separate problem, *Right to Partition as Affected by Severance of Estate in Minerals from Estate in Surface by One or More Cotenants*, 39 A.L.R. 741 (1925).

When minerals and surface interests are held in different ratios, neither a voluntary nor involuntary partition of the surface will be a partition of the minerals. *Kolb v. Morgan, 854 S.W.2d 719 (Ark. 1993)* (unless exception for family settlement agreement applies).

(n33)Footnote 173. *Figge v. Ohio L & M Co., No. 625, 1993 Ohio App. LEXIS 5441 (Ohio App. 1993) Saulsberry v. Saulsberry, 160 S.W.2d 654 (Ky. Ct. App. 1942). See also Robinson v. Speer, 185 So. 2d 730 (Fla. App. 1966)* (upholding agreement as to method of partition).

MCEN 1996 *Partnership v. Glassell, 42 S.W.3d 262 (Tex. App. 2001)* (where an agreement to unitize several leases included a clause describing the conditions under which the unit would cease to exist. The clause was interpreted as a waiver by the parties to their rights to partition at will).

(n34)Footnote 174. *Moseley v. Hearrell, 171 S.W.2d 337 (Tex. 1943); Browne v. Loriaux, 366 P.2d 1016 (Kan. 1961).*

(n35)Footnote 175. *Elrod v. Foster, 37 S.W.2d 339 (Tex. Civ. App. 1931), writ refused* n.r.e.; *Sibley v. Hill, 331 S.W.2d 227 (Tex. Civ. App. 1960)* (agreement to last as long as production continues). *See also Long v. Hitzelberger, 602 S.W.2d 321 (Tex. Civ. App. 1980)* (implied agreement to not partition until farmout terms met); *Odstrcil v. McGlaun, 230 S.W.2d 353 (Tex. Civ. App. 1950)* (implied from fact one co-owner had exclusive right to lease); and *Thomas v. Witte, 29 Cal. Rptr. 412 (1963)* (implied because co-tenancy property unitized).

(n36)Footnote 176. *See generally* Ernest E. Smith, *Methods for Facilitating the Development of Oil and Gas Lands Burdened with Outstanding Mineral Interests, 43 Tex. L. Rev. 129 (1964).*

(n37)Footnote 177. About two-thirds of the statutes so provide. For review of the various statutes, see 2 Summers, *supra* note 32, at §§ 83-86.

(n38)Footnote 178. *See, e.g.*, Arkansas, Ark. Code Ann. §§ 52-201-52-203, 53-406 (receiver at request of any co-tenant); Texas and Mississippi, Tex. Civ. Prac & Rem. Code Ann. § 64.091 and Miss. Code Ann. 1972 §§ 11-17-33-11-17-34 (receiver for unknown or unlocatable persons); North Dakota, N.D. Cent. Code § 38-13-01 *et seq.*, (trustee for unknown or unlocatable persons).

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CHAPTER 49 PETROLEUM AND PIPELINES
II. Basic Ownership Concepts and Protection of Rights.

6-49 Thompson on Real Property, Thomas Editions § 49.06

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§ 49.06 Successive Owners: Right of Life Tenant or Remainderperson to Develop, Produce, or Lease.

§ 49.06(a) Effect of Lease from Life Tenant or Remainderperson Alone.

Neither a life tenant nor a remainderperson may develop individually or authorize development of oil and gas unless drainage is imminent. n179 The remainderperson has no right of possession until the life tenant dies; a lease from the remainderperson will only authorize entry if it is still valid when the remainderperson's interest becomes possessory. n180 A life tenant may not diminish the estate owing to the remainderperson. To develop the minerals would be affirmative waste. n181 However, if drainage is imminent, the life tenant may be required to lease or develop the oil and gas or be guilty of permissive waste. Moreover, the document creating a life estate may authorize leasing or development by the life tenant. n182 In most states, a court of equity would have inherent authority to order the lease or sale of interests that are being drained.

§ 49.06(b) Exception: Open Mine Doctrine.

Oil and gas interests owned by a life tenant subject to rights of a remainderperson may be developed during the life tenant's possession without the permission or joinder of the remainderperson under the "open mine" doctrine.

§ 49.06(b)(1) Applicability of Doctrine.

The open mine doctrine applies when there was an open mine on the premises at the time a life tenancy came into possession. n183 An oil and gas well is a "mine" for the purposes of the doctrine. Additional wells may be drilled pursuant to the lease under which the well existing on the relevant date was drilled. If there was no well, but the interest was leased on the date the life estate comes into being, the open mine doctrine will apply to wells drilled pursuant to that lease. n184 A 1990 Texas case extended the doctrine. The testator set up a testamentary trust, allowing the trustee to execute oil and gas leases. When the trust was to terminate, the testator's son was to receive either a life estate or fee title depending on circumstances. The son received a life estate and oil and gas leases executed by the trustee were in existence. The open mine doctrine applied. n185 Even if the open mine doctrine applies, the life tenant cannot execute additional leases. n186 The open mine doctrine affects both life estates created by conveyance or will and those created by law, such as homesteads and dowers. n187

COMPUTER-ASSISTED RESEARCH

LEXIS: (open w/1 mine) w/50 (oil or gas w/15 well or lease)

§ 49.06(b)(2) Distribution of Proceeds.

In the event the open mine doctrine applies, the life tenant may keep all proceeds without accounting in any manner to the remainderperson.

§ 49.06(c) Joint Leases by Life Tenant and Remainderperson.

Unless the open mine doctrine applies, the life tenant was given authority to lease by the document creating the life estate, or a court approved a lease, the only way to develop oil and gas subject to a life estate is to lease from both the life tenant and remainderperson jointly.

§ 49.06(c)(1) When Deemed to Occur.

Several mechanisms exist to obtain a sufficient lease from both parties. First, a joint lease obviously will be present when the life tenant and remainderperson execute one lease. Second, if one party executes a lease purporting to bind the whole interest, the other may ratify the lease. n188 Third, if the two parties execute leases with substantially identical terms and the same lessee comes to hold the leases, merger occurs and the lessee is deemed to have full rights. n189 One case allowed effective production rights to pass even if the terms of the two leases differed; the lessee had the duty to account for the differing royalty rates. n190

Statutes in several states allow courts to appoint receivers or trustees for the purpose of executing leases covering contingent future interests. n191

§ 49.06(c)(2) Distribution of Proceeds.

If a lease has been properly authorized, proceeds are shared pursuant to basic tenets regulating life estates. n192 The remainderperson is entitled to receive the undiminished property, known as the corpus or principal. The life tenant is entitled possession or the income of the property for life. Normal lease proceeds that are considered principal are the bonus and royalty payments. n193 These should be preserved for the remainderperson with the life tenant entitled to interest earned on the sums. n194 Under a minority rule, however, the bonus is income and paid to the life tenant. n195 Other proceeds generally deemed income are delay rentals. n196

COMPUTER-ASSISTED RESEARCH

LEXIS: (life w/2 estate* or tenant*) and (proceed! or benefit! or royalt!) w/20 (oil or gas or mineral w/5 leas!)

FOOTNOTES:
(n1)Footnote 179. *Wellborn v. Tidewater Assoc. Oil Co., 217 F.2d 509 (10th Cir. 1954); Hathorn v. Amoco Prod. Co., 472 So. 2d 403 (Miss. 1985).*

(n2)Footnote 180. *Wellborn, 217 F.2d at 510.*

(n3)Footnote 181. For additional cases so holding, see 2 Summers, *supra* note 32, at § 223; and Richard W. Hemingway, The Law of Oil and Gas § 5.2 (2d ed. 1983).

(n4)Footnote 182. *Doverspike v. Chambers, 516 A.2d 392 (Pa. Super. 1986); Amarillo Oil Co. v. McBride, 67*

S.W.2d 1098 (Tex. Civ. App. 1934).

(n5)Footnote 183. *Doverspike v. Chambers, 516 A.2d 392 (Pa. Super. 1986); see* § 48.05(b)(2), *supra*.

(n6)Footnote 184. *Clyde v. Hamilton, 414 S.W.2d 434 (Tex. 1967).*

Riley v. Riley, 972 S.W.2d 149 (Tex. App. 1998) (under the open mine doctrine, the homestead claimant was entitled to receive and expend all oil and gas royalties arising out of the homestead property when production had commenced prior to the claim).

(n7)Footnote 185. *McGill v. Johnson, 799 S.W.2d 673 (Tex. 1990).*

(n8)Footnote 186. *Nutter v. Stockton, 626 P.2d 861 (Okla. 1981); but see Cronan v. Castle Gas Co., Inc. 512 A.2d 1 (Pa. Super. 1986)* (when grantor conveyed tract subject to a lease and reserved life estate in all oil and gas, intent was to be able to grant additional leases).

(n9)Footnote 187. *Youngman v. Shular, 288 S.W.2d 495 (Tex. 1956); White v. Blackman, 168 S.W.2d 531 (Tex. Civ. App. 1942),* (wife's homestead).

(n10)Footnote 188. *Burden v. Gypsey Oil Co., 40 P.2d 463 (Kan. 1935)* (remainderperson bound by parol ratification and acceptance of a share of rents and royalties).

(n11)Footnote 189. *Union Oil & Gas Co. v. Wiedemann Oil Co., 277 S.W. 323 (Ky. 1925).*

(n12)Footnote 190. *Hathorn v. Amoco Prod. Co., 472 So. 2d 403 (Miss. 1985). But see Rowe v. Bird, 304 S.W.2d 775 (Ky. Ct. App. 1957)* (no merger when terms differ and leases commenced on different dates).

(n13)Footnote 191. *See, e.g.*, Colo. Rev. Stat. § 38-43-101; Neb Rev. Stat. § 57-22 *et seq*., N.D. Cent. Code § 38-10-12 *et seq*., and Tex. Civ. Prac & Rem. Code Ann. § 64.092.

(n14)Footnote 192. If the life estate is subject to a trust, a state's rules on trust asset distribution, including the Uniform Trust Act and the Uniform Principal and Trust Act, apply. *See* Richard W. Hemingway, The Law of Oil and Gas § 5.2(D) (2d ed. 1983).

(n15)Footnote 193. *In re Bruner's Estate, 70 A.2d 222 (Pa. 1956). See generally* Annotation, *Rights of Tenant For Life or For Years and Remainderman Inter Se in Royalties or Rents, 18 A.L.R.2d 98 (1950).*

(n16)Footnote 194. *Haskell v. Wood, 64 Cal. Rptr. 459 (Ct. App. 1967); Whittington v. Whittington, 608 So. 2d 1274 (Miss. 1992) reh'g denied, 1992 Miss. LEXIS 714* (Miss. Dec. 3, 1992).

(n17)Footnote 195. *Franklin v. Margay Oil Co., 153 P.2d 486 (Okla. 1944); VanAlstine v. Swanson, 417 N.W.2d 516 (Mich. App. 1987).* The same occurs under leases executed under North Dakota statutes N.D. Cent. Code § 38-10-14.

(n18)Footnote 196. *Estate of Toler v. Ponder, 345 P.2d 152 (Cal. App. 1959).*

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CHAPTER 49 PETROLEUM AND PIPELINES
II. Basic Ownership Concepts and Protection of Rights.

6-49 Thompson on Real Property, Thomas Editions § 49.07

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§ 49.07 Rights of Other Interest Holders to Develop, Produce, or Lease.

§ 49.07(a) Defeasible Fees.

Generally, the owner of a determinable fee estate, a fee estate subject to a power of termination, or a fee estate subject to an executory interest may develop or lease the estate for oil and gas without accounting to the holder of the future interest. n197 Naturally, if the document creating the interest forbids oil and gas development, it cannot be done, but a prohibition will not be inferred from a grant specifying that property be used for only certain purposes. Oil and gas development may still take place so long as it does not diminish the use of the land for the primary purpose stated in the limitation. n198 If the future event causing defeasance occurs, the lease from the present owner will terminate. Therefore, it is wise to lease the future interest if possible.

§ 49.07(b) Lands Subject to Servitudes and Restrictions.

As between the owner of an easement or beneficiary of a servitude and the owner of the servient estate, the owner of the servient estate will generally be the party capable of developing or leasing the oil and gas. n199 Nevertheless, the holders of the dominant interests could enjoin oil and gas development if it interferes with their rights. n200

§ 49.07(c) Lands Subject to Security Interests.

Generally, the owner of property subject to a mortgage or deed of trust is the party authorized to develop or lease the oil and gas. This is so despite the fact that in a title theory state, the mortgagee has technical title to the property. n201 Nevertheless, the act of development may constitute waste n202 or leasing might breach various terms of the security agreement. n203 As a practical matter, therefore, a lessee of oil and gas interests needs waivers of priority or subordination agreements from pre-existing lienholders. This will remedy not only the aforementioned problems, but allow the lease to survive the foreclosure of a preexisting lien.

FOOTNOTES:
(n1)Footnote 197. The Restatement of Property states that when the owner of a limited fee is engaging in wanton and unconscionable conduct that will diminish the future interest holder's estate, the future interest holder may seek an

injunction if the interest is likely to vest. Restatement of Property § 193 (American Law Institute 1983). Reasonable oil and gas development is not deemed to be such an act. *Id.* at cmt. h to § 193.

(n2)Footnote 198. *Skipper v. Davis, 83 S.W.2d 318 (Tex. Comm. App. 1935)* (can lease if grant for use for church purposes only, with title to revest in grantor if use abandoned); *but see Devendorf v. Akbar Petr. Corp., 577 N.E.2d 707 (Ohio App. 1989)* (cannot include land "For residential use" in drilling unit).

(n3)Footnote 199. A grant of a right-of-way, however, may be more a determinable fee than an easement based on the language creating the interest. *See* Richard W. Hemingway, The Law of Oil and Gas § 5.4 (2d ed. 1983).

(n4)Footnote 200. *Devendorf v. Akbar Petr. Corp., 577 N.E.2d 707 (Ohio 1989). See also, Property Owners of Leisure Land, Inc., 786 S.W.2d 757 (Tex. App. 1990)* (subdivision restrictions imposed after minerals severed cannot impact mineral estate).

(n5)Footnote 201. *But see* Richard W. Hemingway, The Law of Oil and Gas § 5.6 (2d ed. 1983) (mortgagor not entitled to lease in title theory state although no cases located).

(n6)Footnote 202. P. Martin & B. Kramer, Williams & Meyers Oil and Gas Law § 518 (Matthew Bender).

(n7)Footnote 203. These include due on sales clauses or provisions assigning proceeds from leasing.

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CHAPTER 49 PETROLEUM AND PIPELINES
III. Types of Interests Created from a Landowner's Rights.

6-49 Thompson on Real Property, Thomas Editions

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When someone owns land in fee simple absolute, this includes all rights to the land; the entire proverbial bundle of sticks is owned. These "sticks" include the right to develop any minerals. n204 If nothing is said about minerals when land is transferred, the mineral rights will pass to the grantee. n205 The fee owner, however, may independently grant or reserve particular rights. Out of any initial ownership, different estates and interests may be created. What is passed or reserved depends on the intent expressed in the operative act, and is, of course, limited by the rights the owner had in fact. Although general conveyancing requirements apply, some special requirements may exist. n206

FOOTNOTES:
(n1)Footnote 204. *See* § 49.02, *supra* for theories of ownership in place of minerals and oil and gas in particular. In the oil and gas industry, when the "fee interest" is referred to, ownership of both the surface and mineral rights in fee simple absolute is meant.

(n2)Footnote 205. *Harris v. Currie, 176 S.W.2d 302 (Tex. 1944); see also Day & Co. v. Texland Petr., Inc., 786 S.W.2d 667 (Tex. 1990)* (executive right is incident of mineral estate and impliedly passes by warranty deed unless excepted); *Ford v. Raab, 744 P.2d 956 (Okla. 1987)* (rule of property that all is conveyed which is not specifically reserved promotes unity of title).

(n3)Footnote 206. For example, an instrument creating severed mineral interests in Kansas must be recorded in 90 days after execution, or the interest is void unless it is listed for taxation separately from the fee interest in the land. Kan. Stat. § 79-420. *See Ford v. Willits, 688 P.2d 1230 (Kan. App. 1984), aff'd 697 P.2d 834 (1985)* (both failure to record in 90 days and failure to list for taxation must occur to invalidate a mineral deed).

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CHAPTER 49 PETROLEUM AND PIPELINES
III. Types of Interests Created from a Landowner's Rights.

6-49 Thompson on Real Property, Thomas Editions § 49.08

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§ 49.08 Landowner's Severance of Oil and Gas Estate from the Surface Estate.

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One frequent change from fee simple ownership is the creation of a separate mineral estate, or a "mineral fee." n207 The act creating the separate estate is referred to as a severance. It may be either a reservation in a deed conveying the surface or a direct grant of minerals. The owner of the severed mineral estate will have the same rights in regard to the minerals that the owner of the land had before the severance. More particular transactions may directly refer to the oil and gas estate and transfer or reserve all of the owner's rights to oil and gas. The interest thus created would be complete or "fee" ownership of the oil and gas.

§ 49.08(a) Meaning of the Words "Minerals" and "Surface."

Grants and reservations often refer simply to "all minerals" or refer to specific minerals and add the catch-all "and all other minerals." What substances generally are considered to be mineral is discussed elsewhere. n208 Two points about the words "minerals" and "surface," however, must be underscored.

First, the two interests are entwined. The mineral estate includes a right to use the surface and the surface estate includes a right to subjacent support. Second, the surface estate is more than simply the uppermost plane of dirt. The surface estate includes all rights to the real property that were not conveyed with the mineral estate, including rights to water.

The general effect of a severance was conceptualized by Professor Kuntz: when the mineral estate is severed from the surface, the general intent is to create two modes of enjoyment of the land. n209 Unlike the surface estate, mineral estates are enjoyed by removing substances that gain their value through removal. Surface estates are enjoyed by using the earth in place.

§ 49.08(b) Whether "Minerals" Includes "Oil and Gas."

A more specific question than what is a mineral is whether the words "all minerals" or "all other minerals" include oil and gas. n210 By the majority rule, the terms are not ambiguous but will include oil and gas unless an intent to exclude

oil and gas is shown in the deed itself. n211 A deed reference to mining techniques appropriate to hardrock mining, such as sinking shafts and stripmining, may show an intent to exclude oil and gas. n212 In determining specifically whether oil and gas is a "mineral," only limited use is made of doctrines such as *ejusdem generis* (general words following a specific enumeration are limited to things of a like class) n213 and *expression unius est exclusio alterius* (expression of one thing is the exclusion of another). n214

In addition to the majority rule, other rules exist to determine if oil and gas are included in "minerals." One is the opposite of the majority rule; oil and gas is presumed excluded unless the wording of the grant shows the opposite intent. n215 Other interpretive methods include the so-called "Pennsylvania rule," which simply states that oil and gas are not included in the term minerals. n216 A more widely adopted approach is one which finds the terms ambiguous and employs extrinsic evidence of specific intent to include or exclude oil and gas. n217 Types of relevant parole evidence include: 1) the nature of the grantee's business, or 2) the knowledge of either the parties to the deed or the general community about the value or presence of oil and gas. As time passes, presenting such proof becomes more difficult and title more precarious, forcing oil and gas developers to obtain leases from all potential parties. n218

§ 49.08(c) Relationship Between Oil and Gas Estate and Surface Owner.

The right to use the surface to recover oil and gas is so important that ownership of oil and gas is often defined as the exclusive right to explore for, develop and produce the oil and gas from the lands. n219 If the right to use the surface is not express in the grant, it nevertheless passes by implication. n220 Nevertheless, surface owners also have rights and interests. n221

§ 49.08(c)(1) Rule of Dominance: Right to Use Surface as Is Reasonably Necessary.

The starting point to analyze the relationship between the oil and gas estate and the surface is the theory of dominance. n222 Because use of the surface is necessary to recover minerals, the oil and gas estate has the right to use so much of the surface as is reasonably necessary for exploration, development and production. The surface estate is servient to the mineral. The oil and gas lessee often may use water needed for drilling n223 and also impliedly may dispose of produced salt water. n224 Mineral development, however, may not be negligent or inflict willful or wanton injury on the surface. n225 Unreasonable or excessive surface use will create liability. n226

Before the surface may be used for mineral production, the basic mineral owner's right requires the surface use to be necessary. This requirement may seem to limit the mineral owner, but necessity initially was used as a sword. Few courts second-guessed the reasonableness of or need for a proposed use. n227 Use of the surface, however, was and is limited to that necessary to remove the minerals from the servient estate. n228 Therefore, the owner of the oil and gas could not use the surface of particular land for the benefit of other land. n229 This may be true even if the subject land was unitized with additional land. n230 The inability to use the surface for unit activities may be changed by agreement n231 or by interpretations of statutes allowing for compulsory pooling or unitization. n232 Some courts have implied a duty to restore the property after use n233 but most do not require this if the lessee did not expressly assume the duty. n234

COMPUTER-ASSISTED RESEARCH

LEXIS: (reasonable or necessary w/10 surface) w/50 (oil or gas w/15 lessee! or lease!)

§ 49.08(c)(2) Accommodation Doctrine.

A specialized doctrine, first announced in Getty Oil Co. v. Jones, n235 regulates the rights of the surface owner and an oil and gas lessee. The surface owner in *Jones* had installed a center-pivot irrigation system, which was the most practical farming method for the location. Getty subsequently drilled two new oil wells on the tract. The beam pumps

Getty installed to serve these wells interfered with the irrigation system, but were, the court found, reasonably necessary for production. n236 Another operator, faced with a similar conflict, had used alternative production methods that did not make center-pivot irrigation impossible.

The *Jones* court recognized that both the surface and mineral estates have value. When land was capable of both agricultural and mineral production, public policy therefore required an accommodation between the two uses. If a planned mineral development would substantially interfere with an existing surface use, the oil and gas lessee would have to use any reasonable less damaging alternative means to accomplish its purpose. n237 If the less damaging alternative was economically feasible, refusal to use it would be unreasonable, even if the alternative increased costs. Reasonableness of various alternatives are tested by comparison with "usual, customary, and reasonable practices in the industry under like circumstances of time, place, and servient estate use." n238 Therefore, allowable production methods will vary from locale to locale. The accommodation doctrine, however, is not a straight balancing requirement. If there is no reasonable alternative, and the burden to show one appears to be on the surface owner, n239 the test reverts to whether the proposed use is non-negligent and will enhance mineral production.

The accommodation doctrine has moved beyond Texas and has been expressly adopted in Arkansas, Pennsylvania, North Dakota, Utah, and West Virginia. n240

COMPUTER-ASSISTED RESEARCH

LEXIS: (reasonable or necessary w/10 surface) w/50 (oil or gas w/15 lessee! or lease!) and accommodation or accommodate)

§ 49.08(c)(3) Surface Damage Acts.

In several oil and gas producing states, surface damage acts have legislatively modified the relationship between the surface and mineral estates. n241 These acts require notice to the surface owner and payment for "damage" to the surface. "Damage" under the acts includes damage for reasonable and necessary use of the surface. The acts did reflect the normal practice of the industry to make some payment for surface use, but technically the dominant oil and gas interest had owned the right to make reasonable and necessary use of the surface.

Prior to the enactments, an oil and gas lessee was only legally liable for negligent, wanton, or willful damage to the surface. Despite this rearrangement of rights, the acts have been upheld against challenges that they had violated due process or unconstitutionally taken private property. n242 After initial opposition, oil companies have recognized that the acts can benefit development because they assure a right of entry when their procedures are followed n243 and they have been construed as a surface owner's sole remedy. n244

§ 49.08(d) Ownership of Depleted Formations for Gas Storage.

One of the most efficient ways of storing gas is in depleted formations, preferably near places of consumption. If there has been a severance of estates, two questions arise because the prospective storer will need to gain both surface and subsurface rights.

First, with whom must the storer negotiate for rights to use the surface, either for injection or production purposes? This is easily answered. Consent of the surface estate owner will be needed; neither the standard oil and gas lease nor the easement for reasonable use of the surface will authorize use of the surface for purposes of storing nonnative gas. n245

The second question involves use of the underground formation itself. The cases are less clear on who owns the right to authorize this use. n246 Therefore, absent legislation, authorization of both owners is required. Many jurisdictions provide for condemnation if voluntary consent is not forthcoming. n247

COMPUTER-ASSISTED RESEARCH

LEXIS: (owner or ownership or title) w/15 (depleted w/3 formation) and (gas w/3 storage or storing)

FOOTNOTES:
(n1)Footnote 207. *Bilby v. Wire, 77 N.W.2d 882 (N.D. 1956)* (where minerals and surface have been severed, each is held by separate and distinct title and each is a freehold estate of inheritance).

Ely v. Briley, 959 S.W.2d 723 (Tex. App. 1998) (a reservation of a 1/2 interest in oil, gas and other minerals applied to an additional 266 acres acquired through accretion. In a case of first impression, the court treated a constructively severed mineral estate as equivalent to surface ownership in the application of accretion principles).

(n2)Footnote 208. *See* § 48.03, *supra*.

(n3)Footnote 209. Eugene G. Kuntz, *The Law Relating to Oil and Gas in Wyoming, 3 Wyo. L.J. 107 (1949).*

(n4)Footnote 210. Technically, according to the majority view, oil and gas has an organic origin. *See*§ 49.01(b), *supra*. Oil and gas may be mineral in the broad "animal, mineral, vegetable" sense or by broadly defining mineral as "things extractable." Nevertheless, a lack of definite chemical composition may remove oil and gas from the scientific category of "mineral." *See generally* Annotation, *Oil and Gas as 'Minerals' Within Deed, Lease, or License, 37 A.L.R.2d 1440 (1954).*

(n5)Footnote 211. For cases adopting, *see* P. Martin & B. Kramer, Williams & Meyers Oil and Gas Law § 219.1 (Matthew Bender). On the topic generally, *see* 1 Summers, *supra* note 32, at § 135.

McCormick v. Union Pacific R. Co., 983 P.2d 84 (Colo. App. 1998). In a case of first impression, the court held that reservations of "all coal and other minerals" and "all oil, coal and other minerals" included oil and gas.

McCormick v. Union Pacific Resources Co., 14 P.3d 346 (Colo. 2000) (where oil and gas have the settled meaning of being included as "minerals" in Colorado deeds reserving "other minerals"); *Pawnee Oil & Gas Inc. v. County of Wayne, 751 N.E.2d 1268 (Ill. App. 2001)* (where the court stated that "oil and gas in place are minerals, but because of their fugacious qualities, they are incapable of an ownership distinct from the soil. They belong to the owner of the land only so long as they remain under the land... . Oil and gas are incapable of ownership until actually found and produced.").

(n6)Footnote 212. *Western Dev. Co. v. Nell, 288 P.2d 452 (Utah 1955); but see Luse v. Boatman, 217 S.W. 1096 (Tex. Civ. App. 1919)* ("mine" is a generic term covering any mode of obtaining minerals from beneath the ground). For additional cases, see Richard W. Hemingway, The Law of Oil and Gas § 1.1 (2d ed. 1983) and P. Martin & B. Kramer, Williams & Meyers Oil and Gas Law § 219.1 (Matthew Bender).

(n7)Footnote 213. *See* Richard W. Hemingway, The Law of Oil and Gas § 1.1 (2d ed. 1983) and P. Martin & B. Kramer, Williams & Meyers Oil and Gas Law § 219.5 (Matthew Bender). For general use of the doctrine in determining the meaning of minerals, see § 48.03(a)(1), *supra*. Oklahoma does use the doctrine to determine what minerals are included in a grant of "oil, gas, and other minerals." *Griffith v. Cloud, 764 P.2d 163 (Okla. 1988).*

(n8)Footnote 214. *See* Richard W. Hemingway, The Law of Oil and Gas § 1.1 (2d ed. 1983). For general use of the doctrine in determining the meaning of minerals, *see* § 48, *supra*.

(n9)Footnote 215. *See* P. Martin & B. Kramer, Williams & Meyers Oil and Gas Law § 219.2 (Matthew Bender). *Sheppard v. Zappa, 133 S.W.2d 860 (Ark. 1939)* (local custom and usage at time of conveyance important).

(n10)Footnote 216. *Highland v. Commonwealth of Pa., 161 A.2d 390 (Pa. 1960) cert. denied, 364 U.S. 901.* For additional cases and jurisdictions adopting, *see* P. Martin & B. Kramer, Williams & Meyers Oil and Gas Law § 219.1 (Matthew Bender). Professor Hemingway has posited that it is only the law in Pennsylvania. Richard W. Hemingway, The Law of Oil and Gas § 1.1 (2d ed. 1983)

(n11)Footnote 217. *Kunkel v. Meridian Oil, Inc., 792 P.2d 1254 (Wash. 1990).* For additional cases, *see* Richard W. Hemingway, The Law of Oil and Gas § 1.1 (2d ed. 1983) and P. Martin & B. Kramer, Williams & Meyers Oil and Gas Law § 219.4 (Matthew Bender).

(n12)Footnote 218. Hence, the rule is criticized. Richard W. Hemingway, The Law of Oil and Gas § 1.1 (2d ed. 1983). Williams and Meyers analyze the policy behind rule choices and prefer rules that determine ownership as a matter of law or that confirm ownership in the readily identifiable surface owner. P. Martin & B. Kramer, Williams & Meyers Oil and Gas Law § 219 (Matthew Bender).

(n13)Footnote 219. *See* § 49.02(c), *supra*.

(n14)Footnote 220. *See* Richard W. Hemingway, The Law of Oil and Gas § 5.5 (2d ed. 1983) and P. Martin & B. Kramer, Williams & Meyers Oil and Gas Law § 218.2 (Matthew Bender). *Miller v. Ridgley, 117 N.E.2d 759 (Ill. 1954)* (surface easements implied in reservation of "oil rights").

(n15)Footnote 221. The surface owner retains the right to use that surface, so long as there is no unreasonable interference with mineral development. *Getty Oil Co. v. Royal, 422 S.W.2d 591 (Tex. Civ. App. 1967).* The basic right to subjacent support, however, is less important with oil and gas than other minerals. *See* § 48.08(b)(2), *supra*. Subsidence is less likely from drilling wells.

(n16)Footnote 222. *See* § 48.08, *supra. See also* Annotation, *What Constitutes Reasonably Necessary Use of the Surface of the Leasehold by a Mineral Owner, Lessee or Driller under an Oil and Gas Lease or Drilling Contract, 53 A.L.R.3d 16 (1963).*

Miller Bros. v. Department. of Natural Resources, 513 N.W.2d 217 (Mich. App. 1994) (government prohibition against drilling creates a temporary taking; "nuisance" exception does not apply if seeking to protect surface because owner of surface had contractual duty to allow holders of mineral reservation to exercise their rights to extract oil and gas even if it caused some harm to surface), *appeal denied, 527 N.W.2d 513 (Mich. 1994).*

(n17)Footnote 223. Annotation, *Construction of Oil and Gas Lease Provisions Giving Lessee Free Use of Water from Lessor's Lands, 23 A.L.R.3d 1434.*

(n18)Footnote 224. *Colburn v. Parker and Parsley Dev. Co., 842 P.2d 321 (Kan. App. 1992).*

(n19)Footnote 225. *Brown v. Lundell, 344 S.W.2d 863 (Tex. 1961)* (liable for negligently allowing escape of saltwater). For theories supporting liability for injury to the surface, *see* P. Martin & B. Kramer, Williams & Meyers Oil and Gas Law § 218.10 (Matthew Bender) (nuisance, negligence, willful misconduct, breach of duty imposed by statute or valid order of regulatory agency). *See also* Annotation, *Liability for Injury to Property Occasioned by Oil, Water, or the Like Flowings from Well, 19 A.L.R.2d 1025.*

If livestock are injured, the surface owner must allege that the oil and gas operator was using more surface than was reasonably necessary and was negligent or that the injury was willful, wanton, or intentional. *Santanta Oil Co. v. Henderson, 855 S.W.2d 888 (Tex. App. 1993).*(the standard for a mineral right owner's damage to land is different than for damage to chattel; in this case the standard for liability for the death of a cow is that the mineral rights owner acted intentionally, wilfully or wantonly).

(n20)Footnote 226. *Enserch Exploration, Inc. v. Gardner, 836 S.W.2d 739 (Tex. App. 1992)* (in most such

allegations, damages only payable under contract).

Oryx Energy Co. v. Shelton, 942 S.W.2d 637 (Tex. App. 1996) (where oil and gas lessee caused permanent damage to land surface through excessive use).

(n21)Footnote 227. *Vest v. Exxon Corp., 752 F.2d 959, 961 (5th Cir. 1985)* ("sadly for the surface owner, [the law] implies that a mineral lease gives a large measure of deference to the lessee's view of reasonableness"); *Grimes v. Goodman Drilling Co., 216 S.W. 202 (Tex. Civ. App. 1919)* (wells close to residence). *See generally* P. Martin & B. Kramer, Williams & Meyers Oil and Gas Law §§ 218.4-218.8 (Matthew Bender).

(n22)Footnote 228. *Russell v. Texas Co., 238 F.2d 636 (9th Cir. 1956), cert. denied, 354 U.S. 938 (1956)* (use of lands for such purposes after notification by surface owner of rental requirements constituted acceptance of surface owner's offer to rent).

(n23)Footnote 229. *Mountain Fuel Supply Co. v. Smith, 471 F.2d 594 (10th Cir. 1973).*

(n24)Footnote 230. *Robinson v. Robbins Petr. Corp., 501 S.W.2d 865 (Tex. 1973)* (voluntary unit), *but see Delhi Gas Pipeline Corp. v. Dixon, 737 S.W.2d 96 (Tex. App. 1987)* (approving gathering line across land in voluntary unit).

(n25)Footnote 231. Modern lease forms often extend the rights that impliedly go to the owner of a mineral estate. *See* § 49.31(d), *infra*.

(n26)Footnote 232. *Gulf Oil Corp. v. Deese, 153 So. 2d 614 (Ala. 1963)* (compulsory pooling laws overrode restrictions on surface use); *Dunn v. Southwest Ardmore Tulip Creek Sand Unit, 548 P.2d 685 (Okla. App. 1976)* (may use salt water for compulsory enhanced recovery unit).

(n27)Footnote 233. *Bonds v. Sanchez-O'Brien Oil and Gas Co., 715 S.W.2d 444 (Ark. 1986).*

(n28)Footnote 234. Annotation, *Duty of Oil or Gas Lessee to Restore Surface of Leased Premises upon Termination of Operations, 62 A.L.R.4th 1153 (1986).*

(n29)Footnote 235. *470 S.W.2d 618 (Tex. 1971).*

(n30)Footnote 236. *Id. at 620-621.*

Landreth v. Melendez, 948 S.W.2d 76 (Tex. App. 1997) (where the accommodation doctrine was rendered inapplicable by a lease provision absolving mineral owners from liability for damage to the surface where exploration and production were pursued by "all usual, necessary and convenient means").

(n31)Footnote 237. *Id.* at 622-623.

(n32)Footnote 238. *Id.* at 627. In all but Arkansas, only existing surface uses are protected. *See Diamond Shamrock Corp. v. Phillips, 511 S.W.2d 160 (Ark. 1974).*

The doctrine applies when the surface is owned by a public entity. If the mineral owner would have a reasonable alternative development method, governmental restrictions on development would not be an inverse condemnation of the minerals. *Tarrant County Water Control v. Haupt, Inc., 854 S.W.2d 909 (Tex. 1993), on remand, Haupt, Inc. v. Tarrant County Water Control, 870 S.W.2d 350 (Tex. App. 1994)* (no reasonable means of access to minerals other than vertical drilling from dry land because of costs of directional or platform drilling).

(n33)Footnote 239. In *Sun Oil Co. v. Whitaker, 483 S.W.2d 808 (Tex. 1972),* the court limited the search for alternatives to those available on the leasehold. Other courts have not made this limitation.

(n34)Footnote 240. *Diamond Shamrock Corp. v. Phillips, 511 S.W.2d 160 (Ark. 1974); Einsing v. Pennsylvania Mines Corp., 452 A.2d 558 (Pa. 1982); Hunt Oil Co. v. Kerbaugh, 283 N.W.2d 131 (N.D. 1979); Flying Diamond Corp. v. Rust, 551 P.2d 509 (Utah 1976);*Buffalo Mining Co. v. Martin 267, S.E.2d 721 (W. Va. 1980).

(n35)Footnote 241. Passed in Montana, Mont. Code. Ann. § 82-10-504; Oklahoma, 52 Okla. Stat §§ 318.3 and 318.5; North Dakota, N.D. Cent. Code § 38-11.1-01-10, *see also* § 38-18-07 (Surface Owner Protection Act); South Dakota, S.D. Codified Laws Ann. § 45-5a; West Virginia, W. Va. Code § 22B-2; Washington, Wash. Rev. Code § 79.14.040. *See also* Texas, Tex. Nat. Res. Code Ann. § 52.297 (applies to leases on certain public land) and Wyoming, Wyo. Stat. Ann. § 11-34-120 (applies to certain agricultural lands).

Todd S. Hageman (Comment), *Comparing Effectiveness of Oil & Gas with Coal Surface Damage Statutes in Okla., 46 Okla. L. Rev. 291 (1993).*

(n36)Footnote 242. *Murphy v. Amoco Prod. Co., 729 F.2d 552 (8th Cir. 1984)* (right to not compensate for unavoidable damage only a "minor strand" of property right bundle if property at all); *Davis Oil Co. v. Cloud, 766 P.2d 1347 (Okla. 1986)* (merely changed common law liability rule, not property rights).

See also, Houck v. Hold Oil Co., 867 P.2d 451 (Okla. 1993) (act does not apply to well completed before effective date of act; damages only recoverable if common law standard violated).

(n37)Footnote 243. *Roye Realty & Dev. Inc. v. Watson, 791 P.2d 821 (Okla. App. 1990).*

(n38)Footnote 244. *Turley v. Flag-Redfern Oil Co., 782 P.2d 130 (Okla. 1989)* (surface owner may not protest increased density of drilling).

(n39)Footnote 245. P. Martin & B. Kramer, Williams & Meyers Oil and Gas Law § 222 (Matthew Bender).

Cf., Cassinos v. Union Oil Co. of Cal., 18 Cal. Rptr. 2d 574 (1993) (surface owner may "own" spaces in the formation, but may not authorize third-party salt water disposal that would injure the mineral estate). For a controversy between two parties with storage rights at different depths, *see Reese Exploration, Inc. v. Williams Natural Gas Co., 983 F.2d 1514 (10th Cir. 1993).*

(n40)Footnote 246. *Id.* (arguing that the mineral owner should have the right); *see also*, 1 Kuntz, Lowe, Anderson, Pierce, and Smith, Oil and Gas Law § 2.6 (Anderson).

(n41)Footnote 247. *See, e.g.*, federally certified gas storage facilities under National Gas Act, *17 U.S.C. § 717f*(h). *Columbia Gas Transp. Corp. v. Exclusive Gas Storage Easement, 962 F.2d 1192 (6th Cir. 1992)* (state law governs damage computation). For listings of state condemnation statutes, *see* P. Martin & B. Kramer, Williams & Meyers Oil and Gas Law § 222 (Matthew Bender) and 1 Kuntz, Lowe, Anderson, Pierce, and Smith, Oil and Gas Law § 2.6 (Anderson).

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CHAPTER 49 PETROLEUM AND PIPELINES
III. Types of Interests Created from a Landowner's Rights.

6-49 Thompson on Real Property, Thomas Editions § 49.09

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§ 49.09 Attributes of the Mineral Estate.

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§ 49.09(a) Component Rights and Liabilities Generally.

A definition of a mineral estate, or fee in oil and gas, is necessary to distinguish it from other rights in oil and gas. Each of the mineral estate's component attributes may be individually considered and assigned. n248 As complete ownership of the minerals, the mineral estate includes the right to develop the oil and gas and use the surface for that purpose. n249 Concomitantly, the interest holder bears a liability for costs. n250 Most mineral interest owners do not develop minerals directly, but do so through leasing. The lessee will then bear the costs of development. The owner of the mineral right also has the right to lease oil and gas, referred to as the executive right, and the right to all proceeds of an oil and gas lease. Additionally, the covenants made by a lessee benefit the mineral owner, who has the right to enforce these duties.

§ 49.09(b) Right to Lease Oil and Gas: Executive Right.

Ownership of the executive right gives control of mineral development because the executive right authorizes leasing. n251 When minerals are owned in cotenancy, one cotenant may desire sole control over leasing either because of knowledge of the oil and gas industry or, conversely, because of a desire to protect a surface interest. n252 Assigning the executive right to one person would also make oil and gas more marketable because an oil and gas developer need only deal with one person and would avoid the problems cotenancy creates. n253 To meet these objectives, the executive right over a particular mineral interest must be able to be separated from that mineral interest so that someone other than the particular mineral interest owner would control leasing of it.

The general consensus is that severing the executive right is possible. n254 The severance of the executive right traditionally comes about in two ways: 1) a party conveys to another, reserving to the grantor an undivided interest in the minerals and the exclusive right to lease the minerals; or 2) a grant is made of an undivided interest in the minerals together with the exclusive right to lease the minerals reserved to the grantor. n255

In order to explain the viability of the severed executive right, analogies are made to powers of appointment, n256 powers coupled with an interest, n257 and statutory powers in trust. n258 These theories may be unnecessary because of

a simple property analysis. If a grantor grants an undivided interest in minerals but reserved the exclusive leasing right, the grantor has in essence reserved the entire mineral estate, burdened with an incorporeal interest. This incorporeal interest is the mineral interest devoid of the executive right. It has no possessory rights and the non-executive interest received by the grantee only differs from a royalty because additional lease benefits attach to the non-executive interest. n259

Although a severed executive right has been justified analytically, questions arise about whether the severed executive right is alienable, whether it may be revoked, and how long it may endure. In addition to these property questions, the standard to judge any exercise of the right also provides controversy. n260 Louisiana answers all questions statutorily, n261 but other jurisdictions use case law.

§ 49.09(b)(1) Alienability of Executive Right.

Under the current majority view, the person who holds the executive right over another's mineral interest may convey that right. n262 An exception would be if the language creating the right indicated that it was a personal right. n263 Initial cases differed on the rationale for the result, but the most recent cases simply treat the executive right as a property interest. n264 If the right was granted with or reserved with an undivided interest in minerals in the same tract, the exclusive executive right will pass with a conveyance of the undivided interest to which the exclusive executive right was attached. n265

COMPUTER-ASSISTED RESEARCH

LEXIS: (executive w/1 right or interest) w/50 (aliena! or transfer!)

§ 49.09(b)(2) Revocability of the Executive Right.

The few cases that have considered the matter found that the mineral owner could not revoke the power to lease held by another. n266

COMPUTER-ASSISTED RESEARCH

LEXIS: (executive w/1 right or interest) w/50 (revoke or revocability or terminate or end)

§ 49.09(b)(3) Duration of the Executive Right.

In most instances, unless limited when created, the executive right over a non-executive mineral interest owned by another may last forever. n267

This is especially true when the holder of the executive interest also owns an undivided interest in the minerals in the tract affected by the executive interest. In Dallapi v. Campbell, n268 however, a California court found the executive interest violated the Rule Against Perpetuities. The case is not of wide import because its facts differ from most common fact patterns.

Dallapi involved lots in Los Angeles that had been conveyed with a reservation to the grantor of the exclusive right to "lease and contract for drilling." The grantor retained neither any surface lots nor any mineral interest in the property. Therefore, the court reasoned that the grantor only reserved the right to create leases in the property of another. These leases, not being in existence, would be future interests. Because the reservation did not envision the grantor being the lessee, the grantor's rights were considered a special power of appointment. Moreover, exercise of the power was not limited in time. Therefore, it was impossible to state that the future interest created pursuant to the executive right would vest, if at all, within the period of lives of persons in beings, plus twenty-one years. n269 The court concluded

the executive right could not be exercised because it violated the Rule Against Perpetuities.

The reasoning of *Dallapi* contains the seeds of its avoidance. First, even if the power of appointment analogy is used, viewing the right as a general power of appointment would vest the executive interest. n270 Second, the executive interest could be deemed vested if it was part of a vested property right. A California case after *Dallapi* reasoned that when a person with a mineral interest in particular lands reserves the exclusive executive right in a conveyance of an undivided interest in the minerals, the grantor actually retained all rights in the mineral estate except the share of mineral proceeds conveyed to another. This right to share proceeds would be an incorporeal hereditament. n271 The court viewed both the conveyed right to receive income and the interests reserved as immediately vested. Therefore, if the exclusive executive right is held by someone who also has a mineral interest in the affected tract, the Rule Against Perpetuities should not be violated. If there is no such interest, in order to avoid the *Dallapi* result, the executive right should clearly allow the holder to be the lessee or it should be limited in time.

Logically, when the policies of the Rule Against Perpetuities are considered, the Rule should not be used to invalidate an executive right. The right does not restrain alienation nor render property unmarketable. In fact the exclusive executive right has the opposite effect because it makes development less complicated than when co-tenants exist. n272

COMPUTER-ASSISTED RESEARCH

LEXIS: (executive w/1 right or interest) w/50 rule against perpetuities

§ 49.09(b)(4) Standard for Exercise of the Executive Right.

If one party holds the executive right, the person with a right to proceeds from minerals but no executive right is at the mercy of the executive to obtain a return from the minerals. This is so if the executive right affects either a nonexecutive mineral interest n273 or a nonparticipating royalty interest. n274 The financial realities of the relationship demand a standard to judge the propriety of executive right exercises.

This standard has been set at various levels, ranging from requiring good faith, which would be a simple absence of fraud, n275 to imposing a strict fiduciary requirement on the executive. n276 The good faith standard presumes that the executive's self interest would protect the nonexecutive. Most courts seem to follow the Texas lead n277 and require an intermediate level, namely that the executive use utmost good faith. n278 The executive's duty arises out of the relationship itself and need not be stated in the deed. n279

Texas consistently labels this duty as one of utmost good faith when it adjudicates private rights. n280 Nevertheless, some cases have blurred this ostensible standard with a fiduciary one. The case most-cited for requiring utmost good faith, Manges v. Guerra, n281 also refers to a breach of a fiduciary duty. Manges, the executive, leased to himself at a nominal bonus and also received benefits under a farmout agreement. These benefits were not shared with the non-executive. The court canceled the Manges-to-Manges lease and assessed punitive damages for a willful and wanton violation of the executive's duty. Both remedial responses are appropriate for a breach of a fiduciary duty. Nevertheless, the case stated the executive must exercise utmost good faith and acquire for the non-executive every benefit extracted for the executive. n282

Later Texas cases note the potential confusion in standards, but generally find the questioned conduct was sufficient to breach either the utmost good faith or fiduciary standard. n283 Certain questions, however, need clarification, including whether or not the executive may lease to itself. Under a fiduciary standard, self-dealing is a per se violation. Cases interpreting the executive's duty have not totally precluded self-dealing, but will find a breach if the lease to the executive does not contain fair market bonuses and royalties. n284

Factual circumstances other than self-dealing also can trigger a claim that the executive violated the non-executive's

rights. n285 Generally, the executive must act as a reasonable and prudent landowner would and obtain the most advantageous lease terms available, with due regard for the interests of the non-executive. The executive has no duty to negotiate anything other than a standard, marketable lease. n286 A standard lease would only be objectionable if the terms are designed purposely to injure the non-executive. If parties to a lease collude to damage the non-executive, however, the lessee has been held liable for inducing or contributing to the breach of duty to the non-executive. n287

COMPUTER-ASSISTED RESEARCH

LEXIS: (executive w/1 right or interest) w/50 (duty or standard w/15 non-executive or royalty or nonparticipating)

§ 49.09(c) Right to Proceeds of Oil and Gas Leases.

The owner of the mineral estate may participate in all proceeds of an oil and gas lease. If the mineral estate is transferred while it is still subject to a lease, the right to the proceeds passes with the reversionary interest. n288 The main proceeds of the lease include bonuses, delay rentals, and royalties. Miscellaneous proceeds include shut-in royalty payments and minimum royalties.

Each of the three main proceeds serve distinct purposes. The bonus is the initial payment made for the privilege of entering into the lease. It is customary and generally computed on a per acre basis. Sometimes, if the value of the leasehold is high, some bonus may be deferred and paid out of production. n289 Payment of a bonus is not a prerequisite for a valid lease. The primary consideration for an oil and gas lease is the royalty. It is a share of production, free and clear of costs. n290 Delay rentals are not similar to rentals in a traditional lease. They buy time to delay the obligation to drill a well. n291

Although each of the proceeds generally inure to the mineral estate, the right to receive any of these proceeds may be assigned separately. A mineral interest that has no right to delay rentals or bonuses is generally referred to as a non-participating mineral interest. n292

FOOTNOTES:
(n1)Footnote 248. *Altman v. Blake, 712 S.W.2d 117, 118 (Tex. 1986). See also Mull Drilling Co. v. Medallion Petr., Inc., 809 P.2d 1124 (Colo. App. 1991)* (executive right a property interest individually conveyable).

Bath Township v. Raymond C. Firestone Co., 747 N.E.2d 262 (Ohio App. 2000) (where the grantor reserved all oil and gas rights except the right to renew existing leases and the right to re-lease rights previously covered by expired leases, the grantor retained all other oil and gas rights appurtenant to the property including ownership of the oil and gas, the right to royalties, the right to drill and explore and the right to lease land not covered by existing leases).

(n2)Footnote 249. *See* § 49.08 (c)(1), *supra*.

(n3)Footnote 250. *See, e.g.*, § 49.05(d), *supra* (non-producing cotenant bears proportionate share of costs).

(n4)Footnote 251. *See generally* P. Martin & B. Kramer, Williams & Meyers Oil and Gas Law § 229.3 (Matthew Bender).

Alaska v. United States, 35 Fed. Cl. 685 (1996) (for an executive interest to attach, there must be a specific parcel of land involved; general mineral rights will not suffice), *aff'd 119 F.3d 16 (Fed Cir. 1997), cert. denied, 522 U.S. 1108 (1998).*

(n5)Footnote 252. The protection granted the surface must not totally forbid mineral development. *Eternal Cem. Corp. v. Tammen, 224 S.W.2d 562 (Tex. Civ. App. 1959)* (owner of non-participating royalty enjoined use of surface for cemetery because implied contract that owners of respective interests would exercise rights to avoid injury to rights of

other parties).

(n6)Footnote 253. *See* § 49.05, *supra*.

(n7)Footnote 254. *See generally* Richard W. Hemingway, The Law of Oil and Gas § 2.2 (2d ed. 1983); P. Martin & B. Kramer, Williams & Meyers Oil and Gas Law § 338 (Matthew Bender) and 1 Kuntz, Lowe, Anderson, Pierce, and Smith, Oil and Gas Law § 15.7 (Anderson).

(n8)Footnote 255. In either situation, the undivided interest shorn of the executive right is known as a non-executive fee. *See* § 49.12, *infra*.

(n9)Footnote 256. *Dallapi v. Campbell, 114 P.2d 646 (Cal. App. 1941).*

(n10)Footnote 257. *Bonzo v. Nowlin, 285 S.W.2d 153 (Ky. 1955).*

(n11)Footnote 258. *Howard v. Dillard, 176 P.2d 500 (Okla. 1947);* Eugene Kuntz, *The Rule Against Perpetuities and Mineral Interests, 8 Okla. L. Rev. 183, 188-99 (1955).*

(n12)Footnote 259. P. Martin & B. Kramer, Williams & Meyers Oil and Gas Law § 338 (Matthew Bender). *See also Keville v. Hollister Co., 105 Cal. Rptr. 238 (Ct. App. 1972)* (grantor retained all rights in mineral estate except incorporeal hereditament consisting of share of mineral proceeds conveyed to plaintiff).

(n13)Footnote 260. The question also arises when a non-participating royalty is created. *See* § 49.10(c)(3), *infra*.

(n14)Footnote 261. Ch. 6 of the La. Rev. Stat. Ann., §§ 31:105-113. *See* P. Martin & B. Kramer, Williams & Meyers Oil and Gas Law § 339.4 (Matthew Bender).

(n15)Footnote 262. *See generally* Richard W. Hemingway, The Law of Oil and Gas § 2.2(A) (2d ed. 1983).

(n16)Footnote 263. *Stone v. Texoma Prod. Co., 336 P.2d 1099 (Okla. 1959)* (alienability shown by expressly reserving executive right to "grantor, his heirs, executors, administrators, and assigns"). Professor Hemingway suggests that the grantee may have to be described with the formulaic "and his heirs" in order to confirm transferability. Richard W. Hemingway, The Law of Oil and Gas § 2.2(A) (2d ed. 1983) *But see Mull Drilling Co. v. Medallion Petro., Inc., 809 P.2d 1124 (Colo. App. 1991)* (failure to use "and his heirs" immaterial when statutory short form warranty deed used).

(n17)Footnote 264. *Compare, Pan Am. Petr. Corp. v. Cain, 355 S.W.2d 506 (Tex. 1962)* (executive right over co-tenant's interest not a power coupled with an interest because it does not relate to the owner's undivided interest; therefore it does not survive the death of the first holder unless expressly so stated), *with, Day & Co., Inc. v. Texland Petr., Inc., 786 S.W.2d 667 (Tex. 1990)* (executive right is a property interest even if severed from the other aspects of a mineral interest); *Mull Drilling Co. v. Medallion Petr., Inc., 809 P.2d 1124 (Colo. App. 1991)* (executive right a property interest individually conveyable).

(n18)Footnote 265. *Day & Co., Inc. v. Texland Petr., Inc., 786 S.W.2d 667 (Tex. 1990)* (no express assignment is needed).

(n19)Footnote 266. *See Odstrcil v. McGlaun, 230 S.W.2d 353 (Tex. Civ. App. 1950)* (no partition because to allow one would revoke co-owner's exclusive executive right). *See also* Richard W. Hemingway, The Law of Oil and Gas § 2.2(B) (2d ed. 1983).

(n20)Footnote 267. In Louisiana, it will be subject to liberative prescription. *See* § 49.09(b), *infra*.

(n21)Footnote 268. *114 P.2d 646 (Cal. App. 1941).*

(n22)Footnote 269. *Id.*

(n23)Footnote 270. *Keville v. Hollister Co., 105 Cal. Rptr. 238 (Ct. App. 1972)* (executive right was exercisable to benefit its holder).

(n24)Footnote 271. *Keville v. Hollister Co., 105 Cal. Rptr. 238 (Ct. App. 1972).*

(n25)Footnote 272. *Hollister Co. v. Cal-L Exploration Corp., 102 Cal. Rptr. 919 (Ct. App. 1972)* (arrangement simplifies lessor-lessee relationship).

(n26)Footnote 273. Alluded to in § 49.09(b), *supra* and fully explored § 49.12, *infra*.

(n27)Footnote 274. *See* § 49.10(c)(3), *infra*. If the deed creating a non-participating royalty states that any lease shall not be for a royalty less than 1/8, executing a lease for that amount will not necessarily fulfill the duty. The best efforts and utmost good faith of the executive still are required. *Dearing, Inc. v. Spiller, 824 S.W.2d 728 (Tex. App. 1992).*

(n28)Footnote 275. *Hanson v. Ware, 274 S.W.2d 359 (Ark. 1955).*

(n29)Footnote 276. *Donahue v. Bills, 305 S.E.2d 311 (W. Va. 1983).* For other cases, *see* Richard W. Hemingway, The Law of Oil and Gas § 2.2(D) (2d ed. 1983).

(n30)Footnote 277. *Schlittler v. Smith, 101 S.W.2d 543 (Tex. 1937).*

(n31)Footnote 278. *See, e.g., Welles v. Berry, 434 So. 2d 982 (Fla. App. 1983); Schroeder v. Schroeder, 479 N.E.2d 391 (Ill. App. 1985); J.M. Huber Corp. v. Square Enters., 645 S.W.2d 410 (Tenn. App. 1982)* (employs what "ordinary prudent landowner" would do as test for standard). Louisiana has adopted the utmost good faith standard by statute. La. Rev. Stat. Ann. §§ 31:105-31:113. The standard has also been used to judge the executive's duty in enforcing lease covenants. *Shelton v. Exxon Corp., 921 F.2d 595 (5th Cir. 1991)* (executive expressly had exclusive right to enforce).

(n32)Footnote 279. *Dearing, Inc. v. Spiller, 824 S.W.2d 728 (Tex. App. 1992).*

(n33)Footnote 280. For Relinquishment Act lands, where the state owns the minerals but makes the surface owner its agent for leasing, a fiduciary standard governs the exercise of the executive right. Tex. Nat. Res. Code Ann. §§ 52.188 & 52.189. *But see* (not fiduciary under 1934 law because no ordinary agency arose).

(n34)Footnote 281. *673 S.W.2d 180 (Tex. 1984).*

(n35)Footnote 282. Because an initial opinion that did not use fiduciary language was withdrawn and the new opinion used such language, the mixed signals increased. *Compare, 26 Tex. Sup. Ct. J. 430 (Tex. 1983) with, decision on rehearing, 673 S.W.2d 180 (Tex. 1984).*

(n36)Footnote 283. *Mims v. Beall, 810 S.W.2d 876 (Tex. App. 1991)* (notes equation of standard with fiduciary); *Hawkins v. Twin Montana, Inc., 810 S.W.2d 441 (Tex. App. 1991)* (notes confusion but actions would violate utmost good faith as well as fiduciary standard).

(n37)Footnote 284. *Dearing, Inc. v. Spiller, 824 S.W.2d 728 (Tex. App. 1992).* This case at one point seems to make a blanket prohibition of self-dealing, but later says the executive would not, as a matter of law, be barred from developing the property itself. The facts showed several offers to lease the property on better terms than the executive granted to his family company.

(n38)Footnote 285. *See* P. Martin & B. Kramer, Williams & Meyers Oil and Gas Law § 339.3 (Matthew Bender);

Richard W. Hemingway, The Law of Oil and Gas § 2.2 (2d ed. 1983).

(n39)Footnote 286. *Union Producing Co. v. Scott, 173 F. Supp. 361, 365 (S.D. Tex. 1958), aff'd sub nom., Scott v. Union Producing Co., 267 F.2d 469 (5th Cir. 1959), cert. denied, 363 U.S. 842 (1960), reh'g denied, 364 U.S. 855 (1960)* (inclusion of shut-in royalty clause not objectionable even if term interest not extended by payment; such a lease could command a higher bonus and no collusion was found).

(n40)Footnote 287. *Kimsey v. Fore, 593 S.W.2d 107 (Tex. Civ. App. 1979)* (lease terms manipulated to prohibit drilling during period that term royalty interest existed); *Dearing, Inc. v. Spiller, 824 S.W.2d 728 (Tex. App. 1992)* (punitive damages assessed); *Mims v. Beall, 810 S.W.2d 876 (Tex. App. 1991)* (lessee was executive's son but dicta hints liability could extent to arm's length lessee).

(n41)Footnote 288. *See* § 49.22, *infra*.

(n42)Footnote 289. *Lane v. Elkins, 441 S.W.2d 871 (Tex. Civ. App. 1969).*

(n43)Footnote 290. *Duvall v. Stone, 213 P.2d 212 (N.M. 1949). See* greater detail, § 49.10, *infra*.

In trying to determine the market value of an unproven oil and gas lease "taken" by government, the court noted such value is not reflected by cash transactions. The bonuses and "rents" paid for a lease are generally small and the primary consideration for the lease is the royalty. This is an arrangement in the face of uncertainty that "protects developers from paying too much, and the owners from receiving too little." *Miller Bros. v. Department of Natural Resources, 513 N.W.2d 217, 221 (Mich. App. 1994), appeal denied, 527 N.W.2d 513 (Mich. 1994).*

(n44)Footnote 291. *See* §§ 49.34-49.35, *infra*.

(n45)Footnote 292. It may also, under one view, have no executive right. *See* § 49.20(g), *infra*.

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CHAPTER 49 PETROLEUM AND PIPELINES
III. Types of Interests Created from a Landowner's Rights.

6-49 Thompson on Real Property, Thomas Editions § 49.10

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§ 49.10 Attributes of a Royalty.

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§ 49.10(a) General Definition of a Royalty.

A royalty is a right to a share of the produced oil and gas, free and clear of the costs of exploration, development, and production. n293 In other words, a royalty is an interest in gross production and it is not cost-bearing. By way of example, if a person had a 1/8 royalty interest, the party would be entitled to 1 out of every 8 barrels of oil produced. By definition, a royalty interest lasts for the life of the production and is not limited in dollar value or time. n294

A royalty owner only has the right to receive the specified share of production. In contrast to a mineral interest, the royalty interest contains no right to develop the minerals, no right to use the surface for development, and no right to execute leases. n295 Royalties may be created in different settings, but every royalty interest has the same basic rights and limitations.

§ 49.10(b) Classification of Unaccrued and Accrued Royalty.

Whether or not a royalty is considered real or personal property can be important for purposes of taxes, inheritance, and other matters. Jurisdictions are in full agreement when it comes to the classification of accrued royalty, that is royalty after the oil or gas has been produced. Accrued royalty is personal property. n296 Rights to accrued royalty will not pass with conveyance of the mineral estate. Unaccrued royalty -- royalty to be paid out of future production -- is treated differently. n297

Generally, in ownership in place jurisdictions, a royalty is an interest in land, namely an incorporeal hereditament. It will be real property if the duration of the interest is equivalent to a freehold. Therefore, it must extend for a life estate or be capable of continuing in perpetuity. n298 The potential for infinite duration can be met by an interest that lasts "so long as oil or gas is produced." n299 Kansas, despite being an ownership in place jurisdiction, treats unaccrued royalty as personal property. n300

Non-ownership states logically should not treat a royalty as an incorporeal hereditament because the oil and gas lease

itself is incorporeal; an incorporeal hereditament traditionally may only be carved out of a corporeal estate. Nevertheless, non-ownership states view a royalty having the duration of a freehold as real property for some purposes. n301 However, in certain contexts, such as whether to subject a landowner's royalty to taxation separate from the interest of a lessee, non-ownership states may break ranks with ownership states. n302

§ 49.10(c) Types of Royalty.

§ 49.10(c)(1) "Landowner's" Royalty Reserved in Lease.

Perhaps the most common form of royalty is the royalty payable under an oil and gas lease. n303 This interest is referred to as a "land owner's royalty." Despite this label, it is owed to the mineral interest owner, who may differ from the landowner if the minerals had been severed. Therefore, it is also referred to as the "lessor's royalty." The landowner's or lessor's royalty is deemed reserved from the conveyance to the lessee. The traditional royalty in most states has been a 1/8 royalty, except in California where it is 1/6. Nevertheless, there is no binding standard royalty. Royalty amounts are negotiable and may exceed the norms in geologically promising areas during boom times.

§ 49.10(c)(2) Royalties Created by Lessee: Overriding Royalty.

An oil and gas lessee receives rights to develop the minerals and rights to the production not reserved to the lessor as royalty or otherwise committed under the lease or other agreements. The lessee's interest is referred to as the "working interest." Presuming the "normal" landowner's royalty of 1/8, the working interest would be 7/8 of production. Royalty interests created out of the working interest are referred to as "overriding royalties." n304

Traditionally, overriding royalties compensate those who assist in evaluating and acquiring acreage, such as geologists, independent land agents, or other consultants. n305 Overriding royalties also are often reserved by a lessee when making an assignment of a lease.

Additionally, lessors desiring a greater interest in production than the royalty often state that additional consideration payable out of production will be an "overriding royalty." This override is often treated differently than those reserved from the working interest. n306

An overriding royalty, like any other royalty, is expressed as a fraction or percentage of production. In drafting an overriding royalty, care must be taken to delineate against what amount the fraction applies. For example, if a 1/16 override is to be created, it could mean 1/16 of all 8/8 production or be based on 1/16 of the working interest's 7/8 of production. Overrides created by the lessee are generally specified to be a fractional share of 7/8 of production. n307

§ 49.10(c)(3) Non-Participating Royalty.

As stated elsewhere, ownership of the mineral estate includes the right to receive royalty. Moreover, incidents of a mineral estate may be separately conveyed. Often, either an investor or a mineral estate owner desires to share the proceeds of oil and gas development but does not want to either assume or give up control over development. A method to achieve this passive sharing in the benefits of a mineral estate is to assign the mineral owner's right to receive royalty. A "nonparticipating royalty" is the term used to describe a royalty carved out of the mineral estate independent from an oil and gas lease. The complexities of this interest are explored in § 49.11, *infra*.

§ 49.10(d) Relationship to Other Non-Cost Bearing Interests.

The royalty should be compared to other interests that are not chargeable with the costs of development. Often, either to secure financing or to further compensate a lessor, a "production payment" is created. A production payment gives its owner the right to a certain percentage of gross production until a specified dollar amount has been received. A production payment differs from a royalty because a royalty is for the life of production.

Finally, a caveat about certain other interests that sometimes are referred to as non-cost bearing. For example, the undivided mineral interest of a non-producing co-tenant is called a "carried" or "non-cost bearing" interest. n308 These terms when used in regard to a mineral interest are different than in the royalty context. The mineral interest in certain settings is deemed non-cost bearing because the interest holder is not personally liable to contribute for expenses. The mineral interest, however, is charged with the costs of exploration, development and production; the party incurring these costs when the mineral interest is "carried," however, can only recoup the costs through production. A royalty interest owner, by contrast, is not charged with these costs in any manner, either by direct charge or through deductions from proceeds.

FOOTNOTES:

(n1)Footnote 293. *Duvall v. Stone, 213 P.2d 212 (N.M. 1949).*. For explanation of what costs are not deducted from a royalty owner's share, *see* § 49.48, *infra*.

Temple-Inland Forest Products Corp. v. Henderson Family Partnership, Ltd., 958 S.W.2d 183 (Tex. 1997) (mineral deeds reserved a 1/16 royalty interest free of drilling and production costs).

(n2)Footnote 294. *Lane v. Elkins, 441 S.W.2d 871 (Tex. Civ. App. 1969).* An exception would be a fixed term royalty interest, which is not usually created. *See* § 49.13(a), *infra*.

(n3)Footnote 295. *Grace Petroleum Corp. v. Corporation Comm'n, 841 P.2d 1172 (Okla. App. 1992)* (royalty owners are not persons with a right to produce from the common pool and therefore have no standing to apply to the Commission for an increased density well).

(n4)Footnote 296. *Lone Star Gas Co. v. Murchison, 353 S.W.2d 870 (Tex. Civ. App. 1962), writ refused*, n.r.e.

(n5)Footnote 297. *See generally* Annotation, *Oil and Gas Royalty as Real Or Personal Property, 56 A.L.R.4th 539 (1984).*

(n6)Footnote 298. *Geostar Corp. v. Parkway Petr., Inc., 495 N.W.2d 61 (N.Y. 1993)* For other cases, *see* Richard W. Hemingway, The Law of Oil and Gas § 2.5(B) (2d ed. 1983); Summers, *supra* note 32, at §§ 572-585.

Apache Corp. v. Moore, 891 S.W.2d 671 (Tex App. 1994) (royalty is real property; measure of damages from a blow-out is the value of gas lost, because blow-out did not create permanent damage to realty); *Team Bank v. Meridian Oil, Inc., 879 P.2d 779 (N.M. 1994)* (royalty interest an interest in real property), *cert. granted, judgment vacated on other grounds, 517 U.S. 1217 (1996).*

(n7)Footnote 299. In the rare cases of interests defined for a set period of years, they would be personal property. *Gerhard v. Stephens, 442 P.2d 692 (Cal. 1968).*

(n8)Footnote 300. *Lathrop v. Eyestone, 227 P.2d 136 (Kan. 1951).* Professor Hemingway suggests Ohio and Illinois may also take this view. Richard W. Hemingway, The Law of Oil and Gas § 2.5(B) (2d ed. 1983). Although Kansas cases generally follow *Lathrop*, one case found a royalty to be real property for purposes of statutes dealing with passage to property by devise or descent. *In re Randolph's Estate, 266 P.2d 315 (Kan. 1954).*

(n9)Footnote 301. *White v. McVey, 31 P.2d 850 (Okla. 1934).* For other cases, see Richard W. Hemingway, The Law of Oil and Gas § 2.5(B) (2d ed. 1983); and Summers, *supra* note 32, at §§ 572-585.

(n10)Footnote 302. *Compare, Atlantic Oil Co. v. County of Los Angeles, 446 P.2d 1006 (Cal. 1968)* (right to royalties not right to minerals in the land), *with Sheffield v. Hogg, 77 S.W.2d 1021 (Tex. 1934), reh'g denied, 80 S.W.2d 741 (Tex. 1935)* (taxable interest in land). *See generally* 4 Summers *supra* note 32, at 797, discussing language of ad valorem tax statutes.

(n11)Footnote 303. *See* more detailed discussion on operation of clause, §§ 49.46-49.50, *infra*.

(n12)Footnote 304. *Reynolds-Rexwinkle Oil v. Petex, Inc., 969 P.2d 906 (Kan. App. 1998)* (stating that a lessor owes a duty of fair dealing to a holder of an overriding royalty interest who must show fraud, collusion or bad faith in order to prove a breach of that duty. Without a contract provision to the contrary, an overriding royalty will be extinguished by a subsequent top lease unless the lessor breaches the duty of fair dealing. *XAE Corp. v. SMR Property Management Co., 968 P.2d 1201 (Okla. 1998)* (holding that overriding royalty interest owners who were granted their interests in kind, by separate conveyance, rather than by reservation in a lease assignment, had no right to enforce an implied covenant to market).

AEC Industries v. Survivor Oil, 7 P.3d 1052 (Colo. App. 1999). Defendant was the assignee of certain shallow formations and rights to a specific well. In later assigning both interests to another company, it reserved "an overriding royalty interest" free and clear of any cost of development or operations. The court held that the reserved right was in the nature of a carried working interest rather than an overriding royalty interest because the interest was contingent upon the assignee first recovering its costs. Overriding royalty interests are usually shares of gross production free of costs. As a carried working interest, it was subject to its assignee's mechanic's liens.

(n13)Footnote 305. Roark v. Stoark Oil & Gas, Inc., 813 S.W.2d (Tex. 1991); *Crockett v. McKensie, 867 P.2d 463 (Okla. 1994).*

Overriding royalties also can result under some forced pooling statutes when a mineral owner or working interest owner elects not to participate in a well in the drilling unit. *See, Grace Petroleum Corp. v. Corporation Comm'n, 841 P.2d 1172 (Okla. App. 1992); Clements v. ONEOK Resources Co., 946 P.2d 1154 (Okla. 1997)* (record owner of an overriding royalty interest in a well would have a claim for royalties against leasehold holder if a duty to inform of production was found to exist). *See also Goodall v. Trigg Drilling Co., 944 P.2d 292 (Okla. 1997).*

Roark v. Stoark Oil & Gas, Inc. to Roark v. Stallworth Oil & Gas, Inc., and Crockett v. McKensie, 867 P.2d 463 (Okla. 1994).

(n14)Footnote 306. *Anschutz Corp. v. Natural Gas Pipeline of Am., 632 F. Supp. 445 (D.C. Utah 1986)* (in actuality only grant of additional value to lessor, not an interest of a different type than lessor's royalty).

(n15)Footnote 307. *Concord Oil Co. v. Pennzoil Exploration & Prod. Co., 878 S.W.2d 191 (Tex. App. 1994)* (where a mineral deed contains more than one fraction regarding the interest conveyed, the conveying instrument shall be read as a whole and has priority over the subjective intent of the parties), *rev'd on other grounds, 966 S.W.2d 451 (Tex. 1998).*

(n16)Footnote 308. *See* § 49.05(d), *supra*. Similarly, a mineral interest that is force-pooled is "carried."

OXY USA, Inc. v. Colorado Interstate Gas Co., 883 P.2d 1216 (Kan. App. 1994) (even if "carried," working interest owners bear costs; assignee of working interest owner is not free of costs).

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CHAPTER 49 PETROLEUM AND PIPELINES
III. Types of Interests Created from a Landowner's Rights.

6-49 Thompson on Real Property, Thomas Editions § 49.11

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§ 49.11 Non-Participating Royalty.

§ 49.11(a) Typical Language Creating the Non-Participating Royalty: Fixed Fraction or Percentage "of Royalty."

Although the intricacies of conveyances are discussed elsewhere, n309 typical language creating non-participating royalties illustrates that the interest may be of two types. In one instance, the interest is stated as a fixed fraction of production. For example, an owner may grant a "1/16 royalty in" or "1/16 of the oil and gas produced and saved" from a particular tract of land. n310 Alternatively, a non-participating royalty may be created that grants of a percentage "of the royalty," with phrasing such as "1/2 of the royalty in oil and gas produced" from a particular tract. n311 The share of gross production attributable to each of these formulations differs. n312

§ 49.11(b) Computation of Share of Proceeds Due.

If a royalty is conveyed in terms of a fixed fraction, the amount of gross production due under it is simple. The owner of a 1/16 royalty would be entitled to 1/16 of gross production, or 1 out of 16 barrels of oil. This is a greater share of gross production than would be attributable to an undivided mineral interest in the same amount, *i.e.*, 1/16. Because the royalty in an oil and gas lease is generally apportioned based on the size of the lessor's mineral interest, the owner of an undivided 1/16 mineral interest would receive 1/16 of the royalty reserved in the lease. If the royalty is 1/8, this would be 1/148 of gross production, or 1 out of 148 barrels of oil. Naturally, a 1/16 royalty would be more valuable if there is significant production because of the higher share of gross production. n313 The royalty owner, however, does not participate in bonus and delay rentals as does the mineral interest holder. n314 When there is no production, these are the most valuable proceeds of an oil and gas lease.

Stating the royalty as a fixed fraction of production has another impact. The holder of the executive right could not affect the royalty interest holder's return because it is fixed in advance. This removes any question of what duty may be owed the non-executive, but the fixed return also prevents the fixed royalty holder from participating in any above normal royalty rates that may be negotiated in a lease. The second form of non-participating royalty, the grant of a percentage *of royalty*, refers to and embraces this fluctuation in lease terms. As a consequence, however, if the royalty is based on "1/2 of the royalty," the non-participating royalty owner is dependent on the executive for the amount of

proceeds to be received. n315

When a royalty is phrased in terms of "1/2 of the royalty" the actual share of production is not determinable until a lease is executed. The royalty reserved in the lease will then be divided in half; in other words, the term "1/2 of the royalty" means 1/2 of the royalty specified in any lease. The amount of gross production received by the royalty owner would be equivalent to that received by the owner of a 1/2 mineral interest. If the lease had a 1/8 royalty, both the royalty owner and 1/2 mineral owner would receive 1/16 of gross production. The mineral interest owner, however, unlike the royalty interest owner, would share in bonus and rentals.

§ 49.11(c) Duration of Non-Participating Royalty: Rule Against Perpetuities.

If a non-participating royalty is viewed as a property interest that transfers a present right to share in the proceeds of oil and gas development, then the interest can last forever. Almost all jurisdictions take this view and find the duration of the royalty may be perpetual without violating the Rule Against Perpetuities. n316 Under this analysis, the only uncertain or future aspect of the transaction is whether there will be any practical benefit from the grant. Practical benefit is similar to possession. Deferring possession has never violated the Rule Against Perpetuities so long as the legal right or estate is vested in a timely fashion. n317

Kansas, however, has taken a different view. In *Cosgrove v. Young*, n318 the court stated that until a lease is executed and production begins, a right to royalty is uncertain. The royalty interest therefore is not vested at the time of the grant. Because nothing in the grant analyzed in *Cosgrove* assured production within the time allowed by the Rule Against Perpetuities, the royalty could vest too late and violate the rule. Therefore, a perpetual non-participating royalty may not be created in Kansas. As for non-participating royalties of lesser duration, cases that pre-dated *Cosgrove* had upheld a conveyance of royalties in an existing lease or in leases executed by a specific grantor. n319 However, if production is the "vesting act," as is hinted at in *Cosgrove*, it would seem no non-participating royalty could be granted unless it is limited to 21 years and so long as all and gas is produced. n320

Applying the Rule Against Perpetuities to non-participating royalty interests does not further the policies behind the rule. Non-participating royalties are useful ways of sharing proceeds of mineral development without multiplying controlling interests. Although Kansas reasserted its invalidation of perpetual non-participating royalties, it simultaneously seemed to approve of perpetual non-participating mineral interests. n321

COMPUTER-ASSISTED RESEARCH

LEXIS: (non-participating w/1 royalty) or royalty w/50 rule against perpetuities

§ 49.11(d) Proceeds in Which Royalty Owner Shares: Distinction Between Royalty and Bonus.

Generally, a royalty interest owner, whose interest is phrased in terms of a fraction "of royalty," shares in "royalties" under a lease and does not share in bonuses. n322 When a bonus is paid as a sum certain upon execution of a lease, the only potential conflict is the executive may seek a higher bonus and sacrifice some possible royalty revenue. There is, however, no question that the royalty interest owner will not share in the bonus payment. When, however, the lease specifies that a "bonus" will be paid out of production, royalty and bonus could be considered to overlap. n323

Courts in Texas, however, distinguish royalty and bonus by ascertaining if the payment is to occur throughout the productive life of a well. If it is, it is treated as royalty and shared with a royalty interest holder regardless of the payment's label as overriding royalty or bonus. n324 If, on the other hand, the payment out of production is specified as a sum certain, then it will be a production payment and considered a bonus. n325 Additionally, if the sum must be paid regardless of whether production occurs, it will be a bonus. n326

Oklahoma, however, has in one case declared that the terms "bonus" and royalty can be ambiguous. n327 In resolving the case with extrinsic evidence, the court declared that anything which exceeded the "normal" 1/8 royalty was a bonus belonging to the owner of bonus rights. Under this view, an overriding royalty reserved in addition to the lease's royalty would not be shared with the royalty interest owner. Only payments specifically designated as the landowner's royalty would be shared.

Because of the potential for the executive to manipulate proceeds to maximize the executive's return, the deed creating the royalty interest should specify that the royalty owner will share in all proceeds payable out of production regardless of label. Alternatively, the drafter should consider whether creating a non-executive mineral interest would better serve the client's needs and desires.

FOOTNOTES:
(n1)Footnote 309. *See* § 49.20, *infra.*

(n2)Footnote 310. *See White v. White, 530 S.W.2d 767 (Tex. Civ. App. 1992),* (fractional royalty created by grant of 3/8 of oil and gas produced).

830 S.W.2d 767 (Tex. App. 1992).

(n3)Footnote 311. *See J.M. Huber v. Square Enters., Inc., 645 S.W.2d 410 (Tenn. 1982)* (if reserve 1/2 of royalty, do not receive 1/2 of the value of the minerals).

Luecke v. Wallace, 951 S.W.2d 267 (Tex. App. 1997) (where a deed reserved to the grantor, her heirs and assigns, an undivided 1/2 non-participating interest in any and all oil, gas and mineral royalties reserved by grantee, his heirs and assigns under any future lease of the property, the grantor unambiguously retained a fractional fee simple interest in future royalties which did not violate the rule against perpetuities).

(n4)Footnote 312. *Concord Oil Co. v. Pennzoil Exploration & Prod. Co., 966 S.W.2d 451 (Tex. 1998)878 S.W.2d 191 (Tex. App. 1994)* (where a mineral deed contains more than one fraction regarding the interest conveyed the conveying instrument shall be read as a whole and has priority over the subjective intent of the parties), *rev'd on other grounds, 966 S.W.2d 451 (Tex. 1998).*

(n5)Footnote 313. *McSweyn v. Musselshell County, 632 P.2d 1095 (Mont. 1981).*

(n6)Footnote 314. *Cf. Neel v. Alpar Resources, Inc., 797 S.W.2d 361 (Tex. App. 1990)* (not incongruous to rule that lessor would execute lease and receive no royalty; lessor entitled to bonus, delay rental, and all other attributes of mineral interest other than outstanding non-participating royalty).

(n7)Footnote 315. *Dearing, Inc. v. Spiller, 824 S.W.2d 728 (Tex. App. 1992)* (specifying minimum royalty does not negate the duty or assure compliance by executing a lease for minimum specified). For the standard by which to judge the executive, *see* § 49.09(b)(4), *supra*.

(n8)Footnote 316. *Hanson v. Ware, 274 S.W.2d 359 (Ark. 1955).* For cases in other jurisdictions, *see* Annotation, *Perpetual Non-Participating Royalty Interests in Oil and Gas as Violating the Rule Against Perpetuities, 46 A.L.R.2d 1268.* The only current exception is Kansas. There had been doubts about the validity of perpetual non-participating royalties in Colorado, but at least prospectively they may be created. Colo. Rev. Stat. § 38-30-107.5 (effective July 1, 1991).

(n9)Footnote 317. *Hanson v. Ware, 274 S.W.2d 359 (Ark. 1955).*

(n10)Footnote 318. *Cosgrove v. Young, 642 P.2d 75 (Kan. 1982).*

(n11)Footnote 319. *Miller v. Sooy, 242 P. 140 (Kan. 1926).*

(n12)Footnote 320. 1 David S. Pierce, Kansas Oil and Gas Handbook, § 4.15 (Kansas Bar Association 1986) (noting possibility that production might not occur even under an existing lease in twenty-one years).

(n13)Footnote 321. *Drach v. Ely, 694 P.2d 1310 (Kan. App. 1985), reversed on other grounds, 703 P.2d 746 (Kan. 1985)* (mineral interest presently vested). *See generally* Pierce, *supra* note 320, at § 4.15.

Fritschen v. Wanek, 924 P.2d 1288 (Kan. 1996) (a royalty interest remains vested as long as oil and gas are continuously produced or as long as the property is being continuously developed and operated).

(n14)Footnote 322. *See generally* Annotation, *What Constitutes Oil or Gas 'Royalty' or 'Royalties' Within Language of Conveyance, Exception, Reservation, Devise, or Assignment, 4 A.L.R.2d 492.*

Baxley v. State, 958 P.2d 422 (Alaska 1998) (court describes a net profit share as relating to a percentage of the lessee's production with payment due only after lessee has recouped its expenditures for exploration and development).

(n15)Footnote 323. *See generally* Richard W. Hemingway, The Law of Oil and Gas § 2.6 (2d ed. 1983). A similar question arises when determining what is subject to a proportionate reduction clause, *see* § 49.51(c), *infra*.

(n16)Footnote 324. *Lane v. Elkins, 441 S.W.2d 871 (Tex. Civ. App. 1969), writ refused* n.r.e.; *Twentieth Century-Fox Film Corp. v. Teas, 286 F.2d 373 (5th Cir. 1961), cert. denied, 368 U.S. 818 (1961).*

(n17)Footnote 325. *Lane v. Elkins, 441 S.W.2d 871 (Tex. Civ. App. 1969), writ refused* n.r.e.;*Griffith v. Taylor, 291 S.W.2d 673 (Tex. 1956).*

(n18)Footnote 326. *Griffith v. Taylor, 291 S.W.2d 673 (Tex. 1956).*

(n19)Footnote 327. *Sykes v. Dillingham, 318 P.2d 416 (Okla. 1957).*

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CHAPTER 49 PETROLEUM AND PIPELINES
III. Types of Interests Created from a Landowner's Rights.

6-49 Thompson on Real Property, Thomas Editions § 49.12

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§ 49.12 Attributes of Non-Executive Mineral Interests.

A non-executive mineral interest can, depending on the grant, have the right to receive all the proceeds of a mineral lease. To create a nonexecutive mineral interest, a grant or reservation would convey or reserve an undivided interest in the minerals, but assign the exclusive right to lease to another. For example, a grant of a non-executive mineral interest results from a conveyance of an undivided 1/2 interest in all the minerals in a tract when the conveyance reserves to the grantor the exclusive right to lease the minerals.

The non-executive mineral interest owner has no right to develop or lease, but participates in production and bonus and delay rentals according to the deed. n328 Rights to bonus and delay rentals may be withheld or pass with the interest. n329 If the deed does not specifically allocate the royalty, bonus or delay rental, the rights will adhere to the mineral interest because all attributes of a mineral interest are deemed to pass with its grant unless expressly reserved or, conversely, will remain with a mineral interest's reservation unless granted to the grantee. Whether or not the non-executive interest may enforce the covenants of an oil and gas lease, however, is less clear. n330

If the mineral interest created expressly states that the owner of it will not have rights to lease and will not share in bonus and rentals, there is some tendency to label this particular interest a "non-participating fee" or "non-participating mineral interest," the word "non-participating" being a shorthand for not sharing in bonus and rentals. n331

FOOTNOTES:
(n1)Footnote 328. *Harris v. Griffith, 210 So. 2d 629 (Miss. 1968).*

(n2)Footnote 329. *Mull Drilling Co. v. Medallion Petr., Inc., 809 P.2d 1124 (Colo. App. 1991)* (deed expressly stated interest would not share in rentals and bonus).

(n3)Footnote 330. *Cf.* P. Martin & B. Kramer, Williams & Meyers Oil and Gas Law § 339.3 (Matthew Bender) (noting paucity of case law and arguing that the non-executive should have standing to enforce implied covenants); *Shelton v. Exxon Corp., 921 F.2d 595 (5th Cir. 1991)* (deed expressly granted executive "exclusive right to enforce" and utmost good faith standard governs).

(n4)Footnote 331. *See generally* Pierce, *supra* note 320, at § 4.16.

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CHAPTER 49 PETROLEUM AND PIPELINES
III. Types of Interests Created from a Landowner's Rights.

6-49 Thompson on Real Property, Thomas Editions § 49.13

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§ 49.13 Attributes of a Term Mineral Interest or Term Royalty Interest.

§ 49.13(a) Fixed Term Interests.

Rather than conveying an interest in minerals that necessarily will last in perpetuity, an interest may be granted that is limited in time, such as for a specific term of years. The interest granted may take the form of any of the available interests, including a mineral interest or a royalty interest. Obviously, a mineral interest limited to a specific term of years would not be attractive to a developer; rights would end at the specified date whether or not capital had been recouped. A passive investor, however, may accept the interest as an assignment of proceeds. n332

§ 49.13(b) Defeasible Term Interests.

The more common term interest states that it is for a specific term of years and for so long thereafter as a certain event continues, usually so long thereafter as production continues. n333 Such a grant, if it is of a full or undivided mineral interest, creates a fee simple determinable. For example, a grant could convey all the oil, gas, and other minerals in a particular tract for a period of ten years from a specified date and so long thereafter as oil, gas and/or other minerals or any of them are produced therefrom. n334 The estate is often referred to as a "defeasible" or "base" fee. Title vests immediately in the grantee subject to the grantor's possibility of reverter in the event production does not occur before the required date or fails to continue. n335

A non-participating royalty may also have a defeasible term. n336 Naturally, the holder of such an interest will be dependent on the executive to grant oil and gas leases. n337

§ 49.13(c) Termination of Defeasible Interests: Meaning of "Production."

Unless otherwise specified in the deed creating the interest, the "production" necessary to keep a defeasible fee from terminating is actual production in paying quantities. n338 This is so even in jurisdictions such as Oklahoma, which take the position that a lease will be maintained past the primary term by a well capable of production. n339

Constructive production, which may be sufficient to preserve an oil and gas lease in its secondary term, n340 will not be

sufficient to preserve the defeasible term interest. For example, payment of shut-in royalties will not be "production" despite the fact that they are only payable if a well capable of production in paying quantities has been drilled. n341

There is a conflict about whether other doctrines used in construing oil and gas leases are applicable to defeasible term interests. Texas employs the "temporary cessation of production" doctrine; n342 a term royalty would not terminate unless the cessation of production was permanent. n343 Oklahoma takes the opposite view, partially because the estate terminates naturally and the consideration paid for a defeasible interest would have reflected this fact. n344 Oklahoma also justifies its position by noting that the term owner has not expended funds to achieve production as the oil and gas lessee did. n345 The last case so holding, however, was decided 5 to 4.

The drafter of a term interest for a person acquiring the same should define production to include any manner by which an oil and gas lessee may maintain a lease in the secondary term. In other words, the term interest should last as long as any oil and gas lease will extend if the lease achieved the status of production under the lease's terms before the end of the term interest's stated period. n346

COMPUTER-ASSISTED RESEARCH

LEXIS: (term w/3 royalty or interest) and (production or produce w/15 habendum or extend or extension) w/50 (amount or quantity or nature or kind)

§ 49.13(d) Where Production Must Occur; Effect of Pooling.

Term deeds generally require production on the "premises or any part thereof." n347 If the term deed encompasses separately described tracts, then production on any tract will preserve the interest as to all the land. n348 Because production anywhere on the land will meet the requirement for all the land, if a unit well is on the subject land, the term interest in theory should be preserved for all the land even if some of it is not in the unit, but there is little case law. n349 The same result of extending the interest was reached in Texas if all the land was in the unit but the unit well was off the subject land. n350

Kansas and other jurisdictions have had more trouble with production occurring off the land subject to the term interest. n351 Kansas, however, has more recently recognized that unitization, especially that performed voluntarily to comply with spacing unit requirements, is a necessary part of conservation. Therefore, if the land in which the interest is held is unitized, production from a unit well, if drilled off the subject land, will preserve the term interest, but only in regard to portions of the lands included in the unit. n352 This ruling is not to be applied retroactively to term interests that would have expired under the prior law before it was changed. n353

The drafter of a term interest for a person acquiring the same should insist that the interest will continue so long as production continues on the premises or any lands unitized with the premises. Parties should negotiate whether the term interest should be divisible by expressly stating it is not divisible or by including the equivalent of a "Pugh" Clause. n354

COMPUTER-ASSISTED RESEARCH

LEXIS: (term w/3 royalty or interest) and (production or produce w/15 habendum or extend or extension) w/50 paragraph unit

§ 49.13(e) Legal Relation Between Term Owner and Reversioner.

Two factors color the analysis of the relationship between the term owner and reversioner. One emphasizes that the relationship differs from that of a lessor and lessee. n355 Under the leasing arrangement, development by the lessee for

the mutual benefit of the lessor and lessee is anticipated. Therefore, the lessee has the power to extend the lease interest by developing and, if it makes an investment to that end, the investment is for the mutual benefit of the parties and should be protected. When a defeasible term interest is granted or reserved, there is no anticipation that the term interest holder will develop for the mutual benefit of it and the reversioner. In fact, if the term interest is a mineral interest with the right to lease or develop, the term interest holder will be developing for its own benefit and will be denying an opportunity for the possibility of reverter to become possessory. Because of the conflicting interests between the term interest holder and the reversioner, doctrines designed to protect the investment of a lessee are inapplicable. n356 Additionally, no case law forces a co-tenant of a term mineral interest owner to act to prevent the term interest from expiring. n357

The second factor also recognizes conflicting interests, especially between the reversioner who has the executive interest for a defeasible term royalty interest. Towards the end of the specified time, the executive may prefer to have the royalty interest lapse. The self-interest of the executive, therefore, may not be sufficient to protect the royalty holder. n358 Because of this, there is some precedent stating the executive has a special duty to the term interest holder to act within a reasonable time before expiration of term interest. n359

§ 49.13(f) Reservation of Defeasible Term Interest: Validity Under Rule Against Perpetuities.

When one grants a defeasible term interest, the grantor will retain a possibility of reverter. The grantor's interest will become possessory at the end of the specified term or when production ceases. The timing of the event is unknown and therefore, could extend beyond the time allowed for vesting under the Rule Against Perpetuities. However, a possibility of reverter never violates the Rule because it is presently vested; only possession is deferred. A different analysis applies if a grantor reserves a term mineral interest, *i.e.*, grants the surface and reserves the minerals for 10 years and so long thereafter as oil and gas is produced. The grantee's interest in the minerals is technically an executory interest. Because the interest does not "vest" until it is possessory, the executory interest violates the Rule Against Perpetuities. n360 Courts have upheld the interest, however, for various reasons. n361 The simplest reason would be to simply declare the Rule inapplicable to these interests because they do not impede development and thus inhibit marketability or alienability. n362

COMPUTER-ASSISTED RESEARCH

LEXIS: (term or defeasible w/3 royalty or interest) w/15 rule against perpetuities

FOOTNOTES:
(n1)Footnote 332. For an example, *see Comanche Land & Cattle Co. v. Adams, 688 S.W.2d 914* Tex. App. 1985).

Crosswhite v. McCully, 857 P.2d 90 (Okla. App. 1993) (after a reservation of term royalty interest, reversionary interest passed to owner of mineral estate at end of term despite language in deed saying "minerals to revert to holder of surface interest").

(n2)Footnote 333. Another common formulation adds "or so long as the property is being developed or operated." Williams & Meyers located no cases discussing the affect of adding the clause. They posited that it might provide an extension if drilling was occurring on the terminal date or if there was a temporary cessation of production with resumption of operations in a reasonable time. P. Martin & B. Kramer, Williams & Meyers Oil and Gas Law § 334.2 (Matthew Bender).

(n3)Footnote 334. *Classen v. Federal Land Bank of Wichita, 617 P.2d 1255 (Kan. 1980).*

(n4)Footnote 335. *Wilson v. Holm, 188 P.2d 899 (Kan. 1948).*

(n5)Footnote 336. *Archer County v. Webb, 338 S.W.2d 435 (Tex. 1960)* (conveyance of undivided 1/2 of all oil and

gas royalty that may be produced under oil and gas leases outstanding or to be hereinafter outstanding for 15 years from date, or so long thereafter as oil and gas may be produced).

(n6)Footnote 337. *See* § 49.13(e), *infra*.

(n7)Footnote 338. *Texaco, Inc. v. Fox, 618 P.2d 844 (Kan. 1980)* ("commercial quantities" in deed means "paying quantities" as required in oil and gas lease). For other cases, see P. Martin & B. Kramer, Williams & Meyers Oil and Gas Law §§ 334.4 and 334.6 (Matthew Bender) (arguing that paying quantities should not be required).

Greenfield v. Thill, 521 N.W.2d 87 (N.D. 1994) (construing "found in paying quantities" in defeasible-term mineral deed's habendum clause as requiring "production in paying quantities"); *Babb v. Clemensen, 687 A.2d 1120 (Pa. Super. 1996)* (where lessors' everyday domestic use of gas from lessee's wells did not constitute "production" so as to extend the leases beyond their primary terms), *appeal denied, 701 A.2d 574 (Pa. 1997); Hiroc Programs, Inc. v. Robertson, 40 S.W.3d 373 (Ky. App. 2000)* (where cessation of commercial sales of gas for ten years caused the lease to terminate).

(n8)Footnote 339. *Compare, McVicker v. Horn, Robinson & Nathan, 322 P.2d 410 (Okla. 1958)* (lease extended), *with, Fransen v. Eckhardt, 711 P.2d 926 (Okla. 1985)* (term interest terminates).

(n9)Footnote 340. *See* § 49.33, *infra*.

(n10)Footnote 341. *Archer County v. Webb, 338 S.W.2d 435 (Tex. 1960).* For other cases, see Richard W. Hemingway, The Law of Oil and Gas § 6.5 (2d ed. 1983); and P. Martin & B. Kramer, Williams & Meyers Oil and Gas Law § 334.5 (Matthew Bender).

(n11)Footnote 342. *See* § 49.33(e), *infra*.

(n12)Footnote 343. *De Benavides v. Warren, 674 S.W.2d 353 (Tex. App. 1984), writ refused* n.r.e. *See* possibility that including the words "or the property is being developed or operated" in the habendum may allow the doctrine to apply, P. Martin & B. Kramer, Williams & Meyers Oil and Gas Law § 334.2 (Matthew Bender).

Greenfield v. Thill, 521 N.W.2d 87 (N.D. 1994) (temporary cessation doctrine applies to defeasible term mineral interest in its extended term). *See also, Kelwood Farms, Inc. v. Ritchie, 571 P.2d 338 (Kan. App. 1977).*

(n13)Footnote 344. *Ludwig v. William K. Warren Found., 809 P.2d 660 (Okla. 1990).*

(n14)Footnote 345. For a similar argument, *see* 1 Kuntz, Lowe, Anderson, Pierce, and Smith, Oil and Gas Law § 15.8 (Anderson).

(n15)Footnote 346. For a detailed suggested habendum clause, *see* P. Martin & B. Kramer, Williams & Meyers Oil and Gas Law § 334.10 (Matthew Bender).

(n16)Footnote 347. *See* generally Annotation, *Production on One Tract as Extending Term Other Tract, Where One Mineral Deed Conveys Oil or Gas in Separate Tracts for as Long as Oil or Gas is Produced, 9 A.L.R.4th 1121 (1981).*

(n17)Footnote 348. *Palmer v. Brandenburg, 651 P.2d 961 (Kan. App. 1982); Turner v. McBroom, 565 P.2d 44 (Okla. 1977).* For additional cases, see P. Martin & B. Kramer, Williams & Meyers Oil and Gas Law § 334.9 (Matthew Bender).

Temple-Inland Forest Prod. Corp. v. United States, 988 F.2d 1418 (5th Cir. 1993) (noting general rule but construing particular term reservation against the grantor to effectuate the grant and to vest a reversionary interest as speedily as the terms allow).

(n18)Footnote 349. *Fox v. Feltz, 697 P.2d 543 (Okla. App. 1984)* (unit well off tract but entire tract preserved). *See* P. Martin & B. Kramer, Williams & Meyers Oil and Gas Law § 961.2 (Matthew Bender) (arguing term interests should not be divisible). *Id.* at §§ 960-961.4 (comprehensive discussion of affect of pooling on term interests, including differences based on whether or not both term interest holder and reversioner consented to the pooling or unitization). The simplified discussion here presumes consent.

(n19)Footnote 350. *Southland Royalty Co. v. Humble Oil & Ref. Co., 249 S.W.2d 914 (Tex. 1952); Spradley v. Finley, 302 S.W.2d 409 (Tex. 1957)* (intent of parties was to amend term interest); *Panhandle Eastern Pipe Line Co. v. Isaacson, 255 F.2d 669 (10th Cir. 1958).*

(n20)Footnote 351. *Smith v. Home Royalty Ass'n, Inc., 498 P.2d 98 (Kan. 1972)* (well had to be on land subject to term interest).

(n21)Footnote 352. *Classen v. Federal Land Bank of Wichita, 617 P.2d 1255 (Kan. 1980).*

(n22)Footnote 353. *Kneller v. Federal Land Bank of Wichita, 799 P.2d 485 (Kan. 1990)* (retroactive application would not be an extension of a term interest but a revival of one).

(n23)Footnote 354. *See* § 49.44(e), *infra*. A "Pugh" clause is a lease term that has the same effect on the leasehold as the *Classen* decision had on the term interest; the lease is only preserved as to the lands included in the unit.

(n24)Footnote 355. *See* 1 Kuntz, Lowe, Anderson, Pierce, and Smith, Oil and Gas Law § 15.8 (Anderson).

(n25)Footnote 356. *Ludwig v. William K. Warren Found., 809 P.2d 660 (Okla. 1990); McEvoy v. First Nat'l Bank & Trust Co., 624 P.2d 559 (Okla. App. 1980).*

(n26)Footnote 357. P. Martin & B. Kramer, Williams & Meyers Oil and Gas Law § 337 (Matthew Bender), commenting on *Shell Oil Co. v. Seeligson, 231 F.2d 14 (10th Cir. 1956).*

(n27)Footnote 358. Earlier in the term, the reversioner's self-interest would not necessarily favor delaying development. Similarly, if the royalty is relatively small, such as 1/32, the reversioner also may not desire to delay even toward the end of the term royalty's base life. *See* P. Martin & B. Kramer, Williams & Meyers Oil and Gas Law § 337 (Matthew Bender).

(n28)Footnote 359. *Federal Land Bank of Houston v. United States, 168 F. Supp. 788 (Ct. Cl. 1958); Welles v. Berry, 434 So. 2d 982 (Fla. App. 1983); but see*, Richard W. Hemingway, The Law of Oil and Gas § 2.2 (2d ed. 1983) (arguing should only require action within a reasonable time if the requirement would not disadvantage the executive in negotiating a lease).

(n29)Footnote 360. *See Victory Oil Co. v. Hancock Oil Co., 270 P.2d 604 (Ca. App. 1954), but see Rousselot v. Spanier, 131 Cal. Rptr. 438 (1976)* (grantee received present estate subject to grantor's reserved incorporeal hereditament).

(n30)Footnote 361. *Stevens Mineral Co. v. Michigan, 418 N.W.2d 130 (Mich. App. 1988)* (grantee received fee simple subject to profit prendre); *Bagby v. Bredthauer, 627 S.W.2d 190 (Tex. App. 1981)* (fiction of grant and re-grant); *Earle v. International Paper Co., 429 So. 2d 989 (Ala. 1983)* (reservation similar to regrant); *Williams v. Watt, 668 P.2d 620 (Wyo. 1983)* (rename grantee's interest a vested remainder to effectuate intent of parties).

(n31)Footnote 362. P. Martin & B. Kramer, Williams & Meyers Oil and Gas Law § 325 (Matthew Bender); *see also Williams v. Watt, 668 P.2d 620 (Wyo. 1983)* (Thomas, J. dissenting).

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CHAPTER 49 PETROLEUM AND PIPELINES
III. Types of Interests Created from a Landowner's Rights.

6-49 Thompson on Real Property, Thomas Editions § 49.14

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§ 49.14 The Special Case of Louisiana.

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Louisiana law, based on civil law, takes a different view of mineral ownership. n363 A severed mineral fee does not exist. If one grants or reserves minerals, an incorporeal mineral servitude results, defined as "the right of enjoyment of land belonging to another for the purpose of exploring for and producing minerals and reducing them to possession and enjoyment." n364 Non-participating royalties may also be created. n365 Both of these interests are subject to the doctrine of prescription *liberative causa*. Unless used within ten years, beginning on the day created, they will be extinguished by prescription from non-use. n366 An oil and gas lease is not subject to liberative prescription, n367 but because no lease may have a duration of more than ten years without drilling or mining operations or production, n368 the result is the same.

§ 49.14(a) Extent of Mineral Servitude or Royalty Burden.

A deed may contain several tracts and either reserve or grant a mineral servitude or royalty in the lands. If the tracts are contiguous, one servitude or royalty will be created. n369 Activity sufficient to interrupt prescription on one tract will be sufficient to interrupt prescription throughout the lands. However, if lands included within a deed are non-contiguous, separate servitudes will result and separate acts on each non-contiguous tract will be required to interrupt prescription. n370 Lands are non-contiguous if separated by a road or if they only touch at one point.

COMPUTER-ASSISTED RESEARCH

LEXIS: (mineral w/3 servitude) or royalty and (tracts w/15 contiguous or non-contiguous)

§ 49.14(b) Interruption and Suspension of Prescription.

What acts are sufficient to interrupt prescription differ for mineral servitudes and royalties. In order to interrupt prescription for a royalty, production is necessary. n371 Production in paying quantities is not required, but there should be some removal and storage of oil. n372 For gas, a shut-in well that is capable of production in paying quantities will

suffice. Less than production may interrupt prescription of a mineral servitude. Good faith operations will interrupt prescription even if they result in a dry hole. n373 Good faith operations commence on the spudding in date, not the date on which operations preparatory to drilling begin. n374

For both types of interests, if the necessary act occurs on lands unitized with lands subject to the servitude or royalty, interruption will result, but only insofar as the lands contained in the unit. n375 If the unit activity is on the burdened land itself, it will interrupt prescription throughout. When the act that interrupted prescription ceases, that is, when operations or production ends, a new ten-year period begins.

Prescription may also be suspended. Simple ownership of the interest by a minor or a person with a disability will not work a suspension. n376 If, however, the owner of a mineral servitude is prevented from using it by an obstacle that the owner can neither prevent nor remove, the prescription of non-use will not run for the time the obstacle remains. n377 Parallel provisions deal with suspension by obstacle for royalties. n378 If prescription is suspended, the original period resumes when the obstacle is removed. For example, if five years remained before the obstacle, the interest would prescribe in five years after removal of the obstacle if not interrupted or extended.

COMPUTER-ASSISTED RESEARCH

LEXIS: royalty and (interrupt w/15 prescription) and produce or production
(mineral w/3 servitude) and (interrupt w/15 prescription) and (produce or production or operate or operation* or drill)
or (mineral w/3 servitude) and (suspen! w/15 prescription)
or
royalty and (suspend* or suspension w/15 prescription)

§ 49.14(c) Interruption of the Period of Prescription by Acknowledgment and Contractual Extension.

The owner of lands subject to a servitude may interrupt the period of prescription by an acknowledgment intending that result. A mere mention in a conveyance that the interest conveyed is subject to a servitude or royalty will not have that effect. To be effective, the acknowledgment "must express the intent of the landowner to interrupt prescription," n379 be in writing, and be recorded to affect third parties. n380 These rules, with some modification, apply to royalties. n381

The effect of an interruption by acknowledgment is the same as interruption by use: a new ten year period begins. Mineral servitudes and royalties may be extended for lesser time periods by a contractual extension entered into by the landowner or burdened servitude owner. n382 The same formalities govern as for an acknowledgment.

COMPUTER-ASSISTED RESEARCH

LEXIS: (mineral w/3 servitude) and (interrupt w/15 prescription) and acknowledg!
or
royalty and (interrupt w/15 prescription) and acknowledge!

FOOTNOTES:
(n1)Footnote 363. Louisiana Mineral Code, codified at 31 La. Rev. Stat. Ann. §§ 31:1 - 31:215. *See generally* P. Martin & B. Kramer, Williams & Meyers Oil and Gas Law §§ 216-216.8 (Matthew Bender); 1 Kuntz, Lowe, Anderson, Pierce, and Smith, Oil and Gas Law § 10.7 (Anderson); and John McCollam, *A Primer for the Practice of Mineral Law Under the New Louisiana Mineral Code, 50 Tul. L. Rev. 729 (1976).*

(n2)Footnote 364. La. Rev. Stat. Ann. § 31:21. The non-ownership theory is part of Louisiana law.

(n3)Footnote 365. La. Rev. Stat. Ann. § 31:80.

(n4)Footnote 366. La. Rev. Stat. Ann. § 31:27 (mineral servitude); 31 La. Rev. Stat. Ann. § 85 (royalty). Interests reserved upon conveying property to the state, federal government, or any subdivision of either are exempt during the period of government ownership.

La. Rev. Stat. Ann. § 31:85.

Heirs of Viator v. Tri-Parish Investors, 618 So. 2d 36 (La. App. 1993) (current statute, providing prescription would apply as in the usual case when government transfers land to private ownership, may not be applied retroactively to divest already vested rights), *writ denied, 625 So. 2d 167 (La. 1993); Energy Development Corp. v. Quality Environmental Processes, 734 So. 2d 965 (La. App. 1999)* (any contractual attempt to extend the life of a mineral right beyond the prescriptive period of ten years of non-use is against public policy).

(n5)Footnote 367. La. Rev. Stat. Ann. § 31:115.

(n6)Footnote 368. *Id.*

(n7)Footnote 369. La. Rev. Stat. Ann. § 31:63 (servitude); La. Rev. Stat. Ann. § 31:102 (royalties). The deed may contain lands owned by different parties; La. Rev. Stat. Ann. § 31:66 (servitudes); La. Rev. Stat. Ann. § 31:105 (royalties).

(n8)Footnote 370. La. Rev. Stat. Ann. § 31:64 (servitudes); La. Rev. Stat. Ann. § 31:103 (royalties).

Because the state of Louisiana cannot convey the beds of navigable waters, if the relevant waters were navigable, certain tracts would not be contiguous. If waters were not navigable in 1812 (date of statehood), but became naturally navigable by the time the state transferred title of the surrounding lands, the beds are to be deemed "public" and not subject to conveyance. Hence, the lands were found to be non-contiguous. *Vermilion Bay Land Co. v. Phillips Petroleum Co., 646 So. 2d 408 (La. App. 1994), writ denied, 650 So. 2d 1176 (La. 1995).*

(n9)Footnote 371. La. Rev. Stat. Ann. § 31:87.

(n10)Footnote 372. La. Rev. Stat. Ann. §§ 31:38 and 31:88.

(n11)Footnote 373. La. Rev. Stat. Ann. § 31:29.

(n12)Footnote 374. La. Rev. Stat. Ann. § 31:30. This differs from the situation on oil and gas leases, see § 49.36(b), *infra*.

(n13)Footnote 375. La. Rev. Stat. Ann. §§ 31:37 and 31:89.

(n14)Footnote 376. La. Rev. Stat. Ann. §§ 31:58 and 31:97. Statutes as early as 1944 said minority would not create a suspension.

(n15)Footnote 377. La. Rev. Stat. Ann. §§ 31:59-31:61.

(n16)Footnote 378. La. Rev. Stat. Ann. §§ 31:98-31:100.

(n17)Footnote 379. La. Rev. Stat. Ann. § 31:55.

(n18)Footnote 380. La. Rev. Stat. Ann. § 31:54.

(n19)Footnote 381. La. Rev. Stat. Ann. § 31:93.

(n20)Footnote 382. Naturally, the existence of a royalty burdening a mineral servitude depends on the continued

existence of the mineral servitude.

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CHAPTER 49 PETROLEUM AND PIPELINES
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6-49 Thompson on Real Property, Thomas Editions § 49.15

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§ 49.15 Texas Relinquishment Act Lands.

Texas reserved oil and gas in all lands classified as "mineral lands" when it issued patents during certain eras. By 1942, the state had reserved the minerals under 7,485,000 acres of land. Of these, 7,400,000 acres are subject to the Relinquishment Act of 1919. n383 This act makes the "owner of the soil" the agent of Texas for the purpose of leasing lands. Under current law, the surface owner is a fiduciary for the state and may not engage in self-dealing. The owner is entitled to one-half of the economic benefits from each particular lease negotiated. Although the surface owner may assign these benefits, the assignment will only last for the life of a particular lease. No future lease benefits may be assigned and a conveyance of a mineral interest by the owner of the soil of Relinquishment Act lands is meaningless. n384

FOOTNOTES:
(n1)Footnote 383. Richard W. Hemingway, The Law of Oil and Gas § 2.5(c) (2d ed. 1983).

In seeking to enforce the fiduciary duty owed the state by the surface owner, the state is not subject to the defenses of limitations, estoppel, or laches. *State v. Durham, 860 S.W.2d 63 (Tex. 1993); Tynes v. Mauro, 860 S.W.2d 168 (Tex. App. 1993).*

(n2)Footnote 384. P. Martin & B. Kramer, Williams & Meyers Oil and Gas Law § 303.9 (Matthew Bender).

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CHAPTER 49 PETROLEUM AND PIPELINES
IV. Transfer of Interests in Oil and Gas: Conveyancing and Involuntary Transfers.

6-49 Thompson on Real Property, Thomas Editions § 49.16

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§ 49.16 General Conveyancing Requirements.

A "conveyance" is a transfer of ownership by an instrument that is intended both to be presently operative and to pass an interest in land to another. Oil and gas conveyances must meet the same formalities as apply to real estate conveyances in general. n385 These include the necessity of (1) a writing, (2) words of grant, (3) an adequate description, (4) a designation of the parties, and (5) proper execution. Additionally, because oil and gas conveyances are subject to the Statute of Frauds, a writing signed by the party to be charged is essential. Finally, as with all conveyances, completion of the conveyance requires delivery of the instrument and acceptance of the conveyance.

In addition to these basic requirements, other requirements may be found in recording acts, which apply to oil and gas interests. These requirements generally do not affect the validity of an instrument as between the parties to it; a conveyance is valid between these people without recording. In Kansas, however, a severed mineral interest is void unless recorded within ninety days or filed for taxation separately from the surface. n386 Moreover, in all jurisdictions, recording is a practical necessity for a business transaction. Therefore, any requirements for attestation and acknowledgment found in the relevant jurisdiction's recording act should be followed.

For oil and gas transactions that are considered conveyances, the general rule is that no consideration is required for validity. The exception is Kansas, which requires "serious consideration" for an oil and gas lease. n387 Consideration is advisable, however, in all jurisdictions for several reasons. Consideration is needed: 1) to take advantage of recording acts that protect "purchasers," 2) to avoid potential charges of fraud that could support a rescission, n388 and 3) to prevent creditors from challenging the transaction. n389

FOOTNOTES:
(n1)Footnote 385. *See generally* P. Martin & B. Kramer, Williams & Meyers Oil and Gas Law § 220 (Matthew Bender).

Robbins v. HNG Oil Co., 878 S.W.2d 351 (Tex. App. 1994) (reference in deed to another deed to show source of title does not act to enlarge specific description in the deed); *Energy Development Corp. v. Quality Environmental Processes, 734 So. 2d 965 (La. App. 1999)* (a property description in a conveyance is adequate to give notice to third

parties when it describes the property affected by reference to other conveyances available in the public records).

(n2)Footnote 386. Kan. Stat. Ann. § 79-420. Compliance is a condition precedent to title vesting and title may be attacked by grantor's successors. *Becker v. Rolle, 508 P.2d 509 (Kan. 1973); Ford v. Willits, 688 P.2d 1230 (Kan. App. 1984).* The statute does not apply to royalty interests or leases and does not apply when the grantor excepts a mineral interest from a conveyance. *See generally* Pierce, *supra* note 320, at § 5.10.

(n3)Footnote 387. Unlike other jurisdictions, Kansas considers an oil and gas lease a contract, rather than a conveyance. Therefore, it will need consideration. *Brinkman v. Empire Gas & Fuel Co., 245 P. 107 (Kan. 1926).*

(n4)Footnote 388. *Brisco v. Reschke, 226 P.2d 255 (Kan. 1951)* (deed "good without consideration in the absence of a wrongful act on the grantees such as fraud or undue influence").

(n5)Footnote 389. *See generally* P. Martin & B. Kramer, Williams & Meyers Oil and Gas Law § 220 (Matthew Bender).

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CHAPTER 49 PETROLEUM AND PIPELINES
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6-49 Thompson on Real Property, Thomas Editions § 49.17

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§ 49.17 General Rules of Interpretation.

Many of the same rules of interpretation that apply to other deeds are used to interpret conveyances of interests in oil and gas. n390 Generally, courts attempt to construe the intent of the parties. First, they consider the wording of the deed, using only what is contained within the deed's four corners. If there is still doubt about intent, rules of construction are employed. For example, handwritten or typed words inserted in a form will be granted greater weight in determining intent than the basic form language. As with other instruments, oil and gas transactions may be construed against the drafter, who is generally the grantor. As a last resort, but only if a deed is deemed ambiguous, courts will allow extrinsic or parole evidence of intent. n391

FOOTNOTES:
(n1)Footnote 390. *See* Bruce M. Kramer, *The Sisyphean Task of Interpreting Mineral Deeds and Leases! An Encyclopedia of Canons or Construction*, 24 Tex. L. Rev. (1993); Bruce M. Kramer, *Property and Oil and Gas Don't Mix: The Mangling of Common Law Property Concepts, 33 Washburn L.J. 540 (1994);* Richard C. Maxwell, Oil and Gas Conveyancing: Is There Truth in Labeling?, *33 Washburn L.J. 569 (1994).*

(n2)Footnote 391. Ambiguity is not a prerequisite for parole evidence in a direct attack on a conveyance, that is, in a suit seeking reformation or rescission. *Wiseman v. Priboth, 310 S.W.2d 600 (Tex. Civ. App. 1958)* (mutual mistake alleged and reformation sought). *See also*, Richard W. Hemingway, The Law of Oil and Gas § 3.2(A) (2d ed. 1983). *McCall v. McCall, 24 S.W.3d 508 (Tex. App. 2000).* A deed to described tracts together with all improvements and appurtenances was unambiguous and did not transfer grantor's separate pre-partition royalty interests that were not appurtenant.

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CHAPTER 49 PETROLEUM AND PIPELINES
IV. Transfer of Interests in Oil and Gas: Conveyancing and Involuntary Transfers.

6-49 Thompson on Real Property, Thomas Editions § 49.18

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§ 49.18 Exceptions and Reservations.

A grant generally, if unrestricted, passes all the grantor might own. People often desire to treat ownership of minerals separately from the surface. To this end, an exception or reservation in a deed may initially sever minerals. If the minerals have already been severed, the grantor also may retain an undivided interest in the minerals by exception or reservation. The two techniques -- exception and reservation -- have technical differences.

Traditionally, an exception holds back something from the grant and the grantee never receives this interest. Under this view, the estate "excepted" must already be in existence on the date of the grant. A reservation, however, traditionally was considered a regrant. The deed passed the interest to the grantee and the reservation passed it from the grantee to grantor. n392 A reservation, therefore, under old rules, would require words of inheritance to be perpetual. Most jurisdictions have abandoned this distinction and treat the two techniques interchangeably when ascertaining duration.

Another traditional rule constraining drafters was that an exception or reservation needed to be in the granting or reddendum clause of a deed. If the attempted exclusion was in any other location, it would be invalid because it would be repugnant to the grant. Many cases dealing with oil and gas reject this rule in favor of seeking the intent of the parties from the entire four corners of the deed. n393

Some interpretive problems remain. One reoccurring question is whether an exception is designed to retain an interest for the grantor or simply to exclude an interest that may be outstanding from a deed's warranty. Oklahoma has been the most particular in this regard, n394 requiring "apt" words of reservation to effectively prevent passage to the grantee. n395 Therefore, the clause "Except an undivided 1/2 of the mineral rights under the land" after the habendum did not allow the grantor to retain a mineral interest n396 but the following words in the same locale did withhold a mineral interest: "Except 15/16 of all mineral rights reserved." n397 In a later case, however, where the questioned language was in the granting clause after the land description, the Oklahoma courts were more lenient; minerals were reserved when the phrase "except oil, gas, and other minerals" appeared in the granting clause. n398 When the attempted reservation is made outside of the granting clause, a form of the word "reservation" appears necessary.

Another problem frequently encountered is what to do about an exception or reservation in favor of a third party. A

majority of jurisdictions still adhere to the traditional rule that neither can be created in favor of a third party or stranger to the title. n399 Therefore, if a deed excepts an interest that is not valid by restating the interest or by referring to the deed purportedly creating the interest, most jurisdictions hold that the third party does not receive the interest by virtue of the exception. The jurisdictions split, however, over whether the interest passes to the grantee or remains with the grantor. n400

COMPUTER-ASSISTED RESEARCH

LEXIS: (except or reserv! or exception) w/15 (third w/1 party) and (oil or gas or mineral)
or
(except or reserv! or exception) w/15 (stranger w/3 title) and (oil or gas or mineral)

FOOTNOTES:
(n1)Footnote 392. *See, e.g., Earle v. Paper Co., 429 So. 2d 989 (Ala. 1983)* (Rule against Perpetuities avoided when instrument reserved a defeasible term interest; by the regrant theory the grantee's interest becomes a possibility of reverter).

(n2)Footnote 393. *Beasley v. Shinn, 144 S.W.2d 710 (Ark. 1940).* For additional cases, *see* P. Martin & B. Kramer, Williams & Meyers Oil and Gas Law § 310 (Matthew Bender).

(n3)Footnote 394. A suggested source for the number of problems that arise in Oklahoma is the restricted space available on Oklahoma's statutory form deed. P. Martin & B. Kramer, Williams & Meyers Oil and Gas Law § 310.1 (Matthew Bender).

(n4)Footnote 395. *Messner v. Moorehead, 787 P.2d 1270 (Okla. 1990)* (apt words required; deeds unambiguous within their four corners may not be made ambiguous by parole evidence on intent); *Ford v. Raab, 744 P.2d 956 (Okla. 1987)* (requirement of "apt words" a rule of property designed to promote unity of title).

(n5)Footnote 396. *Ford v. Raab, 744 P.2d 956 (Okla. 1987)* (reversionary interest after expiration of term interest therefore passed to grantee).

(n6)Footnote 397. *Westcott v. Bozarth, 211 P.2d 258 (Okla. 1949)* (emphasis added).

(n7)Footnote 398. *James v. Beckwith, 805 P.2d 117 (Okla. App. 1990).*

(n8)Footnote 399. *See, e.g., Lighthorse v. Clinefelter, 521 N.E.2d 1146 (Ohio App. 1987); Little v. Linder, 651 S.W.2d 895 (Tex. App. 1983), writ refused* n.r.e.; *but see* cases rejecting doctrine, *Willard v. First Church of Christ, 498 P.2d 987 (Cal. 1972); Simpson v. Kistler Inv. Co., 713 P.2d 751, 756 (Wyo. 1986)* (collecting cases); and *Aszmus v. Nelson, 743 P.2d 377 (Alaska 1987).* Some cases made special allowances for some interests given to spouses of the grantor. *See Krug v. Reissig, 488 P.2d 150 (Wyo. 1971),* broadened by *Simpson v. Kistler Inv. Co., 713 P.2d 751 (Wyo. 1986). See also Haynes v. Metcalf, 759 S.W.2d 542 (Ark. 1988)* (plaintiffs estopped from claiming reservation was ineffective).

(n9)Footnote 400. *Noffsinger v. Brown, 408 S.W.2d 436 (Ky. 1966)* (intent was to not pass interest to grantee), *but see Collett v. Riviera Village, Inc., 468 So. 2d 865 (Miss. 1985)* ("subject to" clause only excluded purported prior reservation from warranty; interest passed to grantee). *See* Richard W. Hemingway, The Law of Oil and Gas § 3.2(B) (2d ed. 1983) (maintaining majority of courts find interest remains with grantor after false recital of an outstanding interest). For other cases, *see* P. Martin & B. Kramer, Williams & Meyers Oil and Gas Law § 310.1 (Matthew Bender). *See also id.* at § 310.4.

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CHAPTER 49 PETROLEUM AND PIPELINES
IV. Transfer of Interests in Oil and Gas: Conveyancing and Involuntary Transfers.

6-49 Thompson on Real Property, Thomas Editions § 49.19

AUTHOR: Professor Maria E. Mansfield College of Law University of Tulsa

§ 49.19 Conveyancing Problem: Mineral Interest or Lease?

Occasionally, a dispute arises over whether a transaction is a deed conveying a mineral interest or a lease of the minerals. In some instances, the effectiveness of the transaction may be at issue. For example, under the Texas Relinquishment Act, the surface owner may only act as an agent for the state to lease minerals, not to sell them. n401 In Kansas, mineral interests not timely recorded are invalid but leases are not subject to the rule. n402 More generally, the Internal Revenue Service often questions a transaction because the tax treatment of bonuses for a lease and consideration for a deed differ; bonuses are ordinary income while sale proceeds may be capital gains. n403 Finally, the grantor may seek to forfeit an interest created by a document that has characteristics of both a deed and lease when it has existed for a long period without development. n404

When faced with an ambiguous transaction, no one factor is conclusive in distinguishing mineral interests from leases, but courts do consider whether the primary mode of consideration was a royalty and whether the royalty approximates current leasehold royalties in the area. If so, a lease would be indicated. n405 Other factors that would point to the leasehold classification would be the presence of drilling obligations, n406 surrender clauses, forfeiture clauses, and words such as "let and demise." n407 Conversely, words such as "grant and convey" and large cash considerations would tend to show a deed. n408

One important functional difference between the two types of transactions is that, because a lease anticipates development, it has various implied covenants. n409 It has been argued that with hybrid arrangements, the presence of these duties should not be a function of labelling the transaction as a lease or sale, but should depend upon the probable intent of the parties and what would be needed to accomplish the transaction's purpose. n410

FOOTNOTES:
(n1)Footnote 401. *See* § 49.15, *supra*.

(n2)Footnote 402. *See* § 49.16, *supra*.

(n3)Footnote 403. *West v. Commissioner of Internal Revenue, 150 F.2d 723 (5th Cir. 1945), cert. denied, 326 U.S. 795 (1946). See also* the different treatment of income based on whether the taxpayer has "an economic interest" in the

mineral producing property. Martin McMahon, *A Capsule View of the History and Importance of the Economic Interest Concept in Mineral Taxation, 27 Tulsa L.J. 313 (1992).*

(n4)Footnote 404. *Davis v. Mann, 234 F.2d 553 (10th Cir. 1956).*

(n5)Footnote 405. *Crain v. Pure Oil Co., 25 F.2d 824 (8th Cir. 1928)* (production anticipated because would not convey minerals for $1.00).

But see Bonner v. Oklahoma Rock Corp., 863 P.2d 1176 (Okla. 1993) (post-conveyance compensation labelled "royalty" not itself sufficient to make document a lease).

(n6)Footnote 406. *Campbell v. Fasken, 267 F.2d 792 (5th Cir. 1959)* (production without cost to grantor is object of lease); *United States v. White, 311 F.2d 399 (10th Cir.1962)* (lack of obligation to drill and large initial consideration indicates sale despite royalty retention), *overruled, United States v. White, 401 F.2d 610 (10th Cir. 1968)* (later royalty payment at issue but relabeled whole transaction lease).

(n7)Footnote 407. *West v. Commissioner of Internal Revenue, 150 F.2d 723 (5th Cir. 1945), cert. denied, 326 U.S. 795 (1946)* (absence of words not controlling). For other cases, *see* Richard W. Hemingway, The Law of Oil and Gas § 6.1 (2d ed. 1983).

(n8)Footnote 408. *Dancinger Oil & Ref. Co. of Texas v. Powell, 154 S.W.2d 632 (Tex. 1941)* ($50,000 cash payment and $50,000 deferred to be paid out of production but payable regardless of production deficiencies); *Whitehead v. United States, 555 F.2d 1290 (5th Cir. 1977)* (options to purchase more acreage immaterial to determination was sale).

(n9)Footnote 409. *See* §§ 49.54-49.60, *infra. See also* Annotation, *Instrument Conveying Land, Minerals, or Mineral Rights as Raising Implied Obligation to Drill and Develop for Oil and Gas*, 137 A.L.R. 415 (1942).

Bonner v. Oklahoma Rock Corp., 863 P.2d 1176 (Okla.1993) (no implied covenants in conveyance of minerals in place).

(n10)Footnote 410. P. Martin & B. Kramer, Williams & Meyers Oil and Gas Law § 207 (Matthew Bender).

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§ 49.20 Conveyancing Problem: Mineral Interest or Non-Participating Royalty?

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Often an instrument with a fractional interest is unclear about whether a royalty or mineral interest has been granted or reserved. n411 This occurs because parties do not fully understand the nature of the various rights in oil and gas or because they use inappropriate form deeds. In interpreting an instrument, its title is never given conclusive effect. If other indicators lead the court to label the interest as it appears in the document, the title will be mentioned. Nevertheless, courts may find that an interest is the opposite of the document's title. n412 The result of a classification may be dramatic.

In some jurisdictions, the classification can fundamentally affect a transaction's validity. n413 In all jurisdictions, however, the classification will impact the economic results. Unless otherwise stated, a mineral interest shares in all proceeds under an oil and gas lease; these include royalty, bonus and delay rentals. Sharing in the last two may be important because bonus and delay rentals may be the only significant return if the lands do not produce. The share of production will be less for a mineral interest, however, than the same share of production that belongs to the holder of a royalty of the same fraction. For example, a party owning a 1/8 royalty will receive 1/8 of gross production, or, 1 out of 8 barrels of oil. The owner of an 1/8 mineral interest will receive 1/8 of the royalty reserved in an oil and gas lease. If the lease has a 1/8 royalty, the mineral interest owner would be entitled to 1/64 of production, or 1 barrel out of 64. n414

Interpreting whether a particular transaction creates a mineral interest or royalty is often difficult. Any particular deed may have idiosyncratic language and any relevant jurisdiction may have decisions that are "sports." Seeming judicial irregularities arise because courts may decide a deed is ambiguous and allow in parol evidence of intent in order to do "justice" when a scrivener's error or misunderstanding is suspected. Therefore, although some frequently occurring phrases and interpretations are offered, further research is suggested.

§ 49.20(a) Conveyances of "Oil and Gas in, on, Under, and that May Be Produced from... ."

A deed that simply states that a fraction of "oil and gas in and under" or "in, on, or under" the described land is

conveyed or reserved will create a mineral interest if there are no additional clauses to confuse matters. If the phrase "and that may be produced and saved from" the land is added, the result is the same: a mineral interest results. n415 The "in and under" terminology creates the hallmark of a mineral interest.

While it is clear that this terminology alone will create a mineral interest, the addition of other provisions relating to oil and gas may or may not transform the interest into a royalty. Often, a deed includes an express grant or reservation of an easement across the surface for development purposes. This right of ingress and egress is totally consistent with a mineral interest and, of course, will not detract from the conclusion that a mineral interest has been created.

§ 49.20(b) Conveyances of "Royalty."

In a majority of jurisdictions, the term "royalty" is considered unambiguous and if the term is used without any other language, a cost free share of gross production -- a "non-participating royalty" -- will be created. n416 For example, in most jurisdictions, a conveyance or reservation simply referring to a 1/16 royalty would entitle the holder to 1/16 of gross production. A grant or reservation of a fraction "of royalty" would similarly create a cost free interest tied to the royalty reserved in an existing or future lease. For example, a grant of 1/2 "of royalty" would give 1/16 of gross production under a lease reserving a 1/8 royalty. n417 In neither instance would the holder have the right to bonus, rental, development, or executive rights.

There are exceptions to this general rule. Oklahoma's law is discussed in § 49.20(h) *infra*. It, like the law of at least one other state, was influenced by a theory West Virginia embraced. Adopting a position as venerable as Lord Coke, West Virginia declared that the conveyance of the profits of land is a conveyance of the land itself. n418 Therefore, conveying or reserving "1/2 of royalty" would result in granting or reserving an undivided 1/2 mineral interest. A reference to a 1/16 royalty would create an undivided 1/16 mineral interest. West Virginia has been inconsistent with the rule, n419 but Colorado adopted it. n420

Whether or not a royalty could be created in Colorado was unclear until legislation declared one could be created. n421 Alabama n422 and Illinois n423 have cases that also appear to adopt Coke's rule.

While it is clear that the "royalty" terminology alone will create a royalty in most jurisdictions, the addition of other provisions relating to oil and gas may or may not transform the interest into a mineral interest.

§ 49.20(c) Conveyances of "Royalty" When Deed Includes Language Inconsistent with Royalty Interest.

If a reservation or conveyance uses the "royalty" or "oil and gas produced and saved" terminology but also grants or reserves rights that are inconsistent with a royalty interest, a mineral interest may result, especially in those jurisdictions that find the word "royalty" ambiguous. For example, if easements of ingress and occupancy for the purpose of drilling, storing and marketing oil and gas are added, the interest may be transformed to a mineral interest, which has such rights. n424 Some cases, however, reject this simplistic result and look for the overall intent of the parties; the presence of the easements would be just a factor. n425

Although development and exploration easements are inconsistent with the definition of a royalty, other easements, such as the right to enter to "utilize" the land granted would not be. n426 A royalty owner may want to enter the property to monitor production or to gather oil after it is produced because oil royalty may be taken "in kind." n427 However, because a royalty interest is by definition non-possessory, a drafter should avoid inserting easements unless clearly limited.

§ 49.20(d) Conveyances of "Oil and Gas Produced and Saved."

As with the word "royalty," the use of "oil and gas produced and saved" alone will create a royalty. n428 Hence, a grant

or reservation of 1/16 of the oil and gas produced and saved will entitle the holder to 1/16 of gross production. Jurisdictions that adopt Lord Coke's rule, however, will find an undivided 1/16 mineral interest created because the grant of the profits is deemed to be a grant of the real property interest. n429 The addition of other provisions relating to oil and gas may or may not transform the interest into a mineral interest. n430

§ 49.20(e) Size of Interest Conveyed as Influencing Interpretation.

Some cases have viewed the size of the interest reserved or conveyed as important in determining whether a mineral interest or royalty has been created. Language that might otherwise indicate a royalty, but which involves a large interest, has been interpreted as creating mineral interests. n431 Interpretive questioning begins if the interest greatly exceeds the normal 1/8 royalty reserved in a lease because it becomes difficult to see what royalty the remaining mineral interest would be entitled to upon leasing. When outstanding "royalties" are as large as 1/4 or 1/2, leasing may become difficult because so much of production would be non-cost bearing. n432 Courts in essence find clear language ambiguous when placed in the context of business. n433

Others argue that leasing would not be impossible, especially in very productive areas, n434 or if the party with a very large royalty bargains for different rights, such as a bonus. Some cases have in fact found royalties created by such clear language as "an undivided 1/2 interest in and to all of the oil, gas, and, or, other minerals that may be produced from said land." n435

§ 49.20(f) Reservation or Conveyance of Mineral Interest Without Executive Right and Without Rights to Bonus and Delay Rentals.

While other sections have examined the effect of beginning with language characteristic of a royalty and adding to it additional rights reminiscent of a mineral interest, deeds often do the reverse: they start with language characteristic of a mineral interest and then remove attributes of the estate. The removal may be expressed or implied.

One explicit example would be a deed in which the grantor grants "1/16 of the oil and gas in, on, and under the land, but the grantor reserves all right to bonus, rental, and the exclusive right to lease." The right remaining to the grantee is the right to share in gross production, which is the right to which a royalty interest is entitled. The question becomes, how much gross production should the grantee receive? If the interest is construed as a royalty, the grantee receives 1/16. If a mineral interest is created, the grantee receives 1/16 of whatever royalty is reserved in a lease.

When the fraction conveyed is less than the standard royalty reserved in a lease, some cases have construed such a grant or reservation as a royalty interest either without explanation or because the limited rights would be inconsistent with a mineral interest. n436 Other cases reach the opposite result. n437 There is even less uniformity when the fraction involved exceeds the normal lease royalty. n438

In most jurisdictions, if a royalty is intended, it should and can be created directly: there is no need to delineate a mineral estate and then remove rights. In Kansas, however, a perpetual non-participating royalty is not possible because it is deemed to violate the Rule Against Perpetuities. n439 A "non-participating fee" must approximate for a perpetual non-participating royalty in Kansas. The drafter must begin with the "in and under language" and remove other attributes. n440 The formulation discussed in this section, however, would not give the grantee the amount of production probably intended. To approach the intended result of a 1/16 share of gross production, the grant would have to be of an undivided 1/2 mineral estate, with all attributes other than royalty removed. Naturally, if a lease reserves something other than a 1/8 royalty, the share of production going to the grantee will not be 1/16th but will be 1/2 of the reserved royalty.

§ 49.20(g) Reservation or Conveyance of Mineral Interest Without Rights to Bonus and Delay Rentals.

Another example of rearranging the attributes of a mineral estate are deeds in which the grantor grants "1/16 of the oil and gas in, on, and under the land, but the grantor reserves all right to bonus and rental." This differs from the previous example because no mention is made of the right to lease. Two approaches exist to determine who will have the executive right.

Some cases have held that the executive right is impliedly reserved when the benefits of the executive right are reserved. n441 Therefore, the right will reside with the party who has the right to bonus and delay rentals. The cases that adopt this posture, however, do not continue with the functional analysis to find that the interest without these rights is a royalty. Most conclude that a mineral estate results. One difference in categorizing the interest as a royalty or mineral interest may be the size of the fraction involved. n442

Other precedent, including some of the most recent, pursues a literal approach in assigning executive rights rather than the functional approach. Because each and every attribute of a mineral estate may be separately conveyed, the grantee would receive a mineral interest with executive rights when a grantor reserved the right to bonus and rental. n443 This mineral interest would only, however, receive income from production.

This mineral interest would, of course, resemble a royalty interest except the owner of it would be required to consent to leases. There might be instances where the royalty owner was intended to have executive rights. Requiring a royalty owner to consent to a lease would eliminate the possibility of executive abuse. To achieve this end, however, a royalty interest should be directly created with the addition of the following: "Grantee shall have no right to participate in bonuses and rentals under existing or future leases, they being reserved exclusively to the grantor. But grantee, his heirs and assigns shall have the right to join in the execution of any lease and no lease shall be valid without his joinder." n444

§ 49.20(h) The Confused Situation in Oklahoma.

Oklahoma has had great difficulty with the mineral/royalty distinction. This is partly because its courts find the term "royalty" to be ambiguous. They note that parties use the word both in the technical sense and also to refer to all the benefits that accrue to a mineral owner. n445 No brief summary can possibly be definitive and eliminate the need for individual research, but the following provides the general contours of Oklahoma's Byzantine jurisprudence.

If one encounters the phraseology "royalty" or "oil and gas produced and saved" without added rights, a royalty interest may be created. Although the courts do not always articulate these rationales, two important variables help determine whether a royalty will result: 1) whether the amount of production assigned to the interest is certain; and 2) whether a lease is in existence at the time of the transaction. If the percentage of gross production is certain, a cost-free share of gross production or royalty is more likely to result regardless of whether or not a lease is outstanding at the time of the grant. In other words, the following grants or reservations most likely will create a royalty: "a 1/16 royalty," "1/16 of the oil and gas produced or saved," or "1/2 of the normal 1/8 royalty." n446 If additional rights are added to the grant, however, a mineral interest may result. n447

The result may differ if the grant or reservation is phrased in terms of a percentage or fraction "of royalty." The Oklahoma courts have found ambiguity unless the land was currently under lease. n448 Without the ability to refer to a lease for definition, there is no way to gauge the amount of gross production adhering to the interest. Therefore, a grant or reservation of "1/2 of royalty" generally will create a mineral interest if no lease existed. n449 The owner will share not only in royalties, but also in bonus and rentals and will have leasing and development rights. The same terminology will create a true royalty if the land was under lease at the time of conveyance. n450 In this circumstance, the amount of gross production adhering to the interest is "made certain" by reference to the lease. Despite what appears to be general rules, however, there are cases that do not fit the mold.

Oklahoma also has examined the reverse problem, that is, when language begins as a mineral interest and then removes

attributes of the estate. Oklahoma appears to align with the "non-participating mineral interest" interpretation for deeds such as the following: the grantor grants "1/16 of the oil and gas in, on, and under the land, but the grantor reserves all right to bonus, rental, and the exclusive right to ease." n451 However, a royalty results if the grant reads "1/16 of the oil and gas produced, but the grantor reserves all right to bonus, rental, and the exclusive right to lease." n452 Because Oklahoma reads the phrase "oil and gas produced" as a royalty, the result would probably be the same without the reservation of lease rights. n453

§ 49.20(i) Drafting Suggestions.

In addition to the specific comments made above, generally the drafter should be concise and clear on the rights to be conveyed or reserved and the consequences of the choices. A form should not be elected and then modified to meet the desires of the parties. The desires of the parties should be ascertained and met with specific drafting.

FOOTNOTES:

(n1)Footnote 411. *See generally* Annotation, *What Constitutes Oil or Gas "Royalty" or "Royalties" Within Language of Conveyance, Exception, Reservation, Devise or Assignment, 4 A.L.R.2d 492 (1949).*

(n2)Footnote 412. *See* P. Martin & B. Kramer, Williams & Meyers Oil and Gas Law § 304.1 (Matthew Bender).

(n3)Footnote 413. Royalty interests are not subject to Kansas requirements to be recorded, but they may not be perpetual. See §§ 49.16 and 49.11(c), *supra*. Rules to interrupt prescription in Louisiana differ for royalties and mineral servitudes. *See* § 49.14, *supra*.

(n4)Footnote 414. *See* § 49.11(b), *supra*.

(n5)Footnote 415. Deleting the reference to "oil and gas saved" and simply referring to "oil and gas that may be produced from" or "oil and gas produced," however, has been variously interpreted as being either a royalty or mineral interest. *See* P. Martin & B. Kramer, Williams & Meyers Oil and Gas Law § 304.6 (Matthew Bender).

(n6)Footnote 416. *Schlittler v. Smith, 101 S.W.2d 543 (Tex. Comm. App. 1937).* For other cases in other jurisdictions, *see* Richard W. Hemingway, The Law of Oil and Gas § 2.7 (2d ed. 1983)

Boley v. Greenough, 22 P.3d 854 (Wyo. 2001) (where 77 assignments by parents to children of percentages in oil and gas produced were transfers of perpetual nonparticipating royalties despite the use of "over-riding royalty" in one portion of the document).

(n7)Footnote 417. *See* § 49.11(b), *supra*.

(n8)Footnote 418. *Paxton v. Benedum-Trees Oil Co., 94 S.E. 472 (W. Va. 1917).* Mississippi, in one case, reached the same result but relied on the fact that the deed failed to say that the interest was to be free of costs of discovery and production. *Mounger v. Pittman, 108 So. 2d 565 (Miss. 1959), but see Castle v. Harkins & Co., 464 So. 2d 513 (Miss. 1985)* ("1/64 of all oil gas or other mineral royalties that may become due or be produced on any lease" granted full 1/64 non-participating royalty).

(n9)Footnote 419. *Compare, Davis v. Hardman, 133 S.E.2d 77 (W. Va. Sup. Ct. App. 1963)* (seemingly rejecting it), *with, Rastle v. Gamsjager, 153 S.E.2d 403 (W. Va. 1967)* (adopting rule). *See* L. Skeen, West Virginia Oil and Gas Law, § 4 (1984).

(n10)Footnote 420. *Simson v. Langholf, 293 P.2d 302 (Colo. 1956)* ("49% of all oil and/or gas that may be produced saved and marketed" is mineral interest); *Corlett v. Cox, 333 P.2d 619 (Colo. 1958)* ("61/4 % of all gas, oil and minerals that may be produced ..., or in other words 1/2 of the usual 1/8 royalty" is mineral interest).

(n11)Footnote 421. At least prospectively, they may be created. Colo. Rev. Stat. Ann. § 38-30-107.5 (effective July 1, 1991).

(effective July 1, 1991).

(n12)Footnote 422. *McCall v. Nettles, 37 So. 2d 635 (Ala. 1948)* (within context of will interpretation); *but see Pilcher v. Turner, 530 So. 2d 198 (Ala. 1988)* (may clearly reserve share of oil and gas produced without any other mineral benefits).

(n13)Footnote 423. *Logue v. Marsh, 365 N.E.2d 1159 (Ct. App. Ill. App. 1977)* (discussing precedent).

(n14)Footnote 424. *Wynn v. Sklar & Phillips Oil Co., 493 S.W.2d 439 (Ark. 1973)* (ignoring deed caption of royalty); *Williams v. J. & C. Royalty Co., 254 S.W.2d 178* (Tex. Civ. App. 1953, *writ refused* n.r.e. *See also Loeffler v. King, 236 S.W.2d 772 (Tex. 1951)* (right to share in all lease benefits makes "royalty" a mineral interest).

(n15)Footnote 425. *Atlantic Ref. Co. v. Beach, 436 P.2d 107 (N.M. 1968)* (clause stating intention to be one-half of royalty and to not affect title in fee or to impact other lease benefits overrides easements and language referring to 1/16 mineral interest). *See generally* P. Martin & B. Kramer, Williams & Meyers Oil and Gas Law § 304.13 (Matthew Bender) and Richard W. Hemingway, The Law of Oil and Gas § 2.7(E) (2d ed. 1983).

(n16)Footnote 426. *Neel v. Alpar Resources, Inc., 797 S.W.2d 361 (Tex. App. 1990).* P. Martin & B. Kramer, Williams & Meyers Oil and Gas Law § 304.13 (Matthew Bender).

(n17)Footnote 427. *Hays v. Phoenix Mut. Life Ins. Co., 391 P.2d 214 (Okla. 1964).*

(n18)Footnote 428. *Barker v. Levy, 507 S.W.2d 613 (Tex. Civ. App. 1974), writ refused* n.r.e. (containing a review of other positions); *Barret v. Kuhn, 572 S.W.2d 135 (Ark. 1978).*

(n19)Footnote 429. *Paxton v. Benedum-Trees Oil Co., 94 S.E. 472 (W. Va. 1917); Simson v. Langholf, 293 P.2d 302 (Colo. 1956); Corlett v. Cox, 333 P.2d 619 (Colo. 1958); McCall v. Nettles, 37 So. 2d 635 (Ala. 1948);* and *Logue v. Marsh, 365 N.E.2d 1159 (Ill. App. 1977).*

(n20)Footnote 430. California has interpreted the following to be a mineral interest: "Minerals in, under and/or which may be hereafter produced and save[d] from" the land. *Little v. Mountain View Dairies, 217 P.2d 416 (Cal. 1950).* It is suggested that using this terminology to create a mineral interest in other jurisdictions would be risky. P. Martin & B. Kramer, Williams & Meyers Oil and Gas Law § 304.5 (Matthew Bender).

(n21)Footnote 431. *Simson v. Langholf, 293 P.2d 302 (Colo. 1956)* (49%); *Ford v. Jones, 85 So. 2d 215 (Miss. 1956)* (1/4); *Moore v. Wimberley, 304 S.W.2d 709 (Tex. Civ. App. 1957)* (1/4th) and *Picard v. Richards, 366 P.2d 119 (Wyo. 1961)* (1/5th).

(n22)Footnote 432. *Brooks v. Mull, 78 P.2d 879 (Kan. 1938)* (cannot be 1/2 royalty).

(n23)Footnote 433. *Payne v. Campbell, 164 So. 2d 780 (Miss. 1964).*

(n24)Footnote 434. *Arnold v. Ashbel Smith Land Co., 307 S.W.2d 818* (Tex. Civ. App. 1957, *writ refused* n.r.e. (land containing 1/4 royalty leased for landowner's royalty of 1/2).

(n25)Footnote 435. *Gavenda v. Strata Energy, Inc., 705 S.W.2d 690 (Tex. 1986)* (1/2); and *Arnold v. Ashbel Smith Land Co., 307 S.W.2d 818 (Tex. Civ. App. 1957)* (1/4).

(n26)Footnote 436. *Watkins v. Slaughter, 189 S.W.2d 699 (Tex. 1945)* (emphasizing only to be paid upon production), *but see Grisson v Guetersloh, 391 S.W.2d 167 (Tex. Civ. App. 1965).* For other cases, *see* Richard W.

Hemingway, The Law of Oil and Gas § 2.7 (2d ed. 1983). The result will not necessarily be the same if the executive right is not expressly severed, see § 49.20(g), *Infra*.

A grant of 1/16 of the minerals in and under the land with a reservation of the executive right and the right to delay rentals was interpreted to be a mineral interest despite the fact the deed said the interest was to be "a royalty interest only" because the deed did not, as in *Watkins v. Slaughter*, say payment would only be from production. *French v. Chevron U.S.A., Inc., 871 S.W.2d 276 (Tex. App. 1994), aff'd, 896 S.W.2d 795 (Tex. 1995).*

(n27)Footnote 437. *Phillips Petr. Co. v. Richard, 127 So. 2d 816 (La. App. 1961).* For other cases, *see* Richard W. Hemingway, The Law of Oil and Gas § 2.7 (2d ed. 1983).

(n28)Footnote 438. *Skelly Oil Co. v. Cities Serv. Oil Co., 160 P.2d 246 (Kan. 1945)* ("undivided 1/2 interest to oil, gas, ... in under and that may be produced ... "less power to lease, bonus, and rentals creates royalty but only entitles holder to 1/16 of gross production).

(n29)Footnote 439. *See* § 49.11(c), *supra*.

(n30)Footnote 440. *Drach v. Ely, 703 P.2d 746 (Kan. 1985)* (grant of undivided 1/6 mineral interest that did not include delay rentals and bonus created mineral interest); *Powell v. Prosser, 753 P.2d 310 (Kan. App. 1988).*

(n31)Footnote 441. *Anderson v. Mayberry, 661 P.2d 535 (Okla. App. 1983)* (undivided 1/2 interest).

(n32)Footnote 442. *Anderson v. Mayberry, 661 P.2d 535 (Okla. App. 1983)* (undivided 1/2 mineral interest without executive rights); *HNG Fossil Fuels Co. v. Roach, 656 P.2d 879 (N.M. 1982)* (although "non-participating" when applied to mineral interest terminology normally creates royalty, created mineral interest when 25% interest involved); *Altman v. Blake, 712 S.W.2d 117 (Tex. 1986)* (undivided 1/16 mineral interest). *But see Harris v. Griffith, 210 So. 2d 629 (Miss. 1968)* (interest a royalty), *overruled, Thornhill v. Systems Fuels, Inc., 523 So. 2d 983 (Miss. 1988)* (1/2 interest involved). *See generally Antelope Prod. Co. v. Shriner's Hospital, 464 N.W.2d 159, 161 (Neb. 1991)* (collecting cases on issue).

(n33)Footnote 443. *Diamond Shamrock Corp. v. Cone, 673 S.W.2d 310* (Tex. Civ. App. 1984, *writ refused* n.r.e.; *Thornhill v. Systems Fuels, Inc., 523 So. 2d 983 (Miss. 1988).*

(n34)Footnote 444. *See* P. Martin & B. Kramer, Williams & Meyers Oil and Gas Law § 304.10 (Matthew Bender), contrasting this interest with a mineral interest that would have development rights and executive rights but no bonus or rental rights. They also note that these interests would make leasing more difficult than giving one party exclusive leasing rights.

(n35)Footnote 445. *Melton v. Sneed, 109 P.2d 509 (Okla. 1940)* ("royalty ... used not in the strict sense, but in the broader sense ... as denoting an interest in the minerals").

(n36)Footnote 446. *Carroll v. Bowen, 68 P.2d 773 (Okla. 1937). But see Harder v. Wagler, 779 F. Supp. 150 (D. Kan. 1992)* (deed of 1/3 of landowner's 1/8 royalty ambiguous; granted 1/3 of royalty).

(n37)Footnote 447. *Zemp v. Jacobs, 713 P.2d 25 (Okla. App. 1985)* (interest also had rights to bonuses and rentals under additional language).

(n38)Footnote 448. *Hays v. Phoenix Mut. Life Ins. Co., 391 P.2d 214 (Okla. 1964)* (1/16 of all oil and gas produced created a 1/16 royalty when land was under lease).

(n39)Footnote 449. *Burns v. Bastion, 50 P.2d 377 (1935).*

(n40)Footnote 450. *Meeks v. Harmon, 250 P.2d 203 (Okla. 1952).*

(n41)Footnote 451. *Swearingen v. Oldham, 159 P.2d 247 (Okla. 1945); Jolly v. Wilson, 478 P.2d 86 (Okla. 1970).*

(n42)Footnote 452. *Gardner v. Jones, 181 P.2d 838 (Okla. 1941); Murphy v. Earp, 382 P.2d 731* Okla. 1963).

(n43)Footnote 453. *Armstrong v. McCracken, 229 P.2d 590 (Okla. 1951); but see Pease v. Dolezal, 46 P.2d 757 (Okla. 1952)* (if egress and ingress granted, oil and gas "produced" will be mineral interest).

Thompson on Real Property, Thomas Editions

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CHAPTER 49 PETROLEUM AND PIPELINES
IV. Transfer of Interests in Oil and Gas: Conveyancing and Involuntary Transfers.

6-49 Thompson on Real Property, Thomas Editions § 49.21

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§ 49.21 Conveyancing Problem: Fractional Interests.

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In most jurisdictions, if a person conveys an undivided interest in minerals to another, a tenancy in common is created. In addition to the problems for development that co-tenancies may present, n454 conveyances of fractional interests create interpretive problems. These generally involve questions of quantity.

§ 49.21(a) Mineral Acres and Royalty Acres.

A simple method of conveying an undivided interest in the minerals in a tract is to use a fraction or percentage. In other words, the grantor could grant 1/4 (or 25%) of the minerals in and under certain described property. The grantee would receive this fractional interest in all the described property, regardless of the actual acreage in the tract. From practical standpoint, this means 25% of all proceeds would be payable to the grantee. Other manners of description, however, are holdovers from the past and can complicate how to distribute proceeds.

Fractional conveyances also have been described in terms of "minral acres." If a grantor desired to convey 1/4 of the grantor's minerals and the grantor believed the tract's acreage to be 20 acres, such a grant may be of "5 mineral acres" in the described land. If the tract's acreage was judged to be 160 acres, the grant would read "40 mineral acres." In other words, minerals in sufficient acreage would be given to enable that number as a numerator to create the desired fraction when the tract's acreage is the denominator.

Unfortunately, if the tract has more or less acreage than presumed, the fractional interest will differ. n455 For example, if the 20 acre tract actually contains 21 acres, the grantee will only receive 5/21 or 23.8% of proceeds. Conversely, if the acreage is less than 20 acres, the grantee will receive a higher percentage of the minerals and therefore of proceeds from development. Therefore, this phraseology may be useful as a way to protect the grantee from acreage shortage if the acreage amount is questionable. n456 Nevertheless, it will be difficult for an oil and gas company to ascertain from the record whom should be paid what. Because of these difficulties, current drafters should avoid use of this terminology and if possible and not cost prohibitive, accurate surveys should be performed coupled with a correction instrument for past conveyances.

A similar but even greater difficulty arises with conveyances of "royalty acres." For example, for the 20-acre tract, the grantor might convey "5 royalty acres." This would indicate a cost-free interest but would not answer how great a cost-free interest is created. Two possible constructions exist: 5 royalty acres in a 20 acre tract could create a 25% royalty, giving 25% of gross production, or it could create 25% "of royalty," which would give the grantee 1/4 of any royalty reserved in any lease. One case held that the latter interpretation was correct, n457 but there is no way to predict what other courts might do. n458 In addition to this problem from the use of "royalty acres," if the tract acreage differs from what was expected, the percentages would also vary as is case with mineral acres. Therefore, drafters should avoid royalty acre descriptions if possible.

Finally, drafters should avoid appending a mineral or royalty acre descriptions to a fractional description. For example, some deeds involving a 20 acre tract might state that an undivided 1/4 interest in the minerals in and under the land is being conveyed, but continue with "It is my intent to convey 5 mineral acres." Again, difficulties arise in putting the percentage of proceeds that would be allocated if the acreage differs from the presumed 20 acres. Although some courts have ignored the mineral acres language as surplusage, n459 other courts found the mineral acres limited the grant if there were more acres n460 or increased the percentage ownership going to the grantee if the grantor owned less acreage. n461 Others construed the deed against the drafter. n462

COMPUTER-ASSISTED RESEARCH

LEXIS: (mineral w/1 acre) and (fraction w/1 share w/15 proceed or production or royalty)
or
(royalty w/1 acre) and (fraction w/1 share w/15 proceed or production or royalty)

§ 49.21(b) Reservation of Fractional Interest When Grantor Conveys an Undivided Interest: Double Fraction Problem.

A double fraction problem can occur when the grantor either 1) initially owns a fractional interest, or 2) conveys a fractional interest and then reserves a fractional interest. The question is whether the fractional interest conveyed or reserved is a fraction of the whole mineral interest or a lesser interest.

For an example of the first situation, consider the following. A grantor owns an undivided 1/2 interest in the minerals in and under § 1 and conveys one of the following: a) an undivided 1/2 interest in the minerals in and under § 1, or b) all my interest in § 1. In both instances, grantee would receive an undivided 1/2 interest in the minerals. There is no question of a double fraction. If, however, the grantor conveyed either: a) an undivided 1/2 of the grantor's interest in § 1, or b) an undivided 1/2 of an undivided 1/2 interest in all the minerals in and under § 1, the grantee would receive an undivided 1/4 of the minerals. The fractional interest conveyed is multiplied by the fraction representing the grantor's interest. In a different situation, however, no multiplication takes place. When a deed refers to "1/4 of the minerals *out of* the grantor's 1/2 mineral interests," the phrase "out of" merely indicates a source for the interest; 1/4 of the minerals pass, not 1/8. n463

The second situation raises the question of whether a reservation by a grantor is proportional to the grantor's interest in the minerals or to the entire mineral estate. For example: a grantor owns an undivided interest in the minerals in and under § 1 and conveys an undivided 1/2 interest in the minerals in and under § 1, but reserves either a) an undivided 1/4 interest in the minerals in and under the *land conveyed* (or the land described and conveyed), or b) an undivided 1/4 interest in the minerals in and under the *land described*. In the first instance, the Texas courts will find the grantor reserved 1/4 of 1/2. The reservation is a fraction of the grantor's estate that was conveyed; the grantee thus receives 3/8 of the minerals. n464 In the second instance, however, the grantor will have reserved a full 1/4 interest in the minerals and the grantee will receive a 1/4 undivided interest. The fractional reservation is a fraction of the entire mineral estate because the term "land described" is interpreted to mean the physical land, not the interest owned by the grantor. n465

Despite the artificial nature of the distinction, courts hesitate to abandon it because these rules have been long-standing. n466

§ 49.21(c) Reservation of Fractional Interest Which Creates Overconveyance: *Duhig* Problem.

§ 49.21(c)(1) Statement of Problem.

The overconveyance problem arises when a grantor only owns a partial interest in minerals and executes a deed with two attributes: 1) it does not acknowledge the outstanding interest and 2) it contains a reservation by the grantor of an undivided interest. For example, the owner of an undivided 1/2 interest in the minerals simply conveys "§ 1." This grant would include all the surface and the minerals, but the deed continues as follows: "but reserves to the grantor an undivided 1/2 interest in the minerals in and under § 1." The granting clause purports to grant 100% of the minerals, from which 50% would be reserved. By simple subtraction, the grantee would expect to receive 50%. Because the grantor only owns 50%, to give credit to both the grant and the reservation would be impossible; an overconveyance results. These facts, in a simplified form, are the facts of the famous Duhig v. PeaveyMoore Lumber Co. case. n467

Before examining how the case resolved the issue, it must be emphasized that if the grant acknowledges the outstanding interest, there will be no "overconveyance" and no "*Duhig*" problem. For example, no problem exists if the example above conveyed "§ 1, subject to a previously reserved undivided 1/2 interest in the minerals and further reserving to grantors an undivided 1/2 interest in the minerals." n468 The grantor would retain the 1/2 mineral interest and the grantee would receive the surface and no minerals. Similarly, if the outstanding interest was an undivided 1/4, there would be no overconveyance in either of the following two grants: a) "an undivided 3/4 interest in the minerals in and under § 1, but reserving unto the grantor an undivided 1/4 interest in the minerals;" or b) "all the minerals in and under § 1, subject to a previously reserved undivided 1/4 interest in the minerals and further reserving to grantors an undivided 1/4 interest in the minerals." After both these grants, the grantee would have 1/2 the minerals and the grantor would retain 1/4.

Sometimes, a deed tries to achieve a similar result by referring to an earlier deed after a metes and bounds description. Some courts have construed the second deed to transfer a limited interest if the prior deed described an outstanding interest, but often a reference to a prior deed is simply to confirm a legal description by more firmly establishing its boundaries and the reference will state this purpose. This type of incorporation by reference will not limit the current deed's granting clause. When the second deed, however, refers to a prior deed and states the metes and bounds description and adds "being the same land conveyed in deed executed by Mr. X," some cases limit the current granting clause to the quantum of interest that passed in the deed incorporated by reference. n469 Courts similarly differ on whether a reference back to another deed "for all purposes" would limit the quantum passing in the current deed to that which passed in the prior. n470

§ 49.21(c)(2) Resolution of Problem: Estoppel By Deed.

In the classic overconveyance situation, the *Duhig* court held that the grantee took 50% of the minerals and the grantor retained no minerals. n471 Two explanations for the result are given. The first, which was the author of the *Duhig* opinion's personal explanation, was that as a matter of construction, only a 50% grant was intended. The reservation was merely a withdrawal of the unowned minerals from the conveyance. The majority of the court asserted a more complex analysis. n472

The majority looked at the amount the deed purported to warrant. The granting clause seemingly gave 100% of the minerals, but the reservation of the 1/2 mineral interest would have excepted that from the warranty. The intended conveyance was, therefore, of a 50% interest, but the majority said that the reservation of 50% was also intended. At the moment the reservation is given effect, however, the warranty to the grantee is breached. The normal remedy for a breach of warranty is damages, but here the grantor has an interest which, if given to the grantee, would make the

grantee whole. The majority, therefore, used a variant of after acquired title to say that the grantor is estopped from asserting the reservation. Therefore, the grantee receives as much as possible from the grantor. n473

The resolution is a technical estoppel, not an estoppel *in pais*. Even if the grantee knew of the outstanding interest, the *Duhig* doctrine will apply. n474 In fact, in most instances, at least constructive knowledge will exist. North Dakota at one point seemingly rejected *Duhig* when the grantee had constructive or actual knowledge of the interest. n475 It backpedaled from this position. *Duhig* would only be inapplicable if the grantee owned the outstanding interest. n476

North Dakota's final position is correct if the *Duhig* doctrine is meant to resolve title questions for remote grantors and grantees. Certainty of title requires matters to be resolved from the county records. n477 The only instance of actual knowledge of an outstanding interest on the part of the grantee that can be documented from the county records would be when the grantee owned that interest. Therefore, for title certainty, the rule in the *Duhig* case should be fairly mechanically applied. In essence, the grantee should receive what was warranted, computed as the quantum in the granting clause minus what was expressly reserved.

Obviously, giving this amount to the grantee would overcompensate the grantee who knew of the outstanding interest and bargained based on that knowledge. It would obviously disappoint the grantor who believed that minerals were being reserved. As between the parties to the deed, however, if an error has occurred, the proper remedy is reformation. n478 The rule in *Duhig* does not forbid equitable results between the parties; it is a rule of construction for title certainty. As between successors in interest to the grantor and the grantee, the grantee's successors prevail and receive title, rather than the traditional breach of warranty remedy. The reason title is given is that the traditional remedy is damages, which are limited to the consideration paid. With the highly speculative nature of minerals, this would be an unsatisfactory remedy, especially for a remote grantee after the value of the minerals had been proven. Under *Duhig*, any potential loss from an over conveyance is allocated to the grantor. The rule in *Duhig* has been adopted in numerous jurisdictions. n479

§ 49.21(c)(3) When *Duhig* Is Used.

The next question is whether or not the *Duhig* doctrine should apply in situations that are distinguishable from its parent case. *Duhig* involved a warranty deed and an attempted reservation of a mineral interest identical to the outstanding interest. Fact patterns may differ both in the type of instrument involved and the types of interests outstanding and reserved.

First, courts have differed on the importance of a warranty. If the jurisdiction emphasizes the contractual nature of the case and breach of warranty theory, the rule will not apply to quitclaim deeds. n480 However, if the theory is simply "estoppel by deed," which requires a grantor to stand by a conveyance and not to deny what has been conveyed, the opposite conclusion may result and the rule be applied to quitclaim deeds. n481

Second, the nature of the interest outstanding and reserved may influence results. The rule has not been limited to when these interests are identical, but the courts have been more apt to use the rule when the difference between the outstanding and reserved interests was merely in quantum. For example, consider an outstanding 1/2 interest and a conveyance of "the minerals in § 1, reserving unto the grantor an undivided 1/4 interest in the minerals." The amount the grantee would anticipate is an undivided 3/4 interest. The rule would give the grantee 1/2 the minerals and a cause of action for breach of warranty for the remaining 1/4 interest. Similarly, if in the preceding conveyance the outstanding interest was 1/8 and the grantor reserved 1/4 (which totals 3/8), the grantee would receive 3/4 of the minerals and the grantor would be able to retain 1/8 of the minerals. The outstanding 1/8 would be subtracted from the grantor's attempted reservation of 1/4.

Third, *Duhig* involved an outstanding mineral interest and an attempt to reserve a mineral interest. Therefore, courts had to determine if it should be used when other types of mineral rights are involved. *Duhig* has and definitely should be

applied if there is an outstanding non-participating royalty interest and the grantor attempts to reserve a non-participating royalty interest. n482 It is less obvious that *Duhig* should apply to give the grantee a grantor's reserved royalty interest when what is outstanding is a mineral interest. This requires elaboration.

For example, if the grantor only owned an undivided 1/2 mineral interest, but conveyed "§ 1, reserving an 1/16 royalty," the grantee would anticipate receiving 100% of the mineral interest subject to a 1/16 royalty. The grantee's royalty would not necessarily be equivalent to that adhering to a simple undivided 1/2 mineral interest, which is the most the grantee could actually receive. Under the anticipated grant, the grantee's royalty share could have exceeded that adhering to an undivided 1/2 interest if a lease was executed with a royalty greater than 1/8 because only 1/16 would be owed to another. The grantee would keep all of the royalty in excess of 1/8. Giving the grantee the grantor's reserved 1/16 royalty only will partially compensate for the missing mineral interest when royalty is considered. Additionally, it will not give the grantee the other attributes appurtenant to a mineral interest, such as bonus or rental which the outstanding interest has. Nevertheless, courts have applied *Duhig* and given the interest to the grantee. n483 Similarly, if the outstanding interest was a non-participating royalty, *Duhig* has been used to force the grantor's interest to bear all the burden of the outstanding royalty rather than apportioning the burden between the grantor and grantee. n484

The *Duhig* doctrine has been rejected in certain situations. The most important rejection was for leaseholds. The lessor's royalty will not be reduced under this theory if the lessor does not have the full interest purportedly leased. n485 *Duhig* is also not used to force substitution of rights in different lands. If there was a breach of warranty as to a portion of a tract, extra rights cannot be given in another tract to satisfy the breach. n486

COMPUTER-ASSISTED RESEARCH

LEXIS: (duhig w/5 rule) w/50 (royalty w/15 outstanding)
or
(duhig w/5 rule) w/50 (tract or parcel)
or
(duhig w/5 rule) w/50 lease!

FOOTNOTES:
(n1)Footnote 454. *See* § 49.05, *supra*.

(n2)Footnote 455. This situation is not one of failure of title, but occurs because the acreage is different than anticipated because of poor surveying or natural phenomena such as accretion and deliction. When there has been a failure of title, some courts have changed the normal rule that damages are the sole remedy for a breach of warranty. For example, if the grantor only owned 10 of the 20 acres, the 5 mineral acres would apply to the 10 owned acres, giving the grantee 50% of those minerals. *Daniel v. Allen, 129 S.W.2d 392 (Tex. Civ. App. 1939).* Traditional rules would have given the grantee a damage claim for 2.5 mineral acres. *See also Pursue Energy Corp. v. Perkins, 558 So. 2d 349 (Miss. 1990)* (grantor owned less undivided interest in one tract than was supposed; grantee gets larger interest in second tract subject to the deed). For support of the traditional rule, especially for larger tracts on which more than one well could have been drilled, *see* Richard W. Hemingway, The Law of Oil and Gas § 3.1 (2d ed. 1983).

(n3)Footnote 456. P. Martin & B. Kramer, Williams & Meyers Oil and Gas Law § 320.2 (Matthew Bender).

(n4)Footnote 457. *Dickens v. Tisdale, 164 S.W.2d. 990 (Ark. 1942).*

(n5)Footnote 458. *But see* P. Martin & B. Kramer, Williams & Meyers Oil and Gas Law § 320.3 (Matthew Bender) (rule called clear: mineral acres and royalty acres grant result in same share of gross production).

(n6)Footnote 459. *Woods v. Sims, 273 S.W.2d 617 (Tex. 1954)* (at least as to royalty payments under existing lease by use of "two grant theory").

(n7)Footnote 460. *Wade v. Roberts, 346 P.2d 727 (Okla. 1959)* (deed said interest would "amount to" specific mineral acres); P. Martin & B. Kramer, Williams & Meyers Oil and Gas Law § 320.2 (Matthew Bender) (arguing shows bargaining based on acres).

(n8)Footnote 461. *Superior Oil Co. v. Vanderhoof, 297 F. Supp. 1086 (D. Ct. Mont. 1969).*

(n9)Footnote 462. *Williams v. Phillips Petr. Co., 453 F. Supp. 967 (S.D. Ala. 1978), aff'd, 614 F.2d 5th Cir. 1980).*

(n10)Footnote 463. *Black v. Shell Oil Co., 397 S.W.2d 877 (Tex. Civ. App. 1965).*

(n11)Footnote 464. *Hooks v. Neil, 21 S.W.2d 532 (Tex. Civ. App. 1929), Averyt v. Grande, 717 S.W.2d 891 (Tex. 1986).*

(n12)Footnote 465. *King v. First Nat'l Bank of Wichita Falls, 192 S.W.2d 260 (Tex. 1946); Averyt v. Grande, 717 S.W.2d 891 (Tex. 1986); Kerr-McGee Corp. v. Henderson, 763 P.2d 92 (Okla. 1988).*

(n13)Footnote 466. *Averyt v. Grande, 717 S.W.2d 891 (Tex. 1986).*

(n14)Footnote 467. *144 S.W.2d 878 (Tex. 1940).* The actual facts stated that the undivided 1/2 interest was being "retained," rather than "reserved." This allowed an argument that there was no intent to reserve an additional 1/2 interest for the grantor.

(n15)Footnote 468. In all these examples, the minerals are to be deemed reserved "in the land described." This would refer to the total physical tract. See § 49.21(b), *supra*.

(n16)Footnote 469. *Winters v. Slover, 251 S.W.2d 726 (Tex. 1952)* (mortgage limited to legal interest in prior deed). *But see Duhig v. Peavey-Moore Lumber Co., 144 S.W.2d 878 (Tex. 1940)* (inclusion of following after legal description only identified tract described: "being the same tract of land formerly owned by the ... Company, and after the dissolution of said company, conveyed to W.J. Duhig by B.M. Talbot". The case has been criticized for not recognizing the reference as limiting the second conveyance to the interest received in the first, namely the surface and 1/2 the minerals. Richard W. Hemingway, The Law of Oil and Gas § 3.2 (2d ed. 1983). *See also, Sharp v. Fowler, 252 S.W.2d 153 (Tex. 1952).* ("land *described*" in former deed refers to the physical land only and not to any limited interest conveyed).

(n17)Footnote 470. A typical use would be to add after the metes and bounds description: "being the same land described in that deed from X to Y (recording data), reference to which is made for all purposes." *Compare Harris v. Windsor, 294 S.W.2d 798 (Tex. 1956)* (limits estate in second deed's grant to prior); *with Scarmondo v. Potter, 613 S.W.2d 756 (Tex. Civ. App. 1981)* (stating land is "same two tracts of land conveyed" in prior deed did not except prior reservation from second deed's warranty).

(n18)Footnote 471. *Duhig v. Peavey-Moore Lumber Co., 144 S.W.2d 878 (Tex. 1940). See* simplified facts in § 49.21(c)(1) *supra*. The actual facts stated that the undivided 1/2 interest was being "retained," rather than "reserved." This allowed an argument that there was no intent to reserve an additional 1/2 interest for the grantor.

(n19)Footnote 472. For supplemental reading, *see* Richard W. Hemingway, The Law of Oil and Gas § 3.2(E) (2d ed. 1983); P. Martin & B. Kramer, Williams & Meyers Oil and Gas Law § 311 (Matthew Bender); Willis H. Ellis, *Rethinking the Duhig Doctrine, 28 Rocky Mtn. Min. L. Inst. 947 (1982).*

(n20)Footnote 473. *Duhig v. Peavey-Moore Lumber Co., 144 S.W.2d 878 (Tex. 1940).*

(n21)Footnote 474. *Body v. McDonald, 334 P.2d 513 (Wyo. 1959)* (doctrine based on estoppel by leed, not estoppel in pais).

(n22)Footnote 475. *Gilbertson v. Charlson, 301 N.W.2d 144 (N.D. 1981).*

(n23)Footnote 476. *Sibert v. Kubas, 357 N.W.2d 495 (N.D. 1984).*

(n24)Footnote 477. *See Cole v. Minor, 518 So. 2d 61 (Ala. 1989)* (rejects search for constructive or actual knowledge in favor of objective standard).

(n25)Footnote 478. *See Haddad v. Boon, 609 S.W.2d 609 (Tex. Civ. App. 1980), writ refused* n.r.e. how to compute when statute of limitations runs).

(n26)Footnote 479. These include Alabama, Arkansas, Colorado, Louisiana, Mississippi, North Dakota, Oklahoma, Texas and Wyoming. For cases, *see* Richard W. Hemingway, The Law of Oil and Gas § 3.2 (2d ed. 1983); P. Martin & B. Kramer, Williams & Meyers Oil and Gas Law § 311 (Matthew Bender) (at least eight states follow). *But see Hartman v. Potter, 596 P.2d 653 (Utah 1979)* (rejecting estoppel analysis) and *O'Brien v. Village Land Co., 794 P.2d 246 (Colo. 1990)* (reaching same result as *Duhig* but criticizing estoppel reasoning).

Miller v. Kloeckner, 600 N.W.2d 881 (N.D. 1999) (applying *Duhig* Doctrine).

(n27)Footnote 480. *Compare Hill v. Gilliam, 682 S.W.2d 737 (Ark. 1985)* (rejects doctrine for quitclaim deeds); *with Peterson v. Simpson, 690 S.W.2d 720 (Ark. 1985)* (accepts for warranty deeds).

(n28)Footnote 481. *Blanton v. Bruce, 688 S.W.2d 908 (Tex. Civ. App. 1985), writ refused* n.r.e. It will not, however, apply to partition agreements because no conveyance is involved. *Zapatero v. Canales, 730 S.W.2d 111 (Tex. Civ. App. 1987), writ refused* n.r.e.

(n29)Footnote 482. *Jackson v. McKenney, 602 S.W.2d 124 (Tex. Civ. App. 1980);* P. Martin & B. Kramer, Williams & Meyers Oil and Gas Law § 316.1 (Matthew Bender) (result clear from examining what the grantee anticipated receiving).

(n30)Footnote 483. *McClung v. Lawrence, 430 S.W.2d 179 (Tex. 1968).*

(n31)Footnote 484. *Acoma Oil Corp. v. Wilson, 471 N.W.2d 476 (1991)* (doctrine used in conveyance of a partial mineral interest without a direct reservation to grantor).

(n32)Footnote 485. *McMahon v. Christmann, 303 S.W.2d 341 (Tex. 1957).*

(n33)Footnote 486. *Forrest v. Hanson, 424 S.W.2d 899 (Tex. 1968).*

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CHAPTER 49 PETROLEUM AND PIPELINES
IV. Transfer of Interests in Oil and Gas: Conveyancing and Involuntary Transfers.

6-49 Thompson on Real Property, Thomas Editions § 49.22

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§ 49.22 Conveyancing Problem: Conveyances by Lessor of Leased Property.

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In the next subsections, the factual patterns involve a lessor dealing with an oil and gas estate after it has already been leased. The lessor either conveys the mineral estate or executes a second lease. Many of these problems involve transfer of a portion of the mineral estate in severalty (i.e., by tract) rather than transfer of an undivided interest in the minerals.

§ 49.22(a) Apportionment of Rentals.

Absent any other agreement between the parties to the deed or leasehold, if a leasehold exists and the lessor then subdivides the tract subject to the lease by conveying a portion in severalty, the universal rule is that rental payments will be apportioned. n487 In other words, each owner would be entitled to rentals in the proportion that their tract bears to the total lease acreage. For example, if delay rentals of $320 were due for a 160 acre tract, the owner of 40 acres would be entitled to 40/160 or 1/4 of the rentals, being $80.

§ 49.22(b) Apportionment or Non-Apportionment of Royalties.

Often, after a tract of land has been leased, the owner of the minerals subdivides the tract by conveying a portion of it in severalty. At this point, it must be determined whether royalties should be apportioned or only be paid to the party owning the tract that contains the well. Absent an agreement between the parties to the deed or leasehold, the majority rule is that of non-apportionment. n488 In order to obtain royalties, a party must own the producing tract. In absence of forced pooling, this may create hardships if spacing regulations forbid drilling on some tracts. A minority of jurisdictions choose apportionment as the rule in face of silence by the parties. n489 In all jurisdictions, parties may expressly adopt one or the other rule to achieve desired ends.

§ 49.22(c) Conveyance Made Expressly "Subject to" Outstanding Lease.

§ 49.22(c)(1) Purpose of "Subject to" Clause.

When an interest is conveyed in minerals already under lease, the grantor will generally state in the deed that the conveyance is "subject to" the existing lease. In most jurisdictions, lease proceeds always would be transferred without any express assignment. n490 Therefore, most cases find the purpose of the "Subject to" Clause to be protection of the grantor from a breach of warranty. n491 There is some precedent, however, that grants a greater import to the words; under it, the mere presence of the words "subject to" the lease implies the parties intend apportionment of royalties. n492

§ 49.22(c)(2) "Covers and Includes" Clause Creating "Two Grants" -- Inconsistency Between Land Granted and Land Subject to Lease.

In addition to acknowledging that a conveyance is "subject" to a lease, a conveyance often continues and states that it "covers and includes" proceeds of the existing lease. This clause developed because, under early Texas case law now rejected, n493 the proceeds of an existing lease would not automatically pass to the grantee. The "covers and includes" language has been interpreted as creating a "second grant," one which may either implement or destroy the intention of the parties about how they intend to share proceeds.

In Hoffman v. Magnolia Petroleum Co., n494 the grantee was conveyed an undivided 1/2 interest in the oil and gas in and under a 90 acre tract. This tract was part of a leasehold containing 320 acres. The instrument continued: "It is understood and agreed that this sale is made subject to said lease but covers and includes one-half of all the oil and gas rental or royalty due to be paid under the terms of said lease." The court held that the grantee received 1/2 of the royalty payable from a well located anywhere on the leasehold. A "second grant" separate from the mineral interest in the 90 acres was made, which was a grant of lease proceeds. This grant affected the entire leasehold because only one lease existed. n495

Most likely this result was not what the parties intended. The grantee received one-half of royalties from wells throughout the leasehold, which is a form of apportionment. But if the parties had desired to contractually adopt the apportionment rule, which would allow the grantee to share in royalties wherever wells were drilled, the share of proceeds going to the grantee should have reflected the proportion the 90 acres bore to the 320-acre leasehold. The amount should have been 90/320, adjusted to show the grantee only received an undivided 1/2 interest, or 9/64 of the proceeds. If, however, the parties had desired to follow the rule of non-apportionment, the clause should have read: "It is understood and agreed that this sale is made subject to said lease but covers and includes one-half of all the oil and gas rental or royalty due to be paid under the terms of said lease *insofar as said lease covers all or any part of the land described in this deed*." n496 Without the underscored language, the two-grant theory gave the grantee a second grant of lease proceeds regardless of the land generating the proceeds.

§ 49.22(c)(3) "Covers and Includes" Clause Creating "Two Grants" -- Inconsistency Between Fractional Mineral Interest Conveyed and Share of Lease Proceeds Granted.

A second possibility for a "two-grant theory" occurs not because of an inconsistency between lands subject to a lease and lands conveyed, but because a fractional mineral interest is conveyed in leased lands and the "covers and includes" language uses a different fraction to describe the share of lease proceeds the grantee is to receive. For example, a party wishes to purchase 1/2 of a lessor's interest in minerals. Because a lease exists with a 1/8 royalty, the lessor erroneously believes that the lessor's interest is a 1/8 interest, rather than recognizing that the lessor owns all of the minerals subject to a lease. Therefore, the mistaken lessor's conveyance reads: "an undivided 1/16 interest in the minerals in and under § 1,... but covers and includes 1/2 of all the oil and gas rental or royalty due to be paid under the terms of said lease." The two fractions, of course, grant divergent amounts of gross production. Employing the "two-grant" rationale, courts have found that a permanent 1/16 undivided interest was conveyed, together with a grant of proceeds equal to 1/2, which grant will last through the existence of the specified lease. n497 Thereafter, the grantee will receive only the proceeds attributable to a 1/16 interest, which would be 1/16 of lease proceeds. If the deed continues with a "future interest" clause, however, the result may be clouded.

§ 49.22(c)(4) Impact of "Future Interest Clause."

Two deed clauses and their interrelationship have been discussed: 1) a granting clause that conveys a specified fractional mineral interest and 2) a "covers and includes" clause that deals with proceeds of the lease to which the conveyance is subject. Some deeds add a third clause, which deals with how proceeds and rights will be held after the existing lease ends. This is referred to a "future interest clause." Naturally, all these fractions should be uniform. The reversionary interest found in the "future interest clause" should conform to the earlier granted mineral interest.

Inconsistent fractions in these clauses, however, create interpretive problems. By way of illustration, the previous example may be restated and continued, making the conveyance:

> an undivided 1/16 interest in the minerals in and under § 1, (*granting clause*) ... but covers and includes 1/2 of all the oil and gas rental or royalty due to be paid under the terms of said lease," (*"covers and includes" or "subject to" clause*). In the event said lease is forfeited, the lease interests and all future rentals on said land ... shall be owned jointly ... each owning a 1/2 interest in all oil, gas and other minerals (*Future Interest Clause*).

With this addition, another inconsistency exists: the undivided interest, which should govern the reversion, differs from the fraction in the Future Interest Clause. In this regard, three lines of decisions arose.

Generally, courts refrain from finding the deeds ambiguous and using parole evidence to ascertain intent. n498 Instead, one approach reconciles the interests within the four corners of the deed. A second approach employs the "two-grant" theory to the "third grant," allowing each clause to independently operate. n499 Finally, a court may give one of the clauses controlling weight. The fate of such deeds in Texas is illustrative of the confusion.

Texas, in Alford v. Krum, n500 adopted a bright-line rule that seemingly would end all doubts. The case held that the granting clause would take precedence and overrule any inconsistent clause. Therefore, in the example, the 1/16 mineral interest would control. The Future Interest Clause would not be given independent life because to do so would be "repugnant to the grant." n501 Despite its clarity, the rule was criticized and did not survive. In two cases decided on the same day, the Texas Supreme Court both overruled and distinguished Alford v. Krum.

Jupiter v. Snow n502 was the case where the court found *Alford v. Krum* inapplicable to the deed. Freed from the bright-line rule, the court held that the Future Interest Clause could and did convey an interest in grantor's possibility of reverter, which interest differed from the other interests conveyed. Despite the refusal to apply *Alford v. Krum*, the facts of *Jupiter v. Snow* were close to those found in the earlier case. n503 Luckel v. White, n504 decided the same day, also had similar facts. n505 Rather than distinguishing the case from *Alford v. Krum*, however, the court held that under the "four corners rule," all clauses of a deed must be examined to ascertain intent for a proper harmonizing of the deed. Labels such as "granting" or "habendum" attached to clauses should not control clear intent. Therefore, the Supreme Court overruled *Alford v. Krum*. n506

It appears that Texas has firmly adopted the "three-grant theory," or at least has aligned with the jurisdictions that attempt to find the parties' intent. If any question might arise about retroactive "overruling" and possible reliance on *Alford v. Krum*, the "repugnant to the grant" theory was greatly limited by *Jupiter v. Snow* to make it easy to distinguish *Alford v. Krum* and its "bright-line rule."

§ 49.22(c)(5) Ratification and Revivor.

If a conveyance is made "subject to" a specific lease or deed, and that lease or deed was invalid or had terminated, some precedent would make the reference to the lease validate the prior instrument. Two theories are involved: ratification and revivor. Courts often do not distinguish the two. n507 The "subject to" clause acting as a ratification is less

offensive than construing it as a revivor. n508

Ratification basically involves adopting the acts of another or reaffirming a lease or deed that was technically invalid. For example, a cotenant who has not joined in a lease executed by another cotenant may ratify the lease and join in its terms. A deed or lease may be invalid because of a defective acknowledgement or description. A subsequent acknowledgment of the technically defective instrument or the cotenant's act may truly be evidence of intent to ratify the lease and adopt it.

Revivor, however, deals with breathing new life into an initially effective interest that has ended by its own terms. Sometimes a lessor actually may not know the status of an oil and gas lease, which may be dependent on whether there is production in paying quantities. A casual reference to the lease in itself should not be considered a regrant of the interest. n509

Nevertheless, to avoid such an impact, the "subject to" clause should be limited. If a specific lease or deed is mentioned, the conveyance should be subject to it "to the extent said lease (deed or reservation) is valid." A general clause should read "This deed is subject to any valid oil and gas lease (or deed or reservation) of record."

COMPUTER-ASSISTED RESEARCH

LEXIS: (subject w/1 to w/15 lease!) w/15 oil or gas w/50 ratify or ratification or revive or revivor

§ 49.22(d) Entirety Clause.

The entirety clause is part of an oil and gas lease, but it is discussed here because it may impact on the lessor's conveyances of the leased property. An entirety clause allows the lessee to treat the leased property as one unit despite subdivisions by the lessor. It specifies that the lessee will pay royalties based on the apportionment rule. n510 The provision is for the administrative convenience of the lessee because each party will share in production from each well in the same amount. Most cases state that a subsequent deed cannot affect this prearranged plan. The lessor, therefore, cannot specify that royalties should be paid on a non-apportioned basis, that is, only to the owner of the tract on which a well is drilled. The entirety clause binds the lessor for the life of the lease. n511

§ 49.22(e) Topleasing.

"Topleasing" is the term employed when a lessor grants a second oil and gas lease while the mineral interest is already leased. n512 A toplease generally is granted towards the end of the existing lease's primary term; the toplessee is betting that production will not extend the lease into its secondary term. As such a "bet," the toplessee cannot avoid paying its agreed upon bonus by surrendering the toplease before the end of the primary term of the original lease. n513

Although the toplessee is often a third party, a lessee may "toplease" its own lease to assure that the land will remain leased even if its current lease expires. Because the lessee often has to agree to more onerous terms to assure the lock-up, a lessor will argue that the toplease is a novation and supersedes the existing lease. There is some support for this position. n514

Once a maligned practice, topleasing is now simply another business tool. Two potential problems should be avoided by careful drafting.

§ 49.22(e)(1) Obstruction.

The existing lessee may claim that by executing the toplease, the lessor is guilty of obstruction. Obstruction most frequently occurs when the lessor physically prevents operations, but the doctrine also may apply if the lessor wrongly

repudiates the lessee's title because the repudiation may make it unwise for the lessee to proceed. Although there is some support for the position that a toplease is obstruction, n515 other cases ignore the problem. n516 To attempt to avoid a claim of clouding the lessee's title, the toplease should be made expressly "subject to the existing lease, to the extent that it is valid."

COMPUTER-ASSISTED RESEARCH

LEXIS: topleas! or top-leas! w/50 obstruct!

§ 49.22(e)(2) Rule Against Perpetuities.

A poorly drafted toplease may be invalid under the Rule Against Perpetuities, but a properly drafted one will not violate the Rule. In Peveto v. Starkey, n517 a "top" term royalty deed was invalid because it was to "become effective only on the expiration of" the prior existing term royalty interest. Because the term royalty interest would extend "for so long as production" continued, there was no assurance the second interest would vest in time. If a toplease is to become effective on the expiration of the prior lease, it would have the same infirmity. An oil and gas lease also has the duration of a fee simple determinable and the future interest would vest too late. n518

To avoid the problem, the top lease should be drafted so that it becomes effective, if at all, within the proper time frame. For example, the toplease may state that it is subject to an existing lease and will become effective at the end of that lease, with the proviso that the toplease will automatically terminate "if such lease has not expired 21 years from the date hereof," or "1 year after the end of its primary term." n519 Alternatively, the toplease could be expressed as a present lease of the lessor's reversionary interest, which being subject to an existing lease, would vest in possession at its conclusion. A present interest with only possession deferred does not violate the Rule Against Perpetuities.

COMPUTER-ASSISTED RESEARCH

LEXIS: topleas! or top-leas! w/50 rule against perpetuities

FOOTNOTES:
(n1)Footnote 487. Richard W. Hemingway, The Law of Oil and Gas § 9.4 (2d ed. 1983) (analogous to common law rents).

(n2)Footnote 488. *Japhet v. McRae, 276 S.W. 669.* (Tex. Com. App. 1925) (each leased acre not presumptively equal and therefore production should go to owner of producing acreage); *Foertsch v. Schaus, 477 N.E.2d 566 (Ind. App. 1985).* The rule appears followed in Arkansas, Colorado, Illinois, Indiana, Kansas, Kentucky, Louisiana, Nebraska, New Mexico, Ohio, Oklahoma, Texas, and West Virginia. For cases, *see* P. Martin & B. Kramer, Williams & Meyers Oil and Gas Law § 520 (Matthew Bender). *See also* Annotation, *Respective Rights of Owners of Different Parcels Into Which Land Subject to an Oil and Gas Lease has Been Subdivided*, 64 A.L.R. 634 (1929), supplementing 5 A.L.R. 1162 (1920), and 16 A.L.R. 585 1922).

(n3)Footnote 489. Professors Williams and Meyers identified California, Mississippi, Pennsylvania and Ontario in the minority. P. Martin & B. Kramer, Williams & Meyers Oil and Gas Law § 520 (Matthew Bender); Richard W. Hemingway, The Law of Oil and Gas § 9.4 (2d ed. 1983), cites only California.

(n4)Footnote 490. *See* Annotation, *Deed or Mortgage of Real Estate As Affecting Right to Oil and Gas or Royalty Under Existing Lease*, 140 A.L.R. 1280 (1942), supplementing 94 A.L.R. 660 (1935).

(n5)Footnote 491. *Stracka v. Peterson, 377 N.W.2d 580 (N.D. 1985).*

Jolyne Corp. v. Michels, 446 S.E.2d 494 (W. Va. 1994) (reference in deed to prior lease not sufficient to estop grantor

from claiming lease invalid; reservation or exception in favor of a stranger to title not effective).

(n6)Footnote 492. *Grelling v. Allen, 218 S.W.2d 896 (Tex. Civ. App. 1949), error refused* n.r.e., *criticized in* P. Martin & B. Kramer, Williams & Meyers Oil and Gas Law § 521.4 (Matthew Bender).

(n7)Footnote 493. *Caruthers v. Leonard, 254 S.W. 779 (Tex. Com. App. 1923)* (grantee of fractional interest did not share proportionately); *overruled by Harris v. Currie, 176 S.W.2d 302 (Tex. 1943).*

(n8)Footnote 494. *273 S.W. 828.* (Tex. Com. App. 1925).

(n9)Footnote 495. *Hoffman v. Magnolia Petr. Co., 273 S.W.2d 828 (Tex. Com. App. 1925).* The grant continued to state that should the lease end, then mineral rights "shall be owned jointly ..., each owning one-half interest in all oil, [and] gas ... in and upon said land." The court interpreted this to mean shared ownership in minerals in the 90 acres.

(n10)Footnote 496. Under current Texas law, no "covers and includes" clause would be required to reach this result because proceeds impliedly pass and Texas follows the majority rule of non-apportionment. This automatic passage would also be true in the other jurisdictions that follow the rule of non-apportionment.

(n11)Footnote 497. *Wood v. Sims, 273 S.W.2d 617 (Tex. 1954). See also Anadarko Petr. Co. v. Venable, 850 S.W.2d 302 (Ark. 1993).*

Concord Oil Co. v. Pennzoil Exploration & Prod. Co., 966 S.W.2d 451 (Tex. 1998) (a grant of a 1/96 interest in oil and gas was negated by a right to 1/12 of all rentals and royalties. The deed created only an interest in minerals as a single estate).

(n12)Footnote 498. *But see Heyen v. Hartneet, 679 P.2d 1152 (Kan. 1984)* (grant of undivided 1/16 interest and expression that grantee should receive 1/2 of proceeds "if such land is covered by a ... lease" ambiguous; undivided 1/2 interest based on evidence of intent and presumption to construe in favor of grantee).

(n13)Footnote 499. *Paddock v. Vasquez, 265 P.2d 121 (Cal. App. 1953).*

(n14)Footnote 500. *671 S.W.2d 870 (Tex. 1984).*

(n15)Footnote 501. In the actual case, the "covers and includes" clause referred to 1/16 of royalty, so the case was stronger that the parties intended a 1/16 mineral interest. The "bright line rule," however, was followed in later cases without this inconsistency in the "covers and includes" and "future interest" clauses.

(n16)Footnote 502. *819 S.W.2d 466 (Tex. 1991).*

(n17)Footnote 503. *819 S.W.2d 466 (Tex. 1991).* The concurring justice found the deeds to be near "twins." The deed contained: a grant of an undivided 1/16 interest in and to all oil and gas (*granting clause*); an acknowledgment that the land was currently leased and that "the grantee herein is to receive 1/16 part of the oil ... produced, that grantors now intend to convey 1/2 of the interest they now have in production under said lease" (subject to clause); and "in the event said lease is forfeited, ... the grantee is to have and hold an equal undivided 1/2 of all such minerals" (*future interest clause*).

(n18)Footnote 504. *819 S.W.2d 459 (Tex. 1991).*

(n19)Footnote 505. The issue litigated was whether the grantee would receive 1/4 of a lease royalty that exceeded 1/8 of if the grantee was limited to a fixed 1/32 royalty. The deed contained: 1) granting clause conveying undivided 1/32 royalty interest; 2) "subject to" clause acknowledging existing lease and grantee's right to 1/4 of royalties thereunder; and 3) "future lease" clause reserving grantor's executive rights and stating grantee would receive 1/4 of royalties under any lease.

(n20)Footnote 506. *819 S.W.2d 459 (Tex. 1991)* (future interest clause conveyed distinct present interest in grantor's possibility of reverter different from interest in current leases; grantee entitled to 1/4 of future royalties, but could not receive less than 1/32, which was fixed figure's purpose).

(n21)Footnote 507. For the distinction, *see Bradley v. Avery, 746 S.W.2d 341 (Tex. Civ. App. 1988)* (no revivor of expired lease by execution of division order that did not refer to lease).

(n22)Footnote 508. *See generally* P. Martin & B. Kramer, Williams & Meyers Oil and Gas Law § 340.4 (Matthew Bender); and Ernest E. Smith, *The "Subject to" Clause, 30 Rocky Mtn. Min. L. Inst. 15-1 (1984).*

(n23)Footnote 509. *Cf. McVey v. Hill, 691 S.W.2d 67 (Tex. App. 1985), writ refused* n.r.e. (need clear language recognizing validity of expired instrument to be ratification).

Cf. Jolyne Corp. v. Michels, 446 S.E.2d 494 (W. Va. 1994) (reference in deed to prior lease not sufficient to estop grantor from claiming lease invalid; reservation or exception in favor of a stranger to title not effective).

(n24)Footnote 510. A typical clause reads: "If the leased premises are hereafter owned in severalty or in separate tracts, the premises, nevertheless, shall be developed and operated as an entirety, and royalties shall be paid to each separate owner in the proportion that the acreage owned by him bears to the entire leased acreage." *Gypsy Oil Co. v. Schonwald, 231 P. 864 (Okla. 1924).* Some forms add tracts "now owned in severalty or in separate tracts." This can create unexpected results. *Thomas Gilcrease Found. v. Stanolind Oil & Gas Co., 266 S.W.2d 850 (Tex. 1954)* (applies when parties initially have differing undivided interests in different tracts subject to lease). *See generally* Annotation, *Validity, Construction, and Application of Entirety Clause in Oil and Gas Lease, 48 A.L.R.3d 706 (1993).*

(n25)Footnote 511. *Gypsy Oil Co. v. Schonwald, 231 P. 864 (Okla. 1924)* (covenant burdening land),*Foertsch v. Schaus, 477 N.E.2d 566 (Ind. App. 1985). But see Alsip's Adm'r v. Onstott, 283 S.W.2d 711 (Ky. 1955)* (clause only binds lessor and lessee); *Iskian v. Consolidated Gas Utils. Corp., 251 P.2d 1073 (Okla. 1952)* (lessors and grantees pay all additional costs of lessee for the life of that lease). *See additionally*, Richard W. Hemingway, The Law of Oil and Gas § 9.5 (2d ed. 1983).

(n26)Footnote 512. *Stoltz, Wagner & Brown v. Duncan, 417 F. Supp. 552 (W.D. Okla. 1976).*

Reynolds-Rexwinkle Oil v. Petex, 1 P.3d 909 (Kan. 2000). Where the owner of the operating interest in an oil and gas lease took subject to a reserved overriding royalty interest applicable to extensions or renewals of the lease a subsequently acquired toplease from the same lessors was subject to the overriding royalty interest as well.

(n27)Footnote 513. *Sohio Petr. Co. v. Grynberg, 757 P.2d 1125 (Colo. App. 1988).*

(n28)Footnote 514. *Placid Oil Co. v. Taylor, 325 So. 2d 313 (La. App. 1975). See also Bares v. Stone Oil Corp., 510 So. 2d 102 (La. App. 1987)* (question of intent).

(n29)Footnote 515. *Simons v. McDaniel, 7 P.2d 419 (Okla. 1932); Robinson v. Continental Oil Co., 255 F. Supp. 61 (D. Kan. 1966)* (title attacked by toplease execution).

(n30)Footnote 516. *Jennings v. Elliot, 97 P.2d 67 (Okla. 1939).*

(n31)Footnote 517. *645 S.W.2d 770 (Tex. 1982). See also Siniard v. Davis, 678 P.2d 1197 (Okla. App. 1984)* (in dicta hints that lease beginning at end of another lease would violate Rule).

(n32)Footnote 518. *But see Nantt v. Puckett Energy Co., 382 N.W.2d 655 (N.D. 1986)* (Rule will not apply in commercial setting of toplease).

(n33)Footnote 519. *See Stoltz, Wagner & Brown v. Duncan, 417 F. Supp. 552 (W.D. Okla. 1976)* (lease stated it would vest on a specific date if prior lease terminated; lease reformed to vest unconditionally on that date).

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CHAPTER 49 PETROLEUM AND PIPELINES
IV. Transfer of Interests in Oil and Gas: Conveyancing and Involuntary Transfers.

6-49 Thompson on Real Property, Thomas Editions § 49.23

AUTHOR: Professor Maria E. Mansfield College of Law University of Tulsa

§ 49.23 Involuntary Transfer of Interests in Oil and Gas: Adverse Possession.

[Go To Supp]

§ 49.23(a) Effect of Surface Possession.

§ 49.23(a)(1) No Severance of Minerals and Surface.

If there has been no severance of the oil and gas from the surface estate, the surface adverse possessor who meets all the requirements for adverse possession in the relevant jurisdiction will own the oil and gas. n520

§ 49.23(a)(2) Prior Severance of Minerals and Surface.

As with minerals generally, n521 if the oil and gas has been severed from the surface, adverse possession of the surface will not be sufficient to gain title to the oil and gas. n522 If only an undivided interest is severed, there is some precedent that surface possession would acquire the minerals the surface owner holds. n523 Moreover, any effective severance must occur before the adverse possessor enters. A later severance will not impact the adverse possessor's rights because an actual or constructive ouster is needed to interrupt the adverse possession. n524 The peculiarities of oil and gas require further examination of what constitutes a severance of it from the surface.

What creates a severance to some extent depends on a state's ownership theory. In an ownership in place state, a grant of a mineral interest or fee in oil and gas will obviously create a severance because the oil and gas is owned in place. Although not as clear conceptually, the same effect occurs in a non-ownership state. n525 Similarly, an oil and gas lease operates as a severance in states that view the lessee's interest as a corporeal estate in land. n526 Because the lessee's rights are similar in states that construe the lease as a *profit a prendre*, the lease should also be a severance in those jurisdictions, but there is some case law to the opposite effect. n527 In Louisiana, where a lease is a contractual right, no severance occurs. n528

Another question that might arise is the extent to which a lease severs interests. The better view is that the severance is not only of the lessee's working interest, but also severs the reversionary interest and royalty retained by the surface owner-lessor. n529 Under this view, surface possession would acquire none of the interest subject to the lease.

Additionally, non-participating royalties would not be subject to adverse possession by the surface possessor, but not because of severance theory. Non-possessory interests are not capable of being adversely possessed. n530 No mineral interests may be adversely possessed in Louisiana. n531

COMPUTER-ASSISTED RESEARCH

LEXIS: adverse possess! and (oil or gas or mineral) and (server or severance)

§ 49.23(a)(3) Merger.

If a severance has taken place, what will be the impact of a later reacquisition of the oil and gas estate by the surface owner? If the severance was by mineral deed, the surface owner may be considered to own two separate estates because the doctrine of merger traditionally does not operate on estates of equal dignity unless there is an intent to merge. n532 Therefore, an adverse possessor entering after the reacquisition would not acquire the minerals by surface possession. If, however, a leasehold ends, merger does occur and the adverse possessor entering thereafter may adversely possess both estates by surface activities.

COMPUTER-ASSISTED RESEARCH

LEXIS: adverse possess! and (oil or gas or mineral) and merge[*]

§ 49.23(b) Effect of Actual Possession of Minerals.

§ 49.23(b)(1) Acts of Possession.

As with all minerals, actual possession of the oil and gas for the requisite time period will be sufficient to adversely possess the oil and gas. n533 Actual production of oil and gas in a commercial manner will be required. n534 Mere execution of a lease is insufficient. n535 Additionally, cases have required the production to be on the tract, not on other lands, even if the tract was included in a production unit. n536

§ 49.23(b)(2) Rights Acquired: Color of Title.

Cases dealing with hard rock minerals have limited adverse possession to minerals loosened and mined. n537 By analogy, some cases limit the adverse possessor of oil and gas to the oil and gas producible from one well even if the adverse possessor was claiming under an instrument giving color of title to a specific tract. n538 Other cases, however, grant the adverse possessor rights to the extent purportedly granted in the color of title instrument. n539

§ 49.23(b)(3) Rights Acquired: No Color of Title.

When there is no instrument giving the adverse possessor color of title, statutory provisions in various jurisdictions may govern. It also has been argued that the possessor should get that which may be drained by the producing well. n540

FOOTNOTES:
(n1)Footnote 520. *Hope Land Mineral Corp. v. Christian, 570 N.W.2d 268 (Mich. App. 1997)* (to establish adverse possession of mineral rights, such as gas leases, proof must be clear and cogent that possession was actual, visible, open, notorious, exclusive, continuous and uninterrupted for the statutory period).

(n2)Footnote 521. Doctrine that is applicable to oil and gas, but not peculiar to it, will not be detailed here. *See* full discussion, § 48.12(b), *supra*.

(n3)Footnote 522. *Bodcaw Lumber Co. v. Goode, 254 S.W. 345 (Ark. 1923). Witt v. Graves, 787 S.W.2d 681 (Ark. 1990).*

Sarandos v. Blanton, 25 S.W.3d 811 (Tex. App. 2000). Possession of disputed surface acreage under a vacancy award from the sovereign which purported to convey both surface and mineral estates is subject to the usual requirement of drilling and production in order to obtain title when the mineral estate had been severed prior to the vacancy award.

Oehmig v. Johnson, 638 So. 2d 846 (Ala. 1994) (rule of repose not usable by one without title against one with legal title; mineral owners had no notice of purported claim against their estate and need not constantly search records to see if anyone purported to convey the minerals).

(n4)Footnote 523. *Fadem v. Kimball, 612 P.2d 287 (Okla. App. 1979).*

(n5)Footnote 524. *Ates v. Yellow Pine Land Co., 310 So. 2d 772 (Fla. App. 1975); Hurst v. Southwest Mississippi Legal Servs. Corp., 610 So. 2d 374 (Miss. 1992).*

overruled on other grounds by Rains v. Gardner, 731 So. 2d 1192 (Miss. 1999) after *Hurst v. Southwest Mississippi Legal Servs. Corp*.

Great Western Land Mgmt, Inc. v. Slusher, 939 S.W.2d 865 (Ky. 1996) (adverse possession of a mineral estate may be had if, before the period of possession beings to toll, the surface owner repudiates the trust by acts or words which unmistakably bring notice to the owner of the mineral estate).

(n6)Footnote 525. *Gerhard v. Stephens, 442 P.2d 692 (Cal. 1968); Jilek v. Chicago, Wilmington & Franklin Coal Co., 47 N.E.2d 96 (Ill. 1943).*

(n7)Footnote 526. *Stephens County v. Mid-Kansas Oil & Gas Co., 254 S.W. 290 (Tex. 1923).*

(n8)Footnote 527. P. Martin & B. Kramer, Williams & Meyers Oil and Gas Law § 224.1 (Matthew Bender). *See Fadem v. Kimball, 612 P.2d 287 (Okla. App. 1979)* (because lease issued after possessor entered, immaterial but notes Oklahoma never decided issue). *See* 1 Kuntz, Lowe, Anderson, Pierce, and Smith, Oil and Gas Law § 10.4 (Anderson).

(n9)Footnote 528. *Robinson v. American Liberty Oil Co., 77 So. 2d 533 (La. 1954).*

(n10)Footnote 529. *Saunders v. Hornsby, 173 S.W.2d 795 (Tex. Civ. App. 1943).*

(n11)Footnote 530. *Warmack v. Henry H. Cross Co., 377 S.W.2d 47 (Ark. 1964). Cf. Connaghan v. Eighty-eight Oil Co., 750 P.2d 1321 (Wyo. 1988)* (overriding royalty interest carved from working interest non-possessory and thus not subject to adverse possession).

(n12)Footnote 531. *Savage v. Packard, 50 So. 2d 298 (La. 1950);* La. Rev. Stat. Ann. § 31:159.

(n13)Footnote 532. *Ferguson v. Hillborn, 402 P.2d 914 (Okla. 1965). But see Hunter v. Rosebud County, 783 P.2d 927 (Mont. 1989)* (merger occurred; subsequent deed conveyed all estates).

(n14)Footnote 533. *Thomas v. Rex A. Wilcox Trust, 463 N.W.2d 190 (Mich. App. 1990).*

(n15)Footnote 534. *Hassell v. Texaco, Inc., 372 P.2d 233 (Okla. 1962)* (taking gas from abandoned well for residential and agricultural uses not sufficient).

Cornelius v. The Moody Bible Institute of Chicago, 18 P.3d 1081 (Okla. Civ. App. 2000) (where the claimant's receipt of royalties and payment of taxes were not sufficient to divest ownership from the record owner through adverse

possession. Placing a rig on unitized property, but not on the surface overlaying the mineral interest, did not satisfy the requirement of actually opening a well on a tract and reducing the minerals under that tract to possession).

(n16)Footnote 535. *James v. Langford, 558 F. Supp. 737 (D. Ct. Okla. 1981), aff'd 701 F.2d 123 (10th Cir. 1983); Francis v. Francis, 157 S.W.2d 289 (Ky. App. 1941); Viersen v. Boetcher, 387 P.2d 133 (Okla. 1963).*

(n17)Footnote 536. *Atlantic Richfield Co. v. Thomlinson, 859 P.2d 1088 (Okla. 1993); Hunt Oil Co. v. Moore, 656 S.W.2d 634 (Tex. Civ. App. 1983), writ refused* n.r.e. It has been argued that with small tracts, inclusion in a unit is the only way development could occur and therefore, unit production should suffice. The true owner should be on notice from nearby production that the tract might have been included. P. Martin & B. Kramer, Williams & Meyers Oil and Gas Law § 224.4 (Matthew Bender). *See also Brizzolara v. Powell, 218 S.W.2d 728 (Ark. 1949)* (production from pooled land insufficient); *Dye v. Miller & Viele, 587 P.2d 139 (Utah 1978)* (production from pooled land insufficient).

(n18)Footnote 537. *Thomason v. Mullinax, 403 So. 2d 883 (Ala. 1981). See* § 48.12(b)(2), *supra*.

(n19)Footnote 538. *Piney Oil & Gas Co. v. Scott, 79 S.W.2d 394 (Ky. App. 1934).*

(n20)Footnote 539. *Diederich v. Ware, 288 S.W.2d 643 (Ky. App. Ct. 1956); Mohoma Oil Co. v. Ambassador Oil Corp., 474 P.2d 950 (Okla. 1970).*

(n21)Footnote 540. P. Martin & B. Kramer, Williams & Meyers Oil and Gas Law § 224.4 (Matthew Bender).

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CHAPTER 49 PETROLEUM AND PIPELINES
IV. Transfer of Interests in Oil and Gas: Conveyancing and Involuntary Transfers.

6-49 Thompson on Real Property, Thomas Editions § 49.24

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§ 49.24 Involuntary Transfers Through Non-Use: Dormant Mineral Acts, Marketable Title Acts, Abandonment, Prescription.

Generally, title to oil and gas, like title to any minerals, is not lost by mere non-use. For example, another must adversely use severed oil and gas for title to be transferred under adverse possession theory. Various statutory enactments may modify this and transfer title through non-use. These statutes include dormant mineral acts n541 and marketable title acts. n542 Other exceptions include the Louisiana doctrine of prescription, which limits the duration of non-used interests in oil and gas to ten years. n543 Three jurisdictions have enacted prescriptive statutes that create results similar to Louisiana. n544 Finally, in jurisdictions that deem a mineral interest to be incorporeal, it may be abandoned. Proof of abandonment requires, in addition to non-use, proof of an intent to abandon, which is difficult to prove. n545

FOOTNOTES:
(n1)Footnote 541. *See* § 48.13, *supra. See also*, Annotation, *Validity and Construction of Statutes Providing For Reversion of Mineral Estates For Abandonment or Non-Use, 16 A.L.R.4th 1029 (1982).*

(n2)Footnote 542. *See* § 48.13, *supra*.

(n3)Footnote 543. *See* § 49.14, *supra*.

(n4)Footnote 544. Ga. Code Ann. § 85-407.1, *see Nelson v. Bloodworth, 232 S.E.2d 547 (Ga. 1977);* Tenn. Code Ann. § 64-704; Va. Code, §§ 55-154-55-155.

(n5)Footnote 545. *Gerhard v. Stephens, 442 P.2d 692 (Cal. 1968); see also* § 49.02(d)(1), *supra*.

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CHAPTER 49 PETROLEUM AND PIPELINES
V. Leasing the Oil and Gas Property Interest.

6-49 Thompson on Real Property, Thomas Editions § 49.25

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§ 49.25 Evolution of Modern Lease Form.

The original leases for oil and gas had fixed terms, usually relatively long. n546 This arrangement satisfied neither lessors nor lessees. First, lessors objected because, unlike hard minerals that could always be recovered after a lease expires, neighbors could drain oil and gas during the lengthy term. Second, if there was production, the lessee had to give it up at the end of the term but, because the lessee often could remove casing, the lessor did not retain a producing well. Moreover, during the term, the lessor received no consideration without production. To combat some of these problems, "no term" leases emerged: the lessee would have the right each year to extend the lease by the payment of rentals even if the leasehold was not developed. "No term" leases were attacked on two grounds: they were illusory or violated the Rule Against Perpetuities. n547 Therefore, a combination of a fixed term and extended term emerged. The lease's term would be for the designated period of years and "so long thereafter" as oil or gas is produced. As detailed below, rental payment provisions were developed to defer drilling in the fixed period. n548

The modern form attempts to reconcile the competing interests of the lessor and the lessee. The lessee wants to control the pace of expensive development and to maintain the lease so long as it is either profitable to operate or has speculative value. The lessor, who does not bear the costs of exploration and production, desires quick production, which will generate royalties.

FOOTNOTES:
(n1)Footnote 546. The lease under which Colonel Drake drilled the first oil well at Titusville had a fifteen-year term, with the right to renew for an additional term. *See* Leslie Moses, *The Evolution and Development of the Oil and Gas Lease*, 2 Sw. Legal Fdn. Oil & Gas Institute 1 (1951). On the evolution of the lease generally, *see* P. Martin & B. Kramer, Williams & Meyers Oil and Gas Law §§ 601-601.5 (Matthew Bender).

David E. Pierce, *Incorporating a Century of Oil and Gas Law into the "Modern" Oil and Gas Lease, 33 Washburn L.J. 786 (1994).*

(n2)Footnote 547. Other cases implied a duty either to develop the lease or to surrender it within a reasonable time. *See generally* P. Martin & B. Kramer, Williams & Meyers Oil and Gas Law § 601.3 (Matthew Bender).

(n3)Footnote 548. *See* §§ 49.34-49.35, *infra*.

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CHAPTER 49 PETROLEUM AND PIPELINES
V. Leasing the Oil and Gas Property Interest.

6-49 Thompson on Real Property, Thomas Editions § 49.26

AUTHOR: Professor Maria E. Mansfield College of Law University of Tulsa

§ 49.26 Nature of the Lease.

An oil and gas lease has elements of both a conveyance and a contract. n549 Like a conveyance, it grants rights to use property. Most jurisdictions consider the lease a conveyance for purposes of recording acts and determining the prerequisites to its validity. Unlike the typical deed, however, the parties to a lease are not in a deal that is resolved in a one time contact. They enter into a continuing relationship with contractual rights and duties. It is best, therefore, not to pigeon-hole the oil and gas lease in one or the other category because the lease's attributes change in different settings.

The nature of the lessee's interest in the lease similarly has been determined on a case by case basis in most jurisdictions. n550 Different statutory settings or other contextual situations result in different conclusions. Nevertheless, most jurisdictions label the lessee's interest in an oil and gas lease as a non-possessory interest in land or an incorporeal hereditament, namely a *profit a prendre*. n551 This is true in all non-ownership states. n552 Of the ownership jurisdictions, only three treat the interest as possessory, akin to a fee simple determinable. n553 Kansas, an ownership in place state, treats the lessee's interest as personal property. n554

FOOTNOTES:
(n1)Footnote 549. *Jolyne Corp. v. Michels, 446 S.E.2d 494 (W. Va. 1994)* (lease is both a conveyance and a contract).

(n2)Footnote 550. Similarly, the nature of the landowner's royalty is interpreted situationally. Annotation, *Oil and Gas Royalty as Real or Personal Property, 56 A.L.R.4th 539 (1987).*

(n3)Footnote 551. *See Shields v. Moffitt, 683 P.2d 530, 532 (Okla. 1984)* (oil and gas lease a "hybrid offspring of an intermarriage between real and personal property" described as "hydra-headed") and *Hinds v. Phillips Petr. Co., 591 P.2d 697 (Okla. 1979).*

(n4)Footnote 552. *See* § 49.02(c), *supra*.

(n5)Footnote 553. *Sheffield v. Hogg, 77 S.W.2d 1021 (Tex. 1934); Sistrunk v. Graham, 61 So. 2d 335 (Miss. 1952)* (discussed in concurring opinion); *Heath v. Gray, 274 P.2d 620 (N.M. 1954).* However, in Texas, from 1915 to 1923, the form of the granting clause could impact the result. *Texas Co. v. Daugherty, 176 S.W. 717 (Tex. 1915).*

(n6)Footnote 554. *Utica Nat'l Bank & Trust Co. v. Marney, 661 P.2d 1246 (Kan. 1983).* New York and Washington, non-ownership states, take the same view. *Wagner v. Mallory, 62 N.E. 584 (N.Y. 1902); Walla Walla Oil, Gas, & Pipe Line Co. v. Vallentine, 174 P. 980 (Wash. 1918).*

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CHAPTER 49 PETROLEUM AND PIPELINES
V. Leasing the Oil and Gas Property Interest.

6-49 Thompson on Real Property, Thomas Editions § 49.27

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§ 49.27 Requirements for an Effective Lease.

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Oil and gas leases are subject to the Statute of Frauds. n555 Therefore, they must be in writing and signed by the party to be charged. Additionally, the lease must adequately identify the parties to the lease and describe the property. To be operative, a lease must be delivered and accepted. Acknowledgement and recording is not a prerequisite to a lease's validity, but is necessary to protect the lessee from bona fide purchasers and to provide notice. n556 Consideration is not required except in Kansas n557 and Louisiana. Nevertheless, the custom is to pay a "bonus" to the lessor upon execution of the lease. Consideration is also advisable to protect the lessee under recording acts and to protect it from creditor's claims such as an allegation that the lease was a fraudulent conveyance.

FOOTNOTES:
(n1)Footnote 555. *EP Operating Co. v. MJC Energy Co., 883 S.W.2d 263 (Tex. App. 1994)* (sale of working interest in an oil and gas lease is sale of real property subject to the Statute of Frauds; equitable estoppel -- a reliance on a promise to execute a contract -- not applicable when the terms of that contract were not established); *Ogden v. Ogden, 643 So. 2d 245 (La. App. 1994)* (claim for profits from sale of oil and gas lease based on oral agreement not enforceable; agreements in regard to immovable real property must be in writing even if not seeking title), *writ denied, 648 So. 2d 1339 (La. 1995).*

(n2)Footnote 556. *Anson Corp. v. Oklahoma Corp. Comm'n, 839 P.2d 676 (Okla. App. 1992).*

(n3)Footnote 557. Unlike other jurisdictions, Kansas considers an oil and gas lease a contract, rather than a conveyance. Therefore, it will need consideration to be effective. *Brinkman v. Empire Gas & Fuel Co., 245 P. 107 (Kan. 1926).* The lease, however, is within the purview of recording statutes.

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CHAPTER 49 PETROLEUM AND PIPELINES
V. Leasing the Oil and Gas Property Interest.

6-49 Thompson on Real Property, Thomas Editions § 49.28

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§ 49.28 Interpreting Leases.

A lease is construed pursuant to normal contract and conveyance rules, with some additional canons. n558 Because the lessee generally controls the lease terms, leases are often construed against the lessee. Nevertheless, at some points courts recognize that the lessee has made extensive investments and therefore a lease should be interpreted to preserve the investment. n559 Overall, a lease should be viewed and interpreted to encourage development for the mutual benefit of the lessor and lessee. Because of this mutuality, interpretive techniques applied to longterm or relational contracts are appropriate. n560

FOOTNOTES:
(n1)Footnote 558. *See generally* Bruce M. Kramer, *The Sisyphean Task of Interpreting Mineral Deeds and Leases! An Encyclopedia of Canons or Construction*, 24 Tex. L. Rev. (1993); Bruce M. Kramer, *Property and Oil and Gas Don't Mix: The Mangling of Common Law Property Concepts, 33 Washburn L.J. 540 (1994).*

(n2)Footnote 559. *See, e.g.*, the court-made doctrine of temporary cessation of production, infra § 49.33(e). *Ludwig v. William K. Warren Found., 809 P.2d 660 (Okla. 1991)* (not applied to term interests) *See also* 1 Kuntz, Lowe, Anderson, Pierce, and Smith, Oil and Gas Law § 15.8 (Anderson).

(n3)Footnote 560. This understanding is reflected by the doctrine of implied covenants. *See* § 49.54, *infra*.

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CHAPTER 49 PETROLEUM AND PIPELINES
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6-49 Thompson on Real Property, Thomas Editions § 49.29

AUTHOR: Professor Maria E. Mansfield College of Law University of Tulsa

§ 49.29 Parties to the Lease.

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§ 49.29(a) Necessary Parties.

A lease must come from the owners of the mineral interest, not surface or royalty owners. In addition to ascertaining who owns the mineral interest, the potential lessee must discover who has the executive interest relevant to that mineral interest. n561 Special requirements exist if the interest is subject to a life estate, trust, estate, or marital rights. n562

§ 49.29(b) Authority to Bind Parties.

When dealing with someone acting in a representative capacity two things must be reviewed: local law and the document, if any, creating the relationship. These sources of authority must be examined both at the time the lease is executed and thereafter whenever dealing with the representative. Although the representative may have been able to bind the property initially to a lease, the representative capacity may end. At that point, the representative could not deal with the property, for example, by accepting delay rentals or shut-in royalties.

§ 49.29(b)(1) Homestead Property and Property Subject to Claims by Spouses.

Marital property rules can create problems when leasing from married individuals. n563 A state's common-law and statutory regime could impact the rights gained from a spouse acting individually.

Under common-law dower and curtesy, a spouse had rights to real property the other spouse owned, which rights became operative upon the owning spouse's death. Although many states have either modified or rejected dower and curtsy, to the extent such rights exist, joinder of the non-owning spouse in any lease is advisable. A lease from only the owning spouse, however, is not invalid.

Joinder of both spouses is also advisable in states having other regimes. Some create rights to a "homestead" in particular property. n564 If a state has adopted the Uniform Probate Code provision allowing a spouse to take a forced share of a spouse's "augmented estate," obtaining both spouses' signatures may be even more important. Under this

precept, property conveyed by the decedent alone may have to be returned to the estate in certain circumstances. n565 Finally, community property rules may give a non-owning spouse rights when the property is not the separate property of the owning spouse. Arizona, California, Idaho, Louisiana, Nevada, New Mexico, Texas and Washington have community property regimes. Because of the complexity of rules determining separate ownership of property, joinder of both spouses is advisable in most community property states to assure rights if the property is categorized as community. Nevertheless, in some jurisdictions they are limited protections for bona fide purchasers and others. n566

COMPUTER-ASSISTED RESEARCH

LEXIS: (oil or gas w/2 leas!) w/50 homestead
or
(oil or gas w/2 leas!) w/50 (dower or curtesy)
or
(oil or gas w/2 leas!) w/50 community w/2 property

§ 49.29(b)(2) Property Under Estate or Trust Administration.

Generally, a trustee leasing property for oil and gas would be committing waste unless the instrument creating the trust or a state statute authorizes such leasing. The authorization may exist without express authority to execute oil and gas leases. A trust instrument generally will be read to authorize an oil and gas lease if it grants the trustee the power to sell the property. n567 There is, however, precedent to the contrary. n568 Additionally, a trustee authorized to "lease and manage" property may be able to lease for oil and gas under certain circumstances. n569 To supplement contractual authority and to expedite development, most oil and gas producing states have statutes allowing trustees to grant oil and gas leases. n570 The Uniform Trustees' Powers Act authorizes not only leasing, but expressly allows the trustee to enter into pooling and unitization agreements. n571 Most statutes also allow the lease to extend beyond the term of the trust, which is contrary to the common law of trusts. n572 Statutes may also govern the apportionment of proceeds among the beneficiaries. n573

In the case of a decedent's estate, executors of a testate estate similarly need authority from the will or statute to execute a lease. Some wills provide for oil and gas leasing. As with trusts, some cases imply the power to lease from the power to sell, but it is not necessarily the general rule. Naturally, administrators of intestate estates may only look to statute for leasing authority. Statutes in many oil producing states authorize both executors and personal representatives to execute oil and gas leases, but some of these statutes may not allow a lease to be effective beyond the period of administration unless production begins before the administration ends. n574 Generally, court confirmation is necessary. n575

COMPUTER-ASSISTED RESEARCH

LEXIS: oil or gas w/2 leas!) w/50 (authority or execute w/15 trustee or trust)
or
(oil or gas w/2 leas!) w/50 (authority or execute w/15 executor or representative)

§ 49.29(b)(3) Property of Minors or Incompetents.

Property of minors or incompetents generally cannot be leased without the appointment of an appropriate conservator or guardian. n576 Judicial approval may be needed. Without a statute specifically authorizing longer leases, a minor's guardian cannot execute a lease for a period beyond the child's minority. If there is production within that time, however, a lease may continue under its "so long thereafter" provision. A child reaching majority may also ratify leases that could otherwise be repudiated. A statute may be necessary to confirm a guardian's authorization of unitization or pooling. In the absence of such authority, unit or pooled production off the leasehold may not be sufficient to hold the lease if the minor so elects upon reaching majority.

COMPUTER-ASSISTED RESEARCH

LEXIS: oil or gas w/2 leas!) w/50 (authority or execute w/15 minor or guardian or child or children)

§ 49.29(b)(4) Property of Unascertainable Owners.

Future interests may include contingent rights for which no one may execute a lease because it is impossible to determine who will take the interest. To avoid the problem of unascertainable owners, statutes have been passed that allow for the leasing of future interests running to such parties. n577 These statutes generally set up a statutory trusteeship, which is subject to judicial control. n578

§ 49.29(b)(5) Property Owned by Native Americans.

Property owned by tribes or individual Native Americans generally may not be leased in the same manner as privately owned property. Tribal minerals may only be acquired through statutory routes, which require approval of the Secretary of the Interior. n579 Secretarial approval of leases of minerals owned by individual Native Americans is required if the lands are allotted or trust lands.

FOOTNOTES:
(n1)Footnote 561. *See* § 49.09(b), *supra*.

(n2)Footnote 562. *See* § 49.29(b), *infra*, and § 49.06, *supra*. *See also* § 49.05, *supra* (right of cotenant to develop).

(n3)Footnote 563. *See generally* Stephen J. Hull, *Spousal Joinder Requirements in the Rocky Mountain States, 29 Rocky Mtn. Min. L. Inst. 545 (1983).*

(n4)Footnote 564. Many states require a formal declaration of homestead. Others do not, and will allow the surviving spouse to declare what the homestead is. Normally, the homestead is the spouses' dwelling and certain other specified acreage. If a formal declaration of homestead has been made, a conveyance of the homestead by one spouse may be void.

(n5)Footnote 565. Uniform Probate Code § 2-202. There are limitations on what property held by what parties may be included in the augmented estate. Only the original transferee or that party's donee is liable to return the property. One commentator believes the normal commercial oil and gas lease would be exempt from return even if held by the original transferee. Therefore, the provisions for augmented estates actually may help the title examiner. Stephen J. Hull, *Spousal Joinder Requirements in the Rocky Mountain States, 29 Rocky Mtn. Min. L. Inst. 545, 554-561 (1983).*

(n6)Footnote 566. *See, e.g.*, Cal. Family Code § 1102 (protects bona fide purchasers and provides one year statute of limitations to challenge grants); Wash. Rev. Code Ann. § 26.16.100 (requires instrument of record showing marital interest if property titled to one name); Tex. Fam. Code Ann. § 5.22 (sole management of some community property allowed). If the property is a homestead, joinder may be required. P. Martin & B. Kramer, Williams & Meyers Oil and Gas Law § 516 (Matthew Bender).

Tex. Fam. Code Ann. § 5.22

(n7)Footnote 567. *Franklin v. Margay Oil Co., 153 P.2d 486 (Okla. 1944).*

(n8)Footnote 568. *In re Bruner's Estate, 70 A.2d 222 (Pa. 1950).*

(n9)Footnote 569. *Compare Lanyon Zinc. Co. v. Freeman, 75 P. 995 (Kan. 1904)* (no implication when farm land involved and no leasing activity in area when trust made); with First Nat'l Bank in *Wichita v. Magnolia Petr., 62 P.2d*

891 (Kan. 1936) (implied power when land leased for oil and gas at time trust made).

(n10)Footnote 570. For statute listings, *see* Richard W. Hemingway, The Law of Oil and Gas § 5.7 (2d ed. 1983).

(n11)Footnote 571. Section 3(c)(11).

(n12)Footnote 572. Austin W. Scott, The Law of Trusts, § 189.2 (4th ed. 1987).

(n13)Footnote 573. Section 9 of the 1931 Uniform Principal and Income Act merely restates the rules applicable to life tenants and remainderpersons generally. The 1962 revisions provide for apportionment on the basis of the depletion allowance used for federal income tax purposes. For listing of the 39 jurisdictions that have adopted the two acts (primarily the 1962 version), see Richard W. Hemingway, The Law of Oil and Gas § 5.7 (2d ed. 1983).

(n14)Footnote 574. *See* Richard W. Hemingway, The Law of Oil and Gas § 5.7 (2d ed. 1983). Independent executors under Texas law may not be included in Texas' statute. *Marshall v. Hobert Estate, 315 S.W.2d 604 (Tex. Civ. App. 1958).*

(n15)Footnote 575. *Big Four Petr. Co. v. Quick, 755 P.2d 632 (Okla. 1988)* (but leasing by personal representative under will's power of sale passed equitable title).

(n16)Footnote 576. *See generally* P. Martin & B. Kramer, Williams & Meyers Oil and Gas Law § 519 (Matthew Bender).

(n17)Footnote 577. *See, e.g.*, 60 Okla. St. Ann. §§ 71-73. For other statutes, see Richard W. Hemingway, The Law of Oil and Gas § 5.7(F) (2d ed. 1983).

(n18)Footnote 578. A common-law doctrine, that of Virtual Representation, may also be used. Under it, living persons with a natural relationship to the potential class of takes may be viewed as representing the unascertained group. Lewis M. Simes, Handbook of the Law of Future Interests, Chapter 10, § 49 (2d ed. 1966).

(n19)Footnote 579. Among diverse existent authority is The Indian Mineral Development Act of 1982, *25 U.S.C. §§ 2101*-2108, and the Indian Mineral Leasing Act, *25 U.S.C. §§ 396a*-396g. *See generally* Judith V. Royster, *Mineral Development in Indian Country: The Evolution of Tribal Control over Mineral Resources, 29 Tulsa L.J. 541 (1994). See also*, D. Faith Orlowski and Robbie Emery Burke, *Oklahoma Indian Titles, 29 Tulsa L.J. 361 (1993). See also*, § 57.08(d)(3), *infra*.

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V. Leasing the Oil and Gas Property Interest.

6-49 Thompson on Real Property, Thomas Editions § 49.30

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§ 49.30 Leasing Federal or State Owned Oil and Gas.

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Several statutes govern rights to develop oil and gas owned by the federal government. The primary statute is the Mineral Leasing Act. n580 State-owned oil and gas may be acquired under the statutes of the various states. n581

FOOTNOTES:
(n1)Footnote 580. *30 U.S.C. § 181 et seq. See also* Mineral Leasing Act for Acquired Lands, *30 U.S.C. §§ 351*-359. For a complete discussion, *see* § 55.03, *supra*. Marla E. Mansfield, *A Primer of Public Land Law, 68 Wash. L. Rev. 801 (1993).*

(n2)Footnote 581. 4 Summers, *supra* note 32 at §§ 851-866.

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CHAPTER 49 PETROLEUM AND PIPELINES
V. Leasing the Oil and Gas Property Interest.

6-49 Thompson on Real Property, Thomas Editions § 49.31

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§ 49.31 Granting Clause.

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§ 49.31(a) Size of Interest Granted.

A lessor may not necessarily own the entire fee interest in the oil and gas. Nevertheless, oil and gas leases taken from undivided interest owners often purport to grant a lease on 100% of the minerals. Lessees seek such grants to avoid having some interests unleased if the lessor should own a different undivided interest than originally thought because of ambiguities in the chain of title, or from doctrines such as *Duhig*. n582 Proceeds of the lease are adjusted downward through the proportionate reduction clause. n583 Lessors under such leases may want to modify the warranty clause to avoid warranting title to that which they know they do not own. If the warranty is stricken or modified, the lessee may want to account for after-acquired title by having the lease "cover and include all interest in the described land now or hereinafter acquired."

§ 49.31(b) Substances Covered by Grant.

An oil and gas lease may simply grant rights to "all oil and gas" or it may add "other hydrocarbons" or "other minerals" to the grant. n584 As with other grants, what is included in the term "other minerals" is subject to dispute. The result in a leasing situation is not necessarily the same as when a mineral deed is interpreted, because a lease shows an immediate intent to develop minerals in a specific manner. n585 The doctrine of *ejusdem generis* is often used, but there are questions as to what minerals are "like" oil and gas. Possible "likenesses" include hydrocarbons, minerals produced in the oil and gas stream, or minerals producible by wells. n586

Additionally, questions may arise about what is either oil or gas. Cases have not limited "gas" to combustible natural gas but have included other gaseous products. n587 When oil is separately leased from gas, the dividing line between the two phases determines ownership and is not always clear. n588

§ 49.31(c) Land Covered by the Lease: "Mother Hubbard" Clause.

Because of possible survey inaccuracies, especially in Texas, leases often add a so-called "Mother Hubbard" or

"cover-all" clause. A typical clause is placed after the land description and reads as follows:

> This lease also covers and includes all land owned or claimed by lessor adjacent or contiguous to the land particularly described above, whether the same be in said survey or surveys or in adjacent surveys, although not included within the boundaries of the land particularly described above. n589

Its obvious use, for which judicial approval exists, is to claim for the lessee small parcels of land, n590 including those that may have been gained by adverse possession. n591 Courts have explained that the clause serves a public policy against separate ownership of small strips. n592 If, however, the lessor owns a larger tract adjacent or contiguous to the described lands, the applicability of the clause is questioned. Cases reject inclusion of extra land that approaches or exceeds the size of the particularly described land. n593 This is especially true if the existence of the tract was known at the time the lease was executed. n594 If there was an ambiguity apparent on the face of the lease, however, additional land could be included. n595

The operation of the Mother Hubbard Clause raises other questions. One is whether recording the lease will give notice to a purchaser of the land included in the operation of the clause, but not particularly described in the lease. Some of the sparse case law refuses to bind subsequent good faith purchasers. n596 The lessee should have required an amendatory description to put of record. n597

A second question relates to the effect inclusion of additional acreage will have on the lessee's duties. Because rental payments are often expressed on a per acre basis, additional land may make rental paid based on the described land inadequate. Therefore, the lessee should limit acreage for rental purposes to a stated acreage. n598

COMPUTER-ASSISTED RESEARCH

LEXIS: (mother hubbard or cover-all or cover all clause) w/50 (notice w/15 purchaser)
or
mother hubbard or cover-all or cover all clause

§ 49.31(d) Uses Permitted by the Grant.

An oil and gas lease generally grants the lessee the exclusive right to develop and produce the oil and gas. Rights to explore by seismographic means are included in the grant, but exploration rights may not be exclusive unless expressly made so in the grant. n599 The oil and gas lease also will impliedly give the lessee the right to use so much of the surface as may be reasonably necessary for exploration and production. n600 The common law easement for surface use, as modified by any relevant statute, may be further modified by lease terms. Rights may be either expanded or limited. To list some common examples of limitation, the lessor may require damages for growing crops, n601 burial of pipelines to certain depths, or location of wells away from improvements. The rights of the lessee may also be expanded from the common law rights of a mineral owner, but only if the lessor is also the surface owner. A common expansion is the express right to use the surface for development of minerals not only on the leased land, but also on land pooled or unitized with the leased land. n602

FOOTNOTES:
(n1)Footnote 582. *See* § 49.21(c), *supra*.

(n2)Footnote 583. *See* § 49.51(c), *infra*.

(n3)Footnote 584. It is suspected these clauses originated with a desire to confirm title to casinghead gas and distillate. For other issues, *see* Annotation, *Implied Obligation of Purchaser or Lessee to Conduct Search for, or to Develop or Work Premises For Minerals Other than Oil and Gas, 76 A.L.R.2d 721*.

(n4)Footnote 585. North Dakota by statute defines "other minerals" in a deed to include all minerals unless excluded by name except clay, scoria, and gravel which belong to the surface. N.D. Cent. Code § 47-10-24. A lease will only convey rights to specifically named minerals. N.D. Cent. Code § 47-10-25.

(n5)Footnote 586. *See generally* 2 Kuntz, Lowe, Anderson, Pierce, and Smith, Oil and Gas Law § 24.1 (Anderson)..

(n6)Footnote 587. *Scott Paper Co. v. Taslog, Inc., 638 F.2d 790 (5th Cir. 1981)* (hydrogen sulfide gas); *Northern Natural Gas Co. v. Grounds, 441 F.2d 704* (10th Cir.), *cert. denied, 404 U.S. 951 (1971)* (helium); *Libby v. De Baca 179 P.2d 263 (N.M. 1947)* (carbon dioxide presumed in lease). *See also Aulston v. United States, 915 F.2d 584 (10th Cir. 1990), cert. denied, 500 U.S. 916 (1991).* (carbon dioxide included in statutory reservation of "oil and gas"); *Exxon Corp. v. Lujan, 970 F.2d 757 (10th Cir. 1992)* (carbon dioxide is "natural gas" for purposes of pipelines under Mineral Leasing Act).

(n7)Footnote 588. *Amarillo Oil Co. v. Energy-Agri. Prods., Inc., 794 S.W.2d 20 (Tex. 1990)* (casinghead gas may only come from stratum capable of producing oil). The classification of a well as oil or gas may also affect spacing and other conservation practices. *REO Indus., Inc. v. Natural Gas Pipeline Co., 932 F.2d 447 (5th Cir. 1991)* (relationship between owners when oil owner drills gas well).

(n8)Footnote 589. Variations will refer to "adjoining" lands or limit the clause's effect to the same survey. *Gardner v. Amerada Petr. Corp., 91 F. Supp. 134 (D. Ct. Tex. 1950)* (defining "adjacent," "adjoining" and "contiguous;" lots on either side of road in subdivision both "adjacent" and "contiguous"). *See generally* Annotation *Comprehension and Application of 'Mother Hubbard' or 'Cover-all' Clause in Gas and Oil Lease or Deed, 80 A.L.R.4th 205 (1990).*

(n9)Footnote 590. *Sun Oil Co. v. Burns, 84 S.W.2d 442 (Tex. 1934)* (3.76 acres).

Peacock v. Schroeder, 846 S.W.2d 905 (Tex. App. 1993). Blanchard v. Pan-OK Production Co., 755 So. 2d 376 (La. App. 2000). The "Mother Hubbard" clause of a gas lease did not entitle the lessee to use a road on adjacent land to gain access to the leased premises. Comparison is made with an "adjacent lands" clause which refers to operations conducted on adjacent lands not owned by the lessee.

(n10)Footnote 591. *Whitehead v. Johnston, 467 So. 2d 240 (Ala. 1985)* (1 acre claimed).

(n11)Footnote 592. *Id.*

(n12)Footnote 593. *Smith v. Allison, 301 S.W.2d 608 (Tex. 1956)* (will not include additional 1/4 section); *Jones v. Colle, 727 S.W.2d 262 (Tex. 1987); Continental Oil Co. v. Walker, 117 So. 2d 333 (Miss. 1960)* (usual purpose is to gather in small tracts).

(n13)Footnote 594. *Jones v. Colle, 727 S.W.2d 262,* (Tex. 1987).

(n14)Footnote 595. *Barnett v. Getty Oil Co., 266 So. 2d 581 (Miss. 1975)* (40 acres included when legal description referred to more acreage than land specifically described).

(n15)Footnote 596. *Luthi v. Evans, 576 P.2d 1064 (Kan. 1978)* (inclusion in lease assignment clause showing intent to transfer all leases in county in addition to described leases binding between parties and purchase with actual knowledge but description not sufficient to be constructive notice); *United Pub. Serv. Co. v. Mitchell, 177 So. 697 (La. 1937)* (3rd party not bound). *But see Gulf Prod. Co. v. Spear, 84 S.W.2d 452 (Tex. 1935)* (notice provided; description in lease, however, was incorrect). *See* P. Martin & B. Kramer, Williams & Meyers Oil and Gas Law § 221.8 (Matthew Bender) (arguing recordation should be sufficient notice).

(n16)Footnote 597. *United Pub. Serv. Co. v. Mitchell, 177 So. 697 (La. 1937)* (lessee could compel specific

performance before 3rd party rights intervened).

(n17)Footnote 598. *I.e.*, "For the purpose of calculating the rental payments hereinafter provided for, said land is deemed to comprise "X" acres, whether it actually contains more or less."

(n18)Footnote 599. *Mustang Prod. Co. v. Texaco, Inc., 754 F.2d 892 (10th Cir. 1985); Roye Realty & Dev., Inc. v. Southern Seismic, 711 P.2d 946 (Okla. App. 1985). See* Annotation, *Construction of Oil and Gas Lease as to the Lessee's Right and Duty of Geophysical or Seismograph Exploration or Survey, 28 A.L.R.3d 1426 (1969).*

Musser Davis Land Co. v. Union Pacific Resources, 201 F.3d 561 (5th Cir. 2000). A lease granting the exclusive right to explore for and produce oil and gas gave the assignee the right to conduct seismic exploration and to retain ownership of any seismic data developed by the assignee.

(n19)Footnote 600. *See* rights of mineral owner to use the surface, § 49.08(c), *supra*.

(n20)Footnote 601. Issues under this clause include whether damage to indigenous grass is included and whether damage should be computed by the value of crops growing at the time or that would have been grown through the years. *Bell v. Cardinal Drilling Co. 85 N.W.2d 246 (N.D. 1957)* (limited to cultivated crops growing on date of injury); 52 Okla. Stat. § 320 (includes but not limited to native grasses and trees); *see generally* Annotation, *Construction and Effect of Provisions for Payment of Damages to 'Crops' or 'Growing Crops' in Mineral Deed or Lease, or in Conveyance of Pipeline, 87 A.L.R.2d 235 (1963).*

(n21)Footnote 602. A lease clause giving the lessee the right to use the surface for purposes necessary or useful in "lessee's operations in producing ... minerals ... from the land covered hereby or any other land adjacent thereto" was interpreted as only allowing the lessee to dispose of salt water from lands adjacent to the leased lands if the lessee was actually producing the oil and gas from those lands. *Farragut v. Massey, 612 So. 2d 325 (Miss. 1992).*

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CHAPTER 49 PETROLEUM AND PIPELINES
VI. Habendum Clause: Duration.

6-49 Thompson on Real Property, Thomas Editions § 49.32

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§ 49.32 Primary Term Defined.

The habendum clause of a lease defines its term. A typical clause would read:

> Subject to other provisions herein contained, the term of this lease is for X years from this date (the "primary term") and so long thereafter as oil, gas, or other hydrocarbons are being produced from said land.

The primary term is the definite time period specified in the lease as a number of years. During this period, the lessee has the right, but not the obligation, to drill a well. n603 The lessee therefore may pace development.

FOOTNOTES:
(n1)Footnote 603. If the oil and gas are being drained by wells on adjoining lands, the lessee's duties may change. *See* § 49.58(a), *infra*.

Thompson on Real Property, Thomas Editions

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§ 49.33 Secondary Term Defined.

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The secondary term of an oil and gas lease is that period in which the lease is kept alive by production. It is the defeasible aspect of the lease: it will last "for so long as oil or gas is produced." Production, therefore, is necessary to propel a lease into the secondary term and necessary to maintain the lease in the secondary term. n604 In most jurisdictions, the habendum clause forms a special limitation on the estate; the lease term is not an interest subject to a condition or right of re-entry. Because the term has a special limitation, a lease terminates automatically at the end of the primary term or during the secondary term if there is no production. n605

Generally, the habendum clause itself requires production from the leased land, but other provisions of the lease may expand where production could occur. n606 Additionally, other provisions of the lease may provide for substitutes for production. These substitutes are of two types. They may define an activity as constructive production n607 or declare that, if certain circumstances happen, a lease will not cease. The latter types of provisions buy time to obtain production. n608 These savings clauses and other doctrines, such as the "temporary cessation" rule, operate to modify the harsh results of an automatic termination of a lease.

§ 49.33(a) Meaning of "Production."

§ 49.33(a)(1) Majority Rule.

Under the majority rule, production sufficient to propel a lease into its secondary term must be actual production in paying quantities. n609 Actual production means the hydrocarbons must be brought to the surface. n610 Because oil may be stored efficiently, it normally will be possible to produce it immediately even if the oil is not sold immediately. n611 Natural gas, however, cannot be stored easily. Once produced, it must be marketed through a pipeline. Therefore, in majority rule jurisdictions, production for gas means actual marketing of gas. For oil, actual severance of the oil without marketing may suffice in some jurisdictions.

§ 49.33(a)(2) Minority Rule.

The minority rule is often referred to as the "discovery rule," but this is slightly misleading. n612 Under it, production is present when there is a discovery of oil and gas in paying quantities, but the lessee must do more than simply have discovered the oil and gas. The lessee must employ reasonable diligence toward obtaining a market. A second, intertwined aspect of this requirement is that the lessee must find a market within a reasonable time. The appraisal of the reasonableness of the delay before marketing, however, is influenced by the diligence the lessee displayed. n613 Additionally, the lessee must have some reasonable likelihood of eventual marketing success to sustain the lease. n614 The minority rule recognizes that the oil and gas lease gives the lessee until the end of the primary term to drill. Of necessity, a time lag exists between drilling a well and marketing either oil or gas, although the time lag is more marked for gas, which requires an extensive infrastructure. n615

Because of its adoption of this rule, Oklahoma is more flexible than some other states in ascertaining whether or not a lease has terminated for failure to produce. The lease is not considered to automatically terminate if there is an interruption in paying quantities so long as the interruption does not extend for longer than is justifiable and reasonable under the circumstances. n616 Nevertheless, when the interruption in production is sufficient, the lease will end by its own terms without a court determination. n617

§ 49.33(a)(3) Variants and Special Circumstances.

Some case law suggests a variant of the two rules about the type of production required. Some jurisdictions apparently recognize the difference between oil and gas: the majority rule is followed for oil, but the minority rule is applied to gas. n618 Therefore, actual production is required for oil, but only discovery and reasonable marketing diligence for gas.

Additionally, some states that adopt the majority rule and require actual production modify this stance if the lease contains an operations clause. Such a clause allows the lessee to maintain the lease if operations are in progress at the end of the primary term. n619 Cases have interpreted this clause as indicating an intent to give the lessee a reasonable time after the drilling is completed to commence production. n620 Moreover, a lease in a majority rule state may expressly adopt the minority rule by stating the habendum clause will be satisfied if there is a well capable of production or if a discovery is made. n621

Finally, although it is almost universal to interpret a lease that merely requires "production" to mean that production must be in "paying quantities," n622 a lease may modify this rule. If a lease specifies how much production is necessary to satisfy the habendum clause, the delineation will prevail. n623 The lease language must be specific to change the general rule; references to "commercial quantities" may simply mean "paying quantities." n624 If a lease has a flat-rate royalty and a minimum rental, paying quantities might not be needed if the other sums are paid. n625

§ 49.33(b) How Much Production Is in "Paying Quantities."

Production in paying quantities generally requires a return to the lessee over production and marketing costs. n626 It is immaterial whether the lessee recovers the costs of initially drilling and equipping the well n627 or of lease acquisition. At the point of measuring whether paying quantities exist, these sums have already been spent and the question is whether the lessee should be able to maintain the lease after a sizeable investment. If the current costs of operating are less than the amount that may be realized from marketing, the lessee should be able to take this profit, no matter how small, in order to recoup at least some of the sums expended. n628

In ascertaining whether this litmus test of profitability is met, all income attributable to the working interest is included n629 and deductions are made for all out of pocket costs, such as labor, trucking, transportation, replacement and repair of equipment, production taxes, utilities, license fees, and maintenance of equipment. n630 These are actual and direct costs of continuing production. n631 Depreciation on the well itself is not counted, n632 but some jurisdictions count depreciation on the lifting equipment. n633 Other items such as overhead n634 are variously treated. If one well is

profitable and another not, the habendum clause is arguably satisfied even if the overall operation may be unprofitable. n635

Other definitions of the amount of production that suffices exist. In Kentucky, paying quantities simply means production that provides the lessor with royalties sufficient to compensate for the inconvenience of the lessee's occupation and operations. n636 Louisiana had required not only paying quantities for the lessee, but also that the production provide adequate consideration to the lessor. n637 Current Louisiana law only looks to the amount of royalties to determine if the lessee is operating prudently or out of improper motives. n638

§ 49.33(c) Marginal Wells: Period in Which to Test Paying Quantities.

If a well is marginal, a lease does not terminate as soon as a loss is shown. With marginal wells, the operative question has been defined in Clifton v. Koontz n639 as "whether or not under all the relevant circumstances a reasonably prudent operator would, for the purpose of making a profit and not merely for speculation, continue to operate a well in the manner in which the well in question was operated." n640 Under this and similar approaches, whether a lease terminates for failure to produce in paying quantities depends on all surrounding facts and circumstances. These include why production is low, whether past production was profitable, and what prospects exist for future production. n641 Actions that negate speculation and indicate reasonable holding include attempts to rework the lease n642 or to respond to regulatory change. n643 Some states, however, refuse to consider the good faith of the operator in making paying quantities determinations and require only objective proof. n644

In determining paying quantities under any test, courts do not look at any specific time frame. That is, there is no rule that a lease must show a profit computed on a yearly, monthly, or quarterly basis. n645 Part of the reason for this is because the oil and gas industry is subject to seasonal production fluctuations and price instability. The reasonably prudent operator must have sufficient time to gather and assess data to determine whether to abandon or continue working the lease. As a rule of thumb, however, courts will consider a minimum of one year's information. n646

§ 49.33(d) Equitable Defenses: Estoppel and Waiver.

Generally, a lease will terminate if the lessee fails to produce in paying quantities regardless of the actions of the lessor. After a lease could be deemed terminated, signing a division order or accepting royalties will not estop the lessor from claiming the lease had ended. n647 However, if the lessee stands by after an event that could terminate the lease and permits the lessee to expend large sums, estoppel may be claimed, but the defense will meet with limited success. n648 Cases differ on whether there is a duty to inform the lessees of purported invalidity and therefore on whether silence in the face of development will estop the lessor. n649

The lessee will prevail, however, if the lessor actively obstructed the lessee and prevented operations. The lessor will be estopped from asserting the lease's termination. n650 The filing of a lawsuit challenging the validity of the lease will also stay the habendum clause's effect because a prudent operator would not drill under such a cloud. n651 Unequivocable notice that a lessor considers a lease invalid short of filing suit may have the same effect. The lessee may, however, be obligated to pay delay rentals during this time. n652

§ 49.33(e) "Temporary Cessation of Production."

The automatic nature of a lease's termination when production in paying quantities ceases is harsh when physical production ceases because of mechanical breakdowns or the need to rework wells. Believing parties to leases anticipated such events would happen and did not desire the lessee to loose the lease, courts developed a doctrine to blunt this harshness. n653 Under this doctrine, a cessation of production will not be considered a cessation of production under the habendum clause if the cessation is only "temporary." If it is found to be a temporary cessation, it is as if there was no cessation. n654 If the cessation occurs in the secondary term, the lease will be preserved unless the

cessation continues beyond the "reasonable" period of time the lessee has to resume production. n655

Factors considered in ascertaining whether a cessation was temporary include the length of cessation, the reason for the termination, and the lessee's diligence in restoring production. n656 These factors interrelate. The length of time allowed varies with the cause of the interruption and the lessee's seeming diligence. n657 If the cause was beyond the control of the lessee or for work which will eventually benefit the lessor through greater production or a better market, the courts are more likely to find the cessation temporary. n658

If the lease has a *force majeure* clause n659 or an express cessation of production clause, n660 the common-law doctrine of temporary cessation may be supplanted. Statutes may also be determinative. n661

FOOTNOTES:
(n1)Footnote 604. *Egeland v. Continental Resources, 616 N.W.2d 861 (N.D. 2000).* Production or other operations on any part of the land covered by an oil and gas lease will extend the lease beyond the primary term for all leased land even though a compulsory pooling order is obtained.

(n2)Footnote 605. *Baldwin v. Blue Stem Oil Co., 189 P. 920 (Kan. 1920)* (lease expires even if welldelayed by drought followed by excessive rain, blizzard, epidemic, and wartime restrictions on materials). *But see Stewart v. Amerada Hess Corp., 604 P.2d 854 (Okla. 1979)* (thereafter clause not truly akin to common-law conditional limitation).

San Mateo Community College Dist. v. Half Moon Bay Ltd. Partnership, 76 Cal. Rptr. 2d 287 (1998) (a term lease of five years containing a "thereafter" clause created a determinable fee extending the lease as to any well producing or being drilled at the time. Since no well was producing or being drilled, the lease ended at the end of the term. The conditions in the habendum clause were not subject to the force majeure clause which had limited application to the lease covenants.).

Maschhoff v. Klockenkemper, 740 N.E.2d 830 (Ill. App. 2000) (where the lease terminated through abandonment by nonproduction while the lessee was engaged in litigation to establish the validity of his lease).

(n3)Footnote 606. *See* § 49.44, *infra*. The Habendum Clause itself can enlarge the area from which production may extend the lease by requiring it "on the leased land *or land pooled therewith*."

A lease's habendum clause may state that it would continue "as long as the oil and gas is produced or the premises are being developed or operated." The additional language has been interpreted as incorporating the test to determine if a cessation of production was temporary. *Eichman v. Leavall Resources Corp., 876 P.2d 171 (Kan. App. 1994)* ("develop" means to "make active" or to make available or useful and "operate" means "to cause to function ... to put or keep in operation").

(n4)Footnote 607. *See* § 49.43, *infra*.

(n5)Footnote 608. *See* §§ 49.39-49.41 and 49.45, *infra*.

(n6)Footnote 609. *See generally* P. Martin & B. Kramer, Williams & Meyers Oil and Gas Law § 604.1 (Matthew Bender). Followed in Illinois, Kansas, Louisiana, Michigan, New Mexico, North Dakota, Ohio, and Texas. For cases, *see* Richard W. Hemingway, The Law of Oil and Gas § 6.4 (2d ed. 1983) (who also lists Tennessee) and 2 Kuntz, Lowe, Anderson, Pierce, and Smith, Oil and Gas Law § 26.6 (Anderson).

(n7)Footnote 610. *Ice Brothers, Inc. v. Bannowsky, 840 S.W.2d 57 (Tex. App. 1992)* (production is physically taking oil and gas in a captive state for either storing or marketing).

(n8)Footnote 611. An exception would be if the gas associated with the oil exceeds that which a conservation agency allows to be produced without recovery and marketing of the gas. In this instance, oil production would have to await a gas pipeline.

(n9)Footnote 612. Oklahoma and West Virginia are the primary proponents of this position. Professor Hemingway also lists Indiana, Kentucky, Montana, Pennsylvania and Wyoming. Richard W. Hemingway, The Law of Oil and Gas § 6.4 (2d ed. 1983). *See generally* 2 Kuntz, Lowe, Anderson, Pierce, and Smith, Oil and Gas Law § 26.6 (Anderson) and 2 Summers, *supra* note 32, at §§ 299-300.

(n10)Footnote 613. *McVicker v. Horn, Robinson & Nathan, 322 P.2d 410 (Okla. 1958).*

Danne v. Texaco Exploration & Prod. Co., 883 P.2d 210 (Okla. App. 1994) (where there was a gas meter on well and spot market sales could have been made, lessee failed to exercise due diligence to market product to readily available gas purchaser; lease, however, does not terminate automatically for this failure and lessors who accepted benefits estopped from seeking to forfeit lease).

(n11)Footnote 614. *Bristol v. Colorado Oil & Gas Corp., 225 F.2d 894 (10th Cir. 1955)* (finding diligence despite 9 1/2 year lapse from drilling well when lessee drilled other wells to entice pipeline and hooked up when pipeline entered area).

(n12)Footnote 615. *McVicker v. Horn, Robinson & Nathan, 322 P.2d 410 (Okla. 1958).*

(n13)Footnote 616. *Stewart v. Amerada Hess Corp., 604 P.2d 854 (Okla 1979)* (thereafter clause not truly akin to common-law conditional limitation). *Compare Reese Enters. v. Lawson, 553 P.2d 885 (Kan. 1976)* (mechanical application of paying quantities test without considering good faith of operator).

Texxon Resources v. Star West Petroleum, 994 P.2d 1192 (Okla. Civ. App. 1999). Since cessation of production in paying quantities does not automatically terminate the lease in Oklahoma, the grantor must bring an action to cause forfeiture. The court will examine all of the circumstances surrounding the cessation including the duration, cause and extent of diligence exercised in the resumption of production.

(n14)Footnote 617. *Enfield v. Atlantic Richfield Co., 778 F. Supp. 33 (W.D. Okla. 1989).*

(n15)Footnote 618. *Severson v. Barstow, 63 P.2d 1022 (Mont. 1936). See also* 2 Kuntz, Lowe, Anderson, Pierce, and Smith, Oil and Gas Law § 26.6 (Anderson).

(n16)Footnote 619. *See* § 49.40, *infra*.

(n17)Footnote 620. *Sword v. Rains, 575 F.2d 810 (10th Cir. 1978); McClanahan Oil Co. v. Perkins, 6 N.W.2d 742 (Mich. 1942); but see Gulf Oil Corp. v. Reid, 337 S.W.2d 267 (Tex. 1960)* (60-day cessation of production clause does not enable payment of shut-in royalty when well never actually produced).

(n18)Footnote 621. *See, e.g., Greer v. Salmon, 479 P.2d 294 (N.M. 1970)* ("as long thereafter as oil and gas ... is produced or producible by the lessee from any well").

But see Greenfield v. Thill, 521 N.W.2d 87 (N.D. 1994) (construing "found in paying quantities" in defeasible-term mineral deed's habendum clause as requiring "production in paying quantities").

(n19)Footnote 622. See *generally* 2 Summers, *supra* note 32, at § 293.

Jolyne Corp. v. Michels, 446 S.E.2d 494 (W. Va. 1994) (use of free oil or gas for domestic use does not in itself keep a lease in effect after the primary term).

(n20)Footnote 623. *Renner v. Huntingon-Hawthorne Oil & Gas Co., 244 P.2d 895 (Cal. 1952)* (50 barrels a day on average over 30 days). When such production ceased, the continued acceptance of royalties created a tenancy for month to month.

(n21)Footnote 624. *Cf. Texaco, Inc. v. Fox, 618 P.2d 844 (Kan. 1980)* (interpreting royalty deed). *But see* cases defining "commercial quantities" differently in statutory setting, *State v. Wallace, 369 N.E.2d 781 (Ohio App. 1976)* (means sufficient to sell in statute requiring plugging of non-commercial wells) and *Pan Am. Corp. v. Shell Oil Co., 455 P.2d 12 (Alaska 1969)* (no need to show profitable production for first "commercial" discovery). Under a farm-out, "commercial producers" may mean more than "paying quantities". *Weaver v. Florida Exploration Co., 608 So. 2d 1034 (La. App. 1992, writ denied), 612 So. 2d 99 (La. 1993).*

(n22)Footnote 625. *Bruen v. Columbia Gas Transmission Corp., 426 S.E.2d 522 (W. Va. 1992), but see Morris Exploration Inc. v. Guerra 751 S.W.2d 710 (Tex. App. 1988) writ dismissed* w.o.j. (paying minimum royalties insufficient without actual production).

Hayes v. Equitable Energy Resources Co., 266 F.3d 560 (6th Cir. 2001) (where the court declined to follow the *Bruen* rule for flat rate leases and found no Kentucky authority that eliminated the implied covenant of reasonable development from leases that include fixed rental payments. The lease in question also contained a production component).

(n23)Footnote 626. *See generally* 2 Summers *supra* note 32, at §§ 306-307 and P. Martin & B. Kramer, Williams & Meyers Oil and Gas Law § 604.6 (Matthew Bender).

Duncan Land & Exploration v. Littlepage, 984 S.W.2d 318 (Tex. App. 1998) (well operated periodically during an eight-month period with minimal expenses so as to produce a small profit was found to have production in commercial quantities). *Abraxas Petroleum Corp. v. Hornburg, 20 S.W.3d 741 (Tex. App. 2000).* Requirements for "production" are equally applicable to "producing in paying quantity." Operating and marketing expenses include taxes, overhead charges, labor, repairs, depreciation on salvable equipment and out-of-pocket lifting expenses. Original drilling or reworking expenses are not included.

(n24)Footnote 627. If initial drilling and equipping costs are recovered, a well is said to have "paid out".

(n25)Footnote 628. *Garcia v. King, 164 S.W.2d 509, 511 (Tex. 1942)* ("If a well pays a profit, even small, over operating expenses, it produces in paying quantities, though it may never repay its costs, and the enterprise as a whole may prove unprofitable.").

(n26)Footnote 629. Only the lessor's royalty is initially withheld. *See* P. Martin & B. Kramer, Williams & Meyers Oil and Gas Law § 604.6(f) (Matthew Bender) (weight of authority holds that overriding royalties and other payments from the working interest not deducted). *See Hininger v. Kaiser, 738 P.2d 137 (Okla. 1987)* (override similar to capital expenditure).

(n27)Footnote 630. *Hininger v. Kaiser, 738 P.2d 137 (Okla. 1987); Reese Enters. v. Lawson, 553 P.2d 885 (Kan. 1976)* (also included costs to plug and abandon wells).

See generally

Annotation, *Meaning of 'Paying Quantities' in Oil and Gas Lease, 43 A.L.R.3d 8 (1972).*

Costs of converting a well to a saltwater disposal well were extraordinary expenses similar to capital expenses and should not be considered operating costs even if running the disposal well will substitute for prior costs that were operating costs, namely for trucking salt water off the leasehold. *Lege v. Lea Exploration Co., Inc., 631 So. 2d 716 (La.*

App. 1994), rit denied, 635 So. 2d 1112 (La. 1994).

(n28)Footnote 631. If labor charges are not actually expended, as when the lessee is not paid any wages, the value is not charged as an expense. *Blausey v. Stein, 400 N.E.2d 408 (Ohio St. 1980). But see Reese Enters. v. Lawson, 553 P.2d 885 (Kan. 1976)* (included operator's time on the lease). *See also Pray v. Premier Petr., Inc., 662 P.2d 255 (Kan. 1983)* (do not include cost of building pipeline, which is similar to drilling and equipping well).

Ross Explorations v. Freedom Energy, 8 S.W.3d 511 (Ark. 2000). In determining whether a well is profitable, all direct expenses attributable to the operation of the lease should be considered.

(n29)Footnote 632. *Stewart v. Amerada Hess Corp., 604 P.2d 854 (Okla. 1979); Clifton v. Koontz, 325 S.W.2d 684 (Tex. 1959).*

(n30)Footnote 633. *Stewart v. Amerada Hess Corp., 604 P.2d 854 (Okla. 1979)* (included); *Underwood v. Texaco, Inc., 590 F. Supp. 289 (W.D. Okla. 1981)* (tax depreciation is basis); *Evans v. Gulf Oil Corp., 840 S.W.2d 500 (Tex. Civ. App. 1992)* (include actual physical depreciation of producing equipment); *But see Texaco, Inc. v. Fox, 618 P.2d 844 (Kan. 1980)* (depreciation not included).

(n31)Footnote 634. *Hininger v. Kaiser, 738 P.2d 137 (Okla. 1987)* (do not include administrative expenses even with joint operating agreement earmarking); *Skelly Oil Co. v. Archer, 356 S.W.2d 774 (Tex. 1961)* (included if can trace); *Mason v. Ladd Petr. Corp., 630 P.2d 1283 (Okla. 1981)* (limited to those related to leases' producing operations and not general supervisory employees). *See generally* 2 Kuntz, Lowe, Anderson, Pierce, and Smith, Oil and Gas Law § 26.7(m) (Anderson).

(n32)Footnote 635. *Cowden v. General Crude Oil Co., 217 S.W.2d 109 (Tex. Civ. App. 1948), error refused* n.r.e., *but see Imperial Colliery Co. v. Oxy USA Inc., 912 F.2d 696 (4th Cir. 1990)* (compute paying quantities on leasehold basis). *See* 2 Kuntz, Lowe, Anderson, Pierce, and Smith, Oil and Gas Law § 26.7(1) (Anderson) (arguing it benefits the lessor to produce as much as possible) and P. Martin & B. Kramer, Williams & Meyers Oil and Gas Law § 604.6(g) (Matthew Bender). *See also Perry v. Nicor Exploration, Inc., 738 S.W.2d 414 (Ark. 1987)* (if unit is profitable, all leases held by production even if individual lease not profitable).

(n33)Footnote 636. *United States v. 2,847.58 Acres of Land, 529 F.2d 682 (6th Cir. 1976)* (so long as lessor receives royalties). *See generally* 1 Kuntz, Lowe, Anderson, Pierce, and Smith, Oil and Gas Law § 26.5 (Anderson).

(n34)Footnote 637. *Caldwell v. Alton Oil Co., 108 So. 314 (La. 1926)* (must compare to original bonus and rentals).

(n35)Footnote 638. La. Rev. Stat. Ann. § 31:125 (only examine royalties to determine "reasonableness of the lessee's expectation of continuing production;" need not be adequate or serious consideration).

(n36)Footnote 639. *325 S.W.2d 684 (Tex. 1959).*

(n37)Footnote 640. *Id. at 691. See also Henry v. Clay, 274 P.2d 545, 547 (Okla. 1954)* ("[S]tandard by which the good faith of the lessee is measured is whether the lease is producing, or by the exercise of reasonable skill and diligence could be made to produce, sufficient oil and gas to justify a reasonable and prudent operator in continuing the operation thereof.").

(n38)Footnote 641. Factors identified as relevant include the price of the product, the status of the reservoir, relative profitability of other wells in the area, operating and marketing costs, net profit, lease terms, a reasonable time under the circumstances, and whether the lessee is holding the lease for speculative purposes. *Clifton v. Koontz, 325 S.W.2d 684, 691 (Tex. 1959).*

(n39)Footnote 642. *Clifton v. Koontz, 325 S.W.2d 684 (Tex. 1959).*

(n40)Footnote 643. *Barby v. Singer, 648 P.2d 14 (Okla. 1982)* (not speculative to hold on to lease that lost money for 14 months in anticipation of changes under National Gas Policy Act).

(n41)Footnote 644. *Reese Enters. v. Lawson, 553 P.2d 885 (Kan. 1976).* Nevertheless, the temporary cessation doctrine can operate to temper the harshness. *Kelwood Farms, Inc. v. Richie, 571 P.2d 338 (Kan. App. 1977).*

(n42)Footnote 645. *Clifton v. Koontz, 325 S.W.2d 684 (Tex. 1959).* ("[T]here can be no limit as to time, whether it be days, weeks, or months, to be taken into consideration); *Fisher v. Grace Petr. Corp. 830 P.2d 1380 (Okla. App. 1991).*

Ridenour v. Herrington, 47 S.W.3d 117 (Tex. App. 2001) (where the lease continued for as long as gas was produced in "paying quantities" [implied] but terminated upon cessation of paying production for 60 days after the primary term expired).

(n43)Footnote 646. 2 Kuntz, Lowe, Anderson, Pierce, and Smith, Oil and Gas Law § 26.7(u) (Anderson).

Ross Explorations v. Freedom Energy, 8 S.W.3d 511 (Ark. 2000). Operation for 24 months prior to shut-in is a reasonable time in which to determine profitability.

(n44)Footnote 647. *Greer v. Salmon, 479 P.2d 294 (N.M. 1970). See generally* P. Martin & B. Kramer, Williams & Meyers Oil and Gas Law § 604.7 (Matthew Bender) and 2 Kuntz, Lowe, Anderson, Pierce, and Smith, Oil and Gas Law § 26.14 (Anderson).

Atkinson Gas Co. v. Albrecht, 878 S.W.2d 236 (Tex. App. 1994) (erroneous payment and acceptance of royalties did not work a quasi-estoppel about non-production); *Jolyne Corp. v. Michels, 446 S.E.2d 494 (W. Va. 1994)* (no equitable estoppel to prevent claim that lease terminated for failure to produce).

(n45)Footnote 648. *Indian Territory Operating Co. v. Bridger Petr. Corp, 500 F. Supp. 449 (W.D. Okla. 1980)* (lessor estopped from claiming lease terminated when later demanded further development and lessee complied). *See* P. Martin & B. Kramer, Williams & Meyers Oil and Gas Law § 604.7 (Matthew Bender).

(n46)Footnote 649. *Compare Watson v. Rochmill, 155 S.W.2d 783 (Tex. 1941)* (no estoppel), *with Walter v. Ashlan Oil and Ref. Co., 187 S.W.2d 425 (Ky. 1945)* (may be duty to inform).

(n47)Footnote 650. *Eastern Oil Co. v. Coulehan, 64 S.E. 836 (W. Va. 1909).*

(n48)Footnote 651. *Humphrey v. Seale, 716 S.W.2d 620 (Tex. Civ. App. 1986)* (lessee entitled to suspend operations pending judicial determination of controversy); *accord, Barby v. Cabot Petr. Corp., 944 F.2d 798 (10th Cir. 1991).*

(n49)Footnote 652. *Rice v. Hillenburg, 766 P.2d 182 (Kan. App. 1988).*

(n50)Footnote 653. *See* Annotation, *Rights of Parties to Oil and Gas Lease or Royalty Deed After Expiration of Fixed Term Where Production Temporarily Ceases, 100 A.L.R.2d 885 (1965).*

(n51)Footnote 654. *Cobb v. Natural Gas Pipeline Co. of Am., 897 F.2d 1307 (5th Cir. 1990).*

(n52)Footnote 655. *Krabbe v. Anadarko Petroleum Corp., 46 S.W.3d 308 (Tex. App. 2001)* (where there was a temporary two-month cessation of production due to sudden stoppage of the well or equipment breakdown. Doctrine is not limited to cessation due to causes arising prior to the point of sale of gas from the well, or to physical or mechanical

causes).

(n53)Footnote 656. *Kelwood Farms, Inc. v. Ritchie, 571 P.2d 338 (Kan. App. 1977). See generally*, Richard W. Hemingway, The Law of Oil and Gas § 6.4(B) (2d ed. 1983) and P. Martin & B. Kramer, Williams & Meyers Oil and Gas Law § 604.4 (Matthew Bender). Additional factors considered include the ability of a well to produce in paying quantities and the amount of the lessee's investment.

Eichman v. Leavall Resources Corp., 876 P.2d 171 (Kan. App. 1994) (delineating following factors: 1) period of time cessation persisted, 2) intent of the operator; and 3) cause of the cessation; because there was no repair work or evidence of the operator's intent in 1989, cessation was not temporary).

Hiroc Programs, Inc. v. Robertson, 40 S.W.3d 373 (Ky. App. 2000) (where the habendum clause extended the lease "as long as oil or gas is marketed", the duty of the lessee to market requires use of due diligence and good faith based upon all circumstances. Cessation of commercial sales of gas for ten years caused the lease to terminate).

(n54)Footnote 657. *Saulsberry v. Siegel, 252 S.W.2d 834 (Ark. 1952)* (four years temporary when fire destroyed a derrick); *Logan v. Blaxton, 71 So. 2d 675 (La. App. 1954)* (6 months not temporary when rains caused delay).

Jolyne Corp. v. Michels, 446 S.E.2d 494 (W. Va. 1994) (cessation of production here was not temporary; 9 years and then only produced for domestic use).

(n55)Footnote 658. *Durkee v. Hazan, 452 P.2d 803 (Okla. 1968)* (well being deepened); *Feland v. Placid Oil Co., 171 N.W.2d 829 (N.D. 1969)* (saltwater disposal facilities not available).

(n56)Footnote 659. *See* § 49.45, *infra*. *Sun Operating Ltd. Partnership v. Holt, 984 S.W.2d 277 (Tex. App. 1998)* (the term in the habendum clause was extended by a *force majeure* clause).

(n57)Footnote 660. *See* § 49.41, *infra*.

(n58)Footnote 661. *See* Ind. Code § 32-5-8-1 (lease void if no production or operations for one year), interpreted in, *Wilson v. Elliot, 589 N.E.2d 259 (Ind. App. 1992).*

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CHAPTER 49 PETROLEUM AND PIPELINES
VII. Drilling-Delay Rental Clause: Primary Term Maintenance.

6-49 Thompson on Real Property, Thomas Editions § 49.34

AUTHOR: Professor Maria E. Mansfield College of Law University of Tulsa

§ 49.34 Historical Rationale: Implied Covenant to Drill Exploratory Well.

Early oil and gas leases often extended for lengthy periods with only minimal initial consideration. Because the true consideration for the lease was potential royalties, courts found lessees had an implied duty to drill an exploratory well within a reasonable time. n662 To avoid this duty, lessees provided additional consideration as an alternative to drilling. Payments were added to lease so the lessee could hold it without drilling. n663

These payments delayed the obligation to drill for a specified period, usually one year. Therefore, they are called "delay rentals." Delay rentals are not truly analogous to surface lease rentals; they are not the prime consideration for the right to possess the property of another, but are designed to rebut a duty to drill if the lessee chooses not to drill. Like surface rentals, however, delay rentals are considered income, both for purposes of distribution between successive owners n664 and for income tax. n665 Delay rentals only may be used during the primary term of a lease. Without production or a substitute for it, the secondary term neither begins nor continues.

FOOTNOTES:
(n1)Footnote 662. *Federal Oil Co. v. Western Oil Co., 112 F. 373 (D. Ind. 1902); Hitt v. Henderson, 240 P. 745 (Okla. 1925); Cameron v. LeBow, 338 S.W.2d 399 (Ky. 1960),* for later developments, *see 366 S.W.2d 164 (Ky. 1962)* (lease not abandoned) and *394 S.W.2d 773 (Ky. 1965)* (top lessee an innocent trespasser).

(n2)Footnote 663. *Eastern Oil Co. v. Beatty, 177 P. 104 (Okla. 1918)* (express stipulation for payments negates implied covenant to drill well; lessor cannot complain if compensation paid and no drainage occurring).

Shore Exploration & Production Corp. v. Exxon Corp., 976 F. Supp. 514 (N.D. Tex. 1997) (under Virginia law, an assignee of an oil and gas lease is bound by assignor's agreement to pay delay rentals or give notice of an intent not to do so. A subsequent assignee will also be bound under privity of estate so long as the assignee retains an interest in the leasehold, but not after reassignment to a prior assignee).

(n3)Footnote 664. *See* § 49.06(c)2, *supra*.

(n4)Footnote 665. *Bennett v. Scofield, 170 F.2d 887 (5th Cir. 1948).*

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§ 49.35 Two Forms: "Unless" and "Or."

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Two basic forms of delay rental clauses developed. n666 The "or" form was developed first and obligates the lessee to "drill or pay." A typical clause may read:

> Commencing with the first day of the second year of the term hereof, if the lessee has not theretofore commenced drilling operations on said land or terminated the lease as herein provided, the lessee shall pay or tender to lessor annually, in advance, the sum of _____per acre per year for so much of said land as may then be held under this lease, until drilling operations are commenced or this lease is terminated as herein provided.

The "or" lease today is primarily used in California and Appalachia.

The second form of delay rental clause is an "unless" clause. Under this form, the lease will automatically terminate "unless" a well is commenced or delay rentals are paid:

> If no well is commenced on said land on or before one year from the date hereof, this lease shall terminate as to both parties, unless the lessee on or before that date shall pay or tender to the lessor or to the lessor's credit in the _____Bank at _____(which bank and its successors shall be Lessor's agent and shall continue as the depository for all rentals payable hereunder regardless of changes in ownership of said land or the rentals) the sum of _____Dollars, herein called rentals, which shall cover the privilege of deferring commencement of drilling operations for a period of twelve months. In like manner and upon like payment or tender annually, the commencement of drilling operations may be deferred for successive periods of twelve months each during the primary term hereof.

This type of delay rental clause is sometimes called a "Producers 88 lease" because the printer of the first commonly used lease with an "unless" clause marked the form with that label. The term "Producer's 88," however, does not fully define the terms of any oil and gas lease because the label has been affixed to myriad printed forms. n667

§ 49.35(a) Construction of "Unless" Clause.

With an "unless" clause, the lessee is neither obligated to pay the rentals nor drill. The lessee has the option to either drill, pay rentals, or let the lease lapse. The lessor may neither sue to collect rentals nor to compel drilling. n668 The clause's most distinctive feature, however, is its self-operative nature.

Under the majority view, the "unless" clause creates a special limitation on the lessee's estate. n669 The lease terminates automatically upon the happening of the condition, which is the non-payment of rentals when there is no drilling. Therefore, the clause creates an estate analogous to a fee simple determinable.

The majority interpretation does not view the lease's demise as a forfeiture because the estate itself is limited. The primary term specified in the habendum clause is conditioned by the "unless" drilling clause. The term has no viability without either drilling or delay rental payments. Under this analysis, not even the special provisions of bankruptcy proceedings could impede operation of the clause and prevent a lease from defeasing. n670 Nevertheless, in some jurisdictions there is room for equitable intervention to prevent the estate's end. n671

§ 49.35(b) Construction of "Or" Clause.

Nonpayment of rentals under the "drill or pay" clause is never grounds for an automatic termination of the lease. n672 Under this formulation, the payment of rentals is not a condition, but a covenant. The lessee will have a firm obligation to pay rentals. Therefore, most "or" leases provide that the lessee may surrender the lease and avoid rentals. Initially, such clauses were viewed as creating an estate terminable at the will of one party and therefore terminable by both. However, the surrender clause was later recognized as valid. n673 Nevertheless, because the "or" lease required the lessee to act to avoid liability for rentals, the "unless" clause was developed. The automatic termination under the clause, which is desirable when a lessee intends a lease to lapse, may be harsh when nonpayment occurs for other reasons.

§ 49.35(c) Modification of "Or" Clause: Forfeiture Rights.

A lessor's sole remedy under an unmodified "or" lease is to sue for rentals due and unpaid. n674 Therefore, lessors revised these forms to allow the lessor to forfeit the lease if the lessee fails to pay rentals. Before forfeiture may result, however, the lessor frequently is required under the lease to give the lessee notice of default and an opportunity to cure. n675 Statutes in some producing states create the same type of rights. n676 Lessor forfeiture powers, however, generally do not transform an "or" type lease into an "unless" one. Termination will not be automatic upon nonpayment under these schemes. The lessor must act and object to nonpayment, making this type of "or" estate analogous to a fee simple on condition subsequent.

FOOTNOTES:

(n1)Footnote 666. *See generally* Thomas K. McElroy, *Unless vs. Or: An Appraisal, 6 Baylor L. Rev. 415 (1954);* 2 Summers, *supra* note 32 §§ 331-339 and 3 Kuntz, Lowe, Anderson, Pierce, and Smith, Oil and Gas Law § 29.1-.4 (Anderson).

(n2)Footnote 667. *Fagg v. Texas Co., 57 S.W.2d 87 (1933)* (designation as "Producer's 88" not sufficiently descriptive of estate to be created in lessee to satisfy Statute of Frauds).

(n3)Footnote 668. *Borth v. Gulf Exploration & Prod. Co., 313 N.W.2d 706 (N.D. 1981); Rice v. Hillenburg, 766 P.2d 182 (Kan. App. 1988).*

(n4)Footnote 669. *Rice v. Hillenburg, 766 P.2d 182 (Kan. App. 1988); Phyfer v. San Gabriel Dev. Corp., 884 F.2d 235 (5th Cir. 1989).* For other cases, see 3 Kuntz, Lowe, Anderson, Pierce, and Smith, Oil and Gas Law § 29.2(c) (Anderson). Louisiana is in the majority because, by statute, leases terminate upon the end of the agreed term or upon the occurrence of an "express resolutory condition." Article 133 of the Mineral Code, La. Rev. Stat. Ann. § 31:133.

Holman v. Meridian Oil, 988 S.W.2d 802 (Tex. App. 1999) (involving a determinable estate created by an "unless" clause. Although a duty to release an expired lease may exist, delay in releasing will not cause liability in damages when the record indicates that the lease has ended automatically).

(n5)Footnote 670. *Good Hope Refineries, Inc. v. Benavides, 602 F.2d 998 (1st Cir. 1979), cert. denied, 444 U.S. 992* (trustee's 60-day period to preserve rights of debtor does not extend payment period); *Trigg v. United States, 630 F.2d 1370 (10th Cir. 1980)* (automatic stay inapplicable).

(n6)Footnote 671. *Ledford v. Atkins, 413 S.W.2d 68 (Ky. 1967)* (equity can deny forfeiture) and *Phillips Petr. Co. v. Curtis, 182 F.2d 122 (10th Cir. 1950).*

(n7)Footnote 672. *Girolami v. Peoples Natural Gas Co., 76 A.2d 375 (Pa. 1950). See also* 3 Kuntz, Lowe, Anderson, Pierce, and Smith, Oil and Gas Law § 29.3(c) (Anderson). Despite seeming universal agreement on this, two Michigan cases enforced an "or" lease the same as an "unless" one. *Steed v. Pure Oil Co., 245 N.W. 550 (Mich. 1932); Concord Oil & Gas Co. v. Thompson, 226 N.W. 857 (Mich. 1929).*

(n8)Footnote 673. *Federal Oil Co. v. Western Oil Co., 112 F. 373 (D. Ind. 1902); Guffey v. Smith, 237 U.S. 101 (1915). See generally* 2 Summers, *supra* note 32, at § 332 (older lease forms interpreted).

(n9)Footnote 674. *Butler v. Nepple, 354 P.2d 239 (Cal. 1960)* (lessor can neither terminate lease nor force drilling).

(n10)Footnote 675. *E.g.*, "Upon the violation of any of the terms or conditions of this lease by the lessee and the failure to begin to remedy the same within 90 days after written notice from the lessor so to do, then, at the option of the lessor, this lease shall forthwith cease and terminate."

(n11)Footnote 676. W. Va. Code, § 36-4-9a (60-day notice); Ky. Rev. Stat. Ann. § 353.020 (lessee may avoid lease if lessor does not accept late payment). *See also Warner v. Haught, Inc., 329 S.E.2d 88 (W. Va. 1985)* (statute may not be used by lessee to willfully refrain from payment until notified; equitable forfeiture possible).

W. Va. Code § 36-4-9a also creates a rebuttable legal presumption that if a lessee fails to produce, and either use or sell, oil and gas from the leased premises for a period longer than 24 months, the lessee is presumed to have abandoned any well on the premises. In *Howell v. Appalachian Energy, 519 S.E.2d 423 (W. Va. 1999),* the lessee failed to rebut the presumption created by eight years of non-production and was deemed to have abandoned the well and equipment left on the premises.

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CHAPTER 49 PETROLEUM AND PIPELINES
VII. Drilling-Delay Rental Clause: Primary Term Maintenance.

6-49 Thompson on Real Property, Thomas Editions § 49.36

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§ 49.36 Satisfaction of Clauses: Drilling.

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§ 49.36(a) Commencement or Completion as Requirement.

Rental payments are unnecessary if the lessee undertakes the necessary development actions required by the lease. The lease's wording can impact what is required under the general heading of "drilling." Most leases require either commencement of a "well" or commencement of "operations for the drilling of a well." The two requirements are construed in the same manner, which is outlined below. There is some case law, however, that requires more than preparatory activity, notably penetration of the earth by a drill bit, when a lease employs phrases such as "commence drilling operations," "commence to drill a well," or "commence the actual drilling of a well." n677 Other courts do not make distinctions and follow the same rules regardless of the lease's wording. n678 All courts, however, distinguish clauses that require a well be "completed" by a certain date. Actions sufficient to be "commencement" will not satisfy completion requirements. n679

§ 49.36(b) Definition of "Commencement."

To "commence" either a well or operations for drilling does not require actual spudding of the well, which is penetration of the ground by the drill bit. n680 Rather than requiring spudding, any activities on the ground done in good-faith preparation for drilling and diligently pursued to completion generally will suffice. The commencement requirement is multi-faceted: physical operations, good faith, and diligence are all needed and the tests tend to interrelate. n681 Moreover, the activities must be timely. In the case of the drilling clause, the lessee has until midnight of the specified day to commence. n682 If the lessee then proceeds to complete a well, courts generally are liberal in construing what satisfies the drilling requirement because liberality will foster development and protect the lessee's investment. n683

§ 49.36(b)(1) Meaning of Operations.

The first requirement for commencement is that there be some "operations." Operations for drilling that satisfy commencement may include building roads, n684 clearing drill pads, n685 beginning a water well to obtain water necessary for drilling, n686 or performing other actions that a reasonable and prudent operator would undertake in a

good faith effort to obtain oil or gas. n687 Although courts do tend to accept substantial compliance with the duty, they seemingly require some on the ground activity, which may take place off the leasehold in certain circumstances. n688 For example, applying to the conservation agency for an order placing lands in a drilling unit could be sufficient if drilling is commenced on the unit in time and the leased lands eventually are included in the unit. n689

There is a difference of opinion about whether the lessee must have a drilling permit or contract with a driller for preparatory work to be deemed commencement. n690 The determining factor may be one of the other requirements: good faith or diligent prosecution.

§ 49.36(b)(2) Good Faith.

Activities that normally would be sufficient to be "commencement" will not suffice if a court finds them to have not been done in good faith but as a sham. Naturally, subjective intent is hard to determine. Therefore, courts look to objective evidence, such as due diligence. The requirement of good faith at the time the initial work was done, however, may be judged independently from later due diligence. For example, if the lessee was doing preliminary work at a slow pace to await information from adjacent wells, the lessee may not have had a good faith intent to actually drill a well on the relevant date, which most often is the end of the primary term. n691

§ 49.36(b)(3) Due Diligence.

Related to the requirement of good faith is the requirement that activities "commenced" must be diligently pursued to completion. Diligence after the relevant date is an important indicator of the lessee's good faith on the date that "commencement" was required. n692 If the lessee does not diligently pursue the work, it is as if the operations were not commenced. An "unless" lease would therefore automatically terminate if no rentals were paid. n693

FOOTNOTES:
(n1)Footnote 677. *Lewis v. Nance, 66 P.2d 708 (Cal. 1937)* ("drilling of a well for oil" requires actual drilling); *but see Solberg v. Sunburst Oil & Gas Co., 235 P. 761.* (Mont. 1925) ("Commence drilling operations" -- as opposed to "commence operations for the drilling of a well" -- requires actual drilling). These cases deal with commencing a well at the end of the primary term. *See* § 49.40, *infra*. The standards are generally the same in that context as for meeting the drilling requirement in the primary term and for the dry hole and continuous operations clause, §§ 49.39 and 49.41, *infra*.

Exxon Corp. v. Crosby-Mississippi Resources, Ltd., 154 F.3d 202 (5th Cir. 1998) (operator satisfied requirement to actually commence drilling by engaging subcontractor to drill the hole for conductor pipe since it is more than preparatory. Creation and use of the conductor pipe hole was a necessary part of the drilling process since the conductor pipe was required to support the great weight of the drill pipe.).

(n2)Footnote 678. *See, e.g., Fast v. Whitney, 187 P. 192 (Wyo. 1920)* (no distinction between commencing "operations" and commencing "drilling"); *Jones v. Moore, 338 P.2d 872 (Okla. 1959)* ("Commence to drill a well" did not require actual spudding). For a full discussion, see 3 Kuntz, Lowe, Anderson, Pierce, and Smith, Oil and Gas Law § 32.2 (Anderson).

(n3)Footnote 679. *Baldwin v. Blue Stem Oil Co., 189 P. 920 (Kan. 1920); Wilds v. Universal Resources Corp., 662 P.2d 303 (Okla. 1983).*

(n4)Footnote 680. *Vickers v. Peaker, 300 S.W.2d 29, 32 (Ark. 1957),* states the rationale: "Does drilling commence with operations for the well or does it commence only with the piercing of the ground with the drill bit? Does 'baking a cake' begin with the preparations of the dough or only with the actual placing of the dough in the oven?". *See also Petroleum Energy v. Mid-America Petr., 775 F. Supp. 1420 (D. Kan. 1991).*

(n5)Footnote 681. *Wilds v. Universal Resources Corp., 662 P.2d 303 (Okla. 1983).*

(n6)Footnote 682. *Winn v. Nilsen, 670 P.2d 588 (Okla. 1983)* (midnight on anniversary date). Commencement may also be important under dry hole, cessation of production and drilling operations clauses. *See* §§ 49.39-49.41, *infra*. *See, e.g., Sherhienko v. Kiker, 392 N.W.2d 808 (N.D. 1986)* (similar analysis of commence under cessation of production clause).

(n7)Footnote 683. *See generally* 3 Kuntz, Lowe, Anderson, Pierce, and Smith, Oil and Gas Law § 32.2 (Anderson), 2 Summers, *supra* note 32, at § 349; P. Martin & B. Kramer, Williams & Meyers Oil and Gas Law § 606.1 (Matthew Bender) and Richard W. Hemingway, The Law of Oil and Gas § 6.7 (2d ed. 1983).

(n8)Footnote 684. *Breaux v. Apache Oil Corp., 240 So. 2d 589 (La. App. 1970).*

(n9)Footnote 685. *Jones v. Moore, 338 P.2d 872 (Okla. 1959)* (staked location and dug slush pits).

(n10)Footnote 686. *Compare Hughes v. Ford, 92 N.E.2d 747 (Ill. 1950)* (lease not preserved because water rig brought in solely to hold lease when actual drilling required under agreement), *with LeBar v. Haynie, 552 P.2d 1107 (Wyo. 1976)* (sufficient in light of other activity).

(n11)Footnote 687. *Petroleum Energy v. Mid-America Petr., 775 F. Supp. 1420 (D. Kan. 1991)* (clause defined commencement as the first placement of materials on site or "when the first work, other than surveying or staking, is done ... which is necessary for such operations;" dirt contractors worked and drilling contract with start date before end of term signed).

(n12)Footnote 688. *A & M Oil, Inc. v. Miller, 715 P.2d 1295 (Kan. App. 1986)* (commencing slant drilling sufficient even if property line of leasehold not penetrated until after the primary term).

(n13)Footnote 689. *Kuykendall v. Helmerich & Payne, Inc., 741 P.2d 869 (Okla. 1987).*

(n14)Footnote 690. *Compare Goble v. Goff, 42 N.W.2d 845 (Mich. 1950)* (need permit) and *Herl v. Legleiter, 668 P.2d 200 (Kan. App. 1983)* (need drilling permit or contract for one); *with D'Lo Royalties, Inc. v. Shell Oil Co., 389 F. Supp. 538 (S.D. Miss. 1975)* (intent to drill may be shown without drilling contract), *aff'd, 541 F.2d 279 (5th Cir. 1976)* and *Gray v. Helmerich & Payne, Inc., 834 S.W.2d 579 (Tex. App. 1992)* (permit not required).

(n15)Footnote 691. *D'Lo Royalties, Inc. v. Shell Oil Co., 389 F. Supp. 538 (S.D. Miss. 1975), aff'd, 541 F.2d 279 (5th Cir. 1976); Oelze v. Key Drilling, Inc., 481 N.E.2d 801 (Ill. App. 1985). See* 3 Kuntz, Lowe, Anderson, Pierce, and Smith, Oil and Gas Law § 32.3(c) (Anderson).

(n16)Footnote 692. *Olinkraft, Inc. v. Gerard, 364 So. 2d 639 (La. App. 1978)* (if do not continue, have not "spudded" well); *Hisle v. Keltner, 495 S.W.2d 773 (Ky. 1973)* (stopping drilling to enforce option to lease adjacent land evidence not proceeding in good faith and reasonable diligence). *See also Herl v. Legleiter, 668 P.2d 200 (Kan. App. 1983).*

(n17)Footnote 693. *Wilds v. Universal Resources Corp., 662 P.2d 303 (Okla. 1983); but see Consolidated Gas Co. v. Riechoff, 151 P.2d 588 (Mont. 1944)* (diligent prosecution is an implied covenant; notice and demand for performance required to put lessee in default).

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§ 49.37 Satisfaction of Clauses: Payment of Rentals.

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§ 49.37(a) General Requirements.

If there is no drilling, rental payments are essential to maintain an "unless" lease during its primary term. Although courts are liberal in determining what constitutes commencement of operations for drilling, they take the opposite tack in determining what suffices for paying rentals: the requirement is strictly construed. Substantial compliance is generally not enough, possibly because rentals do not further the ultimate goal of production and do not represent a substantial investment. Courts require rental payments be made at the proper time, in the proper amount, to the proper party, and in the proper manner. n694

§ 49.37(a)(1) Date of Payment.

Delay rental payments are generally payable on or before a date certain. The lease may directly specify the date or state that rentals are due on or before the anniversary date of the lease, which is one year from the date of the lease. The anniversary date is generally the date inserted in the lease form, not the date the lease becomes effective by execution and delivery. n695 Counting one year from the specified date is done in the same manner as for other contracts; the date of contracting is not counted. For example, if a lease is dated April 1, rental will be due April 1 of succeeding years. Regardless of how the lease specifies the due date, the lessee will have until midnight to perform. n696 Most courts allow payment the following business day if the due date falls on a Sunday or holiday. n697 Courts, however, generally will not listen to personal woes as excuses for late payment. n698

§ 49.37(a)(2) Amount of Payment.

Rental payments must be in the full amount. Minor insufficiencies have caused leases to terminate. n699 When rentals are based on acreage subject to the lease, discovery of the actual acreage subject to the lease or the undivided interest owned by the lessor may change the rental amount due from that previously believed to be owed. Increases may occur because title questions are resolved n700 or because more land is included in the leasehold. n701 Therefore, the lessee should specify in the lease that rentals will be based on a certain acreage figure, regardless of whether more or less

acreage actually is subject to the lease.

Moreover, if there is a dispute about the rentals due, the lessee should pay any additional amount and then litigate. The amount of rentals due is generally minimal, but eventual court resolution of the dispute is justified; royalty computations may be impacted substantially if there is a change in the acreage included or quantum of undivided interest owned. These issues may be of import in the rental dispute. When a court determines the threshold question, namely whether a lease terminated for failure to pay rentals, a prompt tender of disputed rentals when notified of the lessor's position may convince a court of the lessee's good faith, even if the tender was technically late. n702

§ 49.37(a)(3) Recipient of Payment.

The owner of the minerals generally is entitled to rentals. n703 Payment to an owner jointly with a non-owner may vitiate the payment. n704 If there are co-tenants, however, each is owed rental in proportion to their interests. The lessee will be liable for paying the proper amount to the proper parties. n705 If, however, one lease was executed and all parties are collectively referred to as "Lessor," the lessee need only make one payment payable to all jointly. n706

Additional problems arise if the lessor transfers all or a partial interest after execution of the lease. The normal lease does not provide for joint payment in this instance, n707 but transfers are binding on the lessee upon proper notice. The owner on the date the rental payment becomes due is entitled to rentals. n708 Even without a specific clause in the lease detailing how notice is to be given, mere recordation of a transfer is not sufficient notice to require the lessee to pay the new owner. n709 The lessee may, however, pay based on the state of the record. n710 Prepayments of rentals, however, will not bind an assignee of the lessor without notice of the payment. Therefore, additional payments may be needed for the new owner on the rental due date despite the lessee having paid the prior lessor in advance. n711

Because of the difficulties that can arise out of co-tenancies and transfers, various lease clauses have been developed to protect the lessee. n712 In extremely complicated situations, the lessee may desire a rental payment division order, which is a document signed by those entitled to payments stipulating their interests. n713

§ 49.37(a)(4) Manner of "Payment" or "Tender" -- Use of Checks.

Payment or tender must be made as specified in the lease. The lessee or someone authorized by the lessee must make the payment; the lessee cannot take advantage of an unrelated third party's payment. n714 Moreover, unless the lease specifies otherwise, rentals must be received by the relevant date, not merely mailed. n715 Even if a lease does not specifically allow the lessee to pay by check, payment by check will be sufficient unless an express demand for legal tender is made. n716 Most modern lease forms specify that mailing by the due date is sufficient, as is payment by check. Mailing, however, must be to the proper address n717 and the lessee must have funds to cover a check. n718 If these conditions are met, delay or loss in the mail is immaterial. Although most courts strictly construe the lease against the lessee, alternate means, such as employing Western Union in a timely manner, may be sufficient, but only if the lease allows mailing to be effective payment. n719

§ 49.37(b) Role of Equity.

Under the majority view, there should be little or no role for equitable concerns when a lessee fails to make proper payments under an "unless" clause. The lease terminates automatically pursuant to its own terms. Nevertheless, occasionally courts will find that the failure to pay was not chargeable to the lessor without fully reconciling the theory employed. n720

§ 49.37(c) Protection of Lessee by Courts.

§ 49.37(c)(1) Excuses for Nonpayment or Tardy, Inadequate, or Improper Payment of Rentals.

Generally, courts require rental payments in strict conformity with the lease and will not excuse errors of the lessee or its agents. n721 Almost all jurisdictions, however, have cases that excuse improper payments caused by an independent third party over which the lessee has no control. n722 To reach this result, the lessee must have been acting in good faith. Similarly, if the lessee acts in good faith and the erroneous payment arose from ambiguity created by the lessor, courts will excuse tardy or inadequate payment. n723 This is especially so if the lessor fails to inform the lessee of the faulty payment. n724 If the lessor is attacking the lessee's title, rental may be waived, but third party litigation will not be an excuse. n725

§ 49.37(c)(2) Revivor.

In some instances, courts have construed an acceptance of late rental payments or other actions which treat the lease as in existence to act as a revivor of the terminated lease. n726

§ 49.37(c)(3) Estoppel or Waiver.

Two different theories have sometimes been used to find that a lease that otherwise would have terminated will not be. These theories concentrate on the actions of the lessor. Estoppel technically means that the lessor's actions have misled the lessee to the lessee's detriment. A waiver would be the lessor's intentional relinquishment of a known right. Courts use these theories without always precisely distinguishing them. n727

Estoppel has been found when the lessor retains an inadequate or late payment for an unreasonable length of time without challenging the leasehold. n728 Sometimes, the court only will allow the lease to be maintained up to the acreage for which payment was received. n729 Nevertheless, without additional investment by the lessee, the lessor's actions should more accurately be described as a waiver, rather than an estoppel. This is especially so because the lessor is not under a general duty to speak when an improper delay rental payment is made. n730 A significant number of cases, however, state the lessor has such a duty if the lessor knows of an error in time to inform the lessee before the rental due date. n731

§ 49.37(d) Protection of Lessee by Lease Terms.

§ 49.37(d)(1) Use of Depositary Bank.

One common way to assist the lessee in making proper delay rental payments is to have the payments be made to a specified bank, referred to as the depositary bank. n732 Although the lease will call the bank the lessor's agent, it is not a true agent. For example, the clauses frequently allow for continued payment to the depository if the lessor dies. n733 Moreover, the bank has limited authority. The bank may only accept proper and timely rentals and its accepting improperly tendered rentals will not estop the lessor. n734 In one aspect, the depository bank is connected to the lessor: Its errors will not be charged to the lessee. n735 Therefore, the lease will not terminate if the bank credits the account of the lessor late or in an improper amount.

§ 49.37(d)(2) Notice of Assignment Provisions.

In order to avoid double liability for rental payments and other problems caused when the lessor assigns an interest, leases often state that no assignment by the lessor will be effective until the lessee is provided with certified copies of transfer documents. Better versions of these clauses provide for a grace period, making the transfers only effective a stated time after receipt. This gives the lessee time to change its records and will prevent difficulties from transfers close to the rental date. n736 If, however, the lessee fails to wait for proper notification and acts based on a title opinion, it may not be protected. n737

§ 49.37(d)(3) Notice of Incorrect Payment Clauses.

Because of the automatic nature of lease termination under the "unless" clause, lessees have attempted to draft savings clauses. n738 Many leases have general "notice of default" clauses that state that if the lessee fails to perform any of its obligations under the lease, it will not be in default until notified by the lessor and the lessee fails to remedy the problem within a stated time period. Cases have refused to apply these general clauses to a failure to pay delay rentals, because to do so would be repugnant to the "unless" clause. n739 A similar fate met a clause providing that a lease would not terminate if there was a neglect or failure to pay rentals until the lessor gave written notice and the lessee failed to pay in ten days. n740

More narrowly drawn clauses were better received. A court upheld the following:

> If Lessee shall in good faith and with reasonable diligence attempt to pay any rental ... , but shall incorrectly pay all or some portion of such rental ... , this lease shall be maintained in force ... , provided that such erroneous rental payment be corrected within thirty (30) days after receipt by lessee of written notice. n741

A direct modification of the "unless" clause to simply require good faith attempts to tender proper rentals was also effective. n742 In the instances where courts approved savings clauses, the lessees did not attempt to overreach and negate the "unless" clause by providing grace for willful failures to pay. The tailored savings clauses simply incorporated equitable principles into the performance obligation.

§ 49.37(d)(4) Use of "Or" Leases.

Because the "or" form of the drilling-delay rental clause does not automatically terminate upon a failure to properly pay rentals, the lease protects a significant investment in bonus payments from inadvertent loss. Therefore, despite the potential for firm rental obligations if not surrendered, the form should be considered for valuable leases.

§ 49.37(d)(5) Use of "Paid-up" Leases.

A "paid-up" lease is another way to insure against inadvertent loss of a lease because all rental payments are paid in advance. A lessee considering this option should not merely prepay with a traditional lease form, but should use a lease that expressly states the lease's nature. This will avoid a claim for rentals from an assignee of the lessor. The lease should also expressly state that the payment of rentals is for the privilege of delaying drilling for the entire primary term and that no duty, either express or implied, exists to drill an exploratory well. To not do so may risk courts implying the duty to drill within a reasonable time, which duty was the original impetus for delay rentals. n743

FOOTNOTES:

(n1)Footnote 694. *See generally* 3 Kuntz, Lowe, Anderson, Pierce, and Smith, Oil and Gas Law §§ 34.1-34.8 (Anderson); Richard W. Hemingway, The Law of Oil and Gas § 6.3 (2d ed. 1983); 2 Summers, *supra* note 32, at §§ 340-348; and P. Martin & B. Kramer, Williams & Meyers Oil and Gas Law § 606 (Matthew Bender).

(n2)Footnote 695. *Hughes v. Franklin, 29 So. 2d 79 (Miss. 1947)* (due on date in lease, not date last cotenant signed); *Greer v. Stanolind Oil & Gas Co., 200 F.2d 920 (10th Cir. 1920). See also Humble Oil & Ref. Co. v. Mullican, 192 S.W.2d 770 (Tex. 1946)* (when second lease executed to ratify first and not replace it, rentals due on anniversary date of first lease).

Griggs v. Parsons Leasing, Inc., 776 So. 2d 766 (Ala. 2000) (the date recited in the lease as the date of agreement was the base for calculating the rental payment date even though execution did not occur until 2 1/2 months later. Notice-and-demand clause did not negate automatic termination provision).

(n3)Footnote 696. *Winn v. Nilsen, 670 P.2d 588 (Okla. 1983).*

(n4)Footnote 697. *Durell v. Miles, 206 P.2d 547 (N.M. 1949)* (employing statute for contracts); *Semans v. Adams, 228 S.W. 353 (Tex. Civ. App. 1921); but see McLaughlin v. Barock, 225 S.W. 575 (Tex. Civ. App. 1920)* (normal contract rule does not apply to delay rentals under "unless" clause because no absolute obligation to pay).

(n5)Footnote 698. *Ford v. Cochran, 223 S.W. 1041 (Tex. Civ. App. 1920)* (no excuse when sick family required attention). *But see Ledford v. Atkins, 413 S.W.2d 68 (Ky. 1967)* (late payment excused when managing partner comatose).

(n6)Footnote 699. *Young v. Jones, 222 S.W. 691 (Tex. Civ. App. 1920)* (payment of $73.29 when $76.25 due).

(n7)Footnote 700. *Schwartzenberger v. Hunt Trust Estate, 244 N.W.2d 711 (N.D. 1976)* (actual mineral acres entitled lessor to $8.00 additional rental; lease terminated).

(n8)Footnote 701. *Klas v. Phillips Petr. Co., 426 N.W.2d 8 (N.D. 1988)* (lease of specific acreage "plus any accretions").

(n9)Footnote 702. *Compare Schwartzenberger v. Hunt Trust Estate, 244 N.W.2d 711 (N.D. 1976)* (no tender) *with Humble Oil & Ref. Co. v. Harrison, 205 S.W. 2d 355 (Tex. 1947)* (disputed amount tendered).

(n10)Footnote 703. The parties to deeds may specify who should receive the various attributes of a mineral estate. *See* § 49.09, *supra*.

(n11)Footnote 704. *Le Rosen v. North Central Tex. Oil Co., 126 So. 442 (La. 1930), overruled on other grounds, Jones v. Southern Natural Gas, 36 So. 2d 34 (La. 1948)* (payment to joint credit of lessor and his wife improper).

(n12)Footnote 705. *Superior Oil Co. v. Jackson, 250 P.2d 23 (Okla. 1952)* (noting general rule but allowing for joint payment if instrument is ambiguous).

(n13)Footnote 706. *York v. McBee, 308 S.W.2d 951 (Tex. App. 1957).*

(n14)Footnote 707. *Superior Oil Co. v. Jackson, 250 P.2d 23 (Okla. 1952)* (not generally allowed to pay jointly but may do if conveyances create uncertainty as to amounts owed to each party).

(n15)Footnote 708. *Hindin v. Caine, 231 P.2d 83 (Cal. App. 1951)* (no apportionment for time).

(n16)Footnote 709. *Reserve Gas Co. v. Carbon Black Mfg. Co., 79 S.E. 1002 (W. Va. 1913).*

(n17)Footnote 710. *Riddle v. Keechi Oil & Gas Co., 176 P. 737 (Okla. 1918).* But in so doing, the lessee may be acting at it peril. *Atlantic Ref. Co. v. Shell Oil Co., 46 So. 2d 907 (La. 1950)* (lease lapsed for incorrect rentals paid on basis of attorney's title opinion in absence of submittal by lessor of certified copy of deed as required by lease).

(n18)Footnote 711. *Gulf Ref. Co. v. Shatford, 159 F.2d 231 (5th Cir. 1947)* (no need to repay if mailed checks 11 days before rental payment due date and notice of change of ownership received next day).

(n19)Footnote 712. *See* § 49.37(d), *infra*.

(n20)Footnote 713. *Compare* division orders for royalties, discussed § 49.71, *infra*.

(n21)Footnote 714. *Wagner v. Mounger, 175 So. 2d 145 (Miss. 1965).* Holders of non-operating interests or cotenants should be privileged to pay to protect the leasehold. 3 Kuntz, Lowe, Anderson, Pierce, and Smith, Oil and Gas Law § 34.2 (Anderson).

(n22)Footnote 715. *Appling v. Morrisson, 227 S.W. 708 (Tex. Civ. App. 1921)* and 3 Kuntz, Lowe, Anderson,

Pierce, and Smith, Oil and Gas Law § 34.4(c) (Anderson); *but see* argument that term "tender" should include use of mails, *APC Oper. P'ship v. Mackey, 841 F.2d 1031 (10th Cir. 1988).*

(n23)Footnote 716. *Cf. TSB Exco, Inc. v. Smith, 818 S.W. 2d 417 (Tex. App. 1991)* (payment of sum for extension of lease may be by check). Some older cases required legal tender without demand. *Chapple v. Kansas Vitrified Brick Co., 79 P. 666 (Kan. 1905).*

(n24)Footnote 717. *Vaughan v. Doss, 245 S.W.2d 826 (Ark. 1952)* (wrong bank).

(n25)Footnote 718. *Nelson Bunker Hunt Trust Estate v. Jarmon, 345 S.W.2d 579 (Tex. Civ. App. 1961).*

(n26)Footnote 719. *Compare Baker v. Potter, 65 So. 2d 598 (La. 1953)* (sufficient tender); *with Keeler v. Dunbar, 37 F.2d 868 (5th Cir. 1930)* (telegraph the agent of lessee and late delivery chargeable to lessee when lease did not expressly allow mailing).

(n27)Footnote 720. *See generally* Richard W. Hemingway, The Law of Oil and Gas § 6.3(E) (2d ed. 1983) and 3 Kuntz, Lowe, Anderson, Pierce, and Smith, Oil and Gas Law § 36.3 (Anderson) and Annotation, *Mistake, Accident, Inadvertence, etc. as Ground for Relief from Termination or Forfeiture of Oil or Gas Lease for Failure to Complete Well, Commence Drilling, or Pay Rental, Strictly on Time, 5 A.L.R.2d 993 (1949).*

(n28)Footnote 721. *Young v. Moncrief, 232 P. 871 (Kan. 1925)* (check lost in mail and lessee had developed surrounding acreage); *Phillips Petr. Co. v. Curtis, 182 F.2d 122 (10th Cir. 1950); Ellison v. Skelly Oil Co., 244 P.2d 832 (Okla. 1951).* Dicta in some cases, however, would allow some excuses. *Oldfield v. Gypsy Oil Co., 253 P. 298 (Okla. 1926).*

(n29)Footnote 722. *Hamilton v. Baker, 214 S.W.2d 460 (Tex. 1948)* (bank wrongfully dishonored check); *Oldfield v. Gypsy Oil Co., 253 P. 298 (Okla. 1926)* (post office delivered to wrong bank); *Ballard v. Miller, 529 P.2d 752 (N.M. 1974)* (post office failed to deliver; rationale to uphold was that lessee evidenced intent not to terminate by timely use of customary payment method); *but see Appling v. Morrison, 227 S.W. 708 (Tex. Civ. App. 1921)* (automatic termination applies when post office delivered late because post office is lessee's agent; no lease clause making mailing timely payment).

(n30)Footnote 723. *Humble Oil & Ref. Co. v. Harrison, 205 S.W.2d 355 (Tex. 1947)* (ambiguous transfer by lessor misinterpreted by lessee); *Kouns v. Southwood Oil Co., 158 S.W.2d 37 (Ark. 1942)* (lessor and assignee caused confusion by failure to properly record interests). *Compare Schwartzenberger v. Hunt Trust Estate, 244 N.W.2d 711 (N.D. 1976)* (no relief when erroneous computation of lessor's interest could have been corrected by examining record on date of lease) and *Norman Jessen & Assocs. v. Amoco Prod. Co., 305 N.W.2d 648 (N.D. 1981)* (mutual mistake of fact allowed for reformation).

(n31)Footnote 724. *Humble Oil & Ref. Co. v. Harrison, 205 S.W.2d 355 (Tex. 1947).*

(n32)Footnote 725. *Rice v. Ritillerberg, 966 P.2d 182 (Kan. App. 1988).*

(n33)Footnote 726. *Brannon v. Gulf States Energy Corp., 562 S.W.2d 219 (Tex. 1977); Day & Co., Inc. v. Texland Petr., Inc., 786 S.W.2d 667 (Tex. 1990).*

(n34)Footnote 727. *Rice v. Hillenburg, 766 P.2d 182 (Kan. App. 1988). See generally* Richard W. Hemingway, The Law of Oil and Gas § 6.3(F) (2d ed. 1983); and 3 Kuntz, Lowe, Anderson, Pierce, and Smith, Oil and Gas Law §§ 36.4(c)-36.4(f) (Anderson). *See also* § 49.22(c)(4), *supra* (ratification or revivor of terminated lease by deed conveying interest "subject to" lease).

(n35)Footnote 728. *Norman Jessen & Assocs., Inc. v. Amoco Prod. Co., 305 N.W.2d 648 (N.D. 1981).*

(n36)Footnote 729. *Rice v. Hillenburg, 766 P.2d 182 (Kan. App. 1988)* (60 acres maintained out of 80).

(n37)Footnote 730. *Johnson v. Smallenberger, 110 So. 2d 119 (La. 1959).*

(n38)Footnote 731. *Richard v. Tarpon Oil Co., 269 So. 2d 261 (La. 1972); Latham v. Continental Oil Co., 558 F. Supp. 731 (D. Ct. Okla. 1980); Hove v. Atchison, 238 F.2d 819 (8th Cir. 1956).*

(n39)Footnote 732. *Trad v. General Crude Oil Co., 468 S.W.2d 612 (Tex. Civ. App. 1971), writ error dismissed*.

(n40)Footnote 733. *Lapeze v. Amoco Prod. Co., 842 F.2d 132.* (5th Cir. 1988).

(n41)Footnote 734. *Wagner v. Mounger, 175 So. 2d 145 (Miss. 1965); Harris v. Kerns, 291 P. 100 (Okla. 1930).*

(n42)Footnote 735. *Carroll v. Roger Lacy, Inc., 402 S.W.2d 307 (Tex. App. 1966).*

(n43)Footnote 736. *Gulf Ref. Co. v. Shatford, 159 F.2d 231 (5th Cir. 1947).*

Hanks v. Wilson, 633 So. 2d 1345 (La. App. 1994) (royalty under a lease was assigned with the assignor retaining a reversionary interest upon the happening of a condition; under the notice of assignment clause, lessee was not liable until it received evidence that the royalty reversion vested).

(n44)Footnote 737. *Atlantic Ref. Co. v. Shell Oil Co., 46 So. 2d 907 (La. 1950)* (no certified copy of deed as required by lease; improper payment to assignee terminates lease).

(n45)Footnote 738. *See generally* P. Martin & B. Kramer, Williams & Meyers Oil and Gas Law § 681.2(3) (Matthew Bender); 3 Kuntz, Lowe, Anderson, Pierce, and Smith, Oil and Gas Law § 3.3 (Anderson) and Richard W. Hemingway, The Law of Oil and Gas § 6.3(F) (2d ed. 1983).

(n46)Footnote 739. *Waddle v. Lucky Strike Oil Co., Inc., 551 S.W.2d 323 (Tenn. 1977); Barbee v. Buckner, 265 S.W.2d 869 (Tex. Civ. App. 1954).*

(n47)Footnote 740. *Lewis v. Grininger, 179 P.2d 463 (Okla. 1947). See also Clovis v. Carson Oil & Gas Co., 11 F. Supp. 797 (E.D. Mich. 1935);* and *McDaniel v. Hager-Stevenson Oil Co., 243 P. 582 (Mont. 1926).*

(n48)Footnote 741. *Woolley v. Stanolind Oil Co., 230 F.2d 97 (5th Cir. 1956).*

(n49)Footnote 742. *Kincaid v. Gulf Oil Corp., 675 S.W.2d 250 (Tex. App. 1984)* ("[T]his lease shall terminate ... unless, on or before one year from the anniversary date Lessee shall pay or tender (or shall make a bona fide attempt to pay or tender) ... delay rentals.").

(n50)Footnote 743. *See* § 49.34, *supra*.

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CHAPTER 49 PETROLEUM AND PIPELINES
VIII. Dry Hole, Cessation of Production and Drilling Operations Clauses.

6-49 Thompson on Real Property, Thomas Editions § 49.38

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§ 49.38 Rationale for Inclusion: Necessity of Production.

The habendum clause of the oil and gas lease requires production at the end of the primary term and at all times thereafter. Without production, the lease will automatically terminate. Therefore, the lessee will want to preserve its investment if it drills and the resulting well is incapable of production or if production once begun ceases. Additionally, if the lessee is drilling a well at the close of the primary term, the lessee will need time to complete it. The dry hole, operations, and cessation of production-continuous operations clauses meet these concerns. They also answer questions about the lessee's duties during the primary term.

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6-49 Thompson on Real Property, Thomas Editions § 49.39

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§ 49.39 Dry Hole Clause.

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§ 49.39(a) Basic Form.

A common formulation of the dry hole clause is as follows:

> If prior to discovery of oil, gas, or other hydrocarbons on this land... Lessee should drill a dry hole or holes thereon... this lease shall not terminate if Lessee commences additional drilling or reworking operations within sixty (60) days thereafter, or if it be within the primary term, commences or resumes payment or tender of rentals or commences operations for drilling or re-working on or before the rental paying date next ensuing after the expiration of sixty (60) days from the date of completion of the dry hole. n744

Different clauses vary the time in which additional operations must begin or rental payments must be made. n745

§ 49.39(b) Use in Primary Term.

If a dry hole is drilled in the primary term, under the dry hole clause, the lessee has the option of continuing drilling operations or resuming rental payments. Prior to use of such clauses, the few cases that considered the effect of a dry hole reached different results. n746 Although all agreed that a dry hole would meet the drilling requirement for the year in which the well was drilled, some courts required the resumption of rentals or drilling in following years. Others viewed the lease satisfied for the primary term. The dry hole clause clarified duties after drilling a dry hole.

The dry hole clause, however, was not intended to modify the lessee's duties if a producing well was drilled. Drilling a producing well would satisfy the drilling and rental requirements for the entire primary term. n747 Therefore, a dry hole drilled after a producing well should not reinstate the duty to pay delay rentals and the wording of most dry hole clauses so indicates by referring to drilling of a dry hole before discovery of oil or gas. n748

§ 49.39(c) Use in Secondary Term.

The dry hole clause preserves the lease in the secondary term because it allows the lessee to try again through re-working the dry hole or drilling another well. Because it only applies before discovery of hydrocarbons, it will not be used if the dry hole is drilled after a paying well ceases production. n749

§ 49.39(d) Construction Problems.

§ 49.39(d)(1) Definition of a Dry Hole.

No precise definition of a dry hole appears in either case law or the typical oil and gas lease. A "duster" -- a well that produces no hydrocarbons -- obviously is a dry hole. However, often wells will contain a "show" of oil or gas or even produce some oil or gas, but not sufficient amounts to make the lessee desire to expend the sums necessary to complete a well. n750 In light of this, one suggested definition is that a dry hole should be a well from which the only benefit the lessee gains is geological information because the well will not meet the requirements of the lease, such as the need to produce in paying quantities. n751

§ 49.39(d)(2) Definition of Completion.

The lessee generally must act under dry hole clauses in a specific time period. Often, this time runs from the "completion" of a dry hole. A producing well is completed when it is made ready to produce, n752 but this does not resolve the question of when a dry hole is completed. To arrive at some guidelines, it is instructive to combine both the definition of a dry hole as an unsuccessful venture and the prudent operator rule. n753 The earliest date for completion would be when the target formations have been tested. n754 If a prudent operator would engage in further operations such as fracturing the well, however, a well would not be completed until that was done. n755 The latest date would be when the lessee formally plugs and abandons the well, but performing activities that the prudent operator would not do will not delay the date of completion. n756 Because there is little precedent and determining when a well is completed is fact specific, a lessee should choose the earliest possible date to measure when the lessee's performance is due.

§ 49.39(d)(3) Definition of "Additional Drilling" and "Re-working" Operations.

One option after a dry hole is to commence re-working or drilling operations. "Re-working operations" is another term without a specific definition. Courts liberally have included any work that a reasonable and prudent operator would do in a good faith effort to obtain or increase production. n757 The work, however, must be done with the intent to improve matters; routine starting of a pump on the leasehold to keep a pump in working order will not be "re-working." n758

Commencing additional drilling is treated in the same manner as what is necessary to commence operations for drilling under the drilling clause. n759 Preparatory work on the ground may be sufficient for "additional drilling." n760 If the lease has a pooling clause, the lessee may pool the leasehold with other property within the specified time after drilling the dry hole and commence drilling on land pooled with the leased tract. n761 Cases split on whether the lessee could save the lease by pooling with a pre-existing producing well during the grace period of the dry hole clause. n762

§ 49.39(d)(4) Time Rental Payment Is Due.

Drilling a dry hole may alter the date on which rental payments are due. Some clauses provide a grace period after completion of the dry hole before rentals must be resumed. n763 Therefore, rentals may be "skipped" for a year because the normal payment day falls within this grace period. n764 More importantly, some versions of the dry hole clause may actually change the date for rental payments.

An example of a clause that changes rental dates is found in Superior Oil Co. v. Stanolind Oil and Gas Co.: n765

> Should the first well drilled ... be a dry hole, then ... , if a second well is not commenced on said land within twelve months thereafter, this lease shall terminate ... , unless the lessee shall resume the payment of rentals in the same amount and in the same manner as hereinbefore provided. And it is agreed that upon the resumption of the payment of rentals, as before provided, that [the delay rental clause] ... shall continue in full just as though there had been no interruption in the rental payments.

Under this clause, the first rental payment after the dry hole would be due twelve months from the well's completion, regardless of the normal rental due date. The remaining rentals could be due arguably on the original rental date or twelve months after the first payment. In *Superior Oil Co.*, the majority found the past practices of the parties established the rental date as the anniversary of the dry hole. n766 Ambiguities such as this should be avoided in drafting. For existing leases, the parties should establish the meaning and amend the lease.

FOOTNOTES:

(n1)Footnote 744. *Rogers v. Osborn, 261 S.W.2d 311 (Tex. 1953).*

(n2)Footnote 745. An alternative form, not widely used today, would simply state that the dry hole liquidated liabilities for rentals in the primary term. *See* 4 Kuntz, Lowe, Anderson, Pierce, and Smith, Oil and Gas Law § 47.2(a)(2) (Anderson).

(n3)Footnote 746. *See* 3 Kuntz, Lowe, Anderson, Pierce, and Smith, Oil and Gas Law § 33.1(b) (Anderson). *See also* Annotation, *"Dry Hole" as "Well" Within Undertaking to Drill Well, 15 A.L.R. 3d 450 (1967).*

(n4)Footnote 747. *Murphy v. Garfield Oil Co., 225 P. 676 (Okla. 1924).* This is true even if the well does not produce in paying quantities. *Id. See generally* 3 Kuntz, Lowe, Anderson, Pierce, and Smith, Oil and Gas Law § 33.1(a) (Anderson).

(n5)Footnote 748. 4 Kuntz, Lowe, Anderson, Pierce, and Smith, Oil and Gas Law § 47.2(a)(2) (Anderson); *Continental Oil Co. v. Boston-Texas Land Trust, 221 F.2d 124 (5th Cir. 1955).*

(n6)Footnote 749. *But see* Cessation of Production -- Continuous Operations Clause, § 49.41, *infra*.

(n7)Footnote 750. For treatment of well that does not produce in paying quantities, *compare Murphy v. Garfield Oil Co., 225 P. 676 (Okla. 1924)* (not a dry hole), *with Continental Oil Co. v. Boston-Texas Land Trust, 221 F.2d 124 (5th Cir. 1955)* (production or discovery for continuous operations needs paying quantities).

(n8)Footnote 751. 4 Kuntz, Lowe, Anderson, Pierce, and Smith, Oil and Gas Law § 47.2(c) (Anderson) (employing industry usage and general purpose of clause).

(n9)Footnote 752. *See Bennet v. Sinclair Oil & Gas Co., 275 F. Supp. 886 (W.D. La. 1967)* (dispute as to whether well completed when "Christmas tree" installed or liner perforated). This would change if the lease refers to "completion of drilling on the ... well." *Modern Exploration, Inc. v. Maddison, 708 S.W.2d 872 (Tex. App. 1986)* (refers to time when total depth is reached).

(n10)Footnote 753. *See* 4 Kuntz, Lowe, Anderson, Pierce, and Smith, Oil and Gas Law § 47.2(c) (Anderson). *See also* P. Martin & B. Kramer, Williams & Meyers Oil and Gas Law § 614.1 (Matthew Bender).

(n11)Footnote 754. *Bradshaw v. Hurt, 247 S.W. 1113 (Ky. 1923). See Lebar v. Haynie, 552 P.2d 1107 (1976)* (well not completed until drilled to deeper formation as producer; not completed as dry hole when reached higher formation).

(n12)Footnote 755. *Unity Oil Co. v. Hill, 255 S.W. 151 (Ky. 1923)* (well completed without fracturing when not prudent to do).

(n13)Footnote 756. *Niles v. Luttrell, 61 F. Supp. 778 (W.D. Ky. 1945)* (well completed when acidized without success).

(n14)Footnote 757. *Cox v. Stowers, 786 S.W.2d 102 (Tex. App. 1990). See Pro-Chem, Inc. v. Lassetter Petr., Inc., 837 P.2d 823 (Kan. App. 1990)* (re-routing of salt water disposal well and line sufficient).

(n15)Footnote 758. *Hall v. McWilliams, 404 S.W.2d 606 (Tex. App. 1966).*

Hydrocarbon Mgmt., Inc. v. Tracker Exploration, Inc., 861 S.W.2d 427 (Tex. App. 1993) (cleaning up site would not be sufficient to be "re-working" under cessation of production clause).

(n16)Footnote 759. *See* § 49.36, *supra*.

(n17)Footnote 760. *Jardell v. Hillin Oil Co., 485 So. 2d 919 (La. 1986); Del-Ray Oil & Gas, Inc. v. Henderson Petr. Corp., 797 F.2d 1313 (5th Cir. 1986); but see Hoyt v. Continental Oil Co., 606 P.2d 560 (Okla. 1980)* (more strictly construing lease clause that required "drilling operations" as opposed to "re-working or drilling operations"), *Serhienko v. Kiker, 392 N.W.2d 808 (N.D. 1986)* (adjustment of special casing liner not re-working).

See generally 4 Kuntz, Lowe, Anderson, Pierce, and Smith, Oil and Gas Law § 47.5 (Anderson); P. Martin & B. Kramer, Williams & Meyers Oil and Gas Law § 618.1 (Matthew Bender); Richard W. Hemingway, The Law of Oil and Gas § 6.9 (2d ed. 1983).

(n18)Footnote 761. *Owens v. Superior Oil Co., 730 P.2d 458 (N.M. 1986).*

(n19)Footnote 762. *Compare Humble Oil & Ref. Co. v. Kunkel, 366 S.W.2d 236 (Tex. Civ. App. 1963)* (cannot save lease); *with Harper v. Hudson Gas & Oil Co., 189 F. Supp. 781 (W.D. La. 1960), aff'd, 299 F.2d 238 (5th Cir. 1962)* (can save lease).

(n20)Footnote 763. *See* clause *quoted* at note 744, *supra*.

(n21)Footnote 764. This would, of course, be in addition to the fact that no rentals would have been due if the lessee was drilling on a rental date.

(n22)Footnote 765. *230 S.W.2d 346 (Tex. Civ. App. 1950), aff'd, 240 S.W.2d 281 (Tex. 1951).*

(n23)Footnote 766. *Id.* The case arose because an assignee had simply read the lease, which the dissent agreed had unambiguously required the original due date to be resumed.

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§ 49.40 Operations Clause.

§ 49.40(a) Basic Use: Conclusion of Primary Term.

An oil and gas lessee generally has until the last day of the primary term to begin drilling a well. Nevertheless, production is needed at the end of the primary term. n767 Operations clauses solve this contradiction. This treatise applies the label "operations clauses" to clauses which are only applicable at the end of the primary term and which are triggered by lessee activity on that date. These clauses are designed to allow the lessee, at a minimum, to complete the well on which it is working at the end of the primary term. If the well is a producer, the lease will then continue. Of two types of operations clauses, one allows more than well completion.

§ 49.40(b) Types of Clauses.

§ 49.40(b)(1) Well Completion.

The first type of operations clause is termed a "well completion" clause because it only allows the lessee to complete or re-work the well on which the lessee was working at the end of the primary term. n768 An example of a clause interpreted in this manner is from Rogers v. Osborn: n769 "If at the expiration of the primary term oil, gas, or other mineral is not being produced ... but lessee is then engaged in drilling or re-working operations ... , this lease shall remain in force so long as operations are prosecuted with no cessation of more than thirty (30) consecutive days, and if they result in the production of oil, gas, or other mineral, so long thereafter as oil, gas or other mineral is produced from said land."

§ 49.40(b)(2) Continuous Operations.

In order to avoid the restrictive interpretation of Rogers v. Osborn, n770 a new form of operations clause was drafted, known as a "continuous operations" clause: "If at the expiration of the primary term oil, gas, or other mineral is not being produced ... but lessee is then engaged in drilling or re-working operations ... , this lease shall remain in force so long as the same or any other such operations are prosecuted with no cessation of more than thirty (30) consecutive days, and if they result in the production of oil, gas, or other mineral so long thereafter as oil, gas or other mineral is

produced from said land." Under this clause, the lessee may begin a second well if the first well is unsuccessful. n771

§ 49.40(c) Delay Between Completion of Operations and Production.

Technically, the cessation of operations would terminate the lease because the extension lasts while the lessee is working or production is needed. Production, under the majority view, means actual production and marketing. Some courts imply that the lessee would have a reasonable period to come into production in these circumstances. n772

FOOTNOTES:
(n1)Footnote 767. On the conflict between the Habendum Clause and the drilling clause, which allows drilling up until the last day, *see* 4 Kuntz, Lowe, Anderson, Pierce, and Smith, Oil and Gas Law § 47.4(a) (Anderson) and Richard W. Hemingway, The Law of Oil and Gas § 6.6 (2d ed. 1983). Under the minority definition of "production," the lessee would impliedly have the right to complete the well if the lessee acts with diligence and good faith. *Simons v. McDaniel, 7 P.2d 419 (Okla. 1932).*

(n2)Footnote 768. *Griffin v. Crutchen-Tufts Corp., 500 So. 2d 1008 (Ala. 1986). Skelly Oil Co. v. Wickham, 202 F.2d 442 (10th Cir. 1953). See generally* 4 Kuntz, Lowe, Anderson, Pierce, and Smith, Oil and Gas Law § 47.4(b)(1) (Anderson) (referring to clause as the "continuous drilling clause").

Johnson v. Yates Petroleum Corp., 981 P.2d 288 (N.M. App. 1999). Lessee satisfied the requirements of a well completion clause to commence drilling operations when, during the primary term, he staked and surveyed the well location, received a permit to drill the well and began to clear brush and level the location. Efforts continued and the well was completed 70 days after the primary term ended.

(n3)Footnote 769. *152 Tex. 540, 261 S.W.2d 311 (1953).*

(n4)Footnote 770. *Id. See also Skelly Oil Co. v. Wickham, 202 F.2d 442 (10th Cir. 1953)* (despite reference in clause to drilling during "any extension" of the lease, only may complete well being drilled at end of term).

(n5)Footnote 771. In *Rogers v. Osborn, 261 S.W.2d 311 (Tex. 1953),* the lessee could not use the dry hole clause because it had argued the hole was not dry. The same problem can arise when the court disagrees with a lessee's determination that a hole was dry; therefore, the revised clause should be used.

Utley v. Marathon Oil Co., 31 S.W.3d 274 (Tex. App. 2000) (where evidence showed operations did not cease for more than 90 consecutive days so as to cause the oil and gas lease to expire).

(n6)Footnote 772. *See Sword v. Rains, 575 F.2d 810 (10th Cir. 1978); but see Gulf Oil Corp. v. Reid, 337 S.W.2d 267 (Tex. 1960)* (operations do not include search for market).

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CHAPTER 49 PETROLEUM AND PIPELINES
VIII. Dry Hole, Cessation of Production and Drilling Operations Clauses.

6-49 Thompson on Real Property, Thomas Editions § 49.41

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§ 49.41 Cessation of Production -- Continuous Operations Clause.

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§ 49.41(a) Basic Forms.

Cessation of production clauses and general continuous operations clauses are designed to allow the lessee to maintain a lease by continuing the effort to develop after the discovery of oil or gas. They tend to take several forms. n773 One directly refers to cessation of production and often is inserted in the same provision as the dry hole clause. For example, the dry hole clause cited above in actuality also contained a cessation of production clause:

> If prior to discovery of oil, gas, or other hydrocarbons on this land Lessee should drill a dry hole or holes thereon, *or after discovery of oil or gas the production thereof should cease from any cause*, this lease shall not terminate if Lessee commences additional drilling or re-working operations within sixty (60) days thereafter, or if it be within the primary term, commences or resumes payment or tender of rentals or commences operations for drilling or re-working on or before the rental paying date next ensuing after the expiration of sixty (60) days from the date of completion of the dry hole. n774

A second method is to concentrate on the secondary term and combine the clause with the basic operations clause:

> If at the end of the primary term, Lessee is conducting operations for drilling a new well, *or if after the expiration of the primary term, production on this lease shall cease*, this lease nevertheless shall continue as long as said operations continue or additional operations are had, which additional operations shall be deemed to be had where not more than sixty (60) days elapse between abandonment of operations on one well and commencement of operations on another well, and if production is discovered, this lease shall continue as long as additional operations are had. n775

Without claiming to exhaust the ingenuity presented in lease forms, the final method noted is to modify the habendum clause:

> Subject to other provisions herein contained, this lease shall remain in force for a period of ten years

> from this date, called primary term, and as long thereafter as oil, gas or other mineral is produced from said land, *or as long thereafter as Lessee shall conduct drilling or reworking operations thereon with no cessation of more than sixty days*. n776

Obviously, with this variety, generalization is difficult.

§ 49.41(b) Use in Primary Term.

Some versions are not operative in the primary term. Those that refer to the primary term generally give the lessee the option of resuming rental payments or resuming operations. n777 In the primary term, any production, whether in paying quantities or not, suffices to hold the lease without rental payments. Therefore, the clause, with its requirements of additional rentals or drilling, should only be triggered by a complete cessation of production.

§ 49.41(c) Use in Secondary Term.

The clauses have special significance in the secondary term because they allow operations to extend the lease and therefore "buy time" to get to actual or constructive production and avoid termination of the lease. n778

§ 49.41(d) Construction Problems.

§ 49.41(d)(1) Definition of "Cessation of Production."

Production may cease because of total, physical cessation of production or production may cease because the amount produced is no longer sufficient to be in "paying quantities" and thus satisfy the habendum clause. n779 As noted earlier, to compute whether production is in "paying quantities" requires examination of operating revenues and expenses over a reasonable period of time to ascertain if a reasonable and prudent operator would continue to operate the leasehold. n780 The period specified in a cessation of production clause is not the accounting period in which to determine paying quantities. n781

Because of the flexibility in paying quantities determinations, logically the cessation of operations clause should not be triggered by a cessation of such production; the lessee would not know conclusively when it would have to resume operations because it would not know when paying production ceased. Therefore, Texas expressly holds that the cessation of production clause only applies after a physical cessation of production. n782 Oklahoma, however, has applied the clause after a cessation to produce in paying quantities, placing the lessee with marginal production at risk. n783 Therefore, in Oklahoma and other jurisdictions that have not ruled on this point, these clauses should be modified to state that they will only come in to play when *all* production ceases for mechanical or geological reasons. If production ceases in Oklahoma because of a marketing decision, but a well is still capable of producing in paying quantities, a lease will not terminate in Oklahoma if a lessee does not resume production or re-working operations within the period specified in the clause. The clause's requirements are not triggered because the lease habendum clause is satisfied in Oklahoma if there is a well capable of producing in paying quantities. n784

§ 49.41(d)(2) Relationship of Express Clause to Judgemade Doctrine of Temporary Cessation of Production.

Judges have construed leases to give the lessee a reasonable period of time to restore production when there has been a temporary cessation of production. n785 At least in the form of continuous operations that amends the habendum clause, the contractual time period will define what period of time will be reasonable to resume production. n786 The clause is not cumulative with the judgemade rule but gives content to it.

§ 49.41(d)(3) Payment of Shut-in Royalty Within Specified Period.

Although the cessation of production clauses expressly refer to additional drilling or re-working, the trend is to allow

the lessee to do anything that would extend the lease during the specified period. Therefore, payment of shut-in royalty within the time for additional operations would extend the lease. n787

FOOTNOTES:

(n1)Footnote 773. 4 Kuntz, Lowe, Anderson, Pierce, and Smith, Oil and Gas Law § 47.3(a)(1) (Anderson).

(n2)Footnote 774. *Rogers v. Osborn, 261 S.W.2d 311 (Tex. 1953).*

(n3)Footnote 775. *Woodson Oil Co. v. Pruett, 281 S.W.2d 159, 162 (Tex. Civ. App. 1955).* For criticisms of clauses that refer to "abandonment" of a well, see *infra*, note 787.

(n4)Footnote 776. *Samano v. Sun Oil Co., 621 S.W.2d 580 (Tex. Civ. App. 1981). Compare* clauses stating that the lease will not end if "the premises are being operated or developed," *Statex Petr., Inc. v. Petroleum Inc., 308 F.2d 815 (10th Cir. 1962);* Annotation, *What Amounts to Development or Operation within Habendum Clause Extending Primary Term While Premises are Being Developed or Operated, 96 A.L.R.2d 322 (1962).*

(n5)Footnote 777. *See* discussion on operation of dry hole clause, § 49.39(b), *supra*.

See also § 49.39(d)(3), *supra*, Definition of "Additional Drilling" and "Re-Working" Operations.

(n6)Footnote 778. *Judice v. Mewbourne Oil Co., 890 S.W.2d 180 (Tex. App. 1994), aff' d* in part, *rev'd* in part, *939 S.W.2d 133 (Tex. 1996)* (where the lease permitted cessation of production without termination so long as reworking operations resumed within 90 days).

(n7)Footnote 779. *See*§ 49.33(a), *supra.*

(n8)Footnote 780. *See*§ 49.33(c), *supra*.

(n9)Footnote 781. *Clifton v. Koontz, 325 S.W.2d 684 (Tex. 1959).*

(n10)Footnote 782. *Bachelor v. Rosenthal, 798 S.W.2d 646 (Tex. App. 1990), writ error denied*.

(n11)Footnote 783. *Hoyt v. Continental Oil Co., 606 P.2d 560 (Okla. 1980); French v. Tenneco Oil Co., 725 P.2d 275 (Okla. 1986).*

(n12)Footnote 784. *Pack v. Santa Fe Minerals, 869 P.2d 323 (Okla. 1994)* (only implied covenant to market requires marketing in Oklahoma and it was not breached when lessee sought to avoid exceeding a well's yearly allowable and to maximize returns by marketing in winter and shutting-in or making sales generating less than expenses in summer). *See also* Williston H. Symonds, Note, *The Michelangelo of the Oklahoma Oil & Gas Industry: The Cessation of Production Clause, Spontaneous Lease Terminations, and Cyclical or Marginal Production Problems, 17 Okla. City U. L. Rev. 413 (1992).*

(n13)Footnote 785. *See*§ 49.33(e), *supra*.

(n14)Footnote 786. *Samano v. Sun Oil Co., 621 S.W.2d 580 (Tex. Civ. App. 1981); French v. Tenneco Oil Co., 725 P.2d 275 (Okla. 1986).*

(n15)Footnote 787. *Skelly Oil Co. v. Harris, 352 S.W.2d 950 (Tex. 1962)* (pooling lease and drilling on unit would also suffice); *see also Mayers v. Sanchez-O'Brien Minerals Corp., 670 S.W.2d 704 (Tex. App. 1984)* (cessation period begins at end of period for which shut-in royalties were paid; lessee gets sixty days after to come into production); *but see Gulf Oil Corp. v. Reid, 337 S.W.2d 267 (Tex. 1960)* (when clause refers to time after "abandonment of well" payment of shut-in royalty would not suffice because shut-in well was not abandoned). Therefore, clauses should not be drafted in that manner. P. Martin & B. Kramer, Williams & Meyers Oil and Gas Law § 618.4 (Matthew Bender).

See Annotation, *Shut-in Royalty Payment Provisions in Oil & Gas Leases, 96 A.L.R.2d 345, 363 (1962)* (shut-in payments as affecting duty to develop leased property).

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CHAPTER 49 PETROLEUM AND PIPELINES
IX. Shut-in Royalty, Pooling, and Force Majeure Clauses.

6-49 Thompson on Real Property, Thomas Editions § 49.42

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§ 49.42 Rationale for Inclusion: Necessity of Production.

Under the basic terms of the habendum clause, production is needed to enter the secondary term of an oil and gas lease and to maintain the lease during the secondary term. n788 Therefore, sums expended for drilling could be lost if the lease is interpreted literally. For example, this could happen if gas is discovered and there is no ready pipeline, which is essential to marketing, because most jurisdictions require actual production and marketing to satisfy the habendum clause. Additionally, if only production directly on the leasehold can maintain a lease, the lease may be lost because a conservation agency's rules require minimum acreage for drilling or because a lessee desired to locate wells in a field based on geological indications. Finally, causes outside of its control may thwart the lessee's attempts to produce. The shut-in royalty clause, provisions for pooling, and the *force majeure* clause provide the lessee with alternative means to hold a lease and to achieve flexibility in development.

FOOTNOTES:
(n1)Footnote 788. *See* § 49.33, *supra*.

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CHAPTER 49 PETROLEUM AND PIPELINES
IX. Shut-in Royalty, Pooling, and Force Majeure Clauses.

6-49 Thompson on Real Property, Thomas Editions § 49.43

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§ 49.43 Shut-in Royalty Clause.

§ 49.43(a) Basic Forms.

The shut-in royalty provision developed to solve the problem of drilling a well capable of producing gas, but for which no marketing is possible because either a pipeline or purchaser is lacking. Because pipelines are not built until there are sufficient developed reserves, there is almost always a time lag between discovery and actual marketing of gas. n789 Shut-in royalty clauses have the uniform goal of preventing a lease from terminating in this situation. Nevertheless, shut-in royalty clauses have numerous variants. n790 They often differ in when payments are due. n791 More importantly, when they will allow payments to be made also varies: some clauses restrict use to wells that produce gas only or are only operative when marketing is impossible. n792

Two general types of clauses, however, may be distinguished based on whether the payments are obligatory or optional. The distinction between these types of forms is necessary to ascertain what will result if a lessee fails to pay the shut-in royalties. n793 By way of example, the following form creates an obligation to pay:

> If a well capable of producing gas in paying quantities is completed hereunder and is shut-in for a period of 90 consecutive days, *this lease shall not terminate, but Lessee shall be obligated to pay or tender to the Lessor as royalty for constructive production, an amount ... [specified]*. Such payment or tender shall be made promptly following the end of each such 90-day period. n794

Forms that do not obligate the lessee to pay the rentals, but which allow the lessee to do so include the following:

> To pay to lessor, as royalty for gas from each well where gas only is found, while such gas is being sold or used of the premises [a certain percentage of value], *and while not so sold or used, the sum of _____dollars per annum for each such well, and while such royalty is so paid such well shall be held to be a producing well within the meaning of [the habendum clause]*. n795

Alternatively, the optional form may state that "where gas ... is not sold or used, lessee may pay or tender a royalty ... . If such payment or tender is made, it will be considered that gas is being produced within the meaning of [the habendum

clause]." n796

§ 49.43(b) Use in Primary Term.

Not all shut-in royalty clauses are usable in the primary term; some specifically state that they apply when a well is drilled "in the secondary term." For leases in which the shut-in royalty is not applicable in the primary term, the lease must be held by other provisions. n797 If applicable in the primary term, most lessees believe that the payment of shut-in royalties, as being equivalent to production, would satisfy the requirement to drill or pay delay rentals. Lessors, however, resent being paid less than delay rentals. Therefore, in drafting the clause, shut-in royalties should be in an amount at least equal to delay rentals and paid on the same date in the primary term. n798

§ 49.43(c) Use in Secondary Term.

Shut-in royalties are most useful in the secondary term. They provide consideration for the lessor and, more importantly, the clause defines what would be "constructive production." Constructive production extends and maintains a lease in the same manner that actual production would. For example, if the shut-in royalty payments are considered the equivalent of production n799 and there is a grace period in which to pay the royalties after completion of the shut-in well, production would be deemed present until the date for payment passes without such payment. n800 Similarly, there is no need to create constructive production through the payment of shut-in royalties if there is other actual production on the lease. n801

§ 49.43(d) Effect of Failure to Pay.

§ 49.43(d)(1) Payment Obligatory or Optional.

Whether or not the failure to pay shut-in royalties will terminate an oil and gas lease depends on whether the payment is a covenant or a condition. n802 If a condition, non-payment will cause the lease to end. An alternative mode of analysis centers on asking whether the payment is the equivalent of production. If so, non-payment will mean there is no production and the lease will terminate if it is in the secondary term. n803

To ascertain what is equivalent to production, the forms detailed *supra* in § 49.43(a) should be examined. In the form in which the payment was obligatory, the clause expressly states that the lease will not terminate *if a well capable of producing gas in paying quantities is completed*. The existence of the shut-in well is the condition for lease continuance; payment of royalties is simply a covenant to provide additional consideration. n804 The two other forms, however, state that *if payments are made*, there will be the equivalent of production. Stated this way, the payment of shut-in royalties creates a special limitation on the estate because only with payment is constructive production achieved. n805 If the lease requires royalty payments and they are not made, as with non-payment of delay rentals under the unless form, n806 the lease will terminate automatically for non-payment. In Louisiana, however, non-payment of shut-in royalties will not create an automatic termination of the lease because of the statutory requirement of notice and demand before judicial termination for non-payment of royalties. n807

Because of the potential impact of non-payment, in drafting a lease from the viewpoint of the lessee, the form should be one that makes the existence of a well capable of production in paying quantities the operative fact which creates constructive production. Shut-in royalties should simply be obligatory consideration. If the lessee desires to end the lease, it should surrender it.

§ 49.43(d)(2) Relationship to Definition of "Production" in Habendum Clause.

As noted previously, n808 a majority of jurisdictions interpret the word "production" in the habendum clause as requiring actual production and marketing. Other jurisdictions require only discovery of hydrocarbons in paying quantities and diligence toward marketing. A court in a minority jurisdiction could give effect to a contractual provision

requiring payment of shut-in royalties as a precondition for "production" despite the fact that the drilling of the well itself would satisfy the habendum clause for entry into the secondary term. n809 Oklahoma, however, has ruled that regardless of lease wording, non-payment of shut-in royalties will not be a special limitation on the lease so long as the lessee is diligently attempting to market. n810 Therefore, shut-in royalties in Oklahoma only moderate the time required to actually produce and market. n811

§ 49.43(e) Construction Problems.

§ 49.43(e)(1) Definition of "Shut-in" Well.

A shut-in well must be a well capable of producing in paying quantities. n812 A lessee may not take advantage of the shut-in royalty clause by simply drilling a well in a geologically promising area and turning off its valve. n813 Requiring the well to be capable of producing in paying quantities is logical because the shut-in well or the royalty payment provides constructive production; most jurisdictions define the production necessary to satisfy the habendum clause as production in paying quantities.

§ 49.43(e)(2) When Is Well "Shut-in" and Payments Due

A well, at one level, is "shut-in" when the valve is turned off. For a once producing well, minor repair down time should not necessitate payment of shut-in royalties and the cessation of production clause will allow the lessee to get back into production. However, a once producing well could be shut-in for lack of market. The date of shut-in would clearly be the date the well ceased to produce, but the date is less clear if the well had never been put on line. As with determining when a dry hole is completed, n814 a lessee should use the earliest possible time in computing when a well that has never been produced has been "shut-in."

In addition to ascertaining the date of "shut-in," when the obligation to pay shut-in royalties first accrues and when later payments are due also are often problematical. n815 Many clauses require that shut-in royalties be paid in advance. If the payments are constructive production, in the absence of actual production in jurisdictions that require the same, a gap between the time when the lease is held in another manner and the "production" will cause the lease to end. The royalties must be paid while the lease is in effect. n816 Texas, a state following the majority rule on what constitutes production, therefore ruled that such a payment must be made before the end of the primary term or a lease will terminate by its own terms. n817 Similarly, if the lease is in the secondary term, the shut-in royalties must be paid before the well is shut-in or the lease will terminate. n818

In order to avoid the problem of a lack of time to pay the shut-in rentals, most modern clauses refer to shut-in times of certain lengths before payments are due. For example, a clause may state that if a well is shut in for 60 days, then shut-in royalty payments may be paid. If there is a grace period, the lease will remain alive for that time. n819 Additionally, some cases have allowed shut-in royalty payments to be made during the period the lessee is granted to resume operations under a cessation of production clause or continuous operations clause. n820 The time of performance selected for all these clauses should be uniform.

Once an initial payment is made, problems may arise in computing when the next shut-in royalty payment is due. Although the clause may state that the payments are to be made "annually" or "quarterly," the date on which to begin counting is problematic. n821 Some clauses require payments annually on the anniversary of the date of the shut-in or payment of the shut-in royalty. n822 Neither of these dates will be the anniversary date of the lease. To fix the date for future payments, a lessee generally will require a shut-in royalty receipt, which details the period for which the payment applies. These receipts have been found binding. n823 Under other clauses, there may be a "floating" date because the payments literally are required each time a well is shut-in. If the well is produced sporadically, new payments may be due after each shut-in even when resumption and shut-in occurs during a period for which earlier shut-in royalty was made. n824

§ 49.43(e)(3) Person or Persons Entitled to Receive Payment.

Because rights to the benefits of a mineral estate may be divided among different parties, determining who is to receive the shut-in payment may create difficulties. n825 Arguably the lease terms could be read literally: if the payments are called "royalty," they are paid to royalty owners, but if called "rental," they go to the parties entitled to delay rentals. Other approaches may be more functional. If the shut-in payments are not credited against actual royalties, they would more logically be related to "delay rentals," which pay for the privilege of delaying development.

To avoid inadvertent loss of the leasehold, a well-drafted shut-in royalty clause should specify who should be paid, especially if the clause is one that makes payment the equivalent of production. Many lease clauses specify that the shut-in payments, even if denominated as royalty, are to be paid to the same party as the delay rentals.

§ 49.43(f) Scope of Clause.

§ 49.43(f)(1) Gas or Oil and Gas.

Most of the early clauses applied to wells "that produce gas only." This could create problems if a well produces condensate along with gas, but courts have allowed use of the clause in this situation, but only if the condensate production alone would not be profitable. n826 The reason for limiting the clause to "gas wells" was the belief that oil could always be produced and sold. n827 This is not, however, the case under modern conservation practices. If an oil well produces gas, the conservation agency may not allow the oil to be produced without recovery or recycling of the gas. n828 Although a well-drafted *force majeure* clause may give relief in some circumstances, in drafting a modern shut-in royalty clause, the wording should apply to the drilling of a well for oil, gas, or both.

§ 49.43(f)(2) Shutting in for Reasons Other than Lack of Market.

Often the clauses state that the payments may be made if there is no market or pipeline for the gas. This was the original impetus for the clause. Currently, however, a lessee may in good faith want to shut-in the well for other reasons, such as awaiting better prices. If the clause is not limited to specific triggers, payments may be required if wells are shut-in for other purposes. n829 This also provides a benefit: the lessee may be privileged to take advantage of the constructive production the clause provides for any good faith business purpose. The lessee should avoid limiting the clause's use or specify that it may be used when the lessee deems it advisable. n830 Naturally, the lessor may desire limits on its use.

§ 49.43(f)(3) How Long May Payments Be Made.

If the lease does not expressly limit how long the payment of shut-in royalties may preserve the lease, in theory the lessee may continue their use indefinitely. As detailed in the next subsection, courts have not necessarily allowed this. A lessor, however, would be wise to state a specific limit on the time that the lease could be held without actual production.

§ 49.43(g) Interrelationship with Implied Covenant to Market.

Courts have found that the lessee has an implied duty to market oil or gas because the lessor's ultimate goal is royalties. n831 The payment of shut-in royalties cannot supplant the implied duty. Nevertheless, payments may make a court more liberal in ascertaining both the lessee's diligence and the reasonableness of any delay because the parties anticipated the problem and provided some consideration to the lessor in the interim. At some point, however, a court may find that, despite the payment of shut-in royalties, an unreasonable period of time has elapsed without marketing or that the lessee has not been reasonably diligent in marketing efforts. n832

FOOTNOTES:
(n1)Footnote 789. *Pray v. Premier Petr., Inc., 662 P.2d 255 (Kan. 1983)* (clause has origin in physical characteristics

of gas: it cannot be stored economically above ground or be transported by truck).

(n2)Footnote 790. *See* 4 Kuntz, Lowe, Anderson, Pierce, and Smith, Oil and Gas Law § 46.2 (Anderson); P. Martin & B. Kramer, Williams & Meyers Oil and Gas Law §§ 632.1-632.16 (Matthew Bender); Richard W. Hemingway, The Law of Oil and Gas § 6.5 (3d ed. 1991); John S. Lowe, *Shut-in Royalty Payments*, 5 E. Min. L. Inst. 18-1 (1984).

Oag v. Desert Gas Exploration Co., 659 N.Y.S.2d 654 (N.Y.A.D. 1997) (where continued production on the original leased premises with payment of royalties to landowners removed the obligation of the lessees to pay further shut-in royalties).

(n3)Footnote 791. *See* § 49.43(e)(2), *infra*.

(n4)Footnote 792. *See* § 49.43(f), *infra*.

(n5)Footnote 793. *See* § 49.43(d), *infra*.

(n6)Footnote 794. *Cf. Risinger v. Arkansas-Louisiana Gas Co., 3 So. 2d 289 (La. 1941)* ("To pay the lessor two hundred dollars each year for each well until such time as the gas shall be utilized or sold off premises").

(n7)Footnote 795. *Greer v. Salmon, 479 P.2d 294, 298 (N.M. 1970).*

(n8)Footnote 796. *Gard v. Kaiser, 582 P.2d 1311, 1312 (Okla. 1978).*

(n9)Footnote 797. For example, if the well had produced, the cessation of production clause may be applicable. *See* § 49.41, *supra*.

(n10)Footnote 798. For a lease so doing, *see Phillips Petr. Co. v. Harnly, 348 S.W.2d 856 (Tex. Civ. App. 1961).* For a lease that did not, *see Davis v. Laster, 138 So. 2d 558 (La. 1962)* (erroneous payment of delay rentals in excess of shut-in royalty amount did not harm lessor).

(n11)Footnote 799. *See* § 49.43(d)(1), *infra*.

(n12)Footnote 800. *Mayers v. Sanchez O'Brien Minerals Corp., 670 S.W.2d 704 (Tex. App. 1984),* (60-day cessation of production clause measured from date of nonpayment of shut-in royalties).

(n13)Footnote 801. *Bennet v. Sinclair Oil & Gas Co., 275 F. Supp. 886 (W.D. La. 1967).*

But if a lessee erroneously believes production is occurring and pays royalties based on its purchaser's error, the payment and acceptance of royalties by the lessor would not be equivalent to paying shut-in royalties. *Atkinson Gas Co. v. Albrecht, 878 S.W.2d 236 (Tex. App. 1994)* (lease terminated for lack of production).

(n14)Footnote 802. *See* 4 Kuntz, Lowe, Anderson, Pierce, and Smith, Oil and Gas Law § 46.3 (Anderson).

(n15)Footnote 803. *See* John S. Lowe, *Shut-in Royalty Payments*, 5 E. Min. L. Inst. 18-1 (1984).

(n16)Footnote 804. *Risinger v. Arkansas-Louisiana Gas Co., 3 So. 2d 289 (La. 1941).*

(n17)Footnote 805. *Greer v. Salmon, 479 P.2d 294 (N.M. 1970).*

(n18)Footnote 806. *See* § 49.35(a), *supra*.

(n19)Footnote 807. *Acquisitions, Inc. v. Frontier Explorations, Inc., 432 So. 2d 1095 (La. App. 1983).*

(n20)Footnote 808. *See* § 49.33(a), *supra*.

(n21)Footnote 809. *See Greer v. Salmon, 479 P.2d 294 (N.M. 1970)* (lease's Habendum Clause required only "producible well;" shut-in royalties still precondition for "production" under clause stating "while paid" would be equivalent to production).

(n22)Footnote 810. *Gard v. Kaiser, 582 P.2d 1311 (Okla. 1978); Blaser Farms, Inc. v. Anadarko Petr. Corp., 893 F.2d 259 (10th Cir. 1990)* (equity disallowed forfeiture despite lease stating nonpayment would terminate), *Roye Realty & Dev., Inc. v. Watson, 791 P.2d 821 (Okla. App. 1990). Compare Plymouth Fertilizer Co., Inc. v. Balmer, 488 N.E.2d 1129 (Ind. App. 1986)* (lease deemed abandoned by lack of shut-in royalties and lax marketing efforts).

Pack v. Santa Fe Minerals, 869 P.2d 323 (Okla. 1994) (no need to pay shut-in royalties).

(n23)Footnote 811. *See* § 49.33(a)(2), *supra* (marketing must be approached with reasonable diligence and within a reasonable period of time).

(n24)Footnote 812. *Griffin v. Crutcher-Tufts Corp., 500 So. 2d 1008 (Ala. 1986); Fisher v. Grace Petr. Corp., 830 P.2d 1380 (Okla. App. 1991).*

Hydrocarbon Mgmt., Inc. v. Tracker Exploration, Inc., 861 S.W.2d 427 (Tex. 1993) (well must be mechanically capable of producing).

(n25)Footnote 813. *Kidd v. Hoggett, 331 S.W.2d 515 (Tex. Civ. App. 1959).*

(n26)Footnote 814. *See* § 49.39(d)(2), *supra*.

(n27)Footnote 815. For an extensive discussion, see 4 Kuntz, Lowe, Anderson, Pierce, and Smith, Oil and Gas Law § 46.5(c) (Anderson).

(n28)Footnote 816. *See* 4 Kuntz, Lowe, Anderson, Pierce, and Smith, Oil and Gas Law § 46.5(c)(3) (Anderson).

(n29)Footnote 817. *Freeman v. Magnolia Petr. Co., 171 S.W.2d 339 (Tex. 1943)* (clause making payment equivalent to production required $50 per year but did not specify when payment was to be made).

(n30)Footnote 818. *Gulf Oil Corp. v. Reid, 337 S.W.2d 267 (Tex. 1960). See Marifarms Oil & Gas, Inc. v. Westhoff, 802 S.W.2d 123, 125-126 (Tex. Civ. App. 1991)* (explaining precedent).

(n31)Footnote 819. *Martin v. Kostner, 644 P.2d 430 (Kan. 1982)* (lease held by production occurring within the one year granted to pay shut-in royalty); *Cali-Ken Petr. Co., Inc. v. Slaven, 754 S.W.2d 64 (Tenn. App. 1988)* (need not pay until end of yearly period during which gas is not sold).

Additionally, cases dealing with shut-in wells define such a well as one temporarily not producing, as opposed to one that is to be put permanently in non-productive status. *See Norman v. Apache Corp., 19 F.3d 1017 (5th Cir. 1994); Cavanaugh v. O'Connell, 732 So. 2d 912 (Miss. 1999)* (stating that Mississippi has never defined the requirements for a shut-in well where the lease contains no definition; cessation of production and a dramatic slowing of activity did not create an abandonment when monthly production reports continued to be filed, equipment was left at the site and employees checked the site; under the deed, a shut-in well was included as a producing well).

(n32)Footnote 820. *Skelly Oil Co. v. Harris, 352 S.W.2d 950 (Tex. 1962); Duke v. Sun Oil Co., 320 F.2d 853, rehearing on proper anniversary date and timeliness of tender, 323 F.2d 518 (5th Cir. 1963), but see Gulf Oil Corp. v. Reid, 337 S.W. 2d 267 (Tex. 1960)* (when clause refers to time after "abandonment of well" payment of shut-in royalty would not suffice because shut-in well was not abandoned).

(n33)Footnote 821. *Phillips Petr. Co. v. Harnly, 348 S.W.2d 856 (Tex. Civ. App. 1961)* (annually only means once a year).

(n34)Footnote 822. *See Blaser Farms, Inc. v. Anadarko Petr. Corp., 893 F.2d 259 (10th Cir. 1990).*

(n35)Footnote 823. *Mayers v. Sanchez-O'Brien Minerals Corp., 670 S.W.2d 704 (Tex. Civ. App. 1984).*

(n36)Footnote 824. *See* P. Martin & B. Kramer, Williams & Meyers Oil and Gas Law § 633.5 (Matthew Bender) (lessee should pay because little authority on whether new payment due).

(n37)Footnote 825. *See* 4 Kuntz, Lowe, Anderson, Pierce, and Smith, Oil and Gas Law § 46.5(f) (Anderson).

(n38)Footnote 826. *Davis v. Laster, 138 So. 2d 558 (La. 1962); Vernon v. Union Oil Co., 270 F.2d 441 (5th Cir. 1959), rehearing denied, 273 F.2d 178 (5th Cir. 1960); Duke v. Sun Oil Co., 320 F.2d 853, rehearing on proper anniversary date and timeliness of tender, 323 F.2d 518 (5th Cir. 1963).*

(n39)Footnote 827. For an extensive consideration of the problem and approaches thereto, see 4 Kuntz, Lowe, Anderson, Pierce, and Smith, Oil and Gas Law § 46.4(d) (Anderson).

(n40)Footnote 828. *See Sinclair Oil & Gas Co. v. Bishop, 441 P.2d 436 (Okla. 1968)* (refusing to interpret clause as requiring well with high gas/oil ratio to be wastefully produced).

(n41)Footnote 829. *See Greer v. Salmon, 479 P.2d 294 (N.M. 1970)* (ruptured line foreclosed delivery to purchaser). *But see Tucker v. Hugoton Energy Corp., 855 P.2d 929 (Kan. 1993)*(clause may not be used if there is a market for gas).

Robert E. Beck, *Shutting In: For What Reasons and For How Long?, 33 Washburn L.J. 749 (1994).*

(n42)Footnote 830. *See* clause allowing for use after production occurs if the lessee "deem[s] it inadvisable to produce and sell gas from such well or wells," *Odom v. Union Producing Co., 141 So. 2d 649, 653 (La. 1961).*

(n43)Footnote 831. *See* § 49.59(a), *infra*. *See* also the definition of "production" under the minority view, § 49.33(a)(2), *supra* and Annotation, *Duty of Lessee or Assignee of Oil and Gas Lease as Regards Marketing or Delivery for Marketing of Oil & Gas Discovered, 71 A.L.R.2d 1219 (1960).*

(n44)Footnote 832. *Cf., Lelong v. Richardson, 126 So. 2d 819 (La. App. 1961)* (may only use for time during which diligent lessee would hold in order to secure market).

Robert E. Beck, *Shutting In: For What Reasons and For How Long?, 33 Washburn L.J. 749 (1994).*

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CHAPTER 49 PETROLEUM AND PIPELINES
IX. Shut-in Royalty, Pooling, and Force Majeure Clauses.

6-49 Thompson on Real Property, Thomas Editions § 49.44

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§ 49.44 Pooling and Unitization Clauses.n833

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§ 49.44(a) Meaning of Pooling and Unitization.

The terms "pooling" and "unitization" are often used loosely and interchangeably. "Pooling," however, means joining together tracts and interests in minerals to form a drilling or spacing unit under conservation rules. n834 The "pooled" interests would share in the expense and proceeds from the one well permitted per unit. "Unitization," on the other hand, refers to joining together of interests in a common reservoir in order to develop it pursuant to the best geological and engineering principles without concern for tract boundaries. n835 Unitization is most common for secondary and enhanced recovery activities. Waterfloods and other such pressurization techniques require use of the formation itself.

Most lease clauses expressly deal with pooling, not unitization. Without a lease term authorizing unitization, the lessor will have to consent to any unitization agreement. The law governing voluntary unitization, and the laws of various jurisdictions authorizing a conservation agency to approve a compulsory unit, will not be detailed. n836 Under the majority rule, however, an agreement either approved by a conservation agency or consented to by the lessor will modify the habendum clauses of the underlying leases to allow production or operations anywhere on the unit to satisfy each individual lease. Language to the contrary, of course, will prevent this result. n837

This chapter also will not extensively cover compulsory pooling, which allows a conservation agency to approve one party's application to pool interests in a drilling or spacing unit. All producing jurisdictions other than Kansas have provisions for compulsory pooling. n838 Kansas adjusts allowables based on acreage; even non-contiguous acreage may be assigned to a well to increase its allowable. n839 Texas's pooling law is limited to fields discovered after a certain date and to instances where the proponent has attempted voluntary pooling under fair and reasonable terms. n840 To otherwise account for small tract development, exceptions from spacing requirements are granted. n841

§ 49.44(b) Basic Form.

The pooling clause allows the lessee to unilaterally modify the rights of the lessor and lessee by allowing the lessee to combine all or part of the lease with other land for the purposes of complying with

operational duties and for sharing production. The clauses can differ in particulars, n842 but for the purposes of discussion, the following is a sample:

> Lessee may at any time or times pool any part or all of said land and lease or any stratum or strata, with other lands and leases, stratum or strata, in the same field so as to constitute a spacing unit to facilitate an orderly or uniform well spacing pattern or to comply with any order, rule, or regulation of the state or federal regulatory or conservation agency having jurisdiction. Such pooling shall be accomplished or terminated by the filing of record a declaration of pooling, or declaration of termination of pooling, and by mailing or tendering a copy to lessor, or to the depository bank. Drilling or re-working operations upon or production from any part of such spacing unit shall be considered for all purposes of this lease as operations or production from this lease. Lessee shall allocate to this lease the proportionate share of production which the acreage in this lease included in any such spacing unit bears to the total acreage in said spacing unit.

The lessee may pool or create a unit for operating purposes, which will directly modify where operations and production required by the lessee may be performed. Pooling also effects both the lessee's duty to pay and he lessor's right to receive royalty.

§ 49.44(c) Use in Primary Term.

If pooling is done in the primary term, drilling operations on the pooled unit, even if off the leasehold, will suffice for the lessee's drilling equirements so that delay rentals will not be needed. Moreover, if the operations for drilling are taking place on the last day of the primary term, the lease will be extended under the lease's operations clause. n843

§ 49.44(d) Use in Secondary Term.

After pooling, unit production, or continuous operations on the unit after the cessation of production, will allow the leasehold to be maintained even if the production or operations are not on the leasehold. n844 Despite the fact that a shut-in royalty clause refers to a well "on said land," if the pooling clause specifically states that operations on the pooled unit should be deemed as if on the leased land, a shut-in royalty payment should preserve a lease even if the shut-in unit well is off the leasehold. n845 One problem occurs if a unit well in a unit formed to produce gas produces oil and is considered an oil well. The oil production will not satisfy the habendum clause of all the committed leases n846 nor will the production be apportioned. n847 However, if production of pooled or unitized substances is achieved, all leases generally will be preserved for "all purposes," including rights to non-unitized substances. n848

§ 49.44(e) Effect of Production or Operations Within the Unit upon Acreage Within and Outside of the Unit.

§ 49.44(e)(1) Rule of Indivisibility.

The general rule is that a lease is indivisible, that is, operations or production anywhere on a lease preserves the entire leasehold. n849 Therefore, the entire lease will be preserved in the following situations:

1) All of the lease is in the unit and the unit well is on the leasehold;

2) All of the lease is in the unit and the unit well is not on the leasehold;

3) Only part of the lease is in the unit and the unit well is on the leasehold; n850 and

4) Only part of the lease is in the unit and the unit well is not on the leasehold. n851

Examples 1 and 3 merely reflect normal indivisibility because the leasehold itself has production. The lessor, however,

has to share the production with other mineral owners because it will be apportioned according to acreage included in the unit. The remaining two examples show how the pooling clause extends indivisibility: The entire lease will be maintained whenever production is attributed to any portion of the lease. From a financial perspective, moreover, the lessor has a reason to object to indivisibility in examples 3 and 4: all of the lease is held but royalties are computed and attributable only to the acreage within the unit. The remaining acreage is not "earning" any return for the lessor. n852

§ 49.44(e)(2) Effect of "Pugh" Clause.

In order to modify the result of the rule of indivisibility, a lessor's attorney by the name of "Pugh" drafted a clause. n853 The so-called "Pugh" clause may read as follows:

> Notwithstanding anything to the contrary herein contained, the commencement of operations for drilling, the drilling or reworking of a well, or the production of oil, gas, or other mineral from any well situated on lands included within a unit embracing a portion of the leased premises and other lands not covered hereby *shall serve only to maintain this lease in force as to that portion of the leased premises embraced in such unit*; but during the primary term delay rentals payable hereunder shall be proportionately reduced and be payable only on that portion of the leased premises not included in such unit.

The basic thrust of a Pugh Clause is that operations and production will only preserve that part of a leasehold included in a unit. n854 It traditionally is found as part of the pooling clause.

§ 49.44(e)(3) Scope of "Pugh" Clause.

In its traditional form, the Pugh Clause only operates if a unit combines both leased and unleased lands; it will not apply if a unit is comprised solely of lands subject to the lease. Nevertheless, a particular clause may state that it will operate in the latter situation. Moreover, some forms of the clause will only apply if the unit well was off the leasehold, not if the unit well is on the leasehold. n855 Similarly, clauses may be drafted so that they only apply to voluntary pooling, but not to units formed by compulsory pooling. n856 Therefore, clauses must be read carefully.

A final scope question is that the Pugh Clause generally refers to "lands" or "tracts" in units, but pooling clauses often allow the lessee to pool individual stratum. Courts have split on whether the Pugh Clause would horizontally divide the lease, preserving only those strata that have been unitized and releasing the remaining strata. n857 If there are multiple plays in an area, the lessor may expressly draft for this result.

§ 49.44(e)(4) Statutory Modification of Rule of Indivisibility.

Some jurisdictions have modified the rule of indivisibility by the statutory equivalent of a Pugh Clause, which applies when statutory drilling or spacing units are created. n858

§ 49.44(f) Allocation of Production.

Most pooling clauses specify that production will be allocated on the basis of proportionate acreage. n859 For example, if the unit is 160 acres and 80 acres are from one lease and 40 acres each from two other leases, the production would be allocated 80/160 or 1/2 to the 80 acre portion and 40/160 or 1/4 to each of the other leaseholds. The lessee will then pay royalty based on the lease's royalty provision. That is, the lessor of the 80-acre tract would be entitled to 1/2 the royalty reserved in the lease. Presuming a 1/8 royalty, this would be 1/16. n860 If the lease does not specify the method of allocation, it is possible that the allocation could be on a more sophisticated basis than simply acreage, such as a combination of acreage, pay zone thickness, and porosity.

§ 49.44(g) Methods of Achieving Pooling or Unitization.

§ 49.44(g)(1) Community Lease.

A "community lease" is one that contains multiple tracts and lessors. The tracts included may or may not be contiguous and the lease may have been executed in counterparts. If the community lease "pools" the tracts, it should authorize proportionate payment of royalties and avoid the need for internal offset wells to prevent drainage of individual lessor's tracts. Whether a community lease has this pooling effect differs from jurisdiction to jurisdiction. n861 In Texas, the execution of a community lease creates a strong presumption that pooling was intended, requiring clear evidence in the lease to rebut the presumption. n862 Oklahoma also finds a presumption that pooling was intended, but the rebuttal may be easier. n863 New Mexico finds no presumption. n864 Community leases are no longer used, most likely because more formal unitization and joint operating agreements are favored.

§ 49.44(g)(2) Basis and Authority of Lessee to Pool.

Absent authority in the lease, a lessee may not voluntarily pool the lessor's interest. n865 Therefore, pooling can only take place under the terms of a lease or a statutory provision. One exception is the doctrine of "equitable" or "judicial pooling," which appears limited to Mississippi and may be of less import after passage of its compulsory pooling act. Under it, drilling a well in an established drilling or spacing unit automatically pooled the interests. n866 Additionally, a lessor may validate an unauthorized pooling by conduct amounting to a ratification. Acceptance of a royalty check with knowledge that it is being paid because of production from a unit may be a ratification of the pooling n867 or work to estop the lessor from objecting. n868 Arguably, the lessor should only be estopped if the unit well was off the leasehold because only then would the lessor clearly be accepting the benefits of the unitization. n869

§ 49.44(h) Problems Under Pooling Clauses and with Unitization.

§ 49.44(h)(1) Exercise Within Authority of Lease.

Pooling clauses generally state when and for what purposes pooling may occur. Some clauses limit the lessee to pooling when necessary to create a drilling or spacing unit; others state that the lessee may pool when necessary "in the lessee's judgment" for orderly development and conservation." n870 Courts are generally liberal in finding that pooling is within the power granted the lessee because pooling fosters general conservation policy. n871

Nevertheless, lease terms may restrict lessee options. If there are limitations on the size of a unit, these limits will be strictly construed, n872 but larger units may be allowed under the authority of compulsory pooling orders. n873

On proper timing of pooling, the lessee may pool whenever the lease is in existence. n874 Pooling at the end at the primary term is authorized n875 and the lessee may exercise the power more than once if the lessee is acting in good faith and the pooling clause is silent on how often it may be used. n876 When a lease refers to pooling for development, however, courts generally required pooling before production, justifying this result on the belief that the clause was designed to enable drill sites to be chosen regardless of lease boundaries. n877

Current leases generally do not limit the power to pool to development only. They allow pooling after production when they authorize pooling "when in the lessee's judgment it is necessary or advisable to do so in order to properly develop and operate said leased premises" n878 or "before or after production." n879 Leases also may expressly allow the lessee to include land on which production is present. Naturally, the lessors may claim the pooling was done in bad faith. The lessor of the productive land, who now must share royalties, and the lessor of the non-developed land, whose lease's habendum clause is now satisfied, may both object.

§ 49.44(h)(2) Compliance with Formal Requirements.

Pooling clauses often require that a declaration of pooling be filed of record. These and other formal requirements are strictly construed. Pooling will not be effective until they are performed, which could affect the timeliness of the

pooling for purposes of extending or maintaining a lease. n880 Moreover, the pooling must be done by the lessee or a duly authorized agent of the lessee. n881

§ 49.44(h)(3) Exercise in Good Faith: Pooling and Unitization.

A theoretically different question from whether the lease authorizes the exercise of pooling is whether the exercise of the power is proper under the circumstances. n882 Often, a lessee desires to preserve multiple leases by including some acreage from each in a unit. For example, a 160-acre unit may contain 100 acres from one lease and 10 acres from each of six other leases. When such pooling is done near the end of primary terms and results in extending many leases, lessors often object. Courts have provided standards to judge the pooling.

Because the lessee has the power to alter the lessor's rights through pooling, the lessee is under a duty to act fairly and in good faith. n883 The source and dimensions of this duty are unclear. The lessee is neither the lessee's true agent nor a fiduciary. n884 The lessee may consider its own interests when it pools.

Nevertheless, courts inquire about whether there is a bona fide geological or development rationale for the pooling. Simply because the lessee acted at the last moment n885 or gerrymandered to preserve acreage will not necessarily indicate bad faith. n886 Including non-productive land or excluding presumptively productive acreage, however, would tend to show bad faith. n887 Similar findings result if the lessee is simply attempting to preserve leases without any plan to develop the acreage so held. n888 One case listed relevant factors as including: 1) whether one well could recover the maximum amount; 2) whether a fair distribution of proceeds would result; 3) whether additional wells were economically feasible; and 4) whether additional wells would affect the ultimate recovery of gas or impact oil recovery from adjacent lands. n889 Some cases have also looked at subjective intent when examining the propriety of pooling. n890 Cancellation was an appropriate remedy if the pooling was unfair, arbitrary, not in good faith, contrary to the purposes of the lease or injurious to the lessor. n891

Lessees are also under a duty to act in good faith when they seek field unitization orders from the relevant conservation agencies. The Tenth Circuit in Amoco Prod. Co. v. Heimann n892 explained that the duty is not that of a fiduciary. Furthermore, good faith does not require the lessee to disclose all geological facts nor require cooperation with the lessor. The lessee does not have unbridled discretion in unitization, but where the unitization requires approval by the conservation agency, the danger of lessee unfairness is ameliorated. In *Heimann*, when the agency concluded that the agreement protected correlative rights after a contested agency hearing, this determination included components of the lessee's good faith duty; the court therefore need not re-litigate the issue. n893 In a situation without a contested hearing, a court might be more active. n894

§ 49.44(h)(4) Duty to Exercise Power.

If a well is producing on or is about to be drilled on adjacent property with which a leasehold could be pooled, and this is the only well that could be drilled in a spacing unit, the lessee may have a duty to pool the lease so the lessor could share in production from this well. The duty may be a part of implied covenants to prevent drainage n895 or to seek favorable administrative action. n896

§ 49.44(h)(5) Cross-Conveyance Theory.

Texas and other jurisdictions adopted a cross-conveyance theory to explain pooling and unitization. n897 Under this theory, each party to the pooling or unitization agreement conveys an interest in their individual property to the others. The theory may affect the following: whether all parties must be included in any lawsuit, the ability for one party to unilaterally leave the agreement, the applicability of the Statute of Frauds and other conveyancing doctrines, venue selection and other matters. n898 To avoid the problems, agreements often expressly disclaim cross-conveyances, even in Texas. n899 Oklahoma, Kansas, and West Virginia have rejected the theory. n900 Additionally, the majority of

jurisdictions, even if they have not verbalized their rationales explicitly, appear to follow a contractual theory to justify the sharing of proceeds. n901

§ 49.44(h)(6) Effect of Pooling on the Non-Executive.

In Texas n902 and other states, n903 the lessee's power to pool a lease will not bind a non-executive interest in the property. For example, a royalty owner may have a non-participating royalty interest in the west half of a section. The lessee may pool this half-section with the east half to create a 640 acre unit, which would apportion the lessor's royalty regardless of the location of the well. The non-participating royalty, however, would be owed in full if the well was located on the west half if the royalty owner did not ratify the pooling. Conversely, if the non-participating royalty owner does not ratify the pooling, the royalty owner would not share in any proceeds of a well on the east half. Louisiana has case law to the contrary of Texas, holding that the non-executive is bound by pooling clauses in a lease; the self-interest of the executive is considered sufficient to protect the non-executive from imprudent lease terms. n904

In all jurisdictions, the non-executive does have the power to ratify pooling. n905 This is because without such power, the non-executive would be at the mercy of the executive. The land subject to the royalty could potentially never be developed if included in a larger lease or a lease with a pooling clause. Therefore, a royalty owner may ratify a pooling agreement if the action is taken promptly. n906

§ 49.44(h)(7) Conflict with Rule Against Perpetuities.

The right to pool may create rights to share in the proceeds of production on lands not owned by the lessor and enable others to share in proceeds from the lessor's lands. Because of this, some analogize the right to pool with the right to create future interests in the property of another. Therefore, if unlimited in time, it could violate the Rule Against Perpetuities. n907 Although the few cases considering the matter rejected the attack, n908 many drafters limit the time in which pooling could occur to twenty-one years.

FOOTNOTES:

(n1)Footnote 833. For additional discussion of this topic, see Bruce M. Kramer and Patrick Martin, The Law of Pooling and Unitization (Matthew Bender).

(n2)Footnote 834. *Whelan v. Manziel, 314 S.W.2d 126 (Tex. Civ. App. 1958).*

Southeastern Pipe Line Co. v. Tichacek, 997 S.W.2d 166 (Tex. 1999). (Pooling by lessee was in good faith and hypothetical units preferred by the lessor were irrelevant in the calculation of drainage damages).

(n3)Footnote 835. *Amoco Prod. Co. v. Ware, 602 S.W.2d 620 (Ark. 1980).* Expenses will be proportionately shared. *Branch v. Mobil Oil Corp., 788 F. Supp. 531 (W.D. Okla. 1991)* (pollution clean-up costs and damages are "unit expenses").

(n4)Footnote 836. Generally, statutes allowing compulsory pooling require a percentage of interest owners to voluntarily agree. *See* Bruce M. Kramer and Patrick Martin, The Law of Pooling and Unitization (Matthew Bender); Owen C. Anderson, *Mutiny: The Revolt Against Unsuccessful Unit Operations, 30 Rocky Mtn. Min. L. Inst. 13-1, 13-3-13-8 (1984).*

(n5)Footnote 837. *Akandas, Inc. v. Klippel, 827 P.2d 37 (Kan. 1992).*

(n6)Footnote 838. *See generally* Annotation, *Validity of Compulsory Pooling or Unitization Statute or Ordinance Requiring Owners or Lessees of Oil and Gas Lands to Develop Their Holdings as a Single Drilling Unit or the Like, 37 A.L.R.2d 438 1954).*

(n7)Footnote 839. *See* 1 Pierce, *supra* note 320, at §§ 3.08-3.11 (1986); *Mobil Oil Corp. v. State Corp. Comm'n, 608 P.2d 1325 (Kan. 1980).*

(n8)Footnote 840. Texas Interest Pooling Act, Tex. Nat. Res. Code Ann. §§ 102.001 *102.112. See* 3 Earnest Smith & Jacqueline Weaver, Texas Law Of Oil And Gas § 12 (1990); *Railroad Comm'n of Texas v. Broussard, 755 S.W.2d 951 (Tex. App. 1988).*

(n9)Footnote 841. For details on these so-called Rule 37 exceptions, *see* 1 Summers, *supra* note 32, at § 86.

(n10)Footnote 842. *See inter alia*, §§ 49.44(h)(1)-49.44(h)(2), *infra* and P. Martin & B. Kramer, Williams & Meyers Oil and Gas Law §§ 669.1-669.31 (Matthew Bender); 4 Kuntz, Lowe, Anderson, Pierce, and Smith, Oil and Gas Law § 48.3(a)(1).

(n11)Footnote 843. *See* § 49.40, *supra*.

(n12)Footnote 844. *See generally* 4 Kuntz, Lowe, Anderson, Pierce, and Smith, Oil and Gas Law § 48.3(a)(2) (Anderson).

(n13)Footnote 845. *Odom v. Union Producing Co., 141 So. 2d 649 (La. 1961); Jones v. Bronco Oil & Gas Co., 446 So. 2d 611 (Ala. 1984),* but *see Federal Land Bank of New Orleans v. Terra Resources, Inc., 373 So. 2d 314 (Ala. 1979)* (lease did not require shut-in royalty payments under clause specifying well "on the premises"; rental payments could be tendered). *See* 4 Kuntz, Lowe, Anderson, Pierce, and Smith, Oil and Gas Law § 46.4(f) (Anderson).

(n14)Footnote 846. *Diggs v. Cities Serv. Co., 241 F.2d 425 (10th Cir. 1957)* (well a gas well).

(n15)Footnote 847. *Skelly Oil Co. v. Savage, 447 P.2d 395 (Kan. 1968).* Liquids produced from a gas well, however, would be apportioned.

(n16)Footnote 848. *Martin v. Kostner, 644 P.2d 430 (Kan. 1982).*

Osborn v. Anadarko Petroleum Corp., 996 P.2d 9 (Wyo. 2000). Conversion of an oil and gas well from extraction to water injection for purposes of secondary recovery operations, when that well is part of a pooled unit and retains its share of production in the unit, does not constitute abandonment so as to allow the owners of an overriding royalty interest to convert their interest unto a 50% working interest.

(n17)Footnote 849. *Meaher v. Getty Oil Co., 450 So. 2d 443 (Ala. 1984)* (Habendum Clause indivisible absent Pugh Clause). *See* Annotation, *Production On One Tract as Extending Term on Other Tract Where One Mineral Lease Conveys Oil or Gas Rights in Separate Tracts for as Long as Oil or Gas is Produced, 35 A.L.R.4th 1167 (1985).*

(n18)Footnote 850. *Wells v. Continental Oil Co., 142 So. 2d 215 (Miss. 1962).*

(n19)Footnote 851. *Texaco, Inc. v. Lettermann, 343 S.W.2d 726 (Tex. Civ. App. 1961)* Professors Williams and Meyers cautioned that the cases are unclear in this situation. P. Martin & B. Kramer, Williams & Meyers Oil and Gas Law § 953 (Matthew Bender).

(n20)Footnote 852. Implied covenants of further development may require additional drilling. *See* § 49.57, *infra*. A fifth situation exists, namely that part of the lease is included in the unit and production is on the non-unitized portion of the lease. *See generally* P. Martin & B. Kramer, Williams & Meyers Oil and Gas Law §§ 669.14, 953 (Matthew Bender).

(n21)Footnote 853. *See* explanation of origin of clause in *Bibler Brothers Timber Corp. v. Tojac Minerals, Inc., 664 S.W.2d 472, 474 (Ark. 1984).*

(n22)Footnote 854. *Id.* (clause that merely requires rental payments on land not included in unit is not Pugh Clause).

Cf. Egeland v. Continental Resources, 616 N.W.2d 861 (N.D. 2000). Where the court reconciled the Pugh clause and the habendum and continuous drilling clauses of the lease and found that the Pugh clause did not terminate leases as to those lands not committed to a producing spacing unit. The leases could be extended by continuous drilling operations.

(n23)Footnote 855. *Bennet v. Sinclair Oil and Gas Co., 275 F. Supp. 886, 892 (W.D. La. 1967).*

(n24)Footnote 856. *Id.*

(n25)Footnote 857. *Compare Rogers v. Westhoma Oil Co., 291 F.2d 726 (10th Cir. 1961)* (yes); with, *Martens v. Kaiser-Francis Oil Co., 768 P.2d 383 (Okla. App. 1989)* (no) and *Friedrich v. Amoco Prod. Co., 698 S.W.2d 748 (Tex. App. 1985).*

(n26)Footnote 858. *See, e.g.*, 52 Okla. Stat. Ann. § 87.1(b) (if spacing unit exceeds 160 acres, production will not hold leasehold outside unit more than 90 days after end of primary term); Ark. Stat. § 15-73-201 (allows lease to continue if additional exploration); and Miss. Code § 53-3-111.

(n27)Footnote 859. Rarely, the clause will state that royalties are not to be apportioned. *See Phillips Petr. Co. v. Mcllroy, 178 F. Supp. 107 (N.D. Tex. 1959).*

(n28)Footnote 860. This example presumes that all lessors are participating in a particular sale of gas or oil. More complex problems arise if there are "split stream sales." For example, Oklahoma by statute requires all lessors to be compensated from each sale. The Production Revenue Standards Act, 52 Okla. Stat. §§ 570.1-570.15 (1992). *See generally* Mark A. Moore, *Oklahoma's Production Revenue Standards Act -- Where's Waldo Now?, 63 Okla. B.J. 3858* (Dec. 31, 1992) and 5 Kuntz, Lowe, Anderson, Pierce, and Smith, Oil and Gas Law § 77.3(f) (Anderson).

(n29)Footnote 861. *See* Annotation, *Rights in Respect of Rents or Royalties Earned Under an Oil and Gas Lease or Other Grant of Mineral Rights in Which Owners of Different Tracts Join as Lessors*, 116 A.L.R. 1267.

(n30)Footnote 862. *French v. George, 159 S.W.2d 566 (Tex. Civ. App. 1942).*

(n31)Footnote 863. *Peerless Oil & Gas Co. v. Tipken, 124 P.2d 418 (Okla. 1942); Stroud v. D-X Sunray Oil Co., 376 P.2d 1015 (Okla. 1962).*

(n32)Footnote 864. *Leonard v. Barnes, 404 P.2d 292 (N.M. 1965)* (no single overall description of land).

(n33)Footnote 865. *Nisbet v. Midwest Oil Corp., 451 P.2d 687 (Okla. 1968)* (if no pooling clause, lessee may only seek compulsory order).

(n34)Footnote 866. *Superior Oil Co. v. Foote, 59 So. 2d 85 (Miss. 1952), suggestion of error overruled, 59 So. 2d 849* (discussing statute). *See generally* P. Martin & B. Kramer, Williams & Meyers Oil and Gas Law § 906.1 (Matthew Bender).

(n35)Footnote 867. *Leopold v. Stanolind Oil & Gas Co., 220 S.W.2d 259, 264 (Tex. Civ. App. 1949); Yelderman v. McCarthy, 474 S.W.2d 781* (Tex. Civ. App. 1971 (acceptance of royalty checks from too-large a unit a ratification despite restrictive endorsement on check).

(n36)Footnote 868. *Grimes v. Dorchester Gas Producing Co., 707 S.W.2d 196 (Tex. Civ. App. 1986)* (cannot question propriety of consolidated area).

(n37)Footnote 869. *See Burnett v. Perkins, 523 So. 2d 106 (Ala. 1988)* (unauthorized pooling ratified when lessor

sued to collect share of royalty from well not on leasehold); *cf. Southland Royalty Co. v. F.P.C., 543 F.2d 1134 (5th Cir. 1976)* (acceptance by reversioner of royalties did not ratify dedication to interstate commerce because royalties owed under lease).

(n38)Footnote 870. *See* clause involved in *Boone v. Kerr-McGee Oil Indus., 217 F.2d 63 (10th Cir. 1954).*

(n39)Footnote 871. *Texaco, Inc. v. Lettermann, 343 S.W.2d 726 (Tex. Civ. App. 1961).*

(n40)Footnote 872. *Jones v. Killingsworth, 403 S.W.2d 325 (Tex. 1965); Sauder v. Frye, 613 S.W.2d 63 (Tex. Civ. App. 1981). See* 4 Kuntz, Lowe, Anderson, Pierce, and Smith, Oil and Gas Law § 48(d)(3) (Anderson).

(n41)Footnote 873. *Gordon v. Crown Central Petr. Co., 679 S.W.2d 192 (Ark. 1984)* (no breach if third party requested larger unit and received compulsory pooling order); *Vogel v. Tenneco Oil Co., 465 F.2d 563 (D.C. Cir. 1972)* (lessee may seek larger compulsory unit and approval of unit modifies lease size restriction).

(n42)Footnote 874. If a lease is alive for limited purposes, such as complying with the dry whole clause which anticipates additional operations, the lessee cannot simply pool the property with productive land. *Humble Oil & Ref. Co. v. Kunkel, 366 S.W.2d 236 (Tex. Civ. App. 1963), but see Harper v. Hudson Gas & Oil Co., 189 F. Supp. 781 (W.D. La. 1960), aff'd, 299 F.2d 238 (5th Cir. 1962)* (can save lease in that manner) and *Owens v. Superior Oil Co., 730 P.2d 458 (N.M. 1986)* (may pool and then drill to production).

(n43)Footnote 875. *Boone v. Kerr-McGee Oil Indus., 217 F.2d 63 (10th Cir. 1954).*

(n44)Footnote 876. *Texaco, Inc. v. Lettermann, 343 S.W.2d 726 (Tex. Civ. App. 1961).*

(n45)Footnote 877. *Humble Oil & Ref. Co. v. Kunkel, 366 S.W.2d 236 (Tex. Civ. App. 1963); Mallet v. Union Oil & Gas Corp., 94 So. 2d 16 (La. 1957). See also Imes v. Globe Oil & Ref. Co., 84 P.2d 1106 (Okla. 1938)* (allowing lessee to pool "at any time" not sufficient to allow lessee to combine non-productive acreage with producing well), *distinguished in, Gillham v. Jenkins, 244 P.2d 291 (Okla. 1952)* (pooling after production to get sufficient acreage to meet wartime rules not bad faith).

(n46)Footnote 878. *Harper v. Hudson Gas & Oil Co., 189 F. Supp. 781 (W.D. La. 1960), aff'd, 299 F.2d 238 (5th Cir. 1962).*

(n47)Footnote 879. *See Odom v. Union Producing Co., 141 So. 2d 649, 653 (La. 1961).*

(n48)Footnote 880. *Sauder v. Frye, 613 S.W.2d 63 (Tex. Civ. App. 1981).*

(n49)Footnote 881. *Pampell Interests, Inc. v. Wolle, 797 S.W.2d 392 (Tex. App. 1990)* (pooling ineffective because designation of pooling failed to state that apparent stranger to title was agent of lessee).

(n50)Footnote 882. *See* 4 Kuntz, Lowe, Anderson, Pierce, and Smith, Oil and Gas Law § 48.3(c)(1) (Anderson), arguing that an unauthorized exercise is simply ineffective, but that when the lessee has improperly exercised the power, the court may have a choice of remedy.

(n51)Footnote 883. *Imes v. Globe Oil & Ref. Co., 84 P.2d 1106, 1109 (Okla. 1938)* (lessee "virtually the agent" of lessors).

(n52)Footnote 884. *Elliot v. Davis, 553 S.W.2d 223 (Tex. Civ. App. 1977). See generally* 4 Kuntz, Lowe, Anderson, Pierce, and Smith, Oil and Gas Law § 48.3(g) (Anderson).

(n53)Footnote 885. *Boone v. Kerr-McGee Oil Indus., 217 F.2d 63 (10th Cir. 1954).*

(n54)Footnote 886. *Elliot v. Davis, 553 S.W.2d 223 (Tex. Civ. App. 1977), writ refused* n.r.e. (gerrymandering, late exercise, and failure to use geological evidence only raises fact issue on bad faith).

(n55)Footnote 887. *Southwest Gas Prod. Co. v. Seale, 191 So. 2d 115 (Miss. 1966)* (unproductive included); *Amoco Prod. Co. v. Underwood, 558 S.W.2d 509 (Tex. Civ. App. 1977), error refused* n.r.e. (unproductive included; productive excluded).

(n56)Footnote 888. *Id.*

(n57)Footnote 889. *Boone v. Kerr-McGee Oil Indus., 217 F.2d 63 (10th Cir. 1954).*

(n58)Footnote 890. *Diggs v. Cities Serv. Oil Co., 241 F.2d 425 (10th Cir. 1957)* (acted in reliance on experts and expended large sums). *But see Froholm v. Cox, 934 F.2d 959 (8th Cir. 1991)* (under clause as written geological justification equivalent to good faith and no examination of subjective intent).

(n59)Footnote 891. *McDonald v. Grande Corp., 214 So. 2d 795 (La. App. 1968).*

(n60)Footnote 892. *904 F.2d 1405 (10th Cir. 1990)* (dealing with commitment of lease to a 1 million acre unit with royalties computed on an acreage basis). The court seemingly limited the effect of its rather expansive reading of the duty in *Amoco Prod. Co. v. Jacobs, 746 F.2d 1394 (10th Cir. 1984).*

(n61)Footnote 893. *Amoco Prod. Co. v. Heimann, 904 F.2d 1405 (10th Cir. 1990).*

(n62)Footnote 894. *Cf. Leck v. Continental Oil Co., 800 P.2d 224 (Okla. 1989)* (court alone has jurisdiction over breach of contract claims in contract dispute), *distinguished, Amoco Prod. Co. v. Heimann, 904 F.2d 1405 (10th Cir. 1990)* (Oklahoma court did not discuss res judicata or collateral estoppel effect of a prior agency proceeding).

cert. denied, 498 U.S. 942 (1990).

(n63)Footnote 895. *Williams v. Humble Oil & Ref. Co., 432 F.2d 165 (5th Cir. 1965). See* § 49.58(a) *infra*.

(n64)Footnote 896. *See* § 49.59(c), *infra*.

(n65)Footnote 897. *Veal v. Thomason, 159 S.W.2d 472 (Tex. 1942).* Precedent is strongest when a community lease is involved. *See generally* 5 Summers, *supra* note 32, at § 956. Williams & Meyers indicated that the theory is probably also adopted in California, Mississippi and Illinois. *See* P. Martin & B. Kramer, Williams & Meyers Oil and Gas Law § 930 (Matthew Bender).

Union Pacific Resources Co. v. Hutchison, 990 S.W.2d (Tex. App. 1999) (states that under the principle of cross-conveyancing, the owners of minerals under the several tracts pooled owned undivided interests in proportion to their contribution of acreage. A royalty owner's consent to the pooling is required.).

(n66)Footnote 898. *See generally* P. Martin & B. Kramer, Williams & Meyers Oil and Gas Law § 929.1 (Matthew Bender).

(n67)Footnote 899. Apparently, they are viewed as effective. *Phillips v. Petr. Co. v. Peterson, 218 F.2d 926 (10th Cir. 1954), cert. denied, 349 U.S. 947 (1955). But see* P. Martin & B. Kramer, Williams & Meyers Oil and Gas Law § 929.2 (Matthew Bender) (doubts ability to privately "make law").

(n68)Footnote 900. *Phillips v. Petr. Co. v. Peterson, 218 F.2d 926, 935 n.7 (10th Cir. 1954), cert. denied, 349 U.S. 947 (1955)* (collecting cases). The theory is probably also rejected in Montana and Louisiana. *See* P. Martin & B. Kramer, Williams & Meyers Oil and Gas Law § 930 (Matthew Bender).

(n69)Footnote 901. *See generally* 5 Summers, *supra* note 32, at § 956.

(n70)Footnote 902. Jones Oil Co. v. Pend Oreille Oil & Gas Co., No. 13-89-481-*CV, 1990 Tex. App. LEXIS 1599* (June 29, 1990); *Brown v. Getty Reserve Oil, Inc., 626 S.W.2d 810 (Tex. App. 1981); London v. Merriman, 756 S.W.2d 736 (Tex. Civ. App. 1988).* For the effect on term mineral interests, *see* § 49.13(d), *supra*. *See also Southland Royalty Co. v. Humble Oil & Ref. Co., 249 S.W.2d 914 (Tex. 1952)* (term owner and reversioner executed one lease; community lease resulted and well off the land with the term interest but in lease held term).

(n71)Footnote 903. *Moncrief v. Harvey, 816 P.2d 97 (Wyo. 1991).*

(n72)Footnote 904. *La Blanc v. Haynesville Mercantile Co., 88 So. 2d 377 (La. 1956).* For arguments in support of this position, *see* P. Martin & B. Kramer, Williams & Meyers Oil and Gas Law § 925.1 (Matthew Bender).

(n73)Footnote 905. *Burnett v. Perkins, 523 So. 2d 106 (Ala. 1988)* (suing for share of royalties is a ratification; court does not address whether executive can bind unilaterally).

(n74)Footnote 906. *Ruiz v. Martin, 559 S.W.2d 839 (Tex. Civ. App. 1977); London v. Merriman, 756 S.W.2d 736 (Tex. Civ. App. 1988).*

(n75)Footnote 907. *Phillips v. Petr. Co. v. Peterson, 218 F.2d 926 (10th Cir. 1954), cert. denied, 349 U.S. 947 (1955)* (pooling invalid under cross conveyance theory, not under contract theory).

(n76)Footnote 908. *Id.* (Utah follows contractual theory of pooling); *Kenoyer v. Magnolia Petr. Co., 245 P.2d 176 (Kan. 1952)* (lease creates present vested estate not subject to rule).

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CHAPTER 49 PETROLEUM AND PIPELINES
IX. Shut-in Royalty, Pooling, and Force Majeure Clauses.

6-49 Thompson on Real Property, Thomas Editions § 49.45

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§ 49.45 *Force Majeure* Clauses.

§ 49.45(a) Rationale for Inclusion.

A *force majeure* clause attempts to excuse non-performance when causes outside the control of the lessee render performance impossible. Naturally, the clause is most important if the required performance is a special limitation on the leasehold, such as the need to conduct operations or to produce to preserve the lease.

§ 49.45(b) Basic Form.

Force majeure clauses vary in their coverage and detail. n909 All state that a lease will not terminate if the described force majeure events prevent the specified types of performance. Often the clauses also state that if the events occur in the primary term, the primary term will be extended. n910 A short example follows:

> The drilling and operating requirements of this lease shall be suspended while, but only as long as lessee is prevented from complying therewith, in whole or in part, by strikes, lockouts, war or inability (other than financial) of Lessee to obtain material or supplies, as well as delays in transportation, accidents and other matters of any kind or nature whatsoever beyond the control of Lessee. n911

Even without a *force majeure* clause, equitable concerns sometimes will prevent a lease from termination. n912 If, however, a *force majeure* clause covers some items and not others, a court might state that the performance is not excused by the happening of a non-covered event.

§ 49.45(c) Interpretation.

Force majeure clauses generally are construed strictly, n913 at least in reported cases. n914 "Beyond the control of the lessee," rather than being a shibboleth allowing wide-ranging relief, is treated more as a limitation on the clause's operation. n915 One way to approach a *force majeure* problem is to ask three questions: 1) is the performance that has not been performed covered by the clause?; 2) is the event that has purportedly prevented performance contained in the clause?; and 3) did the alleged preventing event actually prevent performance? n916

For an example of the first problem, presume that drilling at the end of the primary term did not occur. The clause quoted in § 49.45(b) refers to "drilling requirements" and most likely would cover the inability to drill at the end of the primary term. n917 A clause, however, that merely refers to "all obligations [of the lessee], express and implied" may not cover this drilling. The lessee is not obligated to drill at any time in the primary term.

The next question asks whether the preventing event is contained in the clause. Most *force majeure* clauses end with a catch-all to include all items "beyond the control of the lessee" and some even add "whether similar or not" to those listed. Nevertheless, most courts employ some version of ejusdem generis. For example, operations of a bankruptcy court will be sufficiently similar to an "order of government," n918 but heavy rains would not be a "flood" or "act of God" if the rains were seasonal and predictable. n919

Predictability also enters into the final question: did the alleged preventing event actually prevent performance? If the problem was predictable, the lessee should have provided for alternative means of performance. n920 If there are alternative ways to perform, the event did not cause the non-performance. n921 Increases in expenses and decreases in prices paid for oil or gas are generally deemed predictable and not force majeure events. n922 Additionally, even if a clause refers to the event as causing the non-performance "in whole or in part," courts tend to require the *force majeure* event to be the sole cause of the problem.

FOOTNOTES:

(n1)Footnote 909. *See* 4 Kuntz, Lowe, Anderson, Pierce, and Smith, Oil and Gas Law § 53.5 (Anderson); Richard W. Hemingway, The Law of Oil and Gas § 7.11 (2d ed. 1983). *See* Annotation, *Gas & Oil Lease Force Majeure Provisions, Construction and Effect, 46 A.L.R.4th 978 (1986).*

(n2)Footnote 910. *See, e.g.*, clause in *Gilbert v. Smedley, 612 S.W.2d 270, 272 (Tex. Civ. App. 1981).*

(n3)Footnote 911. *Prairie Oil Co. v. Carleton, 205 P.2d 81, 83 (Cal. App. 1949).*

(n4)Footnote 912. *See, e.g.*, temporary cessation doctrine, § 49.33(e), *infra*.

(n5)Footnote 913. *See generally* Kirkahm, *Force Majeure -- Does it Really Work?, 30 Rocky Mtn. Min. L. Inst. 6-1 (1984);* Annotation, *Gas & Oil Lease Force Majeure* Provisions, Construction and Effect, *46 A.L.R.4th 978 (1986).*

R & B Falcon Corp. v. American Exploration Co., 154 F. Supp. 2d 969 (S.D. Tex 2001) (where a *force majeure* clause in an offshore drilling contract was not applicable to interruption of production resulting from damage to the drilling rig caused by a seabed anomaly or circumstances unknown. There was no act of God because there was no event attributable to nature).

(n6)Footnote 914. The reported cases often involve a lessee that has genuinely tried the patience of the lessor. A well-written *force majeure* clause may provide the lessee with a reasonable track record with relief directly from the lessor without the need of suit.

(n7)Footnote 915. *Cf. Gilbert v. Smedley, 612 S.W.2d 270 (Tex. Civ. App. 1981)* (lack of materials cannot be pled if lessee used materials on another lease); *Perlman v. Pioneer Ltd. P'ship, 918 F.2d 1244 (5th Cir. 1990)* (Need actual material hindrance). *See also*, "sole cause" cases.

Sun Operating Ltd. Partnership v. Holt, 984 S.W.2d 277 (Tex. App. 1998) (the long list of excuses for delays and interruptions in production set forth in a *force majeure* clause was applicable only when the event was outside of the lessee's control).

(n8)Footnote 916. *See* 4 Kuntz, Lowe, Anderson, Pierce, and Smith, Oil and Gas Law § 53.5 (Anderson).

(n9)Footnote 917. *But see Illinois Mid-Continent Co. v. Tennis, 102 N.E.2d 390 (Ind. App. 1951)* ("drilling obligations" in clause did not allow extension of primary term when drilling frustrated in final year of primary term).

(n10)Footnote 918. *Gilbert v. Smedley, 612 S.W.2d 270 (Tex. Civ. App. 1981).*

(n11)Footnote 919. *Logan v. Blaxton, 71 So. 2d 675 (La. App. 1954).*

(n12)Footnote 920. *Id.* (smaller trucks could be used to market oil if muddy roads prevent use of larger trucks).

Hydrocarbon Mgmt., Inc. v. Tracker Exploration, Inc., 861 S.W.2d 427 (Tex. 1993) (shut-in because of prior over-production was action within the control of the lessee and therefore not a *force majeure* excuse for non-production); *Atkinson Gas Co. v. Albrecht, 878 S.W.2d 236 (Tex. 1994)* (*force majeure* clause did not excuse production when the Railroad Commission sealed the well because lessee's failures caused the sealing; compliance with regulations was within the reasonable control of the lessee).

(n13)Footnote 921. *Woods v. Ratliff, 407 So. 2d 1375 (La. App. 1981)* (not excused from non-production during time used to repair pump if could have used temporary pump).

Exploracion De La Estrella Soloataria Inc. v. Birdwell, 858 S.W.2d 549 (Tex. 1993) (if purported *force majeure* event occurred after the time stipulated for performance, it could not excuse non-performance).

(n14)Footnote 922. *Butler v. Nepple, 354 P.2d 239 (Cal. 1960). Cf. Espanade Oil & Gas Co. v. Templeton Energy Income Corp., 889 F.2d 621 (5th Cir. 1989)* (plunge in price of oil did not make purchase of mineral interest impossible under *force majeure*); *Golsen v. ONG Western, Inc., 756 P.2d 1209 (Okla. 1988)* (plunge in price of gas not *force majeure* under gas take-or-pay contract); *but see Kodiak 1981 Drilling v. Delhi Gas Pipeline, 736 S.W.2d 715 (Tex. App. 1987)* (clause including "partial or entire failure to gas supply or market" excuses when general market failure occurred).

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CHAPTER 49 PETROLEUM AND PIPELINES
X. The Lease Royalty Clause

6-49 Thompson on Real Property, Thomas Editions § 49.46

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§ 49.46 Implications of General Form of Oil and Gas Royalties.

Oil and gas royalties generally are expressed in terms of a percentage, rather than as a fixed sum per unit of oil or gas produced. The percentage formula hedges against uncertainty; return for the lessor is tied to production. Some leases further link the lessor's return to the amount of production by either providing a sliding scale for royalties, which increases the royalty percentage if production is higher, or by increasing royalties after "pay-out," which is recovery of drilling costs. n923 Therefore, the lessor's return varies with the lessee's cost recovery.

The majority of leases, however, have a fixed royalty. Prior to the 1970s, the generally accepted royalty was 1/8 in all but California, where 1/6 (or 162/3%) was usual. The royalty, however, is negotiable. n924 During the last boom cycle, royalties of 1/6 and 3/16 were common. Competitive areas could command higher royalties.

§ 49.46(a) Oil "In Kind."

The basic oil and gas lease generally provides that the royalty on oil is an agreed upon fraction of oil produced. n925 For example, the lessee may agree to pay as royalty:

> On oil, 1/8 of that produced and saved from said land, the same to be delivered at the wells or to the credit of Lessor into the pipelines to which the wells may be connected. Lessee shall have the option to purchase any royalty oil in its possession, paying the market price therefore prevailing for the field where produced on the date of purchase.

The oil royalty phrased in this manner is due "in kind." The lessor has a right to the oil itself and owns the royalty oil. Therefore, the royalty share is "reserved" from the lessee's working interest and never passed to the lessee. The quoted clause allowing the lessee to purchase the oil acknowledges this. Some modern forms delete the in kind reference and treat oil like gas.

§ 49.46(b) Gas in Value or Proceeds.

Royalty for gas is not generally in kind. n926 A common formulation, which has created difficulty, n927 provides:

> On gas, including casinghead gas, condensate or other gaseous substances produced and sold or used off the premises ... . The market value at the well on 1/8 of the gas so sold or used, provided that on gas sold at the well the royalty shall be 1/8 of the amount realized from such sale.

The gas royalty is not in kind, but is stated as a specified fraction of the value of the gas or of the proceeds of its sale. n928 The lessee has title to all gas produced. n929 It is presumed that the lessee will dispose of the gas and compensate the lessor in cash. If the lessee uses the gas in production, often the lease provides that no royalty would be due on such gas.

§ 49.46(c) Result of Distinction.

The distinction between the oil "in kind" royalty and the gas royalty reflects historic differences in production and marketing. The lessor easily could store and sell a share of the oil, which generally requires little processing. Gas, however, cannot be stored easily and is only marketable when a pipeline is built. In order to attract a purchaser, one party having title and the right to sell was considered more advantageous. When gas was sold primarily by long-term contract to pipelines, prices would be higher the greater the amount of gas that could be committed to a sale. Although still true, more interest holders in one well are making separate sales because not only are wellhead sales no longer regulated, but shorter contracts and spot sales are more prevalent. n930 Nevertheless, because of the historical distinction in the types of royalties, there are differences in the relationship of the lessor to the product and the remedies available if the lessee does not pay.

Because the lessor "owns" royalty oil unless the lessee purchases it, the lessor generally is requested to sign division orders for the purchaser. n931 The lessee traditionally is viewed as the lessor's agent for sales if the lessor does not arrange for storage or sale of the oil. If royalty payments are not made, the lessor may seek remedies for conversion as well as contractual remedies. n932 Conversion may yield higher damages, but will have a shorter statute of limitations. Additionally, because of an "in kind" royalty, if creditor's attach the lessee's tanks, the lessor can separate the royalty oil.

With gas, however, the lessor cannot use a conversion remedy because the lessee owns the gas. n933 All the lessee has is a contractual right to payment of the royalty. The lessee will be a simple creditor of the lessee. In addition, the lessor is not technically a necessary party to a gas sales contract, but purchasers often include a lessor on division orders.

FOOTNOTES:

(n1)Footnote 923. *See* 3 Kuntz, Lowe, Anderson, Pierce, and Smith, Oil and Gas Law § 39.1(e) (Anderson).

(n2)Footnote 924. *But see* 58 Pa. Stat. §§ 33, 34 (lease invalid unless it guarantees lessor at least 1/8 royalty).

(n3)Footnote 925. 3 Kuntz, Lowe, Anderson, Pierce, and Smith, Oil and Gas Law § 39.1 (Anderson).

(n4)Footnote 926. For discussion of the occasional use of in-kind royalties for gas, *see* 3 Kuntz, Lowe, Anderson, Pierce, and Smith, Oil and Gas Law § 40.3 (Anderson). *See also* discussion, *infra*, at note 998.

(n5)Footnote 927. *See* § 49.49 *infra*.

(n6)Footnote 928. *See* 3 Kuntz, Lowe, Anderson, Pierce, and Smith, Oil and Gas Law § 40.4(a) (Anderson) for a delineation of common types of clauses.

(n7)Footnote 929. *Greenshield v. Warren Petr. Corp., 248 F.2d 61 (10th Cir. 1957), cert. denied, 355 U.S. 907; Anschutz Corp. v. Natural Gas Pipeline Co. of America, 632 F. Supp. 445 (D.C. Utah 1986). Compare Tidewater Assoc. Oil Co. v. Clemens, 123 S.W.2d 780 (Tex. Civ. App. 1938)* (title passes through lease granting clause), *with United Gas Pub. Serv. Co. v. Barrett, 179 So. 506 (La. App. 1938)* (title passes to lessee upon production).

(n8)Footnote 930. *See* § 49.70, *infra* on gas balancing for these so-called "split stream sales." *See also* 4 Summers, *supra* note 32, at Supp. § 762 (new gas contracts).

(n9)Footnote 931. *See* § 49.50(a), *infra* and 3 Kuntz, Lowe, Anderson, Pierce, and Smith, Oil and Gas Law § 39.5 (Anderson).

(n10)Footnote 932. 3 Kuntz, Lowe, Anderson, Pierce, and Smith, Oil and Gas Law § 39.2(b) (Anderson).

(n11)Footnote 933. *Greenshield v. Warren Petr. Corp., 248 F.2d 61 (10th Cir. 1957), cert. denied, 355 U.S. 907; Wilson v. United Texas Transmission Co., 797 S.W.2d 231 (Tex. App. 1990).*

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CHAPTER 49 PETROLEUM AND PIPELINES
X. The Lease Royalty Clause

6-49 Thompson on Real Property, Thomas Editions § 49.47

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§ 49.47 Products Covered by the Royalty Clause.

[Go To Supp]

A lease for oil and gas often allows the lessee to recover other minerals, particularly sulfur. Nevertheless, the primary emphasis is hydrocarbons. Originally, gas was considered a waste and the percentage royalty applied only to oil. If a well produced only gas, royalty was a flat rate per annum. n934 Initially, courts upheld these flat rates as full compensation. n935 More recent courts attempted to avoid the seeming inequitable return to the lessee for a now valuable resource. n936 As gas became more valuable, the current lease form evolved with a percentage royalty for gas. n937

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LEXIS: gas w/1 oil w/15 other w/1 mineral w/50 royalty w/1 clause

Because of the different treatment of oil and gas, however, it becomes of legal as well as geologic interest to determine which phase of the hydrocarbon is being produced. As one court put it:

> Generally, "oil" as used in [leases & sales contracts] ... means crude or unrefined petroleum which is measured and sold in volume according to grade or gravity, while "gas" consists of invisible vapors which are produced from the earth, containing varying amounts of hydrocarbon, some of it denominated "dry" and in other instances "wet," depending upon the amount of liquid hydrocarbons which can be extracted. n938

Legal controversies center on the "wetness" of gas and whether the gas is produced in association with oil.

§ 49.47(a) Royalty on Gas Produced from an Oil Well -- Casinghead Gas and Gasoline.

An oil well may also produce gas, referred to as "casinghead gas." n939 Lessees initially simply vented this gas, but

conservation agencies later required either recovery of the gas or its re-injection. Casinghead gas often has liquids, which may be removed by treatment. The treated liquids are "natural gasoline" and the remaining dry gas would be "residue gas." n940 Old lease forms did not mention these products directly in the lease or royalty provisions.

The handling of casinghead gas under these old forms differed. n941 Texas took the approach that the lease covered casinghead gas, but that royalty was payable not under the flat rate for gas, but under the oil royalty. n942 Oklahoma, conversely, held that the lease did not cover the casinghead gas. The lessor could recover the value of the products recovered minus reasonable costs. n943

Leases then began to mention casinghead gas, but the first versions allowed for a flat rate payment for gas produced from an oil well. Most courts found this would be all the compensation required. No additional payment was needed for the value of the recovered gasoline. n944 Current lease forms tend to include casinghead gas in the percentage gas royalty clause. Therefore, the only issue is when to set the value: either before removal of the gasoline or at the time the end products are sold. n945

COMPUTER-ASSISTED RESEARCH

LEXIS: royalty w/1 clause w/15 casinghead

§ 49.47(b) Royalty on Liquid Components Produced from a Gas Well -- Condensate and Distillate.

Not all gas wells produce "dry" gas, but some produce gas rich in liquids. n946 Such gas is "wet gas" and processes similar to those used to treat casinghead gas may remove the liquid components. These components were first called distillates but are now more commonly referred to as condensates. Generally, royalty is paid under the gas royalty clause. n947 Payment of royalties on the gas stream, however, is deemed payment for the condensates in the gas and the majority rule does not require further payment when the condensates are extracted by the lessee or third-parties. n948 The value of wet gas commanded in the market should reflect the value of the liquids it contains, n949 but some cases do require payments for the constituents. n950

COMPUTER-ASSISTED RESEARCH

LEXIS: (condensate or distillate or liquid w/1 components w/50 royalty)

§ 49.47(c) Other Minerals.

The royalty for the other minerals covered by the lease may be the same percentage royalty as for the hydrocarbons or may be different. n951 Quite often, royalty clauses provide for a fixed dollar amount for each unit of certain minerals produced, especially sulfur. n952

§ 49.47(d) Royalty on Take-or-Pay Payments or Settlements.

Take-or-pay gas contracts obligated pipelines to either take minimum gas amounts or pay certain sums, "take or pay payments." n953 Royalty is not owed on these take-or-pay payments, but would be payable if gas is later taken and the payments credited. Courts have split on whether royalties would be owed on settlements pipelines made to escape the contracts, which had become onerous because of lower gas prices. n954

COMPUTER-ASSISTED RESEARCH

LEXIS: (take-or-pay w/1 settlement! w/50 royalty)

FOOTNOTES:

(n1)Footnote 934. *See generally* 3 Kuntz, Lowe, Anderson, Pierce, and Smith, Oil and Gas Law § 40.2 (Anderson).

(n2)Footnote 935. *Wolf v. Blackwell Oil & Gas Co., 186 P. 484 (Okla. 1920)* (flat rate exclusive compensation; gas not under provision for "oil and other minerals," but drip gasoline on lease would be).

(n3)Footnote 936. *See Southland Royalty Co. v. Pan Am. Petr. Corp., 378 S.W.2d 50 (Tex. 1964)* (avoids flat rate royalty for well producing $1,000,000 worth of gas per year by calling gas "other minerals" when sold, rather than used, on premises) and *McGinnes v. Cayton, 312 S.E.2d 765 (W. Va. 1984)* (reformed lease using mutual mistake theory).

(n4)Footnote 937. *See generally* 3 Kuntz, Lowe, Anderson, Pierce, and Smith, Oil and Gas Law § 40.1 (Anderson).

(n5)Footnote 938. *Barby v. Cabot Corp., 465 F.2d 11, 14 (10th Cir. 1972).*

(n6)Footnote 939. When gas was severed from oil rights, with the oil owner receiving casinghead gas, a lease that did not define these terms was interpreted as incorporating the statutory definition of casinghead gas, which required it to be produced from a stratum classified as oil producing, not simply from an oil well that might produce from several stratum. *Amarillo Oil Co. v. Energy-Agri Prods., Inc., 794 S.W.2d 20 (Tex. 1990).*

(n7)Footnote 940. For early judicial recognition of the science and engineering involved, *see Reynolds v. McMan Oil & Gas Co., 11 S.W. 778 (Tex. Com. App. 1928), reh'g denied, 14 S.W. 819 (Tex. 1929).*

(n8)Footnote 941. *See* Annotation, *Rights Under Oil and Gas Lease or Grant or Operating Agreement in Respect of Wet or Casinghead Gas or Gasoline Recovered Therefrom,* 82 A.L.R. 1304 (1933).

(n9)Footnote 942. *Livingston Oil Corp. v. Waggoner. 273 S.W. 903 (Tex. Civ. App. 1925). See also, Locke v. Russell, 84 S.E. 948 (W. Va. 1915)* and *Wemple v. Producers' Oil Co., 83 So. 232 (La. 1919)* (gasoline recovered on lease is part of oil).

Hutchings v. Chevron U.S.A., Inc., 862 S.W.2d 752 (Tex. 1993) (special royalty provision for casinghead gas in 1925 governs royalty payments, rather than the natural gas royalty provision).

(n10)Footnote 943. *Hammett Oil Co. v. Gypsy Oil Co., 218 P. 501 (Okla. 1921).*

(n11)Footnote 944. *Mussellem v. Magnolia Petr. Co., 231 P. 526 (Okla. 1924)* (payment for gas included its constituents) and *Magnolia Petr. Co. v. Connellee, 11 S.W.2d 158 (Tex. Civ. App. 1928)* (same); but *see Gilbreath v. States Oil Corp., 4 F.2d 232 (5th Cir. 1925),* cert. denied, *268 U.S. 705* (gasoline from casinghead gas part of "oil" and compensated at 1/8 of value). *See generally* 3 Kuntz, Lowe, Anderson, Pierce, and Smith, Oil and Gas Law § 41.3(a) (Anderson) and Richard W. Hemingway, The Law of Oil and Gas § 7.2 (3d ed. 1991).

(n12)Footnote 945. This will depend on whether or not sales are "at the well" or elsewhere. *See, e.g., Barby v. Cabot Corp., 465 F.2d 11 (10th Cir. 1972)* (processed value of liquids not subject to additional royalty under clause providing for "market value at the wellhead or, if used off the premises, market value at the well") and § 49.49(b)(3), *infra*. *See generally* 3 Kuntz, Lowe, Anderson, Pierce, and Smith, Oil and Gas Law § 41.3(a) (Anderson).

(n13)Footnote 946. Whether a well is an oil well or gas well may depend on classification by a conservation agency. *Hufo Oils v. Railroad Comm'n, 717 S.W.2d 405* (Tex. Civ. App. 1986, ("natural gasoline" or "white oil" produced from casinghead gas by a low temperature extraction unit not "crude petroleum oil" for well classification purposes).

(n14)Footnote 947. *Sowell v. Natural Gas Pipeline Co., 789 F.2d 1151 (5th Cir. 1986), reh'g denied, 793 F.2d 1287* (must pay for drips collected at wellhead). *See* 3 Kuntz, Lowe, Anderson, Pierce, and Smith, Oil and Gas Law §

41.3(b) (Anderson) and Richard W. Hemingway, The Law of Oil and Gas § 7.3 (2d ed. 1983). *See* Annotation, *Rights Under Oil and Gas Lease, Deed, or Sales Contract to "Distillate;', "Condensate", or "Natural Gasoline", 38 A.L.R.3d 983 (1971).*

(n15)Footnote 948. *Humble Oil & Ref. Co. v. Poe, 29 S.W.2d 1019 (Tex. Com. App. 1930),* (judgment adopted); *Sowell v. Natural Gas Pipeline Co., 789 F.2d 1151 (5th Cir. 1986), reh'g denied, 793 F.2d 1287* (need not pay for drips taken out of gas away from lease). *See* 3 Kuntz, Lowe, Anderson, Pierce, and Smith, Oil and Gas Law § 41.3(b) (Anderson) and Richard W. Hemingway, The Law of Oil and Gas § 7.3 (2d ed. 1983).

(n16)Footnote 949. *Carter v. Exxon Corp., 842 S.W.2d 393 (Tex. App. 1992)* (royalty based on "market value at well").

(n17)Footnote 950. *Compare Barby v. Cabot Corp., 465 F.2d 11, 14 (10th Cir. 1972), with Old Kent Bank & Trust Co. v. Amoco Prod. Co., 679 F. Supp. 1435 (W.D. Mich. 1988)* (include constituent prices if payment based on "amount realized at well" and sale not at wellhead; use gross proceeds less expenses).

(n18)Footnote 951. *See generally* 3 Kuntz, Lowe, Anderson, Pierce, and Smith, Oil and Gas Law § 41.2 (Anderson).

(n19)Footnote 952. *But see Schwartz v. Prairie Producing Co., Inc., 833 S.W.2d 629 (Tex. App. 1992)* (lease clause for royalty on amount realized for gas may apply to sulfur recovered from hydrogen sulfide in gas, not clause granting $1.00 per then of sulphur mined; ambiguity requires trial). For duties of the lessee with respect to minerals other than oil and gas, *see* 3 Kuntz, Lowe, Anderson, Pierce, and Smith, Oil and Gas Law § 41.4 (Anderson).

(n20)Footnote 953. *CIG v. Hunt Energy Corp., 47 S.W.3d 1 (Tex. App. 2000)* (the court noted that in a take-or-pay contract, the producers are provided with steady income to pay operating and other expenses. The buyer takes the risk that it will not be able to make up a deficiency in payment within the make-up period).

(n21)Footnote 954. *Compare Diamond Shamrock Exploration Corp. v. Hodel, 853 F.2d 1159 (5th Cir. 1988)* (royalty only due on gas actually produced); *Gerard J.W. Bros. & Co., Inc. v. Harkins & Co., 883 F.2d 379,* reh'g denied, *889 F.2d 271 (5th Cir. 1989)* (same result for settlements); *Killam Oil Co. v. Bruni, 806 S.W.2d 264 (Tex. App. 1991) writ denied,* (no royalties due under market value royalty clause); *with Frey v. Amoco Prod. Co., 603 So. 2d 166 (La. 1992)* (royalties due under "amount realized" royalty provision); *Hurd Enters. v. Bruni, 828 S.W.2d 101 (Tex. App. 1992)* (may be recoverable if lessee cannot recoup gas); and *Klein v. Jones, 980 F.2d 521 (8th Cir. 1992) cert. denied, 519 U.S. 815 (1996)* (restrictive interpretation of royalties clause in conventional lease inconsistent with its purpose and unfair to lessor).

Courts also differ on how to measure what damages a purchaser must pay if the purchaser breaches a take-or-pay contract. *Compare, Roye Realty & Dev., Inc. v. Arkla, Inc., 863 P.2d 1150 (Okla. 1993)* (damages computed pursuant to U.C.C. measure, namely, the difference between market price at the time the aggrieved party knew of the repudiation and the contract price), *with Colorado Interstate Gas Co. v. Chemco, Inc., 854 P.2d 1232 (Colo. 1993)* (U.C.C. § 2-708 does not apply; pipeline must either take gas or pay contract price as alternative performance). *See also, Stoute v. Wagner & Brown, 637 So. 2d 1199 (La. App. 1994)* (no class certification for all royalty owners in field over producers' failures to pay royalties on take-or-pay settlements because of different leases and gas purchase agreements). Beverly M. Barrett, Note, *Oil and Gas: Are Royalties Owed on all Take-or-Pay Settlements in Oklahoma, 46 Okla. L. Rev. 745 (1993);* Patricia A. Brown, *Case Note: Equitable Right to Royalties on Take-or-Pay Settlements,* 47 Ark. L. Rev. Vol. 749 (1994).

Transamerican Natural Gas Corp. v. Finkelstein, 933 S.W.2d 591 (Tex. App. 1996) (holding that a royalty owner is not entitled to a share from a take or pay agreement when no gas is extracted or sold; however, the scope is limited to recoupable settlements and does not extend to non-recoupable settlements); *Yates v. Powell, 98 F.3d 1222 (10th Cir.*

1996) (holding that royalties are only due when production has occurred, and thus in a take-or-pay situation, where no gas is produced, no royalty is due);); *Condra v. Quinoco Petroleum, Inc., 954 S.W.2d 68 (Tex. App. 1997)* (where nonrecoupable payment was not paid for production, division orders did not allow overriding royalty holders to claim royalties on the take-or-pay settlement); *Roye Realty & Developing, Inc. v. Watson, 2 P.2d 320* (Okla. 1996 (corrected opinion) (under Oklahoma law, a royalty owner is not entitled to share in take-or-pay settlements unless the lease contains clear language to the contrary); *Alameda v. Transamerican, 950 S.W.2d 93 (Tex. Civ. App. 1997)* (holding that no royalties are payable either for recoupable or for non-recoupable settlements in take-or-pay situations); *Independent Petroleum Ass'n of America v. Babbitt, 92 F.3d 1248 (D.C. Cir. 1996)* (the Minerals Management Service attempt to change Department of the Interior precedent by requiring royalties on take-or-pay settlements is deemed an impermissible departure from established practices); *Independent Petroleum Ass'n of America v. Babbitt, 971 F. Supp. 19 (D.D.C. 1997)* in further proceedings, the prevailing lessee in the D.C. Circuit was exempted from royalties on various types of nonrecoupable take-or-pay payments and, under collateral estoppel, Department of Interior was enjoined from attempting to collect royalties from lessee in actions in other circuits or in administrative proceedings). *EEX Corp. v. U.S. Dept. of Interior, 111 F. Supp. 2d 24 (D.D.C. 2000).* Royalties did not accrue on nonrecoupable take-or-pay settlement payments received by lessee, even if settling purchaser was ultimate purchaser of freed-up gas. Nonrecoupable settlement payments serve as compensation for freed-up gas, gas that the lessee would not have been able to sell without the settlement. Identity of the subsequent purchaser is not relevant.

Watts v. Atlantic Richfield Co., 115 F.3d 785 (10th Cir. 1997) (where royalties would be payable on settlement proceeds under "production-type" lease to the extent that the proceeds constitute payment for gas actually produced and sold despite the absence of an explicit provision to that effect. Royalties cannot be reduced by the acceptance of non-cash items. The duty to pay is based upon an agreement by the producer to exchange its right to pursue a higher price for a lump sum settlement. A reduction in the price that a purchaser is obligated to pay for gas production is not required).

Westerman v. Rogers, 1 P.3d 288 (Colo. App. 1999). The court adopted the analyses of *Yates v. Powell, 98 F.3d 1222 (10th Cir. 1996)*and *Watts v. Atlantic Richfield Co., 115 F.3d 785 (10th Cir. 1997),* and concluded that royalty interests extend to any settlement or payment in which a producer receives consideration for compromising its pricing claim, but only to the extent that the claim relates either to past or future production actually taken by the settling producer. *See United States v. Century Offshore Mgmt. Corp., 111 F.3d 443 (6th Cir. 1997)* (where a lump-sum payment made to a bankrupt natural gas producer by a purchaser under term fixed price contracts had a sufficient nexus to production so as to compel payment of royalties. This payment was an advance under a substituted requirements contract where the parties intended a continuing relationship with future gas sales. Royalties were based on the price paid by the purchaser for gas produced and delivered plus the amount of the lump sum payment allocable to the gas ultimately taken).

Compare Black Butte Coal Co. v. United States, 38 F. Supp. 2d 963 (D. Wyo. 1999) (take-or-pay payments or settlements are not royalty bearing until they are credited toward the purchase of make-up gas). *See also, Stoute v. Wagner & Brown, 637 So. 2d 1199 (La. App. 1994), writ denied, 644 So. 2d 638 (La. 1994). See United States v. Century Offshore Mgmt. Corp., 111 F.3d 443 (6th Cir. 1997), cert. denied, 522 U.S. 1090 (1998).*

Questar Pipeline Co. v. Grynberg, 201 F.3d 1277 (10th Cir. 2000). Under a settlement agreement between a gas pipeline and the owner of a working interest under a take-or-pay contract, the pipeline prepaid and any gas taken over a minimum amount would be credited to making up the prepaid amount. Unit operating agreement required that each owner take proportionately. Pipeline had no right to allocate 100% of unit production to the owner with whom the settlement was made when the price of gas was low so as to maximize the amount of gas it could take before reaching the prepaid total.

Goss Family Ltd. Partnership v. Wood, 15 P.3d 517 (Okla. Civ. App. 2000) (where the lessor was entitled to royalties on gas produced and sold from the premises, there was no right to a royalty on the settlement payment as a non-refundable buy-out to a take-or-pay purchase contract).

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CHAPTER 49 PETROLEUM AND PIPELINES
X. The Lease Royalty Clause

6-49 Thompson on Real Property, Thomas Editions § 49.48

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§ 49.48 Deductions from Royalty.

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§ 49.48(a) Free and Clear of Costs of Production and Discovery.

One of the hallmarks of a royalty is that it is "free of costs." While it is true that a royalty is free of the costs of production and discovery, costs beyond that stage may be proportionately charged against the lessor's interest. Production and discovery costs clearly include costs of lease acquisition, geophysical exploration, drilling the well, equipping the well for production, labor, re-working wells, secondary recovery, and energy required to pump wells. n955

§ 49.48(b) Post-Production Costs Chargeable.

Costs beyond that of discovery and production will be charged proportionately to the lessor. n956 For example, severance taxes are shared, absent provisions to the contrary in the lease or peculiarities of statute. n957 Generally, a lessee may charge costs of transporting, cleaning, dehydrating, and sweetening gas. n958 Compression costs are shared in some jurisdictions. n959 Little uniformity is found in the treatment of costs for separators at or near the well, for measuring production, overhead, interest on borrowed money, and depreciation. n960 Naturally, no costs that are shown to be unreasonable may be charged to the lessor. n961

COMPUTER-ASSISTED RESEARCH

LEXIS: 260k79.3 post-production w/50 (oil or gas)

§ 49.48(c) How to Distinguish.

The basic distinction is between costs of production and costs subsequent to production. In essence, the lessee bears the cost of bringing the oil and gas to the surface and readying it for market. Courts employ several tests to determine the nature of a cost.

Some of these are general. Where costs are incurred may influence the result, with costs on the leasehold usually carried by the lessee. Another way to distinguish the types of costs is whether the costs are to make the product marketable or to increase the value of the product. The lessee should bear the cost of producing a marketable product from the perspective of the nature and quality of the product. n962 An example is sweetening costs. These costs are chargeable to the lessor when courts presume that there is a market for sour gas, n963 but were not chargeable in one case in which the parties stipulated no such market existed. n964 Another general test is to look at the custom of the industry in the area. This might explain why compression costs are not charged to the lessor in some areas, where compression is always needed for gas to enter a pipeline because of low reservoir pressures and where lessees customarily pick up the cost.

A final and perhaps crucial test is the wording of the lease. A lease may clearly state what costs are or are not to be shared and this will bind the parties. n965 Less specifically, a lease may refer to the royalty being free and clear of cost "at the pipeline or other delivery point." Under this construction, transportation costs were cost-free to the lessor. n966 More generally, many leases refer to royalty computations "at the well," which indicates that post-production costs such as transportation and processing are not cost-free to the lessor. n967 This method of proceeding and the resultant industry custom is so strong that a court implied "at the well" as the computation point when a lease referred to "gross proceeds at the prevailing market rate." n968 Similarly, "free of cost in the pipe line to which the Operator may connect wells" was read to imply that parties presumed a connection at the well and the lessee was not to bear alone post-production costs such as treating, transporting, and compression. n969 Leases simply requiring payment on "gross proceeds" have been variously interpreted on the issue of cost deduction. n970

FOOTNOTES:

(n1)Footnote 955. *See generally* P. Martin & B. Kramer, Williams & Meyers Oil and Gas Law § 645.1 (Matthew Bender); Annotation, *Expenses and Taxes Deductible by Lessee in Computing Lessor's Oil and Gas Royalty, 73 A.L.R.2d 1056 (1960).*

Heritage Resources v. NationsBank, 939 S.W.2d 118 (Tex. 1996) (the presumption is that post-production costs can be deducted from royalty payments; however, this rule may be modified by agreement. In this case the commonly accepted meaning of the terms "royalty" and "market value at the well" rendered meaningless the supposed modification section).

(n2)Footnote 956. *See generally* P. Martin & B. Kramer, Williams & Meyers Oil and Gas Law § 645.2 (Matthew Bender); Annotation, *Expenses and Taxes Deductible by Lessee in Computing Lessor's Oil and Gas Royalty, 73 A.L.R.2d 1056 (1960).*

Owen L. Anderson, *Calculating Royalty: Costs Subsequent to Production: "Figures Don't Lie But," 33 Washburn L.J. 591 (1994);* Bruce M. Kramer, *Royalty Interest in the United States: Not Cut from the Same Cloth, 29 Tulsa L.J. 449 (1994).*

Schroeder v. Terra Energy, 565 N.W.2d 887 (Mich. App. 1997) (where agreement obligated an oil and gas operator to pay a percentage of gross proceeds at the wellhead, deduction was allowed for refining and transportation costs required to make the product marketable).

(n3)Footnote 957. *See* 3 Kuntz, Lowe, Anderson, Pierce, and Smith, Oil and Gas Law § 42.2 (Anderson).

For an example of a lease tax-shifting clause, *see J.M. Huber Corp. v. Santa Fe Energy Resources, Inc., 871 S.W.2d 842 (Tex. App. 1994); Lee M. Bass, Inc. v. Shell Western E & P, Inc., 957 S.W.2d 159 (Tex. App. 1997)* (where the lessee agreed to reimburse lessor for all taxes assessed against production, its value or proceeds of sale, ad valorem taxes known to be an obligation of the lessor were not specifically listed and were not reimbursable).

Feerer v. Amoco Production Co., 242 F.3d 1259 (10th Cir. 2001) (under settlement agreement, working interest

owners could not reallocate to royalty interest owners the portion of the severance tax attributed by them to the increased value of post-settlement carbon dioxide royalty payments).

(n4)Footnote 958. "Sweetening" refers to removing hydrogen sulfide, a poisonous and corrosive impurity found in some natural gas. Sulfur may be recovered in the process.

Atlantic Richfield Co. v. Farm Credit Bank of Wichita, 226 F.3d 1138 (10th Cir. 2000). Royalty based on the proceeds of sale at the mouth of the well necessarily incorporated a transportation deduction since the nearest market was 400 miles distant. As a "marketable product" jurisdiction, interest during construction and cost of capital were deductible in reasonable amounts as transportation costs.

Creson v. Amoco Production Co., 10 P.3d 853 (N.M. App. 2000). Royalty payments based upon net proceeds derived from sale at the well anticipated deductions for post-production costs including transportation, dehydration, compression and other costs adding value to the wellhead product.

(n5)Footnote 959. For an extensive discussion, *see Wood v. TXO Prod. Corp., 854 P.2d 880 (Okla. 1992)* (costs not deductible). *Compare Hanna Oil & Gas Co. v. Taylor, 759 S.W.2d 563 (Ark. 1988)* (lessee must bear costs); *with Harding v. Cameron, 220 F. Supp. 466 (W.D. Okla. 1963)* (costs shared).

R. Kevin Redwine and Steven G. Heinen, *Deductibility of Natural Gas Compression Costs in Light of Fox Wood III v. TXO Production Co., 29 Tulsa L.J. 677 (1994).*

(n6)Footnote 960. *See* P. Martin & B. Kramer, Williams & Meyers Oil and Gas Law § 645.3 (Matthew Bender); Annotation, *Expenses and Taxes Deductible by Lessee in Computing Lessor's Oil and Gas Royalty, 73 A.L.R.2d 1056 (1960).*

(n7)Footnote 961. *Piney Woods Country Life Sch. v. Shell Oil Co., 726 F.2d 225 (5th Cir. 1984), cert. denied, 471 U.S. 1005, on remand, 905 F.2d 840 (5th Cir. 1990).*

(n8)Footnote 962. *See* 3 Kuntz, Lowe, Anderson, Pierce, and Smith, Oil and Gas Law § 40.5(b) (Anderson). *See also California Co. v. Udall, 296 F.2d 384 (D.C. Cir. 1961)* (lessee of federal lease must render product in a form for which there is "an established demand;" lessee bears compression costs). *See also Mesa Oper. Ltd. P'ship v. United States, 931 F.2d 318 (5th Cir. 1991) cert. denied, 502 U.S. 1058 (1992)* (federal lessee must include reimbursements from purchasers for post-production costs as part of proceeds for royalty computation). The federal government by regulation does permit deduction of specified marketing allowances. 30 C.F.R. § 206.

Mittelstaedt v. Santa Fe Minerals, Inc., 954 P.2d 1203 (Okla. 1998) (although a lessee is ordinarily prohibited from deducting a proportionate share of transportation, compression, dehydration, and blending costs when they are associated with creating a marketable product, the lessor must bear a proportionate share of these costs when lessee shows them to be reasonable, an enhancement to the value of an already marketable product and that royalty revenues increased proportionately with the allocation of costs. No allocation may be made for compression costs for pushing marketable gas into the purchaser's pipeline).

(n9)Footnote 963. *Piney Woods Country Life Sch. v. Shell Oil Co., 726 F.2d 225 (5th Cir. 1984), cert. denied, 471 U.S. 1005, on remand, 905 F.2d 840 (1990).* The fact that royalty was to be computed "at the well" also contributed to the result.

(n10)Footnote 964. *West v. Alpar Resources, Inc., 298 N.W.2d 484 (N.D. 1980).*

(n11)Footnote 965. Current forms often state royalty as follows: "For gas (including casinghead gas) and all other substances covered hereby, the royalty shall be 1/8 of the proceeds realized by the lessee from sale thereof, less a

proportionate part of costs incurred by the lessee in delivering or otherwise making such gas or other substances merchantable."

(n12)Footnote 966. *Cf. Robert v. Swanson, 222 S.W.2d 707 (Tex. Civ. App. 1949)* (dealing with oil payment).

(n13)Footnote 967. *Piney Woods Country Life Sch. v. Shell Oil Co., 726 F.2d 225 (5th Cir. 1984), cert. denied, 471 U.S. 1005, on remand, 905 F.2d 840 (1990).*

Judice v. Mewbourne Oil Co., 890 S.W.2d 180 (Tex. App. 1994) aff'd in part, *rev'd* in part, *939 S.W.2d 133 (Tex. 1996)* (where the lease computed the royalty on market value at the well of all gas produced and saved and the court allowed the producer to allocate to the royalty owners their proportionate share of the reasonable cost of post-production compression).

(n14)Footnote 968. *Johnson v. Jernigan, 475 P.2d 396 (Okla. 1970)* (market rate in the field determines value; if no such rate, may deduct transportation costs from sales price).

(n15)Footnote 969. P. Martin & B. Kramer, Williams & Meyers Oil and Gas Law § 646.2 (Matthew Bender).

(n16)Footnote 970. *Id. Compare, Hanna Oil & Gas Co. v. Taylor, 759 S.W.2d 563 (Ark. 1988)* (read literally; no deductions for compression costs); *with Kretni Dev. Co. v. Consol. Oil Corp., 74 F.2d 497 (10th Cir. 1934), cert. denied, 295 U.S. 750 (1935)* (ambiguous; interpret in light of circumstances for locale of price determination); *and, Warfield Nat. Gas Co. v. Allen, 88 S.W.2d 989 (Ky. 1935)* (parties contemplated sales at well; value computed there). *See also Contiga Dev. Co. v. United Fuel Gas Co., 128 S.E.2d 626 (W. Va. 1962)* ("at the rate received for such gas" read literally; no deductions for transportation and marketing expenses).

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CHAPTER 49 PETROLEUM AND PIPELINES
X. The Lease Royalty Clause

6-49 Thompson on Real Property, Thomas Editions § 49.49

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§ 49.49 Compensation for Royalty Based upon "Market Value" or "Proceeds."

§ 49.49(a) General Distinction.

Royalty clauses for gas use various formulations such as 1/8 of the "market value," "market price," "proceeds," or "amount realized from sales." The first two wordings are interpreted similarly. What is important is the prevailing price for gas, not necessarily the lessee's sale. The distinction between the two wordings, which is sometimes ignored, is that "price" determinations employ only comparative sales, but opinion evidence may define "value." n971 A bigger distinction is when royalty clauses refer to "proceeds" or "amount realized." In these cases, the lessee's sales contract is of prime importance. n972

§ 49.49(b) Problem of Market Value Royalty and Long-Term Contracts.

Market value royalties created a problem when prices began to rise faster than inflation. n973 The federal government regulated interstate sales of natural gas from 1954 until 1993. Prices were historically low until the late 1970s. n974 Unregulated intrastate prices exceeded the interstate prices. To counter the dual market differential, the National Gas Policy Act of 1978 regulated wellhead prices regardless of whether sales were interstate or intrastate. n975 Currently, wellhead prices are unregulated and prices have fallen dramatically. n976 The historical swings, however, caused conflicts under long-term contracts.

Lessors, who were being paid royalties under long-term interstate contracts entered into before the price rises of the early 1970s, later saw higher prices being paid in both the interstate and intrastate markets. Therefore, the lessors under old contracts sought royalties based on "market value" or "market price" unrelated to the proceeds their lessees were realizing. Under this theory of market value, the lessor would receive a higher percentage of the contract proceeds. A simple example explains the problem from the lessee's perspective. If a contract generates $80 in proceeds subject to royalty, the lessor entitled to 1/8 would receive $10. If the current market value of the gas is $160, the lessor would receive $20. Because the lessee is still only generating $80, the lessor would receive 1/4 of the proceeds. Although the falling prices of natural gas moots the dilemma, the cyclical nature of the industry mandates knowledge of the problem.

COMPUTER-ASSISTED RESEARCH

LEXIS: (market value w/15 royalty) and long-term w/15 contract

§ 49.49(b)(1) Definition of Market Value: *Vela* Rule.

One line of cases adopted the lessor's position: "market value" or "market price" refers to the value at the time the natural gas actually is produced and delivered. The rule became known as the *Vela* rule, after the Texas case that announced it. n977 The rationale behind the rule is that until production, a gas contract is executory. To not use current prices would make market value equivalent to proceeds. n978 Mississippi, n979 Kansas, n980 Montana, n981 and West Virginia n982 have adopted the rule.

§ 49.49(b)(2) Definition of Market Value: *Tara* Rule.

An alternative line of cases, beginning in Oklahoma, defined "market value" as the price assigned in the sales contract applicable to the lease's production, provided the contract was negotiated prudently and in good faith. n983 In addition to Oklahoma, this rule has been adopted in Arkansas n984 and possibly Louisiana. n985 Under this so-called *Tara* rule, market value could never exceed the contract price. The "market value at the well," however, could be less than the contract price if costs of marketing, transporting, and treating are backed-out. Some have argued that the right to subtract costs was the rationale behind the market value at the well wording. n986

§ 49.49(b)(3) When Sales Are "At the Well."

Some lease forms combine proceeds royalty provisions with market value provisions, each being employed in different situations. n987 Generally, these provide that royalties will be computed based on proceeds when sales are made "at the well." Therefore, lessees strenuously argued that sales were at the well to avoid paying based on current market value. The Texas approach was to define the term based on whether sales occurred on the leaseholds, concentrating on where title was transferred. n988 Other courts insisted that "at the well" referred to the quality of the gas, not merely a location. Under this view, the lessor is entitled to royalty on the gas as it emerges from the well; if the sales contract included consideration for treatment or transportation, the sale was not "at the well." n989 More recent cases adopted the latter approach. n990

§ 49.49(b)(4) How to Determine Market Value.

Market value or market price generally is proven by comparable sales. n991 Comparable sales are those comparable in time, quality of gas, quantity of gas, and availability of marketing outlets. n992 Cases diverged over whether the similar sales must deal with gas sold in the same legal market or subject to the same price restraints. n993 In all instances, however, lack of perfect matches required adjustments to sales data. For example, if there are no sales of sour gas, sales of sweet gas would have to be used with deductions for the cost of processing the gas. Working back to subtract costs from the price in the one contract signed by the lessee is one way of showing market value, but is the least favored. Nevertheless, it may be the only provable value. n994

§ 49.49(b)(5) Curing or Avoiding the Market Value Problem.

The lessee's approach to the market value problem in an existing lease would be to amend either the sales contract or the lease. A sales contract amendment would attempt to compensate the lessee for excess royalty payments. The goal of amending the lease would be to obtain the lessor's consent to computing the royalty based on the contract price minus agreed upon costs. One method of doing this indirectly could be use of a division order. In some jurisdictions, a division order can modify the lease terms in this manner because the lessor will be estopped from challenging payments made under the order. n995 The lessor, however, will have the right to revoke the division order at any time. In other jurisdictions, a division order attempting to modify a lease is invalid. n996

New leases should be drafted to avoid the problem. For example, all royalties could be based on the amount realized or proceeds of the contract, with the lessee's right to subtract costs clearly defined. n997 Making the gas royalty payable in kind would be another avoidance technique. This would, however, relinquish the benefit of lessee control of the total gas stream. A variant of this approach is to allow the lessor to take royalty in kind or in value, but to require all proposed contracts to be presented to the lessor. The lessor could then either approve the contract or elect to take in kind. If there is no election, the lease would deem the contract approved and the royalty would be computed on the basis of the contract price. n998

FOOTNOTES:

(n1)Footnote 971. *See Swain v. Santa Fe P. Ry., 538 P.2d 1150 (Ariz. 1975)* and Richard W. Hemingway, The Law of Oil and Gas §§ 7.4(A)-7.4(C) (2d ed. 1983).

(n2)Footnote 972. *See generally* Richard W. Hemingway, The Law of Oil and Gas § 7.3(D) (2d ed. 1983).

Sondrol v. Placid Oil Co., 23 F.3d 1341 (8th Cir. 1994) ("proceeds" to be shared implies lessee receives money or other thing of value, not merely a bookkeeping credit for gas received).

Stinnett v. Colorado Interstate Gas Co., 227 F.3d 247 (5th Cir. 2000). By contract, a "favored nation clause" was engrafted on the basic market value pricing scheme set forth in the lease. This clause increased the stated amount due to the lessors if the lessee voluntarily paid other lessors at a higher rate. Such a clause does not create a fiduciary duty upon the lessees to disclose to the lessor the royalty rate being paid to other lessors.

Niemeyer v. Tana Oil and Gas Corp., 39 S.W.3d 380 (Tex. App. 2001) (where a release required payment of 17.94% of net proceeds, deduction made by lessee's buyer for compression and treating was permissible but net proceeds did not include payments for gas that was never sold but was diverted to the buyer for manufacturing purposes).

(n3)Footnote 973. *See generally* Annotation, *Meaning of, and Proper Method for Determining, Market Value or Market Price in Oil and Gas Lease Requiring Royalty to be Paid on Standard Measured by Such Terms, 10 A.L.R.4th 733 (1981).*

(n4)Footnote 974. Prices were set by "ratemaking" tied to costs of production, albeit at times generic or area ratemaking. Natural Gas Act of 1938, *52 Stat 821, 15 U.S.C. § 717 et seq.*

(n5)Footnote 975. Prices were based on "vintaging" with incentives for new or difficult production. *15 U.S.C. §§ 3301*-3432(b), repealed.

(n6)Footnote 976. *See* 4 Summers, *supra* note 32, at Supp. § 762.

For more contemporary problems, *see* Arthur J. Wright & Carla J. Sharpe, *Direct Gas Sales: Royalty Problems for the Producer, 46 Okla. L. Rev. 235 (1993).*

(n7)Footnote 977. *Texas Oil & Gas Corp. v. Vela, 429 S.W.2d 866 (Tex. 1986); See also Foster v. Atlantic Ref. Co., 329 F.2d 485 (5th Cir. 1964).*

Yzaguirre v. KCS Resources, 53 S.W.3d 368 (Tex. 2001) (where the lease specifies payment of a market value royalty, there is no obligation to pay an increase when gas is sold for more than market value under a long-term sales contract).

(n8)Footnote 978. *Piney Woods Country Life Sch. v. Shell Oil Co., 726 F.2d 225 (5th Cir. 1984), cert. denied, 471 U.S. 1005, on remand, 905 F.2d 840 (5th Cir. 1990).*

(n9)Footnote 979. *Piney Woods Country Life Sch. v. Shell Oil Co., 726 F.2d 225 (5th Cir. 1984), cert. denied, 471*

U.S. 1005, on remand, 905 F.2d 840 (5th Cir. 1990).

(n10)Footnote 980. *Lightcap v. Mobil Oil Corp, 562 P.2d 1 (Kan. 1977) cert. denied, 434 U.S. 876 (1977).*

(n11)Footnote 981. *Montana Power Co. v. Karvik, 586 P.2d 298 (Mont. 1978), after remand, 616 P.2d 321 (Mont. 1980).*

(n12)Footnote 982. *Imperial Colliery Co. v. Oxy U.S.A. Inc., 912 F.2d 696 (4th Cir. 1990).*

(n13)Footnote 983. *Tara Petr. Corp. v. Hughey, 630 P.2d 1269 (Okla. 1981).*

(n14)Footnote 984. *Hillard v. Stephens, 637 S.W.2d 581 (Ark. 1982).*

(n15)Footnote 985. *Henry v. Ballard & Cordell Corp., 418 So. 2d 1334 (La. 1982), but see Shell Oil Co. v. Williams, 428 So. 2d 798 (La. 1983)* (distinguished *Ballard* because parties only raised issue of how to judge current value and therefore followed *Vela* rule).

(n16)Footnote 986. *Compare* John S. Lowe, *Developments in Non-Regulatory Oil & Gas Law*, 32 Oil & Gas Inst. 117, 146-147 (1981) (designed to subtract costs from sales price), *with* Owen C. Anderson, *David v. Goliath: Negotiating the "Lessor's 88" and Representing Lessors and Surface Owners in Oil and Gas Plays, 27 Rocky Mtn. Min. L. Inst. 1029, 1120 (1982)* (designed to subtract costs from value at place of sale).

(n17)Footnote 987. *See, e.g.*, clause quoted § 49.46(b), *supra*.

(n18)Footnote 988. *Exxon Corp. v. Middleton, 613 S.W.2d 240 (Tex. 1981).*

(n19)Footnote 989. *Piney Woods Country Life Sch. v. Shell Oil Co., 726 F.2d 225 (5th Cir. 1984), cert. denied, 471 U.S. 1005, on remand, 905 F.2d 840 (5th Cir. 1990).*

Sondrol v. Placid Oil Co., 23 F.3d 1341 (8th Cir. 1994) (gas sold "at the well" because it was sold before the lessee added value by processing and transporting, citing *Piney Woods*).

(n20)Footnote 990. *State v. Davis Oil Co., 728 P.2d 1107, 1109-1110 (Wyo. 1986)* (collecting cases); *Old Kent Bank & Trust Co. v. Amoco Prod. Co., 679 F. Supp. 1435 (W.D. Mich. 1988).*

(n21)Footnote 991. *See generally* 3 Kuntz, Lowe, Anderson, Pierce, and Smith, Oil and Gas Law § 40.4(d) (Anderson).

La Plaque Corp. v. Chevron U.S.A., Inc., 638 So. 2d 354 (La. App. 1994) (market price may be determined from public record; statute of limitations for underpayment of royalties ran because lessor should have known of any cause of action).

(n22)Footnote 992. *Exxon v. Middleton, 613 S.W.2d 410 (Tex. 1981).*

(n23)Footnote 993. *See, e.g., Matzen v. Cities Servs. Oil Co., 667 P.2d 337 (Kan. 1983), cert. dismissed, 473 U.S. 927 (1985)* (legal characteristics immaterial) and *Shell Oil Co. v. Williams, Inc., 428 So. 2d 798 (La. 1983)* (legal status of comparable and subject gas material). *See also Piney Woods Country Life Sch. v. Shell Oil Co., 905 F.2d 840, 851-52 (5th Cir. 1990)* (summarizing cases).

Smith v. Amoco Production Co., 31 P.3d 255 (Kan. 2001) (where renegotiation under FERC Order 451 did not subject the common lessee to automatic liability under its implied covenant to market as a reasonably prudent producer).

(n24)Footnote 994. *Piney Woods Country Life Sch. v. Shell Oil Co., 726 F.2d 225 (5th Cir. 1984), cert. denied,*

471 U.S. 1005, on remand, 905 F.2d 840 (5th Cir. 1990) (after extensive litigation, actual sales contract best evidence of market value).

Enron Oil & Gas Co. v. Utah, 871 P.2d 508 (Utah 1994) (ad valorem tax reimbursements paid to gas producer by purchasers must be included in calculation of "reasonable market value" of gas under state leases providing for royalty on reasonable market value at well of all gas produced).

(n25)Footnote 995. *Exxon Corp. v. Middleton, 571 S.W.2d 349 (Tex. Civ. App. 1978), reversed in part, 613 S.W.2d 240 (Tex. 1981); Cabot Corp. v. Brown, 745 S.W.2d 104 (Tex. 1988). But see Flowers v. Diamond Shamrock Corp., 693 F.2d 1146 (5th Cir. 1982)* (restrictive endorsement placed on royalty check not an accord and satisfaction unless lessor knew or should have known of claim for higher royalties).

(n26)Footnote 996. *Holmes v. Kewanee Oil Co., 664 P.2d 1335.* (Kan. 1983). *See also Imperial Colliery Co. v. Oxy U.S.A. Inc., 912 F.2d 696 (4th Cir. 1990)* (boiler plate division order could not modify); 52 Okla. Stat. Supp. § 570.10.

(n27)Footnote 997. *E.g.*, "For gas (including casinghead gas) and all other substances covered hereby, the royalty shall be one-eighth of the proceeds realized by the lessee for sale thereof, less a proportionate part of ad valorem taxes and production, severance, or other excise taxes and the costs incurred by the lessee in delivering, processing or otherwise making such gas or other substances merchantable." The lessee is often given the right to purchase production at market prices determined in specified manners.

(n28)Footnote 998. *See* clause in, *Mandell v. Hamman Oil & Ref. Co., 822 S.W.2d 153, 156 (Tex. App. 1991), writ error denied* (requires election for lessor to individually sell).

Thompson on Real Property, Thomas Editions

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CHAPTER 49 PETROLEUM AND PIPELINES
X. The Lease Royalty Clause

6-49 Thompson on Real Property, Thomas Editions § 49.50

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§ 49.50 Payment of Royalty.

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§ 49.50(a) Division Orders.

§ 49.50(a)(1) Nature of a Division Order.

A purchaser of gas or oil will want to confirm that those owning the minerals have authorized the sale and are being paid as their interests demand. To obtain this assurance, the purchaser will normally require all persons entitled to a share in production to sign a "division order." n999 These instruments are most important in the oil industry; regardless of the form of the oil royalty, the lessee generally will deliver all the oil to one purchaser and lessor will have to approve the sale of royalty oil. n1000 For oil transactions, a division order is not technically a contract, but is more a continuing offer to sell the oil on the terms and conditions contained in the division order. Neither party is obligated to sell or purchase, but if they do, the division order's terms will bind the parties. n1001 In the gas industry, division orders are used to protect the purchaser from disagreements about the division of proceeds. The lessee generally has title and authority to sell the lessor's gas. n1002

In addition to stating the amount of each party's interest, division orders often contain numerous other items about the purchase price, the quality of the gas or oil, and the computation of royalty. n1003 Lessors often object to terms of division orders and may submit alternative "statements of interest." The cases are split on whether a signed division order may be a prerequisite for royalty payments. Technically, the lease itself obligates the lessee to pay royalty, especially for gas royalties, where there is no "in kind" provision. n1004 Nevertheless, division orders are customary in the industry and there may be an implied duty for the lessor to cooperate by signing reasonable normal documents. n1005

Because of attempts to modify leases through division orders and the duress felt by lessors to sign orders to receive royalties, some states statutorily defined what terms may be required in a division order and declared that any terms contrary to the lease contained in a division order are invalid unless also contained in a separate agreement. n1006 Other states reached this conclusion judicially. n1007

§ 49.50(a)(2) Effect of Division Order.

The division order is a direction to the purchasing company to pay the proceeds to the owners of production in the specified percentages. It warrants title to the oil or gas and allows for payment in accordance with the division order's terms.

Most importantly, the division order can bind the signatories in regard to payments already made under it. n1008 They cannot sue the purchaser for conversion or for improper payment. Because a division order is not a royalty conveyance, n1009 under the better view, the interest owners could still sue each other if one was overpaid and another underpaid. n1010 Moreover, if the operator prepared the erroneous orders and retained the benefits of the purchase payment, division orders would not prevent suing it. n1011

§ 49.50(a)(3) Modifying or Terminating Division Orders.

Any party to a division order always may revoke it under the customary form. n1012 If a party agreed at one point to a division of proceeds other than one based on ownership shares, that agreement may be changed unilaterally. n1013

§ 49.50(b) Failure to Pay.

The general rule is that, absent a special provision in the lease, a failure to pay royalty will not lead to a forfeiture of a lease because royalty payments are covenants, not conditions. n1014 Courts, however, do have the inherent power to cancel a lease for the lessee's willful and repeated breaches. Additionally, statutes have changed the result in some instances and allowed the lessor to seek cancellation of a lease for non-payment of royalties. n1015

§ 49.50(c) Interest.

Absent a statute, only Kansas regularly allowed prejudgment interest on overdue royalty payments. n1016 The common-law rule granted prejudgment interest only in actions for sums certain; royalties can be subject to question, such as the reasonableness of costs deducted and what the lessor owns. n1017 Nevertheless, if sums were actively used by the lessee during the period of suspense, interest could be required to be paid. n1018 Many states now provide for interest by statute. n1019

§ 49.50(d) Overpayment.

Overpayment of royalties may happen in several situations. n1020 If a lessee overpays royalty because the lessor does not own the interest believed to have been owned, the lease's warranty or proportionate reduction clauses may give the lessee relief. Absent these clauses or if the overpayment was for other reasons, the lessor need not refund payments the lessee voluntarily made. n1021 Refunds can be compelled, however, if payments resulted from a mistake of law or fact. n1022

§ 49.50(e) Statutory Provisions.

Many oil and gas producing states have passed statutes to grant lessors additional rights in regard to royalty payments. n1023 Many of these statutes obligate the first purchaser to pay the lessor directly, thereby eliminating the lessee as a middleman. n1024 Interest generally is required on late payments. n1025 The statutes also often limit the reasons why payments may be withheld. n1026 For example, most only allow suspense accounts for disputes about marketable title and will require payment of royalties attributable to mineral interests not disputed. n1027 Penalties for willful or unreasonable withholding of royalties and provisions for attorney fees are common. n1028

FOOTNOTES:
(n1)Footnote 999. For division order custom and usage for oil, *see Wolfe v. Texas Co., 83 F.2d 425 (10th Cir. 1936),*

cert. denied, 299 U.S. 553. In regard to gas, *see Gavenda v. Strata Energy, Inc., 705 S.W.2d 690 (Tex. 1986).*

In Louisiana, division orders constitute contracts that are binding until revoked and are intended to protect the lessee and purchaser from improper payment of royalties. They authorize distribution of the proceeds of sale to certain identified persons in proportion to their ownership interests in the minerals sold. *See Louisiana Land and Exploration Co. v. Pennzoil Exploration & Prod. Co., 962 F. Supp. 908 (E.D. La. 1997).*

(n2)Footnote 1000. *See generally* 3 Kuntz, Lowe, Anderson, Pierce, and Smith, Oil and Gas Law § 36.3 (Anderson).

(n3)Footnote 1001. *Amerada Petr. Corp. v. Melton, 281 P. 591 (Okla. 1929)* (division order contained necessary contract terms).

(n4)Footnote 1002. *See generally* 3 Kuntz, Lowe, Anderson, Pierce, and Smith, Oil and Gas Law § 40.6 (Anderson). If cotenants are involved in a sale, however, the operator's authority to sell all the gas is not necessarily implied. Absent a division order in this situation, the purchaser risks becoming a converter. *Teel v. Public Serv. Co., 767 P.2d 391 (Okla. 1985); but see Anderson v. Dyco Petr. Corp., 782 P.2d 1367 (Okla. 1989)* (seemingly limiting *Teel* to when the purchaser knows the operator's authority was revoked; generally a cotenant may sell gas and balancing or other accounting devises adjust rights among cotenants).

(n5)Footnote 1003. *See, e.g.*, division orders in *Exxon Corp. v. Middleton, 571 S.W.2d 349 (Tex. Civ. App. 1978), reversed in part, 613 S.W.2d 240 (Tex. 1981)* (transformed market value lease to proceeds by stipulating royalty to be determined by contract proceeds) and *Hull v. Sun Ref. and Mktg. Co., 789 P.2d 1272 (Okla. 1989)* (attempted to add warranties as to gas quality). *See generally* Summers, *supra* note 32, at § 390.

(n6)Footnote 1004. *Hull v. Sun Ref. and Mktg. Co., 789 P.2d 1272 (Okla. 1989)* (may not require under statute despite pre-existing common usage making division order execution precondition to royalty payment); *Schaffer v. Tennoco Oil Co., 647 S.W.2d 446 (Ark. 1983)* (implying signing is not prerequisite to duty by allowing interest on withheld royalties). *See also* La. Rev. Stat. Ann. § 31:138.1.

(n7)Footnote 1005. *Blausey v. Stein, 400 N.E.2d 408 (Ohio 1980)* (not undue burden to require signature); *TXO Prod. Corp. v. Page Farms, Inc., 698 S.W.2d 791 (Ark. 1985)* (recognized but did not apply common law custom and usage allowing purchaser to withhold payment until division order signed).

(n8)Footnote 1006. 52 Okla. Stat. Ann. § 570.11; La. Rev. Stat. Ann. § 31:138.1; *Hull v. Sun Refining and Marketing Co., 789 P.2d 1272 (Okla. 1989)* (not prerequisite to payment under statute on royalty payments).

(n9)Footnote 1007. *Holmes v. Kewanee Oil Co. 664 P.2d 1335 (Kan. 1983). See also Imperial Colliery Co. v. Oxy U.S.A. Inc., 912 F.2d 696 (4th Cir. 1990)* (boiler plate division order could not modify); *but see Exxon Corp. v. Middleton, 571 S.W.2d 349 (Tex. Civ. App. 1978), rev'd in part, 613 S.W.2d 240 (Tex. 1981)* (may modify lease but can revoke division order at any time).

(n10)Footnote 1008. *Phillips Petr. Co. v. Williams, 158 F.2d 723 (5th Cir. 1947).*

(n11)Footnote 1009. *Reagan v. Union Oil Co., 675 P.2d 953 (Mont. 1984).*

The lack of words of grant in the division order may also mean that a lessor's signing of a division order will not revive a lease that had terminated unless the lessee had detrimentally relied on the signing. *Exploracion De La Estrella Soloataria Inc. v. Birdwell, 858 S.W.2d 549 (Tex. App. 1993). See also, Rogers v. Ricane Enters., Inc., 884 S.W.2d 763 (Tex. 1994)* (division order did not transfer title to working interest).

(n12)Footnote 1010. *Wagner v. Sunray Mid-Continent Oil Co., 318 P.2d 1039 (Kan. 1957)* (division order not a

conveyance between lessors nor does it estop underpaid party from seeking correct payment); *but see Benavides v. Warren, 674 S.W.2d 353 (Tex. App. 1984)* (division order bound for past payments in dispute between term royalty owner and reversioner). For other cases, *see* 3 Kuntz, Lowe, Anderson, Pierce, and Smith, Oil and Gas Law § 39.5(b) (Anderson).

(n13)Footnote 1011. *Gavenda v. Strata Energy, Inc., 705 S.W.2d 690 (Tex. 1986). See also, Unioil v. Elledge, 962 F.2d 988 (10th Cir. 1992)* (if had contested amount, acceptance of payment under division order not an accord and satisfaction).

(n14)Footnote 1012. *Snider v. Snider, 255 P.2d 273 (Okla. 1953). See generally* Richard W. Hemingway, The Law of Oil and Gas § 7.5(C) (2d ed. 1983).

(n15)Footnote 1013. *JFD, Inc. v. Chappuis, 615 So. 2d 492 (La. App. 1993).*

(n16)Footnote 1014. *Cannon v. Cassidy, 542 P.2d 514 (Okla. 1975); Roye Realty & Dev., Inc. v. Watson, 791 P.2d 821 (Okla. App. 1990).*

Hitzelberger v. Samedan Oil Corp., 948 S.W.2d 497 (Tex. App. 1997) (where the lease terminated automatically according to the terms of a special limitation or condition because of a failure to make two monthly royalty payments as required during the primary term).

Cf. Coastal Oil & Gas Corp. v. Roberts, 28 S.W.3d 759 (Tex. App. 2000). Oil and gas lease included an express condition subsequent that the lessor could terminate the lease if royalty payments were wrongfully or unreasonably withheld for 30 days after demand. Lessee's failure to pay royalties based upon lessor's failure to sign and return division order was not authorized by Natural Resources Code.

(n17)Footnote 1015. *See* Louisiana Mineral Code, La. Rev. Stat. Ann. §§ 31:137-31:141 (if lessee pays in response to notice, judicial forfeiture only if original failure to pay was fraudulent); *Arceneaux v. Hawkins, 376 So. 2d 362 (La. App. 1979)* and N.D. Cent. Code § 47-16-39.1 (may cancel if court deems equitable); *Imperial Oil of N.D. v. Consol. Oil Co., 851 F.2d 206 (8th Cir. 1988)* (allowed cancellation because statute made royalties "essence" of contract even if damages adequate).

Chevron USA, Inc. v. Vermillion Parish School Board, 128 F. Supp. 2d 961 (W.D. La. 2001) (where notice provision of Louisiana Mineral Code seeking payment of royalties by lessees required individualized notices of demand from all members of class who seek inclusion in litigation).

(n18)Footnote 1016. *Lippert v. Angle, 508 P.2d 920 (Kan. 1973)* (justified for unreasonable and vexatious delay in payment); *Lightcap v. Mobil Oil Corp, 562 P.2d 1 (Kan. 1977)* (equity requires interest when party retains and uses another's money). *See also, Phillips Petr. Co. v. Stahl Petr. Co., 569 S.W.2d 480 (Tex. 1978)* (interest awarded when lessee withheld royalty pending approval of known rates); *Sun Oil Co. v. Wortman, 486 U.S. 717 (1988)* (same).

Louisiana Land and Exploration Co. v. Pennzoil Exploration & Prod. Co., 982 F. Supp. 398 (E.D. La. 1997) (general rule that a well operator is not obligated to pay interest on money withheld during an ongoing title dispute does not apply when the proceeds are merged with corporate funds and used for general corporate purposes. The division order may abrogate the right to recover interest in such a case).

(n19)Footnote 1017. *Exxon Corp. v. Jefferson Land Co., 573 S.W.2d 829 (Tex. Civ. App. 1978)* (no interest if how to calculate royalties at issue). *See* 3 Kuntz, Lowe, Anderson, Pierce, and Smith, Oil and Gas Law § 42.3 (Anderson).

(n20)Footnote 1018. *Wortman v. Sun Oil Co., 690 P.2d 385 (Kan. 1984), judgment vacated, 474 U.S. 806 (1988)* (must use law of states in which leases are); *after remand, Sun Oil Co. v. Wortman, 755 P.2d 488 (Kan. 1987), aff'd,*

486 U.S. 717 (1988).

(n21)Footnote 1019. *See* § 49.50(e), *infra*. Kansas now makes the first purchaser liable for interest. Kan. Stat. Ann. §§ 55-1614-55-1619.

Quinlan v. Koch Oil Co., 25 F.3d 936 (10th Cir. 1994) (Oklahoma statute requiring compounding of interest is not to be applied retroactively).

(n22)Footnote 1020. *See generally* 3 Kuntz, Lowe, Anderson, Pierce, and Smith, Oil and Gas Law § 42.8(a) (Anderson).

(n23)Footnote 1021. *Pacific Gas & Elec. Co. v. Zuckerman, 234 Cal.Rptr. 630 (Cal. App. 1987)* (over-payments made with knowledge of facts and accepted in good faith need not be refunded).

(n24)Footnote 1022. *Gulf Oil Corp. v. Lone Star Producing Co., 322 F.2d 28 (5th Cir. 1963)* (mistaken payment not voluntary).

(n25)Footnote 1023. For listings of statutes and representative cases from Alabama, Arkansas, Indiana, Louisiana, Mississippi, Montana, New Mexico, North Dakota, Oklahoma, Texas, and Wyoming, *see* Richard W. Hemingway, The Law of Oil and Gas § 7.1 (2d ed. 1983).

(n26)Footnote 1024. *E.g.*, 52 Okla. Stat. § 570.10; Tex. Nat. Res. Code Ann. § 91.402.

(n27)Footnote 1025. *See State v. BHP Petr., 804 P.2d 671 (Wyo. 1991)* (interest only due on royalties underpaid after date of act because common law changed; interpreting §§ 30-5-301-30-5-305; *but see Moncrief v. Harvey, 816 P.2d 97 (Wyo. 1991)* (interest awarded because lessee knew of contested interest and did not pay royalties).

(n28)Footnote 1026. *Hull v. Sun Ref. & Mktg. Co., 789 P.2d 1272 (Okla. 1989)* (only may withhold royalty for lack of marketable title under Oklahoma statute).

(n29)Footnote 1027. *Howell Petr. Corp. v. Sampson Resources Co., 903 F.2d 778 (10th Cir. 1990),* interpreting Ark. Code Ann. §§ 15-74-601-15-74-604 (no penalty interest if withhold royalty because of marketability question, but must pay undisputed amounts).

(n30)Footnote 1028. *E.g.*, La. Rev. Stat. Ann. § 31:140 (if lessee fails to pay without reasonable cause, double royalties and attorney fees due).

Maxwell v. Samson Resources Co., 848 P.2d 1166 (Okla. 1993) (treble damages under statute requires intentional or wrongful conduct); *Quinlan v. Koch Oil Co., 25 F.3d 936 (10th Cir. 1994)* (under Oklahoma statute, funds may not be withheld for failure to sign a division order and a person entitled to proceeds is not required to make a showing of marketable title unless a question as to marketability was raised); *Coosewoon v. Meridian Oil Co., 25 F.3d 920 (10th Cir. 1994)* (Oklahoma statutes not applicable to leases of restricted Indian land because pre-empted by federal statutes).

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CHAPTER 49 PETROLEUM AND PIPELINES
XI. Miscellaneous Lease Clauses

6-49 Thompson on Real Property, Thomas Editions § 49.51

AUTHOR: Professor Maria E. Mansfield College of Law University of Tulsa

§ 49.51 Lands and Interests Subject to Lease.

§ 49.51(a) Mother Hubbard Clause.

The "Mother Hubbard" or "cover-all" clause is discussed, *supra*, at § 49.31(c).

§ 49.51(b) Warranty Clause.

In some jurisdictions, using words such as "demise" or "grant" will imply a warranty in a lease. n1029 Most leases, however, have express clauses through which the lessor warrants title. A typical lease warranty would read: "Lessor hereby warrants and agrees to defend the title to such lands... ." Technically, this language would only create a covenant of warranty, a promise to defend title against future lawful claims and demands. To breach such a warranty would require ouster of the lessee. Nevertheless, some courts have treated the clause as a general warranty, which would include the covenants of seisin, right to convey, and no encumbrances. n1030 These covenants may be breached without ouster.

Because a court might include the present covenants in the warranty, many lessors reject the warranty clause, especially when the lease is written to seemingly convey 100% of the mineral interest when the lessor owns only an undivided or partial interest. The lessor would be in breach of the warranty upon execution of the lease. As with other warranties, the fact that both parties knew of the outstanding interest will not preclude a breach. n1031 Lessees generally do not use the warranty to obtain return of bonus money if the lessor did not have full title because lessees want granting clauses to cover the entire interest in the minerals to account for after acquired title. n1032 In spite of this custom, however, a breach of warranty suit would be possible. The lessee could seek a return of bonus and delay rentals, both with interest. n1033 A lessor therefore may want to limit the warranty to the interest the lessor is believed to own and, to meet the lessee's concern, expressly include any after-acquired interests in the grant. Alternatively, if there are known outstanding interests, they should be excluded from the warranty. n1034

§ 49.51(c) Proportionate Reduction or Lesser Interest Clause.

The proportionate reduction or lesser interest clause protects the lessee from having to pay royalty or delay rentals to

more than one party. It has two uses. The first use protects the lessee when the lessor's title fails. Without such a clause, if the lessor's title to some but not all of the mineral estate fails, some precedent suggests the lessee could not reduce royalty and rental payments if the lease was in gross, and not granted on an acreage basis. n1035 The second use of the clause realigns lease benefits when the lessor purports to grant rights to all the minerals but only owns an undivided interest. A lease may knowingly be granted on more than the lessor owns in the following type of situation. Two parties each own an undivided 1/2 interest in the minerals. A lessee intends to pay a 1/8 royalty in total. To ensure that the lessee has leased all the minerals even if the share each lessor owned was not truly one-half, the lease from each owner may purport to cover the whole mineral estate. However, if each lease reserves a royalty of 1/16, the share of a 1/8 royalty would not be accurate if one party actually owned more or less than the other. The lesser interest or proportionate reduction clause remedies this problem as well as title failures. n1036

The clause allows future adjustments that permit the lessee to accurately pay all lessors. A typical clause reads:

> Without impairment of Lessee's rights under the warranty in the event of failure of title, it is agreed that in case lessor owns a lesser interest in the above described land than the entire and undivided fee simple estate therein, then the royalties and rentals herein provided for shall be paid the said lessor only in the proportion which his interest bears to the whole and undivided fee. n1037

For the co-tenant situation, the clause enables the lessee to insert in each lease the full royalty and rental amount that the lessee intends to pay for the whole mineral estate. Whatever interest the two co-tenants own, the lessee will never pay more than a total of a 1/8 royalty and the specified rental; each lessor will receive a proper share. The same result can be seen in the title failure situation. If title fails, the lessor would only receive a share of proceeds proportionate to actual ownership.

Title failure, however, may be of several types, which leads to the first interpretive problem, namely, what triggers the need to reduce benefits. If there is total failure of title to a portion of the lands covered by the lease, royalties will not be owed on a well drilled on the unowned acreage. Conversely, if a well is drilled on land in which the lessor's title to the minerals is complete, royalties should not be reduced. Therefore, the clause is used when an interest is outstanding in minerals to which the lessor also has a claim. The outstanding interest could be an undivided interest in the minerals or other right to the minerals.

The proportionate reduction clause functions in these outstanding interest situations. The clause will reduce benefits if there is an outstanding undivided mineral interest. If the outstanding interest is not a mineral interest but a non-participating royalty, the lessor's royalty is also reduced using the proportionate reduction clause. The method of reduction in this situation has varied. When there was an outstanding 1/8 non-participating royalty and a lease with a 1/8 royalty, one court limited the lessor's royalty to 1/8 of 7/8 of production or 7/64. n1038 Another approach is to subtract the outstanding royalty from the leasehold royalty. n1039

Some confusion also exists about whether a lessee may proportionately reduce rentals and royalties when the lease is a partial interest lease, that is, when the lease purports to grant an undivided interest rather than a full interest. In *Texas Co. v. Parks*, n1040 the lessor owned an undivided 1/2 interest in 320 acres. The lease only purported to cover the lessor's undivided 1/2 interest. Rentals were to be $160 and royalty 1/8. The lessee tendered rentals of $80 under the proportionate reduction clause. The court held the lease terminated for failure to pay proper delay rentals; there was no failure of title and no reason to reduce the rentals because the lessor owned the 1/2 interest leased. Crypticly, the court hinted that royalties may be reduced under a different computation formula. n1041

Peculiar facts may explain the result. The rental amount inserted already appeared to be half of what would it would have been at a normal $1.00 an acre delay rental. Therefore, the court resisted the lessee's attempt to reduce an already reduced rental. Nevertheless, the case should alert the drafter to the need for clarity. One way around the problem would be to modify the proportionate reduction clause so the trigger reads as follows: "if Lessor owns an interest in the oil, gas

and other minerals on, in or under said land less that the entire fee simple estate (whether or not this lease purports to cover the whole or fractional interest) ..." n1042

A final interpretive problem is what payments are to be proportionately reduced. Most clauses refer to "rentals and royalties." Generally, bonuses are not affected because they are paid prior to lease execution. n1043 Overriding royalties the lessor retains, however, create some controversy. In some jurisdictions, they are in the nature of bonuses and therefore not affected. n1044 Other jurisdictions might consider the overriding royalties to be "royalties" but still refuse to proportionately reduce the payment because the extra overriding royalties generally are typed in or added to the lease in a rider. These courts found that the proportionate reduction clause of the printed form should not impact the specially bargained for consideration. n1045 There is precedent, however, to the contrary. n1046

FOOTNOTES:

(n1)Footnote 1029. *See generally* 4 Kuntz, Lowe, Anderson, Pierce, and Smith, Oil and Gas Law § 52.1 (Anderson).

(n2)Footnote 1030. *Oklahoma City v. Harper, 180 P.2d 162 (Okla. 1947); Siniard v. Davis, 678 P.2d 1197 (Okla. App. 1984).*

(n3)Footnote 1031. *Id.*

(n4)Footnote 1032. *See* discussion in 4 Kuntz, Lowe, Anderson, Pierce, and Smith, Oil and Gas Law § 52.2 (Anderson).

(n5)Footnote 1033. *Walker & Withrow, Inc. v. Haley, 653 P.2d 191 (Okla. 1982). Cf. Griffin v. Stanolind Oil & Gas Co., 125 S.W.2d 545 (Tex. 1939)* (proportionate reduction clause does not benefit lessor on warranty claim).

(n6)Footnote 1034. *Siniard v. Davis, 678 P.2d 1197 (Okla. App. 1984)* (existing lease must be an exception from toplease's warranty).

(n7)Footnote 1035. *Piney Oil & Gas Co. v. Allen, 32 S.W.2d 325 (Ky. 1930); Phillips Petr. Co. v. Eckroat, 46 P.2d 464 (Okla. 1935)* (if transaction considered a lease, lessee in possession cannot challenge lessor's title; if considered conveyance, cannot avoid purchase without reconveying). *See also Gibson v. Turner, 294 S.W.2d 781 (Tex. 1956)* (deletion of proportionate reduction clause shows intent not to allow deduction despite mineral title failure); *Probst v. Ingram, 373 P.2d 58 (Okla. 1962)* (reference in royalty clause to production "from the premises" not sufficient to reduce full royalty to fraction contained in granting clause of partial interest lease); *but see Gresham v. Turner, 382 S.W.2d 791 (Tex. App. 1963)* (lease would not reserve 1/8 royalty if lessor only owned 1/8 undivided interest). For arguments in favor of reduction, *see* P. Martin & B. Kramer, Williams & Meyers Oil and Gas Law § 316.4 (Matthew Bender) and 4 Kuntz, Lowe, Anderson, Pierce, and Smith, Oil and Gas Law § 52.4 (Anderson) (employing automatic offset theory).

(n8)Footnote 1036. A variant of this clause is a proportionate increase clause. This would increase benefits for a lessor who actually owns more than was anticipated, perhaps through operation of the Mother Hubbard clause, which adds acreage to the lease in addition to that expressly described in it. *See generally* P. Martin & B. Kramer, Williams & Meyers Oil and Gas Law § 686.1 (Matthew Bender).

(n9)Footnote 1037. *See* clause in *Probst v. Ingram, 373 P.2d 58 (Okla. 1962).* For variants, *see generally* P. Martin & B. Kramer, Williams & Meyers Oil and Gas Law § 686.2 (Matthew Bender).

(n10)Footnote 1038. *E.H. Lester Leasing Co. v. Griffith, 779 S.W.2d 226 (Ky. App. 1989).*

(n11)Footnote 1039. *Neel v. Alpar Resources, Inc., 797 S.W.2d 361 (Tex. App. 1990)* (not incongruous for lessor to execute lease under which he would get no royalty because other benefits accrued). *See also*, P. Martin & B. Kramer, Williams & Meyers Oil and Gas Law §§ 316.3, 686.3 (Matthew Bender).

(n12)Footnote 1040. *247 S.W.2d 179 (Tex. Civ. App. 1952).*

(n13)Footnote 1041. *Texas Co. v. Parks, 247 S.W.2d 179 (Tex. Civ. App. 1952). See also Pollock v. McAlester Fuel Co., 223 S.W.2d 813 (Ark. 1949)* (reducing basic royalty in this situation).

(n14)Footnote 1042. For other solutions, including making the rentals proportional in the lease to start with and only having the proportionate reduction clause apply to the royalties, *see* Richard W. Hemingway, The Law of Oil and Gas § 7.8 (2d ed. 1983) and P. Martin & B. Kramer, Williams & Meyers Oil and Gas Law § 686.4 (Matthew Bender).

(n15)Footnote 1043. *See generally* P. Martin & B. Kramer, Williams & Meyers Oil and Gas Law § 686.5 (Matthew Bender). *But see Probst v. Ingram, 373 P.2d 58 (Okla. 1962)* (production payment a bonus; not reduced because clause refers to royalties and rentals).

(n16)Footnote 1044. *Cf. Probst v. Ingram, 373 P.2d 58 (Okla. 1962)* (production payment a bonus; not reduced because clause refers to royalties and rentals).

(n17)Footnote 1045. *Downen Enters. v. Gem Oil & Gas Co., 476 N.E.2d 42 (Ill. App. 1985)* (override's reference to computation out of 8/8 indicates not to be reduced); *Barker v. Boyer, 794 P.2d 322 (Kan. App. 1990)* (contract governs). *See also McMahon v. Christmann, 303 S.W.2d 267 (Tex. 1957)* (phrase "without reduction" in reference to override means no reduction despite proportionate reduction clause).

Cf. *Horizon Resources, Inc. v. Putnam, 976 S.W.2d 268 (Tex. App. 1998)* (the overriding royalty provision in the addendum to the lease was subject to the proportionate reduction clause in the printed portion since the words "without reduction," "net" or other express language of exemption were not included).

(n18)Footnote 1046. *Finder v. Nyegaard, 367 S.W.2d 217 (Tex. Civ. App. 1963)* (ambiguous wording; had retyped the basic royalty clause with preface "notwithstanding anything to the contrary").

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CHAPTER 49 PETROLEUM AND PIPELINES
XI. Miscellaneous Lease Clauses

6-49 Thompson on Real Property, Thomas Editions § 49.52

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§ 49.52 Lessee's Administrative Protections.

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§ 49.52(a) No Increase of Burden Clause.

Most leases state that the lessor's interest shall be assignable in full or part, but further state that "no change or division in the ownership of the land, rentals, or royalties, however accomplished, shall operate to enlarge the obligations, or diminish the rights of Lessee." n1047 Courts have cited the clause when determining if delay rentals were properly paid to avoid penalizing a lessee for wrongly interpreting an ambiguous document the lessor drafted. n1048 The clause also negates a demand that each new lessor would be entitled to free gas or separate tanks for in kind royalty. More importantly, the lessee's implied covenants are not increased. n1049 Subdivision by the lessor will not require the lessee to drill additional or offset wells within the original leasehold boundaries.

§ 49.52(b) Notice of Assignment Clause.

This clause states that no change of ownership of the lessor's interest will be binding on the lessee until the clause's notification requirements are met. A prior discussion looked at the clause in the context of delay rental payments. n1050 It also will assist the lessee in making shutin royalty payments and complying with notice requirements, such as sending copies of pooling declarations.

The clause is designed to prevent the lease from being forfeited because the lessee misdirected its compliance. n1051 It is not, however, a shield to allow the lessee to escape from other duties, such as the lease's implied covenants. These duties run with the land and the lessor's assignee may enforce them regardless of whether the notice provisions are met. n1052

§ 49.52(c) Surrender Clause.

Oil and gas leases are often of large acreage. Because the lessee may later decide only part is potentially productive, the lessee may want to surrender portions of the lease. An oil and gas lease, like any lease, is deemed indivisible. n1053 A surrender clause, however, gives the lessee the express right to surrender portions of the lease: "Lessee may at any time

or times execute and deliver to lessor or to depository named above or place of record a release covering any portion or portions and be relieved of all obligations as to the acreage surrendered, and thereafter the rental payable hereunder shall be reduced in the proportion that the acreage covered hereby is reduced by said release or releases." n1054

The lessee must comply with any formal requirements contained in the clause, n1055 but if performed, the lessee will be relieved of future obligations unilaterally. The lessor does not have to accept the surrender for it to be effective. n1056 The lessee, however, will still be liable for accrued obligations n1057 and royalty payments will not be proportionately reduced. n1058

Some precedent holds that the clause does not allow a lessee to surrender specific formations; the clause as quoted anticipates acreage reduction. n1059 The lessee, however, may want to be relieved from requirements to drill to prevent drainage from or to develop specific formations. For this reason, the lessee may desire to expressly provide for release of formations.

§ 49.52(d) Separate Ownership or Divisibility Clause.

As with the lessor's interest, the lessee's interest is also generally assignable. n1060 If the lessee transfers a specific tract, the lessee would want the duties in regard to that tract separated from the original lessee's duties. Under basic property law, the lease would be indivisible and the failure of either the assignee or the lessee to pay rentals or otherwise perform would endanger the entire leasehold. The separate ownership clause changes this result: "In the event of an assignment hereof in whole or in part, liability for breach of any obligation issued hereunder shall rest exclusively upon the owner of this Lease, or portion thereof, who commits such breach." The clause is most often employed for delay rental obligations; a lease will therefore only terminate for the acreage leased by the party who does not pay delay rentals. n1061

§ 49.52(e) Notice of Forfeiture and Judicial Ascertainment Clauses.

A lessee generally wants to counter the harshness of the oil and gas lease, which allows the lease to be forfeited on the happening of certain events. Therefore, a "notice of forfeiture" clause similar to the following is often added:

> The breach by Lessee of any obligations arising hereunder shall not work a forfeiture or termination of this Lease nor cause a termination or reversion of the estate created hereby nor be grounds for cancellation hereof in whole or part unless Lessor shall notify Lessee in writing of the facts relied upon in claiming a breach hereof, and Lessee, if in default, shall have sixty days after receipt of such notice in which to commence the compliance with the obligations.

A variant of the clause is more general:

> In the event lessor considers that lessee has not complied with all its obligations hereunder, both express and implied, lessor shall notify lessee in writing, setting forth specifically in what respect lessor claims lessee has breached this lease. The service of notice and elapse of sixty days without lessee meeting or commencing to meet the alleged breaches shall be a condition precedent to any action by lessor for any cause. If within sixty days after receipt of such notice lessee shall meet or commence to meet the breaches alleged by lessor, lessee shall not be deemed to be in default hereunder. n1062

Both clauses generally will be effective and enforceable; they correspond with general equitable dislike of forfeitures. n1063 Employing the abhorrence of forfeiture rationale behind the clause, some cases have held that notice would not be required if damages were the only remedy sought, even under the second type of clause, which refers to "any action" of the lessor. n1064 A more appropriate analysis would forego notice if notice would be futile n1065 or if the lessee's default was active, n1066 so that the lessee would have to be aware of it.

All jurisdictions recognize another limitation on the use of both clauses. If the required obligation creates a special limitation on the estate, non-performance does not technically lead to a forfeiture. Courts have less impetus to temper the impacts of the failure to perform. Therefore, a generally phrased clause will not save an "unless" lease from automatic termination when the lessee fails to pay delay rentals. n1067 Nor will the clause affect the habendum clause; the lease will end for failure to produce in paying quantities despite lack of notice. n1068

A variant of the notice clause, referred to as a judicial ascertainment clause, states that the lease will not terminate until a court ascertains that the lessee is in default and the lessee does not there after begin activity to rectify the default within a specified time. n1069 After an initial distaste for the clause because of a belief that they would multiply actions, courts generally do uphold the clause. n1070 Most lessors, however, will not accept such a clause, at least if an attorney represents them.

§ 49.52(f) Subrogation Clause.

If an oil and gas lease is subsequent to a mortgage or could be impacted by a tax sale, the lessee obviously wants to avoid foreclosure or other consequences of the lessor's delinquency. Therefore, the subrogation clause expressly allows the lessee to make payments and then be subrogated to the lienholder's position. n1071

§ 49.52(g) Entirety Clause.

The entirety clause, which allows the lessee to treat the leased premises as one unit if the lessor subdivides the land, is discussed in § 49.22(d).

§ 49.52(h) Equipment Removal Provisions.

Wells drilled by a lessee and pumping equipment are generally classified as trade fixtures. n1072 During the pendency of a lease, they belong to the lessee. n1073 To confirm that title to them will not automatically pass to the lessor at the end of the lease, most leases allow the lessee to remove equipment, including casing, "at any time." n1074 Even without this clause, lessees were given a reasonable time after a lease ended to remove equipment. n1075 The basic lease clause does not necessarily change the common-law result because the phrase "at any time" has been limited to allow removal only in a reasonable time. n1076 The time period therefore will depend on the circumstances of each case. n1077 Some courts ask whether the delay has injured the lessor. n1078 If the clause contains a specific time for removal, however, that time will bind. n1079

Under any rule, the lessee may not remove casing or otherwise incapacitate a producing well. Title to the casing and non-removable equipment remains with the lessee, but it must be allowed to be used for production with appropriate compensation. n1080 The lessor, however, cannot force the lessee to leave the casing in a non-paying well simply to afford the lessor access to free gas. n1081

FOOTNOTES:

(n1)Footnote 1047. *See generally* 4 Kuntz, Lowe, Anderson, Pierce, and Smith, Oil and Gas Law § 51.1(a) (Anderson).

(n2)Footnote 1048. *Humble Oil & Ref. Co. v. Harrison, 205 S.W.2d 355 (Tex. 1947). See* discussion, § 49.37(c)(1) *supra*.

(n3)Footnote 1049. This may be true even without such a clause. *Felmont Oil Corp. v. Pan Am. Petr. Corp., 334 S.W.2d 449 (Tex. Civ. App. 1960).*

(n4)Footnote 1050. *See* § 49.37(d)(2), *supra*.

(n5)Footnote 1051. *See generally* 4 Kuntz, Lowe, Anderson, Pierce, and Smith, Oil and Gas Law § 51.1(b)

(Anderson).

(n6)Footnote 1052. *U.V. Indus. v. Danielson, 602 P.2d 571 (Mont. 1979); TXO Prod. Corp. v. Page Farms, Inc., 698 S.W.2d 791 (Ark. 1985)* (damages may be recovered for period before notice).

(n7)Footnote 1053. For the history of the clause and general use, *see* 4 Kuntz, Lowe, Anderson, Pierce, and Smith, Oil and Gas Law § 53.2 (Anderson).

(n8)Footnote 1054. *See* P. Martin & B. Kramer, Williams & Meyers Oil and Gas Law § 680.1 (Matthew Bender) for variants.

(n9)Footnote 1055. *Benson v. Nyman, 16 P.2d 963 (Kan. 1932).*

(n10)Footnote 1056. *Superior Oil Co. v. Dabney, 211 S.W.2d 563 (Tex. 1948)* (no consent needed even if surrender form provided for lessor signature).

(n11)Footnote 1057. *Edmonds v. Mounsey, 44 N.E. 196 (Ind. App. 1896).*

(n12)Footnote 1058. *Beverly Hills Oil Co. v. Beverly Hills Unified Sch. Dist., 70 Cal. Rptr. 640 (1968)* (surrender clause only referred to reducing rentals and drilling obligations).

(n13)Footnote 1059. *Shell Oil Co. v. Stansbury, 401 S.W.2d 623 (Tex. Civ. App. 1966).*

(n14)Footnote 1060. *See generally* §§ 49.61-49.63, *infra*.

(n15)Footnote 1061. *See generally* 4 Kuntz, Lowe, Anderson, Pierce, and Smith, Oil and Gas Law § 51.2(d) (Anderson).

(n16)Footnote 1062. *See* clause in *Miami Oil Producers, Inc. v. Larson, 661 P.2d 1260, 1262-1263 (Mont. 1983).*

Cf. Amoco Production Co. v. Texas Meridian Resources, 180 F.3d 664 (5th Cir. 1999) (involving a clause giving the lessor the right to terminate the lease if the lessee, 20 days after notice, has failed to comply with any provisions of the lease. Drilling in a restricted area was a breach of the lease and lessor had no obligation to direct lessee to a permissible area).

(n17)Footnote 1063. *See generally* P. Martin & B. Kramer, Williams & Meyers Oil and Gas Law § 682 (Matthew Bender) and 4 Kuntz, Lowe, Anderson, Pierce, and Smith, Oil and Gas Law § 53.4(c) (Anderson).

(n18)Footnote 1064. *Texas Oil Corp. v. Vela, 429 S.W.2d 866 (Tex. 1968); TXO Prod. Corp. v. Page Farms, Inc., 698 S.W.2d 791 (Ark. 1985); but see Billeaud Planters v. Union Oil Co. of Cal., 245 F.2d 14 (5th Cir. 1957)* (clause plainly requires notice before any action; referred to implied covenants expressly).

(n19)Footnote 1065. *Williams v. Humble Oil & Ref. Co., 432 F.2d 165 (5th Cir. 1970)* (do not have to determine if clause would never apply in damage action because breach active). *See generally* Kuntz, Lowe, Anderson, Pierce, and Smith, Oil and Gas Law § 53.4(c) (Anderson).

(n20)Footnote 1066. *Williams v. Humble Oil & Ref. Co., 432 F.2d 165,* on *reh'g, 435 F.2d 772 (5th Cir. 1972), cert. denied, 402 U.S. 934.*

(n21)Footnote 1067. *Barbee v. Buckner, 265 S.W.2d 869 (Tex. Civ. App. 1954). See generally* § 49.37(d)(3), *supra*.

(n22)Footnote 1068. *McCollough Oil, Inc. v. Rezek, 346 S.E.2d 788 (W. Va. 1986); Miami Oil Producers, Inc. v. Larson, 661 P.2d 1260 (Mont. 1983)* (time under cessation of production clause expired so lease automatically expired).

See generally P. Martin & B. Kramer, Williams & Meyers Oil and Gas Law § 682.2 (Matthew Bender) and 4 Kuntz, Lowe, Anderson, Pierce, and Smith, Oil and Gas Law § 53.4(c) (Anderson).

(n23)Footnote 1069. *Kuehne v. Samedan Oil Corp., 626 P.2d 1035 (Wyo. 1981).*

(n24)Footnote 1070. *But see Frick-Reid Supply Corp. v. Meers, 52 S.W.2d 115 (Tex. Civ. App. 1932)* (violate public policy).

(n25)Footnote 1071. A typical clause would read: "Lessee at its option may discharge any tax, mortgage or other lien upon said land, either in whole or in part, and in the event Lessee does so, it shall be subrogated to such lien with the right to enforce same and apply rentals and royalties accruing hereunder toward satisfying same." *See generally* P. Martin & B. Kramer, Williams & Meyers Oil and Gas Law § 685.3 (Matthew Bender) and 4 Kuntz, Lowe, Anderson, Pierce, and Smith, Oil and Gas Law § 52.3 (Anderson).

(n26)Footnote 1072. *Delk v. Craig, 357 S.W.2d 522 (Ark. 1962).*

(n27)Footnote 1073. *Santa Fe Minerals v. Sanford, 842 P.2d 363 (Okla. App. 1992).*

(n28)Footnote 1074. *See generally* P. Martin & B. Kramer, Williams & Meyers Oil and Gas Law § 674 (Matthew Bender) and 4 Kuntz, Lowe, Anderson, Pierce, and Smith, Oil and Gas Law § 50.3(b) (Anderson).

(n29)Footnote 1075. *McCormick v. Krueger, 593 S.W.2d 729 (Tex. Civ. App. 1979). See generally* Richard W. Hemingway, The Law of Oil and Gas § 7.10 (2d ed. 1983); Summers, *supra* note 32 at § 526 (1954) and 4 Kuntz, Lowe, Anderson, Pierce, and Smith, Oil and Gas Law § 50.3(a) (Anderson).

(n30)Footnote 1076. *Wilson v. Owens, 619 P.2d 866 (Okla. 1980)* (mere absence of intent to abandon equipment will not extend period to reclaim); *Toles v. Maneikis, 412 N.W.2d 263 (Mich. App. 1987)* (failure to remove in 5 years unreasonable).

(n31)Footnote 1077. *Bond Inv. Corp. v. Dynasty Oil Co., 715 F. Supp. 1445 (W.D. Ark. 1989).*

(n32)Footnote 1078. *Delk v. Craig, 357 S.W.2d 522 (Ark. 1962).*

(n33)Footnote 1079. *Wade v. Lillard, 207 P.2d 771 (Okla. 1949). See also Sunray DX Oil Co. v. Texaco, Inc., 417 S.W.2d 424 (Tex. Civ. App. 1967)* (cannot remove after lease termination if clause allows removal "at any time during the term of the lease;" express clause displaces implied common law right).

But see Eichman v. Leavall Resources Corp., 876 P.2d 171 (Kan. App. 1994) (if lease is terminated by court for failure to comply with habendum requirements and lessee defended lease in good faith, lessee will have reasonable time to remove equipment after entry of court judgment evicting lessee from property).

(n34)Footnote 1080. *Fike v. Riddle, 677 S.W.2d 722 (Tex. App. 1984)* (just compensation measured by value of casing in place minus cost of removal). For an extended discussion, see 4 Kuntz, Lowe, Anderson, Pierce, and Smith, Oil and Gas Law § 50.3(c) (Anderson).

(n35)Footnote 1081. *Wade v. Lillard, 207 P.2d 771 (Okla. 1949).*

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§ 49.53 Lessor's Additional Compensation.

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§ 49.53(a) Minimum Royalty Clause.

A minimum royalty clause, which is not standard, assures that the lessor will receive a specified amount annually even if production is not adequate to generate such amounts. n1082 Most such clauses are not phrased so as to make the payment of the royalty a special limitation on the estate.

§ 49.53(b) Free Gas Clause.

Some leases allow the lessor free gas, generally for domestic purposes. n1083 Often, the free gas clause states that the connection will be at the expense of the lessor. n1084 Texas has held that the clause creates benefits and burdens that run with the land and can be assigned like any other property interest. n1085 Depending on the wording of the clauses, however, they may create personal rights rather than covenants that run with the land. n1086 Unlike other lease benefits, the clause runs in favor of the surface owner, not the mineral owner. n1087 The no increase in burden clause should prevent the duty from multiplying when the surface is subdivided, n1088 but the extent to which the benefit is divisible upon subdivision may depend on the clause's wording. References to "principal residence" and the like tend to limit use to one building. n1089

FOOTNOTES:
(n1)Footnote 1082. *See generally* Richard W. Hemingway, The Law of Oil and Gas § 7.6 (2d ed. 1983).

(n2)Footnote 1083. *Id.* at § 7.12, P. Martin & B. Kramer, Williams & Meyers Oil and Gas Law § 660 (Matthew Bender), and 4 Kuntz, Lowe, Anderson, Pierce, and Smith, Oil and Gas Law § 53.6 (Anderson). *See also* P. Martin & B. Kramer, Williams & Meyers Oil and Gas Law § 662 (Matthew Bender) and 4 Kuntz, Lowe, Anderson, Pierce, and Smith, Oil and Gas Law § 53.7 (Anderson) for discussions of the irrigation gas clause.

Jolyne Corp. v. Michels, 446 S.E.2d 494 (W. Va. 1994) (use of free oil or gas for domestic use does not in itself keep a lease in effect after the primary term); *Sethi v. Antonucci, 710 N.E.2d 719 (Ohio App. 1998)* (where the right to free gas

under the lease continued to benefit the residence existing at the time the lease was created but did not benefit a newly constructed house after the property was subdivided).

Acc. Universal Resources Corp. v. Ledford, 961 P.2d 593 (Colo. App. 1998) (the free gas clause is deemed a covenant running with the land unless the benefit is limited to a named individual).

(n3)Footnote 1084. *Sinclair Oil & Gas Co. v. Huffman, 376 P.2d 599 (Okla. 1962)* (does not apply to casinghead gas).

(n4)Footnote 1085. *Thomas v. Thomas, 767 S.W.2d 507 (Tex. App. 1989).*

(n5)Footnote 1086. *Patrick v. Allen, 350 S.W.2d 481 (Ky. 1961)* ("for the life of the well" indicates intent to run with land); *Howell v. Kentucky-West Virginia Gas Co., 275 S.W.2d 429 (1955)* ("for use of grantor's children living on farm" indicates personal right). *See generally* P. Martin & B. Kramer, Williams & Meyers Oil and Gas Law § 660.2 (Matthew Bender).

(n6)Footnote 1087. *Jackson v. Farmer, 594 P.2d 177 (Kan. 1979)* (runs with land); *United Fuel Gas Co. v. McCoy, 307 S.W.2d 176 (Ky. 1957)* (does not benefit mineral owner).

(n7)Footnote 1088. *See* § 49.52(a), *supra*. *Cf. Salisbury v. Columbian Fuel Corp., 387 S.W.2d 864 (Ky. 1965)* (surface owners could assign or dispose of right so long as remained attached to some portion of surface and was not enlarged).

(n8)Footnote 1089. *Compare Stapleton v. Columbia Gas Transmission Corp., 440 N.E.2d 575 (Ohio App. 1981)* (no subdivision when clause was for benefit of "mansion house on premises") and *Thomas v. Thomas, 767 S.W.2d 507* (Tex. App. 1989, *error denied*) (no subdivision when clause refers to principal residence); *with, Jackson v. Farmer, 594 P.2d 177 (Kan. 1949)* (applying clause in all leases in unit to the one unit well); and *Coleman v. Lindsey, 234 S.W.2d 950 (Ky. 1950)* (allows proportioning free gas in community lease although not legally entitled to do so).

Universal Resources Corp. v. Ledford, 961 P.2d 593 (Colo. App. 1998) (a limitation on use to the principal dwelling applies to the first dwelling built on the leased premises when no dwelling existed when the lease was executed).

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CHAPTER 49 PETROLEUM AND PIPELINES
XII. Implied Covenants in Oil and Gas Leases

6-49 Thompson on Real Property, Thomas Editions § 49.54

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§ 49.54 Basis and Nature of Implied Covenants.

§ 49.54(a) In Fact or in Law.

The lessee has traditionally written the oil and gas lease with the lessee's primary goals in mind, which are to obtain both the right but not the obligation to develop the leasehold and to receive security in its tenure should exploitable hydrocarbons be discovered. Other than the need to drill one producing well to satisfy the habendum clause, the lease generally does not have extensive provisions on development. The lessor, who has given up the exclusive right to develop, is therefore subject to the lessee's discretion in many matters. For example, if a well on adjacent lands drains the leasehold, the lessor's hydrocarbons are permanently lost. Even without drainage, if the lessee decides to defer development, the lessor is deprived of any possible return. The clash between what the lessee desires and what the lessor, who does not bear any costs, wants has led courts to supplement the written lease and imply duties on the lessee.

Two theories predominate as explanations of these implied covenants or duties. First, the duties may be implied in law, as a result of the status of the parties. The covenants therefore would be similar to the law of landlord/tenant, husband-wife, or bailor-bailee; duties arise out of the status of the parties. n1090 The covenants would be inherent in the lessor-lessee relationship, in which one party undertakes to develop the property of another for their mutual benefit. The covenants would be designed to promote fairness. n1091 The second main theory to explain the covenants is that the duties are implied in fact: if the parties had considered the matter, the provisions would have been included. The covenants therefore come from the intention of the parties. n1092

A third theory, which may be viewed as a variant of the others or a separate theory, is that the implied covenants are simply an outgrowth of the contractual doctrine of cooperation. n1093 This explanation finds the covenants' origins in two sources: the internal impetus of the reasonable expectations of the parties and the external power of good morals. Analogies exist. For example, the Uniform Commercial Code's duty of good faith, which it imposes in all contracts, codifies the trend to require cooperation. n1094 More specifically, courts have recognized that when one party receives exclusive development rights, the non-developing party is at the mercy of the developer for any return; courts therefore tend to imply a duty on the developer to use good faith efforts to meet the goals of both parties. n1095 An oil and gas lease and its implied duties would be similar to judicial doctrines developed for other relational contracts. n1096

Finally, some have suggested another source of, or at least influence on, the implied covenants: societal goals, which in the past heavily encouraged developing resources. In light of this policy, the lessor's requests to require all reasonable development found fertile soil. n1097 Nevertheless, society may reassess its goals and decide to conserve resources. The emphasis on immediate development may fade. n1098

§ 49.54(b) Effect of Classification.

Classifying a covenant as implied in fact or in law does not have much substantive impact, but the classification may influence procedural rules. If implied in fact, the statute of limitations for written agreement governs n1099 and venue n1100 will be determined pursuant to normal contractual rules. On the other hand, covenants deemed implied in law would be subject to the generally shorter statute of limitations for oral agreements and venue may be limited to the location of the property. It appears, at least for procedural purposes, the majority rule is that covenants are implied in fact. n1101

Another result of the classification may be the ease with which the covenants can be disclaimed or modified. If the duties are implied in fact, any expression on the subject could displace the presumed contractual provision. Covenants that are implied in law, however, are generally harder to disclaim or modify because they tend to reflect societal norms as well as contractual practices. Although nominally adopting the implied in fact rationale, courts are less clear about how to treat the implied covenants when the question of waiver is involved. n1102

FOOTNOTES:

(n1)Footnote 1090. *See* 5 Kuntz, Lowe, Anderson, Pierce, and Smith, Oil and Gas Law § 54.3(a) (Anderson).

(n2)Footnote 1091. Maurice H. Merrill, Covenants Implied In Oil And Gas Leases §§ 222, 223 (2d ed. 1940).

(n3)Footnote 1092. *See, e.g., Dancinger Oil & Ref. Co. of Texas v. Powell, 154 S.W.2d 632 (Tex. 1941); Brewster v. Lanyon Zinc Co., 140 F. 801 (8th Cir. 1905)* (arises from language of contract as a whole). Agesilaus Wilson Walker, *The Nature of the Property Interests Created by an Oil and Gas Lease in Texas, 11 Tex. L. Rev. 399, 404 (1933)* (must have intended operations would be conducted with reasonable regard for lessor and not just from lessee's selfish viewpoint).

(n4)Footnote 1093. P. Martin & B. Kramer, Williams & Meyers Oil and Gas Law § 802.1 (Matthew Bender).

(n5)Footnote 1094. U.C.C. § 1-102(3) (cannot disclaim duty but may provide standards to judge good faith). *See also* U.C.C. § 1-203.

(n6)Footnote 1095. *Wood v. Lucy, Lady Duff-Gordon, 118 N.E. 214 (N.Y. 1917); Cross Props., Inc. v. Brook Realty Co., 430 N.Y.S.2d 820 (1980).*

(n7)Footnote 1096. Charles J. Meyers & Steven M. Crafton, *The Covenant of Further Exploration -- Thirty Years Later, 22 Rocky Mtn. Min. L. Inst. 1-1, 1-22 (1986).*

(n8)Footnote 1097. P. Martin & B. Kramer, Williams & Meyers Oil and Gas Law § 802.2 (Matthew Bender).

(n9)Footnote 1098. Patrick H. Martin, *A Modern Look at Implied Covenants to Explore, Develop and Market under Mineral Leases*, 27 Oil & Gas Inst. 177 (1976).

Patrick H. Martin, *Implied Covenants in Oil and Gas Leases: Past, Present, and Future, 33 Washburn L.J. 639 (1994).*

(n10)Footnote 1099. *Indian Territory Illuminating Oil Co. v. Rosamond, 120 P.2d 349 (Okla. 1941).*

(n11)Footnote 1100. *Petroleum Producers Co. v. Steffens, 162 S.W.2d 698 (Tex. 1942); Suburban Propane Gas Corp. v. McMullan, 590 S.W.2d 790 (Tex. Civ. App. 1979), writ error dismissed*.

(n12)Footnote 1101. For cases, *see* Richard W. Hemingway, The Law of Oil and Gas § 8.1 (3d ed. 1991), and P. Martin & B. Kramer, Williams & Meyers Oil and Gas Law § 803 (Matthew Bender).

(n13)Footnote 1102. As Professor Kuntz notes, the covenants may be considered part of the contract and therefore subject to contractual rules without limiting the nature of the covenants to that of duties implied in fact. 5 Kuntz, Lowe, Anderson, Pierce, and Smith, Oil and Gas Law § 54.3(b) (Anderson).

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§ 49.55 Reasonable Prudent Operator Standard.

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The reasonable and prudent operator standard governs compliance with all the implied covenants and is used to review the lessee's actions. In fact, to a certain extent, there is only one implied duty, and that is to develop and operate the property as a reasonable and prudent operator would. n1103 The "prudent operator" was aptly defined in *Brewster v. Lanyon Zinc Co.*: n1104

> The object of the operations [on an oil and gas lease] being to obtain a benefit for both lessor and lessee, it seems obvious, in the absence of some stipulation to that effect, that neither is made the arbiter of the extent to which or the diligence with which the operations shall proceed, and both are bound by the standard of what is reasonable ... Whatever, in the circumstances, would be reasonably expected of operators of ordinary prudence, having regard to the interests of both lessor and lessee, is what is required.

Louisiana has a parallel requirement, which requires the lessee to be a "good administrator." This requirement is based in statute. n1105 Neither standard treats the lessee as a fiduciary required to subordinate its interests to those of the lessor. n1106 The lessee, however, must consider the interests of both parties.

The "prudent operator" standard does not delineate specified acts for the lessee to perform in certain situations, but it is not simply a requirement that the lessee refrain from subjective bad faith. n1107 The test, like that of the reasonable man from tort law, is a flexible test of what a normally prudent person would do in the particular factual situation. Nevertheless, more than just lack of negligence and compliance with minimal industry standards is needed because the lessee is entrusted with the lessor's development objectives. As a prudent operator, however, the lessee need not go beyond doing what could bring profit to it.

FOOTNOTES:
(n1)Footnote 1103. Courts, however, sometimes state that there is no independent duty to act as a reasonable and prudent operator; it is only relevant in regard to one of the named duties.

(n2)Footnote 1104. *Brewster v. Lanyon Zinc Co., 140 F. 801 (8th Cir. 1905).*

(n3)Footnote 1105. La. Rev. Stat. Ann. § 31:122. *See also Williams v. Humble Oil & Ref. Co., 290 F. Supp. 408 (E.D. La. 1968), aff'd, 432 F.2d 165 (5th Cir. 1970), reh'g denied, 435 F.2d 772 (5th Cir. 1970), cert. denied, 402 U.S. 934 (1971); Frey v. Amoco Prod. Co., 603 So. 2d 166 (La. 1992).*

In re Texaco, 254 B.R. 536 (Bkrtcy. S.D.N.Y. 2000). Included within the duty to act as a reasonably prudent operator is the lessee's obligation to restore the leased property which may not occur until at or near the termination of the lease.

(n4)Footnote 1106. *Hurd Enters. v. Bruni, 828 S.W.2d 101 (Tex. App. 1992)* (no independent duty of good faith and fair dealing; reasonable prudent operator standard protects lessor unless confidential or special relationship exists).

(n5)Footnote 1107. *Ramsey Petr. Corp. v. Davis, 85 P.2d 427 (Okla. 1938)* (rejecting good faith test); *Texas P. Coal & Oil Co. v. Barker, 6 S.W.2d 1031 (Tex. 1926)* (rejecting good faith test). *See generally* P. Martin & B. Kramer, Williams & Meyers Oil and Gas Law §§ 806.1-806.3 (Matthew Bender) and 5 Kuntz, Lowe, Anderson, Pierce, and Smith, Oil and Gas Law § 58.3 (Anderson).

Abraxas Petroleum Corp. v. Hornburg, 20 S.W.3d 741 (Tex. App. 2000). Every contract carries a common law duty to perform the agreed tasks with care, skill, reasonable expedience, and faithfulness. A breach of contract to conduct all operations in a good and workmanlike manner imposes similar liability in contract. In deciding whether a plaintiff may recover in tort, contract, or both the court must determine whether the claim is for breach of a duty imposed by law and whether the injury is only the economic loss to the subject of the contract itself.

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§ 49.56 General Classification of Implied Covenants.

Covenants have been classified in several ways. For example, some duties deal with development and are so labelled. These include covenants to drill an initial exploratory well and to reasonably develop known formations. All jurisdictions recognize these covenants. Some also recognize a third independent development covenant, which requires further exploration into unproven formations or acreage. A second category contains covenants designed to protect the leasehold. The primary, basic covenant is the covenant to protect from drainage. Some jurisdictions additionally seem to require the lessee to not depreciate the lessor's interest. Finally, some covenants deal with the duty to manage and administer the leasehold. The most important of these covenants is the duty to produce and market hydrocarbons. More generally, the lessee must operate with reasonable care and seek favorable administrative action.

These categories of duties are not hard and fast. A particular complaint may involve overlapping duties. For example, in order to protect a lease from drainage, a lessee may need to seek a favorable ruling from a conservation agency for a drilling unit or exception location. n1108 Despite the fluidity of labelling, some of the lessee's covenants have well defined elements and the classification may be useful. The covenants of the lessor are less well defined and classified.

FOOTNOTES:
(n1)Footnote 1108. The latter allows a well to be drilled in a location different than that mandated by drilling and spacing rules.

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CHAPTER 49 PETROLEUM AND PIPELINES
XII. Implied Covenants in Oil and Gas Leases

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§ 49.57 Development Covenants.

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§ 49.57(a) Initial Well.

One of the first implied covenants was the duty to drill an initial well within a reasonable time. Early leases often had a minimal bonus and no additional consideration except royalties. Therefore, courts insisted that the parties anticipated development within a reasonable time. Without this, the consideration would be insufficient to tie up the lessor's property for an extended period. n1109 As noted previously, n1110 the delay rental payment was developed to counter the implied duty; it provides consideration for the delay of initial exploratory drilling. In almost all jurisdictions, therefore, the implied covenant is negated in the conventional "unless" or "or" oil and gas lease. n1111 In Indiana n1112 and Kentucky, n1113 however, the covenant is reinstated upon the lessor's demand despite a provision for payment of rentals. Failure to include a provision for a delay rental payment may make the duty reappear. n1114

§ 49.57(b) Reasonable Development.

The reasonable development covenant, also referred to the duty to drill additional wells or to fully develop, has been adopted in all jurisdictions. n1115 To a certain extent, the covenant is more accurately described as a duty to maintain an active interest in the lease; development may consist of activities other than drilling. A breach typically is asserted when the lessee has only drilled a small number of wells or when existing wells begin to decline. It also causes contention when the leasehold is large, covers non-contiguous tracts, or is only partially in a unit.

The development covenant applies after oil or gas has been discovered and production obtained. The duty may be applicable in the primary term, n1116 but most disputes arise in the secondary term. As stated by the Supreme Court:

> The production of oil on a small portion of the leased tract cannot justify the lessee's holding the balance indefinitely and depriving the lessor, not only of the expected royalty from production pursuant to the lease, but of the privilege of making some other arrangement for availing himself of the mineral content of the land. n1117

One justification for the covenant, evidenced in the quotation, reflects the belief that development is the primary motive for a lease. Judging the duty demands two examinations. First, the lessee must display reasonable diligence. Second, any development demanded must be mutually profitable.

The hallmark of the reasonable development duty is concern with the pace of developing a known resource. When the lessee fails to diligently develop, the lessor is denied the use of the royalties that would be generated. In theory, the lessor has the right to benefit from the lease's production when the oil and gas should be produced, not at some remote future date. n1118 The demand for timely receipt of income is probably the main motivation for lessor suits. Other policies behind the covenant, however, may include preventing both potential waste and averting drainage. For example, the number and timing of wells may influence maximum recovery. Moreover, even if drainage of the leasehold cannot be proven, if there is surrounding production, courts recognize that there may be some drainage and therefore loss to the lessor. n1119

A pooling or unitization order does not supplant the covenant, but the terms of the conservation agency order will influence how the development should proceed. n1120

§ 49.57(b)(1) Proof of Breach of Reasonable Development.

To show a breach of the implied covenant, the lessor bears the burden of proving two elements: 1) an additional well, if drilled, would likely be profitable, and 2) the lessee has unreasonably delayed drilling or other activity. n1121 A realization that the lessee often has the greatest information tempers this burden. Therefore, the plaintiff's expert was not disqualified as an expert because he did not possess all the technical information that the defendant's experts had available. n1122 The lease or equitable concerns may impose additional procedural requirements on the lessor.

The issue of profitability concentrates on the lessee. Any production, of course, would engender a profit for the lessor because the lessor does not bear costs. In this context, profitability for the lessee means that the well must return not only operating costs, but also must return the cost of drilling the well. The lessee should not be forced to expend funds with no hope of recovering the expenditure. n1123 Moreover, the lessee should be able to achieve a reasonable profit over expenses. n1124

The second issue could also be phrased as whether the lessee has shown reasonable diligence in development. It is not enough for the lessor to simply show that another operator would have already drilled a well n1125 or that a seemingly long time has elapsed. n1126 The lessor must prove that a reasonably prudent operator would not have delayed as long under the particular circumstances. Circumstances examined include: 1) the geological data available, 2) the wells already drilled on the leasehold and on adjacent land, 3) the productive capacity of existing wells, 4) drilling costs, 5) the time lapse between prior drilling and the demand for more drilling, and 6) the size of the disputed leasehold. n1127 Market factors, such as the prevailing price for oil or gas and governmental regulations, may also influence a decision on whether delay was reasonable. n1128

A final potential hurdle for the lessor in order to maintain a suit may be notice. The lessor must notify the lessee of its concerns and demand drilling if the lessor desires to cancel the lease. n1129 The lessee would then have a reasonable time to comply. In a majority of jurisdictions, if the lessor is only seeking damages, no notice is needed. n1130 A lease clause, however, may expressly require notice. n1131 If the lessor proceeds on a theory of abandonment, no notice need be given because abandonment involves a voluntary relinquishment of the lease. n1132 Notice also is not needed if it would be futile because the lessee has clearly stated an intent to not develop. n1133 Some cases require the intent to have been manifested to the lessor. n1134

§ 49.57(b)(2) Effect of Inordinate Delay.

In some instances, one or two wells have produced on a leasehold and the lessee had not drilled for numerous years. At a certain point, the delay appears presumptively inordinate. In Oklahoma, once a long delay has been shown, the lessee has the burden of proving that a well would not be profitable or that the delay has not been unreasonable. n1135 Similar results have been achieved by statute. n1136 When the presumption of breach is raised by the time elapsed since last drilling, the lessee can rebut a breach by showing that it has maintained an active interest in the leasehold without drilling. Development activities may include seismic work, drilling plans on adjacent lands to test the formation, farmouts, or other exploratory or secondary recovery planning. n1137

Concern about delay reflects an overriding concern of some courts: lessees should not hold leases for "mere speculation" but must have the honest intent to develop the lease eventually. n1138 There is a fine line between prudently anticipating additional information and waiting until others have proven the area before proceeding. Merely waiting for others to drill and obtain geological information is not compliance with the duty, n1139 but awaiting information on wells being drilled in which the lessee is participating may be prudent. n1140

In addition to its relevance to a claim of breach of the development covenant, long delay also may lead the lessor to allege that the lessee has abandoned the lease's undeveloped areas. n1141

A Texas case stated that there was an implied limitation on a lessee's interest in a lease; it ends when the lessee has abandoned the purpose of the lease or ceased using the leasehold. The court stated this analysis differs from judging compliance with the covenants of reasonable development or exploration, which require additional activity to be profitable. n1142

§ 49.57(b)(3) Effect of Express Lease Provisions.

Because the covenant of reasonable development is implied, an express lease provision could supplant it. n1143 Whether a clause negates the implied duty hinges on whether the clause is inconsistent with the implied duty. n1144 Inconsistency is clear if the lease provision expressly stated that the lessee would not have any express or implied development duties other than drilling the well required to meet the habendum clause. n1145 To negate the duty, the lease must show a clear, unmistakable, unequivocal intent to limit or define the development obligation of the lessee. n1146 Most cases, however, do not arise under leases that expressly waive the implied duty, but involve a lease clause stating that the lessee must drill a certain number of wells or a clause stating that the lessee shall not be required to drill more than the described number. An example of the latter type would be a clause stating that the lessee will not have to drill more than one oil or gas well per stated acreage in order to be full development. Such a clause could define the duty. n1147 Clauses that merely state the number of wells to be drilled, however, could appear to contain additional affirmative duties, rather than being an attempt to limit an implied duty.

To ascertain whether the implied duty is displaced in this situation, courts look to the totality of circumstances to see if it would be reasonable to conclude that the parties would consider the delineated wells to be full development. For example, 16 wells on a total of 170 acres would be sufficient. n1148 No one, however, would accept that 6 wells on 40,000 acres would fully develop the leasehold. n1149 In the latter case, the implied covenant was not supplanted.

§ 49.57(b)(4) Remedies.

Courts take three approaches if the lessee is found to have violated the duty to fully develop. n1150 Some will only grant damages to the lessor. n1151 Others, including Texas and Kansas, begin with a presumption of damages as the appropriate remedy, but will cancel the lease if the damage remedy would be inadequate. n1152 The final approach, followed in Oklahoma, allows cancellation regardless of the adequacy of damages because development goes to the essence of the contract. n1153

If a court orders cancellation, this equitable remedy is used flexibly. Often cancellation is partial; the lessee will be able

to retain acreage or formations that have been developed. n1154 Another important tool is conditional cancellation, n1155 which gives the lessee the chance to perform. The undeveloped portion of the lease will be canceled unless the lessee begins drilling activities within a stated time period.

If damages are awarded, either with or without cancellation, they are measured usually by the amount of royalties the wells should have produced. This measure could lead to double recovery; if there was no drainage, royalties would again be due when the oil was later produced. Interest on the foregone royalties may be the appropriate measure or, alternatively, damage payments could be a credit against future royalties. n1156

§ 49.57(c) Further Exploration.

§ 49.57(c)(1) Situations in Which Question Arises.

The covenant of further exploration, like the reasonable development covenant, only comes into play after there has been initial development. Unlike the development covenant, however, the exploration covenant is not concerned with pacing development of a known field, but demands that the lessee move into less charted waters. In five situations, courts have required lessees to do more than simply develop known deposits:

1. When production has declined from all fully developed known formations,

2. When intense interest in another formation exists in the area,

3. When the lease covers distinct minerals, some of which are undeveloped,

4. When the lease covers non-contiguous tracts that have not all been developed, and

5. When the lease covers a large area compared to the developed acreage. n1157

Naturally, the line between development and exploration is not firm: no well is assured to be a producer until drilled and, therefore, there can be no truly "known" deposits before drilling. Nevertheless, the fundamental loss from a breach of the development covenant is delay in return from production. The loss from a failure to explore primarily may be a loss of information. n1158

Although all courts have at times required activity from lessees in the enumerated situations, not all jurisdictions recognize a separate covenant of exploration. Some use the development covenant to cover these scenarios. The premier advocate of a separate exploration covenant was the late Professor Charles Meyers. n1159

§ 49.57(c)(2) Proof of Breach.

To show a breach of the covenant of further exploration, the lessor must prove that: 1) further exploration would have a reasonable prospect for success, and 2) the lessee has unreasonably delayed undertaking work which a reasonable and prudent operator would have performed. n1160 In some instances, the work requested will be drilling an additional well. As with development, however, exploration may also be fulfilled by seismic work, a systematic drilling program on other land, farmouts, or other prudent means of gathering data. n1161 In essence, the heart of a breach of this covenant, when viewed as an alleged failure to take an active interest in the lease and thus accusing the lessee of holding the lease for speculative purpose, is as follows: a reasonable and prudent operator would have done something under the circumstances and this lessee did nothing. n1162

As with the development covenant, whether or not the lessee violated the reasonable and prudent operator standard may require a wide-ranging examination of geology and economics. In other circumstances, the lessee's admitted disinclination to do further exploration alone may prove a breach because development of the entire lease for the mutual

benefit of the parties is considered an implied condition of the lease. n1163 In all cases, in order to proceed, the lessor will have to give the same notice and opportunity to perform as is required for the covenant of reasonable development. n1164

§ 49.57(c)(3) Whether Profitability Must Be Proven.

One of the most fervent debates over the existence of an exploration covenant is whether or not the lessor must prove that additional drilling would likely be profitable. n1165 To demand absolute proof of profitability in the exploration scenario, which deals with deposits not yet proven to exist on the questioned portion of the leasehold, would, in the words of Professor Meyers, "defeat the lessor's claim before it is ever considered." n1166 The Oklahoma Supreme Court countered, criticizing the de-emphasis of profitability:

> Failure to recognize the profit motive as an instrumental force in oil and gas leases on behalf of both lessee and lessor is to ignore the very essence of the contract. It is unquestionable that both the lessee and lessor intend to benefit monetarily from the produce of the land through sale of its hydrocarbons. To state otherwise is folly or worse ... . It is simply not realistic to ignore profit as a consideration of the prudent operator simply because the lessor demands a wildcat be drilled on a productive lease rather than an additional well to a productive formation. n1167

The truth of the matter is somewhere in the middle.

The separate covenant as formulated originally did consider profitability as part of the circumstances considered in making a prudent operator determination. n1168 Oklahoma itself recognizes that the prudent operator rule for the development covenant does not require absolute proof of the profitability of an additional well, but only that there be a probability of profit. The difference in the development and exploration scenarios is only one of magnitude because there is always risk in drilling a well. n1169 Therefore, the proof of potential profitability needed resides on a sliding scale, which would influence in what manner and when a prudent operator would act. The less probable a profit may be, the more prudent delay would appear. In the long run, however, an oil and gas operator that only drilled "guaranteed" producers would run out of reserves. The prudent operator takes calculated risks.

§ 49.57(c)(4) Existence of Duty in Various Jurisdictions.

The separate duty of exploration, together with the declaration that the lessor need not prove the profitability of an additional well, has been met with varied approval. Colorado n1170 and Kansas n1171 have expressly adopted it. Other states have precedent that may recognize it. n1172 Oklahoma n1173 and Texas n1174 have expressly rejected a separate covenant of exploration. Nevertheless, both states will look at the totality of development and the need for further exploratory or development work under a flexible reading of the covenant of reasonable development. In fact, Oklahoma may be one of the more active jurisdictions in condemning speculative holding and requiring the lessee to show an active interest in the lease. n1175 For example, Oklahoma reverses the burden of proof about the profitability of additional drilling after an inordinate delay elapses after previous work n1176 and it recognizes that a lease may be abandoned.

§ 49.57(c)(5) Remedies.

The remedy for a breach normally would be either absolute or conditional cancellation of the unexplored acreage. Damages would be difficult to compute. n1177 When there is a failure to explore specific formations, courts may horizontally sever the lease, conditionally canceling it as to specific formations only. n1178 There may be no need to conditionally cancel the lease and give the lessee an opportunity to perform if no further development was planned or would be economically justified. n1179

FOOTNOTES:

(n1)Footnote 1109. *See generally* P. Martin & B. Kramer, Williams & Meyers Oil and Gas Law § 811 (Matthew Bender) and 5 Kuntz, Lowe, Anderson, Pierce, and Smith, Oil and Gas Law § 57.1 (Anderson).

(n2)Footnote 1110. *See* § 49.34, *supra*.

(n3)Footnote 1111. *Eastern Oil Co. v. Beatty, 177 P. 104 (Okla. 1918); Warm Springs Dev. Co. v. McAulay, 576 P.2d 1120 (Nev. 1978). See* Annotation, *Covenant in Mining Lease to Develop Property as Affected by Provision for Delay Rental*, 67 A.L.R. 221.

(n4)Footnote 1112. *Consumers' Gas Trust Co. v. Littler, 70 N.E. 363 (Ind. 1904). See generally* Summers, *supra* note 32, at § 397 (1954).

(n5)Footnote 1113. *Cameron v. LeBow, 338 S.W.2d 399 (Ky. 1960)* (lease divisible for some purposes, not others); *L.E. Cooke Corp. v. Hayes, 549 S.W.2d 837 (Ky. App. 1977), dismissed, 572 S.W.2d 420 (Ky. 1978). See generally* Summers, *supra* note 32, at § 397.

(n6)Footnote 1114. *Morrison v. D. & L. P'ship, 499 So. 2d 988 (La. App. 1986).*

(n7)Footnote 1115. *See generally* 5 Kuntz, Lowe, Anderson, Pierce, and Smith, Oil and Gas Law § 58.1 (Anderson); Richard W. Hemingway, The Law of Oil and Gas § 8.3 (2d ed. 1983); and P. Martin & B. Kramer, Williams & Meyers Oil and Gas Law § 831 (Matthew Bender).

(n8)Footnote 1116. *See* discussion of cases in *Morrison v. D. & L. P'ship, 499 So. 2d 988 (La. App. 1986).*

(n9)Footnote 1117. *Sauder v. Mid-Continent Petr. Co., 292 U.S. 272, 281, reh'g denied, 292 U.S. 613 (1934).*

(n10)Footnote 1118. *Temple v. Continental Oil Co., 320 P.2d 1039, 1055-56 (Kan. 1958), on reh'g, 328 P.2d 358, 360 (Kan. 1958)* (not enough for lessee to show has sufficient wells to adequately drain leasehold eventually).

Edmundson Brothers Partnership v. Montex Drilling Co., 731 So. 2d 1049 (La. App. 1999) (where drilling one oil well in ten years did not develop 1196 leased acres).

(n11)Footnote 1119. *Vonfeldt v. Hanes, 414 P.2d 7 (Kan. 1966). See generally* P. Martin & B. Kramer, Williams & Meyers Oil and Gas Law § 831 (Matthew Bender).

(n12)Footnote 1120. *Wolff v. Belco Dev. Corp., 736 P.2d 730 (Wyo. 1987); Mize v. Exxon Corp., 640 F.2d 637 (5th Cir. 1981).*

(n13)Footnote 1121. *Sonat Exploration Co. v. Superior Oil Co., 710 P.2d 221 (Wyo. 1985). See generally* 5 Kuntz, Lowe, Anderson, Pierce, and Smith, Oil and Gas Law § 58.3 (Anderson) and P. Martin & B. Kramer, Williams & Meyers Oil and Gas Law § 832 (Matthew Bender).

(n14)Footnote 1122. *Temple v. Continental Oil Co., 320 P.2d 1039 (Kan. 1958), on reh'g, 328 P.2d 358, 360 (Kan. 1958).*

(n15)Footnote 1123. The computation thus differs from the one necessary to determine if production in "paying quantities" is present to extend the lease. In that situation, the lessee has already invested in drilling the well and the question is whether the lessee should have the opportunity to lessen any potential loss. *See* § 49.33(b), *supra*.

(n16)Footnote 1124. *Jacarilla Apache Tribe v. Supron Energy Corp., 479 F. Supp. 536 (D.Ct. N.M. 1979), modified on other issues, 728 F.2d 1555 (10th Cir. 1984)* and *782 F.2d 855 (10th Cir. 1986). See generally* P. Martin & B. Kramer, Williams & Meyers Oil and Gas Law § 832.1 (Matthew Bender).

(n17)Footnote 1125. *Frazier v. Justiss Mears Oil Co., Inc., 391 So. 2d 485 (La. App. 1980) writ denied, 395 So. 2d 340* (not sufficient absent firm obligation to drill by second lessee); *Felmont Oil Corp. v. Pan-Am. Petr. Corp., 334 S.W.2d 449 (Tex. Civ. App. 1960), But see Humble Oil & Ref. Co. v. Romero, 194 F.2d 383 (5th Cir. 1952)* (accepting satisfactory evidence that another would drill), criticized in P. Martin & B. Kramer, Williams & Meyers Oil and Gas Law § 843.6 (Matthew Bender).

(n18)Footnote 1126. For a collection of time periods that elapsed both with and without a breach of the covenant, *see Sun Oil Co. v. Frantz, 291 F.2d 52, 55 n.6 (10th Cir. 1961).*

Crystal Oil Co. v. Warmack, 855 S.W.2d 299 (Ark. 1993) (failure to reasonably develop 120 acres for 22 years, coupled with no intent to develop, justified treating the original lease as a nullity as to these acres).

(n19)Footnote 1127. *Goodrich v. Exxon Co. U.S.A., 608 So. 2d 1019 (La. App. 1992), writ denied, 614 So. 2d 1241 (La. 1993); Vetter v. Morrow, 361 So. 2d 898 (La. App. 1978). See generally* P. Martin & B. Kramer, Williams & Meyers Oil and Gas Law § 832.2 (Matthew Bender).

(n20)Footnote 1128. *Sanders v. Birmingham, 522 P.2d 959 (Kan. 1974).*

(n21)Footnote 1129. *Superior Oil Co. v. Devon Corp., 604 F.2d 1063 (8th Cir. 1979).*

Hunt v. Stacy, 632 So. 2d 872 (La. App. 1994) (under statutory requirement to "place in default" for passive breaches, lessor must request development, not merely demand release of lease).

(n22)Footnote 1130. *General Crude Oil Co. v. Harris, 101 S.W.2d 1098 (Tex. Civ. App. 1937).*

(n23)Footnote 1131. *See* § 49.52(e), *supra*.

(n24)Footnote 1132. *Rook v. James E. Russell Petr., Inc., 679 P.2d 158 (Kan. 1984). See* § 49.24, *supra*, for an explanation of when abandonment could be applicable.

(n25)Footnote 1133. *Amoco Prod. Co. v. Douglas Energy Co., 613 F. Supp. 730 (D. Kan. 1985); Sapp v. Massey, 358 S.W.2d 490 (Ky. 1962); Superior Oil Co. v. Devon Corp., 604 F.2d 1063 (8th Cir. 1979).*

(n26)Footnote 1134. *Cf. Amoco Prod. Co. v. Alexander, 622 S.W.2d 563 (Tex. 1981).*

(n27)Footnote 1135. *Doss Oil Royalty Co. v. Texas Co., 137 P.2d 934 (Okla. 1943).*

(n28)Footnote 1136. For example, Kansas's Deep Rights Act creates a presumption that the covenant has been breached when no minerals have been produced from the subsurface formations for which relief was sought and shallow oil, gas or other production on the lease had commenced at least 15 years earlier. Kan. Stat. Ann. § 55-224 (shifts burden of proof).

(n29)Footnote 1137. *West v. Sun Oil Co., 490 P.2d 1073 (Okla. 1971); Trust of Chicago v. Samedan, 192 F.2d 282 (10th Cir. 1951); Frazier v. Justiss Mears Oil Co., Inc., 391 So. 2d 485* (La. App.), *writ denied, 395 So. 2d 340 (1988); Johnson v. Hamill, 392 N.W.2d 55 (N.D. 1986).*

(n30)Footnote 1138. *Sauder v. Mid-Continent Petr. Co., 292 U.S. 272, 281 (1934); North York Land Assocs. v. Byron Oil Indus., Inc., 695 P.2d 1188 (Colo. App. 1984).*

Gary B. Conine, *Speculation, Prudent Operation, and The Economics of Oil and Gas Law, 33 Washburn L.J. 670 (1994).*

(n31)Footnote 1139. *Gregg v. Harper-Turner Oil Co., 199 F.2d 1 (10th Cir. 1952).*

(n32)Footnote 1140. *Pohlemann v. Stephens Petr. Co., 197 F.2d 134 (10th Cir. 1952)* (last well on leasehold also only drilled four months before suit).

(n33)Footnote 1141. *See* § 49.24, *supra*.

(n34)Footnote 1142. *Rogers v. Ricane Enters., Inc., 852 S.W.2d 751 (Tex. App. 1993), rev'd, Rogers v. Ricane Enters., Inc., 884 S.W.2d 763 (Tex. 1994).*

(n35)Footnote 1143. *Endicott v. DeBarieri, 369 P.2d 241 (Kan. 1962).*

Jacobs v. CNG Transmission Corp., 772 A.2d 445 (Pa. 2001) (where the parties have expressly agreed that the lessee will continue to pay the landowner for the opportunity to develop and produce oil or gas, the implied covenant to develop is negated and no obligation to drill wells exists).

(n36)Footnote 1144. *See generally* 5 Kuntz, Lowe, Anderson, Pierce, and Smith, Oil and Gas Law § 58.2 (Anderson).

(n37)Footnote 1145. *Cf. Oliver v. Louisville Gas and Elec. Co., 732 S.W.2d 509 (Ky. App. 1989)* (lessee "may but is not obligated or required to drill" negated implied covenant; lease's primary purpose was gas storage).

(n38)Footnote 1146. *Goodrich v. Exxon Co. U.S.A., 608 So. 2d 1019 (La. App. 1992)* (merely requiring development at same intensity as rest of field insufficient).

writ denied, 614 So. 2d 1241 (La. 1993) after Goodrich v. Exxon Co.

(n39)Footnote 1147. *See clause* in, *Sohio Petr. Co. v. Miller, 86 So. 2d 201 (La. 1956):* "Lessee shall reasonably develop the acreage retained hereunder, but in discharging this obligation, it shall in no event be required to drill more than one well per forty (40) acres of the area retained hereunder and capable of producing oil, gas, or other minerals in paying quantities." *Cf. Endicott v. DeBarieri, 369 P.2d 241, 242 (Kan. 1962)* (referring to spacing regulations for requirements).

(n40)Footnote 1148. *Gulf Prod. Co. v. Kishi, 103 S.W.2d 965 (Tex. 1937).*

(n41)Footnote 1149. *Sinclair Oil & Gas Co. v. Masterson, 271 F.2d 310 (5th Cir. 1959), cert. denied, 362 U.S. 952 (1960),* later case, questioning holding on other grounds, *Weymouth v. Colorado Interstate Gas Co., 367 F.2d 84 (5th Cir. 1966).*

(n42)Footnote 1150. *Alumet v. Bear Lake Grazing Co., 732 P.2d 679 (Idaho 1987)* (reviewing law of various jurisdictions). *See generally* P. Martin & B. Kramer, Williams & Meyers Oil and Gas Law § 834 (Matthew Bender).

(n43)Footnote 1151. *Beer v. Griffith, 399 N.E.2d 1227 (Ohio 1980); Daughetee v. Ohio Oil Co., 105 N.E. 308 (Ill. 1914); Hall v. South Penn Oil Co., 76 S.E. 124 (W. Va. 1912).*

(n44)Footnote 1152. *Howerton v. Kansas Natural Gas Co., 108 P. 813 (Kan. 1910); Christie, Mitchell & Mitchell Co., Inc. v. Howell, 359 S.W.2d 658 (Tex. Civ. App. 1962); Meaher v. Getty Oil Co., 450 So. 2d 443 (Ala. 1984); Southwest Gas Producing Co., Inc. v. Seale, 191 So. 2d 115 (Miss. 1966).*

(n45)Footnote 1153. *See also Sapp v. Massey, 358 S.W.2d 490 (Ky. 1962).*

(n46)Footnote 1154. *Morrison v. D. & L. P'ship, 499 So. 2d 988 (La. App. 1986)* (total cancellation only appropriate where well produced irregularly and was not producing at trial); *Baldwin v. Kubetz, 307 P.2d 1005 (Cal. App. 1957)* (repeated and willful violations justified complete cancellation in equity despite lease clause stating lessee could retain producing acreage).

Crystal Oil Co. v. Warmack, 855 S.W.2d 299 (Ark. 1993) (failure to reasonably develop 120 acres for 22 years, coupled with no intent to develop, justified treating the original lease as a nullity as to these acres).

(n47)Footnote 1155. *Roberson Enters. v. Miller Land & Lumber Co., 700 S.W.2d 57 (Ark. 1985)* (preferred remedy because often difficult to know if covenant breached); *Slaughter v. City Servs. Oil Co., 660 S.W.2d 860 (Tex. Civ. App. 1983), no writ* (asserting that in Texas cancellation may only be conditional).

(n48)Footnote 1156. *Cf. Cotiga Dev. Co. v. United Fuel Gas Co., 128 S.E.2d 626 (W. Va. 1962)* (discussing breach of marketing covenant). For an extensive discussion of damage measures, *see* 5 Kuntz, Lowe, Anderson, Pierce, and Smith, Oil and Gas Law § 58.5 (Anderson).

(n49)Footnote 1157. *See generally*, 5 Kuntz, Lowe, Anderson, Pierce, and Smith, Oil and Gas Law § 62.1 (Anderson).

(n50)Footnote 1158. *See* P. Martin & B. Kramer, Williams & Meyers Oil and Gas Law § 841 (Matthew Bender), suggesting the difference in harm suggests that two different duties are at issue.

(n51)Footnote 1159. Initially, in *The Implied Covenant of Further Exploration, 34 Tex. L. Rev. 553 (1956). See also* Charles J. Meyers and Steven M. Crafton, *The Covenant of Further Exploration -- Thirty Years Later, 22 Rocky Mtn. Min. L. Inst. 1-1, 1-22 (1986).*

(n52)Footnote 1160. *See generally* 5 Kuntz, Lowe, Anderson, Pierce, and Smith, Oil and Gas Law § 62.3 (Anderson) and P. Martin & B. Kramer, Williams & Meyers Oil and Gas Law §§ 843.1-843.8 (Matthew Bender).

(n53)Footnote 1161. *Felmont Oil Corp. v. Pan Am. Petr. Corp., 334 S.W.2d 449 (Tex. Civ. App. 1960)* (also holding no true difference between exploration and development duties).

Noel v. Amoco Prod. Co., 826 F. Supp. 1000 (W.D. La. 1993) (participation in nearby test wells and farmouts sufficient).

(n54)Footnote 1162. *Cf. Trust Co. of Chicago v. Samedan Oil Corp., 192 F.2d 282 (10th Cir. 1951)* (what would be unreasonable delay varies based on circumstances because even a prudent operator could delay unreasonably).

(n55)Footnote 1163. *Fox Petr. Co. v. Booker, 253 P. 33, 38 (Okla. 1926)* ("When ... [the lessee] abandons all further testing and disclaims an obligation to test, he may be required likewise to surrender all claim to the property.") For more recent cases, see *Gillette v. Pepper Tank Co., 694 P.2d 369 (Colo. App. 1984); Amoco Prod. Co. v. Douglas Energy Co., 613 F. Supp. 730 (D. Kan. 1985); Stevenson v. Barnes, 702 S.W.2d 787 (Ark. 1986). See generally* P. Martin & B. Kramer, Williams & Meyers Oil and Gas Law § 843.7 (Matthew Bender).

(n56)Footnote 1164. *See* § 49.57(b)(1), *supra* and 5 Kuntz, Lowe, Anderson, Pierce, and Smith, Oil and Gas Law § 62.4 (Anderson).

(n57)Footnote 1165. *See* Annotation, *Right of Lessor to Cancel Oil or Gas Lease for Breach of the Implied Obligation to Explore or Develop Further After Initial Discovery of Oil or Gas, In Absence of Showing Reasonable Expectation of Profit to Lessee from Further Drilling, 79 A.L.R.2d 742 (1961).*

(n58)Footnote 1166. Charles J. Meyersm *The Implied Covenant of Further Exploration, 34 Tex. L. Rev. 553, 557 (1956). See also* Charles J. Meyers and Steven M. Crafton, *The Covenant of Further Exploration -- Thirty Years Later, 22 Rocky Mtn. Min. L. Inst. 1-1, 1-22 (1986).*

(n59)Footnote 1167. *Mitchell v. Amerada Hess Corp., 638 P.2d 441, 446 (Okla. 1981).*

(n60)Footnote 1168. *See* P. Martin & B. Kramer, Williams & Meyers Oil and Gas Law § 841 (Matthew Bender), where factors to be considered include "the feasibility of further exploratory drilling, including the cost of drilling, the market for the product, and the size of the block needed to justify a test well." Other factors listed are: the time lapse since the last drilling, the size of the tract and the number of wells on it, whether untested formations favorable to the formation of hydrocarbons exist on the land, the attitude of the lessee to further testing; and whether part of the leasehold is held by unit production but excluded from participation in royalties.

(n61)Footnote 1169. *Mitchell v. Amerada Hess Corp., 638 P.2d 441 (Okla. 1981).*

(n62)Footnote 1170. *Gillette v. Pepper Tank Co., 694 P.2d 369 (Colo. App. 1984); North York Land Assocs. v. Byron Oil Indus., 695 P.2d 1188 (Colo. App. 1984)* (canceling portion of lease because held for speculative purposes even though prudent operator would not explore or develop).

(n63)Footnote 1171. Kansas's Deep Rights Act, Kan. Stat. Ann. §§ 55-223-55-224.

(n64)Footnote 1172. *Byrd v. Bradham, 655 S.W.2d 366 (Ark. 1983)* (refers to duty to explore); *Humble Oil & Ref. Co. v. Romero, 194 F.2d 383 (5th Cir. 1952)* (Louisiana law). Other states noted by commentators include Kentucky, Maryland, Alabama, and Ohio. *See* P. Martin & B. Kramer, Williams & Meyers Oil and Gas Law § 8.45 (Matthew Bender) and Richard W. Hemingway, The Law of Oil and Gas § 8.3 (2d ed. 1983).

(n65)Footnote 1173. *Mitchell v. Amerada Hess Corp., 638 P.2d 441 (Okla. 1981).*

(n66)Footnote 1174. *Sun Exploration & Prod. Co. v. Jackson, 783 S.W.2d 202 (Tex. 1989). See also Clifton v. Koontz, 325 S.W.2d 684 (Tex. 1959).*

See Rogers v. Ricane Enters., Inc., 852 S.W.2d 751 (Tex. App. 1993), rev'd, Rogers v. Ricane Enters., Inc., 884 S.W.2d 763 (Tex. 1994); discussed *supra*.

(n67)Footnote 1175. Professor Meyers relied on several Oklahoma cases in asserting that a separate covenant existed, *see* P. Martin & B. Kramer, Williams & Meyers Oil and Gas Law § 842.3 (Matthew Bender), *citing Doss Oil Royalty Co. v. Texas Co., 137 P.2d 934 (Okla. 1943); Neff v. Jones, 288 P.2d 712 (Okla. 1959);* and *Sand Springs Home v. Clemens, 276 P.2d 262 (Okla. 1954).*

(n68)Footnote 1176. *Doss Oil Royalty Co. v. Texas Co., 137 P.2d 934 (Okla. 1943).*

(n69)Footnote 1177. *See generally* P. Martin & B. Kramer, Williams & Meyers Oil and Gas Law § 844 (Matthew Bender). *See also* 5 Kuntz, Lowe, Anderson, Pierce, and Smith, Oil and Gas Law § 62.5 (Anderson), in which a damage remedy measured by the cost of drilling a well is discussed and criticized.

(n70)Footnote 1178. *Barnes v. Mack Oil Co., 376 P.2d 279 (Okla. 1962)* (canceling lease as to shallow formations but not deep because had cooperated in exploratory activities in regard to deep formations).

(n71)Footnote 1179. *North York Land Assocs. v. Byron Oil Indus., 695 P.2d 1188 (Colo. App. 1984).*

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CHAPTER 49 PETROLEUM AND PIPELINES
XII. Implied Covenants in Oil and Gas Leases

6-49 Thompson on Real Property, Thomas Editions § 49.58

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§ 49.58 Protection Covenants.

[Go To Supp]

§ 49.58(a) Implied Covenant to Protect from Drainage.

The implied covenant to protect the leasehold from drainage is fundamental and stems directly from the Rule of Capture. n1180 If a well on adjoining property drains oil or gas, the owner of the minerals being drained has no recourse other than self-help. Once the lessor has granted the exclusive right to develop to the lessee, the lessee must undertake such self-help n1181 or the hydrocarbons will be lost to the lessor irreparably. With the arrival of conservation rules limiting the number of wells that can be drilled, the duty has been both contracted and expanded. While the lessor cannot demand a well be drilled contrary to regulations, n1182 the lessee may have a duty to seek an exception location n1183 or to include part of the leasehold in a drilling unit so the lessor would gain some return from the draining well. n1184

The scope of the duty to protect from drainage may also depend on the type of drainage involved. Most cases of drainage entail local drainage, which takes place when one well directly drains a contiguous tract. One court, however, applied the duty to combat field-wide drainage. n1185 Field-wide drainage results from basic reservoir mechanics. For example, in a water-drive reservoir, development anywhere in the field, but particularly production high in the structure, will hasten the end of the productive life of wells lower in the structure. In order to prevent such drainage, the lessee may have to drill additional wells or rework wells on the leasehold lower on the structure, or the lessee may have to seek unitization or other administrative relief. n1186 As with the other implied covenants, regardless of the type of drainage involved, the lessee is only required to do that which the reasonable and prudent operator would do. n1187

§ 49.58(a)(1) Proof of Breach of Drainage Covenant: Generally.

The general elements of a claim for breach of the covenant to protect from drainage are that: 1) substantial drainage has occurred, and 2) an offset well could be profitably drilled. n1188 If damages are sought, the lessor will also have to show the amount of royalties the lessor would have received had proper measures been taken. n1189 The lessee is not deemed a guarantor against drainage; therefore, the duty does not arise if there is only minimal drainage. n1190 The duty, however, may be triggered if there is substantial drainage from one well even if the drained tract is draining other

land through a well. n1191 The burden of proof of all elements is on the lessor, including whether the offset well would be profitable. n1192 As with the development covenant, profitability in this context includes recovering the cost of drilling the well in addition to costs of operating and producing. A reasonable return for the lessee is also needed. n1193

Additionally, the lessor generally must give notice to the lessee and demand protection if the lessor seeks the remedy of cancellation. n1194 The lessee will then have a reasonable time to drill on offset or otherwise remedy the drainage. In a majority of jurisdictions, notice is not required as a prerequisite to an action for damages, n1195 but can impact damage computation. A minority view requires notice before a damage claim. n1196 A lease clause may also necessitate notice. Notice may be foregone if the lessee necessarily would have known of the drainage, as when it is causing the drainage or acquires an interest in the draining well. n1197

§ 49.58(a)(2) Proof of Breach of Drainage Covenant When Lessee Causes Drainage.

Sometimes the lessee, being accused of failing to protect a leasehold from drainage, has caused the drainage. The lessee either owns the minerals beneath the draining well or is a common lessee, that is, the lessee of both the leasehold being drained and the leasehold on which the draining well is located. Some courts sense an inherent unfairness in this situation, believing the lessee to be profiting while the lessor gains no return. n1198 The concern arises from an appreciation of simple human nature.

In a normal drainage situation with separate ownership of the draining and drained tracts, the self-interest of the lessee should protect the lessor. The lessee will get no return and will loose the drained hydrocarbons unless it drills on the drained leasehold. Therefore, if an offset well would be profitable, the lessee would drill it. The interests of the lessor and lessee do not have the same congruence if the lessee is benefiting through the draining well. Its expenses are less without a second well. Courts react to this situation in several ways. n1199

Some cases simply note that the lessee is causing the drainage. n1200 Others expressly state that the rules about drainage do not change. n1201 The most extreme change in the normal rules of drainage have been suggested by courts in Mississippi n1202 and elsewhere. These cases hold that if the lessee has caused the drainage, the lessee may be liable to the drained lessor for damages even if an offset well might not be profitable. n1203 Other courts have adopted an intermediate position. The effect of the lessee causing the drainage is to reverse the burdens of proof. Under this view, the lessor need only prove that substantial drainage has occurred. The lessee will bear the burden of proving that an offset well could not be profitably drilled. n1204 Oklahoma appears to take this position, and has also stated that it will not adopt a theory of strict liability, n1205 but will look to see if a prudent operator would have drilled the well if there was no common ownership. n1206

Almost all jurisdictions do modify the burden of the lessor in one respect; notice to the lessee will not be necessary as a precondition to suit if the lessee operates or owns an interest in the draining well. n1207 Additionally, some will not apply express clauses that limit offset liability when the lessee causes the drainage, n1208 or will not allow the acceptance of delay rentals to act as a waiver of the duty to protect. n1209

§ 49.58(a)(3) Effect of Express Provisions.

Because the duty to protect against drainage is an implied covenant, parties could change the duty by express provisions. Simply delineating the number of wells required on a leasehold, however, will generally only impact the implied covenant to develop. Development requirements and drainage protection are two duties that coexist. n1210 To supplant the drainage covenant, a lease must have express provisions that clearly negate or limit the duties of the lessee in regard to drilling offset wells. n1211 Some courts will generally enforce these clauses, but other cases limit their effectiveness to the primary term n1212 or to drainage not caused by the lessee. n1213 Courts will also enforce clauses that make the judgment of the lessee conclusive about the need to offset. n1214

Difficulty arises, however, when clauses pledge that the lessee will drill offsets in certain situations without expressly negating the duty to drill other wells. For example, a clause may state that the lessee will drill an offset well if a well is drilled at a specified distance from the boundary of the leasehold. Old clauses of this nature may state the maximum offset distance to be 150 or 200 feet. This specified distance may have at one time been a good faith estimate of the distance at which drainage could occur, but modern engineering would recognize the possibility of drainage from a further distance. Additionally, as conservation practices have changed, often no well would be allowed within the distances that would trigger the duty. Consequently, if such a clause delineated the lessee's total duty to offset, the lessee would never have to drill a well to combat drainage. Some courts, therefore, have refused to allow this type of clause to supplant the implied covenant to protect against drainage, stressing the unfairness of leaving the lessor unprotected when the lessor could have reasonably believed the lessee was undertaking an affirmative protective duty under the clause. n1215 Others do allow the clauses some effect, and even engraft on them traditional drainage requirements that limit when the lessee must drill. The lessee will not have to drill offsets unless there has been substantial drainage. n1216

§ 49.58(a)(4) Drainage in the Primary Term.

In the primary term, the lessee has the option to defer drilling by paying delay rentals. Delay rentals are designed to counter the implied covenant to drill an exploratory well within a reasonable time. Logically, the lessor has not relinquished the right to be protected from drainage. n1217 Nevertheless, if the lessor accepts delay rentals with knowledge of the drainage, the majority rule is that the implied right to demand an offset well is waived or the lessor estopped from seeking drilling or damages for the period of the rental. n1218 If the lease has an express requirement to offset, however, the acceptance of rentals will not waive rights to protection under it. n1219 The corollary of all these positions is that the lessor may decline delay rentals and demand protection from drainage. n1220

§ 49.58(a)(5) Remedies.

The preferred remedy for drainage is damages, which make the lessor whole for the loss of oil or gas. n1221 Jurisdictions that require notice often give the lessee a reasonable period of time after notice of the drainage to act as a reasonable and prudent operator would act to prevent the drainage. Damages are computed from that period after the date of notice, however notice was received. n1222 Other jurisdictions would begin to accrue damages from the time a reasonable and prudent operator would have drilled. Damages are alternatively measured by royalties on the drained hydrocarbons, n1223 or royalties on what would have been produced from the offset well. n1224 If the lessor has an interest in the draining well, damages will be reduced to the extent royalty actually had been received. n1225 Lease cancellation or conditional cancellation is a theoretical option, but it is usually only used in the face of a lessee's bad faith or if damages are impossible to ascertain. It is more appropriate when remedies for future drainage are considered. n1226 In some states, n1227 however, statutes require offset of wells drilled within certain distances and specify cancellation as the remedy for a breach. At least one case found no double recovery in ordering both cancellation and damages. n1228

§ 49.58(b) Implied Covenant Not to Depreciate the Lessor's Interest.

Cases have imposed duties upon lessees for drainage they may have caused even if the drilling of an offset well would not be profitable. n1229 For example, the *Millette* court asked whether the lessee must protect the "interests of his lessor against a depletion of the lessor's lands by the affirmative act of the lessee upon adjacent land" and responded by recognizing a duty "to conserve the mineral resources of lessors or to refrain from depletory acts... ." n1230 Similarly, the Tenth Circuit stated that the relationship of lessor and lessee includes "an implied covenant running to the ... [lessor] to refrain from any action which would deplete ... [the lessor's] property in the lease." n1231 Some posit that these cases lead to an additional implied covenant, called the covenant to not depreciate the lessor's interest by affirmative act. n1232 These formulations, however, ignore the reasonable and prudent operator standard, with its emphasis on mutual profit, and therefore most jurisdictions reject them.

Nevertheless, in other situations, such as pooling and unitization, courts recognize the potential for conflict between the lessor and lessee and insist on good faith when the lessee uses the authority to pool or unitize. n1233 For drainage, including drainage by the lessee, there may be a duty to pool or unitize, which would require a lower standard of proof than required to compel the drilling of an offset well. For other problems from joint development, courts have recognized that conservation agency review may provide some controls. n1234

FOOTNOTES:

(n1)Footnote 1180. *See* § 49.02(a), *supra*. *See generally*, 5 Kuntz, Lowe, Anderson, Pierce, and Smith, Oil and Gas Law § 61.1 (Anderson).

(n2)Footnote 1181. *See generally* Annotation, *Implied Duty of Oil and Gas Lessee to Protect Against Drainage*, 14 (1982).

Southeastern Pipe Line Co. v. Tichacek, 977 S.W.2d 393 (Tex. App. 1998) (good faith pooling by oil and gas lessee did not negate lessor's claim for failure to protect from drainage by drilling new wells; expected profit would have justified drilling expense).

(n3)Footnote 1182. *U.V. Indus. v. Danielson, 602 P.2d 571 (Mont. 1979)* (only excused if drilling conflicts with regulation; drilling not prohibited during entire period of drainage).

(n4)Footnote 1183. *Spaeth v. Union Oil Co. of Cal., 710 F.2d 1455 (10th Cir. 1983), cert. denied, 476 U.S. 1104; Amoco Prod. Co. v. Alexander, 622 S.W.2d 563 (Tex. 1981). Cf. Sinclair Oil & Gas Co. v. Bishop, 441 P.2d 436 (Okla. 1967)* (to prevent drainage lessee must seek administrative relief in order to produce well with high gas/oil ratio).

(n5)Footnote 1184. *Breaux v. Pan-Am. Petr. Corp., 163 So. 2d 406* (La. App.), *writ denied, 165 So. 481 (La. 1965). See generally* P. Martin & B. Kramer, Williams & Meyers Oil and Gas Law § 823.4 (Matthew Bender).

(n6)Footnote 1185. *Amoco Prod. Co. v. Alexander, 622 S.W.2d 563 (Tex. 1981).*

(n7)Footnote 1186. *Id.*

Watts v. Atlantic Richfield Co., 115 F.3d 785 (10th Cir. 1997) (stating that the normal duty in Oklahoma to protect against drainage requires the lessee to drill an offset well on the lessor's land or pay damages to the lessor to compensate for gas being drained by adjacent well); *Southeastern Pipe Line Co. v. Tichacek, 997 S.W.2d 166 (Tex. 1999)* (the court noted that a common method used by a lessee to protect the leasehold from drainage is to exercise its contractual pooling authority and combine tracts from two or more leases around an existing well. Express authorization of the lessor is required and a pooling clause is usually found in the lease. As a result of pooling, production and operations anywhere on the pooled unit are treated as if they have taken place on all leased parcels within the unit).

(n8)Footnote 1187. *See generally* 5 Kuntz, Lowe, Anderson, Pierce, and Smith, Oil and Gas Law § 61.3 (Anderson).

Neel v. Heci Exploration Co., 942 S.W.2d 212 (Tex. App. 1997) (where a mineral lessee sued an adjoining producer for damages caused by drainage without notifying unrepresented interest holders of the need for suit and its intent to sue. Notice provided a specific means of fulfilling the implied covenant to protect the leasehold when they are without authority to sue on behalf of the other interests which may then be protected by their owners as they wish), *rev'd in part, Heci Exploration Co. v. Neel, 982 S.W.2d 881 (Tex. 1999).*

(n9)Footnote 1188. *See generally* P. Martin & B. Kramer, Williams & Meyers Oil and Gas Law § 822 (Matthew Bender) and Richard W. Hemingway, The Law of Oil and Gas § 8.5 (2d ed. 1983).

(n10)Footnote 1189. *Williams v. Humble Oil & Ref. Co., 432 F.2d 165 (5th Cir. 1970), cert. denied, 402 U.S. 934* (accounting incompatible with claim for drainage damages because of lessor's burden).

(n11)Footnote 1190. *Good v. TXO Prod. Corp., 763 S.W.2d 59 (Tex. App. 1988), writ refused*, n.r.e.

(n12)Footnote 1191. For an argument requiring offsets, see P. Martin & B. Kramer, Williams & Meyers Oil and Gas Law § 822.3 (Matthew Bender) (rule of capture necessitates).

(n13)Footnote 1192. *Renner v. Monsanto Chem. Co., 354 P.2d 326 (Kan. 1960); Sunray Mid-Continent Oil Co. v. McDaniel, 361 P.2d 683 (Okla. 1961). See generally* P. Martin & B. Kramer, Williams & Meyers Oil and Gas Law § 823 (Matthew Bender).

(n14)Footnote 1193. *Gerson v. Anderson-Prichard Prod. Corp., 149 F.2d 444 (10th Cir. 1945);* P. Martin & B. Kramer, Williams & Meyers Oil and Gas Law § 822.2 (Matthew Bender) and 5 Kuntz, Lowe, Anderson, Pierce, and Smith, Oil and Gas Law § 61.3 (Anderson).

(n15)Footnote 1194. *See generally* 5 Kuntz, Lowe, Anderson, Pierce, and Smith, Oil and Gas Law § 61.4 (Anderson).

(n16)Footnote 1195. *Foster v. Atlantic Ref. Co., 329 F.2d 485 (5th Cir. 1964).*

(n17)Footnote 1196. *U.V. Indus. v. Danielson, 602 P.2d 571 (Mont. 1979).* The Mineral Code of Louisiana requires a demand as a prerequisite for damages. La. Rev. Stat. Ann. § 31:136.

(n18)Footnote 1197. *U.V. Indus. v. Danielson, 602 P.2d 571 (Mont. 1979); Sundheim v. Reef Oil Corp., 806 P.2d 503 (Mont. 1991)* ("constructive notice" is reasonable notice for damage claims, but written notice a prerequisite for cancellation).

(n19)Footnote 1198. *See Geary v. Adams Oil & Gas Co., 31 F. Supp. 830, 834 (E.D. Ill. 1940)* ("haunted by the fact that the defendant is the beneficiary of the oil drained from plaintiffs' land"). For a criticism of this view, see P. Martin & B. Kramer, Williams & Meyers Oil and Gas Law § 824.2 (Matthew Bender) (Rule of Capture negates unjust enrichment).

(n20)Footnote 1199. *See generally* P. Martin & B. Kramer, Williams & Meyers Oil and Gas Law § 824 (Matthew Bender).

(n21)Footnote 1200. *Spiller v. Massey & Moore, 406 P.2d 467 (Okla. 1965).*

(n22)Footnote 1201. *Amoco Prod. Co. v. Alexander, 622 S.W.2d 563, 572 (Tex. 1981)* (collecting cases and concluding prudent operator standard not impacted by conflict of duties to different lessors); *Tidewater Associated Oil Co. v. Stott, 159 F.2d 174 (5th Cir. 1946), cert. denied, 331 U.S. 817 (1947)* (must operate other leasehold to mutual advantage of lessee and that lessor); *Breaux v. Pan-Am. Petr. Corp., 163 So. 2d 406 (La. App. 1964), writ refused*.

(n23)Footnote 1202. *Millette v. Phillips Petr. Co., 48 So. 2d 344 (Miss. 1950); Monsanto Chem. Co. v. Sykes, 147 So. 2d 290 (Miss. 1962); Shell Oil Co. v. James, 257 So. 2d 488 (Miss. 1971). But see Monsanto Chem. Co. v. Andreae, 147 So. 2d 116 (Miss. 1962)* (limiting *Millette* to situations where lessee in bad faith refused to either drill or release lease and substantial drainage).

(n24)Footnote 1203. *Pinson v. Pepco, Inc., 602 F. Supp. 27 (D. S. Dak. 1985)* ("more enlightened view" does not use prudent operator standard); *Millette v. Phillips Petr. Co., 48 So. 2d 344 (Miss. 1950); Cook v. El Paso Nat. Gas Co., 560 F.2d 978 (10th Cir. 1977); Bush Oil Co. v. Beverly-Lincoln Land Co., 158 P.2d 754 (Cal. App. 1945); Adkins v. Huntington Dev. & Gas Co., 168 S.E. 366 (W. Va. 1932).* In this situation, the lessee probably should have included the drained acreage in a drilling unit with the draining well, but the lessee must only do so on good geological evidence of

drainage or it might violate a duty to its other lessor. For a defense of the position making the fact that the lessee is draining material, together with responses the lessee may make to the duty to protect, see 5 Kuntz, Lowe, Anderson, Pierce, and Smith, Oil and Gas Law § 61.1 (Anderson).

(n25)Footnote 1204. *Kaken v. Harper Oil Co., 600 P.2d 1227 (Okla. App. 1979)* (suggested in footnote by opinion's author); *Seacat v. Mesa Petr. Co., 561 F. Supp. 98 (D. Kan. 1983); Elliot v. Pure Oil Co., 139 N.E.2d 295 (Ill. 1956).* See similar suggested compromise to counter possible unfair dealing, P. Martin & B. Kramer, Williams & Meyers Oil and Gas Law § 824.2 (Matthew Bender).

(n26)Footnote 1205. *Feeley v. Davis, 784 P.2d 1066 (Okla. 1989), but see Leck v. Continental Oil Co., 800 P.2d 224 (Okla. 1989)* (possible fraudulent drainage could occur from harsh dealing and sharp practices). Fraudulent drainage was not found because of collateral estoppel. *Lecks v. Continental Oil Co., 971 F.2d 604 (10th Cir. 1992).*

(n27)Footnote 1206. *Rogers v. Heston Oil Co., 735 P.2d 542 (Okla. 1984).*

(n28)Footnote 1207. *U.V. Indus. v. Danielson, 602 P.2d 571 (Mont. 1979).*

(n29)Footnote 1208. *Williams v. Humble Oil & Ref. Co., 432 F.2d 165 (5th Cir. 1970), rehearing denied, 435 F.2d 772, cert. denied, 402 U.S. 934; Millette v. Phillips Petr. Co., 48 So. 2d 344 (Miss. 1950); Bush Oil Co. v. Beverly-Lincoln Land Co., 158 P.2d 754 (Cal. App. 1945).*

(n30)Footnote 1209. *Dillard v. United Fuel Gas Co., 173 S.E. 573 (W. Va. 1934).*

(n31)Footnote 1210. *Hartman Ranch Co. v. Associated Oil Co., 73 P.2d 1163 (Cal. 1937); Stanolind Oil & Gas Co. v. Christian, 83 S.W.2d 408 (Tex. Civ. App. 1935), error refused*.

(n32)Footnote 1211. *Linn v. Wehrle, 172 N.E. 288 (Ohio App. 1928).*

(n33)Footnote 1212. *Coats v. Brown, 301 S.W.2d 932 (Tex. App. 1957)* (dealing with clause only requiring offsets of draining wells within certain distance).

(n34)Footnote 1213. *Shell Oil Co. v. Stansbury, 410 S.W.2d 187 (Tex. 1966).*

(n35)Footnote 1214. *Magnolia Petr. Co. v. Page, 141 S.W.2d 691-693 (Tex. Civ. App. 1940)* ("The judgment of the lessee when not fraudulently exercised in carrying out the purposes of this lease shall be conclusive."); *Labbe v. Magnolia Petr. Co., 350 S.W.2d 873 (Tex. Civ. App. 1961).*

(n36)Footnote 1215. *Williams v. Humble Oil & Ref. Co., 432 F.2d 165 (5th Cir. 1970), reh'g denied, 435 F.2d 772, cert. denied, 402 U.S. 934.*

(n37)Footnote 1216. *Menking v. Tar Heel Energy Corp., 621 S.W.2d 447 (Tex. App. 1981)* (no need to offset well within stated 330 feet of boundary if no substantial drainage); *Good v. TXO Prod. Corp., 763 S.W.2d 59 (Tex. 1988)* (to probe breach of covenant to drill such offsets as reasonable prudent operator would drill required proof of substantial drainage).

(n38)Footnote 1217. *See generally* P. Martin & B. Kramer, Williams & Meyers Oil and Gas Law § 826.2 (Matthew Bender). *See also Texas Co. v. Ramsower, 7 S.W.2d 872 (Tex. Com. App. 1928). Compare Elliott v. Pure Oil Co., 139 N.E.2d 295 (Ill. 1956)* (duty to protect from drainage not relieved by lessor executing division order or accepting royalties from producing well).

(n39)Footnote 1218. *Rogers v. Heston, 735 P.2d 542 (Okla. 1984)* (different subject matter).

(n40)Footnote 1219. *Hood v. Southern Prod. Co., 19 So. 2d 336 (La. 1944).*

(n41)Footnote 1220. *Central Ky. Nat. Gas Co. v. Williams, 60 S.W.2d 580 (Ky. 1933).*

(n42)Footnote 1221. *See generally Wes-Tex Land Co. v. Simmons, 566 S.W.2d 719 (Tex. Civ. App. 1978), writ refused* n.r.e. P. Martin & B. Kramer, Williams & Meyers Oil and Gas Law § 825.2 (Matthew Bender) and 5 Kuntz, Lowe, Anderson, Pierce, and Smith, Oil and Gas Law § 61.5 (Anderson). *See also* Annotation, *Remedy for Breach of Implied Duty of Oil and Gas Lessee to Protect from Drainage, 18 A.L.R.4th 147 (1982).*

HECI Exploration Co. v. Neel, 982 S.W.2d 881 (Tex. 1998) (lessee had no implied obligation to notify royalty owners that lessee intended to sue adjoining owner for damages caused by drainage).

(n43)Footnote 1222. *Webb v. Graf, 159 S.W.2d 433 (Ky. 1942); U.V. Indus. v. Danielson, 602 P.2d 571 (Mont. 1979)* ("notice" from date lessor acquired interest in draining well).

(n44)Footnote 1223. *Olsen v. Sinclair Oil & Gas Co., 212 F. Supp. 332 (D.C. Wyo. 1963)* (cannot limit damages by surrendering lease); *Barnes v. Mack Oil Co., 376 P.2d 279 (Okla. 1962)* (royalty oil the measure). For an appraisal of the two measures, see 5 Kuntz, Lowe, Anderson, Pierce, and Smith, Oil and Gas Law § 61.5(d) (Anderson).

(n45)Footnote 1224. *Wes-Tex Land Co. v. Simmons, 566 S.W.2d 719 (Tex. Civ. App. 1978); Williams v. Humble Oil & Ref. Co., 432 F.2d 165 (5th Cir. 1970), reh'g denied, 435 F.2d 772, cert. denied, 402 U.S. 934 (1970); Webb v. Graf, 159 S.W.2d 433 (Ky. 1942); North Am. Petr. Co. v. Knight, 321 P.2d 964 (Okla. 1958).*

(n46)Footnote 1225. *Indian Territory Illuminating Oil Co. v. Rosamond, 120 P.2d 349 (Okla. 1941); Feeley v. Davis, 784 P.2d 1066 (Okla. 1989);* P. Martin & B. Kramer, Williams & Meyers Oil and Gas Law § 822.5 (Matthew Bender).

(n47)Footnote 1226. P. Martin & B. Kramer, Williams & Meyers Oil and Gas Law § 825.5 (Matthew Bender); and 5 Kuntz, Lowe, Anderson, Pierce, and Smith, Oil and Gas Law § 61.5(e) (Anderson).

(n48)Footnote 1227. *E.g.*, Ken. Rev. Stat. § 353.040.

(n49)Footnote 1228. *Spaeth v. Union Oil Co. of Cal., 710 F.2d 1455 (10th Cir. 1983).*

(n50)Footnote 1229. *See* § 49.58(a)(2), *supra*.

(n51)Footnote 1230. *Sheffield v. Exxon Corp., 424 So. 2d 1297 (Ala. 1982); Millette v. Phillips Petr. Co., 48 So. 2d 344, 346 (Miss. 1950). See also Bush Oil Co. v. Beverly-Lincoln Land Co., 158 P.2d 754 (Cal. App. 1945)* ("an implied obligation on the part of an oil and gas lessee to refrain from taking any affirmative course of action which will result in draining a substantial quantity of oil and gas from the lessor's property" and *Humphreys Oil Co. v. Tatum, 26 F.2d 882, 884 (5th Cir. 1928)* (*cert. denied, 278 U.S. 633)* ("implied covenant that the lessee would do nothing to impair the value of the lease to the lessor").

(n52)Footnote 1231. *Cook v. El Paso Nat. Gas Co., 560 F.2d 978, 984 (10th Cir. 1977).*

(n53)Footnote 1232. Richard W. Hemingway, The Law of Oil and Gas § 8.7 (2d ed. 1983).

(n54)Footnote 1233. *See generally* § 49.44(h)(3), *supra*, dealing with good faith in unitization and pooling.

(n55)Footnote 1234. *Amoco Prod. Co. v. Heimann, 904 F.2d 1405 (10th Cir. 1990)* (dealing with commitment of lease to a 1 million acre unit with royalties computed on an acreage basis).

cert. denied, 498 U.S. 942 (1996) after Amoco Prod. Co.

Thompson on Real Property, Thomas Editions

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CHAPTER 49 PETROLEUM AND PIPELINES
XII. Implied Covenants in Oil and Gas Leases

6-49 Thompson on Real Property, Thomas Editions § 49.59

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§ 49.59 Administrative and Management Covenants.

[Go To Supp]

§ 49.59(a) Implied Covenant to Produce and Market.

Obviously, the central motivation for an oil and gas lease for both parties is the production of oil and gas and, for the lessor, the resultant royalties. Therefore, courts imply a duty to produce and market, which requires the lessee to use due diligence to market produced oil and gas within a reasonable time and at a reasonable price. n1235 The implied duty is of greatest concern with gas because it often requires processing and pipeline connections. n1236 Oil, on the other hand, theoretically is always able to be marketed and the lessor technically may take royalty in kind. But when marketing is not occurring or is being done on questionable terms, the implied covenant should apply to oil because the lessee generally markets both the lessee's oil and the royalty oil.

The implied covenant to market has been considered operative in the primary term of the lease. n1237 Naturally, in the secondary term, the majority of jurisdictions require actual production to maintain the lease even when gas is at issue. A shut-in royalty payment, however, may maintain the lease without actual marketing. n1238 The implied covenant, nevertheless, will eventually require actual marketing. In jurisdictions that allow the "discovery" of hydrocarbons to suffice for entry into the secondary term, diligence in attempting to market is also required. The test for this is similar to the proof of the implied duty to market in a reasonable time. Moreover, in all jurisdictions, the implied covenant also looks to the terms of the sale.

§ 49.59(a)(1) Proof of Breach of Duty to Market in Reasonable Time.

To show a breach of the covenant, the lessor will have to show: 1) there had been a discovery of oil or gas, 2) the product was not sold, 3) a prudent operator could have sold the oil or gas through reasonable diligence, and 4) the lessor was damaged. n1239 If equipment is necessary to make the oil or gas marketable, the lessee must install it, but not if it would be unprofitable. n1240 In judging the lessee's performance, both absolute time lapse and diligence are important.

The oil or gas must be marketed within a reasonable time, but what period of time will be reasonable will depend on the circumstances of the particular case. For example, in Bristol v. Colorado Oil and Gas Corp., n1241 nine and one-half

years after a well was drilled, which was eight years after the end of the primary term, was not an unreasonable length of time because the gas was in wildcat territory and needed processing. The lessee continued drilling to have sufficient reserves to entice a pipeline and began selling gas relatively soon after a pipeline was built. The diligence of the lessee impacted the reasonableness of the time frame. A lesser time period would be unreasonably long if the lessee had not been actively seeking a market or otherwise developing the area. Essentially, the lessor must prove that the lessee was not doing all that the reasonable and prudent operator would do. Some cases, however, find that an inordinate delay is prima facie proof of a breach. n1242

In order to prevail on a claim of breach of the duty to market, the lessor will have to give notice to the lessee and demand that marketing begin. n1243

§ 49.59(a)(2) Proof of Breach of Duty to Market at Reasonable Price.

The second aspect of the implied duty to market is the duty to market at a reasonable price. This is of concern to the lessor whose royalties are computed on a proceeds basis. n1244 Most of the time, the self-interest of the lessee will coincide with that of the lessor. To prevail on a claim that the duty has been breached, the lessor must show that a reasonable and prudent operator would have achieved a better price under the circumstances. n1245 The duty does not require the lessee to always obtain the highest available price because terms other than price may be important, but the lessee should not accept prices significantly lower than the market.

Although most cases simply involve the second-guessing of the lessor about the lessee's business acumen, sometimes the lessee may have an agenda separate from that of the lessor. If there is potential for conflict, however, the duty requires the lessee to treat each lessor individually. One case vividly showed that the lessee may not sacrifice one lessor for the overall betterment of the lessee's market position. In Amoco Production Co. v. First Baptist Church of Pyote, n1246 the lessee had numerous low-price contracts. In marketing the particular lessor's gas, it accepted a price lower than that received by other sellers of gas from the same well. In exchange, the price on the other low-price contracts was raised. The court found the lessee violated its duty to market the lessor's gas at a reasonable price. n1247

Notice should not necessarily be a prerequisite to a suit alleging this breach because notice implies the lessee could remedy the breach by performance. n1248 The offending contract, however, will have already been entered into when the lessee learns of it by way of royalty receipts.

§ 49.59(a)(3) Remedies.

Remedies differ for the two types of breaches of the implied covenant to market. n1249 If the lessee fails to market at all, damages are difficult to ascertain. They would be based on the royalties that would have been received, n1250 creating the same problems of potential double recovery as with damages for failure to diligently develop. n1251 Cancellation or conditional cancellation would be allowed in most jurisdictions, n1252 with absolute cancellation being more frequent for breaches of this covenant than for development covenants. Texas, however, might only allow damages. n1253

The analysis changes if the lessee has simply failed to market on the best terms. Damages would make the lessor whole. These should be based on the difference between royalties computed under the contract that should have been negotiated and the royalties under the offending contract. n1254 If a long-term contract would have been prudent, those terms should govern damages. The court in Amoco Production Co. v. First Baptist Church of Pyote, n1255 however, based damages on the market value of the gas, which could fluctuate, rather than requiring adherence to the terms of one of the contracts that represented the best terms at the time of contracting. The court in essence transformed a royalty provision designed to be computed on proceeds into a market value provision.

§ 49.59(b) To Operate with Reasonable Care.

There is a general implied covenant that the lessee will operate with reasonable care. n1256 This covenant is also referred to as the covenant of diligent and proper operation. It covers not only what should be done, but the manner in which operations should be carried out. The customs of the industry provide the standards with which the prudent operator should comply. n1257 If testing or reworking a well would normally be done, the lessee should perform the work. n1258 The duty may also require secondary recovery or other advanced techniques. n1259 The lessee, however, is not the guarantor of operations and may in good faith rely on the advice of its experts. n1260

Violation of this duty may lead to liability in tort for negligence as well as for breach of contract. n1261 Remedies may include damages, but mandatory injunctions could be issued in appropriate circumstances. Additionally, willful and repeated violations can justify cancellation. n1262

§ 49.59(c) To Seek Favorable Administrative Action.

Conservation agency rules now govern many aspects of oil and gas operations. Wells can only be drilled in certain locations and production may be curtailed to preserve reservoir energy or to prevent waste that accompanies producing in excess of market demand. There is a growing sense that the lessee may not use administrative rulings as an excuse for non-performance, but must seek affirmative administrative relief. n1263 The duty to seek favorable administrative action may also include the duty to appeal adverse orders n1264 and to intervene in proceedings where others are seeking orders that could negatively impact the leasehold. n1265 This duty may be a separate covenant or part of other covenants, such as the duty to diligently develop, to protect from drainage, or to operate with reasonable care.

The test for compliance with this duty is not whether the agency would grant the request, but whether the prudent operator would have applied for the relief. n1266 This standard does, to a certain extent, encompass the likelihood of success because a reasonable and prudent operator is not quixotic. n1267 The lessee may also rely on the reasonable advice of its experts. n1268

FOOTNOTES:
(n1)Footnote 1235. *Cabot Corp. v. Brown, 754 S.W.2d 104 (Tex. 1987). See generally* 5 Kuntz, Lowe, Anderson, Pierce, and Smith, Oil and Gas Law § 60.1 (Anderson); P. Martin & B. Kramer, Williams & Meyers Oil and Gas Law § 853 (Matthew Bender); and Richard W. Hemingway, The Law of Oil and Gas § 8.9(C) (2d ed. 1983).

Pack v. Santa Fe Minerals, 869 P.2d 323 (Okla. 1994) (no breach occurs if lessee voluntarily stops producing and marketing gas from a well for a reasonable time when the lessee is justified by equitable considerations; sales were slowed in the summer in order to maximize returns and avoid exceeding a well's yearly allowable). *Cf. Coosewoon v. Meridian Oil Co., 25 F.3d 920 (10th Cir. 1994)* (Oklahoma law gives operator of lease a fiduciary duty to royalty owners to market gas or oil at highest market price available, but failure to pay royalties timely is not evidence of a failure to market); *Crain v. Hill Resources, 972 P.2d 1179 (Okla. Civ. App. 1998)* (oil and gas lessees breached the implied covenant to market the product by failing to diligently seek a market in the 15 years after the wells were drilled).

Union Pacific Resources Group v. Hankins, 51 S.W.3d 741 (Tex. App. 2001) (issue of possible breach of implied covenant to market was pertinent to all class members).

(n2)Footnote 1236. *Roberts Ranch Co. v. Exxon Corp., 43 F. Supp. 2d 1252 (W.D. Okla. 1997)* (where the producer of gas had no right to use gas to operate its sulfur extraction plant for post-production treatment required to make the gas marketable. The contrary result would have allowed the producer to pass on to the lessor a substantial portion of post-production costs applicable to the producer under its obligation to make the gas marketable).

(n3)Footnote 1237. *Davis v. Cramer, 808 P.2d 358 (Colo. 1991), on remand, 837 P.2d 218 (Colo. App. 1992).*

(n4)Footnote 1238. *See* § 49.43, *supra*.

Condra v. Quinoco Petroleum, Inc., 954 S.W.2d 68 (Tex. App. 1997) (Although the holder of an overriding royalty has no right to enforce an express covenant in the original lease, an implied covenant to market arises under the assignment. Such covenant relates only to actual production and settlement payments made in the absence of production do not create a breach.).

(n5)Footnote 1239. P. Martin & B. Kramer, Williams & Meyers Oil and Gas Law §§ 855-856 (Matthew Bender). *See also Robbins v. Chevron U.S.A., 785 P.2d 1010 (Kan. 1990)* (judged by what an experienced operator of reasonable prudence would have done under conditions existing at the time).

Danne v. Texaco Exploration & Prod. Co., 883 P.2d 210 (Okla. App. 1994) (where there was a gas meter on well and spot market sales could have been made, lessee failed to exercise due diligence to market product to readily available gas purchaser; lease, however, does not terminate automatically for this failure and lessors who accepted benefits estopped from then seeking to forfeit lease).

Rogers v. Westerman Farm Co., 29 P.3d 887 (Colo. 2001) (where court found that marketability of the product was a question of fact based on condition and location. It must be acceptable for purchase and sale in a commercial marketplace and must be commercially saleable in the oil and gas marketplace. The first-marketable product rule is adopted in part).

(n6)Footnote 1240. *Compare Kretni Dev. Co. v. Consolidated Oil Corp., 74 F.2d 497 (10th Cir. 1934), cert. denied, 294 U.S. 750* (need not build unprofitable pipeline to transport to market), with *Union Oil Co. of Cal. v. Ogden, 278 S.W.2d 246 (Tex. Civ. App. 1955)* (must build half-mile long pipeline needed to market).

(n7)Footnote 1241. *225 F.2d 894 (10th Cir. 1955). Cf. Sword v. Rains, 575 F.2d 810 (10th Cir. 1978)* (passage of time is not itself determinative).

(n8)Footnote 1242. *Davis v. Cramer, 808 P.2d 358 (Colo. 1991), on remand, 837 P.2d 218 (Colo. App. 1992).*

(n9)Footnote 1243. *Davis v. Cramer, 808 P.2d 358 (Colo. 1991), on remand, 837 P.2d 218 (Colo. App. 1992)* (accepting less than formal demand when lessee knows of lessor's position). *See generally* 5 Kuntz, Lowe, Anderson, Pierce, and Smith, Oil and Gas Law § 60.4 (Anderson).

(n10)Footnote 1244. It will also be of concern in those jurisdictions that compute market value based on the value at the time of contracting. These jurisdictions, however, require that the contract be one that was negotiated in good faith. Therefore, the implied covenant's basic duty must be met at the time of contracting. *See* § 49.49(b)(2), *supra*.

(n11)Footnote 1245. *Greenshields v. Warren Petr. Corp., 248 F.2d 61* (10th Cir.), *cert. denied, 355 U.S. 907 (1957)* (low price acceptable for distressed gas required to be sold to allow oil production); *Gazin v. Pan-Am. Petr. Corp., 367 P.2d 1010 (Okla. 1962)* (prudent to reject first contract and work to increase reserves for higher price). For an argument that a lessee's business judgment should not be second-guessed if made in good faith, *see* P. Martin & B. Kramer, Williams & Meyers Oil and Gas Law § 856.3 (Matthew Bender).

Schroeder v. Terra Energy, 565 N.W.2d 887 (Mich. App. 1997) (where royalties calculated at the prevailing market price did not require the operator to obtain the best market price); *Watts v. Atlantic Richfield Co., 115 F.3d 785 (10th Cir. 1997)* (where the lessors sought to prove that the producer breached its duty to obtain the best price available).

(n12)Footnote 1246. *579 S.W.2d 280 (Tex. Civ. App. 1979).*

(n13)Footnote 1247. The court used a standard of utmost good faith in judging the lessee's actions. *Amoco Prod. Co. v. First Baptist Church of Pyote, 579 S.W.2d 280 (Tex. Civ. App. 1979).* This standard was later questioned; the

prudent operator standard was favored. *Hurd Enters. v. Bruni, 828 S.W.2d 101 (Tex. Civ. App. 1992).*

(n14)Footnote 1248. *See generally* 5 Kuntz, Lowe, Anderson, Pierce, and Smith, Oil and Gas Law § 60.4 (Anderson).

(n15)Footnote 1249. *See* P. Martin & B. Kramer, Williams & Meyers Oil and Gas Law § 857 (Matthew Bender) and 5 Kuntz, Lowe, Anderson, Pierce, and Smith, Oil and Gas Law § 60.5 (Anderson).

(n16)Footnote 1250. *Carroll Gas & Oil Co. v. Skaggs, 21 S.W.2d 445 (Ky. 1929).*

(n17)Footnote 1251. *See* 5 Kuntz, Lowe, Anderson, Pierce, and Smith, Oil and Gas Law § 60.5(d) (Anderson), suggesting credits against future royalties.

(n18)Footnote 1252. For positions in the various jurisdictions as to whether cancellation is the preferred remedy, see 5 Kuntz, Lowe, Anderson, Pierce, and Smith, Oil and Gas Law § 60.5(e) (Anderson).

(n19)Footnote 1253. *Cf. Guleke v. Humble Oil & Ref. Co., 126 S.W.2d 38 (Tex. Civ. App. 1939).*

(n20)Footnote 1254. *Barby v. Cabot Corp., 550 F. Supp. 188 (W.D. Okla. 1981)* (lessor entitled to royalty would have received if lessee had timely renegotiated contracts).

(n21)Footnote 1255. *579 S.W.2d 280 (Tex. Civ. App. 1979).*

(n22)Footnote 1256. *See generally* 5 Kuntz, Lowe, Anderson, Pierce, and Smith, Oil and Gas Law § 59.1 (Anderson); P. Martin & B. Kramer, Williams & Meyers Oil and Gas Law § 861 (Matthew Bender); and Richard W. Hemingway, The Law of Oil and Gas § 8.9(A) (2d ed. 1983).

(n23)Footnote 1257. *Empire Oil & Ref. Co. v. Hoyt, 112 F.2d 356 (6th Cir. 1940)* (but are not necessarily conclusive); *Irgens v. Mobil Oil Corp., 442 N.W.2d 223 (N.D. 1989).*

(n24)Footnote 1258. *Clifton v. Koontz, 325 S.W.2d 684 (Tex. 1959).*

(n25)Footnote 1259. *Waseco Chem. & Supply Co. v. Bayou State Oil Corp., 371 So. 2d 305 (La. App. 1979)* (fireflooding required if common in area). *See generally Wadkins v. Wilson Oil Corp., 6 So. 2d 720, 721 (La. 1942)* ("implied covenant that the lessee would develop the premises according to the recognized custom and progressive practices among operators in the field"). *See generally* P. Martin & B. Kramer, Williams & Meyers Oil and Gas Law § 861.3 (Matthew Bender) and 5 Kuntz, Lowe, Anderson, Pierce, and Smith, Oil and Gas Law §§ 59.1, 59.3 (Anderson).

(n26)Footnote 1260. *Sinclair Oil & Gas Co. v. Bishop, 441 P.2d 436 (Okla. 1967).*

(n27)Footnote 1261. *Morriss v. Barton, 190 P.2d 451 (Okla. 1948).*

(n28)Footnote 1262. *Baldwin v. Kubetz, 307 P.2d 1005 (Cal. App. 1957). See generally* 5 Kuntz, Lowe, Anderson, Pierce, and Smith, Oil and Gas Law § 59.5 (Anderson).

(n29)Footnote 1263. *Baldwin v. Kubetz, 307 P.2d 1005 (Cal. App. 1957)* (zoning exceptions to allow drilling available); *Amoco Prod. Co. v. Alexander, 622 S.W.2d 563 (Tex. 1981)* (Rule 37 exceptions required). *See generally* Richard W. Hemingway, The Law of Oil and Gas § 8.10(D) (2d ed. 1983) and P. Martin & B. Kramer, Williams & Meyers Oil and Gas Law § 861.4 (Matthew Bender).

(n30)Footnote 1264. *But see Amoco Prod. Co. v. Ware, 602 S.W.2d 620 (Ark. 1980)* (alternative actions sufficient protection in circumstances; unit involved).

(n31)Footnote 1265. *Sinclair Oil & Gas Co. v. Bishop, 441 P.2d 436 (Okla. 1967)* (must protest adjoining operator's flaring, which would injure common source of supply). *See generally*, 5 Kuntz, Lowe, Anderson, Pierce, and Smith, Oil and Gas Law § 59.1 (Anderson). Prof. Kuntz also noted the problems of conflict when the lessee may have interests in more than one leasehold.

(n32)Footnote 1266. *Amoco Prod. Co. v. Alexander, 622 S.W.2d 563 (Tex. 1981).*

(n33)Footnote 1267. *Weymouth v. Colorado Interstate Gas Co., 367 F.2d 84 (5th Cir. 1966)* (need not apply for increased allowable unlikely to be granted).

(n34)Footnote 1268. *Sunray DX Oil Co. v. Crewes, 448 P.2d 840 (Okla. 1969).*

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CHAPTER 49 PETROLEUM AND PIPELINES
XII. Implied Covenants in Oil and Gas Leases

6-49 Thompson on Real Property, Thomas Editions § 49.60

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§ 49.60 Duties Implied on Lessor.

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There are few duties implied on the lessor. The doctrine of obstruction, however, states that a lessor shall not interfere with the lessee's obligations. The lessee receives property rights that must be respected. n1269 In addition to this, there is some precedent stating that the lessor has a duty to cooperate by consenting to prudent operations. For example, if the lessee proposes a fair and reasonable unitization agreement, the lessor must consent or the lessee may be excused from developing the leasehold. n1270 The lessor, however, is not required to consent if there is a difference in expert opinion on the prudence of the activity. n1271 The breach of this duty by the lessor may be an actionable wrong n1272 or an excuse for non-performance by the lessee. n1273

FOOTNOTES:
(n1)Footnote 1269. *See generally*, 5 Kuntz, Lowe, Anderson, Pierce, and Smith, Oil and Gas Law § 56.2 (Anderson).

Atkinson Gas Co. v. Albrecht, 878 S.W.2d 236 (Tex. App. 1994) (lessor did not obstruct or repudiate existence of lease so as to excuse lessee's performance when lessor shut off valve; this was a dispute over royalties and repudiation requires clear, unequivocable challenge to lessee's title).

(n2)Footnote 1270. *Tidewater Associated Oil Co. v. Stott, 159 F.2d 174 (5th Cir. 1946), cert. denied, 331 U.S. 817 (1947)* (lessee offered lessor reasonable plan); *Syverson v. North Dakota State Indus. Comm'n, 111 N.W.2d 128 (N.D. 1961)* (absent actual injury to lessor, unitization order valid).

(n3)Footnote 1271. *Rush v. King Oil Co., 556 P.2d 431 (Kan. 1976).*

(n4)Footnote 1272. 5 Kuntz, Lowe, Anderson, Pierce, and Smith, Oil and Gas Law § 56.4 (Anderson).

(n5)Footnote 1273. 5 Kuntz, Lowe, Anderson, Pierce, and Smith, Oil and Gas Law § 56.5 (Anderson).

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CHAPTER 49 PETROLEUM AND PIPELINES
XIII. Lease Transfers by Lessee

6-49 Thompson on Real Property, Thomas Editions § 49.61

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§ 49.61 Lessee's Right to Transfer.

Transfers of oil and gas working interests are frequent. Many take place because original lessees may obtain a lease for speculative purposes with the intent to sell it to a developer. Other transfers occur because the developing lessee needs financing. Most leases state that the lessee's interest is freely transferable. Even in the absence of such a clause, the lessee could transfer its interest because the interest is a property right. This is also true in Kansas, which considers the leasehold to be personal property. Efforts by lessors to forbid assignment have met with objections as restraints on alienation. n1274 Consent to assignment provisions tailored to legitimate business concerns, however, should be as enforceable in this situation as with leaseholds generally. n1275 A transfer of an interest in a lease or a contract, however, is generally subject to the Statute of Frauds, which means it must be in writing and must adequately describe the interest to be conveyed. n1276 So long as these requirements are met, a lessee may transfer interests in the leasehold in numerous ways. n1277 Obviously, it may assign its whole interest in the lease. Often, the assignment will be accompanied by a reservation of a non-cost bearing interest. This is an overriding royalty, which has no operating rights. n1278 Another option is to assign a full working interest in only some of the acreage in the lease n1279 or some formations. n1280 Such an assignment is referred to as a partial assignment. It differs from assigning an undivided interest in the lease, which would make the assigner and assignee co-tenants.

If the lessee does transfer an undivided interest in the lease, the burden of any outstanding interests in the leasehold, such as overriding royalties, may fall on either the lessee's retained interest or on the transferred interest. In the normal transaction, the parties are aware of the interests and will specify the burden. A proportionate burdening is common. If the outstanding interests are not mentioned, the transferred interest would be unburdened. Conversely, if the transfer is specified as "subject to" the stated interests, the transferee will bear the full burden of the outstanding interests. n1281

FOOTNOTES:
(n1)Footnote 1274. *Shields v. Moffitt, 683 P.2d 530 (Okla. 1984)* (lack of standards made consent requirement a restraint on alienation).

(n2)Footnote 1275. *Id. See also* P. Martin & B. Kramer, Williams & Meyers Oil and Gas Law § 402 (Matthew Bender) (concluding restraints are valid but strictly construed).

(n3)Footnote 1276. *Fagg v. Texas, 57 S.W.2d 87 (Tex. Civ. App. 1933); Lohse v. Atlantic Richfield Co., 389 N.W.2d 35 (N.D. 1986); Robinson v. Smalley, 171 P. 1155 (Kan. 1918); McKenna v. Wallis, 200 F. Supp. 468, aff'd, 366 F.2d 432 (5th Cir. 1961)* (applying Louisiana law). *See generally* Richard W. Hemingway, The Law of Oil and Gas § 9.7 (3d ed. 1991).

(n4)Footnote 1277. *Id.* at § 9.8 and P. Martin & B. Kramer, Williams & Meyers Oil and Gas Law § 401 (Matthew Bender).

(n5)Footnote 1278. *See* § 49.10(c)(2), *supra* and Richard W. Hemingway, The Law of Oil and Gas § 9.9 (2d ed. 1983); Richard W. Hemingway, The Law of Oil and Gas § 9.9 (2d ed. 1983); P. Martin & B. Kramer, Williams & Meyers Oil and Gas Law § 418 (Matthew Bender) and 5 Kuntz, Lowe, Anderson, Pierce, and Smith, Oil and Gas Law § 63.2 (Anderson).

(n6)Footnote 1279. Reciprocal rights between partial owners are discussed in, *Mai v. Youtsey, 646 P.2d 475 (Kan. 1982)* (each owner has rights to use roads; one who volunteers to improve road may not seek contribution).

(n7)Footnote 1280. For difficulties arising from descriptions by depth, *see Carter Oil Co. v. McCasland, 190 F.2d 887 (10th Cir. 1951)* (assignment of "producing horizons above" a certain depth included all of a formation when any part of it was above stated depth).

(n8)Footnote 1281. *See* Richard W. Hemingway, The Law of Oil and Gas § 9.8 (2d ed. 1983).

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CHAPTER 49 PETROLEUM AND PIPELINES
XIII. Lease Transfers by Lessee

6-49 Thompson on Real Property, Thomas Editions § 49.62

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§ 49.62 Effect of Transfer on Lessor.

§ 49.62(a) Further Rights Against the Lessee.

Neither an assignment nor sublease will release the lessee from liability on the express covenants of the lease because the lessee is in privity of contract with the lessor. n1282 There is less authority and little agreement among commentators on whether the lessee remains liable for implied covenants. n1283 A lease term may expressly release the lessee upon assignment, but most such clauses are interpreted to only impact future liabilities, not accrued ones.

§ 49.62(b) Future Rights Against the Transferee.

The lessor's rights against the transferee could depend on the distinction between an assignment and a sublease. n1284 An assignee is in privity of estate with the lessor. n1285 The lessor therefore could enforce any covenants that "touch and concern" the oil and gas estate. Because almost all provisions, both express and implied, of the oil and gas lease "touch and concern" the estate, the lessor could proceed directly against the assignee. n1286 Technically, the lessor would not have a direct cause of action against a sublessee, but would have to sue the lessee. n1287 An exception to this would be if the sublessee expressly assumed the obligations and covenants of the lease in the transfer instrument. The lessor could enforce this promise as a third-party beneficiary. n1288

Under traditional theory, an assignment results from the transfer of the lessee's total term in either the entire leasehold or particular tracts. n1289 If any interest is retained, then the transaction would be a sublease. One reoccurring question is what results if the lessee retains an overriding royalty in the interest assigned. Some cases find the overriding royalty to be a sufficient withheld interest to make the transaction a sublease, n1290 but others disagree. n1291 Similar results have occurred when the lessee retained rights to be notified of the transferee's intent to surrender the lease and a right to take a reconveyance. n1292

The difference between a sublease and assignment is routinely followed in Louisiana, but a statute has lessened the import of the distinction. n1293 In other jurisdictions, the common-law distinction is commonly ignored because it does not comport with industry custom. n1294

FOOTNOTES:

(n1)Footnote 1282. *Whale v. Rice, 49 P.2d 737 (Okla. 1935). But see* Louisiana Mineral Code, La. Rev. Stat. §§ 31:126-132. *See generally*, 5 Kuntz, Lowe, Anderson, Pierce, and Smith, Oil and Gas Law § 64.4 (Anderson). Naturally, the lessor could release the lessor or, if the lessor consents and enters into a new agreement with the assignee, the new arrangement could be a novation.

(n2)Footnote 1283. *Sims v. Inexco Oil Co., 618 F. Supp. 183 (S.D. Miss. 1985)* (lessee-assignor not liable for payment of royalty or for breach of implied covenant to market but lessee sublessor would be). *See generally* Richard W. Hemingway, The Law of Oil and Gas § 9.11 (2d ed. 1983) and P. Martin & B. Kramer, Williams & Meyers Oil and Gas Law § 403.2 (Matthew Bender).

(n3)Footnote 1284. *See generally* Richard W. Hemingway, The Law of Oil and Gas § 9.11 (2d ed. 1983) and 5 Kuntz, Lowe, Anderson, Pierce, and Smith, Oil and Gas Law § 64.2 (Anderson).

(n4)Footnote 1285. This is true up until the assignee assigns again. If it does so, it will no longer be subject to the lease's duties unless they were expressly assumed. *Hartman Ranch Co. v. Associated Oil Co., 73 P.2d 1163 (Cal. 1937).*

(n5)Footnote 1286. *Phillips Petr. Co. v. Taylor, 115 F.2d 726 (5th Cir. 1940).* Similarly, assignees of the lessor have causes of action, *Gillet v. Elmhurst Inv. Co., 207 P. 843 (Kan. 1922).* P. Martin & B. Kramer, Williams & Meyers Oil and Gas Law § 403.3 (Matthew Bender).

(n6)Footnote 1287. *Hartman Ranch Co. v. Associated Oil Co., 73 P.2d 1163 (Cal. 1937). See generally*, 5 Kuntz, Lowe, Anderson, Pierce, and Smith, Oil and Gas Law § 64.5 (Anderson).

(n7)Footnote 1288. *Hartman Ranch Co. v. Associated Oil Co., 73 P.2d 1163 (Cal. 1937)* (allowing lessor to sue as "creditor beneficiary" on sublessee's agreement to assume duties); *Pepper v. Pyramid Oil & Gas Corp., 287 So. 2d 620 (La. App. 1973).* Louisiana now makes the sublessee directly responsible to the lessor for the lessee's obligations to the extent of the interest acquired. La. Rev. Stat. Ann. § 31:128.

(n8)Footnote 1289. *See generally* P. Martin & B. Kramer, Williams & Meyers Oil and Gas Law §§ 413-413.5 (Matthew Bender).

(n9)Footnote 1290. *Robinson v. North Am. Royalties, 463 So. 2d 1384 (La. App. 1985), modified, 509 So. 2d 679 (La. 1987).*

(n10)Footnote 1291. *Sims v. Inexco Oil Co., 618 F. Supp. 183 (S.D.Miss. 1985); Holman v. State, 438 N.W.2d 534 (N.D. 1989).* For arguments for making the relationship between the lessor and actual operator direct, *see* 5 Kuntz, Lowe, Anderson, Pierce, and Smith, Oil and Gas Law § 64.3 (Anderson).

(n11)Footnote 1292. *Garner v. Knudsen, 277 P.2d 890 (Cal. App. 1955)* (provision for retransfer upon operator's option or non-compliance with lease).

(n12)Footnote 1293. The Louisiana Mineral Code provides that no assignor or sublessor is released from duties unless the lessor executes an express discharge. La. Rev. Stat. Ann. § 31:129. It also allows direct suits against both. La. Rev. Stat. Ann. § 31:128.

(n13)Footnote 1294. *Holman v. State, 438 N.W.2d 534 (N.D. 1989); Moore v. Campbell, 267 F. Supp. 1261 (N.D. Tex. 1967).* P. Martin & B. Kramer, Williams & Meyers Oil and Gas Law §§ 412, 414 (Matthew Bender).

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CHAPTER 49 PETROLEUM AND PIPELINES
XIII. Lease Transfers by Lessee

6-49 Thompson on Real Property, Thomas Editions § 49.63

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§ 49.63 Rights and Duties of the Lessee and Transferee.

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§ 49.63(a) Protection of Non-Operating Interests By Implied Covenants.

The lessee's non-operating interest retained in many assignments is an overriding royalty interest. Naturally, the lessee will see no return on this interest unless the assignee produces, but, unless the transfer document requires the drilling of an initial well, there will be no duty to drill one. Because the parties to the creation of an override are more sophisticated, it is argued that implied covenants would be inappropriate. n1295 Nevertheless, there is a movement to imply a general obligation of fair dealing, which would run from the operator to the non-operator and would encompass elements of the traditional implied duties owed to the lessor. n1296 Moreover, despite precedent to the contrary, n1297 some cases allow the lessee with a retained override to enforce the implied covenants, especially the covenant to protect against drainage. n1298 The lessee will have no greater rights nor will the transferee have any greater duties than are owed to the lessor. Other courts simply apply a duty of good faith, which would be less than an affirmative duty to protect from drainage. n1299

§ 49.63(b) Protection of Non-Operating Interests Against "Wash-out."

When the lessee retains an overriding royalty in a lease, it is reserved out of that particular lease's working interest. Therefore, if that lease should terminate, the original lessee's interest will end. n1300 The transferee therefore will have an incentive to let the burdened lease expire and to take a new lease. The general rule is that the transferee is not a fiduciary in respect to the overriding royalty holder. n1301 Exceptions are two: fiduciary responsibilities arise if special circumstances create a fiduciary relationship n1302 or if fraud and collusion take place. n1303 Unless one of the exceptions exist, the transferee could take a new lease without recognizing the override obligation. This was especially troublesome to some when the "new" lease was taken during the life of the burdened lease.

To remedy this problem, many assignments state that the override shall apply to "all modifications, renewals and extensions" of the assigned lease. This will require the transferee to recognize the rights of the overriding royalty holder. n1304 A constructive trust may be imposed on the new lease if the transferee topleases. n1305 Despite the future operation of the provision, the clause does not violate the Rule Against Perpetuities because the lease and the rights

granted under the assignment are vested. n1306

With the prevalence of these clauses, there is a need to determine what is a modification, renewal, or extension of the original lease. If the new lease the transferee takes is substantially different from the original, it may be a new lease to which the overriding royalty will not attach. n1307 Factors considered include: 1) the circumstances surrounding execution of the new lease, 2) the relationship of parties, 3) similarities and differences in terms of the new and old leases, and 4) whether additional consideration was given for new lease. n1308 The extension clause may be mooted if, in addition to applying the override to modifications, renewals and extensions, the assignment also grants the assignee the right to surrender the lease or releases the assignee from obligations to drill or keep the original lease alive. n1309

§ 49.63(c) Implied Covenants of Title from Lessee.

In an assignment of a lease, the lessee generally is not viewed as impliedly giving a warranty of title to the leasehold. To avoid implications arising under a jurisdiction's general law about the use of certain words of grant, most assignments expressly detail what, if any, title assurances are given. Regardless of the lessee's obligations, the transferee will be able to take advantage of the lessor's warranty of title.

§ 49.63(d) Performance or Failure of Performance by a Partial Assignee.

The general requirements of an oil and gas lease are deemed to be indivisible. Most leases, however, state that in the case of a partial assignment, in which only certain acreage is assigned, failure by an assignee or the original lessee to pay delay rentals will only impact the acreage of the lease held by that party. n1310 This applies to segregated tracts and will not assist when undivided interests are assigned; the total rental attributable to a tract must be paid. This express change in the rule of indivisibility is held to confirm indivisibility as to other duties. Each tract will not be viewed as a separate lease.

Under the rule of indivisibility, compliance with a duty for a segregated tract in a lease is compliance for all tracts under the lease. Therefore, the habendum clause will be satisfied for the entire lease if there is production on any of the acreage. n1311 Similarly, the entire lease will be held by one operator's shut-in royalty payments n1312 or activities sufficient to comply with the operations, dry hole, or cessation of production clauses. One possible exception is Louisiana, which had held that production will only retain the acreage held by the producing operator. n1313 Naturally, *Pugh* Clauses and other changes to indivisibility may apply and require production from more than one part of a leasehold. n1314

Royalty payments are primarily due from the operator upon which production is obtained. Although the original lessee will probably remain liable for all royalties, the royalty duty is divisible to the extent that the partial assignee will not be liable for royalties accruing from production on lands not within its assignment. n1315

§ 49.63(e) Divisibility of Implied Covenants After a Partial Assignment.

The implied covenants generally are also deemed to be indivisible. Obligations will not increase because of the assignment of the lease into separate tracts. To a certain extent, however, indivisibility is not an important issue. Each well capable of production should be marketed and each operator could be held accountable for both marketing and prudent operation. n1316 Only the operator of acreage being drained from a well off the leasehold will be required to provide drainage protection; internal offsets between assigned tracts are never required. n1317 The biggest question regarding divisibility arises under the implied covenant of reasonable development.

One operator may be the assignee of a portion of the leasehold on which there has been no development. Some cases have held that the covenant is divisible and each assigned tract must be judged separately. n1318 Others maintain the covenant is indivisible. n1319 If the covenant of reasonable development is indivisible, the lessor will have to prove that

the leasehold as a whole was not being reasonably developed. The lack of development of the single tract may not be conclusive. Nevertheless, when the leasehold encompasses large acreage, the doctrine of partial cancellation will enable a laggard operator to lose an interest without impacting other parts of the leasehold. Therefore, the question of divisibility or indivisibility primarily impacts the scope of evidence the lessor must present. n1320

FOOTNOTES:

(n1)Footnote 1295. *See generally* P. Martin & B. Kramer, Williams & Meyers Oil and Gas Law § 420.1 (Matthew Bender).

(n2)Footnote 1296. P. Martin & B. Kramer, Williams & Meyers Oil and Gas Law § 420.2 (Matthew Bender).

(n3)Footnote 1297. *McNeill v. Peaker, 488 S.W.2d 706 (Ark. 1973)* (no implied covenants in assignment even if consideration is override); *Kile v. Amerada Petr. Corp., 247 P. 681 (Okla. 1926).*

(n4)Footnote 1298. *Cook v. El Paso Nat. Gas Co., 560 F.2d 978 (10th Cir. 1977); Bolton v. Coats, 533 S.W.2d 914 (Tex. 1975); Phillips Petr. Co. v. Taylor, 116 F.2d 994 (5th Cir. 1940); Cole Petr. Co. v. United States Gas & Oil Co., 41 S.W.2d 414 (Tex. 1931)* 86 A.L.R. 719; *Wes-Tex Land Co. v. Simmons, 566 S.W.2d 719 (Tex. Civ. App. 1978), writ refused* n.r.e.

(n5)Footnote 1299. *Tidelands Royalty B. Corp. v. Gulf Oil Corp., 804 F.2d 1344 (5th Cir. 1986)* (assignor must show assignee would act differently if no outstanding royalty).

(n6)Footnote 1300. *Texas Pac. Coal & Oil Co. v. Honolulu Oil Corp., 241 F.2d 920 (5th Cir. 1957).*

(n7)Footnote 1301. *Lillibridge v. Mesa Petr. Co., 907 F.2d 1031 (10th Cir. 1990). See generally* Richard W. Hemingway, The Law of Oil and Gas §9.11(A) (2d ed. 1983); Summers, *supra* note 32, at § 554; and P. Martin & B. Kramer, Williams & Meyers Oil and Gas Law § 420.2 (Matthew Bender).

Degenhart v. Gold King Petroleum Corp., 851 P.2d 304 (Colo. App. 1993).

(n8)Footnote 1302. For an example of special circumstances supporting fiduciary relationships, see *MacDonald v. Follet, 180 S.W.2d 334 (Tex. 1944)* (promise to deal with leases for mutual benefit); *Rees v. Briscoe, 315 P.2d 758 (Okla. 1957)* (no consideration for transfer other than override and reliance on oral promise to drill); *Jack v. Hunt, 410 P.2d 403 (N.M. 1966)* (entering into operating agreement concurrently with assignment).

(n9)Footnote 1303. *Campbell v. Nako Corp., 402 P.2d 771 (Kan. 1965)* (forfeiture or surrender obtained by fraud or collusion with landowner for purpose of avoiding override).

(n10)Footnote 1304. *Avatar Exploration, Inc. v. Chevron, U.S.A., 933 F.2d 314 (5th Cir. 1991)* (designed to prevent "wash out"). *See also, Otter Oil Co. v. Exxon Co., U.S.A., 834 F.2d 531 (5th Cir. 1987)* (discussing clause when interpreting option).

(n11)Footnote 1305. *Probst v. Hughes, 286 P. 875 (Okla. 1930).*

(n12)Footnote 1306. *Independent Gas & Oil Producers, Inc. v. Union Oil Co. of Cal., 669 F.2d 624 (10th Cir. 1982), but see Cities Serv. Oil Co. v. Sohio Petr. Co., 345 F. Supp. 28 (W.D. Okla. 1972)* (applying override to new leases would violate Rule).

(n13)Footnote 1307. *Sunac Petr. Co. v. Parkes, 416 S.W.2d 798 (Tex. 1967)* (lease with different terms taken 1 year after expiration of first neither extension nor renewal).

(n14)Footnote 1308. *Lillibridge v. Mesa Petr. Co., 907 F.2d 1031 (10th Cir. 1990).*

(n15)Footnote 1309. *Sunac Petr. Corp. v. Parkes, 416 S.W.2d 798 (Tex. 1967).*

(n16)Footnote 1310. *See* § 49.52(d), *supra*. *See also* P. Martin & B. Kramer, Williams & Meyers Oil and Gas Law § 407.1 (Matthew Bender).

(n17)Footnote 1311. *Cf. Meaher v. Getty Oil Co., 450 So. 2d 443 (Ala. 1984)* (part of lease in unit).

(n18)Footnote 1312. *Cosden Oil Co. v. Scarborough, 55 F.2d 634 (5th Cir. 1932).*

(n19)Footnote 1313. Past law made the leasehold divisible. *See, e.g., Eota Realty Co. v. Carter Oil Co., 74 So. 2d 30 (La. 1954).* The Mineral Code's wording seemingly reverses this, but the comment claims it is preserving prior law. La. Rev. Stat. Ann. § 31:130; John M. McCollam, *A Primer for the Practice of Mineral Law Under the New Louisiana Mineral Code, 50 Tul. L. Rev. 729 (1976). But see Goodrich v. Exxon Co., U.S.A., 608 So. 2d 1019 (La. App. 1992), writ denied 614 So. 2d 1241 (La. 1993)* (partial cancellation does not create separate new leases with independent maintenance obligations; lease now covers non-contiguous tracts).

(n20)Footnote 1314. *See* § 49.44(e), *supra*.

(n21)Footnote 1315. *See* P. Martin & B. Kramer, Williams & Meyers Oil and Gas Law § 408 (Matthew Bender).

(n22)Footnote 1316. P. Martin & B. Kramer, Williams & Meyers Oil and Gas Law § 410 (Matthew Bender).

(n23)Footnote 1317. *See* Richard W. Hemingway, The Law of Oil and Gas § 9.10 (2d ed. 1983) and P. Martin & B. Kramer, Williams & Meyers Oil and Gas Law § 409.3 (Matthew Bender).

(n24)Footnote 1318. *Cosden Oil Co. v. Scarborough, 55 F.2d 634 (5th Cir. 1932); Dixon v. Anadarko Prod. Co., 505 P.2d 1394 (Okla. 1973).* For other cases, *see* Richard W. Hemingway, The Law of Oil and Gas § 9.10 (2d ed. 1983).

(n25)Footnote 1319. *Dacamara v. Binney, 146 S.W.2d 440 (Tex. Civ. App. 1940); Kothe v. Jefferson, 440 N.E.2d 415 (Ill. App. 1982), aff'd, 455 N.E.2d 73 (Ill. 1983).* For other cases, *see* Richard W. Hemingway, The Law of Oil and Gas § 9.10 (2d ed. 1983).

(n26)Footnote 1320. For a similar argument, *see* P. Martin & B. Kramer, Williams & Meyers Oil and Gas Law § 409.4 (Matthew Bender).

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CHAPTER 49 PETROLEUM AND PIPELINES
XIV. Oil and Gas Contracts by Lessee

6-49 Thompson on Real Property, Thomas Editions § 49.64

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§ 49.64 Support Agreements.

In order to obtain money for drilling, the owner of the right to drill may seek contributions from parties who own interests in other lands. These parties desire geological information from the well to be drilled because it would assist in appraising their own lands. n1321 Often the agreements are informal "letter agreements" without a great degree of detail.

§ 49.64(a) Dry Hole, Bottom Hole, and Acreage Contribution Agreements.

The three main types of support agreements are the dry hole agreement, bottom hole agreement, and acreage contribution agreement. In all three, one party agrees to drill to a specified depth or formation on that party's own land and to run standard tests. n1322 The party agreeing to supply money for the drilling will receive the test results and other geological information. In a dry hole agreement, however, the money will only be paid if the test well is dry. A bottom hole agreement will require payment regardless of the productive status of the well. In the acreage contribution agreement, rather than a money payment, the non-drilling party promises to convey interests in leases in the area of the test well in exchange for the information. n1323 Bottom hole and dry hole agreements may also obligate the drilling party to convey an interest in the drill site or other acreage to the contributor. In this form, the agreements are sometimes called "purchase letters"; without the assignment they are generally referred to as "donation letters."

Problems under these agreements are varied. They include determining whether a well is dry or whether it was properly completed pursuant to the agreement's terms. Additional issues arise over what acreage should be contributed by or conveyed to the supporting party. More generally, the Statute of Frauds applies, requiring an adequate description of the lands involved, n1324 and tax implications should be considered in drafting. n1325

§ 49.64(b) Remedies for Breach.

The support agreements technically may not require a well to be drilled, but if one is begun, the drilling party must carry out the undertaking. n1326 In some other situations, the remedy for a failure to drill a well is the cost of drilling it. n1327 This measure, however, is not used for a breach of a support agreement. The non-breaching party simply lost information. The loss was not of a well on the injured party's own land, which would have given potential return

through production as well as information. Therefore, the value of the lost information is the damage, measure, computed by determining what one would normally pay by way of contribution for access to logs and other information. n1328

FOOTNOTES:

(n1)Footnote 1321. *See generally* 2 Kuntz, Lowe, Anderson, Pierce, and Smith, Oil and Gas Law § 19A.2 (Anderson); P. Martin & B. Kramer, Williams & Meyers Oil and Gas Law § 431 (Matthew Bender).

(n2)Footnote 1322. For the type of information required, *see* letter construed in *Humphrey v. Placid Oil Co., 142 F. Supp. 246 (E.D. Tex. 1956), aff'd, Placid Oil Co. v. Humphrey, 244 F.2d 184 (5th Cir. 1957).*

(n3)Footnote 1323. *See* 6 *W.L. Summers, supra* note 32, at § 1357.

(n4)Footnote 1324. *Paine v. Moore, 464 S.W.2d 477 (Tex. Civ. App. 1971)* (bottom hole purchase agreement).

(n5)Footnote 1325. *Revenue Ruling 80-153 (1980-1 C.B. 10)* (bottom hole contribution included in gross income of driller and not reduction in cost of drilling well; payer must capitalize contribution); Dickens, *Bottom-Hole Contribution: Ramifications of Revenue Ruling 80-153*, 30 Oil & Gas Tax Q. 313 (1981); P. Martin & B. Kramer, Williams & Meyers Oil and Gas Law § 431.2 (Matthew Bender).

(n6)Footnote 1326. *Placid Oil Co. v. Humphrey, 244 F.2d 184 (5th Cir. 1957).*

Arleth v. Freeport-McMoran, 2 F.3d 630 (5th Cir. 1993) (drilling required to "objective depth" despite well producing at shallower depth).

Young Refining Corp. v. Pennzoil Co., 46 S.W.3d 380 (Tex. App. 2001) (where a contract creating a non-operating interest with no right to drill a well was not a farm-out agreement entitling the lessor to a right of first refusal).

(n7)Footnote 1327. Annotation, *Right and Measure of Recovery for Breach of Obligation to Drill Exploratory Oil and Gas Wells, 4 A.L.R.2d 284 (1985).*

(n8)Footnote 1328. *Cf. Hoffer Oil Corp. v. Carpenter, 34 F.2d 589 (10th Cir. 1929)* (farmout in which farmor retained no interest in the drillsite).

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§ 49.65 Farmout Agreements.

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§ 49.65(a) Purpose and General Operation.

A farmout agreement is one in which the owner of a working interest (the farmor) agrees to convey an interest in property to another (the farmee) in exchange for the agreement to drill a specified well on the farmor's property. n1329 A farmout, from the viewpoint of the farmor, is a way to drill without the expenditure of funds. This enables the farmor to preserve a lease at the end of its primary term and spread its risks. From the farmee's perspective, the farmout allows it to earn acreage without the expenditure of bonus money. Generally, the farmee will not be considered a fiduciary. n1330

There is no specific form for a farmout. n1331 Generally, however, the working interest in the drill site is conveyed to the farmee before drilling begins. The farmor traditionally will reserve an overriding royalty interest, often with the right to "back in" or convert this non-operating interest into a share of the working interest after the well has paid out drilling, completing, and operating costs. n1332 The farmee may also earn an interest in additional acreage, either as a result of the initial well being a producer or because it accepts an option to drill additional wells. The Statute of Frauds applies. Therefore, the acreage must be particularly described. n1333

Farmouts can make the drilling of the initial well either a covenant or a condition. If it is a condition for the farmee to earn acreage, generally the only result of non-drilling will be that the farmee will not receive the assignment, n1334 but damages have been awarded. n1335 Often, drilling the first well is considered a covenant of the farmee. In such instances, the attorney for the farmee should require an adequate force majeure clause n1336 because the well must be drilled or the farmee will be in breach. Damages are variously determined. n1337 Measures include the cost of drilling the well n1338 or the value of an interest that would have been sold during drilling by the farmee but was rendered worthless by a third party drilling a dry hole. n1339 In controversies between the farmee and its subsequent assignee, damages could be royalties lost on the retained interest when another drilled successfully. n1340

§ 49.65(b) Tax Consequences.

The parties to the farmout want the transfer of the working interest to the farmee to be a non-taxable event. For the transfer of the working interest in the drillsite, the Internal Revenue Service agrees that the farmor contributes minerals and the farmee contributes drilling as capital to a joint enterprise. n1341 Transfers of interests in other lands, if triggered by the success of the initial well and not through subsequent drilling, may be income to the farmee, namely additional compensation for drilling the first well. This is because "property" for tax purpose is defined as each separate legal interest owned by a taxpayer in each geological deposit and in each separate tract or parcel of land. n1342 Careful planning is required. n1343

A second tax aspect of the arrangement is the farmee's desire to deduct intangible drilling costs as an expense in the year incurred. This may only be done by a party who owns the entire working interest until payout.

FOOTNOTES:

(n1)Footnote 1329. *Robinson v. North Am. Royalties, Inc., 509 So. 2d 697 (La. 1987); Petroleum Fin. Corp. v. Cockburn, 241 F.2d 312 (5th Cir. 1957).*

(n2)Footnote 1330. *Cambridge v. Huggins, 765 S.W.2d 540 (Tex. App. 1989)* (not fiduciary to lessor).

(n3)Footnote 1331. *See* John S. Lowe, *Analyzing Oil and Gas Farmout Agreements, 41 Sw. L.J. 759 (1987);* John R. Scott, *How to Prepare an Oil and Gas Farmout Agreement, 33 Baylor L. Rev. 63 (1981);* Richard W. Hemingway, The Law of Oil and Gas § 9.8(A)-(B) (3d ed. 1991); 2 Kuntz, Lowe, Anderson, Pierce, and Smith, Oil and Gas Law § 19A.3 (Anderson); P. Martin & B. Kramer, Williams & Meyers Oil and Gas Law § 432 (Matthew Bender).

(n4)Footnote 1332. *See Mengden v. Peninsula Prod. Co., 544 S.W.2d 643 (Tex. 1976)* (apportioning costs when property pooled to ascertain when back-in right vested).

(n5)Footnote 1333. *Smith v. Sabine Royalty Corp., 556 S.W.2d 365 (Tex. Civ. App. 1977).*

(n6)Footnote 1334. *Robinson v. North Am. Royalties, Inc., 509 So. 2d 679 (La. App. 1987). See also, Inexco Oil Co. v. Crutcher-Tufts Corp., 389 F. Supp. 1032 (W.D. La. 1975)* (condition must be met; substantial compliance inapplicable).

(n7)Footnote 1335. *Dunham v. Stephens, 423 S.W.2d 957 (Tex. Civ. App. 1968), writ refused* n.r.e.

(n8)Footnote 1336. Some limited force majeure clauses are found in cases. *R. Olsen Oil Co. v. Fidler, 199 F.2d 868 (10th Cir. 1952)* ("unless granite or other practically impenetrable substance is encountered").

(n9)Footnote 1337. Annotation, *Right and Measure of Recovery for Breach of Obligation to Drill Exploratory Oil and Gas Wells, 4 A.L.R.2d 284 (1985).*

(n10)Footnote 1338. *Known as the Oklahoma rule. Eysenback v. Cardinal Petr. Co., 236 P. 10 (Okla. 1925); Fite v. Miller, 200 So. 285 (La. 1940); Fisher v. Tomlinson, 527 P.2d 999 (Kan. 1974); Brown v. Homestake Exploration Corp., 39 P.2d 168 (Mont. 1934). Cf. Jones v. Whittington, 170 So. 2d 764 (La. App. 1965), writ denied* (measure when party breaching had assumed another's obligation under farm-out).

Waldron v. Zapata Exploration Co., 878 S.W.2d 349 (Tex. App. 1994) (waiver of contract claim under farmout requiring the drilling of a well occurred when farmee arranged for another to drill after expiration of the farmout and farmor knew of these efforts and would have shared in any success).

(n11)Footnote 1339. *Martin v. Darcy, 357 S.W.2d 457 (Tex. Civ. App. 1962)* (must prove would have sold interest and anticipated profit reasonably known to parties at time of contracting); *Dunham v. Stephens, 423 S.W.2d 957 (Tex. Civ. App. 1968)* (enhanced value to retained acreage if could show would have sold it during drilling by farmee); *but see, Durbin Bond & Co. v. Gillis, 242 F.2d 176 (5th Cir. 1957)* (need not prove that interest would have been sold in

suit between lessor and lessee).

(n12)Footnote 1340. *Waldrip v. Hamon, 136 F. Supp. 412 (D. Okla. 1955)* (when driller agreed to drill or assign rights to another); *Guardian Trust Co. v. Brothers, 59 S.W.2d 343 (Tex. Civ. App. 1933); Cf. Fisher v. Hampton, 118 Cal. Rptr. 811 (1975)* (breach of limited partnership agreement).

(n13)Footnote 1341. *Palmer v. Bender, 287 U.S. 551 (1933); General Counsel Memorandum 22730, 1941-1 C.B. 214.*

(n14)Footnote 1342. Treasury Regs. § 1.614-1(a).

(n15)Footnote 1343. Emily A. Parker, *Contribution of Services to the Pool of Capital: General Counsel Memorandum 22730 to Revenue Ruling 83-40*, 35 Oil & Gas Inst. 313 (1984); Arnold C. Wegher, *Taxation of Earned Interest -- The Impact of Revenue Ruling 77-176, 24 Rocky Mtn. Min. L. Inst. 521 (1978);* P. Martin & B. Kramer, Williams & Meyers Oil and Gas Law § 433.1 (Matthew Bender).

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CHAPTER 49 PETROLEUM AND PIPELINES
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§ 49.66 Joint Operating Agreements.

§ 49.66(a) Purpose.

An operating agreement specifies the rights and duties of parties with interests in prospective wells in a specified geographic area. It covers how development shall proceed and how costs are to be allocated. n1344 One party is denominated the operator and has specified rights and duties for drilling. The remaining parties are designated "non-operators." They typically only have the right to consent or withhold consent to specified activities and to replace the operator in enumerated circumstances. Generally, operating agreements are used in two different situations. First, co-tenants n1345 or parties who own interests in a drilling unit and who are in the oil and gas industry may desire to designate one party as an operator for the convenience of all. Second, an operator may want to develop for the benefit of itself and investors. In the latter situation, the operator will generally charge an operating fee.

The relationship that arises under a joint operating agreement is somewhere between that of co-tenants, with accounting rights, n1346 and a partnership, where each party is liable for all debts incurred and all torts committed. Under a joint operating agreement, each party is liable only to the extent of its interest in the minerals unless the non-operator exerts sufficient control to transform the arrangement to a mining partnership. n1347 A mining partnership, which is implied, requires three elements: a joint interest in the property, an express or implied agreement to share profits and losses, and cooperation in the project. n1348 Courts have declared that the standard rights a non-operator retains are insufficient to give rise to a mining partnership. A non-operator under the standard agreement only has rights to receive certain data, to have access to the site, and to be consulted. While the non-operator may decide not to participate, it may not veto the operator's plans nor enter into contracts. n1349 Therefore, the liability of the non-operators is several. Each party's interest, however, could be subject to mechanics' and materialmen's liens.

§ 49.66(b) General Operation.

Although parties to a joint operating agreement may design it in any manner they choose, most agreements at least begin with the "Model Form Operating Agreement" promulgated by the American Association of Petroleum Landmen and known as A.A.P.L. Form 610. This form was initially published in 1956, and amended in 1977, n1350 1982, and 1989. n1351 The new forms bear the respective dates.

The operator generally has broad authority to act to achieve the agreement's goals. The Model Form states that the operator will only be liable for "gross negligence and willful misconduct." n1352 Courts construe this provision as negating any fiduciary requirement. n1353 Moreover, the operator is only subject to removal for specified reasons. Nevertheless, the agreement generally describes the required drilling with specificity.

The joint operating agreement typically is entered into after the parties have agreed to drill the initial well and the operator will be required to commence it by a date certain and to drill to the target formation. The operator is authorized to expend sums to drill the well, although the non-operators may have an option to reconsider whether they consent to completion. n1354 Plugging and abandonment also requires consent.

Additional development will require the operator to seek consent, which is normally given in the form of a written "Authorization for Expenditure," referred to as an "AFE." The amount designated for drilling in the AFE is considered only an estimate; the consent given will be for the operation approved, despite cost overruns. n1355 The non-operator will have the option to "go non-consent" initially in regard to a well or, under some operating agreements by express provision, when the costs exceed those in the AFE by a certain percentage. n1356 The participating owners will advance the non-consenting party's share of the cost. The non-consent provision, however, will not shield the non-consenting party from liability for costs imposed by regulation. n1357

To account for the remaining costs, the non-consenting party will not share in the proceeds if the well produces until those who advanced costs attributable to the non-consenting interest have recovered those costs and a penalty, expressed as a percentage of costs. Requiring recovery in addition to actual costs has been upheld against challenges that such provisions are unenforceable penalties; they are designed to compensate those taking the risk that the well will be a non-producer. n1358 High non-consent penalties encourage parties to participate in the risk. Sometimes, there is a distinction in the penalty between recovery of non-avoidable, expenditures with little risk, such as supplying surface equipment, and the actual drilling costs, which require risk taking. n1359

FOOTNOTES:

(n1)Footnote 1344. *See generally* Howard Boigon, *Liabilities and Relationships of Co-Owners under Agreements for Joint Development of Oil and Gas Properties*, 37 Oil & Gas Inst. 8-1 (1986); Ernest E. Smith, *Duties and Obligations Owed by an Operator to Nonoperators, Investors, and Other Interest Owners*, *32 Rocky Mtn. Min. L. Inst. 12-1 (1986);* and 2 Kuntz, Lowe, Anderson, Pierce, and Smith, Oil and Gas Law § 19A.6 (Anderson).

Ernest E. Smith, *Joint Operating Agreement Jurisprudence, 33 Washburn L.J. 834 (1994); Oklahoma Oil & Gas Exploration, Drilling Program 1983-A v. W.M.A. Corporation, 877 P.2d 605 (Okla. App. 1994)* (even if parties to JOA did not go through formal procedures to replace an operator, non-operators may be equitably estopped from denying that assignee of old operator is the operator if they have dealt with that party as operator).

(n2)Footnote 1345. The actions of the operator will satisfy the terms of all leases held by any of the participating parties. *Compare* § 49.05(e), *supra*.

(n3)Footnote 1346. *See* § 49.05(d), *supra*. Accounting allows one co-tenant to operate alone and provides post-production remedies. It does not allocate the risk of drilling.

(n4)Footnote 1347. *Blocker Exploration Co. v. Frontier Exploration, Inc., 740 P.2d 983 (Colo. 1987); Berchelmann v. Western Co., 363 S.W.2d 875 (Tex. Civ. App. 1963).*

(n5)Footnote 1348. *Sparks Bros. Drilling Co. v. Texas Moran Exploration Co., 829 P.2d 951 (Okla. 1991). See*§ 48.19, *supra*. *See generally* P. Martin & B. Kramer, Williams & Meyers Oil and Gas Law § 435 (Matthew Bender) and 2 Kuntz, Lowe, Anderson, Pierce, and Smith, Oil and Gas Law § 19A.7 (Anderson).

(n6)Footnote 1349. *Blocker Exploration Co. v. Frontier Exploration, Inc., 740 P.2d 983 (Colo. 1987); Sparks Bros. Drilling Co. v. Texas Moran Exploration Co., 829 P.2d 951 (Okla. 1991)* (investigating billing is merely acting as a prudent investor, not cooperating in project). *Compare Mud Control Labs. v. Covey, 269 P.2d 854 (Utah 1954)* (rights of non-operator under joint operating agreement that preceded form rose to level of mining partner).

(n7)Footnote 1350. *See* Marvin L. Wigley, *AAPL Form 610-1977 Model Form Operating Agreement, 24 Rocky Mtn. Min. L. Inst. 693 (1978).*

(n8)Footnote 1351. Andrew B. Derman, *The New and Improved 1989 Joint Operating Manual*, Monograph Series No. 15 (Section of Natural Resources, Energy & Environmental Law, ABA and The National Energy & Policy Law Institute, University of Tulsa: 1991).

(n9)Footnote 1352. *Stine v. Marathon Oil Co., 976 F.2d 254 (5th Cir. 1992)* (both physical acts and administrative acts covered by exculpatory clause); *but see Johnston v. American Cometra, Inc., 837 S.W.2d 711 (Tex. App. 1992)* (using a reasonable and prudent standard to judge operator's marketing duty; no mention of any exculpatory clause in agreement).

An operating agreement often gives the operator a right, but not a duty, to market the gas of the non-operators. In exercising such a right, the operator is not required to maintain high-priced sales contracts and may settle contract disputes, but the operator may not let its wholly-owned subsidiary "alter ego" profit on the sale of the non-operator's gas. *Atlantic Richfield v. The Long Trusts, 860 S.W.2d 439 (Tex. App. 1993).* For interpretation of an agreement's market-sharing provision, *see Amoco Rocmount Co. v. Anschutz Corp., 7 F.3d 909 (10th Cir. 1993). See Norman v. Apache Corp., 19 F.3d 1017 (5th Cir. 1994)* (agreement requires operator to act in "good and workmanlike manner;" under Texas law, operator may have to act as reasonable and prudent operator not only in regard to express provisions of the agreement but also in other situations), *cert. denied, 510 U.S. 1112 (1994).*

(n10)Footnote 1353. *Dime Box Petr. Corp. v. Louisiana Land & Exploration Co., 938 F.2d 1144 (10th Cir. 1991).* The court noted that, under Colorado law, the operating agreement would have given rise to a joint venture and fiduciary duties if the exculpatory clause was not present. *Cf. Texstar North Am., Inc. v. Ladd Petr. Corp., 809 S.W.2d 672 (Tex. App. 1991)* (no implied duty of good faith).

Connaghan v. Maxus Exploration Co., 5 F.3d 1363 (10th Cir. 1993) (operator owed no fiduciary duty to non-operator but breached operating agreement by settling lawsuit without consent of non-operator); *Norman v. Apache Corp., 19 F.3d 1017 (5th Cir. 1994)* (under Texas law, joint operating agreement in and of itself will not support finding of a partnership or joint venture; need special relationship for fiduciary duty), *cert. denied, 510 U.S. 1112 (1994).*

(n11)Footnote 1354. *See LPCX Corp. v. Red Eagle Oil Co., 818 P.2d 431 (Okla. 1991)* (consent to reworking operation required under 1956 Agreement).

(n12)Footnote 1355. *M & T, Inc. v. Fuel Resources Dev. Co., 518 F. Supp. 285 (D. Colo. 1981)* (so long as costs are reasonable and necessary). If, however, a non-operator is not a party to an operating agreement, it may limit its consent to the AFE amount. *Sonat Exploration Co. v. Mann, 785 F.2d 1232 (5th Cir. 1986).*

(n13)Footnote 1356. *See Forest Oil Corp. v. Superior Oil Co., 338 So. 2d 758 (La. App. 1976)* (allowing non-consent when costs reached 150% of AFE).

(n14)Footnote 1357. *Railroad Comm'n v. Olin Corp., 690 S.W.2d 628 (Tex. App. 1985),* (nonconsenting parties liable to control and plug well when operator financially incapable). *See generally* Annotation, *Duty and Liability As to Plugging Oil or Gas Well Abandoned or Taken Out of Production, 50 A.L.R.3d 240 (1973).*

(n15)Footnote 1358. *See Hamilton v. Texas Oil & Gas Corp., 648 S.W.2d 316 (Tex. App. 1982)* (upholding 400% penalty as valid; standard in industry was for provisions between 200% and 500%). *Cf. Bennion v. ANR Prod. Co., 819*

P.2d 343 (Utah 1991) (statutory risk penalty not unconstitutional taking of property).

Nearburg v. Yates Petroleum Corp., 943 P.2d 560 (N.M. App. 1997) (where A.A.P.L. Form 610 provided a non-consent penalty provision which allowed the consenting party to recoup up to 200% of its cost of new surface equipment and up to 500% of its cost of drilling and new equipment in the well before the non-consenting party shared in production. Since the parties to the agreement are not obligated to participate in all proposed operations, an election not to do so is not a breach and the recoupment provision does not create liquidated damages or an unenforceable penalty. It is a covenant subject to a condition where the non-consenting party agrees to relinquish temporarily its specified interest in production in exchange for the consenting party bearing the risk of the operation).

(n16)Footnote 1359. For example, a 100%-300% non-consent penalty would allow the contributing parties to recover 100% of the non-risk expenditures and 300% of the risky expenditures. This may be modified to reflect the time value of the money expended on the first category of expenses or to reflect a higher risk for the second type.

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§ 49.67 Unitization Agreements.

Unitization agreements, also called unit agreements, are similar to joint operating agreements; they also allow for mutual development and designate an operator. n1360 Unitization, however, generally will impact the habendum clauses of the underlying leases, while a joint operating agreement does not. n1361 Unitization joins together all, or a significant portion of, a specific geological reservoir in order to develop it as a single consolidated unit employing the best engineering practices. Costs and proceeds are shared pursuant to the agreement's formula. Although unitization may occur for exploration or primary recovery operations, the main use of unitization is to provide for secondary and tertiary recovery operations.

FOOTNOTES:
(n1)Footnote 1360. *See generally,* P. Martin & B. Kramer, Williams & Meyers Oil and Gas Law §§ 920-921.19 (Matthew Bender).

Kansas Baptist Convention v. Mesa Operating Ltd. Partnership, 864 P.2d 204 (Kan. 1993) (operator with discretion on drilling levels must use "good faith" in deciding what wells to drill).

(n2)Footnote 1361. *See supra* § 49.44(a).

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CHAPTER 49 PETROLEUM AND PIPELINES
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§ 49.68 Area of Mutual Interest Provisions.

An Area of Mutual Interest, or "AMI," provision may appear in farmouts, joint operating agreements, or other contracts between oil and gas developers. n1362 The rationale for the AMI is that oil and gas operations can profoundly affect values of property near the operations; parties engaging in such activities want to share the benefits of their risk taking if operations indicate that nearby property is more valuable than others might suppose. The AMI provision obligates each party to share leases they might obtain in the designated area, which must be described with sufficient clarity to be enforceable. n1363 The acquiring party is required to give the other party notice of the acquisition and an option to share in the purchase, which option would be exercisable in a time certain. The requirements may be drafted to be personal obligations, but because the obligations touch and concern land, they may be covenants running with the land, n1364 but this will require some privity of estate. n1365 Because the AMI creates contractual rights and not property rights, it does not violate the Rule Against Perpetuities. n1366 An AMI contained in a farm-out will expire when the farm-out expires without drilling. n1367

FOOTNOTES:
(n1)Footnote 1362. *See* Dante L. Zarlengo, *Area Of Mutual Interest Clauses Regarding Oil and Gas Properties: Analysis, Drafting, and Procedure, 28 Rocky Mtn. Min. L. Inst. 837 (1982)* and 2 Kuntz, Lowe, Anderson, Pierce, and Smith, Oil and Gas Law § 19A.4 (Anderson).

See also, Contribution Clause, Article VIII C. of the A.A.P.L. Form 610-1977 Operating Agreement, construed in *Martin Exploration Co. v. Amoco Prod. Co., 637 So. 2d 1202 (La. App. 1994)* (contribution clause is to protect participants of a joint operating agreement against possibility that one of them might obtain an undue advantage from an outsider at the expense of those paying for the operations; in this case, no need to share acreage because questioned acreage was already part of the contract area with ownership clearly stated in the agreement). *See also*, preferential right of purchase included in some JOA, which relates to interests currently owned by the other party in the event of a proposed sale of the interest, *Questa Energy Corp. v. Vantage Point Energy, Inc., 887 S.W.2d 217 (Tex. App. 1994)* (justified because each participant thinks the property is of value and preferential right allows those who undertook risk the opportunity to increase share and gives participant some control over new participants who may not be financially sound).

(n2)Footnote 1363. *Westland Oil Dev. Corp. v. Gulf Oil Corp., 637 S.W.2d 903 (Tex. 1982); Crowder v. Tri-C Resources, Inc., 821 S.W.2d 393 (Tex. App. 1991).*

(n3)Footnote 1364. *Westland Oil Dev. Corp. v. Gulf Oil Corp., 637 S.W.2d 903 (Tex. 1982).*

(n4)Footnote 1365. *Grimes v. Walsh & Watts, Inc., 649 S.W.2d 724 (Tex. App. 1983), error refused* n.r.e. (without privity of estate, agreement contained in farmout did not run; ended when lease expired); *Petrocana, Inc. v. Margo, Inc., 577 So. 2d 274 (La. App. 1991)* (expires when farmout ends for lack of drilling).

(n5)Footnote 1366. *First Nat'l Bank & Trust Co. v. Sidwall Corp., 678 P.2d 118 (Kan. 1984); Courseview, Inc. v. Phillips Petr. Co., 258 S.W.2d 391 (Tex. Civ. App. 1957), on appeal after remand, 298 S.W.2d 890 (Tex. Civ. App. 1957), aff'd, 312 S.W.2d 197 (Tex. 1957); see also Producers Oil Co. v. Gore, 610 P.2d 772 (Okla. 1980)* (right of first refusal in operating agreement did not violate rule).

(n6)Footnote 1367. *Petrocana, Inc. v. Margo, Inc., 577 So. 2d 274 (La. App. 1991).*

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XIV. Oil and Gas Contracts by Lessee

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§ 49.69 Drilling Contracts.

Most oil and gas operators contract with drilling companies for well drilling. General rules for contracts apply to these transactions. n1368 Nevertheless, three main types of contracts can be identified. n1369 "Daywork" contracts pay the drillers by the time spent. The risks of difficulties encountered in drilling are therefore on the oil and gas operator. The operator will have more control over the contractor's actions than under the other forms of contract and in fact supervises drilling. "Footage" contracts compensate the driller based on the footage drilled. The risks, therefore, are on the driller, although often the driller is compensated at daywork rates in specified circumstances. The oil and gas operator has less control over the drilling. Under a "turnkey" contract, the driller assumes most risks and the operator has little opportunity for input. A set price is negotiated for a completed well at a specified depth. n1370 Obviously, in a busy drilling environment when drill rigs are at a premium, daywork contracts are encountered more frequently.

FOOTNOTES:
(n1)Footnote 1368. *Houy v. Davis Oil Co., 486 P.2d 18 (Colo. 1971).*

(n2)Footnote 1369. For comprehensive coverage, including common contract forms and explanation of the drilling process, see Owen L. Anderson, *The Anatomy of an Oil and Gas Drilling Contract, 25 Tulsa L.J. 359 (1990). See also* 2 Kuntz, Lowe, Anderson, Pierce, and Smith, Oil and Gas Law § 19A.5 (Anderson).

(n3)Footnote 1370. *Continental Oil Co. v. Jones, 177 F.2d 508, 510 (10th Cir. 1949)* (agrees to do all the work and "turn it over ready to 'turn the key' and start the oil running into the tanks.").

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§ 49.70 Gas Balancing Agreements.

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Often more than one oil and gas lessee has rights to the gas from a gas well. This may occur when the lessees: 1) are co-tenants, 2) have pooled interests to form a drilling unit, or 3) have rights to unit production. The lessees may decide to sell their gas under separate contracts, which may have different purchasers or prices. These are referred to as "split-stream" sales. However, it is impossible to physically divide the gas as it emerges from the well. When gas is sold by one party, it inevitably includes gas "owned" by others in the sale. The basic law of cotenancy would require an accounting, but industry custom allows for balancing in kind. Under this process, after sales have been credited to one party, the other would have the right to produce and sell to "balance" the ownership rights. n1371

In some instances, however, cash payments would be needed to settle rights. This is "cash balancing." It obviously must be used when the deposit has been depleted. There is controversy about its customary use in other situations. n1372 One other problem with cash balancing is the price to be used to determine cash balancing, especially if the market price has fluctuated. A gas balancing agreement is a contract that attempts to regulate rights between the parties and explain when balancing in kind and cash balancing would be required. There are no standard terms.

Statutes may also influence how parties participate in a sale from a well. For example, Oklahoma allows non-selling parties to elect to market share. n1373

FOOTNOTES:
(n1)Footnote 1371. *See* Wade A. Hoefling, *Gas Balancing Problems in a Deregulated Market: Changes and Possible Solutions Under Oklahoma Law, 25 Tulsa L.J. 63 (1989).*

(n2)Footnote 1372. *Doheny v. Wexpro Co., 974 F.2d 130 (10th Cir. 1992); Pogo Prod. Co. v. Shell Offshore, Inc., 898 F.2d 1064 (5th Cir. 1990)* (without gas balancing agreement, balancing in kind is preferred when one interest owner is not producing).

Hunt Oil Co. v. Batchelor, 644 So. 2d 191 (La. 1994) (balancing in kind preferred remedy unless it creates waste,

precludes an owner from recovering the owner's just and equitable share, or infringes on the correlative rights of another owner by limiting his liberty to enjoy his rights or causes damages to them; evidence supported Commission's order denying cash balancing); *Jerry Chambers Exploration v. Headington Penn. Corp., 878 P.2d 385 (Okla. App. 1994)* (gas balancing agreement allowed for cash balancing "when production of gas permanently ceases;" cash balancing provision of A.A.P.L. Form 610 (1956) was ambiguous on whether all unit production must have ceased or production from particular well).

(n3)Footnote 1373. Natural Gas Market Sharing Act, 52 Okla. Stat. § 581.1 *et seq. See* Wade A. Hoefling, *Oklahoma's New Natural Gas Market Sharing Act, 63 Okla. B.J. 2245* (July 25, 1992). *See also* Mississippi Natural Gas Marketing Act, Miss. Stat. § 75-58-1 *et seq.*

Gadsco, Inc. v. TXO Prod. Corp., 840 P.2d 1270 (Okla. App. 1992) (construing a party "not selling or otherwise disposing of gas from the well" as not including a party with a contract to sell gas). *See generally* Stephen R. McNamara and Gregory D. Miller, *Oklahoma's Production Revenue Standards Act post FERC Order 636 -- Measurement, Delivery, and Quantity Issues, 29 Tulsa L.J. 639 (1994).*

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§ 49.71 Division Orders.

Division orders are not technically contracts, but are executed in support of gas or oil purchase agreements. They direct the purchaser to pay the proceeds to the parties as their rights appear in the order. The division order protects the purchaser from a claim of conversion. Division orders may also have other terms. They are discussed further in § 49.50(a).

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§ 49.72 Types of Pipelines: Gathering Distinguished from Transmission.

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Pipelines are the most efficient transport for oil and gas, although rail or trucks may also transport oil. n1374 All pipelines are similar to the extent that a fluid passes through them, but they are classified by function. "Gathering lines" are one type. In a simplified definition, they are those pipelines that transport oil or gas from the leasehold to a main pipeline. They generally are of a smaller diameter and lower pressure than long distance trunk or transmission lines.

The distinction between gathering and transmission is important for purposes of regulation under two statutes because the statutes exempt gathering from their reach. Under the Natural Gas Pipeline Safety Act, n1375 the limited gathering exception is restricted to those pipelines that connect a transmission line to a well. n1376 The Natural Gas Act exempts both "production and gathering of natural gas" from federal jurisdiction. n1377 Whether or not a natural gas pipeline is a gathering line for this purpose is determined under a modified primary function test, which flexibly looks at: 1) diameter and length of pipeline; 2) location of compressors and processing plants; 3) extension of facility beyond the central point in a field; 4) location of well along all or part of the facility; 5) geographical configuration of the system; and 6) operating pressure. n1378

FOOTNOTES:
(n1)Footnote 1374. For natural gas, pipelines historically were not only transporters but the major purchasers. This pipeline role will not be as prevalent, especially in the interstate market. The Federal Energy Regulatory Commission in Order 636 required gas pipelines to "unbundle" their merchant and transportation services. They must offer "comparable" transportation service for gas that the pipeline is not selling. Order 636, *57 Fed. Reg. 13,2647* (Apr. 16, 1992); *orders on reh'g*, Order 636-A, *57 Fed. Reg. 36,128* (Aug. 12, 1992) and Order 636-B, *57 Fed. Reg. 57,911* (Dec. 8, 1992).

(n2)Footnote 1375. *49 U.S.C. § 1671*(3) (exempt if in rural locations outside of towns and other populated areas). After the 1992 amendments, the act applies to regulated gathering systems.

(n3)Footnote 1376. *Hamman v. Southwestern Gas Pipeline, Inc., 721 F.2d 140 (5th Cir. 1984).*

(n4)Footnote 1377. § 1(b) of the Natural Gas Act of 1938, codified at *15 U.S.C. § 717*(b). *See generally* Annotation, *What Constitutes "Production and Gathering of Natural Gas" Excluded from Coverage of Natural Gas Act, 44 A.L.R. Fed. (1979) 843.*

(n5)Footnote 1378. *See Farmland Indus., 23 F.E.R.C. P 61,063 (1983); EP Operating Co. v. Federal Energy Reg. Comm'n, 876 F.2d 46 (5th Cir. 1989).* Jurisdiction over gathering facilities may also exist because the company operating the facilities is a natural gas company subject to jurisdiction. *Northern Nat. Gas Co. v. F.E.R.C., 929 F.2d 1261 (8th Cir. 1991), cert. denied, 502 U.S. 856 (1991), but see Northwest Pipeline Co. v. F.E.R.C., 905 F.2d 1403 (10th Cir. 1990)* (rejecting jurisdiction simply because owner has primary function of transporter).

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§ 49.73 Justification for Regulation.

Most of pipeline regulation comes under the heading of public utility law and will not be extensively discussed. n1379 Nevertheless, among the justifications for regulation is the fact that pipelines may be "natural monopolies," which occur when a company enjoys economies of scale so that it can become the sole provider of service. The capital intensive nature of pipeline enterprises lend themselves to this phenomenon; once one pipeline is built there may be little incentive for another to enter the market and duplicate expensive facilities. n1380

A second justification, employed by the states for their common purchaser and ratable take requirements, is to avoid waste of oil and gas and protect correlative rights. n1381

FOOTNOTES:
(n1)Footnote 1379. *See generally* American Gas Association, ed., Regulation of the Gas Industry (Matthew Bender).

(n2)Footnote 1380. *See generally* Richard J. Pierce, *Reconsidering the Roles of Regulation and Competition in the Natural Gas Industry, 97 Harv. L. Rev. 345 (1983)* and *Reconstituting the Natural Gas Industry from Wellhead to Burnertip, 9 Energy L.J. 1 (1988).*

(n3)Footnote 1381. *See* § 49.75(b), *infra*.

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§ 49.74 Federal Regulation of Pipelines.

§ 49.74(a) Safety and Pollution.

Numerous general statutes may apply, but two specific statutes are the Oil Pollution Act of 1990 n1382 and the Natural Gas Pipeline Safety Act. n1383 The first act provides for rather strict liability for spills of oil and the second provides construction standards that preempt conflicting state or local standards. n1384

§ 49.74(b) Oil Pipelines.

The Hepburn Act made common carrier interstate oil pipelines subject to the Interstate Commerce Act. n1385 The Federal Energy Regulatory Commission determines rates. Entry and exit into the industry are subject to control.

§ 49.74(c) Gas Pipelines.

The Natural Gas Act of 1938 n1386 regulates the interstate transportation of natural gas as well as sales for resale. n1387 Pipelines are regulated as public utilities, with rates determined by the Federal Energy Regulatory Commission. Entry and exit into the industry are subject to control. Current regulatory practice is to allow competition, where present, to have a greater role in defining the industry. n1388

FOOTNOTES:
(n1)Footnote 1382. *33 U.S.C. § 2732.*

Symposium, *Oil Pollution Act Rulemaking, 45 Baylor L. Rev. 215-471 (1993).*

(n2)Footnote 1383. *49 U.S.C. §§ 1671*-1686.

(n3)Footnote 1384. *ANR Pipeline Co. v. Iowa State Commerce Comm'n, 828 F.2d 465 (8th Cir. 1987); Natural Gas Pipeline Co. of Am. v. Railroad Comm'n of Texas, 679 F.2d 51 (5th Cir. 1982)* (hydrogen sulfide standards); *but see Tenneco, Inc. v. Public Serv. Comm'n of West Virginia, 489 F.2d 334 (4th Cir. 1973), cert. denied, 417 U.S. 946*

(1973) (no preemption of state ability to assess fees to help defray inspection costs).

(n4)Footnote 1385. *49 U.S.C. § 1*.

(n5)Footnote 1386. *15 U.S.C. § 717*. The Natural Gas Policy Act of 1978 amended and supplemented authority and is codified at *15 U.S.C. § 3301*.

(n6)Footnote 1387. Initially, jurisdiction was not asserted over sales made by producers at the wellhead, but such jurisdiction was later confirmed. *Phillips Petr. Co. v. Wisconsin, 347 U.S. 672 (1954).* In 1978, Congress substituted a legislatively mandated pricing scheme for new wellhead sales in both the interstate and intrastate markets. By 1993, all wellhead price controls ended. *See* Wellhead Decontrol Act of 1989, Pub. L. No. 101-60, *103 Stat. 157,* repealing Title I of the Natural Gas Policy Act of 1978 (codified at *15 U.S.C. §§ 3311*-3333 (1988)).

(n7)Footnote 1388. *See* Richard M. Merriman et al., *Competition Takes Center State*, in American Gas Association, ed., 1 Regulation of the Gas Industry ch. 5D (Matthew Bender).

John Decker (Note), *Authorization of Natural Gas Pipeline Construction: Moving Decisions from Regulators to the Marketplace, 12 Va. Envtl L.J. 505 (1993).*

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§ 49.75 State Regulation of Pipelines.

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§ 49.75(a) Utility Regulation: Oil and Gas Pipelines.

States may regulate intrastate oil and gas pipelines as utilities in the same manner that the federal government regulates interstate pipelines. n1389

§ 49.75(b) Common Purchaser and Ratable Take Statutes.

Common purchaser statutes provide that those pipelines in the business of purchasing oil or gas must buy from all producers and not discriminate. Some states apply these statutes to natural gas pipelines; they must purchase from all producers within reasonable reach of their pipelines and not discriminate on price or other matters if the gas is of the same quality. n1390 If the pipeline cannot purchase all such gas, it must take "ratably" from the producers, that is, in the proportion each producer's production bears to the production of the field or other common source of supply. Statutes apply similar duties on oil pipelines in some states. n1391 Because these statutes are designed to prevent waste and protect correlative rights, they should be constitutional if the pipelines are public utilities or common carriers. n1392

§ 49.75(c) Federal Preemption of State Regulation.

The Natural Gas Act does not occupy the field of natural gas regulation even if it affects interstate commerce. The Act expressly reserves the governing of production and gathering for state action. n1393 The federal government therefore cannot prescribe methods of production under authority of the Natural Gas Act. n1394 States, however, cannot impact the purchasing decisions or rate structure of an interstate pipeline directly. Therefore, a state cannot impose its ratable take statute on an interstate pipeline. n1395 However, a state may act to prevent waste and protect correlative rights and such actions directed to a producer are not preempted even if they have incidental impact on the finances or decisions of an interstate pipeline. n1396

FOOTNOTES:
(n1)Footnote 1389. For a listing of statutes, *see* 4 Summers, *supra* note 32, at § 751.

(n2)Footnote 1390. *See, e.g.*, La. Rev. Stat. §§ 30:41-30:46; Mich. Comp. Laws § 483.104; N.M. Stat. Ann. § 70-2-19; 52 Okla. Stat. Ann. §§ 23 and 240; and Tex. Nat. Res. Code Ann., § 111.081.

(n3)Footnote 1391. *See, e.g.*, Mich. Comp. Laws § 483.4; N.M. Stat. Ann. § 70-2-19; 52 Okla. Stat. Ann. § 54; and Tex. Nat. Res. Code Ann., § 111.081.

(n4)Footnote 1392. Summers, *supra* note 32, at § 754. *But see* § 49.75(c), *infra*.

(n5)Footnote 1393. Section 1(b) states the Act will not apply "to production or gathering of natural gas." *15 U.S.C. § 717*(b).

(n6)Footnote 1394. *Shell Oil Co. v. F.E.R.C., 566 F.2d 536 (5th Cir. 1978).*

(n7)Footnote 1395. *Northwest Cent. Pipeline Corp. v. State Corp. Comm'n of Kan., 372 U.S. 84 (1963); Transcontinental Gas Pipeline Corp. v. State Oil & Gas Bd., 474 U.S. 409 (1986).*

(n8)Footnote 1396. *Northwest Cent. Pipeline Corp. v. State Corp. Comm'n of Kan., 489 U.S. 493 (1989)* (rule canceling unproduced shares of production not preempted).

Rachel C. Lipman, *Hugoton Gas Field: The Ongoing Battle Over Allowables, Underage, and Infill Wells, 33 Washburn L.J. 852 (1994).*

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§ 49.76 Acquisition of Pipelines by Condemnation.

§ 49.76(a) Interstate Pipelines.

A certificate of public convenience and necessity granted under the Natural Gas Act allows the pipeline to acquire rights of way through a condemnation action filed in Federal District Court. n1397 If an underground storage project is part of the jurisdictional facility, the Federal Energy Regulatory Commission must certificate the storage project, but the statute does not refer to condemnation for these purposes. n1398

§ 49.76(b) Intrastate Pipelines.

Most states give the power of eminent domain to oil and gas pipeline companies that are either public utilities or common carriers. n1399 A pipeline built solely to transport a company's own production and not forced to become a common carrier under any state or federal regulation might not be covered. n1400

§ 49.76(c) Valuation.

Generally, because a pipeline is an easement, classic diminishment of value methods determine the condemnation award for the lands actually taken. n1401 The highest and best use of the property is considered. n1402 Damages are also available for agricultural losses and for costs of restoring the land. n1403

Severance damages are assessed if lands not taken have been impacted by the easement. Courts have allowed evidence that the remaining property may have a diminished value because of fears n1404 about dangers from a high pressure pipe line explosion n1405 or from accidents with sour gas, which contains poisonous hydrogen sulfide. n1406

FOOTNOTES:
(n1)Footnote 1397. *15 U.S.C. § 717f*(h). The statute adopts, to the extent possible, the practice and procedure applicable to equivalent state actions.

(n2)Footnote 1398. *15 U.S.C. § 717f*(h). State statutes allowing condemnation for this purpose are collected in 4

Summers, *supra* note 32, at § 757.1.

(n3)Footnote 1399. Statutes are collected in 4 Summers, *supra* note 32, at § 757.

(n4)Footnote 1400. *See Loesch v. Oasis Pipeline Co., 665 S.W.2d 595 (Tex. App. 1984), error refused* n.r.e. (pipeline that transported only gas of its shareholders made itself a regulated public utility by seeking to condemn); *Grimes v. Corpus Christi Transmission Co., 829 S.W.2d 335 (Tex. Civ. App. 1992), writ error denied*.

(n5)Footnote 1401. *See generally*, Annotation, *Eminent Domain, Elements and Measure of Compensation for Oil or Gas Pipeline through Private Property, 38 A.L.R.2d 788 (1954). Cities Serv. Gas Co. v. Beck, 534 P.2d 27 (Okla. Ct. App. 1975)* (excluding evidence of prices paid for other tracts in condemnation proceedings or settlements; voluntary sales may be evidence); *Michigan Wis. Pipe Line Co. v. Fruge, 227 So. 2d 606 (La. App. 1969), writ refused*.

(n6)Footnote 1402. *Louisiana Resources Co. v. Langlinais, 383 So. 2d 1356 (La. App. 1980).*

(n7)Footnote 1403. *Michigan Wis. Pipe Line Co. v. Fruge, 227 So. 2d 606 (La. App. 1969), writ refused* (costs of re-leveling rice land, loss of crop, damage to irrigation canals). *Cf.* Annotation, *Construction and Effect of Provision for Payment of Damages to "Crops" or "Growing Crops" in Mineral Deed or Lease, or in Conveyance of Pipeline or Other Underground Easement, 87 A.L.R.2d 235 (1963).*

(n8)Footnote 1404. *See generally*, Annotation, *Fear of Powerline, Gas or Oil Pipelines, or Related Structure as Element of Damages in Easement Condemnation Proceedings, 23 A.L.R.4th 63 (1983).*

(n9)Footnote 1405. *Stinson v. Arkla Energy Resources, 823 S.W.2d 770 (Tex. Civ. App. 1992); Delhi Gas Pipeline Co. v. Gibbs, 643 S.W.2d 492 (Tex. App. 1982)* (must show similarity between pipelines involved in accidents and proposed pipeline); *Louisiana Resources Co. v. Langlinais, 383 So. 2d 1356* (La. App. 1980, *writ denied*). *Cf. Hero Lands Co. v. Texaco, Inc., 310 So. 2d 93 (La. 1975)* (allowing cause of action for adjacent landowner because of ultrahazardous nature of high pressure gas transmission), *limited in Red River Realty, Inc. v. Relm Corp., 372 So. 2d 792 (La. App. 1979).*

(n10)Footnote 1406. *Delhi Gas Pipeline Co. v. Reid, 488 S.W.2d 612 (Tex. Civ. App. 1972).*

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§ 49.77 Acquisition of Pipelines by Voluntary Action.

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§ 49.77(a) Rights Under Oil and Gas Lease.

The granting clause of an oil and gas lease often gives the lessee the right to lay pipelines. This may or may not be phrased as an exclusive right. The lessee's right, nevertheless, may be assignable if the assignment does not increase the burdens on the lessor's estate. n1407 Naturally, its grantee's rights would end when the oil and gas lease terminates. Because the lessee's right, however, is related to lease development, the lessor may retain the right to grant a pipeline easement for a transmission or trunk line.

§ 49.77(b) Rights to Multiple Lines.

A pipeline easement may expressly state that the grantee receives the right to lay multiple pipelines. n1408 In this event, courts have found the right to be vested immediately and thus to not violate the Rule Against Perpetuities regardless of when the second line is constructed. n1409 The right may be assignable. n1410 Moreover, courts have held that the right will not be abandoned simply by the passage of time. n1411 Nevertheless, there is precedent to the contrary. Louisiana held that the failure to build another line was lost by prescription after ten years. n1412 Another court found that an easement was fixed when one line was built and another was not built for forty years. n1413

The amount of clarity in the grant may lead to some of these different results. For example, a grant to lay "pipeline or pipelines" for a sum certain per rod would envision more than one pipeline, n1414 but a mere reference to "pipeline or pipelines" may not give rights to lay additional lines. n1415

§ 49.77(c) Requirement of Burying Pipeline Below Plow Depth.

Often in agricultural areas the easement requires the grantee to bury the line below plow depth. This responsibility has sometimes been deemed a continual one, requiring reburying the pipeline after erosion n1416 or after lands had been terraced. n1417

FOOTNOTES:

(n1)Footnote 1407. *Hinds v. Phillips Petr. Co., 591 P.2d 697 (Okla. 1979).*

(n2)Footnote 1408. *Traywick v. Transcontinental Gas Pipe Line Corp., 170 So. 2d 802 (Ala. 1965). See also Sigal v. Manufacturers Light & Heat Co., 299 A.2d 646 (Pa. 1973)* (language expressly dealing with additional lines struck from easement).

(n3)Footnote 1409. *Traywick v. Transcontinental Gas Pipe Line Corp., 170 So. 2d 802 (Ala. 1965); Kleinheider v. Phillips Pipe Line Co., 528 F.2d 837 (1975); Phillips Petr. Co. v. Lovell, 392 S.W.2d 748 (Tex. Civ. App. 1965); Northwest Pipeline Corp. v. Forest Weaver Farm, Inc., 646 P.2d 422, 424 (Idaho 1982)* (collecting cases).

(n4)Footnote 1410. *Strauch v. Coastal States Crude Gathering Co., 424 S.W.2d 677 (Tex. Civ. App. 1968).*

(n5)Footnote 1411. *Id. See also Williams v. Humble Pipe Line Co., 417 S.W.2d 453 (Tex. Civ. App. 1967)* (seven years delay no impact).

(n6)Footnote 1412. *Dickerson v. R.J.M. Pipeliners, Inc., 331 So. 2d 501 (La. App. 1976).*

(n7)Footnote 1413. *Pioneer Nat. Gas Co. v. Russell, 453 S.W.2d 882 (Tex. Civ. App. 1979).*

(n8)Footnote 1414. *Phillips Petr. Co. v. Lovell, 392 S.W.2d 748, 751 (Tex. Civ. App. 1965),* (collecting cases); *Moody v. Phillips Petr. Co., 594 S.W.2d 189 (Tex. Civ. App. 1980),* (consideration for additional lines noted).

(n9)Footnote 1415. *Pioneer Nat. Gas Co. v. Russell, 453 S.W.2d 882 (Tex. Civ. App. 1979), error refused n.r.e.* (does not grant rights).

(n10)Footnote 1416. *Mapco, Inc. v. Ratliff, 528 S.W.2d 622 (Tex. Civ. App. 1975),* (deep plowing methods to combat erosion known on date of easement).

Avery v. Colonial Pipeline Co., 444 S.E.2d 363 (Ga. App. 1994) (requirement to bury on "cultivated land" only applies to land used for growing crops).

(n11)Footnote 1417. *Rosticil v. Phillips Petr. Co., 502 P.2d 825 (Kan. 1972)* (lease said would bury when requested by lessor); *but see Potter v. Northern Nat. Gas Co., 441 P.2d 802 (Kan. 1968)* (once duty met not required to rebury later) and *Natural Gas Pipeline Co. of Am. v. Cox, 490 F. Supp. 452 (D. Ark. 1980)* (servient owner must maintain minimum depth when owner's grading makes pipeline not comply with federal law).

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CHAPTER 49 PETROLEUM AND PIPELINES
XV. Pipelines: Regulation and Acquisition

6-49 Thompson on Real Property, Thomas Editions § 49.78

AUTHOR: Professor Maria E. Mansfield College of Law University of Tulsa

§ 49.78 General Relationship Between Dominant and Servient Estate.

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The pipeline easement is the dominant estate. Although the grantor retains the general right to use the property subject to the easement, use of the servient estate may not make operation or maintenance of the pipeline more expensive or more dangerous. n1418 In one instance, the court found the placement of fill dirt from thirteen to over nineteen feet deep to be such an interference. n1419 More frequently, disputes occur over the placement of structures in the easement area. In deeds that expressly prohibit structures, questions arise over what is a structure. n1420 If the owner of the servient estate desires to use it in a manner that could interfere with the easement, that owner bears the cost of relocating the pipeline. n1421

FOOTNOTES:
(n1)Footnote 1418. *See* Annotation, *Correlative Rights of Dominant & Servient Owners in Right of Way for Pipeline, 28 A.L.R.2d 626 (1953).*

Mobil Pipeline Co. v. Smith, 860 S.W.2d 157 (Tex. App. 1993) (owner of land burdened by an agricultural lease may grant a pipeline right of way and the farm tenant could not block access); *Columbia Gas Transmission Corp. v. Tarbuck, 845 F. Supp. 303 (W.D. Pa. 1994)* (easement width was unspecified but interpreted to be 50 feet, which would allow effective use of right-of-way for intended purpose), *Columbia Gas Transmission Corp. v. Tarbuck, 845 F. Supp. 303 (W.D. Pa. 1994), aff'd, 62 F.3d 538 (3d Cir. 1995); Avery v. Colonial Pipeline Co., 444 S.E.2d 363 (Ga. App. 1994)* (operator of pipeline could clear trees and vegetation to permit aerial inspection and maintenance crew access; pipeline has implied right to take actions required of them by federal regulatory laws).

(n2)Footnote 1419. *Mississippi River Transmission Corp. v. Wachter Constr. Co., 731 S.W.2d 445 (Mo. App. 1987). See also, Dudly v. Southern Nat. Gas Co., 442 So. 2d 54 (Ala. 1983)* (sawdust, timber, scrap metal & machinery on easement).

Columbia Gas Transmission Corp. v. Tarbuck, 845 F. Supp. 303 (W.D. Pa. 1994) (further dumping of dirt and rock enjoined), *aff'd, 62 F.3d 538 (3d Cir. 1995).*

(n3)Footnote 1420. *Mid-America Pipeline Co. v. Lario Enters., 942 F.2d 1519 (10th Cir. 1991)* (race track with asphalt and fill on easement was "structure" that would interfere with normal operation and maintenance).

(n4)Footnote 1421. *Minard Run Oil Co. v. Pennzoil Co., 214 A.2d 234 (Pa. 1965)* (surface owner must bury pipeline sufficiently deep to withstand traffic of its proposed road); *Craft v. Arkansas Louisiana Gas Co., 8 Ark. App. 169, 649 S.W.2d 409 (1983)* (house built over pipeline required builder to move pipeline).

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CHAPTER 49 PETROLEUM AND PIPELINES
XVI. Bibliography.

6-49 Thompson on Real Property, Thomas Editions § 49.79

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§ 49.79 Bibliography.

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Non-Use. 16 A.L.R.4th (1982) 1029.

Annotation, Validity, Construction, and Application of Entirety Clause in Oil and Gas Lease. 48 A.L.R.3d (1973) 706.

Annotation, Validity of Compulsory Pooling or Unitization Statute or Ordinance Requiring Owners or Lessees of Oil and Gas Lands to Develop Their Holdings as a Single Drilling Unit or the Like. 37 A.L.R.2d (1954) 438.

Annotation, What Amounts to Development or Operation within Habendum Clause Extending Primary Term While Premises are Being Developed or Operated. 96 A.L.R.2d 322.

Annotation, What Constitutes Oil or Gas "Royalty" or "Royalties" Within Language of Conveyance, Exception, Reservation, Devise, or Assignment. 4 A.L.R.2d (1949) 492.

Annotation, What Constitutes "Production and Gathering of Natural Gas" Excluded from Coverage of Natural Gas Act. 44 A.L.R. Fed. (1979) 843.

Annotation, What Constitutes Reasonably Necessary Use of the Surface of the Leasehold by a Mineral Owner, Lessee or Driller under an Oil and Gas Lease or Drilling Contract. 53 A.L.R.3d (1973) 16.

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Scope

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II. Basic Ownership Concepts and Protection of Rights.

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Supp. to § 49.02 Nature of Landowner's Interest in Oil and Gas in Place.

Change author's first name to Marla.
[Go To Main]

§ 49.02(a) Theories of Ownership. [Go To Main]

§ 49.02(a)(2) Ownership in Place Theory.

Add:

See also Cent. Natural Res., Inc. v. Davis Operating Co., 201 P.3d 680 (Kan. 2009) .

§ 49.02(b) Rule of Capture. [Go To Main]

INB Land & Cattle, LLC v. Kerr-McGee Rocky Mountain Corp., 190 P.3d 806 (Colo. App. 2008) (under the rule of capture, no liability for extraction of oil and gas that migrated from the plaintiff's property).

Alphonzo E. Bell Corp. v. Bell View Syndicate, 76 P. 2d 167 (Cal. App. 1938)

Add:

Distinguished by City of Malibu v. California Coastal Com., 128 Cal. App. 4th 897, 903-904 (2005) (holding that *A. E. Bell Corp. v. Bell View Oil Synd., 76 P.2d 167 (Cal. App. 1938)* was decided before *section 387* was amended to include subdivision (b), which first provided for mandatory intervention under appropriate circumstances. (Stats. 1977, ch. 450, § 1, p. 1486.) Additionally, the trial court exercised its discretion to allow intervention and no abuse was found, however, there is nothing in the case which suggests that a ruling denying discretionary intervention in this case would constitute an abuse of discretion.); *Geo-Viking, Inc. v. Tex-Lee Operating Co., 839 S.W. 2d 797 (Tex. 1992)* ; criticized by *Mission Res., Inc. v. Garza Energy Trust, 166 S.W. 3d. 301, 310 (Tex. App. 2005)* (Court declines to follow the conclusion reached in *Geo-Viking* stating that the decision is in conflict with the Texas Supreme Court.)

§ 49.02(d)(1) Correlative Rights.

Add:

INB Land & Cattle, LLC v. Kerr-McGee Rocky Mountain Corp., 190 P.3d 806 (Colo. App. 2008) (under the rule of capture, no liability for extraction of oil and gas that migrated from the plaintiff's property).

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Supp. to § 49.03 Nature of Landowner or Mineral Interest Owner's Interest in Produced Oil and Gas

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add:

But see N. Natural Gas Co. v. L.D. Drilling, Inc., 618 F. Supp. 2d 1280 (D. Kan. 2009) (stating that Kansas abolished the "rule of capture" through *Kan. Stat. Ann. § 55-1210* and that gas injected into an underground field remains the property of the injector, even if it migrates into an area where the owner has a right to produce native gas).

The *Anderson* case was superseded by statute as stated in *N. Natural Gas Co. v. Martin, Pringle, Oliver, Wallace & Bauer, L.L.P., 217 P.3d 966 (Kan. 2009)*

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Supp. to § 49.04 Protection of Rights to Oil and Gas.

Change author's first name to Marla.
[Go To Main]

§ 49.04(a) Trespass Resulting in Production. [Go To Main]

§ 49.04(a)(4) Special Problems with Subsurface Trespass Through Slant Drilling.

Change computer-assisted research instruction to read:

LEXIS: (oil or gas w/50 trespass!) and underground or subsurface or slant w/2 (drilling or well)

§ 49.04(b) Trespass Caused by Underground Intrusion of Injected Substances. [Go To Main]

CHANGE Deltic Timber Corp. v. Great Lakes Chem. Corp., 2 F. Supp 1192 (W.D. Ark. 1998) TO Deltic Timber Corp. v. Great Lakes Chem. Corp., 2 F. Supp. 2d 1192 (W.D. Ark. 1998)

§ 49.04(c) Usurpation of Geophysical Information. [Go To Main]

§ 49.04(c)(1) Right to Explore.

Add:

Stichting Pensioenfonds, ABP v. Qwest Communs. Int'l, Inc. 2005 U.S. Dist. LEXIS 9026 (D. Colo. Mar. 28, 2005) (Court held that a purchaser's allegations were sufficient to recognize a claim for fraudulent concealment under the standard set forth in *Mallon*).

Add:

Noblin v. Harbor Hills Development, LP, 896 So. 2d 781 (Fla. 5th Dist. App. 2005) (A grant of oil or mineral rights implies an easement to explore and extract minerals which could be extinguished under MRTA); *Kysar v. Amoco Production Co., 379 F.3d 1150 (10th Cir. 2004)* (Lessee had access to entire surface area of communitized portion of land but not non-communitized portion).

III. Types of Interests Created from a Landowner's Rights.

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Supp. to § 49.08 Landowner's Severance of Oil and Gas Estate from the Surface Estate.

Change author's first name to Marla.
[Go To Main]

§ 49.08(c) Relationship Between Oil and Gas Estate and Surface Owner. [Go To Main]

§ 49.08(c)(1) Rule of Dominance: Right to Use Surface as Is Reasonably Necessary.

Add new footnote at end of second sentence: n222.1

add:

Dick Props., LLC v. Paul H. Bowman Trust, 221 P.3d 618 (Kan. App. 2010) .

Add:

Terrebonne Parish Sch. Brd. v. Castex Energy, Inc., 893 So. 2d 789 (La. 2005) (When an oil and gas lease is silent concerning surface restoration, a lessee is only obligated to restore if there is evidence of unreasonable or excessive

use).

See also *Dore Energy Corp. v. Carter-Langham, Inc., 901 So. 2d 1238* (La.App. 3 Cir. May 4, 2005) (following the holding in *Terrebonne Parish Sch. Brd. v. Castex Energy, Inc., 893 So. 2d 789 (La. 2005))*

Add:

Amerikohl Mining Co. v. Peoples Natural Gas Co. 860 A.2d 547 (Pa. 2004) (Easement holder did not have to remove pipeline since right-of-way for mining did not indicate surface mining).

FOOTNOTES:
(n1)Footnote 222.1. *Anthony v. Chevron USA, Inc., 284 F.3d 578 (5th Cir. 2002)* (In order to recover damages for oil spills and leakage, the owner of the surface estate must show specific acts of negligence or use of more of the surface estate than reasonably necessary to carry out its oil operations).

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Supp. to § 49.09 Attributes of the Mineral Estate.

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§ 49.09(a) Component Rights and Liabilities Generally. [Go To Main]

add:

Veterans Land Bd. v. Lesley, 281 S.W.3d 602 (Tex. App. 2009) (when a mineral interest is conveyed, the executory right incident to that interest passes to the grantee unless specifically reserved)

§ 49.09(b) Right to Lease Oil and Gas: Executive Right [Go To Main]

Add:

See also *Garza v. Prolithic Energy Co., L.P., 195 S.W.3d 137 (Tex. App. 2006)* (affirming that a mineral interest deprived of the executive right and the right to receive delay rentals remains an interest in the mineral fee.)

Add:

See also See also *Night Vision Corp. v. United States, 68 Fed. Cl. 368, 391, 2005 U.S. Claims LEXIS 331 (2005)* (holding that the government cannot be obligated to award or even consider the contractor for a SBIR Phase III allegation because there is no substantive provision in an contract, statute or regulation.)

§ 49.09(b)(4) Standard for Exercise of the Executive Right.

Add:

Carlson v. Flocchini Investments, 106 P.3d 847 (Wy. 2005) (Trial court could have been persuaded that the mineral owner executed lease contract in good faith despite a reduction in the royalty owners' proportionate share).

Add:

See also *Marrs & Smith P'ship v. D.K. Boyd Oil & Gas Co., 2005 Tex. App. Lexis 9691* (Tex. App. El Paso Nov. 17, 2005) (equating an utmost good faith standard with a fiduciary obligation. Stating that cases interpreting *Manges* conclude when the executive and non-executive are co-tenants in the mineral estate and when there is a relationship of confidence between the parties this creates a fiduciary relationship between the executive and the non-executive mineral interest owner); *Sauceda v. Kerlin, 164 S.W.3d 892, 2005 Tex. App. LEXIS 4441 (Tex. App. Corpus Christi 2005)*

See In re Bass, 113 S.W.3d 735, 744-45 (Tex. 2003) ; *Aurora Petroleum, Inc. v. Newton, 287 S.W.3d 373, 375 (Tex. App. 2009)* ; *Hlavinka v. Hancock, 116 S.W.3d 412, 417-18 (Tex. App. 2003)* . Sauceda v. Kerlin was overturned by *Sauceda v. Kerlin, 263 S.W.3d 920 (Tex. 2008)* ; however, that decision made no mention of the point pertinent to this part of the text.

Change the Marrs & Smith P'ship citation to: *Marrs & Smith P'ship v. D.K. Boyd Oil & Gas Co., 223 S.W.3d 1 (Tex. App. 2005)* .

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Supp. to § 49.10 Attributes of a Royalty.

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[Go To Main]

§ 49.10(c) Types of Royalty. [Go To Main]

§ 49.10(c)(2) Royalties Created by Lessee: Overriding Royalty

CHANGE Reynolds-Rexwinkle Oil v. Petex, Inc., 969 P.2d 906 (Kan. App. 1998) TO Reynolds-Rexwinkle Oil v. Petex, Inc., 969 P.2d 906 (Kan. App. 1998),* rev'd on other grounds*, 1 P.3d 909 (Kan. 2000).

Correction:

CHANGE Roark v. Stoark Oil & Gas, Inc., 813 S.W.2d (Tex. 1991) ***TO*** *Roark v. Stallworth Oil & Gas, 813 S.W.2d 492 (Tex. 1991)*

§ 49.10(c)(3) Non-Participating Royalty.

Add new footnote at end of second sentence:

[307.1] *Keller Cattle Co. v. Allison, 55 P.3d 257 (Colo. App. 2002)* ("A non-participating royalty is an expense-free interest in oil or gas, if, as, and when produced. The owner of the royalty interest does not share in bonus or rental, nor in the right to execute leases or to explore and develop." Contrast is made with a "mineral interest, which is the property interest created in oil and gas after a severance by mineral deed or by oil and gas lease.").

§ 49.11(a) Typical language Creating the Non-Participating Royalty: Fixed Fraction or percentage "of Royalty" [Go To Main]

CHANGE White v. White, 530 S.W.2d 767 (Tex. Civ. App. 1992) TO White v. White, 830 S.W.2d 767 (Tex. App. 1992). **The second citation should be deleted.**

DELETE 878 S.W.2d 191 (Tex. App. 1994)

DELETE rev'd on other grounds, ***966 S.W.2d 451 (Tex. 1998)***

Add:

Garza v. Prolithic Energy Co., L.P., 195 S.W.3d 137 (Tex. App. 2006) (The three grant clause developed for the reason that typical royalty provided in leases at the time the contract and deed were executed, the court could harmonize the lease provisions in such a way that the grantees' respective 1/2 and 15/32nds mineral interests entitled them to consistently receive a 1/2 and 15/32nds interest in the royalty under the future lease clause.)

§ 49.13(a) Fixed Term Interests. [Go To Main]

CHANGE Comanche Land & Cattle Co. v. Adams, 688 S.W.2d 914 **Tex. App 1985).** ***TO Comanche Land & Cattle Co. v. Adams, 688 S.W.2d 914 (Tex. App. 1985).***

§ 49.13(e) Legal Relation Between Term Owner and Reversioner [Go To Main]

Add:

Alpine County v. United States, 417 F.3d 1366, 1368 2005 U.S. App. LEXIS 16478 (Fed. Cir. 2005) (The court observed that the United State is obligated under *16 U.S.C 500* to pay 25% pf moneys "received." The court

distinguished *Federal Land Bank of Houston* stating that since no moneys were received by the United states there was no implied obligation.)

CHANGE Alpine County v. United State, 417 F.3d 1366, 1368 2005 U.S.App. LEXIS 16478 (Fed. Cir. 2005) TO Alpine County v. United States, 417 F.3d 1366 (Fed. Cir. 2005)

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Supp. to § 49.14 The Special Case of Louisiana.

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[Go To Main]

§ 49.14(b) Interruption and Suspension of Prescription. [Go To Main]

Add:

Central Pines Land Co. v. United States, 274 F.3d 881 (5th Cir. 2001) (Under Louisiana law, a partial obstacle to the use of a mineral servitude does not suspend the prescriptive period).

IV. Transfer of Interests in Oil and Gas: Conveyancing and Involuntary Transfers.

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Supp. to § 49.20 Conveyancing Problem: Mineral Interest or Non-Participating Royalty?

Change author's first name to Marla.
[Go To Main]

§ 49.20(b) Conveyances of "Royalty." [Go To Main]

Remove the second (effective July 1, 1991).

§ 49.20(c) Conveyances of "Royalty" When Deed Includes Language Inconsistent with Royalty Interest. [Go To Main]

CHANGE Logue v. Marsh, 365 N.E.2d 1159 (Ct. App. Ill. App. 1977) TO Logue v. Marsh, 365 N.E.2d 1159 (Ill. App. 1977).

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Supp. to § 49.21 Conveyancing Problem: Fractional Interests.

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[Go To Main]

§ 49.21(c) Reservation of Fractional Interest Which Creates Overconveyance: Duhig Problem. [Go To Main]

§ 49.21(c)(1) Statement of Problem

Add:

Garza v. Prolithic Energy Co., L.P., 195 S.W.3d 137 (Tex. App. San Antonio 2006) (holding that when the grantors owned the entire mineral estate, and the conveyance did not exceed the amount of the mineral estate that was owned the warranty in regards to the mineral estate conveyed was not breached and this is distinguished from the *Duhig* doctrine.)

Gore Oil Co. v. Roosth, 158 S.W.3d 596, (Tex. App. Eastland 2005) (when a deed contains an addition limiting clause stating that the conveyance was subject to all outstanding reservations, covenants, and restrictions, the Duhig doctrine does not apply and the grantor can claim title to the full royalty.)

CHANGE Garza v. Prolithic Energy Co., L.P., 2006 195 S.W.3d 137 (Tex. App. San Antonio 2006) TO Garza v. Prolithic Energy Co., L.P., 195 S.W.3d 137 (Tex. App. 2006)

CHANGE Gore Oil Co. v. Roosth, 158 S.W.3d 596, (Tex App. Eastland 2005) *TO Gore Oil v. Roosth 158 S.W.3d 596 (Tex. App. 2005)*

§ 49.21(c)(2) Resolution of Problem: Estoppel by Deed

Add:

See also *Gilstrap v. June Eisele Warren Trust, 2005 WY 21, 106 P.3d 858, 2005 Wyo. LEXIS 23 (Wyo. 2005)* (following *Body* and *Duhig*)

CHANGE See also *Gilstrap v. June Eisele Warren Trust, 2005 WY 21, 106 P.3d 858, 2005 Wyo. LEXIS 23 (Wyo. 2005)* (following Body and Duhig) TO See also *Gilstrap v. June Eisele Warren Trust, 106 P.3d 858 (Wyo. 2005)* (following Body and Duhig).

§ 49.21(c)(3) When *Duhig* Is Used.

Add:

Gilstrap v. Warren Trust, 106 P.3d 858 (Wyo. 2005) (Two siblings conveyed property to a third sibling with a 1/3 reservation for each grantor sibling. One of the siblings, however, had already given up her interest to the other two and so had none to convey. The court determined that since the one sibling was a co-tenant with a 1/2 reservation, his reservation did not fail and his descendants were entitled to a 1/6 reservation.)

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Supp. to § 49.22 Conveyancing Problem: Conveyances by Lessor of Leased Property.

Change author's first name to Marla.
[Go To Main]

§ 49.22(c) Conveyance Made Expressly "Subject to" Outstanding Lease. [Go To Main]

§ 49.22(c)(4) Impact of future Interest Clause

Add:

Garza v. Prolithic Energy Co., L.P., 195 S.W.3d 137 (Tex. App. San Antonio 2006) (refers to the court overruling ruling in *Alfred* and applies the ruling under *Luckel*)

Sunwest Operating Co., v. Classic Oil & Gas, Inc. 143 Fed. Appx. 614, 2005 U.S. App. LEXIS 17124 (2005) (following *Luckel* and stating when the court seeks to ascertain the intent of the parties it must look at all parts of the deed, and construing the deed to give effect to all of its provisions.)

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Supp. to § 49.23 Involuntary Transfer of Interests in Oil and Gas: Adverse Possession.

Change author's first name to Marla.
[Go To Main]

§ 49.23(a) Effect of Surface Possession. [Go To Main]

§ 49.23(a)(1) No Severance of Minerals and Surface.

add:

Gulley v. Davis, 2010 Tex. App. LEXIS 2710 (Tex. App. 2010)

§ 49.23(a)(2) Prior Severance of Mineral and Surface

See also *Matteson v. Batchelor, 2005 Tex. App. LEXIS 3702* (Tex. App. Texarkana May 13, 2005)

V. Leasing the Oil and Gas Property Interest.

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Supp. to § 49.27 Requirements for an Effective Lease.

Change author's first name to Marla.
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Add:

Dixon v. Amoco Production Co., 150 S.W.3d 191 (Tex. App. 12th Dist. 2004) (Considered together, a Unit Designation List of Leases and a Unit Designation Map provided a legally sufficient description of two oil, gas, and mineral leases.)

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Supp. to § 49.29 Parties to the Lease.

Change author's first name to Marla.
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§ 49.29(b) Authority to Bind Parties. [Go To Main]

§ 49.29(b)(5) Property Owned by Native Americans.

Add:

See generally Oenga v. United States, 91 Fed. Cl. 629 (2010)

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Supp. to § 49.30 Leasing Federal or State Owned Oil and Gas.

Change author's first name to Marla.
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Add:

Southern Wilderness Alliance v. Kempthorne, 525 F.3d 966 (10th Cir. 2008) (BLM's sale of oil and gas leases reversed by federal district court; private lessees not allowed to intervene).

Sierra Club v. Mainella, 459 F. Supp. 2d 76 (D.D.C. 2006) (National Park Service decisions to exempt certain drilling operations from directional drilling regulations were ruled arbitrary and capricious); *BP America Petroleum Production v. Burton, 127 S.Ct. 638, 166 L.Ed.2d 494 (2006)* (attempt to enforce orders to remit underpayments on oil and gas leases was not bound by the six-year statute of limitations, which applies only to court actions); New Mexico ex re. *Richardson v. Bureau of Land Management, 459 F. Supp. 2d 1102 (D. N.M. 2006)* (BLM was required to prepare site-specific environmental analyses of an oil and gas development project prior to issuing the lease, rather that waiting until just before drilling); *Southern Utah Wilderness Alliance v. Norton, 457 F. Supp. 2d 1253 (D. Utah 2006)* (BLM lease issuance denied, because BLM had not taken a "hard look" at the no-leasing alternative); *Northern Alaska Environmental Center v. Kempthorne, 457 F.3d 969 (9th Cir. 2006)* (an environmental impact statement was sufficiently site-specific without being required to examine each parcel of a proposed lease).

Chihuahuan Grasslands Alliance v. Norton, 507 F. Supp. 2d 1216 (D. N.M. 2007) (judicial challenge to agency procedure arising from competitive oil and gas fluid minerals lease sale of public lands).

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Supp. to § 49.31 Granting Clause.

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[Go To Main]

§ 49.31(c) Land Covered by the Lease: "Mother Hubbard" Clause. [Go To Main]

add:

See also Amoco Prod. Co. v. S. Ute Indian Tribe, 526 U.S. 865 (1999)

add:

aff'd by *172 S.W.3d 609 (Tex. 2005)*

Add:

Greer v. J. Hiram Moore, Ltd., 72 S.W.3d 436 (Tex. App. 2002) (The "catch-all" language of a Mother Hubbard clause is not sufficient to effect a conveyance of a significant property interest that the grantor on a royalty deed had no intention to convey.)

Add:

Hamilton v. Wash. Mutual Bank, FA (In re Colon), 2005 Bankr. LEXIS 2376 (Bankr. D. Kan. Dec. 5, 2005) (even if a bona fide purchase learns of the existence of a mortgage and examines the mortgage there is nothing in that instrument that would put a purchaser on notice that the mortgage contained an error. If a real estate description does not sufficiently describe the property there is no constructive knowledge imparted to the trustee.); *Greer v. J. Hiram Moore, Ltd. 72 S.W.3d 436 (Tex. App. 2002)* Affirmed and remanded by *J. Hiram Moore, Ltd. v. Greer, 172 S.W.3d 609 (Tex. 2005)* .

§ 49.31(d) Uses Permitted by the Grant. [Go To Main]

Delete:

Hamilton v. Wash. Mutual Bank, FA (In re Colon), 2005 Bankr. LEXIS 2376 (Bankr. D. Kan. Dec. 5, 2005) . This decision was overturned by *Hamilton v. Wash. Mut. Bank FA (In re Colon), 563 F.3d 1171 (10th Cir. 2009)* .

Add:

See also *Auto. Fin. Co. v. Tyler (In re Auto. Fin. Co.), 2005 Bankr. LEXIS 918* (Bankr. D.D. Miss. May 6, 2005) (following *Farragut* and stating that a company is subject to the release language in an agreement because the company was not an actual party to the release provision.) *Cf. Crawford v. Hrabe, 44 P.3d 442 (Kan. 2002)* (The lessee had the right, without the lessor's consent, to bring off-lease salt water upon the leased premises to increase production.)

VI. Habendum Clause: Duration.

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Supp. to § 49.33 Secondary Term Defined.

Change author's first name to Marla.
[Go To Main]

Add:

Anadarko Petroleum Corp. v. Thompson, 60 S.W.3d 134 (Tex. App. 2000) (a lease for a term of one year and as long thereafter as "gas is or can be produced" is extended only by actual production in paying quantities).

Anadarko Petroleum Corp. v. Thompson, 60 S.W.3d 134 (Tex. App. 2000) was overturned by *Anadarko Petroleum Corp. v. Thompson, 94 S.W.3d 550 (Tex. 2002)* (the clause "gas is or can be produced" is construed to mean that a well actually producing gas or capable of producing gas sustains this particular lease. To be "capable of producing gas,"" a well must be capable of producing gas in paying quantities without additional equipment or repairs.)

§ 49.33(a) Meaning of "Production." [Go To Main]

§ 49.33(a)(2) Minority Rule.

add:

Baytide Petroleum, Inc. v. Cont'l Res., Inc., 2010 Okla. LEXIS 6 (Okla. 2010)

add:

Smith v. Marshall Oil Corp., 85 P.3d 830 (Okla. 2004)

§ 49.33(b) How Much Production Is in "Paying Quantities." [Go To Main]

Add:

Exxon Corp. v. Miesch, 180 S.W.3d 299, 2005 Tex. App. LEXIS 9862 (Tex. App. Corpus Christi 2005) (distinguishes *Abraxas* stating that the duties and injuries in *Abraxas* are sound in contract alone, and the only way they can recover is through the contracts between the parties. Additionally, a party cannot recover is there is a tort separate and apart from the contractual agreement.). *See also Bosch v. Dallas Gen. Life Ins. Co., 2005 Tex. App. LEXIS 2512* Tex. App. Houston 14th Dist. Apr. 5, 2005) (Following *Abraxas* and stating that in order to recover compensatory damages, a breach of contract plaintiff must show that they suffered some pecuniary loss as a result of the breach. Actual damages are recoverable in a breach of contract action when the loss is a natural and foreseeable consequence of the defendant's conduct. Additionally, the mitigation of damages doctrine requires the injured party to exercise reasonable care to minimize damages.)

CHANGE Exxon Corp. v. Miesch, 180 S.W.3d 299, 2005 Tex. App. LEXIS 9862 (Tex. App. Corpus Christi 2005) TO Exxon Corp. v. Miesch, 180 S.W.3d 299 (Tex. App. 2005)* aff'd in part, rev'd on other grounds, *Exxon Corp. v. Emerald Oil & Gas Co., L.C., 2009 Tex. LEXIS 113 (Tex. 2009)

CHANGE Grinnell v. Munson, 137 S.W.3d 706 (Tex. App. 4th Dist. 2004) TO Grinnell v. Munson, 137 S.W.3d 706 (Tex. App. 2004)

CHANGE Wood v. Axis Energy Corp., 2005 La. App. LEXIS 888 (La. App. 3rd Cir. 2005) TO Wood v. Axis Energy Corp., 899 So. 2d 138 (La. App. 2005)

Add:

Grinnell v. Munson, 137 S.W.3d 706 (Tex. App. 4th Dist. 2004) (To establish a cessation of production in paying quantities, a lessor must show "that the lease failed to yield a profit over a reasonable period of time and that a reasonably prudent operator would not have continued to operate the well in the manner it was being operated"); *Wood v. Axis Energy Corp., 2005 La. App. LEXIS 888 (La. App. 3rd Cir. 2005)* (Trial court properly included overhead of non-lessee operator when determining whether or not the well was producing in "paying quanities").

See also *Wood v. Axis Energy Corp., La. App. 04-1464, 899 So. 2d 138, 2005 La. App. LEXIS 888* (La.App. 3 Cir. Apr. 6, 2005) (holding that the plaintiff's were not estopped from claiming that the lease terminated for failure to produce in paying quantities. Subsequently the plaintiff's were not estopped because they it was only after they undertook an investigation of the records that they realized that their initial demand for the termination of the lease. Also, the plaintiff's need not specifically allege the defendants owed them proceeds and therefore the plaintiff should have been awarded an amount for lost lease opportunities.)

CHANGE Wood v. Axis Energy Corp., La. App. 04-1464, 899 So. 2d 138, 2005 La. App. LEXIS 888 (La. App. 3rd Cir. 2005) TO Wood v. Axis Energy Corp., 899 So. 2d 138 (La. App. 2005)

§ 49.33(c) Marginal Wells: period in Which to Test Paying Quantities [Go To Main]

Add:

Brown v. Reeter, 170 S.W.3d 151, 2005 Tex. App. LEXIS 4794 (Tex. App. Eastland 2005) (holding that a party does not need to address the profitability of obtaining production from the lease because she alleged a complete cessation of product for several months.)

CHANGE Brown v. Reeter, 170 S.W.3d 151, 2005 Tex. App. LEXIS 4794 (Tex. App. Eastland 2005) TO Brown v. Reeter, 170 S.W.3d 151 (Tex. App. 2005)

§ 49.33(d) Equitable Defenses, Estoppel and Waiver [Go To Main]

CHANGE See Also *Barker v. Kruckenberg, 33 Kan. App. 2d 545, 105 P.3d 273, 2005 Kan. App. LEXIS 91 (2005)* TO See also *Barker v. Kruckenberg, 105 P.3d 273 (Kan. App. 2005)*

Add:

See Also *Barker v. Kruckenberg, 33 Kan. App. 2d 545, 105 P.3d 273, 2005 Kan. App. LEXIS 91 (2005)* (concluding that it would be inequitable to let a party terminate a lease based on the assertion that the lessee failed to pay a minimum royalty three years prior, especially because the lessee made a additional investment during the interim. Additionally the lessor failed to promptly assert his right of forfeiture and therefore he waived his right to terminate the lease. Additionally, a forfeiture of an oil and gas lease is only appropriate when damages are not practicable.)

§ 49.33(e) "Temporary Cessation of Production." [Go To Main]

Add:

Guinn Investments, Inc. v. Ridge Oil Co., 73 S.W.3d 523 (Tex. App. 2002) (As a matter of first impression, a non-operating oil and gas lessee whose interest during the secondary term is held solely by production from another tract under the same lease may invoke the "Temporary Cessation of Production" doctrine.)

Add rev'd on other grounds, *148 S.W.3d 143 (Tex. 2004)* .

Add:

Somont Oil Co. v. A & G Drilling, Inc., 49 P.3d 598 (Mont. 2002) (Montana, an ownership-in-place state, will recognize a temporary cessation in production only when it is caused by a sudden stoppage of the well or a mechanical breakdown of the equipment used in connection with the well, or the like.)

Ridge Oil Co. v. Guinn Investments, 148 S.W.3d 143 (Tex. 2004) (The temporary cessation of production doctrine applies when there is more than one lessee under a lease. In this case, however, the cessation of production became permanent when the lessee resumed production under a new lease); *Smith v. Marshall Oil Corp., 85 P.3d 830 (Okla. 2004)* (Lease terminated because lessee failed to produce an equitable considerations for his failure to produce gas in "paying quantities.")

VII. Drilling-Delay Rental Clause: Primary Term Maintenance.

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Supp. to § 49.35 Two Forms: "Unless" and "Or."

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[Go To Main]

§ 49.35(a) Construction of "Unless" Clause. [Go To Main]

Add:

Bourg Corp. v. Denbury Onshore, L.L.C., 2005 U.S. App. LEXIS 3209 (5th Cir. 2005) (Lease terminated because "unless" provisions of drilling or paying delay rental were not satisfied).

CHANGE Bourg Corp. v. Denbury Onshore, L.L.C., 2005 U.S. App. LEXIS 3209 (5th Cir. 2005) TO Harry Bourg Corp. v. Denbury Onshore LLC, 129 Fed. Appx. 55 (5th Cir. 2005)

Add:

See also *In re Margulis, 323 B.R. 130, 2005 Bankr. LEXIS 581, 44 Bankr. Ct. Dec. (LRP) 172 (Bankr. S.D.N.Y. 2005)* (holding that the Settlement Agreement essentially granted a debtor to an option to pay and satisfy the Consent Judgment. The option terminated at the end of the grace period and the Claimant did not have to send a notice of default or take action to trigger the termination of the option. The option terminated with the passage of time and therefore the automatic stay was not implicated.)

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Supp. to § 49.36 Satisfaction of Clauses: Drilling.

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[Go To Main]

§ 49.36(b) Definition of "Commencement." [Go To Main]

§ 49.36(b)(1) Meaning of Operations.

Add:

Manzano Oil Corp. v. Chesapeake Operating, Inc., 178 F. Supp. 2d 1217 (D.N.M. 2001) (Commencement of operations on adjacent land to directionally drill well into subsurface of leased land was a commencement that extended the primary term of the lease.)

§ 49.36(b)(2) Good Faith.

Add:

Davis v. Key Gas Corp., 124 P.3d 96 (Kan. Ct. App. 2005) (holding that court looks to the parties' intent from the terms of an unambiguous instrument and tries to harmonize the language. Moreover, the court can enforce an unambiguous instrument according to its plain and common meaning to enforce the parties' intentions.) *Bunnell Farms Co. v. Samuel Gary, Jr. and Associates, 47 P.3d 804 (Kan. App. 2002)* (Lessee's use of a small rig for drilling on date of expiration of lease was commencement of drilling within the primary term notwithstanding that a large rig would be required to complete drilling of the well.)

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Supp. to § 49.37 Satisfaction of Clauses: Payment of Rentals.

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§ 49.37(c) Protection of Lessee by Courts. [Go To Main]

§ 49.37(c)(1) Excuses for Nonpayment or tardy, Inadequate, or Improper Payment of Rentals.

Replace:

In footnote 725, ***CHANGE*** *Rice v. Ritillerberg, 966 P.2d 182* ***TO*** *Rice v. Hillenburg 766 P.2d 182*

§ 49.37(c)(2) Revivor.

Add:

Anadarko Petroleum Corp. v. Thompson, 60 S.W.3d 134 (Tex. App. 2000) (Revivor occurs only where there is a clear intent to grant a new estate or revive an old one by express reference to a former lease).

ADD rev'd on other grounds, *94 S.W.3d 550 (Tex. 2002)* .

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Supp. to § 49.39 Dry Hole Clause.

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§ 49.39(d) Construction Problems. [Go To Main]

§ 49.39(d)(2) Definition of Completion.

add

Exxon Corp. v. Emerald Oil & Gas Co., L.C., 2009 Tex. LEXIS 113 (Tex. 2009)

VIII. Dry Hole, Cessation of Production and Drilling Operations Clauses

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Supp. to § 49.41 Cessation of Production -- Continuous Operations Clause.

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[Go To Main]

§ 49.41(d) Construction Problems. [Go To Main]

§ 49.41(d)(1) Definition of "Cessation of Production"

Add:

Brown v. Reeter, 170 S.W.3d 151, 2005 Tex. App. LEXIS 4794 (Tex. App. Eastland 2005) (The appellee did not need to address the profitability of obtaining production from the lease because the appellee alleged a complete cessation of production for several months.)

IX. Shut-in Royalty, Pooling, and *Force Majeure* Clauses.

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Supp. to § 49.44 Pooling and Unitization Clauses.

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§ 49.44(c) Use in Primary Term. [Go To Main]

Add:

Pioneer Nat. Resources USA, Inc. v. Ranch, Inc., 127 S.W.3d 900 (Tex. App. 13th Dist. 2004) (As a result of the pooling authorization, drilling on another tract extended lessee's primary term).

§ 49.44(g)(2) Basis and Authority of Lessee to Pool

Add:

Tittizer v. Union Gas Corp., 171 S.W.3d 857, 48 Tex. Sup. Ct. J. 1023, 2005 Tex. LEXIS 604 (Tex. 2005) (holding that the lease does not authorize the lessee to execute a polling designation with a retroactive effect. Additionally, the lease provides that unitization can only be effect upon recordation and the lessee is only entitled to her pro rata share of the royalties earned after the date of recordation.)

§ 49.44(h)(1) Exercise Within Authority of Lease.

Trees Oil Co. v. State Corp. Comm'n, 105 P.3d 1269 (Kan. 2005) (Minority participant in a formation channel must be included in the unitization in order to protect the public interest and correlative rights).

§ 49.44(h)(3) Exercise in Good Faith: Pooling and Unitization.

Add:

PYR Energy Corp. v. Samson Resources Co., 470 F. Supp. 2d 709 (E.D. Tex. 2007) (lessee forming a pooled unit did not owe a fiduciary duty to the lessor).

Mission Res., Inc. v. Garza Energy Trust, 2005 Tex. App. LEXIS 2650 (Tex. App. Corpus Christi Apr. 7, 2005) (agreeing with *Elliott* and concluding that a lessee should not be required to subordinate his own interest entirely to those interests of the lessor. Moreover, the lessee should be prohibited from subordinating the lessor's interest entirely to its own interest when it comes to the duty of good faith pooling.)

§ 49.44(h)(4) Duty to Exercise Power

Add:

Brownell Land Co., L.L.C. v. Apache Corp., 2005 U.S. Dist. LEXIS 36594 (E.D. La. Oct. 6, 2005) (Overruling *Williams* in the comments of Section 136 which state "it is the intent of Article 136 to overrule the Williams case insofar as it relieves the lessor of the necessity to put the lessee in default." *La. Rev. Stat. Ann. § 31:136*)

§ 49.44(h)(5) Cross-Conveyance Theory

CORRECT:

Change Union Pacific Resources Co. v. Hutchison, 990 S.W. 2d(Tex. App. 1999) ***TO*** *Union Pac. Resources Co. v. Hutchison, 986 S.W. 2d 610 (Tex. App. 1999)* .

X. The Lease Royalty Clause

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Supp. to § 49.47 Products covered by the Royalty Clause

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Add:

Res-Care, Inc. v. Mt. State Blue Cross & Blue Shield, Inc., 2005 U.S. Dist. LEXIS 20641 (W.D. Ky. Sept. 19, 2005) (Relying on the concurring opinion in *McGinnis* the Court held that unjust enrichment may be appropriate when there is some important intervening event "such as a change in value of natural resources over extensive time periods and their effects on contracts.")

§ 49.47(d) Royalty on Take-or-Pay Payments or Settlements [Go To Main]

Add:

Amoco Prod. Co. v. Watson, 410 F.3d 722, 366 U.S. App. D.C. 215, 2005 U.S. App. LEXIS 10824, 160 Oil & Gas Rep. 424 (2005) (Holding that a letter was not a rule subject to the notice and comment requirement because the letter is not an agency statement with future effect and because there is no regulation that vests the letter's author.)

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Supp. to § 49.48 Deductions from Royalty.

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[Go To Main]

§ 49.48(b) Post-Production Costs Chargeable. [Go To Main]

Add:

Elliott Indus. v. BP Am. Prod. Co., 407 F.3d 1091, 2005 U.S. App. LEXIS 8139 (10th Cir. N.M. 2005) (holding that the party's noncontractual claims do not depend upon or require any interpretation of the "at the well" language of the royalty obligations.)

Columbine II, L.P. v. Energen Resources Corp., 2005 U.S. App. LEXIS 7373 (5th Cir. 2005) (Although language in the sublease indicated that royalties would be paid "at the mouth of the wellhead," the express provision prohibiting deduction of post-production transportation costs controlled and the company could not deduct payments to the well operators from the royalty payments); *Ramming v. Nat. Gas Pipeline Co. of Am., 390 F.3d 366 (5th Cir. 2004)* (Post-production cost deductions from royalty payments were permissible since payments were based on "net proceeds" and "market value"); *Howell v. Texaco, Inc., 2004 Ok. 92 (Okla. 2004)* ("An intra-company gas sale can not be the basis for calculating royalty payments"); *Nexen Pet Petroleum U.S.A., Inc. v. Norton, 2004 U.S. Dist. LEXIS 5471 (E.D. La. 2004)* (Lessee could not claim costs of moving oil from outer offshore platforms to central platform as a transportation cost and deduct from royalty payments).

Bice v. Petro-Hunt, L.L.C., 768 N.W.2d 496 (N.D. 2009) (The majority of states interpret the term "market value at the well" to mean royalty is calculated based on the value of the gas at the wellhead. This interpretation is commonly referred to as the "at the well rule." According to the "at the well" rule, any costs incurred by the lessee after the gas

reaches the wellhead, whether to improve the quality of the gas or to transport it to a market where it may be sold, may be deducted before the royalty is calculated.)

§ 49.48(c) How to Distinguish. [Go To Main]

Add:

Wellman v. Energy Resources, Inc., 557 S.E.2d 254 (W. Va. 2001) (If an oil and gas lease provides for a royalty based on proceeds received by the lessee, unless the lease provides otherwise, the lessee must bear all costs incurred in exploring for, producing, marketing, and transporting the product to the point of sale.)

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Supp. to § 49.50 Payment of Royalty.

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§ 49.50(c) Interest. [Go To Main]

Add:

Gore Oil Co. v. Roosth, 158 S.W.3d 596 (Tex. App. 11th Dist. 2005) ("no prejudgment interest when reasonable doubt exists regarding a title dispute").

XI. Miscellaneous Lease Clauses.

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Supp. to § 49.52 Lessee's Administrative Protections.

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§ 49.52(e) Notice of Forfeiture and Judicial Ascertainment Clauses. [Go To Main]

Add:

Noble v. Federal Ins. Co. (In re Jazzland, Inc.), 2006 U.S. App. LEXIS 1550 (5th Cir. La. Jan. 20, 2006) (holding that funds in a retainage account did not belong to the debtor's estate and the debtor's only position as to the funds in the retainage account was to serve as a conduit to pay money over to the contractor upon satisfaction of all contractual conditions.)

Add:

Wellman v. Energy Resources, Inc., 557 S.E.2d 254 (W. Va. 2001) ("Judicial ascertainment" clauses in oil and gas leases in West Virginia are void as against public policy and do not preclude a court from rendering final judgment in a lease controversy.)

§ 49.52(h) Equipment Removal Provisions. [Go To Main]

Add:

Smith v. Marshall Oil Corp., 85 P.3d 830 (Okla. 2004) (Failure to remove equipment vested ownership in surface owner).

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Supp. to § 49.53 Lessor's Additional Compensation.

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§ 49.53(b) Free Gas Clause. [Go To Main]

Add:

Cline v. Southern Star Central Gas Pipeline, Inc., 356 F. Supp. 2d 1203 (D. Kan. 2005) (Company did not breach contract to provide free gas since landowner was responsible for providing and paying for a connection to the company's pipeline; *Flanagan v. Stalnaker, 607 S.E.2d 765 (W. Va. 2004)* (1990 oil and gas lease was a supplement to the original 1918 lease and did not create another free gas allowance to a second dwelling that was built after the original land was divided); *Alicea v. Welch, 2004 Ohio 3854 (Ohio App. 5th Dist. 2004)* (Lessor was within in his rights to cut off free gas to neighbor since lessor had no right to grant free gas to neighbor).

Add:

EOG Res., Inc. v. Wall, 160 S.W.3d 130, 2005 Tex. App. LE XIS 1060 (Tex. App. Tyler 2005) (The free gas clause is limited to the "principal dwelling," the burden to the mineral estate cannot be extended to additional dwellings without the consent of the lessee. Additionally, the right to take free gas under the clause in a oil and gas lease is both transferable and assignable, however, there can be only one principal dwelling.)

Sutherland v. Fox, 2005 Ohio 1786, 2005 Ohio App. LEXIS 1724 (Ohio Ct. App., Ashland County Apr. 15, 2005)

(every application of he free gas was specifically set forth in the original oil and gas lease and since this lease included "one dwelling" provision there is nowhere in any of the leases or applications is there contemplated the division of free gas rights.)

Add:

Harmon v. McMasters, 57 S.W.3d 850 (Ky. App. 2001) (free gas may be transferred from one dwelling to another so long as the use is limited to one dwelling and so long as the transfer is to another house on the original leasehold).

XII. Implied Covenants in Oil and Gas Leases.

§ 49.54(a) In Fact or Law [Go To Main]

Add:

Ashokan Water Servs., Inc. v. New Start, LLC, 807 N.Y.S.2d 550, 2006 N.Y. Misc. LEXIS 70, 2006 NY Slip Op 26012 (N.Y. Civ. Ct. 2006) (the court refuses to enforce an express "best efforts" provision, or to imply one where it is not expressed, in those situations in which it amounts to a dreaded "agreement to agree.")

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Supp. to § 49.55 Reasonable Prudent Operator Standard

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Add:

Exxon Corp. v. Miesch, 180 S.W.3d 299, 2005 Tex. App. LEXIS 9862 (Tex. App. Corpus Christi 2005) (a reasonably prudent operator acts in good faith, with competence and with due regard to their own interest as well as the interest of the lessor.)

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Supp. to § 49.57 Development Covenants.

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§ 49.57(b) Reasonable Development. [Go To Main]

Add:

Jacobs v. CNG Transmission Corp., 332 F. Supp. 2d 759, 162 O.&G.R. 33 (W.D. Pa. 2004) (Oil and gas lease for "drilling and production rights" and "natural gas storage rights" was not severable. Lessee breached implied covenant to develop and produce oil or natural gas and lease was terminated despite payment of delay rental).

Add:

Meisler v. Gull Oil, Inc., 848 N.E.2d 1112 (Ind. App. 2006) (the implied covenant of reasonable development did not extend to the diligent operation of existing oil and gas wells).

Add:

St. Luke's United Methodist Church v. CNG Development Co., 663 S.E.2d 639 (W. Va. 2008) (partial rescission of oil and gas lease sought based on underdevelopment of property).

§ 49.57(b)(1) Proof of Breach of Reasonable Development

Add:

Exxon Corp. v. Miesch, 180 S.W.3d 299, 2005 Tex. App. LEXIS 9862 (Tex. App. Corpus Christi 2005) (every claim of improper operation by a lessor against a lessee should be tested against the general duty of the lessee to conduct operations as a reasonably prudent operator in order to carry out the purposes of the oil and gas lease.)

§ 49.57(b)(4) Remedies

Add:

Zimmerman v. Group Maint. Corp., 2005 Ohio 3539, 2005 Ohio App. LEXIS 3254 (Ohio Ct. App., Ashtabula County July 8, 2005) (pursuant to a original lease, a lessee is required to pay royalties to the lessor from the oil and gas revenues.)

§ 49.57(c)(1) Situations in Which Question Arises.

Add:

Lundin/Weber Co. v. Brea Oil Co., *11 Cal. Rptr. 3d 768 (Cal. App. 5th Dist. 2004)* (Since the lease detailed the lessee's exploration and development responsibilities, court would not recognize an "implied covenant of further exploration").

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§ 49.58(a) Implied Covenant to Protect from Drainage. [Go To Main]

Correction:

Southeastern Pipe Line Co. v. Tichacek, 977 S.W.2d 393 (Tex. App. 1998) has been overturned by *Southeastern Pipe Line Co. v. Tichacek, 997 S.W.2d 166 (Tex. 1999)* .

§ 49.58(a)(1) Proof of Breach of Drainage Covenant: Generally

Add:

Brownell Land Co., L.L.C. v. Apache Corp., 2005 U.S. Dist. LEXIS 36594 (E.D. La. Oct. 6, 2005) (overruling *Williams* by statute because the official comments to Section 136 note that "it is the intent of *Article 136* to overrule the *Williams* case insofar as it relieves the lessor of the necessity to put the lessee in default." *La. Rev. Stat. Ann. § 31:136*.)

§ 49.58(a)(4) Drainage in the Primary Term

Add:

Brownell Land Co., L.L.C. v. Apache Corp., 2005 U.S. Dist. LEXIS 36594 (E.D. La. Oct. 6, 2005) (overruling *Williams* by statute because the official comments to Section 136 note that "it is the intent of Article 136 to overrule the *Williams* case insofar as it relieves the lessor of the necessity to put the lessee in default." *La. Rev. Stat. Ann. § 31:136*.)

§ 49.58(a)(5) Remedies.

Add:

Kerr-McGee Corp. v. Helton, 133 S.W.3d 245 (Tex. 2004) (Expert testimony did not support award of damages based on drainage); *Eagle Lake Estates, L.L.C. v. Cabot Oil & Gas Corp., 330 F. Supp. 2d 778 (E.D. La. 2004)* (Royalty cannot be collected on pre-unitization production but damages for drainage could be assessed).

ADD rev'd on other grounds, *997 S.W.2d 166 (Tex. 1999)* to the end of the HECI citation.

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Supp. to § 49.59 Administrative and Management Covenants.

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§ 49.59(a) Implied Covenant to Produce and Market. [Go To Main]

Add:

Wellman v. Energy Resources, Inc., 557 S.E.2d 254 (W. Va. 2001) (West Virginia holds that a lessee impliedly covenants that he will market oil or gas produced and bear the costs so associated.)

Delete reference to Union Pacific Resources Group case. *See Union Pacific Resources Group v. Hankins, 111 S.W.3d 69 (Tex. 2003)*

§ 49.59(a)(2) Proof of Breach of Duty to Market at Reasonable Price.

add:

Union Pac. Res. Group, Inc. v. Hankins, 111 S.W.3d 69 (Tex. 2003) (A covenant to market at a reasonable price is implied only with respect to proceeds leases that calculate royalties on an amount realized, not to market-value leases that base royalties on current market value.)

§ 49.59(b) To Operate with Reasonable Care [Go To Main]

Add:

See also United States v. E.I. Dupont De Nemours & Co., 432 F.3d 161 (3d Cir. 2005) (holding responsible parties liable for all the removal and remedial costs necessarily incurred through the monitoring, enforcing, and overseeing of the removal of products.)

See also Crabtree v. Estate of Crabtree, 837 N.E.2d 135, 2005 Ind. LEXIS 1002 (Ind. 2005) (stating that a majority of courts will not allow punitive damages if the tortfeasor dies, because the goal of punitive damages are to punish the wrongdoer. Therefore, if the wrongdoer dies they cannot be punished and punitive damages are not recoverable against the estate of the deceased tortfeasor.)

Add:

Leib v. Rex Energy Operating Corp., 256 F.R.D. 178 (S.D. Ill. 2009) (action alleging pollution caused by operation of oil wells).

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Supp. to § 49.60 Duties Implied on Lessor.

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Add:

Pinnacle Gas Resources, Inc. v. Diamond Cross Properties, LLC, 201 P.3d 160 (Mont. 2009) (action by oil and gas lessee against property owner which refused access to property).

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Supp. to § 49.63 Rights and Duties of the Lessee and Transferee.

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§ 49.63(b) Protection of Non-Operating Interests Against "Wash-out." [Go To Main]

add:

Reynolds-Rexwinkle Oil v. Petex, Inc., 1 P.3d 909 (Kan. 2000)

XIV. Oil and Gas Contracts by Lessee.

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Supp. to § 49.65 Farmout Agreement.

Change author's first name to Marla.
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§ 49.65(a) Purpose and General Operation. [Go To Main]

Add:

Sawyer v. Guthrie, 215 F. Supp. 2d 1254 (D. Wyo. 2002) (Farmout interest owners had no contractual duty to drill continuously on every area covered by the lease to avoid partial termination, nor were such actions required under the duty of good faith and fair dealing.)

§ 49.66(b) General Operation [Go To Main]

Add:

G.R.A.V.I.T.Y. Enters. v. Reece Supply Co., 177 S.W.3d 537 (Tex. App. Dallas 2005) (criticizing *Atlantic* and holding that a supplier should not be awarded attorney fees under *Tex. Civ. Prac. & Rem. Code Ann. § 38.001* (1997) because "§ 38.001 did not provide for attorney fees for a party's successful defense against a claim." Additionally, even though the supplier proved that the manufacturer breached the contract, because there was no award of damages, the supplier could not recover its attorney fees.)

See also

Valence Operating Co. v. Dorsett, 164 S.W.3d 656, 48 Tex. Sup. Ct. J. 671, 2005 Tex. LEXIS 392 (Tex. 2005) (holding *Hamilton* reached the correct result, however, the court disapproved of the *Hamilton* court's treatment of the non-consent penalty as a liquidated damages provision.)

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Supp. to § 49.70 Gas Balancing Agreements

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Add:

City of Rockwood, Tenn. V. IMCO Recycling, Inc., 415 F. Supp. 2d 853 (E.D. Tenn. 2006) (holding that a customer, which paid utility to transport gas through the distribution system to an aluminum plant, was unjustly enriched when the customer under-nominated gas for delivery.)

XV. Pipelines: Regulation and Acquisition

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Supp. to § 49.72 Types of Pipelines: Gathering Distinguished from Transmission

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Add:

Petco Petroleum Corp. v. Natural Gas Pipeline Co. of Am., 410 F. Supp. 2d 715 (D. Ill. 2006) (holding that underground gas storage reservoir was not a pipeline facility subject to regulation. Second, even if there were regulations governing the maintenance of the pipelines applied to the gas storage reservoirs this was not considered a segment of pipeline covered by regulation. Third, even if regulation governing maintenance of pipeline facilities applied to underground gas storage reservoirs, a reservoir must be declared hazardous to be regulated, and the hazard must be fixed promptly.)

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Supp. To CHAPTER 49 PETROLEUM AND PIPELINES

6-49 Thompson on Real Property, Thomas Editions Supp. to § 49.75

Supp. to § 49.75 State Regulation of Pipelines.

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§ 49.75(a) Utility Regulation: Oil and Gas Pipelines. [Go To Main]

Add:

Bd. of County Comm'rs v. BDS Int'l, LLC, 159 P.3d 773 (Colo. Ct. App. 2006) (state law pre-empted county regulations of imposed on well operators).

Ark. Okla. Gas Corp. v. MacSteel Div. of Quanex, 370 Ark. 481, 483 (Ark. 2007) (county had authority to grant a natural gas pipeline easement across county land dedicated as a public park).

§ 49.76(a) Interstate Pipelines [Go To Main]

Add:

Williston Basin Interstate Pipeline Co. v. Dolyniuk Family Trust, 2005 U.S. Dist. LEXIS 12832 (D.N.D. 2005) (Holding that the Natural Gas Act sets forth two types of condemnation of rights of way to construct, operate and maintain pipelines and the condemnation of land necessary to operate the pipelined. In the present case the statute contradicts the

Natural Gas Act and therefore the court concluded that the right of way may be easements in perpetuity.)

§ 49.76(b) Intrastate Pipelines. [Go To Main]

Add:

Bello v. ABA Energy Corp. *16 Cal. Rptr. 3d 818 (Cal. Ct. App. 2004)* (Installation of a pipeline under a public right-of-way was within the public interest and would not unduly burden the landowners).

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Supp. to § 49.77 Acquisition of Pipelines by Voluntary Action.

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§ 49.77(c) Requirement of Burying Pipeline Below Plow Depth. [Go To Main]

add new footnote 1415.1 at the end of the first sentence: n1415.1

FOOTNOTES:
(n2)Footnote 1415.1. For a discussion on the burying of pipelines where an easement requires burial below plow depth, but where the terrain is not suitable farmland, see *Holly Creek Prod. Corp. v. Rose, 284 S.W.3d 542 (Ky. App. 2009)*

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Supp. To CHAPTER 49 PETROLEUM AND PIPELINES

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Supp. to § 49.78 General Relationship Between Dominant and Servient Estate.

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[Go To Main]

Add:

Maritimes & Northeast Pipeline, LLC v. 6.85 Acres of Land in Hancock and Penobscot Counties, Maine, 571 F. Supp. 2d 219 (2008) (action by natural gas pipeline company against property owner seeking declaration that the company had rights to use a road and spur in connection with the pipeline); *Sanderson v. Heath Mesa Homeowners Ass'n, 183 P.3d 679 (Colo. App. 2008)* (for statute of limitations purposes, a pipeline located on landowners' property constituted a continuing trespass, justifying at least nominal damages).

XVI. Bibliography.

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Supp. to § 49.79 Bibliography.

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Add to Annotations:

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CHAPTER 50 WATER RIGHTS

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AUTHOR: Professor James B. Wadley School of Law Washburn University

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Washburn University

Thompson on Real Property, Thomas Editions

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CHAPTER 50 WATER RIGHTS

6-50 Thompson on Real Property, Thomas Editions § 50.01

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§ 50.01 Introduction.

§ 50.01(a) General Nature of Water Rights Law.

To most people, water rights refer to the property right one may have in water to use it for one's own beneficial purposes. The law's view of water right allocation, however, may be broader than the popular view. The law of water rights generally concerns the allocation of rights of access to water for the purpose of making publicly approved uses of the water. n1 As such, this area of the law deals with the manner in which water rights are acquired, n2 the substantive content of such rights, n3 and the extent to which the right or the rightholder may be required to defer to public or private interests in the exercise of such rights. n4 Water right law also deals with a variety of different aspects of water use and abuse and therefore does more than simply allocate rights in water between users who are competing for a share of a limited resource. In addition, the law of water rights governs access to water for recreational and other similar uses n5 and addresses the issue of liability for harm caused by changes in surface drainage patterns. n6

Further, in many jurisdictions, the law of water rights will deal with such peripheral issues as water quality n7 and liability for the misuse of water. n8

Although every jurisdiction has adopted a regime that governs the issues of water right acquisition and exercise, there is great individual variation among the states in this regard. n9 Despite these system differences, however, there is great uniformity as to the nature of the water right itself. n10

In recent decades, the law of water rights, and particularly the prior appropriation doctrine, has been criticized as being inherently flawed for its failure to adequately address environmental issues. n11 The difficulty is probably not in the narrowness of the law of water rights but in the fact that the law of water rights is grounded in the law of property with its attendant recognition of rights to which the law assigns stability, endurance and dimension. n12 The key to reshaping water rights to better accommodate shifts in values is probably not in killing the doctrine but in defining and redefining the nature of the property right so that it better reflects the changes in social values that occur from time to time.

Several issues have dominated concerns over water rights in the past several years. First, there is a growing sense that an increasing number of water rights issues must be dealt with on a multi-national scale. n13

Second, the struggle between federal and state interests regarding water has been intensifying. n14

Finally, the need to modernize state systems to address rapidly changing needs seems increasingly to be of concern to many. n15

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LEXIS: water w/1 right! w/10 allocat! or law!

§ 50.01(b) Water as a Natural Resource.

It would appear that the total quantity of water available on earth is fixed -- at least for practical purposes. Nevertheless, water in nature is known to move through what may be described as a hydrologic cycle. n16 This movement of the water from place to place suggests that, at least in particular geographic areas, water may be considered to some extent to be a renewable resource. Nevertheless, the prevailing view of the general public, and to some extent the view of the law, appears to be that water is a finite and exhaustible resource. This view has played a significant role in the development of the various water right regimes recognized throughout the country, as it may support such divergent approaches to water allocation as management and exploitation. For example, in a jurisdiction where water is plentiful, or where the usable supply recharges fairly readily, much of the system's orientation is likely to be toward management of the resource, as opposed to exploitation. Where water is scarce, or where recharge is slow, more emphasis is likely to be placed on allocation, with a possibly tacit assumption that at some point the resource will be exhausted.

It has also been argued that the law of water rights, and particularly the prior appropriation doctrine, should be broadly conceived to more clearly recognize the status of water, not only as a natural resource, but as an integral part of a complex interrelated natural environment that may need protection in ways that are not always possible because of the present structure of the doctrines. n17 It should be observed that the difficulty is probably not the result of any inherent flaws in the law of water rights as much as it may be in the fact that the law of water rights is grounded in the law of property. Because of this grounding, the law's insistence on particularly quantifiable rights that have some measure of stability and security makes it somewhat difficult for the law of water rights to quickly accommodate shifts in values. It should also be noted that in recent years, there has been an increasing effort to make the law of water rights more sensitive to the needs of the natural environment while at the same time promoting the needs of the human environment. n18

One approach to the difficulty of property rights has been to permit only a public body to acquire the water rights in large amounts of water. The water then can be leased for private use and handled as a matter of contract, rather than property law. n19

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LEXIS: water w/5 natural w/1 resource!

§ 50.01(c) Exploitation of the Resource.

Because of the historic need to supervise competition for water in areas where the available supply is unable to meet the existing or anticipated demand, most allocation systems tend to reflect an exploitative, rather than a management, orientation. Unfortunately, this has sometimes resulted in the establishment of water use and water right patterns which do not always comport with evolving notions of what may be most desirable in the long run from a management perspective. This situation has been further compounded by the fact that the law has historically accorded protected property right status to water rights. This typically makes it very difficult to alter or eliminate established

exploitation-oriented patterns and makes it very difficult to manage the resource in ways which meet future needs. This has caused our water right structure, in many cases, to be out of step with social values regarding the actual use of the resource. n20

The inability to quickly change established patterns that may be deemed overly exploitative has caused sharp criticism of particular water rights doctrines. n21

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LEXIS: exploit! w/5 water w/2 resource!

§ 50.01(d) Management of the Resource.

In recent years, it appears that courts and legislatures in some jurisdictions may be interested in taking a closer look at the fundamental nature of water rights as property, and at the relationship between private rights and public interests in major, limited natural resources. This may give these systems an opportunity to engage in some meaningful management planning without altogether sacrificing allocation objectives. Further, at least a few courts are beginning to take the position that the private right to use the water may need to give way to the larger public need to protect other dimensions of the environment. n22 In a similar fashion, most jurisdictions are developing longterm water management plans that seek to integrate a wide range of concerns relating to the actual availability and use of water. n23 Recent cases suggest a growing effort to accommodate the needs of the human environment (which appear to drive exploitation of the resource) with the needs of the natural environment (which tend to drive efforts of management). The law of water rights has been criticized as being more interested in exploitation than management. n24 It is not disputed, of course, that in the long term, the needs of both the natural and the human environment benefit from management. n25

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LEXIS: manage! w/10 water w/2 resource! or right!

§ 50.01(e) The Law and Its Relation to What Is Known About the Resource.

Water is relatively abundant on this planet and it occurs in a great variety of places and forms. It does not always occur, however, where it is most needed, nor does it always appear in the form most useful or accessible to people. It may be found in either a frozen or solid state or as a liquid. It falls from the atmosphere as rain and snow, and it flows over the ground as streams and rivers, where it is often collected in lakes and ponds. Much of it is found in the ground, where it may occur in a confined or a saturated state. It is wont to move, both above and in the ground. In some places it is abundant; in others, it is very scarce. Despite its form or location, it is a most vital and life sustaining substance.

Scientists have long known that water resources are physically interrelated and move in what has been described as a hydrologic cycle. This is the case regardless of where the water is found or its particular form. n26 This cycle might be described as a series of recurring events in which water falls from the atmosphere as precipitation, then flows over or into the land, where it is again returned to the atmosphere by evaporation or transpiration. n27 The interrelationship of water in this cycle means that an impact upon water in any of its forms, at any stage in the hydrologic cycle, will have an effect elsewhere in the water system. For example, the use of water in one place may diminish the supply in another. In a similar fashion, the cutting of trees, the removal of vegetation or the draining of swamps or other wetlands may increase water supplies elsewhere. Likewise, the creation of lakes may influence the time, place or pattern of precipitation.

Despite this interrelationship, the law has been slow to recognize that water in one form or place is linked to water elsewhere. This is undoubtedly because the need for legal supervision of water use and allocation evolved rather slowly

in response to the need to supervise competition for water in specific, localized areas where a particular available source was unable to meet the existing or anticipated demand for the water. The law has found it convenient, in such a situation, to classify water for purposes of water rights based on how and where the water occurred in relation to the need to use the water, probably primarily in order to minimize the extent to which the law has had to intervene in the allocation process. The result has been that the common law quite early recognized four general categories of water:

(1) confined surface water, located in defined watercourses,

(2) diffused surface water,

(3) water in distinct underground streams, and

(4) percolating groundwater. n28

Waters in each of these categories were considered separate and distinct, and, often, very different rules were developed for each category. n29

Although the law no longer adheres as rigidly as it once did to the common-law classification scheme, the majority of jurisdictions still significantly organize their water rights laws around the four common-law categories.

There has been pressure in most systems to change water law rules to conform to what is known about the resource. Unfortunately, this process has been slow, since the common-law classifications have been used for so long that changes typically raise difficult questions regarding the sanctity of existing and established property rights. As a result, the law has tended and perhaps always will tend to lag somewhat behind what is known about the water resource. Decisions therefore still tend to rely on established precedent rather than being grounded on any newly developed understanding of the resource. Unfortunately, this situation has made it difficult for the law to respond quickly to changing water needs and injects a measure of uncertainty into the viability of established precedents. This is seen in the present struggle in most jurisdictions regarding a variety of difficult legal issues. These questions appear to be driving the present evolutionary trends of water rights systems.

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LEXIS: water w/5 categor!

§ 50.01(f) Questions That Are Driving Water Right Evolution: What Should Be the Legal Status of Water Rights?

Although there is a strong notion that water should be universally available for life-sustaining needs, most allocation decisions have historically dealt with water claims that have commercial rather than life-supporting utility. These decisions have resulted in the recognition of rights of considerable economic value that are given significant protection within our legal system as "property rights." n30 As the demand for water grows and known supplies diminish, difficult choices must therefore be made as to who should have protected access to water-- those who have a commercial interest in it or those who have a lifesustaining interest in it--and under what circumstances and to what extent is it still feasible to consider the private water rights as inviolate property.

The law of water rights, and particularly the prior appropriation doctrine, has been criticized as being inherently flawed for its failure to adequately address environmental issues. n31 The difficulty is probably not so much in the narrowness of the law of water rights as in the fact that the law of water rights is grounded in the law of property with its attendant recognition of rights to which the law assigns stability, endurance and dimension. If a goal of the water right system is now to give protection to emerging environmental values, the key to reshaping water rights to better accommodate such

shifts in values is probably not in radically restructuring the doctrine but in defining and redefining the nature of the property right involved so that it better reflects the changes in social values that occur from time to time. It should be noted that in recent decades, much redefinition has occurred in the law of property generally. n32 Given the peculiar nature of the property right embodied in the water right, such redefinition is not only possible but probable as water availability falls behind water demand and as values associated with water applications change. On the one hand, treating water rights as property has given a measure of certainty to the investment that has been associated with the development of water supplies. Historically, these costs have been borne by those seeking access to the water, and according property rights to those who have expended resources and effort to develop the water supplies and used them to further economic endeavors seems fair. Unfortunately, this has sometimes resulted in the establishment of use and water right patterns which are counter-productive to present notions of what may be the most desirable way in which water should be utilized but which, because of the status the law has historically accorded water rights as a species of property, cannot easily be terminated or altered. This, in turn, has greatly complicated the process of planning to meet future needs.

On the other hand, water is vital to human life and there is a need for allocation policies and rules that promote access to water for the largest possible portion of the population in the jurisdiction. This suggests a great need for flexibility in making allocation decisions which may require the elevation of public need above economic utility. Courts and legislatures in some jurisdictions have taken a closer look at the fundamental nature of water rights as property in recent decades, n33 and the result seems to be an increasing recognition that rights to make use of water may be modified to conform to larger social needs and concerns. n34 While this has injected some measure of uncertainty as to the nature and extent of a particular individual's water right at any specific point in time, it seems to give the system more flexibility in the long term to meet changing water use needs. At some point, however, our system may need to specifically address the question whether it is better to allocate water through a non-property right oriented framework. n35

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LEXIS: legal w/1 status w/15 water w/1 right!

§ 50.01(g) Questions That Are Driving Water Right Evolution: How Should Water Be Allocated?

One of the most difficult issues with which our systems must grapple is the specific question of water allocation. Should water be considered an economic commodity or a public resource? Should it be sold to the highest bidder or be allocated only to those that satisfy some, perhaps arbitrary, criteria? Should the claimant be required to own land in particular locations? n36 Should water be allocated on a "first come, first serve" basis? n37 Should water be made available only to those who somehow have qualified for "water rights"?

It may be argued that the conventional approach of allocating water rights only to those that satisfy system-imposed criteria clearly tends to narrow or reduce the number of potential water users in the jurisdiction -- which may be desirable where water supplies are limited or scarce. However, the approach which grounds access to water upon having secured a water right through such qualification channels, even where water is distributed to others -- as in the case of municipal water systems -- arguably uses the need to qualify for a water right as the basis for exercising some social control over the decision to grant access to water. The presence of a water right that the legal system will recognize and protect carries with it the connotation that the system has judged the applicant and the purpose for use as worthy of the water.

Historically, our water right allocation systems have predicated access to the right upon the acceptability of the ultimate water use, requiring that the use be either reasonable or beneficial. n38 This approach leaves unanswered questions. Can society's definition of "reasonableness" or "beneficial" change over time and, as a result, deny water to a former right holder? Alternatively, can some other mechanism, such as the marketplace, fairly allocate water? To what extent should

altruistic feelings and human need outrank commercial gain and free enterprise as the basis for water allocation decision making?

In contrast, there may be something to recommend the notion that water allocation decisions be made in an economic marketplace. Often, water availability is a factor in many development activities that have considerable public economic value and importance. Without the water, the development will not occur, jobs will not be created, services will not be rendered, and so forth. In our politico-socio-economic system, there are strong feelings that the true costs of water management can best be dealt with where access to the water is secured through market mechanisms. Such allocations may arguably also result in more efficient water use as well. n39

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LEXIS: water w/1 right! w/15 property w/1 right! water w/1 right! w/15 allocat! w/2 system!

§ 50.01(h) Questions That Are Driving Water Right Evolution: How Far Can Water Be Moved to Meet Needs?

Water does not always occur in nature where it is most needed. Since our earliest efforts at managing the resource, there has been a concern with the need to be able to move water to the place where it is most needed. On the other hand, there has been a sensitivity to the fact that moving water too far, particularly outside its natural watershed, may deprive others of an opportunity to use it. As the need for water grows in particular jurisdictions, other places in other jurisdictions may come to be increasingly regarded as potential sources of supply. To what extent should the legal system permit the movement of large quantities of water from one jurisdiction to another? How should the water be treated upon arrival if it is stored prior to use? Can any water rights be created in excess water that may result from such transfers? How should those that are denied water as a result of water movement be treated? These and other such questions will undoubtedly become more common as our water needs grow. Although we have developed some mechanisms to respond to some of the concerns, n40 these tend to be somewhat localized in nature. It may be that there will be a need to develop a nationwide response to these concerns.

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LEXIS: water w/1 right! w/15 move! or moving

§ 50.01(i) Questions That Are Driving Water Right Evolution: Do Cities Have a Higher Claim to the Water Than Does the Countryside?

Agriculture is the largest single water user in the nation. Much of this water is applied to land through irrigation as an integral part of crop production. Much water is undoubtedly wasted in the process. n41 Some may argue that the artificial application of water for such purposes is an "unnatural" use of the water. This argument has some appeal where supplies are scarce and there is intense competition for the water for other, more arguably life-sustaining, purposes. n42 In some parts of the country, it may be appropriate at some point to ask whether it is more valuable to give the water to agricultural as opposed to urban uses. If the choice is between green fields and green lawns, the choice may be easier than if the choice is between food production and public drinking water. Nevertheless, in water scarce areas, the viability of entire communities may require the transferring of water from agricultural use to urban use. Presently, several major (primarily western or southwestern) cities have purchased farmland in order to acquire the water rights. Others have simply purchased water rights from agricultural interests. So far, there has been no noticeable impact on national food supplies. That may not be the case in the future and it may be necessary to consider the difficult questions such choices present. n43

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LEXIS: water w/1 right! w/10 city or cities

§ 50.01(j) Questions That Are Driving Water Right Evolution: What Is the Best Way to Deal with Water Shortages?

All water allocation regimes have developed ways to respond to water shortages. Appropriative jurisdictions tend to reduce or eliminate the most recent users, thereby freeing up water for the earlier appropriators. Riparian jurisdictions tend to apportion the water among all the users, or at least among those whose uses may be said to be reasonable at the time of the emergency. Both systems operate on a sometimes unstated hierarchical basis in which particular uses are considered more valuable, useful, reasonable or beneficial than other uses. n44 Both systems, however, also operate on the unstated assumption that such restructuring of the entitlements will never be undertaken on a permanent or long-term basis so that hierarchy of uses will ever be seriously invoked. n45 Unfortunately, at the time a water shortage is recognized, many jurisdictions find that they have become significantly over-committed -- that is, they already have recognized more water rights than there is available water in the system. In those situations, some right holders who have invested considerable amounts of money to develop their properties or businesses may find their investments destroyed or rendered useless when their entitlement is reduced or terminated.

As water supplies are stretched to meet the needs of growing populations, the most recent users -- even though their uses may be regarded as among the most beneficial -- are often the most disadvantaged. This may cause some rethinking of society's notions of what are acceptable water uses in times of water shortage, which in turn may pose a serious threat to older, less efficient or less desirable uses. This has actually occasioned the reconsideration of the preferred use hierarchy in an effort to resolve the shortage problem on a more equitable or fair basis. n46 It is not unreasonable to expect that as the need for water grows, jurisdictions will need to take a serious look at how uses are ranked during water shortages, and it may be that some serious restructuring of the allocation framework may be necessary, in order to make sure that the distributional priorities match society's vision of how the scarce water ought to be shared. n47

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LEXIS: respon! w/15 water w/2 shortage!

§ 50.01(k) Questions That Are Driving Water Right Evolution: To What Extent May Water Quality Concerns Govern Water Allocation Choices?

The quality of water available for consumptive use has truly become a major national concern in the last decade. This has raised many unanswered questions about the interrelationship between water allocation laws and water quality laws. It has also injected concerns about the extent to which the water user assumes specific stewardship obligations regarding the water as part of the water right itself. Also unclear is the extent to which a government grant of a use privilege, such as a water right, actually constitutes governmental subsidization of desired outcomes. To the extent to which it may be seen as such, there appears to be an opportunity to use the water right granting process as a vehicle for social engineering, including addressing such matters as environmental impacts and water quality concerns. To what extent does such an approach require modification of the property nature of the water right? To what extent should individual water users bear the burden of providing a public benefit in the nature of a clear water resource? Is an activity that results in any contamination of the water a "reasonable" or "beneficial" activity? As the nature of the resource becomes better understood, jurisdictions will increasingly have to consider not only the interrelationship between the various forms and locations of water but the relationships between water use and other facets of a healthy environment.

The law of water rights, and particularly the prior appropriation doctrine has been criticized as being inherently flawed for its failure to adequately address environmental issues. n48 It is clear that environmental concerns generally are

assuming a larger role in water allocation decisions. n49

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LEXIS: water w/2 quality w/1 law!

FOOTNOTES:
(n1)Footnote 1. *See, e.g.*, Ludwik Teclaff, Abstraction and Use of Water: A Comparison of Legal Regimes (United Nations 1972).

For further discussion, *see* Jan Laitos, *Water Rights and Water Quality: Recent Developments*, 23 Colo. Law. 2343 (Oct. 1994); Donald D. MacIntyre, *The Prior Appropriation Doctrine in Montana: Rooted in Mid-Nineteenth Century Goals -- Responding to Twenty-First Century Needs, 55 Mont. L. Rev. 303 (Summer 1994);* John Peck, and Kent Weatherby, *Condemnation of Water and Water Rights in Kansas, 42 U. Kan. L. Rev. 827* (Summer, 1994); Michael Blumm, *Pinchot, Property Rights, and Western Water: (A Reply to Gregory Hobbs), 24 Envtl. L. 1203 (1994);* William Cox, *An Introduction to The Alabama Water Resources Act, 55 Ala. L. Rev. 176 (1994);* Jeff Boyce, *Wrestling with the Bear: A Compact Approach to Water Allocation, 10 Byu J. Pub. L. 301 (1996);* Ray Jay Davis, *Water, Water, Everywhere: Two New Model Water Codes, 9 Prob. & Prop. 8 (Sept.Oct.1995);* Janet C. Neuman, *Run River Run: A Mediation of a Water Rights Dispute Keeps Fish and Farmers Happy _____ For a Time, 67 U. Colo. L. Rev. 259 (Spring 1996).*

(n2)Footnote 2. *See, e.g.*, Frank Maloney et al., Florida Water Law 1980 (Water Resources Research Center, Univ. of Fla., Pub. No. 50, 1980).

(n3)Footnote 3. *See, e.g., Williams v. City of Wichita, 374 P.2d 578 (Kan. 1962),* describing water rights as *usufructary* in nature.

(n4)Footnote 4. *See, e.g., People v. Emmert, 579 P.2d 1025 (Colo. 1979),* discussing the extent to which the public at large may have access to a stream, located on private property, for recreational purposes.

See Empire Lodge Homeowners' Association v. Moyer, 39 P.3d 1139 (Colo. 2001); In re the General Adjudication of All Rights to Use Water in the *Gila River System and Source, 35 P.3d 68 (Az. 2001); Hinton v. Hannigan, 33 P.3d 379 (Or. App. 2001); United States v. Orr Ditch Co., 256 F.3d 935 (9th Cir. 2001); Westlands Water District v. United States, 153 F. Supp. 2d 1133 (E.D. Cal. 2001); Klump v. United States, 50 Fed. Cl. 268 (2001); West Maricopa Combine, Inc. v. Arizona Department of Water Resources, 26 P.3d 1171 (Az. App. 2001).*

See also Department of the Interior, Bureau of Indian Affairs v. Klamath Water Users Protective Association, 532 U.S. 1 (2001), holding that nonprofit association was entitled to access to documents filed by the tribe with the Department of the Interior.

For further discussion, see B. Adams, *From Lucas to Palazzolo: A Case Study of Title Limitations,* 16 J. Land Use & Envt'l L. 225 (2001); J. Shurts, *The Genesis and Early Power of Winters A Book Review of Indian Reserved Rights: The Winters Doctrine and its Social and Legal Context, 36 Tulsa L.J. 641 (2001);* J. Melious, *Enforcing the Endangered Species Act Against the States,* 25 Wm & Mary Envt'l L. & Policy Rev. 605 (2001); H. Doremus, *Water, Population Growth, and Endangered Species in the West, 72 U. Colo L. Rev. 362 (2001);* J. Peck, *Assessing the Quality of a Water Right,* 70 May J. Kan. B. A. 26 (2001); J.Carey and D. Sunding, *Emerging Markets in Water: A Comparative Institutional Analysis of the Central Valley and Colorado-Big Thompson Projects,* 41 Nat. Resources J. 283 (2001); J. Leshy, *Water Rights for New Federal Land Conservation Programs: A Turn-of-the Century Evaluation, 4 U. Denv. Water L. Rev. 271 (2001);* E. Shane, *Water Rights and Gila River III: The Winters Doctrine Goes Underground, 4 U. Denv. Water L. Rev. 397 (2001);* D. Yoskowitz, *Markets, Mechanisms, Institutions, and the Future of Water, 31 Envtl.*

L. Rep. 10237 (2001); J. Neuman, *Adaptive Management: How Water Law Needs to Change, 31 Envtl. L. Rep. 11432 (2001).*

(n5)Footnote 5. James Wadley, *Recreational Use of Non-navigable Waterways*, 56 J. Kan. Bar Ass'n 27 (Nov. 1987).

(n6)Footnote 6. *See, e.g.*, Kan. Stat. Ann. § 24-105. *See also Martinson v. Hughey, 244 Cal. Rptr. 795 (1988).*

(n7)Footnote 7. *See, e.g.*, Water Pollution Act, Kan. Stat. Ann. § 12-3101 *et seq.*

(n8)Footnote 8. *See generally* Steven Shupe, *Waste in Western Water Law: A Blueprint for Change, 61 Or. L. Rev. 483 (1982).*

(n9)Footnote 9. *See, e.g.*, Ludwik Teclaff, Abstraction and Use of Water: A Comparison of Legal Regimes (United Nations 1972).

(n10)Footnote 10. *See* John Cribbet, *Water as a Species of Private Property, 1959 Ill. Bar J. 450 (Jan. 1959).*

For further discussion, *see* Knud E. Hermansen & Donald R. Richards, *Maine Principles of Ownership Along Water Bodies, 47 Me. L. Rev. 35 (Apr. 1995);* Ray Jay Davis, *Water, Water Everywhere: Two New Model Water Codes, 9 Prob. & Prop. 8* (Sept-Oct. 1995); Christine A. Klein, *The Constitutional Mythology of Western Water Law, 14 Va. Envtl. L.J. 13 (Winter 1995);* Peter L. Reich,*The "Hispanic" Roots of Prior Appropriation in Arizona, 27 Ariz. St. L.J. 649 (Summer 1995).*

For further discussion of the growing sensitivity (or need thereof) of water law to environmental concerns, *see* Deborah L. Freeman & Carmen M. Sower, *Against the Flow: Emerging Conflicts Between Endangered Species Protection and Water Use,* 40 Rocky Mts. Mineral L. Inst. 23 (Annual 1994); Michelle Timko-Cary, *The Fourth Circuit Allows Judicial Review of Damage Claims When Review Does Not Conflict with Consent Order under RCRA* (case note), 15 J. Energy, Nat. Resources & Envtl. L. 193 (Summer 1995); William Poole, *Where Have All the Salmon Gone? Salmon Have Been Driven to the Brink of Extinction by Entrenched Water Rights, 15 Cal. Law. 50 (Apr. 1995);* Jane E. Lein, *Protection of Instream Flows: The Aspen Wilderness Workshop Decision,* 24 Colo. Law. 2577 (Nov. 1995); Pamela LeRoy, *Troubled Waters: Pollution and Water Scarcity (Planet Earth 2025: 10 Billion Served?), 6 Colo. J. Int'l. Envtl. L. & Pol'y 299 (Summer 1995);* Mark E. Chandler, *A Link Between Water Quality and Water Rights? Native American Control over Water Quality, 30 Tulsa L.J. 61 (Fall 1994).*

(n11)Footnote 11. *See* Charles Wilkinson, *Aldo Leopold and Western Water Law: Thinking Perpendicular to the Prior Appropriation Doctrine,* 24 Land and Water L. Rev. 1 (1989); John Leshy, *The Prior Appropriation Doctrine of Water Law in the West: An Emperor with Few Clothes,* 19 J. of the West 5 (1990).

(n12)Footnote 12. *See generally* Eric Freyvogle, *Lux v. Hagin, The Common Law Burden of Modern Water Law, 57 U. Colo. L. Rev. 485 (1986).*

(n13)Footnote 13. *See, e.g.*, Scanlan, *The International Law Commission's First Ten Draft Articles on the Law of Non-Navigable Uses of International Watercourses: Do They Adequately Address All the Major Issues of Water Usage in the Middle East? 19 Fordham Int'l L.J. 2180 (1996);* Benvenisti, *Collective Action in the Utilization of Shared Freshwater: The Challenges of International Water Resources Law, 90 Am. J. Int'l L. 384 (1996);* Rivera, *Irrigation Communities of the Upper Rio Grande Bioregion: Sustainable Resource Use in the Global Context,* 36 Nat. Resources J. 521 (1996); Geon, *A Right to Ice? The Application of International and National Water Laws to the Acquisition of Iceberg Rights, 19 Mich. J. Int'l L. 277 (1997).*

(n14)Footnote 14. *See, e.g.*, Josephson, *Katie John and Totemoff: The United States and Alaska Clash over the Reserved Rights Doctrine and Native Alaska Hunting and Fishing Rights -- the U.S. Supreme Court Passes on an*

Opportunity to Resolve the Subsistence Debate, 6 Dick. J. Envtl. L. & Pol'y 225 (1997); Powell, *Recent Application of the Reserved Rights Doctrine: State of Alaska v. Babbitt*, 25 Real Est. L.J. 308 (1997); Getches, *Colorado River Governance: Sharing Federal Authority as an Incentive to Create a New Institution, 68 Colo. L. Rev. 573 (1997);* Blumm, *Seven Myths of Northwest Water Law and Associated Stories, 26 Envtl. L. 141 (1996);* Wilcox, *Maintaining Federal Water Rights in the Western United States, 1966 Army Law 3 (Oct. 1996).*

(n15)Footnote 15. *See, e.g.,* Shontz, *Calming the Waters: Task Force Suggests Simpler Rights Transfer Procedure,* 22 Mont. L. 13 (Nov. 1996); Holtz, *Water Law in Transition: Debates That Could Shape Florida's Future, 70 Fla. B.J. 77 (Nov. 1996);* Mossman, *Whiskey Is for Drinkin' but Water Is for Fightin' About: A First-hand Account of Nebraska's Integrated Management of Ground and Surface Water Debate and the Passage of L.B. 108, 30 Creighton L. Rev. 67 (1996);* Carpenter, *Water for Growing Communities: Refining Tradition in the Pacific Northwest, 27 Envtl. L. 127 (1997).*

(n16)Footnote 16. *See* Frank Maloney et al., Water Law and Administration: The Florida Experience, 1-15 (1968).

See Fish Unlimited v. Northeast Utilities Service Co., 756 A. 2d 262 (Conn. 2000).

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(n18)Footnote 18. For further discussion, *see* Jan Laitos, *Water Rights and Water Quality: Recent Developments*, 23 Colo. Law 2343 October, 1994; William Attwater, *Introduction: Environmental Restraints on Water Law, 25 Pac. L.J. 901 (1994);* Michelle Oullette, et al., *Institutional Reforms in California Groundwater Law, 25 Pac. L.J. 1021 (1994);* Gregory Weber, *The Role of Environmental Law in the California Water Allocation and Use System: An Overview, 25 Pac. L.J. 907 (1994);* James Huffman, *Markets, Regulation and Environmental Protection, 55 Mont. L. Rev. 425 (Summer 1994);* Gregory Hobbs, Jr., *Interpreting the Ecological Integrity Myth: (A Response to Professor Blumm), 24 Envtl. L. 1185 (1994);* Michael Blumm, *Pinchot, Property Rights, and Western Water: (A Reply to Gregory Hobbs), 24 Envtl. L. 1203 (1994);* S. Emmenegger, *Taking Nature's Rights Seriously: The Long Way to Biocentrism in Environmental Law,* 6 Geo. Int'l Envtl. Rev. 545 (1994); Gregory Weber, *The Role of Environmental Law in the California Water Allocation and Use System, 25 Pac. L.J. 907 (1994);* Charles Wilkinson, *Aldo Leopold and Western Water Law: Thinking Perpendicular to the Prior Appropriation Doctrine*, 24 Land and Water L. Rev. 1 (1989); Richard Burleigh, *Agricultural Chemicals and Groundwater Protection: Navigating the Complex Web of Regulatory Controls, 30 Idaho L. Rev. 443 (1994);* Thomas Fahey, Jr. & Richard Roznoy, *Aquifer Protection in Connecticut: Environmental Land Use Restrictions Run Deep, 68 Conn. B.J. 98 (1994);* Benson, Reed D., *Recommendations for an Environmentally Sound Federal Policy on Western Water, 17 Stan. Envtl. L.J. 247 (1998).*

See also Edwards v. First National Bank of North East, 712 A.2d 33 (Md. App. 1998) (cause of action under common law for groundwater contamination).

(n19)Footnote 19. Montana legislation provides that only the Department of Natural Resources and Conservation may make appropriations for amounts of water in excess of 4,000 acre-feet a year or 5.5 cubic feet per second where the water is to be consumed or where water is to be transported outside designated river basins. This water can then be leased to private users under the terms of leases which cannot exceed fifty years. Mont. Code Ann. §§ 85-2-141 and 85-2-301.

(n20)Footnote 20. For further discussion, *see* Judith V. Royster, *Equivocal Obligations: The Federal-Tribal Trust Relationship and Conflicts of Interest in the Development of Mineral Resources, 71 N. Dak. L. R. 327 (Spring 1995).*

See also Blumm, *Seven Myths of Northwest Water Law and Associated Stories, 26 Envtl. L. 141 (1996);* Carpenter, *Water for Growing Communities: Refining Tradition in the Pacific Northwest, 27 Envtl L. 127 (1997);* Rivera, *Irrigation Communities of the Upper Rio Grande Bioregion: Sustainable Resource Use in the Global Context,* 36 Nat. Res. J. 521 (1996); Stephenson, *Groundwater Management in Nebraska: Governing the Commons Through Local Resource Districts,* 36 Nat. Res. J. 521 (1996); Geon, *A Right to Ice? The Application of International and National Water Laws to the Acquisition of Iceberg Rights, 19 Mich. J. Int'l L. 277 (1997).*

(n21)Footnote 21. *See* Charles Wilkinson, *Aldo Leopold and Western Water Law: Thinking Perpendicular to the Prior Appropriation Doctrine,* 24 Land and Water L. Rev. 1 (1989); John Leshy, *The Prior Appropriation Doctrine of Water Law in the West: An Emperor with Few Clothes,* 19 Journal of the West 5 (1990).

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(n22)Footnote 22. *See, e.g., United States v. Glenn-Colusa Irrig. Dist., 785 F. Supp. 1126 (E.D. Cal. 1992); Dep't of Fish and Game v. Anderson-Cottonwood Irrig. Dist. 11 Cal. Rptr. 2d 222 (1992).*

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See also J. Neuman, *Adaptive Management: How Water Law Needs to Change, 31 Envtl. L. Rep. 11432 (2001).*

(n23)Footnote 23. For further discussion, *see* Judith V. Royster, *Equivocal Obligations: The Federal-Tribal Trust Relationship and Conflicts of Interest in the Development of Mineral Resources, 71 N. Dak. L. Rev. 327 (Spring 1995);* Eric L. Garner & Michelle Ouellette, *Future Shock? The Law of the Colorado River in the Twenty-First Century, 27 Ariz. St. L.J. 423 (Summer 1995).*

Reed D. Benson, *Watershed Issue: The Role of Streamflow Protection in N.W. River Basin Management, 26 Envtl. L. 175 (Spring 1996);* Joy Ellis, *Drafting from an Overdrawn Account: Continuing Water Diversions from Mainstream*

Columbia and Snake Rivers, 26 Envtl. L. 299 (Spring 1996); Robert W. Adler, *Addressing Barriers to Watershed Protection, 25 Envtl. L. 973 (Fall 1995).*

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(n24)Footnote 24. *See* Charles Wilkinson, *Aldo Leopold and Western Water Law: Thinking Perpendicular to the Prior Appropriation Doctrine,* 24 Land and Water L. Rev. 1 (1989); John Leshy, *The Prior Appropriation Doctrine of Water Law in the West: An Emperor with Few Clothes,* 19 Journal of the West 5 (1990).

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(n25)Footnote 25. *See, e.g.,* Gregory Weber, *The Role of Environmental Law in the California Water Allocation and Use System, 25 Pac. L.J. 907 (1994);* William Attwater, *Introduction: Environmental Restraints on Water Law, 25 Pac. L.J. 901 (1994);* Michelle Ouellette, et al., *Institutional Reforms in California Groundwater Law, 25 Pac. L.J. 1021 (1994);* James Huffman, *Markets, Regulation and Environmental Protection, 55 Mont. L. Rev. 425 (Summer 1994);* Gregory Hobbs, Jr., *Interpreting the Ecological Integrity Myth: (A Response to Professor Blumm), 24 Envtl. L. 1185 (1994);* Michael Blumm, *Pinchot, Property Rights, and Western Water: (A Reply to Gregory Hobbs), 24 Envtl. L. 1203 (1994);* S. Emmenegger, *Taking Nature's Rights Seriously: The Long Way to Biocentrism in Environmental Law,* 6 Geo. Int'l Envtl. Rev. 545 (1994); Gregory Weber, *The Role of Environmental Law in the California Water Allocation and Use System, 25 Pac. L.J. 907 (1994);* Richard Burleigh, *Agricultural Chemicals and Groundwater Protection: Navigating the Complex Web of Regulatory Controls, 30 Idaho L. Rev. 443 (1994);* Thomas Fahey, Jr. & Richard Roznoy, *Aquifer Protection in Connecticut: Environmental Land Use Restrictions Run Deep, 68 Conn. B. J. 98 (1994).*

(n26)Footnote 26. *See, e.g.*, Frank Foley, *Water & The Laws of Nature*, 5 Kan. L. R. 492 (1957). *See also In re Application U-2, Central Nebraska Public Power and Irrig. Dist. v. Abrahamson, 413 N.W.2d 290 (Neb. 1987).*

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(n27)Footnote 27. *Id.*

(n28)Footnote 28. *See, e.g.*, Frank Maloney et al., Florida Water Law 1980, 5 (Water Resources Research Center, Univ. of Fla., Pub. No. 50 (1980)).

(n29)Footnote 29. *Id.*

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(n30)Footnote 30. *See* discussion at § 50.03, *infra*.

(n31)Footnote 31. *See* Charles Wilkinson, *Aldo Leopold and Western Water Law: Thinking Perpendicular to the Prior Appropriation Doctrine,* 24 Land and Water L. Rev. 1 (1989); John Leshy, *The Prior Appropriation Doctrine of Water Law in the West: An Emperor with Few Clothes*, 19 J. of the West 5 (1990).

(n32)Footnote 32. *See* James B. Wadley, *The Emerging "Social Function" Context for Land Use Planning in the United States: A Comparative Introduction to Recurring Issues, 28 Washburn L.J. 22 (1988).*

(n33)Footnote 33. *See, e.g., Village of Tequesta v. Jupiter Inlet, 371 So. 2d 663 (Fla. 1979); Stone & Sons v. Gibson, 630 P.2d 1164 (Kan. 1981).*

Crystal Lake v. Backlund, 908 P.2d 534 (Colo. 1996) (resolution of what constitutes water is a matter within the exclusive jurisdiction of water courts and turns on the distinction between the legal right to use of water and the ownership of water rights).

(n34)Footnote 34. *See* Myrl Duncan, *High Noon on the Ogallala Aquifer: Agriculture Does Not Live By Farmland Preservation Alone, 27 Wash. L.J. 16 (1987);* Steven Shupe, *Waste in Western Water Law: A Blueprint for Change, 61 Or. L. Rev. 483 (1982).*

(n35)Footnote 35. *See generally* Richard Lazarus, *Changing Conceptions of Property and Sovereignty in Natural Resources: Questioning the Public Trust Doctrine, 71 Iowa L. Rev. 631 (1986).*

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(n36)Footnote 36. *See* discussion of riparian systems and land ownership at § 50.08(d), *infra*.

(n37)Footnote 37. *See* discussion of Appropriative Systems, § 50.09, *infra*.

See Empire Lodge Homeowners' Association v. Moyer, 39 P.3d 1139 (Colo. 2001); Roaring Fork Club L. P. v. St. Jude's Company, No. 00*SC372, 2001 Colo. LEXIS 1053 (Colo. 2001); Westlands Water District v. United States, 153 F. Supp. 2d 1133 (E.D. Cal. 2001).*

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(n38)Footnote 38. *See* §§ 50.88(k), 50.09(l), *infra*. Janet C. Neuman, *Run River Run: A Mediation of a Water Rights Dispute Keeps Fish and Farmers Happy -- For a Time, 67 U. Colo. L. Rev. 259 (Spring 1996).*

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(n40)Footnote 40. *See* § 50.09(bb), (junior appropriators); § 50.08(g) (watershed limitations); § 50.15 (interstate concerns), *infra*.

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(n41)Footnote 41. *See generally* Steven Shupe, *Waste in Western Water Law: A Blueprint for Change, 61 Or. L. Rev. 483 (1982).*

(n42)Footnote 42. *See generally*, Myrl Duncan, *High Noon on the Ogallala Aquifer: Agriculture Does Not Live by Farmland Preservation Alone, 27 Wash. L.J. 16 (1987).*

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(n44)Footnote 44. *See, e.g.*, Kan. Stat. Ann. § 82a-708(b):

Where uses of water for different purposes conflict, such uses shall conform to the following order of preference: Domestic, municipal, irrigation, industrial, recreational and water power uses. However, the date of priority of an appropriation right, and not the purpose of use, determines the right to divert and use water any time when the supply is not sufficient to satisfy all water rights that attach to it. The holder of a water right for an inferior beneficial use of water shall not be deprived of the use of the water either temporarily or permanently as long as such holder is making proper use of it under the terms and conditions of such holder's water right and the laws of this state, other than through condemnation.

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(n45)Footnote 45. *Id.*

(n46)Footnote 46. *See, e.g.*, Kan. Stat. Ann. § 82a-1038(b), which provides that in the event an "intensive groundwater use control area" is established, the chief engineer may alter the manner in which water is allocated and may close the area to further appropriation, apportion water on the basis of priority, reduce amounts of withdrawal without regard to priority, order a system of rotation or any other provision necessary to protect the public interest.

(n47)Footnote 47. For further discussion, *see* Stephen E. White & David E. Kromm, *Local Groundwater Management Effectiveness in the Colorado and Kansas Ogallala Region*, 35 Nat. Resources J. 275 (Spring 1995); Benjamin Lombard, Jr., *Water Conservation and Drought Protection*, 40 Rocky Mts. Mineral L. Inst. 25 (Annual 1994).

(n48)Footnote 48. *See* Charles Wilkinson, *Aldo Leopold and Western Water Law: Thinking Perpendicular to the Prior Appropriation Doctrine*, 24 Land and Water L. Rev. 1 (1989); John Leshy, *The Prior Appropriation Doctrine of Water Law in the West: An Emperor with Few Clothes*, 19 J. of the West 5 (1990). For further discussion, *see* William C. Galloway, *Tribal Water Quality Standards Under The Clean Water Act: Protecting Traditional Cultural Uses, 70 Wash. L. Rev. 177 (Jan. 1995);* Michelle Timko-Cary, *The Fourth Circuit Allows Judicial Review of Damage Claims when Review does not Conflict with Consent Order Under RCRA* (case note), 15 J. Energy Nat. Resources & Envtl. L. 193 (Summer 1995); Mark E. Chandler, *A Link Between Water Quality and Water Rights? Native American Control over Water Quality, 30 Tulsa L.J. 61 (Fall 1994);* Kevin Gover & Jana L. Walker, *Water Quality on Indian Reservations*, 40 Rocky Mts. Mineral L. Inst. 24 (Annual 1994); William Poole, *Where Have All the Salmon Gone? Salmon Have Been Driven to the Brink of Extinction by Entrenched Water Rights, 15 Cal. Law. 50 (Apr. 1995);* Benson, Reed D., *Recommendations for an Environmentally Sound Federal Policy on Western Water, 17 Stan. Envtl. L.J. 247*

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(n49)Footnote 49. *See, e.g.*, Gregory Weber, *The Role of Environmental Law in the California Water Allocation and Use System, 25 Pac. L.J. 907 (1994);* Richard Burleigh, *Agricultural Chemicals and Groundwater Protection: Navigating the Complex Web of Regulatory Controls, 30 Idaho L. Rev. 443 (1994);* Thomas Fahey, Jr. & Richard Roznoy, *Aquifer Protection in Connecticut: Environmental Land Use Restrictions Run Deep, 68 Conn. B.J. 98 (1994).*

See also Josephson, *Katie John and Totemoff: The United States and Alaska Clash over the Reserved Rights Doctrine and Native Alaska Hunting and Fishing Rights -- the U.S. Supreme Court Passes on an Opportunity to Resolve the Subsistence Debate, 6 Dick. J. Envtl. L. & Pol'y 225 (1997);* Rivera, *Irrigation Communities of the Upper Rio Grande Bioregion: Sustainable Resource Use in the Global Context,* 36 Nat. Resources J. 521 (1996); Geon, *A Right to Ice? The Application of International and National Water Laws to the Acquisition of Iceberg Rights, 19 Mich. J. Int'l L. 277 (1997).*

For a discussion of issues relating to trade associations and marketing of water, see *Water Quality Ass'n v. City of Escondido, 61 Cal. Rptr. 2d 878 (1997).*

In *Scheufler v. General Host Corp., 126 F.3d 1261 (10th Cir. 1997),* the court held the lack of an appropriation right in the aquifer did not preclude recovery for pollution to the aquifer underlying plaintiffs' property which prevented them from raising irrigated crops on their land; *D.E. Rice v. Harken Exploration Company, 250 F.3d 264 (5th Cir. 2001).*

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CHAPTER 50 WATER RIGHTS

6-50 Thompson on Real Property, Thomas Editions § 50.02

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§ 50.02 Traditional Structure of Water Rights Law.

§ 50.02(a) In General.

Because water is so vital to the development of society, all systems have developed a methodology for granting and securing rights to the use thereof. n50 As a result, it must be recognized that neither the notion of water rights, nor the particular right allocation methods, are unique to the United States. n51 Although there is considerable variation throughout both the United States and the world regarding the specific details of water rights and water right allocation, there is surprising structural similarity in how water is managed for water right purposes. n52 This is true even though each of the United States is considered to have considerable sovereignty regarding the selection of a water right regime. n53 Much of this commonality results from shared notions regarding the fundamental nature of the water right itself and similar views regarding the significance of particular types of water use.

§ 50.02(b) Structural Features of Water Rights.

Water law has two significant structural elements that merit consideration. First, water rights are considered to be real property rights and are protected as such. n54 The property nature of water rights secures their status vis a vis other rights within the legal system and provides a conceptual framework for dealing with the rights themselves.

Second, water rights are classified according to the kind of water to which they relate, the kind of use that is made of the water and where the water is found. This aspect of water rights is the primary source of labels for the various kinds of rights as well as for the various kinds of allocation systems. This dimension of water right structure is discussed in this section. n55

COMPUTER-ASSISTED RESEARCH

LEXIS: water w/2 right! w/15 real w/1 property water w/2 right! w/15 classif!

§ 50.02(c) Historical Development of the Classification Structure.

Water has had significant social value from time immemorial. It has been used to sustain life, for transportation, for

power generation and manufacturing. Land settlement patterns have been influenced by water availability and population centers have historically been located near water. Societal control over access to water has also been influenced by the location of water. Where water supplies were abundant and demands were few, there seems to have been little need for formal regimes to govern the use of water. n56 On the other hand, where water was scarce and there has been significant competition between users, public intervention into the allocation of the water early proved to be necessary in order to preserve public peace and prevent the forcible taking by one of water that was claimed by another. In most jurisdictions, the most serious concerns were largely the same: how to keep the waterways accessible for transportation and available for commercial use, n57 and how to assure that those who depended upon the water for life supporting purposes had adequate water.

Earliest efforts to influence allocation of access to water seem to have been tied to particular sources of water, and to vary depending on the particular nature of the use of the water. n58 Life-sustaining uses seem to have always received the highest priority, and waterbodies and particular sources of water that were regarded as having the highest social utility seem to have been considered the most imbued with the public interest and within the scope of public authority. n59 This historic "source and use" approach to allocation has engendered considerable structural similarity among allocation systems.

Further, since neither water supplies nor the demand for water have remained constant over time in any jurisdiction, changes have occurred to adapt the formal systems to existing situations and need, usually in order to deal with the most pressing problems of allocation. As systems have changed, there has been an identifiable measure of borrowing from other systems. This has generated a considerable degree of similarity regarding fundamental concerns such as how access to water might be secured, what the water may legitimately be used for, and how disputes over water should be resolved.

As a result, although there is much diversity between jurisdictions, there is also much similarity, especially with respect to the basic structure of water right allocation. n60

COMPUTER-ASSISTED RESEARCH

LEXIS: water w/15 source! w/1 use!

§ 50.02(d) Traditional Classification Scheme: Distinctions Based Upon the Nature of the Water Use (Consumptive and Non-Consumptive Uses).

The allocation of water rights, historically, has depended upon such factors as the kind of use to be made of the water, the nature of the source from which the water was to be taken, and where the water was located. All of these factors interplay to create a very interesting structural matrix. In the United States, it is common, though misleading, n61 to characterize a water right allocation system as either riparian n62 or appropriative n63 in nature, based on how consumptive use rights are allocated with respect to confined surface waters. Such labels do not reflect the true variety in allocation systems present in the various jurisdictions of this country.

The primary distinction the law of water rights makes is between:

(1) rights which represent the power and authority to withdraw the water from the system and to consume or dispose of it, and

(2) rights which merely authorize the use of the water in place.

This distinction classifies rights based upon the nature of water use involved. The critical factors involved in this distinction are the nature and purpose of the ultimate use to which the water is put and the impact of that use of the

water on the quantity or quality of the water available thereafter for others to use from the same source of supply. Generally, if the use of the water "consumes" the water and thereby reduces the quantity or quality of the water available to others, the use is considered *consumptive* in nature. If quality or quantity is not reduced or otherwise adversely affected, the use is considered *non-consumptive*. In common popular parlance, the term "water rights" has typically, but misleadingly, been applied only to rights to make consumptive use of the water.

Consumptive uses are those which are considered to reduce the quantity or quality of the water that is available for others to use after the particular use is made. These uses typically physically remove the water from the water source and include such uses as irrigation, n64 manufacturing and industrial use, n65 municipal water supplies, n66 and possible recreational use n67 and power generation. n68

Non-consumptive use rights involve uses in which neither the quantity nor quality of the water is greatly affected by the use. These uses do not require that the water be removed from the source, nor is it consumed but, rather, the water is used for such purposes as recreational use, commerce and transportation, minimum stream flow maintenance, and even aesthetics. Allocation rules regarding non-consumptive uses typically differ markedly from those relating to the extraction and use of water for consumptive use purposes. n69

COMPUTER-ASSISTED RESEARCH

LEXIS: consumptive w/1 use! w/15 water! non-consumptive w/1 use! w/15 water!

§ 50.02(e) Traditional Classification Scheme: Distinctions Based Upon the Location of the Water.

This distinction is based on whether the waters to which the water right attaches are considered to be on the surface of the ground, called *surface waters*, or beneath the surface of the ground, called *groundwaters*. This distinction between surface and groundwater supplies appears to have developed from the fact that surface supplies were usually the first and the easiest sources of water to be exploited, and reflects a practical approach to the problem of water right allocation in which determinations relating to water availability were often largely made on the basis of a visual inspection of the water supply source. n70

Generally, the water must be said to be occurring "*naturally*" on the surface or in the ground before it becomes the object of the law of water rights. n71 "*Sewage effluent*" has been held not to be "*water*" for purposes of water right allocation statutes. n72 In Hoover v. Pierce County, n73 the court held that where the municipality had built a road and as a result thereof, water was diverted which destroyed an individual's property, a taking of such property occurred. In this case, diffused water was defined to include water produced by rain, melting snow and springs.

COMPUTER-ASSISTED RESEARCH

LEXIS: surface w/1 water! w/15 right! ground w/1 water! w/15 right!

§ 50.02(f) Traditional Classification Scheme: Surface Waters.

States east of the Mississippi River are commonly called *riparian* states, n74 because they have generally elected to allocate surface water rights based upon the ownership of land that borders on, or is riparian to, the water supply. As discussed below, there are significant internal variations between these states. n75

Most states west of the Mississippi River are generally described as *appropriative* (or prior appropriation) states. n76 Here, entitlement to the water is based on the notion of diverting the water from the surface water source, or appropriating it, and applying that water to a beneficial use. n77

The remaining Western states, and the state of Mississippi, water rights are said to be allocated according to a combination of riparian and appropriative. These states n78 are sometimes called "*hybrid*" or *mixed* systems. n79 In Louisiana, the allocation of water is based on the Civil Code which in turn was developed on the basis of the Cuban Civil Code which was, in turn, patterned after the French model. n80 In Hawaii, water rights are commonly considered to be allocated on the basis of a combination of principles derived from riparian water law n81 and ancient Hawaiian legal principles. n82

COMPUTER-ASSISTED RESEARCH

LEXIS: riparian w/2 state! w/15 water w/2 right!
appropriative w/2 state! w/15 water w/2 right!
prior w/1 appropriation w/2 state! w/15 water w/2 right!
hybrid or mixed w/2 state! or system! w/15 water! w/2 right!

§ 50.02(g) Traditional Classification Scheme: Groundwaters.

Water under the surface of the ground has been more difficult for the legal system to deal with than water on the surface, largely because of the difficulty of accurately determining available quantities of water, directions of water flow, and rates of movement. As a matter of fact, it was earlier presumed that groundwater was not practicably usable for consumptive use purposes. As a result, there was a strong feeling that groundwater could be owned by the owner of the land as part of the fee despite the nearly universal view of the law that water in place was not susceptible to private ownership. n83 As the demand for water grew over time, it was discovered that surface supplies alone could not supply enough water to satisfy the total demand, and that the use of groundwater was necessary as an alternative source. Rules were therefore developed to govern competition for this resource.

There is much more variation regarding allocation of water rights in groundwater. Here, jurisdictions do not conveniently divide among Eastern and Western states but rather are scattered among a variety of allocation doctrines or approaches. These include the absolute ownership doctrine, the American or reasonable use rule, the doctrine of correlative rights, the *Restatement (Second) of Torts* rule, and those which have adopted separate groundwater codes.

The earliest rule considered the water beneath the surface of the land to be part of the land itself and, therefore, within the ownership package of the landowner. n84 Under this rule, called the *absolute ownership rule*, one could extract as much water as wanted without any liability to others. n85

The *American* or *reasonable use rule* modifies the absolute ownership doctrine to impose limits on the amount of water extracted, the use to which the water is put and the location of the ultimate water use. n86 Otherwise, the doctrine considered the water to be part of the land and automatically vested in the landowner.

The *correlative rights* doctrine posits that all water users located over a common pool or source share in that pool on a correlative basis. n87 That is, each user's rights are affected by and dependent upon every other user's rights and must be adjusted accordingly.

In some jurisdictions, the user's rights will be judged on the basis of their reasonableness, as measured by the *Restatement (Second) of Torts*. n88 In these jurisdictions, tort concepts are used to quantify the water right.

It is common for the same rules that apply to confined surface waters to be applied to *confined underground waters*. n89 In these jurisdictions, there may actually be two separate groundwater right allocation schemes in place -- one for confined groundwaters and one for percolating groundwaters.

Some jurisdictions have adopted *specialized codes* which apply specifically to groundwater. n90 These are often based

on the appropriative model of water right allocation and may require a governmental permit in order to use the water.

Colorado has several different classes of groundwaters: groundwater which is tributary to a stream, groundwater that is not tributary to a stream which is identified as "designated groundwater" and groundwater that is not tributary to a stream which is identified as simply "non-tributary groundwater." n91 "Designated groundwater" is water that is in basins designated by the Colorado Groundwater Commission. "Non-tributary groundwater" is water not tributary to a stream that is outside such basins. n92 "Tributary groundwater" is water that will, within 100 years, deplete the flow of a natural stream at a rate greater than one-tenth of one percent of the annual rate of withdrawal. n93

Finally, a few systems no longer make a distinction between surface and groundwaters and invoke the same principles and doctrines to address the allocation of water rights regardless of the location of the water. These jurisdictions are generally referred to as *unified* jurisdictions. n94

COMPUTER-ASSISTED RESEARCH

LEXIS: absolute w/1 ownership w/1 rule w/15 water! w/1 right! american or reasonable w/1 use w/1 rule w/15 water! w/1 right! correlative w/1 right! w/15 water! w/1 right! confined or percolating w/1 underground w/1 water! w/15 rule! unified w/1 jurisdiction! w/15 water! w/1 right!

§ 50.02(h) Traditional Classification Scheme: Distinctions Based on the Status of the Waterbody.

Although most systems receive their popular moniker based upon how rights are granted in surface waters, it matters a great deal to the law whether the water involved is confined or dispersed on the surface or through the ground. In most instances, physical conditions associated with the water, such as where it is located or how it is found in relation to the land, determine the particular classification. n95

§ 50.02(i) Traditional Classification Scheme: Confined Surface Waters.

Confined surface waters include rivers, streams, ponds, lakes, n96 swamps and so forth. The primary determinant of such a classification is whether the waterbody may be said to be a "watercourse." n97 This is usually established by the presence of physical features, such as identifiable banks or beds, which confine the water in a recurring way to a discernible location. The presence of such banks or beds is often determined by physical evidence n98 or by vegetation n99 which grows only in water covered locations. In an early case, streams were defined to consist of:

> Water flowing in a definite channel, having a bed and sides or banks, and discharging itself into some other stream or body of water. The flow of water need not be constant, but must be more than mere surface drainage occasioned by extraordinary causes; there must be substantial indications of a stream, which is ordinarily a moving body of water. n100

The objective of the law appears to be to distinguish confined waters from diffused or unconfined waters. This is because diffused waters have historically been considered unreliable sources of water for consumptive use purposes and therefore not subject to consumptive use water right allocation rules. n101

COMPUTER-ASSISTED RESEARCH

LEXIS: confined w/1 surface w/1 water!

§ 50.02(j) Traditional Classification Scheme: Diffused Surface Water.

Diffused water is generally defined to include unconfined water on the surface of the land. n102 This category includes rainfall runoff until it either seeps into the ground or runs into a confined waterbody. Waters of this type have generally

not been the object of consumptive use water rights. n103

COMPUTER-ASSISTED RESEARCH

LEXIS: diffused w/1 surface w/1 water!

§ 50.02(k) Traditional Classification Scheme: Underground Streams.

American jurisdictions early presumed that underground water occurred in underground streams. n104 Although this presumption has since generally been reversed, n105 because of what has been learned about groundwater, it is known that underground streams do in fact exist. n106 The presence of underground streams is typically established through evidence of the presence of beds and banks, a well-defined and distinct channel, and a current of water in much the same fashion as is required for surface streams. n107

If it is established that a body of water exists as an underground lake or stream, it is common for the confined surface water rules to be invoked to govern the appropriation of water for consumptive use purposes. n108

COMPUTER-ASSISTED RESEARCH

LEXIS: underground w/1 stream!

§ 50.02(l) Traditional Classification Scheme: Percolating Groundwater.

It is now understood that most water which occurs in the ground is dispersed through the soil and is considered to be percolating water. This means that it oozes and flows though the soil but without a defined channel. This kind of water is much like diffused surface water except that it represents the major source of groundwater used for consumptive use purposes. n109

COMPUTER-ASSISTED RESEARCH

LEXIS: percolating w/1 ground w/1 water!

§ 50.02(m) Special Problem Waters.

There are several kinds of waterbodies that have been particularly problematic for jurisdictions to deal with, within the traditional classification-based structure. These include artificially created waterbodies, flood and overflow waters, springs, intermittent streams and once-used waters that are being returned to the watercourse as drainage. As a result, these waterbodies have sometimes received special attention in some jurisdictions.

§ 50.02(n) Special Problem Waters: Artificial Waterbodies.

According to early English common law, and hence the rule in most American jurisdictions, only waters found in natural waterbodies were considered to be available for appropriation or use. n110 Therefore, an impoundment of diffused surface water was not, and typically is not generally considered to be available for appropriation for consumptive use purposes by someone other than the landowner upon which the water is captured. n111 Likewise, artificial waterbodies are generally not deemed susceptible of public non-consumptive use rights. n112 As a result, where a dam is built on a natural stream, and thereby creates a lake capable of being used by motorboats, the law will generally not recognize an automatic right in the public to make that use of the water without permission of the owner of the lake. n113

An exception to the general rule exists with respect to consumptive use rights in certain publicly created artificial

waterbodies. For example, an individual may acquire the right to appropriate water for consumptive use purposes in waters impounded in certain federally constructed reservoirs. n114

An exception to the general rule is also sometimes recognized where the watercourse has been in existence or maintained for a sufficiently long period that it may be considered a natural watercourse for purposes of recognizing these rights. n115 This seems particularly the case where public use has been permitted for a long time, even though the lake would otherwise be private. In such cases, courts have sometimes also invoked the doctrine of estoppel to protect the public access rights. n116

COMPUTER-ASSISTED RESEARCH

LEXIS: artificial w/1 waterbod!

§ 50.02(o) Special Problem Waters: Flood Waters.

Flood waters are generally considered to be part of surface watercourse waters even though they may extend beyond the normal boundaries of the lake, river or stream, provided they are physically connected to the stream. n117 Upon separation from the stream, flood waters tend to be considered to be diffused surface waters even though they still may actually be within the physical boundaries of the natural flood plain. n118

Because flood waters are not predictable, they are not normally considered susceptible to consumptive use rights. On the other hand, where the water is simply the result of an annual, predictable event, such as spring snow-melt, the temporary, but regularly occurring, increase in stream capacity may be considered part of the annual stream yield for consumptive use purposes and, therefore, may be appropriated or claimed by individual users. At least one jurisdiction has recognized a so-called meadow right in which the claimant was considered to have rights in the spring overflow water in order to maintain pasture for livestock. n119

COMPUTER-ASSISTED RESEARCH

LEXIS: flood w/1 water!

§ 50.02(p) Special Problem Waters: Springs.

The law has had a difficult time classifying springs because of their intimate connection with both surface and groundwater. The recognition of consumptive use in the out-flow water from springs may preclude someone else from asserting rights to the groundwater that eventually surfaces at the spring. Conversely, granting rights to the groundwater that supplies the spring can actually cause the spring to dry up, which may jeopardize rights of others in the streams or lakes into which the spring flows. In some jurisdictions, the law has responded to this difficulty by focusing on the kind of groundwater supply that feeds the spring. Where the spring is fed by an underground stream, the law in these jurisdictions has tended to apply the surface rules that apply to streams. n120 Where the source is percolating groundwater, these jurisdictions tend to apply the groundwater rules applicable to that type of water. n121 In some jurisdictions, the rule appears to be that if the spring dissipates before reaching a surface waterbody, it may be considered diffused surface water and dealt with accordingly. n122

COMPUTER-ASSISTED RESEARCH

LEXIS: spring! w/50 water! w/2 law! or right!

§ 50.02(q) Special Problem Waters: Return Flow Waters.

Return flow waters may be defined as waters that have been removed from the source of supply for consumptive use purposes but have not been completely consumed. The unused waters are then returned to the stream. Return flow water becomes a classification problem for several reasons. First, the property right nature of water rights is such that the water is considered to be the personal property of the user as long as it is in the possession of the appropriator. n123 As such, the user is generally considered to have the right to use and even re-use the water so long as the use satisfies the reasonable or beneficial use requirements of the jurisdiction and is not released from the user's possession. As long as the water is within the dominion of the user, it will typically not be considered available for further appropriation. Once it leaves the possession of the user, however, it may be considered abandoned and thereby returned to the supply for further appropriation. Although waters of this type are undoubtedly very valuable to subsequent users, who might otherwise not have any water available to them, and it might be considered wasteful in a particular jurisdiction not to permit others to use these waters, their availability for subsequent appropriation is fraught with uncertainty, since the law will not compel the user to abandon it for others to use. n124 Indeed, it may be considered wasteful in some jurisdictions to abandon the water and there may be unstated pressures in the system which actually discourage those uses which may generate return flow waters from releasing the water, once the initial use has ended. On the other hand, if the water actually is abandoned and subsequently used, the new or later user's interest in the water ought to be fairly protected. This creates the classification problem: how should these waters be treated so that the rights of subsequent users can be protected without interfering with rights of present or prior users?

Second, return flow waters are not always returned to the same place or even the same watershed from which they were extracted. This undoubtedly distorts the available supply in both the waterbody to which the waters are returned and downstream in the watershed from which the waters were removed. This may mislead potential users into concluding that there is more water available for use than may actually be present in the system.

Third, return flow waters raise very difficult issues regarding the transferability of water rights. A transfer of the right to a user that is geographically remote to the place of first use undoubtedly will cause any return flow waters to be discharged into a different watershed. Similarly, even though the right is not transferred far, the new point of extraction or return for such waters by the transferee may be in an entirely different location even if it is still within the same watershed. In either case, although there may still be considerable return flow waters, they may be beyond the reach of those who may have come to depend on them.

Finally, return flow waters may return to the stream as diffused water, which may not be considered an object of appropriation rights at all until they actually reach a stream. Where such waters must cross land, they will be subject to jurisdictional rules regarding diffused waters, n125 which may make it difficult to protect these waters for eventual future appropriation. Someone who may be interposed between the point of use and the point of return to the stream may wish to cast the water in an entirely different direction and may have the right to do so. Such waters may also be captured as diffused waters in surface impoundments such as stock ponds, and may never reach the stream at all. n126

There has been little consistency in how these waters are dealt with. Some riparian jurisdictions have dealt with this problem indirectly by imposing place of use restrictions on the water user which are designed to keep the water within the watershed of origin. n127 Some jurisdictions have imposed similar restrictions on groundwater, which after use, may end up in a surface waterbody. n128 Appropriative jurisdictions have typically not limited the place of use. Place of use restrictions, at best, only insure that any water returned after use will most likely end up in the same source of supply, and do not focus on the impact of such return on other potential users that it was originally extracted from.

Some jurisdictions have adopted procedures that require consideration of the impact on return flow users before a transfer of the water right will be approved. n129 In these jurisdictions, the subsequent user has a type of protected right but because the new user typically cannot compel the original user to release water, the right is inherently inferior to that of the first user. Further, most jurisdictions predicate the right to transfer upon the absence of an adverse impact on junior downstream users. n130 No consideration is generally required regarding the effect of the transfer on potential new users in a potentially different watershed.

COMPUTER-ASSISTED RESEARCH

LEXIS: return w/1 flow w/1 water!

§ 50.02(r) Special Problem Waters: Foreign and Imported Waters.

Foreign or imported waters are generally considered to be waters transported from one watershed to another by artificial means. Since these waters are not natural to their eventual place of use, their presence may distort the perceptions of the traditional system regarding the quantity of water available for use. Further, since the waters may be stored prior to their use, they may be commingled with the natural waters in the area. Since water is fungible, it may be difficult to segregate or separately identify the imported waters for purposes of recognizing rights therein. As a result, foreign and imported waters have posed some interesting problems for water right allocation systems.

Some riparian jurisdictions have dealt with the issue by formally seeking to discourage such transfers. n131 In these jurisdictions, the mere movement or use of waters beyond their natural watershed is deemed unreasonable per se and therefore forbidden. In other jurisdictions, where the transportation of the water is permitted, the importer will be considered to have full rights in it on the theory that the water is personal property as a result of having been reduced to possession. n132

Most appropriative jurisdictions permit movement of water from one place to another, though permission may be required where the movement may affect existing water right holders. n133 Such transportation may generally be done in natural or artificial watercourses, n134 even though the water is commingled with other water in those watercourses. Despite the general view that, once water is released from the possession of the water right holder after it has been captured, it becomes available for further appropriation by others, this transported water may still be deemed to be within the control of the appropriator and neither riparian landowners nor other appropriators may secure rights to use the water. n135

The storage of foreign or imported water is also problematic where it is commingled with other waters, either on the surface or in the ground. Most jurisdictions generally consider the importer to have full rights to the water, including the right to re-use the water. n136

COMPUTER-ASSISTED RESEARCH

LEXIS: foreign or imported w/1 water!

§ 50.02(s) Water Right Administration Within the Traditional Framework.

The above basic water right allocation structure was created in response to particular problems and largely evolved at a time when central governments were relatively weak. As a consequence, the government played a relatively minor role with respect to approval of secure water rights as well as right enforcement. Rather, the various early systems created by the several states depended on individual efforts both to secure water rights and to police water right problems. In such a framework, it was necessary to depend upon easily ascertainable (and usually visual) criteria in order to ascertain who had legitimate water rights claims, as well as to calculate the amount of water available for use and to determine the extent of demand likely to be made of the particular source of supply. n137

Early allocation systems relied on the number of individuals owning land abutting the water supply, or upon the existence of physical diversionary structures by which water could be diverted out of the source of supply, as the primary means of controlling the number of water users. These factors were thought to readily reveal whether there were too many competitors for the same source of supply. Significantly, these factors were matters that were within the

"control" or "expertise" of anyone who was interested in using the water. Thus, the system could function without governmental intervention simply by requiring individual water users to satisfy the conditions that would reveal their presence to others who could then act accordingly. In riparian systems, the required act consisted of the acquisition of land that bordered on the source of supply. n138 In appropriative systems, the water right claimant must make a diversion of the water which was then applied to a beneficial use. n139

In such a system, anyone who wished to acquire a water right had only to ascertain, based on the presence of existing water users, whether water was available and then satisfy the minimal criteria of either purchasing land that adjoined the water source or of constructing a diversionary structure that would physically remove the water from the source.

After the right was secured, it was generally the responsibility of the individual water right claimant to assert the right against the alleged cause of interference. This is because the matter of interference with water rights by another was typically left to the individual. In some systems, interference with a water right was considered entirely a private matter, and it was left to the individual to assert the right against the alleged trespasser through legal action directed against that individual. n140 Even where the state has been involved in the policing of water right use, complaints still likely must be brought to the state's attention by the affected individual.

As noted below, n141 governments play a much more active role in the administration of water right regimes than they did early in the history of the nation. Although the traditional structure is largely intact, there has been a distinct movement toward requiring governmental approval of claimed water rights and more governmental authority to police and adjust conflicts arising from competing claims to the water. The rigidity of the structure, however, may limit government somewhat in its ability to deal with the full range of social problems and issues that arise in the course of dealing with water right disputes. At some point, it may be necessary to restructure the water right allocation regimes in order to give governmental authorities necessary flexibility to conform the water right systems of the various jurisdictions to the needs of modern society.

In some states a permit may need to be secured to authorize the recapture and reuse of the water. n142

COMPUTER-ASSISTED RESEARCH

LEXIS: water! w/1 right! w/5 administrat!

§ 50.02(t) Problems Posed by the Traditional Classification System.

It may be said that the compartmentalization of traditional water right structure ignores the interrelationship of water found in nature in the hydrologic cycle. Each of the separate categories in the law of water rights has historically been perceived as virtually independent of the others. The law has then developed quite different rules for each category of uses or sources. This has resulted in rules for uses of waters of one compartment which are incompatible with rules relating to another. Often these rules are in conflict. For example, the law relating to appropriation and consumption of water is considered to be independent of the law relating to rights to make a non-consumptive use of the water. Similarly, the issue of liability for acts associated with misuse of water is considered unrelated to the issues of water consumption. As a result, consumptive use rights generally allow water to be removed from the water source without regard to rights of non-consumptive users. If the water is removed for irrigation, it will no longer be present in the stream for boaters. Neither set of rules appears to recognize the existence of the other. Similarly, if someone lawfully blocks a drainway, this may deprive someone lower in the drainage pattern who depends upon the water to fill a stock pond. However, the law of diffused water does not recognize that drainage water may have significant value for consumptive use purposes.

The most serious consequence of this structural incongruence is perhaps the lack of flexibility in the system to deal with changes occasioned by the development of a more modern society. Rights created and recognized at a time when water

was presumed to be abundant or from sources that were thought to have little social utility beyond that of consumptive use water sources or to have no connection with other waters in the system may be protected by the law in ways which make it difficult for the system to grant water to more recent users for more pressing or needful purposes.

A second serious consequence with which the legal system must contend, as it deals with water right matters within the traditional classification scheme, is that the law will inherently lag behind what is known about the resource. The format of the system itself makes it difficult to manage the resource in accordance with our more accurate understanding of water simply because of the presence of a substantial number of rights which were created, and which the law protects as valuable property rights, pursuant to what may be described as a somewhat artificial view of the resource.

Although property rights have not been discussed in this section, the fact that water rights are considered property has also had a couple of adverse consequences. First, rights that have been acquired years ago may lock in undesirable water use patterns. For example, the early right holder may not be able to change the particular use to which the water is dedicated without risk of losing priority to later right holders. In order to preserve the priority status, the use remains even though it may not be as desirable now as it was when the use began. This is an even more serious problem where the use is wasteful or not very efficient. It may actually deprive others of an opportunity to have water.

Second, the property right structure makes it difficult for the system to shift water from privately valuable uses to socially significant, but perhaps less economically valuable, uses without a high public cost. It may be necessary to condemn or purchase the right from the early right holder in order to terminate the earlier use. For example, in some western jurisdictions, cities have had to purchase farmland in order to secure water rights with an early priority that will assure the cities of an expanded but dependable supply. This has the desired consequence of increasing the public water supply but has the adverse consequence of forcing the agricultural landowner to idle the land. n143

A major problem with the traditional classification scheme is that it addresses primarily the matter of securing a right of access to the water in its natural state. Once the water right is exercised, the water then tends to be treated as an article of commerce and as personal property rather than real property. In other words, the domain of the water right structure tends to end upon exercise of the water right and leaves to other approaches the task of dealing with the consequences. For example, this has subjected state right allocation schemes to potential federal oversight under the auspices of the commerce clause. n144

COMPUTER-ASSISTED RESEARCH

LEXIS: classif! or compartmentaliz! or categor! w/15 w/1 right! w/5 problem!

§ 50.02(u) Alternatives to Traditional Structure.

Although it is difficult to separate problems associated with the fact that water rights are considered to be property rights from problems associated with the classification structure of water rights, a number of jurisdictions have struggled with the difficulty of adapting water right structure to the needs of modern society. Efforts have been made to moderate the rigidity of the traditional classification structure, as well as to avoid the more problematic consequences of water rights as property rights.

Several jurisdictions n145 have abandoned the requirement that water on the surface be treated differently from water under the ground. n146 These jurisdictions are called unified jurisdictions, n147 and include the states of Florida, Iowa, Kentucky and Minnesota. n148 The primary advantage of this approach is that the same allocation rules may be used regardless of the source of water. It should be noted that even these jurisdictions still distinguish between consumptive and non-consumptive uses and have a separate legal regime for diffused surface water.

Some jurisdictions have sought to moderate the rigidity of treating water rights as property rights by creating alternative

means of securing the right. For example, a public entity may acquire a water right and then lease a portion of its right to another water user. n149 Although leases still involve property right concepts, there is an opportunity in the lease to condition the use of the water in ways that might not otherwise be permitted. Further, the lease may be used to facilitate water transfers where, as in riparian systems, the right to transfer is otherwise severely limited.

Contracts, of course, do not involve property rights. Historically, users of water supplied by a public water supply system did not individually acquire any property rights in the water. Rather, they entered into a contract with the supplier and received the water on that basis. There has been some experimentation with the use of contracts as a basis of further water distribution. n150 Contracting for water has the advantage of reducing the number of property right based water rights with which the public authority must deal and therefore gives the system greater flexibility in dealing with changing needs. On the other hand, contract rights may seem a little less secure to the right holder and many may be reluctant to invest in the development of the resource unless there is the kind of assurance of future access to the water that is not as likely under a contract as under a vested property right.

COMPUTER-ASSISTED RESEARCH

LEXIS: unified w/1 jurisdiction! w/15 water! w/1 right! alternative w/1 method! or mean! w/15 water! w/1 right! contract! w/15 water! w/1 right! or use!

FOOTNOTES:
(n1)Footnote 50. *See* §§ 50.03, 50.04(b), *infra*.

(n2)Footnote 51. *See, e.g.*, Ludwik Teclaff, Abstraction and Use of Water: A Comparison of Legal Regimes (United Nations, 1972). Riparian and appropriative regimes, for example, are found in England, Europe, eastern and southern Africa and in Australia.

(n3)Footnote 52. *Id.*

See also Scanlan, *The International Law Commission's First Ten Draft Articles on the Law of Non-Navigable Uses of International Watercourses: Do They Adequately Address All the Major Issues of Water Usage in the Middle East?, 19 Fordham Int'l L.J. 2180 (1996);* Benvenisti, *Collective Action in the Utilization of Shared Freshwater: The Challenges of International Water Resources Law, 90 Am. J. Int'l. L. 384 (1996);* Geon, *A Right to Ice? The Application of International and National Water Laws to the Acquisition of Iceberg Rights, 19 Mich. J. Int'l L. 277 (1997).*

(n4)Footnote 53. *Kansas v. Colorado, 206 U.S. 46, 94 (1907). See also California-Oregon Power Co. v. Beaver Portland Cement Co., 295 U.S. 142 (1935);* where the Court, citing *Kansas v. Colorado, supra,* held that the states had the power to legislate with respect to waters and water rights:

> as they deemed wise in the public interest ... with the right in each to determine for itself to what extent the rule of appropriation or the common law rule in respect of riparian rights should obtain. For since Congress cannot enforce either rule upon any state ... the full power of choice must remain with the state.

Kanazaswa, Mark T., *Efficiency in Western Water Law: The Development of the California Doctrine, 1850-1911, 27 J. Legal Stud. 159 (1998).*

Mineral County v. State Department of Conservation and Natural Resources, 20 P.3d 800 (Nev. 2001).

(n5)Footnote 54. *See* discussion at § 50.03, *infra*.

The law of water rights, and particularly the prior appropriation doctrine, has been criticized as being inherently flawed for its failure to adequately address environmental issues. *See* Charles Wilkinson, *Aldo Leopold and Western Water Law: Thinking Perpendicular to the Prior Appropriation Doctrine,* 24 Land and Water L. Rev. 1 (1989); John Leshy, *The Prior Appropriation Doctrine of Water Law in the West: An Emperor with Few Clothes,* 19 J. of the West 5 (1990). The difficulty is probably not in the narrowness of the law of water rights but in the fact that the law of water rights is grounded in the law of property with its attendant recognition of rights to which the law assigns stability, endurance and dimension.

Klump v. United States, 50 Fed. Cl. 268 (2001); West Maricopa Combine, Inc. v. Arizona Department of Water Resources, 26 P.3d 1171 (Az. App. 2001); Mineral County v. State Department of Conservation and Natural Resources, 20 P.3d 800 (Nev. 2001); Hsieh v. State of Washington Dep't of Ecology, 104 Wash. App. 1002 (2001).

See also J. Peck, *Assessing the Quality of a Water Right,* 70 May J. Kan. B. A. 26 (2001).

(n6)Footnote 55. For further discussion, *see* John C. Peck, *The Kansas Water Appropriation Act: A Fifty-Year Perspective, 43 U. Kan. L. Rev. 735 (July 1995);* Christine A. Klein, *The Constitutional Mythology of Western Water Law, 14 Va. Envtl. L.J. 13 (Winter 1995);* Ray Jay Davis, *Water, Water Everywhere: Two New Model Water Codes, 9 Prob. & Prop. 8* (Sept.-Oct. 1995).

See also Mossman, *Whiskey Is for Drinkin' but Water Is for Fightin' About: A First-hand Account of Nebraska's Integrated Management of Ground and Surface Water Debate and the Passage of L.B. 108, 30 Creighton L. Rev. 67 (1996);* Carpenter, *Water for Growing Communities: Refining Tradition in the Pacific Northwest, 27 Envtl. L. 127 (1997);* Stephenson, *Groundwater Management in Nebraska: Governing the Commons Through Local Resource Districts,* 36 Nat. Resources J. 521 (1996).

(n7)Footnote 56. Julian Juergensmeyer and James Wadley, Water Rights in East Africa (unpublished manuscript 1972, on file with author).

(n8)Footnote 57. *See, e.g.*, Compilation and Summarization of the Massachusetts General Laws, Special Laws, Pertinent Court Decisions, etc., Relating to Water and Water Rights, 23 (Mass. Water Resources Comm. 1970):

> At common law a riparian [owner], if he owned both banks of a stream, or with the consent, however obtained if lawful, of the opposite owner if he owned but one side, always had a right to erect a dam and create a pond or head of water for mill purposes. If by so doing he flowed lands of others above or interfered with other similar dams, his dam might very well be adjudged a nuisance and subject to abatement or damages or both... .
>
> Early in the life of the Colony it became apparent that mills for the grinding of grains and other purposes were essential to the very existence of the communities. It was also apparent that under existing law, many actions and law suits were harassing the millers. This commanded the attention of the colony legislature and in 1714 (Chap. 101) an Act was passed '... for upholding and regulating of mills' which amended the common law so as to permit the flowing of 'some small quantity of lands or meadows' of others... .

(n9)Footnote 58. *See, e.g.*, discussion of Roman law at § 50.04(b), *infra*.

For a discussion of the origins, history and evolution of prior appropriation doctrines, *see* Charles Wilkinson, *Prior Appropriation 1849-1991, 21 Envtl. L. 3* Part I, p. v. (1991). For a discussion of the property law origins of water rights, *see generally* Eric Freyvogle, *Lux v. Hagin, The Common Law Burden of Modern Water Law, 57 U. Colo. L. Rev. 485 (1986).*

(n10)Footnote 59. *See, e.g.*, § 2, Colony Ordinance of 1641-47 (Mass.):

Every inhabitant who is a householder shall have free fishing and fowling in any great ponds, bays, coves and rivers, so far as the sea ebbs and flows within the precincts of the town where they dwell unless the freemen of the same town, or general court have otherwise appropriated them.

Kanazaswa, Mark T., *Efficiency in Western Water Law: The Development of the California Doctrine, 1850-1911, 27 J. Legal Stud. 159 (1998).*

> Provided that no town shall appropriate to any particular person or persons, any great pond, containing more than ten acres of land, and that no man shall come upon another's property without their leave, otherwise as hereafter expressed.

(n11)Footnote 60. For further discussion, *see* John C. Peck, *The Kansas Water Appropriation Act: A Fifty-Year Perspective, 43 U. Kan. L. Rev. 735 (July 1995);* Christine A. Klein, *The Constitutional Mythology of Western Water Law, 14 Va. Envtl. L.J. 13 (Winter 1995);* Ray Jay Davis, *Water, Water Everywhere: Two New Model Water Codes, 9 Prob. & Prop. 8* (Sept.-Oct. 1995).

Mossman, *Whiskey Is for Drinkin' but Water Is for Fightin' About: A First-hand Account of Nebraska's Integrated Management of Ground and Surface Water Debate and the Passage of L.B. 108, 30 Creighton L. Rev. 67 (1996);* Carpenter, *Water for Growing Communities: Refining Tradition in the Pacific Northwest, 27 Envtl. L. 127 (1997);* Stephenson, *Groundwater Management in Nebraska: Governing the Commons Through Local Resource Districts,* 36 Nat. Resources J. 521 (1996).

(n12)Footnote 61. The reason the label is misleading is that it tends to identify the jurisdiction on the basis of the allocation regime that pertains only to consumptive use rights in confined surface waters.

(n13)Footnote 62. For further detailed discussion, *see* § 50.08, *infra*.

(n14)Footnote 63. For further discussion, *see* § 50.09, *infra*.

See Nebraska v. Wyoming, 122 S. Ct. 420 (2001); Concerning the Application for Water Rights of the Consolidated Mutual Water Company, Farmers Reservoir and Irrigation Co., v. Consolidated Mutual Water Company, 33 P.3d 799 (Colo. 2001).

(n15)Footnote 64. *See Ulbricht v. Eufaula Water Co., 6 So. 78 (Ala. 1899).*

(n16)Footnote 65. *See Los Angeles County Flood Control Dist. v. Abbot, 76 P.2d 188 (1938).*

(n17)Footnote 66. *See, e.g., State ex rel. State Engineer v. Crides, 431 P.2d 45 (N.M. 1967).*

See Board of County Commissioners of the County of Arapahoe v. Crystal Creek Homeowners Association, 14 P.3d 325 (Colo. 2000); SRBA v. Potlach Corporation, 12 P.3d 1260 (Id. 2000).

(n18)Footnote 67. *Colorado River Water Conservation Dist. v. Colorado Water Conservation Bd., 594 P.2d 570 (Colo. 1979).*

(n19)Footnote 68. *See, e.g., Joerger v. Mt. Shasta Power Co., 7 P.2d 706 (Cal. 1932).*

(n20)Footnote 69. *See also* Josephson, *Katie John and Totemoff: The United States and Alaska Clash over the Reserved Rights Doctrine and Native Alaska Hunting and Fishing Rights -- the U.S. Supreme Court Passes on an*

Opportunity to Resolve the Subsistence Debate, 6 Dick. J. Envtl. L. & Pol'y 225 (1997); Powell, *Recent Application of the Reserved Rights Doctrine:* State of Alaska v. Babbitt, 25 Real Est. L.J. 308 (1997); Carpenter, *Water for Growing Communities: Refining Tradition in the Pacific Northwest, 27 Envtl. L. 127 (1997);* Stephenson, *Groundwater Management in Nebraska: Governing the Commons Through Local Resource Districts,* 36 Nat. Resources J. 521 (1996).

(n21)Footnote 70. *See also* Mossman, *Whiskey Is for Drinkin' but Water Is for Fightin' About: A First-hand Account of Nebraska's Integrated Management of Ground and Surface Water Debate and the Passage of L.B. 108, 30 Creighton L. Rev. 67 (1996);* Stephenson, *Groundwater Management in Nebraska: Governing the Commons Through Local Resource Districts,* 36 Nat. Resources J. 521 (1996).

See Postma v. Pollution Control Hearings. 11 P.3d 726 (Wash. 2000); In re the General Adjudication of All Rights to Use Water in the *Gila River, 9 P.3d 1069 (Az. 2000);* In the matter of *Water Use Permit Applications, No. 21309, 2000 Hawaii LEXIS 321* (Sept. 27, 2000).

See also United States v. Orr Ditch Co., 256 F.3d 935 (9th Cir. 2001); United States v. State Engineer, 27 P.3d 51 (Nev. 2001); Juergensmeier Farms, Inc, v. Kearney County, 2001 Neb. App. LEXIS 183 (Neb. App. 2001); Rothweiler v. Clark County, 29 P.3d 758 (Wash. App. 2001); Ripley v. Grays Harbor County, 27 P.3d 1197 (Wash. App. 2001); Ryan v. Harrison & Harrison Farms L.L.L. P., No. 00-395, 2001 Mont. LEXIS 192 (Mont. 2001); City of Dothan v. Eighty-Four West, Inc., Ala. Civ. App. LEXIS 600 (Ala. App. 2001); *Hagan v. Upper Republican Natural Resources District, 622 N.W. 2d 627 (Neb. 2001).*

See also H. Franz, R. Kropf, and M. Pearce, *An Insatiable Thirst: The Impact of Water Law on Sprawl in the West,* 15 SPG Nat. Resources & Env't 228 (2001); E. Shane, *Water Rights and Gila River III: The Winters Doctrine Goes Underground,* l4 *U. Denv. Water L. Rev. 397 (2001).*

(n22)Footnote 71. *See, e.g., Alburger v. Philadelphia Elec. Co., 535 A.2d 729 (Pa. 1988); In re* the Adjudication of Water Rights in the *Lower Guadalupe River, 730 S.W.2d 64 (Tex. App. 1987).*

(n23)Footnote 72. *See Arizona Pub. Serv. Co. v. Long, 773 P.2d 988 (Ariz. 1989).*

(n24)Footnote 73. *903 P.2d 464 (Wash. App. 1995).*

(n25)Footnote 74. These states include Alabama, Arkansas, Connecticut, Delaware, Florida, Georgia, Illinois, Indiana, Iowa, Kentucky, Maine, Maryland, Massachusetts, Michigan, Minnesota, Missouri, New Hampshire, New Jersey, New York, North Carolina, Ohio, Pennsylvania, Rhode Island, South Carolina, Tennessee, Vermont, Virginia, West Virginia and Wisconsin.

(n26)Footnote 75. *See* § 50.08, *infra*.

(n27)Footnote 76. These states include Alaska, Arizona, Colorado, Idaho, Kansas, Montana, Nevada, New Mexico, Utah and Wyoming.

(n28)Footnote 77. *See* § 50.09, *infra*.

(n29)Footnote 78. California, Mississippi, Nebraska, North Dakota, Oklahoma, Oregon, South Dakota, Texas and Washington.

(n30)Footnote 79. *See* § 50.10, *infra*.

Westlands Water District v. United States, 153 F. Supp. 2d 1133 (E.D. Cal. 2001).

(n31)Footnote 80. This allocation system is quite similar to the riparian approach. *See* La. Civ. Code Ann., arts. 657, 658. *See also Long v. Louisiana Creosoting Co., 69 So. 281 (La. 1915).*

(n32)Footnote 81. *See Reppun v. Board of Supply, 656 P.2d 57 (1982).*

(n33)Footnote 82. *See, e.g., Territory v. Gay, 31 Haw. 376 (1930), aff'd 52 F.2d 356 (9th Cir. 1930), cert. denied, 284 U.S. 677 (1931).*

For further discussion, *see* Joseph S. McLean, *Streamflow Policy in Vermont: Managing Conflicting Demands on the State's Waters, 19 Vt. L. Rev. 191 (Fall 1994).*

See also Mossman, *Whiskey Is for Drinkin' but Water Is for Fightin' About: A First-hand Account of Nebraska's Integrated Management of Ground and Surface Water Debate and the Passage of L.B. 108, 30 Creighton L. Rev. 67 (1996);* Carpenter, *Water for Growing Communities: Refining Tradition in the Pacific Northwest, 27 Envtl L. 127 (1997).*

See Richhart v. Gleason, 672 N.E.2d 1064 (Ohio 1996) (channel held to be a private ditch and not to constitute stream and therefore not available to the public).

(n34)Footnote 83. *See, e.g., Williams v. City of Wichita, 374 P.2d 578 (Kan. 1962).*

Chance v. BP Chems., Inc., 670 N.E.2d 985 (Ohio 1996) (property owners do not enjoy ownership of waters of state below their properties); *Ponderosa Ridge v. Banner County, 554 N.W.2d 151 (Neb. 1996)* (Nebraska common law forbids owner from extracting groundwater under owner's land in excess of a beneficial use); *Bayou Land Co. v. Talley, 924 P.2d 136 (Colo. 1996)* (owners of overlying land have inchoate right to control and use specified amount of nontributary groundwater); *In re Smith, 924 P.2d 155 (Colo. 1996)* (even though vendor had not applied for a well permit, vendor had right to extract nontributary groundwater underlying her property, by virtue of her ownership of the property). *See also Maddocks v. Giles, 728 A. 2d 150 (Me. 1999).*

See also Mossman, *Whiskey Is for Drinkin' but Water Is for Fightin' About: A First-hand Account of Nebraska's Integrated Management of Ground and Surface Water Debate and the Passage of L.B. 108, 30 Creighton L. Rev. 67 (1996);* Stephenson, *Groundwater Management in Nebraska: Governing the Commons Through Local Resource Districts,* 36 Nat. Resources J. 521 (1996).

(n35)Footnote 84. *See* § 50.11, *infra*.

South Plains Lamesa Railroad Ltd. v. High Plains Underground Water Conservation District No. 1., *52 S.W. 3d 770 (Tex App. 2001).*

(n36)Footnote 85. *See* § 50.11(e), *infra*.

(n37)Footnote 86. *See* § 50.11(f), *infra*.

(n38)Footnote 87. *See* § 50.11(g), *infra*.

(n39)Footnote 88. *See* § 50.11(h), *infra*.

(n40)Footnote 89. *See* Frank Maloney et al., Florida Water Law 42, 1980 (Water Resources Research Center, Univ. of Fla., Pub. No. 50, 1980).

(n41)Footnote 90. *See* § 50.11(i), *infra*.

(n42)Footnote 91. Colo. Rev. Stat. § 37-90-103(6)(a).

(n43)Footnote 92. *Id.*

(n44)Footnote 93. Colo. Rev. Stat. § 37-90-103(10.5).

(n45)Footnote 94. *See* §§ 50.11(j), 50.12 *infra*.

For further discussion, *see* J.W. Looney, *Enhancing the Role of Water Districts in Groundwater Management and Surface Water Utilization in Arkansas, 48 Ark. L. Rev. 643 (Summer 1995);* Kevin J. Neese, *Certainty in Groundwater Rights: Is Prescription Still Available?,* 12 Cal. Real Prop. J. 26 (Fall 1994); John Davidson, *South Dakota Groundwater Protection Act, 40 S.D. L. Rev. 1 (Spring 1995);* Stephen E. White & David E. Kromm, *Local Groundwater Management Effectiveness in the Colorado and Kansas Ogallala Region,* 35 Nat. Resources J. 275 (Spring 1995).

(n46)Footnote 95. For example, in *In re* the Adjudication of Water Rights in the *Lower Guadalupe River, 730 S.W.2d 64 (Tex. App. 1987),* the Texas court held that once surface waters collected in a natural depression come to rest, they become a lake and are subject to appropriation.

See, e.g., Wehby v. Turpin, 1997 Ala. LEXIS 482 (appeal from Shelby Circuit Ct., CV-96-122); *Andersen v. Village of Little Chute, 549 N.W.2d 737 (Wis. 1996); Diblash v. City of Seattle, 933 P.2d 443 (Wash. App. 1997)* (city not liable for increased flow of surface water due to city's initial grading and opening of right of way).

(n47)Footnote 96. *See, e.g., Denver T. & Ft. W.R. Co. v. Dotson, 38 P. 322 (Colo. 1894).*

In *In re* the Adjudication of Water Rights in the *Lower Guadalupe River, 730 S.W.2d 64 (Tex. App. 1987),* the Texas court held that once surface waters collected in a natural depression come to rest, they become a lake and are subject to appropriation.

(n48)Footnote 97. *Gruber v. County of Dawson, 439 N.W.2d 446 (Neb. 1989).*

Ritchart v. Gleason, 672 N.E.2d 1064 (Ohio App. 1996) (diffuse and intermittent flow of water over lowlands does not qualify as a "public watercourse" without more evidence of a streambed or watercourse of some sort).

See, e.g., Centamore v. Commissioner, 634 A.2d 950 (Me. 1993); Application for Water Rights of Hines Highlands Ltd. Partnership and Aspen Wilderness Workshop v. Hines Highlands Ltd. Partnership, 929 P.2d 718 (Colo. 1996); SRBA v. Hagerman Water Rights Owners, 947 P.2d 409 (Id. 1997); USI Properties East, Inc. v. Simpson, 938 P.2d 168 (Colo. 1997); State v. Acquavella, 935 P.2d 595 (Wash. 1997).

(n49)Footnote 98. *See, e.g., Martin v. Bush, 112 So. 224 (Fla. 1927).*

(n50)Footnote 99. *Carpenter v. Hennepin Co., 58 N.W. 295 (Minn. 1894).*

(n51)Footnote 100. *Hutchinson v. Water Slough Ditch Co., 101 P. 1059, 1061 (Idaho 1909).*

(n52)Footnote 101. For further discussion of the law as it relates to diffused waters, *see* § 50.20, *infra*.

(n53)Footnote 102. *See* § 50.20(b), *infra*.

See, e.g., Farley v. Wappapello Foods, Inc., 959 S.W.2d 888 (Mo. App. 1997); Horizon Dev. Group v. Cavalier Condominium Ass'n, 1998 Minn. App. LEXIS 2). See *Schott v. Hennings, 2000 Neb. LEXIS 80* (Neb. App. Mar. 14, 2000).

(n54)Footnote 103. *Id.*

For further discussion, *see* John D. Sours, *Survey of State Rules Regarding Stormwater Runoff Associated with Construction Activities*, 15 Construct. Law. 52 (Nov. 1995).

(n55)Footnote 104. *See* Frank Maloney et al., Florida Water Law 42 1980 (Water Resources Research Center, Univ. of Fla., Pub. No. 50, 1980).

(n56)Footnote 105. *Id.*

(n57)Footnote 106. *See, e.g., Tampa Waterworks v. Cline, 20 So. 780 (Fla. 1896).*

(n58)Footnote 107. *Id.*

See also Maddocks v. Giles, 728 A. 2d 150 (Me. 1999). See Accashian v. City of Danbury, 2000 Conn. Super. LEXIS (Ct. Jan 27, 2000); *Gorman v. Connell, 2001 Del. Ch. LEXIS 46 (Del. Chancery 2001).*

(n59)Footnote 108. *See* Frank Maloney et al., Florida Water Law 42 1980 (Water Resources Research Center, Univ. of Fla., Pub. No. 50, 1980).

(n60)Footnote 109. *See* discussion at § 50.11(d), *infra*.

Colorado has three different classes of groundwaters: 1) groundwater which is tributary to a stream, 2) groundwater that is not tributary to a stream which is identified as "designated groundwater" and 3) groundwater that is not tributary to a stream which is identified as simply "non-tributary groundwater." Colo. Rev. Stat. § 37-90-103(6)(a). "Designated groundwater" is water that is in basins designated by the Colorado Groundwater Commission. "Non-tributary groundwater" is water not tributary to a stream that is outside such basins. *Id.* "Tributary groundwater" is water that will, within 100 years, deplete the flow of a natural stream at a rate greater than one-tenth of one percent of the annual rate of withdrawal. Colo. Rev. Stat. § 37-90-103(10.5).

For a discussion of the extent to which rights in groundwater may be severed from the land, *see* Julie McNitt, *A New Chapter in Missouri Percolating Groundwater: The Non-Severability of Water Rights From Land, 59 Mo. L. Rev. 235 (1994).*

Application for Water Rights of Hines Highlands Ltd. Partnership and Aspen Wilderness Workshop v. Hines Highlands Ltd. Partnership, 929 P.2d 718 (Colo. 1996); SRBA v. Hagerman Water Rights Owners, 947 P.2d 409 (Id. 1997); USI Properties East, Inc. v. Simpson, 938 P.2d 168 (Colo. 1997); State v. Acquavella, 935 P.2d 595 (Wash. 1997). See also Maddocks v. Giles, 728 A. 2d 150 (Me. 1999).

(n61)Footnote 110. *Broadbent v. Ramsbotham, 11 Ex. 602, 156 Eng. Rep. 971 (1865). See also Publix Supermarkets, Inc. v. Pearson, 315 So. 2d 98 (Fla. App. 1975).* For further discussion, *see* Corbridge, *Surface Rights in Artificial Water Courses*, 24 Nat. Res. J. 887 (1984); Kusler, *Artificial Lakes and Recreational Subdivision, 1971 Wis. L. Rev. 369.*

See also Alburger v. Philadelphia Elec. Co., 535 A.2d 729 (Pa. 1988); In re the Adjudication of Water Rights in the *Lower Guadalupe River, 730 S.W.2d 64 (Tex. App. 1987).* In the Texas case, the court held that once surface waters collected in a natural depression come to rest, they become a lake and are subject to appropriation as a natural waterbody. In contrast, in *Arizona Public Service Co. v. Long, 773 P.2d 988 (Ariz. 1989),* "sewage effluent" was not even considered to be "water" for purposes of appropriation.

See Wehby v. Turpin, 1997 Ala. LEXIS 482 (Ala. 1997, appeal from Shelby Circuit Ct., CV-96-122). This dispute

involved the reconstruction of a man-made lake in a way that threatened recreational use rights claimed by plaintiffs.

(n62)Footnote 111. *See, e.g.*, Kan. Stat. Ann. § 82a-728(a).

(n63)Footnote 112. *See, e.g., Anderson v. Bell, 433 So. 2d 1202 (Fla. 1983); Black v. Williams, 417 So. 2d 911 (Miss. 1982); Goodrich v. McMillian, 187 N.W. 386 (Mich. 1922); Kiwanis Club Found. v. Yost, 139 N.W.2d 359 (Neb. 1966); Hood v. Slefkin, 143 A.2d 683 (R.I. 1958). But see* Richard Bartke and Susan Patton, *Water Based Recreation in Michigan - Problems of Developers, 25 Wayne L. Rev. 1005 at 1009-10 (1979),* where it is argued that artificial waters should be treated the same as natural waters for purposes of recreational use. In *In re the Adjudication of Water Rights of the Lower Guadalupe River, 730 S.W.2d 64 (Tex. App. 1987),* the court held that once surface waters which collected in a natural depression came to rest, they became a lake and were at that point subject to appropriation.

(n64)Footnote 113. *Anderson v. Bell, 433 So. 2d 1202 (Fla. 1983); Publix Supermarkets, Inc. v. Pearson, 315 So. 2d 98 (Fla. App. 1975).* If the stream upon which the dam is located is not navigable, the newly created lake may still be said to be private in many jurisdictions despite the fact that it is capable of supporting public recreational use since the public may have no lawful right of access to the water. *Id.* This is arguably the case even where the lake has been created for recreational purposes, such as a lake built on the resort grounds for the exclusive use of patrons of the particular resort. *See, e.g., Silver Blue Lake Association v. Silver Blue Lake Home Owners Association, 245 So. 2d 609 (Fla. 1971). See also Publix Supermarkets, Inc. v. Pearson, 315 So. 2d 98 (Fla. App. 1975).* Where the lakes are created for purposes that include public recreation, as is the case with certain flood control or reclamation projects, public permission to use may be implied or will be expressly granted or may be mandated by the legislation that authorized the construction. This is particularly the case where the project includes the acquisition of the bed underlying the water by the public.

(n65)Footnote 114. *See generally* Joseph Sax, *Federal Reclamation Law*, 2 Waters and Water Rights, ch. 8 (Robert Clark ed. 1967).

(n66)Footnote 115. *See, e.g., Bolinger v. Henry, 375 S.W.2d 161 (Mo. 1984); Kray v. Muggli, 86 N.W. 882 (Minn. 1901).*

In *Johnson v. Board of County Commissioners, 897 P.2d 169 (Kan. App. 1995),* the court held that after 62 years, the configuration of a stream, as altered by the construction of a bridge, would be considered a natural watercourse.

(n67)Footnote 116. *Greisinger v. Klinhardt, 9 S.W.2d 978 (Mo. 1928).*

(n68)Footnote 117. *See, e.g., Watts v. Evansville, Mt. C. & N. Ry., 129 N.E. 315 (Ind. 1921); Frese v. Michalec, 28 N.W.2d 197 (Neb. 1947); Thomson v. Public Serv. Comm'n, 5 N.W.2d 769 (Wis. 1942). But see DeRuwe v. Morrison, 184 P.2d 273 (Wash. 1947); Keener v. Sharp, 111 S.W.2d 118 (Mo. 1937).*

Johnson v. Board of County Comm'rs of Pratt County, 913 P.2d 119 (Kan. 1996) (if water continues to flow in same direction while outside banks of stream, returning upon subsidence of flood, it is to be deemed part of running stream and not surface water).

See Akins v. State, 61 Cal. App. 4th 1, 71 Cal. Rptr. 314 (1998), (reversing lower court which had found the state liable for inverse condemnation for flooding during a heavy storm in 1986); *M & D, Inc. v. McConkey, 573 N.W.2d 281 (Mich. App. 1997)* (liability for failure to disclose flooding problem; liability of state for failure to maintain drain); *Stott v. Finney, 950 P.2d 709 (Idaho 1997)* (flooding resulting from failure of upstream dam); *Morgan v. Earnest Corp. 704 S. 2d 272 (La. App. 1997).*

There is a tendency to apply tort principles of trespass, nuisance or negligence rather than property principles of water right law to resolve liability issues associated with flooding or drainage. *See, e.g., Bays v. Kent State Univ., 684 N.E.2d*

1328 (Ohio 1997) (flooding due to University action).; *Akins v. State, 61 Cal. App. 4th 1, 71 Cal. Rptr. 314 (1998)* (reversing lower court which had found the state liable for inverse condemnation for flooding during a heavy storm in 1986); *M & D, Inc. v. McConkey, 573 N.W.2d 281 (Mich. App. 1997)* (liability for failure to disclose flooding problem; liability of state for failure to maintain drain).; *Stott v. Finney, 950 P.2d 709 (Idaho 1997)* (flooding resulting from failure of upstream dam).: *Morgan v. Earnest Corp. 704 S. 2d 272 (La. App. 1997); Hutchinson v. Town of Andover, 1997 Conn. Super. LEXIS 87 (1997); Steiner v. County of Marshall, 568 N.W.2d 627 (S.D. 1997); Lhotka v. United States, 114 F.3d 751 (8th Cir 1997); Andersen v. Village of Little Chute, 549 N.W.2d 737 (Wis. 1996); Rodriguez v. City of New York, 1996 LW 239948* (S.D.N.Y. May 8, 1996); *Richhart v. Gleason, 672 N.E.2d 1064 (Ohio 1996).*Where the flooding is the result of alleged mismanagement of a man-made structure, such as a reservoir, liability will be determined on the basis of negligence rather than strict liability. *See Jensen v. Intermountain Power Agency, 977 P.2d 474 (Ut. 1999).*

Where damage claims for flooding are grounded in either nuisance or trespass, damages can include not only the diminution of the market value of the property or the restoration and loss of use of the property, but also discomfort and annoyance to the property owner. Annoyance generally refers to distress arising out of physical discomfort, irritation or inconvenience caused by odors, pests, noise and the like. In the absence of evidence of physical manifestations of the distress, creation of unreasonable risk of bodily harm or willful and wanton conduct, the court in *Webster v. Boone, 992 P.2d 1183 (Colo. App. 1999)* held that damages were not available for emotional distress where the flooding was the result of removing a railroad grade. In this case, the court also disallowed an award for attorney fees and costs.

Where the flooded land is determined to be a wetland, the property may be subject to regulation under the Clean Water Act *(33 U.S.C. §§ 1251* to 1387) and the "swampbusting" provisions of the Food Security Act of 1985 *(16 U.S.C. § 3811).* For a further discussion, *see* Chapter 47.12(k) *supra. See also Weyerhaeuser v. Pierce County, 976 P.2d 1279 (Wash. 1999); Gaudreau v. Clinton Irrigation District, 30 P.3d 1070 (Mont. 2001).*

Further, where impoundments have been erected for flood control purposes, the excess water that results in the creation of reservoirs tend to be considered available for consumptive as well as non-consumptive use even though the waters are technically "flood waters." The fact the water is confined seems to satisfy the systems concerns regarding the reliability of the supply. *See California v. United States, 438 U.S. 645 (1978).*

(n69)Footnote 118. *See, e.g., Hengelfelt v. Ehramann, 3 N.W.2d 576 (Neb. 1942); Crawford v. Rambo, 7 N.W. 249 (Ohio 1886). But see In re the Adjudication of Water Rights of the Lower Guadalupe River, 730 S.W.2d 64 (Tex. App. 1987),* where the court held that once surface waters which collected in a natural depression came to rest, they became a lake and were at that point subject to appropriation.

(n70)Footnote 119. *See, e.g., In re Silvies River, 237 P. 322 (Or. 1925).* Colorado has also recognized a "meadow right," provided there is some controlled system of diversion. *See Broad Run Inv. Co. v. Deuel & Snyder Imp. Co., 47 108 P. 755 (Colo. 1910).*

(n71)Footnote 120. *See, e.g., Tampa Water Works Co. v. Cline, 20 So. 780 (Fla. 1896); Whitmore v. Utah Fuel Co., 73 P. 764 (Utah 1903).*

See also Centamore v. Commissioner, 634 A.2d 950 (Me. 1993), where an individual sought to prohibit the transfer of water from a spring beyond the boundaries of the municipality. In this case, the state law, 22 M.R.S.A. § 2660-A, prohibited the transportation of large quantities of water outside of the municipality in which the water was located unless the transfer is approved by the Commissioner of the Department of Human Services. As a matter of fact, the Commissioner had approved the transfer of water from an individual's spring for commercial merchandising. Petitioner objected and brought an action against the Commissioner but did not join the permit holder to the suit. The Superior court denied the petition and remanded for joinder of a "necessary party," holding that the failure to join the permit holder impeded his ability to protect his interest and any relief granted in his absence would not completely and

effectively adjudicate the dispute.

See Schott v. Hennings, No. 98-868, 2000 Neb. App. LEXIS 80 (Neb. App. 2000); Upper Black Squirrel Creek Ground Water Management District v. Goss, 993 P.2d 1177 (Colo. 2000); Norden v. State, 996 P.2d 958 (Or. 1999); South Plains Lamesa Railroad Ltd. v. High Plains Underground Water Conservation District No. 1., *52 S.W. 3d 770 (Tex App. 2001); Hallauer v. Spectrum Properties, Inc., 18 P.3d 540 (Wash. 2001).*

(n72)Footnote 121. *Smith v. Sanders, 189 P.2d 701 (Utah 1948).*

(n73)Footnote 122. *See* Restatement (Second) of Torts, § 846.

(n74)Footnote 123. *See* § 50.03(b), *infra*.

(n75)Footnote 124. *See* Estate of Steed v. Escalante Irrigation Co., 846. P.2d 1223 (Utah 1992) holding that a lower landowner has no right to compel an upper water user to maintain runoff and seepage.

(n76)Footnote 125. *Id.*

(n77)Footnote 126. *See, e.g.*, Kan. Stat. Ann. § 821-728(a).

(n78)Footnote 127. *See* § 50.08(g), *infra*.

(n79)Footnote 128. *See* § 50.11(f), *infra*.

(n80)Footnote 129. *See, e.g., Weibert v. Rothe Brothers, Inc., 618 P.2d 1367 (Colo. 1980).*

City of Thornton v. Bijou Irrigation Co., 926 P.2d 1 (Colo. 1996) (change of water rights cannot be approved if the change will injuriously affect rights of other water users; approval of change of use of transmountain water right does not require compliance with statutory "no injury" requirement).

(n81)Footnote 130. *See* § 50.09(bb), *infra*.

(n82)Footnote 131. *See* § 50.08(m), *infra*.

See also Centamore v. Commissioner, 634 A.2d 950 (Me. 1993) where the state law, 22 M.R.S.A. § 2660-A, prohibited the transportation of large quantities of water outside of the municipality in which the water was located unless the transfer is approved by the Commissioner of the Department of Human Services. In this case, the Commissioner had approved the transfer of water from an individual's spring for commercial merchandising. Petitioner objected and brought an action against the Commissioner but did not join the permit holder to the suit. The Superior court denied the petition and remanded for joinder of a "necessary party," holding that the failure to join the permit holder impeded his ability to protect his interest and any relief granted in his absence would not completely and effectively adjudicate the dispute.

(n83)Footnote 132. *Id.*

(n84)Footnote 133. *See, e.g.*, Kan. Stat. Ann. § 82a-708b.

But see City of Westminster v. Church, 445 P.2d 52 (Colo. 1968), where the court appears to allow unrestricted reuse or disposition of imported water without regard to injury to other appropriators. However, in a later decision, Colorado appears to adopt at least a modified version of the prevailing view. In *Southeastern Colo. Conserv. Dist. v. Fort Lyon Canal Co., 720 P.2d 133 (Colo. 1986),* the court held that changes in the use of stored water would be limited to historical uses in order to prevent injury to other appropriators.

(n85)Footnote 134. *See, e.g., Denver v. Fulton Irrigating Ditch Co., 506 P.2d 144 (Colo. 1972),* dealing with imported water which was not considered to be naturally part of the stream.

(n86)Footnote 135. *Id.*

In *Dodge v. Ellensburg Water Co., 729 P.2d 631 (Wash. 1986),* the court held that imported water that was abandoned by the developer did not become public water subject to state authorized appropriation. *See Salt Lake City v. Silver Fork Pipeline, 5 P.3d 1206 (Utah 2000).*

(n87)Footnote 136. *See, e.g., City of Los Angeles v. San Francisco, 537 P.2d 1250 (Cal. 1975).*

The general rule may be modified by the presence or absence of specific plans to reuse the water. In *Water Supply and Storage Co. v. Curtis, 733 P.2d 680 (Colo. 1987),* the applicant for the water requested that the court decree that "the water may be used and reused and put to a succession of uses until totally consumed." The court ruled that such a holding may be appropriate in a suitable situation but since the applicant had no concrete plans for reuse, the request would be denied.

Westlands Water District v. United States, 153 F. Supp. 2d 1133 (E.D. Cal. 2001).

(n88)Footnote 137. It was far easier to estimate the quantity available if the source was visible, such as a surface waterbody like a stream or a lake. It is probably for this reason that surface allocation systems developed before groundwater systems.

See Empire Lodge Homeowners' Association v. Moyer, 39 P.3d 1139 (Colo. 2001); United States v. Commonwealth of Puerto Rico, 144 F. Supp. 2d. 46 (D. Puerto Rico 2001).

See also H. Franz, R. Kropf, and M. Pearce, *An Insatiable Thirst: The Impact of Water Law on Sprawl in the West,* 15 SPG Nat. Resources & Env't 228 (2001).

(n89)Footnote 138. *See* § 50.08(h), *infra*.

(n90)Footnote 139. *See* § 50.09(d), *infra*.

(n91)Footnote 140. This still tends to be the case in riparian jurisdictions. *See* § 50.08, *infra*.

(n92)Footnote 141. *See* § 50.13, *infra*.

(n93)Footnote 142. *See* Neb. Rev. Stat. § 46-226.01. *See also Central Neb. Pub. Power & Irrigation Dist. v. Abrahamson, 413 N.W.2d. 290 (1987).* For further discussion generally of the problems of regulating imported water, *see* Gregory Weber, *Forging a More Coherent Groundwater Policy in California: State and Federal Constitutional Challenges to Local Groundwater Export Restrictions, 34 Santa Clara L. Rev. 373 (1994).*

(n94)Footnote 143. For a discussion of the problems that arise from the inability of prior appropriation doctrine states to adjust to the needs to protect emerging environmental values, *see* Charles Wilkinson, *Aldo Leopold and Western Water Law: Thinking Perpendicular to the Prior Appropriation Doctrine,* 24 Land and Water L. Rev. 1 (1989); John Leshy, *The Prior Appropriation Doctrine of Water Law in the West: An Emperor with Few Clothes,* 19 J. of the West 5 (1990).

See also Carpenter, *Water for Growing Communities: Refining Tradition in the Pacific Northwest, 27 Envtl. L. 127 (1997);* Josephson, *Katie John and Totemoff: The United States and Alaska Clash over the Reserved Rights Doctrine and Native Alaska Hunting and Fishing Rights -- the U.S. Supreme Court Passes on an Opportunity to Resolve the Subsistence Debate, 6 Dick. J. Envtl. L. & Pol'y 225 (1997);* Powell, *Recent Application of the Reserved Rights*

Doctrine: State of Alaska v. Babbitt, 25 Real Est. L.J. 308 (1997); Mossman, *Whiskey Is for Drinkin' but Water Is for Fightin' About: A First-hand Account of Nebraska's Integrated Management of Ground and Surface Water Debate and the Passage of L.B. 108, 30 Creighton L. Rev. 67 (1996);* Geon, *A Right to Ice? The Application of International and National Water Laws to the Acquisition of Iceberg Rights, 19 Mich. J. Int'l L. 277 (1997).*

(n95)Footnote 144. *See Sporhase v. Nebraska, 458 U.S. 941 (1982).* It has also engendered restrictions on the transportation of the water itself, not as part of the water rights laws per se, but grounded in other concerns. *See, e.g., Centamore v. Commissioner, 634 A.2d 950 (Me. 1993).* There, the state law, 22 M.R.S.A. § 2660-A, prohibited the transportation of large quantities of water outside of the municipality in which the water was located unless the transfer is approved by the Commissioner of the Department of Human Services. In this case, the Commissioner had approved the transfer of water from an individual's spring for commercial merchandising. Petitioner objected and brought an action against the Commissioner but did not join the permit holder to the suit. The Superior court denied the petition and remanded for joinder of a "necessary party," holding that the failure to join the permit holder impeded his ability to protect his interest and any relief granted in his absence would not completely and effectively adjudicate the dispute.

Because of perceived weaknesses in the traditional classification scheme, some jurisdictions may apply tort principles of trespass, nuisance or negligence rather than property principles of water right law to resolve liability issues. This is particularly the case with diffused surface water where liability associated with flooding or drainage is at issue. *See, e.g., Bays v. Kent State Univ., 684 N.E.2d 1328 (Ohio 1997)* (flooding due to University action); *Akins v. State, 61 Cal. App. 4th 1, 71 Cal. Rptr. 314 (1998)* (reversing lower court which had found the state liable for inverse condemnation for flooding during a heavy storm in 1986); *M & D, Inc. v. McConkey, 573 N.W.2d 281 (Mich. App. 1997)* (liability for failure to disclose flooding problem; liability of state for failure to maintain drain); *Stott v. Finney, 950 P.2d 709 (Idaho 1997)* (flooding resulting from failure of upstream dam): *Morgan v. Earnest Corp. 704 S. 2d 272 (La. App. 1997); Hutchinson v. Town of Andover, 1997 Conn. Super. LEXIS 87 (1997); Steiner v. County of Marshall, 568 N.W.2d 627 (S.D. 1997); Lhotka v. United States, 114 F.3d 751 (8th Cir 1997); Andersen v. Village of Little Chute, 549 N.W.2d 737 (Wis. 1996); Richhart v. Gleason, 672 N.E.2d 1064 (Ohio 1996).*

(n96)Footnote 145. *See, e.g.,* Kan. Stat. Ann. §§ 82a-701 *et seq*.

(n97)Footnote 146. Kan. Stat. Ann. § 82a-707(a) provides:

Surface or groundwaters of the state may be appropriated as herein provided. Such appropriation shall not constitute ownership of such water, and appropriation rights shall remain subject to the principle of beneficial use.

(n98)Footnote 147. *See* discussion at § 50.12, *infra*.

(n99)Footnote 148. *See* Frank Maloney et al., Florida Water Law 196-279 (Water Resources Research Center, Univ. of Fla., Pub. No. 50, 1980).

(n100)Footnote 149. *See, e.g.,* Mont. Code Ann. § 85-2-301, which provides that all major consumptive users (of more than 4,000 acre-feet of water per year) and most trans-basin diversions must lease the water from the state. The leases may not exceed 50 years with a possibility of renewal for one additional term. The leases are predicated upon a variety of determinations, including an environmental impact statement and the satisfaction of public interest criteria.

(n101)Footnote 150. *See, e.g., Arizona Pub. Serv. Co. v. Long, 773 P.2d 988 (Ariz. 1989).*

Wyoming v. United States, 933 F. Supp. 1030 (D. Wyo. 1996); Valley Juice Ltd., Inc. v. Evian Waters of France, Inc., 87 F.3d 604 (2d Cir. 1996) (water distribution contract).

Getches, *Colorado River* Governance: *Sharing Federal Authority as an Incentive to Create a New Institution, 68 Colo. L. Rev. 573 (1997);* Geon, *A Right to Ice? The Application of International and National Water Laws to the*

Acquisition of Iceberg Rights, 19 Mich. J. Int'l L. 277 (1997).

In some jurisdictions, tort principles of trespass, nuisance or negligence rather than property principles of water right law may be invoked to resolve liability issues. This is particularly the case with diffused surface water where liability associated with flooding or drainage is at issue. *See, e.g., Bays v. Kent State Univ., 684 N.E.2d 1328 (Ohio 1997)* (flooding due to University action); *Akins v. State, 61 Cal. App. 4th 1, 71 Cal. Rptr. 314 (1998)* (reversing lower court which had found the state liable for inverse condemnation for flooding during a heavy storm in 1986); *M & D, Inc. v. McConkey, 573 N.W.2d 281 (Mich. App. 1997)* (liability for failure to disclose flooding problem; liability of state for failure to maintain drain); *Stott v. Finney, 950 P.2d 709 (Idaho 1997)* (flooding resulting from failure of upstream dam): *Morgan v. Earnest Corp., 704 S. 2d 272 (La. App. 1997); Hutchinson v. Town of Andover, 1997 Conn. Super. LEXIS 87 (1997); Steiner v. County of Marshall, 568 N.W.2d 627 (S.D. 1997); Lhotka v. United States, 114 F.3d 751 (8th Cir 1997); Andersen v. Village of Little Chute, 549 N.W.2d 737 (Wis. 1996); Richhart v. Gleason, 672 N.E.2d 1064 (Ohio 1996); Westlands Water District v. United States, 153 F. Supp. 2d 1133 (E.D. Cal. 2001); Tulare Lake Basin Water Storage District v. Untied States, 49 Fed. Cl. 313 (2001); United States v. Westlands Water District, 134 F. Supp. 2d 1111 (E.D. Cal. 2001); Tanner v. Carter, 20 P.3d 332 (Utah 2001).*

See also J.Carey and D. Sunding, *Emerging Markets in Water: A Comparative Institutional Analysis of the Central Valley and Colorado-Big Thompson Projects*, 41 Nat. Resources J. 283 (2001).

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CHAPTER 50 WATER RIGHTS

6-50 Thompson on Real Property, Thomas Editions § 50.03

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§ 50.03 Water Rights as Property.

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§ 50.03(a) In General.

Water rights are commonly considered to be property rights but it is clear that they are different from most other property rights. An interesting discussion of the fundamental nature of water rights as a species of property rights is found in the case of *United States v. Willow River Power Co*. n151 In that case, the federal government had constructed Red Wing Dam, a hydroelectric power plant, on the upper Mississippi River downstream from its junction with the St. Croix River. The Willow River Power Company maintained a small power plant on the St. Croix. The pool from the federal dam raised the level of the water on the St. Croix to the point that Willow River Power Company could not generate power from its facility. The power company claimed that the federal dam had "taken" or destroyed its riparian water right which permitted the use of the river and, as a result, the power company should be paid compensation for the taking. The Supreme Court denied the taking claim for two reasons.

First, the federal government had a superior interest in the stream, by virtue of its navigational servitude, n152 which functioned much like a paramount title claim. In discussing the relation between this interest and the claimed water right, the Court noted that:

> Rights, property or otherwise, which are absolute against all the world are certainly rare, and water rights are not among them. Whatever rights may be as between equals such as riparian owners, they are not the measure of riparian rights on a navigable stream relative to the function of the Government in improving navigation. Where these interests conflict, they are not to be reconciled as between equals, but the private interest must give way to a superior right, or perhaps it would be more accurate to say that as against the Government such a private interest is not a right at all.

Second, with respect to the claim that the right to a certain level of water in the river was a protected water right, the Court noted that:

> It is clear, of course, that a head of water has value and that the Company has an economic interest in keeping the St. Croix at the lower level. But not all economic interests are "property rights"; only

> those economic advantages are "rights" which have the law back of them, and only when they are so recognized may courts compel others to forbear from interfering with them or to compensate for their invasion. The law has long recognized that the right of ownership of land may carry with it a legal right to enjoy some of the benefits from adjacent waters. But that a closed catalogue of abstract and absolute "property rights" in water hovers over a given piece of shore land, good against all the world, is not in this day a permissible assumption. We cannot start the process of decision by calling such a claim as we have here a "property right"; whether it is a property right is really the question to be answered.

The Court then determined that the claimed right was not a protected interest as against the government's action. n153

A criticism that may be made of contemporary water right structure is that the property nature of water rights may deprive the system of some flexibility in responding to changing values. As our system has become more conscious of the need to give a significant measure of protection to various aspects of the natural environment, it has become apparent that one common obstacle is the rigidity with which the law tends to deal with property rights. n154 The reason is undoubtedly that the law values very highly those attributes of stability and endurance that tend to be associated with property rights because they stimulate investment and development of the property to which the rights pertain. This, in turn, appears to be an outgrowth of the early views that property is important and merits legal protection because of its connection to individual wealth. Indeed, it is often considered to be a primary means by which wealth may be generated. On the other hand, the needs of society are not always grounded in the same kinds of concerns and the choice that the law must often confront when it deals with the clash between private property interests and social interests is whether property should be protected primarily to protect the individual or the common good. In this sense, the system frequently struggles with whether the legal concept of property may be imbued with any significant sense of social function. n155

The aspect of water rights that may ultimately permit the forging of a compromise may be the fact, as discussed below, that the essence of the water right itself is derived from Roman Law and not from the English Common law system. This permits the argument that at least the water right, as property, comes with a significant inherent sense of social function which should enable the courts to define or redefine the nature of the right to make it more responsive to changing social needs and values. n156

Although the general rule is that water rights are a species of real property, that designation refers to the right of access to the water while it is in its natural state. Once the right is exercised and the water is reduced to possession, it may be considered the personal property of the water right holder. As such, it may become an article of commerce. n157 This distinction has been useful in avoiding some restrictions regarding the transferability of the water right. For example, in riparian jurisdictions, the general rule is that water rights cannot be transferred in the absence of a transfer of title to riparian land. Nevertheless, it may be permissible to sell water resulting from the exercise of the water right to someone who otherwise would not qualify as a riparian. In response, some jurisdictions have sought to control the marketing of water where it has the potential to impact water supplies within the jurisdiction. n158

COMPUTER-ASSISTED RESEARCH

LEXIS: water! w/1 right! w/15 property w/1 right!

§ 50.03(b) Water Rights as Real Property.

The law of real property rights tends to be concerned with rights which exist or may exist in favor of private persons in connection with land. n159 Although, strictly speaking, real property consists of only those interests known in the common law as freehold estates, for practical purposes, most rights of ownership, rights to dispose of land not based on ownership, and rights relating to the use and profit of another's land and liens are also considered real property rights. n160

Water rights are interesting in that, while they are real n161 property interests, n162 they do not embody an ownership interest in the water itself. n163

COMPUTER-ASSISTED RESEARCH

LEXIS: water! w/1 right! w/15 real w/1 property

§ 50.03(c) Property Attributes of Water Rights: Access.

In both a real and a practical sense, water right must be considered as a *right of access* to water in order to facilitate the use of the water for only such purposes as the law deems acceptable. From this, it is apparent that the "ability to properly use," rather than "ownership," is the primary property attribute, as it is through the restrictions on use that the law gives its substantive dimension to the water right. Indeed, the right to use is the essential feature of the water right itself. Clearly, the holder of the water right has only a right to make a permitted use of a particular quantity of water; the water right holder does not "own" that quantity of water unless or until it is lawfully reduced to possession. n164

COMPUTER-ASSISTED RESEARCH

LEXIS: right! w/1 access w/1 water! w/50 property w/1 right! or attribute!

§ 50.03(d) Property Attributes of Water Rights: Usufruct.

Water rights are considered to be "usufructary" in nature. n165 A usufruct has been defined in the context of water rights in our legal system as "the right of enjoying a thing, the property of which is vested in another, and to draw from the same all the profit, utility and advantage which it may produce, provided it be without altering the substance of the thing." n166 The concept of usufruct is of Roman law derivation and is a part of the category of rights described in Roman law as *iura in re aliena*, rights in the property of another (or the law of servitudes). n167 In Roman law, the usufruct was one of the four personal servitudes, and represented the right to use and take the fruits and profits of another's property, movable or immovable, without fundamentally altering its character. n168

COMPUTER-ASSISTED RESEARCH

LEXIS: usufruct! w/15 water! w/1 right!

FOOTNOTES:
(n1)Footnote 151. *324 U.S. 499 (1945).*

Ronald A. Kaiser, *Texas Water Marketing in the Next Millennium: A Conceptual Legal Analysis, 27 Tex. Tech. L. Rev. 181 (1996). See also* In the matter of *Water Use Permit Applications, No. 21309, 2000 Hawaii LEXIS 321* (Sept. 27, 2000); *Empire Lodge Homeowners' Association v. Moyer, 39 P.3d 1139 (Colo. 2001); Westlands Water District v. United States, 153 F. Supp. 2d 1133 (E.D. Cal. 2001); Klump v. United States, 50 Fed. Cl. 268 (2001); West Maricopa Combine, Inc. v. Arizona Department of Water Resources, 26 P.3d 1171 (Az. App. 2001); SRBA v. State, 23 P.3d 117 (Id. 2001); Tulare Lake Basin Water Storage District v. Untied States, 49 Fed. Cl. 313 (2001).*

For further discussion, see B. Adams, *From Lucas to Palazzolo: A Case Study of Title Limitations,* 16 J. Land Use & Envt'l L. 225 (2001); J. Peck, *Assessing the Quality of a Water Right,* 70 May J. Kan. B. A. 26 (2001); J. Burling, *Protecting Property Rights in Ecologically Valuable Resources after Palazzolo,* SF64 ALI-ABA 109 (2001).

(n2)Footnote 152. *See* discussion at § 50.16(h), *infra*.

(n3)Footnote 153. For further discussion, *see* Deborah K. Paulus, *Reflections on Takings: The Watuppa Ponds Cases, 17 W. New Eng. L. Rev. 29 (Winter 1995).*

(n4)Footnote 154. For a discussion of the weaknesses of the Prior Appropriation Doctrine to address changing social values, *see* Charles Wilkinson, *Aldo Leopold and Western Water Law: Thinking Perpendicular to the Prior Appropriation Doctrine*, 24 Land and Water L. Rev. 1 (1989); John Leshy, *The Prior Appropriation Doctrine of Water Law in the West: An Emperor with Few Clothes*, 19 J. of the West 5 (1990).

(n5)Footnote 155. *See* James B. Wadley, *The Emerging "Social Function" Context for Land Use Planning in the United States: A Comparative Introduction to Recurring Issues, 28 Washburn L.J. 22 (1988). But see* Michael Heyman, *Property Rights and the Endangered Species Act: A Renascent Assault on Land Use Regulation, 25 Pac. L.J. 157 (1994).*

(n6)Footnote 156. In *Imperial Irrigation District v. State Water Resources Control Board, 225 Cal. App. 3d 548 (1990),* the court responded to a claim by the district that once the right to use water becomes vested, it must be considered a property right which cannot be undermined without the payment of just compensation. The court found that the decision of the board "substantially impacted the practical use and administration" of the District's water. Nevertheless, it did not find the interference unconstitutional. The court said "[t]he historic concepts of water 'rights' in California were dramatically altered by the adoption in 1928 of [a constitutional amendment which empowered the Board to conduct hearings to determine whether particular water uses were reasonable or wasteful]. Our Supreme Court ... acknowledged that the new provision altered previously vested rights... . It has been long established that all property is held subject to the reasonable exercise of police power and that constitutional provisions declaring that property shall not be taken without due process of law have no application in such cases." The rationale of the court is that no one can lawfully acquire a vested right in an unreasonable use of the water.

(n7)Footnote 157. *See Sporhase v. Nebraska, 458 U.S. 941 (1982).*

(n8)Footnote 158. *See Centamore v. Commissioner, 634 A.2d 950 (Me. 1993).* There, the state law, 22 M.R.S.A. § 2660-A, prohibited the transportation of large quantities of water outside of the municipality in which the water was located unless the transfer is approved by the Commissioner of the Department of Human Services. In this case, the Commissioner had approved the transfer of water from an individual's spring for commercial merchandising. Petitioner objected and brought an action against the Commissioner but did not join the permit holder to the suit. The Superior court denied the petition and remanded for joinder of a "necessary party," holding that the failure to join the permit holder impeded his ability to protect his interest and any relief granted in his absence would not completely and effectively adjudicate the dispute.

In some jurisdictions, tort rather than property rules may be invoked. This is particularly the case where the problem is one of liability for harm caused by the water. *See also Akins v. State, 71 Cal. Rptr. 314 (1998)* reversing lower court which had found the state liable for inverse condemnation for flooding during a heavy storm in 1986. *See also M & D, Inc. v. McConkey, 573 N.W.2d 281 (Mich. App. 1997)* (liability for failure to disclose flooding problem; liability of state for failure to maintain drain); *Stott v. Finney, 950 P.2d 709 (Idaho 1997)* (flooding resulting from failure of upstream dam): *Morgan v. Earnest Corp., 704 S. 2d 272 (La. App. 1997); Hutchinson v. Town of Andover, 1997 Conn. Super. LEXIS 87 (1997); Steiner v. County of Marshall, 568 N.W.2d 627 (S.D. 1997); Lhotka v. United States, 114 F.3d 751 (8th Cir 1997); Andersen v. Village of Little Chute, 549 N.W.2d 737 (Wis. 1996); Richhart v. Gleason, 672 N.E.2d 1064 (Ohio 1996).*

In *Good v. United States, 39 Fed. Cl. 81 (Ct. Cl. 1997),* the court held that the federal navigational servitude did not constitute a complete defense to a takings claim arising from the denial of an application for a permit to fill wetlands. On the other hand, the court ruled that the Endangered Species Act did not require that the land be maintained in its natural state and thus did not deprive the landowner of all economic value associated with the property. Finally, the court held that the federal and state regulatory regimes were so pervasive that a developer could not have a reasonable

expectation of putting into effect the development plans.

(n9)Footnote 159. Herbert Tiffany, Outlines of Real Property 1 (1929).

(n10)Footnote 160. *Id.*

(n11)Footnote 161. *United States v. Willow River Power Co., 324 U.S. 499 (1945).*

For further discussion, *see* John Peck & Kent Weatherby, *Condemnation of Water and Water Rights in Kansas, 42 U. Kan. L. Rev. 827* (Summer, 1994). The property right in water may include not only quantity but quality as well. In *Hale v. Colorado River Mun. Water, 818 S.W.2d 537 (Tex. App. 1991),* the court recognized that the riparian landowner enjoyed a right in the quality of the water that could not be taken without just compensation. In this case, the quality was adversely affected by the presence of chloride-saturated spillage.

(n12)Footnote 162. Some jurisdictions include water within the definition of land. *See* Kan. Stat. Ann. § 58-3202(a), relating to liability for recreational use of land:

> "Land" means land, roads, water, watercourses, private ways and buildings, structures, and machinery or equipment when attached to realty.

West Maricopa Combine, Inc. v. Arizona Department of Water Resources, 26 P.3d 1171 (Az. App. 2001); Mineral County v. State Department of Conservation and Natural Resources, 20 P.3d 800 (Nev. 2001); Hsieh v. State of Washington Dep't of Ecology, 104 Wash. App. 1002 (2001); Tulare Lake Basin Water Storage District v. Untied States, 49 Fed. Cl. 313 (2001).

See also J. Peck, *Assessing the Quality of a Water Right,* 70 May J. Kan. B. A. 26 (2001).

(n13)Footnote 163. *See, e.g.*, Kan. Stat. Ann. § 82a-707(a):

Surface or groundwaters of the state may be appropriated as herein provided. Such appropriation shall not constitute ownership of such water, and appropriation rights shall remain subject to the principle of beneficial use.

For further discussion, *see* Deborah K. Paulus, *Reflections on Takings: The Watuppa Ponds Cases, 17 W. New Eng. L. Rev. 29 (Winter 1995);* Peggy B. Johnson, *The Takings Issue in the Local Government and Watershed Context, 1995 Det. C.L. Rev. 12 (Spring 1995);* Christine A. Klein, *The Constitutional Mythology of Western Water Law, 14 Va. Envtl. L.J. 13 (Winter 1995);* A. Lynne Krogh, *Water Right Adjudications in the Western States: Procedures, Constitutionality, Problems and Solutions, 30 Land & Water L. Rev. 9 (Winter 1995);* Corbridge, James N., *Historical Water Use and the Protection of Vested Rights: A Challenge for Colorado Water Law, 69 U. Colo. L. Rev. 503 (1998).*

In *Barnhill v. City of North Myrtle Beach, 511 S.E. 2d 361 (S.C. 1999),* the court upheld an ordinance that restricted the launching and beaching of motorized watercraft, including personal water craft, on public beaches. This ordinance had been challenged as an unconstitutional restriction on access to navigable waters, as preempted by state law and as a regulatory taking. The court held that the public's right of access to navigable waters was subject to reasonable regulation and found the ordinance to be reasonably related to the legitimate public interest in public safety. The ordinance was held not to be preempted because the state authority related only to activities "on the water" and would not affect plaintiffs who sought to operate a land-based jet ski rental business. The ordinance was held not to constitute a taking because the beach was governmental property and there is no private vested property right in a particular use of government property. In this case, a license to conduct a business did not include the public non-consumptive use water right of access to the water.

In *R & R Associates v. City of Providence, 724 A. 2d 432 (R.I. 1999),* it was held that some municipalities and water districts were not liable for the taking of riparian rights. This was because, by statute, only Providence was liable for any takings, even when done for the benefit of end-user communities and water districts.

Water rights were held not to grant any ownership interest in the water itself in *Farmers High Line Canal and Reservoir Co. v. City of Golden, 975 P.2d 189 (Colo. 1999).*

For further discussion, *see* Michael A. Heller, *Boundaries of Private Property, 108 Yale L.J. 1163 (1999).*

(n14)Footnote 164. Upon reduction of the water to possession, the nature of the ownership interest changes from a real property interest to a personal property interest and it may be said that the water right holder "owns" the water.

(n15)Footnote 165. *See, e.g., Williams v. City of Wichita, 374 P.2d 578 (Kan. 1962); F. Arthur Stone & Sons v. Gibson, 630 P.2d 1164 (Kan. 1981).*

This is the case as well even under the common-law doctrine of absolute ownership. *See Williams v. City of Wichita, 374 P.2d 578 (Kan. 1962)* where the court alluded to a "lack of understanding of the meaning of the term 'ownership' as applied to percolating waters" as the basis for an argument that the landowner actually owned the water in and below his or her land. *190 Kan. at 328-29.* The court then stated that:

> [t]he common law concept of 'absolute ownership' of percolating water while it is in one's land is an anomaly -- while giving him the right to abstract from his land all the water he can find there, it affords him no protection against the acts of neighbors who, by pumping on their own land, manage to draw out of his land all the available water it contains. Much of the language in the cases pertaining to absolute ownership is *obiter dicta* and completely unnecessary to the respective decisions... . Thus the use of the term "ownership" as applied to percolating water has never meant that the overlying owner had a property or proprietary interest in the corpus of the water itself... . There is a right of use as it passes, but there is no ownership in the absolute sense. (emphasis added) *Id. at 330.*

The court in this case noted that even under the common law the water belonged to the landowner only "in a limited sense." The landowner had the right to capture the water and "reduce it to his possession and control" at which time it "ceases to be percolating water and becomes his personal property." *Id.*

The court then held that:

> the right of the plaintiff to groundwater underlying his land *is to the usufruct of the water and not to the water itself.* Legislation limiting the right to use is in itself no more objectionable than legislation forbidding the use of property for certain purposes. (emphasis added)

Id. at 339 citing *Euclid v. Ambler Realty Co., 272 U.S. 365 (1926)* and *Mugler v. Kansas, 123 U.S. 623 (1887).*

Hage v. United States, 35 Fed. Cl. 147 (1996) (water rights usufructary in nature); *Denver v. Middle Park Water Conservancy, 925 P.2d 283 (Colo. 1996)* (water rights usufructary in nature); *John v. United States, 247 F.3d 1032 (9th Cir. 2001).*

See also J. Peck, *Assessing the Quality of a Water Right,* 70 May J. Kan. B. A. 26 (2001).

(n16)Footnote 166. J. Cribbet, *Water as a Species of Private Property, 5 Ill. Bar J. 449 at 465 (Jan. 1959).*

See also In the matter of *Water Use Permit Applications, No. 21309, 2000 Hawaii LEXIS 321* (Sept. 27, 2000).

(n17)Footnote 167. *See* Barry Nicholas, an Introduction to Roman Law 140 (1962).

(n18)Footnote 168. In Roman law, personal servitudes were considered similar to praedial servitudes in several respects. Both are fractions of ownership vested in someone other than the owner, they are burdens on ownership which restrict the enjoyment of the owner. They 'run with' the servient property and can be asserted against the world at large. Personal servitudes differ from praedial servitudes in that personal servitudes are conceptualized as personal to the owner and are limited in duration rather than perpetual. Significantly, praedial servitudes effect a permanent enhancement of the content of one ownership at the expense of that of another whereas the personal servitudes, including usufruct, effects a division in time but not the content of the ownership. *Id.* pp. 144-145.

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CHAPTER 50 WATER RIGHTS

6-50 Thompson on Real Property, Thomas Editions § 50.04

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§ 50.04 Limitations on the Property Nature of Water Rights.

§ 50.04(a) In General.

Because the water right holder only has a usufructary interest in the water, the nature of the water right is inherently limited to a right of enjoyment through the use of the water. The right to claim a particular quantity of water under a water right may be further bounded by the obligation to use water for beneficial or reasonable purposes. Thus, even though someone may have a property interest in the water, unless the water is properly used, lawful access can be restricted by the state or even terminated. In this sense, the extent of the right is directly related to the manner and extent of water use. If the water is not used properly, the right to continue the use may be withdrawn or the quantity permitted by the right modified to conform to the extent of actual beneficial or reasonable use.

There are a number of significant limitations on the scope and substantive nature of the water right. These include superior public interests, inherent government authority to supervise the acquisition of water rights and the use of water, system-imposed limitations on the nature of approved uses, jurisdictional rules regarding priorities of use and the presence of superior water rights possessed by others. Some of these limitations will be discussed further. n169

COMPUTER-ASSISTED RESEARCH

LEXIS: limit! w/15 water! w/1 right!

§ 50.04(b) Rationale for the Limited Nature of Water Rights.

The central concept that the water right is usufructary in nature is largely derived from Roman law, n170 and is based on the concept that some things are too vital to human life and to society as a whole to allow them to become the object of unlimited personal monopoly or dominion. n171 English and American legal systems differ from Roman law in that they do not recognize a specific category of things that cannot be owned by anyone. Indeed, these systems require that real property, even property that has public value, must have an owner. Nevertheless, the Roman law notion that certain things ought not be susceptible of private monopoly and control has been influential on English and American law with respect to the manner in which rights in water are addressed.

The English and American common law early recognized that things such as light, air, water and wild animals must remain in "common" until reduced to possession. n172 Because of this heritage, our system does permit some "ownership" of what otherwise might be "public things." To permit this, it has been necessary for our law to recognize several classes of public things. Some things are considered to be public in title but are treated as essentially private in nature, such as public office buildings. The public may be excluded from these with little difficulty. Other things are deemed owned by the state but are considered held in trust for the use and enjoyment of the public. n173 This category would include such things as the federal public domain lands and the beds of navigable waterbodies. n174 Finally, there are things which are considered to be held in common until an approved act reduces them to private possession, at which time the things become the personal property of the possessor. Water itself is viewed as held this way n175 and is so recognized by statute in some states. n176

However, most jurisdictions consider that it is the life-sustaining nature of water that justifies restricting the manner in which rights in water are acquired and as providing the rationale for limitations on the property status of the rights. n177

§ 50.04(c) Specific Limitations: Superior Public Interests.

In *United States v. Willow River*, n178 the United States Supreme Court denied a claim that private water rights were taken as a result of a federal power project. The particular federal interest consisted of a claimed navigational servitude. As noted in § 50.16(h) below, the navigational servitudes operate conceptually like title interests which may have been held back by the federal government when title to the navigable waterbodies passed to the states and are therefore in the nature of an encumbrance upon title that is superior to any interest that was subsequently created under state law. n179 In this case, the navigational servitude may be said to be superior, as much because it was created first as because it is federal in nature.

In a similar sense, federally reserved water rights n180 may be superior to state created water rights because they pre-date the state-created rights. Federal reserved rights are implied by law when public land is set aside for particular reservation purposes. n181 These rights are superior only to those private rights created later in time.

On the other hand, a number of governmental interests have been held to be superior to private water rights as a matter of principle, not just because they may enjoy particular priority under the specific allocation system involved. n182 These include the ability of the state or federal government to manage water for the benefit of the public at large including, specifically, the ability to prevent waste of water, n183 to allocate water for domestic and other uses, n184 to maintain water quality and safety, n185 to protect the public trust in navigable waters, n186 to promote commerce and transportation on water n187 and to provide for minimum streamflow requirements. n188

In Wortelboer v. Benzie County, n189 the court upheld the authority of the state to establish varying lake levels during the year even though, in this case, it produced flooding and erosion and the fish killed created an intolerable stench.

COMPUTER-ASSISTED RESEARCH

LEXIS: public or government! w/1 interest! w/15 limit! w/15 water! w/1 right!

§ 50.04(d) Specific Limitations: Principles of Reasonable and Beneficial Use.

Most United States water allocation systems limit the substantive nature of the water right by defining the range of acceptable uses to which the water may be put. These uses are variously described as "reasonable" or "beneficial" depending on whether the system is described as a riparian or as an appropriative system. In riparian systems, the limitation is imposed through the doctrine of reasonable use. n190 In appropriative systems the corresponding concepts are known as the doctrine of beneficial use. n191 Both doctrines have the effect of limiting the nature of the water right by establishing a narrow and potentially changing universe of uses to which the water may be put. As applied, if the use

is not acceptable under the relevant doctrines of reasonable or beneficial use, the right to use may be altered or withdrawn or denied. Hence, it may be said that the right to use the water under a water right exists only so long as a reasonable or beneficial use is made of the water.

Further, this limitation is arguably an ongoing one, n192 and it is conceivable that, at some future date, the definitional content of the terms "reasonable" and "beneficial" may change in response to changes in the public interest and circumstances, which at that point in time may result in a change or limitation of existing water rights. This means that not only is the water right presently limited to a particular array of acceptable uses, it is also limited by the possibility of future reevaluation and possible termination. In this sense, the "vesting" of the water right n193 must be said to be subject to a continuing contingency -- that the nature of the use to which the water is put may be reconsidered and, in order for the water right to continue, it is necessary that the use to which the water is put be, at the time of re-evaluation, reasonable or beneficial. The nature of this limitation is such that the water right must be seen as held subject to the implicit caveat that if the use fails to satisfy the system's requirements regarding the character of the use, the right itself may be terminated or modified. n194

COMPUTER-ASSISTED RESEARCH

LEXIS: reasonable or beneficial w/1 use w/15 water! w/1 right!

§ 50.04(e) Specific Limitations: Authority to Change the Rules Regarding "Vesting."

Vested property rights are commonly thought to be among the most secure of rights. Indeed, there is the notion that once rights have vested, they are entitled to the full protection of the law and are immune from governmental invasion. Although a vested water right is typically said to be protected against unreasonable governmental interference, courts have made it clear that the state has some flexibility to determine and change the rules relating to the vesting of water rights. n195

This power largely results from the ongoing connection between the right of access to the water and the manner in which the water is used: existing rights persist only so long as the relevant criteria continue to be satisfied and new rights cannot be created unless the claimant abides the appropriate (albeit somewhat changeable) criteria. It thus cannot be said that water rights, once secured, are forever immutable and beyond governmental modification.

COMPUTER-ASSISTED RESEARCH

LEXIS: vest! w/2 water! w/1 right!

§ 50.04(f) Specific Limitations: Power to Prevent Misuse.

The power to modify is also the result of governmental authority regarding misuse and abuse of the water. This results from the status of the public as the owner of the water and the right holder as the possessor of a lesser, fractioned interest therein. As with "reasonable" or "beneficial," the definitional content of the term "misuse" may also change in meaning over time to reflect changes in society's needs and circumstances such that what is viewed as an acceptable use of the water at one point in time may be considered unacceptable at another. As a result, the water right may be reconsidered and radically altered at some future date, or the quantity available thereunder adjusted or perhaps terminated altogether, simply because the use that is presently not considered to be wasteful may, at that later date, be so considered.

Thus, it may be said that both the vesting of a water right and the question of propriety of use are always contingent upon the continuous satisfaction of specific, but changeable, use-related criteria, and a failure to comply at any time may result in the termination of the right despite their present "vested" status. n196

COMPUTER-ASSISTED RESEARCH

LEXIS: prevent! w/2 misuse! w/15 water! w/1 right!

§ 50.04(g) Specific Limitations: Police Power.

From time to time, it may be determined that the current water right allocation scheme of the jurisdiction is no longer adequate to meet the present and future needs of that jurisdiction. At such a time, the jurisdiction may be interested in making radical or fundamental changes in its water right system. The presence of "vested" rights may be seen as an effective deterrent to such changes where the substantive nature of the right may be altered in the process. However, given the particular nature of "vested" water rights, governments have a surprising amount of flexibility in making such changes. n197

Part of this flexibility is derived from the fact that the management of water resources is considered to be within the scope of the police power of the jurisdiction. This subjects water rights to government's power and authority to restrict where it is necessary to protect the health, safety, welfare or morals of the community. n198 Reasonable restriction of rights may occur under the guise of the police power without exposing the government to liability for "taking" the rights. As a result, courts have allowed some fundamental changes in the nature of basic water right allocation systems. n199

COMPUTER-ASSISTED RESEARCH

LEXIS: police w/1 power! w/15 water! w/1 right!

§ 50.04(h) Specific Limitations: Government as Proprietor of the Resource.

Much of the usable water in the United States arises on public domain land. Although, as a general proposition, states are given great authority over the creation of rights in this water, the federal government retains considerable authority, as the proprietor of the land, to supervise the ultimate use and development of the resource.

At the state level, authority is more extensive. In most jurisdictions, the state is deemed to hold title to the water itself and to have only granted limited rights of access to individuals. As such, the state has considerable authority to supervise the use and management of the water. This is derived from the view that the public not only holds title to the resource but holds that title in trust with an affirmative duty to insure that particular public benefits are derived from its use or exploitation. n200

COMPUTER-ASSISTED RESEARCH

LEXIS: government! or state! or federal w/2 authority w/15 water! w/1 right!

§ 50.04(i) Specific Limitations: Ability of Government to Restrict Unexercised Rights.

Courts have widely recognized that vested, but unexercised, rights may lawfully be treated differently from vested, but fully exercised, rights and in many cases have upheld governmental authority not only to change from a riparian to an appropriative system, n201 but to change the rules by which water rights "vest," such that future, unexercised and unquantified water rights are eliminated. n202

COMPUTER-ASSISTED RESEARCH

LEXIS: government! w/2 restrict! w/15 unexercis! w/1 right! w/2 water!

§ 50.04(j) Specific Limitations: "Priority" Systems Associated with the Allocation of Water Rights.

Most water allocation systems appear to indulge the implicit assumption made when a right is granted or recognized, that there will be a sufficient amount of water available to satisfy the claims represented by the right. Nature, of course, does not always cooperate with that assumption and it is likely that there may be times when the amount of water is not adequate to satisfy some or all right holders. In such a situation, each system has devised rules or a mechanism by which to deal with the shortfall. One consequence of these rules may be that some right holders may be denied the ability to enjoy their rights to the fullest extent. In order to justify any reduction in rights, it is necessary to consider that each right is inherently subject to the claims of all other relevant right holders. In this sense, all water rights are correlative, n203 at least in the sense that each water right is subject to, and affected by, every other water right pertaining to the same water source.

Many jurisdictions have developed priority-based mechanisms for determining which of several competing uses may be preferred over the others or how adjustments are to be made when there is not enough water for all. These rules or mechanisms inherently condition the status of a particular water right upon its relation to higher or lower priority rights, such that the ability to fully use and enjoy the particular water right may be significantly limited by the possibility that a competitor can show superior or preferred status.

In appropriative systems, primary priority is established on the basis of the timing of the use; the first to use is preferred over subsequent users. n204 In these jurisdictions, if water supplies are sufficient to meet the claims of all right holders, the inferior, junior or lower priority rights may be denied water. n205 In some jurisdictions, if the time of use is the same, a further priority structure may be invoked which discriminates between the competing claims on the basis of factors, such as the nature of the ultimate water use itself. n206

Status is relevant for priority purposes, and hence, as an inherent limitation on individual water rights, in riparian jurisdictions, as well. Use of the water by non-riparians, for example, may be tolerated only until the use is challenged by a riparian user who can show that the non-riparian's use is harmful and therefore unreasonable. n207 Likewise, "priority" (in the sense that one claim may be preferred over another) is typically established on the basis of land ownership: those who own land abutting the watercourse are preferred over those who do not. n208 Even among right holders of equal status, that is, those who all own riparian land, there is a basis for possibly elevating one claimant over another through the application of the doctrine of reasonable use. n209 If one's use is not reasonable, it will not be permitted as against a user who is making a reasonable use. n210 Thus, in a very real sense, the scope or extent of a particular right limits its relationship to opposing or competing claims and may be adversely affected or reduced by the ability of the competitor to show superior or protected status. Finally, even where all competing right holders are considered to have equally protected status, rights are co-dependent upon each other in that all rights may be reduced equally or equitably if there is not sufficient water for all. n211

COMPUTER-ASSISTED RESEARCH

LEXIS: priorit! w/15 water! w/1 right! w/5 allocat!

§ 50.04(k) Specific Limitations: Exclusivity of the Right.

The water right must be considered to have both an affirmative and a negative dimension. On the affirmative side, the water right authorizes the water right holder to use and enjoy the water represented by the particular right. Although this right is subject to jurisdictional limitations relating to the beneficial or reasonable nature of that use, it must be considered a positive right which entitles the right holder to a particular benefit. This follows from the usufructary nature of the right. On the other hand, the right has a negative, or exclusionary, dimension to it as well. The water right

holder may exclude anyone else from intruding upon the right. n212 This follows from the perception that right grants an exclusive claim to a particular amount of water for the approved use. As a result, the right holder may not only lawfully exclude others from the specific quantity of water to which the right pertains, but may raise the existence of that right as a potential obstacle to the granting or acquisition of other rights by other potential claimants. This latter feature of the right is evident in the requirement that, for a claim to be reasonable or beneficial, it cannot adversely affect existing rights.

COMPUTER-ASSISTED RESEARCH

LEXIS: exclusiv! or exclud! w/15 water! w/1 right!

§ 50.04(l) Specific Limitations: Duration.

Water rights may be of limited duration. There is considerable variation among the respective states on this issue. In some jurisdictions, the right is perpetual; n213 in others it is for a specified period of time. n214 In some jurisdictions, the right exists only so long as the use continues, n215 whereas in others, it lasts as long as the prerequisite riparian land is owned. n216

COMPUTER-ASSISTED RESEARCH

LEXIS: imit! w/2 duration w/15 water! w/1 right!

FOOTNOTES:

(n1)Footnote 169. For further discussion, *see* A. Lynne Krogh, *Water Right Adjudications in the Western States: Procedures, Constitutionality, Problems and Solutions, 30 Land & Water L. Rev. 9 (Winter 1995);* Peggy B. Johnson, *The Takings Issue in the Local Government and Watershed Context, 1995 Det. C.L. Rev. 12 (Spring 1995);* Christine A. Klein, *The Constitutional Mythology of Western Water Law, 14 Va. Envtl. L.J. 13 (Winter 1995);* Deborah K. Paulus, *Reflections on Takings: The Watuppa Ponds Cases, 17 W. New Eng. L. Rev. 29 (Winter 1995).*

See also Akins v. State, 71 Cal. Rptr. 314 (1998) reversing lower court which had found the state liable for inverse condemnation for flooding during a heavy storm in 1986. *See SRBA v. Potlach Corporation, 12 P.3d 1260 (Id. 2000); Farmers Reservoir and Irrigation Company v. Consolidated Mutual Water Company, 33 P.3d 799 (Colo. 2001); Klump v. United States, 50 Fed. Cl. 268 (2001); Tulare Lake Basin Water Storage District v. Untied States, 49 Fed. Cl. 313 (2001).*

(n2)Footnote 170. J. Cribbet, *Water as a Species of Private Property, 5 ILL. BAR J. 449 at 465 (Jan. 1959).*

(n3)Footnote 171. Justinian Institutes, 2.1.1: "Those the ownership of which belongs to nobody in particular, and which all may freely use, comfortable with the use for which nature has intended them; such as air, running water, the sea and its shores."

(n4)Footnote 172. *See* 2 William Blackstone, Commentaries 14-15. Running water was not considered capable of private ownership since it was not under any individual's possession or control.

(n5)Footnote 173. One doctrine that has argued in favor of a special interest in the public at large that results from, and perhaps extends beyond, public ownership of the water or the beds under the water in the public trust doctrine. *See, e.g., Illinois Cent. R.R. v. Illinois, 146 U.S. 387 (1892). See also National Audubon Society v. Superior Court of Alpine County, 658 P.2d 709 (Cal. 1983)* (Mono Lake); *United Plainsmen Ass'n v. North Dakota State Water Conservation Comm'n, 247 N.W.2d 457 (N.D. 1976); State v. Bleck, 338 N.W.2d 492 (Wis. 1983).* For further discussion, *see* Joseph Sax, *The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention, 68 Mich. L. Rev. 471 (1970);* Richard Lazarus, *Changing Conceptions of Property and Sovereignty in Natural Resources: Questioning the Public*

Trust Doctrine, 71 Iowa L. Rev. 631 (1986); Ralph Johnson, *Water Pollution and the Public Trust Doctrine, 19 Env. L. 485 (1989).*

(n6)Footnote 174. *See* § 50.06, *infra*.

(n7)Footnote 175. *See* 2 William Blackstone, Commentaries 14-15. Running water was not considered capable of private ownership since it was not under any individual's possession or control.

(n8)Footnote 176. *See, e.g.*, Kan. Stat. Ann. § 82a-702:

All the water within the state of Kansas is hereby dedicated to the use of the people of the state, subject to the control and regulation of the state in the manner herein prescribed.

See also Proctor v. Sim, 236 P. 114 (Wash. 1925).

(n9)Footnote 177. The California Courts have used a somewhat different rationale -- that one simply can not lawfully acquire a vested right in an unreasonable or otherwise prohibited use of the water. *See Imperial Irrigation District v. State Water Resources Control Board, 225 Cal. App. 3d 548 (1990),* where the court stated: "[t]he historic concepts of water 'rights' in California were dramatically altered by the adoption in 1928 of [a constitutional amendment which empowered the Board to conduct hearings to determine whether particular water uses were reasonable or wasteful]. Our Supreme Court ... acknowledged that the new provision altered previously vested rights ... ." The court then found that "[i]t has been long established that all property is held subject to the reasonable exercise of police power and that constitutional provisions declaring that property shall not be taken without due process of law have no application in such cases." This approach would seem to give the state actually two different ways to reshape a water right without interfering with the "vested property" features of the right: first, it could simply force the elimination of any and all aspects of the resulting use of water that were considered "unreasonable." Second, so long as the state stays within the scope of the police power, the courts recognize that there is no intrusion into the arena of vested rights.

(n10)Footnote 178. *United States v. Willow River, 324 U.S. 499 (1945).*

(n11)Footnote 179. *See* discussion of the source of state authority over water rights, § 50.16(a), *infra*.

(n12)Footnote 180. *See* § 50.17, *infra*.

(n13)Footnote 181. *See Winters v. United States, 207 U.S. 564 (1908); United States v. New Mexico, 438 U.S. 696 (1978).*

(n14)Footnote 182. *See United States v. Willow River, 324 U.S. 499 (1945).*

(n15)Footnote 183. *See* § 50.09(w), *infra*.

(n16)Footnote 184. *See* § 50.21, *infra*.

(n17)Footnote 185. *See, e.g.*, Clean Water Act, *33 U.S.C. §§ 1251*-1376.

In *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency, 34 F. Supp. 2d 1226 (D. Nev. 1999),* a case not directly involving water rights, the court held that an ordinance temporarily prohibiting most construction and a resolution temporarily suspending all permit approvals deprived the owners of all economically viable use of their land. In contrast, the regional plan did not deprive the landowners of all economically viable uses of their land and did not constitute a taking. The ordinances in question were adopted to deal with high hazard lands around alpine lakes and the effect of such lands on eutrophication problems in the lakes. The case is particularly useful for its definition of "economically viable." The court held that the a permitted use of the land is economically viable when a sufficient

number of people would be willing to buy property for that use, whatever it might be. This means the determination is to be made in the context of a "competitive marketplace." If there is only one willing buyer, such as a neighbor, interested in acquiring the land in order to protect the view from the property, there would not be a "competitive" market for the property. The fact that the permitted use might not be one the current owner wants to make does not matter. On the other hand, the fact that someone, such as the government or an environmental group, may be willing to buy the land that can be used only in its natural state does not necessarily mean that leaving the property in its natural state is an "economically viable" use.

In *Barnhill v. City of North Myrtle Beach, 511 S.E. 2d 361 (S.C. 1999),* the court upheld an ordinance that restricted the launching and beaching of motorized watercraft, including personal water craft, on public beaches. This ordinance had been challenged as an unconstitutional restriction on access to navigable waters, as preempted by state law and as a regulatory taking.

The court held that the public's right to access to navigable waters was subject to reasonable regulation and found the ordinance to be reasonably related to the legitimate public interest in public safety. The ordinance was held not to be preempted because the state authority related only to activities "on the water" and would not affect plaintiffs who sought to operate a land-based jet ski rental business. The ordinance was held not to constitute a taking because the beach was governmental property and there is no private right in a particular use of government property.

In *St. Croix Waterway Association v. Meyer, 178 F.3d 515 (8th Cir. 1999),* the court upheld Minnesota's slow no-wake regulations against a challenge that they violated the public trust doctrine.

In *R & R Associates v. City of Providence, 724 A. 2d 432 (R.I. 1999),* it was held that the municipalities and water districts were not liable for the taking of riparian rights. This was because, by statute, only Providence was solely liable for any takings, even when done for the benefit of end-user communities and water districts.

In *Farmers High Line Canal and Reservoir Company v. City of Golden, 975 P.2d 189 (Colo. 1999),* the court refused to allow junior water right holders to seek modification of the city's water rights to impose volumetric limitations.

For a discussion of environmental concerns regarding water and some property implications, see David J. Aiken, *Balancing Endangered Species Protection and Irrigation Water Rights: The Platte River Cooperative Agreement, 3 Great Plains Nat. Resources J. 119 (1999).* Robert W. Adler, *Integrated Approaches to Water Pollution: Lessons from the Clean Water Act,* 23 Harvard Envtl. L. Rev. 203 (1999). Note and Comment, *The Uncertainty Surrounding Grazing and Section 401 of the Clean Water Act: Predicting the Outcome of Oregon Natural Desert Association v. Dombek, 13 B.Y.U. J. Pub. L. 391 (1999);* Michael A. Heller, *Boundaries of Private Property, 108 Yale L.J. 1163 (1999).*

See also Johanna H. Wald & Joseph M. Feller, *Recent Developments in the Law of Grazing on Federal Lands,* SD47 ALI-ABA 151 (1999); Dan A. Tarlock, *The Creation of New Risk Sharing Water Entitlement Regimes: The Case of the Truckee-Carson Settlement, 25 Ecology L. Q. 674 (1999);* Michael J. Pearce, *Analytic Geography in Western Water Management,* 13 SPG Nat. Resources & Env't 537 (1999).

(n18)Footnote 186. *See, e.g., National Audubon Soc'y v. Superior Ct. of Alpine County, 658 P.2d 709 (Cal. 1983).*

(n19)Footnote 187. *See, e.g., Gibbons v. Olden, 22 U.S. (9 Wheat.) 1 (1924). See also Sporhase v. Nebraska ex rel. Douglas, 458 U.S. 941 (1982).*

(n20)Footnote 188. In some jurisdictions, this is accomplished through the act of withdrawing water from the pool available for use or appropriation. *See* Kan. Stat. Ann. § 82a-703a.

(n21)Footnote 189. *537 N.W.2d 603 (Mich. App. 1995).* For further discussion, *see* Douglas L. Grant, *Western Water Rights and the Public Trust Doctrine: Some Realism about the Takings Issue,* 27 Ariz. St. L. Rev. 423 (Summer

1995); Michael C. Blumm and Thea Schwartz, *Mono Lake and the Evolving Public Trust in Western Water, 37 Ariz. L. Rev. 701 (Fall 1995);* Cynthia L. Koehler, *Water Rights and The Public Trust Doctrine: Resolution of the Mono Lake Controversy, 22 Ecology L.Q. 541 (Aug. 1995);* Donna S. Fitzgerald, *Extending Public Trust Duties to Vermont's Agencies: A Logical Interpretation of the Common Law Public Trust Doctrine, 19 Vt. L. Rev. 509 (Winter 1995).*

Getches, *Colorado River Governance: Sharing Federal Authority as an Incentive to Create a new Institution, 68 Colo. L. Rev. 573 (1997);* Josephson, *Katie John and Totemoff: The United States and Alaska Clash over the Reserved Rights Doctrine and Native Alaska Hunting and Fishing Rights -- the U.S. Supreme Court Passes on an Opportunity to Resolve the Subsistence Debate, 6 Dick. J. Envtl. L. & Pol'y 225 (1997);* Powell, *Recent Application of the Reserved Rights Doctrine: State of Alaska v. Babbitt,* 25 Real Est. L.J. 308 (1997); Mossman, *Whiskey Is for Drinkin' but Water Is for Fightin' About: A First-hand Account of Nebraska's Integrated Management of Ground and Surface Water Debate and the Passage of L.B. 108, 30 Creighton L. Rev. 67 (1996);* Holtz, *Water Law in Transition: Debates that could shape Florida's Future, 70 Fla. B.J. 77 (Nov.1996);* Carpenter, *Water for Growing Communities: Refining Tradition in the Pacific Northwest, 27 Envtl. L. 127 (1997);* Geon, *A Right to Ice? The Application of International and National Water Laws to the Acquisition of Iceberg Rights, 19 Mich. J. Int'l L. 277 (1997).*

In *Good v. United States, 39 Fed. Cl. 81 (Ct. Cl. 1997),* the court held that the federal navigational servitude did not constitute a complete defense to a takings claim arising from the denial of an application for a permit to fill wetlands. On the other hand, the court ruled that the Endangered Species Act did not require that the land be maintained in its natural state and thus did not deprive the landowner of all economic value associated with the property. Finally, the court held that the federal and state regulatory regimes were so pervasive that a developer could not have a reasonable expectation of putting into effect the development plans.

(n22)Footnote 190. *See* § 50.08(k), *infra*.

(n23)Footnote 191. *See* § 50.09(m), *infra*.

(n24)Footnote 192. *See, e.g.,* Kan. Stat. Ann. § 82a-707 which provides that:

surface or groundwaters of the state may be appropriated as herein provided. Such appropriation shall not constitute ownership of such water, and appropriation rights shall remain subject to the principle of beneficial use.

See Imperial Irrigation District v. State Water Resources Control Board, 225 Cal. App. 3d 548 (1990), where the court said "[t]he historic concepts of water 'rights' in California were dramatically altered by the adoption in 1928 of [a constitutional amendment which empowered the Board to conduct hearings to determine whether particular water uses were reasonable or wasteful]."

See Empire Lodge Homeowners' Association v. Moyer, 39 P.3d 1139 (Colo. 2001); Concerning the Application for Water Rights of the Consolidated Mutual Water Company, Farmers Reservoir and Irrigation Co., v. Consolidated Mutual Water Company, Colo. LEXIS 953 (Colo 2001); *Farmers Reservoir and Irrigation Company v. Consolidated Mutual Water Company, 33 P.3d 799 (Colo. 2001); Klump v. United States, 50 Fed. Cl. 268 (2001); Defenders of Wildlife v. Hull, 19 P.3d 722 (Az. App. 2001); Hallauer v. Spectrum Properties, Inc. 18 P.3d 540 (Wash. 2001); Barron v. Idaho Department of Water Resources, 18 P.3d 219 (Id.. 2001).*

See also L. Boens, *Aberdeen-Springfield Canal Company v. Peiper: Interpreting Idaho's Forfeiture Statute as Applied to Carey Act Companies, 5 Great Plains Nat. Resources J. 237 (2001);* P. Lacy, *The Irrigated Desert and Imperiled Salmon: "Reclaiming" Illegally Spread Water via the Endangered Species Act,* 4 U. Denv. Water Law Rev. 351 (2001); E. Shane, *Water Rights and Gila River III: The Winters Doctrine Goes Underground, 4 U. Denv. Water L. Rev. 397 (2001).*

(n25)Footnote 193. For a discussion of vesting in riparian systems, *see* § 50.08(h), *infra*. Vesting in appropriative

systems is discussed at § 50.09(d), *infra*.

See Board of County Commissioners of the County of Arapahoe v. Crystal Creek Homeowners Association, 14 P.3d 325 (Colo. 2000).

(n26)Footnote 194. *See Matter of Board of County Comm'rs, 891 P.2d 952 (Colo. 1995)* (court held that there is a limit read into every water decree that the diversion is limited to an amount sufficient for the purpose for which the appropriation was made, even if that is less than the decreed rate of diversion. Further, the right claimant cannot divert more than can be used beneficially).

(n27)Footnote 195. *See, e.g., Williams v. City of Wichita, 374 P.2d 578 (Kan. 1962); Peterson v. Department of Ecology, 596 P.2d 285 (Wash. 1979).*

See Imperial Irrigation District v. State Water Resources Control Board, 225 Cal. App. 3d 548 (1990), where the court stated "[t]he historic concepts of water 'rights' in California were dramatically altered by the adoption in 1928 of [a constitutional amendment which empowered the Board to conduct hearings to determine whether particular water uses were reasonable or wasteful]. Our Supreme Court ... acknowledged that the new provision altered previously vested rights. ..."

Store Safe v. United States, 35 Fed. Cl. 726 (1996) (vested irrigation water rights; vested range stock water rights); *Bayou Land Co. v. Talley, 924 P.2d 136 (Colo. 1996)* (right to extract nontributary groundwater prior to construction of well and/or water court adjudication is not vested right); *Teel Irrigation Dist. v. Water Resources Dep't of Ore., 919 P.2d 1172 (Or. 1996)* (permit for appropriation of water does not represent a perfected and vested water right); Corbridge, James N., *Historical Water Use and the Protection of Vested Rights: A Challenge for Colorado Water Law, 69 U. Colo. L. Rev. 503 (1998).*

See Empire Lodge Homeowners' Association v. Moyer, 39 P.3d 1139 (Colo. 2001); Westlands Water District v. United States, 153 F. Supp. 2d 1133 (E.D. Cal. 2001).

See also J. Peck, *Assessing the Quality of a Water Right,* 70 May J. Kan. B. A. 26 (2001).

(n28)Footnote 196. *See Imperial Irrigation District v. State Water Resources Control Board, 225 Cal. App. 3d 548 (1990),* where the court stated: "[t]he historic concepts of water 'rights' in California were dramatically altered by the adoption in 1928 of [a constitutional amendment which empowered the Board to conduct hearings to determine whether particular water uses were reasonable or wasteful]. Our Supreme Court ... acknowledged that the new provision altered previously vested rights ... . It has been long established that all property is held subject to the reasonable exercise of police power and that constitutional provisions declaring that property shall not be taken without due process of law have no application in such cases." For further discussion, *see* William Poole, *Where Have All the Salmon Gone? Salmon Have Been Driven to the Brink of Extinction by Entrenched Water Rights, 15 Cal. Law. 50 (Apr. 1995);* John C. Peck, *Loss of Kansas Water Rights for Non-Use, 43 U. Kan. L. Rev. 801 (July 1995);* A. Lynne Krogh, *Water Right Adjudications in the Western States: Procedures, Constitutionality, Problems and Solutions, 30 Land & Water L. Rev. 9 (Winter 1995).*

(n29)Footnote 197. *Williams v. City of Wichita, 374 P.2d 578 (Kan. 1962).*

(n30)Footnote 198. *Village of Euclid v. Ambler Realty Co., 272 U.S. 365 (1926).*

(n31)Footnote 199. *Williams v. City of Wichita, 374 P.2d 578 (Kan. 1962).*

See Imperial Irrigation District v. State Water Resources Control Board, 225 Cal. App. 3d 548 (1990), where the court stated: "[t]he historic concepts of water 'rights' in California were dramatically altered by the adoption in 1928 of

[a constitutional amendment which empowered the Board to conduct hearings to determine whether particular water uses were reasonable or wasteful]." For further discussion, *see* A. Lynne Krogh, *Water Right Adjudications in the Western States: Procedures, Constitutionality, Problems and Solutions, 30 Land & Water L. Rev. 9 (Winter 1995);* Peggy B. Johnson, *The Takings Issue in the Local Government and Watershed Context, 1995 Det. C.L. Rev. 12 (Spring 1995);* Douglas L. Grant, *Western Water Rights and the Public Trust Doctrine: Some Realism about the Takings Issue,* 27 Ariz. St. L. Rev. 423 (Summer 1995); Christine A. Klein, *The Constitutional Mythology of Western Water Law, 14 Va. Envtl. L.J. 13 (Winter 1995).*

In *Board of County Commissioners of Ottowa County v. Village of Marblehead, 711 N. E. 2d 663 (Oh. 1999),* an established sewer district was given authority under a statute to complete a county water service project even though the area had been acquired by a municipality during the pendency of the project. The City argued that the statute violated the state Constitution's grant to municipalities of exclusive rights to supply water service to municipal residents. The court held that the statute authorized a valid exercise of police powers that did not substantially infringe on the municipality's constitutional power to operate utilities.

In *Purdie v. Attorney General, 732 A. 2d 442 (N.H. 1999)* the court used the mean high tide rather than the highest high water mark to determine the public boundary between public and private shorelands. In this case, it was held the state effected an unconstitutional taking by using the higher mark.

For further discussion, *see* Michael A. Heller *Boundaries of Private Property, 108 Yale L.J. 1163 (1999).*

(n32)Footnote 200. *See, e.g.*, Kan. Stat. Ann. § 82a-702:

All the water within the state of Kansas is hereby dedicated to the use of the people of the state, subject to the control and regulation of the state in the manner herein prescribed.

See also: Molly Selvin, *The Public Trust Doctrine in American Law and Economic Policy*, 1789-1920, *1980 Wis. L. Rev. 1403;* Deveney, *Title, Jus Publicum, and the Public Trust: An Historical Analysis*, 1 Sea Grant L.J. 13 (1976); Joseph Sax, *The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention, 68 Mich. L. Rev. 471 (1970);* Richard Lazarus, *Changing Conceptions of Property and Sovereignty in Natural Resources: Questioning the Public Trust Doctrine, 71 Iowa L. Rev. 631 (1986).*

It has been held that the federal government acts as a proprietor of the public domain in managing grazing activity on such lands. This was held sufficient to support a federal application for state-granted water rights in *State of Nevada v. Morros, 766 P.2d 263 (Nev. 1988).*

(n33)Footnote 201. *See Williams v. City of Wichita, 374 P.2d 578 (Kan. 1962); In re Hood River, 227 P. 1065 (Or. 1924); In re* Adjudication of Water Rights in the *Upper Guadalupe River, 642 S.W.2d 438 (Tex. 1982);* In the *Matter of Deadman Creek Drainage Basin, 694 P.2d 1071 (Wash. 1985).* Changes have also been made by statute. *See* Miss. Code § 51-3-7; N.D. Cent. Code §§ 61-01-61-01.1 (since repealed); OKLA. Stat. Ann. § 105.2; S.D. Codified Laws Ann. § 46-1-9.

(n34)Footnote 202. *See, e.g., Williams v. City of Wichita, 374 P.2d 578 (Kan. 1962).*

(n35)Footnote 203. This is not to be confused with so-called correlative groundwater rights recognized in several jurisdictions. *See* § 50.11(g), *infra*. In those jurisdictions, it is said that all claimants to the same source are said to be co-equal and the resource is correspondingly apportioned among them.

(n36)Footnote 204. *See* § 50.09(p), *infra*.

(n37)Footnote 205. *See* § 50.09(p), *infra*.

(n38)Footnote 206. *See, e.g.*, Kan. Stat. Ann. § 82a-707 which establishes the following priority structure where the timing of the use is identical: domestic, municipal, irrigation, industrial, recreational and power uses.

(n39)Footnote 207. *See Kennebunk, Kennebunkport & Wells Water Dist. v. Maine Tpk. Auth., 71 A.2d 520 (Me. 1950).* In some jurisdictions, all that is necessary for the riparian to show to prevail is the fact of non-riparian use. *See, e.g., McCord v. Big Brothers Movement, 185 A. 480 (N.J. 1936).*

(n40)Footnote 208. *See, e.g., Tulare Irrig. Dist. v. Lindsay-Strathmore Irrig. Dist., 45 P.2d 972 (Cal. 1935); Wasserburger v. Coffee, 141 N.W.2d 738 (Neb. 1966); Franco-American Charolaise, Ltd. v. Oklahoma Water Resources Bd., 855 P.2d 568 (Okla. 1990).*

(n41)Footnote 209. *See* § 50.08(k), *infra*.

(n42)Footnote 210. *See* § 50.08(k), *infra*.

(n43)Footnote 211. *See* § 50.08(k), *infra*.

(n44)Footnote 212. *See, e.g., Coffin v. Left Hand Ditch Co., 6 Colo. 443 (1882).*

(n45)Footnote 213. Under the common law of both riparian and appropriative systems, there appears to have been no time limit on the duration of the right. *See, e.g., Arizona v. California, 283 U.S. 423 (1931)* where the Court stated that a vested appropriation right allowed the holder "to take and divert from the same source, and to use and consume the same quantity of water annually forever."

(n46)Footnote 214. *See, e.g.*, Wash. Adm. Code § 173-596-010 limits future water rights to a renewable period of 50 years if the quantity appropriated is 40 cubic feet per second or more, or if the water is used to irrigate 2000 acres or more.

In 1985, Montana, the legislature provided that only the Department of Natural Resources and Conservation can make appropriations in excess of 4,000 acre-feet a year and 5.5 cubic feet per second is to be consumed or if water is to be transported outside the basin of the river. Private parties wishing to use this water must lease it from the Department and the leases cannot be for more than 50 years. Mont. Code Ann. §§ 85-2-141 and 85-2-301.

(n47)Footnote 215. *See* § 50.09(ee), *infra*.

(n48)Footnote 216. *See, e.g., Lux v. Haggin, 10 P. 674 (Cal. 1886).*

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CHAPTER 50 WATER RIGHTS

6-50 Thompson on Real Property, Thomas Editions § 50.05

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§ 50.05 State Authority Over Water Rights.

[Go To Supp]

§ 50.05(a) Basis for State Authority.

The power to grant or recognize water rights is clearly recognized as within the power of states. n217 This power is deemed to fall to the states as successors to the Crown of England. n218 As such, the states hold title to the beds of navigable waterbodies, n219 as well as to the water itself, n220 and have the authority to determine the particular allocation system that operates within the state. n221 Although courts accept this position as well settled and to have occurred when the state adopted the common law at statehood, as a matter of history, this view actually enlarges the Common Law view and represents an interesting melding of Roman and English Common Law principles.

The Roman law of water and the common law of England approach the problem of control over water from distinctly different perspectives. According to the Roman view, running water was esteemed to be of sufficient life-sustaining value that it was considered not susceptible of private ownership or monopoly. As such, it was considered to be held in common and accessible to all.

In contrast, the English early adopted an association between ownership and access to the water and the ownership of the underlying land. Tidal waters were distinguished from inland waters and the Crown was considered to "own" the bed of the sea out as far as a cannon shot would reach. n222 Inland waters were susceptible of private ownership. n223 The operative assumption of the English position appears to be that from the ownership of the soil is derived the power to control access to the surface of the water. n224

Since the early days of the United States, there has been a considerable evolution in the doctrine of state authority such that it is quite clear that the acquisition of a water right, regardless of whether the claim is based on the ownership of land associated with the water, carries no title to the water itself until the same is actually reduced to possession. n225

It should be made clear that while the state has authority over the issuance of water rights based on its status as successor to the King, its actual power to regulate water rights is grounded in the inherent police power to protect the health, safety, welfare and morals of the community. n226 As such, the states are not dependent upon any grant of such power from the federal government. This is significant where the exercise of a particular federal power may have the

seeming effect of preempting state action. For example, in the cases where federal authority under the Endangered Species Act, n227 apparently impinges upon state granted water rights, the holdings should not be read as displacing state authority over the issuance or granting of water rights. Rather, the cases would suggest that perhaps there is concurrent jurisdiction over the effects that may result from the uses of water that are authorized by the state granted water right. Where those effects violate federal law, there should be federal consequences that will not be excused by the fact that the state initially authorized the use in the first place. Perhaps a useful way to rationalize the apparent conflict between federal and state authority is to suggest that water rights cannot be granted for activities that are illegal or produce unlawful consequences. If illegality results from the exercise of a water right, it would seem that the use authorized by the water right should be characterized as unreasonable or non-beneficial and therefore should be terminated or modified. If the illegality is the result of the failure to conform to a federal law, that should be of little consequence since state law has never pretended to be the sole arbiter of what is or is not lawful or unreasonable. That a state may suppress a state granted water right because the resulting use of the water is deemed unreasonable is abundantly certain. What is uncertain, of course, is whether the federal government has the power to compel the state to make such a determination and take such an action. One possible outcome from these cases may be to only enjoin the activity that offends the federal law and leave the water right intact so long as it can otherwise be exercised in ways which do not offend the federal restriction. n228

COMPUTER-ASSISTED RESEARCH

LEXIS: state! w/1 authority w/15 water! w/1 right!

§ 50.05(b) State Authority Over Water Arising on Public Land.

State authority over the allocation of water is considered to extend to all water resources within the state's boundaries, even though the water actually has as its source, or is physically located upon, the federally controlled public domain. n229 This authority was expressly granted to Western states by statute n230 but has been considered applicable throughout the United States. n231 As a result, those who seek water rights must claim them under the authority of state law. An important exception to this general rule involves federally created or "reserved" rights. n232 There, the priority, quantity and even validity of competing, state authorized claims law may be preempted by the superior federal status of the rights.

COMPUTER-ASSISTED RESEARCH

LEXIS: state! w/1 authority w/15 water! w/5 public w/2 land or domain

§ 50.05(c) Federal Regulatory Authority Over State Created Water Rights.

The federal government possesses and exercises a wide variety of power over water use. Water-related federal authority may affect: 1) the use and obstruction of navigable waterways; n233 2) pollution and the prevention of contamination of water resources; n234 3) the use of the public land where much of the nation's water originates; n235 4) activities which involve interstate commerce n236 and 5) the use of federally developed reservoirs and reclamation structures from which water is made available to users throughout much of the West. n237 Although these laws are not intended to preempt state water right allocation laws, n238 the exercise of federal regulatory authority over water may have the effect of destroying or modifying the state granted water right. n239

As noted above, the federal government may possess rights in water that are superior to state granted rights. Rights, such as the federal navigational servitude, n240 are based on both federal proprietary and superior sovereign concepts. Although these rights do not grant the federal government access to a particular quantity of water for consumptive use purposes, they may permit the federal government to engage in activities involving the waterbodies which may adversely affect or destroy individual consumptive rights. n241 Reserved rights n242 do grant rights in water for

consumptive use purposes and are neither derived from nor dependent upon state law for their existence or their quantification. n243 These rights are considered to be superior to and have priority over state granted rights which are perfected subsequent to the federal right. n244 Finally, the federal government may claim or hold water rights which are secured under state law, in which case the federal government acts as a direct competitor for the water with individual water users. n245

The most subtle dimension of the federal presence arises by virtue of federal jurisdiction over activities which directly or indirectly impair or impede interstate commerce. n246 This power has been justified federal regulation of activities which pollute or otherwise adversely affect watercourses, n247 as well as for compelling the removal of obstructions from navigable waterways. n248 It is also the supporting basis for federal water quality and pollution control legislation. n249 This power, however, typically has not been the basis for dealing with issues of water consumption, state water right allocation, or other water rights questions that traditionally have been treated under state law. The 1982 case of *Sporhase v. Nebraska ex rel. Douglas* n250 may suggest that the Commerce Clause play a role in water right allocation decisions. In that case, the Supreme Court invalidated a portion of the Nebraska water right allocation statute that denied an individual who owned land partly in Nebraska and partly in Colorado from securing a water right in Nebraska for water which then would be used across the state boundary in Colorado. The Court considered water to be an article of interstate commerce and perceived the statute to constitute an unreasonable state barrier. At least part of the Court's rationale for that decision was the concern that Congress have the power, albeit unexercised, to regulate the interstate consequences of groundwater overdrafts. n251

In a 1992 case, a lawsuit was filed n252 by the Sierra Club to compel the federal government to assume control over the Edwards Underground Aquifer in order to protect and insure water availability for minnows, salamanders and wild rice species that live in Comal Springs which are listed as endangered under the Endangered Species Act. n253 Under this act, the Secretary of Interior is required to publish a list of all species determined by the Interior Department or by the Commerce Department to be endangered and then to promulgate such regulations as the Interior Secretary deems necessary and advisable for the conservation of such species. n254 The act indicates that the federal government may acquire water or an interest therein for the purpose of conserving any endangered species or threatened species, n255 though this is to be done through cooperation "to the maximum extent practicable with the states." n256 It would appear such a requirement would require that the federal interest be acquired either through condemnation or pursuant to relevant state law. Further, the language of the statute does not appear to suggest that it is intended to preempt state water rights. Despite what would seem to be a strained interpretation of the statute to construe the provisions relating to cooperation with the states to suggest that to the extent that state created water rights interfere with the specified objectives or prohibitions of the act, the state law or regulation could be considered void under § 1535(f), the judge nevertheless enjoined the state from interfering with the purposes of the federal statute. n257

COMPUTER-ASSISTED RESEARCH

LEXIS: federal w/2 regulat! w/15 state! w/2 creat! w/2 water! w/1 right!

FOOTNOTES:

(n1)Footnote 217. *See, e.g., California-Oregon Power Co. v. Beaver Portland Cement Co., 295 U.S. 142 (1935); Kansas v. Colorado, 206 U.S. 46 at 94 (1907).*

Charles T. Dumars, *Changing Interpretations of New Mexico's Constitutional Provisions Allocating Water Resources: Integrating Private Property Rights and Public Values, 26 N.M. L. Rev. 367* (Summer, 1996); Frona M. Powell, *The Reserved Water Rights Doctrine,* 25 Real Est. L.J. 306 (1997).

(n2)Footnote 218. *See Martin v. Waddell, 41 U.S. (16 Pet.) 234 (1842).* As other states entered the Union, they came in "on an equal footing" with the original thirteen states and therefore are considered to possess all the powers of those states, including control over the waters of the state. *See Martin v. Pollard's Lessee, 44 U.S. (3 How.) 212 (1845).*

In 1947, the United States Supreme Court held that the federal government, not the states (including the original 13 states), owned the three-mile belt of land along the coast. This holding was reversed by Congress with the passage of the Submerged Land Act, Pub. L. 31, *67 Stat. 29 (1953)* in which the United States released and relinquished to the States all of its claims, rights, interests, title and ownership in lands and resources beneath navigable waters and gave dominion over such waters to the States.

(n3)Footnote 219. *See* § 50.06(i), *infra*.

(n4)Footnote 220. *See* J. Cribbet, *Water as a Species of Private Property, 5 Ill. Bar J. 450 (1959).*

(n5)Footnote 221. *See, e.g., Kansas v. Colorado, 206 U.S. 46 at 94 (1907)* where the Supreme Court expressly held that each state:

> may determine for itself whether the common law rule in respect to riparian rights or that doctrine which obtains in the arid regions of the West of the appropriation of waters for the purposes of irrigation shall control. Congress cannot enforce either upon any state... .

See also Connecticut v. Massachusetts, 282 U.S. 66 (1932), holding that:

> every state is free to change its laws governing riparian ownership and to permit the appropriation of flowing waters for such purposes as it may deem wise.

See FM Properties Operating Company v. City of Austin, 22 S.W. 3d 868 (Tx. App. 2000).

(n6)Footnote 222. 2 Kent's Commentaries, 29 (1826). This has been construed to be a distance of one marine league or three geographical miles. *See Dunham v. Lamphere, 69 Mass. 268, 170 (1955):*

> We suppose the rule to be that these limits extend a marine league, or three geographical miles from shore, and in ascertaining the line of shore this limit does not follow each narrow inlet or arm of the sea, but when the inlet is so narrow that persons or objects can be discerned across it with the naked eye, the line of territorial jurisdiction stretches across from one headland to the other of such inlet.

(n7)Footnote 223. *See* 28 Halsbury, Laws of England 399, 2. 764:

> The soil of lakes and pools, even when they are so large that they might be termed inland seas, does not of common right belong to the Crown and the law as to the ownership of the soil is the same as that applied to inland non-tidal waters whatever the size of the water space may be.

See also Marshall v. The Ullswater Navigation Co., 7 Q.B. Cases 166 (1871) holding the Crown did not own the soil under the waters of lakes and pools.

(n8)Footnote 224. *See, e.g.*, Tyler v. Wilkinson, 4 Mason 397 (1927).

(n9)Footnote 225. *See Williams v. City of Wichita, 374 P.2d 578 (Kan. 1962).*

For further discussion, *see* Deborah L. Freeman and Carmen M. Sower, *Against the Flow: Emerging Conflicts between Endangered Species Protection and Water Use*, 40 Rocky Mts. Mineral L. Inst. 23 (Annual 1994); Josephine P. Beeman, *Historical Development of Instream Flows in Idaho, 37 Advocate 16 (Mar. 1994);* Peter L. Reich, *The*

"Hispanic" Roots of Prior appropriation in Arizona, 27 Ariz. St. L.J. 649 (Summer 1995); Douglas L. Grant, *Western Water Rights and the Public Trust Doctrine: Some Realism about the Takings Issue, 27 Ariz. St. L.J. 423 (Summer 1995);* Knud E. Hermansen & Donald R. Richards, *Maine Principles of Ownership Along Water Bodies, 47 Me. L. Rev. 35 (Apr. 1995);* Eric Maski Tokuyama, *Riparian Rights, 22 Pepp. L. Rev. 1352 (Apr. 1995);* Donna S. Fitzgerald, *Extending Public Trust Duties to Vermont's Agencies: A Logical Interpretation of the Common Law Public Trust Doctrine, 19 Vt. L. Rev. 509 (Winter 1995);* John Davidson, *South Dakota Groundwater Protection Act, 40 S.D. L. Rev. 1 (Spring 1995);* Gregory S. Weber, *Twenty years of Local Groundwater Export Legislation in California: Lessons from a Patchwork Quilt,* 34 Nat. Resources J. 657 (Summer 1994); Stephen E. White & David E. Kromm, *Local Groundwater Management Effectiveness in the Colorado and Kansas Ogallala Region,* 35 Nat. Resources J. 275 (Spring 1995); John D. Sours, *Survey of State Rules Regarding Stormwater Runoff Associated with Construction Activities,* 15 Construct. Law. 52 (Nov. 1995); James S. Witwer, *The Renewal of Authorization to Divert Water on National Forests,* 24 Colo. Law. 2363 (Oct. 1995); Geoffrey M. Craig, *House Bill 1041 and Transbasin Water Diversions: Equity to the Western Slope or Undue Power to Local Government? 66 U. Colo. L. Rev. 791 (Summer 1995).*

(n10)Footnote 226. *See, e.g., Imperial Irrigation District v. State Water Resources Control Board, 225 Cal. App. 3d 548 (1990),* where the court stated: "[t]he historic concepts of water 'rights' in California were dramatically altered by the adoption in 1928 of [a constitutional amendment which empowered the Board to conduct hearings to determine whether particular water uses were reasonable or wasteful]. Our Supreme Court ... acknowledged that the new provision altered previously vested rights ... . It has been long established that all property is held subject to the reasonable exercise of police power and that constitutional provisions declaring that property shall not be taken without due process of law have no application in such cases."

(n11)Footnote 227. *See, e.g., United States v. Glenn-Colusa Irrigation Dist., 758 F. Supp. 1126 (E.D. Cal. 1992); Department of Fish and Game v. Anderson-Cottonwood Irrigation Dist., 8 Cal. App. 4th 1554 (1992).*

(n12)Footnote 228. For further discussion of the conflict between federal environmental authority and state granted water rights, *see Sandra Dunn, Endangered Species Act versus Water Resources Development: The California Experience, 25 Pac. L.J. 1107 (1994);* William Attwater, *Introduction: Environmental Restraints on Water Law, 25 Pac. L.J. 901 (1994);* Michelle Ouellette, et al., *Institutional Reforms in California Groundwater Law, 25 Pac. L.J. 1021 (1994);* Michael Heyman, *Property Rights and the Endangered Species Act: A Renascent Assault on Land Use Regulation, 25 Pac. L.J. 157 (1994).*

(n13)Footnote 229. *California-Oregon Power Co. v. Beaver Portland Cement Co., 295 U.S. 142 (1935).*

(n14)Footnote 230. *See* Desert Lands Act of 1877, *43 U.S.C. §§ 321*-339. This statute was construed to sever all water located upon the public domain land from the land itself, implicitly subjecting the same to state authority. *California-Oregon Power Co. v. Beaver Portland Cement Co., 295 U.S. 142 (1935).*

(n15)Footnote 231. *See* dissent of J. Shroeder in *Williams v. City of Wichita, 374 P.2d 578 (Kan. 1962).*

(n16)Footnote 232. *See* discussion at § 50.17, *infra*.

(n17)Footnote 233. *30 Stat. 1151 (1899)* (Rivers and Harbors Appropriation Act of 1899).

Regarding the federal navigational servitude, see *Kingsport Horizontal Property Regime v. United States, 46 Fed. Cl. 691 (2000).*

(n18)Footnote 234. *See, e.g., 33 U.S.C. §§ 1251*-1376 (Clean Water Act); *33 U.S.C. §§ 1401*-1445 (Ocean Dumping); *42 U.S.C. §§ 300f*-300j-26 (Safe Drinking Water Act); *42 U.S.C. §§ 6901*-6992k (Solid Waste Disposal Act); *42 U.S.C. §§ 9601*-9675 (Comprehensive Environmental Response, Compensation and Liability Act of 1980); *43 U.S.C. §§ 1701*-1784 (Federal Land Policy and Management); *16 U.S.C. §§ 1451*-1464 (Coastal Zone Management Act

of 1972); *42 U.S.C. §§ 4321*-4370a (National Environmental Policy Act of 1969).

(n19)Footnote 235. *See, e.g., 43 U.S.C. §§ 1701*-1784 (Federal Land Policy and Management); *16 U.S.C. §§ 528*-531 (Multiple-Use Sustained-Yield Act of 1960).

(n20)Footnote 236. *Gibbons v. Olden, 22 U.S. (9 Wheat.) 2 (1824).*

(n21)Footnote 237. *See, e.g.,* The Reclamation Act of 1902, *32 Stat. 388,* as amended, *43 U.S.C. 371 et seq.*

In addition to the enumerated primary bases of federal control over water, environmental protection may have a similar, albeit indirect effect. This may particularly be the case where areas are reserved for environmentally related purposes, such as national parks and national monuments. Apart from the effect of "reserved" rights for those purposes, discussed at §§ 50-17 and 50-18, the Wilderness Act of 1964, *16 U.S.C. §§ 1131*-36, other aspects of the Wilderness Act may have an impact on states and others activities in those areas that involve claims to the use of the water. In *United States v. Gotchink, 57 F. Supp. 2d 798 (D. Minn. 1999),* the court considered the prosecution of two Chippewa Indians who used a motorized boat and a power ice auger to exercise their treaty-protected fishing rights in the Boundary Canoe Area Wilderness (BCAW) area contrary to the BCAW regulations. The court held that Congress had not preempted the treaty rights of the Indians but could regulate the scope of the content of those rights to the extent that they were the result of valid, non-discriminatory conservation measures. Under this construction of Indian rights, the Indians could not use the boat, but could use the auger.

For a discussion of the environmental dimension of federal interests, *see* David J. Aiken, *Balancing Endangered Species Protection and Irrigation Water Rights: The Platte River Cooperative Agreement, 3 Great Plains Nat. Resources J. 119 (1999).* Robert W. Adler, *Integrated Approaches to Water Pollution: Lessons from the Clean Water Act,* 23 Harvard Envtl. L. Rev. 203 (1999). Note and Comment, The Uncertainty Surrounding Grazing and Section 401 of the Clean Water Act; *The Uncertainty Surrounding Grazing and Section 401 of the Clean Water Act; Predicting the Outcome of Oregon Natural Desert Association v. Dombek, 13 B.Y.U. J. Pub. L. 391 (1999).*

See also Johanna H. Wald & Joseph M. Feller, *Recent Developments in the Law of Grazing on Federal Lands,* SD47 ALI-ABA 151 (1999); Dan A. Tarlock, *The Creation of New Risk Sharing Water Entitlement Regimes: The Case of the Truckee-Carson Settlement, 25 Ecology L. Q. 674 (1999);* Michael J. Pearce, *Analytic Geography in Western Water Management,* 13 SPG Nat. Resources & Env't 537 (1999).

(n22)Footnote 238. *See, e.g.,* Section 8 of the Reclamation Act of 1902 which provides:

That nothing in this Act shall be construed as affecting or intending to affect or to in any way interfere with the laws of any State or Territory relating to the control, appropriation, use, or distribution of water used for irrigation, or any vested right acquired thereunder... .

(n23)Footnote 239. *See, e.g., United States v. Willow River Power Co., 324 U.S. 499 (1945).*

For further discussion, *see* Getches, *Colorado River Governance: Sharing Federal Authority as an Incentive to Create a new Institution, 68 Colo. L. Rev. 573 (1997);* Josephson, *Katie John and Totemoff: The United States and Alaska Clash over the Reserved Rights Doctrine and Native Alaska Hunting and Fishing Rights -- the U.S. Supreme Court Passes on an Opportunity to Resolve the Subsistence Debate, 6 Dick. J. Envtl. L. & Pol'y 225 (1997);* Powell, *Recent Application of the Reserved Rights Doctrine:* State of Alaska v. Babbitt, 25 Real Est. L.J. 308 (1997); Geon, *A Right to Ice? The Application of International and National Water Laws to the Acquisition of Iceberg Rights, 19 Mich. J. Int'l L. 277 (1997);* Wilcox, *Maintaining Federal Water Rights in the Western United States,* Army Law. 3 (Oct. 1996).

See Atlanta Sch. of Kayaking v. Douglasville-Douglas County Water and Sewer Auth., 981 F. Supp 1469 (N.D. Ga. 1997) (challenge to resolution granting access to reservoir and boat ramp only to residents of the county. Injunction

issued because of possibility that resolution violated federal navigational servitude); *United States v. Nye County, 920 F. Supp. 1108 (D. Nev 1996),* (holding that title to dry federal lands did not pass under equal footing doctrine to the state at time of statehood); *Good v. United States, 39 Fed. Cl. 81 (Ct. Cl. 1997),* (holding that the federal navigational servitude did not constitute a complete defense to a takings claim arising from the denial of an application for a permit to fill wetlands; the Endangered Species Act did not require that the land be maintained in its natural state and thus did not deprive the landowner of all economic value associated with the property; the federal and state regulatory regimes were so pervasive that a developer could not have a reasonable expectation of putting into effect the development plans).

(n24)Footnote 240. *See* § 50.16(h), *infra*.

(n25)Footnote 241. *United States v. Willow River Power Co., 324 U.S. 499 (1945).*

(n26)Footnote 242. *See Winters v. United States, 207 U.S. 564 (1908).*

(n27)Footnote 243. *Id.*

(n28)Footnote 244. *See generally United States v. New Mexico, 438 U.S. 696 (1978).*

(n29)Footnote 245. *Id. at 702:*

> Where water is only valuable for a secondary use of the reservation ... there arises the ... inference that Congress intended, consistent with its other views, that the United States would acquire water in the same manner as any other public or private appropriator.

See also In re Water of Hallett Creek Stream Sys., 749 P.2d 324 (Cal. 1988), cert. denied 488 U.S. 824 (1988), which held that the United States possessed the same riparian rights regarding its land holdings that other California land owners enjoyed.

(n30)Footnote 246. *See generally Wickard v Filburn, 317 U.S. 111 (1942).*

(n31)Footnote 247. *United States v. Holland, 373 F. Supp. 665 (M.D. Fla. 1974).*

(n32)Footnote 248. *United States v. Standard Oil Co., 384 U.S. 224 (1966).*

(n33)Footnote 249. *See, e.g., 33 U.S.C. §§ 1251*-1376 (Clean Water Act); *33 U.S.C. §§ 1401*-1445 (Ocean Dumping); *42 U.S.C. §§ 300f*-300j-26 (Safe Drinking Water Act); *42 U.S.C. §§ 6901*-6992k (Solid Waste Disposal Act); *42 U.S.C. §§ 9601*-9675 (Comprehensive Environmental Response, Compensation and Liability Act of 1980); *43 U.S.C. §§ 1701*-1784 (Federal Land Policy and Management); *16 U.S.C. §§ 1451*-1464 (Coastal Zone Management Act of 1972); *42 U.S.C. §§ 4321*-4370a (National Environmental Policy Act of 1969).

(n34)Footnote 250. *458 U.S. 941 (1982).*

(n35)Footnote 251. For further discussion of groundwater overdraft, *see* § 50.11(n), *infra*.

(n36)Footnote 252. 82 National Wool Grower 23 (Aug. 1992).

See also United States v. Glenn-Colusa Irrigation Dist., 758 F. Supp. 1126 (E.D. Cal. 1992); Department of Fish and Game v. Anderson-Cottonwood Irrigation Dist., 8 Cal. App. 4th 1554 (1992).

(n37)Footnote 253. *16 U.S.C. §§ 1531*-1544.

The judge in the *Edwards Aquifer* case allowed the Texas legislature until May 31, 1993 to develop a management plan for the aquifer. If the legislature failed to meet the court's mandate, the judge authorized the U.S. Fish and Wildlife Service to intervene. *See* U.S. Water News, April, 1993, at 1. One response of the Texas legislature was to establish a water bank under which the Texas Water Development Board was given the authority to purchase, sell, hold and transfer water and water rights. The plan particularly calls for the acquisition of rights in the Guadalupe River which will be pumped and stored for later use in the Edwards-Trinity Aquifer. *See* U.S. Water News, Nov. 1993, at 13. In addition, the state can function as a negotiator between buyers and sellers of the water rights that may be "deposited" or listed with the water bank. A permit granting surface water rights will be protected for ten years while "deposited" in the bank. The board was not given exclusive rights to handle transfers of water rights and such transfers can take place outside of the bank. *Id.*

(n38)Footnote 254. *16 U.S.C. § 1533.*

(n39)Footnote 255. *16 U.S.C. § 1535*(a).

For further discussion see W. Snape III, M. Senatore, K. Gillon, S. George, C. Muffet, R. Anderson and R. Kondor, *Protecting Ecosystems Under the Endangered Species Act: The Sonoran Example, 41 Washburn L.J. 14 (2001).*

(n40)Footnote 256. *16 U.S.C. § 1535*(a).

(n41)Footnote 257. *See* U.S. Water News, Nov. 1992 at p. 16.

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CHAPTER 50 WATER RIGHTS

6-50 Thompson on Real Property, Thomas Editions § 50.06

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§ 50.06 Non-Consumptive Uses.

[Go To Supp]

§ 50.06(a) In General.

A non-consumptive use of water is ordinarily defined as any use that neither diminishes the supply available to other users nor adversely affects its quality. As a general rule, the right to make non-consumptive use of the water may be enjoyed by both the public at large and by riparian landowners.

Non-consumptive rights traditionally have included the rights of ingress and egress from the water, boating, bathing, fishing, wharfing and, in at least some jurisdictions, the right of view. n258 In recent decades, some jurisdictions have also included the right to make recreational use of the water. n259

Non-consumptive use rights are sometimes referred to as riparian rights because they tend to implicate the question of title to the banks or beds of the waterbodies. n260 This is probably because neither the quantity nor the quality of the water is affected by the particular use, and access to the water has historically been seen as turning on the question of title to either the upland or the bed beneath the water. These rights, however, should not be confused with consumptive use riparian rights which are discussed *infra*.

There appear to be two distinct classes of claimants of non-consumptive use (riparian) rights: individual landowners who claim such rights based upon their title to the riparian land that borders on the water and members of the public at large who claim based upon public title to the beds underlying the water. n261 The rights claimed in each case are substantially identical. n262

In recent years, there has been a growing interest in the international implications of non-consumptive use on shared waterbodies and waterways. n263

COMPUTER-ASSISTED RESEARCH

LEXIS: non-consumptive or riparian w/1 use! w/5 right! water!

§ 50.06(b) General Limitations on Rights.

Traditionally, non-consumptive use rights attach to the high seas, inland waterbodies, bays, rivers and lakes but do not attach to swamp or overflow lands (which are covered by water only at times of flooding). n264 Such rights also do not appear to attach to artificially created waterbodies. n265 Rights of this type involving waters of the sea or the ocean are technically referred to as littoral rights rather than riparian rights and are limited by state rules regarding public access below the mean high water mark. n266 Under the common law, the boundary for proprietary purposes was the ordinary high tide mark, which would suggest that unless the state has broadened access, the public claim to rights of this type would ordinarily be greater than the private upland ownership-based claim. n267

All non-consumptive use right holders, whether individual landowners or members of the public at large, compete among themselves for access to the water and are generally considered to be co-equal n268 regarding their entitlement to use the water. n269 In this sense, their rights may be said to be correlative. n270

The right to make particular non-consumptive uses of the water is generally permitted only to the extent that the uses may be considered acceptable under the doctrine of reasonableness. n271 This means that the particular uses of any particular individual must be balanced against the uses of all other right holders. n272

§ 50.06(c) Specific Public Rights: Ingress and Egress from the Water; Passage Along the Foreshore.

This particular right appears to be derived from the early notions that a major function of the common law of water rights was to insure that those that owned land adjoining water should have access to the water for purposes of making use of the water. n273 Lawful access has therefore been considered a required prerequisite to the making of particular uses. In the context of non-consumptive uses, the law appears to assume that title to land, the upland in the case of individual riparian right claimants and title to the bed of the waterbody in the case of the public at large, is the ultimate source of the right of access.

It appears that the right of access in the case of the general public may differ somewhat from the right of access of the individual riparian landowner. In the case of public title, the right appears to be coterminous with the extent of title. n274 Since, in many jurisdictions, the boundary of public title is described as the ordinary high water mark, the public would have the right of access only below the high water mark. This is sometimes described as a right of passage along the foreshore. As a general rule, public water users must have lawful access to the water itself n275 and generally would not have the right to trespass across land owned by private landowners above that mark. n276 It has been held that there may be a limited right of portage onto private land to avoid barriers. n277

Private riparian landowners claiming non-consumptive use rights may have rights of user that extend beyond the boundaries of their title. Clearly, where their land abuts streams, the beds to which are held in title by the public, they would have the same rights of access to the water as would the general public. n278 Where the stream or lakebeds are not held in public title, the upland landowner may hold title to the entire bed of the stream or lake and, therefore, could enjoy the right of access to the entire surface, though the general public may not have a similar right of access. n279 Where the upland owner owns only a fraction of the bed, the landowner may enjoy a right to use the entire surface, even though that involves access to water beyond the particular dimensions of the owner's title. n280

§ 50.06(d) Specific Public Rights: Boating, Bathing and Fishing and Other Commercial Uses of Water.

Traditionally, these specific rights have carried a strong commercial connotation. n281 This is probably derived from the early notions that waterbodies that are large enough to support and sustain widespread public use and enjoyment should be available for such use but those which could not, should not. It was logical and convenient under that view to focus on the commercial utility of the waterbody to make that determination.

In recent decades, there has been a considerable movement in the direction of including recreational activities within the scope of the protected rights. For example, a number of states n282 have adopted so-called recreational boatability tests to determine whether the waterbody should be considered open to public access.

It should be noted that the right to fish does not automatically entitle anyone to actually remove fish from the water. Because fish are typically considered wildlife, the right to fish may require further public permission in the nature of a license. Quantities of fish taken may also be subject to public limitation. Therefore, the right to fish, as well as other non-consumptive use rights, n283 should be considered a right of access to the water for that particular purpose. Permission to engage in the actual activity involved may require additional permission.

COMPUTER-ASSISTED RESEARCH

LEXIS: limit! w/5 non-consumptive or riparian w/1 use! w/5 right!

§ 50.06(e) Specific Public Rights: Wharfing.

Wharfing is generally used to refer not only to the specific activity of constructing wharves, n284 but to other activities which involve physical occupation of the water with structures or with dirt. n285 Such activities, however, must not unreasonably interfere with others' lawful rights of access. n286 In one case, the court held that an individual had the lawful right to temporary anchorage of a houseboat but did not have the right to permanently affix the boat as if it were an island in a way that would interfere with the rights of access to the lake by upland owners. n287

COMPUTER-ASSISTED RESEARCH

LEXIS: wharfing w/15 public w/1 right!

§ 50.06(f) Specific Public Rights: View.

Where the right of view is recognized as a non-consumptive use right, it is considered limited to the right of an unobstructed view over only the right holder's own interest and does not extend over all of the water that the land faces. n288

COMPUTER-ASSISTED RESEARCH

LEXIS: view w/15 public w/1 right! w/15 water!

§ 50.06(g) Relation Between Consumptive and Non-Consumptive Uses.

The rigid compartmentalization of traditional water rights n289 has complicated the relationship between consumptive and non-consumptive use rights and has sometimes relegated non-consumptive use rights to a position of lesser importance. n290

Clearly, the conflict between the two is difficult to deal with for if the water is allowed to be withdrawn from the source of supply, it will not be there for any non-consumptive users to enjoy. If the source of supply is totally depleted for consumptive use purposes, non-consumptive use automatically becomes impossible. On the other hand, if non-consumptive uses are given the larger measure of protection, the ability to make consumptive uses will necessarily be diminished.

Nevertheless, there are a few cases in which non-consumptive uses have been given protection against competing consumptive uses. For example, in Taylor v. Tampa Coal Co., n291 the defendant was enjoined from pumping water

from the lake for irrigation purposes and thereby lowering the level of the lake in order to protect the recreational use rights of boating, bathing, picnicking and fishing. In Sanitary District v. United States n292 the Sanitary district was enjoined from diverting water in quantities which would have lowered the level of the Great Lakes and thereby prevented the riparian owners from using their docks and wharfs to access the water for commercial activities.

In most cases, the non-consumptive use right most sought to be protected will be the right to engage in recreational activity. In the past, the difficulty associated with protecting such a right under the non-consumptive approach has been the reluctance to consider recreation a "commercial" use. On the other hand, the difficulty associated with trying to protect it within the paradigm of consumptive use has been the reluctance of jurisdictions to recognize recreation as the kind of activity for which water could or should be appropriated because it involved an instream kind of use and did not require any diversion or removal of the water from the watercourse.

In recent decades, an increasing number of jurisdictions have broadened their consumptive use statutes to facilitate the acquisition of water rights for the purpose of recreation. n293 The argument in favor of such an expansion is that recreation is the kind of use for which investment may be expected and the way to insure the investment that is likely to generate the erection of recreational facilities or stimulate the improvement of the waterbodies upon which such recreation is likely to occur is through the security that consumptive use water rights offer.

The argument that favors continuing to expand non-consumptive doctrines to accommodate recreational use is two fold: 1) such an approach eliminates the need for anyone to secure any formal permission to engage in the activity -- if the status of the waterbody permits public non-consumptive uses, then the public may engage in such activities as a matter of right; 2) consumptive water rights tend to be considered to be exclusive which may empower those who hold the consumptive recreational use rights to exclude members of the general public or to extract other types of permission to engage in the activity (such as user fees, licenses, etc).

For further discussion generally, *see also* Bruce Elder, *Judicial Recognition of the Public Interest in Water Recreation: Nebraska and United States Supreme Court Realities*, 15 Pub. Land L. Rev. 199 (1994).

COMPUTER-ASSISTED RESEARCH

LEXIS: consumptive w/1 use! w/15 non-consumptive w/1 use! w/15 water!

§ 50.06(h) Private Non-Consumptive Use Rights.

Private rights are derived from the fact of ownership of the land that borders on the watercourse. n294 Historically, the purpose of the rights seems to have been to insure that the upland landowner had access to water frontage in order to develop improvements necessary to commerce, navigation and fishing. n295

While these rights generally tend to be considered the same as those possessed by the public at large, discussion in the cases sometimes has focused on whether the upland landowner had the right to exclude the public at large from the waters that front particular parcels of land. n296 In most, the rule appears to be that the private rights must defer to the public rights and this matter will generally be resolved based on the presence or absence of public rights. n297

Where the state holds title to the bed of the watercourse, the state may grant exclusive access to the area between the state boundary, generally the ordinary high water line, and the edge of the water, which may effectively cut the riparian landowner off from the water. n298 Further, the upland owner's ability to exercise recognized rights of access or wharfing may be considered implicitly subject to a greater public right of use to the same area. n299

COMPUTER-ASSISTED RESEARCH

LEXIS: private w/5 non-consumptive w/1 use w/5 right!

§ 50.06(i) Navigability as the Traditional Basis for Public Non-Consumptive Use Rights.

Traditionally, the general rule was that the public at large had the right of access to waterbodies for the purpose of making non-consumptive uses only where the bed of the waterbody was determined to be held in public title.

The state is generally considered to hold title to the beds of all waterbodies that are "navigable" as a matter of law. n300 According to legal theory, title to the beds of inland waterbodies passed to the states at the time of statehood if the waterbody satisfies the following criteria: 1) that the stream has the capacity 2) in its natural condition 3) to sustain commerce 4) according to traditional modes of trade and travel over water 5) as of the date of statehood. n301 It is generally undisputed that the waters of the sea are available for public use as they are considered navigable. n302

The rationale for this approach appears to be the presumption that waterbodies that are large enough to support significant public commercial use ought to be open to the public at large for all related kinds of activities. n303 Therefore, the central focus of the navigability determination is upon the size and nature of the watercourse.

COMPUTER-ASSISTED RESEARCH

LEXIS: navigable w/1 status w/15 water! w/1 right!

§ 50.06(j) Determining Navigable Status: Capacity for Commercial Use.

Whether a particular waterbody is navigable is a question of fact and generally will not be judicially noticed. n304 Since navigability at the time of statehood must be proved, the most reliable indicia tend to be historical patterns of commercial use. Since details of such a history will often be lacking, courts have demonstrated a propensity to accept a surprisingly meager amount of evidence of commercial activity, such as the floating of logs, n305 or the passage of a boat load of livestock, n306 to justify the conclusion that the waterbody was navigable at the time of statehood. The historic capacity for commercial use may be inferred from more recent use or even from present use. n307

COMPUTER-ASSISTED RESEARCH

LEXIS: navigable w/1 status w/15 commercial w/1 use!

§ 50.06(k) Determining Navigable Status: Natural Condition of the Waterbody.

It has been held that recent improvements are not relevant to the issue of determining navigability at the time of statehood since the issue is one of the natural condition of the waterbody. n308 Nevertheless, courts have determined waterbodies to be navigable despite a significant recent reduction in size or capacity. n309 There appears to be no particular depth, width or volume required, n310 and it has been held that "occasional difficulties in navigation" will not preclude a finding of navigability. n311

COMPUTER-ASSISTED RESEARCH

LEXIS: navigable w/1 status w/15 natural w/1 condition! w/2 waterbod!

§ 50.06(l) Determining Navigable Status: Time of Statehood.

The focus on the status of the waterbody at the time of statehood is the result of an early line of cases which held that the federal government held certain lands in trust for the various states until they were created. n312

COMPUTER-ASSISTED RESEARCH

LEXIS: navigable w/1 status w/15 statehood

§ 50.06(m) Determining Navigable Status: Meander Lines.

Early surveyors were instructed to identify bodies of water that were of sufficient size to be included within those trust lands. The lines by which the surveyors identified the boundaries of waterbodies for that purpose have been referred to as "meander lines." The fact that the waterbody is represented on the early federal surveyor's maps by socalled "meander lines" is considered to create a rebuttable presumption of navigability, though such a designation is not generally considered particularly persuasive. n313

COMPUTER-ASSISTED RESEARCH

LEXIS: navigable w/1 status w/15 meander w/1 line!

§ 50.06(n) Public Access to Navigable Waters.

Public non-consumptive use rights include rights of boating, bathing, fishing, ingress, egress, passage along the foreshore, travel and commercial transportation over the waters, wharfing, recreation and, sometimes, view. n314 As a general rule, the exercise of the rights must be reasonable and must not unreasonably interfere with the lawful rights of others. n315 It has been held that as between public and private holders of non-consumptive use rights, the rights of the public at large prevail over the rights of individual private riparian landowners. n316

The public right of use may extend, under certain circumstances, above the water line to include rights to use the beach or foreshore. The geographical boundaries of public use in most jurisdictions appears to be the physical extent of public title to the beds underlying the waterbodies. n317 That is, the public rights can only be exercised on waters that cover land owned by the public or on dry land below the landward boundary of public title. In most jurisdictions, and the federal government, the boundary between public and private land is the ordinary high watermark. n318

As a general rule, before the public is entitled to exercise any nonconsumptive use rights, the public must have lawful access to the water. n319 This may be a problem where private landowners own all the land adjacent to the watercourse. n320 Under certain circumstances, it has been held that the public can condemn or purchase access to the water. n321

The problem of access to the dry beach area adjoining waterbodies has been a difficult problem in many jurisdictions. The general rule appears to be that the public right of access pertains only to the area below the mean high water mark or seaward of the "dry sand" unless the public has acquired the right of access across the private land. n322

The public right across the dry sand has been established in a number of jurisdictions on a variety of theories such as municipal ownership of the dry sand, n323 public trust, n324 prescription, n325 public dedication, n326 implied dedication of recreational easements, n327 and custom. n328

Where a public right to beach access is recognized, it is generally considered to belong to the public at large, not just to residents of a municipality which owns portions of the dry sand. n329 Some states have sought to statutorily identify and delineate the extent of public beach access rights. n330

§ 50.06(o) Traditional Public Rights in Non-Navigable Waters.

The traditional rule has been that if the waterbody is not navigable for purposes of vesting title in the state, it is not considered open for purposes of public non-consumptive use. n331 In that situation, the riparian landowner is deemed

to hold title to the bed n332 and may exclude the public from the premises. n333 It has been held that landowners in jurisdictions following the traditional rule may even erect fences to keep the public out, so long as the structures do not impede the flow of the water and are not constructed with malicious intent. n334 In some jurisdictions, intruders have been considered to be criminal trespassers and have been prosecuted accordingly, even though there is no physical contact with the bed or bottom of the waterbody. n335

The traditional rule of no access to non-navigable waterbodies has been modified somewhat to accommodate the relationship between private landowners, such that the owner of land underlying the beds of such waterbodies may not exclude other landowners who also have an interest in the same beds. n336 Thus, other individual riparian landowners may be able to use the entire surface of the non-navigable waterbody, except perhaps where the waterbody has been artificially improved. n337 Where an artificial improvement has been used for a significant length of time, however, some courts have treated the waterbody as if it were a natural one and have refused to allow the landowner to return it to its natural state or prevent access thereto. n338

§ 50.06(p) Non-Traditional Approaches to Public Access to Non-Navigable Waters for Non-Consumptive Use Purposes.

There has been dissatisfaction in a number of jurisdictions with the traditional approach to the question of public nonconsumptive use access, particularly as that relates to recreational use of water. Two concerns seem to dominate. First, there is concern that the traditional focus on commercial use in the determination of navigability may be unrealistically narrow and, as a result, may exclude the public from making other appropriate uses, such as recreational use, of many water courses which are of sufficient size to support that kind of activity. Second, there is concern that having to formally adjudicate the navigability-based title status of each individual waterway, before it may be known whether the public has lawful use rights to such waters, is wasteful of public resources and leaves the matter of public access too uncertain. A number of jurisdictions have therefore been persuaded to depart from the traditional approach and to grant public access on some other basis. It is probable that as a result of these changes, the traditional rule that the public has access only to navigable waters is followed only in a minority of jurisdictions. n339

Jurisdictions seeking to broaden public rights of access have adopted a variety of approaches to the problem. Some have redefined navigability in terms that permit public access to a greater number of waterbodies. n340 Others have developed alternative methods of identifying those waterbodies which should be susceptible to public use which base the right of public access on some other footing than the "navigable" status of the waterbody, such as upon the fact of public ownership of the water itself or upon the susceptibility of the water to non-consumptive use. n341

COMPUTER-ASSISTED RESEARCH

LEXIS: public w/1 access w/15 navigable w/1 water!

§ 50.06(q) Non-Traditional Approaches: State Authority to Change Definitions of Navigability.

Although the question of navigable status, for purposes of passing title to the state upon statehood, is a federal question, n342 what the state does with the waterbodies, and even title to the beds, is a question of state law. n343 As a result, a number of states have determined that they have the legal authority to extend public access beyond waters to which the public had access under traditional rules and concepts. This is based upon analogous changes in federal law involving the concept of navigability. There, various definitions have been formally given to the concept of navigability under federal law depending upon the purpose for which the definition may be relevant. For purposes of passing title to the states at the time of statehood, the law has followed the constant definition announced in the *Holt State Bank* case. For purposes of admiralty jurisdiction, federal authority extends to all waters, fresh or salt, with or without tides, natural or artificial, which are in fact navigable in interstate or foreign water commerce. n344 This definition is broader, in many respects, than the "navigability for title" definition. It has also become fairly fixed in terms of content. For purposes of

federal regulation, the definition has undergone considerable evolution, beginning with a definition similar to that of maritime law, basing federal authority to regulate upon whether the waterbody was "navigable in fact" and actually in use for purposes of navigation. n345 Regulatory authority was later extended to waterbodies "which once were navigable." n346 Further evolution occurred when authority was extended over waters which could be made navigable "by reasonable improvement," n347 and then to tributaries of navigable streams. n348 More recently, the federal government has departed from any requirement that the waters be navigable at all for certain kinds of regulation, such as over dredge and fill activities. For those purposes, the law simply requires that the waters be "waters of the United States." n349 All of this suggests that there is nothing inherent in the concept of navigability that limits state or federal regulatory authority, except to the extent that the state may adopt the federal title definition as its regulatory definition. If public access is seen as a function of the state police power, it is arguably subject to limitations on that power. Arguably, since a property right is involved, the exercise of the power may not be confiscatory. Otherwise, the jurisdiction should have considerable power to redefine navigability.

COMPUTER-ASSISTED RESEARCH

LEXIS: state! w/15 change! w/5 definition! w/2 naviga!

§ 50.06(r) Non-Traditional Approaches: Broad State Definitions of Navigability.

Some states have defined navigability for purposes of state law rather broadly, primarily in an effort to enhance opportunities for public recreation. n350 One of the most common definitional changes of this type has occurred in jurisdictions that have employed the so-called "recreational boatability" test. n351 These jurisdictions typically define a waterbody as navigable if it is large enough to support use by pleasure boats. n352 Other jurisdictions have adopted even less stringent definitions, requiring nothing more than the capability of floating a canoe or a saw-log. n353 Most far-reaching appear to be states which define navigability in terms of actual capacity for public recreational use. n354 Many of these definitions have the practical and legal impact of extending public rights of access to waterbodies to which the state cannot claim title under the federal navigability test and suggest that the fact that the state does not have title may not necessarily invalidate the public right of access. Indeed, it has been suggested that the primary reason that the traditional concept of navigability is used is simply because it is the traditional way by which the problem has been addressed. n355

COMPUTER-ASSISTED RESEARCH

LEXIS: state! w/15 broad! w/5 defin! w/2 naviga!

§ 50.06(s) Non-Traditional Approaches: Public Trust.

State attempts to divest the title to beds of navigable waterbodies, or to relinquish the authority to control the use of the water, have been held to be governed by the public trust doctrine. n356 In such a case, courts typically consider whether the jurisdiction has violated the objectives of the public trust under which the lands are deemed held. n357 The public trust doctrine has generally been considered to apply only to the title interest of the state in the land under the waters. n358 In several California cases, the doctrine has been used to justify control over the water itself. n359 Although several jurisdictions have broadened public access to non-navigable waters in this fashion, n360 at least one decision has declined to do so, on the grounds that legislative, rather than judicial, action is required before public rights can be extended beyond waters not navigable for title. n361

In recent years, there has been an interest in expanding the public trust and using it as a means for dealing with a broad spectrum of water right allocation issues. n362

COMPUTER-ASSISTED RESEARCH

LEXIS: public w/1 trust w/15 naviga!

§ 50.06(t) Other Non-Traditional Approaches.

A number of other approaches have been used to broaden public access to traditionally non-navigable waterbodies. At least one state has relied on pre-statehood legislation to find a right of public access. n363 There, early treaties were interpreted to give the public a right of access to "the great rivers." In other states, access has been based on the concept of public dedication n364 or on claimed prescriptive use rights. n365 Finally, some states have found language in the state constitution that could be used as the basis for granted expanded public assess. In *Montana Coalition for Stream Access v. Curran*, n366 for example, the court found support in both the State Constitution and state ownership of the water and in the fact that the waterbody in question could support the use. Private title to the bed was expressly declared to be irrelevant. n367

COMPUTER-ASSISTED RESEARCH

LEXIS: public w/1 access w/15 non-navigable w/1 waterbod!

FOOTNOTES:
(n1)Footnote 258. James Wadley, *Summary Guide to Florida's Water Rights* 4, U. Fla., I.F.A.S. Circular #412 (1976). *See also Wilbour v. Gallagher, 462 P.2d 232 (Wash. 1969). See also* Carroll Dunscombe, Riparian and Littoral Rights 7 (1970).

Montana has a statute that regulates the public use of streams and associated lands. *See* Mont. Code Ann. §§ 23-2-301. This statute has generally been construed to grant to the public the right to use the beds and banks of streams up to the ordinary high-water mark even though fee title to such lands may be privately held. *See Montana Coalition for Stream Access v. Curran, 682 P.2d 163 (Mont. 1984).* The court in *Curran* held that any surface waters that are capable of recreational use may be so used by the public without regard to stream bed ownership or navigability. The public right to use land in conjunction with the exercise of that right was limited in a subsequent case, *Galt v. State Department of Fish, Wildlife, and Parks, 731 P.2d 912 (Mont. 1987).* There, the court held that the public right to use land below the high-water mark existed only to the extent necessary for utilization of the water itself and public authorization of such lands for such activities as the building of duck blinds, boat moorages, camping or big game hunting constituted an unconstitutional confiscation of private property. The court also invalidated as unconstitutional a provision of the statute that required the landowner to bear the cost of constructing portage routes around artificial barriers.

For further discussion generally, *see also* Bruce Elder, *Judicial Recognition of the Public Interest in Water Recreation: Nebraska and United States Supreme Court Realities*, 15 Pub. Land L. Rev. 199 (1994).

(n2)Footnote 259. *See Montana Coalition for Stream Access v. Curran, 682 P.2d 163 (Mont. 1984).*

(n3)Footnote 260. *See, e.g.*, Note, *Riparian Property Rights: Kansas Law of Riparian Ownership, 21 Washburn L.J. 96 (1981).*

(n4)Footnote 261. Early cases construed English law as apparently having identified several categories of streams to which variations of these rights might attach. In *Wood v. Fowler, 26 Kan. 682 (1882),* the court referred to the English rule and identified three such categories:

> First, those small streams, which could not be used for any purpose of navigation, in which title to the soil was in the riparian owner, and along which the public had no rights of highway or otherwise; and intermediate class, in which the riparian owner owned to the middle of the channel, but along whose stream the public had all the rights of a highway; and a third that which was called technically the

navigable stream, where the title to the bed of the stream was in the sovereign, and all rights were in the public.

(n5)Footnote 262. For further discussion, *see* Raez Rahman, *The Law of Non-Navigational Uses of International Watercourses: Dilemma for Lower Riparians, 19 Fordham Int'l L.J. 9 (Oct. 1995);* Ann Brown, *Mother Nature and Missouri's River Boundaries*, 51 J. Mo. St. B. 37 (Jan.-Feb. 1995).

(n6)Footnote 263. For further discussion, *see* Scanlan, *The International Law Commission's First Ten Draft Articles on the Law of Non-Navigable Uses of International Watercourses: Do They Adequately Address All the Major Issues of Water Usage in the Middle East?, 19 Fordham Int'l L.J. 2180 (1996);* Benvenisti, *Collective Action in the Utilization of Shared Freshwater: The Challenges of International Water Resources Law, 90 Am. J. Int'l. L. 384 (1996);* Rivera, *Irrigation Communities of the Upper Rio Grande Bioregion: Sustainable Resource Use in the Global Context,* 36 Nat. Resources J. 521 (1996); Geon, *A Right to Ice? The Application of International and National Water Laws to the Acquisition of Iceberg Rights, 19 Mich. J. Int'l L. 277 (1997).*

See also Givens v. Ichauway, 493 S.E.2d 148 (Ga. 1997) (failure to prove waters were navigable); *Statler v. Catalano, 691 N.E.2d 384 (Ill. App. 1997)* (private use of nonnavigable lake); *Atlanta Sch. of Kayaking v. Douglasville-Douglas County Water and Sewer Authority, 981 F. Supp 1469 (N.D. Ga. 1997)* (challenge to resolution granting access to reservoir and boat ramp only to residents of the county. Injunction issued); *United States v. Nye County, 920 F. Supp. 1108 (D. Nev 1996),* (holding that title to dry federal lands did not pass under equal footing doctrine to the state at time of statehood); *Nagawicka Bay Sailing Club Owners Ass'n v. Wisconsin Dep't of Nat. Res., 570 N.W.2d 911 (Wis. App. 1997)* (State has authority to limit right to build wharf).

(n7)Footnote 264. Carroll Dunscombe, Riparian and Littoral Rights 7 (1970).

(n8)Footnote 265. *Publix Supermarkets v. Pearson, 315 So. 2d 98 (Fla. App. 1975).*

(n9)Footnote 266. *Id.*

Stupak-Thrall v. United States, 89 F.3d 1269 (6th Cir. 1996) (describing littoral rights).

See Wehby v. Turpin, 1997 Ala. LEXIS 482 (1997). This dispute involved the reconstruction of a man-made lake in a way that threatened recreational use rights claimed by plaintiffs. *See also Givens v. Ichauway, 493 S.E.2d 148 (Ga. 1997)* (failure to prove waters were navigable; trespass); *Statler v. Catalano, 691 N.E.2d 384 (Ill. App. 1997)* (private use of nonnavigable lake); *Nagawicka Bay Sailing Club Owners Ass'n v. Wis. Dep't of Nat. Res., 570 N.W.2d 911 (Wis. App. 1997)* (State has authority to limit right to build wharf).

(n10)Footnote 267. *See Shiverly v. Bolby, 152 U.S. 45 (1893); Martin v. Waddell, 41 U.S. 369 (16 Pet. 1842).*

For a discussion of establishment of the ordinary high water mark and its impact on state and private claims, *see State ex rel Sprynczynatyk v. Mills, 592 N.W. 2d 591 (N.D. 1999),* holding that the claims overlap in the shore zone.

For a discussion of the establishment of mean high tide lines, used in coastal areas, see *John G. and Stella Kenedy Memorial Foundation v. Dewhurst, 994 S.W. 2d 285 (Tex. App. 1999).*

In *Purdie v. Attorney General, 732 A. 2d 442 (N.H. 1999)* the court used the mean high tide rather than the highest high water mark to determine the public boundary between public and private shorelands. In this case, it was held the state effected an unconstitutional taking by using the higher mark.

(n11)Footnote 268. *But see* Ralph Johnson, *Riparian and Public Rights to Lakes and Streams, 35 Wash. L. Rev.*

580 (1960), where it is argued that private riparian landowners rights have been restricted in the state of Washington in waters, the beds of which are publicly owned, where those rights are in conflict with the constitutional power of the state to control those waters.

(n12)Footnote 269. *Snively v. Jaber, 296 P.2d 1015 (Wash. 1956).*

(n13)Footnote 270. *See Thompson v. Enz, 154 N.W.2d 473 (Mich. 1967); 188 N.W.2d 579 (Mich. 1971).*

(n14)Footnote 271. *See, e.g., Taylor v. Tampa Coal Co., 46 So. 2d 392 (Fla. 1950).*

(n15)Footnote 272. *Id.*

(n16)Footnote 273. For example, the doctrines of reliction and accretion hold that when the location of the watercourse changes gradually and imperceptibly, the property boundary between the upland and the water moves to maintain the juxtaposition of riparian land to water so that access to the water may be maintained. *See Nebraska v. Iowa, 143 U.S. 359 (1892).*

See Sharon Nicholls, *Public Right of Passage Along the Massachusetts Coast: An Argument for Implementation Without Compensation*, 4 B.U. Pub. Int'l L.J. 113 (1994).

Where the issue is access to the water across the upland, the water right would not normally exist and the matter should be dealt with as an issue of easement law. *See Richards v. Land Star Group, Inc., 593 N.W. 2d 103 (Wis. App. 1999).*

(n17)Footnote 274. *See Kaiser Aetna v. United States, 444 U.S. 164 (1979); Vaughn v. Vermillion Corp., 444 U.S. 206 (1979).*

(n18)Footnote 275. *See Thompson v. Enz, 154 N.W.2d 473 (Mich. 1967), 188 N.W.2d 579 (Mich. 1971).*

(n19)Footnote 276. *See, e.g., Botton v. State, 420 P.2d 352 (Wash. 1966)* (state purchased waterfront property in order to facilitate public access.) *See also Branch v. Oconto County, 109 N.W.2d 105 (Wis. 1961)* (County condemned 50-foot-wide strip across private land to provide public access to lake.).

(n20)Footnote 277. *Elder v. Delcour, 269 S.W.2d 17 (Mo. 1954). See also Buffalo River Conservation & Recreational Council v. National Park Serv., 558 F.2d 1342 (8th Cir. 1977), cert. denied, 435 U.S. 924 (1978).*

(n21)Footnote 278. *But see* Ralph Johnson, *Riparian and Public Rights to Lakes and Streams, 35 Wash. L. Rev. 580 (1960),* where the author argued that private riparian landowners' rights have been restricted in the state of Washington in waters, the beds of which are publicly owned, where those rights are in conflict with the constitutional power of the state to control those waters.

(n22)Footnote 279. *See State ex rel. Meek v. Hays, 785 P.2d 1356 (Kan. 1990).*

(n23)Footnote 280. *See Johnson v. Seifert, 100 N.W.2d 689 (Minn. 1960).*

(n24)Footnote 281. *Bott v. Michigan Department of Natural Resources, 327 N.W.2d 838 (Mich. 1982).*

(n25)Footnote 282. *See, e.g., Hitchings v. Del Rio Woods Recreation & Park Dist., 127 Cal. Rptr. 830 (1976); Lamprey v. State, 53 N.W. 1139 (Minn. 1893); Day v. Armstrong, 362 P.2d 137 (Wyo. 1961).*

See Stupak-Thrall v. United States, 70 F.3d 881 (6th Cir. 1995) (upholding federal authority to regulate private, riparian use of a lake within a wilderness area), *vacated, 81 F.3d 651 (6th Cir 1966), affirmed* by an equally divided *en banc* court, *89 F.3d 1269 (6th Cir. 1996).* The case was back before the court in *Stupak-Thrall v. Glickman, 988 F.*

Supp. 1055 (WD Mich. 1997). Here, the court held that the Forest Service could not bar motorboats from using a lake within a Wilderness Area where the right to use the lake was a prior existing riparian right. The court further held that such a restriction, if imposed, would constitute a "taking" of property in violation of the Constitution.

It has been held that notwithstanding the right to bathe, municipalities can lawfully close beaches and prohibit bathing under certain conditions. *See State v. Oliver, 727 A. 2d 491 (N.J. Super. 1999).*

(n26)Footnote 283. For example, even though the landowner may have a riparian right to wharf, a building permit for the actual construction may be required.

In *Kraft v. Burr, 476 S.E.2d 715 (Va. 1996),* the court held that the king could properly convey title to land under navigable waters to private individuals and on the basis of that title, the landowners could enjoin fishermen from fishing or wading in the river running over the lands.

(n27)Footnote 284. *See, e.g., Johnson v. Bryant, 359 So. 2d 433 (Ala. 1977).*

See also W. Mich. Dock v. Lakeland Inv., 534 N.W.2d 212 (Mich. App. 1995). In Massachusetts, the historic "great ponds" have been held to be open to common use though this has been held not to include the right to erect structures in the pond. *United States v. Grabler, 907 F. Supp 499 (D. Mass. 1995).*

ABKA Ltd. Partnership v. Wis. Dep't of Nat. Res., 573 N.W.2d 900 (Wis. App. 1997) (involving the application of the public trust doctrine to the number of boat slips on a lake that must be available for public rental).

For limits on the right to wharf, *see Nagawicka Bay Sailing Club Owner's Ass'n v. Wis. Dep't of Nat. Res. 570 N.W.2d 911 (Wis. App. 1997),* holding that it was proper to limit the extent to which a pier extended into a lake on the basis of potential adverse environmental effects.

See also Sea Cabin on the Ocean IV Homeowners Ass'n v. City of North Myrtle Beach, 828 F. Supp. 1241 (D. S.C. 1993) (pier was appurtenance owned by homeowners' ass'n and public had no right to walk or fish from pier); *Jacobs v. Lyon Township, 502 N.W.2d 382 (Mich. App. 1993)* (erection of a nonexclusive dock at end of road which permitted reasonable public use of the lake for boating, fishing and swimming was within power of township. Public sunbathing, lounging and picnicking exceeded authority).

See also an unreported Rhode Island Superior court decision, *Harbor Realty v. Coastal Resources Management Council, 1999 R. I. Super. LEXIS 63* (CA No. PC 97-2747, Feb. 19, 1999) involving the right to construct a new commercial fishing facility in Newport harbor. The court refused to overturn a council determination that the *construction would not impair any existing riparian rights.*

See also Tumino v. Long Beach Township, 725 A. 2d 1173 (N.J. Super. 1999) (the court held that the coastal zone management rules promulgated by the Department of Environmental Protection preempted an ordinance governing the length of docks); *Cove Properties, Inc. v. Walter Trent Marina, Inc., 702 So. 2d 472 (Ala. Civ. App. 1999)* (describing the right to wharf out as terminating at the point of navigability).

(n28)Footnote 285. *Wilbour v. Gallagher, 462 P.2d 232 (Wash. 1969).*

(n29)Footnote 286. *Bach v. Sarich, 445 P.2d 648 (Wash. 1968).*

See also an unreported Rhode Island Superior court decision, *Harbor Realty v. Coastal Resources Management Council, 1999 R. I. Super. LEXIS 63* (CA No. PC 97-2747, Feb. 19, 1999) involving the right to construct a new commercial fishing facility in Newport harbor. The court refused to overturn a council determination that the construction would not impair any existing riparian rights.

(n30)Footnote 287. *West v. Smith, 511 P.2d 1326 (Idaho 1973)* (houseboat had been moored for 27 years before objections were raised).

(n31)Footnote 288. Carroll Dunscombe, Riparian and Littoral Rights 2 (1970).

In *Bubis v. Kassin, 733 A. 2d 1232 (N.J. Super. 1999),* inland lot owners brought an action against oceanfront landowners, the village and the Department of Environmental Protection alleging that the construction of a berm and fence restricted their access to the beach and interfered with their view of the ocean. The court held that the inland landowners had a right of access to the beach sufficient to contest the legality of the fence but in the absence of any restrictive covenants, a property owner has no right to an unobstructed view across a neighbor's property.

(n32)Footnote 289. *See* § 50.02, *supra*.

(n33)Footnote 290. *See* discussion in *People v. Emmert, 597 P.2d 1025 (Colo. 1979),* of the provision in the Colorado Constitution that declares all water of the state to be public property to apply only to the allocation of water for consumptive use purposes.

(n34)Footnote 291. *46 So. 2d 392 (1950).*

(n35)Footnote 292. *266 U.S. 405 (1912).*

(n36)Footnote 293. *See, e.g.,* Nev. Rev. Stat. § 533.030(2) which provides that "use of water ... for any recreational purpose is beneficial use." This statute was the apparent basis for the recognition of a water right in the United States Bureau of Land Management to maintain the level of water in a lake sufficient for recreational purposes. *See Nevada v. Morros, 766 P.2d 263 (Nev. 1988).*

(n37)Footnote 294. *See,* Note, *Riparian Property Rights: Kansas Law of Riparian Ownership, 21 Washburn L.J. 96 (1981).*

(n38)Footnote 295. *See Fowler v. Wood, 85 P.2d 763 (Kan. 1906).*

In *Hale v. Colorado River Mun. Water, 818 S.W.2d 537 (Tex. App. 1991),* the court recognized that the riparian landowner enjoyed a right in the quality of the water that could not be taken without just compensation. In this case, the quality was adversely affected by the presence of chloride-saturated spillage.

See Stupak-Thrall v. United States, 70 F.3d 881 (6th Cir. 1995) upholding federal authority to regulate private, riparian use of a lake within a wilderness area), *vacated, 81 F.3d 651 (6th Cir 1966), affirmed* by an equally divided *en banc* court, *89 F.3d 1269 (6th Cir. 1996).* The case was back before the court in *Stupak-Thrall v. Glickman, 988 F. Supp. 1055 (WD Mich. 1997).* Here, the court held that the Forest Service could not bar motorboats from using a lake within a Wilderness Area where the right to use the lake was a prior existing riparian right. The court further held that such a restriction, if imposed, would constitute a "taking" of property in violation of the Constitution.

See also Statler v. Catalano, 691 N.E.2d 384 (Ill. App. 1997) (private use of nonnavigable lake).

(n39)Footnote 296. *See, e.g., People v. Emmert, 597 P.2d 1025 (Colo. 1979).*

(n40)Footnote 297. *See Capune v. Robbins, 160 S.E.2d 881 (N.C. 1968).*

(n41)Footnote 298. *See Silver v. Dreyer, 327 P.2d 1031 (Kan. 1958).*

(n42)Footnote 299. *See Capune v. Robbins, 160 S.E.2d 881 (N.C. 1968).* Undoubtedly this situation has led commentators to suggest that the public right, if present, is paramount to the private right. Professor Johnson has argued

that private riparian landowners' rights have been restricted in the state of Washington in waters, the beds of which are publicly owned, where those rights are in conflict with the constitutional power of the state to control those waters. *But see* Johnson, *Riparian and Public Rights to Lakes and Streams, 35 Wash. L. Rev. 580 (1960).*

(n43)Footnote 300. *United States v. Oregon, 295 U.S. 1 (1935); Oregon v. Corvallis Sand & Gravel Co., 429 U.S. 363 (1977).*

In *State v. Plaquemines Parish Govern., 652 So. 2d 1 (La. App. 1994),* the court needed to determine whether particular lands were held by the state as school trust lands or were beds of nonnavigable waters. Those lands in question that were subject to the ebb and flow of the tide on April 12, 1812 were deemed to belong to the state regardless of their navigability. These lands were not part of the state school trust lands because title did not come to the state as part of the grant of such lands out of the public lands by the federal government. Those that were navigable, but not affected by the ebb and flow of the tide, would also belong to the state and not be part of the school trust lands because title passed to the state by virtue of their navigability. Only those lands under nonnavigable rivers and streams that were not tidelands would be subject to the school land trust.

In Massachusetts, the historic "great ponds" have been held to be open to common use though this has been held not to include the right to erect structures in the pond. *United States v. Grabler, 907 F. Supp. 499 (D. Mass. 1995).*

See also Dubois v. United States Dep't of Agric., Civil No. 95-50-B (N.H. 1995).

It has been held that some claims of the Indians against the state are barred by the Eleventh Amendment. In Idaho v. Coeur d'*Alene Tribe of Idaho, 117 S. Ct. 2028, 138 L. Ed. 2d. 438 (1997),* the Supreme Court ruled that claims regarding title to the bed of the lake within the boundaries of the reservation were the functional equivalent of a quiet title action and did not come within the doctrine of *Ex Parte* Young and were therefore barred by the Eleventh Amendment.

See also Statler v. Catalano, 691 N.E.2d 384 (Ill. App. 1997) (private use of nonnavigable lake); *Atlanta Sch. of Kayaking v. Douglasville-Douglas County Water and Sewer Authority, 981 F. Supp 1469 (N.D. Ga. 1997)* (challenge to resolution granting access to reservoir and boat ramp only to residents of the county. Injunction issued).

See also United States v. Nye County, 920 F. Supp. 1108 (D. Nev 1996), holding that title to dry federal lands did not pass under equal footing doctrine to the state at time of statehood.

Compare George v. Director, 86 F.3d 1162 (9th Cir. 1996) (Navigability for maritime purposes); *Rizzi v. Underwater Constr. Corp., 84 F.3d 199 (6th Cir. 1996)* (navigability for purposes of Longshore and Harbor Workers' Compensation Act).

In *Kraft v. Burr, 476 S.E.2d 715 (Mich. App. 1996),* the court held that the king could properly convey title to land under navigable waters to private individuals and on the basis of that title, the landowners could enjoin fishermen from fishing or wading in the river running over the lands.

Despite the fact that the matter of state title to the beds is inextricably connected to the question of navigability, the state was held not to be an indispensable party in a case in which a riparian landowner sued a neighboring marina alleging that the marina encroached upon the landowner's riparian rights. *See Cove Properties, Inc. v. Walter Trent Marina, Inc., 702 So. 2d 472 (Ala. Civ. App. 1999),* describing the right to wharf out as terminating at the point of navigability.

See Lehigh Falls Fishing Club v. Andrejewski, 735 A.2d 718 (Pa. Super. 1999). The court found the river in question to be navigable and thus the disputed portion was owned by the Commonwealth and held in trust for public use. This

case is interesting because the initial case which decided the navigability of, among others, the Lehigh River in 1826 was later included in an official reporter without reference to the river and the court had to determine whether the river was inadvertently included in 1826 or inadvertently omitted in 1874.

(n44)Footnote 301. *United States v. Holt State Bank 270 U.S. 49 (1926).*

(n45)Footnote 302. *Hughes v. State of Wash., 389 U.S. 290 (1967).*

(n46)Footnote 303. *See* dissent of Williams, J. and Ryan, J. in *Bott v. Michigan Dep't of Nat. Res. 327 N.W.2d 383 (Mich. 1982).*

(n47)Footnote 304. *Neilson v. Carney Groves, Inc., 159 So. 2d 489 (Fla. App. 1964).*

For further discussion, see M. Reimer, *Historical Protection for Florida's Navigable Rivers and Lakes,* 75 APR Fla. B. J. 10 (2001); V. Albrecht, and D. Duncan, *The Public Trust Doctrine & The Navigational Servitude as "Background Principles."* SF64 ALI-ABA 403 (2001); J. Hill, Jr. *The "Right" To Float Through Private Property in Colorado: Dispelling the Myth, 4 U. Denv. Water L. Rev. 331 (2001).*

(n48)Footnote 305. *Bucki v. Cone, 6 So. 160 (Fla. 1889).*

(n49)Footnote 306. *Utah v. United States, 403 U.S. 9 (1971).*

(n50)Footnote 307. *Kregar v. Fogarty, 96 P.2d 845 (Kan. 1908).*

It has been held that some claims of the Indians against the state are barred by the Eleventh Amendment. In Idaho v. Coeur d' *Alene Tribe of Idaho, 117 S. Ct. 2028, 138 L. Ed. 2d. 438 (1997),* the Supreme Court ruled that claims regarding title to the bed of the lake within the boundaries of the reservation were the functional equivalent of a quiet title action and did not come within the doctrine of *Ex Parte* Young and were therefore barred by the Eleventh Amendment. *See also United States v. Nye County, 920 F. Supp. 1108 (D. Nev 1996).*

(n51)Footnote 308. *Vaughn v. Vermillion Corp., 444 U.S. 206 (1979).*

(n52)Footnote 309. *See* Renick Bros. v. State, #79C-58 (D. Gray County Kansas, 1985) holding that the Arkansas River is still navigable despite the fact that it has been dry for several years.

(n53)Footnote 310. *In Broward v. Mabry, 50 So. 826 (Fla. 1909),* a lake was held to be navigable even though it had a mean average depth of not over two feet except in a few basins and was navigable only by flat-bottomed boats drawing from 3 to 6 inches of water.

In the District Court opinion in *Kaiser Aetna v. United States, 444 U.S. 164 (1979),* the judge noted that "a navigable river is any river with enough water in it to float a Supreme Court opinion." *408 F. Supp. 42, 49* (D. Hawaii, 1976) [*quoting* Meyers & Tarlock, Water Resource Management, 240 (1976)].

(n54)Footnote 311. *United States v. Holt State Bank, 270 U.S. 49 (1926).*

Great American Ins. Co. v. Tugs, 933 F. Supp. 1205 (S.D.N.Y. 1996) (navigability does not depend on there being no occasional difficulties in navigation); *Hagan v. Delaware Anglers' and Gunners' Club, 655 A.2d 292 (Del. 1995).*

See also Givens v. Ichauway, 493 S.E.2d 148 (Ga. 1997) (failure to prove waters were navigable according to statutory definition).

(n55)Footnote 312. Carroll Dunscombe, Riparian and Littoral Rights 7 (1970).

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See also United States v. Nye County, 920 F. Supp. 1108 (D. Nev 1996)(holding that title to dry federal lands did not pass under equal footing doctrine to the state at time of statehood); *United States v. Alaska, 521 U.S. 1, 138 L. Ed. 2d 231 (1997)* (title to certain lands not deemed to pass to state upon statehood).

(n56)Footnote 313. *Webb v. Board of Comm'rs of Neosho County, 257 P. 966 (Kan. 1927).*

In *North Shore, Inc. v. Wakefield, 530 N.W.2d 297 (N. D. 1995),* the court ignored the use of "meander lines" in a deed description, holding that in the absence of clear intent to the contrary, the deed would convey land to the ordinary high-water mark to preserve the riparian status of the property.

See Riparian Owner's Right to New Land Created by Reliction or by Accretion Influenced by Artificial Condition not Produced by Such Owner, 63 A.L.R.3d 249 (1998 Supp.).

(n57)Footnote 314. G. Graham Waite, *Public Rights to Use and Have Access to Navigable Waters, 1958 Wis. L. Rev. 335.*

In *ABKA Ltd. Partnership v. Wisconsin Dep't of Nat. Res., 573 N.W.2d 900 (Wis. App. 1997),* the department determined that public trust doctrine required a specific number of boat slips on a lake to be available for public rental.

See also State v. Linn, 556 N.W.2d 394 (Wis. App. 1996) (Department of Natural Resources has authority under public trust doctrine to protect public right of access to navigable waters. Here the village was enjoined from enforcing a parking ordinance that restricted parking for nonvillage residents); *Sea Cabin on the Ocean IV Homeowners Ass'n v. City of North Myrtle Beach, 828 F. Supp. 1241 (D. S.C. 1993)* (pier was appurtenance owned by homeowners association and public had no right to walk or fish from pier); *Jacobs v. Lyon Township, 502 N.W.2d 382 (Mich. App. 1993)* (erection of a nonexclusive dock at end of road which permitted reasonable public use of the lake for boating, fishing and swimming was within power of township. Public sunbathing, lounging and picnicking exceeded authority); *Steier v. Batavia Park Dist., 670 N.E.2d 1215 (Ill. App. 1996)* (park district without authority to limit use of river launch by personal watercraft).

In *Bubis v. Kassin, 733 A. 2d 1232 (N.J. Super. 1999),* inland lot owners brought an action against oceanfront landowners, the village and the Department of Environmental Protection alleging that the construction of a berm and fence restricted their access to the beach and interfered with their view of the ocean. The court held that the inland landowners had a right of access to the beach sufficient to contest the legality of the fence. The court held that in the absence of any restrictive covenants, a property owner has no right to an unobstructed view across a neighbor's property.

See Lehigh Falls Fishing Club v. Andrejewski, 735 A. 2d 472 (Pa. Super. 1999). The court found the river in question to be navigable and thus the disputed portion was owned by the Commonwealth and held in trust for public use. This case is interesting because the initial case which decided the navigability of, among others, the Lehigh River in 1826 was later included in an official reporter without reference to the river and the court had to determine whether the river was inadvertently included in 1826 or inadvertently omitted in 1874.

In *Barnhill v. City of North Myrtle Beach, 511 S.E. 2d 361 (S.C. 1999),* the court upheld an ordinance that restricted

the launching and beaching of motorized watercraft, including personal water craft, on public beaches. This ordinance had been challenged as an unconstitutional restriction on access to navigable waters, as preempted by state law and as a regulatory taking.

The court held that the public's right to access to navigable waters was subject to reasonable regulation and found the ordinance to be reasonably related to the legitimate public interest in public safety. The ordinance was held not to be preempted because the state authority related only to activities "on the water" and would not affect plaintiffs who sought to operate a land-based jet ski rental business. The ordinance was held not to constitute a taking because the beach was governmental property and there is no private right in a particular use of government property.

In *St. Croix Waterway Association v. Meyer, 178 F.3d 515 (8th Cir. 1999),* the court upheld Minnesota's slow no-wake regulations against a challenge that they violated the public trust doctrine.

(n58)Footnote 315. Carroll Dunscombe, Riparian and Littoral Rights (1970).

See W. Mich. Dock v. Lakeland Inv., 534 N.W.2d. 212 (Mich. App. 1995). State v. Town of Linn, 556 N.W.2d 394 (Wis. 1996) (it is appropriate to extend public trust doctrine to include navigable waters and the shore appurtenant in order to ensure public's continued access and free use of water).

(n59)Footnote 316. *See Capune v. Robbins, 160 S.E.2d 881 (N.C. 1968).*

See also Tumino v. Long Beach Township, 725 A. 2d 1173 (N.J. Super. 1999). The court held that the coastal zone management rules promulgated by the Department of Environmental Protection preempted an ordinance governing the length of docks.

(n60)Footnote 317. *Kaiser Aetna v. United States, 444 U.S. 164 (1979).*

(n61)Footnote 318. Frank Maloney, *The Ordinary High Water Mark: Attempts at Settling an Unsettled Boundary Line, 13 Land& Water L. Rev. 465 (1978).*

See also Bubis v. Kassin, 733 A. 2d 1232 (N.J. Super. 1999). Here the court held that public's interest in the area below the mean high water line may actually include areas that had been lawfully reclaimed by filling or by natural accretion and which, otherwise, could be lawfully occupied by private interests.

(n62)Footnote 319. *See Clement v. Watson, 58 So. 25 (Fla. 1912)* (one cannot trespass across private land in order to enjoy such rights).

(n63)Footnote 320. *State ex rel. Thornton v. Hay, 462 P.2d 671 (Or. 1969).*

(n64)Footnote 321. *Branch v. Oconto County, 109 N.W.2d 105 (Wis. 1961)* (private property may be condemned in order to facilitate public access).

(n65)Footnote 322. *Borax Consolidated, Ltd. v. Los Angeles, 296 U.S. 10 (1935).*

Hanigan v. State, 629 N.Y.S 2d 509 (1995) (public right to use navigable waters does not entitle public to cross private land for access to navigable waters.

(n66)Footnote 323. *Matthews v. Bay Head Improvement Association, 471 A.2d 355 (N.J. 1984).*

(n67)Footnote 324. *Id.*

(n68)Footnote 325. *City of Daytona Beach v. Tona-Rama, Inc., 294 So. 2d 73 (Fla. 1974).*

(n69)Footnote 326. *Gion v. City of Santa Cruz, 465 P.2d 50 (Cal. 1970).*

(n70)Footnote 327. *Seaway v. Attorney Gen., 375 S.W.2d 923 (Tex. 1964).*

(n71)Footnote 328. *State ex rel. Thornton v. Hay, 462 P.2d 671 (Or. 1969).*

(n72)Footnote 329. *Borough of Neptune City v. Borough of Avon-By-The-Sea, 294 A.2d 47 (N.J. 1972).*

(n73)Footnote 330. Cal. Pub. Res. Code § 31210 *et seq.*

(n74)Footnote 331. *People v. Emmert, 597 P.2d 1025 (Colo. 1979).*

(n75)Footnote 332. Where different landowners are present on opposite sides of the watercourse, the property interest of each is considered to extend to the thread or middle of the waterbody.

(n76)Footnote 333. *State ex rel. Meek v. Hays, 785 P.2d 1356 (Kan. 1990).*

(n77)Footnote 334. Sam Brownback & James Wadley, Kansas Agricultural Law, 308-310 (1989). *See also* 1962 Op. Att'y Gen. (Ks. 62-15 (Feb. 1, 1962); *1974 Op. Att'y Gen. (Ks.) 74-137* (May 2, 1974).

(n78)Footnote 335. *People v. Emmert, 597 P.2d 1025 (Colo. 1979).*

(n79)Footnote 336. *Johnson v. Seifert, 100 N.W.2d 689 (Minn. 1960).*

(n80)Footnote 337. *Anderson v. Bell, 433 So. 2d 1202 (Fla. 1983).*

(n81)Footnote 338. *Bolinger v. Henry, 375 S.W.2d 161 (Mo. 1984).*

(n82)Footnote 339. *See* Charles Meyers et al., Water Resource Management 470-71 (3d ed. 1988).

(n83)Footnote 340. *Hitchings v. Del Rio Woods Recreation & Park Dist., 127 Cal. Rptr. 830 (1976)* (defining navigability in terms of recreational boatability).

(n84)Footnote 341. *Montana Coalition for Stream Access, Inc. v. Curran, 682 P.2d 163 (Mont. 1984); Montana Coalition for Stream Access v. Hildreth, 684 P.2d 1088 (Mont. 1984).*

(n85)Footnote 342. *United States v. Holt State Bank, 270 U.S. 49 (1926).*

(n86)Footnote 343. It may be difficult for the state to dispose of the title since it is deemed held in public trust in most jurisdictions. *See* Note *The Public Trust Doctrine -- A Tool for Expanding Recreational Tights in Colorado*, 57 U. Colo. L. R. 615 (1986). However, the question of extending public access to waters to which the state does not hold title is entirely a state law question.

(n87)Footnote 344. *See The Daniel Ball, 77 U.S. (10 Wall.) 577 (1871).*

(n88)Footnote 345. *Id.*

(n89)Footnote 346. *Economy Light and Power v. United States, 256 U.S. 113 (1921).*

(n90)Footnote 347. *United States v. Appalachian Electric Power Co., 311 U.S. 377 (1940).*

(n91)Footnote 348. *Oklahoma ex rel. Phillips v. Guy F. Atkinson, 313 U.S. 508 (1941).*

(n92)Footnote 349. *United States v. Holland, 373 F. Supp. 665 (M.D. Fla. 1974).*

(n93)Footnote 350. *Montana Coalition for Stream Access v. Curran, 682 P.2d 163 (Mont. 1984).*

(n94)Footnote 351. *State of Arkansas v. McIlroy, 595 S.W.2d 659 (Ark. 1980).*

(n95)Footnote 352. *Kelley ex rel. MacMullan v. Hallden, 214 N.W.2d 856, 864 (Mich. App. 1936).*

(n96)Footnote 353. *Luscher v. Reynolds, 56 P.2d 1158 (Or. 1936).* It might be argued that in most cases of this type, the jurisdiction is actually accepting the "floating of logs" as the required evidence of commercial use capacity and actual historic use rather than redefining "navigability."

(n97)Footnote 354. *Montana Coalition for Stream Access v. Curran, 682 P.2d 163 (Mont. 1984).*

(n98)Footnote 355. *See* Glenn MacGrady, *The Navigability Concept in the Civil and Common Law: Historical Development, Current Importance, and Some Doctrines That Don't Hold Water, 3 Fla. St. U. L. Rev. 513 (1975).*

(n99)Footnote 356. *Illinois Cent. R.R. v. Illinois, 146 U.S. 387 (1892).*

Selkirk-Priest Basin Ass'n v. State ex rel. Andrus, 899 P.2d 949 (Ida. 1995); Gwathmey v. State, 646 S.E.2d 674 (N.C. 1995).

See ABKA Ltd. Partnership v. Wisconsin Dep't of Nat. Res., 573 N.W.2d 900 (Wis. App. 1997) (involving the application of the public trust doctrine to the number of boat slips on a lake that must be available for public rental).

See also State v. Linn, 556 N.W.2d 394 (Wis. App. 1996) (Department of Natural Resources has authority under public trust doctrine to protect public right of access to navigable waters. Here the village was enjoined from enforcing a parking ordinance that restricted parking for nonvillage residents).

In *Bubis v. Kassin, 733 A. 2d 1232 (N.J. Super. 1999),* inland lot owners brought an action against oceanfront landowners, the village and the Department of Environmental Protection alleging that the construction of a berm and fence restricted their access to the beach and interfered with their view of the ocean. The court held that the inland landowners had a right of access to the beach sufficient to contest the legality of the fence. The court held that in the absence of any restrictive covenants, a property owner has no right to an unobstructed view across a neighbor's property. Here, the court held that the inland owners' rights to use the beach would be governed by the public trust doctrine so long as the area in question remains below the high water line, *citing Matthews v. Bay Head Improvement Ass'n, 471 A. 2d 355 (N.J. 1984), cert. denied, 469 U.S. 821 (1984); Borough of Neptune City v. Borough of Avon-by-the Sea, 294 A.2d 47 (1972).* Thus, if the mean high water line were to shift ocean-ward as a result of accretion, any express easement over the beach upon which the inland owner's claims were based would be revived.

It has been held that notwithstanding the right to bathe, the public trust doctrine did not preclude municipalities from lawfully closing beaches and prohibiting bathing under certain conditions. *See State v. Oliver, 727 A. 2d 491 (N.J. Super. 1999).*

In *St. Croix Waterway Association v. Meyer, 178 F.3d 515 (8th Cir. 1999),* the court upheld Minnesota's slow no-wake regulations against a challenge that they violated the public trust doctrine.

In *State v. Longshore, 982 P.2d 1191 (Wash. App. 1999)* it was held that the public trust doctrine did not encompass the right to take clams from private property.

In *Providence & Worcester Railroad Co. v. Pine, 729 A.2d 202 (R.I. 1999),* it was held that once the railroad filled in and improved land below the mean high water line, the company established rights to the land free and clear of the public trust.

Mineral County v. State Department of Conservation and Natural Resources, 20 P.3d 800 (Nev. 2001); Defenders of Wildlife v. Hull, 19 P.3d 722 (Az. App. 2001); Lowcountry Open Land Trust v. State, 552 S.E. 778 (S.C App. 2001); ABKA Limited Partnership v. Wisconsin Department of Natural Resourcs, 635 N.W. 2d 168 (Wis. App. 2001).

For further discussion, see M. Reimer, *Historical Protection for Florida's Navigable Rivers and Lakes,* 75 Apr Fla. B. J. 10 (2001); W. Snape III, M. Senatore, K. Gillon, S. George, C. Muffet, R. Anderson and R. Kondor, *Protecting Ecosystems Under the Endangered Species Act: The Sonoran Example, 41 Washburn L.J. 14 (2001);* D. Richards, *State ex rel Sprynczynatyk v. Mills: Pubic Policy and the Ambulatory Ordinary High Water Mark on the Missouri River, 5 Great Plains Nat. Resources J. 258 (2001);* J. Burling, *Protecting Property Rights in Ecologically Valuable Resources after Palazzolo,* SF64 ALI-ABA 109 (2001); D. Callies, J. D. Breemer, and W. Richardson, *Selected Legal and Policy Trends in Takings Law: Background Principles, Customs and Public Trust "Exceptions" and the (Mis)use of Landowner's Investment Backed Expectations,* SF64 ALI-ABA 191 (2001); V. Albrecht, and D. Duncan, *The Public Trust Doctrine & The Navigational Servitude as "Background Principles."* SF64 ALI-ABA 403 (2001); E. Ryan, *Public Trust and Distrust: The Theoretical Implications of the Public Trust Doctrine for Natural Resource Management, 31 Envtl L. 477 (2001);* J. Hill, Jr. *The "Right" To Float Through Private Property in Colorado: Dispelling the Myth, 4 U. Denv. Water L. Rev. 331 (2001).*

(n100)Footnote 357. Note, *The Public Trust Doctrine -- A Tool for Expanding Recreational Rights in Colorado, 57 U. Colo. L. Rev. 615 (1986).*

(n101)Footnote 358. *See, e.g., Marks v. Whitney, 491 P.2d 374 (Cal. 1971).*

(n102)Footnote 359. *United States v. State Water Resources Control Bd., 277 Cal. Rptr. 161 (1986). See also National Audubon Soc'y v. Superior Ct. of Alpine County, 658 P.2d 709 (Cal. 1983). See also California Trout, Inc. v. Superior Ct., 266 Cal. Rptr. 788 (1990).*

(n103)Footnote 360. *See, e.g., People v. Weaver, 197 Cal. Rptr. 521, 524 (1983).*

Larman v. State, 552 N.W.2d 158 (Iowa 1996) (public trust doctrine now expanded to public's use of lakes and rivers for recreational purposes).

(n104)Footnote 361. *See State ex rel. Meek v. Hays, 785 P.2d 1356 (Kan. 1990).*

(n105)Footnote 362. *See* Donna S. Fitzgerald, *Extending Public Trust Duties to Vermont's Agencies: A Logical Interpretation of the Common Law Public Trust Doctrine, 19 Vt. L. Rev. 509 (Winter 1995);* Michael C. Blumm & Thea Schwartz, *Mono Lake and the Evolving Public Trust in Western Water, 37 Ariz. L. Rev. 701 (Fall 1995);* Matt Clifford, *Preserving Stream Flows in Montana Through the Constitutional Public Trust Doctrine,* 16 Pub. Land L. Rev. 117 (Spring 1995); Cynthia L. Koehler, *Water Rights and The Public Trust Doctrine: Resolution of the Mono Lake Controversy, 22 Ecology L.Q. 541 (August 1995);* Douglas L. Grant, *Western Water Rights and the Public Trust Doctrine: Some Realism about the Takings Issue,* 27 Ariz. St. L. Rev. 423 (Summer 1995).

(n106)Footnote 363. *Elder v. Delcour, 269 S.W.2d 17 (Mo. 1954).*

(n107)Footnote 364. *Burnquist v. Fischer, 71 N.W.2d 161 (Minn. 1955).*

(n108)Footnote 365. *Buffalo River Conservation & Recreation Council v. National Park Serv., 558 F.2d 1342 (8th Cir. 1977).*

(n109)Footnote 366. *682 P.2d 163 (Mont. 1984).*

The *Curran* holding regarding the public right to use land in conjunction with the exercise of that right was limited in

a subsequent case, *Galt v. State Department of Fish, Wildlife, and Parks, 731 P.2d 912 (Mont. 1987).* There, the court held that the public right to use land below the high-water mark existed only to the extent necessary for utilization of the water itself and public authorization of such lands for such activities as the building of duck blinds, boat moorages, camping or big game hunting constituted an unconstitutional confiscation of private property. The court also invalidated as unconstitutional a provision of the statute that required the landowner to bear the cost of constructing portage routes around artificial barriers.

See also Bruce Elder, *Judicial Recognition of the Public Interest in Water Recreation: Nebraska and United States Supreme Court Realities*, 15 Pub. Land L. Rev. 199 (1994).

(n110)Footnote 367. *Id.* at 170:

> The question is whether the waters owned by the state under the Constitution are susceptible to recreational use by the public. The capability of use of the waters for recreational purposes determines their availability for recreational use by the public. Streambed ownership by a private party is irrelevant.

A similar result was reached in *Day v. Armstrong, 362 P.2d 137 (Wyo. 1961).*

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CHAPTER 50 WATER RIGHTS

6-50 Thompson on Real Property, Thomas Editions § 50.07

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§ 50.07 Consumptive Uses.

§ 50.07(a) In General.

Although it is uniformly recognized throughout the country that the nature of the water right is that it is a usufructary right, there is considerable variety throughout the United States as to how such water rights are actually acquired. This is undoubtedly the result of the considerable sovereignty each state is regarded as having with respect to the selection of a water right allocation regime. n368

§ 50.07(b) Naming the Systems.

It is common in our system to label the state by how water rights in *confined surface waters* are allocated. Thus, a particular state will be called a "riparian jurisdiction" because it allocates and adjusts water rights in rivers, lakes and streams according to the doctrines of "riparianism... . n369 Similarly, a state may be called an "appropriative jurisdiction" because appropriative principles govern the acquisition of water rights in surface waters within the state. n370 It should not be understood that simply because a jurisdiction is identified as riparian or appropriative that all water rights recognized in the state are governed by those principles. Indeed, in many states, the regime that governs water rights in groundwater will differ from the regime of surface waters. n371

Further, it must be recognized that the terms "riparian," "appropriative," and so forth are inevitably used only in the broadest generalized sense when they are used as system labels. There is considerable internal variation between riparian states and between appropriative states on many significant issues of water right interpretation. In that sense, despite any commonality of labelling, each state must be recognized as having its own unique water right regime. Even as states borrow rules and principles from one another, the differences between systems may continue to remain substantial simply because each state is attempting to fashion its own effective system to respond to its own particularized circumstances and conditions.

COMPUTER-ASSISTED RESEARCH

LEXIS: nam! or label! w/15 water! w/1 right! w/15 state!

§ 50.07(c) Variations in Allocation Systems: Surface Waters.

In a most generalized sense, states east of the Mississippi River may be characterized as allocating water rights based upon the ownership of land which borders on the particular water supply. These states are commonly called riparian states, n372 because such land is said to be "riparian" to the water. n373

Most states west of the Mississippi River are described as appropriation (or prior appropriation) jurisdictions. n374 This is because individuals secure water rights in surface waters in these jurisdictions by "appropriating" or exercising physical control or dominion over the water. n375

The remaining western states, n376 and the state of Mississippi, allocate water rights in surface waters in a combination of ways and are commonly called "hybrid" systems, largely because they recognize a mixture of both riparian and appropriative rights. In Louisiana, the allocation of water is based on the Civil Code which evolved from the Cuban Civil Code and which is, in turn patterned after the French model. n377 In Hawaii, surface water rights are allocated on the basis of a combination of principles derived from riparian water law n378 and ancient Hawaiian legal principles. n379

COMPUTER-ASSISTED RESEARCH

LEXIS: surface w/1 water! w/15 riparian or appropriation w/2 state! or jurisdiction!

§ 50.07(d) Variations in Allocation Systems: Groundwaters.

Historically, there has been more variation regarding allocation of water rights in groundwater than there has been in surface systems. Here, jurisdictions do not conveniently divide among eastern and western states but rather tend to scatter among a variety of approaches including the absolute ownership doctrine, n380 the American or reasonable use rule, n381 the doctrine of correlative rights, n382 the *Restatement (Second) of Torts* rule, n383 and even separate groundwater codes. n384

COMPUTER-ASSISTED RESEARCH

LEXIS: groundwater w/15 alloc! w/5 water! w/1 right!

FOOTNOTES:
(n1)Footnote 368. *Kansas v. Colorado, 206 U.S. 46, 94 (1907).*

J. Neuman, *Adaptive Management: How Water Law Needs to Change, 31 Envtl. L. Rep. 11432 (2001).*

(n2)Footnote 369. *See* § 50.08, *infra*.

(n3)Footnote 370. *See* § 50.09, *infra*.

(n4)Footnote 371. *See* § 50.11, *infra*.

(n5)Footnote 372. These states include Alabama, Arkansas, Connecticut, Delaware, Florida, Georgia, Illinois, Indiana, Iowa, Kentucky, Maine, Maryland, Massachusetts, Michigan, Minnesota, Missouri, New Hampshire, New Jersey, New York, North Carolina, Ohio, Pennsylvania, Rhode Island, South Carolina, Tennessee, Vermont, Virginia, West Virginia and Wisconsin.

(n6)Footnote 373. For further discussion, *see* § 50.08(c), *infra*.

(n7)Footnote 374. These states include Alaska, Arizona, Colorado, Idaho, Kansas, Montana, Nevada, New Mexico, Utah and Wyoming.

(n8)Footnote 375. For further discussion, *see* § 50.09(i), *infra*.

(n9)Footnote 376. California, Mississippi, Nebraska, North Dakota, Oklahoma, Oregon, South Dakota, Texas and Washington.

(n10)Footnote 377. This allocation system is quite similar to the riparian approach. La. Civ. Code Ann., arts. 657, 658; *Long v. Louisiana Creosoting Co., 69 So. 281 (La. 1915).*

(n11)Footnote 378. *Reppun v. Board of Supply, 656 P.2d 57 (1982).*

(n12)Footnote 379. *Territory v. Gay, 31 Haw. 376 (1930), aff'd, 52 F.2d 356 (9th Cir. 1930), cert. denied, 284 U.S. 677 (1931).*

(n13)Footnote 380. *See* § 50.11(e), *infra*.

(n14)Footnote 381. *See* § 50.11(f), *infra*.

(n15)Footnote 382. *See* § 50.11(g), *infra*.

(n16)Footnote 383. *See* § 50.11(h), *infra*.

(n17)Footnote 384. *See* § 50.11(i), *infra*.

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CHAPTER 50 WATER RIGHTS

6-50 Thompson on Real Property, Thomas Editions § 50.08

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§ 50.08 Consumptive Use of Surface Waters: Riparian Systems.

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§ 50.08(a) In General.

Riparian systems are among the simplest, as well as the oldest, water right allocation systems in the United States and the world. n385 Most of the jurisdictions in the eastern United States are considered to be riparian jurisdictions, even though in recent decades there have been many modifications in order to adapt these systems to local situations and conditions. n386 Some western jurisdictions n387 continue to recognize some riparian rights. n388

§ 50.08(b) Historical Development.

The development of these systems in the United States generally occurred at the same time as the development of the common law of water rights in England. n389 There appears to have been some borrowing of legal principles from the English system. However, much credible evidence suggests that the American system borrowed from a variety of sources and that the English system has actually relied heavily on the American system for the development of basic principles and concepts. n390

The particular structure of riparian systems, that rights may be claimed by anyone who owns land that borders on or abuts the watercourse, is generally attributed to the coincidence of such factors as the presence of fairly plentiful water supplies, a weak central government, and European legal influence. n391 Under these circumstances, a simple method for right allocation was found in the requirement that land must be owned which borders on the watercourse before a right will be recognized. This eliminated the need for central governmental intervention and empowered the landowner to bear the primary responsibility regarding policing and protecting the right.

§ 50.08(c) Riparian Lands: Defined.

Ownership of "riparian land" has been the *sine qua non* of water right acquisition in riparian systems since the inception of these systems. This is largely because ownership of such land was a fact that could readily be ascertained by anyone who wished to claim a water right, and offered a very simple administrative mechanism to the courts which served as the primary arbiter of rights in the system. Thus, to qualify for a water right, as a general rule, the claimant must own

"riparian" land.

Riparian land is generally considered to be land that borders on surface watercourses such as lakes and streams. n392 The landowner's ownership interest in the land generally must actually "touch the water," n393 though it is not necessary for the landowner to actually own an interest in any portion of the bed. n394 Land is therefore considered to be riparian where the ownership interest immediately adjoins the public title interest in the beds of navigable waterbodies, as well as where it extends below the water's edge as is the case with non-navigable waterbodies. n395

In North Shore, Inc. v. Wakefield, n396 the court ignored language in a deed that described the boundary of the property as the "meander line" of the lake and held that in the absence of clear intent to do otherwise, the deed would be construed as including land to the ordinary high-watermark of the lake, making the property riparian. The rationale for the decision was to maintain stability of land titles where the issue was title to accreted land on the edge of the lake.

In Griffin v. Lamberjack, n397 the court distinguished between riparian land and land covered by a drainage easement as the ground for an action alleging trespass and nuisance. In this case, the court held that the land that bordered on the "dredge cut" was not riparian.

In W. Mich. Dock v. Lakeland Inv., n398 the court considered the owner of a dock to be riparian to a lake because the pier was accreted to the shoreline and the end abutted the lake. n399

COMPUTER-ASSISTED RESEARCH

LEXIS: riparian w/1 land! w/15 water! w/1 right!

§ 50.08(d) Riparian Lands: Legal Significance of Riparian Status.

Being able to denote particular lands as riparian establishes at least three critical matters: 1) it identifies the individuals who may claim consumptive use water rights; 2) it identifies the specific waters to which the water right pertains; and 3) it identifies the particular lands upon which the waters may be used as the water right is exercised. n400

COMPUTER-ASSISTED RESEARCH

LEXIS: legal w/1 status w/15 riparian w/1 land!

§ 50.08(e) Riparian Lands: Determining Which Particular Lands Are Riparian: Source of Title.

In most riparian jurisdictions, the water rights which the landowners enjoy are considered to be limited to the waters which are "adjacent" to the lands. n401 Similarly, the use of the water may be restricted to qualified riparian lands. n402 Jurisdictions have used two quite different tests to determine whether a particular tract is riparian.

The "source of title" rule limits riparian rights to the smallest subdivision, parcel or tract of waterfront land held under one title in a chain of title leading to the present owner. n403 Under this rule, the amount of land considered to be riparian can only be decreased rather than increased. n404 It appears that this rule originated in California but tends to be followed in other western jurisdictions which mix riparian and appropriative principles, since it is seen as promoting the policy found in most of these jurisdictions to limit the extent of riparian rights. n405

COMPUTER-ASSISTED RESEARCH

LEXIS: riparian w/1 land! w/15 source w/1 title

§ 50.08(f) Riparian Lands: Determining Which Particular Lands Are Riparian: Unity of Title.

The "unity of title" rule appears to be followed in the majority of riparian jurisdictions. n406 This rule considers any tract held by one owner which abuts the watercourse to be riparian. n407 Although this rule is more inclusive, as it permits the enlarging of the riparian parcel through the purchase of contiguous land, n408 some riparian jurisdictions limit the amount that could be claimed as riparian under this rule to an amount that is considered reasonable. n409

COMPUTER-ASSISTED RESEARCH

LEXIS: riparian w/1 land! w/15 unity w/1 title

§ 50.08(g) Riparian Lands: Place of Use Limitations.

Some riparian jurisdictions confine the use of water to those portions of riparian land that are located within the same watershed as the source from which the water is extracted. n410 This appears to be based upon the assumption that water used outside the watershed may be returned to different watercourses which, in turn, will either damage the downstream users along the first watercourse, due to the reduction of the stream's flow, or will damage those on the second watercourse, due to the increase there in the stream flow. n411 There is some disagreement among the authorities as to whether the watershed limitation represents a majority viewpoint. n412 It has been criticized as not being particularly adapted to modern conditions. n413

COMPUTER-ASSISTED RESEARCH

LEXIS: riparian w/1 land! w/15 plac! w/2 use! w/1 limit!

§ 50.08(h) Vesting of Riparian Rights.

Riparian rights are said to vest at the time title to the land is acquired and are considered part of the package of rights in the fee. n414 This approach differs significantly from appropriative rights systems in which the water right is considered to be vested only after the right has been exercised in a way which involves the actual application of the water to a beneficial use. Thus, in riparian systems, no actual use of the water is required at the time title is taken to riparian land in order to secure the water right, nor is it necessary to record any claim to the water right as part of the vesting process. This means that the water right will generally not be lost through non-use and that it automatically passes with the property when the land is transferred. n415

COMPUTER-ASSISTED RESEARCH

LEXIS: vest! w/15 riparian w/1 right!

§ 50.08(i) The Quantity of Water to Which the Riparian Right Holder Is Entitled.

The owner of riparian land is considered to hold, as an adjunct to title in the land, a water right in the waters that are adjacent to the land. The particular quantity of water to which the right holder may be entitled is not fixed and will vary depending upon the particular doctrine of the jurisdiction regarding quantification. Two doctrines have been used by riparian jurisdictions to resolve disputes regarding the amount of water claimed. These approaches seek to discriminate between acceptable and unacceptable uses of the water.

§ 50.08(j) Quantity: Natural Flow Doctrine.

The natural flow doctrine is considered the earliest means by which quantities of water claimed under riparian rights were established. According to this rule, which is sometimes referred to as the English Rule, each riparian proprietor on

a watercourse has the right to have the stream flow to the proprietor's land in its natural condition, not perceptibly diminished, polluted or retarded by the use of others. n416

The primary advantage of this rule is that each right holder is assured some meaningful opportunity for access to the stream for the purpose of using the water since the full flow of the stream will assuredly pass by each separate parcel of riparian land. On the other hand, such a rule inherently and severely limits the amount of water that may be actually removed from the stream for consumptive use purposes, since virtually any consumptive use will diminish the quantity or quality of the water available to other users downstream. Thus, it may be observed that the practical consequence of the natural flow doctrine was to maintain a stable, but low, volume demand on the water supply.

In order to preserve a significant right of access and to facilitate the opportunity to make a meaningful use of the water, jurisdictions that followed this doctrine very early distinguished between "natural" and "artificial" uses and permitted the riparian proprietor to use as much water as was needed for "natural" uses, n417 but limited the amount of water that could be used for "artificial" or industrial uses. Natural uses were defined as those necessary to sustain life and included bathing, drinking, watering animals and household uses. n418 Artificial uses, on the other hand, were defined as those which enhanced man's comfort and prosperity. The former uses were always permitted; the latter only so long as they did not materially interfere with the natural flow of the watercourse. n419 An examination of the cases indicates that mining operations, irrigation, power generation and large scale livestock operations have been considered artificial uses. n420

The natural flow doctrine also required that water be used on riparian land or for purposes connected with the riparian land. n421 Because of the restrictiveness of this approach, most riparian jurisdictions have abandoned the natural flow doctrine. n422

COMPUTER-ASSISTED RESEARCH

LEXIS: natural w/1 flow w/1 doctrine w/15 riparian w/1 right!

§ 50.08(k) Quantity: Reasonable Use Doctrine.

The reasonable use doctrine differs markedly from the natural flow doctrine in that it was designed to enhance the opportunity to make non-life sustaining uses of the watercourse rather than to simply maintain the status quo. This approach, sometimes called the American Rule, is the approach to the issue of water right quantification presently taken by the majority of riparian jurisdictions. n423

Each riparian proprietor in a jurisdiction that follows the reasonable use rule may use as much water as is necessary for any lawful purpose so long as: 1) the use is reasonable; and 2) does not unreasonably interfere with the legitimate uses and needs of other proprietors on the stream. n424 The dual concerns of the concept of "reasonableness" focus on the impact of the use upon the interests of the water right holder himself as well as on the impact of that use upon the correlative rights of other protected right holders. Thus, the mere fact that the particular use of the water is of benefit to the riparian landowner is not sufficient by itself to establish the reasonableness of the use. n425 It is also necessary to determine whether the use has an unacceptable impact on the rights of others. n426 A variety of factors must be considered to make such a determination. These include such concerns as:

1) the purpose of the use;

2) the suitability of the use to the particular source of supply;

3) the economic and social value of the use;

4) the extent of harm caused and the practicality of avoiding harm;

5) the impact of the use on existing uses, land values and investments;

6) the utility of the use to the user;

7) the ability of the user causing the harm to avoid the loss; and so forth. n427

Because of the focus of the determination of reasonableness, the quantity of water represented by the right will generally not vary directly with the size of the stream, n428 the size of the riparian tract or the length of its frontage on the water supply, n429 or even with the length of time the water has been used or when the use first began. Rather, these concerns are among the factors which influence the nature and extent of water use, its benefit to the right holder and its impact on the rights of others. n430

COMPUTER-ASSISTED RESEARCH

LEXIS: reasonable w/1 use w/1 doctrine w/15 riparian w/1 right!

§ 50.08(l) Quantity: Adjusting the Quantity.

Approaching the question of quantification from the perspective of the impact of the use upon the rights of others has at least three significant consequences:

1) new uses have an equal chance with established uses to compete for the resource;

2) the reasonableness of any existing use may be reconsidered at any time in the future that a new, competing use arises; and

3) the quantity of water represented by any particular water right is never considered to be fixed and may change over time.

This is because the quantity of the water to which the right holder may lay claim really never becomes fixed, even though a particular quantity of water is presently being used. Further, since the validity of the exercise of the right must continuously be judged in terms of its impact on other existing and future rights, the reasonableness of any established use may be reconsidered at any time in the future as a result of subsequent uses of the water and changes in conditions and situations. As a result, for example, if water supplies are depleted by drought or by an increase in water users, it may be necessary, and lawfully within the parameters of the doctrine, to scale back the quantity required for a particular use in order for that use to remain reasonable.

The primary strength of this approach is that it allows the use of the water in ways which may reduce the source of supply for others. It also has the advantage of flexibility in that the amount may be adjusted over time to reflect changes in the use of the watercourse. On the other hand, the system makes the investment in developments which require water somewhat risky since there is no assurance that the particular quantity needed will always be available, or that society's determination that a particular use is reasonable will not change if circumstances change.

As a result, a variety of rules have been adopted and several riparian jurisdictions have developed rules that are designed to allocate water on a "fair share" basis and give a measure of predictability and security to the quantity of water represented by the water right. In some jurisdictions, for example, it has been held that where users are located on opposite sides of a watercourse, and the water supply is inadequate to meet the needs of both, each may have one-half of the available water. n431 Similarly, in times of water shortage, it has been held that water may be apportioned ratably or

equitably. n432

COMPUTER-ASSISTED RESEARCH

LEXIS: adjust! w/2 quantity w/15 riparian w/1 right!

§ 50.08(m) Transferability of Riparian Rights.

Riparian water rights are considered to be appurtenant to and to run with the land. n433 As such, they automatically follow the title to the land in any title conveyance. In most riparian jurisdictions, the water right cannot be severed from the title to the land and transferred separately. Historically, this made much sense, since there were no governmental agencies or right recording agencies to track water right ownership. In such a situation, the fact of presence of riparian land gave notice of the existence of a potential claim to the water adjacent to the property, and could of itself also serve as the means of identifying the particular right holder. Since there was no convenient way to do a "water right title search," a visual inspection of the watercourse, which would reveal the extent to which claims existed in or to the water, was both necessary and a practical way to keep track of water rights.

As population pressures on water supplies and the need to use the water beyond the borders of the watercourse have grown, some jurisdictions have modified the "no severance" rule to permit limited transfers. n434 And, even in jurisdictions which have not permitted the outright transfer of the water right, there has been some accommodation of the right to transfer the water itself, after it has been reduced to possession through the proper exercise of the right. n435

It may be that even though the ability to transfer either the right or the water is recognized in the jurisdiction, the actual exercise of the right may implicate questions of reasonableness. The ultimate disposition of the water will generally be considered to be a relevant factor in the determination of whether the right is being exercised in a reasonable manner. A transfer, though otherwise lawful, may possibly terminate a water right if it is determined that the ultimate location or use of the water after the transfer is unreasonable. For example, although there is no longer a requirement in many jurisdictions that the water be used on riparian land, it may be that the extraction of water for the sole purpose of selling it elsewhere could be considered unreasonable where the impact of such a removal destroyed existing lawful uses. n436

COMPUTER-ASSISTED RESEARCH

LEXIS: transfer! w/15 riparian w/1 right!

§ 50.08(n) Providing Water for Non-Riparian Users.

An early rule in many riparian jurisdictions was that riparian rights could be exercised only by riparian landowners and that any use of the water by non-riparians was considered unreasonable *per se*, except where water was used for narrowly defined life-sustaining or domestic uses. n437 In recent decades, the view has generally been taken that nonriparian uses are only presumed to be improper and it must affirmatively be established that they are harmful. n438 A few states now permit non-riparian use even though it causes harm to downstream users. n439

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LEXIS: non-riparian w/1 use! w/2 water!

§ 50.08(o) Riparian Rights of Municipalities.

Since riparian land must be owned in order to claim riparian rights, municipalities pose an interesting problem. Even though the city may own land that borders on the watercourse, most of the individuals served by the city will not and

should not be allowed to claim the water through the city's ownership of a small bit of riparian land. Further, if the jurisdiction has restrictions on the use of water on non-riparian land, the city would not be able to distribute any water to its inhabitants since that would essentially involve a non-riparian use of the water. Finally, the sheer size of the demand for water by cities and the general life-sustaining nature of the water uses might be seen as invariably prevailing over the claims of individual right holders on the watercourse. On the other hand, it would seem inconsistent with good public policy to prevent cities from assuming the responsibility of supplying their inhabitants with water. Cities therefore pose an interesting dilemma to riparian systems: how is water made available to cities without radically departing from the principles of the system?

As a general rule, it is neither possible nor practical to require that each individual inhabitant of a municipality make an individual extraction of water from a watercourse. As a matter of fact, most inhabitants would not qualify as riparians because they do not own qualified land. Indeed, the sound management of the resource requires that demands of the type most likely to be made by the inhabitants of the municipality be aggregated and dealt with as a collective problem. Therefore, it is commonly recognized that municipalities have an obligation to supply water to their inhabitants. But since municipalities become major users of the water, and obviously have a potentially harmful impact on other water users from the same source, it is commonly required that municipalities either must qualify as actual riparian landowners on the watercourse, in order to enjoy riparian rights, or use the public power of eminent domain to acquire the rights to the water from private landowners who do qualify for access to the water. n440 These jurisdictions also appear to test the extent to which the municipality may claim the water on the basis of whether the extraction is reasonable. n441

In other jurisdictions, municipalities are given a preference to the water because of the need to provide a public water supply. n442 In many jurisdictions, the need for flexibility in dealing with municipal water supplies has given rise to developments outside the strict confines of riparian rights which have justified such measures as inter-basin transfers of water. n443

COMPUTER-ASSISTED RESEARCH

LEXIS: riparian w/1 right! w/15 municipal!

§ 50.08(p) Administrative Water Right Allocations in Riparian Systems.

The advent of strong central governments is starting to have an impact on the administration of riparian water right systems, and many have moved away from traditional allocation frameworks. A high number of riparian jurisdictions have now adopted some variation of a permit system to assist in dealing with allocation problems. n444 Although most of these systems are limited in scope, often exempting certain uses from the permit requirements n445 or requiring permits for certain uses or for uses from certain kinds of water supplies, n446 they have the effect of diminishing the extent to which the individual landowner exclusively controls the right acquisition process.

Requiring a permit may also move the jurisdiction away from the rigid land ownership and place of use requirements as well, though most of these jurisdictions still continue to condition the issuance of the right upon whether the proposed use is reasonable or in the public interest. n447

Permit systems in riparian jurisdictions differ importantly from permit systems in appropriative jurisdictions. Most of the presently existing permit systems grant permits of limited duration n448 and typically do not provide for any priority among right claimants based on the time the use was commenced or the permit application was filed or granted. n449 Further, these jurisdictions seem to retain the traditional riparian rules for dealing with water shortages under which water may be apportioned ratably or equitably n450 rather than on the basis of timing of the appropriation, as is the case in appropriative jurisdictions.

The major significance of any change in the direction of governmental control would seem to be that it increases the opportunity for nonriparians to secure access to the water.

COMPUTER-ASSISTED RESEARCH

LEXIS: administrat! w/15 water! w/1 right! w/5 allocat! w/50 riparian w/2 system!

FOOTNOTES:
(n1)Footnote 385. Ludwik Teclaff, Abstraction and Use of Water: A Comparison of Legal Regimes 8-9 (United Nations ST/ECA/154 1972).

(n2)Footnote 386. *See generally* Maloney et al., Florida Water Law 1980 (Water Resources Research Center, Univ. of Fla. Pub. 50, 1980).

J.W. Looney, *Enhancing the Role of Water Districts in Groundwater Management & Surface Water Utilization in Arkansas, 48 Ark. L. Rev. 643 (1995).*

R & R Associates v. City of Providence Water Supply Board, 765 A. 2d. 432 (R.I. 2001).

(n3)Footnote 387. California, Mississippi, Nebraska, North Dakota, Oklahoma, Oregon, South Dakota, Texas and Washington are appropriative jurisdictions which still recognize some riparian rights. These jurisdictions are commonly called hybrid or mixed systems. Only California and possibly Nebraska appear to permit the creation of new riparian rights. *See In re Long Valley Creek, 599 P.2d 656 (Cal. 1979); Brummund v. Vogel, 168 N.W.2d 24 (Neb. 1969). See also In re Water of Hallett Creek Stream System, 749 F.2d 324 (Cal. 1988)* holding that the United States could claim unexercised riparian rights relating to reserved public land though the federal government had to apply to the state for authority to exercise those rights.

Hawaii mixes riparian principles with traditional land tenure and has added a permit structure to that. *See* In the matter of *Water Use Permit Applications, No. 21309, 2000 Hawaii LEXIS 321* (Sept. 27, 2000).

(n4)Footnote 388. For further discussion, *see* Knud E. Hermansen & Donald R. Richards, *Maine Principles of Ownership Along Water Bodies, 47 Me. L. Rev. 35 (Apr. 1995);* Eric Maski Tokuyama, *Riparian Rights, 22 Pepp. L. Rev. 1352 (Apr. 1995);* Todd S. Hageman, *Water Law: The Oklahoma Supreme Court's Resurrection of Riparian Rights Leaves Municipal Water Supplies High and Dry* (case note), *47 Okla. L. Rev. 183 (Spring 1994);* Gary D. Allison, *Franco-American Charolaise: The Never Ending Story, 30 Tulsa L.J. 1 (Fall 1994).*

(n5)Footnote 389. *Tyler v. Wilkinson, 24 Fed. Cas. 472 (C. Ct. D.R.I. 1827),* which is generally regarded as the American foundation case.

(n6)Footnote 390. *See* 3 James Kent, Commentaries on American Law (1829); *Tyler v. Wilkinson, 24 F. Cas. 472 (C.C. D.R.I. 1827);* Samuel Weil, *Origin and Comparative Development of the Law of Watercourses in the Common Law and the Civil Law, 6 Cal. L. Rev. 245-342 (1918);* Arthur Maass & H. Zobel, *Anglo-American Water Law: Who Appropriated the Riparian Doctrine?* 10 Pub. Pol'y 109 (1960); T.E. Lauer, *The Common Law Background of the Riparian Doctrine, 28 Mo. L. Rev. 60 (1963);* Wilbert L. Zeigler, Water Use Under the Common Law Doctrines, in Water Resources and the Law 49, 70-72 (1958); John Bennett, *Some Uncertainties in the Law of Water Rights*, 21 So. Cal. L. R. 344 (1948); Clifford Davis, *Historical Roots of Riparianism in* 7 Waters and Water Rights, § 610 (Robert C. Clark ed. 1976).

(n7)Footnote 391. *See* Teclaff, *supra* note 334.

(n8)Footnote 392. *Stratbucker v. Junge, 46 N.W.2d 486 (Neb. 1951).*

(n9)Footnote 393. *Rancho Santa Margarita v. Vail, 81 P.2d 533, 547 (Cal. 1937).*

(n10)Footnote 394. Restatement (Second) of Torts, § 843 (1979). *See also Bouris v. Sargent, 236 N.E.2d 15 (Ill. App. 1968).*

(n11)Footnote 395. *Nilsson v. Latimer, 664 S.W.2d 447 (Ark. 1984).*

(n12)Footnote 396. *530 N.W.2d 297 (N.D. 1995).*

(n13)Footnote 397. *644 N.E.2d 1087 (Ohio App. 1994).*

(n14)Footnote 398. *534 N.W.2d. 212 (Mich. App. 1995).*

(n15)Footnote 399. For further discussion, *see* Knud E. Hermansen & Donald R. Richards, *Maine Principles of Ownership Along Water Bodies, 47 Me. L. Rev. 35 (Apr. 1995);* Eric Maski Tokuyama, *Riparian Rights, 22 Pepp. L. Rev. 1352 (Apr. 1995);* Todd S. Hageman, *Water Law: The Oklahoma Supreme Court's Resurrection of Riparian Rights Leaves Municipal Water Supplies High and Dry (case note), 47 Okla. L. Rev. 183 (Spring 1994);* Gary D. Allison, *Franco-American Charolaise: The Never Ending Story, 30 Tulsa L.J. 1 (Fall 1994).*

(n16)Footnote 400. For further discussion, *see* Knud E. Hermansen & Donald R. Richards, *Maine Principles of Ownership Along Water Bodies, 47 Me. L. Rev. 35 (Apr. 1995);* Eric Maski Tokuyama, *Riparian Rights, 22 Pepp. L. Rev. 1352 (Apr. 1995).*

(n17)Footnote 401. *Turner v. James Canal Co., 99 P.2d 520 (Cal. 1909).*

(n18)Footnote 402. William Farnham, *The Permissible Extent of Riparian Land, 7 Land & Water L. Rev. 31 (1972).*

(n19)Footnote 403. *Rancho Santa Margarita v. Vail, 81 P.2d 533 (Cal. 1935).*

(n20)Footnote 404. *Title Ins. & Trust Co. v. Miller & Lux, 190 P.2d 433 (Cal. 1920).*

(n21)Footnote 405. *Boehmer v. Big Rock Irrig. Dist., 48 P.2d 908 (Cal. 1879).*

(n22)Footnote 406. *Restatement of Torts*, § 843 cmt. c (1939).

(n23)Footnote 407. *See, e.g., Jones v. Conn, 64 P.2d 855 (Or. 1937).*

(n24)Footnote 408. Donald Levi & Kenneth Schneeberger, *The Chain and Unit of Title Theories for Delineating Riparian Lands: Economic Analysis as an Alternative to Case Precedent, 21 Buff. L. R. 439, 442 (1972).*

(n25)Footnote 409. *Sparks Mfg. Co. v. Town of Newton, 41 A. 385 (N.J. 1898), rev'd on other grounds, 45 A. 596 (N.J. 1900).*

(n26)Footnote 410. *Sayles v. City of Mitchell, 245 N.W. 390 (S.D. 1932).*

(n27)Footnote 411. Earl Murphy, *A Short Course on Water Law for the Eastern United States, 1961 Wash. U. L. Q. 93, 94-95.*

(n28)Footnote 412. *Compare* 1 Waters and Water Rights § 53.5(c) (Robert C. Clark ed.) which declares the unity of title rule with the watershed limitation to be the majority rule *with* 6 American Law of Property § 28.55 (A. James Casner ed. 1954) which declares the unity of title rule without the watershed limitation to be the majority rule.

(n29)Footnote 413. Clyde Martz, *Water for Mushrooming Population, 62 W. Va. L. Rev. 1, 11 (1959);* Note, *The*

Riparian Rights Doctrine in South Carolina, 21 S.C. L. Rev. 757, 769 (1969).

(n30)Footnote 414. John Bennett, *Some Uncertainties in the Law of Water Rights, 21 So. Cal. L. Rev. 344 (1948).*

(n31)Footnote 415. For a discussion of the effect of changing from a riparian system to an appropriative system, *see* § 50.14, *infra*.

In the case of *DeBernardo v. Pinewood Lake Association, 747 A.2d 1076 (Conn. Super. 1999),* plaintiffs enjoyed riparian access to a lake on the basis of their membership in the association. The deeds by which they acquired their cottages on the lake expressly noted that no riparian rights in the lake were transferred by the deeds. As lot owners, they were allowed to join the association and it was through the association that they secured the right of access to the lake. The by-laws of the association denied the owners of the cottages the right to occupy them for a specified period of time, between November 1 and April 1 of each year. Because the plaintiffs continued to occupy their cottages after that time, they were expelled from the association and denied access to the lake. The court invalidated the restrictions as unenforceable because they were not equally enforced against all members and did not advance a legitimate corporate purpose.

(n32)Footnote 416. *Boyd v. Greene County, 644 S.W.2d 615 (Ark. App. 1980).*

Huff v. Smith, 679 So. 2d 259 (Ala. App. 1996) (legal right of every riparian proprietor to have natural stream flow without alteration).

(n33)Footnote 417. *Canton v. Shock, 63 N.E. 600 (Ohio 1902).*

(n34)Footnote 418. *Harvey Realty Co. v. Borough of Wallingford, 150 A. 60 (Conn. 1930).*

(n35)Footnote 419. *Ulbricht v. Eufaula Water Co., 6 So. 78 (Ala. 1889).*

(n36)Footnote 420. *Prentice v. Geiger, 74 N.Y. 341 (1878).*

(n37)Footnote 421. *Ulbricht v. Eufaula Water Co., 6 So. 78 (Ala. 1889).*

(n38)Footnote 422. Possibly only Georgia, New Jersey, Pennsylvania and West Virginia still follow the natural flow doctrine.

(n39)Footnote 423. *See, e.g., Ripka v. Wanseng, 589 S.W.2d 333 (Mo. App. 1979).*

Lopardo v. Flemming Co., 97 F.3d 921 (7th Cir. 1996) (*citing* Restatement of Torts); *Stupak-Thrall v. United States, 89 F.3d 1269;* (6th Cir. 1996) (reasonable use doctrine can be invoked only by one riparian against another); *Jordan v. City of Santa Barbara, 54 Cal. Rptr. 2d 340 (1996).*

See Trask v. Public Utilities Commission, 731 A.2d 430 (Me. 1999) for a jurisdiction that used acres as the measure of flowage rights.

(n40)Footnote 424. *Elmore v. Ingalls, 17 So. 2d 674 (Ala. 1944).*

(n41)Footnote 425. Frank Trelease, *The Concept of Reasonable Beneficial Use in the Law of Surface Streams, 12 Wyo. L.J. 1, 16 (1957).*

(n42)Footnote 426. Frank Maloney et al., Florida Water Law 1980, 9 (Water Resources Research Center, Univ. of Fla. Pub. 50, 1980).

See also W. Mich. Dock v. Lakeland Inv., 534 N.W.2d. 212 (Mich. App. 1995).

(n43)Footnote 427. Restatement (Second) of Torts § 850A.

(n44)Footnote 428. *White v. East Lake Land Co., 23 S.E. 393 (Ga. 1895).*

(n45)Footnote 429. *Southern California Inv. Co. v. Wilshire, 77 P. 767 (Cal. 1904).*

(n46)Footnote 430. Restatement (Second) of Torts, § 850A cmt. on clause (g).

(n47)Footnote 431. *Pratt v. Lamson, 84 Mass. 275 (1861).*

See Trask v. Public Utilities Commission, 731 A.2d 430 (Me. 1999) for a jurisdiction that used acres as the measure of flowage rights.

(n48)Footnote 432. *See, e.g.,* Del. Code Ann. tit. 7, § 6010(f)(1).

(n49)Footnote 433. Omerod v. Todmosden Mill Co., 11 L.R. 155 (Q.B. Div'l Ct. 1883).

In *Pfluger v. Clack, 897 S.W.2d 956 (Tex. App. 1995),* a deed was used to sever the mineral estate from the surface estate. The court held that the water rights pertained to the surface estate. There was no evidence that the land was riparian land. Although not at issue in the case but an interesting consideration is whether the court intended the water rights (now part of the surface estate) to be managed according to surface water rights doctrines.

For a case involving vicarious exercise of riparian rights, *see DeBernardo v. Pinewood Lake Ass'n, 747 A.2d 1076 (Conn. Super. 1999).* In this case, plaintiffs enjoyed riparian access to a lake on the basis of their membership in the association. The deeds by which they acquired their cottages on the lake expressly noted that no riparian rights in the lake were transferred by the deeds. As lot owners, they were allowed to join the association and it was through the association that they secured the right of access to the lake. The by-laws of the association denied the owners of the cottages the right to occupy them for a specified period of time, between November 1 and April 1 of each year. Because the plaintiffs continued to occupy their cottages after that time, they were expelled from the association and denied access to the lake. The court invalidated the restrictions as unenforceable because they were not equally enforced against all members and did not advance a legitimate corporate purpose.

(n50)Footnote 434. *See, e.g., Commonwealth Marine Resources Comm'n v. Forbes, 197 S.E.2d 195 (Va. 1973).*

(n51)Footnote 435. Carroll Dunscombe, Riparian and Littoral Rights (1970).

(n52)Footnote 436. *See, e.g., Sanitary Dist. v. United States, 266 U.S. 405 (1912)* (where the district was enjoined from extracting water from the Great Lakes because that would lower the level of the lakes and harm existing riparian users).

(n53)Footnote 437. Frank Maloney et al., Florida Water Law 1980, 9 (Water Resources Research Center, Univ. of Fla. Pub. No. 50, 1980).

(n54)Footnote 438. *Pyle v. Gilbert, 265 S.E.2d 584 (Ga. 1980).*

(n55)Footnote 439. This view is generally defended as being more consistent with the policy of attempting to maximize the number of users which can reasonably be accommodated by the amount of water available for use in the jurisdiction. *See Poire v. Serra, 106 A.2d 39 (N.H. 1954).*

For further discussion, *see* Knud E. Hermansen & Donald R. Richards, *Maine Principles of Ownership Along Water*

Bodies, 47 Me. L. R (Apr. 1995); Eric Maski Tokuyama, *Riparian Rights, 22 Pepp. L. Rev. 1352 (Apr. 1995);* Todd S. Hageman, *Water Law: The Oklahoma Supreme Court's Resurrection of Riparian Rights Leaves Municipal Water Supplies High and Dry (case note), 47 Okla. L. Rev. 183 (Spring 1994);* Gary D. Allison, *Franco-American Charolaise: The Never Ending Story, 30 Tulsa L.J. 1 (Fall 1994).*

(n56)Footnote 440. *Town of Purcellville v. Potts, 19 S.E.2d 700 (Va. 1942).*

(n57)Footnote 441. *Id.*

Habeeb, Wade R., *Propriety of Injunctive Relief Against Diversion of Water by Municipal Corporation or Public Utility, 42 A.L.R. 3d 426* (1998 Supp.).

(n58)Footnote 442. *See, e.g., St. Anthony Falls Water Power Co. v. St. Paul Water Comm'rs, 58 N.W. 33 (Minn. 1894).*

Whether a municipality has an obligation to supply water to end-users has been the source of some litigation. In *Haik v. Town of Alta, 120 S. Ct. 166, 149 L. Ed. 2d 148 (1999),* the town refused to extent water to plaintiffs. As a result of this, plaintiffs were unable to develop their land. The court refused to find that an interest in water for the purpose of real estate development was a fundamental right, citing *Lockary v. Kayfetz, 917 F.2d 1150 (9th Cir. 1990); O'Neal v. City of Seattle, 66 F.3d 1064 (9th Cir. 1995); Manguson v. City of Hickory Hills, 933 F.2d 562 (7th Cir. 1991); Ransom v. Marrazzo, 848 F.2d 398 (3d Cir. 1988); Chatham v. Jackson, 613 F.2d 73 (5th Cir. 1980). See also Thompson v. Salt Lake City Corp., 724 P.2d 958 (Ut. 1986); Rose v. Plymouth, 173 P.2d 285 (Ut. 1946); Platt v. Town of Torrey, 949 P.2d 325 (Ut. 1997).* In this case, the court rejected an equal protection claim finding that there were plausible reasons for Alta to refuse to extend the water lines to the Haik property. Here, the town was bound by a contract with Salt Lake City regarding the supply of water and even though the town had the physical capacity to extend the lines, it did not have the legal authority to do so.

In *Spring v. Bradley, 733 A. 2d 1038 (Md. 1999),* the court ruled against an owner of an undeveloped tract who brought an action to compel the town to supply water and sewer service to the property, citing several cases dealing with the obligations of towns to supply services. These included *Bair v. Mayor and City Council of Westminster, 221 A. 2d 643 (Md. 1966); Merryman v. Baltimore, 138 A. 324 (1927).* These cases were cited for the proposition that a municipality cannot be required to impose a burden on its utility facilities or on the city itself by providing services to persons who are outside of its corporate limits and beyond its taxing powers.

See also R & R Associates v. City of Providence, 724 A. 2d 432 (R.I. 1999), where it was held that some municipalities and water districts were not liable for the taking of riparian rights. This was because, by statute, only Providence was solely liable for any takings, even when done for the benefit of end-user communities and water districts.

Municipalities may adopt ordinances requiring that township residents must connect to municipal systems and to cease using wells for domestic consumption purposes without violating the residents' due process rights. *See Kusznikow v. Township Council of Township of Stafford, 730 A. 2d. 930 (N.J. Super. 1999).*

In *Landmark Development, Inc. v. City of Roy, 980 P.2d 1234 (Wash. 1999),* the court rejected a claim that the city acted in an arbitrary and capricious manner by charging an unreasonable water connection fee for a residential development outside the city limits.

In *Vernon Township Water Authority v. Vernon Township, 734 A. 2d 935 (Pa. Commonwealth Ct. 1999),* a court found that a township did not have the authority to mandate water connections in some areas and not in others and invalidated an optional tap ordinance.

In *Board of County Commissioners of Ottowa County v. Village of Marblehead, 711 N. E. 2d 663 (Oh. 1999),* an established sewer district was given authority under a statute to complete a county water service project even though the area had been acquired by a municipality during the pendency of the project. The City argued that the statute violated the state Constitution's grant to municipalities of exclusive rights to supply water service to municipal residents. The court held that the statute authorized a valid exercise of police powers that did not substantially infringe on the municipality's constitutional power to operate utilities.

In *Turlock Irrigation District v. Heterick, 84 Cal. Rptr. 2d 175 (Cal. App. 1999),* the court dealt with the obligation of an irrigation district, as a municipal corporation, to execute a gas supply contract for the benefit of its customers. The court found the corporation not to be obligated to execute the contract. The reason was that under state law, the power of irrigation districts as municipal corporations was specifically limited to supply only water, electricity, drainage and closely related activities, such as the operation of cement plants and rock quarries.

In *County of Del Norte v. City of Crescent City, 84 Cal. Rptr. 2d 179 (Cal App. 1999),* the court rejected the argument that unincorporated areas outside city limits had a right to hook up to the city water system and held that the city's denial of water service was not arbitrary where the reason for the limitation was the pressure of population growth in the city on the city's system.

R & R Associates v. City of Providence Water Supply Board, 765 A. 2d. 432 (R.I. 2001); Gregg Neck Yacht Club, Inc. v. County Commissioners of Kent County, 769 A. 2d 982 (Md. App. 2001).

(n59)Footnote 443. *Connecticut v. Massachusetts, 283 U.S. 660 (1931). See also State of North Carolina v. Hudson, 731 F. Supp. 1261 (E.D. N.C. 1990).*

For further discussion, *see* Todd S. Hageman, *Water Law: The Oklahoma Supreme Court's Resurrection of Riparian Rights Leaves Municipal Water Supplies High and Dry* (case note), *47 Okla. L. Rev. 183 (Spring 1994).*

(n60)Footnote 444. These jurisdictions include Arkansas, Delaware, Florida, Georgia, Indiana, Iowa, Kentucky, Maryland, Minnesota, Mississippi, New Jersey, New York, North Carolina, South Carolina, Virginia and Wisconsin.

See also William Cox, *An Introduction to The Alabama Water Resources Act, 55 Ala. L. Rev. 176 (1994).*

For a further discussion of water rights in Texas, *see* Martin Hubert & Bob Bullock, *Senate Bill 1, The First Big and Bold Step Toward Meeting Texas's Future Water Needs,* 30 Texas Tech L. Rev. 53 (1999).

(n61)Footnote 445. *See, e.g.,* Del. Code Ann. tit. 7, § 6003.

Southwest Florida Water Management District v. Charlotte County, 774 So. 2d 903 (Fla. App. 2001).

(n62)Footnote 446. *See, e.g.,* Ga. Code Ann. §§ 12-5-31(a)(2), 12-5-31(b)(2).

(n63)Footnote 447. *See, e.g.,* Ky. Rev. Stat. Ann. § 151.170(2).

(n64)Footnote 448. *See, e.g.,* Fla. Stat. Ann. §§ 373.239(3), 373.233.

(n65)Footnote 449. Peter Davis, *Eastern Water Diversion Permit Statutes: Precedents for Missouri, 47 Mo. L. Rev. 429 (1982).*

(n66)Footnote 450. *See, e.g.,* Del. Code Ann. tit. 7, § 6010(f)(1).

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CHAPTER 50 WATER RIGHTS

6-50 Thompson on Real Property, Thomas Editions § 50.09

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§ 50.09 Consumptive Use of Surface Water: Appropriative Systems.

[Go To Supp]

§ 50.09(a) In General.

Most western states of the United States n451 are considered to be appropriative jurisdictions, at least in part. n452 Appropriative systems are sometimes called "prior appropriation" jurisdictions, because of the principle followed in these jurisdictions which determines the priority of the water rights on the basis of the time at which the right was secured. It is commonly said in these jurisdictions that "first in time is first in right." n453 In recent decades, the prior appropriation doctrine has been criticized as being inherently flawed for its failure to adequately address environmental issues. n454 The difficulty is probably not in the narrowness of the law of water rights but in the fact that the law of water rights is grounded in the law of property with its attendant recognition of rights to which the law assigns stability, endurance and dimension. n455 The key to reshaping water rights to better accommodate shifts in values is probably not in eliminating the doctrine but in defining and redefining the nature of the property right so that it better reflects the changes in social values that occur from time to time. n456

§ 50.09(b) Appropriative Systems and Riparian Systems Compared.

Traditional appropriative systems differ from riparian systems in several important respects. First, appropriative systems are based on the principle of actually using the water rather than upon the principle of land ownership as the means by which the right is secured. n457 In contrast to riparian systems, it is not necessary to own land abutting the source of supply in order to secure a water right. On the other hand, it is necessary for the right claimant to take some kind of affirmative action to remove or divert the stream from its source and apply the water to a recognized beneficial use before any right will be recognized. n458

Appropriative systems also tend to prioritize water rights and give highest priority to those rights which were established first. Riparian rights appear to be correlative without regard to when the water right was acquired or when the water was even initially used.

Finally, appropriative systems predicate the continued viability of the water right on the continual use of the water. If the water is not used for a protracted period of time, the right may be lost. In contrast, riparian rights inhere in the title

to the land and are not lost through non-use.

COMPUTER-ASSISTED RESEARCH

LEXIS: appropriative w/15 riparian w/2 system!

§ 50.09(c) Basic Principles.

Water rights in an appropriative system are said to vest, are quantified, and disputes between competing right claimants are adjusted on the basis of the following common major principles:

(1) water rights are secured as a result of the actual use of the water;

(2) use must be for a beneficial purpose;

(3) a failure to exercise the right may cause the right to be extinguished or forfeited; and

(4) priority may be claimed for the rights based upon the time the use began or the right was established.

COMPUTER-ASSISTED RESEARCH

LEXIS: vest! w/15 appropriative w/1 water! w/1 right!

§ 50.09(d) Vesting of the Right: Generally.

An appropriative water right can be secured only by properly "appropriating" the water. For the appropriation to be proper, the right must involve unappropriated water from a natural water supply; the water must be properly brought within the dominion of the appropriator; and it must be applied to an acceptable use.

How vesting is defined is a critical issue. It is well understood that the law of property protects only "vested" rights. Unexercised rights are generally not considered to be "vested." It is on this basis that some jurisdictions have radically restructured their water right regimes to eliminate future unquantified claims to water without "taking" property rights. There has been a growing interest in recent years in the extent to which the means of "vesting" itself may be changed. That is, to what extent can a jurisdiction redefine "vesting"? Recent cases and statutes suggest there may be more flexibility than heretofore understood. n459

One common way to redefine vesting is to add additional requirements to the existing framework that must be satisfied before the right may be considered "vested." For example, some states have added a "public interest" criterion to the determination of whether the application for large amounts of water should be approved. n460 Another approach may be to refine the concept of "reasonable" or "beneficial use" to exclude certain proposed uses from the possible pool of uses for which rights may be granted or in which rights may actually "vest" since the law could not recognize rights in unreasonable uses. n461 Another way a redefinition of "vesting" may be accomplished is through the subjection of the exercise of "vested" rights to the exercise of police power by the jurisdiction. n462

In many jurisdictions, vesting requires a present use rather than some speculative future use. Exceptions are commonly made by statute for municipalities or other public sources of water in order to facilitate long-term planning for the water needs of the jurisdiction. In In re Water Right Claim No. 1927-2, n463 the court considered claims to water by the U.S. Fish and Wildlife Service for a wildlife refuge. The court found that the use of the water for the protection of the habitat was a beneficial use, notwithstanding that the area was already subirrigated by high-water table water. It also found that the claim was not an impermissible future use even though the water may not be immediately needed because of the

subirrigation.

§ 50.09(e) Vesting: Availability of Unappropriated Water.

As a general rule, water is available for appropriation if:

1) it is found in a natural waterbody;

2) it is not subject to another's appropriation right or lawful claim; and

3) the removal of the water from the source of supply will not harm any other lawfully protected water right holder. n464

The determination of whether there is sufficient water in excess of valid prior or superior claims is a factual determination n465 and is one that will generally be made by the water permit granting agency. This determination will be based on data regarding the usual or ordinary known volume or capacity of the water source and data relating to the quantities of water which are already claimed from that source by competing known claimants who hold enforceable water rights.

COMPUTER-ASSISTED RESEARCH

LEXIS: unappropriated w/1 water! w/15 availab!

§ 50.09(f) Vesting: Natural Sources of Supply.

Appropriative water rights are generally recognized only in natural sources of supply. n466 Nevertheless some artificially created waterbodies may be available for certain purposes or under certain circumstances. For example, waters in reservoirs constructed by the Corps of Army Engineers or by the Bureau of Reclamation may be the object of water rights (including storage rights) held by the state or the federal government. n467 Likewise, diffused surface runoff which has been impounded in livestock watering ponds may be collected and lawfully used for consumptive use purposes under the auspices of particular statutes. n468

COMPUTER-ASSISTED RESEARCH

LEXIS: natural w/1 source! w/1 supply w/15 appropriative w/1 water! w/1 right!

§ 50.09(g) Vesting: Withdrawal or Diversion as "Notice."

It was early required that there be a "diversion" of the water from the source of supply. This act was considered necessary:

(1) to give notice "to the world" of the specific claim to the water; and

(2) to constitute irrevocable evidence of the intent to use the water.

For a diversion to be effective, it was necessary to physically remove the water claimed from the source by or through the construction of some kind of structure which would give the required notice of the claim. In addition, the fact that a certain amount of water was no longer present in the stream could be seen as announcing that amount of water was no longer available for appropriation.

In a few jurisdictions, a physical diversion appears to still be required as evidence of an intent to use the water as a predicate to the proper acquisition of a water right. n469

Concerns regarding notice and intent have been addressed as part of the administrative supervision of water rights. Since the right acquisition process generally begins with the filing of an application with the appropriate agency or governmental official which is charged with making the determination of whether unappropriated water is available for additional water rights, there is less of a concern that the "world" be given notice that someone wishes to appropriate the water. The requirement of intent also has little currency in the sense that most courts presently hold that intent need not be established through such formalistic means as physical dominion over the water. n470 It is typically held that an application, filed in good faith, n471 is sufficient to satisfy any remaining notice or intent requirements. n472

COMPUTER-ASSISTED RESEARCH

LEXIS: withdraw! or diver! w/15 notice! w/15 water! w/1 right!

§ 50.09(h) Vesting: Withdrawal or Diversion as Evidence of Location of the Claim and Other Uses.

Although the physical fact of diversion no longer is critical from a notice point of view, it may still be a significant facet of the vesting process for other purposes. The diversion serves to establish the location of the water right, n473 which is generally considered to be the point at which the water is withdrawn from the source even though the place of actual use is quite remote.

The requirement of an actual diversion may also be used to deter or eliminate speculative water rights. n474

COMPUTER-ASSISTED RESEARCH

LEXIS: withdraw! or diver! w/15 locat! w/15 water! w/1 right!

§ 50.09(i) Vesting: Defining "Diversion."

In some jurisdictions, "diversion" is defined in terms of man-made mechanisms or means for diverting the water. n475 In others, the significant issue is whether the water is brought within the dominion or control of the appropriator n476 whether it is actually removed from the watercourse or not. n477

§ 50.09(j) Vesting: Problems of Instream Use.

Jurisdictions which take a broad view of the meaning of diversion appear more willing to recognize instream uses as a "diversion." n478 Jurisdictions which take a more traditional view may still require the physical removal of the water from the source by some artificial means.

In some jurisdictions, water in the source may be formally withdrawn from further appropriation in order to protect instream uses. n479 In these jurisdictions, it is no longer necessary to argue that the instream use constitutes a valid diversion of the water, since the water is shielded from further appropriation by anyone who wishes to ultimately remove the water from the source of supply. In other jurisdictions, action has been taken to create a public reservation of the water in trust for instream uses, n480 or to authorize individual appropriation rights for some kinds of instream uses. n481 It has been held that water need not always be physically removed from the source of supply to satisfy beneficial use requirements. n482

COMPUTER-ASSISTED RESEARCH

LEXIS: instream w/1 use! w/15 water!

§ 50.09(k) Vesting: Use of Natural Overflow.

In some jurisdictions, courts have dealt with claims to water that periodically escapes the boundaries of a stream where the primary utility of this water has been to grow pasture or other crops. Some jurisdictions have recognized this as a valid appropriation, n483 adopting the argument that the recognition of such a right insures that other appropriators will not subsequently extract so much water that at no time will the stream flood and thereby fail to water the pasture. n484 Jurisdictions rejecting such a view tend to do so based on the argument that the claimant has done nothing in the way of a "diversion" to cause the water to flow to that land. n485 In some jurisdictions, the right to make such a use of the water is protected under a particular species of water rights commonly called "meadow right," n486 which appears conceptually to be a sort of domestic use, communal type right.

COMPUTER-ASSISTED RESEARCH

LEXIS: natural w/1 overflow w/15 water!

§ 50.09(l) Vesting: Application to Beneficial Use.

Appropriative jurisdictions also require, as a condition associated with the vesting of water rights, that the water actually be applied to a beneficial use. n487 The requirement of beneficial use also is considered to be an on-going obligation associated with the water right. n488 That is, if at some future date, the use of the water ceases to be beneficial, the right may be terminated.

§ 50.09(m) Vesting: Defining "Beneficial Use."

Beneficial use was initially defined in terms of the value of the particular use of the water to the water right-holder, as well as in terms of the value of the use to society as a whole. Historically, the utility of the use to the right-holder was probably considered to outrank the utility of the use to society. In recent decades, courts and legislatures have shown an increasing interest in the larger social impacts of the use on other kinds of uses and upon the accomplishment of benefits that flow to society as a whole. n489 As a result, there seems to be a strong propensity to balancing all factors relevant to the matter of utility.

Factors which have been considered relevant to the determination of whether a particular use is beneficial now tend to focus on two separate concerns -- the nature of the use and the efficiency of the appropriation. n490

§ 50.09(n) Vesting: Defining "Beneficial Use" -- Nature of the Use.

Whether a particular use is "beneficial" depends in large part on whether:

(1) the use benefits or enhances the productivity of the land of the appropriator; n491

(2) the use benefits society as a whole; n492

(3) the use is reasonable with respect to the rights of others, n493 and rights of the public; n494 and

(4) the use does not cause harm to other appropriators. n495

Most jurisdictions also appear to require that the use in question be a *present* use rather than a *speculative* one. n496 A variety of particular uses have been held to be beneficial. These include aesthetics, n497 domestic use, n498 electricity generation, n499 fish and wildlife maintenance, n500 flood control, n501 irrigation, n502 land reclamation, n503

livestock watering, n504 municipal use, n505 recreational use, n506 and sand and gravel preparation. n507

COMPUTER-ASSISTED RESEARCH

LEXIS: beneficial w/1 use! w/15 water!

§ 50.09(o) Vesting: Defining "Beneficial Use" -- Efficiency of Use.

Courts in many jurisdictions have also focused on the reasonableness of the appropriation in relation to the efficiency of the application of the water itself. n508 In this context, courts have considered whether the use is economical n509 or efficient. n510 Courts have held that extravagant or wasteful applications of the water are not beneficial even though the use may be considered economical to the appropriator, n511 particularly where there is a less wasteful method of water application which could be used. n512

COMPUTER-ASSISTED RESEARCH

LEXIS: beneficial w/1 use! w/15 efficien! w/15 water!

§ 50.09(p) Vesting: The Problem of Due Diligence.

The priority of a water right is generally measured from the point in time at which the right is considered to vest. In view of the fact that several different things must occur before the right vests, it might be anticipated that the law will not consider the right to have actually vested until the completion of the last of the requirements. Some projects, of course, require much more time to complete than others and such a rule, blindly followed, might deprive one who starts first but finished last of protection over another who began later but finished earlier to divert land-use water from the same source. For this reason, the law has long recognized that if the activities necessary to secure the vesting of a water right are diligently pursued and accomplished within a reasonable time, the priority of the water right would be dated from the time of beginning rather than ending of the process. n513 The doctrine invoked to achieve such a result is commonly called the "doctrine of relation back." This doctrine is followed today and is considered to apply to statutory as well as common-law rights. Indeed, when the right is granted as the result of a formal application, statutes typically provide that the priority of the right will be dated from the time the application is received, provided that the conditions prerequisite to the issuance of the right have been accomplished within the time frame set forth in the statute. n514

In order to successfully invoke the doctrine of relation back, the would-be appropriator must, of course, show that the activities required (usually a diversion of the water, and application to beneficial use) were done with reasonable dispatch and completed as quickly as possible. Nevertheless, the meaning of due diligence and reasonable speed are naturally uncertain. The greatest risk is perhaps that someone will complete their project at less than optimum speed but in the meantime may deprive others of the opportunity to appropriate water, because, until the first appropriator's project is completed, it may be impossible to determine whether there is any unappropriated water left for the second appropriator to claim. In this sense, the requirement of diligence insures that undeveloped water will not be hoarded. n515

The Colorado Legislature defined "reasonable diligence" for the first time in 1990 providing that "The measure of reasonable diligence is the steady application of effort to complete the appropriation in a reasonably expedient and efficient manner under all the facts and circumstances." n516 It has been held that the economic feasibility of the project is a relevant fact in the determination of reasonable diligence. n517 Further, the legislation provides that reasonable diligence performed for one part of a project of integrated system that is comprised of several features will be deemed sufficient for the entire project. n518

§ 50.09(q) Priorities Generally.

A traditional feature of appropriative systems is that certain water rights are considered to have priority over other rights. This priority is determined on the basis of the timing of the vesting of the right and has caused these jurisdictions to be popularly known as "prior appropriation" jurisdictions.

§ 50.09(r) Priorities: Rights of Senior Appropriators.

Once the right is secured, it will be considered subordinate only to existing water rights, and generally will not be reduced or suspended in times of shortage unless it is necessary to limit the right in order that those with superior claims might be satisfied. Thus, the senior appropriator is considered to have the first right of withdrawal from the stream, and it is only the surplus beyond that which may be rightfully claimed by the appropriator that is generally considered to be available to others.

According to traditional priority rules, the earlier (or senior) appropriator is considered to be superior to later (or junior) appropriators and is deemed to have the right to sufficient water to satisfy the full needs of the senior appropriator before the junior appropriator may withdraw any water, if there is not enough water available to meet the needs of both appropriators. n519 This still appears to be the general rule in appropriative jurisdictions.

Because this rule causes the junior appropriator to bear the burden of water shortages, it makes the establishment of the priority of a particular water right not only most critical, but a valuable aspect of the property right itself.

There is increasing interest in allowing junior appropriators to provide an alternate source of supply to a senior appropriator or to make other modifications in the manner in which water is extracted in order to allow the junior appropriator to divert water without causing harm to the senior. n520

COMPUTER-ASSISTED RESEARCH

LEXIS: priorit! w/15 senior w/1 appropriator! w/50 water! w/1 right!

§ 50.09(s) Priorities: Establishing Priority.

In most appropriative jurisdictions, priority was initially considered to be established only upon the completion of all the events necessary to secure or vest the water right, subject to the doctrine of relation back. n521 This meant that until the diversion and application process was completed, priority could not be determined. However, once the water was actually applied to beneficial use, the priority of the right would be measured as of the beginning of the diversion process. This approach was adopted to accommodate those appropriators who needed to construct extensive diversion works to move the water considerable distances. Under this approach, another appropriator, seeing the beginning construction, could not rush in and immediately secure a right of higher priority simply because the diversion required less time to complete.

As jurisdictions have modernized the allocation of appropriation rights, through the adoption of administratively granted permits, it is now common to determine priority based upon the date an application is filed with the state administrative agency. There is still a need to complete the diversion and water application process, however, since the acquisition of the right is typically subject to the condition that all statutory or other requirements are satisfied. n522 Once the process of development is completed, the "relation back" doctrine comes into play and establishes priority as of the date the process was begun. n523

COMPUTER-ASSISTED RESEARCH

LEXIS: establish! w/5 priorit! w/50 water! w/1 right!

§ 50.09(t) Priorities: Tie-Breakers.

The likelihood of two claimants having exactly the same priority is diminished to the extent that the right process is initiated with the filing of an application, since each application may be dated to the precise time it is accepted for filing and it is unlikely that two applications will be processed at exactly the same time.

Nevertheless, some jurisdictions have adopted an additional priority structure to serve as a "tie-breaker." In one state, for example, the statute establishes the following order of priority in the event the timing of the use is not dispositive: domestic uses are preferred first, then municipal, irrigation, industrial, recreation and power uses. n524

COMPUTER-ASSISTED RESEARCH

LEXIS: priorit! w/15 tie-breaker! w/50 water! w/1 right!

§ 50.09(u) Priorities: Seasonal Priority.

Most jurisdictions do not recognize seasonal priority. That is, the appropriator will generally be considered to be entitled to take the water at any time it can be put to beneficial use. n525 It may be, however, that the right is limited with respect to the time the water can be used. n526 In that situation, the right would have priority only within the stipulated time frame.

COMPUTER-ASSISTED RESEARCH

LEXIS: seasonal w/5 priorit! w/50 water! w/1 right!

§ 50.09(v) Quantity of Water to Which Rightholder Is Entitled.

The amount of water claimed under an appropriation right is typically limited to the amount 1) of water first appropriated 2) that is actually being used 3) used for for beneficial purposes. n527

§ 50.09(w) Quantity: Establishing an Amount.

The amount to which the appropriator is entitled is affected by a variety of concerns. First, the amount claimed, to some extent, is said to be directly determined by the amount that is actually used. As a general rule, one cannot claim a right to more water than is actually being beneficially used.

Second, the amount actually considered to be beneficially used may be affected by the capacity of the transmission device. Here, the quantity to which the appropriator is entitled will generally be measured as the amount withdrawn at the point of diversion rather than as the amount actually applied to beneficial use at the ultimate point of use. This is justified on the ground that more water must be withdrawn than will actually be used in order to compensate for amounts lost in transit due to seepage and transpiration loss.

The amount to which the appropriator is entitled may also be reduced in a variety of ways. First, as a general rule, if no water is used by an appropriator during a protracted period or even during certain times of the year, the right may be lost to withdraw water at any time and be considered as extending only to the period of actual historical beneficial use. n528

Second, the quantity of water available under a valid appropriation right is usually limited to the amount that was *first* appropriated and put to a beneficial use. n529 Later increases in the amount will generally be considered the object of separate appropriation rights, and subject to a different priority, unless the additional amount meets increased needs which are within the scope of the claimant's "original intent" and the withdrawal is made within a "reasonable time."

n530 However, it is generally recognized that the appropriator does not have the right to the full *flow* of the stream simply because one is the senior appropriator. n531

It has been held that the amount claimed may be reduced if it is extravagant or wasteful, if there is a more efficient method of application available to the appropriator, n532 or if the amount claimed exceeds the reasonable needs of the appropriator. n533

COMPUTER-ASSISTED RESEARCH

LEXIS: quantity! or amount! w/15 appropriat! w/15 water!

§ 50.09(x) Waste Generally.

The problem of waste is a particularly difficult problem for appropriative systems to deal with. It is arguably institutionalized through three particular features of appropriative systems:

1) the rigidity of the priority structure which gives greater protection to older, often less efficient uses;

2) the practice of measuring the amount of water to which the appropriator is entitled at the point of extraction rather than at the point of use; and

3) the propensity in any determination of whether the use is beneficial to give greater weight to the utility of the use to the appropriator than to society at large.

Priority of water rights is a problem since the earliest uses are given the greatest measure of protection. Often the earliest uses will be the least efficient or will be for purposes which are of lesser importance to society. However, since a significant change in the purpose of water use, or even a reduction in the amount used, may risk changes in the water right, there is considerable pressure not to abandon, alter or change early uses, n534 since these changes may result in either having the new use considered as a separate or different use with a later priority, or having the quantity to which the right relates reduced to reflect the amount actually used.

Measuring the amount of water at the point of diversion, as opposed to the point of use, discourages conservation. Since the first to use the water did not have to worry about the needs of later users and could acquire the water at essentially no cost, there was no incentive to construct efficient transportation structures. If a high percentage of the water was lost in the process of getting it from its source to the actual place of use, more water could simply be diverted to offset the losses. n535

Early court interpretations of the concept of "beneficial use" placed heavy reliance upon the utility of the water to the appropriator. n536 This undoubtedly encouraged the use of water for purposes such as irrigation which require (and therefore remove from availability to other appropriators) incredible amounts of water. Although irrigation is vital to successful agriculture in arid areas, irrigation has frequently been criticized as one of the more inefficient uses of water. n537

COMPUTER-ASSISTED RESEARCH

LEXIS: waste! w/50 water! w/1 right!

§ 50.09(y) Waste: Defining Waste.

Waste has been difficult to eliminate, partly because of features of appropriative systems that seemingly encourage it

and partly because of a lack of consensus as to what "waste" actually means in the context of water law and how the concept may be quantified in any meaningful manner. It is clear that courts have held that wasteful uses are generally not considered to be beneficial uses and must be discontinued. n538 It has also been held that water in excess of those amounts actually needed may be considered waste and as a result may possibly be claimed by other appropriators. n539 However, it has been very difficult to determine whether a particular use is wasteful and how much water is being wasted.

It is virtually impossible to find cases which describe particular uses as wasteful *per se*, though the significance of the inquiry should not be minimized. If the *use* itself is wasteful, it will not satisfy the requirements for beneficial use and may be enjoined in its entirety, and the entire amount represented by the appropriation will be considered available for other appropriators. On the other hand, if the use itself is not considered wasteful, only the "excess" may be considered subject to further appropriation. This requires the difficult determination of how much is being claimed in excess of what is actually needed.

It appears to be the practice of courts dealing with the issue of waste to resolve the matter according to all the circumstances surrounding the use. This, of course, must be done on a case-by-case basis. It also appears that only blatantly wasteful uses are likely to be successfully challenged on this ground. This makes the measurement of any "waste" amount a difficult problem.

Part of the measurement problem results from a difficulty determining how much water is actually needed for any particular purpose and, hence, how much of any specific appropriation amount that may be claimed under the right is waste. Traditionally, it has been held that appropriators may claim an amount at the point of diversion which is adequate to supply the amount needed at the point of use. n540 This legitimizes the practice of appropriating enough water from the stream to offset transmission losses due to evaporation, seepage and transpiration. Courts have considered pressing water shortage problems as a basis for requiring more stringent measures to reduce transportation and transpiration losses. n541

It has, therefore, become a generally accepted view that only "excessive," n542 "extravagant," n543 or "unreasonable" n544 waste will be enjoined. In at least one case, the court has suggested that the appropriator is only entitled to an amount that is "reasonable," which should be measured not only in relation to the users' needs on the lands of the appropriator, but reasonable in relation to the reasonable requirements of other, including subsequent, appropriators. n545 In that case, the court ordered improved methods of diverting, conveying, and measuring water so as to assure the greatest possible use of the water.

§ 50.09(z) Transferability of Water Rights.

Like riparian systems, most appropriative jurisdictions n546 have considered water rights to be appurtenant to the land of the water right holder. n547 This means that when such lands are sold or transferred, the water right will automatically revert to the purchaser unless reserved or excepted. When land is fractioned or subdivided, it has been held that a pro rata portion of the water right passes with each parcel. n548 Unlike traditional riparian systems, however, appropriative systems allow water rights to be severed from the land and transferred separately from the land. n549 In Arizona, water rights must be sold together with the land, even though the water may be used on land other than that to which the water right is "attached" for purposes of transfer. n550

In McCasland v. Miskell, n551 the general rule was followed that the sale of land to which water rights are appurtenant conveys the water rights in the absence of evidence of an intent to the contrary. Further, rights that are appurtenant to the land cannot be severed from the land simply by using the water on a different tract. Such a transfer requires approval of the state engineer.

For further discussion, *see* Morris Israel & Jay R. Lund, *Recent California Water Transfers: Implications for Water*

Management, 35 Nat. Resources J. 1 (Winter 1995); Marjorie A. Miller, *Water Export: Is It Legal Yet?* 24 Colo. Law. 817 (Apr. 1995); Gregory S. Weber, *Twenty years of Local Groundwater Export Legislation in California: Lessons from a Patchwork Quilt*, 34 Nat. Resources J. 657 (Summer 1994); Geoffrey M. Craig, *House Bill 1041 and Transbasin Water Diversions: Equity to the Western Slope or Undue Power to Local Government? 66 U. Colo. L. Rev. 791 (Summer 1995); Shareholders in Mutual Water Corporation May Not Apply to State Engineer for Change in Point of Diversion*, (Recent Developments in Utah Case Law) *199 Utah L. Rev. 358 (Winter 1995).*

COMPUTER-ASSISTED RESEARCH

LEXIS: transfer! w/30 water! w/1 right!

§ 50.09(aa) Transfers: Approval.

Appropriative jurisdictions vary as to how such transfers must be structured to be effective. n552 Many jurisdictions require some kind of formal administrative approval of the transfer, in which the land to which the water is to be transferred and the nature of the use to be made of the water after the transfer must be identified. n553 Some jurisdictions require that the transfer be in writing, just as any other conveyance of real property. n554 Approval of a state agency may be required before the transfer is effective, though some jurisdictions require approval only if the place of diversion or the nature of the use is changed as a result of the transfer, n555 or if other appropriators are harmed. n556

Authorized transfers or changes generally do not involve a loss of priority. n557

COMPUTER-ASSISTED RESEARCH

LEXIS: approv! w/5 transfer! w/30 water! w/1 right!

§ 50.09(bb) Transfers: Water Markets.

As in riparian jurisdictions, once the water is reduced to possession, it is considered personal property and generally may be disposed of accordingly. n558 This feature of water rights coupled with the general transferability of water rights has created a market structure for water and water rights in many western states. n559 It has become common in some jurisdictions for individuals or organizations to acquire water rights in order to sell the water to others for municipal or domestic uses. n560 Such uses will generally be considered beneficial, although no specific benefit is derived by the appropriator on land owned by the appropriator.

COMPUTER-ASSISTED RESEARCH

LEXIS: water! w/5 market! w/30 transfer! or sell!

§ 50.09(cc) Transfers: Protecting Junior Appropriators.

It is the rule in most appropriative jurisdictions that the transfer of water rights will not be permitted if the effect is to harm other appropriators, including junior right holders. n561 It is generally the burden of the proponent of the transfer to present at least a *prima facie* case that no harm will result. n562 The burden then shifts to those claiming harm to demonstrate that the proposed change would interfere with their rights. n563

COMPUTER-ASSISTED RESEARCH

LEXIS: protect! w/5 junior w/1 appropriator! w/30 transfer!

§ 50.09(dd) Municipal Rights.

Appropriative jurisdictions generally do not accord municipalities any special priority by virtue of their status as municipalities. This has forced cities and towns to secure appropriation rights just as any other water user, or to purchase water rights from others. n564 These rights have priority based on the time the right was established. Hence, cities can improve their future water supply situation by purchasing rights from those who hold the highest priority.

In addition, most municipalities have the authority to condemn the water rights, if needed, and will thereby assume the priority of the acquired right. n565

Whether a municipality has an obligation to supply water to end-users has been the source of some litigation. In Haik v. Town of Alta, n566 the town refused to extend water to plaintiffs. As a result of this, plaintiffs were unable to develop their land. The court refused to find that an interest in water for the purpose of real estate development was a fundamental right. n567 In this case, the court rejected an equal protection claim finding that there were plausible reasons for Alta to refuse to extend the water lines to the Haik property. Here, the town was bound by a contract with Salt Lake City regarding the supply of water and even though the town had the physical capacity to extend the lines, it did not have the legal authority to do so.

In County of Del Norte v. City of Crescent City, n568 the court rejected the argument that unincorporated areas outside city limits had a right to hook up to the city water system and held that the city's denial of water service was not arbitrary where the reason for the limitation was the pressure of population growth in the city on the city's system.

In Spring v. Bradley, n569 the court ruled against an owner of an undeveloped tract who brought an action to compel the town to supply water and sewer service to the property, citing several cases dealing with the obligations of towns to supply services. n570 These cases were cited for the proposition that a municipality cannot be required to impose a burden on its utility facilities or on the city itself by providing services to persons who are outside of its corporate limits and beyond its taxing powers.

In Landmark Development, Inc. v. City of Roy, n571 the court rejected a claim that the city acted in an arbitrary and capricious manner by charging an unreasonable water connection fee for a residential development outside the city limits.

On the other hand, municipalities may adopt ordinances requiring that township residents must connect to municipal systems and to cease using wells for domestic consumption purposes without violating the residents' due process rights. n572

In Board of County Commissioners of Ottowa County v. Village of Marblehead, n573 an established sewer district was given authority under a statute to complete a county water service project even though the area had been acquired by a municipality during the pendency of the project. The City argued that the statute violated the state Constitution's grant to municipalities of exclusive rights to supply water service to municipal residents. The court held that the statute authorized a valid exercise of police powers that did not substantially infringe on the municipality's constitutional power to operate utilities.

In Vernon Township Water Authority v. Vernon Township, n574 a court found that a township did not have the authority to mandate water connections in some areas and not in others and invalidated an optional tap ordinance.

In Turlock Irrigation District v. Heterick, n575 the court dealt with the obligation of an irrigation district, as a municipal corporation, to execute a gas supply contract for the benefit of its customers. The court found the corporation not to be obligated to execute the contract. The reason was that under state law, the power of irrigation districts as municipal corporations was specifically limited to supply only water, electricity, drainage and closely related activities, such as the

operation of cement plants and rock quarries.

In Farmers High Line Canal and Reservoir Company v. City of Golden, n576 the court refused to allow junior water right holders to seek modification of the city's water rights to impose volumetric limitations.

COMPUTER-ASSISTED RESEARCH

LEXIS: municipal! w/15 water! w/1 right!

§ 50.09(ee) Termination and Loss of Right.

Traditionally, appropriation rights have been considered to be perpetual, subject to loss only through non-use. Such a termination may occur in a variety of ways. n577

§ 50.09(ff) Termination: Abandonment.

In most appropriative jurisdictions, abandonment is defined as the non-use of water together with an intent not to continue the use. n578 It will generally be easier to establish the fact of non-use than it will be to establish an intent not to continue the water use. Such proof is a question of fact which generally must be supported by clear and convincing evidence. The underlying policy of appropriative jurisdictions to encourage the maximum efficient use of waters within the jurisdiction will generally support an inference of the intent to abandon, simply from the fact of protracted non-use. n579

The termination of a water right as a result of abandonment will typically release the water back into the public domain for further appropriation. Thus, water rights may not be acquired simply on the ground that the right has been abandoned. Rather, the would-be appropriator may need to show abandonment to establish that there is sufficient water available to support the new or proposed appropriation. n580

COMPUTER-ASSISTED RESEARCH

LEXIS: terminat! w/5 water! w/1 right! w/30 abandon!

§ 50.09(gg) Termination: Forfeiture.

Appropriative jurisdictions generally have a statutory means of termination based on the non-use of water. These provisions allow the administrator of the system to terminate the water right based on nonuse for a specified period of time. n581 These statutes differ in concept from abandonment in that a formal act of termination by the administrator is required before the water right will be extinguished. This action occurs within the context of a procedure which is triggered by the fact of non-use within the prescribed period. The administrator is generally not required to prove an intent not to use.

The water right holder may avoid forfeiture in most jurisdictions upon a showing of "good cause." In most jurisdictions, non-use resulting from conditions beyond the control of the water right holder, such as weather conditions, will generally be considered to be "good cause." It has been held that forfeiture may result from acts within the control of the right holder, such as the use of the water for purposes other than those for which the right was secured, even though those other uses may actually be considered beneficial purpose. n582

As with abandonment, the termination of a water right as a result of forfeiture typically releases the water back into the public domain for further appropriation.

COMPUTER-ASSISTED RESEARCH

LEXIS: terminat! w/5 water! w/1 right! w/30 forfeit!

§ 50.09(hh) Termination: Prescription, Adverse Possession, Estoppel.

Water rights generally cannot be acquired in most appropriative jurisdictions as a result of prescription, adverse possession or estoppel. Nevertheless, water rights may be lost in this manner. n583 It will generally be necessary to show that the use of the water has been terminated as a result of adverse use by another for the period of time necessary to terminate any other real property interest in the jurisdiction. The party who is causing such an interference, however, neither acquires the water right of the party against whom the activity is directed nor receives any special priority regarding the acquisition of a right in the water that may be released back into the public domain for appropriation by others. n584

COMPUTER-ASSISTED RESEARCH

LEXIS: terminat! or los! w/5 water! w/1 right! w/30 prescription or adverse possession or estoppel!

§ 50.09(ii) Re-Use.

According to the rules by which water rights are considered to be property rights, water rights are real property rights and the right holder does not thereby acquire any title interest in the water itself. However, once the right is exercised to reduce a particular quantity of water to possession, that water becomes the personal property of the right holder and is treated as such by the legal system. This has meant that, as a general rule, as long as water that has been reduced to possession remains on the property of the appropriator, it can be captured and re-used for as long as the appropriator desires. n585 Once it leaves the property, it may be considered abandoned and hence available to others who may secure valid water rights which would entitle them to capture it for their use. n586

This approach has occasioned an interesting dilemma for the system; how can the initial user be given an unfettered right to use the water, while at the same time recognizing rights in subsequent users who may claim the water after it leaves the premises, without giving those subsequent users the right to compel the initial water right holder to let the water go. Most courts appear to have taken the position that the junior appropriator cannot compel the original user to release any excess. n587 On the other hand, such junior appropriators may be given some protection when the transfer of the senior right would cause them harm. n588 Similarly, it has been held that water cannot be captured for re-use on other lands when junior appropriators have relied upon its return to the stream. n589

The reuse of water that has been imported and stored underground prior to the time of initial use poses interesting problems to the system. This water is unlike surface waters in that its users are not the same kind of junior or return flow users to be protected. On the other hand, its undoubtedly has been commingled with other groundwaters to which other appropriators may have rights yet there is generally no likelihood that it will be returned to the ground after the initial use.

There are some cases which have held that when a developer of imported water abandons that water, it does not return to the public water supply to become available for appropriation by others at all. n590 On the other hand, there are cases which hold imported water to be the same as non-imported water and as such, become public water upon abandonment. n591

In at least one jurisdiction, courts have suggested that the reuse issue regarding stored water may raise questions of changes in use that the system can legitimately address. n592

COMPUTER-ASSISTED RESEARCH

LEXIS: re-use w/30 water! w/1 right!

§ 50.09(jj) Adoption of Administrative Principles.

Today, nearly all appropriative jurisdictions, including mixed systems which recognize some riparian rights, n593 have statutes which require water users to obtain permits for the use of surface or groundwaters of the jurisdiction. n594 These statutes have injected a significant measure of administrative supervision of the acquisition and exercise of water rights. There is much variety in the extent to which such administrative control is exercised, but it is clear that the right holder no longer controls the acquisition of water rights as was the case in the early days of such systems.

In some jurisdictions, these statutes may exempt certain uses, such as domestic use, livestock, or small scale diversions, from the permit requirements. In some jurisdictions, the acquisition of an initial permit does not constitute the final grant of a water right but only the official authorization to undertake the specific acts, such as the diversion of the water to beneficial use, which are still considered necessary in order to ultimately secure the right. n595 In these jurisdictions, the right is not considered vested until the administrator finally certifies that all criteria necessary to the acquisition of the water right have been properly followed. n596

COMPUTER-ASSISTED RESEARCH

LEXIS: administrat! w/15 water! w/1 right!

FOOTNOTES:
(n1)Footnote 451. The states of Colorado, Idaho, Montana, Nevada, New Mexico, Utah and Wyoming are generally said to be pure, or Colorado Doctrine appropriative doctrine jurisdictions. That is, these jurisdictions do not recognize any riparian consumptive use water rights. Frank Maloney et al., Florida Water Law 1980, 60 (Water Resources Research Center, Univ. of Fla. Pub. No. 50 (1980)).

In Alaska, California, Kansas, Mississippi, Nebraska, North Dakota, Oklahoma, Oregon, South Dakota, Texas and Washington, some riparian rights are considered to exist. *Id.* These jurisdictions are sometimes called mixed or California Doctrine jurisdictions. *See* § 50.10 *infra*.

For a further discussion of water rights in Texas, *see* Martin Hubert & Bob Bullock, *Senate Bill 1, The First Big and Bold Step Toward Meeting Texas's Future Water Needs*, 30 Texas Tech L. Rev. 53 (1999).

(n2)Footnote 452. Several western states have adopted a mixture of riparian and appropriative principles. *See* discussion of Mixed Systems, § 50.10 *infra*. These states include California, Mississippi, Nebraska, North Dakota, Oklahoma, Oregon, South Dakota, Texas and Washington.

The right to construct a means to convey the water to the place of use is said to follow the water right. This has allowed the owners of irrigated lands who owned a water right but whose chain of title did not contain an express grant of rights to the irrigation ditch that carried the water to claim an implied easement over the non-irrigated parcel. *See Rennard v. Vollmar, 977 P.2d 1277 (Wyo. 1999).* In this case, this rule entitled the owner of the water right to an injunction against interference with the ditch by the non-irrigated parcel owners and to defeat their counterclaim for trespass and property damage. *See generally* Young, Daniel S. and Helton, Duane D. *Developing a Water Supply in Colorado: The Role of an Engineer. 3 U. Denver Water L. Rev. 373 (2000).*

(n3)Footnote 453. *See, e.g.*, Kan. Stat. Ann. § 82a-707(c):

As between persons with appropriation rights, the first in time is the first in right... .

For a discussion of the authority of irrigation districts to develop their surplus real estate for residential use, *see Coden v. Kennewick, 888 P.2d 1225 (Wash. App. 1995).* For further discussion, *see* Christine A. Klein, *The Constitutional Mythology of Western Water Law, 14 Va. Envtl. L.J. 13 (Winter 1995);* John C. Peck, *The Kansas Water Appropriation Act: A Fifty-Year Perspective, 43 U. Kan. L. Rev. 735 (July 1995);* Douglas L. Grant, *Western Water Rights and the Public Trust Doctrine: Some Realism About the Takings Issue,* 27 Ariz. St. L. Rev. 423 (Summer 1995).

(n4)Footnote 454. *See* Charles Wilkinson, *Aldo Leopold and Western Water Law: Thinking Perpendicular to the Prior Appropriation Doctrine,* 24 Land and Water L. Rev. 1 (1989); John Leshy, *The Prior Appropriation Doctrine of Water Law in the West: An Emperor with Few Clothes* 19 J. of the West 5 (1990).

(n5)Footnote 455. *See generally* Eric Freyvogle, *Lux v. Hagin, The Common Law Burden of Modern Water Law, 57 U. Colo. L. Rev. 485 (1986).*

(n6)Footnote 456. For a discussion of some changes in the definition of property, *See* James B. Wadley, *The Emerging "Social Function" Context for Land Use Planning in the United States: A Comparative Introduction to Recurring Issues, 28 Washburn L.J. 22 (1988).*

(n7)Footnote 457. Wells Hutchins, Water Rights Laws in the Nineteen Western States (1971).

(n8)Footnote 458. *Coffin et al. v. Left Hand Ditch Co., 6 Colo. 443 (1882).*

(n9)Footnote 459. *See, e.g., Imperial Irrigation District v. State Water Resources Control Board, 225 Cal. App. 3d 548 (1990).*

(n10)Footnote 460. *See* Mont. Code. Ann. § 85-3-311(2).

(n11)Footnote 461. *See, e.g., California Trout, Inc., v. Superior Court of Sacramento County, 207 Cal. App. 3d 585 (1989),* where the court observed that "[i]f a statute sanctioned a manifestly unreasonable use of water, it would transgress the constitution."

(n12)Footnote 462. *See, e.g., Imperial Irrigation District v. State Water Resources Control Board, 225 Cal. App. 3d 548 (1990),* where the court said "[t]he historic concepts of water 'rights' in California were dramatically altered by the adoption in 1928 of [a constitutional amendment which empowered the Board to conduct hearings to determine whether particular water uses were reasonable or wasteful]. Our Supreme Court ... acknowledged that the new provision altered previously vested rights... . It has been long established that all property is held subject to the reasonable exercise of police power and that constitutional provisions declaring that property shall not be taken without due process of law have no application in such cases."

(n13)Footnote 463. *524 N.W.2d 855 (S.D. 1994).* For further discussion, *see* Note. Washington Water Rights Based on Actual Use or on Delivery System Capacity? Department of Ecology v. Theodoratus, Darryl V. Wareham. *24 Seattle U. L. Rev. 187 (2000).*

(n14)Footnote 464. Competing consumptive and non-consumptive use rights may be used for purposes of making this determination. *See Taylor v. Tampa Coal Co., 46 So. 2d 392 (Fla. 1950).* Thus, water may not be considered available if the removal of the water would interfere with the non-consumptive use right of recreation.

Whether the water is available may be depend upon whether the water is characterized as confined or diffused. *See In re* the Adjudication of Water Rights in the *Lower Guadalupe River, 730 S.W.2d. 64 (Tex. App. 1987).* There, the court held that once the surface waters were collected and came to rest in a natural depression, it could be considered a lake and therefore available for appropriation by the public.

See Corbridge, James N., *Historical Water Use and the Protection of Vested Rights: A Challenge for Colorado Water Law, 69 U. Colo. L. Rev. 503 (1998).*

A permit for a right to use the water was required in *Norden v. State, 973 P.2d 910 (Or. 1999)* where the water from a spring, if undiverted, would flow into a creek. Under Oregon law, if the water would not leave the land of the user if undiverted, no permit is required.

(n15)Footnote 465. *See* Note, *Unappropriated Water: The Amount of Water Remaining After Taking Into Account All Existing Permits at Their Recorded Levels*, 16 TEXAS Tech. L. Rev. 989 (1985).

See, e.g., In re Application of the Hitchcock and Red Willow Irrigation Dist., 410 N.W.2d 101 (Neb. 1987): "While it is true that some unappropriated water is present during times of high flow at the proposed diversion point, to be available in a practical sense, the supply of water must be fairly continuous and dependable."

See Empire Lodge Homeowners' Association v. Moyer, 39 P.3d 1139 (Colo. 2001).

For further discussion, see J. Leshy, *Water Rights for New Federal Land Conservation Programs: A Turn-of-the Century Evaluation, 4 U. Denv. Water L. Rev. 271 (2001).*

(n16)Footnote 466. *See, e.g.*, Colo. Const. art. XVI, § 6.

Corbridge, James N., *Historical Water Use and the Protection of Vested Rights: A Challenge for Colorado Water Law, 69 U. Colo. L. Rev. 503 (1998).*

(n17)Footnote 467. *See* John Peck, *Water Storage in Federal Reservoirs, 32 Kan. L. Rev. 785 at 797 (1984).*

(n18)Footnote 468. *See, e.g.*, Kan. Stat. Ann. § 42-313.

See also In re the Adjudication of Water Rights in the *Lower Guadalupe River, 730 S.W.2d. 64 (Tex. App. 1987)* where surface waters that were collected and came to rest in a natural depression could be considered a natural water body, in this case, a lake.

(n19)Footnote 469. *City and County of Denver v. Colorado River Water Conserv. Dist., 696 P.2d 730 (Colo. 1985).*

Corbridge, James N., *Historical Water Use and the Protection of Vested Rights: A Challenge for Colorado Water Law, 69 U. Colo. L. Rev. 503 (1998).*

(n20)Footnote 470. *See, e.g., Steptoe Livestock Co. v. Gulley, 295 P. 772 (Nev. 1931).*

(n21)Footnote 471. *See, e.g.*, Kan. Stat. Ann. § 82a-711(a).

(n22)Footnote 472. *See Tulkisarmute Native Comm. V. Heinze, 898 P.2d 935 (Alaska 1995)* (requiring "diligent effort" to complete appropriation); *Matter of Bd. of County Comm'rs, 891 P.2d 952 (Colo. 1995)* (open physical act must be sufficient to give third parties notice).

(n23)Footnote 473. *Harvey v. Davis, 655 P.2d 418 (Colo. 1982).*

Corbridge, James N., *Historical Water Use and the Protection of Vested Rights: A Challenge for Colorado Water Law, 69 U. Colo. L. Rev. 503 (1998).*

Westlands Water District v. United States, 153 F. Supp. 2d 1133 (E.D. Cal. 2001).

(n24)Footnote 474. *See Transcounty Water Inc. v. Central Colorado Water Conservancy Dist., 727 P.2d 60 (Colo. 1986).*

(n25)Footnote 475. *State ex rel. Reynolds v. Miranda, 493 P.2d 409 (N.M. 1972).*

(n26)Footnote 476. *See, e.g.,* Kan. Admin. Regs. § 5-1-1(g): Diversion is defined as:

> "the act of bringing water under control by means of a well, pump, dam or other devices for delivery and distribution for the proposed use."

Corbridge, James N., *Historical Water Use and the Protection of Vested Rights: A Challenge for Colorado Water Law, 69 U. Colo. L. Rev. 503 (1998).*

The right to construct a diversionary structure such as a ditch to convey the water to the place of use is said to follow the water right. This has allowed the owners of irrigated lands who owned a water right but whose chain of title did not contain an express grant of rights to the irrigation ditch that carried the water to claim an implied easement over the non-irrigated parcel for that purpose. *See Rennard v. Vollmar, 977 P.2d 1277 (Wyo. 1999).* In this case, this rule entitled the owner of the water right to an injunction against interference with the ditch by the non-irrigated parcel owners and to defeat their counterclaim for trespass and property damage.

(n27)Footnote 477. *Fullerton v. State Water Resources Control Bd., 153 Cal. Rptr. 518 (1979); California Trout, Ltd. v. State Water Resources Control Bd., 153 Cal. Rptr. 672 (1979).*

See also Board of County Comm'rs v. Collard, 827 P.2d 546 (Colo. 1992); In re Application A-16642, 463 N.W.2d 591 (Neb. 1990); State v. Morros, 766 P.2d 263 (Nev. 1988) which all hold that a physical diversion is not necessary to acquire a right of appropriation. *See Matter of Bd. of County Comm'rs, 891 P.2d 952 (Colo. 1995)* holding that "diversion" required an open physical act sufficient to give third parties notice. Such an act might include planning that is focused on the acquisition of water, feasibility studies, capital expenditures and the filing of applications for permits. *See also State ex rel. Matrinez v. McDermett, 901 P.2d 745 (N.M. App. 1995),* holding that mere diversion of the water into an irrigation ditch was not sufficient of itself to constitute a diversion since irrigation contemplates growing something.

(n28)Footnote 478. *State of Idaho, Dept. of Parks v. Idaho Dept. of Water Admin., 530 P.2d 924 (Idaho 1974).*

See e.g., Nevada v. Morros, 766 P.2d 263 (Nev. 1988). Nevada does not have a statute that expressly authorized instream use of water. The court, however, found a basis upon which to recognize a water right in the United States Bureau of Land Management to maintain the level of water in a lake sufficient for recreational purposes in Nev. Rev. Stat. § 533.030(2) which provides that "use of water ... for any recreational purpose is ... a beneficial use."

But see Board of County Comm'rs v. Collard, 827 P.2d 546 (Colo. 1992), where the court held that the water court had misinterpreted Colorado statutes to find a right to instream flows.

For discussion of the development of the right to make instream use, *see* J. Beeman, *Historical Development of Instream Flows in Idaho,* 37 Advoc. (Mar. 1994) 16.

In *In re Application of A-16642, 463 N.W.2d 591 (Neb. 1990),* the court held that nothing in the Nebraska Constitution prohibits appropriations for instream use.

See also Corbridge, James N., *Historical Water Use and the Protection of Vested Rights: A Challenge for Colorado Water Law, 69 U. Colo. L. Rev. 503 (1998).*

(n29)Footnote 479. Cal. Water Code §§ 1253-1257.

(n30)Footnote 480. *See, e.g., Nat. Audubon Society v. Superior Ct. of Alpine City, 658 P.2d 709 (Cal. 1983).*

(n31)Footnote 481. *See* Kan. Stat. Ann. § 82a-707(b) which recognized appropriation rights for recreation and water power generation.

(n32)Footnote 482. *See Colorado River Water Conserv. Dist. v. Colorado Water Conserv. Bd., 594 P.2d 570 (Colo. 1979).*

See also Aspen Wilderness Workshop v. Colo. Water, 901 P.2d 1251 (Colo. 1995), upholding the authority to appropriate water for the purpose of preserving the natural environment.

For further discussion, *see* Josephine P. Beeman, *Historical Development of Instream Flows in Idaho,* 37 Advoc. 16 (Mar. 1994); Jane E. Lein, *Protection of Instream Flows: The Aspen Wilderness Workshop Decision,* 24 Colo. Law. 2577 (Nov. 1995); Robert B. Naeser & Mark G. Smith, *Playing with Borrowed Water: Conflicts Over Instream Flows on the Upper Arkansas River,* 35 Nat. Resources J. 93 (Winter 1995); Joseph S. McLean, *Streamflow Policy in Vermont: Managing Conflicting Demands on the State's Waters, 19 Vt. L. Rev. 191 (Fall 1994);* Matt Clifford, *Preserving Stream Flows in Montana Through the Constitutional Public Trust Doctrine,* 16 Pub. Land L. Rev. 117 (Spring 1995); Deborah L. Freeman & Carmen M. Sower, *Against the Flow: Emerging Conflicts between Endangered Species Protection and Water Use,* 40 Rocky Mts. Mineral L. Inst. 23 (Annual 1994).

(n33)Footnote 483. *See Thomas v. Guiraud, 6 Colo. 530 (1883)* holding that a dam alone, which caused the overflow of a meadow, without the aid of ditches, was valid appropriation.

(n34)Footnote 484. *In re Silvies River, 237 P. 322 (Or. 1925).*

(n35)Footnote 485. *Hardy v. Beaver County Irrig. Co., 234 P. 524 (Utah 1924); Wals v. Wallace, 67 P. 914 (Nev. 1902).*

(n36)Footnote 486. *Broad Run Inv. Co., v. Deuel & Snyder Improv. Co., 108 P. 755 (Colo. 1910).*

Corbridge, James N., *Historical Water Use and the Protection of Vested Rights: A Challenge for Colorado Water Law, 69 U. Colo. L. Rev. 503 (1998).*

(n37)Footnote 487. *See, e.g.,* Ariz. Rev. Stat. § 45-131.

Corbridge, James N., *Historical Water Use and the Protection of Vested Rights: A Challenge for Colorado Water Law, 69 U. Colo. L. Rev. 503 (1998);* Kanazaswa, Mark T., *Efficiency in Western Water Law: The Development of the California Doctrine, 1850-1911, 27 J. Legal Stud. 159 (1998).* For further discussion, *see* Note, *Washington Water Rights Based on Actual Use or on Delivery System Capacity? Department of Ecology v. Theodoratus, Darryl V. Wareham, 24 Seattle U. L. Rev. 187 (2000).*

(n38)Footnote 488. *See, e.g.,* Kan. Stat. Ann. § 82a-707(a):

Surface or groundwaters of the state may be appropriated as herein provided. Such appropriation shall not constitute ownership of such water, and *appropriation rights shall remain subject to the principle of beneficial use*. (emphasis added.)

(n39)Footnote 489. *See, e.g., In re* Water Rights in *Escalante Valley Drainage Area, 348 P.2d 697 (Utah 1960).*

See Ir Re Water Right Claim No. 1927-2, 524 N.W.2d 855 (S. D. 1994), regarding the protection of fowl habitat as a

beneficial use, holding in the affirmative. *See also Aspen Wilderness Workshop v. Colo. Water, 901 P.2d 1251 (Colo. 1995),* approving an appropriation for the purpose of preserving the natural environment.

(n40)Footnote 490. *See, e.g., State Water Resources Control Bd. v. Forni, 126 Cal. Rptr. 851 (1976).*

An increasing number of states are defining "beneficial use" to include recreational use of the water. *See, e.g.*, Nev. Rev. Stat. § 533.030(2) which provides that "use of water ... for any recreational purpose is ... a beneficial use." *See also Benz v. Water Resources Comm'n, 764 P.2d 594 (Or. 1988),* which considered an application for water to leach boron (which had been deposited as the result of extensive irrigation) from the soil. The Commission found that leaching boron from the soil was a beneficial use of the water and allowed it only on the condition that the right be subordinate and inferior to both the storage and direct use of water for other consumptive use purposes. The court upheld the Commission.

A change in use may call into question the beneficial nature of the use. In *Evans v. Water Resources Dep't, 839 P.2d 257 (Or. 1992), rev. denied, 847 P.2d 409 (1993),* the court held that water first diverted for mining and later used for irrigation would be considered the exercise of an irrigation right.

See also Corbridge, James N., *Historical Water Use and the Protection of Vested Rights: A Challenge for Colorado Water Law, 69 U. Colo. L. Rev. 503 (1998);* Kanazaswa, Mark T., *Efficiency in Western Water Law: The Development of the California Doctrine, 1850-1911, 27 J. Legal Stud. 159 (1998).*

(n41)Footnote 491. *See In re Water Rights of Escalante Valley Drainage Area, 348 P.2d 679 (Utah 1960).*

City of Thornton v. Bijou Irrigation Co., 926 P.2d 1 (Colo. 1996) (appropriator of water native to public stream is limited in use of water to actual needs).

(n42)Footnote 492. *Basey v. Gallagher, 87 U.S. (20 Wall.) 670 (1875).*

In *State ex rel. Martinez v. McDermett, 901 P.2d 745 (N.M. App. 1995),* the court held that beneficial use requires "actual use" for some socially acceptable purpose.

See also In re Water Right Claim No. 1927-2, 524 N.W.2d 855 (S.D. 1994). There, the court considered claims to water by the U.S. Fish and Wildlife Service for a wildlife refuge. The court found that the use of the water for the protection of the habitat was a beneficial use notwithstanding that the area was already subirrigated by high-water table water.

(n43)Footnote 493. *See Tudor v. Jaca, 164 P.2d 680 (Or. 1945).*

(n44)Footnote 494. *See Schoddle v. Twin Falls Land and Water Co., 224 U.S. 107 (1912).*

(n45)Footnote 495. Frank Trelease, *The Concept of Reasonable Beneficial Use in the Law of Surface Streams, 12 Wyo. L.J. 1 (1957).*

(n46)Footnote 496. *Jicarilla Apache Tribe v. United States, 657 F.2d 1126 (10th Cir. 1981).*

Corbridge, James N., *Historical Water Use and the Protection of Vested Rights: A Challenge for Colorado Water Law, 69 U. Colo. L. Rev. 503 (1998);* Kanazaswa, Mark T., *Efficiency in Western Water Law: The Development of the California Doctrine, 1850-1911, 27 J. Legal Stud. 159 (1998).*

See Empire Lodge Homeowners' Association v. Moyer, 39 P.3d 1139 (Colo. 2001); In re the General Adjudication of All Rights to Use Water in the *Gila River System and Source, 35 P.3d 68 (Az. 2001); Concerning the Application for*

Water Rights of the Consolidated Mutual Water Company, Farmers Reservoir and Irrigation Co., v. Consolidated Mutual Water Company, 2001 Colo. LEXIS 953 (Colo 2001); Farmers Reservoir and Irrigation Company v. Consolidated Mutual Water Company, 33 P.3d 799 (Colo. 2001); Westlands Water District v. United States, 153 F. Supp. 2d 1133 (E.D. Cal. 2001); Klump v. United States, 50 Fed. Cl. 268 (2001); West Maricopa Combine, Inc. v. Arizona Department of Water Resources, 26 P.3d 1171 (Az. App. 2001); Defenders of Wildlife v. Hull, 19 P.3d 722 (Az. App. 2001); SRBA v. Rosenkrance, 20 P.3d 693 (Id. 2001); United States v. State Engineer, 27 P.3d 51 (Nev. 2001); Hallauer v. Spectrum Properties, Inc., 18 P.3d 540 (Wash. 2001); Tulare Lake Basin Water Storage District v. Untied States, 49 Fed. Cl. 313 (2001); Scheer v. Commonwealth Water Control Board and County of Fawuier, No. 0095-00-4, 2001 Va. App. LEXIS 426 (July 17, 2001); *Mattaponi Indian Tribe v. Commonwealth, 541 S.E. 2d 920 (Va. 2001); Referral of Lower Platte South Natural Resources District v. Lower Platte South Natural Resources District, 621 N.W. 2d 299 (Neb. 2001). See also* L. Boens, Aberdeen-Springfield Canal Company v. Peiper: Interpreting Idaho's Forfeiture Statute as Applied to Carey Act Companies, *5 Great Plains Nat. Resources J. 237 (2001);* J.Carey and D. Sunding, *Emerging Markets in Water: A Comparative Institutional Analysis of the Central Valley and Colorado-Big Thompson Projects*, 41 Nat. Resources J. 283 (2001); J. Leshy, *Water Rights for New Federal Land Conservation Programs: A Turn-of-the Century Evaluation, 4 U. Denv. Water L. Rev. 271 (2001);* P. Lacy, *The Irrigated Desert and Imperiled Salmon: "Reclaiming" Illegally Spread Water via the Endangered Species Act*, 4 U. Denv. Water Law Rev. 351 (2001); E. Ryan, *Public Trust and Distrust: The Theoretical Implications of the Public Trust Doctrine for Natural Resource Management, 31 Envtl L. 477 (2001).*

(n47)Footnote 497. Cal. Water Code § 1243.

(n48)Footnote 498. *Stempel v. Dept. of Water Resources, 508 P.2d 166 (Wash. 1973).*

(n49)Footnote 499. *Cascade Town Co. v. Empire Water & Power Co., 181 F. 1011 (D. Colo. 1910).*

(n50)Footnote 500. *Colorado River Water Conserv. Dist. v. Colorado Water Conserv. Bd., 594 P.2d 570 (Colo. 1979).*

(n51)Footnote 501. *Meridan, Ltd. v. City and County of San Francisco, 90 P.2d 537 (Cal. 1939).*

(n52)Footnote 502. *Clausen v. Armington, 212 P.2d 440 (Mont. 1949).*

(n53)Footnote 503. *Department of Nat. Res. v. Southwestern Colo. Water Cons. Dist., 671 P.2d 1294 (Colo. 1983).*

See Board of County Commissioners of the County of Arapahoe v. Crystal Creek Homeowners Association, 14 P.3d 325 (Colo. 2000).

(n54)Footnote 504. *Stevenson v. Steele, 453 P.2d 819 (Idaho 1969).*

(n55)Footnote 505. *State ex rel. State Engineer v. Crides, 431 P.2d 45 (N.M. 1967).*

(n56)Footnote 506. *See generally* Frank Trelease, *The Concept of Reasonable Beneficial Use in the Law of Surface Streams, 12 Wyo. L.J. 1 (1957). But see Jicarilla Apache Tribe v. United States, 657 F.2d 1126 (10th Cir. 1981); Mimbres Valley Irrig. Co. v. Salopek, 564 P.2d 615 (N.M. 1977) aff'd United States v. New Mexico, 438 U.S. 696 (1978).*

(n57)Footnote 507. *Los Angeles Flood Control Dist. v. Abbott, 76 P.2d 188 (Cal. 1938).*

(n58)Footnote 508. *See, e.g., Allen v. Petrick, 222 P. 451 (Mont. 1924).*

Corbridge, James N., *Historical Water Use and the Protection of Vested Rights: A Challenge for Colorado Water Law, 69 U. Colo. L. Rev. 503 (1998);* Kanazaswa, Mark T., *Efficiency in Western Water Law: The Development of the*

California Doctrine, 1850-1911, 27 J. Legal Stud. 159 (1998).

(n59)Footnote 509. *Wayman v. Murray City Corp., 458 P.2d 861 (Utah 1969).*

(n60)Footnote 510. *Worley v. United States Borax & Chem. Co., 428 P.2d 651 (N.M. 1967).*

(n61)Footnote 511. *Wayman v. Murray City Corp., 458 P.2d 861 (Utah 1969).*

(n62)Footnote 512. *Erickson v. McLean, 308 P.2d 983 (N.M. 1957).*

See also Benz v. Water Resources Comm'n, 764 P.2d 594 (Or. 1988), in which the use of the water for purpose of leaching boron was found to be a beneficial use of the water but the water right was allowed only on the condition that the right be subordinate and inferior to both the storage and direct use of water for other consumptive use purposes.

(n63)Footnote 513. *See, e.g., Ophir Silver Mining Co. v. Carpenter, 4 Nev. 534 (1869).*

(n64)Footnote 514. *See, e.g.,* Kan. Stat. Ann. § 82a-707.

(n65)Footnote 515. *See, e.g., Public Serv. Co. v. Blue River Irrigation Co., 753 P.2d 737 (Colo. 1988).*

(n66)Footnote 516. Colo. Rev. Stat. § 37-92-301(b).

(n67)Footnote 517. *Public Serv. Co. v. Blue River Irrigation Co., 753 P.2d 737 (Colo. 1988); Public Serv. Co. v. Board of Water Works, 831 P.2d 470 (1992).*

(n68)Footnote 518. Colo. Rev. Stat. § 37-92-301(b).

(n69)Footnote 519. *Meridian Ditch Co. v. Koosharem Irrig. Co., 660 P.2d 217 (Utah 1983).*

In *Simpson v. Yale Inv. Co., 886 P.2d 689 (Colo. 1994),* the court held that a junior user of tributary water who applied to augment his supply was not precluded therefrom by a senior user in the absence of any showing of injury to the senior's right.

Aspen Wilderness Workshop, Inc. v. Hines Highlands Ltd. Partnership, 929 P.2d 718 (Colo. 1996) (the doctrine of prior appropriation protects senior appropriators from injury by junior appropriators). In *Farmers High Line Canal and Reservoir Company v. City of Golden, 975 P.2d 189 (Colo. 1999),* the court refused to allow junior water right holders to seek modification of the city's water rights to impose volumetric limitations.

See also Sanpete Water Conservancy District v. Carbon Water Conservancy District, 226 F.3d 1170 (10th Cir. 2000).

(n70)Footnote 520. For further discussion, *see* Harrison Dunning, *The "Physical Solution" in Western Water Law, 57 Colo. L. Rev. 445 (1986).*

(n71)Footnote 521. *Taussig v. Moffat Tunnel Water and Dev. Co., 106 P.2d 363 (Colo. 1940).*

See also Sanpete Water Conservancy District v. Carbon Water Conservancy District, 226 F.3d 1170 (10th Cir. 2000); Westlands Water District v. United States, 153 F. Supp. 2d 1133 (E.D. Cal. 2001).

See also J. Peck, *Assessing the Quality of a Water Right,* 70 May J. Kan. B. A. 26 (2001); P. Lacy, *The Irrigated Desert and Imperiled Salmon: "Reclaiming" Illegally Spread Water via the Endangered Species Act,* 4 U. Denv. Water Law Rev. 351 (2001).

(n72)Footnote 522. Utah Code Ann. § 73-3-5.

(n73)Footnote 523. In some states, an adjudication process may be used to determine the relative priorities of all claimants in a single source. *See State v. Parker Townsend Ranch, 887 P.2d 1247 (N.M. 1994)* (regarding subfile orders as adjudications and their presumed finality). *See also La Madera Comm. Ditch Ass'n v. Scandia Park, 893 P.2d 487 (N.M. App. 1995).* (Whether a full stream adjudication was required before a right claimant can sue another for trespass to that individual's right).

(n74)Footnote 524. Kan. Stat. Ann. § 82a-707(b).

(n75)Footnote 525. *See Harkey v. Smith, 247 P. 550 (N.M. 1926). But see Hardy v. Beaver County Irrig. Co., 234 P. 524 (Utah 1924).*

(n76)Footnote 526. *See, e.g.*, Kan. Stat. Ann. § 82a-1038 wherein the Chief Engineer is empowered to impose a system of use rotation or otherwise to apportion the water among users without regard to priority in areas where critical water shortages are demonstrated.

(n77)Footnote 527. *Hardy v. Beaver Co. Irrig. Co., 234 P. 524 (Utah 1924).*

It may be necessary to determine the quantity of water to which many right holders are entitled. This is typically done in the context of an adjudication of those rights. *See* In the *Matter of the General Determination of the Rights to the Use of All the Water v. Springville, 982 P.2d 65 (Ut. 1999). See Trask v. Public Utilities Commission, 731 A. 2d 430 (Me. 1999)* for a *riparian* jurisdiction that used acres as the measure of flowage rights. *See Upper Black Squirrel Creek Ground Water Management District v. Goss, 993 P.2d 1177 (Colo. 2000).*

(n78)Footnote 528. *Thorne v. McKinley Bros., 56 P.2d 204 (Cal. 1936).*

See Empire Lodge Homeowners' Association v. Moyer, 39 P.3d 1139 (Colo. 2001).

See also L. Boens, *Aberdeen-Springfield Canal Company v. Peiper: Interpreting Idaho's Forfeiture Statute as Applied to Carey Act Companies, 5 Great Plains Nat. Resources J. 237 (2001).*

(n79)Footnote 529. 79 *Ranch, Inc. v. Petsch, 666 P.2d 215 (Mont. 1983).*

See Board of County Commissioners of the County of Arapahoe v. Crystal Creek Homeowners Association, 14 P.3d 325 (Colo. 2000); See also Sanpete Water Conservancy District v. Carbon Water Conservancy District, 226 F.3d 1170 (10th Cir. 2000).

(n80)Footnote 530. *Danielson v. Kerbs, 646 P.2d 363 (Colo. 1982).*

(n81)Footnote 531. *Schodde v. Twin Falls Land and Water Co., 224 U.S. 107 (1912).*

It may be necessary to determine the quantity of water to which many right holders are entitled. This is typically done in the context of an adjudication of those rights. *See* In the *Matter of the General Determination of the Rights to the Use of All the Water v. Springville, 982 P.2d 65 (Ut. 1999).*

See Trask v. Public Utilities Commission, 731 A. 2d 430 (Me. 1999) for a *riparian* jurisdiction that used acres as the measure of flowage rights.

(n82)Footnote 532. *See Id. See also Erickson v. McLean, 308 P.2d 983 (N.M. 1957).*

(n83)Footnote 533. *See, e.g.*, Kan. Stat. Ann. § 82a-707(e).

Montana now requires that decrees adjudicating water rights identify the specific amount of water than can be claimed rather than the "rate of flow." *See* Mont. Code Ann. § 85-2-234. This has been held to apply only to rights acquired after July 1, 1973, the date the present Constitution took effect. *See McDonald v. State of Montana, 72 P.2d 598 (Mont. 1986).*

(n84)Footnote 534. *See* Steven Shupe, *Waste in Western Water Law: A Blueprint for Change, 61 Or. L. Rev. 483 (1982).*

(n85)Footnote 535. *Id.*

(n86)Footnote 536. *See Hague v. Nephi Irrig. Co., 52 P. 765 (Utah 1898):* beneficial uses include "domestic purposes, irrigating lands, propelling machinery, and the like; that is, the water may be applied to any useful purpose." *See also Lake Shore Duck Club v. Lake View Duck Club, 166 P. 309 (Utah 1917):*

To our minds it is utterly inconceivable that a valid appropriation of water can be made under the laws of this state, when the beneficial use of which, after the appropriation is made, will belong equally to every human being who seeks to enjoy it.

(n87)Footnote 537. *Id.*

For further discussion of the need to eliminate potentially wasteful uses of groundwater, *see* Robert Glennon, *Because That's Where the Water Is: Retiring Current Water Uses to Achieve the Safe-Yield Objective of the Arizona Groundwater Management Act, 33 Ariz. L. Rev. 89 (1991).*

For a discussion of rights to wastewater generally, *see* Stuart Somach, *Who Owns Reclaimed Wastewater, 25 Pac. L.J. 1087 (1994).*

(n88)Footnote 538. *In re the Matter of Water Rights of Escalante Valley Drainage Area, 348 P.2d 697 (Utah 1960).*

(n89)Footnote 539. *See Chow v. City of Santa Barbara, 22 P.2d 5 (Cal. 1933).*

See also Imperial Irrigation District v. State Water Resources Control Board, 225 Cal. App. 3d 548 (1990). For a discussion of rights to wastewater generally, *see* Stuart Somach, *Who Owns Reclaimed Wastewater, 25 Pac. L.J. 1087 (1994).*

(n90)Footnote 540. *State ex rel. Cary, 292 N.W. 239 (Neb. 1940).*

(n91)Footnote 541. *United States v. Alpine Land & Reservoir Co., 697 F.2d 851 (9th Cir. 1983).*

(n92)Footnote 542. *See, e.g., Erikson v. Queen Valley Ranch Co., 99 Cal. Rptr. 446 (1971).*

(n93)Footnote 543. *Wyman v. Murray City Corp., 458 P.2d 861 (Utah 1969).*

(n94)Footnote 544. *See, e.g., Tulare Irrig. Dist. v. Lindsay-Strathmore Irrig. Dist., 45 P.2d 972 (Cal. 1935).*

(n95)Footnote 545. *In re* Water Rights in *Escalante Valley Drainage Area, 348 P.2d 679 (Utah 1960). See also Schoode v. Twin Falls Land and Water Co., 224 U.S. 107 (1912); City of Colorado Springs v. Bender, 366 P.2d 552 (1961); Alamosa-La Jara Water Users Protection Ass'n v. Gould, 674 P.2d 914 (Colo. 1983). See also Imperial Irrig. Dist. v. State Water Resources Control Bd., 275 Cal. Rptr. 250 (1990)* where the court quotes with approval Eric Freyvogle, *Context and Accommodation in Modern Property Law, 41 Stanford L. Rev. 1529, 1546-47 (1989)* that

"California has regained for the public much of the power to prescribe water use practices, to limit waste, and to sanction water transfers."

(n96)Footnote 546. Jurisdictions holding that water rights were appurtenant to the land include Arizona, Kansas, Montana, Nebraska, Nevada, North Dakota, Oklahoma, South Dakota and Wyoming.

For further discussion, *see* W.P. Balleau, *Water Appropriation and Transfer in a General Hydrologic System*, 28 Nat. Resources J. 269 (1988); Graffy, Colleen P., *Water, Water Everywhere, Nor any Drop to Drink: The Urgency of Transnational Solutions to International Riparian Disputes, 10 Geo. Int'l Envtl L. Rev. 399 (1998).*

(n97)Footnote 547. *Conant v. Deep Creek & Curlew Valley Irrig. Co., 66 P. 188 (Utah 1901).*

Montana imposes the additional requirement that the appropriator have a possessory interest in the land upon which the water is to be used or the written consent of the person with such possessory interest. *See* Mont. Code. Ann. § 85-2-311(f).

(n98)Footnote 548. *See Crow v. Carlson, 690 P.2d 916 (Idaho 1984).*

(n99)Footnote 549. *See, e.g., Water Transfer Symposium, 31 Ariz. L. Rev. 697-904 (1989);* R. Keith Higginson & Jack A. Barnett, Water Rights and Their Transfer in the Western United States (Conservation Foundation 1984).

See Metropolitan Water District of Southern California v. Imperial Irrigation District, 96 Cal. Rptr. 2d 314 (2000); Sagewillow v. Idaho Department of Water Resources, 13 P.3d 855 (Id. 2000); Salt Lake v. Silver Fork Pipeline Corporation, 5 P.3d 1206 (Ut. 2000).

See Becker v. Pieper, 32 P.3d 912 (Or. App. 2001); United States v. Orr Ditch Co., 256 F.3d 935 (9th Cir. 2001); Tanner v. Carter, 20 P.3d 332 (Utah 2001); Barron v. Idaho Department of Water Resources, 18 P.3d 219 (Id. 2001).

See also J. Peck, *Assessing the Quality of a Water Right*, 70 May J. Kan. B. A. 26 (2001); H. Franz, R. Kropf, and M. Pearce, *An Insatiable Thirst: The Impact of Water Law on Sprawl in the West*, 15 SPG Nat. Resources & Env't 228 (2001); J. Carey and D. Sunding, *Emerging Markets in Water: A Comparative Institutional Analysis of the Central Valley and Colorado-Big Thompson Projects*, 41 Nat. Resources J. 283 (2001); D. Yoskowitz, *Markets, Mechanisms, Institutions, and the Future of Water, 31 Envtl. L. Rep. 10237 (2001);* O. Matthews, L. Scuderi, D. Brookshire, K. Gregory, S. Snell, K. Krause, J. Chermak, B. Cullen, M. Campana, *Marketing Western Water: Can a Process Based Geographic Information System Improve Reallocation Decisions?* 41 Nat. Resources J. 329 (2001); W. Flemming, J. Rivera, C. Ageton, A. Jandacek, J. Marmon, R. Messenger, S. Moeller, D. Meyers-Taylor, M. Santelli, and L. Vitela, *Transfer of Development Rights as an Option for Land Preservation in a Historic New Mexico Community: La Cienega Valley, Santa Fe County, New Mexico*, 41 Nat. Resources J. 427 (2001).

(n100)Footnote 550. *See Salt River Valley Users Ass'n v. Kovacovich, 411 P.2d 201 (Ariz. App. 1966).*

Legislation in Arizona now requires the cities to pay a "transfer fee" to the county from which the water is being transferred to offset such losses. *See* Ariz. Rev. Stat. § 45-566.

In response to a case involving the impact of the Endangered Species Act on rights to pump water from the Edwards Aquifer in Texas, the judge allowed the Texas legislature until May 31, 1993, to develop a management plan for the aquifer. *See* U.S. Water News, April, 1993, at 1. One response of the Texas legislature was to broaden authority to transfer water rights in the state. In so doing, the legislature approved the establishment of a water bank under which the Texas Water Development Board was given the authority to purchase, sell, hold and transfer water and water rights. The plan that was approved to implement the changes in legislation particularly called for the acquisition of rights in the Guadalupe River which are to be pumped and stored for later use in the Edwards-Trinity Aquifer. *See* U.S. Water News,

Nov. 1993, at 13. In addition, the state was authorized to operate the water bank which will handle water right transfers. Rights are listed as being for sale with the bank which then can function as a negotiator between buyers and sellers of the water rights that may be "deposited" or listed with the water bank. A permit granting surface water rights will be protected for ten years while "deposited" in the bank. The board was not given exclusive rights to handle transfers of water rights and such transfers can take place outside of the bank. *Id.*

(n101)Footnote 551. *890 P.2d 1322 (N.M. App. 1994). See Colorado Springs v. Eagle Co. Commr's Bd., 895 P.2d 1105 (Colo. App. 1994)* for a discussion of the power of county governments over interbasin transfers by municipalities. *See Fossum Orchards v. Pugsley, 892 P.2d 1095 (Wash. App. 1995)* for discussion of extent to which irrigation company shares represent water rights that are appurtenant to the shareholder's land unless sold for use on another's land. *See also Consolidated Home Supply v. Town of Berthoud, 896 P.2d 260 (Colo. 1995)* for a discussion of change of use as possible abandonment.

(n102)Footnote 552. *See, e.g.*, The Water Transfer Process as a Management Option for Meeting Changing Water Demands (Lawrence J. MacDonnell ed. 1991).

Montana legislation provides that only the Department of Natural Resources and Conservation may make appropriations for amounts of water in excess of 4,000 acre feet a year or 5.5 cubic feet per second where the water is to be consumed or where water is to be transported outside designated river basins. Mont. Code. Ann. §§ 85-2-141 and 85-2-301.

See also Little v. Greene & Weed Inv., 796 P.2d 718 (Utah App. 1990), rev'd 839 P.2d 791 (Utah 1992) suggesting that water rights may be transferred as appurtenant to land that is sold, without the need for State Engineer issuance of a certificate to the purchaser as a new appropriator.

(n103)Footnote 553. *See, e.g., Southeastern Colorado Water Conservancy Dist. v. Fort Lyon Canal Co., 720 P.2d 133 (Colo. 1986).*

There has been a general broadening of the criteria that may or must be considered by water officials before a water transfer may be approved. *See Bonahm v. Morgan, 788 P.2d 497 (Utah 1989)* holding that the officials should have considered the likelihood that the transfer would cause an increase in flooding adjoining landowners. The state had argued that only the issue of impairment to other water right holders was germane to the approval. *But see In re Application of Sleeper, 759 P.2d 787 (N.M. 1988); United States v. Orr Ditch Co., 256 F.3d 935 (9th Cir. 2001).*

See also D. Yoskowitz, *Markets, Mechanisms, Institutions, and the Future of Water, 31 Envtl. L. Rep. 10237 (2001).*

See also O. Matthews, L. Scuderi, D. Brookshire, K. Gregory, S. Snell, K. Krause, J. Chermak, B. Cullen, M. Campana, *Marketing Western Water: Can a Process Based Geographic Information System Improve Reallocation Decisions?* 41 Nat. Resources J. 329 (2001).

(n104)Footnote 554. *See* Utah Code Ann. § 73-1-11.

(n105)Footnote 555. *See* Kan. Stat. Ann. § 82a-908b.

For a discussion of transfers of federal reclamation water, *see* Brian Gray, et al., *Transfers of Federal Reclamation Water: A Case of California's San Joaquin Valley, 21 Envtl. L. 911 (1991).*

(n106)Footnote 556. *Southeastern Colorado Conservancy Dist. v. Rich, 625 P.2d 977 (Colo. 1981).* In Montana, only "downstream" water users have the right to object to the transfer. Mont. Code Ann. § 85-2-308. In most other states, any interested party may file a protest. *See Bohnam v. Morgan, 788 P.2d 497 (Utah 1989).*

(n107)Footnote 557. *See* Wyo. Stat. Ann. § 41-3-104; NEV. Rev. Stat. § 533.040.

Where a water right is transferred from someone who is actually using less than the total amount authorized under a water right, the amount of water to which the transferee may be reduced to reflect the actual amount used even though such a reduction may not have been possible prior to the transfer. *See Pueblo West Metro. Dis. v. Southeastern Colo. Water Conserv. Dist., 717 P.2d 955 (Colo. 1986).*

For further discussion, *see Shareholders in Mutual Water Corporation May Not Apply to State Engineer for Change in Point of Diversion, (Recent Developments in Utah Case Law), 199 Utah L. Rev. 358 (Winter 1995).*

(n108)Footnote 558. *See, e.g., Perry v. Calkins, 113 P. 136 (Cal. 1911).*

Graffy, Colleen P., *Water, Water Everywhere, Nor any Drop to Drink: The Urgency of Transnational Solutions to International Riparian Disputes, 10 Geo. Int'l Envtl L. Rev. 399 (1998).*

(n109)Footnote 559. *See* Bonnie Saliba & David B. Bush, Water Markets in Theory and Practice (1987); Rodney Smith, Trading Water: an Economic and Legal Framework for Water Marketing (1988); R. Keith Higginson & Jack A. Barnett, Water Rights and Their Transfer in the Western United States (Conservation Foundation 1984).

The needs of municipalities for water has often impelled them to purchase water rights in rural areas and then transfer the rights to the cities. One of the consequences of this activity has been to change the land use patterns in the rural areas in ways that may adversely affect the rural tax base. Legislation in Arizona requires the cities to pay a "transfer fee" to the county from which the water is being transferred to offset such losses. *See* Ariz. Rev. Stat. § 45-566. *See, generally* Howe, Charles W. *Protecting Public Values in a Water Market Setting: Improving Water Markets to Increase Efficiency and Equity. 3 U. Denver Water L. Rev. 357 (2000).*

See also Metropolitan Water District of Southern California v. Imperial Irrigation District, 96 Cal. Rptr. 2d 314 (2000).

See also H. Doremus, Water, Population Growth, and Endangered Species In the West, *72 U. Colo L. Rev. 362 (2001).*

See also J. Carey and D. Sunding, *Emerging Markets in Water: A Comparative Institutional Analysis of the Central Valley and Colorado-Big Thompson Projects,* 41 Nat. Resources J. 283 (2001); D. Yoskowitz, *Markets, Mechanisms, Institutions, and the Future of Water, 31 Envtl. L. Rep. 10237 (2001);* O. Matthews, L. Scuderi, D. Brookshire, K. Gregory, S. Snell, K. Krause, J. Chermak, B. Cullen, M. Campana, *Marketing Western Water: Can a Process Based Geographic Information System Improve Reallocation Decisions?* 41 Nat. Resources J. 329 (2001).

(n110)Footnote 560. *Navajo Dev. Co. v. Sanderson, 655 P.2d 1374 (Colo. 1982).*

(n111)Footnote 561. *See, e.g., Southeastern Colorado Water Conservancy Dist. v. Fort Lyon Canal Co., 720 P.2d 133 (Colo. 1986).*

In the past, most jurisdictions probably considered little other than the impact on junior appropriators that may result from a transfer of water rights. Indeed, some jurisdictions have held that is the only issue to be considered. *See In re Application of Sleeper, 759 P.2d 787 (N.M. 1988).* Other jurisdictions are starting to take a broader view and consider the impact on landowners and others beyond the class of junior appropriators. *See Bonahm v. Morgan, 788 P.2d 497 (Utah 1989)* holding that the officials should have considered the likelihood that the transfer would cause an increase in flooding adjoining landowners. The state had argued that only the issue of impairment to other water right holders was germane to the approval. This suggests that the law is increasingly willing to consider that the transfer of a water right involves more than the simple transfer of a property interest and may have far reaching effects related to both the

manner and the purpose for which the water is to be used.

Aspen Wilderness Workshop, Inc. v. Hines Highlands Ltd. Partnership, 929 P.2d 718 (Colo. 1996) (under situations in which any use by a junior appropriator would cause persistent injury to senior water users, water court must eliminate injury by imposing conditions on exercise of junior right); *City of Thorton v. Bijou Irrigation Co., 926 P.2d 1 (Colo. 1996)* (change of water rights cannot be approved if change will injuriously affect vested rights of water users; this protection extends to junior appropriators' rights in return flows).

(n112)Footnote 562. *See, e.g., Danielson v. Kerbs Ag., Inc., 646 P.2d 363 (Colo. 1982).*

For an interesting way to avoid problems with junior appropriators, *see Arizona Public Serv. Co. v. Long, 773 P.2d 988 (Ariz. 1989).* There, the court held that sewage effluent was not "water" for purposes of the water rights statute. As such, the cities could sell the effluent without regard to the possibility that it might be used by downstream appropriators. As such, the transaction was not construed to involve the sale or transfer of a water right.

(n113)Footnote 563. *See, e.g., Danielson v. Castle Meadows, Inc., 791 P.2d 1106 (Colo. 1990).*

United States v. Gila Valley Irrigation Dist., 920 F. Supp. 1444 (D. Ariz. 1996) (prior appropriator of water bore burden of proving whether practices of junior appropriator had degraded quality of water).

(n114)Footnote 564. *City of Thornton v. The Farmers Reservoir and Irrig. Co., 575 P.2d 382 (Colo. 1978).*

As the needs of municipalities for water has grown, cities have looked to rural areas as a source of water. In many cases, cities have purchase water rights in rural areas which then have been transferred to the cities. One of the consequences of this activity has been to change how that land that no longer has access to water may be used. In many instances, the changes in use have had an adverse impact on the rural tax base. Legislation in Arizona now requires the cities to pay a "transfer fee" to the county from which the water is being transferred to offset such losses. *See* Ariz. Rev. Stat. § 45-566. *For a discussion of municipal liability for the consequences of water use, see* Habeeb, Wade R., *Propriety of Injunctive Relief Against Diversion of Water by Municipal Corporation or Public Utility, 42 A.L.R. 3d 426* (1998 Supp).

For further discussion, see H. Doremus, *Water, Population Growth, and Endangered Species In the West, 72 U. Colo L. Rev. 362 (2001).*

See also D. Yoskowitz, *Markets, Mechanisms, Institutions, and the Future of Water, 31 Envtl. L. Rep. 10237 (2001).*

(n115)Footnote 565. *Town of Sterling v. Pawnee Ditch Extension Co., 94 P. 339 (Colo. 1908).*

Some states authorize municipalities to claim rights in water even though the water is presently unused (a departure from normal appropriation principles that authorize water rights only in water that is actually being used). This is to insure that water is available for anticipated growth. *See* N.M. Stat. Ann. § 72-1-9 which permits a municipality to hold unused water rights for up to forty years. *See Colorado Springs v. Eagle Co. Commr's Bd., 895 P.2d 1105 (Colo. App. 1994)* for a discussion of the power of county governments over interbasin transfers by municipalities.

(n116)Footnote 566. *120 S. Ct. 166, 145 L. Ed. 2d 148 (1999).*

(n117)Footnote 567. *Citing Lockary v. Kayfetz, 917 F.2d 1150 (9th Cir. 1990); O'Neal v. City of Seattle, 66 F.3d 1064 (9th Cir. 1995); Manguson v. City of Hickory Hills, 933 F.2d 562 (7th Cir. 1991); Ransom v. Marrazzo, 848 F.2d 398 (3d Cir. 1988); Chatham v. Jackson, 613 F.2d 73 (5th Cir. 1980). See also Thompson v. Salt Lake City Corp., 724 P.2d 958 (Ut. 1986); Rose v. Plymouth, 173 P.2d 285 (Ut. 1946); Platt v. Town of Torrey, 949 P.2d 325 (Ut. 1997).*

(n118)Footnote 568. *84 Cal. Rptr. 2d 179 (Cal App. 1999).*

(n119)Footnote 569. *733 A. 2d 1038 (Md. 1999).*

(n120)Footnote 570. These included *Bair v. Mayor and City Council of Westminster, 221 A. 2d 643 (Md. 1966); Merryman v. Baltimore, 138 A. 324 (1927).*

(n121)Footnote 571. *980 P.2d 1234 (Wash. 1999).*

(n122)Footnote 572. *See Kusznikow v. Township Council of Township of Stafford, 730 A. 2d. 930 (N.J. Super. 1999).*

(n123)Footnote 573. *711 N. E. 2d 663 (Oh. 1999).*

(n124)Footnote 574. *734 A. 2d 935 (Pa. Commonwealth Ct. 1999).*

(n125)Footnote 575. *84 Cal. Rptr. 2d 175 (Cal. App. 1999).*

(n126)Footnote 576. *975 P.2d 189 (Colo. 1999).*

(n127)Footnote 577. For further discussion, *see* John C. Peck, *Loss of Kansas Water Rights for Non-Use, 43 U. Kan. L. Rev. 801 (July 1995).*

In *Aberdeen-Springfield Canal Co. v. Peiper, 982 P.2d 917 (Ida. 1999),* nonuse of water did not cause canal company to forfeit its water right because there was no evidence that canal company did anything to cause the nonuse by stockholders in the company.

See also Scott v. McTiernan, 974 P.2d 966 (Wyo. 1999), where the court refused to find abandonment of water rights where the nonuse of the water was not voluntary but the result of deliberate actions of the parties seeking a declaration of abandonment.

(n128)Footnote 578. *CF & I Steel Corp v. Purgatoire River Water Conservancy Dist., 515 P.2d 456 (Colo. 1973).*

Denver v. Middle Park Water Conserv. Dist., 925 P.2d 283 (Colo. 1996) (discussing abandonment as question of fact); *In re Clark Fork River Drainage, 903 P.2d 1353 (Mont. 1995).*

See also Scott v. McTiernan, 974 P.2d 966 (Wyo. 1999), where the court refused to find abandonment of water rights where the nonuse of the water was not voluntary but the result of deliberate actions of the parties seeking a declaration of abandonment.

(n129)Footnote 579. *Beaver Park Water Inc., v. Victor, 649 P.2d 300 (1982).*

According to South Dakota statutes, abandonment is presumed after three years of non-use and the water is deemed to revert to the public for further appropriation. This statute appears to be self-executing. Nevertheless, the court in *In re Cancellation of the Stabio Ditch Water Right, 417 N.W.2d 391 (1987)* held that due process required a hearing. This suggests that some statutes that are cast in "abandonment" language may actually be construed as "forfeiture" statutes. In *Denver v. Snake River Water Dist., 788 P.2d 772 (Colo. 1990),* the court held that Denver had failed to produce sufficient evidence to overcome the presumption of abandonment. It did recognize that efforts to sell the water right would constitute evidence on non-abandonment.

In *Musselshell River Drainage Area, 840 P.2d 577 (Mont. 1992),* the court held that the rule that a rebuttable presumption of abandonment may be inferred from long periods of continuous non-use did not violate the state

Constitution.

In *Matter of Clark Fork River Drainage Area, 833 P.2d 1120 (Mont. 1992),* the court held that the city had abandoned its water right after 23 years of non-use.

Consolidated Home Supply Ditch & Reservoir Co. v. Berhtoud, 896 P.2d 260 (Colo. 1995) (abandonment requires a concurrence of nonuse and intent to abandon).

See also Scott v. McTiernan, 974 P.2d 966 (Wyo. 1999), where the court refused to find abandonment of water rights where the nonuse of the water was not voluntary but the result of deliberate actions of the parties seeking a declaration of abandonment. *See Haystack Ranch, LLC, v. Fazzio, 997 P.2d 548 (Colo. 2000).*

See United States v. Orr Ditch Co., 256 F.3d 935 (9th Cir. 2001), recognizing the Nevada rule that prolonged non-use of a water right does not create a rebuttable presumption of abandonment. *See also Defenders of Wildlife v. Hull, 19 P.3d 722 (Az. App. 2001); SRBA v. Rosenkrance, 20 P.3d 693 (Id. 2001),* holding that water rights were forfeited after the expiration of a statutory five-year period.

See N. Nachtigal, *To Abandon or Not to Abandon: What Constitutes Voluntary Abandonment in the Wake of Scott v. Mctiernan, 5 Great Plains Nat. Resources J. 247 (2001).*

(n130)Footnote 580. *See Consolidated Home Supply v. Town of Berthoud, 896 P.2d 260 (Colo. 1995). See also State ex rel. Martinez v. McDermett, 901 P.2d 745 (N.M. App. 1995).*

(n131)Footnote 581. *See, e.g.,* Ariz. Rev. Stat. § 45-190.

Because water rights are considered property, it is generally necessary to give notice and hold a hearing before water rights may be forfeited. *See, e.g., Sheep Mountain Cattle Co. v. Department of Ecology, 726 P.2d 55 (Wash. 1986).* In this case, the statute was dealing with notice and hearing was repealed and the authority of the Department of Ecology to give notice and hold a hearing was eliminated. The court held that forfeiture under such circumstances was unconstitutional as it deprived the Company of property without due process. In *Aberdeen-Springfield Canal Co. v. Peiper, 982 P.2d 917 (Ida. 1999),* nonuse of water did not cause canal company to forfeit its water right because there was no evidence that canal company did anything to cause the nonuse by stockholders in the company.

See also Scott v. McTiernan, 974 P.2d 966 (Wyo. 1999), where the court refused to find abandonment of water rights where the non use of the water was not voluntary but the result of deliberate actions of the parties seeking a declaration of abandonment.

See also Defenders of Wildlife v. Hull, 19 P.3d 722 (Az. App. 2001); SRBA v. Rosenkrance, 20 P.3d 693 (Id. 2001), holding that water rights were forfeited after the expiration of a statutory five-year period.

See also L. Boens, *Aberdeen-Springfield Canal Company v. Peiper: Interpreting Idaho's Forfeiture Statute as Applied to Carey Act Companies, 5 Great Plains Nat. Resources J. 237 (2001).*

(n132)Footnote 582. *Hennings v. Water Res. Dep't., 622 P.2d 333 (Or. App. 1981).*

In *Eureka v. Office of State Eng'r, 826 P.2d 948 (Nev. 1992),* the court held that substantial use of the water after the end of the statutory period of non-use "cures" the forfeiture. Forfeiture is not favored and clear and convincing proof may be required before the water right may be terminated. *See Aberdeen-Springfield Canal Co. v. Peiper, 982 P.2d 917 (Idaho 1999),* where nonuse of water did not cause canal company to forfeit its water right because there was no evidence that canal company did anything to cause the nonuse by stockholders in the company.

(n133)Footnote 583. *In re* Drainage Area of Bear River in *Rich County, 361 P.2d 407 (Utah 1961).*

(n134)Footnote 584. In some jurisdictions, there is an interest in using appropriative (surface) principles to resolve groundwater problems. Consider Kevin J. Neese, *Certainty in Groundwater Rights: Is Prescription Still Available?,* 12 Cal. Real Prop. J. 26 (Fall 1994).

See also Green v. Stansfield, 886 P.2d 117 (Ut. App. 1994), dealing with the acquisition of an easement for an irrigation ditch by adverse use.

(n135)Footnote 585. *Cleaver v. Judd, 393 P.2d 193 (Or. 1964).*

In some jurisdictions, the right to reuse may be conditioned upon securing approval from the administrator of the water rights. *See, Water Supply and Storage Co. v. Curtis, 733 P.2d 680 (Colo. 1987)* where the applicant requested a ruling that the water to which the water right applied could be used and reused and put to a succession of uses until it was totally consumed. The water court declined to give such a ruling. The court noted that such a ruling might be proper under appropriate circumstances but in this case, the applicant did not have any concrete or fully developed plans to reuse the water. In that sense, he did not qualify for a right to that water since he lacked the requisite "intent" to appropriate the water. *See also Central Neb. Pub. Power & Irrigation Dist. v. Abrahamson, 413 N.W.2d 290 (Neb. 1987).*

It has been held in one case that where the right to reuse is established by contract, changes in the right to reuse must also be negotiated by contract: *Denver v. Consol. Ditches, 807 P.2d 23 (Colo. 1991); Thorton v. Bijou Irrigation Co., 926 P.2d 1 (Colo. 1996).*

(n136)Footnote 586. *Pulaski Irr. Ditch Co. v. Trinidad, 203 P. 681 (Colo. 1922).*

See Arizona Public Serv. Co. v. Long, 773 P.2d 988 (Ariz. 1989). There the court held that sewage effluent was not "water" for purposes of the water rights statute. As such, the cities could sell the effluent without regard to the possibility that it might be used by downstream appropriators.

See N. Nachtigal, *To Abandon or Not to Abandon: What Constitutes Voluntary Abandonment in the Wake of Scott v. Mctiernan, 5 Great Plains Nat. Resources J. 247 (2001).*

(n137)Footnote 587. *Bower v. Big Horn Canal Ass'n, 307 P.2d 593 (Wyo. 1957).*

(n138)Footnote 588. *Weibert v. Rothe Brothers, Inc., 618 P.2d 1367 (Colo. 1980).*

(n139)Footnote 589. *Comstock v. Ramsey, 133 P. 1107 (Colo. 1913).*

(n140)Footnote 590. *See Dodge v. Ellensburg Water Co., 729 P.2d 631 (1986).*

(n141)Footnote 591. *See Arizona Public Serv. Com. v. Long, 773 P.2d 988 (Ariz. 1989).*

(n142)Footnote 592. *See Southeastern Colo. Conserv. Dist. v. Fort Lyon Canal Co., 720 P.2d 133 (Colo. 1986),* where the court held that permitted changes in use of stored water were limited to historical uses in order to prevent injury to other appropriators.

(n143)Footnote 593. *See* § 50.10, *infra*.

(n144)Footnote 594. *See, e.g.*, Cal. Water Code § 1225.

Of all the appropriative jurisdictions, only Colorado does not require permits. In Colorado, new water appropriators

must go to water court and begin a proceeding which announces the intention to divert the water. Objectors may claim that there is no water available for appropriation, or that the proposed use is not beneficial, or that it will interfere with existing rights. If no objection is raised, the court will issue a decree, generally conditional upon satisfactorily completing the diversion and using the water in an appropriate manner. *See* Colo. Rev. Stat. §§ 37-92-301(4), 302(1)(a), 601.

For a discussion of innovative administrative approaches, *see* Kevin Pratt, *Water Banking: A New Tool for Water Management, 23 Colo. L. Rev. 595 (1994).*

See Empire Lodge Homeowners' Association v. Moyer, 39 P.3d 1139 (Colo. 2001).

See also H. Franz, R. Kropf, and M. Pearce, *An Insatiable Thirst: The Impact of Water Law on Sprawl in the West,* 15 SPG Nat. Resources & Env't 228 (2001); J. Leshy, *Water Rights for New Federal Land Conservation Programs: A Turn-of-the Century Evaluation, 4 U. Denv. Water L. Rev. 271 (2001);* D. Yoskowitz, *Markets, Mechanisms, Institutions, and the Future of Water, 31 Envtl. L. Rep. 10237 (2001);* J. Neuman, *Adaptive Management: How Water Law Needs to Change, 31 Envtl. L. Rep. 11432 (2001).*

(n145)Footnote 595. *Madera Irrig. Dist. v. All Persons, 306 P.2d 886 (Cal. 1957).*

See generally, Young, Daniel S. and Helton, Duane D. *Developing a Water Supply in Colorado: The Role of an Engineer, 3 U. Denver Water L. Rev. 373 (2000).*

See also South Fork Band of Te-Moak Tribe of Western Shoshone Indians of Nevada v. Sixth Judicial District Court of Nevada, 7 P.3d 455 (Nev. 2000).

(n146)Footnote 596. Where other activity is required after the filing of the application for a permit but before a final right is recognized, appropriative systems typically date the priority of such rights from the date of filing of the application. *See, e.g.,* Kan. Stat. Ann. § 82a-714.

For further discussion, *see* Ray Jay Davis, *Water, Water Everywhere: Two New Model Water Codes, 9 Prob. & Prop. 8* (Sept.-Oct. 1995); John C. Peck, *The Kansas Water Appropriation Act: A Fifty-Year Perspective, 43 U. Kan. L. Rev. 735 (July 1995).*

Thompson on Real Property, Thomas Editions

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CHAPTER 50 WATER RIGHTS

6-50 Thompson on Real Property, Thomas Editions § 50.10

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§ 50.10 Mixture of Hybrid Systems.

§ 50.10(a) In General.

In a number of jurisdictions, n597 one method of water right allocation, such as the appropriative doctrine, may co-exist with an entirely different approach, such as the riparian doctrine. These jurisdictions are said to be "mixed." A common characteristic of most of these states is that they were at one time riparian systems, but later converted to an appropriative method of right allocation without completely abrogating riparian rights. In large measure, most of these jurisdictions have justified the shift to appropriative principles on the ground that riparian principles were not suited to the arid climate of the state. n598

§ 50.10(b) Protecting Existing Riparian Rights.

Hybrid jurisdictions have given a significant measure of protection to riparian water rights that are deemed to have been in existence when the change was made from the riparian to the appropriation doctrine. n599 Though this protection is seen as required to avoid constitutional problems, it is generally limited in scope or duration. In many of these states, the only riparian rights that were considered to be preserved were those that were actively being used at the time the appropriative statute was adopted, or prior to a particular date determined in the statute. n600 In other jurisdictions, unexercised riparian rights may not be considered lost as a result of non-use n601 and may even be considered to have an earlier priority date than appropriation rights, since the latter are always created under statutes which were designed to replace the riparian system. n602

In virtually all mixed jurisdictions, it is no longer possible to acquire new riparian rights. n603 It is clear from the construction given to the statutory provisions which preserve pre-existing riparian rights that these jurisdictions prefer appropriative rights to riparian rights and therefore wish to not only limit, but probably eventually eliminate, the riparian rights. n604

COMPUTER-ASSISTED RESEARCH

LEXIS: protect! w/15 riparian w/2 right!

§ 50.10(c) Quantifying the Pre-Existing Riparian Water Rights.

Hybrid jurisdictions typically limit the scope of riparian rights to the amount of water that was actually being used at the time the system changed from riparian principles to appropriative principles, or to a reasonable amount of water. n605 It is also common to require that the water be used only on riparian land. n606

A few hybrid jurisdictions allow the quantity represented by the right to be increased to meet limited future needs, n607 but may allow appropriation right claimants to use the water until such time as the future need is established. n608

§ 50.10(d) Constitutionality of Termination of Pre-Existing Riparian Rights.

When jurisdictions have made the change from riparian to appropriative principles, it has been common to terminate or cancel certain preexisting common law or riparian rights. Because water rights are considered property rights, any change which infringes vested property rights may raise questions regarding the constitutionality of the change itself.

The issue of whether the cancellation of "vested" but un-used riparian rights is constitutional has been much litigated. In most of these cases, the changes in water right allocation systems has been upheld as not unconstitutionally depriving the water right claimant of a vested property interest. n609 The rationale in most cases seems to be that there is no protected property interest in the speculative future exercise of a presently unquantifiable right and, since nothing was being terminated that was presently being used, there was no damage or harm for which compensation had to be paid. These decisions give jurisdictions much needed flexibility in adapting their particular right allocation systems to changing circumstances because they give some measure of control over both the definition of "vesting" and the process by which it occurs. n610

COMPUTER-ASSISTED RESEARCH

LEXIS: constitution! w/15 terminat! w/15 riparian w/2 right!

FOOTNOTES:
(n1)Footnote 597. California, Mississippi, Nebraska, North Dakota, Oklahoma, Oregon, South Dakota, Texas and Washington are commonly considered to be hybrid or mixed systems.

Kansas is sometimes considered to be a mixed jurisdiction because of the change in 1945 from riparian to appropriative principles. However, although riparian right holders were given a period of time during which the common law rights could be converted to appropriative-type statutory rights, all unexercised riparian rights were extinguished at the time of the statute. *Williams v. City of Wichita, 374 P.2d 578 (Kan. 1962).* Since the statute treats pre-existing (converted) riparian rights exactly the same as rights created under the statute, and since exercised but unconverted riparian rights were extinguished by statute as of July 1, 1980 [Kan. Stat. Ann. § 82a-704a(f)], it would seem that the sections of the statute, particularly §§ 82a-716 and 82a-717a, were intended by the legislature to apply to rights claimed under the common law only until the opportunity to convert those rights to statutory rights expired. Further, the statute has been amended to make the statutory right acquisition process mandatory on all rights claimants, regardless of whether the basis for their claim is the common law or an act of appropriation. *Stone v. Gibson, 639 P.2d 1164 (Kan. 1981).* Thus it is difficult to say that riparian consumptive use rights of any kind continue to exist as such in that jurisdiction.

Kanazaswa, Mark T., *Efficiency in Western Water Law: The Development of the California Doctrine, 1850-1911, 27 J. Legal Stud. 159 (1998).*

For a further discussion of water rights in Texas, *see* Martin Hubert & Bob Bullock, *Senate Bill 1, The First Big and Bold Step Toward Meeting Texas's Future Water Needs,* 30 Texas Tech. L. Rev. 53 (1999). Hawaii is an interesting

mixture of riparian principles, traditional land tenure rules and permits. *See* In the matter of *Water Use Permit Applications, No. 21309, 2000 Hawaii LEXIS 321* (Sept. 27, 2000).

(n2)Footnote 598. For further discussion, *see* Eric Maski Tokuyama, *Riparian Rights, 22 Pepp. L. Rev. 1352 (Apr. 1995);* Todd S. Hageman, Water Law: *The Oklahoma Supreme Court's Resurrection of Riparian Rights Leaves Municipal Water Supplies High and Dry* (case note), *47 Okla. L. Rev. 183 (Spring 1994);* Gary D. Allison, *Franco-American Charolaise: The Never Ending Story, 30 Tulsa L.J. 1 (Fall 1994).*

(n3)Footnote 599. *Hough v. Porter, 98 P. 1083 (Or. 1909).*

Kanazaswa, Mark T., *Efficiency in Western Water Law: The Development of the California Doctrine, 1850-1911, 27 J. Legal Stud. 159 (1998).*

(n4)Footnote 600. *See, e.g.*, Tex. Rev. Civ. Stat. Ann. art. 7619.

For a further discussion of water rights in Texas, *see* Martin Hubert and Bob Bullock, *Senate Bill 1, The First Big and Bold Step Toward Meeting Texas's Future Water Needs*, 30 Texas Tech L. Rev. 53 (1999).

(n5)Footnote 601. *People v. Shirokow, 605 P.2d 859 (Cal. 1980).*

(n6)Footnote 602. *Belle Fourche Irrig. Dist. v. Smiley, 87 S.D. 151, 204 N.W.2d 105 (1973).*

(n7)Footnote 603. Only California and possibly Nebraska appear to permit the creation of new riparian rights. *See In re Long Valley Creek, 599 P.2d 656 (Cal. 1979); Brummund v. Vogel, 168 N.W.2d 24 (Neb. 1969). See also In re Water of Hallett Creek Stream System, 749 P.2d 324 (Cal. 1988)* holding that the United States could claim unexercised riparian rights relating to reserved public land though the federal government had to apply to the state for authority to exercise those rights.

(n8)Footnote 604. *Boquillas Land & Cattle Co. v. Curtis, 213 U.S. 339 (1909).*

For further discussion, *see* Eric Maski Tokuyama, *Riparian Rights, 22 Pepp. L. Rev. 1352 (Apr. 1995);* Todd S. Hageman, *Water Law: The Oklahoma Supreme Court's Resurrection of Riparian Rights Leaves Municipal Water Supplies High and Dry (case note), 47 Okla. L. Rev. 183 (Spring 1994);* Gary D. Allison, *Franco-American Charolaise: The Never Ending Story, 30 Tulsa L.J. 1 (Fall 1994).*

(n9)Footnote 605. *Joslin v. Marin Municipal Water District, 429 P.2d 889 (Cal. 1967).*

In *Franco-American Charolaise, Ltd. v. The Oklahoma Water Resources Board, 855 P.2d 569 (Okla. 1990), readopted, reissued and rehearing denied*, April 3, 1993, the court held that a riparian owner still held a vested right to the reasonable use of the stream despite a 1963 statutory amendment that provided that water rights could be secured after that date on the basis of an appropriation. The question to the court was whether the legislature could abrogate the riparian landowner's right to initiate new reasonable uses on the water in the stream. In holding in favor of the landowner, the court ruled that the amendment was constitutionally infirm. The court reasoned that to hold otherwise deprived the riparian landowner of the right to have his or her use of the water be judged on the basis of its "reasonableness" within the riparian doctrine. The landowner was seen as losing this right even where an existing use was only being expanded, rather than a new use being initiated. The impact of the statute was seen as judging all new uses, regardless of their nature or origin, according to the "time" priority established in the appropriative system. This was seen as antithetical to the very nature of the common-law riparian right, which places no stock in the fact of past use, present use or even non-use.

(n10)Footnote 606. Cal. Water Code, § 101.

(n11)Footnote 607. *In re Waters of Long Valley Creek Stream System, 599 P.2d 656 (Cal. 1979).*

(n12)Footnote 608. *Carlsbad Mut. Water Co. v. San Luis Rey Dev. Co., 178 P.2d 844 (Cal. App. 1947).*

For further discussion, *see* Eric Maski Tokuyama, *Riparian Rights, 22 Pepp. L. Rev. 1352 (Apr. 1995);* Todd S. Hageman, *Water Law*: *The Oklahoma Supreme Court's Resurrection of Riparian Rights Leaves Municipal Water Supplies High and Dry* (case note), *47 Okla. L. Rev. 183 (Spring 1994);* Gary D. Allison, *Franco-American Charolaise: The Never Ending Story, 30 Tulsa L.J. 1 (Fall 1994).*

(n13)Footnote 609. *See, e.g., Emery v. Knapp, 207 P.2d 440 (Kan. 1949); Williams v. City of Wichita, 374 P.2d 578 (Kan. 1962); In re Hood River, 227 P. 1065 (Or. 1924); In re* Adjudication of Water Rights in the *Upper Guadalupe River, 642 S.W.2d 438 (Tex. 1982);* In the *Matter of Deadman Creek Drainage Basin, 694 P.2d 1071 (Wash. 1985); Baumann v. Smrha, 145 F. Supp. 617* (D. Kan.) *aff'd, 352 U.S. 863 (1956).* For further discussion, *see* Frank Trelease, *Coordination of Riparian and Appropriative Rights to the Use of Water, 33 Tex. L. Rev. 24 (1954).*

But see Franco-American Charolaise, Ltd. v. Oklahoma Water Resources Bd., 855 P.2d 569 (Okla. 1990), readopted, reissued and reh'g denied, April 3, 1993, where the court invalidated a statutory amendment that had the apparent effect of extinguishing future unexercised riparian rights of riparian landowners. Under the provisions of a 1963 statutory amendment, water rights could be secured after that date on the basis of an appropriation. The question in this case was whether the legislature could abrogate the riparian landowner's presently unexercised right to initiate new reasonable uses on the water in the stream by requiring that any such activity comply with the right acquisition rules for new water appropriations. In holding in favor of the landowner, the court ruled that the amendment unconstitutionally deprived the landowner of a property interest in the water rights. The court reasoned that to hold otherwise, deprived the riparian landowner of the right to have his or her use of the water be judged on the basis of the "reasonableness" principles of the riparian doctrine, even where the "new" claim was grounded only in the expansion of an existing use. The impact of the statute was seen as judging all new uses, regardless of their nature or origin, according to the "time" priority established in the appropriative system. This was seen as antithetical to the very nature of the common-law riparian right, which places no stock in the fact of past use, present use or even non-use.

For a further discussion of water rights in Texas, *see* Martin Hubert and Bob Bullock, *Senate Bill 1, The First Big and Bold Step Toward Meeting Texas's Future Water Needs,* 30 Texas Tech L. Rev. 53 (1999).

D. Yoskowitz, *Markets, Mechanisms, Institutions, and the Future of Water, 31 Envtl. L. Rep. 10237 (2001).*

(n14)Footnote 610. For further discussion, *see* Eric Maski Tokuyama, *Riparian Rights, 22 Pepp. L. Rev. 1352 (Apr. 1995);* Todd S. Hageman, *Water Law: The Oklahoma Supreme Court's Resurrection of Riparian Rights Leaves Municipal Water Supplies High and Dry* (case note), *47 Okla. L. Rev. 183 (Spring 1994);* Gary D. Allison, *Franco-American Charolaise: The Never Ending Story, 30 Tulsa L.J. 1 (Fall 1994).*

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CHAPTER 50 WATER RIGHTS

6-50 Thompson on Real Property, Thomas Editions § 50.11

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§ 50.11 Consumptive Use of Groundwater.

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§ 50.11(a) In General.

It has become apparent that the demand for water in our nation has outstripped the ability of surface watercourses to meet that demand. n611 As a result, many water users have turned to the primary alternative source of supply -- groundwater.

Historically, not enough was known about groundwater to allow it to be considered as an important source of water for consumptive use purposes. Early rules therefore developed which considered groundwater to be part of the land itself which could be owned absolutely and used exclusively by the landowner. n612 Since these rules developed independently of surface water allocation rules, they were often different from the surface rules.

As the need to use groundwater has grown, it has been discovered that the traditional rules do not always adequately serve the public needs regarding the effective management of water supplies. There has therefore been considerable evolution in the law of groundwater right in order to modify, alter or avoid some of the historic rules. Thus, as a general rule today, groundwater is considered to be owned by the public at large, rather than by the individual landowner, and is therefore subject to significant public supervision and control. n613

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LEXIS: consumptive w/2 use! w/15 groundwater

§ 50.11(b) Traditional Classification of Groundwater Generally.

Water under the ground was traditionally classified much the same as surface waters: if the waters were collected or confined into a discernable channel or watercourse they were called underground streams; n614 if they were found in a dispersed, unconsolidated state, they were called percolating groundwaters. n615 Different rules were developed to deal with these different types of groundwater.

In some jurisdictions, the groundwater may be considered part of the surface estate. In such jurisdictions, if the mineral estate is severed from the surface estate, the water would logically be treated as subject to surface rules as part of the surface estate. Notwithstanding the logic, even though the two estates are separated, the water tends to be managed by the jurisdiction as if it were still groundwater. n616

§ 50.11(c) Classification: Confined Groundwater.

In most jurisdictions, it was early presumed that all groundwater was found in a confined state. This confined water was further presumed to be found in underground streams, n617 which were assumed to have the same characteristics as surface waterbodies. This facilitated the application of the rules relating to the allocation of rights in surface confined waters to the underground waters. Therefore, the traditional rules regulating access to underground streams in most jurisdictions were the same as were used for confined surface waterbodies. n618

A more accurate understanding of the nature of groundwater and the difficult problems associated with establishing the existence of underground streams caused most jurisdictions to reverse the general presumption that all ground waters were confined. In fact, groundwater is now generally presumed to be percolating in most jurisdictions and regulated accordingly. Nevertheless, where water is actually found as underground streams, the surface rules of the jurisdiction were still deemed to apply. n619

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LEXIS: confined w/2 groundwater

§ 50.11(d) Classification: Percolating Groundwater.

Percolating groundwater was early presumed to be an insignificant source of water for consumptive use purposes. As a result, the water was considered to be a part of the land of the landowner and it was felt there was little need to regulate access or use. As the national need for water has expanded, most jurisdictions have changed their allocation rules regarding percolating groundwater. There has been considerable variation among these jurisdictions as to how rights to such waters should be granted.

Typically, water rights in groundwater will be derived from ownership of the land or from some type of appropriative activity. One difficult to resolve question is whether the right could be acquired from the party who is considered by the law to have the groundwater right by adverse use. Most appropriative surface systems disallow the use of prescriptive use as a means by which rights can be acquired from others. n620 When a jurisdiction chooses to extend the surface rules to groundwater (either as an underground stream or as the chosen allocation doctrine) it would normally be assumed that the proscription against adverse use or prescriptive use would apply. On the other hand, riparian surface systems have been more inclined to allow rights to be acquired by adverse use since the acts will often result in a transfer of title to riparian land as well. In most cases, the goal of the allocation system is thought to be to bring certainty to the question of whether one has a right or not. Adverse use and prescription are usually thought of as unsettling to such a goal. In mixed (riparian/appropriative) systems, the issue is particularly difficult: does the system extend the appropriative or the riparian rules to the undergroundwater? n621

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LEXIS: percolating w/2 groundwater

§ 50.11(e) Traditional Groundwater Right Allocation Doctrines: Absolute Ownership.

The earliest approach to the allocation of consumptive use rights in percolating groundwater has been known as the

absolute ownership doctrine, which was derived from old English case law. n622 According to this approach, the water was considered to be part of the land itself, and the owner of the land was therefore considered to have exclusive rights to any percolating groundwater beneath that land. The landowner could extract unlimited quantities of water from the land, regardless of injury caused to others, so long as no harm was caused by malice and no water was wasted. n623

It was considered that the water right belonged "to the owner of the land, as much as to the land itself, or the rocks or stones in it," n624 and was deemed to have been acquired when title to the land was acquired. The water itself was accessed under a "capture" theory: whoever actually withdrew the water was entitled to it. Thus, one landowner could actually withdraw water from beneath a neighbor's tract. And, since the right to extract the water was considered "absolute," the landowner who owned the land from which the water was being extracted had no rights against the adjoining landowner who was actually doing the extracting.

It is somewhat misleading to label the ownership interest of the landowner in the water as "absolute," because of the lack of protection against anyone who withdrew the water, even from beneath one's own land. It is also misleading to say that either landowner actually "owned" the water at all until it was reduced to possession. n625

Only a few jurisdictions still appear to retain this rule. n626

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LEXIS: absolute w/1 ownership w/15 groundwater

§ 50.11(f) Traditional Groundwater Right Allocation Doctrines: American or Reasonable Use Rule.

In an attempt to impose reasonable limitations on the manner in which the water was used, and to restrict the place of use, most jurisdictions modified the absolute ownership doctrine. These changes have resulted in a doctrine known as the American, or reasonable use, rule. n627 Like the absolute ownership rule, the American rule takes the position that the water should be treated as part of the land and is thereby "owned" by the overlying landowners. Unlike the absolute ownership rule, however, the water extracted under this rule must be used on overlying land and the use must be reasonably related to the natural use of the land. If these conditions are met, the landowner could use as much water as desired regardless of the adverse effects to other landowners. n628

The sale or use of water on distant lands was considered unreasonable where it impaired the groundwater supply of another landowner. n629 Likewise, courts have generally considered waste to be unreasonable *per se*. n630

The American rule appears to be presently followed by a few more jurisdictions than is the absolute ownership doctrine. n631

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LEXIS: american or reasonable w/1 use w/rule w/15 groundwater

§ 50.11(g) Traditional Groundwater Right Allocation Doctrines: Correlative Rights.

A few jurisdictions have considered all landowners over a common pool of groundwater to share an equal right to make use of the water in the pool. This approach is usually denominated as the "correlative rights doctrine." n632 This approach appears to be a deliberate extension of the surface doctrine of riparian rights to percolating ground water except that the water is, typically, equitably apportioned among the landowners, and each landowner is considered to have an equal or correlative right to a fair or just proportion of the water. n633 In some jurisdictions, this approach appears to be at variance with riparian principles, in that the amount of water that can be claimed under a correlative

right may vary with the size of the land owned. It has been held in such jurisdictions that the quantity of water to which one may be entitled may be determined by comparing the size of the surface area of the right-holder to the entire area overlying the source of supply. n634 However, as in most riparian jurisdictions, in times of shortage, all users may be reduced proportionately.

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LEXIS: correlative w/1 right! w/15 groundwater

§ 50.11(h) Traditional Groundwater Right Allocation Doctrines: Restatement, Second (Tort) Rule.

In a few jurisdictions, n635 the *Restatement Second* rule regarding groundwater withdrawals n636 appears to have been adopted as a means of regulating rights to groundwater. This view appears conceptually to be an incorporation of many of the elements of the surface water reasonable use rule into the historic American rule. This approach specifically seeks to balance equities and hardships associated with the use among all the competing users, by considering all circumstances which bear on the question of whether a particular use or withdrawal is reasonable. n637 In this sense, the Restatement view is a little broader than the American rule which tends to judge the reasonableness of a use solely on the relation of the use to overlying land. It also appears to be a departure from the correlative rights approach, in that the quantity of water to be used is generally not determined with reference to the land area overlying the source of supply.

§ 50.11(i) Modern Groundwater Right Allocation Doctrines: Groundwater Codes.

In recent years, an increasing number of jurisdictions have rejected the traditional distinction between underground streams and percolating groundwater, as well as the various traditional doctrines relating to rights in percolating groundwater, and have adopted specialized legislation in the form of groundwater codes, or have adopted the same allocation rules for all water found in the ground. n638

A number of jurisdictions have adopted statutes or codes that apply specifically to groundwater. n639 Since many of these jurisdictions are located in the Western United States, such codes tend to be based on the appropriative model of allocating water rights. These codes typically use a permit application procedure to evaluate proposed withdrawals of groundwater, and may even require that a permit be secured before any activity relating to the withdrawal of the water will be permitted.

Other jurisdictions have adopted limited application codes, in which a permit may be required only if the use exceeds a certain amount, n640 comes from a particular source, or involves a particular kind of use. n641 Some jurisdictions limit or regulate the location of the point of groundwater extraction, such as through well-spacing requirements that limit the proximity or size of wells. n642

In Wagoner v. CPNRD, n643 the court considered whether a farmer could be compelled to provide deep soil samples that might reveal residual nitrates. The Groundwater Management District had ordered the farmer to cease any agricultural activity on the land as a result of his failure to provide such samples. The court held that the district did not have the authority before the 1991 Amendments to order the generation of such information.

§ 50.11(j) Modern Groundwater Right Allocation Doctrines: Unified Systems.

Jurisdictions which do not distinguish between percolating groundwater and underground streams, or between surface and groundwater are called "Unified" jurisdictions. In these jurisdictions, the same allocation rules are applied to all

water within the jurisdiction, regardless of whether it is found on the surface or under the ground. n644 Such jurisdictions may apply either riparian or appropriative principles, but tend to vest considerable authority over the decision to allocate water in an administrative structure. n645

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LEXIS: unified w/1 system! or jurisdiction! w/15 groundwater

§ 50.11(k) Area-wide Management of Groundwater Resources.

Several jurisdictions have developed area-wide approaches to deal with the problem of wide-spread groundwater overuse. n646 Some states have adopted codes which manage groundwater only within small geographic areas within the state. n647 These approaches may focus on the particular geographic areas of overuse, or apply only where there is a public or administrative designation of the area as "critical" or "intensive." n648

In others, the districts may be located where the most serious groundwater usage problems are located. n649 Finally, in some states, these districts blanket the entire state. n650

Some special or intensive use districts may be created as a result of the exercise of a local authority, while some have been created by the legislature itself. n651 Regardless of their creation, these districts tend to play a significant role in determining appropriate levels of resource extraction, n652 restricting new uses in problem areas, n653 determining the relationship between individual appropriators and such users as cities, n654 and perhaps even the extent to which some uses should prevail over others. n655 In some districts, special management approaches may be adopted which impose specific limits or provisions which may actually depart from established general rules. n656 Some permit only the extraction of amounts that do not exceed the annual recharge (called "safe yield"). n657 Others permit extractions to exceed the safe yield and actually result in the mining of the resource. n658

COMPUTER-ASSISTED RESEARCH

LEXIS: manage! w/15 groundwater

§ 50.11(l) Groundwater Storage.

In water shortage areas, it may be necessary to import water from afar in order to meet the local needs. It is often desirable to import such water in advance of the need and then store it until such time as it is actually required. In order to minimize evaporation loss, there is increasing interest in underground storage. n659

Most legal problems regarding storage tend to involve the extent to which the importer still retains rights to the water. Since the water may be commingled with water already in the ground, it may be necessary to determine the extent to which the water still retains any separate identity or may otherwise be considered within the control of the importer.

Courts have considered the critical issue in cases of this type to be whether the water has been released from the appropriator's control. The emerging rule appears to be that, even though the water is no longer on the appropriator's premises nor in the appropriator's conduit, it is still subject to the appropriator's rights unless or until it is forfeited or abandoned as a matter of fact or of law. n660 Abandonment is generally a question of intent and will be determined largely on the basis of the conduct of the parties. n661 It has been held in at least one jurisdiction that abandonment will not be presumed. n662

In jurisdictions which perhaps wish to discourage the practice of underground storage, the contrary position appears to be that once the water returns to the ground, it may be considered to have been abandoned, and therefore becomes

public water which is available for future appropriation. n663

Closely aligned to the issue of storage is the idea of moving groundwater from one place to another since it is often the imported water that will be stored in the ground. The law has dealt only indirectly with the issue of groundwater transport and movement except in the importation context. A notable exception is "American Rule" or "Reasonable Use" jurisdictions which have had, as a part of the allocation doctrine itself, a limitation on movement that was expressed in the requirement that the water be used on overlying land. In other jurisdictions, it is fairly assumed that the water can be exported or moved to another location for purposes of use. In recent years, there has been a growing interest in water movement generally that has extended to groundwater. n664

COMPUTER-ASSISTED RESEARCH

LEXIS: storage w/15 groundwater or underground

§ 50.11(m) Interference with Surface Waters.

Although the hydrologic cycle posits that all water is related, the legal system has historically separated groundwater from surface water for purposes of regulation. Experience has suggested a variety of ways in which the use of one kind of water may interfere with the other. For example, extensive groundwater extractions may cause water from surface supplies to migrate into the ground toward the well in order to re-establish equilibrium in the cone of depression that has formed around the well. Likewise, drilling a well upstream from where the water emerges in a spring may interfere with the flow of the spring. Finally, depletion of rivers which are major groundwater recharge points may cause problems for groundwater users. When the use of one kind of water interferes with the use of another, it would seem that both should be managed together. Such coordinated use of surface and groundwater is generally referred to as "conjunctive use." n665

It is typically difficult for consumptive use regimes to effectively manage ground and surface uses in a coordinated fashion because of the historic compartmentalization of the law which has produced different rules for surface and for groundwater use. The typical response in most jurisdictions is to simply select one set of rules or the other as the governing paradigm. Some jurisdictions have selected surface rules, n666 whereas other jurisdictions have selected the groundwater rules. n667

A few jurisdictions have sought to develop special restrictions on groundwater which specifically apply to uses which interfere with surface rights. n668 Other jurisdictions have sought ways to shift surface claims which might interfere with the coordinated development of both surface and ground resources to alternative sources. n669

Jurisdictions which have adopted a unified approach to the problem of water right allocation, of course, do not distinguish between surface and groundwaters, and therefore apply the same rules to both. n670 These states appear to have the greatest flexibility in dealing with the problem.

In Simpson v. Yale Investments Co., n671 the court held that a junior user of tributary water who applied to augment his supply was not precluded therefrom by a senior user in the absence of any showing of injury to the senior's right.

COMPUTER-ASSISTED RESEARCH

LEXIS: interfere! w/15 surface w/2 water!

§ 50.11(n) Recurring Groundwater Problems: Well Interference.

Not all of the problems posed by groundwater use involve the question of water right allocation. Often the use of water

under a lawfully secured right will harm other kinds of interests or even other water users. A number of the more common problems of this type shall be discussed in this section.

Perhaps the most wide-spread harmful consequence of groundwater use is that it may harm another's efforts to extract water from the ground. When water is pumped from the ground, the static water level around the well is lowered, which creates a "depression" in the surface of the underground water, which roughly resembles an inverted cone. As the level of the water is drawn down further, this cone extends progressively further from the well. Groundwater migrates toward the point at which water is being extracted, in order to establish equilibrium and "refill" the cone. When extraction terminates, the cone will gradually disappear. However, when pumping is continued faster than the natural rate of recharge, the size of the cone is enlarged and will extend laterally until it meets a natural source of recharge, such as the bottom of a stream or lake. If the cones of two or more wells overlap or intersect, or the cone reaches a point of groundwater recharge, such as a stream bed, interference is likely. The deeper cone will draw water away from a shallower cone or will draw water away from the surface waterbody that has become the point of recharge. n672 Users of that water may no longer have convenient access and will, perhaps, need to extend their well lower to find an alternative source of water.

Various responses have been developed to deal with this problem. Most eastern jurisdictions appear to permit only reasonable groundwater extractions. In these jurisdictions, the harm caused to another's well, the purposes for which the water was extracted, and where the water is to be used are all relevant to the determination of the reasonableness of the extraction. n673

In the western states, the seniority of the adversely affected appropriation may complicate matters. It appears that priority is given considerable, though not necessarily dispositive, weight in determining whether the offending extraction should be allowed to continue. n674

Correlative rights doctrine jurisdictions may reduce all users ratably when interference occurs. In some jurisdictions, the larger user may be required by statute to pay compensation for damages caused by the pumping, and possibly other costs as may be necessary, to provide the same quality and quantity as before the interference. n675 Many jurisdictions attempt to minimize the likelihood of well interference through well spacing requirements. n676

In *Prather v. Eisenmann*, n677 for example, the Nebraska court found the interference to be actionable only to the extent that it caused unreasonable harm to the plaintiffs. Rather than terminate the particular pumping which had caused the problem, the court ordered the defendant to reimburse the plaintiffs for the cost of extending their well deeper into the ground.

COMPUTER-ASSISTED RESEARCH

LEXIS: interfere! w/30 well or groundwater

§ 50.11(o) Recurring Groundwater Problems: Pollution.

The drilling of a well opens a channel into the ground through which pollutants may enter to contaminate the water supplies of other users. In a similar fashion, in some parts of the nation, the removal of fresh water may allow salt water to intrude and destroy the groundwater resources in that area. In either case, pollution can effectively destroy the value of a water right.

Water pollution is generally considered to be an environmental, rather than a water right, problem in most jurisdictions, including the federal government. This has resulted in the adoption of a variety of statutory provisions, n678 or in the creation of a multiplicity of agencies to deal with the problem in that context. Most of these statutes or agencies are concerned with water quality rather than with the allocation of water rights.

There is some question as to the extent to which these environmental measures can or will preempt state-created water rights. On the one hand, it is expressly provided in some of the federal statutes that they shall not interfere with the state authority to allocate water rights. n679 On the other hand, litigation involving the Endangered Species Act suggests otherwise. n680

In some jurisdictions, water quality has been sufficiently linked to water rights that these states may exercise considerable authority over the actual extraction of the water in order to prevent pollution. For example, a state might require pollution prevention measures as a condition associated with the drilling or even pumping of the wells. It has even been held that pollution of the water can constitute an unlawful interference with another's water right. n681 In one California case, the right-holder was considered to be "entitled to have the water...in its natural state of purity." n682

In jurisdictions which recognize less of a connection between the exercise of water rights and pollution, authority over the water right has been held to prohibit only unreasonable, negligent or nuisance type pollution. n683

COMPUTER-ASSISTED RESEARCH

LEXIS: pollution w/30 groundwater

§ 50.11(p) Recurring Groundwater Problems: Subsidence.

Intensive groundwater extractions may deprive the surface of underground support. When this occurs, the surface of the land may sink, creating a problem identified as subsidence. Subsidence can harm roads, fences, ditches, structures and even the storage capacity of the aquifer. It is known that this problem occurs in areas of severe depletion of the groundwater, such as Arizona, Texas, California, and Kansas.

Property law has long recognized the right to have the surface supported in its natural state. This right is typically described as the right to lateral and subjacent support. There are a few cases which have addressed the surface subsidence harm caused by groundwater extractions under this property right approach. n684

It appears to be more common, however, to approach the problem as one of tort or nuisance and invoke those rules, rather than conventional water right principles or general property doctrines in order to fashion a remedy for the problem. n685

A few jurisdictions have attempted to deal with the problem of subsidence within their groundwater management approaches. n686 These efforts are generally grounded upon specific statutory authority which may have the advantage of having been formulated specifically to deal with the problem.

COMPUTER-ASSISTED RESEARCH

LEXIS: subsidence w/30 groundwater

FOOTNOTES:

(n1)Footnote 611. *See, e.g.*, Earl Finbar Murphy, *Some Legal Solutions for Contemporary Problems Concerning Groundwater and Aquifers*, 4 J. Minn. L. Inst. 24 (1988); Susan Trager, *Emerging forums for Groundwater dispute Resolution in California: A Glimpse at the Second Generation of Groundwater Issues and How Agencies Work Towards Problem Resolution, 20 Pac. L.J. 31 (1988).*

(n2)Footnote 612. *See, e.g., Stoner v. Patten, 63 S.E. 897 (Ga. 1909).*

(n3)Footnote 613. Russell Adams, *Updating Groundwater Law: New Wine in Old Bottles*, 39 Ohio St. L. Rev. 520 (1978).

For further discussion of groundwater problems generally, *see:* Gregory Weber, *Forging a More Coherent Groundwater Policy in California: State and Federal Constitutional Challenges to Local Groundwater Export Restrictions, 34 Santa Clara L. Rev. 373 (1994);* Julie McNitt, *A New Chapter in Missouri Percolating Groundwater: The Non-Severability of Water Rights from Land, 59 Mo. L. Rev. 235 (1994).* For further discussion, *see* John Davidson, *South Dakota Groundwater Protection Act, 40 S. Dak. L. Rev. 1 (Spring 1995).*

For a discussion of concerns regarding municipal uses and liability, see Habeeb, Wade R., *Propriety of Injunctive Relief Against Diversion of Water by Municipal Corporation or Public Utility, 42 A.L.R 3d 426* (1998 Supp.). For a discussion of individual landowner liability, *see* Karnezis, Kristine Cordier, *Liability of Landowner Withdrawing Ground Water from Own Land For Subsidence of Adjoining Owner's Land, 5 A.L.R. 4th 614* (1998 Supp.).

See also City of Valparaiso v. Defler, 694 N.E.2d 1177 (Ind. App. 1998) (city's right to remove groundwater from its own property did not shield it from liability claim for subsidence damage caused to adjacent property).

Municipalities may adopt ordinances requiring that township residents must connect to municipal systems and to cease using wells for domestic consumption purposes without violating the residents' due process rights. *See Kusznikow v. Township Council of Township of Stafford, 730 A. 2d. 930 (N.J. Super. 1999).*

In *N.T. Hill v. City of Fresno, 85 Cal. Rptr. 2d 562 (Cal. App. 1999),* the court dealt with a challenge to well water fees charged developers as a condition for approval of subdivision maps. The fees were to pay for the drilling or maintenance of wells that would serve the needs of the new residents. The issues in the case concerned the procedures by which such challenges may be made. See *Postma v. Pollution Control Hearings. 11 P.3d 726 (Wash. 2000).*

(n4)Footnote 614. *Tampa Waterworks v. Cline, 20 So. 780 (Fla. 1896); Koch v. Wick, 87 So. 2d 47 (Fla. 1956).*

Chatfield East Well Co., v. Chatfield East Property Owners Assoc., 956 P.2d 1260 (Colo. 1998) (developers of land denied the right to transfer to well-drilling company any rights to nontributary groundwater under the land on ground that landowners did not "own" the water under their land).

(n5)Footnote 615. Percolating groundwaters are those which "ooze, seep or filter through the soil beneath the surface, without a defined channel." *Clinchfield Coal Corp. v. Compton, 139 S.E. 308, 311 (Va. 1927).*

Colorado has three different classes of groundwaters: 1) groundwater which is tributary to a stream; 2) groundwater that is not tributary to a stream, that is identified as "designated groundwater"; and 3) groundwater that is not tributary to a stream, that is identified as simply "non-tributary groundwater." Colo. Rev. Stat. § 37-90-103(6)(a). "Designated groundwater" is water that is in basins designated by the Colorado Groundwater Commission. "Non-tributary groundwater" is water not tributary to a stream that is outside such basins. *Id.* "Tributary groundwater" is water that will, within 100 years, deplete the flow of a natural stream at a rate greater than one-tenth of one percent of the annual rate of withdrawal. Colo. Rev. Stat. § 37-90-103(10.5). *See also Qualls, Inc. v. Berryman, 789 P.2d 1095 (Colo. 1990); Danielson v. Castle Meadows, 791 P.2d 1106 (Colo. 1990).*

(n6)Footnote 616. *See generally Pfluger v. Clack, 897 S.W.2d 956 (Tex. App. 1995).*

(n7)Footnote 617. Frank Maloney et al., Florida Water Law 1980, 42 (Water Resources Research Center, Univ. of Fla., Pub. No. 50 1980).

(n8)Footnote 618. *See, e.g., Bollinger v. Henry, 375 S.W.2d 1 (Mo. 1966).*

(n9)Footnote 619. *See* Frank Maloney et al., Florida Water Law 1980, 42 (Water Resources Research Center, Univ. of Fla., Pub. No. 50 1980); R. Timothy Weston, *Law of Ground Water in Pennsylvania, 81 Dick. L. Rev. 11, 19 (1976).*

(n10)Footnote 620. *See* Kan. Stat. Ann. § 82a-705.

(n11)Footnote 621. For a discussion of this issue in a mixed jurisdictions *see* Kevin J. Neese, *Certainty in Groundwater Rights: Is Prescription Still Available?* 12 Cal. Real Prop. J. 26 (Fall 1994); E. Shane, *Water Rights and Gila River III: The Winters Doctrine Goes Underground, 4 U. Denv. Water L. Rev. 397 (2001).*

(n12)Footnote 622. *See Acton v. Blundell, 152 Eng. Rep. 1223 (1843). See also Bollinger v. Henry, 375 S.W.2d 1 (Mo. 1966).*

(n13)Footnote 623. *See, e.g., Amand v. Lehman, 47 S.E. 949 (Ga. 1904).*

E. Shane, *Water Rights and Gila River III: The Winters Doctrine Goes Underground, 4 U. Denv. Water L. Rev. 397 (2001);* D. Yoskowitz, *Markets, Mechanisms, Institutions, and the Future of Water, 31 Envtl. L. Rep. 10237 (2001).*

(n14)Footnote 624. *Wilson v. New Bedford, 108 Mass. 261, 265 (1908).*

(n15)Footnote 625. *See, e.g., Village of Tequesta v. Jupiter Inlet Corp., 371 So. 2d 663 (Fla. 1979).*

(n16)Footnote 626. Russell Adams, *Updating Groundwater Law: New Wine in Old Bottles*, 39 Ohio St. L. Rev. 520 (1978).

See also Fain v. Great Springs Waters of America, 973 S.W.2d 327 (Tex. App. 1998) (court refused to overrule well-settled rule of absolute ownership).; *Chatfield East Well Co. v. Chatfield East Property Owners Assoc., 956 P.2d 1260 (Colo. 1998)* (developers of land denied the right to transfer to well-drilling company any rights to nontributary groundwater under the land on ground that landowners did not "own" the water under their land). Texas apparently continues to follow the doctrine. In *Sipriano v. Great Springs Waters of America, 42 Tex. Sup. Ct. J. 629 (1999),* the court refused to substitute the rule of reasonable use for the current common law framework of capture.

In *Maddocks v. Giles, 728 A. 2d 150 (Me. 1999),* the court invoked the absolute ownership doctrine, called the absolute dominion rule, in a dispute in which it was alleged that excavation activities at a gravel pit caused an underground spring to run dry. The court found no liability for the action.

(n17)Footnote 627. *Forbell v. City of New York, 58 N.E. 644 (N.Y. 1900).*

See Messer-Bowers Company, Inc. v. State of Oklahoma, 8 P.3d 877 (Okla. 2000).

(n18)Footnote 628. *See* Richard Harnsberger et al., *Groundwater: From Windmills to Comprehensive Public Management, 52 Neb. L. Rev. 179 (1973).*

Baker v. Aetna, 1996 U.S. Dist. LEXIS 11600 (D.N.J. 1996) (common-law rule of reasonable use of groundwater); *Martin v. Linden, 607 So. 2d 732 (Ala.1995)* (applying reasonable use rule to dispute between city and landowner over water from an aquifer); *Fain v. Great Spring Waters of America, Inc. 973 S.W.2d 327 (Tex. App. 1998)* (failure to plead cause of action under malice exception to absolute ownership doctrine).

(n19)Footnote 629. *See Canada v. City of Shawnee, 64 P.2d 694 (Okla. 1937).*

(n20)Footnote 630. *See, e.g., Barclay v. Abraham, 96 N.W. 1080 (Iowa 1903).*

(n21)Footnote 631. American rule jurisdictions are said to include Alabama, Connecticut, Illinois, Michigan, New Hampshire, New York, Pennsylvania, Tennessee and West Virginia.

In *Adams v. Lang, 553 So. 2d 89 (Ala. 1989),* the court considered the issue of liability resulting from groundwater extraction. In this case, the pumping of water for catfish ponds caused the artesian wells of the plaintiff to cease flowing. The court rejected the law of nuisance as the basis for decision, holding that the conflict was between persons making competing uses of groundwater and hence subject to the rule of reasonable use. In this case, since the water was being used on overlying land, the use of the water for catfish ponds was not an unreasonable use. Therefore, the defendant was not liable for the harm to the artesian wells.

Texas apparently continues to refuse to follow the reasonable use doctrine. In *Sipriano v. Great Springs Waters of America, 42 Tex. Sup. Ct. J. 629 (Tex. 1999),* the court refused to substitute the rule of reasonable use for the current common law framework of capture. *See also Maddocks v. Giles, 728 A. 2d 150 (Me. 1999),* where the court invoked the absolute ownership doctrine, called the absolute dominion rule, rather than the reasonable use rule, in a dispute in which it was alleged that excavation activities at a gravel pit caused an underground spring to run dry. The court found no liability for the action.

For a further discussion of water rights in Texas, *see* Martin Hubert and Bob Bullock, *Senate Bill 1, The First Big and Bold Step Toward Meeting Texas's Future Water Needs,* 30 Texas Tech L. Rev. 53 (1999).

See C. Hesse, Groundwater, Ill. Inst. For Continuing Legal Ed. Handbook, 4-1 (2001).

(n22)Footnote 632. *Katz v. Walkinshaw, 70 P. 663 (Cal. 1902) modified on reh'g, 74 P. 766 (Cal. 1903).*

E. Shane, *Water Rights and Gila River III: The Winters Doctrine Goes Underground, 4 U. Denv. Water L. Rev. 397 (2001).*

(n23)Footnote 633. In some jurisdictions, the extent to which one's use causes harm to other users must be considered in order to determine whether the amount used is within the right. *Katz v. Walkinshaw, 70 P. 663 (Cal. 1902).*

City of Barstow v. Mojave Water Agency, 75 Cal. Rptr. 2d 477 (Cal. App. 1998) (doctrine of equitable apportionment rejected in favor of a requirement that gives due regard to riparian and overlying rights of surface users).

(n24)Footnote 634. Roscoe Cross, *Groundwaters in the Southeast States, 5 S.C.L.Q. 149, 151 (1952).*

(n25)Footnote 635. These include Michigan, Ohio and Wisconsin. *But see Wiggins v. Brazil Coal and Clay Corp., 452 N.E.2d 958 (Ind. 1983),* where the court refused to adopt the Restatement position, despite a dissent which specifically suggested it should be the rule for the case.

(n26)Footnote 636. Restatement (Second) of Torts, §§ 857-858.

Section 858 provides:

(1) A proprietor of land or his grantee who withdraws groundwater from the land and uses it for a beneficial purpose is not subject to liability for interference with the use of water by another unless

(a) the withdrawal of groundwater unreasonably causes harm to a proprietor of neighboring land through lowering the water table or reducing artesian pressure,

(b) the withdrawal of groundwater exceeds the proprietor's reasonable share of the annual supply or total store of groundwater, or

(c) the withdrawal of the groundwater has a direct and substantial effect upon a watercourse or lake and unreasonably causes harm to a person entitled to the use of the water.

(2) The determination on liability under clause (a), (b), and (c) of subsection (1) is governed by the principles stated in sections 850 to 857.

Section 850A defined unreasonableness for purposes of the issues under § 858. Included are such factors as the purpose of use, the suitability of the use to the water supply, the economic value of the use, social values, the extent of harm, the ease with which the harm can be avoided, protection of existing values and the burden of loss.

(n27)Footnote 637. *Prather v. Eisenmann, 261 N.W.2d 766 (Neb. 1978).*

(n28)Footnote 638. *Hinton v. Little, 296 P. 582 (Idaho 1911). See also* Kan. Stat. Ann. § 82a-707.

Chatfield East Well Co., v. Chatfield East Property Owners Assoc., 956 P.2d 1260 (Colo. 1998) (developers of land denied the right to transfer to well-drilling company any rights to nontributary groundwater under the land). For further discussion, *see* W.P. Balleau, *Water Appropriation and Transfer in a General Hydrologic System*, 28 Nat. Resources J. 269 (1988).

(n29)Footnote 639. *See, e.g.*, Colo. Rev. Stat. §§ 37-90-101-37-90-141.

See Julie McNitt, *A New Chapter in Missouri Percolating Groundwater: The Non-Severability of Water Rights from Land, 59 Mo. L. Rev. 235 (1994).* Effective groundwater management may require or permit municipalities to adopt ordinances requiring that township residents must connect to municipal systems and to cease using wells for domestic consumption purposes. These restrictions have been upheld as not violating the residents' due process rights. *See Kusznikow v. Township Council of Township of Stafford, 730 A. 2d. 930 (N.J. Super. 1999).*

(n30)Footnote 640. Wis. Stat. Ann. § 144.052(2)(e) provides that a permit is required when the capacity of the well and rate of withdrawal exceeds 100,000 gal. per day.

(n31)Footnote 641. Peter Davis, *Eastern Water Diversion Permit Statutes: Precedents for Missouri, 47 Mo. L. Rev. 429 (1982).*

(n32)Footnote 642. *See, e.g.*, S.D. Codified Laws Ann. § 46-6-6.1.

(n33)Footnote 643. *526 N.W.2d 422 (Neb. 1995).*

(n34)Footnote 644. *See, e.g.*, Kan. Stat. Ann. § 82a-702.

Effective groundwater management may require or permit municipalities to adopt ordinances requiring that township

residents must connect to municipal systems and to cease using wells for domestic consumption purposes. These restrictions have been upheld as not violating the residents' due process rights. *See Kusznikow v. Township Council of Township of Stafford, 730 A. 2d. 930 (N.J. Super. 1999).*

(n35)Footnote 645. For further discussion, *see* John Davidson, *South Dakota Groundwater Protection Act, 40 S. Dak. L. Rev. 1 (Spring 1995);* J.W. Looney, *Enhancing the Role of Water Districts in Groundwater Management and Surface Water Utilization in Arkansas, 48 Ark. L. Rev. 643 (Summer 1995).*

(n36)Footnote 646. *See, e.g.*, Groundwater Management Act, Ariz. Rev. Stat. § 45-301 *et seq.*, esp. §§ 45-411-45-637.

(n37)Footnote 647. *See, e.g.*, Kan. Stat. Ann. § 82a-1020.

South Plains Lamesa Railroad Ltd. v. High Plains Underground Water Conservation District No. 1., *52 S.W. 3d 770 (Tex App. 2001).*

For further discussion, see P. Wright, *Fixing the Delta: The CalFed Bay-Delta Program and Water Policy Under the Davis Administration,* 31 Golden State U. L. Rev. 331 (2001); C. Hesse, Groundwater, Ill. Inst. For Continuing Legal Ed. Handbook, 4-1 (2001); H. Franz, R. Kropf, and M. Pearce, *An Insatiable Thirst: The Impact of Water Law on Sprawl in the West,* 15 SPG Nat. Resources & Env't 228 (2001); E. Shane, *Water Rights and Gila River III: The Winters Doctrine Goes Underground, 4 U. Denv. Water L. Rev. 397 (2001).*

(n38)Footnote 648. *See, e.g.*, Kan. Stat. Ann. § 82a-1038.

(n39)Footnote 649. *See, e.g.*, Kan. Stat. Ann. § 82a-1020 *et seq.*

(n40)Footnote 650. *See, e.g.*, Fla. Stat. Ann. § 373.069.

(n41)Footnote 651. Ariz. Rev. Stat. 45-301 *et seq.*

In some states the response may be local. Effective groundwater management may require or permit municipalities to adopt ordinances requiring that township residents must connect to municipal systems and to cease using wells for domestic consumption purposes. These restrictions have been upheld as not violating the residents' due process rights. *See Kusznikow v. Township Council of Township of Stafford, 730 A. 2d. 930 (N.J. Super. 1999).*

(n42)Footnote 652. *See* Arizona Groundwater Management Act, Ariz. Rev. Stat. §§ 45-411-45-637. For further discussion, *see* Connall, *A History of the Arizona Groundwater Management Act, 1982 Ariz. St. L.J. 313.*

(n43)Footnote 653. *Id.*

(n44)Footnote 654. *See Town of Chino Valley v. City of Prescott, 638 P.2d 1324 (Ariz. 1982).*

(n45)Footnote 655. *See* Kan. Stat. Ann. § 82a-1038.

(n46)Footnote 656. For example, although the usual priority for consumptive uses in Kansas is normally determined by the timing of the use, in an intensive groundwater use control area, the chief engineer is empowered by the statute to close the area to further appropriation, determine withdrawal limits for each user, apportion the water among the users according to their priority, or reduce the amount or timing or extractions regardless of their priority. Kan. Stat. Ann. § 82a-1038.

(n47)Footnote 657. The annual recharge or safe yield is generally considered the amount that can be extracted without depleting the resource. It is usually calculated with reference to the amount of water that annually is available to

replenish the supply. Kan. Admin. Regs. § 5-22-7.

For further discussion of the Arizona groundwater management plan, *see* Glennon, *Because That's Where the Water Is: Retiring Current Water Uses to Achieve the Safe-Yield Objective of the Arizona Groundwater Management Act, 33 Ariz. L. Rev. 89 (1991);* Kevin Pratt, *Water Banking: A New Tool for Water Management*, 23 Colo. Law. 595 (1994); Gregory Weber, *Forging a More Coherent Groundwater Policy in California: State and Federal Constitutional Challenges to Local Groundwater Export Restrictions, 34 Santa Clara L. Rev. 373 (1994).*

(n48)Footnote 658. *See* J. David Aiken & Raymond Suppalla, *Ground Water Mining and Western Water Rights Law: The Nebraska Experience, 24 S.D. L. Rev. 607 (1979).*

See Wagoner v. CPNRD, 526 N.W.2d 422 (Neb. 1995) for a consideration of the authority of such districts to compel farmers to provide deep soil samples that might reveal residual nitrates.

For further discussion, *see* John Davidson, *South Dakota Groundwater Protection Act, 40 S. Dak. L. Rev. 1 (Spring 1995);* J.W. Looney, *Enhancing the Role of Water Districts in Groundwater Management and Surface Water Utilization in Arkansas, 48 Ark. L. Rev. 643 (Summer 1995);* Stephen E. White & David E. Kromm, *Local Groundwater Management Effectiveness in the Colorado and Kansas Ogallala Region*, 35 Nat. Resources J. 275 (Spring 1995).

(n49)Footnote 659. Ronald Robie & Patricia Donovan, *Water Management of the Future: A Ground Water Storage Program for the California State Water Project, 11 Pac. L.J. 41 (1979);* Norm Thorson, *Storing Water Underground: What's the Aquifer? 57 Neb. L. Rev. 581 (1878).*

For further discussion of groundwater problems see generally Gregory Weber, Forging a More Coherent Groundwater Policy in California: State and Federal Constitutional Challenges to Local Groundwater Export Restrictions, *34 Santa Clara L. Rev. 373 (1994).* In *FM Properties Operating Company v. City of Austin, 22 S.W. 3d 868 (Tx. App. 2000),* the court held the statute constituted an unconstitutional delegation of authority to the landowner. *See also United States v. City of New York, 96 F. Supp. 2d 195 (E.D. N.Y. 2000); West Maricopa Combine, Inc. v. Arizona Department of Water Resources, 26 P.3d 1171 (Az. App. 2001); Bordeaux v. Jefferson Island Storage & Hub LLC, 255 F.3d 271 (5th Cir 2001); Save Our Peninsula Committee v. Monterey County Board of Supervisors, 104 Cal. Rptr, 2d 326 (Cal. App. 2001).*

(n50)Footnote 660. *Ide v. United States, 263 U.S. 497 (1924); United States v. Haga, 276 F. 41 (D. Idaho 1921).*

(n51)Footnote 661. *Miller v. Wheeler, 103 P. 641 (Wash. 1909).*

(n52)Footnote 662. *City of Los Angeles v. City of San Fernando, 537 P.2d 1250 (Cal. 1975); Alameida County Water District v. Niles Sand & Gravel Co., 112 Cal. Rptr. 846, cert. denied, 419 U.S. 869 (1974). See also Jensen v. Department of Ecology, 685 P.2d 1068 (Wash. 1984).*

(n53)Footnote 663. *Kelley v. Carlsbad Irrig. Dist., 415 P.2d 894 (N.M. 1966).*

(n54)Footnote 664. For further discussion of the issue in California, *see* Gregory S. Weber, *Twenty Years of Local Groundwater Export Legislation in California: Lessons from a Patchwork Quilt*, 34 Nat. Resources J. 657 (Summer 1994).

(n55)Footnote 665. *See* Abrams, *Legal Accommodation of Conjunctive Water Use in* Water Today and Tomorrow, 66-72 (John A. Replogle & Kenneth G. Renard eds., 1984); Frank Trelease, *Conjunctive Use of Groundwater and Surface Water*, 27 B Rocky Mt. Minn. L. Inst. 1853 (1982).

(n56)Footnote 666. *See, e.g., Smith v. Brooklyn, 54 N.E. 787 (N.Y. 1899).*

(n57)Footnote 667. *Herriman Irrig. Co. v. Keel, 69 P. 719 (Utah 1902). But see Little Cottonwood Water Co. v. Sandy City, 258 P.2d 440 (Utah 1953).*

(n58)Footnote 668. *See, e.g.*, Colo. Rev. Stat. § 37-92-302.

City of Barstow v. Mojave Water Agency, 75 Cal. Rptr. 2d 477 (Cal. App. 1998) (doctrine of equitable apportionment rejected in favor of a requirement that gives due regard to riparian and overlying rights of surface users).

See also Chatfield East Well Co. v. Chatfield East Property Owners Assoc., 956 P.2d 1260 (Colo. 1998) (developers of land denied the right to transfer to well-drilling company any rights to nontributary groundwater under the land). *See Postma v. Pollution Control Hearings. 11 P.3d 726 (Wash. 2000); In re* the General Adjudication of All Rights to Use Water in the *Gila River, 9 P.3d 1069 (Az. 2000); Upper Black Squirrel Creek Ground Water Management District v. Goss, 993 P.2d 1177 (Colo. 2000); See Messer-Bowers Company, Inc. v. State of Oklahoma, 8 P.3d 877 (Ok. 2000).*

(n59)Footnote 669. *See, e.g., Alamosa-La Jara Water Users Protection Ass'n v. Gould, 674 P.2d 914 (Colo. 1983). See also Templeton v. Pecos Valley Artisan Conservancy Dist., 332 P.2d 465 (N.M. 1958); Langenegger v. Carlsbad Irrig. Dist., 483 P.2d 297 (N.M. 1971).*

(n60)Footnote 670. *See, e.g.*, Kan. Stat. Ann. § 82a-707(a).

Juergensmeier Farms, Inc, v. Kearney County, 2001 Neb. App. LEXIS 183 (Neb. App. 2001).

For further discussion, see B. Pryor, In the Wake of Hiens: Break Out Your Rulers Missouri Its Time to Measure Your Levees, *66 Mo. L. Rev. 469 (2001).*

(n61)Footnote 671. *886 P.2d 689 (Colo. 1994).*

(n62)Footnote 672. It is largely because of groundwater extractions that the Arkansas River is dry through large stretches in Western Kansas. *See* Renick Brothers, Inc. v. State of Kansas, #79C-58 (Gray County, Kan., 1981).

(n63)Footnote 673. *Forbell v. City of New York, 58 N.E. 644 (N.Y. 1900).*

See generally Foley-Gannon, Ella. Institutional Arrangements for Conjunctive Water Management in California and Analysis of Legal Reform Alternatives. 6 Hastings W.-N.W. J. Envtl. L & Policy 273 (2000).

See also In re the General Adjudication of All Rights to Use Water in the *Gila River, 9 P.3d 1069 (Az. 2000); Postma v. Pollution Control Hearings. 11 P.3d 726 (Wash. 2000).*

E. Shane, *Water Rights and Gila River III: The Winters Doctrine Goes Underground, 4 U. Denv. Water L. Rev. 397 (2001);* D. Yoskowitz, *Markets, Mechanisms, Institutions, and the Future of Water, 31 Envtl. L. Rep. 10237 (2001).*

(n64)Footnote 674. In some jurisdictions, the senior's use must be "reasonably adequate" in light of historic use before it will be protected. *City of Colorado Springs v. Bender, 366 P.2d 552 (Colo. 1961).*

In *SRJ I Venture v. Smith Cattle, 820 P.2d 341 (Colo. 1991),* the court held that before a junior user could be enjoined from pumping in favor of a senior user, it must be demonstrated that the pumping of the junior is causing or will cause material injury to the water rights having senior priority.

(n65)Footnote 675. *See* 6 Minn. R. 1.5054 D (1) a.

(n66)Footnote 676. *See* S.D. Codified Laws tit. 46-6-6.1.

(n67)Footnote 677. *261 N.W.2d 766 (Neb. 1978).*

(n68)Footnote 678. *See, e.g.*, Clean Water Act, *33 U.S.C. §§ 1251*-1387; Safe Drinking Water Act, *42 U.S.C. § 300f et seq.*; Resource Recovery and Conservation Act, *42 U.S.C. § 6926 et seq.*

Edwards v. First National Bank of North East, 712 A.2d 33 (Md. App. 1998) (cause of action under common law for groundwater contamination).; *Wilson v. Amoco Corporation, 989 F. Supp. 1159 (D. Wyo. 1998)* (suit to prevent discharges of contaminants into the environment, under Clean Water Act, *33 U.S.C. § 1365*, and the Resources Conservation and Recovery Act, *42 U.S.C. § 6972); Trinity American Corporation v. E.P.A., 150 F.3d 389 (4th Cir. 1998)* (action to review protective order under Safe Drinking Water Act, *42 U.S.C. §§ 300j et seq*., to control contamination of groundwater); *Tiegs v. Watts, 954 P.2d 877 (Wash. 1998)* (landlord held liable for causing a nuisance as a result of contamination of a well used for commercial farming).; *Tri-county Investment Group, Ltd. v. Southern States, Inc., 500 S.E.2d 22 (Ga. App. 1998)* (private action in nuisance for groundwater contamination).

See also Benson, Reed D., *Recommendations for an Environmentally Sound Federal Policy on Western Water, 17 Stan. Envtl. L.J. 247 (1998);* Waldman, Mitchell, *Land, Water, and Plant Management and Protection, In General*, 2 Florida Jurisprudence, 2d., §§ 27-43. (1998).

See Lawson, J. Marshall, *Transboundary Groundwater Pollution: The Impact of Evolving Groundwater Laws on Salt Marsh Water Intrusion of the Floridan Aquifer Along the South Carolina Georgia Border, 1 S.C. Envtl L.J. 85 (2000).*

See also Olin Corporation v. Insurance Company of North America, 221 F.3d 307 (2d Cir. 2000); Tosco Corporation v. Koch Industries, 216 F.3d 886 (10th Cir 2000).

Western National Mutual Insurance Co, v. Westling Manufacturing Inc, 2001 Minn. LEXIS 804 (Min. App. 2001); Hercules, Incorporated v. AIU Insurance Co., 784 A.2d 481 (Del. 2001); Idaho Rural Council v. Bosma, 143 F. Supp. 2d 1169 (D. Id. 2001); Courrtney Enterprises, Inc. v. Publix Supermarkets, Inc. 788 So.. 2d 1045 (Fla. App 2001); Moore v. Texaco, Inc, 244 F.3d 1229 (10th Cir. 2001); Quincy Mutual Fire Insurance Co v. Borough of Bellmawr, 769 A. 2d 1053 (N.J. Super. 2001).

(n69)Footnote 679. *See, e.g.*, Section 101(g) of the Clean Water Act *[33 U.S.C. § 1251*(g)].

(n70)Footnote 680. *See United States v. Glenn-Colusa Irrig. Dist., 788 F. Supp. 1126 (E.D. Cal. 1992).*

(n71)Footnote 681. *Bauerle v. Board of County Road Comm'rs, 201 N.W.2d 799 (Mich. 1972).*

(n72)Footnote 682. *Wright v. Best, 121 P.2d 702 (Cal. 1949).*

(n73)Footnote 683. Charles Meyers & Dan Tarlock, Selected Legal and Economic Aspects of Environmental Protection, 82 (1971).

(n74)Footnote 684. *See, e.g., Finley v. Teeter Stone, Inc., 248 A.2d 106 (Md. 1968).*

See, e.g., Ytreberg, Dag, *Liability for Damages to Adjacent Land or Building Caused by Dredging, 62 A.L.R. 3D 426;* Karnezis, Kristine Cordier, *Liability of Landowner Withdrawing Ground Water from Own Land For Subsidence of Adjoining Owner's Land, 5 A.L.R. 4th 614.*

See also City of Valparaiso v. Defler, 694 N.E.2d 1177 (Ind. App. 1998) (City's right to remove groundwater from its own property did not shield it from liability claim for subsidence damage caused to adjacent property).

See Kaufman v. Sewerage and Water Board of New Orleans, 762 So. 2d 644 (La. App. 2000), where the court held

that the complainant had not carried his burden of proof as to whether the board's work caused the damage.

(n75)Footnote 685. *See, e.g., Henderson v. Wade Sand & Gravel Co., 388 So. 2d 900 (Ala. 1980).*

(n76)Footnote 686. *See, e.g.,* Texas Water Code Ann. § 52.001 *et seq.*

South Plains Lamesa Railroad Ltd. v. High Plains Underground Water Conservation District No. 1., *52 S.W. 3d 770 (Tex App. 2001).*

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CHAPTER 50 WATER RIGHTS

6-50 Thompson on Real Property, Thomas Editions § 50.12

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§ 50.12 Unified Systems.

§ 50.12(a) In General.

A number of jurisdictions have sought to eliminate the compartmentalization of the common law and deal with all water in the same manner. n687 In these jurisdictions, rights in surface and groundwater will be acquired and regulated according to a common set of rules. n688

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LEXIS: unified w/3 system! w/15 groundwater or surface

§ 50.12(b) Advantages.

The primary advantage of this approach is that it adopts a consistent regime for dealing with rights in both surface and groundwaters. It may be that the principles of such a regime will be those ordinarily found in appropriative jurisdictions, n689 riparian jurisdictions, n690 or a hybrid of the two. n691

Breaking down the rigid walls between surface and groundwaters makes it much easier to deal with what are often described as conjunctive use problems -- uses of one kind of water (such as groundwater) that interfere with the use of the other (surface waters). n692

§ 50.12(c) Dealing with Surface-groundwater Interface.

The use of groundwater interfaces with the use of surface water; it is sometimes said that the uses are "conjunctive." n693 This kind of use is difficult to deal with for most jurisdictions, because of the historic compartmentalization of water rights law which has resulted in different rules for surface and groundwater. These jurisdictions tend to resolve the problem by selecting either the surface n694 or the groundwater n695 rules as the decisional paradigm. A few jurisdictions have developed special restrictions on groundwater which specifically apply to uses which interfere with surface rights. n696

Jurisdictions which have adopted a unified approach to the problem of water right allocation, of course, do not distinguish between surface and groundwaters, and therefore apply the same rules to both. These states appear to have the greatest flexibility in dealing with the problem.

COMPUTER-ASSISTED RESEARCH

LEXIS: conjunctive w/5 use! w/30 groundwater or surface

§ 50.12(d) Disadvantages.

The primary disadvantage of most present unified systems is that they only regulate consumptive uses of the water and do not address non-consumptive issues or liability problems associated with diffused water. This makes it difficult to deal, for example, with the situation where the water needs to be left in the stream to facilitate recreational use but is being removed by someone entitled to do so under a valid consumptive use right. n697 In these situations, if the water is allowed to be withdrawn from the source of supply, there may not be enough remaining for the non-consumptive right-holders to enjoy. On the other hand, if non-consumptive uses are given the larger measure of protection, the ability to make consumptive uses will necessarily be diminished, which may be considered an inefficient use of the resource.

FOOTNOTES:
(n1)Footnote 687. *See, e.g.,* Kan. Stat. Ann. § 82a-707(a).

Southwest Florida Water Management District v. Charlotte County, 774 So. 2d 903 (Fla. App. 2001).

See also D. Yoskowitz, *Markets, Mechanisms, Institutions, and the Future of Water, 31 Envtl. L. Rep. 10237 (2001).*

(n2)Footnote 688. For further discussion, *see* John C. Peck, *The Kansas Water Appropriation Act: A Fifty-Year Perspective, 43 U. Kan. L. Rev. 735 (July 1995).*

(n3)Footnote 689. *See, e.g.,* Kan. Stat. Ann. § 82a-701 *et seq.*

(n4)Footnote 690. *See, e.g.,* Iowa Stat. § 455B.261 *et seq.*

(n5)Footnote 691. *See, e.g.,* Fla. Stat. § 373.013 *et seq.*

(n6)Footnote 692. For further discussion, *see* John C. Peck, *The Kansas Water Appropriation Act: A Fifty-Year Perspective, 43 U. Kan. L. Rev. 735 (July 1995).*

(n7)Footnote 693. *See* Robert Abrams, *Legal Accommodation of Conjunctive Water Use in* Water Today and Tomorrow, 66-72 (John A. Replogle & Kenneth G. Renard eds., 1984); Frank Trelease, *Conjunctive Use of Groundwater and Surface Water*, 27 B Rocky Mt. Min. L. Inst. 1853 (1982).

See generally Foley-Gannon, Ella. Institutional Arrangements for Conjunctive Water Management in California and Analysis of Legal Reform Alternatives. 6 Hastings W. -N.W. J. Envtl. L & Policy 273 (2000); *See also Postma v. Pollution Control Hearings. 11 P.3d 726 (Wash. 2000); In re* the General Adjudication of All Rights to Use Water in the *Gila River, 9 P.3d 1069 (Az. 2000); Upper Black Squirrel Creek Ground Water Management District v. Goss, 993 P.2d 1177 (Colo. 2000).*

(n8)Footnote 694. *See, e.g., Smith v. Brooklyn, 54 N.E. 787 (N.Y. 1899).*

(n9)Footnote 695. *Herriman Irrig. Co. v. Keel, 69 P. 719 (Utah 1902). But see Little Cottonwood Water Co. v. Sandy City, 258 P.2d 440 (Utah 1953).*

(n10)Footnote 696. *See, e.g.,* Colo. Rev. Stat. § 37-92-302.

(n11)Footnote 697. There are a few cases in which non-consumptive uses have been given protection against competing consumptive uses. *See Taylor v. Tampa Coal Co., 46 So. 2d 392 (Fla. 1950),* where the defendant was enjoined from pumping water from the lake for irrigation purposes and thereby lowering the level of the lake in order to protect the recreational use rights of boating, bathing, picnicking and fishing. *See also Sanitary District v. United States, 266 U.S. 405 (1912),* in which the Sanitary District was enjoined from diverting water in quantities which would have lowered the level of the Great Lakes and thereby prevented the riparian owners from using their docks and wharfs to access the water for commercial activities.

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CHAPTER 50 WATER RIGHTS

6-50 Thompson on Real Property, Thomas Editions § 50.13

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§ 50.13 Administrative Management of Water Rights.

§ 50.13(a) In General.

Under traditional riparian and appropriative doctrines, water rights were created and recognized with little intervention on the part of state. In riparian jurisdictions, rights resulted from the mere act of owning riparian land. No permission or approval by any public agency or official was required. Similarly, in appropriative jurisdictions, the right resulted from the acts of diverting the water from the source of supply and applying it to a beneficial use. As in the case of riparian systems, no official approval or permission was needed. In both cases, the respective systems developed at a time when governments were weak and the public interest ill-defined. In each case, the law grew largely as the result of case law involving individuals' efforts to assert water rights against the claimed interference of others. In such a scenario, devices such as land ownership or physical diversion of the water could readily be used as the formal means by which water rights were secured and by which the world was put on notice of the individual claimant's rights. Early statutes relating to water rights in these jurisdictions therefore tended to focus on specific problems such as conservation, drainage, public water supply and water policy development. n698

In recent years, there has been a general movement in the direction of greater state control over the water right acquisition and enforcement processes. Today, as a general rule, most states, including many riparian jurisdictions, will be directly involved in full administration of the state's water right system and may actually make the determination as to whether water is available to meet existing as well as proposed uses. n699

COMPUTER-ASSISTED RESEARCH

LEXIS: state! w/5 administrat! or manage! w/15 water! w/1 right!

§ 50.13(b) The Administrator as the Source of the Water Right.

In jurisdictions which rely upon traditional riparian or administrative doctrines, there may be little for an administrator to do. In these jurisdictions, water rights will continue to be secured and protected through private activities and actions rather than through any form of state intervention.

In other jurisdictions, the administrator may play an active but secondary role to that of the individual. In these jurisdictions, the individual is still responsible for performing the acts by which the water right is secured and will generally not need any permission or approval from the administrator. However, the administrator may act as a registrar and as the primary source of public information and notice regarding water rights. n700 Indeed, a water right may not be enforceable against others unless and until they are officially put on notice of the existence of the claim. To create such notice, the right may need to be registered with the administrator. In this role, the administrator functions in a manner very similar to the registrar of deeds.

In some jurisdictions, this role has been enlarged to involve some influence or control over decisions as to the availability of unappropriated water, whether uses for which the right is claimed are reasonable or beneficial, whether one use interferes with prior or protected uses, and so forth, but does so within the confines of the registration process. The administrator in these jurisdictions may be in charge of a "permit" acquisition process. In such states, it is commonly recognized that the water right will not be recognized unless and until a permit is issued. This has the obvious effect of shifting a measure of control over the actual creation of the water right away from the individual claimant and to the administrator.

In some jurisdictions, very much authority and control over the water right acquisition process is recognized on the part of the administrator. In these jurisdictions, no water right may be secured without the specific *prior* approval of the administrator. n701 In these jurisdictions, it might be said that the administrator has actually replaced the individual right claimant as the party which practically and functionally controls the water right acquisition process. This approach has been criticized because of the discretion given to the administrator n702 by the water right allocation statutes in these jurisdictions, which impose minimal constraints on the administrator's discretion regarding the creation and protection of water rights. n703

COMPUTER-ASSISTED RESEARCH

LEXIS: administrator! w/15 water! w/1 right! w/5 acquisition!

§ 50.13(c) The Administrator as Policeman.

In jurisdictions in which the individual is responsible for securing the water right, the individual also generally has the responsibility to protect those rights. Interference by others will typically be policed through lawsuits brought against the alleged infringer, and the court will function as the arbiter for water rights disputes. As more responsibility over water rights is shifted to the administrator, it is common to find an enlarged police role as well. In some jurisdictions, the administrator will be able to take action to enjoin infringing activities when moved to do so by complaints from affected rightholders. In jurisdictions granting the greatest measure of power to the administrator, the administrator has the initiative and discretion to act in protecting the integrity of the entire system or in resolving specific problems.

§ 50.13(d) Policing the Administrator.

A major concern that arises as this authority and control over water rights is shifted to an administrator, is whether the administrator will act arbitrarily in administering the water right system. This matter is generally governed by statutes that limit administrative discretion n704 and guard against arbitrary actions. n705

In most jurisdictions, regardless of the power of the administrator, if the individual has done what the statute requires in order to secure a water right, and water is available in a sufficient quantity to supply the right, the water right *must* be granted. n706

COMPUTER-ASSISTED RESEARCH

LEXIS: administrat! w/5 discretion or arbitrar! w/30 w/1 right!

FOOTNOTES:
(n1)Footnote 698. *See generally* Peter Davis, *Eastern Water Diversion Permit Statutes: Precedents for Missouri*? *47 Mo. L. Rev. 429 (1982);* J. H. Beuscher, *Appropriation Water Law Elements in Riparian States, 10 BUFF. L. Rev. 448 (1961);* Richard Ausness, *Water Rights Legislation in the East: A Program for Reform, 24 WM. & MARY L. Rev. 547 (1983).*

Southwest Florida Water Management District v. Charlotte County, 774 So. 2d 903 (Fla. App. 2001); United States v. Commonwealth of Puerto Rico, 144 F. Supp. 2d. 46 (D. Puerto Rico 2001).

For further discussion, see J. Leshy, *Water Rights for New Federal Land Conservation Programs: A Turn-of-the Century Evaluation, 4 U. Denv. Water L. Rev. 271 (2001);* E. Shane, *Water Rights and Gila River III: The Winters Doctrine Goes Underground, 4 U. Denv. Water L. Rev. 397 (2001).*

See also Sanpete Water Conservancy District v. Carbon Water Conservancy District, 226 F.3d 1170 (10th Cir. 2000).

(n2)Footnote 699. For further discussion, *see* Ray Jay Davis, *Water, Water Everywhere: Two New Model Water Codes, 9 Prob. & Prop. 8* (Sept.-Oct. 1995); John C. Peck, *The Kansas Water Appropriation Act: A Fifty-Year Perspective, 43 U. Kan. L. Rev. 735 (July 1995);* David M. Howitt, *Oregon Water Management: The Need to Combat Water Spreading and Some Proposals for the Future, 9 J. Envtl. L. & Litig. 249 (Annual 1994). See generally* Young, Daniel S. and Helton, Duane D. *Developing a Water Supply in Colorado: The Role of an Engineer. 3 U. Denver Water L. Rev. 373 (2000).*

(n3)Footnote 700. In some of these jurisdictions, the administrator may be more than a registrar of claims and may have responsibility regarding determinations of water availability and of the likelihood of conflict between proposed allocations of water and existing water users. *See* Frank Trelease, *The Model Water Code, the Wise Administrator and the Goddam Bureaucrat*, 14 Nat. Res. J. 207 (1974).

(n4)Footnote 701. *See, e.g.*, Kan. Stat. Ann. §82a-705:

No person shall have the power or authority to acquire an appropriation right to the use of water for other than domestic use without first obtaining the approval of the chief engineer... .

In 1985, the Montana legislature provided that only the Department of Natural Resources and Conservation can make appropriations in excess of 4,000 acre-feet a year and 5.5 cubic feet per second is to be consumed or if water is to be transported outside the basin of the river. Private parties wishing to use this water must lease it from the Department and the leases cannot be for more than 50 years. Mont. Code Ann. §§ 85-2-141 and 85-2-301.

See generally, Young, Daniel S. and Helton, Duane D. *Developing a Water Supply in Colorado: The Role of an Engineer. 3 U. Denver Water L. Rev. 373 (2000).*

(n5)Footnote 702. *See* Frank Trelease, *The Model Water Code, the Wise Administrator and the Goddam Bureaucrat*, 14 Nat. Res. J. 207 (1974).

(n6)Footnote 703. For further discussion, *see* Benjamin Lombard, Jr., *Water Conservation and Drought Protection*, 40 Rocky Mts. Mineral L. Inst. 25 (Annual 1994).

(n7)Footnote 704. *See* Frank Maloney et al., A Model Water Code (1972). This work is the direct basis for the Florida water right statute, Fla. Stat. ch. 373 *et seq.*, which makes all the waters of the state subject to regulation unless

specifically exempted. Fla. Stat. Ann. § 373.023(1). The administrator under this system is the Department of Environmental Regulation and the various water management districts. Fla. Stat. Ann. § 373.016(3).

(n8)Footnote 705. *See* Kan. Stat. Ann. § 82a-711.

(n9)Footnote 706. Some administrators may be less restricted than others. In Kansas, for example, the administrator is given considerable flexibility to determine whether the proposed application "prejudicially or unreasonably affects the public interest." Kan. Stat. Ann. § 82a-711(a). In making that determination, the administrator must consider the effect of the application on 1) established minimum stream-flows, 2) the area, safe yield and recharge rate of the appropriate water supply, 3) the priority of existing claims, 4) the amount of each existing claim and 5) "all other matters pertaining to such question. *Id.* § 82a-711(b).

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CHAPTER 50 WATER RIGHTS

6-50 Thompson on Real Property, Thomas Editions § 50.14

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§ 50.14 Making Changes in Water Right Allocation Systems.

[Go To Supp]

§ 50.14(a) In General.

Many jurisdictions have struggled with the need to modernize their water right allocation regimes. Such changes, however, have not always been easy to make because of the difficult nature of the legal issues and concerns that are raised once a system seeks to depart from long-standing positions and rules. n707

§ 50.14(b) The Need to Change.

Pressure to make such changes results from a variety of structural, informational and public interest factors. For example, most jurisdictions have encountered difficulties as a result of the fact that the law of water rights developed with a strict sense of separation between surface and groundwaters. This has made it difficult to deal with situations where the use of one kind of water, such as groundwater, causes interference with rights claimed in another, such as surface water. Likewise, jurisdictions often made binding decisions on less than adequate information about the resource itself which has had the effect of permitting the establishment of undesirable allocation or use patterns. Assumptions about future water availability, which have not always been accurate, have undoubtedly caused jurisdictions to adopt rules which now serve to perpetuate questionable uses or practices. Finally, many jurisdictions have experienced a lack of flexibility in meeting changing societal needs for water and responding to changing notions regarding the desirability of particular uses. These, and undoubtedly other, factors have suggested that there are particular attributes of virtually all allocation regimes which from time to time will be considered no longer useful or desirable.

On this basis, a number of jurisdictions have determined that the allocation of water rights on the basis of land ownership is not appropriate where water is scarce and the need is physically remote to the source. These states have therefore replaced riparian principles with appropriative ones. n708

§ 50.14(c) State Authority to Change Allocation Regimes.

It is well settled that the choice of which water right regime should govern allocation questions is a matter of state rather

than federal law. n709 This includes the authority to initially determine which of the various doctrines to use, n710 as well as to later decide to change from one doctrine to another. n711 The primary rationale for such authority appears to be lodged within the police power of the jurisdiction. n712

COMPUTER-ASSISTED RESEARCH

LEXIS: state! w/5 authori! w/15 change! or choice! w/30 water! w/1 right! w/2 regime! or system!

§ 50.14(d) Limits on State Authority.

It has been held that the ability to make fundamental changes in the water right allocation regime of a particular state is limited by the extent to which such changes interfere with or destroy existing valid, vested rights. n713 It has been held that unexercised or unused rights may not be considered "vested" for purposes of making such changes. n714 The rationale for this holding appears to be the difficulty associated with the quantification of the right where the exercise of the right is speculative at best.

It might also be argued that, since the power to make the changes is derived from the police power, the exercise of that power may be tested according to general limitations on the police power as well. That is, unless the proposed change falls within the objectives of the police power of the jurisdiction, it could be argued that the changes may not be made. n715 Conversely, as long as the proposed change promotes the health, safety and welfare of the community and the police power is not being exercised unreasonably, nor in an arbitrary, capricious, confiscatory or discriminatory manner, the change should be permitted. n716

COMPUTER-ASSISTED RESEARCH

LEXIS: state! or change! w/15 interfere! or destroy! w/30 water! w/5 right!

FOOTNOTES:

(n1)Footnote 707. The water rights doctrines generally, and particularly those of Prior Appropriation, have been criticized as being inherently flawed for their failure to adequately address environmental issues or because of their inability to deal with the matter of institutionalized waste. *See* Charles Wilkinson, *Aldo Leopold and Western Water Law: Thinking Perpendicular to the Prior Appropriation Doctrine*, 24 Land and Water L. Rev. 1 (1989); John Leshy, *The Prior Appropriation Doctrine of Water Law in the West: An Emperor with Few Clothes*, 19 J. of the West 5 (1990); Richard Burleigh, *Agricultural Chemicals and Groundwater Protection: Navigating the Complex Web of Regulatory Controls, 30 Idaho L. Rev. 443 (1994);* Thomas Fahey, Jr. & Richard Roznoy, *Aquifer Protection in Connecticut: Environmental Land Use Restrictions Run Deep, 68 Conn. B.J. 98 (1994).* For further discussion, *see* Ray Jay Davis, *Water, Water Everywhere: Two New Model Water Codes, 9 Prob. & Prop. 8* (Sept.-Oct. 1995); Todd S. Hageman, *Water Law: The Oklahoma Supreme Court's Resurrection of Riparian Rights Leaves Municipal Water Supplies High and Dry (case note), 47 Okla. L. Rev. 183 (Spring 1994);* Christine A. Klein, *The Constitutional Mythology of Western Water Law, 14 Va. Envtl. L.J. 13 (Winter 1995);* John C. Peck, *The Kansas Water Appropriation Act: A Fifty-Year Perspective, 43 U. Kan. L. Rev. 735 (July 1995).*

J. Leshy, *Water Rights for New Federal Land Conservation Programs: A Turn-of-the Century Evaluation, 4 U. Denv. Water L. Rev. 271 (2001).*

(n2)Footnote 708. *See:* Miss. Code § 51-3-7; N.D. Cent. Code § 61-01-01.1; Or. Laws § 1090; S.D. Codified Laws Ann. § 46-1-9; Wash. Rev. Code Ann. §§ 90.14-010, 90.14.170.

(n3)Footnote 709. *See Kansas v. Colorado, 206 U.S. 46 at 94 (1907):*

> [Each state] may determine for itself whether the common law rule in respect to riparian rights or

> that doctrine which obtains in the arid regions of the West of the appropriation of waters for the purpose of irrigation shall control. Congress cannot enforce either rule upon any state.

In *California-Oregon Power Co. v. Beaver Portland Cement Co., 295 U.S. 142 (1935),* the court held that the states have the power to legislate with respect to waters and water rights:

> as they deemed wise in the public interest ... with the right in each to determine for itself to what extent the rule of appropriation or the common law rule in respect of riparian rights should obtain. For since "Congress cannot enforce either rule upon any state ... the full power of choice must remain with the state."

(n4)Footnote 710. In *Connecticut v. Massachusetts, 282 U.S. 660 (1932),* the court observed that:

> the laws in respect of riparian rights that happen to be effective for the time being in both states do not necessarily constitute a dependable guide or just basis for the decision of controversies such as that here presented. The rules of the common law on that subject do not obtain in all the States of the Union, and there are variations in their application. The doctrine of appropriation prevails in some states. And every state is free to change its laws governing riparian ownership and to permit the appropriation of flowing waters for such purposes as it may deem wise.

(n5)Footnote 711. *See Baumann v. Smrha, 145 F. Supp. 617 (D.C. Kan. 1956), aff'd, 352 U.S. 863 (1956):*

> The power of a state either to modify or reject the doctrine of riparian rights because unsuited to the conditions in the state and to put into force the doctrine of prior appropriation and application to beneficial use or of reasonable use has been long settled by the adjudicated cases. Of course, such a modification in the law of the state must recognize valid existing vested rights... .

Fain v. Great Springs Waters of America, 973 S.W.2d 327 (Tex. App. 1998) (court refused to overrule well-settled rule of absolute ownership).

(n6)Footnote 712. For further discussion, *see* John C. Peck, *The Kansas Water Appropriation Act: A Fifty-Year Perspective, 43 U. Kan. L. Rev. 735 (July 1995).*

(n7)Footnote 713. *See Baumann v. Smrha, 145 F. Supp. 617 (D.C. Kan. 1956), aff'd, 352 U.S. 863 (1956):*

> [S]uch a modification in the law of the state must recognize valid existing vested rights... .

For an interesting analysis of changes in the California water laws and their impact on vested rights, *see Imperial Irrig. Dist. v. State Water Resources Control Bd., 275 Cal. Rptr. 250 (1990).*

See SRBA v. Potlach Corporation, 12 P.3d 1260 (Id. 2000); G.L. Mezzetta, Inc. v City of American Canyon, 93 Cal. Rptr. 2d. 292 (2000).

See also South Fork Band of Te-Moak Tribe of Western Shoshone Indians of Nevada v. Sixth Judicial District Court of Nevada, 7 P.3d 455 (Nev. 2000).

(n8)Footnote 714. *See Baumann v. Smrha, 145 F. Supp. 617 (D.C. Kan. 1956), aff'd, 352 U.S. 863 (1956):*

> [W]e do not regard a landowner as having a vested right in underground waters underlying his land which he has not appropriated and applied to beneficial use. We hold that the state could properly apply the doctrine of prior appropriation and application to beneficial use to unused and unappropriated waters so long as it recognized and afforded protection to rights which landowners had acquired at the time of the effective date of the act to appropriate and use water.

See also In re Hood River, 227 P. 1065 (Or. 1924). But see Franco-American Charolaise, Ltd. v. Oklahoma Water Resources Bd., 855 P.2d 568 (Okla. 1990) holding that vested, but presently unexercised, common-law riparian rights cannot be taken without compensation.

But see Franco-American Charolaise, Ltd. v. The Oklahoma Water Resources Board, 855 P.2d 569 (Okla. 1990), readopted, reissued and rehearing denied, April 3, 1993, where the court invalidated a statutory amendment that had the apparent effect of extinguishing future unexercised riparian rights of riparian landowners. Under the provisions of a 1963 statutory amendment, water rights could be secured after that date on the basis of an appropriation. The question in this case was whether the legislature could abrogate the riparian landowner's presently unexercised right to initiate new reasonable uses on the water in the stream by requiring that any such activity comply with the right acquisition rules for new water appropriations. In holding in favor of the landowner, the court ruled that the amendment unconstitutionally deprived the landowner of a property interest in the water rights. The court reasoned that to hold otherwise deprived the riparian landowner of the right to have his or her use of the water be judged on the basis of the "reasonableness" principles of the riparian doctrine even where the "new" claim was grounded only in the expansion of an existing use. The impact of the statute was seen as judging all new uses, regardless of their nature or origin, according to the "time" priority established in the appropriative system. This was seen as antithetical to the very nature of the common-law riparian right, which places no stock in the fact of past use, present use or even non-use.

(n9)Footnote 715. *See* John Peck, Legal Constraints On The State of Kansas In Imposing Conservation Practices on Holders of Existing Water Rights (United States Department of the Interior, 1986); Op. Att'y Gen. Kan. 88-6 (Jan. 19, 1988).

(n10)Footnote 716. *See Keystone Coal Ass'n v. DeBenedictis, 480 U.S. 470 (1987). See also Imperial Irrig. Dist. v. State Water Resources Control Bd., 275 Cal. Rptr. 250 (1990)* where the court quotes with approval Eric Freyvogle, *Context and Accommodation in Modern Property Law, 41 Stanford L. Rev. 1592, 1546-47 (1989)* that "California has regained for the public much of the power to prescribe water use practices, to limit waste, and to sanction water transfers." *But see Franco-American Charolaise, Ltd. v. Oklahoma Water Resources Bd., 855 P.2d 568 (Okla. 1990)* holding that vested, but presently unexercised, common-law riparian rights cannot be taken without compensation. In this case, it was argued that the legislation in question was a valid exercise of the police power in the same sense that a zoning ordinance is. This was rejected by the court.

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CHAPTER 50 WATER RIGHTS

6-50 Thompson on Real Property, Thomas Editions § 50.15

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§ 50.15 Interstate Allocation of Water.

[Go To Supp]

§ 50.15(a) In General.

Many watercourses flow from one state to another across state boundaries. It is, therefore, quite possible that the water right laws of one of the states through which the water flows will be different in important respects from the laws of other states associated with that same water course. For example, the Missouri River flows through or past states which have adopted appropriative principles, n717 riparian principles, n718 or a mixture of both. n719 This means that individuals who claim water from that source may have acquired their rights in very different ways. Problems arise when the use of water in one state causes harm to, or interferes with, uses of the water made by water right holders in another state. Because of differences between the states regarding allocation rules, these problems are particularly difficult to deal with. A number of different methods have been developed to resolve disputes where the watercourse crosses state lines. n720

COMPUTER-ASSISTED RESEARCH

LEXIS: interstate w/5 allocat! w/15 water!

§ 50.15(b) Jurisdictional Matters: Disputes Between Individuals.

It may be possible to resolve disputes involving parties from different states in the state courts of, or federal courts sitting in, one or the other of the states which has jurisdiction over the watercourse in which the rights are claimed. n721 This approach is best suited to the resolution of disputes between individual water right claimants, but it may require that the party from the non-forum state submit to the jurisdiction of the other state, n722 or that jurisdiction be secured through the extraterritorial jurisdiction of the state. n723 On the other hand, it is settled that a state does not have a duty under the Constitution to protect individuals from harm inflicted by other private entities n724 and therefore may decline to decide the matter. n725

COMPUTER-ASSISTED RESEARCH

LEXIS: individual! w/5 dispute! w/30 water! w/1 right!

§ 50.15(c) Jurisdictional Matters: the State Acts as *Parens Patriae*.

Where the dispute involves many individuals or the right of the state to control the rights to water within a particular watercourse, it may be necessary to bring the action on behalf of the citizens of one state against the neighboring state. n726 When states sue each other on behalf of their citizens, such suits generally must be brought in the United States Supreme Court. n727 Although Supreme Court jurisdiction is considered "exclusive," the Court has, on occasion, refused jurisdiction. n728 Where the United States is a required party to the suit, consent to join the United States must be secured before judicial relief may be granted. n729 The United States may be involved because of the application of federal statutes such as the Endangered Species Act. n730 Whether consent is granted is usually discretionary, n731 except in the case of McCarran Adjudications. n732

§ 50.15(d) Resolution Doctrines: Comity.

Comity is the principle by which the courts of one jurisdiction may give effect to the laws and decisions of another jurisdiction as a matter of courtesy. Although a court may be reluctant to invoke the laws of another jurisdiction which were fundamentally and conceptually different from its own, where the water right dispute involves jurisdictions that use essentially the same allocation system, one court may comfortably resolve the dispute by applying the common principles of both states' water right allocation systems to the dispute as if the boundaries between the states did not exist. In the case of Bean v. Morris, n733 for example, the court found that even though the problem involved claims to Sage Creek which flowed through portions of both Wyoming and Montana, both jurisdictions allocated water rights on the basis of similar appropriative principles. The court then determined that "in the absence of legislation to the contrary, the States were willing to ignore boundaries, and allowed the same rights to be acquired from outside the State that could be acquired from within." As a result, the court effectively merged the priority structure of the two jurisdictions and the rights of individual appropriators in the respective jurisdictions were considered to have been allocated as if no boundary between the states existed.

In these cases, the law tends to be primarily concerned with the respective equities of water claimed by the respective individual claimants rather than the particular doctrines followed in the respective states. n734

COMPUTER-ASSISTED RESEARCH

LEXIS: comity w/30 water! w/1 right!

§ 50.15(e) Resolution Doctrines: Equitable Apportionment.

Equitable apportionment is an approach taken by the courts and is particularly suited to situations in which the jurisdictions are quite different with respect to their allocation rules and principles. Here, the volume of the watercourse or stream is apportioned between the two states in a way which establishes the quantity of water that is to be managed under the laws of each state. n735 In the first case in which this judicial doctrine was invoked, *Kansas v. Colorado*, n736 the court had to resolve a problem involving one state which allocated water rights in the Arkansas River on the basis of riparian principles, whereas the other invoked appropriative principles. There, the court held that the waters of the River should be equitably apportioned between the states on the ground that:

> One cardinal rule, underlying all the relations of the States to each other, is that of equality of right. Each State stands on the same level with all the rest. It can impose its own legislation on no one of the others, and is bound to yield its own views to none. Yet whenever ... the action of one State reaches through the agency of natural laws, into the territory of another State, the question of the extent and the limitations of the rights of the two States becomes a matter of justiciable dispute between them, and this court is called upon to settle that dispute in such a way as will recognize the equal rights of both and at

the same time establish justice between them. n737

The primary object of the equitable apportionment approach is to fairly and equitably divide the flow of the watercourse between the states involved. This is a difficult matter to determine and typically involves the appointment of a special master to make a factual determination of the problem and make recommendations to the court. This investigation generally considers such diverse matters as the physical and climatic conditions of the respective states; the nature and extent of established uses; the dependence of the economies of both states upon particular water uses; the quantities of water actually available for use, including storage water, in both states; the benefits and harm resulting from the competing existing and proposed uses; the efficiency of water use and the appropriateness of conservation measures in each state to augment water supplies and minimize harm or injury to users in the other state, and so forth. n738

In addition, the court may impose affirmative duties on the respective states to manage the waters so that a fair share is available for use in the other state. n739

COMPUTER-ASSISTED RESEARCH

LEXIS: equitable w/1 apportionment w/30 water!

§ 50.15(f) Other Resolution Approaches: Interstate Compacts.

An alternative to adjudication, of course, is negotiation. In a number of cases, states have avoided the always uncertain outcome of judicial resolution by negotiating a resolution of the problem with the other states involved with the watercourse. This is done through the adoption of an interstate compact or agreement. n740 Such interstate compacts have been held to be binding provided Congress assents to the compact. n741

Properly adopted and approved interstate compacts which are based upon the principles of equitable apportionment have been held to have the status of federal law, n742 and to have the effect of preempting contrary state laws. n743 They have also been held not to constitute an impermissible burden on interstate commerce. n744

Interstate compacts are considered to be fully binding contracts between the signatory states which cannot be unilaterally nullified by either state. n745 However, it has been held that state courts can interpret state laws alleged to be in conflict with the compact according to the general allocation laws of the state. n746

The binding status of an interstate compact alters the posture of states involved in trans-boundary water problems in the sense that the compacts would also seem to be considered to represent a binding official position of the state on the matter of the choice of a particular dispute resolution device for problems of interstate water allocation and, as such, must be considered the preferred method of dispute resolution for matters covered by the compact. Therefore, disagreements between the states should be addressed and, if possible, resolved, within the framework of the compact before it would be proper for the state to seek to adjudicate the matter on the basis of equitable apportionment litigation. n747

COMPUTER-ASSISTED RESEARCH

LEXIS: interstate w/1 compact! w/30 water!

§ 50.15(g) Other Resolution Approaches: Congressional Apportionment.

In only a few cases has Congress directly intervened and mandated a particular apportionment of an interstate watercourse. In the case of the Colorado River, for example, it has been held that Congress legislatively allocated the lower basin of the river between the states involved in the Boulder Canyon Project. n748

On the other hand, it has been held n749 that Congress did not intend to apportion the Upper Basin of the Missouri River under the Flood Control Act of 1934. n750

COMPUTER-ASSISTED RESEARCH

LEXIS: congress! w/1 apportionment w/30 water!

FOOTNOTES:
(n1)Footnote 717. Both Montana and Kansas presently have water right allocation regimes which operate on the basis of appropriative principles.

(n2)Footnote 718. Missouri and Iowa are generally considered riparian jurisdictions.

(n3)Footnote 719. Nebraska, North Dakota and South Dakota are generally considered to be mixed jurisdictions.

For a discussion of the international dimension of the problem, see Tarlock, Dan. A. *Safeguarding International River Ecosystems in Times of Scarcity. 3 U. Denver Water L. Rev. 231 (2000).*

(n4)Footnote 720. For further discussion, *see* Beaverstock, Jeffrey Uhlman, *Learning to Get Along: Alabama, Georgia, Florida and the Chattahoochee River Compact, 49 Ala. L. Rev. 993 (1998);* Note, *Charting No Man's Land: Applying Jurisdictional and Choice of Law Doctrines to Interstate Compacts, 111 Harv. L. Rev. 1991 (1998);* E. Leif Reid, *Ripples From the Truckee: The Case for Congressional Apportionment of Disputed Interstate Water Rights, 14 Stan. Envtl. L.J. 145 (Jan.1995).* Ann Brown, *Mother Nature and Missouri's River Boundaries,* 51 J. Mo. St. B. 37 (Jan.-Feb. 1995); Eric L. Garner & Michelle Ouellette, *Future Shock? The Law of the Colorado River in the Twenty-First Century, 27 Ariz. St. L.J. 423 (Summer 1995);* Robert T. Stephan, *Water Rights to the Arkansas River: The Status of* Kansas v. Colorado, *4 Kan. J.L. & Pub. Pol'y. 65 (Fall 1994). Ponderosa Ridge v. Banner County, 554 N.W.2d 151 (Neb. 1996); Mineral County v. State Department of Conservation and Natural Resources, 20 P.3d 800 (Nev. 2001).*

See also J. Lochhead, An Upper Basin Perspective on California's Claims to Water from the Colorado River Part I: The Law of the River, *4 U. Denv. Water L. Rev. 290 (2001).*

(n5)Footnote 721. *See Willey v. Decker, 73 P. 210 (Wyo. 1903).*

(n6)Footnote 722. *See Brooks v. United States, 119 F.2d 636 (9th Cir. 1944).*

(n7)Footnote 723. *See* Kaiser Steel Corp. v. C.F. & I. Steel Corp., Civil No. 76-224 (D. N.M. 1976).

(n8)Footnote 724. *See DeShaney v. Winnebago County Dep't. of Social Servs., 109 S. Ct. 998 (1989).*

(n9)Footnote 725. *See Houston v. Thomas, 937 F.2d 247 (5th Cir. 1991)* regarding the extent to which a state may decide interstate matters as an adjunct to matters clearly within state jurisdiction.

(n10)Footnote 726. *Kansas v. Colorado, 206 U.S. 46 (1907).*

(n11)Footnote 727. *See 28 U.S.C. § 1251*(a).

The Supreme Court will typically retain jurisdiction in such cases for purposes of issuing "any order, direction, or modification of the decree, or any other supplementary decree, that may at any time be deemed proper in relation to the subject matter in controversy." *See Nebraska v. Wyoming, 325 U.S. at 671 (1945).* This facilitates the reopening of such cases to deal with the alleged failure of one state to fulfill the terms of the original decree. *See Nebraska v. Wyoming,*

113 S. Ct. 1689 (1993).

(n12)Footnote 728. *See New York v. New Jersey, 256 U.S. 296 (1921). See also* Mississippi v. Louisiana (Docket No. 91-1158, Argument Nov. 9, 1992) in which the court has been given an opportunity to decline jurisdiction over a boundary dispute between the two states involving the Mississippi River on the ground that the matter can be resolved as part of a quiet-title action in state court. *See Houston v. Thomas, 937 F.2d 247 (5th Cir. 1991).*

(n13)Footnote 729. *See Arizona v. California, 298 U.S. 558 (1936).*

(n14)Footnote 730. *16 U.S.C. §§ 1531*-1544. *See United States v. Glenn-Colusa Irrig. Dist., 788 F. Supp. 1126 (E.D. Cal. 1992).*

(n15)Footnote 731. Chades Corker, *Water Rights and Federalism, 45 Cal. L. Rev. 604, 631 (1957).*

(n16)Footnote 732. The McCarran Amendment of 1952, *43 U.S.C. § 666* waives sovereign immunity for purposes of area-wide adjudications of water rights where federal rights are involved. For further discussion, *see* § 50.17(b) *infra*.

(n17)Footnote 733. *221 U.S. 485 (1911).*

(n18)Footnote 734. *See Nebraska v. Wyoming, 325 U.S. 589 (1945).*

For further discussion, *see* James Rehnquest, *Taking Comity Seriously: How to Neutralize the Abstention Doctrine, 46 Stan. L. Rev. 1049 (May 1994).*

(n19)Footnote 735. *See Kansas v. Colorado, 206 U.S. 46 (1907).*

People ex rel. Simpson v. Highland Irrv. Co., 917 P.2d 1242 (Colo. 1996).

(n20)Footnote 736. *Id.*

(n21)Footnote 737. *206 U.S. at 97-98.*

(n22)Footnote 738. *See Colorado v. New Mexico, 467 U.S. 310 (1984); Colorado v. New Mexico, 459 U.S. 176 (1982).*

See Longley v. Leucadia Financial Corporation, 9 P.3d 762 (Utah Aug. 25, 2000); *City of Barstow v. Mojave Water Agency, 99 Cal. Rptr. 2d 294 (Cal. 2000).*

See Empire Lodge Homeowners' Association v. Moyer, 39 P.3d 1139 (Colo. 2001); Nebraska v. Wyoming, 122 S.Ct. 420 (2001).

See also J. Lochhead, *An Upper Basin Perspective on California's Claims to Water from the Colorado River Part I: The Law of the River, 4 U. Denv. Water L. Rev. 290 (2001).*

(n23)Footnote 739. *See Idaho v. Oregon, 462 U.S. 1017 (1983).*

See also Nebraska v. Wyoming, 115 S. Ct. 1933 (1995) in which the Supreme Court denied Wyoming leave to file counterclaims in the case involving the North Platte River on the ground that the claims would in effect replace the apportionment scheme with one that would cap Nebraska's share of the river at the volume of probable beneficial use.

For further discussion, *see* Robert T. Stephan, *Water Rights to the Arkansas River: The Status of* Kansas v. Colorado, *4 Kan. J.L. & Pub. Pol'y. 65 (Fall 1994).*

(n24)Footnote 740. *See Frontier Ditch Co. v. Southeastern Colorado Water Conservancy Dist., 761 P.2d 1117 (Colo. 1988).*

H. Franz, R. Kropf, and M. Pearce, An Insatiable Thirst: The Impact of Water Law on Sprawl in the West, 15 SPG Nat. Resources & Env't 228 (2001); J. Drake, Contractual Discretion and the Endangered Species Act: Can the Bureau of Reclamation Reallocate Federal Project Water for Endangered Species in the Middle Rio Grande? 41 Nat. Resources J. 487 (2001); J. Lochhead, An Upper Basin Perspective on California's Claims to Water from the Colorado River Part I: The Law of the River, *4 U. Denv. Water L. Rev. 290 (2001).*

(n25)Footnote 741. *Hinderlider v. La Plata River & Cherry Creek Ditch Co., 304 U.S. 92 (1938).*

Beaverstock, Jeffrey Uhlman, *Learning to Get Along: Alabama, Georgia, Florida and the Chattahoochee River Compact, 49 Ala. L. Rev. 993 (1998);* Note, *Charting No Man's Land: Applying Jurisdictional and Choice of Law Doctrines to Interstate Compacts, 111 Harv. L. Rev. 1991 (1998).*

(n26)Footnote 742. *Cuyler v. Adams, 449 U.S. 433 (1981).*

(n27)Footnote 743. *Hinderlider v. La Plata River & Cherry Creek Ditch Co., 304 U.S. 92 (1938).*

(n28)Footnote 744. *Intake Water Co. v. Yellowstone River Compact Comm'n, 590 F. Supp. 293 (D. Mont. 1983).*

(n29)Footnote 745. *State ex rel. Dyer v. Sims, 341 U.S. 22 (1951).*

(n30)Footnote 746. *Id.*

(n31)Footnote 747. *See Texas v. New Mexico, 462 U.S. 554 (1983).*

Recent litigation involving interstate compacts includes *Nebraska v. Wyoming, 113 S. Ct. 1689 (1993); Texas v. New Mexico, 107 S. Ct. 124 (1987); Oklahoma & Texas v. New Mexico, 111 S. Ct. 2281 (1991);* and the re-opened Kansas v. Colorado which has not yet reached a final decision. *See* Roger Meyers, *Kansas-Colorado suit in homestretch,* Topeka Capital-Journal, Wed., Nov. 18, 1992, at 9A. The master's report in *Kansas-Colorado* ruled in favor of Kansas. A final decision by the Supreme Court is expected in 1995. For further discussion, *see* Robert T. Stephan, *Water Rights to the Arkansas River: The Status of* Kansas v. Colorado, *4 Kan. J.L. & Pub. Pol'y. 65 (Fall 1994);* Beaverstock, Jeffrey Uhlman, *Learning to Get Along: Alabama, Georgia, Florida and the Chattahoochee River Compact, 49 Ala. L. Rev. 993 (1998);* Note, *Charting No Man's Land: Applying Jurisdictional and Choice of Law Doctrines to Interstate Compacts, 111 Harv. L. Rev. 1991 (1998).*

For the latest decision in the ongoing problem over water in the Arkansas River between Kansas and Colorado, *see Kansas v. Colorado, 115 S. Ct. 1733 (1995).* In this decision, the court ruled that in the absence of a showing by Kansas of "material deletion" in the amount of water available to Kansas at the border, it could not establish a violation of the interstate compact. The court also found that laches did not bar Kansas's claim that Colorado pumping violated the compact. Finally, the court ruled that increases in stateline flows that were the result of a post-compact agreement could not offset depletions from post-compact well pumping.

The compact may obligate federal administrators to use particular allocation formulae in releasing water from storage facilities subject to contracts. *See Goshen Irrigation Dist. v. Pathfinder Irrigation District, 62 F. Supp. 2d 1218 (D. Wyo. 1999).*

(n32)Footnote 748. *Arizona v. California, 373 U.S. 546 (1963).* Congressional action resulted from a long history of unsuccessful efforts to resolve claims to the river by Upper and Lower Basin states. *See also* Truckee-Carson-Pyramid Lake Water Rights Settlement Act, Pub. L. 101-168, *104 Stat. 3294 (1990)* dividing the water

of the Truckee River, the Carson River and Lake Tahoe between Nevada and California.

In 1990, Congress exercised its authority to apportion the Truckee River. Truckee-Carson-Pyramid Lake Water Rights Settlement Act, Pub. L. 101-618, *104 Stat. 3294.*

(n33)Footnote 749. *Missouri v. Andrews, 787 F.2d 270 (8th Cir. 1986), aff'd sub nom. ESTI v. Missouri, 484 U.S. 495 (1988).*

(n34)Footnote 750. *33 U.S.C. §§ 701*-709.

For further discussion, *see* E. Leif Reid, *Ripples From the Truckee: The Case for Congressional Apportionment of Disputed Interstate Water Rights, 14 Stan. Envtl. L.J. 145 (Jan. 1995);* Eric L. Garner & Michelle Ouellette, *Future Shock? The Law of the Colorado River in the Twenty-First Century, 27 Ariz. St. L.J. 423 (Summer 1995);* James S. Witwer, *The Renewal of Authorization to Divert Water on National Forests,* 24 Colo. Law. 2363 (Oct. 1995).

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CHAPTER 50 WATER RIGHTS

6-50 Thompson on Real Property, Thomas Editions § 50.16

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§ 50.16 Federal/State Relations Regarding the Administration of Water Rights.

[Go To Supp]

§ 50.16(a) In General.

Courts have held that the authority to manage water resources within their own boundaries belongs to the states. n751 This is the case even though the water actually arises upon or has as its source in the federally controlled public domain. n752 This power has authorized those states to choose their own allocation systems and to change those systems from time to time. n753

The power to manage the water resources within each particular state gives each state the authority to create and recognize water rights to such water resources. This has meant that any individual water appropriators must secure their own rights in and to such waters under the laws of that particular state. n754

An important exception to this general rule arises with respect to federally created or "reserved" rights. These rights are not claimed under state law, and indeed may even preempt the priority, quantity and even validity of competing state authorized water right claims. n755

There are also a number of federal interests that are not in the nature of water rights which may qualify or limit the nature or extent of state-created water rights such as the federal navigational servitude. n756

COMPUTER-ASSISTED RESEARCH

LEXIS: federal w/15 state! w/15 administrat! w/30 water!

§ 50.16(b) Specific Federal Authority Which May Affect State Created Water Rights: General Federal Power to Legislate for the General Welfare.

The Constitution grants the federal government broad powers to tax, spend and regulate for the common welfare. n757 In a conceptual sense, this power is the equivalent of the State's police power except to the extent that the Constitution itself imposes limits on that power. As a result, the federal government must be considered to have great inherent power

over the waters of the nation where such power is necessary to regulate for the common good and welfare of the nation. Congress has typically deferred to the states to manage the water rights aspects of situations where federal regulatory authority has been invoked. n758 These statutes which disavow federal control over or interference with state created water rights must be considered to be self-imposed limitations on federal power. n759 If that is the case, Congress has the power to withdraw the limitation.

On the other hand, if consumptive use water rights are considered to have the same constitutional origin as non-consumptive use water rights, n760 then the federal government may have no authority to displace the states as the *creator* of the rights, even though there may be federal power to limit or otherwise modify the rights. This is because non-consumptive use rights have traditionally been considered to emanate from the state's title to the beds of navigable waterbodies which the states acquired at time of statehood on the theory that the state, not the federal government, stepped directly into the shoes of the sovereign and directly acquired whatever rights were possessed by the king. If that is the case, the power to create such water rights is an inherent feature of the state and not the federal government.

COMPUTER-ASSISTED RESEARCH

LEXIS: federal w/15 regulat! w/15 welfare w/30 water!

§ 50.16(c) Specific Federal Authority: General Federal Regulatory Authority.

The federal government has considerable regulatory authority over a variety of activities which may affect the availability of water for use pursuant to a state granted or recognized water right. This authority extends to such diverse matters as the regulation of activities on or in navigable waterways; n761 the prevention of pollution and contamination of water resources; n762 the regulation of the use of the public land upon which much of the nation's water originates; n763 the protection of interstate commerce; n764 the protection of endangered species and their habitat; n765 and the control of the federally developed reservoirs and reclamation structures and water therein. n766

Although these laws generally are not intended to preempt state water right allocation laws, n767 there is probably no constitutional impediment to the assertion of federal power to override state water rights law. Clearly the power to tax and spend for the general welfare, and the Supremacy Clause, support the claim of federal power. Indeed, the exercise of federal regulatory authority over water or activities which may occur in or on water already has had the effect of destroying or modifying the state granted water rights in several cases. n768

COMPUTER-ASSISTED RESEARCH

LEXIS: federal w/15 regulat! w/30 water!

§ 50.16(d) Specific Federal Authority: General Federal Authority Under the Commerce Clause.

Federal authority under the Commerce Clause may well be the most expansive of powers by which the federal government may influence the exercise of state created water rights without directly exercising control over water allocations. Indeed, because the full regulatory potential of this power has not been asserted, it is sometimes referred to as the "dormant" Commerce Clause.

A very long history of judicial interpretation n769 indicates that the federal government has jurisdiction over a wide variety of activities which directly or indirectly impair or impede interstate commerce. n770 This power has been asserted with respect to a variety of activities involving water and as such has been the basis for regulating activities which pollute or otherwise affect certain watercourses, n771 as well as for compelling the removal of obstructions from navigable waterways. n772

As a general rule, however, federal power regarding interstate commerce has typically not been asserted as a basis for confronting state laws regarding water right allocations. A 1982 U.S. Supreme Court case may suggest a broadening of federal power under the guise of the Commerce Clause with respect to state water allocation decisions.

The United States Supreme Court in 1982 invalidated a state statute which prevented an individual who owned land partly in that state and partly in an adjoining state from securing a water right in the first state for water which then would ultimately be transferred to and used in the adjoining state. n773 The critical feature of the state statute was a provision which authorized the state to deny the application where the adjoining state did not grant citizens of that state reciprocal rights to the waters of the adjoining state. n774 Since the adjoining state did not permit its waters to leave the state for use in the first state, the application was denied. The Court considered the water involved to be an article of interstate commerce, n775 and the lack of reciprocity to constitute an unreasonable state barrier to such commerce. An interesting part of the Court's rationale for invalidating the state statute was the alleged potential, though presently not exercised, power of Congress under the Commerce Clause to regulate, and provide a uniform method for dealing with, among other things, groundwater overdrafts.

While the Court noted that a state may favor its own citizens in times and places of shortage or under such circumstances as might suggest that a prohibition on exportation is necessary to conserve and protect the public welfare, n776 the case must be considered as potentially broadening federal authority over the allocation of water rights by states. The Court's rationale in this and other related cases seems to be that a state may not preserve its own resources exclusively for the benefit of its own citizens. n777

COMPUTER-ASSISTED RESEARCH

LEXIS: commerce w/1 clause w/15 water!

§ 50.16(e) Specific Federal Authority: Water Power and Reclamation.

Congress has considerable authority to erect hydroelectric, reclamation and flood control dams on navigable and non-navigable waterways of the nation. This authority is justified not only under the Commerce Clause but on the basis of national defense powers under the Constitution and on its status as a proprietor of public lands. n778 Indeed, the actual construction of some of these facilities need not even be federal, but may be done by private individuals who may secure a license therefor from the Federal Energy Regulatory Commission. n779

It is clear that such projects may interfere with legitimate state interests in the affected waterways. n780 In some cases, it has been held that those state created rights have been taken by condemnation, and fair compensation must be paid. n781 In other cases, including at least one water right case, the court held that there was no taking of the right. n782 It is clear that states cannot veto the projects based upon the prospect of interference with state created rights. n783

Federal reclamation projects are particularly associated with water use and water right. Such projects have long been an integral part of efforts to settle the western public domain lands and have been specifically designed to develop water for lands which have needed irrigation water in order to be productive, but for which the landowners typically did not have the resources to construct major diversion works. n784 Indeed, one of the primary purposes of the Reclamation Act of 1902 was to publicly subsidize the construction of facilities that could provide irrigation water. n785 As a result, much of the irrigation water of the West comes from federal reclamation projects. n786

The federal government does have considerable control over and responsibility for, the disposition of much of the water developed as a result of reclamation projects. n787 Storage of water under contracts between the ultimate water user and the federal government are common and directly involve the federal government in the question of water management. n788

There has been considerable controversy as to the extent to which federal reclamation projects are subject to state water laws. n789 In California v. United States, n790 it was held that water rights associated with the project generally must be secured under state law and that, once rights are acquired, the water must be distributed according to state law, except where the state law is in direct conflict with the federal law. n791

COMPUTER-ASSISTED RESEARCH

LEXIS: federal w/50 water! w/15 power or reclamation

§ 50.16(f) Specific Federal Authority: Environmental Protection.

The general power to legislate for the public welfare also largely underwrites federal legislation regarding water quality and pollution control. n792 As is the case with regulation of interstate commerce, regulatory authority regarding environmental matters has generally not been asserted as a basis for overriding state water right allocation decisions. A 1992 case in this area may well suggest a broadening of federal power over state water allocations under the auspices of environmental protection. n793 In this case, federal authority under the auspices of the Endangered Species Act n794 was asserted to protect habitat that was the threatened by the exercise of state-created water rights. n795

It is perhaps possible to rationalize the federal claim of authority to protect endangered species with state plenary authority to issue water rights where the exercise of a particular federal power may have the seeming effect of preempting state action. The holdings of the cases n796 should not be read as displacing state authority over the issuance or granting of water rights. Rather, the cases would suggest that perhaps there is concurrent jurisdiction over the effects that may result from the uses of water that are authorized by the state-granted water right. Where those effects violate federal law, there should be federal consequences that will not be excused by the fact that the state initially authorized the use in the first place. Perhaps a useful way to rationalize the apparent conflict between federal and state authority is to suggest that water rights cannot be granted for activities that are illegal or produce unlawful consequences. If illegality results from the exercise of a water right, it would seem that the use authorized by the water right should be characterized as unreasonable or non-beneficial depending on whether the jurisdiction is riparian or appropriative, respectively, and therefore the use that is the object of the right should be considered an inappropriate subject for the recognition of a water right. If the illegality is the result of the failure to conform to a federal law, that should be of little consequence since state law has never pretended to be the sole arbiter of what is or is not lawful or unreasonable. That a state may suppress a state-granted water right because the resulting use of the water is deemed unreasonable is certain. n797 What is uncertain, of course, is whether the federal government has the power to compel the state to make such a determination and take such an action to modify a water right *after* one has already been recognized. One possible argument is that such a change to make something unlawful that may have been lawful at the time the right was created constitutes a taking -- at least to the extent that the inability to exercise the right is lost and the land upon which the right is exercised is rendered completely without viable economic use. This would more likely be the case regarding water rights in existence prior to the adoption of the federal statutes at issue. On the other hand, if the activity covered by the federal statute was made illegal prior to the issuance of the right, but it was not discovered until later that the problem actually existed in respect of a particular water right, the case should go the other way. One possible outcome from these cases may be to only enjoin the activity that offends the federal law and leave the water right intact so long as it can otherwise be exercised in ways which do not offend the federal restriction. n798

COMPUTER-ASSISTED RESEARCH

LEXIS: environment! w/2 protect! w/50 water! w/5 allocat! federal! w/50 water! w/5 quality or pollut!

§ 50.16(g) Specific Federal Authority: Federal Proprietary Interests and Rights as Owner of Public Domain Land.

The federal government is the owner of vast amounts of public land. n799 Early cases suggest that the federal government holds that title in public trust, n800 but with only the powers of an ordinary private owner. n801 Later decisions suggest that the title is held with the more expansive powers of a sovereign. n802 This has caused some concern regarding state authority regarding those lands. n803

Federal proprietary interests have been asserted as the basis for regulation of such diverse activities as public access, n804 power generation, n805 and wild animal control. n806

On the other hand, it has long been understood that the federal government relinquished control to the states over rights of access to water arising on public domain land. n807 It has also been held that the federal government did not have the status of a riparian landowner such that riparian water rights could be asserted by holders of land patents of land formerly in the public domain. n808 It has generally been understood from the foregoing that the federal government did not, and could not, claim water rights simply on the basis of its status as a proprietor of public domain land. n809

The case of In re Water of Hallett Creek System n810 suggests that the federal government may claim rights as a riparian proprietor in those states which recognize riparian rights the same as any other riparian landowner. n811

COMPUTER-ASSISTED RESEARCH

LEXIS: federal w/5 proprietary w/1 interest! w/15 water! federal! w/5 own! w/15 public w/1 land!

§ 50.16(h) Specific Federal Authority: Federal Navigational Servitude.

The federal government also possessed the right, known as the federal navigational servitude, n812 to undertake activities involving navigable waterbodies which are necessary to the promotion and protection of navigation and commerce in such waterbodies. The servitude typically serves as the basis for federal construction of navigational improvement projects and works in navigable waterways, n813 the exercise of regulatory authority to remove obstructions, n814 and the construction of public access for such non-consumptive uses as recreation. n815

This right is conceptually based on both federal proprietary and superior sovereign powers, and has been held to empower the federal government to conduct its activities within navigable waterways without the need to compensate affected private property holders. n816 Where damage from the federal activities on navigable waters is experienced in non-navigable areas, compensation is generally not considered to be owed if the federal project is expressly undertaken for the purpose of protecting the interest in navigation in the navigable waterway. n817

Courts have justified the superiority of the federal navigational servitude and its no compensation feature on the proprietary grounds. It is argued that when title to the beds of navigable waterbodies passed to the state at time of statehood, the federal servitude was held back, akin to a pre-existing title interest, which pre-dates or is otherwise superior to the private interest, such that those who undertake activities on navigable waterways do so with the knowledge of the existence of a prior federal and public title interest in navigation and can thereby have no expectation of compensation if their activity is considered to interfere with or obstruct navigation. n818

The federal navigational servitude seems to be present only in naturally navigable waterbodies and appears to extend therein only to the ordinary high-water mark. n819

Nevertheless, the federal activity which is undertaken under the auspices of the federal navigational servitude may actually permit the federal government to adversely affect or destroy individual state-granted water rights. n820

COMPUTER-ASSISTED RESEARCH

LEXIS: federal w/1 navigational w/1 servitude

FOOTNOTES:
(n1)Footnote 751. *California-Oregon Power Co. v. Beaver Portland Cement Co., 295 U.S. 142 (1935).*

(n2)Footnote 752. *See* Desert Lands Act of 1877, *43 U.S.C. §§ 321*-339.

See Hinton v. Hannigan, 33 P. 379 (Or. App. 2001) dealing with mining claims as a source of ditch or water rights.

See also J.Carey and D. Sunding, *Emerging Markets in Water: A Comparative Institutional Analysis of the Central Valley and Colorado-Big Thompson Projects,* 41 Nat. Resources J. 283 (2001); J. Leshy, *Water Rights for New Federal Land Conservation Programs: A Turn-of-the Century Evaluation, 4 U. Denv. Water L. Rev. 271 (2001);* O. Matthews, L. Scuderi, D. Brookshire, K. Gregory, S. Snell, K. Krause, J. Chermak, B. Cullen, M. Campana, *Marketing Western Water: Can a Process Based Geographic Information System Improve Reallocation Decisions?* 41 Nat. Resources J. 329 (2001); J. Lochhead, *An Upper Basin Perspective on California's Claims to Water from the Colorado River Part I: The Law of the River, 4 U. Denv. Water L. Rev. 290 (2001).*

(n3)Footnote 753. *See Kansas v. Colorado, 206 U.S. 46 at 94 (1907):*

> [Each state] may determine for itself whether the common law rule in respect to riparian rights or that doctrine which obtains in the arid regions of the West of the appropriation of waters for the purpose of irrigation shall control. Congress cannot enforce either rule upon any state.

See also Baumann v. Smrha, 145 F. Supp. 617 (D.C. Kan. 1956), aff'd 352 U.S. 863 (1956):

> The power of a state either to modify or reject the doctrine of riparian rights because unsuited to the conditions in the state and to put into force the doctrine of prior appropriation and application to beneficial use or of reasonable use has been long settled by the adjudicated cases. Of course, such a modification in the law of the state must recognize valid existing vested rights... .

In *California-Oregon Power Co. v. Beaver Portland Cement Co., 295 U.S. 142 (1935),* the court held that the states have the power to legislate with respect to waters and water rights "as they deemed wise in the public interest... . with the right in each to determine for itself to what extent the rule of appropriation or the common-law rule in respect of riparian rights should obtain. For since 'Congress cannot enforce either rule upon any state ... the full power of choice must remain with the state.'"

(n4)Footnote 754. *Kansas v. Colorado, 206 U.S. 46 at 94 (1907).*

(n5)Footnote 755. *See* § 50.17, *infra*.

(n6)Footnote 756. *See* § 50.16(h), *infra*.

For further discussion, *see* Richard Morrison, *State and Federal Law in Conflict over Indian and Other Federal Reserved Water Rights, 2 Drake J. Agric. L. 1 (1997);* Deborah L. Freeman & Carmen M. Sower, *Against the Flow: Emerging Conflicts between Endangered Species Protection and Water Use,* 40 Rocky Mts. Mineral L. Inst. 23 (Annual 1994); David M. Howitt, *Oregon Water Management: The Need to Combat Water Spreading and Some Proposals for the Future, 9 J. Envtl. L. & Litig. 249 (Annual 1994).*

For a discussion of the international dimension of the problem, see Tarlock, Dan. A. *Safeguarding International River Ecosystems in Times of Scarcity. 3 U. Denver Water L. Rev. 231 (2000).*

For a discussion of the problem of federal and state immunity, see Zolezzi, Jeanne M. *The Battle Between Sovereign Immunity and State Law.* 15 SUM Nat. Res. & Envt. 36 (2000).

See also State Engineer of the State of Nevada v. South Fork Band of the Te-Moak Tribe of Western Shoshone Indians of Nevada, 114 F. Supp. 2d 1046 (D. Nev. Aug. 30, 2000).

(n7)Footnote 757. U.S. Const. art. I, § 8.

(n8)Footnote 758. *See* Section 8 of the Reclamation Act of 1902 which provides:

That nothing in this Act shall be construed as affecting or intending to affect or to in any way interfere with the laws of any State or Territory relating to the control, appropriation, use, or distribution of water used for irrigation, or any vested right acquired thereunder... .

(n9)Footnote 759. *See California v. United States, 438 U.S. 645 (1978).*

(n10)Footnote 760. For further discussion, *see* § 50.06, *supra*.

(n11)Footnote 761. *30 Stat. 1151 (1899)* (Rivers and Harbors Appropriation Act of 1899).

(n12)Footnote 762. *See 33 U.S.C. §§ 1251*-1376 (Clean Water Act); *33 U.S.C. §§ 1401*-1445 (Ocean Dumping); *42 U.S.C. §§ 300f*-300j-26 (Safe Drinking Water Act); *42 U.S.C. §§ 6901*-6992k (Solid Waste Disposal Act); *42 U.S.C. §§ 9601*-9675 (Comprehensive Environmental Response, Compensation and Liability Act of 1980); *43 U.S.C. §§ 1701*-1784 (Federal Land Policy and Management); *16 U.S.C. §§ 1451*-1464 (Coastal Zone Management Act of 1972); *42 U.S.C. §§ 4321*-4370a (National Environmental Policy Act of 1969).

(n13)Footnote 763. *See 43 U.S.C. §§ 1701*-1784 (Federal Land Policy and Management); *16 U.S.C. §§ 528*-531 (Multiple-Use Sustained-Yield Act of 1960).

(n14)Footnote 764. *Gibbons v. Olden, 22 U.S. (9 Wheat.) 2 (1824).*

(n15)Footnote 765. *See 16 U.S.C. §§ 1531*-1544.

(n16)Footnote 766. *See* The Reclamation Act of 1902, *32 Stat. 388,* as amended, *43 U.S.C. 371 et seq*.

(n17)Footnote 767. Section 8 of the Reclamation Act of 1902 provides:

That nothing in this Act shall be construed as affecting or intending to affect or to in any way interfere with the laws of any State or Territory relating to the control, appropriation, use, or distribution of water used for irrigation, or any vested right acquired thereunder... .

See FM Properties Operating Company v. City of Austin, 22 S.W. 3d 868 (Tx. App. 2000); City of Kaukauna, Wisconsin v. Federal Energy Regulatory Comm'n, 214 F.3d 888 (7th Cir. 2000); Warr v. United States, 46 Fed. Cl. 343 (2000).

Regarding the federal navigational servitude, see *Kingsport Horizontal Property Regime v. United States, 46 Fed. Cl. 691 (2000).*

Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers, 121 S. Ct. 675 (2001); United States v. State Engineer, 27 P.3d 51 (Nev. 2001); Idaho Rural Council v. Bosma, 143 F. Supp. 2d 1169 (D. Id. 2001); American Wildlands v. Browner, 260 F.3d 1192 (10th Cir. 2001); Mississippi River Revival, Inc., v. Minnesota

Pollution Control Agency, No. C1-01-23, 2001 Minn. App. LEXIS 855 (Minn. App. 2001); Great Northern Paper, Inc. v, Penobscot National, 770 A. 2d 574 (Me. 2001); United States v. Buday, 138 F. Supp. 2d 1282 (D. Mont. 2001); Save The Lake v. Schregardus, 752 N.E. 2d 295 (Ohio App. 2001).

See also K. Finto, C. Graham, B. Smith and P. Shamblin, *Environmental Law, 35 U. Rich. L. Rev. 601 (2001);* L. Witte, *Still No Water for the Woods,* SG039 ALI-ABA 239 (2001); J. Drake, *Contractual Discretion and the Endangered Species Act: Can the Bureau of Reclamation Reallocate Federal Project Water for Endangered Species in the Middle Rio Grande?* 41 Nat. Resources J. 487 (2001).

(n18)Footnote 768. *See United States v. Willow River Power Co., 324 U.S. 499 (1945)* where the federal navigational servitude preempted a state-created riparian water right. *See also United States v. Glenn-Colusa Irrig. Dist., 788 F. Supp. 1126 (E.D. Ca. 1992),* which extends federal regulatory prohibitions of the Endangered Species Act to cover activities permitted under the exercise of state created water rights.

(n19)Footnote 769. *See Gibbons v. Olden, 9 Wheat 1 (1824); Willson v. Blackbird Creek Marsh Co., 27 U.S. 245* (2 Peters) (1829); *Cooley v. Board of Wardens of the Port of Philadelphia, 53 U.S. 299* (12 Howard) (1851); *Baldwin v. Seelig, 294 U.S. 511 (1934).*

Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers, 121 S. Ct. 675 (2001).

See also John v. United States, 247 F.3d 1032 (9th Cir. 2001); United States v. Buday, 138 F. Supp. 2d 1282 (D. Mont. 2001); Wisconsin v. Environmental Protection Agency, 266 F.3d 741 (7th Cir. 2001).

For further discussion, see J. Neuman, *Federal Water Policy: An Idea Whose Time Will (Finally) Come, 20 Va. Envt'l L.J. 107 (2001);* J. Drake, *Contractual Discretion and the Endangered Species Act: Can the Bureau of Reclamation Reallocate Federal Project Water for Endangered Species in the Middle Rio Grande?* 41 Nat. Resources J. 487 (2001); E. Shane, *Water Rights and Gila River III: The Winters Doctrine Goes Underground, 4 U. Denv. Water L. Rev. 397 (2001);* J. Hill, Jr. *The "Right" To Float Through Private Property in Colorado: Dispelling the Myth, 4 U. Denv. Water L. Rev. 331 (2001).*

(n20)Footnote 770. *See Wickard v. Filburn, 317 U.S. 111 (1942).*

Ponderosa Ridge v. Banner County, 554 N.W.2d 151 (Neb.1996) (water is an article of commerce implicating the commerce clause of the US constitution); *Steier v. Batavia Park Dist., 670 N.E.2d 1215 (Ill. App. 1996)* (federal government has power under commerce clause to regulate navigable waters); *United States v. NL Indus., 936 F. Supp. 545 (S.D. Ill. 1996)* (Congress' regulation of improper hazardous waste under CERCLA is a valid exercise of Congress' power under commerce clause); *United States v. 30.54 Acres of Land, More or Less, Situated in Greene County, Commw. of Pa., 90 F.3d 790 (3d Cir. 1996)* (navigable waterways have always been under control of Federal government under the commerce clause); *Hurtley Marine Corp. v. Mieke, 474 S.E.2d 599 (W. Va. 1996)* (state's imposition of fuel use tax on fuel consumed during interstate transportation on inland waterways was fairly related to services provided by the state under commerce clause analysis); *Acorn v. Edwards, 81 F.3d 1387 (5th Cir. 1996)* (Congress is free, pursuant to its commerce clause power, to combat lead contamination in drinking water by regulating drinking water coolers that move in interstate commerce).

(n21)Footnote 771. *United States v. Holland, 373 F. Supp. 665 (M.D. Fla. 1974).*

(n22)Footnote 772. *See United States v. Standard Oil Co., 384 U.S. 224 (1966).*

(n23)Footnote 773. *See Sporhase v. Nebraska ex rel. Douglas, 458 U.S. 941 (1982).*

(n24)Footnote 774. In this case, the Nebraska statute forbids the exporting of water except where the use of the

water was reasonable, not detrimental to the public welfare, not contrary to conservation needs, and the state to which the water was transported granted reciprocal rights to residents of Nebraska. Colorado did not grant reciprocal rights. Therefore, the application for a water right was denied.

(n25)Footnote 775. The court seems to assume that there is no difference between water that has been reduced to possession and water which is as yet unextracted from the ground insofar as the question of "articles of interstate commerce" is concerned. This view is questionable. It is arguable that it is only after water has been reduced to personal possession that it should be considered an article of commerce since water that has been reduced to possession is generally regarded to be personal property whereas water in the ground is still held by the state with title in the state. Frank Trelease, *State Water and State Lines: Commerce in Water Resources, 56 U. Colo. L. Rev. 393 (1985).*

(n26)Footnote 776. *See also El Paso v. Reynolds, 597 F. Supp. 694 (D.N.M. 1984).*

(n27)Footnote 777. *See also Idaho v. Oregon, 462 U.S. 1017 (1983).*

(n28)Footnote 778. *See Federal Power Comm'n v. Union Elec. Co., 381 U.S. 90 (1965); Ashwander v. Tennessee Valley Authority, 297 U.S. 288 (1936).*

See Elephant Butte Irrigation District of New Mexico v. United States Department of Interior, 269 F.3d 1158 (10th Cir. 2001); Westlands Water District v. United States, 153 F. Supp. 2d 1133 (E.D. Cal. 2001); SRBA v. State, 23 P.3d 117 (Id. 2001); United States v. Westlands Water District, 134 F. Supp. 2d 1111 (E.D. Cal. 2001); The West Virginia Highlands Conservancy v. Norton, 161 F. Supp 2d. 676 (D. W. Va. 2001); Kandra v. United States, 145 F. Supp. 2d 1192 (D. Ore. 2001); Sierra Club v. United States Environmental Protection Agency, 162 F. Supp. 2d 406 (D. Md. 2001); American Wildlands v. Browner, 260 F.3d 1192 (10th Cir. 2001); Maple Leaf Farms, Inc. v. State Department of Natural Resources, 633 N.W. 2d 720 (Wis. App. 2001); Flo-Sun, Inc. v. Kirk, 783 So. 2d 1029 (Fla. 2001); Poe v. PPG Industries, 782 So. 2d 1168 (La. App. 2001); State v. Frank, 24 P.3d 338 (N.M App. 2001); Sierra Club v. U.S. Fish and Wildlife Service, 245 F.3d 434 (5th Cir. 2001); State Water Control Board v. Smithfield Foods, Inc. 542 S.E. 2d 766 (Va. 2001); National Wildlife Federation v. United States Army Corps of Engineers, 132 F. Supp. 2d 876 (D. Or. 2001).

For further discussion see J. Shurts, *The Genesis and Early Power of Winters A Book Review of Indian Reserved Rights: The Winters Doctrine and its Social and Legal Context, 36 Tulsa L.J. 641 (2001);* H. Doremus, *Water, Population Growth, and Endangered Species In the West, 72 U. Colo L. Rev. 362 (2001);* J. Melious, *Enforcing the Endangered Species Act Against the States,* 25 Wm & Mary Envt'l L. & Policy Rev. 605 (2001); J.Carey and D. Sunding, *Emerging Markets in Water: A Comparative Institutional Analysis of the Central Valley and Colorado-Big Thompson Projects,* 41 Nat. Resources J. 283 (2001); J. Drake, *Contractual Discretion and the Endangered Species Act: Can the Bureau of Reclamation Reallocate Federal Project Water for Endangered Species in the Middle Rio Grande?* 41 Nat. Resources J. 487 (2001); P. Lacy, *The Irrigated Desert and Imperiled Salmon: "Reclaiming" Illegally Spread Water via the Endangered Species Act,* 4 U. Denv. Water Law Rev. 351 (2001).

(n29)Footnote 779. *See, e.g., Phoenix Hydor Corp. v. F.E.R.C. 775 F.2d 1187 (D.C. Cir. 1985).*

(n30)Footnote 780. *See United States v. Willow River Power Co., 324 U.S. 499 (1945).*

(n31)Footnote 781. *See Portland General Electric Co. v. Federal Power Comm'n, 238 F.2d 165 (9th Cir. 1964).*

(n32)Footnote 782. *See United States v. Willow River Power Co., 324 U.S. 499 (1945).*

(n33)Footnote 783. *First Iowa Hydro-Electric Co-op., 328 U.S. 152 (1946).*

(n34)Footnote 784. *See generally Federal Reclamation Law in* 2 Waters and Water Rights, ch. 8 (Robert Clark ed., 1967).

(n35)Footnote 785. The Reclamation Act of 1902, ch. 1093, *32 Stat. 388,* as amended, *43 U.S.C. § 371 et seq.* (codified in scattered sections of 43 U.S.C.).

The Reclamation Act, as initially enacted provided that the water was to be made available only to residents on land near the facilities and the water was to be used on no more than 160 acres. In recent years, the residency requirement has been removed and the acreage limitation has been increased. *See* Reclamation Reform Act of 1982, Pub. L. No. 97-293, *96 Stat. 1261,* which repealed the residency requirement and raised the acreage limitation from 160 (320 for husband and wife) to 960.

See also 43 C.F.R. part 426 which recognizes a number of alternative arrangements, such as leasing, which generally will avoid the acreage limitation.

State of Alaska v. U.S., 35 Fed. Cl. 685 (1996).

The storage contracts may obligate federal administrators to use particular allocation formulae in releasing water from storage facilities subject to contracts. *See Goshen Irrigation Dist. v. Pathfinder Irrigation District, 62 F. Supp. 2d 1218 (D. Wyo. 1999).*

(n36)Footnote 786. According to U.S. Water NEWS, Nov. 1992, 1, federal reclamation projects serve the following fraction of total irrigated acreage within the respective states:

Arizona: 53 percent
California: 40 percent
Colorado: 7 percent
Montana: 17 percent
Utah: 8 percent

(n37)Footnote 787. John Peck, *Legal Aspects of Water Storage in Federal Reservoirs in Kansas, 32 U. Kan. L. Rev. 785 (1984).*

But see State of Mo. v. Andrews, 586 F. Supp. 1268, 787 F.2d 1986 (8th Cir. 1986), cert. granted sub nom. ESTI v. Missouri, 408 U.S. 905 (1987), holding that the Oahe reservoir in Missouri was not a reclamation project within the meaning of the Reclamation Project Act and hence, the Secretary could not unilaterally execute a contract to provide water from the water for industrial use.

(n38)Footnote 788. *Id.* In one case, *Carson-Truckee Water Conservancy Dist. v. Clark, 741 F.2d 257 (9th 1984),* it was argued that the Secretary of Interior violated the Washoe Project Act by refusing to sell water from the project for municipal and industrial use. The Secretary had decided some water should be saved, at least temporarily, for the conservation of endangered species of fish. The court held, however, that although municipal and industrial uses were beneficial uses for which water could be sold, the Secretary was not obligated to sell water simply because those uses were the only present uses for which the Secretary could obtain some reimbursement for the cost of the project. The Secretary's decision to save the water to preserve wildlife was upheld.

See Board of County Commissioners of the County of Arapahoe v. Crystal Creek Homeowners Association, 14 P.3d 325 (Colo. 2000); City of Kaukauna, Wisconsin v. Federal Energy Regulatory Comm'n, 214 F.3d 388 (7th Cir. 2000).

(n39)Footnote 789. For further discussion, *see* Barbara Andrews & Marie Sansone, Who Runs the Rivers? Dams and Decisions in the New West (Stan. Envt'l. L. Soc. 1983); Amy Kelly, *Staging a Comeback -- Section 8 of the Reclamation Act, 18 U.C. D.L. Rev. 97 (1984).*

(n40)Footnote 790. *438 U.S. 645 (1978).*

(n41)Footnote 791. For further discussion, *see* Reed D. Benson & Kimberly J. Priestley, *Making a Wrong Thing Right: Ending the "Spread" of Reclamation Project Water, 9 J. Envtl. L. & Litig. 89 (Annual 1994).*

(n42)Footnote 792. *See, e.g., 33 U.S.C. §§ 1251*-1376 (Clean Water Act); *33 U.S.C. §§ 1401*-1445 (Ocean Dumping); *42 U.S.C. §§ 300f*-300j-26 (Safe Drinking Water Act); *42 U.S.C. §§ 6901*-6992k (Solid Waste Disposal Act); *42 U.S.C. §§ 9601*-9675 (Comprehensive Environmental Response, Compensation and Liability Act of 1980); *43 U.S.C. §§ 1701*-1784 (Federal Land Policy and Management); *16 U.S.C. §§ 1451*-1464 (Coastal Zone Management Act of 1972); *42 U.S.C. §§ 4321*-4370a (National Environmental Policy Act of 1969).

In the case of *United States v. Dierckman, 41 F. Supp. 2d. 870* (S.D. Indiana), the court dealt with a challenge to a farmers eligibility to receive crop subsidies where the farmer was alleged to have violated the "swampbusting" provisions of the Food Security Act of 1985. The farmer argued that the wetlands involved were beyond the power of the government to regulate because they did not affect interstate commerce. The court found that the Food Security Act was adopted pursuant to the spending clause rather than the interstate commerce clause and hence could reach matters that might be beyond the reach of other enumerated clauses. In contrast, the ability to regulate wetlands under the Clean Water Act would be subject to interstate commerce clause considerations.

For further discussion, see David J. Aiken, *Balancing Endangered Species Protection and Irrigation Water Rights: The Platte River Cooperative Agreement, 3 Great Plains Nat. Resources J. 119 (1999).* Robert W. Adler, *Integrated Approaches to Water Pollution: Lessons from the Clean Water Act,* 23 Harvard Envtl. L. Rev. 203 (1999). Note and Comment, *The Uncertainty Surrounding Grazing and Section 401 of the Clean Water Act; Predicting the Outcome of Oregon Natural Desert Association v. Dombek, 13 B.Y.U. J. Pub. L. 391 (1999).*

(n43)Footnote 793. *See United States v. Glenn-Colusa Irrig. Dist., 788 F. Supp. 1126 (E.D. Cal. 1992). See also Department of Fish and Game v. Anderson-Cottonwood Irrig. Dist., 11 Cal. Rptr. 2d 222 (Ct. App. 1992)* involving the California Endangered Species Act. A similar case has been filed in Texas regarding the use of the Edwards aquifer. *See* U.S. Water News, Nov. 1992 at p. 16.

In one case, the court held that there was a reserved water right for the Hells Canyon National Recreation Area but not one created under the Wilderness Act. *See SRBA v. Potlach Corporation, 12 P.3d 1260 (Id. 2000).*

(n44)Footnote 794. *16 U.S.C. §§ 1531*-1544.

Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers, 121 S. Ct. 675 (2001); Great Northern Paper, Inc. v. Penobscot National, 770 A. 2d 574 (Me. 2001); United States v. Buday, 138 F. Supp. 2d 1282 (D. Mont. 2001); Save The Lake v. Schregardus, 752 N.E. 2d 295 (Ohio App. 2001); Wisconsin v. Environmental Protection Agency, 266 F.3d 741 (7th Cir. 2001)..

For further discussion, see J. Neuman, *Federal Water Policy: An Idea Whose Time Will (Finally) Come, 20 Va. Envt'l L.J. 107 (2001);* H. Doremus, *Water, Population Growth, and Endangered Species In the West, 72 U. Colo L. Rev. 362 (2001);*W. Snape III, M. Senatore, K. Gillon, S. George, C. Muffet, R. Anderson and R. Kondor, *Protecting Ecosystems Under the Endangered Species Act: The Sonoran Example, 41 Washburn L.J. 14 (2001);* B. Ripley, *The Storm Over Stormwater,* 27 Dec Vt. B. J. 39 (2001); J. Drake, *Contractual Discretion and the Endangered Species Act: Can the Bureau of Reclamation Reallocate Federal Project Water for Endangered Species in the Middle Rio Grande?* 41 Nat. Resources J. 487 (2001).

(n45)Footnote 795. *For further discussion, see* William Poole, *Where Have All the Salmon Gone? Salmon Have Been Driven to the Brink of Extinction by Entrenched Water Rights, 15 Cal. Law. 50 (Apr. 1995);* Deborah L. Freeman & Carmen M. Sower, *Against the Flow: Emerging Conflicts between Endangered Species Protection and Water Use,* 40 Rocky Mts. Mineral L. Inst. 23 (Annual 1994); Pamela LeRoy, *Troubled Waters: Pollution and Water Scarcity (Planet Earth 2025: 10 Billion Served?), 6 Colo. J. Int'l Envtl. L. & Pol'y, 299 (Summer 1995).*

(n46)Footnote 796. *United States v. Glenn-Colusa Irrigation Dist., 758 F. Supp. 1126 (E.D. Cal. 1992); Department of Fish and Game v. Anderson-Cottonwood Irrigation Dist., 8 Cal. App. 4th 1554 (1992).*

(n47)Footnote 797. *See, e.g., Imperial Irrigation District v. State Water Resources Control Board, 225 Cal. App. 3d 548 (1990),* where the court stated: "[t]he historic concepts of water 'rights' in California were dramatically altered by the adoption in 1928 of [a constitutional amendment which empowered the Board to conduct hearings to determine whether particular water uses were reasonable or wasteful]. Our Supreme Court ... acknowledged that the new provision altered previously vested rights... . It has been long established that all property is held subject to the reasonable exercise of police power and that constitutional provisions declaring that property shall not be taken without due process of law have no application in such cases."

(n48)Footnote 798. For further discussion of the conflict between federal environmental authority and state-granted water rights, *see* Sandra Dunn, *Endangered Species Act versus Water Resources Development: The California Experience, 25 Pac. L.J. 1107 (1994);* William Attwater, *Introduction: Environmental Restraints on Water Law, 25 Pac. L.J. 901 (1994);* Michelle Ouellette, et al., *Institutional Reforms in California Groundwater Law, 25 Pac. L.J. 1021 (1994).*

(n49)Footnote 799. *See* One Third of the Nation's Land - A Report to the President and to the Congress By the Public Land Law Review Commission (1970). *See also* Sally K. Fairfax & Carolyn E. Yale, Federal Lands (1987); T.H. Watkins & Charles S. Watson, Jr., The Land no One Knows (1975).

(n50)Footnote 800. *United States v. Trinidad Coal & Coking Co., 137 U.S. 160 (1890).*

(n51)Footnote 801. *See Pollard v. Hagin, 44 U.S. (3 How.) 212 (1845).*

(n52)Footnote 802. *See Light v. United States, 220 U.S. 523 (1911); Utah Power & Light Co. v. United States, 243 U.S. 389 (1917).*

(n53)Footnote 803. *See Kleppe v. New Mexico, 426 U.S. 529 (1976). See also* Richard Clayton, *The Sagebrush Rebellion: Who Should Control the Pubic Lands?, 1980 Utah L. Rev. 505.*

(n54)Footnote 804. *Light v. United States, 220 U.S. 523 (1911).*

(n55)Footnote 805. *Utah Power and Light Co. v. United States, 243 U.S. 389 (1917).*

(n56)Footnote 806. *Hunt v. United States, 278 U.S. 96 (1928); Kleppe v. New Mexico, 426 U.S. 529 (1976).*

(n57)Footnote 807. Desert Lands Act of 1877, *43 U.S.C. §§ 321*-339. *See also California v. United States, 438 U.S. 645 (1978).*

United States v. State Engineer, 27 P.3d 51 (Nev. 2001).

See also V. Albrecht, and D. Duncan, *The Public Trust Doctrine & The Navigational Servitude as "Background Principles."* SF64 ALI-ABA 403 (2001).

(n58)Footnote 808. *See California Oregon Power Co. v. Beaver Portland Cement Co., 295 U.S. 142 (1935).*

See generally Baas, Mark J., *Diamond Bar Cattle Co. v. United States: State Water Rights on Federal Lands for not Hold Property Interest to Graze on those Lands, 4 Great Plains Nat. Res. J. 296 (2000).* In a 2000 case, the court held that there was a reserved water right for the Hells Canyon National Recreation Area but not one created under the Wilderness Act. *See SRBA v. Potlach Corporation, 12 P.3d 1260 (Id. 2000).*

(n59)Footnote 809. *California v. United States, 438 U.S. 645 (1978). But see* Charles Wilkinson & H. Michael Anderson, *Land and Resource Planning in the National Forest, 64 Or. L. Rev. 1 (1985)* in which it is argued that the federal government, through the Forest Service, has the authority, notwithstanding state water rights law to the contrary, to set minimum stream flow levels within national forest.

In *Nevada v. Morros, 766 P.2d 263 (Nev. 1988),* the fact that the federal government was the proprietor of the land for purposes of managing grazing activity on the public domain was sufficient to sustain an application for a state-granted right to the United States Bureau of Land Management to maintain the water level of a lake at a level sufficient to sustain recreational use and fishery needs. The court suggested that such an interest would also be sufficient to sustain a state-created water right for the purpose of watering livestock and wildlife.

On the other hand, the fact that the federal government owns the land may affect water rights claimed under state law. *See Camp v. United States Bureau of Land Management, 183 F.3d 1141 (9th Cir. 1999).* In this case, the landowner sought to enforce an easement right of way for water rights with respect to lands formerly managed by the Bureau of Land Management (BLM). The land in question was transferred to someone else as a result of a land exchange and BLM refused to renew the easement. The District Court found the claims to be time-barred. On appeal, the court held that publication of the proposed land exchange in the Federal Register did not start the running of the statute of limitations for claims by a landowner who was entitled by regulation to receive personal notice.

In *United States v. Alpine Land & Reservoir Co., 174 F.3d 1007 (9th Cir. 1999),* the United States claimed water rights under the reservation doctrine for the Newlands Reclamation Project. The federal rights were the subject of adjudications which were entered in 1944 and 1980. Pursuant to the terms of the decrees, in 1996, the United States Fish and Wildlife Service filed an application with the State Engineer to change the place and manner of use of the water rights it had purchased from others and that had been adjudicated in 1944 and 1980. The State Engineer granted the transfer applications. Churchill County filed a protest to the transfer in state court, which was enjoined by the federal district court, on the ground that it had exclusive jurisdiction to hear appeals regarding the water rights that were the subject of the adjudication decrees. On appeal, the 9th Circuit agreed that the district court's jurisdiction was both continuing and exclusive. The court further held that the Anti-Injunction Act, *28 U.S.C. § 2283,* which prohibits federal courts from enjoining state court proceedings did not change that result. There are three exceptions to the Anti-Injunction act: where expressly authorized by Congress, where necessary in aid of federal jurisdiction, or where necessary to protect or effectuate its judgments. In this case, the second exception, in aid of jurisdiction applied.

In *United States v. Gotchink, 57 F. Supp. 2d 798 (D. Minn. 1999),* the court considered the prosecution of two Chippewa Indians who used a motorized boat and a power ice auger to exercise their treaty-protected fishing rights in the Boundary Canoe Area Wilderness (BCAW) area contrary to the BCAW regulations. The court held that Congress had not preempted the treaty rights of the Indians but could regulate the scope of the content of those rights to the extent that they were the result of valid, non-discriminatory conservation measures. Under this construction of Indian rights, the Indians could not use the boat could use the auger.

See generally Elizabeth Sodastrom Sokolove & Sally K. Fairfax, *Federal Reserved Water Rights Applied to School Trust Lands? 34 Land & Water L. Rev. 1 (1999).*

See also Johanna H. Wald & Joseph M. Feller, *Recent Developments in the Law of Grazing on Federal Lands*, SD47 ALI-ABA 151 (1999); Dan A. Tarlock, *The Creation of New Risk Sharing Water Entitlement Regimes: The Case of the Truckee-Carson Settlement, 25 Ecology L.Q. 674 (1999);* Michael J. Pearce, *Analytic Geography in Western Water Management*, 13 SPG Nat. Resources & Env't 537 (1999).

(n60)Footnote 810. *749 P.2d 324 (Cal. 1988), cert. denied, 488 U.S. 824 (1988).*

(n61)Footnote 811. For further discussion, *see* James S. Witwer, *The Renewal of Authorization to Divert Water on*

National Forests, 24 Colo. Law. 2363 (Oct. 1995).

(n62)Footnote 812. *United States v. Willow River Power Co., 324 U.S. 499 (1945).*

(n63)Footnote 813. *Lewis Blue Point Oyster Cultivation Co. v. Briggs, 229 U.S. 82 (1913).*

(n64)Footnote 814. *Union Bridge Co. v. United States, 204 U.S. 364 (1907).*

(n65)Footnote 815. *Kaiser Aetna v. United States, 44 U.S. 164 (1979).*

(n66)Footnote 816. *See Union Bridge Co. v. United States, 204 U.S. 364 (1907).*

See also United States v. Cherokee Nation of Oklahoma, 480 U.S. 700 (1987) where the court held that the federal navigation power gives the federal government a dominant servitude which is not an invasion of any property rights in the stream or the lands underlying it, and that damage sustained as a result of the exercise of the power does not result in a taking of property.

(n67)Footnote 817. *United States v. Cress, 243 U.S. 316 (1917).*

(n68)Footnote 818. *Id. See also United States v. Willow River Power Co., 324 U.S. 499 (1945).*

(n69)Footnote 819. *United States v. Kansas City Life Ins., 339 U.S. 799 (1950); Vaughn v. Vermillion Corp., 444 U.S. 206 (1979); United States v. Cherokee Nation of Okla., 480 U.S. 700 (1987); United States v. Chicago, Milwaukee, St. Paul & Pac. Ry., 312 U.S. 592 (1941).*

(n70)Footnote 820. *United States v. Willow River Power Co., 324 U.S. 499 (1945).*

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CHAPTER 50 WATER RIGHTS

6-50 Thompson on Real Property, Thomas Editions § 50.17

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§ 50.17 General Federal Reserved Water Rights.

[Go To Supp]

§ 50.17(a) In General.

The federal government may claim or hold water rights of various types. These water rights may be perfected under state law n821 or may be independent of state law. n822 Where rights are secured under state law, the federal government is considered to possess the same rights as any other individual water right holder and may not be discriminated against simply because the rights are held by the federal government. n823 Federal rights which arise independently of state law generally have priority over state granted rights which have been perfected subsequent to the federal right. n824

§ 50.17(b) Federal Reserved Rights, Generally.

The doctrine of federal reserved water rights was initially announced in the case of Winters v. United States. n825 Although this particular case concerned claims of Indians to the water, the doctrine has subsequently been extended to all federal lands which have been reserved for particular purposes. n826 In *Winters*, the water right was claimed on behalf of the Indian tribe by virtue of the fact that the Reservation itself was created for the Indians before the non-Indian settlers began to use the water. The court upheld the Indians' claim on the rationale that at the time the Reservation was created out of the public domain, an amount of water was reserved by "necessary implication" to insure that the Reservation would have adequate water to carry out the purposes for which it was created. This granted a water right to the Indians despite the fact that, prior to that time, no water was actually being used by the Indians (which would have been necessary to support the creation of a water right under state law).

The federal reserved rights were initially implied as arising out of the act of reservation on the theory that Congress surely would not have set aside the lands for the purposes for which the reservation was being created without insuring the wherewithal necessary for the reservation to be successful. In that sense, the reservation doctrine is an implied exception to the general proposition that the federal government has delegated to the states the authority to manage the waters of the nation which arise on public domain land. n827 In recent years, Congress appears to follow the practice of explicitly noting in the act of reservation that water sufficient for the reservation purpose is being set aside as well. n828 This, however, should probably not be seen as suggesting that, *unless* the federal government explicitly reserves a water

right at the time a reservation is created, no such water right is intended. This is for two reasons. First, in at least one case, the reservation legislation has expressly stated the intention of Congress that the manner in which water is statutorily reserved in one reservation situation should not be considered as a precedent of any kind regarding any other reservation situation. n829 Second, the authority of the state to manage the water resources on public domain land rests principally upon the fact of federal deference to state authority, n830 which may not be the case in any given particular situation that significantly affects national public interests.

COMPUTER-ASSISTED RESEARCH

LEXIS: federal w/1 reserv! w/15 water! w/1 right! reserv! w/1 doctrine w/15 water!

§ 50.17(c) Waters to Which the Reservation Doctrine Applies.

The federal reserved water rights apply to surface water sources and probably apply to groundwater sources as well, though no final court decision appears to have explicitly so held. n831 Such rights enjoy priority based upon the date the reservation was created. Such rights will, therefore, prevail over subsequent private water rights claimed under state law, as well as over subsequent water rights claimed by the states themselves. n832

§ 50.17(d) Priority of Reservation Rights.

The reserved right is deemed to have come into existence at the time the reservation was created. n833 Priority of the right is therefore not dependent upon the time any actual use of the water begins, the nature of the uses to which the water is or may be applied, or the location of water use. n834

§ 50.17(e) Quantifying the Federal Reserved Rights.

The general rules for determining the amount of water which could be claimed as having been reserved under the federal reserved water rights doctrine were announced in the case of United States v. New Mexico, n835 in which the court held that the amount of water reserved was limited to that amount necessary to accomplish the particular purposes for which the reservation was created. Most of the commentary regarding the decision in this case has been critical of the narrow construction given to reservation purposes by the majority of the court. n836

§ 50.17(f) Reservation Defined.

The reservation doctrine applies to any "reservation" of federal land from the public domain. n837 This has been defined to include the withdrawal of land from the public domain for particular purposes and includes such particularized uses of the public domain as national parks, national monuments, national forests, military bases, and wildlife refuges. n838

§ 50.17(g) Relevant Reservation Purposes.

According to United States v. New Mexico, n839 the reserved right extends only to that amount of water needed to accomplish the *primary* purpose of the reservation. n840 Thus, water which is needed for a secondary use of the reservation would appear to require rights secured in the same manner as any other private appropriator. n841 As a result, courts have looked very closely at, and have tended to read somewhat narrowly, the enactments which have given rise to the reservations in order to ascertain the primary purposes of the reservations. n842

§ 50.17(h) McCarran Amendment Adjudications.

Congress adopted the McCarran Amendment in 1952 to facilitate the quantification of federal reserved water rights. n843 This statute was drafted as a waiver of the defense of governmental immunity in any action brought to establish

the priority and quantity of all rights in a particular water system. This waiver is limited to federal consent to be a party suits:

> (1) for the adjudication of rights to the use of water of a river system or other source, or (2) for the administration of such rights, where it appears that the United States is the owner of or is in the process of acquiring water rights by appropriation under state law, by purchase, by exchange, or otherwise, and the United States is a necessary party to such suit. n844

It has been held that such an adjudication may take place in federal or state court, which are considered to have concurrent jurisdiction over the federal rights involved. n845 Where the adjudication occurs in state court, federal substantive law should be applied by the state court to determine federal rights though that does not always appear to be the case. n846

The federal waiver of sovereign immunity in McCarran adjudications extends only to what may be described as "general, area-wide adjudication" which joins all water right holders within the watershed. n847 It would therefore not apply to individual suits against the United States brought by individual water users. n848 Similarly, since the statute provides for a waiver only in the case of "suits," it would also not extend to state administrative proceedings which affect water rights claimed by the federal government.

McCarran proceedings are typically very complex and time consuming, since they are designed to quantify and resolve once and for all the total priority situation for the water supply, n849 and the proceeding may involve federal rights of all types, including Indian rights. n850

COMPUTER-ASSISTED RESEARCH

LEXIS mccarran w/1 amendment.
waive! w/5 government! w/2 immunity! w/15 water!

FOOTNOTES:
(n1)Footnote 821. *See In re Water of Hallett Creek Stream System, 749 P.2d 324 (Cal. 1988); State v. Morros, 766 P.2d 263 (Nev. 1988).*

(n2)Footnote 822. *See, e.g., United States v. Jessee, 744 P.2d 491 (Colo. 1987).*

See, e.g., SRBA v. State, 959 P.2d 449 (Idaho 1998) (United States claim to reservation rights in all springs and waterholes located on lands that have been withdrawn for stockwatering purposes upheld).

(n3)Footnote 823. *See State v. Morros, 766 P.2d 263 (Nev. 1988); In re Water of Hallett Creek Stream System, 749 P.2d 324 (Cal. 1988), cert. denied sub nom. California v. United States, 488 U.S. 824 (1988).*

See SRBA v. United States, 996 P.2d 806 (Id. 2000)

(n4)Footnote 824. For further discussion, *see* E. Leif Reid, *Ripples From the Truckee: The Case for Congressional Apportionment of Disputed Interstate Water Rights, 14 Stan. Envtl. L.J. 145 (Jan. 1995).*

(n5)Footnote 825. *207 U.S. 564 (1908).*

Matter of Beneficial Water Use Permit Numbers 66459-762, Ciotti; 64988-*G76L, Starner, 923 P.2d 1073 (Mont. 1996)* (concerning claims of Indians to the water).

(n6)Footnote 826. *See Federal Power Comm'n v. Oregon, 349 U.S. 435 (1955).*

(n7)Footnote 827. *See* Desert Lands Act of 1877, *43 U.S.C. §§ 321*-339. *See also California Oregon Power Co. v. Beaver Portland Cement Co., 295 U.S. 142 (1935).*

In re the General Adjudication of All Rights to Use Water in the *Gila River System and Source, 35 P.3d 68 (Az. 2001); Skokomish Indian Tribe v. United States, 161 F. Supp 2d 1178 (D. Wash 2001); Pacific Coast Federation of Fishermen's Associations v. U.S. Bureau of Reclamation, 138 F. Supp. 2d 1228 (N.D. Cal. 2001).*

See also SRBA v. State, 23 P.3d 117 (Id. 2001), denying the federal government an implied reserved water right for islands in the Deer Flat National Wildlife Refuge.

See generally, L. Witte, *Still No Water for the Woods,* SG039 ALI-ABA 239 (2001); C. Meyer and G. Pursley, *The Federal Reserved Water Rights Doctrine in a Skeptical Age,* SG039 ALI-ABA 219 (2001); J. Leshy, *Water Rights for New Federal Land Conservation Programs: A Turn-of-the Century Evaluation, 4 U. Denv. Water L. Rev. 271 (2001);* E. Shane, *Water Rights and Gila River III: The Winters Doctrine Goes Underground, 4 U. Denv. Water L. Rev. 397 (2001).*

(n8)Footnote 828. *See, e.g., 102 Stat. 3961, 3968 (1988),* designating particular areas within the National Park System in the State of Washington as wilderness areas:

> Subject to valid existing rights, within the areas designated as wilderness by this act, Congress hereby expressly reserves such water rights as necessary, for the purposes for which such areas are so designated. The priority of such rights shall be the date of the enactment of this Act.

But see 102 Stat. 4576, creating the Hagerman Fossil Beds National Monument in Idaho:

> Congress finds that there are unique circumstances with respect to the water or water-related resources within the Monument designated by this title. The Congress recognizes that there is little or no water or water-related resources that require the protection of a federal reserve water right. Nothing in this title, nor any action taken pursuant thereto, shall constitute either an expressed or implied reservation of water or water right for any purpose.

SRBA v. State, 959 P.2d 449 (Idaho 1998) (United States claim to reservation rights in all springs and waterholes located on lands that have been withdrawn for stockwatering purposes upheld).

(n9)Footnote 829. In legislation establishing a National Monument in New Mexico, *101 Stat. 1539,* Congress reserved "the minimum amount of water required to carry out the purposes" of the reservation and then noted that:

> Nothing in this section shall be construed as establishing a precedent with regard to future designations, nor shall it affect the interpretation of any other Act or any designation made pursuant thereto.

See James v. Jesse, 744 P.2d 491 (Colo. 1987) where the federal government claimed a reserved water right to instream flows within national forests. The claim was grounded in scientific evidence that efficient instream flows were necessary "to secure favorable conditions of water flows" (one of the few acceptable federal purposes recognized in *United States v. New Mexico, 438 U.S. 696 (1978),* under the Forest Service Organic Act). The trial court dismissed the claim on a motion for summary judgment. The state Supreme Court reversed, requiring a full consideration of the legislative history and factual circumstances to determine whether the purpose of the Organic Act would be entirely defeated unless the United States is allowed to maintain minimum instream flows over the forest lands. If so, the United

States should be granted a reserved right; if not, the claim should be denied. On remand, the United States' claim was denied. In the Matter of the Amended Application of the United States for Reserved Rights in the Platte River (Case No. W-8439-76) (Dist. Ct. Water Div. No. 1, Feb. 12, 1993).

For further discussion generally of the problem of federal reserved rights to instream flows, *see*: Diane McConkey, *Federal Reserved Rights to Instream Flows in the National Forests, 13 Va. Envtl. L.J. 305 (1994).*

In *SRBA v. Potlach Corporation, 12 P.3d 1260 (Id. 2000),* the court held that there was a reserved water right for the Hells Canyon National Recreation Area but not one created under the Wilderness Act. The court refused to find a reserved right to the entire unappropriated flow of water within the Sawtooth National Recreational Area. The court held that the act did not imply a reserved right for either the wilderness portion or the non-wilderness portion.

(n10)Footnote 830. In *Winters v. United States, 207 U.S. 564, 577 (1908),* the court noted that "[t]he power of the Government to reserve the waters and exempt them from appropriation under state law is not denied nor could it be." In *United States v. New Mexico, 438 U.S. 696 (1978),* the court noted that "[w]here Congress has expressly addresses the question of whether federal entities must abide by state water law, it has almost invariably deferred to state law." Nevertheless, "[w]here water is necessary to fulfill the very purposes for which a federal reservation was created, it is reasonable to conclude, even in the face of Congress' express deference to state water law in other areas, that the United States intended to reserve the necessary water."

See Sierra Club v. Yeutter, 911 F.2d 1405 (10th Cir. 1990) denying reserved rights under the Wilderness Act. *But see Sierra Club v. Block, 622 F. Supp. 842 (D. Colo. 1985)* recognizing reserved rights under the Wilderness Act. *See also* Nevada Wilderness Protection Act of 1989, Pub. L. 101-195, *103 Stat. 1784;* Arizona Wilderness Act of 1990, Pub. L. 101-628, *104 Stat. 4469,* which expressly reserve water for the purposes of the acts.

(n11)Footnote 831. *See, e.g., Cappaert v. United States, 426 U.S. 128 (1976)* in which the court held that extractions of groundwater could not interfere with the federal right which the court seems to have characterized as a surface right (even though the Ninth Circuit had held the water involved to be groundwater. *See 508 F.2d 313, 317 (1974).*

See also In re General Adjudication of All Rights to Use Water in the *Big Horn River System, 753 P.2d 76 (Wyo. 1988).* The Wyoming Supreme Court held that the reservation doctrine applied to ground water but no facts had been presented to support the recognition of rights in groundwater in that case. Upon review by the United States Supreme Court, that issue was not addressed. *See Wyoming v. United States, 492 U.S. 406 (1989).*

SRBA v. State, 959 P.2d 449 (Idaho 1998) (United States claim to reservation rights in all springs and waterholes located on lands that have been withdrawn for stockwatering purposes upheld).

Wilderness areas water right claims have been particularly troublesome. In *Sierra Club v. Block, 622 F. Supp 842 (D. Colo. 1985)* the court found that the Wilderness Act could be construed to reserve unappropriated water. The problem has been in compelling the government to assert the claims. In *Sierra Club v. Yeutter, 911 F 2d 1406 (10th Cir 1990),* the avoided the issue by finding the matter not ripe for adjudication. In 1988, the Solicitor of the Department of the Interior issued an opinion concluding that the Wilderness Act reserved no water. *96 Int. Dec. 211.*

In *United States v. Gotchink, 57 F. Supp. 2d 798 (D. Minn. 1999),* the court considered the prosecution of two Chippewa Indians who used a motorized boat and a power ice auger to exercise their treaty-protected fishing rights in the Boundary Canoe Area Wilderness (BCAW) area contrary to the BCAW regulations. The court held that Congress had not preempted the treaty rights of the Indians but could regulate the scope of the content of those rights to the extent that they were the result of valid, non-discriminatory conservation measures. Under this construction of Indian rights, the Indians could not use the boat could use the auger.

See also Elizabeth Sodastrom Sokolove & Sally K. Fairfax, *Federal Reserved Water Rights Applied to School Trust Lands? 34 Land & Water L. Rev. 1 (1999).*

See also Johanna H. Wald & Joseph M. Feller, *Recent Developments in the Law of Grazing on Federal Lands*, SD47 ALI-ABA 151 (1999); Dan A. Tarlock, *The Creation of New Risk Sharing Water Entitlement Regimes: The Case of the Truckee-Carson Settlement, 25 Ecology L. Q. 674 (1999);* Michael J Pearce, *Analytic Geography in Western Water Management*, 13 SPG Nat. Resources & Env't 537 (1999).

(n12)Footnote 832. Glenn v. United States, Civ. No. C-153-61 (D. Utah, 6 Mar. 1963).

(n13)Footnote 833. *Winters v. United States, 207 U.S. 564 (1908).*

(n14)Footnote 834. *Id.*

(n15)Footnote 835. *438 U.S. 696 (1978).*

State of Alaska v. Babbitt, 72 F.3d 698 (9th Cir. 1995) (amount of water reserved under reserved water rights doctrine is limited to what is necessary to fulfill purposes of land reservation).

(n16)Footnote 836. *See, e.g.*, Sally Fairfax & Dan Tarlock, *No Water For the Woods: A Critical Analysis of United States v. New Mexico, 15 Idaho L. Rev. 509 (1979). But see* Alan Boles & Charles Elliott, *United States v. New Mexico and The Course of Federal Reserved Water Rights, 51 Univ. Colo. L. Rev. 209 (1980).* In this case the court found that, since the reservation was a national forest, it was reserved essentially for only two purposes: to conserve the water flows for private and public uses under state law and to furnish a continuous supply of timber for the people. Accordingly, no water was considered reserved for recreation, aesthetics, wildlife preservation nor for cattle grazing.

For further discussion, *see* Robert E. Bakes, *The Snake River Basin Adjudication ... From the Beginning to the Present, 38 Advocate 10 (Feb. 1995);* A. Lynne Krogh, *Water Right Adjudications in the Western States: Procedures, Constitutionality, Problems and Solutions, 30 Land & Water L. Rev. 9 (Winter 1995);* Richard Morrison, *State and Federal Law in Conflict Over Indian and Other Federal Reserved Water Rights, 2 Drake J. Agric. L. 1 (1997).*

See also SRBA v. State, 959 P.2d 449 (Idaho 1998) (United States claim to reservation rights in all springs and waterholes located on lands that have been withdrawn for stockwatering purposes upheld).

For an interesting discussion of the opinion that was almost issued in the Big Horn case, *see* Mergen, Andrew C. and Liu, Sylvia F., *Misplaced Sensitivity: The Draft Opinions in Wyoming v. United States, 68 U. Colo. L. Rev. 683 (1997).*

(n17)Footnote 837. *Winters v. United States, 207 U.S. 564 (1908).*

SRBA v. State, 959 P.2d 449 (Idaho 1998) (United States claim to reservation rights in all springs and waterholes located on lands that have been withdrawn for stockwatering purposes upheld).

(n18)Footnote 838. *See, e.g., Cappaert v. United States, 426 U.S. 1283 (1976)* (Devil's Hole National Monument); *United States v. New Mexico, 438 U.S. 696 (1978)* (Gila National Forest).

SRBA v. State, 959 P.2d 449 (Idaho 1998) (United States claim to reservation rights in all springs and waterholes located on lands that have been withdrawn for stockwatering purposes upheld).

(n19)Footnote 839. *438 U.S. 696 (1978).*

(n20)Footnote 840. *United States v. New Mexico, 438 U.S. 696 (1978).*

SRBA v. State, 959 P.2d 449 (Idaho 1998) (United States claim to reservation rights in all springs and waterholes located on lands that have been withdrawn for stockwatering purposes upheld); *State of Alaska v. Babbitt, 72 F.3d 698 (9th Cir. 1995)* (amount of water reserved under reserved water rights doctrine is limited to what is necessary to fulfill purposes of land reservation).

(n21)Footnote 841. *Id.* In this case, the court refused to consider needs for water which arose as a result of a subsequent statute, the Multiple-Use Sustained-Yield Act of 1960, *16 U.S.C. § 528 et seq.*, since that act was supplemental to and not in derogation of, and therefore "did not broaden" the purposes set forth in the Organic Act of 1897. In that sense, the purposes of the later act were at best *secondary*.

SRBA v. State, 959 P.2d 449 (Idaho 1998) (United States claim to reservation rights in all springs and waterholes located on lands that have been withdrawn for stockwatering purposes upheld).

(n22)Footnote 842. *See, e.g., United States v. City and County of Denver, 656 P.2d 1 (Colo. 1982),* holding that recreational use of the Yampa River in the Dinosaur National Monument was not a primary intended purpose of the reservation.

(n23)Footnote 843. *43 U.S.C. § 666*(a).

Hage v. United States, 35 Fed. Cl. 147 (1996); United States v. Morros, 268 F.3d 695 (9th Cir. 2001); United States v. Commonwealth of Puerto Rico, 144 F. Supp. 2d. 46 (D. Puerto Rico 2001); J. Leshy, Water Rights for New Federal Land Conservation Programs: A Turn-of-the Century Evaluation, *4 U. Denv. Water L. Rev. 271 (2001).*

(n24)Footnote 844. *Id.*

(n25)Footnote 845. *United States v. District Court In and For Eagle County, 401 U.S. 520 (1971).*

Richard Morrison, *State and Federal Law in Conflict Over Indian and Other Federal Reserved Water Rights, 2 Drake J. Agric. L. 1 (1997).*

See also SRBA v. State, 959 P.2d 449 (Idaho 1998) (United States claim to reservation rights in all springs and waterholes located on lands that have been withdrawn for stockwatering purposes upheld).

(n26)Footnote 846. *See, e.g., United States v. Bell, 724 P.2d 631 (Colo. 1986)* where the court imposed state procedural limitations against the federal government which had the effect of reducing the priority of the federal claim.

See also In re General Adjudication of All Rights to Use Water in the *Big Horn River System, 753 P.2d 76 (Wyo. 1988), aff'd* on other grounds by an equally divided Supreme Court, *492 U.S. 406 (1989).*

It has been held that where the adjudication occurs in state court, the federal government can be compelled to pay filing fees despite language in the Amendment, *43 U.S.C. § 666*(a) that provides that no judgment for costs shall be entered against the United States in any such suit. *See United States v. Idaho 113 S. Ct. 1893 (1993).*

But see United States v. Oregon Water Resources Dep't, 774 F. Supp. 1568 (D. Or. 1991), holding that it would be a violation of treaty rights to require Indian Tribes to pay filing fees in *McCarran* adjudications.

(n27)Footnote 847. *Dugan v. Rank, 372 U.S. 609 (1963).*

See also United States v. District Court In and For Eagle County, 401 U.S. 520 (1971); United States v. District Court In and For Water Division Number 5, 401 U.S. 527 (1971).

In *Elephant Butte Irrigation Dist. v. United States, 849 P.2d 372 (N.M. 1993),* it was argued that the adjudication did not satisfy the requirements of the McCarran Amendment because it did not include the entire main stem of the Rio Grande in New Mexico. The court held that the Rio Grande Compact justified the exclusion and because of the terms of the Compact, the resulting adjudication would not constitute "piecemeal litigation." But for the Compact, however, the court suggests that the main stem of a river should ordinarily be included.

See also United States v. Oregon Water Resource Dep't, 774 F. Supp. 1568 (D. Or. 1991), holding that the adjudication was not deficient because it did not include groundwater right claims. The court held that there was nothing in the act that required the simultaneous adjudication of both surface and groundwater claims.

For an interesting discussion of the immunity problem, see Zolezzi, Jeanne M. *The Battle Between Sovereign Immunity and State Law.* 15 SUM Nat. Res. & Envt. 36 (2000).

See also Fent v. Oklahoma Water Resources, 235 F.3d 553 (10th Cir. 2000). In this case, the suit was dismissed because it was deemed barred by federal sovereign immunity and because the state was entitled to Eleventh Amendment immunity as well. The suit alleged an illegal contract between the federal government and the state to store water.

(n28)Footnote 848. *Id.*

Gardner v. Stager, 103 F.3d 886 (9th Cir. 1996) (waiver of sovereign immunity provided by McCarran Amendment was inapplicable to claimants' private suit for water rights against United States).

(n29)Footnote 849. *See, e.g., United States v. City and County of Denver, 656 P.2d 1 (Colo. 1982).*

For discussion of the ability of the judge in an adjudication to communicate ex parte with the state Department of Water Resources, *see San Carlos Apache Tribe v. Bolton, 977 P.2d 790 (Ariz. 1999),* holding that the communications were proper where they involved routine scheduling, administrative or other matters not involving the merits of the adjudication and the Indians were not prejudiced thereby. The court noted that, when in doubt or whenever practicable, the judge should err in favor of giving notice of the communications.

(n30)Footnote 850. *See Colorado River Water Conserv. Dist. v. United States, 424 U.S. 800 (1976).*

For further discussion, *see* Richard Morrison, *State and Federal Law in Conflict Over Indian and Other Federal Reserved Water Rights, 2 Drake J. Agric. L. 1 (1997);* Robert E. Bakes, *The Snake River Basin Adjudication ... From the Beginning to the Present,* 38 Advoc. 10 (Feb. 1995); A. Lynne Krogh, *Water Right Adjudications in the Western States: Procedures, Constitutionality, Problems and Solutions, 30 Land & Water L. Rev. 9 (Winter 1995).* Matter of Beneficial Water Use Permit Numbers 66459-762, Ciotti; 64988-*G76L, Starner, 923 P.2d 1073 (Mont. 1996)* (concerning claims of Indians to the water).

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For further discussion, *see* Alex Tallchief Skibine, *The Chevron Doctrine in Federal Indian Law and the Agencies' Duty to Interpret Legislation in Favor of Indians: Did the EPA Reconcile the Two in Interpreting the "Tribes as States" Section of the Clean Water Act?* 11 St. Thomas Law Rev. 15 (1998); Note, *Expanding State Sovereignty: Idaho v. Coeur D'Alene Tribe of Idaho, 35 Idaho L. Rev. 599 (1999).*

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CHAPTER 50 WATER RIGHTS

6-50 Thompson on Real Property, Thomas Editions § 50.18

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§ 50.18 Indian Reserved Rights.

[Go To Supp]

§ 50.18(a) In General.

According to the above-stated general rule, Indian reservations may also give rise to federal reserved water rights. Indeed, not only did the *Winters* n851 case deal specifically with such a claim, until the 1950s it was commonly thought that Indian rights were the *only* kind of federal reserved rights.

As other reservations have come to be recognized as having reserved rights, an important question arises as to the extent to which reserved rights claimed on the basis of Indian reservations should differ from reserved rights claimed for non-Indian reservations. Although, conceptually, both rights are seen as arising from an implication of Congressional intent regarding the need for water as an integral part of the ability of the reservation to achieve the purposes for which it was created, subtle differences do and must exist between the two. Much of the difference undoubtedly has to do with the long and troubling history of how Indians have been dealt with as a matter of law and a real contemporary concern that the Indians not be unduly restricted in the development of reservation lands.

Important differences exist regarding how reservation purposes are defined and the role such purposes play in quantifying the water rights. n852

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LEXIS: indian! w/5 reserved w/1 right!

§ 50.18(b) Reservation Purposes.

In *Winters*, n853 the court noted that the government policy involved in the creation of Reservations for Indians was to make them a "pastoral and civilized people." It has not generally been understood from this that it was ever Congress's intent to force the Indians to forever adopt a subsistence agrarian lifestyle. In fact, in a later decision, the court opined that Congress intended some flexibility and held that enough water be set aside "to satisfy the future as well as the present needs of the Indian Reservation," n854 as if to suggest that the amount of water required and how the water was

used on reservations may change over time as circumstances might require.

The difficulty with Indian reserved rights, however, probably has more to do with the effects of the Indian rights on state control over water than it does with what society wishes the Indians to achieve. The reality is that Indian reserved rights potentially claim a major portion of the water available in certain areas of the country and the Indians' use of the water is considered to be a serious threat to the availability of the water for other users, regardless of the uses to which the Indians may put the water. In that sense, the "reservation purpose" issue may be considered simply the means by which water is removed from state jurisdiction and, as a result, there may be considerable pressure in jurisdictions of that type to construe the language of the original treaties rather literally, not because of any interest in restricting the Indian's development, but to prevent the Indian reserved right from claiming what may be perceived as "too much" of the state's water. This seems to have been the case in at least one decision n855 where the court, over a vigorous dissent, n856 refused to allow the Indians to use the water claimed under a reserved right for fisheries, livestock, wildlife, aesthetics or mineral development, on the ground that the treaty said that the sole purpose of creation of the reservation was agricultural. n857

COMPUTER-ASSISTED RESEARCH

LEXIS: indian! w/5 reservation! w/30 government! w/5 purpose! or policy

§ 50.18(c) Quantifying the Water Rights.

Under the reservation doctrine, an amount of water sufficient to accomplish the purpose of the reservation is deemed to be "reserved" with the land as it was withdrawn from the public domain. Since neither the fact that water was saved, nor any reference to an exact amount of water thus reserved is ever mentioned in the documents associated with the creation of the reservation, the doctrine of reserved rights has had to judicially address both omissions. The *Winters* court recognized the existence of the right, but did not fix the quantity of water that could be claimed under the right. The criteria for determining that amount have been established in subsequent litigation as being based on the amount of practicably irrigable acreage within the reservation. n858

§ 50.18(d) McCarran Proceedings.

Congress adopted the McCarran Amendment in 1952 n859 to facilitate the quantification of federal reserved water rights, n860 including Indian Reserved Water Rights. n861 This statute was drafted as a waiver of the defense of governmental immunity in any action brought to establish the priority and quantity of all rights in a particular water system. This waiver is limited to "general, area-wide adjudications" which join all water right holders within the watershed. n862

§ 50.18(e) Negotiations.

Because of the complexity of McCarran adjudications, some jurisdictions have determined that a negotiated arrangement with the Indians is desirable. At least one state has legislatively created a negotiation commission that is charged specifically with the responsibility of negotiating water right settlements with the Indian tribes within the jurisdiction. n863 Such agreements must be confirmed by the federal government in order to be effective. n864

COMPUTER-ASSISTED RESEARCH

LEXIS: negotiat! w/15 indian! w/30 water!

§ 50.18(f) Practicably Irrigable Acreage.

When the court in *Arizona v. California* considered the need to quantify Indian reserved rights, it rejected the idea that

Indians should have as much water as was "needed for reservation purposes" as too uncertain. n865 Instead, the court held that the Indian claim was to as much water was necessary to irrigate all practicably irrigable acreage within the reservation. n866 This is a matter of a factual determination, n867 and it has been suggested n868 that it involves a two-part analysis: lands which are susceptible of irrigation must be identified; n869 then it must be ascertained whether such lands can actually be irrigated at a reasonable cost. n870

Once the measure of practicably irrigable acreage has been determined, it is then necessary to determine how much water is actually required to actually irrigate that land - should the Indians actually use the water for irrigation. n871

COMPUTER-ASSISTED RESEARCH

LEXIS: practicably w/1 irrigable w/2 acreage or land

§ 50.18(g) Use Limitations.

As a general proposition, it would appear that Indians should be free to use the water granted to them under reserved rights for whatever purpose they wish since, unlike trees in the national forest, Indians were confined to reservations against their wishes and, as a practical matter, for the purpose of removing them from the rest of the land to which they laid claim so that it would be available for settlement by non-Indians. It would seem patently inconsistent with any notion of self-determination to require that the Indian reserved right be subjected to a literal interpretation of "reservation purposes" in the same fashion as has been required for national forests. n872 Thus, it has been held that the Indians do not actually have to use the water at all or for irrigation purposes in order to maintain their claim to the right. n873 Unfortunately, it would appear that the Indians are not totally free to use the water for any other purpose the Indians may wish. n874 Clearly domestic use, municipal and commercial use has been subsumed within the amount deemed granted under the practicably irrigable acreage standard. n875 Beyond that, there is some uncertainty.

One court did not allow the Indians to use the water for fisheries, livestock, wildlife, aesthetics or mineral development on the ground that the treaty said that the sole purpose of creation of the reservation was agricultural. n876 In that case, after remand from the United States Supreme Court, n877 the Indians argued that the agricultural requirement was to be used only as a measure of the quantity of water to which the reserved right attached and that it did not actually restrict the use to which the Indians put the water. The Court disagreed:

> Our opinion [in *Big Horn I, 753 P.2d 273 (Wyo 1988),* aff'd by evenly divided Supreme Court, *492 U.S. 406 (1989)]* clearly and unequivocally stated that the Tribes had the right to use a quantified amount of water on their reservation solely for agricultural and subsumed purposes and not for instream purposes. If we had intended to specify what water could be used for merely as a methodology to determine the amount of water the Tribes could use for any purpose, we would have said so. Big Horn I, having been affirmed by the United States Supreme Court is final and controlling. The tribes do not have the unfettered right to use their quantified amount of future project water for any purpose they desire. n878

This case illustrates the primary difficulty presented by the Indian reserved rights. The Indians, as somewhat sovereign and therefore free from state control, may claim rights to substantial amounts of water in chronically water-short areas that are superior to state-created water rights. That poses a serious threat to non-Indian water right claimants under state law and to the ability of the state to manage water within the state's boundaries. To allow the Indians an unfettered choice as to how the water may be used is likely to insure that all of the water claimed by the Indians will be used and there will be little left for the non-Indians. On the other hand, confining the Indians to agricultural uses of the water seemingly forces the Indians to engage in activities that may not be as economically rewarding and therefore less attractive which may well result in less water actually being used and therefore more water will likely be available, at least nominally, to nonIndians. Historically, there has been much ambivalence in the nation's policy as to how Indians

should be dealt with. To insist that the Indians forever remain a "pastoral" people in order to have a defensible claim to the water is inconsistent with any effort to make them a part of the mainstream of society and appears to perpetually subject them to a secondary class of citizenship. No other minority is similarly treated as a condition associated with the exercise of any similar right. To argue that the water right is a privilege and therefore can be conditioned in this fashion flies in the face of the reality of how and why reservations were created in the first place. n879

COMPUTER-ASSISTED RESEARCH

LEXIS: indian! w/15 use! w/5 water!

§ 50.18(h) Allocation of Reserved Rights and Priorities Within the Reservation.

It appears that all lands within the reservation enjoy the reserved rights and are entitled to that portion of the water represented by the right in the same proportion as the irrigable acres within that particular tract represent of the reservation's total irrigable acres. n880 Lands which remain in continuous ownership by either the tribe, or as individual Indian allotment, neither lose their water rights nor the priority of such rights simply because the rights are not exercised. n881 On the other hand, lands that are transferred to non-Indians but reacquired by the Indians or the tribe may be treated differently. Reacquired allotment lands may enjoy their original priority provided the non-Indian did not lose the water right through non-use during the time such lands were owned by non-Indians. Homestead lands that were reacquired by the Indians would have the date of reacquisition as their priority date together with such rights as may have been secured by the non-Indian under state law. n882 This appears to be the case even where the reservation and the tribe may have been formally terminated and then recreated. n883

COMPUTER-ASSISTED RESEARCH

LEXIS: reserved w/1 right! w/15 water! w/30 indian! priorit! w/15 water! w/30 indian!

§ 50.18(i) Rights Claimed by Non-Indians on Reservations.

In many Indian reservations, a mixture of non-Indian landowners may be found together with Indian landowners. Such non-Indian landowners may claim water rights based upon the reserved right of the reservation. The Indian right may be shared with the non-Indians in a variety of ways. It is possible for the Indians to lease their water right to the non-Indians. n884 It is also possible for the Indians to transfer such rights by other means of conveyance as well. n885 In at least one case, a court has recognized the claim of a non-Indian landowner based upon the purchase of Indian lands within the reservation from the owner of Indian allotment lands. n886 There, the non-Indian claim to a water right based upon an Indian reserved water right was upheld. n887

In In re Big Horn River, n888 the court held that lands that were located within the boundaries of the Wind River Indian Reservation but which were not owned by Indian allottees did not have the priority date of the reservation. These lands, it was held, were ceded back to the United States for purpose of sale. As a result, the reservation right disappeared as the purpose for which the right was recognized no longer pertained. For these lands, the priority date would be that of the permit granted by the chief engineer to the initial water user. n889

COMPUTER-ASSISTED RESEARCH

LEXIS: non-indian! w/15 water! w/2 right!

§ 50.18(j) State Authority Over Indian Rights.

Although it appears that the state may have some authority over certain aspects of Indian water rights, much is unclear.

State courts may consider questions of Indian Reserved rights as a part of the adjudication proceedings authorized by the McCarran Amendment. n890 Indeed, at least one court has described the effect of the McCarran Amendment as being "to place federal reserved rights within the state adjudication system." n891 On the other hand, the court in *Walton* n892 refused to allow the state to exercise jurisdiction over non-Indian owners of lands within the reservation with respect to matters such as the regulation of water on the ground that such power was preempted by the creation of the reservation. In contrast, other jurisdictions have expressly upheld state regulation of on-reservation, non-Indian water use. n893

Where the law has recognized that non-Indians may hold Indian reserved water right, any transfers of such rights to other non-Indians may be subject to state law to the extent that they involve changes in the place of extraction or use. n894

Federal and Indian policy has historically been fraught with ambivalence. On the one hand, there has been a desire to protect the cultural integrity of Indians by recognizing some measure of tribal sovereignty. On the other, there has been a sense that Indians should be fully integrated into the mainstream of American life. History demonstrates that we have succeeded at neither. History also reveals a tortured trail of abuse and oppression. n895 Indeed, an objective consideration of the relation between Indians and the American system reveals that Indians, as a group, are undoubtedly the least protected of all minorities.

At the state level, considerable jealousy exists regarding access to and control over water. The fact that much water in arid Western States has given rise to fears that Indian control over water may have widespread negative effects on state administration of water rights. This fact, coupled with the historic state propensity to leave Indian rights unprotected (if not affirmatively abused) has left Indians in a very vulnerable position in water right adjudications conducted in state courts. Cases such as the *Big Horn River System Adjudication,* and the *Pyramid Lake* cases suggest that the interests of the Indians are likely to receive short shrift when compared to either state interests or other federal interests. For this reason, it may be argued that granting state courts jurisdiction over Indian rights has been a mistake. It is clear, since the cases dealing with the Endangered Species Act, n896 and associated commentary, n897 that considerable power exists at the federal level to protect Indian water rights outside of the reserved doctrine. Further, recent developments in the area of Indian Law itself, suggest that to expose tribes to state court adjudications of water rights may violate principles of tribal sovereign immunity. n898

COMPUTER-ASSISTED RESEARCH

LEXIS: state! w/5 authority w/15 indian! w/5 water! w/2 right!

FOOTNOTES:

(n1)Footnote 851. *Winters v. United States, 207 U.S. 564 (1908).*

For a further discussion of problems Indians face in the legal system, including issues regarding water rights, *see* Philip Deloria, *The American Indian Law Center: An Informal History, 24 N.M. L. Rev. 315 (1994).*

See also Gina McGovern, *Settlement or Adjudication: Resolving Indian Reserved Rights, 36 Ariz. L. Rev. 195 (1994);* Morrison, Richard, *State and Federal Law in Conflict over Indian and Other Federal Reserved Water Rights, 2 Drake J. Agric. L. 1 (1997);* Helton, Taiawagi, *Indian Reserved Rights in the Dual-system State of Oklahoma, 33 Tulsa L.J. 979 (1998);* Eichelberger, Eunice A., *United States District Court Jurisdiction of Action Brought by Indian Tribe Under 28 U.S.C.A. § 1362, 65 A.L.R. Fed. 649* (1998 Supp.) (jurisdiction to sue states etc).; Zeh, Charles R., and Hearne, Treva J., *Development Considerations on Indian Lands,* 13-SUM Nat. Resources & Env't 350 (1998); Chambers, Reid Peyton, *Indian Law in the United States Supreme Court-Experiences in the 1980's and Predictions for the 1990's, 22 Am. Indian L. Rev. 601 (1998).*

For an interesting discussion of the opinion that was almost issued in the Big Horn case, see Mergen, Andrew C. and Liu, Sylvia F., *Misplaced Sensitivity: The Draft Opinions in Wyoming v. United States, 68 U. Colo. L. Rev. 683 (1997).*

See also Grand Traverse Band of Ottawa and Chippewa Indians v. Director, Michigan Dep't of Nat. Res. 141 F.3d 635 (6th Cir. 1997) (court held that municipalities were bound by consent order expressly providing for implementation of the treaty right to fish and upheld right of transient mooring at public marina).

Assistance in understanding the usufructary nature of Indian water rights may be gathered from two non-water law, but water-related cases. In *United States v. Gotchink, 57 F. Supp. 2d 798 (D. Minn. 1999),* the court considered the prosecution of two Chippewa Indians who used a motorized boat and a power ice auger to exercise their treaty-protected fishing rights in the Boundary Canoe Area Wilderness (BCAW) area contrary to the BCAW regulations. The court held that Congress had not preempted the treaty rights of the Indians but could regulate the scope of the content of those rights to the extent that they were the result of valid, non-discriminatory conservation measures. Under this construction of Indian rights, the Indians could not use the boat could use the auger. In *Minnesota v. Mille Lacs Band of Chippewa Indians, 119 S. Ct. 1187 (1999),* the Supreme Court held that the usufructary rights of the Indians recognized under an 1837 treaty had not been abrogated or terminated by an Executive Order which, in 1850, removed Chippewa Indians from lands previously ceded nor did they terminate when the band entered into another treaty in 1855 or by the admission of Minnesota into the Union. Significantly, the court noted that treaty rights regarding natural resources are reconcilable with state sovereignty over those resources such that statehood by itself is not sufficient to extinguish rights to hunt, fish and gather on land within state boundaries.

For further discussion, see Benson, Reed D. Can't Get No Satisfaction: Securing Water For Federal and Tribal Lands in the West. 30 Envtl L. Rpt. 11056 (2000).

(n2)Footnote 852. For further discussion, *see* Scott B. McElroy & Jeff Davis, *Revisiting Colorado River Conservation District v. United States -- There Must Be a Better Way, 27 Ariz. St. L.J. 597 (Summer 1995);* Sylvia F. Liu, *American Indian Reserved Water Rights: The Federal Obligation to Protect Tribal Water Resources and Tribal Autonomy, 25 Envtl. L. 425 (Spring 1995);* William C. Galloway, *Tribal Water Quality Standards Under The Clean Water Act: Protecting Traditional Cultural Uses, 70 Wash. L. Rev. 177 (Jan. 1995);* Stephen H. Suagee, *A Tribal Strategy Increases Streamflows To Restore a Facility, 9 Nat. Resources & Env't, 23 (Winter 1995);* Mark E. Chandler, *A Link Between Water Quality and Water Rights? Native American Control over Water Quality, 30 Tulsa L.J. 61 (Fall 1994);* Judith V. Royster, *A Primer on Indian Water Rights: More Questions Than Answers, 30 Tulsa L.J. 61 (Fall 1994);* Eric F. Spade, *Indian Reserved Water Rights Doctrine and the Groundwater Question, 19 Am. Indian L. Rev. 403 (Summer 1994);* John S. Harbison, *The Downstream People: The Treating of Indian Tribes as States Under the Clean Water Act, 71 N.D. L. Rev. 473 (Spring 1995);* Kevin Gover & Jana L. Walker, *Water Quality on Indian Reservations,* 40 Rocky Mts. Mineral L. Inst. 24 (Annual 1994); Peter L. Reich, *The "Hispanic" Roots of Prior Appropriation in Arizona, 27 Ariz. St. L.J. 649 (Summer 1995);* Judith V. Royster, *Equivocal Obligations: The Federal-Tribal Trust Relationship and Conflicts of Interest in the Development of Mineral Resources, 71 N.D. L. Rev. 327 (Spring 1995).*

See also Department of the Interior, Bureau of Indian Affairs v. Klamath Water Users Protective Association, 532 U.S. 1 (2001), holding that nonprofit association was entitled to access to documents filed by the tribe with the Department of the Interior.

(n3)Footnote 853. *Winters v. United States, 207 U.S. 564 (1908).*

(n4)Footnote 854. *Arizona v. California, 373 U.S. 546, 600 (1963).*

For an interesting discussion of the opinion that was almost issued in the Big Horn case, see Mergen, Andrew C. and Liu, Sylvia F., *Misplaced Sensitivity: The Draft Opinions in Wyoming v. United States, 68 U. Colo. L. Rev. 683 (1997).*

See also Grand Traverse Band of Ottawa and Chippewa Indians v. Director, Michigan Dep't of Nat. Res. 141 F.3d 635 (6th Cir. 1997) (court held that municipalities were bound by consent order expressly providing for implementation of the treaty right to fish and upheld right of transient mooring at public marina).

For further discussion, see Benson, Reed D. *Can't Get No Satisfaction: Securing Water For Federal and Tribal Lands in the West,* 30 Envtl L. Rpt. 11056 (2000).

In re the General Adjudication of All Rights to Use Water in the *Gila River System and Source, 35 P.3d 68 (Az. 2001)* rejecting strict application of the PIA.

For further general discussion, see B. Perron, *When Tribal Treaty Fishing Rights Become a Mere Opportunity to Dip One's Net into the Water and Pull it Out Empty: The Case for Money Damages when Treaty-Reserved Fish Habitat is Degraded, 25 Wm & Mary Envt'l L & Pol'y Rev. 738 (2001).*

(n5)Footnote 855. *In re General Adjudication of Big Horn River System, 753 P.2d 76 (Wyo. 1988).*

For an interesting discussion of the opinion that was almost issued in the Big Horn case, *see* Mergen, Andrew C. and Liu, Sylvia F., *Misplaced Sensitivity: The Draft Opinions in* Wyoming v. United States, *68 U. Colo. L. Rev. 683 (1997).*

(n6)Footnote 856. Thomas, J., in his dissent, argued that:

> [t]he purpose of establishing an Indian reservation, such as the Wind River Indian Reservation, is to provide a homeland for Indian peoples. If one is to assume that, pursuant to the reserved rights doctrine relating to water, there is an implied reservation of those waters essential to accomplish the purpose of the reservation of land, then I cannot agree that the implied reservation of water with respect to the Wind River Indian Reservation should be limited, as the majority has held in approving the judgment of the district court. The fault that I find with such a limitation is that it assumes that the Indian peoples will not enjoy the same style of evolution as other people, nor are they to have the benefits of modern civilization. I would understand that the homeland concept assumes that the homeland will not be a static place frozen in an instant of time but that the homeland will evolve and will be used in different ways as the Indian society develops... .

For an interesting discussion of the opinion that was almost issued in the Big Horn case, *see* Mergen, Andrew C. and Liu, Sylvia F., *Misplaced Sensitivity: The Draft Opinions in* Wyoming v. United States, *68 U. Colo. L. Rev. 683 (1997).*

For further discussion, see Helton, Taiawagi, *Indian Reserved Rights in the Dual-system State of Oklahoma, 33 Tulsa L.J. 979 (1998);* Eichelberger, Eunice A., *United States District Court Jurisdiction of Action Brought by Indian Tribe Under 28 U.S.C.A. § 1362, 65 A.L.R. Fed. 649* (1998 Supp.) (jurisdiction to sue states etc).; Zeh, Charles R., and Hearne, Treva J., *Development Considerations on Indian Lands,* 13-SUM Nat. Resources & Env't 350 (1998); Chambers, Reid Peyton, *Indian Law in the United States Supreme Court-Experiences in the 1980's and Predictions for the 1990's, 22 Am. Indian L. Rev. 601 (1998).*

(n7)Footnote 857. For further discussion, *see* Judith V. Royster, *A Primer on Indian Water Rights: More Questions Than Answers, 30 Tulsa L.J. 61 (Fall 1994).*

(n8)Footnote 858. *Arizona v. California, 373 U.S. 546 (1963); Arizona v. California, 439 U.S. 419 (1979);* Wyoming v. United States, No. 88-309, *aff'd* on equally divided vote, *June 26, 1989 (57 L. W. 4997).*

For discussion of the ability of Indians to change the use to which the water is allocated under the practicably irrigable

acreage standard, *see In re* the General Adjudication of All Rights to Use Water in the *Big Horn River System, 835 P.2d 273 (Wyo. 1992).* The court rejected the Indian claim that the right to change the nature of the use was a matter of federal, not state, law.

For further discussion, *see* Judith V. Royster, *A Primer on Indian Water Rights: More Questions Than Answers, 30 Tulsa L.J. 61 (Fall 1994);* Eric F. Spade, *Indian Reserved Water Rights Doctrine and the Groundwater Question, 19 Am. Indian L. Rev. 403 (Summer 1994). See also* Gina McGovern, *Settlement or Adjudication: Resolving Indian Reserved Rights, 36 Ariz. L. Rev. 195 (1994);* Wes Williams, Jr., *Changing Water Use for Federally Reserved Indian Water Rights*: *Wind River Indian Reservation, 27 U.C. Davis L. Rev. 501 (1994).*

For an interesting discussion of the opinion that was almost issued in the Big Horn case, *see* Andrew C. Mergen & Sylvia F. Liu, *Misplaced Sensitivity: The Draft Opinions in Wyoming v. United States, 68 U. Colo. L. Rev. 683 (1997).*

Regarding the ability to sue the states in federal court to enforce and quantify water rights, see discussion of Eleventh Amendment immunity of states in *Cayauga Indian Nation of New York v. Cuomo, 1999 U.S. Dist. LEXIS 10579 (N.D. N.Y. 1999).* For a decision finding that two legislative measures revising the state's water laws were unconstitutional because those provisions affected Indian water rights, *see San Carlos Apache Tribe v. Superior Court, 792 P.2d 179 (Ariz. 1999).* Sovereign immunity was not an issue in this case because the challenge was brought in state court and alleged violations of the state Constitution.

For further discussion, see Benson, Reed D. *Can't Get No Satisfaction: Securing Water For Federal and Tribal Lands in the West.* 30 Envtl L. Rpt. 11056 (2000).

See Arizona v. California, 120 S. Ct. 2304 (2000).

(n9)Footnote 859. *43 U.S.C. § 666*(a).

For further discussion, see Benson, Reed D. *Can't Get No Satisfaction: Securing Water For Federal and Tribal Lands in the West.* 30 Envtl L. Rpt. 11056 (2000).

See also State Engineer of the State of Nevada v. South Fork Band of the Te-Moak Tribe of Western Shoshone Indians of Nevada, 114 F. Supp. 2d 1046 (D. Nev. 2000). Here, the court rejected a state motion to remand to state court to enforce a state court water rights decree. The tribe had moved to remove the case to federal court.

(n10)Footnote 860. For further discussion, *see* § 50.17(h) *supra*.

For a general discussion, see Helton, Taiawagi, *Indian Reserved Rights in the Dual-system State of Oklahoma, 33 Tulsa L.J. 979 (1998);* Eichelberger, Eunice A., *United States District Court Jurisdiction of Action Brought by Indian Tribe Under 28 U.S.C.A. § 1362, 65 A.L.R. Fed. 649* (1998 Supp.) (jurisdiction to sue states etc).; Zeh, Charles R., and Hearne, Treva J., *Development Considerations on Indian Lands,* 13-SUM Nat. Resources & Env't 350 (1998); Chambers, Reid Peyton, *Indian Law in the United States Supreme Court-Experiences in the 1980's and Predictions for the 1990's, 22 Am. Indian L. Rev. 601 (1998).*

(n11)Footnote 861. *See Colorado River Water Conserv. Dist. v. United States, 424 U.S. 800 (1976).*

In *In re* the General Adjudication of All Rights to Use Water in the *Big Horn River System, 835 P.2d 273 (Wyo. 1992),* the court held that the tribal water agency could not be substituted for the Wyoming state engineer as the administrator of the Indian's reserved water rights, even within the reservation. The court held that the state engineer was obligated to protect the Indian's reserved rights and that the courts had authority to take appropriate enforcement action.

See also Stephen Feldman, *The Supreme Court's New Sovereign Immunity Doctrine and the McCarran Amendment: Toward Ending State Adjudication of Indian Water Rights, 18 Harv. Envtl. L. Rev. 433 (1994).* Gina McGovern, *Settlement or Adjudication: Resolving Indian Reserved Rights, 36 Ariz. L. Rev. 195 (1994).*

For discussion of the ability of the judge in an adjudication to communicate ex parte with the state Department of Water Resources, *see San Carlos Apache Tribe v. Bolton, 977 P.2d 790 (Ariz. 1999),* holding that the communications were proper where they involved routine scheduling, administrative or other matters not involving the merits of the adjudication and the Indians were not prejudiced thereby. The court noted that, when in doubt or whenever practicable, the judge should err in favor of giving notice of the communications.

(n12)Footnote 862. *Dugan v. Rank, 372 U.S. 609 (1963).*

See also United States v. District Court In and For Eagle County, 401 U.S. 520 (1971); United States v. District Court In and For Water Division Number 5, 401 U.S. 527 (1971).

It has been held that state constitutional disclaimers of jurisdiction over Indian lands does not deprive state courts of the authority to adjudicate Indian water rights under the McCarran Amendment. *See State of Montana v. Confederated Salish and Kootanai Tribes, 712 P.2d 754 (Mont. 1985). See also* Gina McGovern, *Settlement or Adjudication: Resolving Indian Reserved Rights, 36 Ariz. L. Rev. 195 (1994).*

For discussion of state authority in other areas, including water, *see* K. Lenertz, *State Regulatory Authority in Indian Country: State OSHA Jurisdiction, 17 Hamline L. Rev. 447 (1994).*

For further discussion, *see* Judith V. Royster, *A Primer on Indian Water Rights: More Questions Than Answers, 30 Tulsa L.J. 61 (Fall 1994);* Scott B. McElroy & Jeff Davis, *Revisiting Colorado River Conservation District v. United States--There Must Be a Better Way, 27 Ariz. St. L.J. 597 (Summer 1995);* Sylvia F. Liu, *American Indian Reserved Water Rights: The Federal Obligation to Protect Tribal Water Resources and Tribal Autonomy, 25 Envtl. L. 425 (Spring 1995);* Robert E. Bakes, *The Snake River Basin Adjudication ... From the Beginning to the Present, 38 Advocate 10 (Feb. 1995);* A. Lynne Krogh, *Water Right Adjudications in the Western States: Procedures, Constitutionality, Problems and Solutions, 30 Land & Water L. Rev. 9 (Winter 1995).*

(n13)Footnote 863. *See* Mont. Code Ann. § 2-25-212. In this jurisdiction, such an agreement acts as an automatic stay of litigation involving the same claims. Mont. Code Ann. § 85-2-217. For further discussion, *see* Norman Thorsen, *Water Marketing in the Big Sky Country: An Interim Assessment*, 29 Nat. Res. J. 479 (1989).

For further discussion see J. Shurts, *The Genesis and Early Power of Winters A Book Review of Indian Reserved Rights: The Winters Doctrine and its Social and Legal Context, 36 Tulsa L.J. 641 (2001).*

(n14)Footnote 864. *See, e.g.*, Pub. L. No. 97-293, §§ 301-315, *96 Stat. 1261* (Relating to an agreement with the Papago Indian Tribe).

For further discussion, *see* Judith V. Royster, *A Primer on Indian Water Rights: More Questions Than Answers, 30 Tulsa L.J. 61 (Fall 1994).*

A settlement was disapproved in the case of *Arizona v. California, 120 S. Ct. 2304 (2000).*

(n15)Footnote 865. *Arizona v. California, 373 U.S. 546, 600 (1963).*

In re the General Adjudication of All Rights to Use Water in the *Gila River System and Source, 35 P.3d 68 (Az. 2001)* rejecting strict application of the PIA.

See also E. Shane, *Water Rights and Gila River III: The Winters Doctrine Goes Underground, 4 U. Denv. Water L. Rev. 397 (2001).*

(n16)Footnote 866. *Id.*

Matter of Beneficial Water Use Permit Numbers 66459-76L, Ciotti; 64988-*G76L, Starner, 923 P.2d 1073 (Mont. 1996)* (practically irrigable acreage standard applies to future irrigation or reservation land, not to present irrigation practices and current consumptive uses). See *Arizona v. California, 120 S. Ct. 2304 (2000).*

(n17)Footnote 867. For further discussion, *see* H.S. Burness et al., *Practicably Irrigable Acreage and Economic Feasibility: The Role of Time, Ethics, and Discounting*, 23 Nat. Res. J. 289 (1983); H.S. Burness et al., *The "New" Arizona v. California: Practicably Irrigable Acreage and Economic Feasibility*, 22 Nat. Res. J. 517 (1982).

(n18)Footnote 868. *See In re General Adjudication of Big Horn River System, 753 P.2d 76 (Wyo. 1988).*

(n19)Footnote 869. To be susceptible of irrigation, the land must not only be arable, but also land for which there is an engineering feasibility of irrigating the land. *Id.*

(n20)Footnote 870. *Id.*

(n21)Footnote 871. For further discussion, *see* Judith V. Royster, *A Primer on Indian Water Rights: More Questions Than Answers, 30 Tulsa L.J. 61 (Fall 1994).*

(n22)Footnote 872. *See United States v. New Mexico, 438 U.S. 696 (1978).*

In re the General Adjudication of All Rights to Use Water in the *Gila River System and Source, 35 P.3d 68 (Az. 2001)* rejecting strict application of the PIA.

For further discussion see J. Shurts, *The Genesis and Early Power of Winters A Book Review of Indian Reserved Rights: The Winters Doctrine and its Social and Legal Context, 36 Tulsa L.J. 641 (2001).*

(n23)Footnote 873. *Arizona v. California, 439 U.S. 419 (1979).*

(n24)Footnote 874. *See In re General Adjudication of Big Horn River System, 753 P.2d 76 (Wyo. 1988), aff'd* on other grounds by an equally divided court *sub nom. Wyoming v. United States, 492 U.S. 406 (1989).*

(n25)Footnote 875. *Id.*

See Arizona v. California, 120 S. Ct. 2304 (2000).

(n26)Footnote 876. *See In re General Adjudication of Big Horn River System [Big Horn I], 753 P.2d 76 (Wyo. 1988), aff'd* on other grounds by an equally divided court *sub nom. Wyoming v. United States, 492 U.S. 406 (1989).*

(n27)Footnote 877. *In re* Adjudication of All Rights to Use Water in the *Big Horn River System [Big Horn II], 835 P.2d 273 (Wyo. 1992).*

(n28)Footnote 878. *Id.*

(n29)Footnote 879. For further discussion, *see* Judith V. Royster, *A Primer on Indian Water Rights: More Questions Than Answers, 30 Tulsa L.J. 61 (Fall 1994);* Kevin Gover & Jana L. Walker, *Water Quality on Indian Reservations*, 40 Rocky Mts. Mineral L. Inst. 24 (Annual 1994); Sylvia F. Liu, *American Indian Reserved Water Rights: The Federal Obligation to Protect Tribal Water Resources and Tribal Autonomy, 25 Envtl. L. 425 (Spring*

1995); William C. Galloway, *Tribal Water Quality Standards Under The Clean Water Act: Protecting Traditional Cultural Uses, 70 Wash. L. Rev. 177 (Jan. 1995);* Stephen H. Suagee, *A Tribal Strategy Increases Streamflows To Restore a Facility, 9 Nat. Resources & Env't, 23 (Winter 1995);* Mark E. Chandler, *A Link Between Water Quality and Water Rights? Native American Control over Water Quality, 30 Tulsa L.J. 61 (Fall 1994).*

(n30)Footnote 880. *United States v. Anderson, 736 F.2d 1358 (9th Cir. 1984).*

For further discussion, see Benson, Reed D. *Can't Get No Satisfaction: Securing Water For Federal and Tribal Lands in the West.* 30 Envtl L. Rpt. 11056 (2000).

(n31)Footnote 881. *Id.*

(n32)Footnote 882. *Id.*

(n33)Footnote 883. *See United States v. Adair, 723 F.2d 1394 (9th Cir. 1983).*

For further discussion, *see* Stephen H. Suagee, *A Tribal Strategy Increases Streamflows To Restore a Facility, 9 Nat. Resources & Env't, 23 (Winter 1995);* Sylvia F. Liu, *American Indian Reserved Water Rights: The Federal Obligation to Protect Tribal Water Resources and Tribal Autonomy, 25 Envtl. L. 425 (Spring 1995);* Judith V. Royster, *A Primer on Indian Water Rights: More Questions Than Answers, 30 Tulsa L.J. 61 (Fall 1994).*

(n34)Footnote 884. *25 U.S.C. § 415. See also Skeem v. United States, 273 F.2d 93 (9th Cir. 1921).*

Such transfers may be subject to state law to the extent that they involve changes in the place of extraction or use. For further discussion, *see* Harold A. Ranquist, *The Effect of Changes in Place and Nature of Use of Indian Rights to Water Reserved under the Winters Doctrine,* 5 Nat. Res. J. 34 (1972).

For further general discussion, see Helton, Taiawagi, *Indian Reserved Rights in the Dual-system State of Oklahoma, 33 Tulsa L.J. 979 (1998);* Eichelberger, Eunice A., *United States District Court Jurisdiction of Action Brought by Indian Tribe Under 28 U.S.C.A. § 1362, 65 A.L.R. Fed. 649* (1998 Supp.) (jurisdiction to sue states etc).; Zeh, Charles R., and Hearne, Treva J., *Development Considerations on Indian Lands,* 13-SUM Nat. Resources & Env't 350 (1998); Chambers, Reid Peyton, *Indian Law in the United States Supreme Court-Experiences in the 1980's and Predictions for the 1990's, 22 Am. Indian L. Rev. 601 (1998).*

In *Warr v. United States, 46 Fed. Cl. 343 (2000),* a tenant of Native American allottees brought suit for damages arising from crop losses resulting from inadequate water supplies from an irrigation project. The court held that the regulations governing the irrigation project did not mandate compensation from the federal government.

(n35)Footnote 885. *See* Jack Palma, *Considerations and Conclusions Concerning the Transferability of Indian Water Rights,* 20 Nat. Res. J. 91 (1980); David Getches, *Management and Marketing of Indian Water: From Conflict to Pragmatism, 58 Colo. L. Rev. 515 (1988).*

(n36)Footnote 886. *Colville Confederated Tribes v. Walton, 647 F.2d 42 (9th Cir. 1981).*

(n37)Footnote 887. *Id. See also Colville Confederated Tribes v. Walton, 752 F.2d 397 (9th Cir. 1989),* where the extent of the claim was limited to the amount of water the Indian transferee was actually using prior to the transfer.

See also In re the General Adjudication of All Rights to Use Water in the *Gila River System and Source, 35 P.3d 68 (Az. 2001).*

For further discussion see J. Shurts, The Genesis and Early Power of Winters A Book Review of Indian Reserved

Rights: The Winters Doctrine and its Social and Legal Context, *36 Tulsa L.J. 641 (2001);* E. Shane, *Water Rights and Gila River III: The Winters Doctrine Goes Underground, 4 U. Denv. Water L. Rev. 397 (2001).*

(n38)Footnote 888. *899 P.2d 848 (Wyo. 1995).*

(n39)Footnote 889. For further discussion *see* Judith V. Royster, *A Primer on Indian Water Rights: More Questions Than Answers, 30 Tulsa L.J. 61 (Fall 1994).*

(n40)Footnote 890. *See Colorado River Water Conserv. Dist. v. United States, 424 U.S. 800 (1976).*

For further discussion, see Benson, Reed D. *Can't Get No Satisfaction: Securing Water For Federal and Tribal Lands in the West*, 30 Envtl L. Rpt. 11056 (2000); De Young, Tim and Scott, William C. *Environmental Protection in Indian Country*, 15 SUM Nat. Resources & Envt. 20 (2000); Burson, James M. *Middle Rio Grande Regional Water Resource Planning: The Pitfalls and the Promises*, 40 Nat. Res. J. 533 (2000).

See also State Engineer of the State of Nevada v. South Fork Band of the Te-Moak Tribe of Western Shoshone Indians of Nevada, 114 F. Supp. 2d 1046 (D. Nev. 2000); South Fork Band of Te-Moak Tribe of Western Shoshone Indians of Nevada v. Sixth Judicial District Court of Nevada, 7 P.3d 455 (Nev. 2000). In this case, the court held that the tribe had waived sovereign immunity and that the Federal Government was not an indispensable party.

(n41)Footnote 891. *United States v. Bell, 724 P.2d 631 (Colo. 1986).*

For discussion of the ability of the judge in an adjudication to communicate ex parte with the state Department of Water Resources, see *San Carlos Apache Tribe v. Bolton, 977 P.2d 790 (Ariz. 1999),* holding that the communications were proper where they involved routine scheduling, administrative or other matters not involving the merits of the adjudication and the Indians were not prejudiced thereby. The court noted that, when in doubt or whenever practicable, the judge should err in favor of giving notice of the communications.

Whether riverbed was within Indian Country was held to be a mixed question of law and fact in a case involving the application of a state law regarding the illegal possession of game fish. In this case, the bed was found to be outside Indian Country and the Indian's conviction for violating the statute was upheld. *See Hanes v. State, 973 P.2d 330 (Ok. App. 1998).*

Whether aboriginal rights to fish exist on part of members of Native American tribe was held to be a question of fact, resulting in the reversal of convictions of Native Americans in *Commonwealth v. Maxim, 708 N.E. 2d 636 (Mass. 1999).*

For further discussion, see Alex Tallchief Skibine, *The Chevron Doctrine in Federal Indian Law and the Agencies' Duty to Interpret Legislation in Favor of Indians: Did the EPA Reconcile the Two in Interpreting the "Tribes as States" Section of the Clean Water Act?* 11 St. Thomas Law Rev. 15 (1998); Note, *Expanding State Sovereignty: Idaho v. Coeur D'Alene Tribe of Idaho, 35 Idaho L. Rev. 599 (1999).*

(n42)Footnote 892. *Colville Confederated Tribes v. Walton, 647 F.2d 42 (9th Cir. 1981).*

(n43)Footnote 893. *See United States v. Anderson, 736 F.2d 1358 (9th Cir. 1984).*

Grand Traverse Band of Ottawa and Chippewa Indians v. Director, Michigan Dep't of Nat. Res. 141 F.3d 635 (6th Cir. 1997) (court held that municipalities were bound by consent order expressly providing for implementation of the treaty right to fish and upheld right of transient mooring at public marina).; *Menominee Indian Tribe of Wisconsin. v. Thompson, 161 F.3d 449 (7th Cir. 1998)* (court held that the tribe retained no aboriginal rights to hunt or fish on off-reservation lands under Treaty of 1831); *Native Village of Eyak v. Trawler Diane Marie, Inc., 154 F.3d 1090 (9th*

Cir. 1998) (court held that aboriginal title claim to exclusive hunting and fishing rights in the ocean area of the outer continental shelf were barred under federal paramountcy doctrine).

For further discussion, *see* Helton, Taiawagi, *Indian Reserved Rights in the Dual-system State of Oklahoma, 33 Tulsa L.J. 979 (1998);* Eichelberger, Eunice A., *United States District Court Jurisdiction of Action Brought by Indian Tribe Under 28 U.S.C.A. § 1362, 65 A.L.R. Fed. 649* (1998 Supp.) (jurisdiction to sue states etc).; Zeh, Charles R., and Hearne, Treva J., *Development Considerations on Indian Lands,* 13-SUM Nat. Resources & Env't 350 (1998); Chambers, Reid Peyton, *Indian Law in the United States Supreme Court-Experiences in the 1980's and Predictions for the 1990's, 22 Am. Indian L. Rev. 601 (1998).*

(n44)Footnote 894. For further discussion, *see* Harold A. Ranquist, *The Effect of Changes in Place and Nature of Use of Indian Rights to Water Reserved under the Winters Doctrine*, 5 Nat. Res. J. 34 (1972).

See In re Big Horn River, 899 P.2d 848 (Wyo. 1995), holding that priority for water rights on lands within the reservation that were not owned by Indian allottees was governed by permits issued by the chief engineer rather than by the date of the reservation. For further discussion, *see* Judith V. Royster, *A Primer on Indian Water Rights: More Questions Than Answers, 30 Tulsa L.J. 61 (Fall 1994);* Eric F. Spade, *Indian Reserved Water Rights Doctrine and the Groundwater Question, 19 Am. Indian L. Rev. 403 (Summer 1994);* John S. Harbison, *The Downstream People: The Treating of Indian Tribes as States Under the Clean Water Act, 71 N.D. L. Rev. 473 (Spring 1995);* Kevin Gover & Jana L. Walker, *Water Quality on Indian Reservations,* 40 Rocky Mts. Mineral L. Inst. 24 (Annual 1994).

(n45)Footnote 895. *See, e.g.,* Susan Lope, *Indian Giver: The Illusion of Effective Legal Redress for Native American Land Claims, 23 Sw. U. L. Rev. 331 (1994).*

(n46)Footnote 896. *See, e.g., United States v. Glenn-Colusa Irrigation District, 758 F. Supp. 1126 (E.D. Cal. 1992); Department of Fish and Game v. Anderson-Cottonwood Irrigation District, 8 Cal. App. 4th 1554 (1992).*

(n47)Footnote 897. *See, e.g.,* Sandra Dunn, *Endangered Species Act versus Water Resources Development: The California Experience, 25 Pac. L.J. 1107 (1994);* William Attwater, *Introduction: Environmental Restraints on Water Law, 25 Pac. L.J. 901 (1994);* Michelle Ouellette, et al., *Institutional Reforms in California Groundwater Law, 25 Pac. L.J. 1021 (1994);* Susan Lope, *Indian Giver: The Illusion of Effective Legal Redress for Native American Land Claims, 23 Sw. U. L. Rev. 331 (1994).*

(n48)Footnote 898. *See* Stephen Feldman, *The Supreme Court's New Sovereign Immunity Doctrine and the McCarran Amendment: Toward Ending State Adjudication of Indian Water Rights, 18 Harv. Envtl. L. Rev. 433 (1994). See also United States v. Oregon Water Resources Dep't, 774 F. Supp. 1568 (D. Or. 1991),* holding that while the McCarran Amendment did not exempt the United States from payment of filing fees, a similar result would not obtain regarding Indian tribes because of treaty rights and federal law generally.

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CHAPTER 50 WATER RIGHTS

6-50 Thompson on Real Property, Thomas Editions § 50.19

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§ 50.19 Non-Reserved Indian Rights.

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§ 50.19(a) In General.

In addition to reserved rights, Indians may claim water in other ways. Certainly, water rights may be claimed and perfected under the laws of the various states; these rights would be identical to any other state-created water rights. Courts in some jurisdictions have recognized at least two other kinds of Indian water right claims which are not a part of the state water right system and, in fact, are likely to override or prevail over state-created rights. These rights are commonly called pueblo water rights and aboriginal water rights. n899

§ 50.19(b) Pueblo Rights.

Pueblo water rights tend to be recognized in the Southwest, where these historic claims have sometimes been recognized in association with historic villages or towns. n900 The water right appears to be derived, not so much from the fact that the pueblo or town has existed from time immemorial, but from the fact that the town has needed and used water for so long that there can be no question as to the existence of the claim to the water. These rights are then recognized as having ancient status and, therefore, priority based on the fact that such towns themselves were in existence before the creation of the current water right allocation system of the particular jurisdiction. This accords the rights the same status and protection as pre-existing vested rights.

Alternatively, the claim to the water may be protected as a pre-existing right where it may be traced to some Mexican or Spanish Land Grants. n901 This type of claim may actually be broader than a pueblo claim and may extend the doctrine of protecting ancient rights to individual claims which may be recognized on the same basis as that the towns, n902 which, under this approach are considered to be the successors to the historic grantees of the Spanish or Mexican governments. n903

Pueblo rights pertain to water naturally occurring within the boundaries and are considered to embrace both surface and groundwater. n904 However, unlike other Western water rights, they are not subject to the requirement that the water have been used continually since the founding of the pueblo in order to support the existence of the right. n905

Pueblo rights have been held to entitle the town to such water as may be needed for the residents of the village. n906 They therefore would possibly appear to be even more open-ended than Indian reserved rights as to quantity. It has been held that pueblo water rights are limited principally only by the needs of the community. n907

COMPUTER-ASSISTED RESEARCH

LEXIS: pueblo w/2 water! w/2 right!

§ 50.19(c) Aboriginal Water Rights.

It has been argued successfully in at least one case n908 that Indians may claim a right to the water simply on the ground that their claims to the water pre-date the present system. Claims of this type are generally denominated as aboriginal water rights since they are not dependent upon any claim that the right is derived from or related to an historic pueblo or village, nor are they derived in any way from federal reservations.

Given the significance of actual use of the water with respect to the acquisition of water rights in most jurisdictions in the Western states, it might appear that before one could claim an aboriginal right in such a jurisdiction, there must be evidence of uninterrupted use, since aboriginal rights do not seem to be derived from any implied grant or historic status as a village or town. Further, it might be argued that in order for such a right to be confirmed as a pre-existing right, not only must the use of water pre-date the establishment of the present system but it must also be continuous or uninterrupted from the previous period to the present day. Clearly, such a requirement of historic and uninterrupted use, of course, will be virtually impossible to show in most cases and such a requirement would, more often than not, deny the existence of the right.

The little discussion of the creation of aboriginal rights that is found in the cases does not appear to support the requirement of either continual use or uninterrupted use. n909 In this sense, the aboriginal rights doctrine is more consistent with the reserved rights doctrine than it is with the doctrine of the particular jurisdictions in which the right may be claimed. n910 In fact, the cases seem to talk more in terms of the historic nature of the Indian claims to the land rather than the water as the basis for the asserted right. And even here, there seems to be little concern that the Indian's claim to the land be continuous or uninterrupted. n911

The most frequently asserted rationale of the aboriginal right differs from that of both the reserved right and the pueblo right in the sense that whereas the United States government "reserved" the water for the Indians when the reservations were created or the right is claimed based on the historic fact of existence of the pueblo, the aboriginal right appears to be derived directly from the status of sovereignty of the Indian Tribe prior to its submission to United States Authority, n912 and in that sense is somewhat similar to the navigation servitude, which is generally considered to have been "held back" when there was a transfer of jurisdiction. n913 The aboriginal right may be deemed to have simply been retained by the tribe on the basis of tribal sovereignty when the tribe submitted to United States jurisdiction. n914 Indeed, in at least one case, a court has suggested that where the creation of the reservation simply confirmed the existing territorial claims of the tribe, the treaty should be viewed "not as a grant of rights to the Indians, but a grant of rights from them - a reservation of those not granted." n915

On this basis, it has been observed that "[w]here the Reservation is located on lands aboriginally owned by the Indian tribe, their water rights may even be said to have existed from time immemorial." n916 This rationale seems to have been accepted in at least one decision n917 as the basis for determining whether an Indian claim to water fell within the *Winters* doctrine. n918 And at least one court n919 has held that where the area in question had been the ancestral homeland of the tribe, the Indian claim for water to maintain instream flows to support hunting and fishing had the priority of a reserved right and was held to date from "time immemorial." This right was obviously unaffected by non-use that resulted from the dissolution of the tribe and the conveyance of tribal lands into non-Indian ownership. n920

COMPUTER-ASSISTED RESEARCH

LEXIS: aboriginal w/2 water! w/2 right!

§ 50.19(d) Priority of Pueblo and Aboriginal Rights.

The theory upon which both kinds of rights is grounded is that these claims are historic claims and therefore must be recognized and protected as such. Specifically, it is argued that the Indian claim to the water pre-dates the creation of either the current state or federal water right allocation systems. High priority is assigned to such rights as a result of the fact that in the western United States, where such rights have been more often recognized, the date at which the claim is considered to have been perfected determines the relationship between claims, with the earlier claims given priority over later claims. Since the Indian claims pre-date the current formal state systems, they are recognized as having inherent high priority over rights perfected under those systems.

It is also argued that the Indian claims should prevail over state-created claims, on the ground that where the rights were recognized or granted by governments that controlled these areas before the United States acquired them, they should be considered to be "vested rights," and therefore constitutionally preserved and protected as state systems were created. n921

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LEXIS: priorit! w/30 pueblo or aboriginal w/5 right!

FOOTNOTES:
(n1)Footnote 899. For further discussion, *see* Judith V. Royster, *A Primer on Indian Water Rights: More Questions Than Answers, 30 Tulsa L.J. 61 (Fall 1994);* Peter L. Reich, *The "Hispanic" Roots of Prior Appropriation in Arizona, 27 Ariz. St. L.J. 649 (Summer 1995);* Pierre Levy, *Which Right is Right: The Pueblo Water Rights Doctrine Meets Prior Appropriation (case note),* 35 Nat. Resources J. 413 (Spring 1995).

(n2)Footnote 900. For further discussion, *see* Charles Dumars, Marilyn O'Leary & Albert Utton, Pueblo Indian Water Rights (1984); Anastasia Stevens, *Pueblo Water Rights in New Mexico*, 28 Nat. Res. J. 535 (1988).

See also Burson, James M. *Middle Rio Grande Regional Water Resource Planning: The Pitfalls and the Promises.* 40 Nat. Res. J. 533 (2000).

See also City of Barstow v. Mojave Water Agency, 99 Cal. Rptr. 2d 294 (Cal. 2000).

(n3)Footnote 901. *See* Anastasia Stevens, *Pueblo Water Rights in New Mexico*, 28 Nat. Res. J. 535 (1988).

New Mexico, in an interesting decision, appears to have repudiated the pueblo water right doctrine. In the case of *New Mexico v. City of Las Vegas, 880 P.2d 868 (N.M. App. 1994),* the Court of Appeals determined that the State Supreme court, if provided the opportunity, would overrule the doctrine announced in *Cartwright v. Public Serv. Co., 343 P.2d 654 (N.M. 1958).* It therefore declined to follow the holding in that case and appears to have even vacated the effect of *Cartwright*. In *Cartwright,* the court appears to have recognized that the City of Las Vegas held a pueblo water right. In New Mexico, the court held that there was no evidence that the city had relied on that decision in any way that would perfect a vested right to the water. In New Mexico, the court apparently was persuaded to renounce the doctrine on the ground that certain legal scholars have argued that there is no historical basis for the doctrine and that it is incompatible with New Mexico's system of prior appropriation doctrine.

Regarding the history of pueblo water rights, the court exercises rather curious judgment as to what it considers good scholarship and appears to confuse the ultimate nature of water rights with criticism of the accuracy and detail of early Spanish records. The court finds that under Spanish law, water was held in common and concludes that as such, there could be no protectable right, let alone property right in the water. The Spanish view actually seems no different from the Roman law view which is generally recognized as the basis for water rights in our system and certainly has been the basis for both the "reasonableness" and "beneficial use" limitations in both riparian and appropriative systems, including that of New Mexico. However, since no aspect of Spanish law specifically spoke to the issue of claiming an interest in any particular water use as a right, the court concludes that there was no legal basis for protecting the claim of pueblos to the water. The court forgets that the appropriative doctrine itself originated without such specific reference to particular water uses as property but rather was a derivative of the mining codes of the mining camps of the Sierras and was designed primarily to resolve disputes as to the validity of individual claims made by trespassers. Indeed, the "property right" essence of appropriative water rights has simply evolved from a particular set of dispute resolution mechanisms. In that sense, the court is as ignorant of implications of the history of prior appropriation doctrines as it is willing to capitalize in gaps in the history of Spanish administration of water in the Colonial period. Thus, it appears that the court is actually seeking to invalidate the entire historic doctrine simply because it is unwilling to find a basis in the present doctrine upon which to accommodate rights that may have arisen under earlier systems. This seems to be the epitome of anglocentrism and risks a challenge that the entire appropriative system the court is seeking to validate is itself unconstitutional for failure to protect property rights acquired prior to its creation. What really seems to be troubling the court is not the existence of pueblo rights per se, nor even the basis upon which they may arise, but that the doctrine grants to the city an absolute preference to what the court is afraid may be the entire flow of the stream. That the city has such an unlimited right may be more the possibly unsupported conclusion of earlier scholars than a historical feature of the doctrine. However, the court assumes that the criticism on that point actually proves the history. Further, the court neither offers any explanation as to how an absolute right of that nature is any different than a similar appropriative right to the same water nor does the court consider whether that particular interpretation is even an accurate understanding of Spanish law -- given the already accepted conclusion that the nature of rights to water under the Spanish system was essentially the Roman view of rights to water.

The court finds the pueblo doctrine to be incompatible with prior appropriation doctrine in two respects. First, it is argued that pueblo rights make the job of the State Engineer more difficult because such rights are not readily quantifiable. That conclusion is directly derived from the notion that the pueblo rights represent a possibly unlimited claim to the flow of a stream, which may be the actual historical flaw. Further, the court ignores entirely other areas where identical problems exist -- such as the problem with federal reserved rights (including Indian rights). And clearly, such rights do not cease to exist as a matter of law or of historical fact in appropriative systems simply because at some point in time, they are not quantified. It might be observed that *both* the reserved rights doctrine and the pueblo doctrine may be judicial creations rather than relics of history. Finally, the court ignores the fact that there are systems in which riparian rights (to which pueblo rights are conceptually similar) coexist with appropriative rights (*see Franco-American Charolaise, Ltd. v. The Oklahoma Water Resources Bd., 855 P.2d 569 (Okla. 1990), readopted, reissued and rehearing denied*, April 3, 1993) and courts have felt constrained by the constitution from simply eliminating the one in favor of the other simply because one made administration of the other less convenient. The court seems a bit quick to judgment if indeed its goal is to invalidate the pueblo rights doctrine because of the convenience of the State Engineer.

Second, the court is concerned that if the pueblo right is recognized for the City of Las Vegas, other cities may claim such a right and that might somehow jeopardize the ability of the state to comply with its obligations under the provisions of interstate water compacts. That argument suggests that pueblo rights, if recognized, would somehow be different from any other kind of water right recognized by the state that might have an effect of water committed to compact purposes. What the court appears to be afraid of here is that the state may have to terminate later-granted water rights. That situation, however, is a fairly common means of adjusting water deliveries under compacts where courts conclude that one state or another has not fulfilled its obligations. The same argument could be made against the state issuing any new water rights where there is likely to be a similar impact.

The court seems to consider that the real problem with the pueblo rights is determining how much water they represent. While that may be a significant problem, there also seems to be an unstated concern that cities should not have *any* particular priority to water over individuals or rural water users. Both issues seem better suited to the legislature for resolution than to the courts. On the other hand, since the court has chosen to respond to the situation, it may be suggested that in the court's rush to avoid the problem of quantification of pueblo rights, the court may have eliminated one problem simply by creating another: upon what basis *do* cities, that have used water since before New Mexico became a state, protect those rights under the state-adopted doctrine of prior appropriation without losing their priority to every water right claimant that has secured a water right since that time?

(n4)Footnote 902. *See Appalachicola Land & Dev. Co. v. McRae, 98 So. 505 (Fla. 1923)* holding that Indians in Florida held title to certain lands based on grants from Spanish authorities. There appears to be no difference between the rights of Indians vested in the manner and rights of Indians secured under British dominion. *See Mitchell v. United States, 34 U.S. 711* (9 Pet.) 745 (1935).

(n5)Footnote 903. *See New Mexico v. Aamodt, 537 F.2d 1102,* (10th Cir. 1976), *cert. denied, 429 U.S. 1121, 97 S. Ct. 1157, 51 L. Ed. 2d 573 (1977).*

(n6)Footnote 904. *See, e.g., Vernon Irrig. Co. v. City of Los Angeles, 39 P. 762 (Cal. 1895); Cartwright v. Public Serv. Co., 343 P.2d 654 (N.M. 1958).*

(n7)Footnote 905. *See New Mexico v. Aamodt, 537 F.2d 1102 (10th Cir. 1977); Los Angeles v. San Fernando, 537 P.2d 1250 (Cal. 1975); New Mexico v. Aamodt, 618 F. Supp. 993 (D.N.M. 1985).*

(n8)Footnote 906. *Id.*

(n9)Footnote 907. *Id. See also Feliz v. City of Los Angeles, 58 Cal. 73 (1881).*

For further discussion, *see* Judith V. Royster, *A Primer on Indian Water Rights: More Questions Than Answers, 30 Tulsa L.J. 61 (Fall 1994);* Peter L. Reich, *The "Hispanic" Roots of Prior Appropriation in Arizona, 27 Ariz. St. L.J. 649 (Summer 1995);* Pierre Levy, *Which Right is Right: The Pueblo Water Rights Doctrine Meets Prior Appropriation (case note),* 35 Nat. Resources J. 413 (Spring 1995).

(n10)Footnote 908. United States v. Gila Valley Irrig. Dist., Globe Equity Decree No. 59 (D. Ariz. 29 June 1935).

For a later case relying on the Globe Equity Decree, *see United States v. Gila Valley Irrigation Dist., 804 F. Supp. 1 (D. Ariz. 1992).*

But see Menominee Indian Tribe of Wisconsin. v. Thompson, 161 F.3d 449 (7th Cir. 1998) (court held that the tribe retained no aboriginal rights to hunt or fish on off-reservation lands under Treaty of 1831).; *Native Village of Eyak v. Trawler Diane Marie, Inc., 154 F.3d 1090 (9th Cir. 1998)* (court held that aboriginal title claim to exclusive hunting and fishing rights in the ocean area of the outer continental shelf were barred under federal paramountcy doctrine).

(n11)Footnote 909. *See, e.g., Gila River Pima-Maricopa Indian Community v. United States, 684 F.2d 852 (Ct. Cl. 1982);* United States v. Gila Valley Irrig. Dist., Globe Equity Decree No. 59 (D. Ariz. 29 June 1935); United States v. Adair, 38.*723 F.2d 1394 (9th Cir. 1983).*

(n12)Footnote 910. Under the reservation doctrine, it has never been necessary for the Indians to have been using the water reserved to them either before or after the creation of the reservation for such a right to be claimed. Indeed, the amount typically arbitrarily allocated based on "practicably irrigated acreage" which, as a matter of fact, generally exceeds the level of demand at the time the reservation was created. It may be argued that the reservation right exists only by the grace of Congress and the courts, and therefore has only such dimensions as either may dictate. On the other hand, the reservation doctrine gives some measure to the historic status of Indians and their need for water as

independent nations and seeks to recognize to some extent their right to self-determination. Indeed, the reservation doctrine was initially derived from the notion that the reservations for which "reserved rights" were created were the result of treaties with the Indians in which they were acting as sovereign nations. On that same theory, it might be argued that the aboriginal right is as much a reflection of their previous sovereignty as it is a reflection of their previous needs for water. Nevertheless, the reservation doctrine recognizes that at least that type of non-use based water right can exist independently of a use-based appropriative system.

(n13)Footnote 911. *Id.*

(n14)Footnote 912. *See, e.g., Gila River Pima-Maricopa Indian Community v. United States, 684 F.2d 852 (Ct. Cl. 1982);* United States v. Gila Valley Irrig. Dist., Globe Equity Decree No. 59 (D. Ariz. 29 June 1935).

(n15)Footnote 913. *See* § 50.16(h), *supra*.

(n16)Footnote 914. Consider Note, *United States v. Pend Oreille County P.U.D. No. 1: A Signal Conflict between Equal Footing and Aboriginal Indian Title, 16 Env. L. 163 (1985).*

(n17)Footnote 915. *United States v. Washington, 520 F.2d 676 (9th Cir. 1975).*

(n18)Footnote 916. United States National Water Commission, Water Policies for the Future, 473 (1973).

(n19)Footnote 917. *See Gila River Pima-Maricopa Indian Community v. United States, 684 F.2d 852 (Cl. Ct. 1982).*

(n20)Footnote 918. The court in this case said "We do not decide whether the Pimas and Maricopa fall under the full *Winters* doctrine; their reservation may have been established to preserve what they had, not to change their habits from nomadic to pastoral, and this distinction could conceivably make a legal difference."

(n21)Footnote 919. *United States v. Adair, 723 F.2d 1394 (9th Cir. 1983).*

(n22)Footnote 920. For further discussion, *see* Judith V. Royster, *A Primer on Indian Water Rights: More Questions Than Answers, 30 Tulsa L.J. 61 (Fall 1994);* Peter L. Reich. *The "Hispanic" Roots of Prior Appropriation in Arizona, 27 Ariz. St. L.J. 649 (Summer 1995);* Pierre Levy, *Which Right is Right: The Pueblo Water Rights Doctrine Meets Prior Appropriation (case note),* 35 Nat. Resources J. 413 (Spr. 1995). Most courts seem hostile to recognizing aboriginal right beyond the boundaries of the reservation. *See Menominee Indian Tribe of Wisconsin. v. Thompson, 161 F.3d 449 (7th Cir. 1998)* (court held that the tribe retained no aboriginal rights to hunt or fish on off-reservation lands under Treaty of 1831); *Native Village of Eyak v. Trawler Diane Marie, Inc., 154 F.3d 1090 (9th Cir. 1998)* (court held that aboriginal title claim to exclusive hunting and fishing rights in the ocean area of the outer continental shelf were barred under federal paramountcy doctrine).

(n23)Footnote 921. For further discussion, see Pierre Levy, *Which Right Is Right: The Pueblo Water Rights Doctrine Meets Prior Appropriation (case note),* 35 Nat. Resources J. 413 (Spr. 1995). Burson, James M. *Middle Rio Grande Regional Water Resource Planning: The Pitfalls and the Promises,* 40 Nat. Res. J. 533 (2000).

See also In the matter of *Water Use Permit Applications, No. 21309, 2000 Hawaii LEXIS 321* (Sept. 27, 2000).

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CHAPTER 50 WATER RIGHTS

6-50 Thompson on Real Property, Thomas Editions § 50.20

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§ 50.20 Diffused Surface Water.

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§ 50.20(a) In General.

The popular conception of water law as a legal institution is perhaps that it has been created essentially to deal with the issues that arise as a result of water shortage and is the mechanism by which rights to a scarce resource are allocated among the several competitors for that resource. Further, it appears to be a widespread view that the primary interest of the legal system in water is essentially focused upon the ability of individual users to enjoy and consume the water that may be the object of their water right. Indeed, it is difficult for many to imagine circumstances, other than floods or natural disasters, under which the problem to be dealt with is the matter of overabundance of water. It is also difficult to imagine waters that might not be considered particularly useful for consumptive use purpose.

Nevertheless, one branch of water rights law has been designed specifically to deal with diffused surface waters and the problems that arise as a result of activities associated more with the use of the land than with the use of the water.

In the case of Britton v. Claibourne Co., Texas, n922 the court addressed a damage claim in which the plaintiff alleged that his property was flooded as a result of runoff from the road. The court held that there was no defect in the road that caused the flooding. Rather, it was construction by private individuals on the other side of the road. Thus, where the damage was the result of natural runoff caused by private individuals, neither the county nor the city would bear responsibility for damage done thereby. The harmed landowner was deemed to have an action against the individual across the street for "producing an unnatural amount of water." n923

§ 50.20(b) Diffused Water Defined.

Diffused water is generally defined as water that occurs on the surface of the land in an unconfined state, n924 such as "water from rain, melting snow, springs or seepage, or detached from subsiding floods, that lies or flows on the surface of the earth but does not form a part of a watercourse or lake." n925 A notable characteristic of diffused waters is their inability to maintain an identity or existence as a confined waterbody. n926 Diffused surface water, therefore, also includes puddles or "ponds" which have no outlet, but which are formed as the result of rainfall. n927 On the other hand, it has been held that flood and overflow waters from streams and lakes are not diffused waters but are considered

a part of those watercourses so long as the water remains connected to such waterbodies. n928

In Hoover v. Pierce County, n929 the court held that where the municipality had built a road and, as a result thereof, water was diverted which destroyed an individual's property, a taking of such property occurred. In this case, diffused water was defined to include water produced by rain, melting snow and springs.

In Johnson v. Board of County Commr's, n930 the court held that after 62 years, the configuration of a stream, as altered by the construction of a bridge, would be considered a natural watercourse. As a result, a later modification was deemed to require approval from the appropriate authorities. Further, the new bridge created a duty to prevent unnecessary harm downstream. The claims of those injured were not deemed to have accrued for purposes of the statute of limitations until the injured knew that the bridge was the source of the erosion that caused the harm. n931

COMPUTER-ASSISTED RESEARCH

LEXIS: diffused w/2 surface w/2 water!

§ 50.20(c) Diffused Water Contrasted with Confined Surface Water.

For most purposes relating to water rights, diffused surface water stands in direct contrast to confined surface water. As a general rule, diffused surface water is not considered to be sufficiently reliable as a source of water to be usable for consumptive use purposes, and therefore is ordinarily not the object of consumptive use rights. Further, diffused water is considered to be a problem rather than an asset to landowners in many jurisdictions and is therefore typically addressed as a matter of potential liability. Finally, to the extent that diffused surface water actually has some utility to the landowner, rights therein tend to be structured as within drainage easements rather than as a part of more conventional consumptive use rights. n932

§ 50.20(d) Drainage Rights.

In many parts of the nation, it may be difficult to imagine why someone might want diffused surface water to come to or be upon their land. In areas of water scarcity, however, many landowners, particularly users of agricultural land, may depend upon the presence of diffused surface water to keep livestock ponds full or to naturally irrigate the land. As noted above consumptive use water rights are typically not granted nor even recognized in water of this type. n933 Therefore, it is common in jurisdictions of this type to find statutes which specifically grant the landowners the right to impound and use such waters. n934 Further, many jurisdictions appear to have adopted some form of the civil law rule n935 by which a species of reciprocal drainage easements is imposed upon the several landowners to respect the natural drainage patterns in order to assure that the natural diffused surface water flows will not be disrupted.

COMPUTER-ASSISTED RESEARCH

LEXIS: drain! w/15 right! or easement!

§ 50.20(e) Drainage into Natural Waterbodies.

As a general rule, the law allows landowners to discharge water into natural waterbodies as a means of draining the land. This right is recognized in the common law n936 as well as in the statutes of many jurisdictions. n937 Such discharge may occur without liability where 1) the drainage results from the reasonable use of the land, 2) the waters are not diverted into watercourses which would not have received the water naturally, and 3) the natural capacity of the watercourse is not exceeded. n938 It has been held that the upper landowner may use artificial drainage systems to facilitate the natural drainage flow but may not, as a result, increase the volume of water discharge. n939 Public landowners appear to be subject to the same rules. In a 1984 case, it was held that where a city caused the discharge of

water to exceed the capacity of the natural watercourse, liability could properly be imposed on the upper city landowner. Further, it was held that the act of inundating the lower landowner itself may result in the inverse condemnation of the property of the lower landowner. n940

COMPUTER-ASSISTED RESEARCH

LEXIS: drain! w/15 natural w/2 waterbod! or watercourse! inverse condemnation w/30 water!

§ 50.20(f) Common Law Approaches to the Problem of Too Much Water.

Where the problem is too much water in an existing natural drainway, n941 the law generally focuses upon the impact of the water upon, or its relation to, land use activities upon the land n942 and structures rights accordingly. Part of the rationale for this approach is that the drainway is a natural feature of the landscape which can be observed and private land use decisions can, and should be made accordingly.

Jurisdictions tend to follow one of two different doctrines to deal with this problem. n943

§ 50.20(g) Common Law Approaches: Common Enemy Rule.

Under one rule, called the "common enemy" rule, the diffused surface water is considered to be the common enemy, and each landowner is deemed to be entitled to protect himself, regardless of the consequences to others. n944 This rule apparently was adopted on the mistaken assumption that it represented the common law of England. n945

Under this rule, any landowner affected by too much water could build a dike to keep the water from coming onto the land, or could dig a ditch to convey the water off the property in any direction that seemed convenient. Further, the rule allows the landowner to dispose of any excess water that might arise because of activities that occur on that landowner's land as well. For example, an individual might wish to construct a new building and pave an area as a parking lot. To do so, land may have to be leveled which might cause water to run off which might otherwise have been absorbed by the land, or which might have naturally drained in a particular direction to not flow onto the land of a different neighbor. Under this rule, the landowner traditionally could cast the water off the property without regard to where it was cast. This rule is popular in developed areas because it does not discourage land development or the improvement of the land.

As one might imagine, a rule of this type might permit unlimited development of the property but is also likely to cause much harm to neighboring landowners. Many common enemy jurisdictions have modified the doctrine to permit only those changes in the drainage pattern that were incident to the ordinary use, improvement or protection of one's land and which were done without negligence or malice. n946 Similarly, upper landowners may be held liable for harm where the total volume of water has been unreasonably increased or where its velocity has excessively accelerated. n947 While this still permits most development, it does give the non-developing or lower landowner some protection from the increased drainage occasioned by development since in determining whether the activity that alters the drainage is reasonable, it has been deemed appropriate to consider the nature and extent of harm caused to others.

In some jurisdictions, there seems to be a tendency to handle these matters as questions of tort, rather than of water rights. Hence, it is common to find the allegations of harm couched in terms of criminal mischief, nuisance, trespass and negligence. n948

COMPUTER-ASSISTED RESEARCH

LEXIS: common w/1 enemy w/5 rule w/30 water!

§ 50.20(h) Common Law Approaches: Civil Law Rule.

The "civil law rule" operates on the principle that water should flow where nature intends it to flow. n949 Under this rule, the natural drainage pattern was protected and water could not be cast from one's property to another unless it was done in conformity with the natural drainage pattern. The lower owner was obligated to receive water from the upper owner and the upper owner, in turn, was obligated to neither increase the volume nor alter the flow of the water. n950 While this rule was less likely to cause harm to the lower owner, it greatly limited what one could do with the land.

Most civil law jurisdictions have modified the rule to permit the upper owner to make modifications in the drainage pattern and even to accelerate the flow of water so long as the changes are not substantial or do not unreasonably or negligently cause harm to the lower owner. n951 This modification of the rule allows both upper and lower landowners to make reasonable drainage and improvement of their respective lands. n952 Further, since the lower owner is only obligated not to obstruct the natural flow from the upper owner, some alteration of the drainage pattern may be allowed so long as it is not unreasonable or is not done negligently. n953

Although the rule has been modified, the lower landowner is still considered to be burdened with a drainage easement in favor of the upper landowner and must receive the water. n954 The upper owner likewise is still obligated not to harm the lower owner. Despite the modification of the rule in favor of reasonable development activity, at least one case required a landowner to re-contour the land and restore the pre-development drainage pattern so as not to flood a neighbor. n955

COMPUTER-ASSISTED RESEARCH

LEXIS: civil w/1 law w/5 rule w/30 water!

§ 50.20(i) Common-Law Approaches: Hybrid Jurisdictions.

In at least one state, the legislature has adopted the civil law rule for "lands used for agricultural purposes and for highways wholly outside the boundaries of incorporated cities." n956 Otherwise, the rule in the state appears to be the common enemy rule (as modified by the concept of reasonableness). n957

In some jurisdictions, there seems to be a tendency to handle these matters as questions of tort, rather than of water rights. Hence, it is common to find the allegations of harm couched in terms of criminal mischief, nuisance, trespass and negligence. n958

§ 50.20(j) Modifying the Common Law: Reasonable Use.

Several jurisdictions n959 have adopted the general tort principle of reasonableness to resolve liability problems resulting from land use activities which affect diffused water. According to this view, the courts tend to judge the reasonableness of the landowners' activities regarding the surface waters on the basis of all relevant circumstances. n960

In some jurisdictions, the matter has been dealt with legislatively. In Texas, it has been held that provisions of the Water Code which prohibited the diversion of surface water in a manner that damaged the property of another was invoked in a dispute in the case of Fairfield Estates L.P. v. Griffin. n961

COMPUTER-ASSISTED RESEARCH

LEXIS: reasonable w/1 use! w/30 diffused w/2 water!

§ 50.20(k) Civil Law, Common Enemy and Tort Rules Compared.

Since both the common enemy and the civil law rules have been modified to incorporate the concept of reasonableness into their rules to some extent to eliminate, or at least moderate, the somewhat harsh impacts of the traditional rules, n962 the outcome of many cases in both kinds of jurisdictions will appear to be the same. Further, since an increasing number of jurisdictions resolve the matter on the basis of the tort concept of reasonableness, one might wonder, then, what difference, if any still remains.

The significant primary difference between those jurisdictions which still adhere to the civil law rule or the common enemy rule, and those which resolve these issues by invoking the tort rule, would seem to be that the former will apply the principles of property law, while the latter will apply principles of tort law, to resolve essentially the same type of factual problem. This will affect both the extent of duty recognized and the basis upon which the duty is predicated. In the property oriented jurisdictions, the concept of easements n963 and the relationship between the respective parcels loom large, while tort law tends to be focused on aspects of the parties' conduct and the relationship between the several actors.

As between modified civil law and common enemy jurisdictions, the most significant difference would appear to involve burdens of proof. In the common enemy jurisdictions, the conduct of the upper owner would seem to be presumed to be acceptable and the lower landowner would have the burden of demonstrating that it was unacceptable. In the civil law jurisdiction, the upper landowner would seem to have the burden of justifying the alteration in the drainage pattern.

In recent years, there seems to be an increasing tendency to resolve diffused water problems as if they were tort rather than water right or property matters. n964 In City of College Park v. Pichonse, the court found that the easement held by the city carried with it the duty to maintain the premises of the easement so that water not overflow and damage adjoining properties. In Cunningham v. West Va.-American Water Co., the court found that the doctrine of res ipsa loquitur did not apply in the case of a collapsed water main that caused the flooding at issue. n965

COMPUTER-ASSISTED RESEARCH

LEXIS: common w/1 enemy w/50 civil w/1 law w/50 water!

FOOTNOTES:
(n1)Footnote 922. *898 S.W.2d 220 (Tex. App. 1994).*

(n2)Footnote 923. For further discussion, *see* David L. Abney, *When Water Is Not Just Water and Why it Matters in Water Damage Cases, 31 Ariz. Att'y 16 (Feb. 1995);* John D. Sours, *Survey of State Rules Regarding Stormwater Runoff Associated with Construction Activities,* 15 Construct. Law. 52 (Nov. 1995).

(n3)Footnote 924. *Clawson v. Garrison, 592 P.2d 117 (Kan. App. 1979); Dougan v. Rossville Drainage Dist., 575 P.2d 1913 (Kan. App. 1978); 715 P.2d 272 (Kan. 1988).*

Janet Fairchild, *Modern Status of Rules Governing Interference with Drainage of Surface Waters, 93 A.L.R. 3rd 1193* (1998 Supp.); McMahon, Martin J., *Liability for Diversion of Surface Water by Raising Surface Level of Land, 88 A.L. R. 4th 891* (1998 Supp.).

See City of Dothan v. Eighty-Four West, Inc., 738 So. 2d 903 (Ala. App. 1999), finding the question whether the water in a drainage ditch was surface water as opposed to water from a defined or intermittent stream a sufficient question of material fact to preclude the issuance of a summary judgment.

See Anhalt v. Cities and Villages Mutual Insurance Company, 637 N.S. 2d 422 (Wis. App. 2001); *Juergensmeier Farms, Inc, v. Kearney County, 2001 Neb. App. LEXIS 182 (Neb. App. 2001).*

For further discussion, see B. Ripley, The Storm over Stormwater, 27 DEC Vt. B. J. 39 (2001); *D. Yoskowitz, Markets, Mechanisms, Institutions, and the Future of Water, 31 Envtl. L. Rep. 10237 (2001).*

(n4)Footnote 925. Restatement (Second) of Torts, § 846.

In *In re* the Adjudication of Water Rights in the *Lower Guadalupe River, 730 S.W.2d. 64 (Tex. App. 1987),* the Texas court held that once surface waters collected in a natural depression come to rest, they become a lake and are no longer diffused surface waters. As confined waters, they are subject to appropriation.

For further discussion, *see* Jason Johnson, *Abandoning the Common Enemy Doctrine and Adopting the Rule of Reasonable Use: More Problematic than Helpful, 2 Mo. Envtl. L. & Pol'y Rev. 36 (1994).*

(n5)Footnote 926. *Kramer v. Roger, 441 N.E.2d 700 (Ind. App. 1982).*

See City of Dothan v. Eighty-Four West, Inc. 738 So. 2d 903 (Ala. App. 1999), finding the question whether the water in a drainage ditch was surface water as opposed to water from a defined or intermittent stream a sufficient question of material fact to preclude the issuance of a summary judgment. See *Schott v. Hennings, 2000 Neb. App. LEXIS 80* (Neb. App. Mar. 14, 2000).

(n6)Footnote 927. *See, e.g., Brandenberg v. Zeigler, 39 S.E. 790 (S.C. 1901).*

(n7)Footnote 928. *Watts v. Evansville, Mt. C. & N. Ry., 129 N.E. 315 (Ind. 1921).*

(n8)Footnote 929. *903 P.2d 464 (Wash. App. 1995).*

(n9)Footnote 930. *897 P.2d 169 (Kan. App. 1995).*

(n10)Footnote 931. For further discussion, *see* John D. Sours, *Survey of State Rules Regarding Stormwater Runoff Associated with Construction Activities,* 15 Construct. Law. 52 (Nov. 1995); David L. Abney, *When Water Is Not Just Water and Why it Matters in Water Damage Cases, 31 Ariz. Att'y 16 (Feb. 1995).*

(n11)Footnote 932. *See City of Dothan v. Eighty-Four West, Inc., 738 So. 2d 903 (Ala. App. 1999),* finding the question whether the water in a drainage ditch was surface water as opposed to water from a defined or intermittent stream a sufficient question of material fact to preclude the issuance of a summary judgment.

(n12)Footnote 933. An exception may possibly be found in the so-called "meadow right" in some Western jurisdictions which recognizes a consumptive use right in the spring flood overflow of streams. *See, e.g., Broad Run Inv. Co. v. Deuel & Snyder Imp. Co., 108 P. 755 (Colo. 1910); In re Silvies River, 237 P. 322 (Or. 1925).*

In *Griffin v. Lamberjack, 644 N.E.2d 1087 (Ohio App. 1994),* the court used the presence of a drainage easement rather than a threat to riparian rights as the basis for resolving a nuisance and trespass action involving drainage problems. In *Freyou v. Iberia Parish Sch. Bd., 657 So. 2d 161 (La. App. 1995)* the court seems to prefer trespass doctrines to water right doctrines to deal with sewage treatment plant overflows.

In *Bennett v. Tarrant Co. Water Control & Improve. Dist. No. 1, 894 S.W. 2d 441 (Texas App. 1995),* the court held that a flowage easement, contained in a deed, allowed the land to flood occasionally and even though flooding in 1989 and 1990 may have rendered the property useless for its intended purpose during those years, no taking of property occurred.

In *Johnson v. Board of County Comm'rs, 897 P.2d 169 (Kan. App. 1995),* the court held that after 62 years, the configuration of a stream, as altered by the construction of a bridge, would be considered a natural watercourse.

In *Hendrickson v. Wagners, 598 N.W. 2d 507 (S.D. 1999),* it was held that down-drainage landowners were entitled to a permanent injunction against the up-drainage landowners for harm caused by intentionally draining water onto their land which resulted in crop losses. In this case, the injunction required the up-drainage landowners to fill in the drainage ditches. Evidence in this case supported the conclusion that the ditches were intentionally dug.

See Hedger Brothers Cement and Materials, Inc. v. Stump. 10 S.W. 3d 926 (Ark. App. 2000); Screws v. Watson, 755 So. 2d. 1289 (Miss. 2000); Luhnow v. Horn, 760 N.E.2d 621 (Ind. App. 2001); Juergensmeier Farms, Inc, v. Kearney County, 2001 Neb. App. LEXIS 183 (Neb. App. 2001); City of Dothan v. Eighty-Four West, Inc., Ala. Civ. App. LEXIS 600 (Ala. App. 2001); *Gorman v. Connell, 2001 Del. Ch. LEXIS 46 (Del. Chancery 2001); Kovanda v. Vavra, 633 N.W. 2d 576 (Neb. 2001).*

(n13)Footnote 934. *See, e.g.,* Kan. Stat. Ann. §§ 42-313; 82a-718(a).

Janet Fairchild, *Modern Status of Rules Governing Interference with Drainage of Surface Waters, 93 A.L.R. 3rd 1193* (1998 Supp.); Martin J. McMahon, *Liability for Diversion of Surface Water by Raising Surface Level of Land, 88 A.L. R. 4th 891* (1998 Supp.).

(n14)Footnote 935. *See* § 50.20(h), *infra*.

In some jurisdictions, the matter may be resolved by reference to non-water right doctrines. Where damage claims for flooding are grounded in either nuisance or trespass, damages can include not only the diminution of the market value of the property or the restoration and loss of use of the property, but also discomfort and annoyance to the property owner. Annoyance generally refers to distress arising out of physical discomfort, irritation or inconvenience caused by odors, pests, noise and the like. In the absence of evidence of physical manifestations of the distress, creation of unreasonable risk of bodily harm or willful and wanton conduct, the court in *Webster v. Boone, 992 P.2d 1183 (Colo. App. 1999)* held that damages were not available for emotional distress where the flooding was the result of removing a railroad grade. In this case, the court also disallowed an award for attorney fees and costs.

Similarly, where the drainage problem is the result of a man-made structure, such as a reservoir, liability will be determined on the basis of negligence rather than strict liability. *See Jensen v. Intermountain Power Agency, 977 P.2d 474 (Ut. 1999).*

In *Hendrickson v. Wagners, 598 N.W. 2d 507 (S.D. 1999),* the civil law rule was invoked to hold that down-drainage landowners were entitled to a permanent injunction against the up-drainage landowners for harm caused by intentionally draining water onto their land which resulted in crop losses. In this case, the injunction required the up-drainage landowners to fill in the drainage ditches. Evidence in this case supported the conclusion that the ditches were intentionally dug.

(n15)Footnote 936. *See, e.g., Leiper v. Heywood-Hall Constr. Co., 113 A.2d 148 (Pa. 1955).*

(n16)Footnote 937. *See, e.g.,* Kan. Stat. Ann. § 24-106.

(n17)Footnote 938. *See* Frank Maloney & Sheldon Plager, *Diffused Surface Water: Scourge or Bounty?,* 3 Nat. Res. J. 72 (1968).

But see Locklin v. LaFayette, 21 Cal. App. 4th 1190 (1992), aff'd, 867 P.2d 724 (Cal. 1994), where the court held that an upstream landowner could discharge surface waters into a natural watercourse that was inadequate to accommodate the increased flow.

Rothweiler v. Clark County, 29 P.3d 758 (Wash. App. 2001); Rux v. City of Bothell, 108 Wash. App 1017 (2001);

Tovah Corporation v. City of Issaquah, 104 Wash. App. 1056 (2001); Dallas Area Rapid Transit v. RT Realty, L.P., 2001 Tex. App. LEXIS 5862 (Tex. App. 2001); City of Columbus v. Barngrover, 552 S.E. 2d 536 (Ga. App. 2001); Shade v. Missouri Highway Transportation Commission, 2001 Mo. App. LEXIS 1921 (Mo. App. 2001); Price v. City of Seattle, 24 P.3d 1098 (Wash. App. 2001); Ferrell v. County of San Diego, 108 Cal. Rptr. 2d 681 (Cal 2001); City of Eveleth v. Town of Fayl, No. C2-00-1882, 2001 Minn. App. LEXIS 627 (Jun. 5, 2001); *VLX Properties v. Southern States Utilities, Inc. 792 So. 2d 504 (Fla App. 2001); Tarrant Regional District v. Gragg, 43 S.W. 3d 609 (Tx. App. 2001);* City of Whitesboro v. Williams, No. 05-99-01840-*CV, 2001 Tex. App. LEXIS 568* (Jan. 29, 2001).

(n18)Footnote 939. *See, e.g., Hargreaves v. Akrbina, 635 P.2d 221 (Colo. App. 1981). See also Martinson v. Hughey, 244 Cal. Rptr. 795 (1988).*

(n19)Footnote 940. *See Patterson v. City of Belleview, 681 P.2d 266 (Wash. App. 1984).*

(n20)Footnote 941. Occasionally, the problem will be one of too much water in a natural watercourse. Here, the critical issue appears to be how the excessive water got into the watercourse. The law typically views this problem as one of land use or tort law rather than of water rights law and commonly finds that the upper landowner will have a common law duty of care to act in any reasonable manner. Generally, the upper landowner may use and enjoy the property so long as no actionable harm is caused to others and no relevant statutes are violated. It has been held that a landowner, including cities, cannot discharge water into a natural drainway beyond the natural capacity of the drainway to receive the water. *See Patterson v. City of Belleview, 681 P.2d 266 (Wash. App. 1984).*

Fairchild, Janet, *Modern Status of Rules Governing Interference with Drainage of Surface Waters, 93 A.L.R. 3rd 1193* (1998 Supp.); McMahon, Martin J., *Liability for Diversion of Surface Water by Raising Surface Level of Land, 88 A.L. R. 4th 891* (1998 Supp.); In *Locklin v. LaFayette, 21 Cal. App. 4th 1190 (1992), aff'd, 867 P.2d 724 (Cal. 1994),* the court held that an upstream landowner could discharge surface waters into a natural watercourse that was inadequate to accommodate the increased flow. *But see Hickman v. Hunkins, 489 N.W.2d 316 (Neb. App. 1992),* where the court held that an upper appropriator could not negligently interfere with the rights of lower appropriators when draining surface water. *See also Hedlund v. White, 836 P.2d 250 (Wash. 1992),* holding that the discharge of collected surface water onto the adjacent property owner's land constitutes trespass.

Where the flooding is the result of a man-made structure, such as a reservoir, liability will be determined on the basis of negligence rather than strict liability. *See Jensen v. Intermountain Power Agency, 977 P.2d 474 (Ut. 1999).*

Where damage claims for flooding are grounded in either nuisance or trespass, damages can include not only the diminution of the market value of the property or the restoration and loss of use of the property, but also discomfort and annoyance to the property owner. Annoyance generally refers to distress arising out of physical discomfort, irritation or inconvenience caused by odors, pests, noise and the like. In the absence of evidence of physical manifestations of the distress, creation of unreasonable risk of bodily harm or willful and wanton conduct, the court in *Webster v. Boone, 992 P.2d 1183 (Colo. App. 1999)* held that damages were not available for emotional distress where the flooding was the result of removing a railroad grade. In this case, the court also disallowed an award for attorney fees and costs.

In *M.Condello v. Town of Irondequot, 693 N.Y.S. 2d. 775 (N.Y. App. 1999),* the court discusses the different statutes of limitations that might apply where the damage is the result of negligence, trespass and nuisance and in suits for equitable relief. In this case, a school district and city were sued for harm that allegedly resulted from grading the property and removing dead trees. The court found no liability as there was no evidence that the water was artificially drained onto the adjacent property and the improvements in the case were found to be made in good faith.

In *Hendrickson v. Wagners, 598 N.W. 2d 507 (S.D. 1999),* it was held that down-drainage landowners were entitled to a permanent injunction against the up-drainage landowners for harm caused by intentionally draining water onto their land which resulted in crop losses. In this case, the injunction required the up-drainage landowners to fill in the drainage

ditches. Evidence in this case supported the conclusion that the ditches were intentionally dug.

See also Graber v. Logan County Water Resource Board, 598 N.W.2d 846 (N.D. 1999), where board closed a drain on one landowner's land because of harm caused to a neighbor.

In *Sherburn v. Patterson Farms, Inc., 593 N.W. 2d 414 (S.D. 1999)* the court required the removal of a dike that obstructed the flow of water across an adjoining property.

It should be noted that many jurisdictions have statues, not a part of the water right allocation statutes, *see, e.g.,* Kan. Stat. Ann. §§ 24-206-24-307, that make it unlawful to wilfully obstruct ditches, drains and watercourse and which may require formal state permission to change the contour of any natural stream. These statutes must be observed in dealing with such drainage problems. Nevertheless, it will generally be the normal responsibility of landowners to keep the drainways clear of any obstructions, such as silt, that affect than landowner's use of the land. The landowner may have a further duty to remove obstructions from waterways on his land that cause harm to others.

On occasion, the obstruction to a natural watercourse may actually originate on another tract of land (such as where run-off carries debris from one farm and deposits it on another farm in a way that blocks the stream and perhaps causes flooding). This also appears to be considered the recipient landowner's problem unless it can be shown that the debris is the result of a careless practice by the upstream landowner (in which case, the matter would be dealt with under general nuisance law) or was intentionally done (which might be the basis for liability in tort). In these cases, the lower landowner may be able to compel the upper landowner (or whoever is actually causing the problem) to stop the practice or to compensate the lower landowner for the damage done.

Where the obstruction results from a natural event, such as the deposit of silt, it may not be possible for the lower landowner to do anything except clean the stream out at his or her own expense. If it is necessary to create a new channel for the water, it may be necessary to get permission from any affected landowner who may have to bear the burden of the water, since it no longer follows the natural drainage pattern. *See Hargreaves v. Akrbina, 635 P.2d 221 (Colo. App. 1981).* Such permission will normally granted in the form of a drainage easement.

In situations where the problem is chronic or recurring siltation or flooding and does not involve actionable fault by any one landowner, the law in most jurisdictions permits the affected landowners to band together and take collective action to address the problem. This will generally be done through the formation of a drainage or irrigation district, which is then vested with the authority to do what is necessary. In the absence of such a drainage district, the problem will generally remain an individual landowner's problem.

(n21)Footnote 942. For example, in a 1988 case, the court upheld the right of the upper owners to utilize artificial drainage systems to facilitate the natural drainage flow so long as the drainage system merely increases the velocity, but not the volume, of water discharge. *Martinson v. Hughey, 244 Cal. Rptr. 795 (1988).*

(n22)Footnote 943. In *Hoover v. Pierce County, 903 P.2d 464 (Wash. App. 1995),* the court held that where the municipality had built a road and as a result thereof, water was diverted which destroyed an individual's property, a taking of such property occurred.

For further discussion, *see* David L. Abney, *When Water Is Not Just Water and Why it Matters in Water Damage Cases, 31 Ariz. Att'y 16 (Feb. 1995).*

(n23)Footnote 944. *Pritle v. Opco, Inc., 601 S.W.2d 265 (Ark. 1980).*

Fairchild, Janet, *Modern Status of Rules Governing Interference with Drainage of Surface Waters, 93 A.L.R. 3rd 1193* (1998 Supp.); McMahon, Martin J., *Liability for Diversion of Surface Water by Raising Surface Level of Land, 88 A.L.*

R. 4th 891 (1998 Supp.).

Luhnow v. Horn, 760 N.E.2d 621 (Ind. App. 2001); City of Dothan v. Eighty-Four West, Inc., 2001 Ala. Civ. App. LEXIS 600 (Ala. App. 2001); Whorton v. Malone, 549 S.E. 2d 57 (W. Va. 2001); DiBlasi v. City of Seattle, 105 Wash. App 1047 (2001); Silvester v. Spring Valley Country Club, 543 S.E. 2d 563 (S.C App. 2001).

For further discussion, see B. Pryor, *In the Wake of Hiens: Break Out Your Rulers Missouri Its Time to Measure Your Levees, 66 Mo. L. Rev. 469 (2001).*

(n24)Footnote 945. *Walker v. New Mexico & S.P. R.R., 165 U.S. 593 (1897).* English law seems to favor the civil law rule. *See* Ewart v. Cochrane, 4 Maqc. H.L. Cas. 117, *7 Jur. N.S. 925, 5 L.T.N.S. 1, 10 Week Rep. 3 (1861).*

See Halverson v. Skagit County, 983 P.2d 643 (Wash. 1999).

(n25)Footnote 946. Donald Dobbins, *Surface Water Drainage, 36 Notre Dame L. Rev. 518 (1961).*

See Halverson v. Skagit County, 983 P.2d 643 (Wash. 1999), where the common enemy doctrine was invoked to protect a county from liability for flooding that was allegedly induced by levees.

(n26)Footnote 947. *Schmidt v. Chimney Rock Irrig. Dist., 305 N.W.2d 888 (Neb. 1981).*

See Halverson v. Skagit County, 983 P.2d 643 (Wash. 1999).

(n27)Footnote 948. *See Bulldog Battery Corporation v. PICA Investments, Inc. 736 N.E. 2d 333 (Ind. 2000).*

(n28)Footnote 949. *Kauffman v. Griesemer, 26 Pa. 407, 413 (1856).*

Janet Fairchild, *Modern Status of Rules Governing Interference with Drainage of Surface Waters, 93 A.L.R. 3rd 1193* (1998 Supp.); Martin J. McMahon, *Liability for Diversion of Surface Water by Raising Surface Level of Land, 88 A.L. R. 4th 891* (1998 Supp.).

In *Hendrickson v. Wagners, 598 N.W. 2d 507 (S.D. 1999),* the civil law rule was interpreted to hold that down-drainage landowners were entitled to a permanent injunction against the up-drainage landowners for harm caused by intentionally draining water onto their land which resulted in crop losses. In this case, the injunction required the up-drainage landowners to fill in the drainage ditches. Facts in this case supported the conclusion that the ditches were intentionally dug. The civil law rule was held to permit the discharge of surface water over but not onto the land of another. The right to discharge was further held not to include discharge by artificial means.

In *M.Condello v. Town of Irondequot, 693 N.Y.S. 2d. 775 (N.Y. App. 1999),* the court discusses the different statutes of limitations that might apply where the damage is the result of negligence, trespass and nuisance and in suits for equitable relief. In this case, a school district and city were sued for harm that allegedly resulted from grading the property and removing dead trees. The court found no liability as there was no evidence that the water was artificially drained onto the adjacent property and the improvements in the case were found to be made in good faith.

In *Sherburn v. Patterson Farms, Inc., 593 N.W. 2d 414 (S.D. 1999)* the court required the removal of a dike that obstructed the flow of water across an adjoining property.

City of Dothan v. Eighty-Four West, Inc., 2001 Ala. Civ. App. LEXIS 600 (Ala. App. 2001); Kilpatrick v. Tomlin, 2001 Tex. App. LEXIS 1703 (Tx. App. 2001).

For further discussion, see B. Pryor, *In the Wake of Hiens: Break Out Your Rulers Missouri Its Time to Measure Your*

Levees, 66 Mo. L. Rev. 469 (2001).

(n29)Footnote 950. *Gough v. Goble, 119 N.E.2d 252 (Ill. 1954).*

See Hendrickson v. Wagners, 598 N.W. 2d 507 (S.D. 1999). The Civil law rule entitled a down-drainage landowner to a permanent injunction against the up-drainage landowners for harm caused by intentionally draining water onto their land which resulted in crop losses. In this case, the injunction required the up-drainage landowners to fill in the drainage ditches. Facts in this case supported the conclusion that the ditches were intentionally dug.

See also Graber v. Logan County Water Resource Board, 598 N.W.2d 846 (N.D. 1999), where board closed a drain on one landowner's land because of harm caused to a neighbor.

(n30)Footnote 951. *Ratcliffe v. Indian Hills Acres, Inc., 113 N.E.2d 30 (Ohio App. 1952).*

See also Hendrickson v. Wagners, 598 N.W. 2d 507 (S.D. 1999).

(n31)Footnote 952. *Gross v. Connecticut Mut. Life Ins. Co., 361 N.W.2d 259 (S.D. 1985).*

See Hendrickson v. Wagners, 598 N.W. 2d 507 (S.D. 1999), where it was held that the right to discharge water onto the land of another did not include discharge by artificial means. In this case, intentionally dug drainage ditches were required to be filled to prevent the draining of water onto the land of another in ways which caused crop loss.

In *M.Condello v. Town of Irondequot, 693 N.Y.S. 2d. 775 (N.Y. App. 1999),* the court discusses the different statutes of limitations that might apply where the damage is the result of negligence, trespass and nuisance and in suits for equitable relief. In this case, a school district and city were sued for harm that allegedly resulted from grading the property and removing dead trees. The court found no liability as there was no evidence that the water was artificially drained onto the adjacent property and the improvements in the case were found to be made in good faith.

(n32)Footnote 953. *Taylor v. Harrison Const. Co., 115 A.2d 757 (Pa. Super. 1955).*

(n33)Footnote 954. *Murphy v. Fairmount Twp., 133 P. 169 (Kan. 1913).*

(n34)Footnote 955. *Clawson v. Garrison, 592 P.2d 117 (Kan. App. 1979).*

(n35)Footnote 956. Kan. Stat. Ann. § 24-105.

(n36)Footnote 957. *Baldwin v. City of Overland Park, 468 P.2d 168 (Kan. 1970).*

(n37)Footnote 958. *See Bulldog Battery Corporation v. PICA Investments, Inc. 736 N.E. 2d 333 (Ind. 2000). But see Gdowski v. Louie, 101 Cal. Rptr. 2d 609 (2000).* Here, the court found that liability was to be determined based on whether the landowner acted reasonably rather than based upon general negligence or contributory negligence principles.

(n38)Footnote 959. These include Alaska, Delaware, Iowa, Maryland, Minnesota, Missouri, New Hampshire, Nebraska, New Jersey, Nevada, North Carolina, Ohio, Oklahoma, South Dakota and Wisconsin.

See, e.g., Heins Implement Co., et al. v. Mo. Hwy. & Transp. Comm'n, 859 S.W.2d 681 (Mo. 1993).

For discussion of problems associated with changes from common law to reasonable use, *see* Jason Johnson, *Abandoning the Common Enemy Doctrine and Adopting the Rule of Reasonable Use: More Problematic than Helpful, 2 Mo. Envtl. L. & Pol'y Rev. 36 (1994).*

See also Fairchild, Janet, *Modern Status of Rules Governing Interference with Drainage of Surface Waters, 93 A.L.R. 3rd 1193* (1998 Supp.); McMahon, Martin J., *Liability for Diversion of Surface Water by Raising Surface Level of Land, 88 A.L. R. 4th 891* (1998 Supp.).

(n39)Footnote 960. *Omerick v. Department of Nat. Res., 238 N.W.2d 114, cert. denied, 425 U.S. 941 (1976).*

For further discussion, *see* David L. Abney, *When Water Is Not Just Water and Why it Matters in Water Damage Cases, 31 Ariz. Atty. 16 (Feb. 1995).*

Georgia apparently applied tort principles to deal with allegations of damage caused by developers in *Tyler v. Lincoln, 513 S. E. 2d 6 (Ga. App. 1999).* The court rejected an argument that the landowners had a cause of action for violation of riparian rights.

(n40)Footnote 961. *986 S.W. 2d 719 (Tex. App. 1999).* For a further discussion of water rights in Texas, *see* Martin Hubert & Bob Bullock, *Senate Bill 1, The First Big and Bold Step Toward Meeting Texas's Future Water Needs,* 30 Texas Tech L. Rev. 53 (1999).

(n41)Footnote 962. Note, *Owners of Property Damaged by Unlawful Ditching or Unreasonable Discharge of Waters May Obtain Relief by Statute or by Tort Concept of Reasonable Use, 60 N.D. L. Rev. 741 (1984).*

City of Dothan v. Eighty-Four West, Inc., 2001 Ala. Civ. App. LEXIS (Ala. App. 2001).

For further discussion, see B. Pryor, *In the Wake of Hiens: Break Out Your Rulers Missouri Its Time to Measure Your Levees, 66 Mo. L. Rev. 469 (2001).*

(n42)Footnote 963. *See, e.g., Hargreaves v. Akrbina, 635 P.2d 221 (Colo. App. 1981).*

(n43)Footnote 964. *See, e.g., Griffin v. Lamberjack, 644 N.E.2d 1087 (Ohio App. 1994); Freyou v. Iberia Parish Sch. Bd., 657 So. 2d 161 (La. App. 1995); City of College Park v. Pichon, 456 S.E.2d 686 (Ga. App. 1995); Cunningham v. West Va.-American Water Co., 457 S.E.2d 127 (W. Va. 1995).*

(n44)Footnote 965. *See also Hoges v. Tire Recyclers, Inc., 901 P.2d 948 (Or. App. 1995)* (Trespass liability for flooding that resulted from the removal of tires from a stream above the property).

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CHAPTER 50 WATER RIGHTS

6-50 Thompson on Real Property, Thomas Editions § 50.21

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§ 50.21 Domestic Use.

§ 50.21(a) In General.

The Roman Law approach to the allocation of rights in water was predicated upon the perception that water was life-sustaining and therefore should not be the object of private ownership. This view that there is a need to make sure that some water is available to all for such purposes is seen in many jurisdictions in specific rules or doctrines that assure that some minimal amount of water will be available to all who need it. n966 Most jurisdictions consider these life-sustaining purposes to be involved in the "domestic use" of the water. Most jurisdictions also consider such a use of the water to be inherently reasonable or beneficial. n967

§ 50.21(b) Securing Water for Domestic Use Purposes.

One way water is provided for domestic use purposes, of course, is through publicly maintained, sponsored or chartered water distribution companies or franchises. n968 Indeed, in most jurisdictions, it would appear that there is an assumption there is a public responsibility to provide water for life-sustaining needs. n969 As a general rule, where water is provided by such a distribution system, the distributor of such water will normally need to qualify for a consumptive-use water right. n970 This is the case even though the distributor is a city. n971 Alternatively, the entity may have to exercise its power of eminent domain to condemn the rights to the water that is required. n972

Where individuals must compete with other individuals for such water, the water right allocation rules in many jurisdictions have been modified to specifically allow ready access to water for domestic use purposes. This is most frequently accomplished by considering the domestic use of water to be a high-priority kind of consumptive use or a use that is not subject to regulation under the water allocation rules of the jurisdiction. n973

COMPUTER-ASSISTED RESEARCH

LEXIS: domestic w/1 use! w/15 water! w/15 compan! or franchise!

§ 50.21(c) Defining Domestic Use.

Domestic use tends to be defined in terms of particular small-scale uses that are deemed vital to the maintenance of life. For example, one jurisdiction limits domestic use to:

> the use of water by any person or by a family unit or household for household purposes, or for the watering of livestock, poultry, farm and domestic animals used in operating a farm, and for the irrigation of lands not exceeding a total of two (2) acres in area for the growing of gardens, orchards and lawns. n974

As noted above, where water is provided through some public distribution system, the distributor of such water will normally need to qualify for a water right under the rules of the jurisdiction in order to have lawful access to the quantity of water needed for distribution. n975 Generally, no particular priority will be given to such rights even though the water will ultimately be used for domestic use. n976 This is because such large-scale uses are not considered to fall within most definitions of domestic use.

COMPUTER-ASSISTED RESEARCH

LEXIS: domestic w/1 use! w/5 water!

§ 50.21(d) Priority of Domestic Uses.

Since some water will be considered available in some fashion to virtually everyone for domestic purposes, it is important to consider the relation between rights of this type and other consumptive-use rights. Although such a use of water is clearly consumptive in nature, it may be given an unstated priority over other consumptive uses. n977

In jurisdictions where the timing of the water use determines priority, the point in time at which the domestic use began may be considered significant in the event of a dispute over water availability, even though there is no requirement that the domestic use be registered at the time it commences. n978

In riparian jurisdictions, there may be a statutory exemption for domestic use n979 or a presumption that the use is not unreasonable *per se*. n980

Where water is provided through some public distribution system, the distributor may be granted by statute a preference to water for public use purposes. n981

COMPUTER-ASSISTED RESEARCH

LEXIS: priorit! w/30 domestic w/1 use! w/15 water!

§ 50.21(e) Amount of Water That May Be Claimed.

The amount of water that can be claimed under a domestic use right varies from jurisdiction to jurisdiction. In some, "domestic use" is defined in terms of the need for the water for particularly identified lifestaining purposes, without regard to the amount of water. n982 In other jurisdictions, the amount may be limited by the defined need or by quantity. n983

COMPUTER-ASSISTED RESEARCH

LEXIS: domestic w/1 use! w/15 water! w/30 amount!

FOOTNOTES:

(n1)Footnote 966. Historically, the need for water for all was addressed within the so-called natural flow doctrine which distinguished life-sustaining uses from artificial uses and gave significant protection and preference to the natural, life-sustaining uses. *See* § 50.08(j), *supra. See also Meng v. Coffey, 93 N.W. 713 (Neb. 1906).* Recently, the need to make water available for life-sustaining purposes has been codified in statutes of many jurisdictions. *See, e.g.*, Fla. Stat. Ann. § 373.219; Minn. Stat. § 109.41(1).

(n2)Footnote 967. *See, e.g., Evans v. Merriweather, 4 Ill. (3 Scam.) 492 (1842). See* J. H. Buescher, *Wisconsin's Water Law*, 31 Wis. B. Bull. 30, 42 (October 1958): "So-called 'domestic uses' are reasonable under all conditions and circumstances."

(n3)Footnote 968. *See, e.g.*, Kan. Stat. Ann. § 12-2701 *et seq. See also* Clifford Davis, *The Right to Use Water in the Eastern United States, in 7* Water and Water Rights § 614.2 (Robert Clark ed. 1976).

D. Yoskowitz, *Markets, Mechanisms, Institutions, and the Future of Water, 31 Envtl. L. Rep. 10237 (2001).*

(n4)Footnote 969. *See, e.g.*, Kan. Stat. Ann. § 82a-705. *But see Thompson v. Salt Lake City Corporation, 724 P.2d 958 (Utah 1986)* holding that the city had no legal duty to provide water service to all members of the public.

(n5)Footnote 970. *See* discussion of municipal water rights at §§ 50.08(o) and 50.09(cc) *supra*. Often, the water represented by these rights will be stored in reservoirs pursuant to contracts with the federal government. *See* § 50.16(e).

This position undoubtedly results from the large quantity of water required and the likely impact such substantial withdrawals will have on other users. It is also likely the result of the fact that municipalities enjoy extensive powers which are not possessed by individual water users, such as the power of eminent domain, by which they can protect their interest without regard to the priority status of their water rights.

(n6)Footnote 971. *Id.*

(n7)Footnote 972. *See Reynolds v. Roswell, 654 P.2d 537 (N.M. 1982).*

(n8)Footnote 973. *See, e.g.*, Kan. Stat. Ann. § 82a-709.

(n9)Footnote 974. Kan. Stat. Ann. § 82a-701(c).

(n10)Footnote 975. *See* discussion of municipal water rights at §§ 50.08(o) and 50.09(cc), *supra*. Often, the water represented by these rights will be stored in reservoirs pursuant to contracts with the federal government. *See* § 50.16(e).

See also In the matter of *Water Use Permit Applications, No. 21309, 2000 Hawaii LEXIS 321* (Sept. 27, 2000).

(n11)Footnote 976. *See Pernell v. Henderson, 16 S.E.2d 449 (N.C. 1941).*

(n12)Footnote 977. For example, there may be no formal perfection requirements in a particular jurisdictions that must be satisfied in order to secure water for domestic use purposes.

See, e.g., Kan. Stat. Ann. § 82a-728:

Except for the appropriation of water for the purpose of domestic use ... it shall be unlawful for any person to appropriate or threaten to appropriate water from any source without first applying for and obtaining a permit to appropriate water... .

See also Kan. Stat. Ann. § 82a-705:

No person shall have the power or authority to acquire an appropriation right to the use of water for other than domestic use without first obtaining the approval of the chief engineer... .

(n13)Footnote 978. *See, e.g.*, Kan. Stat. Ann. § 82a-709.

(n14)Footnote 979. Minn. Stat. § 109.41(1).

(n15)Footnote 980. *See* J. H. Beuscher, *Wisconsin's Water Law*, 31 Wis. B. Bull. 30, 42 (October 1958).

(n16)Footnote 981. *See, e.g.*, N.Y. Environmental Conservation Law §§ 15-0501-15-1529. *See also* R.I. Gen. Laws § 46-15-7. For further discussion, *see* Sherry Peel, *Acquisition of Muicipal Water Rights in Texas: A Conceptual and Operational Analysis, 17 Tex. Tech. L. Rev. 811 (1988).*

(n17)Footnote 982. *See* J. H. Buescher, *Wisconsin's Water Law*, 31 Wis. B. Bull. 30, 42 (Oct. 1958):

> Domestic uses include the use of water for household purposes and for the watering of livestock. It is generally assumed, in this state as elsewhere, that a riparian may even exhaust the water in the watercourse if necessary to meet legitimate domestic uses.

(n18)Footnote 983. Kan. Stat. Ann. § 82a-701(c). *See also* Kan. Admin. Reg. § 5-1-1(m): "Household purposes - The use of water by a person for cooking, cleaning, washing, bathing, human consumption, restroom facilities or other uses normally associated with the operation of a household. Household purposes includes the use of one and one-half acrefeet of water or less per calendar year by an industrial user." *See also* Kan. Admin. Regs. § 5-3-3:

Storage of water for domestic use. Any person entitled to use water for beneficial purposes may collect and store the same so long as such collection, storage, use and times of use thereafter are consistent with reasonable storage and conservation practices. A reasonable quantity of water stored for domestic use shall be considered to be that quantity sufficient to satisfy the domestic use for the current year and two succeeding years.

For further discussion, see H. Doremus, *Water, Population Growth, and Endangered Species In the West, 72 U. Colo L. Rev. 362 (2001).*

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Supp. To CHAPTER 50 WATER RIGHTS

6-50 Thompson on Real Property, Thomas Editions Supp. to § 50.03

Supp. to § 50.03 Water Rights as Property.

[Go To Main]

§ 50.03(a). In General. [Go To Main]

Add:

Anderson, David A. "Water Rights as Property in Tulare v. United States," *38 McGeorge L. Rev. 461 (2007).*

§ 50.03(b) Water Rights as Real Property. [Go To Main]

Add:

See Parks v. Cooper, 676 N.W.2d 823 (S.D. 2004) , holding that all water in South Dakota belongs to the people in accord with the public trust doctrine.

See also Vance v. Wolfe, 205 P.3d 1165 (Colo. 2009) .

Add:

Anderson, David A. "Water Rights as Property in Tulare v. United States," *38 McGeorge L. Rev. 461 (2007).*

§ 50.04(h) Specific Limitations: Government as Proprietor of the Resource [Go To Main]

add:

Colorado will not deny any right to divert unappropriated waters of any natural stream for beneficial use. See *Vance v. Wolfe, 205 P.3d 1165 (Colo. 2009)*

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Supp. To CHAPTER 50 WATER RIGHTS

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Supp. to § 50.05 State Authority over Water Rights.

[Go To Main]

§ 50.05(a) Basis for State Authority. [Go To Main]

add:

See Waterfall Cmty. Water Users Ass'n v. N.M. State Eng'r (In re Application by Waterfall Cmty. Water Users Ass'n), 216 P.3d 270 (N.M. Ct. App. 2009)

Add:

See Parks v. Cooper, 676 N.W.2d 823 (S.D. 2004) , holding that all water in South Dakota belongs to the people in accord with the public trust doctrine.

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Supp. To CHAPTER 50 WATER RIGHTS

6-50 Thompson on Real Property, Thomas Editions Supp. to § 50.06

Supp. to § 50.06 Non-Consumptive Use.

[Go To Main]

§ 50.06(h) Private Non-Consumptive Use Rights. [Go To Main]

Add:

See Ace Equipment Sales, Inc. v. Buccino, 82 Conn. App. 573 (2004) . There, the court held that each riparian owner of land that abuts a nonnavigable waterbody, his intimates and guests, are given the right of reasonable use of the entire water body, subject to the rights of other riparian owners. *In contrast, in Columbia Land Development, L.L.C. v. Clark, 868 So. 2d 1006 (Miss. 2004)* , the court held that where landowners own land on a nonnavigable lake but whose title extends only to the margin thereof, but does not include an ownership interest in the beds thereof, has no right to boat upon or take fish from the lake. In such situations, the public at large, likewise, does not have any right of access to the lake. Normally, ownership of the bed of nonnavigable river beds will lie with the owner of the adjacent land. *See Portage County Bd. of Comm'rs v. Akron, 808 N.E.2d 444 (Ohio App 2004)* .

The rule regarding rights of upland owners of land abutting non-navigable waters does not extent to artificial water bodies. *See Ace Equipment Sales, Inc. v. Buccino, 869 A. 2d 626 (Conn. 2005)* where abutting landowners were not allowed to use an artificial nonnavigable pond on the land of another.

§ 50.06(i) Navigability as the Traditional Basis for Public Non-Consumptive Use Rights. [Go To Main]

Add:

See Portage County Bd. of Comm'rs v. Akron, 808 N.E.2d 444 (Ohio App 2004) ; *White's Mill Colony, Inc. v. Williams,*

609 S.E.2d 811 (S.C. 2005) ; *Walker Lands, Inc. v. East Carroll Parish Police Jury, 871 So. 2d 1258 (La. App. 2004)* . *See also* Barcott, B. There's An Old Saying in Colorado: You Can Steal My Wife, But Not My Water, 2004 Aug. Legal All. 48 (2004).

See Bauman v. Woodlake Partners, LLC., 681 S.E.2d 819 (N.C. Ct. App. 2009) .

§ 50.06(k) Determining Navigable Status: Capacity for Commercial Use [Go To Main]

add:

See Bauman v. Woodlake Partners, LLC., 681 S.E.2d 819 (N.C. Ct. App. 2009) , holding that in order, under the public trust doctrine, to establish a lake created by damming a creek, it must be established that the creek was navigable prior to the damming.

§ 50.06(n) Public Access to Navigable Waters. [Go To Main]

Add:

See Ace Equipment Sales, Inc. v. Buccino, 82 Conn. App. 573 (2004) .

§ 50.06(o) Traditional Public Rights in Non-navigable Waters. [Go To Main]

Add:

The traditional rule was followed in *Ace Equipment Sales, Inc. v. Buccino, 869 A. 2d 626 (Conn. 2005)* where abutting landowners were not allowed to use a nonnavigable pond on the land of another. In this case, the deed specifically limited the use of the pond by the abutting landowners to industrial purposes.

§ 50.06(s) Non-Traditional Approaches: Public Trust. [Go To Main]

Add:

See Parks v. Cooper 676 N.W.2d 823 (S.D. 2004) holding that all water in South Dakota belongs to the people in accord with the public trust doctrine. *See also Columbia Land Development L.L.C. v. Secretary of State, 868 So. 2d 1006 (Miss. 2004)* .

Add:

See also Michigan Citizens for Water Conservation v. Nestle Waters North America, Inc., 709 N.W. 2d 174 (2006) , confining the public trust doctrine to navigable waters.

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Supp. To CHAPTER 50 WATER RIGHTS

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Supp. to § 50.08 Consumptive Use of Surface Waters: Riparian Systems.

[Go To Main]

§ 50.08(h) Vesting of Riparian Rights. [Go To Main]

Add:

Riparian rights are held to be an incident of the ownership of land that abuts a lake. *Ace Equipment Sales, Inc. v. Buccino, 82 Conn. App. 573 (2004)* . In *Coastal Plains Utilities, Inc. v. New Hanover County, 601 S.E.2d 915 (N.C. App. 2004)* , the court held that a party asserting a riparian right must show that it is a riparian proprietor or that in some what that it has acquired riparian rights in a stream. As such, the proprietor is entitled to the natural flow of the stream, undiminished in quantity and unimpaired in quality except as may be occasionally the result of reasonable use of the water by other proprietors.

§ 50.08(j) Quantity: Natural Flow Doctrine. [Go To Main]

Add:

North Carolina still appears to follow a modified version of the doctrine. *See Coastal Plains Utilities, Inc. v. New Hanover County, 601 S.E.2d 915 (N.C. App. 2004)* , where the court held that a party asserting a riparian right is entitled to the natural flow of the stream, undiminished in quantity and unimpaired in quality except as may be occasionally the result of reasonable use of the water by other proprietors.

§ 50.08(m) Transferability of Riparian Rights. [Go To Main]

Add:

But see Panetta v. Equity One, Inc. 378 N.J.Super. 298, 875 A. 2d 991 (N.J. Super. 2005) , where the court considered the matter of the water right being conveyed with the land as one of intent and that the right would pass automatically unless it was expressly excluded. The case was based on *N.J. S.A.46:3-16* that mandated that deeds be construed to include all appurtenant property rights, such as a riparian grant, unless expressly excluded. In this case, the riparian grant had an existence independent of the ownership of the property, a fact that was unknown to all of the parties except the son of the grantor, who did not disclose this fact when he prepared the deed. The property involved was upland property.

§ 50.08(o) Riparian Rights of Municipalities. [Go To Main]

Add:

In Ohio, municipalities claiming riparian water rights do not have the ability to sell or supply water to individuals who reside outside the city's jurisdiction although the rights do constitute a property interest that can be appropriated and conveyed separately from the underlying land. *See Portage County Board of Commissioners v. City of Akron, 808 N.E. 2d 444 (Ohio App. 2004) . See also Pittsburgh County Rural Water District No. 7 v. City of McAlester, 358 F.3d 694 (10th Cir 2004)* ; *Cobb County v. City of Smyrna, 606 S.E.2d 667 (Ga. App. 2004)* .

§ 50.08(p) Administrative Water Right Allocations in Riparian Jurisdictions. [Go To Main]

Add:

For further discussion, *see* Choe O., Appurtenancy Reconceptualized: Managing Water in an Era of Scarcity, *113 Yale L. J. 1909 (2004).*

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Supp. to § 50.09 Consumptive Use of Surface Water: Appropriative Systems.

[Go To Main]

§ 50.09(e) Vesting: Availability of Unappropriated Water. [Go To Main]

Add:

In *Bitterroot River Protective Association, Inc. v. Siebel, 108 P. 3d 518 (Mont. 2005)* , the court held that amendments to an original application constituted new applications and did not relate back to the original application. As a result, the new applications were prohibited by the fact that the subbasin had been declared closed to new appropriation.

Add:

The burden of demonstrating that waters that have been released into a natural carrier from another source constitute water that is available for appropriation is generally on the party asserting that he or she is entitled to use the water. *See Hidden Hollow Ranch v. Fields, 321 Mont. 505 (2004)* . The test regarding the burden of proof is typically by a preponderance of the evidence. *See City of Aurora v. Simpson (In re Water Rights of Park County Sportmen's Ranch), 2005 Colo. LEXIS 122* (No. 96CW 14, Feb. 14, 2005).

Salvaged water was addressed in the case of *City of Aurora v. Colo. State Engineer, 2005 Colo. LEXIS 122* (No. 96CW 14, Feb. 14, 2005), holding that the rule that applicants may not claim credit for salvaged water applies to the destruction of all native vegetation whether or not it is classified as phreatophytic.

Developed water typically refers to water not previously part of the river system and therefore not subject to administration by the state engineer. *City of Aurora v. Simpson (In re Water Rights of Park County Sportmen's Ranch), 2005 Colo. LEXIS 122* (No. 96CW 14, Feb. 14, 2005).

For further discussion, *see* Barcott, B. There's An Old Saying in Colorado: You Can Steal My Wife, But Not My Water. 2004 Aug. Legal All. 48 (2004).

§ 50.09(j) Vesting: Problems of Instream Use. [Go To Main]

Add:

In *Phelps Dodge Corporation v. Arizona Department of Water Resources, 118 P. 3d 1110 (Az. App. 2006)* , the court held the power of the Department of Water Resources to issue permits to appropriate water for instream flows even though the appropriations did not involve a physical diversion of water. In this case, the United States Forest Service applied for a permit to appropriate water in Cherry Creek for fish, wildlife and recreational purposes.

§ 50.09(l) Vesting: Application to Beneficial Use. [Go To Main]

Add:

Joyce Livestock Co. v. United States (In re SRBA Case No. 39576), 144 Idaho 1 (Idaho 2007) (a rancher's predecessors obtained water rights on federal land by applying the water to a beneficial use; the water rights are appurtenant to their patented land).

Add:

See also State ex rel. Martinez v. City of Las Vegas, 89 P.3d 47 (N.M. 2004) , holding that the City of Las Vegas could not claim an on-going, open-ended pueblo water right. The application to beneficial use must be completed within a reasonable time. *See also In the Matter of the General Determination of the Rights to use All of the Water, Both Surface and Underground within the Drainage Area of Utah Lake and Jordan River in Utah, Salt Lake, Davis, Summit, Wasatch, Sanpete, and Juab Counties in Utah v. Pinecrest Pipeline Operating Company and Pinecrest Water Users Association, 98 P.3d 1 (Utah. 2004)* . There, the court somewhat reluctantly upheld the trial court's determination that beneficial use was found in "satisfying aesthetic desires, reducing fire hazard, and creating property line buffers." The intended use--growing trees--failed because no trees grew. The court was clear to note that its decision should not be interpreted to find that a beneficial use could be established simply by irrigating natural vegetation.

The failure of a city to make a beneficial use of the water within the statutory 5-year period resulted in a denial to the municipal water board of a permit as a matter of law. *See Waterwatch of Oregon, Inc. v. Water Resources Commission, 88 P.3d 327 (Or. App. 2004)* .

§ 50.09(n) Vesting: Defining "Beneficial Use."--Nature of the Use [Go To Main]

add:

See Vance v. Wolfe, 205 P.3d 1165 (Colo. 2009) , holding that applying Colorado River water in Colorado for the use of coalbed methane production constitutes beneficial use.

add:

In Colorado, beneficial use constitutes water use required to accomplish the purposes of the water appropriation under reasonably efficient practices. *See Vance v. Wolfe, 205 P.3d 1165 (Colo. 2009)* .

§ 50.09(r) Priorities: Establishing Priority. [Go To Main]

Add:

In *Bitterroot River Protective Association, Inc. v. Siebel, 108 P. 3d 518 (Mont. 2005)* , the court held that amendments to an original application constituted new applications and did not relate back to the original application. In this case, that meant that the new applications were prohibited by the fact that the subbasin had been declared closed to new appropriation. Priority of a water right relates back to the time it was initiated once proper application to beneficial use is made. *State ex rel. Martinez v. City of Las Vegas, 89 P.3d 47 (N.M. 2004) . See also Hidden Hollow Ranch v. Fields, 92 P.3d 1185 (Mont. 2004)* .

See Waterfall Cmty. Water Users Ass'n v. N.M. State Eng'r (In re Application by Waterfall Cmty. Water Users Ass'n), 216 P.3d 270 (N.M. Ct. App. 2009) , holding water can no longer be appropriated after a water source has been completely appropriated.

§ 50.09(w) Quantity: Establishing and Amount. [Go To Main]

Add at end of second paragraph.

When calculating transportation loss in light of later transfers of the place of diversion or manner of use, any "freed up" water resulting from lower transportation losses may not be considered part of the water right. *See United States v. Truckee-Carson Irrigation Dist. 429 F. 3d 902 (9th Cir. 2005)* .

§ 50.09(y) Transferability of Water Rights. [Go To Main]

Add:

See also Barnes v. Hussa, *39 Cal. Rptr 3d 659 (2006)* .

§ 50.09(z) Transfers of Water Rights. [Go To Main]

Add:

In *Trail's End Ranch, L.L.C. v. Colorado Division of Water Resources, 91 P.3d 1058 (Colo. 2004)* , the court held that changes in the points at which water is removed from the source constitute diversions which may require adjudicating changes to the user's water rights, which, in turn, could possibly alter the user's claim to priority. The court also held that the right to transfer was one of the incidents of a water rights so long as the change neither enlarges the right nor injuriously affects others. It is therefore applied for and adjudicated in the same manner as the initial determination of the water right. *See also Herrmann v. Lindsey,* 136 S.E.3d. 286 (Tex. App. 2004).

In *Herrington v. State ex rel. Office of the State Engineer, 92 P.3d 31 (N.M. App. 2004)* , the court upheld a determination that appropriators were not entitled to change their point of diversion from surface sources to ground water.

In *Hanson v. Turney, 94 P.3d 1 (N.M. App. 2004)* , the court upheld the State Engineer's denial of permission to change the use of the water from irrigation to a subdivision.

In *City of Golden v. Simpson, 83 P.3d 87* Colo. 2004), the court treated a stipulated change decree as if it were a contract.

See also City of West Richland v. Department of Ecology, 103 P.3d 818 (Wash. App. 2004) , regarding the transferability of unperfected water rights.

Add:

In Barnes v. Hussa, *39 Cal. Rptr 3d 659 (2006)* , the court upheld the movement of water from a creek across the land of others to noncontiguous parcels on the ground that the landowners did not meet the burden of showing harm to others.

§ 50.09(dd) Municipal Rights. [Go To Main]

Add:

In the case of *State ex rel. Martinez v. City of Las Vegas, 89 P.3d 47 (N.M. 2004)* , the court denied that a city could claim an open-ended pueblo water right, finding such to be inconsistent with the principles of the appropriation doctrine.

§ 50.09(ff) Termination: Abandonment. [Go To Main]

Add:

See also *Snider v. Kirchhefer, 115 P. 3d 1 (Wyo. 2005)* .

Add:

In *Snider v. Kirchhefer, 115 P. 3d 1 (Wyo. 2005)* , the court refused to grant standing to someone who challenged another's water right as abandoned on the ground that the plaintiffs had failed to show how their water right would be benefitted by abandonment or harmed by the resuscitation of the other water right. The court used a substantial evidence test to review whether the state board's decision was correct.

§ 50.09(gg) Termination: Forfeiture. [Go To Main]

Add:

Courts often use the terms abandonment and forfeiture interchangeably. *See Snider v. Kirchhefer, 115 P. 3d 1 (Wyo. 2005)* , where the court reversed a determination by a state board that a water right had been abandoned on the ground that the plaintiffs had failed to show how their water right would be benefitted by abandonment or harmed by the resuscitation of the other water right. The court used a substantial evidence test to review whether the state board's decision was correct. In *Department of Conservation and Natural Resources, Division of Water Resources v. Foley, 109 P. 3d 760 (Nev. 2005)* , the court held that some changes, including cancellation of water rights, may not always entitle the water right holder to notice of cancellation. This case involved a forfeiture based on lack of use and the issue of notice involved claimants of water rights whose interests did not appear in the files of the State Engineer.

See also Frick Farm Prop., L.P. v. State, 216 P.3d 170 (Kan. 2009) where the court upheld water rights were forfeited after statutory non-use of five years, when the party was not timely in providing evidence of reasonable non-use.

Add:

In *Hannigan v. Hinton, 97 P.3d 1256 (Ore. App.2004)* , the court held that water rights that were appurtenant to mining claims were subject to the state's forfeiture statute and that use of the water at a location that was different than that designated on the water rights certificate constituted nonuse for purposes of the application of the forfeiture statute. *See also In the Matter of the General Determination of the Rights to use All of the Water, Both Surface and Underground within the Drainage Area of Utah Lake and Jordan River in Utah, Salt Lake, Davis, Summit, Wasatch, Sanpete, and Juab Counties in Utah v. Pinecrest Pipeline Operating Company and Pinecrest Water Users Association, 98 P.3d 1 (Utah. 2004)* .

N. Kern Water Storage Dist. v. Kern Delta Water Dist., *54 Cal. Rptr. 3d 578 (2007)* (the state properly measured the forfeiture of appropriated water rights).

§ 50.09(ii) Re-Use. [Go To Main]

Add:

In *City of San Marcos v. Texas Commission on Environmental Quality, 128 S.W.3d 264 (Tex. App. 2004)* , the court found that the city's rights to wastewater effluent were abandoned when the city discharged the water into the river. The city therefore could not divert the water again three miles downstream for reuse.

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Supp. to § 50.11 Consumptive Use of Groundwater.

[Go To Main]

§ 50.11(a) In General. [Go To Main]

Add:

Traditionally, the federal government has not played a significant role regarding the allocation of water rights in ground water. Nevertheless, the federal government has a vital role regarding the quality of groundwater as a result of federal legislation. For further discussion, *see* Leshy, J. The Federal Role in Managing The Nation's Groundwater, 11 Hastings W.-Nw. J. Envtl. L. & Pol'y 1 (2004).

§ 50.11(f) Traditional Groundwater Right Allocation Doctrines: American or Reasonable Use Rule. [Go To Main]

Add:

Arizona applies the reasonable use rule to areas or claims not covered by the Arizona Groundwater Code. *See Brady v. Abbott Laboratories, 433 F. 3d 679 (9th Cir. 2005)* : *Hansen v. United States, 65 Fed. Cl. 76 (2005)* , holding that the landowner has a protected property interest in groundwater under the land under South Dakota Law.

Add:

Nebraska still follows the reasonableness rule. *See Spear Ranch, Inc. v Knaub, 691 N.W.2d 116 (Neb. 2005)* , where the court held that although the surface waters were allocated based on appropriation doctrines, ground water was governed by the common law rule of reasonableness.

§ 50.11(g) Traditional Groundwater Right Allocation Doctrines: Correlative Rights. [Go To Main]

Add:

Courts have held that even though the right to claim the water is inherent in the title to the land, the right carries no proprietary interest in the water itself nor does such a claimant have any priority regarding other similarly situated claimants. *See Spear T. Ranch, Inc. v. Knaub. 691 N.W.2d. 116 (Neb. 2005)* .

§ 50.11(m) Interference with Surface Waters. [Go To Main]

Add:

In *Spear T Ranch, Inc. v. Knaub, 691 N.W. 2d 116 (Neb. 2005)* , the court found in favor of a groundwater user against a claim by a surface user that the groundwater use interfered with rights to creek water. The court noted that Nebraska water law ignores the hydrological fact that groundwater and surface water are inextricably related. Thus, even though the two bodies of water may be related, the court rejected the idea that priority in surface rights does not give the claimant a superior claim to that of a later groundwater extractor since the two systems were treated in law as fully independent of one another. Any recourse would have to be based on tort rather than water law.

Add:

But see Spear T Ranch, Inc. v. Knaub, 691 N.W. 2d 116 (Neb. 2005) , where the court found in favor of a groundwater user against a claim by a surface user that the groundwater use interfered with rights to creek water. The court noted that Nebraska water law ignores the hydrological fact that groundwater and surface water are inextricably related.

Add:

In a case from Nebraska, *Spear Ranch, Inc. v Knaub, 691 N.W.2d 116 (Neb. 2005)* , the court held that a groundwater user is not subject to liability for interference with the use of water of another unless the withdrawal of the groundwater has a direct and substantial effect on the surface water and unreasonably causes harm to the person entitled to use the surface water. There, the court held that although the surface waters were allocated based on appropriation doctrines, ground water was governed by the common law rule of reasonableness.

For a discussion of the right of a surface water user to acquire the full amount of the appropriation by tapping into ground water sources, *see Herrington v. State, 92 P.3d 31 (N.M. App. 2004)* ,

But see Brady v. Abbott Laboratories, 433 F. 3d 679 (9th Cir. 2005) , where the court found that the parties had not pled the case under the Arizona Groundwater Code but rather under the reasonable use common law groundwater rules. In *Reed v. Cloninger, 131 P.3d 359 (Wyo. 2006)* the court dealt with the reverse situation--where a surface use caused the groundwater level to rise to the point of causing damage to the basement of a house. See also *Michigan Citizens for Water Conservation v. Nestle Waters North America, Inc., 709 N.W. 2d 174 (2006)* holding that the test for interference caused by groundwater extraction was a reasonable use balancing test and that under this test, extracting water by a spring water bottling company, was considered unreasonable. The plaintiffs had also argued that the extraction was unlawful under the public trust. The court held that since the water was not navigable, the public trust doctrine did not apply. In *McNamara v. City of Rittman, 838 N.E. 2d 640 (Ohio 2005)* , the court answered in the affirmative two certified questions from the 6th Circuit: whether a landowner had a property interest in groundwater underlying its land and whether governmental interference with that right could constitute an unconstitutional taking.

§ 50.11(o) Recurring Groundwater Problems: Pollution. [Go To Main]

Add:

It is difficult to claim harm to water rights as a result of pollution in many jurisdictions. *See New Mexico v. General Electric Co., 335 F. Supp. 2d. 1266 (D. N.M. 2004)* ; *New Mexico v. General Electric Co. 335 F. Supp. 2d 1185 (D. N.M. 2004)* .

§ 50.11(p) Recurring Groundwater Problems: Subsidence. [Go To Main]

Add:

In the case of *Brady v. Abbott Laboratories, 433 F. 3d 679* (9th Cir. 2005) , plaintiffs argued that extraction of groundwater which caused pecan trees planted on the surface to die was actionable as common law tort and nuisance. The court disagreed and used the groundwater reasonable use doctrine to deny recovery.

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Supp. to § 50.14 Making Changes in Water Right Allocation Systems.

[Go To Main]

§ 50.14(d) Limits on State Authority. [Go To Main]

Add:

In *Department of Conservation and Natural Resources, Division of Water Resources v. Foley, 109 P. 3d 760 (Nev. 2005)* , the court held that some changes, including cancellation of water rights, may not always entitle the water right holder to notice of cancellation. This case involved a forfeiture based on lack of use and the issue of notice involved claimants of water rights whose interests did not appear in the files of the State Engineer.

Add:

In *Department of Conservation and Natural Resources, Division of Water Resources v. Foley, 109 P. 3d 760 (Nev. 2005)* , the court held that some changes, including cancellation of water rights, may not always entitle the water right holder to notice of cancellation. This case involved a forfeiture based on lack of use and the issue of notice involved claimants of water rights whose interests did not appear in the files of the State Engineer.

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Supp. to § 50.15 Interstate Allocation of Water.

[Go To Main]

§ 50.15(a) In General. [Go To Main]

Add:

For further discussion, *see* Hennessy, M., Colorado River Water Rights: Property Rights in Transition. *71 U. Chi. L. Rev. 1661 (2004);* Hansell, W., Who Gets the Hooch?: Georgia, Florida, and Alabama Battle for Water from the Appalachicola-Chattahoochee-Flint River Basin., *55 Mercer L. Rev. 1453 (2004).*

§ 50.15(c) Jurisdictional Matters: The State Acts as *Parens Patriae*. [Go To Main]

Add:

See e.g. Three Forks Ranch Corp. v. City of Cheyenne Wyoming, 96 Fed. Appx. 567 (10th Cir, 2004) , where the court held that the Upper Colorado River Basin Compact did not create a private right of action.

Add:

In *Alabama v. United States Army Corps of Engineers, 424 F. 3d 1117* (11th Cir. 2005) , the court held that disputes between states regarding water stored in federal reservoirs did not constitute the kind of problem for which exclusive Supreme Court jurisdiction was required.

§ 50.15(f) Other Resolution Approaches: Interstate Compacts. [Go To Main]

Add:

In *Three Forks Ranch Corp. v. City of Cheyenne Wyoming, 96 Fed. Appx. 567* (10th Cir, 2004) , the court held that the Upper Colorado River Basin Compact did not create a private right of action.

§ 50.15(g) Other Resolution Approaches: Congressional Apportionment. [Go To Main]

Add:

Congress approves the boundaries between states. When the boundary involves a waterbody, Congress has the ultimate power to declare where the boundary is located in the water. The boundary between Virginia and Maryland was set by compact between the two states and approved by Congress as at the low-water mark on the Virginia side of the Potomac River, effectively granting to Maryland ownership of the entire riverbed. In *Virginia v. Maryland, 540 U.S. 56 (2003)* , the Supreme Court held that that did not deprive Virginia of her riparian rights in the river nor did it deprive her of the power to withdraw water from the river.

Add:

For further discussion, *see* Hennessy, M. Colorado River Water Rights: Property Rights in Transition. *71 U. Chi. L. Rev. 1661 (2004).*

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Supp. to § 50.16 Federal/State Relations Regarding the Administration of Water Rights.

[Go To Main]

§ 50.16(c) Specific Federal Authority: General Federal Regulatory Authority. [Go To Main]

Add:

In *Trout Unlimited v. U.S. Department of Agriculture, 320 F. Supp. 2d 1090 (D. Colo. 2004)* , the court found that the federal assertion of authority to impose bypass flows as a condition on the use of National Forest Land did not constitute the assertion of a water right that would conflict with state law.

§ 50.16(e) Specific Federal Authority: Water Power and Reclamation. [Go To Main]

add:

For a discussion on whether irrigation districts have equitable property interests in water from a federal reclamation project to which the United States has legal title, see *Klamath Irrigation Dist. v. United States, 227 P.3d 1145 (Or. 2010)* .

Add:

The conflict between federal power and state law was addressed in *Natural Resources Defense Council v. Patterson, 333 F. Supp. 2d 906 (E.D. Cal. 2004)* in which it was held that the Bureau of Reclamation had not released sufficient

water from a dam to reestablish and maintain historic fisheries. *See also Central Valley Water Agency v. Untied States, 327 F. Supp. 2d 1180 (E.D. Cal. 2004)* .

§ 50.16(f) Specific Federal Authority: Environmental Protection. [Go To Main]

Add:

See Pac. Coast Fed'n of Fishermen's Ass'ns v. U.S. Bureau of Reclamation, 426 F.3d 1082 (9th Cir. 2005) . There, the federal government sought to balance the interests of fisheries and irrigation agriculture as it discharged its responsibilities under the Endangered Species Act to protect coho salmon and its habitat. The court found that the plan adopted by the government was arbitrary and capricious because it didn't contain a reasoned explanation for the decisions.

Add:

The conflict between managing waterways for flood control, commercial activity and for the protection of endangered species is addressed in *In re Operation of the Missouri River System, 2004 U.S. Dist. LEXIS 11410* (No. 03-MD-1555 (PAM), June 21, 2004, D. Minn.), where the court upheld the decisionmaking of the Army Corps of Engineers decisions regarding the management of the Missouri River. *See also Central Valley Water Agency v. Untied States, 327 F. Supp. 2d 1180 (E.D. Cal. 2004)* ; *Central Delta Water Agency v. State Water Resources Control, 20 Cal. Rptr. 3rd 898 (Cal. App. 2004)* .

For further discussion, *see* Hasenstein, E. Frankenstein and Pitbull? Transmogrifying the Endangered Species Act and "Fixing" the San Juan-Chama Project after Rio Grande Silvery Minnow v. Keys. *34 Envtl. L. 1247 (2004).*

§ 50.16(g) Specific Federal Authority: Federal Proprietary Interests and Rights as Owner of the Public Domain. [Go To Main]

Add:

It has long been held that ranchers who are allowed to graze their livestock on the public domain under the terms of grazing permits do not have a protected property interest in the permits themselves. Nevertheless, they do have a property interest in the associated water rights. *See Walker v. Untied States, 69 Fed. Cl. 222 (2005)* ; *Colvin Cattle Co, Inc. v. United States, 67 Fed. Cl. 568 (2005)* ; *Sacramento Grazing Association v. United States, 66 Fed. Cl. 211 (2005)* .

Add:

It has long been settled that the federal government may apply for and claim water rights under the rules of the states

just the same as a private appropriator or water user. In the recent case of *Phelps Dodge Corporation v. Arizona Department of Water Resources, 118 P. 3d 1110 (Az. App. 2006)* , the court upheld the power of the Department of Water Resources to issue permits to appropriate water for instream flows, even though the appropriations did not involve a physical diversion of water. In this case, the United States Forest Service applied for a permit to appropriate water in Cherry Creek for fish, wildlife and recreational purposes.

§ 50.16(h) Specific Federal Authority: Federal Navigational Servitude. [Go To Main]

Add:

In *Cooper v. Louisiana Department of Public Works, 870 So. 2d 315 (La. App. 2004)* , the court held that permanent flooding of land resulting from the construction of dams and locks along the Ouachita and Black Rivers affected drainage servitudes which were not subject to the federal navigational servitude.

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Supp. to § 50.17 General Federal Reserved Water Rights.

[Go To Main]

§ 50.17(b) Federal Reserved Rights Generally. [Go To Main]

Add:

In *Trout Unlimited v. United States Department of Agriculture, 320 F. Supp. 2d 1090 (D. Colo. 2004)* , the court found that the federal assertion of authority to impose bypass flows as a condition on the use of National Forest Land did not constitute the assertion of a water right that would conflict with state law.

Federal reserved water rights are deemed to exist independently of state law. They are not derived from actual use but are tied to stated purposes regarding the reservation of land for a federal purpose and arise at the time the land is withdrawn from the public domain. These rights are not subject to loss for abandonment. *See In re Water Rights of U.S., 101 P.3d 1072 (Colo. 2004)* .

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Supp. to § 50.18 Indian Reserved Rights.

[Go To Main]

§ 50.18(a) In General. [Go To Main]

Add:

In *The Mattaponi Indian Tribe v. Comm. 43 Va. App. 690 (2004)* , the court held it was without jurisdiction to adjudicate the tribe's assertion of water rights with respect to a reservoir project. The water rights were claimed under a 1677 Treaty. *See also United States v. Orr Water Ditch Co., 309 F. Supp. 2d 1245 (D. Nevada 2004)* ; *United States v. Clifford Matley Family Trust, 354 F.3d 1154 (9th Cir. 2004)* .

For a discussion regarding the impact of treaties as a basis for asserting claims to water by Indian tribes, see *Skokomish Indian Tribe v. United States, 401 F. 3d. 979 (9th Cir. 2005)* .

§ 50.18(c) Quantifying the Water Rights. [Go To Main]

Add:

In *United States v. Truckee-Carson Irrigation Dist. 429 F. 3d. 902 (2005)* the court limited the amount of water that could be used by the tribe under a temporary change in place and manner of use application approved by the state engineer to the maximum amount of water allocated to the prior use. In so doing, the tribe was denied any additional water that might result from a reduced transportation loss. For a further example of using state, rather than federal law regarding Indian water rights, see *United States v. Orr Water Ditch Company, 391 F. 3d 1077 (2004)* .

§ 50.18(j) State Authority over Indian Rights. [Go To Main]

add:

See also United States v. Orr Water Ditch Co., 600 F.3d 1152 (9th Cir. 2010) . In this case the court held the district court did have jurisdiction where taking groundwater would adversely affect the Tribe's decreed water rights, when it was argued that the district court only had jurisdiction to adjudicate issues regarding surface water.

Add:

In *Flathead Joint Board of Control v. United States Department of the Interior, 309 F. Supp. 2d 1217 (D. Mont. 2004)* , the tribe successfully resisted efforts on the part of a state irrigation district to access information about the tribe's use of water. The matter was filed as a request under the Freedom of Information Act (FOIA) and the court held that information about allocation of water rights on the reservation were "commercial or financial" information and not subject to disclosure. Nor was the tribe considered an "agency" for purposes of the intra and inter-agency FOIA exception. Documents prepared by the federal agency and not given to the tribe were considered to be attorney-client or work products protected against discovery.

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Supp. to § 50.19 Non-Reserved Indian Water Rights.

[Go To Main]

§ 50.19(a) In General. [Go To Main]

Add as a new footnote, number 898.1 at the end of first sentence of section. n898.1

§ 50.19(b) Pueblo Rights. [Go To Main]

Add:

In *State ex rel. Martinez v. City of Las Vegas, 89 P.3d 47 (N.M. 2004)* , the court addressed the question of whether the Pueblo rights doctrine still existed in the State of New Mexico. In an earlier decision in this case, the appellate court speculated that if the Supreme Court was presented with the opportunity, it would repeal the doctrine. Thus, the appellate court overturned the New Mexico case that had recognized the existence of the doctrine. Here, the Supreme Court refused to overturn *Cartwright v. Public Service Co. of New Mexico, 343 P.2d 654 (1958)* on the ground that there was no historical basis for the pueblo doctrine. Rather, the court overturned *Cartwright* based on its inconsistency with New Mexico law and not protected by the Treaty of Guadalupe Hidalgo (under which the State eventually acquired the power to administer water rights). Inconsistency was found in the fact that pueblo rights are potentially open-ended regarding amount and purpose of use and are not lost for by forfeiture or non-use. Priority dates, under New Mexico law fix the right to the amount used at that time. The court also rejected the rule from *Cartwright* as a property right because of its inconsistency with the goals of prior appropriation and because it has not induced the kind of reliance contemplated by a rule of property. The court held that although the city did not possess a pueblo right, the matter had to be remanded for the district court to quantify the claimed right of the city based on its reliance interest in the *Cartwright* decision (which involved the city of Las Vegas).

FOOTNOTES:

(n1)Footnote 898.1. *See* In *The Mattaponi Indian Tribe v. Com. 43 Va. App. 690 (2004)* , where the tribe asserted rights based on a 1677 treaty. the court held it was without jurisdiction to adjudicate the tribe's assertion of water rights with respect to a reservoir project. *See also United States v. Orr Water Ditch Co., 309 F. Supp. 2d 1245 (D. Nev. 2004)* .

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Supp. to § 50.20 Diffused Surface Water.

[Go To Main]

§ 50.20(b) Diffused Water Defined. [Go To Main]

Add:

Irrigation runoff can qualify as diffused surface water. However, the argument that irrigation water seeping into the ground which caused the level of the water to rise thereby damaging the basement of a home was a novel issue raised, but not entirely resolved in the case of *Reed v. Cloninger, 131 P.3d 359 (Wyo. 2006)* .

Add:

Spear T. Ranch, Inc. v. Knaub, 269 Neb. 177 (Neb. 2005) ; *Valley Forge Ins. Co. v. Hicks Thomas & Lilienstern, L.L.P. 2004 Tex. App. LEXIS 11301* (No. 01-03-00708-CV, Dec. 16, 2004).

In *Watts v. State, 140 S.W.3d 860 (Tex. App. 2004)* , the court held that diffused surface water lost its status as diffused water at the point where it begins to form a reasonably well-defined channel, with banks and beds or sides and has a current, although the size of the watercourse may be very small and the water may flow only intermittently.

§ 50.20(d) Drainage Rights. [Go To Main]

Add:

Drainage rights in Pennsylvania regarding the maintenance and operation of dams appear to be protected by statues such as the Dam Safety and Encroachment Act rather than common law principles. *See Shamnoski v. PG Energy, 858 A.2d. 589 (Pa. 2004)* ; *First Lady L.L.C. v. JMF Properties, L.L.C., 681 N.W.2d 94 (S.D. 2004)* .

§ 50.20(e) Drainage into Natural Waterbodies. [Go To Main]

Add:

See City of San Marcos v. Texas Comm'n on Environmental Quality, 128 S.W.3d 264 (Tex. App. 2004) .

§ 50.20(g) Common Law Approaches: Common Enemy Rule. [Go To Main]

Add:

South Carolina follows the common enemy rule. *See Lucas v. Rawl Family Ltd. Partnership, 598 S.E.2d 712 (S.C. 2004)* .

§ 50.20(j) Modifying the Common Law: Reasonable Use. [Go To Main]

Add:

West Virginia, Ohio and Pennsylvania follow the reasonable use rule. *See In re Flood Litigation, 607 S.E.2d 863 (2004)* ; *Portage County Bd. of Comm'rs v. Akron, 808 N.E.2d 444 (Ohio App. 2004)* ; *Shamnoski v. PG Energy, 858 A.2d 589 (2004)* . *See also McCormick v. Walmart Stores, Inc. 600 S.E.2d 576 (W. Va. 2004)* .

§ 50.20(k) Civil Law, Common Enemy and Tort Rules Compared. [Go To Main]

Add:

In *Heidkamper v. Odom, 880 So. 2d 362 (Miss App. 2004)* , the court addressed the conditions upon which injunctive relief is available to prevent future flooding from a farm pond as a result of construction of a new dam. The court held that injunctive relief was proper upon a showing of imminent, irreparable harm to the property. In *Greenwald v. Kersh, 593 S.E.2d 381 (Ga. App. 2004)* , the court addressed the matter as nuisance question and specifically had to determine whether the neighbors had ratified the tortious acts of the independent contractor and whether the construction violated

restrictive covenants applicable to the property.

In *Cooper v. Sharon Springs Cent. School Dist., 777 N.Y.S.2d 564 (N.Y.A.D. 2004)* , liability was predicated upon the fact that an upper owner allowed a quantity of debris to enter a watercourse such that it caused damage to lower owners.

In *Cooper v. Louisiana Department of Public Works, 870 So. 2d 315 (La. App. 2004)* , the court used the one-year tort statute of limits to address claims of landowners for permanent flooding. The time did not begin to run until inundation of the lands ceased.

§ 50.21(d) Priority of Domestic Uses. [Go To Main]

add:

In Georgia, no lawful use of water supersedes the right to use water for domestic purposes; all other lawful uses of water are treated equally. *See Tunison v. Harper, 690 S.E.2d 819 (Ga. 2010)* .

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CHAPTER 51 PRIVATE PROPERTY RIGHTS IN AIRSPACE

7-51 Thompson on Real Property, Thomas Editions 51.syn

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§ 51.syn Synopsis to Chapter 51: PRIVATE PROPERTY RIGHTS IN AIRSPACE

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§ 51.09 Bibliography.

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CHAPTER 51 PRIVATE PROPERTY RIGHTS IN AIRSPACE

7-51 Thompson on Real Property, Thomas Editions § 51.01

AUTHOR: Professor David A. Thomas J. Reuben Clark Law School Brigham Young University

§ 51.01 Introduction.

This chapter discusses landowners' various claims to the airspace appurtenant to their properties. These include access to solar energy, access to wind energy, conflicts arising from weather modification activities, aesthetic nuisance, interference with radio and television reception, and disputes over airspace development rights.

Recognition of the full range of property characteristics in airspace is a recent development, and relatively little litigation has occurred in this area. With this dearth of judicial guidance, scholars and legislators have stepped in.

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CHAPTER 51 PRIVATE PROPERTY RIGHTS IN AIRSPACE

7-51 Thompson on Real Property, Thomas Editions § 51.02

AUTHOR: Professor David A. Thomas J. Reuben Clark Law School Brigham Young University

§ 51.02 Solar Access.

(a) Introduction.

Nowhere in the United States is the sun ever directly overhead, so the sunlight reaching any one parcel of property will, therefore, have to pass through the airspace appurtenant to other property. The passage of sunlight through airspace "parcels" is much increased whenever the sun's trajectory is lower on the horizon, such as at more extreme latitudes and during winter months.

The right of access to sunlight, where it exists, may be considered a property right. As with other land use issues, securing a right such as one land parcel's access to sunlight necessarily limits the range of uses open to adjoining landowners. For example, adjoining landowners may not install buildings or landscaping over certain heights, if to do so would interfere with an adjacent solar access right.

(b) Rights to Solar Access Under Traditional Private Nuisance Law.

American courts have never accepted the English doctrine of ancient lights, which recognizes a prescriptive right to the free flow of light and air, nor have they applied the law of private nuisance to achieve the same result. Moreover, the private nuisance doctrine in American courts is subject to inherent limitations that affect its ability to protect solar access. Among these limitations are the requirements that a private nuisance cause of action be based on defendant conduct that is "unreasonable" and damage to the plaintiff's property rights that is "substantial." These limitations make it unlikely that nuisance law can adequately secure solar access. In a case of aggravated conduct by a neighboring property owner, analogous to "spite fence" cases, one court used private nuisance doctrine to protect solar access from unreasonable and spiteful interference by a neighbor. n1 Another court allowed a landowner to challenge the proposed construction of a neighboring residence that would interfere with the sunlight, n2 but that court recognized it was breaking with tradition. Even if nuisance doctrine were regularly employed as a means of securing a right of solar access, an interference could be enjoined only if it were substantial and unreasonable. n3 To make nuisance more useful in this area, courts or statutes must define at what point an interference that occurred during only part of a day, or that obstructed only part of the property, would be considered either substantial or unreasonable.

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LEXIS: solar access or light! w/30 nuisance

(c) Rights to Solar Access Under Easement Law.

Under the English doctrine of ancient lights, a landowner could, after a long period of appropriate use, obtain a prescriptive right, in the nature of an easement against neighboring land, to the free flow of light and air necessary to maintain that use. This doctrine of ancient lights has not been accepted in this country. n4 Instead, American landowners can seek to secure easement rights of solar access by express grant or reservation. n5

An express easement, created by grant or reservation, that protects solar access is a negative easement, permitting its holder (the owner of the dominant tenement) to prohibit interfering uses of the land that is subject to the easement (the servient tenement). Courts have upheld the right of private parties to create such easements protecting rights of access to sunlight, n6 and many states have also enacted statutory provisions specifically authorizing the regulation or the creation of solar access easements. n7

These state statutes vary from simply codifying the common law to elaborating on nuisance scope and remedies. The statutes usually require that the easements must be in writing and may be recorded as an instrument embodying a property interest. Other elements in the statutory easements include provisions for horizontal and vertical dimensions and angles in the descriptions, time restrictions on obstructions, lists of restricted obstructions, transferability, enforcement, and remedies.

COMPUTER-ASSISTED RESEARCH

LEXIS: solar access or light! w/30 easement!

(d) Rights to Solar Access Secured by Restrictive Covenants.

Another device that may be used to secure rights to solar access is the private restrictive covenant. Widely used in residential property developments, private restrictive covenants are often imposed by a developer on the entire tract, so that the owner of each lot is not only bound to observe the covenant's restrictions but is also entitled to enforce observance of the restrictions by every other owner in the development. Such a reciprocal negative servitude or easement could be used to restrict building or landscape improvements on lots that would obstruct solar access.

If a landowner seeking secured solar access is confronted with covenant restrictions, it is sometimes possible to obtain judicial relief. In addition to finding waiver of enforcement from general disregard of the covenant by those bound by it, a court may refuse enforcement because of changed circumstances. In a California case, a landowner seeking to install rooftop collector plates for a solar water heater overcame a covenant restriction against rooftop structures visible from the surrounding area when the court cited new concerns strengthening the public policy to promote the use of solar energy. n8

Legislative relief from covenants restricting solar access is found in state statutes that limit the life of restrictive covenants, n9 or that actually prohibit covenants restricting solar access. n10

COMPUTER-ASSISTED RESEARCH

LEXIS: solar access or light! w/30 covenant!

(e) Private Property Solar Access Rights Modified by Legislation.

If public enthusiasm for solar energy grows, private property rights may be forcibly adjusted by public legislation. A state may resort to its police power and the public nuisance doctrine to prohibit interference with private rights of solar access. No published court decision yet holds that the obstruction of a solar collector can be enjoined as a public nuisance, but there are no theoretical legal obstacles to such a position. n11 And, one state statute has prohibited planting vegetation that casts excessive shade on solar collectors, a prohibition which, however, is enforceable only by public authority. n12

A state may also create a right to solar access, as a right is available to a private property owner. One state has established a permit procedure for a private landowner intending to install a solar collector, which permits and protects the holder from interference with solar access. n13 Another state has established statutory rights to solar access similar to the prior appropriation water rights in that state; a landowner seeking solar access may restrict obstructions on neighboring land if the solar collection is prior in time to those obstructions and if the solar energy is put to beneficial use. n14

Municipal zoning ordinances may also impact on solar access by a private landowner. In some states, legislation specifically authorizes governmental entities with zoning power to consider solar access as a proper public purpose and a proper subject of zoning regulation. n15 Customary zoning restrictions, such as limitations on the height of structures, minimum setback and side clearance requirements, and lot size requirements, may all relate to solar access in particular circumstances. n16

(f) Reflected Sunlight as a Nuisance.

Another type of airspace right is at issue when bright sunlight reflects from something on one parcel of land to the annoyance of persons on neighboring land. In the first known solar reflection case, in 1929, the court rejected the plaintiff's claim of nuisance, probably because the harm was intangible and minimal. n17 In another case the reflection from a municipal water tank painted silver was the object of a complaint for nuisance and for an unconstitutional taking of the plaintiffs' property rights. n18 The nuisance claim was rejected, because no negligence was shown (a result that possibly would not be followed today), and even though the city had constructed the tank in violation of its own zoning ordinances. On appeal, the state supreme court eventually held that if the glare materially depreciated the value of the property, a compensable taking could be found. n19 A court today might be more receptive to nuisance claims in this type of action, if the reflected glare is a serious interference with the plaintiff's use of land, even if intangible, and regardless of the absence of negligence in the defendant's conduct.

COMPUTER-ASSISTED RESEARCH

LEXIS: reflect! w/2 light! or solar w/30 nuisance

FOOTNOTES:
(n1)Footnote 1. *Dunbar v. O'Brien, 220 N.W. 278 (Neb. 1928).*

(n2)Footnote 2. *Prah v. Maretti, 321 N.W.2d 182 (Wis. 1982). Mellenthin v. Berger, 666 N.W.2d 120 (Wis. App. 2003)* (landowners are limited by the private nuisance doctrine so that they do not have an unlimited right to use their land).

(n3)Footnote 3. *See* discussion of nuisances in fact in ch. 67, *infra*.

(n4)Footnote 4. If the doctrine of ancient lights in its traditional form were accepted in this country, even for the specific purpose of encouraging reliance on sunlight as an alternative source of energy, it would have inherent limitations in its practical application: the prescriptive right can be secured only after a long period of sustained use, and the right of access to light is limited to that amount of light necessary for ordinary work.

(n5)Footnote 5. Illustrating the rather severe consequences of not obtaining such a private right is the well-known case of *Fontainebleau Hotel Corp. v. Forty-Five Twenty-Five, Inc., 114 So. 2d 357 (Fla. App. 1959).* A luxury hotel was permitted to build a high-rise addition, even though the addition shaded the swimming pool area of an adjacent hotel during the afternoons of winter days.

(n6)Footnote 6. Gastineau v. City of Bothell, No. 42979-5-*I, 1998 Wash. App. LEXIS 1785* (Wash. App. Div. 1, 1998) (private party's attempt to establish standards on access to sunlight); *Petersen v. Friedman, 328 P.2d 264 (Cal. Dist. App. 1958); Lattimer v. Livermore, 72 N.Y. 174 (1878); Depner v. United States Nat'l Bank, 232 N.W. 851 (Wis. 1930).* In finding that an easement of access to the light and air over premises had not been expressly granted by language contained in a lease, the court explained: "No words need be used to withhold an easement of light and air, but to create one words must be employed which clearly show the intention to give such an easement." *232 N.W. at 853.*

(n7)Footnote 7. *See also* Knud E. Hermansen, et al., Maine Roads and Easements, *48 Me. L. Rev. 197, 255-56 (1996)* (discussing briefly solar easements). N.J. Stat. Ann. § 46:3-24; Ohio Rev. Code Ann. § 5301.63; Or. Rev. Stat. § 105.85; Wash. Rev. Code § 64.04.140; *see State v. City of Mequon Bd. of Zoning App., 626 N.W.2d 366 (Wis. App. 2001)* (under Wisconsin statute, owners of a solar or wind energy system may restrict users or owners of nearby property from creating an impermissible interference with the system); *see* IC 32-23-4-1 to 32-23-4-5; Alaska Stat. § 34.15.145 *et seq.* ; Cal. Civ. Code § 801.5; Colo. Rev. Stat. § 38-32.5-100.3 *et seq.* ; Fla. Stat. Ann. § 704.07; Ga. Code Ann. § 44-9-20 *et seq.* ; Idaho Code § 55-615; Ill. Ann. Stat. ch. 96 1/2, § 7303(f); Ind. Code Ann. § 32-5-2.5-1 *et seq.* ; Iowa Code Ann. § 564A.1 *et seq.* ; Ky. Rev. Stat. Ann. § 381.200(2); 33 Me. Rev. Stat. Ann. ch. 28, § 1401 *et seq.* ; Mass. Gen. Laws Ann. ch. 187, § 1A *et seq.* ; Minn. Stat. Ann. § 500.30; Mo. Ann. Stat. § 442.012; Mont. Code Ann. § 70-17-301 *et seq.* ; Neb. Rev. Stat. § 66-909 *et seq.* ; Nev. Rev. Stat. § 111.370 *et seq.* ; N.H. Rev. Stat. Ann. § 447:49 *et seq.*

(n8)Footnote 8. Kraye v. Old Orchard Assoc., No. C 209 453 (Cal. Sup. Ct., Los Angeles County, Feb. 28, 1979).

(n9)Footnote 9. *See, e.g.,* Ga. Code Ann. § 45-5-60 (duration of restrictive covenants limited to 20 years).

(n10)Footnote 10. *See, e.g.,* Cal. Civ. Code § 714; Colo. Rev. Stat. § 38-30-168.

(n11)Footnote 11. One property owner was successful in compelling a neighboring property owner to restore a view pursuant to a local town ordinance. While the court did not discuss whether blocking the view constituted a nuisance, the court did uphold the ordinance as a valid exercise of the municipality's police power. The ordinance did not create inchoate de facto easements in conflict with state law of easements, and did not interfere with any vested property rights of the defendant property owner. *See Kucera v. Lizza, 69 Cal. Rptr. 2d 582 (1997);* Harpeth Valley Utilities Dist. of Davidson and Williamson Counties v. Metropolitan Gov't of Nashville and Davidson County, No. 01*A01-9711-CH-00686, 1998 Tenn. App. LEXIS 384* (Tenn. App., Jun 12, 1998) (declaring that "protection and encouragement of access to sunlight for solar energy systems may be considered in promulgating zoning regulations"). Zoning Regulations Prohibiting Or Limiting Fences, Hedges or Walls, *1 A.L.R.4TH 373,* § 4a (1980); *see* Tamara C. Sampson & R. Alta Charo, *Access to Sunlight: Resolving Legal Issues to Encourage the Use of Solar Energy, 11 Colum. J. Envtl. L. 417, 427 (1986).* The authors refer in that article to *Prah v. Maretti, 321 N.W.2d 182 (Wis. 1982).* In n.44 of the article, the authors assert that the court in *Prah v. Maretti* held that obstruction of a solar collector can be deemed a *public* nuisance. This assertion is in error; the court in *Prah v. Maretti* held that the obstruction could be deemed a *private* nuisance.

(n12)Footnote 12. Cal. Pub. Res. Code § 25980 *et seq* .

(n13)Footnote 13. *See State v. City of Mequon Bd. of Zoning App., 626 N.W.2d 366 (Wis. App. 2001)* (applying Wis. Stat. Ann. § 66.032); Wis. Stat. Ann. § 66.032.

(n14)Footnote 14. N.M. Stat. Ann. § 47-3-1 *et seq. But see O'Neill v. Brown, 609 N.E.2d 835 (Ill. 1993)* (Illinois Comprehensive Solar Energy Act of 1977 does not create an enforceable "solar skyspace easement" for plaintiff who

brought suit to enjoin defendants from building a second-story addition to their home which would partially shade plaintiff's greenhouse). *See generally* Easements: Ancient Lights and Solar Rights, 23-Sep. Real Est. L. Rep. 8 (1993).

(n15)Footnote 15. Colo. Rev. Stat. § 38-28-106; 1985 Mass. Acts § 637 (G.L. ch. 40A, § 1A); Ariz. Rev. Stat has been amended by 2002 Ariz. Legis. Serv. Ch. 148 (H.B.2601); Ariz. Rev. Stat. §§ 9-461.05, 9-462.01; Cal. Gov't Code § 65860; Conn. Gen. Stat. Ann. § 8-13(d); Me. Rev. Stat. tit. 30, §§ 4956, 4961; Or. Rev. Stat. §§ 215.110, 227.090; Wash. Rev. Code Ann. § 35.63.080 *et seq*., § 36.70.560.

(n16)Footnote 16. *Arndt v. City of Boulder, 895 P.2d 1092 (Colo. App. 1994)* (a solar access permit granted to plaintiff pursuant to the Boulder Solar Access Ordinance was held ineffective for enforcement against neighboring owners, where its recording was such that a title search of the neighbors' property would not reveal existence of the permit, and where the system installed was so different from the one for which the permit was issued as to cause it to expire).

(n17)Footnote 17. *Shepler v. Kansas Milling Co., 278 P. 757 (Kan. 1929).*

(n18)Footnote 18. *McKinney v. City of High Point, 74 S.E.2d 440 (N.C. 1953)* (*McKinney I*).

(n19)Footnote 19. *McKinney v. City of High Point, 79 S.E.2d 730 (N.C. 1954)* (*McKinney II*).

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CHAPTER 51 PRIVATE PROPERTY RIGHTS IN AIRSPACE

7-51 Thompson on Real Property, Thomas Editions § 51.03

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§ 51.03 Access to Wind Power.

[Go To Supp]

(a) In General.

Access to wind has become significant for the same reasons that access to solar energy has assumed renewed importance. Choosing the proper site for wind energy conversion systems is perhaps even more critical to success than is siting for solar access, because wind fluctuates and the choice of good sites is narrower. Perhaps the most striking technical aspect of wind energy is that the power of wind increases eight times if the wind speed is only doubled. Even increases of a lesser magnitude are dramatic: a 12-mile-per-hour wind carries 70% more power than a 10-mile-per-hour wind. n20 Obtaining the best site for maximum wind availability and eliminating interferences with wind flow are factors of extreme importance.

However, use of wind power is not free of controversy. Devices for generating usable energy from wind present some physical danger from the equipment, as well as increased noise and aesthetic disturbance. Continuing technological improvements may ameloirate these concerns.

(b) Access to Wind Under Common Law.

The doctrine of "ancient lights," recognized in England as leading to a prescriptive right to the free flow of light and air, not only does not enjoy acceptance in this country, but has never been applied by analogy to recognize a right to unobstructed wind power. Other well-established legal doctrines securing analogous rights in various natural resources have never been applied to wind power access. These other doctrines include riparian and prior appropriation water rights, rights to lateral and subjacent support, rights to natural drainage, and rights to natural diffusion of pollution-free air. Perhaps the legal doctrine most closely related to wind power rights would be the right to unmodified weather. n21 No court has held that access to wind power should be free of interference based on the right to unmodified weather.

Access to wind power, if available at all under traditional common law principles, is secured in the same ways access to solar power is protected: by private nuisance law and the possibilities of securing easements or covenants or the benefits of public legislation. No court has yet held that a landowner's access to wind power should be free of interference from a neighbor on the basis of private nuisance principles, which require the plaintiff to establish unreasonable use and

substantial harm as prerequisites for relief. Otherwise reasonable uses that disturb nearby land uses will usually not be enjoined, if the disturbed uses are considered especially sensitive. n22 Under private nuisance rules, therefore, a land use requiring access to the maximum wind power might be considered an especially sensitive use that would not be allowed to suppress otherwise reasonable uses of nearby land.

As with solar access, a landowner wishing to secure wind access could purchase an easement in the adjacent lands and have control over the interference with the wind emanating from that land. Either the traditional negative easement, which prohibits the burdened owner from certain conduct or uses on the burdened property, or the newer airspace easement, which maintains three-dimensional airspace free of obstruction, could secure access to windflow. n23 Just as numerous states have accorded statutory recognition and modification of easements securing solar access, wind access may also be strengthened by such statutes. Oregon was the first state to provide statutory sanction for wind easements, n24 and now Minnesota, n25 Montana n26 and Wisconsin n27 also have wind easement statutes. n28 If covenants are used to secure wind access, they must be carefully drafted to ensure that they run with the land and, therefore, can be enforced by and against successive owners. Without the consent of all landowners involved, neither easements - traditional or statutory - nor covenants are available to secure access to wind power. n29

(c) Securing Private Wind Access by Public Regulation.

As Oregon has done, a state may authorize municipal authorities to protect access to wind by local ordinance. n30 Such an ordinance may also be used to control or regulate harmful effects of wind energy conversion equipment. Municipal zoning regulations may be used to direct the siting of wind conversion devices or to prohibit improvements or plantings that inhibit windflow in certain areas. Minnesota required utilities operating nuclear power plants within the state boundaries to put in place wind power systems by the end of 1998, and required additional systems by the end of 2002. n31

(d) Protecting the Rights of Nearby Landowners.

If a jurisdiction promulgates public regulation of wind access, the rights of nearby landowners should also be considered. The rather brief experience with wind energy conversion systems has revealed several possible adverse effects from wind power devices.

A major concern from use of wind conversion machines is safety. Equipment failure in the past has resulted in collapsing structures and in blades being thrown. The very first commercial wind conversion machine in 1945 threw an 8-ton blade 750 feet, fortunately injuring no one. On more modern equipment, fragments of a thrown blade could be cast a distance of a quarter mile. Wind machines in colder sites, especially at higher elevations, could possibly build up snow and ice on the blades and eventually throw particles into nearby areas. n32 No reported cases have appeared relating to these safety concerns, but undoubtedly the landowner with the wind energy conversion system is exposed to possible tort liability.

Noise is another possible objection to use of wind machines. When what was then the world's largest windmill in Boone, North Carolina, went into operation in 1979, the huge, two-bladed rotor mounted on a 135-foot tower, when operating at 35 r.p.m., generated complaints of "irritating low frequency sounds, windows rattling, and crockery shaking, apparently caused by the windmill." n33 One expert attributed the problem to air flowing around the legs of the tower, so that the wind currents were altered by the structure before flowing toward the blades. While the noise problem could be cured by facing the blades into the wind, additional problems of interference with television reception, microwaves and radar beams apparently persisted. n34 Windmill towers have also been resisted on aesthetic grounds, specifically, that they should not be constructed where pleasing views and open spaces are to be preserved. n35 Potential environmental concerns are the damage that wind turbines can inflict on bird populations and the reduction in downwind energy potential caused by the presence of an operating wind turbine. n36

Equitable accommodations between users and nonusers of wind power could become very complex if larger numbers of landowners began installing wind conversion equipment. Even more complex would be the future problem of workouts between competing wind users.

COMPUTER-ASSISTED RESEARCH

LEXIS: access! or machine! or power! w/05 wind w/30 landowner! w/15 right!

FOOTNOTES:
(n1)Footnote 20. Palmer Cosslett Putnam, Power from the Wind 15 (Van Nostrand 1948).

(n2)Footnote 21. *Southwest Weather Research, Inc. v. Duncan, 319 S.W.2d 940 (Tex. Civ. App. 1958), aff'd, 327 S.W.2d 417 (Tex. 1959).*

(n3)Footnote 22. *Belmar Drive-In Theatre Co. v. Illinois State Toll Hwy. Comm'n, 216 N.E.2d 788 (Ill. 1966).*

(n4)Footnote 23. Robert R. Wright, The Law of Airspace 220-223 (Bobbs-Merrill 1968).

(n5)Footnote 24. Or. Rev. Stat. § 105.900 *et seq.*

(n6)Footnote 25. Minn. Stat. § 500.30.

(n7)Footnote 26. Mont. Code Ann. §§ 70-17-101(8), 70-17-303.

(n8)Footnote 27. Wis. Stat. Ann. § 700.35.

(n9)Footnote 28. North Dakota may inferentially recognize an easement for wind access with its statute that authorizes an easement for the "right of receiving air, light or heat from or over, or discharging the same upon the land." N.D. Cent. Code § 47-05-01(8).

(n10)Footnote 29. *Cf.* Contra *Costa Water District v. Vaquero Farms, Inc., 68 Cal. Rptr. 2d 272 (1997),* in which the court ruled in an eminent domain action that the wind power rights were severable from the fee interest.

(n11)Footnote 30. Or. Rev. Stat. § 105.910.

(n12)Footnote 31. Minn. Stat. Ann. §§ 216B.2423, 216C.06(12).

(n13)Footnote 32. These safety concerns are discussed and documented more fully in Kim R. York & Richard L. Settle, *Potential Legal Facilitation or Impediment of Wind Energy Conversion System Sitting, 58 Wash. L. Rev. 387, 400-404 (1983).*

(n14)Footnote 33. *Current Developments, Boone Windmill Arouses Townspeople,* 2 Solar L. Rptr. 468 (1980).

(n15)Footnote 34. *Id. at 469;* Kim R. York & Richard L. Settle, *Potential Legal Facilitation or Impediment of Wind Energy Conversion System Siting, 58 Wash. L. Rev. 387, 403-404, nn. 93-94 (1983).*

(n16)Footnote 35. *Id. at 387, 402, n.87* (1980).

(n17)Footnote 36. *Id. at 403.*

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CHAPTER 51 PRIVATE PROPERTY RIGHTS IN AIRSPACE

7-51 Thompson on Real Property, Thomas Editions § 51.04

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§ 51.04 Summary of Weather Modification Issues in Use of Airspace.

(a) In General.

Although weather modification is a source of potential disputes involving use of airspace, such disputes have produced little reported litigation. The conflicting interests center on the issue of whether an activity to modify the weather for the benefit of some land alters the weather to the disadvantage of other land. No party can complain against another because of adverse effects from natural weather patterns, but when the natural events are altered by human intervention, then a cause of action may arise.

Weather modification proceeds almost exclusively from techniques of cloud seeding. The seeding is usually intended to enhance natural precipitation in particular areas at times when seedable clouds appear. Seeding is also used to dissipate cloud cover or fog, such as around major airports, or to reduce the severity of hailstorms. Both types of seeding activities are probably effective much of the time, although it is difficult to determine with certainty what artificial adverse effects, if any, are part of the weather actually experienced. As stated by one commentator:

> Because it is impossible to predict exactly how much precipitation a given cloud would produce in the absence of seeding, it is equally impossible to measure the effect of seeding. By the same token, because no two clouds are alike in their precipitation potential, it is impossible to obtain accurate comparative data by seeding one cloud and leaving another alone. Determining "normal" precipitation for purposes of comparing it to "enhanced" precipitation is another problem ... Largely because of these uncertainties, experimental cloud seeding has at times yielded unexpected results, such as producing a decrease in precipitation when an increase was intended. n37

Because of this uncertainty, even the successful projects have the potential to injure the intended beneficiaries. Heavy accumulations of snow, increased avalanches, and unexpected flooding could result from overly successful projects to increase precipitation.

(b) Weather Control Litigation.

Surprisingly little weather modification litigation has emerged, and only one case has resulted in a judgment for the

plaintiff. Most of the litigation arose in the early years of weather modification and has now virtually ceased. n38 In the only case in which the plaintiff prevailed, n39 ranchers persuaded the court, through testimony of lay observers, that cloud seeding to suppress hail had diminished the precipitation they would naturally have received. In other cases, the plaintiffs have failed to meet similar burdens of proof. Also, many weather modification projects are now preceded by a series of administrative activities, including hearings at which concerned landowners may voice their interests and fears. These administrative procedures, coupled with plaintiffs' poor prospects for success in court, have combined to reduce the actual litigation to almost nothing.

COMPUTER-ASSISTED RESEARCH

LEXIS: litigat! or modif! w/5 weather w/30 own! w/5 land! or property

(c) Legal Theories for Weather Modification Complaints.

Several common law doctrines provide at least a theoretical possibility of relief for plaintiffs aggrieved by artificially induced weather patterns. These include an ordinary tort action, a trespass action, and a nuisance action.

In a tort action, the plaintiff must show causation, that "but for" the weather modification activities the damage or injury would not have occurred. The uncertainties inherent in all aspects of weather modification activities make causation almost impossible to prove. In the absence of empirical evidence, plaintiffs must rely on expert opinion testimony or statistical probability analyses, neither of which can definitively address the factor of causation for any individual incident. n40

A trespass action is possible if the defendant has caused some other instrumentality to enter the plaintiff's land or airspace. However, trespass claims also require some element of intent on the part of the trespasser, at least intent to enter. Thus, a plaintiff suffering, for instance, from flooding possibly induced by weather modification would have to show that the defendant was reasonably certain that additional moisture would fall on the plaintiff's land. n41

The plaintiff in a nuisance action must show both that the defendant's conduct was unreasonable and that the resulting interference with the plaintiff's land use was substantial. One plaintiff who sought to enjoin cloud seeding as a nuisance on the ground that it would interfere with a resort business was not successful against a defendant trying to provide more culinary water for a very large city population. n42 Success in a nuisance action seems more likely if the plaintiff can show actual damage to the land and buildings as a result of defendant's weather modification activities. The plaintiff may also be more likely to succeed if weather modification can be characterized as an extra-hazardous activity, for which the defendant may be strictly liable for damages. The courts have, so far, rejected this approach in the cases in which it has been advanced. n43

With remedies so difficult to obtain in litigation, some intervention by public law has occurred. Illinois, for a time, allowed cloud seeding only if a permit was first obtained and then only if the seeding was at least supervised by a licensed cloud seeder (although this restriction, along with the state's entire Weather Modification Act, were repealed as of December, 1991); n44 Pennsylvania prohibits seeding to suppress lightning. n45

COMPUTER-ASSISTED RESEARCH

LEXIS: weather w/2 modif! w/30 tort! or nuisance or trespass!

FOOTNOTES:
(n1)Footnote 37. Note, *Federal Weather Modification Projects: Compensating the Landowner, 26 Ariz. L. Rev. 681, 684 (1984).*

(n2)Footnote 38. The cases cited below represent much of the known weather modification litigation: *Lunsford v. United States, 570 F.2d 221 (8th Cir. 1977); Montana Wilderness Ass'n v. Hodel, 380 F. Supp. 879 (D. Mont. 1974);* Weather Eng'g Corp. of Am. v. United States, No. 343-72 (Ct. Cl. 1972); Adams v. California, No. 10112 (Super. Ct., Sutter County, Cal., Apr. 6, 1964); Atmospherics, Inc. v. Ten Eyck, Civ. A (D. Ct. Alamosa County, Colo,. Apr. 4, 1973); Shawcroft v. Department of Nat. Resources, Civ. A (D. Ct. Alamosa County, Colo., Sept. 20, 1972); Reinbold v. Sumner Farmers, Inc., No. 2734 C (Cir. Ct. Tuscola County, Mich. 1974); *Summerville v. North Platte Valley Weather Control Dist., 101 N.W.2d 748 (Neb. 1960); Slutsky v. City of New York, 97 N.Y.S.2d 238 (1950); Saba v. Weather Modification, Inc., 307 N.W.2d 590 (N.D. 1981);* Samples v. Irving P. Krick, Inc., Nos. 6212, 6223 and 6224 (W.D. Okla., Dec. 22, 1954); Pennsylvania Nat. Weather Ass'n v. Blue Ridge Weather Modification Ass'n, 44 Pa. D. & D. 2d 749 (C.P. Fulton County, Pa., Feb. 28, 1968); Township of Ayr v. Fulk, No. 53 (C.P. Fulton County, Pa., Feb. 28, 1968); Farmers & Ranchers for Nat. Weather v. Atmospherics, Inc., Civ. No. 7594 (D. Ct. Lamb County, Tex., May 3, 1974); *Southwest Weather Research, Inc. v. Rounsaville, 320 S.W.2d 211 (Tex. App. 1958),* and *Southwest Weather Research, Inc. v. Duncan, 319 S.W.2d 940 (Tex. App. 1958),* both *aff'd, sub nom., Southwest Weather Research, Inc. v. Jones, 327 S.W.2d 417 (Tex. 1959);* Anvil Orchard Co. v. Weather Modification, Inc., No. 19268 (Super. Ct. Chelan County, Wash. 1956).

(n3)Footnote 39. Farmers & Ranchers for Nat. Weather v. Atmospherics, Inc., Civ. No. 7594 (D. Ct. Lamb County, Tex., May 3, 1974); *Southwest Weather Research, Inc., v. Rounsaville, 320 S.W.2d 211 (Tex. Ct. App. 1958),* and *Southwest Weather Research, Inc., v. Duncan, 319 S.W.2d 940 (Tex. Ct. App. 1958),* both *aff'd, sub nom., Southwest Weather Research, Inc. v. Jones, 327 S.W.2d 417 (Tex. 1969).*

(n4)Footnote 40. *See* Roger P. Hansen, The Scientific Uncertainties: A Lawyer Responds, in Legal and Scientific Uncertainties of Weather Modification 23 (William A. Thomas ed., Duke U. Pr. 1977).

(n5)Footnote 41. Restatement (Second) of Torts § 158, cmt. i (1965).

(n6)Footnote 42. *Slutsky v. City of New York, 97 N.Y.S.2d 238 (1950).*

(n7)Footnote 43. Adams v. California, No. 10112 (Super. Ct., Sutter County, Cal., April 6, 1964); Reinbold v. Sumner Farmers, Inc., No. 2734 C (Cir. Ct., Tuscola County, Mich. 1974).

(n8)Footnote 44. Ill. Stat. Ann. ch. 111, § 7310.

(n9)Footnote 45. Pa. Stat. Ann. tit. 3, § 1115.

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CHAPTER 51 PRIVATE PROPERTY RIGHTS IN AIRSPACE

7-51 Thompson on Real Property, Thomas Editions § 51.05

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§ 51.05 Airspace Rights and Aesthetic Nuisance.

(a) Introduction.

One of the rights to airspace is a right to occupy that space with visual matter. To fill one's land with disorderly and ugly junk may not only offend others' subjective aesthetic sensitivities, but may have more objective consequences in terms of reduced property values. This section explores the emerging legal doctrines governing aesthetic values in airspace rights.

(b) Aesthetic Considerations Under Private Nuisance Law.

A landowner disturbed by the unsightliness of uses or activities on neighboring land has usually been denied judicial relief under traditional nuisance law. Courts are reluctant to grant injunctive relief for claims based solely on aesthetic considerations, because of the danger that the court's own subjective notions in matters of aesthetics will improperly interfere with private property rights. n46 More recently, however, courts have shown more willingness to consider disturbance of a property owner's aesthetic sensitivities as a claim for which relief can be granted. As expressed by one court that did grant injunctive relief, based solely on aesthetic considerations, in ordering unsightly property to be cleaned up:

> [L]egitimate but unsightly activity such as the accumulation of debris on land or the operation of a junkyard ... may become a private nuisance if it is unreasonably operated so as to be unduly offensive to its neighbors. n47

Aesthetics as a consideration in nuisance actions was first announced in a 1972 New Hampshire case in which plaintiffs sought to have an unsightly boat shed removed from a residential area adjacent to a lake. n48 The shed was not removed because the court, in its own aesthetic judgment, did not deem the shed ugly enough to warrant such action. The same court, in a later case, ordered a dock removed from a lake waterfront, because the dock blocked the view of the lake from the plaintiff's residence located on shorefront property. n49

In another state, a dog kennel operation conducted near a cottage and a business was ordered removed, in part because it detracted from the appearance of the plaintiff's premises. n50

Aesthetic considerations were first relied on as the sole factor in a nuisance action for injunctive relief in 1975. In that case, the Oregon Supreme Court stated that "visual aesthetic sensibilities" could be an appropriate basis for recovery in a nuisance action, but refused to order removal of a fence near the beach, because the fence was not sufficiently offensive. n51 The first successful nuisance action based exclusively on aesthetic considerations was decided in 1982, when the Virginia Supreme Court ordered wrecked automobiles removed from a lot in a residential area. n52 In that case, a restrictive covenant prohibited landowners from maintaining any nuisance on the property, and the court in ordering relief effectively decided that the unsightliness of the auto wrecks constituted a nuisance.

It is also likely that injunctions against construction of funeral homes in residential areas are related to the subjective and negative emotional reactions nearby residents are likely to experience if the funeral home goes into operation. n53 For instance, one court declared that:

> the operation of this funeral business ... had an immediate and continuing depressing effect upon [the plaintiffs] which substantially decreased the quiet and peaceful enjoyment of their homes. n54

Most courts, however, are still reluctant to introduce possibly subjective criteria such as aesthetic considerations as factors for determining competing property rights. As expressed by a Missouri court:

> Aesthetic considerations are fraught with subjectivity. One man's pleasure may be another man's perturbation ... . Judicial forays into such a nebulous area would be chaotic. Any imaginary good from doing so is far outweighed by the lurking danger of unduly circumscribing inherent rights of ownership of property and grossly intimidating their lawful exercise. n55

These concerns relate directly to the elements of a private nuisance action that a plaintiff must establish: the interference with the plaintiff's use of land must be substantial, and the defendant's conduct must be unreasonable. Not every incident of unsightliness on land is necessarily a substantial interference with plaintiff's own use and enjoyment of land. A plaintiff's subjective or hypersensitive perceptions should not be the basis for limiting the defendant's use of land. The unreasonableness of the defendant's conduct may depend on whether the benefit to the plaintiff and public of changing the conduct far outweighs the cost or inconvenience to the defendant.

COMPUTER-ASSISTED RESEARCH

LEXIS: aesthetic! or unsightl! w/30 nuisance

(c) Aesthetic Considerations in Public Land Use Regulation.

The traditional reluctance of courts to look beyond the subjectivity of aesthetic judgments is not matched by local legislative branches of government, which more frequently employ aesthetic criteria in land use planning measures. Local elected officials have had to decide whether exercise of governmental police power could be based on "modern societal aesthetic considerations," in such matters as a county criminal ordinance regulating use of land as junkyards. n56 The Supreme Court of North Carolina, in a 1982 opinion comprehensively surveying the decisions of courts in all the other states, concluded that even then most jurisdictions accepted aesthetic considerations as a legitimate basis for police power regulations:

> In light of our 1972 perception ... that the trend was growing toward allowing such regulation, the continued shift such that the trend now represents the new majority, and our general agreement with the views expressed in the recent cases ..., we expressly overrule our previous cases to the extent that they prohibited regulation based upon aesthetic considerations alone. We do not grant blanket approval of all regulatory schemes based upon aesthetic considerations. Rather, we adopt the test ... that the diminution in value of an individual's property should be balanced against the corresponding gain to the public from

such regulation. n57

The conclusion that a majority of jurisdictions now accept that viewpoint had already been reached by scholarly research. n58 The "societal" aesthetic considerations identified by the North Carolina Supreme Court - concern for environmental protection, control of pollution, and prevention of unsightliness - may argue for protection of private property rights of nearby landowners. n59

FOOTNOTES:

(n1)Footnote 46. *See, e.g., Mathewson v. Primeau, 395 P.2d 183 (Wash. 2d 1964).* In denying relief for a landowner offended by the old cars, crates, lumber and household appliances scattered about a neighbor's property, the court refused to entertain aesthetic considerations, believing that to be "a great enlargement of the powers of the courts over the properties and customs of the people." *395 P.2d at 189.*

(n2)Footnote 47. *But see Oliver v. AT&T Wireless Services, 76 Cal. App. 4th 521 (1999)* (After an existing structure was increased in size from 110 feet to 130 feet, adjacent landowners sued and the court held that the mere unsightly appearance and size of a structure that is otherwise legally permitted with the only effect being alleged diminution in value of adjacent property did not constitute a nuisance or give rise to an inverse condemnation claim). *Cook v. Rockwell Intern. Corp. and the Dow Chem. Co., 273 F. Supp. 2d 1175 (D. Colo. 2003)* (substantial and unreasonable interference must be such that a normal person would find it offensive); *Trickett v. Ochs, 838 A.2d 66 (Vt. 2003)* (although not dispositive, zoning ordinances are a factor in determining if conduct is a nuisance); *Allison v. Smith, 695 P.2d 791 (Colo. App. 1984).*

(n3)Footnote 48. *Stagni v. State ex rel. Dept. of Transp. and Development, 812 So.2d 867 (La. 2002)* (view blocked by building); *Haugen v. Kottas, 37 P.3d 672 (Mont. 2001)* (view blocked by fence); *Charlton v. Town of Oxford, 774 A.2d 366 (Me. 2001)* (complainant against ugly and unsightly building must be able to show damages); *Robie v. Lillis, 299 A.2d 155 (N.H. 1972).*

(n4)Footnote 49. *See Village of Brady v. Melcher, 502 N.W.2d 458 (Neb. 1993)* (the Nebraska Supreme Court reviewed an ordinance that found wrecked or junked cars to be a nuisance and found that such restrictions primarily "protect the public health and welfare"; the aesthetic enhancement was a secondary benefit); *Heston v. Ousler, 398 A.2d 536 (N.H. 1979).*

(n5)Footnote 50. *Cook v. Sullivan, 829 A.2d 1059 (N.H. 2003)* (a nuisance exists when an activity substantially and unreasonably interferes with another use and enjoyment of property); *Dunlop v. Daigle, 444 A.2d 519 (N.H. 1982).*

(n6)Footnote 51. *Hay v. Stevens, 530 P.2d 37 (Or. 1975).*

(n7)Footnote 52. *Beckett v. Bundick, 303 B.R. 90 (E.D. Va. 2003)* (use and enjoyment includes an element of personal taste and may be as important to a person as freedom from physical interruption of the land); *Foley v. Harris, 286 S.E.2d 186 (Va. 1982).*

(n8)Footnote 53. *See, e.g., Jack v. Torrant, 71 A.2d 705 (Conn. 1950); Rockenbach v. Apostle, 47 N.W.2d 636 (Mich. 1951); Travis v. Moore, 377 So. 2d 609 (Miss. 1979).*

(n9)Footnote 54. *Jack v. Torrant, 71 A.2d 705 (Conn. 1950).*

(n10)Footnote 55. *Ness v. Albert, 665 S.W.2d 1 (Mo. App. 1983); see also Saurer v. Bd. of Zoning Appeals, 629 N.E.2d 893 (Ind. 1994)* (trial court abused its discretion in granting a mandatory injunction ordering appellant to remove certain items as "junk" from his property as appellant's items did not fall within the common meaning of "junk"; the zoning ordinance was created for purposes not including improvement of aesthetics or scenic view and must be strictly construed to favor the free use of land); *Chad v. City of Fort Lauderdale, 861 F. Supp. 1057 (S.D. Fla. 1994)* (plaintiff, a homeless resident, was denied a preliminary injunction to stop the defendant city from enforcing regulations

prohibiting begging on beaches; such regulations exist to promote a safe and pleasant environment and outweigh plaintiffs' interest in begging).

(n11)Footnote 56. *See, e.g., State v. Jones, 290 S.E.2d 675 (N.C. 1982).*

(n12)Footnote 57. *Ohio v. Skilwies, No. 17077, 1999 Ohio App. LEXIS 20* (Ohio App. 2 Dist.) (aesthetic concerns); *Colts Run Civic Association v. Colt Neck Twp. Zoning Board of Adjustment, 717 A.2d 456 (N.J. Super. 1998); Id., 290 S.E.2d at 681.*

(n13)Footnote 58. Randal J. Cude, Beauty and the Well-Drawn Ordinance: Avoiding Vagueness and Overbreadth Challenges to Municipal Aesthetic Regulations, *6 J. L. & Pol'y 853 (1998);* Samuel Bufford, *Beyond the Eye of the Beholder: A New Majority of Jurisdictions Authorize Aesthetic Regulation, 48 UMKC L. Rev. 125 (1980). See also* James P. Karp, *The Evolving Meaning of Aesthetics in Land-Use Regulation, 15 Colum. J. Envtl. L. 307 (1990).*

(n14)Footnote 59. Mark Bobrowski, Scenic Landscape Protection Under the Police Power, *22 B.C. Envt'l. Aff. L. Rev. 697 (1997);* As time goes on, a consensus may be building for certain standard elements in a legal conception of aesthetic qualities, including visual beauty, prevention of harm, shared human values, and environmental harmony. *See* James P. Karp, *The Evolving Meaning of Aesthetics in Land-Use Regulation, 15 Colum. J. Envtl. L. 307 (1990);* Louis B. Schwartz, *Justice, Expediency and Beauty, 136 U. Pa. L. Rev. 141 (1987).*

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CHAPTER 51 PRIVATE PROPERTY RIGHTS IN AIRSPACE

7-51 Thompson on Real Property, Thomas Editions § 51.06

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§ 51.06 Interference with Radio and Television Reception.

[Go To Supp]

If legal mechanisms are developing to secure access to solar and wind energy, it would seem by rather straightforward analogy that protection of access to radio and television broadcast signals would be afforded by the same legal principles. Ironically, the law on interference with broadcast reception has developed in just the opposite direction. This legal development is based on a single case holding that no nuisance liability would attach to a structure so tall that it distorted commercial television reception on nearby land. n60 The plaintiff in this action sought to enjoin construction of the 110-story Sears Tower in Chicago, because it distorted television reception and thus lowered property values. The distortion occurred because the receiving antennas were lower than the interfering structure. The court noted the analogy to the American rule denying prescriptive rights to the free flow of light and air and concluded that each landowner had a right to use the airspace over its land to build a structure to any desired height, and that interference with broadcast signals was not a sufficient basis for limiting that right.

The court in the *Sears* case also cited other factors, noting that the quality of reception is a function of where the broadcaster chooses to locate the transmitter, in addition to the location of the receiver and of the interfering structure. To require a defendant landowner to refrain from building interfering structures on the land, when the extent of the restriction depends on the uncontrolled choice of the broadcaster in placing a transmitter, was deemed too broad an intrusion into the property rights of the defendant landowner. In this respect, the broadcast access differs from solar energy access, in that the latter imposes a quite predictable restriction on neighboring land. Preemption by federal law has also been given as a reason for rejecting a private nuisance action complaining of radio interference. n61

In one earlier case, the Massachusetts Supreme Court held that a radio broadcaster had no basis in nuisance for requiring a neighboring landowner to stop a landfill project that would reduce the electrical conductivity of the land and thus weaken the broadcast signal. n62 By contrast, an appliance store owner's complaint stated a cause of action in nuisance, when it alleged that a computer placed in a nearby business leaked radiation that distorted the television reception in the appliance store. n63

Airspace rights questions have also arisen in connection with satellite dishes. The dish owners have sought unimpeded

and cost-free access to any broadcast signals that were emitted into the airspace of a satellite dish owners's property; the broadcasters have sought to retain some ownership rights in those signals even when the signals reached the airspace of another, especially the right to charge for reception. The problem became somewhat contained, but by technology rather than resort to property law: a broadcaster wishing to exclude non-paying receivers simply scramble the signal and then charges interested recipients a fee for the use of decoding devices. The property owner is still the master of signals emitted into the property's airspace, but only of such signals as are actually received or "captured," in this instance a scrambled signal. n64 Health issues arise from concerns about radio frequency emissions. n65

COMPUTER-ASSISTED RESEARCH

LEXIS: interfer! w/15 reception! or receiv! w/15 radio or television w/50 nuisance

FOOTNOTES:
(n1)Footnote 60. *People ex rel. Hoogasian v. Sears, Roebuck & Co., 287 N.E.2d 677, cert. den., 409 U.S. 1001 (Ill. 1972).*

(n2)Footnote 61. *Broyde v. Gotham Tower, Inc., 13 F.3d 994 (6th Cir. 1994)* (plaintiff residents' nuisance action against local radio station held to be preempted by the Federal Communications Act which gives the Federal Communications Commission exclusive jurisdiction over radio signal interference with home appliances and systems).

(n3)Footnote 62. *Richmond Bros., v. Hagemann, 268 N.E.2d 680 (Mass. 1971).*

(n4)Footnote 63. *Brower v. Hubbard, 643 So. 2d 28 (Fla. 1994)* (plaintiffs obtained judgment ordering their neighbors to remove an 87-foot radio tower/antenna from their property and enjoining them from making further ham radio transmissions from their home; the appeals court held that the neighbors violated a restrictive covenant and upheld the order to remove the tower/antenna, but reversed the injunction to end all radio transmissions as being overly broad, since not all transmissions interfered with plaintiffs' electronic devices); *Page County Appliance Ctr., Inc. v. Honeywell, Inc., 347 N.W.2d 171 (Iowa 1984).*

(n5)Footnote 64. Note, "Who Owns the Air? Unscrambling the Satellite Viewing Rights Dilemma," *20 Loy. L.A.L. Rev. 145 (1986).*

(n6)Footnote 65. *See* Dean J. Donatelli, Note: Locating Cellular Telephone Facilities: How Should Communities Answer When Cellular Telephone Companies Call? *27 Rutgers L.J. 447, 478-85 (1996)* (discussing potential harms from radio-frequency emissions to health of the local residents near cellular cites and how a claimant may be able to prevail over the cellular companies under the tort theory of nuisance).

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CHAPTER 51 PRIVATE PROPERTY RIGHTS IN AIRSPACE

7-51 Thompson on Real Property, Thomas Editions § 51.07

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§ 51.07 Rights to Airspace of Adjoining Landowners.

[Go To Supp]

(a) Airspace as Property.

A common law Latin maxim of cujus est solum, ejus est usque ad coelum et ad inferos, was understood to be the concept that the owner of the land's surface owned also to the heavens above and to the depths below that surface. Blackstone, who believed the maxim had its origin in civil law, n66 stated "Land hath also, in its legal signification, an indefinite extent, upwards as well as downwards... . So that the word 'land' includes not only the face of the earth, but every thing under it, or over it." n67

Airspace has been likened to other migrating things that might come onto one's land: it is not considered to be really property in the sense of being owned, until it is reduced to the possession or use of the surface owner. n68 A landowner also has the freedom to make use of the airspace as high as capabilities and resources permit. Until so used, the airspace remains a form of public or common property. n69 American courts generally recognize private property rights in airspace of adjoining landowners. Maintaining a structure that encroaches on, over, or under another's land is a trespass. Trespass can be caused by any structure or object that extends over adjacent land and violates that land's airspace. Courts have found such trespasses from wires extending across adjacent land, and from eaves, shutters, walls, roofs, and bay windows which project over the boundary line of adjacent land. n70

When commercial air travel became an obvious development for the future, the federal government asserted exclusive national sovereignty in the airspace over the entire country. This has led courts to conclude that private property rights in airspace are limited to whatever airspace the landowner needs for enjoyment or use of the land, so that airspace rights are merely incidents of land ownership. n71 Reinforcing the notion that private rights in airspace have been limited by impositions of sovereign power are the zoning restrictions in every jurisdiction that describe bulk and height limitations on buildings. n72

(b) The Severability of Airspace Property Rights.

Airspace that is within the "reach" of the private landowner can be severed from surface rights, especially by sale or lease. Railroads were early practitioners of this procedure, selling or leasing airspace over their urban lands for

commercial use while retaining ownership of the underlying surface land. n73

Related to the severance of airspace rights from rights in the land surface itself is the rise of the transferable development right, known widely as a "TDR." Used initially as a device for preserving historic landmarks, the TDR has gone on to a wider variety of applications. To encourage historic preservation at little public expense, the owner of a historic landmark was recognized as having a property right in the undeveloped airspace above the historic structure or land. As permitted by local land use regulations, that landowner was allowed to place certain developments in that airspace but, according to TDR practice, could separate those development rights from the land beneath, and convey them to some other landowner whose own development rights were perhaps not so extensive. The grantor who had conveyed the development rights was thereafter unable to destroy the historic landmark in the process of carrying out some development project. n74

In giving legal recognition to the severance of airspace rights from surface rights when transferring development rights, courts have confirmed the property characteristics of airspace. They have, perhaps, also extended the private rights in airspace a bit, since the purchaser of development rights may have resources for use of those rights that reach higher into that airspace than had the landowner who granted the airspace rights for development. n75 The TDR has possible applications going well beyond historic preservation and, for example, has been used for preservation of agricultural land. n76

The use of TDRs is confined to a few large cities that have chosen to place heavy restrictions on vertical development. Distinct from the sale of TDRs is the much more common practice of simply conveying rights to the airspace over public property. Cities sell development rights to private owners in the airspace over public lands, n77 and states have begun to enact statutes governing such conveyances. However, as can be noted from the following summary of examples of such state legislation, a wide variety of approaches and limitations characterizes such legislation: n78

California: areas above or below state highways may be leased for up to 99 years. n79

Colorado: property rights in areas above the surface of land may be created in others than the surface owners. n80

Connecticut: airspace over school land may be conveyed to a private developer. n81

District of Columbia: the mayor may lease airspace to private parties. n82

Georgia: lease of air rights is permitted over limited access highways. n83

Louisiana: permits for construction of buildings over highways may be issued. n84

Massachusetts: leasing of airspace is permitted over certain municipal properties. n85

Minnesota: air rights of railroad or public utility company may be leased or sold; n86 air rights over a highway may be leased. n87

Nebraska: airspace over city property may be leased for up to 99 years. n88

Nevada: use of airspace over highways is permitted. n89

New Hampshire: airspace over certain public properties may be leased for up to 99 years. n90

North Dakota: space above, below, and adjacent to parking facilities may be used for development. n91

Oklahoma: airspace is real property and may be conveyed as other property interests are conveyed. n92

Pennsylvania: creation of estates in airspace is authorized. n93

Virginia: airspace over public roads may be leased. n94

Washington: airspace over public property may be sold or leased to private parties. n95

Wisconsin: airspace over public property may be sold or leased. n96

The existence and scope of airspace rights are still being explored. With hindsight an occasional older case may be seen as a harbinger of future contests. n97

COMPUTER-ASSISTED RESEARCH

LEXIS: airspace w/30 property w/5 right!
airspace w/30 tdr! or transferable development right!

FOOTNOTES:
(n1)Footnote 66. 2 Blackstone, Commentaries *8.

(n2)Footnote 67. *Id.* at *18.

(n3)Footnote 68. *Bauer v. Waste Mgmt. of Conn., Inc., 662 A.2d 1179 (Conn. 1995)* (municipal height limits on landfills); *id*. at *14.

(n4)Footnote 69. Ezra J. Reinstein, Owning Outer Space, *20 J. Int'l. L. Bus. 59 (1999).* Robert R. Wright, The Law of Airspace 221-222 (Bobbs-Merrill 1968); Clement L. Bouve, *Private Ownership of Airspace,* 1 Air L. Rev. 232 (1930).

(n5)Footnote 70. *Jones v. Wagner, 624 A.2d 166 (Pa. 1993)* (appellants held to have no cause of action for damages where appellees clipped tree branches that protruded from appellants' property onto their own; a landowner is entitled to self-help remedies by trimming branches and may recoup expenses from the trespasser or seeking equitable relief to compel the trespasser to remove the encroachment). *County of Westchester v. Town of Greenwich, Conn., 76 F.3d 42 (2d Cir. 1996)* (trees); *Richards v. Rubicon Mill Condominium Ass'n, 653 N.E.2d 751 (Ohio App. 1995)* (diseased tree extending into airspace fell and fatally injured motorist on city street); *Anderson v. Hudak, 907 P.2d 305 (Wash. App. 1995)* (trees).Courts have restricted the use of aircraft in some trespass actions. *Walker Louisiana Props. v. Broussard, 813 So. 2d 487 (La. App. 2002)* (landowner could enjoin helicopter from flying less than 1000 feet over landowner's property as it interfered with landowner's use and enjoyment of his land); *Wilkinson v. Dallas/Fort Worth Intl. Airport Board, 54 S.W.3d 1 (Tex. App. 2001)* (a landowner can show a compensable "taking" of an air easement directly over his property when the overflights are frequent and low, causing a direct, immediate, and substantial interference with the property owner's use and enjoyment of the land). *Alabama Power Co. v. Gielle, 373 So. 2d 851 (Ala. App. 1979), cert. den., 378 So. 2d 1100 (Ala. 1979);* Franchi v. Boulger, 425 N.E.2d (Mass. App. 1981); *Allen v. Virginia Hill Water Supply Corp., 609 S.W.2d 663 (Tex. Civ. App. 1980); Rahn v. Milwaukee Elec. R.R., 79 N.W. 747 (Wis. 1899); Munro v. Williams, 109 A. 129 (Conn. 1920); Herrin v. Sutherland, 241 P. 328 (Mont. 1925); Mueller's Will, 205 N.W. 814 (Wis. 1925); Butler v. Frontier Tel. Co., 79 N.E. 716 (N.Y. 1906); Zerr v. Heceta Lodge No. 111, Indep. Order of Odd Fellows, 523 P.2d 1018 (Or. 1974); Skinner v. Wilder, 38 Vt. 115 (1865); Huber v. Stark, 102 N.W. 12 (Wis. 1905); Homewood Realty Corp. v. Safe Deposit T. Co., 154 A. 58 (Md. 1931); Rasch v. Noth, 74 N.W. 820 (Wis. 1898); McCourt v. Eckstein, 22 Wis. 153 (1867); Murphy v. Bolger Bros., 15 A. 365 (Vt. 1888); Codman v. Evans, 87 Mass. (5 Allen) 308 (1862).*

(n6)Footnote 71. *Commonwealth v. Rogers, 634 A.2d 245 (Pa. 1993)* (enforcement by the Pa. Dep't of Transportation of a statute prohibiting erecting signs in an airport approach area without prior approval was held to be a proper exercise of police power, even though no compensation was made and no air easement or zoning ordinance regulating the height of signs existed); *Provident Mut. Life Ins. Co. v. City of Atlanta, 864 F. Supp. 1274 (N.D. Ga. 1994)* (plaintiff held to have alleged a cause of action for continuing nuisance where defendant's operation of airport involved planes flying over plaintiff's property frequently and at close proximity, subjecting the property to high levels of noise, dust, exhaust and vibrations); *County of Westchester v. Town of Greenwich,870 F. Supp. 496 (S.D.N.Y 1994)*(plaintiff airport owner's nuisance claim failed where plaintiff did not secure property rights necessary for the operation of the airport runway clear zones, and defendants' growing trees on their land in obstruction of the clear zones was a reasonable use,*Gustafson v. City of Lake Angelus, 76 F.3d 778 (6th Cir. 1996)* (operation of seaplanes on city lake); *Brown v. United States, 73 F.3d 1100 (Fed. Cir. 1996)* (military overflights); *Price v. Charter Township of Fenton, 909 F. Supp. 498 (E.D. Mich. 1995)* (flight frequency limitation); *Persyn v. United States, 34 Fed. Cl. 187 (1995)* and *32 Fed. Cl. 579 (1995)* (military overflights); *Guillot v. Brooks, 651 So. 2d 345 (La. App. 1995)* (landing strip for ultralight aircraft); *Runser v. City of Waterville, 655 A.2d 1249 (Me. 1995)* (taking of aviation easement); *Fiese v. Sitorius, 526 N.W.2d 86 (Neb. 1995)* (claimed aviation easement); *Richmond, Fredericksburg & Potomac R.R. v. Metropolitan Washington Airports Auth., 468 S.E.2d 90 (Va. 1996)* (clear zone for nearby airport); *Mainiero v. City of Bridgeport, 63 F. Supp. 2d 198 (D. Conn. 1999)* (adjoining landowners adjacent to a municipal airport argued that their land was taken without just compensation in violation of their state and federal constitutional rights); *Breneman v. The United States, 57 Fed. Cl. 571 (2003)* (government imposes a navigable servitude when government aircraft flights are a direct and immediate interference with the enjoyment and use of private property); *Air Pegasus of D.C., Inc. v. United States, 60 Fed. Cl. 448 (Ct. Cl. 2004)* (a lessee of property had property right over navigable airspace); *Hartz Mt. Industries, Inc. v. City of Jersey City, 2004 WL 3246421* (N.J. Tax, Feb. 17, 2004) (airspace over land was taxable, even if the underlying land was exempt from taxation); *United States v. Causby, 328 U.S. 256 (1946); Hinman v. Pacific Air Transp., 84 F.2d 755 (9th Cir. 1936), cert. den., 300 U.S. 654 (1937); Swetland v. Curtiss Airports Corp., 55 F.2d 201 (6th Cir. 1932); Hero Lands Co. v. United States, 554 F. Supp. 1262 (Cl. Ct. 1983); Peacock v. County of Sacramento, 77 Cal. Rptr. 391 (1969); Sneed v. County of Riverside, 32 Cal. Rptr. 318 (1963); Roark v. City of Caldwell, 394 P.2d 641 (Idaho 1964); McShane v. City of Faribault, 292 N.W.2d 253 (Minn. 1980); Jackson Mun. Airport Auth. v. Evans, 191 So. 2d 126 (Miss. 1966).*

(n7)Footnote 72. *Columbus Bd. of Educ. v. Tracy, 652 N.E.2d 661 (Ohio 1995)* (separate abutting vertical estate in a multistory building had to be considered separately for tax purposes); *Stansbury v. MDR Development, L.L.C., 871 A.2d 612 (Md. App. 2005)* (a property owner had a property interest in the subaqueous land and in the superadjacent airspace); *American Condominium Assoc., Inc. v. IDC, Inc., 870 A.2d 434 (R.I. 2005)* (airspace units regulated by condominium association).

(n8)Footnote 73. Robert R. Wright, The Law of Airspace 223-237 (Bobbs-Merrill 1968); Theodore Schmidt, *Public Utility Air Rights, 54 A.B.A. Rep. 839 (1929).*

(n9)Footnote 74. One example of the procedure for transferring development rights, that of New York City, is described in Mary B. Spector, *Vertical and Horizontal Aspects of Takings Jurisprudence: Is Airspace Property? 7 Cardozo L. Rev. 489, 508-509, n.129 (1986).*

(n10)Footnote 75. This cryptic discussion of TDRs is not intended to raise issues surrounding the propriety or constitutionality of limitations on development rights. It is those sometimes severe restrictions on overall development rights imposed on private urban land that make desirable the transfer of more extensive rights connected with one parcel to the owner of a less fortunate parcel. *See* Richard Allen Epstein, Takings: Private Property and the Power of Eminent Domain 188-190 (1985); John J. Costonis, *"Fair" Compensation and the Accommodation Power: Antidotes for the Taking Impasse in Land Use Controversies, 75 Colum. L. Rev. 1021 (1975);* Curtis J. Berger, *The Accommodation Power in Land Use Controversies: A Reply to Professor Costonis, 76 Colum. L. Rev. 799 (1976);* Note, *The Unconstitutionality of Transferable Development Rights, 84 Yale L.J. 1101 (1975).*

(n11)Footnote 76. Gerald Torres, *Helping Farmers and Saving Farmland, 37 Okla. L. Rev. 31 (1984).*

(n12)Footnote 77. *Professional Eng'rs v. Department of Transp., 16 Cal. 2d 599 (1993)* (state's granting of airspace leases to private developers held not to exceed scope of authority of statute which allows making leases of airspace rights-of-way over or under state highways). *See, e.g.*, Frank Schnidman & Cameron Roberts, *Municipal Air Rights: New York City's Proposal to Sell Air Rights over Public Buildings and Public Spaces, 15 Urb. Law. 347 (1983).*

(n13)Footnote 78. A more detailed summary of selected state statutory provisions for conveyance of airspace interest is in the Appendix of Frank Schnidman & Cameron Roberts, *Municipal Air Rights: New York City's Proposal to Sell Air Rights over Public Buildings and Public Spaces, 15 Urb. Law. 347, 373-378 (1983).*

(n14)Footnote 79. *Professional Eng'rs v. Department of Transp., 16 Cal. 2d 599 (1993)* (state's granting of airspace leases to private developers held not to exceed scope of authority of statute which allows making leases of airspace rights-of-way over or under state highways); Cal. Sts. & High. Code § 104.12.

(n15)Footnote 80. Colo. Rev. Stat. § 38-32-101.

(n16)Footnote 81. Conn. Gen. Stat. Ann. § 10-290d. *See also* Conn. Gen. Stat. Ann. §§ 12-64, 13a-80a.

(n17)Footnote 82. D.C. Code § 7-1032.

(n18)Footnote 83. Ga. Code Ann. § 32-6-117.

(n19)Footnote 84. La. Rev. Stat. Ann. § 48.381.

(n20)Footnote 85. Mass. Ann. Laws ch. 40, § 22E. *See also* Mass. Ann. Laws ch. 168, § 135.

(n21)Footnote 86. Minn. Stat. Ann. § 308.51.

(n22)Footnote 87. Minn. Stat. Ann. § 161.433.

(n23)Footnote 88. Neb. Rev. Stat. § 14-1730.

(n24)Footnote 89. Nev. Rev. Stat. § 408.212.

(n25)Footnote 90. N.H. Rev. Stat. Ann. § 48-B:2.

(n26)Footnote 91. N.D. Cent. Code § 40-61-03.

(n27)Footnote 92. Okla. Stat. Ann. tit. 60, § 801 *et seq.*

(n28)Footnote 93. Pa. Stat. Ann. tit. 68, § 802.

(n29)Footnote 94. Va. Code §§ 33.1-183.1.

(n30)Footnote 95. Wash. Rev. Code Ann. § 35.22.302.

(n31)Footnote 96. Wis. Stat. Ann. §§ 66.0915.

(n32)Footnote 97. An example of such an earlier case is *Newport Assocs., Inc. v. Solow, 283 N.E.2d 600 (N.Y. 1972), cert. den., 410 U.S. 931, reh'g den., 411 U.S. 977 (1973).* The defendant owned a long-term leasehold interest in the plaintiff's property as well as the fee interest in adjacent land. Seeking the maximum development potential for the fee property, defendant computed a floor area ratio for zoning development restriction purposes, including the unused airspace on the leased property, to which the plaintiff objected. The defendant was held entitled to fully utilize the

leased air space rights for the zoning computations.

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CHAPTER 51 PRIVATE PROPERTY RIGHTS IN AIRSPACE

7-51 Thompson on Real Property, Thomas Editions § 51.08

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§ 51.08 Appendix.

(a) Montana's Wind Energy Easement.

Mont. Code Ann. § 70-17-303 Wind energy easement:

(1) An easement obtained for the purpose of insuring the undisturbed flow of wind across the real property of another must be created in writing and is subject to the same conveyancing and instrument recording requirements as other easements on real property.

(2) An instrument creating a wind energy easement must include:
(a) a legal description of the real property benefitted and burdened by the easement;

(b) A description of the dimensions of the easement sufficient to determine the horizontal space across and the vertical space above the burdened property that must remain unobstructed;

(c) the restrictions placed upon vegetation, structures, and other objects that would impair or obstruct the windflow across and through the easement; and

(d) the terms or conditions, if any, under which the easement may be changed or terminated. [Enacted 1983]

(b) Illinois' Statute Regulating Cloud Seeding Activity.

Ill. Stat. Ann. tit. 11, § 7321:

Except as provided in Section 11 of this Act, no person may engage in weather modification activities:

(a) Without both a professional weather modification license issued under Section 12 of this Act and a weather modification operational permit issued under Section 18 of this Act; or

(b) In violation of any term, condition or limitation of such license or permit.

[Note: This provision was later amended to require only the permit and not the license and, subsequently, by operation of the State's Regulatory Agency Sunset Act, the weather modification regulatory provisions were placed under deferred repeal, to take effect December 31, 1991.]

(c) Private Restrictive Covenant Prohibiting Aesthetic Nuisance.

a. No billboard, unsightly objects, or nuisance shall be erected, placed or permitted to remain on any lot, nor shall any lot be used in any way or for any purpose which endangers the health or unreasonably disturbs other lot owners.

b. No lot may be used in whole or part for the storage of any property or object that will cause such lot to appear in an unclean or untidy condition or that will be visually obnoxious to a reasonable person.

(d) Oklahoma Airspace Act (Okla. Stat. Ann. ch. 60 §§ 801 *et seq.*)

§ 801. Short title.

This act shall be known as the Oklahoma Airspace Act.

§ 802. Airspace defined - provisions pertaining to aviation not affected for purposes of this act.

Airspace is defined as that space which is either occupied or subject to being occupied for the reasonable enjoyment and use of the land surface and any structures thereon by the surface owner or owners, his or their heirs, successors or assigns. The airspace owned by a surface owner or owners is that which lies within the vertical upward extension of his or their surface boundaries. Airspace as defined herein shall in no way be deemed to contravene, supersede, amend, modify or alter the existing powers, requirements, limitations or other provisions of statutory or common law pertaining to aviation, air transportation, air commerce, or air operations.

§ 803. Airspace as real property.

Airspace as defined herein is real property, and until title thereto or rights, interests or estates therein are separately transferred, airspace is the property of the persons holding title to the land surface beneath it.

§ 804. Airspace subject to same statutes, rules of law and common law as other real property.

A. It is the purpose of this act that airspace shall be subject to being acquired, held, enjoyed, possessed, alienated, granted, sold, conveyed, exchanged, transferred, partitioned, assigned, demised, leased, released, charged, mortgaged, encumbered, assessed, devised, condemned, vacated, zoned, platted, divided, subdivided, and otherwise utilized and manipulated in the same manner, upon the same conditions and for the same uses and purposes as other real property; and airspace shall be subject to the same statutes, rules of law, and common law as other real property.

B. All of the rights, privileges, immunities, incidents, powers, remedies, burdens, servitudes, duties, liabilities, limitations and restrictions which apply to titles, estates, rights, and interest in other real

property shall apply to airspace.

C. No power set forth herein, however, shall alter, amend, supersede, hinder, contravene, prevent or affect the exercise of the rights, privileges and immunities otherwise granted by statutory or common law to individuals, partnerships, corporations, business associations, air commerce, air operations, or to public service corporations.

§ 805. Titles, estates, rights and interests as pertaining to airspace.

All forms of titles, estates, rights, and interests which may presently exist or which may hereafter by created by law or equity under statutes pertaining to real property may be legally created, transferred and conveyed in airspace, whether or not such airspace is contiguous to the surface of the earth; and the same shall constitute titles, estates, rights and interests in real property under and subject to the laws pertaining thereto.

§ 806. State, governmental units, individuals, corporations, etc., as possessing same powers and duties with respect to airspace as to other property.

A. The state and all of its departments, commissions, agencies, instrumentalities, divisions, subdivisions and authorities, including all counties, municipal corporations and governmental units of any kind, shall have the same powers, rights and duties with respect to airspace as are possessed with respect to other real property.

B. All private individuals, partnerships, corporations, foundations, trustees, fiduciaries, and all other private persons whatever their legal status, shall have the same powers, rights and duties with respect to airspace as are possessed with respect to other real property.

§ 807. Division of airspace.

Airspace may be divided or apportioned horizontally and vertically, and in any geometric shape or design, in the exercise of any of the powers, rights, or duties by public bodies or private persons under this act.

§ 808. Right, title, and interest to pass at death of owner.

The right, title, interest and estate of a decedent in and to airspace shall pass at his death by testamentary disposition, or in the event of intestacy, shall pass in the same manner as provided by the laws of this state for the descent of other real property.

§ 809. Taxation.

All titles, estates, rights and interests in airspace are subject to taxation to the same extent and in the same manner as other real property is taxed; and for the purpose of taxation, titles, estates, rights and interests in airspace held by persons other than by the owner or owners of the land surface shall be taxed separately from the land surface and from other separately owned airspace, and the owner or owners of the land surface shall not be taxed for airspace which is not owned, nor to the extent that his or their rights therein have been diminished. Nothing contained in this section shall be construed to authorize taxation of unimproved or undeveloped airspace whether by adding to the assessed valuation of the surface or by taxation on said unimproved or undeveloped airspace itself. This act shall not apply to aviation, air or space travel.

§ 810. Powers of state over highways, streets, bridges, etc., not extended so as to cause violation.

The powers granted under this act shall in no way extend the power of state and local authorities having jurisdiction over highways, roads, streets, alleys, bridges or rights-of-way to the point that (a) federal regulations pertaining to federal aid rights-of-way are violated, (b) constitutional limits on the power of such authorities are exceeded, or (c) the right of the public to full and unobstructed use of highways, roads, streets, alleys, bridges and rights-of way is impaired.

§ 811. Joint development use plans.

A. The state and any of its political subdivisions, port authorities and turnpike authorities may join, cooperate and contract with other agencies or instrumentalities of federal, state or local government, or with private persons, corporations, partnerships, business associations, fiduciaries or personal representatives in and for the acquisition, condemnation, purchase, lease, sale, assignment, mortgage or use of title, rights, interests and estates in airspace. This power shall include, but shall not be limited to, the joint development and multiple use of rights-of-way and adjoining property or airspace. In furtherance of such functions, the aforementioned entities and authorities shall have the following powers:

1. To do all things necessary to develop and effectuate a joint development and multiple use plan for an area which is to be developed, including the coordination of such plan and cooperation with all other affected agencies of federal, state or local governments; to collect and distribute informational material pertaining thereto; to cooperate and coordinate activities and function with interested or affected private persons, corporations, partnerships, business associations, fiduciaries, personal representatives or groups; to employ consultants, planners and professional or advisory personnel or services; to contract with federal, state, regional, or local authorities or agencies, or with private persons, corporations, partnerships, business associations or other such organizations or associations for the preparation of transportation and land use studies; and to contract for services, labor, supplies, equipment or other items with governmental authorities or private persons, corporations, partnerships, business associations, fiduciaries, personal representatives or other persons as may be necessary to effectuate the joint development and multiple use plan;

2. To apply for, accept, receive, spend, and account for such funds, grants, loans, gifts and services from federal, state, regional or local governments or their instrumentalities or from private persons or from other sources as may be needed to develop and effectuate the joint development and multiple use plan; and to provide and agree to such reasonable conditions and requirements as may be necessary in connection therewith; and

3. To perform such other acts and enter into such contracts or execute such other legal documents as may be necessary or appropriate to develop, effectuate or execute the joint development and multiple use plan.

B. The state and any of its political subdivisions, port authorities and turnpike authorities may join with any other federal, state, regional or local governmental authority in the condemnation through exercise of power of eminent domain of land or airspace in excess of that necessary for the highway, road, or street right-of-way, whenever such excess condemnation is necessary and appropriate to effectuate a joint development and multiple use plan.

§ 812. Sale of unneeded airspace or real property.

Any governmental authority, agency, or instrumentality which holds right, title, interest or estate in airspace or in other real property which is not needed for a public purpose or for public use may sell, convey or transfer the right, title, interest or estate owned by it, or any lesser right, title, interest or estate, to such persons as the laws of this state permit at public or private sale for not less that seventy-five percent (75%) of the appraised land value thereof, as established by two or more disinterested, qualified appraisers. Along with transfers of unneeded airspace or real property, or right, title, interest or estate therein, the transferor may also grant or transfer easements or other rights and interests in retained airspace and real property which may be required to provide access or support of structures erected in the transferred airspace or property.

§ 813. Governmental authority holding only easements for use as rights-of-way.

In situations in which a governmental authority or agency holds only an easement for use as a right-of-way over land on which is constructed a highway, street, road, alley or bridge:

1. The governmental authority or agency shall possess for and on behalf of the public a right to use such easement for highway, street, road, alley or bridge purposes with full, free and unobstructed passage over such improvements as well as the right to construct, maintain, repair, alter and remove such improvements, subject to all other laws pertaining thereto; and

2. In addition thereto, the governmental authority and agency shall possess for and on behalf of the public the right to make full use of the airspace over, under or upon said right of way, provided that the residual right, title, interest and estate of the owner or owners of the fee in and to the land on which said improvements exist shall not in any way be encumbered, limited, or additionally burdened without just compensation being paid to such owner or owners and with the determination of such just compensation to be made in the manner provided by law for additional takings under the power of eminent domain.

§ 814. Right of eminent domain.

This act shall not alter, amend, repeal, modify or affect the laws of this state providing for the exercise of the power of eminent domain by public or quasi-public agencies, authorities and instrumentalities or by private persons, except as may be specifically provided herein and except that the power of eminent domain may be exercised to condemn and acquire airspace in the same manner as provided by law for the acquisition of other real property or for rights or interests in same. The procedure and rules provided by law for condemnation of real property by public or quasi-public agencies, authorities or instrumentalities and by private persons shall apply to the condemnation of airspace. Whenever more than one procedure for condemnation is provided by law, and whenever there is doubt as to which procedure applies in a particular condemnation proceeding, the condemnation procedure applicable to the State Highway Commission or agency shall be followed.

§ 815. Laws pertaining to powers, privileges, immunities, duties and liabilities of agencies not affected.

Except as specifically provided herein, this act shall not alter, amend, repeal, modify or affect the laws of this state which pertain to the powers, privileges, immunities, duties and liabilities of authorities, agencies, instrumentalities or other such divisions or departments of state and local governments, or to improvement districts or to private persons.

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CHAPTER 51 PRIVATE PROPERTY RIGHTS IN AIRSPACE

7-51 Thompson on Real Property, Thomas Editions § 51.09

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Supp. To CHAPTER 51 PRIVATE PROPERTY RIGHTS IN AIRSPACE

7-51 Thompson on Real Property, Thomas Editions Supp. to § 51.03

Supp. to § 51.03 Access to Wind Power

[Go To Main]

§ 51.03(b) Access to Wind Under Common Law. [Go To Main]

At the end of second sentence of subsection, add new Note 1.1: n1.1

Clark County, Nev. v. Federal Aviation Administration, 522 F.3d 437 (D.C. Cir. 2008) (petition for review of FAA decision that a proposed windfarm would not obstruct airspace near a proposed airport site).

Clark County, Nevada v. F.A.A., 522 F.3d 437 (D.C. Cir. 2008) (FAA decision that proposed windfarm would not obstruct the airspace near a proposed airport); *Center for Bio-Ethical Reform, Inc. v. Los Angeles County Sheriff Department, 533 F.3d 780 (9th Cir. 2008)* (an anti-abortion protesters' truck with large photos of aborted fetuses was not barred from being driven near a school as a disruption of the space near the school; the disruption was due to negative reactions).

MNS Wind Company, LLC v. U.S., 87 Fed. Cl. 167 (Ct. Cl. 2009) (action for breach of easement to develop and operate wind turbines for a wind energy farm); *Ecker Bros. v. Calumet County, 772 N.W.2d 240 (2009)* (county ordinance restricting construction of wind energy turbines was ultra vires under the statute regulating wind energy systems).

§ 51.03(c) Securing Private Wind Access by Public Regulation. [Go To Main]

Add:

Friends of Lincoln Lakes v. Board of Environmental Protection, 2010 Me. 18 (2010) (regulatory agency order

approving permits for a wind energy generation facility was upheld).

At the end of third sentence of subsection, add new Note 30.1: n30.1

§ 51.03(d) Protecting the Rights of Nearby Landowners. [Go To Main]

At the end of first sentence of subsection, add new Note 31.1: n31.1

Add:

Animal Welfare Institute v. Beech Ridge Energy LLC, 675 F. Supp. 2d 540 (D. Md. 2009) (preliminary injunction issued against wind energy project on the allegation that it would injure or destroy endangered bat species).

FOOTNOTES:
(n1)Footnote 1.1. *Romero v. Bernell, 603 F. Supp. 2d 1333 (D. N.M. 2009)* (wind power rights are capable of being partitioned).

(n2)Footnote 30.1. *Zimmerman v. Board of County Com'rs, 218 P.3d 400 (Kan. 2009)* (county zoning regulation prohibiting placement of commercial wind farms in the county was deemed a reasonable land use regulation).

(n3)Footnote 31.1. *Tink-Wig Mountain Lake Forest Property Owners Association v. Lackawaxen Tp. Zoning Heard Bd., 986 A.2d 935* (Pa. Comwlth., 2009) (property owners' association was unsuccessful in challenging permit for construction of wind turbine on the property owned by one of the members).

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Supp. To CHAPTER 51 PRIVATE PROPERTY RIGHTS IN AIRSPACE

7-51 Thompson on Real Property, Thomas Editions Supp. to § 51.06

Supp. to § 51.06 Interference with Radio and Television Reception.

[Go To Main]

Add:

Davidson County Broadcasting, Inc. v. Rowan County Bd. of Com'rs, 649 S.E.2d 904 (N.C. App. 2007) (federal regulation of navigable airspace did not pre-empt the county's authority to regulate the location of a proposed radio broadcast tower).

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Supp. To CHAPTER 51 PRIVATE PROPERTY RIGHTS IN AIRSPACE

7-51 Thompson on Real Property, Thomas Editions Supp. to § 51.07

Supp. to § 51.07 Rights to Airspace of Adjoining Landowners.

[Go To Main]

§ 51.07(a) Airspace as Property. [Go To Main]

Add:

McCarran Intern. Airport v. Sisolak, 137 P.3d 1110 (Nev. 2006) (an owner of land adjacent to the airport was held to have a vested right in the airspace above his land, and height restrictions ordinances to accommodate low-flying aircraft constitute a per se regulatory taking).

Vacation Village, Inc. v. Clark County, Nev., 497 F.3d 902 (9th Cir. 2007) (the county's imposition of height restrictions on the plaintiff's land amounted to a regulatory "per se" taking of airspace requiring compensation).

Virginia Highlands Airport Authority v. Singleton Auto Parts, Inc., 670 S.E.2d 734 (Va. 2009) (condemnation of avigation easement held to not cause loss to a landowner apart from removal of existing trees).

Add:

Alvord, Inv., LLC v. Zoning Bd. of Appeals of City of Stamford, 920 A.2d 1000 (Conn. 2007) (the state common interest ownership act allows for the creation of a common interest community comprised solely of airspace units).

Virginia Highlands Airport Authority v. Singleton Auto Parts, Inc., 670 S.E.2d 734 (Va. 2009) (condemnation of avigation easement for airport authority); *Aircraft Owners and Pilots Ass'n v. F.A.A., 296 Fed. Appx. 92 (D.C. Cir. 2008)* (FAA decision to modify airspace to further safety and efficienty); *Clark County, Nevada v. F.A.A., 522 F.3d 437 (D.C. Cir. 2008)* (FAA decision that proposed windfarm would not obstruct the airspace near a proposed airport).

Add:

Biddle v. BAA Indianapolis, LLC, 860 N.E.2d 570 (Ind. 2007) (noise from aircraft flying within the navigable airspace did not create a taking entitled to compensation).

Add:

Alvord Investment, LLC v. Zoning Bd. of Appeals of City of Stamford, 282 Conn. 393 (2007) (the state's common interest ownership act authorizes a common interest community comprised only of airspace units).

Chicago Title Ins. Co. v. Arkansas Riverview Development, LLC, 573 F. Supp. 2d 1152 (E.D. Ark. 2008) (conveyance of airspace rights by means of airspace lease).

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Supp. to § 51.09 Bibliography.

First Amendment

Add to Articles:

Airspace Disputes

Ishikawa, Jesse S. " Tower Cranes, Trespass, and Temporary Airspace Use Agreements, *20 Prob. & Prop. 63* (February, 2006) .

Sheridan, Jessica A. "Public Forums--Is the Airspace Above a Public Forum Also a Public Forum?" *72 J. Air L. & Com. 419 (Spring 2007).*

"Takings: Flying Within Navigable Airspace," 36 *Real Est. L. Rep.* 6 (May 2007).

Add to Articles:

Solar Access

Gibson, Rachel. "Government's Role in Creating a Vibrant Solar Power Market in California," *36 Golden Gate U. L. Rev. 347* (Spring, 2006).

Wind Access

Bell, Steven G. "The Way the Winds are Blowing These Days: The Rapid Growth of Wind Energy and Legal Hurdles of North Carolina's General Statutes," *8 N.C. J. L. & Tech. 117 (Fall 2006).*

Cashion, Merrell C., Jr. Book Review: "A Guide to United States Patents for Windmills and Wind Energy," *88 J. Pat. & Trademark Off. Soc'y 92 (2006).*

Davidson, Jacob M. "Who Owns the Wind? The Growth of Wind Energy Industry in Texas and the Need for Laws to Regulate It," *39 Tex. Tech L. Rev. 101* (Fall, 2006).

Dietz, Brian. "Turbines Vs. Tallgrass: Law, Policy, and a New Solution to Conflict Over Wind Farms in the Kansas Flint Hills," *54 U. Kan. L. Rev. 1131* (May, 2006).

Diffen, Becky H. "Energy from Above and Below: Who Wins When a Wind Farm and Oil and Gas Operations Conflict?" 3 *Tex. J. Oil Gas & Energy L.* 240 (2008).

Eberhardt, Robert W. "Federalism and the Siting of Offshor Wind Energy Facilities," *14 N.Y.U. Envtl. L.J. 374 (2006).*

Maxted, Brian E. "Developing Wind Power in the Commonwealth: No Longer a Quixotic Quest to Build Wind Farms in Virginia," 33 *Wm. & Mary Envtl. L. & Pol'y Rev.* 319 (Fall, 2008).

Scott, Karen N. "Tilting at Offshore Windmills: Regulation Wind Farm Development Within the Renewable Energy Zone," 18 *J. Envtl. L.* 89 (2006).

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CHAPTER 52 INNS AND INNKEEPERS

7-52 Thompson on Real Property, Thomas Editions 52.syn

AUTHOR: Professor John C. Welsh Albany Law School Union University

§ 52.syn Synopsis to Chapter 52: INNS AND INNKEEPERS

§ 52.01 Common Law Origins.

§ 52.02 Relation of Innkeeper and Guest.

Establishment ClauseCommencement and Termination of Guest Status.

§ 52.04 Infra Hospitium.

§ 52.05 Modern Limitations on the Innkeeper's Liability.

(a) In General.

(b) Notice to Guests.

(c) Statutory Provisions of Individual States.

§ 52.06 Property Deposited for Safekeeping.

(a) Disclosure of Value.

(b) Suitability of Place.

(c) Requirement of Access.

§ 52.07 Property Kept in the Assigned Room.

§ 52.08 Property Kept in Other Locations Within the Hotel.

§ 52.09 Property Kept in Garages and Parking Lots.

§ 52.10 Innkeepers Liens.

(a) Creation.

(b) Enforcement.

§ 52.11 Bibliography.

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CHAPTER 52 INNS AND INNKEEPERS

7-52 Thompson on Real Property, Thomas Editions § 52.01

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§ 52.01 Common Law Origins.

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The common law imposed on an innkeeper the responsibility to preserve from harm all property of a guest that had been placed in the innkeepers's custody, subject to very limited exceptions. The origin of this policy is well described by the New York Court of Appeals in Julett v. Swift as intended to facilitate travel from one portion of the country to another. n1 The traveler was particularly subject to fraud and theft and through necessity was obliged to place confidence in total strangers. Care of the guest's property was placed in the control of the innkeeper's servants over whom the guest had no control. Such servants would have no interest in preserving the guest's property unless their employer was held responsible for its safety. In the event of loss, the guest would usually be dependent upon the testimony of complete strangers who might have some acquaintance or alliance with the innkeeper. The Supreme Court of Iowa noted that "the rule devolved from the Roman era and was designed to protect travel and commerce in times of highwaymen who were often in league with innkeeping." n2

In Dickerson v. Rogers, the Supreme Court of Tennessee, quoting from Sir William Jones' Treatise on Bailments, observed that:

> "travelers, who are most numerous in a rich and commercial country, are obliged to rely almost implicitly on the good faith of inn-keepers, whose education and morals are not of the best, and who might have frequent opportunities of associating with ruffians and pilferers, while the injured guest would seldom or never obtain legal proof of such combinations, or even of their negligence,if no actual fraud had been committed by them." n3

In order to avoid liability for loss to property entrusted by a guest, the innkeeper must establish that the occurrence was caused by act of God, the public enemy or fault of the guest, or the innkeeper's servants or employees. n4 Liability extended to clothing, jewelry, money, horses and articles of bulk unless one of the exceptions applied. Loss might occur through burglary, theft, fire or negligence. n5 As innkeepers became more plentiful and more trustworthy, statutory limits were commonly imposed on the broad responsibility established at common law. n6 No longer were travelers embarking on journeys through a sparsely settled countryside where the inn was the only hope for protection against highwaymen. n7

COMPUTER-ASSISTED RESEARCH

LEXIS: common law w/30 inns or innkeeper!

FOOTNOTES:

(n1)Footnote 1. *See also* George S. Mahaffey Jr., Cause-in-Fact and the Plaintiff's Burden of Proof with Regard to Causation and Damages in Transactional Legal Malpractice Matters: The Necessity of Demonstrating the Better Deal, *37 Suffolk U. L. Rev. 393, 399 (2004).* "...The Romans saw fit to impose a higher standard of care on those persons who held positions of societal import. Those persons, including innkeepers...were held to a standard of utmost care, or exactissima diligentia. Though the Romans never addressed the concept of malpractice, their view of negligence generally, and of holding persons responsible to a certain degree of care, would be shown to impact the development of English common law." *33 N.Y. 570 (1865).*

(n2)Footnote 2. *Hanover Ins. Co. v. Alamo Motel, 264 N.W.2d 774, 775 (Iowa 1978).*

(n3)Footnote 3. *23 Tenn. 179, 181 (1843).*

(n4)Footnote 4. *Asseltyne v. Fay Hotel, 23 N.W.2d 357 (Minn. 1946); Holstein v. Phillips & Sims, 59 S.E. 1037 (N.C. 1907).*

(n5)Footnote 5. *See also* Dennis T. Yokoyama, The Law of Causation in Actions Involving Third-Party Assaults When the Landowner Negligently Fails to Hire Security Guards: A Critical Examination of Saelzler V. Advanced Group 400, *40 Cal. W. L. Rev. 79, 85 (Fall 2003).* A duty to prevent third-party criminal activity "at common law, in fact, was limited to certain discrete situations. At one time, the duty was only imposed upon those who had a special relationship with the plaintiff, such as 'common carrier-passenger, innkeeper-guest, landowner-invitee, custodian-ward.' " *Wilkins v. Earle, 44 N.Y. 172 (1870)* where the liability of an innkeeper for loss to the goods brought by a guest was described as having been settled for centuries.

(n6)Footnote 6. *See Stall v. Almon C. Judd Co., 138 A. 479 (Conn. 1927).*

(n7)Footnote 7. *See Minneapolis Fire & Marine Ins. Co. v. Matson Nav. Co., 352 P.2d 335 (Haw. 1960).*

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CHAPTER 52 INNS AND INNKEEPERS

7-52 Thompson on Real Property, Thomas Editions § 52.02

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§ 52.02 Relation of Innkeeper and Guest.

An inn has been described as a:

> house of entertainment for travelers, and an innkeeper is a person who publicly professed that he keeps an inn, and will receive therein all travelers who promise to pay an adequate price and who come in a situation fit to be received.
>
> To establish the relation of host and guest, the traveler must visit the inn for the purpose of availing himself of the entertainment offered, and the innkeeper must receive the traveler for the purpose of entertaining him. n8

Although the guest is frequently described as a traveler, the distance traveled is irrelevant. Anyone away from home, regardless of distance, who receives accommodations at the inn, is a guest and entitled to hold the innkeeper to the responsibilities at law. n9

At common law, the broad liability imposed upon innkeepers did not apply to proprietors of boarding houses or lodging houses. In such cases, liability of the owner was limited to the exercise of care to preserve the property of the boarders or lodgers. n10 Some jurisdictions have eliminated this distinction and treat all guests of establishments equally when they receive the same services whether they are travelers or n11 Of course, hotels and motels for transients have succeeded to the role formerly held by the roadside inn.

A person who elects to use some services provided by the inn but does not engage a room or partake of food and entertainment was not entitled to common law benefits for items deposited. Where plaintiff sought to recover from an innkeeper for the value of his horse, harness and robes destroyed by fire, the court applied the usual rules of bailment because the owner was not and did not expect to become a guest at the inn. The horse and related items were left for safekeeping in a barn connected with the inn. n12 In a more modern setting, a patron of a hotel checkroom whose property is not returned upon demand is not a guest of the hotel when the guest does not also partake of the available food, room or entertainment. n13 Similarly, the daughter of a guest who had her luggage delivered to the hotel where her parent was staying was a bailor who was not within innkeeper-guest statutory provisions. n14

Mere occupancy of rooms at the inn does not necessarily create the relationship of innkeeper-guest. To achieve "guest" status, the person must be a paying patron who is staying at the inn for the person's own purposes. Band members who were furnished four rooms at a hotel as part payment for their musical engagement were not "guests" of the hotel when their band equipment was stolen from the stage area. n15 Weekly and monthly residents of a YMCA were found to be part of guest-hotel relationship and were not tenants of a landlord. n16 The YMCA provided linen service, mandatory housekeeping service and utilities. None of the rooms had individual bathroom facilities, refrigerators or kitchen ranges. Although each resident received a room key, its removal from the premises was not permitted. The written agreement between the parties described the relationship as one of guest-hotel where the resident accepts the status of a day-to-day licensee and disavows the creation of a tenancy. The exclusive possession and control requisite for a tenant's relationship with a landlord did not exist. n17

COMPUTER-ASSISTED RESEARCH

LEXIS: innkeeper! or host! w/15 guest!

FOOTNOTES:

(n1)Footnote 8. *Wise v. United States, 8 F. Supp. 2d 535 (E.D. Va. 1998)* (where a patron of the hotel bar who had not rented a room was not within the statutory requirement imposed on the hotel to take reasonable precautions to protect the persons and property of its guests; patron was only a business invitee). *Greene v. Doral Conference Center Associates, 2005 WL 1023060* (N.Y.A.D., 2005) (unsuccessful action against a sports and health club to recover damages for breach of common-law duty of innkeepers to receive guests); *Fabend v. Rosewood Hotels & Resorts, L.L.C., 381 F.3d 152 (3d Cir. 2004)* (unsuccessful action against campground operator for breaching innkeeper's duty to protect guests from unreasonable risks of harm). *Hill v. Memphis Hotel, 136 S.W. 997, 998 (Tenn. 1911).*

(n2)Footnote 9. *Walling v. Potter, 35 Conn. 183 (1868).*

(n3)Footnote 10. *See also* Andrea Bastian & Stephen Barth, Defining Hospitality Entities in Contracts and Statutes: A Proactive and Preventative Approach, *33 Golden Gate U. L. Rev. 105 (Spring 2003).* This article includes a description of a 1905 case in New York (*Crapo v. Rockwell, 48 Misc. 1, 5 (N.Y. Trial Term 1905))* where a plaintiff who had been living in a hotel for seventeen months brought a liability suit against the hotel for lost and damaged property. The plaintiff argued that the hotel "had many of the same characteristics of an 'inn' and was, accordingly, subject to liability laws that only applied to inns. The hotel argued that, historically, transient guests stayed at inns while hotels tended to house long term guests or 'tenants.' If the court classified the [hotel] as an 'inn,' the owner, as the insurer of a transient guest's property pursuant to the concept of infra hospitium, would be liable for the plaintiff's loss under common law." *Id.* at 110. The New York Supreme Court, held that an "inn" was defined as accommodating travelers (transient guests), seeking protection from the dangers of such travel. The plaintiff was held to be a tenant of the hotel, instead of a transient guest of an "inn." The hotel was therefore not liable for the loss of and damage to the plaintiff's property. The author concludes, "If the facts of this case were considered today, a different outcome would most likely result, because hotels have evolved from long term tenancies into transient guest lodging." *Id. Asseltyne v. Fay Hotel, 23 N.W.2d 357 (Minn. 1946)* where the hotel catered to transient guests and long-term lodgers. Plaintiff, who lost personal property when the building was destroyed by fire was an out-of-state resident who had accepted a teaching position for the school year. As such she was a lodger who failed in her obligation to prove that defendant was negligent.

(n4)Footnote 11. *See Harkins v. Win Corp., 771 A.2d 1025 (D.C. 2001)* (where the occupant of a furnished room for eight months who paid on a weekly basis and was obliged to make the room accessible for linen and cleaning service was not subject to abrogation of the common-law rule allowing self-help to evict a non-paying roomer. Roomers are usually persons with fewer possessions who would find it easy to relocate). *Leon v. Kitchen Bros. Hotel, 277 N.W. 823 (Neb. 1938),* where plaintiff and his wife had lived at defendant's hotel for nearly two years and had no other home. The plaintiff was a guest and subject to statutory limitations on liability of the hotel if it satisfied its burden to show

compliance with the statutory provisions.

(n5)Footnote 12. *See Ingallsbee v. Wood, 33 N.Y. 577 (1865).*

(n6)Footnote 13. *Fidelman-Danziger, Inc. v. Statler Mgt., 136 A.2d 119 (Pa. 1957).*

(n7)Footnote 14. *Rosin v. Central Plaza Hotel, 103 N.E.2d 381 (Ill. App. 1952).*

(n8)Footnote 15. *See Rambend Realty v. Backstreet Band, 482 N.E.2d 741 (Ind. App. 1985).*

(n9)Footnote 16. *Ann Arbor Tenants Union v. Ann Arbor YMCA, 581 N.W.2d 794 (Mich. App. 1998).*

(n10)Footnote 17. *Id.*

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CHAPTER 52 INNS AND INNKEEPERS

7-52 Thompson on Real Property, Thomas Editions § 52.03

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§ 52.03 Commencement and Termination of Guest Status.

Ordinarily, the relationship of innkeeper and guest arises when the guest registers and engages accommodations. In addition, the relation may arise when baggage is entrusted to the innkeeper or the innkeeper's employee, if the parties contemplate that accommodations will be engaged within a reasonable time. A salesman who deposits baggage with a hotel proprietor with no intention of becoming a guest is not subject to innkeeper-guest rules when the baggage disappears without explanation. Registration as a guest after the loss occurs was unavailing since the salesman had only intended to use hotel facilities available without charge at the time that he delivered his baggage to the porter. n18

The case may be contrasted with the disappearance of an attache case from the vicinity of the owner while he was completing the usual room registration form and inquiry of the desk clerk about the availability of safe deposit boxes. Since the owner of the case had an advance reservation, occupancy of a room by him was clearly within the contemplation of the parties. As a guest, the owner of the case was subject to a $500 limit on hotel liability for loss of the contents of the case, which had an alleged but undisclosed value of $300,000. n19

Where the status of the property owner as a guest has been clearly established it is irrelevant whether the item has been physically delivered to the hotel by the guest or whether the guest is aware of its arrival. n20 A hotel that allows a regular guest to register early in the day in the expectation and hope that an occupancy cancellation would take place later in the day has created the status of innkeeper and guest even though no room becomes available thereafter. n21

The status of innkeeper-guest does not necessarily terminate immediately upon check out and departure by the guest. Where the hotel has undertaken to store baggage or valuables as an accommodation to the guest, the status of "guest" continues and statutory limitations apply in the event of loss or damage to the retained property. n22

It is not necessary that the hotel agree directly with the guest to provide this service. A hotel patron who checked out and inadvertently left behind a jewelry box she had hidden behind two telephone books for safekeeping was treated as a "guest" and subject to the usual liability limits. The jewelry box had been found by a maid who delivered it to the housekeeping department for delivery to the director of hotel security. Its disappearance thereafter was unexplained. n23

COMPUTER-ASSISTED RESEARCH

LEXIS: guest! w/30 commence! or terminat!

FOOTNOTES:
(n1)Footnote 18. *Parker v. Dixon, 157 N.W. 583 (Minn. 1916).*

(n2)Footnote 19. *Delema v. Waldorf Astoria Hotel, 588 F. Supp. 19 (S.D.N.Y. 1984). See also Korr v. Thomas Emery's Sons, 93 N.E.2d 14 (Ohio St. 1950)* where a guest handed his luggage to a doorman, upon leaving a taxi and proceeded to the registration desk. Upon completion of the registration, the luggage had disappeared. Statutory limits on liability for loss of a valise were applied.

(n3)Footnote 20. *See Albuquerque Hilton Inn v. Haley, 565 P.2d 1027 (N.M. 1977)* where luggage of a hotel guest that had been misdirected by an airline was thereafter retrieved by the airline and delivered to the guest's hotel. Before it could be placed in the guest's assigned room, it disappeared from the hotel's bell stand.

(n4)Footnote 21. *See Adler v. Savoy Plaza, 108 N.Y.S.2d 80 (1951).* A suitcase containing jewelry had been delivered to the hotel for safekeeping. The owner held reservations at the hotel for the following day and the hotel manager procured alternative space for the evening when the prospective guest remained unaccommodated.

(n5)Footnote 22. *See Kahn v. Hotel Ramada of Nev., 799 F.2d 199 (5th Cir. 1986);* Salisbury v. St. Regis - *Sheraton Hotel, 490 F. Supp. 449 (S.D.N.Y. 1980); Dilkes v. Hotel Sheraton, 125 N.Y.S.2d 38 (1953).*

(n6)Footnote 23. *See Great Am. Ins. Co. v. Coppedge, 405 So. 2d 732 (Fla. App. 1981).*

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CHAPTER 52 INNS AND INNKEEPERS

7-52 Thompson on Real Property, Thomas Editions § 52.04

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§ 52.04 *Infra Hospitium.*

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The common law rule imposing a broad obligation upon the innkeeper for injury to or loss of the property of a guest applied only when the damaged or missing property was said to be "*infra hospitium*." n24 It has been said that this term includes "all property deposited and accepted in exclusive control of the innkeeper, wherever the innkeeper elects to physically store the property, whatever its character, so long as it is not the type of property for which special statutory provision exists." n25 Although property of the guest retained within the building itself was always intended to be subject to the benefits of the common law rule, it is now customarily applied to automobiles and their contents when dominion and control over them has been entrusted to the innkeeper. n26 It may be necessary for the garage area to be a part of the hotel. n27 Where the vehicle was damaged through negligent operation by a hotel employee, "*infra hospitium*" has been applied. n28 The theft of a tote bag from the possession of guests while they were entering a livery cab parked in the hotel's driveway entrance has been said to occur while the bag and its contents were infra hospitium. Although the hotel retained no direct control over the bag and its contents, issues of fact arose as to whether the hotel had provided adequate security and whether the hotel knew of prior third-party criminal activity in the driveway area. n29

COMPUTER-ASSISTED RESEARCH

LEXIS: infra hospitum
innkeeper! w/15 obligat! w/30 loss! or injur!

FOOTNOTES:
(n1)Footnote 24. "It was the rule at common law that an innkeeper was absolutely liable as an insurer of the property of his guest when brought infra hospitium, whether such loss arose by reason of burglary, theft, fire or negligence, unless the loss was occasioned by the neglect or misconduct of the guest, an act of God or the public enemy." *Davidson v. Madison Corp., 247 N.Y.S. 789, 795 (1931), aff'd 177 N.E. 393 (1931). See Hotel Corp. of Am. v. Travelers Indem. Co., 229 A.2d 158 (D.C. 1967)* where the common law doctrine of *infra hospitium* was applied to the loss of a fur coat from the guest's assigned room.

(n2)Footnote 25. *Shepherd Fleets, Inc. v. Opryland USA, Inc., 759 S.W.2d 914, 923 (Tenn. App. 1988).* The court referred to *Dickerson v. Rogers, 23 Tenn. 179 (1843),* as imposing liability on an innkeeper for a fatal injury to a horse cause by a defect in the stable maintained by the inn for its guests.

(n3)Footnote 26. *See Governor House v. Schmidt, 284 A.2d 660 (D.C. 1971),* where the hotel was found to be a virtual insurer of the guest's property under the theory of *infra hospitium*. The items disappeared from the guest's vehicle while it was parked in a garage that was operated by a parking management company for the hotel. The garage was physically a part of the hotel structure and access was obtained only through the hotel lobby or the driving ramp.

(n4)Footnote 27. *Hallman v. Federal Parking Servs., 134 A.2d 382 (D.C. 1957),* where personal property of a guest left in his car in plain sight was removed by break in after the car had been parked by a bellboy in an independently managed lot. Since the lot was not an integral part of the hotel, the guest was denied the benefit of the *infra hospitium* rule and limited to the less favorable rules arising out of bailment.

(n5)Footnote 28. *Merchants Fire Assur. Corp. of N.Y. v. Zion's Secs., 163 P.2d 319 (Utah 1945).* The court states that "the goods of a guest to be "infra hospitium' and render the innkeeper liable for its loss need not always be within the walls of the inn. (cit. omitted) It is sufficient if the goods are placed where the hotel by its acts has directed the goods to be placed." *163 P.2d at 320.*

(n6)Footnote 29. *Penchas v. Hilton Hotels Corp., 603 N.Y.S.2d 48 (1993).*

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CHAPTER 52 INNS AND INNKEEPERS

7-52 Thompson on Real Property, Thomas Editions § 52.05

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§ 52.05 Modern Limitations on the Innkeeper's Liability.

[Go To Supp]

(a) In General.

The broad innkeeper's liability for loss of or damage to the property of travelers that existed at common law has been modified by statute to some extent in every jurisdiction. n30 Although it is rare for a state to mandate that an inn, hotel or motel provide a place of safekeeping for the valuables of its guests, this requirement is occasionally imposed. n31 Statutes that set liability limits on loss to the establishment serve as an encouragement to the proprietor not subject to a mandate to provide such service. n32 These limits may relate to liability for deposited items and to items retained by the guest. n33 Other statutes seem more intent on compelling the establishment to keep the sleeping rooms secure. n34 Where a hotel furnished the room number of a female guest to her inquiring estranged husband and the husband assaulted a man found in her room, the hotel did not breach any duty to the injured party. Even if a duty to protect the guest's anonymity existed, the attack by her husband, who had identified himself as her brother, was not foreseeable. n35 A female guest was allowed to recover damages against a hotel for injuries suffered in a rape that occurred in the guest room. The hotel security guard saw the unknown male on a stairway and made no inquiry; the self-closing hinges on the hotel room door were defective and the lighting in the area could be found to be inadequate. An innkeeper has a duty to exercise reasonable care to protect its guests, while they are on the premises, from reasonably foreseeable criminal acts of intruders. n36 The wife of a controversial speaker who was shot and killed while giving a speech in the hotel banquet room stated a cause of action against the hotel based upon its failure to provide proper security. A few hours before the speech, the hotel received a telephone call from a man who refused to identify himself inquiring whether metal detectors would be in place during the speech. Hotel security and the sponsor of the speaker were promptly informed of the call. n37 Where hotel guests were attacked in its parking lot by unknown persons, it was for a jury to determine whether a series of prior incidents in the parking lot should have placed the hotel on notice of a dangerous condition of serious crime in the area and on the premises with the resultant risks involved. n38 The duty of a hotel to keep its premises secure from foreseeable criminal activity did not extend to a prospective patron assaulted on a public sidewalk under the hotel canopy as he was about to enter the hotel caf'e. n39 "An innkeeper owes a duty of ordinary care to its guests, invitees, and patrons. This duty is defined as that standard of care exercised by an ordinary innkeeper under the circumstances." n40 Hotel had no duty to protect a bystander from assault on hotel grounds by a hotel patron because the victim was not an invitee of the hotel and the assault was not foreseeable. n41 Such limits are unlikely to discourage patronage by most guests who may be happy that the additional security exists.

COMPUTER-ASSISTED RESEARCH

LEXIS: innkeeper! w/15 liab!

(b) Notice to Guests.

Notice is an important component in the application of the rules establishing the extent of the innkeeper's liability. In some jurisdictions, a guest who is given proper notice of the availability of a secure place for the safekeeping of valuables and thereafter ignores it, is barred from recovery against the establishment for the loss, irrespective of its n42 More frequently, compliance with the notice requirements will not absolve the hotel from loss caused by its own fault or the wrongdoing of its employees. n43

Although statutory requirements for the delivery of notice vary considerably, it is quite common to require a posting in the assigned sleeping room. Alternative locations such as the hotel office, the lobby or other conspicuous places in the public rooms may suffice. n44 Most jurisdictions require posting in the assigned room and in the public areas as well. n45 Where the posting requirements are not complied with, the hotel is denied the benefits of utilizing the liability limits. n46 Since these statutes are in derogation of the common law, courts tend to require strict compliance. n47 Appending the required notice to a paper disclosing unrelated information is not certain to be adequate. A requirement that the notice be placed in a conspicuous position is a requirement that the notice itself be conspicuous. To precede it with diverting material may result in a failure by the guest to read it. n48 A hotel that fails to provide to the guest all notice required by statute is likely to remain subject to the nearly absolute liability of the common law. n49 Knowledge by the guest that a place of safekeeping was available is not equivalent to statutory compliance. n50 When the hotel complies with the statute, its limited liability is not restricted to property left unprotected in the room. Usually there is no requirement that the loss occur from the assigned room. Robberies causing loss to the guest in any part of the hotel are likely to be covered. n51

Failure to comply with the statutory notice requirements may deprive the hotel of liability limits even when loss occurs through theft from a hotel employee after the item was deposited for safekeeping. n52

COMPUTER-ASSISTED RESEARCH

LEXIS: innkeeper! w/15 noti! w/15 guest!

(c) Statutory Provisions of Individual States.

Every state has enacted statutory provisions modifying the broad liability imposed upon the innkeeper at common law. The most common provisions relate to monetary limits on loss sustained by a guest who deposits valuables in a place of safekeeping provided by the inn, hotel or motel, unless the parties make a written agreement to the contrary. Where the guest disregards the notice relating to the place of safekeeping, responsibility of the hotel for loss of the guest's valuables is extinguished except under narrow circumstances (e.g., loss is caused by the fault or wrongdoing of the establishment). Separate monetary limits on loss frequently apply to trunks, valises, packages, other miscellaneous personal belongings, or merchandise samples. Less frequently, state legislatures have enacted special provisions relating to loss by fire and loss to items while in transit to or from the hotel. Since the variances within the jurisdictions are so great, the statutes of each state are separately set forth in summary form.

Alabama: Safekeeping. Every hotel must provide a safe depository for valuable articles of its guests. Posting of notice, including limitations of liability, is required in the hotel lobby and the assigned room. n53 Where the hotel complies, it has no liability for loss or damage to the valuables for any cause unless the items are left in the safe depository. A liability limit of $300 exists for valuables deposited unless a contract between the parties provides otherwise. The hotel

has no obligation to pay more than the actual value of the items regardless of stated value and no obligation to assume a liability in excess of $5,000 irrespective of stated value or actual value. n54 A hotel may contract to vary its liability for the safety of the goods of its guests. n55 Where no variation or modification has occurred, the maximum liability of the hotel is set at $5,000 for all items except baggage. n56

Baggage. Every hotel is required to provide storage space for baggage brought by all users of the hotel, including registered guests. Notice must be displayed in the lobby. Where the space is provided and notice is given, the hotel is not liable for any loss to baggage unless it is taken from the storage space or the assigned room. Liability is limited to $500 unless a contract provides for a greater amount. n57 Baggage provisions include all wearing apparel and merchandise samples but exclude "valuables." n58

Definitions of "hotel," "safe depository" and "valuables or valuable articles" are provided. n59

Alaska: Safekeeping. When the hotel or boarding house provides a place for safekeeping and notice has been posted, the operator has no liability for items of the guests which were not deposited. n60 The operator is not obligated to receive items valued at more than $1,000. If such items are deposited, the operator is not liable without a written agreement assuming additional liability and such responsibility is limited to losses occurring through the negligence of the operator or its agent. n61

Baggage. Liability of the hotel or boardinghouse is limited to losses caused by its negligence or that of its agents. n62 Property left behind or sent in advance may be deposited with a storage company or sold at public auction at least four months after departure of the guest or receipt of the property. n63

Definitions of "guest," "hotel or boardinghouse" and "operator" are provided. n64

Arizona: Safekeeping. When an innkeeper provides a fireproof safe and notice is posted in the assigned room or the office of the inn, no liability exists for loss or injury to items of small size or unusual value except when caused by the act of the innkeeper. n65 The innkeeper may refuse to receive items valued at more than $500. Unless there is a written agreement to the contrary, liability of the innkeeper is limited to $500 except for loss or injury caused by its own fault or negligence. n66

Baggage. Liability is limited to $100 for property kept in a storeroom or baggage room and to $75 for property kept in a parcel or check room. n67

Merchandise Samples or Displays. No liability exists unless the guest gives written notice of the possession or display. Where notice is given, liability is limited to $500 unless caused by the fault or negligence of the innkeeper. n68

The statute applies to a hotel, boarding house, lodging house, apartment house, motel and auto camp. n69

Arkansas: Safekeeping. An innkeeper or hotel keeper who maintains a safe or vault and gives proper notice thereof is not liable for loss or injury to items not delivered for safekeeping unless caused by its negligence or that of its employees. n70 There is no obligation to receive for safekeeping items valued at more than $300, and liability is limited to that amount unless the parties agree to the contrary. n71

Baggage. Liability of the operator is restricted to that of a depository for hire with liability limited to $300 for each trunk and its contents, $100 for each valise and its contents, $25 for each package and its contents and $100 for miscellaneous effects, including wearing apparel and personal belongings. An additional liability may be expressly assumed. Liability for loss due to fire, explosion or vehicle damage is limited to that intentionally or negligently caused by the innkeeper. No liability exists for acts of God. n72

Baggage or other property not claimed by departed guests or such items forwarded in advance of becoming a guest may be held by the innkeeper at the owner's risk. n73

California: Safekeeping. An innkeeper who keeps a fireproof safe and gives notice thereof by posting in the office or assigned room is not liable for articles of unusual value brought by the guest who does not deposit them for safekeeping, except when the loss is caused by the innkeeper's own acts. Liability is limited to $500 for all property of the guest unless a receipt is provided. n74

Baggage. Liability of the innkeeper is that of a depository for hire with a limit of $1,000 in the aggregate. Unless a greater liability is assumed in writing, liability limits are $500 for each trunk and its contents, $250 for each valise and its contents, $250 for each package and its contents and $250 for all other personal property. n75

The statutes specifically include an innkeeper, hotelkeeper, operator of a licensed hospital, rest home or sanitarium, boarding house, housekeeper or lodging house keeper. The baggage provisions also relate to a furnished apartment house keeper and a furnished bungalow court keeper. n76

Colorado: Safekeeping. Any hotel keeper or innkeeper who provides a safe or vault and posts notice thereof in the assigned room and in the public area is not liable for loss sustained by the guest unless the valuables were deposited for safekeeping. Necessary baggage is excluded. For deposited articles, liability does not exceed the declared value at the time of deposit. n77 There is no obligation to receive items valued at more than $5,000 and liability is limited to that amount unless an agreement to the contrary is made. n78

Baggage. Unless an agreement for a greater liability is made, the hotel keeper or innkeeper is limited in liability to $200 for loss of articles left in the assigned room. n79 There is no liability for loss of items when the room is left unoccupied and unlocked, n80 or for items not left in the assigned room nor in the custody of the inn or hotel. n81 Property of a departed guest accepted without charge by the inn or hotel is held as a gratuitous bailment with a liability limit of $50. n82

Unless the innkeeper, hotel keeper or its employees cause the loss through negligence, there is no liability for damage caused by fire, any unforeseen causes or by inevitable accident. n83 Liability is never greater than the actual loss sustained. n84

Connecticut: Safekeeping. The proprietor of an inn or hotel who maintains a safe and posts notice thereof in the office or assigned room is not liable for more than $500 for items delivered unless a greater value is declared and a receipt for the greater value is given. Where the guest fails to utilize the safe, with proper notice given, the proprietor is not liable for loss to the guest of money, jewelry or other valuables. n85

Baggage. Liability for property deposited in a baggage room or checkroom is limited to $350. For property taken from the assigned room, a limit of $1,000 applies. For other losses, liability is limited to $1,000 where damage is caused by the proprietor or an employee. If none of the above circumstances occurred, there is no liability. n86

Delaware: Safekeeping. A hotel, inn or boarding house may avoid common law liability for loss to the valuables of its guests by providing a safe or vault and placing notices thereof in the assigned room and in the public parts of the establishment. n87

Baggage. No statutory provision was found.

District of Columbia: Safekeeping. An establishment which provides lodging to transient guests may avoid liability for loss to the valuables of its guests by providing a suitable place for safekeeping of personal property (excluding automobiles) and posting notices thereof in the assigned room and the public parts of the establishment. n88 A guest

failing to utilize this service is barred from recovery except for property usually retained by a guest in the room. Where loss occurs pertaining to items left for safekeeping, the guest may recover fair market value up to a limit of $1,000. n89

Baggage. Where the establishment maintains a checkroom and posts proper notices, liability for damage to personal property may be limited to the lesser of fair market value or $200, except when loss is caused by the establishment or its employees. n90

Florida: Safekeeping. The operator of a public lodging establishment has no obligation to accept for safekeeping any valuables of a guest. If such items are accepted, liability is limited to loss occurring through the negligence of the establishment not to exceed $1,000 if a receipt setting forth that limitation is delivered to the guest. n91

Baggage. Liability is restricted to losses occurring through the negligence of the establishment with a maximum of $500. This limit may be increased to $1,000 if the guest files an inventory, including values, and the operator is given an opportunity to inspect the items and compare them with the inventory. n92

Georgia: Safekeeping. An innkeeper may provide a place of safekeeping for the valuables of a guest and, with proper posting of notices, avoid liability for items not placed for deposit. Liability for items deposited is limited to $750 unless the guest possesses a receipt for the items. n93 Where the items are to be placed in the hotel safe, a limit of $1,000 applies unless the parties contract for a greater liability. n94

Baggage. Deposit of property in designated public rooms or in an assigned guest room is a delivery to the innkeeper. n95 If loss occurs through theft, the innkeeper is liable as an insurer of the stolen property. n96 Liability of the innkeeper is limited to $1,000 unless an inventory with values is provided to the innkeeper. n97

Hawaii: Safekeeping. A hotel keeper may avoid or limit liability for loss to the valuables of a guest, not caused by the fault of the hotel keeper, by providing a safe or vault and posting a notice thereof in the assigned room and in a public room. Liability is limited to $500 for deposited items if a receipt so stating is provided to the guest. No liability exists for items not deposited. These limits do not apply when the hotel is at fault. n98 Where loss is sustained to an item placed in a security box within the guest's assigned room, there is no liability unless loss was caused by the fault of the hotel. n99

Baggage. No liability exists except when loss is caused through the fault of the hotel. Where the item has been specially intrusted to a hotel employee, liability is limited to $500 unless there is an agreement to the contrary. n100

Where loss to any item is caused by fire or by any other cause or force over which the proprietor has no control, the hotel keeper is responsible to provide ordinary and reasonable care. n101 Rules for valuation of property are set forth. n102

Idaho: Safekeeping. Although the hotel keeper has no obligation to accept valuables for safekeeping, if they are accepted, liability is limited to loss caused by the negligence of the proprietor, not to exceed $1,000, unless a greater liability is assumed. n103

Baggage. Liability for loss of clothing, goods or other property exists only when caused by the innkeeper's negligence. Recovery is limited to $500 unless the guest files an inventory, with values, and an opportunity to inspect and compare is presented. With such an inventory, the maximum liability increases to $1,000 or a higher amount if the hotel keeper agrees in writing. n104

Definitions are provided for "guest," "hotel" and "hotel keeper." n105

Illinois: Safekeeping. Where a hotel provides a safe or vault and posts 10 notices thereof, no liability exists for loss to

the valuables of a guest who fails to deliver the property for safekeeping except, when the loss is caused by the hotel or its employees, a liability limit of $250 applies. Where loss occurs to property delivered to the safe or vault, maximum liability is $500 unless the proprietor agrees to a higher limit. n106

Baggage. Excluding merchandise samples or inventory for sale, liability exists only when loss occurs through the fault of the hotel or its employees with a maximum limit of $250. Where property is placed in a check room, the liability limits are for a trunk and its contents $250, a valise and its contents $75, a package and its contents $25 and all other personal belongings $75. n107 The same monetary limits apply to losses occurring to property being transported to or from the hotel in a company vehicle. n108

For property left by a departed guest or forwarded to the hotel by an expected guest, the hotel has the liability of a gratuitous bailee not to exceed $100 unless a greater liability is assumed. n109

Merchandise Samples or Inventory for Sale. No liability exists, irrespective of the cause of the loss, unless the guest has given written notice of the presence of the merchandise and its value and has received an acknowledgement thereof from the hotel. In such case, liability is limited to $250 unless a greater liability is assumed in writing. n110

Indiana: Safekeeping. Where the hotel provides a safe for the valuables of guests and notices thereof are posted in the assigned room and public parts of the hotel, a guest who fails to utilize such service may not recover against the hotel for loss to such items even if caused by the neglect of the hotel. Liability for loss to items delivered for deposit in the safe is limited to $600, regardless of cause, unless a greater liability is assumed in writing. n111

Baggage. Excluding merchandise samples and inventory for sale, liability for loss to personal property of a guest is limited to $200, regardless of cause. The same limit applies to property placed in check rooms. n112

For loss to property left by a departed guest, the hotel has the liability of a gratuitous bailee, not to exceed $100. n113 For loss to property of a guest while it is in transit to or from the hotel, liability is limited to $200 unless prior written notice of value is given. Such notice will increase the liability limit to $400 unless a greater obligation has been assumed. n114

Merchandise Samples or Inventory for Sale. No liability exists, irrespective of the cause of the loss, unless the guest has given written notice of the presence of the merchandise and its value and has received an acknowledgement thereof from the hotel. In such cases, liability is limited to $400 unless a greater liability is assumed in writing. n115

"Guest" is defined as including a transient guest, permanent guest, tenant or boarder. n116

Iowa: Safekeeping. Where the inn or hotel provides a safe or vault and posts notices in the assigned room and in the public parts thereof of the hotel, liability for loss is limited to $100. Proper locks on the assigned rooms are also required. n117 Where the guest has offered to deliver the item for deposit in the safe and the innkeeper has refused to accept it, the liability limit is inapplicable. However, the hotel is not obligated to accept items valued at more than $500. n118

Baggage. Liability for property of the guest placed in the hotel's care is that of a depository for hire. n119 Maximum liability limits are for a trunk and its contents $250, a valise and its contents $150, a package and its contents $50 and miscellaneous effects $100. n120 Where baggage has been left by a departing guest or forwarded by a prospective guest, the hotel may hold such items at the risk of the owner. n121

Kansas: Safekeeping. Liability of a hotel or motel for loss of valuables of a guest delivered for safekeeping is limited to $250 unless a larger amount is agreed upon. There is no liability where such items have not been delivered to the facility together with an itemized list. n122

Baggage. Liability for loss to baggage and other personal effects is limited to $250 or is excluded under the same circumstances. n123

Merchandise Samples or Inventory for Sale. Liability for loss is limited to $250 after notice and receipt by the hotel of an itemized list. No liability exists otherwise. A hotel is not obligated to accept guests bringing merchandise or samples. n124

A similar limitation of $250 applies to other property of a guest. n125 Definitions of "hotel" and "motel" are limited to establishments providing four or more guest rooms. n126

Kentucky: Safekeeping. No liability for loss of valuables exists where the guest fails to deliver the items to the hotel for safekeeping regardless of the cause. Notice must be posted in a public place. Where valuables are delivered, liability is limited to $300 unless modified by an agreement in writing. n127

Baggage. Liability for loss to personal property is limited to $100 unless caused by the negligence of the hotel or its employees. n128

Merchandise Samples and Inventory for Sale. Liability is limited to $200 unless a greater liability is assumed. n129 The guest must provide notice to the hotel and obtain a written acknowledgement of receipt of notice. n130

Liability for loss to property left by a departed guest is that of a gratuitous bailee and is limited to $100. n131 Liability for loss to property of a guest while in transit to or from the hotel is limited to $100 if no notice is given or $200 when written acknowledgement of receipt of notice of value is provided. A written agreement may establish a greater liability. n132 No liability for loss by fire exists unless the loss is caused by the negligence of the hotel or its employees. n133

Louisiana: Safekeeping. Every hotel or inn is required to provide a safe deposit for valuable articles of guests. n134 No liability exists for valuables not deposited by the guest, despite posting of notice thereof, except for loss caused by fraud or negligence of the hotel or its employees. n135 A liability limit of $500 applies except when increased by a written agreement, or when no safe deposit facility is provided, or when proper posting of notices did not occur or when the guest utilizes the safe deposit facility. n136

Baggage. The hotel is liable for stolen or damaged effects of a guest, whether caused by servants, agents or strangers. n137 The liability limit of $500 applies to loss of cash, jewelry, rare art items, furs, cameras or negotiable instruments included in the effects. n138

Maine: Safekeeping. An innkeeper who provides a metal safe and maintains suitable locks on sleeping rooms is not liable to a guest for loss of valuables if proper notice is given. Liability for loss to items accepted for deposit exists when caused by theft or negligence of hotel employees or when custody is refused by the hotel. There is no obligation to receive items valued in excess of $300. If items of greater value are accepted liability is limited to $300. n139 A greater liability may be assumed in writing. n140 A receipt for property delivered for safekeeping must be provided to the guest in order for the hotel to avoid liability. Where loss is caused by negligence of the hotel, its liability continues. n141

Baggage. For items placed under the hotel's care but not deposited for safekeeping, the liability of a depository for hire applies with limits for loss set at $150 for each trunk and its contents, $50 for each suitcase and its contents, $10 for each package and its contents, and $50 for miscellaneous effects unless a greater liability is assumed. No liability exists for loss by fire not caused by negligence of the hotel or its employees. Baggage or other property of departed guests or anticipated guests may be held by the hotel at the owner's risk. n142

Maryland: Safekeeping. A hotel is not liable for loss of valuables of a guest when the guest declines to use the safe provided, after proper notice, and loss is not caused by collusion or negligence of the hotel. n143 A limit of $300 applies to liability for losses unless the valuables are disclosed to the hotel and a greater value declared. n144 A hotel need not accept items valued at more than $1,000. n145 Maximum liability of $1,000 applies to loss of valuables irrespective of whether they are accepted for safekeeping. n146

Baggage. Liability for loss to property other than valuables is limited to $300 if taken from the assigned room or a baggage room. n147 For such property taken from check rooms, a $75 limit applies if proper notice was given. n148

No liability exists for fire loss except when caused by the negligence of the hotel or its employees. n149 A "valuable" is defined as money, jewelry, securities or plate. n150

Massachusetts: Safekeeping. An innkeeper is liable for loss to valuables of a guest deposited for safekeeping not to exceed $1,000 unless a greater amount is agreed upon. Where valuables are not deposited, no liability exists.

Baggage. Liability for loss is limited to $300. n151

For loss caused by fire or overwhelming force, the innkeeper is liable only if ordinary and reasonable care is not provided. n152

Michigan: Safekeeping. A hotel providing a safe and secure lock on rooms is not liable for loss of valuables unless the hotel has refused to accept the guest's request to deposit the articles. Proper notice of the service must be given. Liability exists for any loss caused by theft, or negligence of the innkeeper or its employees. n153

Baggage. The liability of a depository for hire applies. Unless there is a written agreement to the contrary, liability is limited to $150 for each trunk and its contents, $50 for each suitcase and its contents and $10 for each package and its contents, with an overall limit of $250. n154

Minnesota: Safekeeping. Where an innkeeper provides a safe and proper notice is given, no liability exists for loss to items not deposited by the guest for safekeeping. There is no obligation to accept items valued in excess of $1,000. Where the hotel has refused the guest's offer of deposit, the liability limit of $1,000 applies. n155 For large items of special value, the innkeeper is not liable unless the items are accepted by the hotel with an inventory including values. When accepted, usual valuation rules apply. n156

Baggage. Liability is limited to $1,000 for loss of property from the assigned rooms. n157 No liability exists for loss occurring elsewhere unless a receipt evidencing delivery is presented to the guest. In such case, the limit of $1,000 applies. n158

No liability exists for loss to valuables or other personal property left by departed guests or received from prospective guests. n159 The valuation limits do not apply to property injured by the innkeeper negligently or intentionally. n160

Definitions are provided for "guest," "hotel," "innkeeper," "transient occupancy" and "valuables." n161

Mississippi: Safekeeping. An innkeeper who provides a safe for valuables and suitable locks on assigned rooms is not liable for loss to valuables unless the guest's offer of deposit has been refused. Maximum liability for items received is set at $500 and no obligation exists to accept items of greater value. n162

Baggage. Liability of a depository for hire is imposed for loss to items other than valuables. Maximum limits are set at $100 for each trunk and its contents, $25 for each valise and its contents and $5 for each package and its contents unless a greater liability is assumed in writing. Where loss occurs through theft or negligence of the hotel or its employees, the

limits do not apply. n163

Missouri: Safekeeping. An innkeeper who provides a safe for valuables and gives proper notice thereof is not liable for loss of those items unless they have been refused for deposit. n164 Unless a greater liability is assumed, a limit of $200 applies for items actually delivered. The limit does not apply when loss is caused by willful negligence or wrongdoing of the innkeeper.

Baggage. Baggage is subject to the same rules as money or jewelry. For other property, actual delivery and a receipt are not required. n165

There is no liability for any loss caused by fire not intentionally produced by the innkeeper or the innkeeper's servants. Liability for loss due to theft by an innkeeper or its employees is expressly created.

Merchandise Samples and Inventory for Sale. No liability exists unless notice of the merchandise is given. The innkeeper is not compelled to accept such a guest. n166

Montana: Safekeeping. An innkeeper who keeps a fireproof safe and gives notice thereof is not liable for loss of the guest's valuables not deposited except when caused by the innkeeper's own acts. n167

Baggage. Liability, not to exceed $500, exists for property placed in the innkeeper's care unless loss is caused by irresistible superhuman cause, a public enemy, negligence of the owner or the owner's invitee. n168 Absent negligence on the part of the innkeeper or the innkeeper's employees, no liability exists for loss or wearing apparel, goods or personal effects. n169

Where loss to the property of the guest is caused by fire resulting from the negligence of the innkeeper or the innkeeper's employees, liability is expressly imposed. n170

Nebraska: Safekeeping. No liability exists for loss of valuables of a guest when the hotel maintains a safe, provides rooms with suitable locks and gives notice of the statute when the guest declines to utilize the service. An exception exists if the hotel denies the request of the guest for usage. Where property is accepted, liability exists only when loss is caused by the negligence or dishonesty of the proprietor. There is no obligation to accept property valued at more than $500. That limit applies to all property accepted unless a greater amount is agreed upon in writing. n171

Baggage. Where property is placed in a check room, liability is limited to $200 for a trunk and its contents, $75 for a valise and its contents, $25 for a package and its contents and $75 for miscellaneous effects. A greater liability may be assumed in writing. n172

Liability for items of former guests who have departed for more than 48 hours is that of a gratuitous bailee and recovery is limited to $250 unless a greater liability is assumed. n173 For items being transported to and from any hotel, a limit of $500 applies unless a greater value is declared by the guest. n174 For loss or damage to any property brought to the hotel, arising from the negligence of the proprietor, a limit of $1,000 applies unless a greater value was declared by the guest. n175

Definitions are provided for "hotel," "motel," "rooming house," "boarding house," "apartment house" and "guests." n176

Nevada: Safekeeping. A hotel that provides a fireproof safe and gives notice thereof is not liable for loss of valuables by a guest who fails to use such service. An owner is not obligated to receive items valued at more that $750 or those too large for the safe. n177 Liability is limited to $750 unless a greater amount is assumed in writing. n178

Baggage. Liability for items lost or damaged in guest rooms exists only when there is gross neglect by the proprietor. n179 The above limit of $750 also applies.

New Hampshire: Safekeeping. A hotel keeper is required to provide a safe for deposit of a guest's valuables. If a guest fails to utilize the service after receipt of notice, the hotel keeper is not liable for any loss to the valuables if the hotel keeper is shown to be free of fault or negligence or that the guest caused the loss. For valuables deposited by the guest, liability of the hotel is limited to $1,000.

Baggage. Liability for loss from assigned rooms exists unless the hotel keeper proves freedom from fault or negligence. Maximum liability is $300. For loss of property outside of the assigned room, the hotel keeper is not liable for said property unless as specially entrusted to the hotel's care and custody. n180

There is no liability for damage to guests' property caused by fire unless it was caused by the hotel keeper's negligence. n181

New Jersey: Safekeeping. A guest who fails to utilize a safe provided for deposit of valuables after receipt of notice thereof, has no right of recovery from the hotel for loss sustained. Where valuables are delivered for deposit, liability is limited to $5,000 unless a larger amount is agreed upon. The guest must prove the amount of loss. n182

Baggage. No liability to the guest exists where the hotel is without fault or negligence. Liability is possible for loss of property taken from an assigned room or when the property has been specially entrusted. The guest must prove the amount of loss and a liability limit of $1,500 applies. n183

The hotel keeper is required to provide ordinary and reasonable care for all items in the hotel's custody and is not liable for loss from any force over which the hotel has no control. n184 Definitions of "hotel," "guest" and "valuables" are provided. n185

New Mexico: Safekeeping. A guest who fails to utilize a safe provided for deposit of valuables, after receipt of notice thereof, has no right of recovery from the hotel for loss sustained.

Baggage. Hotel keepers are liable to a guest for loss to property (including valuables) when caused by their theft or negligence with a limit of $1,000. n186

New York: Safekeeping. A hotel that provides a safe or safe deposit boxes and gives public notice thereof is not liable for any loss to valuables of its guests not deposited for safekeeping. An establishment is not required to accept property valued at more than $1,500 and liability is limited to that amount unless a written agreement to the contrary is made. n187

Baggage. Liability for loss to wearing apparel or other property from the assigned room, lobby or hallway is limited to $500 unless caused by negligence of the hotel. Liability for loss to articles deposited in a baggage room is limited to $100 unless a written receipt showing a larger value is issued by the hotel. In such case, liability is limited to $500 except when loss is caused by the hotel's negligence. For parcels deposited in a checkroom without charge, the usual $200 liability limit for loss, exclusive of that caused by the hotel's negligence, may be raised to $300. n188 Loss through fire produces no liability except when the hotel is at fault. n189

For loss of an animal destroyed by fire, liability is limited to $300 unless a larger amount is agreed upon. n190 For property damaged or lost while in transit to and from the hotel, a liability limit of $250 applies unless it is raised to a maximum of $500 through use of a receipt. These limits do not apply when the hotel is at fault. n191

North Carolina: Safekeeping. An innkeeper must accept for safekeeping valuables of a guest in an amount not

exceeding $500 and may refuse to receive items of greater value. No liability exists for valuables not so deposited. n192

Baggage. Liability for loss or damage exists only in cases resulting from a failure to exercise reasonable care. Such liability is limited to $100 unless a list with values is provided to the innkeeper. Upon receipt of the list, the liability limit does not apply. n193

No liability exists where loss occurs through fire not caused by the innkeeper's negligence or resulting from any force over which the innkeeper has no control. n194

North Dakota: Safekeeping. A hotel keeper who provides a safe, proper lock on the sleeping rooms and public notice of the statute is not liable for injury to a guest's property not deposited unless the guest has offered to make the deposit and the hotel has refused it. The hotel is not obliged to accept property valued at more than $300 and liability is limited to that amount for accepted items. n195 A greater liability may be agreed upon. The limits do not apply when loss is caused by theft or negligence of the hotel keeper. n196

Baggage. Property placed in the custody of the hotel, other than in the assigned rooms, is held at the owner's risk except for loss through negligence of the hotel. n197 Liability for property placed in the assigned rooms is that of a depository for hire subject to limits of $150 for each trunk and its contents, $10 for each package and its contents, and $50 for other miscellaneous effects. A greater liability may be assumed in writing. No liability exists for fire not caused by the hotel keeper. n198 Property of a departed guest or a prospective guest may be held by the hotel at the risk of the owner. n199

Ohio: Safekeeping. A hotel keeper who provides a safe, proper lock on sleeping rooms and public notice of the statute is not liable for injury to a guest's property not deposited unless the guest has offered to make the deposit and the hotel has refused it. n200 No hotel keeper is obligated to accept items valued at more than $500 and that limit applies to articles received except when loss occurs through theft or negligence of the innkeeper. n201

Baggage. Liability for other property placed in its care is that of a depository for hire. Unless greater amounts are assumed, liability is limited to $150 for each trunk and its contents, $50 for each valise and its contents and $10 for each package and it contents. n202

Oklahoma: Safekeeping. Where a hotel provides a place of safekeeping for valuables of a guest and provides proper notice of the fact, no liability exists where the guest has failed to deposit the property regardless of the cause of the loss. A hotel is not required to accept items valued at more than $300, and liability is limited to that amount for items received unless a written agreement is made to increase liability. n203

Baggage. Liability for loss irrespective of cause is limited to $100 for each trunk and its contents, $75 for each valise and its contents, $25 for each package and its contents and $50 for miscellaneous effects, with an overall limit of $250, unless a greater amount is agreed to in writing. Liability for property of departed guests is that of a gratuitous bailee and is limited to $50. Liability limits for baggage in transit are the same as those applicable to baggage in the hotel. n204 Definitions of "apartment hotel" and "guest" are provided. n205

Oregon: Safekeeping. A hotel keeper who provides a safe, proper lock on the sleeping rooms and proper notice of the statute is not liable for injury to a guest's property not deposited unless the guest has offered to make the deposit and the hotel has refused to accept it. The hotel is not obliged to accept articles valued at more than $300, and liability is limited to that amount for accepted items. A greater liability may be agreed upon. The limits do not apply when loss is caused by theft or negligence of the hotel. n206

Baggage. No liability exists unless baggage or other property is delivered to the hotel for safekeeping or loss is caused by the negligence of the hotel. n207 For other property, the hotel has the duty of a depository for hire with liability limits of $150 for each trunk and its contents, $50 for each valise and its contents, $10 for each package and its contents

and $50 for other miscellaneous effects unless a greater liability is assigned in writing. n208

Baggage or other property left by departed guests or forwarded by prospective guests may be held at the risk of the owner. n209 In cases where liability is imposed on a hotel, other than those specifically noted, liability is limited to $50 except when caused by theft or gross negligence of the hotel. n210

Pennsylvania: Safekeeping. A hotel keeper who provides a safe, a proper lock on the sleeping rooms and proper notice of the statute is not liable for injury to a guest's property not deposited unless the guest has offered to make the deposit and the hotel has refused to accept it. The hotel is not obliged to accept property valued at more than $300 and liability is limited to that amount for accepted items. n211 A greater liability may be agreed upon. The limit does not apply when loss is caused by theft or negligence of the hotel. n212

Baggage. No liability exists unless baggage or other property is delivered to the hotel for safekeeping or loss is caused by the negligence of the hotel. n213 For other property, the hotel has the duty of a depository for hire with liability limits of $150 for each trunk and it contents, $50 for each valise and its contents, $10 for each package and its contents and $50 for other miscellaneous effects unless a greater liability is assumed in writing. Baggage or other property of departed guests or prospective guests may be held at the risk of the owner. n214

Rhode Island: Safekeeping. A hotel that provides a place of safekeeping for valuables of a guest and gives public notice thereof is not liable for loss of property not deposited. Where property is delivered, liability is limited to $500 unless a greater sum is agreed to in writing. n215

Baggage. No liability exists for items, other than valuables deposited, unless loss occurs through negligence of the hotel keeper. For items not within the assigned room, no liability exists unless they were held in the custody of the hotel. n216

South Carolina: Safekeeping. A hotel that provides a safe for valuables of a guest and gives notice thereof in the assigned room is not liable for loss of property not deposited. When property is delivered, liability exists only when negligence of the hotel keeper caused the loss and a limit of $2,000 applies.

Baggage. When notice is placed in the assigned room directing the guest to keep the door locked, no liability exists for loss caused by failure to comply with the notice. When the hotel keeper's negligence contributes to the loss, a $500 limit applies.

None of the limits apply when loss is contributed to by the wilfulness of the hotel keeper. A definition of "innkeeper" is provided. n217

South Dakota: Safekeeping. A hotel keeper who provides a safe, proper lock on the sleeping rooms and proper notice of the statute is not liable for injury to a guest's property not deposited unless the guest has offered to make the deposit and the hotel has refused to accept it. The hotel is not obliged to accept property valued at more than $300 and liability is limited to that amount for accepted items. n218 A greater liability may be agreed upon. The limit does not apply to any loss caused by theft or negligence of the hotel keeper. n219

Baggage. No liability exists unless baggage or other property is delivered to the hotel for safekeeping or loss is caused by the negligence of the hotel. n220 For other property, the hotel has the liability of a depository for hire, with liability limits of $150 for each trunk and its contents, $50 for each valise and its contents, $10 for each package and its contents and $50 for miscellaneous effects unless a greater liability is assumed in writing. n221 Baggage or other property of departed guests or prospective guests may be held at the risk of the owner. n222

Tennessee: Safekeeping. When a hotel provides a place of safekeeping for the valuables or merchandise samples of a

guest and posts notice thereof in the assigned room, the proprietor is not liable for any loss to such items sustained by a guest who fails to utilize such service. n223 Liability is limited to $300 unless a greater amount is agreed upon. n224

Baggage. When a storage place is provided and notice thereof is given, the hotel is not liable for loss to baggage not deposited in the storage place and not taken from the assigned room unless theft was perpetrated by an employee of the hotel. n225 Existing liability is limited to $150 unless a greater amount is agreed upon in writing. n226

Texas: Safekeeping. A hotel keeper who provides a safe, a proper lock in sleeping rooms and proper notice of the statute is not liable for more than $50 for injury to a guest's property not deposited unless the guest has offered to make the deposit and the hotel has refused to accept it. This limit does not apply when loss occurs through negligence or wrongdoing of the hotel. n227

Baggage. No basic provision concerning liability for baggage of guests has been found. Property of departed guests or prospective guests may be held at the risk of the owner. n228

Utah: Safekeeping. A hotel providing a safe for valuables of its guests and giving notice in the office and assigned rooms is not liable for items not deposited unless loss is caused by acts of its employees. For deposited items, liability is limited to $250 unless a receipt is given by the hotel and a higher value is declared by the guest. n229 The hotel is not required to accept property valued at more than $250, and liability is limited to that amount unless otherwise agreed. Liability exists when loss is caused by theft or negligence of the hotel keeper. n230

Baggage. Excepting valuables, the liability of a hotel for loss to property of guests placed in its care is that of a depository for hire. Liability is limited to $150 for each trunk and its contents, $50 for each valise and its contents, and $10 for each package and its contents, unless a greater liability is assumed. n231

Vermont: Safekeeping. A hotel keeper who provides a safe for the valuables of the guests and gives public notice thereof is not liable to guests for loss to property not deposited unless caused by lack of ordinary care and diligence. n232

Baggage. No liability exists unless loss is caused by lack of ordinary care and diligence of the hotel keeper. n233 The same standard applies to loss or damage to samples or when loss is caused by fire or overwhelming force. n234

A liability limit of $300 applies to all property unless the guest gives notice of the additional value and offers to pay any charges for care. n235

Virginia: Safekeeping. When the hotel posts a notice in the office and the assigned room stating that all valuables must be deposited in the office, no liability exists for loss to items not so deposited. There is no obligation to accept an item valued at more that $500.

Baggage. Liability for loss from the assigned room is limited to $300. The hotel has the duty to exercise due care and diligence to provide honest and competent employees and to take reasonable precautions to protect the property. n236 When the hotel provides suitable locks on the doors and windows and the guest fails to keep the opening secure, the hotel is not liable. n237 When loss occurs through fire or overwhelming disaster, liability is limited to $200 except when caused by negligence of the hotel. n238 No liability exists for items lost or damaged unless they are left in the assigned room or placed in the actual custody of an employee. n239

Washington: Safekeeping. When a hotel provides a safe for the valuables of its guests and gives public notice thereof, it has no liability for loss or damage to items not deposited regardless of the cause. No obligation is imposed to accept property valued at more than $1,000. A liability limit in that amount exists irrespective of the value of the property unless a greater amount is assumed in writing. Loss must be caused by theft or gross negligence of the hotel. n240

Baggage. Excepting valuables, liability is limited to loss caused by gross negligence, not to exceed $200 unless a greater amount is assumed in writing. Other limits include $150 for each trunk and its contents, $50 for each valise and its contents, $10 for each package and its contents and $50 for miscellaneous effects unless increased by written agreement. Property of departed guests and prospective guests may be held at the risk of the owner. In no event shall liability for loss of these goods received by the hotel exceed $100. n241

West Virginia: Safekeeping. A hotel is not liable for loss to the valuables of a guest provided that notice is posted in the assigned room, office and public reception room that such items must be deposited in the office and no such deposit is made.

Baggage. A liability limit of $200 is imposed when loss takes place from the assigned room. The hotel has the duty to exercise due care and diligence in providing honest employees and to take every reasonable precaution to protect the property of the guests. n242

Wisconsin: Safekeeping. A hotel that provides a safe for the valuables of its guests, proper locks on sleeping room doors and gives proper notice thereof is not liable for loss of valuables not tendered for safekeeping. There is no obligation to accept items valued at more than $300. Liability for loss is limited to that amount unless it is increased by written agreement. n243

Baggage. No liability exists for loss to property not delivered to the hotel for safekeeping unless caused by the negligence of the hotel. n244 No liability exists for fire loss unless intentionally caused by the hotel. When liability exists because loss was caused by theft or gross negligence of the hotel, limits include $200 for each trunk and its contents, $75 for each valise and its contents, $10 for each package and its contents and $50 for miscellaneous effects unless a greater liability is assumed. Property of departed guests or prospective guests may be held at the risk of the owner. n245

Wyoming: Safekeeping. A hotel keeper who provides a safe for the valuables of the guests and gives proper notice thereof is not liable for loss to undeposited items unless caused by the negligence of the hotel keeper. This exemption from liability does not apply to such valuables usually retained in the room or on the person of the guest. n246 The form of notice is set forth in the statute. n247

Baggage. No statutory provision.

COMPUTER-ASSISTED RESEARCH

LEXIS: For state statutory provisions, use the search terms above for the desired topic and narrow the library of the search to the desired state.

FOOTNOTES:

(n1)Footnote 30. "In almost all jurisdictions, statutes modify or limit the strict common-law liability of the innkeeper for the loss of or damage to property of guests. Some statutes reduce the liability of an innkeeper for the loss of or damage to the property of a guest from that of an insurer to that of a depository for hire, while others limit the innkeeper's liability for loss or damage to a specified amount. Such statutes are in derogation of the common law, so they are strictly construed and cannot be extended in their operation or effect by a doubtful implication. However, the rule of strict construction may not be pushed to the extent of nullifying the beneficial purpose of the statute, or lessening the scope plainly intended to be given to it." 40A Am. Jur. 2d Hotels, Motels, and Restaurants § 157 (2003). *See* § 52.05 (c), *infra,* for details.

(n2)Footnote 31. For statutes requiring the hotel to provide a safe, *see, e.g.,* Ala. Code § 34-15-12; La. Civ. Code

Ann. art. 2968; N.H. Rev. Stat. Ann. § 353:1.

(n3)Footnote 32. *See, e.g.*, Cal. Civ. Code § 1860; Md. Code Ann., Bus. Reg. § 15-103; excluding liability where a guest declines to utilize such service.

(n4)Footnote 33. *See, e.g.*, Conn. Gen. Stat. Ann. § 44-1; Ga. Code Ann. § 43-21-10, 43-21-11.

(n5)Footnote 34. *Donaldson v. Y.W.C.A. of Duluth, 539 N.W.2d 789 (Minn. 1995)* (lodging house owed no duty to prevent resident from committing suicide), *reversing 526 N.W.2d 215 (Minn. App. 1995)* (which held that a special relationship between the lodging house and the resident gave rise to a duty to aid the resident in distress).

(n6)Footnote 35. *Ellis v. Luxbury Hotels, 666 N.E.2d 1262 (Ind. App. 1996).*

(n7)Footnote 36. *Kukla v. Syfus Leasing Corp., 928 F. Supp. 1328 (S.D.N.Y. 1996).*

(n8)Footnote 37. *Kahane v. Marriott Hotel Corp., 672 N.Y.S.2d 55 (A.D. 1st Dept. 1998).*

(n9)Footnote 38. *McNeal v. Days Inn of America, 498 S.E.2d 294 (Ga. App. 1998).*

(n10)Footnote 39. *McAndrew v. Pierre Hotel, 693 N.Y.S.2d 20 (1999); Rednour v. Hilton Hotels Corp., 724 N.Y.S.2d 739 (A.D. 2001)* (where a homeless person using the telephone in a hotel lobby had no cause of action against the hotel for injuries sustained from a sudden criminal attack); *Camp v. Loughran, 727 N.Y.S.2d 471 (A.D. 2001)* (where an intoxicated guest on a group ski weekend failed to show a breach of duty by the hotel in relation to her sexual assault by other weekend participants); *McAvey v. Lee, 260 F.3d 359 (5th Cir. 2001)* (where a motel was found liable to a guest who fractured his heel while chasing two unidentified robbers who had taken his wallet by force in his motel room); *Young v. Fitzpatrick, 865 So. 2d 969 (La. App. 2004)* (motel was not liable for breaching its duty of ordinary care to the victim of a stabbing at the motel by a motel guest. Insufficient evidence of criminal activity on the motel premises made the attack unforeseeable and the motel staff exercised reasonable care).

(n11)Footnote 40. *Id. at 974; Gardin v. Emporia Hotels, Inc., 61 P.3d 732 (Kan. App. 2003).*

(n12)Footnote 41. *See, e.g.*, Me. Rev. Stat. Ann. tit. 30.A § 3851; Ohio Rev. Code Ann. § 4721.01; Or. Rev. Stat. § 699.010; Tex. Rev. Civ. Stat. Ann. art. 4592.

(n13)Footnote 42. In *Chapparone v. First Florence Corp., 504 S.E.2d 761 (Ga. App. 1998),* the motel was not liable for jewelry valued at $20,000 allegedly stolen from a locked attach'e case left in the room by the guests during their stay. The motel provided lockers for the deposit of valuable articles. Statutory notice of this service was provided in the assigned room. As a result, the motel was absolved of responsibility for undeposited valuables. Failure of the motel manager to mention three thefts from the motel during the preceding year was not relevant. In *Gooden v. Day's Inn, 395 S.E.2d 876 (Ga. App. 1990),* the limitation on liability was upheld even though an employee of the hotel absconded with the money. The statute contained no exception for losses caused by the negligence or intentional torts of the hotel's employees.

In *Goncalves v. Regent Int'l Hotels, 447 N.E.2d 693 (N.Y. 1983),* the court distinguished between negligence arising from non-compliance with statutory provisions and negligence causing loss to the valuables of the guest although full compliance with the statute took place. The latter type of negligence did not remove the limited liability provided to the hotel by the legislature.

(n14)Footnote 43. In *Terry v. Lincscott Hotel Corp., 617 P.2d 56 (Ariz. 1980),* the liability of the hotel for jewelry stolen from the guest's assigned room was eliminated by the guest's disregard of notice of the availability of the safe. If active misfeasance of the innkeeper had caused the loss, liability would have continued.

Under Nevada law, a guest seeking to recover for loss of jewelry not deposited for safekeeping has the burden of proving that loss occurred through the hotel's gross neglect. *Kabo v. Summa Corp., 523 F. Supp. 1326 (E.D. Pa. 1981).*

In *Schear v. Motel Mgt. Corp. of Am., 487 A.2d 1240 (Md. App. 1985),* recovery for loss of valuables from the assigned room was limited to $300 by statute unless the loss resulted from collusion or negligence on the part of the hotel.

(n15)Footnote 44. *See Grimes v. M.H.M., Inc., 776 S.W.2d 336 (Ark. 1989).* Two briefcases containing valuable coins and jewelry disappeared from the guest's assigned room. A question of fact existed as to whether the hotel had posted the required notice in ten conspicuous places in the hotel.

(n16)Footnote 45. *See Searcy v. La Quinta Motor Inns, 676 So. 2d 1137 (La. App. 1996)* (guests at the defendant's motel were allowed to recover $4,939, the value of personal property stolen from their room during their absence. The attempt of defendant to limit liability to $500 pursuant to statute was unsuccessful on appeal. To receive the benefit of the statutory limit, the innkeeper was required to post the article limiting liability conspicuously in the guest room and registration area. Evidence indicated that the statutory text was posted in the guest room in small print on a 3 x 7 inch card, but that only a general disclaimer of liability which did not contain the required statutory wording was posted in the registration area. *O'Rourke v. Hilton Hotels Corp., 560 So. 2d 76 (La. App. 1990)* (the court limited liability to $500 for loss of a guest's rings left in the assigned room. Posting of notices by the hotel was sufficiently conspicuous to comply with the statute).

In *Insurance Co. of N. Am. v. Holiday Inns of Am., 337 N.Y.S.2d 68 (1972),* plaintiff sought to recover $35,000 paid to its insured, a guest of defendant, taken from the guest's assigned room. The statutory defense limiting liability was properly dismissed because the hotel had not posted all of the required notices in the public rooms. Such notices had been properly posted in the guest rooms.

(n17)Footnote 46. *Nicholaides v. University Hotel Assocs., 568 A.2d 219 (Pa. Super. 1990).* The coin collection of guests disappeared from a dresser drawer in their hotel room. Liability would be limited to $300 if the statutory requirements were satisfied. The jury found that no such compliance had occurred.

See also Kates v. Brunswick Motel Enters., 371 S.E.2d 686 (Ga. App. 1988). Property of a guest disappeared from the assigned room and the innkeeper was granted summary judgment in a suit by the guest to recover for the loss. The statutory notice requirements were complied with by placing three notices in the assigned room, one on the wall behind the registration desk and one on the registration form signed by the guest. The statute did not set forth precise locations for posting of the notice.

(n18)Footnote 47. *Latini v. Loews Corp., 657 F. Supp. 475 (S.D.N.Y. 1987).* The purse of a guest was removed from her luggage in her room while she was absent. Although the hotel provided safe deposit boxes for guests to store valuables, a question of fact existed as to whether notices of the availability of the safe deposit boxes were conspicuously posted in the hotel office as required by statute. Twenty-three posters appeared in other parts of the hotel.

Buck v. Hankin, 269 A.2d 344 (Pa. Super. 1970). Valuables of a guest were stolen from the assigned room. Common law liability of the motel remained because it did not give statutory notice of its place for safekeeping. Notice on the registration card of the management's willingness to provide a safe for the storage of valuables was not equivalent to a posting in ten conspicuous places as required by the statute.

(n19)Footnote 48. In *Roth v. Investment Prop. of Lexington, 560 S.W.2d 831 (Ky. App. 1978),* guests unsuccessfully attempted to recover for valuables stolen from the assigned room. Although the statutory requirements for posting in public places were not complied with, a suitable notice was posted on the door of each sleeping room. The notice provided was thought to be more likely to give actual notice to the guest than the form set forth by statute.

See also North River Ins. Co. v. Tisch Mgt., Inc., 166 A.2d 169 (N.J. Super. 1960).

(n20)Footnote 49. *Ippolito v. Hospitality Management Associates, 575 S.E.2d 562 (S.C. App. 2003).* When $500,000 in jewelry and $8,000 of cash were stolen from two guests' room, the court held that it was a question for the jury whether the guests were supplied with adequate notice regarding the availability of safety deposit boxes. Postings of such availability were not in the guest room and although one of the victims admitted he was aware of the availability of a safe, he said he was not informed that he was required to keep valuables in the safe. *Skyways Motor Lodge Corp. v. General Foods Corp., 403 A.2d 722 (Del. 1979).* Valuables of a guest were removed from his assigned room during his absence. Failure of the hotel to advise the guest of the availability of a safe or vault kept in place the nearly absolute liability of the hotel as established at common law. A notice with small type posted in the room requiring valuables to be left in the office was not sufficient. The statute provided that a notice disclosing the existence of a secure safe or vault be posted in every lodging room and other conspicuous places.

(n21)Footnote 50. *Featherstone v. Dessert, 22 P.2d 1050 (Wash. 1933).*

(n22)Footnote 51. However, common law principles may apply to personal injury and property loss to guests assaulted in the hotel parking lot. There was no duty to warn guests of one prior armed robbery of a guest in the parking lot or fifteen incidents or robberies and damage to cars in and around the hotel. *See Roberts v. Forte Hotels, 489 S.E.2d 540 (Ga. App. 1997).* Motel patrons unsuccessfully sued the motel for loss of possessions stolen from them in the motel parking lot by an armed robber as they exited their car. This criminal activity was not reasonably foreseeable since there appeared to be no showing of prior criminal conduct. Liability would exist upon proof of failure to exercise reasonable care to discover the occurrence of harmful acts together with failure to give patrons adequate warning of possible events. *Dettlaff v. Holiday Inns, 10 Fed. Appx. 100 (4th Cir. 2001). Nagashima v. Hyatt Wilshire Corp., 279 Cal. Rptr. 265 (1991)* where property of a guest was taken from her possession while she stood at the checkout counter in the hotel lobby. Liability of the hotel was limited by statute to $500 while the property was on the hotel premises.

(n23)Footnote 52. *See Florida Sonesta Corp. v. Aniballi, 463 So. 2d 1203 (Fla. App. 1985),* where a notice limiting liability of the hotel was posted in the assigned room but the hotel failed to comply with the portion of the statute requiring posting in the office, hall, or lobby, or other prominent place in the establishment.

(n24)Footnote 53. Ala. Code § 34-15-12.

(n25)Footnote 54. *Id.* at § 34-15-13.

(n26)Footnote 55. *Id.* at § 34-15-11.

(n27)Footnote 56. *Id.* at § 34-15-14.

(n28)Footnote 57. *Id.* at § 34-15-15(a).

(n29)Footnote 58. *Id.* at § 34-15-15(b).

(n30)Footnote 59. *Id.* at § 34-15-1.

(n31)Footnote 60. Alaska Stat. § 08.56.050(a).

(n32)Footnote 61. *Id.* at § 08.56.050(b).

(n33)Footnote 62. *Id.* at § 08.56.060(a).

(n34)Footnote 63. *Id.* at § 08.56.060(b).

(n35)Footnote 64. *Id.* at § 08.56.070.

(n36)Footnote 65. Ariz. Rev. Stat. Ann. § 33-302A.

(n37)Footnote 66. *Id.* at § 33-302B.

(n38)Footnote 67. *Id.* at § 33-302D.

(n39)Footnote 68. *Id.* at § 33-302C.

(n40)Footnote 69. *Id.* at § 33-302E.

(n41)Footnote 70. Ark. Stat. Ann. § 20-26-302(a), (b).

(n42)Footnote 71. *Id.* at § 20-26-302(c), (d).

(n43)Footnote 72. *Id.* at § 20-26-303.

(n44)Footnote 73. *Id.* at § 20-26-304.

(n45)Footnote 74. Cal. Civ. Code § 1860.

(n46)Footnote 75. *Id.* at § 1859.

(n47)Footnote 76. *Id.* at §§ 1859-1860.

(n48)Footnote 77. Colo. Rev. Stat. § 12-44-105.

(n49)Footnote 78. *Id.* at § 12-44-106.

(n50)Footnote 79. *Id.* at §§ 12-44-108-12-44-109.

(n51)Footnote 80. *Id.* at § 12-44-108.

(n52)Footnote 81. *Id.* at § 12-44-107.

(n53)Footnote 82. *Id.* at § 12-44-110.

(n54)Footnote 83. *Id.* at § 12-44-111.

(n55)Footnote 84. *Id.* at § 12-44-112.

(n56)Footnote 85. Conn. Gen. Stat. Ann. § 44-1.

(n57)Footnote 86. *Id.* at § 44-2.

(n58)Footnote 87. Del. Code Ann. tit. 24, § 1502.

(n59)Footnote 88. *Paraskevaides v. Four Seasons Washington, 292 F.3d 886 (D.C. Cir 2002)* (where jewelry valued at $1,200,000 was stolen from an in-room hotel safe while the guests were absent, the hotel was denied its rights to use the statutory limit on liability since the required posting had occurred only in the guest rooms and not in the public rooms. The guests actual notice could not cure the defect in posting. The case was remanded for further determination of the hotel's liability).

(n60)Footnote 89. D.C. Code Ann. § 30-101(a).

(n61)Footnote 90. *Id.* at § 38-101(b).

(n62)Footnote 91. Fla. Stat. Ann. § 509.111(1).

(n63)Footnote 92. *Id.* at § 509.111(2).

(n64)Footnote 93. Ga. Code Ann. § 43-21-10.

(n65)Footnote 94. *Id.* at § 43-21-11.

(n66)Footnote 95. *Id.* at § 43-21-9.

(n67)Footnote 96. *Id.* at § 43-21-8.

(n68)Footnote 97. *Id.* at § 43-21-12.

(n69)Footnote 98. Haw. Rev. Stat. § 486K-4(a).

(n70)Footnote 99. *Id.* at § 486K-4(b).

(n71)Footnote 100. *Id.* at § 486K-5.

(n72)Footnote 101. *Id.* at § 486K-6.

(n73)Footnote 102. *Id.* at § 486K-9.

(n74)Footnote 103. Idaho Code § 39-1804(1).

(n75)Footnote 104. *Id.* at § 39-1804(2).

(n76)Footnote 105. *Id.* at § 39-1801.

(n77)Footnote 106. Ill. Comp. Stat. ch. 740, § 90/1.

(n78)Footnote 107. *Id.* at § 90/3.

(n79)Footnote 108. *Id.* at § 90/3.2.

(n80)Footnote 109. *Id.* at § 90/4.

(n81)Footnote 110. *Id.* at § 90/3.1.

(n82)Footnote 111. Ind. Code Ann. § 32-33-7-2.

(n83)Footnote 112. *Id.* at § 32-33-7-3.

(n84)Footnote 113. *Id.* at § 32-33-7-5.

(n85)Footnote 114. *Id.* at § 32-33-7-6.

(n86)Footnote 115. *Id.* at § 32-33-7-4.

(n87)Footnote 116. Ind. Code Ann. § 32-33-7-1. A "lodger" is also included in the definition of "guest."

(n88)Footnote 117. Iowa Code Ann. § 671.1.

(n89)Footnote 118. *Id.* at § 671.2.

(n90)Footnote 119. *Id.* at § 671.3.

(n91)Footnote 120. *Id.* at § 671.4.

(n92)Footnote 121. *Id.* at §§ 671.5-671.6.

(n93)Footnote 122. Kan. Stat. Ann. § 36-402(c).

(n94)Footnote 123. *Id.* at § 36-402(a).

(n95)Footnote 124. *Id.* at § 36-402(b).

(n96)Footnote 125. *Id.* at § 36-402(d).

(n97)Footnote 126. *Id.* at § 36-401.

(n98)Footnote 127. Ky. Rev. Stat. Ann. § 306.020.

(n99)Footnote 128. *Id.* at § 306.030(1)(a).

(n100)Footnote 129. *Id.* at § 306.030(1)(c).

(n101)Footnote 130. *Id.* at § 306.030(1)(b).

(n102)Footnote 131. *Id.* at § 306.030(3).

(n103)Footnote 132. *Id.* at § 306.030(4).

(n104)Footnote 133. *Id.* at § 306.030(2).

(n105)Footnote 134. La. Civ. Code Ann. art. 2968.

(n106)Footnote 135. *Id.* at art. 2969.

(n107)Footnote 136. *Id.* at art. 2971.

(n108)Footnote 137. *Id.* at arts. 2965-2967.

(n109)Footnote 138. *Id.* at art. 2971.

(n110)Footnote 139. Me. Rev. Stat. Ann. tit. 30.A § 3851.

(n111)Footnote 140. *Id.* at § 3852.

(n112)Footnote 141. *Id.* at § 3853.

(n113)Footnote 142. *Id.* at tit. 30.A § 3854.

(n114)Footnote 143. Md. Code Ann., Bus. Reg. §§ 15-102-15-103.

(n115)Footnote 144. *Id.* at BR § 15-103(b)(1).

(n116)Footnote 145. *Id.* at BR § 15-103(b)(2).

(n117)Footnote 146. *Id.* at BR § 15-103(c).

(n118)Footnote 147. *Id.* at BR §§ 15-104, 15-106.

(n119)Footnote 148. *Id.* at BR § 15-105.

(n120)Footnote 149. *Id.* at BR § 15-107.

(n121)Footnote 150. *Id.* at BR § 15-101.

(n122)Footnote 151. Mass. Ann. Laws ch. 140, § 10.

(n123)Footnote 152. *Id.* at ch. 140, § 11.

(n124)Footnote 153. MCLS § 427.102.

(n125)Footnote 154. MCLS at § 427.101.

(n126)Footnote 155. Minn. Stat. Ann. § 327.71, subd. 1.

(n127)Footnote 156. *Id.* at subd. 3.

(n128)Footnote 157. *Id.* at subd. 4.

(n129)Footnote 158. *Id.* at subd. 2.

(n130)Footnote 159. *Id.* at subd. 5.

(n131)Footnote 160. *Id.* at subd. 6.

(n132)Footnote 161. *Id.* at § 327.70.

(n133)Footnote 162. Miss. Code Ann. § 75-73-5.

(n134)Footnote 163. *Id.* at § 75-73-7.

(n135)Footnote 164. A ring valued at $9,750 disappeared from a guest's luggage while it was in the possession of the hotel during the check-in process or after it had been misdelivered to a hotel room occupied by an unknown guest. The innkeeper had a safe deposit box available for valuables of guests but no offer of deposit was ever made. Summary judgment for the guest in the amount of $9,750 was improper. If the statutory notices were properly posted, defendant's liability would be limited to $200. *Stormer v. Richfield Hospitality Services, 60 S.W.3d 10 (Mo. App. E.D. 2001).* Mo. Ann. Stat. § 419.020.

(n136)Footnote 165. This section was rewritten in 2002 to apply to any "lodging establishment" which is defined as any place of business where 5 or more guest rooms are kept and held out to the public for hire by transient and/r permanent guests. *Id.* at § 419.010.

(n137)Footnote 166. *Id.* at § 419.030.

(n138)Footnote 167. Mont. Code Ann. § 70-6-504.

(n139)Footnote 168. *Id.* at § 70-6-501.

(n140)Footnote 169. *Id.* at § 70-6-502.

(n141)Footnote 170. *Id.* at §§ 70-6-503, 70-6-505.

(n142)Footnote 171. Neb. Rev. Stat. § 41-208.

(n143)Footnote 172. *Id.* at § 41-209.

(n144)Footnote 173. *Id.* at §§ 41-210-41-211.

(n145)Footnote 174. *Id.* at § 41-212.

(n146)Footnote 175. *Id.* at § 41-213.

(n147)Footnote 176. *Id.* at §§ 41-202-41-207.

(n148)Footnote 177. Nev. Rev. Stat. Ann. § 651.010, subd. 2.

(n149)Footnote 178. *Id.* at subd. 3.

(n150)Footnote 179. *Id.* at subd. 1.

(n151)Footnote 180. N.H. Rev. Stat. Ann. § 353:1.

(n152)Footnote 181. *Id.* at § 353:2.

(n153)Footnote 182. N.J. Stat. Ann. § 29:2-2.

(n154)Footnote 183. *Id.* at § 29:2-3.

(n155)Footnote 184. *Id.* at § 29:2-4.

(n156)Footnote 185. *Id.* at § 29:2-1.

(n157)Footnote 186. N.M. Stat. Ann. § 57-6-1.

(n158)Footnote 187. N.Y. Gen. Bus. Law § 200.

(n159)Footnote 188. *Id.* at § 201.

(n160)Footnote 189. *Id.* at § 202.

(n161)Footnote 190. *Id.* at § 203.

(n162)Footnote 191. *Id.* at § 203-a.

(n163)Footnote 192. N.C. Gen. Stat. § 72-3.

(n164)Footnote 193. *Id.* at § 72-2.

(n165)Footnote 194. *Id.* at § 72-4.

(n166)Footnote 195. N.D. Cent. Code § 60-01-29.

(n167)Footnote 196. *Id.* at § 60-01-30.

(n168)Footnote 197. *Id.* at § 60-01-31.

(n169)Footnote 198. *Id.* at § 60-01-32.

(n170)Footnote 199. *Id.* at § 60-01-33.

(n171)Footnote 200. Ohio Rev. Code Ann. § 4721.01.

(n172)Footnote 201. *Id.* at § 4721.02.

(n173)Footnote 202. *Id.* at § 4721.03.

(n174)Footnote 203. Okla. Stat. Ann. tit. 15, § 503a.

(n175)Footnote 204. *Id.* at tit. 15, § 503b.

(n176)Footnote 205. *Id.* at tit. 15, §§ 503c-503d.

(n177)Footnote 206. Or. Rev. Stat. § 699.010.

(n178)Footnote 207. *Id.* at § 699.020.

(n179)Footnote 208. *Id.* at § 699.030(1).

(n180)Footnote 209. *Id.* at § 699.030(2).

(n181)Footnote 210. *Id.* at § 699.040.

(n182)Footnote 211. Pa. Stat. Ann. tit. 37, § 61.

(n183)Footnote 212. *Id.* at § 62.

(n184)Footnote 213. *Id.* at § 63.

(n185)Footnote 214. *Id.* at § 64.

(n186)Footnote 215. R.I. Gen. Laws § 5-14-1.

(n187)Footnote 216. *Id.* at § 5-14-2.

(n188)Footnote 217. S.C. Code Ann. § 45-1-40.

(n189)Footnote 218. S.D. Codified Laws Ann. § 43-40-1.

(n190)Footnote 219. *Id.* at § 43-40-2.

(n191)Footnote 220. *Id.* at § 43-40-4.

(n192)Footnote 221. *Id.* at § 43-40-5.

(n193)Footnote 222. *Id.* at § 43-40-6.

(n194)Footnote 223. Tenn. Code Ann. § 62-7-103.

(n195)Footnote 224. *Id.* at § 62-7-104.

(n196)Footnote 225. *Id.* at § 62-7-105.

(n197)Footnote 226. *Id.* at § 62-7-106.

(n198)Footnote 227. V.T.C.A. Occupations Code § 2155.052. Tex. Rev. Civ. Stat. Ann. art. 4592.

(n199)Footnote 228. V.T.C.A. Occupations Code § 2155.053. *Paraskevaides v. Four Seasons Washington, 292 F.3d 886 (D.C. Cir. 2002)* (where jewelry valued at $1,200,000 was stolen from an in-room hotel safe while the guests were absent, the hotel was denied its rights to use the statutory limit on liability since the required posting had occurred only in the guest rooms and not in the public rooms. Actual notice of the guests could not cure the defect in posting. The case was remanded for further determination of the hotel's liability). *Id.*

(n200)Footnote 229. Utah Code Ann. § 29-1-1.

(n201)Footnote 230. *Id.* at § 29-1-2.

(n202)Footnote 231. *Id.* at § 29-1-3.

(n203)Footnote 232. Vt. Stat. Ann. tit. 9, § 3141.

(n204)Footnote 233. *Id.* at § 3143(b).

(n205)Footnote 234. *Id.* at § 3143(a), (c).

(n206)Footnote 235. *Id.* at § 3142.

(n207)Footnote 236. Va. Code Ann. § 35.1-28(A).

(n208)Footnote 237. *Id.* at § 35.1-28(B).

(n209)Footnote 238. *Id.* at § 35.1-28(C).

(n210)Footnote 239. *Id.* at § 35.1-28(D).

(n211)Footnote 240. Wash. Rev. Code Ann. § 19.48.030.

(n212)Footnote 241. *Id.* at § 19.48.070.

(n213)Footnote 242. W. Va. Code § 16-6-22.

(n214)Footnote 243. Wis. Stat. Ann. § 254.80.

(n215)Footnote 244. This section has been renumbered as Wis. Stat. Ann. § 254.81. *Id.* at § 50.81.

(n216)Footnote 245. Wis. Stat. Ann. § 254.82

(n217)Footnote 246. Wyo. Stat. § 33-17-101.

(n218)Footnote 247. *Id.* at § 33-17-102.

Thompson on Real Property, Thomas Editions

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CHAPTER 52 INNS AND INNKEEPERS

7-52 Thompson on Real Property, Thomas Editions § 52.06

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§ 52.06 Property Deposited for Safekeeping.

(a) Disclosure of Value.

One of the most common sources of litigation arises when the guest deposits the item of value with the hotel for safekeeping and, thereafter, a loss occurs when the hotel is in possession. The guest will not have declared the value of the item to the hotel and the hotel will have made no inquiry of the guest. The relevant statute will allow the hotel to refuse to accept for deposit items valued at more than a designated limit. In most jurisdictions, the burden is placed upon the guest to disclose the value. Failure to do so will limit the recovery of the guest to the amount set forth in the statute. n248 A statement by the guest that the items delivered were valuable but without disclosure of approximate value will not prevent the statutory limit from taking effect. n249 A guest who makes a false representation minimizing the value of the items delivered will be limited in recovery to the value asserted. n250 A minority of jurisdictions place the burden upon the hotel to make inquiry rather than require the guest to volunteer the worth of the item deposited. n251 In some states, the negligence of the hotel or its employees bars the hotel from reducing its liability because of the guest's non-disclosure of value. n252

A hotel that provides notice of the availability of a place for safekeeping in a manner inconsistent with the statutory plan will not be able to use the statutory liability limits when loss to the deposited property takes place. n253 For example, issuance to guests of registration cards stating: "Valuable packages must be deposited at the office ... otherwise the management will not be responsible for any loss" estopped the hotel from utilizing the $1,000 statutory limit on liability. n254 A guest who makes a deposit based on such notice could reasonably believe that the hotel would have full responsibility in the event of a loss.

COMPUTER-ASSISTED RESEARCH

LEXIS: safe w/1 keeping w/30 disclos! w/15 value! w/30 hotel!

(b) Suitability of Place.

Statutes that limit the liability of a hotel when it provides a place for keeping safe the valuables of its guests have varying levels of specificity. It may be necessary to provide a "safe," a "metal safe," a "vault" or any appropriate secure

place may suffice. In Ohio, safe deposit boxes of the type commonly found in banks were held to be within the statutory reference to a "metal safe or vault." n255 Similar safe deposit boxes provided in a New York hotel were treated differently. The Court of Appeals found that a material issue of fact existed regarding the equivalence of the safe deposit boxes and the "safe" required by statute. To be within the statutory provision, "a "safe' should be a receptacle that, under the circumstances, provides adequate protection against fire, theft, and other reasonable foreseeable risks. In deciding this question, all aspects of a hotel's security system may be considered." If the safe deposit boxes were found to be the type of secure place contemplated by the statutory limitation on liability, recovery for the alleged loss of more than $1,000,000 would be limited to $500 even if negligence of the hotel were shown. n256

COMPUTER-ASSISTED RESEARCH

LEXIS: safe w/1 keeping w/30 hotel! w/15 place! or vault!

(c) Requirement of Access.

Maintaining a secure safe on the premises and providing the guest with the statutory notice of its presence may not be sufficient to absolve the hotel of liability for loss of valuables taken from the assigned room. Ready accessibility appears to be another important requirement. In Zaldin v. Concord Hotel, the defendant did not provide entry to the safe between the hours of 11 p.m. and 8 a.m. n257 Guests who had placed jewelry in the vault and withdrawn it for evening use were denied the privilege of returning the items shortly after midnight. During the night, the items were stolen from the guest's room. In the absence of any statutory authority in the hotel to restrict access, summary judgment in favor of the hotel was error. When the hotel elects to refuse usage of the safe by the guest, it is not providing a safe and becomes ineligible to receive the statutory protection.

Similarly, guests who sought to return jewelry to the safe deposit box previously provided to them by the hotel but were unable to do so, were allowed to recover against the hotel when the items were stolen from their assigned room while they slept. When returning to the hotel at 5:30 a.m., they waited at the front desk for 24 or more minutes but were unable to locate a hotel employee to assist them. Negligence of the hotel in failing to provide an employee to facilitate restoration of the items into the safe deposit box was sufficient to impose liability. n258

COMPUTER-ASSISTED RESEARCH

LEXIS: safe w/1 keeping w/30 access! w/30 hotel!

FOOTNOTES:
(n1)Footnote 248. Illustrative cases include:

Pachinger v. MGM Grand Hotel-Las Vegas, 802 F.2d 362 (9th Cir. 1986) (when jewelry valued at $19,000 was stolen from an allegedly safe storage area and recovery was limited to $750 (applying Nevada law).

Weiser v. Albuquerque Oil and Gasoline Co., 325 P.2d 720 (N.M. 1958), where a jewelry sample case left with the motel desk clerk disappeared. The case was not placed in the available safe because it was too large, but the guest was given a receipt by the clerk. A liability limit of $1,000 was applied.

Robert Altman, Inc. v. Biltmore Hotel, 11 Cal. Rptr. 838 (1961), where jewelry cases deposited by a salesman-guest disappeared from the hotel vault. Liability was limited to $250. *See also Ricketts v. Morehead Co., 265 P.2d 963 (Cal. App. 1954).*

Oppenheimer v. Morton Hotel, 210 F. Supp. 609 (W.D. Mich. 1962), aff'd, 324 F.2d 766 (6th Cir. 1963), where a briefcase containing diamonds valued at $50,000 disappeared after it had been deposited with the hotel clerk who issued

a safety deposit form to the guest. Liability was limited to $50.

Eichberg & Co. v. Van Orman Fort Wayne, 248 F.2d 758 (7th Cir. 1957) where jewelry samples valued at $29,646 were delivered to a bellboy to be placed in the hotel vault. Liability was limited to $400 when the jewelry disappeared from the hotel manager's office. The merchandise was too large to fit in the available safe.

Carlton v. Beacon Hotel, 157 N.Y.S.2d 744 (1956), aff'd, 149 N.E.2d 527 (1958), where the guest deposited for safekeeping jewelry and foreign currency valued at $23,000. The "Declared Valuation" portion of the form provided by the hotel was left blank by the guest. Recovery was limited by statute to $500.

(n2)Footnote 249. *K.S.K. Jewelry Co. v. Chicago Sheraton, 283 F.2d 28 (7th Cir. 1960),* where items delivered for safekeeping disappeared from a locked checkroom where they were placed because they were too large for the vault.

(n3)Footnote 250. *Kalpakian v. Oklahoma Sheraton, 398 F.2d 243 (10th Cir. 1968),* where jewelry alleged to be worth $286,546 was described as having a value not to exceed $1,500.

(n4)Footnote 251. *Sagman v. Richmond Hotels, 138 F. Supp. 407 (E.D. Va. 1956)* where a salesman-guest deposited a valise containing jewelry with hotel employees who placed the bag in the vault from which it disappeared. The innkeeper who fails to make inquiry as to value does so at his own risk and his right to refuse to accept items valued in excess of the statutory limit was waived.

(n5)Footnote 252. *See Layton v. Seward Corp., 31 N.W.2d 678 (Mich. 1948)* Loss of $3,500 delivered by a guest to the hotel clerk to be placed in the safe must have occurred through theft or negligence of hotel employees. The liability limit of $250 did not apply. In *World Diamond, Inc. v. Hyatt Corp., 699 N.E.2d 980 (Ohio App. 1997),* jewelry dealers as hotel guests deposited personal jewelry and trade inventory in safe deposit boxes provided by the hotel without any disclosure of value. Two days later the boxes were found empty without any evidence of forcible entry. The guests were given the opportunity to avoid the $500 liability limit by showing an oral special arrangement or loss through hotel negligence or employee theft. Notice requirements were satisfied..

Schiffman v. Narragansett Hotel, 134 A.2d 153 (R.I. 1957). A salesman-guest deposited jewelry samples with the hotel for safekeeping. When loss resulted from negligence of the hotel, the statute limiting liability did not apply. Nevertheless, plaintiff had no adequate proof of damages.

Cf. Nova Stylings v. Red Roof Inns, 747 P.2d 107 (Kan. 1987). An unknown person entered the hotel manager's office and removed a bag of jewelry placed there for safekeeping by a salesman-guest. The statutory limit on the innkeeper's liability applied even when the innkeeper was negligent.

Kahn v. Hotel Ramada of Nev., 799 F.2d 199 (5th Cir. 1986). Valuables of a guest disappeared from the hotel baggage room. The hotel's liability was limited to $750 even if the guest proved gross negligence.

(n6)Footnote 253. *Fuchs v. Harbor Island Spa, 420 F.2d 1100 (5th Cir. 1970).*

(n7)Footnote 254. *See Garner v. Margery Lane, Inc., 242 So. 2d 776, 780 (Fla. Dist. App. 1970).* A waiver theory was also employed by the court.

(n8)Footnote 255. *See Chase Rand Corp. v. Pick Hotels Corp. of Youngstown, 147 N.E.2d 849 (Ohio St. 1958).*

(n9)Footnote 256. *Goncalves v. Regent Int'l Hotels, 447 N.E.2d 693, 698-699 (N.Y. 1983).*

(n10)Footnote 257. *397 N.E.2d 370 (N.Y. 1979).*

(n11)Footnote 258. *See Durandy v. Fairmont Roosevelt Hotel, Inc., 523 F. Supp. 1382 (E.D. La. 1981).*

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CHAPTER 52 INNS AND INNKEEPERS

7-52 Thompson on Real Property, Thomas Editions § 52.07

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§ 52.07 Property Kept in the Assigned Room.

When a hotel provides to the guest all required statutory notice, the guest is potentially subject to an elimination of claim or to a statutory liability limit for loss or damage to property while it is in the assigned room. n259 Statutory limits may apply irrespective of the cause of loss or may apply only when no showing is made that the hotel or its employees caused the loss. n260 Variations among jurisdictions are sufficiently great that examination of local law is required. Distinctions may be made between loss through conversion rather than through negligence, or between acts of the hotel and acts of its employees. In Bhattal v. Grand Hyatt-New York, the court concluded that the statutory limits did not apply to loss occurring after a mistaken and unauthorized removal of luggage from the locked room assigned to the guest, since such an act constituted a conversion by the hotel. Employees of the hotel had acted in good faith, relying on the accuracy of a computer which was actually in error. The court distinguished the limits applicable to losses caused by unauthorized actions of hotel employees from the policy excluding limits when loss is caused by the hotel itself. n261

As a means of restricting the guest's ability to recover for loss of property from assigned rooms, Nevada, for example, has imposed the rigid standard of gross neglect. n262 In Louisiana, the innkeeper is absolved from responsibility for loss of property "stolen by force and arms, or with exterior breaking open of doors, or by any other extraordinary violence." n263 However, this article did not apply to loss occurring after an assault on guests in their room and a breaking of the security chain lock when initial entry was obtained through use of a pass key obtained from the desk clerk. n264 More commonly, the usual rules of negligence are applied. n265 It has become more common for hotels to provide secure safes with individual keys or combinations in the hotel room itself. Where a jewelry salesman was unable to deposit his samples valued at $142,000 in the safes provided at the check-in desk because the safes were too small, he was directed by the clerk to use the room safe instead. A notice stated that a guest's valuables so deposited were insured up to $10,000. During the absence of the guest, the safe was forcibly removed from the wall and the contents stolen. It was held that the posted sign did not limit the hotel's liability to $10,000 and that the clerk's representation that the room safe was secure induced usage and estopped the hotel from relying on the statutory limitation on liability. n266

COMPUTER-ASSISTED RESEARCH

LEXIS: guest! w/15 property w/2 loss! or damage! w/15 hotel! w/5 assigned w/2 room!

FOOTNOTES:

(n1)Footnote 259. *See, e.g., Duvall v. The Ritz Carlton Hotel Co., 946 F.2d 418 (5th Cir. 1991).* A patron returned from dinner and found that cash and property valued in excess of $3,000 had been stolen from his hotel room during his absence. The statutory limitation on liability of $500 was found to be applicable. Required notices were properly posted and patron ignored the safe deposit boxes available for use. No notice of the presence of the items in the room had been given to the hotel. *Bleam v. Marriott Corp., 655 N.Y.S.2d 566 (N.Y. App. Div. 1997).* In *Nadjarian v. Desert Palace, 895 P.2d 1291 (Nev. 1995),* guests suffered the loss of personal property valued at $24,800 placed by them in their complimentary assigned room. The Supreme Court found that the statutory liability limit of $750 for property left in the room of a guest might not apply. After assigning the initial room to the plaintiffs, the hotel in error checked the plaintiffs out and re-rented the room to another while plaintiffs' belongings remained inside. Some, but not all, of this property was transferred by the hotel to a second assigned room. The loss of the remaining property might have occurred from the first assigned room or during the transfer process such that summary judgment in favor of the hotel was not proper. The statutory limitation of $500 was applied to a loss caused by a failure to repair the lock on the balcony door of plaintiffs' hotel room. The guests argued unsuccessfully that the hotel was estopped from relying on the limitation by misleading them that the room was safe. No affirmative statement of safety was proved. After the problem was reported, the repairman went to the wrong room. Although such act may have been a negligent mistake, it was not an affirmative action to mislead. *Southernmost Affiliates v. Alonzo, 654 So.2d 1066 (Fla. App. 1995).* In *H.K. Mallak, Inc. v. Fairfield FMC Corp., 209 F.3d 960 (7th Cir. 2000)* a jewelry salesman was robbed as he stepped into the guest room for the first time. The protection of the notice statute does not apply to the losses of a guest resulting from "an inside job." Additionally, notice provisions cannot limit liability of the hotel for losses to the guest occurring prior to having an opportunity to read them.

(n2)Footnote 260. *See Gooden v. Day's Inn, 395 S.E.2d 876 (Ga. App. 1990),* where a hotel employee absconded with money removed from the guest's assigned room by a housekeeper who believed the room to be unoccupied. Under the relevant statutes, the hotel was not liable for articles stolen from the guest's room whether the loss arose through negligence of the hotel's employees or was actually perpetrated by such employees.

Cf. Philip v. Fairmont-Roosevelt Hotel, 469 So. 2d 1140 (La. App. 1985) where a ring disappeared from the guest's assigned room during her absence. A showing of negligence was required to extend liability beyond the $100 statutory limit.

(n3)Footnote 261. *563 F. Supp. 277 (S.D.N.Y. 1983).*

(n4)Footnote 262. *See, e.g., Owens v. Summa Corp., 625 F.2d 600 (5th Cir. 1980),* where a burglar obtained entry to an assigned room through alteration of the dead bolt lock. Similar facts occur in *Levitt v. Desert Palace, 601 F.2d 684 (2d Cir. 1979)* and in *Levin v. Desert Palace, 465 A.2d 1019 (Pa. Super. 1983)* (applying Nevada law).

(n5)Footnote 263. La. Civ. Code Ann. art. 2970.

(n6)Footnote 264. *Kraaz v. LaQuinta Motor Inns, 410 So. 2d 1048 (La. 1982).*

(n7)Footnote 265. *See, e.g., Kutbi v. Thunderlion Enters., 698 P.2d 1044 (Or. App. 1985),* where a thief removed jewelry, clothing and luggage from the assigned room when the guest was not present.

(n8)Footnote 266. *Charles Bernard, Ltd. v. Tobias Jewelry, 751 So. 2d 711 (Fla. App. 2000).*

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CHAPTER 52 INNS AND INNKEEPERS

7-52 Thompson on Real Property, Thomas Editions § 52.08

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§ 52.08 Property Kept in Other Locations Within the Hotel.

In cases where loss or damage occurs to property of a guest not deposited for safekeeping, it is usually irrelevant whether the injury or disappearance takes place in the assigned room or some other part of the hotel. For example, where a working prototype model manufactured by plaintiff disappeared because of overnight entry into a locked conference room, the item was treated as a merchandise sample. The liability limit of $250 applied to loss anywhere within the hotel since no agreement for a greater liability was undertaken. n267

Similarly, a guest who ate dinner in the rotating dining room of a hotel and lost her valuables from her purse by placing it on the stationary portion of the structure was subject to the usual statutory provisions barring recovery because she had failed to deposit her property for safekeeping. n268 A guest who was deprived of her possessions while standing in the hotel lobby at the checkout counter was also subject to liability limits. n269

A bailment is created when a guest of the hotel leaves the hotel restaurant after dinner without taking her purse, and the busboy, pursuant to instructions, places the item with the restaurant cashier. When the cashier thereafter delivered the purse to the wrong person, the hotel breached its duty of reasonable care in the return of the valuables. n270

In some cases, the property of the guest may come within the custody and control of the innkeeper even before the innkeeper is aware of that fact. A prospective guest who placed his luggage in the area used by the hotel to assist guests during registration became subject to the usual innkeeper-guest rules. When the luggage disappeared while he waited for hours to get a room assignment, it was treated as being entrusted to the hotel because it had been placed in the site provided. n271 In contrast, no bailment was created when a patron attending a luncheon in defendant-hotel placed her mink fur jacket in an unattended coatroom. No custody or control was surrendered to the hotel and there was no showing that an implied or constructive delivery occurred because there was no showing of an expectation by the hotel that the area would be utilized by the patron. n272

COMPUTER-ASSISTED RESEARCH

LEXIS: guest! w/15 property w/2 loss! or damage! w/15 hotel! not w/15 assigned w/2 room!

FOOTNOTES:

(n1)Footnote 267. *Associated Mills v. Drake Hotel, 334 N.E.2d 746 (Ill. App. 1975).*

(n2)Footnote 268. *Summer v. Hyatt Corp., 266 S.E.2d 333 (Ga. App. 1980).*

(n3)Footnote 269. In *Moog v. Hilton Hotels Corp., 882 F. Supp. 1392 (S.D.N.Y. 1995),* a large bag containing jewelry and keys disappeared from the floor area adjacent to the guest's legs while she was in the checkout line. The district court found that several issues of fact precluded the hotel from obtaining summary judgment. Since the hotel provided a safe deposit box for its customers, which this plaintiff had used, claims thereunder would be limited to $1,500 even though the loss occurred during the checkout process. Plaintiff asserted that she had never been notified of the statutory liability limit. Although notices of the limitation had been posted, it was doubtful that they were placed where they could readily be seen by guests. Additionally, the plaintiff asserted that her insurance company refused to pay for the loss because the hotel security officer failed to file a police report as he agreed to do and because the hotel failed to provide accurate information concerning the loss to the insurer. The extent of the apparent authority of the security officer and the responses of the hotel in similar situations were in dispute. *Nagashima v. Hyatt Wilshire Corp., 279 Cal. Rptr. 265 (1991).*

(n4)Footnote 270. *Shamrock Hilton Hotel v. Caranas, 488 S.W.2d 151 (Tex. Civ. App. 1972).*

(n5)Footnote 271. *Swanner v. Conner Hotel Co., 224 S.W. 123 (Mo. App. 1920).*

(n6)Footnote 272. *National Fire Ins. Co. v. Commodore Hotel, 107 N.W.2d 708 (Minn. 1961).*

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CHAPTER 52 INNS AND INNKEEPERS

7-52 Thompson on Real Property, Thomas Editions § 52.09

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§ 52.09 Property Kept in Garages and Parking Lots.

For some time, it has been common practice for facilities catering to the housing of transient guests to provide convenient parking accommodations. These accommodations may be on or away from the premises, gratuitous or with additional charges, open or enclosed, with or without access controls and availability of valet service. Baggage, clothing and other personal property of the guest frequently remain stored in the guest's car during the period of occupancy. When loss or damage occurs to the vehicle or its contents, the hotel or motel usually is subject to the rules of bailment in determining its responsibility to the guest. n273 Places that merely provide an open and unguarded parking area do nothing to take possession of the auto or its contents. Control remains entirely with the guest, and no bailment is created. n274 Where the guest is able to show that control and dominion were placed with the innkeeper, a bailment exists and the bailee has the obligation to provide reasonable care for the subject matter bailed. n275 Delivery of the car keys to a hotel employee directed to park the vehicle in the hotel garage commonly is found to establish a bailor-bailee relationship. n276

Where the hotel employee is off-duty at the time, usual agency rules preclude attributing liability to the employer. n277 Contents of the car are included as a part of the bailment when they are apparent to the hotel or are of a type likely to be found in the car. n278 In some cases denying recovery to a guest, it is not clear whether the guest failed to show the creation of a bailment or failed to show that the bailee did not exercise the degree of care required by the circumstances. n279 Where delivery is made to the wrong person as part of the attempt to return, the rules applying absolute liability for misdelivery will ordinarily be applied. n280 The common law principle of "*infra hospitium*" is usually limited to belongings of the guest brought within the hotel building. n281 Consequently, statutory limitations on this liability of the hotel ordinarily do not affect potential recovery of the guest for loss or damage to the guest's car or its contents. n282 Such statutes are intended to modify the broad liability otherwise existing because of an innkeeper-guest relationship. In some cases, the valuables, clothing and baggage of the guest that are stolen or damaged after being left in the automobile are subject to the same statutory limitations applicable if those items had been brought by the guest to the assigned room and loss thereafter occurred. n283 Where the person suffering the loss is not a registered guest of the motel but is on the premises for other purposes, the statutes relating to limitations on the liability of an innkeeper ordinarily do not apply. n284

COMPUTER-ASSISTED RESEARCH

LEXIS: guest! w/15 property w/2 loss! or damage! w/15 hotel! w/5 garage! or parking!

FOOTNOTES:
(n1)Footnote 273. Iowa Code Ann. § 671.8 provides that a hotel or inn has the liability of a bailee for hire for damage to the guest's auto, or its contents while in the garage of the proprietor. Recovery for loss of contents is limited to $50 unless an inventory was filed with the proprietor at the time the auto was left in the garage. Where the garage is not personally owned or operated by the hotel or inn, no liability results. (*See* § 671.7.)

(n2)Footnote 274. *Miller v. Commonwealth Motor Hotels, Inc., 267 N.E.2d 925 (Mass. 1971).* Motel was not liable for theft of guest's vehicle from unattended parking lot.

Cloward v. Pappas, 387 P.2d 97 (Nev. 1963). Motel fire caused loss of property in assigned room and loss of car parked in adjacent carport. The insurer's liability of an innkeeper existing at common law did not apply to car. The guest retained control over the car and no bailment was created.

Sewell v. Mountain View Hotel, Inc., 325 S.W.2d 626 (Tenn. App. 1959). Car of a guest was damaged by a drunken driver while parked in the hotel lot. The court held that the innkeeper was not liable as a matter of law. The car was not "*infra hospitium*." No bailment was created. No attendant was provided to park or look after cars placed in the lot. The guest did not surrender the right of control to the innkeeper who is not responsible for acts of third persons with whom he is in no way connected.

(n3)Footnote 275. *Allen v. Hyatt Regency-Nashville Hotel, 668 S.W.2d 286 (Tenn. 1984).* Hotel guests parked their car in an enclosed hotel garage that maintained security personnel and an attendant controlling the exit. The facts were sufficient to create a bailment for hire and, upon proof of demand and non-delivery, the presumption of negligence applied.

(n4)Footnote 276. *Bidlake v. Shirley Hotel Co., 292 P.2d 749 (Colo. 1956).* A guest who delivered his car keys to a uniformed employee of the hotel to have his car placed in the garage utilized by the hotel surrendered possession of the car to the hotel. When the employee took the vehicle for a joyride and caused it to be damaged, the hotel was liable for losses sustained to the auto and to personal property removed from the glove compartment.

Dumlao v. Atlantic Garage, Inc., 259 A.2d 360 (D.C. 1969). Hotel guest's car and its contents disappeared from the hotel garage where it had been parked by the doorman. The hotel was not liable as a bailee for undisclosed contents. Facts failed to show that a bailment of the contents had been accepted by the hotel or that such an acceptance should be imputed.

Traylor v. Hyatt Corp., 178 S.E.2d 289 (Ga. App. 1970). Guest of a hotel was allowed to sue as a gratuitous bailee for clothing of his two children, college students, left in his car after delivery to a hotel employee for parking. Summary judgment was improperly granted to defendant and the complaint was reinstated.

Zurich Fire Ins. Co. of N.Y. v. Weil, 259 S.W.2d 54 (Ky. 1953). Hotel guest gave his car keys to a bellboy who parked the car in the hotel garage. Another bellboy, while off duty, stole the keys and the car, wrecked the vehicle and abandoned it. The hotel had a duty of ordinary care as a bailee for hire and this duty was breached.

Todd v. Natchez-Eola Hotels Co., 157 So. 703 (Miss. 1934). The hotel was liable for loss of a guest's car taken by the parking lot attendant for his personal use without permission.

(n5)Footnote 277. *Smith v. Hotel Antlers Co., 133 N.E.2d 89 (Ind. App. 1956).* A hotel guest gave his car keys to a hotel bellman in civilian clothes while attending a party in the guest's rooms. The bellman was allegedly intoxicated at the time and a collision soon followed. When loss occurred, the driver was the agent of the guest, not of the hotel.

Therefore, no bailment with the hotel existed. In any event contributory negligence of the guest barred recovery on a bailment theory or on strict liability of an innkeeper.

(n6)Footnote 278. *LaFayette Hotel Co. v. Gordon & Ferguson, Inc., 365 S.W.2d 857 (Ark. 1963).* Sample case of a salesman-guest was stolen from his car which was parked by the hotel doorman in a nearby garage. The court held that it was error to require the hotel to prove that it was free of negligence. The bailor had the burden of showing negligence of bailee. No statute was involved.

Hallman v. Federal Parking Servs., 134 A.2d 382 (D.C. 1957). Contents of a guest's auto were stolen while the car was parked in the hotel lot. Delivery to a bellboy caused an acceptance of the car and its contents into custody of hotel. The contents were in plain view. The lot was not an integral part of the hotel and it became liable as a bailee for hire. It was immaterial that payment was made directly to the lot and not the hotel. *Cf. Lucas v. Auto City Parking Co., 62 A.2d 557 (D.C. 1948)* where contents were not in plain view and no agreement, express or implied, existed.

General Acc. Fire & Life Assur. Co. v. J.F.D.L., Inc., 148 So. 2d 857 (La. App. 1963). A guest's auto and its contents were stolen from the street in front of the hotel where it had been parked by a hotel parking attendant. Guest had made arrangements to park the car in the hotel garage. The court held that there was a question for trial as to whether the suitcase and its contents were items that might be expected to be left in the car giving constructive notice to the hotel sufficient to create a duty of care. Negligence of the hotel was established.

Campbell v. Portsmouth Hotel Co., 20 A.2d 644 (N.H. 1941). Bailment of the guest's car included the contents ordinarily expected to be kept in it.

(n7)Footnote 279. *Brown v. Christopher Inn Co., 344 N.E.2d 140 (Ohio App. 1975).* Items were stolen from the van of a guest while it was parked in hotel lot. No recovery was permitted because no evidence of negligence was shown. The representation of a hotel porter that the contents would be safe did not make the hotel an insurer.

(n8)Footnote 280. *Martin v. Holiday Inns, Inc., 245 Cal. Rptr. 717 (1988).* An auto and U-Haul trailer containing all of the guests' personal possessions were stolen from the motel parking lot. The ninety-day statute of limitations applicable to conversion of clothing, baggage, etc., left at hotel was held to be inapplicable.

Kallish v. Meyer Hotel Co., 184 S.W.2d 45 (Tenn. 1944). A hotel guest delivered his car to the hotel doorman who completed a claim check purporting to be issued by a garage with which the hotel had a working relationship. The vehicle was misdelivered by the garage and found later in a damaged condition. Garage storage charges were billed by the hotel. A bailment for hire was created with the hotel. Its liability as an innkeeper was not considered.

Dispeker v. New Southern Motel, 373 S.W.2d 904 (Tenn. 1963). Car of guest was stolen from hotel parking lot by off-duty bellboy. Hotel was liable on theory of misdelivery because the removal by the bellboy was an analogous act. No showing of negligence is required. The auto was the subject of a bailment for hire because it was delivered to a hotel employee for parking. The thief learned, while on duty, that the car would start without an ignition key.

(n9)Footnote 281. "The term 'infra hospitium,' includes all property deposited and accepted in exclusive control of the innkeeper, wherever the innkeeper elects to physically store the property, whatever its character, so long as it is not the type of property for which special statutory provision exists." *Shepherd Fleets, Inc. v. Opryland USA, Inc., 759 S.W.2d 914, 923 (Tenn. App. 1988).*

Phoenix Assur. Co. of N.Y. v. Royale Inv. Co., 393 S.W.2d 43 (Mo. App. 1965). Guest's car was stolen from a hotel parking lot. The statutory limit on liability of $200 for property of a guest related to things carried into the hotel by the guest and did not include the car. The hotel was nothing more than a bailee for hire of the car.

Shepherd Fleets, Inc. v. Opryland USA, Inc., 759 S.W.2d 914 (Tenn. App. 1988). An employee of a hotel negligently

drove his personal vehicle so as to strike the guest's car parked in the hotel's valet parking lot. Since the car was in the exclusive control of the hotel, it was "practically an insurer" of its value. Statutes limiting liability for baggage and valuables did not apply.

Andrew Jackson Hotel, Inc. v. Platt, 89 S.W.2d 179 (Tenn. App. 1935). The auto of a hotel guest was damaged in a collision while it was being operated by a garage employee. The guest had asked the hotel to arrange for repairs to the car and the garage was an agent of the hotel for that purpose. When the car was removed for repairs, the liability of the hotel ceased. Negligence of the driver of the other vehicle was the proximate cause of the injury. The garage keeper was a bailee for hire who was liable only for his own negligence or that of his employees. The court indicated that "*infra hospitium*" will apply to goods of a guest placed outside of the inn on the direction of the innkeeper without the consent of the guest. Here the guest consented and the principle did not apply.

Merchants Fire Assur. Corp. of N.Y. v. Zion's Secs. Corp., 163 P.2d 319 (Utah 1945). A bellboy parked a guest's car in the hotel garage, returned later for a joyride and damaged the car. The court applied the concept of "*infra hospitium*" to items placed outside of the hotel at its direction as well as goods brought into the hotel building. As a result, the hotel was liable for the damage caused. It was not necessary to prove the existence of a bailment, although one had been created.

Cf. Governor House v. Schmidt, 284 A.2d 660 (D.C. 1971). A guest left his car and its contents in a hotel parking garage. The common law rule of "*infra hospitium*" applied because the garage was physically a part of the hotel structure. It was not necessary for the hotel to be on notice of the contents of the auto left in its custody.

Ellerman v. Atlanta Am. Motor Hotel Corp., 191 S.E.2d 295 (Ga. App. 1972). An auto and its contents owned by a guest were stolen from the motel parking lot. The relationship of innkeeper-guest was created. A contract purporting to exempt the motel from liability for the car's contents was void as against public policy.

Vilella v. Sabine, Inc., 652 P.2d 759 (Okla. 1982). The guest's vehicle and its contents parked in a motel parking lot that was patrolled by a security guard were under the care of the motel within the meaning of a statute generally imposing liability under such circumstances. The statute is a codification of the common law rule making the innkeeper a virtual insurer of property entrusted to its care by a guest. Such liability has not been reduced to that of a bailee for hire. The statute limiting liability for baggage and other items for personal use applied to the extent that these items were part of the contents of the car.

Park-O-Tell Co. v. Roskamp, 223 P.2d 375 (Okla. 1950). The hotel was liable for the loss of a guest's auto and its contents left in the hotel garage provided to guests without charge.

(n10)Footnote 282. A guest sued the hotel where he was staying for the value of personal belongings stolen from his car while it was parked in the hotel's parking lot. Although the alleged loss was in excess of $50,000, summary judgment was granted in the Circuit Court limiting the hotel's liability to the statutory maximum ($1,000 for the loss of valuables and $500 for loss of clothing and other property). Since these amounts did not meet the Circuit Court jurisdictional threshold, the matter was transferred to County Court. The District Court granted certiorari to review the transfer to county court, which would be improper if the hotel made affirmative representations of parking lot safety, thus estopping it from asserting the statutory limitations. *David v. Prime Hospitality Corp., 676 So. 2d 1049 (Fla. App. 1996). Fennema v. Howard Johnson Co., 559 So. 2d 1231 (Fla. App. 1990).* A U-Haul moving van containing almost all of the possessions of the guests and with an automobile in tow were stolen from the motel parking lot. The court held that the statute limiting the motel keeper's liability for loss of a guest's property may not apply to items stolen from the parking lot. In any event, the motel was estopped from invoking the statute because the motel clerk had misled the guests into believing that their contents were safe.

Howard Johnson Co. v. Fair, 575 So. 2d 723 (Fla. App. 1991). The statute limiting the motel keeper's liability does

not apply to automobiles or trailers left in the motel's parking lot. A guest's pickup truck and enclosed trailer were stolen from the motel parking lot. A negligent misrepresentation by the hotel clerk was found to be the cause of the loss.

Plant v. Howard Johnson's Motor Lodge, 500 N.E.2d 1271 (Ind. App. 1986), 514 N.E.2d 1048 (Ind. 1987). A U-Haul moving van and its contents, the possessions of a hotel guest, were stolen from the parking lot of the motel. The van was later recovered but the contents were not. The court held that the statute limiting liability for loss to items brought into the hotel did not apply. A question of fact existed as to whether the motel failed to exercise due care and summary judgment in its favor was improper. Liability of the hotel for the contents of the vehicles depended upon whether the patron exercised reasonable care in leaving the property in the vehicle under the circumstances. Apparently, the court was ready to impose a duty on the hotel even if no bailment for hire was shown.

Kushner v. President of Atlantic City, Inc., 251 A.2d 480 (N.J. Super. 1969). The auto of a guest was stolen from the motel parking lot. Upon a showing of delivery of the vehicle and keys to a hotel employee and a failure to return upon demand, the motel was presumed to be negligent. Full recovery ($6,000) was allowed when the hotel failed to rebut the presumption. The statute limiting liability to $100 for loss of clothing, baggage or other chattels was not applicable.

(n11)Footnote 283. *Solomon v. Downtowner of Tulsa, Inc., 357 F.2d 449 (10th Cir. 1966).* A salesman's jewelry samples were stolen from a guest's car in a motel parking lot, where they were placed by him immediately prior to checking out. No notice of existence or value was given to the motel as required by a statute which excluded motel liability for merchandise samples in the event of non-compliance. This statute applied to departing guests in same manner as to registered guests. Non-liability for loss in the hotel room was not expanded to unlimited liability when the samples were placed in the trunk of the car.

Savoy Hotel Corp. v. Sparks, 421 S.W.2d 98 (Tenn. App. 1967). Valuables of a guest were stolen from his car while it was parked in the hotel parking garage. The car was also stolen but recovered with $500 in damage. The hotel was not liable for the contents because it provided a place of storage which was ignored by the guest. Usual bailment rules were applied to the damage to the car.

(n12)Footnote 284. A person attending a dinner meeting at defendant's hotel parked in the hotel parking garage during a heavy rainstorm. When the patron returned to her car, she found that it had suffered damage from a flash flood occurring in that part of the city. No warning signs were posted by the hotel. Evidence supported instructions to jury to determine whether the damage to the vehicle directly resulted from the failure to warn. There was a rebuttable presumption that the car owner would have heeded the warning. *Rust v. Hammons, 929 S.W.2d 834 (Mo. App. 1996). Diplomat Restaurant, Inc. v. Townsend, 165 S.E.2d 317 (Ga. App. 1968).* Innkeeper statute limiting liability did not relate to items stolen from an auto in restaurant parking lot. In order to apply, lodging must be furnished to the guest. Plaintiff recovered full value for items taken.

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CHAPTER 52 INNS AND INNKEEPERS

7-52 Thompson on Real Property, Thomas Editions § 52.10

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§ 52.10 Innkeepers Liens.

(a) Creation.

Almost all jurisdictions provide for a statutory lien in favor of hotel keepers or innkeepers under which they may retain possession of baggage or other items of personal property as security for the payment of charges due or funds advanced. n285

In some cases, similar types of establishments, such as boardinghouses, lodging houses, restaurants and bed and breakfast establishments, are also specifically included within the purview of the lien.

Such inclusions are an extension of the common law where the lien on possessions of a guest was limited to innkeepers. n286 It is conventional doctrine that this preferred status of the innkeeper was grounded upon the concept that the inn provided for travelers a safe haven from dangers of the road. n287 The Ninth Circuit has said: "Beginning in medieval times, an innkeeper had the nearly absolute duty at common law to take in all travelers and to accept their belongings for safekeeping. With minor exceptions he was absolutely liable to his guests for the full value of those belongings." n288 With such obligations imposed, it was reasonable to provide the innkeeper with an easy method of assuring payment from the departing guest, who was frequently a total stranger. n289 Since hotels and boardinghouses had no similar obligation to accept all persons seeking shelter and to keep their belongings safe, the protection of the lien was thought to be unnecessary for those occupations. n290

Although the expectation is that the property brought upon the premises by the guest will be owned by the guest or another person, such as an employer, with an obligation to pay the charges, the lien may be broad enough to cover property of others while in the possession of the guest when the hotel has no notice of the interest of the true owner. n291 Occasionally, local policy dictates that certain items be excluded from the impact of the lien (e.g., tools and uniforms, n292 intoxicating liquors and military documents, pay or awards, n293 or medications and children's clothing. n294 Commonly, the lien attaches for the full amount of unpaid indebtedness. However, some jurisdictions place an upper limit on the amount of the charges to which the lien will apply. n295 Issues of priority among liens will vary in result according to local law. n296

COMPUTER-ASSISTED RESEARCH

LEXIS: innkeeper! w/5 lien! w/15 creat!

(b) Enforcement.

Procedures for the enforcement of the innkeeper's lien vary considerably within the jurisdictions. n297 Failure of a statute to provide basic constitutional protections of notice and an opportunity for a hearing has been a concern on some occasions.

A typical criticism of a statutory plan was addressed by Klim v. Jones, which found the former California Innkeeper's Lien Law to be unconstitutional. n298 That version of the statute failed to provide for any hearing prior to the imposition of the lien, an approach consistent with early common law principles. n299 Emphasis was also placed upon the hardships imposed by the statute for persons with meager assets and minimal economic strength. Consistent with the *Klim* position that the court had no desire to abolish the innkeeper's lien, the statute was amended to provide that the lien could be enforced only after final judgment for the charges claimed was rendered in favor of the innkeeper. n300 A detailed procedure was established to allow the innkeeper to retain the property pursuant to a writ of possession which may be issued *ex parte* if prescribed conditions are met. n301 Notice of the application is provided to the defendant who is given an opportunity to defeat the issuance of the writ. n302

The challenge to the Florida innkeeper's lien resulted in a similar decision. In Johnson v. Riverside Hotel, Inc., the court found that the property of the motel guests could be seized by the proprietor without notice or hearing in violation of due process requirements. n303 Through the statutory scheme, private individuals were given powers ordinarily vested in state officials. n304 For present enforcement of this hotelkeeper's lien, the operator may apply for a writ of distress enabling the retention of the property until final judgment is rendered. n305 The writ must be served on the defendant unless the defendant cannot be found. n306

In a similar situation, the Illinois statute permitting the private seizure of the property of hotel residents was sustained even though notice of the lien was not provided to the guests. n307 Such a seizure was not traditionally an action of the state ceded to private individuals. n308 Neither was the statutory authorization for the lien a sufficient state involvement so as to produce an unconstitutional deprivation of property rights. n309

New York also found that the enforcement of the innkeeper's lien law allowing the property of a guest to be detained without notice of a hearing was in violation of procedural due process requirements. n310 In time, the statute creating the lien was removed by the legislature. n311 Following the invalidation of the innkeeper's lien, the Court of Appeals with consistency declared that the State Constitution precluded the *ex parte* sale of a bailed automobile in an attempt to enforce a garage man's lien. n312

In other cases, issues relating to state action have been resolved so as to validate the possessory rights of the lienholder even though *ex parte* sale provisions are found to be available to the innkeeper. n313

COMPUTER-ASSISTED RESEARCH

LEXIS: innkeepert! w/5 lien! w/15 enforc!

FOOTNOTES:
(n1)Footnote 285. *See Perkins v. Marriott Int'l, 945 F. Supp. 282 (D.D.C. 1996).* Hotel patrons failed to pay their breakfast, which they believed was complementary. Although they were advised that the breakfast could not be charged to the room, they temporarily left the hotel without making a cash payment. In their absence, their belongings were searched and the room lock was changed. The court found that nonpayment of the charge created a lien in the

hotelkeeper and terminated any reasonable expectation of privacy for the patrons as to items left in the room. Conn. Gen. Stat. Ann. § 49-69; D.C. Code Ann. § 30-102(a); Ill. Comp. Stat. ch. 740 § 90/2; Ind. Code Ann. MCLS § 427.201. Ala. Code § 35-11-130 creates a lien in favor of hotels, inns, boardinghouses and restaurants; Alaska Stat. § 34.35.510 creates a lien in favor of hotels and boardinghouses. Property in the possession of a guest but owned by another is expressly excluded from the lien when the hotel has actual notice of that fact. Definitions of a "guest," "hotel or boardinghouse" and "operator" are provided in § 34.35.530; Ariz. Rev. Stat. Ann. § 33-951 creates a lien in favor of hotels, inns, boardinghouses, lodging houses, apartment houses and auto camp keepers. *See Elkhart Inv. Corp. v. Gazin, 537 P.2d 974 (Ariz. App. 1975),* distinguishing between an auto camp and a mobile home park; the innkeepers' lien was never intended to apply to vacant land; Ark. Stat. Ann. § 20-26-305(a) creates a lien in favor of hotels, inns, rooming houses and boardinghouses not to exceed $200; Cal. Civ. Code § 1861 creates a lien in favor of hotels, motels, inns, boardinghouses and lodging houses; Colo. Rev. Stat. § 38-20-102(b)(2) creates a lien in favor of hotels, motels, inns, boardinghouses and any other person renting temporary shelter to transient guests; Del. Code Ann. tit. 25, § 3901 creates a lien in favor of hotels, inns and a variety of other businesses; D.C. Code Ann. § 34-102(a) creates a lien in favor of hotels, motels or similar establishments providing lodging to transient guests; Fla. Stat. Ann. § 713.67 creates a lien in favor of keepers of hotels, apartment houses, rooming houses and boardinghouses. *See also* § 713.68; Ga. Code Ann. § 43-21-5 creates a lien in favor of inns, boardinghouses, lodging houses and eating houses; Haw. Rev. Stat. § 486K-2 creates a lien in favor of hotel keepers; Idaho Code § 39-1806 creates a lien in favor of hotel keepers. "Hotel" includes inns, public lodging houses and places with more than 10 bedrooms. *See* § 39-1801; Ill. Ann. Stat. ch. 71, para. 2 creates a lien in favor of hotel proprietors; Ind. Code Ann. § 32-8-27-2 creates a lien in favor of owners of any hotel, inn, boarding, eating, or lodging house or restaurant. Under § 13-1-7-33, this lien is extended to the operator of a mobile home park. *See Nicholson's Mobile Home Sales, Inc. v. Schramm, 330 N.E.2d 785 (Ind. App. 1975);* Iowa Code Ann. § 583.2 creates a lien in favor of inns, rooming houses, eating houses and any structure where rooms or board are furnished. *See* the definition of "hotel" in § 583.1; Kan. Stat. Ann. § 36-201 creates a lien in favor of inns, hotels, boardinghouses, apartment houses and rooming houses; Ky. Rev. Stat. Ann. § 376.340 creates a lien in favor of hotels, inns, boardinghouses and houses of private entertainment; La. Civ. Code Ann. art. 3233 creates a lien in favor of innkeepers and all others who let lodgings or receive boarders. Under art. 3234, the lien exists on all items brought by the guest whether owned by the guest or another; Me. Rev. Stat. Ann. tit. 30-A, § 3861 creates a lien in favor of inns, hotels and boardinghouses; Md. Com. Law II Code Ann. § 16-502 creates a lien in favor of hotelkeepers. By § 16-501, keepers of inns, motels and boardinghouses are included; The lien formerly existing under Mass. Ann. Laws ch. 255, § 23 has been abolished. The validity of the section had been sustained in *Davis v. Richmond, 512 F.2d 201 (1st Cir. 1975).* An exception exists under Mass. Ann. Laws ch. 140 § 14 where a guest abandons property for 6 months; Mich. Stat. Ann. § 18.301 creates a lien in favor of a keeper of any hotel, inn, boardinghouse, lodging house, bed and breakfast or furnished apartment; Minn. Stat. Ann. § 327.76, subd. 1 creates a lien in favor of innkeepers; Miss. Code Ann. § 75-73-15 creates a lien in favor of hotels, inns, boardinghouses and restaurants; Mo. Ann. Stat. § 419.060, subd. 1 creates a lien in favor of inns, hotels and boardinghouses, not to exceed $200 owed for board, lodging and money advanced. The lien is also placed upon the wages of the guest. *See Jackson v. Engert, 453 S.W.2d 615 (Mo. App. 1970)* distinguishing among a guest, a lodger and a boarder; Mont. Code Ann. § 71-3-1401 creates a lien in favor of hotels, inns, boardinghouses or lodging houses; Nev. Rev. Stat. Ann. § 108.480 creates a lien in favor of hotels, motels, inns, motor courts, boardinghouses and lodging houses. Exempted from the lien are tools or implements necessary to carry on the trade or employment of the guest as well as required work uniforms; N.J. Stat. Ann. § 2A:44-48 creates a lien in favor of hotels, apartment hotels, inns or boardinghouses; N.M. Stat. Ann. § 48-3-7 creates a lien in favor of innkeepers and others. Liens are also created in favor of operators of hotels, rooming houses, apartment houses, rental dwellings and others under§ 48-3-16; *see Blye v. Globe-Wernicke Realty Co., 300 N.E.2d 710 (N.Y. 1973)* declaring the New York innkeeper's lien unconstitutional because of a failure to provide notice and an opportunity for a hearing. The lien statute was repealed in 1990 by N.Y. Lien Law § 181. However, *see United States v. Rahme, 813 F.2d 31 (2d Cir. 1987)* and cases cited therein for continuing application of the statute after *Blye* and prior to repeal; N.C. Gen. Stat. § 44A-2 creates a lien in favor of hotels, motels and boardinghouses; N.D. Cent. Code § 35-19-01 creates a lien in favor of any inn, hotel or tourist camp for charges not exceeding $200; Ohio Rev. Code Ann. § 4721.04 creates the innkeeper's lien. *Cf. Trout v. Tipton, 145 N.E.2d 478 (Ohio App. 1956)* where defendant failed to show that she was a licensed rooming house operator entitled to a lien; Okla. Stat. Ann. tit. 15, § 501 creates a lien in favor of innkeepers and boardinghouse

keepers; Or. Rev. Stat. § 87.156 creates a lien in favor of inns, hotels and motels. Medications, food and children's clothing are excluded; Pa. Stat. Ann. tit. 37, § 71 creates a lien in favor of keepers of inns of hotels for charges not exceeding $200; R.I. Gen. Laws § 34-33-1 creates a lien in favor of hotel keepers and innkeepers; S.C. Code Ann. § 45-1-30 sets forth provisions allowing sale of a guest's property to satisfy an unpaid obligation without expressly creating a lien; S.D. Codified Laws Ann. § 44-11-5 creates a lien in favor of any lodging establishment for charges not to exceed $500. *See* § 34-18-1(6) for definition of a "lodging establishment"; Tenn. Code Ann. § 66-17-101 creates a lien in favor of all hotels, boardinghouses and lodging houses; Tex. Rev. Civ. Stat. Ann. art. 4594 creates a lien in favor of hotels, boardinghouses, rooming houses, inns, tourist courts and motels; Utah Code Ann. § 38-2-2 creates a lien in favor of keepers of inns, hotels, boardinghouses and lodging houses; Vt. Stat. Ann. tit. 13, § 2585(a) creates a lien in favor of hotels; Va. Code Ann. § 43-31 creates a lien in favor of innkeepers, boardinghouse keepers and houses of private entertainment; Wash. Rev. Code Ann. § 60.66.010 creates a lien in favor of all keepers of inns, hotels, lodging houses and boardinghouses; W. Va. Code § 38-11-5 creates a lien in favor of keepers of inns, lodging houses, restaurants, eating houses or boardinghouses; Wis. Stat. Ann. § 779.43(2) creates a lien in favor of keepers of inns, hotels, boardinghouses and lodging houses; Wyo. Stat. § 33-17-103 creates a lien in favor of any keeper of a hotel, boardinghouse, lodging house or restaurant.

(n2)Footnote 286. *Nicholas v. Baldwin Piano Co., 123 N.E. 226 (Ind. App. 1919); Jackson v. Engert, 453 S.W.2d 615 (Mo. App. 1970); M. & M. Hotel Co. v. Nichols, 32 N.E.2d 463 (Ohio App. 1935).*

(n3)Footnote 287. *Klim v. Jones, 315 F. Supp. 109 (N.D. Cal. 1970); Brams v. Briggs, 260 N.W. 785 (Mich. 1935).* In describing the innkeeper-guest relationship at common law, the court indicated that the accommodation must be furnished to a transient whose stay would only be temporary. *Halsey v. Svitak, 203 N.W. 968 (Minn. 1925).*

(n4)Footnote 288. *Culbertson v. Leland, 528 F.2d 426, 429-430 (9th Cir. 1975).*

(n5)Footnote 289. *Horace Waters & Co. v. Gerard, 82 N.E. 143 (N.Y. 1907)* provides an exhaustive discussion of the common rules relating to innkeepers. This case was overruled in part by *Blye v. Globe-Wernicke Realty Co., 300 N.E.2d 710 (N.Y. 1973).*

(n6)Footnote 290. *Culbertson v. Leland, 528 F.2d 426 (9th Cir. 1975); Turner v. Priest, 171 S.E. 881 (Ga. App. 1933). Cf.* Timothy Sandefur, The Right to Earn a Living, *6 Chapman L. Rev. 207, 225 (Spring 2003).* "*The 1829 Case of Beall v. Beck [2 F. Cas. 1111, 1111 (C.C.D.C. 1829)]* addressed whether a landlord or innkeeper had the right to take possession of property, which in this case involved a slave left behind by a boarder who had not paid his rent. The court said that although the landlord had a privilege to retain a non-paying guest's property, 'wherever the privilege of the landlord would destroy a lawful trade or occupation which is useful to the public, it is restrained by law.' "

(n7)Footnote 291. *See, e.g.,* Alaska Stat. § 34.35.510; La. Civ. Code Ann. art. 3234.

(n8)Footnote 292. *See, e.g.,* Nev. Rev. Stat. Ann. § 108.480.

(n9)Footnote 293. D.C. Code Ann. § 30-102(b). *See, e.g.,* Wis. Stat. Ann. § 779.43(2).

(n10)Footnote 294. *See, e.g.,* Or. Rev. Stat. § 87.156.

(n11)Footnote 295. *See, e.g.,* Ark. Stat. Ann. § 20-26-305(a); § 419.060, subd. 1; Mo. Ann. Stat. § 419.060, subd.1 N.D. Cent. Code § 35-19-01; Pa. Stat. Ann. tit. 37, § 71; S.D. Codified Laws Ann. § 44-11-5.

(n12)Footnote 296. *See, e.g.,* Mont. Code Ann. § 71-3-1401; N.M. Stat. Ann. § 48-3-7; N.C. Gen. Stat. § 44A-2. *See also Nance v. O.K. Houck Piano Co., 155 S.W. 1172 (Tenn. 1913).*

(n13)Footnote 297. Ill. Ann. Stat. ch. 71, para. 2 has been replaced by Ill. Comp. Stat. ch. 740 § 90/2; Idaho Code § 39-1806 has been renumbered as Idaho Code § 39-1807; Ind. Code Ann. § 32-8-27-2 has been replaced by §

32-33-6-1(b); Mich. Stat. Ann. §§ 18-302 and 18-303 have been replaced by MCLS §§ 427.202 and 427.203; Tex. Rev. Civ. Stat. Ann. art. 4595 has been repealed; Va. Code Ann. § 43-34 has been amended to raise the maximum value to $5,000; Wyo. Stat. § 33-17-103 requires 10 days prior notice when payment is not made within 60 days after it becomes due. Ala. Code § 35-11-131 permits enforcement by seizure and sale if payment is not made within 10 days after demand, upon giving 10 days notice of sale; Alaska Stat. § 34.35.520 permits enforcement by sale if the lien is not satisfied within 60 days after the charges become due. Ten days notice of the sale is required; Ariz. Rev. Stat. Ann. § 33-952 permits enforcement by sale if the charges remain unpaid for 4 months. Notice of sale must be published unless the debt is less than $60. No sale may occur until the expiration of 4 weeks from the date of the first publication; Ark. Stat. Ann. § 20-26-305(d) permits enforcement by sale after the lien is not satisfied for 90 days, upon giving 10 days notice of sale; Cal. Civ. Code § 1861 permits enforcement only after final judgment is obtained in a suit to recover the charges. Property not owned by the guest is not subject to the lien if the hotel receives notice of that fact prior to sale; Colo. Rev. Stat. § 38-20-107 permits enforcement when charges are not paid within 30 days after they become due. Under § 38-20-109, 10 days notice of sale is required; Del. Code Ann. tit. 25, § 3903 permits enforcement when charges are not paid within 30 days after they become due. Under § 3905, 15 days notice of sale is required; D.C. Code Ann. § 34-102(b) permits enforcement when charges are not paid within 30 days after they become due. Public sale may occur thereafter upon notice by registered or certified mail plus publication once a week on 3 successive weeks; Fla. Stat. Ann. § 509.403 allows enforcement through a writ of distress when the guest vacates without payment of an outstanding account. *See also* § 509.401 for lockout rights given to the owner of a public lodging establishment; Ga. Code Ann. § 43-21-6 allows enforcement through sale 30 days after termination of the guest relationship. Notice must be given at least 10 days prior to the sale; Haw. Rev. Stat. § 486K-3 allows enforcement through sale after 3 months detention. Notice by publication is required; Idaho Code § 39-1807 allows enforcement through sale 30 days after the lien arose and 15 days after notice. Items not legally in the guest's possession or not owned by the guest are excluded from the lien when the hotel keeper has notice of the interest of the third party; Ill. Comp. Stat. ch. 740, 390/2 allows enforcement through sale 60 days after the lien arose and 10 days after notice; Ind. Code Ann. § 32-33-6-1cb allows enforcement through sale 60 days after the lien arose and 10 days after notice; Iowa Code § 583.3 allows enforcement by ordinary action with attachment and execution. Under § 583.4, an alternative sale procedure is provided when the lien is unsatisfied for 90 days. 10 days notice is required; Kan. Stat. Ann. § 36-203 allows enforcement through sale after the property has been retained for 90 days, upon notice by posting and mailing; Ky. Rev. Stat. Ann. § 376.350 allows enforcement through a sheriff's sale. No notice provisions are included; La. Civ. Code Ann. art. 3236 allows enforcement through sale after 6 months retention. Publication of a notice of sale is required 4 weeks prior to the sale; Me. Rev. Stat. Ann. tit. 30-A, § 3862 allows enforcement through sale after 90 days, upon giving 10 days notice; Md. Com. Law II Code Ann. § 16-502 allows enforcement through sale 15 days after the charges come due. Notice by publication is required at least 10 days before the sale; Mass. Ann. Laws ch. 140, § 14 allows enforcement through sale 6 months after the departure of a guest who has abandoned the items. The conventional innkeeper's lien has ceased to exist; Mich. C.L.S. 427.202 § 18.302 allows enforcement through sale 3 months after departure of a guest. Under § 427.203, notice by publication is required 15 days before the sale and also by personal service if it possible; Minn. Stat. Ann. § 327.76, subds. 2, 3 permits enforcement only after final judgment is obtained in an action to recover the charges due. The innkeeper may take possession of the items during the pendency of the action if it appears that their use as security for payment will be reduced or eliminated. A bond may be required. Sale may occur more than 30 days after entry of final judgment for the innkeeper; Miss. Code Ann. § 75-73-17 allows enforcement through sale when charges are not paid within 10 days after demand upon 10 days notice of sale; Mo. Ann. Stat. § 419.060, subd. 2 allows enforcement through sale 90 days after the lien is created upon giving notice by posting and mail. Under § 419.070, enforcement is permitted against the guest's wages; Mont. Code Ann. § 71-3-1402 allows enforcement through sale 6 months after departure of the guest. Notice by publication is required; Nev. Rev. Stat. Ann. § 108.480 allows enforcement through sale 30 days after default in payment. Under § 108.500, notice by publication is required 10 days prior to the sale together with notice by mail when possible; N.J. Stat. Ann. § 2A:44-49 allows enforcement through sale upon publication of notice of sale for 3 days; N.M. Stat. Ann. § 48-3-13 allows enforcement of the lien in the same manner as foreclosure of a chattel mortgage. Under § 48-3-14, notice by posting or by publication is required; N.Y. Gen. Bus. Law § 207 allows enforcement through sale after 15 days prior notice by publication. *See* § 209 for an alternative sale provision when the lien has remained unpaid for 18 months. These sections continue to exist even

though the statute creating the lien has been repealed. *See* N.Y. Lien Law § 181; N.C. Gen. Stat. § 44A-4 allows enforcement through sale when charges are unpaid for 30 days after notice by mail; N.D. Cent. Code § 35-19-02 allows enforcement through sale with 10 days notice. Under § 35-19-03, any residue must be paid to the guest by the innkeeper who, if no demand is made for 6 months, must then deposit the amount held with the county treasurer; Ohio Rev. Code Ann. § 4721.05 permits public sale after 60 days retention upon giving 10 days notice by publication and mailing. Under § 4721.06, any residue must be paid to the guest by the innkeeper who, if no demand is made within 6 months, must deposit the amount held with the county treasurer; Okla. Stat. Ann. tit. 15, § 501 provides for enforcement by sale of pledged property; Or. Rev. Stat. § 87.172 requires retention of the items for 60 days after the lien attaches. Foreclosure sale is provided for in §§ 87.172-87.206; Pa. Stat. Ann. tit. 37, § 72 requires retention of the items for 30 days before sale. Notice by publication and mailing is required. Under § 73, any residue must be paid to the guest on demand within 6 months and, if none is made, deposited with the county treasurer; R.I. Gen. Laws § 34-33-2 authorizes sale after 6 months retention. Notice by publication 15 days prior to the sale is required together with notice by mail if possible; S.C. Code Ann. § 45-1-30 authorizes sale at least 10 days after departure of the guest subject to a requirement to post notices of sale; S.D. Codified Laws Ann. § 44-11-7 authorizes foreclosure and sale under the general provisions for foreclosure set forth in chapters 21-53 and 21-54; Tenn. Code Ann. § 62-7-108 authorizes sale 30 days after departure of the guest with notice by advertisement 10 days before the sale; Utah Code Ann. § 38-2-4 authorizes enforcement through sale after providing notice by mail, or by publication where mailing will not suffice; Vt. Stat. Ann. tit. 13, § 2585(b) allows enforcement through sale. Under tit. 9, § 1952, the debt must be unpaid for 3 months. 10-day notice requirements are set forth in tit. 9, §§ 1952-1953; Va. Code Ann. § 43-34 authorizes enforcement through sale if the value of the property does not exceed $5,000; Wash. Rev. Stat. Ann. § 60.66.020 authorizes sale after 10 days notice when the bill is unpaid for 3 months; W. Va. Code §§ 38-11-14-38-11-16 set forth methods for enforcement of the lien; Wis. Stat. Ann. § 779.48(1) authorizes enforcement through sale when the bill is unpaid for 3 months. When the property value exceeds $100, enforcement is by action; Wyo. Stat. § 33-17-103 authorizes sale upon 3 days notice when the amount due is not paid within 60 days.

(n14)Footnote 298. *315 F. Supp. 109, 124 (N.D. Cal. 1970).*

(n15)Footnote 299. *See Klim, 315 F. Supp. at 110-11, n.1.*

(n16)Footnote 300. *See* Cal. Civil Code § 1861.

(n17)Footnote 301. *See* Cal. Civil Code §§ 1861.5-1861.28.

(n18)Footnote 302. *See* Cal. Civil Code § 1861.7.

(n19)Footnote 303. *399 F. Supp. 1138 (S.D. Fla. 1975).*

(n20)Footnote 304. *399 F. Supp. at 1140.*

(n21)Footnote 305. *See* Fla. Stat. Ann. §§ 509.403-509.417.

(n22)Footnote 306. *See* Fla. Stat. Ann. § 509.407.

(n23)Footnote 307. *See Anastasia v. Cosmopolitan Nat'l Bank of Chicago, 527 F.2d 150 (7th Cir. 1975), cert. denied, 424 U.S. 928 (1976),* interpreting Ill. Ann. Stat. ch. 71, para. 2 and ch. 82, para. 57.

(n24)Footnote 308. *See id. at 157.*

(n25)Footnote 309. *See id. at 155-56.*

(n26)Footnote 310. *See Blye v. Globe-Wernicke Realty Co., 300 N.E.2d 710 (N.Y. 1973).*

(n27)Footnote 311. *See* N.Y. Lien Law § 181. Repeal effective July 18, 1990. The provision relating to

enforcement of the lien technically remains in effect. *See Gen. Bus. Law* § 207.

(n28)Footnote 312. *See Sharrock v. Dell Buick-Cadillac, 379 N.E.2d 1169 (N.Y. 1978).*

(n29)Footnote 313. *See* Parks v. "Mr. Ford," *556 F.2d 132 (3d Cir. 1977)* relating to the possessory lien of a garage keeper which found that the initial possession was consensual and the retention lien was valid but declared the enforcement by non-judicial sale to be invalid.

Anastasia v. Cosmopolitan Nat'l Bank of Chicago, 527 F.2d 150 (7th Cir. 1975), cert. denied, 424 U.S. 928 (1976), holding that seizure of guests' property by a hotelkeeper under an innkeeper's lien statute did not involve state action.

Davis v. Richmond, 512 F.2d 201 (1st Cir. 1975) holding that no state action took place when the Massachusetts boardinghouse lien statute was enforced against the property of a guest. The statute creating the lien was repealed in 1977. *See* Mass. Ann. Laws ch. 255, § 23.

Jenner v. Shephard, 665 F. Supp. 714 (S.D. Ind. 1987) where the landlord's detention of the possessions of a mobile home park tenant was not state action.

Evans v. Harley Hotels, Inc., 315 S.E.2d 896 (Ga. 1984), app. dis., 469 U.S. 803 (1984), involved hotel lodgers whose personal belongings were seized when they failed to pay their sizable telephone bill. No state action was shown when the sole action alleged was enactment of statutes setting forth circumstances under which the courts would not interfere with the enforcement of innkeeper's liens.

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CHAPTER 52 INNS AND INNKEEPERS

7-52 Thompson on Real Property, Thomas Editions § 52.11

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§ 52.11 Bibliography.

[Go To Supp]

Annotations

Annotation, *Authority of clerk or other employee to waive innkeeper's regulation as to baggage or valuables,* 56 A.L.R. (1928) 316.

Annotation, *Construction and application of terms "jewelry" and "personal ornaments" as used in statute limiting innkeeper's liability for loss or damage to guest's property, 88 A.L.R.3d (1978) 979.*

Annotation, *Construction, scope and application of words descriptive of property in statute relating to liability of innkeeper to guest for loss or damage to property,* 115 A.L.R. (1938) 1088.

Annotation, *Effect of notice limiting liability for valuables or effects of guest in hotel, 9 A.L.R.2d 818 (1950).*

Annotation, *Hotel or innkeeper's liability for refusal to honor reservation, 58 A.L.R.3d (1974) 369.*

Annotation, *Liability for negligence of doorman or similar attendant in parking patron's automobile, 41 A.L.R.3d 1055.*

Annotation, *Liability of bailee for hire of automobile for loss of, or damage to, contents,* 27 A.L.R.2d (1953).

Annotation, *Liability of hotel company for loss of or damage to guest's baggage while being transported to or from the hotel,* 76 A.L.R. (1932) 1106.

Annotation, *Liability of hotel, motel, or similar establishment for damage to or loss of guest's automobile left on premises, 52 A.L.R.3d (1973) 433.*

Annotation, *Liability of hotel or motel for guest's loss of money from room by theft or robbery committed by person*

other than defendant's servant, 28 A.L.R.4th 120.

Annotation, *Liability of innkeeper for loss or damage to property of a guest resulting from fire, 63 A.L.R.2d (1959) 495.*

Annotation, *Liability of innkeeper for property left by departing guest who intends to return,* 22 A.L.R. (1923) 1194.

Annotation, *Liability of innkeeper to guest for injury due to fi*re, *60 A.L.R.3d (1974) 1217.*

Annotation, *Modern views as to validity, under federal constitution, of state prejudgment attachment, garnishment and replevin procedures, distraint procedures under landlords' or innkeepers' lien statutes, and like procedures authorizing summary seizure of property, 18 A.L.R. Fed. (1974) 223.*

Annotation, *Place of posting, and contents of, notice by innkeeper as to safety receptacle for valuables of guests, necessary to comply with statutory provisions in that regard,* 119 A.L.R. (1939) 796.

Annotation, *Statutory limitations upon innkeeper's liability as applicable where guest's property is lost or damaged through innkeeper's negligence, 37 A.L.R.3d (1971) 1276.*

Annotation, *Trailer Park as Place of Public Accommodation Within Meaning of State Civil Rights Statutes, 70 A.L.R.3d 1142.*

Annotation, *What constitutes a hotel or inn,* 19 A.L.R. (1922) 517.

Annotation, *What constitutes a hotel or inn,* 53 A.L.R. (1928) 988.

Annotation, *What information must be given by a guest upon delivering articles into custody of innkeeper,* 53 A.L.R. (1928) 1048.

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Supp. to § 52.01 Common Law Origins.

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Place the reference to the Mahaffey article at the end of the footnote.

Add:

Paliometros v. Loyola, 932 A.2d 128 (Pa. Super. 2007) (motel and its employees were liable to a guest who was sexually assaulted by an invitee during a party on the premises).

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Supp. to § 52.04 Infra Hospitium.

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Add

German v. Campbell Inn, 829 N.Y.S.2d 631 (2007) (unsuccessful action by inn patron who slipped and fell in the inn's recreation room); *Kaeppner v. Leading Mgt., Inc., 2006 Ohio App. LEXIS 3523* (no. 05AP-1324, Jul. 13, 2006) (unsuccessful action by inn patron who slipped and fell on an accumulation of ice on a covered walkway; the ice resulted from melted snow that dripped through a leak in the inn overhang).

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Supp. to § 52.05 Modern Limitations on the Innkeeper's Liability.

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§ 52.05(a) In General. [Go To Main]

Add:

Allen v. Marriott Worldwide Corp., 961 A.2d 1141 (2008) (guest action against hotel after guest slipped and fell on black ice).

Add:

Dean v. City of Buffalo, 579 F. Supp. 2d 391 (W.D. N. Y. 2008) (guest action against hotel arising from disturbance in room).

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Supp. to § 52.11 Bibliography.

www.doi.gov

Add to Annotations:

Annotation, "Liability of innkeeper for injury by object thrown or falling because of conduct of guest," *74 A.L.R.2d 1241*

Annotation, *Liability of innkeeper for injury to guest using hall or similar passageway, 27 A.L.R.2d 822* .

Annotation, *Liability of innkeeper for loss of or damage to automobile of guest or boarder*, 156 A.L.R. 233 .

Annotation, *Liability of innkeeper, restaurateur, or tavern keeper for injury occurring on or about premises to guest or patron by person other than proprietor or his servant, 70 A.L.R.2d 628* .

Annotation, *Liability of innkeeper to guest for injuries occasioned by defects in furnishings or other conditions in room or suite, 18 A.L.R.2d 973* .

Annotation, *Relation of innkeeper and guest as affected by payment for accommodations by week, month, or the like*, 145 A.L.R. 363 .

Add to Annotations:

Annotation, "Modern views as to validity, under Federal Constitution, of state prejudgment attachment, garnishment,

and replevin procedures, distraint procedures under landlords' and innkeepers' lien statutes, and like procedures authorizing summary seizure of property," *18 A.L.R. Fed. 223*

Annotation, "Validity, construction, and application of § 201 (b)(1) and related provisions of the Civil Rights Act of 1964 (*42 U.S.C.A. § 2000a(b)(1)*), prohibiting discrimination or segregation in inns, hotels, motels, or other establishments providing lodging to transient guests," *7 A.L.R. Fed. 450* .

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CHAPTER 53 REAL PROPERTY ASPECTS OF GRAVES AND CEMETERIES

7-53 Thompson on Real Property, Thomas Editions 53.syn

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§ 53.syn Synopsis to Chapter 53: REAL PROPERTY ASPECTS OF GRAVES AND CEMETERIES

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(3) Obligation created by Devotion of Land.

§ 53.10 Bibliography.

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CHAPTER 53 REAL PROPERTY ASPECTS OF GRAVES AND CEMETERIES

7-53 Thompson on Real Property, Thomas Editions § 53.01

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§ 53.01 Scope of Chapter.

This chapter discusses the impacts on real property ownership occasioned by the presence of human burials, which may occur in isolated graves, family burial grounds, or recognized cemeteries. The existence of graves usually gives rise to assorted private rights of visitation or further burials, which impose concomitant restrictions and responsibilities on the occupant of the realty. Under certain circumstances, those private rights may dissipate with the passage of time, making the land available for other uses. Although private rights remain important, they are often subject to public concerns and proscriptions that require either the disinterment and removal of burials, or the protection of burials because of prohibitions on desecration or concerns for historic and cultural preservation.

When organized as a cemetery, graves and related uses of land present issues of compatibility with neighboring landowners and the community, formally addressed as matters of nuisance, but now usually treated as issues of land use regulation. n1 This chapter does not address those issues, nor those relating to the licensing and regulatory control of cemetery operations, or corporate aspects of their maintenance and management.

FOOTNOTES:
(n1)Footnote 1. *See generally*, Joseph D. Lehrer, *Cemetery Land Use and the Urban Planner*, 7 Wash. U. J. Urb. & Contemp. Law 181 (1974); R.P. Davis, Annotation, *Cemetery or Burial Ground as a Nuisance, 50 A.L.R.2d 1324 (1956)*, C.T. Drechsler, Annotation, *Validity of Public Prohibition or Regulation of Location of Cemetery, 50 A.L.R.2d 905 (1956).*

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CHAPTER 53 REAL PROPERTY ASPECTS OF GRAVES AND CEMETERIES

7-53 Thompson on Real Property, Thomas Editions § 53.02

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§ 53.02 Introduction.

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Our national burial customs have made a gradual transition from the use of family or neighborhood burial grounds and church graveyards to formally-organized cemeteries. Much of that change has been reflected inadequately by the case law, which continues to interchangeably draw rules and dicta from one era to another, and from one type of burial to another. The development of the law regarding graves and cemeteries reflects a continuing attempt to adjust the demands of the living for current uses of land against the desire to recognize and respect human burials. More recently, those conflicting values have been complicated by campaigns to preserve graves and cemeteries as both open space resources n2 and repositories of cultural and historic values. n3

Numerous cases have involved the conflict between protection of burials and the interests of land owners who attempted to reclaim burial areas for agricultural uses; n4 other cases have involved intrusions by mining and industrial uses, n5 or proposals for commercial n6 or residential n7 development. Other cases involve gradual changes in the urban surroundings that make a site no longer suitable or desirable as a cemetery, n8 or site alterations proposed by the religious or corporate operators of the cemetery. n9 Whereas many past controversies concerned a servient landowner's desire to obtain unencumbered utilization of the land by refusing to recognize poorly-marked graves as protected interests, more recent cases have concerned formal attempts to develop land while simultaneously recognizing and removing graves from the site. n10 The latter controversies raise issues of statutory procedures for removal and reinterment of bodies, n11 or allegations of abandonment of the burial interests. In both situations, civil n12 or criminal actions n13 for disturbance or desecration of graves may be involved, and some burial areas may be protected by modern federal n14 and state statutory systems for preservation of historic graveyards or protection of unmarked historic or prehistoric graves and their contents. n15

FOOTNOTES:
(n1)Footnote 2. Scenic and recreational values may assume major importance. *See e.g., Mayor & Aldermen of Savannah v. Radford, 401 S.E.2d 709, 710 (Ga. 1991)* (city cemetery operated "for cultural, historical, and recreational purposes for the benefit of the general public and only secondarily for the use of the paying members of the public as a burial ground"). *Kentucky Dep't of Fish & Wildlife Resources v. Garner, 896 S.W.2d 10 (Ky. 1995)* (action by relatives

of a person buried in a graveyard on federal land that is licensed to the state to enjoin the state from placing gates that prevent automobile access to the grave site). An early report urging sensitive reuse was U.S. Dep't of Housing and Urban Development, Cemeteries as Open Space Reservations (1970). Various other sources discuss the problem, *e.g.*, Ruth E. Knack, *The Ultimate Open Space*, Planning, February 1990, at 13. Some states have adopted statutory systems to "dedicate" cemeteries as open space or natural preserves, *e.g.*, 525 Ill. Comp. Stat. Ann. §§ 30/3, 30/11, 30/12.

(n2)Footnote 3. *See e.g.*, Ga. Code Ann. §§ 36-72-1-36-72-16 (protection of cultural heritage represented by abandoned cemeteries and burial grounds). The historic character of cemeteries (and the notoriety of graves therein) can become a valuable resource for a community, creating asserted "cultural, social, entertainment, tourism, and historic benefits." *See Billings v. Concordia Heritage Ass'n, 960 S.W. 2d 688 (Tex. Civ. App. 1997).* N.J. Stat. Ann. 40:10B-1 to -3 [Historic Cemeteries Act]. Special protections for Native American and Native Hawaiian gravesites were created under the Native American Grave Protection and Repatriation Act ("NAGPRA"). *25 U.S.C. § 3001* (2000). Another source of protection comes through the National Historic Preservation Act ("NHPA"). *16 U.S.C. § 470* (2000). *Yankton Sioux Tribe v. U.S. Army Corps of Engineers 194 F. Supp. 2d 977 (D.S.D. 2002)* (U.S. Army motion for dismissal was granted for Native American tribe's claim under the NHPA, but motion for dismissal was denied under the NAGPRA). Haw. Rev. Stat. § 6E-43 [prehistoric and historic burial sites]; R.I. Gen. Laws §§ 23-18-11.1, 23-18.3-1 [protection of historic cemeteries]; Va. Code Ann. § 10.1-2305.C [family graveyards with historical significance]; Wash. Code Ann. §§ 68.60.010-68.60.060 [protection of historic cemeteries].

(n3)Footnote 4. *See e.g., Whitt v. Hulsey, 519 So. 2d 901 (Ala. 1987)* (farming uses incurred on family cemetery); *Dearinger v. Peery, 387 N.W.2d 367 (Iowa App. 1986)* (markers removed, cattle grazing). *See also State ex rel. Atty. Gen. of Iowa v. Terry, 541 N.W.2d 882 (Iowa 1995); Stoker v. Brown, 583 S.W.2d 765 (Tenn. 1979)* (cemetery lands used for farming and cultivation); *Michels v. Crouch, 150 S.W.2d 111 (Tex. App. 1941)* (graves plowed over, grazed by cattle).

(n4)Footnote 5. *See e.g., Lascurain v. City of Neward, 793 A.2d 731 (NJ. Super. Ct. App. Div. 2002)* (daughter no longer had any property interest in her father's grave and city could lease the property where the grave lay for industrial purposes); *Mississippi Transportation Comm'n v. Bridgforth, 709 So. 2d 430 (Miss. 1998)* (condemnation of extensive but unmarked ancient cemetery for highway construction); *Thompson v. City of Red Wing, 455 N.W.2d 512 (Minn. App. 1990)* (gravel extraction on site of Native American burials); *Walker v. Georgia Power Co., 339 S.E.2d 728 (Ga. App. 1986)* (family cemetery condemned for construction of power plant); *Faust v. Mitchell Energy Corp., 437 So. 2d 339 (La. App. 1983)* (mineral rights); *Humphreys v. Bennett Oil Corp., 197 So. 222 (La. 1940)* (oil wells in cemetery); *Van Buskirk v. Standard Oil Co., 134 A. 676 (N.J. 1926)* (oil tanks on colonial family cemetery); *Frost v. Columbia Clay Co., 124 S.E. 767 (S.C. 1924)* (railroad spur); *Bessemer Land & Imp. Co. v. Jenkins, 18 So. 565 (Ala. 1895)* (cemetery discontinued; land reused for pipe works).

(n5)Footnote 6. *AT&T Wireless PSC, Inc. v. City of Independence, 63 S.W.3d 609 (Ky. App. 2001)* (commercial development could not be built on or adjacent to burial grounds). The decision in Callaway v. Ryckeley was reversed and vacated; *see Ryckeley v. Callaway, 412 S.E.2d 826 (Ga. 1992)* (denial of action by descendants for emotional distress absent evidence of malicious or wilful destruction of graves); *Harris v. Borough of Fair Haven, 721 A.2d 758 (N.J. Super. Ct. Ch. Div. 1998)* (court of equity declined to enjoin house construction where city likely to monitor construction to protect any human remains that may be discovered at old cemetery site); *Trinity Cemetery Assn., Inc. v. Township of Wall, 784 A.2d 52 (N.J. 2001)* (Cemetery Act preempted township ordinance and barred it from rezoning cemetery property to residential use after the Cemetery Board issued a certificate of authority allowing a purchaser to operate as a cemetery after recording the deed to the property; the purchaser recorded the deed after the ordinance was introduced, but before it was finally adopted); *Schmolke v. Highland Butterfield, Inc., 471 N.E.2d 226 (Ill. App. 1984)* (proposal for redevelopment of cemetery land as planned unit development with commercial and residential uses); *German Evangelical St. Marcus Congregation of St. Louis v. Archambault, 383 S.W.2d 704 (Mo. 1964)* (cemetery land "well suited for dwellings and business buildings").

(n6)Footnote 7. *See e.g., Callaway v. Ryckeley, 404 S.E.2d 650 (Ga. App. 1991)* (partial destruction of cemetery by

residential subdivision); *Sanford v. Vinal, 552 N.E.2d 579 (Mass. App. 1990)* (residential subdivision on colonial burial area); *Forest Home Cem. Ass'n v. Dardanella Fin. Corp., 329 N.W.2d 885 (S.D. 1983)* (planned residential development on municipal cemetery); *Wana The Bear v. Community Constr., 180 Cal. Rptr. 423 (1982)* (residential subdivision on unmarked Indian graves); *Rhodes v. Nicklas, 624 S.W.2d 504 (Mo. App. 1981)* (construction of house over family cemetery).

(n7)Footnote 8. Petition of First Trinity Evangelical Lutheran Church in *Pittsburgh, 268 A.2d 219 (Pa. 1970)* (change in surroundings dictate abandonment as a suitable burial site); *German Evangelical St. Marcus Congregation of St. Louis v. Archambault, 383 S.W.2d 704 (Mo. 1964)* (cemetery land "well suited for dwellings and business buildings," but portions continued to be well maintained).

(n8)Footnote 9. *Bellevue Masonic Temple, Inc. v. Lokken, 452 P.2d 544 (Wash. 1969)* (proposed disinterment and reconstruction of temple); *Schaeffer v. Unknown Heirs and Next of Kin, 175 N.E.2d 776 (Ohio 1961)* (church allowed to build Sunday school over occupied graves).

(n9)Footnote 10. *See e.g., Dearinger v. Peery, 387 N.W.2d 367 (Iowa App. 1986)* (township abandoned and quitclaimed small public cemetery); *see also State ex rel. Atty. Gen. of Iowa v. Terry, 541 N.W.2d 882 (Iowa 1995); Pantel v. Workmen's Circle/Arbetter Ring Branch 281, 735 N.Y.S.2d 228* (N.Y. App. Div. 3 Dept. 2001) (cemetery owner sought to move monuments). *Schmolke v. Highland Butterfield, Inc., 471 N.E.2d 226 (Ill. App. 1984)* (disinterment, annexation, and rezoning of cemetery land); Petition of First Trinity Evangelical Lutheran Church in *Pittsburgh, 268 A.2d 219 (Pa. 1970)* (disinterment and reinterment); *Ohio v. Glass, 273 N.E.2d 893 (Ohio App. 1971)* (housing developer unsuccessfully sought permits for removal; convicted of tombstone removal), *Touro Synagogue v. Goodwill Indus., 96 So. 2d 29 (La. 1957)* (agreement to sell cemetery for development after removal of remains).

(n10)Footnote 11. *See e.g.,* Arthur J. Anderson & William S. Dahlstrom, *Rural Cemeteries in Urban Environments,* Texas Bar J., January 1989, at 78-80.

(n11)Footnote 12. *See generally,* Danny R. Veilleux, Annotation, *Liability for Desecration of Graves and Tombstones, 77 A.L.R.4th 108 (1990),* and Charles E. Rounds, Jr., *Protections Afforded to Massachusetts' Ancient Burial Grounds, 77 Mass. L. Rev. 176 (1988).*

(n12)Footnote 13. *See generally,* Land owner's erection of fence, clearance of vegetation, and bulldozing of soil under claim of title to realty were insufficient to establish intent required for crime of desecration, *Mullinax v. State of Texas, 756 S.W.2d 40 (Tex. App. 1988).* A criminal conviction for removal of fence materials "enclosing a cemetery" was reversed where evidence established that body had previously been removed from grave site, which no longer could be defined as a cemetery, *State of North Carolina v. Phipps, 449 S.E.2d 450 (N.C. 1994).* J.A. Bryant, Jr., Annotation, *Construction and Application of Graverobbing Statutes, 52 A.L.R.3d 701 (1973);* John S. Herbrand, Annotation, *Validity, Construction, and Application of Statutes Making It a Criminal Offense to Mistreat or Wrongfully Dispose of a Dead Body, 81 A.L.R.3d 1071 (1977).*

(n13)Footnote 14. *Yankton Sioux Tribe v. U.S. Army Corps of Engineers, 194 F. Supp. 2d 977 (D.S.D. 2002)* (U.S. Army's motion for dismissal of Yankton Sioux-Tribe's claim under NAGPRA denied). Archaeological Resources Protection Act of 1979 ("ARPA"), *16 U.S.C. §§ 470aa* to 470ll; Native American Graves Protection and Repatriation Act ("NAGPRA"), *25 U.S.C. §§ 3001*-3013, and *18 U.S.C. § 1170.* Both acts concern burials on federal or tribal lands.

(n14)Footnote 15. *People v. Cypress Hills Cemetery, 622 N.Y.S.2d 300 (1995)* (state action seeking injunction against a cemetery's conducting burials in ground containing construction or demolition debris). *Taggert v. Our Lady Queen of Heaven Catholic Church, 893 So. 2d 1001 (La. App. 2005)* (action against cemetery owners by family members of a decedent whose remains were disturbed. Special state statutory systems are described *infra* at § 53.07(a)(2).

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CHAPTER 53 REAL PROPERTY ASPECTS OF GRAVES AND CEMETERIES

7-53 Thompson on Real Property, Thomas Editions § 53.03

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§ 53.03 Definition and Creation of Graves and Cemeteries.

[Go To Supp]

Human n16 burials might occur singularly n17 or in groups of unmarked graves, n18 as groups of family burials on private property, in organized community burial grounds or graveyards, in churchyards, in publicly-maintained cemeteries, or in corporate cemeteries established to provide "perpetual" maintenance. The distinctions among those categories frequently result in different rights claimed by heirs or relatives, or varied responsibilities imposed on the owners of the land occupied by the graves.

American burial practices and terminology underwent a rapid shift in the mid-19th century, as crowded urban "graveyards" or "burial grounds" n19 were superseded or replaced in many regions by newly-named "cemeteries." n20 The new popularity of cemeteries as "sleeping places of the dead" corresponded with the development of formally-organized cemetery associations or corporations that replaced the uncertainties of graveyards maintained by a church or community with the promised security of permanent and professional management offered by the new entities. n21 The new and spacious rural cemeteries were meticulously planned by landscape architects, and gradually evolved from naturalistic settings to broad lawn designs or memorial parks, often including mausoleums, columbariums, crematories, and related structures. n22

The law regarding cemeteries and other types of burial places reflects the piecemeal evolution of burial practices, and now presents a highly varied body of rules regarding the legal status and protection of places of human burial, usually loosely categorized within the general heading of "cemeteries." However, it is often necessary to determine carefully whether particular graves are categorized, and thus regulated or protected, as part of a "cemetery," and whether that term carries specific statutory or other legal implications. Under many modern statutes, land areas that include graves and yet do not qualify as cemeteries nevertheless may receive protection as "unmarked graves" n23 or other, less precise, n24 categories.

COMPUTER-ASSISTED RESEARCH

LEXIS: unmark! or unregist! w/10 (human w/3 burial) or grave! or cemeter!

FOOTNOTES:

(n1)Footnote 16. There is general recognition that the term "cemetery" includes only *human* burials, and that relevant concerns would not apply to so-called "cemeteries" used for household pets; *e.g., Loid v. Kell, 844 S.W.2d 428 (Ky. App. 1993)* (statutory requirements for "cemeteries" contemplated "dead persons," not pets); and *Hertle v. Riddell, 106 S.W. 282 (Ky. 1907)* (burial of dog is implied violation of contract). *Accord, Shields v. Karns, 622 N.E.2d 673, 675 (Ohio App. 1993)* (statutory definition of cemeteries contemplated only human remains, not family pets). Nor are common law legal encumbrances on realty, of the type resulting from human burials, created by a long-continued practice of burying pet animals on the grounds of a commercial veterinary hospital. *Annunziata v. Millar, 574 A.2d 1021, 1027 (N.J. Super Ct. Ch. Div. 1990).* Statutes are often explicit, *e.g.*, Haw. Rev. Stat. § 441-1 ("Cemetery" means ... any property ... used for the permanent interment of human remains"); 760 Ill. Comp. Stat. Ann. § 100/2 (a cemetery is "land dedicated to and used ... for the interment of human remains.").

(n2)Footnote 17. Legal protection might vary depending on the number of interments; *see* n.89 *infra*.

(n3)Footnote 18. More than half the American states have statutes protecting "unmarked human burials"; many of the statutory definitions are essentially identical to that of N.C. Gen. Stat. § 70-28(6): " "Unmarked human burial' means any interment of human skeletal remains for which there exists no grave marker or any other historical documentation providing information as to the identity of the deceased."

(n4)Footnote 19. The term "burial ground" is still used in many regions to describe an area, which may or may not be the legal equivalent of a "cemetery," that is devoted to and used for interment of human remains; *see, e.g.*, Ga. Code Ann. § 36-72-2(3), *Sanford v. Vinal, 552 N.E.2d 579 (Mass. App. 1990);* N.Y. Town Law § 291 ("cemetery or burial ground"). Additional states have provided special statutory protection to "unmarked human burial grounds," *e.g.*, Minn. Stat. Ann. § 307.08(2); N.M. Stat. Ann. § 18-6-11.2(1).

(n5)Footnote 20. "Cemetery" was derived from the Greek word for sleeping chamber, suggesting death merely as sleep, and a transition from life to eternal life. *See* David C. Sloane, The Last Great Necessity; Cemeteries in American History 55 (1991).

(n6)Footnote 21. *Lanham v. Franklin Township, 2004 Ohio App. LEXIS 1790* (No. CA2003-07-057, Ohio App., Apr. 26, 2004) (action against municipality by owners of a family burial plot, after a stranger was allegedly buried in the plot). For the evolution of burial practices and cemeteries, *see generally* David C. Sloane, The Last Great Necessity: Cemeteries in American History (1991), Kenneth Jackson, Silent Cities: The Evolution of the American Cemetery 20 (1990), James J. Farrell, Inventing the American Way of Death 1830-1920 (1980). One of the first "rural cemeteries" was Mt. Auburn, whose essential history is disclosed in *Proprietors of Mt. Auburn Cem. v. City of Cambridge, 22 N.E. 66 (Mass. 1889).* Evolution of the professionally-managed cemetery is reflected occasionally in judicial opinions; *see, e.g., Mansker v. City of Astoria, 198 P. 199 (Or. 1921).*

(n7)Footnote 22. *Warner v. City of Boca Raton, 887 So. 2d 1023 (Fla. 2004)* (owners of public cemetery plots challenged a prohibition against vertical grave decorations). The definitions are not mutually inclusive; thus, merely to operate a crematory, without making interments, does not constitute a cemetery. *Cemetery Bd. v. Telophase Soc'y of Am., 151 Cal. Rptr. 248 (1978).*

(n8)Footnote 23. *See* § 53.07(a)(2) *infra*.

(n9)Footnote 24. *E.g.*, statutory protection of Indian burial mounds as "burial sites"; *see Thompson v. City of Red Wing, 455 N.W.2d 512 (Minn. App. 1990).* Alaska protects certain "archaeological sites"; Alaska Stat. § 41.35.240; North Dakota protects "cultural resources" that include "burial mounds" and "unregistered graves" in N.D. Cent. Code § 55-03-00.1(1).

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CHAPTER 53 REAL PROPERTY ASPECTS OF GRAVES AND CEMETERIES

7-53 Thompson on Real Property, Thomas Editions § 53.04

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§ 53.04 Creation of Cemeteries: Setting Apart.

Bill of Rights

Early judicial attempts to define cemeteries drew on the generally-recognized meanings of the term, but emphasized that some additional factors must exist to distinguish a "cemetery" from mere graves:

> The word "cemetery,' is defined by Webster to be "a place or ground set apart for the burial of the dead,' and this is the popular idea. What creates the cemetery is the act of setting the ground apart for the burial of the dead, marking it, and distinguishing it from the adjoining ground, as a place of burial. n25

(a) Actual Use.

What might constitute "setting the ground apart" has seldom been directly examined, and the case law reflects a pragmatic awareness of the informality with which many early burial plots and cemeteries were established. n26"Set aparts" usually occurred when landowners actually used some portion of their realty for burial purposes, generally for members of the owner's family or close neighbors, with graves that were physically marked by monuments or enclosures. n27 When thus done informally, title to the land would remain in the original landowner who had instituted the "set aside." n28 Under such circumstances, the legal characterization of the burial area was uncertain, as it was generally recognized that landowners may not create for themselves a property interest on their own land that is separate from the underlying estate. n29 Nor was it necessary to carefully delineate the boundaries of the burial area, so long as the area remained subject to the landowner's direct control. Eventually, however, the physical act of demarcating, or setting apart the land, would probably be clarified by an explanation, or statement of purpose, n30 made as part of a subsequent conveyance; thus, in Boyd v. Brabham, n31 a landowner's will noted the presence of an existing "graveyard" and directed that it be "set apart and forever dedicated to the purpose of a family graveyard with rights of way to and from the same."

More commonly, the area "set apart" was reflected in a subsequent, and more conventional, creation of an implied or express reservation or exception, executed as part of a subsequent conveyance of the larger tract of realty of which it was a portion. n32 In that case, if the burial area had been reserved for the use of the grantor's family, the new grantee's title would be subject to the reservation, and members of the family would hold the reserved rights of burial and

visitation. n33 A potential problem, however, arises if the reservation were to be made for the benefit and retention not of the grantor or the grantor's descendants, but for third persons such as friends or neighbors. Some jurisdictions have invalidated attempts to reserve on behalf of third persons who are not parties to a conveyance, n34 although the majority of reported decisions appear unconcerned with that formality. Third-party reservations are now widely accepted in other areas of easement law. n35 Some courts have, instead, treated the exception of an existing burial area as a reservation "by" the grantor, but to be "held in trust" for the benefit of those persons who hold individual burial rights. n36

COMPUTER-ASSISTED RESEARCH

LEXIS: (establish! or creat!) w/5 (family or private) w/10 (graveyard or cemeter! or burial) easement w/10 (family or private) w/10 (graveyard or cemeter! or burial)

(b) Visible Evidence.

The central feature of the process of "setting apart" is the creation of a physical, visible evidence of graves, marking them by stones or other monuments and perhaps by some form of enclosure, such as a wall or fence. The physical markers serve several purposes, one of which is an aid in conveyancing; thus in Houston Oil Co. v. Williams n37 the fencing around a graveyard gave sufficient certainty to the description of a reservation in a deed, whereas in Carr v. Baldwin, n38 mention only of an "old graveyard" was held insufficient to describe an exception. Many cases involve land surveys and contests of evidence to establish accurate boundaries, n39 sometimes employing sophisticated technologies such as soil resistivity testing to locate the perimeters of a burial area. n40

COMPUTER-ASSISTED RESEARCH

LEXIS: evidence w/10 cemeter! or graveyard or (human w/3 burial)

(c) Notice.

In addition to establishing boundaries, a more important function of the markers and other visible features of graves is to provide notice to subsequent purchasers and owners of the existence of graves, thus providing the basis for trust, easement, or other theories that force a land owner to defer and conform to the presence of burials. n41 As noted in 1959 in a leading decision by the Oklahoma court in Heiligman v. Chambers:

> "[T]he plot was enclosed with a sandstone wall ... with suitable markers. There were trees planted and the entire plot was visible to the naked eye of one looking over the land with the views of purchasing. We therefore hold [the landowner] was charged with notice of the fact that this plot had been dedicated for burial purposes and took title to the ground subject to the rights of the heirs of those buried therein, even though the same was not reserved in the chain of title." n42

Conversely, the complete absence of markers or other apparent indications of graves may be a deciding factor that allows a purchaser to acquire the land in good faith and without notice of the existence of the burials, thus operating effectively to free the land of traditional property restrictions. n43 The common-law approach to poorly-marked graves, however, has been less than satisfactory, prompting many states to adopt "unmarked human burials" statutes that attempt to strike a balance between protection of old graves and appropriate activities by landowners.

(d) Devotion to Purpose.

Enclosures and monuments, however, do more than establish the existence or delimit the physical extent of the real property interest represented by a grave; they also establish the larger legal and ethical evidence that particular land has been symbolically "set apart," "devoted," "appropriated," or "dedicated" to cemetery purposes, and thus subjected to special obligations.

> Regardless of the laws and rules relating to the ownership and control of real property, when a plot of ground is set apart for cemetery purposes, and burials are made in the land, the ground changes its character in the minds and feelings of the community. "It assumes a sacred quality that overrides conveyancers' precedents and requires freedom from profanation until, by abandonment and removal of the bodies or by complete disintegration, there remains nothing to appeal to the emotions of the survivors.' n44

The act of "setting apart" or "devoting" to burial purposes demonstrates the landowner's implicit recognition that the land is to be impressed with a "sacred quality," and the owner's assumption of the restrictions and responsibilities that the new use entails. In that sense, "setting apart" is the landowner's expression of a commitment to devote the land to cemeterial purposes, and a consequential pledge to limit any inconsistent uses of the land, thus creating a restriction that is enforceable under varied theories of law or equity. n45 As noted in the early Virginia case of Benn v. Hatcher: "The present case stands ... on the solemn agreement of the parties themselves, that the lot in question should ... be devoted, in the future, as it had been in the past, to the use of the family as a place of burial for its dead." n46 A devotion of land to burial purposes requires more than friendly assurances of permanence, and must overcome legal safeguards for the protection of real property ownership before it creates a societal and legal consensus that the land is not to be disturbed for other purposes. Although judicial deference may be appropriate to protect burials of human remains, no encumbrance of private land is created by repeated burials of pet animals. n47

COMPUTER-ASSISTED RESEARCH

LEXIS: (set w/2 apart) or devot! or appropriat! or dedict! w/5 (cemeter! w/3 purpose!)

(e) Consecration.

A similar form of "solemn agreement" is represented by "consecration" of land for burial purposes. Cemeteries are often described in case law as "consecrated ground," a term that has precise meanings in ecclesiastical law, generally defined as "to make sacred, to sanctify" or "to dedicate solemnly to a sacred or religious purpose." n48 Similarly, "hallow" means to make holy, to treat as sacred. More generally, consecration is understood to invest specific objects with particular religious significance, transforming them from profane to sacred, and often involves the ritual marking off or delimiting of a place from the mundane world. n49 As used currently, consecration thus appears to be essentially synonymous with, and to reflect the larger general sense of, "devote" or "set apart"; it appears to have no additional legal consequences. ("Desecration," the antonym of consecration, has separate status as a tort, and is covered by penal statutes in most jurisdictions.) n50

COMPUTER-ASSISTED RESEARCH

LEXIS: consecrat! or hollow or devot! or (set w/2 apart) w/5 burial or cemeter!

FOOTNOTES:

(n1)Footnote 25. *Concordia Cem. Ass'n v. The Minnesota & N.W. R.R., 12 N.E. 536, 541 (Ill. 1887).* Although limited in its original application, *Concordia* has been cited repeatedly as a definition; *see, e.g., Village of Villa Park v. Wanderer's Rest Cem. Co., 147 N.E. 104 (Ill. 1925).*

(n2)Footnote 26. *E.g.*, Judge P. J. Graves, writing in *Wooldridge v. Smith, 147 S.W. 1019, 1021 (Mo. 1912),* lamented "the known lax methods used in the earlier days for the establishing of public burying grounds... ."; *see also Dearinger v. Peery, 387 N.W.2d 367, 368 (Iowa App. 1986); State ex rel. Atty. Gen. of Iowa v. Terry, 541 N.W.2d 882 (Iowa 1995); Castro Romero v. Becken, 256 F.3d 349 (5th Cir. 2001)* (the oral history of Lipan Apache Tribe did not establish a burial ground under Texas law).

(n3)Footnote 27. *E.g., Heiligman v. Chambers, 338 P.2d 144 (Okla. 1959)* (marked burials on unalloted land belonging to the Cherokee Nation); *Houston Oil Co. v. Williams, 57 S.W.2d 380 (Tex. App. 1933)* (succession of fences approximately enclosed family graveyard); *Morgan v. Collins Sch. House, 133 So. 675 (Miss. 1931)* (family and neighborhood burials); *Sherrard v. Henry, 106 S.E. 705 (W. Va. 1921)* (marking off a lot "in accordance with custom," using an earthen ridge and plantings, was sufficient to set apart a grave site). Under some rules, *e.g.*, Ky. Rev. Stat. Ann. § 381.710, actual use, rather than visible evidence of the use, is sufficient to constitute a "set aside."

(n4)Footnote 28. *Mingledorff v. Crum, 388 So. 2d 632 (Fla. Dist. App. 1980); Grinestaff v. Grinestaff, 318 S.W.2d 881 (Ky. 1958); Adams v. State, 97 S.E.2d 711 (Ga. App. 1957); Hines v. Tennessee, 149 S.W. 1058 (Tenn. 1911).* Such practices are well-recognized: "the owner of the freehold may devote a part of his premises to the burial of his family or friends. It is but a just exercise of his dominion over his own property." *Kingsbury v. Flowers, 65 Ala. 479, 485 (1880);* the *Kingsbury* quote has been widely repeated, *e.g., Heiligman v. Chambers, 338 P.2d 144, 147 (Okla. 1959).*

(n5)Footnote 29. Modern easement theory holds that, although a landowner while still the owner of the entire estate may not create a true easement that is distinct from that landowner's underlying fee title, the interest could be recognized as a "quasi-easement" that would form the basis for creation of an easement by implied reservation in a subsequent conveyance. *See* Restatement of Property § 473 (1944), Jon W. Bruce & James W. Ely, The Law of Easements and Licenses in Land § 4.03[2][b] (1988).

(n6)Footnote 30. *See generally*, C.T. Foster, Annotation, Statement As to Use of Lands Excepted or Reserved, Etc., 139 A.L.R. 1339, 1360-1362 (1942), and H.D. Warren, Annotation, Private or Family Cemeteries, *75 A.L.R.2d 591 (1961).* Disputed boundaries of recognized public cemetery may be resolved by execution of boundary agreement between cemetery owner and adjoining landowner. *In re St. James Meth. Church of Harnville, 666 So. 2d 1206 (La. App. 1995).*

(n7)Footnote 31. *Boyd v. Brabham, 414 So. 2d 931 (Ala. 1982), aff'd after remand, 442 So. 2d 86 (Ala. 1983); see also Goins v. Beech Bottom Baptist Church, 231 S.W.2d 23 (Ky. 1950).*

(n8)Footnote 32. *E.g., Aldridge v. Puckett, 278 So. 2d 364 (Ala. 1973)* (old deed expressly reserved previously established family burial ground); *Heiligman v. Chambers, 338 P.2d 144 (Okla. 1959)* (marked burials impliedly reserved); *Locke v. Lester, 78 So. 2d 14 (La. App. 1955)* (pre-existing "public graveyard" described in exceptions to later deeds); *Houston Oil Co. v. Williams, 57 S.W.2d 380 (Tex. App. 1933)* (long-established burial area specifically "excepted" in later conveyances); *Brown v. Anderson, 11 S.W. 607 (Ky. 1889)* ("reserving ... the old family graveyard of the grantor"); *Benn v. Hatcher, 81 Va. 25 (1885)* (area long "dedicated" for burials was "reserved" in later conveyance). *See also* C.T. Foster, Annotation, *Statement as to Use Being Made, etc.*, 139 A.L.R. 1339, 1360-1362 (1942).

The absence of a subsequent conveyance to create or define an interest was a partial cause for non-recognition of a family graveyard in *Wooldridge v. Smith, 147 S.W. 1019 (Mo. 1912);* distinguished in *Rhodes v. Nicklas, 624 S.W.2d 504 (Mo. App. 1981),* where an express deed reservation was recognized as sufficient to create a family cemetery that was reserved in all subsequent deeds in the chain of title, although additional evidence nevertheless was required to adequately describe the precise boundaries.

(n9)Footnote 33. *Mingledorff v. Crum, 388 So. 2d 632, 636 (Fla. Dist. App. 1980)* (rights are limited to those related by blood or marriage); *Stoker v. Brown, 583 S.W.2d 765 (Tenn. 1979)* (relatives of decedents may enjoin trespass to cemetery); *Stuart v. Smith, 344 So. 2d 127 (Miss. 1977)* ("heirs" of grantor); *Aldridge v. Puckett, 278 So. 2d 364, 366 (Ala. 1973)* (easement reserved for family); *Bowen v. Hooker, 372 S.W.2d 257 (Ark. 1963)* (heirs and relatives and decedents, and public); *Bradley v. Virginia Ry. & Power Co., 87 S.E. 721 (Va. 1916)* (grantor reserved family burial ground for use by grantor's family); *Hines v. State, 149 S.W. 1058 (Tenn. 1911); Brown v. Anderson, 11 S.W. 607 (Ky. 1889)* (reservation "for members of the grantor's family" excludes licensees); *Benn v. Hatcher, 81 Va. 25 (1885)* (reservation not for individuals, but "for the family as a whole.").

(n10)Footnote 34. *See e.g., Herbert v. Pue, 20 A. 182 (Md. 1890)* (invalidating an attempted reservation made in 1859 to strangers to the deed rather than to the grantor).

(n11)Footnote 35. *See* Restatement of Property § 472 (1944); Jon W. Bruce & James W. Ely, The Law of Easements and Licenses in Land § 3.06 (1988); Gerald Korngold, Private Land Use Arrangements 30-31 (1990). *Compare Locke v. Lester, 78 So. 2d 14 (La. App. 1955)* (dedication to the public can be complete without formal transfer to an entity).

(n12)Footnote 36. *Houston Oil Co. v. Williams, 57 S.W.2d 380 (Tex. App. 1933). Compare* the similar rationale in *Ritter v. Couch, 76 S.E. 428, 432-433 (1912)* (dedication to public created a charitable public trust).

(n13)Footnote 37. *Houston Oil Co. v. Williams, 57 S.W.2d 380 (Tex. App. 1933).* Existing cemetery used as starting point for fence that represented the agreed boundary between adjoining parcels of realty. *Inman v. Nutt, 1993 Tenn. App. LEXIS 153.*

(n14)Footnote 38. Carr v. *Baldwin, 190* S.W.2d 692 (Ky. 1945). *See also AT&T Wireless PSC, Inc. v. City of Independence 63 S.W.3d 609 (Ky. App. 2001)* (The fact that burial grounds are not visible cannot be used as evidence that the grounds were not set aside for burial purposes).

(n15)Footnote 39. *E.g., Shepherd v. Hickory Grove Cemetery Mem'l Fund, Inc., 649 So. 2d 1266 (Ala. 1994)* (old deed reformed to describe accurately the actual location of maintained cemetery). *Whitt v. Hulsey, 519 So. 2d 901 (Ala. 1987); Boyd v. Brabham, 442 So. 2d 86 (Ala. 1983); Locke v. Lester, 78 So. 2d 14 (La. App. 1955).*

(n16)Footnote 40. *E.g., Sanford v. Vinal, 552 N.E.2d 579 (Mass. App. 1990); Stuart v. Smith, 344 So. 2d 127 (Miss. 1977).* An Oregon statute, dealing with techniques to locate graves, provides that a diligent search "shall be reasonably calculated to discover such graves from the existence of monuments, contour of land and terrain, fencing, curbing, and other evidences of the location of graves," and allows probing with a rod to locate human remains therein. Or. Rev. Stat. § 226.520(3).

(n17)Footnote 41. *Whitt v. Hulsey, 519 So. 2d 901 (Ala. 1987); Mingledorff v. Crum, 388 So. 2d 632 (Fla. Dist. App. 1980); Stoker v. Brown, 583 S.W.2d 765 (Tenn. 1979); Bowen v. Hooker, 372 S.W.2d 257 (Ark. 1963)* (fencing and "visible signs and suitable markings"); *Adams v. State, 97 S.E.2d 711 (Ga. App. 1957)* (markers sufficient to put one on notice that it was a burial ground); *Michels v. Crouch, 122 S.W.2d 211 (Tex. Civ. App. 1938).*

(n18)Footnote 42. *Heiligman v. Chambers, 338 P.2d 144, 148 (Okla. 1959).*

(n19)Footnote 43. *Sanford v. Vinal, 552 N.E.2d 579 (Mass. App. 1990)* (unmarked and abandoned colonial burial ground); *Boyd v. Brabham, 414 So. 2d 931 (Ala. 1982)* (issue of fact whether "abandoned"), *aff'd after remand, 442 So. 2d 86 (Ala. 1983); Mayes v. Simons, 8 S.E.2d 73, 75-76 (Ga. 1940)* (neglected burial ground); *see* Annotation, Private Cemeteries, 130 A.L.R. 250, 259-264 (1941), supplemented by H.D. Warren, Annotation, Private or Family Cemeteries, *75 A.L.R.2d 591, 598-599 (1961).* Under some rules, *e.g.*, Ky. Rev. Stat. Ann. § 381.710, proven actual use, rather than visible evidence of the use, is sufficient to constitute a "set aside." *See also* the discussions of "abandonment" and "unmarked human burials," § 53.07(a)(2) *infra*.

(n20)Footnote 44. *Cobb v. Mantua Township Board of Trustees, 2004 Ohio App. LEXIS 4806* (No. 2003-P-0112, Ohio App., Sept. 30, 2004) (burial plot owner brought action against township cemetery for alleged failure to perform dignified services regarding the plaintiff's deceased spouse). *Humphreys v. Bennett Oil Corp., 197 So. 222, 229 (La. 1940).*

(n21)Footnote 45. Several modern opinions have suggested that easement and trust rationales are essentially interchangeable and yield similar results; *see Mingledorff v. Crum, 388 So. 2d 632 (Fla. Dist. App. 1980); Walker v. Georgia Power Co., 339 S.E.2d 728, 730 (Ga. App. 1986).*

(n22)Footnote 46. *Benn v. Hatcher, 81 Va. 25, 30 (1885).*

(n23)Footnote 47. *Annunziata v. Millar, 574 A.2d 1021 (N.J. 1990)*

(n24)Footnote 48. Canon law experts caution that a cemetery is properly "solemnly blessed," whereas the ceremonies of "consecration" are applied to churches. C.M. Power, *The Blessing of Cemeteries*, Canon Law Studies No. 185 (1943). The term is variously used by different sects; *see e.g., Appeal of the Russian Orthodox Church of Ambridge, 152 A.2d 489, 491 (Pa. 1959).*

(n25)Footnote 49. The Encyclopedia of Religion 59 (Mircea Eliade, ed. 1987).

(n26)Footnote 50. *See generally*, Danny R. Veilleux, Annotation, *Liability for Desecration of Graves and Tombstones, 77 A.L.R.4th 108 (1990).*

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CHAPTER 53 REAL PROPERTY ASPECTS OF GRAVES AND CEMETERIES

7-53 Thompson on Real Property, Thomas Editions § 53.05

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§ 53.05 Creation of Cemeteries: Dedication.

Most judicial definitions of "cemetery" include the requirement or expectation that land be "dedicated" as a cemetery, but there are several meanings of "dedication," each giving rise to different consequences.

COMPUTER-ASSISTED RESEARCH

LEXIS: cemeter! w/25 dedicat!

(a) Dedication as Devotion to Purpose.

The phrase "dedication" often is used descriptively to indicate simply that land has been devoted to, designated for, or appropriated to, a burial use by its owner, in the same sense as the phrase occurs in decisions that recognize lands that have been "set apart" as a private cemetery or burial grounds, or reserved for that purpose in relevant deeds. n51 To devote land to burial purposes may, or may not, involve the creation or transfer of property interests. As discussed below, "dedications" may create a form of easement interests in persons other than the owner of the realty, leaving the title to the property in its owner. In those situations, "dedicate" manifestly is synonymous with "devote," and describes the landowner's intent and commitment to allow the land to be used for burial purposes.

"[I]t has long been recognized that the owner may, without using a deed, 'set apart' a portion of his land for use as a family cemetery ... . Perhaps inaccurately, this has often been referred to as a 'dedication'." n52

In that less formal sense, a dedication carries no intimation of the creation of unrestricted public rights of usage nor of a public obligation of maintenance. n53

(b) Dedication to Public Use.

The larger and more exacting definition of "dedication" involves a "dedication to public use," which usually represents a transfer of a real property interest from the owner of the land to the general public. A dedication to public use arises from the actions, and hence implied donative intent, n54 of a landowner, and a concomitant acceptance of that interest by the public at large, or by some entity representing the public. (In that sense, dedication to public use is not an

appropriate legal theory where burials are limited to friends and family members, private groups, or otherwise restricted to only a portion of the public.) n55

(1) Implied Dedication.

Classic examples of dedication to public use include "town proprietors" who laid out new towns with a "cemetery" shown on the plat maps, n56 or proprietors who either publish plans for a cemetery and offer its lots to purchasers, n57 or who simply create and record a plat of the land. n58 They also include landowners who physically "stake out" a burial area in public ceremonies, n59 or who sell to the public plots that are "laid out" in a graded area among established graves and monuments, n60 or convey by deed to a municipal n61 or religious entity. n62 Those cases arose from the common law concept of an *implied dedication* that was definitively established in 1832 by the United States Supreme Court in City of Cincinnati v. Lessees of White. n63 Later cases, in applying that doctrine, have relied on evidence of a landowner's donative intent, found in an apparent consent to use of the land for interment purposes by members of the public for a long period of time, n64 frequently employing rationales of equitable estoppel. n65

The common law of implied dedication did not require conveyance by a deed, n66 nor the existence of a specific transferee; dedications were frequently made "to pious or public purposes" where no specific public entity existed. n67 The courts have emphasized that no particular act or ceremony was required to accomplish a dedication, which frequently occurred in an informal manner:

> It is unclear exactly what arrangements were made between the (land owners) and the general public, but by the turn of the century it is estimated 10-30 graves with large, durable monuments, and other less distinctive graves were located on this one-acre piece of land. n68

The imprecision and uncertainty that resulted from implied dedicatory activity created persistent problems regarding the nature and scope of the property interest(s) thereby created. Did the landowner intend to transfer a full fee title to the entire burial ground, or to create some lesser interest in land, such as an easement, and affecting what portion of the realty? Common law dedication rules provided no firm answers, and courts were forced to rely on general rules of construction and various presumptions appropriate to the circumstances to decipher the nature of the particular interest created by a dedication.

COMPUTER-ASSISTED RESEARCH

LEXIS: dedicat! w/10 cemeter! or grave or burial

(2) Statutory Dedication.

Difficulties with the definition, scope, and extent of the common law of implied dedications have prompted most jurisdictions to enact statutory systems that established procedures and requirements for *statutory dedication*, as part of the general procedures for land subdivision. n69 By analogy, about one-quarter of the states have provided additional specific statutory procedures for the creation and dedication of cemeteries, n70 distinguishing them from the more general land subdivision procedures, n71 occasionally by direct statutory exclusion. n72

Unfortunately, often is unclear the extent to which common law and statutory dedications might continue to co-exist, or whether statutory methods were intended by a legislature to become the exclusive techniques for dedication. Some states ignore the issue, recognizing either common law or statutory methods of dedication. n73 Thus, a 1946 Missouri decision declared that defined portions of a bankrupt cemetery operation that had been actually "set apart and devoted" constituted a "cemetery," despite the failure to comply with all the elements of statutory dedication. n74 In contrast, in the 1982 California case of Wana The Bear v. Community Constr., more than 200 Miwok Indian burials had not been interred according to the later-enacted statutory procedures for dedication, and were therefore not included within

statutory protections that were available only to "dedicated" cemeteries. n75 Yet other courts have held that common law dedication was possible before enactment of exclusive statutory procedures, n76 or have regularly applied statutory protections to recognized, but non-dedicated, burial grounds. n77 At least one state has met the problem of non-dedicated ancient graves in crisp fashion; a 1990 Washington act provides: "Any cemetery, historical cemetery, or historic grave that has not been dedicated pursuant to [statutory procedures] shall be considered permanently dedicated ... ." n78

Statutory dedication of cemeteries generally requires only a few formalities. Some of the statutory procedures contemplate a formal conveyance of land title to a public donee, such as a city or county government. n79 Frequently, however, the formalities require merely the preparation and "filing" of a plat map, n80 or only the recordation of two related documents: (1) a plat map showing the subdivision of the entire tract into individual cemetery lots, with attendant streets and boundaries; and (2) a "certificate or declaration of dedication" or other written instrument that expresses the "dedication" of the land "exclusively to cemetery purposes." n81 The declaration appears to be nothing more than an expression of the land owner's intent, albeit recorded, to restrict the use of the land to cemeterial purposes. In the latter situation, it is very similar to the expression of intent implied or expressed in the "set apart" or "set aside" requirement described above, and merely provides for written evidence of devotion to long-term burial purposes. n82

A variation in the format for statutory dedication is to treat the mere acquisition of land by an incorporated cemetery company as constituting a dedication, since the company's activities are inherently restricted in scope and purpose, thus assuring that the land will remain devoted to cemetery activities. n83

A similar form of dedication might also occur "by deed" which, unlike traditional conveyances of title, is accomplished without an actual transfer to a grantee, and is essentially a recorded unilateral expression of intent to restrict the use of the land to cemeterial purposes. n84

One of the purposes of statutory systems was to reduce the uncertainties of land titles by defining more precisely the particular form of title or interest created by a dedication of cemetery land to public use. Early common law or implied dedications, particularly of streets, were sometimes thought to create qualified or defeasible fees, or perhaps only easements. n85 Dedicated cemeteries could thus revert to the donor's estate upon abandonment. n86 Under statutory systems, the statute will specify the nature of the title or interest received by the public and, by extension, whether any interest is retained by the grantor's estate. Thus, in a case arising under Oklahoma's general statutory dedication provisions, the subdivision and dedication of land by use of statutorily-required plat maps included the "donation" to a city of a tract of land "for cemetery." Under the specific statutory terms, that dedication was held to create a *fee simple interest* in the donee city, thus depriving the donor's successors from asserting any further claim to the realty comprising the cemetery. n87 That result is consistent with the general pattern involving large-scale donations of land to public entities, n88 but the effect of any particular dedication will be determined specifically by the appropriate statutes.

FOOTNOTES:

(n1)Footnote 51. *McCartney v. Lester, 533 S.E.2d 675 (W. Va. 2000)* (West Virginia Supreme Court ruled that for cemetery to be dedicated to public use the land owner must dedicate the land specifically for public use and the public must accept for such a purpose also); *Boyd v. Brabham, 442 So. 2d 86, 88 (Ala. 1983); Stoker v. Brown, 583 S.W.2d 765 (Tenn. 1979); Heiligman v. Chambers, 338 P.2d 144 (Okla. 1959); Houston Oil Co. v. Williams, 57 S.W.2d 380 (Tex. App. 1933); Ritter v. Couch, 76 S.E. 428 (W. Va. 1912); Hines v. Tennessee, 149 S.W. 1058 (Tenn. 1911).*

(n2)Footnote 52. *Stoker v. Brown, 583 S.W.2d 765, 766 (Tenn. 1979). Jenkins v. St. Tammany Parish Police Jury, 736 So. 2d 1287 (La. 1999)* (police jury's denial of application for a conditional use permit to build a family cemetery was ruled unreasonable and arbitrary).

(n3)Footnote 53. *Concerned Love Ones v. Pence, 383 S.E.2d 831 (W. Va. 1989); Vidrine v. Vidrine, 225 So. 2d 691 (La. App. 1969); Grinestaff v. Grinestaff, 318 S.W.2d 881 (Ky. 1958).*

(n4)Footnote 54. "[T]he essence of dedication is intention, an intention to dedicate or set apart for cemetery purposes." *Abrams v. Lakewood Park Cem. Ass'n, 196 S.W.2d 278 (Mo. 1946).*

(n5)Footnote 55. *Mingledorff v. Crum, 388 So. 2d 632, 634-635 (Fla. Dist. App. 1980); Grinestaff v. Grinestaff, 318 S.W.2d 881 (Ky. 1958). See also Concerned Love Ones v. Pence, 383 S.E.2d 831 (W. Va. 1989);* and *Vidrine v. Vidrine, 225 So. 2d 691 (La. App. 1969). Accord, Hughes v. Cobb County, 441 S.E.2d 406, 407-08 (Ga. 1994).*

(n6)Footnote 56. *Campbell v. City of Kansas, 13 S.W. 897 (Mo. 1890); Beatty v. Kurtz, 27 U.S. (2 Pet.) 566 (1829).*

(n7)Footnote 57. *Abrams v. Lakewood Park Cem. Ass'n, 196 S.W.2d 278, 282 (Mo. 1946); Village of Villa Park v. Wanderer's Rest Cem., 147 N.E. 104 (Ill. 1925); Gowen v. Bessey, 46 A. 792 (Me. 1900)* (town designates land as cemetery and offers lots to citizens).

(n8)Footnote 58. *Oakland Cem. Co. v. People's Cem. Ass'n, 57 S.W. 27, 28-29 (Tex. 1900).*

(n9)Footnote 59. *Tracy v. Bittle, 112 S.W. 45 (Mo. 1908); Haslerig v. Watson, 54 S.E.2d 413, 422-423 (Ga. 1949).*

(n10)Footnote 60. *Trefry v. Younger, 114 N.E. 1033 (Mass. 1917).*

(n11)Footnote 61. *Ritter v. Couch, 76 S.E. 428 (W. Va. 1912)* (1831 deed to Charleston; lots made available "by license" to the public).

(n12)Footnote 62. *Bowen v. Hooker, 372 S.W.2d 257 (Ark. 1963)* (existing cemetery deeded to church). Similarly, landowners might make common law express dedications of land for use as a public cemetery by conveying to named persons as trustees. *See, e.g.*, the 1895 deed described in *Shepherd v. Hickory Grove Cemetery Mem'l Fund, Inc., 649 So. 2d 1266 (Ala. 1994); Robinson v. Department of Transp., 364 S.E.2d 884 (Ga. App. 1988)* (burials had occurred for more than one hundred years in area "apparently" legally dedicated).

(n13)Footnote 63. *31 U.S. (6 Pet.) 431 (1832). See also Beatty v. Kurtz, 27 U.S. (2 Pet.) 566 (1829)* (a dedication "to public and pious uses" of church and graveyard).

(n14)Footnote 64. *Locke v. Lester, 78 So. 2d 14 (La. App. 1955)* (long use evidenced by reservation and continuous use is "legally sufficient to dedicate."); *Trefry v. Younger, 114 N.E. 1033 (Mass. 1917); Roundtree v. Hutchinson, 107 P. 345 (Wash. 1910).* Similar tests have been adopted by statute, *e.g.*, Nev. Rev. Stat. Ann. § 452.002: "The uninterrupted use by the public of land for a burial ground for 5 years, with the consent of the owner and without a reservation of his rights, is presumptive evidence of his intention to dedicate it to the public for that purpose."

(n15)Footnote 65. *E.g., Morgan v. Collins Sch. House, 133 So. 675 (Miss. 1931)* (established use for burial, with consent of land owners, obligates owners in equity to recognize continued burial rights); *Bessemer Land & Imp. Co. v. Jenkins, 18 So. 565 (Ala. 1895)* (corporation reported to stockholders that it had "set aside" land "for the burial of the dead."); *Benn v. Hatcher, 81 Va. 25, 29-30 (1885).*

(n16)Footnote 66. *E.g., Haslerig v. Watson, 54 S.E.2d 413 (Ga. 1949); Tracy v. Bittle, 112 S.W. 45 (Mo. 1908).*

(n17)Footnote 67. Traditional versions of the process are derived from the holding in *City of Cincinnati v. Lessees of White, 31 U.S. (6 Pet.) 431 (1832),* which in turn drew on *Pawlet v. Clark, 13 U.S. (9 Cranch) 292 (1815),* and *Beatty v. Kurtz, 27 U.S. (2 Pet.) 566 (1829),* both dealing with dedications to religious uses. Those cases established that a specific entity need not be *in esse* nor operate as a transferee for an effective dedication to occur. Thus, most jurisdictions have held a dedication to result regardless of whether the cemetery was transferred to a distinct entity; *e.g., Locke v. Lester, 78 So. 2d 14 (La. App. 1955)* (dedication is complete "without necessity of formal acceptance by a public or quasi-public corporation"), frequently based on trust theory; *see Ritter v. Couch, 76 S.E. 428, 432-433 (W.Va.*

1912) (dedication to public created a charitable public trust; no beneficiaries necessary), and *Babin v. City of Ashland, 116 N.E.2d 580 (Ohio 1953).* Occasional cases are *contra*; *see e.g., Morgan v. Collins Sch. House, 127 So. 565 (Miss. 1930)* and *133 So. 675 (Miss. 1931)* (deed made to non-existent school and graveyard was canceled as "void for want of a grantee" to quiet landowner's title, which nevertheless remained subject to burial rights); *Kansas City v. Scarritt, 69 S.W. 283, 285 (Mo. 1902)* (title can't lodge in general public). *Compare*, Note, Title to the Interest Granted Under a Common Law Dedication Pending Acceptance by the Specific Grantee, *5 Tex. L. Rev. 201 (1927).*

The absence of a specific grantee frequently means that no entity will exist that can assume the obligation and responsibilities of long-term or perpetual maintenance, with the risk that the cemetery eventually will fall into disrepair or neglect. *See* § 53.09(b) *infra*.

(n18)Footnote 68. *Dearinger v. Peery, 387 N.W.2d 367, 368 (Iowa App. 1986). See also State ex rel. Atty. Gen. of Iowa v. Terry, 541 N.W.2d 882 (Iowa 1995).* Many cases display similar facts, *e.g., Vidrine v. Vidrine, 225 So. 2d 691 (La. App. 1969).*

(n19)Footnote 69. The majority of states appear to apply statutory techniques to all forms of dedication, including cemeteries, *e.g.*, Ga. Code Ann. § 44-5-230; early examples of adoption of general subdivision processes to cemeteries occurred in *Oakland Cem. Co. v. People's Cem. Ass'n, 57 S.W. 27 (Tex. 1900);* and *Langston City v. Gustin, 127 P.2d 197 (Okla. 1942).* Dedication in traditional land subdivision situations is discussed in L.S. Tellier, Annotation, Validity and Construction of Regulations as to Subdivision Maps or Plats, *11 A.L.R.2d 524 (1950). City of Worthington v. City of Columbus, 796 N.E.2d 920 (Ohio 2003)* (the city was not authorized to use its eminent domain power to appropriate property for the proprietary function of a cemetery, especially when that use would destroy an existing public use).

(n20)Footnote 70. Examples of "statutory dedication" of cemeteries include Ariz. Rev. Stat. Ann. § 32-2194.22; Cal. Health and Safety Code §§ 8551, 8553; Haw. Rev. Stat. § 441-4; 765 Ill. Comp. Stat. Ann. § 805/1; La. Rev. Stat. Ann. § 8:302; N.J. Rev. Stat. Ann. §§ 8A:6-8A:7; N.Y. Not-For-Profit-Corp. Law § 1401 [private and family cemetery corporations]; Or. Rev. Stat. Ann. §§ 97.320-97.330; Tex. Health & Safety Code Ann. §§ 711.034-711.035; Wash. Rev. Code §§ 68.24.030-68.040.

(n21)Footnote 71. *E.g., Cedar Hill Mem. Cem. Ass'n v. Storie, 281 S.W.2d 144, 149 (Tex. App. 1955); Clark v. Sunset Hills Mem. Park, 273 P.2d 645, 648-649 (Wash. 1954).*

(n22)Footnote 72. *E.g.*, Haw. Rev. Stat. § 441-4 ("no provision of [subdivision] law ... shall be applicable to cemeteries"). *Laurel Land Mem'l Park, Inc. v. Dallas Central Appraisal Dist., 911 S.W.2d 783 (Tex. App. 1995)* (publicly dedicated cemetery was statutorily exempt from ad valorem taxation).

(n23)Footnote 73. *E.g., Parker v. Fidelity Union Trust Co., 63 A.2d 902, 914 (N.J. Ch. 1949).*

(n24)Footnote 74. *Abrams v. Lakewood Park Cem. Ass'n, 196 S.W.2d 278, 282-283 (Mo. 1946).*

(n25)Footnote 75. *Wana The Bear v. Community Constr., 180 Cal. Rptr. 423, 425 (App. 1982)* (narrow view of "dedication" as only "a land use planning concept."). *See also Winters v. State, 9 Ind. 172 (1857)* (desecration prosecution valid only where "cemetery" was created under statutory procedures).

(n26)Footnote 76. *Dearinger v. Peery, 387 N.W.2d 367, 370 (Iowa App. 1986)* (common law dedication accomplished before enactment of "exclusive" statutory system for public acquisition). *See also, State ex rel. Atty. Gen. of Iowa v. Terry, 541 N.W.2d 882 (Iowa 1995). Compare Wooldridge v. Smith, 147 S.W. 1019, 1022 (Mo. 1912)* (creation of private burying ground must comply with "exclusive" statutory procedures); *distinguished in Rhodes v. Nicklas, 624 S.W.2d 504, 506 (Mo. App. 1981)* (title to land "reserved" as private cemetery is restricted regardless of failure to satisfy statute).

(n27)Footnote 77. *E.g., Bellevue Masonic Temple, Inc. v. Lokken, 452 P.2d 544 (Wash. 1969).*

(n28)Footnote 78. Wash. Rev. Code § 68.60.020. Haw. Rev. Stat. § 441-17 provides that "existing cemeteries" that have "been lawfully established [and platted] shall be deemed to have been dedicated [as per applicable statutes]."

(n29)Footnote 79. *E.g.*, Ohio statutes vest title of dedicated cemeteries in the municipal corporation, or township in which the cemetery is located or by which it is annexed. *Ravenna Township Trustees v. City of Ravenna, 690 N.E.2d 49 (Ohio App. 1996). Langston City v. Gustin, 127 P.2d 197 (Okla. 1942). Compare* notes 65, 66, *supra*.

(n30)Footnote 80. *E.g.*, N.J. Rev. Stat. Ann. §§ 8A:6-8A:7.

(n31)Footnote 81. *E.g.*, Ariz. Rev. Stat. Ann. § 32-2194.22; Cal. Health & Safety Code §§ 8551, 8553; Haw. Rev. Stats. § 441-2; Mont. Code Ann. § 35-21-402; Or. Rev. Stat. § 97.320; Tex. Health & Safety Code tit. 8, ch. 711.034(c)(d)-711.035; Wash. Rev. Code Ann. § 68.24.030.

(n32)Footnote 82. *See Abrams v. Lakewood Park Cem. Ass'n, 196 S.W.2d 278 (Mo. 1946).*

(n33)Footnote 83. *Memphis State Line R.R. v. Forest Hill Cem. Co., 94 S.W. 69 (Tenn. 1906); Whitmore v. Woodlawn Cem., 75 N.Y.S. 847, 849 (1902). But see Melwood, Inc. v. DeKalb County, 336 S.E.2d 571 (Ga. 1985).*

(n34)Footnote 84. *E.g., Oakland Cem. Co. v. People's Cem. Ass'n, 57 S.W. 27 (Tex. 1900).*

(n35)Footnote 85. *Langston City v. Gustin, 127 P.2d 197, 200-206 (Okla. 1942); Tracy v. Bittle, 112 S.W. 45, 50 (Mo. 1908).*

(n36)Footnote 86. *United Cems. Co. v. Strother, 61 S.W.2d 907 (Mo. 1933)* (land owner retains title to commercial cemetery "dedicated" to public use); *Kansas City v. Scarritt, 69 S.W. 283, 285 (Mo. 1902)* ("legal title remained in the original owners").

(n37)Footnote 87. *Langston City v. Gustin, 127 P.2d 197 (Okla. 1942).*

(n38)Footnote 88. *See generally*, L.S. Tellier, Annotation, Validity and Construction of Regulations as to Subdivision Maps or Plats, *11 A.L.R.2d 524, 549-553 (1950).*

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CHAPTER 53 REAL PROPERTY ASPECTS OF GRAVES AND CEMETERIES

7-53 Thompson on Real Property, Thomas Editions § 53.06

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§ 53.06 Nature and Duration of the Interests in Cemeteries and Graves: An Overview.

Graves or unused burial sites impose a range of potential responsibilities and liabilities on the owner of the land in which they are present. They also create a corresponding variety of potential rights and privileges in those persons who may have interests in the sites or graves themselves. Unfortunately, the analysis of property rights in burial areas is often confused by a failure to distinguish adequately between the property interest represented by the entire tract of land occupied by a burial area or cemetery, and the distinct and varied interests that may exist in the individual grave sites or cemetery lots. In both cases, the interests invariably are dependent upon each other, and the scope and duration of all of the interests are interrelated; each is defined by reference to the others.

Generally, a cemetery may exist as an independent unit of land, owned in fee title by a distinct public or private entity. That title will be subject to interests connected to the individual graves or burial sites. Alternatively, the cemetery may exist merely as a defined portion of a larger tract of land; in such cases the cemetery is usually not owned as a fee title, but, instead, held as a qualified fee or an easement. In that case as well the cemetery will be subject to separate interests in individual burial sites. Under either pattern, the individual burial interests may be in the form of trust obligations, servitudes in the form of easements of burial, or similar but less-clearly defined public rights.

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CHAPTER 53 REAL PROPERTY ASPECTS OF GRAVES AND CEMETERIES

7-53 Thompson on Real Property, Thomas Editions § 53.07

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§ 53.07 Interests in the Burial Area or Cemetery as a Whole.

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Three general patterns describe the state of an owner's title to land occupied by a burial area.

(a) Unmarked or Unauthorized Burials.

(1) At Common Law.

Where one or more n89 human burials occur on lands that do not appear to have been either set aside or reserved for burial purposes, nor formally dedicated to public use, the landowner's title may not be restricted by common law property concepts. The absence of visible markings, n90 or other evidence of demonstrated intent by the landowner (or that owner's predecessors) to set aside or otherwise devote the land to burial purposes, removes much of the basis on which a servitude or trust might be imposed. n91 Indeed, there is limited authority for the proposition that a landowner can compel the removal of human remains buried without permission on that owner's land. n92

However, the discovery of an unmarked, or previously unknown grave, although not constituting a traditional restriction on the landowner's title, may nevertheless actuate statutory or local law prohibitions on disturbance of human remains or desecration of graves n93 In many jurisdictions, the only limitation on a landowner's activities occasioned by a burial is the near-universal statutory requirement to summon a coroner or medical examiner upon discovery of human remains. Where it is evident the remains have been buried for an extended time, or do not raise criminal or forensic concerns, the coroner's interest and jurisdiction may terminate. In an increasing number of jurisdictions, however, extensive statutes now offer additional protection to any "unmarked" human burials discovered on private lands.

(2) Statutory Protection for Unmarked or Unauthorized Burials.

Approximately one-half of the states have enacted special statutes for the protection of unmarked human burials. n94 The purpose is often quite broad, as demonstrated by Montana's Human Remains and Burial Site Protection Act:

> The state and its citizens have an obligation to protect from disturbance or destruction all human

> skeletal remains, burial sites, and burial material, including those in marked, unmarked, unrecorded, registered, or unregistered graves or burial grounds located on state or private lands that are not protected as cemeteries or graveyards under existing state law. n95

The majority of the statutes declare an intention to ensure that all burials be accorded equal treatment and respect for human dignity, without reference to ethnic origin, cultural background, or religious affiliation. n96 A smaller additional group of statutes is expressly designed to protect Native American burials, n97 for which there have been extensive problems of vandalism n98 and looting of both artifacts and skeletal remains. n99 Where Native American burials are involved, both groups of statutes usually include special provisions for consultation with, permission from, or supervision by, persons from an "appropriate" present-day Indian tribe who may be affiliated with the persons whose graves are discovered. n100

Under the provisions of both types of acts, landowners will be prevented from undertaking construction or similar activities for a limited, n101 or perhaps indefinite, n102 period, until arrangements have been made variously, for archaeological or historical evaluation, excavation and study, reinterment, or other "disposition" of the remains. Some of the acts, however, specifically exclude named activities - such as farming or mining - that are allowed to continue without restraint. n103 The unmarked burial statutes are often vague about the ultimate treatment to be accorded human remains discovered on private lands - and thus unclear whether graves must remain in place as an implicit restriction on use of the land for other purposes. Although the Colorado and Montana acts allow a landowner to demand disinterment of human remains, n104 some of the other acts assume that burials ought to remain either undisturbed or be reinterred elsewhere on the land, n105 or even deny permission to disinter historically significant remains. n106 For example, Louisiana's law includes the aspirational policy that "every reasonable effort is to be made to restore the unmarked burial site and to avoid disturbing the human skeletal remains." n107 The Massachusetts act directs the state archaeologist to "consult with the site's owner and other interested parties to determine whether prudent and feasible alternatives exist to avoid, minimize or mitigate harm to the burial site." If none are found, the archaeologist will excavate the site and "recover the remains." n108

The majority of the statutes, however, appear to have adopted a position of benign ambiguity, calculated to allow a negotiated solution to be reached among the interested parties, and usually allowing some excavation and disinterment by professional archaeologists, followed either by curation or reinterment of the human remains. Thus, Florida's act imposes an extensive duty of consultation on its state archaeologist in order to achieve proper protection and disposition of the human remains found in an unmarked burial. n109 The Minnesota statute provides simply that non-Indian burials, "shall be dealt with in accordance with provisions established by the state archaeologist." n110 Under the North Carolina provisions:

> Subsequent to taking charge of the human skeletal remains, the Chief Archaeologist shall have 48 hours to make arrangements with the landowner for the protection or removal of the unmarked human burial or human skeletal remains. The Chief Archaeologist shall have no authority over the remains at the end of the 48 hour period and may not prohibit the resumption of the construction or agricultural activities without the permission of the landowner. n111

Hawaii's act overtly recognizes the need to make a reasoned evaluation of competing values, and authorizes a regional "burial council" to "determine whether preservation in place or relocation ... is warranted," following varied criteria for native Hawaiian or "other than Hawaiian" burial sites. n112

It appears likely that, under many of the provisions, human remains, and thus the graves that contain them, will be removed from private land if that is the landowner's wish. n113 The ability to do so, however, is restrained by the prohibitions on disinterment or disturbance without requisite state permits. n114

Although all of the state systems of statutory protection concern unmarked burial sites, generally including those

located on private realty, some statutes offer additional protection to the artifacts found within certain graves. The state systems should be compared to similar federal legislation, primarily the Native American Graves Protection and Repatriation Act of 1990 ("N.A.G.P.R.A."). n115 That act applies only to graves located on certain federally owned or managed lands, and is thus beyond the scope of this chapter. However, as to specific human remains or artifacts removed from graves on private lands, special federal provisions may govern their subsequent possession, curation, or transfer of title. n116 Chief among those are sections in N.A.G.P.R.A., n117 and in the Archaeological Resources Protection Act of 1979 ("A.R.P.A."), n118 that establish federal criminal liability for transactions ("trafficking") regarding artifacts obtained in violation of N.A.G.P.R.A. or excavated or removed in violation of state or local law. Under these provisions, materials acquired from private realty in, for instance, violation of local trespass laws may result in federal prosecution. n119

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LEXIS: unmark! or unregist! w/10 (human w/3 burial or remain!) and not (native w/3 american) or indian unmark! or unregist! w/10 (native w/3 american) or indian w/5 burial or remain!

(b) Known Burials on Land Devoted to Burial Purposes.

A pattern of organized burials inevitably presents some restrictions on the land's title. Organized burials include those burial areas and family, neighborhood, or private cemeteries, that were not effectively "dedicated to public use," but nevertheless were "set aside" or otherwise devoted to burial purposes in any of the manners described in § 53.04 *supra*. Where fee title to a cemetery or burial area is held by a successor to the landowner who originally created the "set aside," no mention of the cemetery may appear in the chain of title, which thus appears unrestricted, and may be subject only to one or more easements of sepulture implied by operation of law. However, where the cemetery area was created by, or recognized in, an express deed, or an express reservation or exception, then standard rules of construction will determine whether the cemetery is held as an easement or a fee title. n120 The common-law restrictions on a landowner's title or possession that are presented by organized burials are supplemented in a few jurisdictions by increased recognition of cemeteries as historical resources. Under recent statutory measures, "areas with a concentration of skeletal remains," n121 or those that have "historical significance" n122 may receive additional regulatory protection similar to that accorded unmarked burials.

(c) Known Burials on Land Dedicated to Public Use.

Land that has been formally "dedicated to public use" will often have had its fee simple title either transferred to a public entity, or retained by the private owner, cemetery corporation, or religious or municipal entity that made the original dedication according to the applicable statutory requirements. n123 Whether transferred or retained, by virtue of the formal dedication the title to the land overtly became impressed with a restricted purpose of sepulture. n124 Moreover, where statutory dedication formalities have been followed, the tract will have well-defined boundaries, and the specific nature of the individual burial interests are likely to have been formally defined by statute or appropriate regulations of the cemeterial management entity. n125

Dedicated cemeteries that have fallen into neglect, whether public or private, may receive additional protection under specific state laws regarding responsibility for "abandoned" cemeteries, discussed in § 53.09(b) *infra*.

FOOTNOTES:
(n1)Footnote 89. Some jurisdictions limit statutory protection of "cemeteries" or "burial grounds" to places where a minimum number of human remains are present. *See, e.g., Town of Sudbury v. Department of Pub. Util., 218 N.E.2d 415, 424 (Mass. 1966)* (remains of one human "not sufficient" to constitute statutory "burial ground"); result *revised by* 1983 Amendment to Mass. Gen. Laws Ann. ch. 114 § 17]; Cal. Health & Safety Code § 8100 ("six or more human bodies being buried at one place constitute the place a cemetery"); Wash. Rev. Code Ann. § 68.04.04(2) ("cemetery" as

"place where five or more human remains are buried"); *but compare* Wash. Rev. Code Ann. § 68.60.010 ("Historical cemetery means any burial site or grounds which contain within them human remains buried prior to November 11, 1889."). Wash. Rev. Code Ann. 68.04.040(2). *See also, AT&T Wireless PSC, Inc. v. City of Independence 63 S.W.3d 609 (Ky. App. 2001)* (The fact that burial grounds are not visible cannot be used as evidence that the grounds were not set aside for burial purposes).

(n2)Footnote 90. Visible markings are an important aspect of the notice available to a landowner; *see* the discussion of "notice" in § 53.04(c), *supra*.

(n3)Footnote 91. *Castro Romero v. Becken, 256 F.3d 349 (5th Cir. 2001)* (lineal descendant's allegation that the oral history of the Lipan Apache tribe established city land as a burial ground was not sufficient to convert the land into a "cemetery" for purposes of a Texas statute providing protection to cemeteries, absent any evidence that the land was publicly dedicated as a cemetery, that the land was enclosed for use as a cemetery, or that the land, even if once used for burial purposes, had not been abandoned). As noted in the early case of *Hunter v. Trustees of Sandy Hill, 6 N.Y. (Hill) 407, 414-415 (1844):* "When these graves shall have worn away; ... when nothing shall remain to distinguish this spot from the common earth around, and it shall be wholly unknown as a graveyard; it may be that some one who can establish a good "paper title,' will have a right to its possession; for it will then have lost its identity as a burial-ground, and with that, all right founded on the dedication must necessarily become extinct." *See also* the discussion of notice in § 53.04(c), *supra*.

(n4)Footnote 92. *Hall v. Carney, 511 S.E.2d 271 (Ga. App. 1999)* (action against cemetery committee for excavating a grave site containing a stillborn baby who had been buried there without the family first informing the cemetery committee), R.F. Martin, Annotation, *Removal and Reinterment of Remains, 21 A.L.R.2d 472, at 530-33 (1952). Compare*, however, the substantial rights and restrictions imposed by the unmarked human burial statutes discussed, *infra*.

(n5)Footnote 93. *State v. Morro, 987 P.2d 420 (N.M. Ct. App. 1999)* (ten tombs defaced by the defendant each constituted a single unit of prosecution under the statute).

(n6)Footnote 94. Ariz. Rev. Stat. Ann. § 41-865; Ark. Code Ann. §§ 13-6-401-13-6-409; Colo. Rev. Stat. §§ 24-80-1301-1305; Del. Code Ann. tit. 7 §§ 5403-5409; Fla. Stat. ch. 872.05; Ga. Code Ann. §§ 36-72-1-36-72-16; Haw. Rev. Stat. §§ 6E-43-6E-43.6; Idaho Code §§ 27-501-27-504; 20 Ill. Comp. Stat. Ann. §§ 3440/1-3440/16; Kan. Stat. Ann. §§ 75-2742-75-2753; La. Rev. Stat. Ann. §§ 8-671-8-681; Mass. Gen. L. ch. 9 § 26A(7), ch. 38 § 6B; Minn. Stat. § 307.08; Mo. Rev. Stat. §§ 194.400-194.410; Mont. Code Ann. §§ 22-3-801-22-3-808; Neb. Rev. Stat. §§ 12-1201-12-1212, 28-1301; N.H. Rev. Stat. Ann. §§ 227-C:8-a-227-C:8-j. §§ 227-C:1-227-C:8-a; N.M. Stat. Ann. § 18-6-11.2; N.C. Gen. Stat. §§ 70-26-70-41; N.D. Cent. Code § 55-03-00.1-55-07; Tenn. Code Ann. §§ 11-6-107-11-6-116; Va. Code Ann. § 10.1-2305; W. Va. Code § 29-1-8a.

(n7)Footnote 95. Mont. Code Ann. § 22-3-802(1)(a).

(n8)Footnote 96. *E.g.*, Ark. Code Ann. § 13-6-401; Fla. Stat. ch. 872.05(1); La. Rev. Stat. Ann. § 8:672; Mont. Code Ann. § 22-3-802(2)(a); Minn. Stat. § 307.08(1).

(n9)Footnote 97. Cal. Pub. Res. Code §§ 5097.94, 5097.98; Conn. Gen. Stat. §§ 10-386-10-390 [applicable only to state lands]; Mass. Gen. L. ch. 38 § 6; Nev. Rev. Stat. Ann. §§ 383.150-383.190; Or. Rev. Stat. Ann. §§ 97.740-97.760; Utah Code Ann. §§ 9-9-401-9-9-406 [applicable only to state lands]; Wash. Rev. Code Ann. §§ 27.44.030-27.44.040. *See generally*, Margaret B. Bowen, *The Reburial of Native American Skeletal Remains: Approaches to the Resolution of a Conflict, 13 Harv. Envtl. L. Rev. 147 (1989);* John E. Peterson, *Dance of the Dead: A Legal Tango for Control of Native American Skeletal Remains*, 15 Am. Ind. L. Rev. 115 (1990); Catherine Yalung & Laurel Wala, *A Survey of State Repatriation and Burial Protection Statutes, 24 Ariz. St. L.J. 419 (1992). See also* William L. Evans, *Who Owns the Contents of Ohio's Ancient Graves?* 22 Capital L. Rev. 711 (1993).

(n10)Footnote 98. *E.g.*, Cal. Pub. Res. Code § 5097.94 preamble, Nev. Rev. Stat. Ann. § 383.180; N.C. Gen. Stat. § 70-27(a)(1). Vandalism may also be a problem with non-Native American graves, such as those of Civil War soldiers; *see* 20 Ill. Comp. Stat. Ann. § 3440/2, and La. Rev. Stat. Ann. § 8:672.

(n11)Footnote 99. Or. Rev. Stat. Ann. § 97.745; Mont. Code Ann. § 22-3-802(1)(b); Utah Code Ann. § 9-9-404.

(n12)Footnote 100. *E.g.*, Cal. Pub. Res. Code § 5097.98 ("those persons ... most likely descended from the deceased Native American"); Fla. Stat. ch. 872.05(6)(b) ("closest related family members ... or community leaders"); N.C. Gen. Stat. §§ 70-32(a) ("consult with ... appropriate tribal group or community"); La. Rev. Stat. § 8:681(a)(4)(b) ("ethnic affinity to any living tribe of Native Americans"); N.C. Gen. Stat. § 70-32(a); Utah Code Ann. §§ 9-9-403(1)(c)27.44.030 to 9-9-403(1)(c)27.44.040 ("cultural affiliation").

(n13)Footnote 101. Ariz. Rev. Stat. Ann. § 41-865(B),(C)(1) (activity must cease; 10 days for inspection); Colo. Rev. Stat. § 24-80-1302(d) (10 day injunction); Haw. Rev. Stat. § 6E-43 (90 day review period); N.H. Rev. Stat. Ann. § 227-C:8-b (1991) (48 hour cessation of activity, with exceptions); N.C. Gen. Stat. §§ 70-29-70-30 (1992) (disturbance must cease immediately, state archaeologist's subsequent control limited to 48 hours); Tenn. Code Ann. § 11-6-107(d)(2) ("immediately cease" disturbance; officials must make determinations within 5 days). Under Tenn. Code Ann. § 11-6-107(d)(7) no public right of access is created by the statutes.

(n14)Footnote 102. *E.g.*, Del. Code Ann. tit. 7 § 5405 (activity to cease immediately, may resume after approval); Fla. Stat. ch. 872.05 (1991) (activity to cease immediately, "shall not resume unless specifically authorized"); La. Rev. Stat. § 8-680 ("activity shall immediately cease"; shall not resume until permit is issued); Mo. Rev. Stat. § 194.407.3 (injunction cannot exceed 30 days); Neb. Rev. Stat. § 12-1205 (1991) (activity to cease immediately, may continue after removal of remains).State archaeologist's denial of permission to disinter historically significant human remains from Native American burial mound was not a taking of property rights where preexisting state statute authorized denial of permission. *Hunziker v. Iowa, 519 N.W.2d 367* (Iowa 1994, *cert. denied, 514 U.S. 1003 (1995)); see* Iowa Code § 263B.9.

(n15)Footnote 103. *E.g.*, 20 Ill. Comp. Stat. Ann. 3440/2 (not intended to interfere with normal enjoyment of ownership or farming, development, etc.); Tenn. Code Ann. § 11-6-107(6) ("normal farming activity"); W. Va. Code § 29-1-8a(a) (not intended to interfere with normal activities of farming, development, mining, improvement). *Compare* Or. Rev. Stat. Ann. § 97.745 (inadvertent acts still obligate actor to reinter at own expense).

(n16)Footnote 104. Colo. Rev. Stat. § 24-80-1302(4)(b) (" shall disinter (Native American remains) ... unless agree to leave *in situ*"); Mont. Code Ann. §§ 22-3-805(6), 22-3-805(7).

(n17)Footnote 105. Subsections (1) and (8) of Ga. Code Ann. § 36-72-8 contain a "presumption" in favor of leaving the cemetery or burial ground "undisturbed," and recognize "the value of the undisturbed cultural and natural environment." Under several statutes, the landowner is obliged to reinter Native American remains discovered through inadvertence and leave them on the land; *see e.g.*, Cal. Pub. Res. Code § 5097.98 ("shall reinter (Native American remains) ... on the property in a location not subject to further subsurface disturbance"); Idaho Code § 27-502 ("persons disturbing graves ... shall cause their human remains to be reinterred"); Nev. Rev. Stat. § 383.170 ("reinter (Native American remains) with appropriate dignity ... in a location not subject to further disturbance"); Or. Rev. Stat. Ann. § 97.745 (reinter at expense of person who disturbed). Idaho's act appears to prefer non-disturbance, but allows excavation for subsequent reinterment following scientific study. Idaho Code § 27-503.

(n18)Footnote 106. *See Hunziker v. Iowa, 519 N.W.2d 367* (Iowa 1994, *cert. denied*, 1995 *514 U.S. 1003 (1995)),* holding that the code's authorization of denial of permission to disinter was not an unconstitutional taking of property rights. Iowa Code Ann. § 263B.9.

(n19)Footnote 107. La. Rev. Stats. § 8:681(A)(1). Under Haw. Rev. Stats. § 6E-43, "preservation in place" is preferred for burials of important historical value, known lineal descendants, or concentration of skeletal remains.

(n20)Footnote 108. *See e.g.*, Mass. Gen. L. ch. 9 § 26A(7).

(n21)Footnote 109. Fla. Stat. Ann. § 872.05(6).

(n22)Footnote 110. Minn. Stat. § 307.08 subd. 7.

(n23)Footnote 111. N.C. Gen. Stat. §§ 70-29, 70-30.

(n24)Footnote 112. Haw. Rev. Stat. § 6E-43.

(n25)Footnote 113. *E.g.*, Neb. Rev. Stat. § 12-1208(2) ("shall cause the remains ... to be interred in consultation with the county coroner"). Iowa Code Ann. § 263B.8 and Kan. Stat. Ann. § 75-2753 both provide for a separate cemetery to be established on state lands to receive reinterments.

(n26)Footnote 114. *Thompson v. City of Red Wing, 455 N.W.2d 512 (Minn. App. 1990)* (statutory protection regulates gravel extraction on site of Native American burials).

(n27)Footnote 115. *25 U.S.C. §§ 3001*-3013. *See also* Renee M. Koslak, The Native American Graves Protection and Repatriation Act: The Death Knell for Scientific Study? *24 Am Indian L. Rev. 129 (2000);* Michelle Hibbert, Galileos or Grave Robbers? Science, the Native American Graves Protection and Repatriation Act, and the First Amendment, *23 Am Indian L. Rev. 425* (1998/1999).

(n28)Footnote 116. *See generally* Kristine O. Rogers, Visigoths Revisited: The Prosecution of Archaeological Resource Thieves, Traffickers, and Vandals, *2 J. Envt'l. Law & Litig. 47 (1987),* and Sherry Hutt, Illegal Trafficking in Native American Human Remains and Cultural Items: A New Protection Tool, *24 Ariz. St. L.J. 135 (1992).*

(n29)Footnote 117. *18 U.S.C. § 1170.*

(n30)Footnote 118. *16 U.S.C. § 470ee*(c).

(n31)Footnote 119. *See United States v. Gerber, 999 F.2d 1112 (7th Cir. 1993)* (valid A.R.P.A). Prosecution of persons who had trespassed on private realty to remove artifacts from ancient burials and subsequently transported them in interstate commerce.

(n32)Footnote 120. *See e.g., Haas v. Gahlinger, 248 S.W.2d 349 (Ky. 1952),* where two cemeteries existed, one as an easement and the other as fee title.

(n33)Footnote 121. Haw. Rev. Stats. § 6E-43 (prehistoric and historic burial sites).

(n34)Footnote 122. R.I. Gen. Laws §§ 23-18-11.1, 23-18.3-1 (protection of historic cemeteries); Va. Code Ann. § 10.1-2305.C (family graveyards with historical significance); Wash. Code Ann. §§ 68.60.010-68.60.060 (protection of historic cemeteries).

(n35)Footnote 123. *Langston City v. Gustin, 127 P.2d 197 (Okla. 1942); United Cems. Co. v. Strother, 61 S.W.2d 907 (Mo. 1933)* (land owner retains title to commercial cemetery "dedicated" to public use); *In re Board of Transp. of N.Y., 251 N.Y.S. 409 (1931)* (abandoned cemetery had value to owners of servient fee title); *Kansas City v. Scarritt, 69 S.W. 283, 285 (Mo. 1902)* ("legal title remained in the original owners").

(n36)Footnote 124. *See, e.g., Ritter v. Couch, 76 S.E. 428 (W. Va. 1912),* and § 53.05(b) *supra*.

(n37)Footnote 125. *Warner v. City of Boca Raton, 64 F. Supp. 2d 1272 (S.D. Fla. 1999)* (public cemetary's restriction on vertical grave makers did not violate the First Amendment).

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CHAPTER 53 REAL PROPERTY ASPECTS OF GRAVES AND CEMETERIES

7-53 Thompson on Real Property, Thomas Editions § 53.08

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§ 53.08 Interests in Individual Grave Sites or Burial Lots.

[Go To Supp]

Throughout the 19th century, American courts struggled to develop an analytical model that could explain the types of interests held in individual graves, burial grounds, and cemeteries. By the early 20th century, it had become apparent that a variety of theories were being employed by courts, many of which were indistinct and poorly understood. As noted in a thoughtful opinion of the Oregon Supreme Court in 1921:

> The right or title acquired under a conveyance of land for burial purposes is ofttimes likened to an easement ... and occasionally to both an easement and a license, but probably most frequently to a license or privilege. Although the right created by the conveyance of a lot for burial purposes ... possess[es] many of the characteristics of an easement; and it likewise possesses some of the qualities of a license ... . Occasionally the suggestion is made that a conveyance for burial purposes creates an estate in the nature of a qualified or base fee. The right with which we are now dealing is in reality sui generis ... and consequently it is difficult to define or to describe such rights when we use words which are usually employed in designating other rights possessing qualities in part similar and in part dissimilar to those inhering in the right of burial. n126

The analysis in many older cases reflected the unsettled state of property theory, and produced conclusions and terminology that are not consistent with the general revisions in nomenclature that followed the adoption of the *Restatement of Property* in 1936-1944. Unfortunately, the general inability to accord burial interests a standard terminology led some courts to suggest that ordinary incidents of real property ownership were not applicable. n127 Within a particular jurisdiction, too-close adherence to *stare decisis* might serve to entrench the older terminology and conceptual formats, thus preventing adoption of more-appropriate analysis and terminology.

The variations in nomenclature used to characterize burial sites also reflect the quite different circumstances under which the sites have been created and are maintained. Modern cases tend to adopt easement theory and terminology as the most appropriate model for analysis of burial interests, but sometimes without considering the varied ways in which those rights may have been created. Thus, where burial sites have been created by informal common law methods

typical of the private family cemeteries, or by implied dedication of neighborhood or public cemeteries, n128 formal written conveyances were rarely used to create interests in individual grave sites. n129 There was little opportunity, and perhaps no sense of necessity, to precisely define the nature and scope of the burial interest. In those circumstances, implied or oral permission by the landowner to family members or friends could be interpreted as a license; but once a burial or other actions had occurred in reliance on the permission, standard modern property theory would hold the license to have become irrevocable, and thus the "essential equivalent" of an easement. n130 Nevertheless, the use of easement theory can as easily yield opposite results, denying burial rights to family members who had previously enjoyed permissive rights. n131

Similarly, a landowner when granting land might reserve or except burial interests from the conveyance. Although occasionally construed as the exception of a full fee title, n132 the grantor's interest is usually construed as the reservation of an easement applicable to the entire cemetery. n133 The resulting easement in gross would be held collectively by a group designated by the grantor, but generally limited to members of the immediate family, who would acquire their rights merely by informal divisibility of the easement in gross, or succession. n134 Little attention appears to have been paid to formal conveyancing concerns, such as the assignability or divisibility of an easement in gross. n135

Where no formal entity existed to hold the title (whether in fee or easement form) for the entire cemetery, duties of maintenance were unspecified, n136 and often undertaken voluntarily by the community, as reflected by the annual "decoration day" custom still practiced in many neighborhood cemeteries located in rural areas. n137

(a) Interests in Individual Sites; Scope.

The scope of the burial interest created by common law techniques varies widely. At the least, it includes a right of access and visitation to existing graves, or additional rights of maintenance, n138 and often includes a vaguely-defined general privilege of making additional burials n139 for the individual or collective persons who hold the interest. The latter, of course, is consistent with the previous devotion or dedication of the land to burial purposes. n140 In contrast, the interests recognized under the unmarked burial statutory systems are considerably narrower. Those statutes provide limited rights of consultation, n141 and perhaps visitation, n142 but generally do not impose on the landowner a requirement to accept additional interments.

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LEXIS: right or privilege or interest w/10 (family or private) w/5 (grave! or burial) or (burial w/3 site)

(b) Interests in Established Cemeteries.

Where individual grave sites or lots are located in established or recognized cemeteries, generally of the kind clearly dedicated to public use, the individual plots or sites usually were created by formal conveyances represented by certificates, n143 or deeds, that are acquired by purchase. Under such circumstances, there is a general recognition of the need for rules and regulations that impose uniform limitations on the use of the burial sites, and a consequential need for centralized management and maintenance. Extensive case law n144 has firmly established the general rule that the interests so created do not convey full ownership of the grave site in the form of a fee simple title, but instead represent a form of easement, leaving full title in the entity that owns the cemetery as a whole. A typical statement holds that:

> [T]he purchaser of a cemetery lot does not acquire a fee simple interest. Rather, he obtains a qualified property right or estate that is more in the nature of an easement, license, or privilege for the exclusive use of the lot for burial purposes so long as the property remains a cemetery. n145

That majority view is derived from traditional analyses of the general nature of the rights of burial, which were developed well before the advent of formally-established cemeteries and statutory dedication procedures. Part of that history is derived by analogy to church practices, and the old status of the right to a pew in church considered as an easement; n146 a larger part was the pragmatic recognition of traditional burial practices in English and American churchyards, in which individual burial spaces were used repeatedly over long periods. n147 Despite (or perhaps because of) n148 the strong tradition of license or easement theory, many turn-of-the-century conveyances of cemetery lots used deeds phrased in classic terminology of the fee simple absolute; courts were then faced with a contradiction of theory. n149 The response was essentially unanimous:

> This court has held, as have most jurisdictions, that ... the purchaser of a lot in a public cemetery, though the deed be absolute in form, does not take any title thereto. The mere privilege or license to make interments in the lot so purchased, exclusive of all other, is all that is acquired thereunder. n150

The persistent judicial inclination to view the individual property interest in a grave site narrowly, and to insist that it be treated as an easement, appears to reflect judicial acknowledgment of both the inherent restrictions on the uses to be made of the interest conveyed and the implicit limitations on its duration. Virtually all of the major discussions of the individual burial interest include language that restricts both its use and duration:

> The rights of owners in burial lots in cemeteries are well established; these rights ordinarily are in the nature of an easement; they do not convey an absolute right of property, but give the right of burial so long as the place continues to be used as a burial ground. It is a limited use for purposes of interment which gives no title to the land. n151

Certainly part of the reason for the refusal to recognize burial interests as full fee simple title is that the severe limitation on use ("for burial only") very substantially curtails the freedom of use and control otherwise characteristic of a fee simple estate; the courts thus seem to be saying that a true fee could not have been intended by the grantor. The result is curious, however, for, in different circumstances, such a narrow restriction on use would probably be invalidated as repugnant to the fee simple interest clearly described by the language of the deed. n152

The underlying reason for the limited characterization of the interest seems to be the widespread recognition that full fee ownership, and, hence, management and control, must necessarily rest in the entity responsible for the entire cemetery, and that holders individual grave sites perforce must have a lesser interest. n153 The widespread disinclination to recognize separate fee ownership in burial lots thus probably reflects pragmatic considerations, most notably the desire to have a single entity that can be held responsible for regulation and maintenance of the entire cemetery. n154 A modern example occurred in Whitesell v. City of Montgomery, n155 where the owner of an entire cemetery unsuccessfully attempted to avoid responsibility for maintenance of the individual burial plots by arguing that, because he did not own the lots in fee, he could be under no obligation to maintain them. The court held, however, that the lots were mere easements, and that as owner of the entire cemetery, he was instead ultimately liable for the condition of the land.

COMPUTER-ASSISTED RESEARCH

LEXIS: right or privilege or interest w/10 public w/5 cemeter! or (burial w/3 site or ground)

FOOTNOTES:

(n1)Footnote 126. *Mansker v. City of Astoria, 198 P. 199, 204 (Or. 1921). See generally,* Note, *The Cemetery Lot: Rights and Restrictions, 109 U. Pa. L. Rev. 378, 379-82 (1961),* Annotation, *Deed as Conveying Fee or Easement,* 136 A.L.R. 379, 399-404 (1942).

(n2)Footnote 127. *Evergreen-Washelli Mem. Park Co. v. Department of Revenue, 574 P.2d 735 (Wash. 1978)*

(burial lots aren't "real estate" for purposes of business tax exemption); *Hammerstein v. Woodlawn Cem., 194 N.Y.S.2d 385 (1960)* (statute prohibited alienation of cemetery lot after interment). Several courts have used asserted status as "non-property" as a questionable basis to avoid application of Fifth Amendment "taking" concerns: *Went v. Methodist Protestant Church, 30 N.Y.S. 157 (N.Y. Sup. 1894)* ("merely" a right of burial, not such a property right as protected by takings prohibitions), State *ex rel. Stephan v. Lane, 614 P.2d 987, 993 (Kan. 1980). Contra* recent cases recognizing burial interests as "property" that is protected against eminent domain powers; *e.g., Walker v. Georgia Power Co., 339 S.E.2d 728 (Ga. App. 1986); Thompson v. City of Red Wing, 455 N.W.2d 512 (Minn. App. 1990).*

(n3)Footnote 128. *Gowen v. Bessey, 46 A. 792 (Me. 1900)* (burial lots informally assigned to citizens in municipal cemetery; declared "irrevocable licenses").

(n4)Footnote 129. *E.g., E.g., Moody v. Dykes, 496 S.E. 2d 907 (Ga. 1998)* (small rural church controlled cemetery land, but maintained no written records regarding ownership of individual burial plots; lot recipients were responsible for marking individual lots); *Bellevue Masonic Temple, Inc. v. Lokken, 452 P.2d 544 (Wash. 1969); Hughes v. Harden, 151 P.2d 425 (Okla. 1944).*

(n5)Footnote 130. 3 Richard B. Powell, The Law of Real Property PP 427, 429 (1987); Restatement (Third) of Property, Servitudes § 2.10 (T.D. No. 1, 1989) (servitude created by estoppel); Restatement of Property §§ 514, 519(4) (1944) (license rendered irrevocable). Oral permission, otherwise a violation of the *Statute of Frauds* , can be validated as an "oral executed license"; *see* Restatement (Third) of Property, Servitudes § 2.9 (T.D. No. 1, 1989).See also *Pyle v. Pyle, 531 S.E.2d 738 (Ga. App. 2000)* (widow sued for interference with burial rights, alleging that the funeral home had caused the city to issue the title to the cemetery lot to the stepson); *Hill v. City of Fort Valley, 554 S.E.2d 783 (Ga. App. 2001)* (property right in cemetery plot consists of an easement which is acquired by the purchase of the plot).

(n6)Footnote 131. *Grinestaff v. Grinestaff, 318 S.W.2d 881 (Ky. 1958)* (court did not analyze claim of easement by estoppel because parties failed to plead it).

(n7)Footnote 132. *Stuart v. Smith, 344 So. 2d 127 (Miss. 1977)* (grantor reserved fee simple title, but subject to burial rights in grantor's heirs).

(n8)Footnote 133. *E.g., Bradley v. Virginia Ry. & Power Co., 87 S.E. 721 (Va. 1916).*

(n9)Footnote 134. *Heiligman v. Chambers, 338 P.2d 144, 148 (Okla. 1959)* (easement descends to grantor's heirs); *Hines v. State, 149 S.W. 1058, 1059 (Tenn. 1911)* (right of burial "extends to all the descendants of the owner who devoted the property to burial purposes, and they may exercise it when the necessity arises.").

Special provisions frequently apply to matters of devise and descent of burial lots; *see* A.L. Schwartz, Annotation, *To Whom Does Title to Burial Lot Pass on Testator's Death*, etc., *26 A.L.R.3d 1425 (1969); compare Hammerstein v. Woodlawn Cem., 194 N.Y.S.2d 385 (N.Y. Sup. Ct. 1960)* (statute prohibited alienation of cemetery lot after interment). *See* Restatement of Property 495 (1944) (alienation of easements in gross by devise); e.g. *Wright v. Hollywood Cem. Corp., 38 S.E. 994 (Ga. 1901)* (deeded cemetery lot passed to heirs of buried decedent), *contra Wooldridge v. Smith, 147 S.W. 1019, 1023 (Mo. 1912)* (older general view that burial interests are not descendable).

(n10)Footnote 135. *See generally* Restatement of Property §§ 491-496 (alienability of noncommercial easements in gross is determined by the manner and terms of their creation in each specific case); *Brown v. Anderson, 11 S.W. 607 (Ky. 1889)* (reservation "for members of the grantor's family" held to include "lineal descendants" but not stranger-licensees); *but cf.* Alan D. Hegi, Note, *The Easement in Gross Revisited: Transferability and Divisibility Since 1945, 39 Vand. L. Rev. 109, 119-21 (1986).*

(n11)Footnote 136. *E.g.,* State *ex rel. Stephan v. Lane, 614 P.2d 987, 999 (Kan. 1980)* (poorly maintained rural cemetery declared "abandoned" under special statutory procedures).

(n12)Footnote 137. Terry G. Jordan, Texas Graveyards 25-28 (1982).

(n13)Footnote 138. *Perkins v. Colonial Cemeteries, Inc., 734 A.2d 1010 (Conn. App. 1999)* (action against cemetery alleging that it had improperly moved the plaintiff's daughter's grave); *Henry v. City of Muskogee, 986 P.2d 1151 (Okla. App. 1999)* (action to prohibit owner of the cemetery from removing a monument the plot owner had erected); *Warner v. City of Boca Raton, 54 F. Supp. 2d 1272 (S.D. Fla. 1999)* (action challenging prohibition on vertical grave decorations); *Chandler v. Henry, 1998 Ark. App. LEXIS 556* (1998; not published) (equity court ordered creation of foot path to provide access to ancient cemetery); *State ex rel. Commr. of Transp. v. Medicine Bird Black Bear White Eagle, 63 S.W.3d 734 (Tenn. App. 2001)* (easement owners also have right to notice of proceeding for terminating burial grounds). *Davis v. May, 135 S.W.3d 747 (Tex. App. 2003)* (right of ingress and egress granted over private land used in part as a private cemetery); *McKenzie v. Commalander, 549 So. 2d 476, 478 (Ala. 1989)* (right to unobstructed access); *Walker v. Georgia Power Co., 339 S.E.2d 728 (Ga. App. 1986)* (right to enter, care for, maintain, use and enjoy); *Mingledorff v. Crum, 388 So. 2d 632, 636 (Fla. Dist. App. 1980)* (right to enter and maintain, conduct services); *Vidrine v. Vidrine, 225 So. 2d 691, 697 (La. App. 1969)* (relatives and friends have unrestricted rights to visit and care for the graves); *Rose v. Rose, 237 S.W.2d 80 (Ky. 1951)* (rights of additional burials, memorial services, and maintenance). *Compare e.g.*, Okla. Stat. Ann. tit. 8 (Cemeteries) § 187 ["Any relative of the deceased who wishes to visit an abandoned cemetery ... shall have the right to reasonable ingress or egress for the purpose of visiting such cemetery."].

(n14)Footnote 139. *Mingledorff v. Crum, 388 So. 2d 632, 636 (Fla. Dist. App. 1980)* (relatives of those interred may themselves be buried); *Vidrine v. Vidrine, 225 So. 2d 691, 697 (La. App. 1969)* (continued right of burial subject to reasonable fees); *Grinestaff v. Grinestaff, 318 S.W.2d 881 (Ky. 1958)* (one branch of family, recipients of prior permission, had acquired rights of visitation, etc. but were denied rights of future burial); *Rose v. Rose, 237 S.W.2d 80 (Ky. 1951)* (rights of additional burials, memorial services, and maintenance); *Hines v. State, 149 S.W. 1058 (Tenn. 1911)* (visitation for maintenance and additional burials).

(n15)Footnote 140. *See Bowen v. Hooker, 372 S.W.2d 257 (Ark. 1963).*

(n16)Footnote 141. *E.g.*, Mont. Code Ann. § 22-3-802(2)(c) (recognize the interests, concerns, and obligations of those having a kinship, tribal, cultural, or religious affiliation with the burial site); N.M. Stat. Ann. § 18-6-11.2E.(2) ("identify and consult with any living person who may be related to the human burial interred in the unmarked burial ground").

(n17)Footnote 142. *E.g.*, Minn. Stat. Ann. § 307.08 3a. ("descendants" may enter the burial sites for the purpose of conducting religious ceremonies "only after obtaining written permission"); Nev. Rev. Stat. § 383.170 (may enter "with permission of landowner"); Tenn. Code Ann. § 11-6-116(a) (right of Native Americans to be present during an excavation).

(n18)Footnote 143. *E.g., Evergreen-Washelli Mem. Park Co. v. Department of Revenue, 574 P.2d 735 (Wash. 1978)* ("interment rights certificates"); *Augusta v. Bredenberg, 91 S.E. 486 (Ga. 1917)* ("certificates").

(n19)Footnote 144. *See generally*, Annotation, *Deed as Conveying Fee or Easement*, 136 A.L.R. 379, 399-404 (1942); *see also* Note, *The Cemetery Lot: Rights and Restrictions, 109 U. Pa. L. Rev. 378 (1961);* Guy V. Slade, Note, *Cemeteries - Nature of Interest of "Owner" of Cemetery Lot, 15 B.U. L. Rev. 307 (1935).*

(n20)Footnote 145. *See also Meek v. Smith, 7 S.W.3d 297 (Tex. App. 1999)* (action against owners of property near a cemetery, seeking an easement to access the cemetery); *Quesenberry v. Meginniss, 520 A.2d 1336 (Md. Ct. App. 1987); Gallaher v. Trustees of the Cherry Hill Methodist Episcopal Church, 399 A.2d 936, 940 (Md. App. 1979).*

(n21)Footnote 146. *See, e.g.*, cases *cited in Trefry v. Younger, 114 N.E. 1033, 1033 (Mass. 1917); Craig v. First Presbyterian Church, 88 Pa. 42 (1879),* William C. Schley, *Property in Church-Pews, Market Stalls and Lots in Cemeteries, 28 U. Pa. L. Rev. 1, 65 (1880).*

(n22)Footnote 147. *See* the historical discussion in R.F. Martin, Annotation, *Removal and Reinterment of Remains, 21 A.L.R.2d 472, 475-83 (1952),* and Percival E. Jackson, *The Law of Cadavers and of Burial and Burial Places,* 22-28, 356-58 (2d ed. 1950). The classic discussion in English law of the practice of re-use of burial sites in contained in *Gilbert v. Buzzard, 161 Eng. Rep. 1342* (Consistency Ct. 1820-21) (need to evacuate burial space for use of succeeding occupants).

(n23)Footnote 148. *See* discussion in William C. Schley, *Property in Church-Pews, Market Stalls and Lots in Cemeteries, 28 U. Pa. L. Rev. 1, 65-66 (1880).*

(n24)Footnote 149. Annotation, *Deed as Conveying Fee or Easement,* 136 A.L.R. 379, 399-404 (1942), Note, *The Cemetery Lot: Rights and Restrictions, 109 U. Pa. L. Rev. 378, 380-82 (1961).* Some of those cases reflected early statutory dedication requirements for the conveyance of a "fee," albeit limited to burial purposes; *see e.g., New York Bay Cem. Co. v. Buckmaster, 9 A. 591 (N.J. 1887).*

(n25)Footnote 150. *Whitesell v. City of Montgomery, 355 So. 2d 701 (Ala. 1978);* quoting *Kerlin v. Ramage, 76 So. 360 (Ala. 1917).*

(n26)Footnote 151. *Trefry v. Younger, 114 N.E. 1033, 1034 (Mass. 1917).*

(n27)Footnote 152. Furthermore, in those cases where use restrictions have been phrased as a condition subsequent, they are rarely allowed to cause a forfeiture of title if the use is violated, and are generally considered ineffective to restrict the landowner's claim to unencumbered title. *See* the dated discussion in Annotation, *Continued Use for Burial Purposes as a Condition Subsequent of a Conveyance or Dedication of Land for that Purpose,* 47 A.L.R. 1174 (1927) (regarding title for entire cemetery, not individual lots). Modern theory requires a clear expression of condition, often combined with a reentry clause, before use limitations would be interpreted as creating a valid condition subsequent; *see* Restatement of Property § 45 (1936).

(n28)Footnote 153. *See, e.g., McWhirter v. Newell, 66 N.E. 345 (Ill. 1903)* ("the fee in the lots ... remains in the trustees of the cemetery ... in trust for the use and benefit of the association and of the lot owners"); *Roanoke Cem. Co. v. Goodwin, 44 S.E. 769 (Va. 1903)* ("an easement ... subject to the general proprietorship and control of the association, in whom the legal title is lodged").But cf. *Ebenezer Bapt. Church, Inc. v. White, 513 So. 2d 1011 (Ala. 1987)* (members of buried decedents' families have sufficient property interest in maintenance of grave areas as to entitle them to an injunction against, but subject to supervision by, church that retains fee title); *Kline v. Green Mt. Cemetery, 677 A.2d 623 (Md. Ct. Spec. App. 1996)* (a cemetery that has conveyed a lot by a traditional "certificate of ownership" may elect to contest proposals for disinterment, either because a disinterment might violate applicable religious precepts or because of the cemetery's implicit promise to provide protection to particular human remains).

(n29)Footnote 154. *Reeves v. Edge, 484 S.E.2d 498 (Ga. Ct. App. 1997)* (lot purchasers bound to comply with cemetery regulations;, *Kirby v. Kirby, 687 A.2d 385 (Pa. Super. Ct. 1997)* (tenants in common of remaining burial privileges obligated to comply with cemetery regulations regarding allocation of interment space); *Augeri v. Roman Cath. Diocese of Brooklyn, 639 N.Y.S.2d 640 (1996)* (action to compel removal of non-family member buried in a family plot); Note, *The Cemetery Lot: Rights and Restrictions, 109 U. Pa. L. Rev. 378, 380-382 (1961).*

(n30)Footnote 155. *Whitesell v. City of Montgomery, 355 So. 2d 701 (Ala. 1978).*

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CHAPTER 53 REAL PROPERTY ASPECTS OF GRAVES AND CEMETERIES

7-53 Thompson on Real Property, Thomas Editions § 53.09

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§ 53.09 Duration of the Interests; Discontinuance and Abandonment.

[Go To Supp]

(a) Duration: Not Perpetual?

A universal qualification on the burial interest stems from the implicit limitations on its duration: " "... for burial purposes so long as the property remains a cemetery," n156"so long as it exists and is not lawfully removed or destroyed ... ," n157 and finally, "to be enjoyed so long as the place continues to be used as a burial-ground, subject to municipal regulation and control, and legally revocable whenever the public necessity requires." n158

On its face, any suggestion that a burial interest is less than perpetual seems to contradict the general cultural perception that burial is for eternity and that nothing could be more permanent. n159 As noted wryly by the South Carolina court: "[T]he places where the dead are buried have been considered sacred and inviolate... . The idea of perpetuity runs through nearly all references to the grave. Of course, as in nearly every other matter, there are exceptions." n160 The clear import of the qualifications on the burial interest is that land, although devoted to burial purposes, may nevertheless potentially be made available for other uses. n161 A famous dissent propounded the pragmatic view:

> If land, once devoted to burial purposes, could not thereafter be used for any other purpose, it would not be many centuries until the face of the earth would be wholly occupied by the dead, and there would be no place for the living. So, while it is true that the law does have tender regard for the sentiment of the living for the dust of their dead, ... still it acknowledges the earth as the only habitation for the living, and gives them a superior right to the soil. n162

(b) Duration: Disuse and Abandonment.

In truth, there is a substantial tradition of family n163 or neighborhood n164 cemeteries becoming disused over the span of decades, resulting, perhaps, in their eventual abandonment and use of the land for other purposes. Similarly, formally organized cemeteries are frequently discontinued or abandoned, often by conscious decisions to disinter the remains and move them to another site, n165 encouraged perhaps by compulsion of municipal authorities. n166 Once true "abandonment" has occurred, the land may become free of at least some, if not all, of its previous restrictions, and the full advantages of ownership can again be enjoyed by those holding the fee title. n167

Part of the concept of "devoting" or "dedicating" land to burials is that interments are expected to continue for some indefinite period of time, and that the land will remain available for that purpose. n168 Thus, many courts have held that, once land has been devoted or dedicated to burial purposes, merely to interrupt or even cease further burials, or otherwise discontinue the use, does not constitute a change of use, nor a refutation of the land's devotion or dedication. n169 Nor does the passage of time and general disuse or neglect qualify as abandonment. n170 In this respect, the burial rules are consistent with other areas of easement law, and with the general rule that non-use of an easement is not enough by itself to constitute abandonment of the easement. n171 For a cemetery to remain quiescent seems not at all inappropriate for a "sleeping place of the dead."

Deterioration or neglect that exceeds mere non-use, especially when combined with the loss of visible identity as a burial area, might, in extreme cases, suffice to constitute "abandonment." n172 Statutes, however, may provide more definitive (and relaxed) standards of abandonment, such as cessation of burials, n173 usually in the context of providing for new mechanisms for the responsibility and maintenance of neglected or abandoned burial areas. n174 Other statutes impose a maintenance duty on local governments where a cemetery is not abandoned, but merely neglected. n175

The general topic of abandonment, and the confusion that it has generated in the case law, may be addressed by several somewhat contradictory rationales.

COMPUTER-ASSISTED RESEARCH

LEXIS: cemeter! w/5 abandon!

(1) Easement Theory.

Some of the rationale of "abandonment" is a logical extension of standard easement theory, which provides a methodology for allowing the owner of the servient land to be relieved of the burden of the easement, and thus to reacquire full freedom of use of the area. Under that theory, conduct of the easement holder may in some cases operate to extinguish an easement. n176

Easement terminology was popularized in the pivotal Heiligman v. Chambers decision in 1959, n177 which held that a family burial plot existed as an easement over the servient estate in land, and remained as such so long as the easement was maintained. Such an easement in gross is held individually or collectively by persons who have no other interest in the land. It is then a small step to focus on the duration n178 and exercise of that easement.

One measure of a burial easement's duration is human memory; many cases have repeated language from Tracy v. Bittle:

> In the case at bar most of those buried there are yet there. ... [I]t is still the resting place of the dead. To this plaintiff and others sacred memories are awakened in viewing the spot... . They have a right to return to the spot, ... and do homage to their sacred memories, ... [and] no strange hand can forbid them. n179

The other measure of an easement's duration is determined by the conduct of the persons holding the easement, or perhaps of others who have undertaken duties of maintenance, and examines whether they ought be heard to complain. In one New Jersey case, "the laches of the complainants" was held to bar their requests for visitation to a long-disuse cemetery; "some of the complainants had not visited the place for over 30 years. None of them had made any effort to care for it... . They all waited before seeking any relief until the burial plot bore no resemblance to a cemetery." n180 That theme was echoed by the Massachusetts court in Sanford v. Vinal:

> where the family has ceased to visit the cemetery and where they have so long neglected to care for it that the ground is no longer recognizable as a cemetery, the family burial ground has been abandoned, and with it the private standing of the descendants [to protect it]. n181

The "abandoned easement" view had been strongly and eloquently put forth by a dissenting opinion to Frost v. Columbia Clay Co.:

> all rights connected with [a burial place] may be abandoned, as all other rights may be; and ... where the beneficiaries of the dedication of land for a graveyard have conducted themselves towards it as the plaintiff and his relatives have done in this case, the abandonment is complete, regardless of the matter of the removal of the bodies buried there. n182

Nevertheless, the majority in that case rejected a focus on the conduct of the easement holders, and held that "abandonment" could only be accomplished "by removal of the remains to a more suitable place." n183 That view is clearly supported by the majority of jurisdictions. n184

(2) Continued Presence of Remains.

The majority view acknowledges the reality of the continued presence of burials, which remain regardless of whether particular holders of an easement in gross have surrendered, waived or abandoned their rights. Here, in many ways, it could be asserted that the easement should not be terminated when its most elemental purpose is still being served. It is, after all, often termed an easement of sepulcher. In that respect, theories of abandonment of land for burial uses harmonize in many ways with theories of devotion or dedication of land for burial. Just as dedication requires both an intent to devote land to burial purposes plus an actual use by interments, n185 by analogy so would the opposite process of abandonment require both the intent to discontinue the use plus the actual cessation of the use. The latter is usually accomplished through physical removal of remains, or arguably by their complete dissolution and return to the soil. n186 Thus, a cemetery will "only lose its character as a resting place of the dead when those already interred are exhumed and removed." n187

The reality of remaining burials is evident also in several state "abandoned cemetery" acts. Those laws declare abandonment, as evidenced by neglect or the absence of responsible caretakers, in order to transfer responsibility for maintenance to a more capable entity, usually a local government. n188 Manifestly, it is precisely because the remains continue to occupy the land that intervention is necessary to assure their continued protection and maintenance.

(3) Obligation created by Devotion of Land.

To allege "abandonment of the easement," and thus allow the re-use of land in which human remains still physically persist, appears to refute or deny the elemental concept of a devotion or dedication of land to burial purposes. That "solemn agreement" n189 was to protect and maintain the burial place. Once the original location is no longer serviceable, that obligation is best absolved by exhumation and reinterment of the remains "in a careful dignified manner by qualified persons." n190 Several cases and statutes thus speak of "abandonment" as a result that can occur only after lawful disinterments. n191

Unmarked burials, of the type addressed in many modern state acts, present a situation not easily addressed by either the easement or dedication rationales. The circumstances surrounding unmarked graves prevent reliance on concepts and responsibilities of dedication, and only rarely involve the identification of still-interested descendants or other interested persons in whom the "sacred memories" endure. In that situation, the statutes generally assert the need for some protection by the state, but impose fewer obligations on the landowner than would be present under the rules of easement and dedication. That protection persists so long as human remains continue to be located on the land. n192

FOOTNOTES:

(n1)Footnote 156. *Gallaher v. Trustees of the Cherry Hill Methodist Episcopal Church, 399 A.2d 936, 940 (Md. App. 1979). See also, Quesenberry v. Meginniss, 520 A.2d 1336 (Md. Ct. App. 1987).*

(n2)Footnote 157. *Bennett v. 3C Coal Co., 379 S.E.2d 388 (W. Va. 1989).*

(n3)Footnote 158. *German Evangelical St. Marcus Congregation of St. Louis v. Archambault, 383 S.W.2d 704, 710 (Mo. 1964);* quoting *Page v. Symonds, 63 N.H. 17, 19 (1883). Page* in turn drew upon the Pennsylvania church disinterment cases, *i.e., Craig v. First Presbyterian Church, 88 Pa. 42 (1879).*

(n4)Footnote 159. "While the normal ultimate destiny of Western man, so far as his bodily parts are concerned, is a single and permanent commitment to the soil, it is recognized that circumstances may require, or at least justify, temporary disturbance of what is often euphemistically called final repose." R.F. Martin, Annotation, *Removal and Reinterment of Remains, 21 A.L.R.2d 472, 474 (1952).*

(n5)Footnote 160. *Frost v. Columbia Clay Co., 124 S.E. 767, 768 (S.C. 1924).*

(n6)Footnote 161. *Touro Synagogue v. Goodwill Indus., 96 So. 2d 29, 32-33 (La. 1957)* ("the land comprising a cemetery is not dedicated as a cemetery in perpetuity").

(n7)Footnote 162. *Ritter v. Couch, 76 S.E. 428, 437 (W. Va. 1912)* (Williams, J., dissenting).

(n8)Footnote 163. *Castro Romero v. Becken, 256 F.3d 349 (5th Cir. 2001)* (lineal descendant's allegation that the oral history of the Lipan Apache tribe established city land as a burial ground was not sufficient to convert the land into a "cemetery" for purposes of Texas statute providing protection to cemeteries, absent any evidence that the land was publicly dedicated as a cemetery, that the land was enclosed for use as a cemetery, or that the land, even if once used for burial purposes, had not been abandoned); *Sanford v. Vinal, 552 N.E.2d 579 (Mass. App. 1990)* (unmarked and abandoned colonial burial ground); *Haas v. Gahlinger, 248 S.W.2d 349 (Ky. 1952)* (sale of land containing family graveyards; grantor paid to remove and reinter remains); *Mayes v. Simons, 8 S.E.2d 73, 75-76 (Ga. 1940)* (neglected burial ground); *see* Annotation, *Private Cemeteries,* 130 A.L.R. 250, 259-264 (1941), supplemented by H.D. Warren, Annotation, *Private or Family Cemeteries, 75 A.L.R.2d 591, 598-599 (1961).*

(n9)Footnote 164. *E.g., Van Buskirk v. Standard Oil Co., 134 A. 676 (N.J. 1926)* (colonial family and community cemetery, some bodies removed and physical evidence obliterated).

(n10)Footnote 165. *E.g., Touro Synagogue v. Goodwill Indus., 96 So. 2d 29, 32-33 (La. 1957); Campbell v. City of Kansas, 13 S.W. 897, 901, 903 (Mo. 1890).* Much of the early case law development is recited in Wm. C. Schley, *Property in Church-Pews, Market Stalls and Lots in Cemeteries, 28 U. Pa. L. Rev. 1, 65-76 (1880).*

(n11)Footnote 166. *See, e.g., Tshaka v. Benepe, 2003 U.S. Dist. LEXIS 8229* (No. 02-CV-5580(ILG), E.D. N.Y., Apr. 9, 2003) (unsuccessful claim by African-Americans and Native Americans that converting cemetery land into a children's playground was discriminatory); *Seale v. Masonic Cem. Ass'n, 18 P.2d 667 (Cal. 1933); see generally,* Annotation, *Constitutionality of Statute or Ordinance Requiring, or Permitting, Removal of Bodies from Cemeteries,* 71 A.L.R. 1040 (1931).

(n12)Footnote 167. *Bogner v. Villiger, 796 N.E.2d 679 (Ill. App. 2003)* (descendants of persons buried in a cemetery obtained a permanent injunction against operation of an irrigation system through the cemetery); *In re Board of Transp. of N.Y., 251 N.Y.S. 409 (1931)* (abandoned cemetery had value to owners of servient fee title); *Kansas City v. Scarritt, 69 S.W. 283 (Mo. 1902)* (dedicated cemetery was later abandoned; title remained in original owners).

(n13)Footnote 168. In *Andrus v. Remmert, 146 S.W.2d 728, 730 (Tex. 1941),* the Texas court recognized the common practice of setting aside or dedicating sufficient surplus land to accommodate future burials. *See also Aldridge*

v. Puckett, 278 So. 2d 364 (Ala. 1973).

(n14)Footnote 169. *Forest Home Cem. Ass'n v. Dardanella Fin. Corp., 329 N.W.2d 885, 889 (S.D. 1983); Stoker v. Brown, 583 S.W.2d 765, 767 (Tenn. 1979); German Evangelical St. Marcus Congregation of St. Louis v. Archambault, 383 S.W.2d 704 (Mo. 1964)* (municipal prohibition against further burials not per se abandonment of cemetery); *Bowen v. Hooker, 372 S.W.2d 257, 259 (Ark. 1963); Heiligman v. Chambers, 338 P.2d 144, 148 (Okla. 1959); Mayes v. Simons, 8 S.E.2d 73, 75-76 (Ga. 1940); In re Board of Transp. of N.Y., 251 N.Y.S. 409, 413 (1931); Tracy v. Bittle, 112 S.W. 45, 49 (Mo. 1908).*

(n15)Footnote 170. *Forest Home Cem. Ass'n v. Dardanella Fin. Corp., 329 N.W.2d 885, 889 (S.D. 1983); accord Sanford v. Vinal, 552 N.E.2d 579 (Mass. App. 1990).*

(n16)Footnote 171. Restatement of Property § 504 cmt. d (1944) ("Non-use does not of itself produce an abandonment no matter how long continued. It but evidences the necessary intention."); *see generally* J.E. Macy, Annotation, *Loss of Private Easement by Non-user or Adverse Possession, 25 A.L.R.2d 1265 (1952).*

(n17)Footnote 172. *Sanford v. Vinal, 552 N.E.2d 579 (Mass. App. 1990)* (unmarked and abandoned colonial burial ground); *Boyd v. Brabham, 414 So. 2d 931 (Ala. 1982)* (issue of fact whether abandonment had occurred), *aff'd after remand, 442 So. 2d 86 (Ala. 1983); Mayes v. Simons, 8 S.E.2d 73, 75-76 (Ga. 1940)* (neglected burial ground); *Damon v. State, 52 S.W.2d 368* (Tex. Comm'n App. 1932) (alleged graves obliterated under pasture); *Campbell v. City of Kansas, 13 S.W. 897, 901, 093 (Mo. 1890)* (held abandoned after most remains removed; land graded and no visible markers remained), *on remand sub nom. Kansas City v. Scarritt, 69 S.W. 283 (Mo. 1902); see* Annotation, *Private Cemeteries,* 130 A.L.R. 250, 259-264 (1941), supplemented by H.D. Warren, Annotation, *Private or Family Cemeteries, 75 A.L.R.2d 591, 598-599 (1961).*

(n18)Footnote 173. *E.g.,* Or. Rev. Stat. § 226.520; "abandoned cemetery means any cemetery in which no remains of deceased persons have been interred for a period of five years."

(n19)Footnote 174. *E.g.,* Ga. Code Ann. § 36-7-2 (1) defines an abandoned cemetery as "a cemetery which shows signs of neglect including, without limitation, the unchecked growth of vegetation, repeated and unchecked acts of vandalism, or the disintegration of grave markers or boundaries and for which no person can be found who is legally responsible and financially capable of the upkeep of such cemetery." Mo. Rev. Stat. § 214.205 (2) defines "abandoned cemetery" as "any cemetery ... in which, for a period of at least one year, there has been a substantial failure to cut grass or weeds or care for graves, grave markers, walls, fences, driveways and buildings or for which proper records have not been kept... ." The attorney general may dissolve the cemetery corporation and vest title in the municipality or county where the cemetery is located. *See* State *ex rel. Stephan v. Lane, 614 P.2d 987 (Kan. 1980)* for application of a similar statute.

(n20)Footnote 175. *See e.g., State v. Terry, 541 N.W.2d 882 (Iowa 1995).*

(n21)Footnote 176. Richard R. Powell, Powell on Real Property P 423 (1968).

(n22)Footnote 177. *Heiligman v. Chambers, 338 P.2d 144 (Okla. 1959).*

(n23)Footnote 178. If narrowly viewed as an easement in gross, many jurisdictions in former periods would have limited its duration by restrictive views of divisibility or descendibility.

(n24)Footnote 179. *Tracy v. Bittle, 112 S.W. 45, 49 (Mo. 1908).*

(n25)Footnote 180. *Van Buskirk v. Standard Oil Co., 134 A. 676, 678-679 (N.J. 1926).*

(n26)Footnote 181. *Sanford v. Vinal, 552 N.E.2d 579, 585-586 (Mass. App. 1990).* Similarly, in *Mayes v. Simons,*

8 S.E.2d 73 (Ga. 1940), plaintiff-descendants of the creator of a family graveyard were denied an injunction to prevent its cultivation "sustained upon the theory of either laches or estoppel."

(n27)Footnote 182. *Frost v. Columbia Clay Co., 124 S.E. 767, 770 (S.C. 1924)* (Cothran, J., dissenting).

(n28)Footnote 183. *Frost v. Columbia Clay Co., 124 S.E. 767, 768 (S.C. 1924).*

(n29)Footnote 184. *See, e.g., Forest Home Cem. Ass'n v. Dardanella Fin. Corp., 329 N.W.2d 885, 889 (S.D. 1983); Bowen v. Hooker, 372 S.W.2d 257, 259 (Ark. 1963).*

(n30)Footnote 185. *See* "actual use" at § 53.04(a) *supra*.

(n31)Footnote 186. *See Wilson v. Read, 68 A. 37 (N.H. 1907).*

(n32)Footnote 187. *State of North Carolina v. Phipps, 449 S.E.2d 450 (N.C. 1994)* ("cemetery" definition inapplicable upon proof that previously buried body had been moved to another location). Georgia's Abandoned Cemeteries Act, Ga. Code Ann. § 36-72-1 *et seq.*, allows each county the discretion to undertake the affirmative obligation to preserve and maintain abandoned family cemeteries or burial grounds. *Smith v. Pulaski County, 501 S.E.2d 213 (Ga. 1998).* New Jersey's Historic Cemeteries Act, N.J. Stat. Ann. §§ 40:10B-1-3, does not require, but merely enables, cities and counties to expend funds to restore historic cemeteries. *Harris v. Borough of Fair Haven, 721 A.2d 758 (N.J. Super. Ct. Ch. Div. 1998). Kansas City v. Scarritt, 69 S.W. 283, 286 (Mo. 1902). Accord, Bowen v. Hooker, 372 S.W.2d 257, 259 (Ark. 1963); Heiligman v. Chambers, 338 P. 2d 144, 148 (Okla. 1959); Frost v. Columbia Clay Co., 124 S.E. 767, 768 (S.C. 1924); Bradley v. Virginia Ry. & Power Co., 87 S.E. 721 (Va. 1916).*

(n33)Footnote 188. *See, e.g.*, Ga. Code Ann. §§ 36-72-1-36-72-16, and the statutes cited in note 166, *supra*.

(n34)Footnote 189. *Benn v. Hatcher, 81 Va. 25, 30 (1885). See also Humphreys v. Bennett Oil Corp., 197 So. 222, 229 (La. 1940),* quoted *supra* in § 53.04(d).

(n35)Footnote 190. Petition of First Trinity Evangelical Lutheran Church in *Pittsburgh, 268 A.2d 219 (Pa. 1970)* (changed conditions around cemetery made appropriate the removal of remains and its consequential abandonment).

(n36)Footnote 191. *E.g.*, Petition of First Trinity Evangelical Lutheran Church in *Pittsburgh, 268 A.2d 219 (Pa. 1970); Powell Grove Cem. Ass'n v. Multnomah County, 365 P.2d 1058 (Or. 1961).*

(n37)Footnote 192. *State v. Terry, 541 N.W.2d 882 (Iowa 1995)* (township had statutory duty to preserve cemetery's burial grounds, but not the burial records, which were already being preserved by a court-appointed burial receiver).

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CHAPTER 53 REAL PROPERTY ASPECTS OF GRAVES AND CEMETERIES

7-53 Thompson on Real Property, Thomas Editions § 53.10

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§ 53.10 Bibliography.

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Annotation, *Construction and Application of Graverobbing Statutes, 52 A.L.R.3d 701.*

Annotation, *Liability for Desecration of Graves and Tombstones, 77 A.L.R.4th 108.*

Annotation, *Liability in Action Based Upon Negligence, for Injury to, or Death of, Person Going Upon Cemetery Premises, 63 A.L.R.3d 1252.*

Annotation, *Measure of Damages for Condemnation of Cemetery Lands, 42 A.L.R.3d 1314.*

Annotation, *Private or Family Cemeteries, 75 A.L.R.2d 591.*

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Annotation, *What Constitutes "Church," "Religious Use," or the Like Within Zoning Ordinance, 62 A.L.R.3d 197.*

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Supp. to § 53.02 Introduction.

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Change footnote from Lascurain v. City of Neward, 793 A.2d 731 (NJ Super. Ct. App. Div. 2002) to Lascurain v. City of Newark, 793 A.2d 731 (N.J. App. 2002)

***Delete the reference to* Callaway v. Ryckeley.**

Add:

Removal of Human Remains from *Cemeteries v. Unknown, 297 S.W.3d 616 (Mo. App. 2009)* (application to disinter and reinter human remains pursuant to statute, applied for in an effort to make grounds suitable for development of a motorsports park, is denied for lack of good cause).

Add to the* Calloway *case citation:

rev'd, *412 S.E.2d 826 (Ga. 1992)* .

Add:

Schultes v. Kane, 856 N.Y.S.2d 684 (2008) (action against cemetery and others for disinterment of several bodies to be buried in a different cemetery).

Add:

Binns v. Westminster Memorial Park, *89 Cal. Rptr. 3d 890 (2009)* (action against cemetery when a stranger was buried in the plaintiff's reserved plot); *Ogborne v. Mercer Cemetery Corporation, 963 A.2d 828 (N.J. 2009)* (action against cemetery whose employees closed the cemetery early and trapped the plaintiff inside; the plaintiff broke a leg while trying to get out).

Add:

San Carlos Apache Tribe v. United States, 272 F. Supp. 2d 860 (D. Ariz. 2003) aff'd, *417 F.3d 1091 (9th Cir. 2005)* .

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Supp. to § 53.03 Definition and Creation of Graves and Cemeteries.

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Add:

Shilling v. Baker, 691 S.E.2d 806 (Va. 2010) (the scattering of human remains above ground is not a "final disposal" comparable to a burial and therefore does not meet the burial requirement to create a cemetery).

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Supp. to § 53.04 Creation of Cemeteries: Setting Apart.

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§ 53.04(a) Actual Use. [Go To Main]

Add

Woodland Grove Baptist Church v. Woodland Grove Community Cemetery Ass'n, Inc., 947 So. 2d 1031 (Ala. 2006) (contest over cemetery land between church and community cemetery associaton).

Add:

Little v. Hall, 2009 Ky. App. LEXIS 185 (2009) (unobstructed, open, peaceable, continuous and as of right for the prescribed statutory period use of private road leading to family cemetery establishes prescriptive easement).

Add:

Davis v. Overall, 686 S.E.2d 839 (Ga. App. 2009) (establishment of a family cemetery creates an easement for heirs to enter onto and care for the burial plots).

§ 53.05(b) Dedication to Public Use. [Go To Main]

Add:

Board of County Com'rs of County of Morgan v. Kobobel, 176 P.3d 860 (Colo. App. 2007) (county not empowered to condemn private land for a road to a private cemetery; it was not a valid public purpose).

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Supp. to § 53.07 Interests in the Burial Area or Cemetery as a Whole.

[Go To Main]

§ 53.07(c) Known Burials on Land Dedicated to Public Use. [Go To Main]

Add at the end of Warner case citation:

aff'd, *420 F.3d 1308 (11th Cir. 2005)* .

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Supp. to § 53.08 Interests in Individual Grave Sites or Burial Lots.

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§ 53.08(a) Interests in Individual Sites; Scope. [Go To Main]

Add

Brady v. SCI Funeral Services of Florida, Inc., 948 So. 2d 976 (Fla. App. 2007) (action against cemetery by parents of deceased infant who was interred in an unlawfully shallow grave).

§ 53.08(b) Interests in Established Cemeteries. [Go To Main]

Add:

Rhee v. Highland Development Corp., 958 A.2d 385 (Md. App. 2008) (action against developer for fraudulently concealing a desecrated cemetery on the premises).

Add "of" after "holder"

Add:

Ogborne v. Mercer Cemetery Corporation, 963 A.2d 828 (N.J. 2009) (action against cemetery whose employees closed the cemetery early and trapped the plaintiff inside; the plaintiff broke a leg while trying to get out).

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Supp. to § 53.09 Duration of the Interests; Discontinuance and Abandonment.

[Go To Main]

§ 53.09(a) Duration: Not Perpetual? [Go To Main]

Add

Township of O'Hara v. Condemnation of Permanent Fee Simple Interest for Public Park and Recreation Area and Facilities of 4.65 Acres, more or less in *O'Hara, 910 A.2d 166* (Pa. Cmwlth., 2006) (township had authority to take property the church intended to use as a cemetery); *Sjuts v. Granville Cemetery Ass'n, 719 N.W.2d 236 (Neb. 2006)* (private owners could not obtain prescriptive easement for an irrigation system across cemetery land).

§ 53.09(b) Duration: Disuse and Abandonment. [Go To Main]

Add:

Davis v. Overall, 686 S.E.2d 839 (Ga. App. 2009) (easement and accompanying rights no longer survive after the person who was granted statutory authority abandons them).

Add:

Davis v. Overall, 686 S.E.2d 839 (Ga. App. 2009) (abandonment will dissolve the easement against the fee created by the establishment of a family burial plot).

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Supp. To CHAPTER 53 REAL PROPERTY ASPECTS OF GRAVES AND CEMETERIES

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Supp. to § 53.10 Bibliography.

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Add

Articles

Brophy, Alfred L. "Grave Matters: The Ancient Rights of the Graveyard," *2006 B.Y.U. L. Rev. 1469.*

Grieser, Adam, et al. "Reconsidering Religion Policy as Violence: Lyng v. Northwest Indian Cemetery Protective Association," *10 Scholar 373 (Spring 2008)* .

Moss, Rachel L. & Seidemann, Ryan M. "Places Worth Saving: A Legal Guide to the Protection of Historic Cemeteries in Louisiana and Recommendations for Additional Protection," *55 Loy. L. Rev. 449 (Fall 2009).*

Add

Annotations

Annotation, *Acquisition of title to ground through adverse possession by cemetery or graveyard authorities, 41 A.L.R.2d 925* .

Annotation, *Liability of Cemetery in Connection with Conducting or Supervising Burial Services, 42 A.L.R.4th 1059* .

Annotation, *Municipal Power to Condemn Land for Cemetery, 54 A.L.R.2d 1322* .

Annotation, *Validity, Construction, and Application of Statutes or Ordinances Regulating Perpetual-care Trust Funds of Cemeteries and Mausoleums, 54 A.L.R.5th 681* .

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CHAPTER 54 RAILROAD LANDS

7-54 Thompson on Real Property, Thomas Editions 54.syn

AUTHOR: Professor David A. Thomas J. Reuben Clark Law School Brigham Young University

§ 54.syn Synopsis to Chapter 54: RAILROAD LANDS

§ 54.01 Introduction.

§ 54.02 Brief History of Land Grants to Railroads.

§ 54.03 Types of Property Rights in Railroad Lands.

(a) Incidents of Right of Way Grants.

(b) Incidents of Other Land Grants.

§ 54.04 Impact of Railroad Land Grants on Private Landholding.

§ 54.05 Bibliography.

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CHAPTER 54 RAILROAD LANDS

7-54 Thompson on Real Property, Thomas Editions § 54.01

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§ 54.01 Introduction.

This brief chapter will review the historical background of land grants to railroads, which became the single most important factor in the settlement of the American West. The types of real property interests acquired by the railroads and the ultimate disposition of those interests will be discussed, concluding with an examination of unique aspects of railroad land interests today.

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CHAPTER 54 RAILROAD LANDS

7-54 Thompson on Real Property, Thomas Editions § 54.02

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§ 54.02 Brief History of Land Grants to Railroads.

As a new nation, the United States of America found itself with a relatively huge territory as a result of England's desire for reconciliation and to block further North American expansion by France and Spain. Within a few years after gaining independence, America's acquisition of the Louisiana Purchase doubled that territory and generated a sense of urgency that those territorial gains be validated by exploration and settlement. n1 This would be best promoted by construction of roads, canals and other public improvements, but it was questioned whether the national government was empowered to directly subsidize those improvements or have them installed without the cooperation of the states. In lieu of direct funding from the federal government, land grants were made to the states for canals and river improvements, especially after the spectacular success of the Erie Canal, which opened in 1825.

Railroads became the paramount form of transportation in the settled portion of the United States during the second quarter of the 19th century. Direct federal aid to railroads was still not given, but rights of way over federal lands were granted to railroads as early as 1835, and railroad construction was encouraged by the lure of mail contracts and by route surveys provided by Army engineers. The early rights of way extended 30 feet on either side of the road line, and included rights to timber for construction within 100 yards on either side of the road line. At terminal locations, rights to 10 acres were also granted. Congress acted on individual right of way requests for almost two decades, but finally enacted legislation standardizing rights of way for railroads and other surface roads. Under this legislation the right of way extended for 100 feet on either side of the road line; earth, stone and timber could be taken from adjacent lands, and land rights for depots and water tanks were also granted. n2

In 1850 a federal statute granted a right of way and made the first major land grant; this grant was made to three states "in aid of construction of a railroad from Chicago to Mobile," n3 and was for the Illinois Central, Mobile & Chicago, and Mobile & Ohio railroads. Setting the pattern for the future, the grant consisted of every alternate even-numbered section of land in a 6-mile strip on either side of the main road and of the branch roads. For land already alienated, compensatory land within 15 miles of the road line would be provided. The statute also required that the retained federal lands between the alternating granted sections not be sold for less than double the prevailing price for public lands. By this means, the political objection to a land give-away was stifled with the argument that enabling the railroad to be built would greatly enhance the value of other public lands, so that grants were really investments (of a pump-priming nature). The at least partial success of this grant opened the way in a few years for the massive grants associated with

the transcontinental railroad. n4

Although the actual construction of the continental railroad was delayed by the Civil War, preparations proceeded even during the conflict. In 1862, federal legislation incorporating the Union Pacific Railroad was approved and signed. n5 This legislation granted rights of way over federal land and made land grants to aid construction of the railway. This act and others closely following authorizing the construction of several transcontinental lines, made land grants directly to the railroads, rather than through the states, and are part of numerous enactments that have been collectively referred to as the Pacific Railroad Laws. n6

Each of these acts rather clearly identified the several separate purposes to be served by the railroad, and the legislative device intended to facilitate that purpose. Typically, the act would recite that the railroad itself would promote settlement by providing a means of transportation through public lands, that the railroad right of way would serve national defense, that the land grants and bonds would help finance the construction, and that making stone and timber available from adjacent lands would aid construction, among other recitations.

Popular opinion among western settlers rather quickly turned against the railroads as soon as it was perceived that lands were not being released for public sale as soon as had been hoped, and that transportation costs remained artificially high. The last railroad land grant was authorized in 1871 and, thereafter, homestead grants became the main means of getting public lands into the hands of settlers. After 1871, only rights of way were granted to railroads.

For a few years, Congress enacted individual laws for right of way grants to railroads, but in 1875 it passed the Railroad Right of Way Act. This act standardized railroad rights of way at 100 feet on each side of the railroad line and included the right to take certain construction materials from adjacent public lands.

FOOTNOTES:

(n1)Footnote 1. It was the accepted viewpoint that new territory could be obtained by discovery and that title to that territory could be "perfected" or "consummated" by possession:

> This principle was, that discovery gave title to the government whose subjects, or by whose authority, it was made, against all other European governments, which title might be consummated by possession. *Johnson v. M'Intosh, 21 U.S. (8 Wheat.) 543, 573 (1823).*

(n2)Footnote 2. *10 Stat. 28. Pittman v. Frazer, 129 F.3d 983 (8th Cir. 1997)* (discussing the liability of railroad companies to maintain their right-of-way at or around any railroad crossing of a public road or highway free of growing vegetation which may obstruct the view of pedestrians and vehicle operators using the public highways).

(n3)Footnote 3. *9 Stat. 466 Norfolk Southern Railway Company v. Smith, 611 S.E.2d 427 (N.C. App. 2005)* (presumed statutory grant of railroad right of way).

(n4)Footnote 4. Thomas E. Root, *Railroad Land Grants: From Canals to Transcontinentals* 12-16 (1987).

(n5)Footnote 5. *12 Stat. 489, amended, 13 Stat. 356.*

(n6)Footnote 6. Union Pacific, *12 Stat. 489, amended, 13 Stat. 356;* Northern Pacific, *13 Stat. 365;* Atlantic and Pacific, *14 Stat. 292;* Texas Pacific, *16 Stat. 573.*

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CHAPTER 54 RAILROAD LANDS

7-54 Thompson on Real Property, Thomas Editions § 54.03

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§ 54.03 Types of Property Rights in Railroad Lands.

[Go To Supp]

(a) Incidents of Right of Way Grants.

The incidents of the rights of way granted to railroads were not defined in the charters or the federal statutes. In 1880, the U.S. Supreme Court noted that the right of way grants exhibited no restrictions, and that they were superior to competing claims to the same land, because of the necessity of maintaining a continuous rail route. n7 Later, the Court held that right of way grants were conditioned on the continued use of the right of way land for railroad purposes. n8 Therefore, the property interest held in the right of way was "a limited fee, made on the implied condition of reverter in the event that the company ceased to use or retain the land for the purpose for which it was granted." n9 This characterization of the interest, most accurately described as a fee simple determinable, meant that the right of way could not be alienated, and also was not subject to adverse possession. n10

The repose of this property rights question was disturbed in 1957, in the case of United States v. Union Pacific Railway n11 The Court held that, by inference from other parts of the original enabling act, the Union Pacific did not obtain mineral rights in the right of way lands, and that the railroad's property interest in the right of way was in the nature of an easement, rather than a limited fee. With this easement, the railroad obtained only surface rights and any other rights incident to the use of the right of way land for railroad purposes. The court had already held that rights of way granted under the Railroad Right of Way Act of 1875 also were easements only, without rights to subsurface minerals. n12

Now, parties that wish to obtain oil and gas rights on railroad right of way lands may qualify under the Railroad Right of Way Leasing Act of 1930. n13 Even though the court cases have generated some confusion about who should be the lessor of those mineral rights, it has since been held that the procedure under the 1930 act is the exclusive procedure for obtaining oil and gas rights under railroad rights of way. n14 Obtaining rights to other minerals is still problematic, although the most secure method would be to file locations and claims in the usual manner and also to secure the cooperation of the railroad that holds the surface rights.

(b) Incidents of Other Land Grants.

The immense grants of land to the railroads did not vest immediately. They were considered present but conditional

grants, and would not vest until the location of the rail line had been fixed. However, any lands that were possibly subject to railroad claims, from the time the general location of the route was identified, were made no longer open to entry by individual private settlers. n15 These lands thus withdrawn from entry remained so until the railroad line was made definite, and then the lands that were to remain withdrawn from entry or private appropriation were definitely identified. Also at that time the railroad title vested. n16 The vesting of title was held to relate back to the time the grant was statutorily authorized. n17

For the so-called "indemnity lands," lands open to selection by the railroad in place of lands within the primary grants that had already been appropriated, no title vested until the selection was actually made, a point that was resolved when one railroad sought to select indemnity land within the area of another railroad's original grant. n18 The federal government provisionally withdrew some land for a forest reserve, before selection of indemnity lands; the withdrawal was not made permanent until after selection, and the railroad claim was held superior. n19

So-called "mineral lands" were excepted from the railroad land grants, but these were defined to mean oil and gas lands, and not coal and iron lands. n20 Eventually, because identifying mineral lands was a slow and uncertain process, and railroads were issuing patents for such lands to third parties, it was held that the mineral rights were reserved to the United States, but that a fee title to those lands could pass by patent. n21 It was also held that once a patent was issued to a railroad, presumably under the conclusion that the patented lands were non-mineral, subsequent discovery of minerals could not change the status of the land or cause rescission of the patent. n22 Also, federal legislation in 1890 subjected all patents west of the 100th meridian to reservations for ditches and canals constructed under federal authority. n23

In conflicts between railroad land grant claims and claims by settlers who acted under homestead or preemption laws, Congress eventually enacted relief or exchange laws permitting the settlers to choose other equivalent land. n24 When a railroad failed to construct the railroad for which land grants were made, it was eventually required that the land grants (but not necessarily the rights of way) be forfeited and returned to the public domain. In the judicial decisions on forfeiture issues, it was held that some manifestation of Congressional intention to assert forfeiture was required. n25 Later legislation left Congress free to declare forfeitures without a prior judicial inquiry, although subject to judicial review. n26

A somewhat inconspicuous provision of the early railroad land grant legislation granted rate concessions to the federal government when transporting troops, mail, munitions and similar goods. These rate concessions became very significant during World War II, and some relief for the railroads was provided in the Transportation Act of 1940. n27 This act offered payment of full rates by the government in exchange for the railroad releasing its claims to lands granted. Subsequently, releases of claims to more than 8,000,000 acres in the western states were filed by railroads.

FOOTNOTES:

(n1)Footnote 7. St. Joseph & Denver City Ry. v. *Baldwin, 103* U.S. (13 Otto) 426 (1880). *City of Auburn v. U.S. Government, 154 F.3d 1025 (9th Cir. 1998)* (the Interstate Commerce Commission Termination Act's (ICCTA) powers of federal preemption in matters of construction, acquisition, operation, abandonment, or discontinuance of spur, industrial, team, switching, or side tracks, or railroad facilities, are broadly construed to cover both economic and environmental regulation). A few courts have had to resolve the impact of the ICCTA regarding the future use of a rail right-of-way. *In re Conservation L. Found., 782 A.2d 909 (N.H. 2001)* (Congress intended the federal government to exclusively occupy the field of railroad regulation, including the preservation of railroad corridors for future rail use); *Buffalo Twp. v. Jones, 778 A.2d 1269 (Pa. Cmwlth. App. 2001)* (township not required to receive approval from ICC before transforming railroad right-of-way into recreational trail where township assumed full responsibility for management of right-of-way and for any legal or financial liability arising out of operation of the trail). *But see, Jones v. Union Pacific Railroad Co., 94 Cal. Rptr. 2d 661 (Cal. Ct. App. 2000).*

(n2)Footnote 8. *Northern Pac. Ry. v. Townsend, 190 U.S. 267 (1903).* Some state statutes also placed other burdens

on railroads in their landholdings. *Southeast Cass Water Resource Dist. v. Burlington N. R.R., 527 N.W.2d 884 (N.D. 1995)* (railroad responsible to change bridges and culverts to accommodate drainage); *Grantwood Village v. Missouri Pacific R.R., 95 F.3d 654 (8th Cir. 1996)* (right of way can be discontinued under the Trails Act, and not considered an abandonment); *Newberry v. Board of Comm'rs of Fremont County, 919 P.2d 141 (Wyo. 1996)* (a tort case discussing the use of abandoned railroad beds as trails under the National Trails System Act); *Becker v. Surface Transp. Bd., 132 F.3d 60 (D.C. Cir. 1997)* (authorizing conversion of a railroad right-of-way to a trail under the National Trails System Act, *16 U.S.C. § 1241); Nebraska Trails Council v. Surface Transp. Bd., 120 F.3d 901 (8th. Cir. 1997)* (review of a decision of the Surface Transportation Board (STB) establishing a $150 fee for requests to use or acquire proposed-to-be abandoned railroad rights-of-way for interim recreational trail use); *RLTD Railway Corp. v. Surface Transp. Bd., 166 F.3d 808 (6th Cir. 1999)* (a properly abandoned right-of-way is generally outside of the jurisdiction of the Surface Transportation Board (STB) to grant a trail condition); *Eldridge v. City of Greenwood, 503 S.E.2d 191 (S.C. Ct. App. 1998)* (abandonment extinguishes the statute-given easement of right-of-way). *But see, Burlington Northern and Santa Fe Ry. Co. v. Benson County Water Resource Dist., 618 N.W.2d 155 (N.D. 2000); King County v. Burlington Northern R.R. Corp., 885 F. Supp. 1419 (W.D.Wash. 1994)* (describing Congressional response to Northern); *Citizens Against Rails-to-Trails v. Surface Transp. Bd., 267 F.3d 1144 (D.C. Cir. 2001)* (construing National Trails System Act regarding abandonment of railroad right-of-way); *Kulmer v. Surface Transp. Bd., 236 F.3d 1255 (10th Cir. 2001)* (Surface Transportation Board (STB) could consider likelihood of continued rail freight service as factor in deciding whether to approve disputed offer of financial assistance in rail abandonment proceedings); *Chatham v. Blount County, 789 So.2d 235 (Ala. 2001)* (railroad abandoned easement by selling the rails, crossties, and track material, and, thus, the land reverted to the adjoining landowners before the railroad quitclaimed its interest to a city and county for construction of a recreational trail; the sale rendered impossible the use of the easements as a railroad right-of-way or for railroad purposes, and the railroad had unsuccessfully attempted to sell its interest in the easements for non-railroad uses); *Buffalo Twp. v. Jones, 778 A.2d 1269 (Pa. App. 2001)* (a railroad right-of-way terminates and the property interest reverts back to the property owner when the land ceases to be used for railroad purposes. National Trails Systems Act did not require township to receive approval from Interstate Commerce Commission (ICC) before transforming railroad right-of-way into recreational trail); *Chatham v. Blount County, 789 So.2d 235 (Ala. 2001)* (railroad abandoned easement by selling the rails, crossties, and track material, causing the land revert to the adjoining landowners); *Buffalo Twp. v. Jones, 778 A.2d 1269 (Pa. Cmwlth. App. 2001); Stone v. U.S.D. 222, 77 P.3d 509 (Kan. App. 2003)* (the original conveyance to the railroad was a right of way rather than a fee simple, and the land reverted to adjacent owners upon abandonment by the railroad); Moore v.*United States, 58 Fed. Cl. 134 (Ct. Cl. 2003)* (conveyance of land to a railroad for specified uses conveyed only an easement and not fee title); *Keife v. Logan, 75 P.3d 357 (Nev. 2003)* (the reversionary interest in the right of way belonged to the owner of the underlying land); *Louisville & Indiana Railroad Company v. Indiana Gas Company, 792 N.E.2d 885 (Ind. App. 2004)* (legislation allowing the railroad to hold fee simple interests was retroactive); *State Department of Natural Resources v. Hess, 665 N.W.2d 560 (Minn. App. 2003)* (deed to railroad created an easement rather than a fee simple determinable; railroad's removing tracks constituted an abandonment of the easement); *Lowers v. United States, 663 N.W.2d 408 (Iowa 2003)* ("right of way" deed to railroad conveyed a defeasible fee rather than an easement; this decision abrogrates earlier decisions); *Hash v. United States, 403 F.3d 1308 (Fed. Cir. 2005)* (a taking occurred when railroad's abandoned right of way was converted into a recreational trail).

(n3)Footnote 9. *190 U.S. at 271. Malnati v. State, 803 A.2d 587 (N.H. 2002)* (state's easement not extinguished when railroad ceased using right-of-way, despite no affirmative action by the state--the statute provided that leased right automatically reverted to state upon expiration of the lease term); *CSX Transportation, Inc. v. Rabold, 691 N.E.2d 1275 (Ind. App. 1998)* ("right-of-way" language is generally construed to convey an easement); *Consolidated Rail Corp., Inc. v. Lewellen, 666 N.E.2d 958 (Ind. App. 1996)* (the original conveyance helps determine the type of estate the railroad had in the land, which helps determine the present estate); *Illinois Cent. R.R. v. Roberts, 928 S.W.2d 822 (Ky. App. 1996); State v. Barras, 615 So.2d 285 (La. 1993)* (railroad company acquired right-of-way through General Railroad Right of Way Act and upon abandonment the right of way reverted to the United States as underlying fee owner); *Johnson v. Kansas City Southern, 224 F.R.D. 382 (S.D. Mo. 2004)* (land conveyances contiguous to a railroad easement carried the title to the center of the railroad line); *Stone v. U.S.D. No. 222, 91 P.3d 1194 (Kan. 2004)* (railroad had

acquired a fee simple absolute interest in the land); *Kershaw Sunnyside Ranches, Inc. v. Yakima Interurban Lines Association, 91 P.3d 104 (Wash. App. 2004)* (deed to railroad conveyed only an easement).

(n4)Footnote 10. *Read v. Montgomery County, 643 A.2d 476 (Md.1994)* (railroad's interest in parcels acquired by public grant through act of Congress could not be extinguished by adverse possession).

(n5)Footnote 11. *United States v. Union Pac. Ry., 353 U.S. 112 (1957).*

(n6)Footnote 12. *Great Northern Ry. v. United States, 315 U.S. 262 (1942). See also, Clark v. CSX Transp., Inc., 737 N.E.2d 752 (Ind. Ct. App. 2000)* (stating that a railroad had easement interests in some parcels of land and fee simple interests in other parcels along a railroad right-of-way); *Roeder Co. v. K & E Moving & Storage Co., Inc., 4 P.3d 839 (Wash. Ct. App. 2000)* (a specific deed granting a right-of-way to a railroad company actually conveyed a fee simple interest, not an easement); *Marlow v. Malone, 734 N.E.2d 195 (Ill. Ct. App. 2000)* (Federal statute passes title to abandoned railroad right-of-way to persons or entities who can show paper title to the property underlying the right-or-way.)

(n7)Footnote 13. *30 U.S.C. §§ 301*-306.

(n8)Footnote 14. *Phillips Petroleum Co., 61 Idaho 93 (1953).*

(n9)Footnote 15. *Buttz v. Northern Pac. Ry., 119 U.S. 55,* (1886).

(n10)Footnote 16. *St. Paul & Pac. Ry. v. Northern Pac. Ry., 139 U.S. 1 (1891).*

(n11)Footnote 17. *St. Paul & S.C. Ry. v. Winona & St. Paul Ry., 112 U.S. 720 (1885). Masayesva v. Zah, 65 F.3d 1445 (9th Cir. 1995)* (Hopi tribal land did not include land acquired from railroads).

(n12)Footnote 18. *Id.*

(n13)Footnote 19. *United States v. Northern Pac. Ry., 256 U.S. 51 (1921).*

(n14)Footnote 20. *12 Stat. 489 (1870).* Andrew C. Mergen, *Surface Tension: The Problem of Federal/Private Split Estate Lands*, Land & Water L. Rev. Vol. 33 (1998).

(n15)Footnote 21. *Barden v. Northern Pac. Ry., 154 U.S. 288 (1894).*

(n16)Footnote 22. *Burke v. Southern Pac. Ry., 234 U.S. 669 (1914).* Andrew C. Mergen, *Surface Tension: The Problem of Federal/Private Split Estate Lands*, Land & Water L. Rev. Vol. 33 (1998) 430. "Split estates administered by the BLM are often the result of efforts to consolidate checkerboard patterns of land ownership by reacquiring railroad land grant reserves. When the land is reacquired, the holder of the land will sometimes reserve the mineral estate while conveying the surface estate to the federal government. Where split estate lands managed by the BLM contain economically valuable minerals, the development of the mineral estate is unlikely to be controversial because in many Western states the BLM routinely permits mineral exploration and development."

(n17)Footnote 23. *26 Stat. 391.*

(n18)Footnote 24. *See, e.g., 18 Stat. 194.*

(n19)Footnote 25. *See, e.g., St. Louis, Iron Mtn. & S. Ry. v. McGee, 115 U.S. 469 (1885).*

(n20)Footnote 26. *26 Stat. 496. Chevy Chase Land Co. of Montgomery County, Md. v. United States, 37 Fed. Cl. 545 (1997)* (under Maryland law, railroad abandoned alleged easement in railroad tracks, and applied to Interstate Commerce Commission (ICC) for abandonment authorization, which the ICC granted; then the railroad declined to fix

tracks when they fell in disrepair, and made arrangements with shippers to transport goods by truck).

(n21)Footnote 27. *49 U.S.C. § 10321*.

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CHAPTER 54 RAILROAD LANDS

7-54 Thompson on Real Property, Thomas Editions § 54.04

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§ 54.04 Impact of Railroad Land Grants on Private Landholding.

The railroads expected to profit handsomely from their land grants, in two ways. First, revenue from the sale of the lands to settlers was to figure significantly in the railroads' ability to construct and maintain the line. Second, by bringing more people to settle along the line, railroad business would naturally be enhanced. Thus, railroads undertook ambitious programs of "colonization" along the lines. n28

FOOTNOTES:
(n1)Footnote 28. Railroads' efforts to attract settlers to their lands continued into the twentieth century, with greatest emphasis on the High Plains and the intermountain west. Most of the railroads' land suitable for farming was sold or withdrawn by the early years of the century, but they continued efforts to bring settlers to lands that were now in private hands or to the vast public lands opened for homesteading. Diminution of Indian reservations also opened up new tracts for settlement. Farming opportunities expanded further as great ranches continued a 19th-century trend to break up. As irrigation expanded in the arid west, even more territory became susceptible to settlement and farming; railroads actively sponsored many pioneer irrigation projects. In both the southern and the north central states, where less raw land was available for homesteading, the railroads promoted immigration through the appeal of available existing farmland or cultivatable land, especially in the form of abandoned farms. Roy V. Scott, Railroad Development Programs in the Twentieth Century 16-23 (1985).

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CHAPTER 54 RAILROAD LANDS

7-54 Thompson on Real Property, Thomas Editions § 54.05

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§ 54.05 Bibliography.

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Annotation, *Abandonment of a Railroad Right of Way, What Constitutes, 95 A.L.R.2d 468.*

Annotation, *Conveyance of "Right of Way," in Connection with Conveyance of Another Tract, As Passing Fee or Easement, 89 A.L.R.3d 767 (1979).*

Annotation, *Crossing, Liability of Railroad or Other Private Landowner for Vegetation Obscuring View at Railroad Crossing, 66 A.L.R.4th 885.*

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Supp. To CHAPTER 54 RAILROAD LANDS

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§ 54.03(a) Incidents of Right of Way Grants. [Go To Main]

Add:

Bitner v. Watco Companies, Inc., 226 P.3d 563 (Kan. App. 2010) (unsuccessful claim that railroad had abandoned its interest in the land and that the plaintiffs had a reversionary interest in the land).

Add:

Sinclair Marketing Inc. v. City of Commerce City, 226 P.3d 1239 (Colo. App. 2009) (railroad rights of way do not constitute public rights of way for annexation purposes).

Add:

Avista Corp. v. Wolfe, 549 F.3d 1239 (9th Cir. 2008) (declaration of abandonment under Abandoned Railway Right of Way Act); *Herr v. Herr, 957 A.2d 1280 (Penn. Super. 2008)* (action over party's reversionary interest in strip of land owned by the railroad); *Hinojos v. Lohmann, 182 P.3d 692 (Colo. App. 2008)* (action quiet title to land underlying an abandoned railroad right of way). *Hash v. U.S., 454 F. Supp. 2d 1066 (D. Idaho 2006)* (railroad deeds conveyed a fee simple determinable); *King Associates, LLP v. Bechtler Development Corp., 632 S.E.2d 243 (N.C. App. 2006)* (a deed granting a railroad a right to way held to have granted a fee simple rather than an easement); *Goldman v. RBC, Inc., 632 S.E.2d 850 (S.C. 2006)* (holding that railroad obtained an easement for as long as the land was used as a railroad).

Blendu v. U.S., 79 Fed. Cl. 500 (2007) (grant to railroad as "perpetual right of way" conveyed an easement rather than fee simple title).

Add:

Bailey v. Town of Saltville, 691 S.E.2d 491 (Va. 2010) (grant to railroad was for a fee simple interest, not an easement); *Rogers v. U.S., 90 Fed. Cl. 418 (2009)* (government's conversion of abandoned railroad land to a recreation trail constituted a taking).

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Annotation, *Boundary Under Conveyance of Land Bordering on Railroad Right of Way,* 85 A.L.R. 404 .

Annotation, *Who Entitled to Land Upon its Abandonment for Railroad Purposes, Where Railroad's Original Interest or Title was Less than Fee Simple Absolute,* 136 A.L.R. 296 .

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CHAPTER 55 PUBLIC LANDS

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§ 55.syn Synopsis to Chapter 55: PUBLIC LANDS

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§ 55.02 History of Public Lands in the United States.

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(b) Early Policy Developments Regarding Public Lands.

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43 U.S.C. § 11610(b)(2)Public Lands and Mineral Resources.

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§ 55.08 Public Lands and Resources to be Preserved.

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CHAPTER 55 PUBLIC LANDS

7-55 Thompson on Real Property, Thomas Editions § 55.01

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§ 55.01 Introduction.

The purpose of this chapter is to provide an overview of how American public domain lands were acquired, how they have passed into private ownership in the past, and - within a legal and regulatory context - how they are presently managed and administered. The chapter is based upon and provides citation to the principal sources of legal authority pertaining to public lands. This chapter will serve as an introduction to a vast subject whose full treatment requires separate treatise publications. n1

FOOTNOTES:
(n1)Footnote 1. For the Congressional declaration of Public Land Policy, *see 43 U.S.C. § 1701, Appendix. State of Alaska v. Babbitt, 72 F.3d 698 (9th Cir. 1995)* (public lands include some specific navigable waters reserved as appurtenant to reserved water rights); *Oregon v. Holloway, 908 P.2d 324 (Or. App. 1995)* ("public lands" can be broadly referred to as any land owned by a unit of government, regardless of whether the governmental unit could freely alienate the land).

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CHAPTER 55 PUBLIC LANDS

7-55 Thompson on Real Property, Thomas Editions § 55.02

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§ 55.02 History of Public Lands in the United States.

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(a) How the Public Domain Was Assembled.

The public domain, that is, the lands belonging to the American public and held and administered through the American public's national government, could not officially begin to be assembled until the Articles of Confederation were ratified in 1781, two years before the official conclusion of the War for Independence against Great Britain. The Confederation, however, opened for business mired in a deep debate over whether it, indeed, had any public lands. The vast and undelineated western holdings of several of the states in the Confederation were still formally within the jurisdiction of those states, who were taking steps to transfer those lands into private ownership, and the objections to all of that process by the other states were so serious that the very existence of the Confederation was threatened.

This dilemma had been a long time in gestation. In the one and a quarter centuries between the founding of the first successful English colony in America and the founding of the last of the thirteen colonies, England issued charters to those colonies granting vast tracts of land extending westward into regions whose geography was entirely unknown. The first grant, to the Virginia proprietors, was the most extreme. Officially the boundaries ran several hundred miles to the north and south, and to the west, from sea to sea. Although several colonies' westward boundaries extended, by their terms, all the way to the Pacific Ocean, it was then unknown how far it actually was to that westward limit. The colonies were very active in disposing of their lands into private hands, but only in those areas that had been settled or explored.

In the 1750s, French claims were extended southward into the western lands of several English colonies. English resistance was a factor in the beginning of the Seven Years War, at the conclusion of which the territorial claims of the British colonies all the way west to the Mississippi River were confirmed.

Of course, the British sovereignty did not endure and only 20 years after the end of the Seven Years War, Great Britain and its former colonies concluded a peace acknowledging that Great Britain's former sovereign title in its American lands was held by the new American government under the Articles of Confederation.

Seven of the Confederation's constituent states still held vast areas of unoccupied westward land, and this jurisdiction

had not been disturbed by the Articles of Confederation. The six states without such western lands in their domain insisted that the other seven states turn their western lands over to the Confederation as public lands. To help resolve the impasse, the Continental Congress also asked those seven states to relinquish their claims. If that were to happen, Congress expressed its intention to hold those lands for the common benefit of the United States with the ultimate goal that the lands would be settled and admitted to the United States as new states in the same status as the original states. Between 1784 and 1802, the seven states' western territories were thus ceded to the national government. Upon the first of those cessions, the final ratification of the Articles of Confederation was given and the new national government officially came into being at the same time as the new public domain of the national government. When the national government under the Articles of Confederation was replaced by the national government under the Constitution on March 4, 1789, the lands in the public domain were growing and yet to grow more. For the most part, these were lands which had not yet been in any private ownership and also which had not yet come within the jurisdiction of any state.

Some of the state cessions did not become part of the public domain, but became lands that were immediately assigned to the jurisdiction of a new state. Part of Virginia became Kentucky and then much later another part of Virginia became West Virginia. Part of North Carolina became Tennessee. The Tennessee land was formally ceded to the national government but almost all of it was already subject to private claims and very quickly was accepted as a new state. Vermont was created out of territory claimed by both New York and New Hampshire; and Maine was created from Massachusetts land in 1820. Some of the western lands ceded to the national government had already been subjected to private claims and, thus, also did not become part of the public domain.

From its beginnings with the western cessions between 1784 and 1802 the public domain was dramatically expanded by new territorial acquisitions of the United States over the next half century. National territorial additions over the next decades included the Louisiana Purchase in 1803, the cession of Florida by Spain in 1819, the annexation of Texas in 1845, acquisitions under the Oregon Compromise in 1846, the territory acquired at the conclusion of the war with Mexico in 1848, the federal purchase of public lands from Texas in 1850, the Gadsden Purchase in 1853, and the acquisition of Alaska by purchase in 1867. While some of these lands were held privately at the time they were acquired by the United States, the overwhelming majority was not held privately and was thus added to the public domain.

(b) Early Policy Developments Regarding Public Lands.

An enormously important step towards a rational policy of public land management and disposal was taken when the Continental Congress enacted the Land Ordinance of 1785. In this legislation, the rectangular governmental surveys that had been characteristic of the New England colonies were adopted as a part of the United States land policy, and all the lands then or thereafter in the public domain were subjected to that survey system. The survey was to produce townships, each consisting of an area of land six miles wide by six miles long divided into sections of one square mile each. The section numbered 16 in each township was to be reserved so that revenue from its sale would be devoted to public schools within the township. The Ordinance reserved for the public one-third of all of the gold, silver, lead and copper to be extracted from within the township. When the survey was completed, lands from within the township could be sold at auction to the highest bidder at not less than one dollar per acre. Lands within the surveyed township already occupied and improved could be purchased at minimal price by the occupants even before the auction period. The Land Ordinance of 1785 did not establish any limits on the amount of acreage that any purchaser could buy, and purchasers were not required to settle or improve the land. Under those circumstances, the attempt by means of the Land Ordinance of 1785 to create an orderly system for disposing of public lands was flawed in the failure of the ordinance to deal effectively with problems created by squatters and by purchases on behalf of large land speculators.

The Land Ordinance of 1785 was soon followed by the Northwest Ordinance of 1787. The Northwest Ordinance of 1787 defined a three-stage process by which the territories could become states of the union and which, by creating effective local government, would encourage security of land titles and ultimately enhance the sale of public lands to private parties.

Both the Land Ordinance of 1785 and the Northwest Ordinance of 1787 were enacted by the Confederation without any specific authority to do so. Concerns for this possible lack of authority and the instability of land arrangements that might result therefrom were shared by the delegates to the convention to draft a new Constitution. Ultimately, the new Constitution did address these issues with two provisions:

> New States may be admitted by the Congress into this Union; but no new State shall be formed or erected within the Jurisdiction of any other State nor any State be formed by the Junction of two or more States, or Parts of States, without the Consent of the Legislatures of the States concerned as well as of the Congress. n2
>
> The Congress shall have power to dispose of, and make all needful rules and regulations respecting the territory or other property belonging to the United States; and nothing in this Constitution shall be so construed as to prejudice any claims of the United States or of any particular State. n3

One of the most persistent controversies and, indeed, the first controversy to arise following passage of the Northwest Ordinance, was how to treat states equally in terms of their power over and access to public lands. The principle of equality between the states had been established by the Northwest Ordinance, which decreed that any new states would be admitted to the union "on an equal footing with the original states in all respects whatever... ."

On the one hand, the original states - especially those which had ceded their vast western lands to the Confederation - proclaimed that they had used their people and their money to help win control of the lands that were now in the public domain and they should now be able to share in the wealth emanating from the public domain. Above all, revenue from sale of the public domain should be used to retire the national debt.

Congress, however, took a different tack. From the proceeds of public lands sales, Congress directly appropriated large sums for roads in the new states. In addition, Congress turned over directly to the new states huge acreage for schools and other public institutions, ultimately returning about 19% of the public domain to the seven new states that were formed out of the Northwest Territory.

Based on the principle of equality, the old states then made claims on the public domains lands. The new states proclaimed that, for them, equality meant that they should have control of all the federal public domain lands within their boundaries, as was the case with the old states. As the controversy raged throughout the 19th century, Congress made moves to mollify both groups of states. To the new states that were formed during the 19th century, Congress granted approximately 181 million acres of public domain lands within their boundaries. Over half again that amount was given to railroads who were constructing rail lines and encouraging settlement through those states. To satisfy the older states, Congress made a number of charges against public land revenues for the benefit of public improvements in the states that no longer had large amounts of public land. Inevitably, there remained a large disparity between the public land benefits accorded the newer public lands states and those obtained by the older states.

By the end of the 19th century the sentiment of the older states had changed. And from those states came cries for the federal government to responsibly preserve and manage the remaining public domain under the so-called "public trust" doctrine. As the public trust doctrine has gained acceptance, the public land states, especially those in the West, have raised their own countervailing concerns about how much state power can be exerted over the vast federal public domain lands within their respective state boundaries. This, too, is actually an issue of equal footing illustrating again that this appealing doctrine has proved to be a problematic principle over the decades.

In addition to these public claims on the public domain, another idealistic but troublesome principle involving public lands was the commitment of the American government to honor the claims and rights of private grantees in the newly acquired public lands, including claims of foreign grantees. Many extended and acrimonious controversies were necessary to carry out this policy. In disputes over public lands between private parties, usually the speculators,

developers and other claimants of large acreage were more successful so that, in the end, 34 million acres in 19 states were confirmed to grantees of titles pre-dating American sovereignty.

(c) Disposal of Public Lands.

(1) Alienations.

Sales of lands in the public domain commenced even before the first stage of acquisitions from the old states was completed. Because the earliest cessions of western lands from the original states took place over a period of several years, it was natural that sales to private parties of parcels from those lands would commence before the cession process had run its full course. While some thought that public lands should simply be granted outright to settlers on the frontier, national necessity required that as much revenue as possible be obtained from the sale of such lands.

The first sales took place in Ohio as the Northwest Territory opened up to orderly settlement under the Land Ordinance of 1785 and the Northwest Ordinance of 1787. The surveyor general of the treasury department was responsible for surveying the lands and issuing the patents when the lands were sold. Receivers and registers at a few local land offices accepted and accounted for payments that were made. In 1812, these functions were taken over by the General Land Office under the Secretary of the Treasury, and the General Land Office was shifted to the Interior Department in 1849. Nevertheless, the early sales of public domain land to private parties remained slow because of cheap land abundantly available almost everywhere else.

Beginning about 1800 and extending to 1820, sales of lands from the public domain were made on credit. The credit arrangements called for payment of annual installments, with interest usually at 6%, unless excused, and the patents were not issued until payments were complete. Sales were to be in acreage blocks that at first encompassed entire townships but were later reduced to 640 acres, then to 320 acres and even lower. Even with smaller acreage and extended payment periods and forgiveness of interest, defaults and delinquencies were very common in the early years of the 19th century and occasionally federal legislation extended the payment period or authorized forgiveness of payments or of interest obligations.

When delinquencies did not diminish by 1820, Congress withdrew authorization for credit sales and required a full cash payment made for sales at auctions. At the same time, the minimum price was reduced from $2 per acre to $1.25 per acre.

Once the period of cash sales got under way again in 1821, many conflicts arose between well-funded groups of speculators who would usually be successful bidders at land auctions, and the settlers and squatters who had already commenced farming of public lands even before surveys had taken place. To combat the organized efforts of land speculator groups, the pre-auction settlers often formed groups of their own, and each group tried to manipulate the bidding either to preserve their farms (in the case of the settlers) or to succeed in acquiring their first choice of land (in the case of the speculators). Speculation in land was actually encouraged during the 1830s by federal land practices which extended much more public domain land into the auction process than could be bid upon and purchased by the potential buyers. Even among the lands which were purchased, mostly by speculators, much acreage was left unsettled and unimproved and thus tended to retard the development of local communities.

Along with cash sales, another prominent method of placing public domain lands into the ownership of private parties was opened up in 1841 with passage of the Preemption Acts. n4 This general preemption law and the special preemption laws that preceded it, recognized that many frontier settlers had already settled upon public domain lands, had improved the lands, and hoped then from the proceeds of their labors to have money for purchasing the lands when they officially became open for sale. This plan depended on their not having to bid competitively against other potential purchasers at a public auction. This avoidance of the public auction, then, was the preemption referred to in the titles of the bills.

The General Preemption Act of 1841 was a step toward validating the activities of these settlers and squatters, but it applied only to settlement that occurred on public lands that had been surveyed although not yet opened to auction. A settler could qualify for preemption on 160 acres by actually living on and improving the land and building a residence on it. A settler wishing to claim preemption was required to have notation of the claim made on public land records, including a written declaration of intent to improve and preempt a quarter section. Proof of meeting those qualifications and final entry had to be made within one year and paying $1.25 per acre. A person who was a head of family, a widow, or a single person over 21, and did not already own more than 320 acres, and had no previous preemptions, would be eligible under the 1841 Preemption Act. In 1862, another preemption act extended this procedure to settlers who had made their entry on public lands that had not yet been surveyed. With that legislation, preemption and homesteading became the predominant means of private acquisition of lands from the public domain. Because it eliminated competitive bidding, and gave the settlers an entire year to raise funds and to make improvements to validate their claims, it became a major means for moving lands of the public domain into the hands of small private farmers.

A highly specialized method of dispersing acreage from the public domain was the use of warrants and scrip. Warrants for claims of acreage against the public domain were issued to soldiers for their military service or to others for some other form of public service or for installing community improvements. The warrants varied in the number of acres and were often intended to draw upon lands which were still in the wild state, not yet surveyed and opened and often not very appealing for settlement. In the early days, holders of warrants often sold them for immediate cash, rather than waiting for the lands to be opened up or to be pacified. When the lands to which particular warrants pertained were insufficient to satisfy all the warrants, the government sometimes issued a scrip which gave the holder a right to claim a certain number of acres from other public lands anywhere in the public domain. Eventually large portions of the warrants and scrips issued were bought up by land speculators, n5 who were eventually able to profit from them. Land warrants were issued for military service as late as 1898. Congressional legislation in the mid-20th century imposed recording requirements for warrants, and unused and unlocated warrants were repurchased by the government. No scrip was valid after January 1, 1975. In the whole history of land warrants and scrips, several million acres of the public domain were dispensed by these methods.

Perhaps the largest blocks of public domain lands were dispensed directly to the various states under a wide variety of programs. The earliest of those programs consisted of working out the terms for the state relationship to public lands within state boundaries upon admission to statehood. The pattern for all thirty public land states was set by the procedure followed in connection with Ohio's statehood after the passage of the Northwest Ordinance and the first attempts to create states out of the Northwest Territory. The Northwest Ordinance itself required that any state created from the Northwest Territory would be bound to not interfere with the disposal of public lands by the United States, nor with federal regulations relating to securing the title to those lands. Likewise, those states would be prohibited from imposing taxes on federally-owned land within their boundaries. The procedure for Ohio's statehood, followed closely by that for other states emerging from the Northwest Territory, was detailed in the Congressional Enabling Act.

Under the Enabling Act, the inhabitants of the Ohio area were to elect representatives to a convention, according to formulas and procedures set out in the act, and the convention of delegates would then consider a number of propositions relating to the conditions under which Ohio would then be admitted as a state. The statehood convention would be required to enact an irrevocable ordinance disclaiming state rights in the federal public domain within the territory, and once such an ordinance was enacted, then the other propositions regarding other public domain lands within the state could be considered on a more or less optional basis by the state convention. If an acceptable mix of propositions or counter-proposals was tendered to Congress, then they, together with the one irrevocable proposition already enacted, would be part of the package of conditions for statehood. The "optional" proposition consisted of various programs under which public lands within the territory would be transferred to the state.

In the case of Ohio, the convention did enact the irrevocable ordinance and made counter-proposals seeking mostly to enlarge the various grants of public domain lands under the other programs. Almost all of the counter-proposals were

accepted by Congress, which then resolved to admit Ohio to statehood on what was considered to be an equal footing with the other states. The same procedure, but with varying results, was followed by other territories seeking statehood. Using the various programs for federal land grants as bargaining proposals, each state created a different mix of regulations and programs for disposal of public lands within their respective territories. All this was on the condition that they accept the one irrevocable ordinance abandoning claims to public domain within their boundaries, surrendering any right to tax federally-owned land, and agreeing also to tax residents and non-residents alike with respect to ownership of public lands. Also, all public domain lands within the state were to be exempt from local taxation for five years after transfer by sale into private ownership.

Among the other programs for transferring public domain lands into state or private ownership, was the granting of section 16 of every township to the state for the support of public schools. n6 After 1850, the program called for granting of sections 16 and 36 for that purpose. After 1896, Utah and Arizona received for public schools four sections in each township. Also, most states received 5% of the net proceeds from public domain land sales within their boundaries for the construction of roads. In the early years states were also granted lands that encompassed salt springs and some adjacent sections with the proviso that the states retain title and only lease the salt springs to private parties, thus assuring that the flow of revenue would continue to the states for those lands. Later, sale of the salt springs public lands by the states was permitted. Also, in states where specific sections were received for school purposes, and those sections were not available because of preemption or other earlier disposition, the states were given the right to select other lands in substitution.

Very soon after this process began, all states began asking for special congressional legislation for land grants devoted to special improvements. Roads such as the Cumberland Road from Baltimore to the Ohio Valley and the Erie Canal, connecting New York City with western New York, were funded in part by additional land grants to the states affected. The notion of land grants for particular special improvements had by 1841 evolved into a system of general grants to the states for internal improvements. In 1841, Congress granted 500,000 acres of the public domain to each of the public land states then in existence and to each such state admitted thereafter. Some states immediately sold the lands to be used for schools and improvements, while other states created a sort of trust arrangement for the lands, hoping to derive long-term income from them. To exercise more control over the application of proceeds from such land, after 1889 Congress made some land grants directly to specific worthy institutions within the states, rather than directly to the states.

Several Swamp Land Acts in the middle of the 19th century were the result of the states having persuaded Congress that among the public domain lands within their territories were marshy and swampy lands that were of no value to the federal government. It was also believed at the time that the federal government was without Constitutional authority to give aid to drain those swampy lands and it therefore seemed appropriate to turn them over to the states. The Swamp Land Acts immediately gave to the states the title to swamp and overflowed lands unfit for cultivation, but a specific identification of those lands had to be made later. The program was widely abused, and the states eventually obtained almost 65 million acres of so-called swamp lands under this act. An apt criticism of this program has been delivered in the following terms:

> Many of the lands granted as swamp lands were not wet except in flood stage, heavy rain, or because one part of them touched lakes or water courses. Many of them were valuable lands which sold well to farmers, and despite the intent of Congress, the proceeds were not always used to reclaim those swamps which did exist. Few public lands acts were so loosely worded, caused so much trouble in selection and conflicting claims between settlers, and achieved so little of the original purpose. n7

In 1862 Congress made available to all states grants of land to endow colleges of agricultural and mechanical arts. The resulting land grant colleges thus obtained 30,000 acres for each of their representatives and senators in Congress. If the state had no such acreage of public domain within its boundaries, then the state received scrip which could be used for claims against public domain lands elsewhere.

Because land grants of public domain lands to the states were a matter of bargaining, the bargaining frequently turned on estimates of the population in the territory applying for statehood; the more sparsely populated western states eventually had considerably more of their territories left in federally controlled public lands than was true in the older eastern states. To compensate for the consequent reduction of tax base in those states, the federal government eventually adopted a system of payments made to those states in lieu of taxes they would have otherwise received from their public domain lands, had those lands passed into private ownership. n8

In 1927, Congress confirmed that, in land grants to the states, the mineral rights, or lands designated as mineral lands, were also included in the passage of title to the states.

Beginning in 1850, the federal government undertook a specific policy of supporting and encouraging development of railroads by extending huge grants of public land to the railroads. The railroads obtained both rights of way for the actual lines and grants of other lands, the proceeds from the sale of which would help subsidize railroad construction. Also, these land sales to private settlers would help build the base of customers for the new railroad lines. The land grants to railroads, eventually amounting to many hundreds of millions of acres, were eventually deemed to be profligate, especially because they were often not used for their intended purposes. When the railroads delayed disposing of the lands to private parties, that conduct actually inhibited and delayed development of the frontier in many areas and kept the lands off the tax rolls of the state government. The creation of railroad land grants in terms of alternating sections of land have left even today a crazy quilt pattern of federal and private land ownership in the states most affected. Railroad practices have also caused some confusion as to mineral rights in the western lands. Nevertheless, as is more fully explained in Chapter 54, *supra*, the railroad land grants were a very significant element of the effort to move large tracts of public domain lands into private ownership.

At the time the railroad grants were reaching their peak, Congress introduced the Homestead Act of 1862 n9 which was the most effective method for moving public domain lands into the hands of settlers at minimal purchase prices. Persons who were 21 years of age, or were heads of families, and were citizens or were becoming citizens, could under this act, enter 160 acres of the surveyed public domain and obtain a patent for the price of $1.25 an acre. As to unsurveyed lands, settlers were also able to enter such lands on which Indian title had been extinguished, have the land entered in the land office register books and thus become protected from other entries and then perfect the title once surveying occurred. The Homestead Act of 1962, combined with the preemption practices just described, succeeded in bringing many millions of acres of the public domain lands into private ownership.

When the frontier reached the more arid desert lands, larger tracts with fewer requirements were opened up for homesteading, and improvements for irrigation became a prominent part of the required activity. However, much abuse of these land disposal practices also occurred, especially in permitting land speculators to accumulate large tracts by purchase from settlers taking improper advantage of Homestead Preemption Laws. Most of these practices were brought to a halt by Congressional legislation culminating in the General Revision Act of 1891. n10

(2) Reservations and Withdrawals.

Passage of the General Revision Act of 1891 signaled the transition from the period of disposing lands in the public domain into private ownership to a period of preserving lands in the public domain for a variety of conservation and other purposes. The General Revision Act repealed most of the statutory opportunities for obtaining lands by preemption and, in addition, made provisions for forest reservations, authorizing the president to "set apart and reserve ... any part of the public lands wholly or in part covered with timber or undergrowth, whether of commercial value or not, as public reservations." n11

After the process of forest reservations had begun, by the Organic Act of 1897 n12 the federal government was authorized to exercise protective management measures over the retained forest reservations. Within ten years after

passage of the General Revision Act of 1891, approximately 50 million acres had been withdrawn from the public domain, most of it for forest reservations. By the time of Theodore Roosevelt's administration, an additional 150 million acres had been withdrawn for forest reservations.

In addition to the withdrawals and reservations, the federal government occasionally made purchases, and even obtained property through eminent domain. In 1896, it was established that the federal government could, by eminent domain condemn private property for inclusion in the Gettysburg National Military Park. n13 Along with the withdrawals of land from the public domain for forest reservations, there had always been withdrawals for military purposes, Indian reservations, and lands deemed to be "mineral" in character.

Yellowstone National Park's creation, in 1872, represented the first withdrawal of public lands for a national park. However, the national park system was not created until 1916, and only then was a systematic administration of national park lands commenced. The National Park Service was charged with conserving "the scenery and the natural and historic objects and wild life ... and to provide for the enjoyment of the same in such manner and by such means as will leave them unimpaired for the enjoyment of future generations." n14

Concurrently with the conservationist purposes embedded in the National Park Service's charter, the Forest Service had been pursuing a policy of forest *development* in those lands withdrawn from the public domain for forest reservations. The two worthy purposes were bound to clash, and they did.

Excluding Alaska, the lands of the federal public domain had once consisted of 1,446,436,106 acres. By the turn of the century, approximately one third of this acreage remained in federal hands; 258,151,044 acres of that land were surveyed, 191,347,263 acres of the land were unsurveyed, and all of it was unappropriated, not withdrawn or reserved. Over 99% of this total acreage was in the western part of the United States, west of the 100th meridian. The lands thus left for disposal into private ownership were, for the most part, less suitable for agriculture and not likely to be entered any time soon. This circumstance, combined with increasing interest in conservation and preservation, meant that momentous changes were in store for the lands of the public domain. n15

FOOTNOTES:

(n1)Footnote 2. U.S. Const. art. IV, § 3 cl. 1.

(n2)Footnote 3. U.S. Const. art. IV, § 3 cl. 2.

(n3)Footnote 4. *5 Stat. 453.*

(n4)Footnote 5. While the warrants were technically not assignable, this restriction was usually evaded by creative use of powers of attorney.

(n5)Footnote 6. *Morrow v. Vinson, 666 So.2d 802 (Miss. 1995)* (adequacy of consideration for leases of 16th section lands was challenged).

(n6)Footnote 7. Loren L. Mall, Public Land and Mining Law 44 (2d ed. 1981).

(n7)Footnote 8. *31 U.S.C. §§ 1601*-1607.

(n8)Footnote 9. *43 U.S.C. § 161 et seq.* ; §§ 161-164 *repealed*, Pub.L. No. 94-579, *90 Stat. 2787 (1976).*

(n9)Footnote 10. *16 U.S.C. § 471; repealed*, Pub.L. No. 94-579, *90 Stat. 2792 (1976).*

(n10)Footnote 11. *16 U.S.C. § 471, 26 Stat. 1103, repealed in 90 Stat. 2792.*

(n11)Footnote 12. *16 U.S.C. §§ 473*-481 (*repealed in part in* 1976).

(n12)Footnote 13. *United States v. Gettysburg Elec. Ry., 160 U.S. 668 (1896)* (The court justified the condemnation of property by saying, "Any act of Congress which plainly and directly tends to enhance the respect and love of the citizen for the institutions of his country and to quicken and strengthen his motives to defend them, and which is germane to and intimately connected with and appropriate to the exercise of some one of all of the powers granted by Congress must be valid"); *United States v. Shumway, 199 F.3d 1093 (9th Cir. 1999)* ("Once owners have a presumptive right to a patent, the government cannot take a valid mining claim for public use without paying compensation.").

(n13)Footnote 14. *16 U.S.C. § 1; Utah Ass'n of Counties v. Clinton, 1999 U.S. Dist. LEXIS 15852* (this case upholds the right of the President of U.S. to withdraw lands for public preservation under the Antiquities Act of 1906 *(16 U.S.C. § 431).* The legislature does not have this exclusive power). *See also* Squillace, Mark. "The Monumental Legacy of the Antiquities Act of 1906," *37 Ga. L. Rev. 473 (2003)* (article discusses the history, controversies, legal issues, and future of the Antiquities Act); Rusnak, Eric C. "The Straw that Broke the Camel's Back? Grand Staircase-Escalante National Monument Antiquates the Antiquites Act," *64 Ohio St. L.J. 669 (2003)* (article advocates greater public involvement in land management and asserts that the Antiquities Act only serves the interests of the President of the United States); Wilkinson, Jay. "Creating Refuge out of Waste: The D.C. Court of Appeals Upholds the Hanford Reach National Monument," 24 J. Land Res. & Envt'l. L. 163 (2004) (article examines current and future constitutional challenges to the withdrawal of land from the Hanford Nuclear Reservation under the Antiquities Act).

(n14)Footnote 15. The Alaska Native Claims Settlement Act (ANCSA) of 1971, *43 U.S.C. § 1601 et seq.*, revoked Native reserves in Alaska, except for the Annette Island reserve, and completely extinguished all aboriginal claims to Alaska lands. In exchange, Congress transferred $962.5 million and approximately 44 million acres of Alaska land to state-chartered private business corporations formed pursuant to the statute (all shareholders of the corporations were required to be Alaska Natives). *See Alaska v. Native Village of Venetie Tribal Gov't, 522 U.S. 520 (1998)* (defining "Indian country" and Indian lands). *See also United States v. Roberts, 185 F.3d 1125,* (10th Cir. 1999); *HRI, Inc. v. E.P.A., 198 F.3d 1224 (10th Cir. 2000); United States v. M.C., 2004 U.S. Dist. LEXIS 5169* (No. CR-02-219 MV, Mar. 24, 2004) (school did not meet criteria under the dependent Indian community test).

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CHAPTER 55 PUBLIC LANDS

7-55 Thompson on Real Property, Thomas Editions § 55.03

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§ 55.03 Public Lands and Mineral Resources.

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(a) Reservations of Public Domain Mineral Resources.

An axiom for most of the programs designed to pass public domain lands into private ownership was that so-called "mineral lands" were to be excluded from such disposition. Thus, public domain lands transferred by sale, homestead, preemption, grants to states and railroads, and grants under other programs were all directed to exclude lands that were deemed mineral lands.

Lands came to designated as "mineral lands" generally upon surface observation by surveyors, land office officials, the parties seeking entry, or parties opposing those seeking entry. The lack of method and thoroughness in such a system combined with the absence of incentive, so that huge acreages of public lands with mineral resources passed into private ownership. Moreover, patents to private parties for agriculture, state or railroad grants relinquished to grantees and patentees any minerals discovered on the lands after the conveyances were issued.

An early attempt at selling lands with coal at a higher price than the minimum price set for public domain lands generally had been a failure. The Coal Act of 1873 imposed acreage restrictions and higher minimum prices so that those wishing to obtain such lands typically made agricultural entries that intentionally ignored the mineral character of the land.

In 1906 President Roosevelt withdrew from such entry approximately 66,000,000 acres of land known to have coal resources on them. Other similar withdrawals were made in the next three years, so that thereafter entries on those lands could only be made under the mineral laws. Congress felt compelled to act, and finally passed the Coal Lands Acts of 1909 and of 1910, which opened the withdrawn lands for agricultural entry but reserved the minerals to the federal government. n16

Meanwhile, in the first decade of the 20th century, various acreages were withdrawn from the public domain because they were thought to contain oil. By legislation in 1910, Congress authorized major withdrawals of land from the public domain, but left those withdrawn lands subject to location for certain minerals, and closed to entry for agriculture and for extraction of petroleum. In the following decade, almost all lands still in the public domain were excluded from

entry for the purpose of withdrawing oil. However, Congress adjusted this with the Agricultural Entry Act of 1914 n17 which reopened such lands for agricultural entry but reserved to the federal government the minerals which had been the reason for the lands' withdrawal.

Mineral reservations for the federal government were even more comprehensive in the Stockraising Homestead Act of 1916, which - while enlarging the acreage amounts for homestead purposes - reserved all minerals on such lands to the federal government. n18 In patents issued under that Act, the minerals and all rights to prospect for them and remove them were reserved to the federal government. A further momentous shift occurred under the Taylor Grazing Act of 1934, n19 which resulted in withdrawing from entry virtually all public lands in the western states, making such withdrawn lands available for classification as grazing districts, and reserving all minerals in such lands to the United States.

(1) Coal.

Deposits of coal were reserved to the federal government under the same circumstances as other minerals, as described above, except that coal and iron found on land granted to railroads were available to the grantees.

(2) Metalliferous Minerals.

Metalliferous minerals were formally reserved to the federal government under the same provision of the Stockraising Act of 1916 that reserved other mineral resources; the Act reserved "all the coal *and other minerals* [emphasis added] in the lands so entered and patented, together with the right to prospect for, mine, and remove the same." n20

(3) Non-metalliferous Minerals.

Non-metalliferous minerals were formally reserved to the federal government under provisions of the Agricultural Entry Act of 1914. n21 This Act reserved phosphate, nitrate, potash, oil, gas and asphalt deposits - and later provisions added sodium and sulfur - but only as to those public lands that were identified or classified or withdrawn from entry precisely because they contained such deposits; there was no blanket reservation of those mineral deposits as to all public lands. When such lands were conveyed into private ownership, the private ownership rights were subject to rights to mine for and extract the deposits.

(b) Disposal of Public Domain Mineral Resources.

(1) Coal.

Unlike other mineral deposits, coal deposits were not subject to location procedures, but, under authority of legislation as early as 1864, could be purchased. Under 1873 legislation, the sales could be in tracts of 160 acres or 320 acres. After adoption of the 1920 Mineral Leasing Act n22 coal deposits were no longer sold, but could only be leased. Now, under provisions of the Federal Coal Leasing Amendments Act of 1975, n23 leaseholders must put the leases into production within ten years or forfeit their leases. A significant landowner protection appeared in the Surface Mining Control and Reclamation Act of 1977, n24 which prohibited creating federal coal leases without the consent of the affected landowners.

(2) Metalliferous Minerals.

The reserved rights to metalliferous minerals may be disposed of by the government in accordance with any disposal laws in effect at the time of disposal. Leasehold rights in some mineral deposits may be acquired under the Mineral Leasing Act of 1920 n25 and the Coal Leasing Amendments Act of 1975. n26 Most of the metalliferous minerals, however - especially those on stockraising homesteads - are subject to location procedures set forth in the General Mining Law of 1872. n27 Also, sections of the Stockraising Homestead Act of 1916 governing severance of minerals

are still in effect. n28

Under these severance provisions, prospectors have the right at any time to enter onto stockraising lands to prospect for minerals. Prospectors are potentially liable for surface damage, including damage to grazing resources, especially under the Open Pit Mining Act of 1949. n29

Although the basic procedures and qualifications for mineral location and extraction are still found in the General Mining Law of 1872, some modifications have been effected by the Surface Resources Act of 1955 n30 the Multiple Mineral Development Act of 1955, n31 provisions of the Federal Land Policy and Management Act, n32 and the Mining and Minerals Policy Act of 1970. n33

(3) Non-metalliferous Minerals.

The Mineral Leasing Act of 1920 n34 effectively withdrew from location procedures most of the so-called non-metalliferous minerals, the so-called fossil fuels and chemical or fertilizer minerals. The leasing procedures introduced by this act applied to the mineral rights that had been reserved to the federal government as well as to minerals remaining unsevered on lands still in the public domain.

(4) Summary of Federal Regulatory Jurisdiction.

The irrational tangle of regulatory responsibilities among federal agencies with stewardship over the public domain has been aptly described as follows:

> The authority of the various governmental agencies over the different minerals is not allocated on a logical basis. Rather, the division of authority reflects the differing moods of Congress over the years and its perception of which agency would best accomplish the goal of the moment for the minerals in question, whether the primary consideration at the time was mineral development or environmental protection.
>
> The Office of Surface Mining created by SMCRA was granted unusual authority under that law to regulate both the environmental and the mining aspects of coal mining operations. By SMCRA, coal is given unique treatment. SMCRA regulates coal mining on both public lands and private lands, a situation which applies to no other mineral. SMCRA established an entire and separate regulatory system for coal. Coal had never been subject to the Mining Law of 1872, and it was removed in 1976 by the Coal Leasing Amendments from coverage under the Mineral Leasing Act of 1920.
>
> The regulatory agencies with authority under the three systems, mineral location, leasing, and coal leasing, have conflicting ranges of authority. BLM, [Bureau of Land Management] is the mineral leasing agent for all federal lands, but there the unity ends. As to mineral locations under the Mining Law of 1872, the BLM, within the Department of the Interior, is solely responsible for supervising mineral operations although it shares authority over surface management with other federal land-holding agencies such as the Forest Service and the Fish and Wildlife Service over lands within such reserves. As to leases granted pursuant to the Mineral Leasing Act of 1920, the authority is divided between two agencies within the Department of the Interior. The BLM is the federal leasing agent, but the U.S. Geological Survey administers the mineral aspects such as engineering and the BLM has responsibility for non-mineral matters such as surface impacts. When the Department of Energy was created in 1977, *91 Stat. 565, 42 U.S.C. §§ 7101*-7352, certain economic aspects of fuel mineral leasing were transferred from the Department of the Interior to the new Department of Energy. Under the Mineral Leasing Act for Acquired Lands, *61 Stat. 913 (1947), 30 U.S.C. §§ 351*-359, and as to acquired forest lands and coal and geothermal lands, the BLM may only issue mineral leases with the consent of the federal agency to which the land is assigned and subject to such conditions as the surface management agency may include

to protect the land for the surface uses and purposes. As to coal leases issued by the BLM under SMCRA, the Office of Surface Mining, either at the federal level or through federally-approved state OSM offices created to regulate under the Act, has single and total authority over all aspects of coal mining operations. n35

(5) Overview of Mineral Location Procedures.

"Location" is the technical term signifying the procedure for establishing a right to find and remove minerals from the land. The earliest federal location laws specifically referred to rock bearing gold, silver, cinnabar, copper, lead, tin, and "other valuable deposits." This latter term was eventually interpreted to include diamonds, stone used as building materials, n36 salt deposits, petroleum deposits (until the Mineral Leasing Act of 1920), and petrified wood (until 1962).

Location procedures apply to public domain lands, principally in the western states, and to certain private lands on which federal reservations of mineral rights are held. Only the private lands entered under the Stockraising Homestead Act and the Taylor Grazing Act are currently subject to location; other lands under federal mineral reservation have not been subject to location because the necessary regulations have never been issued.

In the process of location the qualified locating party (an individual, group or association) must discover the minerals in amounts that justify the extraction effort, take possession of them, and lay out the boundaries of the claim on the surface of the land. State and local regulations may impose additional requirements, such as recording a certificate, posting notice, or actually constructing a shaft or tunnel. Claims may be classified as either lode or placer (pronounced "plasser"). Lode claims are those that consist of veins, lodes or ledges of mineral, confined to seams or fissures in the rock, usually beneath the surface, although often visible in outcroppings. Minerals in placer claims are found on the surface, often mixed with other loose materials. A placer claim may include a large surface area, and a lode claim may be located within a placer claim. A successful location confers rights of exploitation and exclusion. Under the Federal Land Policy and Management Act of 1976, holders of previously located claims were given three years to file notice of their claims or have the claims conclusively considered abandoned. n37

FOOTNOTES:

(n1)Footnote 16. *30 U.S.C. §§ 81,* 85; *Southern Ute Indian Tribe v. Amoco Prod. Co., 119 F.3d. 816 (10th Cir. 1997)* (the definition of coal as stated in The Coal Lands Acts of 1909 and 1910 is to be interpreted broadly so as to include rights to coalbed methane gas); *Southern Ute Indian Tribe v. Amoco Prod. Co., 863 F. Supp. 1389 (D. Colo. 1994)* ("coal" as reserved by the federal government in the Coal Lands Acts of 1909 and 1910 meant only solid matter and hence did not include rights to coalbed methane gas), *rev'd, Amoco Prod. Co. v. Southern Ute Indian Tribe, 526 U.S. 865 (1999).* This opinion gives a good history of the development and context of the Coal Lands Acts. For federal legislation concerning coalbed methane gas, *see* Ownership of coalbed methane, *42 U.S.C. § 13368* (1998), and Coalbed Methane Gas -- Protection Contracts and Leases of Surface Patent Holders, Pub. L. No. 105-367, *112 Stat. 3313, 1998* (*modifying 30 U.S.C. § 81,* recognizing right of United States to coalbed methane gas from coal rights conveyed by 1909 or 1910 Acts).

(n2)Footnote 17. *30 U.S.C. §§ 121,* 124; *Amoco Production Co. v. Southern Ute Indian Tribe, 526 U.S. 865 (1999)* (in lands where the coal is reserved by the United States, "coal," for purposes of Coal Land Acts of 1909 and 1910, does not include coalbed methane (CBM) gas).

(n3)Footnote 18. *43 U.S.C. §§ 291*-292, 299; *Rosette, Inc., v. United States, 64 F. Supp. 2d 1116 (D. N.M. 1999)* (geothermal resources located under the patent land given under the Stock Raising Homestead Act were "other minerals" retained by the United States).

(n4)Footnote 19. *46 U.S.C. §§ 315e*-315g; *UOP v. Babbitt, 99 F.3d 344 (9th Cir. 1996)* (in a reversal of this theme, Arizona used § 8 of the Taylor Grazing Act to make an equal acre exchange of land with the United States in

1947 while attempting to reserve mineral rights to the State).

(n5)Footnote 20. *43 U.S.C. §§ 291*-292, 299; §§ 291-298 *repealed*, Pub. L. No. 94-579, *90 Stat. 2787 (1976).*

(n6)Footnote 21. *30 U.S.C. §§ 121*, 124.

(n7)Footnote 22. *43 U.S.C. §§ 181*, 191, 201, 203, 207, 209, 352; § 181 *repealed*, *46 Stat. 1029 (1930);* 191, 201, 203, 207, *repealed*, Pub.L. No. 94-579, *90 Stat. 2787 (1976).*

(n8)Footnote 23. *Id.*

(n9)Footnote 24. *30 U.S.C. §§ 1201*-1328.

(n10)Footnote 25. *30 U.S.C. §§ 181*-287.

(n11)Footnote 26. *90 Stat. 1083 (1976), amending 30 U.S.C. §§ 181*-287.

(n12)Footnote 27. *30 U.S.C. §§ 22*-47.

(n13)Footnote 28. *43 U.S.C. § 299.*

(n14)Footnote 29. *30 U.S.C. § 54.*

(n15)Footnote 30. *30 U.S.C. § 615.*

(n16)Footnote 31. *30 U.S.C. §§ 521*-531.

(n17)Footnote 32. *43 U.S.C. §§ 1732*, 1744, 1781(f), 1782.

(n18)Footnote 33. *30 U.S.C. § 21a.*

(n19)Footnote 34. *30 U.S.C. §§ 181*-287.

(n20)Footnote 35. Loren L. Mall, Public Land and Mining Law 82 (1981); *Kunkes v. United States, 78 F.3d 1549 (Fed. Cir. 1995)* (a requirement that $200 be paid to preserve unpatented mining claims did not constitute a regulatory taking); *see also Hodel v. Virginia Surface Mining & Reclamation Ass'n, 452 U.S. 264 (1981)* (SMCRA relies on program of cooperative federalism that allows states, within limits established by federal minimum standards, to enact and administer their own regulatory programs, structured to meet their own particular needs); *Duncan Energy Co. v. United States Forest Service, 109 F.3d 497 (8th Cir. 1997)* (the Forest Service has only limited authority to regulate use of the subservient surface estate by the dominant mineral estate, and its processing time must be reasonable); *South Dakota Mining Assoc. v. Lawrence Cty., 977 F. Supp. 1396 (W.D. S.D. 1997)* (county ordinance forbidding surface mining preempted by Mining Act of 1872). *But see Matter of Town of Parishville v. Contore Co., Inc., 667 N.Y.S. 2d 453 (N.Y. App. Div. 1998)* (local building permit ordinances not superseded by Mined Land Reclamation Law when ordinances are of general applicability and do not attempt to regulate mining activities).

(n21)Footnote 36. Under the Common Varieties Act of 1955, *30 U.S.C. § 611*, common varieties of sand, gravel, stone, pumice, pumicite and cinders are explicitly not subject to location procedures.

(n22)Footnote 37. *43 U.S.C. § 1744; Hayes v. A.J. Assocs., 846 P.2d 131 (Alaska 1993)* (federal mining law requires locator to act in good faith in order for claim to be valid as safeguard against fraudulent subsequent locators) (*sub. op., 960 P.2d 556 (Alaska 1998)).* The 1976 Act also required an annual filing of an affidavit of assessment work with the BLM to avoid forfeiture/abandonment of the claims. New legislation, titled the "1992 Act," requires every holder of unpatented mining claims on federal land to pay a per-claim annual fee of $100, superseding the requirements

of the 1976 Act. Pub. L. No. 102-381, *106 Stat. 1374 et seq.* (1992). *See Jones v. Babbitt, 121 F.3d 1327 (9th Cir. 1997)* (a failed challenge to the new requirements of the 1992 Act).

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CHAPTER 55 PUBLIC LANDS

7-55 Thompson on Real Property, Thomas Editions § 55.04

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§ 55.04 Public Lands and Timber Resources.

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The historically free hand wielded by federal agencies in dealing with public land timber resources is now coming under increasing restriction. Major reservations of forest land from the public domain were authorized by the Forest Reserves Amendment of 1891, n38 and guidelines for managing those reservations were enacted in the Organic Act of 1897. n39 These were further refined by the Multiple-Use, Sustained Yield Act of 1960. n40 The Forest Service was created in 1905, and exercised broad discretion in administering timber sales to private parties, working out related contract disputes, and attempting to meet the ever-increasing demands for timber production. Today, this discretion is subject to larger policy considerations of conservation and environmental protection. n41

In its management policies, the Forest Service practiced a multiple-use policy from the beginning, even though the Organic Act of 1897 referred only to managing with respect to timber and water. n42 In the Multiple-Use, Sustained Yield Act of 1960, five multiple uses were authorized: "It is the policy of the Congress that the national forests are established and shall be administered for outdoor recreation, timber, watershed, and wildlife and fish purposes." n43 Much subsequent conflict occurred over defining and prioritizing such uses, and in determining to what extent judicial or other restrictions may be imposed on the traditional broad discretion of the Forest Service.

The National Forest Management Act of 1976, n44 in effect, replaced the Organic Act of 1897 and gave much more specific guidance on forest management practices, stimulated in part by public controversies over clear-cutting. Also, many millions of acres have been administratively withheld from timber production in order that their suitability for wilderness preservation could be studied. Under the National Environmental Policy Act, environmental procedures, including use of environmental impact statements and access to judicial review, are now incorporated into Forest Service procedures. n45

FOOTNOTES:

(n1)Footnote 38. *16 U.S.C. § 471 repealed*, Pub. L. No. 94-579, *90 Stat. 2792 (1976).*

(n2)Footnote 39. *16 U.S.C. §§ 473*-482, *repealed*, Pub. L. No. 94-588, *90 Stat. 2958 (1976).*

(n3)Footnote 40. *16 U.S.C. §§ 528*-531.

(n4)Footnote 41. *Mountains States Legal Found. v. Glickman, 92 F.3d 1228 (D.C. Cir. 1996)* (Forest Service chose moderate alternative from environmental impact statement in attempt to balance environmental and lumbering interests and was challenged by local municipalities and lumber company that claim grizzly bear was given undue preference over people).

(n5)Footnote 42. *16 U.S.C. § 476; repealed*, Pub. L. No. 94-588, *90 Stat. 2958 (1976).*

(n6)Footnote 43. *16 U.S.C. § 528.*

(n7)Footnote 44. *16 U.S.C. §§ 1600*-1614.

(n8)Footnote 45. *Portland Audubon Soc. v. Babbitt, 998 F.2d 705 (9th Cir. 1993)* (BLM required to prepare supplemental environmental impact statements pertaining to northern spotted owl regardless of fact that new resources management plans and environmental impact statements therefor would address all relevant information); *Inland Empire Pub. Lands Council v. Schultz, 992 F.2d 977 (9th Cir. 1993)* (Forest Service justified in not preparing environmental impact statement prior to timber sale in national forest when evidence showed it had taken "hard look" at environmental consequences as required by National Environmental Policy Act); *Inland Empire Pub. Lands Council v. Glickman, 911 F. Supp. 431 (D. Mont. 1995)* (the Forest Service's sale of salvage timber in a fire-damaged area of a national forest was challenged); *Inland Empire Pub. Lands Council v. Glickman, 88 F.3d 697 (9th Cir. 1996)* (Forest Service's sale of salvage timber in a fire-damaged area of a national forest challenged again with the court finding for the Forest Service, again); *Idaho Conserv. League v. Thomas, 91 F.3d 1345 (9th Cir. 1996)* (Forest Service's plan to sell lumber not arbitrary or capricious change from past policies as extensive fire damage could not be foreseen when Forest Service made long-range plans); *Kleissler v. United States Forest Service, 157 F.3d 964 (3rd Cir. 1998)* (good discussion of standing and intervention rights in action by environmentalists to restrict logging activities in a National Forest); *Blue Mountains Biodiversity Project v. Blackwood, 161 F.3d 1208 (9th Cir. 1998)* (Forest Service required to prepare an EIS prior to awarding a series of timber contracts in the Umatilla National Forest). *See also Forest Guardians v. Bureau of Land Management, 188 F.R.D. 389 (D. N.M. 1999); but see Wetlands Action Network v. U.S. Army Corps of Engineers, 222 F.3d 1105 (9th Cir. 2000). Airport Cmtys. Coalition v. Graves, 280 F. Supp. 2d 1207 (W.D. Wash. 2003)* (the United States Army Corps of Engineers did not act arbitrarily by issuing a permit to disturb wetland area); *Utah Envtl. Cong. v. Bosworth, 285 F. Supp. 2d 1257 (D. Utah 2003)* (a report by the Forest Service declaring that a forestry project made no significant impact was upheld in a challenge by an environmental group); Matheny, Stephanie D. "Notes and Comments: Who Can Defend a Federal Regulation? The Ninth Circuit Misapplied Rule 24 by Denying Intervention of Right in Kootenai Tribe of Idaho v. Veneman," *78 Wash. L. Rev. 1067 (2003)* (article contends that the Ninth Circuit should disregard the federal defendant rule); *MooreFORCE, Inc. v. United States DOT, 243 F. Supp. 2d 425 (M.D.N.C. 2003)* (environmental impact statement upheld in challenge by environmental group); *Ind. Forest Alliance, Inc. v. United States Forest Serv., 325 F.3d 851 (7th Cir. 2003)* (the Forest Service did not act arbitrarily or capriciously in its decision to implement a forest openings maintenance project); *Earth Island Inst. v. United States Forest Serv., 351 F.3d 1291 (9th Cir. 2003)* (environmental group successfully challenged a Forest Service timber sale policy on the grounds that the policy required further study); *Sierra Club, Inc. v. Austin, 82 Fed. Appx. 570 (9th Cir. 2003)* (Forest Service study inadequate because a "hard look" is required concerning the environmental impact of logging); *Ctr. for Biological Diversity v. United States Forest Serv., 349 F.3d 1157 (9th Cir. 2003)* (environmental group successfully challenged an environmental impact statement from the Forest Service on the grounds that the report was inadequate); *Native Ecosystems Council v. United States Forest Serv., 54 Fed. Appx. 901 (9th Cir. 2003)* (a Forest Service timber sale policy was upheld because the agency took an appropriate "hard look" at the environmental impact of the policy); League of Wilderness Defenders - *Blue Mts. Biodiversity Project v. Forsgren, 259 F. Supp. 2d 1115 (D. Ore. 2003)* (policy allowing salvaging of wood in burned areas struck down because of inadequate environmental assessment).

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CHAPTER 55 PUBLIC LANDS

7-55 Thompson on Real Property, Thomas Editions § 55.05

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§ 55.05 Public Lands and Water Resources.

(a) Public Rights in Waters and Lands Near Waters.

The distinction between private and public waters has traditionally depended on whether the water is navigable or not, but several different standards or elements of navigability may be applied.

(1) Navigability: The English Common Law Background.

(i) Tidelands.

In the history of Anglo-American common law, the earliest documentation of public rights in water-related lands is no older than the reign of King John in the early 13th century. From his reign are still preserved royal grants of seashore lands to private parties, grants which are noteworthy for their failure to describe the seaward boundary of the granted lands with precision. Without strict limits grantees naturally exercised possessory rights of such tidelands right up to the water. n46 Until the 16th century, the monarch did not even challenge private landowners' occupancy of tidelands, lands between the highwater and low-water lines, and no such action succeeded until 1632. n47

At this time, the intellectual foundation for asserting public rights in tidelands was just emerging. The view that tidelands had not been included in the medieval shoreland grants was first expressed in the second half of the 16th century, n48 but gained influential advocates only a century later. n49 A series of English cases accepted that thesis by imposing the presumption that tidelands were crown property, unless the private claimant proved to the contrary. In the early 19th century, an English judge declared that the presumptive public ownership of tidelands was "a doctrine of ancient establishment." n50

This presumption favoring royal ownership of tidelands, even though possibly contrary to grants made anciently to private subjects, n51 was so strong that it was applied in England's American colonies without question:

> The conclusions reached by this court in several leading and well-considered cases were that the various charters granted by different monarchs of the Stuart dynasty for large tracts of land on the Atlantic coast conveyed to the grantees both the territory described and the powers of government,

> including the property and the dominion of lands under tide waters; that by those charters the dominion and propriety in the navigable waters, and in the soils under them, passed as part of the prerogative rights annexed to the political powers conferred on the patentee, and in his hands were intended to be a trust for the common use of the new community, to be freely used by all for navigation and fishery, and not as private property to be parcelled out and sold for his own individual emolument; that upon the American Revolution, all the rights of the Crown and of Parliament vested in the several states, subject to the rights surrendered to the national government by the constitution of the United States; that when the Revolution took place the people of each state became themselves sovereign, and in that character hold the absolute right to all their navigable waters, and the soils under them, for their common use, subject only to the rights since surrendered by the constitution to the general government. n52

(ii) River Lands.

Turning again to the situation in England, the presumptive ownership of lands under freshwater rivers was in the private party, just the opposite of the presumption of foreshore ownership. n53 In this matter, the historical practice was determinative, and many of the oldest charters expressly conveyed to the grantees the ownership of the river to the midstream. As stated in Hale's 17th-century treatise:

> Fresh waters of what kind soever, do of common right belong to the owners of the soil adjacent; so that the owners of the one side have, of common right, the propriety of the soil, and consequently the right to fishing, *usque filum aquae*; and the owners of the other side the right of soil or ownership and fishing unto the *filum aquae* on their side. And if a man be owner of the land on both sides, in common presumption he is the owner of the whole river, and hath the right of fishing according to the extent of his land in length. With this agrees the common experience. n54

The English ownership right of freshwater rivers extended to the lands submerged beneath the water and to certain rights in the waters themselves. In the 19th century the modern English laws as to freshwater rivers were summarized as follows:

> The natural presumption is, that a man whose land abuts on a river owns the bed of the river up to the middle of the stream, and, if he owns the land on both sides, the presumption is that the whole bed of the river belongs to him, unless it is a tidal river. There is also a presumption that the owner of the bed of the river has the right to fish in the stream, and to prevent other persons from fishing there. n55

However, whereas the English rule regarding ownership of tidelands was considered received in the American colonies, the English rules on ownership of rivers and submerged river lands were not treated as received law in America. The colonies' charters were considered to have conferred sovereign rather than private ownership over rivers and river lands:

> ... [B]y those charters the dominion and propriety in the navigable waters, and in the soils under them, passed as part of the prerogative rights annexed to the political powers conferred on the patentee, and in his hands were intended to be a trust for the common use of the new community, to be freely used by all for navigation and fishery, and not as private property to be parcelled out and sold for his own individual emolument. n56

This ambivalence among the colonies toward the traditional English rules on rights in freshwater rivers led eventually to much inconsistency among the courts in the American states:

> The decisions in respect to public fresh waters are in hopeless conflict. A considerable number of jurisdictions purport to adopt the English common law rule, but they construe it as a rule of substantive law rather than a presumption. The majority of jurisdictions have repudiated the English rule, thus construed, as to some or all of their public fresh waters. Some states have title to the beds of all their

public waters; others to the beds of their public rivers, but not of their public lakes; still others to the beds of their public lakes, but not of their public rivers. n57

(iii) River Waters.

Even if the soil submerged beneath a flowing river was acknowledged to be in private ownership, English common law recognized that royal and public rights existed in the water itself. Glanville n58 and Bracton n59 wrote of public rights in flowing waters, and the large rivers in England were subject to a public right of navigation. To interfere with either the flow or the navigability of a stream was an offense both against the monarch and against the public. n60 The common public right of passage was confirmed in the clause of the Magna Carta commanding the king to remove various obstructions from the Thames and Medway rivers, and from other rivers throughout England. n61 In England even the private rights in river beds and banks could be subject to public rights incidental to navigation. n62

(iv) Summary.

In mature form, English law governing land located beneath navigable water distinguished between ownership and rights of use and control. The ownership of such lands was in the monarch, more or less as a private right, but with a public responsibility. The rights of use and control were in the public and were exercised by Parliament. n63 In the United States, the distinction was moot, because "[t]he State has succeeded to all the rights of both crown and Parliament in the navigable waters and the soil under them, and here the *jus privatum* [private right] and *jus publicum* [public right] are both vested in the State." n64

(2) The Emergence of American Rules.

(i) State Sovereign Ownership.

American rules of water rights generally emphasize sovereign ownership by the states, but formulation of the details of those rules has been left largely to federal law. Federal case law emphasized that sovereign ownership of certain waters and water-related lands is in the states. n65 Moreover, in American jurisprudence, the English distinction between royal sovereignty and public or Parliamentary ownership was ignored because the American state was also the embodiment of the public, thereby merging sovereignty and ownership or title.

Thus the American rule developed that states have sovereign ownership of submerged lands and tidelands, n66 and this view of sovereign ownership was applied to new states as well as to the original colonies. n67 State sovereign ownership of lands beneath all navigable waters is affirmed by federal statute in the Submerged Lands Act of 1953. n68

(ii) Expansion of the Concept of Navigability.

In accordance with the old English common law, the early American courts equated navigable waters with waters subject to the tidal action of the seas, that is, "the sea, or ... waters within the ebb and flow of the tide." n69 With the opening of inland waterways for commerce, the concept of navigability had to be extended beyond seas and tidal waters. Federal admiralty jurisdiction, also tied to navigable waters, was extended to the larger rivers and Great Lakes, n70 and state sovereign ownership was similarly extended to lands under non-tidal water. n71

As navigability became the test for determining the limits of such expansion, several definitions of navigability emerged. To describe the limits of federal jurisdiction of waters under the Commerce Clause, the Supreme Court adopted an expansive concept of navigability, which included waters that are both actually and potentially "navigable in fact." Waters that are navigable in fact are waters that:

[A]re used, or are susceptible of being used, in their ordinary condition, as highways for commerce, over which trade and travel are or may be conducted in the customary modes of trade and travel on

> water. And they constitute navigable waters of the United States within the meaning of the acts of Congress, in contradistinction from the navigable waters of the States, when they form in their ordinary condition by themselves, or by uniting with other waters, a continued highway over which commerce is or may be carried on with other States or foreign countries in the customary modes in which such commerce is conducted by water. n72

Under state law, waters can be deemed navigable regardless of any connection with interstate commerce. n73 However, navigability was determined only when the state was admitted to statehood. n74 Therefore, if a state attempts to establish its sovereign ownership over non-tidal water lands, it must show that, at the time statehood was obtained, the water was capable of being used as a "highway" for travel and trade. In a few circumstances, federal authority over such state lands has been successfully imposed by a disposition of the lands prior to statehood. n75 Historically, there was some confusion about whether navigability for purposes of determining state sovereignty would be determined by a federal test, or by definitions promulgated by the individual states. Now it is settled that a federal test is the standard and, in contrast to some earlier state standards, the federal test requires that navigable waters have some potential for commercial use. n76

Specific applications of the federal test are still left to the states:

> Even in those states most receptive to public claims on ... water resources, clearly not every brook or pond found on privately owned land is subject to a public right to use water in place. There is always some threshold to be crossed before a particular body of water is deemed suitable for public use and public rights. n77

The most widely accepted standard for this threshold has been the log flotation test, by which "all streams are to be deemed navigable which are capable in their natural state and in their ordinary volume of water to transport to market the products of the fields, forests, and mines." n78 An auxiliary standard has been labeled as the "pleasure boat" test, under which waters are navigable if they will sustain "boating for mere pleasure." n79

However defined in individual jurisdictions, navigability in fact continues to be the standard for determining which waters are subject to public rights and regulations. n80

Also, state sovereignty is not absolute, but must be exercised responsibly and in keeping with the "trust which requires the government of the State to preserve such waters for the use of the public." n81 A state may alienate its water-related lands to a private grantee, but the alienation is subject to a retained public right to use the water until development by the private grantee makes such use impractical. n82 Public rights retained in conveyances of state water-related lands to private grantees may be extinguished if the private development furthers a public value or does not significantly impair the public use. n83

Most of the western states have adopted statutory or constitutional provisions that proclaim all water in place as under state ownership, and courts of those states have accordingly affirmed a public right to use those waters. n84 The statutes and constitutions of some other states directly confer a public right of use upon specified waters without addressing the issue of ownership. n85

Another source of public right is the federal Commerce Clause, which has been interpreted to confer on the general public a "navigation servitude" over navigable waters, including navigable waters on state and Indian lands. n86 The concept of navigability under the federal navigation servitude requires that the waters have a potential for use in interstate commerce. n87

The basic conclusion to be drawn from these rules and guidelines is that all navigable waters are public waters, n88 and that recognition of public rights continues to be dependent upon a finding of navigability. n89

(iii) State and Federal Regulation of Navigable Waters.

In addition to federal regulation of public navigable waters under the power of the Commerce Clause, states may also regulate navigable waters, n90 either as defined by a navigable in fact standard or by some other, state statutory standard. n91 The federal power to regulate waters as part of the power to regulate interstate commerce applies to bodies and streams of water whose navigability is such that the water is capable of sustaining some impact on interstate commerce n92 or whose navigability corresponds to a statutory definition. n93

(iv) State Police Power Regulation of Navigable and Non-navigable Waters.

A state's specific power to regulate navigable waters is separate from a state's general power to regulate all waters, whether or not navigable, as part of the state's police power. Such police power regulation may only be imposed to promote the public health, safety, morals or welfare. n94 If police power regulation of private rights in waters or water-related lands is excessive, or if direct public regulation is imposed where the water is not in fact navigable, payment of just compensation to the private property owner may be required. n95

(b) Relationship of Public and Private Rights in Waters and Water-related Lands.

(1) Common Law Public Right to Use Public Waters Over Private Lands.

If privately owned land is beneath water that is subject to a public right of use, the public right is usually considered an easement that encumbers the private land. n96 Alternatively, the private land title has also been viewed as limited by the public use right. n97 The public right to use waters over privately held beds and banks beneath those waters has been ruled as including an incidental right to use those beds and banks; however, usually no analogous right exists to use adjacent private lands, such as riparian land. Thus, there is no common law public right to cross riparian land in order to gain access to public waters or to related public land, such as a foreshore. n98

(2) Implied Public Rights to Traverse or Use Private Lands in Connection with Use of Public Waters.

Even without a recognized common law public right to cross private lands in order to gain access to public waters, a jurisdiction may recognize one or more of several other implied public rights of access. n99

(i) Prescriptive Easement.

A majority of jurisdictions hold that public access to beaches over private lands, or even use of the private area of beaches (between mean high tide line and vegetation line) is permissive and therefore not adverse. n100 However, some courts have recognized that long and consistent use by the public may result in a prescriptive easement. Even if a court agrees that such a large group as "the public" can acquire a prescriptive easement, it must also find that members of the public crossed or used private land without permission but believing that they had a right to do so, and considered the private portion of the beach a public recreation area. n101

(ii) Implied Dedication.

If a court does not recognize a prescriptive easement in the public, it may still find the functional equivalent in an implied dedication. n102 Such a dedication may be considered a dedication by "adverse use" that is not permissive and is uninterrupted for at least as long as the prescriptive period. n103

(iii) Customary Right.

A few other jurisdictions have re-introduced the medieval doctrine of customary rights to protect long, continuous use of beaches by the public. n104 In its ancient form, the doctrine of custom was said to arise from a use that had

continued for so long that "the memory of man runneth not to the contrary."

(iv) Public Trust.

New Jersey courts have found in the public trust doctrine a source for a public right to use the privately owned dry sand portions of beaches; n105 one court has proclaimed that "enjoyment of rights in the foreshore [public rights] is inseparable from use of dry sand beaches [which may be privately held]." n106 An Iowa court has also implied that public access to a river may be founded on the public trust. n107

(3) Limitations that Public Water Use Rights May Impose on Private Water Rights.

If an upstream diversion by a private water user threatens the navigability of a public stream, the private diversion may be restrained. n108 Furthermore, upstream private diversions may be enjoined if they threaten the public right to use water in place. n109 It is now being recognized that environmental preservation and protection are included within the public right to use water in place. n110

(c) Public Regulations of Water Rights Related to Land.

Landowners whose properties are bounded or traversed by natural surface watercourses are called riparian proprietors, and their rights to the waters coursing over or touching their lands are called riparian rights. n111 A landowner with property bounded or touched by a body of surface water is called a littoral owner, n112 but the term "riparian" is often used to refer to both riparian proprietors and littoral owners. n113

In some jurisdictions, especially in the more arid regions of the western United States, riparian rights have been replaced, supplemented, or revised by systems of water rights founded in the doctrine of prior appropriation. Under prior appropriation, public water resources are assigned to private users in specified quantities for specified qualified uses, referred to as beneficial uses. Those who secure their rights earlier in time have rights superior to those who are later, as is connoted by the term prior appropriation. n114

Riparian rights were recognized in the English common law and so entered into the jurisprudence of many American states, unless a state's particular circumstances required modifications. n115 Prior appropriation laws were not part of the common law, so their adoption by any state required explicit action to modify the common law riparian rights. n116 Some states accept prior appropriation rules as the exclusive law for surface waters, n117 while other states maintain riparian rules for some circumstances and prior appropriation rights for others. In some of those states, unused riparian rights can become subject to appropriation, n118 and in some states prior appropriation will be applied only to waters in the public domain. n119 In intrastate conflicts between riparian and prior appropriation rights, some states treat the riparian rights as superior, n120 while others prefer the appropriation rights, n121 and still others give priority to whichever rights were first established. n122

The surface water law systems of individual states are summarized as follows: n123

Alabama:

Riparian rights, reasonable use.

Alaska:

Prior appropriation.

Arizona:

Prior appropriation.

Arkansas:

Riparian rights, reasonable use.

California:

Both riparian and prior appropriation, with riparian rights deemed superior, unless the appropriation is earlier. California follows the "reasonable use" theory of riparianism.

Colorado:

Prior appropriation applies to streams and tributary waters. Other water, such as non-tributary groundwater, is subject to separate administrative rules.

Connecticut:

Riparian rights, natural flow.

Delaware:

Riparian rights, natural flow.

Florida:

Florida, formerly a common-law riparian state, adopted comprehensive legislation in 1972 for water use and management. Property rights in Florida water arise only upon the issuance of a consumptive use permit; these are issued by water management districts for "reasonable-beneficial" uses of water resources that will not interfere with any existing legal use of water (including non-permitted, domestic uses), and that are consistent with the public interest. The doctrine differs from both the riparian reasonable use doctrine and the prior appropriation beneficial use doctrine.

Georgia:

Riparian rights according to natural flow, modified by reasonable use provisions.

Hawaii:

Riparian rights created by statute; proprietors may not diminish the water supply of other proprietors, but may not enjoin diminution by another unless harm to reasonable use can be shown. Hawaii also recognizes "appurtenant water rights," measured by the quantity of water used in taro cultivation in 1848.

Idaho:

Prior appropriation, under a judicial recognition that a prior appropriator has a superior right over a riparian water user who subsequently applies the waters to a beneficial use.

Illinois:

Riparian rights, reasonable use.

Indiana:

Riparian rights according to a statutory "reasonable beneficial use" definition.

Iowa:

A legislative permit system has replaced common law riparian rights, but the system retains basic riparian concepts.

Kansas:

Riparian rights were in effect until 1945, and then Kansas adopted prior appropriation. Water uses in effect in 1945 are considered vested and superior to subsequent appropriation rights.

Louisiana:

Riparian rights.

Maine:

Riparian rights, reasonable use.

Maryland:

A legislative permit system of appropriation or use governed by reasonable use is in effect.

Massachusetts:

Riparian rights according to reasonable use, but a permit system was enacted in 1985. All then existing uses were preserved if registered by 1989.

Michigan:

Riparian rights, reasonable use.

Minnesota:

Riparian rights, reasonable use.

Mississippi:

Since 1956, Mississippi has had a statutory appropriation system based on beneficial use, and preserving uses begun three or fewer years before 1956. The Water Resources Act of 1985 created a permit system for acquiring rights to use water, based on beneficial use. Pre-1985 rights could be preserved by filing a notice of claim within three years after the date of the Act.

Missouri:

Riparian rights, reasonable use.

Montana:

Prior appropriation, but the 1973 Water Use Act introduced a permit system and preserved pre-1973 rights.

Nebraska:

Riparian rights according to reasonable use, coupled with a prior appropriation permit system, based

on beneficial use. Riparian rights could vest between 1855 and 1895, when the appropriation statute was enacted. No new riparian rights could be created thereafter, but vested riparian rights were preserved.

Nevada:

Prior appropriation, beneficial use.

New Hampshire:

Riparian rights, reasonable use.

New Jersey:

Riparian, natural flow with respect to most issues.

New Mexico:

Prior appropriation, beneficial use.

New York:

Riparian rights according to reasonable use, but under the Water Resources Law a permit may be obtained to take water outside the riparian watershed.

North Carolina:

Riparian rights, reasonable use.

North Dakota:

Prior appropriation, beneficial use.

Ohio:

Riparian rights, reasonable use.

Oklahoma:

Adopted riparian and appropriation systems prior to statehood. New riparian rights, according to reasonable use, may be created and have priority over appropriation rights.

Oregon:

Recognized both reasonable use riparian rights and appropriation prior to enactment of water code in 1909. Since then, only appropriation rights may be created, subject to existing riparian rights.

Pennsylvania:

Riparian rights, reasonable use.

Rhode Island:

Riparian rights, natural flow.

South Carolina:

Riparian rights, reasonable use.

South Dakota:

Before 1955, both reasonable use riparian rights and appropriation rights were recognized. After enactment of the 1955 Water Law, only appropriation rights based on beneficial use could be created, and actual pre-1955 riparian and appropriation uses were preserved.

Tennessee:

Riparian rights, reasonable use.

Texas:

Riparian rights under English common law and according to reasonable use, and riparian rights under Spanish land grants were recognized for a time. In 1889 and 1895 an appropriation system was enacted, preserving existing valid riparian claims. After 1966, riparian owners were required to file their claims or risk losing them.

Utah:

Prior appropriation, beneficial use.

Vermont:

Riparian rights, reasonable use.

Virginia:

Riparian rights, reasonable use, with some possible modification by recent water protection legislation.

Washington:

Riparian rights, reasonable use and, since 1917, permit-based appropriation as the only method of creating new water rights.

West Virginia:

Riparian rights, reasonable use.

Wisconsin:

Riparian rights according to reasonable use, and subject to statutory priorities for certain diversions.

Wyoming:

Prior appropriation, beneficial use.

FOOTNOTES:

(n1)Footnote 46. When the grants involved tidal or non-tidal lands next to rivers, they typically included lands to the midstream of the rivers.

(n2)Footnote 47. Attorney General v. Philpott (1632), *cited in* Attorney General v. Richards, (Ex. 2 Anstr. 607, *3*

R.R. 632 (1795).

(n3)Footnote 48. That tidelands were not included in the old grants of royal shorelands was expressed in *"Proofs of the Queen's Interest in Lands Left by the Sea and the Salt Shores Thereof,"* a short treatise by Thomas Digges, written in 1568-69 and reprinted in Stuart Archibald Moore, A History of the Foreshore and the Law Relating Thereto (3d ed. 1888).

(n4)Footnote 49. Specifically, the thesis was incorporated into Matthew Hale's treatise *De Jure Maris*, which, though written in about 1666, was not formally published until 1787. Hale, however, represented the monarch in tidelands cases beginning not later than 1647. Hale's treatise is reprinted in Stuart Archibald Moore, A History of the Foreshore and the Law Relating Thereto (3d ed. 1888).

(n5)Footnote 50. Attorney General v. Burridge, 10 Price 350, *147 Eng. Rep. 335, 342 (Ex. 1822). See also* Attorney General v. Parmeter, 20 Price 378, *147 Eng. Rep. 345 (Ex. 1811), aff'd*, Parmeter v. Gibbs, 10 Price 412, *147 Eng. Rep. 356 (Ex. 1813);* Attorney General v. Richards, 2 Anstr. 603, *145 Eng. Rep. 980 (Ex. 1795).* By the end of the 18th century, ownership by the monarch was beginning to be considered ownership by the public, and any specific royal grants of shorelands were subject to public rights in the tidelands. *See, e.g.*, dissent of Best, J., in Blundell v. Catterall, 5 Bard. & Adl. 268, *106 Eng. Rep. 1190 (K.B. 1821).*

(n6)Footnote 51. As declared by Stuart Archibald Moore in A History of the Foreshore and the Law Relating Thereto 24 (3d ed. 1888):

> On consideration of the charters here referred to ... it will appear that the widely prevailing notion that the Crown has scarcely ever parted with the foreshore has no foundation in fact; and as the theory of the prima facie title of the Crown rests entirely upon this assumption - viz; that the Crown has retained the foreshore as part of the waste dominions of the Crown never granted out - it would seem that this theory (the origin of which we shall shew in the time of Elizabeth) is a theory based upon a presumption of fact which is, as regards, at any rate, the greater part of the kingdom, wholly untrue. It is a theory of what might have been, but it is not a theory based upon true facts.

(n7)Footnote 52. *Morris v. United States, 174 U.S. 196 (1899); Bogle Farms, Inc. v. Baca 925 P. 2d 1184 (N.M. 1996)* (in controversy over whether sand and gravel are minerals, court affirmed that upon becoming a state, New Mexico gained title to all tidelands within its borders, held in trust for the public).

(n8)Footnote 53. Everett Fraser, *Title to the Soil Under the Public Waters - A Question of Fact, 2 Minn. L. Rev. 313, 322 (1918).*

(n9)Footnote 54. Matthew Hale, De Jure Maris ch. I (1787).

(n10)Footnote 55. Blount v. Layard, [1891] 2 chs. 681, 689.

(n11)Footnote 56. *Morris v. United States, 174 U.S. 196 (1899).*

(n12)Footnote 57. Everett Fraser, *Title to the Soil Under Public Waters - A Question of Fact, 2 Minn. L. Rev. 313, 326 (1918).*

(n13)Footnote 58. Glanville, IX, 9; XIII, 34-37.

(n14)Footnote 59. Bracton, ff. 221a, 232a.

(n15)Footnote 60. Earl F. Murphy, *English Water Law Doctrines Before 1400*, 1 Am. J. of Legal History 103, 107, 109 (1957); 2 Public Works in Medieval Law lvi (Selden Society vol. 40, C.T. Flower ed. 1923); 1 Public Works in

Medieval Law xxvii (Selden Society vol. 32, C.T. Flower ed. 1915).

(n16)Footnote 61. Magna Carta cl. 33.

(n17)Footnote 62. *See, e.g., Lord Fitzwater's Case, I Mod. 105, 86 Eng. Rep. 766 (K.B. 1673).*

(n18)Footnote 63. Harrison C. Dunning, *Sources of the Public Right*, in 4 Waters and Water Rights 18 (Robert E. Beck ed. 1991).

(n19)Footnote 64. *Langdon v. Mayor, 93 N.Y. 129, 155 (1883).*

(n20)Footnote 65. *See, e.g., Shively v. Bowlby, 152 U.S. 1 (1894); Martin v. Waddell, 41 U.S. (16 Pet.) 367 (1842); United States v. Nye County, 920 F. Supp. 1108 (D. Nev. 1996)* (dominion over navigable waters and the land underneath are identified with the sovereign power of government so that upon admission of a State to the Union, all U.S. lands underlying navigable waters pass to the State, while a large percentage of the State's total area in dry land can be held back as federal public land).

(n21)Footnote 66. *Martin v. Waddell, 41 U.S. (16 Pet.) 367 (1842); RJR Technical Co. v. Pratt, 439 S.E.2d 176 (N.C. 1994) rev'd in part, 453 S.E.2d 147 (N.C. 1995)* (state grants of lands beneath navigable waters to private parties invalid because such lands are held by state in trust for public benefit); *Robert's River Rides v. Steamboat Dev. Corp., 520 N.W.2d 294 (Iowa 1994)* (riverbed from highwater mark to center of stream belongs to state as trustee, not proprietary owner); *Natland Corp. v. Baker's Port, Inc., 865 S.W.2d 52 (Tex. 1993)* (state possesses title to bays, arms, and inlets of the Gulf of Mexico but such lands are public property held in trust for use and benefit of the people); *Larson v. Sando, 508 N.W.2d 782 (Minn. App. 1993)* (state owns land under navigable waters as trustee for public, and not as proprietor with right of alienation); *Murphy v. Department of Natural Resources, 837 F. Supp. 1217 (S.D. Fla. 1993)* (land beneath all navigable waters held in trust by sovereign for public benefit according to public trust doctrine), *aff'd, 56 F.3d 1389 (11th Cir. 1995); Donnell v. United States, 834 F. Supp. 19 (D. Me. 1993)* (states have power to exercise authority over submerged lands but subject to federal government's control for purposes of navigation and commerce); *Flanders Indus., Inc. v. Michigan, 512 N.W.2d 328 (Mich. 1993)* (title and domain over lands covered by the Great Lakes belongs to states where such lands are located, but the lands are not held in proprietary capacity, but are held in trust for public); *James v. State of Alaska, 950 P.2d 1130 (Alaska 1997)* (the tidelands and lands underneath the coastal water of the Tongass belong to Alaska by conveyance under the equal footing doctrine). *But see United States v. State of Alaska, 117 S. Ct. 1888 (1997)* (holds that the United States can reserve submerged lands prior to statehood for public purposes; the Court ruled that the United States kept ownership of submerged lands within the National Petroleum Reserve at the time Alaska attained statehood). Brough, Daniel K. "Alternatives in Accretion: Why There Is Not Yet an Appropriate Solution to the Application of Accretion Law to Mineral Estates," *2004 B.Y.U.L. Rev. 169 (2004)* (note argues that applying accretion law to both severed and unsevered mineral estates is the best option to the problem of applying accretion law to mineral estates).

(n22)Footnote 67. *Pollard's Lessee v. Hagan, 44 U.S. (3 How.) 212 (1845).*

(n23)Footnote 68. *43 U.S.C. § 1311*(a); Idaho v. Coeur d'*Alene Tribe of Idaho, 117 S. Ct. 2028 (1997)* (this case describes the development of U.S. law governing navigable waters and provides a comparison with English law), *reh'g denied, 118 S. Ct. 19 (1997); Government of Guam ex rel. Guam Economic Dev. Auth. v. United States, 179 F.3d 630 (9th Cir. 1999)* (this Act is not a continuing grant of land to the states when new land is discovered; Congress expressly reserved future land in the Submerged Lands Act.).

(n24)Footnote 69. *The Steamboat Thomas Jefferson, 23 U.S. (10 Wheat.) 428 (1825); Atlanta Sch. of Kayaking v. Douglass-Douglas County Water and Sewer Auth., 981 F. Supp. 1469 (N.D. Ga. 1997)* (affirms that navigable waters are those subject to the ebb and flow of the tide, are currently used or have been used, and are susceptible for use in transporting interstate or foreign commerce); *Palm Beach Isles Assocs. v. United States, 58 Fed. Cl. 657 (Fed. Cl. 2003)* (the Army Corps of Engineers did not violate the Takings Clause by denying an application to develop submerged land

near a federal waterway).

(n25)Footnote 70. The Propeller Genesee *Chief v. Fitzhugh, 53 U.S. (12 How.) 443 (1851).*

(n26)Footnote 71. *Barney v. Keokuk, 94 U.S. (4 Otto) 324 (1877).*

(n27)Footnote 72. *The Daniel Ball, 77 U.S. (10 Wall.) 557, 563 (1870).*

(n28)Footnote 73. *Utah v. United States, 403 U.S. 9 (1971); see also Rice v. Harken Exploration Co., 89 F. Supp. 2d 820 (N.D. Tex. 1999)* ("Navigable waters" are broadly defined under the Clean Water Act and Oil Pollution Act to include natural surface water in the U.S.); *but see FD&P Enters. v. United States Army Corps of Eng'rs, 239 F. Supp. 2d 509 (D.N.J. 2003)* (navigable waters in this case are determined by evaluating the nexus between the navigable river and the disputed wetlands); *Carabell v. United States Army Corps of Eng'rs, 257 F. Supp. 2d 917 (E.D. Mich. 2003)* (private property could not be developed because it was part of a significant nexus with navigable waters); *Coulter v. Bronster, 57 F. Supp. 2d 1028 (D. Haw. 1999)* (Congress has the power to regulate commerce involving navigable waters, but federal regulation of navigation is not so pervasive as to implicitly preempt Hawaii's regulation of inland water activities).

(n29)Footnote 74. *Id.* However, the navigability definition is not tied exclusively to means of commerce and travel that were extant at the time of admission to statehood. *Alaska v. United States, 662 F. Supp. 455 (D. Alaska 1987), aff'd, Alaska v. Ahtna, Inc., 891 F.2d 1401 (9th Cir. 1989).*

(n30)Footnote 75. *But see Utah Div. of State Lands v. United States, 482 U.S. 193 (1987).*

(n31)Footnote 76. *United States v. Utah, 283 U.S. 64 (1931); United States v. Holt State Bank, 270 U.S. 49 (1926); Brewer-Elliott Oil & Gas Co. v. United States, 260 U.S. 77 (1922); LeBlanc v. Cleveland, 198 F.3d 353 (2d Cir. 1999)* (the test for navigability is determined with reference to modern day obstructions). *See also Historic Aircraft Recovery Corp. v. Wrecked & Abandoned Voight F4U-1 Corsair Aircraft, 294 F. Supp. 2d 132 (D. Me. 2003)* (court declined to incorporate state test to determine navigability); *In re Strahle, 250 F. Supp. 2d 997 (N.D. Ind. 2003)* (court adopted federal test to determine navigability); Pierce, Richard J. Jr. "Essay: What Is a Navigable Water? Canoes Count But Kayaks Do Not," *53 Syracuse L. Rev. 1067 (2003)* (article explores alternative methods of distinguishing between navigable and non-navigable waters).

(n32)Footnote 77. Harrison C. Dunning, *Waters Subject to the Public Right*, in 4 Waters and Water Rights 87 (Robert E. Beck ed. 1991).

(n33)Footnote 78. *Mayor of Havre de Grace v. Harlow, 98 A. 852 (Md. 1916).*

(n34)Footnote 79. *See, e.g., DeGayner & Co. v. DNR, 236 N.W.2d 217 (Wis. 1975); Adirondack League Club, Inc. v. Sierra Club, 706 N.E.2d 1192 (N.Y.2d 1998)* (evidence of a river's capacity for recreational use is in line with traditional test of navigability of whether a river has a practical utility for trade or travel).

(n35)Footnote 80. *State ex rel. Meek v. Hays, 785 P.2d 1356 (Kan. 1990); Village of Menomonee Falls v. Wisconsin Dep't of Nat. Resources, 412 N.W.2d 505 (Wis. 1987); City of Oak Creek v. State Dep't of Nat. Resources, 518 N.W.2d 276 (Wis. 1994)* (stream is navigable in fact if capable of floating boat, skiff, or canoe of the shallowest draft and has periods of navigable capacity from year-to-year or has continued navigable long enough to be useful as highway for recreation or commerce -- such use must only be possible; no actual performance required); *Mellenix v. United States, 984 F.2d 101 (4th Cir. 1993)* (waters are navigable when used or susceptible of being used in ordinary condition as highways for commerce over which trade and travel are or may be conducted in customary modes of trade and travel on water); *Lykes Brothers, Inc. v. United States Army Corps of Eng'rs, 821 F. Supp. 1457 (M.D. Fla. 1993)* (to qualify as navigable, waterway must form continued highway over which commerce may be conducted with other states or foreign countries in customary modes in which commerce is conducted by water), *aff'd, 64 F.3d 630 (11th Cir.*

1995); Muckleshoot Indian Tribe v. Federal Energy Regulatory Comm'n, 993 F.2d 1428 (9th Cir. 1993) (although stream may retain navigable character despite non-navigable interruptions, this stream was not navigable due to a 21-mile stretch incapable of supporting actual or substantial commercial activity); *Atlanta School of Kayacking, Inc. v. Douglasville-Douglas Cty. Water and Sewer Auth., 981 F. Supp. 1469 (N.D. Ga. 1997)* (navigable in fact if river is susceptible of being used in ordinary condition to transport commerce).

(n36)Footnote 81. *Illinois Cent. R.R. v. Illinois, 146 U.S. 387 (1892).*

(n37)Footnote 82. *People v. California Fish Co., 138 P. 79 (Cal. 1913). See also Orion Corp. v. State, 747 P.2d 1062 (Wash. 1987), cert. denied, 486 U.S. 1022 (1988)* (asserting that tidelands were subject to the paramount public right of navigation and fishery); *CWC Fisheries, Inc. v. Bunker, 755 P.2d 1115, 1118 (Alaska 1988)* (ordinarily a state conveyance of tideland is "subject to continuing public easements for purposes of navigation, commerce, and fishery"); *Lechuza Villas West v. California Coastal Comm'n, 60 Cal. App. 4th 218 (1997)* (in ruling that a proposed building project on the coast should be designed so as not to interfere with the public's navigational rights, this case provides a good description of public and private rights with regard to navigable waters), *reh'g denied, 1998 Cal. LEXIS 2126, cert. denied, 525 U.S. 868 (1998).*

(n38)Footnote 83. *Illinois Cent. R.R. v. Illinois, 146 U.S. 387 (1892).*

(n39)Footnote 84. Ariz. Rev. Stat. Ann. § 45-141A; Cal. Water Code § 102; Colo. Const. art. XVI, § 5; Idaho Code § 42-101; Mont. Const. art. IX, § 3; Nev. Rev. Stat. § 533.025; N.M. Const. art. XVI, § 2; N.D. Const. art. XI, § 3 (waters are the property of the state); N.D. Cent. Code § 61-01-01 (waters belong to the public); Or. Rev. Stat. § 537.110; S.D. Codified Laws § 46-1-3; Tex. Water Code Ann. § 11.021; Utah Code Ann. § 73-1-1; Wash. Rev. Code § 90.03.010.

See also Alaska Const. art. VIII, § 13; Kan. Stat. Ann. § 82a-702 (limited by judicial decision to consumptive use); Neb. Const. art. XV, § 5; States have also acquired land bordering waterways through other federal statutes. *See e.g., United States ex rel. Fort Mojave Indian Tribe v. Byrne, 279 F.3d 677 (9th Cir. 2002)* (when it became a state in 1850, California obtained at least an inchoate or equitable right to certain land along the Colorado River under the Swamp and Overflowed Lands Act).

(n40)Footnote 85. *See* Harrison C. Dunning, *Sources of the Public Right* in 4 Waters and Water Rights 72-73 (Robert E. Beck ed. 1991).

(n41)Footnote 86. *United States v. Cherokee Nation, 480 U.S. 700 (1987); United States v. Rands, 389 U.S. 121 (1967); United States v. Twin City Power Co., 350 U.S. 222 (1956); FPC v. Mohawk Power Corp., 347 U.S. 239 (1954); Forestier v. Johnson, 127 P. 156 (Cal. 1912); Atlanta School of Kayacking, Inc. V. Douglasville-Douglas Cty. Water and Sewer Auth., 981 F. Supp. 1469 (N.D. Ga. 1997)* (Commerce Clause challenge to access restriction through county reservoir).

(n42)Footnote 87. *Kaiser Aetna v. United States, 444 U.S. 164 (1979).* The test for navigability under the federal navigation servitude considers four factors: (1) whether the waterway was navigable in its natural state and comparable to the major natural bodies to which the servitude has been applied; (2) whether the waterway was located on private property; (3) whether the waterway became navigable through the investment of private funds; and (4) whether the Army Corps of Engineers has consented to an improvement affecting navigability. *Alameda Gateway, Ltd. v. United States, 45 Fed. Cl. 757 (1999).*

(n43)Footnote 88. *See, e.g., People v. Emmert, 597 P.2d 1025 (Colo. 1979); Downes v. Crosby Chems., Inc., 234 So.2d 916 (Miss. 1970).*

(n44)Footnote 89. *Golden Feather Community Ass'n v. Thermalito Irrig. Dist., 257 Cal. Rptr. 836 (1989)* (no injunction available, under the public trust doctrine, to maintain a reservoir for public recreational use, because the

waters at issue were not navigable).

(n45)Footnote 90. *United States v. Locke, 529 U.S. 89 (2000)* (when there is concurrent federal and state regulation for maritime commerce, the Supreme Court, in effort to establish uniformity, must ask whether the local laws in question are consistent with the federal statutory structure)

(n46)Footnote 91. *See, e.g., In re Adjudication of Upper Guadalupe River Segment of Guadalupe River Basin, 625 S.W.2d 353 (Tex. Civ. App. 1981), aff'd, 642 S.W.2d 438 (Tex. 1982), aff'd, Wyoming v. United States, 492 U.S. 406 (1989).*

(n47)Footnote 92. *See, e.g., United States v. Lamastus & Assocs., Inc., 785 F.2d 1349 (5th Cir. 1986).*

(n48)Footnote 93. *See, e.g., 16 U.S.C. § 796*(8); The Wilderness Act of 1964, *16 U.S.C. §§ 1131*-36 (1994), generally prohibits the use of motorboats within any designated wilderness. *See Friends of the Boundary Waters Wilderness v. Dombeck, 164 F.3d 1115 (8th Cir. 1999)* (claim that motorboat quotas unduly limit access to Boundary Waters Canoe Area Wilderness (BWCA) by violating the APA, ADA, and NEPA). A good example comes from the statutory definition of navigable waters covered by the Clean Water Act, *33 U.S.C. § 1251 et seq. Mutual Life Ins. Co. of New York v. Mobil Corp., 1998 U.S. Dist. LEXIS 4513 (N.D. N.Y. 1998)* lists waters covered by the Clean Water Act to include: (1) "Navigable waters from any point source." *33 U.S.C. § 1362*(12). (2) Navigable waters which are "the waters of the United States, including the territorial seas." *Id.* § 1362(7). (3) Navigable waters include "not only actually navigable waters but also tributaries of such waters, interstate waters and their tributaries, and nonnavigable intrastate waters whose use or misuse could affect interstate commerce." *United States v. Riverside Bayview Homes. Inc., 474 U.S. 121, 123-124, 88 L.Ed. 2d 419, 106 S. Ct. 455 (1985)* (*citing 40 Fed. Reg. 31320 (1975)).* (4) Navigable waters include freshwater wetlands adjacent to navigable waters. *Id.* at 124. (5) "Congress intended to regulate the discharge of pollutants into all waters that may eventually lead to waters affecting interstate commerce." *United States v. Eidson, 108 F.3d 1336, 1341* (11th Cir.), *cert. denied, 139 L.Ed. 2d 177, 118 S. Ct. 248 (1997).* (6) Tributaries that are natural or man-made, intermittent or continuous, are within the CWA. *Id. at 1341-1342.* (7) Ground water not connected to navigable water is not within the CWA's coverage. *Village of Oconomowoc Lake v. Dayton Hudson Corp., 24 F.3d 962,* (7th Cir.), *cert. denied, 513 U.S. 930, 130 L.Ed. 2d 282, 115 S. Ct. 322 (1994).* (8) The CWA covers ground waters that are hydrologically connected to regulate surface waters. *Williams Pile Line Co. v. Bayer Corp., 964 F. Supp. 1300 (S.D. Iowa 1997).*

(n49)Footnote 94. *See, e.g., Weeks v. North Carolina Dep't of Nat. Resources & Community Dev., 388 S.E.2d 228* (N.C. App.), *review denied, 393 S.E.2d 890 (N.C. 1990); Coastal Petroleum v. Chiles, 701 So.2d. 619 (1997)* (affirms lower court's ruling to prevent Coastal Petroleum from exploring and drilling on sovereign land, on the basis of the public trust doctrine and the police powers of the state in protecting the public interests), *reh'g denied, 707 So.2d 1123 (Fla. 1998), cert. denied, 524 U.S. 953 (1998); Russian River Watershed Protection Comm. v. City of Santa Rosa, 142 F.3d 1136 (9th Cir. 1998)* (California North Coast Regional Water Quality Control Board has discretion to determine a method of compliance with NPDES permits under *33 U.S.C. § 1342*(b)).

(n50)Footnote 95. *See, e.g., State Eng'r v. Cowles Bros., 478 P.2d 159 (Nev. 1970). See also Stupak-Thrall v. Glickman, 89 F.3d 1269 (6th Cir. 1996)* (the federal government also has police power to regulate and the Organic Act delegated Congress' police power to the Forest Service. Forest Service regulations restricting lake use did not effect a taking or go beyond state law limitations on police power regulation, because plaintiff's riparian rights have never included the right to be immune from reasonable regulation), *cert. denied, 519 U.S. 1090 (1997).*

(n51)Footnote 96. *See, e.g., Lovejoy v. Van Emmenes, 416 A.2d 1192 (Conn. 1979).*

(n52)Footnote 97. *Just v. Marinette County, 201 N.W.2d 761 (Wis. 1972); but see McQueen v. South Carolina Coastal Council, 530 S.E.2d 628 (S.C. 2000), rev'd, McQueen v. S.C. Coastal Council, 354 S.C. 142, 580 S.E.2d 116 (S.C. 2003), cert. denied, 124 S. Ct. 466 (2003).*

(n53)Footnote 98. *Concerned Citizens of Brunswick County Taxpayers Ass'n v. State ex rel. Rhodes, 381 S.E.2d 810 (N.C. App. 1989); rev'd, 404 S.E.2d 677 (N.C. 1991).*

(n54)Footnote 99. *State v. Barras, 615 So.2d 285 (La. 1993)* (the banks of navigable rivers are private things subject to public use); *Dardar v. Lafourche Realty Co., Inc., 985 F.2d 824 (5th Cir. 1993)* (waterway created on private property with private funds not subject to navigational servitude, but connecting navigable water bodies are, so long as private dredging is not what initially rendered them navigable).

(n55)Footnote 100. *See, e.g., City of Daytona Beach v. Tona Rama, Inc., 294 So.2d 73 (Fla. 1974); Purdie v. Attorney General, 732 A.2d 442 (N.H. 1999)* (the public trust rights extend to the mean of the high water mark, not the highest high water mark); *People for Open Waters v. Estate of Gray, 643 So.2d 415 (La. 1994)* (no public right to cross private land in order to access public water running through the private land); *Buckskin Hunting Club v. Bayard, 868 So.2d 266 (La. App. 2004)* (hunters are not allowed to hunt on banks of navigable waterways).

(n56)Footnote 101. *Gion v. City of Santa Cruz, 84 Cal. Rptr. 162 (1970).* The theory of a prescriptive easement in the public was applied in the *Gion* case, but was later rejected by state legislation enabling a private owner to post a sign on the private property disclaiming any implied easement or dedication or to file for record a disclaimer notice. *See* Cal. Civ. Code 1009; *County of Los Angeles v. Berk, 161 Cal. Rptr. 742 (1980); Larman v. State of Iowa, 552 N.W.2d 158 (Iowa 1996)* (state failed to establish a prescriptive easement, since public access had been by way of another easement for a road, which precluded showing the requirement of adverse public access). *See also Friends of the Trails v. Blasius, 93 Cal. Rptr. 2d 193 (Cal. Ct. App. 2000).*

(n57)Footnote 102. Comment, *This Land is My Land: The Doctrine of Implied Dedication and Its Application to California Beaches, 44 S. Cal. L. Rev. 1092 (1971).*

(n58)Footnote 103. *Gion v. City of Santa Cruz, 84 Cal. Rptr. 162 (1970); but see Friends of the Trails v. Blasius, 93 Cal. Rptr. 2d 193,* (Cal. Ct. App. 2000).

(n59)Footnote 104. *City of Daytona Beach v. Tona Rama, Inc., 294 So.2d 73 (Fla. 1974); State ex rel. Haman v. Fox, 594 P.2d 1093 (Idaho 1979)* (doctrine of custom recognized, but not applied in this case).

(n60)Footnote 105. *Matthews v. Bay Head Imp. Ass'n, 471 A.2d 355 (N.J. 1984); Borough of Neptune City v. Borough of Avon-By-The-Sea, 294 A.2d 47 (N.J. 1972); National Ass'n of Home Builders of the United States v. New Jersey Dep't of Envt'l. Protection, 64 F. Supp. 2d 354 (D. N.J. 1999)* (artificially filled land becomes subject to the state's tidelands grants and therefore is considered "public trust property." In determining what amount of privately owned land is "reasonably necessary" to public's right of access to a walkway that is situated on tidelands, the court looked at the following factors: 1) location of the dry sand area in relation to the foreshore; 2) extent and availability of publicly owned upland and area; 3) nature and extent of the public demand; and 4) usage of the upland sand area by the owner). *City of Long Branch v. Liu, 833 A2d 106 (N.J. Super. Ct. 2003)* (land from newly created beach belongs to the state).

(n61)Footnote 106. *Matthews v. Bay Head Imp. Ass'n, 471 A.2d 355, 363 (N.J. 1984); National Ass'n of Home Builders of the United States v. New Jersey Dep't of Envt'l. Protection, 64 F. Supp. 2d 354 (D. N.J. 1999)* (factors given to show what privately owned land is reasonably necessary to use under the public trust doctrine).

(n62)Footnote 107. *State v. Sorensen, 436 N.W.2d 358 (Iowa 1989); see Koch v. Strathmeyer, 742 A.2d 946 (Md. 1999)* (implied easement over road between subdivision lots extended from public road to creek on other end and, therefore, entitled interior lot owners to access to the waterway); *Branson Sch. Dist. RE-82 v. Romer, 161 F.3d 619 (10th Cir. 1998)* (Colorado voters may alter management principles guiding state's trusteeship of public lands), *cert. denied, 526 U.S. 1068 (1999); see also District 22 United Mine Workers of America v. Utah, 229 F.3d 982 (10th Cir. 2000).* North Carolina's public trust doctrine has recently undergone judicial change. *Gwathmey v. North Carolina Dep't of Env't., Health & Nat. Resources, 464 S.E.2d 674 (N.C. 1995)* (land lying beneath a navigable body of water is subject

to the public trust doctrine, the test of navigability being whether the body of water in its natural condition could be navigated by watercraft). *See also* Rasband, James R. The Disregarded Common Parentage of the Equal Footing and Public Trust Doctrines. Land & Water L. Rev. Vol. 32, No. 1 (1997). *See Golden Feather Community Ass'n. v. Thermalito Irrigation Dist., 257 Cal. Rptr. 836 (Cal. Ct. App. 1989)* (members of the public unsuccessfully tried to assert the pubic trust doctrine to require increased levels of water at a man-made reservoir). Mongeau, Deborah. "Public Beach Access: An Annotated Bibliography," *95 Law Libr. J. 515 (2003)* (article gives good overview of public trust doctrine and offers possible solutions to increase public access).

(n63)Footnote 108. *United States v. Rio Grande Dam & Irrig. Co., 174 U.S. 690 (1899).*

(n64)Footnote 109. *National Audubon Soc'y v. Superior Ct., 189 Cal. Rptr. 346, cert. denied, 464 U.S. 977 (1983); see also Golden Feather Community Ass'n. v. Thermalito Irrigation Dist., 257 Cal. Rptr. 836 (Cal. Ct. App. 1989)* (members of the public unsuccessfully tried to assert the pubic trust doctrine to require increased levels of water at a man-made reservoir).

(n65)Footnote 110. Harrison C. Dunning, *Scope of the Public Right*, in 4 Waters and Water Rights 83-85 (Robert E. Beck ed. 1991); *Stupak-Thrall v. United States, 70 F.3d 881 (6th Cir. 1995)* (the riparian rights of private citizens, whose recreational and resort property lay on the shore of a lake with most of its shoreline in a wilderness area, could be governed by federal legislation and regulations), vacated, *81 F.3d 651 (6th Cir. 1996), cert. denied, 519 U.S. 1090 (1997); Great Cove Boat Club v. Bureau of Pub. Lands, 672 A.2d 91 (Me. 1996)* (in the context of state public lands, riparian rights are subject to reasonable regulation); *Stupak-Thrall v. Glickman, 988 F. Supp. 1055 (W.D. Mich. 1997)* (generally the government may enforce regulations on the use of a lake, but this narrowly applied holding enjoined the government from making restrictions on riparian land owner's recreational and resort use of this particular lake).

(n66)Footnote 111. *United States v. State Water Resources Control Bd., 227 Cal. Rptr. 161 (1986); Stupak-Thrall v. United States, 843 F. Supp. 327 (W.D. Mich. 1994)* (riparian owners share common right to make reasonable use of lake surface, but right is not absolute and may be regulated by government police power), *vacated, 81 F.3d 651 (6th Cir. 1996), cert. denied, 519 U.S. 1090 (1997); Robert's River Rides v. Steamboat Dev. Corp., 520 N.W.2d 294 (Iowa 1994)* (riparian owner's access to water is a property right, but subject to right of government to maintain and promote navigation by whatever reasonable means); *Wheeler v. City of Wayzata, 511 N.W.2d 39 (Minn. 1994)* (riparian rights are subordinate to public's rights in navigable waters, hence riparian rights are subject to state regulation in the public interest), *rev'd, 533 N.W.2d 405 (Minn. 1995).*

(n67)Footnote 112. 101 *Ranch v. United States, 905 F.2d 180 (8th Cir. 1990).*

(n68)Footnote 113. *Hutner v. Kellogg, 563 N.E.2d 1338 (Ind. App. 1990).*

(n69)Footnote 114. *R. T. Nahas Co. v. Hulet, 752 P.2d 625 (Idaho 1988).*

(n70)Footnote 115. *Rayne v. Coulbourne, 500 A.2d 665 (Md. App. 1985).*

(n71)Footnote 116. In the Matter of Chumstick Creek Drainage Basin in *Chelan County, 694 P.2d 1065 (Wash. 1985); Colorado v. New Mexico, 459 U.S. 176, reh'g den., 459 U.S. 1229, app. after remand, 467 U.S. 310, reh'g den., 468 U.S. 1224 (1982).*

(n72)Footnote 117. *See, e.g., Three Bells Ranch Assocs. v. Cache La. Poudre Water Users Ass'n, 758 P.2d 164 (Colo. 1988).*

(n73)Footnote 118. *See, e.g., United States v. Fallbrook Pub. Util. Dist., 165 F. Supp. 806 (S.D. Cal. 1958).*

(n74)Footnote 119. *See, e.g., In re Application A-16642, 463 N.W.2d 591 (Neb. 1990).*

(n75)Footnote 120. *See, e.g., United States v. Fallbrook Pub. Util. Dist., 165 F. Supp. 806 (S.D. Cal. 1958).*

(n76)Footnote 121. *See, e.g.,* Deadman Creek Drainage Basin in *Spokane County v. Abbott, 694 P.2d 1071 (Wash. 1985).*

(n77)Footnote 122. *See, e.g., Waters of Horse Springs v. State Eng'r, 671 P.2d 1131 (Nev. 1983); Meridian Ditch Co., Inc. v. Koosharem Irr. Co., 660 P.2d 217 (Utah 1983).*

(n78)Footnote 123. These summaries are drawn from 6 Waters and Water Rights 5-489 (Robert E. Beck ed. 1991). Kentucky's law has not been summarized.

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CHAPTER 55 PUBLIC LANDS

7-55 Thompson on Real Property, Thomas Editions § 55.06

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§ 55.06 Public Lands and Grazing Resources.

[Go To Supp]

Grazing occurs on about 100 million acres in national forests, and about 170 million acres of BLM lands outside of Alaska. Policy issues of public range management continue to be sources of heated debate. n124 While any supposed common law right to graze livestock on the public domain was supplanted by the Taylor Grazing Act of 1934 n125 a new era of stricter controls began in the 1970's. The National Environmental Policy Act of 1969 imposed a variety of environmental controls, the Federal Land Policy and Management Act imposed new duties (including land use planning) and constraints on the BLM, and individual legislation assured that uses in competition for rangeland would be included in BLM programs. n126

FOOTNOTES:
(n1)Footnote 124. *Baca v. King, 92 F.3d 1031 (10th Cir. 1996)* (a challenge to a land exchange by the BLM which ended a public land grazing lease of over 50 years was dismissed for failure to show injury redressable by the relief sought); *United States v. Gardner, 107 F.3d 1314 (9th Cir. 1997)* (in deciding that defendant's use of public lands for grazing was unauthorized, the court provides a good discussion of the application and purpose of the equal footing doctrine), *cert. denied, 118 S. Ct. 264 (1997); Public Lands Council v. Babbitt, 154 F.3d 1160 (10th Cir. 1998) opinion amended, superseded, 167 F.3d 1287 (10th Cir. 1999)* (BLM regulations governing the administration of livestock grazing on public lands held invalid as exceeding Secretary of the Interior's authority under the TGA, FLPMA, and PRIA (Public Rangelands Improvement Act of 1978, *43 U.S.C. § 1901 et seq.*).)

(n2)Footnote 125. *43 U.S.C. §§ 315*-315r. Good overview of Taylor Grazing Act. *See Public Lands Council v. Babbit, 167 F.3d 1287 (10th Cir. 1999); United States v. Shenise, 43 F. Supp. 2d 1190 (D. Colo. 1999)* (Taylor Grazing Act prohibits grazing trespass on federal land without a permit). *See also Diamond Bar Cattle Co. v. United States, 168 F.3d 1209,* (10th Cir. 1999) (no private property right exists to graze cattle on federal public rangelands); *Public Lands Council v. Babbitt, 529 U.S. 728* (discussing the authority of the Secretary of the Interior on creating and enforcing regulations under Taylor Grazing Act).

(n3)Footnote 126. One example of such legislation is the Wild Free-Roaming Horses and Burros Act of 1971; *Rice v. United States, 211 F.R.D. 10 (D.D.C. 2002)* (personal financial information of ranchers seeking grazing permits on

public lands was released to an environmental group pursuant to the FOIA); *Kleppe v. New Mexico, 426 U.S. 529 (1976)* (holding that the Property Clause of the U.S. Constitution, Art. IV, § 3, cl. 2, permitted federal protection of burros grazing on public lands), *reh'g denied, 429 U.S. 873 (1976); Diamond Bar Cattle Co. v. United States, 168 F.3d 1209 (10th Cir. 1999)* (holding that the government's allowing private parties to use public lands is an implied license, revocable at-will by the government and vests no private property interests in individual licensees).

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CHAPTER 55 PUBLIC LANDS

7-55 Thompson on Real Property, Thomas Editions § 55.07

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§ 55.07 Public Lands and Wildlife Resources.

From the time when concerns about wildlife went no further than its availability as a food resource, a fully developed wildlife law has emerged, with concerns centered on habitat quality. As a public issue, wildlife law is still growing at the federal level, but the great weight of law and regulation is and will continue to be promulgated at the state level. Wildlife is deemed owned by the state in trust for the people, and a state may regulate the export of wildlife outside its boundaries without offending the Commerce Clause of the federal Constitution. n127 President Theodore Roosevelt's 1903 executive order creating a bird refuge on federal land commenced federal activity in wildlife matters; these federal programs were consolidated into the National Wildlife Refuge System by legislation in 1966. Other federal legislation extended protection to individual species or reinforced state efforts to control poaching and other illegal activities.

Beginning with the Endangered Species Act of 1973 n128 the federal approach toward wildlife became much more aggressive and had a more profound impact on property rights. n129 By some referred to as "the most stringent wildlife law ever enacted by any country," the act:

> applies only to species of fauna and flora officially listed as endangered or threatened, but the species so designated are legally sheltered from virtually all human acts that could tend to diminish their stock. All federal agencies are enjoined to refrain from any action that jeopardizes the continued existence of listed species or harms their critical habitat. All persons are absolutely forbidden to kill, pursue, or harass such species on or off federal lands. The ... Act has become an important limitation on federal land management agency discretion... . n130

Even with this new legislative approach, state law still governs most wildlife questions on federal lands, although federal wildlife management actions may often be taken in contravention of state law. n131

FOOTNOTES:

(n1)Footnote 127. *Geer v. Connecticut, 161 U.S. 519 (1896); Cajon Prod. Corp. v. Petera, 854 F. Supp. 843 (D. Wyo. 1994)* (Wyoming statute declaring state ownership of all wildlife within state, albeit as trustee for its citizens, held constitutional), *aff'd, 70 F.3d 1566 (10th. Cir. 1995).*

(n2)Footnote 128. *16 U.S.C. §§ 1531*-1543.

(n3)Footnote 129. *Sweet Home Chapter v. Babbitt, 17 F.3d 1463 (D.C. Cir. 1994)* (interpretation of Endangered Species Act upheld which called for automatic prohibitions on all threatened species by blanket rule and stated that such prohibitions do not have to be extended on species-by-species basis), *rev'd, 515 U.S. 687 (1995); Maine v. Norton, 257 F. Supp. 2d 357 (D. Me. 2003)* (federal agencies had the right to add species of fish to endangered list despite state objection).

(n4)Footnote 130. George Cameron Coggins & Charles F. Wilkinson, Federal Public Land and Resource Law 781 (2d ed. 1987).

(n5)Footnote 131. Title VIII of the Alaska National Interest Lands Conservation Act (ANILCA), *16 U.S.C. §§ 3111*-3126, provides for priority subsistence hunting and fishing on public lands, but the priority is implemented only if the state fails to enact laws consistent with ANILCA. *See e.g., Alaska Legislative Council v. Babbitt, 15 F. Supp. 2d 19 (D.D.C. 1998)* (a failed challenge to the implementation of ANILCA).

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CHAPTER 55 PUBLIC LANDS

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§ 55.08 Public Lands and Resources to be Preserved.

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Laws that promote preservation for historic purposes have a longer tradition than those promoting preservation for ecological, scenic or aesthetic purposes. According to the Antiquities Act of 1906 n132 public lands could be reserved or withdrawn if they contained objects or places of historic, scientific, or scenic value. Also, commercial exploitation of such objects or places was prohibited. The Act was particularly aimed at the ransacking and vandalizing of various Indian ruins. The Act's all important definition of "object of antiquity" was struck down in 1974 as unconstitutionally vague, n133 but the Archaeological Resources Protection Act of 1979 n134 attempted to correct many of the deficiencies of the older legislation. Under this new legislation, a permit is required in order to excavate, remove or damage archaeological resources on public or Indian lands, and dealing in illegally obtained artifacts is prohibited and punished. n135

The Historic Sites Act of 1935 n136 gives the Secretary of the Interior power to designate sites and buildings of historic significance and to protect sites that are threatened by other federal activities.

No firm answers have yet been found to questions on how federal or state law can deal with threats to parks and historic sites that emanate from outside the boundaries of those areas. Parks may be threatened by off-site pollution; sites may simply wear out from too heavy visitation. In the future, lands around parks and other important sites may come under development restrictions as "buffer zones."

Preservation and regulation of rivers became important when their value for irrigation, hydroelectric power generation, and flood control became apparent. The Reclamation Act of 1902 n137 the Federal Power Act of 1920, n138 and other legislation authorizing dams and flood control measures n139 have all had huge impact on American river systems. Major projects in the eastern U.S. have been undertaken by the Army Corps of Engineers, while in the west the work has been done by the Bureau of Reclamation.

However, the loss of natural and free-flowing river systems to these other worthy purposes has generated a protracted and intense debate, the first important result of which was the Wild and Scenic Rivers Act of 1968. n140 This act is

designed to preserve selected rivers and their immediate environments if they possess "outstandingly remarkable scenic, recreational, geologic, fish and wildlife, historic, cultural, or other similar values." n141 Powers of streamflow management are conferred to protect the "free-flowing" qualities of the rivers selected for protection.

Preservation of wilderness areas was pioneered by the United States, with the establishment of Yellowstone National Park in 1872, establishment of an entire national park system, some wilderness set-asides by the Forest Service beginning in the 1920s, and then the setting aside of pristine wilderness areas under the Wilderness Act of 1964. n142 In official wilderness areas, resource development is generally prohibited. Land that is being studied for possible inclusion in wilderness areas is also protected from development during the study period. The Forest Service sometimes placed itself in opposition to the no-development wilderness proposals, because they ran counter to that agency's long standing policies of multiple use and sustained yield; some of these differences were smoothed over by the Multiple Use, Sustained Yield Act of 1960, but philosophical differences still persist. n143

Areas designated as protected wilderness are expanding directions by several separate procedures. Wilderness area designations can be made for Forest Service lands, in national parks, as part of the wildlife refuge system, and on BLM lands.

FOOTNOTES:
(n1)Footnote 132. *16 U.S.C. §§ 431*-433.

(n2)Footnote 133. *United States v. Diaz, 499 F.2d 113 (9th Cir. 1974).*

(n3)Footnote 134. *16 U.S.C. §§ 470aa*-470ll; *United States v. Quarrell, 310 F.3d 664 (10th Cir. 2002)* (under the Archaeological Resources Protection Act criminal liability for unauthorized excavation does not require that the defendants knew they were on public land).

(n4)Footnote 135. Further protection is afforded by the federal Native American Graves Protection and Repatriation Act of 1990, *25 U.S.C. §§ 3001*-3013, requiring, under some circumstances, holders of Native American sacred objects or objects of cultural patrimony to return them, upon request, to a direct lineal descendant of a person who owned the object or to a tribe that can show it owned or controlled the object. *See also* William L. Evans, Who Owns the Contents of Ohio's Ancient Graves? 22 Capital L. Rev. 711 (1993); Robert W. Lannan, "Anthropology and Restless Spirits: The Native American Graves Protection and Repatriation Act, and the Unresolved Issues of Prehistoric Human Remains." *22 Harv. Envtl. L. Rev. (1998) 369. But see Leisnoi, Inc. v. Stratman, 154 F.3d 1062 (9th Cir. 1998)* (although subsurface estate's mining of sand and gravel may damage the surface estate and destroy Native American artifacts buried in the ground, court holds for subsurface estate and does not rule on whether Alaska property law precludes mining activity that unreasonably interferes with rights of surface-estate owners). Seidemann, Ryan M. "Article: Time for a Change? The Kennewick Man Case and Its Implications for the Future of the Native American Graves Protection and Repatriation Act." *106 W. Va L. Rev. 149 (2003)* (article reviews recent developments in case law regarding the Native American Graves Protection and Repatriation Act).

(n5)Footnote 136. *16 U.S.C. §§ 461*-470t.

(n6)Footnote 137. *43 U.S.C. §§ 371*-376; § 373a-1, *repealed*, Pub. L. No. 88-426, *78 Stat. 426 (1964).*

(n7)Footnote 138. *16 U.S.C. § 791 et seq.* ; § 791, *repealed, 49 Stat. 847 (1934).*

(n8)Footnote 139. *33 U.S.C. § 701 et seq.*

(n9)Footnote 140. *16 U.S.C. §§ 1271*-1287.

(n10)Footnote 141. *16 U.S.C. § 1271.*

(n11)Footnote 142. *16 U.S.C. §§ 1131*-1136; In re SRBA, Case No. 39576, 1999 CL 778325 (wilderness preservation is the primary purpose of the Wilderness Act; this is done by setting wilderness use as the highest use); *Norton v. Southern Utah Wilderness Alliance, 542 U.S. 55 (2004)* (when the Bureau of Land Management permitted certain off-road vehicle use in wilderness study areas, it did not violate its mandate under the Federal Land Policy and Management Act to not impair areas for preservation as wilderness).

(n12)Footnote 143. *Mausolf v. Babbitt, 85 F.3d 1295 (8th Cir. 1996)* (Conservation groups granted standing to oppose a snowmobilers' association challenge to the National Park Service restrictions on snowmobiling, because conservation groups showed that the National Park Service did not adequately represent conservation interests).

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CHAPTER 55 PUBLIC LANDS

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§ 55.09 Public Lands and Recreational Resources.

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The challenges and tensions inherent in providing recreation resources within the public lands have been well described as follows:

> The single greatest demand on the public lands in terms of total user-days is from persons seeking recreational opportunities ... Recreation is a resource like the more conventional ones: Congress has recognized that recreation is a valid and sometimes preferred land use and has encouraged and subsidized it on numerous occasions. Recreation is one of the major "multiple uses" to be provided for by the Forest Service and the BLM. The Fish and Wildlife Service is also enjoined to allow recreational use on refuges when it is compatible with wildlife purposes. Congress has charged the National Park Service "to conserve the scenery and the natural and historic objects and the wildlife [in parks] and to provide for the enjoyment of the same in such manner and by such means as will leave them unimpaired for future generations." National Park Act of 1916, *16 U.S.C.A. § 1* ...
>
> Like other resources, intensive recreation can degrade the natural environment and pose conflicts with other resource uses. Access to hunting can be barred by mining claims; ski area proposals are fought by hikers, hunters, and bird-watchers; motorcyclists are despised by many but can find no other open country; increased sight-seeing visitations overwhelm the public use areas of Yellowstone; and so forth. As a general rule, the more mechanized or technologically advanced the form of recreation, the more potential for conflict and destruction it poses. Off-road vehicles, for example, are more dangerous to ecological stability than hikers or joggers, hunters make more of an impact than birdwatchers, and hotels cause more serious changes than tents. Quantity, too, is important: a horde of hikers will leave the terrain in worse condition than a single jeep. n144

Under provisions and money from the Land and Water Conservation Fund, n145 federal agencies purchase land to be used for specific recreational purposes. The Fund also makes grants to states for enlargement of state recreational land systems. To the extent recreational facilities and amenities are provided on public lands, the responsible federal agencies often contract out to private concessionaires to provide these services and resources. These activities and the

ordinary mishaps connected with recreation often lead private parties to seek tort compensation from the federal government. Governmental liability may be based on and subject to the restrictions of the Federal Tort Claims Act n146 or on state tort law. n147

It has been established that private persons have a license to use public domain lands for recreational purposes, but the license is revocable, according to Congressional mandate. All restrictions are controversial, but more strenuous efforts have been made to regulate use of off-road vehicles than any other form of recreation. n148

FOOTNOTES:

(n1)Footnote 144. George Cameron Coggins & Charles F. Wilkinson, Federal Public Land and Resource Law 886 (2d ed. 1987).

(n2)Footnote 145. *16 U.S.C. §§ 4601-4*-4601-11.

(n3)Footnote 146. *28 U.S.C. §§ 1291,* 1346, 1402, 2401, 2411-2412, 2671-2680.

(n4)Footnote 147. *Roten v. United States, 850 F. Supp. 786 (W.D. Ark. 1994)* (U.S. not liable for visitor's death at national recreation area; liability not present under Arkansas statute and state statutes provide the standard, if applicable, when U.S. is sued under Federal Tort Claims Act), *aff'd, 39 F.3d 1184 (8th Cir. 1994); Ravell v. United States, 22 F.3d 960 (9th Cir. 1994)* (U.S. not liable for private citizen's injury at government air force base; government would not be liable under California law and state statutes provide standard, if applicable, for when U.S. is sued under Federal Tort Claims Act); *Dorman v. United States, 812 F. Supp. 685 (S.D. Miss. 1993)* (U.S. not liable for plaintiff's injury from alleged negligent maintenance of boat landing at government owned reservoir; no liability under Mississippi statute, and state statutes provide standard, if applicable, for when U.S. is sued under Federal Tort Claims Act); *Fairchild v. United States, 1996 U.S. Dist LEXIS 5248 (N.D. Ill. 1996)* (law of state in which alleged acts of negligence occurred applies; standard not met for claim of negligence under Arizona law, so no need to address whether action barred by discretionary-function exception of the Federal Tort Claims Act); *Wilson v. United States, 940 F. Supp. 286 (D. Or. 1996)* (in balancing need for public to have access and need of Forest Service to preserve public safety, the United States government is immune from liability for serious injury to child in lake under the Federal Tort Claims Act discretionary function exception. Additionally, Oregon's Recreational Use Act applies to recreational area in question and grants to the United States immunity from liability), *aff'd, 133 F.3d 931 (9th 1998). But see Oberson v. United States, 311 F. Supp. 2d 917* (D. Mont., No. CV-99-48-BU-DWN, Jan. 23, 2004) (United States liable under the Federal Torts Claims Act for failure to warn snowmobile riders of dangerous conditions on government maintained trail).

(n5)Footnote 148. *Everett v. United States, 158 F.3d 1364 (D.C. Cir. 1998)* (Forest Service's denial of access permit for helicopter was appropriate where petitioner sought use of public lands as a landing site for more convenient access to his own private vacation home), *cert. denied, 143 L. Ed. 2d 1010 (U.S. 1999).*

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§ 55.10 Bibliography.

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This book discusses the origins and development of public land law and then covers the present management of the public domain. It discusses acquisitions, disposals and exchanges of land, land use planning, wilderness review, withdrawals, and grazing and range management. It concludes with a look at the Department of the Interior's procedure for the management of federal public lands.

Beck, Robert E. Beck, ed. *Waters and Water Rights.* 7 vols. Charlottesville, Va.: The Michie Co., 1991-1993.

Bowes, Michael D. & John V. Krutilla. *Multiple-Use Management: The Economics of Public Forestlands.* Washington, D.C.: Resources for the Future, 1989.

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This book is a study of the evolution of the 1872 Mining Law. It discusses the decline of free access and Congress' failure to adapt mining law to changing conditions in the mineral industry. It examines the evolution of the law of discovery and looks at modern discovery as well. The book also discusses the regulation of mining activities to protect the environment, and special problems associated with mining in the wilderness and federal minerals under privately owned surfaces. It concludes with a discussion of the leasing alternatives and prospects for changing present mining law.

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This book begins with a history of grazing on U.S. Forest Service rangeland. It discusses how the free range caused chaos and includes a section on the pioneers of grazing regulation. It then discusses the management tasks existing when the Forest Service accepted full administration of forest reserves in 1905. It also covers the role of science in rangeland management and the depleting effect of World War II. Finally, it discusses the lost opportunities in range management during the Depression, new resolves in the 1940s, and continuing challenges today.

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Fellig, Thomas J. "Pursuit of the Public Trust: Beach Access in New Jersey from Neptune v. Avon to Matthews v. BHIA." *Colum. J. Envt'l L.* Vol. 10, No. 1 (1985).

This article discusses two broad principles the author claims Borough of Neptune City v. Borough of Avon-by-the-Sea has come to stand for: first, that coastal municipalities must make their dry sand beaches available "to all on equal terms"; and second, that private owners of dry sand beaches are restricted from excluding the public at large from recreational access and use. It then discusses the role of public interest legal representation in beach access litigation. It also states, however, that Neptune's application has a drawback in that municipalities now have little, if any, incentive to build facilities on beaches. If they build them these cases suggest that the state might have power to control them.

Ferguson, Karen L. "This Land Is Our Land: Private Interests in Public Lands." *Mich. L. & Pol'y Rev.* Vol. 2 (1997) 187.

Feriancek, Jeanine. "Coal and Coalbed Methane Development Conflicts: No Easy Solution, 14-SPR Nat. *Resources & Env't* 260.

Finnell, Gilbert L., Jr. "Public Access to Coastal Public Property: Judicial Theories and the Taking Issue." *N.C. L. Rev.* Vol. 67, No. 3 (1989) 517, 627.

This article analyzes the judicial theories for establishing and preserving public rights of access and the implications of Supreme Court takings jurisprudence on such access. It argues for wide judicial recognition of public rights in this area and suggests ways for courts to implement them. It also discusses common law doctrines for perfecting public rights in private coastal lands, ways of protecting existing public interests in beaches, and the taking issue.

Flynn, Roger. "The Right to Say No: Federal Authority Over Hardrock Mining on Public Lands." *16 J. Envtl. L. & Litig. 249 (Fall 2001).*

Foley, Colin. "The Grand Staircase--Escalante National Monument: Balancing Public and Private Rights in the Nation's Lands." *25 B.C. Envtl. Aff. L. Rev. (1998) 743.*

Forrest, Steven C. "Creating New Opportunities for Ecosystem Restoration on Public Lands: An Analysis of the Potential for Bureau of Land Management Lands." *23 Pub. Land & Resources L. Rev. 21 (2002).*

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Glover, Kristen H. "Managing Wild Horses on Public Lands: Congressional Action and Agency Response." *79 N.C. L. Rev. 1108 (May 2001).*

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This article first defines the term "mineral estate" and then describes the various types of interests that may be held in mineral property. It discusses mineral owner-ship in Colonial America and the early United States and how the concept of a public mineral estate developed under the subsequent acquisition of public lands. It also discusses the effect of the major public land disposition enactments on the public mineral estate. The article then speaks directly to the disposition of that pub-lic mineral estate, covering policies and procedures employed to the present day.

Hasenstein, Ethan R. "Public Lands Management at the Crossroads: Balancing Interests in the 21st Century." *34 Envt'l. L. 1013 (Fall 2004).*

Hayes, Kevin. "History and Future of the Conflict Over Wilderness Designations of BLM Land in Utah." *16 J. Envt'l. L. & Litig. 203 (Spring 2001).*

Heisel, Edward J. "Biodiversity and Federal Land Ownership: Mapping a Strategy for the Future." *25 Ecology L.Q. (1998) 229.*

"How Did We Get Here? Looking to History to Understand Conflicts in Public Land Governance Today," 23 *Pub. Land & Res. L. Rev.* 1 (2002).

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This article traces the history of private rights in public lands from the issue of western land claims confronted by the nation's founders. It goes through the stages of acquisition, disposal, and then retention of public lands. It discusses the management of the public domain and several different understandings of the legal status of the public lands in relation

to the government and its citizens.

Iraola, Roberto. "Public Lands, Wilderness, and National Security." *109 Penn. St. L. Rev. 791 (Winter 2005).*

Keiter, Robert B. "Ecological Concepts, Legal Standards, and Public Land Law." 44 *Nat'l Res. J.* 943 (Fall 2004).

Kemmis, Daniel. "Re-Examining the Governing Framework of the Public Lands." *75 U. Colo. L. Rev. 1127 (Fall 2004).*

Lacy, Peter M. "Our Sedimentation Boxes Runneth Over: Public Lands Soil Law as the Missing Link in Holistic Natural Resource Protection." *31 Envt'l. L. 433 (Spring 2001).*

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This article gives the history and the scope of the government regulation of public lands. It includes topics such as timber, grazing, minerals, and recreational uses. Part I discusses how the commercial commodity development of public lands has been declining in relative importance, while the use of public lands for recreation and preservation has become predominant. Part II explores the reasons behind the reduction in commercial uses of public lands and the rise in use of these lands for recreational and preservationist purposes. Part III discusses the relevant federal agencies and how they cope with change.

Lannan, Robert W. "Anthropology and Restless Spirits: The Native American Graves Protection and Repatriation Act, and the Unresolved Issues of Prehistoric Human Remains." *22 Harv. Envt'l. L. Rev. (1998) 369.*

Mansfield, Marla E. "A Primer of Public Land Law." *Wash. L. Rev.* Vol. 68, No. 4 (1993) 753, 801.

This article first outlines the constitutional authority for public land law, specifically addressing withdrawals, reservations, and classifications of public land thereby obtained. It also examines statutory mandates for the various land management systems. It concludes by discussing the relationship between "multiple-use" and "dominant-use" as these two terms are used in the regulation of public lands.

McIntosh, Heidi. "New Highways Under an Old Law: R.S. 2477 and Its Implications for the Future of Utah's Federal Public Land." *18 Utah B.J. 16* (March/April 2005).

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This article examines the interaction between livestock and the wilderness throughout the evolution of the wilderness concept in the U.S. It tracks grazing through certain stages: the administrative wilderness (1924-1964); the statutory wilderness (1964-1976); and the clarification of congressional intent (1977-1985). It then discusses the present status of livestock grazing management in B.L.M. wilderness and concludes with a forecast of the future.

Muhn, James. "Public Water Reserves: The Metamorphosis of a Public Land Policy." 21 *J. Land Res. & Envt'l. L.* 67 (2001).

Negris, Karen A. "Access to New Jersey Beaches: The Public Trust Doctrine." *Colum. J.L. & Soc. Probs.* Vol. 20, No. 4 (1986) 437.

This article discusses the public trust doctrine by examining Matthews v. Bay Head Improvement Ass'n (granting public right to cross privately owned dry sand areas to access beaches) and the cases which followed it. The author subjects Matthews to a constitutional analysis and reaches the conclusion that the case amounts to an unlawful taking of

property in violation of the 5th and 14th amendments. In her opinion, this decision should have been made by the legislature, not the Supreme Court.

Nie, Martin. "Administrative Rulemaking and Public Lands Conflict: The Forest Service's Roadless Rule." 44 *Nat'l Res. J.* 687 (Summer 2004).

Olinger, Todd M. "Public Rangeland Reform: New Prospects for Collaboration and Local Control Using the Resource Advisory Councils." *69 U. Colo. L. Rev. (1998) 633.*

Olson, Mitchell R. "The R.S. 2477 Right of Way Dispute: Constructing a Solution." *Envt'l L.* Vol. 27, (Spring 1997) 289.

Pariser, David B. "Current Issues Relating to Emergency Federal Coal Leasing." *W. Va. L. Rev.* Vol. 89, No. 3 (1987) 593.

This article discusses the state of coal leases at the time it was written and the federal coal management program in general. It examines the history of emergency leasing with an analysis covering the period from the Mineral Lands Leasing Act of 1920 to the Federal Coal Leasing Amendments Act of 1976. It also discusses issues related to the administration of emergency leasing and explores policy options for the Interior Department.

Pasko, Brian Scott. "The Great Experiment That Failed? Evaluating the Role of a 'Committee of Scientists' as a Tool for Managing and Protecting Our Public Lands." *32 Envt'l. L. 509 (Spring 2002).*

Powell, Frona M. "The Public Trust Doctrine: Implications for Property Owners and the Environment." *Real Est. L. J.* Vol. 25, No. 3 (1997) 255.

Powell, Frona M. "The Reserved Water Rights Doctrine." *Real Est. L. J.* Vol 25, No. 3 (1997) 306.

"Public Lands Graving Fee Reform: Welfare Cowboys and Rolex Ranchers." *10 N.Y.U. Envt'l. L.J. 403 (2002).*

Rasband, James R. "The Disregarded Common Parentage of the Equal Footing and Public Trust Doctrines." *Land & Water L. Rev.* Vol. 32, No. 1 (1997) 1.

Ruberto, Michelle A. & Kathleen A. Ryan. "The Public Trust Doctrine and Legislative Regulation in Rhode Island: A Legal Framework Providing Greater Access to Coastal Resources in the Ocean State." *Suffolk U. L. Rev.* Vol. 24, No. 2 (1990) 353.

This article begins by discussing the Roman and English common law antecedents of the public trust doctrine, its development in American law, and its present state. It then examines Rhode Island's approach to allowing public access with the doctrine and uses New Jersey law as a model. The authors point out Rhode Island's tendency to support government control of public trust rights, but they also advocate changes in the Rhode Island public trust doctrine -- stating that a recent constitutional amendment restricts coastal development, but does not empower the state to create a new access right.

Ruffatto, Steven P. & Carolyn S. Otsby. "Cohabitation of Wilderness and Mining: Can the Marriage be Saved?" *Rocky Mtn. Min. L. Inst.* Vol. 38 (1992) 11.

This article pertains to § 55.03(b)(5) with a section on establishing valid wilderness mining rights which discusses location, filing, and discovery requirements. The article also applies to § 55.03(b)(4) with a section on the regulation of mining activities in wilderness areas. This section deals with mining in both Forest Service and B.L.M. wilderness as

well as the issue created by claims existing prior to the withdrawal of the land for wilderness purposes.

Schiffer, Lois J. "Public Lands Litigation in the Geography of Hope." *1 Wyo. L. Rev. 413 (2001).*

Sheldon, Karin P. "How Did We Get Here: Looking to History to Understand Conflicts in Public Land Governance Today." 23 *Pub. Land & Res. L. Rev.* 1 (2002).

Shepard, Harold. Comment, "Livestock Grazing in B.L.M. Wilderness and Wilderness Study Areas." *J. Envt'l L. & Litig.* Vol. 5 (1990) 61.

This article examines the relationship between grazing and wilderness in light of the Wilderness Act, the Federal Land Policy and Management Act, and the National Environmental Policy Act. It discusses policy and guidelines for B.L.M. wilderness study and examines case law affecting grazing in wilderness and wilderness study areas. It also discusses the wilderness designation process under the Department of the Interior. The author concludes that grazing should be prohibited in wilderness and wilderness study areas.

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Tobias, Carl. "Natural Resources and the Ninth Circuit Split." *28 Envt'l. L. (1998) 411.*

Uram, Robert. "A Critical Review of Valid Existing Rights Under S.M.C.R.A." *Nat. Res. & Env't* Vol. 5, No. 3 (1991) 19.

This article introduces S.M.C.R.A. by discussing the evolution of its basic regulatory structure. In doing so, it examines coal reclamation standards and the adoption of nationwide permanent rules. Then it treats § 522(e) of S.M.C.R.A. specifically and discusses five areas where surface coal operations were banned regardless of their compliance with those rules and regulations. It also examines the difficulty of rulemaking regarding valid existing rights under the statute.

Wilkinson, Charles F. & H. Michael Anderson. "Land and Resource Planning in the National Forests." *Or. L. Rev.* Vol. 64 (1985) 1.

This article begins with a discussion of the origin of national forest management and an examination of the legal context for planning in the national forests. It contains sections dealing specifically with rangeland regulation, timber policy and planning, and policy and regulation of minerals, wildlife, recreation, wilderness preservation, and wilderness mining.

Vaskov, Nicholas G. "Continued Cartographic Chaos, or a New Paradigm in Public Land Configuration? The Effect of New Laws Authorizing Limited Sales of Public Land," *20 UCLA J. Envt'l. L. & Pol'y 79* (2001/2002).

Yablon, Marcia. "Property Rights and Sacred Sites: Federal Regulatory Responses to American Indian Religious Claims on Public Land." *113 Yale L.J. 1623* (May, 2004).

Zellmer, Sandra B. "Sustaining Geographies of Hope: Cultural Resources on Public Lands." *73 U. Colo. L. Rev. 413 (Spring 2002).*

Annotations

Annotation, *Application in Federal Eminent Domain Proceedings of Rule that Subsequent Enlargement of Public Project to Include Lands Adjacent to, not Within Scope of, Project from Time Government Was Committed to it, Entitles Condemnee to Value Added in Meantime by Proximity of Public Improvement, 14 A.L.R.Fed. 806 (1977).*

Annotation, *Cancellation of Patent or Entry Under Desert Land Act (43 U.S.C.S. §§ 321 et seq.), Because of Attempts to Improperly Assign or Convey, 25 A.L.R.Fed. 801.*

Annotation, *Claims Based on Construction and Maintenance of Public Property as Within Provision of 28 USCS § 2680(a) Excepting From Federal Tort Claims Act Claims Involving "Discretionary Function or Duty," 37 A.L.R.Fed. 537.*

Annotation, *"Compliance with State Standards" as Requirement to Granting Right-of-Way Over Federal Public Lands under § 505(a)(iv) of the Federal Land Policy and Management Pact of 1976 (43 USCS § 1765(a)(iv)), 60 A.L.R.Fed. 386.*

Annotation, *Construction and Application of Geothermal Steam Act of 1970 (30 U.S.C.S. §§ 1001 et seq.), Pertaining to Leases of Government Lands for Development of Geothermal Steam Resources, 40 A.L.R.Fed. 814.*

Annotation, *Construction and Application of § 4 of Outer Continental Shelf Lands Act of 1953 (43 U.S.C.S. § 1333), Relting to Laws Applicable to Subsoil and Seabed of Outer Continental Shelf and Artificial Islands and Fixed Structures Erected Thereon, 30 A.L.R.Fed. 535.*

Annotation, *Construction and Application of § 4(f) of Department of Transportation Act of 1966 (49 U.S.C.S. § 1653(f)), as Amended, and § 18(a) of Federal-Aid Highway Act of 1968 (23 U.S.C.S. § 138) Requiring Secretary of Transportation to Determine That All Possible Planning for Highways Has Been Done to Minimize Harm to Public Park and Recreation Lands, 19 A.L.R.Fed. 904.*

Annotation, *Construction and Application of § 23(b) of Federal Power Act (16 U.S.C.S. § 817), Requiring Any Person Intending to Construct Dam or Project on Nonnavigable Stream to File Declaration of Such Intention, 40 A.L.R.Fed. 891.*

Annotation, *Construction and Application of Statute of Limitations (42 U.S.C.A. § 9613(g)(1)) for Action Under § 107 of Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) (42 U.S.C.A. § 9607) for Natural Resource Damages, 144 A.L.R.Fed. 285.*

Annotation, *Construction and Application of Taylor Grazing Act (43 USCS § 315 et seq.), 42 A.L.R.Fed. 353.*

Annotation, *Construction and Application of Wilderness Act (16 USCS § 1131 et seq.) Providing for National Wilderness Preservation System, 14 A.L.R.Fed. 508.*

Annotation, *Easements: Way by Necessity Where Property is Accessible by Navigable Water, 9 A.L.R.3d 600.*

Annotation, *Effect of Statute Limiting Landowner's Liability for Personal Injury to Recreational User, 47 A.L.R.4th 262.*

Annotation, *Environmental and Conservation Groups' Standing to Challenge Omission or Adequacy of Environmental*

Impact Statement Required by § 102(2)(c) of National Environmental Policy Act of 1969 (42 U.S.C.A. § 4332(2)(c)), 63 A.L.R.Fed. 446.

Annotation, *Extinguishment by Prescription of Natural Servitude for Drainage of Surface Waters, 42 A.L.R.4th 462.*

Annotation, *Federal Tort Claims Act, 1 A.L.R.2d 222.*

Annotation, *Federal Tort Claims Act: Liability of United States for Injury or Death Resulting from Condition of Premises,* 91 A.L.R.Fed.

Annotation, *Grant, Administration, and Construction, Under Outer Continental Shelf Lands Act of 1953 (43 U.S.C.A. §§ 1331 et seq.), of Leases to Explore for Oil and Gas Deposits Under Continental Shelf, 31 A.L.R.Fed. 615.*

Annotation, *Grant, Reservation, or Lease of Minerals and Mining Rights as Including, Without Expressly so Providing, the Right to Remove the Minerals by Surface Mining, 70 A.L.R.3d 383 (1987).*

Annotation, *Implied Acceptance, by Public Use, of Dedication of Beach or Shoreline Adjoining Public Waters, 24 A.L.R.4th 294.*

Annotation, *Judicial Review of Interior Department Decisions Affecting Claims of Mineral Interests in Public Lands, 5 A.L.R.Fed. 566.*

Annotation, *Liability of United States, Under Federal Tort Claims Act (28 U.S.C.S. §§ 1346, 2671 et seq.), for Death or Injury Sustained by Visitor to National Park or National Forest, 66 A.L.R.Fed. 305.*

Annotation, *Loss of Private Easement by Nonuse, 62 A.L.R.5th 219.*

Annotation, *Mine Tailings as Real or Personal Property, 75 A.L.R.4th 528.*

Annotation, *Necessity and Sufficiency of Environmental Impact Statements under § 102(2)(c) of National Environmental Policy Act of 1969 (42 U.S.C.S. § 4332(2)(c)) in Cases Involving Logging, Mining, and Related Projects, 74 A.L.R.Fed. 70.*

Annotation, *Necessity and Sufficiency of Environmental Impact Statements under § 102(2)(c) of National Environmental Policy Act of 1969 (42 U.S.C.S. § 4332(2)(c)) in Cases Involving Park, Recreational, Wilderness, and Related Projects, 75 A.L.R.Fed. 378.*

Annotation, *Necessity and Sufficiency of Environmental Impact Statements under § 102(2)(c) of National Environmental Policy Act of 1969 (42 U.S.C.S. § 4332(2)(c)) in Cases Involving Power Projects, 66 A.L.R.Fed. 395.*

Annotation, *Necessity and Sufficiency of Environmental Impact Statements under § 102(2)(c) of National Environmental Policy Act of 1969 (42 U.S.C.S. § 4332(2)(c)) in Cases Involving Water and Waterworks Projects, 67 A.L.R.Fed. 54.*

Annotation, *Penalties Under 30 U.S.C.S. § 1268 for Violating Surface Mining Control and Reclamation Act, 82 A.L.R.Fed. (1987) 218.*

Annotation, *Proof and Extinguishment of Aboriginal Title to Indian Lands, 41 A.L.R.Fed. 425.*

Annotation, *Private Improvement of Land Dedicated but not Used as Street as Estopping Public Rights, 36 A.L.R.4th*

(1981) 625.

Annotation, *Public Rights of Recreational Boating, Fishing, Wading, or the Like in Inland Stream the Bed of Which is Privately Owned, 6 A.L.R.4th 1030.*

Annotation, *Real-Property Quiet Title Actions Against United States Under Quiet Title Act (28 U.S.C.S. § 2409a), 60 A.L.R.Fed. 645.*

Annotation, *Right of Public in Shore of Inland Navigable Lake Between High and Low-Water Marks, 40 A.L.R.3d 776.*

Annotation, *Right of Public to Fish in Stream Notwithstanding Objection by Riparian Owner, 47 A.L.R.2d 381.*

Annotation, *Right of Riparian Owner on Navigable Water to Access to Water*, 89 A.L.R. 1156.

Annotation, *Rights, Privileges, or Easements of Public, its Grantees or Licensees, on Land Bordering on Navigable Water*, 53 A.L.R. 1191.

Annotation, *Scope of Prescriptive Easement for Access (Easement of Way), 79 A.L.R.4th (1991) 604.*

Annotation, *Standing of Private Citizen, Association, or Organization to Maintain Action in Federal Court for Injunctive Relief Against Commercial Development or Activities, or Construction of Highways, or other Governmental Projects, Alleged to Be Harmful to Environment in Public Parks, Other Similar Recreation Areas, or Wildlife Refuges, 11 A.L.R.Fed. 556.*

Annotation, *State and Local Government Liability for Injury or Death of Bicyclist Due to Defect or Obstruction in Public Bicycle Path, 68 A.L.R.4th 204.*

Annotation, *Tacking as Applied to Prescriptive Easements, 72 A.L.R.3d (1977) 648.*

Annotation, *Title to Beds of Natural Lakes or Ponds*, 23 A.L.R. 757; supplemented by 112 A.L.R. 1108.

Annotation, *Transfer of Riparian Right to Use Water to Nonriparian Land*, 14 A.L.R. 330; supplemented by 54 A.L.R. 1411.

Annotation, *Validity, Construction, and Application of Federal Statute (16 U.S.C.A. § 551) and Implementing Regulations Providing for Protection of National Forests and Punishing Violations of Such Regulations, 19 A.L.R.Fed. 492.*

Annotation, *What Constitutes "Common Varieties" Within Meaning of Federal Statute (30 U.S.C.S. § 611) Providing That no Deposit of Common Varieties of Sand, Stone, Gravel, Pumice, Pumicite, or Cinders Shall be Deemed "Valuable Mineral Deposit," 38 A.L.R.Fed. 456.*

Annotation, *What Constitutes Impairment of Proposed Intervenor's Interest to Support Intervention as Matter of Right Under Rule 24(A)(2) of Federal Rules of Civil Procedure in Environmental Actions, 76 A.L.R.Fed. 762.*

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CHAPTER 55 PUBLIC LANDS

7-55 Thompson on Real Property, Thomas Editions § 55.11

AUTHOR: Professor David A. Thomas J. Reuben Clark Law School Brigham Young University

§ 55.11 Appendix.

1701. Congressional declaration of policy.

(a) The Congress declares that it is the policy of the United States that--

(1) the public lands be retained in Federal ownership, unless as a result of the land use planning procedure provided for in this Act, it is determined that disposal of a particular parcel will serve the national interest;

(2) the national interest will be best realized if the public lands and their resources are periodically and systematically inventoried and their present and future use is projected through a land use planning process coordinated with other Federal and State planning efforts;

(3) public lands not previously designated for any specific use and all existing classifications of public lands that were effected by executive action or statute before the date of enactment of this Act [enacted Oct. 21, 1976] be reviewed in accordance with the provisions of this Act;

(4) the Congress exercise its constitutional authority to withdraw or otherwise designate or dedicate Federal lands for specified purposes and that Congress delineate the extent to which the Executive may withdraw lands without legislative action;

(5) in administering public land statutes and exercising discretionary authority granted by them, the Secretary be required to establish comprehensive rules and regulations after considering the views of the general public; and to structure adjudication procedures to assure adequate third party participation, objective administrative review of initial decisions, and expeditious decisionmaking;

(6) judicial review of public land adjudication decisions be provided by law;

(7) goals and objectives be established by law as guidelines for public land use planning, and that management be on the basis of multiple use and sustained yield unless otherwise specified by law;

(8) the public lands be managed in a manner that will protect the quality of scientific, scenic, historical, ecological, environmental, air and atmospheric, water resource, and archeological values; that, where appropriate, will preserve and protect certain public lands in their natural condition; that will provide food and habitat for fish and wildlife and domestic animals; and that will provide for outdoor recreation and human occupancy and use;

(9) the United States receive fair market value of the use of the public lands and their resources unless otherwise provided for by statute;

(10) uniform procedures for any disposal of public land, acquisition of non-Federal land for public purposes, and the exchange of such lands be established by statute, requiring each disposal, acquisition, and exchange to be consistent with the prescribed mission of the department or agency involved, and reserving to the Congress review of disposals in excess of a specified acreage;

(11) regulations and plans for the protection of public land areas of critical environmental concern be promptly developed;

(12) the public lands be managed in a manner which recognizes the Nation's need for domestic sources of minerals, food, timber, and fiber from the public lands including implementation of the Mining and Minerals Policy Act of 1970 *(84 Stat. 1876, 30 U.S.C. 21a)* as it pertains to the public lands; and

(13) the Federal Government should, on a basis equitable to both the Federal and local taxpayer, provide for payments to compensate States and local governments for burdens created as a result of the immunity of Federal lands from State and local taxation.

(b) The policies of this Act shall become effective only as specific statutory authority for their implementation is enacted by this Act or by subsequent legislation and shall then be construed as supplemental to and not in derogation of the purposes for which public lands are administered under other provisions of law.

Legislative History

HISTORY: (Oct. 21, 1976, P.L. 94-579, Title I, § 102, *90 Stat. 744.)*

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Supp. To CHAPTER 55 PUBLIC LANDS

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Supp. to § 55.02 History of Public Lands in the United States.

[Go To Main]

§ 55.02(b) Early Public Developments Regarding Public Lands. [Go To Main]

At end of the third full paragraph, add new Note 3.1: n3.1

FOOTNOTES:
(n1)Footnote 3.1. *Hawaii v. Office of Hawaiian Affairs, 129 S. Ct. 1436 (2009)* (the Congressional resolution apologizing for the role of the United States in overthrowing the Hawaiian monarchy did not strip the state of its sovereign authority to alienate public lands that had been ceded to the state).

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Supp. To CHAPTER 55 PUBLIC LANDS

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Supp. to § 55.03 Public Lands and Mineral Resources.

[Go To Main]

§ 55.03(b) Disposal of Public Domain Mineral Resources. [Go To Main]

§ 55.03(b)(4) Summary of Federal Regulatory Jurisdiction.

Add:

Southern Utah Wilderness Alliance v. Kempthorne, 525 F.3d 966 (10th Cir. 2008) (federal district court reversed BLM's sale and issuance of oil and gas leases on public land).

§ 55.03(b)(5) Overview of Mineral Location Procedures.

Add:

Mount Royal Joint Venture v. Kempthorne, 477 F.3d 745 (D.C. Cir. 2007) (action by mining claimants challenging federal agency orders withdrawing public lands from mineral location and entry).

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Supp. To CHAPTER 55 PUBLIC LANDS

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Supp. to § 55.04 Public Lands and Timber Resources.

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Add:

Western Watersheds Project v. Bureau of Land Management, 552 F. Supp. 2d 1113 (D. Nev. 2008) (action alleging that BLM's fire management policy violated environmental and endangered species laws).

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Supp. to § 55.06 Public Lands and Grazing Resources.

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Add

Colvin Cattle Co., Inc. v. U.S., 468 F.3d 803 (Fed. Cir. 2006) (denial of grazing permit could not be construed as also a taking of any water right).

Ventana Wilderness Alliance v. Bradford, 313 Fed. Appx. 944 (9th Cir. 2009) (grazing for over 115 years was a sufficient basis to conclude that grazing on formerly private land was "established" within the meaning of the Wilderness Act).

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Supp. to § 55.08 Public Lands and Resources to Be Preserved.

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At the end of first sentence of third paragraph, add new Note 136.1: n136.1

Add

Southern Utah Wilderness Alliance v. Norton, 457 F. Supp. 2d 1253 (D. Utah 2006) (BLM granting of oil and gas leases successfully challenged because the BLM failed to take a "hard look" and the no-leasing alternatives).

FOOTNOTES:
(n2)Footnote 136.1. *Pleasant Grove City, Utah v. Summum, 129 S. Ct. 1125 (2009)* (by allowing the regulating of the placement of permanent monuments in a public city park, the city was exercising a form of government free speech not subject to scrutiny under the *First Amendment*).

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Supp. to § 55.09 Public Lands and Recreational Resources.

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Add

Seven Lakes Development Co., L.L.C. v. Maxson, 144 P.3d 1239 (Wyo. 2006) (landowners with a right to hunt and fish on neighbor's land had a right to enter public lands from the neighbor's property); *Utah Shared Access Alliance v. Carpenter, 463 F.3d 1125 (10th Cir. 2006)* (approving BLM's temporary closure of designated off-road vehicle routes);

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Add

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CHAPTER 56 TERRITORIES AND POSSESSIONS

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AUTHOR: Professor Caryl A. Yzenbaard Salmon P. Chase College of Law Northern Kentucky University

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CHAPTER 56 TERRITORIES AND POSSESSIONS

7-56 Thompson on Real Property, Thomas Editions § 56.01

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§ 56.01 An Overview.

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Most of the fifty states which currently comprise the United States of America were, at one time, territories. n1 Territories have been defined to include all lands acquired by the United States, whether by treaty, purchase or otherwise, which have an organized form of government, but have not become incorporated into the United States. n2 The term territory often is used to include a Commonwealth (and will be herein) though as noted *infra,* there are technical if not substantive differences. n3

This chapter will discuss the five principal territories of the United States in alphabetical order. They are: The Commonwealth of the Northern Mariana Islands, The Commonwealth of Puerto Rico, The Territory of American Samoa, The Territory of Guam, and The Territory of the Virgin Islands. Not included herein are discussions of the District of Columbia or Micronesia. n4 Nor does this chapter discuss those former territories which became either States or independent countries. n5

For each territory a brief review will note how it was acquired and its current form of government, followed by a discussion of land laws (noting especially any special restrictions regarding the ownership of land). n6

FOOTNOTES:
(n1)Footnote 1. The author wishes to acknowledge Nancy Cutler, a 1993 graduate of the Salmon P. Chase College of Law of Northern Kentucky University and a member of the Ohio Bar, for her invaluable assistance in the preparation of the original Chapter. Charles H. McLaughlin, *Territories of the United States*, 10 The Guide to American Law, Everyone's Legal Encyclopedia 59 (West Pub'g Co.) for a listing of the United States Territories and their admission as States, including therein the date of the Act Organizing the Territory and the number of years the State had been organized as a territory. The last territory to become a state was Hawaii on August 21, 1959, after 59 years as a territory.

(n2)Footnote 2. *See, e.g.,* New York *ex rel. Kopel v. Bingham, 211 U.S. 468 (1909).* Traditionally, the United States has acquired territory by conquest or treaty under the foreign affairs power of the Constitution. *See United States v. Huckabee, 83 U.S. 414 (1872).* Of the five territories discussed herein, two were acquired by treaty after the Spanish-American War (Puerto Rico and Guam); two were by voluntary cession (American Samoa and the Northern

Mariana Islands); and one was by purchase (the Virgin Islands). *See* §§ 56.11, 56.13, 56.12, 56.10, and 56.14, *infra*, respectively. Ways to acquire territories other than purchase, cession or treaty, include occupation, prescription, conquest, accession or adjudication. An unusual way to acquire territory is found in *48 U.S.C. §§ 1411*-1419 which provides for United States citizens to claim islands, rocks, and keys with guano deposits, if that island, rock, or key is not within the lawful jurisdiction of another government. After the guano is removed, the United States is not required to maintain possession. *See Jones v. United States, 137 U.S. 202 (1890)* (extending federal criminal jurisdiction over Navassa Island in the Caribbean noting that the procedures of the Act had been observed).

(n3)Footnote 3. The plea for Guam to be considered as a Commonwealth was included in the testimony of The Honorable Xavier Becerra before the House Resources Committee as reported by 1997 Federal information Systems Corrain Federal News Service, October 29, 1997. § 56.06 *infra*. Thus, the Northern Mariana Islands and Puerto Rico are both Commonwealths within the United States. Guam had asked to be so considered. As noted therein, there are differences; however, the distinctions have not always been noted by Congress, the Executive Branch, or the courts, and thus for ease of discussion (unless the context requires otherwise) the term "territory" will be used. Note the similar discussion in the Preface, of the fine work by Arnold H. Leibowitz, Defining Status (Martinus Nigjoff Publishers (1989), and the recent article by Jon M. Van Dyke, *The Evolving Legal Relationships Between the United States and its Affiliated U.S. - Flag Islands*, 14 Univ. Haw. L. Rev. 445 (1992).

(n4)Footnote 4. A good discussion regarding the five territories as well as the smaller islands of the Trust Territories may be found in the Report of the Chairman, Committee on Resources, House of Representatives by Barry R. Berick, 1997 Federal Documents Clearing House, Inc. GA Reports, November 10, 1997. Though *see* § 56.07 *infra*, for a brief discussion of the Trust Territories. Nor does it discuss the Pacific Islands without permanent populations, such as Midway or Wake Islands.

(n5)Footnote 5. For example, under the Treaty of Paris which followed the Spanish-American War, the United States acquired the Philippines in addition to Guam and Puerto Rico. *See* the Treaty of Paris, dated December, 10, 1898, and proclaimed on April 11, 1899; *30 U.S. Stat. 1754*, T.S. No. 343 (1899). The Philippines were granted independence and sovereignty in 1946. *See* Philippine Independence Act, *48 U.S.C. §§ 1221*-1226, *22 U.S.C. §§ 1391*-1394.

(n6)Footnote 6. For a new, comprehensive book please *see* Stanley K. Laughlin, Jr. The Law of United States Territories and Affiliated Jurisdictions. (Lawyers Cooperative Publishing 1995) and cited in the Bibliography. A guide to finding regulations and statutes may be found in the article by William A. Hilyerd, Using the Law Library: A Guide for Educators Part III: Oh, Statute (or Regulation), Where Are Thou? *34 J. L. & Educ. 101 (2005)* who notes, though, that the Puerto Rico Code is in Spanish. An excellent book which discusses the five territories from various perspectives is by Peter C. Stuart, Isles of Empire: The United States and Its Oversees Possessions, University Press of America, Inc., 1999 (Maryland) and also cited in the Bibliography. The chapters (each of which addresses the issue as to each territory) include economic perspectives; social perspectives; and political perspectives. Of particular interest to this author was the chapter titled "In Our Own Image" which described the effect of Americanization on the culture in each territory. Recent law review articles discussing the territories include that of Cleveland, Sarah H., "Power Inherent in Sovereignty: Indians, Aliens, Territories and the Nineteenth Century Origins of Plenary Power Over Foreign Affairs," *81 Tex. L. Rev. (November 2002) 1;* Saito, Natsu Taylor, Symposium: "Asserting Plenary Power Over the 'Other': Indians, Immigrants, Colonial Subjects, and Why U.S. Jurisprudence Needs To Incorporate International Law," *20 Yale L. & Pol'y Rev. (2002) 427;* and Roman, Ediberto & Simmons, Theron, "Membership Denied: Subordination and Subjugation Under United States Expansionism," *39 San Diego L. Rev. (Spring, 2002) 437.* For a more complete discussion, please *see* the Bibliography, and in particular Liebowitz, noted *supra*, note 3. Land restrictions are particularly noteworthy in American Samoa (where a person must have 1/2 or more native blood) and the Northern Mariana Islans (where a person must have 1/4 or more native Chamorro or Carolinian blood). *See* §§ 56.12(a) and 56.10(a) *infra* respectively. Such land restrictions are not uncommon. *See, e.g.*, Hawaii Homes Commission Act, ch. 42, § 201(a)(7), *42 Stat. 108 (1921)* which Act was subsequently incorporated into Hawaiian state law by virtue of a "compact" between Hawaii and the United States. That Act provides that certain public lands can be leased only to Native Hawaiians who were descendants of not less than one-half part of the blood of the races inhabiting the Hawaiian

Islands prior to 1778. The Alaska Native Claims Settlement Act, *43 U.S.C. §§ 1601*-1629 provides for public lands and moneys to be conveyed to "natives" of Alaska. Natives are defined as United States citizens who are of one-fourth degree or more Alaskan Indian, Eskimo or Aleut blood or a combination thereof. But note that Congress deleted a provision of the Bill of Rights to the 1950 Organic Act for Guam which would have allowed such restrictions. *See* § 56.13(a) *infra*.

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CHAPTER 56 TERRITORIES AND POSSESSIONS

7-56 Thompson on Real Property, Thomas Editions § 56.02

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§ 56.02 Authority for the Possession of Territories by the United States and Oversight Responsibility.

The only Constitutional authority regarding territories is found in art. IV, § 3, cl. 2 which provides:

> The Congress shall have the Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States; and nothing in this Constitution shall be so construed as to prejudice any claims of the United States or of any particular State.

Under this Clause Congress manages the territories. n7 The power of Congress is broad, n8 as is that of the executive. n9 Each territory may be organized and treated separately by the Congress. n10 Although under the authority of Congress, the territories are today largely self-governing; though there is no deference to local authority as exists for the states under the Tenth Amendment. n11

At one time, the status of territory was viewed as merely a "way station" on the road to statehood and equality. n12 The Northwest Ordinance of 1787, which later was used for the development of other territorial lands, envisioned three stages: during the initial stage the territory would be governed by appointed officials; during the second stage the territory would elect a legislative body and draft a permanent constitution (at which time a non-voting delegate would be sent to Congress); and the last stage was statehood. n13 There are no legal requirements for statehood and the Constitution grants Congress the authority to admit new states. n14 Three traditional criteria for statehood were that the inhabitants of the proposed new state were sympathetic toward the principles of democracy; that the majority of the inhabitants wanted statehood; and that the proposed new state had sufficient population and resources to support state government and provide its share of the cost of the federal government. n15 With the possible exception of Puerto Rico, it is unlikely that any of the current territories will achieve statehood: they are not contiguous to the U.S.; are often far away; and are populated by persons who often speak a different language and have a different culture. n16

Today, oversight responsibility for the territories is with the Department of the Interior and, in particular, with the Office of Territorial and International Affairs. n17 In the Congress, most territorial matters are dealt with in the House Interior and Insular Affairs Committee on which committee the territorial delegates sit n18 and, in particular, by its Subcommittee on Territories.

COMPUTER-ASSISTED RESEARCH

LEXIS: congress! w/15 authority w/ 30 possess! w/ 15 territor!
oversight w/ territor!

FOOTNOTES:

(n1)Footnote 7. *See Dorr v. United States, 195 U.S. 138, 149,* (1904), where it is noted: "We conclude that the power to govern territory, is implied in the right to acquire it, and given to Congress in the U.S. Const. art. IV, § 3, to whatever other limitations it may be subject, the extent of which must be decided as questions arise...". In addition to the Territorial Clause, the power of the federal government to govern the territories also stems from the inherent sovereignty of the national government. *See American Ins. Co. v. 356 Bales of Cotton, 26 U.S. 511, 543 (1828)* ("[T]he right to govern may be an inevitable consequence of the right to acquire territory. Whatever may be the source whence the power is derived, the possession of it is unquestioned"). *See also Late Corp. of Church of Jesus Christ, etc. v. United States, 136 U.S. 1 (1890)* (results necessarily from being within jurisdiction of the United States).

(n2)Footnote 8. *See National Bank v. County of Yankton, 101 U.S. 129, 133 (1880)* ("... Congress is supreme ... Congress may not only abrogate laws of the territorial legislatures, but it may itself legislate directly for the local government."); *Simms v. Simms, 175 U.S. 162, 168 (1899)* ("In the Territories of the United States, Congress has the entire dominion and sovereignty, national and local, Federal and state, and has full legislative power over all subjects upon which the legislature of a State might legislate; and may, at its discretion, intrust that power to the legislative assembly of a territory"). Or *see 48 U.S.C. § 1423i* regarding bills passed by the Guam Legislature to the effect that "The Congress of the United States reserves the power and authority to annul the same."

Of course, the power of Congress is not without limit. *See Downes v. Bidwell, 182 U.S. 244 (1901)* (Congress holds the territories in trust for the benefit of the people and is limited by Constitutional restrictions as to personal rights). *See also* § 56.03 *infra*.

(n3)Footnote 9. The executive power is as broad as the plenary power granted Congress and derives from the foreign affairs power as well as the power of the commander-in-chief. *See, e.g., National Bank v. County of Yankton, supra* note 8 and *United States v. Angcog, 190 F. Supp. 696 (D. Guam 1961).*

(n4)Footnote 10. *See Harris v. Municipality of St. Thomas and St. John, 111 F. Supp. 63,* (D. V.I. 1953), *aff'd, 212 F.2d 323 (1954)* (government of the territories belongs primarily to Congress and secondarily to such agencies as Congress may establish for that purpose and Congress has the power to organize different territories differently and to grant to each such powers as it deems proper).

(n5)Footnote 11. Traditionally, each local government has the traditional republican format with three distinct branches of government: the executive, legislative and judicial. Generally each local legislature may enact purely local laws. Examples of local legislation have included the right to dispose of property at death in *Warburton v. White, 176 U.S. 484 (1900);* the right to enact property controls in *Water Isle Hotel & Beach Club, Ltd. v. Kon Tiki St. Thomas, Inc., 795 F.2d 325 (3d Cir. 1986);* or restrictions on the corporate ownership of land as in *Puerto Rico v. Rubert Hermanos, Inc. 309 U.S. 543 (1940). See* in addition the discussions under each territory. Nonetheless, Congress may retain the right to annul such legislation. *See* note 8, *supra*. *See also Guam v. Olsen, 431 U.S. 195 (1977)* (Supreme Court invalidated a Guam legislative enactment establishing a Supreme Court in Guam noting that absent express congressional authorization, a territorial legislature may not foreclose federal appellate review of local decisions). Perhaps there is some deference given in Puerto Rico as to local law. *See Fornaris v. Ridge Tool Co., 400 U.S. 41 (1970).*

(n6)Footnote 12. *See* among other authors on this subject Stanley K. Laughlin Jr., The Burger Court and The United States Territories, *36 U. Fla. L. Rev. 755 (1984);* Liebowitz, *supra* n. 3; Elizabeth A. McKibben, The Political Relationship Between the United States and Pacific Island Entities: The Path to Self-Government in the Northern

Mariana Islands, Palau, and Guam, *31 Harv. Int'l L.J. 257 (1990);* The Northwest Ordinance and the Principle of Territorial Evolution, The American Territorial System (John Porter Bloom, ed. 1973 Athens, Ohio University Press).

(n7)Footnote 13. Northwest Territory Ordinance of 1787, art V, full text cited in Act of August 7, 1789, ch 8, *1 Stat. 50.* This evolutionary process justified the extensive Congressional authority over the territories. *See O'Donoghue v. United States, 289 U.S. 516, 537 (1933)* (Congressionally created territorial government was necessarily limited to the "period of pupilage").

(n8)Footnote 14. The sole legal requirement is that no new state is to be admitted without the consent of a state from which it is carved if applicable. *See* U.S. Const. art. IV, § 3, ch 1.

(n9)Footnote 15. *See* Northwest Ordinance, *supra* note 13.

(n10)Footnote 16. Hawaii and Alaska are the exceptions to the non-contiguous lands. The Philippines were granted independence. *See* note 5 *supra*. The fear of the consequences of annexing such distant ocean communities of a different origin, habit and language from those of the continental people led Justice White to create the theory of territorial incorporation in *Downes v. Bidwell* , note 8, *supra* which in turn created territories that were or were not destined for eventual admission to statement. *See Balzac v. Porto Rico, 258 U.S. 298 (1922). See* § 56.03 *infra* regarding the Insular Cases of which these are two of the more prominent cases. Given the small size of most of the territories, especially when coupled with unique indigenous cultures and the use of a language other than English, it is doubtful whether statehood can be achieved or is even desired. *See also* § 56.09 *infra*.

(n11)Footnote 17. A good discussion regarding the five territories may be found in the Report of the Chairman, Committee on Resources, House of Representatives by Barry R. Berick, 1997 Federal Documents Clearing House, Inc. GA Reports, November 10, 1997 including a notation that though the Department of the Interior deals with the federal administration for CNMI, Guam, Virgin Islands and American Samoa; however, Puerto Rico is treated as if it were a state and is referred to the Office of the President. Information regarding the territories and the Department of the Interior may be found at *www.doi.gov* The Department of the Interior has the right to represent the territories before the executive and legislative branches. The Office of Territorial and International Affairs (OTIA) is now headed by an Assistant Secretary. At one time, the Department of the Navy had such responsibility.

(n12)Footnote 18. The Committee on Interior and Insular Affairs Committee was renamed the Committee on Natural Resources. See 103 H.R. REP. No. 779, Correction of Committee Names in U.S. Code, 103rd Cong., 2nd Sess., October 3, 1994. Typically, there is an Omnibus Territories bill each year.

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CHAPTER 56 TERRITORIES AND POSSESSIONS

7-56 Thompson on Real Property, Thomas Editions § 56.03

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§ 56.03 The Insular Cases.

The Insular Cases are a series of cases decided by the United States Supreme Court between 1901 and 1922 in which the role of the territories was discussed and the basis set for the current American territorial system, especially with regard to those offshore territories acquired after the Spanish-American War of 1898. The cases, in turn, follow the recommendations in a series of Harvard Law Review articles concerning the proper role of the territories. n19

In the cases heard during the 1900 term of the Court, n20 the most important of which was Downes v. Bidwell, n21 the Court began to make distinctions among the territories. In *Downes*, the U.S. Collector of Customs attempted to collect duties on trade between Puerto Rico (or Porto Rico as it was then known) and the United States, pursuant to the Foraker Act, on the basis that Puerto Rico was a foreign country. Could territorial tariffs differ from tariffs on the States? If the territory were the same as a state, the tariffs would have to be the same under the Uniformity Clause. The majority held that Congress had authority over the territories and that the Constitution applied to the territories only when Congress specifically so provided and then only to the extent indicated except as to personal rights protected by the Constitution. As a result, the Uniformity Clause of the Constitution was held not to apply and the Foraker Act was upheld.

Justice White's concurring opinion in *Downes*, however, is still applied to territorial questions and established the distinction between incorporated territories and unincorporated territories. n22 Justice White noted that though the Constitution might be applicable everywhere, its application was required only when a territory was incorporated as part of the United States. An unincorporated territory, however, was not such an "integral" part of the United States and thus the Constitution did not automatically so apply. The central issue, therefore, according to Justice White, was whether Puerto Rico, under the Treaty of Paris, n23 had become an incorporated or unincorporated territory. Justice White determined that the Treaty of Paris did not provide for incorporation, but had left that to Congress to decide, and since Congress had not so acted, Puerto Rico was an unincorporated territory. n24

Other territorial cases followed, n25 with the distinction drawn by Justice White fully accepted in Balzac v. Porto Rico. n26 In *Balzac*, the Court held that if a territory were an incorporated territory, then the territory was a likely candidate for eventual statehood and all constitutional rights applied. Nonetheless, if the territory were an unincorporated territory, then only those provisions or rights which were fundamental of the Constitution would apply. In Puerto Rico, as an unincorporated territory, only fundamental rights were required and the right to a jury trial was not such a fundamental

right. The Court reasoned it would be unjust to force the United States legal system on a territory which already had its own system. n27 An incorporated territory such as Alaska, however, was entitled to all Constitutional provisions, including the right to a jury trial. n28

The five current territories of the United States are all considered unincorporated territories. As such, many of the cases have dealt with whether a particular issue is a "fundamental" right which must be applied, or not. n29 Although the label of unincorporated is still widely used regarding the territories, other approaches have been suggested. Thus, in King v. Morton, n30 the D.C. Circuit Court noted that all safeguards of individual rights must apply except those for which implementations were "impractical or anomalous." n31

A final result of the Insular cases with their distinctions between incorporation and unincorporation is that unincorporated territories are viewed as ineligible for statehood. n32

COMPUTER-ASSISTED RESEARCH

LEXIS: insular w/1 cases w/30 territor!

FOOTNOTES:
(n1)Footnote 19. *See also* the discussion concerning these cases in the article by Gabriel A. Terrasa, The United States, Puerto Rico, and The Territorial Incorporation Doctrine: Reaching A Century of Constitutional Authoritarianism, *31 J. Marshall L. Rev. 55 (1997);* Roman, Ediberto, "The Alien-Citizen Paradox and Other Consequences of U.S. Colonialism," Fla. St. U.L. 25 (1998) 1 in which the author urges that the insular cases be overruled. A discussion of these cases may be found in the article by Monge, Jose Trias, Articulos: Plenary Power and the Principle of Liberty: An Alternative View of The Political Condition of Puerto Rico, Rev. Jur. U.P.R. 68 (1999) 1. *See also* the article by Levinson, Sanford, "Symposium: The Canon(s) of Constitutional Law: Why the Canon Should be Expanded to include the Insular Cases and the Saga of American Expansionism," Const. Commentary, 17 (Summer 2000) 241. The author notes that the material for the essay will appear in a forthcoming book from Duke University Press, by Burnett, Christina Duffy and Marshall, Burke, etc., Foreign in a Domestic Sense: Puerto Rico, American Expansion and the Constitution. The Insular Cases continue to be discussed. *See* the article by Soltero, Carlos R., "The Supreme Court Should Overrule the Territorial Incorporation Doctrine and End One Hundred Years of Judicially Condoned Colonialism," *22 Chicano-Latino L Rev. (Spring 2001) 1.* They also were discussed in the article by Hall, Daniel E., "Curfews, Culture, and Custom in American Samoa: An Analytical Map for Applying the U.S. Constitution to U.S. Territories," *2 Asian-Pacific L & Pol'y J. (Winter 2001) 69.* These cases again were reviewed in the Comment by Jose D. Roman, "Trying To Fit An Oval Shaped Island Into A Square Constitution: Arguments for Puerto Rican Statehood," *29 Fordham Urb. L. J. (2002) 1681* who concludes first that the only complete solution for citizens of Puerto Rico to vote in presidential elections is to become the fifty-first state and second that it would be difficult to overturn the Insular cases. The effects of the insular cases also were discussed in the Comment by Gutierrez, Hannah M.T., "Guam's Future Political Status: An Argument for Free Association with U.S. Citizenship," Asian-Pacific L & Pol'y J. 4 (February 2003) 5. *See also* the Student Note by Windsor, Jr., Pedro Juan "A Cry for Freedom: Boriken (Puerto Rico) & Indigenous Nations in America," Gender Race & Just. 7 (Fall, 2003) 439. The application of the principals of the Insular Cases was suggested regarding the constitutional status of the Guantanamo Bay Naval Base in Cuba in an article by Gerald L. Newman, Closing the Guantanamo Loophole, *50 Loy. L. Rev. 1 (2004). See, e.g.*, C. C. Langdell, The Status of Our New Territories, *12 Harv. L. Rev. 365 (1899)* (advocating a narrow view of the Constitution and that Congressional limitations applied only to States); Carmen F. Randolph, Constitutional Aspects of Annexation, *12 Harv. L. Rev. 291 (1898)* (advocating a broad construction with statehood in the future); Abbot Lawrence Lowell, The Status of Our New Possessions-A Third View, *13 Harv. L. Rev. 155 (1899)* (advocating territorial incorporation).

(n2)Footnote 20. The other cases include *De Lima v. Bidwell, 182 U.S. 1 (1901)* (Puerto Rico was not a foreign country and thus import duties levied on sugar were illegal); *Goetze v. United States, 182 U.S. 221 (1901)* (Hawaii and Puerto Rico were not foreign countries within the meaning of the tariff law); *Dooley v. United States, 182 U.S. 222*

(1901) (military authority to establish duties ceased with ratification of treaty ceding Puerto Rico to the United States); *Armstrong v. United States, 182 U.S. 243 (1901)* (post-treaty duties recoverable under Dooley); *Huus v. New York & Porto Rico S.S. Co., 182 U.S. 392 (1901)* (steamship operating between New York and Puerto Rico held not engaged in foreign trade). These cases were cited extensively in *United States v. Verdugo-Urquirdez, 494 U.S. 259 (1990).*

(n3)Footnote 21. *See* note 8 *supra*. (noting that the Fourth Amendment does not apply to searches by U.S. agents of property owned by nonresident aliens located outside the United States).

(n4)Footnote 22. *But see Reid v. Covert, 354 U.S. 1 (1957).*

(n5)Footnote 23. *See* note 5, *supra* regarding the Treaty of Paris which ended the Spanish-American War of 1898.

(n6)Footnote 24. In contrast, according to Justice White, were Louisiana and Florida which were territories which had been formally incorporated into the United States. *Downes, supra* note 16, at p. 311.

(n7)Footnote 25. Other significant cases included Dorr v. United States, note 8 *supra* (jury trial provision of Constitution held inapplicable in the Philippines) though held applicable in Alaska in *Rassmussen v. United States, 197 U.S. 516 (1905). See also Hawaii v. Mankichi, 190 U.S. 197 (1903)* (grand and petit jury inapplicable in Hawaii).

(n8)Footnote 26. *See* note 16, *supra*.

(n9)Footnote 27. Balzac, *supra* note 16, at 309.

(n10)Footnote 28. *See Rassmussen, supra,* note 25 which held that Alaska, having been incorporated into the United States by the treaty under which it was acquired and by subsequent congressional legislation, required a jury trial. Hawaii was incorporated by statute. *See* Act of April 30, 1900, *31 Stat. 141.*

(n11)Footnote 29. The following were held to not apply in the unincorporated territories: the right to an indictment by a grand jury under the Fifth Amendment in *Ocampo v. United States, 234 U.S. 91 (1914)* and Hawaii v. Mankichi, note 26, *supra*; a trial by jury in criminal cases under the Sixth Amendment in Balzac *supra*, note 16; Dorr, note 7 *supra* and in *Porto Rico v. Tapia, 245 U.S. 639 (1918). See also* Downes v. Bidwell, note 8 *supra*, at 277 to the effect that the First Amendment protection against bills of attainder or *ex post facto* law may not apply; *Dowdell v. United States, 221 U.S. 325 (1911)* (Sixth Amendment right to confront adverse witnesses).

On the other hand, the following have been held so fundamental as to apply to unincorporated territories. *See, e.g., Turney v. United States, 115 F. Supp. 457 (Ct. Cl. 1953)* (Fifth Amendment right to just compensation); *Feliciano v. Barcelo, 497 F. Supp. 14 (D.C.P.R. 1979)* (Eighth Amendment rights against cruel and unusual punishment); or *Fernandez v. Chardon, 681 F.2d 42 (1st Cir. 1982)* (right to a writ of habeas corpus).

Whether the Fourteenth Amendment Due Process Clause applies is not settled. *See Commonwealth of N. Mariana Islands v. Atalig, 723 F.2d 682 (9th Cir. 1984)* (held that trial by jury was not a fundamental right which was required).

(n12)Footnote 30. *520 F.2d 1140 (D.C. Cir. 1975) but compare with Commonwealth of the N. Mariana Islands v. Atalig, 723 F.2d 682 (9th Cir. 1984).*

(n13)Footnote 31. *See also Reid v. Covert, supra* note 22. This results in a balancing test requiring the government to demonstrate that not to extend the right would be impractical and anomalous in a given setting.

(n14)Footnote 32. *See* note 16, *supra. See also* Balzac, *supra* note 16, at 311 or Downes *supra* note 8, at 282. Incorporation has been bestowed by Congress only on those territories destined for statehood. *See Smith v. Government of Virgin Islands, 375 F.2d 714 (3d Cir. 1967).*

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CHAPTER 56 TERRITORIES AND POSSESSIONS

7-56 Thompson on Real Property, Thomas Editions § 56.04

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§ 56.04 Incorporated versus Unincorporated Status.

Territories may be either incorporated or unincorporated. n33 As an incorporated territory, all provisions of the Constitution apply and the territory is awaiting statehood. n34

In an unincorporated territory only the "fundamental rights of the Constitution" apply. n35 It is not anticipated that they will become states. n36 Although the five current territories are unincorporated territories or Commonwealths, and are subject to broad Congressional and executive control, n37 each also has substantial powers of self-government. Each territory has its own legislature to enact local laws, n38 each elects its own governor, and typically each has its own Constitution. n39

COMPUTER-ASSISTED RESEARCH

LEXIS: incorporated or unincorporated w/15 territor!

FOOTNOTES:
(n1)Footnote 33. *See* discussion in § 56.03, *supra* regarding the Insular Cases. Incorporation may occur either by congressional approval of the treaty of cession which provides for eventual annexation as with Alaska (*See* Rassmussen v. United States, *supra*, note 25) or by a separate congressional act as with the Act of April 30, 1900, *31 Stat. 141* annexing the Hawaiian Islands by statue. The five territories of concern in this chapter are all unincorporated. *See* in general Gerald L. Newman, Whose Constitution? *100 Yale L.J. 909 (1991);* Stanley K. Laughlin, Jr. The Application of the Constitution in United States Territories: America Samoa, A Case Study, *2 U. Haw. L. Rev. 337* (1980-81) and Laughlin, Jr. *36 U. Fla. L. Rev. 755, supra*, n. 12.

(n2)Footnote 34. *See Rassmussen v. United States, supra* note 25. *See also* § 56.03, *supra*. All incorporated territories in fact have become states. *See* Smith v. Government of Virgin Islands, *supra*, note 32 and Balzac v. Porto Rico, *supra*, note 16.

(n3)Footnote 35. *See* note 29, *supra*.

(n4)Footnote 36. *See* dissent of Justice Harlan in Downes v. Bidwell, *supra* note 8, at 380, to the effect that:

> The idea that this country may acquire territories anywhere upon the earth, by conquest or treaty, and hold them as mere colonies or provinces - the people inhabiting them to enjoy only such rights as Congress chooses to accord to them - is wholly inconsistent with the spirit and genius as well as with the words of the Constitution.

See also § 56.09 *infra* regarding the future of the territories. Although plebiscites have been held in the various territories, it seems likely that only in Puerto Rico may statehood be a realistic possibility.

(n5)Footnote 37. *See* note 10 *supra. Note also Asiatic Petr. Co. v. Insular Collector of Customs, 297 U.S. 666 (1936)* (territorial legislature has all legislative power except as limited by the U.S. Constitution or the Organic Act or other laws of Congress).

(n6)Footnote 38. *48 U.S.C. § 1681* (regarding Northern Mariana Islands) is now *48 U.S.C. § 1801 et. seq.* A good discussion regarding the court systems in each of the territories may be found in an article by Peter Nicolas, "American-Style Justice in No Man's Land," *36 Ga. L. Rev. (Summer 2002) 895. See, e.g., 48 U.S.C. § 821* (Legislature of Puerto Rico); *48 U.S.C. § 1423* (Legislature of Guam); *48 U.S.C. § 1571* (Virgin Islands). Section 201 of the Covenant to Establish a Commonwealth of the Northern Mariana Islands in Political Union with the United States of America, Act of March 24, 1976, Pub. L. 94-241, *90 Stat. 263 as amended and reprinted at 48 U.S.C. § 1681* (hereinafter "Covenant") provided for a Constitutional Convention to be held. The Constitution was ratified by the people of the Northern Mariana Islands in March of 1977 and was approved by President Carter on October 24, 1977, which Constitution provided for a Local Legislature. The Constitution became effective on January 8, 1978. Proclamation No. 4594, *42 Fed. Reg. 56,593 (1977) reprinted in 48 U.S.C. § 1681.* American Samoa, as an unorganized territory, is under the supervision of the Secretary of the Interior; however, under their Constitution, the Samoans do elect their own legislature, though the laws enacted thereby must be submitted to the Secretary for approval. *See* § 56.12, *infra*.

(n7)Footnote 39. The Act authorizing the establishment of constitutions for the Virgin Islands and Guam is found in Public Law 94-584, 94th Congress *90 Stat. 2899 (1976), amended by* § 51 Act of Dec. 24, 1981, P.L. 96-597 *(94 Stat. 3479)* and *codified at 48 U.S.C. § 1421.* Although all are granted the authority to enact a Constitution, not all have. For example, both Guam and the Virgin Islands do not have their own Constitutions. In Guam, a draft Constitution was presented to the people in 1979 but failed to attain the necessary vote. Various reasons were attributed to its failure ranging from that it was not sufficiently pro-Guamanian to pro-American to plain confusion. On November 3, 1981 the people of the Virgin Islands rejected the proposed Fourth Constitution which had been approved by Pub. L. No. 97-21 for submission to them. One result of this defeat may have been the changes in 1984 to the Organic Act to modernize the judicial system and to make the territory more autonomous. *See* Act of Oct 5, 1984, Pub. L. No. 98-454, *98 Stat. 1732 (1984).*

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CHAPTER 56 TERRITORIES AND POSSESSIONS

7-56 Thompson on Real Property, Thomas Editions § 56.05

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§ 56.05 Organized versus Unorganized Status.

A territory is organized when Congress has enacted an Organic Act for it. n40 The Organic Acts, enacted by Congress and not by the local legislatures, create the local legislatures and define their authority. Usually, the Acts permit the inhabitants to become United States citizens, provide for an elected governor and allow for an elected delegate to represent the territory in congressional committees. n41 Of course, the Acts may be amended by Congress. Congress may still enact local legislation, and the President may still issue broad executive orders. n42

Guam n43 and the Virgin Islands n44 are both organized, unincorporated territories. Puerto Rico and the Northern Mariana Islands, though Commonwealths, are treated as organized, unincorporated territories. n45 American Samoa, though an unincorporated territory, is unorganized. n46 Because of this status, the Secretary of the Interior has wide authority over all aspects of the Samoan government. n47

COMPUTER-ASSISTED RESEAERCH

LEXIS: organiz! or unorganiz! w/15 territor!

FOOTNOTES:
(n1)Footnote 40. The territory is organized when a civil government has been established by an organic act of congress. *See United States v. Standard Oil Co., 404 U.S. 558, reh'g denied 405 U.S. 969 (1972).* Typically, the territories were initially under the authority of the military. Today, the administration of all territories has been transferred to the Department of the Interior. *See, e.g., United States v. Borja, 191 F. Supp. 463 (D. Guam 1961).*

(n2)Footnote 41. *See* § 56.08, *infra*.

(n3)Footnote 42. *See* National Bank v. County of Yankton, *supra* note 8, at 132-33 where the court notes that the Organic Law of a territory is binding on it, Congress still is supreme and has the inherent right to amend the Acts. The Presidential powers may be found in U.S. Const., art. II, § 2.

(n4)Footnote 43. *See* Organic Act of Guam, *48 U.S.C. §§ 1421*-28. Note in particular *48 U.S.C. § 1421a* defining Guam as an unincorporated territory of the United States whose capital is Agana. Guam has an elected governor,

unicameral legislature, elected representative in Congress and a Bill of Rights. *See generally* § 56.17, *infra*.

(n5)Footnote 44. *See 48 U.S.C. § 1541 et seq. See also Government of Virgin Islands v. Bodle, 427 F.2d 521 (3d Cir. 1970).* In general, *see* § 54.19, *infra*. The Virgin Islands have an elected governor, elected unicameral legislature, elected representative to Congress and a bill of rights.

(n6)Footnote 45. *See* § 56.06, *infra*; Andorra Bruno & Garrine P. Laney, U.S. Insular Areas and Their Political Development, Congressional Research Report Oct. 1, 1996 (explores political development of the five territories). Prior to its recognition as a commonwealth by Congress on July 3, 1952, Puerto Rico was an organized unincorporated territory. *See In re Brown, 439 F.2d 47 (3d Cir. 1971). But see Cosentino v. International Longshoremen's Ass'n, Dist. Council of Ports of P.R. 126 F. Supp. 420 (D. P.R. 1954)* (after creation of the Commonwealth, Congress can no longer amend the Puerto Rican Constitution and both parties must consent to amendment of such Acts as Puerto Rico now enjoys self-government).

(n7)Footnote 46. *See Meaamaille v. American Samoa, 550 F. Supp. 1227, 1231 (D. Haw. 1982).*

(n8)Footnote 47. The authority was given by Exec. Order No. 10264, June 29, 1951, *16 F.R. 6419, reprinted in 48 U.S.C. § 1662.* American Samoa is governed under Act of February 20, 1929, ch. 281, *45 Stat. 1253*, codified at *48 U.S.C. § 1661*(c) which provides that until Congress provides for the government of the islands, all civil, judicial and military power shall be vested in such person as directed by the President.

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CHAPTER 56 TERRITORIES AND POSSESSIONS

7-56 Thompson on Real Property, Thomas Editions § 56.06

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§ 56.06 Commonwealth Status.

Currently, Puerto Rico n48 and The Northern Mariana Islands n49 are both Commonwealths rather than territories. Guam has initiated procedures to have commonwealth status considered. n50 Meanwhile, the Virgin Islands are planning a plebescite to consider their status, including commonwealth, and many in Puerto Rico prefer statehood or independence to commonwealth. n51

The difference in status between a Commonwealth and a territory is murky. n52 Certainly it can be noted that with a Commonwealth both the people of the affected area and Congress gave prior approval thereto. n53 Commonwealth status may provide additional local autonomy and may restrict federal power in a manner similar to the states, and in point of fact both commonwealth and territorial status do provide for additional local autonomy with less federal supervisory authority. The federal government has continuing responsibility for national security and foreign affairs. n54

In practice, Congress and the executive branch often continue to treat the Commonwealths as territories. n55 The courts likewise, though often noting the special status to be accorded a Commonwealth, often do not in fact accord them different treatment. n56 To date, complaints regarding such treatment have not been addressed effectively. n57

COMPUTER-ASSISTED RESEARCH

LEXIS: commonwealth w/15 status w/50 territor!

FOOTNOTES:
(n1)Footnote 48. Act of July 3, 1950, ch. 446, *64 Stat. 319*, Pub. Law 600 authorized Puerto Rico to draft its own Constitution for approval by the people of Puerto Rico and by the Congress. After the Puerto Rican people approved the Constitution on March 3, 1952, it was amended and approved by Congress by Joint Resolution on July 3, 1952, c. 567, *66 Stat. 327*, and proclaimed by the Governor of Puerto Rico to be in force and effect on July 25, 1952. *See also 48 U.S.C. § 731;* § 56.12, *infra*. On November 14, 1993, the residents of Puerto Rico voted in a nonbinding plebescite regarding its future relationship with the United States. The "enhanced" Commonwealth option received 48.6% of the votes, Statehood received 46.3% of the vote and Independence 4.4% of the votes. Reported by Larry Rohter, Puerto

Rico Votes to Retain Status as Commonwealth, N.Y. Times, No. 15, 1993 at A1. *See also* Dorian A. Shaw, The Status of Puerto Rico Revisited: Does the Current U.S.-Puerto Rico Relationship Uphold International Law?, *17 Fordham Int'l. L.J. 1006 (1994).* According to a 1997 poll, a majority now support commonwealth status (45%, with 36% for Statehood and 4% for independence). *See* 1997 Information Access Company IAC (SM) Newsletter Database, Caribbean Update, Inc., Oct. 1, 1997. ISSN: 8756-324X. Bill Number H.R. 4751 was introduced on June 26, 2000 to the 106th Congress 2nd Session which would recognize entry of the Commonwealth of Puerto Rico into permanent union with the United States as a nation.

(n2)Footnote 49. *See* The Covenant to Establish a Commonwealth of the Northern Marian Islands in Political Union with the United States of America, Act of March 24, 1976, Pub. L. 94-241, *90 Stat. 263* as *amended and reprinted* at *48 U.S.C. § 1681* (hereinafter referred to as The Covenant). The Covenant was approved by the District Legislature on February 20, 1975 and by 78.8 per centrum of the people of the Northern Mariana Islands voting in a plebiscite held on June 17, 1975. The Covenant was transmitted by President Ford on July 1, 1975 to Congress. *See* H.R. Doc. No. 2071, 94th Cong. 1st Sess. (1975) *reprinted in* S. Rep. No. 433, 94th Cong. 1st Sess. 100 (1975). President Ford signed H.R. J. Res. 549 on March 24, 1976.

(n3)Footnote 50. The Guam Legislature established a Commission on Self-Determination for Guam to ascertain the type of political relationship the populace desired with the United States. A plebiscite was held in 1982 to determine if statehood, commonwealth, incorporation, free association, independence or maintenance of the status quo was desired. Commonwealth and statehood were the preferred choices. As a result, a Draft Commonwealth Act was presented to the Guam public in August of 1987. Most provisions were approved except for those articles concerning Chamorro self-determination and immigration. The Commission reworded the failed sections and resubmitted the Draft which was approved. This draft Commonwealth bill was first introduced in Congress in the Spring of 1988 as H.R. 98 (symbolic of the 1898 Treaty of Paris which ceded Guam to the United States), which bill has been resubmitted each session. Concerns of the United States include the reservation of privileges for the Chamorros and the requirement for Guam consent before federal laws will apply to Guam. In addition, unlike the Northern Mariana Islands who first sought Congressional approval to discuss status and jointly negotiated the Covenant, Guam voted on the Commonwealth draft first and then presented it as a fait accompli to Congress. A call for commonwealth status was included in the Testimony of The Honorable Xavier Becerra before the House Resources Committee, 1997 Federal Information Systems Corrain Federal News Service, October 29, 1997. A discussion of Guam's continuing desire for commonwealth status is discussed in an article by Lansing, Paul and Hipolito, Peter, "Guam's Quest for Commonwealth Status," Asian Pacific American Law Journal 5 (1998) 1. The article addresses the need for commonwealth status for Guam's economic survival and discusses key elements of the Guam Commonwealth Act. The article also suggests that Guam's continued insistence on mutual consent and self-determination without compromise will prevent enactment of the bill.

(n4)Footnote 51. *See* § 56.09, *infra*. Once again, Puerto Rico had the opportunity to vote pursuant to H.R. 856, 105th Congress (1997). The vote, taken in December of 1998, concluded with the following vote tallies according to The Record, Bergen Record Corp. on December 18, 1998: Commonwealth: 1%; Free Association: 3%; Independence: 2.5%; Statehood: 46.5%; None of the Above 50.2%. As reported in an article by Sheila I. Velez Martinez, Copyright 1999 Interpress Service on February 1, 1999, the Puerto Rican Supreme Court declared illegal an advertisement, published on December 24, 1998 which ignored the "none of the above" vote. Commonwealth supporters disapproved of the ballot wording and thus urged the "none of the above" vote. *See also* Muniz, H. Michael, "Did the U.S. Puerto Rico Political Status Act Establish a Blueprint Leaving Puerto Rico on the Verge of Statehood?" D.C. L. J. Int'l L. & Prac. 6 (1997) 435; Hermilla, Nelson D., "Puerto *Rico 1898-1998:* The Institutionalization of a Second Class Citizenship," Dick. J. Int'l L. Vol. 16 (1998) 275. *See also* Jose Trias Monge, Articulos: Plenary Power and the Principal of Liberty: An Alternative View of The Political Condition of Puerto Rico, *68 Rev. Jur. U.P.R. 1 (1999)* and Manuel Rodriguez-Orellana, Human Rights Talk ... and Self-Determination, Too!, Notre Dame L. Rev. 73 (May, 1998).

(n5)Footnote 52. The term Commonwealth in this context is different than the Commonwealth of Kentucky or Virginia. *See also Smith v. Pangilinan, 651 F.2d 1320 (9th Cir. 1981)* (noting that the Commonwealth of the Northern

Mariana Islands is no more a foreign nation than is the Commonwealth of Puerto Rico).

(n6)Footnote 53. In Puerto Rico, it has been termed a compact. *See 48 U.S.C. § 731a. See also Mora v. Torres, 113 F. Supp. 309, 313 (D. P.R. 1953) aff'd sub nom. Mora v. Mejias, 206 F.2d 377, 382 (1st Cir. 1953).* As a compact, the consent of both the United States and Puerto Rico should be required to alter the relationship and thus the district court held that Puerto Rico was bound by the Fifth Amendment as part of the compact. On appeal, the First Circuit affirmed the lower court; however, the appeals court devoted little discussion to the concept of the compact. *See also* dicta in *Examining Bd. of Eng'rs, Archs., & Surveyors v. Flores de Otero, 426 U.S. 572, 596 (1976)* (... without parallel in history and governed by compact requiring mutual consent"). *See also United States v. Quinones, 758 F.2d 40 (1st Cir. 1985)* (creation of a Commonwealth granted Puerto Rico authority over its own local affairs; however, Congress maintained similar powers over Puerto Rico as it possess over federal states).

In the Northern Mariana Islands, the relationship has been viewed as a Covenant and Articles I, II, III and Sec. 501 and 805 may be modified only with the consent of both the Islands and Congress. *See 48 U.S.C. § 1801. See also A & E Pac. Constr. Co. v. Saipan Stevedore, 888 F.2d 68, 71 (9th Cir. 1989).*

The laws creating the Commonwealth, as with state enabling acts, were elaborate in procedure and substance. The approval of both parties were required. *See Figueroa v. Puerto Rico, 232 F.2d 615, 620 (1st Cir. 1956).*

(n7)Footnote 54. *See* for example § 104 of the Covenant with the Northern Mariana Islands which reads: "The United States will have complete responsibility for and authority with respect to matters relating to foreign affairs and defense affecting the Northern Mariana Islands."

(n8)Footnote 55. For example, Congress has unilaterally amended the Puerto Rican Federal Relations Act found in Chapter 4 of the U.S.C. The legislative history to Pub. Law 600 authorizing the drafting of the Commonwealth Constitution indicate that neither Congress nor the Executive felt that Commonwealth status would change their authority over Puerto Rico. *See, e.g.,* H.R. Rep. No. 2275, 81st Cong., 2d Sess. (1950), *reprinted in* U.S.C.C.A.N. 2681 "It is important that the nature and general scope of § 3336 be made absolutely clear. The bill under consideration would not change Puerto Rico's fundamental political, social and economic relationship to the United States." The executive branch shared that view. *See, e.g.,* H.R. Rep. No. 2275, 81st Cong., 2d Sess. 5-6 (1950), *reprinted in* U.S.C.C.A.N. 2681, 2684-2685 (letter of Secretary of the Interior Oscar L. Chapman to Senator Joseph C. O'Mahoney Chairman of the Senate Committee on Interior and Insular Affairs: it is "fundamental that the Constitution of the United States gives the Congress complete control and nothing in the Puerto constitution could affect or amend or alter that right." For a more complete discussion *see* Liebowitz, *supra* n. 3, at pp. 165 *et seq.*

See also Morene Rios v. United States, 256 F.2d 68 (1st Cir. 1958) (term territory in federal statue probably includes Commonwealth as well); *Caceres v. San Juan Barge Co., 387 F. Supp. 221 (D.P.R. 1974)* (as a Commonwealth, the government of Puerto Rico has such powers as Congress from time to time has seen fit to give it the broad power of Congress to legislate for a national territory). *See Guerrero v. Clinton, 156 F.3d 1190* (9th Cir., 1998) where the court held that mandamus relief was not appropriate when a legislator from Guam sued the Director of Insular Affairs on behalf of Guam, CNMI and Hawaii for the failure to issue the annual report to Congress as required by the Compact of Free Association Act of 1985. *See also* the Comment by Jose D. Roman, "Trying to Fit An Oval Shaped Island Into A Square Constitution: Arguments for Puerto Rican Statehood," *29 Fordham Urb. L. J. (2002) 1681, 1693* that Commonwealth Status has had no effect of its treatment under the Constitution.

(n9)Footnote 56. *See, e.g., Examining Bd. of Eng'rs, Archs. and Surveyors v. Flores de Otero, supra,* note 54 (noting that the Commonwealth was a status different from a territory, but then used traditional standards to declare unconstitutional a local government statute) or Commonwealth of the N. Mariana Islands v. Atalig, note 29, *supra* noting that though the Islands enjoy a right of self government with mutual consent which is unparalleled with territories, the court then held that trial by jury did not apply by using the traditional unincorporated doctrine with fundamental rights theory rather than the Covenant which expressly covered it).

Often Puerto Rico is treated as if it were a state; however, at other times it is treated differently. *See, e.g., Posadas de Puerto Rico Assocs. v. Tourism Co. of P.R., 478 U.S. 328 (1986)* (Commonwealth dictates application of the same rule as one of the fifty states); *Calero-Toledo v. Pearson Yacht Leasing Co., 416 U.S. 663 (1974)* (requiring a three-judge district court as with the states rather than only one as would be sufficient with a territory). *But see Harris v. Rosario, 446 U.S. 651, 651-652 (1980)* (Congress may treat Puerto Rico differently from the states so long as there is a rational basis for its actions); *Sanchez v. United States, 376 F. Supp. 239 (D.P.R. 1974)* (Puerto Rico is a duly constituted political entity but is not a state as are the other fifty states); *Nestle Prods., Inc. v. United States, 310 F. Supp. 792 (Cust. Ct. 3d Div. 1970)* (Commonwealth status was at most regulatory and did not change the fundamental political relationship to the United States). *See also* § 56.08(c), *infra*. Puerto Rico is treated as a state for purposes of the eleventh amendment. *See Puerto Rico Aqueduct & Sewer Author. v. Metcalf & Eddy, Inc., 113 S. Ct. 684 (1993); New Progressive Party v. Hernandez, 779 F. Supp. 646 (D.P.R. 1991).*

(n10)Footnote 57. Thus, many of the articles cited in the Bibliography advocate a need for the Congress to address the status of all the territories and especially what is meant by a Commonwealth. *See also Hillblom v. United States, 896 F.2d 426 (9th Cir. 1990)* where two registered voters of the Northern Marianas Islands sought an injunction to prevent the enactment or enforcement of laws which they felt violated § 103 of the Covenant. The court found that the three acts in question did not violate the Convent. Prior to filing the lawsuit, a Task Force of the Northern Marianas Islands had voiced concerns that the United States was continuing to administer the islands as if it were a territory, which concerns also were reported to the United Nations.

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CHAPTER 56 TERRITORIES AND POSSESSIONS

7-56 Thompson on Real Property, Thomas Editions § 56.07

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§ 56.07 The Trust Territories.

After the Second World War, the United States acquired the Trust Territory of the Pacific Islands (TTPI), or Micronesia, pursuant to a unique United Nations relationship. n58 Throughout the Trusteeship, sovereignty remained with the Micronesian entity. n59 The trusteeship of the United States ended as to the Northern Mariana Islands with the approval of the Covenant establishing the Commonwealth, n60 and the United Nations Trusteeship Council voted to end the United States administration of the other Trust territories when the Compacts of Free Association for them went into effect. n61

The United States entered into a Compact with The Freely Associated States of the Federal States of Micronesia (Kosrae, Pohnpei, Truck and Yap) and with the Republic of the Marshall Islands in 1986. n62 The Compact with The Republic of Palau, though executed by the United States and by Palau on January 10, 1986, n63 has not yet been approved by the people of Palau. The voters of Palau have given the requisite approval to the Compact except for the nuclear provisions which, under the Palau Constitution, required a ratification vote of 75%. In November of 1992, Palau amended its Constitution to require only 59% voter approval of the nuclear provisions as well. Until such time as the voters of Palau ratify the Compact, the United States will continue to administer the Trust Territory there. n64

A Compact, along with its subsidiary agreements, forms a unique international political relationship under which the Freely Associated States (the FAS) control their own internal affairs as well as their foreign relations; however, the United States provides a defense umbrella for them. In addition, in return for certain federal programs and funding, the United States military will have certain defined uses of the area for at least fifty years. Citizens of the FSM are not citizens of the United States, nor does the United States Constitution apply. Although it is a unique relationship, many have felt that the FAS is a good arrangement for the countries involved and may be preferable to either territorial or commonwealth status. n65

FOOTNOTES:
(n1)Footnote 58. *See* Trusteeship Agreement for the Former Japanese Mandated Islands, Approved by the Security Council on April 2, 1947, and entered into force on July 18, 1947, *61 Stat 397,* T.I.A.S. No. 1665, 8 U.N.T.S. 189. Approval by the United States was by an executive agreement approved by Congress. *See* H.R.J. Res. 233, 80th Cong., 1st Sess., 93 Cong. Rec. 8731 (1947), Exec. Order No. 9875, 3 C.F.R. 658. *See also 48 U.S.C. § 1681 et seq.* During the

forty years of trusteeship, the role of the United States was similar to though not equivalent with a territorial relationship. *See Gale v. Andrus, 643 F.2d 826 (D.C. Cir. 1980).*

(n2)Footnote 59. *See United States v. Covington, 783 F.2d 1052 (9th Cir. Haw. 1985).*

(n3)Footnote 60. Although the Commonwealth status was recognized in 1975, it was not fully implemented until the United Nations Trusteeship Council voted to end the United States administration of the Trust Territories and the President of the United States recognized them by Proclamation 5564 on November 3, 1986, *51 Fed. Reg. 40,389 (1986)* (3 C.F.R. 146). *See Holmes v. Director of Revenue and Taxation, 827 F.2d 1243 (9th Cir. 1987). See also* note 61 *infra*.

(n4)Footnote 61. *See* Resolution 2183 in Report of the Trusteeship Council to the Security Council on the Trust Territory of the Pacific Islands, May 29, 1986. The President of the United States recognized them, as well as the Commonwealth of the Northern Mariana Islands, by Proclamation 5564 on November 3, 1986, *51 Fed. Reg. 40,389 (1986)* (3 C.F.R. 146) at which time the United States also notified the United Nations that the Trusteeship Agreement had now terminated as to FSM and the Marshall Islands. Security Council Document 5/18313, October 24, 1986. Some questions have been raised as to whether there can be termination solely by the United States to the Trusteeship Council. Technically, an argument also might be made that until Palau approves its Compact, all the members of the former trust territory remain under the supervision of the United States. As noted in note 58 *supra*, a delegation from the Northern Mariana Islands petitioned the United Nations Trusteeship Council for guarantees of internal self-government; however, the position of the United States was that the Trusteeship had now been terminated (to which the Islanders noted that only the U.N. Security Council should terminate the trusteeship and only when in fact the CNMI enjoyed self-government).

(n5)Footnote 62. *See* Pub. L. No. 99-239, Jan. 14, 1986, *99 Stat. 1770, reprinted as amended in 48 U.S.C. § 1682.* The people of FSM approved their Compact by a majority vote of 79% and the people of the Marshall Islands by a vote of 58%.

(n6)Footnote 63. *See* Pub. L. 99-658, Nov. 14, 1986, *100 Stat. 3672, reprinted at 48 U.S.C. § 1681*.

(n7)Footnote 64. Palau approved the compact on the eight referendum thereon on November 9, 1993, which was approved by the United States by Public Law 99-658 on Nov. 14, 1986, and Public Law 101-219 on Dec. 12, 1989. As of Oct. 1, 1994 the Trust Territory is no longer in effect. *See* Public Papers of the Presidents dated Sept. 17, 1994. Also reported by Warren Osmund in The Christian Science Monitor on Oct. 1, 1994 at page 7. *See also* the article by Keitner, Chimene I. and Reisman, W. Michael, "Free Association: The United States Experience" in Tex. Int'l L. J. 39 (Fall 2003) 1. It is felt that the change in voter threshold, as well as other economic facts may allow the Compact now to be ratified. *See* David Judson, Official Says Compact No Choice for Palau, Gannett News Service, March 31, 1993; Floyd Whaley, Palau May Reach Comprise with U.S., Reuters Limited, April 13, 1993. A vote may be held as early as July of 1993.

(n8)Footnote 65. *See* § 56.09 *infra*. In the Comment by Gutierrez, Hannah M. T., "Guam's Future Political Status: An Argument for Free Association with U.S. Citizenship," Asian-Pacific L. & Pol'y J. 4 (February 2003), the use of a freely associated status is proposed with the addition that citizenship be retained with the United States.

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CHAPTER 56 TERRITORIES AND POSSESSIONS

7-56 Thompson on Real Property, Thomas Editions § 56.08

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§ 56.08 Selected Consequences of Being a Territory.

[Go To Supp]

(a) Citizenship.

In all territories, other than American Samoa, United States citizenship has been granted to the inhabitants. n66 Although citizens, they are not eligible to vote for the President or Vice-President of the United States. n67 American Samoans are United States nationals rather than citizens. n68

COMPUTER-ASSISTED RESEARCH

LEXIS: territor! w/15 citizen!

(b) House of Representatives.

Puerto Rico sends an elected Resident Commissioner to the House of Representatives. n69 American Samoa, Guam and the Virgin Islands all send a delegate to the House of Representatives. n70 Only the Northern Mariana Islands are not so represented in the House of Representatives. n71 Until recently, these representatives, though they participated in the Committee work of the House and in particular the House Interior and Insular Affairs Committee and its Subcommittee on Territories, did not vote. In 1993, these delegates were given voting privileges in the House of Representatives when the Committee meets as a Committee of the whole; however, if their votes would be decisive a *de novo* vote on the House Floor is required. n72

COMPUTER-ASSISTED RESEARCH

LEXIS: representative! w/30 territor!

(c) Federal Programs.

The inhabitants of the various territories are, and have been, the beneficiaries of various federal social and economic programs. It is not unusual, however, for the territories to be singled out for special treatment, often to the detriment of

the territory. For example, in Califano v. Torres n73 the United States Supreme Court upheld a set-aside formula which restricted funds for the aged, blind and disabled in Puerto Rico under the SSI program. n74 Differing funding formulas are common as is total exclusion from a particular program. n75

COMPUTER-ASSISTED RESEARCH

LEXIS: territor! w/30 federal w/2 program!

(d) Selected Federal Laws.

In general, the laws of the United States apply to the territories, unless the territories are exempted. n76 Federal income taxes either do not apply or are paid to the treasury of the Territory. n77 With the exception of Puerto Rico, the territories are outside the customs area of the United States. n78 A territory may or may not be subject to such federal laws as the United States Immigration law n79 or the coastwise shipping laws. n80

COMPUTER-ASSISTED RESEARCH

LEXIS: territor! w/30 federal w/2 law!

FOOTNOTES:
(n1)Footnote 66. *See* § 301 of the Covenant for Northern Mariana Islands. A question remained as to children of marriages between a Trust Territory citizen and another non-U.S. national which was settled by defining a citizen of a Trust Territory as including a person born in the Trust Territory who has or had one parent born in the Trust Territory in Delona Cruz v. United States, 3 Commonw. Rptr. 108 (D.N. Mar. I. 1987).

Citizenship was not granted to Puerto Ricans until 1917 when it was given collectively under the Jones Act of March 2, 1917; c. 145, *39 Stat. 961. See 48 U.S.C. § 731.* It had been withheld under both the Treaty of Paris and the Foraker Act of 1900. Some felt that a grant of citizenship might imply that Puerto Rico was now an incorporated territory awaiting statehood.

Citizenship was granted the Virgin Islands in 1927 by Pub. L. 640, February 25, 1927, Ch. 192, 69th Congress, 2d Sess.

Citizenship was granted to Guam in 1950. *See* Act of June 27, 1952, c. 477, Title III, ch. 1, § 307, *66 Stat. 237* and codified at *8 U.S.C. § 1407. See* dePassalacqua, John L.A., "Voluntary Renunciation of United States Citizenship by Puerto Rican Nationals," 66 Re. Jr. U.P.R. 269 (1997). Persons born in the Commonwealth of the Northern Mariana Islands in 1982 and 1983 qualified as citizens of the *United States. Sabangan v. Powell, 375 F.3d 818 (9th Cir. 2004).*

(n2)Footnote 67. *See* Atty. Gen. of Guam on behalf of all U.S. Citizens Residing in *Guam, etc. v. United States, 738 F.2d 1017, 1019 (9th Cir. 1984)* (right to vote in presidential election is a function of state and not national citizenship); Sanchez v. United States, note 56 *supra*. *See De La Rosa v. United States, 32 F.3d 8 (1st Cir. 1994), cert. denied, Igarta v. United States 115 S. Ct. 1426 (1995),* which held that residents of Puerto Rico had no right under Article II of the Constitution to vote in presidential elections and that failure of the Uniformed and Overseas Citizens Absentee Voting Act to guarantee citizens moving to Puerto Rico the right to vote in presidential elections did not violate due process or equal protection. For a comment thereon please *see* Amber L. Cottle, "Silent Citizens: United States Territorial Residents and the Right to Vote in Presidential Elections," U. Chi. Legal F. 315 (1995) and as noted in the Bibliography. Although residents elect delegates to the national conventions, they do not vote. *See* the article by Gold, Matea, "Campaign 2000: A User's Guide," 2000 Times Mirror Company, April 9, 2000. *See also De La Rosa v. United States, 229 F.3d 80, 2000 U.S. App. Lexis 25499 (1st Cir. 2000)* holding that citizens residing in Puerto Rico do not have the right to participate in the national election for president and vice-president. The decision by the First

Circuit Court of Appeals in De La Rosa II decided in 2000 reversed the district court. This case is reviewed in the Comment by Jose D. Roman, "Trying to Fit An Oval Shaped Island Into A Square Constitution: Arguments for Puerto Rican Statehood," *29 Fordham Urb. L. J. (2002) 1681, 1713* who concludes that the only complete solution is for Puerto Rico to become the fifty-first state. The various cases which have discussed the issue of voting in presidential elections are reviewed in the Roman Comment. *See also* Comment, Igarta, "de La Rosa v. United States: The Right of the United States Citizens of Puerto Rico to Vote for the President and the Need to Reevaluate America's Territorial Policy," *4 U. Pa. J. Const. L. (2001) 141.* The issue of who qualifies as a natural born citizen to be eligible to serve as President of the United States is discussed in an article by Sarah Helene Duggin and Mary Beth Collins, "Natural Born in the USA: The Striking Unfairness and Dangerous Ambiguity of the Constitution's Presidential Qualifications Clause and Why We Need to Fix It," *85 B.U. L. Rev. 53 (2005).* In this article the authors suggest that a person born in a territory which later becomes a state probably would so qualify. Less certain is the rule for persons born in The Commonwealth of the Northern Mariana Islands, The Commonwealth of Puerto Rico, Guam and the Virgin Islands. The authors note it is unlikely that a person who cannot vote for the Presidency would have the right to serve as President. Even less likely is American Samoa where they are viewed as "nationals" who may subsequently become citizens through an expedited naturalization process.

(n3)Footnote 68. *See 8 U.S.C. §§ 1101*(a)(29), 1408.

(n4)Footnote 69. *See 48 U.S.C. § 891.* The Commissioner serves for four year and presents his or her certificate of election through the Department of State. The qualifications of a Commissioner are that the Commissioner be a bona fide citizen of the United States, twenty-five years of age, and be able to read and write the English language. *See 48 U.S.C. § 892.*

(n5)Footnote 70. *See 48 U.S.C. § 1711* (Guam and the Virgin Islands). The delegate is to be elected every two years by majority vote, must be at least twenty-five years of age and have been a citizen of the United States for at least seven years prior to the date of the election, be an inhabitant of the territory from which elect and not be a candidate for any other office. *See 48 U.S.C. § 1731* (American Samoa) and *48 U.S.C. § 1713* provides for similar qualifications.

(n6)Footnote 71. The Covenant, in § 901, does provide for the appointment or election of a Resident Representative to the United States who presents the election certificate to the Secretary of State. The Northern Mariana Islands Constitution, Art V. was amended to allow a non-voting delegate, yet the Commonwealth has not requested the congressional legislation which would be necessary to change the status of its Resident Representative.

(n7)Footnote 72. This privilege was also extended to the non-voting delegate from the District of Columbia. The House Rules were amended in 1993. The constitutionality of the new rules was affirmed and a preliminary injunction against its enforcement denied in Michel v. Anderson, No. 93-5109 (D.C. County Appeals 1994) Lexis 1205. The case contains a good review of the history of the non-voting delegate. The challenge to this House Rule was upheld in *Michel v. Anderson, 14 F.3d 623 (D.C. Cir. 1994).* However, the 104th Congress changed the rule and the delegates no longer may cast ballots when the House meets as a Committee of the Whole. *See* 141 Cong. Rec. H23, § 212, Jan. 4, 1994, 104th Congress, 1st Sess. H.B. 2876, dealing with the rights of the non-voting delegates, was assigned to the Resources Committee on Jan. 24, 1996. *See* Andorra Bruno, "Territorial Delegates to the U.S. Congress: A Brief History, Government Division," Congressional Research Report, Jan. 23, 1997. Currently, the Resident Commissioner from Puerto Rico and the delegate from American Samoa, Guam and the Virgin Islands are present in the House of Representatives but they cannot vote. They may introduce bills, serve on and vote in committee, and may participate in debates; however, the only period of time in which they could vote was in 1993 and 1994. There still is no representative from the Northern Mariana Islands. None are represented in the Senate.

(n8)Footnote 73. *435 U.S. 1 (1978).*

(n9)Footnote 74. The court in *Califano* noting various justifications for the Congressional action including, the fact that the inhabitants do not pay income taxes; it would upset the local economy, would cost too much for treasury, etc.).

See also Harris v. Rosario, note 56, *supra* (withstanding an equal protection argument).

(n10)Footnote 75. Caps also have been placed on Medicaid, National Assistance Programs, Elementary and Secondary Education Programs, ADC, etc. A 1981 study by the Comptroller General of the United States found that Puerto Rico received less favorable treatment than it would have received as a state under approximately twenty federal spending programs. *See* Comptroller General of the U.S., "Puerto Rico's Political Future: A Divisive Issue With Many Dimensions," 120-125 (1981). *See also* Richard B. Cappalli, "Federal Financing in the Commonwealth of Puerto Rico," 39 Rev. Jr. U.P.R. 17, 103 (1970) noting that "While it is doubtful that Congress would have the constitutional power to discriminate against a particular State in the application of federal grant programs, its plenary territorial clause power authorizes such discriminations against territories and it is doubtful whether the creation of the commonwealth has affected this power."

(n11)Footnote 76. *See, e.g., Craibow Corp. v. Occupational Safety and Health Review Comm'n, 493 F.2d 1064 (1st Cir. 1974)* (under compact with Puerto Rico and the Puerto Rican Federal Relations Acts, new federal legislation requires no prior consent of Puerto Rico to be applicable there); Caceres v. San Juan Barge Co., *supra,* note 55; Hillblom v. United States of America, *supra,* note 57, holding that three federal laws applied in the Northern Mariana Islands including the Magnuson Fishing Conservation Act, the Swine Health Protection Act and the Shipping Act of 1984). Both Puerto Rico and the Virgin Islands were excluded from the settlement of a law suit regarding fees paid to travel agents as not being part of the United States, as discussed in an article by Lindsay M. Germano, Casenote: Contract Law-Interpretation of "United States" -- Eighth Circuit Holds that Settlement Agreement for "United States" Travel Agents excludes Affected Agents in Puerto Rico and the U.S. Virgin Islands, *69 J. Air. L. & Com. 195 (Winter 2004).*

(n12)Footnote 77. *See 48 U.S.C. § 734* noting that the statutory laws of the United States not locally inapplicable are effective in Puerto Rico except for the Internal Revenue Laws. *See 48 U.S.C. §§ 1421h,* 1421i providing that though the income tax laws of the United States are in force they are deemed a territorial income tax payable to the government of Guam; *48 U.S.C. § 1397* provides for a "mirror image" income tax approach in the Virgin Islands with the payment to the Virgin Island treasury. *See* Philip Joseph Deutch, "The Uniformity Clause and Puerto Rican Statehood," *43 Stan. L. Rev. 685 (1992)* regarding the effect of Statehood on income taxes paid in Puerto Rico. *See also* the Note by Deborah S. Di Piero, "Puerto Rico's Need for Corporate Incentives following the 1996 Amendment to Section 936," B.U. Int'l L.J. Vol. 15 (1997) 549. A discussion of Internal Revenue Code Section 936 and the territories is discussed in an article by Andrews, III, William Lee, "No Bull's Eye for 'Targeted' International Tax Rules," Va. Tax. Rev. 18 (Spring 1999) 781. In the case of *Specking v. Commissioner of Internal Revenue, 117 T.C. 95,* (2001), the court concluded that compensation earned by the taxpayer on Johnston Island (one of the islands in Johnston Atoll) was not foreign earned income because this island is an unorganized, unincorporated insular possession of the United States. This case also discussed the tax implementation agreement between the United States and American Samoa, *1988-1 C.B. 408.* A good discussion of the exclusion of federal taxes in America Samoa, Guam and the Northern Mariana Islands may be found in the case of *Francisco v. Comm'r, 2002 U.S. Tax Ct. Lexis 59 (1002)* in which case the court agreed that income earned while in the harbor of America Samoa may be excluded by the taxpayer but not as to income earned while in international waters.

(n13)Footnote 78. *See 48 U.S.C. § 738* which provides that all merchandise and articles coming into the United States from Puerto Rico and vice versa are free of duty. This was a part of the original Foraker Act of 1900 and thus, since July 25, 1902, trade between Puerto Rico and the Mainland has been free of tariff duties. The other territories do not have this protection, though to a limited extent they are protected by General Headnote 3(a) of the U.S. Tariff Code and the Generalized System of Preferences, *19 U.S.C. § 1202.*

(n14)Footnote 79. Under the Covenant, the Commonwealth of the Northern Mariana Islands has control over its own immigration policies and the immigration laws of the United States do not apply. Section 503(a) of the Covenant. *But see* Maybeth Herald, "The Northern Mariana Islands: A Change in Course under Its Covenant with the United States," *71 Oregon L. Rev. 127 (1992)* (in which article the author addresses the serious problems which have arisen due

in part to the open door policy of immigration in the Northern Mariana Islands which has resulted in an estimate of one-half of the population being non-resident aliens). American Samoa also has its own immigration policy. *See* Title 41 of the American Samoa Code. It is difficult to obtain permanent residency in Samoa. For a non-Samoan to qualify for such status, the person must either have established permanent residence in American Samoa prior to January 1, 1950, or have been physically and legally present in American Samoa for a continuous period of at least 20 years, be of good moral character, and a person for whom deportation would be a hardship. A person legally adopted by an American Samoan also may qualify if under the age of 21 at the time of adoption. The number of persons who may be granted such status may not exceed ten in any given year. *See* 41 A.S.C. 0403. In addition American Samoa is explicitly omitted as part of the Immigration and Nationality Act of 1952 continued in *8 U.S.C. § 1101*(a)(38). Guam, and in particular the Chamorro population, would like to control immigration. The Second Guam Constitutional Convention and the draft Guam Commonwealth Act both seek to attain immigration control. Although Congress could exempt Guam, it has not done so. *See Tiaco v. Forbes, 228 U.S. 549 (1913); 8 U.S.C. § 1101*(a)(36)(38).

(n15)Footnote 80. The Coastwise shipping laws including the Jones Act of *46 U.S.C. §§ 13,* 289, 292, 316, 808, 883 and 883-1 apply to Guam and Puerto Rico though not to American Samoa, the Virgin Islands and to large extent the Northern Mariana Islands.

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CHAPTER 56 TERRITORIES AND POSSESSIONS

7-56 Thompson on Real Property, Thomas Editions § 56.09

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§ 56.09 Future Status.

The status of each territory appears to be in question today with the possible exception of American Samoa. n81 Options include Statehood, n82 incorporated status, Commonwealth, n83 Compact of Free Association or independence. n84

FOOTNOTES:
(n1)Footnote 81. American Samoa is the only unorganized, unincorporated territory. Following the acceptance of the cessions in 1929, a Congressional Commission held hearings in 1930 which resulted in a draft of an Organic Act which would have provided citizenship and established an independent executive and judicial branch of government; however, the bill failed of passage in the House of Representatives in 1933. Samoans traditionally have distrusted any attempt to organize them, fearing an Organic Act might eliminate or erode their traditional powers over land and immigration. Thus, in 1969 the American Samoa Political Status Commission, composed of concerned citizens and legislators, recommended that Samoa remain an unorganized, unincorporated territory and reject other options including independence, union with Western Samoa, incorporation status, Commonwealth or becoming a county of the State of Hawaii. A similar recommendation was made in 1975. *See* § 56.12 *infra*.

See David Judgson, *Territorial Delegates Decry Colonialism, Gannett News Service*, February 9, 1993, noting that the territories met in Washington for a three-day conference and are in various states of redefining the status of their relationships with the United States. The article notes that they were linked by aspirations for full protection of the U.S. Constitution and fearful of losing sovereignty over native lands, language or culture. Peter C. Stuart in his book Isles of Empire: The United States and Its Overseas Possessions in Chapter 15 reviews the various positions taken. Puerto Rico has held four (with one being a procedural one) plebiscites since 1967 with the most recent being in 1998 with commonwealth receiving the most votes. Guam has held four referenda in 1982 and 1987 to have a Puerto Rican style of commonwealth which has not received approval from Washington. The Virgin Islands held a plebiscite in 1993 and reaffirmed the current arrangement. Even American Samoa has twice studied the issue. He notes that in addition to the suggestions noted in the book, the concept of merger with existing states has been discussed with a merger between Puerto Rico and the Virgin Islands; a merger of Guam and the Northern Mariana Islands, and a merger of America Samoa with the Hawaiian Islands.

(n2)Footnote 82. *See* footnote 51, *supra*, regarding the 1993 plebescite in Puerto Rico. The arguments for statehood include the political right to vote for the United States President and Vice-President and to be represented by two Senators and possible additional voting representation in the House of Representatives. Statehood would also allow full participation in federal programs, though it may require the payment of federal income taxes. *See* § 56.08(d) *supra*. At the present time, only Puerto Rico is seriously considering statehood.

(n3)Footnote 83. *See* note 51, *supra* that Guam is seeking such status. *See also* the article by Lansing, Paul and Hipolito, Peter, "Guam's Quest for Commonwealth Status" Asian-Pacific Am. L. J. 5 (Spring 1998) 1, in which the desire for Commonwealth Status for Guam is discussed and negative comparisons are made with the precedent set by the Commonwealth of the Northern Mariana Islands.

(n4)Footnote 84. *See also* the article by Keitner, Chimene I. and Reisman, W. Michael, "Free Association: The United States Experience" in Tex. Int'l L. J. 39 (Fall 2003) 1. As noted *supra* in note 57, not all residents of the Northern Mariana Islands have been pleased with Commonwealth status and feel that the United States still has too much control of local affairs. Free Association, as adopted by some of its neighbors, has looked appealing. The Virgin Islands, until recently, have been content with status as an unincorporated, organized territory.

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CHAPTER 56 TERRITORIES AND POSSESSIONS

7-56 Thompson on Real Property, Thomas Editions § 56.10

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§ 56.10 The Commonwealth of the Northern Mariana Islands.

(a) Background.

The Mariana Island Chain, with the exception of the Island of Guam, form the Commonwealth of the Northern Mariana Islands (hereinafter CNMI). n85 The islands contain under two hundred square miles of land, with the most populated island being Saipan. n86 In 1975, the islands entered into a covenant with the United States to establish a Commonwealth. n87 Prior to that time, the islands had been part of the Trust Territory administered by the United States under the auspices of the Security Council of the United Nations. n88 In 1972, the Mariana delegates to the Congress of Micronesia sought separate negotiations with the United States, and in 1975 the Covenant was signed. n89 At one time, consideration was given to having the islands join with Guam. n90 The requested status became the first acquisition of territory by the United States in fifty years. n91

Under the terms of the Covenant, an independent legislature, executive branch, and judiciary are established. n92 The Covenant provides for three areas of "special treatment": CNMI has control over its own immigration policies; n93 the right to trial by jury is not guaranteed in all cases; n94 and the Covenant allows a restraint on land. n95 The Covenant also provides that Article I (Political Relationship), Article II (Constitution of the Northern Mariana Islands), Article III (Citizenship and Nationality), § 501 (dealing with the applicability of United States Laws) and § 805 (the Land Restraint) may not be changed without the consent and agreement of both the CNMI and the United States. n96

COMPUTER-ASSISTED RESEARCH

LEXIS: commonwealth w/1 northern marina islands

(b) Land.

As with all of Micronesia, land is very important in the CNMI. n97 As noted in § 805 of the Covenant, the ownership of land is important in the culture and traditions of the people and the land restriction provided therein is necessary to protect the people against exploitation and to promote economic advancement and self-sufficiency. n98 As a result, the ability to provide for a restraint on alienation was inserted into the Covenant n99 and implemented by the Constitution of CNMI. n100

Under the terms of the restraint, the acquisition n101 of permanent and long-term interests in real property in the Commonwealth is restricted to persons who are at least one-quarter Northern Mariana Island descent. n102 A long-term interest is defined as a lease which exceeds fifty-five years. n103 The definition of Northern Mariana Island descent includes those persons who were either Chamorro n104 or Carolinian. n105 Partly because of the open immigration policy, the numbers of Chamorros and Carolinians have decreased on the islands. n106 The land restraint also limits the ability of a corporation to purchase land on the islands. n107

The land restraint described *supra* was upheld by the 9th Circuit Court of Appeals in Wabol v. Villacrusi. n108 In *Wabol*, a landowner brought action to avoid a thirty-year lease which contained an unconditional option to renew for twenty additional years. The landowner noted that the lease violated Article XII of the Constitution and was therefore void *ab initio*. The defense was that Article XII violated the Equal Protection Clause of the United States Constitution. The Court concluded that the right to acquire permanent or long-term interests in real estate was not a right protected by the United States Constitution, and upheld the land restriction. In addition, the Court noted that Article XII precluded a reformation of the lease. n109 Since the *Wabol* case upholding the land restriction, the federal courts have held the issue of the land restraint to be an issue of CNMI law, and have declined jurisdiction in several cases involving the restraint. n110

The Covenant also notes that the United States recognizes and respects the scarcity and importance of land, and if the United States must acquire any real property not transferred to it under the Covenant, it will acquire only the minimum amount necessary to accomplish the public purpose for which it is taken and will first try to use public, rather than private, real property. n111 Concerns likewise were expressed concerning the presence of the United States military. Despite such concerns, the presence of the military has not been significant. Section 8 of the Covenant also provides for lands to be leased to the United States and for the transfer of public lands to the Government of CNMI. n112

The property laws of CNMI, except for the land restraint noted *supra*, are consistent with those on the mainland, although there appear to be numerous quiet title actions. n113 If a statute or local customary law does not apply in a given situation, the applicable common law as expressed in the Restatements is used and, if not covered by the Restatements, then the common law as generally understood and applied in the courts of the United States is used. n114

COMPUTER-ASSISTED RESEARCH

LEXIS: commonwealth w/1 northern marina islands w/30 land! w/50 own!
commonwealth w/1 northern marina islands w/30 restraint! w/5 alien! or land!

FOOTNOTES:

(n1)Footnote 85. In point of fact, there is no Southern Mariana Island. The name of the Commonwealth was adopted during the Commonwealth negotiations of the early 1970's in part to distinguish these islands from Guam which had been a territory of the United States since 1899. *See* note 5, *supra*. The volcanic island chain is located approximately 1,500 miles south of Japan and approximately the same distance from the Philippines.

(n2)Footnote 86. Saipan also is the largest, most developed island and the capital of the islands. The other principal islands are Rota and Tinian. Some of the other islands are maintained as uninhabited wildlife preserves. *See* Herald, The Northern Mariana Islands: A Change in Course under Its Covenant with the United States, *supra* note 79, for population trends in the early 1990's.

(n3)Footnote 87. *See* note 38, *supra*. The Covenant to Establish a Commonwealth of the Northern Mariana Islands in Political Union with the United States of America, Act of March 24, 1976, Pub. L. 94-241, *90 Stat. 263* as *amended and reprinted at 48 U.S.C. § 1801*. The Covenant was approved by the Mariana Island District Legislature on February 20, 1975 and by 78.8% of the people voting in a plebiscite held on June 17, 1975. The Covenant was implemented by

Pub. L., No. 95-157, *91 Stat. 1266* (Nov. 8, 1977) and fully implemented in 1986 with the termination of the Trusteeship in the United Nations. Proclamation 5564 on November 3, 1986, *51 Fed. Reg. 40,399 (1986)* (3 C.F.R. 146). *See* note 61, *supra*.

(n4)Footnote 88. *See* § 56.07, *supra* and in particular note 61. The Security Council had delegated the operating supervision to the Trusteeship Council. The Covenant was fully implemented when the United Nations Trusteeship Council voted to end the United States administration of the Trust territories and the President of the United States recognized them by Proclamation 5564 on November 3, 1986 (3 C.F.R. 146).

(n5)Footnote 89. At the time, the Micronesia Congress was considering the future status of the trust territories. Disagreements arose with the other Micronesian leaders, especially concerning the ability of unilateral withdrawal from any agreement with the United States. Those Marianas leaders who supported integration with the rest of Micronesia were voted out of office in 1970 and the Marianas Island District Legislature passed a resolution declaring that the Marianas would "secede from the Trust Territory, if necessary by force of arms, and with or without the consent of the United Nations" to achieve its goal of close association with the United States. Resolution No. 30-1971 dated February 19, 1971. *See* S. Rep. No. 1, 433, 94th Cong. 1st Sess. 47 (1975). The history of the negotiations are recited in Northern Mariana Islands v. Atalig, *supra*, note 29. Prior to the United States Trusteeship, the islands had been administered by the Japanese under a League of Nations mandate. *See* Gale v. Andrus, *supra*, note 58. Prior to the Japanese, the Germans, Spanish, Carolinians and the Chamorros had populated the islands. *See also* "Comment: Congressional Colonialism in the Pacific: The Case of the Northern Mariana Islands and its Covenant with the United States," *3 Scholar (Fall 2000) 41*. Although the Commonwealth of the Northern Mariana Islands is not a state, it was held that it should be treated as such for purposes of the Quiet Title statute of *28 U.S.C.A. § 24091* because of § 502(a)(2) of the Covenant it was held in the case of *N. Mariana Islands v. United States, 279 F.3d 1070 (9th Cir. 2002)* and thus it was not subject to the twelve year statute of limitations. The Covenant is discussed in an article by Horey, Joseph E., "The Right of Self-Government in the Commonwealth of the Northern Mariana Islands," Asian-Pacific L. & Pol'y J. 4 (Summer, 2003) 180. *See also* the discussion in the article by Keitner, Chimene I., and Reisman, W. Michael, "Free Association: The United States Experience," Tex. Int'l L. J. 39 (Fall, 2003) 1.

(n6)Footnote 90. *See 48 U.S.C. § 1844* if Guam and CNMI do decide to join. The islands are geographically and culturally close to Guam. The possible linkage had the apparent support of the United States, the United Nations, as well as the Mariana islands; however, Guam rejected the proposal. *See* S. Rep. No. 433, 94th Cong. 1st Sess. (1975). Plebiscites were held on Saipan and Tinian in both 1961 and 1963 in which support was noted for the integration with Guam; however, Guam voted against it on November 4, 1969. The negative vote on Guam may well reflect a lingering bitterness on Guam toward the Chamorros who came from Saipan during World War II and served as local police and administrators for the Japanese on occupied Guam.

(n7)Footnote 91. The last acquisition of territory was the acquisition of Swain's Island in American Samoa in 1925. *See* note 142 *infra. See Fleming v. Department of Pub. Safety, 837 F.2d 401, 403 (9th Cir. 1988)* (The people of the Northern Mariana Islands in recent years have elected to enter into a closer relationship with the United States). To date, the association has been well received in general; although as noted in note 58, *supra*, some in the CNMI feel that the United States is continuing to treat them as a territory and intrudes too much in its internal affairs. Although the Resident Representative presents his or her official documentation to the Department of State under § 901 of the Covenant, the general administrative supervision is under the Secretary of the Interior. *See* Executive Order dated November 3, 1986.

(n8)Footnote 92. The Covenant is reprinted in *48 U.S.C. § 1681* and also is discussed in Northern Mariana Islands v. Atalig, note 29 *supra. See 48 U.S.C. § 1694* regarding the jurisdiction of the District Court for the Northern Mariana Islands. § 1694(a), (b) and (c) provide that in addition to the traditional jurisdiction of a district court, the Federal District Court would have appellate jurisdiction over local courts until an appellate system was adopted. In addition, for the first fifteen years after such adoption, appeals from the local Supreme Court are to be to the Ninth Circuit Court of Appeals. The judge for the District Court is appointed for a term of ten years. *See also* note 110, *infra* regarding the

establishment of a local appellate system. *See Sablan v. Manglona, 938 F.2d 970 (9th Cir. 1991)* in which case the court found it lacked jurisdiction to hear the case. In the Sablan case, the plaintiff had filed suit in the trial court of NMI to quiet title to certain land on the Island of Saipan. The plaintiff argued that the defendant's claims to the land were invalid because the defendant was not a person of NMI descent and thus could not hold title under Article XII of the Constitution. The local courts had ruled against the plaintiff. *See also Aldan-Pierce v. Mafnas, 31 F.3d 756 (9th Cir. 1994),* in which the court discussed jurisdiction under the new law and held that after the appeal from the United States District Court had been dismissed, the judgment of the CNMI Superior Court became final. *See also Santos v. Nansay Micronesia, 76 F.3d 299 (9th Cir. N.M.I. 1996),* in which the court discussed the jurisdiction of CNMI courts and noted that in this case the 9th Circuit lacked jurisdiction to review the claim as no federal question was raised until it was too late. The Court determined that it lacked jurisdiction to review a claim that a party was denied due process regarding the assessment of punitive damages. The Northern Mariana Islands' courts had held that compensatory and punitive damages were appropriate when grantors had been fraudulently induced to convey real property. After the fifteen years have passed, appeals from the CNMI Supreme Court will be by writ of certiorari to the United States Supreme Court. Likewise, the 9th Circuit lacked jurisdiction to review a case involving a lease, *Diamond Hotel Co., LTD. v. Matsunaga, 99 F.3d 296 (9th Cir. N.M.I. 1996).* The Code requires the recusal of a judge if the judge is related to an attorney in a case within the second degree of consanguinity. However, this provision was not violated the case of *Boddy v. Guerrero, 179 F.3d 714 (9th Cir. 1999). See also Oriental Crystal (Holding) Ltd. v. Lone Star Casino Corp., 1999 U.S. App. Lexis 9117 (9th Cir 1999)* (CNMI is the "ultimate expositor of local Northern Marianas law;" however, this court may examine the CNMI court's interpretation of CNMI law to determine if it is untenable).

(n9)Footnote 93. *See* § 503 of the Covenant and note 79 *supra*. The large numbers of nonresidents who have come to CNMI to work in the garment factories has attracted the attention of the press and a law suit has been filed. *See* 1999 South China Morning Post Ltd. January 25, 1999. *See also* 1998 Information Access Company, IAC (SM) Newsletter Database Global Information Network, April 1, 1988. *See* David T. Fisher, "Current Development: Legislative Branch: Commonwealth of the Northern Mariana Islands Reform Act," Geo. Immig. L. J. Vol. 12 (1997) 226. Senate bill 1052 was referred to the Senate Committee on Natural Resources on May 13, 1999 and directs the Attorney General to establish, administer, and enforce an effective program of immigration control for CMNI; currently the US Immigration and Nationality Act does not extend to CNMI. Senate Bill 1052 was adopted by the Senate on February 8, 2000; however, it met resistance in the House. *See* Whitney, David, "Alaska Allies at Odds Over U.S. Islands Abuse," Anchorage Daily News, July 31, 2000. Recent law articles discuss the plight of the nonresidents and the control by CNMI over its immigration policies and its exemption from the federal minimum wage. Each suggests a different remedy. Florke, Robert S., "Notes & Comments: Castaways on Gilligan's Island: The Plight of the Alien Worker in the Northern Mariana Islands," Temp. Int'l & Comp. L.J. 13 (Fall, 1999) 381, suggests the United States should address the alien worker problem unilaterally until the CNMI shows the ability to provide significant assistance for the alien workforce. Such measures might include the removal of CNMI's sovereignty over its wage and immigration laws; the establishment of a stronger presence of OSHA; and the threatened removal of duty free status for certain CNMI goods. Cuison, Rose Cruz, "Comment: The Construction of Labor Abuse in the Mariana Islands as Anti-American," UCLA Asian-Pacific Am. L. J. 6 (Spring 2000) 61 discusses that whereas the labor abuse in the CNMI is complex, the right of self-government and self-determination also should be retained. Karet, Deborah J., "Comment: Privatizing Law on the Commonwealth of the Northern Mariana Islands: Is Litigation the Best Channel for Reforming the Garment Industry," Buffalo L. Rev. 48 (Fall, 2000) 1047, suggests that private law suits have achieved more for the workers than has legislation. *See also* the article by Smith, Karen M., "Solving Worker Abuse Problems in the Northern Mariana Islands," 24 Boston College Int'l & Comp. L. Rev. (Spring 2001) 381, which article suggests more controls on immigration and also includes a nice history of the Commonwealth and of the garment industry. The settlement agreement as well as the history of Saipan and the garment industry was discussed in the article by Erin Geiger Smith, Note: Case Study: Does I v. The Gap, Inc.: Can a Sweatshop Suit Settlement Save Saipan?, *23 Rev. Litig. 737 (2004).*

(n10)Footnote 94. *See* § 501 of the Covenant and Northern Mariana Islands v. Atalig, *supra*, note 29, reviewing the Covenant and found that the Sixth Amendment right to a jury trial did not apply in CNMI.

(n11)Footnote 95. *See* § 56.01, *infra*.

(n12)Footnote 96. *See* § 105 of the Covenant. *See also* A & E Pac. Constr. Co. v. Saipan Stevedore, *supra*, note 53. Persons born in the Commonwealth of the Northern Mariana Islands in 1982 and 1983 qualified as citizens of the United States and are thus eligible for US passports. *Sabangan v. Powell, 375 F.3d 818 (9th Cir. 2004).* It was determined that the Longshore and Harbor Workers' Compensation Act does apply to CNMI in *Saipan Stevedore Co. v. Director, Office of Workers' Compensation Programs, 133 F.3d 717 (9th Cir. 1998).*

(n13)Footnote 97. Article 6, §§ 2-3 of the Trusteeship Agreement, *see* note 58 *supra,* directed the United States not only to promote the independence and self-government of the trust inhabitants, but also to protect them against the loss of their land. *See Wabol v. Villacrusis, 958 F.2d 1450, 1461 (9th Cir. 1992)* where the court notes that" ... there can be no doubt that land in the Commonwealth is a scarce and precious resource. Nor can the vital role native ownership of land plays in the preservation of NMI social and cultural stability be underestimated." The court notes that the legislative history of the Covenant indicates that the political union of the Commonwealth and the United States could not have been accomplished without the land restrictions. The importance of the land in the Commonwealth was discussed in the case of *Benavente v. Mariana's Public Land Corporation, 2000 N. Mar. I. Lexis 13 (S.Ct. N.M.I. 2000)* which case also discussed the role of the Mariana's Public Land Corporation. The court refused to set aside a deed because of alleged fraud. A discussion of the land registration system established by the Land Commission is found in the case of *Estate of Vicente S. Muna v. Commonwealth of the Northern Mariana Islands, 2000 N. Mar. I. Lexis 8 (S.Ct. N.M.I. 2000).* The Trust Territory Homestead Program (and its five hectare limitation) was discussed in the case of *Aguon v. Marianas Public Land Corporation, 2001 N. Mar. I. Lexis 4, Appeal No. 99-030, 2001 MP 4 (S.Ct. N.M.I. 2001).*

(n14)Footnote 98. There are only 183.5 square miles of land in the CMNI. As noted by Laughlin, *supra* n. 33, at p. 386 and as quoted in *Wabol, supra, n. 97 at 1462, n.20,* "free alienation is impractical in this situation not because it would not work, but because it would work too well."

(n15)Footnote 99. *See* § 501(b) and § 805 of the Covenant. Section 805(a) provides that the alienation of permanent and long-term interests shall exist for twenty-five years after the termination of the Trusteeship Agreement (or until 2011), although it may continue thereafter.

(n16)Footnote 100. Article XII of the Constitution, *reprinted in* Commonwealth Code (CMC) at B-301, B-334, B-335 implements § 805 of the Covenant. In 1993, the CNMI Legislature adopted CNMI Public Law 8-32 (drafted as Senate Bill 8-124, SCS2, Eighth Northern Marianas Commonwealth Legislature, 45th Sess.) in response to the cases of *Ferreira v. Mafnas, 1 F.3d 960 (9th Cir. N.M.I. 1993) aff'd, Ferreira v. Borja, 93 F.3d 671 (9th Cir. N.M.I. 1996)* (discussed in footnote 110 *infra*) and *Aldan-Pierce v. Mafnas, 31 F.3d 756 (9th Cir. N.M.I. 1994)* discussed in notes 92 and 102 herein). This legislation provided for 1) a limitation on attorney fees in Article XII cases (the land restraint); 2) assured restitution to persons who lose any interest in land which is reclaimed by an Article XII judgment; 3) notes that a resulting trust does not arise merely because the purchase price for the land is paid for by persons of non-Mariana descent; 4) sets a six-year statute of limitation for Article XII claims with certain exceptions; and 5) allows CNMI courts to sever any void terms of an agreement which violates Article XX in part. This legislation, as well as the cases, are discussed in Robert Torres, "Ferreira v. Borja: Land Transactions in the Northern Marianas," 29 New England L. R. 209 (1994) and cited in the Bibliography. *See also Diamond Hotel Co. v. Matsunaga, 99 F.3d 296 (9th Cir. N.M.I. 1996)* (court lacked jurisdiction to consider issue of whether lease violated provision of Commonwealth Constitution regarding acquisition of property from persons of Northern Mariana descent).

(n17)Footnote 101. Section 2 broadly defines the term acquisition as including transfers by sale, lease, gift, inheritance, or other means although exceptions are created for transfer by inheritance to a spouse or for foreclosure by a mortgagee so long as the interest is then disposed of within five years. The CNMI Supreme Court decided that the Commonwealth Constitution prohibited the issuance of a writ of execution on a tract of land in *Saipan v. Rasiang, 1999 N. Mar. I. Lexis 1 (N.M.I. 1999).* The CNMI Code exempts land from attachment and execution unless it is owned by

the debtor in his or her own right and the court decides that justice requires the attachment. 7 CMC § 4210. The property in question was owned as tenants in common and although each party had a separate interest, the court held it was within the trial court's discretion not to order it sold. The court also discussed Article XI, Section 5(a) of the Constitution which does not allow the freehold interest in a homestead to be transferred for ten years after acquisition though it may be mortgaged to improve the land. Such a transfer means by sale and does not include a transfer by either inheritance or mortgage. The Court noted further that homestead lots may not be transferred by judicial sale within the ten-year period after receipt of the homestead.

(n18)Footnote 102. Section 4 defines a person of Northern Mariana descent as one who is a citizen or national of the United States and who is at least one-quarter Northern Mariana Chamorro or Northern Mariana Carolinian or combination thereof, or an adopted child of a person of such descent if adopted while under the age of eighteen. A person is considered to be a full-blooded Chamorro or Carolinian if that person was born or domiciled in the Northern Mariana Islands by 1950 and was a citizen of the Trust Territory of the Pacific before the termination of the Trusteeship. *See* Aldan-Pierce v. Mafnas, footnote 92, *supra*, which case involved a suit to enforce an option agreement against allegations that it violated the land restrictions. In the case of *Milne v. Lee Po Tin, 2001 N. Mar. I. Lexis 14, Appeal No. 99-010, 2001 NP 16 (S.Ct. N.M.I. 2001),* the court determined that a lease amendment with a lessee who was not of Northern Marianas descent was void under Article XII of the N.M.I. Constitution. This court also cited *Diamond Hotel Co., Ltd. v. Matsunago, 4 N. Mar. I. 213 (1995).* In the case of In the *Matter of the Estate of Joseph Rufo Roberto v. Roberto, 2003 MP 16, 2003 N. Mar. I. LEXIS 16 (2003)* the court determined that, because of the land ownership restriction, the decedent was unable to own property because he was not of Northern Mariana descent. From the time of land purchase, however, the decedent had a right of possession which was superior to that of any other person or entity except the grantor and possibly the Government. The six-year statute of limitation had run as to the grantor. Thus, the court concluded that the title was in the name of the trust to whom the land had been transferred more than six years before.

(n19)Footnote 103. Section 3 of Article XII. This section was amended in 1985. Previously the term was forty years. *See also Diamond Hotel Co., LTD. v. Matsunaga, 99 F.3d 296 (9th Cir. N.M.I. 1996),* in which case the 9th Circuit held that it lacked jurisdiction to review a case in which the Commonwealth Supreme Court held that an unconstitutional provision of a lease (regarding the land restriction) was severable from the remainder of the lease.

(n20)Footnote 104. The Chamorros of the Northern Mariana Islands were almost destroyed by the Spanish in the 17th century. Those who survived the brutal slaughter were resettled on Guam. Only a few remained on the Island of Rota. The Carolinians began to move to the islands in the early 19th century, which move was supported by the Spanish, and became the dominant community on Saipan during that century. The Chamorros did not start to return until 1816. When the Germans acquired the Mariana Islands in 1899 by purchase, they continued the Spanish effort to introduce a patrilineal naming system and in time succeeded. The Carolinians began to follow Chamorro patterns and in the latter part of the 19th century, the demographics began to shift in favor of the Chamorros. A good history is noted in Howard P. Willens & Deanne C. Siemer, The Constitution of the Northern Mariana Islands: Constitutional Principles in a Pacific Setting, *65 Georgetown L.J. 1373 (1977).*

(n21)Footnote 105. The Carolinians are a minority today; however, they qualify as noted in note 102, *supra* for NMI descent and have a special office in the executive branch to which the governor is to appoint a person who is acceptable to the Carolinian community. *See* Mariana Constitution, Art III, § 18. The Carolinians have their own language, dances and ties to the Caroline Islands.

(n22)Footnote 106. *See Herald, n. 79, supra* who notes that the Chamorros are now the second largest ethnic group and the Carolinians now the fifth on the islands. The article notes that use of the native languages has decreased and many are leaving the islands. Article XXII, § 3 of the Northern Marisland Constitution designates the three official languages as Chamorro, Carolinian and English. In the case of *Commonwealth of the Northern Mariana Islands v. Guerrero, 2003 MP 15, 2003 N. Mar. I. LEXIS 14 (2003)* the court held that the litigant had the constitutional right to speak Chamorro in a judicial proceeding rather than English.

(n23)Footnote 107. Section 5 of Article XII notes that a corporation is considered to be a person of Northern Mariana descent so long as it is incorporated in the Commonwealth, has its principal place of business in the Commonwealth, and 100% of its directors and its shareholders are of Mariana descent. Section 5 was amended in 1985 to raise the percent of directors and shareholders from 51% to 100%. *See also Milne v. Hillblom, 165 F.3d 733 (9th Cir. 1999)* in which the court determined that the purchasing corporation did qualify under the requirements of the CNMI Constitution at the time (i.e. 51% of native peoples only required for the Board of Directors). Note also that CNMI Public Law 8-32 (2 N. Mar. I. Code §§ 4941-4992) was enacted by the CNMI legislature to deal with actions concerning Article XII of the CNMI Constitution. As noted in the case of *Milne v. Hillblom, supra at 735.* This Act appears to be a codification of the *Ferreira* line of cases. *See Ferreira v. Borja, 93 F.3d 671 (9th Cir. 1996). See also Iglesias v. Realty Trust Corp., 2003 MP 7, 2003 N. Mar. I. LEXIS 6 (2003)* in which case the entry of a summary judgment was held to be proper as the court considered the issue as to whether the corporation was of Northern Marianas descent to be a legal question and the evidence showed that the corporation had been incorporated in NMI, had its principal place of business in NMI, and the requisite percentage of directors and stakeholders were of Northern Marianas descent.

(n24)Footnote 108. *See* note 97, *supra*.

(n25)Footnote 109. Section 6 of Article XII provides that a transaction made in violation of § 1 shall be void *ab initio*. Although the court noted it was void under § 6, the case was remanded and the court noted in a footnote that the trial court might want to adjust the equities of the situation by compensating the tenant for the amount expended in improving the property.

The court also determined that it had the jurisdiction to hear the case despite the fact that the Commonwealth Judicial Reorganization Act of 1989, NMI Pub. L. No. 6-25, was enacted while the appeal was pending. This Act established a local appellate court system including a Supreme Court. *See 48 U.S.C. § 1694* regarding the District Court for the Northern Mariana Islands and note 93, *supra*.

(n26)Footnote 110. *See* Sablan v. Manglona, note 92 *supra*; *Yokeno v. Mafnas, 973 F.2d 803 (9th Cir. 1992)* (the court found no jurisdiction; however, the series of land transfers used to comply with Article XII is interesting to review). *See also In re Realty Trust Corp., 143 B.R. 920 (D.N.M.I. 1992)* (questions concerning whether land transactions violated the ethnic property ownership qualifications of XII should be considered by the local courts and thus Chapter 11 case should be dismissed). Citizenship provisions are also rigidly construed. *See Smith v. Pangilinan, 651 F.2d 1320 (9th Cir. 1981). But see Ferreira v. Mafnas, 1 F.3d 960 (9th Cir. N.M.I. 1993),* in which a purchaser of Northern Mariana Descent (NMD) brought a quiet title action. The seller of the land also was of Northern Mariana Descent. The purchaser obtained financing from persons not of such descent and, in return for the financing, entered into a partnership agreement with them in which the land was leased for forty years and the purchaser agreed to convey the land to the partnership if the law ever changed to allow such a conveyance, to purchase the improvements at the end of the lease, and to convey the land to a person of NMD if the purchaser ever withdrew from the partnership. The Supreme Court of CNMI held that this created a resulting trust for persons not of NMD and held that the transaction therefor violated the CNMI Constitution and gave the title to the land to the original seller. The 9th Circuit vacated the judgment and remanded. The court found that this had been an inappropriate use of the resulting trust doctrine as such was not the parties' intent and, even if it were their intent, a trust would not be created as it would have had the illegal purpose of avoiding the land restraint in the CNMI Constitution. The 9th Circuit noted that although the CNMI Supreme Court was the ultimate expositor of local Northern Mariana law, the United States Court of Appeals may review that court's interpretation thereof if the interpretation was untenable or amounted to a subterfuge to avoid federal review. *See also* footnote 100 *supra* discussing the CNMI legislation enacted in response to this case. After *Ferreira v. Mafnas, 1 F.3d 960 (9th Cir. N.M.I. 1993)* was decided, the Northern Mariana Commonwealth Supreme Court quieted title in favor of the purchaser. An appeal was then taken again to the Ninth Circuit. The Court held in *Ferreira v. Borja, 93 F.3d 671 (9th Cir. N.M.I. 1996)* that the Court of Appeals lacked jurisdiction to determine claims which primarily involved the Constitution and common law of the Commonwealth of the Northern Mariana Islands and that the law of

the case doctrine precluded the claim which requested the Court of Appeals to overrule its prior decision. *See* footnote 107 *supra* regarding CNMI Public Law 8-32 (2 N. Mar. I. Code §§ 4941-4992) which codifies much of the *Ferreira* case.

(n27)Footnote 111. *See* Article VIII, § 806(a) of the Covenant. Subsection (b) thereof notes that the United States will try to acquire the land by means other than eminent domain if possible. Leibowitz, *supra*, n. 3, at 352 notes that these procedures seem to work in that in 1987 the Air Force requested land on Saipan for a radar tracking station and indicated that if the request were refused it would not use eminent domain. *But see Commonwealth of the N. Mariana Islands v. United States, 399 F.3d 1057, 2005 U.S. App. LEXIS 3210 (9th Cir. 2005)* in which case the appellate court affirmed the district court's grant of summary judgment that the United States acquired the paramount interest in the seaward submerged lands found off the shores of the Commonwealth. In addition, any laws enacted by the CNMI legislature to the contrary were inconsistent with the paramountcy doctrine and were preempted by federal law.

(n28)Footnote 112. Sections 802 and 803 provide for lands to be leased to the United States and notes that the term will be for fifty years with a renewal option for fifty years. All lands held by the Government of the Trust Territory of the Pacific Islands were transferred to the Government of the Northern Mariana Islands under § 801 of the Covenant. The Marianas Pub. Land Corp., created under the CMNI Constitution, manages all public lands. *See Govendo v. Marianas Public Land Corporation, 1992 WL 62888* (Board of Directors must act in accordance with strict standards of fiduciary care).

(n29)Footnote 113. *See, e.g., Cepeda v. Hefner, 1992 WL 135905* (quiet title action involving Article XII); *Cabrera v. Cabrera, 1992 WL 62896* (quiet title action involving delivery of a deed); *Ferreira v. Borja, 1992 WL 62894* (quiet title action involving Article XII in which a resulting trust was used to rectify an impermissible land use); *Repecki v. Mac Homes, 1991 WL 70063* (quiet title action regarding improvements as well as quitclaim deed, lease and title insurance issues). *But see* Santos v. Nansay Micronesia, footnote 92, *supra*, in which the court awarded both compensatory and punitive damages when land had been conveyed due to fraud, despite the defendant's assertion that restitution was the more appropriate remedy.

(n30)Footnote 114. *See* 7 CNMI Code § 3401. *See also* Yokeno v. Mafnas, note 111 *supra*. Building codes and zoning codes have been adopted relatively recently. *See* 2 CNMI Code §§ 711(a) and 7201, 7221. The court looked to the laws of the United States when neither Commonwealth written law nor Chamorro law resolved how to adequately trace marital property was held in the case of *Santos v. Santos, 2000 N. Mar. I. LEXIS 2 (S.Ct. N.M.I. 2000).* Estoppel and gift by deed were discussed in the case of *Piteg v. Piteg, 2000 N. Mar. I. LEXIS 6 (S.Ct. N.M.I. 2000).* The Restatements of Contracts 2d was discussed in the case of *Rosario v. Camacho, 2001 N.Mar. I. LEXIS 3,* Appeal No. 99-003 & 99-013 (S.Ct. N.M.I. 2001) in which case the validity of a gift deed and accounting among cotenants were discussed.

Thompson on Real Property, Thomas Editions

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CHAPTER 56 TERRITORIES AND POSSESSIONS

7-56 Thompson on Real Property, Thomas Editions § 56.11

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§ 56.11 The Commonwealth of Puerto Rico.

(a) Background.

The Commonwealth of Puerto Rico consists of four islands in the Caribbean. n115 Acquired by the United States in 1898 from Spain, n116 Puerto Rico originally was under the temporary governance of the United States military. n117 The Organic Act of 1900, often referred to as the Foraker Act, provided for a civil government and established the District Court for Puerto Rico. n118 In 1917 a second Organic Act, often referred to as the Jones Act, provided for additional self-government, a bill of rights, and for U.S. citizenship. n119 Puerto Rico was an organized, unincorporated territory. n120 Puerto Rico became a Commonwealth in 1952. n121 The Spanish language and traditions remain strong. n122

Puerto Rico now elects its own legislature and governor n123 and has its own judiciary system. n124 The Federal District Court of Puerto Rico, unlike the federal district courts of the other territories, is an Article III court. n125 Although Puerto Rico is a Commonwealth, the U.S. Congress retains certain powers. n126

COMPUTER-ASSISTED RESEARCH

LEXIS: commonwealth w/5 puerto rico

(b) Land.

Puerto Rico is a civil law jurisdiction whose civil code contains elements of both the Spanish and the Louisiana Codes. n127 Mortgage laws may be found in Title 30 of the Civil Code. n128 General property laws may be found in Title 31. n129 The concept of real property is the Spanish "*immueble*" or immovable property which includes both land and buildings. n130

Puerto Rico is a community property jurisdiction. n131 Property may be registered. n132 The 1958 Condominium Law of Puerto Rico became a model for condominium laws throughout the United States. n133 Corporations may not own real estate beyond that which is reasonably necessary to carry out the purposes of the corporation, and a corporation authorized to engage in agriculture shall, by its charter, be restricted to the ownership and control of land not to exceed

five hundred acres of land. n134 The power of eminent domain is provided for in Article II, § 9 of the Constitution. n135 The first Sunday of May is "Land Day." n136

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LEXIS: puerto rico w/30 land! or propert!

FOOTNOTES:
(n1)Footnote 115. The four islands are Culebra, Mona, Vieques, and the largest island, Puerto Rico. The islands are located approximately 1,100 miles southeast of Florida. The name Puerto Rico was substituted for Porto Rico pursuant to the Act of May 17, 1932, c. 190, *47 Stat. 158. See also 48 U.S.C. § 731*.

(n2)Footnote 116. Spain ceded Puerto Rico to the United States at the conclusion of the Spanish-American war under the Treaty of Paris, dated December 10, 1898, and proclaimed on April 11, 1899; *30 U.S. Stat. 1754,* T.S. No. 343 (1899). *See also* note 5, *supra. See A.S. Lascelles & Co. v. United States, 49 Ct. Cl. 382, aff'd, De Pas v. United States, 243 U.S. 625 (1914)* (Puerto Rico did not become a part of the United States until the treaty had been signed by both parties thereto and the ratification exchanged). Christopher Columbus stopped briefly on Puerto Rico in 1493. At that time, the islands were inhabited by the Taino Indians from South America. A Spanish outpost was established in 1508. Spain introduced slaves from Africa in 1510 to work the sugar cane and coffee plantations.

(n3)Footnote 117. General Davis, the commander in control of the islands, allowed the existing municipal laws to continue in effect. As a result, the Spanish Civil Code, the Spanish Mortgage Law, and other Spanish laws which had been made applicable in Puerto Rico in 1889 by a Spanish Royal Decree, survived the change in sovereignty. Laws were changed only when inconsistent with the United States Constitution or laws.

(n4)Footnote 118. Act of April 12, 1900, c. 191, *31 Stat. 77.* The Foraker Act established a civil government with a Governor appointed by the President of the United States, an elected House of Delegates, and an elected Resident Commissioner to speak for Puerto Rico in the United States House of Representatives. The Act also provided in § 40 for a Commission to study and suggest changes to the existing legal system in Puerto Rico with the intent of reconciling differences between the Spanish Civil law and traditional Anglo-American law. The commission urged the maintenance of the civil tradition. The Insular Legislative Assembly therefore left the Civil Code intact, with only minor alterations. Today, however, many of the property code statutes are derived from the Louisiana Civil Code. Other codes were adopted or modified from other jurisdictions. *See* Marvel Rodriquez Ramos, Interaction of Civil Law and Anglo-American Law in the Legal Method in Puerto Rico, *23 Tulane L. Rev. 1 (1948).*

The Foraker Act of 1900 rejected a proposal to make Puerto Ricans U.S. citizens lest by implication the Act incorporated Puerto Rico into the Union. *See* 33 Cong. Reg. 3037 (1900) at 3354. *See also* § 56.04 *supra* regarding the differences between incorporated and unincorporated status.

(n5)Footnote 119. Act of March 2, 1917, c. 145, *39 Stat. 961,* commonly known by its popular name as the Jones Act. A collective grant of U.S. citizenship was granted. *See* note 66, *supra*. The upper house, or Senate, which had been appointed by the President was now elected. The legislative system was similar to that of the U.S. Congress with the governor having a veto power and the President of the United States having an ultimate veto.

(n6)Footnote 120. *See Balzac v. People of Porto Rico, supra,* n.16. The Jones Act did not expressly incorporate Puerto Rico into the Union and it contained a Bill or Rights which would not be needed if it were so incorporated.

(n7)Footnote 121. Act of July 3, 1950, ch. 446, *64 Stat. 319,* Pub. L. 600. This bill authorized the people of Puerto Rico to adopt their own constitution and to organize a local government, which was to be republican in form and contain the fundamental civil guaranties of a bill of rights. A referendum was to be held to give the people the opportunity to accept or reject it, which if ratified was to be by a majority of the voters participating in the island-wide

referendum. Congress was to ratify any proposed Constitution before it became effective. *See 48 U.S.C. §§ 731b*-731d. *48 U.S.C. § 731b* recognizes that these sections were adopted in the nature of a "compact." *See* note 53 *supra*. The proposed Constitution was approved by a majority vote of the people of Puerto Rico in a referendum held in March of 1952. The Constitution, as amended, was approved by Congress by Joint Resolution on July 3, 1952, c. 567, *66 Stat. 327* and proclaimed by the Governor of Puerto Rico to be in force and effect on July 25, 1952. Public Law 600 also provided for the automatic repeal of a large number of sections of the pre-existing Organic Act of 1917 as amended, including the sections dealing with purely local concern such as the structure of the insular government. The remaining sections of the Organic Act continued in effect as the Puerto Rican Federal Relations Act, *48 U.S.C. § 731e. See also Cosentino v. International Longshoremen's Ass'n Dist. Council of Ports of P.R., supra*, note 44 (existing federal laws would continue to apply to Puerto Rico whenever applicable prior to the approval of the Commonwealth).

The Popular Democratic Party advocated Commonwealth status at that time as a permanent status equal in dignity to Statehood. Many felt that the Spanish language and identity would have been eroded by statehood. *But see* § 56.09, *supra*, note 82. Many in Puerto Rico today advocate statehood, including the New Progressive Party. See footnote 182, § 56.06 supra regarding recent voting on status which was held in December of 1998 and resulted in the following vote: Commonwealth: 1%; Free Association: 3%; Independence: 2.5%; Statehood: 46.5%; and None of the Above 50.2%. A good discussion of the history of Puerto Rico and the various alternatives may be found in an article by Jose Trias Monge, "Articulos: Plenary Power and the Principle of Liberty: An Alternative View of the Political Condition of Puerto Rico," Rev. Jr. U.P.R. 68 (1999) 1. The status of Puerto Rico continues to invite comment. Ingram, John D., "Puerto Rican Independence: Whose Choice? The People of Puerto Rico or The United States Government?" Mich. L. Rev. (2001) 85, discusses the various alternatives and includes a history of the Commonwealth. Declet Jr., Rafael A., "The Mandate Under International Law for a Self-executing Plebiscite on Puerto Rico's Political Status, and the Right of U.S. Resident Puerto Ricans to Participate," *28 Syracuse J. Int'l L. & Com. (Summer 2001) 19,* includes a history and concludes that Puerto Rico has never fully exercised its rights of self-determination. *See also* the Comment by Jose D. Roman, "Trying to Fit an Oval Shaped Island Into A Square Constitution: Arguments for Puerto Rican Statehood," *29 Fordham Urb. L. J. (April 2002) 1681* which comment suggests the need for statehood in order for citizens to be able to vote in presidential elections. *See also* the article by Keitner, Chimene I. and Reisman, W. Michael, "Free Association: The United States Experience," Tex. Int'l L. J. 39 (Fall 2003) 1 in which Puerto Rico is discussed.

(n8)Footnote 122. Although the political parties in Puerto Rico may disagree on whether Puerto Rico should become a state, remain as a Commonwealth, or become independent, all agree on the need to preserve the Spanish cultural identity of the islands. On April 5, 1991, the Governor signed a law making Spanish the official language, superseding P.R. Laws Ann. tit. 1, § 51 in which Spanish and English were both recognized. *See* LEXIS 1991 P.R. ALS 4; 1991 P.R. Act 4; 1991 P.R. H.B. 417. English remains the official language of the Federal District Court pursuant to *48 U.S.C. § 864.* The English language requirement was in the Foraker Act of 1900. The Court Interpreters Act of 1978 provides for bilingual interpreters. *See* Pub. L. 95-539, *92 Stat. 2042* and *codified at 28 U.S.C. §§ 1827*-1828. The legislation allows a language other than Spanish to be used when its use would be convenient, necessary or indispensable. *See also* the article by Lisa Napoli, "The Legal Recognition of the National Identity of a Colonized People: The Case of Puerto Rico," B. C. Third World L. J. Vol. 18 (1998) 159; Roman, Ediberto, "Empire Forgotten: The United States' Colonization of Puerto Rico," Vil. L. Rev. Vol. 42 (1997) 1119. Although Puerto Rico is now officially bilingual, the use of Spanish predominates as noted in the Comment by Abel, Josiane Deschamps, "Language, Nationality and the Law: What Lies Ahead for America," U. Miami Inter-Am. L. Rev. 34 (Spring 2003) 343 and the article by Alvarez-Gonzalez, Julian, "Law, Language and Statehood: The Role of English in the Great State of Puerto Rico," Law & Ineq. 17 (1999) 359.

(n9)Footnote 123. Pursuant to the Puerto Rican Constitution, the Governor and Legislature are elected; and judges are appointed. *See also 48 U.S.C. § 821. See also Garcia v. Friesecke, 597 F.2d 284 (1st Cir. 1979)* (grant to Puerto Rican Legislature of legislative power regarding local matters is considered to be as broad and comprehensive as language can make it). *48 U.S.C. § 845* notes that the Puerto Rican Legislature may amend, alter, modify or repeal the income tax laws in force in Puerto Rico. An elected governor was first provided by the Elective-Governor Act of 1947,

ch. 490, *61 Stat. 770. See* the article by Jose Julian Alvarez-Gonzalez, Law, Language and Statehood: The Role of English in the Great State of Puerto Rico, Law & Ineq. J. 17 (Summer, 1999) 359 whose author concludes that the issue of language will not disappear. Jose Trias Monge suggests that a reason that statehood has not been preferred by the people of Puerto Rico lies with concerns for its national identity, language and culture. Jose Trias Monge, Articulos: Plenary Power and the Principle of Liberty: An Alternative View of the Political Condition of Puerto Rico, Rev. Jr. U.P.R. 68 (1999) 1 at 20. *See also* the comment by Morton, Sean M., "Comment: Death Isn't Welcome Here: Evaluating the Federal Death Penalty in the Context of a State Constitutional Objection to Capital Punishment," *64 Alb. L. Rev. (2001) 1435* in which the Puerto Rican Constitution, which outlaws capital punishment, is discussed.

(n10)Footnote 124. The courts of Puerto Rico are administered as if a single district under the Constitution of Puerto Rico, Article V, § 2. At the time of acquisition in 1898, Puerto Rico had a functioning legal system which used the Spanish civil law. *See* note 118 *supra*. The Foraker Act established a Federal District Court. Until 1961, appeals from the Puerto Rican Supreme Court went to the First Circuit Court of Appeals; however, at the present time such appeals are to the United States Supreme Court, as with state courts. *See 28 U.S.C. § 1258.* The First Circuit, however, was sensitive to issues of local autonomy. *See, e.g., Marquez v. Aviles, 252 F.2d 715 (1st Cir. 1958)* (approval of the Commonwealth impliedly withdraw federal court jurisdiction over local questions).

(n11)Footnote 125. Currently, the District Court in Puerto Rico has seven judges. *See 28 U.S.C. § 133. See also 28 U.S.C. § 119.* Appeals are to the First Circuit Court of Appeals. *See 28 U.S.C. § 1291. See also 48 U.S.C. § 864* noting that the laws of the United States relating to appeals are as with the several States.

(n12)Footnote 126. *See generally* § 56.06 *supra*. Congress has never intervened directly with the Constitution nor with any law of Puerto Rico nor is intervention likely to occur. In fact, under the compact between Puerto Rico and the United States, Congress cannot amend the Puerto Rico Constitution unilaterally. *See United States v. Quinones, supra*, note 53 (Puerto Rico is no longer a federal governmental agency but is like a state. The Congressional intent behind the approval of the Puerto Rican Constitution was that the Constitution would govern the organization of local government and its adoption would in no way alter the applicability of U.S. laws such as the Omnibus Crime Control Act). *See Rodriquez v. Popular Democratic Party, 457 U.S. 1, 8 (1982),* Mora v. Mejias, *supra*, note 53. *See also Agosto v. Barcelo, 594 F. Supp. 1390 (D.P.R. 1984),* with *mandamus granted* in *Hernandez-Agosto v. Romero-Barcelo, 748 F.2d 1 (1st Cir. 1984)* (federal law governs relative rights and obligations of political branches of the Puerto Rican government when in conflict and the Puerto Rican government is restricted by federal law and federal principles). Congress and the President do, however, adopt legislation and rule on matters of concern to the residents of Puerto Rico (either by inclusion or exclusion).

48 U.S.C. § 734 provides that statutory laws of the United States not locally inapplicable are effective in Puerto Rico except for the Internal Revenue laws. *See also* Caceres v. San Juan Barge Co., *supra*, note 55 (as a commonwealth the government of Puerto Rico has such powers as Congress from time to time gives it under the broad power of Congress to legislate for national territory); Craibow Corp. v. Occupational Safety and Health Review Comm'n, *supra*, note 76 (new federal legislation does not require the prior consent of Puerto Rico to be applicable there). *See also* Jose Monge Trias, Puerto Rico: The Trials of the Oldest Colony in the World (New Haven. Yale University Press 1997); Gabriel A. Terrasa, The United States, Puerto Rico, and The Territorial Incorporation Doctrine: Reaching A Century of Constitutional Authoritarianism, *31 J. Marshall L. Rev. 55 (1997).* Puerto Rico: The Trials of the Oldest Colony in the World, has been reviewed by Juan R. Torruella, in the Yale Law Journal, Vol. 107 (1998) (1503). *See also* the reviews by Own M. Fiss, Decolonizing Puerto Rico: A Review of Jose Trias Monge, 'Puerto Rico: Trials of the Oldest Colony in the World,' Rev. Jr. U.P.R. 67 (1998) 1121 and by Christina Duffy Burnett, Puerto Rico: The Trials of the Oldest Colony in the World by Jose Trias Monge, Yale J. Int'l L. 23 (Summer, 1998) 561. *See also* the article by Levinson, Sanford, "Symposium: the Canon(s) of Constitutional Law: Why the Canon Should be Expanded to Include the Insular Cases and the Saga of American Expansion," Const. Commentary, 17 (Summer 2000) 241. The author notes that the material for the essay will be included in a book by Burnett, Christian Duffy and Marshall, Burke, eds., Foreign in a Domestic Sense: Puerto Rico, American Expansion, and the Constitution. (Duke University Press) which book contains

essays on Puerto Rico. The United States Navy's bombing exercises on the island of Vieques has generated much discussion and lawsuits. The district court dismissed the lawsuit to stop the Navy from resuming bombing exercises on the island in *Puerto Rico v. Rumsfeld, Civil Action No. 01-886, 2001 U.S. Dist. Lexis 21872 (District Ct. D.C. 2001),* and in the *United States of America v. Sued-Jimenez, 275 F.3d 1 (Appeals 1st Cir. P.R. 2001)* the trespassing convictions were affirmed. President George W. Bush has said the bombings will end by May of 2003. The debate continues regarding the status of Puerto Rico. *See also* the articles by Jason Adolfo Otano, Note: Puerto Rico Pandemonium: The Commonwealth Constitution and the Compact-Colony Conundrum, *27 Fordham Int'l L. J. 1806 (2004);* Angel R. Oquendo, Liking to be in America: Puerto Rico's Quest for Different in the United States, *14 Duke J. Comp. & Int'l L. 249 (2004);* Karina Camacho, Note & Comment: The United States-Puerto Rico Relationship: Incomplete Decolonization, *48 How. L. J. 491 (2004). See also United States v. Ayala, 289 F.3d 16* (lst Cir. 2002) (convictions affirmed); *United States v. Zenon-Rodriguez, 289 F.3d 28* (lst Cir. 2002) (trespass in surrounding waters). The National Authorization Act for Fiscal Year 2001, Pub. L. No. 106-398, Title XV, 1508 (2002) transferred parts of the Island to the Interior for administration.

(n13)Footnote 127. The Spanish Civil Code of 1888 was made applicable to Puerto Rico by Royal Decree of July 31, 1889. Basically, that Civil Code remains in force today, although more than one hundred articles of the Louisiana Civil Code also became part of the Puerto Rico Civil Code. *See* Ramos, *supra*, note 118 as well as Gonzales Tejera, Eason-Weinmann Center for Comparative Law Symposium on Reflections on the Civil-Law Tradition in Louisiana: Agenda for the Twenty-First Century: Mortis Causa Wealth Transfer and the Protection of the Family: The Spanish-Puerto Rican Experience, *60 Tulane L. Rev. 1231 (1986).* Thus, for example, in Title 31, § 1111 the term ownership is defined and the derivation is noted as being the Civil Code, 1902, § 354; Spanish Civil Code, Art. 348; and the Civil Code of Louisiana, Art. 488.

See also Porto Rico v. Fortuna Estates, 279 F. 500 (1st Cir 1922) (under the general order of November 4, 1898, and the Foraker Act, the laws of Porto Rico in force at the time continued to apply and thus a prescriptive right to land which had commenced to run under the Spanish Civil Code, Art. 1957 continued until the adoption of the Porto Rican Code on March 1, 1902). *But see United States v. Hato Rey Bldg. Co., 886 F.2d 448 (1st Cir. 1989)* noting that *Fortuna Estates* had been superseded by statute and that today adverse possession will not apply to acquire an interest in land held by the United States. *See* for example, the brief comment in *Pritzker v. Yari, 42 F.3d 53* (lst Cir. P.R. 1994) noting that the Spanish Civil Code may, at times, constitute significant authority in the interpretation of the Puerto Rico Civil Code, though not when the Puerto Rico Code is clear. As noted in the book by Peter C. Stuart, Isles of Empire: The United States and Its Overseas Possessions, on page 260, the first two organic acts for Puerto Rico contained a limitation of landholding to five hundred acres which limitation lacked enforcement provisions and was widely ignored.

(n14)Footnote 128. Title 30 was updated in 1979, replacing the Spanish Mortgage Law of 1893. *See also In re Hernandez, 244 B.R. 549 (Bankr. D.P.R. 2000)* in which case the court concluded that title to the mortgaged property was transferred to the foreclosure sale purchaser when the deed of judicial sale was executed and thus was not property of the bankruptcy estate when the title was conveyed prior to the petition for bankruptcy. The differences between an ordinary mortgage foreclosure and a summary foreclosure proceeding were discussed in the case of *In re Martinez Oritiz, 306 B.R. 727 (Bankr. D.P.R. 2004)* and it was determined that, because the statute had not been followed in the summary proceeding, the debtor still retained an interest in the property.

(n15)Footnote 129. Subtitle 2 thereof deals with Property, Ownership and Its Modification including the classification of property, ownership, common ownership, waters, possession, usufruct, servitude, homestead and the registry of property. Subtitle 3 deals with the different ways of acquiring ownership of property.

The act is to be known as The Civil Code of Puerto Rico, Civil Code, 1920 § 1. Section 10 of Chapter 1, Title 30 notes that all real property is subject to the laws of the country where situated (derived from Civil Code, 1902, § 10 Spanish Civil Code). Conveyances of real property in Puerto Rico therefore are governed by Puerto Rican laws. *See United States v. Deya, 369 F. Supp. 1113 (D.P.R. 1974); Weston v. Stuckert, 329 F.2d 681 (1st Cir. 1964). See*

Estancias La Ponderosa Dev. Corp. v. Harrington, 195 B.R. 210 (Bankr. D.P.R. 1996) in which the court discussed some of the rules regarding contracts for the sale of land and held specifically that, if the land had less than 90% of the acreage promised, the purchaser had an option of either demanding a reduction in the total sale price or rescinding the contract. *See also Santiago v. Figueras (In re Figueras), 193 B.R. 118 (Bankr. D.P.R. 1996)* (noting that the gift of residential property to their children constituted a fraudulent transfer and was void when husband grantor later filed a Chapter 7 proceeding); *Caridev, Inc. v. Stubbe (In re J. Gus Lallande, Inc.), 197 B.R. 406 (Bankr. D.P.R. 1996)* (contract by the bankruptcy trustee for the sale of land located in a flood zone was void ab initio as it was executed contrary to express requirements of Puerto Rico law). A power of attorney for the sale of land must be specially conferred pursuant to P.R. Laws Ann. tit. 31, § 4425 and thus, it was held in *Ibizarry v. Varela, 59 F Supp. 2d 358 (D.P.R. 1999)* that the power granted to the sister in connection with the settlement of the parents' estate did not extend to the conveyance of the property once the siblings acquired title. Consequently, the brother continued to own an interest in the subject property.

(n16)Footnote 130. *See* P.R. Laws Ann. tit. 31, § 1041which defines immovable as "those which cannot move themselves or be removed from one place to another." P.R. Laws Ann. tit. 31, § 1042 adds that "things may be immovable either by their own nature or by their destination or the object to which they are applicable." P.R. Laws Ann. tit. 31, § 1043 then lists items which are immovable. All three sections were derived from the Louisiana Code. *See also* P.R. Laws Ann. tit. 31, § 1027 which divides property into either corporeal or incorporeal items.

Adverse possession is recognized. *See, e.g.*, P.R. Laws Ann. tit. 31, § 5278 and *United States v. Deya, supra,* note 129. Adverse possession does not run against the United States. *See United States v. Hato Rey Bldg. Co., Inc., supra,* note 127 (U.S. may not be stripped of its recorded title to land forming part of the Caribbean National Forest by virtue of adverse possession).

Pursuant to the Treaty of Paris, *supra,* note 5, all public lands in Puerto Rico formerly held by Spain became the property of the United States. *See also Lasky v. United States, 388 F. Supp. 1036 (D.P.R. 1975)* (U.S. ownership by virtue of the Treaty of Paris continued unless the U.S. had been divested of it). *See also 48 U.S.C. § 748* noting that the President may from time to time convey such lands to the people of Puerto Rico. *See In re Lang, 191 B.R. 268 (Bankr. D.P.R. 1995)* in which the court held that when one spouse filed bankruptcy in Puerto Rico, all property of that debtor, as well as community property, became estate property. *See also* Santiago v. Figueras (In re Figueras), footnote 129 *supra,* in which the court held that the husband's debt could be paid from conjugal property.

(n17)Footnote 131. *See* P.R. Laws Ann. tit. 31, § 3621. As is traditional in a civil law system, children are also protected and cannot easily be disinherited by a parent. *See* P.R. Laws Ann. tit. 31, §§ 2453 *et seq.*

(n18)Footnote 132. *See* P.R. Laws Ann. tit. 31, §§ 1871 *et seq.* The issuance of title insurance was discussed in the case of *Sheils Title Co. v. Commonwealth Land Title Ins. Co., 184 F.3d 10* (lst Cir. 1999).

(n19)Footnote 133. Act 104, June 15, 1958 of Puerto Rico may be found in P.R. Laws Ann. tit. 31, § 1291 *et seq* . The act itself may be traced to the Spanish Civil Code, Article 396 later to become Article 300, which was derived from Article 664 of the Napoleonic Code. Act 104 was later amended in 1976 by Act 157. The essential characteristics of horizontal ownership or condominium were given in *Arce v. Caribbean Home Constr. Corp. 108 P.R. Dec. 225 (1978).* Puerto Rico also provided the impetus for § 234 of the National Housing Act authorizing the Federal Housing Authority to provide federally insured mortgages on condominiums. *See 48 U.S.C. § 1715.*

(n20)Footnote 134. Article VI, § XIV of the Constitution, Chapter 35, P.R. Laws Ann. tit. 28, § 401 *et seq.* and *48 U.S.C. § 751.* In addition, no corporation is authorized to conduct the business of buying and selling real estate. Corporations may lend money and have real estate as a security; however, if the real estate is purchased as a result of foreclosure, it must be disposed of within five years. *See* 1966 Op. Sec. Jus. No. 15 (Corporation cannot hoard land or speculate in land). The limitation of five hundred acres does not apply to non-agricultural corporations. *See* 1956 Op. Sec. Jus. No. 70 and *People v. Fajardo Sugar Co., 50 P.R.R. 156 (1936)* (fact that corporation is authorized by its

Articles of Incorporation to engage in the manufacturing of sugar does not operate as a release of these restrictions when it engages in agriculture). The five hundred acre limitation does not apply to the Commonwealth nor to governmental corporations. *See* P.R. Laws Ann. tit. 28, § 402 and *Puerto Rico v. Eastern Sugar Assocs., 156 F.2d 316 (1st Cir. 1946).* This section is not a "law of the United States" for purposes of vesting exclusive jurisdiction. *See Puerto Rico v. Rubert Hermanos, Inc. supra*, note 11.

(n21)Footnote 135. P.R. Laws Ann. tit. 28, § 1113 that no person is to be deprived of ownership unless for a just purpose and on payment of compensation. Private property is not to be taken or damaged for public use except upon the payment of just compensation and in the manner provided by law, and *see* P.R. Laws Ann. tit. 32, § 2901. *See Commonwealth v. Superior Ct., 95 P.R.R. 328 (1975)* (state cannot take without just compensation); *Sands v. Ext. Sagrado Corazon, Inc., 103 P.R.R. 826 (1975)* (property is taken when a private party of the government violates or destroys restrictive conditions imposed on two adjacent lots where a residential development was to be built. A jury is not required to determine just compensation. *See Iriarte v. United States, 157 F.2d 105 (1st Cir. 1946).* "Inverse condemnation" is used to protect an owner when the State has failed to comply with these provisions. *See Heftler Int'l, Inc. v. P.B., 99 P.R.R. 454 (1970). See also Deniz v. Municipality of Guaynabo, 285 F.3d 142* (lst P.R. 2002) that the remedy of inverse condemnation is not noted in the Code but is generally available.

(n22)Footnote 136. *See* P.R. Laws Ann. tit. 1, § 105. The day is set aside for "extolling love for land as an inexhaustible source of production and life." As part of the celebration, the Secretary of Agriculture must promote the concept of small landowners and award prizes to them.

Thompson on Real Property, Thomas Editions

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CHAPTER 56 TERRITORIES AND POSSESSIONS

7-56 Thompson on Real Property, Thomas Editions § 56.12

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§ 56.12 The Territory of American Samoa.

American Samoa is an unorganized, unincorporated territory of the United States, n137 consisting of seven islands located approximately half way between Hawaii and Australia. n138 American involvement with the islands began in 1839 when they were visited by Navy Lieutenant Charles Wilkes. n139 In 1872, the United States established a naval station at Pago Pago, though a proposed harbor agreement was never ratified. n140 In 1889, following the Berlin Conference, the United States, Germany, and Great Britain formed a tripartite agreement regarding the entire area, which agreement ended ten years later with the United States assuming authority over Tutulai and other islands of the Samoan group east of Longitude 171 degrees west of Greenwich. n141 In the early 1900s, the Samoans ceded their land (with the exception of Swain's Island) in two separate agreements to the United States. n142 Though the islands were acquired in the early 1900s, it was not until 1929 that Congress formally accepted the Articles of Cession. n143

As an unorganized, unincorporated territory of the United States, American Samoa's governing authority rests with the Secretary of the Interior. n144 Congress has not acted to change that status, nor have Samoans to date desired such change. n145 Consequently, all civil, judicial, and military powers of the government in American Samoa are exercised by the Secretary of the Interior. n146 Under the Samoan Constitution, n147 Samoans now elect their own Governor and Lieutenant Governor, n148 their own legislature, n149 and conduct their own court system. n150

The relationship between American Samoa and the United States is unique. Of particular significance is the traditional social structure of the Matai and the Communal Ownership of land. n151 The importance of land and the traditional means of communal ownership always have been recognized by the United States. n152 Likewise, the Matai Structure has been recognized. n153 The United States also has allowed American Samoa to have its own immigration system which applies to all, including American citizens. n154

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LEXIS: territor! w/5 american samoa

(a) The Matai Structure.

The American Samoan culture is based on extended families who hold land communally. Traditionally, the extended family or "*aigra*" had rights in titles and land tenure. An extended family may consist of from eight to fifty people in a single household, at whose head is a *matai*. Typically, it is a patriarchal society where the women move to the husband's home. Each household is responsible for its members and contribute to the maintenance of the village. n155 The *matai* title represents supreme authority and responsibility within the family group. Part of the authority of the *matai* is to assign land to family members in exchange for services. n156

Matai title succession today is governed statutorily and all matai titles are to be registered. n157 To be a title holder, a candidate must meet all qualifications and be chosen by the family. n158 If the family cannot agree, the High Court has authority to select the holder of the matai title. n159

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LEXIS: american samoa w/50 matai

(b) Land.

Land is very important in American Samoa. It is said to be the very fiber of the social, economic and political pattern. n160 Protection of traditional land patterns was continued in both grants of cession. n161

The American Samoan Constitution provides for land alienation restraints, n162 with implementing legislation found in Title 37 of the American Samoan Code. n163 According to the restraints it is prohibited for any *matai* of a Samoan family to alienate such lands without the written approval of the Governor of American Samoa. Only freehold lands may be conveyed to any person who has less than one-half native blood. It is prohibited to alienate any native lands to a person with non-native blood unless such person was born in American Samoa, was a descendant of a Samoan family, lives with Samoans as a Samoan, lived in American Samoa for more than five years or has officially declared intentions of making American Samoa home for life. n164 If two persons marry who have any non-native blood, their children may not inherit land unless the children are at least one-half native blood. n165 The restraints were upheld in Craddick v Territorial Registrar, n166 where the High Court of American Samoa considered and rejected equal protection challenge. n167

In American Samoa, the three basic types of land are freehold, individually owned land, and communal or native land. n168 Freehold land represents only a small portion of the land and is land which was protected by the Berlin Treaty of 1889. n169

Individually owned land is land which has been cleared by an individual person for personal use. Individually owned land arises from cultivation and continuous occupancy. n170 Although it is a possibly important source of land ownership in American Samoa (and one which may grow in significance), little land is so held today. n171

Most land in America Samoa is communal land. n172 This communal or native land is owned by the extended family, is controlled by the *matai*, and is the key to the land tenure system. n173 The *matai* assigns the land or "*pule*" for a home or cultivation and in return services are rendered to the *matai*. n174 Communal land may be conveyed by the *matai* only with the approval of the governor. n175

Communal lands n176 may be leased to any person, for a term not to exceed fifty-five years, so long as the purpose does not include mining or cutting of timber. The lease, however, must be submitted to the Governor for approval and at least one-tenth of the land must be cultivated or occupied. n177 In addition, native lands may be leased for school purposes for as long as thirty years with renewals. n178

A separation agreement allows for a structure to be separate and distinct from the real estate and is treated as personal

property. The senior *matai* in charge of communal land, the male members of a family living on communal land, or the owners of individual or freehold lands may execute separation agreements. n179 The agreement itself must be in writing and be recorded. The separation agreement enables a house to be used as collateral for a mortgage. n180

To acquire possession of the land originally, Samoan families went into the bush, took possession, cleared the land, and claimed it as their own. A mere claim to ownership, without more, was insufficient. n181 Today title to land may be registered; however, registration is not required until the title is transferred. n182 Possession of land, when disputed in American Samoa, is often difficult to ascertain. Disputes over the land may be reduced to two *matais* presenting decades worth of hearsay evidence over who had been planting what plants where and who had cleared what corner. n183 Consequently, the concept of adverse possession has become central to settling land disputes. n184

Property law in American Samoa is based on the American Samoa Constitution, the American Samoa Code, and so much of the common law of England as is suitable to the conditions in American Samoa. n185 If there is a conflict between those sources, Samoan custom will prevail. n186

The American Samoan Code contains provisions for inheritance and for intestate succession of individually held land. n187 A transfer may be made in trust for a child of a native owner of non-native land who is married to a non-native, or for the issue of such a marriage. n188 Dower rights are recognized in freehold and individually owned lands. n189

Among laws affecting land are the following:

a. If land is given as an atonement for a crime against a family member, the property becomes the communal property of the family and not the individual property of the victim's family. n190

b. Landowners can bring an action for nuisance against other landowners, such as when odors are emitted by tuna canneries. n191

c. The Rule Against Perpetuities cannot be applied to American Samoan communal property. n192

d. Land can be held communally even if they have the European surname of an ancestor. n193

e. Land may be taken by eminent domain and just compensation must be paid. n194 However, if native lands taken for governmental purposes are reconveyed or transferred, the grantees must be native Samoans. n195

COMPUTER-ASSISTED RESEARCH

LEXIS: american samoa w/30 restraint! w/5 land! or alien!
american samoa w/30 land! w/15 freehold or individual! or communal or native
american samoa w/30 separation w/1 agreement!
american samoa w/15 property

FOOTNOTES:
(n1)Footnote 137. *See Meaamile v. America Samoa, supra*, note 46.

(n2)Footnote 138. The primary island is Tutuila on which Pago Pago Bay is located; however, the other volcanic islands are Annu'u, the Manu's group of Ta'u, Olosega, and Ofu; as well as the two coral islands Rose Island (which services as a wildlife refuge) and the privately owned Swains Island. Total land area is approximately seventy-six square miles. The American Samoa Bar Association now provides an Internet source for the American Samoa Code at *www.asbar.org*. This good news was reported in an article by William A. Hilyerd Using the Law Library: A Guide for Educators--Part I: Untangling the Legal System, *33 J. L. & Educ. 213 (2004).*

(n3)Footnote 139. Lieutenant Wilkes charted the islands and negotiated understandings with the various Samoan matais or chiefs.

(n4)Footnote 140. The United States Senate failed to ratify the agreement. *See* H.R. Exec. Doc. No. 161, 41st Cong. 1st Sess. 6, (1876), as noted in the American Samoa Code Annotated under Historical Documents. A Treaty of "friendship and commerce" was made January 17, 1878, and ratified on February 13, 1878, between the United States and American Samoa, which treaty was annulled by the Treaty of December 1, 1899, *see* note 141, *infra*. Several matais sought annexation with the United States as early as 1873. This early history also is retold in Leibowitz, *supra* n. 3, at pp. 412 *et seq.*

(n5)Footnote 141. *See* Convention Respecting Samoa Islands as *reprinted in* Am. Samoa Code Ann., Historical Documents. In 1899, the United States renounced all rights and claims in Western Samoa, over which Germany assumed control. *See* Convention Respecting Samoa Islands, *31 Stat. 1878*, T.S. No. 314 (1899). The Convention is also *reprinted in* Am. Samoa Code Ann., Historical Documents. Six months later, President McKinley proclaimed American authority over the islands and placed them under the control and authority of the Department of the Navy. *See* Exec. Order No. 540, dated February 19, 1900, which order continued until revoked by Exec. Order No. 10,264, June 29, 1951, *16 Fed. Reg. 6419* transferring authority to the Secretary of the Interior. Both orders and the delimitation of authority, Secretary's Order No. 2657, are *reprinted in* Am. Samoa Code Ann., Historical Documents.

(n6)Footnote 142. In 1900 the Islands of Tutuila and Annu'u were ceded by the Chief of Tutuila to the United States on April 17, and *reprinted in* Am. Samoa Code Ann., Historical Documents. On July 16, 1904, a similar cession was made by King and Chiefs of the Manau Islands of Ta'u, Olosego, Ofu and Rose Island as *reprinted in* Am. Samoa Code Ann., Historical Documents, p. 3. The seventh island, Swains Island, was made a part of American Samoa by a joint resolution of Congress on March 4, 1925. *See* Act of March 4, 1925, c. 563, *43 Stat. 1357*, and *codified at 48 U.S.C. § 1662* (noting American sovereignty over American Samoa is extended over Swains Island). With both cessions, and as more fully discussed in § 56.16, *infra*, the Samoans requested and the United States agreed to represent and protect native land ownership.

(n7)Footnote 143. *See* Act of February 20, 1929, c. 281, *45 Stat. 1253;* May 22, 1929, c. 6, *46 Stat. 4* and codified at *48 U.S.C. § 1661*.

(n8)Footnote 144. *See 48 U.S.C. 1661*(c) noting that until Congress shall provide for the government of the islands, all civil, judicial and military powers shall be vested in such person as the President of the United States shall direct. Originally that authority was given to the Secretary of the Navy; however, it was transferred to the Secretary of the Interior on July 1, 1951. *See* Exec. Order No. 10,264, *16 Fed. Reg. 6419 (1951). See also* note 141, *supra*. A good general discussion regarding the government of American Samoa may be found in Comment and Analysis, Janet Matthews Information Services, Quest Economics Database, Asia & Pacific Review World of Information, November 1998. A good general discussion of the history and culture of American Samoa may be found in the article by Hall, David E., "Curfews, Culture, and Custom in American Samoa: An Analytical Map for Applying the U.S. Constitution to U.S. Territories," *2 Asian-Pacific L. & Pol'y J. (Winter 2001) 69.*

(n9)Footnote 145. As noted in § 56.05 *supra*, American Samoa is the only unorganized territory. Following the acceptance of the cessions in 1929, a Congressional Commission held hearings in 1930, which resulted in a draft Organic Act. This Act would have provided citizenship and established an independent legislative, executive, and judicial branches of government. *See* American Samoan Commission, S. Doc. No. 249, 71st Cong., 3rd Sess. 7 (1931). The Commission recommendations were not acted on and the proposed Organic Acts died in Congress. Samoans also distrusted passage of the bill, fearing it might eliminate or erode their traditional powers over land and immigration. In both 1969 and 1975, American Samoa Political Status Commissions, composed of concerned citizens and legislators of Samoa, reviewed the political status of American Samoa and recommended that American Samoa remain as an unorganized, unincorporated territory. Note also discussion in Am. Samoa Code Ann., § 41.0201 noting that when Congress considered Organic Acts for American Samoa the Congress recognized the rights of American Samoa to

protect their "lands, customs, culture, and traditional American Samoan family organizations of persons of American Samoa ancestry."

(n10)Footnote 146. The Secretary's power, and that of the Assistant Secretary of the Office of Territories and International Affairs (OTIA) within the Secretary's office, are plenary under *48 U.S.C. § 1661*(c) and Exec. Order No. 10,264, *supra*, note 144. *See also* notes 148-151, *infra*. For example, in the *Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Hodel, 637 F. Supp. 1398 (D.D.C. 1986), aff'd,* in *830 F.2d 278 (1987) cert. denied, 486 U.S. 1015 (1988)* (hereinafter "Presiding Bishop") the plaintiff had appealed a decision of the High Court of American Samoa to the Secretary of the Interior who declined to overrule the Samoan Court. The Federal District Court noted that the Secretary exercised broad powers under Exec. Order No. 10,264, *supra*, note 144; however, the Secretary need not so review. The Secretary had noted that to review the decision would undermine a policy fostering greater self-government and self-sufficiency in American Samoa. *See also King v. Andrus, 452 F. Supp. 11 (D.D.C. 1977).*

(n11)Footnote 147. The Constitution of Samoa, through proposed by a Constitutional Convention and approved in a plebescite, still required the approval of the Secretary of the Interior to have legal force when it was originally adopted in 1960 and went into effect on October 17, 1960. The Constitution was amended in 1966 to reactivate the locally selected legislature and to limit somewhat the powers of the federally appointed governor. The amended Constitution was ratified in 1966, approved by the Secretary of the Interior on June 2, 1967, and went into effect on July 1, 1967. An amendment was made in 1971 regarding the Legislature. All amendments made to the Constitution now must be approved not only by the Secretary of the Interior pursuant to Exec. Order No. 10,264, *supra*, note 144, but may be made only by Act of Congress. *See* Pub. L. 98-213, § 12, Dec. 1983, *97 Stat. 1462,* codified at *48 U.S.C. § 1662a.*

(n12)Footnote 148. The Constitution was amended in 1977 to allow for the election thereof. Prior to that time, the Samoan people had rejected proposals to allow an elected Governor and Lieutenant Governor. *See* Dept. of Interior, Secretary's Order No. 3009 (Sept. 13, 1977) *reprinted in* Am. Samoa Code Ann., Historical Documents, p. 8. *See also* Title 4 Am. Samoa Code Ann.

(n13)Footnote 149. The Legislature is provided for in Article II of the Revised Constitution and consists of an elected House and a Senate composed of eighteen members who are selected in accordance with Samoan custom by the county councils of the county they are to represent. *See also* Title 2 Am. Samoa Code Ann. and in particular Am. Samoa Code Ann. § 2.0203 regarding the election of Senators. All laws passed by the Legislature, however, must be submitted to the Secretary of the Interior for approval. *See* Secretary's Order No. 2657 at 2(b)(4) (August 29, 1951) *reprinted as amended in* Am. Samoa Code Ann., p. 7. Note that the legislature is called Fono after the traditional council of chiefs. Any United States national at least 25 years of age who has resided in American Samoa for five years is eligible to run for the lower chamber. Am. Samoa Const. Art II, §§ 3 and 4. According to Peter C. Stuart in his book Isles of Empire: The United States and Its Overseas Possessions on page 273 the territorial legislature, the Fono, meets in a building which resembles the traditional village fale.

(n14)Footnote 150. *See* Title 3 Am. Samoa Code Ann. § 3.0101 notes that the judicial power of American Samoa is vested in a High Court, a district court and a village court in each village. The High Court is found in Title 3, Am. Samoa Code Ann. § 3.0201 *et seq.* and an excellent discussion thereof also may be found in *Presiding Bishop, supra* note 146. The court notes that the High Court System consists of three divisions: The Land and Title Division; the Trial division; and an Appellate Division. The Secretary of the Interior appoints the Chief Justice and an Associate Justice each of whom is to be learned in the law and shall sit on the High Court. *See* Am. Samoa Code Ann. § 3.1001. The Secretary may also appoint associate justices from members of Article III federal courts to serve on the appellate division court from time to time. Associate judges might not be lawyers and are appointed by the governor on the recommendation of the Chief Justice and must be confirmed by the Senate; however, they are familiar with local land law and custom (typically they are local matai). *See* Am. Samoa Code Ann. § 3.1004. On an appeal to the High Court in a land case, a majority of five judges shall prevail with a panel consisting of three justices and two associate judges. The majority can consist of two judges even though in general a majority must carry at least two justices. *See* Am. Samoa

Code Ann. § 3.0221. The court in *Hodel* noted that though the Secretary may appoint and remove justices, the Secretary in general has removed himself from overseeing the routine affairs of the High Court. The appeal from the High Court is to the Secretary of the Interior. Thus, the collateral attack in *Hodel* to ask the Federal District Court to direct the Secretary of the Interior to review the decision of the Samoan High Court. The District Court refused to so order. Another example was *King v. Andrus, supra,* note 146 (the court noted the broad authority of the Secretary of the Interior; however, it would not order the Secretary to intervene).

The district court has limited civil and criminal jurisdiction, though it may not hear land or matai title cases. *See* Am. Samoa Code Ann. § 3.0302. The village court has jurisdiction over matters arising under the regulations of the respective village. *See* Am. Samoa Code Ann. § 3.0402.

See also in general, Stanley K. Laughlin Jr., The Constitutional Structure of the Courts of the United States Territories: the Case of American Samoa, 13(b) Haw. L. R., 379 (1991).

(n15)Footnote 151. *See* §§ 56.12(a)-56.12(b) *infra*. In Title 2 of the Am. Samoa Code Ann., § 1.0201 provides that the following are declared to have the effect of law in American Samoa: The Constitution of American Samoa; those parts of the United States Constitution and laws which are in effect; the Code; so much of the common law of England as is suitable to conditions in American Samoa and not inconsistent with this section and provisions of prior codes. In § 1.0202 it is noted that the customs of the Samoan people are to be preserved, including the village councils.

(n16)Footnote 152. In both grants of cession as well as in the Samoan Constitution and the Samoan Code, all of which must be approved by either Congress or the Secretary of the Interior, the importance of land ownership is noted. Thus, for example, in the 1904 cession, *see* note 142 *supra*, it is noted "...the rights of the chiefs in each village and of all people concerning their property shall be recognized." *See* Am. Samoa Code Ann., Historical Documents, p. 4. Note also that the cessions were accepted, ratified and confirmed in *48 U.S.C. § 1661*.

(n17)Footnote 153. Note for example, the American Samoan Code limits Senators to those who are matais and provides for the registration of the matai title. *See* Am. Samoa Code Ann. § 1.0401 *et seq. See* note 158, *infra*, noting the qualifications which are necessary to be considered a matai.

(n18)Footnote 154. America Samoa is explicitly omitted from the Immigration and Nationality Act of 1952. *See 8 U.S.C. § 1101*(a)(38). *See* Am. Samoa Code Ann. § 41.0301 *et seq.* , regarding immigration registration and § 41.0401 *et seq.* , regarding the status of immigrants. It is difficult to acquire permanent resident status unless one is an American Samoan. Under Am. Samoa Code Ann. § 41.0403 permanent resident status is accorded only a person who is physically and legally present in American Samoa for a continuous period of at least twenty years, has good moral character, and for whom deportation would be a hardship. The number of such individuals is limited to ten a year. An adopted person, to so qualify after December 31, 1980, must have been adopted prior to the age of twenty-one.

(n19)Footnote 155. Note that it might be possible to belong to several "aigras" or extended families. Membership in the family is complex and some live on "aigra" land and some may live apart from it but provide economic assistance. Some may not so reside or contribute but are potential members if they can prove kinship. Currently, the "aigra" group tends to be segmented into smaller groups. *See generally* Margaret Mead, The Samoans, in Cooperation-Competition Among Primitive Peoples (Beacon Press 3d 1967); Arnold H. Leibowitz, American Samoa: Decline of a Culture, 10 Cal. W. Int'l L. Rev. 220; Laughlin, *supra*, n. 33; Robert Gardner, Justice in Lava Lava Land, L.A. Lawyer, 8 (April 1987).

(n20)Footnote 156. *See, e.g.*, Tavai v. Silao, 2 Am. Samoa 2d 1 (1983). Failure to render the required services may result in eviction from the land. A matai also serves to promote family unity and prestige, to settle disputes, to promote religious participation and to represent the family in the village. Land may be distributed for homes and cultivation. The act of assignment is a "tofi." When land is abandoned, it is returned to the family. The power of the matai to control the land was called a "pule." *See* Presiding Bishop *supra* note 146, at 1402. A good discussion of the Matai structure and

the customs of the American Samoa may be found in the article by Hall, David E., "Curfews, Culture, and Custom in American Samoa: An Analytical Map for Applying the U.S. Constitution to U.S. Territories," *2 Asian-Pacific L. & Pol'y J. (Winter 2001) 69.*

(n21)Footnote 157. *See* Am. Samoa Code Ann. § 1.0401 *et seq* . All titles were to be registered prior to January 1, 1969. A matai title may be removed for cause or if a matai is absent from American Samoa for more than one year. *See* Am. Samoa Code Ann. §§ 1.0411 and 1.0412 *et seq* .

(n22)Footnote 158. To qualify as a matai an individual must be at least one-half Samoan blood; been born on American soil; be chosen by the family for the title; and must live with Samoans as a Samoan. If born abroad, the person may still qualify by residing in American Samoa for a continuous period of not less than ten years prior to filing the application to be so registered and must have renounced the country of birth. *See* Am. Samoa Code Ann. § 1.0403. *See also Vainini v. Ala, 4 Am. Samoa 683 (1965).* The individual in general must have lived in American Samoa for one calendar year preceding date of claim. *See* Am. Samoa Code Ann. § 1.0404. The individual claiming title must then file a claim of succession with the territorial registrar, which claim is accompanied by a certificate from the chiefs of the village to which the claimed title is attached noting that the matai title is an old and traditional title of the Samoan people and that twenty-five blood members of the title signed the petition. The petition must also state that a family meeting was called and held for the purpose of selecting a successor to the title. *See* Am. Samoa Code Ann. § 1.0405. Note, however, if there are fewer than twenty-five family members, a lesser number may sign. *See In re Matai Title Fagaima, 4 Am. Samoa 83 (1973).*

(n23)Footnote 159. *See* Am. Samoa Code Ann. § 1.0409(c) where the High Court shall be guided by the follow ing considerations in the priority listed: the best hereditary right (if equal the male descendant prevails over the female), the wish of the majority or plurality of those clans of the family as customary in that family; the forcefulness, character and personality of the individual and the value of the holder of the title to the family, village and country. *See, e.g., Asuego v. Manuma, 4 Am. Samoa 616 (1965)* where there were at least eleven candidates to succeed the deceased matai, including one candidate who was not a family member. The court ranked the candidates according to the statute, though it noted that the best hereditary right was not sufficient alone. *See also Tuaolo v. Tutogi, 4 Am. Samoa 488 (1964)* (blood daughter of deceased matai had best hereditary right; however, the court did not rule in her favor because the other candidate prevailed in three out of four of the categories). *See also Presiding Bishop, supra* note 146.

(n24)Footnote 160. *See Haleck v. Lee, 4 Am. Samoa 519, 551 (1964). See also Presiding Bishop, supra* note 146, at 1401 n.2, "Every Western power that has entered the Samoan islands, not just the United States, in their official documents and treaties, has recognized what anyone who has ever visited Samoa or knows anything about Samoa knows, that the culture is integrally involved in communal ownership of land, and to upset or destroy that feature of Samoan society would ultimately destroy the society."

(n25)Footnote 161. *See* note 142, *supra*. In the 1900 Cession it is noted that "The Government of the United States of America shall respect and protect the individual rights of all people dwelling in Tutuila to their lands and other property ..." *See* Am. Samoa Code Ann., Historical Documents, p. 2.

(n26)Footnote 162. Article 1, § 3 of the Revised Constitution notes that it is the policy "... to protect persons of Samoan ancestry against alienation of their lands ... Such legislation as may be necessary may be enacted to protect the lands, customs, culture and traditional Samoan family organization of persons of Samoan ancestry." The section goes on to note that no change in the law of alienation may be made unless it is approved in two successive legislatures by a two-thirds vote of the entire membership of each house and by the Governor.

(n27)Footnote 163. *See* Am. Samoa Code Ann., § 37.0201 *et seq.* . The provisions of this Chapter 2 of Title 37 dealing with land restraints were amended in 1962, 1965 and again in 1968. Concern was expressed as to whether the requirements of the Constitution described in note 163, *supra*, had been complied with and thus the provisions were re-adopted in Pub. L. 16-88 and Pub. L. 17-31 to ensure compliance. It should be noted that a racial restriction was

upheld as early as 1900 in *Sapela v. Veevalu, 1 Am. Samoa 635 (1900)* (regulations of the Naval station prohibit the sale of native lands to a foreigner).

(n28)Footnote 164. *See* Am. Samoa Code Ann. § 37.0204(b). As used herein the term "Samoan" includes Western Samoans. *See Moon v. Falemalama, 4 Am. Samoa 836 (1975).*

(n29)Footnote 165. *See* Am. Samoa Code Ann. § 37.0204. *See* Willis v. Willis, 2 Am. Samoa 2d 102 (1986) (children of a man who was half Samoan and a wife who was full Samoan qualified). Note, that under Am. Samoa Code Ann. § 37.0205 a trust may be established of non-communal land for a child or issue of a child who is married to a non-native. Section (d) thereof notes that the section does not prohibit the transfer of native land for governmental purposes to the United States Government or to the American Samoan Government, or with the approval of the Governor, to a recognized religious society so long as on reconveyance and retransfer the land will go to native Samoans. *See* Mageo v. Viena, 1 Am. Samoa 2d 83 (1983 (matai granted use of family land "so long as" used for church purposes and the court found it reverted on the death of the pastor); Petesa C.C.C. v. Tu'inanau, 1 Am. Samoa 2d 23 (1980) (transfer to church void because the church was not a legal entity at time of transfer). Native lands means communal land under Am. Samoa Code Ann. § 37.0201(d). *See* note 176, *infra*. Subsection (e) thereof provides that true children of the present record titleholder of Swains Island who were not under the matai system shall be deemed to have heritable blood.

(n30)Footnote 166. 1 Am. Samoa 2d 10 (1980).

(n31)Footnote 167. *See Craddick v. Territorial Registrar*, note 166 *supra* noting "American Samoa has demonstrated compelling state interest in preserving the lands of American Samoa for Samoans and in preserving the Fa'a Samoa [i.e. Senate]...We find the prohibition against the alienation of land to non-Samoans to be necessary to the safeguarding of those interests." The court in *Presiding Bishop, supra*, note 146, noted even if it were to strike down § 37.0204 as unconstitutional, it would not change the ruling of a territorial court. On appeal the court found it unnecessary to discuss the racial restriction on alienation.

(n32)Footnote 168. *See Presiding Bishop, supra* note 146 at 1401. *See* Leuma v. Willis, 1 Am. Samoa 2d 48 (1980) for a concise history of land ownership in American Samoa. After the cession in 1900 and the change in political status, American Samoa and Western Samoa became two separate political entities and also diverged in their treatment of Samoan land customs. In Western Samoa, land and matai titles remained intertwined and could not be separated and thus the power of the matai was defined by the land over which he had control. In American Samoa, however, the matai title and land title began to become separate matters with the introduction of Western law with succession to the matai title being governed by statute and land succession by possession and control. As early as 1905 the English concept of adverse possession began to appear. Land surveys and title registration began to play a role in adjudicating land claims and areas not so claimed and registered generally were virgin forest. Associate Justice Murphy theorizes that these influences laid the groundwork for individual land ownership. In any event, after World War II, there was recognition that land could be held in America Samoa either as original freehold, communal land, or as individual land.

(n33)Footnote 169. *See* Am. Samoa Code Ann. § 37.0201(b). Such land may be inherited, sold, leased, is subject to dower interests and is not subject to the restraint on alienation. Of the approximately 45,500 acres in American Samoa, only about 550 to 600 acres were acquired by the "paplagis" before 1889, which land was confirmed as being freehold by the Land Commission created by the Berlin Act of 1889. The Land Commission had dealt with land matters until the cession agreements with the United States and the High Court was established to have jurisdiction over land and matai title cases. For a concise history of individual land ownership *see Leuma v. Willis, supra*, note 168.

(n34)Footnote 170. The means to acquire individually owned lands were set forth in *Taatiati v. Misi, 1 Am. Samoa 346 (1948).* In *Tiamalu v. Simaile, 1 Am. Samoa 222 (1945)* the court recognized that lack of evidence of communal ownership could then be presumed to be individually owned. *But see* Reid v. Puailoa, 1 Am. Samoa 2d 85, 87 (1985) that "since all land was once communal land, there is a presumption that all land still is. It is this presumption that any

entity asserting a given parcel is anything other than communal land must inevitably overcome." The alienation restraint of Am. Samoa Code Ann. § 37.0204 by prescribing that no lands other than freehold lands may be sold to a person of less than one-half native blood may be a tacit legislative admission that there is individually owned land. *See* note 167, *supra*.

(n35)Footnote 171. In addition there is a small amount of land which is owned by the Church as well as a small amount of government owned land. *See also* note 165, *supra*. Am. Samoa Code Ann. § 37.0204 permits the transfer to the government or to the Church on approval of the Governor. *See* note 165 *supra*. It has been suggested that individually owned land may increase if more family members want to break away from communal obligations and to have possible perpetual individual rights in the land.

(n36)Footnote 172. *See Presiding Bishop, supra,* note 146, where it is estimated at 90%. Peter C. Stuart in his book Isles of Empire: The United States and Its Overseas Possessions, on page 260 estimates that only a few acres of land are now owned by outsiders.

(n37)Footnote 173. *See* Am. Samoa Code Ann. § 37.0201(d) and § 56.15, *supra*. Persons who marry into a Samoan family do not have a say in the communal property nor do individual occupants have any greater right than another member of the family. No one has a power of appointment to pass possessory rights to others. *See* Tufele v. Mose, 7 Am. Samoa 2d 157, 159 (1988). When a family gives up possession on communal land, the land reverts to the matai and to the family. *See also Talagu v. Te'l, 4 Am. Samoa 121 (1974).* Family lands are under the jurisdiction of the matai and a young man in the family has no authority to permit strangers to live on communal lands. *See Talo v. Heirs of Seki, 4 Am. Samoa 477 (1964).*

(n38)Footnote 174. *See* note 156 *supra*. Failure to render the required services may result in eviction. It is the matai who is in charge of the property. Thus in Timalu v. Craddick, 2 Am. Samoa 2d 50 (1985) the court held that the plaintiff owned the land by quitclaim deed, despite allegations that it was communal land, in that the matai did not contest the ownership. *See also* Nauma v. Fau, 2 Am. Samoa 2d 27 (1981) to the effect that the current matai has the power to alter arrangements made by the previous matai, though the person in possession of the land does have some rights. But if a person, on learning of obligations owed the matai, renders the service to the matai, the matai may not evict that person from the communal lands. *See Fuga v. Olive, 4 Am. Samoa 664 (1962).*

(n39)Footnote 175. *See* Am. Samoa Code Ann. § 37.0204(a). *See also Haleck v. Tiumala, 3 Am. Samoa 380 (1959); Fau v. Thilson, 4 Am. Samoa 443 (1964)* (matai may not alienate communal property without written approval of the Governor). Title to communal land may pass from one family to another by conveyance or by adverse possession. *See Tufele v. Mose, supra*, note 173.

(n40)Footnote 176. *See* Am. Samoa Code Ann. § 37.0221. Whether non-communal lands may be leased or not, there is little authority. A portion of the American Samoan Code has been reserved for landlord/tenant law, Am. Samoa Code, Title 38, and Am. Samoa Code Ann. § 43.1401 *et seq.* , provide for a summary proceeding to recover possession of premises, which includes "lands covered by a lease."

(n41)Footnote 177. *See* Am. Samoa Code Ann. § 37.0221.

(n42)Footnote 178. *See* Am. Samoa Code Ann. § 37.0222.

(n43)Footnote 179. *See* Am. Samoa Code Ann. § 37.1501 *et seq.*

(n44)Footnote 180. Banks would not or could not hold mortgages on communal lands and thus the legislature established the separation agreement to provide the lending institutions with more security. *See* Tavai v. Silao, 2 Am. Samoa 2d 1, 3 (1983); *Coffen v. Mageo, 4 Am. Samoa 14 (1970).* Although the court in Tavai noted that the concept of license was inapplicable, either as a revocable or irrevocable license but rather that the homeowner could either remove the home or the matai could compensate them for it, the court in Roberts v. Sespasara, 7 Am. Samoa 2d 139 (1988)

suggested that a separation agreement might be evidence of a "license not revocable at will."

(n45)Footnote 181. *See* Craddick v. Olotoga, 2 Am. Samoa 2d 29 (1984) (land must be cleared, cultivated, and occupied). *See also* Tupuola v. Tu'ufuli, 1 Am. Samoa 2d 80 (1983) that continuous use and possession is better evidence of title than family history and tradition. *See also* Walter Tiffany, High Court Influences on Land Tenure Patterns in America Samoa, 49 Oceania 258 (1978).

(n46)Footnote 182. *See* Am. Samoa Code Ann. § 37.0210. While title registration is similar to traditional registration, Samoan culture also plays a part. Am. Samoa Code Ann. § 37.0101 *et seq.* , contains the requirements for land registration. In addition to including a metes and bounds description of the land, the description must also include a statement regarding whether the property is communally or individually owned. A certificate is needed from a surveyor as well as the village "pulenuu." If land is communal, only the matai may request to have the land surveyed. *See* Galea'l v. Ma'ae, 2 Am. Samoa 2d 4 (1984) (non-titled family member attempted to register the family land with little success since the matai had not requested the survey). Notice of the registration must be placed in the village closest to the land. Adverse claims are referred to the High Court. If there are no adverse claims, the territorial registrar shall register the land.

Title registration has been conducted since the original cession. *See, e.g., Fiu v. Sopoaga, 1 Am. Samoa 210 (1910)* noting that an alleged conveyance of land by deed was ineffectual, since the deed had not been registered.

Traditionally, only a small percentage of communal lands has been registered; however, the necessity to protect property rights, especially in view of laws which allow forfeiture of unused land, has increased the amount.

(n47)Footnote 183. *See, e.g., Mulu v. Taliutafa, 3 Am. Samoa 82, 84-85 (1953)* (dealing with title registration) in which case the court described the difficulty of ascertaining ownership for registration when the court must rely on oral renditions of family tradition. "In this case, tradition goes back hundreds of years. Each of the parties ... tried to establish ownership through the traditions of his own family with respect to the land. Consequently, the court heard four different traditions no two of which were the same." One family traced the family tradition from A.D. 839 to the 1904 cessions.

(n48)Footnote 184. Am. Samoa Code Ann. § 37.0120a contains the requirements for adverse possession as actual, open, notorious, hostile, exclusive and continuous occupancy of real estate for 30 years. *See also Tufele v. Mose, supra*, note 173; and *Presiding Bishop, supra*, note 146, that only Samoan natives may acquire native land by adverse possession and that possession must be exclusive.

(n49)Footnote 185. *See* note 151, *supra*, and Am. Samoa Code Ann. § 1.0201.

(n50)Footnote 186. *See* Tavai v. Silao, 2 Am. Samoa 2d 1 (1983) where there was a dispute concerning a separation agreement. The Silaos had been given permission to build a structure on Tavai communal land where they had lived before moving to the United States. The Silaos rented the structure without the permission of the matai and failed to provide services to the matai. They argued that a license had been created which was made irrevocable by improvements. The matai argued it was a revocable license. The court agreed with neither and applied "tofi" and held that under Samoan custom, when the land was abandoned, it returned to the family. The court noted that "We should accept Samoan customs and traditions as controlling support. Actually, common law principles which are based on private ownership of land are often the antithesis of Samoan customs and traditions, which are based on communal land." *See also* In the Matter of the Matai Title Tuiolesega, 1 Am. Samoa 2d 37 (1980) (court not bound by the Federal Rules of Civil Procedure).

(n51)Footnote 187. *See* Title 40 of Am. Samoa Code Ann. *See also Tiumalu v. Lutu, 2 Am. Samoa 222 (1945)* (individually held property descends to children of deceased owner). N. Am. Samoa Code Ann. § 37,0204(c) that if a person has any non-native blood and marries a person with any non-native blood, their children may not inherit land

unless the combined percentage is at least one-quarter Samoan blood.

(n52)Footnote 188. *See* Am. Samoa Code Ann. § 37.0205. *See also Aftufil v. Timoteo, 3 Am. Samoa 395 (1959)* (upholding a Naval Regulation permitting a grant of a trust to a son or daughter legally married to a non-native); *Sapela v. Veevalu, supra, n. 163* (a trust established for a child of a "mixed" marriage). *See also* note 165, *supra*.

(n53)Footnote 189. *See* Am. Samoa Code Ann. § 40.0103, though subject to the alienation restrictions of Title 37. *See Puluti v. Muliufi, 4 Am. Samoa 672 (1964)* recognizing the right of dower in individually held land. Dower does not apply to communal land. *See* Am. Samoa Code Ann. § 40.0106 and Tufele v. Mose, *supra*, n. 173, noting that "dower rights are non-existent in the communal land context."

(n54)Footnote 190. *See* Leota v. Faumuilna, 4 Am. Samoa 2d 111 (1987).

(n55)Footnote 191. *See* Siofele v. Van Camp, 1 Am. Samoa 2d 114 (1983).

(n56)Footnote 192. *See Tufele v. Mose, supra*, note 173.

(n57)Footnote 193. *See Willis v. Willis, supra*, note 165 (though husband was only half Samoan, his wife was full Samoan and their children were three-quarters Samoan).

(n58)Footnote 194. *See* Am. Samoa Code Ann. § 37.2001 *et seq.*

(n59)Footnote 195. *See* Am. Samoa Code Ann. § 37.0204(d). *See* Burns Philip v. Mageo, 1 Am. Samoa 2d 95 (1983) (court found this section was violated and thus the corporation to whom it had attempted to convey the land had a lease for only thirty years, at which time the property reverted to the government, and if the government no longer had a valid public purpose, it reverted to the family). *But see* Atualevao v. American Samoan Gov't, 2 Am. Samoa 2d 66 (1985) where the court held that, though leased briefly to the FAA, the land was now used as a rock crushing facility; however, by eminent domain, the government took title in fee simple.

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CHAPTER 56 TERRITORIES AND POSSESSIONS

7-56 Thompson on Real Property, Thomas Editions § 56.13

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§ 56.13 The Territory of Guam.

[Go To Supp]

(a) Background.

Guam, consisting of 217 square miles, is the largest island in the Mariana Island Chain and is located at the southern end thereof, lying approximately 210 miles from the Commonwealth of the Northern Mariana Islands and 1,500 miles east of the Philippines. n196 In 1898 the United States acquired Guam n197 from Spain, who first claimed the island as a possession in 1565. At that time, the Chamorros occupied the island. n198 From 1898 until Guam became a territory in 1950, n199 except for the Japanese Occupation during the Second World War, n200 Guam was governed by the United States Navy. n201 The United States military presence in Guam remains significant. n202

Currently Guam is an organized, unincorporated territory of the United States. n203 Guam has a unicameral legislature, n204 and elects its own Governor and Lieutenant Governor. n205 Guam has its own judiciary, and an Article IV District Court sits in Guam. n206 Guam does not have its own Constitution. n207 Many in Guam would like a change in status, probably to the status of a Commonwealth; however, no change is predicted in the near future. n208

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(b) Land.

As elsewhere in the Pacific, land is scarce and valuable in Guam. Land records have been, and continue to be, somewhat chaotic. At the time the United States acquired Guam, there was no land registration system. Few surveys had been made. Even at the time of the Second World War, much land remained unsurveyed. The war further confused land holdings, as land records were destroyed. Military needs often dictated that land be taken and used. Since the conclusion of the War, the arduous process of sorting land records has proceeded. n209

After the Second World War, Congress authorized the Navy to acquire land by transfer, and to transfer land not required for military uses to the Government of Guam. n210 The Meritorious Claims Act was enacted to make payments for war

damage. n211 Disputes concerning the use of the land by the military have been many and the dissatisfaction significant. n212 Congress responded in 1977 and provided in the Omnibus Territories Act that the District Court of Guam had authority to review land claims. n213

In the original draft of the 1950 Organic Act, a provision allowed the Guam Legislature to enact legislation limiting land ownership to those of local ancestry. It was not included in the final draft. n214 Nonetheless, in 1974 the Guam Legislature did establish the Chamorro Land Trust Commission to lease certain lands only to native Chamorros. n215 A Land Management Act governs the use of governmental real property and the Land Transfer Board oversees applications to lease or purchase government land. n216

Guam's Civil Code, modeled on the California Code and California laws, applies as to private real property. n217 California decisions are used to resolve legal issues in Guam, with decisions which predate the enactment of the Guam Code noted as controlling and those subsequent thereto as persuasive, though not necessarily binding. n218 The Ninth Circuit Court of Appeals, reviewing Guam cases, often engages in a *de novo* review. n219 Guam now has a land registration system. n220 Land cases continue to be plentiful in Guam. n221

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FOOTNOTES:
(n1)Footnote 196. The size of the island and its location has caused Guam to have military significance. The island itself is about 30 miles long and from 4 to 9 miles wide with a "pinched" middle. The climate is tropical; however, during the rainy season the island often is hit with typhoons.

(n2)Footnote 197. Guam was acquired as part of the Treaty of Paris of 1898, and proclaimed April 11, 1899, *30 U.S. Stat. 1754*, T.S. No. 343 (1899). *See also* note 5, supra. *See also 48 U.S.C. § 1821*.

(n3)Footnote 198. The Spanish claim lay dormant until 1668, when missionaries arrived. The Chamorros openly rebelled against Spanish rule until the end of the 17th century. Spanish rule replaced the communal land rights which had been based on a caste system. Basically, the island was divided into districts headed by local chiefs known as matuas. Each chief controlled the lands of his district for the benefit of the group. On the death of the Chief, his brother or nephew ascended and took the name of the founder or chief ancestor of the family. The chiefs were organized into matrilineal clans. Others in the social class were the middle class, or atchaot and the manachang, who worked as serfs. As time passed, many persons moved to villages rather than stay on their lands. At the time the United States received Guam from Saipan, much of the land was held by descendants of the Chamorro nobility who had married the Spanish. Even before the Second World War, much of the land in Guam was held not in individual titles but in larger tracts with the family members agreeing among themselves who would work the lands. For a good discussion on this system *see* Laura Thompson, Guam and Its People (3d ed., Princeton University Press 1947); Paul B. Souder, Guam, Land Tenure in the Pacific (Ron Crocombe ed., Oxford University Press 1971).

Today, the Chamorros constitute approximately forty percent of the population according to The Economist, May 6, 1989. There have been conscious attempts to understand and preserve the Chamorro heritage. Thus, in 1966 the Guam Legislature created the Commission on the Chamorro Language which, among other things, created a Chamorro-English dictionary. The Chamorro language is to be used in the schools, and various places on the island have been given Chamorro names. *See* § 11950 *et seq.* of the Guam Gov't Code creating the Commission on Chamorro Language, §§ 11680-11681 of the Guam Gov't Code establishing a bilingual-bicultural education program, and § 13999 *et seq.* of the Guam Gov't Code establishing the Guam Place Name Commission. In the proposed Guam Constitution of 1977, a specific Article was included called "Guam Culture"; however, the Guam Constitution was not ratified. *See* note 39, *supra* and note 208, *infra*. *See also* the article by Lansing, Paul and Hipolito, Peter, Asian Pacific American Law

Journal 5 (Spring 1998), in which article the authors discuss the Guam Commonwealth Act. The Act included a provision for self-determination for indigenous Chamorro people of Guam and, as written, few individuals of non-Chamorro descent in Guam, though American citizens, would be eligible to vote for the Act if the Act were submitted for a vote. In his Comment, " 'Respeta I Taotao Tano': The Recognition and Establishment of the Self Determination and Sovereign Rights of the Indigenous Chamorros of Guam Under International, Federal, and Local Law," 3 Asian-Pacific L. & Pol'y J. (February 2002), Anthony (T.J.) F. Quan explores the history of the Chamorros in Guam and argues that the Chamorros be recognized as an indigenous people under local, federal and international law. According to Peter C. Stuart in his book Isles of Empire: The United States and Its Overseas Possessions, on page 270, concerns are raised concerning the decline in use of the native Chamorro language with an estimate of only 29.3 percent using the language at home.

(n4)Footnote 199. Although the Treaty cited in note 197, *supra* provided in Article IX that "the civil rights and political status of the native inhabitants of the territories hereby ceded to the United States shall be determined by Congress," nothing outside of executive action was done with Guam for almost fifty years. *See* note 200, *infra*. The Organic Act for Guam was enacted by Act of August 1, 1950, c. 512, § 2, *64 Stat. 384* and *codified at 48 U.S.C. § 1421 et seq.* In an article by Souki, Jesse K., "Militarization: The Forgotten Heroes: Reparations for Victims of Occupied Guam During World War II," Seattle J. Soc. Just. 1 (Spring/Summer 2003) 573, the argument is made that reparations should be paid by Congress because residents of Guam were not adequately protected during this time period.

(n5)Footnote 200. The Japanese Occupation from December of 1941, until July of 1944, was relatively brief, though painful. Chamorros from the Northern Mariana Islands were brought in to assist the Japanese, which may explain in part why Guam rejected union with those islands. *See* note 90, *supra*. Japanese discipline was rigorous, concentration camps were built and war damage was severe. After Guam was recaptured in 1944, most of the island, except for some of the South, was used for United States military purposes. The military presence remains significant. *See* note 202, *infra*.

(n6)Footnote 201. President McKinley placed Guam under the Department of the Navy by executive order, Exec. Order No. 108-A of December 23, 1898, where it stayed until 1950. By Exec. Order No. 10,077, *14 Fed. Reg. 5533 (1949)*, as amended by Exec. Order No. 10,137, *15 Fed. Reg. 4241 (1950)*, the administration of Guam was transferred from the Navy to the Secretary of the Interior, effective July 1, 1950. *See 25 Op. Att'y Gen. 292 (1904)* to the effect that the political status of Guam was "anomalous with the only administrative authority derived from the President as Commander-in-Chief." The military Governor held all legislative, executive and judicial authority over the island. *See also* note 207, *infra*.

(n7)Footnote 202. Current estimates place the military presence at one-third of the population of the island and the military is a major employer of the island. Guam always has had military significance. In 1898, Guam was important because of Germany's purchase of the Northern Mariana Islands.

Although supervision of the islands was transferred from the military to the Secretary of the Interior in 1950, note 201 *supra*, the United States military continued to control access to the Island from 1950 until 1962. During the second World War, President Roosevelt had, by Executive Order, designated a three-mile area around Guam as a Naval Defense Sea Area and Airspace Reservation. Permission of the Secretary of the Navy was required to enter this zone even if one were a United States citizen. This policy was instituted by the Navy in 1950. *See* Exec. Order No. 8683, 3 C.F.R. 894 (Comp. 1938-1943) and Exec. Order No. 11045, 3 C.F.R. 629 (Comp. 1958-1963). The Order was challenged and sustained in United States v. Angcog, note 9, *supra*. The residents of Guam, especially the Chamorros, remember this order with displeasure.

See also § 56.02, *supra*, concerning the military use of land which has caused continued displeasure in Guam. The 1986 Guam Commission on Self-Determination and the proposed Guam Commonwealth Act would require the United States to use only the minimum land necessary in a way similar to that contained in the Northern Mariana Covenant. *See* notes 50, 111, 112, *supra*. *But see* Guam Legis. E.O. 95-02 (1995), E. O. 95-17 (1995), and E.O. 95-21 (1995),

discussing the assumption of caretaker responsibility for certain naval bases. *See also* 1995 Guam Laws P.L. 23-23 (Bill 128 (LS)) adding Chapter 20, Title 1 to Guam Code Ann. regarding the creation of the Guam Repatriation Commission.

(n8)Footnote 203. The Organic Act for Guam may be found at *48 U.S.C. § 1421 et seq.* The Act was amended in 1968, primarily in the area of individual liberties. *See, e.g., 48 U.S.C. § 1421b* The Bill of Rights. As with other organized territories, the Organic Act establishes the limits for local authority. *See* §§ 56.04 and 56.05, *supra*. Thus, in Guam v. Olsen, note 11 *supra*, the court held that Guam had no authority to establish a Supreme Court. Likewise, Guam could not authorize appeals from judgments of the Federal District Court in criminal cases. *People of the Territory of Guam v. Okada, 694 F.2d 565 (9th Cir. 1982). But see* note 207, *infra*.

The Secretary of the Interior supervises Guam. The residents of Guam objected to the supervisory audit control of Guam by a government comptroller and thus, in 1978, that function was transferred to the Inspector General, Department of the Interior. *See 48 U.S.C. § 1442.*

(n9)Footnote 204. *See 48 U.S.C. § 1423.* Qualifications for office and power are noted in *48 U.S.C. § 1423a et seq. See 48 U.S.C. § 1423i,* the last sentence thereof which notes that the United States Congress reserves the right to annul all laws enacted by the Legislature. *See Bordallo v. Camacho, 416 F. Supp. 83 (D.C. Guam 1973), aff'd, 520 F.2d 763 (9th Cir. 1975)* (duty of the Governor of Guam to report to the Secretary of the Interior all laws enacted by the Guam Legislature is a non-discretionary ministerial duty).

(n10)Footnote 205. *48 U.S.C. § 1422.* This ability to elect the Governor was the result of the Act of September 11, 1968, Pub. L. 90-497, § 1, *82 Stat. 842.*

(n11)Footnote 206. *See 48 U.S.C. § 1424.* The Omnibus Territories Act of 1984 allowed the Guam Legislature to establish an appellate court system. *See* Act of Oct. 5, 1984, Pub. L. 98-454, Title VIII, § 801, *98 Stat. 1742. 48 U.S.C. § 1424-1* notes that the Guam Legislature may establish local courts with jurisdiction over all causes in Guam over which a federal court does not have exclusive jurisdiction. The appellate system held void in *Olsen* is now permitted. The district court has the traditional jurisdiction of a federal district court and also additional jurisdiction, if not vested by the legislature in another court (prior to the establishing of the local appellate system it also had appellate jurisdiction). The judge for the district court is appointed by the President for a term of ten years. *See 48 U.S.C. § 1424b.* Appeals are to the Ninth Judicial Circuit, which court will have jurisdiction to hear appeals from the Guam Supreme Court for the first fifteen years. *See 48 U.S.C. § 1424-2. See Hair v. Pangilinan, 816 F.2d 1341 (9th Cir. 1987)* (Court of Appeals must affirm decisions of the Appellate Division of the District Court of Guam on matters of local law unless manifestly erroneous). *See Eie Guam Corporation v. The Supreme Court of Guam, 191 F.3d 1123 (9th Cir. Guam 1999)* (which held that the federal court would not hear the particular case in that it did not feel it was final in the Guam Supreme Court and even if it were final and the federal court could review local Guam law, that this was a Guam statute which is more appropriately interpreted by the Guam court); *Apusento Garden (Guam) Inc. v. Superior Court of Guam, 94 F.3d 1346 (9th Cir. Guam 1996)* (Guam's statutory mandamus standard controlled the district court's disposition of a mandamus petition involving an arbitration award). The role of the courts was discussed in the case of *Guam v. Guerrero, 290 F.3d 1210 (9th Cir. Haw. 2002)* which in turn was discussed in an article by Elizabeth Myers, International Law In United States Courts: Why the Ninth Circuit Should Have Considered Self-Determination When Deciding Guam v. Guerrero, *37 U.C. Davis L. Rev. 1359 (2004). See also Haeuser v. Dep't of Law, Gov't of Guam, 368 F.3d 1091 (9th Cir. 2004).*

(n12)Footnote 207. In 1976, Congress authorized a Constitutional Convention and a draft Constitution was submitted to the electorate in 1979, but failed to attract the necessary vote for passage. *See also* note 39, *supra*.

(n13)Footnote 208. *See* § 56.09, *supra,* as well as note 50. The issue of commonwealth status was presented again to the United States Congress in 1995. *See* Guam Commonwealth Act, H.R. 1056, 104th Session lst, 141 Cong. Rec. H.3804, March 24, 1995. *See also* Van Dyke, John M., Self-Determination for Nonself-governing Peoples and for Indigenous Peoples: The case of Guam and Hawaii, U. Haw. L. Rev. 18 (1996) 623. The history of Guam as a territory

and a proposal that a free association be created with United States citizenship is discussed in the Comment by Guiterrez, Hannah M.T. "Guam's Future Political Status: An Argument for Free Association with U.S. Citizenship," Asian-Pacific L. & Pol'y J. 4 (February 2003) 5.

(n14)Footnote 209. *See* discussions contained in Thompson and Souder, note, *supra*. *See also* discussion in Leibowitz, *supra*, n. 3, at pp. 351 *et seq.* Leibowitz quotes Vice-Admiral Forrest P. Sherman in Hearings Before the House Comm. on Naval Affairs at p. 352: "When we recaptured Guam we proceeded with the development of the island without regard to ownership for the most effective and rapid prosecution of the war."

For a concise history of the land before and after the war *see Naval Gov't of Guam v. 11,825,263 Square Meters, 102 F. Supp. 427 (D.C. Guam 1952).*

(n15)Footnote 210. The Land Transfer Act, Pub. L. 225, 79th Cong. 1st sess. (1945), authorized the Secretary of the Navy to transfer to the Naval Government of Guam public lands no longer required. The Land Acquisition Act, Pub. L. 594, 79th Cong. 2nd Sess. (1946), authorized the Secretary of the Navy to acquire land in Guam to resettle the residents. Under the Organic Act, property owned by the United States in Guam, unless reserved, was to be transferred to the Guam Government. *See 48 U.S.C. § 1421f.* Some, but not all, such land was quitclaimed by the U.S. Government to Guam. Significant areas were reserved by Executive Order reserving certain property in Guam. *See* Exec. Order No. 10,178, *15 Fed. Reg. 7313 (1950),* which order is *reprinted at 48 U.S.C. § 1421f.* Some lands so transferred were accompanied by conditions such as the Brooks Amendment, Pub. L. 96-418, § 818(b)(2).

The Secretary of the Interior also may sell or lease property owned by the United States in Guam and not transferred to Guam under *48 U.S.C. § 1421f*(c), and has done so. *See Bordallo v. Camacho, 475 F.2d 712 (9th Cir. 1973)* (land so transferred). *See Yamashita v. People of Guam, 59 F.3d 114 (9th Cir. Guam 1995),* in which the court briefly discussed the transfer of land ownership from Spain to the United States to the Government of Guam. *But see Government of Guam v. United States, 179 F.3d 630 (9th Cir. 1999)* in which the court held that the Organic Act of Guam does not provide a continuing grant to the government of Guam of all land no longer used for a military purpose nor does the doctrine of aboriginal title support the Government of Guam's claim. The court noted it was a one-time grant and did not have continuing force and thus the United States did not have to transfer land condemned or found to be "excess" though occasionally it has transferred unneeded land to the government of Guam. As noted in the book by Peter C. Stuart, Isles of Empire: The United States and Its Overseas Possessions on pages 117 and 135, the land owned by the federal government in Guam, at one time substantial, has decreased to about one-third today.

(n16)Footnote 211. *See* Act of Nov. 15, 1945, ch. 483, *59 Stat. 582.* Payment was to be made for the loss or destruction of property resulting from the Japanese occupation, general hostilities of the war, or non-combat related activities. After passage of the Organic Act, the Guam Land and Claims Commission administered this Act as well as the Land Transfer Act of 1946. Payments of the claims have been slow and many felt the compensation too low. The military experience in Guam is one reason why the Guam Commission on Self-Determination, in developing the Gram Commonwealth Act, proposed language similar to that other CNMI Covenant limiting new land acquisitions by the military. *See* note 202, *supra*.

(n17)Footnote 212. *See Government of Guam v. United States, 744 F.2d 699 (9th Cir. 1984);* Naval Gov't of Guam v. 11,825, 263 Square Meters, note 210, *supra* (noting that when Guam was reoccupied, the United States took land as needed for military purposes without taking into consideration property lines and ownership). *See also* Leibowitz, *supra*, n. 5, at p. 358, that "Considerable litigation, both public and private, has resulted from both the military acquisition and failure to transfer the land back to Guam."

(n18)Footnote 213. *See* Act of October 15, 1977, Pub. L. 95-124, Title II, § 204, *91 Stat. 1162,* as *amended and codified at 48 U.S.C. § 1424c.* The district court is given authority to award fair compensation to those persons whose interests were acquired other than through judicial condemnation, where it is determined that less than fair market value was paid as a result of duress, undue influence, or other unconscionable action, or where it was unfair, unjust or due to

inequitable action by the United States. If the issue of compensation was adjudicated in a condemnation proceeding, the case is *res judicata. But see Limtiaco v. United States, 675 F.2d 1069 (9th Cir. 1982)* (even in those cases where there was a judicial condemnation procedure, the issue of fair compensation could be raised if the original owners had not made an appearance). *See also Franquez v. United States, 604 F.2d 1239 (9th Cir. 1979)* (background for the Act is discussed).

(n19)Footnote 214. *See* 5(n) of H.R. 7273, 81st Cong. 2d Sess. 1950. *See* Robert A. Katz, The Jurisprudence of Legitimacy: Applying the Constitution to U.S. Territories, 59 Univ. of Chicago L. Rev. 779, 788 (1992), which suggests that over one-half of land in Guam is now owned by non-natives. The Guam experience influenced the Northern Mariana Islands with their land restriction. *See* note 98, *supra*. *See* John M. Van Dyke, Di Amore-Siah, and Gerald W. Berkley-Coats, Self-Determination for Nonself-governing Peoples and for Indigenous Peoples: The Cases of Guam and Hawaii, *18 U. Haw. L. Rev. 571 (1996)* at 626 (noting that now less than half of the island's current population are Chamorro).

(n20)Footnote 215. *See* Guam Gov't Code § 13901 *et seq.* A "native Chamorro" is defined as a person who has at least one-fourth part of the blood of any person who inhabited the island prior to 1898. This is similar to The Hawaiian Homes Commission Act of 1920, *42 Stat. 108. See also* 1995 Guam Laws P.L. 23-38 (Bill 317 (LS)) as *amended by* P.L. 23-47 (Bill 1 (4-S)) regarding rules and regulations for the Chamorro Land Trust, which is *codified at* Chapter 75, Title 21 Guam Code Ann. §§ 75103 and 75107. *See also* E.O. 95-18 (1995) regarding the creation of the Chamorro Heritage Institute Planning Group. The Chamorro Registry Act was enacted to collect data on the residency of all Chamorros on Guam and on the registration eligibility of Chamorro families. *See* 3 Guam Code Ann. Ch. 20 (2001).

(n21)Footnote 216. *See* Title XIV of the Guam Gov't Code. Section 13003 notes that the Director is to keep records on government real property and to make suggestions regarding the allocation of that property for maximum benefit. The Department also is responsible for surveying, taking inventory and classifying lands. *See* § 13005. In addition, a Territorial Planning Commission is authorized under Chapter III, § 13200 *et seq.* to prepare a comprehensive plan for development in Guam.

(n22)Footnote 217. The Guam Civil Code was first adopted in 1953 and, though there are variations between the Guam Code and the Code of California, many sections were and are comparable. The foreword to the Guam Code notes this history. Division Second is the Property Section of the Code, which, in turn, is divided into four parts: property in general, real or immovable property, personal or movable property, and the acquisition of property. Guam is a community property state. *See* § 687. Section 755 notes that real property located in Guam is to be governed by the law of Guam. *But see* Santiago v. Estate of Quintada, No. Civ. CV-90-00053A (D. Guam A.D. Jun 12, 1991) in which the court used the Philippine Code, noting it as the applicable law at the time of the decedent's death in 1903, and which case involved the division of property at death known as "pattida." *See also Camacho v. Du Sung Corp., 121 F.3d 1315* (9th Cir. Guam, 1997) (California law regarding landlord tenant law); *Archbishop of Guam v. G.F.G. Corp., 1997 Guam 12, 1997 Guam LEXIS 2* (D. Guam) (landlord tenant code virtually identical to California's former unlawful detainer statute); In the *Matter of the Estate of Borja, 1997 WL 208982* (D. Guam) (regarding probate law). California law regarding fiduciaries was to be used in a case involving the sale of land by a client to his attorney it was held in the *Estate of Edward C. Benavente v. Maquera, 2000 WL 145041, 2000 Guam 9.* The *Benavente* case was cited in the case of *Gayle v. Hemlani, 2000 WL 1299637, 2000 Guam 25* which was another case involving real property, however the applicable statute of limitations barred the action. Ownership of real property by several persons in Guam may be as joint tenants, tenants in common, partnership interest, or as community property it was noted in the case of *Hamlani v. Nelson, 2000 Guam 20* (Guam Terr.). This case also discussed California decisions regarding the meaning of encumbrance and discussed portions of the title registration system in Guam. The issue of disposition and reimbursement for community property was discussed in the case of *Guerro v. Moylan, 2000 Guam 28* (Guam Terr.). A private power of sale for a mortgage in default is authorized by Section 2932 of the Guam Civil Code and was discussed in the case of *Paulino v. Biscoe, 2000 Guam 13* (Guam Terr.), which case held that if the sale proceeds are insufficient to satisfy the underlying debt, that the mortgagee may maintain an action to recover the deficiency.

(n23)Footnote 218. *See Guam Hakubotan v. Furusawa Inv. Corp., 947 F.2d 398 (9th Cir. 1991)* (Guam Code adopted from the Civil Code of California in 1933 and California decisions predating 1933 are binding, while later decisions are persuasive); *In re Petition of Gov't of Guam, 869 F.2d 1326 (9th Cir. 1989)* (boundary dispute and land registration case); *Hair v. Flores, 1986 WL 68520 (D. Guam 1986)* (California law controlling in case involving a fee simple on condition subsequent with a right of re-entry).

(n24)Footnote 219. *See* In re Petition of Government of Guam, *supra*, note 218 (de novo review regarding marketable title claim).

(n25)Footnote 220. *See* Guam Gov't Code § 1157.31. *See Application of Aguon, 1993 WL 128362.* The land registration system reflects the need to have surveys and to ascertain ownership. Land which is not registered is recorded under the pre-war cadastral survey and land registration act. *See Taitague v. First Island Indus. Inc., 1990 WL 320752 (D. Guam App. Div. 1990)* (discussing title registration act and noting family estates); Government of Guam v. Curz, *supra*, note 218 (noting confusion with land titles and overlapping claims); *Wells v. Lizama, 396 F.2d 877 (9th Cir. 1968). See* Yamashita v. People of Guam, note 210 herein, in which the court held: (1) in order to obtain Torrens registration, the claimant must prove title against all; (2) that adverse possession could not apply as to land owned by the United States prior to the transfer of the land to the Government of Guam in 1952; and (3) the Government of Guam was not estopped to deny title by virtue of its acceptance of property taxes for the land. *See also Guam v. Gill, 61 F.3d 688 (9th Cir. Guam 1995)* for a discussion of the process to obtain land registration. The Guam Land Title Registration Act is codified at 21 Guam Code Ann. §§ 29101-29206. *See also* In the *Matter of the Application of Rivera, 1997 WL 208990* (D. Guam) (regarding a landlocked parcel and an easement). The title registration or Torrens system is discussed in the case of *Pelouski v. Taitano, 2000 Guam 34* (Guam Terr.). Title registration was discussed in the case of *In re Application of Leon Guerrero, Slip Copy, Guam Terr. 2001, 2001 Guam 22,* noting that an aggrieved party may appeal under Title 21 GCA § 29116 (1998). The case notes that the government of Guam adopted California's system of Land Title Registration in *Wells v. Lizama 396 F.2d 877 (9th Cir. Guam 1968)* and also discusses the doctrines of boundaries by acquiescence and adverse possession.

(n26)Footnote 221. Most of the land cases involve disputes with the government of either the United States or Guam, rather than against another person. *See Franquey v. United States, supra,* note 213. This may be due to the military presence. *See also* Guam v. Gill, footnote 220 *supra* and its related case of *People of the Territory of Guam v. Cruz, 67 F.3d 176 (9th Cir. Guam 1995),* amended People of Guam v. Cruz, *95 C.D.O.S. 7697 (9th Cir. Guam 1995),* in which criminal convictions for the attempted theft of government land were obtained against persons who participated in a scheme to enlarge land ownership into government land by the use of fraudulent maps. The issue of damages for breach of the contract to convey real property was discussed in Executive View Estate, Inc. v. Kamminga, Civil Case No. 95-00125A, LEXIS 2856 (D. Guam, 1996) (in the absence of bad faith, the purchaser was entitled only to a return of monies paid and of expenses to examine the title). *See also In re Application of Leon Guerrero, 2005 Guam 1; 2005 Guam LEXIS 1 (2004)* regarding adverse possession; *Bank of Guam v. Flores, 2004 Guam 25; 2004 Guam LEXIS 30 (2004)* regarding mortgage foreclosures; and *Mobil Oil Guam Inc. V. Tendido, 2004 Guam 7; 2004 Guam LEXIS 5 (2004)* regarding preemptive rights.

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CHAPTER 56 TERRITORIES AND POSSESSIONS

7-56 Thompson on Real Property, Thomas Editions § 56.14

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§ 56.14 The Territory of the Virgin Islands.

[Go To Supp]

(a) Background.

The Virgin Islands were first so named by Christopher Columbus in 1493, after St. Ursula and her 11,000 sea-faring virgins. n222 Today, the Territory of the Virgin Islands consists of three diverse larger islands as well as many smaller islands. n223 The capital, Charlotte Amalie, is located on St. Thomas, an island with a history of mercantile activities. n224 Often associated with St. Thomas is the small island of St. John. n225 The third large island is St. Croix, which has a tradition of being more of an agricultural island, though today its population may be the largest of the three. n226

The Danes had control over all these islands by 1735. n227 Though the United States had expressed an interest in purchasing the islands as early as the 1860s, the eventual sale did not occur until 1917, when they were purchased for twenty-five million dollars. n228 In general, the transfer was without incident, although problems did develop concerning a concession granted to "*Det Vestindiske Kompagni*," regarding a license and other interests in the harbor at St. Thomas. n229

The Virgin Islands today are an unincorporated, organized territory of the United States. n230 Initially, on purchase from Denmark, a temporary government was provided under the control of the Navy. n231 In 1931, control was transferred to the Secretary of the Interior. n232 The first Organic Act of 1936 was considered a major advance in local self-government. n233 In 1954 the Act was revised, at which time a centralized legislature was established, as well as a Bill of Rights. n234 Currently, the residents elect their own governor n235 and have an elected unicameral legislature. n236 The Islands have local trial courts, and although there is authority for creating local appellate courts, this has not occurred to date. n237 Congress has created a District Court for the Virgin Islands, appeals from which go to the Third Circuit Court of Appeals. n238 The Virgin Islands do not have their own Constitution. n239 In general, the residents of the Virgin Islands have been content with their status, though a plebiscite was held on status in 1993. n240

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(b) Land.

All public lands of the Virgin Islands were ceded by Denmark to the United States Government, who in turn transferred land not reserved to the local Virgin Island Government. n241 At one time the Virgin Islands Corporation managed lands for the general welfare. n242 Currently, the Revised Organic Act of 1954 grants the Secretary of Labor the right to lease or sell property which is not needed for public purposes. n243

The Virgin Islands law rests upon common law. Section 4 of the Virgin Island Code Annotated notes that "The rules of the common law, as expressed in the restatements of the law approved by the American Law Institute and to the extent not so expressed, as generally understood and applied in the United States, shall be the rules of decision in the courts of the Virgin Islands in cases to which they apply, in the absence of local laws to the contrary." n244 The Restatements are to be used, however, only if there is no applicable statute. n245 Of course, if the local law applies, it is used even if contrary to the rules stated by the Restatement. n246 In addition, the courts occasionally have used Danish law. n247

In the Virgin Island Code, Chapter 1 of Title 28 deals with estates in general and includes provisions for joint ownership, n248 descent, n249 and adverse possession. n250 Chapter 3 deals with conveyances of property and Chapter 7 with the recording of documents. Chapter 11 is the Statute of Frauds and Chapter 19 deals with condemnation of property. n251 Chapter 31 is the Landlord/Tenant chapter and Chapter 13 provides for a condominium regime. Although dower does not exist, the surviving spouse does have a right of election. n252 Of note is the rent control act first enacted in 1947 to deal with the housing shortage following the end of WWII. n253 Of all the territories, the Virgin Islands probably are the most similar to the mainland regarding property law. n254

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FOOTNOTES:
(n1)Footnote 222. The islands at that time were inhabited by the Caribs.

(n2)Footnote 223. The lands include those islands acquired by the United States by purchase from Denmark. *See* cession of the Danish West Indian Islands by the Convention between the United States of America and His Majesty the King of Denmark, entered into August 4, 1916, and ratified by the Senate on September 7, 1916, *39 Stat. 1706. See 48 U.S.C. §§ 1405* and 1541(a). In addition to the three main islands, the territory includes hundreds of tiny islands which were an original part of the Danish West Indies. These islands, however, are to be distinguished from the nearby, but separate islands, known as the British Virgin Islands. Two treaties were signed delineating maritime boundaries in the Caribbean. *See* Treaty on The Delineation in The Caribbean of a Maritime Boundary Relating to the U.S. Virgin Islands and Anguilla and Treaty on the Delineation in the Caribbean of a Maritime Boundary Relating to Puerto Rico/U.S. Virgin Islands and the British Virgin Island with Annex, S. Treaty Doc. No. 23, agreed to resolution of notification Oct. 6, 1994 (Unpublished).

(n3)Footnote 224. *See 48 U.S.C. § 1541*(b).

(n4)Footnote 225. Approximately two-thirds of St. John's is dedicated for park purposes.

(n5)Footnote 226. Under the Danish rule, *see* note 229 *infra*, the government of the islands was split between St. Thomas/St. John and St. Croix. Still today, their views may diverge along these lines; however, they are united for greater influence with the United States. The islands are approximately twelve hundred miles southeast of Florida and forty miles east of Puerto Rico.

(n6)Footnote 227. Prior to that time, the islands had been inhabited by the Dutch, the English, the Spanish and the French. Africans were brought to the islands to work the sugar plantations. Today, the Puerto Rican presence is

growing, as is a small, though forceful, United States mainland presence.

(n7)Footnote 228. Secretary of State Stewart had suggested their purchase in order to prevent either Russian or Austrian expansion in the Caribbean, and the Navy desired the use of the harbors. Negotiations began again in the early 1900's with the final sale price nearly five times that agreed on in 1902 (when the Danish Parliament failed to ratify the sale). The primary motivations for the purchase were military considerations, including the Panama Canal and a possible sale to Germany. March 31 is still celebrated as Transfer Day. The history may be read in Dianne Russell, Some Ethical Consideration of Judicial Vacancies: A Case Study of the Federal Court System in the *United States Virgin Islands, 5 Georgetown J. Legal Ethics 697 (1992) and Leibowitz, supra n. 5, at p. 223 et seq.*

(n8)Footnote 229. The Convention entered into between the *King of Denmark and the United States, supra* note 222, may be found in Volume One of the Virgin Islands Code Annotated, Historical Documents. The Convention itself was proclaimed on January 25, 1917. According to Peter C. Stuart in his book Isles of Empire: The United States and Its Overseas Possessions on pages 276 and 334, the Virgin Islands have many celebrations including Transfer Day (when possession was transferred from Denmark) and Organic Act Day.

In Article 1 of the Convention, it is noted that the King of Denmark ceded to the United States all territory claimed by Denmark in the West Indies. Article 2 contains a warranty that the property was free from encumbrances and also seeks to protect private property rights. In Article 4, it is noted that a concession had been granted to "Det Vestindiske Kompagni," a West Indian Company or WICO, by the Ministry of Finance of Denmark on January 18, 1913, and on April 16, 1913, it was granted a license to embank, drain, deepen and utilize a certain area in the St. Thomas Harbor, as well as to receive preferential rights to commercial, industrial, or shipping establishments in the harbor, which the United States agreed to maintain. As noted in *West Indian Co. v. Government of the Virgin Islands, 844 F.2d 1007, 1009 (3d Cir. 1988),* Denmark had informed the United States at the time of signing the convention that the grant was in perpetuity and without time limitation and that rights had vested under Danish law. No further acts of significance occurred until 1968, when the Department of the Interior sued to quiet title to the harbor and to procure a declaratory judgment that the treaty rights under the Convention had lapsed. Eventually, the parties agreed to a Second Addendum to the Memorandum of Understanding in which WICO agreed to give up certain lands in return for a conveyance from the Virgin Islands government for fifteen acres and a promise to alter the coastal Management Act so that WICO could reclaim its harbor. When the Virgin Islands Legislature repealed the legislation approving the settlement, and issued a stop order on the dredging permit, the contractor sued for summary judgment. The court granted the motion and held that the Second Addendum was a binding contract and the repeal by the Government of the Virgin Islands was invalid as violative of the Contract Clause.

(n9)Footnote 230. *See* §§ 56.04 and 56.05, *supra. See also Government of Virgin Islands v. Bodle, supra* note 43 (noting this status). *See also West Indian Co. v. Government of the Virgin Islands, supra,* note 229, noting that though not having the sovereignty of a state, as an unincorporated territory it is treated as a state government regarding contractual obligations. To the same effect *see In re Estate of Hooper, 359 F.2d 569 (3d Cir. 1966).*

(n10)Footnote 231. Act of March 3, 1917, "An Act to Provide a Temporary Government for the West Indian Islands...", *39 Stat. 1132.* Basically, this government followed the existing Danish government with two separate legislatures: one on St. Croix and the other on St. Thomas for St. Thomas and St. John. All civil powers were vested in the military governor.

(n11)Footnote 232. In 1931, the President transferred jurisdiction of the islands to the Department of the Interior and appointed the first civilian Governor. *See* Exec. Order No. 5566. Today, relations between the Government of the Virgin Islands and the United States still are under the Secretary of the Interior. *See 48 U.S.C. § 1541*(c). All required reports from the Governor are made to the Secretary of the Interior. *See 48 U.S.C. § 1544.*

(n12)Footnote 233. Act of June 22, 1936, c. 699, § 41 *49 Stat. 1807. See also 48 U.S.C. § 1406m,* noting that this subchapter may be cited as the Organic Act of the Virgin Islands of the United States. The Act established a system of

civil government with an elected legislature, though it continued to have separate legislatures for St. Thomas/St. John and for St. Croix. Universal suffrage was established abolishing property qualifications and extending the vote to women.

(n13)Footnote 234. Act of July 22, 1954, c. 558, § 2, *68 Stat. 497; 48 U.S.C. § 1541 et seq.* The Revised Organic Act of 1954 superseded the Organic Act of 1936 where they were inconsistent. *See Virgo Corp. v. Paiewonsky, 384 F.2d 569 (3d Cir. 1967).* The bill of rights is in *48 U.S.C. § 1561. See also In re Brown, supra*, note 45, (inclusion of § 1561 shows intent of Congress to make Federal Constitution applicable to the Islands to the fullest extent possible, consistent with status of a territory). The Act noted in *48 U.S.C. § 1541*(a) that the Virgin Islands were an unincorporated territory of the United States. *See also Granville-Smith v. Granville-Smith, 349 U.S. 1 (1955).*

(n14)Footnote 235. *See* The Elective Governor Act of 1968, Pub. L. 90-496, which provided for the popular election of the Governor and Lieutenant Governor. This bill also removed several of the supervisory controls of the Secretary of the Interior and eliminated the Presidential veto of local legislation. Today *see 48 U.S.C. § 1591 et seq.* for the election of the Governor and Lieutenant Governor, their powers and duties and the executive branch in general.

(n15)Footnote 236. As noted *supra*, in note 234, a consolidated legislature was provided for in the Revised Organic Act of 1954. Currently the Legislature has fifteen members. *See 48 U.S.C. § 1571* regarding the Legislative Branch. *See also Port Const. Co. v. Government of Virgin Islands, 359 F.2d 663 (3d Cir. 1966)* (Virgin Island Legislature has full legislative powers limited only by the Constitution, the Revised Organic Act, and other federal statutes applicable to the Virgin Islands and thus, has legislative power similar to that of States); Water Isle Hotel & Beach Club, Ltd. v. Kon Tiki St. Thomas, Inc., *supra*, note 11 (Government has authority to enact legislation affecting property owned by United States which was leased to private entity, where local legislation was not incompatible with but rather served the federal government's interest). *See also 48 U.S.C. § 1575*(g) requiring a listing of all laws enacted each year to be transmitted to Congress.

(n16)Footnote 237. *See 48 U.S.C. § 1611*(a) noting that the judicial power is vested in a court of record designated the District Court of the Virgin Islands, established by Congress, and in such appellate and lower courts as established by the local legislature. The ability to create the appellate system was part of the Omnibus Territories Act of 1984. *See* Pub. L. 98-454. Until such time as the appellate courts are established, appeals are to the District Court. *See 48 U.S.C. §§ 1612* - 1613a. When the appellate system is established, appeals from the High Court thereof will be to the Third Circuit Court of Appeals for fifteen years. *See 48 U.S.C. § 1613.* Currently there are nine territorial judges, with four on St. Croix and five on St. Thomas.

The Virgin Island Legislature enacted Bill No. 5040 on February 1, 1985, to expand the jurisdiction of its courts. The Act was to become effective in three stages; however, it was often postponed. Nonetheless, on October 1, 1990, the first stage became effective, which provided that the local territorial courts would have concurrent jurisdiction with the district court over criminal actions where the maximum sentence did not exceed fifteen years. One year later, the territorial court was to acquire concurrent jurisdiction as to all criminal actions. Nonetheless, on August 29, 1991, the Virgin Island Legislature passed local law No. 5594, which amended V.I. Code Ann. tit. 4, § 76 to vest jurisdiction in the territorial court over all civil matters regardless of the amount in controversy, which change became effective October 1, 1991. Because of this enactment, the jurisdiction for all criminal cases was postponed until October 1, 1993. *See also Estate of Thomas Mall, Inc. v. Territorial Ct. of the Virgin Islands, 923 F.2d 258 (3d Cir. 1991)* (jurisdiction of the District Court of the Virgin Islands over local matters had not been divested by this concurrent jurisdiction in the local courts unless the law so noted). *See Isidor Paiewonsky Assocs. v. Sharp Properties, Inc., 998 F.2d 145 (3d Cir. 1993)* (regarding jurisdiction of the local courts and the district court). *See also Virgin Islands Housing Auth. v. Coastal Gen. Constr. Serv. Corp., 27 F.3d 911 (3d Cir. 1994)* in which the court held that unless there existed an independent basis for federal jurisdiction, a suit to confirm or vacate an arbitrator's award pursuant to the Federal Arbitration Act was to be brought in a territorial court. *But see Newland Moran Real Estate v. Green Cay Props., Inc., 41 F. Supp. 2d 576 (D.V.I. 1999)* in which the court notes the promulgation of the Virgin Islands Rules of Appellate Procedure. The Virgin Islands, since 1997, now has an appellate court which hears appeals from the territorial courts; however there is

still no Supreme Court. *See* V.I. Code Ann. Tit 4, § 33. A review of the court system may be found in *BA Properties, Inc. v. Gov't of the United States V.I., 299 F.3d 207 (3d Cir. 2002)* which noted it had plenary review over the local appellate court. In this court, the third circuit reinstated the verdict of the territorial court that a stamp fee must be paid on a transfer of property at a foreclosure sale.

(n17)Footnote 238. *See* § 1611 *et seq.* The court is comprised of two judicial divisions: The Division of St. Croix which is held in Christiansted and the Division of St. Thomas and St. John which is held at Charlotte Amalie. The Judges are appointed for a term of ten years. As noted in note 237, *supra* in part, the jurisdiction of the district court includes not only the traditional jurisdiction of a federal district court, but also concurrent jurisdiction with the local courts and appellate jurisdiction therefrom until such time as a local appellate system is created. The court is not an Article III court. *See Government of Virgin Islands v. Bell, 392 F.2d 207 (3d Cir. 1968).*

Unfortunately, the District Court has not been permanently staffed since the retirement of one judge and the death of the other judge in 1988 and 1989, respectively. *See* an excellent article on the crisis this has created, by Russell, *supra*, note 234. Russell notes that currently the Third Circuit is assigning judges for periods of one month at a time. The backlog is growing. As of May of 1993, no judge had been appointed. The two seats were filled when Thomas K. Moore was confirmed by the United States Senate on June 30, 1992, according to 1992 DER 126 d 41 and Raymond L. Finch on May 17, 1994, as noted in 62 USLA, both as district judges. *See Camacho v. Dodge, 947 F. Supp. 886 (D.V.I. 1996)* (District court bound by Third Circuit cases even if applied in the context of purely local, Virgin Islands substantive law regarding the judicial sale of real property). The third circuit did not have jurisdiction either by the 1917 treaty nor any federal statute regarding a quiet title action of a littoral landowner it was held in the case of *Club Comanche, Inc. v. Gov't of the V.I. 278 F.3d 250 (3d Cir. 2002).*

(n18)Footnote 239. On November 3, 1981, the people of the Virgin Islands rejected the proposed Fourth Constitution which had been approved by Pub. L. 97-21 to them for submission. Parts of the Constitution would have repealed the local government provisions of the Revised Organic Act of 1954, the territory's basic charter, and would have reformed the Organic Act to provide for an improved system of appellate review. As a result of this defeat, changes were made to the Revised Organic Act to modernize the judicial system and to make the territory more autonomous. *See* note 237, *supra*.

(n19)Footnote 240. *See* The New York Times, February 21, 1988, § 4, at 4, col. 5, to the effect that no one is more content than the Virgin Islands, though in time that may change. The Los Angeles Times, part 1; at 11, col. 1, noted on April 30, 1989 that choosing a new form of government has not aroused much enthusiasm in the Virgin Islands. Abstract, Virgin Islanders Face Referendum, N.Y. Times, January 11, 1993, reported that the votes were to begin on September 7, 1993 (an earlier vote was put-off by Hurricane Hugo). The basic choices are: the status quo (with additional local control), integration with the United States either as a State or as an incorporated territory, or independence. Neither the Legislative Political Status Commission of 1985 nor the Bill authorizing a plebiscite in 1989 called for a Commonwealth as an alternative.

(n20)Footnote 241. *48 U.S.C. § 1405c* and *48 U.S.C. § 1545. But see 48 U.S.C. § 1545*(b) to the effect that property administered by the Secretary of the Interior as part of the National Park System is retained by the United States. The military presence is not significant. The Coral Reef National Monument was established by Presidential proclamation in January 17, 2001. The area in the submerged lands off the island of St. John is a tropical marine ecosystem. The proclamation was based on the Antiquities Act of 1906 (section 2 of the Act of June 8, 1906, 34 State. 225, *16 USC 431).*

(n21)Footnote 242. The corporation was authorized by *48 U.S.C. § 1407* for the purpose of economic development. It was repealed by Pub. L. 97-357, Title III, § 308(3), October 19, 1982, *96 Stat. 1710.* § 1407i had transferred to the Corporation all property held by the Virgin Islands Company. One of the property interests transferred was all of the interest of the United States in "Bluebeard's Castle Hotel."

(n22)Footnote 243. *See 48 U.S.C. § 1545*(a).

(n23)Footnote 244. Title 1, Chapter 1, § 4 V.I. Code Ann. If the Restatement is silent, and a split of authority exists, a court is to select the sounder rule. *See also Enron Corp. v. Lawyers Title Ins. Corp., 940 F.2d 307, 310 (8th Cir. 1991)* (on appeal, it is a de novo review on issues of Virgin Island law). Motions for summary judgment were denied in the following cases related to the In re TuTu Wells Contamination Litigation: *Harthman v. Texaco, Inc., 909 F. Supp. 991, 999 and 1005 (D.V.I. 1995).* In *Harthman v. Texaco, Inc., 909 F. Supp. 991,* it was held that physical harm is not an element of the tort of trespass or nuisance, and landowners could recover for negligence or strict liability without showing that they suffered physical harm. *See also* the companion cases of *Virgin Islands Tree Boa v. Witt, 918 F. Supp. 879 (D.V.I. 1996)* and *Hawksbill Sea Turtle v. Federal Emergency Management Agency, 939 F. Supp. 1195 (D.V.I. 1996),* regarding the construction of temporary emergency housing following a hurricane. *See* Isidor Paiewonsky Assocs. v. Sharp Properties, Inc., note 237 *supra,* (involving landlord tenant law); *In re Tutu Wells Contamination Litigation v. Laga Indus., Ltd., 846 F. Supp. 1243 (D.V.I. 1993)* (contamination of water wells); and *Brandy v. Flamboyant Inv. Co., Ltd., 772 F. Supp. 1538 (D.V.I. 1991)* (tort law), all of which noted the use of the Restatements. Other cases using the Restatement include *Land Holdings v. Mega Holdings, 1999 U.S. Dist. LEXIS 17805 (D.V.I. 1999)* (doctrine of merger does not apply to mortgages); *Mahogany Run Condo. Assn. v. ICG Realty Mgmt. Corp., 1999 U.S. Dist. LEXIS 2005; 40 V.I. 404 (D.V.I. 1999)* (using the Restatements of Torts and Conflicts regarding insurance proceeds after a hurricane); *Donohue v. Lynch, 1998 U.S. Dist. LEXIS 16228 (D.V.I. 1998)* (statute and Restatement regarding adverse possession); and *Saastopunkkien Keslcus-Osake Pankki v. Allen-Williams Corp., 7 F. Supp. 2d 601 (D.V.I. 1998)* (mortgage foreclosure). The court looked for guidance to the Restatement and to the Virgin Islands Code regarding the meaning of the word "bequeath" however, no definitive description was given nonetheless, by reading the words in context of the will, the court concluded that a gift of condominium units were to pass to the takers, and the Estate was to pay the mortgages, thereon it was held in the case of In the *Matter of the Estate of Gloria Paraliticci, 42 V.I. 71, 2000 V.I. LEXIS 5 (Terr. Ct. V.I. 2000). See also Andrews v. Roberts, 42 V.I. 34, 2000 V.I. LEXIS 1 (Terr. Ct. V.I. 2000)* in which case the court construed an installment land contract as a mortgage (thus requiring foreclosure rather than forfeiture on default); discussed the requirements of adverse possession; and noted the use of the Restatements. The use of a tentative draft of the Restatement (Third) of Property was discussed in the case of *Peter Bay Owners Ass'n v. Stillman, 163 F. Supp. 2d 527 (D.V.I. 2001)* as the final draft was not enacted until 1998, which was after the applicable dates of the case. The Restatement of Property (Second) did not need to be used, given the language of the option agreement regarding the Rule Against Perpetuities, according to *Creque v. Texaco Antilles, Ltd., 43 V.I. 107, 2001 V.I. LEXIS 2 (Terr. Ct. V.I. 2001).*

(n24)Footnote 245. *See Callwood v. Virgin Islands Nat'l Bank, 221 F.2d 770 (3d Cir. 1955)* (using both the Restatement of Property as well as the Restatement of Agency and the Restatement of Conflicts to determine the validity of an assignment concerning a life estate and the attendant issue of waste). *See also Moore v. A.H. Riise Gift Shops, 659 F. Supp. 1417 (D.V.I. 1987)* (common law is that contained in the Restatement, unless preempted by the Virgin Island law). *See* 1 United States Virgin Islands Code Ann., Art 4. Real property was forfeited pursuant to *21 U.S.C. § 881*(a)(7) because it was used to facilitate the commission of a drug-related crime. United States v. The Premises and Real Property Located at No. 162-*A., 1999 U.S. Dist. LEXIS 8916 (D.V.I. 1999).*

(n25)Footnote 246. *See, e.g., West Indian Co. v. Government of the Virgin Islands, 23 V.I. 176 (D.V.I. 1987)* (Rule against Perpetuities as enunciated by the Restatement (Second) of Property inapplicable where modified by local laws to the contrary. Local laws include Virgin Island statutes and case law. *See Moore v. A.H. Riise Gift Shops, supra,* note 245. *See also Shearman & Assocs. v. Continental Cas. Co., 901 F. Supp. 199 (D.V.I. 1995)* (noting that the court would look first to the Virgin Islands Code and controlling decisions of the Virgin Island Courts; and here public policy was found which noted that it was against such policy to assert against a subcontractor a defense of "pay when paid" clause in subcontract between general contractor and subcontractor).

(n26)Footnote 247. *See Smith v. de Freitas, 329 F.2d 629 (3d Cir. 1964)* (defendant's right to use a stairway passageway was affirmed either on the basis that it was an ancient "*frigang*" or by prescription); *Virgin Islands v. Price, 181 F.2d 394 (3d Cir. 1950)* (upon acquisition of the islands from Denmark in 1917, the federal court was given the

right to review all cases arising in the Virgin Islands which would have been reviewable by the courts of Denmark, it being the intent of Congress to continue in force the local law so far as it was compatible with the changed sovereignty until changed either by Congress or the local legislature). The V.I. Code Ann. tit. 1, § 4 also cites *Red Hook Marina Corp. v. Antilles Yachting Corp., 9 V.I. 236 (D.V.I. 1971)* (parties may use Danish laws as they existed in 1917 to determine land boundaries). *See* In re Tutu Wells Contamination Litigation v. Laga Indus., Ltd., note 244 *supra*, noting that contamination of water wells was a claim for damage to "real property" and used the property tort claim statute of limitation. *See Newfound Mgmt. Corp. v. Lewis, 131 F.3d 108 (3d Cir. 1997)* (containing a description of boundaries including the Danish influence in a quiet title action). In the case of *Club Comanche, Inc. v. Government of the Virgin Islands, No. 01-1717, 2002 U.S. App. LEXIS 569 (3d Cir. 2001),* the court concluded that the transfer of land from Denmark to the United States and then to the Government of the Virgin Islands was not sufficient to support a federal question for jurisdiction. In the case of *Seaver v. Seaver, 208 F. Supp. 2d 557 (2002)* the Danish law in effect in 1917 regarding the rights of non-marital children was not met and thus standing was absent.

(n27)Footnote 248. *See* 28 V.I. Code Ann. § 7. Tenancy by the entirety was introduced by 28 V.I. Code Ann. § 7(c) on September 1, 1957. It was not defined, however, and thus the majority rule of the common law regarding such an estate in those jurisdictions with a Married Woman's Property Act applies. *See Masonry Prods., Inc. v. Tees, 6 V.I. 108, 280 F. Supp. 654 (D.V.I. 1968)* (creditor of an individual spouse cannot reach the spouse's interest in the estate during their joint lives). *See Newfound Mgmt. Corp. v. Sewer, 885 F. Supp. 727 (D.V.I. 1995),* regarding a quiet title action to lands on the East End of St. John's which involved boundary disputes and surveys over many years.

(n28)Footnote 249. *See* 15 V.I. Code Ann. §§ 2, 84. *See also* the case of In the *Matter of the Estate of Austin A. DeChabert, Sr., 2000 V.I. LEXIS 14 (Terr. Ct. V.I. 2000),* which case determined that the estate of Florida resident must institute separate administration in the Territory to deal with real property in the Territory and that a resident of the Territory is to serve as the administrator.

(n29)Footnote 250. *See* 28 V.I. Code Ann. § 11 (noting a term of fifteen years if the possession is uninterrupted, exclusive, actual, physical, adverse, continuous, and notorious under claim or color of title). *See Donohue v. Lynch, 1998 U.S. Dist. LEXIS 16228 (1998)* (adverse possession discussed). Adverse possession was not shown in the case of *Netsky v. Sewer, 205 F. Supp. 2d 443 (D.V.I. 2002);* however, adverse possession was established in the case of *Burnett v. Benjamin, 44 V.I. 170 (2002)* and sufficient evidence was shown of adverse possession to deny a motion by the landowner that the roadway was private in *Hodge v. Bluebeard's Castle, Inc., 44 V.I. 242 (2002). See also DeCastro v. Stuart, 2004 U.S. Dist. LEXIS 5992, 45 V.I. 591 (2004)* (adverse possession not proven) and *Sasso v. Hackett, 45 V.I. 375, 2004 V.I. LEXIS 5 (2004)* (adverse possession proven).

(n30)Footnote 251. 28 V.I. Code Ann. § 411 provides that the public uses are those authorized by Congress or the Legislature of the Virgin Islands. *See S. & S. Servs. v. Rogers, 40 V.I. 320, (1999) 35 F. Supp. 2d 459* (requirements for a deed discussed). The Statute of Frauds rendered void any oral modification of the original lease according to *Mountaintop Limited Partnership v. Columbian Emeralds International, Inc., V.I. 193, 2001 V.I. LEXIS 11 (Terr. Ct. V.I. 2001).* Although a tenant could remove a "superficiary house" (one owned by a person other than the landowner on whose land it stands), the landowner had no duty to compensate the tenant for the house. *See Martin v. George, Civil No. 12/1999 2001 V.I. LEXIS 37 (Terr. Ct. V.I. 2001).* Because of the defendant's encroachment on plaintiff's land, a sale did not occur for three years; however, any prejudgment interest was based in tort rather than on the contract because the contract was only an oral contract it was found in *Bookworm, Inc. v. Tirado, 44 V.I. 300 (2002). See* Government of the Virgin Islands v. 0.459 Acres of land, *286 F. Supp 2d 501 (2003)* in which case arbitration was held as a permissible means to resolve issues arising under the Virgin Islands eminent domain statute. *See also Government of the Virgin Islands v. 0.459 Acres of Land, 2004 U.S. App. LEXIS 12839 (3d Cir. 2004)* (affirming an arbitration award given to landowner in a condemnation proceeding).

(n31)Footnote 252. *See* 15 V.I. Code Ann. § 83 (dower abolished September 1, 1957). Community property does not exist in the Virgin Island and the spouse has a right of election. *See* 15 V.I. Code Ann. § 10. Other chapters in title twenty-eight deal with acknowledgement of instruments, fraudulent conveyances, action for nuisance, waste or trespass,

and mortgage liens among other items. *See also Mapes Monde, Ltd. V A.H. Rise Gift Shop, Inc., 337 F. Supp. 2d 704 (D. V.I. 2004)* (landlord tenant law). The following cases decided in 2004 all involved mortgage law: *UMLIC VP LLC v. Matthias, 364 F.3d 125, 2004 U.S. App. LEXIS 6426, 45 V.I. 786 (2004)* (foreclosure sale ordered); *Bank of N.S. v. Family Broad., Inc., 121 Fed. Appx. 440, 2005 U.S. App. LEXIS 172 (2005)* (foreclosure sale confirmed); and *Barclays, Inc. v. St. Croix Estates 399 F.3d 570, 2005 U.S. App. LEXIS 3440 (3d Cir. 2005)* (mortgage did not contain a future advance clause).

(n32)Footnote 253. *See* 28 V.I. Code Ann. § 831 *et seq.* This was an emergency act which was to remain in effect only as long as the housing shortage existed. However, it has not been repealed and there is much litigation surrounding the terms. *See, e.g., Kress, Dunlap & Lane Ltd. v. Downing, 193 F. Supp. 874 (D.V.I. 1961)* (giving a summary of the Act).

(n33)Footnote 254. *See, e.g., Harris v. Lombardi, 1990 V.I. LEXIS 5* (March 8, 1990) (case involving a restrictive covenant and whether it survived a valid tax sale, if it rendered the title unmarketable, which would allow rescission of the land sale contract or set aside the warranty deed); *De Jesus v. David, 1190 V.I. LEXIS 14* (August 13, 1990) (conveyance of a fee title and improvements made on the land of another). *See also Joseph v. Henry, 958 F. Supp. 238 (D.V.I. 1997)* (regarding restrictive covenants on a life estate); *Christian v. All Persons, 962 F. Supp. 673 (D.V.I. 1997)* (judicial sales); *Hawksbill Sea Turtle v. Federal Emergency Management Agency, 126 F.3d 461 (3d Cir. 1997)* (temporary housing and the Endangered Species Act). In S. & S. Serv. v. Rogers, Case No. 91-207, LEXIS 646 (U.S. Dist. Ct. V.I. January 14, 1999) the court discussed the necessity of having a valid delivery for a deed to be effective. In the case of *Peter Bay Homeowners Ass'n, Inc. v. Stillman, 294 F.3d 524 (3d Cir. 2002),* the court noted that in general federal courts do not get involved in real property issues; however, the court did have subject matter jurisdiction in 1975 regarding the easement issue and although in 1990 such matters now will be decided by the local courts, this court had jurisdiction to interpret its 1975 decision.

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CHAPTER 56 TERRITORIES AND POSSESSIONS

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§ 56.15 Bibliography.

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Supp. To CHAPTER 56 TERRITORIES AND POSSESSIONS

7-56 Thompson on Real Property, Thomas Editions Supp. to § 56.01

Supp. to § 56.01 An Overview.

[Go To Main]

Add:

Garcia v. Gutierrez, 192 P.3d 275 (N.M. App. 2008) (under the Parental Kidnapping Prevention Act, Indian tribes are United States territories that are treated as states).

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Supp. To CHAPTER 56 TERRITORIES AND POSSESSIONS

7-56 Thompson on Real Property, Thomas Editions Supp. to § 56.08

Supp. to § 56.08 Selected Consequences of Being a Territory.

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§ 56.08(d) Selected Federal Laws. www.oosa.unvienna.org/Reports/intlagree.pdf

Add:

Boumediene v. Bush, 128 S. Ct. 2229 (2008) (enemy combatants detained at Guantanamo Bay, Cuba, are entitled to habeas corpus rights).

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Supp. To CHAPTER 56 TERRITORIES AND POSSESSIONS

7-56 Thompson on Real Property, Thomas Editions Supp. to § 56.13

Supp. to § 56.13 The Territory of Guam.

www.oosa.unvienna.org/SpaceLawreaties.html

§ 56.13(a) Background. www.oosa.unvienna.org/SpaceLaw/gares/index.html

Add:

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Supp. To CHAPTER 56 TERRITORIES AND POSSESSIONS

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Supp. to § 56.14 The Territory of the Virgin Islands.

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§ 56.14(b) Land. [Go To Main]

Add:

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Supp. To CHAPTER 56 TERRITORIES AND POSSESSIONS

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Supp. to § 56.15 Bibliography.

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CHAPTER 57 INDIAN LAND

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Bibliography.

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CHAPTER 57 INDIAN LAND

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§ 57.01 Overview of Indian Land Law.

Historically, the central issue about Native American land was the terms of its acquisition by non-Indians. Although there was always governing law, and the law never endorsed seizure by force or coerced transfer, coercion was common, force was common enough, and legal remedies were inadequate to non-existent. This history raises profound questions of political morality that continue to inspire popular and scholarly interest. Many of these questions are beyond the purpose of a treatise to explain rules governing the law of real property according to the conventions of legal positivism. Some of the history is outlined in section 57.04 as relevant to the legal concepts discussed there, and citations in the chapter refer to leading authorities who address broader questions about the justness of Indian land acquisition.

During the 1920s, wholesale acquisition of Indian land ended in most of the country. n1 The Indian land base that survived the mass-transfer era has been fairly stable in its extent. It comprises over 100 million acres, 4.2% of the nation's land. n2 The law governing alienation of Indian land is essentially the same as it was while mass transfers were taking place, so important legal connections with that era remain. The modern law of Indian property centers on use of the land, its minerals, water, fish, and other valuable features, including enterprises located in Indian country.

Most Indian land is held under distinct laws that do not apply to other land. Outside Alaska, most Indian land is within one of more than 260 Indian reservations where tribes exercise powers of government. Tribal governments define property rights in tribal land among tribal members. Federal law governs the relationship between tribal land and non-members and governs some internal relationships as well. Federal law also governs the property rights of thousands of individual Indians who own land in severalty that is subject to federal restrictions, commonly called allotments. And federal law governs many other economic relations between tribal members and other persons in Indian country. As a result, tribal property law is largely internal to each tribe and its members. This chapter makes a few references to tribal property law, as it does to the occasional state law governing Indian property. Most of the chapter is devoted to federal laws and treaties governing Indian land, which dominate the field in practice.

FOOTNOTES:
(n1)Footnote 1. Major questions remained in Alaska, which were settled in 1971. *See infra* § 57.06(d). Significant local losses occurred, especially during the "termination" era after World War II, but these were offset by substantial gains at

other times. *See* Felix S. Cohen, Handbook of Federal Indian Law 144-206 (1982 ed.).

(n2)Footnote 2. *See* David H. Getches, Charles F. Wilkinson & Robert A. Williams, Jr., Federal Indian Law: Cases and Materials 20 (3d ed. 1993). The text's figures include 44 million acres of Native Alaskans' entitlements. They do not include any land in Hawaii. *See* Bureau of Indian Affairs, Acreages of Indian Lands by Area and State (1990).

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CHAPTER 57 INDIAN LAND

7-57 Thompson on Real Property, Thomas Editions § 57.02

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§ 57.02 Outline of the Chapter.

This chapter discusses treaties with the Indian nations and the distinct federal and tribal laws governing most of the Indian land in the United States. § 57.03 defines basic terms, and § 57.04 discusses fundamental concepts from an historical perspective.

The next two sections discuss the two basic classifications of restricted Indian land, land owned by Indian tribes (§ 57.05), and land owned by individual Indians (§ 57.06). Restricted Indian land is held under a unique trust controlled by the federal government, and § 57.07 describes the nature of this trust relationship. The many federal statutes that control alienation of Native American land are the subject of § 57.08.

Two sections discuss subjects that merit separate treatment: Indian hunting, fishing, and gathering rights (§ 57.09), and water rights (§ 57.10). The chapter concludes with a section relating Indian land law to the tribal sovereignty doctrine (§ 57.11).

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CHAPTER 57 INDIAN LAND

7-57 Thompson on Real Property, Thomas Editions § 57.03

AUTHOR: Professor Richard B. Collins School of Law University of Colorado

§ 57.03 Definitions.

(a) Indian Nation; Indian Tribe.

In federal law, Indian nation or Indian tribe means a political community that occupied part of the United States at the time of European contact. An Indian tribe is a political and legal entity that can make government-to-government agreements, exercise powers of internal sovereignty, own property corporately, and make contracts. n3 The federal government has formally recognized hundreds of tribes in treaties and statutes, and it maintains a register of tribes with whom it has a government-to-government relationship. n4 Congress and the President have broad power to recognize, define, or terminate tribes. There have been many particular disputes over legal qualification as a tribe. n5

(b) Indian; Native American.

American Indians are persons who are members of an Indian tribe or descendants of members. Native Hawaiians and some Native Alaskans are denominated separately. Many people now prefer the term Native Americans, and in this chapter it is used interchangeably with Indians or when Native Hawaiians and Alaskans are to be included. Federal and tribal law determine status as an Indian, Native Alaskan, Native Hawaiian, or tribal member for various legal purposes. n6

(c) Indian Country; Tribal Indian Country.

Indian country means territory within the United States in which the Indian country laws of the United States displace corresponding state law. It includes Indian reservations as well as terms less well known, such as allotments, rancherias, and pueblos. n7 Tribal Indian country means Indian country that is subject to a tribal government, in which the laws of Indian nations govern Indian people, further displacing state law. n8

(d) Indian Title.

Indian title refers to the land title of an Indian tribe. The term has been applied to refer to restricted land of individual Indians, but in this chapter it means only tribal title. n9 Tribal ownership is the collective right of the tribe, in which tribal members have only a derivative interest based on their membership. n10

FOOTNOTES:
(n1)Footnote 3. *See* Cohen, *supra* n. 1, at 3.

(n2)Footnote 4. *53 Fed Reg. 52829-02 (1988); see also 59 Fed. Reg. 9294 (1994)* and 25 C.F.R. § 83.5 (1999).

(n3)Footnote 5. *See* Cohen, *supra* n. 1, at 3-19, 750-757; 25 C.F.R. pt. 83 (1992) (Procedures for Establishing that an American Indian Group Exists as an Indian Tribe); William W. Quinn, Jr., Federal Acknowledgment of American Indian Tribes, *17 Am. Indian L. Rev. 37 (1992).*

Federal power over tribes has been challenged unsuccessfully by states, by tribes, and by individual Indians and non-Indians. For criticism of the power, *see* Robert A. Williams, The American Indian in Western Legal Thought (1990); Vine Deloria & Clifford M. Lytle, The Nations Within (1984); Nell Jessup Newton, Federal Power over Indians: Its Sources, Scope, and Limitations, *132 U. Pa. L. Rev. 195 (1984).*

(n4)Footnote 6. *See generally* Cohen, *supra* n. 1, at 19-27.

(n5)Footnote 7. *See generally id*. at 27-46; *infra* § 57.11(a)(4).

(n6)Footnote 8. *See infra* § 57.11. Essentially all Indian country is also tribal Indian country except for some public domain allotments. Public domain allotments are described *infra* § 57.06(b)(2).

(n7)Footnote 9. *See infra* § 57.05.

(n8)Footnote 10. *See infra* § 57.06.

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CHAPTER 57 INDIAN LAND

7-57 Thompson on Real Property, Thomas Editions § 57.04

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§ 57.04 Fundamentals.

[Go To Supp]

(a) The Federal Restraint on Alienation of Indian Title.

Only the United States can extinguish Indian title. n11 This is the most important legal rule governing Native American land. Most other rules are derived from this sovereign prerogative. Federal law governing Indian land evolved from the national and international law of the European nations that colonized the Americas. The earliest attempts to impose law on raw force were the works of Spanish Dominican jurists, particularly Las Casas and Vitoria. They opposed the claim that Native Americans had no legal rights because they were heathens and argued that native land ownership should be respected, that natives' land should be purchased in voluntary transactions, not seized by force. These principles were framed in reaction to the conquests of Hispaniola, Cuba, Mexico, and Peru, and they influenced both Crown and Church. n12 The principles were often dishonored, but they had a powerful effect on legal history. By the 19th century, Vitoria's principles had become sufficiently accepted that the U.S. Supreme Court recited them as law. n13

European sovereigns vied with each other for American territory. To govern their colonial competitions, they developed the rule that the first European power to discover new territory should have exclusive right to it against all others. This right was often transferred involuntarily as a result of the many wars among European nations, when the winner replaced the first discoverer. Or it could be transferred by purchase, as Louisiana. One of the rule's most important applications was to land transactions with Native Americans. Under this "rule of discovery," the first European sovereign (or its successor by war or purchase) claimed the right to acquire Indian land exclusive of other European sovereigns. n14

The "discovering" sovereign's exclusive right was applied as well to restrain private persons and groups who sought to acquire land from Indian nations. This served to carry out Vitoria's rule that Indian land should be honorably bought because government actions were more open. It helped the sovereign keep the peace with tribes and control the pace of European settlement. Less honorably, it gave the sovereign a convenient way to reward favorites or to resell land at a profit. n15

For property law, the sovereign patent was a certain root of title, uncomplicated by differences in property concepts between Native American and European societies. When land passed through sovereign procedures, it became an

English fee simple or other European equivalent, regardless of its status under Indian sovereignty. Had it not, there would often have been doubt about what had been sold and bought. n16

The British Crown and government observed the restraint concept. Its enforcement varied with the degree of attention London gave its American possessions. n17 Attention was at apogee during the 1760s, and in 1763, George III issued his famous Indian country Proclamation, which asserted the restraint in terms that are protective of Indian title. n18 The Proclamation is relied on by Native Canadians as a basis for their claims to land and sovereignty. n19

Upon independence of the United States, it was generally assumed that the sovereign restraint should continue. Within states, there was uncertainty because it was unclear whether the state or the United States was the sovereign successor to the Crown for purposes of Indian title. Both purported to exercise the Crown's power. n20 For federal lands outside states, the United States was the unchallenged successor. It continued the restraint, n21 and in the Northwest Ordinance, Congress enacted one of the most eloquent statements of Vitoria's principle of honorable dealing:

> The utmost good faith shall always be observed towards the Indians; their lands and property shall never be taken from them without their consent; and in their property, rights, and liberty they never shall be invaded or disturbed unless in just and lawful wars authorized by Congress; but laws founded in justice and humanity shall, from time to time, be made, for preventing wrongs being done to them and for preserving peace and friendship with them. n22

Under the Constitution, Congress reenacted the Northwest Ordinance and enacted the Nonintercourse Act, which put the restraint on alienation into the statutes. n23 Knox and Jefferson, as members of Washington's cabinet, gave the rule careful articulation. n24

The essential effects of the restraint applied to the common law of property are to reverse the common-law presumption of alienability and to vest great power over Indian land in the federal government. n25 A seller or buyer of tribal land must show clear authority in federal law to allow a transfer, while at common law, one advocating limits on alienability must prove a clear and lawful source of limits. n26

COMPUTER-ASSISTED RESEARCH

LEXIS: extinguish! w/30 indian w/2 title! or land!
restraint! w/2 alienat! w/30 indian w/2 title! or land!

(b) Indian Treaties.

Under the "discovery" rule, colonial sovereigns controlled purchases of tribal land, and the business of acquiring it was a major governmental enterprise. In many instances, governments carried out this purpose through the formal and international mechanism of treaties with Indian nations. The United States continued this policy after independence, first under the Articles of Confederation, then under the Treaty Clause of the Constitution. n27

The United States made several hundred treaties with Indian nations. n28 A principal provision in most of them was a land cession to the United States in return for payment to the tribe and recognition of tribal ownership and exclusive control of a reduced domain. For most tribes, this process was repeated to diminish tribal territory yet again. A harsh variation promoted by the Jackson Administration was the removal treaty, in which a tribe agreed, usually under duress, to relinquish its entire territory and remove to lands in the West that were remote from white settlements. n29 The principal area to which tribes removed became known as Indian Territory, now Oklahoma and part of Kansas. n30

Congress ended the making of new treaties with Indian nations in 1871, n31 but many of today's tribal land titles are guaranteed in treaties made before that date. The treaties also preserved tribal self-government within tribal territory, so

they are the source of distinct property rules grounded in tribal sovereignty. n32 After 1871, the Government continued to make agreements with tribes; these became law when ratified by Congress in statutes. n33

Under the Constitution, treaties have the same rank as federal statutes. Hence, a later statute can override a treaty, a power that Congress has exercised to abrogate aspects of Indian treaties. n34 Moreover, many tribes never made treaties or agreements with the Government, and others made treaties that were never ratified. n35 As a result, much tribal land was set aside by federal statute or by executive order of the President, rather than by treaty or agreement.

For these reasons, the legal importance of Indian treaties is not so much for their particular provisions as it is for the general policies and interpretive practices they established. Land set aside by statute or executive order, and even land purchased by or for tribes, is presumptively subject to the policies and practices established under the treaties. n36

COMPUTER-ASSISTED RESEARCH

LEXIS: indian! w/5 treaty or treaties

(c) Marshall Court Decisions.

The Marshall Court decided five major disputes that depended on the status of Native Americans or their land. n37 Only one had an Indian party, and that case was dismissed for want of jurisdiction. n38 Nevertheless, these decisions articulated legal concepts that dominate federal Indian law.

Constitutional and legislative antecedents of the court's decisions were sparse but fundamental. The Constitution implied that tribal Indians were not part of the political community of the United States, n39 and the Government had made dozens of treaties with tribes, implying their national status. The Constitution gave Congress power to regulate commerce with the Indian tribes, ranking tribes with states and foreign nations but implying that they are different from either. n40 Congress had exercised this power in statutes known as the Indian Trade and Intercourse Acts. These laws enacted the federal restraint on Indian title, regulated trade with tribal Indians, and provided for federal trial and punishment of interracial crimes. n41

COMPUTER-ASSISTED RESEARCH

LEXIS: marshall w/1 court w/30 indian! or native american!

(1) Indian Title Cases.

Four of the Marshall Court's decisions addressed the nature of Indian title. n42 The best known is Johnson v. M'Intosh, which is often studied in law school courses on the law of property. n43 In 1773 and 1775, Johnson and his fellow plaintiffs had bought large tracts of land in the far west of Virginia directly from their tribal owners. Their purchase violated the sovereign restraint on alienation because they did not act through the Crown. Nor did they obtain ratification by the Crown or, after independence, by Virginia or the federal government. Instead, the federal government acquired the same tracts as parts of later cessions by the tribes. The Government patented part of one tract, by then in Illinois, to M'Intosh. The court ruled that the earlier purchases were legally void and held for M'Intosh.

While this decision accorded with long-established precedents and practice, Marshall's opinion was a more thorough and complete articulation than had previously existed, and remains the best-known discussion of the subject. Moreover, in this opinion and in *Fletcher*, the court accommodated the sovereign restraint on alienation to the Federal Constitution and to other aspects of American law.

Johnson and *Fletcher* conceptualized the sovereign interest as "fee simple" ownership subject to Indian title, which

consisted of a "right of occupancy" in the tribes. n44 In *Fletcher*, this was a convenient device to recognize the State of Georgia as proprietary successor to the Crown, yet to sustain the federal restraint on alienation as a regulatory power. The issue was validity of massive, frontier land transfers by the State to private buyers. The court's opinion sustained the transfers to vest ownership in the buyers after Indian title was extinguished, but it recognized that the federal government had sole power to extinguish Indian title.

The description of Indian title as a "right of occupancy" subject to a "fee simple" interest in the state or federal government or their private successors has been the source of confusion and error. To those bent on minimizing Indian rights, the right of occupancy sounded conveniently like a common law tenancy at will, and fee simple resonated with its exalted common-law meaning. That the court meant no such thing is clear; it later described the tribal right to be "as sacred as the fee simple of the whites." n45 But other judges have occasionally succumbed to the temptation and referred to the tribal right as a "mere" right of occupancy that was unprotected in one context or another. n46 Some academic criticism of *Johnson* centers on the court's recital of the "rule of discovery" as conferring "fee simple" ownership on the discovering European power and on the states or the United States as successor sovereign. n47 The recital implies two propositions: assertion of the sovereign right to define land ownership (and other legal relationships), and definition of tribal ownership as an exercise of the sovereign right. The first, the Europeans' subordination of tribal sovereignty, raises profound political and moral issues beyond the scope of this treatise. n48 The second, the crucial question for property law, is the nature of ownership recognized in the Indian nations. The concept in federal law (though many times unenforced in practice) has consistently been that Indian title includes all rights of ownership except the right to sell to outsiders, which is subject to the federal restraint on alienation. Because the Indian right includes full and exclusive possession, use, and enjoyment, the sovereign's "fee simple" is very different from common-law possessory or future interests held in fee simple. It is more like the fee simple of a private law trustee, and this analogy has worked its way into the law. n49

The physical extent of tribal ownership has been the subject of several kinds of disputes. Original Indian title was not represented by writings or surveys, and it was described as based on possession or occupancy. This raised an important question about the intensity of possession required to support Indian title. From the earliest Spanish conquests, opponents of Native Americans argued that hunting, gathering and other uses that involved only occasional human presence, should not be recognized. Land so little used should be declared to be vacant or waste land, terra nullius, available to the first Europeans to put it to agricultural or other intensive use. This argument was made to the court and rejected in general terms in *Johnson*, n50 then more explicitly countered as part of the holding in *Mitchel*. The court specifically recognized tribal possessory title in broad terms based on any tribal use, including hunting. n51

In treaties with the United States, the limit of original tribal title usually corresponded with the limit of a tribe's exclusive possession respected by other tribes, in other words, with a tribe's national boundaries. As a result, virtually all land to which the federal government extinguished Indian title was the subject of a purchase agreement with a tribal owner. n52 Questions about the justness of these acquisitions depend mostly on tribal volition in making agreements; in many cases, coercion or fraud was manifest. n53

Another issue about the extent of tribal ownership was whether voluntary abandonment of possession constituted loss of Indian title. The Supreme Court has held that it did, n54 although this rule has seldom been the basis for extinguishment of Indian title. The concept has more often figured in disputes over which of two tribes owned disputed territory. n55

An important limit on the extent of tribal ownership relates to navigable waterways within tribal boundaries. This is discussed in connection with Indian title. n56

COMPUTER-ASSISTED RESEARCH

LEXIS: indian! or native american! w/30 fee simple
indian! or native american! w/30 right w/1 occupancy

(2) Tribal Sovereignty Cases.

The Supreme Court's decisions in the two Cherokee cases arose out of the State of Georgia's effort to assert its jurisdiction over Cherokee territory. Cherokee Nation v. Georgia was an original action in the Supreme Court against the State seeking a ruling that the State had no jurisdiction over Cherokee country. n57 The court dismissed for want of original jurisdiction, but Marshall's opinion laid the conceptual groundwork for the trust relationship between the federal government and the Indian nations. n58

In Worcester v. Georgia, the court reviewed state court convictions of two white missionaries to the Cherokees who had refused to obey state law requiring them to apply for a state permit to be in Cherokee country and to acknowledge the primacy of state authority. The court reversed, holding that under the treaties between the United States and the Cherokee Nation, the State had no jurisdiction in Cherokee country. n59 This decision, the court's most influential in the field of Indian law, is the foundation of the tribal sovereignty doctrine. n60

COMPUTER-ASSISTED RESEARCH

LEXIS: tribal w/1 sovereignty

(d) Constitutional Power of Congress.

The Supreme Court's holding in Worcester, that Georgia had no jurisdiction over Cherokee country, rejected the claim that the federal government lacked constitutional power to oust the State's jurisdiction. n61 All other "states' rights" arguments against the validity of federal Indian treaties and statutes have been rejected by the court. n62 In recent years, equal protection attacks on federal Indian laws and treaties have also been rejected. According to the court, classification as an Indian in federal law is essentially political rather than invidiously racial. n63

The Supreme Court has consistently sustained federal legislative power to override Indian treaty rights and to restrict tribal sovereignty. n64 The only successful constitutional attacks on federal statutes applied to Indian affairs have overturned laws found to take Indian property without just compensation or to deprive Indians of property without due process. n65 This so-called "plenary power doctrine" has been criticized, n66 but the court continues to follow it. n67 The court imposes an important limit on the power by its requirement that congressional intent to invade Indian rights be clearly expressed. n68

COMPUTER-ASSISTED RESEARCH

LEXIS: congress! w/15 power! constitution! w/30 indian!

FOOTNOTES:
(n1)Footnote 11. *25 U.S.C. § 177. See* 25 C.F.R. § 152.22(b) (1992).

(n2)Footnote 12. *See* Wilcomb E. Washburn, Red Man's Land/White Man's Law 5-23 (1971); 4 Handbook of North American Indians, History of Indian-White Relations 96-102 (Wilcomb Washburn, ed. 1988); Cohen, *supra* n. 1, at 489-491; Felix S. Cohen, Handbook of Federal Indian Law 47 (1941); Felix S. Cohen, The Spanish Origin of Indian Rights in the Law of the United States, *31 Geo. L.J. 1 (1942).*

Vitoria's defense of the Indians was undercut by his advocacy of Spanish rights of trade and proselytization, and by his concept of "just wars" against Native Americans. *See* Washburn at 11-12.

(n3)Footnote 13. *See Mitchel v. United States, 34 U.S. (9 Pet.) 711, 734 (1835).* The version of Native American rights that worked its way into international law was free of most of the negative aspects of Vitoria's position. *See supra*

note 12.

(n4)Footnote 14. *See infra* text accompanying notes 47-49.

(n5)Footnote 15. *See* Cohen, *supra* n. 1, at 232-233, 487-489.

(n6)Footnote 16. *See Choteau v. Molony, 57 U.S. (16 How.) 203 (1853)* (dispute about whether purchase from tribe was fee or lesser interest); *Johnson v. M'Intosh, 21 U.S. (8 Wheat.) 543, 592-594 (1823)* (tribes had treated "sale" to plaintiffs as revoked).

(n7)Footnote 17. *See Mohegan Tribe v. Connecticut, 638 F.2d 612 (2d Cir. 1981), cert. denied 452 U.S. 968 (1981);* Mohegan Indians v. Connecticut (Privy Council 1773) (unpublished, described in Joseph Henry Smith, Appeals to the Privy Council from the American Plantations 422-442 (1950)).

(n8)Footnote 18. Royal Proclamation of Oct. 7, 1763, *quoted and explained*, IV Charles J. Kappler, Indian Affairs: Laws and Treaties 1172-73 (1929). *See Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 548 (1832);* Robert N. Clinton, The Proclamation of 1763: Colonial Prelude to Two Centuries of Federal State Conflict over Management of Indian Affairs, *69 B.U. L. Rev. 329 (1989).*

(n9)Footnote 19. *See, e.g*., Bruce Clark, Native Liberty, Crown Sovereignty (McGill-Queens Univ. Press 1990).

(n10)Footnote 20. *See Oneida Indian Nation of N.Y. v. New York, 860 F.2d 1145 (2d Cir. 1988), cert. denied, 493 U.S. 871 (1989).*

(n11)Footnote 21. *See* Cohen, *supra* n. 1, at 74-78; 1 Francis Paul Prucha, The Great Father: The United States Government and the American Indians 109 (1984).

(n12)Footnote 22. Northwest Ordinance, July 13, 1787, sec. 14 Art. III, *reenacted*, Act of Aug. 7, 1789, ch. 8, *1 Stat. 50.* Mocking the many departures from this high standard is a frequent point of social commentary. *See, e.g.*, Of Utmost Good Faith (Vine Deloria, Jr., ed. 1971).

(n13)Footnote 23. Act of July 22, 1790, ch. 33, *1 Stat. 137* (*codified as superseded and amended at 25 U.S.C. § 177). Seneca Nation of Indians v. New York, 206 F. Supp. 2d 448 (W.D.N.Y. 2002)* (tribal conveyance of islands in Niagara River did not violate Nonintercourse Act because at time of conveyance the islands were not tribal land protected by the Act). *See Seneca Nation of Indians v. State of New York, 26 F. Supp. 2d 555 (W.D.N.Y. 1998)* (to establish violation of the Indian Nonintercourse Act, plaintiff must show (1) it is an Indian "tribe" within the meaning of the Act, (2) the parcels of land at issue are covered by the Act as a tribal land, (3) the United States has never consented to alienation of the tribal land, and (4) trust relationship between the United States and the tribe, which is established by coverage of the Act, has never been terminated or abandoned).

(n14)Footnote 24. *See* Washburn, *supra* n. 12, at 54-58.

(n15)Footnote 25. One kind of criticism of the rule invokes the common law's strong policy favoring alienability. *See, e.g.*, 1 Prucha, *supra* n. 21, at 108-114; 2 *id*. at 661-662, 879-887. Another centers on unequal treatment of the Indians and the federal government's power and control. *See* Williams, *supra* n. 5, at 285-317; Washburn, *supra* n. 12, at 41.

(n16)Footnote 26. *See* chapter 29.

(n17)Footnote 27. *See* Cohen, *supra* n. 1, at 58-70; *see also* David Wilkins, Quit-Claiming the Doctrine of Discovery: A Treaty-based Reappraisal, *23 Okla. City U.L. Rev. 277 (1998).*

(n18)Footnote 28. *See id*. at 62-107; II Charles J. Kappler, Indian Affairs: Laws and Treaties (1904); IV *id*.

1065-1081 (1929). Most Indian treaties before 1846 were published together in volume 7 of the Statutes at Large. Many Indian treaties were never ratified by the Senate. *See* II Kappler at 1031-1074; III *id*. 698-716 (1913); IV *id*. 1081-1147; V *id*. 685-710 (1941). *See* Vine Deloria, Jr., Reserving to Themselves: Treaties and the Powers of Indian Tribes, *38 Ariz. L. Rev. 963 (1996). See also United States v. Peterson, 121 F. Supp. 2d 1309 (D. Mont. 2000)* (stating that although the Blackfeet tribe retained hunting rights under a treaty ceding land to the federal government, Congress abrogated the hunting rights on a portion of the land that was subsequently included in a national park).

(n19)Footnote 29. *See* Grant Foreman, Indian Removal (1932); Cohen, *supra* n. 1, at 78-92.

(n20)Footnote 30. *See* Cohen, *supra* n. 1, at 770-775.

(n21)Footnote 31. Act of Mar. 3, 1871, ch. 120, § 1, *16 Stat. 544, 566* (*codified as amended at 25 U.S.C. § 71). See* Cohen, *supra* n. 1, at 105-107.

(n22)Footnote 32. *See infra* § 57.11.

(n23)Footnote 33. *See Rosebud Sioux Tribe v. Kneip, 430 U.S. 584 (1977).* For some years after 1871, these agreements were often called treaties in popular discourse. *Id. at 596.* However, Congress often imposed unilateral modifications on post-1871 agreements, as the facts of *Rosebud* show. Before 1871, statutory overrides of treaties had been rare.

(n24)Footnote 34. *United States v. Dion, 476 U.S. 734 (1986). See* Louis Henkin, The Constitution and United States Sovereignty: A Century of Chinese Exclusion and Its Progeny, *100 Harv. L. Rev. 853 (1987).*

(n25)Footnote 35. Some unratified treaties were with tribes that had other, ratified treaties, but others were with tribes that had no other treaties with the Government. Most notable were 18 unratified treaties made with California tribes in 1851-52. *See* IV Kappler, *supra* n. 28, at 1081-1128.

(n26)Footnote 36. *Oklahoma Tax Comm'n v. Sac & Fox Nation, 508 U.S. 114, 123-26 (1993); Oklahoma Tax Comm'n v. Citizen Band of Potawatomi Tribe of Oklahoma, 498 U.S. 505, 511 (1991); Merrion v. Jicarilla Apache Tribe, 455 U.S. 130, 134 n.1 (1982); Cree v. Flores, 157 F.3d 762 (9th Cir. 1998)* (Indian Treaties must be interpreted as the Indians would have understood them, and if a case is unclear, it must be resolved in Indians' favor); *see also LaRock v. Wisconsin Dept. of Revenue, 606 N.W.2d 580 (Wis. Ct. App. 1999).*

(n27)Footnote 37. *Mitchel v. United States, 34 U.S. (9 Pet.) 711 (1835); Worcester v. Georgia, 31 U.S. (6 Pet.) 515 (1832); Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1 (1831); Johnson v. M'Intosh, 21 U.S. (8 Wheat.) 543 (1823); Fletcher v. Peck, 10 U.S. (6 Cranch.) 87 (1810).*

(n28)Footnote 38. *Cherokee Nation v. Georgia, supra* note 37.

(n29)Footnote 39. U.S. Const. art. I § 2 cl. 3 defined the political community for purposes of representation in Congress and apportionment of direct taxes. It counted all free persons except "Indians not taxed," and three-fifths of other persons. The Fourteenth Amendment superseded the slavery provision but retained the exception for "Indians not taxed." In 1788 and 1868 this meant noncitizen, tribal Indians not assimilated into state societies. The Indians' original status was changed by treaty and statute, and today all Native Americans are citizens and are counted under Article I. *See infra* note 110 and accompanying text; Cohen, *supra* n. 1, at 639-640; *American Vantage Co., Inc. v. Table Mountain Rancheria, 292 F.3d 1091 (9th Cir. 2002)* (Congress extended citizenship to Indian individuals but not to Indian tribes). *United States v. Errol D., Jr., 292 F.3d 1159, 1163 (9th Cir. 2002)* (ambiguous provisions in both treaty and non-treaty matters should be "construed liberally" in favor of the Indians); *Timpanogos Tribe v. Conway, 286 F.3d 1195 (10th Cir. 2002)* (Indian reservations created by statute, agreement, or executive order generally have the same legal ramifications as those created by treaty).

(n30)Footnote 40. U.S. Const. art. I § 8 cl. 3. *See Cherokee Nation, 31 U.S. (5 Pet.) at 18-19.*

(n31)Footnote 41. The Act of Mar. 30, 1802, ch. 13, *2 Stat. 139,* was in force for the first four decisions discussed here. It had replaced similar statutes passed in 1790, 1793, 1796, and 1799. *See* Cohen, *supra* n. 1, at 109-113. The 1802 act was *superseded by* the Act of June 30, 1834, ch. 161, *4 Stat. 730* (repealed in part) (*codified as carried forward and amended at 18 U.S.C. §§ 1152,* 1160, 1165; *25 U.S.C. §§ 177,* 179, 180, 193, 194, 201, 229, 230, 263, 264).

(n32)Footnote 42. *See supra* note 37. Indian title was discussed in each cited opinion except Cherokee Nation v. Georgia.

(n33)Footnote 43. *21 U.S. (8 Wheat.) 543 (1823). See, e.g.,* Jesse Dukeminier & James E. Krier, Property 4 (3d ed. 1993); Charles M. Haar & Lance Liebman, Property and Law 3 (2d ed. 1985).

(n34)Footnote 44. *Fletcher, 10 U.S. (6 Cranch.) at 142-143; Johnson, 21 U.S. (8 Wheat.) at 585-587.*

(n35)Footnote 45. *Mitchel v. United States, 34 U.S. (9 Pet.) 711, 746 (1835), quoting Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1,* (1831) (Baldwin, J., concurring). This was presaged by Justice Johnson's separate opinion in *Fletcher* , in which he argued that the state's interest subject to Indian title should not be characterized as a fee simple because the Indian interest was the equivalent of a fee. *10 U.S. (6 Cranch.) at 146-147.* Johnson wanted to call the state's interest a "right of pre-emption"; he did not differ about the federal restraint on alienation of Indian title.

(n36)Footnote 46. *E.g., Tee-Hit-Ton Indians v. United States, 348 U.S. 272, 279 (1955)* (discussed *infra* § 57.05(a)); *In re Wilson, 634 P.2d 363, 365 (Cal. 1981).* Another imperfect attempt to describe Indian title in common-law terms was made in *United States v. Cook, 86 U.S. (19 Wall.) 591, 593-94 (1874),* where the court said the Indian right is like that of a life tenant or tenant for years, with the United States holding the future interest in fee. The court was more accurate in *Holden v. Joy, 84 U.S. 211, 244 (1872),* where it described tribal title as "absolute, subject only to the pre-emption right of purchase" of the United States.

(n37)Footnote 47. An early example is Joseph Story, A Familiar Exposition of the Constitution of the United States (1840) at 13-14 ("It is difficult to perceive, why [the Indians'] title was not ... as well founded as the title of any other nation ... The truth is, that the European nations paid not the slightest regard to the rights of the native tribes.") *See also* Robert A. Williams, Jr., *supra* n. 5, at 287-317. *Cf.* Felix S. Cohen, Original Indian Title, *32 Minn. L. Rev. 28, 48-49 (1947)* ("Marshall's doctrine that the Federal Government and the Indians both had exclusive title to the same land at the same time" was "a fiction devised to get around a theoretical difficulty posed by common law concepts.")

(n38)Footnote 48. The rule of discovery treated Indian nations as inferior by asserting the exclusive right to deal with them, an assertion of the right to control their territory. Of course, this would have been meaningless without the power to back it up, and in North America, Indian nations in fact formed alliances in wars among French, British, and Anglo-American forces. *See* Cohen, *supra* n. 1, at 57-59. Some tribes agreed to U.S. sovereignty in treaties, but most did not or agreed only with doubtful volition; the rule of discovery and other laws were imposed on them, either by the U.S. or by a European predecessor. In Worcester v. Georgia, the court explicitly said that the rule of discovery was a rule only among Europeans and their successor governments. *31 U.S. (6 Pet.) at 542-545. See also Karuk Tribe of California v. United States, 41 Fed. Cl. 468 (1998)* (tribal rights of occupancy and enjoyment may be extinguished, abridged, or curtailed by the United States at any time without payment of just compensation).

(n39)Footnote 49. *See infra* § 57.07. A trust title concept was implied by the wording of the Royal Proclamation of 1763, *supra* note 18, which reserved all unpatented land west of the Alleghenies "under the dominion and protection" of the Crown "for the use of the ... Indians."

(n40)Footnote 50. *Johnson, 21 U.S. (8 Wheat.) at 569-570.* Counsel for defendant urged the anti-Indian view, relying on the court's opinion in *Fletcher,* which had referred to land subject to Indian title as "vacant lands." *10 U.S. (6 Cranch.) at 142,* cited at *21 U.S. (8 Wheat.) 570. See also id.* at 92 (same term in the pleadings). However, the Fletcher

court also said that Indian title to such ("vacant") land "is certainly to be respected in all courts." *Id*. at 142-143.

The anti-Indian view had support in the published views of some European writers. *See, e.g*., 3 Emmerich de Vattel, The Law of Nations or the Principles of Natural Law §§ 81, 209, pp. 37-38, 85-86 (1758, tr. C. Fenwick); John Locke, An Essay Concerning the True Origin, Extent and End of Civil Government [Second Treatise of Government], in Treatise of Civil Government and A Letter Concerning Toleration 18-33 (C. Sherman ed. 1937, orig. pub. 1689).

(n41)Footnote 51. *Mitchel, 34 U.S. (9 Pet.) at 746* ("their hunting grounds were as much in their actual possession as the cleared fields of the whites"). However, the nature of Indian land use contributed to the rule that original Indian title lacks Fifth Amendment protection. *See infra* § 57.05.

(n42)Footnote 52. *See* Indian Land Cessions in the United States, in 18th Annual Report, Bureau of American Ethnology (Charles C. Royce, ed., 1896-97); Washburn, *supra* n. 12, at 109-123; Cohen, *supra* n. 47, at 34-43. "Exclusive possession" included joint or common possession by two or a few tribes so long as it was clearly exclusive of others. *See* Pueblo of Laguna v. United States, 17 Indian Cl. Comm'n 615, 668 (1967).

(n43)Footnote 53. *See Tee-Hit-Ton Indians v. United States, 348 U.S. 272, 289-290 (1955); Choctaw Nation v. United States, 119 U.S. 1, 37-38 (1886).* The most comprehensive evidence of coercion and fraud is found in the facts of the many claims decisions of the federal courts and the Indian Claims Commission. *See infra* § 57.07(d)(4). Other evidence of coercion arises from the lengthy list of unratified treaties with tribes. *See supra* note 35.

(n44)Footnote 54. *Williams v. City of Chicago, 242 U.S. 434 (1917).* The court's opinion cited dicta in several earlier opinions, including *Johnson* and *Mitchel. 242 U.S. at 438.*

(n45)Footnote 55. *See* Cohen, *supra* n. 1, at 492. Some cases have turned on whether an abandonment was voluntary. *Id*. at 492-493.

(n46)Footnote 56. *See infra* §§ 57.05(b), 57.09(c)(1), (c)(2), 57.10(b).

(n47)Footnote 57. *Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1 (1831). See generally* John R. Prince, Indian Country: A Different Model of Sovereignty, *33 Gonz. L. Rev. 103 (1998).*

(n48)Footnote 58. On the trust relationship, *see infra* § 57.07. On the jurisdictional issue in Cherokee Nation, *see* Cohen, *supra* n. 1, at 316 n.279.

(n49)Footnote 59. *Worcester v. Georgia, 31 U.S. (6 Pet.) 515 (1832).*

(n50)Footnote 60. *See infra* § 57.11(a)(1). *See also* Robert D. Cooter and Wolfgang Fikentscher, Indian Common Law: The Role of Custom in American Indian Tribal Courts, Part I, *46 Am. J. Comp. L. 287 (1998).*

(n51)Footnote 61. *31 U.S. (6 Pet.) at 558-562.*

(n52)Footnote 62. *E.g., United States v. John, 437 U.S. 634, 651-654 (1978); United States v. Mazurie, 419 U.S. 544, 554-556 (1975); United States v. Sandoval, 231 U.S. 28 (1913); United States v. Kagama, 118 U.S. 375 (1886). See generally* Cohen, *supra* n. 1, at 207-212, 270-279.

(n53)Footnote 63. *See* Cohen, *supra* n. 1, at 653-660; *United States v. Archambault, 206 F. Supp. 2d 1010,1017 (D.S.D. 2002)* (laws that treat Indians differently than non-Indians based not upon racial classifications, but upon the "unique status" of Indians as a "separate people" with their own political institutions)

(n54)Footnote 64. *Lone Wolf v. Hitchcock, 187 U.S. 553, 566 (1903); The Cherokee Tobacco, 78 U.S. (11 Wall.) 616 (1871). See United States v. Dion, 476 U.S. 734 (1986).*

(n55)Footnote 65. *E.g.*, *Hodel v. Irving, 481 U.S. 704 (1987); United States v. Sioux Nation, 448 U.S. 371, 417-424 (1980).* In *Muskrat v. United States, 219 U.S. 346 (1911),* the court held that a special jurisdictional statute relating to certain federal Indian laws violated Article III of the Constitution. However, this was a technical and procedural decision; the substantive issues not reached in Muskrat were decided in favor of the constitutional validity of congressional action in other cases. *Gritts v. Fisher, 224 U.S. 640 (1912); Heckman v. United States, 224 U.S. 413 (1912).*

(n56)Footnote 66. *See supra* note 5.

(n57)Footnote 67. *E.g.*, *National Farmers Union Ins. Cos. v. Crow Tribe, 471 U.S. 845, 851 (1985); United States v. Wheeler, 435 U.S. 313, 323 (1978).*

(n58)Footnote 68. *See infra* § 57.07(b). E.g., *Oneida Indian Nation v. New York, 194 F. Supp. 2d 104 (N.D.N.Y. 2002)* (congressional intent to terminate title to Indian land must be plain and unambiguous, but not necessarily by federal treaty or statute).

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CHAPTER 57 INDIAN LAND

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§ 57.05 Tribal Land.

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Tribal land ownership has many different origins. It can be held under original Indian title; a treaty; a federal statute; an executive order of the President; a purchase, gift or exchange; or a title established by a prior foreign sovereign or by a state. There are also variations in the form of titles. Some are not specifically denominated, others are explicitly in fee simple or owned by the United States in trust for a tribe. n69 Most of the important incidents of ownership are the same regardless of origin or form. All tribal land is subject to the federal restraint on alienation, including title held in "fee simple." n70 All tribal land has the same rights of possession and use. All tribal title has the same legal protection against state or private interference. All tribal land probably has the same relation to questions about tribal and state sovereignty. n71 Historically, the one important distinction in forms of tribal ownership is between Indian title that is legislatively recognized under federal treaties or statutes, and title that is not.

COMPUTER-ASSISTED RESEARCH

LEXIS: tribal w/1 land! w/2 own!

(a) Legislatively Recognized Indian Title.

"Recognized" title is protected under the Fifth Amendment against federal taking without just compensation; n72"unrecognized" title is not. Recognized title is tribal ownership recognized in a treaty or statute or based on purchase or exchange; in other words, it is title grounded in legislative recognition under federal or state law. Unrecognized title is tribal ownership based on original Indian title or on an executive order setting aside federal land for a tribe; it lacks legislative recognition. n73 Original Indian title, also called aboriginal Indian title, is the property right in land possessed by an Indian tribe at the time of European contact. The right continues until changed by positive act of the federal government or an antecedent sovereign. In most cases, original title was sold to the United States or a prior sovereign in a treaty of cession or was confirmed to the tribe in the treaty, thereby becoming recognized title. In some instances, original title was not recognized or sold, and in Tee-Hit-Ton Indians v. United States, the Supreme Court held that original title has no Fifth Amendment protection against a federal taking. n74 It is protected against a state taking or private ouster. n75

In 1855, President Pierce began the practice of setting aside tracts of land for Indian tribes by presidential order based solely on executive power over the public lands. In some cases the land set aside was occupied by tribes under original Indian title; in others original Indian title had been previously extinguished. These became known as executive order Indian reservations, and dozens of them were established. n76

For some years there was doubt about the legality of this practice, but in 1915 the Supreme Court held that Congress had ratified it by implication. n77 However, the court has also held that tribes do not have recognized title to executive order reservations. The land may be taken by federal action without payment of compensation. n78

Executive order reservations became controversial in the 1920s. In 1922, Interior Secretary Albert Fall (notorious for the Teapot Dome scandal) issued an opinion stating that executive order Indian reservations were subject to mining entry under federal laws governing the public domain, and the Indians were not entitled to payment for minerals removed. n79 Soon after, an opinion by Attorney General Stone reached the contrary conclusion. n80 Congress settled the issue by statute, expressly recognizing tribal ownership of the mineral estate in executive order reservations. n81

In 1919, Congress forbade creation of new executive order reservations. n82 But in 1934, the Indian Reorganization Act authorized the Secretary of the Interior to establish new reservations or additions to reservations by secretarial order. n83

The rule that "unrecognized" Indian title lacks Fifth Amendment protection has been strongly criticized, particularly regarding original Indian title. n84 That application does seem to conflict with Vitoria's principles and with the Northwest Ordinance. n85 The rule does not affect much land now held by tribes. Little or no land is held in original Indian title alone, and much of the tribal land in executive order Indian reservations - possibly all of it - has become recognized under one or another federal statute. n86 Even when it applies, the Fifth Amendment does not protect the essential Native American interest in the land itself, other than being paid for it. n87

COMPUTER-ASSISTED RESEARCH

LEXIS: indian! w/5 title! w/15 recognize!

(b) Indian Title in Watercourses.

Under the common law, non-navigable waterways are part of the adjoining upland property if included in its boundaries. But navigable waterways are owned by the sovereign in trust for all the people. There is a strong presumption against most kinds of private rights in navigable watercourses. Private rights in fee simple ownership usually end at the high water mark or line of mean high tide. n88

Constitutional case law divides the sovereign interest in navigable waterways between the federal government and the states. The states own the fee interest in trust for their people. The federal government owns a navigational servitude, giving it control to promote and protect navigation. Moreover, the Supreme Court has interpreted the Constitution and federal navigation acts to expand the common-law definition of navigable. Under American law, many interior waterways are navigable, contrary to English law. n89

The state proprietary interest in navigable watercourses is subject to state law. Private rights can be acquired, and rights to divert and use water are commonly available. But states are generally reluctant to create other private rights, particularly rights in beds or banks of waterways. The tradition of watercourses as commons is very strong. n90

Prior to statehood of a public land state, the federal government owned all sovereign rights in navigable watercourses. At that time, it could grant private rights in watercourses, and some conveyances have been recognized. But there is a

strong presumption against a conveyance; it must be explicit and clear. Conveyance of the adjoining upland without more was not enough, nor was inclusion within a boundary. Upon statehood, the federal proprietary interest in navigable watercourses vested in the new state. n91

Applying the law of navigable waterways to Indian land has caused difficulties, which is ironic. Most American waterways are publicly owned, either pursuant to the strong rule for navigable waterways or as a matter of title, and they are treated as commons. Tribal lands were usually held as commons, so the conflict between Native American and Anglo-American concepts of land ownership was much less with regard to waterways. When treaties were made, the waterways and their fisheries appeared endlessly abundant, and ownership of beds seemed unimportant. Whether the Indians reserved distinct rights in common as separate societies, or they were to share in the general commons, did not loom as a problem and was not addressed. But in modern times fishing is heavily regulated and ownership of beds can be valuable, so the issue of one commons or several has often come to the forefront. When non-navigable watercourses are within or on the boundaries of Indian land, the common-law rule is applied with few difficulties. When within the land boundary, Indian title includes waterways and their beds and banks, and conveyance of the upland alienates the adjacent waterway under rules of general application. n92 Distinct rules apply to water (use) rights in arid areas. n93

When navigable watercourses are within or on the boundaries of Indian land, legal rules conflict. Original Indian title was supposed to be the entire domain possessed by the tribe, including watercourses, and treaty reservations were supposed to recognize the same title in a reduced domain. Surely the Indian people thought so, and the usual rule of treaty interpretation is to carry out their just expectations. n94 On the other hand, the rules establishing state and federal control of navigable waters are policies that the Supreme Court has strongly protected against private claims. n95

Tribes have argued that they are not ordinary private claimants, but they have had limited success. The court has denied tribal claims to own navigable watercourses except in two circumstances. One is the unique situation in parts of the former Indian Territory, now Oklahoma, where removal treaties had explicitly promised that the land would never be included within the boundaries of any state or organized territory. The court held that this overcame the presumption that navigable watercourses were held by the United States in trust for the people of a future state, and the tribes own them. n96

The second situation, of more general application, is when an Indian fishery is part of a reservation. In these cases, the courts have readily inferred that the fishery was to be exclusive, and that the tribe owned the watercourse as protection for its fishery. n97 In other words, the courts have sustained the focused expectations of fishing Indians to own their fisheries, but they have denied the general expectations of other Indians to own navigable watercourses within tribal boundaries. n98

State ownership of navigable waterways may affect disputes about reservation boundaries. When the issue is whether a navigable waterway is within a reservation, the formal question is congressional intent. But in ambiguous cases, a court may be influenced by the state's claim of ownership of its beds and banks to find the waterway outside the reservation. n99 Federal dam building has generated analogous questions. When the federal government has acquired tribal land for a dam and reservoir, by purchase or eminent domain, it is often ambiguous whether the land under the reservoir and along its shore was intended to remain within the tribal reservation. n100

COMPUTER-ASSISTED RESEARCH

LEXIS: indian! w/5 title! w/15 water! w/5 navigable

(c) Tribal Interests in Land Owned by Others.

Tribes can own servitudes and other interests in land owned in fee by others. n101 An important example is retained tribal rights to hunt, fish, and gather wild plants on lands ceded to the United States, discussed below. n102 A unique

right was established by the Native American Graves Protection and Repatriation Act. n103 The Act vests ownership of Native American human remains, funerary objects, and other cultural items discovered on federal land in lineal descendants or in tribes or Native Hawaiian organizations. n104

(d) Acquiring Tribal Ownership.

Congress can pass a new law establishing tribal title or transferring public land to a tribe, and this is occasionally done. Some statutes applicable only to particular tribes entitle those tribes to acquire land under various circumstances. n105 And tribes to which it applies can acquire land under Section 5 of the Indian Reorganization Act of 1934. n106 This Act applies to all tribes except those that rejected it by referendum; about four-fifths of the tribes are subject to the Act. n107 Tribes are authorized to purchase allotted land that is subject to their jurisdiction. n108 Tribal ownership can also be acquired by exchange. n109 And tribes can purchase land or receive gifts of land from other sources.

The federal restraint on alienation appears to attach to any tribal ownership, no matter how acquired. n110 This assertion is untested as applied to tribal acquisitions entirely independent of federal involvement or approval, but the statutory wording seems too clear for exceptions. In most instances, tribes seek to have acquired land held in trust for them by the United States. Federal regulations provide criteria and procedures for accepting trust title. n111 Another important issue is whether newly-acquired tribal land is Indian country subject to tribal sovereignty. This is addressed in another section of this chapter. n112

COMPUTER-ASSISTED RESEARCH

LEXIS: acquir! w/15 tribal w/15 land! or title!

FOOTNOTES:

(n1)Footnote 69. *See* Cohen, *supra* n. 1, at 472; *Federal Power Comm'n v. Tuscarora Indian Nation, 362 U.S. 99 (1960).* Modern statutes provide for newly-established Indian title to be held in trust by the United States. *See, e.g., 25 U.S.C. §§ 459,* 465, 501, 1466, 1495, 2209. The discussion here is about tribal land held in some equivalent of fee simple. Tribes can, of course, own lesser interests such as leaseholds. *See infra* § 57.05(c). In Alaska, most Native land is held by state-chartered corporations subject to federal statutory standards. *See infra* § 57.06(d). For examples of the trust relationship with the United States as trustee, *see Cobell v. Norton, 240 F.3d 1081 (D.C. Cir. 2001); White Mountain Apache Tribe v. United States, 249 F.3d 1364 (Fed. Cir. 2001); Confederated Tribes of Warm Springs Reservation of Oregon v. United States, 248 F.3d 1365 (Fed. Cir. 2001); San Xavier Development Authority v. Charles, 237 F.3d 1149 (9th Cir. 2001); Fallon Paiute-Shoshone Tribe v. City of Fallon, 174 F. Supp. 2d 1088 (D. Nev. 2001); State v. Boyd, 34 P.3d 912 (Wash. App. 2001).*

(n2)Footnote 70. *25 U.S.C. § 177;* 25 C.F.R. § 152.22(b) (1992); *United States v. Candelaria, 271 U.S. 432 (1926). See* Cohen, *supra* n. 1, at 510-522. For examples of the trust relationship with the United States as trustee, *see Cobell v. Norton, 240 F.3d 1081 (D.C. Cir. 2001); White Mountain Apache Tribe v. United States, 249 F.3d 1364 (Fed. Cir. 2001); Confederated Tribes of Warm Springs Reservation of Oregon v. United States, 248 F.3d 1365 (Fed. Cir. 2001); San Xavier Development Authority v. Charles, 237 F.3d 1149 (9th Cir. 2001); Fallon Paiute-Shoshone Tribe v. City of Fallon, 174 F. Supp. 2d 1088 (D. Nev. 2001); State v. Boyd, 34 P.3d 912 (Wash. App. 2001).*

(n3)Footnote 71. *See infra* § 57.11(b).

(n4)Footnote 72. *Seneca Nation v. New York, 206 F. Supp. 2d 448, 505 (W.D.N.Y. 2002)* (to show recognized title, tribe must show a "definite intention by congressional action or authority to accord legal rights, not merely permissive occupancy").

(n5)Footnote 73. *See* Cohen, *supra* n. 1, at 473-499. See Raymond Cross, Sovereign Bargains, Indian Taking, and the Preservation of Indian Country in the Twenty-first Century, *40 Ariz. L. Rev. 25 (1998);* see also *Alaska v. Native*

Village of Venetie Tribal Government, 522 U.S. 520 (1998) ("dependent Indian Communities," as used in statute defining "Indian country," refers to a limited category of Indian lands that are neither reservations nor allotments, have been set aside by Federal Court for use of Indians as Indian land, and are under federal superintendence; however, the land transferred to private corporations consisting of Indian shareholders, in fee simple without restrictions, and subsequently reconveyed to the tribe was not "Indian country," and the tribe consequently lacked authority to impose tax on business activities conducted on land).

(n6)Footnote 74. *348 U.S. 272 (1955). See generally* Michael J. Kaplan, Proof and Extinguishment of Aboriginal Title to Indian Lands, *41 A.L.R. Fed. 425 (Supp.1998).*

(n7)Footnote 75. *United States ex rel. Hualapai Indians v. Santa Fe Pac. R. Co., 314 U.S. 339 (1941); Cramer v. United States, 261 U.S. 219 (1923). See* Cohen, *supra* n. 1, at 508-528. *Cf. Oneida Indian Nation of N.Y. v. New York, 860 F.2d 1145 (2d Cir. 1988), cert. denied, 493 U.S. 871 (1989)* (states had authority to acquire tribal land under Articles of Confederation).

(n8)Footnote 76. For a complete list of executive orders relating to Indian reservations, *see* I Kappler, *supra* n. 28, at 801-936 (1904); III *id*. 667-691; IV *id*. 1001-64; V *id*. 642-684; VII U.S. Dept. of Interior, Kappler's Indian Affairs: Laws and Treaties 1399-1601 (1972).

The term executive order Indian reservation is used in two senses. The one described in the text is executive orders under general presidential authority over public lands. In other instances, Congress has specifically authorized the President to establish a reservation by executive order. *See, e.g., Donnelly v. United States, 228 U.S. 243, 255-259 (1913).* The list of orders in Kappler, *supra*, includes both kinds.

(n9)Footnote 77. *United States v. Midwest Oil Co., 236 U.S. 459 (1915). See also Arizona v. California, 373 U.S. 546, 598 (1963), amended, 466 U.S. 144 (1984);* III Kappler, *supra* n. 28, at 692-695.

(n10)Footnote 78. *Sioux Nation v. United States, 316 U.S. 317 (1942). See* Cohen, *supra* n. 1, at 493-495. When Congress has specifically authorized the President to establish a reservation by executive order, *see supra* note 75, it should be classified as legislatively recognized and thus subject to Fifth Amendment protection.

(n11)Footnote 79. *49 Int. Dec. 139 (1922).* On Teapot Dome, *see* Burt Noggle, Teapot Dome: Oil and Politics in the 1920s (1962).

(n12)Footnote 80. *34 Op. Att'y Gen. 181 (1924).*

(n13)Footnote 81. Act of Mar. 3, 1927, ch. 299, *44 Stat. 1347* (*codified as amended at 25 U.S.C. §§ 398a*-398e). *See also* Act of Dec. 22, 1982, Pub. L. 97-382, *96 Stat. 1938* (*codified at 25 U.S.C. §§ 2101*-2108).

(n14)Footnote 82. *See generally* Cohen, *supra* n. 1, at 493-499. The Act of June 30, 1919, ch. 4, § 27, *41 Stat. 3, 34* (*codified at 43 U.S.C. § 150)* forbade executive withdrawals of public lands for Indian use. *See also 25 U.S.C. § 398d* (no executive authority to change boundaries of reservations).

(n15)Footnote 83. June 18, 1934, ch. 576, §§ 5, 7, *48 Stat. 985, 986* (*codified as amended at 25 U.S.C. §§ 465,* 467). The Secretary may act only for tribes covered by the Act. *See infra* note 104 and accompanying text.

(n16)Footnote 84. *See, e.g.*, Nell Jessup Newton, At the Whim of the Sovereign: Aboriginal Title Reconsidered, *31 Hastings L.J. 1215 (1980).*

(n17)Footnote 85. *See supra* text accompanying notes 12-13, 22.

(n18)Footnote 86. *See* Cohen, *supra* n. 1, at 494-497. Until 1971, most of Alaska was subject to original Native

title claims, but all were extinguished in that year. *See infra* § 57.06(d). The only important remaining claims to original title are in eastern states, particularly the Oneida claim in New York. *See County of Oneida v. Oneida Indian Nation, 470 U.S. 226 (1985);* Symposium on Indian Law: The Eastern Land Claims, *31 Me. L. Rev. 1 (1979). Cf. United States v. Dann, 470 U.S. 39 (1985)* (original title claim extinguished by judgment of Indian Claims Commission), *amended, 873 F.2d 1189 (9th Cir. 1989).*

(n19)Footnote 87. In *United States v. Sioux Nation, 448 U.S. 371 (1980),* the court sustained an award of more than $100 million for taking of the Black Hills. But the Sioux have refused the award and sought return of land. *See* Hearing on S. 1453 Before the Select Committee on Indian Affairs, 99th Cong., 2d Sess. (1986).

One of the Supreme Court's most justly criticized decisions on Indian rights was *Federal Power Comm'n v. Tuscarora Indian Nation, 362 U.S. 99 (1960),* in which the court sustained condemnation of Indian land with compensation under ambiguous statutory authority.

(n20)Footnote 88. *See* chapter 55

(n21)Footnote 89. *Id.*

(n22)Footnote 90. *See* chapter 50.

(n23)Footnote 91. *Id.*

(n24)Footnote 92. *Oklahoma v. Texas, 258 U.S. 574, 592-596 (1922); Donnelly v. United States, 228 U.S. 243, 259-264 (1913).*

(n25)Footnote 93. *See infra* § 57.10 (Indian water rights).

(n26)Footnote 94. *See infra* § 57.07(b). *But see* In re General Adjudication of All Rights to Use Water in *Gila River System and Source, 35 P.3d 68 (Ariz. 2001)* (Indians are entitled to broad interpretation of water rights in order to further self-sufficiency, but under the *Winters* doctrine, the reservation only retains rights to water necessary to fulfill the purposes of the Indian reservation, no more).

(n27)Footnote 95. *See supra* text accompanying notes 87-90. Idaho v. Coeur d'*Alene Tribe, 521 U.S. 261 (1997)* (tribal action alleging ownership of bed of lake and submerged lands of its tributaries within reservation boundaries was barred by doctrine of sovereign immunity).

(n28)Footnote 96. *Choctaw Nation v. Oklahoma, 397 U.S. 620 (1970).*

(n29)Footnote 97. *Alaska Pac. Fisheries v. United States, 248 U.S. 78 (1918); Confederated Salish & Kootenai Tribes v. Namen, 665 F.2d 951* (9th Cir.), *cert. denied, 459 U.S. 977 (1982)* (*see* opinion of Rehnquist, J., dissenting from denial of certiorari); *Puyallup Indian Tribe v. Port of Tacoma, 717 F.2d 1251 (9th Cir. 1983), cert. denied, 465 U.S. 1049 (1984).*

(n30)Footnote 98. *Montana v. United States, 450 U.S. 544 (1981)* (denying tribal ownership of streambed based on pre-statehood treaty); *United States v. Holt State Bank, 270 U.S. 49 (1926)* (same regarding lakebed); *United States v. Aranson, 696 F.2d 654* (9th Cir.), *cert. denied, 464 U.S. 982 (1983)* (riverbed not part of executive order reservation). *But see In re Estate of Hobbs, 46 P.3d 594 (Mont. 2002)* (title to lakebed on reservation border between high water mark and meander line still rests in United States in trust for tribes).

(n31)Footnote 99. *See Skokomish Indian Tribe v. France, 320 F.2d 205 (9th Cir. 1963), cert. denied, 376 U.S. 943 (1964)* (mean high water mark of navigable waterway found to be reservation boundary).

(n32)Footnote 100. *See, e.g., Lower Brule Sioux Tribe v. South Dakota, 711 F.2d 809 (8th Cir. 1983), cert. denied,*

464 U.S. 1042 (1984) (reservation boundary not changed by reservoir project). *Idaho v. United States, 533 U.S. 262 (2001)* (court considers whether U.S. intended to include submerged lands within reservation and to defeat future states title to those lands).

(n33)Footnote 101. *Bugenig v. Hoopa Valley Tribe, 229 F.3d 1210 (9th Cir. 2000)* (An Indian tribe is not allowed to exercise jurisdiction over a nonmember unless Congress provides a "clear statement" granting jurisdiction to the tribe).

(n34)Footnote 102. *See infra* § 57.07.

(n35)Footnote 103. Nov. 16, 1990, Pub. L. 101-601, § 3, *104 Stat. 3048, 3050* (*codified at 25 U.S.C. § 3002). See* Symposium, The Native American Graves Protection and Repatriation Act of 1990 and State Repatriation-Related Legislation, *24 Ariz. St. L.J. 151 (1992). See also* Sherry Hunt, Native American Cultural Property Law: Human Rights Legislation, *34 Arizona Attorney 18* (5), 1998. *Yankton Sioux Tribe v. U.S. Army Corps of Engineers, 209 F. Supp. 2d 1008 (D.S.D. 2002)* (NAGPRA applies to former federal lands transferred to state under Water Development Resources Act).

(n36)Footnote 104. The act also applies on tribal land. Its effectiveness depends on tribal initiative. *See* Rennard Strickland & Kathy Supernaw, Back to the Future: A Proposed Model Tribal Act to Protect Native Cultural Heritage, *46 Ark. L. Rev. 161 (1993).*

(n37)Footnote 105. *E.g., 25 U.S.C. §§ 1733b,* 1747(a), 1754(b)(2).

(n38)Footnote 106. *Supra* note 82, *48 Stat. 985* § 5 (*codified at 25 U.S.C. § 465).*

(n39)Footnote 107. *Id.* § 18, *48 Stat. 988* (*codified at 25 U.S.C. § 478). See 25 U.S.C. § 473;* 25 C.F.R. § 151.5 (1992) (application of IRA in Alaska & Oklahoma).

(n40)Footnote 108. Indian Land Consolidation Act, Jan. 12, 1983, Pub. L. 97-458, tit. II, *96 Stat. 2517* (*codified as amended at 25 U.S.C. §§ 2201*-2211).

(n41)Footnote 109. *Id.*; Indian Reorganization Act, *supra* note 82, § 4 (*codified at 25 U.S.C. § 464)* (confined to tribes covered by the Act); *United States v. Hess, 348 F.3d 1237 (10th Cir. 2003)* (quiet title action on property acquired for Indian Tribe by exchange.) *See* 25 C.F.R. § 151.6 (1992); *infra* § 57.08(a). *See also 43 U.S.C. § 149;* 43 C.F.R. subpt. 2271 (1992) (provision to allow non-Indians within certain Indian reservations to exchange private land for other federal land).

(n42)Footnote 110. *See supra* note 70 and accompanying text; 25 C.F.R. § 151.1 (1992).

(n43)Footnote 111. *See* 25 C.F.R. pt. 151 (1992). *Id.* § 151.3 states federal policy.

(n44)Footnote 112. *See infra* § 57.11(a)(4).

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CHAPTER 57 INDIAN LAND

7-57 Thompson on Real Property, Thomas Editions § 57.06

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§ 57.06 Individual Interests in Land.

[Go To Supp]

Native Americans have the same rights as other persons to own land under state and federal law. In the last century, most Indian people were not citizens of the United States, and some states limited land ownership by noncitizens. All Native Americans born in the U. S. are now citizens, and laws forbidding ownership by noncitizens have been held unconstitutional. n113 Native Americans can own several kinds of property interests under distinct laws applicable only to them. These are the subject of this section, but they are too numerous and complex for complete coverage here. Some interests are under statutes applicable to a single tribe or to a few tribes. The purpose of this section is to discuss broadly applicable rules and to identify more local schemes with sufficient citations to allow research to continue in specialized works.

COMPUTER-ASSISTED RESEARCH

LEXIS: individual! w/5 own! w/15 land! w/15 indian! or native american!

(a) Individual Rights in Tribal Property.

Tribal ownership is the collective right of the tribe, in which tribal members have only derivative interests based on their membership. Typically, a tribal member gains a derivative right at birth or enrollment and loses it at death. The member's interest cannot be transferred, inherited, or severed, and members have only such rights of use and enjoyment as tribal law grants. In general, tribal ownership is more like corporate ownership than tenancy in common. But it lacks the private corporate owner's transferable share or derivative right to sue, yet it is greater than the private interest in a municipal corporation. n114

Except in a few instances when federal law specifies individual rights in tribal property, members' rights are dependent on tribal law. Tribal law usually allocates to members use rights in tribal property, such as homesites, grazing leases, fields for farming, fishing rights, timber cutting rights, water rights, and business sites. Compared with the common law of property, use rights in tribal land are much more likely to be revocable, to be alienable only to a very limited extent, and to be of limited duration. Each tribe's law, customary and statutory, should be examined to evaluate a local issue.

n115

COMPUTER-ASSISTED RESEARCH

LEXIS: individual! w/5 right! w/30 tribal w/5 land! or property

(b) Allotments.

Allotment is a term of art in federal Indian law, identifying a parcel of land beneficially owned by one or more Native Americans and subject to a federal restraint on alienation. Most allotments are held in the name of the United States as trustee for their Indian owners. A smaller number, mostly in eastern Oklahoma, are held in fee simple by Indian owners subject to an explicit federal restraint on alienation. However, the purpose of the trust title is to control alienation, so the two forms of title have virtually identical legal effects in practice. On the other hand, allotments are subject to many particular statutes, and differences among these can be significant. n116

Except for alienation, allotment ownership is almost identical to common-law fee simple ownership. Multiple ownership usually results from inheritance, and heirs hold the land as tenants in common. n117

COMPUTER-ASSISTED RESEARCH

LEXIS: allotment! w/15 own! w/30 indian! or native american!

(1) Allotments of Tribal Land.

In the 1850s, federal officials decided that parceling tribal land in severalty to tribal members should be promoted as part of a policy favoring Indian assimilation into the family farm culture of Anglo-America. Beginning in 1854, most treaties and agreements with tribes included a provision that entitled tribal members to claim an individual homestead out of tribal land. These were nominally consensual agreements, but uniformity of the clauses raises a strong inference that the federal government insisted on them. n118

Parcels patented to members out of tribal land were the first of what came to be known as allotments. Advocates of allotment were dissatisfied with the limited number of allotments achieved through provisions in treaties and agreements, and in the late 1870s, they began to propose that allotment of tribal land be mandated by statute. Some members of Congress resisted any statute that did not provide for tribal consent, but eventually their opposition was overcome, and Congress enacted the General Allotment Act of 1887, also called the Dawes Act. n119 The Act authorized the President to impose allotment on tribes covered by it. In practice the Interior Department sought consent of tribes to allotment, but there was a good deal of overbearing, and the threat of compulsory allotment overshadowed negotiations. However, some tribes successfully resisted allotment, including most in the Southwest. n120

A key part of the allotment scheme was the assumption that tribes did not really need all the land they owned. An allotment should be conveyed to each tribal family for its agricultural support. Remaining tribal land was "surplus" and should be sold to homesteaders. The General Allotment Act authorized sale of surplus land with tribal consent. n121 Overbearing was again frequent, and Congress unilaterally altered the terms of some "surplus" land sale agreements. n122 Millions of acres of tribal land were sold under this plan; it was the last method of wholesale transfer of Indian land to non-Indian ownership. n123

With few exceptions, allotment was a disaster for Indian people. One historian described the policy as "an orgy of plunder and exploitation." n124 In the 1920s, the Government itself decided that the policy had failed. Compulsory allotment of tribal land was suspended in 1928 and ended in 1934. n125 Since then, allotments of tribal land have been made only in a few specific instances and with Indian consent. However, thousands of allotments made before 1928

remain under federal restrictions, and thousands of former allotments have been sold to non-Indians under the allotment laws. n126

COMPUTER-ASSISTED RESEARCH

LEXIS: allotment! w/30 tribal w/5 land!

(2) Public Domain Allotments.

The federal government's 19th century enterprise of extinguishing tribal title was followed by opening large tracts of acquired land to settlement under various public land laws such as the Homestead Act. n127 Claimants had to be eligible for citizenship, so most Indians did not qualify for homesteads. But in the allotment era after the Civil War, the Government wanted to encourage Indians to take public domain homesteads as part of its assimilation policy. Accordingly, Congress passed statutes that allowed individual Indians to obtain restricted homesteads, which are usually called public domain allotments. Section 4 of the General Allotment Act and several other statutes were enacted to this end. n128 In some instances, officials of the Bureau of Indian Affairs used these statutes to acquire several, proximate public domain parcels as a reservation for homeless tribes. n129

Some statutes authorizing public domain allotments remain in force, and claims under them can still be made. n130 But successful claims are difficult because regulations require that a new allotment be sufficient for self-support of the claimant, a standard difficult to meet under modern conditions. n131

COMPUTER-ASSISTED RESEARCH

LEXIS: allotment! w/30 public w/1 domain

(3) The General Allotment Act.

The General Allotment Act governs most allotments made out of tribal land and located outside eastern Oklahoma. The Act also applies to public domain allotments. n132 Sections 1 through 3 of the Act, now suspended, governed the making of allotments out of tribal land. n133 Section 4 authorizes public domain allotments. Section 5 provides that an allottee shall receive a patent declaring that the United States holds the allotment in trust for the allottee and the allottee's heirs for 25 years. n134 The trust period is now indefinite. n135 Section 7 entitles allottees to a "just and equal" share of water available for irrigation. n136

Section 6 of the Act governs the making of unrestricted fee patents when the allotment trust period ends. n137 Under the original act, this occurred automatically after 25 years and could occur earlier in the Secretary's discretion, whether or not the allottee consented. Under current law, the trust can end only upon application by the allottee and approval of the Secretary. n138 There has been much litigation over the effects of Section 6 on jurisdictional issues. n139

Many special allotment acts were passed for particular tribes. n140 These statutes are mostly patterned after the General Allotment Act, and the general act continues to apply except for conflicting provisions. Special allotment acts were also passed for tribes in eastern Oklahoma that are not subject to the general act. n141

COMPUTER-ASSISTED RESEARCH

LEXIS: general allotment act

(4) Adjudicating Allotment Rights.

Federal law grants jurisdiction to federal district courts over actions involving title to or possession of allotments outside eastern Oklahoma. n142 The statute confers exclusive jurisdiction over actions by Indians who claim a right to obtain an allotment in the first instance. It makes the United States an indispensable party defendant and waives its sovereign immunity to suit. This part of the statute is now confined largely to claims to public domain allotments because rights to allotments out of tribal land are suspended by more recent statutes. n143 The statute also confers jurisdiction over suits "in relation to" allotment rights, authorizing actions to contest rights in allotments previously made. In these actions, the United States is not indispensable, and its immunity is not waived. n144 Whether federal court jurisdiction under the latter part of the statute is exclusive of or concurrent with state courts is uncertain. n145 Actions against the United States that are not within the statutory waiver are barred by sovereign immunity. n146

Actions under the statute are subject to federal statutes of limitations. Actions to quiet title against the United States must be brought within twelve years after a claim accrues. n147 Other actions must be brought within six years. n148

COMPUTER-ASSISTED RESEARCH

LEXIS: jurisdiction! w/30 allotment!

(5) Allotments in Eastern Oklahoma.

President Jackson's removal scheme centered on the major tribes in the southeast, the Cherokees, Choctaws, Chickasaws, Creeks, and Seminoles (the "Five Civilized Tribes"). These tribes were forcibly moved to Indian Territory during the 1830s under removal treaties. Although made under duress, the treaties did grant the tribes a fee simple interest and promised that their new territory would never be included within a state or organized territory without their consent. n149 The tribes established strong governments and enjoyed substantial prosperity during the 1850s. But the Civil War had a devastating effect. Two tribes formally sided with the Confederacy as did sizeable factions of the others. All the tribes suffered huge losses in the War. Afterward, the federal government treated them as vanquished parts of the Confederacy. New treaties were negotiated under conditions in which the tribes had little bargaining power. The Cherokees ceded their western lands, and all tribes agreed to allotment. n150

Despite these treaties, the Five Tribes persuaded Congress to except them from the General Allotment Act, and their reduced territory was excluded from Oklahoma Territory when it was established in 1890. n151 But the respite was temporary, and allotment was agreed to, again with manipulation and some duress, in a series of agreements made at the turn of the century. Their territory became part of the State of Oklahoma in 1907. n152

The allotment laws applying to the Five Tribes differ from other allotment statutes in many details. A formal difference previously mentioned is that title is held by allottees in fee simple subject to a federal restraint on alienation. Of more practical importance, probates of the estates of deceased allottees are in the Oklahoma state courts, and many other incidents of ownership are subject to state court jurisdiction. n153

Osage Indian lands in Oklahoma were also excepted from the General Allotment Act and in 1906 were made subject to a distinct allotment statute that differs in many respects from both the General Allotment Act and the statutes applicable to the Five Tribes. The statute, enacted after discovery of oil on Osage lands, severed the Osage mineral estate from the surface and divided the mineral estate into allotments granted to members on the 1906 tribal roll as tenants in common. n154

COMPUTER-ASSISTED RESEARCH

LEXIS: allotment! w/30 oklahoma

(c) Lands of Native Hawaiians.

The original land ownership of Native Hawaiians was largely extinguished under the laws of the Kingdom and Republic of Hawaii, although Americans were heavily involved in later stages. When U. S. sovereignty attached in 1898, much land that had been part of the royal domain, then public land of the republic, became public domain of the United States. n155

In 1921, Congress enacted the Hawaiian Homes Commission Act, intended to provide homesteads to persons of at least half Native ancestry. n156 However, few grants were made, and in 1959, the federal government transferred control of the Act and lands subject to it to the State of Hawaii. The State has also made few grants, and the Act is a continuing source of controversy. n157

COMPUTER-ASSISTED RESEARCH

LEXIS: native w/1 hawaiian! w/15 land!

(d) Lands of Native Alaskans.

Native Alaskans own public domain allotments, and there is one Indian reservation in the state, but most Native land is held under the Alaska Native Claims Settlement Act of 1971 (ANCSA). n158 In scope, ANCSA was the most significant settlement with Native Americans in U. S. history. Based on extended negotiations with Natives and other interested parties, ANCSA extinguished original Native title to most of Alaska, about 365 million acres. In return, Natives agreed to accept 44 million acres in fee, to be conveyed to Native corporations established under Alaska law and to individuals, and payments into a trust fund in the Treasury of up to $962.5 million. Title to land conveyed is in unrestricted fee simple, but ANCSA restricts alienation of shares in the Native corporations established under it according to complex provisions of the statute and its many amendments. n159 The Ninth Circuit recently held that Native Alaskan applicants were not entitled to land allotments under Alaska Native Allotment Act. These applicants failed to show that they had made use of the land on which they resided while minors, and that prior to withdrawal of the land from the public domain, that they had personally used or occupied the land. n160

COMPUTER-ASSISTED RESEARCH

LEXIS: native w/1 alaskan! w/15 land!

FOOTNOTES:

(n1)Footnote 113. On Indian citizenship, *See* Cohen, *supra* n. 1, at 639-645. On land ownership by noncitizens, *see Fujii v. State, 242 P.2d 617 (1952)* (California ban violated Fourteenth Amendment).

(n2)Footnote 114. *The Cherokee Trust Funds, 117 U.S. 288, 308 (1886)* (tribal members had no direct interest in proceeds of sale of tribal land). *See* Cohen, *supra* n. 1, at 605-607; *see Klauser v. Babbitt, 918 F. Supp. 274 (W.D. Wis. 1996)* (limiting right of devise of fractional interest to heirs of those who already own undivided interest in same property did not violate Fifth Amendment). *See also* Allison M. Dussias, Squaw Drudges, Farm Wives, and the Damn Sisters' Last Stand: American Indian Women's Resistance to Domestication and the Denial of Their Property Rights, *77 N.C. L. Rev. 637 (1999).*

(n3)Footnote 115. *See, e.g.*, 3 Navajo Tr. C. ch. 1, 3, 5 (1977) (agricultural leases); 5 *id.* ch. 3, 11 (business leases); 16 *id.* ch. 9, 11 (homesite leases). *See also infra* § 57.08(c).

(n4)Footnote 116. *See* Cohen, *supra* n. 1, at 612-18. In some contexts, it is customary to limit use of the word "allotment" to original allotments, to distinguish restricted land received by inheritance, devise, gift, or purchase. In this chapter, however, the broader definition is used; Robert D. Cooter and Wolfgang Fikentscher, Indian Common Law: The Role of Custom in American Indian Tribal Courts, Part II, *46 Am. J. Comp. L. 509 (1998).*

(n5)Footnote 117. *See infra* § 57.08(b).

(n6)Footnote 118. *See* 1 Prucha, *supra* n. 21, at 347-348; Cohen, *supra* n. 1, at 613. The Indian Territory tribes in what is now eastern Oklahoma "agreed" to allotment in treaties made in 1866, in which the tribes were treated as part of the Confederacy. *See id.* at 773. Allotments made under treaties were patented in restricted fee title rather than trust title.

(n7)Footnote 119. Act of Feb. 8, 1887, c. 119, *24 Stat. 388* (*codified as amended at 25 U.S.C. §§ 331*-334, 339, 341, 342, 348, 349, 354, 381). On the Act's history, *see* Delos S. Otis, The Dawes Act and the Allotment of Indian Lands (Francis Prucha ed. 1973).

(n8)Footnote 120. *See* Cohen, *supra* n. 1, at 613 n.9; Francis Paul Prucha, American Indian Policy in Crisis 254 (1976) (map).

(n9)Footnote 121. Section 5, *codified as amended at 25 U.S.C. § 348.*

(n10)Footnote 122. *See, e.g., Rosebud Sioux Tribe v. Kneip, 430 U.S. 584, 592, 606 (1977).*

(n11)Footnote 123. Hearings on H.R. 7902 Before the House Comm. on Indian Affairs, 73rd Cong., 2d Sess. 16-18 (1934) (memorandum of John Collier estimating loss of more than 80% of Indian land value due to allotment), *quoted in* Getches, Wilkinson & Williams, *supra* n. 2, at 196.

(n12)Footnote 124. Angie Debo, And Still the Waters Run: The Betrayal of the Five Civilized Tribes 91 (1972); *see generally* Michael A. Heller, The Tragedy of the Anticommons: Property in the Transition from Marx to Markets, *111 Harv. L. Rev. 621 (1998).*

(n13)Footnote 125. Act of June 18, 1934, ch. 576, § 1, *48 Stat. 984* (*codified at 25 U.S.C. § 461). See* Cohen, *supra* n. 1, at 614-615.

(n14)Footnote 126. *See* Cohen, *supra* n. 1, at 138.

(n15)Footnote 127. *See* chapter 55.

(n16)Footnote 128. *25 U.S.C. § 334;* statutes cited in Cohen, *supra* n. 1, at 615 n.28, 744 n.50 (Alaska).

(n17)Footnote 129. *See, e.g., Washoe Tribe of Nev. & Calif. v. Greenley, 674 F.2d 816, 817 (9th Cir. 1982).*

(n18)Footnote 130. *See* 25 C.F.R. pt. 151 (1992); 43 C.F.R. pt. 2530, subpts. 2561, 2564 (1992).

(n19)Footnote 131. *See* chapter 55; George C. Coggins & Charles F. Wilkinson, Federal Public Land and Resources Law 158 (2d ed. 1987).

(n20)Footnote 132. Section 4 of the act, *25 U.S.C. § 334,* is one of the principal laws authorizing public domain allotments. The Act of Feb. 23, 1927 (*codified at 25 U.S.C. § 335),* applies the general act to other public domain allotments; *see* Douglas B. L. Endreason, A Review of the 1990s and a Look At What's Ahead, *22 Am. Indian L. Rev. 611 (1998).*

(n21)Footnote 133. *25 U.S.C. §§ 331*-333. Section 8 of the Act, *25 U.S.C. § 339 amended by* § 340, excepts from its coverage the principal tribes in eastern Oklahoma. *See infra* § 57.06(b)(4).

(n22)Footnote 134. *Codified as amended at 25 U.S.C. § 348; see* Matthew Atkinson, Red Tape: How American Laws Ensnare Native American Lands, Resources, and People, *23 Okla. City U. L. Rev. 379 (1998).*

(n23)Footnote 135. *25 U.S.C. §§ 462,* 478-1. *See supra* § 57.06(b)(1), *infra* text accompanying note 218.

(n24)Footnote 136. *25 U.S.C. § 381*. Sections 1 and 5 of the Act also refer to irrigation. *25 U.S.C. §§ 331*, 348. On water rights, *see infra* § 57.10(f)(2).

(n25)Footnote 137. *Codified as amended at 25 U.S.C. § 349.*

(n26)Footnote 138. *See supra* § 57.06(b)(1); *infra* § 57.08(a).

(n27)Footnote 139. *E.g., County of Yakima v. Yakima Indian Nation, 502 U.S. 251 (1992)* (section 6 authorizes ad valorem tax of former allotments but not excise tax on land sales); *Moe v. Confederated Salish & Kootenai Tribes, 425 U.S. 463, 477-479 (1976)* (section 6 does not authorize state personal property tax or cigarette excise tax on reservation Indians). *See infra* § 57.11(b)(1).

(n28)Footnote 140. *E.g*., Act of Mar. 3, 1921, ch. 135, *41 Stat. 1355* (Ft. Belknap Res.); Act of Mar. 4, 1907, ch. 2933, *34 Stat. 1413* (Jicarilla Res.), Act of Jun. 4, 1898, ch. 376, *30 Stat. 429* (Uintah & Ouray Res.). *See also 25 U.S.C.A. § 331* historical note.

(n29)Footnote 141. *See infra* § 57.06(b)(5). Coverage of the General Allotment Act was specified in section 8, codified as amended at *25 U.S.C. § 339.* The original act omitted the Five Civilized Tribes, the Osage Tribe, and others in Oklahoma, New York, and Nebraska. Some tribes were added in 1889. *See 25 U.S.C. § 340.* The other omissions have not been the subject of important events at law.

(n30)Footnote 142. *25 U.S.C. §§ 345*-346; *28 U.S.C. § 1353; United States v. City of Tacoma, 332 F.3d 574 (9th Cir. 2003)* (failure to join United States as a party in a condemnation action for Indian allotment land rendered condemnation invalid).

(n31)Footnote 143. *See supra* § 57.06(b)(1). On suits for public domain allotments, *see Pence v. Kleppe, 529 F.2d 135 (9th Cir. 1976).*

(n32)Footnote 144. *United States v. Mottaz, 476 U.S. 834 (1986); Fontenelle v. Omaha Tribe, 430 F.2d 143 (8th Cir. 1970); Gerard v. United States, 167 F.2d 951 (9th Cir. 1948).* The statute literally applies to actions by and against allotted Indians. In all reported actions, plaintiffs have been allottees, but in *United States v. Fairbanks, 171 F. 337 (8th Cir. 1909), aff'd, 223 U.S. 215 (1912),* Indian claimants to allotment were both plaintiffs and defendants.

(n33)Footnote 145. *Compare United States v. Mottaz, supra* note 141, *with McKay v. Kalyton, 204 U.S. 458 (1907). See also Minnesota v. United States, 305 U.S. 382 (1939).*

(n34)Footnote 146. *See United States v. Mottaz, 476 U.S. at 841.*

(n35)Footnote 147. *28 U.S.C. § 2409a*(g); Section 2409a(g) is part of the Quiet Title Act, consenting to suits against the United States to quiet title to land. The statute has a specific exception for claims to Indian land. *28 U.S.C. § 2409a*(a). *See Alaska v. Babbitt, 38 F.3d 1068 (9th Cir. 1994)* (dismissing State's suit claiming ownership of right-of-way across Indian allotment because of sovereign immunity of U.S.); *see United States v. Mottaz, 476 U.S. at 841-848.*

(n36)Footnote 148. *28 U.S.C. § 2401*(a). *See Capoeman v. United States, 440 F.2d 1002 (Ct. Cl. 1971).*

(n37)Footnote 149. *See* Cohen, *supra* n. 1, at 770-771.

(n38)Footnote 150. *See id.* at 772-773.

(n39)Footnote 151. *See id*. at 773.

(n40)Footnote 152. *See id*. at 774.

(n41)Footnote 153. *See id*. at 785-788; 25 C.F.R. pts. 16, 116, 213 (1992). *See also* Tim Vollmann and M. Sharon Blackwell, "Fatally Flawed": State Court Approval of Conveyances by Indians of the Five Civilized Tribes - Time for Legislative Reform, *25 Tulsa L.J. 1 (1989).*

(n42)Footnote 154. *See* Cohen, *supra* n. 1, at 788-797; 25 C.F.R. pts. 17, 90, 91, 117, 121, 122, 154, 158, 214, 226 (1992).

(n43)Footnote 155. *See* Getches, Wilkinson & Williams, *supra* n. 2, at 945-972; Neil M. Levy, Native Hawaiian Land Rights, *63 Cal. L. Rev. 848 (1975); see* Samuel J. Panarella, Not in My Backyard Pash v. HPC: The Clash Between Native Hawaiians Gathering Rights and Western Concepts of Property in Hawaii, *28 Envt'l. L. 467 (1998). See also Ka Pa'akai O Ka'Aina v. Land Use Com'n, State of Hawai'i, 7 P.3d 1068 (Haw. 2000)* (discussing the Hawaii State Land Use Commission's responsibility under the Constitution of Hawaii to protect and preserve the traditional rights of native Hawaiians in its decisions).

(n44)Footnote 156. Act of July 9, 1921, ch. 42, *42 Stat. 108; see Kepo'o v. Watson, 952 P.2d 379 (Haw. 1998)* (any conflicts between Hawaiian Homes Commission Act and state statute is a matter of state constitutional law; environmental impact statutes (EIS) do not conflict with HHCA and Hawaiian lands are "state lands" for purposes of EIS).

(n45)Footnote 157. *See Leiff Koa Bush v. Watson, 918 P.2d 1130 (Haw. 1996)* (third party agreements between non-Hawaiian farmers and native Hawaiian homestead lessees violated Hawaiian Homes Commission Act), *cert. denied sub nom. Hou Hawaiians v. Hawaii, 474 U.S. 1055 (1986).* Heffner, John, Student Author, "Between Assimilation and Revolt: A Third Option for Hawaii as a Model for Minorities World-Wide." 7 Tex. Int. L.J. Vol. 37 (2002) 591; *see Price v. Hawaii, 764 F.2d 623 (9th Cir. 1985);* Wilkinson, Charles F., "Land Tenure in the Pacific: The Context for Native Hawaiian Land Rights." *64 Wash. L. Rev. 227 (1989).*

(n46)Footnote 158. Dec. 18, 1971, Pub. L. 92-203, *85 Stat. 668* (*codified as amended at 43 U.S.C.A. §§ 1601*-1629e); *Bay View, Inc. v. U.S., 278 F.3d 1259 (Fed. Cir. 2001)* (ANCSA extinguished all aboriginal title in Alaska and did not create a trust relationship between U.S. and Alaskan natives). *See Stratman v. Leisnoi, Inc, 969 P.2d 1139 (Alaska 1998)* (equitable remedy of undoing transaction in which native village receive land patents would be available if village lost its certification as native village under Alaska Native Claims Settlement Act (ANCSA); federal court has jurisdiction to determine merits of action by holder of grazing lease to decertify native village that was established under ANCSA). *See also Leisnoi, Inc. v. Stratman, 154 F.3d 1062 (9th Cir. 1998)* (the owner of a sub-surface estate was not required to obtain the native village's consent to mine sand and gravel, pursuant to ANCSA). *See also Swiss v. Chignik River Ltd., 951 P.2d 433 (Alaska 1998)* (ANCSA did not limit conveyances of subsistence campsites by village to only one per subsistence use; ANCSA does not impose express limitations on number of subsistence). *See also* ANCSA & Statehood Implementation Act, Dec. 2, 1980, Pub. L. 96-487, tit. IX, *94 Stat. 2430* (*codified as amended at 43 U.S.C.A. §§ 1631*-1642).

(n47)Footnote 159. *See* Getches, Wilkinson & Williams, *supra* n. 2, at 913-922; Thomas R. Berger, Village Journey: The Report of the Alaska Native Review Commission (1985); David S. Case, Alaska Natives and American Laws (1984); Cohen, *supra* n. 1, at 739-757. *See Native Village of Eyak v. Trawler Diane Marie, Inc., 154 F.3d 1090 (9th Cir. 1998)* (claims of aboriginal title asserted by native villages of Alaska, claiming exclusive right to occupancy to the portion of the outer continental shell of the United States, were barred by federal paramountcy doctrine). *Chickaloon-Moose Creek Native Ass'n v. Norton, 360 F.3d 972 (9th Cir. 2004)* (conveyances of land under ANCSA governed by Deficiency Agreement entered into by U.S. government and Native Alaskans.)

(n48)Footnote 160. *Akootchook v. United States, 271 F.3d 1160 (9th Cir. 2001).*

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CHAPTER 57 INDIAN LAND

7-57 Thompson on Real Property, Thomas Editions § 57.07

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§ 57.07 The Federal Trust Relationship and Indian Property.

[Go To Supp]

Many statutes explicitly provide for the federal government to hold land or money in trust for tribes or for individual Indians. n161 A few statutes and much scholarly and popular writing refer to a broader concept of trust relationship between Indian tribes and the United States. n162 These two sets of authorities relate to two strains of "trust law" in the legal and political system. The elaborate law of private trusts and other fiduciary relationships is a branch of property law that arose in the English Court of Chancery. n163 In the 17th century, political thinkers began to borrow the trust concept to express the ideal of government as the people's servant, the concept of the public trust as a basis for government's accountability to the governed. Both strains had a common purpose in harnessing of power, private trust to restrain the power of common-law feoffees to uses, guardians, and other fiduciaries; public trust to limit governmental power. n164

In federal Indian law, trust concepts center on the relationship between the federal government and both Indian property and Indian people. The disparity in power is enormous. The Government controls alienation of all tribal land and much individual land. Congress has nearly plenary power to enact statutes to govern Indian people, property, and territory. Yet in the last century Native Americans could not vote, and now that they can, their numbers are too few to restrain Congress by direct political action. n165 However, the Supreme Court and Congress have circumscribed federal power to some extent. These limits are the subject of this section.

COMPUTER-ASSISTED RESEARCH

LEXIS: federal w/15 trust! w/15 indian or native american!

(a) The Concept of Federal Obligation.

In his Cherokee Nation opinion, Chief Justice Marshall said that the Indian nations' "relation to the United States resembles that of a ward to his guardian." n166 Many consider this dictum demeaning to Indians, and indeed it led to the bureaucratic practice of referring to Indians who own restricted property as "incompetent." n167 Although Marshall's phrase was demeaning in popular and political usage, its legal analogy was both apt and significant. It was

apt because the federal government had sweeping powers over tribes like the broad authority of a guardian. It was significant because the court implied that the power should be limited by a correlative duty akin to the fiduciary duty that a guardian owes a ward. Coming at the height of President Jackson's drive to strip eastern tribes of their lands, this was a strong challenge to the political establishment. n168 The next year in Worcester, Marshall analogized the status of tribes to that of protectorates under international law. n169 This conveyed a similar message by a more dignified analogy, although again associated with colonialism. n170

(b) Canons of Construction as Judicial Limits on Federal Power.

In his concurring opinion in Worcester, Justice McLean said, "The language used in treaties with the Indians should never be construed to their prejudice," and he recognized the Indians' disadvantage in agreeing to treaties written only in a foreign language. n171 In time, the full court adopted his view as a rule of construction. n172 Moreover, the court adopted an analogous rule for federal statutes applied to tribes and Indians, holding that statutory ambiguities should be construed in favor of Indians' unique rights. n173 These canons of construction temper congressional power to impair the interests of tribes and Indians by requiring that the power be exercised clearly and openly. The canons are thus an important, inertial protection for previously recognized Indian rights. n174

COMPUTER-ASSISTED RESEARCH

LEXIS: cannon! w/1 construction w/30 indian! or native american!

(c) Treaty and Statutory Trusts.

Many Indian treaties obliged the Government to hold land or money for tribes. Most did not specify on what basis, but a few expressly described the relationship as a trust. n175 After the Civil War, Congress began to adopt the trust concept in statutes, inviting judicial supervision of government management. n176 By the end of the 19th century, the trust usage had become routine. n177

The courts have tended to generalize the trust concept to apply to all federal control over Indian property, whether or not formally designated as a trust. n178 It is common to refer to tribal land as "trust land," even when there is no legislative use of the word trust. n179 The courts have treated the power represented by the federal restraint on alienation of tribal property to imply a correlative duty to exercise the power according to fiduciary standards. n180

There is an important distinction between trusts over Indian money and securities held by the federal government, and trusts over restricted Indian land. In the case of money and securities, the trustee is in possession and control of the corpus, and it is assumed that interest will be paid or the corpus invested. n181 Private trust law can be applied by analogy, subject to the sovereign immunity of the United States. n182 Federal trusts over land are less like private trusts. The Indian beneficiaries have possession and use of the land. For purposes relating to alienation, the federal trustee has control of the property, but for other purposes, its control is limited. The Supreme Court has expressly held that the Government owes no general duty to manage the property productively. The court said that the trust ownership is simply to hold the title, akin to a common-law use or dry trust. n183

In some modern statutes, Congress has referred explicitly to the trust relationship between the United States and Indian nations, a concept broader than property trusts. n184 It is uncertain whether this usage will have coercive effects at law. It does provide indirect statutory approval of the Supreme Court's canons of construction.

COMPUTER-ASSISTED RESEARCH

LEXIS: trust w/2 land! w/30 indian! or native american!

(d) Breach of Trust Remedies.

Private trusts are subject to close judicial supervision. Trust beneficiaries have strong remedies against trustees for breach of trust, although judicial redress of wrongs against a private trust by outsiders must normally be sought by the trustee, not by a beneficiary. The latter rule does not limit the legal rights of Indians; third-party wrongs against Indian property may be enforced either by the United States, the Indian owners, or both. n185 But judicial authority over the federal government as trustee of Indian property is much more limited than the power of courts of equity over private trustees. In some respects the limits are inherent. The trustee cannot be removed by a court, and the duty of undivided loyalty required by the private law of trusts cannot be directly required of a national government serving all its people. n186

COMPUTER-ASSISTED RESEARCH

LEXIS: breach w/1 trust w/5 remed! w/30 indian! or native american!

(1) Interpretation of Treaties and Statutes.

Other limits result from judicial deference to the role of Congress. The federal trusteeship arises from treaties with Indian nations and from acts of Congress. The trusts are creatures of the treaties or statutes that establish them. The treaties and statutes are of equal dignity with other laws; they are not higher law. Whether a statute or treaty provides for a trust expressly or by implication, it must be construed with other statutes and competing interests of other persons. The Supreme Court's canons of construction in favor of Indian interests are an important protection, but the canons are limited to cases of ambiguity. n187

Many Indian claims fail because courts decide that a competing statute or policy outweighs the Indian claim. The most fundamental example has been explicit in federal statutes since the founding of the Nation. A private trustee cannot acquire property from its beneficiary, while the Nonintercourse Act established the United States as the exclusive buyer or broker of tribal trust land. n188 In countless instances, the federal government has directly benefited from dubious transactions with Indian nations. Post hoc review of these transactions confines judicial remedies to money damages, such as the award for the Black Hills, a remedy Indian people often find inadequate. n189

Another prominent example is Nevada v. United States. n190 This action, filed by the United States in 1973, sought to reopen a 1944 federal court decree that had quantified water rights in the Truckee River basin in Nevada. The United States had brought the original suit and had appeared in it as trustee for the Pyramid Lake Paiute Tribe. The Government had also represented its interest as owner and operator of a reclamation project with claims directly opposed to those of the Tribe. In the original action, the Government had favored its reclamation interests, which had powerful political backing in the state, over those of the Indians. Yet the court unanimously rejected the Government's bid to reopen and upheld the decree, based on res judicata. It is difficult to imagine anything less consonant with fiduciary duty as customarily understood in courts of equity than the Government's behavior in the original action. Private trust law might confine the remedy to an action against the trustee, but for tribes, that confronts sovereign immunity and limits on remedies. n191

Other decisions in which breach of trust claims failed because of competing rights or statutory abrogation have involved such diverse subjects as federal invasion of Indian holy places, n192 punishment of trust beneficiaries for killing eagles, n193 and prosecution of beneficiaries for trespassing on their ancestral lands. n194 In general, the courts sustain trust claims against officials in control of Indian property unless statutes clearly defeat the claim, or competing reliance interests of long standing would be overturned. n195

COMPUTER-ASSISTED RESEARCH

LEXIS: interpret! w/30 indian! w/15 statute! or treaty or treaties!

(2) Sovereign Immunity and Statutes of Limitations.

Judicial enforcement of the federal trust relationship is limited in two other significant ways. One is by the doctrine of sovereign immunity of the United States. Prospective enforcement is not impaired because of the rule that allows officials to be enjoined against future violations of the law without regard to sovereign immunity. n196 Moreover, there are strong rules against conflicts of interest on the part of government officials. n197 But retroactive enforcement against the Government itself, such as suits for damages or to quiet title to land, requires waiver of immunity. n198

Congress has expressly waived immunity to adjudicate damages claims for certain past wrongs to tribes. n199 Other claims can be brought under waivers of immunity in general statutes such as the Federal Tort Claims Act. n200 In many instances, no explicit waiver applies. Litigants can claim an implicit waiver, but the Supreme Court rarely accepts such claims. In Indian cases, the court has refused to imply a waiver from statutory use of the word trust without more. n201 However, the court has been willing to imply a waiver from specific statutory schemes for federal control of Indian property. The court's leading decision implying a waiver is United States v. Mitchell. n202 Indian allottees sought damages for mismanagement of the timber resource on their allotments. The court refused to imply a waiver from the trust title to the allotments, but it did imply a waiver from the timber management statute, even though the latter did not use the word trust. n203 The Mitchell litigation shows that the crucial issue is not use of the word trust in a statute, but the nature of federal control and duty under a statutory scheme. Where executive officers control Indian property like a private trustee, a breach-of-trust claim is more likely to succeed.

The second obstacle to Indian enforcement of the federal trust is statutes of limitations. Because many wrongs that are the subject of Indian claims occurred long ago, statutes of limitations have been a major barrier. Congressional acts that have expressly waived immunity for Indian claims have also set aside this defense. Absent an express waiver, Indian claims are usually barred by the same statutes as those of other plaintiffs. n204 Even with a waiver, remedies are confined to those provided in the waiving statute. Courts may award only damages, and awards are usually limited to simple interest or are without interest prior to judgment. n205

COMPUTER-ASSISTED RESEARCH

LEXIS: indian! or trib! w/30 sovereign immunity
indian! or trib! w/30 statutes w/1 limitation!

(3) Appeals to the Constitution and to Congress.

Litigants on both sides of Indian rights cases sometimes claim that a federal statute or treaty is unconstitutional, but they have had very little success. The only constitutional arguments that have succeeded are a few modest claims that Indian property has been taken without compensation or deprived without due process. n206

Because the court defers broadly to Congress on Indian rights, many appeals for redress are made directly to that body, rather than to the courts. Like any appeal to a discretionary forum, this has varied outcomes. As a result, the federal trust concept strikes observers differently. It has been both lauded as a "cornerstone" of federal Indian law, and disparaged as "weak," subject to "political whim or caprice." n207

(4) Indian Claims.

Until the recent past, the largest share of litigation about Native American interests was claims cases against the United States. Although not real property and thus beyond the immediate scope of this treatise, most claims were (and are) based on wrongs involving Indian land.

Because of sovereign immunity, claims cases are necessarily based on statutes in which the United States consents to suit. Until 1946, consent statutes for Indian claims were mostly enacted case-by-case. The statutes typically set aside defenses based on statutes or limitations or laches. n208 With immunity and limitations waived, the Supreme Court responded with very strong opinions about trust duties of the Government. n209

In 1946 Congress attempted to regularize Indian claims litigation by establishing the Indian Claims Commission to hear all previously accrued claims according to common statutory standards. Cases before the Commission had to be filed by 1951, although some of them are not yet final. n210 The 1946 Act also provided for jurisdiction in the Court of Claims over Indian and tribal claims accruing thereafter. n211

(e) Tax and Regulatory Immunities.

The federal trust over Indian property is closely related to immunities from federal and state taxes of the property and of income derived from it, and of land use regulations. These are discussed in section 57.11(b) of this chapter.

FOOTNOTES:

(n1)Footnote 161. *E.g., 25 U.S.C. §§ 160,* 161, 348, 459, 465, 2209; *see Forrest Associates v. Passamaquoddy Tribe, 719 A.2d 535 (Me. 1998)* ("Indian trust land" is property the title to which the United States holds in trust for an Indian Tribe, whereas land that Indian tribes hold in fee simple, is a property in which the owner is entitled to the entire property, with power to dispose). *See also Forrest Associates v. Passamaquoddy Tribe, 760 A.2d 1041,* (Me. 2000). *See also* Watson, Blake A., "The Trust and Parry of Federal Indian Law," *23 U. Dayton L. Rev. 437 (1998).*

(n2)Footnote 162. *E.g., 25 U.S.C. §§ 450n*(2), 1601(a), 2401(1)-(2), 2502(b); Reid Peyton Chambers, Judicial Enforcement of the Federal Trust Responsibility to Indians, *27 Stan. L. Rev. 1213 (1975).*

(n3)Footnote 163. *See* chapter 5.

(n4)Footnote 164. On public trust in political and legal theory, *see* Peter Charles Hoffer, The Law's Conscience 31-46, 81 (1990).

(n5)Footnote 165. *See* Richard B. Collins, Indian Consent to American Government, *31 Ariz. L. Rev. 365, 371, 383 (1989).*

(n6)Footnote 166. *Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1, 17 (1831). See supra* § 57.04(c).

(n7)Footnote 167. *See* Cohen, *supra* n. 12, at 169-173.

(n8)Footnote 168. *See* 1 Prucha, *supra* n. 21, at 208-210; Burke, Joseph C., "The Cherokee Cases: A Study in Law, Politics, and Morality," *21 Stan. L. Rev. 500, 514-518 (1969).*

(n9)Footnote 169. *Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 560-561 (1832). See supra* § 57.04(c).

(n10)Footnote 170. *See* Joseph G. Starke, Introduction to International Law, 115-116 (10th ed. 1989).

(n11)Footnote 171. *31 U.S. (6 Pet.) at 582.* The quoted sentence began a paragraph that included the statement that treaty language should not be construed technically against the Indian party but according to the Indians' understanding in light of the language barrier. *See also* Treaty with the Choctaw Nation, Sept. 27, 1830, art. XVIII, *7 Stat. 336* ("in the construction of this treaty, whenever well founded doubts shall arise, it shall be construed most favorably towards the Choctaws.")

(n12)Footnote 172. *Washington et al, v. Washington State Commercial Passenger Fishing Vessel Association, et*

al, 443 U.S. 658, 675-76 (1979), modified, 444 U.S. 816 (1979). The court's first holding on point quoted McLean but misattributed his opinion to *Marshall. In re Kansas Indians, 72 U.S. (5 Wall.) 737, 760 (1867).*

(n13)Footnote 173. *Oneida Indian Nation v. City of Sherrill, 337 F.3d 139 (2d Cir. 2003)* (ambiguities in treaty language are construed in favor of Indians); *E.g., Bryan v. Itasca County, 426 U.S. 373, 392-393 (1976); Alaska Pac. Fisheries v. United States, 248 U.S. 78, 89 (1918).*

(n14)Footnote 174. *See* Taylor, A.J., "Lack of Trust: South Dakota v. Yankton Sioux Tribe and Abandonment of the Trust Doctrine in Reservation Diminishment Cases," *73 Wash. L. Rev. 1163 (1998). See* Collins, *supra* n. 161, at 379; *infra* § 57.09(b), § 57.11(a)(1). *See also* Act of May 6, 1822, ch. 58, 3. Stat. 682 (*codified as carried forward at 25 U.S.C. § 194).* ("In all trials about the right of property in which an Indian may be a party on one side, and a white person on the other, the burden of proof shall rest upon the white person, whenever the Indian shall make out a presumption of title in himself from the fact of previous possession or ownership.")

(n15)Footnote 175. *E.g.*, Treaty with the Choctaw & Chickasaw, Apr. 28, 1866, art. 2, *14 Stat. 769;* Treaty with the Osage, Sept. 29, 1865, art. 2, *14 Stat. 687;* Treaty with the Potawatomi Nation, June 5 & 17, 1846, art. 7, *9 Stat. 853.* An important antecedent of explicit trust language was the Royal Proclamation of 1763, *supra* note 18, which reserved all unpatented land west of the Alleghenies "under the dominion and protection" of the Crown "for the use of the ... Indians." *See also Morongo Band of Mission Indians v. Federal Aviation Administration, 161 F.3d 569 (9th Cir. 1998)* (unless there is a specific duty that has been placed on government with respect to Indians, federal agency's general trust responsibility to Indian Tribes is discharged by agency's compliance with general regulations and statutes not specifically aimed at protecting Indian Tribes).

(n16)Footnote 176. *E.g.*, Act of June 10, 1876, ch. 122, *19 Stat. 58* (*codified at 25 U.S.C. § 160).*

(n17)Footnote 177. *See* I Kappler, *supra* n. 28, at 1022 (1904) (list of Indian trust funds in the Treasury). *See also* III *id*. 717-718; IV *id*. 1177-1190; V *id*. 814-829 (same for later periods).

(n18)Footnote 178. *See, e.g., The Cherokee Trust Funds, 117 U.S. 288 (1886).*

(n19)Footnote 179. *See supra* note 69; *See, e.g., Merrion v. Jicarilla Apache Tribe, 455 U.S. 130 (1982)* ("tribal trust property").

(n20)Footnote 180. *See supra* § 57.04(a).

(n21)Footnote 181. *25 U.S.C. §§ 160*-162a. *See Cheyenne-Arapaho Tribes of Okla. v. United States, 512 F.2d 1390 (Ct. Cl. 1975); but see Whiskers v. United States, 600 F.2d 1332 (10th Cir. 1979).*

(n22)Footnote 182. *See infra* § 57.07(d)(2); *Sherwood Valley Rancheria v. Friends of East Willits Valley, 123 Cal. Rptr. 2d 708 (Cal. App. 2002)* (distinguished federal trust power from eminent domain power).

(n23)Footnote 183. *United States v. White Mountain Apache Tribe, 537 U.S. 465 (2003)* (U.S. occupancy of Indian trust land raises to duty as trustee to one that includes maintenance of the land); *United States v. Mitchell, 445 U.S. 535 (1980)* (*Mitchell I*).

(n24)Footnote 184. *25 U.S.C. §§ 450n*(2), 1601(a), 2401(1)-(2), 2502(b). *Cf. 43 U.S.C. § 1601*(b) (negating any "lengthy wardship or trusteeship" under Alaska Native Claims Settlement Act); *Adams v. Vance, 570 F.2d 950 (D.C. Cir. 1978)* (finding federal trust obligation to protect Eskimos' subsistence). On the trust relationship in Alaska, *see* Getches, Wilkinson & Williams, *supra* n. 2, at 918-922. *See also* Wood, Mary C., "Protecting the Attributes of Native Sovereignty: A New Trust Paradigm for Federal Actions Affecting Tribal Lands and Resources," *1995 Utah L. Rev. 109 (1995).*

(n25)Footnote 185. *Poafpybitty v. Skelly Oil Co., 390 U.S. 365 (1968).* Formerly there was some doubt about the capacity of tribes to sue absent statutory authority, although no court had denied the right. *See* Cohen, *supra* n. 12, at 283-285. Under current law, the issue is settled in favor of the capacity to sue.

(n26)Footnote 186. *See infra* notes 184, 185 and accompanying text.

(n27)Footnote 187. *See supra* § 57.07(b).

(n28)Footnote 188. The current act is *25 U.S.C. § 177. See* Cohen, *supra* n. 1, at 510-522; *supra* § 57.04(c)(2).

(n29)Footnote 189. *See United States v. Sioux Nation, 448 U.S. 371 (1980);* Ball, Milner S., "Legal Storytelling: Stories of Origin and Constitutional Possibilities," *87 Mich. L. Rev. 2280, 2301-2302 (1989).*

(n30)Footnote 190. *463 U.S. 110 (1983).*

(n31)Footnote 191. *See supra* note 30 and accompanying text; *infra* § 57.07(d)(2).

(n32)Footnote 192. *Lyng v. Northwest Indian Cem. Protective Ass'n, 485 U.S. 439 (1988).*

(n33)Footnote 193. *United States v. Dion, 476 U.S. 734 (1986).*

(n34)Footnote 194. *United States v. Dann, 470 U.S. 39 (1985), amended, 873 F.2d 1189 (9th Cir. 1989).* Trust cases often generate differences within the court. *See, e.g., South Carolina v. Catawba Indian Tribe, Inc., 476 U.S. 498, 520-521 (1986)* (Blackmun, J., dissenting); *Mountain States Tel. & Tel. Co. v. Pueblo of Santa Ana, 472 U.S. 237, 275-279 (1985)* (Brennan, J., dissenting); *United States v. Mitchell, 463 U.S. 206, 228-230 (1983)* (Powell, J., dissenting).

(n35)Footnote 195. *See* Chambers, *supra* n. 158.

(n36)Footnote 196. *See Lane v. Pueblo of Santa Rosa, 249 U.S. 110 (1919).* This rule was enacted by Congress in 1976 as a consent to suit. *5 U.S.C. § 702. See Bowen v. Massachusetts, 487 U.S. 879 (1988).*

(n37)Footnote 197. *See* 25 C.F.R. §§ 140.5, 211.4, 212.3 (1992); 43 C.F.R. pt. 20 (1992); *see* 43 C.F.R. pt. 20 subpt. C (1993) (amended regulations).

(n38)Footnote 198. *Naganab v. Hitchcock, 202 U.S. 473, 475-476 (1906).*

(n39)Footnote 199. *See infra* § 57.07(d)(4).

(n40)Footnote 200. *28 U.S.C. §§ 1346*(b), 2671-2680. *See Hatahley v. United States, 351 U.S. 173 (1956).* The Tucker Act and "Indian Tucker Act," *28 U.S.C.A. §§ 1491,* 1505, consent to Claims Court jurisdiction over claims against the United States arising under the Constitution, statutes, regulations, contracts, and over other non-tort claims, but they do not waive immunity. *United States v. Mitchell, 445 U.S. 535, 538-540 (1980)* (*Mitchell I*). Similarly, the Quiet Title Act, *28 U.S.C. § 2409a,* consents to suits against the United States to quiet title, but it does not create property rights. *See United States v. Mottaz, 476 U.S. 834, 841-844 (1986). See also 25 U.S.C. §§ 345*-346 & *28 U.S.C. § 1353* (allotment acts), *supra* § 57.07(b)(4); *43 U.S.C. § 666* (McCarran Amendment), *infra* notes 336-340 and accompanying text.

(n41)Footnote 201. Mitchell I, *supra* note 179.

(n42)Footnote 202. *463 U.S. 206 (1983)* (*Mitchell II*).

(n43)Footnote 203. *Compare Mitchell I, supra* note 179 (no waiver implied from trust title) *with Mitchell II, supra*

note 198 (waiver implied from timber management statute). On the latter statute, *see infra* § 57.08(b)(4).

(n44)Footnote 204. *United States v. Mottaz, 476 U.S. 834 (1986).*

(n45)Footnote 205. *See* Cohen, *supra* n. 1, at 568-571.

(n46)Footnote 206. *See supra* § 57.04(d).

(n47)Footnote 207. *Compare* Cohen, *supra* n. 1, at 221 (trust doctrine is "one of the primary cornerstones of Indian law"), *with* Williams, Jr., Robert A., "Encounters on the Frontier of International Human Rights Law: Redefining the Terms of Indigenous Peoples' Survival in the World," *1990 Duke L.J. 660, 703* ("a weakly interpreted 'trust' responsibility that Congress itself can define, limit, or terminate at its own political whim or caprice.") On the relation of tribal rights to international law, *see infra* § 57.11(d).

(n48)Footnote 208. *Oneida Indian Nation v. New York, 194 F. Supp. 2d 104 (N.D.N.Y. 2002)* (rejecting laches and adverse possession defenses in Indian land claims). *See* Cohen, *supra* n. 1, at 562-574. Before 1946, claims based on treaties were expressly excluded from the ordinary jurisdiction of the Court of Claims. Indians and tribes could sue on claims not based on treaties but subject to the 6-year statute of limitations applicable to most claims against the Government. As a result of the treaty exclusion and the limitations period, all or virtually all Indian claims were brought under the 142 special jurisdictional acts authorizing Indian claims. *See id.* at 562-563.

(n49)Footnote 209. *E.g., Seminole Nation v. United States, 316 U.S. 286, 296-297 (1942)* (conduct of Government should "be judged by the most exacting fiduciary standards"); *Shoshone Tribe of Indians v. United States, 299 U.S. 476, 497 (1937).*

(n50)Footnote 210. *See* Cohen, *supra* n. 1, at 564-565. The Commission was abolished in 1978, and pending cases were transferred to the Court of Claims.

(n51)Footnote 211. *28 U.S.C.A. §§ 1491* (individual plaintiffs), 1505 (tribal plaintiffs). The treaty exclusion, *supra* note 203, was removed (for Indian treaties only) by the 1946 act. For discussion of modern claims issues, *see* Newton, Nell Jessup, "Indian Claims in the Courts of the Conqueror," *41 Am. U. L. Rev. 753 (1992).*

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CHAPTER 57 INDIAN LAND

7-57 Thompson on Real Property, Thomas Editions § 57.08

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§ 57.08 Alienation of Interests in Indian Land.

[Go To Supp]

(a) Scope of the Federal Restraint on Alienation.

This section discusses the rules applicable to alienation of Indian land that is subject to a federal restraint on alienation. The concept and history of the federal restraint are explained above. n212 It applies to any form of alienation that federal or state law can recognize as valid. The restraint alone does not limit the right of tribes to allocate interests in their land to their members, so long as the interests are internal to tribal society. Tribal interests can be for exclusive use and be made inheritable, but they depend entirely on tribal law, for definition and enforcement. n213

Dozens of specific federal statutes, discussed in this section, have been enacted to govern alienation of interests in tribal land. The purpose of each of these statutes was to authorize and control conveyances to non-members of the tribal owner. It is uncertain if these statutes restrict internal tribal authority to allocate land interests to members. In practice, tribes control allocation of homesites and of hunting and fishing rights among members. Other land use allocations are regulated by the Interior Department with varying levels of tribal involvement and control. n214

The federal restraint restricts all tribal land categorically. n215 The status of land owned in severalty by individual Indians depends on the title to each parcel. Conveyance of restricted land requires clear authority in federal law. Numerous federal statutes consent to alienation in specified circumstances. Most of these statutes require administrative approval of the Secretary of the Interior for a valid transfer. The federal restraint does not permit any valid transactions in restricted Indian land except those specifically authorized. An unauthorized transfer is void and may not be enforced even after restrictions are subsequently removed. n216 Proceeds from the lawful sale of allotted land that are held by the Secretary may not be reached to satisfy antecedent debts of the allottee except with the Secretary's approval. n217 Nominally, it is a federal crime to induce a restricted owner to attempt to convey any interest except as authorized by law, although this statute has seldom been applied in practice. n218 The federal restraint applies to land, but not to chattels on the land. Common-law rules are usually applied to determine whether property is part of the land and thus subject to the restraint. n219 However, archeological resources on Indian land are subject to special statutory restrictions whether or not classified as part of the land. n220

COMPUTER-ASSISTED RESEARCH

LEXIS: federal w/5 restraint! w/15 alienant! w/15 indian! w/5 land!

(b) Conveyance of Fee Simple Ownership; Mortgages.

No statute of general applicability authorizes conveyance of fee simple interests in tribal land. A few statutes authorize conveyance of specific classes of land. n221 There is broad authority for exchanges of tribal land for land of equal value when approved by the Secretary of the Interior, applicable to tribes covered by the Indian Reorganization Act. n222 During the years when allotment was a favored federal policy, a basic part of the scheme was to have federal restrictions come to an end, usually within one generation. The land would become subject to state law, including law governing voluntary and involuntary alienation. n223 This policy was carried out in several ways. First, restrictions on Indian allotments expired automatically after a specified number of years, most commonly 25. Second, a few specific statutes removed restrictions from an entire class of allotments. n224 Third, the allotment statutes authorize the Secretary of the Interior to remove restrictions from allotment owners who are capable of managing the land, and some Interior Secretaries claimed authority to remove restrictions without an allottee's consent. There were periods before 1921 in which the Secretary issued unilateral patents in fee to large numbers of allottees. This led to lawsuits claiming that restrictions were improperly removed, which had mixed results. n225

When federal policy changed, each of these practices was altered. Under present law, removal of restrictions is largely a choice of each Indian owner. Time limits for automatic trust expiration have been extended indefinitely, and few allotment restrictions are expiring automatically. n226 The Secretary no longer claims general authority to remove restrictions without Indian consent. n227 However, these changes did not affect land from which restrictions had previously been removed.

Adult allotment owners may apply for removal of federal restrictions from their land. The Secretary makes a discretionary determination whether the applicant is competent to manage the land. n228 If restrictions are removed, the land becomes subject to local property law and may be sold. n229

An allotment may be sold directly by its Indian owners with approval of the Secretary, or may be sold by the Secretary with consent of the Indian owners. When Indian owners are minors or adults under a guardian, the land may be sold by the guardian or with the guardian's consent. Normally, the Secretary has the land appraised. Under certain conditions, a negotiated sale may be made for not less than the appraised price. Otherwise, there must be an advertised sale based on sealed bids. n230

When allotment owners apply to have restrictions removed or to sell, Interior regulations authorize the Secretary to give other Indians or tribes who may be adversely affected by a sale "a reasonable opportunity to acquire the land from the applicant." n231 With Secretarial approval, Indian allotment owners may give allotted land to their close relatives in trust, n232 or sell allotted land to other Indians in trust. n233 Allotments held in multiple ownership can be partitioned in kind by the Secretary according to the partition laws of the state, with or without allottees' consent. n234

A federal statute authorizes allotted land to be mortgaged with consent of the Secretary. Allotted land that is lawfully mortgaged is subject to foreclosure or sale as if the owner had an unrestricted fee simple interest. n235 No general statute authorizes tribal land to be mortgaged, but there is specific authority to mortgage tribal land acquired with Farmers Home Administration loans to secure their repayment. n236

Like mortgage foreclosures, other forms of involuntary transfer of restricted Indian land are void unless specifically authorized by federal law. In some parts of the country, particularly eastern Oklahoma, there were many attempts to have restricted Indian land seized and sold at tax sales. Federal courts invalidated thousands of transactions. n237 The doctrine of adverse possession also does not apply without specific authority. n238

COMPUTER-ASSISTED RESEARCH

LEXIS: convey! w/5 fee simple w/30 land! w/5 indian! or tribal mortgage! w/30 land! w/5 indian! or tribal

(c) Succession to Allotments by Will or Inheritance.

When the Indian owner of a restricted allotment dies, succession to allotted land is governed by federal statutes. When an allottee dies and the person who succeeds to the property is not an Indian qualified to own restricted property, an unrestricted fee patent may issue. When the successor is qualified, restrictions usually continue in force. n239

Adult allottees may make wills according to Interior regulations. n240 Intestate succession is governed by several federal statutes, which incorporate state laws on basic definitions of heirs. They also incorporate tribal marriage laws and specify standards for heirs by adoption and for escheat. n241 Probate of estates of deceased Indians who owned allotments, and of their trust personalty, is under the exclusive jurisdiction of probate judges in the Department of the Interior. n242

Restricted estates of deceased owners of restricted land who are Indians of the Five Civilized Tribes or Osage Tribe are governed by special statutes. Substantive state law defines inheritance and governs the making of wills. Osage Indians require approval of their wills by the Secretary of the Interior, Five Tribes Indians do not. Oklahoma state courts have probate jurisdiction over estates that include restricted land. n243

COMPUTER-ASSISTED RESEARCH

LEXIS: allotment! w/15 succession! w/30 indian!

(d) Conveyances of Leaseholds and Servitudes.

(1) Leaseholds; Power Project Easements.

All restricted Indian land, tribal and allotted, may be leased by its owners for any useful purpose with approval of the Secretary of the Interior. n244 Leases cannot exceed 25 years, with numerous exceptions. Grazing leases have shorter time limits. n245 Leases for most purposes can include renewal rights for up to 25 more years. And leases on several reservations may be made for up to 99 years, the economic equivalent of transferring the fee. n246 The Secretary must also approve lease cancellations. n247

The Federal Power Act authorizes the Federal Energy Regulatory Commission and the Secretary of the Interior to license the use of Indian reservation land for dams and other power project works for as much as 50 years. n248 The Act does not require Indian consent, and licenses have been made or renewed despite Indian opposition. n249 However, in recent years federal regulations have required a greater voice for tribes in license proceedings. n250

COMPUTER-ASSISTED RESEARCH

LEXIS: lease! or easement! w/50 indian! w/5 land!

(2) Rights-of-Way.

Under a 1948 statute, the Secretary of the Interior may grant rights-of-way for any purpose across any restricted Indian land. n251 Consent of tribal owners is required, and consent of allottees is required unless owners are too numerous or are unavailable. n252

Several older statutes authorize the Secretary to grant rights-of-way for specified purposes without tribal or Indian

consent. n253 These statutes were expressly saved by the 1948 statute, so statutory authority to grant rights-of-way without Indian consent remains. However, Secretarial regulations require consent for rights-of-way under departmental control, so statutory authority to act without Indian consent is not being exercised. n254

COMPUTER-ASSISTED RESEARCH

LEXIS: right! w/1 way w/30 indian! w/5 land!

(3) Mining and Oil and Gas Leases and Sales.

Much Indian land has valuable mineral deposits. Congress first authorized tribes to alienate mineral interests in 1891, and additional authority has been enacted several times, so that most tribal land is subject to at least three mining statutes. n255 Older statutes authorize only a typical mining lease, which allows the lessee to remove all commercially valuable minerals subject to a reserved royalty interest in the tribe. The most recent statute, the Indian Mineral Development Act of 1982, n256 is more comprehensive. It authorizes tribes to make any kind of agreement for mining and sale of minerals, including agreements that involve tribes in mining operations. It appears to allow a mineral deed, in which the full mineral interest is sold outright without a reserved royalty. n257 Many new mining agreements are being made under the 1982 Act, while older leases continue to be governed by the statute under which they were made.

Mining leases on allotted land outside eastern Oklahoma are authorized under a 1909 statute. n258 Allottees must approve leases, but the Secretary has detailed control and can approve leases for allottees who are minors, mentally incompetent, contingent remaindermen, or for heirs who are not yet determined or cannot be located. n259 Allottees may also be included in a tribal leasing scheme under the 1982 Act. Mining leases on most allotments in eastern Oklahoma are governed by distinct statutes and regulations. n260

Management of royalty interests in Indian mining leases is under the Minerals Management Service (MMS) of the Interior Department. Its most important function is monitoring and collection of royalties under oil and gas leases. n261 There has been some controversy about MMS diligence in this function. n262 Aside from royalties, Indian oil and gas leases are managed by the Bureau of Land Management. n263

COMPUTER-ASSISTED RESEARCH

LEXIS: indian! w/5 land! w/30 lease! w/15 oil! or gas! or mineral! or mining
indian! w/5 land! w/30 deed! w/15 oil! or gas! or mineral! or mining

(4) Timber Sales.

A 1910 statute authorizes sale of timber from tribal or allotted land. n264 In general, sales may authorize only sustained-yield logging. n265 The Secretary must approve all sales, and Interior regulations include provisions to encourage Indian timber enterprises and to authorize cutting for personal use by tribal members. n266

(5) Fishing, Hunting, Gathering, and Water Rights.

These rights are the subject of separate sections of this chapter. n267 Permitting, leasing, and sale of rights to outsiders, and allocation to tribal members, are discussed in those sections.

(e) Condemnation of Indian Land.

The United States can condemn Indian land under its power of eminent domain. n268 The courts have required that congressional authority to condemn restricted Indian land be clear. In several instances, executive attempts to condemn under statutes not clearly intended to encompass Indian land have been held invalid. n269

States and public utility companies lack power to condemn restricted Indian land except when authorized by Congress. Federal law grants states and utilities no general authority to condemn tribal land, although there is specific authority to condemn certain rights-of-way. n270 By contrast, federal law authorizes allotted Indian land to be condemned for any public purpose under state law to the same extent as unrestricted land. n271 Condemnation actions must, however, be brought in Federal District Court, and the United States is an indispensable party defendant. n272 Moreover, these statutes authorize only judicial condemnation. States and utilities cannot claim title to Indian land by physical occupation under the theory of "inverse condemnation." n273

The sovereign powers of Indian nations over their members in Indian country presumably include the power of eminent domain, but exercise of that power over allotted land is doubtful because of federal restrictions. However, Congress has authorized tribes to take undivided minority interests in allotments within tribal jurisdiction when a majority of the owners consent to sell to the tribe, subject to Interior approval. n274

(f) Involuntary Alienation.

Involuntary alienation of Indian land is restricted by the federal restraint on alienation and by the federal trust title. Suits to quiet title against claims of Indian trust ownership are barred by sovereign immunity of the United States unless brought under an explicit statutory consent. n275 The trust title has been held to preempt state commercial law in a bankruptcy proceeding. n276 State laws providing for attachment of liens by judgment creditors, materialmen, and the like are also preempted. n277

COMPUTER-ASSISTED RESEARCH

LEXIS: indian! w/5 land w/30 condemn!

FOOTNOTES:
(n1)Footnote 212. *See supra* §§ 57.04(a), 57.04(c); 57.05; 57.06.

(n2)Footnote 213. *See Johnson v. M'Intosh, 21 U.S. (8 Wheat.) 543, 592-594 (1823),* discussed *supra* text accompanying notes 42-49. *See also* In re Estate of Wauneka, 13 Indian L. Rep. 6049 (Navajo Sup. Ct. 1986) (probate of use rights in tribal land). *See also South Dakota v. Yankton Sioux Tribe, 522 U.S. 329 (1998) aff'd in part, rev'd in part, Yankton Sioux Tribe v. Gaffey, 188 F.3d 1010 (8th Cir. 1999)* (under Surplus Land acts passed to open reservation lands to settlement states acquired primary jurisdiction over unallotted opened lands of the applicable surplus land; act freed land of its reservation status and thereby diminished reservation boundaries). *See also* Paula Mitchell Marks, In a Barren Land: American Indian Dispossession and Survival, published by New York: William Morrow, c. 1998.

(n3)Footnote 214. *White Mountain Apache Tribe v. United States, 249 F.3d 1364 (Fed. Cir. 2001)* (discussing Secretary of the Interior's role in alienation); *See, e.g., infra* note 239 (Interior control over grazing by tribal members).

(n4)Footnote 215. *25 U.S.C. § 177;* 25 C.F.R. § 152.22(b) (1992). The restraint does not apply to land held by Native corporations under the Alaska Native Claims Settlement Act, although shares in the corporations are restricted. *See* Getches, Wilkinson & Williams, *supra* n. 2, at 913-17; Cohen, *supra* n. 1, at 746-748; *supra* § 57.06(d).

(n5)Footnote 216. *25 U.S.C. § 354. See* Cohen, *supra* n. 1, at 618-619. *See Yankton Sioux Tribe v. Gaffey, 14 F. Supp. 2d 1135 (D.S.D. 1998) aff'd in part, rev'd in part, 188 F.3d 1010 (8th Cir. 1999)* (holding that (1) Act of Congress, which opened the Yankton Sioux Reservation to allow non-Indians to purchase land and settle there, and which diminished the size of the reservation only to the extent of the ceded lands, was not inconsistent with the preservation of previous treaty boundaries, (2) within the Yankton Sioux reservation, the Tribe and the federal government exercise primary criminal and civil jurisdiction in Indian country, that is, the lands within the original exterior 1858 Treaty boundaries that are or were Indian allotments or lands reserved for agency purposes, even though

some of those lands may now have passed into fee status, and (3) lands purchased by the Tribe and taken into trust by the federal government pursuant to statutes are subject to declaratory judgments for tribe, counterclaims, and permanent injunction). *See also State of Connecticut ex rel. Blumenthal v. Babbitt, 26 F. Supp. 2d 397 (D.Conn. 1998) rev'd, Connecticut ex rel. Blumenthal v. U.S. Dept. of Interior, 228 F.3d 82 (2d Cir. 2000)* (Connecticut Indian Land Claims Settlement Act prohibited Secretary of the Interior from taking into a trust, for benefit of Indians, 165 acres of land, which was outside of settlement).

(n6)Footnote 217. *25 U.S.C. § 410.*

(n7)Footnote 218. Act of June 25, 1910, ch. 431, § 5, *36 Stat. 857* (*codified at 25 U.S.C. § 202).*

(n8)Footnote 219. *See e.g., United States v. Cook, 86 U.S. (19 Wall.) 591 (1874)* (harvested timber part of tribal land); *Black Hills Inst. of Geological Research v. South Dakota Sch. of Mines & Tech., 12 F.3d 737 (8th Cir. 1993), cert. denied, 115 S. Ct. 61 (1994)* (fossil skeleton of Tyrannosaurus Rex part of allotted land).

(n9)Footnote 220. *16 U.S.C. §§ 431*-433 (Antiquities Act of 1906); *id.* §§ 470aa-470mm (Archeological Resources Protection Act of 1979); *18 U.S.C. § 1170* & *25 U.S.C. §§ 3001*-3013 (Native American Graves Protection and Repatriation Act of 1990). *See* 25 C.F.R. pts. 261-262 (1994); 43 C.F.R. pt. 7 (1993); Comment, David G. Bercaw, Requiem for Indiana Jones: Federal Law, Native Americans, and the Treasure Hunters, *30 Tulsa L.J. 213 (1994).*

(n10)Footnote 221. *See* 25 C.F.R. § 152.21 (1992) and statutes cited therein.

(n11)Footnote 222. *25 U.S.C. § 464. See* 25 C.F.R. § 152.21 (1992). On coverage of the Indian Reorganization Act, *see supra* § 57.05(c).

(n12)Footnote 223. *25 U.S.C. § 349. See* Cohen, *supra* n. 1, at 127-38, 144-48, 612-14, 619.

(n13)Footnote 224. *See* Cohen, *supra* n. 1, at 620.

(n14)Footnote 225. *See* Cohen, *supra* n. 1, at 621. Recent lawsuits have failed because of statutes of limitations. *E.g., United States v. Mottaz, 476 U.S. 834 (1986); Nichols v. Rysavy, 809 F.2d 1317* (8th Cir.), *cert. denied, 484 U.S. 848 (1987).*

(n15)Footnote 226. *25 U.S.C. § 462; 25 U.S.C. § 478-1;* 25 C.F.R. Appendix to Chapter I (1992). Restrictions on allotted land expire to the extent that a deceased allottee's heirs or devisees are not Indians qualified to own restricted property. *See infra* note 233 and accompanying text.

(n16)Footnote 227. Present law authorizes involuntary removal of restrictions in partitions of allotments (*see infra* note 228 and accompanying text) and for Indians who take allotted land by will or inheritance *(25 U.S.C. §§ 372,* 373). Interior regulations authorize use of the latter power only to sell interests of multiple heirs who are not competent to manage the property. 25 C.F.R. § 152.20 (1992). Involuntary removal is also authorized for Indians of the Five Civilized Tribes in Oklahoma who take allotments by will or inheritance. Act of Aug. 11, 1955, ch. 786, *69 Stat. 666;* 25 C.F.R. §§ 152.14-152.15 (1992).

(n17)Footnote 228. *See* 25 C.F.R. §§ 152.1-152.16 (1992). *See also id*. pt. 153 (Crow allottees). The allotment statutes vary in form, so removal can involve issuance of an unrestricted fee patent to the land, or of a certificate of competency to the allottee. The statutes do not limit the removal right to adults, but the Secretary's regulations require applicants to be at least 21 years old. Minors can apply to have allotted land sold. *See infra* note 221 and accompanying text.

(n18)Footnote 229. State law applies if the land is outside tribal Indian country. Within Indian country, tribal law applies to tribal owners except when a federal statute provides otherwise. *See County of Yakima v. Yakima Indian*

Nation, 502 U.S. 251 (1992); Moe v. Confederated Salish & Kootenai Tribes, 425 U.S. 463, 477-79 (1976). Whether the allotment laws allow tribes to limit alienation of former allotments has not been determined; no tribe has imposed limits more restrictive than state law.

(n19)Footnote 230. 25 C.F.R. §§ 152.17-152.32 (1992); 43 C.F.R. § 4.301 (1992). Inherited and devised allotments belonging to Indians of the Five Civilized Tribes in Oklahoma who are of at least one-half Indian ancestry may be sold with approval of an Oklahoma Probate Court under statutes unique to those tribes. *See* Vollmann & Blackwell, *supra* n. 150, at 3-4, 20-42.

(n20)Footnote 231. 25 C.F.R. § 152.2 (1992). *See also id*. §§ 152.3, 152.27(b). No specific statute authorizes these regulations. They may be within the Secretary's implied powers under allotment and trust statutes.

(n21)Footnote 232. *25 U.S.C. § 408* & 25 C.F.R. pt. 156 (1992) authorize an allottee to relinquish allotted land to the allottee's unallotted children. 25 C.F.R. § 152.25(d) (1992) authorizes restricted gifts to an allottee's spouse, sibling, lineal ancestor, or lineal descendant. Both provisions require discretionary approval of the Secretary. For gifts to be restricted, the recipient probably must be an Indian qualified to own restricted property. *See id*. § 152.6. Restricted gifts may be to life tenants and remaindermen. *Id*. pt. 179.

(n22)Footnote 233. Restricted sales are not explicitly authorized by a single regulation, but restricted land can be sold and fee land placed in trust. *See* 25 C.F.R. §§ 151.4, 152.17-152.28 (1992).

(n23)Footnote 234. *25 U.S.C. §§ 348*, 378; 25 C.F.R. § 152.33 (1992). *See Sampson v. Andrus, 483 F. Supp. 240 (D.S.D. 1980)* (interpreting *25 U.S.C. § 483* also to authorize partition). *See also 25 U.S.C. 355;* Cohen, *supra* n. 1, at 787-788, 795 (partition of allotted lands of Indians of Five Civilized Tribes and Osage Tribe).

(n24)Footnote 235. Act of Mar. 29, 1956, ch. 107, *70 Stat. 62* (*codified as amended at 25 U.S.C. § 483a).* The statute covers deeds of trust as well as mortgages. Foreclosure is under applicable tribal law, or if there be none, state law. Foreclosure removes federal restrictions unless the tribe acquires the land, in which case restrictions continue.

(n25)Footnote 236. *25 U.S.C. §§ 488*-494.

(n26)Footnote 237. *E.g., Heckman v. United States, 224 U.S. 413 (1912). See* Debo, *supra* n. 121, at 205.

(n27)Footnote 238. *Compare South Carolina v. Catawba Indian Tribe, Inc., 476 U.S. 498 (1986)* (federal statute imposed state statutes of limitations on tribal land claim), *with County of Oneida v. Oneida Indian Nation, 470 U.S. 226 (1985)* (no statute bars land claim that arose in 1795). A 1926 statute subjects restricted lands of the Five Civilized Tribes in Oklahoma to state adverse possession law. *See* Vollmann & Blackwell, *supra* n. 150, at 18-19.

(n28)Footnote 239. *25 U.S.C. § 372;* 25 C.F.R. § 152.6 (1992); 43 C.F.R. § 4.240(a)(4) (1992). Indian heirs and devisees can apply for patents in fee or sale under the rules discussed in § 57.08(b), and the Secretary can sell land of multiple heirs who are incapable of managing their interests. 25 C.F.R. § 152.20 (1992). *See supra* note 219 and accompanying text.

When an Indian of the Five Civilized Tribes in Oklahoma dies owning restricted land, restrictions end for heirs or devisees who are not of at least one-half Indian ancestry under statutes unique to those tribes. *See Vollmann & Blackwell, supra n. 150.*

(n29)Footnote 240. *25 U.S.C. § 373;* 43 C.F.R. § 4.260 (1992) (owners of trust property who are at least 18 years old may make a will). *See also id*. § 4.233(a)-(b) (authorizing self-proved wills, codicils, and revocations); § 4.261 (anti-lapse provision); § 4.262 (killers may not take); 25 C.F.R. pt. 179 (1992) (life tenants and remaindermen). The statute requires secretarial approval of wills, and Interior officials formerly reviewed Indian wills substantively. *See Tooahnippah v. Hickel, 397 U.S. 598 (1970)* (limiting secretarial authority). Current regulations authorize

administrative approval only as to form.

(n30)Footnote 241. *25 U.S.C. §§ 348,* 371, 372, 372a, 373a, 373b, 2205-2207; 43 C.F.R. § 4.205 (1992). *See Hodel v. Irving, 481 U.S. 704 (1987).* In *Hodel*, the Supreme Court held that a provision of the Indian Land Consolidation Act that provided for the escheat of any undivided fractional interest comprising less than two percent of the total tract and that had brought in less than one hundred dollars to the owner in the past year, was unconstitutional. Congress amended the provision so that it applied to interests that hadn't earned one hundred dollars in the past five years, but even that provision was held unconstitutional. *See Babbitt v. Youpee, 519 U.S. 234 (1997). But see* Lindo, Michelle M., "The Indian Land Inheritance Problem Revisited," *22 Am. Indian L. Rev. 223 (1998). See also* Schwab, C.A., "Constitutional Law: Fifth Amendment Just Compensation Clause B Escheat of Indian Trust Lands," *65 Tenn. L. Rev. 805 (1998).*

(n31)Footnote 242. *25 U.S.C. §§ 372,* 373, 374; 25 C.F.R. pt. 15 (1992); 43 C.F.R. pt. 4, subpt. D (1992). Interior probate judges are article I "administrative law" judges. Their decisions can be reviewed by federal district courts under the Administrative Procedure Act. *See Tooahnippah v. Hickel, supra* note 234, at 605-607. Special statutes and regulations apply only to certain reservations. 43 C.F.R. §§ 4.300-4.308 (1992) (Yakima, Warm Springs & Nez Perce Res. & environs); *id.* §§ 4.350-4.357 (White Earth Res.).

(n32)Footnote 243. *25 U.S.C. §§ 375*-375d; 25 C.F.R. pts. 16, 17 (1992). *See* Vollmann & Blackwell, *supra* n. 150, at 11-23; Cohen, *supra* n. 1, at 787-788, 795.

(n33)Footnote 244. Act of Aug. 9, 1955, ch. 615, *69 Stat. 539* (*codified as amended at 25 U.S.C.A. §§ 415*- 415d); *Utah v. U.S. Dept. of Interior, 45 F. Supp. 2d 1279 (D. Utah 1999)* (statutory requirement of Secretarial approval is primarily concerned with protecting Native Americans by insuring that their land transactions with third parties are advantageous to the Native American); *Skull Valley Band of Goshute Indians v. Leavitt, 2002 U.S. Dist. LEXIS 15125* (D. Utah July 30, 2002) (state lacked standing in claim alleging that tribe had not lawfully approved lease of its land to company for nuclear waste storage). *See Seva Resorts, Inc. v. Hodel, 876 F.2d 1394 (9th Cir. 1989)* (sustaining Secretary's discretion). The statute specifically lists the purposes for which leases may be made, but the list is so comprehensive that it encompasses all useful purposes. The statute in terms covers all restricted Indian land, but it is not exclusive, and several other statutes authorize more specific kinds of leases. Some statutes apply only to one tribe or reservation. *E.g., 25 U.S.C. §§ 380,* 393-395, 397, 402-403c, 416-416j, 477, 635. Some of these statutes became practically obsolete upon adoption of the 1955 Act. *See generally* Robert N. Clinton, Nell Jessup Newton & Monroe E. Price, American Indian Law: Cases and Materials, 946-66 (3d ed. 1991).

(n34)Footnote 245. *See generally* 25 C.F.R. pts. 166-168 (1992) (grazing regulations) and statutes cited therein. Statutory authority limits grazing leases to ten years. *E.g., 25 U.S.C.A. § 415.* The Secretary's general grazing regulations limit grazing leases without improvements to five years. 25 C.F.R. § 166.14(a) (1992). Allottees need no permit to graze their own animals on their own land. *Id.* § 166.8.

The Secretary's Navajo Grazing Regulations, *id.* pt. 167, in practice apply only to tribal members because tribal grazing land is not leased to outsiders. Interior claims legal authority for these regulations based on the general concept of avoidance of waste. *Id.* § 167.1. The regulations require members to have permits approved by the Superintendent; permits are for one year but renew automatically. *Id.* § 167.9. Because the Secretary's authority is uncertain and many Navajos dispute it, Navajo permits in practice are of indefinite duration. *See also* 3 Navajo Tr. C. ch. 3, 5 (1977).

(n35)Footnote 246. 25 C.F.R. pt. 162 (1992). Particular provisions apply only to specific reservations. *Id.* §§ 162.15-162.20.

(n36)Footnote 247. 25 C.F.R. § 162.14 (1992); *Rosebud Sioux Tribe v. McDivitt, 286 F.3d 1031 (8th Cir. 2002)* (lessee lacked standing under statutes imposing limitations on contracts and leases involving Indian lands to challenge Bureau of Indian Affairs decision to void lease). *See Yavapai-Prescott Indian Tribe v. Watt, 707 F.2d 1072 (9th Cir.*

1983) (sustaining validity of regulation); *United States v. Karlen, 645 F.2d 635 (8th Cir. 1981)* (U.S. recovered damages for lease violations).

(n37)Footnote 248. *16 U.S.C.A. §§ 791a*-828c. *Id.* § 797(e) authorizes "licenses" to use federal and Indian land, but the interests conveyed are more accurately described as easements, or in some instances as leases. *See* chapter 50. *See also id.* § 803(e)(1) (annual license payments require "approval" of tribe). *See also United States v. Pend Oreille Pub. Util. Dist. No. 1, 28 F.3d 1544 (9th Cir. 1994)* (tribe entitled to damages for utility's flooding tribal land).

(n38)Footnote 249. *See Escondido Mut. Water Co. v. La Jolla Band of Mission Indians, 466 U.S. 765 (1984); Lac Courte Oreilles Band of Lake Superior Chippewa Indians v. Federal Power Comm'n, 510 F.2d 198 (D.C. Cir. 1975). See also Federal Power Comm'n v. Tuscarora Indian Nation, 362 U.S. 99 (1960), infra* notes 262, 263-264.

(n39)Footnote 250. *See, e.g., Escondido Mut. Water Co., supra* note 243; 18 C.F.R. § 16.8 (1992) (tribes must be consulted in relicensing or takeover). *See also* Indian Energy Resources Act, Oct. 24, 1992, Pub. L. 102-486, tit. 26, *106 Stat. 3113* (*codified at 25 U.S.C.A. §§ 3501*-3506 (technical assistance to tribes).

(n40)Footnote 251. Act of Feb. 5, 1948, ch. 45, *62 Stat. 17* (*codified at 25 U.S.C. §§ 323*-328); *McDonald v. Means, 2002 U.S. App. LEXIS 16391* (9th Cir. Aug. 14, 2002) (although federal government granted right of way for federal road access across reservation, it still had fiduciary duty to manage the right of way for the tribe, and tribe retained some control over traffic and maintenance).

(n41)Footnote 252. 25 C.F.R. pt. 169 (1992). *See also id*. pt. 170 (roads of the Bureau of Indian Affairs); pt. 175 (Indian electric power utilities).

(n42)Footnote 253. *25 U.S.C. §§ 311*-322. *See also id*. § 341 (General Allotment Act § 10, reserving congressional authority to grant rights-of-way and to condemn lands).

(n43)Footnote 254. 25 C.F.R. §§ 169.3, 169.23-169.28 (1992). The Secretary's authority to require Indian consent when statutes do not was sustained in *Southern Pac. Transp. Co. v. Watt, 700 F.2d 550* (9th Cir.), *cert. denied, 464 U.S. 960 (1983).* However, allotted land may be condemned for any purpose, including rights-of-way. *See infra* text accompanying notes 265, 266.

(n44)Footnote 255. *25 U.S.C. §§ 396a*-401, 2101-2108; *Navajo Nation v. U.S., 263 F.3d 1325 (Fed. Cir. 2001)* (the purpose of the Indian Mineral Leasing Act *(25 U.S.C. § 396 et seq.*) is to protect the natural resources of the Indians and manage them so as to maximize their benefit to the Indians). *See generally* Royster, Judith V., "Mineral Development in Indian Country: The Evolution of Tribal Control over Mineral Resources," *29 Tulsa L.J. 541 (1994). Montana v. Crow Tribe of Indians, 523 U.S. 696 (1998)* (Montana severance and gross proceeds taxes on coal extracted from mines held in trust for Indian Tribe were not subject to disgorgement based on their negative impact on marketability of tribe's coal by allegedly depriving tribe of its fair share of economic rent). David A. Hubbard, Indian Oil Valuation Regulations, 1998 Mineral Law Series: Rocky Mountain Mineral Law Foundation CH4 (10), CH5A (23), CH5B (5), CH6A (12), and CH6B (36), January 1998. *See* 25 C.F.R. pts. 200, 211, 216 (1992); *56 Fed. Reg. 58734-44, 48-52* (Nov. 21, 1991) (proposed revision of pt. 211 and new pt. 225); 43 C.F.R. pt. 3160 (1992) (oil & gas operations). Special regulations govern mining leases on certain reservations. *See* 25 C.F.R. pt. 217 (1992) (Uintah & Ouray); *id.* pt. 227 (Wind River). On the evolution of tribal rights to minerals on executive order reservations, *see supra* text accompanying notes 78-79. On mineral leasing generally, *see* Clinton, Newton & Price, *supra* n. 238, at 971-989.

(n45)Footnote 256. *25 U.S.C. §§ 2101*-2108; *see* 25 C.F.R. pt. 225 (1994). *See* United States, Congress, Senate Committee on Indian Affairs (1993), To Permit the Leasing of Mineral Rights in Any Case in Which the Indian Owners of An Allotment that is Located Within the Boundaries of the Fort Berthold Indian Reservation and Held in Trust by the United States Have Executed Lease to More Than 50% of the Mineral Estate of That Allotment: Report, Washington D.C. 1998.

(n46)Footnote 257. *See* chapter 48; *see also Southern Ute Indian Tribe v. Amoco Production Co., 151 F.3d 1251 (10th Cir. 1998)* (Indian Tribe was entitled to coal bed methane contained in the coal, which did not pass to surface patentees inasmuch as direct history of the Coal Lands Act indicated that Congress intended a reservation of coal). This decision amended by *Southern Ute Indian Tribe v. Amoco Production Co., 525 U.S. 1130 (1999)* (Congressional reservation pertained to the solid rock fuel known as coal, but not natural gas in coal formation). *See also* Peterson, Miranda K., "Oil & Gas Law," *75 Den. U.L. Rev. 1031 (1998),* Francis, Katina L., "Mining Law -- Ownership of Coalbed Methane B -- A Judicial Step Toward Efficient CBM and Coal Development. Southern Ute Tribe v. Amoco Production Company," *119 F.3d 816 (10th Cir. 1997), 33 Land & Water L. Rev. 469 (1998);* Callard, Amy, "Southern Ute Indian Tribe v. Amoco Production Company: A Conflict Over What Killed the Canary," *33 Tulsa L.J. 909 (1998).*

(n47)Footnote 258. Act of Mar. 3, 1909, ch. 263, *35 Stat. 783* (*codified as amended at 25 U.S.C. § 396).*

(n48)Footnote 259. 25 C.F.R. pt. 212 (1992). *See 56 Fed. Reg. 58744-48* (Nov. 21, 1991) (proposed revision of pt. 212). However, the Secretary probably cannot approve an oil and gas lease by most but not all competent heirs subject to a working interest in the dissenters. *See* Vollmann & Blackwell, *supra* n. 150, at 47-48.

(n49)Footnote 260. 25 C.F.R. pt. 213 (1992) (Five Civilized Tribes); *id*. pts. 214, 226 (Osage Tribe); *id*. pt. 215 (1992) (Quapaw Tribe), and statutes cited therein. Procedures under the Five Tribes statutes were severely criticized and the federal government held liable for an Indian's loss in *Walker v. United States, 663 F. Supp. 258 (E.D. Okla. 1987). See* Vollmann & Blackwell, *supra* n. 150, at 23-42.

(n50)Footnote 261. 30 C.F.R. pts. 201-217, 228-243 (1992). *See 30 U.S.C. §§ 1701*-1757; 43 C.F.R. pts. 3000-3590 (1992). The Federal Government was recently held liable for concealing from the Navajo Nation the increase in royalty rates and was ordered to grant monetary relief to the *Nation. Navajo Nation v. United States, 263 F.3d 1325 (Fed. Cir. 2001).*

(n51)Footnote 262. *Navajo Nation v. United States, 263 F.3d 1325 (Fed. Cir. 2001)* (United States breached its fiduciary duty to Navajo Nation when Secretary concealed from Nation the decision increasing royalty rate). *See* Pat Remick, Royalties, UPI, Sept. 20, 1984, LEXIS, Nexis Library, Omni file; Indian Hurt in Oil Deals, Denver Post, Nov. 22, 1983, at 26. *See also* Vollmann & Blackwell, *supra* n. 150, at 46-49 (summary of shortcomings of Indian mineral leasing procedures).

(n52)Footnote 263. 43 C.F.R. pt. 3160 (1992). *See* Anthony M. Sabino, Native American Rights, 45 Apr. Fed. Law. 20 (1998).

(n53)Footnote 264. Act of June 25, 1910, ch. 431, §§ 7, 8, *36 Stat. 857* (*codified as amended at 25 U.S.C. §§ 406*-407. The statute was applied and discussed in *United States v. Mitchell, 463 U.S. 206 (1983)* & *445 U.S. 535 (1980); White Mtn. Apache Tribe v. Bracker, 448 U.S. 136 (1980);* and *United States v. Algoma Lumber Co., 305 U.S. 415 (1939). See also 25 U.S.C. §§ 196,* 197 (authority to sell dead timber). The 1910 statute does not apply to the Five Civilized Tribes or Osage Tribe, nor does any other general authority to sell live timber from their lands. Whether the dead timber statute applies to them is uncertain. *Id.* § 196. However, Five Tribes Indians may be able to sell timber by conditional removal of restrictions. *See* 25 C.F.R. § 152.12 (1992).

(n54)Footnote 265. 25 C.F.R. § 163.4-.5 (1992). Authority for the present regulations is based on *25 U.S.C. §§ 407* & 466. The latter section may be more restrictive, but it applies only to tribes that are subject to the Indian Reorganization Act; *Confederated Tribes of Warm Springs Reservation of Oregon v. United States, 248 F.3d 1365 (Fed. Cir. 2001)* (if the government breaches its fiduciary duty by selling a tribe's timber assets for less than their full value, the tribe is entitled to recover the difference between the actual proceeds and the greatest appropriate revenue that should have been obtained). *See 25 U.S.C. § 478; supra* text accompanying n. 104.

(n55)Footnote 266. *Marlys Bear Medicine v. United States, 192 F. Supp. 2d 1053 (D. Mont. 2002)* (under Montana law, Bureau of Indian Affairs with the pervasive and comprehensive control over Blackfeet Reservation timbering

operations had fiduciary duty to insure that basic safety procedures were used at logging site); *See* 25 C.F.R. pt. 163 (1992) (forestry regulations); *id*. §§ 163.6, 163.8(a), 163.14, 163.19 (Indian operations); *id*. § 163.20 (personal use of Indians); *id*. pts. 164, 165 (sale of forest products produced by Indian enterprises from reservation timber); *White Mtn. Apache Tribe v. Bracker, 448 U.S. 136 (1980).*

The National Indian Forest Resources Management Act, Nov. 28, 1990, Pub. L. 101-630, tit. III, *104 Stat. 4532* (*codified at 25 U.S.C. §§ 3101*-3120), has extensive provisions to improve management of Indian forests and to increase tribal control.

(n56)Footnote 267. *See infra* §§ 57.09, 57.10.

(n57)Footnote 268. *Federal Power Comm'n v. Tuscarora Indian Nation, 362 U.S. 99 (1960); United States v. Winnebago Tribe, 542 F.2d 1002, 1004-1006 (8th Cir. 1976).*

(n58)Footnote 269. *E.g., United States v. Winnebago Tribe, supra* note 262; *United States v. 2005.32 Acres of Land, 160 F. Supp. 193 (D. S.D. 1958). Federal Power Comm'n v. Tuscarora Indian Nation, supra* note 262, is a notorious counterexample that provoked a famous dissenting comment. *Id. at 142* (Black, J., dissenting).

(n59)Footnote 270. *See supra* § 57.08(d)(2). *See also Federal Power Comm'n v. Tuscarora Indian Nation, supra* notes 262, 263 finding power to condemn "non-reservation" tribal land under Federal Power Act. States can however exercise in rem jurisdiction to condemn land held in fee by Indian tribes that have minimum contacts with the state. *Cass County Joint Water Resource Dist. v. 1.43 Acres of Land in Highland Township, 643 N.W.2d 685 (N.D. 2002).*

(n60)Footnote 271. Act of Mar. 3, 1901, ch. 832, § 3, *31 Stat. 1084* (*codified at 25 U.S.C. § 357).*

(n61)Footnote 272. *Minnesota v. United States, 305 U.S. 382 (1939).*

(n62)Footnote 273. United States v. *Clarke, 445* U.S. 253 (1980).

(n63)Footnote 274. Act of Jan. 12, 1983, Pub. L. 97-459, § 205, *96 Stat. 2517* (*codified as amended at 25 U.S.C. § 2204).*

(n64)Footnote 275. *Alaska v. Babbitt, 38 F.3d 1068 (9th Cir. 1994)* (dismissing State's action claiming ownership of right-of-way across Indian allotment because of sovereign immunity of U.S.). *See* Cohen, *supra* note 1, at 323-24; *28 U.S.C. § 2409a*(a) (Quiet Title Act, consenting to suits against the United States to quiet title to land with specific exception for claims to Indian land. Tribal sovereign immunity is an added barrier to suits claiming ownership against a tribe). *See also infra* § 57.11(a)(5).

(n65)Footnote 276. *See also In re Greene, 980 F.2d 590 (9th Cir. 1992), cert. denied, 114 S. Ct. 681 (1994)* (suit against tribal business by bankruptcy trustee barred by tribal immunity).

(n66)Footnote 277. *See Red Mountain Machin. Co. v. Grace Inv. Co., 29 F.3d 1408 (9th Cir. 1994)* (sustaining mechanics' lien under state law imposed on non-Indian leasehold interest in tribal land because no direct effect on tribe; dictum that result otherwise if attempt to impose lien on tribal property); 25 C.F.R. § 162.12(a), (c) (1994) (lessee of Indian trust land may encumber leasehold with consent of the Secretary).

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CHAPTER 57 INDIAN LAND

7-57 Thompson on Real Property, Thomas Editions § 57.09

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§ 57.09 Fishing, Hunting, and Gathering Rights.

[Go To Supp]

(a) Origins.

The traditional economies of many Native American societies relied substantially on fishing, hunting, trapping, and harvesting wild plants. This fact is reflected in treaty negotiations and provisions in which the tribal party often sought to protect these activities. Protection was accomplished directly by reserving land. Indian title, or tribal ownership, includes all possessory uses of the land and the right to exclude others. n278 In other negotiations, tribes reserved rights to hunt, fish, and gather from their cessions of land to the Government. These include off-reservation fishing rights in the Pacific Northwest and Great Lakes regions that are of great economic and social importance. When the federal government established Indian reservations by statute or executive order, fishing interests have been significant in deciding the extent of the area reserved. n279

Native Americans also control taking of wildlife within tribal Indian country because of the Indian sovereignty doctrine. Within Indian country, Indians are immune from most state laws even for activities on land that is not Indian-owned. n280 And federal laws of general applicability are often interpreted not to apply to reservation Indians. Absent any of these distinctive rights to take wildlife, Indians have the same rights and duties as other citizens. n281

(b) Federal Regulation.

Congress has power to regulate Indian hunting, fishing, and gathering. This authority is exercised in three forms. The most direct is administrative regulation of Indian fishing or hunting in a few specific situations where effective tribal regulation is lacking. n282 No federal statute explicitly authorizes these regulations. The courts have sustained them based on general statutes that authorize the Executive to manage Indian affairs, and on the specific treaty or law setting aside a reservation or reserving a right to fish or hunt. n283 Selling or transporting wildlife taken in violation of the regulations is a federal crime under the Lacey Act. n284

The second form is federal support of tribal regulation. Selling or transporting wildlife taken in Indian country in violation of tribal law is a federal crime, again under the Lacey Act. The Act applies to Indians, as well as to outsiders, who violate tribal law. n285

The third form of federal regulation of Indian hunting, fishing, and gathering is general statutes and international treaties imposing conservation and environmental restrictions on all persons. In United States v. Dion, the Supreme Court held that congressional intent to override distinctive Indian rights to take wildlife must be "clear and plain." n286 Dion reviewed convictions of Sioux Indians for killing and selling birds in violation of the Eagle Protection Act, the Migratory Bird Treaty Act, and the Endangered Species Act. n287

The Eagle Protection Act bans killing eagles and commerce in eagle parts, with a limited exception for Indian religious use. n288 The Supreme Court sustained Dion's conviction under the Act for killing eagles, rejecting his treaty right claim. The court held that the Eagle Protection Act met the "clear and plain" standard to override Indian rights. n289

The Migratory Bird Treaty Act and the Endangered Species Act have broader impact than the Eagle Protection Act, so their application to Indians is important. The Supreme Court has not decided whether either statute overrides Indian treaty and other rights, and lower courts have reached varying interpretations. n290 Several statutes and international treaties affect Native hunting and fishing in Alaska. n291

COMPUTER-ASSISTED RESEARCH

LEXIS: regulat! w/30 indian! w/15 hunt! or fish! or gather!

(c) Tribal and State Regulation.

Tribal and state regulation of Indian and Indian country hunting, fishing, and gathering are usually exclusive of each other rather than concurrent. In other words, regulatory authority over a particular activity is either in the tribe or in the state but not both.

(1) Regulation on Indian Trust Land.

When land held in Indian trust ownership is subject to a tribal government, the land is tribal Indian country. The Indian sovereignty doctrine bars most state regulation of Indians unless a federal statute explicitly authorizes state regulation. And no federal statute consents to state regulation of Indian hunting, fishing, or gathering. n292

The Supreme Court has recognized one important exception to this pattern. The court has held that states can impose conservation limits on reservation fishing when it threatens off-reservation fish runs. However, enforcement of this power is probably confined to federal and tribal courts. n293

In most ordinary situations, hunting, fishing, and gathering rights based on Indian title are subject to exclusive authority of tribal owners. Tribes routinely allocate the resource among tribal members and regulate their activities. They also have jurisdiction, backed by federal penalties, to regulate non-members by conditioning access to the resource. n294 In New Mexico v. Mescalero Apache Tribe, the Supreme Court held that tribal regulation of non-members bars concurrent regulation by the state. n295

Indian title may not encompass ownership of navigable waterways within tribal boundaries. The courts have recognized tribal ownership only under certain circumstances. Most important is when reservations were set aside for fishing tribes prior to statehood. n296 In other cases, the state owns the waterway, and its proprietary interest must be considered in analyzing fishing rights. n297

COMPUTER-ASSISTED RESEARCH

LEXIS: regulat! w/30 indian! w/5 trust w/5 land!

(2) Regulation on Other Land in Indian Country.

Non-Indian fishing and hunting on land or waterways not held in Indian trust is under exclusive jurisdiction of state governments, even if the land is located within an Indian reservation. n298 As already noted, states often own the beds and banks of navigable streams within reservations. Other land has gone out of tribal ownership in various ways. Tribes lack authority to regulate wildlife on these lands. n299

On the other hand, all land within reservation boundaries is tribal Indian country, regardless of ownership. The Indian sovereignty doctrine bars most state jurisdiction over Indians. It is generally assumed that states cannot regulate hunting or fishing by Indians anywhere in Indian country. n300 Whether and to what extent a state can assert jurisdiction over Indians when it owns the land or waterway has not been determined. n301 Any landowner can restrict access to the land, but when a state grants access to the public, it may be precluded from conditioning Indian access on submission to state jurisdiction. n302

COMPUTER-ASSISTED RESEARCH

LEXIS: indian w/1 sovereignty w/1 doctrine

(3) Regulation of Reserved Indian Rights to Fish, Hunt, or Gather on Ceded Lands.

This subject concerns servitudes akin to common-law profits a prendre, rights to remove natural resources from land owned in fee by other persons or governments. n303 It is mostly about "off-reservation" rights, although issues can arise regarding land within reservations that has gone out of tribal ownership. Rights of this nature usually depend on an explicit provision in a treaty or statute, although when a provision exists, it is interpreted favorably to the Indians. n304 Moreover, in Menominee Tribe v. United States, the Supreme Court held that a federal statute terminating federal supervision over a reservation did not extinguish the tribe's treaty right to hunt and fish free from state regulation. n305

Fishing servitudes reserved by tribes in the Pacific Northwest and Great Lakes regions have been a significant source of litigation and social friction. n306 State governments and non-Indian interests argued that the Indians' reserved rights are no greater than those of other persons, in other words, that the Indians have no servitudes but only guarantees against discrimination. The courts rejected these claims and held that the Indians have substantive rights to take fish.

The rights most frequently litigated are those reserved in treaties with tribes in the Pacific Northwest "of taking fish, at all usual and accustomed grounds and stations ... in common with all citizens of [Washington] Territory." n307 The Supreme Court has held that these treaties allocated the fishing right into treaty and non-treaty shares. They entitle tribal members to take a share of the fish that pass through tribal fishing areas, a share defined by the Indians' reasonable needs or half the fish run, whichever is less. n308 Commercial fishing is included in the tribal right, and hatchery-bred fish are subject to allocation under the treaties. n309 The Indian right includes easements of access to fishing stations. n310

No federal statute subjects these reserved rights to state regulation. Nevertheless, the courts have held that states can regulate in the interest of conservation. n311 State authority is limited to that necessary for conservation of a species, and the state cannot discriminate against the Indians or against their fishing methods. n312

Other forms of state regulation have been struck down. The courts have held that the state may not require Indians to obtain a state fishing license, n313 and that tribal members are not confined to fishing technology in use when the treaties were made. n314 Many other aspects of these treaties have been subjects of litigation. n315 In other respects, tribes have authority to allocate the fishing right and to regulate their members. n316

Some hunting or gathering servitudes were reserved only for "unoccupied" federal land, and at times grazing rights have

been reserved in the same form. n317 Many of these rights have expired because of the limitation. n318 Where a right survives, disputes can arise when Indian uses conflict with interests of other persons. In Wisconsin treaty cases, the federal courts have held that hunting rights guarantee an Indian right to take game, again measured by the lesser of half the harvest or a moderate living. n319

COMPUTER-ASSISTED RESEARCH

LEXIS: regulat! w/30 reserved w/2 indian! w/2 right! w/15 hunt! or fish! or gather!

FOOTNOTES:

(n1)Footnote 278. *Timpanogos Tribe v. Conway, 286 F.3d 1195 (10th Cir. 2002)* (Indian hunting and fishing rights need not be expressly mentioned in the treaty); *Midwater Trawlers Co-operative v. Dept. of Commerce, 282 F.3d 710 (9th Cir. 2002)* (fact that tribe may not have harvested whiting species offish at time of treaty does not limit its current rights to harvest such fish under the treaty). *See* Cohen, *supra* n. 1, at 449-450. *See also Menominee Tribe v. United States, 391 U.S. 404 (1968)* (treaty words "to be held as Indian lands are held" reserved rights to hunt and fish).

(n2)Footnote 279. *See, e.g., Alaska Pac. Fisheries v. United States, 248 U.S. 78 (1918)* (statutory reservation includes exclusive fishery in adjoining sea because of tribe's dependence on fishing).

(n3)Footnote 280. *See infra* § 57.11(a)(2).

(n4)Footnote 281. *See* Cohen, *supra* n. 1, at 645-653.

(n5)Footnote 282. 25 C.F.R. pt. 241 (1992) (Annette Islands & Karluk Reservations); *id*. pt. 242 (Red Lake Reservation); *id*. pt. 248 (Columbia River in-lieu fishing sites); *id*. pt. 249 (off-reservation treaty fishing); *id*. pt. 250 (Hoopa Valley Reservation). Regulations in this class are often temporary, until tribal authority is effective. *See also* Starla Kay Roels, "Borrowing Instead of Taking: How the Seemingly Opposite Threads of Indian Treaty Rights and Property Rights Activism Could Intertwine to Restore Salmon to Rivers," *28 Envt'l. L. 375 (1998).*

(n6)Footnote 283. *United States v. Eberhardt, 789 F.2d 1354, 1358-61 (9th Cir. 1986); Northern Arapahoe Tribe v. Hodel, 808 F.2d 741, 748-750 (10th Cir. 1987); United States v. Michigan, 623 F.2d 448 (6th Cir. 1980)* (all relying on *25 U.S.C. §§ 2,* 9). *See also Commonwealth v. Maxim, 695 N.E.2d 212 (Mass. App. 1998)* (fishing rights of Native Americans protected by treaty may be regulated by state in interest of conservation, provided the regulation is a reasonable and necessary measure, and it doesn't discriminate against Native Americans).

(n7)Footnote 284. Act of Nov. 16, 1981, Pub. L. 97-79, *95 Stat. 1073* (*codified as amended at 16 U.S.C. §§ 3371*-3378). The Lacey Act does not authorize the regulations; it supplies a remedy to enforce regulations that are otherwise lawful. Fisher, Christine, Student Author, "Conspiring to Violate the Lacey Act." Envt'l. L. Spring 2002. *See United States v. Eberhardt, supra* note 273.

(n8)Footnote 285. Lacey Act, *supra* note 274. The act creates a federal remedy for violation of tribal law by any person in Indian country. *See United States v. Big Eagle, 881 F.2d 539 (8th Cir. 1989), cert. denied, 493 U.S. 1084 (1990); United States v. Sohappy, 770 F.2d 816 (9th Cir. 1985), cert. denied, 477 U.S. 906 (1986);* Carl H. Johnson, "Balancing Species Protection with Tribe Sovereignty: What Does the Tribal Rights-Endangered Species Order Accomplish?" *83 Minn. L. Rev. 523 (1998). See also* Sandi B. Zellmer, "Indian Lands as Critical Habitat for Indian Nations and Endangered Species: Tribal Survival and Sovereignty Come First," *43 S.D.L. Rev. 381 (1998). See also 18 U.S.C. § 1165* (federal crime for non-Indian to enter restricted Indian land without permission for purpose of hunting, fishing, or trapping).

(n9)Footnote 286. *476 U.S. 734, 738. See supra* § 57.07(b).

(n10)Footnote 287. Act of June 8, 1940, ch. 278, *54 Stat. 250* (*codified as amended at 16 U.S.C. §§ 668*-668d);

Act of July 3, 1918, ch. 128, *40 Stat. 755* (*codified as amended at 16 U.S.C. §§ 703*-711); Act of Dec. 28, 1973, Pub. L. 93-205, *87 Stat. 884* (*codified as amended at 16 U.S.C. §§ 1531*-1543).

(n11)Footnote 288. *United States v. Hardman, 297 F.3d 1116 (10th Cir. 2002)* (practitioners of Native American religions who are not members of federally recognized tribes cannot be excluded from obtaining permits unless government can show that such exclusion is the least restrictive means for advancing interest in preserving eagle population and protecting Native American culture).

(n12)Footnote 289. *United States v. Dion, 476 U.S. 734 (1986).*

(n13)Footnote 290. *E.g., United States v. Dion, 762 F.2d 674 (8th Cir. 1985)* (rejecting treaty right defense to convictions under Migratory Bird Treaty Act for selling birds), *rev'd in part on other counts, 476 U.S. 734 (1986); United States v. Bresette, 761 F. Supp. 658 (D. Minn. 1991)* (sustaining treaty right defense to Migratory Bird Treaty Act prosecution for selling birds); *United States v. Billie, 667 F. Supp. 1485 (S.D. Fla. 1987)* (rejecting treaty right defense to Endangered Species Act prosecution for killing panther); *United States v. Cutler, 37 F. Supp. 724 (D. Idaho 1941)* (sustaining treaty right defense to Migratory Bird Treaty Act prosecution for killing birds). *See* Robert Laurence, "The Abrogation of Indian Treaties by Statutes Protective of the Environment," 31 Nat. Resources J. 859 (1991); Cohen, *supra* n. 1, at 282-286. *See also* Comment, Tracy A. Diekemper, "Abrogating Treaty Rights Under the Dion Test: Upholding Traditional Notions that Indian Treaties are the Supreme Law of the Land," *10 J. Envt'l. L. & Litig. 473 (1995).*

(n14)Footnote 291. Tomsen, Jennifer L., " 'Traditional' Resource Uses and Activities: Articulating Values and Examining Conflicts in Alaska." Alaska L.R. 19 (June 2002) 167. *See* Cohen, *supra* n. 1, at 759-761.

(n15)Footnote 292. *See Mattz v. Arnett, 412 U.S. 481 (1973); infra* § 57.11(a)(2). A federal statute that transfers criminal jurisdiction to states over many areas of Indian country has a specific exception for Indian hunting, fishing, and trapping. *18 U.S.C. § 1162*(b).

(n16)Footnote 293. *Puyallup Tribe v. Department of Game, 433 U.S. 165 (1977)* (*Puyallup III*). The applicable treaty reserved the right to fish "in common with" non-Indians, so the treaty explicitly recognized a non-Indian right, which the court stressed. The Indian right can be exercised on or off reservations, and off-reservation applications are discussed *infra* notes 300, 301 and accompanying text.

Enforcement of the state power recognized in *Puyallup III* can be had by civil action in federal court against tribal officials and fishermen and in those tribal courts that grant comity, but enforcement in state court is probably barred by tribal sovereignty. *See infra* § 57.11(a)(2), (5). Federal prosecutions are possible under the Lacey Act. *See supra* notes 274, 275 and accompanying text.

(n17)Footnote 294. *See supra* note 275 and accompanying text; *United States v. Pollmann, 364 F. Supp. 995 (D. Mont. 1973).*

(n18)Footnote 295. *462 U.S. 324 (1983). See Alaska Pac. Fisheries v. United States, 248 U.S. 78 (1918); Eastern Band of Cherokee Indians v. North Carolina Wildlife Resources Comm'n, 588 F.2d 75 (4th Cir. 1978).*

(n19)Footnote 296. *See supra* § 57.05(b).

(n20)Footnote 297. *Montana v. United States, 450 U.S. 544 (1981).*

(n21)Footnote 298. *Id. at 557-567; Lower Brule Sioux Tribe v. South Dakota, 917 F. Supp. 1434 (C.D.S.D. 1996)* (state had exclusive jurisdiction to regulate nonmember and non-Indian hunting and fishing within nonmember owned fee lands and lands taken by Army Corps of Engineers which were within boundary of reservation); *Whiterock v. State, 918 P.2d 1309 (Nev. 1996).*

(n22)Footnote 299. *Confederated Tribes of Chehalis Indian Reservation v. Washington, 96 F.3d 334 (9th Cir. 1996)* (aboriginal fishing rights extinguished with aboriginal title by 1863 executive order opening lands for non-Indian settlement); *Menominee Indian Tribe of Wisconsin v. Thompson, 943 F. Supp. 999 (W.D. Wis. 1996)* (obligatory removal treaty of 1848 extinguished all of tribe's usufructuary rights in Wisconsin lands and waters). *See also* Comment, Dorothy E. Graham, "*Indian Affairs -- Tribal Regulatory Authority -- Tribes Lack Authority Over Non-Indian Conduct on Taken Lands Within Reservations, South Dakota v. Bourland, 508 U.S. 679 (1993),*" *18 Suffolk Transnat'l L. Rev. 405 (1995). See South Dakota v. Bourland, 113 S. Ct. 2309 (1993)* (tribe lacked authority to regulate non-Indian hunting and fishing on land bought by federal government for reservoir). *See also Hanes v. State, 973 P.2d 330 (Okla. Crim App. 1999)* (state has the power to enforce its protective fishing regulations against a Cherokee Indian at the water's edge on the west bank of Grand River (Neosho), which is not a navigable water).

(n23)Footnote 300. *See Muckleshoot Tribe v. Lumni Indian Tribe, 141 F.3d 1355 (Wash. 1998)* (tribe's usual and accustomed fishing places did not extend to marine area south of the island named in decree). *E.g., Lower Brule Sioux Tribe v. South Dakota, 711 F.2d 809, 812 (8th Cir. 1983), cert. denied, 464 U.S. 1042 (1984). But see supra* note 282 and accompanying text.

(n24)Footnote 301. *Cf. United States v. Thomas, 151 U.S. 577 (1894)* (alternative holding: federal government, and not state, had jurisdiction to prosecute Indian for murder occurring on state-owned land within Indian reservation).

(n25)Footnote 302. *See Puyallup Tribe v. Department of Game, 414 U.S. 44 (1973)* (*Puyallup II*) (state regulation cannot single out Indian fishing); *Kimball v. Callahan, 493 F.2d 564, 569-570* (9th Cir.), *cert. denied, 419 U.S. 1019 (1974)* (discussing tribal hunting and fishing rights in national forest and on private land). *But see* Puyallup Tribe v. Dept. of Game (*Puyallup III*), *supra* note 282 (state has limited power to regulate Indians to conserve wildlife).

(n26)Footnote 303. *See* chapter 65; Clinton, Newton & Price, *supra* n. 238, at 815-858. The best-known rights were reserved in treaties, but some rights are established in federal statutes. *See, e.g., 16 U.S.C. § 835d* (Columbia River Basin); Getches, Wilkinson & Williams, *supra* n. 2, at 922-933 (subsistence rights in Alaska).

(n27)Footnote 304. *Washington v. Fishing Vessel Ass'n, 443 U.S. 658, 664-669 (1979), modified, 444 U.S. 816 (1979). But see Crow Tribe of Indians v. Repsis, 73 F.3d 982 (10th Cir. 1995)* (interpretation of original treaty construed narrowly and against Indian interpretation in regard to hunting and fishing rights.); *Antoine v. Washington, 420 U.S. 194, 199-200 (1975). See supra* § 57.09(b). See 25 C.F.R. § 249 (1998).

(n28)Footnote 305. *391 U.S. 404 (1968)* (treaty words "to be held as Indian lands are held" reserved rights to hunt and fish; termination statute did not explicitly override the rights). *See Cheyenne-Arapaho Tribes v. Oklahoma, 618 F.2d 665 (10th Cir. 1980); Kimball v. Callahan, 493 F.2d 564* (9th Cir.), *cert. denied, 419 U.S. 1019 (1974), 590 F.2d 768* (9th Cir.), *cert. denied, 444 U.S. 826 (1979); but see United States v. Von Murdock, 132 F.3d 534 (10th Cir. 1997). See also Menominee Indian Tribe of Wisconsin v. Thompson, 161 F.3d 449 (7th Cir. 1998)* (tribe was not entitled to off-reservation sturgeon fishing and treaty-reserved rights and aboriginal rights arising from occupancy and use of land from time immemorial enjoy different levels of legal protection and are subject to special rules of contract interpretation to compensate Indians).

(n29)Footnote 306. *See* Fay G. Cohen, Treaties on Trial: The Continuing Controversy over Northwest Indian Fishing Rights (1986); Cohen, *supra* n. 1, at 450-456.

(n30)Footnote 307. Treaty of Medicine Creek, Dec. 26, 1854, art. 3, *10 Stat. 1133. See also* Michael C. Blumm and Brett M. Swift, "The Indian Treaty Piscary Profit and Habitat Protection in the Pacific Northwest: A Property Rights Approach," *69 U. Colo. L. Rev. 407 (1998).*

(n31)Footnote 308. *Washington v. Fishing Vessel Ass'n, 443 U.S. 658, 686 (1979)* (indian right limited to earning a "moderate living"), *modified, 444 U.S. 816 (1979). Midwater Trawlers Co-operative v. Dept. of Commerce, 282 F.3d 710 (9th Cir. 2002)* (an equitable measure of the tribe's common right to take fish pursuant to treaty is to first divide the

harvestable portion of each run into equal treaty and non-treaty shares and then reduce the tribal share if tribal needs may be satisfied by a lesser amount).

(n32)Footnote 309. *United States v. Washington, 759 F.2d 1353, 1358-1360* (9th Cir.), *cert. denied, 474 U.S. 994 (1985). See* 25 C.F.R. pt. 249 (1992) (Interior Regulations governing off-reservation treaty fishing under certain circumstances). *See also* Phil Katzen and Riyaz Kanji, "Tribal Rights to Harvest Shellfish (United States v. Washington)," 52 Washington State Bar News 16(6), July 1998 and Richard Kirk Eichstaedt, "Save the Whales" and "Save the Makah:" The Makah and the Struggle for Native Whaling, *4 Animal Law 145 (1998).*

(n33)Footnote 310. *United States v. Winans, 198 U.S. 371 (1905).*

(n34)Footnote 311. *Puyallup Tribe v. Department of Game, 414 U.S. 44 (1973)* (*Puyallup I*). *See Puyallup Tribe v. Department of Game, 433 U.S. 165 (1977)* (*Puyallup III*); *United States v. Michigan, 653 F.2d 277, 279 (6th Cir. 1981), cert. denied, 454 U.S. 1124 (1981).*

(n35)Footnote 312. *Id.* at 175; *Puyallup Tribe v. Department of Game, 414 U.S. 44 (1973)* (*Puyallup II*).

(n36)Footnote 313. *Tulee v. Washington, 315 U.S. 681 (1942).*

(n37)Footnote 314. *United States v. Michigan, 471 F. Supp. 192, 260 (W.D. Mich. 1974), aff'd, 653 F.2d 277* (6th Cir.), *cert. denied, 454 U.S. 1124 (1981); United States v. Washington, 384 F. Supp. 312, 402 (W.D. Wash. 1974), aff'd, 520 F.2d 676 (9th Cir. 1975), cert. denied, 423 U.S. 1086 (1976).*

(n38)Footnote 315. *See, e.g., United States v. Washington, 506 F. Supp. 187, 202-08 (W.D. Wash. 1980)* (recognizing tribal claim that treaty limits environmental degradation of fisheries), *aff'd in part and vacated in part, 759 F.2d 1353 (9th Cir. 1985)* (per curiam). *See also* Getches, Wilkinson & Williams, *supra* n. 2, at 895-897. The federal courts have adjudicated disputes between treaty tribes over treaty fishing rights. *E.g., United States v. Suquamish Tribe, 901 F.2d 772 (9th Cir. 1990).*

(n39)Footnote 316. *See* Cohen, *supra* n. 1, at 456-458.

(n40)Footnote 317. *See, e.g.*, Treaty of Medicine Creek, *supra* note 296, *quoted in Washington v. Fishing Vessel Ass'n, supra* note 297, at 674.

(n41)Footnote 318. *E.g., State v. Coffee, 556 P.2d 1185 (Idaho 1976). See Ward v. Race Horse, 163 U.S. 504 (1896)* (hunting right implicitly repealed by act admitting Wyoming as a state). *But see Antoine v. Washington, 420 U.S. 194 (1975)* (sustaining hunting right).

(n42)Footnote 319. *See Lac Courte Oreilles Band of Lake Superior Chippewa Indians v. Voight, 700 F.2d 341* (7th Cir.), *cert. denied, 464 U.S. 805 (1983)* (LCO I); Charles F. Wilkinson, "To Feel the Summer in the Spring: The Treaty Fishing Rights of the Wisconsin Chippewa," *1991 Wis. L. Rev. 375, 398-402. See* Karen Ferguson, "Indian Fishing Rights: Aftermath of the Fox Decision and the Year 2000," *23 Am. Indian L. Rev. 97 (1998).*

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CHAPTER 57 INDIAN LAND

7-57 Thompson on Real Property, Thomas Editions § 57.10

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§ 57.10 Indian Water Rights.

[Go To Supp]

(a) The *Winters* Decision.

In Winters v. United States, the Supreme Court held that an agreement between two tribes and the United States reserving land in Montana for the tribes' home had implicitly reserved the right to divert enough water from a boundary river to carry out the reservation's agricultural purposes. n320 Winters established the reserved water rights doctrine as an important part of water law in the arid western states. The English common law of water rights, known as the riparian doctrine, was applied in the eastern states, where water is abundant. The doctrine is based on riparian access to water and on reasonable sharing of a plentiful resource. n321 Indian water rights have not been in serious dispute in riparian states. n322 The common law could not have served as the water law of arid states without adjustment to take account of scarcity. Farmers and miners in arid regions wanted to divert surface water to land away from rivers, which would have required legislative authority under the common law. Western settlers simply took water supplies without regard to common-law claims of other landowners. Because most of the land was owned by the federal government, which was subject to political control, this practice was highly successful. It was adopted in territorial and state legislation and evolved into the prior appropriation doctrine that is in force in every western state. Under it, the first person to divert water and apply it to beneficial use owns the right to continue diverting the same supply. Water not beneficially used has no owner; it is unappropriated and available to claimants who first put it to use. n323

Settlers brought the family farm culture to the arid West, and irrigated agriculture was of central importance. In most places, water use for crops has dwarfed other uses. Some Indian tribes in the Southwest irrigated crops before European contact, and their paramount right to continue has been recognized by the courts as part of their Indian title. n324 A few other tribes in arid areas were dependent on fishing, and their water rights have also been recognized, although unevenly. n325

The traditional economies of most tribes used very little water, but the reservation system required hunting tribes to give up their traditional means of support. The federal government's policy was to convert their economies to farming and grazing. n326 For farming in arid areas, large amounts of irrigation water would be needed. But under the prior appropriation system, settlers would often divert water before an Indian reservation could begin farming use. Moreover, the prior appropriation system was in severe conflict with the Indians' reasonable expectations in making treaties and in

occupying their lands under Indian title. Under prior appropriation, water supplies that had served tribal land since time immemorial could be diverted by upstream appropriators, leaving reservations completely dry. n327

The water conflict came to a head in Winters. The Fort Belknap Reservation in Montana had begun to irrigate from the Milk River, but in a dry year, upstream settlers took all the water. The United States sued as trustee for the tribes, claiming water rights for the reservation under several theories. Priority of diversion was unclear, but the federal courts bypassed that question to establish the rule that setting aside the reservation for agricultural purposes implicitly reserved a water right for the tribe on that date. The right is paramount to claims of subsequent appropriators regardless of who irrigated first. n328

COMPUTER-ASSISTED RESEARCH

LEXIS: reserved w/1 water w/1 right! w/1 doctrine w/30 indian! or trib!

(b) Sources of *Winters* Rights.

The Winters decision has been consistently followed in other surface water cases. Its theory has been applied to all Indian reservations that meet its criteria of purposes and need, whether set aside by treaty, statute, executive order, or other action under federal law, and whether or not the watercourse is navigable. n329

There is some uncertainty about reserved rights to groundwater. In Cappaert v. United States, the Supreme Court sustained the federal government's claim to a reserved water right for a federal wildlife reservation, water needed to sustain a desert fish. n330 The fish lived in deep pools that were surface sources but sustained from hydrologically-connected groundwater, and the decision enjoined defendants from groundwater pumping that lowered the pools. Based on Cappaert and some lower court decisions, it is likely that the Winters holding extends to groundwater in appropriate cases. n331 However, at least one court has largely rejected a tribal claim to reserved rights in groundwater. n332

State groundwater law is less uniform than the prior appropriation law governing surface supplies in the West. n333 This complicates questions about the relation between rights claimed under state and federal law. Also, some groundwater sources are hydrologically connected to surface supplies ("tributary" groundwater), others are not. Some sources are local to the land of one owner, others extend under the land of many owners. n334 Indian rights surely include local sources, and their surface rights are protected against tributary pumping. n335 Other rights are less certain.

COMPUTER-ASSISTED RESEARCH

LEXIS: reserved w/1 right! w/1 groundwater w/30 indian! or trib!

(c) Purposes for Which Water Is Reserved.

The Winters court held that setting aside a reservation implicitly reserved water for reservation purposes. Reservation purposes include preserving the Indians' previous water uses, although these were modest in most circumstances. The two important uses were irrigated agriculture by tribes who practiced it, and fisheries, most of which were not in arid areas. n336

Reservation purposes also include the new purposes explicit or implicit in setting aside a reservation. During the period when most reservations were established, the essential federal plan was to convert Indians from hunting and gathering, which required very large amounts of land for support, to agriculture on much reduced domains. In arid areas such as eastern Montana, this purpose required water. This was the essential chain of reasoning in Winters. n337

In litigation over the extent of their water rights, tribes have claimed reserved water rights for other purposes, such as mining, recreation, manufacturing, and non-traditional fishing. Their theory is that the purpose of a reservation is a homeland for the residence and support of the tribe, so any use that contributes to that purpose carries out a reservation purpose. The Supreme Court has not addressed this question. However, one lower court has rejected the theory and confined reservation purposes to agricultural: farming, grazing, domestic and municipal use, and agricultural power production. n338 Other decisions seem to be based on the same assumption. n339 On the other hand, the Winters opinion more generally held that tribes are entitled to enough water for their needs, n340 a standard uncertain enough that this issue cannot be regarded as settled.

COMPUTER-ASSISTED RESEARCH

LEXIS: reserv! w/5 water! w/5 purpose! w/30 indian! or trib!

(d) Extent of Irrigation Rights.

In Winters, the Supreme Court held that setting aside a tribal reservation implicitly reserved enough unappropriated water for the reservation's needs. Under this standard, the size of the tribal right is uncertain. Owners of junior rights on the same stream are in doubt about the extent of senior Indian rights not in use. Moreover, tribal needs can change with changes in population, irrigation technology, and other factors.

The uncertainty is only slightly lessened by development of reservation uses. Irrigation projects have been built to serve many reservations in the West, but all were built by the Interior Department, and most were influenced by its Bureau of Reclamation. As a result, Indian water rights were seldom asserted for these projects. For some of them, water rights were obtained under state law, as required by the Reclamation Act. n341 As a result, the extent of *Winters* irrigation rights has seldom been tested by actual water development to serve Indian lands.

However, the extent of *Winters* irrigation rights has been tested extensively in lawsuits to quantify all water rights in a particular watershed, known as general stream adjudications. These lawsuits do not depend on actual water development; they seek to specify all entitlements, whether or not based on actual use. n342

Prior to 1952, the sovereign immunity of the United States barred adjudications of federal or Indian water rights except when the Government decided to bring an action as plaintiff. In several cases, the United States did sue on its own behalf and as trustee for tribes. The claims made for tribes in these cases were modest and often far less than an advocate for the tribes should have made. Irrigation claims tended to be based on actual use, and other claims were ignored. The Government's trust over Indian land was severely compromised by conflict with its interest in reclamation projects. n343

This pattern changed in the Colorado River case, Arizona v. California. n344 The State of Arizona brought an original action in the Supreme Court against California to determine the states' respective water rights in the lower Colorado River. The United States intervened to assert its interests, and it made trustee claims for the five Indian reservations in the basin. This time, irrigation claims for tribes were extensive and consistent with what the Winters decision had appeared to recognize.

The Supreme Court's decision adopted a solution to the uncertainty of the "needs" standard of Winters. The court awarded the tribes enough water to irrigate all reservation land that was practicably irrigable. This standard sought to award tribes as much water as the needs standard could within practical limits and according to information available at the time of the adjudication. In exchange for this present award, the tribes were foreclosed from seeking to increase the award later based on new facts or changed circumstances, and other parties were foreclosed from seeking to decrease the tribal award. n345 By converting the tribal right from an uncertain right looking to the future into a fixed, present quantity, the court attempted to give other rights a more certain basis.

In 1952, Congress enacted a statute commonly known as the McCarran Amendment. n346 It consents to suits against the United States in any general stream adjudication brought in a state or federal court. n347 In 1976, the Supreme Court interpreted the consent to include water rights owned by the United States in trust for Indian tribes. n348 Under this statute, several western state governments have filed general stream adjudications that encompass Indian lands and name the United States as defendant in its capacity as trustee for tribes. In these actions the United States, and tribes who intervene in their own right, have asserted irrigation water claims based on practicably irrigable acreage, the standard in Arizona v. California, as well as claims for other purposes. n349 Opposing parties have challenged the standard in various ways, and many questions about the extent of Indian irrigation rights remain open. n350

COMPUTER-ASSISTED RESEARCH

LEXIS: irrigat! w/2 right! w/15 reserv! w/5 use! w/30 indian! or trib!

(e) Applying Agricultural Water Rights to Other Uses.

The reserved rights doctrine entitles tribes to substantial amounts of water for irrigation and fisheries in appropriate cases. In recent years the question has arisen whether a tribal irrigation right can be applied to other uses, uses that do not define the right in the first instance. There are several judicial dicta saying that tribes have this right for uses within but not without tribal reservations. n351 But one court denied a tribe's claim to convert its irrigation right to an instream-flow right for fisheries and recreation. n352 All the decisions appear to assume that the tribal right is in some sense appurtenant to the land, so that its use cannot be entirely divorced from use of the land.

(f) Alienation and Regulation of Indian Water Rights.

(1) Sale of Tribal Water Rights.

Tribal *Winters* rights are probably not alienable for use apart from tribal land, absent statutory consent, because of the federal restraint on alienation of the land. This may be so either because *Winters* rights are inherently appurtenant to the land and thus restrained with it. Or if *Winters* rights are a separate interest, they are nonetheless a form of real property subject to the restraint. n353 No general statute consents to alienation. Several statutes applicable to particular reservations consent to alienation, implying that consent is necessary. n354

Under the prior appropriation system, water rights are unique. When a senior owner is not using its entitlement, junior owners can enjoy the resource without payment. It has been assumed that *Winters* water rights are subject to the same rule. n355 For other kinds of Indian resources, political forces commonly advocate alienability to non-Indians. For water rights, the politics are reversed. Junior owners who enjoy the water resource oppose alienability of Indian water rights, fearing that buyers would put the rights to use. n356

COMPUTER-ASSISTED RESEARCH

LEXIS: sale! or sell! w/30 water! w/2 right! w/15 indian! or trib!

(2) Allotment Water Rights.

When tribal land was allotted in severalty to tribal members, each allotment implicitly received a proportionate share of the tribe's *Winters* water right. n357 The right is held in trust appurtenant to the land; while the trust period continues, it is essentially the same as the tribal water right. Like the tribal right, the allotment right is probably not alienable for use apart from the allotted land in the absence of specific statutory authorization. n358

When allotted land is transferred, the *Winters* right generally accompanies the transfer. The right passes with transfers in

trust, whether inter vivos or at death. n359 Allotments can go out of trust in various ways. Most directly, allottees can sell their land with approval of the Secretary of the Interior. n360 When this occurs, the courts have held that the allotment's share of the *Winters* water right continues as an appurtenance to the former allotment. n361 But when the land is purchased by a non-Indian, the water right also becomes subject to state law. In states that have the prior appropriation doctrine, water rights must be perfected by being put to a beneficial use. Most tribal *Winters* rights are defined by irrigation, which is a beneficial use. Thus when irrigation begins during the trust, the right continues unabated after sale to a non-Indian. In most cases, allotments go out of trust entirely undeveloped. When this occurs, non-Indian purchasers must begin to irrigate with due diligence after acquiring the land, or the *Winters* water right is lost. n362

COMPUTER-ASSISTED RESEARCH

LEXIS: allot! w/30 water! w/2 right! w/30 indian! or trib!

(3) Leasing Water Rights.

No general statute consents to leases of tribal or allotted water rights apart from the land to which they are appurtenant. Several statutes applicable to particular reservations do consent to leases for as long as 100 years. n363

A federal court has held that *Winters* water rights can be leased in conjunction with leases of allotted land. n364 The reasoning of the decision applies as well to leases of tribal land, and some leases can be made for 99 years. n365 However, this market is much more limited than the general right to sell or lease a water right for use on other land; many potential buyers, such as municipalities, are excluded.

COMPUTER-ASSISTED RESEARCH

LEXIS: leas! w/15 water! w/2 right! w/30 indian! trib!

(4) Regulating Water Rights.

Water rights are closely regulated by state governments in the arid western states. Most states rely on systems administered by a state engineer, while Colorado relies heavily on water courts. Regulatory systems control recognition of new water rights, administration of existing rights, and transfers of rights to new points of diversion, to new uses, or to new owners. n366 Indians and Indian property in Indian country are generally immune from state regulation, and this rule has been assumed to apply to water rights. n367 Some state water regulators have attempted to obtain jurisdiction over Indian water rights as an adjunct to water quantification decrees. On their part, several Indian nations have asserted jurisdiction over all water rights in their territory, including those appurtenant to unrestricted land owned by non-Indians. Lower court decisions on validity of these competing claims are inconclusive. n368

(g) Indian Irrigation Projects.

The federal government has built a number of irrigation projects that serve restricted Indian lands. Many were financed with tribal trust funds held in the Treasury. In some instances, Indian lands are within Reclamation projects subject to the Reclamation Act. More often, Indian irrigation projects are separately administered by the Bureau of Indian Affairs. As Indian allotments within irrigation projects were sold or leased, many non-Indians became landowners served by the projects. n369

Lands within an Indian irrigation or Reclamation project are subject to Interior regulations. n370 Generally, lands within a project are treated equally, sharing ratably in shortages. When project lands are sold, buyers acquire project water rights that the seller owned. These aspects of projects are the same for unrestricted land and for restricted Indian

land. n371

COMPUTER-ASSISTED RESEARCH

LEXIS: indian! w/15 irrigat! w/5 project!

FOOTNOTES:
(n1)Footnote 320. *207 U.S. 564 (1908).* In section 7 of the General Allotment Act of 1887, Congress implied that reservations had water rights, but the statute did not say what the nature of the rights might be. *See supra* § 57.06(b)(3).

(n2)Footnote 321. Darla J. Mondou, The American Indian Agricultural Resources Management Act: Does the Winters Water Bucket Have a Hole in it? *3 Drake J. Agric. L. 381 (1998). See* chapter 50.

(n3)Footnote 322. California, Oregon, and Washington are "mixed" states that first recognized riparian rights, then converted to the prior appropriation system. *See* chapter 50. Indian rights have been contested in arid parts of these states.

(n4)Footnote 323. *See* chapter 50.

(n5)Footnote 324. In re General Adjudication of All Rights to Use Water in *Gila River System and Source, 35 P.3d 68 (Ariz. 2001)* (creation of a federally reserved water right in an Indian reservation is not dependent on beneficial use; the reservation retains its priority despite non-use); *Compare* In re General Adjudication of All Rights to Use Water in *Big Horn River System, 48 P.3d 1040 (Wyo. 2002)* (non-Indian purchasers of Indian allotments obtain reserved water rights but only for acreage irrigated by Indian predecessors or put under irrigation within reasonable time after purchase), *with United States v. Gila Valley Irr. Dist., 31 F.3d 1428 (9th Cir. 1994)* (history of irrigation rights in Gila Valley). *E.g.*, United States v. Gila River Irr. Dist., No. 59 Globe Eq. decree at 86 (D. Ariz., June 29, 1935). *See* James L. Merrill, Aboriginal Water Rights, 20 Nat. Resources J. 45 (1980).

(n6)Footnote 325. *Compare Nevada v. United States, 463 U.S. 110 (1983)* (tribal fishing right compromised), *with United States v. Adair, 723 F.2d 1394 (9th Cir. 1983)* (tribal fishing right defended), *cert. denied, 467 U.S. 1252 (1984).* Most fishing tribes were in wet areas.

(n7)Footnote 326. *See* Winters v. United States, *supra* note 309, *207 U.S. at 576.*

(n8)Footnote 327. *See 207 U.S. at 565-567, 576-577;* Cohen, *supra* n. 1, at 578-581.

(n9)Footnote 328. *See 207 U.S. at 577;* Richard B. Collins, "Indian Allotment Water Rights," *20 Land & Water L. Rev. 421, 423-426 (1985).* The decree in *Winters* protected only the reservation's actual use at the time, 5,000 miner's inches of water. *See infra* § 57.10(d).

(n10)Footnote 329. *E.g., Arizona v. California, 373 U.S. 546 (1963), decree entered, 376 U.S. 340 (1964)* (executive order reservations), *amended, 466 U.S. 144 (1984).* In re General Adjudication of All Rights to Use Water in *Gila River System and Source, 35 P.3d 68 (Ariz. 2001)* (indians are entitled to broad interpretation on water rights in order to further self-sufficiency, but under the Winters doctrine, the reservation only retains rights to water necessary to fulfill the purposes of the Indian reservation, no more). *See* Cohen, *supra* n. 1, at 585-587.

(n11)Footnote 330. *426 U.S. 128 (1976); but see Potlatch Corp. v. United States, 12 P.3d 1260 (Idaho 2000).*

(n12)Footnote 331. *See New Mexico v. Aamodt, 618 F. Supp. 993, 1010 (D. N.M. 1985); Tweedy v. Texas Co., 286 F. Supp. 383 (D. Mont. 1968).*

(n13)Footnote 332. In re General Adjudication of All Rights to Use Water in the *Big Horn River System, 753 P.2d*

76, 99-100 (Wyo. 1988), aff'd by equally divided vote sub nom. Wyoming v. United States, 492 U.S. 406 (1989). The Supreme Court's review was confined to the issue of the proper measure of the tribe's irrigation right; on the groundwater issue, certiorari was denied. *See 492 U.S. 926 (1989); 488 U.S. 863 (1989); 57 U.S.L.W. 3267, 3319 (1989).* The state court's groundwater ruling confirmed Indian rights in existing domestic wells. What was denied was the tribe's claim to unused groundwater rights for irrigation and other purposes.

(n14)Footnote 333. *See* chapter 50.

(n15)Footnote 334. *Id.*

(n16)Footnote 335. *See* Collins, *supra* n. 317, at 430-431.

(n17)Footnote 336. *See supra* notes 313, 314 and accompanying text.

(n18)Footnote 337. *207 U.S. at 576-577.*

(n19)Footnote 338. In re Big Horn River System, *supra* note 321, *753 P.2d at 94-99. But see United States v. Adair, 187 F. Supp. 2d 1273 (D. Or. 2002)* (Indian tribes' water rights included a right to water to support the resources that the tribes gathered in addition to the resources the tribes hunted, fished, and trapped).

(n20)Footnote 339. *See* Collins, *supra* note 317, at 429-430. Traditional fishing was not at issue in the *Big Horn* case; it has been recognized in appropriate cases. *See supra* note 314 and accompanying text.

(n21)Footnote 340. *207 U.S. at 577;* Capossella, Peter, "Indian Reserved Water Rights in the Missouri Basin." Great Plains Nat. Resources J. Vol. 6 (Spring-Summer 2002) 131.

(n22)Footnote 341. *See* Collins, *supra* note 317, at 439-442; Cohen, *supra* n. 1, at 728-732; *infra* § 57.10(g).

(n23)Footnote 342. *See, e.g., Colorado River Water Conserv. Dist. v. United States, 424 U.S. 800 (1976).*

(n24)Footnote 343. *See Nevada v. United States, 463 U.S. 110 (1983);* National Water Commission, Water Policies for the Future - Final Report to the President and to the Congress of the United States 474-475 (1975); Cohen, *supra* n. 1, at 596-599.

(n25)Footnote 344. *373 U.S. 546 (1963), decree entered, 376 U.S. 340 (1964), decree amended, 383 U.S. 268 (1966), supplemental decree entered, 439 U.S. 419 (1979), modified, 460 U.S. 605 (1983), second supplemental decree entered, 466 U.S. 144 (1984).* The five reservation tribes involved intervened in 1979. *460 U.S. at 612-615.*

(n26)Footnote 345. *See Arizona v. California, 460 U.S. 605, 615-628 (1983), amended, 466 U.S. 144 (1984).*

(n27)Footnote 346. Act of July 10, 1952, ch. 651, § 208, *66 Stat. 560* (*codified at 43 U.S.C. § 666).*

(n28)Footnote 347. *United States v. District Ct. for Eagle County, 401 U.S. 520 (1971).*

(n29)Footnote 348. *Colorado River Water Conservation Dist. v. United States, 424 U.S. 800 (1976).*

(n30)Footnote 349. *See, e.g., United States v. Superior Ct. of Maricopa Country, 144 Ariz. 265, 697 P.2d 658 (Ariz. 1985); State ex rel. Greely v. Confederated Salish & Kootenai Tribes, 712 P.2d 754 (Mont. 1985);* In re Big Horn River System, *supra* note 321.

(n31)Footnote 350. *See, e.g.,* In re Big Horn River System, *supra* note 321. The Supreme Court's 4-4 vote in this case implies that four justices were willing to reexamine the practicably irrigable acreage standard. *See also Escondido Mut. Water Co. v. La Jolla Band of Mission Indians, 466 U.S. 765 (1984); Arizona v. California, 460 U.S. 605 (1983),*

amended, 466 U.S. 144 (1984).

(n32)Footnote 351. *E.g., United States v. Anderson, 591 F. Supp. 1 (E.D. Wash. 1982), aff'd in part, rev'd in part, 736 F.2d 1358 (9th Cir. 1984); Colville Confederated Tribes v. Walton, 647 F.2d 42, 48* (9th Cir.), *cert. denied, 454 U.S. 1092 (1981). See* Frank J. Trelease, Indian Water Rights for Mineral Development, in Natural Resources Law on American Indian Lands 230-233 (Peter Maxfield ed. 1977).

(n33)Footnote 352. *In re Big Horn River System, 835 P.2d 273 (Wyo. 1992).*

(n34)Footnote 353. *See supra* §§ 57.04(a), 57.08(a); chapter 50.

(n35)Footnote 354. Colorado Ute Water Rights Settlement Act of 1988, Pub. L. 100-585, § 5, *102 Stat. 2973, 2974* (transfers confined to Upper Colorado River Basin); Ft. Hall Indian Water Rights Act of 1990, Pub. L. 101-602, § 6(a), (h), *104 Stat. 3059, 3061* (transfers allowed only within reservation); Southern Arizona Water Rights Settlement Act of 1982, Pub. L. 97-293, tit. III, § 306(c), *96 Stat. 1274, 1280* (unlimited transfers). Other statutes allow long-term leases for use on non-Indian land. *E.g.*, Ft. McDowell Indian Community Water Rights Settlement Act of 1990, Pub. L. 101-628, § 407(f), (g), *104 Stat. 4480, 4488* (100 year leases for use only within 3 Arizona counties). *See* Clinton, Newton & Price, *supra* n. 238, at 911-914.

(n36)Footnote 355. *See Holly v. Yakima Indian Nation, 655 F. Supp. 557 (E.D. Wash. 1985), aff'd mem., 812 F.2d 714 (9th Cir. 1987)* (tribe lacked jurisdiction over non-Indians' use of surplus water on reservation); Collins, *supra* note 317, at 427.

(n37)Footnote 356. *See, e.g.*, limitations that competing interests have obtained in Indian water rights settlement statutes, *supra* note 343, *infra* note 352.

(n38)Footnote 357. *United States v. Powers, 305 U.S. 527 (1939).* On allotment of tribal land, *see supra* § 57.06(b)(1).

(n39)Footnote 358. *See supra* § 57.10(f)(1).

(n40)Footnote 359. *See* Collins, *supra* n. 317, at 436-437.

(n41)Footnote 360. *See supra* § 57.08(b).

(n42)Footnote 361. *See* In re Big Horn River System, *supra* note 321, *753 P.2d at 112-114;* Collins, *supra* note 317, at 445-449.

(n43)Footnote 362. In re General Adjudication of All Rights to Use Water in *Big Horn River System, 48 P.3d 1040 (Wyo. 2002)* (non-Indian purchasers of Indian allotments obtain reserved water rights but only for acreage irrigated by Indian predecessors or put under irrigation within reasonable time after purchase). *See* Collins, *supra* note 317, at 443-456.

(n44)Footnote 363. *E.g.*, Northern Cheyenne Indian Reserved Water Rights Settlement Act of 1992, Pub. L. 102-374, § 5(c), *106 Stat. 1186, 1188;* Ft. McDowell Act, *supra* note 343; Salt River Pima-Maricopa Indian Community Water Rights Settlement Act of 1988, Pub. L. 100-512, § 8, *102 Stat. 2549, 2554* (leases only to named municipalities).

(n45)Footnote 364. *Skeem v. United States, 273 F. 93, 95-96 (9th Cir. 1921). See* Collins, *supra* note 317, at 437-438.

(n46)Footnote 365. *See supra* § 57.08(d)(1).

(n47)Footnote 366. *See San Carlos Apache Tribe v. Superior Court in and for County for Maricopa, 972 P.2d 179 (Ariz. 1999)* (regulating of surface water in Arizona). *See* chapter 50.

(n48)Footnote 367. *Montana v. United States EPA, 941 F. Supp. 945 (D. Mont. 1996)* (Montana tribes granted EPA treatment-as-state status). *See City of Albuquerque v. Browner, 97 F.3d 415 (10th Cir. 1996)* (tribe could establish water quality standards that were more stringent than federal standards). Jane Marx, Jana L. Walker, and Susan M. Williams, "Tribal Jurisdiction over Reservation Water Quality and Quantity," *43 S.D. L. Rev. 315 (1998). See* Cohen, *supra* n. 1, at 604. On the general rule, *see infra* § 57.11(a)(2).

(n49)Footnote 368. *See United States v. Anderson, 736 F.2d 1358, 1363-1366 (9th Cir. 1984)* (state had jurisdiction over water appurtenant to non-Indian land on reservation); *Colville Confederated Tribes v. Walton, 647 F.2d 42, 51-53* (9th Cir.), *cert. denied, 454 U.S. 1092 (1981)* (water system entirely within Indian country under exclusive tribal jurisdiction including non-Indian land); *Holly v. Yakima Indian Nation, 655 F. Supp. 557 (E.D. Wash. 1985), aff'd mem., 812 F.2d 714 (9th Cir. 1987)* (tribe lacked jurisdiction over non-Indians' use of surplus water on reservation); *In re Big Horn River System, 835 P.2d 273, 280-83 (Wyo. 1992)* (reversing trial court decision that substituted tribal regulators for state engineer). *See also* Mark E. Chandler, "A Link Between Water Quality and Water Rights?: Native American Control over Water Quality," *30 Tulsa L.J. 105 (1994);* infra § 57.11(b)(4). *See also* Taiawagi Helton, "Indian Reserved Water Rights in the Dual-System State of Oklahoma," *33 Tulsa L.J. 979 (1998).*

(n50)Footnote 369. *See 25 U.S.C.A. §§ 381*-390; *Scholder v. United States, 428 F.2d 1123* (9th Cir.), *cert. denied, 400 U.S. 942 (1970);* Cohen, *supra* n. 1, at 728-732.

(n51)Footnote 370. *See* 25 C.F.R. pt. 171 (1992) (operation & maintenance of irrigation projects); *id*. pt. 172 (Pueblo Indian lands served by Reclamation project); *id*. pt. 173 (concessions, permits & leases on irrigation project lands); 43 C.F.R. pts. 200-499 (1992) (Bureau of Reclamation).

(n52)Footnote 371. *See* Collins, *supra* note 317, at 439-442.

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CHAPTER 57 INDIAN LAND

7-57 Thompson on Real Property, Thomas Editions § 57.11

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§ 57.11 Property and Tribal Sovereignty.

[Go To Supp]

(a) The Tribal Sovereignty Doctrine.

(1) Recognition.

The parties to early treaties between the United States and the Indian nations intended that tribes continue to exercise internal sovereignty over land reserved to them except for limited federal jurisdiction over interracial matters. In Worcester v. Georgia, the Supreme Court held that Georgia had no jurisdiction over Cherokee territory under the Cherokee treaties and federal statutes, and the court's reasoning applied to most or all of the early treaty reservations. n372 The treaty policy articulated in Worcester is the point of departure for decisions about jurisdiction over all Indian country, whether established by treaty, statute, executive order, or other means, and whether before or after statehood. n373 Congress can alter Worcester's jurisdictional rules by statute. It can limit tribal authority, impose federal standards, or authorize state jurisdiction. The Supreme Court requires that congressional intent to limit tribal authority be clear, and this is an important restraint on the power. For example, federal statutes of general application are often held not to apply to tribes or to reservation Indians. But the court has characterized Congress's substantive power as plenary and has rejected claims of constitutional limits to the power. n374

COMPUTER-ASSISTED RESEARCH

LEXIS: sovereign! or jurisdiction! w/15 trib! w/15 land! or country

(2) Sovereignty over Indians in Indian Country.

Jurisdiction over Indians in Indian country continues to be governed by the Worcester precedent. States have authority only when federal law clearly authorizes it. Congress has imposed federal authority in a number of important areas, notably jurisdiction over serious crimes by and against Indians. It has subjected some reservations to state law and courts. But most tribes are left free to govern their members in broad areas that are part of ordinary state jurisdiction outside Indian country. n375

In the 1930s, the federal government undertook to revitalize tribal governments. The Indian Reorganization Act and Courts of Indian Offenses provided standard forms that were promoted to the tribes and widely adopted by them. In the intervening years, many tribes have substantially altered these forms to establish more diverse governmental structures. n376

(3) Sovereignty over Non-Indians in Indian Country.

The most important change in federal law since Worcester involves the status of non-Indians in Indian country. At the time of Worcester, the only non-Indians who could lawfully enter Indian country were government agents or persons admitted by the tribe. Thereafter, Indian country was opened successively to non-Indian passage, presence, residence, and land ownership. In a series of cases, the Supreme Court decided that states have jurisdiction over non-Indians in Indian country in matters not directly affecting Indians. n377 In recent years, tribal governments have sought to exercise greater authority over non-Indians in tribal territory. The Supreme Court has rejected tribal jurisdiction to punish non-Indians criminally. In civil cases, tribes lack general authority over non-Indians based solely on presence within tribal boundaries. n378 But the court has sustained tribal jurisdiction over non-Indians who use tribal land or enter into commercial relations with Indians. n379

COMPUTER-ASSISTED RESEARCH

LEXIS: sovereign! or jurisdiction! w/15 non-indian! w/15 indian! w/2 country

(4) Indian Title and Tribal Sovereignty.

The tribal sovereignty doctrine crucially depends on whether a place is or is not Indian country. This in turn bears some connection to tribal title. Originally the issue was straightforward; land in Indian title, and only such land, was Indian country. But allotting and opening of reservations complicated the question. So did the practice of restoring land to tribes, rather than simply reserving part of their original holdings. Statutory anomalies arose, and judicial decisions were not always consistent. n380

In 1948 Congress enacted a comprehensive definition of Indian country. n381 This statute and its judicial interpretations have resolved most major problems that had arisen under prior law. The statute defines Indian country as reservations, allotments, and "dependent Indian communities." It specifies that reservations established after statehood are included and that all land within reservation boundaries, regardless of ownership, is Indian country. Application of the statute continues to present courts with disputes about whether a particular location is a reservation or a dependent Indian community. n382

COMPUTER-ASSISTED RESEARCH

LEXIS: title! w/15 sovereign! w/5 indian! or trib! w/5 country

(5) Tribal Sovereign Immunity.

Tribes have governmental immunity from suit in federal or state courts unless lawfully waived by the tribe or overridden by Congress. The immunity is similar to that of the federal and state governments, except that tribes have enacted few waivers to suit in their own courts, many tribes none at all, in contrast to the broad internal waivers in federal and state law. n383 Immunity protects against remedies that operate retroactively against the tribe, such as judgments for money damages and adjudications of land title. It does not bar injunctions against tribal officials that operate in the future, by analogy to the doctrine of *Ex parte Young*. n384

COMPUTER-ASSISTED RESEARCH

LEXIS: trib! w/5 immunity

(6) Rights of Persons Under Tribal Jurisdiction.

While Indian nations are subject to authority of Congress, they are not directly limited by most of the personal rights guarantees in the Constitution. The original Bill of Rights limited only the federal government, and the Fourteenth Amendment expressly applies only to states. n385 However, in 1968 Congress passed the Indian Civil Rights Act, which imposed on tribal governments most of the personal rights guarantees found in the Bill of Rights and Fourteenth Amendment. n386 The statute gave federal courts jurisdiction to issue writs of habeas corpus to persons in tribal custody. But Congress did not give federal courts jurisdiction to hear civil actions brought to enforce the Act; tribal governments have exclusive authority over civil remedies. n387 Federal civil rights statutes of general application have been accommodated to Indian country in a variety of ways. n388

COMPUTER-ASSISTED RESEARCH

LEXIS: person! w/2 right! w/30 jurisdiction w/15 indian! or trib!

(b) Effects of Tribal Sovereignty on the Law of Real Property.

Particular jurisdictional rules applicable to Indian country are complex, and many are only distantly related to land law. Tribal law can define internal property rights of tribal members and can govern some disputes between members and non-members. However, Indian land is subject to so much federal control that tribal law plays a fairly small part in the Indian country law of real property. Similarly, tribal institutions have had only a minor role in enforcement of Indian country land law. Present federal policy favors increasing the authority of tribal governments, so this pattern may change. n389

There are two important effects of tribal sovereignty on real property law in Indian country. When an activity is heavily regulated or taxed under state or federal law, Indian immunity or exemption can significantly increase property values. One subject already addressed is fishing rights. Immunity from state regulation makes Indian fishing rights more valuable. n390 On the other hand, when tribal governments impose taxes or regulations, they can limit property values. This section discusses important kinds of Indian immunities and tribal impositions.

COMPUTER-ASSISTED RESEARCH

LEXIS: trib! or indian! w/15 law! w/30 real w/1 property

(1) State and Federal Taxes.

Immunity of restricted Indian land from state and local land taxes has been a basic federal policy from the nation's founding. Many statutes expressly provide that restricted Indian land shall not be taxable. Courts have also found exemption based on the trust title to Indian land. Unrestricted land owned by Indians in tribal Indian country is non-taxable based on the general immunity of reservation Indians from state law. Other federal statutes expressly authorize state taxation of restricted Indian land, reflecting the assumption that express consent is necessary. n391

Indians have no inherent immunity from federal taxes, but exemptions from taxation appear in the tax laws. The most important is exemption of tribes (but not of individual Indians) from federal income tax. The Tax Code defines taxable entities as persons, corporations, trusts, and estates. State and local governments are not taxable entities, nor are Indian tribes. However, federal laws taxing and regulating all employers probably apply to Indian tribes acting as employers. n392

The express tax exemption of Indian allotments also bars federal income taxation of income derived directly from allotted land. The exemption does not extend to business activities conducted on the land that are not inherently connected to it, and the exemption does not apply to income of Indians from tribal land. n393

Indian immunities from personal taxation by states derive mostly from the general Indian country immunity from state jurisdiction. When the incidence of a state tax falls on Indians or tribes in Indian country, the state lacks jurisdiction to tax unless a federal statute explicitly consents. Most litigation has arisen over state income and sales taxes, but the rule generally applies to all state taxes. n394

In recent years the most frequent source of litigation over state taxes has arisen from taxation of Indian country transactions between Indians and non-Indians. When the incidence of the tax is on the Indian party, the state lacks jurisdiction to tax based on the rule stated above. When the incidence of the tax is on the non-Indian party, state jurisdiction is not preempted by Indian country immunity without more. But the Supreme Court has interpreted some federal statutes governing Indian land use to bar state taxation more specifically. In general, the court has found state authority lacking when commercial activity relates to "reservation value," such as harvesting tribal timber or hunting on tribal land. When commercial activity is transitory, the court sustains state jurisdiction. n395 But the court has also sustained state power to tax the "reservation value" of mineral production from Indian land, and the court has invalidated state taxation of the transitory activities of non-Indians selling most kinds of goods and chattels to Indians. n396 Each statutory scheme must be analyzed according to the court's criteria. A prominent application of these rules is to cigarette taxes, where the level of state taxation is so high that sales free of state taxes enjoy a significant competitive advantage. Indian country sales to Indian buyers are exempt, whether the tax incidence is on sellers or buyers. Sales by Indian sellers to non-Indian buyers are exempt when the tax incidence is on sellers. When the tax incidence is on non-Indian buyers, the state tax is lawful, and the state can compel Indian and tribal sellers to collect and remit the tax. n397

COMPUTER-ASSISTED RESEARCH

LEXIS: state or federal w/2 tax! w/30 indian! w/5 land!

(2) Tribal Taxes.

Tribal governments may be barred from taxing allotted land and its income by the express tax exemption of allotments. n398 Otherwise, tribes have broad authority to tax their members, but reservation poverty limits the effectiveness of doing so. Also, many tribes get substantial income from tribally-owned resources. Tribes can tax non-Indians in tribal territory who use tribal land or enter into commercial relations with Indians. Notably, tribal taxation of mineral and business lessees of tribal land has been sustained. n399 This authority is less attractive when states have concurrent jurisdiction to tax the same transaction; double taxation deters investments. Some tribes and states have made tax compacts to divide tax resources and avoid double taxation. n400

COMPUTER-ASSISTED RESEARCH

LEXIS: trib! w/2 tax!

(3) Gambling and Alcohol.

The possession, manufacture, and sale of alcoholic beverages in Indian country is governed by federal statutes. Federal law bans alcohol completely except to the extent that the governing tribe consents. But if a tribe consents, sales must also comply with state law. Hence, tribes and states have concurrent jurisdiction to license and tax transactions allowed by federal law. n401

Regulation of gambling in Indian country involves significant regulatory values. Traditionally, most states allowed bingo but forbade other kinds of gambling. In the 1970s, Indians and tribes began to operate bingo games in Indian country, and the Indian games operated without state licenses and offered higher stakes than states allowed. Most state efforts to suppress the games were rejected by the courts. n402 But Indian and tribal attempts to operate other kinds of gambling establishments were suppressed under federal law. n403 In 1988, Congress passed the Indian Gaming Regulatory Act. n404 The Act establishes a National Indian Gaming Commission. It confirms tribal authority over Indian country bingo and related games but also subjects them to federal oversight by the Commission. The Act establishes a complex procedure for tribes to enter into compacts with states to govern other kinds of gambling in Indian country. Many compacts have been made, and some tribes operate extensive gambling enterprises. n405 Other state governments have refused to enter into compacts, and tribes have sued to compel good faith negotiations under the statute. Courts have reached conflicting results. n406 The Act bans gaming on Indian lands acquired after 1988, but provides for a waiver of that ban by the Secretary of the Interior, subject to the concurrence of the Governor of the State in which the gaming is to occur. This requirement of gubernatorial concurrence has been the subject of controversy and at least one lower court has held it to violate the Appointments Clause, because it encroahes on the authority of the executive branch. n407

COMPUTER-ASSISTED RESEARCH

LEXIS: indian! w/30 statute! w/15 gambling or alcohol

(4) Environmental Regulation.

Indian land in Indian country is generally subject to tribal and not state regulation, and tribes regulate less than states. However, the field of environmental regulation is dominated by federal law. As noted above, application of federal law to reservation Indians is a question of congressional intent for each statute. n408

Earlier federal laws regulating the environment did not expressly address application in Indian country, and courts had to decide by implication. The most important statute is the National Environmental Policy Act. One court held that secretarial approval of the leasing of Indian land is an event governed by the act. n409 The Secretary of the Interior applies the act, producing a complex body of administrative law. n410 The Clean Air Act does not mention Indian country, but regulations under it delegate important authority to tribes, which has been sustained. n411 In more recent statutes, Congress has expressly provided a role for tribal governments. n412

COMPUTER-ASSISTED RESEARCH

LEXIS: environment! w/5 regulat! w/30 indian! w/5 land! or country

(c) Hawaii and Alaska.

The tribal sovereignty doctrine has not been recognized for Hawaiian Natives. n413 In Alaska, the doctrine applies to the one reservation in the state, but its application to other Native lands is uncertain. Native Alaskan villages claim inherent sovereignty and claim statutory powers under the Indian Reorganization Act, but many aspects of Native sovereignty are limited by federal statutes and by lack of recognized Indian country in the state. n414

(d) Tribal Sovereignty and International Law.

In the formative years of the United States, many Indian nations asserted sovereign rights greater than those recognized by the law of the United States. n415 Under the United Nations, international recognition of distinct national rights of indigenous peoples has increased, and some Indian nations are again asserting greater sovereignty. n416 These efforts

have not yet affected domestic law, but it is possible that more international norms will become enforceable domestically in the future.

FOOTNOTES:
(n1)Footnote 372. *31 U.S. (6 Pet.) 515 (1832). See supra* § 57.04(c).

(n2)Footnote 373. *See* Collins, *supra* note 161, at 374-381.

(n3)Footnote 374. *See id*. at 367-370. *See also* John T. Tutterow, "Federal Review of Tribal Court Decisions: In Search of A Standard or a Solution for the Problem of Tribal Court Review by the Federal Courts," *23 Okla. City U. L. Rev. 459 (1998). See also* Timothy M. Reynolds, "Federal Indian Law," *75 Den. U. L. Rev. 997 (1998).*

(n4)Footnote 375. *See* Cohen, *supra* n. 1, at 207-385. The status of tribal authority over Indians who are not members of the governing tribe is uncertain. In *Duro v. Reina, 495 U.S. 676 (1990),* the Supreme Court equated them with non-Indians and held that tribes lack criminal jurisdiction over them; *but see Mousseaux v. U.S. Com'r of Indian Affairs, 806 F. Supp. 1433 (D. S.D. 1992); Winer v. Penny Enters, 674 N.W.2d 9 (N.D. 2004)* (State had no jurisdiction to prosecute traffic violation that occurred on state road inside Indian reservation and that was committed by an Indian.) *See also Washington v. Colville Confederated Tribes, 447 U.S. 134, 160-61 (1980)* (non-member Indians held subject to state tax). Congress then enacted a statute intended to overturn *Duro*. Act of Nov. 5, 1990, Pub. L. 101-511, tit. VII, § 8077, *104 Stat. 1892* (temporary); Act of Oct. 28, 1991, Pub. L. 102-137, *105 Stat. 646* (permanent) (*codified at 25 U.S.C. § 1301).* Whether this statute will be sustained by the court, and the scope of its application, are uncertain. *See* Nell Jessup Newton, "Permanent Legislation to Correct Duro v. Reina," *17 Am. Indian L. Rev. 109 (1992). See also State v. Zornes, 584 N.W.2d 7 (Minn. App.1998)* implied overruling, *State v. Johnson, 598 N.W.2d 680 (Minn. 1999); State v. Busse, 616 N.W.2d 760 (Minn. Ct. App. 2000)* (state could enforce statute prohibiting driving under cancellation of a license against tribal members on reservation land). *See also State v. Couture, 587 N.W.2d 849 (Minn. App.1999)* (state had jurisdiction to charge tribal member who was involved in a single-car accident while driving on reservation land while under the influence of alcohol); *Florida Paraplegic Assn, Inc. v. Miccosukee Tribe of Indians of Florida, 166 F.3d 1126 (5th Cir. 1999)* (where Indian tribe has not waived sovereign immunity under statute, tribe retains its common-law immunity from private suits unless Congress unequivocally express its intent to abrogate Indian tribe's sovereign immunity in his case, Indian tribe was not amenable to private suits alleging violations of public accessible accommodations to disabled).

(n5)Footnote 376. *See id*. at 144-206, 332-348.

(n6)Footnote 377. The leading case was *United States v. McBratney, 104 U.S. 621 (1882). Arizona v. Sorkhabi, 46 P.3d 1071 (Ariz. App. 2002)* (state has exclusive jurisdiction over crimes committed by non-Indians against non-Indians on reservation as well as victimless crimes by non-Indians on reservation based on the fact that these crimes do not involve essential tribal relations or affect the rights of Indians). The General Crimes Act creates federal jurisdiction over crimes committed by non-Indians against Indians in Indian country. *United States v. Billadeau, 275 P.3d 692 (8th Cir. 2001). See Cordova v. Holwegner, 971 P.2d 531 (Wash. App. Div. 1999)* (tribal sovereignty over members and non-members does not extend beyond what is necessary to protect self-government and it cannot survive without express congressional delegation [treaty or statute]; tribes retain only that sovereignty necessary to control the tribes' internal relationships and to preserve their own unique customs and social order). *See* Cohen, *supra* n. 1, at 261-385.

(n7)Footnote 378. *Big Horn County Elec. Co-op., Inc. v. Adams, 219 F.3d 944 (9th Cir. 2000)* (stating the tribe could not assess an ad valorem tax on a utility company that held a right-or-way easement over the reservation).

(n8)Footnote 379. *Fidelity and Guaranty Ins. Co. v. Bradley, 212 F. Supp. 2d 163 (W.D.N.Y. 2002)* (tribal court had jurisdiction over dispute between non-Indian insurer and Indian with whom insurer had entered into consensual contractual relationship for construction project on tribal land for benefit of tribe); *N.L.R.B. v. Pueblo of San Juan, 228 F.3d 1195 (10th Cir. 2000), superseded by 280 F.2d 1278 (10th Cir. 2000)* (holding that the National Labor Relations

Act did not prohibit the enforcement of a tribal right-to-work ordinance when a non-Indian company had entered into commercial activities on the reservation); *but see Bugenig v. Hoopa Valley Tribe, 229 F.3d 1210 (9th Cir. 2000)* (an Indian tribe is not allowed to exercise jurisdiction over a nonmember unless Congress provides a "clear statement" granting jurisdiction to the tribe). Nichols, Peter, "American Style Justice in No Man's Land." Ga. L. R. Vol. 36 (Summer 2002) 895; Baker, Mark, Student Author, "The Hollow Promise of Tribal Power to Control the Flow of Alcohol Into Indian Country." Va. L. Rev. Vol. 88 (May 2002) 685; *Merrion v. Jicarilla Apache Tribe, 455 U.S. 130 (1982); Montana v. United States, 450 U.S. 544 (1981); Oliphant v. Suquamish Tribe, 435 U.S. 191 (1978); but see United States v. Weaselhead, 156 F.3d 818 (8th Cir. 1998).* On the status of non-member Indians, *see supra* note 364. *See generally* Robert Laurence, The Dominant Society's Judicial Reluctance to Allow Tribal Civil Law to Apply to Non-Indians: Reservation Diminishment, Modern Demography and the Indian Civil Rights Act, *30 U. Rich. L. Rev. 781 (1996). See Means v. Northern Cheyenne Tribal Court, 154 F.3d 941 (9th Cir. 1998), overruled by United States v. Enas, 255 F.2d 662 (9th Cir. 2001). But see United States v. Enas, 204 F.3d 915 (9th Cir. 2000)* (tribal courts do not have criminal jurisdiction over non-Indians; amendment to Indian Civil Rights Act, delegating to tribes the power to exercise criminal jurisdiction over all Indians could not be applied retrospectively). *See also County of Lewis v. Allen, 163 F.3d 509 (9th Cir. 1998)* (Indian tribes lack authority over the conduct of nonmembers on non-Indian land within reservation unless (1) there is a consensual relationship between a nonmember and a tribe or a member of a tribe, and (2) where such authority is necessary to preserve tribal self-government).

(n9)Footnote 380. *See* Cohen, *supra* n. 1, at 27-34.

(n10)Footnote 381. *18 U.S.C. § 1151.*

(n11)Footnote 382. *E.g., Oklahoma Tax Comm'n v. Sac & Fox Nation, 508 U.S. 114 (1993); see also LaRock v. Wisconsin Dept. of Revenue, 606 N.W.2d 580,* (Wis. Ct. App. 1999). *Oklahoma Tax Comm'n v. Citizen Band of Potawatomi Tribe, 498 U.S. 505 (1991); see also Florida v. Seminole Tribe of Florida, 181 F.3d 1237 (11th Cir. 1999). Solem v. Bartlett, 465 U.S. 463 (1984); City of Sherrill, New York v. Oneida Indian Nation of New York, 125 S. Ct. 1478 (2005)* (parcels of land which the tribe purchased and which were within the boundaries of the former reservation, did not constitute a unification of the fee and aboriginal title, which would have enable the tribe to assert sovereignty over the parcels and avoid payment of city property taxes). *See* Cohen, *supra* n. 1, at 34-46. *See also* Daniel I.S.J. Rey-Bear, "The Flathead Water Quality Standards Dispute: Legal Bases for Tribal Regulatory Authority Over Non-Indian Reservation Lands," *20 Am. Indian L. Rev. 151 (1996).*

(n12)Footnote 383. *Friends of East Willits Valley v. County of Mendocino, 23 Cal. Rptr. 2d 708 (Cal. App. 2002)* (tribe waved its sovereign immunity in state court). *See also* Supreme Court Leading Cases of 1997, II. Federal Jurisdiction and Procedure, *112 Harv. L. Rev. 273 (1998). Oklahoma Tax Comm'n v. Citizen Band of Potawatomi Tribe, 498 U.S. 505, 509 (1991); see also Florida v. Seminole Tribe of Florida, 181 F.3d 1237 (11th Cir. 1999). See* Clinton, Newton & Price, *supra* n. 239, at 337-343. Whether and when tribes can be sued in their own courts depends on the law of each tribe. *See* Ralph W. Johnson & James M. Madden, Sovereign Immunity in Indian Tribal Law, *12 Am. Indian L. Rev. 153 (1984). See also* Supreme Court Leading Cases of 1997, II. Federal Jurisdiction and Procedure, *112 Harv. L. Rev. 273 (1998).*

(n13)Footnote 384. *Iowa Mut. Ins. Co. v. LaPlante, 480 U.S. 9 (1987); but see Strate v. A-1 Contractors, 520 U.S. 438 (1997); Bowen v. Doyle, 230 F.3d 525 (2d Cir. 2000).National Farmers Union Ins. Cos. v. Crow Tribe, 471 U.S. 845 (1985); Santa Clara Pueblo v. Martinez, 436 U.S. 49 (1978). See Puyallup Tribe v. Department of Game, 433 U.S. 165, 168-73 (1977)* (sustaining state court jurisdiction over tribal members represented in lawsuit by tribe). *See also In re Greene, 980 F.2d 590 (9th Cir. 1992), cert. denied, 114 S. Ct. 681 (1994)* (suit against tribal business by bankruptcy trustee barred by tribal immunity).

(n14)Footnote 385. *Talton v. Mayes, 163 U.S. 376 (1886).*

(n15)Footnote 386. Apr. 11, 1968, Pub. L. 90-284, tit. II, *82 Stat. 77* (*codified as amended at 25 U.S.C. §§ 1301*

-1303). In 1990 Congress amended ICRA to include the inherent power of Indian tribes to exercise criminal jurisdiction over all Indians whether or not members of that particular tribe. *See United States v. Lara, 294 F.3d 1004 (8th Cir. 2002).*

(n16)Footnote 387. *Santa Clara Pueblo v. Martinez, 436 U.S. 49 (1978). But see* Dry Creek Lodge, Inc. v. Ara pahoe & *Shoshone Tribes, 623 F.2d 682* (10th Cir.), *cert. denied, 449 U.S. 1118 (1981)* (sustaining federal court jurisdiction over claim of taking of property by tribe). *See also* Dennison v. Tucson Gas & Elec. Co., 2 Indian L. Rep. No. 4 p. 52 (Navajo Sup. Ct. 1974) (use rights in tribal land a property right protected by Indian Civil Rights Act).

(n17)Footnote 388. *See* Cohen, *supra* n. 1, at 670-672.

(n18)Footnote 389. *See Golden Hill Paugussett Tribe of Indians v. Town of Trumbull, 716 A.2d 920 (Conn. App. 1998)* (a tribal leader was precluded under collateral estoppel doctrine from relitigating issue of leader's authority to bring quiet title action on behalf of Indian tribe). *See* Indian Self-Determination Act, Jan. 4, 1975, Pub. L. 93-638, *88 Stat. 2203* (*codified as amended at 25 U.S.C. §§ 450*-450n). A few reported decisions address tribal authority over land subject to federal restrictions. *E.g., Conroy v. Conroy, 575 F.2d 175 (8th Cir. 1978)* (sustaining authority of tribal divorce court to divide restricted property); In re Estate of Wauneka, 13 Indian L. Rep. 6049 (Navajo Sup. Ct. 1986) (probate of use rights in tribal land).

(n19)Footnote 390. *See supra* § 57.10. In addition, Congress has expressly exempted income from treaty fishing rights from the federal income tax. I.R.C. §§ 3121(a)(21), 7873.

(n20)Footnote 391. *County of Yakima v. Yakima Indian Nation, 502 U.S. 251 (1992)* (federal statute authorized ad valorem tax on former allotments but not excise tax on land sales). *See* Cohen, *supra* n. 1, at 405-412, 416-431. *See Cass County, Minnesota v. Leech Lake Band of Chippewa Indians, 524 U.S. 103 (1998)* (when Congress makes Indian reservation land freely alienable, it manifests an unmistakably clear intent to render the land subject to state and local taxation and the repurchase of the land by an Indian tribe does not cause the land to reassume tax-exempt status). *See also* Scott A. Taylor, "State Property Taxation of Tribal Fee Lands Located Within Reservation Boundaries: Reconsidering of Yakima v. Confederated Tribes and Bands of the Yakima Indian Nation and Leech Lake Band of Chippewa Indians v. Cass County," *23 Am. Indian L. Rev. 55 (1998). See also* David J. Bodney, "Taxing Times in Indian Country," *34 Arizona Attorney 22 (1998).*

(n21)Footnote 392. I.R.C. § 7871. *See* Robert A. Williams, Jr., Small Steps on the Long Road to Self-Sufficiency for Indian Nations: The Indian Tribal Governmental Tax Status Act of 1982, 22 Harv. J. on Legis. 335 (1985); Cohen, *supra* n. 1, at 389-404. *See Cree v. Flores, 157 F.3d 762 (9th Cir. 1998)* (the 1855 Treaty with Yakama Indian Nation exempted them from various Washington state truck license and overweight permit fees as applied to non-tribal member agents of Yakama Nation who had been hired to drive log trucks as permitted under Tribal employment ordinance).

(n22)Footnote 393. *See* Cohen, *supra* n. 1, at 391-399. *See* Rose Litvack, "State Taxation of Business Conducted on Indian Reservations," *16 J. State Tax'n 31,* Spring 1998.

(n23)Footnote 394. *E.g., Montana v. Blackfeet Tribe, 471 U.S. 759 (1985)* (oil & gas severance tax on tribal royalties struck down; claim of congressional consent rejected as ambiguous). *See generally* Cohen, *supra* n. 1, at 406-412.382. *Flat Center Farms, Inc. v. State Dept. of Revenue, 49 P.2d 578 (Mont. 2002)* (state could not impose corporate license tax on Indian-owned corporation that did business entirely within reservation). *Narragansett Indian Tribe v. Rhode Island, 296 F. Supp. 2d 153 (D. R.I. 2003)* (state sales tax fell on non-Indian consumers of cigarettes and state held authority to enforce tax by entry onto property.); *People v. Tracy, 764 N.Y.S.2d 585 (N.Y. Misc. 2003)* (non-Indian purchase of tobacco on Indian reservation subject to state taxes). *Narrangansett Indian Tribe of Rhode Island v. Rhode Island, 2005 WL 1119758 (1st Cir. 2005)* (when the state sought to enforce the criminal provisions of its cigarette tax law on tribal settlement lands, it violated the tribe's sovereign rights).

(n24)Footnote 395. *E.g., White Mtn. Apache Tribe v. Bracker, 448 U.S. 136 (1980)* (taxes on timber production

struck down); *Washington v. Colville Confederated Tribes, 447 U.S. 134 (1980)* (cigarette tax sustained). *Gila River Indian Community v. Waddell, 91 F.3d 1232 (9th Cir. 1996)* (state interests in providing governmental functions critical to success of sporting and cultural events on reservation were sufficient to justify Arizona transaction privilege tax). *See Loveness v. State ex rel. Arizona Dept. of Revenue, 192 Ariz. 224, 963 P.2d 303 (Ariz. App. 1998)* (tribal sovereignty was infringed by state imposition of individual tax on income that non-Indians, who did not reside on Indian reservation, earned from providing logging services on the reservation). *See also Thompson v. Crow Tribe of Indians, 962 P.2d 577 (Mont. 1998)* (Indian tribe was immune from non-tribe taxpayer's state court suit seeking to cancel resort tax liens imposed by tribe on gross receipts of taxpayer's business within reservation boundaries).

(n25)Footnote 396. *Cook v. United States, 86 F.3d 1095 (Fed. Cir. 1996)* (sale of diesel fuel on Indian land not exempt from federal excise tax); *Cotton Petroleum Corp. v. New Mexico, 490 U.S. 163 (1989)* (sustaining oil & gas severance tax); *Central Machinery Co. v. Arizona Tax Comm'n, 448 U.S. 160 (1980)* (sales tax struck down).

(n26)Footnote 397. *Oklahoma Tax Comm'n v. Citizen Band of Potawatomi Tribe, 498 U.S. 505 (1991); see also Florida v. Seminole Tribe of Florida, 181 F.3d 1237 (11th Cir. 1999). Goodman Oil Co. of Lewiston v. Idaho State Tax Commn., 28 P.3d 996 (Idaho 2001)* (Idaho fuel tax imposed legal incident on retailer rather than on distributor). *Washington v. Colville Confederated Tribes, 447 U.S. 134 (1980); Moe v. Confederated Salish & Kootenai Tribes, 425 U.S. 463 (1976). But see Kaul v. State Dept. of Revenue, 970 P.2d 60 (Kan. 1998)* (Indian reservation within boundaries of Kansas was not a "territory" within meaning of statutory motor fuel tax exemption for fuel exported from Kansas to another territory and state could impose motor vehicle tax on nontribal Native American retailers of gasoline on Indian reservation). *See also SAC and Fox Nation of Missouri v. Lafaver, 31 F. Supp. 2d 1298 (D.Kan. 1998), rev'd, 213 F.3d 566 (10th Cir. 2000)* (Indian tribes were exempt from motor-vehicle fuel tax under state statute exempting any fuel transactions where the fuel is exported to any other state or territory, or to any foreign country).

(n27)Footnote 398. *See supra* notes 379, 381 and accompanying text.

(n28)Footnote 399. *E.g., Kerr-McGee Corp. v. Navajo Tribe, 471 U.S. 195 (1985); but see Strate v. A-1 Contractors, 76 F.3d 930 (8th Cir. 1996) aff'd, 520 U.S. 438 (1997). Merrion v. Jicarilla Apache Tribe, 455 U.S. 130 (1982). See* Cohen, *supra* n. 1, at 432-439.

(n29)Footnote 400. *See* Frank Pommersheim, "Tribal-State Relations: Hope for the Future?" *36 S.D. L. Rev. 239, 258-268 (1991);* Cohen, *supra* n. 1, at 380-381, 416.

(n30)Footnote 401. *18 U.S.C. §§ 1154,* 1156, 1161, 3055, 3113, 3488; *25 U.S.C. §§ 251,* 253; *Rice v. Rehner, 463 U.S. 713 (1983); United States v. Mazurie, 419 U.S. 544 (1975). See* Cohen, *supra* n. 1, at 305-308.

(n31)Footnote 402. *California v. Cabazon Band of Mission Indians, 480 U.S. 202 (1986). See also United States v. 103 Electronic Gambling Devices, 223 F.3d 1091* (N.D.Cal) ("MegaMania," an electronic gaming device is a class II gambling device within the meaning of the Indian Gaming Regulatory Act); *United States v. 1020 Electronic Gambling Devices, 38 F. Supp. 2d 1219 (E.D. Wash. 1999)* (while appeal is pending regarding separate judgments of forfeiture of certain gambling devices, tribes do not have to surrender the slot machines). *See* Heide L. McNeil, "Indian Gaming in Arizona: The Great Casino Controversy Continues," *34 Arizona Attorney 12* (9), January 1998. *See also* James H. Frey, "Federal Involvement in the United States Gaming Regulation," 556 Annals Am. Acad. Pol. & Soc. Sci. 138 (1998).

(n32)Footnote 403. *E.g., United States v. Farris, 624 F.2d 890 (9th Cir. 1980); cert. denied, 449 U.S. 1110 (1981); but see United States v. E.C. Investments, Inc., 77 F.3d 327 (9th Cir. 1996). See* Cohen, *supra* n. 1, at 287-297. *See United States v. Santee Sioux Tribe of Nebraska, 135 F.3d 558 (8th Cir. 1998)* (state statute made under IGRA operation of video poker, blackjack, and slot machines prohibited as gambling devices).

(n33)Footnote 404. Oct. 17, 1988, Pub. L. 100-497, *102 Stat. 2467* (*codified as amended at 18 U.S.C. § 1168* & *25 U.S.C.A. §§ 2701*-2721). *See* 25 C.F.R. pts. 501-577 (1994). *See Diamond Game Enterprises, Inc. v. Reno, 9 F. Supp. 2d 13 (D.D.C. 1998) rev'd, 230 F.3d 365 (D.C. Cir. 2000)* (Diamond's gaming device was found to be a class III

gaming device that required tribal-state compact for its legal operation). *See also United States v. The Spokane Tribe of Indians, 139 F.3d 1297 (9th Cir. 1998)* (portions of IGRA remaining in effect, after the Supreme Court declared portions of IGRA permitting tribes to bring suits against states that refused to negotiate gaming compacts were unconstitutional, could not form basis for injunction prohibiting Indian Tribe from engaging in gaming after state allegedly refused to negotiate compact in good faith). *See also* Jeremy P. Pisca, "Betting a Future: The Debate Over the Statutes of Indian Gaming in the State of Idaho," *34 Idaho L. Rev. 651 (1998);* Gregory Elvine-Kreis, "The Effect of the Indian Gaming Regulatory Act on California Native American's Independence," *35 San Diego L. Rev. 179 (1998).*

(n34)Footnote 405. *Artichoke Joe's California Grand Casino v. Norton, 2002 U.S. Dist. LEXIS 14300* (E.D. Cal. July 29,2002) (California compacts allowing tribes to exercise exclusive class III gaming rights on Indian land did not violate due process or equal protection clauses of Constitution). *Confederated Tribes of Siletz Indians of Oregon v. State of Oregon, 143 F.3d 481 (9th Cir. 1998)* (tribal-state compacts regulating class III gambling devices under Indian Gaming Regulatory Act (IGRA) on reservation did not bar state from releasing report under its public record laws). *See also Keweenaw Bay Indian Community v. United States, 136 F.3d 469 (6th Cir. 1998)* (IGRA generally prohibiting gambling on certain Indian lands acquired after October 17, 1988, applied to class III gaming devices authorized by valid tribal-state compact). *See also* N.J. Bride, "Seminole Tribe v. Florida: The Supreme Court's Botched Surgery of the Indian Gaming Regulatory Act," J. Legis. 21(1), p.149-63, 1998; *Miami Tribe of Oklahoma v. United States, 5 F. Supp. 2d 1213 (D. Kan. 1998)* (National Indian Gaming Commission refused Indian tribe's class III gaming management because the proposed operation did not constitute "Indian land" under IGRA). *Confederated Tribes of the Chehalis Reservation v. Johnson, 958 P.2d 260 (Wash. 1998)* (Indian Gaming Regulatory Act did not preempt application of state records act to require disclosure of state gaming commission records of "community contribution" paid by tribes to defray costs of the impact of Indian gaming operations on non-tribal government agencies, under the terms of tribal-state gaming compacts). *See generally* Bennett Cooper, III, "What's in the Cards for the Future of Indian Gaming Law?" *5 Vill. Sports & Ent. L.J. 129 (1998). But see Alabama-Coushatta Tribes of Texas v. Texas, 208 F. Supp. 2d 670 (E.D. Tex. 2002)* (tribes governed by Restoration Act may not conduct gambling operations on reservation lands). *See, e.g., Mashantucket Pequot Tribe v. Connecticut, 913 F.2d 1024 (2d Cir. 1990), cert. denied, 499 U.S. 975 (1991). See generally* I. Nelson Rose, "Gambling and the Law - Update 1993," *15 Hastings Comm. & Ent. L.J. 93 (1992).*

(n35)Footnote 406. *Compare Kickapoo Tribe of Indians v. Kansas, 818 F. Supp. 1423 (D. Kan. 1993), app. pending, with Sault Ste. Marie Tribe of Chippewa Indians v. Michigan, 800 F. Supp. 1484 (W.D. Mich. 1992) vacated and remanded, 517 U.S. 1129 (1996).* Mechoopda Indian Tribe of Chico Rancheria v. Schwarzenegger, 2004, U.S. Dist. LEXIS 8334 (No. CIV. S-03-2327, March 12, 2004) (tribal attempt to force arbitration over gambling license failed because of lack of standing). *See Seminole Tribe of Florida v. Florida, 517 U.S. 44 (1996). See also United States v. Santa Ynez Band of Chumash Mission Indians of Santa Ynez Reservation, 33 F. Supp. 2d 862 (C.D. Cal. 1998)* (state's refusal to negotiate with Indian tribes, which commenced class III gambling in face of legal disputes concerning what kinds of gaming were subject to tribal-state compacts, was not bad faith).

(n36)Footnote 407. *See Confederated Tribes of Siletz Indians of Oregon v. United States, 841 F. Supp. 1479 (D. Or. 1994);* Jason D. Kolkema, "Federal Policy of Indian Gaming on Newly Acquired Lands and the Threat to State Sovereignty: Retaining Gubernatorial Authority Over the Federal Approval of Gaming on Off-Reservation Sites," *73 U. Det. Mercy L. Rev. 361 (1996); Passamaquoddy Tribe v. Maine, 75 F.3d 784 (1st Cir. 1996)* (Maine not subject to Indian Gaming Regulatory Act).

(n37)Footnote 408. *See supra* notes 363, 380 and accompanying text. *See* Judith V. Royster, "Of Surplus Lands and Landfills: The Case of the Yankton Sioux," *43 S.D. L. Rev. 283 (1998). Miccosukee Tribe of Indians v. United States, 2003 U.S. Dist. LEXIS 2255* (No. 02-22778-CIV, February 5, 2003) (clear Congressional intent to protect endangered species allows application of ESA to tribal lands without specific mention of tribal land in the statute.)

(n38)Footnote 409. *Norvell v. Sangre de Cristo Dev. Co., 519 F.2d 370 (10th Cir. 1975); Davis v. Morton, 469 F.2d 593 (10th Cir. 1972). See also* Dean B. Suagee, "Tribal Self-Determination and Environmental Federalism:

Cultural Values As A Force for Sustainablity," 3-Fall Widener L. Symp. J. 229 (1998); M.V.R. Gouda and D. Easterling, "Nuclear Waste and Native America: The MRS Siting Exercise," 9(3) Risk Health Safety & Env't 229 (1998).

(n39)Footnote 410. *See* 25 C.F.R. § 163.27 (1992) (NEPA for forest leases); *57 Fed. Reg. 48430 (1992)* (typical NEPA notice); Dean B. Suagee, "The Application of the National Environmental Policy Act to "Development" in Indian Country," *16 Am. Indian L. Rev. 377 (1991).*

(n40)Footnote 411. 40 C.F.R. § 52.21(g)(4) (1992). *See Nance v. Environmental Protection Agency, 645 F.2d 701 (9th Cir. 1981)* (sustaining earlier version). *Cf. Lyon v. Amoco Prod. Co., 923 P.2d 350 (Colo. App. 1996)* (tribe had exclusive jurisdiction over environmental claims concerning the drilling of wells and production of natural gas on Indian trust lands within Indian reservation).

(n41)Footnote 412. *30 U.S.C.A. § 1300* (strip mining); *33 U.S.C. § 1362*(4) (Water Pollution Control Act; tribes equated with municipalities); *42 U.S.C. § 300f*(10) (Safe Drinking Water Act; same); *id*. §§ 9601(36), 9604(d)(1)(A), 9607(f)(1) (Superfund). *See generally* Mark E. Chandler, *supra* note 357; Walter E. Stern, "Environmental Compliance Considerations for Developers of Indian Lands," *28 Land & Water L. Rev. 77 (1993). See State of Montana v. U.S.E.P.A, 137 F.3d 1135 (9th Cir. 1998)* (Indian tribe retains inherent civil authority over conduct of non-Indians of fee lands within its reservation when that conduct threatens or has some direct impact on health and welfare of that tribe).

(n42)Footnote 413. *See* Getches, Wilkinson & Williams, *supra* n. 2, at 951; Mililani B. Trask, "Historical and Contemporary Hawaiian Self-Determination: A Native Hawaiian Perspective," 8 Ariz. J. Int'l Comp. L. 77 (1991). *See* Jeffrey Wutzke, "Dependent Independence of the Nunavut Model to Native Hawaiian Sovereignty and Self-Determination," *22 Am. Indian L. Rev. 509 (1998).*

(n43)Footnote 414. *See id*. at 933-945. *See also* David M. Blurton, "ANCSA Corporation Lands and the Dependent Indian Community Category of Indian Country," *13 Alaska L. Rev. 211 (1996)* (arguing that ANCSA lands are " 'Indian country,' and are therefore subject to the exercise of tribal sovereign powers").

(n44)Footnote 415. The most important examples in the formative years were tribal alliances with the British against the United States. *See* 1 Prucha, *supra* n. 21, at 61-88. *See also* Cherokee Nation v. Georgia, (Cherokee claim to be foreign state); *Lone Wolf v. Hitchcock, 187 U.S. 553 (1903)* (claim that treaty rights cannot be abrogated by Congress). *See generally* Story, *supra* n. 47, at 12-13 (1840).

(n45)Footnote 416. *See* Getches, Wilkinson & Williams, *supra* n. 2, at 1021-1046; Patrick Thornberry, "International Law and the Rights of Minorities," 141-254 (Clarendon Press 1991); S. James Anaya, "Indigenous Rights Norms in Contemporary International Law," 8 Ariz. J. Int'l Comp. L. 1 (1991).

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Supp. To CHAPTER 57 INDIAN LAND

7-57 Thompson on Real Property, Thomas Editions Supp. to § 57.04

Supp. to § 57.04 Fundamentals.

[Go To Main]

§ 57.04(a) The Federal Restraint on Alienation of Indian Title. [Go To Main]

Add:

For a modern case regarding alienation of Indian land see *Yankton Sioux Tribe v. Podhradsky, 577 F.3d 951 (8th Cir. 2009)* where the court was faced with the issue whether all land not ceded to the United States remained part of the Indian tribe's separate reservation.

§ 57.04(c) Marshall Court Decisions. [Go To Main]

§ 57.04(c)(1) Indian Title Cases.

Add:

For a discussion of how the Supreme Court has looked at federal Indian law since the 1980's see Mathew L. M. Fletcher, "The Supreme Court and the Rule of Law: Case Studies in Indian Law," 55 *Fed. Law.* 26 (April, 2008).

§ 57.04(d) Constitutional Power of Congress. [Go To Main]

Add:

Mathew L. M. Fletcher, "The Supreme Court and the Rule of Law: Case Studies in Indian Law," 55 *Fed. Law.* 26 (2008) (arguing that the Supreme Court has consistently ruled against tribal interests since the late 1980's, creating confusion in the area of Indian law Jurisprudence.)

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Supp. to § 57.05 Tribal Land.

[Go To Main]

Add the following cases to the list of cases where there is a trust relationship between the US and a tribe:

Confederated Tribes and Bands of the Yakama Nation v. United States, 89 Fed.Cl. 589 (2009) ; *Miami Tribe of Oklahoma v. United States, 679 F. Supp. 2d 1269* (D. Kan., 2010) ; *Wilkinson v. United States, 564 F.3d 927 (8th Cir. 2009)* .

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Supp. to § 57.06 Individual Interests in Land.

[Go To Main]

§ 57.06(a) Individual Rights in Tribal Property. [Go To Main]

Add

Spota ex rel. Unkechaug Indian Nation v. Jackson, 10 N.Y.3d 46, 883 N.E.2d 344 (N.Y. 2008) (a tribal member's wife, who was not a member of the tribe but was residing on a reservation allotment, became an "intruder" when the husband transferred the allotment to a brother).

Cermak v. U.S., 478 F.3d 953 (8th Cir. 2007) (action by descendants of tribal member claiming deprivation of rights assigned to the member through issuance of Indian Land Certificates).

§ 57.06(b) Allotments. [Go To Main]

§ 57.06(b)(4) Adjudicating Allotment Rights.

Add:

DuMarce. v. Scarlett, 446 F.3d 1294 (Fed. Cir. 2006) (action by heirs to allotted Indian lands for declaration that returning lands in trust for the tribe was an unlawful taking).

Add:

Spota *ex rel. Unkechaug Indian Nation v. Jackson, 853 N.Y.S.2d 520 (2008)* (a tribal member's wife, who was not a tribal member, resided on a reservation allotment and was an "intruder" by definition of the applicable statute).

§ 57.06(c) Lands of Native Hawaiians. [Go To Main]

Add:

In *Hawaii v. Office of Hawaiian Affairs, 129 S.Ct. 1436 (2009)* , the Supreme Court was faced with the question of whether the Apology Resolution could prevent the State of Hawaii from alienating public lands which the United States acquired when U.S. sovereignty attached to Hawaii. The Supreme Court held that the Apology Resolution did not strip the State of Hawaii of its power to alienate the land ceded to it.

§ 57.06(d) Lands of Native Alaskans. [Go To Main]

Add:

Under ANSCA, the $962.5 million was to be distributed to thirteen "Regional Corporations" which were groups of natives unified by a "common heritage and sharing common interest" and an unspecified number of "Village corporations." *Stratman v. Leisnoi, Inc., 545 F.3d 1161 (9th Cir. 2008)* . To qualify as a village for the purposes of ANSCA the Secretary of the Interior must find that "(A) twenty-five or more Natives were residents of an established village on the 1970 census enumeration date as shown by the census or other evidence satisfactory to the Secretary, who shall make findings of fact in each instance; and (B) the village is not of a modern and urban character, and a majority of the residents are Natives." *43 U.S.C. § 11610(b)(2)*.

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Supp. To CHAPTER 57 INDIAN LAND

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Supp. to § 57.07 The Federal Trust Relationship and Indian Property.

[Go To Main]

§ 57.07(b) Canons of Construction as Judicial Limits on Federal Power. [Go To Main]

Add:

See Guidiville Band of Pomo Indians v. NGV Gaming, LTD, 531 F.3d 767 (9th Cir. 2008) (citing *Montana v. Blackfeet Tribe of Indians, 471 U.S. 759, 766 (1985)* ("One of those canons of construction is that federal statutes relating to Indian Tribes must be 'construed liberally in favor of the Indians.' ").

§ 57.07(c) Treaty and Statutory Trusts. [Go To Main]

Add:

Navajo Nation v. U.S., 501 F.3d 1327 (Fed. Cir. 2007) (action against U.S. for breach of trust in leasing tribal lands for coal mining).

Add:

Yankton Sioux Tribe v. Podhradsky, 529 F. Supp. 2d 1040 (D. S.D. 2007) (land within the original exterior boundaries of the reservation and thereafter taken into trust by the federal government was "Indian country").

§ 57.07(d) Breach of Trust Remedies. [Go To Main]

§ 57.07(d)(2) Sovereign Immunity and Statutes of Limitations.

Add:

See Cheyenne-Arapaho Tribes of Oklahoma v. United States, 80 Fed. Cl. 197 (2007) (holding that Indian tribe action seeking an accounting for mining rights was barred by the statute of limitations.)

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Supp. To CHAPTER 57 INDIAN LAND

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Supp. to § 57.08 Alienation of Interests in Indian Land.

[Go To Main]

§ 57.08(c) Conveyances of Fee Simple Ownership: Mortgages. [Go To Main]

Add:

In re Schugg, 384 B.R. 263 (D. Ariz. 2008) (claim by Ch. 11 bankruptcy trustee to land acquired by debtor within boundary of an Indian reservation).

Add:

Courts generally defer to tribal law to determine tribal membership and what constitutes an "intruder." *Spota ex rel. Unkechaug Indian Nation v. Jackson, 883 N.E.2d 344, 349 (N.Y. 2008)* .

§ 57.08(d) Conveyances of Leaseholds and Servitudes. [Go To Main]

§ 57.08(d)(3) Mining and Oil and Gas Leases and Sales.

Add:

United States v. Navajo Nation, 129 S. Ct. 1547 (2009) (action by tribe alleging that the Secretary of the Interior breached fiduciary duties to the tribe in connection with royalties on a coal mining lease); *In re Natural Gas Royalties, 562 F.3d 1032 (10th Cir. 2009)* (action alleging that natural gas companies underpaid royalties on gas purchased from

Indian lands).

Add:

But see U.S. v. Navajo Nation, 129 S.Ct. 1547 (2009) (Where the Supreme Court rejected an Indian tribe's suit against the Secretary of the Interior for breaching his fiduciary duties with respect to coal mining royalties.).

§ 57.08(f) Involuntary Alienation. [Go To Main]

Add:

Oneida Tribe of Indians of Wisconsin v. Village of Hobart, Wisconsin, 542 F. Supp. 2d 908 (E.D. Wis.) (land within the original boundaries of the reservation was conveyed to tribal members in fee simple, then to third parties, and then reacquired by the tribe; such land was subject to the village's condemnation power).

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Supp. to § 57.09 Fishing, Hunting, and Gathering Rights.

[Go To Main]

§ 57.09(c) Tribal and State Regulation. [Go To Main]

§ 57.09(c)(1) Regulation on Indian Trust Land.

Add:

In addition to federal regulations, Indian fishing rights may be subject to conditions and restrictions vis-a-vis treaties with the U.S. Government. See *U.S. v. Washington, 573 F.3d 701 (9th Cir. 2009)* .

§ 57.09(c)(3) Regulation of Reserved Indian Rights to Fish, Hunt, or Gather on Ceded Lands.

Add:

U.S. v. Washington, 573 F.3d 701 (9th Cir. 2009) .

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Supp. To CHAPTER 57 INDIAN LAND

7-57 Thompson on Real Property, Thomas Editions Supp. to § 57.10

Supp. to § 57.10 Indian Water Rights.

[Go To Main]

§ 57.10(a) The Winters Decision. [Go To Main]

Add:

For a discussion on how the Winters decision is likely to influence a conflict over water rights in North Dakota see "Indian Reserved Water Rights: Impending Conflict or Coming Rapprochement between the State of North Dakota and North Dakota Indian Tribes," *85 N.D. L. Rev. 1 (2009).*

§ 57.10(b) Sources of Winters Rights. [Go To Main]

Add:

For a general discussion of contemporary issues regarding Indian reserved water rights see "Hot Topics: Indian Reserved Water Rights, Water Quality Trading, and the Public Trust Doctrine from 2008 Eastern Water Resources Conference Charlotte, NC May 1-2, 2008," 11 No. 1 *ABA Water Resources Committee Newsl.* 3.

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7-57 Thompson on Real Property, Thomas Editions Supp. to § 57.11

Supp. to § 57.11 Property and Tribal Sovereignty.

[Go To Main]

§ 57.11(a) The Tribal Sovereignty Doctrine. [Go To Main]

§ 57.11(a)(2) Sovereignty over Indians in Indian Country.

Add:

Meyer & Associates, Inc. v. Coushatta Tribe of Louisiana, 992 So. 2d 446 (La. 2008) .

§ 57.11(a)(3) Sovereignty Over Non-Indians in Indian Country.

Add:

In re Schugg, 384 B.R. 623 (D. Arizona 2008) (bankruptcy trustee who acquired land of debtors located within the boundary of an Indian reservation claimed access to the land).

Add:

Garcia v. Gutierrez, 192 P.3d 275 (N.M. App. 2008) (fee land within the exterior boundaries of tribal land is part of the tribe's territory for jurisdictional purposes under the Parental Kidnapping Prevention Act).

§ 57.11(a)(4) Indian Title and Tribal Sovereignty.

Add:

Hydro Resources, Inc. v. U.S. E.P.A., 562 F.3d 1249 (10th Cir. 2009) (determination that land intended for a uranium mine fell with a dependent Indian community).

§ 57.11(a)(6) Rights of Persons Under Tribal Jurisdiction.

Add:

Plains Commerce Bank v. Long Family Land and Cattle Co., 128 S. Ct. 2709 (2008) (challenge by a non-Indian bank to tribal court judgment); *Garcia v. Gutierrez, 192 P.3d 275 (N.M. App. 2008)* (under the Parental Kidnapping Prevention Act, Indian tribes are United States territories that are treated as states).

Add:

See, e.g., Sweet v. Hinzman, 634 F. Supp. 2d 1196 (W.D. Wash. 2008) (Indian tribe members sought writs of habeas corpus under the Indian Civil Rights Act.); *State v. Madsen, 760 N.W.2d 370 (S.D. 2009)* (The *Fourth Amendment* standards applied by virtue of the Indian Civil Rights Act to a search conducted in a hotel room in an Indian casino).

§ 57.11(b) Effects of Tribal Sovereignty on the Law of Real Property. [Go To Main]

§ 57.11(b)(1) State and Federal Taxes.

Add:

For a further discussion on Taxation on Indian land see "Taxation in Indian Country After Carcieri v. Salazar," *36 Wm. Mitchell L. Rev. 590 (2010).*

§ 57.11(b)(3) Recognition.

Add:

Miami Tribe of Oklahoma v. U.S., 198 Fed. Appx. 686 (10th Cir. 2006) (Indian tribe action against U.S. Dept. of Interior for approval to conduct gaming on Indian land).

See "Indian tribes and Casinos: 9th Circuit Tax Ruling Helps Chip Away at Tribal Sovereignty," 35 *Mont. Law.* 5 (November, 2009); *Barona Band of Mission Indians v. Yee, 528 F.3d 1184 (9th Cir. 2008)* (the 9th Circuit held that state sales taxes applied to the materials purchased for casino expansions on tribal lands).

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Supp. to § 57.12 Bibliography.

[Go To Main]

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Stacy L. Leeds, *American Indian Property* (2009).

Add to Articles

Albert, Michelle Kay. "Obligations and Opportunities to Protect Native American Sacred Sites Located on Public Lands," *40 Colum. Hum. Rts. L. Rev. 479 (Winter 2009).*

Berkey, Curtis G. "Rethinking the Role of Federal Trust Responsibility in Protecting Indian Land and Resources," *83 Denv. U. L. Rev. 1069 (2006).*

Carpenter, Kristen. "Contextualizing the Losses of Allotment Through Literature," *82 N.D. L. Rev. 605 (2006).*

Duchesne, Matthew. "Tribal Trustees and the Use of Recovered Natural Resource Damages Under CERCLA," 48 *Nat. Resources J.* 353 (Spring, 2008).

Gantt, Karen. "This Land Is Your Land, This Land Is My Land: Indian Land Claims," *28 J. Land Resources & Envtl. L. 1 (2008).*

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Rice, G. William. "Teaching Decolonization: Reacquisition of Indian Lands Within and Without the Box--An Essay," *82 N.D. L. Rev. 811 (2006).*

Shively, Erica. "The Future of Quantifying Tribal Water Rights in North Dakota," *84 N.D. L. Rev. 455 (2008).*

Slepnikoff, Lisa M. "More Questions Than Answers: Plains Commerce Bank v. Long Family Land and Cattle Company, Inc., and the U.S. Supreme Court's Failure to Define the Extent of Tribal Authority Over Nonmembers on Non-Indian Land," *54 S.D. L. Rev. 460 (2009).*

Wandres, Patrick W. "Indian Land Claims: Sherrill and the Impending Legacy of the Doctrine of Laches," *31 Am. Indian L. Rev. 131* (2006-2007).

Watson, Blake A. "John Marchall and Indian Land Rights: A Historical Rejoinder to the Claim of 'Universal Recognition' of the Doctrine of Discovery," *36 Seton Hall L. Rev. 481 (2006).*

Welcker, Zachary. "Tribes as Trustees Again (Part I): The Emerging Tribal Role in the Conservation Trust Movement," *32 Harv. Envtl. L. Rev. 373 (2008).*

Wood, Mary Christina and Matthew O'Brien, "Tribes as Trustees Again (Part II): Evaluating Four Models of Tribal Participation in the Conservation Trust Movement," *27 Stan. Envtl. L.J. 477* (June, 2008).

Younger, Judith T. "Across Curricular Boundaries: Searching for a Confluence Between Marital Agreements and Indian Land Transactions," *26 Law & Ineq. 495 (Summer 2008).*

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CHAPTER 58 ANTARCTICA

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AUTHOR: Professor Caryl A. Yzenbaard Salmon P. Chase College of Law Northern Kentucky University

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CHAPTER 58 ANTARCTICA

7-58 Thompson on Real Property, Thomas Editions § 58.01

AUTHOR: Professor Caryl A. Yzenbaard Salmon P. Chase College of Law Northern Kentucky University

§ 58.01 An Overview.

Antarctica has been described physically as a cold and barren place, a cruel and inhospitable land, yet one whose beauty defies description. Over the years it has lured explorers, adventurers, business people and scientists, and though many return for visits, few spend an entire year there, and no person calls it a permanent domicile.

Antarctica has inspired the national interests of many countries, and great patriotic dreams in some; however, it also has been called a sovereignless continent, n1 while others say it is a foreign land. n2 Though seven nations claim sovereignty over portions of the continent, such claims have been held in abeyance for the past 30 years and probably will continue to be so held for the foreseeable future. n3 Today, over 20 nations have permanent bases on the continent, and the men and women of many nations work in peace. Scientific research is the primary activity on this continent. n4

Private ownership of land in Antarctica is unknown. n5 The moratorium placed on sovereignty claims, especially when coupled with the inhospitable living conditions, insure that real property ownership claims will not be made in the near future; however, future events may change that status. This chapter, therefore, will discuss the Antarctic Treaty System and the traditional sovereignty claims, as well as differing rationales for the ownership of the continent.

FOOTNOTES:
(n1)Footnote 1. *See Beattie v. United States, 756 F.2d 91 (D.C. Cir 1984)* in which the majority held that Antarctica was not a country at all. *But see* Judge Scalia's dissent, noting that it is not accurate to call Antarctica a "large continent which has never been and is not now subject to the sovereignty of any nation," but more properly described as "an entire continent of disputed territory," quoting F. M. Auburn, Antarctic Law and Politics (1982). *But see Smith v. United States, 113 S. Ct. 1178, 1179 (1993),* in which Justice Rehnquist referred to Antarctica as a "sovereignless region" and held that the exception to the Federal Tort Claims Act waiver of sovereign immunity for any claim arising in "foreign country" included a claim arising in Antarctica. *See also Environmental Defense Fund, Inc. v. Massey, 986 F.2d 528, 529 (D.C. Cir. 1993),* where Antarctica was described as "not only a unique continent, but somewhat of an international anomaly." For an interesting discussion regarding the Smith case, *see* Bederman, David J., "First Arguments At The Supreme Court of the United States: A Chilly Reception at the Court" J. App. Prac. & Process 5 (Spring 2003) 51. In the case of *Smith v. Raytheon Co., 297 F Supp. 2d 399 (D. Mass 2004),* the court determined that since Antarctica was a "foreign country" the employer did not have to pay overtime under the Fair Labor Standards Act.

(n2)Footnote 2. *See, e.g., Smith v. United States, 953 F.2d 1116 (9th Cir. 1991)* noting that as a foreign country the claim fell into the exemption to the Federal Tort Claims Act *aff'd* in *Smith v. United States, 113 S. Ct. 1178, 122 L. Ed. 2d 548 (1993). But see Larry Martin v. Commissioner of Internal Revenue, 50 T.C. 59 (1968)* noting that Antarctica was not a foreign country for purposes of exemption under § 911(a)(2), I.R.C. 1954.

(n3)Footnote 3. *See* § 58.13 *et seq., infra*. A succinct and interesting discussion of the history of territorial claims and current activities may be found in the Australian Financial Review, Concord in a Cold Climate, by David Mcgonigal and Julia Green, October 20, 2001. An excellent book that discusses all the various concerns regarding Antarctica is by Christopher C. Joyner, Governing the Frozen Commons: The Antarctic Regime and Environmental Protection. Columbia: University of South Carolina Press, 1998.

(n4)Footnote 4. *See* §§ 58.04 and 58.05, *infra*. As noted in § 58.04, note 27, tourism is becoming increasingly popular.An ancient meteorite taken from Antarctica may prove that there was once life on Mars. *See, e.g.*, the article by Tim Radford in The Guardian, "New evidence of life on Mars: Scientists say meteorite shows conclusive evidence, but others disagree," February 27, 2001.

(n5)Footnote 5. *See, e.g.*, discussion in Francisco Orrego Vicuna, Antarctic Mineral Exploitation -- The Emerging Legal Framework 103 (Cambridge University Press 1988) to the effect that the question of private property in the Antarctic has "received very little consideration." Vicuna notes that the State of Chile opened a register of Antarctic property in Punta Arenas, the first inscription of which noted that the State was the owner of all land within the limits of the claimed Antarctic area. The need for private international law for Antarctica is growing. *See* § 58.12 *infra*. *Note also* the quote from Beverly May Carl, The Need for a Private International Law Regime in Antarctica, The Antarctic Legal Regime 68 (Christopher C. Joyner & Sudhir K. Chopra eds., Martinus Nijhoff Publishers, 1988) to the effect that "property will have to be ascertained as fishing increases, development begins, and human activity grows."

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CHAPTER 58 ANTARCTICA

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AUTHOR: Professor Caryl A. Yzenbaard Salmon P. Chase College of Law Northern Kentucky University

§ 58.02 Physical Description.

Antarctica is the fifth largest continent and covers over five million square miles. n6 It is asymmetrically placed around the south geographical pole with 2 indentations for the Ross and Weddell seas and with the projection of the Antarctic Peninsula. Only 2 to 4% of the area is ice-free and over 97% is covered by a permanent ice cap. The land is surrounded by thick and relatively permanent fields of ice known as ice shelves, which, because they are relatively fixed, often are treated as land. During the winter months, additional surface area is added by the sea ice. The continent is surrounded by the Southern or Antarctic Ocean, which is a continuation of the Atlantic, Pacific and Indian oceans. The Antarctic Convergence, a belt of water approximately 40 kilometers wide, is formed by the northerly flowing Antarctic cold currents meeting the warmer sub-Antarctic waters.

The Antarctic Treaty, in Article VI, defines Antarctica as the area south of 60 degrees South Latitude including all ice shelves. n7 This definition was expanded by the Convention on the Conservation of Antarctic Marine Living Resources to include the area within the Antarctic Convergence. n8

It is now believed that at one time Antarctica was part of a super-continent known as Gondwana which included South America, Africa, Australasia and India. This theory, first proposed by Alfred Wegener in 1912 has been supported with recent fossil finds. n9

The continent itself is divided into two portions commonly known as East or Greater Antarctica and West or Lesser Antarctica. The large eastern side, lying south of the Indian Ocean and facing Africa, the Indian Ocean and Australia, is a dry, high-altitude, deserted, ice-covered plateau comprised of stable Precambrian rocks. Glaciers and mountains surround it, and included therein are both the geographic South Pole, which is the earth's southernmost point and where all lines of longitude meet, and the south magnetic pole, which is the farthest point on the earth in the direction of magnetic south (though this pole does move).

In places, the weight of the ice has caused the land to drop below sea level. On the Western side is the Transarctic Mountain Chain, a chain of mountains which stretch for almost five thousand kilometers and is composed of tall peaks and dry valleys. West Antarctica, in contrast, faces the Pacific Ocean and South America. Much of its land is well below sea level and is comprised of an archipelago of mountainous islands joined by the ice. Two large bays, Weddell

and Ross, are located here as well as the Antarctic Peninsula which is a long, narrow, mountainous ridge. n10

Antarctic has been described as the "coldest, driest, windiest, least accessible, worst known and generally the most unpleasant" area in the world. n11 Mean temperatures generally are about 20 degrees colder than those in the equivalent latitude of the Arctic. Average temperatures range from 40 degrees below zero Fahrenheit to 94 degrees below zero Fahrenheit during the winter months and from 0 degrees Fahrenheit to 31 degrees below zero Fahrenheit during the warmest summer months. n12 In addition, strong and violent winds blow, often without warning. From October until March, Antarctica receives little to no sunlight. The annual precipitation, usually in the form of snow, is only 3 to 7 centimeters and generally only on the coast where it is also warmer. n13 In the mid-1980's, atmospheric studies revealed that an ozone "hole" developes every spring. n14

FOOTNOTES:

(n1)Footnote 6. Much of the information contained herein came from Patrick T. Bergin, Antarctica, The Antarctic Treaty Regime, and Legal and Geopolitical Implications of Natural Resource Exploration and Exploitation, *4 Fla. J. Int'l L. 2 (1988);* Jonathan Chester, Antarctica -- Beauty in the Extreme (Michael Friedman Publishing Group, Inc. 1991); The Antarctic Legal Regime (Christopher C. Joyner & Sudhir K. Chopra eds., Martinus Nijhoff Publishers, 1988); John May, The Greenpeace Book of Antarctica (Doubleday 1989); Todd Jay Parriott, Territorial Claims in Antarctica: Will the United States Be Left Out In The Cold, *22 Stanford J. Int'l L. 67 (1986);* The Antarctic Treaty Regime (Gillian Triggs ed., Cambridge University Press 1987); Encyclopedia Americana Gillian Triggs ed., Grolier, Inc. 1991); The World Book Encyclopedia 1992.

(n2)Footnote 7. Antarctic Treaty, Dec. 1, 1959, art. 6, *12 U.S.T. 794*, T.I.A.S. No. 4780, 402 U.N.T.S. 71 (entered into force June 23, 1961). Note that the Treaty does not affect the right of any State under international law regarding the high seas within that area. The area does include the ice shelves. The questions remain, however, concerning the water under the ice shelves and the effect of the 1982 United Nations Convention on the Law of the Sea with its 200 mile exclusive economic zones. As to the latter, it has been suggested that the high seas are included now in the ambit of the Antarctic Treaty. *See* Christopher C. Joyner, The Exclusive Economic Zone and Antarctica, *21 Va. J. Int'l. L. 691 (1981);* Donald R. Rothwell, The Antarctic Treaty; 1969-1991 and Beyond, 14 Sidney L. R. 62, 70 (March, 1990). See Environmental Information Networks, Inc., Global Warming Network Online Today, Dec. 4, 1995 which notes that from Jan. 17 until Feb. 27, 1995, three large ice pieces broke off from the Larsen Ice Shelf, including one the size of Rhode Island. The history of the Antarctic Ice Sheet, including the sections of floating Larsen Ice Shelf which have detached and floated out to sea is discussed in the article by Wise, Jr., Sherwood Willing, "The Antarctic Ice Sheet: Rise and Demise?" J. Land Use & Envtl. Law 15 (Summer 2000) 383.

(n3)Footnote 8. *See* The Convention on the Conservation of Antarctic Marine Living Resources, May 20, 1980, art. 4, *33 U.S.T. 3746*, T.I.A.S. No. 10240 (entered into force April 7, 1982) which notes that the Convention applies to the Antarctic marine living resources of the area south of 60 degrees South Latitude and "the marine living resources of the area between that latitude and the Antarctic Convergence which form part of the Antarctic marine ecosystem." The Antarctic Convergence is a meandering line joining points along parallels of latitude and meridians of the longitude.

(n4)Footnote 9. *See, e.g.*, Joyner, The Evolving Minerals Regime for Antarctica, The Antarctic Legal Regime 130 (Christopher C. Joyner & Sudhir K. Chopra., eds.) *See also* Chester *supra*, n. 6, at 37. *See* the article in The Southland Times (New Zealand), January 27, 2001, "Gateway to Antarctica," which describes some of the common characteristics shared by New Zealand and Antarctica when they both were part of Gondwana.

(n5)Footnote 10. The Antarctic Peninsula at one time was divided into 2 sections called Graham Land and Palmer Land named for the British and American explorers; however the Chileans called the northern portion O'Higgins Land for its national hero and Argentina called it the Argentina Antarctic. Thus, the use of the common term today of Antarctica Peninsula. *See* May *supra* n. 6, at 154-155.

(n6)Footnote 11. *See* Mitchell & Tinker, Antarctica and Its Resources, Earthscan Press Briefing Document No. 21

at 1 (1979). It has been called a "white desert." *See* Auburn, The White Desert, 19 Int'l. and Comp. L. Q. 229 (1970).

(n7)Footnote 12. *See, e.g.*, Parriott, *supra*, note 6.

(n8)Footnote 13. Thus, despite all the ice, Antarctic is one of the driest deserts on Earth. *See* Daniel & Sally Grotta, "Antarctica, Whose Continent is It Anyway?" Popular Science, January 1992 at 63.

(n9)Footnote 14. In 1987, the loss of ozone climbed to 50 percent during the spring. *See* Ned P. Nanda, International Environmental Law & Protection of the Atmosphere, Beijung Conference on the Law of the World, April 22-27, 1990 (published by The World Peace Through Law Center). Ozone in the stratosphere protects the earth from the sun's ultraviolet rays. Preliminary findings during the 1990-91 season note that ozone loss in the upper atmosphere is linked to the use of CFCs (chlorofluorocarbons commonly used as refrigerants and propellants in spray cans) and that the hole was larger than before. *See* Grotta, *supra*, note 13. *See also* the articles by Jennifer S. Bales, Transnational Responsibility and Recourse for Ozone Depletion, *19 B.C. Int'l & Comp. L. Rev. 259 (1996);* William C. Burns, Global Warming: The United Nations Framework Convention on Climate Change and the Future of Small Island States, *8 Duke Envt'l L. & Pol'y F. 81 (1997).* The United States Board on Geographic Names named de Zafra Ridge, located on Longhurst Plateau in the Cook Mountains of Antarctica, after Robert L. de Zafra who, with his colleagues showed that chlorine from chlorofluorocarbons was responsible for the seasonal ozone hole over Antarctica as reported in The New York Times, "A Name in a Cold Continent," by Karen W. Arenson, January 23, 2002.

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CHAPTER 58 ANTARCTICA

7-58 Thompson on Real Property, Thomas Editions § 58.03

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§ 58.03 Plant and Animal Life in Antarctica.

The harsh climate, coupled with the ice-covered terrain, prevent the successful survival of most land flora and fauna. Only two species of flowering plants are present and then only near the shore on the west coast of the Antarctic Peninsula: a single hair grass and a small pearlwort; however, over 400 types of lichens and more than 80 types of mosses have been identified. They grow slowly and it is said that a boot print on the moss carpet may be seen for years. n15 There are no land vertebrates, although there are some microscopic invertebrates, with the largest being a half-inch, wingless midge.

The major fauna include seabirds, penguins, seals and whales. The seabirds include 6 species of Albatross and 4 types of petrels. Penguins are abundant, with over 7 species represented. The Southern or Antarctic Ocean is ideal for seals and whales. Krill, rich in protein, are abundant and serve as a vital link in the food chain. n16 In addition, the Ocean is home to over a hundred types of fish and the seabed is rich in flora and fauna.

In 1964, the Treaty members adopted The Agreed Measures for the Conservation of Antarctic Fauna and Flora, n17 the Convention for the Conservation of Antarctic Seals was adopted in 1972, n18 and The Convention on the Conservation of Antarctic Marine Living Resources was adopted in 1982. n19 All of these measures were adopted to protect the flora and fauna of Antarctica. n20

FOOTNOTES:
(n1)Footnote 15. *See* Chester, *supra* n. 6, at p. 92; Chapter 5 of May, *supra*, n. 6. *But see* Environmental Information Networks, Inc., Global Warming Network Online Today, Sept. 29, 1994, which notes that British researchers theorize that the plant life of Antarctica may be benefiting from the global warming. *See also* Kyodo News International, Inc., Japan Science Scan. Mar. 3, 1996, which notes that a new seed plant has been discovered growing in a rocky area. Fossils inside of rocks and the discovery of a hadrosaur, a duck-billed dinosaur, are helping scientists understand the ecosystem of Antarctica. *See* Comment, Lundgren, Gretchen, Protecting Federal Fossils from Extinction, B.C. Envt'l Aff. L. Rev. 26 (Fall, 1998) 225; Life on Mars, Before the Subcommittee on Space and Aeronautics of the House Committee on Science, 104th Cong. (Sept. 12, 1996) (statement of Richard N. Zare, Professor of Chemistry, Stanford University). Cited as well in Comment, Woodruff A. Polk, "Welcome to the Hotel Antarctica: The EPA's Interim Rule on Environmental Impact Assessment of Tourism in Antarctica," Emory Int'l L. Rev. 12 (Fall, 1998) 1395.

(n2)Footnote 16. Harvesting of krill has been a concern. *See* Parriott, *supra* note 6, at 72 (1986). *See also* the discussion regarding krill in Stuart B. Kaye, "Legal Approaches to Polar Fisheries Regimes: A Comparative Analysis of the Convention for the Conservation of Antarctic Marine Living Resources and the Bering Sea Doughnut Hole Convention," *26 Cal. W. Int'l L. J. 75 (1995).*

(n3)Footnote 17. Agreed Measures for the Conservation of Antarctic Fauna and Flora, June 2-13, 1964, *17 U.S.T. 991, 996,* T.I.A.S. No. 6058 (1966) *reprinted in* W.M. Bush, 1 Antarctica and International Law, a Collection of Interstate and National Documents, (1982) at 78-79 and *modified in 24 U.S.T. 1793, 1802,* T.I.A.S. No. 7693 (1973). *See* § 58.07 which notes that the Agreed Measures were designed to protect native mammals, birds and plant life on the continent. *See also* Joyner, Review Article: The Evolving Antarctic Legal Regime, *83 Am. J. Int'l L. 605, 606 (1989).*

(n4)Footnote 18. Convention for the Conservation of Antarctic Seals, June 1, 1972, *29 U.S.T. 441,* T.I.A.S. No. 8826 (entered into force March 11, 1978). *See also* § 58.07, *infra*, note 51. This Convention was adopted for the purpose of protecting 6 species of seals from commercial exploitation.

(n5)Footnote 19. Convention on the Conservation of Antarctic Marine Living Resources, May 20, 1980, *33 U.S.T. 3746,* T.I.A.S. 10240 (entered into force April 7, 1982). *See also* § 58.07. This is an international agreement supporting an ecosystem approach to the conservation and management of living resources which inhabit the oceans surrounding Antarctica.

(n6)Footnote 20. More may need to be done to protect the fragile environment of Antarctica. See also the Antarctica Conservation Act of 1978, *16 U.S.C. § 2401 et seq.*, making mandatory the Agreed Measures for the Conservation of Antarctic Flora and Fauna.

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CHAPTER 58 ANTARCTICA

7-58 Thompson on Real Property, Thomas Editions § 58.04

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§ 58.04 Current Activities.

The primary activity in Antarctica has been, is, and will continue to be, scientific research. n21 Currently there are approximately 65 bases, of which approximately 35 are year long bases, all of which engage in such research. n22

In the past, whaling and sealing interests were strong. Currently, the Convention for the Conservation of Antarctic Seals (CCAS), formally ratified on March 11, 1978, provides protection for the seals. Three types of seals (the fur, elephant and Ross seals) are protected, and limits are set for the killing of leopard, crabeater, and Weddell seals. n23 The International Whaling Commission, established in 1946, also regulates the whaling industry. n24 Much large-scale fishing has occurred in Antarctica, including the harvesting of krill. n25 The Convention on the Conservation of Antarctic Marine Living Resources (CCAMLR), effective April, 1982, attempts to conserve and manage the Antarctic ecosystem as a whole. n26

Tourism is a growing industry and is the only commercial activity on the continent. Initially tours were by plane; however, since 1958 cruises have become popular. n27

At one time, many felt that mining would become popular; however, what minerals exist are difficult to extract. In addition, the recent Protocol signed in Madrid prohibits mining for the next 50 years. n28

FOOTNOTES:
(n1)Footnote 21. *See* The Antarctic Treaty, December 1, 1959, *12 U.S.T. 794*, T.I.A.S. No. 4780, 402 U.N.T.S. 71 (entered into force June 23, 1961) discussed in depth in § 58.08 *infra*. The preamble thereto acknowledges the substantial contributions to scientific knowledge by international cooperation and that freedom of scientific investigation should continue. Article II and III provide for the freedom of scientific investigation and cooperation.

(n2)Footnote 22. Bases are noted in May, *supra*, n. 6. *See also* § 58.05 regarding the human presence; *but see* the article of Wall St. J., Friday, December 27, 1991, at B4 to the effect that many nations are reducing their Antarctica research for economic reasons at the present time.

(n3)Footnote 23. *See* Convention for the Conservation of Antarctic Seals, June 1, 1972, *29 U.S.T. 441*, T.I.A.S. No. 8826 (entered into force March 11, 1978). In addition, the seals are to be killed quickly and humanely with no kills

from March 1 to August 31 of each year. Zones also are rotated where no killings are to occur. Nonetheless, seals may be taken for scientific research. *See also* Parriott, *supra* note 6, at 73 (1986) noting that the economic value of the Antarctic seals lies primarily in their pelts but also in the value of their blubber for oil and their meat for pet food.

(n4)Footnote 24. A whaling moratoria has been imposed at times. *See* R. Tucker Scully, "The Marine Living Resources of the Southern Ocean," *33 U. Miami L. Rev. 341 at 346 (1978).*

(n5)Footnote 25. *See* Parriott, *supra*, note 6, who notes that in addition to krill, fish, cephalopods (squid and octopus) crab and lobsters also may be harvested.

(n6)Footnote 26. *See* § 58.07 *infra*. Note, however, krill fishing continues and quotas on other fish are often difficult to enforce. *See* Rothwell, *supra* note 7, at 77.

(n7)Footnote 27. *See*, Grotta, *supra* note 13, at p. 67, noting that while the National Science Foundation cannot forbid anyone from going to Antarctica, the agency's unofficial attitude is that all tourists are unwanted interlopers who interfere with research, and if they get into trouble, must be rescued. *See also* J. A. Heap, "Current and Future Problems Arising from Activities in the Antarctic," The Antarctic Treaty Regime (Gillian Triggs ed., Cambridge University Press 1987) noting that accidents do occur which require massive diversion of science logistics. New Zealand now requires cruise ships to have suitably qualified government representatives aboard to prevent environmental damage. *See* Chester, *supra* n. 6, at 125 noting as well that the number of tourists increased greatly and Chile now has a hotel. Private yachts also visit the continent, often without the guides. *See* Nigel Sitwell, "Worth Seeing Getting to the Bottom of the World," Travel & Leisure, Dec. 1992 at 56. *See also* § 58.22, note 194 *infra*. *See also* the following articles which discuss the increase of tourist activity as well as of environmental concerns: Robert N. Andersen, "Leading International Efforts To Improve Environmental Controls in Antarctica While Navigating National Politics," *6 Geo. Int'l Envt'l L. Rev. 303 (1994);* Jennifer Angelini & Andrew Mansfield, "A Call for U.S. Ratification of the Protocol on Antarctic Environmental Protection," *21 Ecology L.Q. 163 (1994). See also* the discussion regarding tourism in Paul Lincoln Stoller, "Protecting the White Continent: Is the Antarctic Protocol Mere Words or Real Action?" *12 Ariz. J. Int'l & Comp. Law 335 (1995). See also* Note, A Right to Ice? The Application of International and National Water Laws to the Acquisition of Iceberg Rights, Mich. J. Int'l L. 19 (1997) 277. The continued growth of tourism is described in an article by Keran Mulvaney, "The Last Wild Place: Antarctica," Vol. 8, No. 6, p. 36, as reported by 1997 Information Access Company on Nov. 21, 1997. *See* Christopher C. Joyner, "Recommended Measures Under the Antarctic Treaty: Hardening Compliance with Soft International Law," Mich. J. Int'l L. 19 (1998) 401; Stokke, Olav Schram and Vidas, Davor eds., "Governing the Antarctic: The Effectiveness and Legitimacy of the Antarctica Treaty System," Cambridge, New York, Melbourne, Cambridge University Press 1996. Both note the concern with the increased numbers of private parties and commercial tourists visiting Antarctica and thus the need may arise to draft a legally binding annex specifically regulating tourism. An article by Joanna Hunter, The Times (London), December 12, 1998 describes various ways to reach Antarctica. *See also* Kyodo News Service, Japan Economic Newswire, November 3, 1998 which describes the Croydon Travel flights to Antarctica which are now in their fifth season. The Protocol, which is now effective, requires permits for visitors. *See* § 58.07. The increase in tourism is discussed as well as the EPA's Interim Rule in an article by Woodruff A. Polk, "Welcome to the Hotel Antarctica: The EPA's Interim Rule on Environmental Impact Assessment of Tourism in Antarctica," Emory Int'l L. Rev. 12 (Fall, 1998) 1395. An excellent review of tourism may be found in the article by Kees Bastmeijer and Ricardo Roura, "Current Development: Regulating Antarctic tourism and the Precautionary Principle," 98 American Journal International 763 (2004). In this article the authors note that from 1991-2003 tourism was viewed as a legitimate use, although some consultative members felt that it should be regulated. At the Twenty-seventh ATCM meeting, tourism was made an integral part of the agenda and the subject of a separate working group. As noted on page 775, the need for some regulatory action was recognized. Such regulations might include the need for an accreditation system for tour operators; the establishment of a tourism database; the prohibition of structural tourism facilities; safety and self-sufficiency and the development of site-specific guidelines. The authors also note that questions may arise concerning property rights by private individuals or commercial entities by long-term use of a site or by the construction of structural tourism facilities. The authors note that all measures, decisions, and resolutions that were adopted by the twenty-seventh Consultative Meeting may be found at

www.asoc.org.

(n8)Footnote 28. The Protocol on Environmental Protection to the Antarctic Treaty, signed June 22, 1991 Doc. [11th Antarctic Treaty Special Consultative Meeting] XI A.T.S.C.M./2, text of Final Act, Oct. 4, 1991, *reprinted in 30 I.L.M. 1455 (1991)*, which Protocol was ratified by the United States Senate during the final legislative days of the 102nd Congress. Treaty Document No. 102-22. *See also* The Antarctic Protection Act of 1990, Pub. L. 101-594, *104 Stat. 2975 (1990)* prohibits United States citizens from engaging in mining in Antarctica. *See also* § 58.07 *infra*. The major hard minerals found are copper, tin and coal and are believed to be located in the Antarctic Peninsula, the Transantarctic Mountains, and East Antarctica. There also may be oil and natural gas. *See* Note, Exploring the Last Frontiers for Mineral Resources: A Comparison of International Law Regarding the Deep Seabed, Outer Space and Antarctica, *23 Vand. J. Transnat'l L. 819* (1990-1991). The Madrid Protocol was adopted by the United States by Public Law on Oct. 21, 1996. *See 104 P. L. 227, 110 Stat. 3034.* It is codified at *16 U.S.C. §§ 2401*-1403a and is known as The Antarctic Science, Tourism, and Conservation Act of 1996. The rules regarding it may be found at 40 C.F.R. section 8 and *66 FR 6345 and 63468.* The revised rules are effective January 7, 2002. *See also* Francisco Orrego Vicuna, "The Protocol on Environmental Protection to the Antarctic Treaty: Questions of Effectiveness," *7 Geo. Int'l Envt'l L. Rev. 1 (1994);* Jonathan D. Weiss, Comment: The Balance of Nature and Human Needs in Antarctica: The Legality of Mining, 9 Temple Int'l & Comp. L.J. 387 (1995), both of which are cited in the Bibliography. *See also* Christopher C. Joyner & Ethel R. Theis, "Eagle Over the Ice: The U.S. in the Antarctica," (Hanover. London: University Press of New England. 1997). At the time the book was written, however, the United States had not yet ratified the Madrid Protocol. All members have now ratified the Protocol and it became effective January 14, 1998.

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CHAPTER 58 ANTARCTICA

7-58 Thompson on Real Property, Thomas Editions § 58.05

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§ 58.05 The Human Presence.

The harsh climate and inhospitable terrain limit the human presence; however, at the same time these circumstances create a high level of interaction and cooperation among those present, who unite against the common foe: the elements. Scientific bases have replaced the explorers and adventurers of former years, though from time to time private adventurers (who are not bound by the treaty) still come. Currently there are more than 60 bases (approximately 35 of which are year round), from 20 nations. n29 The bases tend to be concentrated on the Antarctic Peninsula, although some bases are strategically placed around the continent. Usually, the bases are built on rocky outcrops on the coast or on snow-free oases. Some are built on the ice shelves which shift and at times must be replaced. In the past, the United States and the former USSR have had the largest presence. n30

Generally, the bases are staffed by research personnel, who are assisted by military personnel. n31 Each base attempts to provide a variety of activities for its inhabitants. Transportation is difficult. Usually travel to Antarctica is by air or ship, while on land, over-snow vehicles are vital. n32

FOOTNOTES:
(n1)Footnote 29. Bases are noted in May, *supra*, n. 6. The New York Times, January 1, 1991, Science Desk, The Environment Page, at A36, reported that the United States and the former U.S.S.R. had agreed to establish their first joint research station on the drifting ice of the Weddell Sea. *But see* "As the Cold War Ends, Many Nations Are Cutting Their Antarctica Research," Wall St. J., Friday, December 27, 1991, at B4, to the effect that many nations are reducing their Antarctica research for economic reasons. Greenpeace, a non-governmental organization, operates a year-round station. *See* Ronald W. Scott, "Protecting United States Interests in Antarctica," *26 San Diego L. Rev. 575 (1989)* noting at 599 that in addition to Greenpeace, 13 nations "winter over." In 1997, Norway's Boerge Ousland became the first person to cross Antarctica alone and unaided, it was reported in AP Newsfeed, Jan. 16, 1998.

(n2)Footnote 30. *See generally* Chester, *supra*, n. 6, chapter entitled Against the Elements, May, *supra*, n. 6, or Scott, *supra*, n. 29. King George Island, close to South America, is home to at least nine bases. The United States' base at the South Pole, Amundsen-Scott, shifts from time to time and must then be rebuilt. The United States has 4 permanent bases with McMurdo being the largest having its own theater, chapel, radio station, bar and labs (it is also only 2 miles from the New Zealand's Scott Base). The bases of the United States and the former U.S.S.R are

strategically placed around the continent.

(n3)Footnote 31. Often the French, Chilean and Argentinean bases are staffed only by the military. *See* Scott, *supra* n. 29, at 598. At the Chilean base, a hotel, bank, post office, school, and hospital have been built to bolster its claims; and Argentina has had 8 children, starting with Emilio Marcos Palma in 1978, born at its bases. *See* §§ 58.13 and 58.15 *infra*. The United States Antarctic Program (USAP) is administered and funded by the National Science Foundation, an independent government agency. The National Science Foundation funds all operation, maintenance and personnel costs. *See also* § 58.20 *infra*, note 175.

(n4)Footnote 32. Air travel tends to be from New Zealand or South America though the Soviets also had a comprehensive air-support system. Many countries are trying to minimize the amount of vehicular traffic due to the damage caused to the local ecology and the pollution created. Fewer and fewer dogs are being used.

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CHAPTER 58 ANTARCTICA

7-58 Thompson on Real Property, Thomas Editions § 58.06

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§ 58.06 Background to the Antarctic Treaty.

During the early 1900's, explorers, adventurers, whalers and sealers visited Antarctica. As a result, seven countries made territorial claims on the continent. n33 Prior to the 1900's the ancient Greeks suggested a landmass to the south with which to balance Europe, Asia, and the north and thus named it Antarktikos, meaning opposite the bear or the constellation above the North Pole. Arktos subsequently was modified to Arctic for the north and thus Antarctica for the South. Columbus's map-makers noted it as Terra Australis Incognita. Polynesian legends note that in the 7th century an explorer sailed south to a place of "bitter cold where white rocklike forms grew out of a frozen sea." n34

The age of exploration on Antarctica left a legacy of interlocking rivalries and competing territorial claims. Antarctica was a continent without a government, with no recognized national property rights, and, as a result no one to politically manage the continent or to assign private property rights. n35 Thus, in 1948 the United States proposed that Antarctica be ruled by a United Nations Trusteeship or by a form of condominium control. n36 Chile also suggested that all sovereignty claims be held in abeyance for 5 years. n37 Then in 1959, the International Geophysical Year, embracing the dual objectives of exploring outer space and Antarctica, led to the drafting of the Antarctic Treaty. n38 The original treaty was signed by 12 countries, n39 and to date they have been joined by other countries representing approximately 80% of the world population. n40

The Treaty also led to the formation of the Scientific Committee for Antarctic Research, or SCAR, which is a non-governmental organization of scientists coordinating research activities and the sharing of information in Antarctica. n41

FOOTNOTES:
(n1)Footnote 33. The seven countries include Argentina, Australia, Chile, France, New Zealand, Norway and the United Kingdom. *See* § 58.13 *et seq. infra* for a discussion of each country and its claim.

(n2)Footnote 34. *See* Chester, *supra* n. 6, at 44.

(n3)Footnote 35. *See* Bernard Herber, "Mining or World Park? A Politico-Economic Analysis of Alternative Land Use Regimes in Antarctica," 31 Nat. Resources J. 839, 840 (1991). Thus, although the United Kingdom, France, Australia, New Zealand and Norway recognize each other's claim, Chile and Argentina dispute the claims of the United

Kingdom as well as each other's claims. The United States and the former USSR, while not asserting a claim and while maintaining a large presence in Antarctica, do not recognize the claims of others and reserve the right to make a claim in the future. Approximately 80 to 85% of Antarctica has been claimed, leaving one sector unclaimed. At one time, it was felt that the United States would claim that portion. *See* § 58.20 *infra*, note 169. The area lies between 150 degrees and 90 degrees west. In fact, even the question of who first discovered the continent of Antarctica is in doubt with claims being made by Palmer of the United States, Bransfield of the United Kingdom and Bellingshausen of the former Soviet Union. *See* Auburn, *supra*, n. 1.

(n4)Footnote 36. *See* Bush, *supra*, n. 17, (Vol. I at 461-468). This followed the conflict among Argentina, Chile and the United Kingdom regarding the Antarctic Peninsula. *See* § 58.08, *infra*, note 71.

(n5)Footnote 37. *See* Bush, *supra*, n. 17 (Vol. II, p. 385).

(n6)Footnote 38. The International Council of Scientific Unions sponsored the International Geophysical Year which was held from July 1, 1957 until December 31, 1958 (the dates fixed to take advantage of the intense solar activity at that time). More than sixty research stations were utilized. The United States Naval Support played an extensive and invaluable role. The countries involved feared that possible territorial claims might retard the scientific research and thus agreed that the research would continue, information would be shared, and that movements would not be hindered. In addition, by this time several countries were now interested in Antarctica or in having United Nations control there. Some, and in particular the United States and the former USSR, had substantial interests in Antarctica. These factors all contributed to a resolution of the "Antarctica problem." Some may have felt a treaty was better than a UN Trustship to preserve their sovereignty claims. The United States took the lead and called a conference. The treaty itself was drafted quickly after the preliminary negotiations were accomplished. The Treaty was signed on December 1, 1959 and became effective June 23, 1961. *See* § 58.02, *supra* note 7.

(n7)Footnote 39. The twelve members were Argentina, Australia, Belgium, Chile, France, Japan, New Zealand, Norway, The Republic of South Africa, The Soviet Union, The United Kingdom, and the United States (using the names of countries in effect at that time). One difficulty during the time between signature and ratification was in the United States where some members of the Senate opposed the Treaty due to the failure of the United States to assert a sovereignty claim prior to entry into the treaty.

(n8)Footnote 40. *See* § 58.09 *infra* noting the current parties who are Antarctic Treaty Consultative Parties (ATCPs) and thus entitled to vote and those countries who have acceded to the Treaty, but may not vote.

(n9)Footnote 41. SCAR is located in Cambridge, England and is affiliated with the International Council of Scientific Unions. It has played such a vital role in the coordination and monitoring of Antarctic activities that it has been described as serving a secretariat function. *See* Rothwell, *supra*, n. 7, though a formal secretariat is still advocated.

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CHAPTER 58 ANTARCTICA

7-58 Thompson on Real Property, Thomas Editions § 58.07

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§ 58.07 The Antarctic Treaty System (ATS).

The Antarctic Treaty forms the basis of the Antarctic Treaty System (or ATS as it is commonly known). n42 Agreed measures and recommendations are joined with the Treaty to form The Antarctic Treaty System. Since the effective date of the Treaty, treaty members have met every 2 years to discuss issues of concern. n43 Since 1961, almost 200 formal recommendations have been made ranging from mineral resources to tourism, although most have dealt with the environment and the ecosystem. n44 Special meetings may be called to discuss a single issue. n45 At the ATM meetings, consultative parties may vote; however, acceding members may not. n46

In 1964, at the ATM meeting in Brussels, the document known as The Agreed Measures for the Conservation of Antarctic Fauna and Flora was adopted. n47 The Agreed Measures document declares Antarctica to be a special conservation area and seeks to protect the flora and fauna thereon from the impact of the human presence. n48 Specially Protected Areas are created in Article VIII of the Agreed Measures to protect unique natural ecological systems. n49

In 1972, the Convention for the Conservation of Antarctic Seals (CCAS) was adopted although it did not go into force until 1978. n50 This Convention applies to six species of seals; prohibiting the killing or catching of the Ross, Southern Elephant and Fur seals and setting limits each year for the Crabeater, Leopard and Weddell seals. n51

The Convention on the Conservation of Antarctic Marine Living Resources (CCAMLR), adopted in 1980, was the result of a recommendation first made at the 1975 Antarctic Treaty meetings and again at subsequent meetings. n52 The primary objective of the CCAMLR is to preserve all Antarctic marine living resources, including fish, crustaceans, creatures on the continental shelf and bird life. It was adopted with a single ecosystem approach to the conservation of the marine living resources. Its coverage extends not only to the traditional area included within the Treaty itself but also beyond the 60 degree South latitude to the area between that latitude and the Antarctic Convergence which forms part of the Antarctic marine ecosystem. n53 A Commission for the Conservation of Antarctic Marine Living Resources has been established, a Secretariat is located in Hobart, and a Scientific Committee provides assistance. n54

The Convention attempts to regulate the marine ecosystem as a whole and allows "rational" use of such resources. It thus forms an important part of the environmental efforts in Antarctica. n55

Regulating mineral resource activities in Antarctica has been a concern for a number of years. n56 After 6 years of negotiations, The Convention on the Regulation of Antarctic Mineral Resources Activities (CRAMRA) opened for signature on November 25, 1988, and was to enter into force after ratification by all ATCPs, including the original 7 claimants. n57 This Convention sought to preserve the environment while at the same time regulating its mineral exploitation. n58 The Convention was to apply to all mineral resource activities on the continent of Antarctica, all Antarctic islands and in the seabed and the subsoil of the adjacent offshore areas up to the deep seabed. n59 The Convention called for a variety of institutions to regulate mineral activities in Antarctica, including the establishment of a Commission, a Secretariat, and an advisory committee. n60 Nonetheless, both France and Australia noted that they would not ratify the Convention, n61 and CRAMRA never came into force.

In October of 1991, The Protocol on Environmental Protection to the Antarctic Treaty was signed. n62 Under this Protocol (sometimes referred to as the Madrid Protocol), mining is banned for 50 years. n63 The Protocol and its Annexes (and more may be needed) provide environmental protection for Antarctica as well as banning mining activities. A Committee for Environmental Protection is created in Article 11, whose functions include monitoring environmental impact assessment procedures concerning scientific research, tourism, and other governmental and non-governmental activities. Four Annexes were appended to the original Protocol and are considered an integral part of it. These 4 Annexes deal with environmental impact assessment, the conservation of Antarctic fauna and flora, waste disposal and waste management, and the prevention of marine pollution. The Protocol was ratified by the United States Senate on October 7, 1992. n64

FOOTNOTES:

(n1)Footnote 42. *See* § 58.08 for a discussion of the Treaty terms. The Treaty, was signed in Washington on December 19, 1959 and entered into force on June 23, 1961. *See 12 U.S.T. 794*, T.I.A.S. No. 4780, 402 U.N.T.S. 71. Originally twelve countries signed the treaty. Argentina, Australia, Belgium, Chile, France, Japan, New Zealand, Norway, the Union of South Africa, the Union of Soviet Socialist Republic, the United Kingdom and the United States of America. The Treaty provides the framework for international activity and is the basis for stability. Membership in the system, either as a Treaty Consultative Party (ATCP) or as an acceding member have grown. *See* § 58.09 *infra*. There have been few incidents of international conflict. *See* Piotroutz Blay, et al., "Antarctica After 1991: The Legal and Policy Options," ASOLP Occ. Paper 2 (1989). The Antarctic Treaty System is thoroughly discussed in a new book by Christopher C. Joyner, Governing the Frozen Commons: The Antarctic Regime and Environmental Protection. Columbia: University of South Carolina Press, 1998. This book was reviewed by Bilder, Richard B. in 95 American Journal of International Law (April 2001) 481. The Antarctic Treaty System provides a "...brilliant and extremely successful model of international environmental law" it was noted in a Note by Verhaag, Melissa A., "It Is Not Too Late: The Need for a Comprehensive International Treaty to Protect the Arctic Environment," Geo. Int'l Envtl. L. Rev. 15 (2003) 555 at 571 *et seq.* The Antarctic Treaty was suggested as a possible model for peace in Jerusalem in an article by Roy Balleste, The International Status of Jerusalem: The Legacy of Lasting Peace, *43 Rev. D. P. 249 (2004).*

(n2)Footnote 43. Article IX (2) of the Treaty required a meeting at the City of Canberra within two months after the Treaty was effective and thereafter "at suitable intervals and places, for the purpose of exchanging information, consulting together on matters of common interest pertaining to Antarctica, and formulating and considering, and recommending to their Governments, measures in furtherance of the principles and objectives of the Treaty... ." In practice they meet every two years at a conference hosted by one of the ATCPs. At the 16th A.T.M. meeting in Bonn, it was determined to hold meetings every year and thereby eliminate the need for preparatory meetings.

There is no standing secretariat nor a central agency for information. All is very decentralized. Many have suggested the need for such Secretariat with its organizational infrastructure. Likewise the cost of hosting the meetings is high. The meeting was held in Antarctica in January of 1999, for the first time. *See* IAC (SM) Newsletter Database, Kyodo News International, Inc., Japan Pol'y & Politics, September 14, 1998. *See* Christopher C. Joyner, "Recommended Measures Under the Antarctica Treaty: Hardening Compliance with Soft International Law," Mich. J. Int'l L. 19 (1998) 401.

(n3)Footnote 44. The recommendations become binding only if adopted unanimously and are not binding on a non-ATCP unless such parties accept them, nor are they binding on any state which is not a party to the treaty.

(n4)Footnote 45. For example, special meetings were used significantly during the 1980's regarding the mineral regimes. The 11th special A.T.M., which met in Chile during November/December of 1990 and later in Madrid during April and June of 1991 resulted in the 1991 Protocol on Environmental Protection to the Antarctic Treaty. *See* note 62 *infra*.

(n5)Footnote 46. Non-consultative parties now are invited and may listen. This was partially a result of criticism that the A.T.C.P.s or Atlantic Treaty Consultative Party constituted an selective exclusive club. *See also* note 86.

(n6)Footnote 47. Agreed Measures for the Conservation of Antarctic Fauna and Flora, June 2-13, 1964, *17 U.S.T. 991,* T.I.A.S. No. 6058 (1966), *modified in 24 U.S.T. 1793, 1802,* T.I.A.S. No. 7693 (1973) *reprinted in* Bush, Vol. I at 146-160. *See* § 58.07, *supra,* note 17. *See also* The Antarctic Conservation Act of 1978, *16 U.S.C. § 2401 et seq.*

(n7)Footnote 48. The Agreed Measures, in Article IV, seek to bind Antarctic Treaty members and non-members such as a member of an expedition. *See* W. M. Bush, Antarctica and International Law (1982). Note, however, the comment in Sitwell, *supra,* note 27.

(n8)Footnote 49. Specially Protected Areas are given special protection and differ from Sites of Special Scientific Interest (S.S.S.I.), Sites of Historic Interest (S.H.I.), Specially Reserved Areas (S.R.A.) and Multiple-Use Planning Areas (M.P.A.), all of which were adopted as recommendations to implement the Agreed Measures. Restrictions are relaxed in an S.S.S.I. area where the purpose is to safeguard scientific research rather than the site itself. *See* May, *supra* n. 6, at 141, which notes the sites.

(n9)Footnote 50. This Convention was the result of a conference held outside of the Treaty framework so that non-Treaty participants could be involved. It opened for signature on June 1, 1972 and went into effect in 1978. Convention on the Conservation of Antarctic Seals, June 1, 1972, *29 U.S.T. 441,* T.I.A.S. No. 8826 (entered into force March 11, 1978), *see also* note 18 *supra*. This Convention was adopted to protect the seals from commercial exploitation in anticipation of the problem rather than in reaction thereto.

(n10)Footnote 51. Article 2. The seals may be taken for scientific study, if indispensable for food for dogs or humans, or as a specimen for educational institutions and museums so long as a permit is received. Any killing is to be humane. Zones for the killing are rotated and no kills are permitted from March 1 to August 31. Although no regulatory body has been established, SCAR does provide scientific advice under Article 5. CCAS has been relatively successful even though enforcement is by the flag state under Art 2(2) and Art 5 (5); with perhaps the former U.S.S.R. taking the most seals. *See* Piotroutz Blay, "New Trends in the Protection of the Antarctic Environment: The 1991 Madrid Protocol," *86 Am. J. Int'l L. 377, 381 (1992),* Rothwell, *supra* n. 7, at 75, May, *supra,* n. 6.

(n11)Footnote 52. The Convention on the Conservation of Antarctic Marine Living Resources, May 20, 1980, *33 U.S.T. 3476,* T.I.A.S. NO. 10240 (entered into force on April 7, 1982) *reprinted in 19 I.L.M. 89. See also* note 8. The series of meetings among the ATCPs culminated in a special Conference in Canberra in May of 1980 where the Conference was successfully concluded the next month. *See* Rothwell, *supra* n. 7, at 76. *See* the article by William C. Burns, "The International Whaling Commission and the Future of Cetaceans: Problems and Prospects," *8 Colo. J. Int'l Envt'l L. & Pol'y 31 (1997).* The effectiveness of this Treaty is debated in the article by Kieran Mulvaney, "The Last Wild Place: Antarctica," Vol. 8. No. 6, p. 36, as reported by 1997 Information Access Company on Nov. 21, 1997. This Convention is discussed in Note, Brad L. Bacon, "Enforcement Mechanisms in International Wildlife Agreements and the United States: Wading Through the Murk," Geo. Int'l Envt'l L. Rev. 12 (Fall, 1999) 331.

(n12)Footnote 53. The line, fixed by Article I (1) and (4), is a meandering biological boundary, joining certain points along the parallels of latitude and meridians of longitude and may extend as far north as the 45 degree south latitude.

(n13)Footnote 54. *See* Article 7, Article 13, and Article 17 thereof respectively.

(n14)Footnote 55. *See also* the Comment by Popick, Ian J., "Are There Really Plenty of Fish in the Sea? The World Trade Organization's Presence Is Effectively Frustrating the International Community's Attempt to Conserve the Chilean Sea Bass," Emory L.J. 50 (Summer 2001) 939 in which article the scheme to assist in the overfishing of the Patagonian toothfish or Chilean sea bass pursuant to CCAMLR's Catch Documentation Scheme is discussed. Rothwell, *supra*, n. 7 who notes, however, that the convention has received mixed reviews in that quotas are often not enforced, krill harvesting continues to be too great, and there remains uncertainty regarding offshore jurisdiction.

(n15)Footnote 56. *See* Note, *supra* at note 28, at 836. A discussion of the environmental initiatives of the Antarctic Treaty System is included in the article by Gray, Kevin R., "International Environmental Impact Assessment: Potential for a Multilateral Environmental Impact Assessment: Potential for a Multilateral Environmental Agreement," Colo. J. Int'l Envtl. L. & Pol'y 11 (Winter 2000) 83, 114.

(n16)Footnote 57. CRAMRA was signed June 2, 1988, Doc. AMR/5CM/88178, *reprinted in 27 I.L.M. 589*, (1988). Plans for the Convention started in 1982 at the 11th A.T.M. in Buenos Aires in July of 1981.

(n17)Footnote 58. For example, a set of environmental conditions that a prospective operation must meet were stipulated in Article 4(1), impact statements were required prior to any activity under Article 2(3), and any activity approved was not to affect global or regional weather patterns, in Article 4(3). As noted, mining was permitted; however these conditions were "tough conditions," but they were not stated in absolute terms. *See* Blay, *supra* note 51, at 382.

(n18)Footnote 59. Article 5(2).

(n19)Footnote 60. Article 18 (Commission), Article 23 (Advisory Committee), Article 33 (Secretariat).

(n20)Footnote 61. The Convention opened for signature at Wellington on November 25, 1988 and was to be open until November 25, 1989. The Convention would enter into force under Article 62 thereof only upon the ratification or agreement of all States referred to in Article IV(1)(a)(b) of the Antarctic Treaty and at least four states referred to in paragraph 1(c) of that Article including at least three developing countries. Consequently, when France and Australia, as original claimants and signatories under the Treaty refused to ratify the Treaty, the Treaty could not enter into force. At the time, many other countries supported CRAMRA including the United States, the former Soviet Union and the United Kingdom. France and Australia advocated a Wilderness Park, though Australia noted that it might accede if alternate strategies could not be found and Antarctica would otherwise be unprotected. Prior to the October 1990 meeting in Paris, France and Australia circulated a joint proposal calling for comprehensive measures to protect the environment and dependent ecosystem. *Reproduced as* XV ATCM/WP/2 and SV ATCM/WP/3 respectively in the Final Report of Fifteenth Antarctic Treaty Consultative Meeting 202-13 (1989).

(n21)Footnote 62. It was signed June 22, 1991, Doc. [11th Antarctic Treaty Special Consultative Meeting] XI A.T.S.C.M./2, text of Final Act, October 4, 1991 *reprinted in 30 I.L.M. 1455 (1991)*, which Protocol was adopted by the ATCPs and opened for signature on October 4, 1992. The Protocol provides that it will be opened for signature on October 4, 1991 and will remain open until October 3, 1992. *See also* note 28 *supra*. *See also* the address by Mackay, Don, "International Law Weekend Proceedings: The Proposed Antarctic Treaty on Environmental Damage," published in ILSA J. Int'l & Comp. L 6 (Spring 2000) 473, which discussed the various agreements for dealing with liability to the Antarctic environment.

(n22)Footnote 63. Article 7 prohibits any activity relating to mineral resources other than scientific research; however under Article 25 the Protocol may be amended at any time in accordance with Article XII(1)(a) and (b) of the Antarctic Treaty which requires the unanimous agreement of the consultative parties or, Article 7's prohibition on mining may be amended at a review conference after fifty years, though such an amendment must be accompanied by a legally binding regime specifying agreed means to determine which activities on the continent are acceptable and under

what conditions permitted.

(n23)Footnote 64. *See* S. Ex. Rept. No. 102-54, 9/22/92, ratified on 10/7/92 as Treaty Document No. 102-22. Although ratified by the Senate in 1993, the State Department determined that the Protocol was not self-implementing and thus legislation is needed to deposit the United States instrument of ratification and make the United States a party to the Protocol. *See* Hearing on Antarctic Scientific Research, Tourism and Marine Resources Act of 1993 before the Senate Comm. on Commerce, Science and Technology, 103rd Cong., 1st Sess. (1993) (Statement of R. Tucker Scully, Director, Office of Oceans, Department of State). Four separate bills were introduced into the 103rd Congress, 1st Sess. (1993): H.R. 964, H.R. 3532, H.R. 1066 and S. 1427. *See also* Andersen, *supra* note 27, as well as Angelini and Mansfield, note 27, and Elaine F. Forman, "Protecting the Antarctic Environment: Will a Protocol Be Enough?" *7 Am. U. J. Int'l L. & Pol'y 843 (1992). See* footnote 28 of § 58.04 regarding the current status of the Protocol. The Protocol became effective on January 14, 1998. A critique of the Madrid Protocol may be found in an article by Kathleen T. Mulville, "How the Antarctic Science, Tourism, and Conservation Act of 1996 Fails Antarctica," Wm. & Mary Envt'l L. & Pol'y Rev. 23 (Spring, 1999) 649. The author is especially concerned with the coordination of international joint projects.

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CHAPTER 58 ANTARCTICA

7-58 Thompson on Real Property, Thomas Editions § 58.08

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§ 58.08 Provisions of the Antarctic Treaty.

The Antarctic Treaty, signed at Washington, D.C., on December 1, 1959, by 12 countries, is the basis for the Antarctic Treaty System. n65 The Preamble and Article I of the Treaty note that Antarctica is to be used for peaceful purposes only. Military bases are prohibited, although military personnel and equipment may be used for scientific research or for any other peaceful purpose. n66

Articles II and III of the Treaty provide for freedom of scientific investigation in Antarctica and for cooperation toward that end. Article III also notes that information regarding scientific programs shall be exchanged to permit maximum economy and efficiency of operations; scientific personnel as well as scientific observations and results are to be exchanged. Parties are encouraged to work with agencies of the United Nations and other international organizations having a scientific or technical interest in Antarctica. n67

Article IV deals with the difficult issue of sovereignty; however, it did so in such a way as to allow the parties to come together without prejudice to their particular claims. n68 Article IV(1)(a) notes that the Treaty is not to be interpreted as a renunciation by any of the parties as to previously asserted rights or claims to territorial sovereignty. n69 Provision 1(b) of Article IV notes that the treaty is not to be interpreted as prohibiting any future claim to Antarctica; the provision was inserted for the benefit of the United States and the former Soviet Union, as both nations had extensive interests in Antarctica but had never made formal claims; n70 and 1(c) was inserted to deal with the conflicting claims of Argentina, Chile and the United Kingdom, n71 and notes that the Treaty does not prejudice any party's recognition or non-recognition of another's claim. Paragraph 2 of Article IV notes that activities occurring while the Treaty is in force will not constitute a basis for either asserting, supporting, or denying a claim to territorial sovereignty. n72

Nuclear explosions and the disposal of radioactive waste materials are prohibited in Article V. n73 The area covered by the Treaty is set forth in Article VI and is noted as all areas south of 60 degree South Latitude, including all ice shelves. n74 Nonetheless, the area was expanded somewhat by the Convention on the Conservation on Antarctic Marine Living Resources to include the marine living resources between that latitude and the Antarctic Convergence. n75

Inspections are authorized by Article VII to assure compliance with the provisions of the Treaty. n76 Article VIII attempts to deal with jurisdiction over nationals, which often is difficult because of not recognizing sovereignty claims.

Under paragraph 1 thereof, inspectors and scientific personnel who are exchanged under the terms of the Treaty and members of their staffs are subject only to the jurisdiction of the Contracting Party of which they are nationals regarding all acts or omissions which occur while in Antarctica and exercising their functions. Under paragraph 2 thereof the Contracting Parties agree to consult together to reach a mutually acceptable solution. n77

Article IX(1) notes that contracting parties shall meet from time to time to exchange information, to consult on matters of common interest, and to formulate recommendations in furtherance of the goals and objectives of the Treaty, including the peaceful use of Antarctica; the facilitation of scientific research and scientific cooperation; the facilitation of inspection, to formulate recommendations regarding the exercise of jurisdiction; and for the preservation and conservation of living resources in Antarctica. n78 Article IX, paragraph 2 notes that an acceding Party may become a Contracting Party by conducting substantial scientific research in Antarctica. n79 Article X notes that the parties are to work in a manner consistent with the Charter of the United Nations and Article XI notes that if any dispute arises between 2 or more of the parties concerning the interpretation or application of the Treaty, the parties shall consult among themselves to have it resolved by negotiation, inquiry, mediation, conciliation, arbitration, judicial settlement or any other peaceful means, and if not so resolved, with the consent of the parties involved be referred to the International Court of Justice for settlement. n80

Modifications and amendments are discussed in Article XII. Section 1(a) provides that the Treaty may be modified or amended at any time by the unanimous agreement of the Contracting parties. Any such modification or amendment is subject to ratification by the appropriate governments and enters into force upon the receipt of the document of ratification. n81 Thirty years from the effective date of the Treaty, or after June 23, 1991, any Contracting Party may request a Conference of all Contracting Parties in order to review the operation of the Treaty. At such a Conference, a majority of the Contracting Parties may approve a modification or an amendment. n82 Thus, contrary to popular opinion, the Treaty did not end in 1991, nor could a party withdraw at that time; however, after this date a contracting party may now ask for a review, and modifications or amendments now require only a majority vote rather than the prior unanimous vote. n83

Article XII provides for ratification of the Treaty. Paragraph 1 thereof notes that the Treaty shall be open for accession by any state which is a Member of the United Nations or by any other State which may be invited to accede to the Treaty with the consent of all the Contracting Parties. n84 Instruments of ratification and accession are to be deposited with the United States of America as the depository Government and the present Treaty registered with the United Nations. Finally, Article XIV notes that the Treaty was written in English, French, Russian and Spanish.

FOOTNOTES:

(n1)Footnote 65. The twelve countries were Argentina, Australia, Belgium, Chile, The French Republic, Japan, New Zealand, Norway, The Union of South Africa, The Union of Soviet Socialist Republics, the United Kingdom of Great Britain and Northern Ireland, and the United States of America (using the 1959 names for the countries). *See 12 U.S.T. 794*, T.I.A.S. No. 4780, 402 U.N.T.S. 71. The Treaty was proclaimed by the President of the United States on June 23, 1961, ratified by him on August 18, 1960 and ratification advised by the Senate on August 10, 1960. *See also* § 58.07.

(n2)Footnote 66. *See* § 58.05 at note 31 that the research bases on Antarctica are staffed by research individuals who are assisted by the military, though some bases are staffed only by the military who are engaged in scientific research.

(n3)Footnote 67. SCAR has been particularly effective. *See* § 58.06 and note 41. Some have suggested, however, that not all research results are shared and thus duplicate research may occur. Others have noted that not all research is equally valid.

(n4)Footnote 68. *See* § 58.10 regarding sovereignty claims and § 58.13 *et seq.* regarding individual countries' claims. *See also* Gillian Triggs, The Antarctic Treaty Regime: A Workable Compromise or a "Purgatory of

Ambiguity?" *17 Case W. Res. J. Int'l L. 195 at 201 (1986)* who notes the Article was so drafted to enable each state to adopt differing views as to its meaning.

(n5)Footnote 69. This provision was included for the seven claimant states: Argentina, Australia, Chile, France, New Zealand, Norway, and the United Kingdom.

(n6)Footnote 70. *See* §§ 58.20 and 58.21 *infra*.

(n7)Footnote 71. These claims conflict in the Antarctic Peninsula. The British claims based on discovery and occupation conflict with the claims of Chile and Argentina, both of whom use contiguity as well as other claims. *See* § 58.10 *infra*. The United Kingdom offered to have its title adjudicated through the International Court of Justice in 1947, 1951 and again in 1953 and finally submitted a unilateral application to the Court. However, Argentina and Chile refused to accept the jurisdiction of the Court and the petition was removed from the Court's consideration. *See* I.C.J. Pleadings Antarctic Cases (1955) 38 and 75; I.C.J. Reports** (1956) at 13-17. *See also* Christopher C. Joyner, "Anglo-Argentine Rivalry After the Falklands/Malvinas War: Laws, Geopolitics, and the Antarctic Connection," 15 Lawyer of the Americans 457, 490 (1984).

(n8)Footnote 72. Of course, the Treaty is binding only on those who have acceded to it. A non-signatory party may make a claim. Although claims are frozen in § 2 of Article 4, what might be the effect when and if the Treaty ever ends? Is it a return to 1959? For a discussion thereon *see* Parriott, *supra,* note 6.

(n9)Footnote 73. The use of nuclear energy is not prohibited, however, and the United States did use such energy in the 1970's.

(n10)Footnote 74. By including ice shelves, the status as to these formations, which are neither land nor water, was clarified; however, it leaves open the question as to claims under the ice shelves. Also in question is the effect of the 1982 United Nations Convention on the Law of the Sea which recognizes a 200 mile exclusive economic zone. *See also* note 7 *supra*.

(n11)Footnote 75. Article 4 of C.C.A.M.L.R., *see* note 8 *supra*. This creates a meandering biological boundary which may extend as far north as the 45 degree south latitude.

(n12)Footnote 76. Some commentators have noted that only the United States performs inspections on a regular basis. *See* Rothwell, *supra* n. 7, at 70, n. 46. Greenpeace also performs inspections. *See* May, *supra* n. 6, at pp. 159 and 169.

(n13)Footnote 77. *See* § 58.12 *infra* in general regarding jurisdiction.

(n14)Footnote 78. *See* § 58.07, and note 45 regarding these meetings. The recommendation process was discussed in the article by Christopher, C. Joyner, "Recommended Measures Under the Antarctic Treaty: Hardening Compliance with Soft International Law," Mich. J. Int'l L. 19 (Winter, 1998) 401.

(n15)Footnote 79. *See* § 58.09 which discuss the differing memberships within the ATS.

(n16)Footnote 80. Note, however, that neither Argentina nor Chile consented to have the jurisdiction of the International Court of Justice settle the conflicting claims in the Antarctic Peninsula. *See* note 71 *supra*. The mere fact that a dispute has been so referred does not remove the requirement that the parties continue to seek to resolve it. *See, e.g.,* David Colson, "The Antarctic Treaty System: The Mineral Issue," *12 Law & Pol'y Int'l Bus., 841 (1980).* During the Falklands/Malvinas War, the two warring parties (Argentina and The United Kingdom) continued to cooperate with regard to Antarctic matters. *See* Joyner, *supra* note 71, at 499.

(n17)Footnote 81. If the government does not ratify it within two years from when the modification or amendment

went into force, such party is deemed to have withdrawn from the treaty. *See* Article XII(1)(b). The 1991 Madrid Protocol was the first such amendment to the Treaty. *See* § 58.07 *supra*, note 62.

(n18)Footnote 82. *See* Article XII 2(a) and (b). If such modification or amendment has not entered into force within two years after communication to all contracting parties, such party may give notice of its withdrawal from the present Treaty, which withdrawal shall take effect two years after the receipt of the notice. *See* Article XII 2(c).

(n19)Footnote 83. If a member does opt out of the Treaty under this provision (the earliest time would be June 21, 1993), query the effect of its sovereignty claims under Article IV ? Will the legal status of the parties revert to the status quo as it existed in 1959 as suggested by Chile? What about the substantial activities of some parties during the time when the Treaty was in effect (granted, under Article IV(1)(c) such activities are not to prejudice the rights of the parties, but can they be used to bolster a claim)? *See* Parriott, *supra* note 6 at 90-93. *See also* Blay et al., "Antarctica after 1991: The Legal and Policy Options," ASOLP Occ Paper 2 at 3-5 (1989). Of course, a non-member state is not bound by the Treaty at all.

(n20)Footnote 84. *See* § 58.09 which lists the current acceding members.

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CHAPTER 58 ANTARCTICA

7-58 Thompson on Real Property, Thomas Editions § 58.09

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§ 58.09 Parties to the Antarctic Treaty.

The parties to the Antarctic Treaty fall into 3 groups: original signatories to the Treaty; Antarctic Treaty Consultative Parties (ATCPs) n85 and Antarctic Treaty Non-Consultative Parties (non-ATCPs). Those members entitled to vote under the Treaty include the original signatories and the ATCPs. The non-ATCPs are acceding members who have agreed to the terms of the Treaty, but who have not engaged in the substantial scientific research required under Article IX of the Treaty to become a voting member.

Article XIII of the Treaty provides that any State which is a Member of the United Nations, or any other State invited to accede to the Treaty by all Contracting Parties, may accede to the Treaty. Acceding members may attend sessions of the Antarctic Treaty members, although they have no vote. n86 An acceding member may become an Antarctic Treaty Consultative Party by conducting substantial scientific research in Antarctica. n87

Current voting members include the original 12 signatories: Argentina, Australia, Belgium, Chile, France, Japan, New Zealand, Norway, the Republic of South Africa, the former Soviet Union, the United Kingdom, and the United States. Additional Antarctic Treaty Consultative Parties include Brazil, the People's Republic of China, Ecuador, Finland, Germany, n88 India, Italy, the Netherlands, Peru, Poland, South Korea, Spain, Sweden, and Uruguay.

Current acceding members who are non-voting members (non-ATCPs) include Austria, Bulgaria, n89 Canada, Columbia, Cuba, Czechoslovakia, Denmark, Greece, Hungary, North Korea, Papua, New Guinea, Romania, and Switzerland.

FOOTNOTES:
(n1)Footnote 85. The term ATCPs often includes both the original signatories and the new consultative parties. The current parties are noted in the article by Joyner, Christopher C., "Recommended Measures under the Antarctica Treaty: Hardening Compliance with Soft International Law," Mich. J. Int'l L. 19 (1998) 401. Current acceding members are noted as now including Guatemala, Turkey and the Ukraine. Czechoslovakia is now represented by the Czech Republic and the Republic of Slovakia.

(n2)Footnote 86. Such members have attended regularly since 1984. The invitation to attend became routine as

part of Contracting Parties' attempts to address the issue that their discussions were conducted in secret. A.T.M. meetings now also include various international organizations and more documents are now available. *See* Recommendation XII-6, Final Report of the Twelfth Antarctic Treaty Consultative Meeting 40 (1983).

(n3)Footnote 87. *See* Article IX (2). Many states have become ATCPs, even though the cost of research is substantial. As a result, many countries have not become ATCPs, and those who do conduct research tend to build bases close to existing bases. The amount of research required and the difficulty of attaining ATCP status has changed over the years. For example, Poland was the first to accede, however it did not achieve ATCP status until 1979, whereas many recent ATCPs have been admitted in a relatively short time with perhaps not the same amount of research as required of poland. It has been suggested that the inclusion of India and Brazil as ATCPs was due more to the pressure of the non-aligned resolution in the United Nations than the research conducted. *See* Sudhir K. Chopra, "Antarctica as a Common Regime: A Conceptual Framework for Cooperation and Coexistence," The Antarctic Legal Regime 184 (Christopher C. Joyner & Sudhir K. Chopra eds. 1988). Some of the research progress is slow. Norway and Belgium's research efforts are almost non-existent, but as original signatories they remain as active voting members. *See also* § 58.21 note 193, *infra*. There are few, if any, representatives as either an ATCP or an acceding member from the Middle East or from black Africa.

(n4)Footnote 88. The Federal Republic became an ATCP in 1981 and the German Democratic Republic in 1987.

(n5)Footnote 89. Bulgaria became a voting member as an Antarctic Treaty Consultative Party in 1998 as reported by Christopher C. Joyner in his book, Governing the Frozen Commons, on page 269. Czechoslovakia is now the Czech Republic and the Republic of Slovakia. In addition, Guatemala, Turkey and the Ukraine are now acceding members. *See* Christopher, C. Joyner, "Recommended Measures Under the Antarctic Treaty: Hardening Compliance with Soft International Law," Mich. J. Int'l L. 19 (1998) 401 at note 2.

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CHAPTER 58 ANTARCTICA

7-58 Thompson on Real Property, Thomas Editions § 58.10

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§ 58.10 Types of Sovereignty Claims.

Traditionally, Antarctica has been viewed as *res nullius* (or land owned by no one, according to Roman law). n90 If the continent was *res nullius* then it was susceptible to acquisition by a state. Various theories have been advanced as a means of acquisition including discovery, sector, contiguity, geological affinity, Pan-American primacy, and primarily, effective occupation.

Seven countries have made territorial claims to approximately 85% of the continent, n91 leaving approximately 15% of the continent unclaimed. n92 The territorial claims are "frozen" under the Treaty. n93

Some have based claims of sovereignty on the fact of discovery. n94 The fact of discovery alone, however, is insufficient and more is needed than visual apprehension or the flying of a flag, though such acts of symbolism often accompany the acts of discovery. n95

Argentina and Chile base their claims in part on historic right or the theory of *uti possidetis*. In 1493, Pope Alexander VII issued 4 Papal Bulls in which he divided the New World between Spain and Portugal. Under these Papal Bulls, which were followed by the Treaty of Tordesillas, Spain obtained rights to the New World and obtained all lands west of the 46th meridian "from the Arctic to the Antarctic Poles" (Portugal was awarded the other half). As a result, Argentina and Chile, upon succession from Spain, claim Antarctica as theirs. This theory has not been well received. n96

Contiguity and proximity claims are based on 2 similar theories which refer to the extension of sovereignty from a state over lands which are contiguous to the state. Argentina and Chile also claim sovereignty based on the proximity of their states to Antarctica, n97 particularly as to their overlapping claims with Great Britain. n98 This theory has not been well received especially in that it involves extending sovereignty from one continent to another and involves great geographic distances.

Geological affinity, a theory very similar to contiguity/proximity, has been used by Chile and Argentina to argue that the Antarctic Peninsula and Ellsworth Land are a continuation of the Andes Mountains and thus belong to them as a natural extension. n99 The relatively close proximity of Antarctica to Argentina and Chile also has led to the

"Pan-American" primacy theory for asserting sovereignty. When the United States' bases were planned in 1939, President Franklin D. Roosevelt noted that United States activities in the area would be conducted on behalf of all American Republics. n100 In 1948, Chile and Argentina mutually proclaimed an intent to exercise exclusive rights over the "South American Antarctic" and later enacted the Inter-American Treaty of Reciprocal Assistance. n101

The sector theory notes that lines are drawn to the South Pole either from the country's mainland or from a portion of the Antarctic coast which had been discovered or occupied by the claimant. n102 Although the claimant states have all advocated this theory, the United States, as well as most scholars, reject it. n103

The primary theory used by all claimant states is that of effective occupation. Discovery, though insufficient by itself, provides a title which remains inchoate until there is effective occupation by the state. Effective occupation requires the state to show not only actual possession but also administration of the area (including the control over the territory, its people and its resources). The state then must show some display of authority. Of course, difficulties with the theory include uncertainty on the tasks required, the time periods involved, and the fact that large areas of vacant hostile land are involved in Antarctica. n104

FOOTNOTES:

(n1)Footnote 90. If land is viewed as *res nullius*, then customary international law prescribes various methods for its acquisition. It is land which has no owner or possessor or it has been abandoned by its owner. If, on the other hand, the land is incapable of being possessed, then it is generally referred to as *res communis* or *terra publica*. If it is *res communis*, then it is not subject to appropriation by any state and instead allows free access to all. Traditionally, Antarctica has been viewed as *res nullius* and the seven claimant states have asserted sovereignty claims on that basis. It has been argued, moreover, that the doctrine of occupation with regard to *res nullius* land must be "the applicable rule with respect to Antarctica because the comity of nations is not willing to adhere to any other rule." *See* Parriott, *supra* note 6, at 78. On the other hand, those who argue it is *res communis* note that much of Antarctica is not even land, or that it is land which is above sea level, and thus should be considered *res communis* or some other concept which is more realistic. *See, e.g.*, Chopra, note 87; Note, Thaw in International Law? Rights in Antarctic under the Law of Common Space, *87 Yale L.J. 804, 907 (1978)* noting that exclusive territorial claims in Antarctica are untenable for they violate the historical pattern of international practice and agreement in Antarctica, rest on inadequate application of various doctrines of international law, and rely on outmoded assumptions. The opportunity to have the sovereignty claims under *res nullius* adjudicated was lost when Argentina and Chile refused to consent to the jurisdiction of the International Court of Justice when the United Kingdom raised the issue. *See* note 71, *supra*. *See also* § 58.11.

(n2)Footnote 91. Only New Zealand and the United Kingdom might have been willing to relinquish their sovereignty claims at the time of the treaty. Of the seven claimant states, only five of them recognize each other's claims (Australia, France, New Zealand, Norway and the United Kingdom). Their claims have been legally untested and remain in limbo under the protection of the Antarctic Treaty. An opportunity to have the claims judged was lost when jurisdiction was refused by Argentina and Chile when the United Kingdom brought the issue to the International Court of Justice. *See* note 71, *supra*. It has been suggested that some claimants may be willing to forego sovereignty claims if the ATS can be protected otherwise, or for another rational management system be installed. *See* Bergin, *supra*, note 6. At times, New Zealand's interest in Antarctica has been lukewarm. *See* § 58.17. *See* Comment: Joseph J. Ward, Black Gold in a White Wilderness-Antarctica Oil: The Past, Present and Potential of a Region in Need of Sovereign Environmental Stewardship, J. Land Use & Env. 13 (1998) 517 in which the author calls for the recognition of sovereign rights as a way to answer concerns regarding mining.

(n3)Footnote 92. The area known as Ellsworth Land and Byrd Land lies between 150 and 90 degrees West. *See also* notes 156 and 169, *infra*. The seven countries claiming a portion of Antarctica and the date of first making such claims are Argentina (1942), Australia (1933), Chile (1940), France (1924), New Zealand (1923), Norway (1939) and the United Kingdom (1908). The claims of Argentina, Chile and the United Kingdom overlap in the Antarctic Peninsula as noted, and as a result, these countries do not recognize the claims of each other. The other claimants recognize each

other; however, countries such as the United States and the former Soviet Union do not recognize the claims of the others, but reserve the right to claim an interest in the future. *See* § 58.08 and note 71, *supra*.

(n4)Footnote 93. *See* § 58.08, *supra*. *See also* the comment made by then Judge Scalia in the dissent in *Beattie v. United States, 756 F.2d 91, 106 (D.C. Cir. 1984) aff'd Smith v. United States, 113 S. Ct. 1178, 122 L. Ed. 2d 548 (1993)* that "it is also wrong to conclude that under the Antarctica Treaty of 1969 the signatory nations agreed not to exercise sovereignty in Antarctica," Maj. op. at 93. Article IV(1) of that Treaty merely provides that the treaty does not *prejudice* any nation's claim or basis for a claim to Antarctica; and Article IV(2) merely provides that while the Treaty is in force no activities shall constitute a basis for asserting a claim in Antarctica and no new claim shall be asserted. (emphasis included).

(n5)Footnote 94. Antarctica was the last continent to be discovered and was not actually sighted until 1820 when three explorers so sighted it: Palmer of the United States, Bransfield of the United Kingdom, and Bellingshausen of the Soviet Union. Discovery alone is not enough and often it is very difficult to ascertain who did what and when. Joyner, *supra* note 7, at 707. An example noted by Joyner, was the mountains "found" by an Argentinean flight in 1955, which were "discovered" by the United States in 1956, and again by the United Kingdom in 1957.

(n6)Footnote 95. Flags are often erected, documents or plaques buried, postage stamps are issued. In 1909, Shackleton though near death, took symbolic possession of the polar plateau by raising flags and burying a cylinder of stamps and documents. Though never making a formal claim to Antarctica, the United States Navy did erect bronze pipes and buried brass plates in 1948 and dropped flyers. *See* § 58.20, *infra*. Symbolic acts create confusion, are questionable and are not practical.

(n7)Footnote 96. It is particularly difficult to defend when Antarctica was unknown, to Spain at the time of the Bulls and even at the time of succession by Argentina and Chile from Spain.

(n8)Footnote 97. South Africa also may have made a claim for special entitlement based on proximity according to the Note, Thaw, *supra* note 89, at 815.

(n9)Footnote 98. *See* Phillip W. Quigg, A Pole Apart: The Emerging Issue of Antarctica, 115 (1983). *See also* note 71 *supra*.

(n10)Footnote 99. *See, e.g.*, Parriott, *supra* note 6, at 88, note 150. Again, this theory has received little recognition.

(n11)Footnote 100. Reported in Quigg, *supra* n. 97, at 117. The support by the United States for this theory soon diminished.

(n12)Footnote 101. *See* Robert D. Hayton, "The 'American' Antarctic," *50 Am. J. Int'l L. 583 (1956)*. This argument also is used to bolster their claims on the Antarctic Peninsula as against the United Kingdom. *See* note 71, *supra*.

(n13)Footnote 102. The sector theory originally was applied to the Arctic Ocean claims by Canada and the former Soviet Union. *See* Parriott, *supra* note 6, at 87.

(n14)Footnote 103. Norway may not advocate this theory in that Norway rejected the sector theory in the Arctic region. *See* Quigg, *supra* n. 97, at 115. If actually applied, the claims of Chile and Argentina would be very small and the Australian claim would not correspond with what is claimed. It is not a recognized customary international law principle for Antarctica. *See* J. Peter A. Bernhardt, "Sovereignty in Antarctica," *5 Cal. W. Int'l L.J. 297 at 332, 338 (1975).*

(n15)Footnote 104. Usually 3 cases are cited to support the concept of effective occupation and that something less

may be required in Antarctica, in that the land is unoccupied or cannot be so occupied. The most similar is the Legal Status of Eastern Greenland, 1933 P.C.I.J. (Ser. A/B) No. 53 which case involved a dispute between Norway and Denmark. In 1931, Norway proclaimed Eastern Greenland to be *terra nullius* and placed it under her sovereignty. Denmark based its prior claim to the area on its continuous and peaceful exercise of sovereign rights over a long period of time, dating back to 1381. The International Court of Justice found for Denmark and noted that Denmark's intent to exercise sovereignty had been sufficient (the Court noted as relevant, legislation enacted in Denmark, the issuance of permits to visitors, coastal inspections, etc., even though Denmark's physical presence did not extend into the many inaccessible areas).

In Clipperton Island, Affaire d'Iile de Clipperton, *26 A.J.I.L. 274, 282,* UN Rep. Vol. II, p. 1105, 2 R. Int'l Arb. Awards 1105 (1932) between France and Mexico, the Arbitrator Victor Emmanuel III noted that the island was *res nullius* in 1858 when the French naval officer saw it from the ship, proclaimed it for France, and so notified the Hawaiian government, where it was published. The arbitration held these were sufficient acts of occupation, though symbolic, as the island was uninhabited.

In the Island of Palmas (Neth. v. U.S.), Award of 4 April 1928, Max Huber Arbitrator, United Nations, R.I.A.A. UN Rep. Vol. II, 829-871, 2 R. Int'l Arb. Awards 829 (1929), the issues regarding occupation were clarified regarding an island that had a substantial population. The acts of Holland at different periods between the middle of the 17th century and 1898 were sufficient to acquire sovereignty as against the United States, whose claim was based on discovery or contiguity. Acts of sovereignty may be intermittent.

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CHAPTER 58 ANTARCTICA

7-58 Thompson on Real Property, Thomas Editions § 58.11

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§ 58.11 Antarctica If Not Viewed as *Res Nullius.*

The issue of sovereignty, discussed in the prior section, presupposes that the continent was *res nullius* or owned by no one. Although widely supported, some have suggested that Antarctica should be viewed as either *res communis, res publica or terra communis*. n105 If viewed as *res communis* or a form thereof, the land cannot be possessed and sovereignty claims would not be recognized; however, all states would have free access to conduct research, to send expeditions, and to harvest the resources. n106 In recent years, some have suggested that the principles of the common heritage of mankind should be applied in Antarctica. n107

If viewed as *res communis*, perhaps a format other than the current Antarctic Treaty System should be utilized. Some have suggested an International Convention to create a new Antarctic Treaty initialed by the United Nations General Assembly; others a form of International Trusteeship under the Charter of the United Nations. n108 The concept of a United Nations trusteeship is not novel. n109 In 1948 the United States had suggested such a trusteeship. Nonetheless, beginning in 1982 each session of the General Assembly has involved discussions concerning Antarctica. The areas of concern include: that the consultative parties provide information to the United Nations so that it may serve as the central repository for data about Antarctica; that the Secretary General be invited to general and special ATS meetings; that a moratorium be placed on minerals negotiations until all can participate; that there be an equitable sharing of resources; n110 that the consultative parties take steps to exclude South Africa from participation in consultative meetings. n111 Another possibility is assimilation of all or part of the area by the International Seabed Authority. n112 A world park or wilderness reserve has been suggested. n113 Another suggestion has been a form of condominium structure in which 2 or more parties, acting collectively, would share authority and sovereignty over Antarctica. n114 Of course, other modes include the proposal that all states should have free access to Antarctica and its resources n115 or that states should assert independent territorial claims. n116

FOOTNOTES:
(n1)Footnote 105. The opportunity to have the sovereignty claims under *res nullius* adjudicated was lost when Argentina and Chile refused to consent to the jurisdiction of the International Court of Justice when the United Kingdom raised the issue. *See* § 58.10 *supra*. *See also* the discussion by Brilmayer, Lea and Klein, Natalie, Land and Sea: Two Sovereignty Regimes in Search of a Common Denominator, N.Y.U. J. Int'l. L. & Pol'y 33 (Spring 2001) 703 (noting that Antarctica more nearly resembles maritime assets than land-based assets). In his book, Governing the

Frozen Commons: The Antarctic Regime and Environmental Protection, Christopher C. Joyner discusses Antarctica as a global commons.

(n2)Footnote 106. Proponents of *res communis* note that it is consistent with the practice of cooperation under the ATS, that it is an acceptable principle of customary international law, and that it rejects the colonial nature of *res nullius*. *See, e.g.,* Note, Thaw, *supra*, note 89.

(n3)Footnote 107. The common heritage of mankind typically involves four characteristics as indicated in Note, A World Park in Antarctica: The Common Heritage of Mankind, *10 Va. Envtl. L.J. 109 (1990):* 1. that the territory is not subject to appropriation; 2. all share responsibility; 3. all share benefits; and 4. all committed to peaceful use. The concept may be seen with the deep seabed in the 1982 U.N. Convention on the Law of the Sea (U.N. CLOS III) U.N. Doc. A/Conf/62/122 (1982) *reprinted in 21 I.L.M. 1261 (1982)* and with outer space in the Agreement Governing the Activities of States on the Moon and Other Celestial Bodies, A/SPC/34/L 12 and Treaty on Principles Governing the Activity of States in the Exploration and Use of Outer Space, including The Moon and other Celestial Bodies, Vol. 610 *(1967) 18 U.S.T., 2410* U.N.T.S. 205. *See also* the article by Frakes, Jennifer, "Notes and Comments: The Common Heritage of Mankind Principle and the Deep Seabed, Outer Space, and Antarctica: Will Developed and Developing Nations Reach a Compromise?" Wis. Int'l L.J. 21 (Spring 2003) 409.

(n4)Footnote 108. Beginning in 1982, several developing nations, led by Malaysia, initiated a Debate on Antarctica in the General Assembly of the United Nations, which debate has been continued since that time. *See* U.N. GAOR, 37th Sess., U.N. Doc. A/37/PV 10 (1982).

(n5)Footnote 109. *See* § 58.06, note 36 *supra*. 19 Dep't St. Bull. 283, 301 (1948). New Zealand and the United Kingdom made similar overtures in 1956 and 1958 respectively. Triggs, *supra* n. 68, at 197 suggests that the reason the trusteeship was rejected was due to the sovereignty issue.

(n6)Footnote 110. The Consultative Parties have now agreed to furnish reports of the regular meetings to the Secretary General and have acquiesced to the U.N. role as a central depository for information regarding Antarctica. *See* Question of Antarctica: Reports of the Secretary-General, 42 U.N. GAOR (Agenda Item 70) at 5, U.N. Doc. A/42/586 (1987).

(n7)Footnote 111. The Consultative Parties have not excluded South Africa, although this issue has split the unanimity of the regime in the United Nations. In the 43rd session of the U.N., five consultative parties (Argentina, Brazil, China, the German Democratic Republic and India) as well as acceding members Cuba, Ecuador, Peru and Romania voted for the exclusion of South Africa (many of the ATCS use ATCPs did not participate in the vote).

(n8)Footnote 112. *See* suggestion in Blay et al., *supra*, n. 83 noting that many middle eastern states have suggested this. *See also* Triggs, n. 68 at 217. China has also suggested this.

(n9)Footnote 113. Many conservation groups have advocated a world park to preserve the unique environment of Antarctica per se and as a scientific laboratory for monitoring international environmental problems. The concept may be traced to the Second World Conference on National Parks held in Yellowstone in 1972. The suggestion by Australia and France supporting this concept in the late 1980's was the first major split among the ATCPs. Whether an organization separate from the current Antarctic Treaty System would be needed for such a park is questioned. If the ATS managed such a concept, it would need something similar to an Antarctic Environmental Protection Agency with an Infractions Committee as suggested in May, *supra*, n. 6, at 159.

(n10)Footnote 114. *See* discussion in Parriott, *supra*, n. 6, at 98 to the effect that under this model the consultative parties, acting together, would share authority and sovereignty over Antarctica. The advantages noted included political stability to encourage commercial interests; allow the area to be considered a coastal state for purposes of applying the LOS Convention; and to dissuade the rest of the international community from attempting to impose an international regulatory regime on Antarctica.

(n11)Footnote 115. *See* Note, Thaw, *supra*, note 89, at 841 that Antarctica is analogous to the "high seas."

(n12)Footnote 116. *See* Parriott, *supra*, note 6, at 98 noting that this would resolve the question of sovereignty and reward those states which have taken an active position in Antarctica in the past.

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CHAPTER 58 ANTARCTICA

7-58 Thompson on Real Property, Thomas Editions § 58.12

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§ 58.12 Jurisdiction in Antarctica.

In addition to sovereignty concerns, questions of jurisdiction may arise. n117 Under Article VIII(1) of the Treaty, scientific personnel present under subparagraph (1)(b) of Article III as well as observers under paragraph (1) of Article VII and their respective staffs, are subject only to the jurisdiction of the contracting party of which they are nationals regarding all acts or omissions occurring while in Antarctica for the purpose of exercising their functions. As to all other persons, the contracting parties concerned in any dispute are to consult together immediately with the view to reaching a mutually acceptable solution concerning jurisdiction. n118 If the parties fail to settle the dispute, then by consent the parties may take the issue to the International Court of Justice. n119

Currently, there are no courts in Antarctica. The human presence has increased, however, and so has the need for private law. n120 To date, however, the nations have refrained from enforcing their laws on persons from other countries in the claimed sectors and thus conflict has been avoided. All seven claimant states have enacted legislation concerning criminal conduct. n121 Likewise, each of the states has enacted legislation regarding claims in its sector of Antarctica. n122 South Africa has special legislation for South African citizens in Antarctica. n123 The United States has implicitly added Antarctica to the special maritime and territorial jurisdiction of the United States in 1984. n124

FOOTNOTES:
(n1)Footnote 117. Jurisdiction, in contrast to sovereignty, is positive and allows a state to make and enforce laws. Of course, once jurisdiction is reserved there still may be a choice of law's problem.

(n2)Footnote 118. *See* Article VIII(2) of the Treaty. The Treaty, of course, does not apply to nationals of countries who are outside the Treaty system, nor does it seem to cover non-governmental personnel such as Greenpeace nor families of the scientists or private tourists or explorers. *See also* note 77, *supra*.

(n3)Footnote 119. *See* Article XI(1) which notes that the parties are to consult among themselves with a view to having the dispute resolved by either negotiation, inquiry, mediation, conciliation, arbitration, judicial settlement or another peaceful means; however if the dispute is not so resolved the parties, by consent, may go to the International Court for settlement under Article XI(2). The parties, of course, might not consent. *See* note 71 *supra*, regarding the refusal of Chile and Argentina to consent regarding sovereignty of the Antarctic Peninsula.

(n4)Footnote 120. Issues of concern, while not of great international importance, are of concern to the individuals involved. Such issues include marriages, deaths, crimes, civil actions, etc. *See, e.g.,* Carl, *supra*, note 5 who suggests at page 69 that " "... jurisdiction remains one of the unsolved problems of the Antarctic system." *See Smith v. United States of America, 113 S. Ct 1178, 1179, 122 L. Ed. 2d 548 (1993)* where Chief Justice Rehniquist notes " "...Antarctica, a soverignless region without civil tort law of its own."

(n5)Footnote 121. *See* dissent of then Judge Scalia in *Beattie v. United States, 756 F.2d 91, 106 (D.C. Cir. 1984), quoting* Richard B. Bilder, "Control of Criminal Conduct in Antarctica," *52 Va. L. Rev. 231, 260 (1966).*

(n6)Footnote 122. *See, e.g.,* Australia conferred jurisdiction of its courts for claims in Antarctic Territory Act 1954, Act No. 42 of 1954, Art. 6(1) *reprinted in* Bush, *supra* n. 17, at Vol. 2, p. 179 as well as Australia, Antarctic Treaty Act of 1960, Act No. 48 of 1960, Art. 4 *in* Bush at 192. Argentina by Decree Law No. 2,191 of Feb. 28, 1957 *reprinted in* Bush, at 15. Chile by Law No. 11,846 of July 17, 1955, 78 Diario Oficial 1321 (June 21, 1955) *reprinted in* Bush at 402 and Statute of the Chilean Antarctic Territory Decree No. 298, July 17, 1956, 79 Diario Official 1922-23 (Oct. 3, 1956) *reprinted in* Bush at 407. France by Law No. 55-1052 of August 6, 1955 (1955) *reprinted in* Bush at 531 and 71-569 *reprinted in* Bush at 574. New Zealand by New Zealand Antarctic Act of 1960 *noted in* Carl, *supra* note 5, at note 50 as being *reprinted in* 11 Polar Rec. 303 (1962). Norway, Law of Feb. 27, 1930, No. 3 Norges Lover 1682-1963 & 1247-48 (1964) *as amended* Law of June 2, 1960, No. 17, Norges Lover 1847-48 as *noted in* Carl, *supra* note 5, at 50. United Kingdom, The British Antarctic Territory Order in Council, Stat. Instr., 1962, No. 401 *reprinted in* 11 Polar Rec. 306-13 (1962) *as noted in* Carl, *supra* note 5, at note 50.

(n7)Footnote 123. *See* Carl, *supra* note 5, at note 50a noting the South Africa Citizens in Antarctica Act, Act No. 55 of 1962 promulgated by Government Notice No. 826 in 4 Gazette Extraordinary, No. 249 (May 25, 1962) and *reprinted in* 11 Polar Rec. 313 (1962).

(n8)Footnote 124. *18 U.S.C. § 7*(7). This means that there is jurisdiction over certain felonies committed by United States nationals or by foreign nationals against United States nationals in Antarctica. *See also United States v. Escamilla, 467 F.2d 341 (4th Cir. 1972)* (holding that a homicide committed by a U.S. civilian contractor on free-floating ice was within the special maritime and territorial jurisdiction of the United States). United States nationals are also subject to civil and criminal penalties for violations of the Agreed Measures for the Conservation of Antarctic Fauna and Flora and for violations of the Convention on the Conservation of Antarctic Marine Living Resources. *See 16 U.S.C. §§ 2407*-08, 2437-38. United States' military personnel are under the Uniform Code of Military Justice *codified at 10 U.S.C. § 805.*

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CHAPTER 58 ANTARCTICA

7-58 Thompson on Real Property, Thomas Editions § 58.13

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§ 58.13 Claim by Argentina.

Argentina, along with Chile, is probably the most ardent supporter of territorial sovereignty in Antarctica. n125 Argentina bases its claims of sovereignty on a variety of theories, including discovery, n126 *uti possidetis,* n127 propinquity or contiguity, n128 geological and geographical grounds, n129 sector, n130 Pan-American primacy, n131 and effective occupation. n132 Argentina claims an area containing approximately 400,000 square miles. n133

During the 20th century, Argentina has been very active in showing acts of administration and occupancy over its claimed area in order to demonstrate good effective occupation. To that end, in 1978 a pregnant woman was flown in and gave birth to the first child born on the continent. n134 The Argentina stations at Marambio and Esperenza are active outposts. n135 In 1977 Argentina proclaimed its base a capital. n136 Visits have been made by the Argentinean President, Argentinean flags have been flown and it has been formally incorporated into Argentina. n137 Argentina has also been active with other symbolic actions to show effective occupation. n138

FOOTNOTES:
(n1)Footnote 125. *See, e.g.,* Hayton, *supra* n. 100, at 587 (1956) in which it is noted that Antarctic claims in Argentina have been propagandized with a "dedication verging on fanaticism." *See also* N.Y. Times, Feb. 19, 1964, at 3, col. 3, noting that Feb. 22 was declared Antarctic Day in Argentina and celebrating "unrenounceable" sovereignty over the area so claimed. Argentina and Chile are both adamant supporters of their respective claims; however, Argentina has been the more conservative and inflexible of the two. *See also* Bryan Hodgson, "An Island of Isolation No More. Antarctica," 177 Nat'l Geo. No. 4 at 3 (April 1990).

(n2)Footnote 126. An Argentinean Admiral named Guillermo Brown claimed to have seen ice-covered islands at a latitude 65 degrees south at least four years before Bellingshausen, Palmer and Bransfield Smith discovered the Antarctic Peninsula. Prior to 1900, Argentina showed little interest in the continent; however, in 1904, Argentina accepted the invitation of the Scottish National Antarctic Expedition to assume official control over the meteorological observatory on Laurie Island, which maintenance continues to this day. At that time an Argentinean flag was raised as a gesture of national ownership, and an Argentinean citizen performed a stamp cancellation. A radio transmitter was installed in 1927 and postal service was extended. Since establishing this base, Argentina has attempted to appear sovereign in its sector by establishing bases, stations, refuges, lighthouses, buoys, post offices, etc.

(n3)Footnote 127. *See* § 58.10 and note 95, *supra*.

(n4)Footnote 128. *See* § 58.10 and note 96, *supra*.

(n5)Footnote 129. *See* § 58.10 and note 98, *supra*. Strategically, Antarctica has been important to Argentina as protection on her southern flank and could be in the future if the Panama Canal ever were to close.

(n6)Footnote 130. *See* § 58.10 and note 101 *supra*.

(n7)Footnote 131. *See* § 58.10 and notes 99 and 100 *supra*.

(n8)Footnote 132. *See* § 58.10 and note 103, *supra*.

(n9)Footnote 133. *See* May, *supra* n. 6, at p. 115.

(n10)Footnote 134. Emilio Marcos Palma was born and immediately declared an Argentinean citizen. Since that time other children have been born to members of the Argentina military at Esperenza, and Argentina attempts to winter over. *See* N.Y. Times, April 20, 1982, A26 at Column 4. The suggestion often has been made that Argentina wants to colonize Antarctica and that its bases at Esperenza and Marambio are more like frontier settlements than scientific bases. Argentinean scientific research tends to be small, considering the number of staff present.

(n11)Footnote 135. *See* Chester, *supra* n. 6, at 103, or May, *supra*, n. 6 who notes also that plans include the installation of hotels, banks, and shops.

(n12)Footnote 136. Marambio was declared to be a provisional seat of government and the entire Argentine Cabinet conducted their daily business there in August of 1973.

(n13)Footnote 137. Joyner, *supra,* note 71 indicates that the flag was first raised in 1904 on Laurie Island, a permanent National Commission on the Antarctic established in 1940, and in 1942 tablets were deposited proclaiming Argentina's annexation of all lands within the area south of latitude 60 degrees south and between longitudes 25 degrees west and 68 degrees 43 minutes west. In 1951 the Antarctic Institute was created and placed under the Ministry of the Army. In 1955 national legislation was promulgated to formally incorporate the South Atlantic territories into the provinces of the national federal domain.

(n14)Footnote 138. For example, a stamp was cancelled in 1904, postal service extended to the continent in 1927 with postmasters designated from time to time; coroners and local magistrates have been designated. In 1964, February 22 was declared a national Antarctic holiday by decree in Decree No. 1,032 (Feb. 18, 1965) 21 Bef. 1964, as reported by Scott, *supra*, n. 29, who also reports that by 1946 publicity programs were established to make the Argentinean people more Antarctic conscious.

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CHAPTER 58 ANTARCTICA

7-58 Thompson on Real Property, Thomas Editions § 58.14

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§ 58.14 Claim by Australia.

The current portion of Antarctica claimed by Australia was first received in 1933 by Australia from the United Kingdom. n139 It is the largest claim in Antarctica, composed of almost 1/3 of the continent, and lies between the latitudes of 45 degrees and 160 degrees east (south of Australia), but excluding the territory claimed by France. n140

Although Australian activity may have been limited initially, its interests have grown, and now Australia is often classified with Argentina and Chile as one of the more ardent claimants. n141 Currently, Australia's priorities appear to include the maintenance of its sovereignty claim; to strengthen the Treaty's consultative framework, and to maintain a balanced scientific program.

FOOTNOTES:
(n1)Footnote 139. Although there is some history of Australian explorers, Australia's claims originated in the cession of rights from Britain in 1933. Order in Council placed certain territory in the Antarctic Seas under the Authority of the Commonwealth of Australia, February 7, 1933, Australia 2 Statutory Rules and Orders commonwealth Statutory Rules revised, *reprinted in* Naval War College, 46 Int'l. L. Doc. 236 (1948-49). *See also* I Austl. C. Acts 27 (1901-1950). *See also* note 165.

(n2)Footnote 140. Basically, this is the land south of Australia, excluding the wedge for Adelie Land which is claimed by France. The Australian claim is approximately one-third of Antarctica, a claim which some note is too large to be credible or to surrender. The exclusion of Adelie Land is tacit recognition of the French claim.

(n3)Footnote 141. However, Australia joined with France in 1988 to stop the ratification of CCAMLR and to suggest that Antarctica be made a World Park. *See* § 58.11, note 112. Note the article by Christy Collis, The Proclamation Island moment: making Antarctica Australian, *8 LTC 39 (2004),* in which it is observed that almost half of Antarctica is in the Australian claim.

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CHAPTER 58 ANTARCTICA

7-58 Thompson on Real Property, Thomas Editions § 58.15

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§ 58.15 Claim by Chile.

Although Chile did not make a formal claim in Antarctica until 1940, it, along with its sometime rival Argentina, is one of the most ardent claimants on the continent. n142 The claim itself lies between 53 degrees and 90 degrees West between the unclaimed portion on the West and overlaps the Argentina and United Kingdom claims on the East. n143

The sovereignty claim of Chile is based on discovery, n144 effective occupation, n145 the sector theory, n146 *uti possidetis*, n147 continuity and proximity, n148 geological and geographical grounds, n149 and Pan-American primacy. n150

Chile has been very active in Antarctica to strengthen its claim of effective occupation. For example, the President of Chile visited bases in 1951. n151 Additions to its permanent settlement at its Teniente Marsh Station on King George Island in 1984 have made it a frontier town with facilities for up to 100 families including schools, telephones, radios, televisions and a hotel for tourists. n152

FOOTNOTES:
(n1)Footnote 142. *See* § 58.13, *supra*, note 124. *See also* Note, Thaw, *supra* note 89, at note 32 indicating that Chile has been adamant concerning its Antarctic claim, noting that it is part of Chile's "metropolitan territory" and a "southernmost province" citing Conference on Antarctica 6-7 (1959) (U.S. Dep't of State Publication No. 7060). *See also* the comment in Hodgson, "An Island of Isolation No More. Antarctica," 177 National Geographic No. 4 at 3 (April 1990) that both Chile and Argentina saw the actions of France and Australia at the 15th biennial treaty meeting revoking approval of CRAMRA as an attack on the treaty and to their claims.

(n2)Footnote 143. *See* Allen A. Boraiko, Acts of Faith in Chile, 174 No. 154 Nat'l Geo. No. 154 (July 1988). *See also* note 71 *supra*.

(n3)Footnote 144. *See* May, *supra* n. 6, at p. 117 who noted that a Chilean sailing ship made discoveries in 1820 and a whaling station was established on Deception Island in 1906. Nonetheless, there is no substantial record of a direct entry by Chile into Antarctica prior to its delineation of its territorial claim in 1950.

(n4)Footnote 145. *See* § 58.10 and note 113 *supra*. The colonization of its portion is an attempt to strengthen its

effective occupation claim. Note also that Chile opened a Register of Antarctic Property in Punta Arenas, the first inscription of which noted that the State of Chile was the "owner of all land, island, islets, reefs within the limits of the claimed Antarctic area. *See* Vicuna, *supra* n. 5, at page 103 citing Register of Antarctic Property, Punta Arenas, inscription No. 1, page 1, 9 March 1961.

(n5)Footnote 146. *See* § 58.10 and note 101 *supra*.

(n6)Footnote 147. *See* § 58.10 and note 98 *supra*.

(n7)Footnote 148. *See* § 58.10 and note 96 *supra*. As noted therein, Chile along with Argentina often use this claim *vis-a-vis* the claim of the United Kingdom in the Antarctic Peninsula. *See* note 71 *supra*.

(n8)Footnote 149. *See* § 58.10 and note 98 *supra*.

(n9)Footnote 150. *See* § 58.10 and notes 99 and 100 *supra*.

(n10)Footnote 151. *See* May, *supra* n. 6, at page 117 who notes that the settlement is known as "Villa Las Estrellas" or the Town of the Stars. The various activities of Chile in Antarctica were detailed in an article by Colin Woodard in "Endless Detente; Various Claims In Antarctica Regions," 1999 Educ. Found. for Nuclear Sci. Bull., Atomic Scientists, January 1999.

(n11)Footnote 152. *See* the general discussion in May, *supra* n. 6, at page 117 or Scott, *supra*, at 604 who notes in addition that in 1983 the Director of the Chilean Antarctic Institute publicly rejected the internationalization of Antarctica and asserted Chile's view of the Treaty as merely deferring its sovereign territorial rights. Haydon, *supra* n. 100, at 595 (1956) relates of officials who speak of "national patrimony" in Chile with special instruction on Chilean rights in Antarctic given in the schools.

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CHAPTER 58 ANTARCTICA

7-58 Thompson on Real Property, Thomas Editions § 58.16

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§ 58.16 Claim by France.

France may have the most dubious territorial claim in Antarctica. In 1840, a French explorer named Dumont d'Urville sighted from his ship what is now known as Adelie Land. As a result, years later in 1924, the French issued a decree claiming an undefined stretch of land in Antarctica, and placed it under the administration of the French colony of Madagascar. n153 The United States Government refused to recognize the French claim. n154 The first French base was established in 1957 although 17 men wintered over in 1951. n155 Although the French claim is small, and its scientific research somewhat limited, France always has been a strong defender of its national interest. n156

FOOTNOTES:
(n1)Footnote 153. *See* F. M. Auburn, "The Ross Dependency -- An Undeclared Condominium," Auckland U. L. Rev. 103 (1970). It defined its claim in 1938 according to Green Haywood Hackworth, 1 Digest of Int'l Law 459 (1940).

(n2)Footnote 154. Of course, the United States does not recognize any sovereignty claims while reserving the right to make its own in the future. However, Hackworth, *supra*, note 152 who notes at 460 that the United States, in 1939, refused to recognize the French claim since the explorer did not even visit the land. Australia noted that its own Mawson had charted Adelie land in 1912; however, by its later claims in Antarctic which remove the wedge for Ad'elie land there is implicit recognition of the French claim. *See* note 139 *supra*.

(n3)Footnote 155. *See* May, *supra* n. 6, at page 118. Concern in recent years has centered on the French plans to build an airstrip at its base.

(n4)Footnote 156. *See* J. R. Rowland, "The Treaty Regime and the Politics of the Consultative Parties," The Antarctic Legal Regime 20 (Joyner and Chopra, eds. 1988). Note, however, that France was a leader in the movement regarding opposition to CRAMRA. According to an article by Piers Akerman in The Daily Telegraphy (Sydney), January 24, 2002, France has decided not to collect a territorial tax on those who set foot or anchor within its Antarctic territory as it was claimed such a tax would be in violation of the Antarctic Treaty; however, changes to the legislation may be made especially to gain greater control over the tourist industry in Antarctica.

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CHAPTER 58 ANTARCTICA

7-58 Thompson on Real Property, Thomas Editions § 58.17

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§ 58.17 Claim by New Zealand.

In 1923, Great Britain ceded to New Zealand, the Ross Dependency, which contains approximately 170,000 square miles of land and 130,000 square miles of permanent ice shelf. n157 It was unclear when first ceded whether New Zealand was merely administering British claims in the area or whether New Zealand had its own independent claim. n158 For many years, New Zealand's interest in Antarctica was lukewarm and twice it implied that it might relinquish any claim it had. n159 Today, however, New Zealand conducts an active program of scientific research and works closely with the United States. n160 In addition to the research bases, New Zealand appoints magistrates and a coroner, and prints stamps. n161

FOOTNOTES:
(n1)Footnote 157. The claim, lying between 160 degrees east longitude and 150 degrees west longitude, is based on a 1923 Order in Council by the United Kingdom to the Governor of New Zealand. Order in Council No. 974 of 30 July 1923 New Zealand Statutory Rules and Orders 712-13 (1928), New Zealand Gazette (Wellington) Aug. 6, 1923, at 22, *reprinted in* U.S. Naval War College, 46 Int'l L. Docs. 236-37 (1948-49). *But see* Auburn, Antarctic Law and Politics (1982) at 294 who notes there is no evidence of acceptance by New Zealand. Australia formally accepted its claim from the United Kingdom. *See* note 138 *supra*. If the sector principal discussed in § 58.10 *supra* at note 101 were adopted, New Zealand would have an independent claim in that the area claimed is longitudinally immediately below New Zealand. Likewise, the claim might be based on the theory of geographical proximity or continuity discussed in § 58.10 at note 96 *supra*. *See* dissent of then Judge Scalia in *Beattie v. United States, 756 F.2d 91, 107 (D.C. Cir. 1984). See also* Auburn, *supra,* note 152, at 5; Joyner, "Antarctica and the Law of the Sea: Rethinking the Current Legal Dilemmas," *18 San Diego L. Rev. 415, 417, n. 8 (1981).*

(n2)Footnote 158. *See* dissent in *Beattie, supra* note 156, at 107 n.2 *quoting* Auburn, Ross Dependency, at 70-73.

(n3)Footnote 159. *See, e.g.,* Auburn, *supra* note 11 at 247 noting that there was little human activity to which laws could apply and that the government recognized that it held no accepted authority; Auburn, note 152 at 102 that claim "shakey."

(n4)Footnote 160. *See*; May, *supra* n. 6, at 121 to the effect that New Zealand works closely with the U.S. and that the American McMurdo station is within sight of Scott base. *See* the article by Bernie, NAPP, "Keeping the Flag Flying

on Our Slice of the Ice," The Evening Post (Wellington), January 8, 2001 in which the writer reviews the claims of New Zealand, the posting of stamps, and the addition of an artists' program to the science-dominated menu of activities.

(n5)Footnote 161. *See* Auburn, *supra* note 152, at 62 noting that a New Zealander must apply for a permit to export money from New Zealand if he or she wants to get U.S. dollars to spend at McMurdo base. In addition, although a coroner is appointed, Auburn noted that an inquest for a death in the area was held in Wellington in 1970. Note the somewhat caustic comment of then Judge Scalia, in the *Beattie* dissent at 109 to the effect that New Zealand had issued stamps in more than one denomination for The Ross Dependency compared with only a zip code for the *U.S. Beattie v. United States of America, 756 F.2d 91 (D.C. Cir. 1984).*

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CHAPTER 58 ANTARCTICA

7-58 Thompson on Real Property, Thomas Editions § 58.18

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§ 58.18 Claim by Norway.

Norway's interest in Antarctica began when Norwegian whalers operated in the Southern Ocean starting at the end of the 19th century. A Norwegian, Roald Amundsen, became the first person to reach the South Pole. n162 Norway claimed sovereignty over the area between the claims of the United Kingdom and Australia, commonly known as Queen Maud Land, in 1939. n163 After discontinuing the whaling expeditions in the 1960's the role of Norway has been somewhat limited; however, Norway continues to be active in the ATS. n164

FOOTNOTES:
(n1)Footnote 162. *See* May, *supra* n. 6, at 122.

(n2)Footnote 163. The claim lies between 20 degrees West longitude and 45 degrees East longitude between the Australian and United Kingdom claims. It has been suggested that the claim was made after Nazi Germany announced territorial motives of the Schwabenland expedition, especially when coupled with possible Soviet expansion. *See* § 58.21, note 182.

(n3)Footnote 164. Norway abandoned its one station it had within the claimed sector in 1958-1960. Conference on Antarctica (1959) (U.S. Dep't of State Publication No 7060) at 20 and no new year-round station has been established since then, although summer expeditions have occurred. The absence of a substantial scientific research program, while remaining a voting member of the ATS, has caused some tensions. Generally the role of Norway in the ATS has been a liberal one. Norway's lack of presence in Antarctica also raises issues concerning its sovereignty claims.

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CHAPTER 58 ANTARCTICA

7-58 Thompson on Real Property, Thomas Editions § 58.19

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§ 58.19 Claim by the United Kingdom.

British explorers were among the first to arrive in Antarctica as well as being among the more active explorers. n165 The first formal British claim was made in 1908. n166 Much of the British claim was later ceded to New Zealand and Australia. n167 The United Kingdom maintains an active scientific program. n168

FOOTNOTES:
(n1)Footnote 165. Captain Cook visited Antarctic waters in 1772-1775 and claimed it for King George III (naming the island South Georgia). The first British sighting of the coast was by Edward Bransfield in 1920, although the American Palmer and Russian Bellingshausen also share that honor.

(n2)Footnote 166. The United Kingdom bases its claim on discovery and subsequent effective occupation as noted in the Antarctica Cases, note 71 *supra*. The claim was by Letter Patent of July 21, 1908, *reprinted in* 101 Brit. Foreign & St. Papers 76 (1909). A second Letter Patent of Mar. 28, 1917 *reprinted in* 111 Brit. Foreign & St. Papers 16 (1919) was necessary in that the former included portions of the Argentine and Chilean Patagonia. According to the second Letter Patent, the claim lies between 20 degrees west longitude and 50 degrees west longitude. The current claim overlaps the claims of Chile and Argentine on The Antarctic Peninsula. *See* note 71 *supra*.

(n3)Footnote 167. *See* § 58.14, *supra* note 138 and § 58.17, *supra* note 156.

(n4)Footnote 168. May, *supra* n. 6, at page 125 notes that The British Antarctic Survey maintains five bases as well as extensive summer field operations. The emergence of the resource questions and the aftermath of the Falkland Island/Malvinas war with Argentina has strengthened British interests in Antarctica.

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CHAPTER 58 ANTARCTICA

7-58 Thompson on Real Property, Thomas Editions § 58.20

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§ 58.20 Position of the United States.

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Despite having had and maintaining an active presence in Antarctica, the United States has never made a formal claim on the continent. n169 At one time, many felt the United States would make such a claim on the last remaining unclaimed portion of Antarctica, but that did not occur. n170 The United States, as well as the former Soviet Union, recognize no claim in Antarctica; however, both reserve the right to state a claim in the future. n171

American interest in Antarctica began with American sealers in the early 19th century, among whom was Nathaniel Brown Palmer, who claimed he had seen new lands south of the South Shetland Islands in 1820. n172 Subsequently Charles Wilkes made important discoveries along the coastline, especially along what is now known as Wilkesland. In the 20th century, Richard Evelyn Byrd made 2 unofficial expeditions, and in 1935 Lincoln Ellsworth explored Antarctica under the sanction of the U.S. Department of State. Although unofficial claims were made for the United States, the United States made no official claim. n173

The United States maintains an active research program in Antarctica and often works closely with other countries. n174 The research program is supported by the United States military, which provides needed logistical support. n175 United States policy is set by the Antarctic Policy Group, which is chaired by the Secretary of State. n176

At the end of the 102nd Congress, the U.S. Senate ratified the 1991 Protocol on Environmental Protection to the Antarctic Treaty, which provides environmental protection in Antarctica and bans all mining for the next 50 years. n177 The Conte Bill, signed on November 16, 1990, prohibited United States companies from carrying out any mineral activities in Antarctica, including prospecting. n178

Only 3 cases in the United States have dealt with Antarctica. The question raised in all 3 cases have been whether Antarctica is a foreign country. In Larry R. Martin, n179 the Tax Court concluded that Antarctica was not a foreign country which would qualify under the tax code for an exemption on income earned there. In 1984, the Appeals Court for the District of Columbia found Antarctica to be an "international anomaly" which would not qualify as a foreign country, for the purpose of an exemption under the Federal Tort Claims Act. n180 In 1991, the 9th Circuit held just the

opposite, that Antarctica was a foreign country which qualified as an exemption under the Federal Tort Claims Act. n181

FOOTNOTES:
(n1)Footnote 169. It was the United States who proposed in 1948 that the Antarctic region be placed under a United Nations trusteeship or, in the alternative, under a condominium regime. *See* note 36 *supra*. It was also the United States who organized and advocated the Treaty itself in 1959. *See* note 40 *supra*.

(n2)Footnote 170. The unclaimed portion lies between the New Zealand Claim and the Chilean Claim. This also may be the most uninviting portion of Antarctica. *See* Auburn, *supra* note 156, at 126. If the Treaty is ever renegotiated, some have suggested that the United States may then make a claim. The U.S. position has fluctuated over the years. For example, in 1924, the Secretary of State noted that no territorial claims could be valid in Antarctica because discovery must be followed by an actual settlement. *See* Hackworth, *supra* note 152, at 399. Prior to W.W. II, however, the United States did strengthen its bases in Antarctica and there is some evidence that President Franklin Roosevelt wanted to occupy Antarctica in 1939. *See* Parriott, *supra* note 6, at 102 where it is noted that in 1938 U.S. aircraft were instructed to drop claim papers over the Antarctic territory. Since the Treaty has been in force, the United States Antarctic policy also has oscillated between attempts to preserve U.S. individual interests and international cooperation in Antarctica. The most recent example was the support of the United States for CRAMRA which allowed mining in Antarctica (though regulated), which later changed when the United States ratified the Madrid Protocol position which bans all mining for the next fifty years.

(n3)Footnote 171. *See* Article VI (1)(b) and § 58.08 *supra*, note 70. Although some scholars have been critical of the United States for not making a formal claim, it has had the advantage of allowing the United States the option to locate bases of operation wherever desired. As a result, both the United States and the former Soviet Union have strategically placed bases around the continent. *See* § 58.05. The U.S.'s Amundsen-Scott base is at the South Pole.

(n4)Footnote 172. This was the Antarctic Peninsula seen by Palmer in 1820 as well as the Englishman Smith and the Russian Bellingshausen.

(n5)Footnote 173. Both Byrd and Ellsworth claimed Antarctica on behalf of the United States, however, the U.S. never ratified either claim. Byrd, for example, planted the United States flag and placed flyers in cairns to show occupation. Likewise the United States made no formal claims with subsequent explorations or while establishing scientific bases there.

(n6)Footnote 174. The U.S. operated Operation Deep Freeze I from 1955-56, which was the first permanently manned base in Antarctica. Currently the United States has four year-round bases with McMurdo being the largest, which has its own theater, chapel, radio station, bar and labs. McMurdo has also been issued a zip code. Note the comment and somewhat caustic opinion by then Judge Scalia in the dissent of *Beattie*, at 109 to the effect that "In any case, I personally feel that as a display of sovereign epistolary power, the assignment of a zip code is topped by New Zealand's seizure of the philatelic monopoly; it has issued Ross Dependency postage stamps, in more than one denomination." *Beattie v. United States of America, 756 F.2d 91 (D.C. Cir 1984)*. The United States works closely with many countries, and especially with New Zealand (McMurdo is the Ross Dependency). Wilkes Station is in the sector claimed by Australia and the Ellsworth Station is in the area claimed by Argentina. The N.Y. Times, Jan. 1, 1991, at A36, reported that the U.S. and the U.S.S.R. had agreed to establish their first joint scientific effort in Antarctica. But note many nations are now cutting their Antarctic Programs. *See* Wall St. J., Dec. 27, 1991 at B4.

(n7)Footnote 175. The superior air operational reach provided by the United States allows aerial photographic mapping, reconnaissance support for research transportation missions, and search and rescue missions.

(n8)Footnote 176. The Antarctic Policy Group was established in 1965 by President Lyndon Johnson. Members include the Secretary of State, Secretary of Defense and the Director of the National Science Foundation. The

Department of State makes the overall policy, whereas the National Science Foundation administers and funds the entire U.S. Antarctic Program. *See* Scott, *supra* n. 29, at 598 *et seq.* for a detailed discussion.

(n9)Footnote 177. *See* note 28 *supra*. The Protocol imposes strict limitations on waste disposal and discharge of pollutants into Antarctic waters, requires the protection of Antarctic fauna and flora, requires the application of environmental impact assessment procedures for activities undertaken in Antarctica and calls for the development of an environmental emergency response. A Committee for Environmental Protection will be established. *See also* § 58.07 *supra*, note 63.

(n10)Footnote 178. The Antarctic Protection Act of 1990, Pub. L. 101-594, *104 Stat. 2975 (1990).*

(n11)Footnote 179. *See Larry Martin v. Commissioner of Internal Revenue, 50 T.C. 59 (1968).*

(n12)Footnote 180. *See Beattie v. United States of America, 756 F.2d 191 (1984).* Note the dissent of then Judge Scalia to the effect that Antarctica was in fact a foreign country. On remand, *690 F. Supp. 1068 (1988)* the Court found that the United States was not guilty of negligence under the Act and had no legal duty to furnish air traffic services on a routine basis to civilian aircraft. The disaster that befell the flight involved was the fault of Air New Zealand and of the flight crew.

(n13)Footnote 181. *See Smith v. United States, 953 F.2d 1116 (9th Cir. 1991).* The Smith case was affirmed by the United States Supreme Court in *Smith v. United States, 113 S. Ct. 1178 (1993).* The Court held that the exception to the Federal Tort Claims Act's waiver of sovereign immunity for any claim arising in a "foreign country" includes a claim arising in Antarctica, thus resolving the conflict between the D.C. and 9th Circuits. The Court felt that the plain meaning of the word "country" included Antarctica, even though it has no recognized government. *See also* James C. Conley, Recent Decisions, *32 Duq. L. Rev. 167 (1993);* Mark Dean, Smith v. United States: Justice Denied Under the FTC "Foreign Country" Exception, *38 St. Louis U. L.J. 553* (1993/1994). The position adopted by the United States Supreme Court in Smith was discussed in an article by Lauren S.B. Bornemann who concluded that the case will probably prevent tort claims arising in outer space. She then proposes legislation to allow Federal Tort Claims Act coverage. *See* Lauren S.B. Bornemann, "This is Ground Control to Major Tom ... Your Wife Would Like to Sue But there's Nothing We Can Do ...The Unlikelihood that the FTCA Waives Sovereign Immunity for Torts Committed by United States Employees in Outer Space: A Call for Preemptive Legislation," J. Air. L. & Com. 63 (February-March, 1998) 517. In *Environmental Defense Fund, Inc. v. Massey, 986 F.2d 528 (D.C. Cir. 1992),* the court held that the presumption against extraterritorial application of statutes did not apply where the conduct regulated by the statute occurred primarily, if not exclusively, in the United States and the alleged extraterritorial effect of the statute will be felt in Antarctica. The allegation in Massey was that the National Science Foundation violated the National Environmental Policy Act by failing to prepare an environmental impact statement before going forward with plans to incinerate food wastes in Antarctica. The Court was careful to note that the decision was limited to the facts and did not address how other statutes might apply to Antarctica. As a result, environmental review of activities in Antarctica must be in compliance with the National Environmental Policy Act as well as the measures adopted in the Madrid Protocol. The Clinton Administration decided not to appeal the ruling. *See* U.S. Dep't of Just., Press Release No. 93-070 (March 15, 1992). Thomas, "Space Tourism: Fanny Packs, Ugly T-Shirts, and the Law in Outer Space," Suffolk U.L. Rev. 36 (2003) 695. *See also* Murphy, Sean D. "Contemporary Practice of the United States Relating to International Law: State Jurisdiction and Immunities: Extraterritorial Application of NEPA," A.J.I.L. 97 (October 2003) 962.

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CHAPTER 58 ANTARCTICA

7-58 Thompson on Real Property, Thomas Editions § 58.21

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§ 58.21 Other Interests in Antarctica.

The former USSR has a significant presence in Antarctica and, like the United States, makes no claim of sovereignty, and recognizes none while reserving the right to make a claim in the future. n182 The Russian explorer von Bellingshausen may have been the first to discover Antarctica in 1820, although Russian interest in Antarctica thereafter waned until the mid-20th century. n183 Significant scientific research has been conducted at the Soviet bases; however, this may well decrease in the future. n184

Antarctic Treaty Consultative Parties (ATCPs) maintain or have maintained bases on Antarctica as a condition of becoming an ATCP. n185 Generally these countries do not claim to have territorial aspirations. n186 Also involved in Antarctica are the non-claimants who were original signatures to the Treaty. n187 Although the ATCPs and the original signatories may not agree on sovereignty claims, in general, they have worked well together. n188

FOOTNOTES:
(n1)Footnote 182. *See* Peter A. Toma, "Soviet Attitude Towards the Acquisition of Territorial Sovereignty in the Antarctic," *50 Am. J. Int'l L. 611 (1956). See also* note 170 *supra*.

(n2)Footnote 183. The Englishman Bransfeld and the American Palmer also claim that honor. Its first base was established in 1956. Possible Soviet expansion claims, with the possibility of a sovereignty claim over Peter I Island, helped Norway to declare sovereignty over Dronning Maud Land. *See* § 58.18 *supra*, note 162. In the 1950's, the United States was concerned with a possible Soviet claim, which in part led to the calling of the conference which resulted in the Antarctic treaty. By 1959, the Soviets had six bases on Antarctica placed over a large geographical area. Soviet interests have been political and scientific. *See* May, *supra* n. 6, at 122 and 130.

(n3)Footnote 184. *See* Wall St. J., Friday, December 27, 1991 in which it notes that the signing of the Madrid Protocol banning mining for 50 years, along with the end of the cold war, has caused many nations to cut their Antarctica research, including the Soviets. It notes that at one point the Soviets were so strapped for cash that they asked France to pay the salaries of the Soviet workers at the Vosto K. station. *See also* note 173 *supra*.

(n4)Footnote 185. *See* § 58.09, *supra*, listing the current ATCPs. *See also* Article IX (2) of the Treaty, as *discussed in* § 58.08, *supra*, which requires a party to conduct substantial scientific research as a condition of becoming an ATCP.

See in particular § 58.09, *supra*, note 87 of noting that some of the bases are small and the quality of research has varied among the countries. Norway's program is limited. *See* note 193 *infra*.

(n5)Footnote 186. Brazil is a Consultative Party member and maintains bases on Antarctica. Some Brazilian writers have advocated a "frontage" theory for sovereignty which would grant sovereignty claims in Antarctica only to those countries whose south-facing coastline would project onto Antarctica. Under this theory, Brazil would claim a sizeable sector at the expense of Chile and Argentina.

(n6)Footnote 187. These countries include Belgium, Japan and the Republic of South Africa. Belgium does not maintain an active base, though it does exchange scientists with other countries, especially in the area of marine biology and oceanography. Japan cannot be a claimant under the Treaty of Peace signed by Japan in September 8, 1951, however, it does maintain bases on Antarctica. South Africa maintains bases on Antarctica and has enacted special legislation for South African citizens in Antarctica. *See* § 58.12, *supra*, note 122.

(n7)Footnote 188. The Treaty has allowed a diverse group of nations to work together. Differences did arise regarding the U.N. and the mining agreements; however, in general, relations have been good. *See* notes 110, 112 *supra* and note 188 *infra*.

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CHAPTER 58 ANTARCTICA

7-58 Thompson on Real Property, Thomas Editions § 58.22

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§ 58.22 Current and Future Status of the Antarctic Treaty System.

As a general statement, the Antarctic Treaty System has worked very well and all indications are that it will continue to thrive. It has been notable for allowing freedom of scientific research in a non-militarized, denuclearized environment. n189 In general, the members of the ATS work well together. n190 There has not been a successful protest against the system to date. Nonetheless, there have been and continue to be both internal and external strains on the system.

Differences between claimant members states and non-claimant member states continue to exist, despite the "freezing" of claims under the Treaty. The sovereignty issue has not disappeared, especially with non-member states. n191 Many states have not acceded to the Treaty and are not bound thereby. n192 The desire of many states (including France and Australia prior to the Madrid Protocol) calling for Antarctica to be a Wilderness Park or another form involving the common heritage of mankind is strong. n193

Among treaty members conflicts have arisen between industrialized members and less developed member states, with the latter often wanting a greater sharing of information, the opportunity for joint ventures and transfers of technology. n194

The need for a permanent Secretariat continues to grow. The impact of tourism must be addressed. n195 Scientific research will continue even if at a reduced rate; however, better coordination and sharing of information may be needed. n196 A body of private international law must be developed for the resolution of a variety of private issues. n197

Last, but not least, will private real property interests ever exist on the continent? Probably not. n198

FOOTNOTES:
(n1)Footnote 189. In fact, some have suggested the system has worked so well that it has become legitimized under customary international law either by acquiescence or estoppel. *See also* Rothwell, *supra* n. 7, at 85 who notes that "The Antarctic Treaty during its first 30 years has indeed proved to be a remarkable document." The resolution of the mineral issue, freezing all such claims for the next fifty years, retained the unity of the System. A review conference was not called as some had feared. *See* Governing the Antarctica: The Effectiveness and Legitimacy of the Antarctic Treaty System (Olav Schram Stokke and Davor Vidas, eds. Cambridge. New York. Melbourne: Cambridge Univ. Press. 1996).

The book by Stokke and Vidas, cited above, as well as the book by Francesco Francioni & Tullio Scovazzi, International Law for Antarctica (2d ed), The Hague, London, Boston, Kluwer Law International 1996, were reviewed by Donald R. Rothwell in *92 A.J.I.L. 92 (1998)* 170. In a thoughtful article, Professor David J. Bederman reviews and compares the books written by Joyner and Theis, Eagle Over the Ice: The U.S. in the Arctic, The Polar Regions and the Development of International Law, by Rothwell and Governing the Antarctic: The Effectiveness and Legitimacy of the Antarctic Treaty System, by Stokke and Vidas. Professor Bederman concludes at 190 that "With the publication of the three books considered here, ATS scholarship is in the envious position of needing less theory and more elaboration of creative legal solutions to vexing practical problems. That is a happy circumstance and the credit goes entirely to the authors of the three volumes considered in this essay." Book Review, David J. Bederman, "Theory on Ice: Antarctica in International Law and Relations," Va. J. Int'l L. 39 (Winter, 1999) 467.

(n2)Footnote 190. The system has provided stability and allowed peaceful coexistence. Even during the Falklands/Malvinas war the two warring parties (Argentina and the United Kingdom) cooperated in Antarctica.

(n3)Footnote 191. The potential use of Exclusive Economic Zones under the Law of the Sea may renew the sovereignty issue.

(n4)Footnote 192. For example, CLAMRA responded to concerns regarding krill harvesting; however, it does not bind non-member states such as Taiwan. A non-member state, Pakistan, has indicated it will establish a base on Antarctica. In addition, in general most of Africa and many Southern Asian and Middle Eastern countries are not acceding members and in fact are often vitriolic in condemnation of the system. Many non-member states feel a moral obligation to participate in Antarctica especially when coupled with the common heritage of mankind principal. Buenos Aires appears to have the support of all but Great Britain among the original twelve signatories as the site for administrative headquarters, according to an article in "La Nacion" web site Buenos Aires, as reported by the BBC Summary of World Broadcasts on April 12, 2000.

(n5)Footnote 193. *See* § 58.11 and note 191, *supra*. *See* Jost Delburch, "The Role of the United Nations in Dealing with Global Problems," *4 Ind. J. Global Legal Stud. 277 (1997);* William R. Moommaw, "Sovereignty Challenged," *21 Fletcher F. World Aff. 7 (1997);* International Law for Antarctica (Francesco Francioni and Tullio Scovazzi, eds., 2nd ed. The Hague, London, Boston: Kluwer Law Int'l. 1996).

(n6)Footnote 194. In addition, the costs involved with becoming an A.T.C.S. are great and thus it is difficult for many acceding states to become A.T.C.S. which carries with it the voting privilege. On the other hand, some ATCPs or original signatories to the Treaty are permitted to participate fully in the process while not engaged in substantial scientific research, if any at all.

(n7)Footnote 195. Some cruise ships now have suitably qualified government representatives on board to prevent environmental damage; however, private yachts are not so governed. *See, e.g.,* a recent article by Gillian Triggs Sitwell, "Worth Seeing, Getting to the Bottom of the World," Travel & Leisure, Dec. 1991 at 56 in which the author notes that approximately 6,400 people visited Antarctica in the 1991-92 season. It is noted that though a symposium was held in Colmar, France regarding tourism, which brought considerable consensus, problems remain, including the fact that yachtsmen often ignore regulations regarding protected areas. In 1992 the major operators established the International Association of Antarctic Tour Operators.

(n8)Footnote 196. *See*, for example, the discussion in Chester, *supra* n. 6, noting that not all scientific research is equally valid nor evenly distributed. At times the research is ill-conceived and poorly managed. Scientific logistics need to be improved.

(n9)Footnote 197. *See* § 58.12 *supra*, note 119.

(n10)Footnote 198. Though note the private international law should address concerns dealing with personal property or with the leasing of buildings or stations.

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Supp. to § 58.20 Position of the United States.

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Add:

See, e.g., Gober v. Commissioner of Internal Revenue, T.C. Memo 2008-110 (April 22, 2008) (income from wages earned while working in Antarctica was not eligible for foreign earned income exclusion).

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CHAPTER 59 PROPERTY ISSUES IN SPACE LAW

7-59 Thompson on Real Property, Thomas Editions 59.syn

AUTHOR: Professor David A. Thomas J. Reuben Clark Law School Brigham Young University

§ 59.syn Synopsis to Chapter 59: PROPERTY ISSUES IN SPACE LAW

§ 59.01 Introduction.

§ 59.02 The International Framework of Space Law.

(a) The United Nations Treaties.

(1) The Outer Space Treaty.

(2) The Rescue Agreement.

(3) The Liability Convention.

(4) The Registration Convention.

(5) The Moon Treaty.

(b) Other Rules of International Law.

§ 59.03 American Property Law Issues Posed by Outer Space.

§ 59.04 Bibliography.

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CHAPTER 59 PROPERTY ISSUES IN SPACE LAW

7-59 Thompson on Real Property, Thomas Editions § 59.01

AUTHOR: Professor David A. Thomas J. Reuben Clark Law School Brigham Young University

§ 59.01 Introduction.

Neither the federal nor the state governments in the United States have any appreciable amount of formal law addressing issues of outer space and related activities. Almost all of the considerable literature on space law is expressed hypothetically, making suggestions for legislation, raising issues that will eventually need legal solutions, and discussing the various international treaties by which nations take tentative steps toward addressing those issues in the international arena. n1

FOOTNOTES:
(n1)Footnote 1. Rene Oosterlinck, Tangible and Intangible Property in Outer Space, Proceedings of the Thirty-Ninth Colloquium on the Law of Outer Space, International Institute of Space Law of the International Astronautical Federation (1997).

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CHAPTER 59 PROPERTY ISSUES IN SPACE LAW

7-59 Thompson on Real Property, Thomas Editions § 59.02

AUTHOR: Professor David A. Thomas J. Reuben Clark Law School Brigham Young University

§ 59.02 The International Framework of Space Law.

As a subject of international law, space law is being formed by international conventions, individual rules recognized by various countries, international customs recognized so broadly as to have the force of law, general principles of international law, decisions of tribunals, and writings of legal scholars and experts. n2

(a) The United Nations Treaties.

The United Nations, in 1958, approved a resolution calling for the peaceful use of outer space, expressing the need for international cooperation, and declaring the sovereign equality of countries engaging in outer space activities. n3 At the same time, an *ad hoc* Committee on the Peaceful Uses of Outer Space (C.O.P.U.O.S.) was established, which eventually became a permanent committee and drafted several treaties for adoption by the General Assembly and ratification by member states. Of these treaties, the most important are the Outer Space Treaty of 1967, the Rescue Agreement of 1968, the Liability Convention of 1972, and the Registration Convention of 1975. The Moon Treaty of 1979 is also of potential importance but has not been widely accepted. n4

(1) The Outer Space Treaty.

The Outer Space Treaty provides that outer space, the moon, and other extraterrestrial bodies are the province of all peoples, are free for exploration and use by all countries, and are not subject to national appropriation or claims of sovereignty: n5

No. 8843. TREATY ON PRINCIPLES GOVERNING THE ACTIVITIES OF STATES IN THE EXPLORATION AND USE OF OUTER SPACE, INCLUDING THE MOON AND OTHER CELESTIAL BODIES. OPENED FOR SIGNATURE AT MOSCOW, LONDON AND WASHINGTON, ON 27 JANUARY 1967

The States Parties to this Treaty,

> Inspired by the great prospects opening up before mankind as a result of man's entry into outer space,

Recognizing the common interest of all mankind in the progress of the exploration and use of outer space for peaceful purposes,

Believing that the exploration and use of outer space should be carried on for the benefit of all peoples irrespective of the degree of their economic or scientific development,

Desiring to contribute to broad international co-operation in the scientific as well as the legal aspects of the exploration and use of outer space for peaceful purposes,

Believing that such co-operation will contribute to the development of mutual understanding and to the strengthening of friendly relations between States and peoples,

Recalling resolution 1962 (XVIII), entitled "Declaration of Legal Principles Governing the Activities of States in the Exploration and Use of Outer Space," which was adopted unanimously by the United Nations General Assembly on 13 December 1963,

Recalling resolution 1884 (XVIII), calling upon States to refrain from placing in orbit around the earth any objects carrying nuclear weapons or any other kinds of weapons of mass destruction or from installing such weapons on celestial bodies, which was adopted unanimously by the United Nations General Assembly on 17 October 1963,

Taking account of United Nations General Assembly resolution 110 (II) of 3 November 1947, which condemned propaganda designed or likely to provoke or encourage any threat to the peace, breach of the peace or act of aggression, and considering that the aforementioned resolution is applicable to outer space,

Convinced that a Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, including the Moon and Other Celestial Bodies, will further the Purposes and Principles of the Charter of the United Nations,

Have agreed on the following:

Article I

The exploration and use of outer space, including the moon and other celestial bodies, shall be carried out for the benefit and in the interests of all countries, irrespective of their degree of economic or scientific development, and shall be the province of all mankind.

Outer space, including the moon and other celestial bodies, shall be free for exploration and use by all States without discrimination of any kind, on a basis of equality and in accordance with international law, and there shall be free access to all areas of celestial bodies.

There shall be freedom of scientific investigation in outer space, including the moon and other celestial bodies, and States shall facilitate and encourage international co-operation in such investigation. n6

Article II

Outer space, including the moon and other celestial bodies, is not subject to national appropriation by claim of sovereignty, by means of use or occupation, or by any other means.

Article III

States Parties to the Treaty shall carry on activities in the exploration and use of outer space, including the moon and other celestial bodies, in accordance with international law, including the Charter of the United Nations, in the interest of maintaining international peace and security and promoting international co-operation and understanding.

Article IV

States Parties to the Treaty undertake not to place in orbit around the earth any objects carrying nuclear weapons on celestial bodies, or station such weapons in outer space in any other manner.

The moon and other celestial bodies shall be used by all States Parties to the Treaty exclusively for peaceful purposes. The establishment of military bases, installations and fortifications, the testing of any type of weapons and the conduct of military maneuvers on celestial bodies shall be forbidden. The use of military personnel for scientific research or for any other peaceful purposes shall not be prohibited. The use of any equipment or facility necessary for peaceful exploration of the moon and other celestial bodies shall also not be prohibited.

Article V

States Parties to the Treaty shall regard astronauts as envoys of mankind in outer space and shall render to them all possible assistance in the event of accident, distress, or emergency landing on the territory of another State Party or on the high seas. When astronauts make such a landing, they shall be safely and promptly returned to the State of registry of their space vehicle.

In carrying on activities in outer space and on celestial bodies, the astronauts of one State Party shall render all possible assistance to the astronauts of other States Parties.

States Parties to the Treaty shall immediately inform the other States Parties to the Treaty or the Secretary-General of the United Nations of any phenomena they discover in outer space, including the moon and other celestial bodies, which could constitute a danger to the life or health of astronauts.

Article VI

States Parties to the Treaty shall bear international responsibility for national activities in outer space, including the moon and other celestial bodies, whether such activities are carried on by governmental agencies or by non-governmental entities, and for assuring that national activities are carried out in conformity with the provisions set forth in the present Treaty. The activities of non-governmental entities in outer space, including the moon and other celestial bodies, shall require authorization and continuing supervision by the appropriate State Party to the Treaty. When activities are carried on in outer space, including the moon and other celestial bodies, by an international organization, responsibility for compliance with the Treaty shall be borne both by the international organization and by the States Parties to the Treaty participating in such organization.

Article VII

Each State Party to the Treaty that launches or procures the launching of an object into outer space, including the moon and other celestial bodies, and each State Party from whose territory or facility an object is launched, is internationally liable for damage to another State Party to the Treaty or to its natural or juridical persons by such object or its component parts on the Earth, in air space, including the moon and other celestial bodies.

Article VIII

A State Party to the Treaty on whose registry an object launched into outer space is carried shall retain jurisdiction and control over such object, and over any personnel thereof, while in outer space or on a celestial body. Ownership of objects launched into outer space, including objects landed or constructed on a celestial body, and of their component parts, is not affected by their presence in outer space or on a celestial body or by their return to the Earth. Such objects or component parts found beyond the limits of the State Party to the Treaty on whose registry they are carried shall be returned to that State Party, which shall, upon request, furnish identifying data prior to their return.

Article IX

In the exploration and use of outer space, including the moon and other celestial bodies, States Parties to the Treaty shall be guided by the principle of co-operation and mutual assistance and shall conduct all their activities in outer space, including the moon and other celestial bodies, with due regard to the corresponding interests of all other States Parties to the Treaty. States Parties to the Treaty shall pursue studies of outer space, including the moon and other celestial bodies, and conduct exploration of them so as to avoid their harmful contamination and also adverse changes in the environment of the Earth resulting from the introduction of extraterrestrial matter and, where necessary, shall adopt appropriate measures for this purpose. If a State Party to the Treaty has reason to believe that an activity or experiment planned by it or its nationals in outer space, including the moon and other celestial bodies, would cause potentially harmful interference with activities of other States Parties in the peaceful exploration and use of outer space, including the moon and other celestial bodies, it shall undertake appropriate international consultations before proceeding with any such activity or experiment. A State Party to the Treaty which has reason to believe that an activity or experiment planned by another State Party in outer space, including the moon and other celestial bodies, would cause potentially harmful interference with activities in the peaceful exploration and use of outer space, including the moon and other celestial bodies, may request consultation concerning the activity or experiment.

Article X

In order to promote international co-operation in the exploration and use of outer space, including the moon and other celestial bodies, in conformity with the purposes of this Treaty, the States Parties to the Treaty shall consider on a basis of equality any requests by other States Parties to the Treaty to be afforded an opportunity to observe the flight of space objects launched by those States.

The nature of such an opportunity for observation and the conditions under which it could be afforded shall be determined by agreement between the States concerned.

Article XI

In order to promote international co-operation in the peaceful exploration and use of outer space, States Parties to the Treaty conducting activities in outer space, including the moon and other celestial bodies, agree to inform the Secretary-General of the United Nations as well as the public and the international scientific community, to the greatest extent feasible and practicable, of the nature, conduct, locations and results of such activities. On receiving the said information, the Secretary-General of the United Nations should be prepared to disseminate it immediately and effectively.

Article XII

All stations, installations, equipment and space vehicles on the moon and other celestial bodies shall

be open to representatives of other States Parties to the Treaty on a basis of reciprocity. Such representatives shall give reasonable advance notice of a projected visit, in order that appropriate consultations may be held and that maximum precautions may be taken to assure safety and to avoid interference with normal operations in the facility to be visited.

Article XIII

The provisions of this Treaty shall apply to the activities of States Parties to the Treaty in the exploration and use of outer space, including the moon and other celestial bodies, whether such activities are carried on by a single State Party to the Treaty or jointly with other States, including cases where they are carried on within the framework of international inter-governmental organizations.

Any practical questions arising in connection with activities carried on by international inter-governmental organizations in the exploration and use of outer space, including the moon and other celestial bodies, shall be resolved by the States Parties to the Treaty either with the appropriate international organization or with one or more States members of that international organization, which are Parties to this Treaty.

Article XIV

1. This Treaty shall be open to all States for signature. Any State which does not sign this Treaty before its entry into force in accordance with paragraph 3 of this Article may accede to it at any time.

2. This Treaty shall be subject to ratification by signatory States. Instruments of ratification and instruments of accession shall be deposited with the Governments of the United Kingdom of Great Britain and Northern Ireland, the Union of Soviet Socialist Republics and the United States of America, which are hereby designated the Depositary Governments.

3. This Treaty shall enter into force upon the deposit of instruments of ratification by five Governments including the Governments designated as Depositary Governments under this Treaty.

4. For states whose instruments of ratification or accession are deposited subsequent to the entry into force of this Treaty, it shall enter into force on the date of the deposit of their instruments of ratification or accession.

5. The Depositary Governments shall promptly inform all signatory and acceding States of the date of each signature, the date of deposit of each instrument of ratification of and accession to this Treaty, the date of its entry into force and other notices.

6. This Treaty shall be registered by the Depositary Governments pursuant to Article 102 of the Charter of the United Nations.

Article XV

Any State Party to the Treaty may propose amendments to this Treaty. Amendments shall enter into force for each State Party to the Treaty accepting the amendments upon their acceptance by a majority of the States Parties to the Treaty and thereafter for each remaining State Party to the Treaty on the date of acceptance by it.

Article XVI

Any State Party to the Treaty may give notice of its withdrawal from the Treaty one year after its entry into force by written notification to the Depositary Governments. Such withdrawal shall take effect one year from the date of receipt of this notification.

Article XVIII

This Treaty, of which the English, Russian, French, Spanish and Chinese texts are equally authentic, shall be deposited in the archives of the Depositary Governments. Duly certified copies of this Treaty shall be transmitted by the Depositary Governments to the Governments of the signatory and acceding States.

In witness whereof the undersigned, duly authorised, have signed this Treaty.

Done in triplicate, at the cities of London, Moscow and Washington, the twenty-seventh day of January, one thousand nine hundred and sixty-seven.

(2) The Rescue Agreement.

The Rescue Agreement concerns the return and rescue of astronauts and the return of spacecraft and component parts of the launching country: n7

AGREEMENT ON THE RESCUE OF ASTRONAUTS, THE RETURN OF ASTRONAUTS AND THE RETURN OF OBJECTS LAUNCHED INTO OUTER SPACE

The Contracting Parties,

Noting the great importance of the treaty on Principles Governing the Activities of States in the exploration and Use of Outer Space, including the Moon and Other Celestial Bodies, which calls for the rendering of all possible assistance to astronauts in the event of accident, distress or emergency landing, the prompt and safe return of astronauts, and the return of objects launched into outer space,

Desiring to develop and give further concrete expression to these duties,

Wishing to promote international co-operation in the peaceful exploration and use of outer space,

Prompted by sentiments of humanity,

Have agreed on the following:

Article I

Each Contracting Party which receives information or discovers that the personnel of a spacecraft have suffered accident or are experiencing conditions of distress or have made an emergency or unintended landing in territory under its jurisdiction or on the high seas or in any other place not under the jurisdiction of any State shall immediately:

(*a*) notify the launching authority or, if it cannot identify and immediately communicate with the launching authority, immediately make a public announcement by all appropriate means of communication at its disposal;

(*b*) notify the Secretary-General of the United Nations, who should disseminate the information without

delay by all appropriate means of communication at its disposal.

Article II

If, owing to accident, distress, emergency or unintended landing, the personnel of a spacecraft land in territory under the jurisdiction of a Contracting Party, it shall immediately take all possible steps to rescue them and render them all necessary assistance. It shall inform the launching authority and also the Secretary-General of the United Nations of the steps it is taking and of their progress. If assistance by the launching authority would help to effect a prompt rescue or would contribute substantially to the effectiveness of search and rescue operations, the launching authority shall co-operate with the Contracting Party with a view to the effective conduct of search and rescue operations. Such operations shall be subject to the direction and control of the Contracting Party, which shall act in close and continuing consultation with the launching authority.

Article III

If information is received or it is discovered that the personnel of a spacecraft have alighted on the high seas or in any other place not under the jurisdiction of any State, those Contracting Parties which are in a position to do so shall, if necessary, extend assistance in search and rescue operations for such personnel to assure their speedy rescue. They shall inform the launching authority and the Secretary-General of the United Nations of the steps they are taking and of their progress.

Article IV

If, owing to accident, distress, emergency or unintended landing, the personnel of a spacecraft land in territory under the jurisdiction of a Contracting Party or have been found on the high seas or in any other place not under the jurisdiction of any State, they shall be safely and promptly returned to representatives of the launching authority.

Article V

1. Each Contracting Party which receives information or discovers that a space object or its component parts has returned to Earth in territory under its jurisdiction or on the high seas or in any other place not under the jurisdiction of any State, shall notify the launching authority and the Secretary-General of the United Nations.

2. Each Contracting Party having jurisdiction over the territory on which a space object or its component parts has been discovered shall, upon the request of the launching authority and with assistance from that authority if requested, take such steps as it finds practicable to recover the object or component parts.

3. Upon request of the launching authority, objects launched into outer space or their component parts found beyond the territorial limits of the launching authority shall be returned to or held at the disposal of representatives of the launching authority, which shall, upon request, furnish identifying data prior to their return.

4. Notwithstanding paragraphs 2 and 3 of this Article, a Contracting Party which has reason to believe that a space object or its component parts discovered in territory under its jurisdiction, or recovered by it elsewhere, is of a hazardous or deleterious nature may so notify the launching authority, which shall immediately take effective steps, under the direction and control of the said Contracting Party, to eliminate possible danger of harm.

5. Expenses incurred in fulfilling obligations to recover and return a space object or its component parts under paragraphs 2 and 3 of this Article shall be borne by the launching authority.

Article VI

For the purposes of this Agreement, the term "launching authority" shall refer to the State responsible for launching, or where an international intergovernmental organization is responsible for launching, that organization, provided that organization declares its acceptance of the rights and obligations provided for in this Agreement and a majority of the States members of that organization are Contracting Parties to this Agreement and to the Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, including the Moon and Other Celestial Bodies.

Article VII

1. This Agreement shall be open to all States for signature. Any State which does not sign this Agreement before its entry into force in accordance with paragraph 3 of this Article may accede to it at any time.

2. This Agreement shall be subject to ratification by signatory States. Instruments of ratification and instruments of accession shall be deposited with the Governments of the United Kingdom of Great Britain and Northern Ireland, the Union of Soviet Socialist Republics and the United States of America, which are hereby designated the Depositary Governments.

3. This Agreement shall enter into force upon the deposit of instruments of ratification by five Governments including the Governments designated as Depositary Governments under this Agreement.

4. For States whose instruments of ratification or accession are deposited subsequent to the entry into force of this Agreement, it shall enter into force on the date of the deposit of their instruments of ratification or accession.

5. The Depositary Governments shall promptly inform all signatory and acceding States of the date of each signature, the date of deposit of each instrument of ratification of and accession to this Agreement, the date of its entry into force and other notices.

6. This Agreement shall be registered by the Depositary Governments pursuant to Article 102 of the Charter of the United Nations.

Article VIII

Any State Party to the Agreement may propose amendments to this Agreement. Amendments shall enter into force for each State party to the Agreement accepting the amendments upon their acceptance by a majority of the States Parties to the Agreement and thereafter for each remaining State Party to the Agreement on the date of acceptance by it.

Article IX

Any State Party to the Agreement may give notice of its withdrawal from the Agreement one year after its entry into force by written notification to the Depositary Governments. Such withdrawal shall take effect one year from the date of receipt of this notification.

Article X

This Agreement, of which the English, Russian, French, Spanish and Chinese texts are equally authentic, shall be deposited in the archives of the Depositary Governments. Duly certified copies of this Agreement shall be transmitted by the Depositary Governments to the Governments of the signatory and acceding States.

In witness whereof the undersigned, duly authorised, have signed this Agreement.

done in triplicate, at the cities of London, Moscow and Washington, the twenty-second day of April, one thousand nine hundred and sixty-eight.

(3) The Liability Convention.

The Liability Convention establishes principles of liability for property damage and personal injury caused by space-related activities: n8

CONVENTION ON INTERNATIONAL LIABILITY FOR DAMAGE CAUSED BY SPACE OBJECTS

The States Parties to this Convention,

Recognizing the common interest of all mankind in furthering the exploration and use of outer space for peaceful purposes,

Recalling the Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, including the Moon and Other Celestial Bodies,

Taking into consideration that, notwithstanding the precautionary measures to be taken by States and international intergovernmental organizations involved in the launching of space objects, damage may on occasion be caused by such objects,

Recognizing the need to elaborate effective international rules and procedures concerning liability for damage caused by space objects and to ensure, in particular, the prompt payment under the terms of this Convention of a full and equitable measure of compensation to victims of such damage,

Believing that the establishment of such rules and procedures will contribute to the strengthening of international co-operation in the field of the exploration and use of outer space for peaceful purposes,

Have agreed the following:

Article I

For the purposes of this Convention:

(*a*) The term "damage" means loss of life, personal injury or other impairment of health; or loss of or damage to property of States or of persons, natural or juridical, or property of international intergovernmental organizations;

(*b*) The term "launching" includes attempted launching;

(*c*) The term "launching State" means:

(i) a state which launches or procures the launching of a space object;

(ii) a State from whose territory or facility a space object is launched;

(*d*) The term "space object" includes component parts of a space object as well as its launch vehicle and parts thereof.

Article II

A launching State shall be absolutely liable to pay compensation for damage caused by its space object on the surface of the earth or to aircraft in flight.

Article III

In the event of damage being caused elsewhere than on the surface of the earth to a space object of one launching State or to persons or property on board such a space object by a space object of another launching State, the latter shall be liable only if the damage is due to its fault or the fault of persons for whom it is responsible.

Article IV

1. In the event of damage being caused elsewhere than on the surface of the earth to a space object of one launching State or to persons or property on board such a space object by a space object of another launching State, and of damage thereby being caused to a third State or to its natural or juridical persons, the first two States shall be jointly and severally liable to the third State, to the extent indicated by the following:

(*a*) If the damage has been caused to the third State on the surface of the earth or to aircraft in flight, their liability to the third State shall be absolute;

(*b*) If the damage has been caused to a space object of the third State or to persons or property on board that space object elsewhere than on the surface of the earth, their liability to the third State shall be based on the fault of either of the first two States or on the fault of persons for whom either is responsible.

2. In all cases of joint and several liability referred to in paragraph 1 of this Article, the burden of compensation for the damage shall be apportioned between the first two States in accordance with the extent to which they were at fault; if the extent of the fault of each of these States cannot be established, the burden of compensation shall be apportioned equally between them. Such apportionment shall be without prejudice to the right of the third State to seek the entire compensation due under this Convention from any or all of the launching States which are jointly and severally liable.

Article V

1. Whenever two or more States jointly launch a space object, they shall be jointly and severally liable for any damage caused.

2. A launching State which has paid compensation for damage shall have the right to present a claim for indemnification to other participants in the joint launching. The participants in a joint launching may conclude agreements regarding the apportioning among themselves of the financial obligation in respect of which they are jointly and severally liable. Such agreements shall be without prejudice to the right of a State sustaining damage to seek the entire compensation due under this Convention from any or all of the launching States which are jointly and severally liable.

3. A State from whose territory or facility a space object is launched shall be regarded as a participant in a joint launching.

Article VI

1. Subject to the provisions of paragraph 2 of the Article, exoneration from absolute liability shall be granted to the extent that a launching State establishes that the damage has resulted either wholly or partially from gross negligence or from an act or omission done with intent to cause damage on the part of a claimant State or of natural or juridical persons it represents.

2. No exoneration whatever shall be granted in cases where the damage has resulted from activities conducted by a launching State which are not in conformity with international law including, in particular, the Charter of the United Nations and the Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, including the Moon and Other Celestial Bodies.

Article VII

The provisions of their Convention shall not apply to damage caused by a space object of a launching State to:

(*a*) nationals of that launching State;

(*b*) foreign nationals during such time as they are participating in the operation of that space object from the time of its launching or at any stage thereafter until its descent, or during such time as they are in the immediate vicinity of a planned launching or recovery area as the result of an invitation by that launching State.

Article VIII

1. A State which suffers damage, or whose natural or juridical persons suffer damage, may present to a launching State a claim for compensation for such damage.

2. If the State of nationality has not presented a claim, another State may, in respect of damage sustained in its territory by any natural or juridical person, present a claim to a launching State.

3. If neither the State of nationality nor the State in whose territory the damage was sustained has presented a claim or notified its intention of presenting a claim another State may, in respect of damage sustained by its permanent residents, present a claim to a launching State.

Article IX

A claim for compensation for damage shall be presented to a launching State through diplomatic channels. If a State does not maintain diplomatic relations with the launching State concerned, it may request another State to present its claim to that launching State or otherwise represent its interests under

this Convention. It may also present its claim through the Secretary-General of the United Nations, provided the claimant State and the launching State are both Members of the United Nations.

Article X

1. A claim for compensation for damage may be presented to a launching State not later than one year following the date of the occurrence of the damage or the identification of the launching State which is liable.

2. If, however, a State does not know of the occurrence of the damage or has not been able to identify the launching State which is liable, it may present a claim within one year following the date on which it learned of the aforementioned facts; however, this period shall in no event exceed one year following the date on which the State could reasonably be expected to have learned of the facts through the exercise of due diligence.

3. The time-limits specified in paragraphs 1 and 2 of this Article shall apply even if the full extent of the damage may not be known. In this event, however, the claimant State shall be entitled to revise the claim and submit additional documentation after the expiration of such time-limits until one year after the full extent of the damage is known.

Article XI

1. Presentation of a claim to a launching State for compensation for damage under this Convention shall not require the prior exhaustion of any local remedies which may be available to a claimant State or to natural or juridical persons it represents.

2. Nothing in this Convention shall prevent a State, or natural or juridical persons it might represent, from pursuing a claim in the courts or administrative tribunals or agencies of a launching State. A State shall not, however, be entitled to present a claim under this Convention in respect of the same damage for which a claim is being pursued in the courts or administrative tribunals or agencies of a launching State or under another international agreement which is binding on the States concerned.

Article XII

The compensation which the launching State shall be liable to pay for damage under this Convention shall be determined in accordance with international law and the principles of justice and equity, in order to provide such reparation in respect of the damage as will restore the person, natural or juridical, State or international organization on whose behalf the claim is presented to the condition which would have existed if the damage had not occurred.

Article XIII

Unless the claimant State and the State from which compensation is due under this Convention agree on another form of compensation, the compensation shall be paid in the currency of the claimant State or, if that State so requests, in the currency of the State from which compensation is due.

Article XIV

If no settlement of a claim is arrived at through diplomatic negotiations as provided for in Article IX, within one year from the date on which the claimant State notifies the launching State that it has

submitted the documentation of its claim, the parties concerned shall establish a Claims Commission at the request of either party.

Article XV

1. The Claims Commission shall be composed of three members: one appointed by the claimant State, one appointed by the launching State and the third member, the Chairman, to be chosen by both parties jointly. Each party shall make its appointment within two months of the request for the establishment of the Claims Commission.

2. If no agreement is reached on the choice of the Chairman within four months of the request for the establishment of the Commission, either party may request the Secretary-General of the United Nations to appoint the Chairman within a further period of two months.

Article XVI

1. If one of the parties does not make its appointment within the stipulated period, the Chairman shall, at the request of the other party, constitute a single-member Claims commission.

2. Any vacancy which may arise in the Commission for whatever reason shall be filled by the same procedure adopted for the original appointment.

3. The Commission shall determine its own procedure.

4. The Commission shall determine the place or places where it shall sit and all other administrative matters.

5. Except in the case of decisions and awards by a single-member Commission, all decisions and awards of the Commission shall be by majority vote.

Article XVII

No increase in the membership of the Claims Commission shall take place by reason of two or more claimant States or launching States being joined in any one proceeding before the Commission. The claimant States so joined shall collectively appoint one member of the Commission in the same manner and subject to the same conditions as would be the case for a single claimant State. When two or more launching States are so joined, they shall collectively appoint one member of the Commission in the same way. If the claimant States or the launching States do not make the appointment within the stipulated period, the Chairman shall constitute a single-member Commission.

Article XVII

The Claims Commission shall decide the merits of the claim for compensation and determine the amount of compensation payable, if any.

Article XIX

1. The Claims Commission shall act in accordance with the provisions of Article XII.

2. The decision of the Commission shall be final and binding if the parties have so agreed; otherwise the

Commission shall render a final and recommendatory award, which the parties shall consider in good faith. The Commission shall state the reasons for its decision or award.

3. The Commission shall give its decision or award as promptly as possible and no later than one year from the date of its establishment, unless an extension of this period is found necessary by the Commission.

4. The Commission shall make its decision or award public. It shall deliver a certified copy of its decision or award to each of the parties and to the Secretary-General of the United Nations.

Article XX

The expenses in regard to the Claims Commission shall be borne equally by the parties, unless otherwise decided by the Commission.

Article XXI

If the damage caused by a space object presents a large-scale danger to human life or seriously interferes with the living conditions of the population or the functioning of vital centers, the States Parties, and in particular the launching State, shall examine the possibility of rendering appropriate and rapid assistance to the State which has suffered the damage, when it so requests. However, nothing in this Article shall affect the rights or obligations of the States Parties under this Convention.

Article XXII

1. In this Convention, with the exception of Articles XXIV to XXVII, references to States shall be deemed to apply to any international intergovernmental organization which conducts space activities if the organization declared its acceptance of the rights and obligations provided for in this Convention and if a majority of the States members of the organization are State Parties to this Convention and to the Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, including the Moon and Other Celestial Bodies.

2. States members of any such organization which are States Parties to this Convention shall take all appropriate steps to ensure that the organization makes a declaration in accordance with the preceding paragraph.

3. If an international intergovernmental organization is liable for damage by virtue of the provisions of this Convention, that organization and those of its members which are States Parties to this Convention shall be jointly and severally liable; provided, however, that:

(*a*) any claim for compensation in respect of such damage shall be first presented to the organization;

(*b*) only where the organization has not paid, within a period of six months, any sum agreed or determined to be due as compensation for such damage, may the claimant State invoke the liability of the members which are States Parties to this Convention for the payment of that sum.

4. Any claim, pursuant to the provisions of this Convention, for compensation in respect of damage caused to an organization which has made a declaration in accordance with paragraph 1 of this Article

shall be presented by a State member of the organization which is a State Party to this Convention.

Article XXIII

1. The provisions of this Convention shall not affect other international agreements in force in so far as relations between the States Parties to such agreements are concerned.

2. No provision of this Convention shall prevent States from concluding international agreements reaffirming, supplementing or extending its provisions.

Article XXIV

1. This Convention shall be open to all States for signature. Any State which does not sign this Convention before its entry into force in accordance with paragraph 3 of this Article may accede to it at any time.

2. This Convention shall be subject to ratification by signatory States. Instruments of ratification and instruments of accession shall be deposited with the Governments of the United Kingdom of Great Britain and Northern Ireland, the Union of Soviet Socialist Republics and the United States of America, which are hereby designated the Depositary Governments.

3. This Convention shall enter into force on the deposit of the fifth instrument of ratification.

4. For States whose instruments of ratification or accession are deposited subsequent to the entry into force of this Convention, it shall enter into force on the date of the deposit of their instruments of ratification or accession.

5. The Depositary Governments shall promptly inform all signatory and acceding States of the date of each signature, the date of deposit of each instrument of ratification of and accession to this Convention, the date of its entry into force and other notices.

6. This Convention shall be registered by the Depositary governments pursuant to Article 102 of the Charter of the United Nations.

Article XXV

Any State Party to this Convention may propose amendments to this Convention. Amendments shall enter into force for each State Party to the Convention accepting the amendments upon their acceptance by a majority of the States Parties to the Convention and thereafter for each remaining State Party on the date of acceptance by it.

Article XXVI

Ten years after the entry into force of this Convention, the question of the review of this Convention shall be included in the provisional agenda of the United Nations General Assembly in order to consider, in the light of past application of the Convention, whether it requires revision. However, at any time after the Convention has been in force for five years, and at the request of one third of the States Parties to the Convention, and with the concurrence of the majority of the State Parties, a conference of the States Parties shall be convened to review this Convention.

Article XXVII

Any State Party to this Convention may give notice of its withdrawal from the Convention one year after its entry into force by written notification to the Depositary Governments. Such withdrawal shall take effect one year from the date of receipt of this notification.

Article XXVIII

This Convention, of which the English, Russian, French, Spanish and Chinese texts are equally authentic, shall be deposited in the archives of the Depositary Governments. Duly certified copies of this Convention shall be transmitted by the Depositary Governments of the signatory and acceding States.

(4) The Registration Convention.

The Registration Convention establishes a registry for space objects: n9

CONVENTION ON REGISTRATION OF OBJECTS LAUNCHED INTO OUTER SPACE

The States Parties to this Convention,

Recognizing the common interest of all mankind in furthering the exploration and use of outer space for peaceful purposes,

Recalling that the Treaty on principles governing the activities of States in the exploration and use of outer space, including the moon and other celestial bodies, of 27 January 1967 affirms that States shall bear international responsibility for their national activities in outer space and refers to the State on whose registry an object launched into outer spaced is carried,

Recalling also that the Agreement on the rescue of astronauts, the return of astronauts and the return of objects launched into outer space of 22 April 1968 provides that a launching authority shall, upon request, furnish identifying data prior to the return of an object it has launched into outer space found beyond the territorial limits of the launching authority,

Recalling further that the Convention on international liability for damage caused by space objects of 29 March 1972 establishes international rules and procedures concerning the liability of launching States for damage caused by their space objects,

Desiring, in the light of the Treaty on principles governing the activities of States in the exploration and use of outer space, including the moon and other celestial bodies, to make provision for the national registration by launching States of space objects launched into outer space,

Desiring further that a central register of objects launched into outer space be established and maintained, on a mandatory basis, by the Secretary-General of the United Nations,

Desiring also to provide for States Parties additional means and procedures to assist in the identification of space objects,

Believing that a mandatory system of registering objects launched into outer space would, in particular, assist in their identification and would contribute to the application and development of international law governing the exploration and use of outer space,

Have agreed on the following:

Article I

For the purposes of the Convention:

(a) The term "launching State" means:

(i) A State which launches or procures the launching of a space object;

(ii) a State from whose territory or facility a space object is launched;

(b) The term "space object" includes component parts of a space object as well as its launch vehicle and parts thereof:

(c) The term "State of registry" means a launching State on whose registry a space object is carried in accordance with article II.

Article II

1. When a space object is launched into earth orbit or beyond, the launching State shall register the space object by means of an entry in an appropriate registry which it shall maintain. Each launching state shall inform the Secretary-General of the United Nations of the establishment of such a registry.

2. Where there are two or more launching States in respect of any such space object, they shall jointly determine which one of them shall register the object in accordance with paragraph 1 of this article, bearing in mind the provisions of article VIII of the Treaty on principles governing the activities of States in the exploration and use of outer space, including the moon and other celestial bodies, and without prejudice to appropriate agreements concluded or to be concluded among the launching States on jurisdiction and control over the space object and over any personnel thereof.

3. The contents of each registry and the conditions under which it is maintained shall be determined by the State of registry concerned.

Article III

1. The Secretary-General of the United Nations shall maintain a Register in which the information furnished in accordance with article IV shall be recorded.

2. There shall be full and open access to the information in this Register.

Article IV

1. Each State of registry shall furnish to the Secretary-General of the United Nations, as soon as practicable, the following information concerning each space object carried on its registry:

(a) name of launching State or States;

(b) an appropriate designator of the space object or its registration number;

(c) date and territory of location of launch;

(d) basic orbital parameters, including:
(i) nodal period,

(ii) inclination,

(iii) apogee,

(iv) perigee;

(e) general function of the space object.

2. Each State of registry may, from time to time, provide the Secretary-General of the United Nations with additional information concerning a space object carried on its registry.

3. Each State of registry shall notify the Secretary-General of the United Nations, to the greatest extent feasible and as soon as practicable, of space objects concerning which it has previously transmitted information, and which have been but no longer are in earth orbit.

Article V

Whenever a space object launched into earth orbit or beyond is marked with the designator or registration number referred to in article IV, paragraph 1 (b), or both, the State of registry shall notify the Secretary-General of this fact when submitting the information regarding the space object in accordance with article IV. In such case, the Secretary-General of the United Nations shall record this notification in the Register.

Article VI

Where the application of the provisions of this Convention has not enabled a State Party to identify a space object which has caused damage to it or to any of its natural or juridical persons, or which may be of a hazardous or deleterious nature, other States Parties, including in particular States possessing space monitoring and tracking facilities, shall respond to the greatest extent feasible to a request by that State Party, or transmitted through the Secretary-General on its behalf, for assistance under equitable and reasonable conditions in the identification of the object. A State Party making such a request shall, to the greatest extent feasible, submit information as to the time, nature and circumstances of the events giving rise to the request. Arrangements under which such assistance shall be rendered shall be the subject of agreement between the parties concerned.

Article VII

1. In this Convention, with the exception of articles VIII to XII inclusive, references to States shall be deemed to apply to any international inter-governmental organization which conducts space activities if the organization declares its acceptance of the rights and obligations provided for in this Convention and if a majority of the States members of the organization are States Parties to this Convention and to the Treaty on principles governing the activities of States in the exploration and use of outer space, including the moon and other celestial bodies.

2. States members of any such organization which are States Parties to this Convention shall take all appropriate steps to ensure that the organization makes a declaration in accordance with paragraph 1 of this article.

Article VIII

1. This Convention shall be open for signature by all States at United Nations Headquarters in New York. Any State which does not sign the Convention before its entry into force in accordance with paragraph 3 of this article may accede to it at any time.

2. This Convention shall be subject to ratification by signatory States. Instruments of ratification and instruments of accession shall be deposited with the Secretary-General of the United Nations.

3. This Convention shall enter into force among the States which have deposited instruments of ratification on the deposit of the fifth such instruments with the Secretary-General of the United Nations.

4. For States whose instruments of ratification or accession are deposited subsequent to the entry into force of this Convention, it shall enter into force on the date of the deposit of their instruments of ratification or accession.

5. The Secretary-General shall promptly inform all signatory and acceding States of the date of each signature, the date of deposit of each instrument of ratification of and accession to this Convention, the date of its entry into force and other notices.

Article IX

Any State Party to this Convention may propose amendments to the Convention. Amendments shall enter into force for each State Party to the Convention accepting the amendments upon their acceptance by a majority of the States Parties to the Convention and thereafter for each remaining State Party to the Convention on the date of acceptance by it.

Article X

Ten years after the entry into force of this Convention, the question of the review of the Convention shall be included in the provisional agenda of the United Nations General Assembly in order to consider, in the light of past application of the Convention, whether it requires revision. However, at any time after the Convention has been in force for five years, at the request of one third of the States Parties to the Convention and with the concurrence of the majority of the States Parties, a conference of the States Parties shall be convened to review this Convention. Such review shall take into account in particular any relevant technological developments, including those relating to the identification of space objects. n10

Article XI

Any State Party to this Convention may give notice of its withdrawal from the Convention one year after its entry into force by written notification to the Secretary-General of the United Nations. Such withdrawal shall take effect one year from the date of receipt of this notification.

Article XII

The original of this Convention, of which the Arabic, Chinese, English, French, Russian and Spanish

texts are equally authentic, shall be deposited with the Secretary-General of the United Nations, who shall send certified copies thereof to all signatory and acceding States.

In Witness whereof the undersigned, being duly authorized thereto by their respective Governments, have signed this Convention, opened for signature at New York on the fourteenth day of January one thousand nine hundred and seventy-five.

(5) The Moon Treaty.

The Moon Treaty has not been widely accepted, especially by the major nations, for reasons related to property rights and summarized as follows:

Article XI of the Moon Treaty declares that "the moon and its natural resources are the common heritage of mankind." This concept entails an "equitable sharing" by all parties in the benefits derived from these natural resources, whereby the interest and needs of the developing countries, as well as the efforts of those countries which have contributed either directly or indirectly to the exploration of the moon, shall be given special consideration. Further, when exploitation of these resources becomes feasible, the Moon Treaty requires the establishment of an international regime, including appropriate procedures to govern the exploitation of these resources. Developing countries argue that the "common heritage of mankind" principle amounts to a theory of common property for all the nations and peoples of the world. Consequently, if the Moon Treaty were widely accepted, there could be significant legal ramifications regarding the taking of "common heritage of mankind" property, such as mineral resources, without consent of all the "owners." n11

The text of the Moon Treaty is as follows: n12

Agreement Governing the Activities of States on the Moon and Other Celestial Bodies

The General Assembly,

Reaffirming the importance of international cooperation in the field of the exploration and peaceful uses of outer space, including the moon and other celestial bodies, and of promoting the rule of law in the field of human endeavor,

Recalling its resolution 2779 (XXVI) of 29 November 1971, in which it requested the Committee on the Peaceful Uses of Outer Space and its Legal Sub-Committee to consider the question of the elaboration of a draft international treaty concerning the moon, as well as its resolutions 2915 (XXVII) of 9 November 1972, 3182 (XXVIII) of 18 December 1973, 3234 (XXIX) of 12 November 1974, 3388 (XXX) of 18 November 1975, 31/8 of 8 November 1976, 32/196 A if 20 December 1977 and 33/16 of 10 November 1978, in which it, *inter alia*, encouraged the elaboration of the draft treaty relating to the moon,

Recalling, in particular, that in resolution 33/16 it endorsed the recommendation of the Committee on the Peaceful Uses of Outer Space that the Legal Sub-Committee at its eighteenth session should continue as a matter of priority its efforts to complete the draft treaty relating to the moon,

Having considered the relevant part of the report of the Committee on the Peaceful Uses of Outer Space, in particular paragraph 62, 63, and 65,

Noting with satisfaction that the Committee on the Peaceful Uses of Outer Space, on the basis of the deliberations and recommendations of the Legal Sub-Committee, has completed the text of the draft

Agreement Governing the Activities of States on the Moon and Other Celestial Bodies,

Having considered the text of the draft Agreement Governing the Activities of States on the Moon and Other Celestial Bodies,

1. *Commends* the Agreement Governing the Activities of States on the Moon and Other Celestial Bodies, the text of which is annexed to the present resolution;

2. *Requests* the Secretary-General to open the Agreement for signature and ratification at the earliest possible date;

3. *Expresses its hope* for the widest possible adherence to this Agreement.

89th plenary meeting

5 December 1979

ANNEX

Agreement Governing the Activities of States on the Moon and Other Celestial Bodies

The States Parties to this Agreement,

Noting the achievements of States in the exploration and use of the moon and other celestial bodies,

Recognizing that the moon, as a natural satellite of the earth, has an important role to play in the exploration of outer space,

Determined to promote on the basis of equality the further development of cooperation among States in the exploration and use of the moon and other celestial bodies,

Desiring to prevent the moon from becoming an area of international conflict,

Bearing in mind the benefits which may be derived from the exploitation of the natural resources of the moon and other celestial bodies,

Recalling the Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, including the Moon and Other Celestial Bodies, the Agreement on the Rescue of Astronauts, the Return of Astronauts and the Return of Objects Launched into Outer Space, the Convention on International Liability for Damage Caused by Space Objects, and the Convention on Registration of Objects Launched into Outer Space,

Taking into account the need to define and develop the provisions of these international instruments in relation to the moon and other celestial bodies, having regard to further progress in the exploration and use outer space,

Have agreed on the following:

Article I

1. The provisions of this Agreement relating to the moon shall also apply to other celestial bodies within the solar system, other than the earth, except in so far as specific legal norms enter into force with respect to any of these celestial bodies.

2. For the purposes of this Agreement reference to the moon shall include orbits around or other trajectories to or around it.

3. This Agreement does not apply to extraterrestrial materials which reach the surface of the earth by natural means.

Article II

All activities on the moon, including its exploration and use, shall be carried out in accordance with international law, in particular the Charter of the United Nations, and taking into account the Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations, adopted by the General Assembly on 24 October 1970, in the interest of maintaining international peace and security and promoting international cooperation and mutual understanding, and with due regard to the corresponding interests of all other States Parties.

Article III

1. The moon shall be used by all States Parties exclusively for peaceful purposes.

2. Any threat or use of force or any other hostile act or threat of hostile act on the moon is prohibited. It is likewise prohibited to use the moon in order to commit any such act or to engage in any such threat in relation to the earth, the moon, spacecraft, the personnel of spacecraft or man-made space objects.

3. States Parties shall not place in orbit around or other trajectory to or around the moon objects carrying nuclear weapons or any other kinds of weapons of mass destruction or place or use such weapons on or in the moon.

4. The establishment of military bases, installations and fortifications, the testing of any type of weapons and the conduct of military manoeuvre on the moon shall be forbidden. The use of military personnel for scientific research or for any other peaceful purposes shall not be prohibited. The use of any equipment or facility necessary for peaceful exploration and use of the moon shall also not be prohibited.

Article IV

1. The exploration and use of the moon shall be the province of all mankind and shall be carried out for the benefit and in the interests of all countries, irrespective of their degree of economic or scientific development. Due regard shall be paid to the interests of present and future generations as well as to the need to promote higher standards of living and conditions of economic and social progress and development in accordance with the Charter of the United Nations.

2. States Parties shall be guided by the principle of cooperation and mutual assistance in all their activities concerning the exploration and use of the moon. International cooperation in pursuance of this Agreement should be as wide as possible and may take place on a multilateral basis, on a bilateral basis or through international intergovernmental organizations.

Article V

1. States Parties shall inform the Secretary-General of the United Nations as well as the public and the international scientific community, to the greatest extent feasible and practicable, of their activities concerned with the explorations and use of the moon. Information on the time, purposes, locations, orbital parameters and duration shall be given in respect of each mission to the moon as soon as possible after launching, while information on the results of each mission, including scientific results, shall be furnished upon completion of the mission. In the case of a mission lasting more than sixty days, information on conduct of the mission, including any scientific results, shall be given periodically, at thirty-day intervals. For missions lasting more than six months, only significant additions to such information need be reported thereafter.

2. If a State Party becomes aware that another State Party plans to operate simultaneously in the same area of or in the same orbit around or trajectory to or around the moon, it shall promptly inform the other State of the timing of and plans for its own operations.

3. In carrying out activities under this Agreement, States Parties shall promptly inform the Secretary-General, as well as the public and the international scientific community, of any phenomena they discover in outer space, including the moon, which could endanger human life or health, as well as of any indication of organic life.

Article VI

1. There shall be freedom of scientific investigation on the moon by all States Parties without discrimination of any kind, on the basis of equality and in accordance with international law.

2. In carrying out scientific investigations and in furtherance of the provisions of this Agreement, the States Parties shall have the right to collect on and remove from the moon samples of its mineral and other substances. Such samples shall remain at the disposal of those States Parties which caused them to be collected and may be used by them for scientific purposes. States Parties shall have regard to the desirability of making a portion of such samples available to other interested States Parties and the international scientific community for scientific investigation. States Parties may in the course of scientific investigations also use mineral and other substances of the moon in quantities appropriate for the support of their missions.

3. States Parties agree on the desirability of exchanging scientific and other personnel on expeditions to or installations on the moon to the greatest extent feasible and practicable.

Article VII

1. In exploring and using the moon, States Parties shall take measures to prevent the disruption of the existing balance of its environment, whether by introducing adverse changes in that environment, by its harmful contamination through the introduction of extra-environmental matter or otherwise. States Parties shall also take measures to avoid harmfully affecting the environment of the earth through the introduction of extraterrestrial matter or otherwise.

2. States Parties shall inform the Secretary-General of the United Nations of the measures being adopted by them in accordance with paragraph 1 of this article and shall also, to the maximum extent feasible, notify him in advance of all placements by them of radioactive materials on the moon and of the purposes of such placements.

3. States Parties shall report to other States Parties and to the Secretary-General concerning areas of the moon having special scientific interest in order that, without prejudice to the rights of other States Parties, consideration may be given to the designation of such areas as international scientific preserves for which special protective arrangements are to be agreed upon in consultation with the competent bodies of the United Nations.

Article VIII

1. States Parties may pursue their activities in the exploration and use of the moon anywhere on or below its surface, subject to the provisions of this Agreement.

2. For these purposes States Parties may, in particular:

(a) Land their space objects on the moon and launch them from the moon;

(b) Place their personnel, space vehicles, equipment, facilities, stations, and installations anywhere on or below the surface of the moon.

Personnel, space vehicles, equipment, facilities, stations and installations may move or be moved freely over or below the surface of the moon.

3. Activities of States Parties in accordance with paragraphs 1 and 2 of this article shall not interfere with the activities of other States Parties on the moon. Where such interference may occur, the States Parties concerned shall undertake consultations in accordance with article 15, paragraphs 2 and 3, of this Agreement.

Article IX

1. States Parties may establish manned and unmanned stations on the moon. A State Party establishing a station shall use only that area which is required for the needs of the station and shall immediately inform the Secretary-General of the United Nations of the location and purposes of that station. Subsequently, at annual intervals that State shall likewise inform the Secretary-General whether the station continues in use and whether its purposes have changed.

2. Stations shall be installed in such a manner that they do not impede the free access to all areas of the moon of personnel, vehicles and equipment of other States Parties conducting activities on the moon in accordance with the provisions of this Agreement or of Article I of the Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, including the Moon and Other Celestial Bodies.

Article X

1. States Parties shall adopt all practicable measures to safeguard the life and health of persons on the moon. For this purpose they shall regard any person on the moon as an astronaut within the meaning of article V of the Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, including the Moon and Other Celestial Bodies, and as part of the personnel of a spacecraft within the meaning of the Agreement on the Rescue of Astronauts, the Return of Astronauts and the Return of Objects Launched into Outer Space.

2. States Parties shall offer shelter in their stations, installations, vehicles and other facilities to persons in

distress on the moon.

Article XI

1. The moon and its natural resources are the common heritage of mankind, which finds its expression in the provisions of this Agreement, in particular in paragraph 5 of this article.

2. The moon is not subject to national appropriations by any claim of sovereignty, by means of use or occupation, or by any other means.

3. Neither the surface nor the subsurface of the moon, nor any part thereof or natural resources in place, shall become property of any State, international intergovernmental or non-governmental organization, national organization or non-governmental entity or of any natural person. The placement of personnel, space vehicles, equipment, facilities, stations and installations on or below the surface of the moon, including structures connected with its surface or subsurface, shall not create a right of ownership over the surface or the subsurface of the moon or any areas thereof. The foregoing provisions are without prejudice to the international r'egime referred to in paragraph 5 of this article.

4. States Parties have the right to exploration and use of the moon without discrimination of any kind, on the basis of equality and in accordance with international law and the provisions of this Agreement.

5. States Parties to this Agreement hereby undertake to establish an international r'egime, including appropriate procedures, to govern the exploitation of the natural resources of the moon as such exploitation is about to become feasible. This provision shall be implemented in accordance with article 18 of this Agreement.

6. In order to facilitate the establishment of the international r'egime referred to in paragraph 5 of this article, States Parties shall inform the Secretary-General of the United Nations as well as the public and the international scientific community, to the greatest extent feasible and practicable, of any natural resources they may discover on the moon.

7. The main purposes of the international r'egime to be established shall include:

(a) The orderly and safe development of the natural resources of the moon;

(b) The rational management of those resources;

(c) The expansion of opportunities in the use of those resources;

(d) An equitable sharing by all States Parties in the benefits derived from those resources, whereby the interests and needs of the developing countries which have contributed either directly or indirectly to the exploration of the moon, shall be given special consideration.

8. All the activities with respect to the natural resources of the moon shall be carried out in a manner compatible with the purposes specified in paragraph 7 of this article and the provisions of article 6, paragraph 2, of this Agreement.

Article XII

1. States Parties shall retain jurisdiction and control over their personnel, space vehicles, equipment,

facilities, stations and installations on the moon. The ownership of space vehicles, equipment, facilities, stations and installations shall not be affected by their presence on the moon.

2. Vehicles, installations and equipment or their component parts found in places other than their intended location shall be dealt with in accordance with article 5 of the Agreement on the Rescue of Astronauts, the Return of Astronauts and the Return of Objects Launched into Outer Space.

3. In the event of an emergency involving a threat to human life, States Parties may use the equipment, vehicles, installations, facilities or supplies of other States Parties on moon. Prompt notification of such use shall be made to the Secretary-General of the United Nations or the State Party concerned.

Article XIII

A State Party which learns of the crash landing, forced landing or other unintended landing on the moon of a space object, or its component parts, that were not launched by it, shall promptly inform the launching State Party and the Secretary-General of the United Nations.

Article XIV

1. States Parties to this Agreement shall bear international responsibility for national activities on the moon, whether such activities are carried out by governmental agencies or by non-governmental entities, and for assuring that national activities are carried out in conformity with the provisions of the Agreement. States Parties shall ensure that non-governmental entities under their jurisdiction shall engage in activities on the moon only under the authority and continuing supervision of the appropriate State Party.

2. States Parties recognize that detailed arrangements concerning liability for damage caused on the moon, in addition to the provisions of the Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, including the Moon and Other Celestial Bodies, and the Convention on International Liability for Damage Caused by Space Objects, may become necessary as a result of more extensive activities on the moon. Any such arrangements shall be elaborated in accordance with the procedure provided for in article 18 of this Agreement.

Article XV

1. Each State Party may assure itself that the activities of other States Parties in the exploration and use of the moon are compatible with the provisions of this Agreement. To this end, all space vehicles, equipment, facilities, stations and installations on the moon shall be open to other States Parties. Such States Parties shall give reasonable advance notice of a projected visit, in order that appropriate consultations may be held and that maximum precautions may be taken to assure safety and to avoid interference with normal operations in the facility and to avoid interference with normal operations in the facility to be visited. In pursuance of this article, any State Party may act on its own behalf or with the full or partial assistance of any other State Party or through appropriate international procedures within the framework of the United Nations and in accordance with the Charter.

2. A State Party which has reason to believe that another State Party is not fulfilling the obligations incumbent upon it pursuant to this Agreement or that another State Party is interfering with the rights which the former State has under this Agreement may request consultations with that State Party. A State Party receiving such a request shall enter into such consultations without delay. Any other State Party which requests to do so shall be entitled to take part in the consultations. Each State Party participating in

such consultations shall seek a mutually acceptable resolution of any controversy and shall bear in mind the rights and interests of all States Parties. The Secretary-General of the United Nations shall be informed of the results of the consultations and shall transmit the information received to all States Parties concerned.

3. If the consultations do not lead to a mutually acceptable settlement which has due regard for the rights and interests of all States Parties, the parties concerned shall take all measures to settle the dispute by other peaceful means of their choice appropriate to the circumstances and the nature of the dispute. If difficulties arise in connection with the opening of consultations or if consultations do not lead to a mutually acceptable settlement, any State Party may seek the assistance of the Secretary-General, without seeking the consent of any other State Party concerned, in order to resolve the controversy. A State Party which does not maintain diplomatic relations with another State Party concerned shall participate in such consultations, at its choice, either itself or through another State Party or the Secretary-General as intermediary.

Article XVI

With the exception of articles 17 to 21, references in this Agreement to States shall be deemed to apply to any international intergovernmental organization which conducts space activities if the organization declares its acceptance of the rights and obligations provided for in this Agreement and if a majority of the States members of the organization are States Parties to this Agreement and to the Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, including the Moon and Other Celestial Bodies. States members of any such organization which are States Parties to this Agreement shall take all appropriate steps to ensure that the organization makes a declaration in accordance with the provisions of this article.

Article XVII

Any State Party to this Agreement may propose amendments to the Agreement. Amendments shall enter into force for each State Party to the Agreement accepting the amendments upon their acceptance by a majority of the States Parties to the Agreement and thereafter for each remaining State Party to the Agreement on the date of acceptance by it.

Article XVIII

Ten years after the entry into force of this Agreement, the question of the review of the Agreement shall be included in the provisional agenda of the General Assembly of the United Nations in order to consider, in the light of past application of the Agreement, whether it requires revision. However, at any time after the Agreement has been in force for five years, the Secretary-General of the United Nations, as depository, shall, at the request of one third of the States Parties to the Agreement and with the concurrence of the majority of the States Parties, convene a conference of the States Parties to review this Agreement. A review conference shall also consider the question of the implementation of the provisions of article 11, paragraph 5, on the basis of the principle referred to in paragraph 1 of that article and taking into account in particular any relevant technological developments.

Article XIX

1. This Agreement shall be open for signature by all States at United Nations Headquarters in New York.

2. This Agreement shall be subject to ratification by signatory States. Any State which does not sign this

Agreement before its entry into force in accordance with paragraph 3 of this article may accede to it at any time. Instruments of ratification or accession shall be deposited with the Secretary-General of the United Nations.

3. This Agreement shall enter into force on the thirtieth day following the date of deposit of the fifth instrument of ratification.

4. For each State depositing its instrument of ratification or accession after the entry into force of this Agreement, it shall enter into force on the thirtieth day following the date of deposit of any such instrument.

5. The Secretary-General shall promptly inform all signatory and acceding States of the date of each signature, the date of deposit of each instrument of ratification or accession to this Agreement, the date of its entry into force and other notices.

Article XX

Any State Party to this Agreement may give notice of its withdrawal from the Agreement one year after its entry into force by written notification to the Secretary-General of the United Nations. Such withdrawal shall take effect one year from the date of receipt of this notification.

Article XXI

The original of this Agreement, of which the Arabic, Chinese, English, French, Russian and Spanish texts are equally authentic, shall be deposited with the Secretary-General of the United Nations, who shall send certified copies thereof to all signatory and acceding States.

In witness whereof the undersigned, being duly authorized thereto by their respective Governments, have signed this Agreement, opened for signature at New York on... .

(b) Other Rules of International Law.

In addition to these multilateral treaties emanating from the United Nations, international legal custom has also emerged to deal with other legal problems connected with activity in outer space. Some of these have only indirect impact on property rights.

Widely accepted custom has confirmed the right to launch satellites and other space objects into orbit over the territory of other nations of the world. This right may be exercised without prior permission or authorization of the countries over whose territories the launches occur. This custom with regard to outer space is in contrast with the custom with respect to air space, as attested by the numerous attacks on aircraft that have intentionally or unintentionally violated another nation's sovereign air space. Additionally, there is no international consensus treating launching vehicles the same as reentering vehicles or satellites. Many countries regard reentry as a violation of airspace n13

Another significant component of international space law is that of telecommunication, regulated to some degree by the International Telecommunication Union of the United Nations. n14

Yet to be addressed are issues of space debris and nuclear contamination. n15"It is estimated that there are already four million pounds of debris in low earth orbit and that the accumulation of small debris increases at a rate in excess of ten percent per year." n16

All nations are concerned about possible militarization and "weaponization" of outer space. n17

FOOTNOTES:

(n1)Footnote 2. The United Nations has prepared a 55-page report listing international agreements and other legal materials regarding space law entitled International Agreements and Other Available Legal Documents Relevant to Space-Related Activities, United Nations, Vienna 1999, at *www.oosa.unvienna.org/Reports/intlagree.pdf*.

(n2)Footnote 3. G.A. Res. 1348, U.N. GAOR U.N. Doc. A/4090 (1958).

(n3)Footnote 4. The five treaties and agreements have been ratified and signed as follows: The Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, including the Moon and Other Celestial Bodies (the "Outer Space Treaty," adopted by the General Assembly in its resolution 2222 (XXI)), opened for signature on 27 January 1967, entered into force on 10 October 1967, 96 ratifications and 27 signatures (as of 1 February 2001); The Agreement on the Rescue of Astronauts, the Return of Astronauts and the Return of Objects Launched into Outer Space (the "Rescue Agreement," adopted by the General Assembly in its resolution 2345 (XXII)), opened for signature on 22 April 1968, entered into force on 3 December 1968, 87 ratifications and 26 signatures (as of 1 February 2001); The Convention on International Liability for Damage Caused by Space Objects (the "Liability Convention," adopted by the General Assembly in its resolution 2777 (XXVI)), opened for signature on 29 March 1972, entered into force on 1 September 1972, 81 ratifications and 26 signatures (as of 1 February 2001); The Convention on Registration of Objects Launched into Outer Space (the "Registration Convention," adopted by the General Assembly in its resolution 3235 (XXIX)), opened for signature on 14 January 1975, entered into force on 15 September 1976, 43 ratifications and 4 signatures (as of 1 February 2001); The Agreement Governing the Activities of States on the Moon and Other Celestial Bodies (the "Moon Agreement," adopted by the General Assembly in its resolution 34/68), opened for signature on 18 December 1979, entered into force on 11 July 1984, 9 ratifications and 5 signatures (as of 1 February 2001). (Information from the United Nations Office for Outer Space Affairs website *www.oosa.unvienna.org/SpaceLawreaties.html*.

(n4)Footnote 5. Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, Including the Moon and Other Celestial Bodies, opened for signature January 27, 1967, 610 U.N.T.S. 205 (1967).

(n5)Footnote 6. Margaret A. Roberts, U.S. Remote Sensing Data From Earth Observation C Law, Policy and Practice, 22 Air & Space Law 30, 33 (1997) (commentary and later provisions tied to the treaty by the U.N. General Assembly).

(n6)Footnote 7. Agreement on the Rescue of Astronauts, the Return of Astronauts and the Return of Objects Launched into Outer Space, opened for signing April 22, 1968, 672 U.N.T.S. 45 (1968).

(n7)Footnote 8. Convention on International Liability for Damage Caused by Space Objects, 961 U.N.T.S. 187 (1972).

(n8)Footnote 9. The Convention on the Registration of Objects Launched Into Outer Space, opened for signature January 14, 1975, 1023 U.N.T.S. 15 (1975).

(n9)Footnote 10. Dr. Ernst Fasan, Dominium Lunae, Proprietas Lunae, Proceedings of the Thirty-Ninth Colloquium on the Law of Outer Space, International Institute of Space Law of the International Astronautical Federation (1997); Dr. Harry H. Almond, Jr., The Legal Status of Property on the Moon and Other Celestial Bodies, Proceedings of the Thirty-Ninth Colloquium on the Law of Outer Space, International Institute of Space Law of the International Astronautical Federation (1997); V.S. Mani, The Common Heritage of Mankind: Implications for the Legal Status of Property Rights on the Moon and Celestial Bodies, Proceedings of the Thirty-Ninth Colloquium on the Law of Outer Space, International Institute of Space Law of the International Astronautical Federation (1997); H.L. van Traa-Engelman, Clearness Regarding Property Rights on the Moon and Other Celestial Bodies, Proceedings of the Thirty-Ninth Colloquium on the Law of Outer Space, International Institute of Space Law of the International Astronautical Federation (1997); Gyula Gal, Acquisition of Property in the Legal Regime of Celestial Bodies,

Proceedings of the Thirty-Ninth Colloquium on the Law of Outer Space, International Institute of Space Law of the International Astronautical Federation (1997); Patricia M. Sterns, G. Harry Stine, & Leslie I. Tennen, Preliminary Jurisprudential Observations Concerning Property Rights on the Moon and Other Celestial Bodies in the Commercial Space Age, Proceedings of the Thirty-Ninth Colloquium on the Law of Outer Space, International Institute of Space Law of the International Astronautical Federation (1997); Gabriel Lafferranderie, ed., Outlook on Space Law Over the Next 30 Years 33, 208 (Kluwer Law International, The Hague, 1997) (common heritage, ownership of equipment and installations on the moon).

(n10)Footnote 11. Joseph A. Bosco, International Law Regarding Outer Space - An Overview, *55 J. Air L. & Com. 609, 619-620 (1990).*

(n11)Footnote 12. Agreement Governing the Activities of States on the Moon and Other Celestial Bodies, 34 U.N. GAOR, Supp. at 77 (1979).

(n12)Footnote 13. Andrei D. Terekhov, "Passage of Space Objects Through Foreign Airspace: International Custom?" 25 J. Space L. 1 (1997)

(n13)Footnote 14. Henry Wong, "The Paper 'Satellite' Chase: the ITU Prepares for its Final Exam in Resolution" 18, *63 J. Air L. & Com. 849 (1998).*

(n14)Footnote 15. Jennifer M. Seymour, "Containing the Cosmic Crisis: a Proposal for Curbing the Perils of Space Debris," 10 Geo. Int'l. Envt'l. L. R. 891 (1998); Peter T. Limperis, Note, "Orbital Debris and the Spacefaring Nations: International Law Methods for Prevention and Reduction of Debris, and Liability Regimes for Damage Caused by Debris," 15 Ariz. J. of Int'l & Comp. L. 319 (1998); Delbert D. Smith, "The Technical, Legal, and Business Risks of Orbital Debris," *6 N.Y.U. Envt'l L. J. 50 (1997).*

(n15)Footnote 16. *Id.* at 641-642. Glenn H. Reynolds & Robert P. Merges, Outer Space: Problems of Law and Policy 207 (Boulder, Colo.: Westview Press. 1997) (describes the problems caused by nuclear pollution and space debris: window damage to Space Shuttle Challenger in 1983 by a paint chip.2 millimeters in diameter, gamma ray sensing satellites collecting unintelligible data due to unshielded nuclear power sources on some satellites. Also an analysis of the difficult problem of determining what space debris is.); Lubos Perek, Space Debris: Discussions in the United Nations in 1996, Proceedings of the Thirty-Ninth Colloquium on the Law of Outer Space, International Institute of Space Law of the International Astronautical Federation (1997); Ali Akbar Golrounia & Dr. Mohsen Bahrami, The Draft of the International Law Association for a Convention on Space Debris (Buenos Aires): Can it Meet the Needs of the 21st Century? Proceedings of the Thirty-Ninth Colloquium on the Law of Outer Space, International Institute of Space Law of the International Astronautical Federation (1997); Gabriel Lafferranderie, ed., Outlook on Space Law over the Next 30 Years, 305 (The Hague: Kluwer Law International, 1997).

(n16)Footnote 17. For a full text "Index of Online General Assembly Resolutions Relating to Outer Space" listing United Nations General Assembly Resolutions in. pdf format in Arabic, Chinese, English, French, Russian, and Spanish visit *www.oosa.unvienna.org/SpaceLaw/gares/index.html*.

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CHAPTER 59 PROPERTY ISSUES IN SPACE LAW

7-59 Thompson on Real Property, Thomas Editions § 59.03

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§ 59.03 American Property Law Issues Posed by Outer Space.

Probably the most vexing of these issues for the United States is the approach of the Moon Treaty, which declares outer space natural resources as free from exploitation by individual nations. This has been widely criticized as unhelpful in a world where these new deposits of natural resources may be badly needed, and incentives for - rather than prohibitions against - their exploitation should be included in the legal regime. n18 One writer has suggested, alternatively, that outer space natural resources should be made available in accordance with a reasonable use doctrine, familiar in the riparian rights of American water law. n19

Closer to home, another persisting issue is establishing the actual delineation between air space and outer space. According to presently accepted legal doctrine, a private landowner or a government may exercise "sovereignty" over air space; as exhibited in the various multilateral treaties, however, the usual approach toward outer space is to declare it free from exercise of national sovereignty. If this distinction persists and is universally recognized, then it will be necessary to create some universal standard on the physical extent of airspace rights over land and territory. n20 In addition to property law issues, other rather ordinary legal disputes, such as those centered on contract issues, inevitably rise in connection with efforts to explore and exploit outer space. n21

FOOTNOTES:
(n1)Footnote 18. Rodolphe J.A. De Seife, "Star War or Star Peace: The Impact of International Treaties on the Commercial Use of Space," 1 American Enterprise, the Law, & the Commercial Use of Space 73, 94, 97 (1986); Declan J. O'Donnell, Metaspace: A Design for Governance in Outer Space, 1 Space Governance: J. of U. Soc. Space & World Bar Assoc. 8, 11 (1996); Glenn H. Reynolds and Robert P. Merges, Outer Space: Problems of Law and Policy, 97-177 (Boulder Colo.: Westview Press, 1997).

(n2)Footnote 19. Douglas Alan Barritt, A 'Reasonable' Approach to Resource Development in Outer Space, *12 Loy. L.A. Int'l & Comp. L. J. 615 (1990).*

(n3)Footnote 20. *See* Bin Cheng, The Legal Status of Outer Space and Other Issues: Delimitation of Outer Space and Definition of Peaceful Use, 11 J. Space L. 89 (1983); He Qizhi, The Problem of Definition and Delimitation of Outer Space, 10 J. Space L. 157, 158 (1982). Margaret A. Roberts, "U.S. Remote Sensing Data From Earth Observation C Law, Policy and Practice," 22 Air & Space Law 30, 31 (1997) (United States advocates and pursues an "open skies"

policy, allowing satellite flight and data collection over other nations).

(n4)Footnote 21. *New Valley Corp. v. United States, 34 Fed. Cl. 703 (1996)* (action for breach of contract damages for government's failure to launch commercial payload after change in space shuttle policy); *American Satellite Co. v. United States, 34 Fed. Cl. 468 (1995)* (action for damages for failure to launch satellite after presidential decision to no longer use space shuttle for commercial payloads).

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CHAPTER 60 THE LAW OF EASEMENTS: RIGHTS IN THE PROPERTY OF ANOTHER

7-60 Thompson on Real Property, Thomas Editions 60.syn

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§ 60.syn Synopsis to Chapter 60: THE LAW OF EASEMENTS: RIGHTS IN THE PROPERTY OF ANOTHER

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CHAPTER 60 THE LAW OF EASEMENTS: RIGHTS IN THE PROPERTY OF ANOTHER

7-60 Thompson on Real Property, Thomas Editions § 60.01

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§ 60.01 Introduction.

Interests akin to easements have existed in one form or another from medieval and back to Roman times, though easements were not placed into a separate category in English law until the 19th century. n1 Because very few pieces of land exist in total isolation from any other, it flows from the very nature of the world we live in that property schemes include some methods to control the effects neighboring pieces of land have on one another. Because owners will want themselves to have some control over the arrangements benefitting and burdening themselves and their land, it is predictable that those mechanisms will permit private agreements. And because the owners on each side of an agreement governing use of their land will want to be able to count on the agreement surviving the transfer of the counterpart's property, a private land use system has to have the ability to benefit and burden the parties' successors in interest.

Partly by design and partly by historical serendipity, the property system in this country has three very closely interrelated mechanisms to make it possible for landowners to regulate the effects their properties have on one another. The easement is the oldest of the forms in effect today. The other two forms, the real covenant and the equitable servitude, developed to solve problems caused by limitations that English and American judges placed on the reach and validity of easements. n2

The similarities among the three mechanisms and the rules governing them (and, more critically, the subtle differences that serve as traps for the unwary) have led to a very strong movement in many jurisdictions and among property scholars completely or partially to unify the easement, real covenant and equitable servitude. Those working for that unification, and perhaps most people studying or working with these mechanisms, find it ludicrous and perhaps unconscionable that these three tools performing almost entirely identical functions can exist simultaneously and frustrate property owners (and their lawyers) in their desire to create lasting structures for their land relationships. n3

In a number of jurisdictions, one of the major functional distinctions between the real covenant and the equitable servitude has in large part disappeared with the abolition of horizontal privity. n4 The American Law Institute, in its new *Restatement (Third) of Property (Servitudes)* , now in the process of adoption, goes further and proposes to replace all three with one single servitude. n5 These movements to merge, partially or completely, the three forms of servitude will be dealt with in some detail in a later chapter. n6 Most property transactions still occur in places where the

distinctions among the easement, the real covenant and the equitable servitude retain greater or lesser vitality. Even in jurisdictions that have somewhat streamlined their systems of servitudes, many of the disputes that will arise over previous property dealings may require application of the traditional categories. This chapter examines the easement and the next several the real covenant and the equitable servitude.

FOOTNOTES:

(n1)Footnote 1. *See, e.g.,* Susan French, Toward a Modern Law of Servitudes: Reweaving the Ancient Strands, *55 S. Cal. L. Rev. 1261, 1262 (1982)* (similar arrangements at least since medieval times); Restatement (Third) of Property (Servitudes), Introduction at xxii, xxiv (Tent. Draft No. 1, 1989) (Rights of Way and other forms of servitudes in the Twelve Tables of Rome). In the Twelve Tables of Rome, long thought of as the most ancient reasonably extant source of Roman law, there is a requirement of a five-foot passage way between each cultivated field to provide all farmers access to their fields. This right of way could not be lost by prescription. This sounds like a very strong version of what we now would call an easement by necessity. The Twelve Tables, in 1 The Civil Law, Table VIII, Law IV (Samuel Parsons Scott, trans. Central Trust 1932).

(n2)Footnote 2. The distinctions among these three forms of servitude are by no means always clear, nor are they necessarily consistent from jurisdiction to jurisdiction. Their development in American law does not follow a clear and consistent path. *See generally* Uriel Reichman, Toward a Unified Concept of Servitudes, *55 S. Cal. L. Rev. 1179, 1186-1230 (1982).*

(n3)Footnote 3. For a handy compendium of some of the insulting epithets (*e.g.,* unspeakable quagmire) used by scholars to describe the state of American servitude *see* Susan F. French, Toward a Modern Law of Servitudes: Reweaving the Ancient Strands, 55 S. Cal. Rev. 1261, 1261 n.1 (1982).

(n4)Footnote 4. Restatement (Third), Property (Servitudes), § 1,4 cmt. a at 29 (2000). Introduction § 4 at xxv (Tent. Draft No. 1, 1989).

(n5)Footnote 5. The American Law Institute, in its recently completed Restatement (Third), Property (Servitudes) goes further and replaces the traditional categories with those of easement, profit and covenant, governed by much simplified rules. Introduction § 4 at xxiii-xxvi (Tent. Draft. No. 1, 1989).

(n6)Footnote 6. *See* Ch. 63, *infra*.

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CHAPTER 60 THE LAW OF EASEMENTS: RIGHTS IN THE PROPERTY OF ANOTHER

7-60 Thompson on Real Property, Thomas Editions § 60.02

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§ 60.02 Easement Defined.

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(a) Use of the Land of Another.

An easement is one of several ways in which one may obtain rights in the land of another, for the benefit of one's own property or for one's own personal benefit. n7 According to the 1944 *Restatement of Property* , an easement is "an interest in land in the possession of another" that entitles the easement owner to "limited use or enjoyment" of that land, protects the easement owner from interference of third parties in that use, is not subject to the will of the landowner, is not a normal incident of ownership of land that the easement owner already possesses and "is capable of creation by conveyance." n8 Consistent with the Restatement's definition of an easement as an interest in land "in possession of another," an easement may be obtained against one who has less than a freehold interest in land, such as a leaseholder, subject to divestment if the property passes to the holder of a future interest. n9 One court puts it that an easement "is the right to use the land of another for a specific purpose that is not inconsistent with the general use of the property owner." n10 Similarly stated, it is "an interest in land which grants to one person the right to use or enjoy land owned by another." n11 The easement may involve the right to act upon the land of another or, more rarely, to compel another landholder to perform or to refrain from some specific action on the landholder's own land. n12 The most easily recognized example of an easement is the right of one person to pass over the land of another.

(b) Easements as Property Rights.

Courts agree that easements are treated as property rights, rather than mere contract rights, though they differ dramatically in the names they give those rights. n13 Most courts describe easements as interests in land; a few do not. n14 Most courts, but not all, describe them as real property interests subject to the Statute of Frauds. n15 Because easements are treated as property rights, American law gives them status and protection similar to that accorded the outright ownership of land. Easements cannot, for example, be taken by the government except with the same eminent domain protections and processes given to other property rights. n16 As property rights or interests in land, easements may be subject to tax. n17 Because they are property rights, the same formalities generally must be observed to create them as for other property rights, including satisfying the Statute of Frauds. n18

(c) Nonpossessory Interest: Easement Contrasted With Fee or Leasehold.

The right in land held by an easement owner differs from the fee interest or even the leasehold interest in that it is a "use" interest, but not a "possessory" interest in the land. n19 Thus the easement holder has neither the permanent possession of even a single molecule of the land itself, nor the exclusive time-bounded possession granted by a lease. n20 Instead the easement holder has the right to make or control a particular use of the land that remains owned by another. Terminological confusion arises from the non-possessory nature of the easement. That the interest is not possessory leads courts to say that it is not an *estate* in land, but an *interest* in land. n21 A few courts, however, reintroduce the confusion between estates and interests in land by saying that the easement interest itself may be held in fee, even as a defeasible fee. n22 Another court distinguishes ownership of land as an estate from an easement, which, the court says, more resembles a claim or an encumbrance against the title to the land. n23 To further complicate the matter, some courts will refer to the easement as a mere right of use and *not* an interest in land. n24 This distinction between possession and use can have significant consequences. In some jurisdictions, for example, the requirement for "exclusive use" in creating a prescriptive easement differs from that for adverse possession because of the non-possessory nature of an easement. n25

COMPUTER-ASSISTED RESEARCH

LEXIS: Easement W/15 Fee or Leasehold W/10 Compar! or Contrast! or Distin! or Differ! W/15 Interest

(d) Incorporeal Interest.

Courts will sometimes make the above point that easements do not involve the right to possess land itself by describing them as "incorporeal," n26 an "incorporeal interest in the land of another," n27 or an "incorporeal hereditament." n28 Though pointing out that the "aggregates of legal relations" that make up property interests in the traditional lawyer's definition are incorporeal whether possessory or not, the *Restatement* notes that the corporeal-incorporeal distinction "corresponds to a fundamental difference between possessory and non-possessory interests" and remains useful. n29 The fee or leasehold owner of the land to which an easement applies retains all the incidents of ownership in the land that do not contradict the particular rights of the easement holder. Thus if the easement holder has the right to cross over the land of another at a certain point, the owner of the underlying property ordinarily has the right to use the exact same part of the property in any way that does not prevent the easement holder from the actions which the easement grants. n30 The owner of the underlying fee may, for example, herself cross that particular strip of land but may not construct a building on it. Crossing it would not interfere with the easement holder's rights; placing a building on it would obviously make it difficult for the easement holder to cross at the spot specified in the easement.

COMPUTER-ASSISTED RESEARCH

LEXIS: Easement W/15 Incorporeal W/10 Interest

(e) Positive and Negative Easements.

A positive easement grants to the easement holder the right to perform some action on the land of another. The vast majority of easements recognized in this country are positive easements. A negative easement grants to the easement holder "the right to prevent the possessor of the land from doing acts upon it which, were it not for the easement, he would be privileged to do." n31 The Virginia Supreme Court notes that a negative easement does not bestow a right to travel physically on the servient estate, but rather prohibits the servient owner from activities on the servient estate "which the owner would otherwise be entitled to perform." n32 It is important to note that the terms "positive" and "negative" are used differently in real covenants and equitable servitudes. Real covenants or equitable servitudes are positive when they require the *burdened landowner* to do something on the land (as opposed to the positive easement which permits the *easement holder* to do something on the land) and negative when they prohibit the burdened landowner from some action on the land. n33 Restrictive covenants are "also commonly categorized as negative

easements," n34 though they have more of the character of equitable servitudes.Thus, the Florida Supreme Court states that restrictive covenants on use are defined not as true easements but as "negative easements or equitable servitudes. Such so-called easements are basically not easements in the strict sense but are more properly classified as rights arising out of contract. n35

(1) Only Four Negative Easements Generally Recognized.

Courts in the United States seldom recognize negative easements. Four traditional negative easements have passed into our jurisprudence from the English courts: the duty of an adjoining landowner not to remove support from the easement holder's building, not to block the easement holder's windows, not to interfere with air flowing to the easement holder's land in a defined channel, and not to interfere with water flowing to easement holder's land in a defined channel. n36 The English courts refused to recognize further negative easements, in part because they could be created by prescription, and their nature makes them difficult to see and defend against. n37 The difficulty in seeing physical evidence of the existence of negative easements causes a serious notice problem for purchasers of land in the absence of a recording system. This objection loses its force in the United States because in this country negative easements generally cannot be established by prescription and recording systems are universal. The English courts also had difficulty conceptualizing a duty to refrain from acting on one's own land. American courts have generally accepted the English limitations and, with some significant exceptions noted below, will not recognize purported negative easements beyond the traditional four. n38 One exception is Virginia, which recognizes two classes of easement: (1) the privilege to use the land of another and (2) the right to demand of the owner of the land to refrain from certain uses of his or her land for the benefit of the easement holder. n39

(2) Easements of View, Light or Air.

A few jurisdictions recognize the negative easement of view, which serves to prevent the servient tenement from interfering with the view from the dominant tenement. The Alaska Supreme Court notes that a landowner cannot recover from a neighbor just for blocking the view: "The only way to prevent a neighbor from constructing a building which would block one's view is to buy an easement of view." n40 In other words, the right cannot be won by prescription, but only by express grant. The same court noted, though, that if the State condemned part of a parcel abutting a road, "an easement of visibility across the taken parcel is reserved to the owner of the remaining parcel." n41 The Iowa Supreme Court refused to use nuisance law to prevent a neighbor from erecting a building that would block the view of plaintiff's property from the road; in the court's view, to do otherwise would be to recognize a prescriptive negative easement, something it was not willing to do. n42 New York has recognized an easement of view since at least the 19th century. n43 In California, while there is no natural right to unobstructed air, light or view, for example, "[s]uch a right may be created by private parties through granting of an easement". n44 Similarly, Illinois courts refuse to imply an easement for light or air in a lease, and, in a case where a lessee tried to prevent the lessor from building a tall building on its neighboring lot, a federal court analogized that principle to refuse to recognize an easement for radio waves to be implied in a lease. n45 Other jurisdictions, New Jersey and Vermont, for example, use equitable servitudes or restrictive covenants, rather than easements, to the same end. n46

(3) Solar Easements.

Wisconsin has used nuisance law to, in effect, recognize a negative easement to force a landowner to refrain from blocking a neighbor's solar panels, n47 as has New Hampshire. n48 The Supreme Court of Iowa refused to use the nuisance doctrine to recognize an easement of view, where plaintiff alleged defendant's building blocked passing motorists' view of plaintiff's building, but in doing so emphasized that express solar easements were justified by other arguments and expressly permitted by Iowa statute. n49 By the Iowa court's logic, easements of view would also be permissible only if authorized by statute, and use of nuisance law to create them would, objectionably, recognize negative prescriptive easements. Other jurisdictions also expressly recognize solar easements, e.g., Indiana: "Any solar easement shall be created in writing and shall be subject to the conveyancing and recording requirements" applied to

other interests in land. n50

(4) Conservation Easements.

Many jurisdictions have used conservation easements to preserve historic districts and scenic areas from development or change. n51 The conservation easement is a negative easement that prevents the fee owner from making use of the land in ways that would compromise its preservation. n52 The conservation easement is a very popular tool because it involves far less cost in reaching its goal than would the purchase of the fee interest in land and because the easement's purchase from willing sellers avoids legal challenges that accompany attempts to reach the same goal through regulation. n53 Because of doubt over the common law validity of this latter form of negative easement, most jurisdictions have enacted statutes explicitly permitting them. Indiana, for example, states that "a conservation easement may be created, conveyed, recorded, assigned, released, modified, terminated, or otherwise altered or affected in the same manner as other easements." n54 Maryland authorizes conservation easements, making them enforceable in law or equity, either appurtenant or in gross, and if in gross fully inheritable and assignable. n55 Colorado authorizes conservation easements as fully transferable and emphasizes that the conservation easement constitutes an interest in real property "notwithstanding that it may be negative in character." n56

COMPUTER-ASSISTED RESEARCH

LEXIS: (Negative or Conservation or Solar) W/10 Easement W/20 (Air or Light or View or Water or (Lateral or subjacent W/5 Support))

(5) Reciprocal Negative Easements.

There are frequent references in the cases to the negative reciprocal easement. Where a landowner subdivides a single piece of property and sells a substantial number of those lots with restrictive covenants meant to further the owner's plan of development, the owner's remaining lots will be bound by the same restrictions. Those who purchase lots with such restrictions in their deeds gain an equitable right to enforce them on later purchasers "with actual or constructive notice of the restrictions and covenants." n57 The fact that defendant purchasers deliberately asked that the restriction be eliminated from their deeds was itself evidence that they did indeed have the notice necessary to support this equitable right of enforcement. n58 This right is variously called "an implied reciprocal negative easement, or an implied equitable servitude, or negative implied restrictive covenant." n59 Similarly, where a common grantor has subdivided property pursuant to a general plan or scheme of development and sold a substantial number of lots subject to restrictions benefitting retained land, a Missouri court identifies the equitable interest as "a reciprocal negative easement or implied reciprocal servitude, to enforce a similar restriction against the purchaser of the unrestricted lots who has actual or constructive notice of the restrictions." n60 In a lengthy discussion of the history, development and meaning of the "negative reciprocal easement doctrine," the Court of Appeals of Maryland notes that they have variously been "called reciprocal negative easements, implied equitable reciprocal servitudes or merely equities attached to land. n61 While some jurisdictions refer to this doctrine as an easement, many scholars treat it as a form of equitable servitude, and it will be treated fully in a later chapter with equitable servitudes. n62

COMPUTER-ASSISTED RESEARCH

LEXIS: Reciprocal W/10 Negative W/10 Easement

(f) Easements Appurtenant and in Gross.

Easements that benefit a piece of land have some different characteristics than easements that benefit a person or organization. Easements benefitting a piece of property are "appurtenant"; those benefitting a person directly, rather than indirectly in the person's status as the owner of benefitted property, are "in gross."

(1) Easements Appurtenant.

An easement is appurtenant when the right to use the easement benefits another piece of land, no matter who owns that land. n63 An easement appurtenant is imposed on corporeal property, not on the owner of it, for the benefit of corporeal property, not of the owner of it. n64 In a real sense then, the easement appurtenant defines the relationship of two pieces of land, rather than that of one person with a piece of land of another. Those two pieces of land are the dominant and the servient tenement. Easements appurtenant must have both a dominant tenement and a servient tenement. n65 Thus, in Connecticut, a claimed easement of way failed because "the grant to Gardner in the 1886 deed does not identify which of the two parcels owned by Gardner" was the dominant estate, even though only one was contiguous to the land over which the way was claimed n66 n67 Easements in gross will have no dominant tenement, but will have a servient tenement.

(2) Easements in Gross.

If an easement benefits a particular person or persons (or business or organization) whether or not they own another piece of land, the easement is in gross, i.e., personal. n68 The easement in gross benefits a person as a person, rather than because the person owns land benefitted by the easement. n69 It is personal to the parties and ends with the life of the parties; a statement in a will that a driveway was to be kept open for the use of the four devisees was a statement that the right was to be personal and not a right that runs with the land. n70 The holder of an easement in gross benefits "only personally, not in connection with his ownership or use of any specific parcel of land." n71 The following example illustrates the difference. Imagine that Able lives in a congested urban area in which parking is at a premium. She approaches neighbor, Baker, across the street for permission to park on his property. Baker sells her that right in perpetuity. That right to park is an easement. If that easement were appurtenant, and Able were to move to a new house down the street, she would no longer have the right to use the easement-burdened property, while whoever came into ownership of the land which she had occupied would have the right to benefit from the easement parking right. It is the land across the street from the easement-burdened land that benefits from an appurtenant easement, not the owner of the land except in the role as its owner. If the easement were in gross, i.e., personal to Able herself, n72 she would still have the right to use the parking easement no matter where she would move, down the street or across town; whoever moved into the property she had vacated, however, would have no right to use the parking easement. By contrast with the easement appurtenant, here where the easement is in gross, it benefits Able personally, and the right to use it travels with her down the street or across town.

(3) The Dominant Tenement.

An easement appurtenant is imposed for the benefit of corporeal property; it serves a parcel of land. n73 The property for the benefit of which the easement is imposed is called the dominant tenement. n74 Because, in contrast, an easement in gross benefits a person rather than a piece of land, the easement in gross does not have a dominant tenement. The property upon which the easement is imposed is called the servient tenement. The owner or possessor of the dominant tenement benefits from the easement only indirectly, "in a way that cannot be separated from the land." n75 An Arkansas court held the "rule of general application to be that a lessee of the dominant estate is entitled to the use of its appurtenant easements in connection with the use and enjoyment of his leasehold interest." n76 This right is not limited to the lessee of all the rights in the dominant estate; thus, the Arkansas court held that a lessee of hunting rights could use an appurtenant easement. n77 The owner benefits only because of being the owner or possessor of that land. Easements are appurtenant to a dominant tract of land if they benefit the owner in the use and enjoyment of that dominant tract. n78 In some jurisdictions, an easement appurtenant cannot come into existence absent unity of title between the easement and the dominant tenement; thus in a Connecticut case, a described easement could not have been appurtenant to a particular tract of land, because the easement owner only had half the fee ownership of that tract. n79 An easement is appurtenant if "exercised in connection with the occupancy of other land." n80 If the holder of the dominant tenement ceases to own or possess that land, she receives no continuing benefit from the easement.

(4) The Servient Tenement: Common to Both Easements Appurtenant and Easements in Gross.

By definition (an easement is an interest in land, and the servient tenement is the land) both easements appurtenant and easements in gross must have a servient tenement. The servient tenement is the property over which the easement holder has rights. n81 In an easement appurtenant, the servient tenement need not necessarily be adjacent to the land it serves (for example, there might be an easement over servient tenement parcel a, through servient tenement parcel b, to reach dominant tenement parcel c). n82 To use the traditional property lawyer's image, the bundle of rights that make up the servient property has been divided between the easement holder and the servient tenement owner. The particular right represented by the easement now is either attached to the dominant tenement (in the case of an easement appurtenant) or is owned by the easement holder (in the case of an easement in gross). The owner of the servient tenement retains the ownership only of a bundle of rights diminished by the easement rights that now reside elsewhere and therefore has the power to transfer away only that limited bundle of rights.

(5) Distinguishing Easements Appurtenant and In Gross.

In the absence of specific language identifying whether an easement is appurtenant or is in gross, courts are forced to make an interpretation of the likely intent of the parties to the agreement. The conveying instrument not only often fails to specify whether the easement is appurtenant or in gross, but, further, the answer to that query "cannot be determined by the nature of the rights granted because easements for right of way ("ingress and egress') may be either appurtenant or in gross." n83 Some courts find a presumption rebuttable by surrounding circumstances that an easement in gross was intended where "the easement makes no mention of the heirs and assigns of the grantee." n84 Other courts hold that unless an easement possesses all the elements necessary to be an appurtenant easement, it will be considered a "mere" easement in gross, and that where language bears more than one construction that "which least restricts the property will be adopted." n85 Generally, however, where the documentation or surrounding circumstances do not make clear the intent of the parties, courts presume that the easement is appurtenant. n86 The Nebraska Supreme Court states that an easement in gross is "never presumed when it can fairly be construed as appurtenant to some other estate." n87 Pointing out that in Missouri an easement is never presumed to be a mere personal right when it can fairly be construed to be appurtenant to another estate, the Missouri Court of Appeals found that the existence of a potential dominant and servient tenement and of the termination point of the questioned right-of-way on that dominant tenement sufficed to show the existence of an easement appurtenant. n88 Other considerations evidencing the existence of an easement appurtenant include the continuing value of the easement to the dominant tenement no matter who owns the dominant tenement, recognition by successors to the servient estate of the right of dominant estate owners to use it and use of language "appurtenant to my other land." n89 If one intends that an easement is to be considered in gross, therefore, one must carefully specify that the easement is for one particular person's use. If one intends that a court certainly interpret an easement to be appurtenant one should use language that ties the easement to a dominant tenement, language stating that the easement is to benefit a particular piece of land no matter who is its owner.

COMPUTER-ASSISTED RESEARCH

LEXIS: Easement W/10 Appurteant or in Gross W/15 Compar! or Contrast! or Distin! or Differ!

(g) *Profits a Prendre*.

Under English law, there was an interest separate from the easement called the *profit a prendre*. The profit still exists in American law, but the law governing it for all practical purposes has merged into that governing easements. The right to enter another's land and take away minerals, or other things of value such as timber or game, is a *profit a prendre*. n90 The *profit a prendre* is a non-possessory interest in land that consists "of a right to take the soil or substance of the soil, such as the right to take wild game or fish." n91 Another court defines the profit as a privilege to acquire, "by severance or removal from another's land, some thing or things previously constituting a part of the land or pertaining to the land." n92 It is a "right exercised by one person in the soil of another, accompanied with participation in the profits of the soil,

or in a right to take part of the soil or produce of the land." n93 Because English law did not recognize the existence of the easement in gross, and the *profit a prendre* could exist in gross, the profit had a good deal of importance under English law. The easement in gross does exist in the United States, and, therefore, the *profit a prendre*, in the mind of some, has very little importance here. The 1944 *Restatement* found no need to treat the profit separately on the ground that rules governing it were identical with those governing easement. n94 The *Restatement (Third)*, however, has resurrected the profit from the oblivion into which it was consigned by the 1944 Restatement, because it serves different purposes and can involve different considerations than other servitude devices. n95 For those reasons, the profit receives full treatment later in this treatise. n96

FOOTNOTES:

(n1)Footnote 7. Restatement (Third), Property (Servitudes) Other forms include profits, licenses, real covenants, and equitable servitudes (sometimes called restrictive covenants). In Louisiana, a civil law jurisdiction, easements are referred to as predial servitudes.

(n2)Footnote 8. *Price v. Eastham, 73 P.3d 1051, 1057 (Alaska 2003)* (*citing Ludwig v. Gosline, 465 A.2d 946, 947 (N.J. Super. App. Div. 1983))* (prescriptive easement).

(n3)Footnote 9. Restatement (Third), Property (Servitudes) Restatement of Property § 450 (1944). That the right given in an easement is not a normal incident of land ownership distinguishes the easement from rights inherent in land ownership, *e.g.*, the right to lateral support. *See* § 69.01, *supra.*

(n4)Footnote 10. *Abbott v. Nampa Sch. Dist. No. 131, 808 P.2d 1289, 1293 (Idaho 1991).*

(n5)Footnote 11. *Commercial Wharf E. Condo. Ass'n v. Waterfront Parking Corp., 552 N.E.2d 66, 73 (Mass. 1990).*

(n6)Footnote 12. These latter rights are called negative easements and are more fully treated in § 60.02(e) *et seq.*, *infra*.

(n7)Footnote 13. *E.g., Magna, Inc. v. Catranis, 512 So. 2d 912, 913 (Ala. 1987)* ("An easement is property"); *Skidmore v. First Bank of Minneapolis, 773 P.2d 587, 589 (Colo. App. 1988)* (interest in property), *cert. denied, 790 P.2d 843 (Colo. 1990); Burris v. Cross, 583 A.2d 1364, 1377 (Del. Super. Ct. 1990)* ("property or an interest in land").

(n8)Footnote 14. *E.g., Hayes v. Gibbs, 169 P.2d 781 (Utah 1946)* (not an interest in land but a servitude treated as though it were a separate parcel).

(n9)Footnote 15. *Darsaklis v. Schildt, 358 N.W.2d 186, 190 (Neb. 1984)* (subject to statute of frauds), *contra, Conn. Super Ltd. P'ship v. Plan & Zoning Comm'n, 588 A.2d 624, 629 (Conn. 1991)* (easement can be freehold, various types of fee interest, term of years or chattel interest according to its duration) (*citing Rosenblum v. Eisenhauer, 280 A.2d 537 (Conn. Super. 1971).*

(n10)Footnote 16. United States v. 10.0 Acres, 533 F.2d 1092, 1095 (9th Cir. 1976).

(n11)Footnote 17. *Salt Lake City S. Ry Co. v. State Tax Comm'n, 987 P.2d 594, 597-598 (Utah. 1999)* (easement is tangible property for tax purposes).

(n12)Footnote 18. *See* § 60.03(a)(5), *infra*.

(n13)Footnote 19. *Boucher v. Boyer, 484 A.2d 630, 635 (Md. 1984)* ("nonpossessory interest in the real property of another"); *Thurston Enters., Inc. v. Baldi, 519 A.2d 297, 300 (N.H. 1986)* (easement grants "only a non-possessory interest in land").

(n14)Footnote 20. In the Matter of Tideland's License 96-0114-*T, 740 A.2d 1125, 1130 (N.J. Super. Ct. App. Div. 1999)* (quoting this sentence in determining inland owners' easement to river and right to build dock).

(n15)Footnote 21. *E.g., Concord & Bay Point Land Co. v. City of Concord,280 Cal. Rptr. 623, 626 (Ct. App. 1991)..*

(n16)Footnote 22. *E.g., Conn. Super Ltd. P'ship v. Plan & Zoning Comm'n, 588 A.2d 624 (Conn. 1991)* (*citing Rosenblum v. Eisenhauer, 280 A.2d 537 (Conn. Super. 1971)); Erie-Haven, Inc. v. First Church of Christ, Scientist, 292 N.E.2d 837, 841 (Ind. App. 1973).*

(n17)Footnote 23. *Dean v. MOD Props., Ltd., 528 So. 2d 432, 433* (Fla. App.) *rev. denied, 534 So. 2d 400 (Fla. 1988).*

(n18)Footnote 24. *Department of Transp. v. English, 218 S.E.2d 134, 138 (Ga. App. 1975)* (properly speaking, an easement is a right of use and not an interest in land... ."). Other courts use almost identical language as the definition of a license. *See, e.g., Dotson v. Wolfe, 391 So. 2d 757, 759 (Fla. Dist. App. 1980)* (as opposed to easement, license is "merely a personal right to use the property of another for a specific purpose, is not an interest in land and, therefore, may not be assigned or conveyed.").

(n19)Footnote 25. *See* § 60.03(b)(6)(ix), *infra*. The point, simply put, is that since an easement expressly created by deed does not necessarily involve exclusive use, the "exclusive use" requirement imported into easements won by prescription (similar to adverse possession) must have some different meaning than it does in the law of adverse possession. That different meaning is explored in the citation with which this note begins.

(n20)Footnote 26. *Belle Fourche Pipeline Co. v. State, 766 P.2d 537, 543 (Wyo. 1988)* ("[easements] are incorporeal).

(n21)Footnote 27. *Tract Dev. Serv., Inc. v. Kepler, 246 Cal. Rptr. 469, 476* (Ct. App.), *rev. denied* (Cal. 1988).

(n22)Footnote 28. *Voltmer Family Farms, Inc. v. Board of Equalization, 343 N.W.2d 755, 757 (Neb. 1984)* (an "incorporeal hereditament which permits use of another's land for a specific purpose.")

(n23)Footnote 29. Restatement of Property § 450, cmt. c at 2903-2904.

(n24)Footnote 30. *Mueller v. Hoblyn, 887 P.2d 500, 504 (Wyo. 1994)* (quoting this treatise). An easement may occasionally exclude even the servient owner, as for example, railroad easements. The more exclusive the easement, however, the more likely a court will find it to be a fee interest rather than an easement. *See* §§ 60.03.(a)(7)(i), 60.03.(a)(7)(iii), *infra*.

(n25)Footnote 31. Restatement of Property § 452 (1944).

(n26)Footnote 32. *Prospect Dev. Co. v. Bershader, 515 S.E.2d 291, 299 (Va. 1999)* (granting such an easement by estoppel).

(n27)Footnote 33. *See* § 60.02(e), *infra*.

(n28)Footnote 34. *Witter v. Taggart, 577 N.E.2d 338, 339 (N.Y. 1991).*

(n29)Footnote 35. *Palm Beach County v. Cove Club Investors Ltd., 734 So. 2d 379, 385 n.8 (Fla. 1999)* (*citing Board of Public Instruction v. Town of Bay Harbor Islands, 81 So. 2d 637 (Fla. 1955).*

(n30)Footnote 36. Colin Sara, Boundaries and Easements 174 (Sweet & Maxwell 1991) ("the two main negative easements are the right of light and the right of support. Apparently, negative rights which have been accepted as

easements such as a right to receive a flow of air through a defined channel, *e.g.*, through a cellar vent, and a right to receive water in an artificial stream, both have positive elements since in each case there is a defined channel which the servient owner could block should he so wish").

(n31)Footnote 37. *See id.* 174-176 (outlining courts' rejection of new negative easements).

(n32)Footnote 38. For a pithy explanation of the English courts' difficulty with negative easements, *see* Jesse Dukeminier & James E. Krier, Property 851-54 (3d ed. Little, Brown & Co. 1993).

(n33)Footnote 39. *Prospect Development Co. v. Bershader, 515 S.E.2d 291, 298-299 (Va. 1999)* (granting a negative easement by estoppel over objection of dissent that would have imposed a restrictive covenant). A Lexis search of Virginia appellate cases revealed that the term is almost always used in the context of the reciprocal negative easement. *See infra*, § 60.02(e)(5).

(n34)Footnote 40. 8,960 *Square Feet, More or Less v. State Dep't of Transp. and Pub. Facilities, 806 P.2d 843, 845-846 (Alaska 1991)* (dispute over state-constructed berm blocking view). This is consistent with the idea expressed earlier that negative easements must be express and may not be prescriptive.

(n35)Footnote 41. *Id. at 846 n.6.* If the state used the condemned property in a way that blocked visibility to or from the remaining portion of the previously undivided property, the owner of the remaining property would be due additional compensation for the loss of this reserved easement. The idea is that the remaining property has already lost part of its value by being divided; it can lose further value if the property taken away is so used as to block the remaining property's view of the road, a value deserving recompense. This appears to be a narrow exception to the standard position that a negative easement cannot be implied.

(n36)Footnote 42. *Mohr v. Midas Realty Corp., 431 N.W.2d 380 (Iowa 1988).*

(n37)Footnote 43. *Zipp v. Barker, 57 N.Y.S. 569 (App. 1899)., aff'd 59 N.E. 1133 (N.Y. 1901); Witter v. Taggart, 577 N.E.2d 338 (N.Y. 1991)* (refusing to recognize easement of view because of lack of notice to bona fide purchaser of servient tenement; easement in dominant tenement chain of title but not mentioned in servient); *See* Kenneth L. Gartner, Witter v. Taggart and Ammirati v. Wire Forms, Inc.: The Potential Ramifications of New York's Newly Restrictive Definition of "Chain of Title" and Newly Expansive Definition of "Easement by Necessity" 5 Hofstra Prop. L.J. 101, 105-07 (1992).

(n38)Footnote 44. *Pacifica Homeowners' Ass'n v. Wesley Palms Retirement Community, 224 Cal. Rptr. 380, 382 (App. 1986).*

(n39)Footnote 45. *Infinity Broadcasting Corp. v. Prudential Ins. Co., 869 F.2d 1073, 1075-1077 (7th Cir. 1989).*

(n40)Footnote 46. *Roehrs v. Lees, 429 A.2d 388 (N.J. Super. App. Div. 1981)* (second floor encroached on 25-foot setback meant to protect ocean view); *McDonough v. W.W. Snow Constr. Co., 306 A.2d 119 (Vt. 1973)* (affirmed requirement that defendant take down second floor interfering with view of Lake Champlain and the Adirondacks).

(n41)Footnote 47. *Prah v. Maretti, 321 N.W.2d 182 (Wis. 1982).*

(n42)Footnote 48. *Tenn v. 889 Assocs., Ltd., 500 A.2d 366, 370 (N.H. 1985).*

(n43)Footnote 49. *Mohr v. Midas Realty Corp., 431 N.W.2d 380, 383 (Iowa 1988)* (also reaffirming rejection of doctrine of ancient lights, a negative prescriptive easement across neighbor's property; to recognize such through nuisance same as granting prescriptive easement).

(n44)Footnote 50. Ind. Code Ann. § 32-5-2.5-2.

(n45)Footnote 51. *See generally,* Andrew Dana & Michael Ramsey, Conservation Easements & the Common Law, *8 Stan. Envtl. L.J. 2 (1989).*

(n46)Footnote 52. Andrew Dana & Michael Ramsey, Conservation Easements and the Common Law, *8 Stan. Envtl. L.J. 2, 13-14 (1989).*

(n47)Footnote 53. *See generally* Karen A. Jordan, Perpetual Conservation: Accomplishing the Goal Through Preemptive Federal Easement Programs, 43 Case W. L. Rev. 401 (1993) (proposing federal conservation easements that would preempt any state law limitations on the duration of easements).

(n48)Footnote 54. Ind. Code Ann. § 32-5-2.6-2 (a). Conservation easements do not take effect until accepted and recorded, *id.* at (b), are unlimited in duration unless stated otherwise in the instrument, *id.* at (c), and the easement does not impair an interest already in existence unless the owner of the interest is a party to the conservation easement or consents to it, *id.* at (d).

(n49)Footnote 55. Md. Real Prop. Code Ann. § 2.118.

(n50)Footnote 56. Colo. Rev. Stat. § 38-30.5-103.

(n51)Footnote 57. *Evans v. Pollock, 796 S.W.2d 465, 466 (Tex. 1990)* (restrictions need not apply to all property within subdivision).

(n52)Footnote 58. *Forster v. Hall, 576 S.E.2d 746, 300 (Va. 2003).*

(n53)Footnote 59. *Id* .

(n54)Footnote 60. *Ferrell v. Simmerly, 812 S.W.2d 228, 230 (Mo. App. 1991).*

(n55)Footnote 61. *Schovee v. Mikolasko, 737 A.2d 578, 588 (Md. 1999).*

(n56)Footnote 62. *See, e.g.*, Jesse Dukeminier & James E. Krier, Property 866-871 (3d ed. Little, Brown & Co. 1993) and its treatment of *Sanborn v. McLean, 206 N.W. 496 (Mich. 1925).*

(n57)Footnote 63. *Barrett v. Kunz, 604 A.2d 1278, 1280 (Vt. 1992)* ("appurtenant easements serve a parcel of land" whereas "easements in gross are intended to benefit only the holder ... [and] expire when the property is conveyed"); *Russakoff v. Scruggs, 400 S.E.2d 529, 531 (Va. 1991)* ("easements are appurtenant to, and run with, the dominant tract if they benefit the owner in his use and enjoyment of that tract").

(n58)Footnote 64. *Belle Fourche Pipeline Co. v. State, 766 P.2d 537, 543 (Wyo. 1988).*

(n59)Footnote 65. *Town of Moorcroft v. Lang, 779 P.2d 1180, 1184 (Wyo. 1989)* ("cannot be created without a servient estate to which the obligation rests and dominant estate to which the right belongs").

(n60)Footnote 66. *Branch v. Occhionero, 681 A.2d 306, 309-310 (Conn. 1996)* (to create right of way appurtenant to dominant estate, both dominant and servient estates must be identified).

(n61)Footnote 67. *Hise v. BARC Electric Coop., 492 S.E.2d 154, 157 (Va. 1997)* (easements "with a servient estate but no dominant estate"). *See also King v. Lang, 42 P.3d 698, 702 (Idaho 2002)* (primary distinction is that in easement appurtenant there is dominant estate to which easement is attached and in easement in gross there is not).

(n62)Footnote 68. *Abbott v. Nampa Sch. Dist. No. 131, 808 P.2d 1289, 1295 (Idaho 1991)* ("easements in gross are personal to the holder").

(n63)Footnote 69. *Ammer v. Arizona Water Co., 818 P.2d 190, 194 (Ariz. App. 1991)* (easement in gross "created to benefit its owner independently of his ownership or possession of specific land").

(n64)Footnote 70. *Merriman v. Yutterman, 723 S.W.2d 823, 825 (Ark. 1987).* Though traditionally not alienable, easements in gross in some jurisdictions may be alienable, inheritable and devisable, depending on their nature and the terms of their creation. *See* § 60.07(c), *infra*.

(n65)Footnote 71. *Consolidation Coal Co. v. Mutchman, 565 N.E.2d 1074, 1084 (Ind. App. 1990).*

(n66)Footnote 72. *See* § 60.02(f)(5), *infra*.

(n67)Footnote 73. *Barrett v. Kunz, 604 A.2d 1278, 1279 (Vt. 1992).*

(n68)Footnote 74. *Belle Fourche Pipeline Co. v. State, 766 P.2d 537, 543 (Wyo. 1988)* (elements of an appurtenant easement: incorporeal; imposed on property and not the owner of it; no right to participation in profits from property; imposed for the benefit of corporeal property; two distinct tenements: dominant, to which the right belongs, and servient, upon which the obligation is imposed.)

(n69)Footnote 75. *Consolidation Coal Co. v. Mutchman, 565 N.E.2d 1074, 1083-1084 (Ind. App. 1990).*

(n70)Footnote 76. *Carver v. Jones, 773 S.W.2d 842, 845-846 (Ark. App. 1989).*

(n71)Footnote 77. *Id.*

(n72)Footnote 78. *Russakoff v. Scruggs, 400 S.E.2d 529, 531 (Va. 1991).*

(n73)Footnote 79. The Connecticut Supreme Court passed on the opportunity to abandon the unity of title doctrine, instead rejecting a claimed easement because of failure of the granting documents to identify which of two pieces of property owned by the person identified as owner of the easement was meant to be the dominant tenement. *Branch v. Occhionero, 681 A.2d 306, 308 n.4 (Conn. 1996). Dean v. Riley, 623 A.2d 521, 524 (Conn. App. 1993).*

(n74)Footnote 80. *Koplin v. Hinsdale Hosp., 564 N.E.2d 1347, 1354 (Ill. App. 1990).*

(n75)Footnote 81. *Moylan v. Dykes, 226 Cal. Rptr. 673, 676 (App. 1986)* (servient tenement is "land to which the burden or servitude is imposed").

(n76)Footnote 82. *Dean v. Riley, 623 A.2d 521 (Conn. App. 1993)* (*citing Saunders Point Ass'n, Inc. v. Cannon, 418 A.2d 70 (Conn. 1979)).*

(n77)Footnote 83. *Moylan v. Dykes, 226 Cal. Rptr. 673, 677 (App. 1986).*

(n78)Footnote 84. *Kelly v. Ivler, 450 A.2d 817, 821 (Conn. 1982)* (presumption created by lack of words of inheritance not conclusive); *Three-O-Three Invs., Inc. v. Moffitt, 622 S.W.2d 736, 739-740 (Mo. App. 1981)* (lack of "heirs," "assigns," "perpetual," "permanent," or "forever" not fatal to creation of easement appurtenant).

(n79)Footnote 85. *Tupper v. Dorchester County, 487 S.E.2d 187, 191 (S.C. 1997).*

(n80)Footnote 86. *E.g., Kirk v. Tomulty, 831 P.2d 792, 796* (Wash. App.) ("There is a strong presumption in Washington that easements are appurtenant"), *rev. denied, 841 P.2d 47 (Wash. 1992); Kelly v. Ivler, 450 A.2d 817, 822 (Conn. 1982), quoting Blanchard v. Maxson, 80 A. 206 (Conn. 1911)* ("an easement of way will never be presumed to be personal when it can fairly be construed to be appurtenant to land."); *Moylan v. Dykes, 226 Cal. Rptr. 673, 677 (App. 1986)* (easement "will not be interpreted as being in gross if it may fairly be interpreted as being appurtenant").

(n81)Footnote 87. *Spilker v. First Nat'l Bank & Trust Co., 319 N.W.2d 429, 431-432 (Neb. 1982)* (*quoting Johnson v. Weber, 70 N.W.2d 440, 445 (Neb. 1955))* (interior quotes omitted).

(n82)Footnote 88. *Three-O-Three Invs., Inc. v. Moffitt, 622 S.W.2d 736, 739 (Mo. App. 1981).*

(n83)Footnote 89. *Kelly v. Ivler, 450 A.2d 817, 822-823 (Conn. 1982).*

(n84)Footnote 90. *In re Lee, 354 S.E.2d 759, 761 (N.C. App. 1987), rev. denied, 358 S.E.2d 520 (N.C. 1987).*

(n85)Footnote 91. *Burlingame v. Marjerrison, 665 P.2d 1136, 1139 (Mont. 1983).* Other examples the court gives, taken from a previous edition of this treatise, are the right to feed cattle on another's land, and the right to take gravel or stone or minerals from another's land.

(n86)Footnote 92. *Merriam v. First Nat'l Bank of Akron, 587 So. 2d 584, 586 (Fla. App. 1991).*

(n87)Footnote 93. *Oakley Valley Stone, Inc. v. Alastra, 715 P.2d 935, 937 (Idaho 1985).*

(n88)Footnote 94. The Wisconsin Supreme Court accepts the 1944 Restatement's analysis that there is no legally significant difference between an easement and a profit and states that the analysis of the Restatement (Third), *see* Note 84, *infra*, creates "virtually no meaningful distinction between profits and easements." *Figliuzzi v. Carcajou Shooting Club, 516 N.W.2d 410, 415 (Wis. 1994),* and authorities therein (holding hunting rights to be an easement precluding development of property). Restatement of Property § 450, Special Note at 2901-2902 (1944).

(n89)Footnote 95. Restatement (Third) of Property (Servitudes), Introduction at xxvi (Tent. Draft No. 1, 1989).

(n90)Footnote 96. *See* Chapter 65, *infra*.

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CHAPTER 60 THE LAW OF EASEMENTS: RIGHTS IN THE PROPERTY OF ANOTHER

7-60 Thompson on Real Property, Thomas Editions § 60.03

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§ 60.03 Creation of Easements.

[Go To Supp]

(a) Express Easements.

(1) Easements by Grant or Devise.

Persons in possession of property may create express easements by grant, for a consideration or by gift, transferring away the right or rights represented by the easement to another. Easements are "as likely to appear in independent instruments as they are to appear in deeds or contracts for the transfer of a fee simple estate." n97 Persons may also create easements by will, for example, willing an easement in a piece of land to one person, and the land to another. The person creating the easement must intend to create such an interest and observe the proper formalities in the local jurisdiction for transferring property by grant or by devise. n98

(2) Easements by Reservation and Exception.

One may also reserve an easement for oneself, and in some jurisdictions for others, over a piece of property when transferring away that property, or one may except an already-existing easement from a transfer of the servient property. A grantor may reserve an interest out of the granted land appurtenant to the retained land, and such an interest will be transferable with the dominant tenement just like any other easement appurtenant. n99 It is not necessary to use the words "reserve," "reserving," or "reserved" to create an easement by reservation; in a Missouri case, reference in a deed to conveying property "subject to" an easement was interpreted to reserve an easement in the grantor. n100 In Maine, courts routinely construe a deed provision purporting to reserve an easement for the benefit of land retained by the grantor "as the creation of an easement appurtenant to that land and have obviated the requirement of the technical words "heirs' to preserve and interest of perpetual duration." n101 Where land is subdivided, an easement may be reserved for remaining parcels through reference to a plat or subdivision plan showing the easement. n102 In determining the existence of an easement by reservation from the documents conveying a piece of land it is "necessary that the grantee of the property being burdened by the servitude have knowledge of its use or its necessity." n103 To avoid arguments in court, and the danger that a court will misinterpret the grantor's intention, one should take great care to use the proper term to create the interest one desires.

(i) Distinguishing Reservation and Exception.

Under old English law, when one transferred away property, one could reserve an interest in the property, like an easement, to oneself, or one could except a portion of the piece of land or a previously existing interest in it (an easement, for example) from the conveyance. A reservation, then, dealt with incorporeal interests and an exception usually with corporeal interests and sometimes with *previously existing* incorporeal interests. A reservation "creates a new right in the grantor from the subject of the conveyance, something which did not exist as an independent right before the grant and which is originated by it." n104 Conceptually, reservation was thought to involve "an express grant of the easement by the grantee" back to the grantor of the property. n105 By contrast, an exception involves withdrawing some pre-existing interest from that which would be conveyed away, an interest that without that exception would be part of the conveyance. n106 In sum, a reservation involves grantors creating and reserving a right or interest that had no existence previously, while in an exception the grantor excepts from the conveyance something already in existence. n107 The distinction between reservations and exceptions has disappeared in many jurisdictions, and, in fact, many conveyances and court decisions use the terms interchangeably or as a matched pair. n108 Because of their interchangeable use, the two terms "are not treated as conclusive as to the nature of the provision, but must yield to manifest intent." n109

COMPUTER-ASSISTED RESEARCH

LEXIS: Easement /25 Reserv! /25 Except! /25 Distinguish or Distinction or Difference

(ii) Creating Grants by Reservation or Exception in Third Persons.

Under an old common law rule, still valid in the majority of jurisdictions, one was not permitted to reserve or except an easement in a third person while conveying property to another. Thus, in New York, the "long-accepted rule in this State holds that a deed with a reservation or exception by the grantor in favor of a third party, a so-called "stranger to the deed', does not create a valid interest in favor of that third party." n110 In Arkansas the rule is worded that an exception or reservation in favor of a stranger to the deed is void except to confirm a right which the stranger already had. n111 In Maine, a reservation "benefitting one not a party to the deed cannot create any interest not previously existing ..." n112 The conceptual problem underlying the existence of the rule was that the easement one wished to convey to a third person did not exist before the property was conveyed away. n113 To reach the desired result under the common law rule, one could first create and convey away an easement in one action and then convey away the servient tenement in another, excepting from the conveyance that now pre-existing easement. n114 A number of jurisdictions have in recent times disposed of the common law rule as an antiquity with no real justification in modern property regimes, thereby making it possible to reserve or except an easement for a third party in the same transaction as the servient tenement is conveyed away to a different party. California did so in 1972. n115 Noting that the majority of states forbid reservation of easements in third parties and the validity of the reasons for doing so, the Montana Supreme Court noted that "in the proper case, where the intent of the grantor to reserve an interest in property to a stranger is clearly shown," the court would give effect to that intent. n116 The long-accepted rule forbidding such transactions was abolished in Wyoming when it adopted "the enlightened approach that the intent should control and that archaic and inappropriate feudalistic principles should no longer apply." n117 In rejecting the rule, the court recognized "the potential of a granting interest to create interests in several people and even different interests among the several people." n118 The Alaska Supreme Court aligned itself with the California courts and rejected the rule as conflicting with their view that a deed should be construed to give effect to the donor's intent. n119 The Connecticut Supreme Court abolished the unity of title doctrine, forbidding the reservation of an easement in a third party (to reserve an easement there must be unity of title between the property served and the dominant way), concluding that the "intent of the deed creating an easement should be effectuated even if no unity of title exists between the servient estate and the dominant estate the easement is intended to serve," thus now permitting reservation of an easement in a third party. n120

COMPUTER-ASSISTED RESEARCH

LEXIS: Easement W/20 Creat! or Grant! W/20 Reserv! or Except! W/20 Third W/5 Person or Party

(3) Easements by Dedication.

Persons may create easements by dedication, either statutory or common law. In dedicating an easement, one places a form of ownership of the property or of an easement in the public at large, as in a street or a park. A dedication of real estate "has been defined as a landowner's giving of a right or easement for public use." n121 The Wyoming Supreme Court analogizes the acknowledgment and recordation of a subdivision plat setting aside property for public use to a deed in fee simple to the public of that portion of the property. n122 Thus, an easement claimed to have been dedicated solely for the benefit of the members of a subdivision was not properly a dedication, because an easement may only be dedicated "to the public and not to a part of the public." n123 While a landowner may dedicate land for a specific or limited purpose, the landowner "cannot retain discretion to alter or control future use of the property once it has been accepted by the public." n124 Comparing the act of dedication to a contract between two parties, the South Dakota Supreme Court states that there "must be an unconditional offer by the grantor to create a public highway and there must be an unconditional acceptance by the appropriate public authority that it becomes one. n125 For the easement to be valid, the public must accept the dedication. This requirement in part exists to prevent landowners by simply conveying land from "compelling the authorities to assume the burdens of maintaining or repairing property offered for dedication." n126 There are two commonly recognized forms of dedication, statutory and common law, that differ in the type of interest owned by public through their governmental body.

(i) Statutory Dedication.

Statutory dedication often occurs as part of the process by which subdivision plats are filed and approved. It requires strict adherence to specific statutory requirements and "results in a conveyance of the title of the subject property to an ascertainable grantee." n127 Some of the typical requirements for a highway dedication, for example, are: "preparation of a plat by a surveyor which is certified by the surveyor and acknowledged by the owner of the land, the recording of the plat, the certificate, and the acknowledgment in the recorder's office of the county in which the land is situated." n128 The Wyoming Supreme Court noted that the critical elements to a statutory dedication are the "intention of the owner to dedicate and acceptance thereof by the public..." n129 A California court held that an offer of dedication "which is accepted on the condition that the proffered property be improved does not result in a completed dedication, no more than does a conditional acceptance of an offer create a valid contract." n130 So long as the statutory requirements are fulfilled, some jurisdictions find that there need not always be a formal acceptance of the dedication. n131 Statutory dedication traditionally is defined to give some form of a limited, defeasible fee interest. The description of the fee varies, from a conditional fee to a trustee interest n132 in such of the property as necessary for use as a road. One phrasing is that by statutory dedication, the landowner "granted title to the street or roadway in fee so long as used for public purposes, but upon condition that should the street or roadway be vacated, then the title would pass to the then owners of the lots abutting thereon." n133 If the grant were of an easement rather than a form of fee, upon abandonment the land would return to the grantors or their successors, who often also turn out to be the abutting landowners. Under the interpretation that there is a limited fee, for example, a village would have no ownership rights in minerals beneath a street, but would have some right to the minerals to the degree they were "of practical utility for the use or maintenance of the property as a street or alley." n134 Such a dedication transfers "only the surface and so much of the subsurface as is necessary for street construction and municipal services," with no interest in the oil and minerals lying under the streets and alleys." n135

COMPUTER-ASSISTED RESEARCH

LEXIS: Easement W/10 Dedicat! W/20 Statut!

(ii) Common Law Dedication.

Traditionally, common law dedication grants to the public an easement in a roadway that will cease when use of the roadway ceases; some courts require that for a developer to convey fee interest in a road there must be an express grant to the governmental authority. n136 This contrasts with the grant by a statutory dedication of a form of limited fee interest to the statutory grantee. When the roadway ceased to be used, the property used for the easement by common law dedication would then return to those from whom it had been dedicated, rather than to the abutting landowners. n137 It would not be unreasonable, though, for courts to assume that the fee ownership would have passed with the adjoining land absent an explicit statement to the contrary, in the same way as is done with railroad right of way easements. n138 In one case, for example, where an 1872 statute created public highways from all section lines in specified counties, those highways granted only an easement to the public; the fee title continued to be vested in the abutting landowners, in that case the original owners. n139 Attempted statutory dedications that fail some requirement sometimes will still fulfill the requirements to be considered a common law dedication. n140 One description of the requirements for such a dedication is "(1) the party platting the land intended to create an easement, and (2) the public accepted the easement." n141 In Texas, mere failure to object to use by the public will not establish a common law or implied dedication; there must be some clear and unequivocal declaration by an owner of an intention to set the road apart for public use. n142 An easement by implied or common-law dedication and a public easement by prescription are sometimes difficult to distinguish, and the cases do not always do so successfully. n143

(iii) Common Law Dedication by Reference to Map or Plat.

One may dedicate land to the public by express language, by reservation, or by conduct showing an intent to dedicate. Such conduct intending a dedication may exist "where a plat is made showing streets and the land is sold either by express reference to such a plat or by a showing that the plat was used and referred to in negotiations for the sale." n144"A developer's sale of lots in a subdivision according to a recorded plat creates private easement rights in favor of purchasers in any area set apart for their use." n145 Those rights include areas like streets and parks, and exist whether or not there has ever been acceptance by public authorities or the public generally, on the ground that the purchasers have given consideration for the property's higher value by paying a higher price. n146 Even where the dedication by plat or map is not formally accepted by the appropriate authorities, persons who rely on the plat in making a purchase acquire an interest akin to an easement appurtenant in the rights of way. n147 Though the public may be foreclosed after the passage of sufficient time without acceptance by the governmental unit or general public use, those who have purchased in reliance on the roads shown in a plat or plan retain a private easement that cannot be abridged by the governmental body absent compensation. n148 This right applies to all members of the subdivision who purchased in reliance on the plat or plan, not merely those with property abutting the easement. n149 Use by the public can itself constitute acceptance even in the absence of formal acceptance by public authorities. n150 Where a deed of dedication could not be found, reference to the dedicated street in a recorded plat served to establish the easement. n151 Simple mention of the existence of a road in a deed without the requisite offer to and acceptance by the public authorities, however, may not suffice to create a dedication. n152

COMPUTER-ASSISTED RESEARCH

LEXIS: Easement /25 Dedicat! /25 Statut! /25 Common law or Common Law /25 Distinguish or Distinct! or Difference

(4) Who May Create Express Easements.

Because an easement is an interest in land, anyone who is the possessor of the land may burden it with an easement; that easement cannot last any longer than the possessor's possessory estate in the land. n153 Thus, in Texas, a life estate holder may grant an easement over the life estate, "but the easement lasts only as long as the life tenant is alive." n154 The consent of all the owners of the servient estate is required to create an easement binding that estate. n155 One cannot grant an easement in what one does not own; thus all of the co-owners of a piece of land "must join in the deed

before an easement in their jointly owned property will arise ... ." n156 The common law rule is that "a deed representing one cotenant's attempt to grant an interest in a distinct portion of property held in cotenancy is voidable by the non-consenting cotenant." n157 Thus, a cotenant who had neither consented to nor ratified her cotenant's quitclaim deed of an easement successfully voided it; the court reasoned that an easement granted to a stranger inevitably interfered with the non-granting cotenant's undivided right to full enjoyment of her cotenancy. n158 If one is co-owner of land, one may not grant an easement over the land that interferes with the rights of the other co-owners. n159 The interest can become valid, however, by the ratification of the other cotenants. n160 The interest is at least voidable as to the other co-owners, though valid against the grantor and successors, and perhaps against the other cotenants by principles of estoppel or on partition. n161

COMPUTER-ASSISTED RESEARCH

LEXIS: Easement w/10 Grant or Create or Deed w/25 Tenant or Lessee or Joint Owner or Co-owner or Coowner

(5) Creation of Express Easements Subject to Statute of Frauds.

Because easements are almost universally treated as property interests rather than contractual, most courts insist that easements, like other property interests, must be created in writing. n162 Thus, an oral contract to create an easement is within the statute of frauds and itself is not valid. n163 An easement will not be "directly enforceable unless in writing." n164 Because it creates an "interest in real estate" permitting use of another's land, an easement is the type of interest in land subject to the Statute of Frauds. n165 The grant of an express easement must satisfy the Statute of Frauds to be valid. n166 As interests in land, easements "cannot be created or transferred except by a written instrument." n167 The writing, just as with a deed, must be signed by the person granting the easement; the parties must be named, and the easement described as to location and any limitations placed on use. The writing "must identify 'the seller and the buyer, their respective intention to sell and to purchase, a description of the subject matter of the sale, the purchase price, and terms of payment.' " n168

COMPUTER-ASSISTED RESEARCH

LEXIS: Express W/20 Easement W/20 Grant! or Creat! W/20 Statute of Frauds

(6) Easements by Agreement, Written or Oral.

Easements may in some situations arise by agreement rather than by grant "where from the nature of the subject matter it is evident that the parties intended that privileges designed for the permanent use of the property should form an incident of the principal contract," no particular type of language being necessary. n169

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LEXIS: Easement W/20 Grant! or Creat! W/20 Written or Oral W/5 Agreement

(i) Oral Easements and the Doctrine of Part Performance.

Generally speaking, easements cannot be created orally, any more than land can be sold without a deed. Courts will, however, sometimes enforce agreements or contracts to grant an easement, and treat the easement as though it had been granted, even if the contract or agreement were oral. Thus, two parties in 1949 had agreed orally to jointly construct, maintain and use a driveway constructed along the boundary line between the lot. This arrangement worked until 1987, when the successor to one of the parties built a fence blocking the others' use. The Alabama Supreme Court upheld a lower court decision that this was a trespass against an "easement by contract," and refused to overrule Alabama precedent that "an easement can be created by contract and that such easements are alienable." n170 Some states have

created an exception to the Statute of Frauds "and have allowed the creation of easements by oral contract where the contract has been relied upon and acted upon." n171 The Connecticut Supreme Court has said that oral easements "may be created, and thus taken out of the Statute of Frauds, by part performance by one of the parties." n172 Recognizing this type of easement, a court is, in essence, using estoppel with a different label to prevent a party from denying an easement, the promised existence of which has been relied on. n173

By permitting the enforcement of an easement where a written description is entirely lacking, the doctrine of part performance, a fortiori, applies in the case of a written easement containing an inadequate description that would not otherwise satisfy the Statute of Frauds. n174 Recognition of part performance sufficient to take an agreement, purportedly granting an easement out of the statute in Washington, requires proof of the essential terms of the contract as well as consideration of several factors specific to conveyance of estates in real property. n175

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LEXIS: Easement W/5 Oral or Contract W/25 Part Performance

(7) Contents of the Writing.

No magic words or particular words of art are required to demonstrate the creation of an easement. n176"[A]ny words which clearly show the intention to give an easement, which is by law grantable, are sufficient to effect that purpose, providing the language is sufficiently definite and certain in its terms." n177 So long as the words make clear the intention to create an easement, the law does not require perfection in its description; thus the Georgia Supreme Court upheld an easement, where its description in a recorded and an unrecorded plat disclosed the grantors' intention "with regard to the quantity and location of the right of way." n178 Neither words of limitation, n179 nor words of inheritance, n180 nor technical terminology are necessary to create an easement. n181 If the language of the grant is free from ambiguity, it is not the subject of interpretation, "and no resort to extrinsic facts and circumstances may be made to modify the clear terms of the grant." n182 To determine whether an easement is the intention of the parties, courts will examine the language of the grant, the circumstances surrounding its creation and the property involved, with construction in favor of the grantee. n183 Indeed, the writing establishing the easement may not even formally do so. Thus, the Delaware Supreme Court held that a petition and counter-petition to partition land held as tenants in common, both of which referred to an easement over one of the parcels benefitting the other, sufficed to establish the existence of the easement and left only its location at issue. n184 A statement that a conveyance is "subject to" an easement does not necessarily create one because the language usually refers to already existing easements. n185 Some states are very strong in their unwillingness to let the words "subject to" be interpreted to create an easement; one court states that nothing in those words "would even hint" at the creation of affirmative rights or connote a reservation or retention of property rights. n186 Other courts will read surrounding language for aid in determining whether "subject to" is intended to create an easement. n187 Thus, arguing in favor of creating an easement was that it earlier had provided the only access to the property and that the easement was explicitly described rather than simply a prophylactic clause reciting that the conveyance was subject to easements of record; arguing against was the failure to identify the dominant estate or to identify whether the easement was appurtenant or in gross. n188 The choice of proper language can be very important, however, to demonstrate the intention to create an easement and the type of easement to be created. n189 To phrase the problem in another way, it is important to be clear in one's intention to avoid the possibility of a court misinterpreting that intention. The language of the grant should express as clearly as possible the duration of the easement, its location and size, and any limitations of purpose or use.Courts often construe the scope and meaning of an ambiguously worded easement against the grantor, or, in the situation where an easement has been reserved, against the one who reserved it. n190 All this is important to prevent disputes and, if disputes do arise, to make sure that the desires of the parties are not subject to future incompatible interpretations by a court. For example, noting that a deed which accurately and correctly describes the land and interest conveyed is not subject to a variant construction, the Colorado Court of Appeals specifically enforced a grant of an easement against arguments of reasonableness of use, stating that if "the width, length, and location of an easement for ingress and egress have been

specifically and definitely set forth in the grant, the expressed terms thereof are controlling, and what is reasonable or necessary is not decisive." n191 Following are several common problems caused by the wording of easements.

(i) To Distinguish from a Fee Simple Absolute.

Where it is not certain whether a fee simple or an easement interest was intended, courts rely on several types of phrases to help their decision. Thus, where a deed grants "only a right" in a parcel of land, one court states that an easement is conveyed. n192 Deeds that in the granting clause state they are conveying a "right of way over, across, or upon certain land" generally are construed to grant an easement. n193 Terms such as "right of way," "road" or "roadway" bring a "strong, almost conclusive, indication that the interest conveyed is an easement." n194 Thus, for example, a Missouri court found a "strong, almost conclusive" presumption that the terms "road" or "roadway" meant an easement interest while the term "strip of land" indicated the conveyance of a fee simple absolute. n195 Some courts find no such conclusive presumption: "It should be noted at the outset that the use of the term "right of way' in a deed does not determine whether the interest so described constitutes an easement or a fee." n196 One court stated that a reference to a certain narrow strip "without expressing any intention to limit the grant to an easement" created a fee simple. n197 Where the granting document referred to "the limited right to go on to the land of the grantor adjacent to the land conveyed," this granted an easement on the adjoining property. n198 Some courts find the presence of a warranty clause to suggest a fee simple absolute and the absence an easement. n199

COMPUTER-ASSISTED RESEARCH

LEXIS: Easement W/10 Fee Simple or (Fee W/5 Interest or Estate) W/25 Distin! or Differ! or Compar!

(ii) To Distinguish from a Defeasible Fee.

It is sometimes difficult to distinguish between an easement and a fee simple determinable or a fee simple subject to condition subsequent. The latter two estates refer to the granting of a fee interest subject to a condition upon the failure of which the property either automatically or upon the grantor's action returns to the grantor's ownership. If the language of the grant appears to grant a fee and then later states that if certain conditions are not met the property will either revert to the original owner or be subject to reentry by the original owner, a court may refuse to interpret the grant to be an easement. Thus the Nebraska Supreme Court interpreted such language. n200 It was fatal to the easement claim that the granting clause conveyed "the entire estate, with no exceptions, reservations, or specifications for the use of the land," and only later placed conditions on its use, thus comporting exactly with the definition of a fee simple subject to condition subsequent in the *Restatement of Property* . n201 The same court, by contrast, held there to be an easement rather than a defeasible fee where the grant specifically limited use of the land conveyed "for the purpose of constructing a Rail Road there on" and for all uses and purposes connected with its construction and use. n202

(iii) Railroad Rights of Way.

Because rights of way grant a railroad exclusive use of a strip of land, courts have long divided over whether they should be considered fees simple or easements. Most courts have considered them to be easements, the decision often turning upon the language used in the grant. n203 One court puts it that the general rule is that if the grant refers to a "strip, piece, or parcel of land," without language as to its use or purpose or other limitation to the estate it is to be construed as a fee estate, but "reference to a right of way in such conveyance generally leads to its construction as conveying only an easement." n204 The Indiana Supreme Court has set out two further rules for construing grants to railroads. First, deeds prepared by the railroads are construed in favor of grantors of the land, and, second, where there is ambiguity in the deed, absence in a railroad-prepared deed of language specifying that conveyance of strip of land is in fee simple will be evidence of parties' intent that the conveyance not be in fee simple. n205 The use of the term "right of way" generally suggests the creation of only an easement. n206 The easement grants the right of way to the railroad; absent specific language to the contrary, the easement does not grant a reciprocal right of continuing rail service to the

abutting property owners. n207 Courts first attempt to resolve ambiguity from within the four corners of the document and, failing that, look at outside circumstances. n208 The importance of the distinction arises when the railroad abandons use of the right of way. If the interest is a fee simple, the railroad can do what it will with the land; if it is an easement for railroad purposes, when the railroad abandons it, the land will return to the control of the fee owner. There is a presumption in many jurisdictions that the fee lies in the adjoining property, unless a grantor of that adjoining land has explicitly excepted the fee interest upon conveyance. n209

Examples. The Tennessee Supreme Court found an easement for railroad purposes only rather than a fee interest where the term "right of way" was used in the conveyance without evidence of any intention to convey more. n210 The Arkansas Supreme Court, by contrast, found there to be a fee interest where the term "right of way" was used only in companion deeds identifying property in the first deed (in which the term was not used), where no language limited use to railroad purposes, where the railroad was granted rights to use of water, earth and gravel from outside the property conveyed, and where the grantor's wife surrendered dower and homestead rights, something not necessary for granting only an easement. n211 In another case the same court held that the term "right of way" was used to identify the tract, not specify its use, and, given that the deed contained a habendum clause (used in the grant of an estate), dower and curtesy were relinquished, the deed was entitled simply "quitclaim," and there was no statement of permission to remove stone and gravel or borrow earth from within the conveyance, and the railroad previously already had an easement, the grantor conveyed a fee interest and not an easement. n212 In affirming a finding that one such right of way was a fee simple, the Illinois Supreme Court noted that a deed conveying a definite "parcel" or "strip" of land without language limiting the estate granted a fee simple and that use of the words "convey and warrant" suggest an intention to convey a fee simple, whereas words granting only a "right" in a parcel of land convey an easement. n213 The Idaho Supreme Court held there to be a fee simple where the grantors "did 'grant, sell and convey' " their land to the railroad " 'to have and to hold ... forever' " without any limitation over to railroad purposes. n214 Where, by contrast, the grant conveying the right of way provided that if the railroad abandoned the route "the land shall revert and become the property of the grantor, his heirs, or assigns", the Iowa Court of Appeals held that the railroad received a fee simple determinable interest in the land. n215 Where a railroad attempted to prevent a landowner who owned land adjoining both sides of its right of way, the South Carolina Supreme Court held that, despite use of phrases often interpreted to create a fee simple determinable, a statutory grant of " 'good and right title ... so long as the same shall be used only for the purposes of said road and no longer' " did not grant a fee interest but an easement and therefore could not prevent the landowner from crossing so long as it did not interfere with the railroad's business. n216 An Ohio court found a fee interest where the granting clause conveyed all the real estate without words condition or forfeiture, without a reverter clause or provision for right of re-entry, and where the words limiting to railroad use appeared only in a prefatory clause describing the purpose of the conveyance. n217 In a case construing two deeds granting strips of land to railroads, the Alabama Supreme Court held the grants to be in fee simple on the principle that every estate in land is to be construed to be a fee simple absent unambiguous language to the contrary n218 and that the use of the term "right of way" appears after and not as part of the granting clauses, and that the reference to "strips" of land is "merely a description of the property's configuration, not an indication that only an easement was intended to be conveyed." n219

COMPUTER-ASSISTED RESEARCH

LEXIS: Railroad W/20 Right-of-Way or Right of Way W/20 Fee And Easement

Rails to Trails. Which type of interest the railroad owns in these rights of way is potentially very significant where many abandoned railroad rights of way are being turned into recreational pathways in the well-known rails to trails movement. If the rights of way are easements for purpose of running a railroad over them, if the railroad ceases to do so, they would revert to the original owners. The railroad may not have the right to turn them over to local government for rails to trails conversion. n220 If they are fee interests, the railroads would be free to do so. Congress has passed a statute defining rails to trails use as being within the definition of a railroad right of way; this statute is under attack in the courts as working a taking of the property of the underlying fee owners. n221 When given the opportunity, the Supreme Court did not definitively determine whether there was the taking of a compensable property right in the

conversion of railroad rights of way for public trail use. n222 A federal court has since then refused to find that the owners of the adjoining fee had sufficient expectation of receiving the abandoned easement to have suffered a taking, and that the railroad easements had not yet been definitively abandoned, but were being kept available in case of need for future railroad purposes. n223 The Federal Circuit en banc has since reversed the Preseault panel's decision, found there to be a taking and remanded for proceedings to determine the appropriate compensation. n224 Note that the court has not held the National Trails System Act to be unconstitutional; it has held that the owners of the underlying fee deserve compensation when the conversion authorized by the act takes place. The court held that because in this case the use for which the easement was granted could not by its terms be stretched to include rails-to-trails conversion, the fee owners had the right to possession and deserved compensation for the loss of that right. n225 The court notes that the outcome could be different, depending on whether the scope of the easement could be interpreted to include wider uses, such as rails-to-trails. n226 The Court of Appeals of Maryland, in response to a question certified from the Fourth Circuit, has done just that, interpreting the railroad easement to include such uses, n227 while the Federal Court of Claims notes Chevy Chase but interprets Missouri law to opposite effect. n228 While other courts continue to deal with challenges to this act on other grounds, generally holding for the government, n229 it seems obvious that if this court's interpretation stands, the act will become much less important because the expense of making use of it in many cases will be very high.

(iv) To Distinguish an Easement from a License.

While an easement is an interest in land whereby one person acquires rights over the land of another, a license is permission to do something on another's land without having an interest in the land. n230 An easement "is distinguished from a license because a license is not an interest; a license is merely a privilege to do some act on the land without possessing an interest in the land." n231 The *Restatement* defines a license as an interest in land that entitles its owner to a use of the land arising from the consent of the one whose use of the land is affected by the licensee's actions, but it is "not incident to an estate in the land, and ... is not an easement." n232 The use is, for the *Restatement*, one that *could* be privileged as an easement, but "its creation lacks a formal requirement necessary to the creation of an easement, or ... it is created to endure at the will of the possessor of the land subject to the privilege." n233 As an interest in land, an easement generally is subject to the Statute of Frauds, while a license may be oral. n234 A license is revocable; an easement is not. n235 Thus, that an agreement gave someone access to another's land as long as the grantor owned the land and the grantee permitted the other access to water demonstrated that there was an easement rather than a license: it was not revocable at the servient tenement's will. n236 The license is a personal privilege that expires with the death of either party. n237 A license is terminable at the will of either party, cannot be assigned, does not pass at death, terminates upon conveyance of the land, is an agreement binding only upon the parties. n238 In declaring that, under Michigan law, an oral license could not be rendered irrevocable by estoppel alone, without being coupled to a separate interest in land, the state Supreme Court noted that the grantor of such an intended oral license "in effect, orally conveys an easement," an interest that, under the Statute of Frauds, can be granted only in writing. n239 Ordinarily a license cannot ripen into an easement. The rights granted in easements and licenses often closely resemble one another, and the documents establishing them sometimes fail adequately to distinguish them. Courts say that they look to the intent of the parties to distinguish an easement from a license. n240 If a court cannot distinguish an easement from a license, it will interpret the interest as a license due to a concern for the unrestricted usability of property. n241 The creation of an easement requires a writing with plain, direct and unequivocal language evincing the grantor's intent to create a right in the nature of an easement rather than a revocable license. n242 Courts will look for language speaking of an "interest," language of grant, language suggesting permanence, or language reserving the rights of the fee owner, to help guide them in cases of ambiguity.

COMPUTER-ASSISTED RESEARCH

LEXIS: Easement W/10 License W/25 Distin! or Differ!

(8) Recording a Prerequisite for Validity or Enforceability.

Easements are subject to the same requirements of the recording acts as are other interests in land. In order to protect oneself from losing one's easement to a bona fide purchaser of the servient tenement, the easement must be recorded. Jurisdictions differ over whether failure to record affects the easement's validity, or its enforceability against one purchasing without notice. n243 In many cases, that may be a distinction without a difference, where the challenge to the easement is placed by that bona fide purchaser: the use of the easement will be lost. Even where a failure to record does not affect the basic validity of the easement as between the original grantor and grantee, the bona fide purchaser without notice will take free of the easement. "A bona fide purchaser of the servient estate without actual or constructive notice of an easement takes title free from its burden." n244 In a case concerning the state highway department, the North Carolina Supreme Court held in favor of a bona fide purchaser for value against a claim by the State Department of Transportation to an unrecorded highway easement. n245 A purchaser of real property has constructive notice of the existence of properly recorded instruments: thus, "an instrument that is properly recorded in the proper county is notice to all persons of its existence." n246 In some jurisdictions, however, where an easement, even though unrecorded, is open and visible, "notice ... may be imputed to a purchaser," requiring inquiry to be made. n247 In a title registration state, that an easement does not appear on the certificate of registration means that "the subsequent purchaser of registered land taking a certificate of title for value and in good faith, shall hold the same free from all encumbrances except those noted on the certificate ... ." n248 The Massachusetts Supreme Judicial Court in that case validated easements not appearing on the registration because the servient property owners had actual notice of their existence at the time of the property registration, and thus fit under an exception applying to purchasers with actual notice. n249

COMPUTER-ASSISTED RESEARCH

LEXIS: Easement W/20 Record W/15 Stat! or Requir! W/20 Valid! or Subseq! Purchaser

(b) Easements Without Express Agreement.

Easements may come into existence without the express agreement of the owner of the servient tenement. They most commonly come into existence by implication by estoppel, from prior use, or by necessity, or they may come into existence by prescription, a process similar to adverse possession. Some courts tend to speak of easements by implication from prior use and easements by necessity as subsets of the same category. n250 Thus, recognizing that the common law has long distinguished between easements by necessity and those implied from prior use, the South Dakota Supreme Court noted that their prior cases had "not mentioned the distinction" between them. n251 Governmental or private entities may obtain them through a form of eminent domain.

(1) Easements by Public Condemnation.

Governmental units may condemn easements over property for public purposes, following the same rules as their condemnation of fee interests. For constitutional reasons, the condemnation must be for a public purpose, and there must be the payment of appropriate compensation. n252 Compensation for the condemnation of easements can be rather complex, involving not only the diminished usefulness of that part of the land over which an easement runs, but also severance and other damages to the unaffected land. Thus, where an unrestricted, permanent sewer easement bisected the property on which a tavern sat, damages had to be calculated for the most injurious effect the easement might have, in that if the utility desired, it could completely cut off access to half of the property. n253 Examples of other rights, besides the expected rights of way, that have been acquired by condemnation include: conservation easements, scenic views, drainage and flooding, the rights to impose nuisances, air rights and development rights. n254 A government may condemn easements for highway purposes. n255

(2) Easements by Private Condemnation.

Many jurisdictions delegate to certain private parties the right to seize land, with proper compensation, for purposes that

are deemed to be public. Thus, some jurisdictions have authorized railroads to condemn easements for their rights of way. Other jurisdictions authorize privately owned public utilities to condemn easements needed, for example, for electric, water or sewer lines. n256 In Missouri, a corporation forced to relocate its pipelines by the Army Corps of Engineers placed them on another's property rather than its own; the court said that their right of private condemnation shielded them from having to remove the pipes. n257 In that state the condemning authority itself has the right to determine necessity. n258 Still other jurisdictions explicitly authorize private parties whose property is landlocked to condemn private ways of necessity, partially on the ground that it is not in the public interest for land to be useless. In Washington, for example, a statute "authorizes private condemnation of land for a right of way for the construction of roads, ditches or other structures necessary for the proper use and enjoyment of landlocked property." n259 In Mississippi, one seeking to condemn such a private way must show an inability to obtain a reasonable right of way from neighboring owners and must show that the private way is reasonably, not absolutely, necessary, but "there must be a real necessity not just mere convenience at stake before private property can be taken." n260 The Alabama Supreme Court interprets Alabama's statute granting landlocked private parties the ability to condemn a right-of-way over a neighbor's property to require the condemning party to prove there to be no other way out or that to create one would be prohibitively expensive because "after all, this is a condemnation proceeding. We are taking the property of one man and giving it to another." n261 Note the difference from the easement of necessity, treated below, that compensation must be paid in the case of private condemnation.

COMPUTER-ASSISTED RESEARCH

LEXIS: Easement W/20 Public or Private W/5 Condemnation

(3) Easements by Estoppel.

If a person has exercised a right that looks like an easement, relying reasonably on an oral or other promise that would not in itself satisfy the statute of frauds, and has reasonably changed position based on that reliance, a court may find that person to possess an easement, despite the failure to satisfy the ordinary requirements to establish an express easement. A Texas court, for example, affirmed that there was no easement by estoppel where a property owner failed to inform appellant that his use was permissive, thereby precluding his gaining an easement; where there is a duty to speak, silence can be a form of representation, but there was no duty to speak without some special relationship between appellant and the landowner. n262 Having held that a developer had defrauded, both actually and constructively, a land purchaser by describing neighboring property as "preserved" from development and would never be built on, and by having charged a premium price based upon that description, the Virginia Supreme Court held that the land purchaser had an easement affirmative over the neighboring "preserved land" preventing development. n263 A representative listing of the elements of equitable estoppel applied by courts to a dispute over easement rights, is (1) conduct, acts, language or silence amounting to a representation or concealment of material facts; (2) the party to be estopped either knows the facts or the circumstances require the facts to be imputed to that party; (3) the truth about the facts must be unknown to the party claiming benefit of the estoppel at the time they were acted upon; (4) the conduct must occur with the intention or expectation that it will be acted upon, or under the circumstances that it is both natural and probable that it will be acted upon; (5) the conduct must be relied upon by the other party, and, thus relying, the other party must be led to act upon it; and (6) the other party must in fact act upon the conduct and change position for the worse. n264 The doctrine of estoppel is generally not applicable to government in the carrying out of its duties. Thus, that a village had not prevented a neighboring landowner from crossing land previously invested with an easement was not an action sufficient to invoke the estoppel doctrine. n265

(4) Easements by Implication from Prior Use; the Quasi-Easement.

Where a property owner has used one part of a single piece of property for the benefit of another part of the property, and then divides the property, the possessor of the previously benefitted portion of the land may also possess an easement over the previously burdened part of the property. The Rhode Island Supreme Court puts it that when a

previously unified piece of land is severed, a grant will be implied of all continuous and apparent easements used in fact during unity, " 'though they have no legal existence as easements.' " n266 Many courts call the pre-severance use of one part of the property for the benefit of another a "quasi-easement." n267 Where property is divided and part conveyed away, the easement may be implied on either the retained or the conveyed away property. n268 Most courts presume such an easement must rest on "the implied intent of the parties gathered from the circumstances surrounding the conveyance." n269 One court justifies the existence of easement by implication from prior use on the grounds that the conveyance of a piece of property, on principle, "imparts all the benefits and burdens which exist at the time of the sale." n270 In Virginia, absent restrictions imposed by the grant, the easement comes into existence because "a grantor of property conveys everything that is necessary for the beneficial use and enjoyment of the property." n271 The easement by implication is a " 'true easement having permanence of duration,' " and thereby differs from an easement by necessity that disappears when the necessity bringing it into existence disappears. n272 Once the elements were proven to exist at the time of the easement's creation, it becomes an easement appurtenant, and "the elements for creation are no longer relevant to a determination of the continued existence of that easement upon a subsequent conveyance." n273 In other words, in Nebraska, one terminates an easement by implication in the same ways one terminates an express easement, whereas an easement by necessity may disappear with the necessity creating it. n274

(i) The Traditional Elements.

A common statement of the elements of an easement implied from prior use is (1) common ownership followed by a conveyance separating the unified ownership; (2) before severance, the common owner used part of the property for the benefit of the other part, a use that was apparent, obvious, continuous and apparent; (3) and the claimed easement is necessary and beneficial to the enjoyment of the parcel previously benefitted. n275 Some states recognize both this traditional standard and an eight-factor balancing test arising from the *Restatement of Property* . n276

COMPUTER-ASSISTED RESEARCH

LEXIS: Easement W/10 Impli! W/10 Element or Requir! W/10 Creat! or establish! or prov!

One piece of land divided. Courts have uniformly required that to imply an easement from prior use, the property must have originally been unified under the same owner. Unity of ownership is a prerequisite to a finding of an implied easement. n277 If there has been "no unity of ownership, there can be no implied easement." n278 There must be severance of a previous unity of title between the dominant and the servient estate. n279 The previously existing use becomes an easement only at the severance of the property. Thus, a quitclaim land deed to the United States did not extinguish an easement by implication or necessity to preserve access to grantor's retained land; the easement would not have existence until the deed became operative. n280 The severance necessary to create this type of easement usually is voluntary, but need not be. Thus, where property is severed by the foreclosure of a mortgage, if the other requirements are met, one of the pieces of property may be benefitted by an easement implied from prior use. n281 Where a portion of a piece of land is leased out, a Texas court held that "a written lease agreement for a term of years creates a sufficient separation of title to support an implied easement appurtenant. n282 The severance can occur when husband and wife divorce and split their property. n283

Previously existing "servitude" -- the Quasi-Easement. The easement by implication from prior use requires that one part of the property have been used for the benefit of the other during the time the property was unified. For example, an owner runs a sewer line from one end of the property over the other to the public sewer line on the adjacent road; when the property is divided, in certain cases the owner of the one parcel will retain an easement to continue to run the sewer line over the other parcel. n284 During the time of unity of title, the owner of the property imposes "an apparently obvious and permanent servitude on part of his property in favor of another part"; if reasonably necessary to the enjoyment of the property benefitted, "the servitude survives the severance and becomes an easement by implication." n285 Some courts will describe the pre-existing use as a quasi-easement, "existing conditions on the retained land that are apparent and observable and the retention of which would clearly benefit the land conveyed." n286 The easement

might also run the other direction, benefitting the land retained. n287 It is called a "quasi-easement," of course, because one cannot own a genuine easement over one's own property. Courts may even refer to the quasi-dominant and the quasi-servient estate to describe the benefitted and burdened portions of the previously undivided property. n288 A statement of the "permanence" of the servitude is that the common owner must have used the premises in this altered condition "long enough before the conveyance to show that the change was intended to be permanent." n289 Before an easement may be granted, the use must be "apparent and continuous" at the time the dominant owner acquires the land; this requirement to confirm the intent of the original owner to use part of the land for the benefit of another part. n290 Where a husband and wife, for example, regularly used a parking lot for customers renting storage sheds on their adjoining lot, after their divorce and the property division, an easement over the husband's land, since sold, was implied to benefit the lot with storage sheds retained by the wife. n291 The use of the easement "must have been continuous so that the parties must have intended that its use pass by the grant ... ." n292 To demonstrate permanence, some courts will describe the use as "longstanding." n293

COMPUTER-ASSISTED RESEARCH

LEXIS: Easement W/10 Former Use or Previous Use or Pre-existing Use or Preexisting Use W/25 Quasi-Easement or "Quasi-Easement"

Degree of Necessity Required. It does not usually suffice that there be a pre-existing use in an undivided piece of property. Before courts will imply from that pre-existing use an easement to which the servient owner has not agreed, the court will require that there be some necessity that it do so. For some courts, the focus is on the probable intent of the parties. n294 The necessity is not the same degree as that required for an easement by necessity, but some courts will require that there be "reasonable necessity" before implying the easement. n295 Though some courts require strict necessity, the "general rule" requires a finding of reasonable necessity, "such as will contribute to the convenient enjoyment of the property, other than a mere temporary convenience." n296 Although a strong finding of necessity will argue for finding an easement by implication, this necessity "need not always be strict and absolute," but is "only a circumstance resorted to show the intention of the parties." n297 The degree of necessity may be described as "highly convenient and beneficial to the land conveyed." n298 When "the circumstance of prior use is present, the elements of the grantor's necessity for and benefit from the easement need not be as strong in order to prove an easement as when necessity is the sole circumstance inferring an intent for an easement." n299 In Virginia the finding of reasonable necessity to justify an easement by implication from prior use "requires a showing of need which, by definition, may be less than that required for establishing an easement by necessity, but must be something more than simple convenience." n300 Some courts require a lesser or no finding of necessity at all. n301 Following this understanding that the purpose for the necessity requirement is to show that the parties would likely have made the easement explicit had they thought about it, some jurisdictions hold that a later disappearance of the necessity does not lead to the disappearance of the easement. n302 Thus, the Alaska Supreme Court pointed out that the necessity required for an implied easement is measured at the time of severance, and the easement so created will not disappear even if that necessity disappears. n303

Differing Degrees of Necessity When the Dominant Tenement is the Retained rather than the Conveyed Parcel. n304 Some courts demand a higher finding of necessity when the dominant tenement is the portion of the property retained. One justification of that distinction is that the seller will be the one with more sure knowledge of the existence of a pre-existing use and the one with the duty to inform the buyer that the property being purchased may be burdened with an easement. n305 In order to burden the purchaser this way and lessen the value of the property, these courts will demand proof of strict necessity. If the seller retains the servient tenement, such a court will require the purchaser of the dominant tenement to prove only reasonable necessity; the seller has superior knowledge that the property being sold has previously benefitted from such a quasi-easement and more appropriately bears the burden of its continuance when reasonably necessary for the enjoyment of the sold parcel.

COMPUTER-ASSISTED RESEARCH

LEXIS: Easement W/10 Impli! W/20 Former Use or Previous Use or Pre-existing Use or Pre-existing Use W/30 Necess! or Degree W/3 Necessity

(ii) The Restatement Approach to the Implied Easement.

The *First Restatement* treats the implied easement from prior use and the easement by necessity as members of the same class, the degree of necessity being one of the relevant factors in determining whether an implied easement is granted. The Restatement factors to be considered are: (a) "whether the claimant is the conveyor or the conveyee, (b) the terms of the conveyance, (c) the consideration given for it, (d) whether the claim is made against a simultaneous conveyance, (e) the extent of the necessity of the easement to the claimant, (f) whether reciprocal benefits result to the conveyor and the conveyee, (g) the manner in which the land was used prior to its conveyance, and (h) the extent to which the manner of prior use was or might have been known to the parties." n306 No one of those factors is dispositive. The factors in both of these tests are ways to determine whether the parties would have intended an easement had it been thought of at the time the property was divided.

(5) Easements by Necessity.

Where a piece of land has been divided, and the result is that one piece is useless without an easement, the owner of that piece may possess an easement over the other. n307 An easement by necessity may also come into existence when a parcel is divided and sold to two or more grantees, and one ends up landlocked. n308 It arises however the severance occurs, for example, by foreclosure or the exercise of eminent domain. A court may find that logic suggests that claims for an easement of necessity have more force between simultaneous conveyees than when the claim is against the conveyor, because it is reasonable to infer that the conveyor dividing land among simultaneous conveyees "intends that very considerable privileges of use shall exist between them." n309 The *Restatement* notes that such situations often arise in family distributions of land. n310

(i) Justified by Implied Intent or by Public Policy?

One justification for the easement by necessity is that the grantor is "presumed to have intended" to retain or to have conveyed to grantees "a means of access to the property in question, so that the land may be beneficially utilized." n311 The intent presumed in this conception of the way of necessity contradicts the required finding of adversity with the result that one with a way necessity will never be in the position to prove a prescriptive easement. n312 It arises "by implied grant" when property is severed in a way that leaves part of it landlocked. n313 Some jurisdictions have enacted into statute that a grant of a way of necessity will be implied where landlocked property is conveyed or retained. n314 Similarly, the same statutory scheme provides for a statutory way of necessity in situations where the parcels do not come from the same grantor. n315 Other jurisdictions, however, refuse to permit condemnation of a private way or implied reservation of an easement by a grantor, because the grantor has caused the problem by failing to reserve an easement. n316 Another, and perhaps the better, justification is that public policy prohibits land from being conveyed away in a manner that renders it useless, and the easement by necessity arises to cure that problem. n317 The public policy justification for the way of necessity often contravenes the intent of the original grantor or grantee; it "arises "to meet a special emergency ... in order that no land be left inaccessible for the purposes of cultivation." " n318 Some courts mix the two justifications: "[A] way of necessity is an easement arising from an implied grant or implied reservation; it is of common law origin and is supported by the rule of sound public policy that lands should not be rendered unfit for occupancy or successful cultivation... ." n319 The same court further notes that the way of necessity "rests on public policy often thwarting the intent of the grantor or grantee," noting that the demands of our society prevent "man-made efforts to hold land in perpetual idleness" by making it landlocked. n320

(ii) The Easement by Necessity May Run Over Either the Land Retained or that Conveyed Away.

The easement usually arises when an inner portion of land, either conveyed away or retained, is entirely surrounded by

lands owned by the grantor or by the grantor plus strangers. n321 An easement by necessity may also run the other way, permitting a grantor a way of necessity over the land conveyed away. n322 Some jurisdictions, however, do not recognize an implied reservation of easement by a grantor "simply because it sold the land that provided the only access to the landlocked parcel." n323 Presuming that a vendor would not knowingly convey part of a parcel in a way that deprived the remainder of any value, the North Carolina Court of Appeals read its state's law to place it in the majority of jurisdictions that recognize an easement of necessity in favor of the grantor over the grantee's new lands. n324 The easement arises unless the granting document explicitly disclaims any right of access. n325 It is a generally accepted common law principle that easements by necessity are appurtenant to the dominant tenement (obviously since they exist to benefit landlocked land) and benefit successors to the dominant tenement. n326 The defense of laches in some jurisdictions can bar an easement of necessity. n327

(iii) Elements to Establish the Easement by Necessity.

The necessary elements to establish an easement by necessity are commonly stated to be: (1) unity of title; (2) the dominant tenement has been severed from the servient, thereby curtailing access from the dominant estate to a public roadway; and (3) that a reasonable necessity existed for such a right of way at the time the parcels were severed. n328 In this context most courts will define reasonable necessity as strict necessity. The burden of proof is on the one attempting to establish the easement, in some jurisdictions "by clear and convincing proof." n329 Under the *Restatement* , an easement by necessity is treated under the same heading as an implied easement from prior use, and the eight-part test applies. n330

COMPUTER-ASSISTED RESEARCH

LEXIS: Easement W/10 Necessity W/10 Element or Requir! W/10 Creat! or Establish! or prov! But not use W/5 Prior or Pre-existing

Unity of Title. As with easements implied from prior use, an easement by necessity cannot be created unless the dominant and servient tenements were originally one piece of property. Original unity of title in dominant and servient tenements is required. n331 Thus, an easement by necessity was granted where a common grantor conveyed land that was "entirely surrounded by the land from which it was severed." n332 The unity of title required for an easement by necessity must be complete, that is, both the dominant and servient tenements must have belonged to the same person. n333 Thus the South Carolina Supreme Court held in a case where a man owned a landlocked tract in fee simple and the neighboring tract as tenant in common with his wife, there could not be an easement by necessity because holding one tract in fee simple and the other as a tenant in common does not meet the requisite unity of title. n334 The State of Colorado failed to establish a private way of necessity over railroad tracks because there was "nothing in the record to show unity of ownership prior to any division, nor is there evidence indicating that such an easement has ever existed." n335

Severance Leading to Lack of Access. For an easement by necessity to be implied, the severance creating the dominant and servient tenement must have created a situation in which there was no access for the dominant tenement to some public roadway. Thus, the Montana Supreme Court affirmed a summary judgment that the successor to the original owner of land and condominium complex developer had an easement of necessity over roads through the complex to reach a main road. n336 The severance creating an easement by necessity may also arise from forced sale of some or all of the land in question, as through tax sale, eminent domain, or mortgage foreclosure. n337 The lack of access must be "the result" of the severance. n338 The necessity must exist at the time of the severance of the two estates; it cannot arise later. n339 Thus where landowners rendered their own property landlocked by selling off their access, they could not claim an easement by necessity over property from which their land was originally carved out; their landlocked status resulted "not from a grant of property to them but by their own acts in conveying away their highway access." n340

Necessity. There must be a reasonable necessity for the right of way sought by the creation of the easement by necessity. Most courts will be quite strict in the degree of necessity they will demand, stricter than with an easement implied by prior use. For an easement by necessity, there must be "a genuine necessity; mere convenience is not enough." n341 The easement must be "absolutely necessary;" it must exist "in fact and not as a mere convenience." n342 The rule of strict necessity is "not limited to one of absolute necessity, but to reasonable necessity, as distinguished from mere convenience." n343 Showing of alternative access across navigable water can sometimes defeat a claim for an easement of necessity, but access over a marshy tidal flat that would require expensive dredging and which sometimes froze was not sufficient. n344 The proponent of an easement by necessity must prove its necessity. Thus, in a Maine case involving access to property fronting on the Atlantic Ocean, though there was evidence of a rather steep bank above a ledge and cobblestone beach and that there were no docks, wharves or moorings, the supreme court affirmed denial of an easement by necessity because "no evidence on the record establishes that a dock or wharf could not be built at reasonable expense to provide continuing and readily available access from the water." n345 When landowners claimed their property was "effectively" landlocked because of geographical barriers inhibiting access, the Wisconsin Supreme Court noted that Wisconsin courts had never previously "recognized geographical barriers alone as circumstances warranting an easement by necessity," and held that it was not enough that the grantor had "difficulty" with access so long as there was access. n346 The Virginia Supreme Court identifies the "modern view" to be that a way of necessity may exist even when the property borders on a waterway, "if the water route is not available or suitable to meet the requirements of the uses to which the property would reasonably be put." n347 Where a river adjoining property was navigable, there was insufficient evidence of the necessity required for this type of easement. n348 The *Restatement* treats the easement by necessity under the heading of implied easements, using the degree of necessity as the most important of the factors to be considered whether to imply that an easement exists. n349

Easement Extinguished When Necessity Ceases. If some other means of access should arise after the easement by necessity has been created, some jurisdictions will declare the easement to be abolished. n350 Thus, an easement by necessity would cease to exist when an alternate public road was built and accepted by authorities. n351 Such easements by necessity "last as long as the necessity lasts and terminate when other access to the landlocked parcel becomes available." n352 This is different than the case of the easement implied from prior use, where some jurisdictions hold that the easement will survive the end of the necessity required for its creation. n353 The logic for this distinction lies in the role of necessity in the two types of easements. For the easement implied from prior use, necessity serves as evidence of the intent of a grantor to continue a pre-existing easement; if that intent is there, the easement should be treated like any other easement and so survive the termination of the necessity. An easement of necessity does not depend on the existence of a pre-existing easement, and courts split over whether necessity serves simply as an indicator of intent, or the public policy justification for implying the easement. Because the necessity is so much more crucial to the creation of, and is fundamentally the only reason for, this type of easement, and because courts often demand a higher degree of necessity than for creating a prior use easement, the courts view the expiration of the necessity as terminating the easement also.

(6) Prescriptive Easements.

(i) Compared to Adverse Possession.

Gaining easements by prescription bears many similarities to adverse possession, and courts often mix up their characteristics. In adverse possession one may succeed to ownership in fee of a piece of property by acting openly as though one were the owner against the interests of the real owner for a period of time defined as sufficient in the particular jurisdiction. n354 Similarly, one may gain easement rights over the property of another by exercising those rights for a sufficient period of time without the permission of the fee owner who has had sufficient notice. The fundamental difference is that in adverse possession one acquires a possessory interest in land which, when proved, leads to a change in title n355 while in prescription, the fee owner retains ownership of the underlying property and the prescriptive easement claimant succeeds to a new, limited right to make use of that property. n356

(ii) Historical and Theoretical Bases for Easements by Prescription.

There have been, according to the American Law Institute's new *Restatement (Third) of Property (Servitudes)* , four theories underlying the American jurisprudence of prescriptive easements. The first two provide the foundation for modern acquisitive prescription theory: (1) sufficiently long-term use or enjoyment of property may create an entitlement to it, a property right, and (2) such use or possession may perfect a flawed title. A third theory, little used these days, sees long-continued use or possession as evidence of an entitlement created at some time lost in the mists of the past: the fiction of the lost grant. The fourth theory is the basis for extinctive prescription and statutes of limitation: there should be but a limited time for the asserting legal claims. n357 The English gradually abandoned acquisitive prescription theory and relied on statutes of limitation to confirm adverse possession of use rights; because the statute of limitations for proving uses required harking back to 1189, courts eventually compensated for the increasingly difficult task of proving a long enough prescription period and adopted the theory of the lost grant which allowed acquisition of servitudes after twenty years after certain requirements were met. Twentieth century American courts have largely abandoned the lost grant theory and rely on a combination of statutes of limitation (defining the prescriptive period) and acquisitive prescription theory (creates a property right in the prescriptive user). n358 The abandonment is not total, however. While recognizing that it is a doctrine "under siege" and that the Restatement (Third) calls for its eradication, the Vermont Supreme Court refused the opportunity to abandon the theory of the lost grant, though it redefined it as a rebuttable "bursting bubble" evidentiary presumption. n359 In Minnesota, a farmer claimed the prescriptive right to flood his neighbor's fields by increasing the size of his dam and the pond behind it. The court found insufficient evidence that the flooding was frequent enough to create a prescriptive flood easement, and that if there had been one it had been abandoned for many years. n360 This confused historical and conceptual basis for prescriptive easements has led to some uncertainties in requirements to create interpretations of the scope of easements.

(iii) Interests Subject to Prescription.

Generally speaking, any positive easement n361 that may be expressly created may also be acquired by prescription. n362 The right most commonly won by prescription is a right of way over neighboring land. If one wins an easement by prescription over a right of way, the easement encompasses the whole right of way, not merely that part of it actually used. n363 Other types of rights may be created. For example, a right to discharge pollution was won by prescription, n364 as were drainage rights, n365 irrigation ditch rights, n366 swimming rights, n367 and the right to use a fire escape on a neighboring building. n368 A Missouri case was remanded to see if a prescriptive easement had been established to pump sewage from a private residence into a steel company sewage system. n369 In South Dakota, for time reasons, a farmer failed in preventing county from correcting drainage that was flooding neighbors' land, a correction that would flood his own land; "plaintiff was claiming a prescriptive flood right." n370 Some, but not all, jurisdictions will recognize avigation, or air navigation, easements (the right to fly low over another's land) by prescription. n371 Prescriptive easements may be either appurtenant or in gross. n372 More than one easement may be won over the same property. Thus, one person was able to acquire a prescriptive easement over the same property over which another had purchased an easement, just as the fee owner could have sold to two parties the right to pass over the same right of way. n373 The type of use by which one establishes a prescriptive easement determines the type of easement won. Thus, it was a matter for the trial court to decide whether parties had proved that they had used an easement in an exclusive enough manner to establish an exclusive easement by prescription, one that no one but they would be able to use. n374

(iv) No Prescriptive Easements Against Government or Public Interests.

Just as with adverse possession, a prescriptive easement may not be won against government property held for a public use or when it is made inalienable by grant or statute; where the property is held in a proprietary capacity, and its alienability is not restricted, prescription is available in some jurisdictions. n375 Thus, an Alaskan statute provides that no prescription or statute of limitations runs against title by the state, nor may any title or interest to land under the state's jurisdiction be acquired by adverse possession or prescription, or in any other way except by conveyance from the state. n376 Nor may a prescriptive right of way be acquired in property not government owned but affected with a

public interest or dedicated to a public use; thus it could not be acquired over the property of a railroad (a public utility) if that property was being used for a public purpose. n377

(v) Prescription by the Public.

In some jurisdictions the general public may acquire an easement over a right of way with the result that a private road can become a public road against the will of the owner. In Illinois, for example, a private road can become a public highway through prescriptive use by the public for fifteen years, fulfilling the same requirements necessary to establish a private prescriptive easement. n378 The Montana Supreme Court puts it that the evidence must be convincing that, for the statutory period, "the public have pursued a definite, fixed course, continuously and uninterruptedly, and coupled with it an assumption of control and right of use adversely under a claim or color of right, and not merely by the owner's permission... ." n379 In Maine, where the easement sought is a public recreation easement in wild, uncultivated land there is an assumption of permissive use. n380 While Maine retains its presumption of permissive use in wild, uncultivated land when a public prescriptive recreational easement is sought, the presumption is the opposite in the case of a private prescriptive easement of way. n381 The primary test is not necessarily the number of people to use the road, but the nature of the use, "namely, whether or not the public, generally, have had the free, unrestricted right to use the road." n382 Before a county can be become owner of a prescriptive easement, thereby avoiding the duty to condemn and pay for it, some jurisdictions will require special procedural steps, including filing of a plat showing the road. Without this special form of notice, prescription will not occur. n383 To the requirement of public use for five years, Idaho adds that the road must be "worked and kept up at the expense of the public.' n384 In quotation in the last sentence on the page, change the fourth word from the end to "uninterrupted."

(vi) The Elements of the Prescriptive Easement.

To create a prescriptive easement one must prove facts similar to those required to prove adverse possession of land. n385 For one to gain ownership of a piece of property by adverse possession one must be in exclusive actual possession of the property in a manner that is adverse, hostile under a claim of right and for a sufficient length of time under the law of the particular jurisdiction. n386 To gain a prescriptive easement over someone else's land, one's use must be "adverse, under claim of right, exclusive, continuous, uninterrupted, and with the knowledge and acquiescence of the servient owner for at least 20 years" n387 in one jurisdiction, while in another the claimant must "establish an open, notorious, continuous, uninterrupted use for the five-year statutory period, under a claim of right, with the actual or imputed knowledge of the property owner," n388 and in still another one must prove a use that is "adverse, exclusive and interrupted ... for 20 years." n389 The treatment in the following sections will underline how these various requirements shade into one another. This melange of redundant terms, the *New Restatement* suggests, reflects the divergent theoretical strata underlying American prescription theory, and, as boiled down in modern American doctrine, "requires only that a prescriptive use be maintained in a manner that is open or notorious and continued without effective interruption for the prescriptive period." n390 The *New Restatement* gives a state-by-state survey of the stated requirements to establish prescription. n391

COMPUTER-ASSISTED RESEARCH

LEXIS: Easement W/10 Prescript! W/20 Element or Requir! W/10 Creat! or Establish! or Prov!

(vii) Burden of Proof.

Most courts place the burden of proof for each of the elements of a prescriptive easement on the party seeking the easement, under varying but usually quite strict standards because prescriptive rights are disfavored as necessarily working a forfeiture of existing property rights. n392 In New York, the law is "settled" that one must prove the elements by "clear and convincing evidence." n393 Missouri has a standard of clear and convincing evidence because the law does not favor the establishment of prescriptive easements. n394 Noting that it had never "explicitly stated that the

elements of a prescriptive easement must be established by clear and convincing evidence," the Minnesota Supreme Court stated, "that they must be so proved was implicit in our adoption of the rules of adverse user for prescriptive easements." n395 The Idaho Supreme Court requires the claimant to present "reasonably clear and convincing proof" of the elements. n396 In Vermont, the burden is "strict proof, that is, by clear and satisfactory evidence." n397 In Connecticut and the District of Columbia, by contrast, the burden of proof is on the proponent of the prescriptive easement under the standard of preponderance of the evidence. n398 In New Hampshire, one must prove the elements by a balance of probabilities. n399

(viii) Adverse, Under Claim of Right or Hostile.

These requirements suggest with varying emphases that the use of the property must contradict the rights of the owner.

Adversity, Hostility, and Claim of Right - Acting Against Owner's Interest. The terms "adverse use" and "hostile use" are often used interchangeably. n400 In like manner, "[e]vidence to show hostility and claim of right to satisfy the requirements of a prescriptive easement is of a similar nature" n401 The prescriptive user is not acting under the aegis of the owner, but under the prescriptive user's own authority. To describe a use as hostile is not to say that anger or enmity need be shown; for these purposes a "hostile" use is one "of such nature and exercised under such circumstances as to manifest and give notice that the use is being made under a claim of right." n402 In California, adversity can occur when the use occurs by mistake. n403 In Maine, by contrast, not only must the act be of the type that could be called hostile or adverse, but the person claiming the prescriptive easement must possess the correct state of mind; the claimants "had no intent to use adversely to an owner because they believed they were using a public road to which all members of the public had rightful access." n404 A use of a neighbor's land based on mere neighborly accommodation is not adverse and cannot ripen into a prescriptive easement. n405 Use of land permissive at its beginning cannot ripen into an adverse use without a distinct and positive assertion of a right hostile to the owner. n406 A claim for a prescriptive easement over a circular driveway that fronted two lots failed because the previous owners had given each other permission to use the portion in front of their respective lots; adversity did not begin until permission was withdrawn. n407 A condominium owner in Maryland failed to establish the right to a particular parking space, because all were common owners of the parking area, and simple use of one space for no matter how long was not hostile to the rights of other owners, since the owner had permission to use any of the development's parking spaces. n408 An adverse use is a use inconsistent with the rights of the true owner, such that if the owner discovers it, the owner will find cause to prevent it. Thus, where a parcel of land was the subject of a claimed easement, a court affirmed a finding that a prescriptive easement had been created against the tenant in possession, but not against the reversioner, because the reversioner, not in possession, was "legally unable to bring an action to prevent plaintiff from gaining the easement by prescription." n409 It is a use not made in subordination to the owners. n410 An adverse use is a use "without license or permission, for an adverse right of an easement cannot grow out of a mere permissive enjoyment, the real point of distinction being between a permissive or tolerated use, and one which is claimed as a matter of right." n411 Where a town had vacated a road across private property connecting two highways in exchange for $2,000, future uses were considered permissive in that the owners had posted the property as private but "as a good neighbor in the community in which it was situated" permitted people use of the road. n412 Some courts define adverse use as made with the knowledge and acquiescence but without the permission of the owner. n413 In South Dakota, once the person claiming a prescriptive easement has proven open, visible, continuous and unmolested use of property for 20 years, the use will be presumed to be under a claim of right and the landowner will have the burden to rebut "this presumption by showing that the use was permissive." n414 The Restatement (Third), Property (Servitudes) § 2.17 cmt. g (2000) considers this definition to be a remnant of the lost grant fiction that makes no sense for modern prescription doctrine, which depends on theories of acquisitive prescription and the running of statutes of limitations. n415 Worse yet is the difficulty in distinguishing acquiescence of the owner from permission of the owner, which destroys a claim of prescriptive use. n416

COMPUTER-ASSISTED RESEARCH

LEXIS: Easement W/10 Prescript! W/20 Advers! or Hostil! or (Claim W/2 Right) W/10 Creat! or Establish! or Prov!

Presumption of Permissive Use or of Adverse Use. Some jurisdictions have a presumption that use of an existing roadway is permissive. n417 In Idaho, where an owner of property constructs a way over it for convenience, mere use of it by others that does not interfere with the owner's will be presumed to be permissive. n418 Another common presumption is that if a use once was permissive, it is presumed to continue permissive unless the proponent can show evidence to the contrary, including evidence that the owner was made aware of the proponent's attempt to convert the use into an adverse one. n419 Because prescriptive easements are not favored, the person seeking to establish one has the burden of proof, and "such use is presumed permissive, absent evidence of hostile entry." n420 For fear that mere neighborly consideration may result in an owner's loss of control over land, some jurisdictions presume mere use without more to be permissive and incapable of ripening into a prescriptive easement absent rebuttal of the presumption. n421 In a Montana case involving landlocked property, where testimony showed that early homesteaders commonly let each other cross their lands, the evidence showed a use permissive in its inception and, therefore, not a claim of right. n422 In Wyoming, one claiming a prescriptive easement in an unimproved road crossing a neighbor's land, faces a presumption of permissive use and must prove that intention to make hostile use was brought home to the neighbor in "a clear and unequivocal way." n423 In others, however, there is no presumption of permissive use. n424 In the District of Columbia, adversity may be presumed from proof of a prima facie case of open and continuous use for the appropriate statutory period "in the absence of contrary evidence." n425 In South Dakota, once the person claiming a prescriptive easement has proven open, visible, continuous and unmolested use of property for 20 years, the use will be presumed to be under a claim of right and the landowner will have the burden to rebut "this presumption by showing that the use was permissive." n426 In Illinois, there is a rebuttable presumption of adverse use "where the use of the land or way occurred normally, or in other words, has been used openly, uninterruptedly, continuously and exclusively for more than 20 years, and the origin of such way is not shown." n427 In Idaho, where there is evidence of how the use of the road began, the presumption of adverse use does not apply. n428 In a Mississippi case involving a landlocked property owner, the Mississippi Supreme Court noted that when one is trying to prove the elements of a prescriptive easement, "requiring a litigant to prove a lack of permission is unreasonable because the law typically frowns upon requiring a party to prove a negative." n429 In New York, where the other elements are proven, the first element of hostile use will be presumed, shifting the burden to the record owner "to produce evidence rebutting the presumption of adversity." n430 Thus, where plaintiffs had established that use of an access way was open, notorious and uninterrupted for more than the required period, a presumption arose that the use was adverse. n431 In Idaho the test is similar, but if the use is by the general public, the presumption reverses to a rebuttable one of permissive use. n432 The Oklahoma Supreme Court states that the presumption of adversity arises only against someone who does not show a superior right and where there is no evidence to explain how the use began. n433 In Missouri, open, continuous, visible and uninterrupted use for the statutory period raises a presumption that the use is adverse, but when facts appear in the evidence to show permission, the presumption loses all force and vanishes, and whether the use must be shown as if no presumption had ever operated. n434 Evidence of friendly relationships between families when meeting served to rebut that presumption. n435 Simple testimony of permissive use will not serve to rebut the presumption of adverse use, if the court does not believe the testimony. n436 Another New York case points out that the presumption also disappears, and the proponent must come forward with affirmative facts that the use was adverse where "it is shown that the user and landowner are related by blood or part of a select group of friends." n437 In some jurisdictions, there is no presumption of adversity where the land over which an easement is sought is wild, uncultivated or unenclosed because of the theory of neighborly accommodation and problems of notice. n438 Pennsylvania law is even stronger; the Pennsylvania Supreme Court states that a prescriptive easement "may not be acquired through unenclosed woodland," in order to "protect owners of woodland property from unknown and undesired encroachment of their property." n439 The Maine Supreme Court has held public recreational uses of unposted open fields or woodlands and the ways through them to be permissive and has broadened the definition beyond the "wild" lands of old cases to state that "it is the public recreational uses of land, not the nature of the land alone, that triggers application of the rebuttable presumption of permissive use in public prescriptive easement cases." n440 In the first line of the first LEXIS paragraph, delete "8m." When an easement is claimed over such land, "the better rule is regard the use as permissive until affirmatively shown to be adverse." n441

COMPUTER-ASSISTED RESEARCH

LEXIS: Easement W/10 Prescript! W/20 Presum! W/10 Adverse or Permiss! W/5 Use

Under a Claim of Right or Claim of Title. One translation of "adversity" is that the prescriptive easement claimant acts as though the use being made were already owned, that is, it is not with the permission or by the grant of the owner. The Mississippi Supreme Court describes the use as being "under claim of ownership." n442 The Illinois Court of Appeals describes the requirement as "under claim of right or title inconsistent with that of the true owner." n443 The determination of a claim of right in the District of Columbia focuses on "factual manifestations of claimed ownership." n444 Nevada identifies claim of title with exclusivity: "For a use to be adverse it must be exclusive, that is, held under a claim of title exclusive of any other right, as one's own." n445

COMPUTER-ASSISTED RESEARCH

LEXIS: Easement W/5 Prescript! W/25 Claim W/2 Right or Claim W/2 Title W/25 Valid! or Restablish! or Creat!

Color of Title. A few jurisdictions recognize that making a claim under color of title can affect winning an easement by prescription. n446 Thus, in Wyoming, a prescriptive easement requires either a claim of right or a claim of right under color of title. n447 Color of title means having documentary claim to the easement through a deed or some other document that would grant it but for some defect. The way that the color of title affects adverse possession of land is that in some jurisdictions there will be a shorter statute of limitations, and in some jurisdictions, taking by adverse possession some part of a piece of property under color of title will win the entire property described in the document. n448 Color of title works similarly for prescriptive easements in those jurisdictions that apply it to prescription. In Washington, proof of color of title in adverse possession means that the adverse possessor is deemed to have possession of the entire tract described in the deed; applying the same principles to a prescriptive easement resulted in a county having a full forty-foot right of way easement the parties had "arguably intended" in the defective documentation, though the county had "never exercised ownership of the road banks until recently." n449 Holding that, as a matter of law, the issue of color of title should not have been presented to a jury due to an adversity period of only 4.5 years, the North Carolina Supreme Court declined to decide whether a prescriptive easement could have been acquired under color of title in seven years rather than the usual twenty. n450 A Florida court held that where a servient owner was attempting to extinguish part of an existing easement by adverse possession, the fee owner's claim is a claim of right under color of title and, therefore, ripens in seven years rather than twenty. n451 The difference justifying the latter case, however, appears to be that the Florida court is talking about a possessory action against an already existing easement rather than an attempt to create one by prescription.

COMPUTER-ASSISTED RESEARCH

LEXIS: Easement W/5 Prescript! W/25 Color of Title
Easement W/5 Prescript! W/25 Color of Title W/25 Valid! or Establish! or Creat!

Open and Notorious or With Knowledge of the Owner. The requirement that the use be open and notorious, however it is phrased, is for purpose of notice. n452 If the owner has actual notice, one need not worry about openness or notoriety of the use. n453 Knowledge of adverse use shown by the statements of one co-owner may be considered against other co-owners. n454 The use must have been "open and notorious such that the true owner had notice of the claim." n455 Thus, the New Mexico Court of Appeals held that an electric cooperative had established a prescriptive easement for existing electric lines and the safety zone around them, but had not established an easement as wide as it wished for new larger lines, because there was nothing visible to put the landowner on notice. n456 The adverse use must be with the owner's "knowledge and acquiescence, n457 or by a use so open, notorious, visible and uninterrupted that knowledge and acquiescence will be presumed," each of the elements being essential and open to contradiction. n458 Notice must

be actual or from "known facts of such nature as to impose a duty to make inquiry which would reveal the existence of an easement." n459 Thus, a property owner had the required "express notice" when a road had been rerouted through its land after a train crash and for decades the County had maintained the road and had even installed a culvert. n460 Open and notorious means "a distinct and positive assertion of a right hostile to the rights of the owner;" it must be brought to the attention of the owner. n461 An owner should not be deprived of the right to exclude without being put on sufficient notice that there has been an invasion of the property and that the owner should take action. n462 An owner is charged with notice of an easement where its existence is apparent upon an ordinary inspection of the premises; notice can be constructive or implied from circumstantial evidence. n463

COMPUTER-ASSISTED RESEARCH

LEXIS: Easement W/5 Prescript! W/25 Open or Notorious W/25 Notice

Exclusivity. This is one of the more difficult of the requirements for establishing an easement by prescription. If exclusivity is read to mean that the prescriptive easement seeker must use the property to the exclusion of its owner, it would demand something of the person attempting to establish an easement by prescription that is not required of any other easement owner. If one is trying to gain ownership of all the rights to a piece of land, a requirement of exclusivity as to the fee owner makes very good sense; it results in the owner being displaced, and therefore the fee owner has every good reason to be placed on notice that ownership rights are at risk. An exclusivity requirement of that type makes little sense when applied to an easement by prescription, because the use made by an ordinary easement holder is not necessarily exclusive to the rights of the fee holder. The servient owner in an ordinary non-exclusive easement has the right to make use of the property along with the easement holder, as well might other easement holders; it should be similarly so for prescriptive easements. n464 Most courts, therefore, will interpret the exclusivity requirement to mean something different than making the prescriptive easement holder use the property to the exclusion of anyone else. n465 In Illinois, for example, exclusivity as a requirement for a prescriptive easement "does not require a showing that only the claimant made use of the way, but that the claimant's right to use the lane does not depend upon a like right in others." n466 Similarly, in Montana, the use must be "independant of a like right of way in another." n467 In Alabama, the claimant's rights must "rest upon its own foundations and not depend upon a like right in any other person ... ."; a prescriptive easement of way can come into existence if the owner passes over the same way is shared by the owner. n468 According to the *Restatement (Third)* , the exclusivity requirement is most often used to deny the creation of a prescriptive easement where the use cannot be distinguished from that of the general public (that distinction is better made by the open or notorious requirement), or in cases where one uses rights concurrently with the owner, thus creating an inference of permissive use. n469 In some states exclusivity is not a requirement for establishing an easement by prescription. Thus, that others had used a road in Rhode Island did not defeat a claim of prescription: the claimant need not have been the only one to make use of a road, so long as the use was made independently of others, under a claim of right. n470 In New York, the elements to find prescription are similar to those for adverse possession, save that "demonstration of exclusivity is not essential." n471 In Missouri, the adverse use does not need to be exclusive; one seeking such an easement claims only the right to make a certain use of the land and "does not claim to possess the whole title and exclude the owner from it for all purposes." n472

COMPUTER-ASSISTED RESEARCH

LEXIS: Easement W/5 Prescript! W/25 Exclusiv! W/25 Valid!

Continuous for the Statutory Period. To obtain a prescriptive easement, one must prove that the appropriate type of use was continuous and uninterrupted for the statutory period.

Continuity of the Use. For a use to be "continuous" does not mean that it must be "constant"; it is necessary, however, that "there be no break in the essential attitude of mind required for adverse use." n473 Continuity requires use often enough to provide notice to the potential servient owner, and "uninterrupted" means that use is "not interrupted by the

act of the owner of the land or by voluntary abandonment by the party claiming the right." n474 The use needs to be more or less frequent "according to the purpose and nature of the easement, a use often and regular enough to give notice that the users were asserting a claim of right." n475 Some jurisdictions find continuity in seasonal use. Thus, in Rhode Island, seasonal use of a rural path did not defeat continuity, because even under the stricter standards for finding adverse possession, it is only necessary to show that "the claimant has acted toward the land in question 'as would an average owner, taking properly into account the geophysical nature of [the] land.' " n476 In North Carolina, placing fish traps in a river during fishing season, and use of a road during growing season for a number of years were sufficient to provide continuity of use. n477 A New York court held that use of a roadway every other weekend between Memorial Day and Labor Day and at Thanksgiving, for the prescriptive period was appropriate seasonal use to satisfy the continuity requirement. n478

Interruption During the Prescriptive Period. An easement must be used without effective interruption during the prescriptive period. n479"Either an interruption from an act of the owner of the servient estate or a voluntary abandonment by the adverse user may prevent the easement from ripening." n480 Effective interruption means that the owner must cause the prescriptive user to stop the use, resort to a statutory procedure that produces an interruption or "bring a legal action that results in establishing the landowner's right to terminate the use." n481 Where a property owner's gradual escalation of attempts to interrupt a prescriptive use was met by escalation in acts by the public to keep the way clear, there was no interruption but further proof of the adverse and hostile nature of the public's acts. n482 Suing an airport for nuisance would interrupt the continuity necessary to establish a prescriptive avigation easement. n483 By contrast, in Maine, oral, written or public notice will suffice to interrupt the running of the statutory period, in that in Maine's law a prescriptive easement can only be established with the acquiescence of the property owner. n484 In a dispute over whether beach access also included the right to place a pier, the Indiana Court of Appeals found a two-year intermission while their pier was in disrepair did not effectively interrupt the twenty years required for a prescriptive easement: "[M]ere intermissions in use of reasonable duration" do not necessarily equal an interruption; abandonment "denotes the subjective element of intent as well as mere non-use." n485 Interruption can also occur when the one seeking an easement acts in a way inconsistent with gaining prescription, e.g., by submitting oneself to the owner's title by asking and gaining permission. Asking permission once the prescriptive period has run, however, "does not obliterate a vested prescriptive right." n486

COMPUTER-ASSISTED RESEARCH

LEXIS: Easement W/5 Prescript! W/25 Period or Statutory Period or Statutory Time or Limit! or Statute of Limitations W/25 Continu! W/25 Interrupt! or Uninterrupt! or Disrup!

Length of the Statutory Period. Statutory periods vary widely from state to state, both in length and in the source for the chosen length, some states, for example, basing their limit on the limit for adverse possession and others on a limit specifically established for prescription. n487 It is, for example, ten years in Missouri, n488 fifteen years in Connecticut, n489 and twenty years in North Carolina. n490

COMPUTER-ASSISTED RESEARCH

LEXIS: Easement W/5 Prescript! W/25 Period or Statutory Period or Statutory Time or Limit! or Statute of Limitations

Tacking. Those attempting to obtain a prescriptive easement may rely on tacking successive periods of use to reach the statutory period, so long as there is privity of title between successive users. n491 The Maine Supreme Court refused to permit tacking between dominant landowners and visitors to their predecessors in title, due to lack of privity. n492 In Missouri, one can satisfy the ten-year prescription period "by the tacking together of successive owners" prescriptive use. n493 Another way to put it is that continuity of use is not broken by change in ownership of the dominant tenement. n494 The Mississippi Supreme Court overruled older precedent and held that tacking could be used to establish a prescriptive easement in the same way as for adverse possession. n495 The *New Restatement* defines privity

to be a transfer, formal or informal, between the prescriptive users of "the inchoate servitude or the estate benefitted by it." n496

COMPUTER ASSISTED RESEACH

LEXIS: Easement W/5 Prescript! W/25 Period or Statutory Period or Statutory Time or Limit! or Statute of Limitations W/40 Tack!

(7) The Doctrine of Custom.

Closely related to the prescriptive easement as a source of public access particularly to shorelines is the ancient doctrine of custom. The State of Oregon has used this doctrine to preserve to the public access to the dry sand portions of ocean beaches. n497 The Oregon Supreme Court paraphrases the common law doctrine of custom as follows:

> (1) The land has been used in this manner so long "that the memory of man runneth not to the contrary"; (2) without interruption; (3) peaceably; (4) the public use has been appropriate to the land the usages of the community; (5) the boundary is certain; (6) the custom is obligatory, i.e., it is not left up the individual landowners as to whether they will recognize the public's right to access; and (7) the custom is not repugnant or inconsistent with other customs or laws. n498
>
> The doctrine has been found to apply to classic dry sand areas abutting the ocean, but not to inland, freshwater coves with no history of customary use by the public. n499 The Oregon Supreme Court has held that the regulation of development on dry sand areas based on this doctrine is not a taking because anyone purchasing ocean-front land is on notice that their bundle of rights does not include exclusive control over dry sand areas. n500 Hawaii and Texas are among other jurisdictions recognizing this doctrine. n501

FOOTNOTES:

(n1)Footnote 97. Restatement (Third) of Property (Servitudes) § 2.1 cmt. b (2000).

(n2)Footnote 98. *See* Chapters 82 and 88, *infra*, for deed and will formalities; Restatement (Third) of Property (Servitudes) § 2.1 cmt. b (2000).

(n3)Footnote 99. *Wallner v. Johnson, 730 S.W.2d 253, 256 (Ark. App. 1987).*

(n4)Footnote 100. *Heigert v. Londell Manor, Inc., 834 S.W.2d 858, 868 (Mo. App. 1992), citing Behm v. Saeli, 560 So. 2d 431, 432 (Fla. App. 1990)* (looking at surrounding circumstances, interpreted "subject to" to reserve an easement).

(n5)Footnote 101. *O'Neill v. Williams, 527 A.2d 322 (Me. 1987).*

(n6)Footnote 102. *Catalano v. Woodward, 617 A.2d 1363, 1366 (R.I. 1992)* (plat referred to for description of premises intended to be conveyed becomes for that purpose part of the deed); public use can result in the easement being a public highway, *see* § 60.03(a)(3)(iii) *infra*.

(n7)Footnote 103. *Halverson v. Turner, 885 P.2d 1285, 1288 (Mont. 1994).*

(n8)Footnote 104. *Bauer v. Lancaster County Sch. Dist. 001, 501 N.W.2d 707, 710 (Neb. 1993)* (*quoting Elrod v. Heirs, Devisees, Etc., 55 N.W.2d 673, 675 (Neb. 1952)).*

(n9)Footnote 105. *Seccombe v. Weeks, 767 P.2d 276, 279 (Idaho App. 1989)* (*citing* previous edition of this treatise).

(n10)Footnote 106. *Russell v. Garver, 777 P.2d 12, 14 (Wash. App. 1989).*

(n11)Footnote 107. *Nature Conservancy v. Kolb, 853 S.W.2d 864, 870 (Ark. 1993).*

(n12)Footnote 108. In stating its intention to treat both as a single topic, the Wyoming Supreme Court stated, "The normal rules for differentiating an exception from a reservation are frequently stated and often ignored." *Simpson v. Kistler Inv. Co., 713 P.2d 751, 755 n.3 (Wyo. 1986); Roeder Co. v. Burlington N., Inc., 714 P.2d 1170, 1173 (Wash. 1986)* (whether a clause in a deed will be considered an exception or a reservation depends less upon the words used than the nature of the interest excepted or reserved).

(n13)Footnote 109. *See also Stickney v. City of Saco, 770 A.2d 592, 606 (Me. 2001)* (distinction now "virtually obsolete" and two terms used interchangeably). *Nature Conservancy v. Kolb, 853 S.W.2d 864, 870 (Ark. 1993).*

(n14)Footnote 110. *Lechtenstein v. P.E.F. Enter., Ltd., 592 N.Y.S.2d 777, 779 (1993)* (*quoting Matter of Estate of Thompson v. Wade, 509 N.E.2d 309, 310 (N.Y. 1987)).* The court in *Thompson* expressly refused to adopt the "minority rule" permitting reservation in a third party enunciated in *Willard v. First Church of Christ, Scientist, 498 P.2d 987 (Cal. 1972).*

(n15)Footnote 111. *Haynes v. Metcalf, 759 S.W.2d 542, 543 (Ark. 1988).*

(n16)Footnote 112. *Anchors v. Manter, 714 A.2d 134, 137-138 (Me 1998)* (*quoting* this section).

(n17)Footnote 113. Thus, if the language of exception or reservation referred to a right already existing in a third party, the rule did not apply; it was to reach the situation of an interest being newly created and transferred to a third party. *See Simpson v. Kistler Inv. Co., 713 P.2d 751, 755-756 (Wyo. 1986).*

(n18)Footnote 114. *Anchors v. Manter, 714 A.2d 134, 138 (Me. 1998)* (*quoting* this sentence)

(n19)Footnote 115. *Willard v. First Church of Christ, Scientist, 498 P.2d 987 (Cal. 1972).*

(n20)Footnote 116. *Loomis v. Luraski, 36 P.3d 862, 867 (Mont. 2001).*

(n21)Footnote 117. *Simpson v. Kistler Inv. Co., 713 P.2d 751, 756-757 (Wyo. 1986)* (in extensive caselaw analysis, pointing to California, the District of Columbia, Kentucky, possibly Michigan, Missouri, North Dakota, Oregon and Tennessee as states where the rule at that date in no form applied). The Connecticut Supreme Court has discussed adopting the minority rule, but refused to change the traditional rule until the facts of a case would absolutely require it. *Ozyck v. D'Atri, 538 A.2d 697, 700 (Conn. 1988).*

(n22)Footnote 118. *Id. at 761.*

(n23)Footnote 119. *Aszmus v. Nelson, 743 P.2d 377, 379-380 (Alaska 1987).*

(n24)Footnote 120. *Bolan v. Avalon Farms Property Owners Ass'n, 735 A.2d 798, 803-804 (Conn. 1999)* (*citing* Restatement (Third) of Property (Servitudes) chapter 2 (Tent. Draft No. 1, 1989, officially adopted 1998) and numerous cases from other states).

(n25)Footnote 121. *Bauer v. Lancaster County Sch. Dist. 001, 501 N.W.2d 707, 710 (Neb. 1993)* (*quoting Western Fertilizer and Cordage Co. v. BRG, Inc., 424 N.W.2d 588, 593 (Neb. 1988)).*

(n26)Footnote 122. *Owsley v. Robinson, 65 P.3d 374, 376 (Wyo. 2003).*

(n27)Footnote 123. *Butler Drive Prop. Owners Ass'n v. Edwards, 427 S.E.2d 879, 881 (N.C. App. 1993) See also Owsley v. Robinson, 65 P.3d 374, 377 (Wyo. 2003)* (easement dedicated not to general public but only for utility

purposes in subdivision)..

(n28)Footnote 124. *Timberlake Plantation Co. v. County of Lexington, 431 S.E.2d 573, 575 (S.C. 1993).*

(n29)Footnote 125. *Selway Homeowners Ass'n v. Cummings,657 N.W.2d 307, 313 (S.D. 2003).*

(n30)Footnote 126. *Price v. Walker, 383 S.E.2d 686, 689 (N.C. App. 1989).*

(n31)Footnote 127. *Woodward v. Schultz, 155 N.E.2d 568, 572 (Ill. 1959).*

(n32)Footnote 128. *Terwelp v. Sass, 443 N.E.2d 804, 806 (Ill. App. 1982)* (stating that requirements basically unchanged since 1884).

(n33)Footnote 129. *Owsley v. Robinson, 2003 Wyo. LEXIS 40,* *8 (Wyo. March 6, 2003) (utility easement within subdivision not dedicated for general public use).

(n34)Footnote 130. *Mikels v. Rager, 284 Cal. Rptr. 87, 97 (1991).*

(n35)Footnote 131. *Arkansas Louisiana Gas Co. v. Parker Oil Co., 183 So. 229, 240 (La. 1938).*

(n36)Footnote 132. *Southwestern Bell Tel. Co. v. State Corp. Comm'n, 664 P.2d 798, 800-801 (Kan. 1983)* (non-platted, non-city highway, fee in adjoining landowners, statutorily dedicated street vests "absolutely" in the county in trust).

(n37)Footnote 133. *Terwelp v. Sass, 443 N.E.2d 804, 806 (Ill. App. 1982)* (*citing Prall v. Burckhartt, 132 N.E. 280 (Ill. 1921)).*

(n38)Footnote 134. *Village of Kalkaska v. Shell Oil Co., 446 N.W.2d 91, 93 (Mich. 1989)* (village had no fee interest in minerals under streets; oil company that purchased them from fee owners did).

(n39)Footnote 135. *City of Evanston v. Robinson, 702 P.2d 1283, 1289-1290 (Wyo. 1985).*

(n40)Footnote 136. *E.g., Northpark Assocs. No. 2, Ltd. v. Homart Dev. Co., 414 S.E.2d 214, 216 (Ga. 1992).*

(n41)Footnote 137. *Terwelp v. Sass, 443 N.E.2d 804, 806 (Ill. App. 1982).*

(n42)Footnote 138. *See, e.g., Smith v. Smith, 622 A.2d 642, 647-648 (Del. 1993).*

(n43)Footnote 139. *Southwestern Bell Tel. Co. v. State Corp. Comm'n, 664 P.2d 798, 800 (Kan. 1983)* (abutting landowners were those from whom the easement was taken).

(n44)Footnote 140. *Reiman v. Kale, 403 N.E.2d 1275, 1277-1278 (Ill. App. 1980).*

(n45)Footnote 141. *See also Luevano v. Maestas, 874 P.2d 788, 794 (N.M. App. 1994)* (including as essential elements acts inducing belief owner intended dedication, that landowner was competent, that public relied on acts and will benefit from dedication and that there was offer and acceptance of dedication); *Koehler v. Price, 562 N.E.2d 370, 373 (Ill. App. 1990)* (finding no dedication, but finding access easement by implication from prior use), *citing Reiman v. Kale, 403 N.E.2d 1275, 1277 (Ill. App. 1980).*

(n46)Footnote 142. *Roberts v. Allison, 836 S.W.2d 185, 189-190 (Tex. App. 1992). See also Childs v. Sammons, 534 S.E.2d 409, 410 (Ga. 2000)* (mere use even for extended time by small portion of public does not support inference of dedication without express intention to dedicate and acceptance by public authorities).

(n47)Footnote 143. *Luevano v. Maestas, 874 P.2d 788, 794-795 (N.M. App. 1994)* (cases do not provide with

clarity a basis for distinguishing prescription from implied dedication).

(n48)Footnote 144. *Price v. Walker, 383 S.E.2d 686, 688 (N.C. App. 1989); Volco, Inc. v. Lickley, 889 P.2d 1099, 1102-1103 (Idaho 1995)* (marked streets on recorded plat demonstrating dedication of roadway easements).

(n49)Footnote 145. *Northpark Assocs. No. 2, Ltd. v. Homart Dev. Co., 414 S.E.2d 214, 215 (Ga. 1992).*

(n50)Footnote 146. *Id. at 215-216.*

(n51)Footnote 147. *Price v. Walker, 383 S.E.2d 686, 688 (N.C. App. 1989).*

(n52)Footnote 148. *See also Carrier v. Lindquist, 37 P.3d 1112, 1116 (Utah 2001)* (*quoting* this sentence) (dispute concerning private easement over former public alley; easement survives vacation of alley). *Potis v. Coon, 496 A.2d 1188, 1192 (Pa. Super. 1985).*

(n53)Footnote 149. *Id. at 1193.*

(n54)Footnote 150. *Catalano v. Woodward, 617 A.2d 1363, 1368 (R.I. 1992).*

(n55)Footnote 151. *Town of Sparta v. Hamm, 387 S.E.2d 173, 175-176* (N.C. App), *rev. denied 389 S.E.2d 819 (N.C. 1990).*

(n56)Footnote 152. *Hereford v. Gingo-Morgan Park, 551 So. 2d 918, 920 (Ala. 1989).*

(n57)Footnote 153. *Allingham v. Nelson, 627 P.2d 1179, 1182 (Kan. App. 1981)* (owner of estate less than fee can grant easement only to continue during the time the estate may continue) (*quoting* previous edition of this treatise).

(n58)Footnote 154. *Hamman v. Southwestern Gas Pipeline, Inc., 821 F.2d 299, 303 (5th Cir. 1987) vacated in part on reh'g, 832 F.2d 55 (1987)* (life estate holder was alive, but later divested of her interest).

(n59)Footnote 155. Restatement (Third) of Property (Servitudes) § 2.3 (Tent. Draft No. 1, 1989).

(n60)Footnote 156. *Ecenbarger v. Lesoine, 438 A.2d 969, 973 (Pa. Super. 1981).*

(n61)Footnote 157. *Ianotti v. Ciccio, 591 A.2d 797, 799 (Conn. 1991).*

(n62)Footnote 158. *Id., at 802-803.*

(n63)Footnote 159. *L.D.D.C., Inc. v. Pressley, 322 S.E.2d 416, 417-418 (N.C. App. 1984)* (majority rule binding that easement granted by one cotenant ineffective as to rights of other cotenant) (*citing Browning v. Highway Comm'n, 139 S.E.2d 227, 229 (N.C. 1964).*

(n64)Footnote 160. *Keller v. Hartman, 333 S.E.2d 89, 95-96 (W. Va. 1985)* (nonjoining cotenant may "affirm or ratify").

(n65)Footnote 161. Restatement (Third) of Property (Servitudes) § 2.3 & cmt. a (Tent. Draft No. 1, 1989); *L.D.D.C., Inc. v. Pressley, 322 S.E.2d 416, 417-418 (N.C. Ct. App. 1984)* (*citing Investment Co. v. Telegraph Co., 72 S.E. 361, 363 (N.C. 1911).*

(n66)Footnote 162. *See* Restatement (Third) of Property (Servitudes) § 2.7 Statutory Note at 126-131 (2000) for a survey of law of the various states on the Statute of Frauds and the transfer of interests in land.

(n67)Footnote 163. *Carlson v. Bold Petroleum, Inc., 1996 P.2d 751, 752 (Colo. App. 2000) Cooper v. Re-Max Wyandotte County Real Estate, Inc., 736 P.2d 900, 906 (Kan. 1987). But see* § 60.03(a)(b), *infra* for exceptions to the

Statute of Frauds requirement.

(n68)Footnote 164. *Mountain View, Inc., v. Bryson, 336 S.E.2d 432, 433-434 (N.C. App. 1985), rev. denied, 341 S.E.2d 27 (N.C. 1986); Berg v. Carlstrom, 347 N.W.2d 809, 812 (Minn. 1984)* (Statute of Frauds applies to grants of easements).

(n69)Footnote 165. *Berg v. Ting, 886 P.2d 564, 568-569 (Wash. 1995)* (grant of an express easement a conveyance within meaning of statute of frauds; description of servient tenement insufficient to satisfy statute); *Darsaklis v. Schildt, 358 N.W.2d 186, 190 (Neb. 1984); Pick v. Bartel, 659 S.W.2d 636, 637 (Tex. 1983)* (an interest in land "subject to the Statute of Frauds").

(n70)Footnote 166. *Judge v. Rago, 570 A.2d 253, 256 (Del. 1990).*

(n71)Footnote 167. *Winters v. Alanco, Inc., 435 So. 2d 326, 329 (Fla. App. 1983).*

(n72)Footnote 168. *Rhode Island Five v. Medical Assocs., 668 A.2d 1250, 1255-1256 (R.I. 1996)* (neither subject matter nor consideration sufficiently specified).

(n73)Footnote 169. *Wallis v. Luman, 625 P.2d 759, 767 (Wyo. 1981)* (*quoting* a previous edition of this treatise).

(n74)Footnote 170. *Saucer v. Champion, 603 So. 2d 950, 951 (Ala. 1992)* (*citing Cleek v. Povia, 515 So. 2d 1246 (Ala. 1987)).*

(n75)Footnote 171. *Id.*

(n76)Footnote 172. *Walton v. Town of New Hartford, 612 A.2d 1153, 1158 n.10 (Conn. 1992)* (*citing Birdsey v. Kosienski, 101 A.2d 274 (Conn. 1953))* (finding license rather than easement under those facts).

(n77)Footnote 173. *See Wayt v. Buerkel, 875 P.2d 499, 505* (Or. App.) ("the theory of equitable estoppel and related doctrine of part performance are used to avoid the statute of frauds when parties enter into an oral agreement concerning the use of land."), *adhered to as modified, 876 P.2d 868 (Or. App. 1994); see also supra,* § 60.03(b)(3) (easements by estoppel).

(n78)Footnote 174. *Berg v. Ting, 886 P.2d 564, 571 (Wash. 1995).*

(n79)Footnote 175. *Id. at 571-572* (delivery and assumption of actual and exclusive possession; payment or tender of consideration; making of permanent, substantial and valuable improvements, referable to the contract).

(n80)Footnote 176. *Kayfirst Corp. v. Washington Term. Co., 813 F. Supp. 67, 71 (D.D.C. 1993).*

(n81)Footnote 177. *Beebe v. Swerda, 793 P.2d 442, 444 (Wash. App. 1990).*

(n82)Footnote 178. *Murdock v. Ward, 477 S.E.2d 835, 835 (Ga. 1996).*

(n83)Footnote 179. *Dean v. MOD Props., Ltd., 528 So. 2d 432, 433* (Fla. App.) ("[T]he same words of limitation generally used to create or convey an estate in land, although not necessarily required, are commonly used to create or convey an easement."), *rev. denied 534 So. 2d 400 (Fla. 1988).*

(n84)Footnote 180. *596 N.Y.S.2d 535, 536* (App. Div.), *leave app. denied, 622 N.E.2d 306 (N.Y. 1993).*

(n85)Footnote 181. *Wallis v. Luman, 625 P.2d 759, 767 (Wyo. 1981).*

(n86)Footnote 182. *Sprinkle v. American Mobilephone Paging, Inc., 525 So. 2d 1353, 1356 (Ala. 1988).*

(n87)Footnote 183. *Lago v. Guerrette, 592 A.2d 939, 942 (Conn. 1991).*

(n88)Footnote 184. *In re Real Estate of Marta, 672 A.2d 984, 986 (Del. 1996).*

(n89)Footnote 185. *Wild River Adventures, Inc. v. Board of Trustees, 812 P.2d 344, 346-347 (Mont. 1991)* (commonly refers to existing easements, liens and real covenants).

(n90)Footnote 186. *Id.*

(n91)Footnote 187. *E.g., Heigert v. Londell Manor, Inc., 834 S.W.2d 858, 867-868 (Mo. App. 1992)* (must ascertain intent of writer; surrounding circumstances show "subject to" resulted in created appurtenant easement by reservation); *Beebe v. Swerda, 793 P.2d 442, 444-446 (Wash. App. 1990)* (interpreting other language surrounding "subject to" to find creation of an easement).

(n92)Footnote 188. *Aszmus v. Nelson, 743 P.2d 377, 379 (Alaska 1987)* (court remands for further evidence on donor intent).

(n93)Footnote 189. *Seccombe v. Weeks, 767 P.2d 276, 280 n.1 (Idaho App. 1989)* (imploring practitioners creating interests by reservation or exception "to clarify the language used by expressing simply the type and extent of the servitude sought and thus avoid doubt as to what the parties intended").

(n94)Footnote 190. *Tipperman v. Tsiatso, 964 P.2d 1015, 1019 (Ore. 1998)* (rule of last resort, when other rules for interpreting easements, like surrounding circumstances, have not resolved ambiguities)..

(n95)Footnote 191. *Pickens v. Kemper, 847 P.2d 648, 650-651 (Colo. App. 1993)* (here deeds set width and legal description of easement's exact dimensions, not merely a right of way "over" a strip). Where, by contrast, the description of the servient estate in the grant of an easement is not sufficient to encumber "a specific servient estate" it may fail to satisfy the *Statute of Frauds. Berg v. Ting, 886 P.2d 564, 569 (Wash. 1995).* An insufficient description of the dominant estate may result in a court's refusal to enforce an express easement. *Branch v. Occhionero, 681 A.2d 306, 309-310 (Conn. 1996); Oakes v. Hattabaugh, 631 N.E.2d 949, 951-952 (Ind. App. 1994)* (instrument should describe with reasonable certainty easement created and dominant and servient tenements), *transfer denied* (Ind. 10/6/94).

(n96)Footnote 192. *Urbaitis v. Commonwealth Edison, 575 N.E.2d 548, 552 (Ill. 1991).*

(n97)Footnote 193. *Lincoln Sav. and Loan Ass'n v. State, 768 P.2d 733, 735* (Colo. App. 1988, *cert. denied* Feb. 13, 1989) (*en banc*).

(n98)Footnote 194. *Hartman v. J & A Dev. Co., 672 S.W.2d 364, 365 (Mo. App. 1984); Meyerink v. Northwestern Pub. Serv. Co., 391 N.W.2d 180, 182 (S.D. 1986)* (right of way "usually indicates" only an easement).

(n99)Footnote 195. *Homan v. Hutchison, 817 S.W.2d 944, 949 (Mo. App. 1991).*

(n100)Footnote 196. *Machado v. Southern Pac. Transp. Co., 284 Cal. Rptr. 560, 564 (App.1991)* (distinguishing use of term as limiting the interest conveyed and as merely expressing the purpose for making the grant).

(n101)Footnote 197. *American Trading Real Estate Prop., Inc. v. Town of Trumbull, 574 A.2d 796, 797 (Conn. 1990); Lincoln Sav. and Loan Ass'n v. State, 768 P.2d 733, 735* (Colo. App. 1988, *cert. denied*, Feb. 13, 1989) (*en banc*) (strip, piece, parcel or tract of land without language limiting use suggests fee).

(n102)Footnote 198. *Wylie v. Tull, 769 S.W.2d 409, 411 (Ark. 1989).*

(n103)Footnote 199. *Safeco Title Ins. v. Citizens & Southern Nat'l Bank, 380 S.E.2d 477, 479 (Ga. App. 1989).*

(n104)Footnote 200. *See, e.g., State Dep't of Rds. v. Union Pac. R.R. Co., 490 N.W.2d 461 (Neb. 1992).*

(n105)Footnote 201. *Reikofski v. Bodwell, 529 N.W.2d 531, 534 (Neb. 1995).*

(n106)Footnote 202. *Id.* at 467, *citing* Restatement of Property § 45 at 133 (1936).

(n107)Footnote 203. *Buhl v. U.S. Sprint Commun. Co., 840 S.W.2d 904, 907 (Tenn. 1992)* (in case of ambiguity, intent to be in light of circumstances; "right of way" generally is mere easement).

(n108)Footnote 204. *Hefty v. All Other Members of the Certified Settlement Class, 680 N.E.2d 843, 854-855 (Ind. 1997).* For application *compare Tazian v. Cline, 686 N.E.2d 95, 98 (Ind. 1997)* (holding "strip of land" to be fee interest) *with CONRAIL v. Lewellen, 682 N.E.2d 779, 782 (Ind. 1997)* (deed of right of way along with language referring to "Land, Right of way and Right of drainage for its Railway" granted the railroad an easement).

(n109)Footnote 205. *Hefty, 680 N.E.2d at 855* (citations omitted).

(n110)Footnote 206. *Nature Conservancy v. Kolb, 853 S.W.2d 864, 869 (Ark. 1993)* (*citing Coleman v. Missouri Pac. R.R., 745 S.W.2d 622, 623 (Ark. 1988)* (general rule that if purports to convey right of way, conveys only easement in perpetuity for railroad purposes)).

(n111)Footnote 207. *Macon-Bibb County Indus. Auth. v. Central of Ga. R.R., 466 S.E.2d 855 (Ga. 1996)* (no contractual right or easement to continued service); *City of Louisville v. Louisville Scrap Material Co., 932 S.W.2d 352 (Ky 1996)* (city regaining ownership of easement need not supply rail service). *But see C&G, Inc. v. Rule, 25 P.3d 76, 80 (Idaho 2001)* (absent language about purpose or otherwise limiting conveyance, courts will construe as fee simple).

(n112)Footnote 208. *Id.* at 868-869 (if intent ascertainable from four corners, will be effected).

(n113)Footnote 209. *Smith v. Smith, 622 A.2d 642, 647-648 (Del. 1993).*

(n114)Footnote 210. *Buhl v. U.S. Sprint Commun. Co., 840 S.W.2d 904, 908 (Tenn. 1992).*

(n115)Footnote 211. *Coleman v. Missouri Pac. R.R., 745 S.W.2d 622, 624 (Ark. 1988).*

(n116)Footnote 212. *Nature Conservancy v. Kolb, 853 S.W.2d 864, 869-870 (Ark. 1993); Urbaitis v. Commonwealth Edison, 575 N.E.2d 548, 552-554 (Ill. 1991)* (no per se rule that term "right of way" negates possibility that fee title conveyed; references to right of way located the land upon which rail bed was to be built, did not limit the estate).

(n117)Footnote 213. *Urbaitis v. Commonwealth Edison, 575 N.E.2d 548, 552 (Ill. 1991).*

(n118)Footnote 214. *Union Pac. R.R. Co. V. Ethington Family Trust, 50 P.3d 450, 453 (Idaho 2002).*

(n119)Footnote 215. *McClure v. England, 2002 Iowa App. LEXIS 1066,* *3-*4 (Iowa App. October 16, 2002).

(n120)Footnote 216. *Faulkenberry v. Norfolk S. Ry., 563 S.E.2d 644, 645-648 (S.C. 2002)* (citing 1845 S.C. Acts No. 2945).

(n121)Footnote 217. *Little Miami, Inc. v. Wisecup, 468 N.E.2d 935, 937-938 (Ohio App. 1984).*

(n122)Footnote 218. *Moss v. Williams, 822 So. 2d 392, 396 (Ala. 2001);* similarly, *C&G, Inc. v. Rule, 25 P.3d 76, 80 (Idaho 2001).*

(n123)Footnote 219. Moss, at *17.

(n124)Footnote 220. *Lawson v. State, 730 P.2d 1308 (Wash. 1986);* this was the dispute in the *Nature Conservancy* case in notes 175-176, *supra*, and accompanying text.

(n125)Footnote 221. National Trails Sys. Act, *16 U.S.C. §§ 1241*-1251 (1988).

(n126)Footnote 222. *Presault v. I.C.C., 494 U.S. 1 (1990)* (holding that property owners had failed to use Tucker Act remedy; therefore, premature to argue Trails Act taking without compensation).

(n127)Footnote 223. *Presault v. United States, 27 Fed. Cl. 69 (1992).*

(n128)Footnote 224. *Preseault v. United States, 100 F.3d 1525 (Fed. Cir. 1996), citing* this chapter.

(n129)Footnote 225. *Id. at 1542-1544.*

(n130)Footnote 226. *Id. at 1552.*

(n131)Footnote 227. *Chevy Chase Land Co. v. United States, 733 A.2d 1055, 1072-1080 (Md. 1999)* (holding rails to trails to be within scope of easement and there to have been no abandonment of the easement). The court states that rights of way are in effect "public highways that must conform in their use to new modes of transportation so long as they are reasonable and no more burdensome to the servient estate." *Id. at 1080.*

(n132)Footnote 228. *Glosemeyer v. United States, 45 Fed. Cl. 771, 2000 U.S. Claims LEXIS 11,* *17-*29 n.17 (Fed. Cl. 2000).

(n133)Footnote 229. *E.g., Grantwood Village v. Missouri Pac. R.R., 95 F.3d 654 (8th Cir. 1996)* (ICC's authorization of trails use precludes finding of abandonment), *cert. denied, 117 S. Ct. 1082 (U.S. 1997); Birt v. Surface Transp. Bd., 90 F.3d 580 (D.C. Cir. 1996)* (turning back challenge to timing of ICC action).

(n134)Footnote 230. *Wangen v. Kecskes, 845 P.2d 721, 725 (Mont. 1993); Mumaugh v. Diamond Lake Area Cable T.V., 456 N.W.2d 425, 430 (Mich. App. 1990).*

(n135)Footnote 231. *Kuhlman v. Rivera, 701 P.2d 982, 985 (Mont. 1985). See also Kitchen v. Kitchen, 641 N.W.2d 245, 249 (Mich. 2002)* (licenses not interests in land, and thus not bound by the requirements of the statute of frauds).

(n136)Footnote 232. Restatement of Property § 512 (1944).

(n137)Footnote 233. *Id.* at § 514.

(n138)Footnote 234. *Id.* at § 512 cmt. c.

(n139)Footnote 235. *Wangen v. Kecskes, 845 P.2d 721, 725 (Mont. 1993); Champaign Nat'l Bank v. Illinois Power Co., 465 N.E.2d 1016, 1019 (Ill. App. 1984).*

(n140)Footnote 236. *Wangen v. Kecskes, 845 P.2d 721, 725 (Mont. 1993).*

(n141)Footnote 237. *Griffith v. Montgomery County, 470 A.2d 840, 846* (Md. App.), *cert. denied, 479 A.2d 373 (Md. 1984),* and *cert. denied, 469 U.S. 1191 (1985).*

(n142)Footnote 238. *Weir v. Consolidated Rail Corp., 465 N.E.2d 1341, 1345 (Ohio 1983).*

(n143)Footnote 239. *Kitchen v. Kitchen, 641 N.W.2d 245, 250* (Mich. 2002.

(n144)Footnote 240. *Quality Discount Mkt. Corp. v. Laconia Planning Bd., 571 A.2d 271, 274 (N.H. 1990).*

(n145)Footnote 241. *New York State Elec. & Gas Corp. v. Aasen, 550 N.Y.S.2d 223, 226 (App. Div. 1990).*

(n146)Footnote 242. *Id.*

(n147)Footnote 243. *See* § 82.08(d)(2), *infra* on the effect of the recording acts on the validity or enforceability of conveyances of land.

(n148)Footnote 244. *Jones v. Fuller, 856 S.W.2d 597, 603 (Tex. App. 1993).*

(n149)Footnote 245. *Department of Transportation v. Humphries, 496 S.E.2d 563, 567-568 (N.C. 1998)* (as "pure race" state, North Carolina focuses on recordation above everything else).

(n150)Footnote 246. *Jones, 856 S.W.2d at 603.*

(n151)Footnote 247. *Tan Corp. v. Johnson, 555 N.W.2d 613, 616-617 (S.D. 1996)* (observation of actual use enough to give notice of unrecorded driveway easement).

(n152)Footnote 248. *Wild v. Constantini, 615 N.E.2d 557, 560 (Mass. 1993)* (generally "no easement can pass as appurtenant affecting registered land as the servient estate, which is not disclosed on its title... .," though there is an exception where there is actual knowledge).

(n153)Footnote 249. *Id. at 560-61.*

(n154)Footnote 250. *See, e.g., Bode v. Bode, 494 N.W.2d 301, 304 n.1 (Minn. App. 1992)* (court has, in dicta, used easement by necessity interchangeably with easement by implication).

(n155)Footnote 251. *Thompson v. E.I.G. Palace Mall, LLC, 657 N.W.2d 300, 305 (S.D. 2003)* (distinguishing between degrees of necessity required).

(n156)Footnote 252. *See* Chapters 74 and 81, *infra* (for a discussion of rules for eminent domain).

(n157)Footnote 253. *Hickey v. Town of Burrillville, 713 A.2d 781, 785-786 (R.I. 1998)* (measure by what condemnor can do and not by what he intends to do).

(n158)Footnote 254. Restatement (Third), Property (Servitudes) § 2.18 cmt. h & Reporter's Note (2000). § 2.18 cmt. g & Reporter's Note at 148-149 (Tent. Draft No. 3, 1993).

(n159)Footnote 255. *Alemany v. Commissioner of Transp., 576 A.2d 503 (Conn. 1990).*

(n160)Footnote 256. *Mapco, Inc. v. Williams, 581 S.W.2d 402 (Mo. App. 1979).*

(n161)Footnote 257. *Sanitary & Improve. Dist. No. 1 v. Nebraska Pub. Power Dist., 573 N.W.2d 460, 465-467 (Neb. 1998)* (*citing* Neb. Rev. Stat. §§ 70-301, 70-670); *Montana Power Co. v. Burlington N. R.R., 900 P.2d 888, 891 (Mont. 1995)* (easement for power lines) (*quoting* Mont. Code Ann. § 70.30.102(11)).

(n162)Footnote 258. *Id.* at 405 (before the process of condemnation takes place there is a trespass for which damages will be due, but the condemnor is shielded from ejectment. *Id.* at 406-407).

(n163)Footnote 259. *E.g., Sorenson v. Czinger, 852 P.2d 1124, 1127 (Wash. App. 1993)* (affirming right of access across neighbor's land; if value of burdened land decreases too much, purchase at fair market value may be required), *rev. denied, 866 P.2d 40 (Wash. 1993). Reece v. Smith, 594 S.E.2d 654 (Ga. App. 2004)* (landlocked landowners had a right to an easement across neighboring land to a public road).

(n164)Footnote 260. *Hooks v. George County, 748 So. 2d 678, 682 (Miss. 1999)* (remanded on necessity question).

(n165)Footnote 261. *In re Cater, 772 So. 2d 1117, 1120 (Ala. 2000),* (*quoting Southern Rwy. v. Hall, 100 So. 2d 722, 725 (Ala. 1957), quoting State ex rel. Carlson v. Superior Court, 181 P. 689, 691 (Wash. 1919)).*

(n166)Footnote 262. *Roberts v. Allison, 836 S.W.2d 185, 188 (Tex. App. 1992).*

(n167)Footnote 263. *Prospect Dev. Co. v. Bershader, 515 S.E.2d 291 (Va. 1999).*

(n168)Footnote 264. *Kephart v. Portmann, 855 P.2d 120, 123-124 (Mont. 1993)* (plaintiffs' actions in representing to defendants that defendants had superior right in ditch, plaintiffs' knowledge of that superior right shown in documents, that defendants did not know that plaintiffs would thirty years later deny that right, plaintiffs longtime permitting defendants to use the ditch, and defendants' action in reliance by expending money on ditch estopped plaintiffs from denying defendants' rights). Where, conversely, there is no oral agreement or its equivalent, there is no easement by estoppel. *Wayt v. Buerkel, 875 P.2d 499, 505* (Or. App.) (no easement by estoppel for delivery of water through defendant's property), adhered to as modified, *876 P.2d. 868 (Or. App. 1994).*

(n169)Footnote 265. *New England Continental Media, Inc. v. Town of Milton, 588 N.E.2d 1382, 1384-1385 (Mass. App. 1992).*

(n170)Footnote 266. *Catalano v. Woodward, 617 A.2d 1363, 1367 (R.I. 1992)* (*quoting Kenyon v. Nichols, 1 R.I. 411, 414 (1851)).* The easements would have no legal existence because one may not hold an easement over one's own land. *See, e.g., id.* at 1367 (cannot create easement in land "unified in the possession of one owner").

(n171)Footnote 267. *See* § 60.03(b)(4)(i), *infra* (Previously existing "servitude" - the Quasi-easement).

(n172)Footnote 268. *Robinson v. Maine Cent. R.R., 623 A.2d 626, 627 (Me. 1993).*

(n173)Footnote 269. *Wangen v. Kecskes, 845 P.2d 721, 724 (Mont. 1993).*

(n174)Footnote 270. *Hallock v. Wear, 551 N.E.2d 712, 718 (Ill. App. 1990), app. denied, 561 N.E.2d 691 (Ill. 1990).*

(n175)Footnote 271. *Carter v. County of Hanover, 496 S.E.2d 42, 45-46 (Va. 1998).*

(n176)Footnote 272. *Proper v. Greager, 827 P.2d 591, 593 (Colo. App. 1992)* (*quoting Bromley v. Lambert & Sons, 752 P.2d 595, 596 (Colo. App. 1988)).*

(n177)Footnote 273. *Hillary Corp. v. United States Cold Storage, Inc., 550 N.W.2d 889, 899 (Neb. 1996).*

(n178)Footnote 274. *See infra*, § 60.03(b)(5)(iii) at p. 434.

(n179)Footnote 275. *Granite Props., Ltd. P'ship v. Manns, 512 N.E.2d 1230, 1236 (Ill. 1987); Hallock v. Wear, 551 N.E.2d 712, 718 (Ill. App. 1990)* (same); *Proper v. Greager, 827 P.2d 591, 593 (Colo. App. 1992)* (similar listing). *See also United States v. Srnsky, 271 F.3d 595, 599 (4th Cir. 2001)* (*citing* this section).

(n180)Footnote 276. *Mann-Hoff v. Boyer, 604 A.2d 703, 706, 707 (Pa. Super. 1992), app. denied, 613 A.2d 560 (Pa. 1992)* (Restatement and traditional approaches coexist in Pennsylvania). *See also Epstein Family P'ship v. K-Mart Corp., 13 F.3d 762, 772-773 (3d Cir. 1994)* (refusing to select between competing Pennsylvania tests).

(n181)Footnote 277. *Kayfirst Corp. v. Washington Term. Co., 813 F. Supp. 67, 72 (D.D.C. 1993).*

(n182)Footnote 278. *Bovi v. Murray, 601 A.2d 960, 962 (R.I. 1992)* ("without unity of title, an implied easement cannot exist"; noting that principle dates back to at least 1928 in state).

(n183)Footnote 279. *O'Connell v. Larkin, 532 A.2d 1039, 1042-1043 (Me. 1987).*

(n184)Footnote 280. *Patterson v. Buffalo Nat. River, 76 F.3d 221 (8th Cir. 1996)* (construing Arkansas law).

(n185)Footnote 281. *E.g., Koestel v. Buena Vista Pub. Serv. Corp., 676 P.2d 6, 8 (Ariz. App. 1984)* (dispute over easement for water pipe over lots severed by foreclosure and sheriff's deed; remanding on issue whether necessity requirement was met).

(n186)Footnote 282. *Plagge v. Gambino, 570 S.W.2d 106, 109 (Tex. App. 1978)* (finding evidence did not support easement by implication).

(n187)Footnote 283. *E.g., Butler v. Lee, 774 P.2d 1150 (Utah App. 1989)* (easement implied for benefit of lot retained by wife).

(n188)Footnote 284. *See Van Sandt v. Royster, 83 P.2d 698 (Kan. 1938)* (a popular casebook case to demonstrate the easement implied from previous use). Eerily similar to *Van Sandt is Diener v. Ratterree, 945 S.W.2d 406, 408 (Ark. App. 1997),* involving this time buried lines leading to a septic tank. Where the sewer line was considered apparent even though invisible in Van Sandt because sewage had to go somewhere, so here the appellant was on notice because he "had owned land adjacent to the property in question," and knew there had to be septic lines "because there were no sewer lines in the area."

(n189)Footnote 285. *Manitowoc Remanufacturing v. Vocque, 819 S.W.2d 275, 278-279 (Ark. 1991); Monte v. Di Marco, 596 N.Y.S.2d 253, 254* (App. Div.), *leave app. denied, 619 N.E.2d 661 (N.Y. 1993)* ("apparently permanent and obvious servitude" on one part of estate for benefit of another).

(n190)Footnote 286. *Robinson v. Maine Cent. R.R., 623 A.2d 626, 627 (Me. 1993).*

(n191)Footnote 287. *Id .*

(n192)Footnote 288. *See, e.g., Rowland v. Woods, 388 S.E.2d 684, 685 (Ga. 1990).*

(n193)Footnote 289. *Proper v. Greager, 827 P.2d 591, 593 (Colo. App. 1992).*

(n194)Footnote 290. *George v. Goshgarian, 189 Cal. Rptr. 94, 97 (App. 1983).*

(n195)Footnote 291. *Butler v. Lee, 774 P.2d 1150, 1152-1153 (Utah App. 1989).*

(n196)Footnote 292. *Peacock v. Schroeder, 846 S.W.2d 905, 910 (Tex. App. 1993).*

(n197)Footnote 293. *Wangen v. Kecskes, 845 P.2d 721, 724 (Mont. 1993).*

(n198)Footnote 294. *Frederick v. Consolidated Waste Servs., Inc., 573 A.2d 387, 389-390 (Me. 1990)* (circumstances at time of conveyance denote grantor's intent to subject the retained land to an easement); *O'Connell v. Larkin, 532 A.2d 1039, 1042-43 (Me. 1987).*

(n199)Footnote 295. *Monte v. Di Marco, 596 N.Y.S.2d 253, 254 (1993)* (necessity need only be reasonable, not absolute); *Cheever v. Graves, 592 N.E.2d 758, 763 (Mass. App. 1992)* ("reasonably necessary for the enjoyment of the land retained"); *McConnell v. Satterfield, 576 N.E.2d 1300, 1302 (Ind. App. 1991); Hallock v. Wear, 551 N.E.2d 712, 719-720 (Ill. App. 1990)* (level of necessity required is "reasonable necessity").

(n200)Footnote 296. *Koestel v. Buena Vista Pub. Serv. Corp., 676 P.2d 6, 9 (Ariz. App. 1984).*

(n201)Footnote 297. *O'Connell v. Larkin, 532 A.2d 1039, 1042-43 (Me. 1987).*

(n202)Footnote 298. *Evanik v. Janus, 458 N.E.2d 962, 969 (Ill. App. 1983).*

(n203)Footnote 299. *Koehler v. Price, 562 N.E.2d 370, 374 (Ill. App. 1990).*

(n204)Footnote 300. *Carter v. County of Hanover, 496 S.E.2d 42, 45-46 (Va. 1998).*

(n205)Footnote 301. *Mann-Hoff v. Boyer, 604 A.2d 703, 706 (Pa. Super. 1992), app. denied, 613 A.2d 560 (Pa. 1992)* (*quoting Burns Mfg. Co., Inc. v. Boehm, 356 A.2d 763, 767 (Pa. 1976))* (easement by implication "notwithstanding that the easement is not essential for the beneficial use of the property"). The *Mann-Hoff* court interprets this in light of other Pennsylvania opinions to mean that the easement does not require a showing of absolute necessity but that the claimed easement be convenient or beneficial to the dominant estate. *Id.* at 708 n.4.

(n206)Footnote 302. *Proper v. Greager, 827 P.2d 591, 593 (Colo. App. 1992)* (a true easement having permanent duration, to be distinguished from easement by necessity which lasts only so long as the necessity does).

(n207)Footnote 303. *Norken Corp. v. McGahan, 823 P.2d 622, 631 (Alaska 1991)* (That there is a convenient alternate access at time of court's ruling "does not resolve the question of whether an implied easement arose in 1967, the date of ... severance").

(n208)Footnote 304. *E.g., Beck v. Mangels, 640 A.2d 236, 243-244 (Md. App. 1994), cert. dismissed, 655 A.2d 370 (Md. 1995).* Where, however, there is a simultaneous conveyance of both servient and dominant parts of a piece of land, "the more liberal implied grant rule applies and not the more strict implied reservation test." *Id. at 243. See also Barrett v. Hill, 1999 Tenn. App. LEXIS 879,* *10 (Tenn. App. 1999) (*citing* this section as identifying an easement by implication for underground sewer lines as a "recognized application" of general rule).

(n209)Footnote 305. *See* Restatement of Property § 476 and cmt. c (1944).

(n210)Footnote 306. *Mann-Hoff v. Boyer, 604 A.2d 703, 707 (Pa. Super. 1992), app. denied, 613 A.2d 560 (Pa. 1992)* (*citing* Restatement of Property § 476 (1944). *Rank v. Frame, 522 N.W.2d 848, 852 (Iowa App. 1994)* (applying Restatement factors); *Wayt v. Buerkel, 875 P.2d 499, 504-505* (Or. App.) (same), *adhered to as modified, 876 P.2d 868 (Or. App. 1994).*

(n211)Footnote 307. *Bowers v. Andrews, 557 A.2d 606, 609 (Me. 1989).*

(n212)Footnote 308. *Morrell v. Rice, 622 A.2d 1156, 1158 (Me. 1993).*

(n213)Footnote 309. *Id.*

(n214)Footnote 310. Restatement of Property § 476 cmt. f (1944).

(n215)Footnote 311. *Herrera v. Roman Catholic Church, 819 P.2d 264, 267 (N.M. App. 1991).*

(n216)Footnote 312. *Sapp v. General Dev. Corp., 472 So. 2d 544, 545-546 (Fla. App. 1985).*

(n217)Footnote 313. *Broadhead v. Terpening, 611 So. 2d 949, 953 (Miss. 1992). Enzor v. Rasberry, 648 So. 2d 788 (Fla. App. 1994).*

(n218)Footnote 314. *E.g., Wimberly v. Lake Weir Yacht Club Ass'n, 480 So. 2d 224, 224 n.1 (Fla. App. 1985)* (*quoting* Fla. Stat. § 704.01).

(n219)Footnote 315. *Sapp v. General Dev. Corp., 472 So.2d 544, 545 (Fla. App. 1985)* (*citing* Fla. Stat. § 704.01(2).

(n220)Footnote 316. *Mersac v. National Hills Condominium Ass'n, 480 S.E.2d 16, 18 (Ga. 1997)* (affirming denial of private way of necessity).

(n221)Footnote 317. *E.g., Big Sky Hidden Village Owners Ass'n v. Hidden Village, Inc., 915 P.2d 845, 850 (Mont. 1996)* (strong public policy against shutting off a tract of land, rendering it unusable); *Ghen v. Piasecki, 410 A.2d 708, 712 (N.J. Super. App. Div. 1980)* ("[M]utual intent is not an essential element in the establishment of a way of necessity. Such an easement is created as a result of a strong public policy that no land be made inaccessible or useless").

(n222)Footnote 318. *Traders, Inc. v. Bartholomew, 459 A.2d 974, 978 (Vt. 1983)* (*quoting Howley v. Chaffee, 93 A. 120, 122 (Vt. 1915).*

(n223)Footnote 319. *Lichty v. Sickels, 197 Cal. Rptr. 137, 139 (App. 1983)* (interior quotes omitted).

(n224)Footnote 320. *Lichty, 197 Cal. Rptr. at 139-140* (interior quotes omitted).

(n225)Footnote 321. *Granite Prop. Ltd. P'ship v. Manns, 512 N.E.2d 1230, 1236 (Ill. 1987).*

(n226)Footnote 322. *E.g., Carver v. Jones, 773 S.W.2d 842, 844 (Ark. App. 1989)* (easement by necessity either granted or reserved by severance).

(n227)Footnote 323. *Mersac, Inc. v. National Hills Condominium Ass'n, 480 S.E.2d 16, 18 (Ga. 1997).*

(n228)Footnote 324. *Cieszko v. Clark, 374 S.E.2d 456, 459-460 (N.C. App. 1988).*

(n229)Footnote 325. *Bode v. Bode, 494 N.W.2d 301, 303-304 (Minn. App. 1992).*

(n230)Footnote 326. *Broadhead v. Terpening, 611 So. 2d 949, 954 (Miss. 1992).*

(n231)Footnote 327. *Cieszko v. Clark, 374 S.E.2d 456, 460-461 (N.C. App. 1988)* (laches requires unreasonable delay that is injurious or prejudicial to the party invoking defense; remand for further facts).

(n232)Footnote 328. *Herrera v. Roman Catholic Church, 819 P.2d 264, 267 (N.M. App. 1991).*

(n233)Footnote 329. *Myers v. Stickley, 375 S.E.2d 595, 598 (W. Va. 1988).*

(n234)Footnote 330. Restatement of Property § 476 & cmt. g (1944) (if property is useless without the easement nothing short of explicit language in the conveyance negating an easement will prevent it from being implied; if the property has uses without the easement, "the implication becomes subject to control by other circumstances." *Id.*, cmt. g at 2984).

(n235)Footnote 331. *Hereford v. Gingo-Morgan Park, 551 So. 2d 918, 921 (Ala. 1989).*

(n236)Footnote 332. *Wolfe v. Belzer, 585 N.Y.S.2d 98, 99 (App. Div. 1992).*

(n237)Footnote 333. *Kennedy v. Bedenbaugh, 572 S.E.2d 452, 455 (S.C. 2002).*

(n238)Footnote 334. *Id.* (Citing cases back to 1860).

(n239)Footnote 335. *State Dep't of Hwys. v. Denver & Rio Grande W. R.R., 757 P.2d 181, 183 (Colo. App. 1988), aff'd, 789 P.2d 1088 (Colo. 1990)* (noting that taking for private way of necessity is exception to state constitutional provision against land being taken for private use. Colo. Const. art. II, § 14).

(n240)Footnote 336. *Big Sky Hidden Village Owners Ass'n v. Hidden Village, Inc., 915 P.2d 845, 849-851 (Mont. 1996).*

(n241)Footnote 337. *E.g., Shpak v. Oletsky, 373 A.2d 1234, 1242 (Md. 1977)* (way of necessity not proven because foreclosed land had other outlet at time of severance).

(n242)Footnote 338. *Harris v. Greco, 318 S.E.2d 335, 339 (N.C. App. 1984).*

(n243)Footnote 339. *Peacock v. Schroeder, 846 S.W.2d 905, 910 (Tex. App. 1993).*

(n244)Footnote 340. *Schwab v. Timmons, 589 N.W.2d 1, 7-8 (Wis. 1999).*

(n245)Footnote 341. *Hereford v. Gingo-Morgan Park, 551 So. 2d 918, 921 (Ala. 1989).*

(n246)Footnote 342. *U.S. Cablevision Corp. v. Theodoreu, 596 N.Y.S.2d 485, 488 (App. Div. 1993).*

(n247)Footnote 343. *Myers v. Stickley, 375 S.E.2d 595, 598 (W. Va. 1988).*

(n248)Footnote 344. *Morrell v. Rice, 622 A.2d 1156, 1159-1160 (Me. 1993).*

(n249)Footnote 345. *Amodeo v. Francis, 681 A.2d 462, 465-466 (Me. 1996).*

(n250)Footnote 346. *Schwab v. Timmons, 589 N.W.2d 1, 7-8 (Wis. 1999).*

(n251)Footnote 347. *Parker v. Putney, 492 S.E.2d 159, 162 (Va. 1997)* (*quoting Hancock v. Henderson, 202 A.2d 599, 602 (Md. 1964))* (the only public access to waterway was too far away to be convenient; river more like limited access road than public highway).

(n252)Footnote 348. *Lawson v. Hill, 396 N.E.2d 617, 627 (Ill. App. 1979)* (required speculating on uses in 1848 to see if property was really inaccessible on severance).

(n253)Footnote 349. Restatement of Property § 476 & cmt. g (1944) (necessity is "the circumstance that contributes most to the implication of an easement").

(n254)Footnote 350. *Hereford v. Gingo-Morgan Park, 551 So. 2d 918, 922 (Ala. 1989).*

(n255)Footnote 351. *Id* .

(n256)Footnote 352. *Broadhead v. Terpening, 611 So. 2d 949, 953 (Miss. 1992).*

(n257)Footnote 353. *See* notes 245-46, *supra* and accompanying text.

(n258)Footnote 354. *See* Ch. 87, *infra* (adverse possession).

(n259)Footnote 355. *Id.* If one has adversely possessed against less than a fee interest, *e.g.*, against a term of years or a life estate, the underlying fee ownership may remain with the reversioner.

(n260)Footnote 356. *Oakley Valley Stone, Inc. v. Alastra, 715 P.2d 935, 937-938 (Idaho 1985)* (most basic distinction between doctrines is that between possession and use.).

(n261)Footnote 357. Restatement (Third), Property (Servitudes) § 2.17 cmt. b (2000). § 2.16 cmt. b at 5 (Tent. Draft No. 3, 1993).

(n262)Footnote 358. *Id.*

(n263)Footnote 359. *Chittenden v. Waterbury Center Community Church, 726 A.2d 20, 27-30 (Vt. 1998).*

(n264)Footnote 360. *Cincotta v. Jerome, 717 A.2d 639, 639 (R.I. 1998).*

(n265)Footnote 361. Negative easements can only be express; generally, they cannot be created by implication or prescription. Restatement of Property § 458 cmt. e (1944). *See* §§ 60.02(e)(1)-60.02(e)(5), *supra*.

(n266)Footnote 362. *Preshlock v. Brenner, 362 S.E.2d 696, 698 (Va. 1987)* (*citing Haines v. Galles, 303 P.2d 1004, 1006 (Wyo. 1956)).*

(n267)Footnote 363. *McGray v. Lamontagne, 623 A.2d 161, 163 (Me. 1993).*

(n268)Footnote 364. *Anneberg v. Kurtz, 28 S.E.2d 769 (Ga. 1944).*

(n269)Footnote 365. *Nagel v. Emmons County, 474 N.W.2d 46 (N.D. 1991)* (*citing* statute); *Miiller v. County of Davison, 452 N.W.2d 119, 121 (S.D. 1990)* (*citing* statute); *National Props. Corp. v. Polk County, 386 N.W.2d 98, 105 (Iowa 1986).*

(n270)Footnote 366. *Mildenberger v. Galbraith, 815 P.2d 130, 134-135 (Mont. 1991).*

(n271)Footnote 367. *Miller v. Lutheran Conference & Camp Ass'n, 200 A. 646 (Pa. 1938).*

(n272)Footnote 368. *Brooks, Gill & Co. v. Landmark Prop., 503 N.E.2d 983 (Mass. App. 1987).*

(n273)Footnote 369. *Kollmeyer v. Stupp Bros. Bridge & Iron Co., 824 S.W.2d 438 (Mo. App. 1991).*

(n274)Footnote 370. *Steiner v. County of Marshall, 568 N.W.2d 627, 631 (S.D. 1997).*

(n275)Footnote 371. An avigation easement is an easement of right to navigation in airspace over designated land. *County of Westchester v. Town of Greenwich, 629 A.2d 1084, 1085 n.1 (Conn. 1993)* (*citing Sticklen v. Kittle, 287 S.E.2d 148, 153 (W. Va. 1981)).* Cases recognizing prescriptive avigation easements include: *Baker v. Burbank-Glendale-Pasadena Airport Auth., 270 Cal. Rptr. 337, 340 (App. 1990); Christie v. Miller, 719 P. 2d 68, 70 (Or. App. 1986)* (same; planes not continously taking off and landing not sufficient to defeat prescription); *contra, Sticklen v. Kittle, 287 S.E.2d 148, 155 (W. Va. 1981)* (no recognition of prescriptive avigation easement). Answering a question certified to it by the Second Circuit, the Connecticut Supreme Court refused to decide whether a prescriptive avigation easement was possible in the state because the facts of the particular case did not support prescription. *County of Westchester v. Town of Greenwich, 629 A.2d 1084 (Conn. 1993).* Westchester County's effort to gain such an easement, therefore, failed in the *Second Circuit. County of Westchester v. Commissioner of Transp., 9 F.3d 242 (2d Cir. 1993).* Avigation easements are in question only when flights are low enough to interfere significantly with the owner's use of property. *Baker, 270 Cal. Rptr. at 371* (noise, vibration, fumes, fuel particles and incovenience so interfere with the underlying property that it amounts to a taking).

(n276)Footnote 372. *E.g., Bova v. Vinciguerra, 585 N.Y.S.2d 125, 127 (App. Div. 1992)* (one easement affirmative; because another proponent did not hold real property, she was "entitled to a prescriptive easement in gross and not appurtenant"); *Miller v. Lutheran Conference & Camp Ass'n, 200 A. 646 (Pa. 1938)* (in gross swimming right).

(n277)Footnote 373. *Preshlock v. Brenner, 362 S.E.2d 697, 698 (Va. 1987).*

(n278)Footnote 374. *Hoffman v. Skewis, 668 P.2d 1311, 1313-1314 (Wash. App. 1983), rev. denied, 101 Wash. 2d 1001 (1984).*

(n279)Footnote 375. *City of Tonawanda v. Ellicott Creek Homeowners Ass'n, 449 N.Y.S.2d 116, 121-22 (App. Div. 1982).*

(n280)Footnote 376. *Price v. Eastham, 75 P.3d 1051, 1056-1057 (Alaska 2003)* (*citing* Alaska Stat. § 38.95.010).

(n281)Footnote 377. *Norfolk and W. Ry. v. Waselchalk, 421 S.E.2d 424, 425 (Va. 1992).*

(n282)Footnote 378. *Town of Deer Creek Rd. Dist. v. Hancock, 555 N.E.2d 1147-1149 (Ill. App. 1990)* (maintenance by public authorities is a strong indication road is public highway, *id*. at 571, 555 N.E.2d 1149). Similarly, the Maine Supreme Court states that the requirements for the creation of a public way "by prescriptive use parallel those for the creation of a prescriptive easement." *Stickney v. City of Saco, 770 A.2d 592, 601 (Me. 2001)* and must be proved by a preponderance of the evidence. Id.

(n283)Footnote 379. *Leffingwell Ranch v. Cieri, 916 P.2d 751, 755 (Mont. 1996)* (holding use was permissive) (citation omitted); *Swandal Ranch Co. v. Hunt, 915 P.2d 840, 844-845 (Mont. 1996)* (owner failed to show neighborly accommodation to show public use was permissive).

(n284)Footnote 380. *S.D. Warren Co. v. Vernon, 697 A.2d 1280, 1284 (Me. 1997)* (holding there to be private, but not public easement).

(n285)Footnote 381. *Lyons v. Baptist Sch. of Christian Training, 804 A.2d 364, 370 (Me. 2002).*

(n286)Footnote 382. *Town of Deer Creek, 555 N.E.2d at 1149-1150; S.D. Warren Co. v. Vernon, 697 A.2d 1280, 1284 (Me. 1997)* (test not frequency or number but use by people who are not separable from the public generally).

(n287)Footnote 383. *E.g., Steplock v. Board of County Comm'rs, 894 P.2d 599, 606 (Wyo. 1995).*

(n288)Footnote 384. *Floyd v. Board of Comm'rs, 52 P.3d 863, 869 (Idaho 2002)* (*citing* I.C. § 40-202(3)).

(n289)Footnote 385. The most significant difference is in exclusivity. As will be seen below, courts disagree over how exclusive must be the easement owner's use and, indeed, over the meaning of exclusivity within the easement context.

(n290)Footnote 386. *See* Ch. 87 (adverse possession).

(n291)Footnote 387. *C. & E. P'ship v. Donnelly, 367 S.E.2d 490, 492 (Va. 1988).*

(n292)Footnote 388. *Cardenas v. Kurpjuweit, 779 P.2d 414, 417 (Idaho 1989).*

(n293)Footnote 389. *Mahoney v. Devonshire, Inc., 587 A.2d 1146, 1148 (Md. App. 1991), cert. denied, 590 A.2d 159 (Md. App. 1991).*

(n294)Footnote 390. Restatement (Third) of Property (Servitudes) § 2.16 cmt. g at 16-17 (Tent. Draft No. 3, 1993).

(n295)Footnote 391. Restatement (Third) of Property (Servitudes) § 2.16 Reporter's Note, Requirements for Prescription at 40-42 (Tent. Draft No. 3, 1993).

(n296)Footnote 392. *Berger v. Colonial Parking, Inc., 1993 Del. Ch. LEXIS 95* at *7 (Del. Ch. June 9, 1993). *Unruh v. Tash, 896 P.2d 433, 435-436 (Mont. 1995).*

(n297)Footnote 393. *Charlebois v. Lobe-A Prop. Owners, Inc., 597 N.Y.S.2d 776, 778 (N.Y.A.D. 1993); Wechsler v. New York State Dep't of Envt'l Conserv., 597 N.Y.S.2d 507, 510* (App. Div.), *leave app. denied, 622 N.E.2d 306 (N.Y. 1993).* West Virginia follows the same standard. *Jamison v. Waldeck United Meth. Church, 445 S.E.2d 229, 232 (W. Va. 1994).*

(n298)Footnote 394. *Tamko Asphalt Prods., Inc. v. Arch Assocs., 830 S.W.2d 434, 438 (Mo. App. 1992).*

(n299)Footnote 395. *Rogers v. Moore, 603 N.W.2d 650, 657 (Minn. 1999)* (resisting call to adopt stricter standard).

(n300)Footnote 396. *Anderson v. Larsen, 34 P.3d 1085, 1089 (Idaho 2001).*

(n301)Footnote 397. *Palisades Sales Corp. v. Walsh, 459 A.2d 933, 936 (R.I. 1983).*

(n302)Footnote 398. *Reynolds v. Soffer, 459 A.2d 1027, 1030 (Conn. 1983)* (no presumption of permissive use); *Public Storage, Inc. v. Eliot St. Ltd. Pt'ship, 567 A.2d 389, 392 (Conn. App. 1989); Chaconas v. Meyers, 465 A.2d 379, 381-382 (D.C. 1983).*

(n303)Footnote 399. *Mastin v. Prescott, 444 A.2d 556, 558 (N.H. 1982).*

(n304)Footnote 400. *Berger v. Colonial Parking, Inc., 1993 Del. Ch. LEXIS 95* at *9 (Del. Ch. June 9, 1993).

(n305)Footnote 401. *Johnson v. Kaster, 637 N.W.2d 174, 178 (Iowa 2001)* (mere use does not constitute hostility or claim of right, but maintaining and improving land can).

(n306)Footnote 402. *Mecimore v. Cothren, 428 S.E.2d 470, 472* (N.C. App.) (driveway easement), *rev. denied, 435 S.E.2d 336 (N.C. 1993).*

(n307)Footnote 403. *Otay Water Dist. v. Beckwith, 3 Cal. Rptr. 2d 223, 225 (App. 1991).*

(n308)Footnote 404. *Glidden v. Belden, 684 A.2d 1306, 1317-1318 (Me. 1996).*

(n309)Footnote 405. *Tacke v. Wynia, 853 P.2d 87, 91 (Mont. 1993). Asche v. Land and Building Known as 64-29 232nd Street, 784 N.Y.S.2d 577 (2004)* (agreement between landowners rebutted a presumption of adversity necessary to establish an easement by prescription).

(n310)Footnote 406. *Carpenter-Union Hills Cem. Ass'n v. Camp Zoe, Inc., 547 S.W.2d 196, 200 (Mo. App. 1977). Jamison v. Waldeck United Meth. Church, 445 S.E.2d 229, 233 n.3 (W. Va. 1994); Sharp v. White, 749 So. 2d 41, 42-43 (Miss. 1999).*

(n311)Footnote 407. *Carr v. Constable, 470 S.E.2d 408, 412 (W. Va. 1996).*

(n312)Footnote 408. *Jurgensen v. New Phoenix Atl. Condo. Council of Unit Owners, 843 A.2d 865, 875 (Md. 2004)* (analogizing to tenants in common, where prescription cannot occur simply from use, but must include ouster).

(n313)Footnote 409. *Dieterich Int'l Truck Sales, Inc. v. J.S. & J. Services, Inc., 5 Cal. Rptr. 2d 388 (App. Div. 1992), rev. denied* (Cal. 1992).

(n314)Footnote 410. *Homan v. Hutchison, 817 S.W.2d 944, 950 (Mo. App. 1991).*

(n315)Footnote 411. *Mahoney v. Devonshire, Inc., 587 A.2d 1146, 1151 (Md. App. 1991), cert. denied, 590 A.2d 159 (Md. 1991).*

(n316)Footnote 412. *Norman Twp. v. E.T.I. Explosives Techs. Int'l, Inc., 587 N.E.2d 51, 53* (Ill. App.), *app. denied, 596 N.E.2d 630 (Ill. 1992).*

(n317)Footnote 413. *Rappold v. Durocher, 849 P.2d 1017, 1019 (Mont. 1993); Gault v. Bahm, 826 S.W.2d 875, 880 (Mo. App. 1992); Page v. Bloom, 584 N.E.2d 813, 815 (Ill. App. 1991); Naab v. Nolan, 327 S.E.2d 151, 152 (W. Va. 1985).*

(n318)Footnote 414. *Dowley v. Morency, 737 A.2d 1061, 1069 (Me. 1999)* (oral, written, or public notice).

(n319)Footnote 415. Restatement (Third) of Property § 2.16 cmt. g at 17 (Tent. Draft No. 3, 1993).

(n320)Footnote 416. *Id* .

(n321)Footnote 417. *E.g., West v. Slick, 326 S.E.2d 601, 610-611 (N.C. 1985)* ("permissive or with the owner's consent unless the contrary appears").

(n322)Footnote 418. *Chen v. Conway, 829 P.2d 1349, 1354 (Idaho 1992).*

(n323)Footnote 419. *Wechsler v. New York State Dep't of Envt'l. Conservation, 597 N.Y.S.2d 507, 510-511 (App. Div. 1993)* (proponent failed to prove owner aware of subsequent assertion of adverse right), *leave app. denied, 622 N.E.2d 306 (N.Y. 1993).*

(n324)Footnote 420. *Prazma v. Kaehne, 768 P.2d 586, 589 (Wyo. 1989).*

(n325)Footnote 421. Wilfon v. Cyril Hampel 1985 Trust, 781 P.2d 769, 771 (Nev. 1989) (neighbor's use of roadway established by landowner over the landowner's own land presumed permissive and result of neighborly accommodation by latter); *Vandervoort v. McKenzie, 412 S.E.2d 696, 698-699 (N.C. App. 1992).*

(n326)Footnote 422. *Keebler v. Harding, 807 P.2d 1354, 1358 (Mont. 1991).*

(n327)Footnote 423. *A.B. Cattle Co. v. Forgey Ranches, 943 P.2d 1184, 1188 (Wyo. 1997).*

(n328)Footnote 424. *Reynolds v. Soffer, 459 A.2d 1027, 1030 (Conn. 1983).*

(n329)Footnote 425. *Chaconas v. Meyers, 465 A.2d 379, 382 (D.C. 1983).*

(n330)Footnote 426. *Kokesh v. Running, 652 N.W.2d 790, 794 (S.D. 2002)* (*citing Kougi v. Curry, 44 N.W.2d 114, 117 (S.D. 1950).*

(n331)Footnote 427. *Weihl v. Wagner, 569 N.E.2d 297, 299 (Ill. App. 1991), app. denied, 575 N.E. 925 (Ill. 1991).*

(n332)Footnote 428. *Hunter v. Shields, 1998 Idaho 953 P.2d 588, 591 (Ida. 1998).*

(n333)Footnote 429. *Dieck v. Landry, 796 So. 2d 1004, 1008 (Miss. 2001).*

(n334)Footnote 430. *City of Tonawanda v. Ellicott Creek Homeowners Ass'n, 449 N.Y.S.2d 116, 119 (1982).*

(n335)Footnote 431. *Brocco v. Mileo, 565 N.Y.S.2d 602, 603-604 (1991), app. denied, 577 N.E.2d 1059 (N.Y. 1991),* and *reargument dismissed, 600 N.E.2d 621 (N.Y. 1992);* similarly Missouri in *Gault v. Bahm, 826 S.W.2d 875, 880 (Mo. App. Div. 1992)* (*quoting* a previous edition of this treatise).

(n336)Footnote 432. *Marshall v. Blair, 946 P.2d 975, 980-981 (Idaho 1997)* (presumption of permissive use rebutted).

(n337)Footnote 433. *Willis v. Holley, 925 P.2d 539 (Okla. 1996)* (initial use of road permissive) (citations omitted).

(n338)Footnote 434. *Homan v. Hutchison, 817 S.W.2d 944, 948 (Mo. App. 1991).*

(n339)Footnote 435. *Chaconas v. Meyers, 465 A.2d 379, 383 (D.C. 1983).*

(n340)Footnote 436. *Gault v. Bahm, 826 S.W.2d 875, 883 (Mo. App. 1992).*

(n341)Footnote 437. *Wechsler v. New York State Dep't of Envt'l Conserv., 597 N.Y.S.2d 507, 510 (App. Div.1993)* (proponent member of family partnership that owned bridge), *leave app. denied, 622 N.E.2d 306 (N.Y. 1993).*

(n342)Footnote 438. *E.g., Carpenter-Union Hills Cem. Ass'n v. Camp Zoe, Inc., 547 S.W.2d 196, 201-202 (Mo. App. 1977); Weihl v. Wagner, 569 N.E.2d 297, 299 (Ill. App. 1991), app. denied, 575 N.E.2d 925 (Ill. 1991).*

(n343)Footnote 439. *Martin v. Sun Pipeline Co., 666 A.3d 637, 640 (Pa. 1995).*

(n344)Footnote 440. *Lyons v. Baptist School, 804 A.2d 364, 372 (Me. 2002).*

(n345)Footnote 441. *Reynolds v. Soffer, 459 A.2d 1027, 1029 (Conn. 1983).*

(n346)Footnote 442. *Dethlefs v. Beau Maison Dev. Corp., 511 So. 2d 112, 117 (Miss. 1987).*

(n347)Footnote 443. *Chicago Steel Rule Die & Fabricators Co. v. Malan Constr. Co., 558 N.E.2d 341, 344 (Ill. App. 1990).*

(n348)Footnote 444. *Chaconas v. Meyers, 465 A.2d 379, 383 (D.C. 1983).*

(n349)Footnote 445. *Anderson v. Felten, 612 P.2d 216, 218 (Nev. 1980).*

(n350)Footnote 446. To make a claim under color of title, simply put, means to claim by authority of a deed or another otherwise effective document that turns out to be defective, *e.g.*, forged or lacking some other feature required by the jurisdiction. *See* § 87.12, *infra* (adverse possession under color of title).

(n351)Footnote 447. *Prazma v. Kaehne, 768 P.2d 586, 589 (Wyo. 1989)* (*citing Koontz v. Town of Superior, 746 P.2d 1264, 1268 (Wyo. 1987)).*

(n352)Footnote 448. *See* Ch. 87, *infra*, for a discussion of adverse possession.

(n353)Footnote 449. *Sparks v. Douglas County, 695 P.2d 588-590 (Wash. App. 1985).*

(n354)Footnote 450. *Higdon v. Davis, 337 S.E.2d 543, 548-549 (N.C. 1985)* (the only way the claimants could reach seven years would be to include the deed preceding theirs, and tack the time periods together, but the previous deed contained no reference to an easement and so could not be used to claim an easement under color of title).

(n355)Footnote 451. *Kitzinger v. Gulf Power Co., 432 So. 2d 188, 191 n.2 (Fla. App. 1983). See also Jones v. Johnson, 827 So. 2d 768 (Ala. 2002)* (distinguishing between ordinary prescription with 20-year limit and "adverse use for the statutory period" of 10 years where there is color of title and payment of taxes).

(n356)Footnote 452. Restatement (Third), Property (Servitudes) 2.17 cmt. h (2000). § 2.16 cmt. h at 18 (Tent. Draft No. 3, 1993).

(n357)Footnote 453. *Id.*

(n358)Footnote 454. *Gault v. Bahm, 826 S.W.2d 875, 881 (Mo. App. 1992).*

(n359)Footnote 455. *Perry v. Williams, 353 S.E.2d 226, 227 (N.C. App. 1987).*

(n360)Footnote 456. *Cunningham v. Otero County Elec. Coop., Inc., 845 P.2d 833, 837-838 (N.M. App. 1992).*

(n361)Footnote 457. *See* § 60.03(b)(6)(viii), *supra*, for problems with the knowledge and acquiescence formula when juxtaposed with the requirement that the use be without permission of the owner.

(n362)Footnote 458. *McGray v. Lamontagne, 623 A.2d 161, 162 (Me. 1993).*

(n363)Footnote 459. *Collins Trust v. Allamakee County Bd. of Supervisors, 599 N.W.2d 460, 465 (Iowa 1999).*

(n364)Footnote 460. *Id.*

(n365)Footnote 461. *Rappold v. Durocher, 849 P.2d 1017, 1019 (Mont. 1993).*

(n366)Footnote 462. *Gault v. Bahm, 826 S.W.2d 875, 879 (Mo. App. 1992).*

(n367)Footnote 463. *White v. Ruth R. Millington Living Trust, 785 S.W.2d 782, 786 (Mo. App. 1990).*

(n368)Footnote 464. *Apley v. Tagert, 584 So. 2d 816, 818 (Ala. 1991)* (nor is it material, in this regard, that someone else had an exactly similar easement of passage, nor that another was being established); Restatement (Third), Property (Servitudes) 2.17 cmt. g (2000).

(n369)Footnote 465. *Apley v. Tagert, 584 So. 2d 816, 818 (Ala. 1991)* (if use must be exclusive, "this appears to be so in a very limited sense, if at all").

(n370)Footnote 466. *Page v. Bloom, 584 N.E.2d 813, 815-816 (Ill. App. 1991).*

(n371)Footnote 467. *Rappold v. Durocher, 849 P.2d 1017, 1019 (Mont. 1993).*

(n372)Footnote 468. *Apley v. Tagert, 584 So. 2d 816, 818 (Ala. 1991).*

(n373)Footnote 469. Restatement (Third), Property (Servitudes) § 2.17 cmt. g (2000). (Tent. Draft No. 3, 1993).

(n374)Footnote 470. *Palisades Sales Corp. v. Walsh, 459 A.2d 933, 937 (R.I. 1983).*

(n375)Footnote 471. *City of Tonawanda v. Ellicott Creek Homeowners Ass'n, 449 N.Y.S.2d 116, 119 (App. Div.1982)* (*citing Di Leo v. Pecksto Holding Corp., 109 N.E.2d 600 (N.Y. 1952); Weinberg v. Shafler, 414 N.Y.S.2d 61, 63 (App. Div. 1979), aff'd, 407 N.E.2d 1351 (N.Y. 1980).*

(n376)Footnote 472. *Whittom v. Alexander-Richardson P'ship, 851 S.W.2d 504, 508 (Mo. 1993)* (*en banc*).

(n377)Footnote 473. *Id.*

(n378)Footnote 474. *Rappold v. Durocher, 849 P.2d 1017, 1019 (Mont. 1993).*

(n379)Footnote 475. *Concerned Citizens of Brunswick County Taxpayers Ass'n v. State, 404 S.E.2d 677, 687 (N.C. 1991)* (purpose and nature of easement to reach inlet and seashore for fishing, bathing and other recreational use; public use appropriate for that purpose).

(n380)Footnote 476. *Palisades Sales Corp. v. Walsh, 459 A.2d 933, 936-937 (R.I. 1983).*

(n381)Footnote 477. *Concerned Citizens of Brunswick County Taxpayers Ass'n v. State, 404 S.E.2d 677, 687 (N.C. 1991)* (situations in older precedents).

(n382)Footnote 478. *Miller v. Rau, 597 N.Y.S.2d 532, 534-35 (App. Div. 1993).*

(n383)Footnote 479. Restatement (Third), Property (Servitudes) § 2.17 (2000). (Tent. Draft No. 3, 1993).

(n384)Footnote 480. *Bromelmeier v. Brookhart, 570 N.E.2d 90, 92 (Ind. App. 1991). Pittman v. Lowther, 610 S.E.2d 479 (S.C. 2005)* (prescriptive easement use was sufficiently interrupted by servient landowner's placing barriers and planting rye on the road).

(n385)Footnote 481. Restatement (Third), Property (Servitudes) § 2.17 cmt. j (2000). (Tent. Draft No. 3, 1993).

(n386)Footnote 482. *Concerned Citizens of Brunswick County Taxpayers Ass'n v. State, 404 S.E.2d 677, 685-686 (N.C. 1991)* (40 or 50 no trespassing signs turned into firewood; driving around telephone pole barrier; cable gate increased to 100 feet long without stopping traffic; ten-foot-wide aluminum gates destroyed).

(n387)Footnote 483. *Baker v. Burbank-Glendale-Pasadena Airport Auth., 270 Cal. Rptr. 337, 341 (1990).*

(n388)Footnote 484. *Dowley v. Morency, 737 A.2d 1061, 1069 (Me. 1999)* (consent by silence). *See also* Adversity, Hostility and Claim of Right, page 440, *supra*, in main text.

(n389)Footnote 485. *Bromelmeier v. Brookhart, 570 N.E.2d 90, 92 (Ind. App. 1991).*

(n390)Footnote 486. *Gault v. Bahm, 826 S.W.2d 875, 882 (Mo. App. 1992).*

(n391)Footnote 487. For a listing of statutes of limitations for prescriptive easements and of the sources for those statutes, *see* Restatement (Third), Property (Servitudes) § 2.17 & Reporter's Note at 309-311 & Statutory Note at 312-315 (2000). § 2.16 Reporter's Note cmt. k at 64-65 and Statutory Note at 67-73 (Tent. Draft No. 3, 1993).

(n392)Footnote 488. *Tamko Asphalt Prods., Inc. v. Arch Assocs., 830 S.W.2d 434, 438 (Mo. App. 1992).*

(n393)Footnote 489. *Reynolds v. Soffer, 459 A.2d 1027, 1029 (Conn. 1983).*

(n394)Footnote 490. *Vandervoort v. McKenzie, 412 S.E.2d 696-698 (N.C. App. 1992).*

(n395)Footnote 491. *Gutcheon v. Becton, 585 A.2d 818, 822 (Me. 1991)* (plaintiffs could tack nineteen years of prior use accumulated by predecessors in title).

(n396)Footnote 492. *Kornbluth v. Kalur, 577 A.2d 1194, 1195-96 (Me. 1990).*

(n397)Footnote 493. *Homan v. Hutchison, 817 S.W.2d 944, 947 (Mo. App. 1991).*

(n398)Footnote 494. *Baker v. Burbank-Glendale-Pasadena Airport Auth., 270 Cal. Rptr. 337, 341 (App. 1990), op. modified* (Ct. App. June 18, 1990) and *rev. denied* (Cal. Aug. 1, 1990).

(n399)Footnote 495. *Rutland v. Stewart, 630 So. 2d 996, 999 & n.1 (Miss. 1994)* (*overruling* 1930 decision).

(n400)Footnote 496. Restatement (Third), Property (Servitudes) § 2.17 cmt. l (2000). 1 at 31 (Tent. Draft No. 3, 1993).

(n401)Footnote 497. *See State ex rel. Thornton v. Hay, 462 P.2d 671 (Or. 1969)* and progeny.

(n402)Footnote 498. *Stevens v. City of Cannon Beach, 854 P.2d 449, 454-455 (Or. 1993)* (*en banc*) (*citing State ex rel. Thornton v. Hay, 462 P.2d 671, 677 (Or. 1969)), cert. denied, 114 S. Ct. 1332 (1994).*

(n403)Footnote 499. *McDonald v. Halvorson, 780 P.2d 714, 723-724 (Or. 1989).*

(n404)Footnote 500. *Stevens v. City of Cannon Beach, 854 P.2d 449 (Or. 1993)* (*en banc*) (holding that regulation is not taking under *Lucas v. South Carolina Coastal Council, 112 S. Ct. 2886 (1992)), cert. denied, 114 S. Ct. 1332 (1994).*

(n405)Footnote 501. *See* Erin Pitts, The Public Trust Doctrine: A Tool for Ensuring Continued Public Use of Oregon Beaches, *22 Envt'l L. 731, 737 n.40 (1992)* (discussing other jurisdictions' use of common law doctrine of custom). The author proposes that the public trust doctrine, where certain resources belong to the public at large, may be a more efficacious tool to protect beach access.

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CHAPTER 60 THE LAW OF EASEMENTS: RIGHTS IN THE PROPERTY OF ANOTHER

7-60 Thompson on Real Property, Thomas Editions § 60.04

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§ 60.04 Scope of the Easement.

[Go To Supp]

(a) Rights of the Easement Owner or of the Dominant Tenement.

The owner of easement rights can make reasonable use of them. The new Restatement defines the easement holder's rights of any reasonable use to include the proviso that "manner, frequency, and intensity ... may change over time to take advantage of developments in technology and to accommodate normal development of the dominant estate or enterprise benefited by the servitude," so long as the changed use does not unreasonably damage or interfere with the enjoyment of the servient estate. n502"A grantor of an easement may create an extensive or a limited easement." n503 The extent of the easement is regulated by the "by the intent of the parties as manifested by the language of the grant." n504 Where the grant is silent, courts look "to the surrounding circumstances to determine the intention of the grantor and the grantee." n505 To determine the nature of the easement "created by deed, [the court] must discern the intention of the parties to the deed by considering the language of the deed, the situation of the property and the surrounding circumstances." n506 An easement is to be construed "in connection with the intention of the parties, as evidenced by the language employed and the circumstances in existence at the time the easement was granted." n507 The easement's use must be "in accordance with and confined to the terms and purposes of the grant." n508 Thus, an express easement of way, on its face created without limitation, that provided access to an otherwise landlocked parcel remained in effect even after the parcel was no longer landlocked; the court refused to consider parol evidence that the easement was granted for that specific purpose and thus should vanish when alternate access became available. n509 The burden "may not be increased beyond that reasonably contemplated by the parties at the time of creation." n510 Where there is a dispute over the reasonableness of a proposed use, the Oklahoma Supreme Court notes that the reasonableness of a use is a question of fact and places upon the person proposing the use the burden of proving that the "rights granted by the easement are sufficiently extensive to justify the proposed use." n511 If the grant contains no limitations, the court will attempt to discern what the parties would have reasonably expected, and will usually be generous in its interpretation. n512 The language of the easement can grant to the easement holder a good deal of discretion in the use of the easement or limit the use very narrowly; if the grant is not clear, the court will interpret the scope of the easement in favor of "free and untrammeled use of the land." n513 The generous reading of unlimited easements can extend also to use of other land necessary to the fruitful enjoyment of the easement. Thus, in Alabama, the power company had the right to move equipment over an existing road to safely access a utility easement to construct and maintain transmission lines. n514 Holders of separate easements over the same piece of land must "exercise their rights so that they do not unreasonably

conflict with one another," and, in case of conflict, earlier-created easements have priority over later ones. n515

(1) Overburdening the Servient Tenement.

Courts strike a balance within the language of the grant between the freedom given to the dominant tenement to make use of the grant and the right of the servient tenement not to be adversely affected in the use of the land over which the easement lies. n516 The following sections present several different situations in which that balance has to be struck.

(i) Subdividing the Dominant Tenement.

Courts generally consider that subdividing is a reasonable use for a dominant tenement served by an appurtenant easement the terms of which do not limit its use. Subdivision and conveying away of portions of a dominant estate "does not, in and of itself, mean that an additional burden is imposed upon the servient estate." n517 Distinguishing between an increase in the degree of burden and an additional burden, the former being something to be expected absent restrictions, the Virginia Supreme Court let stand the expansion of a marina from 84 to 280 boat slips. n518

COMPUTER-ASSISTED RESEARCH

LEXIS: Easement W/10 Subdivi! W/5 Dominant Tenement W/25 Increase W/2 Burden

(ii) Using the Eeasement to Benefit a Different Piece of Land Than the Dominant Tenement.

An easement appurtenant cannot be used to benefit land other than that to which it is appurtenant. n519 An easement owner could not use an easement intended by express grant to provide access to a 77 acre plot to manage a 4764 acre forest: "An easement can be used only in connection with the estate to which it is appurtenant and cannot be extended by the owner to any other property which he may then own or afterward acquire, unless so provided in the instrument by which the easement is created ... ." n520 An easement owner was completing a shopping center on two lots, only one of which was served by an express easement. The court enjoined use of an easement appurtenant to only one of two lots making up the shopping center, where plans showed the intention to use the easement for both, stating that an easement may not be used to benefit another non-dominant parcel of land even though the two parcels are adjacent and under common ownership. n521 All use of the easements was enjoined because the authorized and unauthorized uses could be so intermingled as to require enjoining any use until a way could be found to prevent intermingling. n522 A private roadway granting access to all lots within a subdivision gave rights to all lot owners but could not be used to access a lot outside the subdivision: "An easement appurtenant must bear some relation to the use of the dominant estate and is incapable of existence separate from it; any attempted severance from the dominant estate must fail." n523 The purchaser of several lots, however, could use a right of way easement along the lots' boundary even though the easement was not appurtenant to all the lots; the general rule prohibiting use of an easement for after-acquired lots applied, but these lots were being joined to the others for a single residential lot, and the servient tenement suffered no additional burden. n524 Similarly, the Washington Supreme Court held that use of an easement to benefit a second lot joined to that to which the easement was appurtenant was indeed a misuse of the easement, but that an injunction was inappropriate given that the two lots were limited to use for a single dwelling and no additional burden was placed on the servient tenement; the "actual and substantial injury" necessary for injunctive relief was lacking. n525 An easement providing access to an asphalt plant did not permit an expansion in the number of daily crossings by large trucks because the excess was not required for the development of the dominant land and interfered with enjoyment of the servient estate; the court found the excess use to be for the development of other parcels. n526

COMPUTER-ASSISTED RESEARCH

LEXIS: Easement W/10 Benefit W/5 (Nondominant Tenement or Non-Dominant Tenement or Servient Tenement) W/25 Increase W/2 Burden

(iii) Increasing the Frequency or Changing the Type of Use of the Servient Tenement.

A common complaint arises when the owner of the dominant tenement heavily increases the use of that land or changes the type of use, thereby increasing the burden on the servient tenement. Whether courts will consider the resulting additional burden on the servient tenement to be acceptable depends on what can be gleaned of the intention of the parties at the time of the grant and whether the additional burden can be characterized as "reasonable." The result of that reasoning process can differ depending whether the easement is express, implied from prior use, by necessity or by prescription.

Express Easement Granted or Reserved for a Limited Purpose. If the grant states a specific purpose for the easement, courts are usually chary about expanding that use. Thus, where a railroad had permitted the laying of telephone cable not used for railroad purposes on an easement granted only for railroad purposes, there was an additional burden on the servient tenement for which the fee holders deserved compensation. n527 The owner of an easement of way over an existing dirt road could not build poles and run electric wires over the easement. n528 Where the easement was not so limited, the stringing of coaxial cable by a television cable company along an easement owned by a public utility constituted no additional burden on the owner of the servient estate. n529 A city could convert an easement along the boundary of a subdivision expressly granted "for roadway purposes" into an equestrian trail over the objection of subdivision owners because the change in use was not "dramatically different" and posed no additional burden on the servient land. n530 A grantee exceeded the rights created by an easement for the express purpose of moving cattle and equipment by using the easement for recreational and personal purposes. n531 An easement granted for "agricultural purposes" did not include the right to use it for big game hunting access, n532 nor did a parking easement include the right to store cars for sale on a used car lot. n533 Stating that the use "must be reasonable and as little burdensome to the servient estate as the nature of the easement and the purpose will permit." The Connecticut Court of Appeals permitted docks necessary to launch boats but refused to permit the holder of an easement for boating purposes to build racks to store them. n534 Under an express easement granting business access, a servient owner could not prevent persons with the permission, "express or implied" of the dominant owner from using the easement for business access. n535

Express Easement Granted or Reserved with No Limitation of Purpose. If the grant or reservation states no limitation on the use of easements, courts will be rather generous in their interpretation, though the degree of that generosity varies from state to state. The Idaho Supreme Court held that a lower court acted improperly by limiting use of an easement to daylight hours and setting other conditions for its use, which, if violated, would result in its forfeiture. n536 When an easement is created in general terms, courts construe it as "broad enough to permit any use which is reasonably connected with the reasonable use of the land to which it is appurtenant." n537 Where the instrument creating the easement "does not limit its use, the easement may be used for 'any purpose to which the dominant estate may then, or in the future, be reasonably be devoted.' " n538 There is the qualification that no use "may be made of the easement, different from that established when the easement was created, which imposes an additional burden on the servient estate." n539 Thus, construction of a sewer beneath a highway easement "is a proper and contemplated public use of the easement." n540 Adding additional customers to an existing sewer line would create no greater disruption to the easement. n541 Running power and telephone lines above an easement and pipelines underneath "do not increase the burden on the servient estate and are permissible uses." n542 In Maine, by contrast, even when an easement is unrestricted by its terms, its purposes are to be determined by the presumed intent of the parties at the time; so where an easement of way was granted into a farm field, its later development into a homesite does not automatically result in the easement owner having the right to install utility lines on or under the surface. n543 An easement creating a public walkway could also be used by "wheelchairs, baby carriages, and watercraft which are transportable on foot." n544 Easements "may be expanded as 'the passage of time creates new needs and the uses of the property change.' " n545 A road easement sixteen feet wide could be expanded to eighteen to twenty feet in order to accommodate farm equipment, because this was a foreseeable reasonable use based on past use. n546 Where, however, an easement was specifically defined to be twenty feet wide, and defendants increased its width to fifty feet, paved it and ran large trucks over it, the court enjoined the misuse and required the easement holder to restore the servient tenement to its original condition. n547 Even where the courts would otherwise refuse to expand an express easement, the right to make a "new and

different use of an express easement" may also be established by prescription. n548

COMPUTER-ASSISTED RESEARCH

LEXIS: Easement W/10 Increase or Expand or Change W/5 Use or Burden W/5 Servient Tenement or Servient Estate

Easements by Implication from Prior Use. Courts are more strict in regulating new and increased uses of an easement implied from prior use. As might be suggested by the name of the interest, courts will pay very close attention to what form the use took before the severance of property took place. These easements, as well as those of necessity and by prescription, more resemble easements the use of which is restricted by the grant than they do unrestricted easements. The use the property is being put to at the time the easement arises supplies limits to the use of the easement in the future, not absolute limits, "but a normal development of the use of the property." n549 The court in that case limited the implied easement to agricultural, forestry and personal use. n550

Easements by Necessity. The uses of an easement implied by necessity must reflect the necessity which justifies the easement's existence. Since there is no express agreement, courts will be careful in interpreting how far the use of such an easement may go. One determines whether an easement by necessity exists from the circumstances when the landlocked parcel was severed; one should define the scope, however, "with reference to the reasonable enjoyment of the land and all lawful uses to which it may be put ... ." n551 The court, therefore, held that a landlocked dominant tenement owner could install underground utilities on the easement and refused to limit future use to a single family; such uses had to be considered in their context. n552 By contrast, where a dominant owner had a private way of necessity granted by statute, the owner was limited to use the road as a way of ingress and egress and could not use it as an easement for water, sewage and electricity to serve a proposed development. n553 A dominant tenement owner could construct a new home because the extent of an easement by necessity was to be gleaned from the circumstances surrounding the conveyance and it was to be "assumed that they anticipated such uses as might reasonably be required by a normal development of the dominant tenement." n554

COMPUTER-ASSISTED RESEARCH

LEXIS: Easement W/5 Impli! or (Impli! W/3 Necessity) W/10 Increase or Expand or Change W/5 Use or Burden W/5 Servient Tenement or Servient Estate

Easements by Prescription. Courts will look with care at attempts to change or increase the burden placed upon the servient tenement by a prescriptive easement. Whether an easement was established by grant or by prescription can be critical to the test of whether the new use of an easement is proper; the extent of a prescriptive easement "is fixed by the use through which it was created." n555 Thus, a prescriptive recreational easement later written down could not be used for residential subdivision purposes; the court found the writing not to be an express grant but only the confirmation of a prescriptive easement. n556 Similarly, in a Pennsylvania case, a document acknowledging rights under a prescriptive easement was not evidence of a party deliberately limiting its rights but the recognition of limitations imposed by the use by which the easement was won. n557 Permissible uses for a prescriptive easement, in contrast to those for an easement by grant, "are necessarily defined by the use of the servient land during the prescription period." n558 Even an exclusive easement can occur by prescription, though perhaps rarely. n559 The "common and ordinary use which establishes the prescriptive right also limits and qualifies it," but does not fix it eternally. n560 Logic does not require that courts limit prescriptive easements that severely, lest with the passage of time the easements become useless. A Maryland court found that a prescriptive easement holder had the right to repair, maintain, and even improve the easement, because those improvements resulted from the evolution of the dominant estate and did not unreasonably burden the servient estate. n561 A prescriptive easement "must encompass some flexibility of use, and adapt to natural and foreseeable developments in the use of the surrounding land"; an increase in vehicular traffic due to residential development did not unreasonably burden the servient estate. n562 If a change in use is a change in degree, it can be permissible, if a change in quality it will be impermissible. n563 The beneficiary of a prescriptive easement "may vary

the use of the easement to a reasonable extent," a flexibility "limited, however, by concern for the degree to which the variance further burdens the servient estate." n564 A federal court refused to permit an employer-lessee to expel peaceful union organizers from adjacent shopping-center sidewalks in a shopping center over which it had "something akin to an implied easement of necessity ... to ensure access to its leased property" because such expulsions were not necessary to the use of leased property. n565 Thus, to change from a single large agricultural enterprise to a residential development owned by several individuals would substantially alter the prescriptive easement. n566 The prescriptive easement can itself be enlarged even to the extent that the servient estate is injured, but only by a further prescription. n567

COMPUTER-ASSISTED RESEARCH

LEXIS: Easement W/3 Prescript! W/10 Increase or Expand or Change W/5 Use or Burden W/5 Servient Tenement or Servient Estate

(b) Rights of the Servient Tenement Owner.

(1) The Non-exclusive Easement.

While the dominant tenement owner has the right to use the servient tenement according to the terms of the easement, the fee owner retains whatever uses do not interfere with the rights of the dominant owner. n568"The owner of the servient estate is entitled to use the estate in any manner not inconsistent with, or which does not materially interfere with, the use of the easement by the owner of the dominant estate." n569 A servient tenement shopping center operator could make parking lot improvements that diminished the number of spaces available to a parking easement holder because the grant did not specify how the lot was to be accessed, did not guarantee a particular number of spaces and stated that easement would be subject to the regulation of the shopping center. n570 Unless the grant establishing the easement specifically states that the easement is exclusive, the servient estate owner "retains the right to use the property in common with the grantee." n571 Thus, an agricultural easement can co-exist with recreational uses by the fee owners. n572 The holder of a non-exclusive easement may not interfere with the servient owner's use of the freehold, so long as the servient owner's use does not interfere with the right granted in the easement. The owner of a servient estate must "abstain from acts interfering with or inconsistent with the proper enjoyment of the easement by the owner of the dominant estate." n573 If it is necessary for reasonable use of the servient tenement and does not interfere with the easement, a servient owner may place a gate across the easement. n574 Grant of a right of way for ingress and egress "without any limiting language" does not prevent the owner of the servient estate from constructing gates or fences. n575 In West Virginia, a servient owner, absent contractual provision to the contrary, by statute may maintain an unlocked gate across an easement. n576 The Mississippi Supreme Court permitted a servient owner to keep gates on a private way of access; absent language in the grant either way, where the locked gate was important to the servient owner's use and not overly burdensome on the dominant owner's use, the gate was acceptable. n577 In Idaho, absent a showing that it was "unreasonable" or "unduly restrictive," the servient owner of land burdened by a prescriptive easement was permitted to maintain a gate. n578 The Illinois Appellate Court, however, noted a modern increase of respect for an easement owner's rights and held that placing a gate or fence across a right-of-way, even though the gate was accessible to the dominant owner, is an unreasonable interference with the dominant owner's use of the easement absent demonstration of necessity by the servient owner. n579

(2) The Exclusive Easement.

An exclusive easement grants unfettered rights to the owner of the easement to use the easement for purposes specified in the grant "to the exclusion of all others"; because the exclusive easement, in effect, strips the servient owner of the right to use the land for certain purposes, thus limiting the fee, and itself has been called almost a conveyance of the fee, this type of easement is generally not favored by the courts. n580 Where the exclusive easement grants to the easement holder exclusive use for *all* purposes, the easement more closely resembles a fee interest and, some courts say, should

not be considered an easement. n581 Absent language in the grant showing a specific intention to create an exclusive easement, a Florida court states that the resulting easement must be construed as non-exclusive. n582 When confronted with an "exclusive easement of way," the Virginia Supreme Court cited this section in interpreting the easement as non-exclusive, leaving to the owner of the servient tenement the right to use the easement in any way "not inconsistent with the uses granted to the owner of the easement," access to the highway. n583

(c) Location and Size of the Easement.

(1) By the Terms of the Grant.

(i) Establishing the Location.

Ordinarily the placement of an easement is established by the grant, as to specific width, length and location. This location usually cannot be changed without the agreement of both parties, no matter arguments of necessity and reasonableness: the grant controls. n584 If the grant does not specify the location of the easement, courts grant either party the right to locate the easement, so long as the location is reasonable. In New York, for example, a servient owner could designate a route that avoided the easement owners crossing the center of the land while crops were growing, even thought the route was a little longer: it had only be "reasonable and convenient under all the circumstances." n585 In Tennessee, a court allowed the dominant tenement owner to clear a path on the servient estate for ingress and egress: "If the servient owner does not place the pathway, and no prior use had been made of the easement, the dominant owner may place it, 'having due regard to the convenience of the landowner.' " n586 In Delaware, in a dispute over partition of land held as tenants in common, the court upheld location of an easement proposed by one of the parties, which location needed only be "reasonable and convenient under all the circumstances." n587 A court protected a beach easement even though no exact location was mentioned: "The mere fact that the precise location is undefined does not negate the existence of the right of access." n588 If there is "language in the deed sufficient to serve as a pointer or guide to the ascertainment of the location of the land," the North Carolina Court of Appeals considered the easement valid and was willing to use parol evidence to resolve any ambiguity on the location. n589 Some jurisdictions recognize the possibility of a "floating" easement that does not define its placement; in deciding location the court will look at, among other things, the actual practice of the parties. n590 By contrast, some jurisdictions have statutes requiring specific location of an easement. In a dispute over the location of an easement in Wyoming, the court referenced a statute that a recorded express easement that did not specifically describe its location is void unless a valid description is also recorded within a year after the easement's creation. n591

COMPUTER-ASSISTED RESEARCH

LEXIS: Easement W/10 Establish or Place or Set W/5 Location or Location W/5 Specific

(ii) Changing the Location.

Unless both parties agree, courts will generally not allow one party to relocate an easement. A Florida appellate court, for example, refused to permit the trial court relocate an express easement for beach access to lessen the impact on the servient estate. n592 The Virginia Supreme Court held that a lower court could not order an easement relocated from one section of property to another part of the land that had come into the ownership of the Park Authority. n593 The Maine Supreme Judicial Court held that a right of relocation explicitly retained in the grant of the easement was personal to the original servient owner and did not pass to future owners, thus rejecting the attempt of the current servient owner to relocate an easement of way. n594 The new Restatement, by contrast, adopts the rule that the servient owner may relocate the easement at the servient owner's own expense so long as that relocation does not interfere with the utility of the easement, frustrate the purpose of the easement or increase the burden on the easement holder. In so holding, the new Restatement rejects the majority rule in the United States and adopts a rule used in Louisiana and a few other states. n595 Citing the Restatement, the New York Court of Appeals calls for a balancing test where there is an easement without a specifically defined placement, holding that absent evidence of intent to the contrary the servient

landowner may, at his or her own expense, move a right-of-way "so long as the change does not frustrate the parties' intent or object in creating the right-of-way, does not increase the burden on the easement holder, and does not significantly lessen the utility of the right of way." n596 In a dispute over a ditch easement, where agreement had not been reached and the servient owner made changes in and around the ditch, the Colorado Supreme Court held that the servient owner had committed trespass against the easement and stated that the servient owner had no right to alter or change a drainage ditch without permission of the dominant tenement or without first obtaining a declaration of a court that the alteration would not harm the dominant owner. n597 Following a substantial discussion of the rights of ditch easement owners, the court noted that traditional easement law as applied also to ditches would not permit the servient owner to move a ditch, but that modern situations called for the development of a doctrine of accommodation to help reconcile competing land uses. The court did not go so far as to accept the Restatement's giving to the servient owner the right to move the easement where it does not impinge on the rights of the dominant owner, but instead chose to require the servient owner to seek a declaratory judgment that, according to the Restatement's test, the change will not harm the rights of the easement owner. n598 The parties can, of course, agree to change the location of an easement, and despite the controlling power of the grant, circumstances also can sometimes lead a court to imply the parties' agreement to changing the easement's location. In some jurisdictions that placement may be changed by long use. Thus, in Washington State, an easement owner encroached on the platted position of a road in which she owned an easement and constructed a new road a short distance away. Since this new road and the encroachment had lasted a long time, the Washington Court of Appeals declared the easement moved and the land upon which the original easement had been platted to have been successfully adversely possessed by the encroacher. n599 Where parties had used for many years an easement differently placed than on the original grant, consent to the change of location could be implied from the acts and acquiescence of the parties, "and an estoppel to claim a former location to be the true one arises from acquiescence in the change." n600 The Oregon Court of Appeals implied the agreement of a servient owner, when the dominant owner spent considerable time and money in the improvement of a roadway placed differently than the grant stated, and the servient owner failed to object. n601 In New Hampshire, where a deeded easement has been obstructed or blocked by the actions of the servient owner, "the owner of the dominant estate may deviate from the deeded right of way in order to preserve the right granted as long as the proposed deviation is not unduly burdensome to the servient estate." n602 Where a servient owner changes the location of an easement for the benefit of the servient tenement, the dominant owner, of course, retains the right to use the new path. n603

COMPUTER-ASSISTED RESEARCH

LEXIS: Easement W/20 Locat! or Relocat! or (Change W/5 Locat!)

(2) Easement by Implication from Prior Use or by Necessity.

Since one must have an established and visible quasi-easement in use for a considerable time prior to severance, the location of an easement implied from prior use is necessarily established at its creation. n604 There do not seem to be any special rules governing relocation of this type of easement, once established. If a way of necessity has been determined to exist, if there was a way in use at the time of separation, "plainly visible and known to the parties, the plainly visible and known way will be held to be the location of the way granted unless it is not reasonable and convenient for both parties." n605 The right to select the location of the easement "belongs initially to the owner of the servient estate at the time the dominant estate is created," a right to be exercised "in a reasonable manner, having due regard for the rights and interests of the dominant estate owner"; if the servient owner fails to do so, the dominant owner may, with the same concern for the convenience of the parties. n606 In some jurisdictions, the court may place the easement absent agreement of the parties. n607 Once the easement has been located, it will not be changed without the consent of both parties, "even though the use of the easement where located becomes detrimental to the use of the servient estate." n608

COMPUTER-ASSISTED RESEARCH

LEXIS: Easement W/5 Necessity or Easement W/5 (Impli! W/7 Use W/5 Prior or Former or Preexisting or Pre-existing) W/20 Relocat! or Reposition (Change W/5 Locat! or Site or Position or Placement)

(3) Prescriptive Easement.

The placement and size of a prescriptive easement is that which has been appropriated by the dominant owner in winning the prescriptive easement. The Connecticut Supreme Court remanded a case because the court declaring a prescriptive easement did not establish the boundaries of the right of way. n609 An electric cooperative had not established a prescriptive easement fifteen feet on either side of its existing lines, but only so much as was needed for safety and maintenance; nothing in the existing use put the landowner on notice that a wider easement was being claimed for future, larger towers. n610 Once that placement has been established, it is no more changeable than that of any other easement. Thus, the Georgia Supreme Court did not permit the *servient* owner to relocate a driveway easement won by prescription. n611 The West Virginia Supreme Court, by contrast, refused to permit the purchasers of the *dominant* tenement of a prescriptive easement from relocating the access to their property from the servient estate. n612 The general location of a prescriptive easement can be changed either by oral consent or by acquiescence, but the owner of the easement cannot extend it beyond the actual use or "beyond such width as is reasonably necessary for the purpose for which it was created or acquired." n613 Thus, the Mississippi Supreme Court held that relocating a cow path and paving it without the consent or acquiescence of the fee owner impermissibly changed its character and use. n614 The Pennsylvania Superior Court held that the possessor of land subject to a prescriptive easement could not change the easement location when the proposed change materially interfered with the holders' use of their easement; the new placement made maneuvering of farm equipment difficult and provided more dangerous highway access. n615

COMPUTER-ASSISTED RESEARCH

LEXIS: Easement W/5 Prescript! W/20 Locat! or Relocat! or (Change W/5 Location)

FOOTNOTES:
(n1)Footnote 502. Restatement (Third), Property (Servitudes) § 4.10 (2000). This is a default rule helping to ascertain the intentions of the parties in the absence of some terms to the contrary. *Id.*, cmt. a.

(n2)Footnote 503. *Mandia v. King Lumber & Plywood Co., 583 N.Y.S.2d 5, 9 (App. Div. 1992).*

(n3)Footnote 504. *Commercial Wharf E. Condo. Ass'n v. Waterfront Parking Corp., 552 N.E.2d 66, 76 (Mass. 1990).*

(n4)Footnote 505. *Rowell v. Turnage, 618 So. 2d 81, 86 (Miss. 1993).*

(n5)Footnote 506. *Ezikovich v. Linden, 618 A.2d 570 (Conn. App. 1993), cert. denied, 623 A.2d 1023 (Conn. 1993)* (*citing Lago v. Guerrette, 592 A.2d 939 (Conn. 1991)).*

(n6)Footnote 507. *Burns v. Alderman, 838 P.2d 878, 882 (Idaho App. 1992).*

(n7)Footnote 508. *Stoesser v. Shore Drive P'ship, 494 N.W.2d 204, 208 (Wis. 1993).*

(n8)Footnote 509. *Lawley v. Abbott, 642 So. 2d 707, 708 (Ala. 1994).*

(n9)Footnote 510. *Easton v. Appler, 548 So. 2d 691, 695 (Fla. App. 1989).*

(n10)Footnote 511. *Burkhart v. Jacob, 976 P.2d 1046, 1050 (Okla. 1999)* (reversing summary judgment on reasonableness of requested use).

(n11)Footnote 512. *Lichteig v. Churinetz, 519 A.2d 99, 101 (Conn. App. 1986)* (easement with no limitations to be

construed "broad enough to permit any use which is reasonably connected with the reasonable use of the land to which it is appurtenant").

(n12)Footnote 513. *See also Chevy Chase Land Co. v. United States, 733 A.2d 1055, 1074 (Md. 1999)* (quoting this and previous sentence). *Gisler v. Allen, 693 S.W.2d 201, 206 (Mo. App. 1985).*

(n13)Footnote 514. *Burgess v. Alabama Power Co., 658 So. 2d 435, 436-437 (Ala. 1995).*

(n14)Footnote 515. Restatement (Third), Property (Servitudes) § 4.12, cmts. a & b & Reporter's Note (Tent. Draft No. 4, 1994), and cases cited therein.

(n15)Footnote 516. *Roaring Fork Club, L.P. v. St. Jude's Co., 36 P.3d 1229, 1235 (Colo. 2001)* (*citing* this section for doctrine of accommodation in moving easement).

(n16)Footnote 517. *See also Shooting Point, L.L.C., v. Wescoat, 2003 Va. LEXIS 34,* *19 (Feb. 28, 2003) (same); *Hayes v. Aquia Marina, Inc., 414 S.E.2d 820, 822-823 (Va. 1992).*

(n17)Footnote 518. *Hayes, 414 S.E.2d at 823.*

(n18)Footnote 519. Restatement (Third), Property (Servitudes) § 4.11 (2000).

(n19)Footnote 520. *State ex rel. Fisher v. McNutt, 597 N.E.2d 539, 541-542 (Ohio App. 1992).*

(n20)Footnote 521. *D.N.D. Neffson Co. v. Galleria Partners, 745 P.2d 206, 207 (Ariz. App. 1987).*

(n21)Footnote 522. *Id* .

(n22)Footnote 523. *Burns v. Alderman, 838 P.2d 878, 882 (Idaho App. 1992).*

(n23)Footnote 524. The same court, however, refused to apply *Carbone* where the person purporting to convey easement rights that would not add a significant burden to the servient owners had no right to convey those rights. *Giardino v. Belle Haven Land Co., 757 A.2d 1103, 1112 (Conn. 2000)* (fundamental distinction that in previous cases user of appurtenant easement also owned dominant estate). *Carbone v. Vigliotti, 610 A.2d 565, 569 (Conn. 1992).*

(n24)Footnote 525. *Brown v. Voss, 715 P.2d 514, 517 (Wash. 1986)* (damages of $1.00 were not appealed).

(n25)Footnote 526. *McCann v. R.W. Dunteman Co., 609 N.E.2d 1076 (Ill. App. 1993), app. denied, 616 N.E.2d 336 (Ill. 1993).*

(n26)Footnote 527. *Buhl v. U.S. Sprint Commun. Co., 840 S.W.2d 904, 912-913 (Tenn. 1992).*

(n27)Footnote 528. *Ward v. McGlory, 265 N.E.2d 78, 79-80 (Mass. 1970).*

(n28)Footnote 529. *Centel Cable T.V. v. Cook, 567 N.E.2d 1010, 1015 (Ohio 1991).*

(n29)Footnote 530. *City of Scottsdale v. Thomas, 753 P.2d 1207 (Ariz. App. 1988).*

(n30)Footnote 531. *Riverton Farms, Inc. v. Castle, 441 N.W.2d 405, 407 (Iowa App. 1989).*

(n31)Footnote 532. *Steil v. Smith, 901 P.2d 395 (Wyo. 1995).*

(n32)Footnote 533. *University Pl. -- Lincoln Assocs. L.P. v. Nelson, 530 N.W.2d 241, 243-244 (Neb. 1995).*

(n33)Footnote 534. *Ezikovich v. Linden, 618 A.2d 570, 572 (Conn. App. 1993), cert. denied, 623 A.2d 1023 (Conn.*

1993) (*quoting Kuras v. Kope, 533 A.2d 1202 (Conn. 1987)).*

(n34)Footnote 535. *Flynn v. Siren, 711 P.2d 1371, 1372 (Mont. 1986).*

(n35)Footnote 536. *Gray v. Gore, 807 P.2d 643, 644 (Idaho 1991).*

(n36)Footnote 537. *Burkhart v. Jacob, 976 P.2d 1046 (Okla. 1999)* (term "ingress and egress" creates easement in general terms) (*citing* this treatise). *Lichteig v. Churinetz, 519 A.2d 99, 101 (Conn. App. 1986)* (dominant party may not use driveway easement for property adjoining that to which it is appurtenant, but not unreasonable use to provide access for social guests).

(n37)Footnote 538. *Shooting Point, L.L.C., v. Wescoat, 2003 Va. LEXIS 34,* *17 (Va. Feb. 28, 2003) (subdividing 276 acres into 18 home sites).

(n38)Footnote 539. *Id.*

(n39)Footnote 540. *Eyde Bros. Dev. Co. v. Eaton County Drain Comm'rs, 398 N.W.2d 297, 304 (Mich. 1986).*

(n40)Footnote 541. *Kimlow, Inc. v. Seminole Landing Ass'n, 586 So. 2d 1290, 1291-1292 (Fla. Dist. App. 1991).*

(n41)Footnote 542. *State v. Homar, 798 P.2d 824, 826 (Wyo. 1990).*

(n42)Footnote 543. *Guild v. Hinman, 695 A.2d 1190, 1192-1193 (Me. 1997)* (*citing* long line of cases and recent statutory codification of rule of construction); *Thompson v. Pendleton, 697 A.2d 56, 59 (Me. 1997)* (deed specifying right of way to be used for ingress and egress does not include right to install utilities).

(n43)Footnote 544. *Lien v. Loraus, 403 N.W.2d 286, 289 (Minn. App. 1987), rev. denied* (Minn. June 9, 1987).

(n44)Footnote 545. *Hale v. Miracle Enters. Corp., 517 So. 2d 102, 104 (Fla. App. 1987).*

(n45)Footnote 546. *Mahoney v. Devonshire, Inc., 587 A.2d 1146, 1153 (Md. App. 1991), cert. denied, 590 A.2d 159 (Md. 1991).*

(n46)Footnote 547. *Mandia v. King Lumber & Plywood Co., 583 N.Y.S.2d 5 (App. Div. 1992).*

(n47)Footnote 548. *Nishanian v. Sirohi, 414 S.E.2d 604, 606 (Va. 1992).*

(n48)Footnote 549. *Liles v. Wedding, 733 P.2d 952, 954 (Or. App. 1987)* (*citing* Restatement of Property § 484 cmt. b (1944)).

(n49)Footnote 550. *Id.*

(n50)Footnote 551. *Morrell v. Rice, 622 A.2d 1156, 1160 (Me. 1993).*

(n51)Footnote 552. *Id* .

(n52)Footnote 553. *Rowell v. Turnage, 618 So. 2d 81, 87 (Miss. 1993)* (limited to 15-foot easement barred by locked gates to which dominant owner had been given key).

(n53)Footnote 554. *Wolfe v. Belzer, 585 N.Y.S.2d 98, 99 (App. Div. 1992).*

(n54)Footnote 555. *Wright v. Horse Creek Ranches, 697 P.2d 384, 387-388 (Colo. 1985).*

(n55)Footnote 556. *Wright, 697 P.2d at 390.*

(n56)Footnote 557. *POA Co. v. Zoning Board, 713 A.2d 70, 75-76 (Pa. 1998)* (because of limitations of access imposed by prescriptive easement, denial of use variance was improper).

(n57)Footnote 558. *Gutcheon v. Becton, 585 A.2d 818, 822 (Me. 1991).*

(n58)Footnote 559. *Otay Water Dist. v. Beckwith, 3 Cal. Rptr. 2d 223 (App.1991)* (prescriptive easement for reservoir), *rev. denied* (Cal. 1992).

(n59)Footnote 560. *Mahoney v. Devonshire, Inc., 587 A.2d 1146, 1149 (Md. App. 1991), cert. denied, 590 A.2d 159 (Md. 1991).*

(n60)Footnote 561. *Mahoney, 587 A.2d at 1151.*

(n61)Footnote 562. *Gutcheon v. Becton, 585 A.2d 818, 822-823 (Me. 1991).*

(n62)Footnote 563. *Gault v. Bahm, 826 S.W.2d 875, 883 (Mo. App. 1992).*

(n63)Footnote 564. *Wright v. Horse Creek Ranches, 697 P.2d 384, 388-389 (Colo. 1985); Gault v. Bahm, 826 S.W.2d 875, 883 (Mo. App. 1992).*

(n64)Footnote 565. *UFCW Local 400 v. NLRB, 222 F.3d 1030, 1037 (D.C. Cir. 2000)* (*citing* this section).

(n65)Footnote 566. *Wright, 697 P.2d at 388-89.*

(n66)Footnote 567. *Merrill v. Penrod, 704 P.2d 950, 956* (Idaho App.), *rev. denied, 776 P.2d 828 (Idaho 1985).*

(n67)Footnote 568. *Skow v. Goforth, 618 N.W.2d 275, 278 (Iowa 2000)* (*citing* this sentence). *Skidmore v. First Bank of Minneapolis, 773 P.2d 587, 589 (Colo. App. 1988), cert. denied, 790 P.2d 843 (Colo. 1990).*

(n68)Footnote 569. *Nampa & Meridian Irrigation Dist. v. Washington Federal Savings, 20 P.3d 702, 706 (Idaho 2001).*

(n69)Footnote 570. *Thomas v. Farrell, 568 A.2d 409 (Vt. 1989).*

(n70)Footnote 571. *Bergen Ditch & Reservoir Co. v. Barnes, 683 P.2d 365, 367 (Colo. App. 1984).*

(n71)Footnote 572. *State Dep't of Fish & Wildlife v. Kortge, 733 P.2d 466, 469 (Or. App. 1987), rev. denied, 738 P.2d 977 (Or. 1987).*

(n72)Footnote 573. *Magna, Inc. v. Catranis, 512 So. 2d 912, 913 (Ala. 1987).*

(n73)Footnote 574. *Ericsson v. Braukman, 824 P.2d 1174, 1178 (Or. App. 1992), rev. denied, 830 P.2d 595 (Or. 1992)* and *rev. denied, 830 P.2d 596 (Or. 1992); Wallner v. Johnson, 730 S.W.2d 253, 258-259 (Ark. App. 1987).*

(n74)Footnote 575. *Skow v. Goforth, 618 N.W.2d 275, 277-281 (Iowa 2000)* (after surveying cases and Restatements, adopting liberal approach to building of fence, so long as there is no demonstrated harm to dominant tenement owner). *Contra Johnson v. Godonis, 631 N.E.2d 370, 372-373 (Ill. App. 1994)* (though inconvenience of fence controlling lake access is slight, fence is unreasonable burden on easement absent proof of necessity by servient owner). *Tanaka v. Sheehan, 589 A.2d 391, 396 (D.C. 1991).*

(n75)Footnote 576. *Ridgwell v. Brasco Bay Corp., 493 S.E.2d 123, 125 (Va. 1997)* (*citing* Va. Code § 33.1-202).

(n76)Footnote 577. *Rowell v. Turnage, 618 So. 2d 81, 86-87 (Miss. 1993).*

(n77)Footnote 578. *Marshall v. Blair, 946 P.2d 975, 982 (Idaho 1997).*

(n78)Footnote 579. *Johnson v. Godonis, 631 N.E.2d 370, 372-373 (Ill. App. 1994).*

(n79)Footnote 580. *Latham v. Garner, 673 P.2d 1048, 1050 (Idaho 1983)* (contains extensive case authority on the exclusive easement).

(n80)Footnote 581. *Latham, v. Garner, 673 P.2d at 1050 n.1.*

(n81)Footnote 582. *Stephens v. Dobbins, 511 So. 2d 652, 653 (Fla. App. 1987).*

(n82)Footnote 583. *Walton v. Capital Land, Inc., 477 S.E.2d 499, 500 (Va. 1996)* (owner of servient tenement may use in manner that will not interfere with ingress and egress to highway).

(n83)Footnote 584. *Herren v. Pettengill, 538 S.E.2d 735, 736 (Ga. 2000)* (adhering to majority rule). *Consolidated Amusement Co. v. Waikiki Bus. Plaza, Inc., 719 P.2d 1119, 1123 (Haw. App. 1986).*

(n84)Footnote 585. *Mosher v. Hart, 550 N.Y.S.2d 187, 188 (1990).*

(n85)Footnote 586. *McCammon v. Meredith, 830 S.W.2d 577, 581 (Tenn. App. 1991), app. denied* (Tenn. Mar. 16, 1992).

(n86)Footnote 587. *In re Real Estate of Marta, 672 A.2d 984, 986 (Del. 1996)* (*citing* this section).

(n87)Footnote 588. *Cheever v. Graves, 592 N.E.2d 758, 761 (Mass. App. 1992).*

(n88)Footnote 589. *Williams v. Skinner, 379 S.E.2d 59, 61-64 (N.C. App. 1989), cert. denied, 384 S.E.2d 532 (N.C. 1989).*

(n89)Footnote 590. *Edgcomb v. Lower Valley Power & Light, 922 P.2d 850, 855-857 (Wyo. 1996)* (transmission line).

(n90)Footnote 591. *Carney v. Board of County Comm'rs, 757 P.2d 556, 562 (Wyo. 1988)* (*citing* Wyo. Stat. § 34-1-141).

(n91)Footnote 592. *White Sands, Inc. v. Sea Club v. Condo. Ass'n, 581 So. 2d 589, 589-590 (Fla. Dist. App. 1990), rev. denied, 581 So. 2d 166 (Fla. 1991).*

(n92)Footnote 593. *Fairfax Cty. Park Auth. v. Atkisson, 445 S.E.2d 101, 105* (Va.), *cert. denied, 115 S.Ct. 668 (1994).*

(n93)Footnote 594. *Gilder v. Mitchell, 668 A.2d 879, 881-882 (Me 1995).*

(n94)Footnote 595. Restatement (Third) of Property (Servitudes) § 4.8(3) and cmt. f at 575 (2000).

(n95)Footnote 596. *Lewis v. Young, 705 N.E. 2d 649, 653-654 (N.Y. 1998)* (location change permitted).

(n96)Footnote 597. *Roaring Fork Club v. St. Jude's Co., 36 P.3d 1229, 1231 (Colo. 2001).*

(n97)Footnote 598. *Id. at 1236-1238.*

(n98)Footnote 599. *Barnhart v. Gold Run, Inc., 843 P.2d 545, 547 (Wash. App. 1993)* (*citing Curtis v. Zuck, 829 P.2d 187 (Wash. App. 1992)).*

(n99)Footnote 600. *Buxton v. Murch, 457 S.E.2d 81, 84-85 (Va. 1995)* (*quoting Wagoner v. Jack's Creek Coal Corp., 101 S.E.2d 627, 630 (Va. 1958)).*

(n100)Footnote 601. *Ericsson v. Braukman, 824 P.2d 1174, 1177 (Or. App. 1992), rev. denied, 830 P.2d 595 (Or. 1992)* and *rev. denied, 830 P.2d 596 (Or. 1992)* (parties "implicitly agreed" to relocation).

(n101)Footnote 602. *Flanagan v. Prudhomme, 644 A.2d 51, 60 (N.H. 1994)* (adopting compromise position proposed by dominant owner).

(n102)Footnote 603. *Pettus v. Keeling, 352 S.E.2d 321, 326 (Va. 1987)* (where easement location changed for benefit of servient owner, "the owner of the dominant estate does not lose his right to use the easement at its new location").

(n103)Footnote 604. *See* §§ 60.03(b)(4) (easement by implication from prior use), 60.03(b)(4)(i) (previously existing servitude, quasi-easement), *supra*.

(n104)Footnote 605. *Broyhill v. Coppage, 339 S.E.2d 32, 37 (N.C. App. 1986).*

(n105)Footnote 606. *Samuelson v. Alvarado, 847 S.W.2d 319, 322-323 (Tex. App. 1993).*

(n106)Footnote 607. *Broadhead v. Terpening, 611 So. 2d 949, 954 (Miss. 1992).*

(n107)Footnote 608. *Samuelson, 847 S.W.2d at 323.*

(n108)Footnote 609. *Reynolds v. Soffer, 459 A.2d 1027, 1031 (Conn. 1983).*

(n109)Footnote 610. *Cunningham v. Otero County Elec. Coop., Inc., 845 P.2d 833 (N.M. App. 1992).*

(n110)Footnote 611. *Thomason v. Kern & Co., 376 S.E.2d 872, 873 (Ga. 1989)* (once easement has been established, servient tenement may not alter its path).

(n111)Footnote 612. *Shrewsbury v. Humphrey, 395 S.E.2d 535, 539-540 (W. Va. 1990).*

(n112)Footnote 613. *Jordan v. Goodson, 558 So. 2d 848, 850 (Miss. 1990).*

(n113)Footnote 614. *Id* .

(n114)Footnote 615. *Palmer v. Soloe, 601 A.2d 1250-1253 (Pa. Super. 1992).*

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CHAPTER 60 THE LAW OF EASEMENTS: RIGHTS IN THE PROPERTY OF ANOTHER

7-60 Thompson on Real Property, Thomas Editions § 60.05

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§ 60.05 Responsibility for the Easement.

[Go To Supp]

(a) Maintenance and Repair.

The general principle governing maintenance is that duty follows privilege. Ordinarily, therefore, the owner of an easement has the duty to repair and maintain, and the right to do so. The new Restatement imposes a duty on the beneficiary of the easement to maintain and repair "to the extent necessary to (a) prevent unreasonable inter-ference with the enjoyment of the servient estate, or (b) avoid liability of the servient estate owner to third parties." n616 The owner of the dominant interest has the duty to maintain the easements and make reasonable improvements, "so long as the improvements do not unreasonably increase the burden upon the servient estate"; paving a roadway was reasonable. n617 Reasonableness is a question of fact. n618 Building a road on an ingress/egress easement is one of the things reasonably necessary for the use of the easement that the easement owner is entitled to do. n619 Protection against interference in the use of an easement often results in a secondary easement of access for necessary maintenance and repairs. n620 A power company's right to trim trees was limited to that necessary for safety and had to be done in a reasonable manner. n621 Servient owners, according to the New Restatement, have no duty to the dominant owner to "repair or maintain the servient estate or the facilities used in the enjoyment of the easement or profit." n622 Because the duty to maintain an easement ordinarily rests on the easement owner, servient owners had no duty to construct stairs to the beach for the benefit of a dominant estate owner. n623 A court required an easement owner, by contrast, to grade and improve a roadway for the transportation of farming machinery and equipment, because "the owner of an easement has not only the right but the duty to keep the easement in repair." n624 The servient owners are not responsible for costs for maintenance and repair of a roadway easement. n625 Joint use of an easement by the dominant and servient owners, or joint use by separate easements of the same facility or portion of the servient tenement gives rise to a duty of contribution to the reasonable costs of maintenance and repair. n626 These duties of maintenance and repair or of contribution may be varied by agreement. Thus, where a grant stated that the grantee would "contribute, pro rata to maintain and keep in good repair the road" until its acceptance as a public road, the Connecticut Supreme Court determined that the dominant owner would bear all costs of repair because the servient owner's land was not developed and thus contributed nothing to the deterioration of the road. n627 Where multiple parties, in this case the lot owners in a subdivision, share in the use of roadway easements, they must also share in the cost of maintenance and repair. n628 The rule governing proportional responsibility for maintenance arising from use of an easement by multiple parties in some jurisdictions has been made statutory. Thus, in California, maintenance is to be shared either according to

agreement or proportionally to use, with provision made for an arbitrator in cases of disagreement. n629

COMPUTER-ASSISTED RESEARCH

LEXIS: Easement W/10 Maintenance or Repair W/5 Responsib! or Duty

(b) Responsibility for Harm Due to Deficiencies in Maintenance or Repair.

Dominant owners are responsible not only for the repair and maintenance of an easement, but also for any damage occurring from failure to maintain and repair. Because the servient landowner had no responsibility "to maintain or repair, or to warn or to barricade dangerous conditions on the easement that are in the sole control of the holder of the easement," the servient owner was not liable for the electrocution of a worker on such an easement. n630 The parent of a child injured by electric wires on an exclusive easement could not hold the servient estate owner liable for maintenance of the easement absent an express agreement allocating that duty. n631 Holders and sole users of a non-exclusive easement which they had the right and duty to maintain were not liable to a trespassing motorcyclist who was killed by striking a chain they had strung against trespassers; the easement holders, as the responsible parties in the place of the fee owner, were subject only to the very limited duty of care owed a trespasser by a fee owner. n632 A servient owner who had no right of possession and control over a private roadway was not responsible for injury, but that fell on those of the multiple dominant owners abutting the portion of the easement where the injury occurred: each "is responsible for the maintenance and repair of the portion of the private right of way which abuts his or her land." n633 Often in establishing easements, the grant will specify who will have the duty for easement upkeep. Where an agreement existed reallocating common law maintenance responsibilities, the City, the dominant land-owner, did not have to repair erosion damage to lakes (a duty it would ordinarily have had). n634

COMPUTER-ASSISTED RESEARCH

LEXIS: Easement W/10 Maintenance or Repair W/5 Responsib! or Duty W/25 Injur! or Damage or Tort!

(c) Improvements.

Courts often permit dominant estate owners to make improvements to the easements so long as there is no detriment to the servient owner. For a power company with an underground easement to expand and place its transformers above ground violates the general rule that the use of an easement may not be enlarged to the injury of the servient estate. n635 Because the dominant owner has the right to make reasonable improvements to an easement, "so long as the improvement does not unreasonably increase the burden upon the servient estate," paving an easement was appropriate. n636 Substitution by the dominant owner of cattle guards for gates over an easement "was a permissible improvement of the easement and did not materially increase the burden on the servient estate." n637 To be permissible, the improvements must not unreasonably increase the burden on the servient estate, must be a change of degree rather than of kind, and must have been reasonably foreseeable by the parties at the time the easement was established. n638 A dominant owner could not construct a swale and curtain drain on a septic field because it increased the servient estate's burden; easement owners may make material alterations only if they do not increase the burden or interfere with the servient owner's enjoyment of the servient property. n639

COMPUTER-ASSISTED RESEARCH

LEXIS: Easement W/5 Improve! or Change! or Modif! or Alter W/5 Size or Extent or Scope

FOOTNOTES:
(n1)Footnote 616. Restatement (Third) of Property (Servitudes) § 4.13(1)(a)-(b) (2000).

(n2)Footnote 617. *Hayes v. Aquia Marina, Inc., 414 S.E.2d 820, 823 (Va. 1992).*

(n3)Footnote 618. *Id. at 823.*

(n4)Footnote 619. *Kolouch v. Kramer, 813 P.2d 876, 880 (Idaho 1991).*

(n5)Footnote 620. *Collins v. Swinger, 2001 Mont. LEXIS 527* at *13 (Mont. Dec. 17, 2001) (statutory secondary easement to enter, inspect, repair).

(n6)Footnote 621. *Larew v. Monongahela Power Co., 487 S.E.2d 348, 353 (W. Va. 1997)* (remanded to see if trimming of 300-year-old white oak reasonable).

(n7)Footnote 622. Restatement (Third) of Property (Servitudes) § 4.13(3) (2000).

(n8)Footnote 623. *Shapiro v. Burton, 502 N.E.2d 545, 549 (Mass. App. 1987), rev. denied, 504 N.E.2d 1066 (Mass. 1987).*

(n9)Footnote 624. *Page v. Bloom, 584 N.E.2d 813, 816 (Ill. App. 1991).*

(n10)Footnote 625. *Briones v. Solomon, 769 S.W.2d 312, 318 (Tex. App. 1989).*

(n11)Footnote 626. Restatement (Third) of Property (Servitudes) § 4.13 (3)-(4) (2000).

(n12)Footnote 627. *Lakeview Assocs. v. Woodlake Master Condominium Ass'n, 687 A.2d 1270 (Conn. 1997).*

(n13)Footnote 628. *Brentwood Subdiv. Rd. Ass'n v. Cooper, 461 N.W.2d 340, 342 (Iowa App. 1990).*

(n14)Footnote 629. *Healy v. Onstott, 237 Cal. Rptr. 540 (1987)* (interpreting former and current Cal. Civ. Code § 845).

(n15)Footnote 630. *Kibbons v. Union Elec. Co., 823 S.W.2d 485, 488 (Mo. 1992)* (*en banc*).

(n16)Footnote 631. *Reyna v. Ayco Dev. Corp., 788 S.W.2d 722, 724 (Tex. App. 1990).*

(n17)Footnote 632. *Wagner v. Doehring, 553 A.2d 684, 687-689 (Md. 1989).*

(n18)Footnote 633. *Oswald v. Hausman, 548 A.2d 594, 597 (Pa. Super. 1988).*

(n19)Footnote 634. *Briarcliff Lakeside Townhouse Owners Ass'n v. City of Wheaton, 524 N.E.2d 230, 233-234 (Ill. App. 1988).*

(n20)Footnote 635. *Villager Condo. Ass'n v. Idaho Power Co., 829 P.2d 1335, 1337 (Idaho 1992).*

(n21)Footnote 636. *Hayes v. Aquia Marina, Inc., 414 S.E.2d 820, 823 (Va. 1992).*

(n22)Footnote 637. *Van Raden v. Harper, 891 P.2d 78, 79 (Wyo. 1995).*

(n23)Footnote 638. *Id.*

(n24)Footnote 639. *Professional Exec. Ctr. v. LaSalle Nat'l Bank, 570 N.E.2d 366, 374-375 (Ill. App. 1991).*

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CHAPTER 60 THE LAW OF EASEMENTS: RIGHTS IN THE PROPERTY OF ANOTHER

7-60 Thompson on Real Property, Thomas Editions § 60.06

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§ 60.06 Remedies for Harm Involving Easements.

(a) Redress for Harm Suffered by the Servient Owner.

Where an easement has been inappropriately claimed, the purported easement holder may be guilty of a continuing trespass. This follows naturally from one characteristic of an easement as permitting the holder to do on someone else's property what would otherwise be a trespass. "[I]njunctive relief may be awarded for unlawful use of an easement." n640 The Virginia Supreme Court, noting that that principle protects a landowner from someone establishing prescriptive rights over the land, upheld an order requiring removal from an easement of brick columns placed by the dominant tenement owner. n641 The servient tenement owner also may recover money damages, both compensatory and punitive, for harm suffered by the servient tenement due to misuse of the easement. In a Texas case, a gas company that had begun construction of a pipeline was found not to have an easement because the person from whom the easement was purchased could not convey it. The gas company was held to be a trespasser as a matter of law and liable for damages, including those for mental anguish, and further was ordered to correct deficiencies in the pipeline. n642 In a New York case, where both compensatory and punitive damages were sought for misuse of an easement, the parties stipulated the withdrawal of all requests for money damages, and the trial court awarded punitive damages, the appellate court reversed on the ground that punitive damages were included within the stipulation. n643 As seen above, n644 The remedies spoken of above are all civil law remedies; but logically in some situations the criminal law can be invoked, though unwisely. Courts from time to time warn of the danger of disputes over easements and other land-use problems escalating to the point that people bring criminal charges. Thus in Arizona, a servient owner brought criminal trespass charges against a minor for walking down a driveway to get access to her property; the court adjudged it to be really a property dispute over the validity of an easement and that it was improper to apply the criminal trespass statute to it. n645 The Supreme Court of Nevada reversed a finding of malicious prosecution against a servient owner who had prosecuted a criminal trespass charge, but refused to comment "on the social utility of resorting to the criminal courts in this manner ... ." n646 Civil remedies may also be abused, as in a California case where parties in a dispute over an easement invoked a harassment statute, the passage of which was motivated by the experience of a young woman being stalked. n647 an easement properly granted may be extinguished if it is overused or misused to the damage of the servient tenement, or the easement holder may be enjoined from the overuse.

COMPUTER ASSIGNED RESEARCH

LEXIS: Easement! W/25 Trespass or Ejectment or Injunct! or (Damages or Money Damages W/10 Compensat! or Punitive!)

(b) Redress for Harm Suffered by the Easement Holder.

Most of the cases examined in this study have involved demands by the easement holder that the easement be respected. Courts usually grant an injunctive remedy of specific performance. For example, the Illinois Appellete Court affirmed an injunction prohibiting a shopping center operator from building a restaurant that would interfere with a parking easement, n648 the Colorado Court of Appeals affirmed a summary judgment granting an injunction against building of a fence that intruded into the area of an easement, n649 and the Arkansas Court of Appeals affirmed an injunction prohibiting interference with an easement by necessity. n650 The Tenth Circuit Court of Appeals applying Kansas law reversed the district court's finding that a damage remedy was adequate for the building of an automobile race track over a gas pipeline easement and held that because of the continuing nature of the injury the gas company was clearly "entitled to a mandatory injunction requiring the removal of materially interfering structures above its pipeline." n651 The court noted that in Kansas law where the nature of the violation of the easement is continuing, as in the existence of a building, damage remedies are usually inadequate and injunctive remedies appropriate. n652 Some courts will balance the relative burdens, balance the equities, in deciding whether to grant injunctive relief, but are much more reluctant to do so if the encroachment on the easement was deliberate. Thus, a Florida court required a servient owner to remove all of a wall that encroached on a fifty-foot wide easement area; it refused to balance the equities, because the servient owner knew it was encroaching when it built the wall. n653 The Alabama Supreme Court contrasted a case in which the comparative injury doctrine permitted a court to substitute a land swap (which would be a form of damages) for removing a house minimally encroaching on a flood easement from a case involving encroachment by a shopping center owner of a parking easement in which the injury was too serious to permit application of the doctrine. n654 If the easement holder has suffered harm not fully recompensed by a decree of specific performance, the easement holder may also receive an award of money damages, both compensatory and punitive, in whatever way the court views as appropriate. Thus, the Indiana Court of Appeals refused to reverse a refusal of damages for interference with a prescriptive easement when it held that the easement holders had failed to sustain their burden of proof of the amount of damages. n655 The New Hampshire Supreme Court, by contrast, upheld an award of damages for loss of rental income caused by interference with a beach access easement. n656

COMPUTER-ASSISTED RESEARCH

LEXIS: easement! W/25 Injunct! or (Money Damages or Damages W/5 Compensat! or Punitive!)

FOOTNOTES:
(n1)Footnote 640. *Nishanian v. Sirohi, 414 S.E.2d 604, 606 (Va. 1992).*

(n2)Footnote 641. *Nishanian, 414 S.E.2d at 606.*

(n3)Footnote 642. *Hamman v. Southwestern Gas Pipeline, Inc., 821 F.2d 299, 306-307 (5th Cir. 1987)* (affirming awards for mental anguish, cost of stone removal, cost of road repair, cost of farm equipment, prejudgment interest and prospective attorney fees for the appeal), *vacated in part on reh'g, 832 F.2d 55 (5th Cir. 1987)* (vacating attorney fees as disallowed by statute).

(n4)Footnote 643. *Mandia v. King Lumber & Plywood Co., 583 N.Y.S.2d 5, 10-11 (App. Div.1992).*

(n5)Footnote 644. *See* § 60.04(a)(1)(iii), *supra* section on extinguishment for overuse.

(n6)Footnote 645. In re Appeal in *Maricopa Cty, Juvenile Action No. JV-512490, 942 P.2d 477, 479-480 (Ariz. App. 1997)* (*citing* cases from other jurisdictions). The cases cited used terms like "abuse of a penal statute" and "abuse

of process" for such use of the criminal law.

(n7)Footnote 646. *Jordan v. Bailey, 944 P.2d 828, 834 n.5 (Nev. 1997).*

(n8)Footnote 647. *Byers v. Cathcart, 67 Cal. Rptr. 2d 398, 401 (App. 1997).*

(n9)Footnote 648. *Madigan Bros., Inc. v. Melrose Shopping Ctr., 463 N.E.2d 824 (Ill. App. 1984).*

(n10)Footnote 649. *Pickens v. Kemper, 847 P.2d 648 (Colo. App. 1993).*

(n11)Footnote 650. *Carver v. Jones, 773 S.W.2d 842 (Ark. App. 1989).*

(n12)Footnote 651. *Mid-America Pipeline Co. v. Lario Enter., Inc., 942 F.2d 1519, 1530 (10th Cir. 1991).*

(n13)Footnote 652. *Mid-America Pipeline Co., 942 F.2d at 1528-1529* (extensively citing *Mid-America Pipeline Co. v. Wietharn, 787 P.2d 716 (Kan. 1990)).*

(n14)Footnote 653. *Diefenderfer v. Forest Park Springs, 599 So. 2d 1309, 1313 (Fla. App. 1992)* (recognizing doctrine but refusing to apply), *rev. denied, 613 So. 2d 4 (Fla. 1992).*

(n15)Footnote 654. *West Town Plaza Assocs., Ltd. v. Wal-Mart Stores, Inc., 619 So. 2d 1290, 1296-1298 (Ala. 1993).*

(n16)Footnote 655. *Bromelmeier v. Brookhart, 570 N.E.2d 90, 93 (Ind. App. 1991).*

(n17)Footnote 656. *Flanagan v. Prudhomme, 644 A.2d 51, 61 (N.H. 1994)* (servient owner failed to prove lack of mitigation by dominant owner).

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CHAPTER 60 THE LAW OF EASEMENTS: RIGHTS IN THE PROPERTY OF ANOTHER

7-60 Thompson on Real Property, Thomas Editions § 60.07

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§ 60.07 Change of Ownership of Easements.

[Go To Supp]

(a) Transfer of the Servient Tenement and the Requirement of Notice.

The very nature of an easement, and a major point justifying its existence, is to guarantee that an arrangement for the non-possessory use of land survives the transfer of that land into the hands of another. The basic rule is that "an easement, once created and recorded, runs with the land and is a burden or benefit for all successors in the chain of title." n657 Whenever the servient tenement is transferred, it remains burdened by any easement in existence at the time of its transfer, whether the easement be appurtenant or in gross. Under old English law, a person purchasing the servient tenement would do so at the purchaser's own risk; if a valid easement existed, it remained valid, whether or not the servient purchaser was aware of its existence. The risk of being bound by an easement of which one was ignorant was one of the reasons for the old English suspicion of negative easements. n658 One was much less likely to be put on notice by a property owner's failure to do something on the property in response to an easement, than by signs of someone else's use of the property: a person with an easement of way was likely to leave tracks. American law, however, has long ago transported the requirement of notice into easement law for those who purchase a servient tenement for value. n659 Those who do not purchase land for value, e.g., who receive it by gift generally are not protected by recording systems. n660 To be bound by an easement, a servient purchaser must have some form of notice: record notice, actual notice, or inquiry notice. n661 In some states, easements, as interests in real estate, must be recorded to give constructive notice to subsequent purchasers of the servient tenement. n662 The servient purchaser has the full protection of the state's recording system, whether the easement in question is express, n663 by implication n664 or by prescription. n665 Thus, the bona fide purchaser for value of a servient tenement, that is, the purchaser without notice according to the type of recording system, will not be bound by the easement of which there was no notice. n666 One purchasing land with knowledge of facts that would put a prudent person upon inquiry which, if prudently pursued, would lead to "actual notice of rights claimed adversely by another, is chargeable with the actual notice he or she would have received." n667 For terms of an easement to bind servient owners, "they must have had either notice of record, actual notice, or constructive notice"; purchasers were put on notice of easement by existence of a boat dock and the footpath leading to it. n668 Treatises and "the overwhelming majority of case law" agree that an easement will not bind the subsequent bona fide purchaser of a servient tenement who purchases "without notice, either actual or constructive, of the easement." n669 Actual and inquiry notice are particularly important when dealing with implied or prescriptive easements that may not be recorded. Thus, in a case dealing with a prescriptive drainage

easement in Iowa, the purchaser would be bound if a reasonable inspection of the property would have revealed the existence of the easement. n670

COMPUTER-ASSISTED RESEARCH

LEXIS: Eeasemen W/20 Notice W/10 Valid or Subseq! Purchaser or Successor or Bound or Bind! or Burden! W/15 Servient W/5 (Tenement or Estate)

(b) Transfer of Easements Appurtenant.

(1) Benefits Remain With the Dominant Tenement.

As an interest in land that is part of the dominant tenement, an easement appurtenant is automatically alienated; it "attaches to, passes with and is an incident of ownership of the particular land." n671 An easement by necessity, by definition, is an appurtenant easement, to which the ordinary rules apply. n672 Ownership of the appurtenant easement "follows ownership of the dominant estate." n673 It passes "by conveyance of the land to which it is annexed." n674 The easement appurtenant "is presumed to be conveyed with the property to which it is appurtenant," n675 and it cannot be alienated separately from it. n676 The new Restatement similarly states that the original party or successor to a benefit that runs with an interest in property "is entitled to the benefit only during the time the party or successor holds the benefited property interest," n677 and that the benefit of an appurtenant servitude (here an easement) is transferable only with the benefited interest or estate. n678 The easement right has, in sum, become one out of the bundle of rights attached to the dominant tenement, and until it is terminated, cannot be separated from the dominant tenement. Unless expressly excepted, a transfer of real property includes all easements appurtenant to it, "although not referred to in the transfer, and whether the transfer is voluntary or involuntary." n679 Because the easement is attached to the dominant tenement, future transfers of the tenement will carry the easement with them, even if unmentioned, because language "is not necessary to convey the easement with these deeds because the easement is one appurtenant." n680 Use of the term "appurtenances" is not necessary to transfer an appurtenant easement. n681 Some jurisdictions recognize the same result through statute. n682

COMPUTER-ASSISTED RESEARCH

LEXIS: Easement W/20 Benefit W/15 Dominat W/5 (Estate or Tenement) W/20 Transfer! or Convey! or Assign! or Devis!

(2) Severability of Easement Appurtenant.

The above section and the rhetoric of most courts appear to make it clear that easements appurtenant, by their very nature, cannot be severed from the dominant tenement they serve. Some scholars urge that if the intention is clearly enough expressed, courts ought to permit such severance, i.e., the easement going to one person and the dominant tenement to another. n683 Add to text following callout for The new Restatement agrees: "[A]ppurtenant benefits may not be severed and transferred separately from the benefitted property unless otherwise provided by the terms of the servitude." n684 A severance like this could be conceived to transform the easement appurtenant into an easement in gross, n685 or to substitute a different piece of land for the original dominant tenement. If a prime motivation of modern servitude law is to give effect to the intention of landowners, then surely these scholars are correct, and the ability to make such a severance ought to exist. However, a transformation of this type would require convincing courts to venture a more creative reading of their precedents than many would be willing to make. Perhaps, at least in those jurisdictions permitting transfer of easements in gross, the same end could be reached with less risk of adverse actions by courts and less risk to the clarity of the distinctions between easements appurtenant and in gross by structuring the original conveyance to create an easement in gross whose owner happens at the time of transfer to own neighboring land, rather than to create an easement appurtenant. To reach this end would require careful wording in the document

creating the easement to state clearly the desire to create an easement in gross, and to overcome the presumption that many courts have in face of ambiguous language that the existence of a potential dominant tenement is strong proof of the intention to create an easement appurtenant rather than an easement in gross. n686

(3) Divisibility of the Dominant Tenement and Access to the Easement Appurtenant.

If the dominant tenement served by an easement should be subdivided, courts will generally hold that each of the pieces resulting from the subdivision of the dominant tenement continues to have the right to use the easement. Subject to limitations imposed on an easement at its creation or by the terms of the transfer of the dominant tenement, those who succeed to the parts into which a dominant tenement may be subdivided, "thereby succeed to the privileges of use of the servient tenement authorized by the easement." n687 If the dominant tenement is transferred in separate parcels to different persons, "each grantee acquires a right to use easements appurtenant to the dominant estate, provided the easements can be enjoyed as to the separate parcels without any additional burden on the servient tenement." n688 The presumption here seems to be that since the original dominant tenement, absent some limitation in the grant, can use the easement to serve whatever development may naturally occur, permitting the parcels resulting from dividing that tenement to use it should not unreasonably worsen the burden on the servient tenement. Subdivision is an entirely foreseeable use of land, and the servient tenement owner would be expected to understand that in granting the easement, and the servient owner who did not wish the easement to be so heavily used could condition the original grant.

COMPUTER-ASSISTED RESEARCH

LEXIS: Easement W/20 Dominant W/5 (Tenement or Estate) W/20 Divi! or Subdivi! W/20 Access or Right

(c) Transferability of Easements in Gross.

An easement in gross, by contrast to an easement appurtenant that was transferred whenever the dominant tenement was, traditionally was severely limited in alienability. It could not be conveyed, devised or inherited. Courts retained great suspicion of easements in gross, n689 Some courts retain that reluctance to permit alienability. n690 and limiting their alienability was one way of limiting their effectiveness and their duration. By contrast, despite the fact that easements in gross are "personal to the grantee only, and are generally not assignable or transferable," Texas courts permit parties "to create an assignable easement in gross through an express assignment provision." n691 Abandoning the longstanding principle ("no proposition ... more firmly settled") n692 that easements in gross were not transferable, the Maine Supreme Court has held that easements in gross are assignable when the parties clearly express "that intent in the language of the deed." n693 The new Restatement continues the trend towards alienability of easements in gross by stating that benefits in gross are freely transferable, unless they are personal. n694 Some states achieve the same result by statute. n695 Where easements in gross are transferable, the formal requisites for their transfer by inter vivos conveyance or by devise are the same as those for the creation inter vivos or by devise of an easement of like duration. n696

(1) Transferability of Commercial Easements in Gross.

Many jurisdictions have in later days adopted a distinction between commercial and personal easements in gross, holding commercial easements in gross to be fully alienable while retaining limitations on personal easements. n697 Thus, the *Restatement* has it that commercial easements in gross are alienable property interests, with the same restrictions on alienability as imposed on an estate in land of like duration. n698 The parties may provide that commercial easements are not alienable in the agreements creating them. n699 A commercial easement in gross does not mean that the easement is held by an organization rather than an individual. The distinction is whether the easement benefits the holder for commercial purposes or for personal purposes. Thus, an easement in gross permitting swimming in a private lake would be commercial if it were for the purpose of permitting an individual to run a swimming club on the lake, rather than to provide swimming facilities for the individual and family.

COMPUTER-ASSISTED RESEARCH

LEXIS: Easement in Gross W/15 Commercial W/40 Transfer! or Alienab! or Convey! or Devis! or Sell or Sale

(2) Transferability of Personal Easements in Gross.

While most courts currently permit the transfer of commercial easements in gross, many still refuse to permit the transfer of personal easements in gross. Among the reasons for this dichotomy is that granting a personal right presumably involves a personal relationship. These courts, then, do not permit such easements to extend to someone who was not part of the original relationship; to do so may burden the servient tenement beyond the contemplation of the parties. The *Restatement's* position is more generous: that the alienability of non-commercial easements in gross is "determined by the manner or terms of their creation." n700 Some courts will permit a non-commercial easement in gross to be transferred, if its transferability has been made part of the agreement. n701 A few courts consider them to be of their very nature not transferable; in that case the intention of the parties will not suffice to make them so. n702

COMPUTER-ASSISTED RESEARCH

LEXIS: Easement in Gross W/15 Personal or Noncommercial or Non-Commercial W/40 Transfer! or Alienab! or Conver! or Devis! or Sell or Sale

(3) Statutory Developments.

Most law in the area of easements is court-made, but a few states have enacted statutory provisions making some easements in gross transferable. Indiana uses a limited definition of an "easement in gross of a commercial character" and then declares that those easements created after June 30, 1989 are alienable unless the instrument creating them says otherwise, amending the statute that held this type of easement created after July 6, 1961 was alienable only if the instrument creating it so specified. n703 California courts, by contrast, interpret a tissue of Civil Code sections concerning the definition and alienability of property to say that all easements, whether commercial or non-commercial, are presumed to be alienable absent something in the conveyance to the contrary. n704 A Virginia statute simply says: "Any estate or interest in or claim to real estate, including easements in gross, may be disposed of by deed or will." n705 Statutes in most other states dealing with this question are limited to specific types of easements, like conservation or solar easements. n706

(4) Apportionability of Easements in Gross.

Courts differ about the permissibility of apportioning an easement in gross. The fear in permitting apportioning is that it will lead to overburdening of the servient tenement. The *Restatement* position is that apportionability depends on the manner or terms of the easement's creation. n707 The divisibility of the easement in gross will depend on its terms. Where the easement is exclusive, permitting someone sole use of the easement or the right to take all of a substance from the land, the holder may transfer as much as desired because no matter how many people attempt to use the easement, the measure is "all." n708 One court interprets the exclusivity of the easement to mean exclusive as to the fee owner, but not forbidding more than one easement; thus, two overlapping easements in gross were apportionable, thereby permitting an electric company to lease its poles to a cable television operator. n709 Where the easement is not exclusive or there is no absolute measure, the problem is more difficult, leading some courts to say the easement is not divisible, and others to say that whether the easement or profit may be divided depends on the grantor's intent. n710

COMPUTER-ASSISTED RESEARCH

LEXIS: easement in Gross W/40 Divi! or Apportion!

FOOTNOTES:

(n1)Footnote 657. *Smith v. Jack Nicklaus Dev. Corp., 587 N.E.2d 1243, 1248-1249 (Ill. App. 1992)* (drawings recorded as part of easements placed purchasers on notice of likelihood of plantings that would interfere with view).

(n2)Footnote 658. *See, e.g.*, Colin Sara, Boundaries and Easements 174 (Sweet & Maxwell 1991).

(n3)Footnote 659. *See, e.g.*, Charles E. Clark, Real Covenants and Other Interests Which "Run with Land" 161-162 (Callaghan and Co., Chicago 1929) (rule of enforceability against those who take with notice or are not purchasers for value "necessarily applies to easements ... .").

(n4)Footnote 660. *See* § 92.14(b)(1), *infra* (on the functioning of recording systems).

(n5)Footnote 661. Some courts' language shows the close relationship between actual and inquiry notice by seemingly conflating them. "Actual notice depends upon the purchaser having either actual knowledge of the easement or knowledge of sufficient facts to charge him or her with a duty to make inquiry that would reveal the existence of the easement." *National Prop. Corp. v. Polk County, 386 N.W.2d 98, 102-103 (Iowa 1986).*

(n6)Footnote 662. *Kimco Addition, Inc. v. Lower Platte S. Nat. Resources Dist., 440 N.W.2d 456, 460 (Neb. 1989).*

(n7)Footnote 663. *Hall v. Allen, 771 S.W.2d 50, 53 (Mo. 1989)* (easement by unrecorded grant).

(n8)Footnote 664. *Tiller v. Hinton, 482 N.E.2d 946, 950-951 (Ohio 1985)* (both easements implied from previous use and easements of necessity not binding without notice); *George v. Goshgarian, 189 Cal. Rptr. 94 (1983)* (easement by implication from prior use).

(n9)Footnote 665. *Kiler v. Beam, 539 A.2d 1138, 1140-1141 (Md. App. 1988)* (prescriptive easement).

(n10)Footnote 666. *Tiller v. Hinton, 482 N.E.2d 946, 949-950 (Ohio 1985)* (purchaser not bound by unrecorded notice of which had neither actual nor constructive notice).

(n11)Footnote 667. *National Prop. Corp. v. Polk County, 386 N.W.2d 98, 103 (Iowa 1986).*

(n12)Footnote 668. *Hall v. Allen, 771 S.W.2d 50, 53 (Mo. 1989)* (*en banc*).

(n13)Footnote 669. *Kiler v. Beam, 539 A.2d 1138, 1140 (Md. App. 1988).*

(n14)Footnote 670. *National Prop. Corp. v. Polk County, 386 N.W.2d 98, 106 (Iowa 1986).*

(n15)Footnote 671. *Butler Drive Prop. Owners Ass'n v. Edwards, 427 S.E.2d 879, 881 (N.C. App. 1993).*

(n16)Footnote 672. *Broadhead v. Terpening, 611 So. 2d 949, 954 (Miss. 1992); Lichty v. Sickels, 197 Cal. Rptr. 137, 139 (1983)* (easement by necessity is appurtenant and thus will pass with the estate when sold).

(n17)Footnote 673. *Matter of Parcel of Land Located on Geneva Lake, Town of Linn, Walworth County, 477 N.W.2d 333, 338 (Wis. App. 1991).*

(n18)Footnote 674. *Schnuck Markets, Inc. v. Soffer, 572 N.E.2d 1169, 1182 (Ill. App. 1991), app. denied, 580 N.E.2d 134 (Ill. 1991).*

(n19)Footnote 675. *Scott v. Curtis, 798 P.2d 248, 251 (Or. App. 1990).*

(n20)Footnote 676. *Luevano v. Group One, 779 P.2d 552, 554 (N.M. App. 1989)* (easement appurtenant "deemed to run with land and is unassignable in the absence of a transfer of the dominant estate").

(n21)Footnote 677. Restatement (Third) of Property (Servitudes) § 4.4(2) (2000).

(n22)Footnote 678. *Id.* § 4.6(a). The Restatement emphasizes that this is a default rule that can be changed by the intent of the parties. *Id.* at cmt. a., cmt. b.

(n23)Footnote 679. *Wallner v. Johnson, 730 S.W.2d 253, 256 (Ark. App. 1987).*

(n24)Footnote 680. *Butler Drive Prop. Owners Ass'n v. Edwards, 427 S.E.2d 879, 882 (N.C. App. 1993).*

(n25)Footnote 681. *Wallner v. Johnson, 730 S.W.2d 253, 256 (Ark. App. 1987).*

(n26)Footnote 682. *See, e.g.*, Cal. Civ. Code § 1104.

(n27)Footnote 683. *See, e.g.*, Gerald Korngold, Private Land Use Arrangements: Easements, Real Covenants, Equitable Servitudes § 5.06 (Shepards/McGraw-Hill 1990) (finding little authority).

(n28)Footnote 684. Restatement (Third) of Property (Servitudes) § 4.6 cmt. b. (Tentative Draft No. 4, 1994); *see also id.* § 4.4 cmt. c.

(n29)Footnote 685. Language in John Goddard, A Treatise on the Law of Easements 10 (American ed. 1880), suggests that such a severance is possible under American law. A close reading in the context of the English denial of the existence of easements in gross suggests, however, that the author may be discussing the right to create easements in gross in the first place.

(n30)Footnote 686. *See* § 60.02(f)(5) *supra* and noted cases.

(n31)Footnote 687. Restatement of Property § 488 (1944).

(n32)Footnote 688. *See Mularoni v. Bing, 34 P.3d 497, 502-503 (Mont. 2001)* (*quoting* this sentence). *Wallner v. Johnson, 730 S.W.2d 253, 256-257 (Ark. App. 1987).*

(n33)Footnote 689. In England they were and still are forbidden. An easement has to have a dominant tenement. *See, e.g.*, Colin Sara, Boundaries and Easements 161-162 (Sweet & Maxwell 1991) (there can be no doubt that the concept that the benefit of the easement must be annexed to land and cannot exist in gross "represents the law as it stands").

(n34)Footnote 690. *Tupper v. Dorchester County, 487 S.E.2d 187, 191 (S.C. 1997)* (easement in gross mere personal privilege to use land of another; "privilege is incapable of transfer").

(n35)Footnote 691. *Farmer's Marine Copper Works, Inc. v. City of Galveston, 757 S.W.2d 148, 152 (Tex. App. 1988)* (affirming injunction requiring removal of encroachments on roadway easement).

(n36)Footnote 692. *O'Donovan v. McIntosh, 728 A.2d 681, 685 (Me. 1999)* (Wathen, C.J., dissenting).

(n37)Footnote 693. O'Donovan, at 685.

(n38)Footnote 694. Restatement (Third) of Property (Servitudes) § 4.6(1)-(2) (Tent. Draft No. 4, 1994). Whether an easement is personal is decided by whether a number of factors, including the relationship of the parties, the amount paid, and the nature of the servitude, indicate that the parties should "reasonably have expected" that the benefit would be transferable. *Id.*, § 4.6 (2).

(n39)Footnote 695. *See infra* § 60.07(c)(3).

(n40)Footnote 696. Restatement of Property §§ 494, 495 (1944).

(n41)Footnote 697. *Miller v. Lutheran Conference & Camp Ass'n, 200 A. 646, 651 (Pa. 1938)* (obvious difference between personal enjoyment easements and commercial exploitation easements); *Champaign Nat'l Bank v. Illinois Power Co., 465 N.E.2d 1016, 1021 (Ill. App. 1984)* (weight of modern authority holds commercial easements in gross alienable).

(n42)Footnote 698. Restatement of Property § 490 (1944).

(n43)Footnote 699. Restatement of Property § 489 cmt. b (1944).

(n44)Footnote 700. Restatement of Property § 491 (1944).

(n45)Footnote 701. *E.g., Lindley v. Maggert, 645 P.2d 430, 431 (Mont. 1982).*

(n46)Footnote 702. *E.g., Sandy Island Corp. v. Ragsdale, 143 S.E.2d 803, 806-806 (S.C. 1965)* (personal easements in gross not transferable; easement in case was commercial).

(n47)Footnote 703. Ind. Code Ann. § 32-5-2-1(a)-(c).

(n48)Footnote 704. *Collier v. Oelke, 21 Cal. Rptr. 140, 141-42 (1962)* interpreting Cal. Civ. Code §§ 652, 802 and 1044 to say easement in gross is property and can be transferred); *City of Anaheim v. Metropolitan Water Dist., 147 Cal. Rptr. 336, 339 (1978)* (relying on *Collier* , "because an easement in gross is personal, it may be conveyed independent of land").

(n49)Footnote 705. "Although personal to the grantee, the easement [in gross] is transferable by the grantee." *Hise v. BARC Elec. Coop., 492 S.E.2d 154, 157 (Va. 1997)* (*citing* same statutory section). Va. Code Ann. § 55-6.

(n50)Footnote 706. *E.g.*, Colo. Rev. Stat. § 38-30.5-103 (conservation easement in gross freely transferable); Md. Real Prop. Code Ann § 2-118(c) easement may be in gross "and as such it is inheritable and assignable"); Ohio Rev. Code Ann. §§ 5301.63, 5301.67-5301.70 (solar and conservation easements).

(n51)Footnote 707. Restatement of Property § 493 (1944).

(n52)Footnote 708. *Abbott v. Nampa School Dist. No. 131, 808 P.2d 1289, 1295-1296 (Idaho 1991).*

(n53)Footnote 709. *Witteman v. Jack Barry Cable T.V., 228 Cal. Rptr. 584, 588-589 (1986), rev. dismissed, 742 P.2d 779 (Cal. 1987), cert. denied, 484 U.S. 1043 (1988).*

(n54)Footnote 710. *Abbott, 808 P.2d at 1296.*

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CHAPTER 60 THE LAW OF EASEMENTS: RIGHTS IN THE PROPERTY OF ANOTHER

7-60 Thompson on Real Property, Thomas Editions § 60.08

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§ 60.08 Termination of Easements.

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Easements are hardier creatures than are real covenants and equitable servitudes, which can be terminated for considerably more legal and equitable reasons than can easements. The primary means by which parties seek to terminate easements include expiration, merger, release, abandonment, forfeiture for misuse, changed conditions, laches and adverse possession.

(a) Expiration by Terms of the Agreement or Nature of the Easement.

Easements may in their grant specify that they will terminate at a specific date or on the occurrence of specific events, or their nature, e.g., easements by necessity, may determine that they terminate on the occurrence of certain events.

(1) Termination by Date.

Courts must determine the clarity with which the terminating events are defined. Where the easement is due to expire at a clearly specified date certain, there is little problem and little room for dispute.

(2) Termination by Fulfilled Conditions.

The grant creating an easement may itself set up conditions other than a date, the fulfillment of which will cause the automatic termination of the easement. n711 Some jurisdictions permit both determinable easements and easements subject to conditions subsequent. n712 Where the terminating event is differently defined than by a date, courts will examine the agreement carefully, because clauses providing for "termination of an interest in real property upon discontinuance of the use of such property for specific purposes are not favored in the law and will be strictly construed against the grantor." n713 Where, for example, the dominant owner of a driveway easement, providing that the easement would terminate upon building new or expanding old buildings on the dominant tenement, built a 230-square-foot addition to the house, the easement terminated: such limitations or conditions will be enforced unless not sufficiently definite, or contrary to law or public policy. n714 An easement of access to repair an antenna system terminated when the repair agreement did. n715 Railroad rights of way, where they are interpreted to be easements,

terminate when the railroad ceases using them for that purpose. n716 By contrast, in an easement granted an electric company for transmission towers "for such period of time as it may use the same or until use thereof is abandoned," the fact that the power company had de-energized the lines was rebutted by the fact that it still patrolled and maintained the lines, that the grant included the right to replace and rebuild them, and that the power company had submitted plans to replace them upon obtaining adjacent easements. n717

(3) Termination Because of Changed Conditions.

Termination for changed conditions is a very important tool when dealing with real covenants and equitable servitudes. It is less important, but still has application to easements, mostly to those implied by law and to express easements with conditions built into the grant.

If changed conditions make it impossible for an easement to fulfill its purpose, the easement may terminate. Where two dominant landowners equally owned a public utilities easement on the boundary of their properties and one of them built a building that went up to the property line and rendered the easement useless, the court terminated the easement, thereby preventing the offending owner from using that half of the easement that ran on the other party's property. n718 An easement "granted for a particular purpose terminates as soon as the purpose ceases to exist, is abandoned, or is rendered impossible of accomplishment." n719 By contrast, where a dominant owner purchased two non-adjoining lots from a grantor who had created an easement across servient land separating them and then purchased an additional lot connecting them, the court refused to terminate the easement. Noting the general rule that an easement given for a specific purposes "terminates as soon as such purpose ceases to exist," but that the intent of the parties was dispositive, the court construed the grant in favor of the dominant party and found insufficient proof that termination was intended. n720

COMPUTER-ASSISTED RESEARCH

LEXIS: Easement W/20 (Terminat*** or Forefeit*** or Extin!) W/10 Change W/3 Condition*

(4) Easements by Necessity.

Easements by necessity generally terminate upon the removal of the necessity that caused their creation. The possessor of a driveway easement by necessity lost use of the easement upon the availability of other access to the property; such easements "have the implied purpose to make possible the use of the dominant land, and therefore will terminate when the necessity for their existence disappears." n721 A dominant owner's easement by necessity did not terminate, however, by refusal of offers of alternative access over the servient estate because of public policy against penalizing the landlocked property owner in case a court later determined the offer was reasonable; the dominant owner should not be so coerced into accepting whatever offer was made. n722

COMPUTER-ASSISTED RESEARCH

LEXIS: Easement! W/3 Necessity W/20 (Terminat*** or Forfeit*** or Extinguish!) W/10 Change W/3 Condition*

(b) Termination by Action of the Parties.

(1) Termination by Merger or Unity of Ownership.

Because one cannot own an easement in one's own land, when servient and dominant estates come into the same ownership, the easement between them disappears, is merged into the possessory right. n723 As the *Restatement of Property* puts it, if the dominant and servient tenements of an appurtenant easement come into ownership of the same person, the easement terminates to the extent that the estate right in the servient tenement permits the uses previously permitted only because of ownership of the dominant estate. n724 In other words, if x owns an easement permitting her

to cross over y and comes into ownership of y, the easement terminates if x can now cross y because of her estate ownership right and no longer needs the easement to be permitted to do so. If the owner of an easement in gross comes into ownership of an estate in the servient tenement, the easement terminates to the extent that the ownership of that estate permits the uses authorized by the easement. n725 Before merger will occur, "[t]he ownership of the two estates must be co-extensive and equal in validity, quality and all other circumstances of right." n726 Whether the easement is extinguished will be affected by the degree of merger between the two estates; complete merger brings extinguishment, partial merger may not. There must be complete unity of title for merger to occur; n727 that one is only a joint owner of one of the parcels will prevent merger from occurring. n728 Where easements in a subdivision serve all members of the subdivision, there can be no merger and extinguishment of the easement unless the entire subdivision comes into one ownership. n729 A partial merger insufficient to extinguish easements may occur when, for example, a party owns one lot individually and the other jointly. n730 Courts may, however, look behind apparent differences in degree of ownership to see if there should be merger. Thus, in a Nevada case, presumptions in community property law overcame statements in a deed that land was owned by two men as separate property; since their other parcel was also owned as community property, merger extinguished an apparent easement over one of the parcels. n731 If the owner of a dominant tenement becomes leaseholder of the servient tenement there is no merger; merger will occur only when there is unity of title as well as unity of possession. n732 The easement will not be extinguished in this situation, or in other situations of limited ownership (e.g., life estates), because there will come a time when the tenancy for years or the life estate will terminate and the parcels of property once again will be completely separate, leaving the dominant owner still in need of the easement. When a dominant tenement owner or the owner of an easement in gross is a remainder or reversionary owner of the servient estate, the easement will be extinguished only when that owner comes into both possession and ownership of the full estate. n733 Again, this result makes complete sense, because until the easement owner comes into full possession of the estate, the usefulness and value of the easement remains intact. The reason for this outcome grows out of the definition of an easement as the ownership of rights of use in the land of another and from the underlying principle that one cannot own an easement in one's own land. The formerly dominant owner still has rights over the servient tenement, but they are now incidents of ownership rather than of an easement, and if the ownership of the properties is once again severed, easement rights do not automatically revive, but ordinarily will have to be established anew. n734 Where an easement owner purchased the servient tenement and then reconveyed to the sellers, the easement over the servient tenement was extinguished. n735 If only one of the cotenants in a dominant tenement comes into ownership of the servient tenement, the other cotenant retains easement rights at the same time as the first cotenant loses them. If the lessee of the dominant tenement becomes owner of the servient tenement, the lessee will not operate under easement rights, but the dominant tenement owner will retain easement rights.

An easement extinguished by merger has ceased to exist. It does not come back into existence when the estates are once again separated without the same type of action required to bring an easement into existence in the first place. n736 If an easement by necessity is required by the re-severance of the parcels, it is treated as a new easement by necessity under normal rules. n737 An easement by implication from prior use (the prior use often called a quasi-easement) may arise upon reseparation, again following the ordinary rules for creating such an easement. n738 There also exists a mortgage exception to the merger doctrine. Where a dominant tenement benefitting from an easement is mortgaged and then merged with the servient tenement and the servient tenement re-severed from the dominant tenement, the easement will survive to benefit the mortgagee if the mortgagee's interest should become possessory, to protect the mortgagee "from losing the full value of its security interests, including the benefit of any easement." n739

COMPUTER-ASSISTED RESEARCH

LEXIS: Easement or Right of Way or Right-of-Way W/15 Extinguish! or Terminat! or Forefeit! W/20 (Merg! or Unity W/3 (Title or Possession or Ownership)

(2) Termination by Release.

Any easement, no matter how created, may terminate by the agreement of both the dominant and servient parties,

through a formal release. It may occur through either an inter vivos conveyance or a devise. n740 Since this is, in a sense, the conveyance back to the servient owner of those parts of the bundle of rights contained in the easement, in the ordinary course of affairs, the release must be in writing sufficient to satisfy the Statute of Frauds and fulfill the same type of formalities as the original conveyance. n741 Just as with abandonment, the effectiveness of a release depends upon a finding of intention: in a release the intention is to give up the easement for the benefit of the servient owner, while abandonment has no reference "to any resulting benefit to anyone else." n742 Because it operates to increase the alienability of land, some courts will require less formality to release an easement than to create one. n743 This can go rather far; thus, the Maine Supreme Court, reversing the trial court, found that a party released a statutorily created constructive easement, of which it was unaware at the time, by entering into a lease for an easement which included a larger area, required payment and permitted the state agency to take possession on default. "By entering into a lease that contained terms and conditions that were inimical to the property interest it enjoyed pursuant to its statutorily created constructive easement, AHI clearly and unequivocally manifested an intention to release the constructive easement." n744 The use of the word "abandon" in a document does not suffice to make the agreement an abandonment: "A bilateral transaction through which an easement is extinguished by the concurrence of both the owner of the easement and owner of the servient tenement is properly termed a "release,' not an abandonment." n745 Release of part of an easement does not necessarily extinguish the entire easement. n746

COMPUTER-ASSISTED RESEARCH

LEXIS: Easement W/25 Terminat*** or Forfeit*** or Cancel! W/25 Release W/10 Writing or Oral

(3) Termination by Abandonment.

A dominant party may terminate an easement by abandoning it. Abandonment is an intentional relinquishment of the easement "indicated by conduct respecting the use authorized thereby." n747 Abandonment is a question of intent, and the burden of proof "is on the person asserting abandonment." n748 Mere non-use does not suffice to prove abandonment, any more than failing to make use of fee ownership has any effect absent adverse possession. There must be other evidence of a clear intent to abandon.

(i) Non-use Alone Usually Not Proof of Abandonment.

Courts will ordinarily not find an easement to have been abandoned because of simple non-use, even when the non-use is for a long duration. The Nebraska Supreme Court distinguishes between easements created by grant or deed and those that arise by prescription or implication. Mere nonuse for any period of time cannot extinguish an easement acquired by deed, while for prescriptive or implied easements, nonuse for a period sufficient to create a prescriptive easement raises a rebuttable presumption of abandonment. n749 The Maine Supreme Court has it that abandonment of a private easement requires proof of " '(1) a history of nonuse coupled with an act or omission evincing a clear intent to abandon, or (2) adverse possession by the servient estate.' " n750 Statutes may control the abandonment of public easements. Thus, the Idaho Supreme Court held that a statute requires that a public, prescriptive road easement can only abandoned by "ordinance" or formal action. n751"A claim of abandonment can be upheld only where non-use is accompanied by affirmative and unequivocal acts indicative of an intent to abandon and is inconsistent with the continued existence of the easement." n752 In that case even though the easement holder put in place flood control measures that made the easement unusable for periods of time, that act did not supply evidence of intent to abandon. n753 The West Virginia Supreme Court extended this rule to prescriptive easements in keeping with public policy considerations "which revere vested property rights." n754 Where the easement is publicly owned, there may be additional requirements of explicit official action to prove abandonment. "The conduct must be some affirmative official act, and not mere implication." n755 One court holds, however, that there can arise "a presumption of a public intent to abandon a road ... raised by evidence of nonuse for twenty years or more, intentional or voluntary desertion of a road, or acquiescence, even for a few years, in the discontinuance of an old road combined with use of a new road. n756 A state did not abandon a borrow pit easement for road building purposes by failing to use it for twenty-four years. n757 Lot purchasers in a

subdivision did not abandon road easements when the roads were never developed. n758 Even coupling non-use of an easement with use of a more convenient right of way does not deprive the easement holder of the rights to use the easement whenever desired. n759 That "a right of way no longer serves its intended purpose of access is irrelevant to the issue of abandonment"; thus, in one case, use of an equally convenient means of island access was not evidence of intent to abandon. n760

(ii) Affirmative and Unambiguous Indications of Intent to Abandon.

The intention to abandon need not be shown by express declaration but may be read from acts inconsistent with continuing existence of the easement n761 or with continuing "the use of the property for the purposes for which it was acquired." n762 Although non-use itself does not prove abandonment, it can be evidence of it in combination with other facts and circumstances. n763 Thus, an easement for the use of a stairway was held abandoned when it had been bricked and sealed for a period of twenty-nine years and no use had been attempted for at least fifteen years. n764 An ingress-egress easement was held abandoned after better than two decades of non-use and the erection without objection to numerous improvements interfering with its use, including garage, patio, stone barbecue, retaining wall, etc., "the pervasiveness and permanency" of which distinguished it from other cases. n765 The evidence for abandonment must be "clear and convincing." n766 A dominant owner's failure to object to a dumpster that obstructed his driveway easement for fifteen years did not terminate the easement: the owner retained the right to enjoyment, and the servient owner had no right to obstruct the easement. n767 Failure to object to the construction of a pond that submerged a portion of a right of way did not prove abandonment. n768 Where a wooden fence had been erected in 1933 over a portion of an easement granted in 1882 and two large elm trees allowed to grow, the court affirmed a finding of no abandonment, noting that permanence of structures is relevant to an intent to abandon, and that the fence and trees could easily be removed. n769 Nonuse of a private easement for decades, allowing overgrowth and acquiescing in the parking of old cars over the easement did not provide prima facie evidence of abandonment. n770 A railroad's abandonment of track use and attempt to convey away property over which a prescriptive easement had been won was itself evidence of an intent to abandon the easement and the property returned to the adjoining landowners. n771

(iii) Adverse Act by Servient Party.

Confusion has existed over whether, before abandonment will be found, there must also be an adverse act by the servient party. The Maine Supreme Court, for example, recognized an inconsistency in its own cases on the question, but decided against any such requirement. n772 In Maine, however, establishing adverse possession of an existing easement by the servient estate may serve as an alternative means to make a prima facie showing of abandonment. n773 The majority rule is that it is not necessary to prove reliance by the servient owner to demonstrate abandonment. n774

COMPUTER-ASSISTED RESEARCH

LEXIS: Easement W/5 (Terminat! or Forefeit*** or Extinguish!) and Abandon! or Nonuse or Non-Use

(4) Termination by Estoppel.

Very similar to termination by abandonment is termination by estoppel. A servient tenement owner may cause extinguishment of an easement by taking action inconsistent with the existence of the easement, if it is done in reliance on conduct of the easement owner, if the easement owner reasonably should have foreseen such reliance and action, and if the servient owner would suffer unreasonable harm by restoring the easement. n775 The same standards and arguments would presumably apply for the extinguishment of an easement by estoppel as for the creation of an easement by estoppel, n776 though the *Restatement* suggests that there is no necessity of misstatement of fact as in other applications of the doctrine of estoppel. n777 The Alaska Supreme Court defines estoppel necessary to extinguish an easement as coming from taking a position inconsistent with one previously taken where circumstances "render assertion of the second position unconscionable." n778 The court will consider both the advantage gained by the one

making the inconsistent statements, whether the inconsistency was significant enough to make the assertion unconscionable and whether the earlier assertion was based on full knowledge of the facts. n779 The Georgia Supreme Court affirmed a summary judgment that landowners had lost recreational easements over land designated as parks, because of the servient developer's reliance on the dominant tenement owner's actions. n780 The Utah Supreme Court held that a city was not estopped from enforcing the full width of an easement that rendered driveway, retaining walls and a proposed fence in violation of setback requirements, where informal representations made for a small fee on the city engineer's own time about the placement of the easement were not the type upon which plaintiff could reasonably rely. n781 A nice illustration of the operation of the factor requiring consideration of harm to the servient owner by revival of an easement otherwise potentially subject to estoppel comes from a Pennsylvania case. The court refused to estop the owner of an easement over church lands because the easement could be revived in limited form without harming the church whose building encroached on part of the easement. n782 The difference between the two doctrines is sometimes stated to be that termination by abandonment in most jurisdictions does not require reliance by the servient tenement owner while termination by estoppel does. n783 Finding termination by estoppel may be appropriate, then, where weakness in the unambiguous evidence of intent to abandon may be counterbalanced by reliance by the servient owner. n784

COMPUTER-ASSISTED RESEARCH

LEXIS: Easement! W/25 (Extin! or Terminat!) W/10 Estop!

(5) Laches.

Another method similar to abandonment and estoppel by which easements are attacked is the equitable defense of estoppel. Servient owners who wish to have disputed easements terminated will sometimes invoke laches if the dominant owner has not responded to actions challenging the easement and the servient owner has been harmed by the delay. For the laches defense to succeed, a court must find that "the plaintiff unreasonably delayed seeking relief and that prejudice to the defendant resulted from the plaintiff's delay." n785 Laches is an affirmative defense to the enforcement of an easement, with the burden of proof belonging to the one proposing the defense. n786 The period of delay sufficient to establish laches is fact-specific. "The period of delay for laches begins to run when the party discovers or could have discovered the wrong of which he complains, or where, in light of any resulting prejudice to the defendant, it became reasonable to expect the plaintiff to act upon the wrong." n787 A Massachusetts court found plaintiffs who waited two years to file suit guilty of laches in attempting to prevent construction of a house that was well under way, though slowly, and had cost considerable money; plaintiffs retained other beach rights, however, because as to them defendants were not harmed by their delay in protecting their rights. n788 A servient owner failed to demonstrate laches where the dominant owner had failed to bring suit for four years, and the improvements made were done after the dispute had already arisen and so were at his own peril. n789 A pipeline company was not barred by laches where a hog farmer erected four buildings over the easement because the company had warned the farmer at the outset; the court ordered the buildings removed. n790 By contrast, where a servient owner erected an obstruction to an easement, and the dominant owner waited three years to bring suit, the court terminated the easement due to laches because the dominant owner had the right and authority to have the obstructions removed as soon as they went up and sat on their rights, not even taking action when the servient owner made further improvements. n791 The Delaware Supreme Court held that laches was not an appropriate defense to an easement of necessity even after a very long period, because an easement of necessity could lie dormant and be activated by a remote grantee: the necessity did not create the easement but merely created the need for an easement for as long as the necessity continued. n792 Another court found no limitations period appropriate to bar claims which establish easements by necessity. n793

COMPUTER-ASSISTED RESEARCH

LEXIS: Easement W/50 Terminat! and Laches

(6) Termination by Forfeiture for Misuse.

Servient tenement owners sometimes attempt to have an easement forfeited on the grounds that the dominant tenant has overused it. n794 Courts frequently back away from the forfeiture remedy. n795 A court enjoined use of a roadway by traffic which benefitted parcels other than the dominant tenement but refused to terminate the easement despite overuse. n796 An Arizona court enjoined all use of an easement and distinguished that remedy from forfeiture by providing that use could resume when steps were taken to prevent the non-dominant parcel from benefitting from the easement. n797

COMPUTER-ASSISTED RESEARCH

LEXIS: Easement W/15 (Terminat! or Forfeit*** or Extinguish!) W/30 (Excess*** W/5 Use***) or Overuse! or Misuse!

(7) Termination by Adverse Possession.

Just as an easement can be won by prescription, similar to adverse possession, so can it be lost. The *Restatement* states that an easement can be extinguished by action that would be permitted only if the easement did not exist, provided "(a) the use is adverse to the owner of the easement and (b) the adverse use is, for the period of prescription, continuous and uninterrupted." n798 To be adverse, "the use must be made without submission to or without being in subordination to the owner of the easement ... and must be open and notorious ... ." n799 Stating that "hostility or adversity" meant that a claimant possessed property "intending to be its owner and not in subordination to the true owner," the Oregon Supreme Court held that where a party claimed adverse possession of a twenty-foot wide easement which he thought actually lay elsewhere, that mistake itself provided the element of hostility; "[n]o further inquiry into the claimant's state of mind" was necessary. n800 In describing elements for the loss of easements by adverse possession, courts name elements very similar to those necessary for the adverse possession of land: n801 actions, for example, that are "actual, continuous, adverse, visible, notorious, and hostile" for the requisite amount of time. n802 The principles governing extinction of an easement by adverse possession are those governing "acquisition of a title by adverse possession and acquisition of an easement by prescription: open, notorious, exclusive, adverse, continuous and uninterrupted use for the full statutory period." n803 To extinguish an easement by adverse possession, "the possessor must prove, by clear and convincing evidence, an exclusive, actual, hostile, open, and continuous possession for the statutory fifteen year period." n804 That the servient owner already possesses the land over which an easement runs creates an analytical difference that requires that the showing of adversity and hostility be stronger than that required to take possession of land by adverse possession. To terminate an easement by adverse possession, "one must take an action that would be permitted only if the easement did not exist." n805

(i) Inconsistent With the Use Permitted by the Easement.

A major issue in the discussion of loss of an easement by adverse possession is whether the use by the adverse possessor is sufficiently contrary or hostile to the easement owner's use. The difficulty arises because there is no easily drawn definition of what use is adverse to an easement holder's rights; the easement holder often has rights to use the same land as does the servient owner. A clearer showing of adversity is necessary to extinguish an easement than to create one by prescription. n806 The servient owner already has the right to use the servient tenement in any way that does not obstruct the easement; thus what might look like a use that would create a prescriptive easement may be a use that is still within the servient owner's rights. The adverse possessor must show that the use interferes significantly enough with the easement owner's enjoyment of the easement to give notice that the easement is under threat. So, unless the servient owner's use so interferes that the easement owner cannot get use of the easement, proving adverse possession of an existing easement is problematic. Though the elements are similar, therefore, "conduct that is sufficient to acquire title over land may not be sufficient to extinguish someone else's easement over (or use of) that land;" there must be use made of the land that is "inconsistent with the use made and rights held by the easement holder, not merely possession which is inconsistent with another's claim of title." n807 Maintenance of a fence and a gate that was only

occasionally locked did not suffice for adverse possession extinguishing an easement. n808 In another case a house, garage, stone patio, barbecue, retaining wall and other improvements materially blocking the easement were sufficient to extinguish it by adverse possession. n809 A servient owner successfully terminated an easement by maintaining a six-foot chain link fence blocking off use of the easement for the prescriptive period: no actual hostile intent was needed, but only action inconsistent with the easement. n810 A short 15-39 inch wall built on a four-foot wide easement strip, though built by mistake, sufficed to terminate an easement by adverse possession. n811 When a tenant adversely possessed against an easement over the landlord's property, the easement was extinguished for the benefit of the landlord's reversion; the adverse possession could not defeat the landlord's fee interest in the land over which the easement ran because the tenant's possession was with the landlord's permission. n812

(ii) Finding of Inconsistency Dependent on Type of Use Easement Owner Makes.

Where an easement owner did not attempt to use a roadway easement acquired in 1959 until 1991, there was no adverse possession even though the servient owner had planted trees down the center and elsewhere in the easement path. n813 Thus, when no occasion has arisen for the use of an easement, the action of the servient owner in fencing the land will not be adverse to the easement until "(1) the need for the right of way arises, (2) a demand is made by the owner of the dominant tenement that the easement be opened and (3) the owner of the servient tenement refuses to do so." n814

(iii) Cannot Adversely Possess a Government Body's Easement.

As in ordinary law of adverse possession, adverse possession of an easement could not be maintained against a municipality. n815 That a *previous* easement holder had been a municipality did not rescue an easement from adverse possession where the servient owner had sealed off a roadway for exclusive use. n816

COMPUTER-ASSISTED RESEARCH

LEXIS: Easement and (Terminat*** or Forfeit*** or Extinguish!) and "Adverse** Possess***

(c) Termination by Action of Third Parties.

(1) Termination by Eminent Domain.

Just as may a possessory interest, an easement may be taken by eminent domain.

(i) Condemnation of the Servient Tenement.

"An easement is extinguished by a taking of eminent domain of the servient tenement, or of an interest therein, to the extent to which the taking permits a use inconsistent with the continuance of the use authorized by the easement." n817 An eminent domain taking of the servient tenement "extinguishes all other interests in the subject property," more specifically, the easement rights of the dominant estate. n818 So, if a governing body seizes a servient tenement, and the easement is no longer usable, the easement owner deserves compensation. The easement is treated like other property rights. Because the easement is a valuable property right, of course, the easement owner will be eligible for payment for its loss. Compensation must put the easement owner in a position equivalent to that before the condemnation. If, for example, an easement by necessity is extinguished by the condemnation of the servient tenement, compensation must be sufficient to provide the dominant owner with an alternative access. An appurtenant easement's value is typically measured by the loss in value to the dominant tenement, the more severe the loss in the dominant tenement's value, the higher the compensation; courts have found this a more appropriate measure than an increase in the value of the servient tenement through the termination of the easement. n819 Appurtenant easement owners may receive payment for a drop in value of the dominant tenement, called severance damages. n820 Where the government took a private road over which parties had exclusive easements and opened it up the public, the easement holders had the right to demonstrate the difference between the market value of their dominant property when the roads were private and when they were

made public. n821 Where a dominant tenement suffers no diminution in value, it is possible for a court to find that no compensation is due the easement owner. n822 Just as a leaseholder receives compensation for the condemnation of a leasehold, so also where a leasehold in a dominant tenement is not itself condemned but loses value through the condemnation of an easement that benefitted it, the leaseholder may receive severance damages. n823 The owner of an easement in gross also deserves compensation for the seizure of the servient tenement. Measurement is more difficult, there being no dominant tenement to value. Courts attempt to value what a person in a free market would pay for such an easement to determine what recompense the owner of an easement in gross should receive. n824

(ii) Condemnation of the Dominant Tenement.

Where a dominant tenement is condemned, by contrast, any easements appurtenant to it are also condemned, because of their essential connection to the dominant tenement; when the dominant tenement is forcibly transferred away, the easement survives with it. n825 The dominant owner deserves compensation also for the value of the easement over neighboring property; this is part of the value of the dominant tenement itself.

COMPUTER-ASSISTED RESEARCH

LEXIS: Easement W/25 Terminant! or Forfeit! or Extinguish! W/25 Eminent Domain

(2) Extinguishment by Operation of Marketable Title Act.

Marketable Title Acts can work to extinguish easements in much the same way they do with other property interests. An easement that does not appear in the record within the time required by the Marketable Title Act will be extinguished unless the easement is visible in a way that provides notice. n826 This rule also can apply to governmental subdivisions, thus costing a Minnesota township a roadway right of way. n827 The Act is irrelevant to easements that come into existence after the root title specified by the Act; their validity will be decided by the standard rules. n828 Because Marketable Title Acts generally except interests in possession or use from being extinguished by the Act, a prescriptive easement may survive attack under the Act. n829 Ways of necessity may also come within the exception generally existing in the Act for an interest "the existence of which is clearly observable by physical evidence of its use." n830 Where a way of necessity had not been used for more than thirty years nor any notice filed of its existence, however, the Florida Supreme Court held that it was subject to the Marketable Record Title Act and therefore extinguished. n831 Concerning property registered under a Torrens system, the Minnesota Supreme Court held that the certificate of title of the property owner contesting an easement was itself the source of title and less than the statutory forty years old, thereby preserving a previously unused easement that had been created in 1950. n832

COMPUTER-ASSISTED RESEARCH

LEXIS: Easement W/15 Extinguish! or Terminat! or Forfeit! W/20 Market! Title Act*

(3) Foreclosure of the Servient Estate.

When a creditor forecloses the mortgage on a servient estate, the status of any easements in existence on the estate comes into question. The general rule is one of timing: " "First in time, first in right' certainly applies to this situation." n833 If the easement were in existence before the property was mortgaged, it will survive the foreclosure. If the easement were created after the property was mortgaged, the mortgage will have priority and the easement will be extinguished. n834 In a Texas case, an easement granted after the execution of a deed of trust to secure payment of a promissory note was invalidated by the bank's foreclosure on its deed of sale, absent evidence of ratification of the easement by the bank. n835 One court states the rule that to protect the mortgagee, "upon foreclosure of a mortgage and after the redemption period, title to the mortgaged property vests in the purchaser at the foreclosure sale and relates back to the date of the mortgage, extinguishing intervening rights and claims," and this applies also to ways of necessity

arising after the mortgage date. n836 The Wyoming Supreme Court stated that for the post-mortgage easement holder's rights to be extinguished, the easement holder should be joined as a party to the foreclosure if the mortgagee has actual or constructive notice of the existence of the easement. n837 One exception to those rules is that if the mortgagee granted the mortgage with no actual or constructive knowledge of the existence of the easements, the easement may be extinguished upon foreclosure. Thus, in a New Hampshire case, an unrecorded purchase and sale agreement promised an easement over a piece of property if the sale of that property to the one seeking the easement failed; the promised easement was an equitable interest in land and survived because the foreclosing mortgagee had actual knowledge of the agreement to grant it. n838

COMPUTER-ASSISTED RESEARCH

LEXIS: Easement or Right of Way or Right-of-Way W/25 Extinguish! or Terminat! or Forfeit! W/25 Mortgag! W/15 Sale or Foreclos!

(4) Tax Deeds.

A question may arise whether an easement is extinguished upon a forced sale of the servient tenement due to nonpayment of taxes. Does the purchaser of a servient tenement under a tax deed take the property burdened or not? As has been seen elsewhere, sale under eminent domain generally leads to the extinguishment of any easement interest attached to the land (and an appropriate payment for such interests). The result under the somewhat analogous tax sale deeds varies more by jurisdiction. The *Restatement of Property* has it that an easement in gross is extinguished by a tax sale, whereas an easement appurtenant is not, partly because the lost value in the servient tenement due to the burdening of the property by easement can be recouped in valuation of the dominant tenement. n839 In a case of first impression, the Maine Supreme Court noted that in a substantial number of states "a tax sale does not extinguish an easement appurtenant where its value or burden is included in the assessed value of the properties" and held that since such interests are included in the tax valuation of property in Maine "an easement is not extinguished upon a tax sale." n840 In Washington, a purchaser at a tax foreclosure sale generally takes the property free from all encumbrances, except that a statute "protects recorded appurtenant easements from extinguishment." n841 In a Michigan case, property sold under a tax deed was taken free of a railroad right of way easement despite a statute mandating the opposite because the court held that the statute should be applied only prospectively. n842 Noting that most jurisdictions have held that appurtenant easements survive tax sales, the Mississippi Supreme Court held that to be the law in Mississippi, noting the nature of easements as interests in land and noting that whatever value is lost to the governmental body by the property being encumbered by an easement is balanced by the taxable gain in the value of the dominant tenement. n843 Where tax deeds extinguish easements, they usually do so when the tax levy predates the establishment of the easement. n844 An easement that could have been extinguished may be preserved under the terms of sale. n845 As to an easement by prescription, if the prescription period has not run before tax delinquency occurs, the court in an Ohio case stated that "a purchaser of forfeited lands at auditor's sale ... acquires a new and perfect title free of any claim of an easement by prescription." n846

COMPUTER-ASSISTED RESEARCH

LEXIS: Easement or Right of Way or Right-of-Way W/25 Extinguish! or Terminat! or Forfeit! W/25 Tax Deed or Tax W/15 Sale or Foreclos!

(d) Effect of Termination of Easements.

The result of a finding that an easement has been terminated is that the complete control of the land will ordinarily return to the owner of the underlying fee or servient tenement. This applies also where easements are determinable or have been granted subject to a condition subsequent, with the necessary variance that upon violation of the condition the easement returns to the then owner of the servient tract "rather than to the original grantor or his heirs." n847

(1) Ownership of Roadbeds or Railroad Beds Upon Termination of an Easement.

Where roadbeds or railroad easements are terminated, ownership of the underlying fee usually is presumed to vest in the adjoining landowners, with each taking to the center line of the easement, unless there is evidence that the easement was taken from property on one side more than from property on the other. n848 Thus where a road is dedicated to public use, once the road is abandoned, the adjoining landowners will usually have the right to regaining control over the easement. Railroad easements are similar, with certain exceptions, for example, that one adjoining owner may be given ownership of an additional portion of the property hosting the easement sufficient to access a public roadway adjoining the easement. n849 The Delaware Supreme Court recently joined the "majority of the jurisdictions which have considered this issue" in holding that land adjoining a railroad right of way easement will presumptively carry with it ownership of the fee interest in the right of way when the land is conveyed, unless the grantor explicitly excepts ownership of that fee. n850 Where adopted, this presumption has been held strong enough to control even where a metes and bounds description in a grant appears to extend ownership of land only to the boundary of the abandoned railroad right of way, though the contrary has also been held. n851

(2) Rights Surviving Termination of Roadway Easement.

When a governing body abandons a public right of way over a road, what happens to people living along that road? We have already seen that adjoining landowners usually take ownership to the centerline of the roadway; that outcome can leave people along the road stranded. In many jurisdictions a private easement for those adjoining it remains over the roadway that survives government abandonment of the road. n852 In a jurisdiction so holding, even if the adjoining landowners take possession of the underlying fee of an abandoned road right of way, none will be able to prevent any of the others adjoining that roadway from using it, though it is no longer open to the general public.

FOOTNOTES:

(n1)Footnote 711. *Eis v. Meyer, 555 A.2d 994, 996 (Conn. App. 1989), aff'd, 566 A.2d 422 (Conn. 1989).*

(n2)Footnote 712. *E.g., Higdon v. Davis, 337 S.E.2d 543, 547-548 (N.C. 1985)* (however, reentry is not required to terminate an easement subject to condition subsequent where owner of servient tract is already in possession of the fee interest).

(n3)Footnote 713. *Florida Power Corp. v. Lynn, 594 So. 2d 789, 792* (Fla. App.), *rev. denied, 602 So. 2d 942 (Fla. 1992)* (*citing Dade County v. City of N. Miami Beach, 69 So. 2d 780 (Fla. 1953)).*

(n4)Footnote 714. *Eis v. Meyer, 555 A.2d 994, 996 (Conn. App. 1989), aff'd, 566 A.2d 422 (Conn. 1989).*

(n5)Footnote 715. *Country Manors Ass'n v. Master Antenna Sys., Inc., 458 So. 2d 835 (Fla. App. 1984).*

(n6)Footnote 716. *E.g., Richmond, F. & P. R.R. v. State Corp. Comm'n, 336 S.E.2d 896 (Va. 1985); McKinley v. Waterloo Ry., 368 N.W.2d 131, 135 (Iowa 1985); Ludington & N. Ry. v. Epworth Assembly, 468 N.W.2d 884, 888 (Mich. App. 1991), app. denied, 480 N.W.2d 101 (Mich. 1992).*

(n7)Footnote 717. *Florida Power Corp. v. Lynn, 594 So. 2d 789, 791-92* (Fla. App.), *rev. denied, 602 So. 2d 942 (Fla. 1992).*

(n8)Footnote 718. *Byrd Cos. v. Smith, 591 So. 2d 844, 847-848 (Ala. 1991).*

(n9)Footnote 719. Byrd Companies, at 847.

(n10)Footnote 720. *Lawrence v. Pate, 594 So. 2d 73, 74-75 (Ala. 1992).*

(n11)Footnote 721. *Parham v. Reddick, 537 So. 2d 132, 135 (Fla. App. 1988).*

(n12)Footnote 722. *Bode v. Bode, 494 N.W.2d 301, 304 (Minn. App. 1992):* If easements could be terminated by a mere offer of other access, the dominant estate owner would be forced to run the risk of losing all access to the property if a court eventually decided that the alternate access was reasonable. The dominant owner should not be forced to run this risk.

(n13)Footnote 723. *Cheever v. Graves, 592 N.E.2d 758, 762 (Mass. App. 1992).*

(n14)Footnote 724. Restatement of Property § 497 (1944).

(n15)Footnote 725. Restatement of Property § 499 (1944).

(n16)Footnote 726. *Mularoni v. Bing, 34 P.3d 497, 503 (Mont. 2001)* (*citing* 28A C.J.S. Easements 123 (1996)). *Lacy v. Seegers, 445 So. 2d 400, 401 (Fla. App. 1984).*

(n17)Footnote 727. *Will v. Gates, 680 N.E.2d 1197, 1200 (N.Y. 1997)* (when only portion of servient estate acquired, there is no complete unity of title and no merger). *See also Mularoni, 34 P.3d at 503.*

(n18)Footnote 728. *Cheever v. Graves, 592 N.E.2d 758, 762 (Mass. App. 1992).*

(n19)Footnote 729. *Tract Dev. Serv., Inc. v. Kepler, 246 Cal. Rptr. 469, 476 (1988)* (no merger because whole subdivision, in essence, servient to each lot, and each lot to every other lot), *rev. denied* (Cal. 1988); *Johnston v. Bates, 778 S.W.2d 357, 362 (Mo. App. 1989)* (merger occurred when defendant purchased last lot in subdivision).

(n20)Footnote 730. *Pochinski Realty Assocs. v. Puzio, 598 A.2d 523, 525 (N.J. Super. App. Div. 1991)* (no merger; fee owner of one lot, rights of tenant in common in the other); *Myers v. Salin, 431 N.E.2d 233, 242 (Mass. App. 1982)* (no merger where party owned one lot in his own right and other as tenant by entirety with wife), *rev. denied, 441 N.E.2d 1043 (1984); Lacy v. Seegers, 445 So. 2d 400, 404 (Fla. App. 1984)* (same).

(n21)Footnote 731. *Breliant v. Preferred Equities Corp., 918 P.2d 314, 318, 319 (Nev. 1996).*

(n22)Footnote 732. *Auman v. Grimes, 527 A.2d 1045, 1047 (Pa. Super. 1987)* (easement also protects interests after leasehold ceases).

(n23)Footnote 733. *Parkinson v. Board of Assessors, 495 N.E.2d 294, 295 n.3 (Mass. 1986)* (no merger where intervening life estate prevents complete unity of title); *Guy v. State, 438 A.2d 1250, 1253 (Del. Super. 1981)* (no merger where fee subject to outstanding estate in possession).

(n24)Footnote 734. The new Restatement follows the same principle. Restatement (Third) of Property (Servitudes) § 7.5 & cmt. b (2000). Restatement of Property § 497 cmt. a (1944).

(n25)Footnote 735. *Dean v. Riley, 623 A.2d 521, 522, 524, 525 (Conn. App. 1993).*

(n26)Footnote 736. *E.g., see also Elrod v. Elrod, 526 S.E.2d 339 (Ga. 2000); Pergament v. Loring Properties Ltd., 599 N.W.2d 146, 149 (Minn. 1999); Freeman v. Rost Family Trust, 973 P.2d 1281, 1284 (Colo. App. 1999)* (*citing* this sentence). The new Restatement follows the same principle. Restatement (Third) of Property (Servitudes) § 7.5 (2000). *Riccio v. De Marco, 591 N.Y.S.2d 569, 571 (App. Div. 1992)* (extinguished easement may be renewed in subsequent conveyance of either lot only by using language to recreate easement de novo).

(n27)Footnote 737. *Riccio, 591 N.Y.S.2d at 572 n.2 (App. Div. 1992).*

(n28)Footnote 738. *Breliant v. Preferred Equities Corp., 918 P.2d 314, 319-320 (Nev. 1996)* (claimants did not prove easement by implication upon reseverance). *Pochinski Realty Assocs. v. Puzio, 598 A.2d 523, 525-526 (N.J. Super. App. Div. 1991).*

(n29)Footnote 739. *Pergament v. Loring Properties Ltd., 599 N.W.2d 146, 151 (Minn. 1999).*

(n30)Footnote 740. Restatement of Property §§ 500, 501 (written instrument under seal, though most jurisdictions dispense with seal), 502 (same requirements as for devise of estate in land of like duration) (1944).

(n31)Footnote 741. Restatement of Property § 500 & cmt. a (1944); *Guy v. State, 438 A.2d 1250, 1253 (Del. Super. 1981).*

(n32)Footnote 742. *Jackvony v. Poncelet, 584 A.2d 1112, 1114 (R.I. 1991)* (*citing* Restatement of Property § 504 cmt. b (1944)).

(n33)Footnote 743. *Great Cove Boat Club v. Bureau of Pub. Lands, 672 A.2d 91, 94 (Me. 1996).*

(n34)Footnote 744. *Id. at 94-95.*

(n35)Footnote 745. *Id.*

(n36)Footnote 746. *Id.* at 1117.

(n37)Footnote 747. Restatement of Property § 504 (1944).

(n38)Footnote 748. *Leibowitz v. City of Miami Beach, 592 So. 2d 1213, 1214 (Fla. App. 1992), rev. denied, 601 So. 2d 552 (Fla. 1992).*

(n39)Footnote 749. *Mueller v. Bohannon, 589 N.W.2d 852, 858-859 (Neb. 1999)* (erection of fences provided evidence of actual abandonment) (*citing* this treatise).

(n40)Footnote 750. *Rutland v. Mullen, 798 A.2d 1104, 1109 (Me. 2002)* (nonuse for decades, allowing overgrowth of trees and acquiescing in defendant's parking of old cars over easement not sufficient for prima facie evidence of abandonment) (citations omitted).

(n41)Footnote 751. *Floyd v. Board of Commissioners, 52 P.3d 863, 872-873* (Idaho, 2002).

(n42)Footnote 752. *Richards Asphalt Co. v. Bunge Corp., 399 N.W.2d 188, 192 (Minn. App. 1987).*

(n43)Footnote 753. *Id.*

(n44)Footnote 754. *Strahin v. Lantz, 456 S.E.2d 12, 15 (W. Va. 1995).*

(n45)Footnote 755. *Bridger v. Lake, 896 P.2d 406, 409 (Mont. 1995).*

(n46)Footnote 756. *Shadan v. Town of Skowhegan, 700 A.2d 245, 247 (Me. 1997).*

(n47)Footnote 757. *Harrison v. State Hwys. & Transp. Comm'n, 732 S.W.2d 214, 217 (Mo. App. 1987).*

(n48)Footnote 758. *Crabbe v. Veve Assoc., 549 A.2d 1045 (Vt. 1988).*

(n49)Footnote 759. *Jackvony v. Poncelet, 584 A.2d 1112, 1117 (R.I. 1991).*

(n50)Footnote 760. *Witt v. McKenna, 600 A.2d 105, 107 (Me. 1991).*

(n51)Footnote 761. *Richards Asphalt Co., 399 N.W.2d at 192.*

(n52)Footnote 762. *Hickerson v. Bender, 500 N.W.2d 169, 171 (Minn. App. 1993).*

(n53)Footnote 763. *National Prop. Corp. v. Polk County, 386 N.W.2d 98, 105 (Iowa 1986)* (prescriptive easement can be lost by at least ten years non-use accompanied by "facts and circumstances clearly indicating an intentional relinquishment").

(n54)Footnote 764. *Bank of Fayetteville, N.A. v. Matilda's, Inc., 803 S.W.2d 549, 551 (Ark. 1991).*

(n55)Footnote 765. *Hickerson v. Bender, 500 N.W.2d 169, 171 (Minn. App. 1993).*

(n56)Footnote 766. *See, e.g., Koshian v. Kirchner, 527 N.Y.S.2d 921, 922 (1988).*

(n57)Footnote 767. *Erday's Clothiers, Inc. v. Spentzos, 592 N.E.2d 615, 621 (Ill. App. 1992).*

(n58)Footnote 768. *Clausi v. Meddaugh, 498 N.Y.S.2d 267, 268 (1986), app. denied, 503 N.E.2d 1378 (N.Y. 1986).*

(n59)Footnote 769. *Downing House Realty v. Hampe, 497 A.2d 862, 864 (N.H. 1985).*

(n60)Footnote 770. *Rutland v. Mullen, 798 A.2d 1104, 1109 (Me. 2002).*

(n61)Footnote 771. *Wheeling Stamping Co. v. Warwood Land Co., 412 S.E.2d 253, 256-257 (W. Va. 1991)* (cessation of use through which prescriptive easement was created "is tantamount to extinguishment of the easement").

(n62)Footnote 772. *Canadian Nat'l Ry. v. Sprague, 609 A.2d 1175, 1179 (Me. 1992)* (reconciling *Chase v. Eastman, 563 A.2d 1099 (Me. 1989)* and *Witt v. McKenna, 600 A.2d 105 (Me. 1991)).*

(n63)Footnote 773. *Rutland v. Mullen, 798 A.2d 1104, 1109 (Me. 2002).*

(n64)Footnote 774. *Lague, Inc. v. Royea, 568 A.2d 357, 358 (Vt. 1989)* (identifying and adopting majority rule).

(n65)Footnote 775. Restatement of Property § 505 (1944).

(n66)Footnote 776. *See* § 60.03(b)(3), *supra* (section easements by estoppel).

(n67)Footnote 777. Restatement of Property § 505 cmt. a (1944).

(n68)Footnote 778. *Keener v. State, 889 P.2d 1063, 1067 (Alaska 1995)* (in dispute over width of easement, state not estopped from claim of 50-foot easement; second position asserting wider easement not unconscionable because earlier assertion not made with full knowledge of facts).

(n69)Footnote 779. *Id. at 1068.*

(n70)Footnote 780. *Rolleston v. Sea Island Prop., Inc., 327 S.E.2d 489, 492-493* (Ga.), *cert. denied, 474 U.S. 823 (1985).*

(n71)Footnote 781. *Terry v. Price Mun. Corp., 784 P.2d 146 (Utah 1989).*

(n72)Footnote 782. *Baptist Church v. Urquhart, 178 A.2d 583, 588 (Pa. 1962).*

(n73)Footnote 783. *Nahabedian v. Jarcho, 510 A.2d 425, 429 (R.I. 1986)* (borderline between two shadowy because each requires some activity by easement owner and estoppel has reliance by servient owner).

(n74)Footnote 784. *See id.*

(n75)Footnote 785. *Keener v. State, 889 P.2d 1063, 1066 (Alaska 1995).*

(n76)Footnote 786. *Myers v. Salin, 431 N.E.2d 233, 240 (Mass. App. 1982).*

(n77)Footnote 787. *Keener v. State, 889 P.2d 1063, 1066, 1067 (Alaska 1995)* (defendant-appellant claims 34-year delay; court accepts plaintiff claim that delay was only five months from time it was called upon to act upon wrong).

(n78)Footnote 788. *Myers, 431 N.E.2d at 241-242.*

(n79)Footnote 789. *Russakoff v. Scruggs, 400 S.E.2d 529, 533-534 (Va. 1991).*

(n80)Footnote 790. *Mid-America Pipeline Co. v. Wietharn, 787 P.2d 716, 721-722 (Kan. 1990).*

(n81)Footnote 791. *Zimmerman v. Cindle, 548 N.E.2d 1315, 1317 (Ohio App. 1988).*

(n82)Footnote 792. *Pencader Assoc. v. Glasgow Trust, 446 A.2d 1097, 1099-1100 (Del. 1982)* (dormant 170 years!).

(n83)Footnote 793. *Lichty v. Sickels, 197 Cal. Rptr. 137, 141-42 (App. 1983).*

(n84)Footnote 794. *See* § 60.04(a)(1), *supra* (discussion of misuse and overuse of easement).

(n85)Footnote 795. *Schwartz v. Castleton Christian Church, Inc., 594 N.E.2d 473, 477 (Ind. App. 1992)* ("[A]xiom that the law does not favor forfeitures applies to easements") (eminent domain statute did not require forfeiture of appurtenant easement).

(n86)Footnote 796. *McCann v. R.W. Dunteman Co., 609 N.E.2d 1076 (Ill. App. 1993), app. denied, 616 N.E.2d 336 (Ill. 1993).*

(n87)Footnote 797. *D.N.D. Neffson Co. v. Galleria Partners, 745 P.2d 206, 207 (Ariz. 1987).*

(n88)Footnote 798. *Mueller v. Hoblyn, 887 P.2d 500, 507 (Wyo. 1995).* Restatement of Property § 506 (1944).

(n89)Footnote 799. *Id.*, § 506 cmt. c.

(n90)Footnote 800. *Faulconer v. Williams, 964 P.2d 246, 252 (Ore. 1998).*

(n91)Footnote 801. The elements are also similar to those required for the creation of prescriptive easements. For a list of the state requirements for prescription, *see* Restatement (Third), Property (Servitudes) § 2.17 cmt. g & Reporter's Note cmt. g at 291 (2000).

(n92)Footnote 802. *Estojak v. Mazsa, 562 A.2d 271, 274-275 (Pa. 1989)* (subdivision owners used street easement as extension of front yard for 21 years, maintaining lawn and garden but no structures; no adverse possession because easement not blocked and use not inconsistent with easement).

(n93)Footnote 803. *Turner v. Halverson, 885 P.2d 1285, 1290 (Mont. 1994).*

(n94)Footnote 804. *See also Faulconer v. Williams, 964 P.2d 246, 251 (Ore. 1998)* (clear and convincing evidence that use was actual, open, notorious, exclusive, continuous and hostile for ten year statutory period). *Hickerson v. Bender, 500 N.W.2d 169, 171 (Minn. App. 1993).*

(n95)Footnote 805. *Mueller v. Hoblyn, 887 P.2d 500, 506 (Wyo. 1995).* The court held that fencing, planting crops and drilling a well were not sufficiently adverse to an easement owner's rights to start the clock for adverse possession where the easement owners were using an alternate means of access; the clock began only with a demand to open the easement and refusal to meet that demand. *Id. at 509.*

(n96)Footnote 806. *Kitzinger v. Gulf Power Co., 432 So. 2d 188, 191-192 (Fla. App. 1983)* (interpreting 3 Powell, The Law of Real Property 424 (1981)).

(n97)Footnote 807. *Mueller v. Hoblyn, 887 P.2d 500, 507 (Wyo. 1995). Estojak, 562 A.2d at 274-75*

(n98)Footnote 808. *Gandy Co. v. Freuer, 313 N.W.2d 576 (Minn. 1981); Hutter v. Medlock, 777 S.W.2d 869, 871-872 (Ark. App. 1989)* (gate placed across previously won prescriptive easement, but not locked, did not sufficiently interrupt easement holders' use to imply acquiescence that would terminate easement).

(n99)Footnote 809. *Hickerson v. Bender, 500 N.W.2d 169, 171-172 (Minn. App. 1993).*

(n100)Footnote 810. *Mourelato v. Fraternal Society of Canicatti, Inc., 787 N.Y.S.2d 814 (2004)* (an owner of fenced land extinguished an easement through adverse possession). *Public Storage, Inc. v. Eliot St. Ltd. P'ship, 567 A.2d 389-391 (Conn. App. 1989).*

(n101)Footnote 811. *Smith v. Tippett, 569 A.2d 1186, 1189-1190 (D.C. 1990).*

(n102)Footnote 812. *Spiegel v. Ferraro, 541 N.E.2d 15, 17-18 (N.Y. 1989).*

(n103)Footnote 813. *Kolouch v. Kramer, 813 P.2d 876, 879-880 (Idaho 1991).*

(n104)Footnote 814. The Montana Supreme Court makes an almost identical statement. *Halverson v. Turner, 885 P.2d 1285, 1290 (Mont. 1994)* (maintenance of fence not use adverse to easement). *Kolouch* at 879.

(n105)Footnote 815. *City of Edmonds v. Williams, 774 P.2d 1241, 1242-1243 (Wash. App. 1989)* (Fence across also would not have sufficed, even absent municipal interest).

(n106)Footnote 816. *Borough of Edgeworth v. Lilly, 565 A.2d 852, 855-856 (Pa. Commw. 1989), app. denied, 582 A.2d 325* (Pa.) and *app. denied, 582 A.2d 326 (Pa. 1990).*

(n107)Footnote 817. *Chicago Steel Rule Die & Fabricators Co. v. Malan Constr. Co., 558 N.E.2d 341, 348 (Ill. App. 1990)* (*quoting* Restatement of Property § 507 (1944)).

(n108)Footnote 818. *New England Continental Media, Inc. v. Town of Milton, 588 N.E.2d 1382, 1384 (Mass. App. 1992).*

(n109)Footnote 819. *Redevelopment Agency v. Tobriner, 200 Cal. Rptr. 364, 370, cert. denied, 469 U.S. 882 (1984);* Restatement of Property § 508 cmt. c (1944).

(n110)Footnote 820. *United States v. 57.09 Acres of Land, 706 F.2d 280, 281 (9th Cir. 1983).*

(n111)Footnote 821. United States v. 10.0 Acres, 533 F.2d 1092, 1095-1096 (9th Cir. 1976) (*en banc*) (loss of value through loss of exclusivity and being made more accessible to trespassing and other harms).

(n112)Footnote 822. *Redevelopment Agency v. Tobriner, 264 Cal. Rptr. 481 (1989), rev. denied,* (Cal. 1990).

(n113)Footnote 823. *United States v. 57.09 Acres of Land, 706 F.2d 280, 282 (9th Cir. 1983).*

(n114)Footnote 824. Restatement of Property § 508 cmt. d (1944).

(n115)Footnote 825. *Schwartz v. Castleton Christian Church, 594 N.E.2d 473, 475-476 (Ind. App. 1992)* (construing Ind. Code § 32-11-1-11).

(n116)Footnote 826. *Zimmerman v. Cindle, 548 N.E.2d 1315, 1318 (Ohio App. 1988)* (easement last mentioned in

documents in 1872).

(n117)Footnote 827. *Township of Sterling v. Griffin, 244 N.W.2d 129 (Minn. 1976)* (decision did not, however, bar individuals along roadway from establishing private easements by prescription. *Id.* at 134-135).

(n118)Footnote 828. *E.g., Spring Lakes, Ltd. v. O.F.M. Co., 467 N.E.2d 537 (Ohio 1984)* (Marketable Title Act irrelevant; easement not binding on purchaser because recorded outside chain of title).

(n119)Footnote 829. *E.g., Schulz v. Syvertsen, 591 A.2d 804 (Conn. 1991)* (while Marketable Title Act extinguished deeded easements, some plaintiffs proved prescriptive easements that survived Act); *Davis v. Havana Mineral Wells, Inc., 363 N.E.2d 856, 859-860 (Ill. App. 1977)* (covenants in deeds barred by Act, but prescriptive easement recognized).

(n120)Footnote 830. *Traders, Inc. v. Bartholomew, 459 A.2d 974, 979 (Vt. 1983)* (preserving way of necessity in continuous use, leaving physical evidence of its existence).

(n121)Footnote 831. *H & F Land Co. v. Panama City-Bay County Airport and Indus. Dist., 736 So. 2d 1167 (Fla. 1999)* (case of first impression).

(n122)Footnote 832. *Hersh Properties, LLC. v. McDonald's Corp., 588 N.W.2d 728, 735-737 Minn. 1999)* (signage easement: to allow MTA to trump Torrens title would effectively destroy the purpose of the Torrens Act, an "absurd result." *Id.* at 737).

(n123)Footnote 833. *United States v. Roberts, 788 F. Supp. 555, 557 (S.D. Fla. 1991)* (extinguishing easement created three years after notes and mortgage executed).

(n124)Footnote 834. *Accord Massey Assocs. v. Whitehorse Inns, Inc., 454 S.E.2d 513, 514-515 (Ga. 1995)* (sign easement extinguished at foreclosure because mortgage predated grant of easement). *Bush v. Duff, 754 P.2d 159, 164 (Wyo. 1988)* (easements created after execution of mortgage "eradicated by foreclosure of the mortgage"), *disapproved on other grounds by Ferguson Ranch, Inc. v. Murray, 811 P.2d 287, 289 (Wyo. 1991).*

(n125)Footnote 835. *Motel Enters., Inc. v. Nobani, 784 S.W.2d 545, 546-547 (Tex. App. 1990)* (reversing summary judgment because issue of material fact as to ratification).

(n126)Footnote 836. *Bush v. Duff, 754 P.2d 159, 164 (Wyo. 1988), disapproved on other grounds by Ferguson Ranch, Inc. v. Murray, 811 P.2d 287, 290 (Wyo. 1991).*

(n127)Footnote 837. *Id.*

(n128)Footnote 838. *Hawthorne Trust v. Maine Sav. Bank, 618 A.2d 828 (N.H. 1992).*

(n129)Footnote 839. Restatement of Property § 509 & cmt. e (1944).

(n130)Footnote 840. *Stickney v. City of Saco, 770 A.2d 592, 609 (Me. 2001).*

(n131)Footnote 841. *Lake Arrowhead Community Club, Inc. v. Looney, 770 P.2d 1046, 1047 (Wash. 1989)* (*citing* Wash. Rev. Code § 84.64.460). *Accord, Thirteen South Ltd. v. Summit Village, Inc., 866 P.2d 257, 260 n.2 (Nev. 1993), citing* Lake Arrowhead.

(n132)Footnote 842. *City of Boyne City v. Crain, 446 N.W.2d 348, 352 (Mich. App. 1989).*

(n133)Footnote 843. *Hearn v. Autumn Woods Office Park Property Owners Ass'n, 757 So. 2d 155, 160-161 (Miss. 1999).*

(n134)Footnote 844. *See, e.g., Smith v. Gwinnett County, 286 S.E.2d 739 (Ga. 1982)* (easements in subdivision recreation areas recorded before action forcing sale of property for taxes protected); Genesee, *Inc. v. Firstline Inv., Inc., 740 P.2d 367, 370 (Wash. App. 1987)* (easement protected so long as established of record prior to year for which tax foreclosed), *rev. denied, 109 Wash. 2d 1012 (1987).*

(n135)Footnote 845. *E.g., Pagano v. Kramer, 236 N.E.2d 858, 859 (N.Y. 1968)* (easement that would otherwise have been extinguished was preserved to purchaser of tax-deed property from city because deed from city stated that it was sold subject to such an easement).

(n136)Footnote 846. *Cookston v. Box, 160 N.E.2d 327, 332 (Ohio App. 1959)* (applying general rule to prescriptive easements).

(n137)Footnote 847. *E.g., Higdon v. Davis, 337 S.E.2d 543, 548 (N.C. 1985)* (easement granted on condition that driveway be constructed and maintained by easement holder).

(n138)Footnote 848. *Buffington v. Buffington, 568 A.2d 194, 196-197 (Pa. Super. 1989)* (construing Pennsylvania statute presuming ownership to each adjoining landowner to center line absent evidence easement taken unevenly).

(n139)Footnote 849. *Nelson v. Battle Forest Friends Meeting, 436 S.E.2d 122, 124-125 (N.C. 1993)* (holding that statute does not apply to facts of case in that roadway did not adjoin railroad easement).

(n140)Footnote 850. The Alabama Supreme Court has followed Smith in adopting the majority position. *Ex Parte Jones, 669 So. 2d 161, 165 (Ala. 1995). Smith v. Smith, 622 A.2d 642, 647 (Del. 1993)* (adopting majority position).

(n141)Footnote 851. *Vaughn v. Fitzgerald, 511 P.2d 1148, 1151-1152 (Okla. App. 1973);* more usually such a description will rebut the presumption, *see Roeder Co. v. Burlington N. R.R., 716 P.2d 855, 861 (Wash. 1986)* (presumption rebutted when "metes and bounds provisions in a deed describe property that extends up to, but does not include, a railroad right of way... .") (*en banc*).

(n142)Footnote 852. *E.g., Gillmor v. Wright, 850 P.2d 431, 437-438 (Utah 1993).*

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Supp. To CHAPTER 60 THE LAW OF EASEMENTS: RIGHTS IN THE PROPERTY OF ANOTHER

7-60 Thompson on Real Property, Thomas Editions Supp. to § 60.02

Supp. to § 60.02 Easement Defined.

[Go To Main]

§ 60.02(b) Easements as Property Rights. [Go To Main]

Add:

Oliver v. State ex rel. Com'r of Transp., 760 N.W.2d 912 (Minn. App. 2009) (easement as property right protected by the Minnesota constitution)

§ 60.02(e) Positive and Negative Easements. [Go To Main]

§ 60.02(e)(1) Only Four Negative Easements Generally Recognized.

At the end of the first sentence of the subsection, add new Note 35.1 n35.1

§ 60.02(e)(4) Conservation Easements.

Add:

See Gerald Korngold, "Solving the Contentious Issues of Private Conservation Easements: Promoting Flexibility for the Future and Engaging the Public Land Use Process," *2007 Utah L. Rev. 1039);* Nancy A. McLaughlin and Mark Benjamin Machlis, "Protecting the Public Interest and Investment in Conservation: A Response to Professor Korngold's Critique of Conservation Easements," *2008 Utah L. Rev. 1561.*

§ 60.02(e)(5) Reciprocal Negative Easements.

Add:

Patch v. Springfield School Dist., 989 A.2d 500 (Vt. 2009) (reciprocal negative easements not adopted everywhere)

§ 60.02(f) Easements Appurtenant and in Gross. [Go To Main]

§ 60.02(f)(3) The Dominant Tenement.

Add:

Rosen v. Keeler, 986 A.2d 731 (N.J.Super. 2010) (easement in gross belongs to its owner independently of his ownership or possession of land)

§ 60.02(g) Profits a Prendre. [Go To Main]

Add:

Christopher Meredith, "Imputed Abandonment: A Fresh Perspective on Adverse Possession and a Defense of the Objective Standard," *29 Miss. C. L. Rev. 257 (2010)* (profit a prendre also called "an easement 'plus' ").

FOOTNOTES:
(n1)Footnote 35.1. *Ashby v. Maechling, 229 P.3d 1210 (Mont. 2010)* (negative easements viewed "with extreme caution")

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Supp. to § 60.03 Creation of Easements.

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§ 60.03(a) Express Easements. [Go To Main]

§ 60.03(a)(1) Easements by Grant or Devise.

Add:

Gold Creek North Ltd. Partnership v. Gold Creek Umbrella Ass'n, 177 P.3d 201 (Wash. App. 2008) (documents did not grant an express easement, but only expressed an intent to create such an interest); *Gray v. Osborne, 739 N.W.2d 855 (Iowa 2007)* (easement created by subdivision plat); *Hernandez v. Whittemore, 651 S.E.2d 180 (Ga. App. 2007)* (express easement created by plat); *Vander Heide v. Boke Ranch, Inc., 736 N.W.2d 824 (S.D. 2007)* (an oral agreement to modify an easement was barred by the statute of frauds)

§ 60.03(a)(2) Easements by Reservation and Exception.

Add:

Blazer v. Wall, 183 P.3d 84 (Mont. 2008) (a statement in the deed that the conveyance was "subject to" a road easement did not expressly create or reserve an easement).

§ 60.03(a)(3) Easements by Dedication.

Add:

K & A Acquisition Group, LLC v. Island Pointe, LLC, 682 S.E.2d 252 (S.C. 2009) (Easements by dedication can be lost by abandonment).

§ 60.03(a)(3)(iii) Common Law Dedication by Reference to Map or Plat.

add:

Jackson v. Board of Com'rs of County of Monroe, 916 N.E.2d 696 (Ind.App. 2009) (dedication typically involves deed or plat)

§ 60.03(a)(7) Contents of the Writing.

Add:

Williamson v. River Crest Plantation, LLC, 687 S.E.2d 318 (N.C.App.2009) (contents of writing can be proven only by writing, not extrinsic evidence)

Add

Smith v. Tolar, 636 S.e.2d 112 (Ga. App. 2006) (purported express easement was void for vagueness).

§ 60.03(a)(7)(iii) Railroad Rights of Way.

Add:

Lake CDA Investments, LLC v. Idaho Dep't. of Lands, 2010 Ida. LEXIS 98 (Idaho 2010) (RR rights of way distinguished from others such as canals)

§ 60.03(b) Easements Without Express Agreement. [Go To Main]

Add:

William Smith, "Florida Premises Liability on Easements of Way: Liability for Injuries to Third Parties," *62 Fla. L. Rev. 829 (July 2010)* (though a servient owner usually does not have an obligation to perform maintenance on the easement absent express agreement, "arguably the servient owner may be liable in tort for injuries suffered by third parties in the easement area").

Add:

Inlet Harbour v. South Carolina Department of Parks, Recreation and Tourism, 659 S.E.2d 151 (S.C. 2008) (reference to a plat in a deed did not create a presumption of implied easement); *H.S. Farrell, Inc. v. Formica Construction Co., Inc., 838 N.Y.S.2d 628 (2007)* (filling of subdivision map was insufficient to establish an implied easement).

§ 60.03(b)(1) Easements by Public Condemnation.

Add:

Wymberley Sanitary Works v. Batliner, 904 N.E.2d 326 (Ind. App. 2009) (public utility easements for extension of sewer line acquired by condemnation); *Winkel v. Miller, 205 P.3d 688 (Kan. 2009)* (easement for asphalt mixing strip used in highway repair condemned by highway authority); *Wagler v. West Boggs Sewer Dist., Inc., 898 N.E.2d 815 (Ind. 2008)* (sewer district had authority to condemn easements).

§ 60.03(b)(3) Easements by Estoppel.

Add

Kienzle v. Myers, 853 N.E.2d 1203 (Ohio App. 2006) (sewer easement by estoppel over adjacent landowner's property).

§ 60.03(b)(4) Easements by Implication from Prior Use; the Quasi-Easement.

Add

Perbix v. Verizon North, Inc., 919 N.E.2d 1096 (Ill. App. 2009) (defines a quasi-easement); *West End Properties Ass'n of Camp Mineola, Inc. v. Anderson, 823 N.Y.S.2d 412 (2006)* (implied easement arising from pre-existing use when the title was severed).

§ 60.03(b)(5) Easements by Necessity.

§ 60.03(b)(5)(i) Justified by Implied Intent or by Public Policy?

Add:

Ashby v. Maechling, 229 P.3d 1210 (Mont. 2010) (easements by necessity are considered with extreme caution because they deprive the servient tenement owner of property rights through mere implication).

§ 60.03(b)(5)(iii) Elements to Establish the Easement by Necessity.

Add:

Wolf v. Owens, 172 P.3d 124 (Mont. 2007) (strict necessity required for easement by necessity).

Add

Rau v. Collins, 891 A.2d 1175 (Md. App. 2006) (no implied easement of necessity when the necessity did not exist while the properties were under common ownership or at the time of severance).

§ 60.03(b)(6) Prescriptive Easements.

§ 60.03(b)(6)(vi) The Elements of the Prescriptive Easement.

Add:

Burke v. Pierro, 986 A.2d 538 (N.H. 2009) (the claimants must show that they or their predecessors have achieved twenty years of "adverse, continuous, and uninterrupted" use)

Add:

Mierzejewski v. Brownell, 925 A.2d 1126 (Conn. App. 2007) (a septic tank could not be used to establish a prescriptive use that would extinguish an easement, because the tank was not open and visible).

§ 60.03(b)(6)(viii) Adverse, Under Claim of Right or Hostile.

Add

Miller v. Harris, 945 So. 2d 1072 (Ala. App. 2006) (claimed easement use was open, visible, and continuous).

§ 60.03(b)(7) The Doctrine of Custom.

Add:

Timothy M. Mulvaney, "Instream Flows and the Public Trust," *22 Tul. Envtl. L.J. 315 (Summer 2009)* (discussing the effects of the doctrine used in the Halverson case).

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Supp. to § 60.04 Scope of the Easement.

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§ 60.04(a) Rights of the Easement Owner or of the Dominant Tenement. [Go To Main]

Add

McFarland v. Kempthorne, 464 F. Supp. 2d 1014 (D. Mont. 2006) (appurtenances language in deed or patent did not create express easement).

§ 60.04(a)(1)(iii) Increasing the Frequency or Changing the Type of Use of the Servient Tenement.

Add:

Brannon v. Boldt, 958 So. 2d 367 (Fla. App. 2007) (an implied easement for ingress and egress could not also be used for fishing or scenic viewing).

§ 60.04(b)(2) The Exclusive Easement.

Add:

Gray v. McCormick, *84 Cal. Rptr. 3d 777 (2009)* (easement precluded the owner of the servient tenement from making any use of the easement area).

§ 60.04(c) Location and Size of the Easement. [Go To Main]

§ 60.04(c)(1) By the Terms of the Grant.

§ 60.04(c)(1)(i) Establishing the Location.

Add:

Beery v. Shinkle, 193 S.W.3d 435 (Mo. App. 2006) (action by owners of dominant estate to establish location of a permanent easement).

Add:

Brumbaugh v. Mikelson Land Co., 185 P.3d 695 (Wyo. 2008) (lot owners had "floating easements" for utilities and access).

§ 60.04(c)(1)(ii) Changing the Location.

Add

Sheppard v. Justin Enterprises, 646 S.E.2d 177 (S.C. App. 2007) (relocation of easement denied because it would increase the burden on the servient estate).

Sweezey v. Neel, 904 A.2d 1050 (Vt. 2006) (Vermont rejects new Restatement's position allowing servient owner to unilaterally relocate the easement).

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Supp. to § 60.05 Responsibility for the Easement.

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§ 60.05(a) Maintenance and Repair. [Go To Main]

Add:

Shikner v. Stewart, 2010 Ohio App. LEXIS 1244 (Ohio App., Ottawa County Mar. 19, 2010) (Deeds creating easement evinced a clear intention to create an obligation on the parties for maintenance and improvement of the entire easement, as there was nothing in the deeds to suggest that the easement area within a named lot should be treated any differently than the remainder of the easement.).

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Supp. to § 60.07 Change of Ownership of Easements.

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§ 60.07(a) Transfer of the Servient Tenement and the Requirement of Notice. [Go To Main]

Add:

John W. Fisher, "The Scope of Title Examinations in West Virginia Revisited," *111 W. Va. L. Rev. 641 (Spring 2009).*

§ 60.07(c) Transferability of Easements in Gross. [Go To Main]

Add:

Borek Cranberry Marsh, Inc. v. Jackson County, 773 N.W.2d 522 (Wis. App. 2009) (transferable unless the deed shows intent to limit transferability)

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Supp. to § 60.08 Termination of Easements.

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§ 60.08(b) Termination by Action of the Parties. [Go To Main]

§ 60.08(b)(3) Termination by Abandonment.

Add:

Seven Springs, LLC v. Nature Conservancy, 855 N.Y.S.2d 547 (2008) (the town's abandonment of a public highway did not extinguish private easements).

Add:

Spencer v. Kosir, 733 N.W.2d 921 (Wis. App. 2007) (abandonment of express easement not established).

§ 60.08(b)(3)(i) Non-use Alone Usually Not Proof of Abandonment.

add:

Luciani Realty Partners v. North Haven Academy, LLC, 988 A.2d 930 (Conn. App. 2010) (must show "unequivocal and decisive acts clearly indicating an intent on the part of the owner of the easement to abandon the use of it.").

§ 60.08(b)(7) Termination by Adverse Possession.

Add:

McGinley v. Postel, 830 N.Y.S.2d 588 (2007) (easement not extinguished by adverse possession).

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CHAPTER 61 REAL COVENANTS: PROMISES CONCERNING THE USE OF LAND

7-61 Thompson on Real Property, Thomas Editions 61.syn

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§ 61.07 Termination of the Covenant or of the Right to Enforce It.

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§ 61.08 Bibliography.

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CHAPTER 61 REAL COVENANTS: PROMISES CONCERNING THE USE OF LAND

7-61 Thompson on Real Property, Thomas Editions § 61.01

AUTHOR: Professor John H. Pearson Notre Dame Law School University of Notre Dame

§ 61.01 Introduction.

Private land-use planning involves the use of several tools that in many ways are identical in appearance and in function. All of them involve agreements among neighboring landowners concerning the use of their respective pieces of land, and all of them purport to control those uses even after those pieces of land pass out of the ownership of those making the agreements. Accident of history, the inherently conservative tendencies of common-law judges, and the ongoing struggle between those wanting freedom for owners to define the use of land into the future and those wanting freedom of alienation have delivered to us an almost incomprehensible muddle in which the easement, the real covenant and the equitable servitude in many ways look alike, act alike and serve almost identical purposes. In many jurisdictions the differences among them have been so worn away that one is often not certain which among these labels best describes the arrangement controlling any given piece of land. That result could be viewed as just one of the charming anomalies of a common-law system but for the fact that in some jurisdictions there remain significant enough differences in the nature of the interests that disaster can strike the unwary landowner attempting to use them in planning for the future. Of those three interests, the easement, the real covenant and the equitable servitude, this chapter will examine the real covenant. n1 To do so, we will have to indulge in the fiction that the real covenant exists as a clearly distinct interest governed by clearly distinct rules. The underlying truth is that for the reason given above, anyone wishing to make use of any of these planning tools must consult the law of a local jurisdiction with great care to make certain how that jurisdiction governs attempts to control the use of parcels of land when they pass from the hands of the original promisor and promisee.

FOOTNOTES:
(n1)Footnote 1. Easements are discussed in Chapter 60 and equitable servitudes in Chapter 62 of this treatise. As part of its mission to harmonize, rationalize and otherwise simplify these three interests, the new Restatement proposes to abolish the terms "real covenant" and "equitable servitude" because they "describe servitudes encompassed within the term 'covenant that runs with land.' " Restatement (Third) of Property (Servitudes) § 1.4 (2000).

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CHAPTER 61 REAL COVENANTS: PROMISES CONCERNING THE USE OF LAND

7-61 Thompson on Real Property, Thomas Editions § 61.02

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§ 61.02 Definition.

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(a) A Tool for Private Land-Use Planning.

A real covenant n2 is a promise governing the use of land made by one property holder usually for the benefit of another property holder, n3 the benefit and burden of which are intended to and do pass to certain successors n4 of the original parties. It is "a promise to do or to refrain from doing certain things with respect to real property." n5 A real covenant is a tool for private land-use planning by which landowners may structure the relationship between their parcels of land. It is the functional equivalent of an easement in situations in which courts have traditionally refused to recognize easements. n6

(b) A Promise Binding on the Parties' Successors.

The real covenant is a device contractual in origin that has taken on most of the qualities of an interest in land and is enforceable against people who would not be bound under traditional contract law. What differentiates the real covenant from a simple contractual promise is that it is enforceable *on* the original promisor's successors in interest without any action on their part to assume the burden, and it is enforceable as a matter of course *by* the original promisee's successors in interest; in other words, the real covenant "runs with the land." n7 Not all covenants entered into by neighboring landowners are real covenants; landowners may also enter into personal covenants, binding only the original parties. "Intent is not enough to make a running covenant out of one which is by its nature personal." n8 The real covenant is one "that 'touches or concerns' the land, as opposed to a 'personal' covenant, which is merely a promise made by a grantor to a grantee generally concerning use of the land." n9"The primary distinction between real and personal covenants is that real covenants run with the land, binding the heirs and assigns of the covenanting parties, and personal covenants do not." n10 That court maintains that even a personal covenant is enforceable on the purchaser of burdened land, if the land was purchased with notice and the covenant restrictions "concern land or its use." n11 The real covenant is "a covenant so connected with realty that either the right to enforce or the duty to perform passes to assigns of the land ... ." n12"A covenant running with the land is one relating to the land, or as more commonly said one which touches and concerns n13 the land itself, so that its benefit or obligation passes with the ownership." n14 One court illustrated the difference between a personal and a real covenant by holding that a covenant to return a security deposit did not run with the land unless the landlord were required to use the money, if forfeited, for the benefit of the

land. n15 In that situation, if the forfeited money was required to be used for the benefit of the land, the burden of the covenant would have run, and a new owner of the fee interest would be responsible for the return of the security deposit; if there was no such requirement, the original landlord would be responsible for the security deposit's return as a personal covenant.

(c) Enforceable Both at Law and in Equity.

While real covenants traditionally were enforceable only at law, the general situation today in the United States is that real covenants may be enforced both at law and in equity, whichever better serves to vindicate the rights of the promisee. n16

(d) Positive or Negative Covenant.

A real covenant can be positive or negative. It can bind the promisor and successors to perform some particular deed that benefits the promisee's land or burdens the promisor's land or it can prohibit the promisor or successor from performing some particular action on the land. n17 Most states draw no distinction between positive and negative obligations for a real covenant; a few will not permit positive obligations to run with the land. n18 A covenant may contain both positive and a negative elements, *e.g.*, a covenant to operate a department store in a mall and not to subdivide the space. n19 Some types of promises that, if all requirements for formation are met, courts have found enforceable as real covenants have included promises to construct a road and lay water and sewage lines, n20 to supply reciprocal parking privileges, n21 to use property only for permanent residential construction, n22 to build upon land or, upon failure to do so, to grant the original seller the right to repurchase the land at the original purchase price. n23

FOOTNOTES:
(n1)Footnote 2. A "real covenant" is so called because it is a covenant concerning real property. From late Middle English "real" has taken the meaning "consisting of or pertaining to immovable property, such as lands or buildings," 2 The New Shorter Oxford English Dictionary 2493 (Oxford 1993). Real property received its name from the Latin "res" or thing, referring to permanent, unmovable property to be distinguished from moveable chattels. Only real actions, those causes dealing with this type of property, arising primarily from disputes among lords and their tenants, were, from at least the 12th century and increasingly thereafter, eligible for adjudication in the King's courts. For an accessible treatment of the development of the early real actions, *see* A.W.B. Simpson, A History of the Land Law, 25-46 (Oxford 2d ed. 1986).

(n2)Footnote 3. In certain situations the benefit may flow to an individual other than as an owner of land. *See* § 61.04(d)(3), *infra*.

(n3)Footnote 4. There are certain required relationships between the original parties and their successors before the covenant will be deemed to run with the land. *See infra*, § 61.04(c) (vertical privity).

(n4)Footnote 5. *Suffolk Bus. Ctr., Inc. v. Applied Digital Data Sys., Inc., 581 N.E.2d 1320, 1322 (N.Y. 1991).*

(n5)Footnote 6. *See infra*, § 61.03(a).

(n6)Footnote 7. *See* Restatement of Property Ch. 45, Introductory Note, Topic A (1944) (real covenant unique in that, under circumstances, benefit and burden may run with the land). More precisely, the burden, at least, runs with the estate in land of the promisor; in the Restatement view, to be bound one must possess at the very least an estate of equal duration to that of the promisor. In an equitable servitude, by contrast, the obligation is said to run with possession of the land itself; it is a feature of the land that comes with possession.

(n7)Footnote 8. *Mullendore Theatres, Inc. v. Growth Realty Investors, Inc., 691 P.2d 970, 972 (Wash. App. 1984).*

(n8)Footnote 9. *Dierberg v. Wills, 700 S.W.2d 461, 464 n.1 (Mo. App. 1985).*

(n9)Footnote 10. *Tarrant Appraisal Dist. v. Colonial Country Club, 767 S.W.2d 230, 235 (Tex. App. 1989),* writ denied (Tex. Nov. 22, 1989).

(n10)Footnote 11. *Id.*

(n11)Footnote 12. Charles E. Clark, Real Covenants and Other Interests Which "Run with Land" 93 (2d ed. Chicago: Callahan 1947).

(n12)Footnote 13. If a promise between two landowners does not "touch and concern" land, most jurisdictions will refuse to enforce it on successors in interest. *See infra,* § 61.04(d) (touch and concern requirement).

(n13)Footnote 14. *Richardson v. Mustang Fuel Corp., 772 P.2d 1324, 1327 (Okla. 1989)* (*quoting Local Fed. Sav. & Loan Ass'n v. Eckroat, 100 P.2d 261, 262 (Okla. 1940)).*

(n14)Footnote 15. *Mullendore Theatres, Inc. v. Growth Realty Investors Co., 691 P.2d 970, 971-72 (Wash. App. 1984).*

(n15)Footnote 16. *See infra,* § 61.05.

(n16)Footnote 17. *Webb v. Smith, 568 N.W.2d 378 (Mich. Ct. App. 1997)* (as a general rule, courts will enforce valid use restrictions. However, the court can grant an exception for a "technical violation" of a negative covenant that in no wise adds to or takes from the true purpose of the covenant).

(n17)Footnote 18. *Net Realty Holding Trust v. Franconia Properties, 544 F. Supp. 759, 763 n.3 (E.D. Va. 1982).*

(n18)Footnote 19. *Id. at 762-63 & n.3.*

(n19)Footnote 20. *Dryden v. Calk, 771 F. Supp. 181, 182-83 (S.D. Tex. 1991)* (proper type of activity for covenant, but no promise made).

(n20)Footnote 21. *AC Assocs. v. First Nat'l Bank, 453 So. 2d 1121 (Fla. Dist. Ct. App. 1984).*

(n21)Footnote 22. *Taylor v. Kohler, 507 So.2d 426 (Ala. 1987); Grasso v. Thimons, 559 A.2d 925 (Pa. Super. 1989), app. denied, 577 A.2d 544 (Pa. 1990)* (refusing to extend to mixed residential uses).

(n22)Footnote 23. *Suffolk Bus. Ctr., Inc. v. Applied Digital Data Sys., Inc., 581 N.E.2d 1320 (N.Y. 1991). Create 21 Chuo, Inc. v. Southwest Slopes, Inc., 918 P.2d 1168 (Haw. Ct. App. 1996)* (a purchaser protected himself by using a positive covenant to require that the land he was purchasing be free from all encumbrances. The vendor was therefore required to convey land free of all encumbrances, regardless of the fact that the purchaser might have known of an encumbrance at the time the covenant was made).

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CHAPTER 61 REAL COVENANTS: PROMISES CONCERNING THE USE OF LAND

7-61 Thompson on Real Property, Thomas Editions § 61.03

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§ 61.03 History.

(a) Reasons for the Rise of the Real Covenant in Property Law.

Why can interests that are in most ways equivalent be variously called easements, real covenants or equitable servitudes? The reason lies in history. n24"Confusion results from the fact that essentially the same interest may be treated under some circumstances as any one of these things." n25 Each of these interests resembles the other, but all have subtle differences that can lead to disaster for the unwary person involved in the ownership of land and for the person's attorney. The latter two devices maintain their importance in large degree due to struggles in courts over the limits to be placed on land-use agreements that would bind future owners, reflecting the struggle between keeping land free of encumbrances, and therefore more easily alienable, and "the belief, confirmed by experience in many cases, that realty may be most advantageously developed when the owner is able to subject it to such conditions and restrictions as his customers may desire." n26 Courts have often found themselves on the free alienability side of the argument, viewing too easy enforcement of servitudes as dangerous. "From the beginning, courts have controlled servitude use by refusing to enforce a variety of arrangements freely entered into by landowners and occupiers." n27 The real covenant has become an important tool in private land use planning primarily because of the reluctance of English courts to enforce either negative easements or those requiring positive action on the part of the servient landowner. n28 Landowners felt the need to be able to enforce agreements by which neighbors would refrain from using their property in ways that harmed that of the landowners or by which neighbors would do certain things on their property that would benefit the landowners in their ownership of their own property. Courts refused to permit easements to perform that function, with a limited number of exceptions, and so the landowners turned to contract law to enable them to reach their goal. Contract law was a useful tool because persons customarily would bind themselves to perform positive actions or to refrain from some action, and those promises would be enforced as a matter of course by the courts. n29 A conventional rendition of that scenario involves the English courts further burdening the real covenant, an event leading to the development of the equitable servitude. n30 Some scholars argue that the above scenario does not necessarily reflect the way in which the use of the real covenant developed in this country, that various homegrown versions of it popped up in the law without any specific connection to actions of English courts or the law of easements, n31 but to whatever degree that is correct, the real covenant and its cousin, the equitable servitude, have come to serve in this country to fill in the gaps caused by limitations placed on easement law, as they have in English law. n32

(b) Limitations on the Creation and Use of the Real Covenant.

This new tool required a stretch of ordinary conceptions of contract law, because the real covenant would require binding future owners of the burdened property, persons who were not parties to the original agreement. Contract law traditionally would not bind persons who were not parties to the contract at its inception, unless they assumed the contractual obligations. The English courts soon acted to put serious limitations on this new tool, which had itself come into use to overcome courts' limitations on the use of easements. n33 Because the real covenant purported to bind persons not originally party to the agreement binding the use of land, the courts required a special relationship between those original parties before they would bind or benefit their successors; they would enforce such agreements only if the original parties were related as landlord and tenant. n34 The tenant's successor, therefore, could be bound by the agreement, but no one else. n35 The English courts would only enforce the burden of a negative covenant, both in law and equity if the proper privity existed, and in equity alone if it did not: "It is well established that the burden of a covenant does not run with the land of the covenantor at common law, except where the original contracting parties are lessor and lessee. Nor does the burden of a positive covenant run with freehold land in equity." n36 The burden of a positive covenant, thus, "never runs with freehold land either at common law or in equity." n37 Besides limiting who could make an agreement enforceable on successors in interest, the courts also limited the type of activity that could be controlled by this type of agreement: the activity had to touch and concern land, to involve or affect its use. n38 These requirements so severely limited the usefulness of the real covenant that property owners and their attorneys found another tool to enable them to do what they would with their land, the equitable servitude. n39 American courts, too, recognized the real covenant, but widened the required relationship between the original parties sufficiently enough that the real covenant became a significant tool in private land-use planning. n40 Many more landowners, therefore, could take advantage of the real covenant to reach the goals denied them under easement law. American courts also generally came to enforce positive covenants, thereby making the real covenant a useful tool in many more types of land transactions. n41 American courts, however, also imported some of the limitations of English law, an attitude frequently expressed in language that courts disfavor restrictions on the use of land. n42"Not every covenant binds subsequent owners or users of the land, even though the covenant purports to be a covenant that runs with the land." n43 American law has imported the requirements of horizontal privity and touch and concern with varying definitions and varying degrees of enforcement.

(c) Unified Servitudes.

There are significant movements both in courts and academia to rationalize the current situation of three different but similar instruments of private land use control. n44 Forces in academia are pushing for the recognition of a single servitude that would encompass the easement, real covenant and equitable servitude into one single servitude governed by a single, modernized and rationalized set of rules. n45 The movement in the courts has been to remove many of the differences between the real covenant and the equitable servitude such that, for all practical purposes, if not formally, in those jurisdictions one has, in effect, only easements and a form of servitudes encompassing the other two. n46 The California Supreme Court, for example, traced the history of the development of real covenants and equitable servitudes in that state and stated puzzlement as to whether fusion had already been accomplished. n47 In a Georgia case involving payment of homeowners' assessments, the state supreme court noted that covenants relating to land are enforceable "against subsequent grantees with notice ... . It is immaterial in such cases whether the covenant runs with the land or not, the general rule being that it will be enforced according to the intention of the parties." n48 Language quoted in a Florida case illustrates that either fusion of the interests has occurred or that terminology has become so confused that it *should* occur: "Restrictive covenants are private promises or agreements creating negative easements or equitable servitudes which are enforceable as rights arising out of contract." n49 The Washington Supreme Court notes that there are essentially two kinds of covenants running with the land, real covenants and equitable covenants and that Washington courts generally do not distinguish between them. n50

(d) Property Right or Contractual Interest.

Real covenants were originally conceived to be entirely creatures of contract rather than property interests. The vast

majority of jurisdictions these days consider them to be interests in land and therefore of necessity created in writing and beneficiary of the same protections given to fee interests, easements and other interests in land. Thus, for example, government's ability to condemn covenant rights generally is believed to be governed by the Fifth Amendment: Covenant rights cannot be condemned except for public purpose, and if government condemns the burdened property, the owner of the benefited property must be compensated for the loss of the covenant rights. n51 This is one area where it makes a very real difference whether a covenant right be considered a property right or interest in property; if the right sounded only in contract, the protections would be considerably less. n52 That covenants are so widely considered property rights does not, however, change their essentially contractual origin and nature. Thus, courts frequently state that one must construe covenants by ordinary principles of contract interpretation. n53 This stands witness to the hybrid creature covenants have become, mixing aspects of land use and contractual law.

FOOTNOTES:

(n1)Footnote 24. For an interesting and accessible presentation of the very complex development of servitudes law in general and the real covenant in particular in this country, *see* Uriel Reichman, Toward a Unified Concept of Servitudes, *55 S. Cal. L. Rev. 1179 (1982).*

(n2)Footnote 25. Charles E. Clark, Real Covenants and Other Interests Which "Run with Land" 5 (2d ed. 1947). In some situations, courts find that it does not matter; *e.g.*, a given set of "parking restrictions cannot be cancelled or modified, whichever label -- easements or restrictive covenants -- is placed upon various of the agreement's provisions." *AC Assocs. v. First Nat'l Bank, 453 So. 2d 1121, 1125 (Fla. App. 1984).*

(n3)Footnote 26. Clark, *supra* note 24, at 7.

(n4)Footnote 27. Susan F. French, Servitude Reform and the New Restatement of Property: Creation Doctrines and Structural Simplification, *73 Cornell L. Rev. 928, 928 & n.6 (1988)* (noting that both Roman and English law refused to permit servitudes that imposed affirmative obligations or created benefits in gross).

(n5)Footnote 28. "[N]o right, except the right of support, of immunity against the doing on servient land of some otherwise lawful act (not involving interference with the flow of something), appears to have been accepted as an easement, and it is thought that the class of negative easements is now closed." Spencer G. Maurice, Gale on Easements 25 (15th ed. London: Sweet & Maxwell, 1986); "A right to have something done is not an easement, nor is it an incident of an easement, and an obligation to do something on one's own land can only arise, speaking generally, by statute or contract." *Id.* at 39; Susan F. French, Servitudes Reform and the New Restatement of Property: Creation Doctrines and Structural Simplification, *73 Cornell L. Rev. 928, 938 (1988)* (English law creates spurious easements to enforce affirmative burdens; otherwise they are enforceable neither in law nor in equity).

(n6)Footnote 29. English courts eventually permitted the burden of these contractual arrangements to run if there was privity of estate and if the covenant were negative. In England, where a contractual arrangement has been entered into obligating the servient landowner to do something positive on his or her land, "the burden of a contractual obligation of that kind does not run with the land." Spencer G. Maurice, Gale on Easements 39 (15th ed. London, Sweet & Maxwell, 1986).

(n7)Footnote 30. *See, e.g., Davidson Bros., Inc. v. D. Katz & Sons, Inc., 579 A.2d 288, 291, 292 (N.J. 1990)* (development in English courts); *see also* Ch. 62, *infra* (equitable servitudes).

(n8)Footnote 31. *See generally* Uriel Reichman, Toward a Unified Concept of Servitudes, *55 S. Cal. L. Rev. 1177 (1982).* In the historical sections of his article, Reichman argues that much American servitude law developed relatively independently of English law and that it was only in the latter part of the nineteenth century that American jurisdictions began to classify servitudes under a tripartite system of easements, real covenants, and equitable servitudes like that existing in many jurisdictions today. In Professor Reichman's analysis, part of the attractiveness of the real covenant to American law lay in the then fascination with contract theory as a "potential mechanism whereby the notion of contract

might be injected into the law of real estate," with a whole series of practical advantages for new mechanisms of land-use control. *Id. at 1217.*

(n9)Footnote 32. Professor Reichman traces the first discussion of modern real covenant theory to *Norman v. Wells, 17 Wend. 136 (N.Y. 1837)* and its true beginning to Judge Hare's 1852 analysis of *Spencer's Case, 5 Co. 16a, 77 Eng. Rep. 72 (1583)* in J. Smith, 1 A Selection of Leading Cases 179 (1866). Uriel Reichman, Toward a Unified Concept of Servitudes, *55 S. Cal. L. Rev. 1177, 1212-16* and accompanying notes (1982).

(n10)Footnote 33. *See* Restatement of Property Part III, Introd. Note at 3158 (1944).

(n11)Footnote 34. *See infra* § 61.04(a) (horizontal privity).

(n12)Footnote 35. *See* Restatement of Property Part III, Intro. Note at 3158 (1944).

(n13)Footnote 36. G.L. Newsom, Preston & Newsom's Restrictive Covenants Affecting Freehold Land 70 (8th ed. London, Sweet & Maxwell, 1991).

(n14)Footnote 37. *Id.*

(n15)Footnote 38. *See infra* § 61.04(d) (touch and concern). Exactly what it means for a covenant to touch and concern land, and whether the notion has any independent significance at all are difficult questions that will be dealt with in the above-mentioned section.

(n16)Footnote 39. *See infra* Chapter 62 (the equitable servitude).

(n17)Footnote 40. *See infra* § 61.04(a) (horizontal privity).

(n18)Footnote 41. *See infra* § 61.02(d) (positive and negative covenants).

(n19)Footnote 42. *E.g., Charping v. J.P. Scurry & Co., 372 S.E.2d 120, 121 (S.C. App. 1988)* ("an historical disfavor for restrictive covenants based upon the view that the best interests of society are advanced by the free and unrestricted use of land").

(n20)Footnote 43. *Flying Diamond Oil Corp. v. Newton Sheep Co., 776 P.2d 618, 623 (Utah 1989).*

(n21)Footnote 44. *See* James H. Backman & David A. Thomas, A Unified Approach to the Concept of Servitudes, A Practical Guide to Disputes Between Adjoining Landowners (1989-94).

(n22)Footnote 45. The American Law Institute in its Restatement (Third) of Property (Servitudes) (2000) proposes such a fusion of interests into one servitude; *see generally* Susan F. French, Servitudes Reform and the New Restatement of Property: Creation Doctrines and Structural Simplification, *73 Cornell L. Rev. 928 (1988).* Professor French is the Reporter for the Restatement (Third) of Property (Servitudes) (2000). For a useful presentation of the debate over how American servitude law should be restructured, *see* the Symposium on the Reform in Servitude Law, 55 S. Cal. L. Rev. No. 6 (Sept. 1982).

(n23)Footnote 46. *See* Susan F. French, Servitudes Reform and the New Restatement of Property: Creation Doc trines and Structural Simplification, *73 Cornell L. Rev. 928, 950-51 (1988)* (other than requirement of horizontal privity, real covenants and equitable servitudes are functionally equivalent. The only differences other than horizontal privity "are equitable servitudes, more severe limits on benefits in gross and the possible restriction of equitable servitudes to negative obligations.")

(n24)Footnote 47. *Citizens for Covenant Compliance v. Anderson, 906 P.2d 1314, 1319, 1320 (Cal. 1995), reh'g denied* (Cal. 1996).

(n25)Footnote 48. *Timberstone Homeowner's Ass'n v. Summerlin, 467 S.E.2d 330, 332 (Ga. 1996)* (*quoting Lowry v. Norris Lake Shores Dev. Corp., 203 S.E.2d 171 (Ga. 1974)).*

(n26)Footnote 49. *Kilgore v. Killearn Homes Ass'n, 676 So. 2d 4, 7 (Fla. App. 1996).*

(n27)Footnote 50. *Hollis v. Garwall, Inc., 974 P.2d 836, 842 (Wash. 1999), amended 1999 Wash. LEXIS 727* (Wash. Oct. 25, 1999) (where enforcement based in whole or in part on notice rather than incorporation of restriction in deed, covenant can only be equitable).

(n28)Footnote 51. *See e.g., Dible v. City of Lafayette, 713 N.E.2d 269, 273 (Ind. 1999)* (restrictive covenant cannot be enforced but is compensable interest in land); *Palm Beach County v. Cove Club Investors, Ltd., 734 So.2d 379, 383-386 (Fla. 1999)* (noting split in authority); *Mercantile-Safe Deposit & Trust Co. v. Mayor and City Council, 521 A.2d 734, 740-41 (Md. 1987)* (majority rule in U.S. is that restrictive covenant running with land is "a compensable property right for compensation purposes"); Restatement of Property § 566 & cmt. c (1944).

(n29)Footnote 52. *See e.g., Southern Cal. Edison Co. v. Bourgerie, 507 P.2d 964, 966-67 (Cal. 1973)* (distinction between easement for which compensation must be made and contractual right which is noncompensable is "inequitable and rationally indefensible").

(n30)Footnote 53. *E.g., Brown v. Perkins, 923 P.2d 434, 437 (Idaho 1996)* ("apply generally the same rules of construction as are applied to any contract or covenant"); *Jarrett v. Valley Park, Inc., 922 P.2d 485, 488 (Mont. 1996)* ("rules of construction applicable to contracts").

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CHAPTER 61 REAL COVENANTS: PROMISES CONCERNING THE USE OF LAND

7-61 Thompson on Real Property, Thomas Editions § 61.04

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§ 61.04 Creation of the Real Covenant: What Must Be Demonstrated?

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The law requires a number of things to be demonstrated before it will deem a promise made between two individuals to benefit or burden their successors. The promisors in some jurisdictions must be in a special relationship to one another (horizontal privity) at least to make the burden run; the promise must be express and will ordinarily not be implied; the intent that the promise be binding upon successors must be clear; the promise in some jurisdictions must be in writing at least sufficient to satisfy the Statute of Frauds; the promise in some jurisdictions must be recorded; the subject matter of the promise must be of a particular type affecting persons in their ownership of land (touch and concern).

(a) Horizontal Privity to Make the Burden Run: Who May Create a Real Covenant?

Any neighboring landowners may enter into contracts, may covenant, concerning the use of land, and those contracts will be enforced upon the original promisee subject to ordinary rules of contract law. The real covenant does more than that, however. It purports to benefit and bind not just the promisee and the promisor, but also their successors. By entering such covenants, landowners attempt to define the relationship of pieces of land in a way that will remain stable until future owners can agree to change it. As noted above, the desire to so control land relationships pits a challenge to contract law as well as against the bias of Anglo-American courts toward the free alienability and usability of land. n54 English courts, therefore, were very reluctant to enforce real covenants, meant to bind and benefit those not parties to the original agreement, and eventually limited their enforcement to covenants entered into by parties who, at the time the covenant was entered into, were in a special relationship, generally called horizontal privity. The only parties who could demonstrate the required horizontal privity in English law were the landlord and the tenant. American courts, too, imported the limitation of horizontal privity. Generally, American courts widened the definition in several very significant ways, and, indeed, some would say the doctrine has little remaining force in American law; a real covenant can be "created in any transaction involving conveyance of some other interest in land." n55 The new *Restatement*, in its argument to unify servitudes, would abolish the horizontal privity requirement entirely; in its opinion, the doctrine is so attenuated that its abolition has largely already occurred. Professor Susan French, the Reporter for the new *Restatement*, has noted: "Since the doctrine has little support in modern case law and none among scholars of servitude law, its elimination should not prove controversial." n56 The result would be that the class of those able to enter into agreements binding and benefiting their successors in interest will be widened to included all neighboring landowners.

Be that as it may, American courts that still hold to the horizontal privity doctrine recognize several relationships beyond the landlord-tenant relationship that can give rise to privity sufficient to support an enforceable real covenant.

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(1) Mutual Privity.

American courts, led by Massachusetts, broadened the concept of horizontal privity to include persons who when they entered into a contract concerning the use of their neighboring land already shared some interest in the land, usually that one party already held an easement in the land of the other. That shared interest gained the label "mutual privity." Some courts hold that "parties are in privity where one has an easement in land owned by the other, so long as the covenant concerns the easement." n57 Another defines mutual privity to exist in a "covenant arising from simultaneous interests in the same land." n58 If the parties were to enter into an agreement governing the use of one another's land, land that was already related, those courts would enforce that agreement on successors to the original parties. It might be put that the already existing relationship suffices to support enforcement beyond normal contract boundaries. Even with this widening, however, the class of landowners able to take advantage of the real covenant remained severely limited. Some courts went further still and widened the potential class of those able to enter into an enforceable real covenant by recognizing a third type of horizontal privity generally called instantaneous privity.

(2) Instantaneous Privity.

Very frequently, when parties wish to convey land to another, they wish to do so on condition that they can have some control over the future relationship of the conveyed and the retained property. One may wish, for example, to convey part of a piece of land but ensure that the conveyed portion is used in a way that will increase the value of the retained piece. The majority of jurisdictions requiring horizontal privity to establish an enforceable real covenant find privity to come sufficiently into existence "when the original covenanting parties make their covenant in connection with the conveyance of an estate in land from one of the parties to the other." n59 That form of horizontal privity commonly is called "instantaneous privity." n60 The very conveyance of the property itself supplies the relationship sufficient to stretch traditional contract rules and justify binding to the covenant the successors to the original parties; thus the notion that the privity arises instantaneously. The recognition of instantaneous privity significantly widened the class of those able to enter into a real covenant. It did not, however, widen the class to include the very large number of landowners who have no relationship to one another other than that of neighbor and who would wish to control the use of their respective properties by their successors. Those persons are still limited to the equitable servitude, for violation of which damages are not ordinarily an available remedy, or else must indulge in legal sleight of hand to create instantaneous privity by one conveying property to the other and the other reconveying that property to its original owner. n61 To alleviate that situation would require widening the definition of horizontal privity to a point that it had no meaning. Some jurisdictions have desired to make the real covenant available to neighbors and so have simply abolished the requirement of horizontal privity as being an antiquated remainder of ancient law with no support in modern policy needs, an action supported by the new *Restatement* and many other scholars.

(3) Abolition of Horizontal Privity.

A number of jurisdictions have completely abolished horizontal privity as a condition necessary to the enforceability of real covenants. In fact, the new *Restatement* argues that the abolition of the horizontal privity requirement is strongly supported in the case law, and that in only a few states does it retain much vitality. n62 One example of those few states where the doctrine appears to have continuing vitality is Virginia, where the supreme court in recent cases refers to the fulfillment of the doctrine as evidence of the validity of real covenants. n63 The same court also points to the presence of horizontal privity to validate a restrictive covenant enforceable at common law, where an equitable servitude could

not be demonstrated because of lack of a common scheme. n64 Stronger evidence of continuing vitality of the doctrine would be use of it to invalidate a covenant. Courts do, at least occasionally, invoke horizontal privity to deny agreements the status of real covenants. The Washington State Court of Appeals, for example, held that a right of refusal was a personal contract and not a covenant running with the land because neither was there horizontal privity nor did the agreement touch and concern land. n65 Some jurisdictions still formally have the requirement, but their courts doubt its continuing validity. The Indiana Court of Appeals, for example, held that horizontal privity had been proved in a given case, but, given the widespread exceptions to it and objections to it, "doubt[ed] whether this requirement has much vitality in Indiana." n66 In these jurisdictions even simple neighbors may create real covenants, and courts will enforce them on the successors to the original parties. Jurisdictions doing so have removed one of the primary factors distinguishing the real covenant from the equitable servitude. Virtually all promises giving rise to a real covenant also create an equitable servitude, thus making the equitable servitude a popular means to circumvent the technical requirements necessary to create a real covenant, including that of horizontal privity. n67 If there need no longer be any relationship preexisting or caused by a conveyance between neighboring landowners, the only difference of real significance remaining is whether courts will enforce at law, or only at equity, agreements that fail the other formalities necessary for the creation of a real covenant. There may be genuine policy reasons for courts to be reluctant to do so. Equitable servitudes, for example, may be implied in certain circumstances and will be enforced if there is notice; real covenants must be expressly entered into. n68 Courts would have to consider seriously whether they would be willing not only to require a successor party to abide by such a covenant but also make the party liable to money damages absent an explicit acceptance of that burden. n69

(4) Horizontal Privity Not Necessary for Benefit of Covenant to Run.

While some American jurisdictions may still require a demonstration of horizontal privity before they will enforce a covenant on the successor of the promisor, horizontal privity is not necessary for the successor of the promisee to have the benefit of the covenant against the original promisor. The Restatement puts it that the only privity required to support running of the benefit, as opposed to running of the burden, is that privity arising out of the promise itself. n70 Thus, where two neighbors enter into a promise concerning the use of the land of one of them, the successor to the promisee may enforce the promise against the original promisor, and lack of privity between promisor and promisee is no defense. n71 If the promisor had conveyed the land to a successor, however, the promise would not be enforceable against the successor because the burden would not have run absent horizontal privity.

(b) The Promise Must Be Express, and Cannot Be Implied.

Most jurisdictions will require that the covenant be expressly made. While courts will, under the right conditions, imply an equitable servitude, the general rule is that real covenants must be expressly made. Covenants can be expressed as modern contracts or expressed in deeds; they can be created both by inter vivos and testamentary transfers. n72 They can be "created by donative transfers, as well as by contracts and transfers for consideration." n73

(1) The Promise Must Be Clearly Delineated.

Courts historically have a prejudice against enforcing real covenants for the reasons given above n74 and will sometimes go out of their way in giving the covenant the most restricted reading possible, but they will enforce the clearly stated and unambiguous covenant. "Where the terms of an agreement are clear and unambiguous, it is the duty of the court to construe them as written." n75 Strict construction is at issue only where there is ambiguity. n76 In order to determine whether a provision of a covenant is ambiguous, the Idaho Supreme Court says that it "must determine whether the provision is reasonably susceptible to conflicting interpretations." n77 When there is ambiguity, the Idaho court states that it will attempt to ascertain the intent of the parties "from the language of the covenants, the existing circumstances at the time of the formulation of the covenants, and the conduct of the parties." n78 The Oregon Supreme Court lays out a threefold inquiry: (1) examine the text of the provision in the context of the document as a whole; (2) if ambiguity remains after that step, then examine extrinsic evidence of the parties' intent; (3) if that fails, then rely on

"appropriate maxims of construction." n79 If the language is unambiguous, extrinsic evidence will not be admissible in construing a covenant. n80 Even where language is undefined and may be ambiguous, courts remain quite free in determining the weight and admissibility of extrinsic evidence. Thus, the Georgia Supreme Court states that where words are not defined in a restrictive covenant they are to "construed as to carry into effect the intention of the parties, which is to be collected from the whole instrument, and the circumstances surrounding its execution," with the judge authorized to find the meaning of undefined words "in accordance with their 'common everyday sense... .' " n81 The court then held that the testimony of the drafter of the covenant that the intention of a provision requiring only "site-built" construction was only to exclude factory-built and mobile homes from the subdivision did "not require a different conclusion" than the court's contrary analysis of the intention of the parties, which derived a more restrictive meaning of "site-built" from the common meaning of words and from the four corners of the document. n82 Stating that the interpreting court's goal is to seek the "real intention of the parties" and that restrictions in a residential subdivision must be interpreted to "increase the desirability of [the] lots as residences," the South Dakota Supreme Court sustained an injunction against a sandblasting business in a subdivision not explicitly prohibiting businesses, even though less obtrusive businesses had not been objected to. n83 In creating a covenant, therefore, it is important to be very clear in expressing the nature and extent of the promise defined in it. The Supreme Court of Virginia, for example, refused to enforce a restrictive covenant in a lease forbidding the *construction* of a second supermarket in a shopping center against someone *remodeling* an already existing department store for use as a supermarket. n84 Noting that in cases of ambiguity, covenants were to be interpreted in a way leading to free use of land and in the absence of a specific definition of family in a subdivision single-family residence covenant, the New Mexico Supreme Court held that a group home for AIDS patients was not in violation because the persons lived together in a way that a family would. n85 The Arkansas Supreme Court, noting that when "there is uncertainty in the language by which a grantor in a deed attempts to restrict the use of realty, freedom from restraint will be decreed," did exactly that in holding that a covenant requirement that "all chimneys and foundations below siding shall be constructed with brick or stone" did not forbid use of metal insert fireplace box or metal pipes through the chimney. n86 After distinguishing covenants forbidding commercial, industrial or business uses from covenants forbidding non-residential uses, the Michigan Supreme Court upheld banning a family day-care home because of its nature as a business despite its burdening the neighborhood no differently than a residence would. n87 The Nebraska Supreme Court interpreted a covenant forbidding non-residential use as one meant to prevent commercial use, and therefore held that the owner of a lot could use a neighboring lot to provide access to the lot on which his home was to be built; such a use enhanced the residential nature of the neighborhood. n88 The South Carolina Supreme Court interpreted a covenant forbidding construction of any residence costing less than $10,000 to permit construction of a mobile home because the terms of the covenant "do not prohibit mobile homes and thus we will not enlarge the restriction by construing the words beyond their clear meaning." n89 The Hawaii Supreme Court held that, where the purpose of a covenant limiting houses to two stories was to limit the height of buildings, the covenant was ambiguous for failure to state the maximum height of the stories, and therefore not enforceable against the builder of a three-story house. n90 The Washington Court of Appeals, noting that restrictions were not to be interpreted to extend "by implication to any use not clearly expressed," interpreted a covenant forbidding placement of trailers not to forbid placing of a mobile home. n91 The Washington Supreme Court, by contrast, accepted a use of the word "family" as used in its ordinary context rather than explore the many possible dictionary uses of the word in upholding a single-family covenant's exclusion of an adult care home. n92 Similarly, the Alabama Supreme Court used the ordinary notion of "dwelling" to determine that neither a carport or a storage room can be considered part of a dwelling to satisfy the minimum size required by a covenant. n93 These examples demonstrate that, unless one enjoys the thrill of allowing a court to interpret the meaning of one's covenant, it is critically important to be precise in one's choice of words. Apparently precise words used imprecisely court disaster, as do vague words carelessly used.

(i) The Presumption in Favor of Untrammeled Use.

It has been a virtual truism that in cases of ambiguity, a covenant will be interpreted in the way least burdensome to the free use of land. In Michigan, for example, noting that restrictive covenants are interpreted strictly against grantors and those enforcing them, "and all doubts are resolved in favor of the free use of property," the state's supreme court pointed out that their decisions are based on two apparently "inconsistent" principles: the broad freedom of landowners to make

legal use of their property and the requirement that courts normally "enforce unwaived restrictions on which the owners of other similarly burdened property have relied." n94 The Idaho Supreme Court notes that while contract principles are generally used in construing covenants, because "restrictive covenants are in derogation of the common law right to use land for all lawful purposes" the court will not extend by implication any "restriction not clearly expressed." n95 That traditional presumption is giving way in some jurisdictions, however. The Washington Supreme Court, for example, after noting the traditional presumption, states that the time has arrived "to expressly acknowledge that where construction of restrictive covenants is necessitated by a dispute not involving the maker of the covenants, but rather among homeowners in a subdivision governed by the restrictive covenants, rules of strict construction against the grantor or in favor of free use of land are inapplicable." n96 The court notes that this is not an entirely new development, pointing to decades-old cases from Kentucky and New Hampshire. n97 While restating the traditional presumption, the Montana Supreme Court softens it by cautioning that the "free use of property must be balanced against the rights of the other purchasers in the subdivision." n98 The new *Restatement of the Law of Property* also distinguishes between the drafter and the successors to the drafter who are residents of a subdivision in deciding whether to apply the traditional rule construing language against the drafter. n99 It would be premature to suggest, however, that there is an irresistible tide against use of the traditional presumption against the drafter in interpreting ambiguous covenants. The Supreme Court of Oregon, for example, has explicitly resisted the invitation to do so, citing concerns for protection of purchasers, certainty and the reduction of litigation and allowing full use of property. n100

(ii) Grantor May Retain Right to Change Covenants.

Jurisdictions generally permit a grantor to retain the right to change, revoke or make exceptions to covenanted restrictions so long as that right is explicitly retained in the creating instrument, construing the document most strongly against its author. n101 The power to make some types of changes might be vested in an architectural control committee or the Homeowners Association. A Texas subdivision covenant, for example, forbade use of a certain type of roofing material, but granted to the Architectural Control Committee "the right to waive" that requirement under certain conditions. n102 The Louisiana Supreme Court, in interpreting that state's version of a subdivision scheme of covenants and servitudes, noted the possibility of permitting them to be released by less than all of those bound by them but required unanimous approval for an increase in the burden. n103 If the covenants permit it, new properties may be joined to a subdivision and gain the right to participate in changing covenants. In an Idaho case where a neighboring property owner consented to a subdivision's covenants, the state Supreme Court held that the consenting owner thereby gained the right to vote on amending covenants and thus provided the majority required to permit one of the other owners to continue keeping hogs on his property. n104 In some jurisdictions, the power to make such changes is subject to review under a reasonableness standard whether the changes are consistent with the "intent stated in the declaration of purpose." n105 The exercise of the right must be reasonable, with due regard for the property rights and investments of those who relied on the covenants in full force at the time of purchase. n106 In those jurisdictions, courts must determine whether the exceptions were "reasonably exercised or whether they essentially destroyed the covenants," a factual matter inconsistent with summary judgment. n107

(iii) Covenant May Be Limited or Unlimited in Duration.

A real covenant may specify by its terms its duration. It may be by its terms permanent; it will then be subject to termination under rules discussed later. n108 It may be created to exist for a specific period of time, at the end of which it will expire, or it may be created to last until the occurrence of a specified event. A real covenant may have an original limited term with provisions for renewal, either automatic or requiring action by the parties. n109 Covenants will sometimes state specific times at which they will automatically renew themselves, unless terminated or altered. Thus, in Arkansas, an attempt to revise covenants so as to prevent the building of an apartment building failed because the revision was recorded after the automatic renewal of the original covenants; it should have been recorded in advance, to take effect as of the date of the original's expiration. n110 It is important that the covenants be crafted so that there will be no dispute over what term the parties intend.

(2) The Promise Must Be in Writing.

Courts will also require that the covenant be in writing. Underlying the necessity that a covenant be written, the Arkansas Supreme Court notes that while existence of a general plan of development might be used to argue for the continuing validity of a *written* covenant contained in a chain of title, they "have no case in which a restriction has been *created* as the result of a general development scheme." n111 Oral real covenants generally will not be enforced, absent estoppel, part performance or other such doctrines. A writing requirement serves all the purposes generally put forth for the Statute of Frauds, both evidentiary and formal. The writing requirement removes many of the dangers of relying on contradictory oral testimony. It also serves to underline the seriousness of what the parties are entering into. Finally, it makes it more likely that someone purchasing land bound by a real covenant will do so knowingly; there will exist evidence of its existence that increases the likelihood of notice. Where the promise is made as part of another document, as in a deed evidencing the transfer of land or in a will, the writing required is that which is necessary to make the underlying transaction valid. The *Restatement* had it that the successors to title of land burdened by a promise were not bound unless the promise were "in writing under seal." n112 At the time the first *Restatement* was issued, in 1944, about three-fourths of the states had already abolished the seal requirement. n113 Recognizing that most other states have since also done so, the new *Restatement* would totally abolish the requirement that the writing creating the real covenant be under seal and would require no other writing than that required to create an estate of like duration. n114 Beyond the signed writing or memorandum satisfying the Statute of Frauds or the Statute of Wills, a few jurisdictions still require formalities like the use of the seal, witnesses or acknowledgments. n115 In California, a statute has it that for a covenant to run with the land, there must be a writing containing the covenants that particularly describes the benefited and burdened land and that states that the parties' successors in interest shall be bound for the benefit of the land owned by, granted by, or granted to the covenantee. n116 The California Supreme Court has clarified that the writing necessary may not appear in any of the deeds involved but may be separately recorded, and so long as it is recorded before the contracts of sale, describes the property and states the intent to bind all purchasers, those who take with the constructive notice provided by the recording system will be bound. Separate mention in deeds is not required. n117 The Montana Supreme Court held that where covenants were contained in the contract for sale but not the deed, where the deed made no reference to restrictive covenants and where no separate declaration of covenants was ever filed, the covenants merged into the deed and were extinguished by it and, therefore, could not be enforced. n118

(3) The Statute of Frauds.

The writing memorializing a real covenant must at the very least satisfy the Statute of Frauds or the Statute of Wills as to the transaction of which it is a part. If it stands alone, it must satisfy the Statute of Frauds. It must identify what the promise is and must identify the parties to it. It must identify the land to be bound and, perhaps, where the benefit lies. It must be signed at least by the party to be bound. Thus the Arkansas Supreme Court found invalid a covenant signed by only one of the co-owners of the property to be bound because "all of the parties did not sign the covenants." n119 Acceptance of a deed poll (one signed only by the grantor), however, has been found to satisfy the Statute of Frauds and place burdens upon the grantee. n120 The writing requirement for a Real Covenant often goes beyond those requirements, however.

(c) The Parties Must Intend That the Benefit and Burden of the Promise Run with the Land.

Besides sometimes requiring a particular relationship between the original promisor and promisee, courts universally require that the parties have *intended* that the promise run with the land. It is not enough that a promise be made between people in the transfer of land; that promise may still be only personal and will not then be binding upon or enforceable by successors. The courts require evidence that the parties *intended* that the promise entered into be enforceable by and on their successors. n121

COMPUTER-ASSISTED RESEARCH

LEXIS: real w/2 covenant w/50 inten! w/50 run w/3 land

(1) Intent May be Gleaned from the Language of the Conveyances Alone or from That Language Compared with Other Evidence of Intent.

Intent is a "question of fact to be discovered by reference to the instrument in its entirety and the manifest meaning of the language used by the parties." n122 One discovers the intent of the parties "from the governing instrument itself and from the particular language selected to reflect the goals and understandings of the parties." n123 The circumstances to be considered in case of ambiguity of language are those in existence at the time the promise was made; those in existence at the time enforcement is sought are irrelevant to solution of the ambiguity. n124

(2) No Particular Language Is Required to Demonstrate the Required Intent.

While the use of particular words is "not determinative and no particular words need be used," the terminology chosen is highly significant and launches the legal analysis. n125 Certain expressions will, however, be read by courts to strongly evidence that intent. "[L]egal terms of art in a conveyance are presumed to have been used with their accustomed meaning, especially where the context and circumstances reveal no contrary direction." n126 An agreement to "permanently maintain" a tile drain across the promisor's piece of property, for example, evidenced an intent to bind not only the promisor "but later grantees of the burdened property as well." n127 A statement that all covenants "are intended to be and shall be construed as covenants running with the land, binding upon, inuring to the benefit of and enforceable by the parties hereto and their successors and assigns" sufficiently "indicates that the parties intended" the covenants to run with the land. n128 The use of the words "heirs" or "assigns" in deeds for property "tend to support the conclusion that the covenants were intended to run with land rather than that they were personal ... ." n129 The Maryland high court also noted that the presence of language binding "Successors and assigns" is virtually conclusive on intent, lacking intent to the contrary. n130 Where a deed employed the phrase "heirs, successors and assigns" after other covenants in a deed, but not after the clause in question, it appeared that the parties did not intend the clause to run with the land. n131 In one case, language that parties "bind themselves" to a covenant that failed to provide that the parties "bind their heirs and successors" was evidence of no intent to create a covenant running with the land. n132 Language speaking "in terms of perpetuity," the fact that the land originally retained in the conveyance in which the covenant was created "necessarily benefited from the covenant," and mention of the covenant in later conveyances are all evidence the covenant was intended to run with the land. n133 Where a repurchase provision in a deed was characterized in the deed as a covenant and lacked a reentry authorization or forfeiture effect, the provision was intended by the parties to create a covenant enforceable in equity rather than a future interest enforceable only under statutory restraints. n134

(d) The Touch and Concern Requirement: What Type of Promise Will be Enforced as a Real Covenant?

Just because a promise is made by two parties in horizontal privity with one another does not suffice to make it an enforceable real covenant. English courts early on demanded that the promise be one that seriously impacted on the use of land. It had to "touch and concern" the use of land, before a court would find that the promise had to be kept by future owners of the promisor's land. If the promise did not touch and concern the land, it was personal to the promisor, and would follow the promisor even after the land was conveyed away, rather than run with the land. American courts generally also maintain the touch and concern requirement. n135 According to Professor Susan French, Reporter for the new *Restatement*, while the courts generally speak of the touch and concern requirement as though it were necessary for the creation of a real covenant, it often functions as a termination tool to relieve the successors of promisors of burdens that courts find unwise or pernicious. n136 Many scholars believe that the touch and concern requirement is a tool without any real content of its own that is used by courts when they perceive that, for public policy or other reasons, a promise ought not bind successors to the promisor. Cutting the "Gordian knot bind[ing] this state's jurisprudence regarding covenants running with the land," the New Jersey Supreme Court relegated the touch and concern requirement to the status of one factor among many to "consider in determining the reasonableness of the covenant."

n137 The new *Restatement* shares the opinion of the lack of necessity for a touch and concern requirement and urges that it be abolished because other doctrines like restraints on trade and competition, restraints on alienation, and unconscionability much more directly and satisfactorily assist the courts in policing servitudes. n138

(1) Definitions: When Does a Covenant "Touch and Concern" Land?

Courts and commentators find it very difficult to tell. "It has been found impossible to state any absolute tests to determine which covenants touch and concern land and which do not." n139 Courts have "consistently relied upon rather general statements in their analyses of the touch and concern requirement." n140 To touch and concern land, a covenant must "relate to the use of both the benefited and burdened land." n141 A covenant restricting use touches and concerns land if it increases the value of the unrestricted land and decreases the value of the restricted land by limiting its use. n142 In Mississippi, for example, a covenant concerning payment of royalties was found to personal rather than real because while it burdened land, it benefitted only an individual. n143 While some older cases have required that the covenant have a physical effect on land, other courts have eschewed that requirement. n144 It suffices that "the covenant have some economic impact on the parties' ownership rights by, for example, enhancing the value of the dominant estate and decreasing the value of the servient estate." n145 A covenant granting a laundry company possession of premises within a condominium complex for its washers and driers touched and concerned the land because it clearly benefited the company and, besides burdening the property, benefited the condominium owners and increased the value of the property. n146 In Colorado, to touch and concern land, a covenant must "closely relate to the land, its use, or its enjoyment." n147 In Maryland, for example, from the promisee's point of view, a covenant touches and concerns land when it tends necessarily to enhance its value "or render it more convenient or beneficial to the owners or occupants." n148 Conversely, from the covenantor's point of view, the covenant touches and concerns land if the land is rendered less valuable due to the burden placed upon it. n149 These two citations suggest one fairly common test to see if a covenant touches and concerns land: does it change the value or legal rights of land; does it benefit or burden it? "What is essential is that the burdens and benefits created must relate to the land and the ownership of an interest in it; the burdens and benefits created are not the personal duties or rights of the parties to a covenant that exist independently from the ownership of an interest in the land." n150 After holding that a family day-care home violated a covenant restricting commercial uses, the Michigan Supreme Court refused to hold that enforcing such a covenant violated public policy in the absence of definite indications in Michigan "constitutions, statutes or common law that supports" the view that enforcing such covenants is contrary to the state's public policy. n151 Similarly, the Idaho Supreme Court refused to find a covenant that would prohibit a group home for the elderly to be against public policy, despite statutes overruling similar *zoning* statutes. n152 Does the covenant "in purpose and effect substantially alter" legal rights "which otherwise would flow from ownership of land and which are connected with land"? n153 The touch and concern requirement is met "when the covenant affects the legal relations -- the advantages and the burdens -- of the parties to the covenant, as owners of particular parcels of land and not merely as members of the community in general, such as taxpayers or owners of other land." n154 It is essential that the covenant in some way affect the legal rights of the covenanting parties as landowners: "Where the burdens and benefits created by the covenant are of such a nature that they may exist independently from the parties' ownership interests in land, the covenant does not touch and concern the land and will not run with the land." n155

COMPUTER-ASSISTED RESEARCH

LEXIS: real covenant & (touch & concern w/25 test or defin!)

(2) Touch and Concern: the Burden Side.

Many jurisdictions will not enforce a covenant unless it touches and concerns both benefited land and burdened land. n156 The 1944 Restatement has the burden running *either* if the enforcement of the promise benefits the promisee in the physical use of the land *or* if the consummation of the transaction of which the promise is part similarly benefits the promisor. n157"It will be noted that 'benefit' and 'burden' tests are stated in the alternative; if either is met, the covenant

may be one running with the land." n158 The use must benefit the promisor or the promisee in the *physical* use of the respective land. n159 There are a few exceptions in which the burden may involve actions off the land that enhance the land of the promisee, and the promise will be enforced by the courts because the promisee's use of land is benefited. A prime example is the covenant not to compete; many jurisdictions will permit the benefit to run with the land, even though the burden be personal to the covenantor. n160 If no benefit can be demonstrated to the land of the promisee, however, courts will not enforce such a covenant; thus, in Illinois, the Appellate Court refused to enforce a covenant not to operate a currency exchange n161 within two blocks of the spot defendants previously operated such an exchange, because plaintiffs were themselves not in the currency exchange business, and the building where the previous exchange had been housed had been torn down and not yet replaced. n162

COMPUTER-ASSISTED RESEARCH

LEXIS: real covenant & (touch & concern w/25 test or defin!) w/50 burden!

(3) Touch and Concern: the Benefit Side.

Many jurisdictions will require that the covenant affect legal relations to land not only on the burden side but also on the benefit side. They will, therefore, not enforce covenants "in gross." Thus, the Restatement has it that the "benefit of a promise can run with land only if it is a promise respecting the use of land of the beneficiary of the promise." n163 Thus, while courts will recognize that a covenant restricting the use of the promisor's land will touch and concern that land, the North Carolina Supreme Court noted that such a use restriction, however, does not always touch and concern the dominant estate. n164 That court held that, in the particular case, "the close proximity of the lands involved" and the "relatively secluded nature of the area" where the properties were located showed that restricting the promisor's use of lands would "affect plaintiff's ownership interests in the property owned by them, and therefore the covenants touch and concern their lands." n165 In Virginia, the degree of change necessary to defeat the "purpose of the restrictive covenant rendering it null and void" must practically " 'destroy the essential objects and purposes of the [covenant].' " n166 The Indiana Court of Appeals, enforcing a promise to "permanently maintain" a tile drain, notes that the successor to a "covenantee's property interest may enforce the covenant if it is logically connected to his property." n167 A covenant granting a laundry company the right to place washers and driers on the premises of a condominium development ran with the land because possession was necessary to its enjoyment of its leasehold estate, and the covenant both burdened and benefited the residents of the condominium complex. n168 A person who held no land in the county in which land had been granted to build a courthouse would have no standing in Arizona to enforce such a covenant because one "must retain an interest in land which the promise was intended to benefit at the time it was made." n169 In Hawaii, a grantor was held not to have established a "restrictive covenant enforceable at law" because there was no reference to a dominant estate or parcel, nor did the grantor retain any interest in the plot expected to benefit from the restriction at the time the restriction was created. n170 The Mississippi Supreme Court held a covenant to be personal rather than real because, though it burdened land, it did not benefit land but an individual and therefore failed the "touch and concern" test. n171 In effect, courts taking that point of view require, to borrow language from the world of easements, that the covenant be "appurtenant" to land before they will enforce it. Some courts do recognize real covenants in gross, even if reluctantly. The Hawaii Supreme Court, for example, notes that covenants in gross are disfavored in the law because of deleterious effects on the market value of land due to the difficulty of finding the owner of such a covenant; because they make possible a larger number of people who could control property from afar; because they allow outsiders owning no land in the community to impose their views on it; and because appurtenant covenants promote flexible consensual land use arrangements. n172 That court, therefore, will find a covenant in gross only when the intention to create one is unambiguously present in the creating documents. n173 One commentator points out that while in the ordinary case there is both a dominant and a servient piece of land involved in a real covenant, the question of whether the benefit runs and the burden runs should be considered separately, thereby making it possible for one holding the benefit in gross to enforce it against the promisor's successors. n174"Although there is some authority in American law that a blanket prohibition on covenants in gross exists, the cases show that covenant benefits in gross are recognized and enforced in a variety of contexts." n175 Courts have permitted developers to enforce covenants after selling all their

land, if the developers intended that they have the power to do so. The new *Restatement* would have it that neither the benefit nor the burden of a servitude "is required to touch or concern land in order for the covenant to be valid as a servitude." n176

COMPUTER-ASSISTED RESEARCH

LEXIS: real covenant & (touch & concern w/25 test or defin!) w/50 benefit

(4) Affirmative Covenants.

(i) In General.

While English law will not enforce affirmative covenants n177 requiring action on the part of the owner of a piece of property, partly on the ground that such covenants do not burden or change the value of the property but place a personal burden on the owner of the property, most American courts will enforce such covenants. The "majority American view ... makes no distinction between affirmative and restrictive covenants for the purpose of determining whether a covenant runs with the land." n178 The general rule regarding "affirmative burdens imposed by covenants is that they run with the land where the necessary requirements are satisfied." n179 Thus, the Court of Appeals of Maryland held that a covenant requiring lessee to restore property to its former condition was a covenant that ran with the land, for which compensation was due when the property was condemned. n180 The Alabama Supreme Court enforced as a covenant running with land a vendor's lien requiring a city, the purchaser of property, to reserve 50 acres for 40 years for a golf course and to construct the golf course; if the provision was "reserved for the benefit of adjacent land retained, and not merely for personal advantage, covenants are said to touch and concern (the land)." n181

COMPUTER-ASSISTED RESEARCH

LEXIS: affirmative covenant w/20 run! with the land

(ii) Covenants to Pay Money.

Courts historically have shown a special reluctance to enforce covenants for the payment of money, with the justification that the duty to pay money did not touch and concern land itself. Courts in latter days have been more willing to recognize and enforce covenants to pay money. Though a "covenant for the payment of money may at first blush appear to be a personal covenant," it may touch and concern land "if its purpose is to benefit the covenantor's interest in the land." n182 Covenants to pay money might, for example, include money as dues to homeowners' associations or contributions to the upkeep of common areas. "The covenant to pay maintenance assessments for the purpose of repairing and improving the common areas and recreational facilities of [a subdivision] touches and concerns the land." n183 Noting that as a matter of law, covenants for payment of annual assessments for property owners' associations run with the land, the Mississippi Supreme Court held that "the underlying right of having the capacity to form a [mandatory] homeowners association is one that will run with the land." n184"Nearly every jurisdiction that has reviewed the question of assessments for condominium recreational facilities has held them to be binding covenants running with the land." n185 Despite the force of that 1983 statement, the question continues to reappear. In one 1996 example, the Georgia Supreme Court reversed a lower court decision that a covenant to pay assessments to a homeowners association did not pertain to land use: the purpose "is to maintain the common property in the subdivision for the use and enjoyment of all owners." n186 Where only the owners of land in a subdivision had the right to use the common facilities, as contrasted to the public using them at sufferance, and the availability of the facilities increased the value of the property within the assessment area, the covenant to pay an upkeep assessment touched and concerned land. n187 In Ohio, the obligation to return tenants' security deposits, by contrast, is personal to the landlord and does not run with land because it is not "so connected with, attached to and inherent in land that the assignee of the reversion would have the right to take advantage of it or be obligated to perform it." n188 A court in Oregon recognized that,

generally, covenants to pay costs for common property have been held to satisfy the touch and concern requirement, but refused to recognize an initiation fee as touching and concerning land when the property owner was not an automatic member of the golf club that was the Association's only land, and the owner's contribution would, therefore, have "no necessary connection" either to the purchaser's own property or the right to use any common property. n189 In contrast, where membership in the golf course was mandatory, the Nebraska Supreme Court held that the existence of a special class of public nonresidential members did not negate the fact that the required dues benefited the dues payers' property and so sufficiently touched and concerned land to be enforced as a real covenant running with the land. n190

COMPUTER-ASSISTED RESEARCH

LEXIS: covenant w/10 pay! w/2 money! w/10 run! with the land

(5) Negative Covenants.

A negative, or restrictive, covenant binds the promisor to refrain from a given activity on the promisor's own land. Restrictive or negative covenants are the most common encountered in the United States and the only ones that will be enforced in England, and then only in equity unless the promisee and promisor are in a landlord-tenant relationship. "Generally, the purpose behind a restrictive covenant is to maintain or enhance the value of land, often times by controlling the nature and use of surrounding lands." n191 Restrictions on land based on covenants are enforceable at both law and equity in the United States. Some states will note a historical disfavor for enforcing restrictive covenants, "based on the view that the best interests of society are advanced by the free and unrestricted use of land." n192 The result of that disfavor is that restrictive covenants will be interpreted strictly and the proponent must demonstrate that the covenant applies to the property "either by its express language or by a plain and unmistakable implication." n193 Despite their doctrinal dislike for restrictive covenants, courts will still enforce their clear and unambiguous language even in the face of arguments that the words themselves are unreasonable. Thus, the Montana Supreme Court reversed a lower court decision that a ban on tv satellite dishes in a subdivision's restrictive covenants did not apply to modern 18-inch dishes that were no more obtrusive than were the antennas permitted under the covenants. n194 Examples of negative restrictive covenants include those prohibiting the placing of house trailers on the land, n195 restricting the use of property to the raising of minks, n196 and imposing setback lines for building. n197

COMPUTER-ASSISTED RESEARCH

LEXIS: (restrictive covenant or negative covenant) w/10 (run with the land or touch & concern) w/50 (rule or principle or h*ld)

(6) Power to Enforce and Obligation to Obey a Real Covenant.

There is a good deal of rhetoric in the cases that courts enforce covenants only reluctantly because of their negative effects upon the alienability of property; because of those effects, covenants are strictly construed against those who would enforce them. n198 Despite that rhetoric, covenants are enforced routinely either in law or equity so long as they meet certain requirements as to who may enforce them and as to which type of enforcement, legal or equitable, is appropriate.

(e) Vertical Privity: Who May Enforce or Benefit from the Real Covenant?

Even after posing the question of the relationship required between the original promisors necessary to support enforcement by and on successor parties answered by the horizontal privity requirement, there remains the question if any special relationship is required between the promisor and the promisor's successor in interest and between the promisee and the promisee's successor in interest before courts will enforce a real covenant. The answer comes in the development of the concept of vertical privity. Vertical privity "requires a showing of succession in interest between the

original covenanting parties and the current owners of the dominant and servient estates." n199 One definition is that vertical privity is established "where the party seeking to enforce the covenant and the party against whom it is to be enforced are successors in title to the property of the covenantee and covenantor respectively." n200 In New York, to enforce a real covenant, one must show that one's property "derives from the original grantor who imposed the covenant and whose property was benefited thereby, and concomitantly, that the party to be burdened derives his property from the original grantee who took the property subject to the restrictive covenant"; one seeking to enforce such a covenant demonstrates this privity by showing title that comes through a "continuous lawful succession from the original grantor." n201 Now, the party seeking enforcement must show only that "he held property descendant from the promisee which benefited from the covenant and that the owner of the servient parcel acquired it with notice of the covenant." n202 Vertical privity is a very loose and somewhat inconsistent term with a meaning for the relationship between the promisor and the promisor's successor that in some jurisdictions is different than that required for the promisee and the promisee's successor. This looseness and inconsistency has made the new *Restatement's* rejection of the doctrine and replacement of it by rules differing according to the nature of the covenant a welcome change. n203

COMPUTER-ASSISTED RESEARCH

LEXIS: real covenant* w/50 (vertical w/2 privity) or (privity w/2 estate)

(1) Vertical Privity Between the Promisor and Successors: Is the Successor Bound?

For the successor of the promisor to be bound, the successor traditionally must legitimately succeed to the entire estate of the promisor; if the successor has some lesser estate, the promisor is the one bound to see that the promise is carried out. The Restatement of Property has it that successors in title to the promisor are not bound unless they hold "(a) the estate or interest held by the promisor at the time the promise was made, or (b) an estate or interest corresponding in duration to the estate or interest held by the promisor at that time." n204 This meaning of vertical privity suggests that it is more accurate to refer to the burden of the covenant running with the *estate* in land rather than with the land itself. To be burdened, one must succeed to the promisor's estate or at least to an estate or interest of equal duration. The new *Restatement* abolishes the concept of vertical privity and replaces it with a series of specific rules that can be changed by agreement. In sum, the burden of a covenant runs to successors except that it does not run to someone of superior title to the promisor and the burden of an affirmative covenant does not run to one holding an estate of lesser duration except for lessees and life tenants whose situations are covered by separate rules. n205

(2) Vertical Privity Between the Promisee and Successors: May the Successor Enforce?

The relationship required between the *promisee* and the promisee's successors, however, in some jurisdictions is much looser, and some would think hardly qualifies as a privity requirement at all. Vertical privity in this situation means "little more than a succession to some interest in the benefited parcel." n206 Thus, for example, where a subdivision is platted with restrictions, "any one of the plat owners may seek judicial assistance to compel compliance by another lot owner with the restrictive covenants." n207 The Restatement has it that the meaning of the requirement that, to be beneficiary of a real covenant, one must succeed to the estate held by the original promisee has been broadened so that the benefit of a real covenant can "run with the land only to one who succeeds to some interest of the beneficiary in the land respecting the use of which the promise was made"; not included, therefore, are those who claim the land by paramount title or hold adversely to the successors in interest. n208 The Restatement defines "some interest" to mean that the benefit "will run with any part of the interest of the beneficiary of the promise if the part succeeded to is of such a character that performance of the promise will be of benefit to the owner of it." n209 To enforce a real covenant, the holder "need show only ... that the owner of the servient parcel acquired it with notice of the covenant." n210 The new *Restatement* explicitly abolishes the requirement of vertical privity before a successor can benefit from a covenant and replaces it with a default rule that benefits appurtenant to land run to all subsequent owners and possessors of the benefited property. n211 The benefit of affirmative covenants may not run, however, to those who hold estates of lesser duration than the original parties to the covenant nor to those holding adversely to the original owner of property

benefited by the promise. n212

(i) Homeowners Associations.

A special problem arises with subdivisions and the duty to pay assessments for their upkeep. As the section on Covenants to Pay Money n213 suggests, courts these days have very little difficulty considering the duty to pay for amenities and for the enforcement of covenants to be a duty that runs with the land because it seems so clearly to touch and concern land; the assessment burdens each lot and what it purchases increases their value. The problems arises when one asks who has the right to enforce that covenant. The original developer who may have no continuing interest in the development? Must some individual member of the community personally take the initiative and bear the cost of enforcement? In early days there was some problem with considering homeowners associations to have the right of enforcement of that and other obligations. If the covenant to pay is a real covenant and privity remains important, where does the association gain its privity? The problem generally went away for some jurisdictions when their courts held that associations, even when they owned no land of their own, either succeeded to the rights of the developer who established the covenant or were agents of the current lot owners within their developments. n214 The Mississippi Supreme Court reasoned back from the accepted idea that the right to collect assessments for the upkeep of the amenities was a covenant that ran with the land to the idea that the right to create a mandatory association to do so, even when the original developer did not, also was a covenant that ran with the land. n215 These association-friendly solutions to the problem are by no means unanimous, however. By contrast, the Florida Supreme Court refused to adopt a rule of associational standing n216 to permit suit by a homeowners association that was not itself a property owner or the explicit assignee of the developer's rights, though the individual owners clearly had standing. n217

(f) Notice Requirement.

One traditional difference between real covenants and equitable servitudes is that one could be bound by a valid real covenant even if one had no notice of its existence, while the enforceability of an equitable servitude depended entirely on notice to the party to be bound. American jurisdictions generally have imported the notice requirement also to real covenants, though cases can be found to the contrary. Thus, the Missouri Court of Appeals states: "A real covenant 'runs with the land' and is binding on all successors in interest, regardless of whether they had any actual or constructive notice of such covenant when they acquired title." n218 Ordinarily, however, one cannot be bound to a real covenant attached to land one obtains unless one has actual or constructive notice of its existence. The Texas Supreme Court, for example, states that a covenant runs with the land when, the other requirements having been met, "the successor to the burden has notice." n219

COMPUTER-ASSISTED RESEARCH

LEXIS: (real covenant* w/10 (notice or record!)) Or (real covenant w/50 (actual notice or constructive notice))

(1) Actual Notice.

If one has actual notice of the existence of an otherwise valid real covenant at the time of acquiring a piece of property, one will, of course, be bound by it, except possibly in those jurisdictions that make recording a prerequisite for validity. n220 In one case, constructive notice existed because of the original recorded subdivision declaration, and signature of the parties or their predecessors in title to an amendment constituted "actual notice of the restrictions and liability for assessments." n221

(2) The Recording Acts.

States treat the effects of the recording acts differently. Generally, a failure to record does not affect validity of a real covenant between the original parties. In a few jurisdictions, including some using land registration systems (Torrens Act), a real covenant may not be valid even between the original parties unless properly recorded. Thus, in North

Carolina, an assignment of pier rights did not bind a subsequent purchaser because of failure to record, even if the purchaser had actual notice. n222 In Kentucky, a restrictive covenant "will be enforced only when the instrument is placed in a recorded instrument, actual notice of a purported restriction notwithstanding." n223 The effect of a failure to record in most jurisdictions is that future purchasers of the land subject to the covenant will not be bound unless they possessed actual notice. n224 If the real covenant has been recorded at the time a piece of property is acquired, the purchaser will be deemed to have notice whether or not the purchaser actually did. In North Carolina, for example, a purchaser is "conclusively presumed" to know the contents of any documents within the chain of title "and is put on notice of any fact or circumstance affecting his title which is disclosed by such instruments." n225 When covenants are on file in the county's deed records, "subsequent purchasers would have constructive notice of the restrictions and be bound by them." n226

(3) Constructive Notice.

Notice can be ascribed to a purchaser of a property burdened by an expressly created real covenant if there is evidence on the property that a court finds should have put the ordinarily prudent purchaser on notice of its existence. If one has "sufficient information to stimulate inquiry which would lead to knowledge of adverse or hostile and superior claim or title, and fails therein, the injury is the result of his own folly," and a court of equity will offer no protection. n227 In that case, not only were the purchasers charged with constructive notice because they had been told of the restrictions not mentioned in their deed, they were "charged with constructive notice of that which appears on the face of the conveyances in their chain of title." n228

FOOTNOTES:

(n1)Footnote 54. The bias towards free alienability of land is still seen in modern courts. *See Goforth v. Smith, 991 S.W.2d 579 (Ark. 1999)* (restrictive covenants are strictly construed against the free transferability of land. Therefore, all doubts should be resolved against the covenant restrictions and in favor of the free transferability of land).

(n2)Footnote 55. Susan F. French, Servitudes Reform and the New Restatement of Property: Creation Doctrines and Structural Simplification, *73 Cornell L. Rev. 928, 934 (1988).*

(n3)Footnote 56. *Id. at 935* (footnotes omitted); *but see Runyon v. Paley, 416 S.E.2d 177, 184 (N.C. 1992).*

(n4)Footnote 57. *Moseley v. Bishop, 470 N.E.2d 773, 777 (Ind. App. 1984).*

(n5)Footnote 58. *Flying Diamond Oil Corp. v. Newton Sheep Co., 776 P.2d 618, 627 (Utah 1989).*

(n6)Footnote 59. *Runyon v. Paley, 416 S.E.2d 177, 184 (N.C. 1992)* (affirming requirement of instantaneous horizontal privity and holding that it had been fulfilled because the covenant had been created "in connection with the transfer of an estate in fee of property then owned [by original covenantee]") (citing a previous edition of this treatise). *See also Sonoma Dev., Inc. v. Miller, 515 S.E.2d 577, 580 (Va. 1999)* (citing Runyon and this section for notion that covenant must be part of transaction transferring interest in land).

(n7)Footnote 60. Some courts use the term horizontal privity to refer only to instantaneous privity.

(n8)Footnote 61. That the requirement of horizontal privity can be so easily sidestepped by use of a straw man is one of the factors lessening the importance of the horizontal privity requirement.

(n9)Footnote 62. Restatement (Third) of Property § 2.4, Reporter's Note and cases cited therein (2000).

(n10)Footnote 63. *Waynesboro Village v. BMC Properties, 496 S.E.2d 64, 68 (Va. 1998)* (record indicates defendant established [horizontal privity]; covenants therefore run with land and are enforceable at common law). The court then further explored the issue in *Sonoma Dev., Inc. v. Miller, 515 S.E.2d 577, 580 (Va. 1999)* (focusing on essential elements of horizontal privity) (citing this section).

(n11)Footnote 64. *Sloan v. Johnson, 491 S.E.2d 725, 727-728 (Va. 1997)* (citing this treatise) (prohibiting multiple residences where covenant permits but one). This seems rather unusual, in that equitable servitudes are generally considered much easier to demonstrate than are real covenants.

(n12)Footnote 65. *Feider v. Feider, 699 P.2d 801, 803-04 (Wash. App. 1985)* (finding neither instantaneous privity nor mutual privity because the right of first refusal "did not pass with an estate in land or relate to coexisting or common property interests"); *Bremmeyer Excavating, Inc. v. McKenna, 721 P.2d 567, 569 & n.2 (Wash. App. 1986)* (contract not a covenant because did not touch and concern or satisfy requirement of horizontal privity, following *Feider*); *see also Lake Arrowhead Community Club, Inc. v. Looney, 770 P.2d 1046, 1050 (Wash. 1989)* (noting requirement of horizontal privity and that homeowners' association met that standard even without formal title to land because agent of all that held title).

(n13)Footnote 66. *Moseley v. Bishop, 470 N.E.2d 773, 778 n.1 (Ind. App. 1984).*

(n14)Footnote 67. *Id*.

(n15)Footnote 68. *See infra* § 61.04(f).

(n16)Footnote 69. Some would argue that the limitation to only injunctive relief actually harms the person bound by the servitude since specific performance may be more burdensome than a damages remedy; *see, e.g.*, James L. Winokur, The Mixed Blessings of Promissory Servitudes: Toward Optimizing Economic Utility, Individual Liberty, and Personal Identity, *1989 Wis. L. Rev. 1, 94-95 (1989)* (decrying "anomalous distinction" between enforcing promissory servitudes at law as real covenants and at equity as equitable servitudes).

(n17)Footnote 70. Restatement of Property § 548 (1944).

(n18)Footnote 71. Restatement of Property § 548 cmt. a, illus. 1 (1944).

(n19)Footnote 72. Restatement (Third) of Property (Servitudes) § 2.1 & cmt. a & b (2000).

(n20)Footnote 73. *Id*. at § 2.1 cmt. d.

(n21)Footnote 74. *Cf. contra Mains Farm Homeowners Ass'n v. Worthington, 854 P.2d 1072, 1074 (Wash. 1993)* (premise that restrictive covenants restrict alienability and should be strictly construed may not be correct; such covenants may enhance efficient use of land), *quoting* Robert D. Brussack, Group Homes, Families, and Meaning in the Law of Subdivision Covenants, *16 Ga. L. Rev. 33, 42, 44* (1981-1982).

(n22)Footnote 75. *Foods First, Inc. v. Gables Assocs., 418 S.E.2d 888, 889 (Va. 1992).*

(n23)Footnote 76. *Miller v. Bolyard, 411 S.E.2d 684, 686 (W. Va. 1991); Waynesboro Village, L.L.C. v. BMC Properties, Inc., 496 S.E.2d 64, 67-68 (Va. 1998); Holaday v. Fraker, 920 S.W.2d 4, 6 (Ark. 1996)* (no ambiguity; violation of residential use restriction).

(n24)Footnote 77. *Gabriel v. Cazier, 938 P.2d 1209, 1211 (Idaho 1997).*

(n25)Footnote 78. *Id.* (addressing meaning of term "business"). *Parkwood Ass'n v. Capital Health Care Investors, 514 S.E.2d 542 (N.C. Ct. App. 1999)* (ambiguous terms are to be given their natural meaning using the customary definition at the time the covenant was created).

(n26)Footnote 79. *Yogman v. Parrott, 937 P.2d 1019, 1021-1023 (Ore. 1997)* (determining that rental of vacation home to others is not a commercial enterprise that would violate covenant).

(n27)Footnote 80. *E.g., Grasso v. Thimons, 559 A.2d 925, 928 (Pa. 1989)* (restriction to residential uses cannot be

read to mean residential and mixed residential uses).

(n28)Footnote 81. *Elite Realty Servs., Inc. v. City of Auburn, 528 S.E.2d 236, 237 (Ga. 2000).*

(n29)Footnote 82. *Id. at 238.*

(n30)Footnote 83. *Prairie Hills Water & Dev. Co. v. Gross, 653 N.W.2d 745, 751-752 (S.D. 2002)* (preamble referred to subdivision for purpose of residential building and development).

(n31)Footnote 84. *Foods First, Inc. v. Gables Assocs., 418 S.E.2d at 890 (Va. 1992)* (erecting building does not include "interior remodeling of an existing structure"; parties could have specified otherwise).

(n32)Footnote 85. *Hill v. Community of Damien of Molokai, 911 P.2d 861, 867-870 (N.M. 1996).*

(n33)Footnote 86. *Ray v. Miller, 916 S.W.2d 117, 118, 119 (Ark. 1996).*

(n34)Footnote 87. *Terrien v. Zwit, 648 N.W.2d 602, 606 (Mich. 2002)* (refraining to reach whether covenant forbidding non-residential use would have been breached).

(n35)Footnote 88. *Lake Arrowhead, Inc. v. Jolliffe, 639 N.W.2d 905, 912-913 (Neb. 2002).*

(n36)Footnote 89. *Taylor v. Lindsey, 498 S.E.2d 862, 864 (S.C. 1998)* (also refusing for same reason to recalculate $10,000 limit into today's dollars: if grantor wanted to index for inflation, he could have done so).

(n37)Footnote 90. *Hiner v. Hoffman, 977 P.2d 878, 881-882 (Haw. 1999)* (drafters chose "ambiguous and ineffectual language" to restrict homes' height); *Fong v. Hashimoto, 994 P.2d 500, 505 (Haw. 2000)* ("one-story in height" restriction held ambiguous, following *Hiner*).

(n38)Footnote 91. *Parry v. Hewitt, 847 P.2d 483, 484-486 (Wash. App. 1992).*

(n39)Footnote 92. *Mains Farm Homeowners Ass'n v. Worthington, 854 P.2d 1072, 1074, 1075 (Wash. 1993)* (giving language ordinary and common use and not reading so as to defeat plain and obvious meaning).

(n40)Footnote 93. *Carpenter v. Davis, 688 So. 2d 256, 258 (Ala. 1997).*

(n41)Footnote 94. *O'Connor v. Resort Custom Builders, Inc., 591 N.W.2d 216, 219-220 (Mich. 1999)* (holding timeshares to be barred by "residential use" covenants though short-term rentals are not). The Hawaii Supreme Court similarly resolves all doubts in favor of free and unrestricted use of property. *Hiner v. Hoffman, 977 P.2d 878, 885-886 (Haw. 1999),* as does the *Colorado Supreme Court. Buick v. Highland Meadows Estates at Castle Peak Ranch, Inc., 21 P.3d 860, 863 (Colo. 2001)* (yet holding that single-family covenant precludes road construction). The Arkansas Supreme Court also maintains the presumption in favor of untrammeled use, *Forrest Constr, Inc., v. Milam, 43 S.W.3d 140, 145 (Ark. 2001)* (all doubts to be resolved in favor of free use of land, save by plain meaning to the contrary of language employed in covenant), as does the *South Carolina Supreme Court. South Carolina Dep't of Natural Res. v. Town of McClellanville, 550 S.E.2d 299, 302 (S.C. 2001).*

(n42)Footnote 95. *Pinehaven Planning Bd. v. Brooks, 70 P.3d 664, 667 (Idaho 2003)* (covenants forbidding commercial buildings or commercial ventures do not cover rental of residential property).

(n43)Footnote 96. *Riss v. Angel, 934 P.2d 669, 677 (Wash. 1997). See also* Riss v. Angel: Washington Remodels the Framework for Interpreting Restrictive Covenants, *73 Wash. L. Rev. 433 (1998).*

(n44)Footnote 97. *Id.* at 676 (*citing Highbaugh Enter. Inc., v. Deatrick & James Const. Co., 554 S.W.2d 878 (Ky. 1977)* and *Joslin v. Pine River Dev. Corp., 367 A.2d 599 (N.H. 1976).*

(n45)Footnote 98. *Toavs v. Sayre, 934 P.2d 165, 167 (Mont. 1997).*

(n46)Footnote 99. Restatement (Third) of Property (Servitudes) § 4.1 & ct. 500, Reporters Note at 513 (2000).

(n47)Footnote 100. *Yogman v. Parrott, 937 P.2d 1019, 1023 (Ore. 1997)* (traditional maxim serves to avoid imposing restrictions that cannot reasonably be known, to allow full use of property, to reduce litigation by promoting certainty, and to promote uniform interpretation of covenants).

(n48)Footnote 101. *Levitt Homes, Inc. v. Old Farm Homeowners' Ass'n, 444 N.E.2d 194, 200 (Ill. App. 1982)* (developer's retention of right held valid, citing cases that similarly hold).

(n49)Footnote 102. *Pilarcik v. Emmons, 966 S.W.2d 474, 478-479 (Tex. 1998).*

(n50)Footnote 103. *Brier Lake, Inc. v. Jones, 710 So. 2d 1054, 1059.*1060 (La. 1998). Though Louisiana is the only civil-law (as opposed to common-law) state in the Union, its law on this particular subject seems comparable to that of the common-law states. *See also Hudson v. Morrison Heights Baptist Church, 782 So. 2d 726, 728 (Miss. 2001)* (covenants by their terms bind for initial 25 years and renew every ten years unless instrument of change signed by majority of lot owners has been recorded).

(n51)Footnote 104. *Nordstrom v. Guindon, 17 P.3d 287, 290-291 (Idaho 2000).*

(n52)Footnote 105. *E.g., Perry v. Bridgetown Community Ass'n, 486 So. 2d 1230, 1234 (Miss. 1986)* (upholding assessment for reasonable maintenance).

(n53)Footnote 106. *Moore v. Megginson, 416 So. 2d 993 (Ala. 1982).*

(n54)Footnote 107. *Appel v. Presley Cos., 806 P.2d 1054, 1056 (N.M. 1991)* (reversing defendants' summary judgment and remanding to see if exceptions power reasonably exercised).

(n55)Footnote 108. *See infra* § 61.07.

(n56)Footnote 109. *E.g., Perry v. Bridgetown Com. Ass'n, 486 So. 2d 1230, 1231 (Miss. 1986)* (covenants for 30 years followed automatically by 10-year terms absent actions by owners); *Scholten v. Blackhawk Partners, 909 P.2d 393 (Ariz. Ct. App. 1995)* (when the duration of the restrictive covenant is not found in the terms of the covenant itself, courts will often construe the duration to continue for a "reasonable time").

(n57)Footnote 110. *Barber v. Watson, 953 S.W.2d 579, 582 (Ark. 1997)* (25-year covenants automatically renewed in 1993; 1995 revisions thus unavailing).

(n58)Footnote 111. *Ray v. Miller, 916 S.W.2d 117, 119 (Ark. 1996)* (emphasis added). The point seems to be that while other evidence, such as a general plan of development, might serve to place one on notice of the existence of a written restriction, it cannot take the place of the writing.

(n59)Footnote 112. Restatement of Property § 532 (1944).

(n60)Footnote 113. Restatement of Property § 532 cmt. b, Statutory Note, at 3201 (1944).

(n61)Footnote 114. Restatement (Third) of Property (Servitudes) § 2.7 (2000). The Reporter notes, *id.*, cmt. b at 116: "The seal has become functionally obsolete and is no longer required as a matter of common law."

(n62)Footnote 115. For a list of those thirteen states and the District of Columbia *see* Restatement (Third) of Property (Servitudes) § 2.7, Statutory Note at 89-90 (Tentative Draft No. 1, 1989).

(n63)Footnote 116. *Scaringe v. J.C.C. Enters., Inc., 253 Cal. Rptr. 344, 348 (App. 1988)* (*citing* Cal. Civ. Code § 1468). The section also requires that the covenant touch and concern land and that the document containing it be recorded. *Id*.

(n64)Footnote 117. *Citizens for Covenant Compliance v. Anderson, 906 P.2d 1314, 1325-1329 (Cal. 1995), reh'g denied*, (Cal. Mar. 28, 1996).

(n65)Footnote 118. *Urquhart v. Teller, 958 P.2d 714, 720 (Mont. 1998)* (this despite statement in the contract of sale that the covenants were to run with the land. *Id.* at 716). *Accord, Knock v. Kirschoff, 2002 Iowa App. Lexis 1347,* *3-7 (Iowa App. Dec. 30, 2002).

(n66)Footnote 119. *Forrest Constr., Inc. v. Milam, 43 S.W.3d 140, 145 (Ark. 2001).*

(n67)Footnote 120. *Brendonwood Common v. Franklin, 403 N.E.2d 1136, 1141 (Ind. App. 1980).*

(n68)Footnote 121. *County Comm'rs v. St. Charles Assocs., 784 A.2d 545, 559 (Md. 2001)* (even if a covenant by its terms runs with the land it may not be enforceable if parties creating it intend that it not run). The court further points out that just because a document says that a covenant is one that runs with the land "does not necessarily make it so." *Id.*

(n69)Footnote 122. *White v. Wilhelm, 665 P.2d 407, 412* (Wash. App.), *rev. denied, 100 Wash. 2d 1025 (1983)* (here the question was not whether the burden should run but what burden was intended).

(n70)Footnote 123. *Suffolk Bus. Ctr., Inc. v. Applied Digital Data Sys., Inc., 581 N.E.2d 1320, 1322 (N.Y. 1991); Columbia Club, Inc. v. American Fletcher Realty Corp., 720 N.E.2d 411 (Ind. Ct. App. 1999)* (intent that the covenant run with the land must be determined by the specific language of the parties and the situation of the parties at the time of the agreement. Also, intent can be determined by the contract read in its entirety); *Musgrave v. Brookhaven Lake Property Owners Ass'n, 990 S.W.2d 386 (Tex. Ct. App. 1999)* (terminology of the contract is helpful but not dispositive when determining if the parties intended the covenant to run with the land).

(n71)Footnote 124. *Id*.

(n72)Footnote 125. *Suffolk Bus. Ctr., Inc. v. Applied Digital Data Sys., Inc., 581 N.E.2d 1320, 1322 (N.Y. 1991)* (construing language to create covenant running with the land rather than future estate on a condition subsequent).

(n73)Footnote 126. *Id*.

(n74)Footnote 127. *Moseley v. Bishop, 470 N.E.2d 773, 776-77 (Ind. 1984).*

(n75)Footnote 128. *Net Realty Holding Trust v. Franconia Properties, Inc., 544 F. Supp. 759, 762-63 (E.D. Va. 1982).*

(n76)Footnote 129. *Bodin v. Kinne, 512 N.Y.S.2d 737, 738 (A.D. 1987).*

(n77)Footnote 130. *County Comm'rs v. St. Charles Assocs., 784 A.2d 545, 560 (Md. 2001).*

(n78)Footnote 131. *Clarke v. Caldwell, 521 N.Y.S.2d 851, 854 (A.D. 1987).*

(n79)Footnote 132. *Smith v. Estate of LaTray, 555 N.Y.S.2d 968, 970 (A.D. 1990).*

(n80)Footnote 133. *Malley v. Hanna, 480 N.E.2d 1068, 1071 (N.Y. 1985).*

(n81)Footnote 134. *Suffolk Bus. Ctr., Inc. v. Applied Digital Data Sys., Inc., 581 N.E.2d 1320, 1324 (N.Y. 1991).*

(n82)Footnote 135. *E.g., Vulcan Materials Co. v. Miller, 691 So. 2d 908* (Miss. 997) (noting and explaining

requirement that a covenant, to be a real than a personal covenant, "touch and concern" the land). *See also* cases in the subsections that follow.

(n83)Footnote 136. Restatement (Third) of Property (Servitudes) § 3.2 cmt. b (2000).

(n84)Footnote 137. *Davidson Bros., Inc. v. D. Katz & Sons, Inc., 579 A.2d 288, 295 (N.J. 1990).*

(n85)Footnote 138. Restatement (Third) of Property (Servitudes) § 3.2 & cmt. b (2000)) ("Neither the burden nor the benefit of a covenant is required to touch or concern land in order for the covenant to be valid as a servitude.")

(n86)Footnote 139. Charles E. Clark, Real Covenants and Other Interests Which "Run with Land" 96 (2d ed. Chicago: Callahan 1947) (suggesting the effect of the covenant on the parties' legal relationships in respect to land as a tool to determine whether a covenant touches and concerns land); *Cypress Gardens, Ltd. v. Platt, 952 P.2d 467 (N.M. Ct. App. 1997)* (for covenants to run with the land, the "touch and concern" requirement is the only requirement that focuses on the substantive language of the covenant, rather than the intent and relationship of the parties).

(n87)Footnote 140. *Westland Oil Dev. Corp. v. Gulf Oil Corp., 637 S.W.2d 903, 911 (Tex. 1982).*

(n88)Footnote 141. *B.C.E. Dev., Inc. v. Smith, 264 Cal. Rptr. 55, 57 (App. 1989).*

(n89)Footnote 142. *LuMac Dev. Corp. v. Buck Point Ltd. P'ship, 573 N.E.2d 681, 684 (Ohio App. 1988)* (upholding enforcement of covenant limiting trailers on land).

(n90)Footnote 143. *Vulcan Materials Co. v. Miller, 691 So.2d 908, 913-915 (Miss. 1997)* (personal covenant binding because obligation assumed by promisor's successor).

(n91)Footnote 144. *Runyon v. Paley, 416 S.E.2d 177, 183 (N.C. 1992)* (*citing Flying Diamond Oil Corp. v. Newton Sheep Co., 776 P.2d 618, 624 (Utah 1989)).*

(n92)Footnote 145. *Runyon, 416 S.E.2d at 183* (citing a previous edition of this treatise).

(n93)Footnote 146. *Nassau Terrace Condominium Ass'n v. Silverstein, 537 N.E.2d 998, 1001 (Ill. App. 1989).*

(n94)Footnote 147. *Cloud v. Ass'n of Owners, 857 P.2d 435, 440 (Colo. App. 1992), cert. denied* (Colo. Aug. 30, 1993).

(n95)Footnote 148. *Gallagher v. Bell, 516 A.2d 1028, 1033 (Md. App. 1986)* (*quoting Whalen v. Baltimore & Ohio R.R., 69 A.2d 390 (Md. 1908)), cert. denied, 519 A.2d 1283 (Md. 1987).*

(n96)Footnote 149. *Gallagher, 516 A.2d at 1034.*

(n97)Footnote 150. *Flying Diamond Oil Corp. v. Newton Sheep Co., 776 P.2d 618, 623 (Utah 1989).*

(n98)Footnote 151. *Terrien v. Zwit, 648 N.W.2d 602, 609 (Mich. 2002)* (public policy is not to be found in the personal preferences of members of the court, but must be clearly rooted in law. *Id*. at 608).

(n99)Footnote 152. *D & M Country Estates Homeowners Ass'n v. Romriell, 59 P.3d 965, 970 (Idaho 2002).*

(n100)Footnote 153. *Neponsit Property Owners' Ass'n v. Emigrant Indus. Sav. Bank, 15 N.E.2d 793, 796 (N.Y. 1938).*

(n101)Footnote 154. *Regency Homes Ass'n v. Egermayer, 498 N.W.2d 783, 791 (Neb. 1993)* (finding no test perfect, explicitly adopts New York test set out in *Neponsit*).

(n102)Footnote 155. *Runyon v. Paley, 416 S.E.2d 177, 183 (N.C. 1992).*

(n103)Footnote 156. *Vulcan Materials Co. v. Miller, 691 So. 2d 908, 913-915 (Miss. 1997)* (covenant held to be personal was binding because obligation assumed by promisor's successor). *B.C.E. Dev., Inc. v. Smith, 264 Cal. Rptr. 55, 57 (App. 1989).*

(n104)Footnote 157. Restatement of Property § 537 (1944).

(n105)Footnote 158. *Mercantile-Safe Deposit & Trust Co. v. Mayor & City Council, 521 A.2d 734, 737 (Md. 1987).*

(n106)Footnote 159. Restatement of Property § 537 cmt. f (1944).

(n107)Footnote 160. This differs from a noncompetition covenant preventing certain *land* from being used in competition. For example, a covenant prohibiting land sold by a supermarket company from being used for a competing supermarket was upheld. *E.g., Davidson Bros., Inc. v. D. Katz & Sons, Inc., 579 A.2d 288 (N.J. 1990).*

(n108)Footnote 161. Currency exchanges cash checks and perform other monetary services for a fee, serving especially those who do not have access to a bank.

(n109)Footnote 162. *American Nat'l Bank & Trust Co. v. Tufano, 584 N.E.2d 400, 401 (Ill. App. 1991).*

(n110)Footnote 163. Restatement of Property § 543(1) (1944).

(n111)Footnote 164. *Runyon v. Paley, 416 S.E.2d 177, 183 (N.C. 1992)* (*citing Stegall v. Housing Auth., 178 S.E.2d 824 (N.C. 1971),* which held that a covenant did not meet touch and concern requirement where the record failed to show that grantor's property was in area of restricted property or the distance between the pieces of property).

(n112)Footnote 165. *Runyon, 416 S.E.2d at 184.*

(n113)Footnote 166. *Chesterfield Meadows Shopping Center Assocs. v. Smith, 568 S.E.2d 676, 680 (Va. 2002)* (*quoting Booker v. Old Dominion Land Co., 49 S.E.2d 314, 317 (Va. 1948)* (covenant purpose to protect historical structure that had since been moved)).

(n114)Footnote 167. *Moseley v. Bishop, 470 N.E.2d 773, 777 (Ind. App. 1984).* The court held that the promise to maintain the tile drain affected plaintiff's lands and met the touch and concern requirement but that damages were insufficiently proven. The court, however, permitted plaintiff relief if she were billed to reconstruct the tile drain.

(n115)Footnote 168. *Nassau Terrace Condominium Ass'n v. Silverstein, 537 N.E.2d 998, 1001 (Ill. App. 1989).*

(n116)Footnote 169. *Lacer v. Navajo County, 687 P.2d 404, 411 (Ariz. App. 1983)* (determining, however, despite lack of standing, that any possible covenant was terminated due to change in circumstance frustrating purpose of covenant), *rev. denied* (Ariz. April 5, 1984).

(n117)Footnote 170. *Fong v. Hashimoto, 994 P.2d 500, 506-507 (Haw. 2000).*

(n118)Footnote 171. *Vulcan Materials Co. v. Miller, 691 So. 2d 908, 913 (Miss. 1997)* (holding covenant to be nonetheless enforceable because obligation assumed by promisor's successor); *Alexander v. Wardlow, 2005 Miss. App. LEXIS 205,* No. 2003-CA-02354-COA, Mar. 22, 2005, (a restrictive covenant requiring payment of maintenance association assessment ran with the land and could be enforced by placing liens on lots).

(n119)Footnote 172. *Waikiki Malia Hotel, Inc. v. Kinkai Properties Ltd. P'ship, 862 P.2d 1048, 1059 (Haw. 1993).*

(n120)Footnote 173. *Id. at 1057.*

(n121)Footnote 174. *See* Charles E. Clark, Real Covenants and Other Interests Which "Run with Land" 101-11 (2d ed. Chicago: Callahan 1947).

(n122)Footnote 175. Restatement (Third) of Property (Servitudes) § 2.6, Reporter's Note at 108 (2000) (citation omitted).

(n123)Footnote 176. Restatement (Third) of Property (Servitudes) § 3.2 (2000). While noting that this section covers both benefits and burdens in gross, the Reporter states that Rule 3.2 is redundant as to benefits because of the rule in § 2.6. *Id.* at § 3.2 cmt. c at 413 (2000).

(n124)Footnote 177. Note that the term "affirmative" when used with easements gives the holder the right to perform some positive action on the servient tenement, while the same term used with covenants requires the person bound to perform some action on his or her land. *See supra* § 60.02(e) (affirmative easements).

(n125)Footnote 178. *Mercantile-Safe Deposit & Trust Co. v. Mayor & City Council, 521 A.2d 734, 738 (Md. 1987).*

(n126)Footnote 179. *Columbia Club, Inc. v. American Fletcher Realty Corp., 720 N.E.2d 411 (Ind. Ct. App. 1999)* (affirmative covenants when properly executed impose affirmative burdens on the grantee); City of New York v. Delafield 246 Corp., 662 N.Y.S.2d 286 (N.Y. App. Div. 1997) (generally, affirmative covenants will not be binding on subsequent grantees unless the long established requirements have been met, even if the covenant specifically states that the covenant should run with the land); *Brendonwood Common v. Franklin, 403 N.E.2d 1136, 1141 (Ind. App. 1980).*

(n127)Footnote 180. *Mercantile-Safe, 521 A.2d at 743.*

(n128)Footnote 181. *Lowenburg v. City of Saraland, 489 So. 2d 562, 564 (Ala. 1986)* (internal quotation marks and citations omitted).

(n129)Footnote 182. *Flying Diamond Oil Corp. v. Newton Sheep Co., 776 P.2d 618, 625 (Utah 1989)* (holding that covenant to pay 2.5% royalty to surface owner ran with land).

(n130)Footnote 183. *Inwood N. Homeowners' Ass'n v. Harris, 736 S.W.2d 632, 635 (Tex. 1987).*

(n131)Footnote 184. *Griffin v. Tall Timbers Dev., Inc., 681 So. 2d 546, 550 (Miss. 1996)* (conclusion also supported by wording of covenant).

(n132)Footnote 185. *Stream Sports Club, Ltd. v. Richmond, 457 N.E.2d 1226, 1231 (Ill. 1983)* (citing as examples cases from Alabama, Arkansas, Florida, Iowa, New York, Pennsylvania, Washington).

(n133)Footnote 186. *Timberstone Homeowner's Ass'n v. Summerlin, 467 S.E.2d 330, 332 (Ga. 1996).*

(n134)Footnote 187. *Riverton Community Ass'n v. Myers, 584 N.Y.S.2d 368, 369 (A.D. 1992).*

(n135)Footnote 188. *Castlebrook, Ltd. v. Dayton Properties Ltd. P'ship, 604 N.E.2d 808, 813 (Ohio App. 1992).*

(n136)Footnote 189. *Ebbe v. Senior Estates Golf & Country Club, 657 P.2d 696, 701-02 (Or. App. 1983).*

(n137)Footnote 190. *Regency Homes Ass'n v. Egermayer, 498 N.W.2d 783, 792-93 (Neb. 1993).*

(n138)Footnote 191. *Rasp v. Hidden Valley Lake, Inc., 519 N.E.2d 153, 157 (Ind. App. 1988).*

(n139)Footnote 192. *Stuart v. Chawney, 560 N.W.2d 336 (Mich. 1997)* (the intent of the drafter is controlling in an

action to enforce a negative covenant; however, the provisions are to be strictly construed and all ambiguities will be resolved in favor of the free transferability of land); *Charping v. J.P. Scurry & Co., 372 S.E.2d 120, 121 (S.C. App. 1988).*

(n140)Footnote 193. *Id. Webb v. Smith, 568 N.W.2d 378 (Mich. Ct. App. 1997)* (as a general rule, courts will enforce valid use restrictions. However, the court can grant an exception for a "technical violation" of a negative covenant that in no wise adds to or takes from the true purpose of the covenant).

(n141)Footnote 194. *Jarrett v. Valley Park, Inc., 922 P.2d 485, 488 (Mont. 1996)* (advancing technology does not "render ambiguous language which is otherwise direct and clear").

(n142)Footnote 195. *Newman v. Wittmer, 917 P.2d 926 (Mont. 1996); LuMac Dev. Corp. v. Buck Point Ltd. P'ship, 573 N.E.2d 681 (Ohio App. 1988).*

(n143)Footnote 196. *Bodin v. Kinne, 512 N.Y.S.2d 737 (App. Div. 1987).*

(n144)Footnote 197. *Westmoreland Ass'n v. West Cutter Estates, Ltd., 579 N.Y.S.2d 413 (A. D. 1992).*

(n145)Footnote 198. *E.g., Foods First, Inc. v. Gables Assocs., 418 S.E.2d 888, 889 (Va. 1992)* (construed strictly against party seeking enforcement; burden of proof on enforcing party); *Collins v. City of El Campo, 684 S.W.2d 756, 761 (Tex. App. 1984)* (construed strictly; in favor of freer use of property and against restrictions); *Barber v. Dixon, 302 S.E.2d 915, 916, 917 (N.C. App. 1983)* (follows rule of strict construction in interpreting restrictive covenants; ambiguities resolved in favor of unrestricted use).

(n146)Footnote 199. *Runyon v. Paley, 416 S.E.2d 177, 184 (N.C. 1992).*

(n147)Footnote 200. *Moseley v. Bishop, 470 N.E.2d 773, 777 (Ind. App. 1984).*

(n148)Footnote 201. *Malley v. Hanna, 480 N.E.2d 1068, 1070 (N.Y. 1985).*

(n149)Footnote 202. *Orange & Rockland Utils., Inc. v. Philwold Estates, Inc., 418 N.E.2d 1310, 1314 (N.Y. 1981).*

(n150)Footnote 203. *See* Restatement (Third) of Property (Servitudes) § 5.2 & cmt. b (2000).

(n151)Footnote 204. Restatement of Property § 535 (1944).

(n152)Footnote 205. Restatement (Third) of Property (Servitudes) § 5.2 (2000). Lessees and life tenants are covered in §§ 5.3 and 5.4.

(n153)Footnote 206. Curtis J. Berger, Some Reflections on a Unified Law of Servitudes, *55 S. Cal. L. Rev. 1323, 1327 (1982).*

(n154)Footnote 207. *Houlihan v. Zoning Board, 738 A.2d 536, 538 (R.I. 1999).*

(n155)Footnote 208. Restatement of Property § 547 & cmt. d (1944).

(n156)Footnote 209. *Id*. § 547 cmt. c at 3268-69 (1944).

(n157)Footnote 210. *Orange & Rockland Utils., Inc. v. Philwold Estates, Inc., 418 N.E.2d 1310, 1314 (N.Y. 1981).*

(n158)Footnote 211. Restatement (Third) of Property (Servitudes) § 5.2 & cmt. b (2000).

(n159)Footnote 212. *Id*. at §§ 5.2, 5.3 (2000). Special rules concerning lessees and life tenants are in §§ 5.3 and 5.4. Adverse possessors may benefit if the affirmative covenant was for repair, maintenance or service to the benefited

land, and if the burden on the promisor is not materially increased. *Id*. at § 5.5 (2000 [material deleted]).

(n160)Footnote 213. *See supra*, § 61.04(d)(4)(ii). Cases cited there suggest that, in deciding whether the individual homeowner is bound to the assessment, courts may consider how the homeowner is bound to the association and to what degree availability of the amenities is limited to the homeowners. *Windemere Homeowners Ass'n Inc. v. McCue, 990 P.2d 769 (Mont. 1999)* (the original covenants contained a provision which allowed the covenants to be amended; therefore, changing the covenants and requiring the homeowners to pay for the paving of common roads is valid, even though this was not contemplated in the original covenants).

(n161)Footnote 214. The classic case is *Neponsit Property Owners Ass'n v. Emigrant Indus. Sav. Bank, 15 N.E.2d 793 (N.Y. 1938).* The court evaded technical doctrinal questions by looking behind the corporate form of the plaintiff association and recognizing it to be the agent or representative of the property owners. Only "blind adherence to an ancient formula designed to meet entirely different conditions" would force the court to do otherwise. *Id. at 798.* "In substance if not in form," both the touch and concern and privity requirements were satisfied. *Id*

(n162)Footnote 215. *Griffin v. Tall Timbers Dev., Inc., 681 So.2d 546, 550 (Miss. 1996)* (the words of the covenant also supported that conclusion).

(n163)Footnote 216. *Palm Point Property Owners' Ass'n v. Pisarski, 626 So.2d 195, 196, 197 and n.4 (Fla. 1993).* The doctrine of associational standing states that "an association has standing to bring suit on behalf of its members when: (a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit." *Id.* at n.4 (*quoting Hunt v. Washington State Apple Advertising Comm'n, 97 S. Ct. 2434, 2441 (1997)).*

(n164)Footnote 217. Palm Point Property Owners' Ass'n, at 197, 198; *contra, Conestoga Pines Homeowners' Ass'n v. Black, 689 P.2d 1176 (Colo. App. 1984).*

(n165)Footnote 218. *Dierberg v. Wills, 700 S.W.2d 461, 464 n.1 (Mo. App. 1985).* But note that in this case, though reference to the covenant was lacking in some deeds in the chain of title, it was present in others, thus supplying record notice.

(n166)Footnote 219. *Inwood N. Homeowners' Ass'n v. Harris, 736 S.W.2d 632, 635 (Tex. 1987).*

(n167)Footnote 220. *E.g., Desai v. Ok Oil, Inc., 505 S.E.2d 271 (Ga. Ct. App. 1998)* (the subsequent purchaser had actual notice of the covenant between the original parties; therefore, the covenant was binding on the subsequent purchaser regardless of the fact that the deed in the chain of title referred to the wrong deed book when referencing the covenant); *Simms v. Lakewood Village Property Owners Ass'n., 895 S.W.2d 779 (Tex. Ct. App. 1995)* (actual notice with regard to covenants can be defined as express information and things which could be disclosed by reasonable inquiry and use of the means at hand); *Oliver v. Schultz, 885 S.W.2d 699, 701 (Ky. 1994)* (restrictive covenants will be enforced only when the restriction is placed in a recorded instrument, "actual notice notwithstanding"); *Smith v. Watson, 322 S.E.2d 588, 593 (N.C. App. 1984), rev. denied, 329 S.E.2d 394 (N.C. 1985)* (holding even actual notice insufficient to bind purchaser of land subject to unrecorded covenant).

(n168)Footnote 221. *Perry v. Bridgetown Community Ass'n, 486 So. 2d 1230, 1234 (Miss. 1986)* (appellants accepted deeds with notice and were thereby subject to and bound by them).

(n169)Footnote 222. *Smith v. Watson, 322 S.E.2d 588, 593 (N.C. App. 1984), rev. denied, 329 S.E.2d 394 (N.C. 1985).*

(n170)Footnote 223. *Oliver v. Schultz, 885 S.W.2d 699, 701 (Ky. 1994)* (that the instrument was collaterally recorded did not suffice).

(n171)Footnote 224. Restatement (Third) of Property (Servitudes) § 2.7 cmt. i (Tentative Draft No. 1, 1989).

(n172)Footnote 225. *Four Seasons Homeowners Ass'n v. Sellers, 302 S.E.2d 848, 853 (N.C. App. 1983).*

(n173)Footnote 226. *Tarrant Appraisal Dist. v. Colonial Country Club, 767 S.W.2d 230, 235 (Tex. App. 1989).*

(n174)Footnote 227. *Taylor v. Kohler, 507 So.2d 426, 427 (Ala. 1987)* (*quoting Leslie v. Click, 128 So. 170, 172 (Ala. 1930)).*

(n175)Footnote 228. *Taylor, 507 So. 2d at 428.*

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CHAPTER 61 REAL COVENANTS: PROMISES CONCERNING THE USE OF LAND

7-61 Thompson on Real Property, Thomas Editions § 61.05

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§ 61.05 Type of Redress Available: Injunction or Damages.

A real covenant is enforceable either at law or in equity "by the owner of the dominant estate against the owner of the servient estate." n229 While a personal covenant creates a personal obligation or right enforceable at law only between the original covenanting parties, "a real covenant creates a servitude upon the land subject to the covenant ('the servient estate') for the benefit of another parcel of land ('the dominant estate')." n230 It has been traditional to state that a real covenant could be enforced at law only, while an equitable servitude could be enforced at equity only. The current state of the law in the United States generally is that both legal and equitable remedies are available for the violation of a real covenant. n231 The difference from the redress available for violation of an equitable servitude might be stated that money damages are the primary redress for violation of a real covenant, with equitable relief only available where money damages are insufficient. n232 As will appear below, however, courts routinely find money damages to be insufficient. Other more indirect forms of redress may also flow out of the existence of a covenant; thus, in North Carolina, a homeowner was able to rescind the purchase of a home on land subject to a covenant restricting it to residential use when it was discovered that the property could not support a septic system and was thus impossible to use as restricted. n233 In another example, this one from Missouri, a lessor was found liable for over a million dollars in damages for violating the covenant of quiet enjoyment in a grocery store lease; the lessor did so by violating a covenant restricting it from leasing any other of its property within a mile for use as a grocery store. n234

(a) Injunction Where Damages Insufficient.

Because the real covenant is at its foundation a contract device, in theory it should be as difficult to award injunctive relief as it is to obtain specific performance in standard contracts. Language exists stating that specific performance is available only when damages are inadequate. Injunction in North Carolina is "a proper equitable remedy to enforce a restrictive covenant when the plaintiffs show that their remedy at law is inadequate and that they will suffer irreparable damage if the violation is allowed to continue." n235 The nature of the obligations contained in real covenants, however, means that equitable relief will often, perhaps almost routinely, be necessary. In Alabama, mere breach of the covenant "is a sufficient basis for interference by an injunction." n236 In Texas, a restrictive covenant may routinely be enforced by injunction without necessity to show any particular amount of damages or that the injury will be irreparable; a remedy at law is inadequate if damages "cannot be determined with some precision." n237"Where clear violations of restrictive covenants are involved, however, the irreparable harm requirement is considerably relaxed";

though a remedy as severe as removal of a building requires further consideration whether the order will result in economic waste. n238 Blocking a view in violation of a covenant is the type of injury for which monetary damages are very difficult to determine and an injunction is an appropriate remedy; if modifying the offending addition did not restore the view, it would have to be removed in its entirety. n239 So routinely are money damages found inadequate, that they are sometimes discussed more as supplements when *injunctive relief* proves inadequate. In Alabama, for example, where specific performance of a covenant running with the land has been granted, damages also may be available, but only if specific performance would not be a complete remedy. n240 Damages can also be awarded to the *defendant* where a temporary restraining order to prevent violation of a covenant turns out to have been improperly sought, though jurisdictions disagree on the type of damages to which one might be liable. n241 Perhaps it would be fair to say that if one seeks only an equitable remedy one is trying to enforce the agreement not as a covenant but as an equitable servitude. n242

(b) Equitable Remedies Require Balancing of Hardships.

Courts often state that they require courts to balance the hardships between promisor and promisee parties before awarding equitable relief. "In determining whether to grant an injunction, the court must consider the relative convenience-inconvenience and the comparative injuries to the parties." n243 While some courts will refuse to balance the equities in cases where the defendant has deliberately, rather than inadvertently, violated the covenant, the South Dakota Supreme Court held that an injunction requiring removal of a $100,000 cabin deliberately placed in violation of a covenant was "simply too harsh considering the intangibility of the harm," and thus was an abuse of discretion. n244 The Arkansas Supreme Court, by contrast, held that it was improper to examine the surrounding circumstances when a landowner had built a deck in contravention of a clear and unambiguous covenant and remanded for enforcement of the covenant by "removal of the encroachment." n245 While Hawaii law will not apply the relative hardship test where a property owner "deliberately and intentionally" violates a restriction, the test will be applied where a subsequent purchaser "who took no action regarding the initial violation is asked to bear the burden of a mandatory injunction to remove the violation." n246

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LEXIS: real covenant or restrictive covenant w/25 damage* or money damage* or enjoin! or injunction or at law or equity

FOOTNOTES:

(n1)Footnote 229. *Runyon v. Paley, 416 S.E.2d 177, 182, 183 (N.C. 1992); see Polk Bros., Inc. v. Forest City Enters., 776 F.2d 185, 193 (7th Cir. 1985)* ("The law of Illinois entitles a party to obtain specific performance of covenants running with the land.").

(n2)Footnote 230. *Runyon, 416 S.E.2d at 182.*

(n3)Footnote 231. Restatement of Property § 530 cmt. a (1944) (remedies for breach of contract are available, including "a judgment for damages and, as an alternative thereto and subject to the rules relating to the granting of equitable relief, an injunction or other appropriate equitable remedy."). *Exit 1 Properties Ltd. Partnership v. Mobil Oil Corp., 692 N.E.2d 115 (Mass. App. Ct. 1998)* (the court is not limited to granting monetary damages as stated in the statute; the court can modify the covenant and then enforce the covenant as modified).

(n4)Footnote 232. *Pelosi v. Wailea Ranch Estates, 985 P.2d 1045 (Haw. 1999)* (the court can grant equitable relief whether or not there were actual monetary damages).

(n5)Footnote 233. *Lumsden v. Lawing, 421 S.E.2d 594 (N.C. App. 1992).*

(n6)Footnote 234. *Shop'n Save Warehouse Foods v. Soffer, 918 S.W.2d 851 (Mo. App. 1996)* (offending property

was across the street).

(n7)Footnote 235. *Barber v. Dixon, 302 S.E.2d 915, 916 (N.C. App. 1983), rev. denied, 305 S.E.2d 732 (N.C. 1983).*

(n8)Footnote 236. *Taylor v. Kohler, 507 So. 2d 426, 428 (Ala. 1987).*

(n9)Footnote 237. *Gigowski v. Russell, 718 S.W.2d 16, 21-22 (Tex. App. 1986), writ ref'd n.r.e*. (Tex. Mar. 1987); *Voice of the Cornerstone Church Corporation v. Pizza Property Partners, 160 S.W.3d 657 (Tex. App. 2005)* (use of property for church purposes breached a covenant permitting only "commercial/light industrial" uses).

(n10)Footnote 238. *New Hampshire Donuts, Inc. v. Skipitaris, 533 A.2d 351, 353, 354 (N.H. 1987).*

(n11)Footnote 239. *Leonard v. Stoebling, 728 P.2d 1358, 1363 (Nev. 1986)* (*quoting Glover v. Santangelo, 690 P.2d 1083, 1086 (Or. App. 1984); see also New Hampshire Donuts, 533 A.2d at 351* (upholding ordered removal of portion of building blocking view of donut shop).

(n12)Footnote 240. *Wright v. Cypress Shores Dev. Co., 461 So. 2d 1296, 1299 (Ala. 1984)* (at first, damages also permitted to stand, but cancelled on rehearing because specific performance sufficed and because of election of remedies clause in covenant).

(n13)Footnote 241. *Tracy v. Capozzi, 642 P.2d 591, 594, 595 (Nev. 1982).*

(n14)Footnote 242. For the law of equitable servitudes, *see infra*, Ch. 62.

(n15)Footnote 243. *Clark v. Asheville Contracting Co., 323 S.E.2d 765, 769 (N.C. App. 1984)* (requiring that finding of facts be made before requiring materials removal taking nine months and costing $13.5 million), *aff'd as modified 342 S.E.2d 832 (N.C. 1986). West Penn Specialty MSO, Inc. v. Nolan, 737 A.2d 295 (Pa. Super. Ct. 1999)* (the court should enter an injunction where the injunction is necessary to prevent irreparable harm, it would prevent the greater harm by granting the injunction, and it would restore the parties to their respective conditions before the wrongful conduct).

(n16)Footnote 244. *Harksen v. Peska, 581 N.W.2d 170, 176 (S.D. 1998).*

(n17)Footnote 245. *Clifford Family Limited Liability Co. v. Cox, 971 S.W. 2d 769, 771-772 (Ark. 1998).*

(n18)Footnote 246. *Pelosi v. Wailea Ranch Estates, 985 P.2d 1045 (Haw. 1999).*

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CHAPTER 61 REAL COVENANTS: PROMISES CONCERNING THE USE OF LAND

7-61 Thompson on Real Property, Thomas Editions § 61.06

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§ 61.06 Transferability of Real Covenants.

The transferability of real covenants raises different questions depending upon whether one is discussing the burden or the benefit. Clearly when the covenant is one attached to land, the burden will be transferred when the burdened land is transferred and the benefit will transfer when the benefited land is transferred.

(a) On Transfer, the Burden Automatically Runs at Law with the Estate and in Equity with Possession.

(1) In General.

Where the burden of a covenant involves land, as do most, when the land is transferred, whether by conveyance or devise, by gift or for consideration, the burden runs with the estate transferred. It need not be specifically mentioned in the documents of transfer; if it is mentioned anywhere in the chain of title in a way to give effective notice, the burden will run. This is a difference from the old law under which the burden would run whether or not there were notice. n247 The covenant will be enforceable at law against whoever succeeds to the *full estate* of the original promisor. When equitable or injunctive relief is sought, it may be had against whoever is the possessor of the land whether or not that person has the full estate of the original covenantor. Thus, the degree of identity with the original covenantor's estate will determine whether both legal and equitable relief is available for violation of the covenant or only equitable relief. In other words, if the appropriate identity with the estate on the part of the promisor's successor is missing, one may be limited to that equitable relief available against land burdened by an equitable servitude. n248 The new *Restatement*, by contrast, lessens the importance of what estate is held by the person in deciding whether a benefit or burden passes to a successor party, and in so doing rejects the doctrine of vertical privity. n249 Its default rule is that, with specified exceptions, "an appurtenant benefit and burden runs to all subsequent owners and possessors of the benefited and burdened property, including a lessee, life tenant, adverse possessor, and person who acquires title by a lien-foreclosure proceeding." n250 The distinctions are that the burden of a servitude does not run to a person with title superior to the one who created it; that, except for lessees and life tenants, benefits and burdens of affirmative covenants do not run to persons with estates of lesser duration; and that, with some exceptions, the benefits of affirmative covenants do not run to persons holding property adversely to the owner of the property. n251 The particular distinctions in the new *Restatement* concerning when the burdens and benefits of affirmative covenants run track to some degree what would be the outcome under the old rules, especially in a jurisdiction where the category of covenant applies only to affirmative covenants and equitable enforcement is available only to negative covenants enforced as equitable

servitudes. They operate more rationally, however, by distinguishing according to the content of the covenant rather than to its form.

(2) Continuing Obligation of the Original Promisor upon Transfer.

When a piece of land burdened by a real covenant is transferred, the original promisor is not necessarily relieved of the burden of the promise. Whether the promisor will be relieved of that burden "depends upon the intention manifested in the making of the promise," n252 an intention that may be explicitly stated or inferred from the nature of the act promised. n253 The original promisor is not necessarily relieved of the obligation upon transfer of the land burdened because the real covenant is a creature of contract, and under the law of contracts, one may not necessarily transfer one's burden to another without the permission of the promisee. The new *Restatement* states the rule that, absent intention to the contrary and subject to some exceptions, if the burden is appurtenant to land, it will run with the land to the next possessor. n254 Whether the burden will run depends significantly on whether fulfillment of the promise requires the cooperation of the possessor of the land. n255

(b) The Benefit Runs with the Possession of the Benefited Land.

Where a parcel of land is benefited by a covenant, the benefit runs to whoever is in possession of the land whether or not that person is in possession of the full estate that belonged to the original promisee. Common sense commends imposing a lesser requirement of ownership to have the right to enforce a covenant than to be bound by it. Since a real covenant benefits a piece of land, it follows that whoever is rightfully in possession of the land ought to be able to enforce the covenant for the benefit of the land. The new *Restatement* maintains, except as otherwise intended by the creators, "an appurtenant benefit or burden runs to subsequent owners and possessors of the benefited and burdened property ... ." n256

FOOTNOTES:
(n1)Footnote 247. *See supra* § 61.04(f) for discussion of importation of notice into law of real covenants.

(n2)Footnote 248. *See* Restatement of Property § 535 (1944).

(n3)Footnote 249. Restatement (Third) of Property (Servitudes) § 5.2, cmt b (2000).

(n4)Footnote 250. *Id.* at § 5.2 (2000).

(n5)Footnote 251. Restatement (Third) of Property (Servitudes) § 5.2(1)-5.2(3) (2000). The affirmative covenant benefits that run to adverse possessors include covenants to repair, maintain, or render services to the property and those that can be enjoyed without diminishing their value to the owner of the property or materially increasing the burden on the obligated person. *Id.* at § 5.5.

(n6)Footnote 252. Restatement of Property § 538 (1944).

(n7)Footnote 253. *Id.* at § 538 cmt. b &c.

(n8)Footnote 254. Restatement (Third) of Property (Servitudes) § 5.2 (2000).

(n9)Footnote 255. *Id*. at § 5.2 & cmt. a at 16-17 (2000).

(n10)Footnote 256. Restatement (Third) of Property (Servitudes) § 5.2 (2000). The exceptions include: benefits of affirmative covenants which do not run to persons who hold estates of lesser duration, *id.* at § 5.2(1); lessees and life tenants whose interests are covered in separate rules and whose possession of the property ordinarily would entitle them to the benefit of covenants meant to benefit land, *id*. at §§ 5.3, 5.4; and adverse possessors for covenants to maintain, repair or service the property and where the benefits can be enjoyed by the adverse possessor without reducing their

value to the owner or materially increasing the burden on the promisor. *Id*. at § 5.5.

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CHAPTER 61 REAL COVENANTS: PROMISES CONCERNING THE USE OF LAND

7-61 Thompson on Real Property, Thomas Editions § 61.07

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§ 61.07 Termination of the Covenant or of the Right to Enforce It.

As may an easement, a real covenant may be perpetual, though there are probably more mechanisms by which a real covenant may be terminated than with easements. n257 Absent any limitation in the agreement or countervailing policies, as described below, covenants "may exist for so long as the estate to which they are annexed endures." n258 Because a currently effective real covenant involves a right already vested in the holder, it is not subject to the Rule against Perpetuities. n259 A real covenant may be terminated by terms of the agreement creating it, by action of those party to it or their successors, by action of third parties or by action of law. It may be terminated completely, or a particular party may simply lose the right to enforce it because of defenses available to a violator of the covenant. Sometimes the right to specific enforcement of the covenant may be lost, but a right to collect damages still remain. The cases concerning equitable enforcement of a covenant do not always clarify whether the covenant in question is a genuine real covenant or simply an equitable servitude. When equitable enforcement is sought, some jurisdictions appear to treat the agreement in question as an equitable servitude, and when legal enforcement is sought they treat it as a real covenant. In those jurisdictions, one would ask the additional questions necessary to establish any additional factors when one needed enforcement at law, that is to collect damages. Traditionally, however, real covenants were only enforced at law, and equitable servitudes only in equity. n260 As seen above, that distinction in large part no longer holds, and equitable enforcement is available for real covenants. This chapter will, therefore, necessarily deal with forms of termination or refusal to enforce that in some jurisdictions would apply only to equitable servitudes.

(a) By Terms of the Agreement.

A real covenant may by its terms specify a particular date or period of time n261 or a particular occurrence at which the covenant will expire. The obligation "terminates in accordance with the intentions manifested in the making of the promise." n262 Presuming the date or the occurrence is clearly specified, the covenant will automatically expire, without any action by the parties, unless the agreement requires some action. When the covenant terminates by the terms of the agreement, it will completely cease to exist, and after that event no right to enforcement either specifically or in damages will remain. n263 The agreement may also specify recurring times at which the covenant may be either cancelled or amended. Thus, one covenant stated that it would be binding until a date certain and then "be automatically extended for successive periods of ten years unless by a vote of the majority of the then owners of the building sites covered by these covenants it is agreed to change said covenants in whole or in part." n264

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LEXIS: (terminat! or expir! or extin! or cancel! or aboli!) w/5 covenant w/10 (agreement or date)

(b) By Action of Those Party to It.

Courts have recognized a series of doctrines by which those party to a covenant may cause its extinguishment. In some cases the extinguishment is total; in others, only equitable enforcement is prohibited while the possibility of receiving damages for the violation remains.

(1) Unified Ownership or Merger.

If the piece of property benefited and the piece of property burdened by the same covenant come completely under the same ownership, the covenant will be extinguished. n265 Any rights that would have belonged to the covenant's beneficiary because of the covenant will instead belong to the holder because of ownership of both pieces of property. Because a promise presumes the existence of two parties, one a promisor and the other a promisee, if by one party coming into possession of interests in both the benefited and burdened land, "both the benefit and the burden of a promissory obligation come into the hands of one person, the obligations ceases to exist." n266 Transfer of the previously benefited or burdened parcel into new hands does not automatically revive the covenant or servitude; it must be created anew. n267

COMPUTER-ASSISTED RESEARCH

LEXIS: (terminat! or expir! or extin! or cancel! or aboli!) w/15 covenant w/25 (merg! or single owner! or unified owner!)

(2) By the Promisee.

(i) By Release or Rescission.

Those benefiting from a covenant may enter into an agreement (rescission) or act unilaterally (release) in terminating fully or partially the covenant. n268 Formalities required to release or rescind a covenant are similar to those required to create it; it must be in writing sufficient to satisfy the Statute of Frauds and any particular formalities required in the jurisdiction. n269 Before a covenant will be extinguished by release, the release must be entered into by all who are promisees. A release by one beneficiary will be effective as to that beneficiary but leave the rights of others undisturbed. n270 Though a developer or successor party may specifically retain the right to release covenants and restrictions placed on particular lots, some jurisdictions will honor those releases only when they are consistent with any existing scheme of development meant to benefit and relied upon by other purchasers of land within the development. n271 One whose lease over property may expire before the scheduled expiration of a covenant over it does not have the power to release or modify the covenant in a way that will bind the interests surviving after the end of the lease. n272 If the parties instead enter into an agreement to extinguish the covenant, whether it need be in writing or not depends on the nature of contract and whether the Statute of Frauds requires it. n273

COMPUTER-ASSISTED RESEARCH

LEXIS: (terminat! or expir! or extin! or cancel! or aboli!) w/5 covenant w/25 (releas! or resci!)

(ii) Termination Inferred from Actions by Promisees Inconsistent with the Continuation of Covenants.

A whole series of very closely related doctrines completely terminates or at least prevents the equitable enforcement of

covenants because of behavior by the promisee that is inconsistent with their continued efficacy. The doctrines do not demand explicit renunciation of the covenants in question but infer renunciation from some action by the promisee.

(iii) Abandonment.

The promisee may abandon the benefits of the promise by actions sufficiently contradictory to it. Abandonment may be explicit, *e.g.*, through a written statement abandoning claim to benefit of the promise. Abandonment may also be implied by a court, usually by clear and convincing evidence, from actions that the court reads to show a definite, specific intent to abandon the covenant. A court may refuse to enforce a covenant that has "been habitually and substantially violated so as to create a impression that it has been abandoned ... ." n274 The Utah Supreme Court puts it that "case law is uniform that before an abandonment of a covenant may be found there must be 'substantial and general noncompliance' with the covenant." n275 Where the promise is deemed abandoned, it may not be enforced either in law or in equity.

COMPUTER-ASSISTED RESEARCH

LEXIS: (terminat! or expir! or extin! or cancel! or aboli!) w/5 covenant w/50 abandon!

(iv) Acquiescence.

Very similar to abandonment is the doctrine of acquiescence. Where the distinction is made, abandonment prevents enforcement in either law or equity, while acquiescence will prevent enforcement at equity while preserving the possibility of enforcement at law. n276 Acquiescence presumes a level of violation not so great as to call the covenant abandoned, and will be read to apply only to activities similar to the previous violations. That covenant beneficiaries have acquiesced in one type of violation does not necessarily mean that they will be found to have acquiesced in violations of a different type. "Restrictive covenants will not be enforced when property owners have acquiesced in prior violations of the covenants"; acquiescence in minor violations, however, may not prohibit subsequent enforcement. n277 The court may find that the promisee may no longer enforce the promise in equity as to other instances of the particular violation involved, but retains the right of enforcement against other violations. n278 A Florida court, for example, permitted enforcement of a covenant requiring use of property for single-family residences against a developer's plan to put in a road carrying 1,500 cars a day, though property owners had acquiesced in occasional, limited use of the property for access to feed cattle. n279 The promisee may still, however, be able to collect damages for violations of like kind, though the right to equitable enforcement is lost. A primary factor in determining whether to apply the doctrine of acquiescence is "the effect of the prior violations upon the ability of the proponent of the restriction to enjoy the benefits of the covenant compared to the potential abridgement of the proponent's enjoyment of the covenant's benefit caused by the violation sought to be enjoined." n280 One statement of the factors to be used in determining whether the doctrine should be applied includes:

> (1) the relative nearness of the objecting landowners to both the use which they are attempting to prevent and the use which has been allowed;
>
> (2) the similarity of the previous nonconforming use to that which the landowners now seek to prevent; and
>
> (3) how many previous nonconforming uses have been permitted. n281

Another court lists the criteria for determining acquiescence to include:

> (1) whether those seeking enforcement had notice of the violations;
>
> (2) the length of the period of inaction;

(3) the extent and kind of violation;

(4) the proximity of violations to those who complained of them;

(5) any affirmative approval of violations;

(6) whether the violations were temporary or permanent; and

(7) the amount of investment involved. n282

Courts will sometimes refuse to find acquiescence in the failure of a landowner to object to behavior in violation of a covenant "by other property owners in a different portion of the restricted area, which were not consequential or, if consequential, did not materially and adversely affect him in the use and enjoyment of his own property." n283 Acquiescence may in some jurisdictions be healed by a duly recorded reaffirmation of the covenants by those bound by them. Thus in West Virginia, the Supreme Court held that in face of such a reaffirmation, one challenging the covenant must prove that there have been further violations of the covenants after the recordation and that they were acquiesced in for a "protracted period." n284

COMPUTER-ASSISTED RESEARCH

LEXIS: (terminat! or expir! or extin! or cancel! or aboli!) w/5 covenant w/50 acquiesc!

(v) Estoppel.

If the promisor acts contrary to the promise in reasonable reliance on representations made by the promisee, a court may find the promisee estopped to prevent or collect damages for the violation in question. A common statement of the requirements to show estoppel is that: "1) the party to be estopped made a representation of material fact and later took a position contrary to that representation; 2) the party claiming estoppel relied upon this representation; and 3) that party suffered a detrimental change in position as a result of this reliance." n285 The New Restatement has it that the reliance must be foreseeable. n286 When a party induces such reliance by assertions made or by "silence when he ought to speak out," either "intentionally or through culpable negligence," the party may be estopped to deny that "the state of facts does in truth exist, over a different or contrary state of facts as existing at the same time, or deny or repudiate his acts, conduct or statements." n287 In Georgia, for example, a property owner who received permission, later rescinded, to build a commercial garage on land restricted to residential use, failed to establish the detrimental reliance necessary to an estoppel defense where the permission had already been appealed before he began construction and the down-payment could be recovered. n288 The doctrine is applied with great caution, where to refuse to do so would, practically speaking, sanction a fraud. n289 Estoppel cannot be based on silence where both parties have equal knowledge of or access to the facts. n290

COMPUTER-ASSISTED RESEARCH

LEXIS: terminat! or expir! or extin! or aboli! or cancel! or enforc! w/25 covenant w/10 estop! and not (warranty or seisin)

(vi) Laches.

Closely related to estoppel is the doctrine of laches. n291 If a promisee unreasonably delays too long a time to act on a violation of a covenant, and injustice would be done to the promisor by then enforcing the covenant, a court may in its discretion declare it unenforceable in equity due to laches. n292 There must have been a delay, and the delay "must have been unreasonable under the circumstances." n293 The doctrine is based on the "assumption that the party to whom laches is imputed has knowledge of his rights and the opportunity to assert them, that by reason of his delay some

adverse party has good reason to believe those rights are worthless or have been abandoned, and that because of a change of conditions during this delay it would be unjust to the latter to permit him to assert them." n294 It is an affirmative defense that must be pleaded, and the burden is on the party who asserts it. n295 The delay must prejudice specifically the party seeking to invoke laches; if it does not it is irrelevant. n296 Courts are reluctant to invoke the doctrine, and will do so only to prevent injustice; it will not be used to "defeat justice." n297 Before laches will be found, courts will require that the delay be found unreasonable and unexplained and must be shown to have caused "disadvantage and prejudice" to the defendant. n298 Laches is not a favored defense and "will be sustained only if the litigant has been guilty of inexcusable neglect in enforcing a right, to the prejudice of his adversary." n299 Thus, where the architectural committee of a homeowners' association contacted a homeowner before offending construction was completed and a representative of the association was turned away from the property (thereby demonstrating that the property owner was warned of the association's position), where suit was filed eight months after completion of the construction, and there was little expenditure of money on the construction, the Nebraska Supreme Court held a claim of laches to be without merit. n300 Delay alone is not usually sufficient to trigger a finding of laches, and where actions of the persons claiming protection of the doctrine have contributed to the delay or the violation of the covenant was deliberate, courts will not invoke the doctrine. n301 Where the defendant's actions in apparently forging a waiver misled the plaintiff into delaying court proceedings, a New York appellate court refused to find the plaintiff barred by laches. n302 The length of delay that would trigger a laches defense is often difficult to ascertain in a given jurisdiction. n303 One factor considered is whether the delay is severe enough practically to "preclude the court from arriving at a safe conclusion as to the truth of the matters in controversy," thus hindering the determination of the equities of a situation. n304 In Florida, an appellate court barred enforcement of a residential-use-only covenant under a laches statute that bars any equitable action "unless it is commenced within the time provided for legal action concerning the same subject matter" and dispenses with the provision requiring that the promisor be harmed by the delay in enforcement of rights and the provision that the promisee not have unclean hands. n305 Though the right to injunctive relief be lost, the promisee may still retain the right to an award of damages at law. Because damages are seen to be less severe a remedy than injunctive relief, action that bars "the latter kind of relief may not be sufficient to bar the former." n306

COMPUTER-ASSISTED RESEARCH

LEXIS: terminat! or expir! or extin! or cancel! or aboli! or enforc! w/25 covenant w/10 laches

(vii) Unclean Hands.

Courts will sometimes recognize that a covenant ought not be enforced because the plaintiff comes to the action with "unclean hands"; the plaintiff is, in other words, guilty of the same actions of which the defendant is accused. Unclean hands is an affirmative defense invoked to prevent enforcement of a covenant. Courts sometimes say that the doctrine has force only when the party seeking shelter under it has been harmed by the inequitable activity of the plaintiff. In other words, not any violation of a covenant by a party will necessarily bar that party from enforcing covenants on another; the plaintiff's violation must have had some harmful effect on the defendant against whom enforcement is sought. n307 A plaintiff's car restoration on residential property, for the most part a hobby, was held not to bar that plaintiff's enforcement of a residential-use covenant against operation of a beauty shop, "essentially a store with regular activities and traffic," in a neighbor's house. n308

COMPUTER-ASSISTED RESEARCH

LEXIS: terminat! or extin! or expir! or cancel! or aboli! or enforc! w/25 covenant w/25 unclean hands

(c) By Action of Third Parties.

(1) By Statute.

Perhaps as a reflection of the historic discomfort with planning devices perceived to interfere with the easy alienability of land, a number of states have various statutory tools to extinguish real covenants, most of which seem to function to place specific time limits on their survival. These tools act to put time limits on their survival, or provide statutes of limitation for their enforcement in the face of particular violations, or subject them to Marketable Title Acts in the same way as are other challenges to clean title. A final category of statutes codifies some of the traditional common-law termination tools.

(i) Specific Time Limits.

Jurisdictions may have statutes specifically terminating real covenants after the passage of a given amount of time. Georgia statutes, for example, have it that "covenants restricting lands to certain uses" cannot run for more than 20 years in municipalities or counties in which zoning laws have been adopted, with separate rules for scenic easements and covenants and for subdivisions of a minimum size. n309 The effect of the special rules is to permit the scenic and subdivision covenants to exist for potentially much longer periods of time. n310 A Minnesota statute, with some specific exceptions, states that "all private covenants, conditions, or restrictions created by which the title or use of real property is affected" cease to be valid and may be disregarded 30 years after the effective date of the document creating them. n311 A Massachusetts statute limits covenants to thirty years, except where a different expiration period, longer or shorter, is given in the covenant; thus when a covenant was amended to remove a fifty-year expiration date, the statutory thirty-year period began to run from the date of amendment. n312

(ii) Statutes of Limitation.

Restrictive covenants can also lose their enforceability in face of a particular breach through statutes of limitation. Thus, in Georgia, besides the 20-year limitation, there is a two-year statute of limitations on the enforcement of a covenant that has been breached. n313 Missouri applies a ten-year statute to the breach of restrictive covenants generally, n314 and a two-year statute to those breaches involving building size, cost, location or improvements. n315 New York, also, has a two-year statute for enforcement of "a covenant or agreement restricting the use of land or to recover damages for breach thereof ... ." n316

(iii) Marketable Title Acts.

A number of jurisdictions terminate easements unless they are periodically rerecorded, by operation of specific Marketable Title provisions or through the general operation of their Marketable Title Act. In Wisconsin, for example, actions to enforce easements or covenants other than conservation easements will be barred if there has not been a timely recording of an instrument expressly referring to them within 40 years; n317 the North Carolina act uses a period of 30 years. n318 It does not matter for the applicability of the Act in Florida if the one attacking a restriction not rerecorded within thirty years had actual notice of the restriction. n319 The Illinois statute employs a forty-year period, n320 with an exception for any easement or interest in the nature of an easement, the existence of which "is apparent from or can be proved by physical evidences of its use ... ." n321 Ohio, too, uses a forty-year period, n322 as does Utah. n323 Massachusetts statutes under the heading "Protection of Land Titles from Uncertain and Obsolete Restrictions" use a 30-year period with 20-year extension periods and impose particular recording requirements. n324 In Minnesota, by contrast, rights arising from certain covenants governed by a specific statute are specifically exempted from the Marketable Title Act and made subject to their own harsher equivalent. n325

(iv) Codifying Common-Law Relief.

Jurisdictions may also codify some of the same relief available elsewhere by common law. Thus, in New York a statute "authorizes a court in any action seeking relief against a restrictive covenant or a declaration with respect to its enforceability to cause its extinguishment 'if the court shall find that the restriction is of no actual and substantial benefit to the persons seeking its enforcement or seeking a declaration or determination of its enforceability, either because the purpose of the restriction has already been accomplished or, by reason of changed condition or other cause, its purpose

is not capable of accomplishment, or for any other reason' but requires payment to the party who would otherwise be entitled to enforcement of the covenant of such damages as he will sustain from its extinguishment.' " n326 A Minnesota statute states that when any covenants or similar interests have become "merely nominal, and of no actual and substantial benefit to the party or parties to whom or in whose favor they are to be performed, they may be wholly disregarded ... ." n327 Before equitable relief instead of money damages will be granted, a Massachusetts statute requires that even properly recorded and otherwise valid covenants be determined to be of "actual and substantial benefit" to the person claiming rights of enforcement. It further codifies common-law extinguishment tools like change of circumstances and requires that the covenants not interfere with growth in the public interest. n328

(2) By Eminent Domain or Condemnation.

In the majority of states, real covenants running with the land are compensable property rights for eminent domain purposes, at least to the extent they add measurable value to the land to which they are attached. n329 For calculating the statute of limitations when the dominant owner seeks redress under an inverse condemnation theory, the Maryland high court has held that the taking occurs when the servient property is condemned, not when some action incompatible with the covenant occurs on the servient property; if the facts permit, an action for ejectment or to quiet title may still remain. n330 The method used to evaluate a real covenant subject to condemnation is the same as that used for appurtenant easements. n331 The method used for "every reported eminent domain case in the United States involving the condemnation of easements appurtenant," and, therefore, the one used for evaluating real covenants, requires an analysis (derived from an appraisal of the dominant estate before and after the taking) of the "decrease in value of the dominant estate (or dominant tenement) resulting from the taking of the easement." n332 Where an alternative measure of damage is permitted (the actual value of what is taken plus severance or resulting damages to the remaining land), it is an alternative and not cumulative to the decrease in market value of the remaining land. n333

(3) By Foreclosure or Tax Sale.

One who takes a burdened estate due to a foreclosure or tax sale may take it free of any real covenant, depending on when the debt causing the foreclosure or tax sale was incurred. In a bankruptcy case, for example, a bank was held to have a lien on the amenities (golf course, etc.) of a subdivision that remained in the hands of the bankrupt developer, but that lien was subject to a restrictive covenant that pre-existed establishment of the lien and benefitted the property owners within the subdivision. n334 Thus, if the real covenant was entered into before the property was mortgaged, the property will remain subject to the covenant; if the real covenant was entered into after the property was mortgaged, the property will be taken free of the covenant, assuming proper notice is given the owner of a properly recorded real covenant.

(d) Public Policy.

Courts may hold real covenants to be unenforceable facially or as applied for violation of public policy, expressed constitutionally or in federal statute. They will frequently attempt to find other reasons for their decisions than public policy or constitutional rights to avoid having to pass on that type of question. n335

(1) Constitutional Rights.

The Supreme Court has found that covenants that forbid the sale of housing on racial grounds were unenforceable; n336 the courts, however, have been less than willing to expand that rationale to discrimination against other groups or to other constitutional rights. The major reason that this control on covenants has not spread more is that in theory covenants are private, contractual arrangements that do not involve state action. In *Shelley*, the Court found state action in the recourse to the courts to enforce the offending covenants. Courts have been very leery about expanding that reasoning to encompass other constitutional rights. The Illinois Court of Appeals, for example, avoided an attempt to argue that enforcing covenants forbidding billboards violated rights to free speech by noting that the billboards also violated height restrictions of the covenant, and thus could be forbidden on grounds applicable to all structures. n337

There are federal and state statutes that may serve to prevent the enforcement against particular groups of covenants that might otherwise be valid.

(2) Fair Housing Act.

A promising but not yet widely used tool to overcome covenants that would forbid group homes for the retarded, the elderly, or other groups that might qualify as handicapped, at least as reported cases show, is the Fair Housing Act. Thus, a federal district court granted a summary judgment as to liability in a case involving neighbors who tried to invoke restrictive covenants to prevent sale of a home for use as a group home for disabled individuals. n338 The House Committee on the Judiciary has stated that the Act "is intended to prohibit special restrictive covenants or other terms or conditions, or denials of service because of an individual's handicap which ... exclude, for example, congregate living arrangements for persons with handicaps." n339 The First Circuit Court of Appeals reversed a Puerto Rico district court's similar action on procedural grounds, but preserved to the residents of an elder-care facility the right to pursue their claim under the Fair Housing Act. n340 The Texas Court of Appeals found the Fair Housing Act and the Americans with Disabilities Act applicable to situations where covenants were relied on to the detriment of group homes. n341 The New Mexico Supreme Court, having already held that a home for AIDS patients qualified as a single-family residence because the residents functioned as a household in the same way that a family would, reviewed the Fair Housing Act claim of the group home "in order to correct the trial court's erroneous ruling on the legal effect of the FHA." n342 The court concluded that enforcement of the covenants in question violated several prongs of the Act. n343 There is, as yet, very little case law to render it certain that the Act will be able to trump existing covenants. n344 The United States Supreme Court, however, in a case involving zoning and not covenant restrictions, held in 1995 that a zoning statute limiting unrelated persons living together to five was not rescued by the Fair Housing Act's exemption for maximum occupancy restrictions. n345 This decision may, and this is conjecture, suggest the reception that a challenge to similar covenant restrictions may face in the Supreme Court.

(3) State Law.

Several state courts and legislatures have acted to overcome the effects of real covenants in preventing group homes for the handicapped. The Indiana legislature, for example, passed a statute declaring such covenants to be unenforceable against such groups. The Indiana Supreme Court, in response, declared that the statute violated the State Constitution's Contracts Clause when it voided already existing covenants. n346 The court was silent as to the prospective reach of the covenant, but the legislature in its next session repealed the entire statute. The Arkansas Supreme Court has refused an invitation to rule on whether such covenants violate the Fourteenth Amendment. n347 The Washington Court of Appeals has noted that even if the state's zoning statutes defined adult homes as residential uses of property, it remained unanswered "whether zoning may override the constitutional contractual right of parties to covenant ... ." n348 The Washington Supreme Court answered that question in the negative and refused the invitation to consider whether public policy required interpreting such covenants to permit adult care homes because they deemed the record inadequate to decide "due to the lack of any comprehensive presentation of governmental goals, efforts, needs and successes existing in fact." n349 After holding that a family day-care home violated a covenant restricting commercial uses, the Michigan Supreme Court refused to hold that enforcing such a covenant violated public policy in the absence of definite indications in Michigan "constitutions, statutes or common law that supports" the view that enforcing such covenants is contrary to the state's public policy. n350 Similarly, the Idaho Supreme Court refused to find a covenant that would prohibit a group home for the elderly to be against public policy, despite statutes overruling similar zoning statutes. n351

(e) By Events Independent of the Parties.

(1) Changed Circumstances.

If circumstances surrounding the land burdened or benefited or the covenant itself have sufficiently changed, a court may find that the covenant is terminated. Originally, changed circumstances such as the change in the character of a

neighborhood benefited by covenants operated only as an equitable defense to injunctive relief but was not a defense to the covenant at law; the modern trend is to invalidate the covenant itself. n352 The changed circumstances that may justify removing restrictions must occur after the person seeking removal of the restrictions has purchased the burdened property. n353 The right to terminate covenants because of changed circumstances sometimes is statutory, and its definitions and rules statutorily controlled. n354

(i) Purpose Accomplished or Impossible to Accomplish.

Courts may extinguish covenants if, due to changes in the character and environment of the property, the purpose for which they were established can no longer be accomplished or if it would be unreasonable or oppressive to enforce them. n355 Change of conditions must have "frustrated the object of the covenant without fault or neglect on the part of the party who seeks to be relieved from the restrictions." n356 The changes must be so radical as practically to destroy the essential objects and purposes of the agreement; thus, the presence of occasional car restoration activity and of one neighbor's tax preparation activity did not so change the neighborhood as to prevent enforcement of a residential-use covenant against parties who wished to operate a beauty shop with its stream of traffic in their home. n357 Where, despite the changes that have occurred, the restriction "is for the benefit of and is still of substantial value to the dominant lot ..., a court of equity will restrain its violation." n358 This extinguishment will normally entitle the holder to an award of damages measured by the loss in value to the benefited land. The aggrieved party must plead and prove those damages; thus, in New York, the Court of Appeals upheld the extinguishment of a restrictive covenant on the grounds of impossibility of accomplishment but upheld the refusal to award damages because defendant failed to establish damages in quantifiable terms to his remaining land from the extinguishment of the covenant. n359 A covenant may be terminated if there is no one entitled to enforce it. n360

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LEXIS: extin! or expir! or aboli! or cancel! or terminat! or enforc! w/10 covenant w/25 (changed circumstance or impossib!)

(ii) Loss of Benefit.

In Arizona, equity will enforce covenants unless "the changes in the surrounding area are so fundamental or radical as to defeat or frustrate the original purposes of the restrictions." n361 In that case, in which a cemetery owner wanted to use part of its restricted land for a residential development, the court held that a zoning change merely was an indication of the most profitable use to which land could be put, and "a mere change in value [of burdened land] does not justify removal of a restrictive covenant." n362 Similarly, an Indiana court states that public policy requires the invalidation of restrictive covenants when changes in the character of the subject land are "so radical as practically to destroy the essential objects and purposes of the agreement." n363 Changes in conditions must be "so great or radical as to neutralize the benefits of the restriction and destroy its purpose." n364 The law does not permit termination or modification of the burdens of restrictive covenants just to provide for the best or most profitable use of a piece of affected property. In Virginia, the degree of change necessary to defeat the "purpose of the restrictive covenant rendering it null and void" must practically " 'destroy the essential objects and purposes of the [covenant].' " n365 A Florida court n366 stated that if a restriction was imposed for the benefit of and still benefits the dominant estate, it will be enforceable despite changed conditions. n367 That court held that even though beneficiary property lessees had never made use of parking rights on burdened property, the restrictions remain because there is no proof that they could not be of value in the future. n368 Courts tend to weigh changes occurring within a neighborhood more than those occurring in the immediately surrounding area. n369 Courts will require the person seeking to avoid enforcement of the covenant to prove not only that changes have occurred but to show how the changes have "adversely affected the purpose of the covenant." n370 There is a dispute over whether it is true that "equity will not enforce a restrictive covenant in the absence of any benefit to party seeking enforcement of the restriction." n371

COMPUTER-ASSISTED RESEARCH

LEXIS: extin! or expir! or aboli! or cancel! or terminat! or enforc! w/10 covenant w/25 (loss of value or loss of benefit)

(2) Balancing of Hardships.

In determining whether to enforce a real covenant by injunctive relief, courts will sometimes balance the hardship worked on the promisor by enforcement with the hardship on the promisee of a violation, and if the hardship suffered by the promisor is greater will relegate the promisee to a damages remedy. The balance may be also put in terms of harm versus benefit. n372 Thus, injunctive relief will be denied "if the harm done by granting the injunction will be disproportionate to the benefit secured thereby." n373 If the enforcement of a restriction will harm the promisor without substantially benefiting the promisee's land, it may be held unenforceable. n374 Not any imbalance in the equities will suffice, the Restatement notes, when an imbalance is the only reason for denying equitable enforcement; the "disproportion must be one of considerable magnitude... ." n375

FOOTNOTES:
(n1)Footnote 257. *See, e.g., AC Assocs. v. First Nat'l Bank, 453 So. 2d 1121, 1126 (Fla. App. 1984)* (covenants may well be cancelable under less stringent conditions than easements).

(n2)Footnote 258. *LuMac Dev. Corp. v. Buck Point Ltd. Partnership, 573 N.E.2d 681, 685 (Ohio App. 1988)* (covenant prohibiting trailer courts and house trailers).

(n3)Footnote 259. An agreement by which a real covenant becomes effective at some later date may, however, be subject to the Rule against Perpetuities.

(n4)Footnote 260. *See infra*, Ch. 62 (equitable servitudes).

(n5)Footnote 261. *E.g., AC Assocs., 453 So.2d at 1124* (reciprocal parking covenants for 55 years from date of conveyance).

(n6)Footnote 262. Restatement of Property § 554 (1944).

(n7)Footnote 263. There may, of course, still remain a right to redress in damages for violations that occurred before the expiration of the covenant rights.

(n8)Footnote 264. *Swenson v. Erickson, 998 P.2d 807, 815 (Utah 2000)* (change attempted at non-authorized date ineffective).

(n9)Footnote 265. *See* Restatement of Property § 555 (1944). *Desai v. Ok Oil, Inc., 505 S.E.2d 271 (Ga. Ct. App. 1998)* (when the benefited and burdened side of a covenant are acquired by one owner, the intent of the owner will be the controlling factor when determining whether the covenants have merged).

(n10)Footnote 266. *Id.* § 555 cmt. a at 3288.

(n11)Footnote 267. Restatement (Third) of Property (Servitudes) § 7.5 (2000).

(n12)Footnote 268. *See* Restatement of Property §§ 556, 557 (1944).

(n13)Footnote 269. *See id.* at § 557 & cmt. e (1944).

(n14)Footnote 270. *See e.g., Goodman v. Superior Court, 670 P.2d 746, 748 (Ariz. App. 1983)* (release by city of covenant governing part of a land parcel not effective against property owners for whose benefit covenant was entered into).

(n15)Footnote 271. *E.g., Wright v. Cypress Shores Dev. Co., 413 So.2d 1115 (Ala. 1982)* (while noting disagreements among jurisdictions, court limits right to release covenant burden that had been exercised to permit convenience store in residential development contrary to scheme).

(n16)Footnote 272. *E.g., AC Assocs. v. First Nat'l Bank, 453 So.2d 1121, 1129 (Fla. App. 1984)* (longer lease expiring 14 years before parking covenant).

(n17)Footnote 273. *See* Restatement of Property § 557 & cmt. e (1944).

(n18)Footnote 274. *Steiger v. Lenoci, 733 A.2d 1192 (N.J. Super. Ct. App. Div. 1999)* (a heavy burden is placed on those who would argue abandonment by past actions. The past actions must have been so pervasive as to show a clear intent of abandonment); *Pebble Beach Property Owners' Ass'n v. Sherer, 2 S.W.3d 283 (Tex. Ct. App. 1999)* (where substantial violations have occurred that establish abandonment of a restrictive covenant, the restrictive covenant is impliedly waived); *White v. Wilhelm, 665 P.2d 407, 411* (Wash. App.), *rev. denied, 100 Wash. 2d 1025 (1983)* (holding requirement to gain permission of architectural committee to have been abandoned because committee had not existed in several years and much building had gone on without its permission).

(n19)Footnote 275. *Swenson v. Erickson, 998 P.2d 807, 813 (2000)* (small storage sheds on 19 of 52 lots not abandonment so as to permit building of large woodshop).

(n20)Footnote 276. *See* Restatement of Property § 561 cmt. d (1944) (acquiescence not a bar to relief at law though it may affect the measure of damages).

(n21)Footnote 277. *See, e.g., City of Rolling Meadows v. National Adver. Co., 593 N.E.2d 551, 558 (Ill. App. 1991)* (erection of water tower too tall not proven to violate anti-billboard covenant, and even if so would not prove city acquiescence sufficient to extinguish covenant), *app. denied, 602 N.E.2d 475 (Ill. 1992), cert. denied, 113 S. Ct. 1385 (1993); Goforth v. Smith, 991 S.W.2d 579 (Ark. 1999)* (a landowner's neighbor had a communications tower on the neighbor's property in violation of a restrictive covenant. The neighbor built two subsequent towers in 1965 and 1988. When the neighbor started to build a third tower, the landowner brought suit to enforce the restrictive covenant action against his neighbor; the action was dismissed because the landowner had acquiesced in his neighbor's activity for the past 30 years).

(n22)Footnote 278. *See* Restatement of Property § 561 (1944).

(n23)Footnote 279. *Siering v. Bronson, 564 So. 2d 247, 248-249 (Fla. App. 1990).*

(n24)Footnote 280. *Hrisomalos v. Smith, 600 N.E.2d 1363, 1368 (Ind. App. 1992).*

(n25)Footnote 281. *Id.*

(n26)Footnote 282. *Vaughn v. Eggleston, 334 N.W.2d 870, 873 (S.D. 1983)* (*quoting Pool v. Denbeck, 241 N.W.2d 503, 507 (Neb. 1976)).*

(n27)Footnote 283. *Miller v. Bolyard, 411 S.E.2d 684, 687 (W. Va. 1991)* (plaintiff did not waive objection to neighboring garage that violated covenant by failure to object to similar violation in a distant part of the subdivision).

(n28)Footnote 284. *Carr v. Michael Motors, Inc., 557 S.E.2d 294, 302 (W. Va. 2001).*

(n29)Footnote 285. *Killearn Acres Homeowners Ass'n v. Keever, 595 So. 2d 1019, 1022 (Fla. App. 1992)* (no estoppel because no evidence that representation was made).

(n30)Footnote 286. Restatement (Third) of Property (Servitudes) § 7.6 (2000).

(n31)Footnote 287. *Grasso v. Thimons, 559 A.2d 925, 929 (Pa. Ct. 1989)* (*quoting Blofsen v. Cutaiar, 333 A.2d 841, 843-844 (Pa. 1975)), app. denied, 577 A.2d 544 (Pa. 1990).*

(n32)Footnote 288. *Parker v. Peaceful Valley Property Owners Ass'n, 519 S.E.2d 440, 442 (Ga. 1999).*

(n33)Footnote 289. *Pelican Island Property Owners Ass'n, Inc. v. Murphy, 554 So. 2d 1179, 1181 (Fla. App. 1989)* (no estoppel because no proper proposal made, consent to which properly could be found in association's lack of response: no estoppel by silence unless proponent was ignorant of truth.)

(n34)Footnote 290. *Id.*

(n35)Footnote 291. Courts sometimes use the terms laches, estoppel, waiver and acquiescence in ways that do not always keep the doctrines distinct. *See, e.g., Stepanek v. Roth, 418 So.2d 74, 75 (Miss. 1982)* (appellees are "estopped by the doctrine of laches.").

(n36)Footnote 292. *See, e.g., City of Rochelle v. Suski, 564 N.E.2d 933 (Ill. App. 1990)* (trailer homes erected under city permits encroached on city property nearly twenty years; remanded to see if laches would bar city's attempt to remove them when they were expensive to move and city demonstrated no need for property).

(n37)Footnote 293. *Pelosi v. Wailea Ranch Estates, 985 P.2d 1045, 1057-1058 (Haw. 1999)* (delay not unreasonable) (interior quotation marks omitted).

(n38)Footnote 294. *Goforth v. Smith, 991 S.W.2d 579, 586-587 (Ark. 1999)* (telecommunications tower; other towers standing for 30 years).

(n39)Footnote 295. *Williamson v. Pope, 299 S.E.2d 661, 662 (N.C. App. 1983).*

(n40)Footnote 296. *City of Rolling Meadows v. National Adver. Co., 593 N.E.2d 551, 558 (Ill. App. 1991)* (delay affecting this defendant was only six weeks; delay affecting other defendant "could not have prejudiced" this defendant), *app. denied, 602 N.E.2d 475 (Ill. 1992), cert. denied, 113 S. Ct. 1385 (1993).*

(n41)Footnote 297. *Blackburn v. Richardson, 849 S.W.2d 281, 289-90 (Mo. App. 1993).*

(n42)Footnote 298. *Id., 849 S.W.2d at 289.*

(n43)Footnote 299. *Beaver Lake Ass'n v. Sorenson, 434 N.W.2d 703, 706 (Neb. 1989); see also New Hampshire Donuts, Inc. v. Skipitaris, 533 A.2d 351, 356-57 (N.H. 1987)* (laches based on injustice of allowing recovery when no excuse is given for delay that has worked an injustice; no laches because negotiations were continuing while defendant was constructing offending building).

(n44)Footnote 300. *Sorenson, 434 N.W.2d at 706.*

(n45)Footnote 301. *E.g., New Hampshire Donuts, 533 A.2d at 351, 356.*

(n46)Footnote 302. *Goodfarb v. Freedman, 431 N.Y.S.2d 573, 578 (1980)* (laches not available because of defendants' "own conduct in misleading their neighbors into inaction").

(n47)Footnote 303. *See Port Perry Marketing Corp. v. Jenneman, 982 S.W.2d 789 (Mo. Ct. App. 1998)* (former owner had failed to enforce restrictive covenants for 19 years. The new owner who recently purchased the property tried to enforce the covenants within 1 year of acquiring the property. However, the new owner can be charged with the delay of the old owner and therefore laches is not precluded as a defense to the new owner's enforcement attempts); *Stepanek v. Roth, 418 So. 2d 74, 75 (Miss. 1982)* (court notes that times as long as 12 years have not resulted in laches while times as short as five weeks have, depending on circumstances; violations here had lasted three to ten years without

protest).

(n48)Footnote 304. *Sea Island Bank v. First Bulloch Bank & Trust Co., 267 S.E.2d 12, 13 (Ga. 1980)* (*quoting Citizens & S. Nat'l Bank v. Ellis, 156 S.E. 603 (Ga. 1931)).*

(n49)Footnote 305. *Engle v. Acopian, 432 So. 2d 113, 115-16 (Fla. App. 1983)* (*quoting* Fla. Stat. § 95.11(6)).

(n50)Footnote 306. Restatement of Property § 562 cmt. c (1944).

(n51)Footnote 307. *See, e.g., Blackburn v. Richardson, 849 S.W.2d 281, 290 (Mo. App. 1993)* (no unclean hands found where plaintiff's minor violation did no harm to defendants and would be easily remedied upon request).

(n52)Footnote 308. *Miller v. Bolyard, 411 S.E.2d 684, 687 (W. Va. 1991).*

(n53)Footnote 309. Ga. Code Ann. §§ 44-5-60(b), (c) (1993).

(n54)Footnote 310. *Id.* § 44-5-60(c).

(n55)Footnote 311. Minn. Stat. § 500.20 subd. 2a; *see Matter of Turners Crossroad Dev. Co., 277 N.W.2d 364, 373 (Minn. 1979)* (stating that this subdivision applies to covenants, conditions or restrictions created by any instrument conveying land).

(n56)Footnote 312. *Stop & Shop Supermarket Co. v. Urstadt Biddle Props., 740 N.E.2d 1286, 1289 (Mass. 2001).*

(n57)Footnote 313. Ga. Code Ann. § 9-3-29.

(n58)Footnote 314. Mo. Rev. Stat. § 516.010 (actions for recovery of any "lands, tenements, or hereditaments"); *McLaughlin v. Neiger, 286 S.W.2d 380, 384 (Mo. App. 1956)* (noting that enforcement of covenants is governed by ten-year statute of § 516.010).

(n59)Footnote 315. Mo. Rev. Stat. § 516.095.

(n60)Footnote 316. N.Y. Real Prop. Acts Law § 2001 (1).

(n61)Footnote 317. "Actions to enforce ...covenants restricting the use of real estate, set forth in any recorded instrument shall not be barred by this section for a period of 40 years after the date of recording such instrument, and the timely recording of an instrument expressly referring to the ...covenants or of notices pursuant to this section shall extend such time for 40-year periods from the recording." (Wis. Stat. § 893.33(6)); actions affecting title to real estate use a period of 30 years. (Wis. Stat. § 893.33(2)).

(n62)Footnote 318. N.C. Gen. Stat. § 47B-2 (30-year period); § 47B-4 (1993) (preservation for further 30-year periods by recording notice).

(n63)Footnote 319. *Cunningham v. Haley, 501 So.2d 649, 651 (Fla. App. 1986)* (landowners' title unencumbered; actual notice does not suffice to protect use restrictions created prior to root title from being extinguished by Act).

(n64)Footnote 320. 735 Ill. Comp. Stat. Ann. § 5-13-118.

(n65)Footnote 321. 735 Ill. Comp. Stat. Ann. § 5-13-120.

(n66)Footnote 322. Ohio Rev. Code Ann. § 5301.51(A).

(n67)Footnote 323. Utah Code Ann. §§ 57-9-1-57-9-4.

(n68)Footnote 324. Mass. Ann. Laws ch. 184, §§ 27-30. Restrictions imposed before January 1, 1962 operate from a base period of fifty years, those imposed later thirty years. Notice and recording requirements are specified in § 29.

(n69)Footnote 325. Minn. Stat. § 541.023 subd. 2a(c). Covenants are subject to Minn. Stat. § 500.20. *See supra* § 61.07(c)(1)(I) and *infra* § 61.07(c)(1)(iv).

(n70)Footnote 326. *Orange & Rockland Utils., Inc. v. Philwold Estates, 418 N.E.2d 1310, 1314,* (N.Y. 1981) (*quoting* Real Prop. Act § 1951.2 in upholding extinguishment of 1923 covenant restricting land use to hydroelectric purposes; standard is balancing of equities rather than previously required finding of "no value" to beneficiaries); *Board of Education v. Doe, 452 N.Y.S.2d 964 (1982)* (relying on same to extinguish covenants for lack of remaining value to holders; right to payment lost for lack of proof).

(n71)Footnote 327. Minn. Stat. § 500.20 subd. 1.

(n72)Footnote 328. Mass. Ann. Laws ch. 184, § 30.

(n73)Footnote 329. *Mercantile-Safe Deposit & Trust Co. v. Baltimore, 521 A.2d 734, 740-741 (Md. 1987). See also Dible v. City of Lafayette, 713 N.E.2d 269 (Ind. 1999).*

(n74)Footnote 330. *Electro-Nucleonics, Inc. v. Washington Suburban Sanitary Comm'n, 554 A.2d 804 (Md. 1989), cert. denied, 110 S. Ct. 158 (1989).*

(n75)Footnote 331. *Redevelopment Agency v. Tobriner, 200 Cal. Rptr. 364, 369-370 (App. 1984)* (*citing Southern Cal. Edison Co. v. Bourgerie, 507 P.2d 964 (Cal. 1973)), cert. denied, 105 S. Ct. 250 (1984).*

(n76)Footnote 332. *Id*. at 367.

(n77)Footnote 333. *Washington Suburban Sanitary Comm'n v. Cae-Link Corp., 622 A.2d 745, 763 (Md. 1993), cert. denied, 114 S. Ct. 288 (1993)* (*affirming* reversal of trial court's conflating of methods of damage calculation).

(n78)Footnote 334. *Magraw v. Dillow, 671 A.2d 485 (Md. 1996)* (the right of redemption arising under a tax sale was enough of a burden to constitute an encumbrance on the property, within the meaning of the covenant against encumbrances); *Pagosa Lakes Property Owners Ass'n v. Fairfield Pagosa (In re Fairfield Pagosa), 97 F.3d 247, 253 (8th Cir. 1996).*

(n79)Footnote 335. *See, e.g., Mains Farms Homeowners Ass'n v. Worthington, 854 P.2d 1072, 1077-1080 (Wash. 1993)* (refusing to pass on public policy arguments because record inadequate to address facts and policies underlying issue); *Collins v. City of El Campo, 684 S.W.2d 756, 762 (Tex. Ct. App. 1984)* (construing zoning statute and covenants by their language to permit home for unrelated retarded adults rather than pass on constitutional and public policy arguments) *error ref'd n.r.e.* (Tex. 1985); *but see Deep E. Tex. Regional Mental Health and Mental Retardation Servs. v. Kinnear, 877 S.W.2d 550 (Tex. App. 1994)* (allowing group home because 1) covenant applies to architectural standards rather than use, and 2) public policy mandates assistance to mentally handicapped under various statutes).

(n80)Footnote 336. *See Shelley v. Kraemer, 334 U.S. 1 (1948).*

(n81)Footnote 337. *Linn Valley Lakes Property Owner's Ass'n v. Brockway, 824 P.2d 948 (Kan 1992)* (a private agreement restricting signs in a residential neighborhood was not a per se violation of the constitutionally protected right to free speech); *City of Rolling Meadows v. National Adver. Co., 593 N.E.2d 551, 559-60 (Ill. App. 1991), app. denied, 602 N.E.2d 475 (Ill. 1992), cert. denied, 113 S. Ct. 1385 (1993).*

(n82)Footnote 338. *United States v. Scott, 788 F. Supp. 1555 (D. Kan. 1992).*

(n83)Footnote 339. H.R. Rep. No. 711, 100th Cong., 2d Sess. 23-24 (1988), *reprinted in* 1988 U.S.C.C.A.R. 2173,

2184, 2185 (*quoted* in *Scott, 788 F. Supp. at 1561).*

(n84)Footnote 340. *Casa Marie, Inc. v. Superior Court, 988 F.2d 252 (1st Cir. 1993).*

(n85)Footnote 341. *Deep E. Tex. Regional Mental Health and Mental Retardation Servs. v. Kinnear, 877 S.W.2d 550, 556-560 (Tex. App. 1994).*

(n86)Footnote 342. *Hill v. Community of Damien of Molokai, 911 P.2d 861, 871-877 (N.M. 1996).*

(n87)Footnote 343. *Id. at 877.*

(n88)Footnote 344. The Washington Supreme Court refused to address a Fair Housing Act argument concerning placement of adult care homes because it was raised first on appeal and only by an amicus. *Mains Farm Homeowners Ass'n v. Worthington, 854 P.2d 1072, 1080 (Wash. 1993).*

(n89)Footnote 345. *City of Edmonds v. Oxford House, Inc., 115 S. Ct. 1776 (U.S. 1995)* (construing *42 U.S.C. § 3607* (b)(1)).

(n90)Footnote 346. *Clem v. Christole, 582 N.E.2d 780 (Ind. 1991).*

(n91)Footnote 347. *McGuire v. Bell, 761 S.W.2d 904, 911 (Ark. 1988)* (claim unsupported by convincing argument or authority).

(n92)Footnote 348. *Hagemann v. Worth, 782 P.2d 1072, 1076 (Wash. App. 1989)* (covenant does not impede public interest in group homes, but only prohibits locations where it violates contractual rights of those party to covenant).

(n93)Footnote 349. *Mains Farm Homeowners Ass'n v. Worthington, 854 P.2d 1072, 1077-1080 (Wash. 1993).*

(n94)Footnote 350. *Terrien v. Zwit, 648 N.W.2d 602, 609 (Mich. 2002).* Public policy is not to be found in the personal preferences of members of the court, but must be clearly rooted in law. *Id. at 608.*

(n95)Footnote 351. *D & M Country Estates Homeowners Ass'n v. Romriell, 59 P.3d 965, 970 (Idaho 2002).*

(n96)Footnote 352. *See Essenson v. Polo Club Associates, 688 So. 2d 981 (Fla. Dist. Ct. App. 1997)* (Rezoning of property at the request of the servient estate did not permit the cancellation of the restrictive covenants, despite the doctrine of changed circumstances); *Stolba v. Vesci, 909 S.W.2d 706 (Mo. Ct. App. 1995)* (when considering the defense of changed circumstances, the totality of the circumstances must be considered); *Hrisomalos v. Smith, 600 N.E.2d 1363, 1366 n.1 (Ind. App. 1992).*

(n97)Footnote 353. *See e.g., Acopian v. Haley, 387 So. 2d 999, 1001 & n.1 (Fla. App. 1980)* (because many changes in neighborhood occurred after owners of burdened property acquired title, any error was harmless), *rev. denied, 392 So. 2d 1375 (Fla. 1981).* The court notes that the logic of hinging the effect of changed circumstances on when property was purchased has been attacked, given that the focal point of determining whether restrictions should be removed should be whether the intent and purpose of the original parties in creating the restrictions has been frustrated by changing circumstances.

(n98)Footnote 354. *See supra*, § 61.07(c)(1) (section on statutory extinguishment).

(n99)Footnote 355. *City of Rolling Meadows v. National Adver. Co., 593 N.E.2d 551, 559 (Ill. App. 1991), app. denied, 602 N.E.2d 475 (Ill. 1992), cert. denied, 113 S. Ct. 1385 (1993).*

(n100)Footnote 356. *Cody v. Anthony Fabiano and Sons Inc., 667 N.Y.S.2d 446 (N.Y. App. Div. 1998)* (mining

company bought undeveloped residential lots hoping to expand mining operations. The mining company tried to prove that the covenant restricting the area to residential use only was incapable of being accomplished. However, the court denied relief to the mining company because they knew of the covenant in advance and created their own hardship); *AC Assocs. v. First Nat'l Bank, 453 So. 2d 1121, 1127 (Fla. App. 1984); Acopian v. Haley, 387 So. 2d 999, 1001 (Fla. App. 1980) rev. denied, 392 So. 2d 1375 (Fla. 1981).*

(n101)Footnote 357. *Miller v. Bolyard, 411 S.E.2d 684, 687 (W. Va. 1991).*

(n102)Footnote 358. *Acopian v. Haley, 387 So. 2d 999, 1001-02 (Fla. App. 1980)* (14-lot subdivision restricted to single-family residences, eight vacant, six with houses, one of which used for real estate office; no showing here that the many changes in the surrounding neighborhood or the use of one home for office had materially affected the subdivision or frustrated the purpose of the restrictions), *rev. denied, 392 So. 2d 1375 (Fla. 1981).*

(n103)Footnote 359. *Orange & Rockland Utils., Inc. v. Philwold Estates, Inc., 418 N.E.2d 1310, 1316 (N.Y. 1981).*

(n104)Footnote 360. *E.g., Lacer v. Navajo County, 687 P.2d 404, 411 (Ariz. App. 1983)* (citing a former edition of this treatise), *rev, denied* (Ariz. Apr. 5, 1984).

(n105)Footnote 361. *Goodman v. Superior Court, 670 P.2d 746, 748 (Ariz. App. 1983).*

(n106)Footnote 362. *Id.*

(n107)Footnote 363. *Hrisomalos v. Smith, 600 N.E.2d 1363, 1366 (Ind. App. 1992)* (*quoting Cunningham v. Hiles, 395 N.E.2d 851, 855 (Ind. 1979), modified on reh'g, 402 N.E.2d 17 (Ind. Ct. App. 1980)).*

(n108)Footnote 364. *McNamee v. Bishop Trust Co., 616 P.2d 205, 212 (Haw. 1980)* (*quoting Sandstrom v. Larsen, 583 P.2d 971, 977 (Haw. 1978)).*

(n109)Footnote 365. *Chesterfield Meadows Shopping Ctr. Assocs. v. Smith, 568 S.E.2d 676, 680 (Va. 2002)* (*quoting Booker v. Old Dominion Land Co., 49 S.E.2d 314, 317 (Va. 1948)* (covenant purpose to protect historical structure that had since been moved)).

(n110)Footnote 366. *AC Assocs. v. First Nat'l Bank, 453 So. 2d 1121, 1125 (Fla. App. 1984).*

(n111)Footnote 367. *Id. at 1127.*

(n112)Footnote 368. *Id. at 1128* (record only shows that scope of restriction was greater than necessary).

(n113)Footnote 369. *Hrisomalos v. Smith, 600 N.E.2d 1363, 1367 (Ind. 1992).*

(n114)Footnote 370. *Id.* (*quoting Cunningham v. Hiles, 395 N.E.2d 851, 855 n.3 (Ind. 1979), modified on reh'g, 402 N.E.2d 17 (Ind. 1980)).*

(n115)Footnote 371. *Grasso v. Thimons, 559 A.2d 925, 928 & n.4 (Pa. 1989)* (contrary view that right to enforce is absolute regardless of proof of damage resulting from breach), *app. denied, 577 A.2d 544 (Pa. 1990).*

(n116)Footnote 372. The harm done to the promisee by denying injunctive relief would seem to be the functional equivalent for balance purposes of the benefit given by granting injunctive relief.

(n117)Footnote 373. Restatement of Property § 563 (1944).

(n118)Footnote 374. *Lacer v. Navajo County, 687 P.2d 404, 411 (Ariz. App. 1983), rev. denied,* (Ariz. Apr. 5, 1984).

(n119)Footnote 375. Restatement of Property § 563 cmt. c at 3310 (1944).

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CHAPTER 61 REAL COVENANTS: PROMISES CONCERNING THE USE OF LAND

7-61 Thompson on Real Property, Thomas Editions § 61.08

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§ 61.08 Bibliography.

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Annotations

Annotation, *Change of Neighborhood as Affecting Restrictive Covenants Precluding Use of Land for Multiple Dwelling, 53 A.L.R.3d 492.*

Annotation, *Condominium or Co-operative Association Bylaw or Other Rule Restricting Occupancy by Children, 100 A.L.R.3d (1980) 241.*

Annotation, *Construction and Application of Restrictive Covenants Governing Billboards and Outdoor Advertising, Use of Signs, 61 A.L.R.4th 1290.*

Annotation, *Covenant in Deed Restricting Material to be Used in Building Construction, 41 A.L.R.3d 1290.*
Annotation, *Covenant Restricting Occupancy of Premises to Persons Over or Under Specified Age, 68 A.L.R.3d 1239.*

Annotation, *Restrictive Covenant or Right to Enforcement Thereof as Compensable Property Right, 4 A.L.R.3d 1137; 22 A.L.R.3d 961.*

Annotation, *Restrictive Covenants as to Height of Structures or Buildings, 1 A.L.R.4th 1021.*

Annotation, *Use of Property for Multiple Dwelling as Violating Restrictive Covenant Permitting Property to be Used for Residential Purposes Only, 99 A.L.R.3d 985.*

Annotation, *Validity, Construction, and Effect of Contractual Provision Regarding Future Revocation or Modification of Covenant Restricting Use of Real Property, 4 A.L.R.3d 570.*

Annotation, *Validity and Construction of Restrictive Covenant Controlling Architectural Style of Buildings to be Erected on Property, 47 A.L.R.3d 1232.*

Annotation, *Validity and Construction of Restrictive Covenant Prohibiting or Governing Outside Storage in Residential Neighborhoods, 32 A.L.R.4th 651.*

Annotation, *What Constitutes a Building Within Restrictive Covenant, 18 A.L.R.3d 850.*

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Supp. To CHAPTER 61 REAL COVENANTS: PROMISES CONCERNING THE USE OF LAND

7-61 Thompson on Real Property, Thomas Editions Supp. to § 61.02

Supp. to § 61.02 Definition.

[Go To Main]

§ 61.02(b) A Promise Binding on the Parties' Successors. [Go To Main]

Add

Clark v. Mead Realty Group, Inc., 854 N.E.2d 972 (Mass. App. 2006) (purported real covenant between grantor and grantee did not extend to the grantee's successor in interest).

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Supp. To CHAPTER 61 REAL COVENANTS: PROMISES CONCERNING THE USE OF LAND

7-61 Thompson on Real Property, Thomas Editions Supp. to § 61.04

Supp. to § 61.04 Creation of the Real Covenant: What Must Be Demonstrated?

[Go To Main]

§ 61.04(b) The Promise Must Be Express, and Cannot Be Implied. [Go To Main]

Add:

Skyline Woods Homeowners Ass'n, Inc. v. Broekemeier, 758 N.W.2d 376 (Neb. 2008) (restrictive covenant to maintain land as a golf course, that ran with the land, was implied); *City of Huntington Woods v. City of Detroit, 761 N.W.2d 127 (Mich. App. 2008)* (restrictive covenant created by deed).

§ 61.04(b)(1) The Promise Must Be Clearly Delineated.

Change Foods First, Inc. v. Gables Assocs., 418 S.E.2d at 890 (Va. 1992) to Foods First, Inc. v. Gables Assocs., 418 S.E.2d 888, 890 (Va. 1992).

§ 61.04(b)(2) The Promise Must Be in Writing.

Add:

Costa Serena Owners Coalition v. Costa Serena Architectural Com., *97 Cal. Rptr. 3d 170 (2009)* .

§ 61.04(c) The Parties Must Intend That the Benefit and Burden of the Promise Run with the Land. [Go To Main]

§ 61.04(c)(1) Intent May be Gleaned from the Language of the Conveyances Alone or from That Language Compared with Other ...

Add:

See also PCS Phosphate Co. v. Norfolk Southern Corp., 559 F.3d 212 (4th Cir. 2009) (the language and purpose of the agreement are taken into account in discovering the intent of the parties).

§ 61.04(d) The Touch and Concern Requirement: What Type of Promise Will be Enforced as a Real Covenant? [Go To Main]

Add:

Gambrell v. Nivens, 275 S.W.3d 429 (Tenn. App. 2008) (covenant to not operate a wedding chapel on the land touched and concerned the land); *Village of Philadelphia v. FortisUS Energy Corp., 851 N.Y.S.2d 780 (2008)* (a covenant to pay the seller a sum of money in order to be free to use the property as desired did not touch and concern the land).

Change (Miss. 997) *to* (Miss. 1997)

§ 61.04(d)(1) Definitions: When Does a Covenant "Touch and Concern" Land?

Add:

See also Johnson v Nisbet, 891 N.Y.S.2d 180 (2009) .

Add:

Midsouth Golf, LLC v. Fairfield Harbourside Condominium Association, Inc., 652 S.E.2d 378 (N.C. App. 2007) (an amenity fee covenant did not touch and concern the land and thus was not a real covenant).

§ 61.04(d)(4) Affirmative Covenants.

§ 61.04(d)(4)(i) In General.

Add:

See also Beeter v. Sawyer Disposal LLC, 771 N.W.2d 282 (N.D. 2009) ("[T]he parties' intent, no matter how clearly expressed, cannot make a personal covenant run with the land and bind subsequent purchasers[.]".

§ 61.04(d)(5) Negative Covenants.

Add:

Chick-Fil-A, Inc. v. Cft Dev., LLC, 652 F. Supp. 2d 1252, 1261 (M.D. Fla. 2009) ("[G]enerally, a restrictive covenant is not ambiguous unless it is susceptible to more than one reasonable interpretation."); *Winn-Dixie Stores, Inc. v. Dolgencorp, Inc., 964 So. 2d 261 (Fla. App. 2007)* (an exclusive right to sell groceries in the shopping center, contained in an anchor tenant's lease, was an enforceable real covenant).

§ 61.04(e) Vertical Privity: Who May Enforce or Benefit from the Real Covenant? [Go To Main]

Add:

See also Wein II, LLC v. Porter, 683 S.E.2d 707 (N.C. Ct. App. 2009) .

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Supp. To CHAPTER 61 REAL COVENANTS: PROMISES CONCERNING THE USE OF LAND

7-61 Thompson on Real Property, Thomas Editions Supp. to § 61.08

Supp. to § 61.08 Bibliography.

[Go To Main]

Add to Annotations

Annotation, *Billboards or Advertising Display as Violating Covenants Restricting Use of Real Property*, 41 A.L.R. 760 .

Annotation, *Period of Duration of Covenant Restricting Use of Real Property When Not Expressly Stated*, 95 A.L.R. 458 .

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CHAPTER 62 SERVITUDES

7-62 Thompson on Real Property, Thomas Editions 62.syn

AUTHOR: Professor James L. Bross College of Law Georgia State University

§ 62.syn Synopsis to Chapter 62: SERVITUDES

§ 62.01 Overview of the Law of Servitudes.

§ 62.02 The Rise of the Private Restrictive System.

§ 62.03 Elements of the Real Covenant.

§ 62.04 The Required Relationship Between Original Parties: Horizontal Privity.

§ 62.05 The Required Relationship Between Promisor and Successor: Burden Vertical Privity.

§ 62.06 The Required Relationship Between Promisee and Successor: Benefit Vertical Privity.

§ 62.07 An Intent to Bind and Benefit Successors.

§ 62.08 Defining "Touch and Concern the Land."

§ 62.09 Applicability of Touch and Concern to Equitable Servitudes.

§ 62.10 A Problem at the Boundary of Elements: Servitudes in Gross.

§ 62.11 The Form of the Covenant.

§ 62.12 Some Theories of Equitable Servitudes.

§ 62.13 The Notice Element of Equitable Servitudes.

§ 62.14 Common Schemes of Development.

§ 62.15 Changed Conditions as a Defense to Enforcement.

§ 62.16 Miscellaneous Equitable Defenses.

§ 62.17 Statutory Reforms: Time Limits and Obsolescence.

§ 62.18 Introduction to Environmental Easements.

§ 62.19 Conservation Easements: Natural Areas.

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§ 62.21 Historic Preservation Easements.

§ 62.22 Introduction to Solar Access.

§ 62.23 Some History of Light & Air Easements: Ancient Lights and Spite Fences.

§ 62.24 Solar Protection Through Nuisance Law.

§ 62.25 Prior Appropriation Theories of Solar Access.

§ 62.26 Privately-negotiated Solar Access Servitudes.

§ 62.27 Local Government Roles in Solar Access.

§ 62.28 An Introduction to Transferable Development Rights.

§ 62.29 Early Concepts of Flexible Density: The Floor/Area Ratio.

§ 62.30 Flexible Density with Flexible Locations: The PUD.

§ 62.31 Emergence of Transferable Development Rights.

§ 62.32 Judicial Responses to TDR.

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CHAPTER 62 SERVITUDES

7-62 Thompson on Real Property, Thomas Editions § 62.01

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§ 62.01 Overview of the Law of Servitudes.

[Go To Supp]

A servitude is a right to affect another's use and enjoyment of a property interest. The new *Restatement of Servitudes* defines a servitude as "a legal device that creates a right or an obligation that runs with land or an interest in land." n1 This latter definition, perhaps inadvertently, does not compass benefits of a servitude held in gross or burdens running with an interest less than an estate such as an easement. n2

"American Law has recognized between five and fourteen different devices ... which are treated as servitudes." n3 *The Restatement of Servitudes* attempts to "restructure servitudes law as an integrated body of doctrine." n4 Chapter 63 addresses "Unified Servitudes."

Among those devices which have achieved significant doctrinal elaboration are:

1. *Rights to Use Property in the Possession of Another: Profits, Licenses, Easements.*

   A. The profit is a right to exploit resources on land possessed by another. *The Restatement of Property* concluded that American analysis of profits was indistinguishable from American analysis of easements and folded profits into easements; n5 in *The Restatement of Servitudes* , "the term profit has been resurrected from the oblivion into which it was consigned by the 1944 *Restatement*." n6 The old *Restatement's* decision cost the legal lexicon some of its most colorful words such as turbary, n7 piscary, n8 and estovers. n9 Courts have continued using the term "profit" in any event. n10 *See* Chapter 65.

   B. A license is a right, revocable at the will of the possessor, to use property possessed by another. Common examples include a ticket for a seat at a baseball game and the brass plates in Chicago sidewalks identifying plazas opened through zoning bonuses. Misuses of the word "license" include the "irrevocable license" more properly called an

"easement" and as a shorthand designation for "nonpossessory" interests in the dichotomy "lease or license." n11 *See* Chapter 64.

C. The easement includes all rights to use property possessed by another with a duration not subject to revocation at will by the possessor. *See* Chapter 60.

2. *Real Covenants at Law Running with the Land.*

A Real Covenant is a promise respecting the use of land which can bind a successor to the promisor as if the successor were the promisor and benefit a successor to the promisee as if the successor were the promisee. The successor to the promisor can be held liable for damages. The bewildering elements for real covenants and the fuzzy boundary between real covenants and equitable interests are responsible for the tag "unspeakable quagmire" applied to covenants. n12 *See* Chapter 61.

3. *Equitable Servitudes/Equitable Liens*

Courts sometimes treat Equitable Servitudes as merely an equitable remedy for the Real Covenant. n13 The singular development of Equitable Servitudes makes them analogous to trusts because they are distinct rights enforceable at equity, not necessarily recognized at law. n14 The elements of the Equitable Servitude and their differences from the elements of the Real Covenant are the focus of the first section of this Chapter.

Equitable Liens originate in a distinct and relatively simple set of rules for equitable charges. n15 Cases regularly treat the lien as an aspect of equitable servitudes. n16 Equitable liens are integrated into this chapter's review of Equitable Servitudes.

4. *Environmental Servitudes: Scenic Easements, Facade Easements, Preservation Easements and Solar Easements.*

Notwithstanding the name "easement" for these interests, this class of devices is akin to the equitable servitude in restricting actions by the land's possessor and imposing affirmative obligations on the possessor. The elements of these "Easements" and their differences from the elements of Equitable Servitudes are the focus of the second section of this Chapter.

5. *Transferable Development Rights.*

This technique of compensable public regulation creates an in-kind currency system linking the windfalls of those benefitted by regulation with the wipeouts of those impaired by regulation. The junction with regulation makes this topic an apt one for consideration in Chapter 74 [Land Use Regulation], Chapter 75 [Historic Preservation] or Chapter 81 [Regulatory Taking]. The long-term restriction on use of parcels sending Development Rights make this Chapter's final section an equally apt place for analysis.

FOOTNOTES:

(n1)Footnote 1. Restatement of the Law Third, Property (Servitudes) [hereinafter Restatement of Servitudes], at 8 (2000).

(n2)Footnote 2. Restatement of Property, *supra* note 1, § 535, Comment f (1944). A covenant to spray an orchard could run with a profit to pick apples from the orchard.

(n3)Footnote 3. Restatement of Servitudes, *supra* note 1, Tent. Draft #1, *Introduction,* at xxi (1989).

(n4)Footnote 4. Professor French described the interim status of her efforts in "Tradition and Innovation in the New Restatement of Servitudes: A Report from Midpoint," *27 Conn. L. Rev. 119 (1994).* The final sections of the Restatement (Third) of Property (Servitudes) were approved on May 12, 1998, by the American Law Institute. "Completed Restatement of Servitudes Adapts Ancient Law to Modern Times," *66 U.S. Law Week 2724* (5/26/98). Susan F. French, "Servitudes Reform," *73 Corn. L. Rev. 928, 951 (1988).* Professor French is the Reporter for the Restatement of Servitudes.

(n5)Footnote 5. Restatement of the Law of Property (Servitudes) § 450 *Special Note* at 2901-2902 (1944).

(n6)Footnote 6. Restatement of Servitudes, *supra* note 1, Tent. Draft #1 at xxvi (1989).

(n7)Footnote 7. The right to cut turf for fuel from the land of another.

(n8)Footnote 8. The right to catch fish from a stream through another's land.

(n9)Footnote 9. The right to harvest wood for fuel and necessary repairs from the land of another. The right of estovers is alive and well in Mississippi: *Hood v. Foster, 13 So. 2d 652 (Miss. 1943); Guthrie v. Guthrie, 102 So. 2d 381 (Miss. 1958); Threatt v. Rushing, 361 So. 2d 329 (Miss. 1978).*

(n10)Footnote 10. *Commercial Wharf E. Condo. Ass'n v. Waterfront Parking Corp., 552 N.E.2d 66 (Mass. 1990)* (parking rights not classified as "profits"); *Sproul v. Gilbert, 359 P.2d 543 (Or. 1960)* ("To have labeled it a "*profit a prendre* 'would have frightened the rancher away," referring to grazing rights); *McCartin Leisure Indus. v. Baker, 378 N.E.2d 980 (Mass. 1987)* (sand removal).

(n11)Footnote 11. Alfred F. Conard, "An Analysis of Licenses in Land," *42 Colum. L. Rev. 809 (1942);* R. Powell & R. Rohan, Powell on Real Property PP 427-430 (1968 Abridgement).

(n12)Footnote 12. Edward H. Rabin & Roberta Rosenhall Kwall, Fundamentals of Modern Real Property Law 447 (1992).

(n13)Footnote 13. When statutes remove equitable remedies for promises respecting the use of land, judges attempt to evade the "taking" issue by the remedies-substance distinction. A "mere" change of remedy for an otherwise-intact substantive right does not effect a taking. *Blakeley v. Gorin, 313 N.E.2d 903 (Mass. 1974).*

(n14)Footnote 14. The seminal case Tulk v. Moxhay, 2 Phil. 774, *41 Eng. Rep. 1143 (Ch. 1848),* specifically enforced a promise which could not have run with the land at law in England.

(n15)Footnote 15. Allison Dunham, "Economic Analysis of Covenants," 8 J. of Law & Econ. 133 (1965).

(n16)Footnote 16. *Neponsit Prop. Owners' Ass'n v. Emigrant Indus. Sav. Bank, 15 N.E.2d 793 (N.Y. 1938).*

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CHAPTER 62 SERVITUDES

7-62 Thompson on Real Property, Thomas Editions § 62.02

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§ 62.02 The Rise of the Private Restrictive System.

Systems of covenants and restrictions have become a common, and in some markets nearly universal, feature of residential and large-scale commercial development in the United States. "A recent study estimates that in California, alone, there were 1,400,000 units in common interest developments, and between 12,000 and 16,000 common interest community associations in existence in June, 1986." n17 For one flourishing type of privately restricted development, the "gated community," a recent monograph estimates 4,000,000 residents in 30,000 developments. n18

The spread of Planned Unit Developments, Condominiums and Office Parks where common elements, interdependence and governance mechanisms demand systems of restrictions is only a partial explanation for the floodtide. n19 Even conventional residential subdivisions are bound by declarations of restrictions. The invisible hand of the market of homebuyers is not the primary explanation for what planner Daniel Lauber describes as "capitalism pressing its citizens to live in socialist collectives." n20 The preferences of government and financing institutions are robust factors in the legal form of development.

At the local level, subdivision review, P.U.D. approval and site plan review may be occasions for the imposition of a wide variety of governmental compulsions. The exercise of discretion has its price. Permit-granting behavior is linked to covenants as a part of the "contract zoning game," usually in an arrangement with neighbors to mitigate externalities or to limit uses available under a broad zoning category. n21 When common areas such as playgrounds or streets are not dedicated to the government, local governments will want clear, enforceable systems to insure maintenance of those private commons; without such systems for maintenance, the homebuyers will gather to demand government repair for the first pothole. Blanket imposition of use restrictions by covenants and servitudes can obviate difficult zoning issues for the future. n22 The mechanisms for imposed restrictions in subdivision review are not ordinarily explicit in the subdivision law. n23 One treatise observes that deed restrictions can be imposed as conditions of subdivision approval. n24 Practical handbooks for local planners unobtrusively promote mandated declarations of restrictions; one such handbook includes "proposed restrictive covenants" on its "Technical Check List for Use in Subdivision Review" without any other mention of the issue. n25

At the national level, the federal government and private markets operating under federal influence dictate the form and substance of restrictions. The federal "new communities" program of the 1970's promoted gargantuan declarations n26

of restrictions that were unenforceable through sheer complexity. n27 The role of F.H.A. in setting standards for development is well documented. n28"The national standards of the FHA are ... influential even beyond the development it insures. In Houston one appraiser of property referred to [FHA Bulletins] on his shelves as "Bibles." n29

User-friendly enforcement of restrictions depends on equitable remedies. Although members of the Chicago-School view of Law & Economics sometimes criticize equitable remedies because the costs of enforcement can exceed the benefits of enforcement, n30 that unbalanced calculus is precisely what appeals to homeowners in protected developments. n31 The classic "single-family only" restriction would be obliterated without equity. Few qualified appraisers would testify to any measurable economic damage if duplexes were built in single-family areas. Courts specifically enforce the "single-family only" rules without proof of economic damage n32 and thereby satisfy the American dream of isolation from creeping multifamily dwellings. n33 Other types of restrictions, where damages are quantifiable, would present simple cost-benefit issues for violators and could produce incentives for the greatest feasible violation. If a restriction setting height limits to preserve views were violated, damages would reach their acme when the view is entirely blocked; the sensible tactic is to build the largest building possible to maximize return on the damages paid. n34

Systems of restrictions are pervasive in the development business. Those systems are a consequence of top-down leverage, not bottom-up demand. n35 Those systems would be empty gestures to homebuyers without equitable enforcement of the restrictions. n36

COMPUTER-ASSISTED RESEARCH

LEXIS: private w/30 restrict! w/5 system! system! w/5 restrict! or covenant!

FOOTNOTES:

(n1)Footnote 17. Restatement of Servitudes, *supra* note 1, Tent. Draft #1, xxii-xxiii (1989), *citing* S. Barton & C. Silverman, Common Interest Homeowners' Association Management Study 3, California Department of Real Estate (Oct. 1987). As restrictions and homeowners' association have expanded to most of the new development in some markets, the need for rules for governance of the associations has produced a generation of statutes under the neologism, "Common Interest Development." *See, e.g.*, 2004 Cal. ALS 346, 2004 *Cal. AB 2376,* Stats. 2004 ch. 346 (effective 1/1/2005); Md. Real Property Code Ann. § 11B-113.4 (2004); Colorado Revised Statutes 38-33-3-101 & 102 (2004). Such community associations may have a quasi-municipal status subjecting them to constitutional limitations pertaining, for example, to expressive rights. *See e.g., Comm. for a Better Twin Rivers v. Twin Rivers Homeowners' Assoc., 2006 N.J. Super. LEXIS 29* (No. A-4047-03T2, Apr. 19, 2005).

(n2)Footnote 18. Edward Blakely & Mary Gail Snyder, Fortress America: Gated and Walled Communities in the United States 1 (Lincoln Institute of Land Policy, 1995). *See also* Lucy Soto, Suburban Fortresses, Atlanta Journal & Constitution (Sunday, Sept. 17, 1995) at F4 (compares crime in gated and ungated communities and finds ten more crimes in the gated community during the reporting period).

(n3)Footnote 19. *Sea Watch Stores Limited Liability Co. v. Council of Unit Owners of Sea Watch Condominium, 691 A.2d 750 (Md. App. 1997),* discusses the function of common-law restrictive covenants in an eight-store development established under the Maryland Condominium Law and holds that amendments to by-laws cannot deprive unit owners of rights created by a declaration of restrictions.

(n4)Footnote 20. For concerns on life in a collective, *see* Stewart Sterk, "Minority Protection in Residential Private Governments," *77 B. U. L. Rev. 273 (1997).* The A.L.I.'s 1998 approval of the Restatement of Servitudes' Chapter 6 on the governance of common interest communities generated controversy as floor amendments proposed the "business judgment rule" to replace the draft's "reasonableness" standard. The "reasonableness" standard was adopted; the potential for tyranny in community organizations that lack profit motives to moderate megalomania made the "business

judgment standard" inappropriate. "Completed Restatement of Servitudes Adapts Ancient Law to Modern Times," *supra* Note 4 at 2724. *See also* Hyatt, "Common Interest Communities: Evolution and Reinvention," 31 John Marshall L. Rev. 303 (1998), the lead article in "The Robert Kratovil Memorial Seminar in Real Estate Law: Reinventing America's Master Planned Communities," 31 John Marshall L. Rev. 299-442 (1998). Paula A. Franzese, "Common Interest Communities: Standards of Review and Review of Standards, A Festschrift in Honor of Daniel R. Mandelker," *3 Wash. U. J. L. & Pol'y 663 (2000). Compare*, Paula Franzese, "Building Community in Common Interest Communities: the Promise of the Restatement (Third) of Servitudes," 38 Real Property, Probate and Trust Journal 17 (2003).

(n5)Footnote 21. *See, e.g.*, State *ex rel. Zupancic v. Schimenz, 178 N.W.2d 533 (Wis. 1970). See* the analysis of "servitudes as a regulatory tool" in Stewart Sterk, "Publicly Held Servitudes in the New Restatement," *27 Conn. L. Rev. 157, 164-177 (1994).* E. Ryan, "Zoning, Taking and Dealing: The Problems and Promise of Bargaining in Land Use Planning Conflicts," *7 Harv. Neg. L. Rev. 337 (2002).*

(n6)Footnote 22. *See, e.g., Brady Dev. Co. v. Town of Hilton Head Island, 439 S.E.2d 266 (S.C. 1993)* (a lot owner who knowingly built a house in a subdivision without water and sewer services unsuccessfully sued the town that approved the subdivision in violation of its development standards). 1515-1519 *Lakeview Boulevard Condominium Association v. Apartment Sales Corporation, 43 P.3d 1233 (Wash. 2002)* (the City of Seattle, concerned about the stability of a condominium in a landslide area, conditioned its approval on a covenant exculpating the city from liability for damages caused by soil movement; the covenant was found effective to exculpate the city from liability for issuing the permit but not from losses caused by negligent maintenance of the city's storm drain.)

(n7)Footnote 23. *See, e.g., Home Builders v. City of St. Peters, 868 S.W.2d 187 (Mo. 1994)* (upholding city ordinance requiring that new residential subdivisions be encumbered by a trust account to defray lot owners' costs in enforcing restrictions not enforced by subdivision managers); *Doylestown v. Teeling, 635 A.2d 658 (Pa. 1993)* (covenant against further subdivision imposed as condition of subdivision approval); *Essenson v. Polo Club Assocs., 688 So. 2d 981 (Fla. App. 1997)* (enforces a restrictive covenant between a developer and a neighbor in exchange for the neighbor's agreement to withdraw opposition to a zone change); City of New York v. Delafield 246 Corp., 662 N.Y.S.2d 286 (App. Div. 1997) (enforces restrictions imposed by the City as a condition in zoning). *The Bryco Company v. City of Milford, 1999 Ohio App. LEXIS 4750 (1999)* (approves covenant limiting number of rental units as a condition of PUD approval). As a condition of development permission, city required developer to record a deed covenant giving warning of landslide risks to future buyers. 1515-1519 *Lakeview Boulevard Condominium Association v. Seattle, 9 P.3d 879 (Wash. App. 2000),* held that buyer had not waived the right to sue for landslide damage caused by negligent maintenance of a public storm drain. *In re Busik, 759 A.2d 417 (Pa. Cmwlth. 2000)* found a waiver of a developer's right to challenge a development condition requiring certain agreements with neighbors. *County Commissioners v. St. Charles, 784 A.2d 545 (Md. 2001)* (County's settlement agreement about P.U.D. is a covenant running with the land to provide water and sewer connections at agreed price). *Cf. Gangemi v. Zoning Bd. of Appeals, 763 A.2d 1011 (Conn. 2001)* (enforcement of condition prohibiting rental of beach houses violated public policy against restraints on alienation). *Chestnut Real Estate Partnership v. Huber, 811 A.2d 389 (Md. App. 2002)* (Neighborhood organization granted injunction enforcing an agreement made with the developer and adopted by government agencies as the controlling document for development).

(n8)Footnote 24. Peter W. Salsich, Land Use Regulation at § 8.06, 466-467 (1991). *See, e.g., Sousa v. Danville Twp. Planning Bd., 568 A.2d 1225 (N.J. Super. 1990)* (where covenant imposed as condition to subdivision approval, "general public" is necessary party to its elimination).

(n9)Footnote 25. New York State Office of Planning, Control of Land Subdivision, Appendix D, at 54 (1968).

(n10)Footnote 26. Hugh Mields, Federally Assisted New Communities 52, 90 (1973) (noting mandatory "governance mechanisms" and design review boards).

(n11)Footnote 27. After Jefferson Ventures acquired the residential portions of Shenandoah, Georgia [renamed White Oak], the restrictions shriveled from 500 pages to 50. The original developers defaulted; H.U.D., the guarantor on the financing, sold to Jefferson Ventures.

(n12)Footnote 28. FHA Underwriting Handbook for Home Mortgages §§ 704401.1 & 70449.4; FHA Neighborhood Standards, FHA Land Planning Bulletin No. 3; Planned Unit Development With a Homes Association, FHA Land Planning Bulletin No. 6.

(n13)Footnote 29. Constance Perin, Everything in its Place 14-15 (1977) (an anthropologist's study of "the many meanings in American society of the single-family house" and other aspects of the social meaning of shelter).

(n14)Footnote 30. Robert C. Ellickson, "Alternatives to Zoning," *40 U. Chic. L. Rev. 681 (1973). See* Amos Elberg, "Note: Remedies for Common Interest Development Rule Violations," *101 Colum. L. Rev. 1958 (2001).*

(n15)Footnote 31. William B. Stoebuck, "Running Covenants: An Analytical Primer," *52 Wash. L. Rev. 861, 889 (1977). See, e.g., Heath v. Uraga. 24 P.3d 413 (Wash. App. 2001), rev. den'd, 2002 Wash. LEXIS 28,* (requiring house torn down to the foundation because building plans had not been submitted to a review committee). Damages alone would hardly have satisfied the frightened neighbors in *Turudic v. Stephens, 31 P.3d 465 (Or. App. 2001)* if the court had not construed "residential use" to include keeping "pets" such as cougars or mountain lions.

(n16)Footnote 32. *Cordogan v. Union Nat'l Bank of Elgin, 380 N.E.2d 1194 (Ill. App. 1978).*

(n17)Footnote 33. C. Perin, *supra* note 24, at 89-90.

(n18)Footnote 34. *See, e.g., Frankland v. City of Lake Oswego, 517 P.2d 1042 (Or. 1973)* (a P.U.D. case).

(n19)Footnote 35. Government's role in spurring restrictions does not necessarily transform all restrictions into "state action," notwithstanding *Shelley v. Kraemer, 334 U.S. 1 (1948). See, e.g., Midlake on Big Boulder Lake v. Cappuccio, 673 A.2d 340 (Pa. Super. 1996)* (judicial enforcement of condo's ban on posting signs did not present a First Amendment issue).

(n20)Footnote 36. § 8.2 of the Restatement of Servitudes states that servitudes "may be enforced by any appropriate remedy or combination of remedies..." During debates, the A.L.I. defeated a motion to make the right to routine injunctive relief more explicit by moving examples from Comment C into the black letter law of § 8.2. "Completed Restatement of Servitudes Adapts Ancient Law to Modern Times," *supra* Note 4 at 2725. "If it were not for the entrance of the court of equity in the area of equitable servitudes, the restrictive covenant would be next to worthless as a tool for the person who desires to develop a residential area in an orderly fashion." John C. Paulus, "The Use of Equitable Servitudes in Land Use Planning," 2 Willam L. Rev. 399 (1963).

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CHAPTER 62 SERVITUDES

7-62 Thompson on Real Property, Thomas Editions § 62.03

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§ 62.03 Elements of the Real Covenant.

Spencer's Case, n37 is "the parent case for covenants running with the land." n38 Tulk v. Moxhay, n39 is "the progenitor of equitable servitudes." n40

The elements entailed in Real Covenants are present in *Spencer's Case*: privity between original parties, privity between original parties and their successors, intent to run, and touch and concern the land. Only the definitions for those elements have changed. Some scholars add "form" to the listed elements, n41 although the form is often the routine form for conveyances which satisfy the Statute of Frauds and the needs of the recording acts. The evolution of those elements has been a classic application of the case method to answer the question: "What are the legally relevant facts of *Spencer's Case*?" n42

FOOTNOTES:
(n1)Footnote 37. 5 Co. Rep. 15a, *77 Eng. Rep. 72 (Q.B. 1583).*

(n2)Footnote 38. *Flying Diamond Oil Corp. v. Newton Sheep Co., 776 P.2d 618 at n.5 (Utah 1989). Spencer's Case* brought together the familiar elements for real covenants, but it was not the first case on the subject. *See, e.g., Pakenham's Case, Y.B. Hil. 42 Edw. 3,* pl. 14 (1368).

(n3)Footnote 39. 2 Phil. 774, *41 Eng. Rep. 1143 (Ch. 1848).*

(n4)Footnote 40. *Id.* The "progenitor" was preceded on both sides of the Atlantic by equitable enforcement of promises respecting land which were not real covenants. *See, e.g., Whatman v. Gibson, 9 Sim. 196, 59 Eng. Rep. 333 (Ch. 1838),* and *Barrow v. Richard, 8 Paige Ch. 351 (N.Y. Ch. 1840).*

(n5)Footnote 41. Charles Clark, Covenants and Interests Running With the Land 94 (2d ed. 1947) [hereinafter Clark].

(n6)Footnote 42. For historical perspective on real covenants and equitable servitudes, *see:* Uriel Reichman, "Toward a Unified Concept of Servitudes," *55 S. Cal. L. Rev. 1177, 1186-1230 (1982);* Lawrence Berger, "A Policy Analysis of Promises Respecting the Use of Land," *55 Minn. L. Rev. 167, 168-173, 184-187 (1970)* [hereinafter,

Berger]; Clark, *supra* note 33, at 92-137, 170-186 (2d ed. 1947).

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CHAPTER 62 SERVITUDES

7-62 Thompson on Real Property, Thomas Editions § 62.04

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§ 62.04 The Required Relationship Between Original Parties: Horizontal Privity.

Judge Charles Clark was adamant that the term "privity" applied to the original promisor and promisee was not a "proper sense," but "an entirely unjustifiable meaning"; n43 however, Judge Clark conceded that the concept "expresses a restriction perhaps justifiable from the standpoint of public policy." n44 Current scholarship would not admit this justification. n45

In evolving from English law, American horizontal privity has moved from a relationship justifiable by medieval metaphysics, to a formalistic loophole easily satisfied n46 and, ultimately, to nothingness.

In his superb article, "A Policy Analysis of Promises Respecting the Use of Land," Lawrence Berger created convenient labels for the manifestations of horizontal privity analyzed by Charles Clark. n47

A. The English horizontal privity, "tenurial privity," limits Real Covenants to certain future estate/present estate divisions of ownership; "tenurial privity" is the narrowest reading of *Spencer's Case* where the relationship was reversion/estate for years.

B. The first American easing of privity was Massachusetts' "simultaneous privity," requiring both parties to have a "continuing and simultaneous interest in the same piece of property." n48"Simultaneous privity" covered the future estate/present estate relationship in *Spencer's Case* and added easements [and concurrent estates by the terms of the definition].

C. In 1944, *Restatement of Property* bowed to Massachusetts n49 but sided with the American majority of its time in "instantaneous privity." n50 The "instant" in question is the moment when the promisor and promisee each have one hand on a deed transferring an interest in property; for that instant, they are in privity. n51 The transfer of an estate for years in *Spencer's Case* satisfies "instantaneous privity."

D. The final view is "promise alone" privity, in reality no horizontal privity test. The new *Restatement of Servitudes* eliminates horizontal privity. n52

There is universal agreement that Tulk v. Moxhay eliminated the horizontal privity element from equitable servitude doctrine. Under the English rule of tenurial privity, *Tulk* could not run as a real covenant although the facts satisfied the three less restrictive views of horizontal privity in the United States. *Restatement of Servitudes* § 2.4 brings real covenants in line with equitable servitudes.

Oliver Wendell Holmes foresaw the current state of horizontal privity:

> "According to the general opinion there must be privity of estate between the covenantor and covenantee ... . Some have supposed the privity to be tenure; some, an interest of the covenantee in the land of the covenantor; and so on. The first notion is false, the second misleading, and the proposition to which they are applied is unfounded. Privity of estate, as used in connection with covenants at common law, does not mean tenure or easement; it means succession to a title. It is never necessary between covenantor and covenantee, or any other person, except between the present owner and the original covenantor." n53

COMPUTER-ASSISTED RESEARCH

LEXIS: horizontal w/1 privity

FOOTNOTES:
(n1)Footnote 43. Clark, *supra*, note 33, at 111.

(n2)Footnote 44. *Id.*

(n3)Footnote 45. *See* Sources collected in Restatement of Servitudes, *supra* note 1, *Reporter's Note* to § 2.4 at 97-99.

(n4)Footnote 46. Criticizing the Restatement of Property's retention of some horizontal privity, Charles Clark said, "only at small residue of occasional covenants, prepared either by naive and trusting laymen or by the dumbest of lawyers, can be upset." Clark, *supra* note 33, at 218, reproducing *52 Yale L.J. 699 (1943).*

(n5)Footnote 47. For a summary of state law on horizontal privity, *see* Covenants Respecting the Use of Land, Richard R. Powell, The Law of Real Property P 673 [2] (Patrick J. Rohan ed., 1991), [hereinafter Powell on Real Property].

(n6)Footnote 48. Berger, *supra* note 34 at 180-181.

(n7)Footnote 49. Restatement of Property § 534(b): "the promise is made in the adjustment of the mutual relationship arising out of the existence of an easement ..."

(n8)Footnote 50. Restatement of Property § 534(a): "the transaction of which the promise is a part includes a transfer of an interest either in the land benefitted by or in the land burdened by the performance of the promise." *See, e.g., Wayne Harwell Properties v. Pan Am. Logistics Ctr., 945 S.W.2d 216 (Tex. App. 1997)* (applies the "instantaneous" test for horizontal privity and holds that the transfer of a 15% cash-flow interest in land does not satisfy horizontal privity). *Fong v. Hashimoto, 1998 Haw. App. LEXIS 8* (2/20/98), held that the interest of a seller after executing a contract of sale was sufficient to permit the seller to impose restrictions on another parcel for the benefit of the sold land. *Sonoma Development, Inc. v. Miller, 258 Va. 163, 515 S.E.2d 577 (1999)* reaffirms Virginia's commitment to the "instantaneous privity" requirement, citing Chapter 61 of this treatise; *Peters v. Nelson, 1999 Ohio App. LEXIS 3991 (1999),* applies "estoppel by deed" to pass title to property when deeds were recorded out of order but refuses to enforce a covenant in the first-recorded deed because there could be no privity with no title passing at the time of the first deed's

recording.

(n9)Footnote 51. Even this form of Horizontal Privity is inapplicable when only the benefit of a real covenant has passed to a successor. Privity may also be omitted in the relationship between the covenantor and a third-party beneficiary of the covenant. *See The Nature Conservancy v. Congel, 233 A.D.2d 248, 689 N.Y.S.2d 317 (App. Div. 1999)* (rejecting the "stranger to deed" doctrine for equitable easements and covenants). Restatement of Property § 548.

(n10)Footnote 52. Restatement of Servitudes, *supra* note 1, § 2.4: "No privity relationship between the parties is necessary to create a servitude."

(n11)Footnote 53. Oliver Wendell Holmes, The Common Law 404 (1881).

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CHAPTER 62 SERVITUDES

7-62 Thompson on Real Property, Thomas Editions § 62.05

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§ 62.05 The Required Relationship Between Promisor and Successor: Burden Vertical Privity.

One authority tersely concludes that "vertical privity exists in all covenant situations except where a successor ... is an adverse possessor or a disseisor." n54 *Restatement of Property* § 535 presents a more complex picture in its demand that the burden exist only when there has been succession to the "same estate or interest" or "an estate or interest corresponding in duration." The commonest example of failure to satisfy vertical privity is the subtenant; unlike the assignee, who succeeds to all the remaining interest of a predecessor tenant, n55 the subtenant receives some lesser interest. Similarly, a transfer of a life estate from a promisor who had a fee simple absolute would not transfer the burden of a real covenant at law. There is a division in the cases on whether a mortgagee is bound by real covenants with cases distinguishing between lien and title theories of mortgage. n56 The use of the word "succession" in *Restatement of Property* § 535 indicates that a chain of transfers must connect promisor to the new party to be burdened. *Restatement of Property* § 539 uses the word "successor" for "Running of the Burdens in Equity" but does not require a connecting chain of conveyances. n57 Elimination of vertical privity allows equity to bind adverse possessors and disseisors. n58 It is likely that the *Restatement of Servitudes* will apply the vertical privity rules for equitable servitudes to real covenants as it has for horizontal privity. n59

FOOTNOTES:
(n1)Footnote 54. Covenants Respecting the Use of Land, 5 Powell on Real Property, *supra* note 39, P 673[2] at 60-72 (Rohan ed. 1991).

(n2)Footnote 55. *Spencer's Case* involved the assignee of an estate for years.

(n3)Footnote 56. Restatement of Property § 535, Comment d; 5 Powell on Real Property, *supra* note 39, P 673[3] (Rohan ed. 1990). *United States Fidelity & Guar. Co. v. Old Orchard Plaza Ltd. P'ship, 672 N.E.2d 876 (Ill. App. 1996)* (Old Orchard's promise to make a termination payment to its tenant Brunswick is a covenant running with the land, but not binding on a mortgagee in possession for lack of privity).

(n4)Footnote 57. "The burden of this equitable interest binds all those having interests in the land subordinate to or arising posterior to that of the promisor ... regardless of whether they have the same estate the promisor had or whether they succeed him in anything other than possession." Restatement of Property § 539, Comment i.

(n5)Footnote 58. Berger, *supra* note 34, at 187-195.

(n6)Footnote 59. Berger, note 34, at 206-207, urges melding of the rules of assignments and subleases.

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CHAPTER 62 SERVITUDES

7-62 Thompson on Real Property, Thomas Editions § 62.06

AUTHOR: Professor James L. Bross College of Law Georgia State University

§ 62.06 The Required Relationship Between Promisee and Successor: Benefit Vertical Privity.

On the benefit side, the phrasing of *Restatement of Property* § 547 requiring succession to "some interest" opens huge classes of potential plaintiffs. The new Restatement of Servitudes § 5.2, Comments b & d, ease even this requirement of succession. n60 While § 535 permits expansion of the class of burdened parties through subdivision into many parcels, so long as each receives an estate with the same duration as the promisor's, § 547 extends even to those with easements permitting minor incursions. The class of plaintiffs is further extended by third-party beneficiary theory "... and by allowing Homeowners' Associations to sue on behalf of members who satisfy traditional privity." n61 A short answer to the problem of multiplying plaintiffs is that the law of damages would sort out the varying amounts of money, if any, available to each potential plaintiff. n62 The holder of an easement to pick a single rose each year would find litigation unprofitable. n63 As with the burden side, vertical privity on the benefit side is eased at equity. General principles of equity afford protection against the plaintiff with minimal interest in the benefit. n64

FOOTNOTES:
(n1)Footnote 60. *Dingle v. Anna Hilldick Revocable Living Trust, 2001 Ohio App. LEXIS 5717* (12/20/2001), follows the new Restatement's view.

(n2)Footnote 61. *Neponsit Property Owners' Ass'n v. Emigrant Indus. Sav. Bank, 15 N.E.2d 793 (N.Y. 1938),* is the widely followed leading case on this principle. *See, e.g., Woodson v. Okanagan River Ranches Homeowners Ass'n, 1997 Wash. App. LEXIS 1987* (12/2/1997). *Cf. Palm Point Property Owners v. Pisarski, 626 So.2d 195 (Fla. 1993). Dogwood Valley Citizens Association, Inc. v. Winkelman, 590 S.E.2d 358 (Va. 2004)* (a non-stock corporation with no duty to maintain common areas had no authority to conduct non-judicial sales of lots for nonpayment of assessments because it was not a "property owners' association" under the relevant statute). Restatement of Property § 541: "The persons initially entitled to enforce the obligation of a promise respecting the use of land are the promisee and such third persons as are also beneficiaries of the promise."

(n3)Footnote 62. Restatement of Property § 551: "The benefit of a promise ... can be separately enforced by the successor to each or any part except in so far as such enforcement presents an unsolvable problem of computation or imposes an undue burden on the obligor."

(n4)Footnote 63. A revocable licensee would need to expedite litigation to avoid Restatement of Property § 549:

"one entitled to the benefit of a promise ... ceases to be entitled to the benefit of the promise when he no longer has in the land an interest... ."

(n5)Footnote 64. *See, e.g.*, Restatement of Property § 563: "Injunctive relief ... will be denied if the harm done by granting the injunction will be disproportionate to the benefit secured thereby."

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CHAPTER 62 SERVITUDES

7-62 Thompson on Real Property, Thomas Editions § 62.07

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§ 62.07 An Intent to Bind and Benefit Successors.

[Go To Supp]

Spencer's Case and all subsequent authorities n65 demand a manifestation of intent that a real covenant should run with the land. *Spencer's Case* dictated ritualistic, thaumaturgic language [the magic phrase "and his assigns"] to show intent where the promise involved a thing not in being [tenant's promise to build a new wall on the leased property]. Later sources allow intent to appear in a range of evidence. n66 The most difficult problems of implied intent arise when consumer expectations in a common scheme of development clash with the parole evidence rule, the statute of frauds, and title-search methodology. Those are considered *infra* at § 62.14.

FOOTNOTES:
(n1)Footnote 65. Restatement of Property § 544: "The benefit of a promise respecting the use of land ... runs with the land only in so far as it was intended by the parties to the promise that it should run." *Well-Built Homes, Inc. v. Shuster, 2003 Mass. Super. LEXIS 445 (2003),* found the language conveying properties "subject to restrictions to be determined later" in a series of deeds from a divorcing husband and wife to create purely personal contracts and not enforceable servitudes.

(n2)Footnote 66. Restatement of Servitudes, *supra* note 1, § 2.2: "The intent to create a servitude may be express or implied. No particular form of expression is required."

Calling it a "salutary tendency," Berger, *supra* note 34, at 173-174, says: "The more modern approach is to infer intent by viewing the 'entire instrument as a whole.' " Changes in the paradigm of rules of construction can assist in reaching true intent. *See, e.g., Riss v. Angel, 934 P.2d 669 (Wash. 1997),* replacing a narrow construction based on a preference for the unfettered use of land with a liberal construction to achieve a general scheme's collective goals. Little, "Liss v. Angel: Washington Remodels the Framework for Interpreting Restrictive Covenants, *73 Wash. L. Rev. 433 (1998). Hollis v. Garwall, Inc., 974 P.2d 836 (Wash. 1999),* continues the liberalization of rules of construction by applying the "context rule of interpretation" to introduce extrinsic evidence for real covenants. *Canyon Meadows Home Owners Ass'n v. Wasatch County, 2001 Utah App. LEXIS 115 (2001),* uses both the express language of restrictions and a multi-factor analysis of context to determine an intent to run. *See also* Rohan, "Preparing Community Associations for the Twenty-First Century: Anticipating the Legal Problems and Possible Solutions," *73 St. John's L. Rev. 3 (1999)*

(urging enforcement of restrictions "whenever reasonably possible"). Developer's retention of dispensing power over covenants presented jury question on whether promises were intended to be "covenants running with the land," as the recorded declaration stated, or personal to the developer. *Roach v. West Indies Inv. Co., 94 F. Supp. 2d 634 (D. V.I. 2000).* The intent of the parties should be expressed as precisely as possible. *See Keene v. Elkhart County Park and Recreation Board, 2000 Ind. App. LEXIS 2033* (12/14/2000). The Park Board's 1924 promise to build and "maintain" a bridge "to provide safe and secure crossing ... for all farming operations..." required the agency to upgrade the bridge to meet the needs of contemporary farming. The bridge was not locked in to the simpler needs of the farm in 1924. Doctrines favoring expansive use of the dominant tenement in the case of legal easements are transplanted to equitable easements; as with the legal easements, the potential for changes in use highlights the need for drafting with express limits. David Johnson, "One Step Forward, Two Steps Back: Construction of Restrictive Covenants after the Implementation of Section 202.003 of the Texas Property Code," *32 Tex. Tech. L. Rev. 355 (2001). See also* M. Madison, The Real Properties of Contract Law *82 B. U. L. Rev. 404* AT 445-459. *Compare* F. Parisi, Entropy in Property, *50 Am. J. Comp. L. 595, 629 (2002),* urging judicial property rules that counter fragmentation of ownership by rejecting Epstein's freedom of contract model.

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CHAPTER 62 SERVITUDES

7-62 Thompson on Real Property, Thomas Editions § 62.08

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§ 62.08 Defining "Touch and Concern the Land."

The thorniest scholarly disputes on real covenants arise from attempts to define "touch and concern the land." There are nearly as many definitions as commentaries. It is tempting to conclude that the concept should be discarded because it cannot be applied with integrity. n67 *Spencer's Case* makes no definition of touch and concern; instead, the Queen's Bench catalogues covenants which had been held to run or not run with land. The catalogue in *Spencer's Case* evokes a suggestion by Kenneth Culp Davis to soften "the extravagant version of the rule of law." n68 Noting the hazards and difficulties of "abstract generalizations," Davis concludes:

> "Seeing all around a complex subject is not a prerequisite to making a sound rule, because *a rule need not be in the form of an abstract generalization; a rule can be limited to resolving one or more hypothetical cases, without generalizing*." n69[italics in original]

The distillation of "abstract generalizations" may be a fixation of scholars, especially those charged with Restatements, and of some judges. n70 Despite the diversity of scholarly views, judges have been able to apply the concept to cases before them. n71 Relatively few restrictions unrelated to land development are written and enforced. n72 Those courts attempting a precise definition often fill the reporters attempting to overrule an unfortunate confluence of abstract language and hard facts. New York's history is instructive. In Miller v. Clary, n73 a precise rule to resolve a sticky case produced a holding that affirmative covenants do not touch and concern the land. n74 New York agonized through three generations of cases attempting to explain *Miller* n75 before reducing the affirmative nature of a covenant to one of several factors balanced in applying "touch and concern." n76

"Touch and concern" is really one approach to the question: "Should there be any limit on the type of promises which run with the land?" Current Scholarship contains several sorts of answers: *no* limits other than those which may apply generally to contracts, *ex ante* limits on promises [for which "touch and concern" is the prototype]; and *ex post facto* limits on promises [for which the *Restatement of Servitudes* is the model]:

> *A. No Limits*. This point of view has one vocal spokesman, Richard Epstein. Working from "freedom of contract" dogma, Epstein opposes limits on promises unless he can identify externalities which justify intervention in the marketplace. n77 Because Epstein believes that title recordation already provides protection from his only externality [lack of notice to innocent purchasers], he opposes further

legal doctrine limiting promises. n78 Epstein's contractarian model posits a type of freedom of choice in creating restrictions and in purchasing land bound by restrictions unseen in real life. n79 Gregory Alexander n80 and Stewart Sherk n81 are among those scholars challenging Epstein's views.

B. Bigelow/Clark Test. Characterizing it as a "scientific method of approach to the problem which seems to afford the most practical working tests," Charles Clark advocated Bigelow's analysis of "touch and concern." n82 The "science" in the test is real estate appraisal. On the burden side, the appraiser must determine if the promisor's "legal interest [is] rendered less valuable by the promise"; on the benefit side, the appraiser must conclude that the promisee's "legal interest as owner [is] rendered more valuable." Courts as well as scholars endorsed the approach. n83"The infirmity of the *Bigelow* test is its circularity." n84 Using the promise to provide permanent housing for the grantor's children in Schaefers v. Apel, n85 an appraiser could find that the obligation to house someone else's children reduced the value of the burdened property and increased the value of the benefitted property. n86 Yet, the Alabama Supreme Court had no difficulty in rejecting the promise as a real covenant. The *Bigelow/Clark* test measures the effect of certain promises without regard to whether the promises violate some underlying policy of "touch and concern." n87 The test also requires a duplex analysis of the benefit side and the burden side to determine "touch and concern." Other contending tests create a unitary test.

C. Reichman's "Land Utilization" Test. "Promoting the efficient utilization of land is more than a common characteristic of servitudes, it is the overriding policy governing these rights." n88 Reichman's approach predicts the decisions reached in most real cases. n89 Similarly without reference to Reichman's writing, the Oregon courts required that a covenant "somehow respect the use of the land" in holding that System Development Credits earned by a landowner who provided necessary infrastructure did not run with the land. n90 Reichman's claim that the test is "objective" n91 is criticized because it presupposes a "collective vision of what that [private land holding system] is supposed to do." n92 That criticism is equally applicable to most of the judge-made rules on common law property. Judges assume that they understand what the system is designed to accomplish and freely make rules according to that understanding.

D. Berger's Expectations Test. "The expectation that promises must either run with the land or be personal ... is based on an ostensibly logical but actually unsound policy foundation ... . [T]he normal expectations of society is the test." n93 Because it provides less predictability and greater flexibility than other tests, Berger's approach shades into *ex post facto* approaches, despite its billing as "touch and concern." The test interacts with Notice concepts and transforms the validity question into a fact issue for juries rather than a legal question for judges. Specialized communities with bold-face disclosure of expectations could form under this approach. A condominium targeted at single-parent families might include a real covenant to contribute four hours per week of cooperative child care if the condominium gave proper notice [more than recorded declarations might be needed to satisfy a jury].

E. Multi-factor Balancing Tests. Eagle Enterprises v. Gross n94 and Davidson Bros. v. D. Katz & Sons, Inc. n95 are leading cases employing multi-factor balancing tests. *Eagle Enterprises* finesses earlier New York analyses of "touch and concern" by discounting former mandates to factors; instead of a rule banning affirmative covenants outside of leases, the balancing considers affirmative nature of the covenant and the duration of the covenant as factors. The reporter of the *Restatement of Servitudes* classifies *Eagle Enterprises* as an *ex ante* approach, asserting that the balancing is based on circumstances at the time of litigation, rather than at the effective date of the covenant. n96 *Davidson Bros.* extends the usual rules for non-competition covenants in employment contracts to real covenants; "touch and concern" becomes one of eight factors in establishing "reasonableness." n97 Some of the factors are set *ex ante* by the creation of the servitude; n98 some emerge and change over time; n99 and one is only an *ex post facto* determination at the time of litigation. n100 One commentator asserts the multi-factor approach in *Davidson Bros.* "unnecessarily clutters the inquiry" of covenants' running. n101

The collected cases cited in *Davidson* n102 and the further adoption of multi-factor balancing tests n103 suggest an emerging rule that could become a majority, especially with Reichman's concerns for land utilization blended effectively into the balancing.

F. *Restatement of Servitudes*. Many elements of the new *Restatement* could be equated with *Eagle Enterprises* or *Davidson Bros.* were it not for the *Restatement'* s insistence that "touch and concern" is no longer required. n104 while the judges believe that they are simply embellishing "touch and concern." n105 In some instances, tests which are merely factors to be balanced in the cases n106 become hard rules in the new *Restatement*. n107 The bulk of the new *Tentative Draft #2* inventoried the public policies applicable or not applicable to the validity of servitudes. n108 Additional public policies will appear in *Tentative Draft #3*. n109 Essential to the elimination of "touch and concern" is the Reporter's conclusion that cases applying the doctrine are either using it as a guise for other substantive policies [those listed in §§ 3.3 to 3.10] or are making a determination that a once-valid covenant has become obsolete. n110

COMPUTER-ASSISTED RESEARCH

LEXIS: touch! w/1 concern! w/15 limit! touch! w/1 concern! w/30 bigelow! or clark! touch! w/1 concern! w/30 land! w/2 utiliz! touch! w/1 concern! w/15 expect!

FOOTNOTES:
(n1)Footnote 67. Patrick Wiseman, "When the End Justifies the Means: Understanding Takings Jurisprudence in a Legal System with Integrity," *63 St. John's L. Rev. 433, 435 (1989):* "I use 'integrity' both in the Dworkinian sense that law should be viewed 'as a coherent and structured whole,' and in the related and more common sense that legal practitioners (lawyers and judges) should be presumed to behave in a principled way."

(n2)Footnote 68. Kenneth Culp Davis, Discretionary Justice 27-51 (1971).

(n3)Footnote 69. *Id.* at 60.

(n4)Footnote 70. *See* Bernard E. Jacob, "The Law of Definite Elements: Land in Exceptional Packages," *55 S. Cal. L. Rev. 1369, 1400-1401 (1982).*

(n5)Footnote 71. In response to a lexis search for "Touch and Concern the Land" in documents with covenant or servitude, 165 cases appear. Most of the 165 actually turn on issues such as intent or interpretation of the scope of the restrictions; "touch and concern" is ritually recited with all elements. In those cases with a holding on "touch and concern," judges evince little difficulty in resolving most cases. For example, Alabama's supreme court had little struggle in concluding that a promise by a grantee to "provide a permanent home" for the grantor's daughter and son did not touch and concern the land, *Schaefers v. Apel, 328 So. 2d 274 (Ala. 1976),* or in concluding that a promise not to subdivide land did touch and concern the land, *Little v. Hunter, 265 So. 2d 441 (Ala. 1972).*

(n6)Footnote 72. *Taormina Theosophical Community, Inc. v. Silver, 190 Cal. Rptr. 38 (1983),* stretches the bounds of "touch and concern" with covenants requiring adherence to certain beliefs. That case turned on California statutory interpretations and reached a result which would no longer be possible for new restrictions after statutory amendments, *190 Cal. Rptr. 38.*

(n7)Footnote 73. *103 N.E. 1114 (N.Y. 1913).*

(n8)Footnote 74. The most common affirmative covenant is the promise by a tenant to pay rent. New York's rule does not apply to that affirmative covenant. Miller v. Clary's holding did not apply to the largest class of instances covered by the generalization: as fully described, *Miller v. Clary* held that affirmative covenants, other than those in

leases, do not touch and concern the land, except for several instances in which affirmative covenants do touch and concern the land.

(n9)Footnote 75. *Neponsit Prop. Owners' Ass'n v. Emigrant Indus. Sav. Bank, 15 N.E.2d 793 (N.Y. 1938); Nicholson v. 300 Broadway Realty Corp., 164 N.E.2d 832 (N.Y. 1959); University Gardens Prop. Owners' Ass'n v. Steinberg, 214 N.Y.S.2d 208 (1963).*

(n10)Footnote 76. *Eagle Enters. v. Gross, 349 N.E.2d 816 (N.Y. 1976).*

(n11)Footnote 77. Richard Epstein, "Notice and Freedom of Contract in the Law of Servitudes," *55 S. Cal. L. Rev. 1353 (1982);* Richard Epstein, "Covenants and Constitutions," *73 Corn. L. Rev. 906 (1988).*

(n12)Footnote 78. Richard Epstein sees no externalities threat in behavior that only the economically ill-advised engage in. If his model of behavior indicates that the rational optimizer would not perform a particular act, the law needs no protection against that act.

(n13)Footnote 79. *See,* discussion of government role in requiring restrictions, *supra* § 62.02.

(n14)Footnote 80. Gregory Alexander, "Freedom, Coercion, and the Law of Servitudes," *73 Corn. L. Rev. 883 (1988).*

(n15)Footnote 81. Stewart Sherk, "Freedom from Freedom of Contract: The Enduring Value of Servitudes Restrictions," *70 Iowa L. Rev. 615 (1985);* Stewart Sherk, "Foresight and the Law of Servitudes," *73 Corn. L. Rev. 956 (1988).*

(n16)Footnote 82. Clark, *supra* note 33, at 97, *citing* Harry Augustus Bigelow, "The Content of Covenants in Leases," *12 Mich. L. Rev. 639 (1914).*

(n17)Footnote 83. *See* Clark, *supra* note 33, at 97, n.18. *Cf.,* Restatement § 537 & Division V, Part III, Introductory Note at 3160-3161 (1944).

(n18)Footnote 84. Berger, *supra* note 34, at 211.

(n19)Footnote 85. *Supra* note 40.

(n20)Footnote 86. The parents of teenagers and those with adult "boomerang" children would provide a lively market for the benefitted property.

(n21)Footnote 87. In Property classes, I ask whether a promise by my neighbor to supply my house with one, medium-rare, 5 pound or larger, prime roast beef with Yorkshire pudding at 6 p.m. each Saturday would run. Students easily conclude that the beef promise satisfies the *Bigelow/Clark* test; students also have instinctive reactions against enforcement of the promise as a real covenant running with the land. Changing the promise to cover "Minnesota Hot Dish at 6 p.m. each Saturday" sometimes sways Garrison Keillor fans to enforce the promise.

(n22)Footnote 88. Uriel Reichman, "Toward a Unified Concept of Servitudes," *55 S. Cal. L. Rev. 1177, 1232 (1982);* Uriel Reichman, "Judicial Supervision of Servitudes," *7 J. Legal Stud. 139, 151-152 (1978).*

(n23)Footnote 89. Without reference to Reichman's writing, *Noblesville Redevelopment Comm'n v. Noblesville Ass'n, 646 N.E.2d 364, 369 (Ind. App. 1995),* considered "society's goals of land utilization and free alienability" (emphasis added) in holding that a government's guarantee for Tax Increment Financing touched and concerned the land. *In re Tony Snow, 201 B.R.. 968, 1996 Bankr. LEXIS 1364, 29 Bankr. Ct. Dec. (CRR) 1174 (C.D. Cal. 1996),* adopts Reichman's analysis in imposing an equitable servitude staying any transfer of the bankrupt's land for 180 days. *Id.* at 14-15.

(n24)Footnote 90. *Summer Oaks Limited Partnership v. McGinley, 55 P.3d 1100 (Or. App. 2002).*

(n25)Footnote 91. *7 J. Legal Stud. at 151-152.*

(n26)Footnote 92. Richard Epstein, "Notice and Freedom of Contract in the Law of Servitudes," *55 S. Cal. L. Rev. 1353, 1359 (1982).*

(n27)Footnote 93. Berger, *supra* note 34, at 211-212.

(n28)Footnote 94. *Supra* note 44.

(n29)Footnote 95. On remand, the restrictive covenant prohibiting use of inner-city property as a supermarket was found unenforceable as unreasonable and contrary to public interest. *Davidson Bros., Inc. v. D. Katz & Sons, Inc., 643 A.2d 642 (N.J. Super. A.D. 1994). 579 A.2d 288 (N.J. 1990).*

(n30)Footnote 96. Restatement of Servitudes, *supra* note 1, *T.D. #2*, reporter's note at 14 (1991). *Cf.* City of New York v. Delafield 246 Corp., 662 N.Y.S. 2d 286 (App. Div. 1997), *supra* Note 19.2 of this Chapter, applying the "touch and concern" standards from Eagle Enterprises.

(n31)Footnote 97. *579 A.2d at 294. DeTullio v. Chebrah Bikur Cholim, Inc., 1999 Conn. Super. LEXIS 912 (1999),* applies a "reasonableness" test without articulated factors in refusing to enforce a congregation's covenant prohibiting future religious use of its former synagogue. The court also applies a subjective test for notice of restrictions where a buyer claimed that it did not understand the plain meaning of the covenant

(n32)Footnote 98. "1. The intention of the parties when the covenant was executed";

"2. Whether the covenant had an impact on the consideration exchanged when the covenant was originally executed";

"3. Whether the covenant clearly and expressly sets forth the restrictions";

"4. Whether was in writing ...";

"5. Whether the covenant is reasonable concerning area, time or duration ...";

Id. at 295.

(n33)Footnote 99. "4. ... [if recorded], whether the subsequent grantee had actual notice of the covenant." *Id.*

(n34)Footnote 100. "8. Whether, even if the covenant was reasonable at the time it was executed, "changed conditions' now make the covenant unreasonable." *Id.*

(n35)Footnote 101. Paula A. Franzese, "Out of Touch: The Diminished Viability of the Touch and Concern Requirement in the Law of Servitudes," *21 Seton Hall L. Rev. 235, 257 (1991).*

(n36)Footnote 102. *Id. at 294.* Non-competition covenants drive most of the change in "touch and concern" analysis toward a balancing of factors based on reasonableness.

(n37)Footnote 103. *Hotz v. Rich, 6 Cal. Rptr. 2d 219 (1992). Cf., Portola Hills Community Ass'n v. James, 8 Cal. Rptr. 2d 580 (1991). Regency Homes Ass'n v. Egermayer, 498 N.W.2d 783 (Neb. 1993)* (applying the *Bigelow/Clark* test from Neponsit Property Owners' Assn. v. Emigrant Indus. Sav. Bank, *supra* n.65, the Nebraska court adds a multifactor balancing test to determine the validity of a lien for unpaid dues to a recreational facility).

(n38)Footnote 104. Restatement of Servitudes, *supra* note 1,§ 3.2. James Winokur, "Ancient Strands Rewoven, or

Fashioned out of Whole Cloth?: First Impressions of the Emerging Restatement of Servitudes," *27 Conn. L. Rev. 131, 140 (1994),* concludes that "contrasts between the old touch and concern rule and the new Restatement replacement fade a bit upon closer examination." Dan Tarlock finds continued vitality in the old law in "Touch and Concern Is Dead, Long Live the Doctrine," *77 Neb. L. Rev. 804 (1998),* Susan French defends the new Restatement in "The Touch and Concern Doctrine and the Restatement (Third) of Servitudes: A Tribute to Lawrence E. Berger," *77 Neb. L. Rev. 653 (1998).*

(n39)Footnote 105. "We do not abandon the "touch and concern' test ..." *Davidson Bros.* at 295. *Garland v. Rosenshein, 649 N.E.2d 756, 758 at n.4,* (Mass. 1995), declines an opportunity to adopt the new Restatement's approach to touch and concern in holding that a covenant prohibiting development of a parcel is personal where the promisee owns no benefitted land. Notwithstanding the new Restatement, ex ante "Touch and Concern the Land" is alive and well in the American judiciary. *See, e.g., Mapleton Utils., Inc. v. Foxcliff S. Assocs., 673 N.E.2d 5 (Ind. App. 1996)* (a 1985 agreement granted easements to a utility company in exchange for "utility rebates" in a newly developed adjoining area. Requiring that a promise must have a "relation to the interest or estate granted, and the act to be done must concern the interest granted or conveyed," the court held that the promise may have benefitted the new adjoining development but did not "touch and concern" the easements actually conveyed); *Vulcan Materials Co. v. Miller, 691 So. 2d 908 (Miss. 1997)* (Miller transferred his options to purchase limestone deposit in return for royalties on limestone production on the transferred tracts and on any other land operated by the buyer. This arrangement, described as "a virus running with the land" by a lower court, was found not to "touch and concern" the land; however, it was enforced against a purchaser who had expressly assumed the obligation. Query: What is this case, clearly about the payment of money, doing in a chancery court?). *Paloma Investment Limited Partnership v. Jenkins, 1998 Ariz. App. LEXIS 181, 280 Ariz. Adv. Rep. 3* (10/13/98) (a Water Rights Agreement that entitled Jenkins to 20% of all net proceeds from the transfer of a ranch's water rights was not a covenant because the promise did not "touch and concern the land." *280 Ariz. Adv. Rep at 20.* The agreement was enforceable as a royalty). *Workman v. Brighton Properties, Inc., 976 P.2d 1209 (Utah 1999),* eased or perhaps eliminated the "touch and concern" element for covenants by enforcing a promise to pay for a water system in one subdivision against property in a second noncontiguous subdivision a mile away.

(n40)Footnote 106. "6. Whether the covenant imposes an unreasonable restraint on trade ...";

"7. Whether the covenant interferes with the public interest." *Davidson Bros., 679 A.2d at 295.*

(n41)Footnote 107. "A servitude that imposes an unreasonable restraint on trade or competition is invalid." Restatement of Servitudes, *supra* note 1, § 3.6.

"A servitude ... is valid unless ... [it] violates public policy." Restatement of Servitudes, *supra* note 1, *T.D. #2,* § 3.1.

(n42)Footnote 108. § 3.3. "The Rule against Perpetuities does not apply ..."

§ 3.4. "Direct Restraints on Alienation ..."

§ 3.5. "Indirect Restraints on Alienation ..."

§ 3.6. "Unreasonable Restraints on Trade or Competition ..."

§ 3.7. "Unconscionability ..." Restraints on alienation in covenants have received increased attention in both cases and law reviews. *Indian River Colony Club, Inc. v. Bagg, 727 So. 2d 1142, 24 Fla. Law W.D. 757 (Fla. App. 5th Dist. 1999)* (upholds a covenant requiring forced sell-back to development by departing residents in a closely knit community of former warrant officers who enjoy club privileges comparable to those experienced during military service); *Prieskorn v. Maloof, 1999 N.M. App. LEXIS 104, 1999 NMCA 132, 38 N.M. St. B. Bull. 48 (1999)* (a forfeiture clause prohibiting immorality and the sale of liquor does not become an "unreasonable restraint" simply because the unavailability of title insurance stifles sales); Brophy and Ghosh, "Whistling Dixie: The Invalidity and Unconstitutionality of Covenants

against Yankees," X Villanova Envt'l L. J. 57 (1999).

(n43)Footnote 109. "Interests in privacy, personal autonomy, freedom of speech, expression and association, and freedom from various forms of discrimination." Restatement of Servitudes, *supra* note 1, *T.D. #2, Introduction* at xvi. In 1998, the A.L.I. approved a reworked completion of Chapter 3 concluding that servitudes are valid unless illegal, unconstitutional or in violation of public policy. The original provisions were thought too controversial in 1991, and the final versions still raised concerns about vagueness. "Completed Restatement of Servitudes Adapts Ancient Law to Modern Times," *supra* Note 4. For one of the additional policy concerns, "freedom from various forms of discrimination," the judiciary has moved ahead dramatically without guidance from the Restatement of Servitudes. In implementing the Fair Housing Act, judges have enjoined enforcement of "single-family only" restrictions. *See, e.g., Martin v. Constance, 843 F. Supp. 1321 (E.D.Mo. 1994); Hill v. Community of Damien of Molokai, 911 P.2d 861 (N. Mex. 1996); Deep East Texas Regional Mental Health and Mental Retardation Servs. v. Kinnear, 877 S.W.2d 550 (Tex. App. 1994). Cf. Terrien v. Zwit, 648 P.2d 602 (Mich. 2002)* (in an opinion advocating a limited role for the judiciary in defining "public policy," enforces covenant prohibiting "commercial, industrial or business uses" to exclude "family day care center" and rejects trial court and dissenting judges claim of public policy invalidating the restriction as applied). *But see* M. Duncan, "Reconceiving the Bundle of Sticks: Land as a Community-Based Resource," *32 Envt'l Law 773, 803 (2002).* A covenant prohibiting buyers from opposing a developer's future attempts to rezone property was invalidated based on public policies expressed in Georgia's "anti-SLAPP suit" law. *Providence Construction Co. v. Bauer, 494 S.E.2d 527 (Ga. App. 1997).* Conducting religious services in a home violated a single-family covenant and could be enjoined without violating state or federal policy. *Tien Tao Ass'n, Inc. Kingsbridge Park Community Ass'n., 953 S.W.2d 525 (Tex. App. 1997).* In the *Matter of Holliday, 14 FCC 17167, 1999 FCC LEXIS 5039* (10/8/99), finds FCC preemption of architectural review of plans for five 30' masts with five television antennas and three satellite dishes. The FCC finds a one-dish limit "arbitrary" because the limit relies on aesthetics and "not a valid safety basis." *Reagan Nat. Advertising of Austin, Inc. v. Capital Outdoors, Inc., 96 S.W.3d 490 (Tex. Ct. App. 2002)* (cites Restatement of Property for policy against restraints on alienation).

(n44)Footnote 110. Susan F. French, "Servitudes Reform and the New Restatement of Property: Creation Doctrines and Structural Simplification," *73 Corn. L. Rev. 928, 939-940 (1988); see* Susan French, "Can Covenants not to Sue, Covenants against Competition and Spite Covenants Run with Land? Comparing Results under the Touch or Concern Doctrine and the Restatement Third, Property (Servitudes)," 38 Real Property, Probate and Trust Journal 267 (2003).

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CHAPTER 62 SERVITUDES

7-62 Thompson on Real Property, Thomas Editions § 62.09

AUTHOR: Professor James L. Bross College of Law Georgia State University

§ 62.09 Applicability of Touch and Concern to Equitable Servitudes.

[Go To Supp]

> "The common law requirements of "privity' and "touch and concern' are weighted with fine distinctions and are the subject of much disagreement among courts and legal scholars ... .[T]he numerous demands ... can be reduced to the two requirements for the creation of equitable servitudes: *viz.*, intent and notice." n111
>
> "American courts probably apply the same touch and concern requirement to the burdens of equitable servitudes as they do to real covenants." n112

The perception that "touch and concern" does not apply in equity arises partly from the historical fact that early equitable servitudes were negative promises that did not raise the "affirmative covenant" bugaboo which preoccupied 19th century cases on "touch and concern." n113 Lawrence Berger accurately identifies an "underlying (and perhaps unconscious) assumption that the covenant must be land-related or "touch and concern' the land before a subsequent purchaser would be bound" in the language of Tulk v. Moxhay. n114 At the very least, the flexible canons of equity offer opportunities to consider the varying policies identified in § 62.07 as support for "touch and concern." n115

COMPUTER-ASSISTED RESEARCH

LEXIS: touch! w/1 concern! w/30 equitable w/1 servitude!

FOOTNOTES:
(n1)Footnote 111. James Gordley, "Symposium on Law in the Twentieth Century: The Common Law in the Twentieth Century: Some Unfinished Business," *88 Calif. L. Rev. 1815 (2000)* at 1868: "If the owner agrees not to do certain other things, or if he agrees to do something himself, the restriction is a covenant, and common law courts will enforce it only if it satisfies certain technical requirements called 'touch and concern' and 'privity.' If these requirements are not satisfied, the covenant may still be enforceable in courts of equity, in which case it is called an 'equitable servitude.' "It is bizarre, however, to set up elaborate technical requirements that one type of interest must meet only to escape them through the creation of another type of interest... ." " John C. Paulus, "The Equitable Servitudes in Land Use Planning,"

2 Willam. L. Rev. 400 (1963).

(n2)Footnote 112. Susan F. French, "Toward a Modern Law of Servitudes: Reweaving the Ancient Strands," *55 S. Cal. L. Rev. 1261, 1277 (1982).*

(n3)Footnote 113. Berger, *supra* note 34, at 217.

(n4)Footnote 114. *Id.*

(n5)Footnote 115. *Nahrstedt v. Lakeside Village Condominium Ass'n, 878 P.2d 1275 (Cal. 1994),* interprets Cal. Civil Code § 1354 providing that use restrictions are "enforceable equitable servitudes, unless unreasonable." In a suit by a cat lover to prevent enforcement of a no-pet restriction, the court rejected a lower court's requirement that such covenants could be enforced "only upon proof that plaintiff's cats would be likely to interfere with the right of the homeowners to 'peaceful and quiet enjoyment of their property." Rejecting a lot-by-lot evaluation of reasonableness, the court supported uniform enforcement of a restriction unless the burdened owner "can show that the burden it imposes on affected properties so substantially outweighs the benefit of the restriction that it should not be enforced against any owner." (emphasis added)

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CHAPTER 62 SERVITUDES

7-62 Thompson on Real Property, Thomas Editions § 62.10

AUTHOR: Professor James L. Bross College of Law Georgia State University

§ 62.10 A Problem at the Boundary of Elements: Servitudes in Gross.

Servitudes in gross present two kinds of issues: first, the static benefit held in gross while the burden purportedly binds successors and, second, possible attempts to assign the benefit. The initial creation of a servitude in gross presents difficulties under some "touch and concern" tests, especially the *Bigelow/Clark* test analyzing the impact of the servitude on interests in land on both sides of the transaction. At law, servitudes in gross run afoul of some concepts of privity. n116 Even in equity, where privity is not directly applicable, a servitude in gross may not be protected under chancery rules relegating suits to ordinary contract remedies unless property interests are directly threatened. n117

Professor French, reporter for the new *Restatement*, identified several policy reasons against servitudes in gross, besides the ritualistic favor for "free alienation and unfettered use." Without a fully-developed recording system, as in English common law, an appurtenance requirement enhances "notice" because servitudes can be discovered through neighborhood inquiry. n118 In effective recording systems, the fact of a servitude in gross may be discoverable; but the current location of its owner will not necessarily be a public record. When landowners seek relief from obsolete servitudes, nearby land with appurtenant servitudes may rise in value when the burdened land is properly developed; n119 the holder of a benefit in gross may act as an obstructionist hold-out for windfall greymail.

Professor French also saw advantages to servitudes in gross, particularly for the categories of Environmental Easements treated in later sections of this chapter. n120 Statutes often address the right of enforcement in gross for facade easements, conservation easements and the like. n121 Many servitudes in gross can be legitimated under current law by bundling the promise with an additional interest. n122

Restatement of Servitudes § 2.6 declares that "the benefit of a servitude may be created to be held personally, in gross... ." The policies objections identified by the reporter in her earlier articles are addressed directly in other sections or treated as *de minimis*. n123 Assignment of benefits in gross was "a subject for another day" in 1982; pending the tentative drafts on succession, guidance may be found in the fact that "benefits in gross are *freely* permitted." n124

COMPUTER-ASSISTED RESEARCH

LEXIS: servitude! w/5 gross

FOOTNOTES:

(n1)Footnote 116. *See, e.g., Waikiki Malia Hotel v. Kinkai Props., 862 P.2d 1048 (Haw. 1993)* (when a parent company of the former owner of adjacent land attempted to enforce a height limit, the court recognized the theoretical possibility that a covenant in gross could be enforced without privity, but concluded that the language of the instant covenant did not express such an intention clearly).

(n2)Footnote 117. Clark, *supra* note 33, at 181. *Cf.* Susan F. French, "Toward a Modern Law of Servitudes: Reweaving the Ancient Strands," *55 S. Cal. L. Rev. 1261, 1287 at n.142 (1982).*

(n3)Footnote 118. French, *supra* note 103, at 1286.

(n4)Footnote 119. *Id.* at 1287.

(n5)Footnote 120. Restatement of Servitudes, *supra* note 1, *T.D. #1,* § 2.6, reporter's note to Comment d at 71 (1989).

(n6)Footnote 121. Allison Dunham, "Statutory Reformation of Land Obligations," *55 S. Cal. L. Rev. 1345 (1982).*

(n7)Footnote 122. Susan F. French, "Servitudes Reform and the New Restatement of Property: Creation Doctrines and Structural Simplification," *73 Corn. L. Rev. 928, 945-947 (1988).* The widely-studied case of *Pratte v. Balatsos, 113 A.2d 492 (N.H. 1955); 132 A.2d 142 (N.H. 1956);* Zecharia Chafee, "The Music Goes Round and Round: Equitable Servitudes and Chattels," *69 Harv. L. Rev. 1250 (1955),* would have no difficulty as a legal easement with a seal added or as a lease with a particular location possessed by the juke box.

(n8)Footnote 123. Restatement of Servitudes, *supra* note 1, § 2.6, Reporter's note to Comment d.

(n9)Footnote 124. Restatement of Servitudes, Tent. Draft #4 (1994), § 4.6 (1) provides: "Except where application of the rules stated in § 4.1 [Interpretation of Servitudes] leads to a different result, a servitude benefit that is not personal is transferable as follows ... . (b) A benefit in gross is freely transferable." § 8.1 of the Restatement of Servitudes eliminates ownership of benefitted land as a prerequisite to enforcement of servitudes. Harm to some legitimate interest is still required to show standing. Restatement of Servitudes, supra note 1, *T.D. #1,* § 2.6, Comment d.

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CHAPTER 62 SERVITUDES

7-62 Thompson on Real Property, Thomas Editions § 62.11

AUTHOR: Professor James L. Bross College of Law Georgia State University

§ 62.11 The Form of the Covenant.

"As to form, the promise must in theory be in writing, signed and sealed by the promisor. In many jurisdictions such formalities have been more or less dispensed with ... ." n125 *Restatement of Property* § 522(1) continues the writing and signing elements n126 before listing a series of instances in which the writing or signing requirements may be inapplicable. n127 *Restatement of Servitudes* § 2.7 makes "the formal requirements for the creation of a servitude ... the same as those required for creation of an estate in land of like duration." The old and new *Restatements* eliminate the "seal" requirement for real covenants while noting that seals had always been irrelevant to equitable servitudes. n128 Section 62.13, *infra*, on Common Schemes of Development offers an extended exploration of the boundaries of writing requirements for equitable servitudes.

FOOTNOTES:
(n1)Footnote 125. Clark, *supra* note 33, at 94.

(n2)Footnote 126. § 523 makes specific application of the Statute of Frauds to "Promises to Make Payments for Benefits in the Use of Land." *See* Restatement of Property, Topic A. The Statute of Frauds at 3163-3165 (1944).

(n3)Footnote 127. § 522(2): "A promise by the grantee in a deed poll ..."

§ 524: "Promises Enforceable by Estoppel."

§ 525: "An oral promise ... partly performed."

§ 527: "Promises ... inferred by Circumstances of Conveyance."

(n4)Footnote 128. Restatement of Property § 539, cmt. j at 3235. Some equitable servitudes are nothing more than legal easements lacking a seal. *Pratte v. Balatsos, 113 A.2d 492 (N.H. 1955).*

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CHAPTER 62 SERVITUDES

7-62 Thompson on Real Property, Thomas Editions § 62.12

AUTHOR: Professor James L. Bross College of Law Georgia State University

§ 62.12 Some Theories of Equitable Servitudes.

While transparent on utility, Tulk v. Moxhay was cryptic on theory. Sections of the opinion pose contract as the underpinning of equitable servitudes. n129 Other sections suggest a property interest such as an easement. n130 Professor Reno's exhaustive analysis offers historical support for both contract and property theory. n131

The contract theory traces to the consequential litigation occasioned by Ms. Wagner's failure to sing in Mr. Lumley's auditorium. Mr. Lumley's right to specific performance against Ms. Wagner imposes a duty on third parties not to interfere with the equitable remedy. n132 The modern descendant of Lumley's remedy appears in the suit by the Boston Patriots against University of Colorado boosters for enticing Chuck Fairbanks when Fairbanks had a contract to coach the Patriots. An advantage of the contract theory is that it supports affirmative obligations and personal liability for damages for interference to the equitable right. *In personam* liability attaches for meddling with *in rem* rights. The contract theory can effectively circumnavigate from equity back to remedies at law associated with real covenants. An implied assignment passes the benefit from promisee to successors. The contract theory more clearly avoids the issue of legal privity in the creation of equitable rights. n133

The property theory elongates the legal doctrine of equitable easements to a new situation, begetting an equitable property interest like the use or trust. The property/easement theory more easily explains why the original promisor can be relieved of an obligation after transferring the affected land, provides a ready explanation for passing of the benefit to the purchaser of benefitted land, and is more likely to produce just compensation when the affected land is condemned for uses which violate the servitude. n134 Affirmative obligations present greater challenges which are sometimes met by equitable analogies to "spurious easements." n135

Both property n136 and contract theories n137 have illustrious supporters. In the parallel development of contract and property theories in common schemes of development, *infra* at § 62.14, Justice Kenneth O'Connell typifies a pragmatic approach to theory:

> Some courts have regarded the prior grantee as a third-party beneficiary of a contract ... . A second theory, recognized by some courts, recognizes the creation of an implied reciprocal servitude ... . We feel free to employ either of these theories, as the case may demand... n138

Legal theory has moved from attempts to explain equitable servitudes by some exogenous source like contract or easements. After integrating equitable servitudes and real covenants, n139 scholars now attempt to integrate all servitudes into one system. n140 Cases like Davidson Bros. indicate judicial progress in justifying results on servitudes because of the legitimate needs of a system of restrictions, without limits imposed by systems of contract and easements created to meet different needs.

FOOTNOTES:

(n1)Footnote 129. "This court has jurisdiction to enforce a contract between the owner of land and his neighbor purchasing a part of it ... . Here there is no question about the contract ... . [T]he question is, not whether the covenant runs with the land, but whether a party shall be permitted to use the land in a manner inconsistent with the contract entered into by the vendee, and with notice of which he purchased." 2 P-H. 777-778.

(n2)Footnote 130. "For it an equity is attached to the property by the owner, no one purchasing with notice of that equity can stand in a different situation from the party from whom he has purchased." *Id.* The servitude is kin to an iron pin used for boundary markers.

(n3)Footnote 131. Russell R. Reno, "Equitable Servitudes in Land," *28 U. Va. L. Rev. 951 (1942).*

(n4)Footnote 132. *Lumley v. Wagner, 1 De G. M. & G. 604 (Ch. App. 1852); Lumley v. Gye, 2 E. & B. 216, 118 Eng. Rep. 1083 (Q.B. 1854).*

(n5)Footnote 133. *Streets v. J. M. Land & Dev. Co., 898 P.2d 377, 380 (Wyo. 1995)* (adopting contract theory to allow imposition of a restriction by a contract purchaser).

(n6)Footnote 134. Ralph W. Aigler, "Measure of Compensation for Extinguishment of Easement by Condemnation," *1945 Wis. L. Rev. 5 (1945);* 2 Nichols on Eminent Domain § 5.73[1] (3d ed. 1970). *Cf. Southern Cal. Edition v. Bourgerie, 507 P.2d 964 (Cal. 1973),* declining to use labels as a basis for taking analysis. *Harris County Flood Control Dist. v. Patiohome Owners Ass'n, 1996 Tex. App. LEXIS 37 (Tex. App. 1996),* found a taking of property in the condemnation of 20 parcels subject to subdivision assessments. The court remands for determination of accrued unpaid assessments and the lump-sum capitalized value of future assessments.

(n7)Footnote 135. Clark, *supra* note 33, at 122-124.

(n8)Footnote 136. *Id.* at 174-175: "It seems preferable, therefore, to adopt the view of Dean Roscoe Pound and other learned writers that these restrictions be considered upon the land, similar at least to easements and profits." [citations omitted].

(n9)Footnote 137. Harlan F. Stone, "Equitable Rights and Liabilities of Strangers to a Contract," *18 Col. L. Rev. 291 (1918);* 3 Tiffany, Real Property § 861 at 485-487 (3d ed. 1939).

(n10)Footnote 138. *Rodgers v. Reimann, 361 P.2d 101, 103-104 (Or. 1961).* While on the faculty of the University of Oregon, Justice O'Connell was the maven of Oregon property teachers.

(n11)Footnote 139. Berger, *supra* note 34.

(n12)Footnote 140. Richard Reichman, "Toward a Unified Concept of Servitudes," 55 S. Cal. 1177 (1982), and related commentaries in that Symposium Issue of 55 S. Cal. #6 (1982).

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CHAPTER 62 SERVITUDES

7-62 Thompson on Real Property, Thomas Editions § 62.13

AUTHOR: Professor James L. Bross College of Law Georgia State University

§ 62.13 The Notice Element of Equitable Servitudes.

The imposition of an additional "notice" stricture for equitable servitudes is comprehensible in light of the redundant emphasis on the word "notice" in Tulk v. Moxhay. n141 French ascribes the element to Britain's lack of an effective recording system. n142 The independent "notice" element can furnish either more or less protection for the burdened successor than already exists in law. n143 As less protection, one may consider the rights of burdened parties under common schemes discussed in the next section.

FOOTNOTES:
(n1)Footnote 141. "Covenants Respecting the Use of Land," 5 Powell on Real Property, *supra* note 39, P 673[2][d] (Rohan ed., 1991). Quotations from Tulk v. Moxhay, *supra* notes 87, 88.

(n2)Footnote 142. Susan F. French, "Servitudes Reform and the New Restatement of Property: Creation Doctrines and Structural Simplification," *73 Corn. L. Rev. 928, 941 (1988).*

(n3)Footnote 143. As more protection, French cites a shield for donees or for purchasers in a race-notice jurisdiction who buy before recording of the servitude and record after recording of the servitude. *Compare Mannweiler v. LaFlamme, 781 A.2d 497 (Conn. App. 2001)* (failure to record restrictions as required by Connecticut's Marketable Title Act did not extinguish restrictions) *with Virginia Highland Civic Association v. Paces Properties, Inc., 550 S.E.2d 128 (Ga. App. 2001)* (purchaser of property from State Department of Transportation not charged with notice of terms of settlement agreement on highway project. The settlement terms were also part of an Atlanta City Ordinance and a resolution of the Georgia Senate.)

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CHAPTER 62 SERVITUDES

7-62 Thompson on Real Property, Thomas Editions § 62.14

AUTHOR: Professor James L. Bross College of Law Georgia State University

§ 62.14 Common Schemes of Development.

[Go To Supp]

A well-designed system of covenants will establish the geographic, temporal and substantive limits of the restrictions applicable to the development. Implementation of such a system may include: filing a plat describing the land within the development, simultaneously filing a declaration of restrictions establishing the restrictions applicable to the various segments described in the plat and selling property by reference to the plat and declaration. n144

Where a developer has established uniform restrictions with clear physical boundaries, the restrictions are described as a "Common Scheme of Development." n145 The concept of a common scheme is useful even where proper procedures are followed in drafting and recording the system of restrictions. For example, restrictions phrased as personal obligations of the developer can be construed to bind and benefit all buyers within the subdivision where a common scheme is demonstrated. n146

The common scheme can provide guidance for discretionary functions performed by boards and committees, n147 although a well-drafted document cannot eliminate all of the risks of such discretionary functions. n148 The right to "change or modify" restrictive covenants includes the power to impose assessments secured by liens to maintain facilities and infrastructure. n149 Wise v. Harrington Grove Community Association, Inc., n150 held that planned community under state statute had no right to impose fines for violating restrictions in the absence of express authority in articles and bylaws.

The more challenging and problematic use of the common scheme is in establishing implied intent and notice where a developer has not followed careful procedures. For instances of inadequate documentation and notice, the presence of widespread - although not necessarily universal - similar restrictions on lots sold by a single developer can raise an inference that development-wide, mutually enforceable restrictions are intended. n151 Moreover, the presence of such widespread restrictions can give notice of the existence of an intent to mutually bind and benefit all lots within the development. n152

Two theories are advanced for the inferences raised by the existence of a common scheme. As with the theories for

equitable servitudes generally, n153 either a property model or a contract model can support those inferences:

> 1. The property theory, reciprocal negative easement, posits an implied mutual intent to bind and benefit all property held by the developer when the developer first extracts a promise from a buyer. n154 The first express restrictions set the pattern for implied restrictions on all remaining unsold lots. The presence of similar express restrictions in later transfers provides evidence of the implied intent in the first restrictive transfer. A pattern of development in accordance with the implied restrictions creates "notice" of the implied intent to bind all lots, even those not expressly restricted. n155 The reciprocal negative easement has no retroactive power to bind lots sold before the first express covenant by a buyer. n156
>
> 2. The contract theory is essentially an extension of third-party beneficiary theory to an entire development. n157 The theory relies on an implied intent that an express covenant was intended to benefit all buyers within the development. n158 The contract theory can bestow retroactive benefits on lots sold before the first express restriction. Retroactive burdens would require some peculiar extension of mutuality or innovative third-party burden theory. n159 The contract-based common scheme of development in modern practice may include mixed-use developments with non-uniform restrictions. n160

The common scheme can impose unforeseen burdens on some purchasers of property which is apparently unrestricted. The rights of those unexpectedly burdened buyers are balanced against the rights of the majority of buyers who purchased restricted lots in expectation of a uniformly restricted development. Common scheme cases may represent a primitive type of land-buyer consumer protection making utilitarian balancing in favor of the expectations of the greatest number at the expense of the rights of a few. Developers who sell lots restricted individually, rather than restricted in bulk by methods such as filing of a declaration, may be engaged in their own "scheme" to maintain flexibility to abort a pattern of restrictions if market conditions change or were ill-judged initially. n161

Conservative interpretative canons of construction - such as construction against a grantor, interpretation fixed at the moment of delivery and constructional preference for unfettered use of land - undercut the implied intent and notice for incomplete common schemes. California's cases represent a consistent line of precedent against implied common schemes. n162

COMPUTER-ASSISTED RESEARCH

LEXIS: common w/1 scheme! w/5 develop! w/30 restrict!

FOOTNOTES:

(n1)Footnote 144. John C. Paulus, "The Use of Equitable Servitudes in Land Use Planning," 2 Willam. L.J. 400 (1963).

(n2)Footnote 145. *See* Covenants as to Use, P 672 Implied Covenants; Common Plan of Development, 5 Powell on Real Property, *supra* note 39.

(n3)Footnote 146. *See, e.g., Hunt v. Del Collo, 317 A.2d 545 (Del. Ch. 1974)* (Obligation of developer to build driveways imposed on all buyers. Common scheme spreads the burden and benefit uniformly despite restrictive language that "Declarant Joseph G. Savarese, covenants and agrees that *he* will, at *his sole cost and expense* ..." (emphasis added).) *Cf. Tennsco Corp. v. Attea, 2002 Tenn. App. LEXIS 423* (6/13/2002), noting the absence of a common scheme in holding a covenant personal to the original sellers.

(n4)Footnote 147. *Hanson v. Salishan Properties, Inc., 515 P.2d 1325 (Or. 1973).*

(n5)Footnote 148. *Riss v. Angel, 934 P.2d 669 (Wash. 1997)* (homeowners and their board are jointly and severally

liable for damages to lot owner unreasonably and arbitrarily denied approval of construction plans); *Stuart v. Flemming, 560 N.W.2d 336 (Mich. 1997)* (failure to form an Architectural Control Committee may bar enforcement of covenant requiring new construction to be "beautifully harmonious"). *Cf. Cypress Garden, Ltd. v. Platt, 1997 N.M. App. LEXIS 125* (Dec. 3, 1997) (held that no standards were needed for a covenant giving a developer discretionary power over mobile homes). *Schovee v. Mikolasko, 737 A.2d 578 (Md. 1999),* cites Restatement (Third) of Servitudes in determining whether a lot falls within a common scheme.

(n6)Footnote 149. *Evergreen Highlands Ass'n v. West, 73 P.3d 1 (Colo. 2003).*

(n7)Footnote 150. *584 S.E.2d 731 (N.C. 2003).*

(n8)Footnote 151. *Snow v. Van Dam, 197 N.E. 224 (Mass. 1934). Lake Limerick County Club v. Hunt Mfg. Homes, Inc., 84 P.3d 295 (Wash. App. 2004),* follows the Restatement of the Law Third, Property (Servitudes), § 1.1 in merging law and equity rules under a common scheme to allow an implied obligation to pay association fees. Under *Louisiana's Civil Law Code, Chambless v. Parker, 867 So. 2d 867 (La. App. 2004),* reached a result analogous to the equitable rules in other jurisdictions by finding a common scheme where 13 of 18 lots were bound by express restrictions.

(n9)Footnote 152. *Sanborn v. McLean, 206 N.W. 496 (Mich. 1925).*

(n10)Footnote 153. *Supra* § 62.12.

(n11)Footnote 154. *Sanborn v. McLean , supra* note 117.

(n12)Footnote 155. In Sanborn v. McLean, only 53 of 91 lots were expressly restricted. Nonetheless, McLean - whose own title contained no restrictions - was bound to a single-family plan of restrictions. The court envisioned a title search in which McLean, her curiosity triggered by the uniform appearance of the area, would check the chain of title to all lots in the same area to discover a pattern of restrictions imposed by a common developer. *See,* Lawrence Berger, "A Policy Analysis of Promises Respecting the Use of Land," *55 Minn. L. Rev. 167, 201-202 (1971),* for a critique of the court's concept of notice. *Oliver v. Schultz, 885 S.W.2d 699 (Ky. 1994),* overrules Kentucky authority implying notice from deeds to collateral properties where a restriction was not included in a landowner's record title. *Schovee v. Mikolasko, 356 Md. 93, 737 A.2d 578 (1999),* cites Restatement (Third) of Servitudes in determining whether a lot falls within a common scheme. *Fong v. Hashimoto, 994 P.2d 500 (Hawaii 2000),* requires that all lots in a development must be restricted to impose an equitable servitude under a common scheme. *Cf. Richart v. Jackson, 758 A.2d 319 (Vt. 2000),* finding inquiry notice of binding restrictions against buyer whose chain of title contained no restrictions.

(n13)Footnote 156. *But see, Evans v. Pollock, 796 S.W.2d 465 (Tex. 1990),* which purports to use negative reciprocal easement to bind two lots sold before any express restrictions were imposed. *Walsh v. East Pikeland Township, 829 A.2d 1219 (Pa. Comwlth. 2003)* (a lot transferred before the recording of a document containing covenants was not subject to those covenants for lack of notice); *Barner v. Chappell, 585 S.E.2d 590 (Va. 2003)* (no vertical privity in chain of title of property transferred before initial covenants).

(n14)Footnote 157. *See* Snow v. Van Dam, note 116 *supra.* The Massachusetts court used contract analysis because its precedent under the Statute of Frauds precluded any implied restrictions, including the negative reciprocal easement.

(n15)Footnote 158. *Everson v. Wieckert, 1997 Wisc. App LEXIS 108 (1997).*

(n16)Footnote 159. *Cf.* Evans v. Pollock, note 121 *supra*. *Roper v. Camuso, 829 A.2d 589 (Md. 2003)* (a neighbor whose land was not expressly subject to restrictive covenants was intended to be part of community and had standing to seek equitable enforcement of restrictions).

(n17)Footnote 160. *Gulf Oil Corp. v. Fall River Hous. Auth., 306 N.E.2d 257 (Mass. 1974).*

(n18)Footnote 161. *McInerney v. Pinehurst Area Realty, Inc., 590 S.E.2d 313 (N.C. App. 2004)* (a developer's amendment of existing covenants was not an unfair trade practice).

(n19)Footnote 162. *See, e.g., Werner v. Graham, 183 P. 945 (Cal. 1919); Riley v. Bear Creek Planning Comm'n, 551 P.2d 1213 (Cal. 1975). Cf. Citizens for Covenant Compliance v. Anderson, 906 P.2d 1314 (Cal. 1995), rev'g 34 Cal. Rptr. 2d 523 (Cal. App. 1994)* (restrictions enforceable against a buyer whose deed did not recite the restrictions when a declaration demonstrating an intent to create a common scheme was recorded before buyer executed a contract of sale).

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CHAPTER 62 SERVITUDES

7-62 Thompson on Real Property, Thomas Editions § 62.15

AUTHOR: Professor James L. Bross College of Law Georgia State University

§ 62.15 Changed Conditions as a Defense to Enforcement.

Obsolete restrictions are a concern in the development market. n163

For covenants at law where only damages are available as a remedy, obsolescence is solved by the inability to prove monetary harm when restrictions cease to serve their function. For equitable servitudes, where injunctions may be available to complainants unable to prove any real damages, obsolescence is not a self-solving problem. n164

Courts have developed two doctrines under the rubric of "changed conditions" to remove equitable enforcement of outmoded servitudes:

1. Trustees of Columbia College v. Thacher n165 is the root of the earlier theory of changed conditions. After an elevated railroad was built through an area restricted to residential uses, the court concluded that "the land in question furnishes an ill seat for dwelling houses." The original purpose of the restrictions could no longer be fulfilled under the el tracks. New York's approach to changed conditions is a precursor of the contract doctrine of frustration of purpose. n166 In the absence of an express statement of purpose in the restrictions, the court will determine the purpose. n167 After a trial court found changed conditions relieved enforcement of a non-compete clause protecting an original lessee who was not currently operating a grocery store in the shopping center, the appellate court ruled that the absence of a competing grocery store could still be an important motive for renting retail space used for another store. n168 In another application of frustration of purpose, *River Heights Associates v. Batten*, n169 limited evidence of change to those occurring inside the subdivision; a widened highway and strip commercial abutting the undeveloped lots at the periphery of the subdivision were not relevant where the only changes within the boundaries of the subdivision were aging homes and maturing trees.

2. Downs v. Kroger n170 is the fundamental precedent for the second theory for changed conditions. Rather than consider the functionality of the restrictions over the whole development, *Downs* weighs the hardship of enforcement against individual lots, particularly those lots at the perimeter of the restricted area. *Downs* is analogous to the rules for variances in zoning. n171 Hardship on the perimeters of restricted areas is an entirely predictable outcome. If there were no pressures in the marketplace for uses other than those to which the restrictions limit the land, there would be no need for the restrictions.

> Those pressures for other uses are inevitably experienced strongly where the restricted development abuts other unrestricted land. Intelligent buyers of perimeter lots should discount appropriately in anticipation of those difficulties. The hardship approach to changed conditions may offer relief from the normal forces in the land market, not from unique unanticipated conditions. n172

In practice, the two theories may be discussed interchangeably without regard to their different underpinnings and implications. Burden v. Lobdell n173 quotes *Annot., 4 A.L.R.2d 1114 (1949):* "Consequently, for a change in neighborhood conditions to relieve against enforcement ... such change may be so radical as to render the restrictions unreasonable, confiscatory, and discriminatory [*Downs*], or as practically to destroy the purpose for which the restriction was originally imposed [*Thacher*] ... ." [bracketed notations added]. n174

COMPUTER-ASSISTED RESEARCH

LEXIS: change! w/2 condition! w/30 restrict! or easement! or servitude! or covenant!

FOOTNOTES:

(n1)Footnote 163. Servitudes are not terminated by the Rule against Perpetuities that may erase obsolete development limits enforced by forfeiture. *See* R. Link & K. Licata, Perpetuities Reform in North Carolina: The Uniform Statutory Rule against Perpetuities, Nondonative Transfers, and Honorary Trusts, *74 N. C. L. Rev. 1783, 1837 (1996):*

> The better view is that restrictive covenants are not subject to the common-law Rule or the USRAP. *See* Restatement (Third) of Property (Servitudes) 3.3 (Tentative Draft No. 2. 1991), Hess, *supra* note 32, at 275, n. 40. The duration of restrictive covenants is regulated by the doctrine of changed conditions whereby an outmoded covenant becomes unenforceable.

Cf. J. Mahoney, "Perpetual Restrictions on Land and the Problem of the Future," *88 Va. L. Rev. 739 (2002),* expressing concern about the unlimited duration of Conservation Easements. See, infra, at § 61.28.

(n2)Footnote 164. Although the origin of the doctrine was in equity as a defense to specific relief, some cases use the doctrine to bar legal actions for damages. *See* cases collected in Gerald Korngold, Private Land Use Arrangements § 11.07 at n. 137 (1990). *See* Michael Heller, "The Boundaries of Private Property," *108 Yale L. J. 1163 (1999),* which expresses concern about potential risks from fragmentation of property interests that may, among other problems, lock common interest associations "into low-value uses resulting in a tragedy of the anticommons." *Id. at 1185.*

(n3)Footnote 165. *87 N.Y. 311 (1882).*

(n4)Footnote 166. *Whitling v. Snyder, 659 N.E.2d 423 (Ill. App. 1996),* quotes Roscoe Pound, The Progress of the Law, 1918-19, Equity, *33 Harv. L. Rev. 813, 821 (1920):* "The duration of the servitude is determined by its purpose."

(n5)Footnote 167. *Chesterfield Meadows Shopping Center Assoc. v. Smith, 568 S.E.2d 676 (Va. 2002)* gave great weight to testimony by the original promissee of the covenant in concluding that the essential objects and purposes of a restriction protecting an historic structure had been practically destroyed by general change to a commercial area

(n6)Footnote 168. *Tippecanoe Associates v. Kimco Lafayette 671, Inc., 811 N.E.2d 438 (Ind. App. 2004).*

(n7)Footnote 169. *591 S.E.2d 683 (Va. 2004).*

(n8)Footnote 170. *254 P. 1101 (Cal. 1927).*

(n9)Footnote 171. *See generally* Daniel R. Mandelker, Land Use Law §§ 6.35-6.45 (2d ed. 1988).

(n10)Footnote 172. *Cf. Klefstad Companies, Inc. New Boston Allison Ltd. Partnership, 2000 U.S. Dist. LEXIS 14637* (S.D. Ind. 9/29/2000). As a matter of law, restrictions setting up mixed-use common scheme did not violate public policy and were not subject to changed conditions defense simply because current market conditions diminished value of a project complying with the original plan for "a twelve-story Office Tower with small floor plates."

(n11)Footnote 173. *235 N.E.2d 660, 663 (Ill. App. 1968).*

(n12)Footnote 174. *Smith v. Chesterfield Meadows Shopping Center Associates, 523 S.E.2d 834 (Va. 2000),* allows extrinsic evidence to show the purpose of restrictions challenged under the changed conditions doctrine.

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CHAPTER 62 SERVITUDES

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§ 62.16 Miscellaneous Equitable Defenses.

[Go To Supp]

Many aspects of remedial analysis in Equity are obviated by Chancery's willingness to "entertain bills for injunctions to prevent their [covenants'] breach although the breach would cause no substantial injury." n175 Nevertheless, examples can be found of balancing of hardship, n176 laches, n177 unclean hands, n178 estoppel, n179 and waiver or acquiescence. n180

FOOTNOTES:
(n1)Footnote 175. *Hartman v. Wells, 25 N.E. 500 (Ill. 1913).*

(n2)Footnote 176. *Lange v. Scofield, 567 So. 2d 1299 (Ala. 1990). Pelosi v. Wailea Ranch Estates, 985 P.2d 1089 (Haw. 1999),* allows later purchaser of burdened property to raise equitable balancing of interests and laches even though Hawaii normally excludes such defenses to intentional breaches of equitable servitudes; dissenting judge accuses the majority of opening a loophole for intentional violators who will simply transfer title to raise defenses. *Cf. Brooks v. Orshoski, 717 N.E.2d 1137* (Ohio App. 6 Dist. 1999) (benefitted homeowner entitled to injunction against covenant violator even absent showing of irreparable or actual harm).

(n3)Footnote 177. *Hunt v. DelCollo, 317 A.2d 545 (Del. Ch. 1974).*

(n4)Footnote 178. *Cordogan v. Union Nat'l Bank of Elgin, 380 N.E.2d 1194 (Ill. App. 1978).*

(n5)Footnote 179. *Sugar Creek Homes Ass'n v. Berry, 590 S.W.2d 590 (Tex. Civ. App. 1979).*

(n6)Footnote 180. Labelling is inconsistent for those cases where complainants seek to enforce against one violator while tolerating similar violations by other violators. *See, e.g., Smith v. Shinn, 350 P.2d 348 (Idaho 1960). Compare Tottis v. Dearborn Hills Civic Assoc., 2002 Mich. App. LEXIS 888* (6/18/02) (finding waiver where 11 of 47 houses on the same street violated the garage setback from which plaintiffs sought relief) *with Pietrowski v. Dufrane, 634 N.W.2d 109 (Wis. App. 2001)* (plaintiff did not waive right to enjoin improper detached garage by tolerating prohibited sheds in other neighbors' yards). *Prairie Hills Water and Development Co. v. Gross, 653 N.W.2d 745 (S.D. 2002),* finesses a

business' equitable defenses to residential-only restrictions by declaring the business a public nuisance.

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CHAPTER 62 SERVITUDES

7-62 Thompson on Real Property, Thomas Editions § 62.17

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§ 62.17 Statutory Reforms: Time Limits and Obsolescence.

Legislation terminating servitudes may address the broad public policy implications of antiquated restrictions that obstruct beneficial development patterns or it may serve narrow private interests of influential politicians. n181 The laws enacted have been of varying complexity.

Georgia's original statute represents the simplest model of legislation: a twenty-year time limit on the enforcement of covenants restricting use in zoned areas. n182 The twenty-year limit happened to coincide with the age of covenants preventing the development of Lenox Square Shopping Center by a well-connected builder. As condominium and other development forms have created a demand for more durable restrictive agreements, n183 especially to counter the judiciary's pro-development standards for review of zoning, n184 the legislature has retreated from the time limit. House Bill 556 of the 1993 Legislative Session amended O.C.G.A. § 44-5-60 to provide automatic renewal of covenants for an indefinite series of twenty-year periods. n185

Massachusetts General Laws c. 184, § 30, inserted by St. 1961, c. 448, § 1, is a more intricate approach to removing restrictions. Unlike Georgia's old law, which provided no compensation for eradicated servitudes, the Massachusetts law removes equitable enforcement while paying damages for servitudes which retain value. n186 Several of the provisions of the Massachusetts law merely track existing equity doctrines. n187 The innovative provisions of the statute allow a court to deny equitable relief when enforcement is "not in the public interest." Under traditional judicial rules, "a restrictive covenant cannot be construed according to the results of a local election or plebiscite as to whether it should be enforced. It is individual and specific and intended to be enforced by anyone who entered into it in good faith and wishes to retain its benefits for his own property." n188 In Massachusetts, private property interests in servitudes are now subject to the public's iron whim. Targeted state laws may "reinterpret" specific types of restrictions to change their effect. n189 Federal bankruptcy law may "launder" real property from covenants and servitudes when a trustee conveys property "free and clear of all liens, charges and encumbrances." n190

FOOTNOTES:
(n1)Footnote 181. *See* dissenting opinion of Quirico, J., in *Blakeley v. Gorin, 313 N.E.2d 903 (Mass. 1974),* recounting legislative accommodations for a site owned by Cabot, Cabot & Forbes.

(n2)Footnote 182. O.C.G.A. § 44-5-60, old Code § 29-301, upheld as constitutional against a taking challenge in *House v. James, 207 S.E.2d 201 (Ga. 1974). Cf. Palm Beach County v. Cove Club Investors Ltd., 734 So. 2d 379,* (Fla. 1999), finds a taking of a club's rights to dues payable from assessment on lot condemned by County.

(n3)Footnote 183. *See* Seth G. Weissman & Clara L. Fryer, "Recommended Changes in the Law Affecting Condominium and Homeowner Associations in Georgia," 1 Ga. St. L. Rev. 185 (1985).

(n4)Footnote 184. James S. Altman, Paul Bolster & James L. Bross, "Judicial Review of Georgia Zoning: Cyclones & Doldrums in the Windmills of the Mind," 2 Ga. St. L. Rev. 97 (1986).

(n5)Footnote 185. *Appalachee Enters. v. Walker, 463 S.E.2d 896 (Ga. 1995),* found an impermissible interference with vested property rights in the new act's attempt to extend those existing covenants whose twenty-year time limit had not yet expired. The holding limits the application of the statute to those covenants created after the effective date of the statute and leaves a ticking time-bomb of doubt about the status of use restrictions in preexisting condominiums. Although Georgia's new procedure for renewal of covenants did not apply to pre-existing restrictions, a property owner who participated in an ineffective attempt to renew older restrictions could be bound by promissory estoppel. *Canterbury Forest Ass'n v. Collins, 532 S.E.2d 736 (Ga. App. 2000).*

(n6)Footnote 186. *Blakeley v. Gorin, supra n.7,* upheld the Massachusetts law against a taking challenge. The case supplied two alternative rationales:

> 1. If there was a taking, just compensation was paid under the damages remedy and the taking was for a public use under urban renewal precedent.
>
> 2. There was no taking because only the remedy, not the substantive property right, was removed. This second rationale appears difficulty under *Riverbank Improvement Co. v. Chadwick, 117 N.E. 244 (Mass. 1917),* which invalidated an earlier Massachusetts law as a taking. *Blakeley* does not overrule *Riverbank.*

(n7)Footnote 187. "Changes in the character of the properties affected ..." mirrors changed conditions. Another section describes waiver, laches and estoppel.

(n8)Footnote 188. *Cordogan v. Union Nat'l Bank of Elgin, 380 N.E.2d 1194 (Ill. App. 1978). Hostler v. Green Park Development Co., 986 S.W.2d 500 (Mo. App. 1999),* holds that "zoning ordinances cannot defeat the rights of a landowner in a covenant because zoning is not a proper condemnation action."

(n9)Footnote 189. *Sussex Commun. Servs. v. Soc'y. for Mentally Retarded, 467 S.E.2d 468 (Va. 1996)* (Va. Code § 39-96.6(C) construing various care and group homes to be "single-family" applies retroactively to existing restrictions).An additional legislative limit on community restrictions has been proposed in Vermont where the "Right to Dry" bill has been introduced to protect outdoor clotheslines from covenants in deeds, leases or condominium declarations. Holding the Line, Yankee at 14 (Feb. 2000).

(n10)Footnote 190. *See, e.g., Marathon Fin. Corp. v. H.H.C. Liquidation Corp., 483 S.E.2d 757 (S.C. App. 1997). See generally* Mattingly, "Sale of Property of the Estate Free and Clear of Restrictions and Covenants in Bankruptcy," *4 Am. Bankr. Inst. L. Rev. 431 (1996).* George Kuney, "Further Misinterpretation of Bankruptcy Code Section 363(f): Elevating in rem Interests and Promoting the Use of Bankruptcy Proof Real Estate Developments," *76 Am Bankr. L.J. 389 (2002).* Although a sale in bankruptcy may strip the land itself of covenants, bankruptcy may not relieve the bankrupt estate of its obligations under assessments attached to the bankrupt's land. *See Bartee v. Tara Colony Homeowners Association, 212 F.3d 277, 36 Bankr. Ct. Dec. 34 (5th Cir. 2000);* Ricotta, "Comment: Community Associations and Bankruptcy: Why Post Petition Assessments should not be Discharged," *15 Bank. Dev. J. 187 (1999).*

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CHAPTER 62 SERVITUDES

7-62 Thompson on Real Property, Thomas Editions § 62.18

AUTHOR: Professor James L. Bross College of Law Georgia State University

§ 62.18 Introduction to Environmental Easements.

For certain purposes to which equitable servitudes are otherwise suited, two characteristics are consequential flaws: lack of durability over long periods of time n191 and lack of assurance that equitable servitudes can be enforced in gross by individuals and organizations without land clearly benefitted by the servitude. n192 New categories of statutory servitudes have arisen to address those two flaws for specified classes of restrictions, primarily restrictions serving environmental purposes. n193 Iowa immunizes scenic easements from the changed conditions doctrine n194 while Georgia excepted scenic easements from its old statutory time limit on servitudes limiting use. n195 Montana, a Field Code state, lists easements "conserving open space to preserve park, recreation, historic, cultural and natural values" under both "easements attached to land" n196 and "easements not attached to land." n197 In their ambidextrous capacity to be either appurtenant or in gross, Montana's preservation easements are classified with the right to a particular seat in a church under the Code.

FOOTNOTES:
(n1)Footnote 191. Primarily as a result of the defenses discussed in §§ 62.15-62.17. Jeffrey Tapick, Student Note: "Threats to the Continued Existence of Conservation Easements," *27 Colum. J. Envtl. L. 257 (2002).*

(n2)Footnote 192. *Compare Johnson v. State Hwy. Dept., 556 P.2d 724 (Or. App. 1976)* (Highway Dept. lacked privity to enforce covenant at law), *with Bennett v. Commissioner of Food & Agrl., 576 N.E.2d 1365 (Mass. 1991)* (state officials could enforce certain easements in gross). Statutory rights of enforcement for Environmental Easements are akin to Texas law granting the City of Houston power to enforce private servitudes. *See, e.g., Houston v. Revels, 2001 Tex. App. LEXIS 4119* (6/21/01); *Troung v. Houston, 2002 Tex. App. LEXIS 9081* (12/19/02).

(n3)Footnote 193. In August, 2003, the National Conference of Commissioners on Uniform State Laws approved a Uniform Environmental Covenants Act (UECA). *www.law.upenn.edu/bll/ulc/ulc_frame.htm.* Amy Edwards, "Institutional Controls: The Converging Worlds of Real Estate and Environmental Law and the Role of the Uniform Environmental Covenant Act," *35 Conn. L. Rev. 1255 (2003);* Laurie DeBrie Thanheiser, "The Allure of a Lure: Proposed Federal Land Use Restriction Easements in Remediation of Contaminated Property," *24 B.C. Envtl. Aff. L. Rev. 271 (1997).* E. McDaniel, "The Uniform Conservation Easements Act: An Attorney's Guide for the Oklahoma Landowner," *55 Okla. L. Rev. 341 (2002);* M. Thompson and J. Jay, "An Examination of Court Opinions on the Enforcement and Defense of Conservation Easements and Other Conservation and Preservation Tools: Themes and

Approaches to Date," *78 Denv. U. L. Rev. 373 (2001);* J. Tapick, "Threats to the Continued Existence of Conservation Easements," *27 Colum. J. Envt'l. L. 257 (2002);* P. Nichols, "Do Conservation Easements and Water Mix in Colorado?" *5 U. Denv. Water L. Rev. 504 (2002).*

(n4)Footnote 194. Iowa Code § 308.4 (1991). *See* Note, "Conservation Easements and the Doctrine of Changed Conditions," *40 Hastings L.J. 1187 (1989).*

(n5)Footnote 195. O.C.G.A. § 44-5-60 (1992).

(n6)Footnote 196. Montana Code § 70-17-101 (1991).

(n7)Footnote 197. Montana Code § 70-17-102 (1991).

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CHAPTER 62 SERVITUDES

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AUTHOR: Professor James L. Bross College of Law Georgia State University

§ 62.19 Conservation Easements: Natural Areas.

"A conservation easement is designed to preserve the servient land in an undeveloped or natural state." n198 Conservation easements for natural areas were the thrust of the first wave of statutes creating environmental easements. The impetus for those statutes were two of the strangest bedfellows in environmental law: Highway Departments and the Nature Conservancy. State Highway Departments, "encouraged" by federal policy and the threat of lost federal funding, lobbied for easements conserving the views from and natural ambiance around highways; n199 there is no evidence of any sense of irony in the lobbying by highway builders. Among the non-highway conservation easements are those for Columbia River Gorge, n200 the Connecticut River, n201 natural areas, n202 scenic easements, n203 scenic urban waterways, n204 trails, n205 wild & scenic rivers, n206 and the Willamette River Greenway. n207 Donations of conservation easements to non-profit organizations like the Nature Conservancy or to governments n208 are often tax-motivated. n209 Expanded taking rules applicable to stringent limits on development may spur government interest in environmental easements. n210

COMPUTER-ASSISTED RESEARCH

LEXIS: conservation w/1 easement! w/30 natural w/2 area! or state!

FOOTNOTES:
(n1)Footnote 198. *See* Jon W. Bruce & James W. Ely, The Law of Easements and Licenses in Land § 11.02 (1988). *See also* Melissa Walter Baldwin, "Conservation Easements: A Viable Tool for Land Preservation," *32 Land & Water L. Rev. 89 (1997). Cf.* Federico Cheever, "Public Good and Private Magic in the Law of Land Trusts and Conservation Easements: A Happy Present and a Troubled Future," *73 Den. U. L. Rev. 1077 (1996).* Maureen Rudolph and Adrian Gosch, "A Practitioner's Guide to Drafting Conservation Easements and the Tax Implications," *4 Great Plains Nat. Res. J. 143 (2000).*

(n2)Footnote 199. Ark. Stat. Ann. § 27-69-105 (1992) (Mississippi River Parkway); Ark. Stat. Ann. § 27-74-501 (other highways); Cal. Gov Code § 7000 (1992) (Westside Freeway); Ill. Rev. Stat. Ch. 105, P 904 (1991) (Alton Lake Heritage Parkway); Ill. Rev. Stat. Ch. 121, P 4-201.15 (1991) (Scenic easements generally in Highway Dept.); Iowa Code § 308.3 (1991) (Mississippi River Parkway); Miss. Code Ann. § 55-13-3 (1991) (Natchez Trace Parkway).

(n3)Footnote 200. Or. Rev. Stat. § 196.124 (1991).

(n4)Footnote 201. Conn. Gen. Stat. § 25-102(f) (1990).

(n5)Footnote 202. Tenn. Code Ann. § 11-15-102 (1992).

(n6)Footnote 203. Mass. Ann. Laws ch. 1601 (1992).

(n7)Footnote 204. Wis. Stat. § 30.275 (1989-90).

(n8)Footnote 205. N.C. Gen. Stat. § 113A-90 (1991); N.J. Stat. § 13:8-32 (1991).

(n9)Footnote 206. N.J. Stat. § 13:8-47 (1991).

(n10)Footnote 207. Or. Rev. Stat. § 390.332 (1991).

(n11)Footnote 208. Cal. Gov. Code § 51065 (1992) and Md. Natural Resources Code § 5.1217 (1991) authorize governments to accept conservation easements.

(n12)Footnote 209. I.R.C. § 170(h) (1992); *McLennan v. United States, 24 Cl. Ct. 102 (1991);* "Property Tax Assessment of Conservation Easements," *17 B.C. Envtl. Aff. L. Rev. 823 (1990). Browning v. C.I.R., 1997 U.S. Tax Ct. LEXIS 69, 10 T. C. No. 16 (1997),* considers a charitable deduction for donation of a farmland preservation easement to Howard County, Maryland.

(n13)Footnote 210. *Lucas v. South Carolina Coastal Council, 112 S. Ct. 2886 (1992).*

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CHAPTER 62 SERVITUDES

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AUTHOR: Professor James L. Bross College of Law Georgia State University

§ 62.20 Conservation Easements: Farmland Preservation.

Sparked by some of the same tax consequences that drive conservation easements n211 and by provisions of successive federal statutes on agriculture, n212 easements for farmland preservation are in a boomlet n213 especially in New England. n214 Some activities preserved on farms - such as runoff of fertilizer, insecticides and soil - may have adverse implications for areas preserved under other conservation easements.

COMPUTER-ASSISTED RESEARCH

LEXIS: conservation w/1 easement! w/30 farmland w/1 easement!

FOOTNOTES:
(n1)Footnote 211. Edward Thompson, Jr., "Conservation Easements: Preserving American Farmland," Prob. & Prop. Nov./Dec. 1992 at 13. Tax incentives can also entrap the unwary farmer. In 1985, a family farmer's estate saved $218,328 in estate taxes by electing farm use assessment under § 2032A of the Internal Revenue Code. In 1992 the inheriting son transferred the farm's development rights to the State of New Jersey under a program designed to preserve agriculture. The conservation easement, for which taxpayer received more than $1.4 million, was the disposition of an "interest in qualified real property" that triggered a recapture tax. *Estate of Gibbs v. United States, 161 F.3d 242 (3d Cir. 1998).*

(n2)Footnote 212. *See* Karen A. Jordan, "Perpetual Conservation: Accomplishing the Goal Through Preemptive Federal Easement Programs," 43 Case Wes. Res. L. Rev. 401, 413-423 (1993), recapitulates a generation of sundry federal agriculture programs employing conservation easements.

(n3)Footnote 213. *See generally* Thomas J. Daniels, "The Purchase of Development Rights: Preserving Agricultural Land and Open Space," 57 APA Journal No. 4 at 421 (Autumn 1991). Sean F. Nolon and Cozata Solloway, "Preserving Our Heritage: Tools to Cultivate Agricultural Preservation in New York State," *17 Pace L. Rev. 591 (1997).*

(n4)Footnote 214. *E.g.*, Land for Maine's Future, 5 M.R.S. § 6209 (1991); Green Acres Land Acquisition, R.I. Gen. Laws § 32-4-3 (1991). *In re Rattee (New Hampshire Agricultural Lands Preservation Committee), 761 A.2d 1076 (N.H. 2000),* broadly construes the authority of the Agricultural Lands Preservation Committee to craft preservation

restrictions not explicitly stated in the authorizing statute. Donald D. Hagman & Julian Conrad Jurgensmeyer, Urban Planning and Land Development Control Law § 15.9, at 498-501 (2d ed. 1986), describes the Massachusetts program.

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CHAPTER 62 SERVITUDES

7-62 Thompson on Real Property, Thomas Editions § 62.21

AUTHOR: Professor James L. Bross College of Law Georgia State University

§ 62.21 Historic Preservation Easements.

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The National Trust for Historic Preservation has been as important a player for historic conservation easements as the Nature Conservancy has been for conservation easements in natural areas. Local and federal taxes are again a stimulus to this class of environmental easements. n215 In its rudimentary form, the preservation easement will save only the external street-front of a building, the facade. n216 Depending on how that facade is set into a context of reconstruction, the preserved facade may have the charm of a perfect ruby set in the navel of a hippopotamus. An appreciation of the importance of exterior context and interior features of historic structures has widened the scope of historic easements, especially in the face of cases limiting government regulations. n217

COMPUTER-ASSISTED RESEARCH

LEXIS: historic! w/1 preserv! w/2 easement!

FOOTNOTES:
(n1)Footnote 215. Janet Diehl & Thomas S. Barrett, The Conservation Easement Handbook 51-60 (1988).

(n2)Footnote 216. O.C.G.A. § 44-10-30 (1992); Tenn. Code Ann. § 11-15-102(3)(b) (1992), includes "Facade Easement" under the definition of "Protective Easement."

(n3)Footnote 217. *E.g., Society of Jesus of New England v. Boston Landmark Comm'n, 564 N.E.2d 571 (Mass. 1990)* (first amendment limits regulation of church interior); *Flores v. City of Boerne, 73 F.3d 1352 (5th Cir. 1996), cert. granted 117 S. Ct. 293 (1996),* invalidated local historic district regulations affecting the Catholic Church. The Supreme Court, through Justice Scalia, reversed the 5th Circuit's ruling and struck down the Religious Freedom and Restoration Act of 1993. *117 S. Ct. 2157, 138 L. Ed. 2d 624 (1997). United Artists Theater Circuit, Inc. v. Philadelphia, 595 A.2d 6 (Pa. 1991), reargued and reversed, 635 A.2d 612 (1993)* (regulation of building interior, particularly affirmative duty of maintenance, constitutes taking); *Cf.* Teachers Ins. & Annuity Ass'n v. New York (preservation regulation of Four Seasons Restaurant inside Seagram Building upheld).

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CHAPTER 62 SERVITUDES

7-62 Thompson on Real Property, Thomas Editions § 62.22

AUTHOR: Professor James L. Bross College of Law Georgia State University

§ 62.22 Introduction to Solar Access.

Solar access would be simple if the sun pointed directly downwards toward all points on the earth's surface. Solar access would be relatively simple if the earth were flat enough and stable enough for sunshine to strike all points at a relatively high angle during all seasons. Unfortunately, the earth is an oblate spheroid; and the spheroid tilts its beltline in relation to the sun through seasonal precession. In the Northern Hemisphere, the sun strikes the earth at a high angle during the summer and at a low angle during the winter. The change from summer to winter is largest in the most Northern latitudes where solar heating is most useful in the winter. As the following illustration demonstrates, natural and man-made objects can easily interfere with solar access during the winter. Without legal control over land south of the solar installation, the user of solar energy may find substantial investments rendered meaningless. The most straightforward control of the obstructing land is through merger, i.e., by buying enough land south of the collector to prevent all possible interference. The sections which follow present methods of protecting solar access other than merger.

COMPUTER-ASSISTED RESEARCH

LEXIS: solar 2/1 access w/15 merger!

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CHAPTER 62 SERVITUDES

7-62 Thompson on Real Property, Thomas Editions § 62.23

AUTHOR: Professor James L. Bross College of Law Georgia State University

§ 62.23 Some History of Light & Air Easements: Ancient Lights and Spite Fences.

American common law rejected those aspects of English law inconsistent with our more rambunctious and utilitarian view of land. Among the rejected precepts of English law was the Doctrine of Ancient Lights, a form of prescription which permitted gawking across another's land to ripen into a permanent right to gawk across another's land. n218 Because English law allowed prescription by staring, English landowners were entitled to erect walls to obstruct views before they could ripen into immutability; without the need to interrupt prescription, n219 American law might consider some useless, but spiteful, wall-building tortious. n220 American cases resolutely uphold a landowner's right to build useful structures, even where those structures obstruct, block views, light and air for neighboring properties. n221 Under spite fence doctrine, the owner of a solar collector could enjoin an barrier only if the barrier were useless for any purpose other than obstructing sunlight.

FOOTNOTES:
(n1)Footnote 218. Gerald Korngold, Private Land Use Arrangements § 2.02, at 7-9 (1990).

(n2)Footnote 219. Recent statutes on solar access have reaffirmed the doctrine that an easement for light cannot be prescribed. *See e.g.,* Ky. Rev. Stat. Ann. § 381.200(2); Mo. Ann. Stat. § 442.012(2). *Palomeque v. Prudhomme, 664 So. 2d 88 (La. 1995),* recognizes a form of prescriptive right to light or view against the K-Paul Restaurant.

(n3)Footnote 220. *Sundowner v. King, 509 P.2d 785 (Idaho 1973)* (enjoining grotesquely large billboard blocking light & air to neighboring motel); *Great Atl. & Pac. Tea Co. v. New York World's Fair 1964-1965, Inc., 249 N.Y.S.2d 256 (1964)* (enjoining huge plastic shrubbery obscuring view of A. & P.'s sign from World's Fair parking lot); *Fontainbleau Hotel Corp. v. Forty-Five Twenty-Five, Inc., 114 So. 2d 357 (Fla. App. 1959)* (reversing injunction against Fountainebleu's addition blocking winter sunlight onto Eden Roc's pool). The positions taken by American law (allow tort action, prohibit prescription) and English law (allow prescription, prohibit tort action) on light & air access mirror the positions taken by America and England on lateral support. *See* Bognuda v. Upton & Shearer Ltd. (1972) N.Z.L.R. 741 (C.A.).

(n4)Footnote 221. *Kruger v. Shramek, 5 Neb. App. 802, 565 N. W.2d 742 (1997),* adopts the "general rule that a lawful building or structure cannot be complained of as a private nuisance because it obstructs the view of neighboring property." *Chatsworth Realty 344 LLC v. Hudson Waterfront Company, 2003 N.Y. Slip Op. 50601U, 2003 N. Y. Misc.*

LEXIS 166 (New York County, 2003) (no protected right to light and air even for units which would become legally classified as unsuitable for living use under relevant codes).

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CHAPTER 62 SERVITUDES

7-62 Thompson on Real Property, Thomas Editions § 62.24

AUTHOR: Professor James L. Bross College of Law Georgia State University

§ 62.24 Solar Protection Through Nuisance Law.

Except under spite fence rules, access to sunlight has not been a protected property right for nuisance actions in traditional American law. In ordinary nuisance actions, unlike spite fence suits, activity may be enjoined even when the activity is useful. Beginning in 1982, with Prah v. Maretti, n222 a few judges have reevaluated their long-standing reluctance to protect access to sunlight under nuisance law. Prah erected a passive solar house near the southern boundary of his property; in compliance with all applicable laws and restrictions, Maretti later built a house which interfered with Prah's solar access. In its decision, the Wisconsin Supreme Court did not hold that Maretti's house constituted a nuisance; the court simply classified solar access as a protectable property right under nuisance law. Prah still had the burden of proving that Maretti engaged in intentional and unreasonable conduct by interfering with Prah's protected property right. By building close to his southern property line, Prah may have created a hypersensitive use; Maretti's conduct may have been reasonable under the circumstances.

The nuisance model is unsatisfactory in several respects. It does not provide certain, predictable protection of solar access. It does not delineate clearly the rights of adjoining property owners to develop or landscape their tracts. It entails the expense of litigation. n223 Finally, it has not received widespread acceptance. n224

COMPUTED-ASSISTED RESEARCH

LEXIS: solor or sunlight w/15 nuisance w/2 law

FOOTNOTES:
(n1)Footnote 222. *321 N.W.2d 182 (Wis. 1982).*

(n2)Footnote 223. Adrian J. Bradbrook, "Australian and American Perspectives on the Protection of Solar and Wind Access," 28 Nat. Res. J. 229, 233-234, 237-238, 260-261 (1988) (nuisance remedy impractical).

(n3)Footnote 224. *Compare Tenn v. 889 Assocs., Ltd., 500 A.2d 366 (N.H. 1985)* (following *Prah*), *with Sher v. Leiderman, 226 Cal. Rptr. 698 (1986)* (rejecting *Prah*).

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CHAPTER 62 SERVITUDES

7-62 Thompson on Real Property, Thomas Editions § 62.25

AUTHOR: Professor James L. Bross College of Law Georgia State University

§ 62.25 Prior Appropriation Theories of Solar Access.

A pioneering analysis of solar access in a superb student note recommended the prior appropriation law of western water rights as the paradigm for solar rights. n225 New Mexico followed that model in its statutory solar access law. n226 It has not otherwise been accepted. n227 Prior appropriation is an especially problematic approach to solar access at a time when its viability for water rights is under challenge. n228 Rules favoring pioneer entrants into risky ventures display an historical evolution from early encouragement to later scorn when the pioneer's activities become inefficient in a fully-developed setting. n229

FOOTNOTES:
(n1)Footnote 225. Note, "The Allocation of Sunlight: Solar Rights and Prior Appropriations Doctrines," *47 Colo. L. Rev. 421 (1976).*

(n2)Footnote 226. N.M. Stat. Ann. §§ 47-3-1 to 47-3-10.

(n3)Footnote 227. California grants mandatory protection of solar access against certain vegetation. Cal. Pub. R. 25981 & 25982 (1979); Sher v. Leiderman, *supra* note 191, denies the protection to passive solar designs and expressly rejects the prior appropriation model.

(n4)Footnote 228. "Prior Appropriation passed away last month at the age of 152." Charles F. Wilkinson, "Eulogy, Prior Appropriation 1848-1991," 21 Envt'l Law V (1991). *See generally* Charles F. Wilkinson, Crossing the Next Meridian: Land, Water and the Future of the West (1992).

(n5)Footnote 229. Morton J. Horwitz, "The Transformation in the Conception of Property in American Law 1780-1860," *40 U. Chic. L. Rev. 248, 249-251 (1973).*

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CHAPTER 62 SERVITUDES

7-62 Thompson on Real Property, Thomas Editions § 62.26

AUTHOR: Professor James L. Bross College of Law Georgia State University

§ 62.26 Privately-negotiated Solar Access Servitudes.

The most conventional statute on solar access merely authorizes privately negotiated solar easements. n230 The label "easement" skirts defenses available against enforcement of equitable servitudes. For example, the doctrine of changed conditions is not generally applied to legal easements. Statutes do not specify that solar easements, unlike other classes of environmental easements, may be held in gross because solar access is useful only as an appurtenance to a particular solar collector. Iowa initiated a method for private eminent domain to compel neighbors to sell solar easements. n231 The Iowa procedure compares to statutes authorizing private eminent domain for access n232 or other infrastructure; n233 Iowa may even recognize that private solar collectors are part of a state's energy supply entitled to public utility rights. By contrast with the Iowa model, Missouri expressly prohibits *any* use of eminent domain by anyone to create solar access. n234

COMPUTER-ASSISTED RESEARCH

LEXIS: solar w/1 access w/15 servitude!

FOOTNOTES:
(n1)Footnote 230. In addition to the Kentucky and Missouri statutes cited in *supra* note 187, *see, e.g.*: O.C.G.A. § 44-9-21; Ill. Rev. Stat. Ch. 961/2, P 7303; Burns Ind. Code Ann. § 36-7-2-2; R.R.S. Neb. § 66-9-1;N.H. R.S.A. 477:49; O.R.C. Ann. 45301.63 (Baldwin); Tenn. Code Ann.; § 66-9-2-1; Va. Code Ann. § 55-352; R.C.W. 64.04.150; Wy. Stat. § 34-22-101.

(n2)Footnote 231. Iowa Code Ann. §§ 564A.1 - 546A.9.

(n3)Footnote 232. O.C.G.A. § 44-9-40 (1991); Or. Rev. Stat. § 376.105.

(n4)Footnote 233. Cal. Code of Civ. Pro. § 1245.325 (utility services).

(n5)Footnote 234. Mo. Ann. Stat. § 442.012(1).

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CHAPTER 62 SERVITUDES

7-62 Thompson on Real Property, Thomas Editions § 62.27

AUTHOR: Professor James L. Bross College of Law Georgia State University

§ 62.27 Local Government Roles in Solar Access.

Enabling legislation delegating solar access powers to local governments display a range of governmental involvement:

1. placing solar access on the laundry list of permissible purposes for land use laws; n235

2. making solar access a mandatory element of comprehensive plans; n236

3. actively protecting solar access in local land use regulations. n237

4. Solar access can be factor relevant to impact analysis required for land use decisions under SEPA laws. n238

FOOTNOTES:
(n1)Footnote 235. Conn. Gen. Stat. 8-25 (subdivision regulations); Utah Code Ann. § 10-8-901 (1992) (city zoning enabling); Wis. Stat. § 59.97 (zoning).

(n2)Footnote 236. A.R.S. § 9-461.05; C.R.S. 30-28-106.

(n3)Footnote 237. Mass. Ann. Laws ch. 40A, § 9B, allows local governments to grant special solar permits that create easements protected from defined impermissible interference. The section authorizes a Solar Map for the locality. Wis. Stat. Ann. § 66.032 lets local governments implement a solar easement system like that in Iowa. For examples of the application and interpretation of municipal solar access laws, *see Arndt v. City of Boulder, 1994 Colo. App. LEXIS 291* (Oct. 9, 1994) (to claim the protection of a solar access permit under city law, the applicant must build precisely the solar system described in the permit application); *Sullivan v. Ashland, 882 P.2d 633 (Or. App. 1994)* (reversing a ruling by the state Land Use Board of Appeals, the court remands to the city for interpretation of setback calculations under the city's Solar Access ordinance). *Kucera v. Lizza, 69 Cal. Rptr. 2d 582 (1997)* (Tiburon ordinance that preserves view and sunlight access by restricting tree growth upheld as a valid exercise of the police power and not preempted by state statutes on servitudes. In its defense of the ordinance, Tiburon was joined by 71 other California cities).

(n4)Footnote 238. *See e.g., Gastineau v. City of Bothel, 1998 Wash. App. LEXIS 1785 (1998),* where a landowner complained of obstructed solar access to his greenhouse in Fall, Winter, and Spring.

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CHAPTER 62 SERVITUDES

7-62 Thompson on Real Property, Thomas Editions § 62.28

AUTHOR: Professor James L. Bross College of Law Georgia State University

§ 62.28 An Introduction to Transferable Development Rights.

There are several common elements to any system of Transferable Development Rights. Every TDR problem begins with a site restricted by regulation to density substantially less than normal market demands. That severe restriction of development exists because the site serves some defined policy objective in its low-density configuration; that objective may be preservation of historic sites and structures, conservation of natural areas such as wetlands, or preservation of a current use to which the land is particularly suited, such as agriculture.

Usually for reasons of equity or politics, but sometimes out of necessity to avoid a finding of taking in the severe restriction of use, the government wishes to provide compensation to the severely restricted landowner. Government wishes to provide this compensation without spending its own money. The compensation is marketable units of density that the owner of the restricted lot can sell to someone in an area where increased density will not damage the policy objectives of the TDR system. The marketable units represent the difference between the restricted density and some concept of "normal" development. n239

Servitudes play an important function in this system because they reify the density being moved. Servitudes restrict the land that has surrendered density and memorialize the added density at the receiving site. The difficulties in harnessing density to policy objectives without a permanent record of the transaction can be seen in Fred F. French Investing Co. v. New York. n240 As originally built, Tudor City was a four-acre residential complex with substantial open space. The city approved Tudor City with the open space shown as "parks" on the plans; however, the developer made no formal arrangement restricting the use of the open space or dedicating it to public use. Consequently, a later developer was free to make development plans for the open space and successfully sue the city for a categorical taking when the City "zoned" the open space as public parks. Neither governments nor landowners can depend on unwritten, unrecorded "understandings" about limits on use in return for density incentives. n241

FOOTNOTES:
(n1)Footnote 239. *See e.g., Heffington v. City of Austin, 1996 Texas App. LEXIS 3274,* (Tex. App. 1996), where Austin granted TDR for the difference between the previous height limit (generally 200', although only 60' for the claimant's property) and a new 45' height limit imposed to preserve views of the Texas Capitol. *But see Bella Vista Apartments v. Bennett, 89 N.Y.2d 465, 678 N.E.2d 196 (1997),* requiring approval of the Board of Standards and Appeals before a

property that had been given a variance for a movie theater could donate unused density to an adjoining property that needed extra F.A.R. for a 14-story building.

(n2)Footnote 240. *350 N.E.2d 381, app. dismissed, 429 U.S. 990 (N.Y. 1976).*

(n3)Footnote 241. The gravity of a recorded TDR is illustrated in *Gordon v. Flamingo Holding Partnership, 624 So. 2d 294 (Fla. 1993),* finding prejudice to a mortgagee in the transfer of development rights from a parcel securing a mortgage.

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CHAPTER 62 SERVITUDES

7-62 Thompson on Real Property, Thomas Editions § 62.29

AUTHOR: Professor James L. Bross College of Law Georgia State University

§ 62.29 Early Concepts of Flexible Density: The Floor/Area Ratio.

Land Use laws began flexible use of density when regulations changed from "Envelope Zoning" specifying the precise form of buildings to Floor/Area regulations allowing flexibility in the use of density on a building site. n242 Floor/Area ratio [FAR] limits the total floor space in the building to some multiple of the area of the site. It is the normal method of regulating density for commercial and institutional development in urban areas.

When the flexible density of FAR is combined with a broader definition of the "building site" for "Area" is calculated in the ratio's denominator, greater density is available for flexible allocation. This system, which can extend the site over several blocks separated by streets, permits "borrowing" of density from one block to another. Such a system resulted in a particular surprise for residents of Portland, Oregon, in the early 1970's when a bank with a two-block site borrowed density from one block to construct a tapering tower on the second block. The tower occluded the view of Mt. Hood from some of the most valuable hillside houses in the city. City residents confused FAR regulations with height regulations. The FAR matched the density of a leading department store, Meier & Frank; that store did not block views. However, without a height limit, other uses of the same FAR could block views.

COMPUTER-ASSISTED RESEARCH

LEXIS: flexible w/2 density w/30 (floor w/1 area w/1 ratio!) or far!

FOOTNOTES:
(n1)Footnote 242. John J. Costonis, Space Adrift 80-82 (1974).

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CHAPTER 62 SERVITUDES

7-62 Thompson on Real Property, Thomas Editions § 62.30

AUTHOR: Professor James L. Bross College of Law Georgia State University

§ 62.30 Flexible Density with Flexible Locations: The PUD.

Even in suburbs, when large commercial structures are unknown, flexible density can be harnessed to policy objectives. The very essence of the Planned Unit Development is flexible use of density. Clustering development to conserve open space, irregularly shaped lots to conform to natural features, and mixing of uses so that conventional dwelling units/acre measures lose their meaning are normal in the P.U.D. In urban settings, the P.U.D. can achieve objectives associated with more elaborate TDR systems. In Dupont Circle Citizens Ass'n v. D.C. Zoning Comm'n n243 four landowners applied for P.U.D. approval. Two owners participated solely to satisfy the one-acre minimum size requirement for P.U.D. applicants; those owners did not change their buildings as part of the process. Two owners were the active participants; the owner of the historic Christian Heurich Mansion transferred the unused density from its historic site to the owner of an adjacent developable lot. The overall P.U.D. complied with the density regulations for the area; the new building was at a much greater density than it could have achieved without the P.U.D. to reallocate the density.

COMPUTER-ASSISTED RESEARCH

LEXIS: flexible w/2 density w/30 (planned w/1 unit w/1 development!) or pud!

FOOTNOTES:
(n1)Footnote 243. *355 A.2d 550 (D.C.C.A. 1976).*

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CHAPTER 62 SERVITUDES

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AUTHOR: Professor James L. Bross College of Law Georgia State University

§ 62.31 Emergence of Transferable Development Rights.

Today's TDR systems can cover vast regions of restricted and receiving zones to achieve great public objectives. Norman Williams describes the Montgomery County, Maryland, system to preserve agricultural uses and open space. n244 In the Rural Density Transfer zone containing 89,000 acres, 11,000 acres have transferred 2,200 development rights to receiving areas designated in the County. After litigation that clarified the allocation of responsibility between the elected officials and the appointed Planning Commission, n245 the system has continued implementation. Williams also describes another large-scale TDR system operating in the 1,000,000-acre Pine Barrens of New Jersey. n246

FOOTNOTES:
(n1)Footnote 244. 5 Norman Williams, American Land Planning Law § 159.11, *1992 Cumulative Supplement* at 217. A T.D.R. system is a mandatory element of "agricultural land" designations within Urban Growth Areas under *Washington's Growth Management Act. City of Redmond v. Central Puget Sound Growth Management Hearings Board, 136 Wash. 2d 38, 959 P.2d 1091 (1998),* invalidates "agricultural land" designations made when the city had no TDR system in place.

(n2)Footnote 245. *West Montgomery County Citizens Ass'n v. Maryland Nat'l Capital Park & Planning Comm'n, 522 A.2d 1328 (Md. 1987).*

(n3)Footnote 246. 5 Norman Williams, American Land Planning Law § 160.31 at 715-724 (1985), *1992 Cumulative Supplement* at 240-242. *Dittmer v. County of Suffolk, 975 F. Supp. 440 (E.D.N.Y. 1997),* presented a challenge to the facial validity of similar preservation rules for *Long Island's Barrens. W. J. F. Realty Corp. v. State of New York, 176 Misc. 2d 763, 672 N.Y.S.2d 1007 (1998),* upholds the Long Island Pine Barrens Protection Act against broad facial challenges and temporary taking claims. *Toussie v. Central Pine Barrens Joint Planning and Policy Commission, 1999 N.Y. Misc. LEXIS 528 (1999),* reviews the application of the Commission's procedures for transferable development right credits.

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CHAPTER 62 SERVITUDES

7-62 Thompson on Real Property, Thomas Editions § 62.32

AUTHOR: Professor James L. Bross College of Law Georgia State University

§ 62.32 Judicial Responses to TDR.

Fred F. French Investment Co. n247 makes clear one judicial limit on TDR: marketable development rights do not constitute just compensation when a categorical taking has occurred. TDRs do perform a function in deciding whether a taking has occurred in non-categorical cases. *JSS Realty Co. v. Town of Kittery, Me.*, n248 provides a legal caution to governments tinkering with TDR systems. A contract-clause claim and a substantive due process allegation were allowed to proceed to trial when the Town of Kittery reduced the developable area on a site and also eliminated TDR from the same site. In Penn Central Transportation Co. v. New York, n249 the value of marketable development rights was an element in the calculation of the return available to the landowner. For analysis of whether a landowner has been deprived of "all economically viable use" under Lucas v. South Carolina Coastal Council n250 TDR will be an aspect of economic viability. n251

So long as proper lines of authority are recognized and fair procedures exist, TDR systems will meet the generally favorable response represented by City of Hollywood v. Hollywood. n252 The transfer of development rights from beachfront to uplands in that case is shown in the final illustration to this chapter.

COMPUTER-ASSISTED RESEARCH

LEXIS: tdr! or transferable w/1 development w/1 right!

FOOTNOTES:
(n1)Footnote 247. *Supra* note 205.

(n2)Footnote 248. *177 F. Supp. 2d 64 (D.Me. 2001).*

(n3)Footnote 249. *438 U.S. 104 (1978).*

(n4)Footnote 250. *112 S. Ct. 2886 (1992).*

(n5)Footnote 251. In *Suitum v. Tahoe Regional Planning Authority, 117 S. Ct. 1659, 137 L. Ed. 2d 980 (1997),* a Stream Environment Zone, applicable to Mrs. Suitum's lot, essentially banned private development. Rejecting the 9th

Circuit's holding that Mrs. Suitum had not exhausted her administrative remedies under a TDR program, the court remanded for a judicial determination of the TDRs' effect on the taking claim. The case sparked a dispute on the meaning of *Lucas v. South Carolina Coastal Council, 505 U.S. 1003 (1992),* between Justice Souter and Justice Scalia. Premised on the trial court's finding that Lucas' land was "valueless," *505 U.S. at 1007,* Souter's majority opinion implicitly recognizes that TDRs may be used to shovel "value" onto unbuildable land to avoid takings. Relying on an additional aspect of the trial court's finding that the Council "deprived Lucas of any reasonable economic use of the lots," *Id. at 1009,* and his own characterization of the issue as loss of "all economically beneficial or productive use of the land," *Id. at 1015,* Scalia concluded that the Stream Environment Zone was a categorical taking under Lucas. For Scalia, TDRs are relevant only as part of the just compensation issue. Scalia's opinion in Lucas reiterates three findings by the trial judge: that the regulations "deprived Lucas of any reasonable economic use... eliminated the unrestricted right of use, and rendered them valueless." A conventional application of elementary case analysis to Lucas would suggest that, until a holding of categorical taking to some new case lacking one or more of those facts, all three statements must be present for Lucas to apply. Among post-Suitum cases, *see Good v. United States, 39 Fed. Cl. 81, 45 ERC (BNA) 1518 (1997),* considering the impact of TDR on a taking claim; *Dittmer v. County of Suffolk, 975 F. Supp. 440 (E.D.N.Y. 1997), supra* note 210 of this Supplement chapter, finding unresolved TDR issues relevant to federal abstention. *Palazzolo v. Rhode Island, 121 S. Ct. 2448, 150 L. Ed. 2d 592,* removes one prong of the Lucas holding. The acquisition of land after the enactment of regulations is not a bar to a claim under Lucas. T. Bongard, "Does Palazollo v. Rhode Island's Upholding of the Transferability of Takings Claim Require a Rethinking of Takings Jurisprudence," *81 N.C. L. Rev. 392 (2002).*

(n6)Footnote 252. *432 So. 2d 1332 (4th D.C.A. Fla. 1983), pet. for rev. denied, 441 So. 2d 632 (Fla. 1982). Fisher v. Giuliani, 280 A.D.2d 13, 720 N.Y.S.2d 50 (N.Y. App. Div. 2001),* upholds an expansion of the potential receiving sites for Transferable Development Rights in the Manhattan Theater District but remands new rules on discretionary density bonuses for further environmental impact analysis.

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Supp. To CHAPTER 62 SERVITUDES

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Supp. to § 62.01 Overview of the Law of Servitudes.

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Add

See also Schneider, Michael S., "Seeing the Light: Ignoring Collateral Economic Benefits to the Public When Enforcing Servitudes," 12 *Suffolk J. Trial & App. Advoc.* 139 (2007); Wood, Joshua, "Powell v. Washburn: To the Restatement (Third) of Property: Servitudes--And Beyond," *49 Ariz. L Rev. 193 (Spring 2007).*

Van Houweling, Molly Shaffer. "The New Servitudes," *96 Geo. L.J. 885* (March, 2008).

Add:

Note, "Touch and Concern, the Restatement (Third) of Property: Servitudes, and a Proposal," *122 Harv. L. Rev. 938* (January, 2009).

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Supp. to § 62.07 An Intent to Bind and Benefit Successors.

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Add

Powell v. Washburn, 125 P.3d 373 (Ariz. 2006) (a servitude should be interpreted to give effect to the intention of the parties; restrictions for an aviation-related planned residential community did not include permission for use of recreational vehicles as residences); Wood, Joshua, "Powell v. Washburn: To the Restatement (Third) of Property: Servitudes--And Beyond," *49 Ariz. L Rev. 193 (Spring 2007). Birdwood Subdivision Homeowners' Ass'n, Inc. v. Bulotti Const., Inc., 175 P.3d 179 (Idaho 2007)* (claim of equitable servitude denied because of lack of intent); *Mulcahy v. Verhines, 742 N.W.2d 393 (Mich. App. 2007)* (servitude of access affirmed because intent established).

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Supp. to § 62.09 Applicability of Touch and Concern to Equitable Servitudes.

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Add:

Gambrell v. Nivens, 275 S.W.3d 429 (Tenn. App. 2008) (a covenant to not use the land for a wedding chapel touched and concerned the land and could be enforced as a servitude).

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Supp. To CHAPTER 62 SERVITUDES

7-62 Thompson on Real Property, Thomas Editions Supp. to § 62.14

Supp. to § 62.14 Common Schemes of Development.

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Add:

But see Feola v. Driftwood Key Club, 2010 Wash. App. LEXIS 404 (2010) (dues and assessments not explicitly set out in the articles, covenants, and bylaws are still valid if those articles, covenants, and bylaws "correlate" to give the levying authority power over the subject matter).

Add:

Burke v. Pierro, 986 A.2d 538 (N.H. 2009) (common schemes are inferred from the language of the instrument, conduct of the parties, and the surrounding circumstances).

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Supp. to § 62.16 Miscellaneous Equitable Defenses.

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Add:

Madkour v. Zoltak, 924 A.2d 11 (Vt. 2007) (expiration of equitable servitude).

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7-62 Thompson on Real Property, Thomas Editions Supp. to § 62.21

Supp. to § 62.21 Historic Preservation Easements.

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Add:

See also Conner v. City of Seattle, 223 P.3d 1201 (Wash. App. 2009) .

Add new § 62.33. Bibliography

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Articles:

Bray, Zachary. "Reconciling Development and Natural Beauty: The Promise and Dilemma of Conservation Easements," *34 Harv. Envtl. L. Rev. 119 (2010).*

Bronin, Sara C. "Solar Rights," *89 B.U.L. Rev. 1217 (Oct. 2009).*

Michael, Jeffrey A. & Palmquist, Raymond B. "Environmental Land Use Restriction and Property Values," *11 Vt. J. Envtl. L. 437 (Spring 2010)* .

Sheppard, Charles B. "Land Use Covenants: A Summary of Aspects of California Law Regarding Land Use Covenants With Comparisons to the Restatement (Third) of Property," *37 W. St. U. L. Rev. 27 (Fall 2009).*

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CHAPTER 63 The Concept of a Unified Servitude

7-63 Thompson on Real Property, Thomas Editions 63.syn

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§ 63.syn Synopsis to Chapter 63: The Concept of a Unified Servitude

§ 63.01 Introduction to the Chapter.

§ 63.02 History and Status of the Unified Servitude Movement

§ 63.03 Problems That Can Be Addressed by a Unified Servitude

(a) A Basic Overview of Servitudes in American Property Law.

(b) Major Issues of Discontent with the Contemporary American Law of Servitudes.

(1) Horizontal privity.

(2) Restrictions on Enforcement of Affirmative Covenants.

(3) Restrictions on Benefits in Gross.

(4) The Touch and Concern Requirement.

(5) Vertical Privity.

§ 63.04 The Restatement's New Easement Rules.

§ 63.05 Potential Benefits of Unified Servitude Rules.

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CHAPTER 63 The Concept of a Unified Servitude

7-63 Thompson on Real Property, Thomas Editions § 63.01

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§ 63.01 Introduction to the Chapter.

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To conclude the several chapters in this volume covering the major forms of servitudes recognized in American property law, n1 it is appropriate to add this chapter on the concept of a unified servitude. Proponents of the unified servitude depict it as a cure for the various doctrinal deficiencies of current servitude law. Those doctrinal deficiencies arise from a history of fractured and piecemeal development of the law pertaining to the several varieties of servitudes and from rules based on historical circumstances that no longer exist. Reform, however, is restrained by the usual factor that inhibits all attempts to correct perceived problems in American property law. That factor is that most aspects of property law are assigned to the jurisdiction of the individual American states, which are under no obligation to coordinate their legal reforms with those of any of the other states. Even the most thoughtful and urgent invitations to adopt reforms, such as in the latest Restatement effort promoting the unified servitude, can be and often are considered without action or even completely ignored by state lawmakers and judges. In view of that, it should be no surprise that the Restatement proposals will likely have almost no impact on the everyday activities of practicing lawyers and their clients. n2

Nevertheless, it is still possible that some or all of the proposed corrections could be embodied in one or more uniform laws or model codes which, over time, could be adopted by a large number of state legislatures. Uniform laws and model codes relating to property law do not have a record of numerous adoptions, n3 but that could change if the need for reform is pressing and the proposed reforms are obviously meritorious.

FOOTNOTES:
(n1)Footnote 1. The chapters covering servitudes in this Vol. 7 are Ch. 60, "The Law of Easements: Rights in the Property of Another"; Ch. 61, "Real Covenants: Promises Concerning the Use of Land"; and Ch. 62, "Servitudes." Related chapters in Vol. 8 are Ch. 64, "Licenses," and Ch. 65, "*Profits a Prendre.*"

(n2)Footnote 2. *See*, David A. Thomas, "Restatements Relating to Property: Why Lawyers Don't Really Care," 38 Real Property, Probate and Trust J. 655 (Winter 2004).

(n3)Footnote 3. *See*, David A. Thomas, Ch. 9, "Uniform and Model Laws Relating to Property," in 2 David A. Thomas (ed.), Thompson on Real Property, Thomas Edition, pp. 43-122 (1994--).

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CHAPTER 63 The Concept of a Unified Servitude

7-63 Thompson on Real Property, Thomas Editions § 63.02

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§ 63.02 History and Status of the Unified Servitude Movement

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At this time, the culminating event in the history of the movement promoting the adoption of a unified servitude is the issuance in the year 2000 of the Restatement of the Law of Property Third (Servitudes). In describing the background for this effort, the Restatement authors give only a brief history of servitudes, a review of ways that servitudes are still valuable in modern real estate law and practice, and a description of the major areas of reform addressed in the Restatement. n4

The best example of servitudes in ancient times is, not surprisingly, found in Roman law and practice:

> Rights of way appear in the Twelve Tables of Rome, and later Roman Law recognized a variety of servitudes including rights of dig and burn lime, pasture cattle, draw and transport water, encroach on a neighbor's airspace, and rights to light, view, and support. n5

In the history of Anglo-American property law, a covenant running with the land appears in an English Year Book case dated 1368. The owner of a manor, whoever the owner happened to be, was entitled to have religious singing performed in the manor chapel. Medieval English law recognized various servitudes categorized all together as incorporeal hereditaments. Over two centuries after running covenants were recognized in England, Spencer's Case of 1583 n6 was the first to address touch -and-concern and privity issues in real covenants. In 1834, the decision in *Keppel v. Bailey* n7 announced a ruling that led to recognizing a distinction between covenants enforceable at law and those enforceable only in equity. This distinction was further enlarged in the well-known English Chancery case of *Tulk v. Moxhay*, n8 considered the foundation of equitable servitude doctrine.

The emergence of servitude law in the United States has focused on the three principal servitudes of easements, covenants and equitable servitudes. It is not too simplistic to say (1) that covenants arose because of courts' reluctance to recognize certain--generally newer--types of easements; n9(2) that judicial recognition of covenants was restrained unless certain strict requirements were met; and (3) that equitable servitudes emerged from that class of covenants denied enforcement because of failure of some technical restrictions.

The English courts' refusal to recognize new--especially negative--easements persisted because, among other reasons, England had until 1925 no effective public record system for land titles. This meant that a prospective purchaser's best protection against unknown encumbrances would be to inspect the land, but negative easements encumbering land were less likely to be discovered by inspecting the land.

The English judges' refusal to recognize new types of negative easements inexplicably carried over into American jurisdictions, which did enjoy more or less reliable land record systems. While occasionally a few new negative easements were recognized in individual states, and many states authorized new types of easements through legislation, the basic restrictions on new negative easements remained in place. n10

The irrationality perpetuating the old restrictions, and the anachronistic nature of the restrictions themselves, have given rise to several specific criticisms of contemporary servitude law. The main criticisms are described in the next section.

FOOTNOTES:

(n1)Footnote 4. "Introduction," Restatement of the Law of the Property Third (Servitudes), pp. 4-5 (2000).

(n2)Footnote 5. *Id.* at 5.

(n3)Footnote 6. *Spencer's Case, 5 Co. 16a, 77 Eng. Rep. 72 (1583).*

(n4)Footnote 7. 2 *MV&K 517, 39 Eng. Rep. 1042 (1834).*

(n5)Footnote 8. 2 Phillips 774, *41 Eng. Rep. 1143 (Ch. 1848).*

(n6)Footnote 9. "Thwarted by the law courts' refusal to recognize new types of negative easements, landowners turned--in the early nineteenth century--to the law of contracts. They sought judicial recognition of a contract right respecting land use enforceable not only against the promisor landowner, but against his successors in title as well." Jesse Dukeminier and James E. Krier, Property, 858-859 (5th ed. 2002).

(n7)Footnote 10. The irrational rules for and distinctions between the various types of servitudes are described in Susan F. French, "Toward a Modern Law of Servitudes: Reweaving the Ancient Strands," *55 S. Cal. L. Rev. 1261 (1982),* and Uriel Reichman, "Toward a Unified Concept of Servitudes," *55 S. Cal. L. Rev. 1179 (1982).*

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CHAPTER 63 The Concept of a Unified Servitude

7-63 Thompson on Real Property, Thomas Editions § 63.03

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§ 63.03 Problems That Can Be Addressed by a Unified Servitude

(a) A Basic Overview of Servitudes in American Property Law.

The following section is a seriously simplified description of the servitudes recognized in American property law, along with their basic components and requirements for validity or enforceablity. In order to present such a description, it is necessary to set aside the huge number of doctrinal differences in respective states' jurisprudence. While those differences are part of larger problem addressed by the very concept of a Restatement, it is possible to present a more generalized description of servitudes which will reveal the problems intended to be addressed by the concept of a unified servitude. As the following paragraphs will explain, covenants can be seen as servitudes that couldn't qualify for treatment as easements, and equitable servitudes are servitudes that couldn't qualify for treatment as covenants. The unified servitude is premised on the notion that these conceptual disabilities in the these interests are caused by imposing requirements for validity that no longer make sense.

(1) *Easements*. An easement is a right to use or affect the use of land owned by someone else. Easements are usually classed as affirmative easements, such as a right of way, and negative easements, such as a right to prohibit an adjacent owner from building something on the land that would block sunlight. If the easement benefits land, the easement is termed an appurtenant easement and the land benefitted is called a dominant tenement. The land burdened by the easement is called the servient tenement. If the easement right does not pertain to land, such as a right to use a neighbor's swimming pool, the easement is considered personal in nature and called an easement in gross. Easements are real property interests and may be created and conveyed by the usual instruments used in real estate transactions. A landowner may create and convey an easement by deed, or retain an easement by means of a deed conveying land that will be the servient estate of the easement. Easements "run with the land," meaning that whoever owns the dominant and servient estates also have the easement benefits and burdens, respectively. For historical reasons, courts have resisted recognizing new or novel types of easements, especially negative easements.

(2) *Covenants*. Covenants have arisen at least partly in response to courts' reluctance to recognize new varieties of easements. While an easement is created by conveyancing language, a covenant is created by contracting language. A covenant arises from an agreement respecting the use of land. For example, one landowner may agree with a

neighboring landowner not to build a two-story house that would block the neighbor's view. The covenantor has a duty not to so build, and the covenantee has a right to enforce observance of that duty. Those agreement or contractual rights attach themselves to the land and affect successor owners if certain additional conditions. If those conditions are met, then the covenant that originated in contract is considered an interest in the affected land, and closely resembles the easement. Just as the appurtenant easement is divided according to its dominant and servient estates, the land benefitted by the covenant is distinguished from land burdened by the covenant. It is often important to know whether the burdened land when held by a successor owner continues to be burdened; this question is often phrased as whether the burden of the covenant "runs with the land." Similarly, it may be important to know if the benefitted land when held by a successor owner continues to be benefitted; this question is often phrased as whether the benefit "runs with the land." A covenant whose burden and benefit both run with the land is similar to appurtenant easement and is considered an interest in land; such covenants are often referred to as real covenants. Several arcane requirements have arisen regarding whether covenant benefits and burdens run with the land. Not all jurisdictions impose all the requirements, so the following description is intended, for purposes of this chapter, to some of the doctrinal complexity that gives rise to suggestions for reform.

(A) *The Running of the Burden*. If the burden of a covenant is to be recognized as "running," and therefore being an encumbrance on the burdened land, courts have imposed several different requirements, although not all requirements are imposed in all jurisdictions. These requirements may be labeled as horizontal privity, vertical privity, both the benefit and burden must "touch and concern" the land, and the parties must have intended for the burden to run.

(B) *The Running of the Benefit*. If the benefit of a covenant is to be recognized as "running," and therefore subject to enforcement by whoever owns the benefitted land, courts have also imposed several different requirements, although not the same requirements as govern the running of covenant burdens. These requirements may be labeled as the parties' intent that the benefit run and that the benefit must touch and concern the land. Only a few jurisdictions impose either horizontal or vertical privity requirements.

(C) *Explanation of the requirements*.

Horizontal privity. Horizontal privity is a form of privity of estate that exists between the original covenanting parties when they enter into the covenant in connection with their roles as landlord and tenant or as grantor and grantee. In other words, in order for the burden of a covenant to run, the covenant must be entered into in connection with a conveyance of a property interest between covenantor and covenantee.

Vertical privity. For vertical privity to exist, a successor to either covenanting party must succeed to the same estate as that held by the predecessor party.

Touch and concern. For either the benefit or burden to "touch and concern" the land, usually means that the covenant must affect the nature, quality or value of the land or its use. If the benefit of a covenant is in gross, that is, it is personal to the covenantee and does not affect the covenantee's land in any way, then the benefit does not touch and concern the land.

Intent. Usually the parties' intent that the benefit and burden run is indicated by language in the covenant to the effect that the covenant pertains to the parties and their "heirs and assigns," or equivalent language. In the absence of such language in the covenant itself, intent may be inferred from parties' words or conduct or even from the nature of the covenant itself. A covenant to preserve open space or a view hardly makes sense if it pertains only to the immediate covenanting parties.

(D) *Summary of Running Requirements*.

Recognizing numerous differences between jurisdictions, it can be said that the running of the burden of a covenant (allowing a successor to the original covenantor to be required to observe the covenant) requires that the covenant be created under circumstances of horizontal privity (between the original covenanting parties), vertical privity (between covenantor and successor), both the burden and benefit must touch and concern land, and the parties' intent that the burden run. The running of the benefit (allowing a successor to the original covenantee to enforce the covenant) requires that the benefit of the covenant touch and concern the land and that the parties have intended for the benefit to run.

A strong case can be made for the conclusion that many of these requirements and the differences in their application (as between burdens and benefits, and as between covenants and easements) are no longer justified or rational under modern law. The unified servitude advanced in the Restatement of Property (Third) (Servitudes) adopts this conclusion and presents a less complex and more rational uniform set of requirements governing both easement and covenants.

(3) *Equitable Servitudes*.

The most straightforward explanation of equitable servitudes is that they are like covenants--that is, promises respecting the use of land--that cannot be enforced as covenants running with the land because one or more of the requirements described in the preceding section does not exist. The core requirements for enforceability of an equitable servitude differ somewhat from state to state, but usually consist of (1) an intent of the original parties that the obligation of the promise run to successors in interest, and (2) that the promise touches and concerns the land. From some cases it may also be inferred that some element of consideration for the promise be present.

(4) *Profits a Prendre*. Usually shortened in modern American legal writing as profits, these interests consist of rights to take something of value, such as minerals or timber, from the land of another. Profits are relevant to larger issues of servitudes because a right to take something from the land of another often necessarily includes a right of entry for that purpose, and that right is or is very similar to an easement.

(5) *Licenses*. License is a right to go on to the land of someone else for a particular purpose. Much discourse has taken place on the notion of whether a license is actually an interest in land, because the license can be created orally and can be unilaterally revoked by the licensor. That question becomes moot (in favor of the license being indeed an interest in real property) if the licensee comes into a position of justifiable reliance on the continuance of the license or if the license is "coupled with an interest." This latter situation would arise, for example, if the licensee is authorized a car on the licensed land; the license cannot be revoked until the license is able to retrieve the car. A license that becomes irrevocable under either type of situation is generally indistinguishable from an easement, and thus irrevocable licenses are, like profits, relevant to larger issues of servitudes.

(b) Major Issues of Discontent with the Contemporary American Law of Servitudes.

(1) Horizontal privity.

The Restatement authors opined that

> in the United States, the rule [requiring horizontal privity for the running of a covenant burden] served only to prevent covenants among neighbors from running, and could easily be circumvented by using a straw person. As a practical matter, the horizontal privity requirement had little effect after 1848, because covenants could be enforced against successors in equity whether or not there was privity between covenantor and covenantee. n11

(2) Restrictions on Enforcement of Affirmative Covenants.

The refusal of English courts to accept new types of negative easements and accompanied by a similar reluctance to

accept new types of affirmative covenants, a position also adopted in some U.S. jurisdictions. New York and New Jersey adopted rules that affirmative covenants would not run, and the "situation was not as clear in other states, but substantial doubt remained whether affirmative covenants could be enforced in equity. n12 The restriction became completely obstructive and worthless in real estate developments during the twentieth century.

(3) Restrictions on Benefits in Gross.

In U.S. servitude jurisprudence, courts did not adopt the English position refusing to enforce easement benefits in gross, but did refuse to recognize covenant benefits in gross. This was not compatible with the rise of historic preservation and conservation servitudes.

(4) The Touch and Concern Requirement.

The touch and concern requirement for running of covenant burdens and benefits helped exclude harmful or frivolous covenants, but eventually

> the doctrine interfered with innovative development techniques and financing arrangements ... [T]he doctrine failed to address the serious threats to the public good posed by restrictions designed to discriminate on racial or religious grounds, or designed to impose substantial limits on freedom of speech or association. n13

(5) Vertical Privity.

The intended function of vertical privity was to identify the covenant benefits and burdens that should run not only to grantees (as successor owners in fee), but also to life tenants, lessees and adverse possessors. The Restatement authors believed the vertical privity requirement was inadequate to this task, and proposed a set of rules addressing those tasks directly, rendering the vertical privity requirement itself obsolete.

Beyond these specific discontents with individual servitude doctrines, the Restatement authors believed that maintaining all of the traditional distinctions between the different types of servitudes was no longer necessary. Therefore, the new Restatement proposes a consolidation, simplification and unification of easement rules, described in the next section.

FOOTNOTES:
(n1)Footnote 11. Susan F. French, "Highlights of the New Restatement (Third) of Property: Servitudes," Real Prop. Prob. & Tr. J. 225, 229-230 (Summer, 2000).

(n2)Footnote 12. *Id.* at 230.

(n3)Footnote 13. *Id.* at 232.

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CHAPTER 63 The Concept of a Unified Servitude

7-63 Thompson on Real Property, Thomas Editions § 63.04

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§ 63.04 The Restatement's New Easement Rules.

The essence of the Restatement unified easement concept is in this statement from the Reporter: "Instead of treating easements, profits, and covenants as separate and independent bodies of law, the Restatement treats them as different types of servitudes governed by a single body of law." n14

Thus, in the Restatement, a servitude is defined as "legal device that creates a right or obligation that runs with land or an interest in land." n15 The Restatement servitudes are placed in three categories, n16 distinguished by the function of the servitude.

"An easement creates a nonpossessory right to enter and use the land in the possession of another and obligates the possessor not to interfere withe uses authorized by the easement." n17

"A profit a prendre is an easement that confers the right to enter and remove timber, minerals, oil, gas, game, or other substances from land in the possession of another. It is referred to as a profit in this Restatement." n18

In the Restatement, not all covenants are servitudes. n19"A covenant is a servitude if either the benefit or the burden runs with the land. A covenant that is a servitude 'runs with the land.' " n20 An affirmative covenant requires the covenantor to do something, a negative covenant requires the covenantor to refrain from doing something, and a restrictive covenant is a negative covenant that restricts or limits permissible uses of land. n21

The Restatement Reporter summarized this simplification as follows:

> Profits create affirmative rights to enter and remove natural resources or other substances from another's land. Easements create affirmative rights to use another's land or common property. Covenants create rights to receive money or services or rights to have other landowners abide by use restrictions or other obligations. n22

This unification of servitudes necessarily eliminates some of the traditional forms of servitudes and distinctions between

them:

> The Restatement sweeps away negative easements, equitable servitudes, and executed parol licenses, because the doctrinal differences that formerly distinguished these servitude categories have been eliminated. In the modernized law of servitudes there are no significant differences between negative easements and restrictive covenants, between equitable servitudes and covenants, or between executed parol licenses and easements. n23

The Restatement next adopts a single set of rules for these interests it calls servitudes:

> 1. Rules for creation of a servitude. n24
>
> 2. Intent to create a servitude (which intent may be express or implied, with no particular form of expression required). n25
>
> 3. Necessary parties to creation of a servitude. n26
>
> 4. Elimination of the horizontal privity requirement. n27
>
> 5. Benefits and burdens of servitudes pertaining to estates or other servitudes. n28
>
> 6. Recognition of servitude benefits in gross and benefits granted to third parties. n29
>
> 7. Requirements for creation of an easement (the same as for creation of estates in land of like duration, including statute of frauds requirements). n30

These rules and a few other miscellaneous rules found scattered about in the Restatement enable the Reporter to state the following basic rules for the unified servitudes:

> 1. A servitude is created by a contract or conveyance intended to create rights or obligations that run with the land if the servitude complies with the Statute of Frauds.
>
> 2. The beneficiaries of a servitude are those intended by the parties.
>
> 3. Servitude benefits held in gross are assignable unless contrary to the intent of the parties ...
>
> 6. Servitude benefits and burdens run to all subsequent possessors of the burdened or benefitted property ...
>
> 7. Servitudes may be enforced by any servitude beneficiary who has a legitimate interest in enforcement, whether or not the beneficiary owns land that would benefit from enforcement.
>
> 8. Servitudes that have not been terminated may be enforced by any appropriate legal or equitable remedies. n31

FOOTNOTES:

(n1)Footnote 14. *Id.* at 227.

(n2)Footnote 15. 1 Restatement of Property (Third): Servitudes § 1.1(1), p. 8 (2000).

(n3)Footnote 16. *Id.* at § 1.1(2), p. 8.

(n4)Footnote 17. *Id.* at § 1.2(1), p. 12.

(n5)Footnote 18. *Id.* at § 1.2(2), p. 12.

(n6)Footnote 19. *Id.* at § 1.3, Comment a., p. 24.

(n7)Footnote 20. *Id.* at § 1.3(1), p. 23.

(n8)Footnote 21. *Id.* at § 1.3(2) and (3), p. 23.

(n9)Footnote 22. Susan F. French, "Highlights of the New Restatement (Third) of Property: Servitudes," Real Prop. Prob. & Tr. J. 225, 227 (Summer, 2000).

(n10)Footnote 23. *Id.* at 228.

(n11)Footnote 24. 1 Restatement of Property (Third): Servitudes § 2.1, p. 51 (2000).

(n12)Footnote 25. *Id.* at § 2.2, p. 62.

(n13)Footnote 26. *Id.* at § 2.3, p. 87.

(n14)Footnote 27. *Id.* at § 2.4, p. 96.

(n15)Footnote 28. *Id.* at § 2.5, p. 99.

(n16)Footnote 29. *Id.* at § 2.6, p. 102.

(n17)Footnote 30. *Id.* at §§ 2.7 and 2.8, pp. 115, 131.

(n18)Footnote 31. Susan F. French, "Highlights of the New Restatement (Third) of Property: Servitudes," Real Prop. Prob. & Tr. J. 225, 228-229 (Summer, 2000).

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CHAPTER 63 The Concept of a Unified Servitude

7-63 Thompson on Real Property, Thomas Editions § 63.05

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§ 63.05 Potential Benefits of Unified Servitude Rules.

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Law students who are usually required to master the arcane, complex and irrational traditional rules governing the various types of servitudes usually do so without pausing to exercise critical analysis. Later on, many thoughtful lawyers, judges and legal scholars are able to strenuously question the perpetuation of many of these doctrines. The Restatement's promulgation of proposals for a unified servitude is a thoughtful and hopeful attempt to improve this area of the law. One scholar sounded the note of optimism that many will share:

> The doctrines should no longer be dependent on diverse historical origins of the traditionally recognized categories of servitudes. There should be no distinctions made based on the type of remedy--legal or equitable--that may be sought. It should not matter whether the interest was based on an agreement or a conveyance. All servitudes should be property interests to be tested under a uniform set of requirements. n32

The Restatement work on servitudes will have no direct impact on property jurisprudence unless state legislatures enact some or all the Restatement provisions as state statutes. An occasional state court judge could decide, in an appropriate case, to adopt some or all of the Restatement provisions in exercise of inherent judicial powers in a common law system. Until either of those events occurs, this work will remain mostly for study.

FOOTNOTES:
(n1)Footnote 32. James H. Backman, Ch. 4, "A Unified Approach to the Concept of Servitudes," in 1 James H. Backman and David A. Thomas, A Practical Guide to Disputes Between Adjoining Landowners--Easements, at p. 4-20 (1989--).

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Supp. To CHAPTER 63 THE CONCEPT OF A UNIFIED SERVITUDES

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Supp. to § 63.01 History and Status of the Unified Servitude Movement.

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Add:

See, Joseph William Singer, *Property Law: Rules, Policies, and Practices* 425 (5th ed. 2010).

Add

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Supp. To CHAPTER 63 THE CONCEPT OF A UNIFIED SERVITUDES

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Supp. to § 63.02 History and Status of the Unified Servitude Movement.

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Add:

Cribbet, John E. and Corwin W. Johnson. *Principles of the Law of Property* 394-396 (3d ed. 1989).

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Supp. to § 63.05 Potential Benefits of Unified Servitude Rules.

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Add:

See Jesse Dukeminier *et al.*, *Property* 750 (6th ed. 2006).

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CHAPTER 64 LICENSES

8-64 Thompson on Real Property, Thomas Editions 64.syn

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CHAPTER 64 LICENSES

8-64 Thompson on Real Property, Thomas Editions § 64.01

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§ 64.01 Introduction to the Chapter.

This chapter treats the somewhat elusive concept of license. Licenses are often confused with easements and are usually considered as interests in land. However, because most licenses share the common characteristic of revocability, they are more ephemeral than most interests in land. The chapter consists of a discussion of license definitions, characteristics and incidents (§ 64.02), the historical development of the legal concept of licenses (§ 64.03), the scope, transfer and termination of licenses (§ 64.04), and how licenses are treated in the courts (§ 64.05). This last section highlights cases in which licenses are treated much like easements, are treated as irrevocable because of being coupled with other interests, and are adjudicated in contractual situations.

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CHAPTER 64 LICENSES

8-64 Thompson on Real Property, Thomas Editions § 64.02

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§ 64.02 Definitions of Licenses.

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§ 64.02(a) In General.

License is defined as a relationship between two or more persons with respect to the use of a tract of land in which there is nothing more than a revocable privilege by one of them to be upon the land, which presence would, in the absence of the privilege, be actionable by the other. n1 Some writers have objected to such a definition of license because it includes revocability. n2 The objection is based upon the argument that such a definition fails to distinguish between the operative facts that create the relationship and the legal content of the relationship. This argument ignores the fact that the license is a *legal* relationship and that the courts that created it have always defined it as a revocable. Even if the definition were to be restricted to the operative facts, however, it would seem proper to include revocability in the definition. In such a situation the usual understanding would seem to be that, when one has done nothing more than extend permission to another to enter one's land, the permission can be withdrawn at any time. If more was intended, or if there were other facts that would indicate an intention to limit the right to withdraw the permission, the situation would amount to more than a simple extension of permission to enter.

A license, being a simple permission to enter land, may be extended by any person who has a right to be on the land even though that person's interest in the land may amount to less than fee simple ownership. In fact, it may be true that the presence on the land of both of the parties to a license relationship may be a trespass in relation to one who has an interest superior to that of the licensor. Thus, one who has nothing more than a possessory interest in the land may give a license to another and the only effect of the granting of the license is that the licensee's presence on the land will not be a wrong as to the licensor. n3

§ 64.02(b) As an Interest in Land.

Licenses are by definition revocable and because they are always revocable it is sometimes said that licenses do not represent interests in land. n4 Such a statement is quite obviously not correct. n5 While the revocability of the interest means that it will never prevail as against the creator of the license, and while the fact of revocability may mean that the interest is of little or perhaps no value, it is undeniably a legal interest in the land to which it relates. n6

The statement that a license is not an interest in land is sometimes said to be proven by those decisions which deny the license holder a share of a condemnation award. n7 However, it is obvious that a licensee should not be given a share of such an award if the result would be to reduce the amount to be received by the licensor since the licensor could at any time revoke the license. n8 Furthermore, it is generally held that a transfer of the land by the licensor terminates the license and a condemnation action results in a transfer of the property. n9

Further support for the proposition that a license is not an interest in land is said to come from the fact that the creation of a license does not require compliance with the Statute of Frauds. n10 Since the Statute of Frauds applies to any situation in which an "interest in land" is transferred, its inapplicability to the license transaction would seem to require the conclusion that the license is not an interest in land. However, the mere fact that the Statute of Frauds has been construed to apply only to interests in land which are more substantial and valuable than licenses does not mean that a license is not an interest in land. n11

While there are numerous cases holding that a licensee cannot maintain an action for interference with the license by third persons, n12 thus tending to lend additional support to the proposition that the license is not a legally protected interest in land, there are several cases to the contrary. For example it has been held that licenses to maintain a millrace, n13 or to run a water line, n14 or a sewer line, n15 would be protected against interference by third persons. It may be that these latter cases only stand for the proposition that such an action will be allowed when the licensee has made a considerable investment in reliance on the license and there appears little likelihood of it being revoked, n16 and that they do not detract greatly from the more general proposition which would deny any such protection. The original Restatement of Property seemed to take this position. n17 On the other hand, the general lack of protection afforded the licensee against third persons does not detract from the fact that the licensee's interest is protected by law. Whatever may have been held with respect to the right against third persons, the fact that the licensee is immune from an action of trespass by the licensor, so long as the license remains unrevoked, n18 requires the conclusion that it is a legally protected interest in land.

COMPUTER-ASSISTED RESEARCH

LEXIS: licens! w/3 interest w/3 land or property and possess! and revoc! or irrevoc!

EXPLANATION: With a Lexis search, the "States" database appears to be more useful than the "Realty" database.

FOOTNOTES:

(n1)Footnote 1. A simple definition of license comes from *Thiokol Chem. Corp. v. Morris County Bd. of Taxation, 197 A.2d 176 (N.J. 1964),* where the permission to make a transitory use of property is the hallmark of a revocable license. *See also Wehby v. Turpin, 710 So. 2d 1243 (Ala. 1998)* (a license is the giving of one's consent to do a specified activity, a personal privilege which is generally revocable at the will of the licensor); *Milbrook Hunt, Inc. v. Smith, 670 N.Y.S.2d 907 (App. Div. 1998)* (a license is a mere personal privilege to commit some act or series of acts on the land of another without possessing any estate therein); *Hennebont v. Kroger Co., 289 A.2d 229 (Pa. Super. Ct. 1972)* (a license is a personal and initially revocable privilege to perform an act or series of acts on land of another).

(n2)Footnote 2. *See* Powell on Real Property(R) § 34.24 (Michael Allan Wolf ed., Matthew Bender), for a list of articles on the subject. *But see Gasparo v. City of New York, 16 F. Supp. 2d 198 (E.D. N.Y. 1998)* (a license is cancelable at will, without cause); *Millbrook Hunt, Inc. v. Smith, 670 N.Y.S.2d 907 (App. Div. 1998)* (fox hunting club obtained judgment declaring that agreement was a lease not a license, based primarily on the fact that agreement had a specified term, which distinguished it from a revocable license).

(n3)Footnote 3. *See Metcalf v. Hart, 27 P. 900 (Wyo. 1891), appeal dismissed, 31 P. 407 (1892),* in which licenses were created by one who had only a "desert land" entry. The status of a guest with whom the landowner has a relationship has been held to be that of a licensee. *See Bennett v. Rogers, 519 N.W.2d 808 (Iowa 1994),* in which it was

held that a "live-in party" was not a tenant at will and therefore not entitled to notice prior to eviction, *distinguished by Petty v. Faith Bible Christian Outreach Center, Inc., 584 N.W.2d 303 (Iowa 1998). See also Loren v. Marry, 600 N.Y.S.2d 369 (1993).*

Merry v. Clark, 2002 Ohio 4204, 2002 Ohio App. LEXIS 4341 (2002) (license agreement concerning use and maintenance of a lane across the licensor's land). *Riverton Associates v. Harvey, 772 N.Y.S.2d 199 (2003)* (summary eviction proceeding against licensee of tenant upon death of tenant); *Dejesus v. Rodriguez, 768 N.Y.S.2d 126 (2003)* (license holdover proceeding against owner's ex-girlfriend; court held that ex-girlfriend was not mere licensee).

(n4)Footnote 4. Raleigh C. Minor, The Law of Real Property 160 (Andersen Bros. 1908). In the *Matter of Niagara Mohawk Corp. v. New York State Dep't of Transp., 637 N.Y.S.2d 505 (1996)* (fees for the licenses of a utility to erect electrical power transmission lines and gas transmission pipelines across lands of the state canal system were changed, and the court held that the licensee did not have a sufficient property interest in the amount of fee it paid for its due process rights to be violated by the change). *Forge v. Smith, 580 N.W.2d 876 (Mich. 1998)* (licenses are generally revocable at will, a license coupled with an interest is not, but to be irrevocable, the license must constitute an easement appurtenant), *distinguished by Kitchen v. Kitchen, 607 N.W.2d 425 (Mich. App. 1999).*

(n5)Footnote 5. Restatement of Property § 512 (1944); Charles E. Clark, Covenants and Interests Running with Land 30 (2d ed. 1947). Continued possession of a license "may become essential in the pursuit of a livelihood. This creates a property interest, revocation of which cannot be achieved without procedural due process as required by the 14th Amendment." *Gee v. Professional Practices Comm'n, 491 S.E.2d 375 (Ga. 1997). See also Goldrush II v. City of Marietta, 482 S.E.2d 347 (Ga. 1997), cert. denied, 118 S. Ct. 70 (1997). But see Federal Lands Legal Consortium v. United States, 195 F.3d 1190 (10th Cir. 1999)* (holders of livestock grazing allotments in forests did not have property rights, even though the defendant's customary practice was to renew grazing permits, creating a unilateral expectation of continued practice); *Markstein v. Countryside I, L.L.C. 77 P.3d 389 (Wyo. 2003)* (property owners' fishing rights were in the form of an easement, while their recreational use rights were in the form of a license); Care Ambulance-Paramedics, Inc. v. Stow, Ohio App. 2003 (ambulance service operator through its city license did not have a constitutionally recognized and protected property interest).

(n6)Footnote 6. In *Brooklyn E. Dist. Term. v. City of New York, 139 F.2d 1007, 1012 (2d Cir. 1944),*the court stated: "Respondent's power of termination after ten years ... and the possibility of its exercise do not prevent award for later periods though it is a proper subject for consideration in fixing value." In regard to value it has also been held that a licensee does not have an insurable interest. *Smith v. Royal Ins. Co. Ltd., 111 F.2d 667 (9th Cir. 1940); Chevy Chase Land Co. of Montgomery County, Md. & Columbia Country Club v. United States & Montgomery County, Md., 37 Fed. Cl. 545 (1997)* (land company conveyed a 12-acre parcel as a railroad right of way, which the railroad later conveyed to the city for a hiker/biker trail; the land company claimed unsuccessfully that it had conveyed only an easement, rather than a fee simple), *distinguished by Eldridge v. City of Greenwood, 503 S.E.2d 191* (S.C.App. Jun 15, 1998).

(n7)Footnote 7. *Clapp v. City of Boston, 133 Mass. 367 (1882). But see Brooklyn E. Dist. Term. v. City of New York, 139 F.2d 1007, 1012 (2d Cir. 1944),* discussed in the footnote above, where the issue was discussed and an award allowed. The interest of the condemnee was probably more than a license, however. *Tricker v. Pennsylvania Turnpike Comm'n, 717 A.2d 1078 (Pa. Commw. Ct. 1998)* (where state constructed expressway over licensed right-of-way, property owner possessed no real property interest subject to condemnation or taking, because licensee had not spent money in reliance on license to use right-of-way).

(n8)Footnote 8. The facts in *Brooklyn E. Dist. Term. v. City of New York, 139 F.2d 1007, 1012 (2d Cir. 1944)* illustrate this proposition. In that case the total value of the condemned property was paid into court and the litigation was between those claiming interests in the property as to the division of that award. Any amount given to the licensee was subtracted from that due the fee owner.

(n9)Footnote 9. *See* §64.04(b), *infra*.

(n10)Footnote 10. Actually the statement more often found is that the license is not an interest in land and therefore the Statute of Frauds does not apply to its creation. For example, the court in *Sweeney v. Bird, 292 N.W. 506, 508 (Mich. 1940),* stated: "Where nothing beyond a mere license is contemplated and no interest in the land is proposed to be created, the statute of frauds has no application." *Forge v. Smith, 580 N.W.2d 876 (Mich. 1998)* (because a license is not considered an interest in land, licenses do not have to comply with the requirements of the statute of frauds); *Eileen T. Quigley, Inc. v. Miller Family Farms, Inc., 629 A.2d 110 (N.J. Super. App. Div. 1993)* (a parol consent to enter upon land amounts only to a license).

(n11)Footnote 11. *See* Charles E. Clark, Covenants and Interests Running with Land 26 (2d ed. 1947), where it is stated "... the Statute of Frauds ... is properly not applicable to many simple and limited activities performed on the land." *But see Lodestar Tower North Palm Beach, Inc. v. Palm Beach Television Broadcasting, Inc., 665 So. 2d 368 (Fla. Dist. App. 1996)* (a license confers no interest in land, may be created orally, and merely gives one the authority to do a particular act on another's land); *Hill v. Eads, 970 S.W.2d 882 (Mo. App. 1998)* (a license is the privilege to enter land for a stated purpose which does not vest one with title, interest, or an estate in the licensee); *Cutter Flying Serv. v. Property Tax Dep't, 572 P.2d 943 (N.M. App. 1977)* (a license does not create an interest in land but is similar to a tenancy at will).

(n12)Footnote 12. *See, e.g., Taft v. Bridgeton Worsted Co., 141 N.E. 119 (Mass. 1923).* A plaintiff who owned land over a lake was using the lake as a source of ice for his business. He took ice not only from over his own land but also from over that of his neighbors by virtue of licenses from them. The defendant tortiously interfered with the level of the water in the lake and was sued for damages to the plaintiff's ice business. The court held that the plaintiff could recover only for the damage to his right to take ice from over his own land. For citation of other cases to the same effect, *see* Charles E. Clark, Covenants and Interests Running with Land 28 (2d ed. 1947).

(n13)Footnote 13. *Case v. Weber, 2 Ind. 108 (1850).*

(n14)Footnote 14. *Moundsville Water Co. v. Moundsville Sand Co., 19 S.E.2d 217 (W.Va. 1942).*

(n15)Footnote 15. *Miller v. Inhabitants of Greenwich Twp., 42 A. 735 (N.J. 1899).*

(n16)Footnote 16. Indeed, the licenses in such cases may have become irrevocable and therefore may have become easements as a result of such expenditures. *See* §64.05(b), *infra*.

(n17)Footnote 17. Restatement of Property § 521(1) cmt. c (1944).

(n18)Footnote 18. *Clifford v. O'Neill, 42 N.Y.S. 607 (1896); Kremer v. Chicago M. & St. P. Ry. Co., 52 N.W. 977 (Minn. 1892); Schiffman v. Hickey, 200 P. 1035 (Or. 1921); Kimack v. Adams, 930 S.W.2d 505 (Mo. App. 1996)* (licenses and leases distinguished); *Utah v. Hawkins, 967 P.2d 966 (Utah App. 1998)* (where licensee exceeded scope of license by coming in the middle of the night, kicking in door of shop, and removing his own equipment and that of licensor, license was exceeded and criminal trespass resulted).

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CHAPTER 64 LICENSES

8-64 Thompson on Real Property, Thomas Editions § 64.03

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§ 64.03 Historical Background of Licenses.

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§ 64.03(a) In General.

The license concept in our legal system is a simple recognition that one who is on land with the permission of the landowner cannot be committing a wrong as to such landowner, and it is implicit in such a situation that the permission can be revoked at any time. n19 The origin and development of this idea in the Anglo-American legal system and in the Roman Law has been obscured, however, because of a failure, perhaps due to its simplicity, to differentiate it from other more substantial or more complex, relationships.

§ 64.03(b) Roman Origin.

Whether the license concept was recognized as a separate legal relationship in Roman Law has been the subject of some disagreement. n20 Arguably, the modern license can be traced to the Roman doctrine of *precarium*, which was not often dealt with by scholars as a concept separate from contract and only occasionally mentioned. n21 One author suggests that the *precarium* was similar to a tenancy at will in the English Law. n22 Unlike the usufruct n23 or other servitudes which were recognized interests in land, the *precarium* was a gratuitous grant of possession and right of use of property which remained revocable at will regardless of the agreement between the parties. n24 The tenant *precario* was liable to the grantor only for *dolus*, or willful misuse, and remedies were available to the tenant against third persons who interfered with the tenant's possession. n25 As with mere license the *precarium* terminated upon the death of the holder. n26 The *precarium* thus had many of the characteristics of the license, but was probably a broader concept which included more substantial interests, some of which are dealt with in our system under landlord/tenant law.

§ 64.03(c) Early Anglo-American Authority.

In early English cases the license, as presently conceived, seems to have also been merged with other more substantial interests. The evolution of licenses as a doctrinal concept apart from other incorporeal hereditaments can be observed by the late 15th century, although the lines of distinction were not clearly marked. n27

In many cases, a claim of privilege, license or liberty was made, though not always successfully, as a matter of defense

to an action. n28 But while these cases illustrate the existence of such a concept (i.e., a privilege without any other interest in land), for centuries the courts continued to grapple with the problems of determining the specific nature of various types of licenses and whether a particular arrangement constituted a license, lease, easement, or something else. One scholar maintained that even into the early 19th century "judicial uses of the term *easement*... were substantially synonymous with *license*." n29 He cites, for example, Wood v. Lake, decided in 1751, in which the court used the terms easement, license, and liberty interchangeably to describe a seven-year parol agreement for stacking coal on another's land, and, inexplicably, stated that "the agreement in the present case was only for an easement, and not for an interest in the land." n30 As a further illustration he used Parker v. Staniland, n31 in which the court described the right of one to enter the land of another to remove potatoes as "only an easement, a right to come upon the land, for the purpose of taking up and carrying away the potatoes; but that gave him no interest in the soil." n32 There were earlier English cases, however, which dealt with the license concept in terms similar to those used today. Webb v. Paternoster, n33 for example, decided in 1629, discussed licenses and held that mere licenses were revocable, while those coupled with an interest were irrevocable. Arguably, it was the 1845 case of Wood v. Leadbitter n34 which defined the modern license relationship and distinguished it from the easement. n35 Wood v. Leadbitter involved the ejection of a ticket-holding patron of a racetrack. When the patron refused to leave he was forcibly ejected, and he brought suit for false imprisonment. The court found for the defendant, stating that the transaction created a mere license which, by its nature, was revocable. n36 Noting the distinction between a mere license and a license coupled with an interest, the court stated that the former were revocable while those licenses coupled with an interest were not. n37 Further, the opinion differentiated between easements and licenses in terms of creation by holding that "no incorporeal inheritance affecting the land can either be created or transferred otherwise than by deed." n38 As a result of this case the license concept became distinguishable from other property relationships and began to acquire its modern form.

§ 64.03(d) Confusion of the License Concept.

While the decision in Wood v. Leadbitter may have articulated the modern license concept, it dealt with a fact situation that would probably not be disposed of within that concept today. For many years, however, the rights of the purchaser of a ticket to an amusement event received a great deal of attention and, in the United States, resulted in law review commentaries by the most distinguished scholars n39 and a Supreme Court decision by Mr. Justice Holmes. n40 The issue was whether the ticket created a license or a more substantial interest in the place where the event was occurring. If it created a license only, then the proprietor could eject the patron arbitrarily even though doing so might constitute a breach of contract. If it created a property interest, either an easement or a leasehold estate, in the theater, or place where the event was being held, then any effort to eject the patron would give rise to an action of trespass in favor of the patron. While there were cases going both ways, the result usually reached was that there was a right of ejection and it was usually rationalized on the basis that the patron had only a license. n41 The more thoughtful commentators recognized, however, that property concepts had little to do with the result in those cases. The issue which should have been discussed was the policy question of the need to maintain order at such events as opposed to the rights of the individual patron. n42

Another group of license cases that are probably only of historic interest are those sometimes described as a situation in which one has a license to do an act on one's own land. Those were cases in which a dominant owner gave a permission, or license, to the servient owner to obstruct the easement in such a way as to require the conclusion that the easement had been extinguished. In rationalizing that the easement right had terminated, the courts determined that the license had become irrevocable.

In one of the prominent English cases dealing with this situation a building was allowed to be constructed on the servient estate which obstructed an easement for the passage of light and air, and it was held that the easement was extinguished. n43 One of the problems with this line of authority is that it utilizes the concept of an irrevocable license, a contradiction in terms, and another is that it arose out of the English law which recognized the prescriptive easement for light and air, an idea which has not been widely adopted in the United States. n44 The most important reason why the cases should be regarded as only of historical interest, however, is that they represent only situations in which an

easement has been abandoned. n45 In fact, in most of the instances where this line of reasoning has been used in the United States it was an alternative line of reasoning in which the opinions were based primarily upon the theory of abandonment of easements. In one case, for example, a landowner, through whose land a railroad ran, gave the railroad company permission to close a railroad crossing. Acting upon the consent, or license as it was called, the company closed the crossing and built another at a different location. The court held that any easement the landowner had at the old railroad crossing site was extinguished. Although the court discussed the theory and line of authorities dealt with herein, the decision was primarily based upon the idea of abandonment. n46 The same kind of reasoning has been used with respect to a line of cases involving the diversion of a stream with the consent of a downstream owner who later seeks to revoke the consent. n47

§ 64.03(e) Current Status of the License Concept.

Although it has been recognized that the license concept is not the proper basis for disposing of the disputes between theater owners and their patrons or those involving abandonment of easements, the concept nevertheless continues to be used in many situations where it is not appropriate. It may be used, for example, as a means of explaining the result in a case that was actually based upon an unarticulated policy decision, n48 or it may be as a means of expressing a negative result in a dispute in which a party has failed to establish the existence of another relationship. n49 In the latter situation the analysis will typically be devoted to the question of the existence or nonexistence of the contended-for relationship, and when it is found that such a relationship does not exist, the license label will be applied with little consideration being given to whether it accurately describes the relationship between the parties.

There also continues to be a tendency to confuse the license concept with easements in some situations with the result that there are many inconsistent and misleading statements made concerning the nature of the license relationship. This is particularly apparent in those situations in which the word license is used, usually in conjunction with other language, to describe relationships that have become, or were in their origin, irrevocable. The result is a contradiction in terms if the license is defined as a revocable relationship. Examples are the license coupled with an interest, n50 and the executed parol license. n51 In some of these situations the function of the license-plus reasoning may be to avoid the effect of the Statute of Frauds and in others to explain the application of the estoppel doctrine. In all of such situations, however, the relationship, despite the label, is something other than license and in the case of the license coupled with an interest or the executed parol license it is, in fact, easement. Those relationships will nevertheless be discussed herein, despite the fact that they are actually easements.

FOOTNOTES:

(n1)Footnote 19. While this definition would seem elementary, *see* §64.03(a) *infra* for a discussion of the controversy that it would have once evoked.

(n2)Footnote 20. *See* 7 Sir William Holdsworth, A History of English Law, 326 (2d ed. Little Brown 1937), where it is suggested that the distinction between licenses and other real property relationships "had been obscured by changes in the forms of action and by a forgetfulness of the Roman rules which Bracton had stated." *But see* Charles E. Clark, Covenants and Interests Running with Land 13, 18 n.17 (2d ed. 1947), stating that "In Roman or civil law there seems to be no defined legal interest of this character, there being no lesser *iure in re aliena* than servitudes...."

(n3)Footnote 21. *See* William Warwick Buckland, A Textbook of Roman Law from Augustus to Justinian, 521-525 (3d ed. 1966), where the author classifies precarium as a form of "innominate contract."

(n4)Footnote 22. Max Radin, Handbook of Roman Law, 214 (West 1927).

(n5)Footnote 23. 1 Theodor Mommsen et al., The Digest of Justinian, xxvii (University of Philadelphia Press 1985) where the *usufruct*, or *usufructus*, is defined as a personal servitude granting the right to use another's property and take its "fruits" or profits.

(n6)Footnote 24. William Warwick Buckland, A Textbook of Roman Law from Augustus to Justinian, 524 (3d ed. 1966).

(n7)Footnote 25. Max Radin, Handbook of Roman Law, 215 (West 1927).

(n8)Footnote 26. William Warwick Buckland, A Textbook of Roman Law from Augustus to Justinian, 525 (3d ed. 1966).

(n9)Footnote 27. 7 Sir William Holdsworth, A History of English Law, 356 (2d ed. Little Brown 1937).

(n10)Footnote 28. (1470) Y.B. 9 Edw. 4, f. 4, pl. 15; (1471) Y.B. 10 Edw. 4, f. 4, pl. 7; (1481) Y.B. 20 Edw. 4, f. 4. pl. 2, as cited in Charles E. Clark, Covenants and Interests Running with Land 18 n.17 (2d ed. 1947).

(n11)Footnote 29. Alfred E. Conard, *Easements, Licenses and the Statute of Frauds,* 15 Temple Law Quarterly 222, 223 (1940-1941).

(n12)Footnote 30. *Sayer 3, 96 Eng. Rep. 783 (K.B. 1751).*

(n13)Footnote 31. 11 *East 362, 103 Eng. Rep. 1043 (K.B. 1809).*

(n14)Footnote 32. 11 *East 362, 103 Eng. Rep. 1045 (K.B. 1809).*

(n15)Footnote 33. (1629) Palmer 71; 2 Rolle 143, 152; Noy 98; Golbolt 282. In this case, Sir William Plummer gave Webb a license to put hay on his land until it could be sold. The hay remained on the property for two years. Plummer subsequently leased the land to Paternoster who, in turn, placed his cattle on the pasture. Webb brought an action of trespass when the cattle ate his hay. The court stated that as a matter of law, Webb had more than a reasonable amount of time to sell the hay and therefore the license was revocable. Later cases such as *Wood v. Leadbitter, 153 Eng. Rep. 351, 13 M. & W. 838.* (Ex. 1845), *infra*, point out that the two real points decided in *Webb* were that the question of reasonable time was for the court, not the jury, and that two years was more than a reasonable amount of time. Therefore, the revocability distinction was merely dictum, although it was certainly a rule with which the court entirely agreed.

(n16)Footnote 34. *153 Eng. Rep. 351; 13 M. & W. 838.* (Ex. 1845).

(n17)Footnote 35. *See* Alfred E. Conard, *Easements, Licenses and the Statute of Frauds,* 15 Temple Law Quarterly 224 (1940-1941). *See also* Albert J. Harno, *The Revocability of Licenses as Applied to Property in Land, 7 Ky. L.J. 1, 12 (1915).*

(n18)Footnote 36. *See Wood v. Leadbitter, 153 Eng. Rep. 351; 13 M. & W. 838.* (Ex. 1845).

(n19)Footnote 37. *Wood v. Leadbitter, 153 Eng. Rep. 351, 354; 13 M. & W. 838.* (Ex. 1845). Despite revocability, a continuing duty toward the licensee may persist in some situations. *Gladon v. Greater Cleveland Regional Trans. Auth., 662 N.E.2d 287 (Ohio 1996)* (the court stated that when a trespasser or licensee is discovered in a position of peril, a landowner is required to use ordinary care to avoid injuring the trespasser or licensee) *distinguished by Coniff v. Waterland, Inc., 693 N.E.2d 1127 (Ohio App. 1997).*

(n20)Footnote 38. *Wood v. Leadbitter, 153 Eng. Rep. 351, 354; 13 M. & W. 838.* (Ex. 1845).

(n21)Footnote 39. *See, e.g.*, Alfred E. Conard, *The Privilege of Forcibly Ejecting an Amusement Patron, 90 U. Pa. L. Rev. 809 (1942);* William E. Burby, *Land Burdens in California*, 3 So. Cal. L.R. 141, 144 (1930). *See also* Albert J. Harno, *The Revocability of Licenses as Applied to Property in Land, 7 Ky. L.J. 1, 9-14 (1915);* Charles E. Clark, Covenants and Interests Running with Land 38-49 (2d ed. 1947).

(n22)Footnote 40. *Marrone v. Washington Jockey Club, 227 U.S. 633 (1913).* Despite the general policy of automatic renewal, a season ticket to sporting events is a series of revocable licenses, which may be revoked by the licensor at any time. The expectation that season tickets will be automatically renewed does not ripen into a property interest. *In re Liebmann, 208 B.R. 38 (Bankr. N.D. Ill. 1997) distinguished by In re Gorodess, 2001 Bankr. LEXIS 1686, 47 Collier Bankr. Cas. 2d (MB) 897* (Bankr. D. Colo. Dec. 31, 2001).

(n23)Footnote 41. *Marrone v. Washington Jockey Club, 227 U.S. 633 (1913). See also* Albert J. Harno, *The Revocability of Licenses as Applied to Property in Land, 7 Ky. L.J. 1, 9 (1915).*

(n24)Footnote 42. *See* Charles E. Clark, Covenants and Interests Running with Land 28 (2d ed. 1947). *See also* Alfred E. Conard, *Easements, Licenses and the Statute of Frauds,* 15 Temple Law Quarterly 222 (1940-1941). Both writers, as well as Harno, favor the patron.

(n25)Footnote 43. *Winter v. Brockwell, 8 East 308, 103 Eng. Rep. 359 (K.B. 1807).*

(n26)Footnote 44. *See* William E. Burby, Handbook of the Law of Real Property § 28, at 74 (3d ed. West 1965).

(n27)Footnote 45. *See* Charles E. Clark, Covenants and Interests Running with Land 34 (2d ed. 1947). *See also* Alfred E. Conard, *An Analysis of Licenses in Land, 42 Col. L.R. 809, 818 (1942).*

(n28)Footnote 46. *Boston & P.R. Corp. v. Doherty, 28 N.E. 277 (Mass. 1891).*

(n29)Footnote 47. *See, e.g., Addison v. Hack, 2 Md. (Gill) 221 (1844).* These cases also generally discuss the line of authority known as executed parol license. *See* § 64.05(b), *infra*. They are factually similar in that they generally involve the expenditure of money in reliance upon the oral permission given by the party whose land is being burdened.

(n30)Footnote 48. *See, e.g., Charlton v. Champaign Park Dist., 442 N.E.2d 915 (Ill. App. 1982).*

(n31)Footnote 49. *See* § 64.05(b) & (c), *infra*. *Osceola v. Osceola, 870 So. 2d 174 (Fla. App. 2004)* (a license permitting an Indian tribe to use property did not divest the state court of jurisdiction); *Markstein v. Countryside I, L.L.C. 77 P.3d 389 (Wyo. 2003)* (property owners' fishing rights were in the form of an easement, while their recreational use rights were in the form of a license).

(n32)Footnote 50. *See* §64.05(c), *infra.*

(n33)Footnote 51. *See* §64.05(b), *infra.*

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CHAPTER 64 LICENSES

8-64 Thompson on Real Property, Thomas Editions § 64.04

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§ 64.04 Scope, Transfer and Termination of Licenses.

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§ 64.04(a) Scope of the License.

The rights of the licensee are fixed by the agreement creating the license, if there is one. If there is no agreement, or the agreement does not fix the rights of the parties with respect to the matter in issue then it becomes a question of the reasonableness of the expectations of the parties. n52 The question is seldom raised in litigation between the licensor and licensee because, the license being revocable, the licensor can, by revoking, terminate all rights of the licensee. It is occasionally raised in situations where the licensee has acted pursuant to the license and the question is the extent to which the acts exceeded the authority given by the license. n53 Transformed into an easement, such questions depend upon the scope of the easement thereby acquired and should be dealt with in the same way as those arising out of other easement relationships. n54

COMPUTER-ASSISTED RESEARCH

LEXIS: licens! w/10 interest w/10 land or "real property" and nature or extent or scope and right! and revoc! or irrevoc!

EXPLANATION: With a Lexis search, the "States" database appears to be more useful than the "Realty" database. With a Westlaw search, it is generally best to use the Key Number system wherever possible.

§ 64.04(b) Transfer and Termination.

Licenses are inherently revocable and will be considered revoked by any act that is inconsistent with the continued existence of the relationship. Since most licenses are a result of a relationship of trust and confidence, a transfer of license rights will normally be considered to be inconsistent with the intention of the parties, and there are numerous cases stating that any attempt to assign such rights will result in the termination of the license. n55 Furthermore, it is frequently said that the death of either of the parties to the license relationship will terminate it. n56 However, in many of these decisions that question was not directly in issue, or the statement provided only an alternative basis for the decision in the case. Rather, in many cases, while the litigation was between transferees or successors of the original parties, the license had obviously been revoked as a result of the dispute between them. Instead of so holding, it may be

stated that the license was revoked upon the transfer by one of the parties. n57

Whether the license is transferable or has been terminated should depend upon the intention of the parties, or, if they have not expressed their intentions, the reasonableness of their expectations. n58 The fact that the license is to be the basis for a commercial enterprise to be conducted by the licensee may be some basis for concluding that the license is transferable, but there are many such cases holding that such licenses are nontransferable. n59 No single fact should be dispositive of this question. In fact, in one class of cases in which the relationship has been generally characterized as that of licensor/licensee, the amusement event ticket cases, the license is nearly always assumed to be transferable. In fact, large businesses have grown up around the transaction involved in transferring such tickets and this act has been given a common name (scalping) and the business or practice of transferring amusement tickets is often regulated by statute. n60 While some of the concession cases contain statements supporting the idea of non-transferability, or termination upon an attempted transfer, n61 the relationships in those cases are generally based upon contract and the outcome should depend upon the extent to which the contracting parties have developed expectations on that question.

Executed parol licenses which have become irrevocable because of the expenditure of money or labor by the licensee are, of course, no longer licenses. They are easements and are subject to the rules relating to termination of easements generally including those relating to release and abandonment. They may also be terminated by the fact that the improvement which was the basis for transforming them into easements has run its useful life. n62

The license coupled with an interest is also something more than a license. It is a form of easement and as such it is clearly irrevocable. It too will have a duration based upon factors involved in the creation of the relationship. Since it generally involves the right to retrieve items of personal property from the land of the licensor, its duration will be measured by the needs and expectations of the parties with respect to the particular personal property. If no time has been fixed by the parties, the licensee will generally be given a reasonable time within which to remove the property.

COMPUTER-ASSISTED RESEARCH

LEXIS: owner and license w/3 termin! or transfer! or abandon! or extinguish! and interest w/3 land or "real property" and possess! and revoc! or irrevoc!

EXPLANATION: With a Lexis search, the "States" database appears to be more useful than the "Realty" database. With a Westlaw search, it is generally best to use the Key Number system wherever possible.

FOOTNOTES:

(n1)Footnote 52. Restatement of Property § 516 (1944).

(n2)Footnote 53. *See Kissecker v. Monn, 36 Pa. 313 (1860); Satin v. Hileah Race Course, Inc., 65 So. 2d 475 (Fla. 1953).*

(n3)Footnote 54. *See Easements* ch. 60, *supra*.

(n4)Footnote 55. *See, e.g., Klein v. Stamler, 124 A. 366 (N.J. 1924); Bryant v. West, 219 S.W. 355 (Mo. 1919); Bruley v. Garvin, 81 N.W. 1038 (Wis. 1900); United Coin Meter Co. v. Gibson, 311 N.W.2d 442 (Mich. App. 1981); Qualls v. Lake Berryessa Enters., 76 Cal. App. 4th 1277 (1999)* (contract for use of mobile home lot created license that was actionable for breach of contract when another mobile home was placed on boundary adjacent to original lot); *Wehby v. Turpin, 710 So. 2d 1243 (Ala. 1998)* (license to use lake is personal, does not attach to or run with the land, and cannot be assigned, conveyed, or inherited); *Brown v. Rice, 716 So. 2d 807 (Fla. Dist. App. 1998)* (sale of condominium unit did not transfer license to use garage because a license is a personal privilege automatically extinguished upon sale or conveyance of the servient property).

(n5)Footnote 56. *See Hodson v. Kennett, 60 A. 686 (N.H. 1905),* holding that the death of the licensor operated as a

revocation. For other cases holding that the death of the licensee revoked the license, *see Prince v. Case, 10 Conn. 375 (1835); Trustees of Caledonia County Grammar Sch. v. Kent, 84 A. 26 (Vt. 1912); Schmoldt v. Loper, 182 N.W. 728 (Wis. 1921); but see Britt v. Berry, 202 S.W. 830 (Ark. 1918),* in which it was held that the successor to a licensee did not become an adverse possessor.

(n6)Footnote 57. *See, e.g., Bates v. Duncan, 42 S.W. 410 (Ark. 1897); Jones v. Stover, 108 N.W. 112 (Iowa 1906); Waddell v. School Dist. No. 2 of Yellowstone County, 238 P. 884 (Mont. 1925).*

(n7)Footnote 58. Restatement of Property §517 (1944).

(n8)Footnote 59. *See, e.g., Bryant v. West, 219 S.W. 355 (Mo. 1919).*

(n9)Footnote 60. *See In re Opinion of Justices, 143 N.E. 808 (Mass. 1924),* in which the constitutionality of a statute regulating the resale of ticket was held constitutional.

(n10)Footnote 61. *See Ulan v. Vend-a-Coin, 558 P.2d 741, 744 (Ariz. App. 1976).*

(n11)Footnote 62. *See* § 64.05(b), *supra.*

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CHAPTER 64 LICENSES

8-64 Thompson on Real Property, Thomas Editions § 64.05

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§ 64.05 Judicial Enforcement of Licenses

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§ 64.05(a) In General.

There are few legal relationships that consist of nothing other than a simple privilege to enter the land of another. In most cases in which the license concept is at issue, many other legal interests are present and a complex fact situation must be measured against the expectations of the parties. A resolution of issues unrelated to the license privilege may result in the decision that the relationship between the parties has terminated, and the result may be phrased in terms of a license that has been revoked. However, a slight variation in the facts could change the decision to one of irrevocability, in which case it is apparent that the relationship has become something other than license, or that at least the license privilege has not been dispositive of the issues involved in the litigation.

Therefore, while the license concept remains constant, its use in the various lines of authority, in which it regularly appears, does not. There are several distinct lines of authority involving the license concept, and dealing with commonly recurring fact situations, in each of which, the cases, while bearing a close relationship to each other, may have little in common with those in other lines of authority. Still, there are some generalizations that can be made about the license relationship. As a result, the organization used herein will be based upon a separate discussion of each of the major fact patterns while at the same time making some effort to generalize about the entire area.

§ 64.05(b) Licenses Treated As Similar to Easements.

Parties frequently deal with each other on an informal basis in situations in which their activities would be characterized as easement if more formality attended the entry into the relationship. Thus, a landowner may allow another to make some limited use of the land without any effort being made to embody the arrangement in a document. For example, the landowner may permit another to lay a water pipe across the land, or build a road, or divert a stream that crosses the land of both the parties. The fact situations range from those in which the arrangement is begun with nothing being said by either party although by their actions it is clear the landowner assents to what is being done, to those in which it begins with an express, but oral, understanding of exactly what is to be done and how long it is to be allowed. In between, of course, are many possibilities such as those in which there is an oral permission to engage in the activity with nothing being said concerning duration, or those in which the parties anticipate that the arrangement will be

formalized later but they fail to do so. In all of these situations the Statute of Frauds, or lack of conveyancing formalities, or perhaps a failure to clearly express, even orally, the intent to do so, prevents the relationship from becoming an easement, at least at the outset. The assent of the landowner to the activities, however, protects the actor from being treated as a trespasser and the arrangement is characterized as a license.

If the landowner attempts to terminate the relationship and the licensee objects, the courts will frequently intervene on behalf of the licensee to convert the license relationship into an irrevocable right that can only be called easement. The result is to dispense with the Statute of Frauds, or conveyancing formalities, or even the necessity for an adequately expressed intent, to reach a result that recognizes and gives effect to justifiably formed expectations. The courts will not do so in the absence of compelling reason, however, because the effect is to impose a permanent or long lasting burden upon the land of one who may not have anticipated such an effect, and that result is contrary to the Statute of Frauds. The recurring fact patterns that have led the courts to reach such results usually include some action on the part of the landowner that causes the other party to develop expectations concerning the right of use, and conduct on the part of the permittee. These expectations typically include the expenditure of substantial amounts of money or labor, which can be characterized as detrimental reliance. This is the kind of situation that has typically been said to trigger the equitable doctrine of estoppel; frequently the doctrine is invoked in these cases even though its application is based upon conduct that is often promissory rather than being representational or indicative of fraud or concealment.

While many intricate theories have been advanced to explain the result in these cases, such as variations upon the part performance doctrine, executed parol license, etc., n63 the fact is that all of these cases are simple illustrations of the broad principle outlined above, n64 and such cases bear a close resemblance to those in which restrictive covenants are imposed upon lands because of oral promises or representations made at the time of purchase. n65

The principle has been applied in many fact situations. In an Illinois case, n66 permission was given to an adjoining landowner to build a driveway on the land of the person extending the permission. As a result the licensee constructed his house with an attached garage that could only be reached by use of the permissive way. If the permission was allowed to be revoked the licensee would have been required to build a new garage and driveway on the other end of the house. The court held that the license had become irrevocable. In other words, it had become an easement because of the unfairness that would result from allowing it to be revoked. The doctrine has been applied to water pipes, n67 irrigation ditches, n68 drains, n69 and other easement-like uses. n70

While most courts recognize and apply these principles, n71 there are occasional statements that no amount of reliance can render an oral license irrevocable. n72 There are also decisions that permit revocation despite the fact that there has been claimed reliance, but they simply illustrate that the court, in these cases, is required to balance the interest of the parties and the policy of the Statute of Frauds. The unfairness to the claimant must be of such magnitude as to justify imposing the burden upon the landowner and thwarting the operation of the Statute of Frauds. If, for example, the expenditures were not great, n73 or the reliance not reasonable, n74 or the conduct of the landowner not calculated to induce reliance, n75 the balance may be struck against the claimant.

When the reliance has reached the point where it will justify imposing a burden upon the landowner, the relief will usually take the form of elevating the license to the status of easement. n76

Yet there is some disagreement among the courts and writers as to the duration of the easement thus created. It has been argued that it should be of perpetual duration and thereby given the same status as if it had been created by a written grant. n77 On the other hand, it has been contended that the duration should only be of such length as to enable the licensee to recover the investment that justified the decision to make the license irrevocable. The argument here is that the interest is created only to avoid the unfairness of depriving the claimant of an investment. n78 The latter position has been criticized on the basis that it creates uncertainty in land titles. n79 The older cases which recognized a limit on the life of the interest tended to base it upon the useful life of the improvement when kept in a good state of repair, and the disputes involved the extent to which the licensee's maintenance amounted to renewal as opposed to repairs. n80

That standard seems to have given way to the more current amortization of investment idea.

Although the usual relief when the licensee has expended money in reliance upon the license is in the form of rendering the license irrevocable, it is sometimes said that the only relief to which the claimant is entitled is restitutionary. Under such reasoning the landowner would be allowed to revoke but would also be required to make restitution to the claimant at least to the extent that the landowner was benefitted by the improvement made by the claimant. n81 In those situations where the licensee has erected a removable structure and the license has been held to be revocable, the licensee will generally be permitted to remove it. n82 The licensee may not be required to restore the premises to their former condition upon revocation of the license, however. n83

Even though the license is held to be irrevocable it may still be lost if the property is sold to a bona fide purchaser. Thus in the case of buried water line it was held that the sale of the burdened property to a party who had no notice of its existence resulted in the termination of the interest. n84 Such decisions should be compared to those involving easements created by implication where it is held that such interests, not being embodied in a recordable document, are not subject to the recording acts. It could be argued that the same reasoning should be applied to the easements created when a license is rendered irrevocable. n85

COMPUTER-ASSISTED RESEARCH

LEXIS: oral or parol w/10 licens! and easement and land or property and statute w/1 frauds

EXPLANATION: With a Lexis search, the "States" database appears to be more useful than the "Realty" database.

§ 64.05(c) License Coupled with an Interest.

In some situations a license will be implied as a part of another transaction between the parties. Thus, if a party owns personal property that is on the land of another with permission, a license will be implied to permit the removal of the same. n86 It may not even be necessary that the licensee have title to the personal property. A contract right to acquire it may be an adequate interest. Thus, in one case the plaintiff sold several lots of land to the defendant. One of the lots contained a building that plaintiff had leased to a third person. The sale terms also provided for the plaintiff to demolish the leased building and in an unrelated transaction the plaintiff agreed to build a new building on other land for the tenant of the building being demolished. Plaintiff needed the materials from the demolished building in the construction of the new building. The sale contract provided that the title to the demolished building was to remain in the defendant until demolition was completed. Before the demolition the defendant changed his mind about demolishing the building and notified plaintiff that he would not permit the demolition. Plaintiff proceeded to demolish it anyway to obtain the materials needed in the construction of his new building. The court held that plaintiff had a license coupled with an interest which justified his entry onto the premises. n87

The license in such cases is generally held to be irrevocable for a reasonable period of time. That result is accomplished by calling the interest a license coupled with an interest. n88 Such an interest is quite obviously different from the simple license relationship as defined herein. In fact it more nearly resembles the easement by necessity, n89 or the easement implied in favor of mineral developers to enable them to obtain access to the mineral deposit through the surface of the land. n90 The similarity to these easement relationships lies in the extent to which the interest is being created to satisfy policy objectives relating to the efficient and economic use of property rather than any actual perceived intent on the part of the parties.

Interestingly, while the Statute of Frauds is not a problem in the easements implied from necessity or for the removal of minerals because of the theory that the easement is being implied into a written grant, apparently no problem is perceived in the fact that the license coupled with an interest may rest entirely in parol. n91 The license is being implied here simply from the need to have access to one's property, and there may be no document between the parties from

which the right can be implied. In Ingalls v. St. Paul M. & M. Ry. Co., n92 the plaintiff's house was built on defendant's land pursuant to an oral license and the license was made irrevocable to permit the plaintiff to remove the house. There was never any writing between the parties into which it could be implied. n93

A series of timber cases illustrates the creation of this kind of license arrangement. In those cases it was held that if the contract for the sale of timber does not create an interest in the standing trees it nevertheless gives the vendee a revocable license to enter the land and cut the trees. Once the trees are cut an irrevocable license arises to enter and remove the cut trees. n94 A revocation after some but not all of the trees have been cut therefore terminates the right of the vendee to enter to cut any more trees but leaves unaffected the vendee's irrevocable license to remove the cut trees. This is explained on the basis that a contract for the sale of timber is a contract for the sale of real estate and while it is unenforceable unless in writing, a contract for the sale of trees that have been cut relates only to personal property. Once the contract is executed by the cutting of the trees and reducing them to personal property they become the property of the vendee. n95

It has been held that the failure of the licensee to act within the life of the license, be it a time fixed by agreement or a reasonable time, n96 will result not only in termination of the license but also loss of the asset to which the existence of the license relates. n97

COMPUTER-ASSISTED RESEARCH

LEXIS: licens! w/5 coupled and interest or grant

EXPLANATION: With a Lexis search, the "States" database appears to be more useful than the "Realty" database.

§ 64.05(d) Licenses Arising in Contractual Situations.

§ 64.05(d)(1) In General.

Licenses may also be created as an incident of contracts. If a contract calls for the entry upon the land of one of the contracting parties by the other, but the relationship between the parties makes it clear that they were not dealing primarily for the land use right, a license may arise. Since specific performance will not be required of most contracts and the parties therefore have the power to breach and thereby terminate the right of the other to performance, the privilege of entry conferred by such a contract, even if it is in writing, is revocable and the right of entry onto the real estate which it created must, therefore, be characterized as license. n98 This is true even though the revocation of the license might constitute a breach of contract for which damages may be had. n99 On the other hand, if the parties were primarily interested in conferring a right of entry upon the land, and the transaction is reflected in a writing, the interest will be called an easement or lease and the right will be deemed to be irrevocable and binding upon successors.

COMPUTER-ASSISTED RESEARCH

LEXIS: licens! w/5 interest w/5 land or property and possess! and contract or agreement and revoc! or irrevoc!

EXPLANATION: With a Lexis search, the "States" database appears to be more useful than the "Realty" database.

§ 64.05(d)(2) Theater Ticket Cases.

The results in the theater ticket cases n100 are frequently explained on the basis outlined in the previous paragraph. Thus, a ticket holder is generally held to have only a revocable license and can be ejected by the proprietor of the theater at will, even though such an ejection may result in a breach of contract for which damages may be recovered by the patron. In such cases, the patron is entitled to recover only if the theater proprietor uses more force than necessary in

ejecting the patron. n101 However, it is doubtful whether the result in those cases can be explained on the basis of property concepts alone. The more thoughtful cases recognize that the ultimate question is one of policy in which the extent to which a theater proprietor should have the power to maintain order is balanced against the patron's the right to view the event. n102

COMPUTER-ASSISTED RESEARCH

LEXIS: licens! and ticket and eject! and revoc! or revok!

EXPLANATION: With a Lexis search, the"States" database appears to be more useful than the "Realty" database. With a Westlaw search, it is generally best to use the Key Number system wherever possible, however in this case adding the "licens!" term helps avoid extraneous material.

§ 64.05(d)(3) The Concession Cases.

Another line of cases in which a contractual relationship may give rise to a license is that in which the owner of an establishment gives another a concession to operate a business on the premises. The fact situations are typified by those in which a hotel or department store allows another to conduct a particular type of business such as a gift shop n103 or music department n104 on a part of the premises, or those in which an apartment building owner contracts for another to install coin-operated laundry machines in the building. n105 Such a relationship does not clearly fit into any of the customary categories of property interests. It resembles easement in that the concessionaire is given a right of access for a limited purpose. It resembles a lease in that the parties may anticipate that a particular space be used and there is usually a periodic payment required which may resemble rent. While it has aspects of both easement and lease it may also look like a simple business relationship which only incidentally involves the use of land.

The courts are frequently called upon to determine disputes between the parties to such a relationship and also to determine the rights between one of the parties to the relationship and a third person, perhaps a governmental agency, and the result may depend upon whether the relationship is categorized as lease, easement, or license. In disputes between the parties the question may be whether the relationship extends to successors in interest, n106 whether the concessionaire became a holdover tenant after expiration of the original agreement, n107 whether there is tort liability of the landowner to the concessionaire, n108 or the right of the landowner to terminate the relationship, n109 or to a summary eviction remedy. n110 The relationship of the concessionaire to third persons may also sometimes depend upon the characterization of the interest as lease, easement, or license. Tax questions, for example, may be different if the concessionaire is characterized as lessee than if characterized as dominant owner or licensee. n111 Tort liability to third persons may also depend upon such a characterization n112 and various governmental relationships impact differently upon leases than upon the other two possible characterizations. n113

In such cases, a court is asked to render a specific kind of relief and the entitlement to such a remedy is said to depend upon whether a particular relationship, usually a lease, n114 exists. While there is sometimes an underlying policy question that has an influence on the decision, the result will ordinarily depend upon how much the facts resemble those that are typical in the contended-for relationship. Thus, to the extent the concessionaire is given exclusive control of a specific area and rent is reserved on a periodic basis, the relationship is apt to be called landlord/tenant with the result that the relationship will survive a transfer by the landlord, n115 and the tenant will be entitled to rights and remedies available to those similarly situated. n116

Unfortunately, for the rational and logical development of the law of licenses, if the contended-for relationship is found not to exist, or if the claimant is found not to be entitled to the relief requested, the result is usually called license with little thought being given to the implications of attaching such a label. For example, the operator of a gift shop in a hotel attempted to avoid the termination of its interest upon the sale of the hotel in a situation in which the document establishing the relationship provided for termination in the event the hotel was sold. It also provided for the kind of

rent that might be found in a lease, but gave the hotel owner the right to move the gift shop around in the hotel, thus creating an ambiguous relationship. An attempt was made to give additional weight to the claim by asserting that the document created a lease and that the gift shop owner was a tenant.

In denying the relief the court characterized the gift shop owner as a licensee rather than simply relying upon the provision for termination in the event of sale. n117 The implication of the decision is that the relationship could have been terminated at the will of the licensor at any time. One wonders, however, if the characterization would have been the same if the dispute had arisen as a result of the licensor's arbitrary attempt to terminate the relationship prematurely.

Similarly, the concessionaire in an arrangement for the installation of coin-operated laundry machines in the "laundry room in basement" sought to avoid eviction after the written agreement had expired by claiming to be a "statutory tenant." The court held for the apartment house owner and characterized the interest as a license n118 even though the arrangement in this case designated a specific area for the licensee to occupy, and therefore more nearly resembled the typical lease arrangement, in contrast to the previous case in which the gift shop owner's space was subject to being changed by the hotel owner. There is therefore even more doubt as to whether the decision would have been the same if the dispute had arisen during the term created by the document.

Occasionally, the characterization possibilities open to the court in such cases include "easement" as well as "lease" and "license." In one case n119 the City was attempting to cancel a contractual arrangement with a Landfill Authority on the basis that the Authority, by accepting trash from another municipality, had sublet or assigned in violation of the express terms of the agreement. The court avoided the problem by saying that the arrangement amounted to an easement in gross rather than a lease or license. The decision seemed to be as result oriented as the previous cases and it is doubtful that it provides any insight into analyzing the license cases.

The cases involving tort liability, either between the landowner and the concessionaire or between the concessionaire and third persons, were, in an earlier era in which the existence of the landlord/tenant relationship was held to insulate the landlord from liability to either the tenant or third persons, n120 more dependent upon the property classification system than at present. If the concessionaire was called a licensee it might have implications with respect to the liability of the landowner to the concessionaire and it might also have implications with respect to the liability of the concessionaire to other persons. The lessening of the importance of the property classification system has followed from developments in both tort law and property law. Thus, as property law has abandoned the doctrine of caveat emptor in the landlord/tenant situation, and has come to view the landlord/tenant relationship as a contractual one in which the landlord has a continuing obligation to proved adequate housing, n121 the liability of the landlord to the tenant for injuries received by the tenant has come to depend upon the same principles of negligence or absolute liability as are applied in other tort situations. n122 Similarly tort law has abandoned the rules that made liability depend upon the property label applied to the parties. n123 These developments have tended to reduce the importance of the license concept in the concession cases, but there are still occasionally cases in which the result in a tort case is stated in terms of whether or not the occupant of land is said to be a licensee. n124

Additionally, in many situations the rights and liabilities of the concessionaire with respect to third persons will still depend upon the extent to which the relationship is characterized as license. Real estate tax liability may depend upon such a determination in some situations. Thus, in one case the federal government allowed a private company to use federal land in carrying out contracts with the government. There was no charge for the use of the land, and the right of use was limited to the period of defense contracts between the U.S. Government and the contractor. The state in which the property was located sought to tax the land under a state statute that taxed otherwise exempt property that was leased to a nonexempt user. The arrangement between the federal government and the user had to be characterized as either a lease or something else. When it was determined not to be a lease and, therefore, not taxable, it was said to be a license arrangement. n125

Similarly, when a taxpayer challenged an arrangement between a publicly owned park and the operator of a water slide

located in the park, it was necessary to characterize the transaction in order to determine if the public body was justified in entering into it without having advertised for competitive bids. The waterslide operator was given the use of specific space in the park for a specific term and was required to pay a percentage of profits to the public body. If the transaction was a lease, bids would have been required to prevent the arrangement from violating a statute relating to the disposition of public property. The transaction was upheld by characterizing it as a license arrangement. n126 While the arrangement resembles the typical lease arrangement in many ways, the case was undoubtedly influenced by an unarticulated position concerning the policy behind the statute being construed. n127

Thus while the concession cases have ostensibly been the source of much of the law regarding the creation of licenses, there is some question as to the extent to which those cases have actually been based upon, or have contributed to, the body of law relating to the license relationship. In many of them the license characterization is simply a way of stating a negative result in litigation involving the existence or nonexistence of another relationship. n128

COMPUTER-ASSISTED RESEARCH

LEXIS: licens! and lease w/15 "department store" or building or complex and possess! w/10 space

EXPLANATION: With a Lexis search, the "States" database appears to be more useful than the "Realty" database.

§ 64.05(d)(4) Advertising Sign Cases.

Agreements for the maintenance of advertising signs on the land of another have frequently been held to create only a license, n129 despite the fact that they may be in writing and for consideration. n130 Sometimes they are held to create an easement in gross. n131 The lack of uniformity as to the treatment to be accorded such arrangement is no doubt due in part to the fact that the transaction does not fit readily into any of the customary categories of property law. Thus, while they seem to involve a payment for the use of specific space for a stated period of time and would therefore resemble the landlord/tenant situation, the space that is utilized may be no more than a coat of paint thick and it is not anticipated that human access be had except for the purpose of posting and maintaining the sign. For these reasons it is difficult to conclude that the transferee has received the possessory right necessary to characterize the transaction as a lease arrangement. Easement is perhaps the most appropriate characterization since the transaction involves access to property for a limited purpose. There may, however, be a personal element involved in the relationship since the purpose is to deliver a message and the location may be on premises used by the transferor as a residence or business. As a result the arrangement may be more appropriately designated as contractual with the result the property interest is called license. Furthermore the consideration paid for the privilege may be small in comparison to the extent to which the sign may interfere with the use of the property for other purposes. Since the question as to the kind of relationship is a matter of intent, and all such factors may bear upon intent, inconsistency in the decisions involving this relationship is not surprising.

In the most frequently cited case of this kind, Baseball Publishing Co. v. Bruton, n132 in which the question was the right to a remedy in kind, the court struggled with the characterization possibilities of lease, license, and easement, and concluded that the relationship was an easement in gross. To the same effect is a New York case in which the question was the extent to which the advertiser was entitled to a condemnation award when the signs were required to be removed for the purpose of widening a highway. n133 An Ohio case, however, denied the advertiser the right to participate in a condemnation award on the basis that such an agreement creates only a license. n134

It has also been held that a written agreement giving a church the right to maintain a large lighted sign created only a license which could be revoked. n135 The agreement in that case, which provided for an annual payment, did not indicate the duration of the right, but designated it as easement. The appellate court upheld the lower court decision on the basis that there was sufficient evidence to support the finding that the intent was to create only a license. n136 Such an agreement was also held to create only a license in a case in which the transferor attempted to hold the advertiser as a

holdover tenant for another term. n137 The latter holding would also be consistent with the conclusion that the agreement created an easement even though the court called it a license.

FOOTNOTES:
(n1)Footnote 63. One writer found it necessary to use six different theories to explain the results in the cases. Five of his theories related to the cases being here discussed. The sixth is related to the easement coupled with an interest. *See* Alfred E. Conard, *Unwritten Agreements for the Use of Land*, 14 Rocky Mt. L.R. 153, 294 (1942).

The Restatement (Third) of Property deals with these situations in §§ 2.9 and 2.10. § 2.9 creates an exception to the Statute of Frauds in situations in which the transferee "in reasonable reliance on the existence of the servitude has so changed position that injustice can be avoided only by giving effect to the parties' intent to create a servitude." § 2.10 provides as follows:

> § 2.10 Creation by Estoppel
>
> If injustice can be avoided only by establishment of a servitude, the owner or occupier of land is estopped to deny the existence of a servitude burdening the land when:
>
> (1) the owner or occupier permitted another to use that land under circumstances in which it was reasonable to foresee that the user would substantially change position believing that the permission would not be revoked, and the user did substantially change position in reasonable reliance on that belief; or
>
> (2) the owner or occupier represented that the land was burdened by a servitude under circumstances in which it was reasonable to foresee that the person to whom the representation was made would substantially change position on the basis of that representation, and the person did substantially change position in reasonable reliance on that representation.

Hoffman v. United Iron & Metal Co., 671 A.2d 55, (Md. App. 1996) (in an action against the owners of an automobile shredding facility for nuisance and trespass, among other counts, the court held that the shredding facility had acquired a prescriptive easement to maintain a nuisance for excessive noise, explosions, and air pollutants against persons who owned property and lived in the area for a continuous 20-year period), *distinguished by Johnson v. Indresco, Inc., 124 F.3d 197 (6th Cir. 1997).*

See e.g., Dance v. Tatum, 629 So. 2d 127 (Fla. 1993) (A license in land is generally revocable at the pleasure of grantor, but there is an exception. The exception exists where permission is granted to use property for a certain purpose, and in that use the permittee has expended large sums or incurred heavy obligations for its permanent improvement.); *Tricker v. Pennsylvania Turnpike Comm'n, 717 A.2d 1078 (Pa. Commw. Ct. 1998)* (a license becomes irrevocable when the licensee, in reliance upon license, treats land differently than if there were no license, by spending money for changes in land).

(n2)Footnote 64. Efforts are sometimes made to isolate and give controlling significance to particular facts in these cases. *See, e.g.*, Charles E. Clark, Covenants and Interests Running with Land 62 (2d ed. 1947), where the author, who labeled those who are given the benefit of this doctrine "land grabbers" and the landowners who are burdened thereby as "neighborly," says: "... unless the licensor has stated that his permission is ... to last permanently or for a stated time, he should be entitled to extinguish the privilege at any time."

(n3)Footnote 65. Thus, in *Miller v. Lawlor, 66 N.W.2d 267 (Iowa 1954),* the same kind of reasoning was used to create a right to a view across defendant's land with the result that defendant was prohibited from building in such a way as to obstruct the view. Prior to plaintiff's purchasing the house from a third person a promise was obtained from the

defendant that the view would not be obstructed. The result here could be phrased either in terms of a land use covenant, an easement for light and air, or an executed parol license, and it was created because of reliance by plaintiff on defendant's oral assurances. Interestingly, the court discussed different theories that might be used to justify the result such as part performance, equitable estoppel and promissory estoppel and said, as to such theories, "We deem the difference ... more apparent than real." *Id. at 271.*

(n4)Footnote 66. *Mercer v. Strum, 293 N.E.2d 457 (Ill. App. 1973). See also Dupont v. Whiteside, 721 So. 2d 1259 (Fla. App. 1998)* (irrevocable license to use roadway based on expenditures in constructing a home).

(n5)Footnote 67. *Monroe Bowling Lanes v. Woodfield Livestock Sales, 244 N.E.2d 762 (Ohio App. 1969); Hallauer v. Spectrum Props., Inc., 1999 Wash. App. LEXIS 1540* (Wash. App. Aug. 24, 1999) (water line diverting warm water to fish hatchery was not easement but license that was extinguished when property foreclosed).

(n6)Footnote 68. *Stoner v. Zucker, 83 P. 808 (Cal. 1906). Kitchen v. Kitchen, 641 N.W.2d 245 (Mich. 2002)* (irrevocable oral license for placement of an irrigation system across licensor's property).

(n7)Footnote 69. *Eppling v. Guentzens, 117 N.W.2d 820 (Iowa 1962).*

(n8)Footnote 70. *See, e.g., Russell v. Hubbard, 59 Ill. 335 (1871); Coumos v. Transcontinental Garage, 230 P.2d 748 (Wyo. 1951).* In both cases the owner of a building, built near the boundary, permitted the adjoining landowner to utilize a wall of the building in constructing a new building on the adjoining tract. It was held that the oral license to use the wall could not be revoked. It should be noted that in *Kamphouse v. Gaffner, 73 Ill. 453, 461 (1874),* the court stated that Russell "must either be limited to cases of party walls or be considered as overruled." *Tusher v. Gabrielsen, 68 Cal. App. 4th 131, 80 Cal. Rptr. 2d 126 (1998)* (license to use pond revocable); *Morning Call, Inc. v. Bell Atlantic-Pennsylvania, Inc., 761 A.2d 139 (Pa. Super Ct. 2000)* (Telephone service provider had an irrevocable license to keep its equipment on an apartment building. The equipment had been attached to the building for over 50 years, but neither side could produce a document that allowed the phone company to place its equipment on the apartment building).

(n9)Footnote 71. The cases are somewhat confusing and sometimes contradictory. For a citation of cases, see Charles E. Clark, Covenants and Interests Running with Land 62 n.146 (2d ed. 1947). The author of that work expresses some hostility to the operation of this doctrine.

(n10)Footnote 72. *See Mayor of Baltimore v. Brack, 3 A.2d 471 (Md. 1939); Belzoni Oil Co. v. Yazoo & M.V. Ry., 47 So. 468 (Miss. 1908).*

(n11)Footnote 73. In *Keck v. Scharf, 400 N.E.2d 503 (Ill. App. 1980),* the claim was to a roadway upon which the claimant had spread some rock and it was held that the expenditure was not great enough to justify imposing a burden upon the land. To the same effect is *Rouse v. Roy L. Houck Son's Corp., 439 P.2d 856 (Or. 1968).* In *Loid v. Kell, 844 S.W.2d 428 (Ky. 1993),* the purchasers of burial rights in a pet cemetery were held to be entitled to no relief against a purchaser of the cemetery burial ground who refused to recognize such burial rights and to use the cemetery for other purposes. The court stated that an easement by estoppel would not be binding on a subsequent purchaser with notice. While the decision may not be defensible on that ground, the court also held that the interest was a license and that the purchasers of the burial rights had not "erected valuable improvement in reliance on the license."

(n12)Footnote 74. *In Reed v. Horne, 187 So. 2d 316 (Miss. 1966),* both parties understood that no rights were to accrue until a writing was executed. The writing finally submitted by the landowner was rejected by the claimant, and it was held that the license was revocable. To the same effect is *Brown v. Eoff, 530 P.2d 49 (Or. 1975),* where the parties were aware that the license was only to last until the parties negotiated a formal easement. However, the fact that the parties anticipate the execution of a writing at a later time is only one of the factors bearing upon the reasonableness of the expectations of the parties. For example, in *Hunter v. Slater, 49 N.W.2d 33 (Mich. 1951),* the parties anticipated that defendant would later reduce their arrangement to a writing to be drafted by the defendant. Defendant nevertheless told

plaintiffs to go ahead and build their road. Defendant never produced the writing. The court held for the plaintiffs and prevented defendant from revoking the license.

(n13)Footnote 75. *Bieber v. Zellner, 220 A.2d 17 (Pa. 1966).* And *see Ewing v. Rhea, 62 P. 790 (Or. 1900),* which held that silent acquiescence by the landowner did not raise an estoppel.

(n14)Footnote 76. *See* Charles E. Clark, Covenants and Interests Running with Land 59 (2d ed. 1947), where the author stated:

> ... executed license or irrevocable license is a misnomer. What we are dealing with is an easement for that is what the licensee gets ... and hence a case ... was quite correct in granting a decree quieting title to an easement... .

See also Alfred E. Conard, *An Analysis of Licenses in Land, 42 Col. L.R. 820 (1942),* where it is said:

> When the parties have so acted that an unwritten license becomes irrevocable, an easement has arisen. To call it an irrevocable license is to imply a difference which does not exist... .

See also Industrial Disposal Corp. of Am. v. City of E. Chicago Dep't of Water Works, 407 N.E.2d 1203 (Ind. App. 1980).

In an unusual fact situation in which the licensee acquired the burdened property subject to a purchase money mortgage, the license, which had become irrevocable prior to that time because of the expenditure of money in reliance upon its continued existence, did not terminate, or merge into the fee title, so that when the mortgage was foreclosed and the property reacquired by the mortgagee it was still subject to the irrevocable license. The court thought it was necessary to its decision to hold that the license had never become an easement. The reasoning was that if the license became an easement it was subject to the doctrine of merger and would have ceased to exist when the licensee acquired the burdened estate. There are, obviously, other grounds available for the decision, and it, therefore, does not detract from the proposition that an irrevocable license is, in effect, an easement. *Dance v. Tatum, 629 So. 2d 127 (Fla. 1993).*

(n15)Footnote 77. In 3 Herbert T. Tiffany, The Law of Real Property, 417 (3d ed. Callaghan 1939) it is said:

> There is no more reason that the privilege should in such a case be restricted to the life of the improvements than that a decree specifically enforcing a contract for the sale of land, based on part performance involved in the making of valuable improvements, should call for a conveyance of an estate to endure only as long as the improvements endure.

He is obviously referring to cases in which an unwritten transfer of an easement is being given effect and the owner of the burdened land intended to create a perpetual interest. In such cases the function of the doctrine is simply to remove the bar of the Statute of Frauds. There are many cases, however, in which no such intent appears. In such cases the landowner may have simply failed to object to the activities or may have given a permission which was not intended to be perpetual, but upon which the licensee relied in making improvements. Tiffany's reasoning would not appear to be applicable to such cases.

(n16)Footnote 78. The Restatement took this position in § 519(4). In Alfred E. Conard, *An Analysis of Licenses in Land, 42 Col. L.R. 820 (1942),* the author criticized the Restatement position and that of another writer as follows:

> Burby suggests that it lasts until the licensed improvement decays without repair; the Tentative Restatement suggests that it lasts until the licensee has had a fair opportunity to realize upon his

expenditures. Apparently there is one case for the former view and none for the latter.

The Restatement seems to have prevailed, however, in that the recent cases have tended to adopt its position. *See Eliopulos v. Kondo Farms, Inc., 643 P.2d 1085 (Idaho 1982)*where it was held that six years was a sufficient time to recover a $500 investment. *See also Brusco Towboat Co. v. State by Straub, 567 P.2d 1037 (Or. App. 1977) aff'd in part, rev'd in part, 589 P.2d 712 (Or. 1978)*and *Belmont County Water Dist. v. State, 135 Cal. Rptr. 163 (1976).* One case, however, stated the duration in terms of the licensee's right to enter to maintain the structure "for so long as the nature of it called for." *Cooke v. Ramponi, 239 P.2d 638, 641 (Cal. 1952).*

(n17)Footnote 79. In Alfred E. Conard, *An Analysis of Licenses in Land, 42 Col. L.R. 821 (1942),* it is said:

> The Restatement's test of duration is even more objectionable; land titles will not gain in certainty by injecting the question of reasonable realization on expenditures.

(n18)Footnote 80. *Clark v. Glidden, 15 A. 358 (Vt. 1888); Phillips v. Cutler, 95 A. 487 (Vt. 1915).* Some cases denied access for the purpose of making repairs, however, and limited the duration to the life of the improvement without repairs. *Grimshaw v. Belcher, 26 P. 84 (Cal. 1891).*

(n19)Footnote 81. *See Mayor of Baltimore v. Brack, 3 A.2d 471, 475 (Md. 1939),* but the right to restitution may not be available against a successor to the original licensor. *See Shipley v. Fink, 62 A. 360 (Md. 1905). See also* 120 A.L.R. 549 (1939).

(n20)Footnote 82. The situations in which structures are erected may not be easement-like situations at all. They are more likely to be situations in which the licensee is given possession. To render the license irrevocable under those circumstances would in effect give the fee simple title to the claimant. Occasionally such a decision is made, however, and it is rationalized as an executed parol gift of land. *See Greiner v. Greiner, 293 P. 759 (Kan. 1930). See also* William E. Burby, Handbook of the Law of Real Property § 28, at 149 (3d ed. West 1965).

When the licensor is allowed to revoke after the licensee has erected a building upon the premises, the fixtures doctrine would seem to give title to the structures to the landowner, but, despite that doctrine, the licensee is generally allowed to remove the improvements. *See* § 46.02(g), *supra.*

(n21)Footnote 83. In *North Amber Meadows Homeowners Ass'n, v. Haut Enters., 647 A.2d 127 (Md. 1994),* it was held that when a landowner revoked the license of a homeowners' association to maintain a "storm water management pond" there was no obligation on the part of the licensee to restore the property to its former state.

(n22)Footnote 84. *Industrial Disposal Corp. of Am. v. City of E. Chicago Dep't of Water Works, 407 N.E.2d 1203, 1206 (Ind. App. 1980).*

(n23)Footnote 85. This would result in the apparent anomaly that the easement derived from an irrevocable license was entitled to more protection than one embodied in a grant. The anomaly is only apparent, however, because in the case of the easement embodied in a written grant the owner has a recordable document and if the interest is lost to a bona fide purchaser it is due to the failure of the easement owner to record.

(n24)Footnote 86. *See Ingalls v. St. Paul M. & M. Ry., 40 N.W. 524 (Minn. 1888),* in which the plaintiff, pursuant to an oral license, erected a house on land that was later sold to the defendant. Defendant refused to permit plaintiff to remove the house. The plaintiff elected to sue for conversion of the house. In finding for the plaintiff the court stated: "But if the licensee has erected ... a building which continues to be his property, he is entitled upon revocation to a reasonable opportunity to remove it." *Id. at 525. See also Rogers v. Cox, 96 Ind. 157, 158 (1884),* where the court stated: "An owner of land who sells property which can only be taken possession of by an entry upon the land, cannot

deny the vendees right to enter the land for that purpose." The court went on to hold that the implied license was irrevocable. To the same effect is *Carey v. Glenco Citrus Products Corp., 45 Cal. Rptr. 365 (1965),* where it was held that the purchaser of a growing crop had a license to enter to harvest the crop.

Sammons v. American Auto. Ass'n, 912 P.2d 1103 (Wyo. 1996) (The Supreme Court of Wyoming held that a third party against whom the licensor expressly suspended its consent to entry can still enter into the premises to remove the personal property of the licensee provided that its egress is done in reasonable manner and time. The court followed Restatement (Second) of Torts 2d § 176 (1965));*Hill v. Eads, 970 S.W.2d 882 (Mo. App. 1998)* (The landowner failed to enjoin licensee's removal of building constructed on land in what was deemed to be a license agreement. Permission from owner of land to erect and occupy a building on premises, even if not given in writing, will make the building property of the builder. The inference springing from a license agreement is that the land will be left as it was found [without the building]).

(n25)Footnote 87. *Bomberger v. McKelvey, 220 P.2d 729 (Cal. 1950).*

(n26)Footnote 88. *Bomberger v. McKelvey, 220 P.2d 729, 736 (Cal. 1950).*

(n27)Footnote 89. *See* 25 Am. Jur. 2d *Easements and Licenses*, § 29 at 530 for a discussion of easement by necessity.

(n28)Footnote 90. The policies behind the surface access easement for mineral developers has been the subject of reexamination by both courts and legislators and the resulting relationship more nearly resembles eminent domain than easement in that the mineral developer is being given the right to buy surface access rights. *See* Ronald W. Polston, *Redefining the Relationship Between the Surface Owner and the Mineral Developer,* 12 Eastern Min. Law Foundation § 22.01 (1991).

(n29)Footnote 91. *See, e.g., Ingalls v. St. Paul M. & M. Ry., 40 N.W. 524 (Minn. 1888).*

(n30)Footnote 92. *Ingalls v. St. Paul M. & M. Ry., 40 N.W. 524 (Minn. 1888).*

(n31)Footnote 93. Of course the same is true of the executed parol license cases, see § 64.05(b) *supra*, and both situations have been held to be exceptions to the Statute of Frauds, *see* Conard, Alfred E. "Easements, Licenses and the Statute of Frauds." Temp. Q. Vol. 15 (1940-1941) 294 but the similarity of these cases to the implied easement cases provides a new perspective on the implied easement cases.

(n32)Footnote 94. *See Drake v. Wells, 93 Mass. (11 Allen) 141 (1865); Giles v. Simonds, 81 Mass. (15 Gray) 441 (1860); Ross v. Hamilton, 113 A. 781 (Vt. 1921). See also 26 A.L.R.2d 1194 (1952).*

(n33)Footnote 95. *See* 2 Herbert T. Tiffany, The Law of Real Property, 528 (3d ed. Callaghan 1939). The Uniform Commercial Code now covers contracts for the sale of timber. U.C.C. §2-107(2). In the original version such contracts were covered only if the timber was to be cut by the vendor, but the current version covers them regardless of whether the timber is to be cut by the vendor or vendee. U.C.C., 1990 Official Text, Appendix II, 2-107(1) & (2).

(n34)Footnote 96. For cases concerning what is a reasonable time see *74 A.L.R.2d 886 (1960).*

(n35)Footnote 97. *See Lange & Christ Box & Lumber Co. v. Haught, 52 S.E.2d 695 (W. Va. 1949).*

(n36)Footnote 98. *Marrone v. Washington Jockey Club, 227 U.S. 633, 636 (1913). See also Richfield Oil Co. v. Hercules Gasoline Co., 297 P. 73 (Cal. App. 1931)* in which an oil and gas lessee contracted to sell his products to the plaintiff. The lessee then transferred the lease to the defendant who refused to sell to the plaintiff. Although the contract allowed the plaintiff to enter the land to make a pipeline connection, the plaintiff was denied relief and the interest was called a license. *Village of Wagon Mound v. Mora Trust, 62 P.3d 1255 (N. M. App. 2003)* (licensees had a right to

operate a water line in connection with a contractual right to receive and use spring water).

(n37)Footnote 99. *Marrone v. Washington Jockey Club, 227 U.S. 633, 636 (1913). See also May v. Breunig, 120 N.Y.S. 98 (1909).*

(n38)Footnote 100. *See* § 64.03(d), *supra.*

(n39)Footnote 101. *See Marrone v. Washington Jockey Club, 227 U.S. 633, 636 (1913).*

(n40)Footnote 102. *See* § 64.03(d), *supra*.

(n41)Footnote 103. *Union Travel Assoc. v. International Assocs., 401 A.2d 105 (D.C. 1979). Mandia v. Applegate, 708 A.2d 1211 (N.J. Super. App. Div. 1998)* (Lessee of commercial space was given permission to display merchandise on boardwalk, and year after year lessee extended use of boardwalk. The court deemed the boardwalk relationship to be that of licensor to licensee, and licensor was awarded damages for unauthorized use of boardwalk along with an injunction against further use by former licensee).

(n42)Footnote 104. *R.H. White v. Jerome H. Remick & Co., 84 N.E. 113 (Mass. 1908).*

(n43)Footnote 105. The coin-operated laundry cases are legion. *See, e.g., Polner v. Arling Realty, 88 N.Y.S.2d 348 (1949),* which has a fairly typical fact situation.

(n44)Footnote 106. *Reliable Washer Serv. v. Delmar Assocs., 267 N.Y.S.2d 419 (1966),* in which it was held that the transaction was a license and therefore not binding on a purchaser from the licensor; *but see Weiman v. Butterman, 260 N.E.2d 321 (Ill. App. 1970),* where the purchaser was bound on the basis of a finding that the transaction constituted a lease.

(n45)Footnote 107. *BeWigged by Suzzi, Inc. v. Atlantic Dep't Stores, Inc., 359 N.E.2d 721 (Ohio App. 1976); Lordi v. County of Nassau, 198 N.E.2d 33 (N.Y. 1964).*

(n46)Footnote 108. *Simons v. Murray Realty Co., 112 N.E.2d 264 (Mass. 1953).*

(n47)Footnote 109. *Ulan v. Vend-a-Coin, 558 P.2d 741 (Ariz. App. 1976).* An attempt by the state of Iowa to lease a portion of the bed of the Mississippi River to a pleasure boat operator was held to have created only a license because of the public trust doctrine. *Roberts River Rides, Inc. v. Steamboat Dev. Corp., 520 N.W.2d 294 (Iowa 1994).*

(n48)Footnote 110. *Jo Mark Sand & Gravel Co. v. Pantenella, 96 A.2d 217 (Conn. 1953).*

(n49)Footnote 111. *See Wenner v. Dayton-Hudson Corp., 598 P.2d 1022 (Ariz. 1979),* in which the plaintiff had a contract with a retailer by which the plaintiff would maintain departments in the stores of the retailer and would receive a percentage of the retailer's gross profit on the entire retail operation. The local taxing authorities characterized the plaintiff's income as being from leased property. It was held that the plaintiff had only a license and the income was therefore not taxable.

(n50)Footnote 112. *Di Renzo v. Cavalier, 135 N.E.2d 394 (Ohio 1956).*

(n51)Footnote 113. *See Metroweb Corp. v. County of Lake, 474 N.E.2d 900 (Ill. App. 1985),* in which it was held that the arrangement was not a lease and, therefore, the transferee did not have the possessory interest that would entitle it to challenge a zoning ordinance.

(n52)Footnote 114. As indicated, however, the options are sometimes limited to license and easement. *Senrow Concessions, Inc. v. Shelton Prop., Inc., 178 N.E.2d 726 (N.Y. 1961). Hill v. Eads, 970 S.W.2d 882 (Mo. App. 1998)* (For a landlord-tenant relationship to exist, the agreement must give tenant exclusive possession of premises, or a

portion thereof, but if evidence shows that the agreement conferred a non-exclusive privilege to use or occupy the premises, then the agreement is deemed a license); *Gasparo v. City of New York, 16 F. Supp. 2d 198 (E.D.N.Y. 1998)* (in holding that the City may not terminate newsstand agreements because of the First Amendment, the court states that a document titled a "license" may still be a lease if it grants not only a revocable right but the exclusive right to use and occupy that land).

(n53)Footnote 115. *See Polner v. Arling Realty, 88 N.Y.S.2d 348 (1949). But see Timmons v. Cropper, 172 A.2d 757 (Del. 1961),* holding a pinball concession to be a license because of the failure to allocate specific space, among other reasons.

(n54)Footnote 116. *See Weiman v. Butterman, 260 N.E.2d 321 (Ill. App. 1970),* where laundry machine concessionaire successfully sued apartment complex owner for breach of lease. *See also Nahas v. Local 905, Retail Clerks Int'l Ass'n, 302 P.2d 829 (Cal. 1956),* where an arrangement was characterized as a license rather than a lease. The court held that the tenant storeowner was not entitled to maintain a trespass or ejectment action against union picketers and at the most could only "maintain an action to enjoin or to redress a violation of his right to exercise the license." *Id. at 830.*

In a case in which the City of Anaheim sought to build an office complex, in a part of the parking lot of the stadium "leased" to the California Angels baseball team, it was held that the City was not limited to a particular area of the tract in regard to its obligation to provide 12,000 ground-level parking spaces. The "lease" gave the City control of the premises except to the extent necessary to provide the spaces, and it could, therefore, rearrange the parking lot in order to make room for the office complex regardless of where the parking was located when the arrangement began. The court said: "Arrangements between landowners and those who conduct commercial operations upon their land are so varied that it is increasingly difficult and correspondingly irrelevant to attempt to pigeonhole these relationships as 'leases', 'easements', 'licenses', 'profits' or some other obscure interest in land devised by the common law in far simpler times." *Golden West Baseball Co. v. City of Anaheim, 31 Cal. Rptr. 2d 378 (1994), vacated, California v. Wiley, 25 Cal. App. 4th 11 (1994).*

(n55)Footnote 117. *See Union Travel Assoc. v. International Assocs., 401 A.2d 105, 108 (D.C. 1979).*

(n56)Footnote 118. *Greenbro Coin Meter Corp. v. Basch, 132 N.Y.S.2d 876 (1954).*

(n57)Footnote 119. *Town of Kearney v. Municipal San. Landfill Auth., 363 A.2d 390 (N.J. 1976).*

(n58)Footnote 120. *See, e.g., Simms v. Kennedy, 76 So. 739 (Fla. 1917),* where the court stated:

> ... prima facie where the lessee is in entire possession, occupancy and control of the premises under a lease, and the premises were in good condition when leased, the lessor is not liable in damages for injuries to third persons caused by defects in the premises. And where action for damages is brought against the lessor, he may plead specially the lease to and the possession, occupancy, and control of the premises by another in bar of the action... .

See also Kalis v. Shattuck, 11 P. 346 (Cal. 1886).

(n59)Footnote 121. *Javins, Saunders, and Gross v. First Nat'l Realty Corp., 428 F.2d 1071 (D.C. Cir. 1970). See* Uniform Residential Landlord and Tenant Act §2.104, 7b U.L.A. 49 (Supp. 1993).

(n60)Footnote 122. *Trentacost v. Brussel, 412 A.2d 436 (N.J. 1980). Ruiz ex rel. Ruiz v. Kaprelian, 731 A.2d 118 (N.J. Super. Ct. App. Div. 1999).*

(n61)Footnote 123. *See Rowland v. Christian, 443 P.2d 561 (Cal. 1969),* as the first case to abolish the

classification scheme for licensees, invitees, and trespassers as determinative of the standard of care owed by a landholder. *See also Mile High Fence Co. v. Radovich, 489 P.2d 308 (Colo. 1971)* but see, *Bath Excavating & Const. Co. v. Wills, 847 P.2d 1141 (Colo. 1993)* (stating that the Colorado legislature intended to supercede *Mile High* by statute); *Pickard v. City of Honolulu, 452 P.2d 445 (Haw. 1969).*

(n62)Footnote 124. *See Di Renzo v. Cavalier, 135 N.E.2d 394, 396 (Ohio 1956). See also Younce v. Ferguson, 724 P.2d 991 (Wash. 1986),* declining to follow *Rowland* and its progeny and explicitly reaffirming the use of the common-law distinctions. *Calvillo-Silva v. Home Grocery, 968 P.2d 65,* (Cal. 1998) (stating that the California legislature intended to partially reverse *Roland* by enacting section 847), *distinguished by Jenkins v. County of Los Angeles, 74 Cal. App. 4th 524* (Cal. App. 2 Dist. Aug. 23, 1999).

(n63)Footnote 125. *Thiokol Chem. Corp. v. Morris County Bd. of Taxation, 197 A.2d 176 (N.J. 1963). See also Application of Rosewell, 387 N.E.2d 866 (Ill. App. 1979),* where Cook County attempted to put a city-awarded parking garage on the tax rolls on the theory that it was leased to a private party. The court held that operation of the garage by third parties constituted a license.

(n64)Footnote 126. *See Charlton v. Champaign Park Dist., 442 N.E.2d 915, 919 (Ill. App. 1982). But see Miller v. City of New York, 203 N.E.2d 478 (N.Y. 1964),* for an opposite holding in which a contract allowing the construction of a golf course was held to be a lease and beyond the power of the park commissioner to make.

(n65)Footnote 127. For a similar case with an opposite holding *see Mason v. Carroll, 269 So. 2d 879 (Ala. 1972),* where the concessionaire was given the right to build and maintain a par three golf course. The court held the arrangement to be a lease and therefore the concessionaire was not liable for the death of a child in a lake built by the concessionaire. If the arrangement had been held to be a license the child would have been an invitee in a public park and the concessionaire would have been liable.

(n66)Footnote 128. *Quantum Corp. v. Taxation & Revenue Dep't, 956 P.2d 848 (N.M. App. 1998)* (In case involving the rental of bingo halls to non-profit organizations, the court analyzes "bingo lease" agreements, discusses leases and licenses, and determines that agreement at issue is a lease because of issues of revocability and control) *overruling recognized by State v. Simpson, 32 P.3d 1226 (Kan. App. 2001) Gasparo v. City of New York, 16 F. Supp. 2d 198 (E.D. N.Y. 1998)* (although a license is terminable at will, without cause, the City of New York may not revoke newsstand licenses because that would be an impermissible intrusion on protected First Amendment activity).

(n67)Footnote 129. *Lewis v. Baxter Laundries, Inc., 236 N.W. 239 (Mich. 1931); Cooper v. Boise Church of Christ, 524 P.2d 173 (Idaho 1974). See also* 119 A.L.R. 1523 (1938); *Keller v. Southwood North Med. Pavilion, Inc., 959 P.2d 102 (Utah 1998)* (addendum to lease agreement gave only license to place sign on monument).

(n68)Footnote 130. *See Cooper v. Boise Church of Christ, 524 P.2d 173 (Idaho 1974).*

(n69)Footnote 131. *Baseball Pub'g Co. v. Bruton, 18 N.E.2d 362 (Mass. 1938).* In that case the court emphasized that the contract gave the advertiser the exclusive right to maintain a sign on the wall of a building. Previous Massachusetts cases had held that agreements for the maintenance of signs created only a license. *See Baertner v. Donnelly, 5 N.E.2d 419 (Mass. 1936); Taylor v. Maxwell Co., 31 F.2d 711 (1st Cir. 1929),* citing Massachusetts cases.

(n70)Footnote 132. *Baseball Pub'g Co. v. Bruton, 18 N.E.2d 362 (Mass. 1938).*

(n71)Footnote 133. *Rochester Poster Advertising Co. v. State, 213 N.Y.S.2d 812 (1961).* The court held that the claimant had an easement in gross. Statutes may require compensation in some situations. *See, e.g.,* Ind. Code Ann. § 8-23-20-12.

(n72)Footnote 134. *Ohio Valley Advertising Corp. v. Linzell, 152 N.E.2d 380 (Ohio App. 1957), aff'd, 153 N.E.2d 773 (Ohio 1958).*

(n73)Footnote 135. *Cooper v. Boise Church of Christ, 524 P.2d 173, 176 (Idaho 1974).*

(n74)Footnote 136. *Cooper v. Boise Church of Christ, 524 P.2d 173, 175-76 (Idaho 1974).*

(n75)Footnote 137. *Goldsmith v. Outdoor Adv. Co., Inc., 264 N.Y.S. 189 (1933).* To the same effect is *Lewis v. Baxter Laundries, Inc., 236 N.W. 239 (Mich. 1931),* in which the licensee removed the sign and the landowner was denied the right to recover the monthly payments as rent.

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CHAPTER 64 LICENSES

8-64 Thompson on Real Property, Thomas Editions § 64.06

AUTHOR: Professor Ronald W. Polston School of Law Indiana University, Indianapolis

§ 64.06 Bibliography.

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8-64 Thompson on Real Property, Thomas Editions Supp. to § 64.02

Supp. to § 64.02 Definitions of Licenses.

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§ 64.02(a) In General. [Go To Main]

Add:

Dewey Beach Lions Club, Inc. v. Longanecker, 905 A.2d 128 (Del. Ch. 2006) (owner gave public a license to traverse land; neighbor could not obtain a prescriptive use of the land).

Lally v. Fasano, 875 N.Y.S.2d 750 (2009) (a daughter-in-law as a licensee on her father-in-law's property was subject to summary eviction).

Add:

By the Stem, LLC v. Optimum Properties, Inc., 862 N.Y.S.2d 756 (2008) (license created by oral agreement).

§ 64.02(b) As An Interest in Land. [Go To Main]

Add:

Hanks v. Spann (Ala. App. 2009) (property owner exceeded the scope of an implied license to use a road).

Add:

Green v. Genovese, No. 23472, Apr. 23, 2008, Ohio App. (licensee of marina could recover compensation for a taking of part of the land for a road widening project).

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8-64 Thompson on Real Property, Thomas Editions Supp. to § 64.03

Supp. to § 64.03 Historical Background of Licenses.

[Go To Main]

§ 64.03(a) In General. [Go To Main]

Add:

Montrose Orchards, Inc. v. Lane, 2006 Mich. App. LEXIS 821 (Mich. Ct. App. 2006) (an oral license allowing licensee to bury and maintain water line was revocable at will).

§ 64.03(c) Early Anglo-American Authority. [Go To Main]

Add

Seven Lakes Development Co., L.L.C. v. Maxson, 144 P.3d 1239 (Wyo. 2006) (right to hunt and fish was a profit rather than a license).

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Supp. to § 64.04 Scope, Transfer and Termination of Licenses.

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§ 64.04(a) Scope of the License. [Go To Main]

Add:

Roman Catholic Church of Our Lady of Sorrows, 850 N.Y.S.2d 569 (2008) (the license did not permit the license holder to install structures consisting of steel beams and pipes on the licensed property).

§ 64.04(b) Transfer and Termination. [Go To Main]

Add

Montrose Orchards, Inc. v. Lane, 2006 Mich. App. LEXIS 821 (Mich. Ct. App. 2006) (an oral license allowing licensee to bury and maintain water line was revocable at will).

Add:

Blackburn v. Lefebvre, 976 So. 2d 482 (Ala. App. 2007) (license to use a pier was not terminated when the pier was destroyed by a hurricane).

Add:

Weyerhaeuser Co. v. Brantley, 510 F.3d 1256 (10th Cir. 2007) (license that terminated during a certain year was not extended by prescription).

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Supp. to § 64.05 Judicial Enforcement of Licenses.

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§ 64.05(b) Licenses Treated as Similar to Easements. [Go To Main]

Add:

HSP Gaming, L.P. v. City of Philadelphia, 954 A.2d 1156 (Pa. 2008) (subsequent revocation of license was invalid).

Add:

Thomas v. King, 160 S.W.3d 445 (Mo. App. 2005) (permissive license to cross land had been revoked; prescriptive easement obtained).

Add:

Hitch v. Vasarhelyi, 691 S.E.2d 286 (Ga. App. 2010) (license issued by a state agency to a landowner to build a dock did not constitute a taking of the neighbor's property).

§ 64.05(d) Licenses Arising in Contractual Situations [Go To Main]

§ 64.05(d)(1) In General.

Add:

Perbix v. Verizon North, Inc., 919 N.E.2d 1096 (Ill. App. 2009) (cables were laid on land pursuant to a license rather than an easement, and could be required to be removed).

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Annotation, *Right of licensee for use of real property to compensation for expenditures upon revocation of license*, 120 A.L.R. 549 .

Annotation, *Right of licensee of real property to injunction against, or damages for, trespass by third persons*, 139 A.L.R. 1204 .

Annotation, *Right of one who acquires title to, or other interest in, real property to benefit of a license previously issued*

by the public, permitting use of property for a specified purpose, 131 A.L.R. 1339 .

Annotation, *Rights, privileges, or easements of public, its grantees or licensees, on land bordering on navigable water*, 53 A.L.R. 1191 .

Annotation, *Status as licensee or lessee of one in occupation of land in anticipation of the making or execution of a lease*, 123 A.L.R. 700 .

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CHAPTER 65 PROFITS A PRENDRE

8-65 Thompson on Real Property, Thomas Editions 65.syn

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§ 65.syn Synopsis to Chapter 65: PROFITS A PRENDRE

§ 65.01 Definitions of Profits A Prendre.

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§ 65.01(b) Profits A Prendre As Incorporeal Interests.

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§ 65.04(c) Oil and Gas.

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§ 65.04(c)(4) Other Issues.

§ 65.04(c)(5) Legislative Rejection of Corporeal Classification.

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§ 65.04(d)(1) Corporeal/Incorporeal Classification.

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§ 65.05 Bibliography.

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CHAPTER 65 PROFITS A PRENDRE

8-65 Thompson on Real Property, Thomas Editions § 65.01

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§ 65.01 Definitions of *Profits A Prendre*.

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§ 65.01(a) Definition.

The term "*profit a prendre*" describes an interest that consists of a right of access to land for the limited purpose of removing some naturally occurring substance from the land. n1 It thus includes both an interest in the substance to be removed and the right of access to the land for that purpose. This collection of legal interests has traditionally been classified, along with easements and other servitudes, as incorporeal, or non-possessory. n2

§ 65.01(b) *Profits A Prendre* As Incorporeal Interests.

The terms "incorporeal" and "non-possessory" are both relics of a prior era. Neither accurately describes the qualities that are supposed to differentiate easements and profits from the more substantial interests with which they are thereby contrasted: the corporeal or possessory interests. n3 These terms suggest that while the fee interest is tangible and confers the exclusive possessory right, easements and profits are intangible and confer no possessory rights. Thoughtful examination of these concepts reveals the fallacy of such a classification system.

All such interests in land represent relationships between people and are, of course, intangible. The fee simple absolute and lesser interests, such as easements and profits, are customary groupings of interests and are themselves intangibles. The common law distinction between corporeal and incorporeal, which is equivalent to tangible/intangible, does not, therefore, accurately describe the difference between the fee simple estate and the easements and profits. n4 The possessory/non-possessory dichotomy also fails to isolate a difference. A possessory interest is one that includes access to and control over the land or some part of it. The owner of an easement also has such an interest, and the same is true of those who own profits. In fact, the owners of some easements and profits have almost complete control over the land to which their interest relates. n5 Examples include railroad rights of way and coal owners who engage in strip mining.

Most courts and writers have come to accept the rationale that the essential difference between incorporeal interests and the residual corporeal interest out of which they were created is that the incorporeal interests are limited in scope to the accomplishment of the purpose for which they were created. n6 Such a definition does not, however, seem to accurately describe those situations, such as a railway right of way or a coal owner who is allowed to strip mine, in which the

servitude owner clearly has the major share of control, and, in an effort to explain this seeming incongruity, such servitudes have been said to involve ownership of the surface. n7 There would seem to be no justification for creating such a new classification of ownership, however. There is no inconsistency in describing such interests as limited when compared to the fee ownership. Such interests have a single purpose; when that purpose is accomplished or abandoned they will cease to exist, and the entire interest in the property will revert to the fee owner. Furthermore, the creation of a new category of ownership of the surface would only create an unnecessary uncertainty. It would be difficult to determine when the control had reached the point where the interest was converted from a servitude into ownership of the surface.

COMPUTER-ASSISTED RESEARCH

LEXIS: "*profit a prendre*" and right w/3 take or remove and land or property

EXPLANATION: With a Lexis search, the "States" database appears to be more useful than the "Realty" database.

§ 65.01(c) Historical Anomalies in the *Profit a Prendre* Definition.

The combination of an outmoded classification system with the fact that it attempts to make a distinction between possessory and non-possessory interests in a situation where there is little factual basis for doing so has tended to result in an irrational system. In addition, since many of the interests that would have historically been classified as incorporeal *profits a prendre* became bases for governing relationships between those involved in extracting from the earth those substances that produced most of the energy needed by a developing industrial society, the strain on the system was increased. The courts felt a need to protect the developing energy industries in a way that seemed impossible under a classification system with its attendant procedural and substantive rules designed for a medieval agricultural society. The result is that the classification system today is almost incomprehensible and sometimes seems irrelevant to the bodies of law developed to govern the relationships between those involved in the activities within their scope.

If the bodies of law governing the various industries where the relationship is, or should be, that of a *profit a prendre* are functioning fairly smoothly, and if they appear to be doing so, why is there a need for concern about the classification system itself? Such a query becomes particularly appropriate when one considers the fact that the classification under consideration is a relic of an outmoded system of thought. One need only examine the many cases, n8 however, that struggled with this irrational classification system in a vain effort to find guidance in resolving the disputes in these industries to realize that there is a need to bring order to the system.

While the term "*profit a prendre*" is a product of an outmoded classification system, there would seem to be no problem with continuing to use it, as long as it is understood to mean an interest in land which is created for the limited purpose of permitting the removal of some naturally occurring substance from the land. When so understood, it becomes clear that the *profit a prendre* is a temporary title fragment which should be reunited with the residual fee upon completion of the contemplated activity or upon abandonment of the efforts of the developer.

FOOTNOTES:
(n1)Footnote 1. Restatement of Property (Servitudes) § 1.2 (2000).

(n2)Footnote 2. Restatement of Property §450 cmt. c (1944).

Harlow v. Lake Superior Iron Co., 36 Mich. 105, 119-120 (1877) (until the *profit a prendre* is "actually exercised and possession is taken, it is a floating, indefinite, and incorporeal right"). *Hubscher and Son, Inc. v. Storey, 578 N.W.2d 701 (Mich. App. 1998)* (commenting on *Harlow*).

(n3)Footnote 3. *See* William B. Stoebuck and Dale A Whitman, The Law of Property 435-436 (3d ed. 2000) where it is stated:

> Thus, "incorporeal" means simply "non-possessory." Today, however, the word carries inaccurate connotations that easements and profits are non-physical interests, contrasted with physical estates. In the first place, all interests in land are non-physical concepts, legally protected rights. Second, the uses that may be exercised by the holder of a servitude are as physical as the possession that goes with an estate... .

(n4)Footnote 4. In 1 P. Martin & B. Kramer, Williams & Meyers Oil and Gas Law Ch. 2, § 211 (Matthew Bender), it is stated:

> Hohfeld points out that all legal interests are incorporeal in character; Kocurek, taking the same position, points out that the right of ownership is no more corporeal than is a right to an easement; Salmond observes that the distinction sought to be made between corporeal and incorporeal property, if literally applied, is illogical and absurd.

(n5)Footnote 5. *Townsend v. State ex rel. State Highway Dept., 871 P.2d 958 (N.M. 1994)* (stating that a *profit a prendre* is similar to an interest in real property; however, it is transformed into a personal property interest when the physical substance is removed from the land. Thus the wrongful taking of the substance constitutes conversion).

(n6)Footnote 6. *See* Powell on Real Property(R) § 34.02 (Michael Allan Wolf ed., Matthew Bender). Restatement of Property cmt. A (1944).

(n7)Footnote 7. *See Pennsylvania S.V. R.R. v. Reading Paper Mills, 24 A. 205 (Pa. 1892),* where it is said: "... the railroad's ordinary right of way for its tracks ... would seem to be rather a fee in the surface and so much beneath as may be necessary for support, though a base or conditional fee, terminable on the cesser of the use for railroad purposes."

(n8)Footnote 8. *See* § 65.05, *infra*.

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CHAPTER 65 PROFITS A PRENDRE

8-65 Thompson on Real Property, Thomas Editions § 65.02

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§ 65.02 Historical Background.

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§ 65.02(a) Incorporeal Interests in General.

Despite the fact that the corporeal/incorporeal distinction, insofar as it assumes that only some interests in land are intangible (or possessory), makes no sense today, it made a great deal of sense to lawyers of the Middle Ages. At that time land ownership was equated with physical possession, and transfers of land were by physical livery of seisin. In the ceremony of livery of seisin, the entire tract of land, from the center of the earth to the heavens, was symbolically delivered by the grantor to the grantee, and the grantee was deemed to have physically received it, but since it was not possible to physically deliver an easement or a *profit a prendre* to the grantee, the medieval lawyer could not conceive of the transferee of one of the limited interests as having a physical, or possessory, interest in the land. n9 Such interests were considered to be intangible or incorporeal. n10 They could not be transferred by livery but only by grant under seal.

These concepts were formed before contract law had developed, and grants of incorporeal interests were sometimes used in situations that would later be covered by contract law. n11 As a result, there were many kinds of incorporeal interests which could only with difficulty be considered as incidents of real property today. There were offices, annuities, patronage rights, and many other kinds of rights which were considered to be incorporeal interests in land. At the time Blackstone wrote he was able to reduce the incorporeal interests to ten different kinds. n12 Interestingly, for our purposes, he does not include *profits a prendre*. The incorporeal interest that he called commons, however, is the one from which our modern concept of *profit a prendre* evolved.

§ 65.02(b) The Commons.

While the commons of Blackstone's time and earlier included interests we would recognize as *profits a prendre* today, it also included many relationships peculiar to the English land holding patterns of the Middle Ages and for which there is no modern counterpart. Thus, it included many customary rights which neither depended upon nor were created by transfer; rather, they depended upon custom arising out of the strip cultivation system of the Middle Ages. n13

The commons also included some interests that were, however, created by transfer, and in which the resulting

relationships existed between the landowner and another. In fact, the transferee might not even be an owner of land because, contrary to the rules with respect to easements, there was no requirement that the transferee's interest be appurtenant. *Profits a prendre* could be held in gross. n14 The difference between easements and profits in this regard was simply a matter of remedies available for the protection of the interests, n15 under the procedural system of that day.

While there were many kinds of commons, the four principal kinds were pasture, turbary, piscary, and estovers. n16 Pasture was simply the right to allow one's animals to graze on the lands of another. Turbary was the right to remove turf, piscary the right to fish, and estovers the right to remove wood from the affected land. All of these involved a right to remove something from the burdened land. Pasture, for example, was said to involve the right to remove grass by the mouth of the cattle. n17 There are also occasional references to commons of coals and to commons *sans nombre*. n18 This collection of incorporeal interests was called "commons" because the interests were generally held in common with the owner of the burdened land and sometimes with other dominant owners. They could be exclusive, however, and in such cases they were referred to as "several rights" rather than "commons." n19

The four principal kinds of commons reflected the needs of the agricultural society of the Middle Ages, but they did not very well serve the emerging industrial society of the 18th and subsequent centuries. As the function of the incorporeal interest changed to reflect changing times, the words used to describe the concept also changed. In describing the kinds of rights held by owners of the various kinds of commons, English texts of the 18th and 19th centuries used the phrase "*profit a prendre*," sometimes with the addition of the words "*in alieno solo*." n20 The American cases, while still referring to the English authorities which used the word "commons" as the category under which these kinds of interests were grouped, adopted the phrase "*profit a prendre*" as the classification heading for such interests. n21 The appearance of the *profit a prendre* as a new and separate heading in property texts was short lived, however. Writers and courts began to assert that there was no substantive difference between profits and easements, and the two areas began to be described under the single heading of servitudes. n22 The observation that there was a lack of difference between the two was based upon the realization that the only difference that had caused the two to develop separately in the first place was that previously, under the English cases, only profits were capable of being created in gross; by that time, however, both profits and easements had that quality. n23

FOOTNOTES:

(n1)Footnote 9. *See* 2 A. James Casner, American Law of Property §8.16 at 240 (Little Brown 1952).

(n2)Footnote 10. *See* 2 A. James Casner, American Law of Property §8.16 at 240 (Little Brown 1952).

(n3)Footnote 11. In 2 Frederick Pollock & Frederic W. Maitland, The History of the English Law 146 (2d ed. Cambridge University Press 1968) it is said: "The yet feeble law of contract is supplemented by a generous liberality in the creation of incorporeal things."

(n4)Footnote 12. 2 William Blackstone, Commentaries 21 (Fac. of 1st ed., Univ. of Chicago Press 1979). It is there said: "Incorporeal hereditaments are principally of ten sorts; advowsons, tithes, commons, ways, offices, dignities, franchises, corodies or pensions, annuities, and rents."

(n5)Footnote 13. *See* 3 William Holdsworth, History of the English Law 145 (3d ed. Little Brown 1927).

(n6)Footnote 14. In Blackstone, *supra* note 11, at 34, it is said: "Commons in gross, or at large, is such as is neither appendant nor appurtenant to land, but is annexed to a man's person; being granted to him and his heirs by deed... This is a separate inheritance, entirely distinct from any landed property, and may be vested in one who has not a foot of ground in the manor."

(n7)Footnote 15. 3 Holdsworth, *supra* note 13, at 157.

(n8)Footnote 16. Blackstone, *supra* note 12, at 34.

(n9)Footnote 17. 2 Pollock & Maitland, *supra* note 11.

(n10)Footnote 18. In *Caldwell v. Fulton, 31 Pa. 475, 478 (1858)* there is reference to commons *sans nombre*. *See also* Blackstone, *infra* note 58, where the commons of coals is referred to.

(n11)Footnote 19. 3 Herbert T. Tiffany, Real Property 435, §844 (3d ed. Callaghan 1939).

(n12)Footnote 20. In 3 Holdsworth, *supra* note 13, at 143 it is said: "There are many varieties of right to profits a prendre in alieno solo known to the common law, and most of them may be the subject of common rights."

(n13)Footnote 21. *See* William L. Burdick, Handbook of the Law of Real Property 441 (1914); and Herbert T. Tiffany, Real Property 427 (3d ed. 1938).

(n14)Footnote 22. *See* 2 A. James Casner, American Law of Property 231 (Little Brown 1952) citing and relying on Restatement of Property §450 (1944).

(n15)Footnote 23. Restatement of Property §450, Special Note (1944).

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CHAPTER 65 PROFITS A PRENDRE

8-65 Thompson on Real Property, Thomas Editions § 65.03

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§ 65.03 Incidents of *Profits A Prendre*.

§ 65.03(a) In General.

As has been indicated, the substantive rules governing the *profit a prendre* relationship are generally the same as those governing easements. An exception exists with regard to those relationships covered by the Uniform Commercial Code. If the substance is to be extracted by the buyer, however, the code will only govern relationships involving the extraction of fossil fuels. n24 Few such relationships, therefore, are governed by the code because fossil fuels are nearly always removed by professional developers who purchase that right from landowners. The code will, however, cover most arrangements relating to growing crops, timber, and "other things attached to the realty and capable of severance without material harm thereto ...," n25 "because arrangements with respect to such substances are covered, whether such things are to be removed by the seller or the buyer; the possible exceptions with respect to timber have already been noted." n26

While most arrangements for the extraction of fossil fuels will not be governed by the UCC, that does not mean that they will be left to be governed by the general rules relating to easements. Very specialized bodies of law have developed to govern relationships relating to the extraction of coal. n27 and oil and gas. n28 Those subjects are covered elsewhere in this treatise.

There are some aspects of the relationship that require special treatment, and those areas will be touched upon here.

§ 65.03(b) Creation.

The documents that create *profits a prendre* are frequently called leases by the parties. This seems to be true not only with respect to those relating to the extraction of oil and gas and coal, but also with respect to those involving most other kinds of profits. Thus, there are judicial decisions in which arrangements that have extended the right to hunt, n29 take turpentine from pine trees, n30 and take geothermal steam, n31 timber, n32 sand, gravel, and stone, n33 have utilized a form entitled "Lease." Many such arrangements will be for a term of years and will often include a secondary term beyond the fixed term, which will be measured by the continuance of production of the named substance. When considered along with the title of the document, the fact that the duration is measured in years sometimes results in an effort to characterize the relationship as landlord/tenant and to attempt to apply rules applicable to such tenancies. n34

Such efforts are quite obviously mistaken. The relationship created by such a document does not confer the general possessory right that is a part of the landlord/tenant relationship. It gives only a right of access to land for the purpose of removing the designated substance and leaves the landowner's general right of possession undisturbed, except to the extent necessary to accomplish that purpose.

In Kennecott Corp. v. Union Oil Co., n35 for example, the court correctly rejected the argument that landlord/tenant law should be applied to a "Lease" that was for the purpose of extracting geothermal steam. n36 In doing so, the court, relying mostly on cases from the oil and gas area, said, "A profit interest in geothermal resources is not an ordinary leasehold interest at all. Rather it is a means by which a party may explore for and extract resources until it chooses in its sole discretion to surrender the right to do so. Upon ... surrender ... the ... interest automatically extinguishes and merges into the estate out of which it was carved." n37

There are also occasional decisions construing written transfers of the right to take a substance from the land of the transferor as creating nothing more than a license that is revocable at the will of the transferor. n38 There is no apparent justification for such a characterization, and such decisions have been criticized by the commentators. n39

COMPUTER-ASSISTED RESEARCH

LEXIS: "profit a prendre" and right w/3 take or remove and land or property and lease and creat!

EXPLANATION: With a Lexis search, the "States" database appears to be more useful than the "Realty" database.

§ 65.03(c) Transferability and Divisibility.

Most questions concerning transferability and divisibility will be covered either by the same rules as govern easements or by those that come from specialized bodies of law designed for specific industries. However, there are some problems relating to profits that require special treatment. Such problems result from the fact that the profit includes the right to take some substance from the land. Attempts to transfer or divide the right will have a different impact upon the servient estate than would transfer or division of an easement. The results in these cases, however, are based upon a determination of the scope of the right, and that, in turn, depends upon the intent of the parties. n40 To that extent, the approach is the same as in the easement cases.

Although there is not a large number of cases involving such questions, it is said to be the general rule that a non-exclusive profit is transferable but not divisible. n41 If a transfer is to more than one person, the new owners must work the profit as a common stock. n42 They must, in other words, work it jointly and take no more than would have been taken by a single owner. The reason for the rule is obviously to give effect to the presumed intent of the parties. In the non-exclusive situation, in which the right is to be exercised in conjunction with the servient owner, to permit new users to be introduced into the situation would tend to diminish the amount of the substance available for the servient owner.

When the profit is exclusive, however, it is generally said to be the rule that it is completely transferable and divisible. n43 That is particularly true in those situations in which the servient owner is compensated on the basis of a payment of a specific amount per unit of substance removed. n44 In such situations, the more of the substance that is taken, or the more quickly it is taken, is a benefit to the owner of the servient estate and will be presumed to be within the contemplation of the parties.

Since the question of transferability and divisibility is a matter of intention the facts of each case must be examined. If it appears that the parties did not intend either transferability or divisibility, those qualities will not exist. In one case, for example, the court held that an exclusive boating and fishing privilege was not transferable or inheritable because the parties failed to expressly extend the right to heirs and assigns. n45

COMPUTER-ASSISTED RESEARCH

LEXIS: "*profit a prendre*" and transfer! or divisib! or alien! w/5 interest

EXPLANATION: With a Lexis search, the "States" database appears to be more useful than the "Realty" database.

FOOTNOTES:
(n1)Footnote 24. U.C.C. § 2-107(1).

(n2)Footnote 25. U.C.C. §2-107(2).

(n3)Footnote 26. *See* §65.05(d)(2), *supra*.

(n4)Footnote 27. *See* ch. 48, *supra*.

(n5)Footnote 28. *See* ch. 49, *supra*.

(n6)Footnote 29. *St. Helen Shooting Club v. Mogle, 207 N.W. 915 (Mich. 1926).*

(n7)Footnote 30. *Newton v. Allen, 141 S.E.2d 417 (Ga. 1965).*

(n8)Footnote 31. *Kennecott Corp. v. Union Oil Co., 242 Cal. Rep. 403 (1987).*

(n9)Footnote 32. In *Alexander v. Gardner, 96 S.W. 818 (Ky. 1906),* while the document of transfer was not called a lease, the court nevertheless called the relationship to transfer timber rights a landlord/tenant relationship.

(n10)Footnote 33. *Baker v. Hart, 25 N.E. 948 (N.Y. 1890).*

(n11)Footnote 34. *See, e.g., Alexander v. Gardner, 96 S.W. 818 (Ky. 1906);* and *Kennecott Corp. v. Union Oil Co., 242 Cal. Rep. 403 (1987).*

(n12)Footnote 35. *242 Cal. Rep. 403 (1987).*

(n13)Footnote 36. *242 Cal. Rep. 403 (1987).*

(n14)Footnote 37. *Kennecott Corp. v. Union Oil Co., 242 Cal. Rep. 403, 408 (1987).*

(n15)Footnote 38. *See, e.g., East Jersey Iron Co. v. Wright, 32 N.J. Eq. 248 (1880); Mallet v. McCord, 56 S.E. 1015 (Ga. 1907);* and *Hodgson v. Perkins, 5 S.E. 710 (Va. 1888).*

(n16)Footnote 39. In *Frank Goodwin, Law of Real Property 415 (West 1905) East Jersey Iron Co. v. Wright, 32 N.J. Eq. 248 (1880)* is criticized as follows: "This case, it is entirely safe to say, is unsound. What was granted was undoubtedly a profit a prendre."

(n17)Footnote 40. *See* Roger A. Cunningham et al, The Law of Property 462 (2d ed. West 1993).

(n18)Footnote 41. *Harlow v. Lake Superior Iron Co., 36 Mich. 105 (1877); Anderson v. Gipson, 144 S.W.2d 948 (Tex. App. 1940); O'Donovan v. McIntosh, 728 A.2d 681 (Me. 1999)* (a *profit a prendre* is freely assignable).

(n19)Footnote 42. *See* Charles E. Clark, Covenants and Interests Running with the Land 65, 66 (2d ed. 1947), first published as *The Running of Easements and Profits, 38 Yale L.J. 139 (1928),* for a citation of cases.

(n20)Footnote 43. *See Hinds v. Phillips Petr., 591 P.2d 697 (Okla. 1979).*

(n21)Footnote 44. *See* Restatement of Property § 493 cmt. c (1944).

(n22)Footnote 45. *Williams v. Diederich, 223 S.W.2d 402 (Mo. 1949). Hagan v. Delaware Anglers' & Gunners' Club, 655 A.2d 292 (Del. Ch. 1995)* (Stating that a *profit a prendre* that is "appurtenant" automatically passes with the property; however, a *profit a prendre* "in gross" is a personal right and will not automatically pass with the property. Whether a *profit a prendre* is appurtenant or in gross is based on the specific circumstances of the grant.)

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CHAPTER 65 PROFITS A PRENDRE

8-65 Thompson on Real Property, Thomas Editions § 65.04

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§ 65.04 Current Jurisprudence on the Profits Concept.

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§ 65.04(a) In General.

Despite the fact that profits are now considered by most writers to be governed by the same rules as govern easements, n46 there continues to be a separate discussion of the cases dealing with *profits a prendre*. n47 It is also clear that functionally the two areas deal with distinctly different kinds of transactions. In fact, highly specialized bodies of law have developed governing transactions in industries where the basic relationship is that of a *profit a prendre*. The oil and gas industry n48 is the chief example. The harvesting of timber n49 and the removal of coal n50 and other minerals are other examples of industries in which the basic relationship is, or may arguably be, that of a *profit a prendre*. While no effort will be made here to discuss in detail those separate bodies of law (which are dealt with elsewhere in this treatise), there are many aspects of the *profit a prendre* relating to those areas that require separate discussion.

COMPUTER-ASSISTED RESEARCH

LEXIS: "*profits a prendre*" and land or property and coal or timber or oil w/5 right and owner!

EXPLANATION: With a Lexis search, the "States" database appears to be more useful than the "Realty" database.

§ 65.04(b) The Coal Cases.

§ 65.04(b)(1) The Early Decisions.

As the early disputes involving the extraction of coal began to reach the courts, the classification of the developer's interest as a *profit a prendre* (and therefore incorporeal) seemed to create problems that might hinder the development of coal as a major energy source. There was some question, for example, concerning the extent to which an incorporeal interest, particularly one in gross, could be transferred and divided among several owners. n51 Since complete transferability and divisibility were deemed essential to the industry, the classification system seemed to pose an obstacle to the development of the industry. While this problem could have been overcome simply by holding that exclusive *profits a prendre* were freely transferable and divisible, as, indeed, later did occur, n52 the reaction of an early

Pennsylvania case, Caldwell v. Fulton, n53 was instead to change the classification system with respect to coal. It was reasoned that when the ownership of the coal itself was transferred, a separate corporeal fee simple estate was created underground. Interestingly, the deed in that case only purported to give the "full right and privilege of digging and taking away stone coal," n54 and did not contain language of transfer with respect to the coal itself. The deed was consistent, in other words, with the idea that a traditional incorporeal interest was created. While it may have been an exclusive right that was transferred, the law with respect to incorporeal interests at that time recognized such a possibility and referred to it as a several right. n55 The trial court, while uncertain whether to call the transferees' interest a "common in gross, or appurtenant, or a license," held that it was an incorporeal interest. n56

The Pennsylvania Supreme Court, however, went to great lengths to explain that the rights of the coal owner were more substantial than would be indicated by calling it an incorporeal interest; in doing so, the court created the concept of coal ownership which still dominates industry thinking today. It is a concept, however, that is inconsistent with most of property law generally, contains internal inconsistencies and has been largely repudiated both legislatively and judicially. It is the idea that when the title to solid minerals is severed from the surface, a new -- but buried -- tract of land is created that is owned by the mineral owner in a fee simple possessory estate. Those who describe it seem to think in terms of layers of ownership. The surface owner is considered as owning the top layer, but the mineral owner is considered as owning everything below it. In fact, the reference to the residual fee owner as the "surface owner" is a part of that thinking.

The analysis used by the Pennsylvania Supreme Court in *Caldwell* was, first of all, based upon some misconceptions about incorporeal rights. The Court says, for example, that "common of estovers, of turbary, and of coals, are not, strictly speaking, incorporeal, for they are not so much the produce of the lands annually renewable as they are part of the land itself. But these are always appendant or appurtenant... ." n57 That statement, of course, is incorrect with respect to both of the points made because, as has been shown, the commons, including those mentioned by the court, were clearly considered to be incorporeal n58 and were permitted to be held in gross in the English Common Law. n59 Several other statements by the court in *Caldwell*, and from other cases of that era, take an extreme position with respect to the rights of the coal owner that is difficult to reconcile both with the law existing at that time and with subsequent developments. One court, for example, referred to a conveyance reserving the minerals as a conveyance in which the grantor "severs his estate vertically, i.e. he grants out his estate in parallel horizontal layers, and the grantee gets only the parallel layer granted to him." n60 In *Caldwell* the court said, "... it is more incongruous still to treat the surface as a corporeal hereditament, and the mine right ... as incorporeal... It would be more according to analogy to consider the surface as incorporeal...." n61 To the same effect, in a subsequent Pennsylvania case the court said, "... there would be no more propriety in claiming a title in the grantor [who conveyed the coal] to the space it [the coal] occupies than there would be in claiming a similar right in a vendor of the surface to the space developed by the vendee in digging the cellar and foundation of a house." n62 The *Caldwell* court also stated, "... there is no more reason for considering the coal an incorporeal hereditament, because it has not been opened, than there is for considering the soil as such because it has not been plowed." n63 Yet another Pennsylvania court said, "... a mine right severed from the ownership of the soil, may be regarded as a separate close, and compared to the lower story of a building." n64

COMPUTER-ASSISTED RESEARCH

LEXIS: Date is bef 1920 and profit and land or property and coal or mineral w/5 right and owner! and not oil and not timber

EXPLANATION: With a Lexis search, the "States" database appears to be more useful than the "Realty" database.

§ 65.04(b)(2) Ownership in Place.

Such extreme statements almost seem to take the view that a severance of the minerals results in the drawing of an imaginary line beneath the surface at a depth that would give the surface owner only enough soil to cultivate or build

upon, while the mineral owner would receive the rest. Of course, neither this position nor the extreme statements that gave rise to it can be justified. The person referred to as the "surface owner" does not just own a layer of soil but is the owner of the residual fee simple estate to which temporary title fragments, such as mineral ownership, should ultimately return. n65 The estate of such a person extends from the center of the earth to the heavens. n66 The only exception is with respect to those substances to which the mineral owner has a right of removal. If there are no mineral substances or if those substances have been mined out, then the mineral ownership amounts to nothing. The mineral owner's right is nothing other than the right to remove whatever mineral substances may be present under the ground, and it is a right that is by nature temporary, for when the owned substance is removed, the right ceases to exist. n67 Nor does it make any difference whether the mineral interest is created by a grant of the minerals or by a grant of the surface reserving or excepting the minerals. In either case, because of the temporary nature of the mineral interest, the residual fee must be in the person who holds or receives the right to the surface of the land. n68

The courts in the early coal cases seem to have been misled by the fact that the word "incorporeal" refers to an intangible right or an asset lacking physical substance, and they could not conceive of coal, a physical substance, in this manner. Since the coal occupied space, according to the Pennsylvania Court n69 it must therefore be considered corporeal, and if one owned the thing itself, one must be considered as having a corporeal interest. n70

There are several problems with this reasoning. n71 The first is the idea that coal is owned in place. It is difficult to see how that is any different from owning the exclusive right to remove the coal. In either case, the owner of the right is the only person who can remove it, sell it, and otherwise enjoy the benefits of ownership while the right exists. The ownership-in-place theory is obviously only important for the purpose of reaching the further conclusion that the interest must be classified as corporeal, which in turn is only important in that it requires the still further conclusion that certain substantive rules that have heretofore only been applied to corporeal interests must be applied to the interest in the coal. Among those rules are rules relating to transferability and divisibility, acquisition by adverse possession, use of the space left by removal of coal, and susceptibility to loss by abandonment. The application of these rules, theretofore applied only with respect to corporeal estates, meant that the interest in the coal included the right to use mined out space, n72 was freely transferable and divisible, n73 was subject to rules of adverse possession, n74 and was not subject to loss by abandonment. n75

§ 65.04(b)(3) The Corporeal Classification.

Even if it is accepted that coal is owned in place, it does not necessarily follow that the interest must be classified as corporeal. The phrase "corporeal interest in real estate" is a product of an era when ownership was called seisin and property was conveyed by livery of seisin. Ownership of land was considered to be a tangible physical thing. The physical thing was the land, but in another sense, it was the title to the land. The fee simple interest in real estate was a corporeal interest, and it was, of course, transferred by livery of seisin. The interests called servitudes, however, were not regarded as corporeal because they could not be transferred by livery of seisin. n76 It was impossible to conceive of only a part of the ownership of land being physically handed to another. These interests were thought of as intangible or non-possessory. It is also clear that the *profit a prendre*, which included the right to take part of the substance of the land, was considered to be incorporeal. n77

By the time the first coal case made the link between ownership-in-place and corporeal classification, the ownership concept of seisin and the practice of conveying land by livery of seisin had been replaced by a more abstract notion of land ownership, in which title was conveyed by a deed. The corporeal/incorporeal classification system, which was based upon the idea of seisin, was obsolete. The words "corporeal" and "incorporeal" continued to be used, but their meanings were changing. They were acquiring their modern meanings, in which corporeal is the residual fee interest and incorporeal is a right of access for a limited purpose. Coal ownership could not have qualified as a corporeal interest under the old meaning of corporeal because it could not have passed the test for inclusion in that class; it was not capable of transfer by livery of seisin. Nor could it be classified as corporeal under the emerging modern meaning of the word, which was being used to describe a residual interest in land. The coal owner has a limited right of access to land

for the purpose of removing the coal. The ownership-in-place theory apparently was viewed as a means of circumventing this fact. By reasoning that the coal was owned in place, it was possible to treat that ownership as unlimited and then to transfer without articulation that unlimited, or residual, quality to the land in which the coal was located.

Viewed in another way, the court was retroactively inserting the coal interest into a classification system in which it would not have fit at the time the rules the court was seeking to apply were formulated. One of the early Pennsylvania cases seemed to recognize the fallacy involved in this reasoning when it said that if the mined out space belonged to the residual owner, then it follows that the interest must be classified as incorporeal. n78 That case argued, however, that the mined out space belonged to the coal owner. Later Pennsylvania cases, however, recognized that the space belonged to the residual owner.

It is clear, then, that the concept of ownership-in-place does not require the conclusion that the interest is corporeal. Ownership-in-place is irrelevant to the tests for inclusion within either the old or new meaning of corporeal. However, even if it were to be accepted, however, that the ownership of coal was to be classified as corporeal, it would not necessarily follow that the rules theretofore applicable to corporeal interests should be applied to it. The rule relating to susceptibility to loss by abandonment provides an illustration.

§ 65.05(b)(4) Abandonment.

The rule that corporeal interests are not subject to loss by abandonment comes from the era in which title to land was regarded as a physical thing. Title, as a physical thing, had to have a continuous existence; there could be no gap in seisin. Title had to be somewhere in someone all the time. Quite obviously, it could not be abandoned because that would involve the impossible (i.e., a situation in which it didn't exist). This rule was only applicable to corporeal interests such as the fee. Even though the reason for the rule relating to abandonment has ceased to exist, the rule continues to be applied to the interests that were classified as corporeal at the time the rule was adopted. n79 It does not make sense, however, to insert coal ownership into that system and apply to it rules that were based upon the existence of a quality coal ownership was not deemed to possess at the time the rules were adopted. Nor does it make any sense, viewed at the time the rule was applied to coal ownership, to apply a rule that is based upon reasons that have ceased to exist.

The newer meaning of "corporeal," in which it simply referred to the residual, or general, possessory right and did not require that the interest be capable of transfer by livery of seisin, may seem to have enabled the court to label coal ownership corporeal. But it borders on the absurd to then give that ownership the qualities of the old corporeal interest and apply to it the rules that grew out of those old qualities.

It is also clear that in the modern mineral cases other than coal, the rules relating to abandonment have little to do with the classification of the interest as corporeal or incorporeal, n80 so there is no necessary link between them. In the area of oil and gas, for example, while it has been held in one jurisdiction that oil and gas interests are subject to loss by abandonment because of their classification as incorporeal interests, n81 other jurisdictions hold otherwise. n82 Furthermore, some of the jurisdictions that classify oil and gas interests as corporeal hold some of those interests to be susceptible to loss by abandonment and others not, and the distinction seems to have little to do with the classification system employed. n83

COMPUTER-ASSISTED RESEARCH

LEXIS: abandon! w/5 lease or agree! and coal or mineral and "*profit a prendre*"

EXPLANATION: With a Lexis search, the "States" database appears to be more useful than the "Realty" database.

§ 65.04(b)(5) Legislative Rejection of Corporeal Classification.

While courts have been fairly uniform, n84 in refusing to apply rules of abandonment to solid minerals n85 (and even occasionally to migratory ones), n86 legislative enactments have worked towards the opposite effect. Dormant minerals statutes, which have been enacted in several states, n87 have the same effect as applying rules of abandonment to solid minerals, except that their operation is based upon the mere lapse of time rather than upon the finding of an intent to abandon. One such statute n88 is expressly based upon a conclusive presumption of abandonment which becomes effective upon the lapse of the prescribed number of years from the time of last activity. With this widespread legislative rejection of the one key issue for which the corporeal/incorporeal distinction has been responsible, there seems to be little reason for continuing to insist that the interest in solid mineral is corporeal, and it should once again be recognized that such ownership is an incorporeal interest known as a *profit a prendre*.

§ 65.04(b)(6) Ownership of Space.

Most of the other decisions that have been said to follow from the classification of coal interests as corporeal have actually had little to do with their classification and would have been equally consistent with an incorporeal classification. One such example is the decision with respect to the right of the coal owner to use the mined out space in the coal mine. The first Pennsylvania case to consider this question was Lillibridge v. Lackawanna Coal Co., n89 in which the residual owner sought to prevent the coal owner from using the mined out space for transporting coal that had been mined from beneath other lands. The residual owner argued that the situation was similar to that in which a mineral owner was not permitted to use the surface of the land to transport coal mined from other lands. The court in that case reasoned that while the coal owner has an implied easement to use the surface to obtain access to the coal mined from beneath the servient tract, it would go beyond the scope of the easement to use such easements to serve non-dominant property. n90 The court in *Lillibridge* could see no difference between using the surface and using the mined out tunnels for the purpose of prohibiting the use of the easement to serve non-dominant property. It therefore concluded that if the coal owner was to have a right to use the mined out tunnels, it must base that right on something other than easement. It held that right to be based upon ownership of the space left by mining out the coal. While the *Lillibridge* opinion contains some equivocal language, n91 it apparently held that the space occupied by the coal was owned in fee by the coal owner. Subsequent cases in Pennsylvania n92 and elsewhere have, however, held that the ownership of the space exists only until the coal mining operation is completed, n93 and the *Lillibridge* opinion is now cited in support of that position. n94 Until the mining operation is completed the coal owner has the exclusive right to use the tunnels. A New York case n95 applied the rule to a salt mine operation and held that the surface owner could not lease the mined out tunnels as a waste disposal site so long as the salt owner was using the space for conducting a mining operation in the salt deposit, even if the major part of the operation was on other lands. That decision also recognized that when the salt mining operation was completed the space would belong to the residual fee owner. n96

The results in the cases involving use of mined out space quite obviously do not depend upon the classification of the interest as corporeal. In fact, to the extent that they recognize the ultimate ownership of that space by the residual fee owner, they are inconsistent with such a classification, because they recognize that the coal owner has the limited right to use the space in connection with the coal mining operation. Thus, they are more logically explained on the basis that the coal owner's incorporeal interest in the underground space is broader in scope than the surface rights which are included as a part of it. That incorporeal interest includes the exclusive but temporary right to use the mined out space. Such a result also makes as a matter of sense policy. It is consistent with the needs of the underground mining operation, and it does not interfere with any reasonable expectations of the servient owner. The surface owner has no reasonable expectation of using that space while the mining operation continues, and it is difficult to see how its use by the coal owner could be said to increase the burden on the servient estate.

§ 65.04(b)(7) Other Decisions Based on Corporeal Classification.

The other decisions with regard to coal ownership that have supposedly been based upon the corporeal/incorporeal

distinction, such as divisibility and transferability, n97 application of the rules relating to adverse possession, n98 and separate assessability for taxation purposes, n99 are also consistent with the interest being classified as incorporeal.

There is seldom a contention today that the kind of exclusive profits involved in the extraction of fossil fuels are indivisible or non-transferable; this is true whether the ownership interest being transferred is classified as corporeal or incorporeal. n100 Such a result does not, therefore, depend upon the interest being classified as corporeal. The questions involved in transferability and divisibility are questions relating to the scope of the right; when transfer or division increases the burden on the servient estate, it will be prohibited. n101

It might seem that the rules relating to adverse possession would only be applied to corporeal or possessory interests and that incorporeal interests would be subject to prescription. That distinction has not been made in the oil and gas cases, however. In those cases the rules of adverse possession are applied in jurisdictions that consider the interest in oil and gas as incorporeal, and those rules are the same as those applied to interests in coal. n102 The same thing is true with respect to the separate assessment for real estate tax purposes. n103

Therefore, none of the decisions that supposedly depend upon the corporeal classification would change, except perhaps those relating to susceptibility to loss by abandonment if coal ownership is recognized as a *profit a prendre*. While such a change might prompt a review of those decisions that shield coal ownership from the application of rules relating to abandonment, and ultimately a change in such rules, the result would be more consistent with the balance of property law and would reflect better policy.

COMPUTER-ASSISTED RESEARCH

LEXIS: "*profit a prendre*" and corporeal or incorporeal

EXPLANATION: With a Lexis search, the "States" database appears to be more useful than the "Realty" database.

§ 65.04(c) Oil and Gas.

§ 65.04(c)(1) The Corporeal/Incorporeal Distinction.

The oil and gas cases have generated even more discussion in judicial opinions and the law reviews n104 concerning ownership theories than have the coal cases, and while the coal discussion may contain many internal inconsistencies and erroneous conclusions about the law of real property, its commentators have at least been fairly uniform in their approach. The oil and gas discussion, on the other hand, has had even more glaring inconsistencies and errors and, in addition, has spawned a literature that is chaotic. Decisions in this area seldom seem to have any relationship to the discussion of ownership theory upon which they purport to be based.

The early Pennsylvania case n105 that first considered the ownership theory concluded that the coal cases did not provide an appropriate analogy. That was true because of what the court perceived to be the natural state in which oil and gas existed. At that time, it was thought that oil and gas flowed beneath the surface in rivers. Since oil under any given tract at one moment might be beneath a neighboring tract the next moment, it was thought impossible to use the corporeal (or ownership-in-place) theory that the coal cases had utilized. An analogy was therefore made to the body of law relating to wild animals which were referred to as animals *ferae naturae*. Such animals were not owned while in a state of nature but became the property of the first person to reduce them to possession. Building on this analogy, the court referred to oil and gas as minerals *ferae naturae* and held that they were not subject to being owned until reduced to possession. Such a holding would seem to require the conclusion that interests in oil and gas, when severed from the surface, were incorporeal.

Several other courts adopted the reasoning of the Pennsylvania court with its incorporeal classification, n106 but at a

very early time a possessory, or corporeal approach, began to gain acceptance. In fact, Pennsylvania joined the movement and reversed its position. n107 Some of the courts adopting the corporeal approach pointed out that the original Pennsylvania decision had been based upon erroneous conclusions about the manner in which oil and gas exist in their natural states. n108 They do not flow around beneath the earth but are trapped under pressure in air tight formations and remain fixed in place until a low pressure point is introduced into the formation. According to the courts adopting it, this new information made it possible to base the law of oil and gas upon an ownership-in-place, or corporeal, theory. n109

The corporeal approach was still required to cope with the fact that oil and gas do, in fact, move within the formation when a low pressure point is introduced. As a result, oil or gas that is produced in a well near a boundary may have come from beneath the adjoining tract. The ownership-in-place theory was required to make an accommodation for that fact, and it did so by accepting the rule of capture, under which ownership of any given quantity of oil or gas may be lost if it is produced through a well bottomed under an adjoining tract. n110

This approach is invalid for several reasons. First of all, if the coal cases that utilize a corporeal theory of ownership are of questionable validity, as has been indicated, n111 then it would seem clear that such a classification cannot be appropriate when applied to oil and gas. The very fact that the theory must be modified by the rule of capture is an indication of its inappropriateness. How much difference can there be between an approach that holds the substances to be unowned and one that takes the position that they are owned but the ownership is subject to being lost if produced by a neighbor? The most damning evidence of the unsoundness of this approach, however, is the fact that neither the writers nor the courts can agree on whether the decisions of a given state place that state in one or the other of the camps. n112 Furthermore, in an effort to explain the decisions, the writers have come up with even more dubious distinctions such as the "qualified ownership-in-place" theory n113 and the "ownership of strata" theory. n114

Not only is it difficult to determine which theory a state is following (one court recited both theories in succeeding paragraphs, apparently without realizing that they are different), n115 but also the decisions in a given state are sometimes opposite to what should supposedly follow from the theory that the state purports to follow. n116 The leading writers in the field have concluded that the results in decided cases do not seem to depend upon the theory that the state has adopted. n117

COMPUTER-ASSISTED RESEARCH

LEXIS: oil or gas w/5 lease or agree! and right and profit and corporeal or incorporeal

EXPLANATION: With a Lexis search, the "States" database appears to be more useful than the "Realty" database.

§ 65.04(c)(2) Abandonment.

If the theories of ownership were to make a difference, it would seem that the principal difference between the corporeal and incorporeal jurisdictions should be with respect to whether the interest is subject to being lost by abandonment, but the decisions on that question cannot be explained on that basis. In fact, it is difficult to find any unifying factor in those decisions. It is true that the California courts, which have identified that state with the incorporeal holding in their more definitive statements on that subject, n118 have held that the interest is subject to loss by abandonment. n119 Other jurisdictions that have classified the interest as incorporeal, however, have held that it is not subject to loss by abandonment. n120 The Texas decisions, which represent the clearest statement of the ownership-in-place, or corporeal, position, n121 have held that, when transferred by deed, the mineral fee is not subject to loss by abandonment, n122 but when transferred by an oil and gas lease, is subject to loss by abandonment. n123 Other states, both corporeal and incorporeal, have reached the same result as Texas. n124 There would seem to be no basis for the distinction made in the Texas cases between transfers by deed and by lease, or if a distinction is to be made, based on the method of transfer, it should be to the opposite effect.

The distinction between transfers by deed and by lease is invalid because both kinds of transfers generally give to the transferee the entire interest in the oil and gas in fee. The duration of the interests in the two situations may differ, but not always. The oil and gas lease always creates a fee simple determinable, n125 and while the mineral conveyance or reservation may be perpetual, it also frequently utilizes a fee simple determinable with the same kind of conditions as the oil and gas lease. n126 It is true that the transactions are functionally different in that the oil and gas lease contemplates development by the transferee, while the transfer, or reservation, by deed does not. That difference would not seem to justify treating the mineral transferee as a corporeal owner and the oil and gas lessee as an incorporeal owner, however. In fact, since the distinction is supposedly based upon possession or lack of possession, the oil and gas lessee would seem to be the one (if either is) treated as a possessor because the oil and gas lessee is the one who will actually remove the minerals from the ground. It will be recalled that in much of the reasoning in the coal cases in which the corporeal/incorporeal distinction had its beginning, there was an emphasis on the extent to which the coal owner would have physical possession of the substance. n127 The mineral transferee, on the other hand, is the owner of a speculative interest, who will never possess anything other than a share of the money realized from development.

COMPUTER-ASSISTED RESEARCH

LEXIS: abandon! w/5 lease or agree! and oil and "*profit a prendre*"

EXPLANATION: With a Lexis search, the "States" database appears to be more useful than the "Realty" database.

§ 65.04(c)(3) Adverse Possession.

As in the coal cases, one of the areas in which it might be thought that the corporeal/incorporeal distinction would have an impact is the law of adverse possession. If the jurisdiction regards the interest as incorporeal, the rights of an adverse user should be dealt with under the doctrine of prescription, while the corporeal jurisdictions should utilize doctrine of adverse possession. n128 All jurisdictions, however (except perhaps Louisiana), n129 describe the implications of adverse use under the heading of adverse possession. n130 Further, the rules relating to the rights of adverse users vary little from jurisdiction to jurisdiction, and where there are differences, those differences have nothing to do with the ownership theory of the jurisdiction. n131

§ 65.04(c)(4) Other Issues.

It might be thought necessary to classify the interest as corporeal in order to permit the transfer of undivided interests because of a supposed rule against divisibility, but there does not exist a single oil and gas case, in either kind of jurisdiction, which prohibits transfers that divide the interest. n132

One of the leading Texas cases in which the result was supposedly based upon the ownership-in-place theory is Elliff v. Texon. n133 In that case the question was the extent to which a landowner on whose land there was a gas well could recover from an adjoining owner who negligently wasted much of the gas in the common formation. The Texas court held that there was liability for wasting the gas. It was argued that the plaintiff owned the gas that was wasted and that recovery could be based upon a conversion theory. The implication was that the decision would be different in a non-ownership state, and even if recovery was allowed, the measure of damages would be different in a non-ownership state. In fact, similar results have been reached in states that classify oil and gas as incorporeal. n134

Similar to the coal cases, the issue of the ownership of the space occupied by the oil and gas has been litigated, and the result has been much the same; it is owned by the residual fee owner rather than by the mineral owner. The issue has been raised in the gas storage cases. It becomes material in determining whether the oil and gas owner or the residual fee owner is entitled to be paid for the gas storage rights. In both corporeal and incorporeal states, the residual fee owner is generally successful in such litigation. n135 The one state that held for the mineral owner in this situation was

Kentucky, n136 which is generally classed as an incorporeal state. n137 If the ownership theory were to have any impact on this issue, it would seem that Kentucky would take the opposite position. In this area, as in the coal area, the fact that the residual fee owner is regarded as owning the space occupied by the minerals is a clear indication that the mineral owner's interest is nothing more than a right to remove a substance and must be considered a temporary interest. It should therefore be classified as an incorporeal interest known as a *profit a prendre*.

§ 65.04(c)(5) Legislative Rejection of Corporeal Classification.

As was true with respect to the coal cases, Dormant Mineral Statutes, which have been adopted in many states, n138 have the effect of applying a statutorily defined doctrine of abandonment to severed interests in oil and gas. To the extent that this is true, it represents a legislative repudiation of the corporeal classification which has been adopted by some courts, or, what amounts to almost the same thing, a repudiation of the refusal of the courts to apply the rules of abandonment to such interests. Such statutes have been adopted in states that adopt a corporeal theory, as well as in those that utilize the incorporeal theory.

§ 65.04(d) The Timber Cases.

§ 65.04(d)(1) Corporeal/Incorporeal Classification.

The cases dealing with the rights to standing timber have dealt with many of the same ownership issues as have the mineral cases. There is, in fact, a great deal of similarity between the areas. Standing timber is a substance with commercial value occurring naturally on the land, and the rights in or to it are frequently transferred separately from the residual rights in the land. In order to realize any value from the separate interest in the standing timber, the transferee must enter the land and sever the timber. Just as in the mineral cases, courts have had to address the question of the nature of the transferee's interest in the substance and in the land to which it is attached.

There is no question that at the early common law the right to enter land and remove timber was considered to be an incorporeal right, similar to the servitudes, and it was called the common of estovers. n139 The modern cases, however, have tended both to emphasize the ownership of the substance itself and to conclude that such ownership must necessarily result in a corporeal, possessory interest in the land. n140 To that extent, they have followed the path taken by the mineral law cases. Since timber occupies the surface of the land, however, and therefore interferes with surface use prior to removal, there are different issues presented than there are with respect to minerals. The overall treatment of the timber cases, however, when compared to the mineral cases, provides a great deal of insight into the operation of the classification system in both areas.

Since use of the land for timber growth precludes almost any other use of the property, most cases have held that while the timber grantee owns the timber in place and has a corporeal and possessory interest in the land, there is an implied obligation to remove it in a reasonable time. n141 It is also generally held that a failure to remove it in a reasonable time, or within the time provided in an express provision, results in loss of any interest in the timber, rather than just loss of the right of removal. n142 The result of the majority approach is to create an interest that substantively has more resemblance to an incorporeal *profit a prendre* than do the interests of mineral owners. The fact that the interest in the timber itself terminates if it is not removed within the time provided, or within a reasonable time if none is provided, makes it clear that the interest consists of nothing more than a right of removal. The imposition of a time limit on the right of removal is also consistent with the interest being a temporary one.

COMPUTER-ASSISTED RESEARCH

LEXIS: "*profit a prendre*" and land or property and right w/3 take or remove w/3 timber and not oil and not gas

EXPLANATION: With a Lexis search, the "States" database appears to be more useful than the "Realty" database.

§ 65.04(d)(2) The Uniform Commercial Code.

A jurisdiction's adoption of the Uniform Commercial Code, particularly the 1972 amendment to §2-107(2), n143 would seem to represent a statutory repudiation of the position that severed timber interests are corporeal interests in the real estate. The original §2-107(2) provided that a contract for the sale of timber to be cut was a contract for the sale of goods, if the timber was to be cut by the seller. n144 The 1972 amendment defines all contracts for the sale of timber to be cut as contracts for the sale of goods, regardless of who is to cut it. While the code refers only to contracts -- and it might therefore leave open the question of the effect of a timber deed -- it would seem that all timber transactions would be covered by the code. The litigated transactions typically involve a single document in which the landowner "give[s] and grant[s] ... the right, privilege and option to purchase ... the standing timber," n145 or similar language. One court, construing such a document, said that it could see no difference between a contract for the sale of timber and a conveyance of the timber. n146 Furthermore, even if the transaction involved both a contract and a conveyance in separate documents, it would seem irrational to hold that the contract was for the sale of goods but the subject matter became real estate when the time arrived for performance.

The code provision only applies to timber "to be cut," n147 and that too would seem to leave room for the operation of previous law with respect to conveyances or contracts for the sale of timber that was not to be cut. Such a transaction would seem to be based on a contradiction in terms, however. The value of timber can be realized only if it is cut. While it might be possible to envision a transfer of timber that was to be left standing in perpetuity or a transfer of all timber now standing or germinating for growth in the future, n148 such a transfer would more properly be regarded as a transfer of the residual fee interest in the land on which the timber stood. That would be true because there would be little other use to which the property could be put by the residual owner and also because the renewal of the timber resource does not depend upon human activity. Such an interest would therefore seem to be perpetual. For these reasons, in fact, most courts (as has been noted) have construed such conveyances as requiring that the timber be cut within a reasonable time. n149

The code would therefore seem to classify timber as goods, for purposes of all transactions involving it. The fact that it does so is a repudiation of the attempt by the courts to apply the mineral law approach to transactions which sever the timber interest from the residual fee. Superficially, this approach would seem, however, to incorporate the same fallacy found in the mineral law cases, in that it seems to place emphasis upon the rights in the substance being conveyed. The problem with the reasoning in the mineral law cases, however, was not just with the conclusion that the substances were owned in place, but that such ownership seemed to require the further conclusion that the interest was therefore a corporeal, or unlimited, interest in the land itself. The code's treatment of timber rights would seem to take the opposite direction and deemphasize the interest in the land. n150 That there is an interest in the land which must accompany the ownership of the timber, however, cannot be denied. n151 Even if the timber is classified as goods, the timber owner must have a right of access to the land for the purpose of removing it. That access right would seem to be a *profit a prendre*, and to the extent the code gives content to that right, the code is simply regulating rights in land.

§ 65.04(e) Other *Profits a Prendre*.

The *profits a prendre* can include the rights to remove many substances from land in addition to those already mentioned. n152 In fact, almost any transaction extending the right to remove any naturally occurring substance from the land of another results in the creation of a *profit a prendre*. Other examples are transactions creating the rights to take stone, n153 sand and gravel, n154 wild animals, n155 fish, n156 fill dirt, n157 turpentine from pine trees, n158 ice, n159 apples, n160 seaweed, n161 waste slate, n162 and geothermal steam, n163 and to take forage by grazing cattle. n164 There is some question as to whether the right to remove water is to be treated as a profit. Such a right is sometimes said to amount to only an easement. n165 The rule apparently applies only to water flowing naturally in a stream or to percolating or ground water, however. If the water has been confined in a cistern or pond, the right to remove it when transferred to another will be called a profit. n166 There would appear to be little in the way of logic or policy to justify such a distinction, but it may amount to nothing more than a semantic problem, since the same

substantive law governs both the easement and profit relationships.

COMPUTER-ASSISTED RESEARCH

LEXIS: "*profit a prendre*" and right w/3 take or remove and land or property and not oil and not gas

EXPLANATION: With a Lexis search, the "States" database appears to be more useful than the "Realty" database.

FOOTNOTES:
(n1)Footnote 46. *Figliuzzi v. Carcajou Shooting Club of Lake Koshkonong, 516 N.W.2d 410 (Wis. 1994)* (Stating that under Wisconsin law no distinction is made between profits a prendre and easements).

(n2)Footnote 47. In the Restatement (Third) of Property (Tentative Draft No. 1, 1989) the American Law Institute has recognized this fact. In the Introduction to that document at page xxvi it is said: "The term profit has been resurrected from the oblivion into which it was consigned by the 1944 Restatement because it describes a device that is used for a purpose quite different from the other servitude devices, and occasionally calls for somewhat different considerations, if not different rules." *See, e.g., In re Minitz, 192 B.R. 313, 320 (Bankr. D. Mass. 1996)* (explaining that profits are divided into *profits a prendre* and *profits a rendre*), *distinguished by Johnson v. Cottonport Bank, 259 B.R. 125* (W.D.La. Dec 28, 2000); *Magraw v. Dillow, 671 A.2d 485, 490 (Md. App. 1996)* (*profits a prendre* briefly noted).

(n3)Footnote 48. *See* ch. 49, *supra.*

(n4)Footnote 49. *See* ch. 55, *supra.*

(n5)Footnote 50. *See* ch. 48, *supra.*

(n6)Footnote 51. *Caldwell v. Fulton, 31 Pa. 475 (1858).*

(n7)Footnote 52. 1 P. Martin & B. Kramer, Williams & Meyers Oil and Gas Law Ch. 2, § 210.6 (Matthew Bender).

(n8)Footnote 53. *Caldwell v. Fulton, 31 Pa. 475 (1858).*

(n9)Footnote 54. *Caldwell v. Fulton, 31 Pa. 475, 476 (1858).*

(n10)Footnote 55. *See* 3 Herbert T. Tiffany, Real Property 435, §844 (3d ed. Callaghan 1939).

(n11)Footnote 56. *Caldwell v. Fulton, 31 Pa. 475, 477 (1858).*

(n12)Footnote 57. *Caldwell v. Fulton, 31 Pa. 475, 479 (1858).*

(n13)Footnote 58. *See* Blackstone, *supra* note 12, at 32, where it is said: "Common, or right of common, appears from its very definition to be an incorporeal hereditament." And at page 34 where it is said:

> There is also a common of digging for coal, minerals, stones, and the like. All these bear a resemblance to common of pasture in many respects; though in one point they go much further: common of pasture being only a right of feeding on the herbage and vesture of the soil, which renews annually; but common of turbary, and the rest, are a right of carrying away the very soil itself.

(n14)Footnote 59. *See* note 12, *supra.*

(n15)Footnote 60. *Eardley v. Granville, 3 Ch. Div. 826 (1876).*

(n16)Footnote 61. *Caldwell v. Fulton, 31 Pa. 475, 481 (1858).*

(n17)Footnote 62. *Lillibridge v. Lackawanna Coal Co., 22 A. 1035, 1037 (Pa. 1891).*

(n18)Footnote 63. *Caldwell v. Fulton, 31 Pa. 475, 480 (1858).*

(n19)Footnote 64. *Scranton v. Phillips, 94 Pa. 15 (1880).*

(n20)Footnote 65. For further development of this proposition, see Ronald W. Polston, *Mineral Ownership Theory: Doctrine in Disarray, 70 N.D. L. Rev. 541 (1994).*

(n21)Footnote 66. 2 William Blackstone, Commentaries 18 (Fac. of 1st ed., Univ. of Chicago Press 1979).

(n22)Footnote 67. The Virginia Dormant Minerals Statute, Va. Code Ann. §55-154 (1986), operates upon the theory that when there has been no mining activity for a period of 25 years there is a conclusive presumption that there are no minerals under the land. The operative section of that Statute provides: "... it shall be presumed that there are no commercial minerals ... in or on the land, and the court shall enter a decree declaring the claim or right to be a cloud on the title and releasing the land therefrom ..."

(n23)Footnote 68. Interestingly, the traditional approach to coal ownership when carried to the extreme has seemed to suggest that if the owner of the fee were to convey off the surface only, while retaining everything else, the result would leave the residual interest in the mineral owner. Indeed, regarding the surface owner as having only a layer of soil, as was said in *Eardley v. Granville, 3 Ch. Div. 826 (1876),* would seem to lead to such a conclusion. While no such express statements can be found there is a statement in *Caldwell v. Fulton, 31 Pa. 475 (1858),* which suggests such a conclusion. The court there said: "Now as his whole interest was corporeal before the sale, and by his deed only the surface passed, that which remains ungranted must be corporeal." *Schultz v. Consolidation Coal Co., 475 S.E.2d 467 (W. Va. 1996), distinguished by Antco, Inc. v. Dodge Fuel Corp., 550 S.E. 2d 622* (W.Va. Jun 29, 2001).

If this kind of thinking were accepted as valid it would make the application of the dormant mineral statutes to such mineral interests problematic. This is particularly true of the prototype dormant mineral statute which was first adopted by Indiana. §32-5-11-1 Ind. Code. That statute provides for the terminated mineral interest to revert to "the owner of the estate out of which it was carved." Regarding the mineral estate as the residual interest out of which the surface layer was carved would seem to disrupt the operation of such a statute. Since the reserved interest in such a conveyance will only exist if there are minerals under the land, however, it is impossible to regard that interest as the residual interest in the land. Thus in *Shell Oil Co. v. Moore, 48 N.E.2d 400 (Ill. 1943),* the court held that a deed conveying the surface only was, in effect, a reservation of the minerals. It seems clear that the Dormant Minerals Statute would operate to terminate the interest reserved in such a conveyance.

(n24)Footnote 69. *Caldwell v. Fulton, 31 Pa. 475, 481 (1858).*

(n25)Footnote 70. The Court was confusing the profit produced by the right with the right itself, something Blackstone had cautioned against when he said:

> And indeed if we would fix a clear notion of an incorporeal hereditament, we must be careful not to confound together the profits produced, and the thing, or hereditament which produces them. An annuity for instance, is an incorporeal hereditament; for though the money, which is the fruit or product of this annuity, is doubtless of a corporeal nature, yet the annuity itself, which produces that money, is a thing invisible...

(n26)Footnote 71. In another respect, however, the courts were correct in their analysis. They were correct in finding no difference between coal ownership and residual ownership with respect to the extent to which ownership

interests were tangible or intangible, and they were correct in their conclusion that both kinds of ownership include the right to possession. The problem lay in their treating all property rights as tangible, including coal. Furthermore, as a result of their inept handling of the changing meaning of these terms, they were led to attribute to coal ownership the residual, or unlimited, quality that had always been included in the corporeal or possessory concept, which they now applied to coal. They should have recognized that, in view of the new meanings of these phrases, in which incorporeal and non-possessory no longer meant intangible and non-possessory, but intangible and with a right to possession for a limited purpose, coal ownership must be classified as incorporeal and non-possessory.

(n27)Footnote 72. *Lillibridge v. Lackawanna Coal Co., 22 A. 1035 (Pa. 1891).*

(n28)Footnote 73. *Caldwell v. Fulton, 31 Pa. 475 (1858).*

(n29)Footnote 74. *Caldwell v. Copeland, 37 Pa. 427 (1860).*

(n30)Footnote 75. *Hummel v. McFadden, 150 A.2d 856 (Pa. 1959); Uphoff v. Trustees of Tufts College, 184 N.E. 213 (Ill. 1933).*

(n31)Footnote 76. *See* 2 A. James Casner, American Law of Property §8.16 at 240 (Little Brown 1952).

(n32)Footnote 77. *See* note 58, *supra.*

(n33)Footnote 78. *Lillibridge v. Lackawanna Coal Co., 22 A. 1035, 1037 (Pa. 1891).*

(n34)Footnote 79. *See, e.g., Hummel v. McFadden, 150 A.2d 856, 862 (Pa. 1959),* where it is said: "A corporeal hereditament cannot be the subject of abandonment ..."

(n35)Footnote 80. *See* §65.02(b)(2), *supra.*

(n36)Footnote 81. *Gerhard v. Stephens, 442 P.2d 692 (Cal. 1968).*

(n37)Footnote 82. *Jilek v. Chicago, Wilmington, & Franklin Coal Co., 47 N.E.2d 96 (Ill. 1943); and see* Ronald W. Polston, *Legislation, Existing and Proposed, Concerning Marketability of Mineral Titles, 7 Land & Water L. Rev. 73, n.3 (1972).*

(n38)Footnote 83. *See* §65.05(b)(2), *supra.*

(n39)Footnote 84. In Louisiana, however, the courts, from the first, treated the ownership of solid minerals as incorporeal for purposes of applying code provisions relating to the doctrine of liberative prescription of incorporeal interests. *See Frost-Johnson Lumber Co. v. Sallings Heirs, 91 So. 207 (La. 1920).* That doctrine has an effect similar to rules of abandonment under the common law and was, in fact, one of the models for Dormant Minerals legislation. *See* Ronald W. Polston, *Legislation, Existing and Proposed Concerning Marketability of Mineral Titles, 7 Land & Water L. Rev. 73 (1972).*

(n40)Footnote 85. *See* §65.05(b)(4), *supra.*

(n41)Footnote 86. *See* §65.05(c)(2), *supra*.

(n42)Footnote 87. *See* Ronald W. Polston, *Recent Developments in Oil and Gas Law,* 6 E. Min. L. Inst. 19.04 (1985); Ronald W. Polston, *Recent Developments in Oil and Gas Law,* 7 E. Min. L. Inst. 19.08 (1986); and Ronald W. Polston, *Legislation Existing and Proposed Concerning Marketability of Mineral Titles, 7 Land & Water L. Rev. 73 (1972)* for a discussion of such statutes and citation of cases construing them.

(n43)Footnote 88. Mich. Stat. Ann. §26.1163(1)-(4), *18 Oil & Gas Rep. 259 (1963).*

(n44)Footnote 89. *22 A. 1035, 1037 (Pa. 1891).*

(n45)Footnote 90. The entire opinion is devoted to the question of the ownership of space and the court does not even cite or discuss the authorities being repudiated. It is clear from the statement of the plaintiff 's position and from the authorities quoted, however, that this is the contention being made. Thus there is a quote from Hamilton v. Graham, L.R. H.L. Sc. 166 (1871) in which it is said: "There is no doubt that the Duke of Hamilton was not entitled to increase the burdens upon the servitude on the surface by bringing minerals from other property over the surface."

(n46)Footnote 91. The Court says at page 1039, for example, that there is no allegation "that all the coal in the vein has been taken out," with the inference that, if it had, the case may have been decided differently.

(n47)Footnote 92. *Webber v. Vogel, 42 A. 4 (Pa. 1889).*

(n48)Footnote 93. *Moore v. Indian Camp Coal Co., 80 N.E. 6 (Ohio 1907); Middleton v. Harlin Wallins Coal Co., 66 S.W.2d 30 (Ky. 1933).*

(n49)Footnote 94. *International Salt Co. v. Geostow, 697 F. Supp. 1258 (W.D.N.Y. 1988).*

(n50)Footnote 95. *International Salt Co. v. Geostow, 697 F. Supp. 1258 (W.D.N.Y. 1988).*

(n51)Footnote 96. A similar situation was presented in *Cassinos v. Union Oil Co. of Cal., 18 Cal. Rptr. 2d 574 (1993), distinguished by N.L.R.B. v. Calkins, 187 F.3d 1080 (9th Cir. 1999),* in which an oil and gas lessee, pursuant to permission from the surface owner, pumped waste water from an adjoining lease into one of the oil wells on the property. The mineral owner/lessor objected on the basis that the waste water was encroaching upon the producing strata and damaging the oil production operation. The lessor was allowed to recover damages from the lessee. The court declined to rule on the question of the right of the surface owner to use the underground strata for disposal of waste water because, even if such right existed, it could not be used in such a way as to injure the rights of the mineral owner.

(n52)Footnote 97. *Caldwell v. Fulton, 31 Pa. 475 (1858).*

(n53)Footnote 98. *Caldwell v. Copeland, 37 Pa. 427 (1860)* (involving the same parties and the same land as was involved in *Caldwell v. Fulton, 31 Pa. 475 (1858)).*

(n54)Footnote 99. *Sanderson v. City of Scranton, 105 Pa. 469 (1884),* involved the separate assessment of coal.

(n55)Footnote 100. *See* note 132, *infra.*

(n56)Footnote 101. William B. Soebuck and Dale A. Whitman, The Law of Property 462 (3d ed. West 2000).

(n57)Footnote 102. *See, e.g., Brockman v. Jones, 610 S.W.2d 943 (Ky. App. 1980)* where authorities from the two areas are considered to be interchangeable. The extent to which that is true is a commentary on the validity of the corporeal/incorporeal in both areas. If oil and gas is considered an incorporeal interest then the law of prescription, not adverse possession, should be used. In *Lillibridge v. Lackawanna Coal Co., 22 A. 1035, 1036 (Pa. 1891),* for example, it is said "... that possession of the mineral may be recovered by ejectment, and title to it may be acquired by adverse possession under the statute of limitations, though not by prescription, because it is not an incorporeal right." In Louisiana where interests in oil and gas were always considered to be incorporeal, and therefore subject to loss by the code provisions relating to liberative prescription, any doubt as to whether solid minerals would be treated the same way was removed with the adoption of the Mineral Code in 1975. It is now clear that both solid minerals and oil and gas are considered to be incorporeal and subject to liberative prescription. 1 P. Martin & B. Kramer, Williams & Meyers Oil and Gas Law Ch. 2, § 216 (Matthew Bender).

(n58)Footnote 103. Oil and Gas interests are also generally assessed separate from the surface. *See, e.g., Bilby v. Wire, 77 N.W.2d 882 (N.D. 1956).*

(n59)Footnote 104. *See* 1 P. Martin & B. Kramer, Williams & Meyers Oil and Gas Law Ch. 2, § 203 (Matthew Bender), for a listing of cases and law review articles.

(n60)Footnote 105. *Westmoreland and Cambria Natural Gas Co. v. De Witt, 18 A. 724 (Pa. 1889).*

(n61)Footnote 106. *See Townsend v. State, 47 N.E. 19 (Ind. 1897); Kelley v. Ohio Oil Co., 49 N.E. 399 (Ohio 1897); Transcontinental Oil Co. v. Emmerson, 131 N.E. 645 (Ill. 1921).*

(n62)Footnote 107. *See 4 U. Pitt. L. Rev. 274 (1938)* for a citation of authorities.

(n63)Footnote 108. *4 U. Pitt. L. Rev. 274 (1938),* where it is said: "The earlier courts with a knowledge as yet imperfect of the true characteristics of oil and gas, place too great an emphasis on their fugitive characteristics." To the same effect is *Elliff v. Texon Drilling Co., 210 S.W.2d 558 (Tex. 1948),* where the court said: "In the light of modern scientific knowledge these early analogies have been disproven, and courts generally have come to recognize that oil and gas, as commonly found in underground reservoirs, are securely entrapped in a static condition ..."

(n64)Footnote 109. *See Stephens County v. Mid-Kansas Oil and Gas Co., 254 S.W. 290 (Tex. 1923).*

(n65)Footnote 110. *Elliff v. Texon Drilling Co., 210 S.W.2d 558 (Tex. 1948),* where it is said: "This migratory character of oil and gas has given rise to the so-called rule or law of capture."

(n66)Footnote 111. *See* §65.05(b)(2), *supra*.

(n67)Footnote 112. In 1 P. Martin & B. Kramer, Williams & Meyers Oil and Gas Law Ch. 2, § 203 (Matthew Bender), the leading authority in the field, the authors have prepared a table in which they compare how they and six other writers have classified each of the states which have considered the question. There is disagreement as to seven of the 24 states that have been classified, and in many of the other states, on which there is agreement, the cases contain inconsistent statements on the subject. For example, while the authors all agree that Kentucky is a non-ownership state, there are cases such as *Hammonds v. Central Ky. Nat. Gas Co., 75 S.W.2d 204, 205 (Ky. 1934), overruled*, *Texas American Energy Corp. v. Citizens Fidelity Bank & Trust Co., 736 S.W.2d 25 (Ky. 1987),* in which the court, in successive paragraphs, adopted both the ownership and non-ownership theories.

(n68)Footnote 113. 1 P. Martin & B. Kramer, Williams & Meyers Oil and Gas Law Ch. 2, § 203.2 (Matthew Bender).

(n69)Footnote 114. 1 P. Martin & B. Kramer, Williams & Meyers Oil and Gas Law Ch. 2, § 203.4 (Matthew Bender).

(n70)Footnote 115. *See* n. 112, *supra*.

(n71)Footnote 116. *See* 1 P. Martin & B. Kramer, Williams & Meyers Oil and Gas Law Ch. 2, § 204.5 (Matthew Bender), where, after discussing the holding of Texas and Oklahoma on a particular issue said: "If the theory held in these states were significant in this context, the opposite results would have been expected."

(n72)Footnote 117. 1 P. Martin & B. Kramer, Williams & Meyers Oil and Gas Law Ch. 2, § 204.9 (Matthew Bender) where it is said: "... the theory held by the state is of little importance apart from its influence on the classification of mineral, royalty and leasehold interests as corporeal or incorporeal..." Those authors then consider the importance of the corporeal/incorporeal distinction and conclude at § 211 that it, too, is of "little importance."

(n73)Footnote 118. *Callahan v. Martin, 43 P.2d 788 (Cal. 1935),* but for a discussion of the California decisions which have taken the opposite position *see* Wm. E. Colby, *The Law of Oil and Gas, 31 Cal. L. Rev. 357, 386 (1943). Wells Fargo Bank v. Goldzband, 53 Cal. App. 4th 596 (1997)* (the oil and gas lease granted the lessee a profit a prendre, which is defined as an interest in real property in the nature of an incorporeal hereditament).

(n74)Footnote 119. *Gerhard v. Stephens, 442 P.2d 692 (Cal. 1968).*

(n75)Footnote 120. *See* 82, *supra*.

(n76)Footnote 121. *See Stephens County v. Mid-Kansas Oil and Gas Co., 254 S.W. 290 (Tex. 1923).*

(n77)Footnote 122. *Loomis v. Gulf Oil Corp., 123 S.W.2d 501 (Tex. App. 1938).*

(n78)Footnote 123. There are a number of Texas cases which so hold, but some writers argue that those cases are applying a special limitation contained in the oil and gas lease. *See* 1 P. Martin & B. Kramer, Williams & Meyers Oil and Gas Law Ch. 2, § 210.1 (Matthew Bender). *See also* A. W. Walker, Jr., *The Nature of Property Interests Created by an Oil and Gas Lease in Texas, 7 Tex. L. Rev. 565 (1929)* for a list of cases. The Texas case on which the proposition that an oil and gas lease can be lost by abandonment was based was *Texas Co. v. Davis, 254 S.W. 304 (Tex. 1923).* The Texas Supreme Court in *Rogers v. Ricane Enters., 884 S.W.2d 763 (Tex. 1994)* refused to apply the rule to a partial assignment of an oil and gas lease. In doing so, the court created some doubt about the continued validity of the proposition. In that case the lease had been assigned, as to a portion of the acreage covered by it, to a corporation. The corporation had engaged in no activity on the assigned portion for many years and had, in fact, been dissolved. It was contended that the assignment had been abandoned. The trial court and the *Texas Court of Civil Appeals, Rogers v. Ricane Enters., 852 S.W.2d 751 (Tex. 1993)* held, in reliance on Texas Co. v. Davis, that the interest created by the assignment had been abandoned. The Texas Supreme Court, in a 5-4 decision, reversed, holding that an interest in real estate cannot be abandoned unless the interest is created for a specific purpose which is described in the document creating the interest. The *Davis* case was not expressly overruled, however.

(n79)Footnote 124. (In Arkansas, an ownership state) *Bodcaw Lumber Co. v. Goode, 254 S.W. 345 (Ark. 1923);* (In Kentucky, a non-ownership state); *Cameron v. Lebow, 366 S.W.2d 164 (Ky. 1960).*

(n80)Footnote 125. Oil and gas leases are typically for a fixed primary term and as long thereafter as oil and gas are produced. *See* Richard W. Hemingway, The Law of Oil and Gas 263 (3d ed. West 1991).

(n81)Footnote 126. *Id.* at 109.

(n82)Footnote 127. Furthermore, in the first of the Pennsylvania coal cases, *Caldwell v. Fulton, 31 Pa. 475 (1858),* the document was similar to an oil and gas lease, in that it appeared to give only the developmental right rather than to transfer the fee in the coal. The court there held that the exclusive right to develop the mineral amounted to ownership.

(n83)Footnote 128. *See* note 102, *supra*. *See also* 1 P. Martin & B. Kramer, Williams & Meyers Oil and Gas Law Ch. 2, § 210.7 (Matthew Bender), where it is said: "Theoretically the classification of an interest in oil and gas as corporeal in character would mean that such interest might be extinguished by adverse possession whereas if classified as incorporeal in character it could be extinguished by prescription." *Rogers v. Ricane Enters., 930 S.W.2d 157 (Tex. App. 1996).*

(n84)Footnote 129. *See* note 102, *supra*.

(n85)Footnote 130. *See* note 128, *supra*. Following the material quoted in that note, the authors continue: "it suffices to note at this point that no differences in results are found to depend upon the classification of the interest as corporeal or incorporeal." *Central Oregon Fabricators v. Hudspeth, 977 P.2d 416 (Ore. Ct. App. 1999)* (stating that adverse possession can, but in this case does not, extinguish a *profit a prendre*).

(n86)Footnote 131. *Id.*

(n87)Footnote 132. The only case found in which such an argument was made is *Cowling v. Deep Vein Coal Co., 183 F.2d 652 (7th Cir. 1950),* and the issue was not decided. *See* 1 P. Martin & B. Kramer, Williams & Meyers Oil and

Gas Law Ch. 2, § 210.6 (Matthew Bender). *See, e.g., Enron Oil & Gas Co. v. Worth, 947 P.2d 610 (Okla. App. 1997)* (an exclusive right, in the nature of a profit a prendre, if granted in gross, may be transferred in gross; divisibility is permissible so long as the servient estate is not burdened beyond the terms of the grant).

(n88)Footnote 133. *210 S.W.2d 558 (Tex. 1948).*

(n89)Footnote 134. *Breaux Pan Am. Petr. Corp., 163 So. 2d 406 (La. App. 1964), writ ref 'd, 165 So. 2d. 481 (La. 1964); Manufacturers' Gas & Oil Co. v. Indiana Nat. Gas & Oil Co., 57 N.E. 912 (Ind. 1900).*

(n90)Footnote 135. *See Ellis v. Arkansas La. Gas Co., 450 F. Supp. 412 (E.D. Okla. 1978), aff 'd, 609 F.2d 436 (10th Cir. 1979); Tate v. United Fuel Gas Co., 71 S.E.2d 65 (W. Va. 1952).* The opposite position is advocated in 1 P. Martin & B. Kramer, Williams & Meyers Oil and Gas Law Ch. 2, § 222 (Matthew Bender).

(n91)Footnote 136. *Central Ky. Nat. Gas Co. v. Smallwood, 252 S.W.2d 866 (Ky. 1952). Ralston v. Thacker, 932 S.W.2d 384 (Ky. App. 1996), overruled, Texas American Energy Corp. v. Citizens Fidelity Bank & Trust Co., 736 S.W.2d 25 (Ky. 1987).*

(n92)Footnote 137. *See* note 112, *supra.*

(n93)Footnote 138. *See* note 87, *supra.*

(n94)Footnote 139. *See* §65.02(b), *supra*.

(n95)Footnote 140. *Lodwick Lumber Co. v. Taylor, 98 S.W. 238 (Tex. 1906); Gabbard v. Sheffield, 200 S.W. 940 (Ky. 1918); Butterfield Lumber Co. v. Guy, 46 So. 78 (Miss. 1908). See also Hoglund v. Omakwood Prods., Inc., 914 P.2d 1197 (Wash. App. 1996).*

(n96)Footnote 141. *Hall v. Eastman Gardiner & Co., 43 So. 2 (Miss. 1907); Union Sawmill Co. v. Agerton, 25 S.W.2d 13 (Ark. 1930); Hudson v. Cox, 274 S.W. 1118 (Ky. 1925). See also* 52 Am. Jur. 2d *Logs and Timber* §37 (1970) for further citation of cases.

(n97)Footnote 142. *Lamers v. Anderson, 139 P.2d 482 (Idaho 1943); Union Sawmill Co. v. Agerton, 25 S.W.2d 13 (Ark. 1930).* It has even been held that title to timber that has been cut is lost if not removed within the time limit in the contract or deed. *Lamers v. Anderson, supra,* but most would probably hold that only the title to standing timber was lost. *Richmond Land Co. v. Watson, 107 S.W. 1045 (Mo. App. 1908); Erskine v. Savage, 51 A. 242 (Me. 1901).*

(n98)Footnote 143. U.C.C., 1990 Official Text 1010.

(n99)Footnote 144. U.C.C., 1990 Official Text 1010.

(n100)Footnote 145. *United States v. 3035.73 Acres of Land, 650 F.2d 938 (8th Cir. 1981).*

(n101)Footnote 146. *United States v. 3035.73 Acres of Land, 650 F.2d 938 (8th Cir. 1981).*

(n102)Footnote 147. U.C.C., §2-107(2).

(n103)Footnote 148. Some cases have come close to allowing such an interest based upon the analogy to mineral cases. *Butterfield Lumber Co. v. Guy, 46 So. 78 (Miss. 1908); Lodwick Lumber Co. v. Taylor, 98 S.W. 238 (Tex. 1906); Gabbard v. Sheffield, 200 S.W. 940 (Ky. 1918).*

(n104)Footnote 149. *See* note 140, *supra*.

(n105)Footnote 150. The Code, in fact, tends to deemphasize title as a basis for resolving specific issues between

parties to a transaction involving the transfer of property. *See* U.C.C. §2-401 and Official Comments following that section.

(n106)Footnote 151. The situation resembles that in which a structure or a piece of equipment is sold and the transferee must be given access to the land on which it is located in order to remove it. The right in the land in that situation is frequently called a license coupled with an interest, but it is generally recognized as being little different from an easement. *See* Licenses (Ch. 64, §64.03(d)), *supra*.

(n107)Footnote 152. *Trimble v. Kentucky River Coal Corp., 31 S.W.2d 367, 369 (Ky. 1930),* lists cases dealing with the right to remove various substances from the land and in which the right has been characterized as a *profit a prendre*.

(n108)Footnote 153. *Baker v. Hart, 25 N.E. 948 (N.Y. 1890).*

(n109)Footnote 154. *Miller v. State, 183 A. 17 (Conn. 1936).* In *Bonner v. Oklahoma Rock Corp., 863 P.2d 1176 (Okla. 1993),* however, the Oklahoma Supreme Court held that a transfer of the "gravel, rock and other solid earthly substances" was a transfer of the ownership of those substances in place, and, as such, it created more than a *profit a prendre*. *Hubscher & Son v. Storey, 578 N.W.2d 701 (Mich. App. 1998)* (in holding that a sand and gravel contract was not in violation of the rule against perpetuities, the court stated that the "profit a prendre is the right to acquire, by severance or removal from another's land, something previously constituting part of the land"). *Rousenberg v. Krone, 1998 Ohio App. LEXIS 6184* (Ohio App. Dec. 16, 1998) (stating that the removal of gravel clearly falls within the definition of a *profit a prendre*).

(n110)Footnote 155. *Bingham v. Salene, 14 P. 523 (Or. 1887); Hanson v. Fergus Falls Nat'l Bank, 65 N.W.2d 857 (Minn. 1954).* In *Figliuzzi v. Carcajou Shooting Club, 516 N.W.2d 410 (Wis. 1994),* the court enjoined the development of a tract for residential purposes at the suit of the owner of the hunting rights on the tract. The right was characterized as a *profit a prendre*. *David Lee Boykin Family Trust v. Boykin, 661 So. 2d 245 (Ala. App. 1995); Menominee Indian Tribe of Wis. v. Thompson, 943 F. Supp. 999 (W.D. Wis. 1996), aff'd, 161 F.3d 449 (7th Cir. 1998).*

(n111)Footnote 156. *Tinicum Fishing Co. v. Carter, 61 Pa. 21 (1869). Hagan v. Delaware Anglers' and Gunners' Club, 655 A.2d 292 (Del. Ch. 1995).*

(n112)Footnote 157. *DeLuca v. C. W. Blakeslee & Sons Inc., 391 A.2d 170 (Conn. 1978).*

(n113)Footnote 158. *Newton v. Allen, 141 S.E.2d 417 (Ga. 1965).*

(n114)Footnote 159. *Hinckel v. Stevens, 54 N.Y.S. 457 (1898).*

(n115)Footnote 160. *Taylor v. Millard, 23 N.E. 376 (N.Y. 1890).*

(n116)Footnote 161. *Hill v. Lord, 48 Me. 83 (1861).*

(n117)Footnote 162. *Mathews Slate Co. of N.Y., Inc. v. Advance Indus. Supply Co., 172 N.Y.S. 830 (1918).*

(n118)Footnote 163. *Kennecott Corp. v. Union Oil Co., 242 Cal. Rptr. 403 (1987).* There could also be a profit a prendre for the removal of deer, berries, and mushrooms. In *Roman v. Julian, 1998 Conn. Super. LEXIS 2668,* the defendant failed in a claim of adverse possession or easement by prescription, causing failure of the defendant's allied claim for a profit a prendre to take the products of the land (deer, berries, and mushrooms). *See also Yaali, Ltd. v. Barnes & Noble, Inc., 506 S.E.2d 116 (Ga. 1998)* (boating and fishing privileges treated as profits a prendre).

(n119)Footnote 164. *Farish v. Murphy, 727 So. 2d 1120 (Fla. App. 1999)* (reaffirming that a taking of forage by the grazing of cattle is not merely an easement, but a *profit a prendre*).

(n120)Footnote 165. *See Saratoga State Waters Corp. v. Pratt, 125 N.E. 834 (N.Y. 1920); but see* Charles E. Clark, Covenants and Interests Running with the Land 86, 87 (2d ed. Callaghan 1947), first published as Charles E. Clark, *The Running of Easements and Profits, 38 Yale L.J. 139 (1928),* where the author contends that the right to take water should always be considered a profit, and cites cases in which that has occurred. *Dorey v. Estate of Spicer, 715 A.2d 182 (Me. 1998)* (The plaintiff failed in an attempt to claim that flowage rights from dam were a unique type of easement appurtenant to a mill site. The court held that the flowage rights were in the nature of "a prendre in alieno solo," stating that "a profit a prendre in the lands of another, when not granted in favor of a dominant tenement, cannot properly be said to be an easement, but an estate of interest in land itself"). *Rousenberg v. Krone, 1998 Ohio App. LEXIS 6184* (in holding that the right to spring water was an easement appurtenant rather than a profit a prendre, the court stated that "in that water is not a 'part of the soil' or a product thereof, we cannot determine that the spring water at issue is a profit a prendre").

(n121)Footnote 166. *Loch Sheldrake Assoc. v. Evans, 118 N.E.2d 444 (N.Y. 1954).*

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CHAPTER 65 PROFITS A PRENDRE

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Supp. To CHAPTER 65 PROFITS A PRENDRE

8-65 Thompson on Real Property, Thomas Editions Supp. to § 65.01

Supp. to § 65.01 Definitions of Profits A Prendre

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§ 65.01(a) Definitions [Go To Main]

Add:

Devon Energy Production Company, L.P. v. American Int'l Specialty Lines Insurance Co. (S.D. Tex.) (In Louisiana, a mineral servitude is a right "similar to the common-law profit a prendre, which is real right owned separately from the land.").

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Supp. to § 65.02 Historical Background

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§ 65.02(b) The Commons [Go To Main]

Add:

Foxley & Co. v. Ellis, 201 P.3d 425 (Wyo. 2009) (grazing rights constituted a profit a prendre).

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Supp. to § 65.04 Current Jurisprudence on the Profits Concept.

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§ 65.04(e) Other *Profits a Prendre*. [Go To Main]

Add

Seven Lakes Development Co., L.L.C. v. Maxson, 144 P.3d 1239 (Wyo. 2006) (right to hunt and fish was a profit rather than a license).

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CHAPTER 66 CONSTITUTIONAL IMPACTS ON REAL PROPERTY

8-66 Thompson on Real Property, Thomas Editions 66.syn

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§ 66.syn Synopsis to Chapter 66: CONSTITUTIONAL IMPACTS ON REAL PROPERTY

§ 66.01 Introduction to the Chapter.

§ 66.02 Federal Constitutional Recognition and Protection of Property Interests.

§ 66.03 Fourth Amendment Impacts.

§ 66.03(a) Property-Based Definition of Fourth Amendment Rights.

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§ 66.03(c) The Warrant Requirement.

§ 66.03(c)(1) Administrative Searches Generally.

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§ 66.04 First Amendment Impacts.

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§ 66.04(a)(2) Restrictive Zoning of Adult Entertainment Businesses.

§ 66.04(a)(3) Local Regulation of Signs and Billboards.

§ 66.04(b) Freedom of Religion.

§ 66.05 Equal Protection.

§ 66.06 Bibliography.

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CHAPTER 66 CONSTITUTIONAL IMPACTS ON REAL PROPERTY

8-66 Thompson on Real Property, Thomas Editions § 66.01

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§ 66.01 Introduction to the Chapter.

This chapter deals with selected elements of the Federal Constitution that impact on real property. These include property impacts under the Fourth Amendment, under the First Amendment, and under the equal protection provisions of the U.S. Constitution. The constitutions of the several states often provide specific provisions regarding property ownership and use, generally within declarations of individual rights, such as privacy, or in prohibitions on government activity, such as those regarding uncompensated "takings" and eminent domain. Separate chapters (Chapters 80 and 81) directly address aspects of eminent domain and regulatory takings inherent in the Federal Constitution's Fifth Amendment, and another (Chapter 74) deals with a variety of federal constitutional matters involved in public regulation of land use. This chapter does not address federal statutory provisions, such as those in § 1983 of United States Code Title 42, which provide protections against and remedies for invasion of property rights. n1

FOOTNOTES:
(n1)Footnote 1. *Lynch v. Household Fin. Corp., 405 U.S. 538 (1972).*

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CHAPTER 66 CONSTITUTIONAL IMPACTS ON REAL PROPERTY

8-66 Thompson on Real Property, Thomas Editions § 66.02

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§ 66.02 Federal Constitutional Recognition and Protection of Property Interests.

The United States Supreme Court has repeatedly asserted that American constitutional law and common law regard real property ownership as encompassing an inherent "bundle of rights." n2 That bundle of rights is variously described as including the right to sole and exclusive possession of property, n3 the right to exclude others, n4 and the rights to possess, use, or dispose of the property. n5 The "bundle of rights" terminology occasionally results in mixed metaphors and peculiar phrasing, n6 and is not itself of constitutional origin, but rather adapted from early theoretical analyses of property ownership. n7 The various "rights" asserted among the "bundle" are in reality simply collective attributes of the many rights, interests, and privileges recognized under general 20th century property theory. n8

The character, scope, and extent of individual rights in property are traditionally derived from state law rather than created by the United States Constitution. n9 Additional definition of property rights occurs in application of the prohibitions within both the Fifth and Fourteenth Amendments against governmental actions that would deprive any person of "life, liberty, or property without due process of law." Further, several aspects of both the First, Fourth, and Fifth Amendments to the U.S. Constitution limit the extent to which states may infringe on the bundle of rights called property.

COMPUTER-ASSISTED RESEARCH

LEXIS: (bundle w/5 right!) w/10 property

FOOTNOTES:
(n1)Footnote 2. *See, e.g., Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 1006 (1992).*

(n2)Footnote 3. *See, e.g., Nollan v. California Coastal Comm'n, 483 U.S. 825, 831 (1987); Loretto v. Teleprompter Manhattan C.A.T.V. Corp., 458 U.S. 419, 426 (1982); see also Hendler v. United States, 952 F.2d 1364, 1375 (Fed. Cir. 1991).*

(n3)Footnote 4. *Kaiser Aetna v. United States, 444 U.S. 164, 179-180 (1979); Pruneyard Shopping Ctr. v. Robins, 447 U.S. 74, 80 (1980).* This may also be phrased as a "right to be left alone"; *see Katz v. United States, 389 U.S. 347 (1967)* and *Olmsted v. United States, 277 U.S. 438, 478 (1928)* (Brandeis, dissenting) *overruled in part, Berger v. State*

of N.Y., 388 U.S. 41 (1967); Katz v. U.S., 389 U.S. 347 (1967); Stevens v. City of Cannon Beach, 510 U.S. 1207, 1209 (1994).

(n4)Footnote 5. *Fresh Pond Shopping Ctr., Inc. v. Callahan, 464 U.S. 875, 878 (1983), cf. Andrus v. Allard, 444 U.S. 51, 65-66 (1979).*

(n5)Footnote 6. "We have repeatedly held that, as to property reserved by its owner for private use, the right to exclude others is one of the most essential sticks in the bundle of rights that are commonly characterized as property." *Nollan v. California Coastal Comm'n, 483 U.S. 825, 831-832 (1987).* In *Andrus v. Allard, 444 U.S. 51, 65-66 (1979),* the Court instead analogized particular rights to the individual "strands" of a bundle.

(n6)Footnote 7. *See, e.g.*, F.W. Maitland, The Mystery of Seisin, *2 Law Q. Rev. 481, 489 (1886).*

(n7)Footnote 8. Restatement of the Law of Property §§ 1-8 (1936).

(n8)Footnote 9. *Katz v. United States, 389 U.S. 347, 350, 351 (1967); Board of Regents v. Roth, 408 U.S. 564, 577 (1972). Preseault v. I.C.C., 494 U.S. 1, 13 (1990), distinguished by Allustiarte v. U.S., 256 F.3d 1349* (Fed. Cir. Jul 16, 2001). *John R. Sand & Gravel Co. v. United States, 60 Fed. Cl. 230 (2004)* (state law determines which sticks are in a person's bundle of property rights).

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CHAPTER 66 CONSTITUTIONAL IMPACTS ON REAL PROPERTY

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§ 66.03 Fourth Amendment Impacts.

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The Fourth Amendment to the United States Constitution protects "the right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures... ." n10

§ 66.03(a) Property-Based Definition of Fourth Amendment Rights.

Early Supreme Court decisions used common law property concepts to define the extent of the Fourth Amendment prohibition against unreasonable search and seizure. In Olmsted v. United States n11 the Court, in upholding the use of telephone wiretaps, had suggested that the Fourth Amendment limited only searches and seizures of material, tangible property when those actions occurred by physical entry, thus foreclosing further Fourth Amendment inquiry in the absence of common law trespass or "actual physical invasion of [a] house." n12 However, the premise that property concepts either control or limit the Government's power of search and seizure has since been discredited. The Supreme Court instead has recognized that a principal objective of the Fourth Amendment is a concern with broader issues of privacy, and has increasingly discarded "fictional and procedural barriers" based only on property concepts. n13

COMPUTER-ASSISTED RESEARCH

LEXIS: Trespass or (invasion w/2 physical) w/10 (fourth pre/2 amendment)

§ 66.03(b) The Reasonable Expectation of Privacy Standard.

In its 1967 Katz v. United States n14 decision, the Supreme Court abandoned the "trespass to realty" restriction of *Olmsted.* The Court declared unconstitutional the placing of electronic listening and recording devices on the outside of public telephone booths to obtain incriminating evidence. Although there was no physical entrance into the area occupied by the suspect, or any ownership claims to the location, the Court nevertheless held that the suspect had a legitimate "expectation of privacy" within the telephone booth. In a broadly principled decision, the Court held that the Fourth Amendment "protects people, not places," and that "the correct solution of Fourth Amendment problems [would no longer be determined by the] incantation of the phrase 'constitutionally protected area.'" n15

The *Katz* decision held that a governmental intrusion qualifies as a "search" within the meaning of the Fourth Amendment's ban on unreasonable searches and seizures when the government violates an individual's "reasonable expectation of privacy." n16 Justice Harlan wrote that the *Katz* standard rests on two separate requirements: "first, that a person have exhibited an actual (subjective) expectation of privacy and, second, that the expectation be one that society is prepared to recognize as 'reasonable.'" n17 The "reasonable expectation" formulation has since become accepted as the principal test of intrusion; thus, in California v. Greenwood, n18 the contents of garbage bags placed on the street curb were held not protected from search, because a trash collector or other persons might easily have sorted through the material. Under such circumstances, the defendant could not have had a "reasonable" expectation that the contents of the bags would remain private. n19

COMPUTER-ASSISTED RESEARCH

LEXIS: (expect! w/5 privacy or private) w/10 (fourth pre/2 amendment) or (search w/5 seizure)

§ 66.03(b)(1) Open Fields and Curtilage. n20

Adoption of the "reasonable expectation of privacy" test established by *Katz* in 1967 did not produce a definitive answer to the question of what constitutes an unlawful search of real property for Fourth Amendment purposes. Departure from the *Olmsted* concept of "intrusion as trespass" meant paradoxically both that enclosed realty could nevertheless be subjected to warrantless search, and that areas not categorized as private realty potentially could receive Fourth Amendment protection. In Oliver v. United States, n21 the Supreme Court held that government agents' disregard of a locked gate and intrusion into a privately owned but "open" field was neither a "search" in the constitutional sense nor an invasion of privacy merely because such an intrusion would be a technical trespass at common law. Reaffirming that an entry onto "open" fields was not subject to Fourth Amendment protection, n22 the Court regarded a purpose of the Amendment as protecting instead the privacy and sanctity of the home, utilizing the ancient concept of "curtilage" to define the protected and intimate space that includes and surrounds a home. n23

The definition of curtilage was more closely focused three years later, in United States v. Dunn, n24 when government drug enforcement agents crossed several fences surrounding the defendant's ranch house to discover a drug laboratory concealed within a barn. The Court held the intrusion was not a search under the Fourth Amendment because the barn was not within the curtilage of the ranch house. Declining to adopt a "bright-line rule" based on physical structures such as fences, the Court instead set out a four-factor test to determine the extent of a home's curtilage umbrella:

(1) the proximity of the area to the home;

(2) whether the area is within an enclosure surrounding the home;

(3) the nature of the uses to which the area is put; and

(4) the steps taken by the resident to protect the area from observation by passers-by. n25

The Court maintained that those factors were useful analytical tools "only to the degree that, in any given case, they bear upon the centrally relevant consideration -- whether the area in question is so intimately tied to the home itself that it should be placed under the home's 'umbrella' of Fourth Amendment protection." n26

The degree to which a person has a protected and "reasonable" expectation of privacy within the curtilage of the home is subject to further qualification in situations involving aerial surveillance, described below.

COMPUTER-ASSISTED RESEARCH

LEXIS: (curtilage w/5 privacy or private) or (search w/5 seizure) or (privacy or private)

§ 66.03(b)(2) Aerial Surveillance. n27

Several cases have addressed the extent to which private owners of real property can reasonably expect to be free from aerial surveillance. In California v. Ciraolo, n28 and Florida v. Riley, n29 the Court held that local police had not violated the Fourth Amendment by flying over and observing a home owner's realty, and in Dow Chemical Co. v. United States, n30 the Court held unreasonable an expectation that a heavily secured outdoor industrial plant would not be the subject of sophisticated aerial photographic surveillance.

Utilizing the expectation of privacy doctrine established in *Katz*, the Supreme Court held in the 1986 *Ciraolo* opinion that aerial observation of a home was not a violation of the Fourth Amendment. The Court assumed, but did not decide, that the defendant home owner had a subjective expectation of privacy in his fenced suburban yard, while assuming as well that the yard was within the curtilage of his home, "where privacy expectations are most heightened." n31 Despite the assumptions of curtilage protection, the Court concluded that the aerial surveillance did not constitute a Fourth Amendment search, because the homeowner's subjective expectation that his backyard activities would be shielded from aerial observation was unreasonable and "not an expectation that society is prepared to honor." n32 The Court relied almost entirely on the assertion that Ciraolo had waived his expectations of privacy by knowingly exposing his backyard to the plain view of outsiders in an era of routine air travel. n33 A vigorous dissent by Justice Powell argued that the owner's expectation of privacy was reasonable because his yard was within the curtilage of his home, where an individual's expectation of privacy "virtually always will be legitimate," and because the actual danger to privacy posed by passengers on commercial airliners is "virtually non-existent" and "too trivial to protect against." n34 Nonetheless, three years later in Florida v. Riley, n35 the Court held that a landowner could not reasonably have expected that the interior of a partially covered greenhouse in a residential backyard was protected from low-level aerial observation. In a plurality opinion, the Court found that even though the defendant had taken precautions against ground-level observation by leaving the roof and side windows partially open, the contents of the greenhouse were open to public view from the air. The Court cautioned, however, that observation of "intimate details connected with the use of the home or curtilage," or creation of "undue noise,... wind, dust, or threat of injury," could cause an otherwise legal observation to violate the Fourth Amendment. n36

In *Dow*, a precision aerial camera was used by the EPA to photograph the petitioner's 2,000-acre chemical plant from high altitudes after Dow had refused the agency's request to conduct an on-site inspection of the plant. The Supreme Court concluded that the warrantless aerial surveillance of the chemical complex did not constitute a Fourth Amendment search. It held that the open area of an extensive industrial plant was not analogous to the historically protected curtilage of a dwelling, but instead was "more comparable to an open field." n37 It also suggested that "the [g]overnment has greater latitude to conduct warrantless inspections of commercial property." n38 The Court concluded that the particular technical methods of surveillance employed by the EPA were not sufficiently intrusive to violate that reduced expectation of privacy. n39

COMPUTER-ASSISTED RESEARCH

LEXIS: surveillance w/5 (fourth pre/2 amendment) or (search w/5 seizure) or (privacy or private)

§ 66.03(c) The Warrant Requirement. n40

The Fourth Amendment also provides that "no warrants shall issue, but upon probable cause... ." n41 The law of search and seizure regards a search as reasonable if it is pursuant to a warrant, which itself is based on a showing of probable cause. However, warrantless searches are also considered reasonable in certain circumstances.

§ 66.03(c)(1) Administrative Searches Generally.

The primary exception to the warrant and probable cause requirement concerning searches of real property is found in the so-called "administrative" or "regulatory" searches, applicable generally to "relatively unintrusive" governmental activities. Mid-20th century cases generally upheld the right of government sanitary, fire, or other inspectors to enter private homes without a warrant for these searches. n42 By 1967, however, in Camara v. Municipal Court n43 and See v. City of Seattle, n44 the Court began to place restrictions on warrantless inspections of both homes and businesses. The Court pointed out that inspections by city officials were not merely "civil" in nature, as the consequences might render the occupant or owner subject to criminal process. Unless an emergency required immediate access, owners or occupants of homes or businesses therefore had a constitutional right to insist that inspectors first obtain a search warrant. The warrant, however, need not conform to the full Fourth Amendment standard of probable cause, n45 and a "reasonable" or a "suitable" warrant would suffice. n46

COMPUTER-ASSISTED RESEARCH

LEXIS: administrative w/5 (fourth pre/2 amendment) or (search w/5 seizure) or (warrant w/5 search or inspect!)

§ 66.03(c)(2) Administrative Searches: Pervasively Regulated Businesses. n47

Certain "closely" or "pervasively" regulated businesses are susceptible to warrantless inspections, escaping even the relaxed requirement of a *Camara-See* warrant. Thus, based on "the long history of the regulation of the liquor industry during pre-Fourth Amendment days," the decision in Colonnade Catering Corp. v. United States n48 upheld warrantless entry of liquor store premises by federal inspectors. The Court recognized that Congress "has broad authority to fashion standards of reasonableness for searches and seizures" in the liquor industry, n49 as Congressional statutes have "repeatedly granted federal agents power to make warrantless searches and seizures of articles under the liquor laws." n50

In 1972, the Supreme Court in United States v. Biswell n51 upheld the validity of warrantless searches of firearms stores during business hours. Although the Court noted that federal regulation of interstate traffic in firearms is not as "deeply rooted in history" as the government's control of the liquor industry, it recognized both the need for close scrutiny of firearms traffic within state borders and that inspection was a crucial part of the regulatory scheme. n52 The Court concluded that if the statute was to be properly enforced and inspections made effective, "inspections without warrant must be deemed reasonable official conduct under the Fourth Amendment," when in contrast, the requirement of a warrant "could easily frustrate inspection." n53

Similarly, in Donovan v. Dewey, n54 the Court upheld the constitutionality of warrantless inspections made pursuant to the Federal Mine Safety and Health Act. There again, justification was based on the pervasive regulation of an industry with a "notorious history of serious accidents and unhealthful working conditions," and deference to the congressional finding that unannounced, warrantless inspections were essential to ensure compliance with the Mine Safety Act. n55

Six years later, in New York v. Burger, n56 a case reviewing the constitutionality of a state statute that authorized the warrantless inspection of an automobile junkyard, the Supreme Court established specific guidelines governing administrative inspections of pervasively regulated businesses: n57

> (1) there must be a "substantial" governmental interest that informs the regulatory scheme pursuant to which the inspection is made,
>
> (2) the warrantless inspection must be "necessary to further the government scheme," and

(3) the certainty and regularity of the statute's inspection program must provide a constitutionally adequate substitute for a warrant. "In other words, the regulatory statute must perform the two basic functions of a warrant: it must advise the owner of the commercial premises that the search is being made pursuant to the law and has a properly defined scope, and it must limit the discretion of the inspecting officers." n58

COMPUTER-ASSISTED RESEARCH

LEXIS: administrative w/5 (fourth pre/2 amendment) or (search w/5 seizure) or (warrant w/5 search or inspect!)

§ 66.03(c)(3) Administrative Searches: Statutorily Authorized Programs.

Unlike businesses that traditionally have been closely regulated, other business enterprises that lack the history of pervasive or intensive governmental control are probably protected from warrantless inspections. Thus, in Marshall v. Barlow's, Inc., n59 the Court held unconstitutional a provision in the Occupational Safety and Health Act (O.S.H.A.) that permitted warrantless inspections of the work area of any employment facility within O.S.H.A.'s jurisdiction. n60 In distinguishing its previous decisions that had upheld warrantless inspections of liquor and firearms dealers, the Court held that when such "an entrepreneur embarks upon such a business, he has voluntarily chosen to subject himself to a full arsenal of governmental regulation." n61 In contrast, OSHA applied to a vast number and variety of enterprises, n62 not selected because of previous pervasive regulation.

COMPUTER-ASSISTED RESEARCH

LEXIS: administrative w/5 (fourth pre/2 amendment) or (search w/5 seizure) or (warrant w/5 search or inspect!)

FOOTNOTES:

(n1)Footnote 10. *U.S. Const. amend. IV. State v. Earl, 2004 UT App. 163* (No. 20020821-CA, May 13, 2004) (a police officer's warrantless entry into a tenant's home violated the 4th amendment, but the officer was justified in arresting the defendant based on his intervening illegal act).

(n2)Footnote 11. *Olmsted v. United States, 277 U.S. 438 (1928), overruled in part, Berger v. State of N. Y., 388 U.S. 41 (1967); Katz v. U.S., 389 U.S. 347 (1967), accord, Goldman v. United States, 316 U.S. 129, 135 (1942) overruled in part, Katz v. U.S., 389 U.S. 347 (1967).*

(n3)Footnote 12. *Olmsted v. United States, 277 U.S. 438, 457, 463-66 (1928) overruled in part, Berger v. State of N. Y., 388 U.S. 41 (1967); Katz v. U.S., 389 U.S. 347 (1967). Blanton v. State, 2003 Ala. Crim. App. LEXIS 189* (No. CR-00-1665, Aug. 29, 2003) (defendant was properly convicted because the agent didn't violate his 4th Amendment rights by planting a microphone on wall to his apartment, as no physical trespass had occurred).

(n4)Footnote 13. *Katz v. United States, 389 U.S. 347 (1967), Warden v. Hayden, 387 U.S. 294 (1967). See generally,* Ernest H. Schopler, Annotation, *Supreme Court's Views as to the Federal Legal Aspects of the Right of Privacy, 43 L. Ed. 2d 871 (1987)* and William C. Heffernan, *Property, Privacy, and the Fourth Amendment, 60 Brook L. Rev. 663 (1993).*

Rook v. State, 679 N.E.2d 997 (Ind. App. 1997) (an officer's observation of an area behind the house being searched was not a search under the Fourth Amendment, even though the observation was with binoculars); *State v. Siegal, 934 P.2d 176 (Mont. 1997) overruled, State v. Kuneff, 970 P.2d 556 (Mont. 1998)* (use of thermal imaging in the context of a criminal investigation constitutes a search under the Montana Constitution); *Commonwealth v. Gindlesperger, 706 A.2d 1216 (Pa. Sup. 1997)* (warrantless use of a thermal imaging device was an unconstitutional search); *Commonwealth v. Feineigle, 690 A.2d 748 (Pa. Commw. 1997)* (photographs taken of garage interior by fire marshal standing outside the garage did not constitute an unreasonable search); *Gudema v. Nassau County, 163 F.3d 717 (2d*

Cir. 1998) (mere ownership of property does not establish a legitimate expectation of privacy unless the owner vigilantly protects the right to exclude others). *United States v. White, 401 U.S. 745, 778 (1971)* (Douglas, J., dissenting).

(n5)Footnote 14. *Katz v. United States, 389 U.S. 347 (1967).*

(n6)Footnote 15. *Katz v. United States, 389 U.S. 347, 350-351 (1967). See also Lynch v. Household Fin. Corp., 405 U.S. 538, 552 (1972):* "Property does not have rights. People have rights... In fact, a fundamental interdependence exists between the personal right to liberty and the personal right in property. Neither could have meaning without the other."

(n7)Footnote 16. *Katz, 389 U.S. at 360* (Harlan, J., concurring). *United States v. Paige, 136 F.3d 1012 (5th Cir. 1998)* (no reasonable expectation of privacy in attic space at the time marijuana was discovered there), *distinguished by United States. v. Barth, 26 F. Supp. 2d 929* (W.D.Tex. Sep 21, 1998); *People v. Schafer, 946 P.2d 938 (Colo. 1997)* (person camping on unimproved, unused, unfenced and unposted land has a reasonable expectation of privacy in the tent and the personal effects in the tent); *State v. Witherington, 702 So. 2d 263 (Fla. App. 1997)* (a warrantless search of a screened in back porch violates the privacy expectation), distinguished by *State v. Brockman, 788 So. 2d 406* (Fla. App. 5 Dist. Jul 6, 2001); *State v. Hubbel, 951 P.2d 971 (Mont. 1998)* (no expectation of privacy in the private land leading up to and including the defendant's residence threshold); *State v. O'Brien, 572 N.W.2d 870 (Wis. App. 1997)* (warrant for search of residence also authorizes search of the vehicle that is located on the premises).

(n8)Footnote 17. *389 U.S. at 361. Lancaster v. State, 105 S.W.3d 365 (Ark. App. Div. 3 2003)* (no violation of 4th Amendment rights where officers drove up to driveway of house, discovered marijuana growing in plain view, and then obtained search warrant); *Nilson v. State, 106 S.W.3d 869 (Tex. App. 5th Dist. 2003)* (where officer found drug paraphernalia in defendant's garbage, denial of defendant's motion to suppress was proper as defendant had no reasonable expectation of privacy in her garbage); *United States v. Bautista, 362 F.3d 584 (9th Cir. 2004)* (because tenant's rental period had not expired and he had not been evicted, he retained a legitimate expectation of privacy in his hotel room); *Shaul v. Cherry Valley-Springfield Cent. Sch. Dist., 363 F.3d 177 (2d Cir. 2004)* (teacher had no expectation of privacy in the classroom after being suspended from teaching and barred from the classroom); *United States v. Boose, 92 Fed. Appx. 377 (8th Cir. 2004)* (appellant did not have a privacy interest in hiding under his cousin's bed in order to evade the police, so the police's warrantless entry of his cousin's home did not violate appellant's Fourth Amendment rights); *United States v. Neely, 345 F.3d 366 (5th Cir. 2003)* (defendant did not forfeit his possessory rights to clothing simply by going to a hospital); *United States v. Lonedog, 67 Fed. Appx. 543 (10th Cir. 2003)* (no Fourth Amendment reasonable expectation of privacy in undeveloped film that spilled out of defendant's car after an accident); *United States v. Gonzalez, 328 F.3d 543 (9th Cir. 2003)* (defendant had no objectively reasonable expectation of privacy in hospital's public mailroom that would preclude video surveillance of activities already visible to the public).

(n9)Footnote 18. *California v. Greenwood, 486 U.S. 35 (1988).*

(n10)Footnote 19. *California v. Greenwood, 486 U.S. 35, 40-43 (1988).*

(n11)Footnote 20. *See generally,* Annotation, *Supreme Court's Development of "Open Fields Doctrine" with Respect to Fourth Amendment Search and Seizure Protections, 80 L. Ed. 2d 860 (1986),* and David B. Sweet, Annotation, *What Is Within "Curtilage" of House or Other Building... Under Fourth Amendment, 94 L. Ed. 2d 832 (1989).*

(n12)Footnote 21. *Oliver v. United States, 466 U.S. 170 (1984). See also United States v. McKeever, 5 F.3d 863 (5th Cir. 1993)* (Fact that government officer conducting surveillance violated trespass laws has no relevance to Fourth Amendment inquiry. Open fields doctrine teaches that Fourth Amendment provides no protection from searches for items on private property outside structure, outside curtilage of home, or outside other place in which society is prepared to recognize reasonable expectation of privacy).

(n13)Footnote 22. *Hester v. United States, 265 U.S. 57 (1924). United States v. Rapanos, 115 F.3d 367 (6th Cir. 1997)* (fenced parcel of land cleared of vegetation consisted of open field in which there was no expectation of privacy); *O'Neal v. State, 689 So .2d 1135 (Fla. App. 1997)* (a fenced lot in an urban area was considered an open field); *State v. Gates, 703 A.2d 696 (N.J. Super. 1997)* (open fields exception to the warrant requirement); *Barton v. State, 962 S.W.2d 132 (Tex. App. 1997)* (open fields doctrine); *Moss v. State, 878 S.W.2d 632 (Tex. 1994)* ("Open field" for purposes of open fields doctrine need not be "open" or "field" as those terms are commonly used. Fenced garden and shed near defendant's home on 35-acre tract were within curtilage of rural home, for purposes of Fourth Amendment); *United States v. Traynor, 990 F.2d 1153 (9th Cir. 1993)* (The Fourth Amendment's proscription of searches within the curtilage of the home is not violated, even if officers first trespass upon property that is obviously curtilage while investigating a tip, as long as the incriminating observations themselves take place outside the protected curtilage.), *overruled by U.S. v. Johnson, 256 F.3d 895 (9th Cir. 2001); Wysong v. State, 614 So. 2d 670 (Fla. 1993)* (Unfenced front yard was equivalent of open field for which police officers passed to get to threshold front door and was not within scope of Fourth Amendment; therefore, officers' approach to front door and knocking on door was not an illegal entry upon property merely because of display of "No Trespassing" sign.); *United States v. Pinter, 984 F.2d 376 (10th Cir. 1993)* ("Open fields" doctrine permits police to enter and search a field without a warrant, and fact that officers trespass onto private property in doing so does not transform their actions into a "search" within meaning of Fourth Amendment). *United States v. Perry, 95 Fed. Appx. 598 (5th Cir. 2004)*(where agent's entry onto defendant's land was lawful under open fields doctrine, the subsequent evidence seized was lawful).

(n14)Footnote 23. *Oliver at 466 U.S. 170, 180, relying on Boyd v. United States, 116 U.S. 616, 630 (1886)* and 4 Blackstone Commentaries *225. *See also Payton v. New York, 445 U.S. 573, 601 (1980), New York v. Harris, 495 U.S. 14 (1990). State v. Campbell, 640 So. 2d 622 (La. 1994)* (underneath area of raised house is "curtilage" protected by Fourth Amendment); *State v. Maxfield, 886 P.2d 123 (Wash. 1994),* distinguished by *State v. Porter, 942 P.2d 974 (Wash. 1997).*

Central Oregon Fabricators, Inc. v. Hudspeth, 977 P.2d 416 (Or. Ct. App. 1999) (Grantees of a profit a prendre that allowed them to hunt on another person's land did not abandon their right to hunt by lack of use since there was no verbal expression or other conduct that showed intent to abandon their interests). *United States v. Barajas-Avalos, 359 F.3d 204 (9th Cir. 2004)* (having no dishes, food, clothing, bedding, electricity, or water, a trailer was not a permanent or temporary home, so curtilage doctrine did not apply); *United States v. Hatfield, 333 F.3d 1189 (10th Cir. 2003)* (officer's walking in defendant's pasture along fence did not constitute a search because the fact the defendant owned the pasture did not create a reasonable expectation of privacy from observations of his curtilage made from the pasture); *United States v. Gerard, 362 F.3d 484 (8th Cir. 2003)* (that information used to obtain a search warrant was based on an officer's smelling marijuana while climbing a ladder to look into defendant's locked garage did not invalidate warrant, as the garage lay outside the curtilage of defendant's dwelling); *United States v. Romero-Bustamente, 337 F.3d 1104 (9th Cir. 2003)* (statute that authorized Border Patrol, without warrant, to access private lands, but not dwellings, within 25 miles from any external boundary of United States, did not extend to backyards, as curtilage was part of home itself under Fourth Amendment).

(n15)Footnote 24. *United States v. Dunn, 480 U.S. 294 (1987). See also State v. Johnson, 879 P.2d 984 (Wash. 1994)* (Although under Fourth Amendment a person's expectation of privacy in open field, even if subjectively manifested, is not deemed objectively reasonable or legitimate, person is not precluded from protecting that person's private affairs in open field under State Constitution. Federal agents' intrusion onto "open fields" owned by defendants was unreasonable intrusion into defendants' private affairs under State Constitution, such that evidence resulting from intrusion should have been suppressed; defendants posted multiple signs manifesting desire to exclude others from open fields, placed chain link gate and fence around property and closed gate); *State v. Poppe, 883 P.2d 905 (Or. 1994)* (In area where it is difficult to tell where one piece of property ends and another begins, person who wishes to maintain protected privacy interest must take steps such as erecting fence or posting signs to exclude intruders); *Atkins v. State, 882 S.W.2d 910 (Tex. 1994)* (Determining whether particular area is included within "curtilage" of home is determined by whether occupant of home had reasonable expectation of privacy in area; there is no reasonable expectation of

privacy if activity viewed by officer is visible from street, or curtilage of home is open to public); *United States v. Santa Maria, 15 F.3d 879 (9th Cir. 1994)* (Fourth Amendment protects structures other than dwellings from unreasonable searches and seizures, and structure need not be within curtilage in order to have Fourth Amendment protection.); *United States v. Wright, 991 F.2d 1182 (4th Cir. 1993)* (Defendant's barn was outside curtilage of his home and was thus like "open field," which included any occupied or undeveloped area outside curtilage, for purposes of deciding Fourth Amendment protection, and as an open field, government's intrusion was not unreasonable search proscribed by Fourth Amendment).

(n16)Footnote 25. *480 U.S. 294, 301. State v. Rodriguez, 65 P.3d 181 (Haw. 2003)* (officer's presence on curtilage was not justified, so marijuana plants observed from there were not in plain view); *State v. Goebel, 654 N.W.2d 700 (Minn. App. 2002)* (street at the end of the driveway was not in the curtilage of the home); *People v. Riddle, 649 N.W.2d 30 (Mich. 2002)* (the castle doctrine that a landowner need not retreat and may use deadly force in self-defense does not extend to outlying areas in the curtilage of the home); *Jones v. State, 564 S.E.2d 220 (Ga. App. 2002)* (a back-yard shed was within the curtilage of the home).

See also State v. Gabbard, 877 P.2d 1217 (Or. 1994) (State Constitution protects privacy interest in land outside curtilage of person's dwelling, if person manifests intent to exclude public by erecting barriers, such as fences or signs. Although person has privacy interest in curtilage of dwelling, person impliedly consents to visitors going to front door of person's house, provided that person has not manifested intent to forbid intrusion of casual visitors onto property) distinguished by *State ex rel. Juvenile Dept. of Coos County v. Reeves, 988 P.2d 433 (Or. App. 1999); State v. Graffus, 871 P.2d 1115 (Wash. 1994)* (Officer with legitimate business may enter areas of curtilage which are impliedly open, such as access routes to house, without warrant; officer is free to keep his or her eyes open but may not substantially or unreasonably depart from such area or engage in particularly intrusive method of viewing) distinguished by *State v. Ross, 959 P.2d 1188 (Wash. App. Div. 1998); State v. Hornback, 871 P.2d 1075 (Wash. 1994)* (Curtilage of home enjoys heightened Fourth Amendment protection; however, person does not have reasonable expectation of privacy in areas of curtilage impliedly open to the public. Entry by law enforcement officials onto those areas of home's curtilage, such as driveways, walkways or access routes leading to residence, does not constitute search and does not implicate Fourth Amendment. "No trespassing" sign alone does not withdraw permission to enter access routes to house or other portions of curtilage impliedly open to the public and thus presence of "no trespassing" sign is not dispositive of homeowner's reasonable expectation of privacy for Fourth Amendment purposes); *State v. Espinoza, 442 S.E.2d 911 (Ga. 1994), rev'd, 454 S.E.2d 765 (Ga. 1995).* (For search warrant purposes, concept of curtilage is more easily applied to land surrounding single-family dwelling than to common areas surrounding multifamily dwelling; when area in question is common area serving multiple dwellings, it is less likely that residents of any one unit have expectation of privacy or reasonably consider area to be extension of dwelling); *United States v. Ishmael, 843 F. Supp. 205 (E.D. Tex. 1994), rev'd, 48 F.3d 850 (5th Cir. 1995).* Although metal building constructed on resident's property was not within curtilage of home, court held it was not "open field" for Fourth Amendment purposes; to allow government to intrude up to very windows of building simply because it was outside of curtilage of home would eviscerate Fourth Amendment); *State v. Hoke, 866 P.2d 670 (Wash. 1994)* (Officer substantially and unreasonably departed from area of curtilage impliedly open to public. Homeowner need not take overt steps signalling that area of curtilage is private; such burden would be inconsistent with law and seriously weaken constitutional protection against unreasonable searches); *State v. Mierz, 866 P.2d 65 (Wash. 1994)* (Defendant's backyard, which was enclosed by six-foot fence and a gate which was secured by a padlock, was part of curtilage of his house and Department of Wildlife agents' warrantless intrusion into yard without permission violated Fourth Amendment); *State v. Chaussee, 866 P.2d 643 (Wash. 1994)* (Although police officers on legitimate business may enter area of curtilage which is impliedly open to public, substantial or unreasonable departure from the area exceeds scope of implied invitation and intrudes upon constitutionally protected expectation of privacy); *United States v. Hopper, 58 Fed. Appx. 619 (6th Cir. 2003)* (denial of motion to surpress evidence affirmed with regard to curtilage where that area of the home was not enclosed, was not put to special use, and was not protected from open observation).

(n17)Footnote 26. *480 U.S. 294, 301. United States v. Mooring, 137 F.3d 595 (8th Cir. 1998)* (a barn was not

within the curtilage of the farmhouse); *United States v. Soliz, 129 F.3d 499 (9th Cir. 1997)* (a parking area is not within the curtilage of the home), *overruled by U.S. v. Johnson, 256 F.3d 895 (9th Cir. 2001); United States v. Jenkins, 124 F.3d 768 (6th Cir. 1997)* (the back yard is not within the curtilage of the house); *State v. Burston, 693 So. 2d 600 (Fla. App. 1997)* (a carport is part of the curtilage of the dwelling) *distinguished by Small v. State, 710 So. 2d 591* (Fla. App. 4 dist. Feb 18, 1998); *State v. Webb, 943 P.2d 52 (Idaho 1997)* (a marijuana garden is not within the curtilage of the residential property); *Commonwealth v. Butterfield, 691 N.E.2d 975 (Mass. App. 1998)* (a driveway adjacent to the driveway, and a walkway from the driveway to the back door of the residence, are not part of the curtilage of the residence); *State v. Carter, 569 N.W.2d 169 (Minn. 1997), rev'd, 525 U.S. 83 (1998)* (observation of interior constituted a search whether or not made from curtilage); *State v. Jackson, 937 P.2d 545 (Utah App. 1997)* (garbage set out for collection is beyond the curtilage of the home); *United States v. Van Damme, 48 F.3d 461 (9th Cir. 1995)* (the greenhouses in which marijuana was growing were not within the curtilage of the defendant's residence); *United States v. Hall, 47 F.3d 1091 (11th Cir. 1995)* (seizure of shredded documents from dumpster on defendant's business premises did not violate the Fourth Amendment); *United States v. Dufour, 43 M.J. 772 (Ct. Crim. App. 1995)* (investigator's walking along sidewalk in front of accused's residence and observing drug activity in plain view from that location was not intrusive or unreasonable); *State v. Bullock, 901 P.2d 61 (Mont. 1995)* (defendant had reasonable expectation of privacy in a section of a private driveway even though that section was not located within the curtilage of the defendant's cabin); *Alward v. Nevada, 912 P.2d 243 (Nev. 1996)* (legitimate expectation of privacy in tent), *rev'd, 58 N.E. 879 (N.Y. 1900) distinguished by Lincoln v. State, 988 P.2d 305* (nev. Nov 29, 1999).

("Curtilage" protected by Fourth Amendment is land immediately surrounding and associated with home -- that area associated with intimate activity of home and privacies of life. If law enforcement officer or agent does not go beyond area of residence that is impliedly open to public, no privacy interest is invaded.); *United States v. Conley, 856 F. Supp. 1010 (W.D. Pa. 1994)* (open areas outside the curtilage of the house are not included within Fourth Amendment coverage because those areas do not qualify as persons, houses, papers, or effects); *State v. Rogers, 638 A.2d 569 (Vt. 1993) See also Hagan v. Delaware Anglers' & Gunners' Club, 655 A.2d 292 (Del. Ch. 1995)* (police officer's observation of defendants' garden from wooded area surrounding curtilage of their home was not a search. Officer could conduct constitutional, warrantless search in woods between road and cleared area behind defendant's house). *Daughenbaugh v. City of Tiffin, 150 F.3d 594 (6th Cir. 1998)* (unattached garage within 50 or 60 yards of a house is within the curtilage). *Bond v. United States, 120 S. Ct. 1462, 1464 (2000). But see, State v. Costin, 720 A.2d 866 (Vt. 1998); State v. Hall, 719 A.2d 435 (Vt. 1998).*

(n18)Footnote 27. *See generally,* Bruce G. Berner, *The Supreme Court and the Fall of the Fourth Amendment, 425 Val. U. L. Rev. 388 (1991),* Bradley W. Foster, *Warrantless Aerial Surveillance and the Right to Privacy: The Flight of the Fourth Amendment, 56 J. Air L. & Com. 719 (1991),* and Annotation, *Aerial Observation or Surveillance as Violative of the Fourth Amendment Guarantee Against Unreasonable Search or Seizure, 56 A.L.R. Fed. 772 (1982).*

(n19)Footnote 28. *California v. Ciraolo, 476 U.S. 207 (1986).*

(n20)Footnote 29. *Florida v. Riley, 488 U.S. 445 (1989).*

(n21)Footnote 30. *Dow Chemical Co. v. United States, 476 U.S. 227 (1986).*

(n22)Footnote 31. *California v. Ciraolo, 476 U.S. 207, 213 (1986).*

(n23)Footnote 32. *California v. Ciraolo, 476 U.S. 207, 214 (1986).*

(n24)Footnote 33. *California v. Ciraolo, 476 U.S. 207, 213-215 (1986). See also State v. Robbins, 647 A.2d 555 (Pa. 1994)* (Helicopter surveillance of defendant's property from altitude of 500 feet was not a "search"); *Henderson v. People, 879 P.2d 383 (Colo. 1994)* (Ordinary unintrusive visual observations from public navigable airspace do not constitute "search" under Fourth Amendment).

(n25)Footnote 34. *California v. Ciraolo, 476 U.S. 207, 220-224 (1986).*

(n26)Footnote 35. *Florida v. Riley, 488 U.S. 445 (1989). See generally,* David J. Stewart, *Florida v. Riley: The Emerging Standard for Aerial Surveillance of the Curtilage, 43 Vand. L. Rev. 275 (1990). See also United States v. Pinson, 24 F.3d 1056 (8th Cir. 1994)* (Party claiming to have suffered unlawful invasion in violation of Fourth Amendment must establish as threshold matter that he had legitimate expectation of privacy in object searched or seized, and such expectation is reasonable only if he manifests subjective expectation of privacy in object of challenged search and society is willing to recognize that subjective expectation as reasonable); *United States v. Van Damme, 823 F. Supp. 1552 (D. Mont. 1993), vacated, 48 F.3d 461 (9th Cir. 1995)* (Use of camera to photograph greenhouse compound during helicopter fly-overs did not violate Fourth Amendment; although greenhouse compound photographed was not industrial complex, it was in open field so that use of camera did not raise Fourth Amendment concerns).

(n27)Footnote 36. *Florida v. Riley, 488 U.S. 445, 452 (1989) See also Moss v. State, 878 S.W.2d 632 (Tex. 1994)* (There was warrantless intrusion of defendant's property that violated his reasonable expectation of privacy where, after observing marijuana on his property from helicopter, law enforcement officers were unable to land helicopter, and circled area for 20 to 40 minutes, generating noise, wind and turbulence and upsetting defendant's children). *United States v. Cusumano, 67 F.3d 1497 (10th Cir. 1995) vacated, 83 F.3d 1237 (10th Cir. 1996); see also, United States v. Elkins, 95 F. Supp. 2d 796 (W.D. Tenn. 2000)* (use of a thermal imager to sense heat signatures of activities within a house was a search subject to the warrant requirement); *Pew v. Scopino, 904 F. Supp. 18 (D. Me. 1995)* (one inspection by helicopter constituted a search within the meaning of the Fourth Amendment); *United States v. Eight Firearms et al., 881 F. Supp. 1074 (S.D. W. Va. 1995)* (aerial surveillance of claimant's backyard did not violate the Fourth Amendment); *LaFollette v. Commonwealth of Ky., 915 S.W.2d 747 (Ky. 1996)* (use of forward looking infrared radar to sense heat emissions in flyover of dwelling was not a search).

(n28)Footnote 37. *Dow Chemical Co. v. United States, 476 U.S. 227, 239 (1986).*

(n29)Footnote 38. *Dow Chemical Co. v. United States, 476 U.S. 227, 237-38 (1986), quoting Donovan v. Dewey, 452 U.S. 594, 598-599 (1981). See also New York v. Burger, 482 U.S. 691, 699-700 (1987).*

(n30)Footnote 39. *Dow Chemical Co. v. United States, 476 U.S. 227, 238-39 (1986).*

(n31)Footnote 40. *See generally,* Louis Fisher, *Congress and the Fourth Amendment, 21 Ga. L. Rev. 107 (1986). United States v. Cusumano, 67 F.3d 1497 (10th Cir. 1995), vacated, 83 F.3d 1237 (10th Cir. 1996); see also United States v. Elkins, 95 F. Supp. 2d 796 (W.D. Tenn. 2000)* (use of a thermal imager to sense heat signatures of activities within a house was a search subject to the warrant requirement). *State v. Earl, 2004 UT App. 163* (No. 20020821-CA, May 13, 2004) (a police officer's warrantless entry into a tenant's home violated the 4th amendment, but the officer was justified in arresting the defendant based on his intervening illegal act); *Eggleston v. Pierce County, 64 P.3d 618 (Wash. 2003)* (property owner's home rendered uninhabitable by the execution of a criminal search warrant and preservation order).

(n32)Footnote 41. *U.S. Const. amend. IV. United States v. Villanueva Magallon, 43 Fed. Appx. 16 (9th Cir. 2002)* (the second of two houses on the same property was included in the scope of a search warrant even though not individually identified); *State v. Boll, 651 N.W.2d 710 (S.D. 2002)* (inevitable discovery doctrine did not apply to a second search of property following an illegal first search). *Banks v. Ky. St. Police, 57 Fed. Appx. 242 (6th Cir. 2003)* (No Fourth Amendment violation when arresting officer had ample probable cause to arrest for criminal trespass after defendant refused to leave what the officer reasonably believed was not his residence).

(n33)Footnote 42. *See District of Columbia v. Little, 339 U.S. 1 (1950)* (health officer could inspect defendant's home for unsanitary conditions, but defendant had no obligation to allow the inspector to enter); *see also Ohio ex rel. Eaton v. Price, 364 U.S. 263 (1960)* (allowing inspection of homes for health hazards to protect the occupants and the

general public); *Frank v. Maryland, 359 U.S. 360 (1959) overruled in part, Camara v. San Francisco, 387 U.S. 523 (1967)* (inspector could search home for evidence of rat infestation in belief that a nuisance existed in or near home).

(n34)Footnote 43. *Camara v. Municipal Court, 387 U.S. 523 (1967).*

(n35)Footnote 44. *See v. City of Seattle, 387 U.S. 541 (1967). See also Flatford v. City of Monroe, 17 F.3d 162 (6th Cir. 1994)* (The Fourth Amendment's guarantee against unreasonable searches and seizures not only protects criminal suspects, but also limits governmental intrusions in civil context); *Miller v. Pollution Control Bd., 642 N.E.2d 475 (Ill. 1994)* (County waste inspector's entry on landowner's property to photograph land, after observing litter on property from road, was not unreasonable search within meaning of Fourth Amendment); *Swint v. City of Wadley, 5 F.3d 1435 (11th Cir. 1993), vacated in part, 514 U.S. 35 (1995)* (Fourth Amendment applies to administrative searches of business property).

(n36)Footnote 45. *Camara, 387 U.S. at 534. Acton v. Vernonia Sch. Dist. 47J, 23 F.3d 1514 (9th Cir. 1994), vacated, 515 U.S. 646 (1995)* (Under Oregon Constitution, criminal search is not permissible unless it conforms with warrant clause or falls within recognized exception to warrant requirement; by contrast, warrant clause and exceptions do not provide exclusive authorization for administrative searches); *Suss v. American Soc'y for Prevention of Cruelty to Animals, 823 F. Supp. 181 (S.D.N.Y. 1993)* (Legal authority supporting reasonable governmental action to protect nonhuman species does not permit municipality or private organization to exercise or trigger sovereign compulsion to break into private property without even an attempt to contact the owner or to obtain a warrant); *United States v. Sorenson, 28 F. Supp. 2d 1310 (D. Utah 1998)* (a warrant is not required to search a federal pretrial releasee's residence when the search is made pursuant to a supervised release agreement). *United States v. Bulacan, 156 F.3d 963 (9th Cir. 1998)* (courts apply a balancing test to determine whether an administrative search meets the Fourth Amendment's reasonableness requirement).

(n37)Footnote 46. *Camara v. Municipal Court, 387 U.S. 523, 534-539 (1967); see also City of Seattle, 387 U.S. at 546; Black v. Village of Park Forest, 20 F. Supp. 2d 1218 (N.D. Ill. 1998)* (a landlord's consent is insufficient to authorize a search of a tenant's home); *Marshall v. Barlow's, Inc., 436 U.S. 307, 324 (1978).*

(n38)Footnote 47. *See generally,* Richard P. Shafer, Annotation, *Fourth Amendment's Prohibition of Unreasonable Search and Seizure as Applied to Administrative Inspections of Private Property, 69 L. Ed. 2d 1078 (1982).*

(n39)Footnote 48. *Colonnade Catering Corp. v. United States, 397 U.S. 72 (1970).*

(n40)Footnote 49. *Colonnade Catering Corp. v. United States, 397 U.S. 72.* 77 (1970).

(n41)Footnote 50. *Colonnade Catering Corp. v. United States, 397 U.S. 72.* 75 (1970). *State v. Moussaed, 2003 Ohio App. LEXIS 4486* (No. L-03-1030, Sept. 19, 2003) (defendant's motion to suppress was properly denied because the discovery of general criminal activity was incidental to the administrative search for a violation of the liquor control act and not its objective).

(n42)Footnote 51. *United States v. Biswell, 406 U.S. 311 (1972).*

(n43)Footnote 52. *United States v. Biswell, 406 U.S. 311, 315-316 (1972).*

(n44)Footnote 53. *United States v. Biswell, 406 U.S. 311, 316 (1972). See also United States v. Nicoletti, 870 F. Supp. 96 (E.D. Pa. 1994)* (Unauthorized disposal of asbestos from building gave rise to emergency justifying warrantless entry of building by pollution control officer. Pollution control officer had satisfactory reason for securing immediate entry without warrant, and thus, entry did not violate Fourth Amendment).

(n45)Footnote 54. *Donovan v. Dewey, 452 U.S. 594 (1981).*

(n46)Footnote 55. *Donovan v. Dewey, 452 U.S. 594, 600-605 (1981). But see Commonwealth v. Burgan, 450 S.E.2d 177 (Va. 1994)* (Mine owner has diminished expectation of privacy because he or she cannot help but be aware that he or she will be subject to effective inspection, for purposes of determining whether search falls within exception to warrant requirement applicable to commercial premises of closely regulated industries. State was not entitled to search miners for smoking materials without warrant; no statutory or regulatory scheme authorized searching miners).

(n47)Footnote 56. *New York v. Burger, 482 U.S. 691 (1987). See also United States v. Branson, 21 F.3d 113 (6th Cir. 1994)* (Tennessee statute authorizes warrantless inspections of vehicles and parts on premises of person or firm engaged in business of buying or selling used automobile parts); *United States v. Proffitt, 843 F. Supp. 350 (M.D. Tenn. 1994), rev'd, 43 F.3d 1473 (6th Cir. 1994)* (Tennessee regulatory statute authorizing administrative inspections of auto parts records and inventory was unconstitutional to extent it authorized warrantless searches to locate stolen vehicles); *People v. Calvert, 23 Cal. Rptr. 2d 644,* (1993) (Defendant's automobile repair shop was a closely regulated business that could be constitutionally subjected to administrative inspections under Vehicle Code section authorizing inspections of automobile repair shops and new or used car lots).

(n48)Footnote 57. *482 U.S. 691 at 702-703.*

(n49)Footnote 58. *482 U.S. 691 at 703. See also United States v. Zhang, 833 F. Supp. 1010 (S.D.N.Y. 1993)* (In order for industry regulation to diminish expectation of privacy to point where warrantless searches are permitted, regulation must provide notice to owners of firms in industry that their property will be subject to periodic inspections undertaken for specific purpose. Doctrine permitting warrantless searches of closely regulated industries applies only where regulatory scheme performs basic functions of warrant; such requirement highlights importance of conducting warrantless searches pursuant to regulatory authority, despite any diminished expectations of privacy due to mere existence of regulatory schemes); *Blue v. Koren, 865 F. Supp. 169 (S.D.N.Y. 1994), rev'd, 72 F.3d 1075 (2d Cir. 1995)* (Warrantless administrative searches of highly regulated industries are proper where there is substantial government interest in regulatory scheme, search is necessary to further the regulatory scheme, and inspection program constitutes adequate substitute for warrant in terms of certainty and regularity of application). *United States v. Maldonado, 356 F.3d 130 (5th Cir. 2004)* (because the warrantless inspection of defendant's moving van, a vehicle within the extensively regulated interstate trucking industry, was valid under the administrative search exception to the warrant requirement, the court upheld the district court's denial of defendant's motion to suppress).

(n50)Footnote 59. *436 U.S. 307 (1978).*

(n51)Footnote 60. *Id. at 310. See also Tri-State Steel Constr., Inc. v. Occupational Safety & Health Review Comm'n, 26 F.3d 173,* (D.C. Cir. 1994) (Contractual right of entry that general contractor and subcontractors afforded "appropriate" federal inspectors and state was incompatible with any expectation of privacy that subcontractors may have manifested in open areas of construction project and, thus, there was no Fourth Amendment violation in Occupational Safety and Health Administration's (OSHA's) warrantless inspection of site) *distinguished by Abateco Services, Inc. v. Bell, 477 S.E. 2d 795* (Va. App. Nov. 19, 1996); *Trinity Indus. v. Occupational Safety & Health Review Comm'n, 16 F.3d 1455 (6th Cir. 1994)* (OSHA instruction CPL 2.45A does not comply with United States Supreme Court's *Barlow* decision setting forth requirements for administrative inspections; by allowing employee complaint to trigger administrative plan search, OSHA attempts to authorize full-scope inspection in absence of probable cause showing required for such inspection); *Reich v. Kelly-Springfield Tire Co., 13 F.3d 1160 (7th Cir. 1994)* (Warrant is necessary for nonconsensual OSHA inspections).

(n52)Footnote 61. *463 U.S. at 313. See also Lesser v. Espy, 34 F.3d 1301 (7th Cir. 1994)* (Search of dealers' rabbitry conducted by administrator of Animal and Plant Health Inspection Service (APHIS) pursuant to Animal Welfare Act fit within exception to warrant requirement for closely regulated industries); *People v. Taube, 864 P.2d 123 (Colo. 1993)* (Temporary restraining order issued under Nuisance Act that prohibited defendant from selling, encumbering, transferring, damaging, mortgaging, or in any manner disposing or destroying contents of her home did not amount to order authorizing police to enter and search for evidence). *United States v. Maldonado, 356 F.3d 130 (5th*

Cir. 2004) (vehicles within the extensively regulated interstate trucking industry are subject to warrantless inspection under the administrative search exception).

(n53)Footnote 62. *Compare Donovan v. Dewey, 452 U.S. 594, at 600-605 (1981).*

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CHAPTER 66 CONSTITUTIONAL IMPACTS ON REAL PROPERTY

8-66 Thompson on Real Property, Thomas Editions § 66.04

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§ 66.04 First Amendment Impacts.

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Various cases have examined the interaction of real property rights and the free speech and freedom of religion clauses of the First Amendment. Cases based on free speech have arisen in areas such as the right to picket or petition on private property, zoning controls of adult businesses, and the display of signs and billboards. Other cases have involved challenges to zoning ordinances based on the religion clauses of the First Amendment.

§ 66.04(a) Freedom of Speech.

§ 66.04(a)(1) The Landowner's Right to Exclude Persons Exercising First Amendment Freedoms. n63

The Supreme Court has addressed a mixed group of cases involving the inevitable conflicts that occur when persons attempt to exercise various First Amendment freedoms on land that is held in private ownership, while private owners of the real property attempt to exclude such persons from their land.

One of the first cases to raise the issue also framed the subsequent debate.In Marsh v. Alabama n64 a person who attempted to distribute religious literature on the premises of a company-owned town violated the wishes of the town's management. Marsh, a Jehovah's Witness, was warned that she could not distribute her literature and was later arrested and convicted under state laws penalizing trespass to realty. The Court held that the town, although owned by a private corporation, otherwise had "all the characteristics of any other American town," thus serving as the functional equivalent of a public area, or in speech terms, a public forum. The Court thus balanced "the constitutional rights of the owners of property against those of the people to enjoy freedom of press and religion," n65 and held that the state could not impose criminal sanctions on the defendant.

The "public function" test of Marsh v. Alabama was at first followed, n66 but eventually abandoned, n67 in subsequent decisions involving private shopping centers and various types of activity, such as peaceful union picketing or distribution of antiwar handbills. In a concluding case in the series, Hudgens v. National Labor Relations Board, the Court permitted shopping mall owners to ban picketing on private property, apparently on the theory that state action is not involved, and the First Amendment is not violated, by private restrictions imposed on private realty. n68

By 1980, the Court had returned to a pre-*Marsh* position that property "does not lose its private character merely because the public is generally invited to use it for designated purposes." n69 Nevertheless, as established in Pruneyard Shopping Center v. Robins, n70 there may be situations where specific provisions of a state constitution protect "speech and petitioning, reasonably exercised, in shopping centers, even [when] privately owned." n71 In that case, the Court affirmed a California Supreme Court decision, based on state constitutional provisions, that allowed the public to have access to a private shopping center's central courtyard in order to solicit signatures for political petitions. As a related matter, the *Pruneyard* decision noted concern for potential First Amendment rights of the landowners themselves, and a fear that they might be identified with, or subjected to, the views expressed by members of the public on their realty. The Court suggested that the views expressed by members of the public in passing out pamphlets or seeking signatures for a petition would not likely be identified with those of the owner, and that the owners could expressly disavow any connection with the message by simply posting signs in the area where the speakers or handbill distributors stand. n72

The character of land as a public forum can also be affected by the status of the land's owner. Under the holdings of *Lloyd* and *Pruneyard*, privately owned lands frequented by members of the public appear categorically to be exempt under federal rules from public forum status. However, land owned by public agencies and open to public use will often qualify as a public forum. As described in International Society for Krishna Consciousness v. Lee, n73 publicly owned realty is not automatically subjected to forum status. Rather, on land that "has traditionally been available for public expression," such as streets or parks, or that has been designated as a forum, public expression can be restricted only with narrowly drawn regulations that achieve a compelling state interest. n74 All other categories of lands owned by public agencies, however, may be subjected to reasonable limitations on expressive activity. Thus, airport terminals owned by public agencies, although widely accessible to the general public, are neither by tradition nor purpose made available for speech activity, and do not qualify as public fora, although they are still not able to unreasonably ban all First Amendment activities. n75

COMPUTER-ASSISTED RESEARCH

LEXIS: property w/10 (first pre/2 amendment) or (free! w/2 speech) or (free! w/2 religion)

§ 66.04(a)(2) Restrictive Zoning of Adult Entertainment Businesses. n76

Local land use and zoning ordinances, enacted to protect a locality's interest in preserving the quality of its neighborhoods, occasionally conflict with the First Amendment communication rights exercised by an owner or occupant of land. The question arose directly in Young v. American Mini Theatres, n77 where a local ordinance forced the dispersal of adult theaters by requiring that they be at least 1000 feet apart. A plurality of the Court upheld the ordinance, both because society's interest in protecting the free flow of sexually explicit materials was "of a wholly different, and lesser, magnitude" than its interest in protecting political debate, and because the city's desire to protect the quality of life within its neighborhoods was sufficiently compelling to justify the regulation. n78 The *Young* rule was reinforced in City of Renton v. Playtime Theatres, n79 upholding a zoning ordinance aimed exclusively at adult theaters.

Under those opinions, local governments may generally single out adult entertainment businesses for special regulatory treatment in the form of "time, place, and manner" regulations, thus restricting the locations where such businesses can operate, so long as the government can show it has a substantial interest in regulating the businesses, and that the regulations allow for reasonable alternative avenues of communication.

In both cases the Court treated the local ordinances' effect on speech as content-neutral, characterizing the predominate intention of the local governments as being to control the undesirable secondary effects of adult theaters -- street crime, decline of property values, decrease in retail trade, and general urban decay -- rather than suppression of the messages of the films shown in those theaters. n80 The inquiry then became whether such an ordinance "is designed to serve a

substantial governmental interest and allows for reasonable alternative avenues of communication." n81 In both cases, the necessary "governmental interest" existed in the local government's desire to "preserve the quality of urban life." n82 As to "reasonable alternate avenues," however, the *Renton* Court merely cautioned that "the First Amendment requires only that *Renton* refrain from effectively denying respondents a reasonable opportunity to open and operate an adult theater within the city."

The *Renton* caveat regarding a "reasonable opportunity to operate" may be relevant whenever cities attempt to exclude all adult businesses, whether through an outright ban, overly restrictive locational restrictions, or by giving officials undue discretion over special use or licensing provisions. Such a situation was presented in Schad v. Borough of Mount Ephraim, n83 in which the Court invalidated a zoning restriction that effectively excluded all live entertainment, including nude dancing, from the Borough of Mt. Ephraim. n84 The overt rationale of the holding was unclear, however, as the Court's majority opinion simply concluded that the ordinance was facially overbroad and that the Borough had not justified it.

COMPUTER-ASSISTED RESEARCH

LEXIS: (zon! or regulat! or restrict! or ordinance) w/25 (adult w/5 business!) or pornography

§ 66.04(a)(3) Local Regulation of Signs and Billboards.

Ordinances that regulate signs or billboards located on private realty raise free speech problems because such messages, whether commercial or non-commercial in content, are forms of speech protected by the First Amendment.

The Supreme Court has taken a restrictive view of ordinances that attempt to ban residential "for sale" and "for lease" signs located directly on the premises of the real property advertised. In Linmark Associates v. Township of Willingboro, n85 a township banned on-premise "for sale" signs in the community, ostensibly in order to reduce residential turnover and prevent panic selling by homeowners, thus impairing efforts to achieve racial integration. The Court struck down the ordinance, rejecting a claim that it was constitutional as a "time, place, and manner" regulation. The Court ruled that the ban impermissibly restricted the content of expression on a matter of vital concern to the community, and held that other means of communicating information on the sale of homes did not offer a satisfactory alternative.

In contrast to the *Linmark* position, which effectively allows land occupants to erect certain categories of signs, the general rule now appears to be that controls may be imposed on signs as a matter of aesthetic regulation. The 1984 decision of Members of the City Council of Los Angeles v. Taxpayers for Vincent n86 inhibits many theoretical free speech objections to sign ordinances because the Court reasoned that the "substantive evil" of visual blight was not merely a "possible byproduct" of the form of speech, but was created inherently by signs as a medium of expression, thus justifying their aesthetic regulation. n87

The case arose with a Los Angeles ordinance that prohibited the posting of signs on public property, and was brought by a candidate for public office whose political signs were removed by the city. The Court held the ordinance did not violate the free speech clause, both because it was a viewpoint-neutral "time, place, and manner" regulation, and because the prohibition on signs on public property was no greater than necessary to advance these interests. The Court held that the city was not required to adopt a less restrictive alternative than the prohibition, such as an exemption for political signs, because such exemptions might create an unconstitutional discrimination against the content of speech and because exemptions could defeat the objective of combatting visual blight.

Similar concerns regarding ordinances that categorize based on the content of signs had arisen earlier in Metromedia, Inc. v. City of San Diego, n88 in which a sign ordinance applicable to private realty that prohibited off-premises commercial billboards generally, but exempted on-premises business identification signs. The ordinance also exempted

twelve categories of signs, including governmental and temporary political signs. A plurality opinion held unconstitutional the provision that limited on-premises signs to commercial messages, stating that it improperly regulated the content of speech by preferring commercial over non-commercial speech. The plurality also invalidated the twelve exemptions contained in the ordinance because they constituted discrimination on the basis of content. Further precedential value of the opinion was compromised by its variety of opinions and holdings.

Broad regulatory prohibitions on signs that are based on aesthetic concerns remain valid, but it would be insufficient to exempt only "for sale" signs of the type protected by the 1984 *Vincent* decision. In the 1994 case of City of Ladue v. Gilleo, n89 a municipal ban on almost all signs on private residential realty was held by a unanimous Court to violate the First Amendment, because private residential signs "have long been an important and distinct medium of expression." n90

An ordinance of the City of Ladue, Missouri, prohibited residential signs except those falling within specified exemptions. A homeowner posted an anti-war sign on her front lawn, later replacing it with a similar message inside her window. Both were prohibited by the sweeping terms of the ordinance, as they were not included within the various specified exceptions, such as identification or for sale signs.

The *Ladue* opinion reflected both an elemental concern for freedom of expression on issues of pivotal political importance and a "special respect for individual liberty in the home." n91 Both factors came together in the context of residential signs, which the court described as a "venerable means of communication that is both unique and important." n92

> Displaying a sign from one's own residence often carries a message quite distinct from placing the same sign someplace else, or conveying the same text or picture by other means. Precisely because of their location, such signs provide information about the identity of the "speaker."... Furthermore, a person who puts up a sign at her residence often intends to reach *neighbors*, an audience that could not be reached nearly as well by other means. n93

The *Ladue* opinion strongly suggests that there are few practical substitutes for a residential medium of communication, but the Court cautioned that "more temperate" forms of regulation, short of a total ban, might nevertheless remain available. n94

COMPUTER-ASSISTED RESEARCH

LEXIS: (zon! or regulat! or restrict! or ordinance) w/25 (sign or billboard)

§ 66.04(b) Freedom of Religion. n95

The First Amendment's ban on laws "respecting an establishment of religion, or prohibiting the free exercise thereof," has had only a tangential impact on real property ownership, generally by creating a sphere of religious activity that is somewhat insulated from unwanted interference by private or governmental sources. Thus, some localities have acted to protect religious land users by delegating to them an approval power over the activities of neighboring land users. One such case reached the Supreme Court in the 1982 decision of Larkin v. Grendel's Den, Inc. n96 The Court in that case held that a Massachusetts law giving churches and schools the power to veto applications for liquor licenses violated the Establishment Clause, stating that the statute enmeshed churches in the processes of government and created the danger of "political fragmentation and divisiveness along religious lines." n97

Although local governments possess the power to regulate the environment in the vicinity of churches, the Court held that the statute was not simply a legislative exercise of zoning power, but instead delegated discretionary governmental powers to religious bodies without sufficient standards. Thus, because the churches' power under the statute could have

been used by churches for explicit religious goals, the statute invalidly advanced religion.

By far the more common interaction between First Amendment religious concerns and interests in real property occurs with the widespread state practice of offering special consideration to religious users in matters of local land use controls. There, the "free exercise" clause is frequently employed in state courts to insulate religious users of land from too-burdensome governmental regulation. The Supreme Court confronted such an issue in Church of the Lukumi Babalu Aye v. City of Hialeah, n98 where it voided a city ordinance that prohibited the ritual slaughter of animals. The Court invalidated the ordinance as having "targeted" a church that practiced animal sacrifice as a form of devotion, and failed to demonstrate either the requisite compelling governmental interest or that the ordinance had been narrowly tailored to advance that interest. n99

The lower federal appellate courts, however, have demonstrated a general willingness to uphold various zoning regulations as applied to religious structures and activities. In Lakewood, Ohio Congregation of Jehovah's Witnesses v. City of Lakewood, n100 the Sixth Circuit upheld a restriction on churches in residential districts as applied against a congregation that planned to build a church on land they had acquired. The Circuit Court held that the right to build a church was not protected by the First Amendment's free exercise clause because construction was not a "fundamental tenant" or "cardinal principle" of the religion's faith. Further, the restriction did not result in an undue burden on religious observance because the ordinance permitted churches in non-residential districts covering ten percent of the city, and the church potentially could build in these districts even though this would be more expensive and "less conducive to worship." n101

In Grosz v. City of Miami Beach, n102 the Eleventh Circuit agreed that while the "government may never regulate religious beliefs, the [First Amendment] does not prohibit absolutely government regulation [that burdens religious practices]." n103 Nevertheless, it proposed a two-part test, asking first whether the government sought to regulate religious beliefs or opinions rather than merely placing a burden on religious conduct, and second, requiring that the ordinance have both a secular purpose and effect. n104 Only if a government regulation passes both of these threshold tests should a court balance the burden of the city's legitimate interests in maintaining its zoning objectives against the burden on the plaintiff's right to free exercise of religion. In *Grosz*, the circuit court found that the city's substantial interests in maintaining certain wholly residential zones free of the noise and crowds associated with religious worship did not unduly burden freedom of religion since more than half the city was available for religious institutions. n105 However, where zoning ordinances appear to place more than an incidental burden on the free exercise of religion, courts may invalidate the application of the ordinance where it appears to have been based on dissimilar treatment of religious institutions. Thus, in Islamic Center of Mississippi, Inc. v. City of Starkville, n106 the Fifth Circuit found that an ordinance which was applied to deny a special permit for establishment of a mosque at numerous proposed sites had "advanced no rational basis other than neighborhood opposition to show why the exception granted all other religious centers was denied the Islamic Center." n107

COMPUTER-ASSISTED RESEARCH

LEXIS: (regulat! or restrict!) w/25 (free w/5 religio**) or (religious w/5 conduct)

FOOTNOTES:

(n1)Footnote 63. *See generally,* Curtis J. Berger, *Pruneyard Revisited: Political Activity on Private Lands, 66 N.Y.U. L. Rev. 633 (1991),* Alan E. Brownstein and Stephen M. Hankins, *Pruning Pruneyard Limiting Free Speech Rights Under State Constitutions on the Property of Private Medical Clinics Providing Abortion Services, 24 U. C. Davis L. Rev. 1073 (1991).*

(n2)Footnote 64. *Marsh v. Alabama, 326 U.S. 501 (1946).*

(n3)Footnote 65. *Marsh v. Alabama, 326 U.S. 501, 509 (1946).*

(n4)Footnote 66. *Amalgamated Food Employees Union v. Logan Valley Plaza, 391 U.S. 308 (1968).*

(n5)Footnote 67. *Hudgens v. National Labor Relations Bd., 424 U.S. 507, 518 (1976),* asserted that the rationale of *Logan Valley Plaza* was entirely refuted by the intervening decision of *Lloyd Corp. v. Tanner, 407 U.S. 551 (1972).*

(n6)Footnote 68. *Hudgens v. National Labor Relations Bd., 424 U.S. 507, 519-521 (1976).Dixon v. Coburg Dairy, Inc., 2003 U.S. App. LEXIS 20225* (No. 02-1266, 4th Cir., May 30, 2003) (where an employee at a privately owned workplace was terminated for refusing to remove a Confederate flag sticker from his toolbox, the employer was entitled to summary judgment as to the wrongful discharge and retaliatory discharge claims based upon free speech).

(n7)Footnote 69. *Lloyd Corp. v. Tanner, 407 U.S. 551, 569 (1972), as cited in Pruneyard Shopping Ctr. v. Robins, 447 U.S. 74, 81 (1980). United Food & Commerce Workers Local 1099 v. City of Sydney, 364 F.3d 738 (6th Cir. 2003)* (dismissal of §1983 claims of petitioning union members was affirmed in part on finding that parking lots and sidewalks leading to polling places were nonpublic forums and a restriction on soliciting signatures was reasonable and viewpoint neutral); *Albertson's Inc. v. Young, 131 Cal. Rptr. 2d 721 (2003)* (the sidewalk of a private grocery, not attached to other stores nor in an area conducive to public gatherings for socializing, was not a public or quasi-public forum entitling solicitors seeking petition signatures to free speech protection).

(n8)Footnote 70. *Pruneyard Shopping Ctr. v. Robins, 447 U.S. 74 (1980).*

(n9)Footnote 71. *See generally* Curtis J. Berger, *Pruneyard Revisited: Political Activity on Private Lands, 66 N.Y.U. L. Rev. 633 (1991); Glendale Assocs. v. NLRB, 347 F.3d 1145 (9th Cir. 2003)* (NLRB properly held that the shopping center owners violated the NLRA by prohibiting union members from distributing handbills naming a center tenant as the rule violated the state constitution (because it was content-based discrimination) and thus, the owners lacked a state property right).

(n10)Footnote 72. *Pruneyard, 447 U.S. at 87.* Recognizing the absence of Federal Constitutional protections of free speech in private shopping centers, the majority of state courts have declined to find similar protections in state constitutions, but the *Pruneyard* approach has been followed by several states that hold that shopping center owners cannot prohibit free speech activities under particular state constitutional provisions. *See* New Jersey Coalition Against War in the *Middle East v. J.M.B. Realty Corp., 650 A.2d 757, 768-770 (N.J. 1994). See generally,* Annotation, *Validity, Under State Constitutions, Or Private Shopping Center's Prohibition Or Regulation Of Political, Social, Or Religious Expression Or Activity, 38 A.L.R. 4th 1219 (1985).*

Lee v. Katz, 276 F.2d 550 (9th Cir. 2002) (lessee's regulation of free speech activities on city-owned land was a "public function"). *See also ACLU of Nev. v. City of Las Vegas, 333 F.3d 1092 (9th Cir. 2003)* (because a pedestrian mall, as a commercial district and public thoroughfare, unmistakably possessed the characteristics of a traditional public forum, a circuit court reversed a district court's conclusion that it was a nonpublic forum, and thus, a ban on leafleting was not permitted).

(n11)Footnote 73. *International Soc'y for Krishna Consciousness v. Lee, 505 U.S. 672 (1992). See also Cornelius v. NAACP Legal Defense and Educ. Fund, Inc., 473 U.S. 788 (1985) distinguished by, Metro Display Advertising, Inc. v. City of Victorville, 143 F.3d 1191 (9th Cir. 1998), aff'd in part, rev'd in part, 721 F. Supp. 572 (S.D.N.Y. 1989).*

(n12)Footnote 74. *112 S. Ct. 2705 at 2711. Lee, 505 U.S. at 678* (O'Connor, concurring). *See, e.g., Frisby v. Schultz, 487 U.S. 474 (1988). See also Madsen v. Women's Health Ctr., Inc., 114 S. Ct. 2516 (1994)* (injunction designed to protect operators and clients of abortion clinic upheld by U.S. Supreme Court, holding that a content-neutral injunction against protesters' activities is valid if its provisions burdened no more speech than necessary to serve significant government interests. Street and public sidewalk around clinic characterized as public forum and properly included within injunction's buffer zone, but inclusion of adjacent areas of private realty was too broad and burdened more speech than necessary to serve specific government interests). *Moore v. City of Van, 238 F. Supp. 2d 837 (E.D.*

Tex. 2003) (city's denial of individuals' request to conduct meeting in community center, because meeting would contain religious message, songs, and prayer, violated First Amendment; center was designated public forum, and city did not show compelling interest).

(n13)Footnote 75. *Lee v. International Soc'y for Krishna Consciousness, 112 S. Ct. 2701, 2712 (1992)* (O'Connor, concurring). *Friends of the Vietnam Veterans Memorial v. Kennedy, 899 F. Supp. 680 (D.D.C. 1995); rev'd, 116 F.3d 495 (D.C. Cir. 1997)* (total ban on T-shirt sales was not justified by government's desire to prevent discordant commercialism). *ACLU v. City of Las Vegas, 13 F. Supp. 2d 1064* (outdoor public mall area designed to increase tourism and business is neither a traditional public forum nor a designated public forum). *Scroggins v. City of Topeka, 2 F. Supp. 2d 1362 (D. Kan. 1998)* (extent to which government may regulate expressive activity on public property depends upon the character of the public property in question).

(n14)Footnote 76. *See generally,* Annotation, *Validity of "War Zone" Ordinances Restricting Location of Sex-Oriented Businesses, 1 A.L.R.4th 1297 (1980).*

(n15)Footnote 77. *Young v. American Mini Theatres, 427 U.S. 50 (1976).*

(n16)Footnote 78. *Young* at 70, 71-73. As to a lesser standard of protection, compare *Barnes v. Glen Theatre, 501 U.S. 560, 564, 111 S. Ct. 2456, 2460 (1991).*

(n17)Footnote 79. *City of Renton v. Playtime Theatres, 475 U.S. 41 (1986). See* Alan C. Weinstein, *The Renton Decision: A New Standard for Adult Business Regulation,* 32 Wash. U. J. Urb. & Contemp. Law 91 (1987).

(n18)Footnote 80. *Renton at 475 U.S. 47-49; Young at 427 U.S. 70-71;* see Leading Cases, *100 Harv. L. Rev 100, 193 (1986),* and compare *Barnes v. Glen Theatre, 111 S. Ct. 2456 (1991).R.V.S., L.L.C. v. City of Rockford, 361 F.3d 402 (7th Cir. 2003)* (city ordinance prohibiting exotic dancing nightclubs with clothed dancers violated the First Amendment because there was no evidence connecting the nightclubs with alleged secondary effects and mainstream performances could fall under its purview); *G.M. Enters. v. Town of St. Joseph, 350 F.3d 631 (7th Cir. 2003)* (ordinances were constitutional where they were not an attempt to regulate the expressive content of nude dancing, and the town had a reasonable basis for believing they would reduce the secondary effects associated with sexually oriented businesses); *N.W. Enters. v. City of Houston, 352 F.3d 162 (5th Cir. 2003)* (standard of constitutional scrutiny, after *Alameda Books,* was simply whether the city ordinance addressed secondary effects of adult speech, as demonstrated by the legislative record submitted by the city); *Ctr. For Fair Pub. Policy v. Maricopa County, 336 F.3d 1153 (9th Cir. 2003)* (Arizona statute prohibiting sexually oriented businesses from operating during late night hours was constitutional under First Amendment because it was not a complete ban and it was enacted to ameliorate secondary effects associated with businesses); *Peek-a-Boo Lounge of Bradenton, Inc. v. Manatee County, 337 F.3d 1251 (11th Cir. 2003)* (summary judgment was reversed on constitutional challenge to two ordinances where one had been adopted without any evidence it would combat secondary effects of adult entertainment businesses and doubt had been cast on the rationale for the other); *Ways v. City of Lincoln, 331 F.3d 596 (8th Cir. 2003)* (city's interests in preventing the secondary adverse effects of public nudity and protecting the order, morality, health, safety, and well-being of the populace were important and the ordinance was substantially related to those objectives); *Encore Videos, Inc. v. City of San Antonio, 330 F.3d 288 (5th Cir. 2003)* (because a city did not provide at least some substantial evidence of secondary effects specific to adult businesses that sell goods solely for off-site entertainment, its ordinance restricting their locations was struck down as unconstitutional); *Nightlife Partners, Ltd. v. City of Beverly Hills, 304 F. Supp. 2d 1208 (C.D. Cal. 2004)* (restrictions on sexually explicit business patrons placing tips on dancers' persons or clothing and forbidding dancers from one-on-one solicitation of tips were reasonable time, place, and manner restrictions that did not violate the First Amendment); *Bigg Wolf Discount Video Movie Sales, Inc. v. Montgomery County, 256 F. Supp. 2d 385 (D. Md. 2003)* (county ordinance requiring adult entertainment businesses to be located in certain zoning districts was not an invalid time, place, or manner restriction as the county sought to minimize the businesses' secondary effects on surrounding communities).

(n19)Footnote 81. *Renton at 475 U.S. 50.Heideman v. S. Salt Lake City, 348 F.3d 1182 (10th Cir. 2003)* (city ordinance banning nudity in sexually oriented businesses was within its lawful powers, as the city compiled sufficient evidence to support the ordinance, the city's interest was unrelated to the suppression of free expression, and the restriction was no greater than was essential to the furtherance of the government interest); *BGHA, L.L.C. v. City of Universal City, 340 F.3d 295 (5th Cir. 2003)* (evidence demonstrated that a city had a substantial government interest in adopting an ordinance licensing sexually orientated businesses; furthermore, there were reasonable alternative avenues of communication available); *Erie Blvd. Triangle Corp. v. City of Schenectady, 250 F. Supp. 2d 22 (N.D.N.Y. 2003)* (Summary judgment was denied because of questions of fact as to whether adult entertainment ordinance was narrowly tailored to serve a substantial government interest and whether the ordinance allowed for reasonable alternative avenues of communication); *Franklin Jefferson, Ltd. v. City of Columbus, 244 F. Supp. 2d 835* (S.D. Ohio, 2003) (because 11 sites were too few to provide reasonable alternative avenues of communication for adult businesses, an ordinance violated the Constitution by failing to leave open adequate alternative avenues of communication for adult businesses); *State v. Fantasia Rest. & Lounge, Inc., 2004 Del. Super. LEXIS 72* (No. 0112001060, Mar. 9, 2004).

(n20)Footnote 82. *Id.*; *Young, 427 U.S. at 71. See also Bukaka, Inc. v. County of Benton, 852 F. Supp. 807 (D. Minn. 1993)* (District Court upheld operator's facial challenge to county's requirement of conditional use permit as applied to an establishment featuring live nude entertainment. County's code appeared ... to vest unbridled discretion in county's decision makers.) *distinguished by Kismet Investors, Inc. v. County of Benton, 617 N.W. 2d 85 (Minn. App. 2000).See generally* Annotation, *Validity of Ordinances Restricting Location of "Adult Entertainment" or Sex-oriented Businesses, 10 A.L.R. 5th 538 (1994).*

(n21)Footnote 83. *452 U.S. 61 (1981). Colacurcio v. City of Kent, 163 F.3d 545 (9th Cir. 1998); but see Alameda Books, Inc. v. Los Angeles, 222 F.3d 719 (9th Cir. 2000). See also Fly Fish, Inc. v. City of Cocoa Beach, 337 F.3d 1301 (11th Cir. 2003)* (the failure of the ordinance to provide sufficient sites for the location of existing establishments unconstitutionally failed to leave open ample alternative avenues of expression for the establishment; the licensing provisions were also unconstitutional since they granted the city unfettered discretion to deny the license, provided no time limit for granting or denying a license, and imposed a fee without a showing that the fee was related to administrative costs); *Freelance Ent. L.L.C. v. Sanders, 280 F. Supp. 2d 533 (N.D. Miss. 2003)* (district court found a part of an ordinance intended to regulate nude exotic dancing that restricted other sexual conduct both overbroad and in conflict with other parts of the ordinance); *State v. Mutschler, 65 P.3d 469 (Ariz. App. Div. 1 2003)* (defendants' convictions for violating a municipal code prohibiting persons from operating live sex businesses were upheld as, contrary to defendants' contentions, the municipal code was not unconstitutionally vague and/or overbroad).

(n22)Footnote 84. *Schad v. Borough of Mount Ephraim, 452 U.S. 61, 62-65 (1981). Compare Renton 475 U.S. at 48,* where the Court cautioned that "the First Amendment requires only that Renton refrain from effectively denying [the theater] a reasonable opportunity to open and operate an adult theater within the city."

(n23)Footnote 85. *Linmark Assocs. v. Township of Willingboro, 431 U.S. 85 (1977).*

(n24)Footnote 86. *Members of the City Council of Los Angeles v. Taxpayers for Vincent, 466 U.S. 789 (1984).*

(n25)Footnote 87. *Members of the City Council of Los Angeles v. Taxpayers for Vincent, 466 U.S. 789 (1984)* thus confirmed the earlier holding in *Metromedia, Inc. v. City of San Diego, 453 U.S. 490 (1981)* that aesthetics is a substantial governmental interest that justifies the restrictions a sign ordinance imposes on free speech. *Immaculate Conception Corp. v. Iowa Department of Transportation, 656 N.W.2d 513 (Iowa 2003)* (statute that regulated outdoor advertising devices along State highways drew a legitimate distinction between on-premise and off-premise signs and regulated a school's signage consistent with constitutional norms pertaining to commercial speech); *Texas Department of Transportation v. Barber, 111 S.W.3d 86 (Tex. 2003)* (statute that regulated the placement of certain billboards near interstate highways was content neutral and did not infringe upon the landowner's free speech rights when it prohibited a political billboard on non-residential land); *Lombardo v. Warner, 353 F.3d 774 (9th Cir. 2003)* (Court found that a regulation equally burdened commercial and non-commercial speech, and that it was not content based); *Granite St.*

Outdoor Advert. Inc., v. City of Clearwater, 351 F.3d 1112 (11th Cir. 2003) (advertising company had standing to challenge zoning provision related to billboard, but the provision was not overbroad, because it was content-neutral and gave no discretion to the permitting authority); *Valley Outdoor, Inc. v. County of Riverside, 337 F.3d 1111 (9th Cir. 2003)* (companies' billboards were illegal where they failed to meet the content-neutral zoning, size, and height restrictions in both versions of the county's ordinance, and the restrictions were severable from the unconstitutional grandfather provision); Herschaft v. Bloomberg, Fed. Appx. 26 (2d Cir. 2003) (denial of motion for preliminary injunction challenging constitutionality of city ordinance that banned posting of signs on certain city property was affirmed; city had significant interest in appearance and in preventing litter created by signs); *Natl. Advert. Co. v. City of Miami, 287 F. Supp. 2d 1349 (S.D. Fla. 2003)* (a city's zoning ordinance, which allowed onsite signs but banned most offsite billboards, was a constitutionally permissible content-neutral regulation intended to regulate structures rather than to suppress speech); *B & B Coastal Enters. v. Demers, 276 F. Supp. 2d 155 (D. Me. 2003)* (restaurant owner was not entitled to enjoin a town from enforcing its sign ordinance where the ordinance served the town's legitimate interest in traffic safety and aesthetics); *Lamar Advert. Co. v. City of Douglasville, 254 F. Supp. 2d 1321 (N.D. Ga. 2003)* (where a city ordinance provided a blanket prohibition against certain signs, drew a content-based distinction between types of flags, and promulgated content-based distinctions in fees, those provisions were unconstitutional and were stricken).

(n26)Footnote 88. *Metromedia, Inc. v. City of San Diego, 453 U.S. 490 (1981).See also Burk v. Augusta-Richmond County, 2004 U.S. App. LEXIS 7261* (No. 03-11756, 11th Cir., April 15, 2004) (an ordinance regulating expressive activities that did not threaten public safety, traffic, or the peace (its purported content-independent goal) was content-based because it targeted only political speech and was not narrowly tailored); *Coral St. Sys. v. City of Sunrise, 287 F. Supp. 2d 1313 (S.D. Fla. 2003)* (a city's sign code was held unconstitutional where it impermissibly afforded greater protection to commercial speech than to noncommercial speech, and favored some forms of noncommercial speech over others).

(n27)Footnote 89. *512 U.S. 43 (1994).*

(n28)Footnote 90. *City of Ladue v. Gilleo, 512 U.S. 43, 55 (1994).*

(n29)Footnote 91. *City of Ladue v. Gilleo, 512 U.S. 43, 58 (1994).*

(n30)Footnote 92. *City of Ladue v. Gilleo, 512 U.S. 43, 54 (1994).*

(n31)Footnote 93. *City of Ladue v. Gilleo, 512 U.S. 43, 56-57 (1994).*

(n32)Footnote 94. *City of Ladue v. Gilleo, 512 U.S. 43, 58, n.17 (1994).*

(n33)Footnote 95. *See generally,* Alan Weinstein & Edward H. Zeigler, Jr., *Report of the Subcommittee on First Amendment and Land-Use Law*, 23 The Urban Lawyer 659 (1991), and Scott D. Godshall, Note, *Land Use Regulation and the Free Exercise Clause, 85 Colum. L. Rev. 1562 (1984).*

(n34)Footnote 96. *Larkin v. Grendel's Den, Inc., 459 U.S. 116 (1982).*

(n35)Footnote 97. *Larkin v. Grendel's Den, Inc., 459 U.S. 116, 127 (1982).*

(n36)Footnote 98. *Church of the Lukumi Babalu Aye v. City of Hialeah, 508 U.S. 520 (1993).*

(n37)Footnote 99. *Church of the Lukumi Babalu Aye v. City of Hialeah, 508 U.S. 520, 529-30 (1993).*

(n38)Footnote 100. *Lakewood, Ohio Congregation of Jehovah's Witnesses v. City of Lakewood, 699 F.2d 303 (6th Cir. 1983), cert. denied, 464 U.S. 815 (1983).*

(n39)Footnote 101. *See Lakewood, Ohio Congregation of Jehovah's Witnesses v. City of Lakewood, 699 F.2d at*

306-07. See also Grace Community Church v. Town of Bethel, 622 A.2d 591 (Conn. 1993) (Zoning regulation requiring special permit before church could be built in residential zone did not violate church's First Amendment right to freedom of religion and assembly; special permit process was reasonable response to potential planning problems associated with construction of church in residential neighborhood). *Castle Hills First Baptist Church v. City of Castle Hills, 2004 U.S. Dist. LEXIS 4669* (No. SA-01-CA-1149, W.D. Tex., Mar. 17, 2004) (city's refusal to allow a change in use of a church building's existing fourth floor substantially burdened church's religious exercise, but burden imposed by denial of the church's additional parking use permit was neither substantial nor undue); *Corp. of the Presiding Bishop v. City of W. Linn, 86 P.3d 1140 (Or. App. 2004)* (city's ordinances imposed a burden on the church in that they were not able to implement a particular design, did not prevent the church from building in the desired location or otherwise impose a substantial burden on the church's religious exercise); *N. P. Union Conference Assoc. of the Seventh-Day Adventists v. Clark County, 74 P.3d 140 (Wash. App. Div. 2 2003)* (county properly denied church's application to build 40,000 square-foot church administrative office building in agricultural district where such "office buildings" were precluded by ordinance).

(n40)Footnote 102. *721 F.2d 729 (11th Cir. 1983), cert. denied, 469 U.S. 827 (1984).*

(n41)Footnote 103. *Grosz v. City of Miami Beach, 721 F.2d 729 (11th Cir. 1983). Petra Presbyterian Church v. Village of Northbrook, 2003 U.S. Dist. LEXIS 15105* (No. 03 C 1936, N.D. Ill., Aug. 28, 2003) (church failed to show a reasonable likelihood of success on its equal protection claim, where the zoning code was amended to treat all religious and non-religious organizations the same with respect to the industrial, commercial, and office districts).

(n42)Footnote 104. *Grosz v. City of Miami Beach, 721 F.2d 729 (11th Cir. 1983). Civil Liberties for Urban Believers v. City of Chicago, 342 F.3d 752 (7th Cir. 2003)* (municipal zoning ordinance that was amended to treat churches equally with secular assemblies was found not to violate statutory and constitutional prohibitions on the free exercise of religion, and plaintiff churches found locations in the city); *Vineyard Christian Fellowship of Evanston, Inc. v. City of Evanston, 250 F. Supp. 2d 961 (N.D. Ill. 2003)* (no rational explanation existed for treating the church differently from similarly situated institutions such as cultural and membership organizations; thus, the church's equal protection rights were violated by a city zoning ordinance).

(n43)Footnote 105. *Grosz v. City of Miami Beach, 721 F.2d 729, 738 (11th Cir. 1983).*

(n44)Footnote 106. *840 F.2d 293 (5th Cir. 1988) but see Korean Buddhist Dae Won Sa Temple of Hawaii v. Sullivan, 953 P.2d 1315 (Haw. 1998).* ("Municipalities may impose reasonable restrictions on the time, place or manner of protected speech, provided the restrictions are: (1) content-neutral; (2) narrowly tailored to serve a significant government interest; and (3) leave open ample alternative channels for communication of the information").

(n45)Footnote 107. *Islamic Center of Mississippi, Inc. v. City of Starkville, 840 F.2d 293, 302 (5th Cir. 1988). Thomas v. Anchorage Equal Rights Commission, 165 F.3d 692 (9th Cir. 1999); vacated, rehearing granted, 192 F.3d 1208 (9th Cir. 1999).*

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CHAPTER 66 CONSTITUTIONAL IMPACTS ON REAL PROPERTY

8-66 Thompson on Real Property, Thomas Editions § 66.05

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§ 66.05 Equal Protection.

Zoning and other land use regulations that classify land uses inevitably raise an equal protection problem. Landowners can make two types of equal protection objections to zoning ordinances, making either an attack on the ordinance on its face, or against the ordinance as applied.

In the 1974 case of Village of Belle Terre v. Boraas, n108 a zoning ordinance defined a "family" as no more than two unrelated individuals. Plaintiffs, who rented their home in a single-family zoning district to six unrelated college students, challenged this definition on several constitutional grounds, including substantive due process and equal protection. Applying the rational relationship standard, the Court upheld the ordinance, finding a rational basis in the city's desire to maintain a quiet residential environment. n109

The Supreme Court qualified the holding in Belle Terrein Moore v. City of East Cleveland, n110 which had struck down a local housing code restricting the number of related individuals who could live together. The plurality opinion noted that the restriction on related individuals living together did little to meet legitimate community objectives, such as the prevention of overcrowding and traffic congestion. Thus, the ordinance was struck down essentially because it interfered with the sanctity of the family.

The Supreme Court has also adopted a middle-tier judicial review standard in equal protection cases when classifications are quasi-suspect. The middle-tier standard requires a legislative classification to bear a substantial, rather than a necessary, relationship not to an important, but rather to a compelling, governmental interest.

In City of Cleburne v. Cleburne Living Ctr., n111 the Supreme Court reviewed a city's denial of a special use permit for a group home for the mentally retarded. The group home planned to locate in an "apartment house" district where the zoning ordinance required a special use permit for residence housing the "insane or feeble-minded" and for alcoholics and drug addicts. It did not require a special use permit in this district for hospitals, sanitariums, nursing homes, or homes for convalescents or the aged.

The Court held that the mentally retarded were not a quasi-suspect class that required middle tier equal protection review. It found there were legitimate reasons to distinguish the mentally retarded from other groups. The Court also

noted that federal and state legislation protected the mentally retarded, and that this legislation indicated they were not politically powerless.

Although the Court did not invalidate the special permit requirement for the group home, it held the permit denial unconstitutional under the rational relationship standard. It pointed out that the zoning ordinance did not require a permit for similar uses in the district, but that the differences between these uses and a home for the mentally retarded were largely irrelevant to the city's legitimate zoning interests. Neither were the reasons for denying the permit acceptable. The city denied the permit because of neighborhood fears, e.g., that nearby junior high school students might harass the group home residents. The Court held that "mere negative attitudes" are not a sufficient reason to deny a permit. Objections that the group home would be overcrowded and located in a floodplain were not acceptable because the same objections applied to similar group homes the ordinance allowed without a permit.

COMPUTER-ASSISTED RESEARCH

LEXIS: (regulat! or zon! or ordinance) w/5 (equal protection)

FOOTNOTES:
(n1)Footnote 108. *416 U.S. 1 (1974).*

(n2)Footnote 109. *Village of Belle Terre v. Boraas, 416 U.S. 1 (1974).*

(n3)Footnote 110. *431 U.S. 494 (1977).*

(n4)Footnote 111. *473 U.S. 432 (1985).*

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CHAPTER 66 CONSTITUTIONAL IMPACTS ON REAL PROPERTY

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Annotation, *What Is Within Curtilage of House or Other Building, So As to Be Within Protection from Unreasonable Searches and Seizures, under Federal Constitutional's Fourth Amendment -- Supreme Court Cases, 94 L. Ed. 2d 832.*

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Add:

Grant v. State, 978 So. 2d 862 (Fla. App. 2008) (evidence found using a search warrant was tainted by a prior illegal warrantless search).

§ 66.03(b)(1) Open Fields and Curtilage.

Add:

Walls v. State, 944 A.2d 1222 (Md. App. 2008) (reference to "premises" in search warrant did not limit the search to the defendant's house).

Add:

Ornelas v. U.S., 576 U.S. 690 (1996) (standard of review for curtilage decisions).

Add

Wilson v. State, 952 So. 2d 564 (Fla. App. 2007) (a greenhouse containing marijuana was not within the curtilage of the house); *United States v. Taylor, 458 F.3d 1201* (11th Cir. 2006) (a pond was not within the curtilage of the house); *United States v. Cousins, 455 F.3d 1116 (10th Cir. 2006)* (the sideyard area of the house was not within the curtilage of the house); *Phillips v. State, 630 S.E.2d 844 (Ga. App. 2006)* (a vehicle parked in back of the house was not within the curtilage).

Add:

U.S. v. Quintant, 594 F. Supp. 2d 1291 (M.D. Fla. 2009) (driveway area near the front of the residence was part of the curtilage); *State v. Hoffman, 196 P.3d 939 (Kan. App. 2009)* (seized trash was within curtilage of defendant's home); *Quintana v. Commonwealth of Kentucky, 276 S.W.3d 753 (Ky. 2008)* (back yard was protected curtilage); *U.S. v. Conrad, 578 F. Supp. 2d 1016 (N.D. Ill. 2008)* (deck at the back of the house was part of the curtilage); *U.S. v. Davis, 530 F.3d 1069 (9th Cir. 2008)* (areas that were 180-200 feet away from the residence, outside the chain link fence of the workshop, and that bore no evidence of domestic activity were not part of the curtilage).

State v. Peterson, 879 N.E.2d 806 (Ohio App. 2007) (detective trespassed on curtilage, rendering warrantless search of residence unlawful).

Add:

United States v. Struckman, 603 F.3d 731 (9th Cir. 2010) (back yard was curtilage); *Commonwealth v. Perez, 922 N.E.2d 855 (Mass. App. 2010)* (area of disturbed earth near the house was in the curtilage); *State v. Olm, 224 P.3d 245 (Ariz. App. 2010)* (front yard was part of the curtilage); *State v. Perkins, 222 P.3d 1198 (Ut. App. 2009)* (back patio was not part of the curtilage); *Ruiz v. State, 23 So. 3d 208 (Fla. App. 2009)* (unenclosed parking lot was not part of the curtilage); *U.S. v. Dobbs, 357 Fed. App'x 767 (9th Cir. 2009)* (driveway was not within the curtilage); *Thomas v. State, 684 S.E.2d 391 (Ga. App. 2009)* (detached garage was within the curtilage of the apartment); *Commonwealth v. Gibbs, 981 A.2d 274 (Pa. Super. 2009)* (front porch did not constitute curtilage); *U.S. v. Rey, 663 F. Supp. 2d 1086 (D. N.M. 2009)* (power-line easement was not within the curtilage of a yurt located on the defendant's property).

§ 66.03(b)(2) Aerial Surveillance.

Add:

U.S. v. Nichols, 248 Fed. Appx. 105 (11th Cir. 2007) (court found that curtilage on the property ended short of the first

marijuana plant that was observed from a state patrol helicopter).

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United States v. Hayes, 209 Fed. Appx. 548 (7th Cir. 2006) (contraband that was visible during post office processing provided probable cause for search of the residence).

State v. Leffler, 165 P.3d 386 (Wash. App. 2007) (the emergency exception to the warrant requirement did not justify this warrantless search); *State v. Fisher, 154 P.3d 455* (officer's off-property open view of a trash bag did not justify seizure of the trash bag under the plain view doctrine).

§ 66.03(c)(1) Administrative Searches Generally.

Add:

Washington County Health Department v. White, 878 N.E.2d 224 (Ind. App. 2008) (mobile home owners could enjoin county from searching their mobile homes without a warrant).

§ 66.03(c)(2) Administrative Searches: Pervasively Regulated Businesses

Add:

Davis v. State, 907 N.E.2d 1043 (Ind. App. 2009) (exigent circumstances permitted a warrantless search of the curtilage).

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§ 66.04(a)(2) Restrictive Zoning of Adult Entertainment Businesses

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TJS of New York, Inc. v. Town of Smithtown, 598 F.3d 17 (2d Cir. 2010) (adequacy of alternative sites); *Big Dipper Entertainment, LLC v. City of Warren, 658 F. Supp. 2d 831 (E.D. Mich. 2009)* (ordinance properly aimed at secondary effects, was narrowly tailored, allowed for alternate channels of expression, and did not violate free speech on its face or as applied); *Annex Books, Inc. v. City of Indianapolis, Ind., 581 F.3d 460 (7th Cir. 2009)* (public benefits did not justify curtailment of speech); *East Brooks Books, Inc. v. Shelby County, Tenn., 588 F.3d 360 (6th Cir. 2009)* (the act was rationally related to the state's legitimate interest, was not overbroad facially or as applied, and was not an invalid prior restraint of speech).

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CHAPTER 67 THE PROPERTY LAW ASPECTS OF PRIVATE NUISANCE

8-67 Thompson on Real Property, Thomas Editions 67.syn

AUTHOR: Professor David A. Thomas J. Reuben Clark Law School Brigham Young University

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CHAPTER 67 THE PROPERTY LAW ASPECTS OF PRIVATE NUISANCE

8-67 Thompson on Real Property, Thomas Editions § 67.01

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§ 67.01 Introduction and Early History.

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Private nuisance is not only a distinct area of property law, but is also a subject for tort law, and law students will typically hear references to the same leading cases in both the first year property class and the first year torts class. As with other sources of conflict between adjoining landowners, enormous amounts of litigation are conducted over issues of private nuisance. The substantive legal rules for private nuisance are not particularly complicated, but the factual settings in which those rules must be applied are infinitely varied, and seldom can the decision in one case be relied on as a sure guide for similar cases in the future. Stability in private nuisance litigation is further undermined by the carelessness with which some courts invoke private nuisance legal concepts, which has produced a jurisprudence permeated with inconsistency and confusion. n1

Nuisance is one of the most ancient concepts in the Anglo-American common law. From the corrupted Latin term "nocumentum," meaning "harm," the Norman French term "nuisance" arose. Early common law records show courts acting to protect landholders from the most serious type of harm, that of dispossession. In Anglo-Saxon times complainants brought their actions in the principal Anglo-Saxon local courts, the hundred courts. After the Norman Conquest in 1066 A.D., the Norman kings recognized that threats to property rights also threatened the peace, and so it was in the king's interest to resolve such disputes with dispatch. This interest they pursued by establishing a royal court, whose justices traveled to court sessions throughout the realm to hear and decide cases important enough to endanger the peace. Private disputants could request a hearing before a royal justice, or the justices could assert "jurisdiction" on their own initiative. The cases were opened by writ, and the general writ seeking access to the king's court was known as the Writ of Right. In 1166, during the reign of Henry II (1154-1189), judges created a procedure especially for dealing with wrongful dispossession from land, the Assize n2 of Novel Disseisen. n3

When a complainant alleged no dispossession but that the accused interfered with the use of the land, the allegation was phrased as a harm or nuisance to the land, n4 a variant of the Assize of Novel Disseisin that eventually became known as the Assize of Nuisance. n5 Nuisance thus attained the special meaning of harm to land. Judges later developed a new form of action known as "trespass on the case," or "case," to cover a wide variety of injuries resulting from wrongful acts, and to replace the assize of nuisance. For a time this new action was actually called an "action on the case for

nuisance," and over time it was used for complaints of conduct that was not so serious as to render the complainant's land uninhabitable, but which rendered occupancy less convenient. n6

For Bracton, writing in the 12th century, the most common example was obstructing a private right of way. By easy analogy he was able to conclude that when a *public* way was obstructed, the remedy of removing the obstruction could be justified for the common good, or the good of the public, even though no private land was affected. n7 This reasoning was followed a century later by the writer known as Britton, n8 and by others who wrote about private nuisance. When writing about nuisance, they typically referred to conduct that offended the community in general as "common" nuisances and then as "public nuisances." n9

During the reign of Henry II in the late twelfth century, public nuisance cases were heard in the main royal court, or by royal justices sent out to the principal regional courts. Eventually, minor offenses were heard in courts leet or sheriff's tourns, successor tribunals to the old Anglo-Saxon hundred courts. This assignment of jurisdiction became official in the late fourteenth century by a statute enacted during the reign of Richard II, the first known statute dealing with public nuisances. n10 Considered criminal, such conduct was prosecuted through use of a presenting jury, and of presentment and indictment for offenses.

The private remedy implicit in this statute had been recognized even earlier. Although the earliest mentions of remedies for public nuisances, or purprestures, did not recognize a private right of action, n11 a case as early as 1411 suggested that a private plaintiff could sue on a public nuisance. n12 Some writers and judges believed that a public offense should not give rise to a private right, but such actions were included regularly in the expansion of actions for trespass on the case, because those actions lay when adequate remedies were not available under the other standard writs. With the English antipathy to overlapping remedies, private nuisance actions were brought under the Assize of Nuisance, and private actions for public nuisance were brought as actions for trespass on the case, all as mutually exclusive categories. The logical consistency of this arrangement was confirmed in the requirement that a plaintiff in a private nuisance action had to be seized of a free tenement; no such requirement existed for actions on the case.

FOOTNOTES:

(n1)Footnote 1. Traditionally, most of the scholarly discourse in private nuisance has been carried on by torts professors rather than property professors; however, the torts discourse has not been particularly helpful. Prosser thought that nuisance was surrounded by the most "impenetrable jungle in the entire law" and that nuisance was "incapable of any exact or comprehensive definition." In his view, courts considering nuisance cases tended to use the labels from nuisance terminology rather than to apply any real analysis of the problem. W. Page Keeton, Prosser and Keeton on the Law of Torts 616-617 St. Paul, MN: West Pub. Co. (5th ed. 1984).

(n2)Footnote 2. An assize is best described as a decree, edict or ordinance issued by a medieval legislative body; the term assize also denotes a legislative session.

(n3)Footnote 3. The form for the complaint under the Assize of Novel Disseisin alleged that the accused had wrongfully dispossessed the complainant from the land. *See, e.g.,* Ranulf Glanville, *De Legibus et Consuetudinibus Regni Angliae* fol. 13, c. 33.

(n4)Footnote 4. *See, e.g.,* Ranulf Glanville, *De Legibus et Consuetudinibus Regni Angliae* fol. 13, c. 36.

(n5)Footnote 5. *See* Janet Loengard, "The Assize of Nuisance: Origins of an Action of Common Law," *37 Cambridge L.J. 144 (1978);* William A. McRae, Jr., "The Development of Nuisance in the Early Common Law," *1 U. Fla. L. Rev. 27, 29-32 (1948).*

(n6)Footnote 6. *See, e.g.,* Aldred's Case (1611), 9 Co. Rep. F. 57b, 77 Engl. Rep. 816 (defendant held liable for erecting a pig-sty that blocked the plaintiff's windows and "stank him out").

(n7)Footnote 7. Bracton, fol. 232b.

(n8)Footnote 8. Britton, book II, ch. 30.8.

(n9)Footnote 9. J. R. Spencer, "Public Nuisance -- A Critical Examination," *48 Cambridge L.J. 55, 58-59 (1989).*

(n10)Footnote 10. *12 Rich. 2,* c. 13 (1389): "If anyone cast dung etc. into Ditches, Water etc. which are next to any City, Borough or Town, he who will may sue forth a writ directed unto the Mayor Sheriff or Bayliff of such Town etc."

(n11)Footnote 11. Glanvill, ix. c. 11; Bracton f. 234.

(n12)Footnote 12. *Y.B. 12 Hen. 4,* c. 43 (1411); *see also Y.B. 27 Hen. 8,* c. 26, 27 (1535).

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CHAPTER 67 THE PROPERTY LAW ASPECTS OF PRIVATE NUISANCE

8-67 Thompson on Real Property, Thomas Editions § 67.02

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§ 67.02 Private Nuisance Distinguished from Other Acts Against Property.

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§ 67.02(a) Distinctions Between Private Nuisance and Public Nuisance.

Every aspect of *private* nuisance relates to the use of land: the essence of private nuisance is unreasonable conduct by the defendant in the use of land, which causes a substantial interference in the plaintiff's use and enjoyment of land. n13 By contrast, no aspect of *public* nuisance necessarily relates to land, although commonly a public nuisance does involve land use. A public nuisance is unreasonable conduct that interferes with a right common to the general public, n14 and a public nuisance may occur whether the source or the result of that interference relates to the use of land.

By way of illustration, a private nuisance may occur when a landowner hosting loud parties at a house may cause a private nuisance against the rights of nearby residents, who find that they are disturbed in the use of their land by the loud noises coming from the land of the party host. A public nuisance, on the other hand, would be created by one riding a loud motorcycle through a quiet community; the disturbing noise is not produced by the use of private land, and it may be a public nuisance even if private landowners do not complain, because the disturbance would be against "a right common to the general public."

It is possible and even common for certain conduct to constitute both a public nuisance and a private nuisance simultaneously. If unreasonable use of land produces substantial interference with another's use of land, but also violates a right common to the general public, then both types of nuisances exist simultaneously. n15 A livestock feed lot or a refinery may produce pests or odors over such a wide area that the rights of the general public are affected and, at the same time, nearby private landowners may suffer extraordinary interference with the use and enjoyment of their own lands.

A private landowner usually has no cause of action against one who produces a public nuisance unless the plaintiff can show extraordinary interference with private land use. n16 This common law principle is modified in some states whose statutes defining and prohibiting certain public nuisances also create a concurrent private right of action for private nuisance. n17 Without such special authorization, most public nuisance actions are pursued by public authority rather than by private landowners.A landowner seeking relief under either or both nuisance and trespass theories is not required to also establish that a taking has occurred. n18

§ 67.02(b) Distinctions Between Private Nuisance and Trespass.

Private nuisance and trespass are deceptively similar, because they both involve interference with the rights of private landowners. Conceptually, however, the two concepts are mutually exclusive. Nuisances are, by definition, non-trespassory. They are interferences with the use and enjoyment of land, but are not invasions onto the land. n19 Typical examples of land use interferences that are non-trespassory nuisances are bright lights, loud noises and offensive odors. n20

Trespasses, on the other hand, are typically physical, tangible invasions onto the land of another. A trespass could be committed by a person or some other animate entity, or by any tangible thing which is moved onto the property of another. Despite the seemingly clear distinctions between trespass and nuisance, some situations give rise to nuisance-like activities that may also produce a form of tangible invasion on another's properties. For instance, one landowner's wood-burning stove may drop soot and other particles onto the land of another; a landowner who pollutes a stream as it flows through the land may be responsible for the damage done by the polluted stream as it flows through a neighbor's land. In either instance, a complaint could be grounded in both nuisance and trespass.

In some respects, the trespass actions are easier for plaintiffs, who need only prove an invasion of their land. However, if there is any doubt that an actual physical invasion of the land occurred, then the plaintiffs are better advised to rely on a nuisance theory, even though nuisance plaintiffs have the additional burdens of showing unreasonable conduct on the part of the defendant and an interference with plaintiff's land use that is substantial. Even in a trespass action, some sort of substantial harm must be shown, if the plaintiff wishes to obtain more than nominal damages. The subject of trespass is treated in Chapter 68, *infra.* n21

§ 67.02(c) Distinctions Between Private Nuisance and Attractive Nuisance.

The problem of attractive nuisance is actually more closely related to trespass than it is to private nuisance. An attractive nuisance occurs if a landowner maintains on the land a condition dangerous to children, but nevertheless attractive to them, which condition in fact causes injury to the child, if the landowner has not exercised reasonable care to provide protection against the occurrence. n22 It is similar to private nuisance in that it requires that the defendant landowner have been negligent, which is analogous to the private nuisance requirement that the defendant have acted unreasonably; attractive nuisance actions do not require that there have been any interference with the use and enjoyment of the plaintiff's land. n23

FOOTNOTES:

(n1)Footnote 13. *Mayor and Council of Borough of Rockaway v. Klockner & Klockner, 811 F. Supp. 1039 (D.N.J. 1993)* (under New Jersey law, a private nuisance applies only to interference with use of neighboring or adjoining land).

(n2)Footnote 14. 44 *Plaza, Inc. v. Gray-Pac Land Co., 845 S.W.2d 576 (Mo. App. 1992)* (planting of trees that blocked motorists' view); *Brown v. Scioto County Board of Comm'rs, 622 N.E.2d 1153 (Ohio App. 1993)* (a public nuisance is the invasion of public rights which are common to all members of the public and was historically criminal in nature, with recovery limited to those who could show harm different from that suffered by the public generally; a private nuisance is interference with an interest in land). *People ex. rel. Gallo v. Acuna, 929 P.2d 596* (Cal)., *cert. denied, 117 S.Ct. 2513 (1997)* (An alleged "criminal street gang" is deemed a public nuisance and enjoined from further occupation of the streets, lawns, and sidewalks of the urban community which they terrorize. This case provides a good discussion of public nuisance, standing, harm, remedies, and also discusses why the injunction is proper over objections citing the First, Fifth, and Fourteenth Amendments to the U.S. Constitution). *People ex rel. Gwinn v. Kothari, 100 Cal.Rptr.2d 29 (Cal. Ct. App. 2000)* (Motel owners were enjoined from allowing prostitution or use of illegal drugs at their motel under California statutes that defined prostitution and illicit drugs as public nuisances. The lower court issued the injunction to apply in perpetuity to all future owners of the motel; however, the appellate court reversed, holding that an injunction of this type did not run with the land); *Goldhirsch v. Majewski, 87 F. Supp. 2d 272 (S.D. N.Y.*

2000) (A spectator at a paintball contest was injured by a stray pellet and sued the paintball game contestants and the parents of minor contestants, alleging strict liability and negligent entrustment. The District court in New York held, *inter alia,* that the paintball game was not an abnormally dangerous activity, and the paintball game was not a public nuisance).

See Restatement (Second) of Torts §821B (1979) ("a public nuisance is an unreasonable interference with a right common to the general public").

(n3)Footnote 15. *Friends of H Street v. City of Sacramento, 24 Cal. Rptr. 2d 607 (1993)* (impairing a landowner's rights of ingress and egress to and from an adjacent public street is both a public and private nuisance).

See Mayor of Detroit v. Arms Technology, Inc., 669 N.W.2d 845 (Mich. App. 2003) (*private* nuisance is related to the use of land but public nuisance is not similarly limited).

(n4)Footnote 16. *Blair v. Anderson, 570 N.E.2d 1337 (Ind. App. 1991)* (private landowner bringing public nuisance claim must demonstrate special injury that is distinct in kind from the injury suffered by the public).

(n5)Footnote 17. This approach is illustrated in 4 Restatement (Second) of Torts § 821D.

(n6)Footnote 18. *Brown v. Scioto County Board of Comm'rs, 622 N.E.2d 1153 (Ohio 1993)* (action against odor from sewage treatment plant).

(n7)Footnote 19. 4 Restatement (Second) of Torts § 821B; *Ravan v. Greenville County, 434 S.E.2d 296 (S.C. App. 1993)* (trespass is an intentional invasion of the plaintiff's exclusive possession of the property, and nuisance is a substantial and unreasonable interference with the plaintiff's use and enjoyment of the property). However, *see Lamb v. Martin Marietta Energy Systems, Inc., 835 F. Supp. 959 (W.D. Ky. 1993),* holding that, under Kentucky law, a valid nuisance claim requires a physical invasion or physical touching of the plaintiff's land; and *In re Bloomingdale Partners, 160 B.R. 101 (N.D. Ill. 1993),* holding that, under Illinois law, an invasion of another's land need not be physical for purposes of establishing a private nuisance. *Kitsap County v. Allstate Ins. Co., 964 P.2d 1173 (Wash. 1998); But see, Cle Elum Bowl, Inc. v. North Pacific Ins. Co., Inc., 981 P.2d 872 (Wash. Ct. App. 1999)* ("nuisance" is an unreasonable interference with another's use of land; "trespass" is an invasion of the interest in exclusive possession of property). *See Rogers v. Hicks, 2004 Me. Super. LEXIS 6* (No. RE-02-25, May 8, 2004) (difference between nuisance and trespass is that trespass directly interferes with another's property while nuisance interferes with another's right to use his or her property); *Williams v. King, 860 So. 2d 847 (Miss. Ct. App. 2003)* (claim for private nuisance does not require proof of an actual physical invasion).

(n8)Footnote 20. *Brown v. Scioto County Board of Comm'rs, 622 N.E.2d 1153 (Ohio App. 1993)* (complaint in nuisance and trespass for odors from sewage treatment plant).*Baumann v. Snider, 532 S.E.2d 468 (Ga. Ct. App. 2000)* (discussing the differences between nuisance and trespass in the context of the "uphill neighbors" who caused increased runoff of rain-water on the "downhill neighbor's" property).

(n9)Footnote 21. *Petsey v. Cushman, 788 A.2d 496 (Conn. 2002)* (same four-factor test applied to both private and public nuisance).

(n10)Footnote 22. *Thunder Hawk v. Union Pac. R. Co., 844 P.2d 1045 (Wyo. 1992)* (elements of attractive nuisance). *See Fritts v. Clover Park Sch. Dist. No. 400, 2003 Wash. App. LEXIS 2895* (No. 30323-0-II, Dec. 9, 2003) (discussing the elements of attractive nuisance: (1) the instrumentality or condition must be dangerous in itself, that is, must be an agency which is likely to, or probably will, result in injury to those attracted by, and coming in contact with it; (2) it must be attractive and alluring, or enticing, to young children; (3) the children must be incapable, by reason of their youth, of comprehending the danger involved; (4) the instrumentality or condition must be left unguarded and exposed at a place where children of tender years are accustomed to resort, or where it is reasonably to be expected that

they will resort, for play or amusement, or for the gratification of youthful curiosity; and (5) it must be reasonably practicable and feasible either to prevent access to the instrumentality or condition, or else to render it innocuous, without obstructing any reasonable purpose or use for which it was intended); *Mason v. City of Mt. Sterling, 122 S.W.3d 500 (Ky. 2003)* (outlining the Restatement (Second) of Torts factors for attractive nuisance: (a) the place where the condition exists is one upon which the possessor knows or has reason to know that children are likely to trespass, and (2) the condition is one of which the possessor knows or has reason to know and which he realizes or should realize will involve an unreasonable risk of death or serious bodily harm to such children, and (c) the children because of their youth do not discover the condition or realize the risk involved in intermeddling with it or in coming within the area made dangerous by it, and (d) the utility to the possessor of maintaining the condition and the burden of eliminating the danger are slight compared with the risk to children involved, and (e) the possessor fails to exercise reasonable care to eliminate the danger or otherwise protect the children).

(n11)Footnote 23. Attractive nuisance appeared in § 339 of the Restatement of Torts (1934), and then was slightly modified in the Restatement (Second) of Torts (1965). As modified, the doctrine eliminated the requirement that the rule applied only to "young" children and the requirement that the condition on the defendant's land be attractive or enticing to children.

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CHAPTER 67 THE PROPERTY LAW ASPECTS OF PRIVATE NUISANCE

8-67 Thompson on Real Property, Thomas Editions § 67.03

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§ 67.03 Principles of Private Nuisance Law.

[Go To Supp]

A private nuisance is the unreasonable conduct of one landowner in using the land that causes a substantial interference with another landowner's use and enjoyment of land. Private nuisance liability is grounded on a very ancient concept of the common law and of the pre-Norman English Law, which teaches that one should not use one's land so as to injure the property of another, expressed in the Latin maxim, "*Sic utere tuo ut alienum non laedas.*" n24

Because landowners typically live in close proximity to one another, it is axiomatic that not all activities on one owner's land that annoy or irritate the owners of other land constitute actionable nuisances. The annoyance is not a private nuisance, unless the interference with the plaintiff's land use is substantial and unless the defendant's conduct that produced the annoyance is considered unreasonable. Accordingly, conduct that is unreasonable and harm that is substantial under some circumstances may not be unreasonable conduct or substantial harm under all circumstances. Smells, lights, and noise that would seriously annoy inhabitants of a residential subdivision development may be only negligible conditions in the vicinity of a large manufacturing facility. n25

Nevertheless, certain uses of land are so unreasonable that they are deemed to constitute actionable nuisances at all times and under any circumstances. These are termed nuisances as a matter of law, or nuisances per se. A lawful business, such as a quarry operation, that is permitted and regulated by the state, cannot be a nuisance at law and becomes a nuisance in fact only because of the manner in which it is conducted. n26

§ 67.03(a) Private Nuisances as a Matter of Law.

Conduct that is considered a nuisance as a matter of law is theoretically conduct that is a nuisance under any circumstances. n27 A plaintiff who successfully proves a nuisance per se, or a nuisance as a matter of law, does not need to prove the individual elements of unreasonable conduct by the defendant or substantial harm to the plaintiff's land use n28 A nuisance as a matter of law is deemed certain to result in injury and the plaintiff is entitled to abatement of that type of nuisance simply by showing its existence, without regard to whether damages are proved.

Nuisances as a matter of law may be caused by land uses that are motivated by malice toward the plaintiff landowner,

are forbidden by law, or are flagrantly contrary to generally accepted standards of conduct. Successful private nuisance claims of nuisances as a matter of law are relatively rare in any of these categories. Frequently, conduct that would constitute a private nuisance as a matter of law in one of those categories is conduct that also constitutes a public nuisance and in many circumstances is more likely to be prosecuted and abated as a public nuisance. A number of reported cases announce the principles pertaining to nuisances as a matter of law while holding, in the immediate case, that such a nuisance as a matter of law has *not* been shown in that case.

It should also be noted that a few courts have delivered troublesome decisions labeling certain conduct as a nuisance as a matter of law, but only under certain circumstances or in certain locations. n29

§ 67.03(a)(1) Private Nuisances Forbidden by Law.

When a statute or local ordinance prohibits *as a nuisance* specific conduct in the use of land, then such conduct is a nuisance as a matter of law because it has been specifically prohibited by law. n30 In other words, if the conduct is by law labeled a nuisance and prohibited as such, it is a nuisance as a matter of law; if the conduct is simply declared illegal, without being labeled as a nuisance, it will be considered a nuisance as a matter of law only if that conduct interferes with others' use and enjoyment of their lands. By way of illustration, a fireworks business that attempted to locate in an area prohibited to it by local land use regulation would not, by that fact alone, have been a nuisance as a matter of law; however, if its attempt to become established in the wrong area posed a threat to the safety of nearby landowners, then the illegality of its conduct would have made it a nuisance as a matter of law. n31 Another business operating illegally without a license and in violation of building and safety codes was not enjoined as a nuisance as a matter of law, because none of these illegalities posed immediate threats to nearby landowners. n32 For the same reason another enterprise located in violation of a fire district ordinance also was not treated as a nuisance as a matter of law, because no immediate threat was posed to nearby landowners. n33

Private landowner conduct that violates a statute or ordinance is usually the type of conduct that might be offensive to the rights of the public generally and therefore may also be attacked as a public nuisance. In fact, in such cases where either private nuisance or public nuisance is an appropriate theory of the case, courts have shown a preference for pursuing the case as a public nuisance and approving a private nuisance right of action only if the plaintiff can show special injury. n34

It should also be noted that certain types of landowner conduct which would ordinarily be private nuisances may be validated and authorized by statutory authority. n35

Although a rather wide range of landowner activity could conceivably be declared illegal and thus considered nuisances as a matter of law because forbidden by law, in fact only a few distinct categories of such conduct have emerged from the cases. A nuisance as a matter of law has been found when a landowner has blocked a public road by constructing a fence across the road or placing a structure on the road, with that barrier also interfering with access to and from private land. Such conduct is usually both a public nuisance and a private nuisance, and as a private nuisance is treated as a nuisance as a matter of law. n36

Also common are violations of land use regulations, such as a business enterprise in an exclusively residential area. n37 Other conduct that may be illegal and cause a private nuisance would be activities that create pollution. A landowner whose oil wells polluted the water wells on neighboring land was liable to the neighbor under a theory of nuisance as a matter of law, because the polluting of water wells was illegal. n38

Another common category of nuisance as a matter of law arises from certain business activities that are illegal. An illegal gambling establishment may be a private nuisance as a matter of law when it prompts a neighboring landowner to complain of noise, litter and increased traffic. n39 A gambling house that is illegal as a matter of common law may give rise to a private nuisance as a matter of law, even if it is not the object of a specific statutory prohibition. n40 A

house of prostitution may be considered a nuisance as a matter of law, either because it is illegal or because it is a land use contrary to public standards of conduct. n41

COMPUTER-ASSISTED RESEARCH:

LEXIS: Private w/5 nuisance w/10 (matter of law or illegal or forbid! or prohib!)

§ 67.03(a)(2) Private Nuisances Contrary to Public Standards of Conduct.

Some land uses are considered nuisances as a matter of law, even if they are not specifically prohibited by statute as nuisances, if those uses represent conduct that falls below public standards; typically these are land uses which by their nature seriously threaten the morals, decency and safety of the community or of individual landowners. n42 In this category, houses of prostitution are the most common examples. n43

It is also possible to classify certain extremely dangerous activities as private nuisances as a matter of law. n44 However, usually such extremely dangerous or ultra-hazardous activities are treated as nuisances principally because of the location or timing of the conduct, which is a more typical analysis for nuisances in fact than for nuisances as a matter of law.

COMPUTER-ASSISTED RESEARCH:

LEXIS: Private w/5 nuisance w/10 (matter of law or moral! or decen! or safe! or public standard)

§ 67.03(a)(3) Private Nuisances Motivated by Malice.

Almost any conduct that would constitute merely a nuisance in fact can be treated as a nuisance as a matter of law, if it is motivated solely by malice toward a neighboring landowner. n45 Conduct that is motivated partly by malice and partly by non-malicious motives will not be treated as a private nuisance as a matter of law and will usually be considered a private nuisance in fact, even if the dominant motivation is malicious. n46

Understandably, cases in which defendants have been shown to have acted out of exclusively malicious motives are relatively rare. In one English case, a landowner's gunfire was intended to disrupt the fox breeding on a neighbor's property; n47 in another English case a landowner fired a gun in order to frighten ducks from a neighbor's duck pond. n48 In both cases the conduct was treated as a nuisance as a matter of law. In an American case, the defendant pursued a deliberate course of conduct for more than three years in operating a lawn mower at early hours in the vicinity of the plaintiff's nearby bedroom, and creating additional noise by playing a radio at a high volume and stimulating a dog to bark excessively. This conduct of creating excessive noise was exacerbated by use of bright lights and occasionally making obscene gestures. This nuisance as a matter of law was ordered abated and the defendant also paid monetary damages. n49

In another domestic conflict involving malicious conduct, an occupant of a room in a building deliberately cooked onions to produce an offensive smell to irritate the occupant of another room in the same building. The outcome of the case was inconclusive because of the plaintiff's retaliatory activities. n50

A landowner may also require the clearing away of adjacent structures or other items that block the flow of light and air, if the placement of the obstructions is shown to have been malicious in motive. n51 This relief is available even though American courts reject the English doctrine of ancient lights and do not permit landowners to claim a prescriptive right to the free flow of light and air. n52

The best known instances of structures treated as nuisances as a matter of law because of malicious motivation are the

so-called "spite fences." If a landowner builds a fence next to the boundary of adjoining property, and the structure is of no use to the landowner and has as its sole purpose the annoyance of the neighboring landowner, it may be treated as a "spite fence" and be subject to abatement as a nuisance as a matter of law. n53 Indeed, most courts consider it never acceptable to use one's property maliciously in any way to annoy another landowner. n54 In some states, statutes have declared spite structures illegal and some of those statutes confer a specific private right of action for nuisance. n55 Against challenges that such legislation effectively takes property without due process of law, those statutes have been uniformly upheld. n56

It is not easy for the plaintiff to prevail in a spite fence case, because the plaintiff is required to prove, with clear and convincing evidence, n57 that the fence is of no value to the defendant and that its purpose is to annoy the plaintiff. n58 Malicious intent need not be shown subjectively, but may be manifested by its objective effect on the plaintiff's property and a showing that there is no benefit to the defendant. n59

In earlier times, spite fences were not enjoined as nuisances as a matter of law, because the structures were confined entirely to the defendant's own property. n60 This view has now yielded to the more modern view that it is never acceptable to use one's land specifically for the purpose of injuring or irritating another landowner.

COMPUTER-ASSISTED RESEARCH:

LEXIS: Private w/5 nuisance w/10 (matter of law or malic! or improp! motiv!)

§ 67.03(b) Private Nuisances in Fact.

All private nuisances that are not nuisances as a matter of law are classed as nuisances in fact, or sometimes referred to as nuisances *per accidens*. A private nuisance in fact is a private nuisance which, in its particular setting, constitutes a nuisance, although the conduct might not be a nuisance in another locality or at another time or under some other circumstances. The smoke and smells of a manufacturing enterprise would probably not be a nuisance in the middle of an industrial district, but in closer proximity to a residential district might very well constitute a private nuisance in fact.

Conceptually, a cause of action for private nuisance is rather simple and straightforward, being composed of only two elements: the defendant's conduct in use of land must be shown to be unreasonable, and the interference with the plaintiff's use and enjoyment of land must be shown to be substantial. Both of these evaluations should be made on an objective basis, especially so that a defendant landowner's use and enjoyment of land is not unduly restricted because of the complaints of a hyper-sensitive neighboring landowner. n61

§ 67.03(b)(1) Unreasonableness of Defendant's Conduct in the Use of Land.

A private nuisance plaintiff may show that the defendant landowner's conduct in the use of land was unreasonable because it was either intentional, negligent, or abnormally dangerous. n62 No private nuisance liability resulted when formaldehyde gas from a nearby manufacturing plant damaged food in the plaintiff's grocery store, when the plaintiff was not able to show that the defendant's conduct was either negligent or intentional. n63 However, for certain activities to be considered unreasonable, neither negligence nor intent need be shown, if the activities are considered inherently dangerous. Thus a quarry owner was liable in private nuisance for concussion damage caused on nearby land by blasting operations, even though the operations were carried out in a non-negligent manner. n64

A condition that occurs naturally on the defendant's property that interferes with the use and enjoyment of plaintiff's land will usually not be actionable as a private nuisance, because it cannot be shown that the defendant's conduct was unreasonable. Thus, if the defendant fails to abate insects on the defendant's land, the annoyance caused to the nearby plaintiff landowner will not be a private nuisance, unless it is made so by a statutory requirement to abate the insects. n65

Apart from these negligent, intentional or abnormally dangerous activities, there are few keys as to which aspects of the whole range of landowner's conduct may be open to a charge of unreasonableness. There are, in fact, no firm rules as to when a defendant's use of land is unreasonable. Enormous numbers of cases have struggled with this problem, n66 and out of those cases a few criteria have emerged with which to evaluate the reasonableness of the defendant's conduct. These criteria include the character of the area in which the conduct occurs; the nature and relative utility of the use complained of, especially as balanced against the harm allegedly caused; whether the activity can be carried out in a less harmful manner; and whether the offending use preceded or followed the use that the complainant alleges was disrupted. n67

The judicial holdings on what is reasonable conduct and what is not reasonable conduct offer no sure guide applicable to future cases. A use that is lawful under a municipality's zoning ordinance may nevertheless be the subject of a private nuisance action. n68 Defendant's conduct which at one time would not have been considered a nuisance may later be considered a private nuisance if circumstances in the area have changed. n69

In most cases the element of the reasonableness of defendant's conduct in a private nuisance action is a question of fact, n70 although in some older cases it was treated as a question of law. n71 When the trier of fact, either the jury or the court, attempts to assess reasonableness, usually the most difficult judgment is that which compares the utility of defendant's land use that causes the harm with the substantiality of the interference with the plaintiff's land use.

COMPUTER-ASSISTED RESEARCH:

LEXIS: Private w/5 nuisance w/30 (in fact or per accidens)

§ 67.03(b)(2) Substantiality of Harm to Plaintiff's Use and Enjoyment of Land.

The second principle element for establishing a nuisance in fact is that the harm to or interference with the plaintiff's use and enjoyment of land must be substantial. n72 The evaluation of substantiality must necessarily be somewhat relative and subjective; however, courts have declared that a substantial interference is one that makes the plaintiff's use of the land unhealthy, n73 uncomfortable or inconvenient. n74 A plaintiff is more likely to succeed in a private nuisance action, if the alleged harm relates to objective or tangible physical injury or property damage rather than to less tangible, more subjective discomforts and inconveniences. n75 Certain types of alleged harm or interference with land use are more likely to be found not substantial enough to sustain a private nuisance action. For instance, when the only harm the plaintiff can show is diminution in property value, n76 or rental value, n77 the plaintiff will generally not succeed. Likewise a plaintiff who alleges only that the defendant's conduct interferes with an illegal enterprise or produces increased traffic or offends aesthetic tastes will usually not succeed. n78 However, more commonly today, some aesthetic disturbances, such as debris, may qualify for abatement relief. n79 Whatever the particular type of interference alleged by the plaintiff, courts agree that mere annoyances or slight inconveniences are not sufficient to sustain the cause of action for private nuisance. n80

Courts also agree that whether an alleged nuisance is substantial should be judged from the objective perspective of a reasonable person, rather than from the subjective perspective of the particular plaintiff; this guards against over-zealous complaints from hyper-sensitive plaintiffs. n81 An important presumption in these matters, however, is that plaintiffs are persons of ordinary sensitivities; this presumption can be rebutted by contrary evidence. n82 Not only may the hyper-sensitive plaintiff be an unsure basis for a nuisance action, but a land use by the plaintiff which is unusually vulnerable to or susceptible to interference from reasonable use of the defendant's land may also not be the basis for a private nuisance action. n83 For instance, an outdoor movie theater operator may not be able to sustain a nuisance claim against the bright lights of a nearby baseball field or race track which legitimately operates at night. n84

COMPUTER-ASSISTED RESEARCH:

LEXIS: Private w/5 nuisance w/30 ((in fact or per accidens) or (substantial! w/3 harm!))

Occasionally, even a reasonable plaintiff who legitimately complains of substantial harm will not succeed against conduct of the defendant that is not necessarily unreasonable but may also be perceived as being especially valuable. This was perhaps best illustrated in the well-known case of Boomer v. Atlantic Cement Co., n85 where a cement plant which emitted extremely annoying particulate pollution over a widespread area was permitted to continue in operation, because plant closure would severely harm the area's economy and its operations were considered reasonable in view of the limited means for pollution control then available.

§ 67.03(b)(3) Defendant's Conduct as Proximate Cause of Plaintiff's Complaint.

Although the unreasonableness of defendant's conduct and the substantiality of the interference with plaintiff's use of land are the two major elements of a private nuisance cause of action, a third issue arises in some cases, and that is whether the defendant's conduct or the conduct which the defendant controlled or could have controlled was the proximate cause of the alleged nuisance. n86 This issue has arisen in public intoxication cases, for instance, in which a brewery was not restrained, on the basis of private nuisance, from shipping products into a county where complaints of unruly and intoxicated citizens had been filed. n87 Likewise, if persons come onto an owner's property without permission or knowledge of the owner and then create a nuisance, the owner will not be held liable. n88

The plaintiff's contributory negligence may be a factor in determining the amount of damages for which the defendant is liable in a private nuisance action, n89 but will not affect whether injunctive relief is appropriate. n90

Proximate cause also arises as an issue in cases where natural causes have combined with the defendant's conduct to create a nuisance. Natural causes alone will usually not qualify for nuisance relief, n91 but if the nuisance on the plaintiff's land is also partly caused by defendant's conduct, the plaintiff may qualify for relief. n92 Thus a landowner who maintained a row of tall trees was liable for damages and the costs of removing the trees when some blew down during a windstorm and damaged the plaintiff's house on adjacent land. n93

COMPUTER-ASSISTED RESEARCH:

LEXIS: Private w/5 nuisance w/30 ((in fact or per accidens) or (proximate! w/3 caus!))

FOOTNOTES:
(n1)Footnote 24. This maxim is found in the earliest written sources of the common law: Glanville, The Laws and Customs of the Kingdom of England b. 13, c. 32-39 (Ca. 1187); Bracton, De Legibus et Consuetudinibus Angliae b. 4, c. 37, ff. 221, 233, 234, 234b (1250); Fleta, Commentarius Juris Anglicani[eit] b. 4, c. 18 (ca. 1290); Britton b. 2, c. 23, 30-32 (ca. 1290); 1 William Blackstone, Commentaries 306-307, 3 William Blackstone, Commentaries 217-219. The maxim is cited in numerous cases as the basis of nuisance liability. *See, e.g., Nicholson v. Connecticut Half-Way House, Inc., 218 A.2d 383 (Conn. 1966). See also* William A., Jr. McRae, *The Development of Nuisance in the Early Common Law, 1 U. Fla. L. Rev. 27 (1948);* Elmer E. Smead, *Sic utere tuo ut alienum non laedis: A Basis of the State Police Power, 21 Cornell L. Q. 276 (1936). Hein v. Town of Foster--Zoning Bd. of Review, 632 A.2d 643 (R.I. 1993)* (a landowner's use of land must be congruous with, tolerant of, and have no adverse effects on existing uses of neighboring property).

See In re Realen Valley Forge Greenes Associates, 838 A.2d 718 (Pa. 2003) (a property owner is obliged to utilize his property in a manner that will not harm others in the use of their property).

(n2)Footnote 25. *Karpiak v. Russo, 676 A.2d 270 (Pa. Super. Ct. 1996)* (noise from landscaping machinery was not a nuisance because it occurred near a road frequently traveled by loud trucks); *Barrett v. T.L. James & Co., 671 So.*

2d 1186 (La. App. 1996) (whether inconvenience from industrial smoke, odors and noise constitutes private nuisance depends on local ordinances and customs and the character of the neighborhood), *reh'g denied, 674 So. 2d 973 (La. 1997).*

Rushing v. Kansas City S. Ry., 14 F. Supp. 2d 869 (S.D. Miss. 1998), rev'd, 185 F.3d 496 (5th Cir. 1999) (common law nuisance claims against railroad are preempted by Noise Control Act (NCA) of 1972, §17, *42 U.S.C. §4916); West v. Luna, 1998 Tenn. App. LEXIS 560* (Tenn. App. Aug. 12, 1998) (noise may be deemed a nuisance after weighing the following factors: 1) the locality, 2) the character of the neighborhood, 3) the nature of the use causing the noise, 4) the extent and frequency of the injury, 5) the time of day when the noise occurs, and 6) the effects on the enjoyment of life, health, and property of those affected by the noise). *See* S. Camden Citizens in *Action v. New Jersey Dep't. of Envtl. Prot., 254 F. Supp. 2d 489 (D.N.J. 2003)* (the character, volume, frequency, duration, time, and locality of noises are relevant factors in determining whether the alleged annoyance is a private nuisance).

(n3)Footnote 26. *Stone Man, Inc. v. Green, 435 S.E.2d 205 (Ga. 1993).*

(n4)Footnote 27. *Brown v. Scioto County Board of Comm'rs, 622 N.E.2d 1153 (Ohio App. 1993)* (the essence of a nuisance per se is that, regardless of the degree of care used by the defendant, some activities are inherently injurious and cannot be conducted without injuring someone's property or rights).

(n5)Footnote 28. *McCord v. Green, 555 So. 2d 743 (Ala. 1989)* (injunction of anticipated nuisance denied when nuisance was not shown to be "per se"), *overruled, Parker v. Ashford, 661 So. 2d 213 (Ala. 1995).*

Ogle v. Kelly, 629 N.E.2d 495 (Ohio App. 1993) (a nuisance may be an absolute nuisance imposing strict liability); *Anderson v. Village of Little Chute, 549 N.W.2d 737 (Wis. App. 1996)* (municipality liable for damages caused by diverting storm water through plaintiff's residential property). *Pope v. Ohio Dep't of Transp., 698 N.E.2d 536 (Ohio Ct. Cl. 1998)* (nuisance per se consists of an intentional act resulting in harm, or act involving unlawful conduct causing unintentional harm; absolute liability attaches, even without fault); *Tiegs v. Watts, 954 P.2d 877 (Wash. 1998)* (nuisance per se is something that in and of itself is a nuisance and therefore is not permissible or excusable under any circumstances). *See Luensmann v. Zimmer-Zampese & Associates, Inc., 103 S.W.3d 594 (Tex. App. 2003)* (nuisance per se may be proven either by showing that the activity is a nuisance at all times, under all circumstances, and in any location, or by showing that the activity violated a law).

(n6)Footnote 29. *See, e.g., De LaHunta v. City of Waterbury, 59 A.2d 800 (Conn. 1948),* in which the court declares that a finding of absolute nuisance "does not depend merely upon the inherent nature of the condition, but involves also a consideration of all relevant facts." *59 A.2d at 802-803.*

(n7)Footnote 30. *Lew v. Superior Court (Byrd), 25 Cal. Rptr. 2d 42 (1993)* (statute declaring that drug houses are nuisances, whether the unlawful activity is carried on by the landowner or by others; statutory abatement scheme does not preclude private action); *State ex rel. Pizza v. Carter, 622 N.E.2d 1194 (Ohio 1993)* (liability under a nuisance statute requires that the defendant had knowledge of and participated in the nuisance activity); *Gill v. LDI, 19 F. Supp. 2d 1188 (W.D. Wash. 1998)* (if conduct is lawful it only becomes nuisance if it unreasonably interferes with a person's use or enjoyment of property, but nuisance per se if the conduct is illegal and interferes with someone's use and enjoyment of property).

See Luensmann v. Zimmer-Zampese & Associates, Inc., 103 S.W.3d 594 (Tex. App. 2003) (nuisance per se may be proven by showing that the activity violated a law).

(n8)Footnote 31. *Alpha Enters. v. City of Houston, 411 S.W.2d 417 (Tex. Civ. App. 1967), cert. denied, 389 U.S. 1005 (1967), reh'g denied, 390 U.S. 913 (1968).*

(n9)Footnote 32. *Olson v. Platteville, 251 N.W. 245 (Wis. 1933).*

(n10)Footnote 33. *Knight v. City of Riverton, 259 P.2d 748 (Wyo. 1953).*

(n11)Footnote 34. *Spring-Gar Community Civic Ass'n v. Home for Homeless (homeless shelter in small residential community), 516 N.Y.S.2d 399 (1987).*

(n12)Footnote 35. *Botsch v. Leigh Land Co., 239 N.W.2d 481 (Neb. 1976)* (statutory authority did not extend to this particular activity); *Pure Air & Water Inc. of Chemung County v. Davidsen, 668 N.Y.S.2d 248 (N.Y. App. Div. 1998)* (Right to Farm Law precludes private nuisance by landowner if agricultural practice was sound and did not deny landowners due process).

(n13)Footnote 36. *Martin v. Klamath County, 592 P.2d 1037 (Or. 1979)* (nuisance created by fence across a right of way).

(n14)Footnote 37. *Rochester Hills v. Socrra, 481 N.W.2d 753 (Mich. App. 1991)* (unauthorized composting operation), *rev'd, 486 N.W.2d 678 (Mich. 1992). But see, Harper v. Summit County, 963 P.2d 768 (Utah App. 1998)* (where railroad loading facility was built in violation of county development code, it was not a nuisance per se).

(n15)Footnote 38. *See Branch v. Western Petr., Inc., 657 P.2d 267 (Utah 1982); Gill v. LDI, 19 F. Supp. 2d 1188 (W.D. Wash. 1998)* (rock quarry's pollution of pond was in violation of Clean Water Act and was nuisance per se).

(n16)Footnote 39. *Widmer v. Fretti, 116 N.E.2d 728 (Ohio App. 1952).*

(n17)Footnote 40. *State v. Gedarro, 579 P.2d 949 (Wash. App. 1978).*

(n18)Footnote 41. *People ex rel. Gwinn v. Kothari, 100 Cal. Rptr. 2d 29 (Cal. Ct. App. 2000)* (California statutes defined prostitution and illegal use of drugs as public nuisances. The lower court issued the injunction against prostitution and use of illegal drugs that was to apply in perpetuity to all future owners of the land; however, the appellate court reversed, holding that an injunction of this type did not run with the land).

(n19)Footnote 42. *Thomas Circle Ltd. P'ship v. United States, 372 A.2d 555 (D.C. App. 1977)* (house of prostitution is a nuisance per se); *City of Clarence v. Brocklemeyer, 948 S.W.2d 274 (Mo. App. 1997)* (city ordinance declaring abandoned or derelict vehicles on private property a nuisance is upheld); *Holsten v. Haverford Twp., 698 A.2d 174 (Pa. Commw. 1997)* (dogs loose on private property do not constitute a public nuisance).

(n20)Footnote 43. State *ex rel Prosecuting Att'y v. Alray Northcrest Plaza, 381 N.W.2d 731 (Mich. App. 1985)* (action to eliminate use of property for or in connection with prostitution, gambling, and illicit possession of intoxicants); *People v. Adult World Bookstore, 166 Cal. Rptr. 519 (1980). See also, People ex rel. Gwinn v. Kothari, 100 Cal. Rptr. 2d 29 (Cal. Ct. App. 2000).*

(n21)Footnote 44. *Eyrich v. Earl, 495 A.2d 1375 (N.J. 1985)* (exposure of public to wild animals); *Cook v. Rockwell Intern. Corp., 181 F.R.D. 473 (D. Colo. 1998)* (unduly hazardous activities and uses of land that are clearly unreasonable acts in view of surrounding circumstances are absolute nuisances).

(n22)Footnote 45. *Burnett v. Rushton, 52 So. 2d 645 (Fla. 1951)* (harassment). *See also* 4 Restatement (Second) of Torts § 829.

(n23)Footnote 46. *Roper v. Durham, 353 S.E.2d 476 (Ga. 1987)* (fence).

(n24)Footnote 47. *Hollywood Silverfox Farm v. Emmett, 2 K.B. 468 (1936).*

(n25)Footnote 48. *Keeble v. Hickeringill, 11 East. 573, 103 Eng. Rep. 1127 (1809).*

(n26)Footnote 49. *Burnett v. Rushton, 52 So. 2d 645 (Fla. 1951).*

(n27)Footnote 50. *Medford v. Levy, 8 S.E. 302 (W. Va. 1888).*

(n28)Footnote 51. *Dunbar v. O'Brien, 220 N.W. 278 (Neb. 1928).*

(n29)Footnote 52. *Fontainebleau Hotel Corp. v. Forty-five Twenty-five, Inc., 114 So. 2d 357 (Fla. App. 1959) . See Dowdell v. Bloomquist, 2004 R.I. LEXIS 48* (No. 2002-630-Appeal, Mar. 15, 2004) (the act of blocking the passage of light and air does not constitute a private nuisance in and of itself; rather it is the act paired with malicious intent).

(n30)Footnote 53. *Welsh v. Todd, 133 S.E.2d 171 (N.C. 1963)* (spite fence as a private nuisance); *Burris v. Creech, 17 S.E.2d 123 (N.C. 1941); Wilson v. Handley, 119 Cal. Rptr. 2d 263 (2002)* (under the spite fence statute, a fence need not interfere with anything more than light and air; intent to annoy need be only the dominant, not the exclusive, motive).

(n31)Footnote 54. *Sundowner, Inc. v. King, 509 P.2d 785 (Idaho 1973).* (no right to erect spite fence).

(n32)Footnote 55. *See, e.g.*, Cal. Civ. Code § 841.4;Conn. Gen. Stat. § 52-570; Mass. Gen. Laws Ann. c. 49, § 21; N.H. Rev. Stat. Ann. § 476:1; Wis. Stat. Ann. § 844.10.

(n33)Footnote 56. *Horan v. Byrnes, 54 A. 945 (N.H. 1903).*

(n34)Footnote 57. *Hornsby v. Smith, 13 S.E.2d 20 (Ga. 1941)* (evidence for spite fence must meet the clear and convincing standard).

(n35)Footnote 58. *Racich v. Mastrovich, 273 N.W. 660 (S.D. 1937)* (fence built with no apparent benefit, solely to injury plaintiff); *Norton v. Randolph, 58 So. 283 (Ala. 1912).* Some courts may distinguish between a fence with no benefits (to anyone, from an "objective" perspective) and one with no value (to the defendant, "subjectively").*See Dowdell v. Bloomquist, 2004 R.I. LEXIS 48* (No. 2002-630-Appeal, Mar. 15, 2004) (fence found to be private nuisance where evidence of malicious intent plainly outweighs the discounted benefit claimed by the defendant).

(n36)Footnote 59. *Rapuano v. Ames, 145 A.2d 384 (Conn. App. 1958)* (maliciously raised fence impaired neighbor's land enjoyment).

(n37)Footnote 60. *Scharlack v. Gulf Oil Corp., 368 S.W.2d 705 (Tex. App. 1963)* (billboard on adjoining property held to be not a nuisance); *Cohen v. Perrino, 50 A.2d 348 (Pa. 1947).*

(n38)Footnote 61. *T.K. Stanley, Inc. v. Cason, 614 So. 2d 942 (Miss. 1992)*(hydrogen sulfide gas from a salt-water disposal well that interferes with use of neighboring property can still constitute a prima face case of nuisance, even though neighboring owner was especially susceptible to the adverse effects of the gas).

(n39)Footnote 62. *Turnbaugh v. Anderson, 793 P.2d 939 (Utah App. 1990); Bily v. Omni Equities, Inc., 731 S.W.2d 606 (Tex. 1987); Osborne v. Power, 908 S.W.2d 340 (Ark. 1995)* (massive Christmas light display was a nuisance); *Espinosa v. Rowell Tower, Inc., 910 P.2d 940 (N.M. App. 1995)* (knowledge that the activity violated the law was not an essential element of a cause of action for nuisance); *Kopecky v. National Farms, Inc., 510 N.W.2d 41 (Neb. 1994)* (citing Restatement (Second) of Torts §826, the court declared that an intentional nuisance is unreasonable if the gravity of the harm outweighs the utility of the defendant's conduct, or if the harm caused is serious and the burden of compensating for the harm is so great as to make it not feasible to allow the conduct to continue). *See In re Bloomingdale Partners, 160 B.R. 101 (N.D. Ill. 1993)* (noise pollution from air-conditioning equipment was considered intentional if the defendant knew that the noise was a substantial interference with land use, even if no invasion or interference was intended; Illinois law requires intent to create the consequences, not merely engage in the conduct, but this intent is established by merely showing defendant's knowledge of the consequences of the conduct). Prior conduct barred by the statute of limitations may still be admitted in evidence to show intent of current conduct. *Finlay v. Finlay, 854 P.2d 315 (Kan. App. 1993). Jamail v. Stoneledge Condo. Owners Ass'n., 970 S.W.2d 673 (Tex. App. 1998)* (liability

for nuisance may rest on intentional conduct that causes invasion of enjoyment of another's land).

See Jupin v. Kask, 2004 Mass. Super. LEXIS 161 (No. 02-0997, May 4, 2004) (storage of firearms in a locked cabinet in a homeowner's basement cannot be said to be unreasonable).

(n40)Footnote 63. *Wright v. Masonite Corp., 368 F.2d 661 (4th Cir. 1966),cert. denied, 386 U.S. 934 (1967); Bargmann v. Soll Oil Co., 574 N.W.2d 478 (Neb. 1998)* (if a defendant's conduct unavoidably results in interference with use and enjoyment of another's property, the interference is "intentional," for purposes of nuisance, because interference was substantially certain to result); *Iglesias v. Dazi, 677 N.Y.S.2d 158 (N.Y. App. Div. 1998)* (neighbors were not liable for nuisance or trespass without a showing that the neighbors intentionally created the nuisance).

(n41)Footnote 64. *Opal v. Material Serv. Corp., 133 N.E.2d 733 (Ill. App. 1956)*

(n42)Footnote 65. *Ken Cowden Chevrolet, Inc. v. Corts, 316 N.W.2d 259 (Mich. App. 1982)* (no nuisance when land left uncultivated). *But see White v. Louviere, 664 So. 2d 603 (La. App. 1995)* (cause of action for injury caused by roots of tree on defendant's adjacent land).

(n43)Footnote 66. *See, e.g., Rodrigue v. Copeland, 475 So. 2d 1071 (La. 1985), cert. denied, 475 U.S. 1046 (1986), vacated by 479 So. 2d 356 (La. 1985) and vacated by Klein v. Copeland, 482 So. 2d 613 (La. 1986); Padilla v. Lawrence, 685 P.2d 964 (N.M. App. 1984); Nissan Motor Corp. v. Maryland Shipbuilding & Drydock Co., 544 F. Supp. 1104 (D. Md. 1982), aff'd, 742 F.2d 1449 (4th Cir. 1984); Rose v. Chaiken, 453 A.2d 1378 (N.J. Super. 1982); People v. Cifarelli, 454 N.Y.S.2d 525 (1982); People v. Mason, 177 Cal. Rptr. 284 (1981); Sandifer Motors, Inc. v. City of Roeland Park, 628 P.2d 239 (Kan. App. 1981); Wood v. City of Huntsville, 384 So. 2d 1081 (Ala. 1980); Jewett v. Deerhorn Enters., 575 P.2d 164 (Or. 1978); Friendship Farms Camps, Inc. v. Parson, 359 N.E.2d 280 (Ind. App. 1977); City of Cloquet v. Cloquet Sand and Gravel Co., Inc., 251 N.W.2d 642 (Minn. 1977); Captain Soma Boat Line v. City of Wis. Dells, 255 N.W.2d 441 (Wis. 1977); Arbor Theatre Corp. v. Campbell Soup Co., 296 N.E.2d 11 (Ill. App. 1973); Lynn Open Air Theater v. Sea Crest Cadillac-Pontiac, Inc., 294 N.E.2d 473 (Mass. App. 1973); Lee v. Rolla Speedway, Inc., 494 S.W.2d 349 (Mo. 1973); Estancias Dallas Corp. v. Schultz, 500 S.W.2d 217 (Tex. Civ. App. 1973); Louisville & Jefferson County Air Bd. v. Porter, 397 S.W.2d 146 (Ky. App. 1965); Caldwell v. Knox Concrete Prods., Inc., 391 S.W.2d 5 (Tenn. App. 1965); Suter v. City of Okmulgee, 373 P.2d 527 (Okla. 1962); Lee v. Florida Pub. Utils. Co., 145 So. 2d 299 (Fla. App. 1962); Schlotfelt v. Vinton Farmers' Supply Co., 109 N.W.2d 695 (Iowa 1961); Wade v. Fuller, 365 P.2d 802 (Utah 1961);Newman v. Sessions, 108 S.E.2d 870 (Ga. 1959); Antonik v. Chamberlain, 78 N.E.2d 752 (Ohio App. 1947); Hannum v. Oak Lane Shopping Ctr., Inc., 119 A.2d 213 (Pa. 1956); Morgan v. High Penn Oil Co., 77 S.E.2d 682 (N.C. 1953); Riblet v. Spokane-Portland Cement Co., 248 P.2d 380 (Wash. 1952), overruled, Bradley v. American Smelting and Refining Co., 709 P.2d 782 (Wash. 1985); Young v. Brown, 46 S.E.2d 673 (S.C. 1948)* ; *Rose v. Socony-Vacuum Corp., 173 A. 627 (R.I. 1934), abrogated, Splendorio v. Bilray Demolition Co., Inc., 682 A.2d 461 (R.I. 1996); Sprague v. Sampson, 114 A. 305 (Me. 1921); Scheufler v. General Host Corp., 126 F.3d 1261, 45 ERC (BNA) 1346,* (10th Cir. 1997) (continuing groundwater polluter loses again in private nuisance action for failing to curb polluting activities); *McEneaney v. Chestnut Hill Realty Corp., 650 N.E.2d 93* (Mass. App.), *cert. denied, 652 N.E.2d 146 (Mass. 1995)* (nuisance action by condominium unit owner against the condominium association for a nuisance on the common areas); *H. Wayne Palmer & Assocs. v. Heldor Indus., Inc., 839 F. Supp. 770 (D. Kan. 1993)* (storing of chemicals on defendant's property was not unreasonable conduct for nuisance purposes, simply because a single, isolated fire later occurred on plaintiff's premises and damaged plaintiff's property); *City of Lawrenceville v. Macko, 439 S.E.2d 95 (Ga. App. 1993)* (a one-time occurrence does not amount to a nuisance).

(n44)Footnote 67. *Kopecky v. National Farms, Inc., 510 N.W.2d 41 (Neb. 1994)* (in a nuisance action against a swine-raising operation, evidence offered on the social utility of the operation, going to the reasonableness of the activity, should have been admitted, following Restatement Second of Torts §826). Whether a use of property is unreasonable depends on the locality, the character of the neighborhood, the nature of the use, the extent of the injury, and the effect upon the enjoyment of life. *Williams v. Monsanto Co., 856 S.W.2d 338 (Mo. App. 1993).* Whether conduct constitutes a nuisance may depend on the type of neighborhood, the nature of the thing or wrong complained

of, its proximity to those alleging the injury or damage, the frequency, continuity or duration, and the resulting damage or annoyance. *Finlay v. Finlay, 854 P.2d 315 (Kan. App. 1993)*

(n45)Footnote 68. *Krueger v. Mitchell, 317 N.W.2d 155, aff'd, 332 N.W.2d 733 (Wis. 1983)* (private airport, even though lawfully operated, may still cause a nuisance); *Borton v. Forest Hills Country Club, 926 S.W.2d 232 (Mo. App. 1996)* (landowner can sue for private nuisance, despite golfers' easement to enter property to retrieve errant golf balls, if the extent of use exceeds the intended level).

(n46)Footnote 69. *Herrin v. Opatut, 281 S.E.2d 575 (Ga. 1981)* (agricultural operation may become a nuisance under changed conditions). *Concerned Area Residents for the Environment v. Southview Farm, 834 F. Supp. 1410 (W.D.N.Y. 1993)* (a farmer accused of causing a nuisance by using manure for fertilizer has the burden of showing that it is a sound and reasonable agricultural practice).

(n47)Footnote 70. *Filisko v. Bridgeport Hydraulic Co., 404 A.2d 889 (Conn. 1978);Sandifer Motors, Inc. v. City of Roeland Park, 628 P.2d 239 (Kan. App. 1981); Briscoe v. Harper Oil Co., 702 P.2d 33 (Okla. 1985). Kopecky v. National Farms, Inc., 510 N.W.2d 410 (Neb. 1994); Whitehouse v. Lead Industries Ass'n, 2003 R.I. Super. LEXIS 50* (No. 99-5226, Mar. 20, 2003).

(n48)Footnote 71. *Frost v. Berkeley Phosphate Co., 20 S.E. 280 (S.C. 1894)* (escape of noxious gas).

(n49)Footnote 72. *Tarzia v. Town of Hingham, 622 N.E.2d 1372 (Mass. App. 1993).*

See Smith v. Muellner, 2004 Conn. Super LEXIS 633 (No. CV030102009S, Feb. 9, 2004) (reasonableness of interference depends upon a balancing of circumstances; fact finder must take into consideration all relevant facts, including the nature of both the interfering use and the use and enjoyment invaded, the nature, extent, and duration of the interferences, the suitability of the locality of both the interfering conduct and the particular use and enjoyment invaded, whether the defendant is taking all feasible precautions to avoid any unnecessary interference with the plaintiff's use and enjoyment of his or her property, and any other factors that the fact finder deems relevant). *Tarzia v. Town of Hingham, 622 N.E.2d 1372 (Mass. App. 1993).*

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(n50)Footnote 73. *Sandifer Motors, Inc. v. City of Roeland Park, 628 P.2d 239 (Kan. App. 1981)* (flood damages).

(n51)Footnote 74. *Kolstad v. Rankin, 534 N.E.2d 1373 (Ill. App. 1989)* (firing range); *Marsland v. Pang, 701 P.2d 175 (Haw. 1985). In re Tutu Wells Contamination Litig. v. Texaco, Inc., 909 F. Supp. 991 (D. Virgin Islands 1995)* (interference constituting a nuisance need not cause physical harm to the land); *Osborne v. Power, 908 S.W.2d 340 (Ark. 1995)* (massive Christmas light display was a nuisance); *Stiglianese v. Vallone, 637 N.Y.S.2d 284 (1995)* (nuisance caused by neighbor's son who practiced with heavy metal rock band and played amplified home stereo and guitar music over a three-year period of time), *rev'd, 666 N.Y.S.2d 362 (1997)* (reversed because the court concluded that the holding had been based on extraneous factors, including trial court's acceptance of unverified decibel reading from plaintiff while excluding similar reading from defendant and the court's consideration of the son's status as an amateur musician), *rev'd, 680 N.Y.S.2d 224 (N.Y. App. Div. 1998)* (reversing the appellate court and reinstating the trial court in part.).

(n52)Footnote 75. *Haas v. Lavin, 625 F.2d 1384 (10th Cir. 1980); Citizens for Preservation of Waterman Lake v.*

Davis, 420 A.2d 53 (R.I. 1980); Sigma Fin. Corp. v. Investment Loss Recovery Servs., Inc., 673 So. 2d 572 (Fla. Ct. App. 1996)(publication of defamatory statements against plaintiff's company is not a cognizable nuisance claim); *St. David's Episcopal Church v. Westboro Baptist Church, Inc., 921 P.2d 821 (Kan. App. 1996), cert. denied, 117 S. Ct. 765 (1997)* (defendant church picketed outside plaintiff church and created fear of violence that infringed religious worship in plaintiff's church); *San Diego Gas & Elec. Co. v. Superior Ct., 920 P.2d 669 (Cal. 1996)* (no standing for claim that electromagnetic fields from power lines caused physical harm); *Lucero v. Trosch, 904 F. Supp. 1336 (S.D. Ala. 1995)* (anti-abortion activist's statements to physician on television that he would kill an abortion doctor if he had a gun did not constitute actionable private nuisance); *Jordan v. Georgia Power Co., 466 S.E.2d 601 (Ga. App. 1995), reh'g granted, 1996 Ga. LEXIS 592* (Ga. Apr. 12, 1996) (alleged electromagnetic fields were not deemed to be a nuisance). *Anglado v. Leaf River Forest Products, Inc., 716 So. 2d 543 (Miss. 1998)* (owners could not recover for nuisance due to unwarranted public perception of danger).

(n53)Footnote 76. *City of Newport v. Emery, 559 S.W.2d 707 (Ark. 1977)*(mere diminution in property value insufficient to establish nuisance); *Borenkind v. Consolidated Edison Co. of N.Y., 626 N.Y.S.2d 414 (1995)* (loss of property value because of proximity to high voltage power lines was not actionable in nuisance). *Golen v. The Union Corp., 718 A.2d 298 (Pa. Super. Ct. 1998)* (hazardous waste contamination that only impacted owner's ability to sell and not their use had not remedy at law).

But see Lewis v. General Elec. Co., 254 F. Supp. 2d 205 (D. Mass. 2003) (recognizing a stronger jurisprudential trend upholding private nuisance claims based on diminution in property value).

(n54)Footnote 77. *Tortorella v. H. Traiser & Co., 188 N.E. 254 (Mass. 1933)* (no nuisance from loss of business because of noise).

(n55)Footnote 78. *United States v. County Bd. of Arlington County, 487 F. Supp. 137 (E.D. Va. 1979)* (no nuisance because of unsightly buildings); *Allison v. Smith, 695 P.2d 791 (Colo. App. 1984); Aldridge v. Morgan, 912 S.W.2d 151 (Tenn. App. 1995)* (recovery allowed for residential lot strewn with lumber, clothes locker, and old refrigerator; conditions were found to be "fertile breeding ground for vermin" in addition to being aesthetically offensive).

(n56)Footnote 79. *Allison v. Smith, 695 P.2d 791 (Colo. App. 1984)* (accumulation of debris can be a nuisance); *Swanson v. Warner, 865 P.2d 493 (Or. App. 1993)* (complaint alleged obstruction of view by planting of trees).

(n57)Footnote 80. *Krueger v. Mitchell, 317 N.W.2d 155* (Wis.), *aff'd, 332 N.W.2d 733 (Wis. 1983)*(private nuisance action against airport); *Adams v. Berkowitz, 622 N.Y.S.2d 565 (N.Y. App. Div. 1995)* (alleged disturbance caused by neighbor's air conditioner did not, as a matter of law, rise to the level of substantial and unreasonable interference with neighbor's property).

See also Shadow Group v. Heather Hills Home Owners Ass'n, 576 S.E.2d 142 (N.C. Ct. App. 2003) (pattern jury instruction for private nuisance states that "[i]nterference is substantial when it results in significant annoyance, material physical discomfort or injury to a person's health or property. A slight inconvenience or a petty annoyance is not substantial interference.").

(n58)Footnote 81. *Parker v. Reaves, 505 So. 2d 323 (Ala. 1987)* (reasonable person standard); *Jenkins v. CSX Transp., Inc., 906 S.W.2d 460 (Tenn. App. 1995)*(recovery in nuisance action for allergic reaction to creosote fumes from railroad ties denied because of plaintiff's extremely rare allergic condition).

(n59)Footnote 82. *Burgess v. Omahawks Radio Control Org., 362 N.W.2d 27 (Neb. 1985)* (action to enjoin flight of radio-controlled aircraft); *Gray v. Westinghouse Elec. Corp., 624 N.E.2d 49 (Ind. App. 1993)* (a plaintiff who pleads fear for safety of person or property meets the requirement under a nuisance statute that the pleading be based on a situation that is injurious to health or offensive to senses or obstructive of free use of the property so as to interfere with comfortable enjoyment of life or property).

(n60)Footnote 83. *Nissan Motor Corp. v. Maryland Shipbuilding & Drydock Co., 544 F. Supp. 1104 (D. Md. 1982)* (no nuisance when plaintiff voluntarily came to an area that was not smoke-free); *Page County Appliance Ctr., Inc. v. Honeywell, Inc., 347 N.W.2d 171 (Iowa 1984).*

(n61)Footnote 84. *Amphitheatres, Inc. v. Portland Meadows, 198 P.2d 847 (Or. 1948).*

(n62)Footnote 85. *Boomer v. Atlantic Cement Co.,257 N.E.2d 870 (N.Y. 1970).*

(n63)Footnote 86. *State v. Tippetts-Abbett-McCarthy-Stratton, 527 A.2d 688 (Conn. 1987)* (bridge designer was not sufficiently in control of project to be liable for nuisance); *Lentz v. Mason, 961 F. Supp. 709 (D.C.N.J. 1997)* (Private nuisance claim denied for lack of proximate cause. Action brought by landowners against real estate broker because a tenant stored torpedoes on property); *Thomsen v. Greve, 550 N.W.2d 49 (Neb. App. 1996)* (house filled with smoky odor from defendant's stove found to be proximate cause of plaintiff's illness); *Karpiak v. Russo, 676 A.2d 270 (Pa. Super. Ct. 1996)* (dust from landscaping was found not to be harmful and did not cause illness).

See Oliveria v. Maurer, 2003 Conn. Super. LEXIS 3393 (No. CV020814584, Dec. 8, 2003) (private nuisance claim denied because broken sewer pipe was out of defendant's control).

(n64)Footnote 87. State *ex rel. Weatherby v. Dick & Bros. Quincy Brewing Co., 192 S.W. 1022 (Mo. 1917).*

(n65)Footnote 88. Tennessee *Coal, Iron & R. Co. v. Hartline, 11 So. 2d 833 (Ala. 1943).*

(n66)Footnote 89. *Wilhelm v. City of Great Falls, 732 P.2d 1315 (Mont. 1987)* (contributory negligence used as a defense).

(n67)Footnote 90. *Batick v. Seymour, 443 A.2d 471 (Conn. 1982)* (contributory negligence no defense to absolute nuisance); *Turner v. Thompson, 430 N.E.2d 157 (Ill. App. 1981); H. Wayne Palmer & Assocs. v. Heldor Indus., Inc., 839 F. Supp. 770 (D. Kan. 1993)* (storing of chemicals on defendants property was not unreasonable conduct for nuisance purposes, simply because a single, isolated fire later occurred on plaintiff's premises and damaged plaintiff's property); *City of Lawrenceville v. Macko, 439 S.E.2d 95 (Ga. App. 1993)* (a one-time occurrence does not amount to a nuisance).

(n68)Footnote 91. *Ken Cowden Chevrolet, Inc. v. Corts, 316 N.W.2d 259 (Mich. App. 1982)* (damage from natural causes not actionable as nuisance).

(n69)Footnote 92. *Lichtman v. Nadler, 426 N.Y.S.2d 628 (1980)* (nuisance must be predicated on negligent or intentional conduct).

(n70)Footnote 93. *Rubin v. Appel, 194 So. 2d 318 (Fla. App. 1967).*

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CHAPTER 67 THE PROPERTY LAW ASPECTS OF PRIVATE NUISANCE

8-67 Thompson on Real Property, Thomas Editions § 67.04

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§ 67.04 Procedural Principles of Private Nuisance Law.

[Go To Supp]

§ 67.04(a) Proper Parties.

The plaintiff in a private nuisance action must have a presently possessory land interest which is affected by the alleged nuisance. Such a presently possessory estate may include a fee simple, a life estate, a tenancy for years, an easement, or some other servitude interest. n94 When the property in question has been recently transferred, the transferee may have standing to sue those who cause the nuisance. n95

As for the defendants, at common law the property owner was always liable for any nuisance originating on the owner's land, but in modern times liability is not determined by ownership or occupancy alone. n96 A more accurate statement of the principle of defendant responsibility is that the proper defendant in a nuisance action is the party in control of the cause of the nuisance. Thus, liability attaches to the party who, personally or through an agent, n97 creates or continues a nuisance, or otherwise fails to abate the nuisance. n98 If a nuisance originating on defendant's land has been caused or created by trespassers, tenants or natural causes, and without the control or affirmative act or negligence of the defendant landowner, liability for such nuisances may not be imposed on the defendant landowner. n99

Other questions concerning proper defendants arise when, after a nuisance is created on defendant's land, the land is conveyed to another. The landowner who creates the nuisance on the land and then transfers the land to another is usually liable for any continuing damage caused by the nuisance, especially if the nuisance continues without the active involvement of the grantee of the land. n100 Developers who installed a faulty drainage system on the land before transferring their interest in the development remained liable for the continuing damage caused by the system after they no longer had an interest in the property. n101 Also a successor in interest to the land on which a nuisance exists may be liable for damage occurring after acquiring an interest in the land, if the nuisance is continued with the successor's knowledge. n102 If the successor in interest to the land is the personal representative of the now deceased party who created the nuisance, the liability of the decedent's estate is usually governed by state law on survival of causes of action. It is also possible for a nuisance plaintiff, in occupancy of a parcel of land, to sue a former occupant of the same land under a nuisance claim, such as when former lessees of the plaintiff's land permit gasoline contamination of the soil. n103

Principles are usually liable for nuisances caused by their agents. In the case of a corporation, the corporation may be held liable for a private nuisance created or continued by an agent of the corporation who is conducting the business of a corporation. n104 Employers generally are liable for nuisances created by their employees--even if the creation of those nuisances is outside the scope of the employment--if the employers know of their employees' activities and fail to restrain them. n105 In the case of a corporate employer, personal liability for creating the nuisance may be imposed on persons who direct the affairs of the corporation as well as on those who personally participate in creating the nuisance. n106 Also, parents can be held liable for the nuisances caused by their children. n107

If the defendant in a private nuisance action is a governmental entity enjoying some degree of sovereign immunity, that defendant will usually be subject at least to equitable relief for the nuisance activity. n108 Under the rule that no governmental entity has the inherent power to create and maintain a nuisance, a school board was subject to a legal action seeking to have a defective school parking lot repaired. n109

COMPUTER-ASSISTED RESEARCH:

LEXIS: Private w/5 nuisance w/100 (proper w/3 (party or plaintiff or defendant))

§ 67.04(b) Notice Requirements.

In most private nuisance actions, it is not necessary for the plaintiff to give any sort of prior notice to the defendant before commencing the action. This principle applies to a defendant who has created the private nuisance, n110 as well as to one who actively continues a private nuisance created by another. n111 A defendant may be considered as actively continuing the nuisance either because of affirmative conduct or because of negligent failure to stop the nuisance. n112

By contrast, notice is required for a defendant who comes into possession of land that has previously been used to create a continuing nuisance, and which possessor then passively and non-negligently continues a private nuisance created on the land by the preceding possessor; such a person is entitled to notice of the existence of the nuisance and also a request and opportunity to abate it, before legal action may be commenced. n113 For instance, if a property owner places on the land a structure that causes a nuisance, then conveys the land, and the grantee is aware of the structure but not aware that it causes a nuisance, the grantee is deemed to be passively continuing the nuisance and would be entitled to notice of the nuisance and has an opportunity to abate it before legal action could be commenced. Once such a grantee receives notice of the nuisance and an opportunity to abate, continuing the condition thereafter is deemed purposeful or negligent, and no subsequent notice is necessary before the action may be commenced.

In situations where notice is normally required, n114 the requirement does not arise if the defendant already has actual knowledge of the nuisance or later waives the notice requirement by failing to object to lack of notice. n115 Also, if under the circumstances it is clear that a notice of the nuisance and a request to abate would go unheeded, then no such notice and request are necessary before commencing legal action. n116 In some states, notice requirements for private nuisance causes of action are prescribed by statute, although in those states where the statutes merely codify the common law, the usual common law exceptions as described above are also applicable. n117

Notice, once required, need be in no particular form n118 and may be either written or oral. n119 The essential elements of the notice are a statement that nuisance exists and a statement or request that it be abated. n120 For a defendant to whom such a notice is the first indication that defendant's land is causing a nuisance, liability for that nuisance would not begin until after a reasonable time for acting in response to the notice. n121

A special type of notice requirement is imposed on a party intending to use self-help to abate the nuisance. Such a party must indicate in the notice that self-help is intended n122 and, if the proposed self-help abatement requires the prospective plaintiff to go onto the land of the defendant, the notice must include a demand on the defendant to abate the nuisance before such self-help is undertaken, n123 unless there is an urgent reason for more immediate abatement

by means of self-help. n124

COMPUTER-ASSISTED RESEARCH:

LEXIS: Private w/5 nuisance w/5 notice

§ 67.04(c) Statutes of Limitations and Laches.

§ 67.04(c)(1) Statutes of Limitations in Actions for Damages.

A cause of action for damages resulting from private nuisance is subject to the defense of statute of limitations. n125 In applying the appropriate statute of limitations, a most important question is determining when the period of the statute begins to run, which is usually marked by when the plaintiff's cause of action accrues. If the nuisance is deemed an occasional or temporary nuisance rather than constant and permanent, the cause of action for damages accrues, and the statute of limitations therefor begins to run, only when an injury first occurs, not when the nuisance itself first arises. n126 This point is illustrated in a case where water carried through a municipal sewer system occasionally damaged the plaintiff's land, so that the cause of action for purposes of the statute of limitations accrued when the water damage first occurred, not when the sewer system was first constructed and began operation. n127 It should also be noted that the statute of limitations in damage actions for temporary or recurring nuisances begins running anew with each successive occurrence or injury, although damages may be recovered only for those injuries actually incurred up to the time of the action. n128

A different statute of limitations rule applies where the nuisance is considered permanent rather than temporary or continuing; in such cases the cause of action is deemed to accrue when the condition arises which will cause the nuisance, not later when the injury first occurs. n129 Thus, a plaintiff whose land was damaged from water pollutants carried continuously to the land by an upstream city sewer system was held to have acquired the cause of action at the time the sewer system began to operate, not later when the damage to the land first occurred. n130

Procedurally, then, it becomes occasionally very important to distinguish between a permanent nuisance and a temporary or continuing nuisance. A permanent nuisance is rather generally defined as a constant and continuous nuisance which is unabatable and produces all of its identifiable damage at once; an example of such one-time damage is diminution in property value. n131 If the cause of the nuisance is permanent, and the damages can be anticipated and estimated with reasonable certainty, then the nuisance will likely be considered permanent. n132 Accordingly, only one action for recovery of damages is permitted against the party responsible for a permanent nuisance.

The contrast between permanent and temporary nuisances may be illustrated by the example of a sewer and drainage system which is properly constructed and maintained but may cause a permanent nuisance if for some reason its structures lower property values or otherwise cause the environment or quality of life to deteriorate. However, if damage occurs specifically from the negligent operation of the sewer and drainage system, that nuisance would be considered temporary, with the cause of action accruing upon the occurrence of the damage rather than upon the installation of the system. If a landowner seeks to establish a private nuisance cause of action against one whose conduct also constitutes a public nuisance, the private action may be barred by the statute of limitations, even though the running of the statute will not legalize the public nuisance aspect of the conduct. n133

COMPUTER-ASSISTED RESEARCH:

LEXIS: Private w/5 nuisance w/50 statute of limitation

§ 67.04(c)(2) Laches in Actions for Equitable Relief.

In some states actions to *recover damages* from private nuisances are governed by specific statutes of limitations, and in some states even an action to *abate* a private nuisance may be governed by a specific statute of limitations. n134 Usually, however, actions to abate a nuisance, as matters for equitable relief, are not subject to the same limitations periods as actions at law to recover damages. Equitable actions can become time-barred under the equitable doctrine of laches, which denies relief to a suitor who has been guilty of unconscionable delay in pressing the demand or the suit.

No exact formula governs the application of laches. In general, the principles of laches are that the suit must be commenced with reasonable promptness, n135 but even an unreasonable delay will not bar the action if the delay has not caused the defendant's situation to change for the worse. n136 Laches will not bar an action to abate a continuing nuisance. n137 In reported litigation, the defense of laches is seldom raised and seldom sustained. However, the presence of this restraint sometimes places potential plaintiffs in a dilemma. If a potential plaintiff observes activity on the defendant's land that threatens to create a nuisance for the plaintiff, the doctrine of laches may prompt the plaintiff to act early to abate that activity. A potential plaintiff may not want to passively stand by and observe the construction of an improvement that will cause a nuisance and then act to remove the construction only after it is completed, n138 yet an action may not be permitted that is based merely on fear that the structure will likely cause a nuisance. n139 Occasionally a suit will be permitted under those circumstances, if the plaintiff shows a reasonable certainty that the structure, when completed, will result in a nuisance. n140

COMPUTER-ASSISTED RESEARCH:

LEXIS: Private w/5 nuisance w/50 laches

§ 67.04(d) Right to Jury Trial.

Under the common law an action to recover money damages for private nuisance was triable by jury. n141 In modern American jurisdictions the right to a jury trial in such actions is constitutional n142 and cannot be defeated by legislation. n143 Individual litigants, however, may waive the right to a jury trial in such actions. n144

The right to jury trial does not extend to suits in equity seeking to abate a nuisance and where no damages are sought. n145 Occasionally, a state statute will authorize a jury trial for even these equitable actions. In some states, when the plaintiff seeks both the legal relief of money damages and the equitable relief of injunction, the parties may have a jury trial only on the legal issues, such as the existence of the nuisance and the amount of the damages, n146 while in other states neither party has a right to a jury trial on any of the issues in such a case. n147

COMPUTER-ASSISTED RESEARCH:

LEXIS: Private w/5 nuisance w/50 jury w/10 (right or entitle!)

FOOTNOTES:
(n1)Footnote 94. *See, e.g., Knoff v. American Crystal Sugar Co., 380 N.W.2d 313 (N.D. 1986)* (tenant may recover for damage to leasehold interest); *Upper Chattahoochee Riverkeeper Fund v. City of Atlanta, 986 F. Supp. 1406 (N.D. Ga. 1997); Hoffman v. United Iron and Metal Co., 671 A.2d 55 (Md. App. 1996)* (ownership of land is not necessary; possession of land near alleged nuisance is sufficient); *Kizer v. Finch, 672 So. 2d 511 (Ala. 1995)* (subdivision lot owners have a claim against a person who allowed dogs to leave waste on the right of way in front of the owners' lot); *McEneaney v. Chestnut Hill Realty Corp., 650 N.E.2d 93* (Mass. App.), *cert. denied, 652 N.E.2d 146 (Mass. 1995)* (nuisance action by condominium unit owner against the condominium association for a nuisance on the common areas); *Concerned Area Residents for the Environment v. Southview Farm, 834 F. Supp. 1410 (W.D.N.Y. 1993)* (a proper nuisance plaintiff may be any person whose rights to use or enjoy land have been invaded or interfered with). *Union Pac. R.R. v. Reilly Indus., Inc., 4 F. Supp. 2d 860 (D.C. Minn. 1998)* (owner of nonpossessory estate can recover in action for private nuisance).

(n2)Footnote 95. *Jacques v. Pioneer Plastics, Inc., 676 A.2d 504 (Me. 1996)* (when a nuisance continues, it creates a new cause of action each day; if land is transferred while the nuisance occurs, the transferee has a cause of action); *Young v. Kolkmeier Dev., Inc., 901 S.W.2d 257 (Mo. App. 1995)* (landowners can sue for nuisance that began before they acquired the land; they "stand in shoes" of prior owners who did not sue). *But see Koehn v. Ayers, 26 F. Supp. 2d 953 (S.D. Tex. 1998)* (current possessory interest does not include right prior nuisance claims where Texas law bars purchasers of real property from asserting claims for property damage that occurred before purchase unless deed expressly transfers cause of action to purchaser).

(n3)Footnote 96. *Bartlett v. Hume-Sinclair Coal Mining Co., 351 S.W.2d 214 (Mo. App. 1961)* (not essential that defendant be the owner); *Gray v. Westinghouse Elec. Corp., 624 N.E.2d 49 (Ind. App. 1993)* (one who creates the nuisance, even though not the owner of the land from which the nuisance emanates can be required to abate the nuisance). *But see Heath v. Wal-Mart Stores, Inc., 113 F. Supp. 2d 1294 (S.D. Ind. 2000).*

(n4)Footnote 97. *United States v. South Carolina Recycling & Disposal, Inc., 653 F. Supp. 984 (D.S.C. 1984)* (successor in interest held liable), called into doubt by *U.S. v. Olin Corp., 927 F. Supp. 1502 (S.D. Ala 1996); Gelman Sciences, Inc. v. Dow Chem. Co., 508 N.W.2d 142 (Mich. App. 1993)* (defendant may be liable for employing another to do work that the defendant knew was likely to create a nuisance).

(n5)Footnote 98. *Hasapopoulos v. Murphy, 689 S.W.2d 118 (Mo. App. 1985)* (damage from encroaching trees); *Gray v. Westinghouse Elec. Corp., 624 N.E.2d 49 (Ind. App. 1993)* (one who creates the nuisance, even though not the owner of the land from which the nuisance emanates can be required to abate the nuisance); *but see, Heath v. Wal-Mart Stores, Inc., 113 F. Supp. 2d 1294 (S.D. Ind. 2000); Gelman Sciences, Inc. v. Dow Chem. Co., 508 N.W.2d 142 (Mich. App. 1993); City of Saginaw v. Carter, 996 S.W.2d 1 (Tex. App. 1999)* (sets forth rules governing municipality's liability for private nuisance claim).

(n6)Footnote 99. *Attorney Gen. v. Ankersen, 385 N.W.2d 658 (Mich. App. 1986); Bellflower v. Pennise, 548 F.2d 776 (8th Cir. 1977)* (no liability where property is made the instrumentality of a nuisance by a third party); *Resolution Trust Corp. v. Rossmoor Corp., 40 Cal. Rptr. 2d 328 (1995)* (landlord not liable for leaks from tenant's underground storage tanks).

(n7)Footnote 100. *State v. Tippetts-Abbett-McCarthy-Stratton, 527 A.2d 688 (Conn. 1987)* (action against designer and construction supervisor of bridge); *Minaya v. Massachusetts Credit Union Share Ins. Corp., 467 N.E.2d 874 (Mass. 1984); New York Telephone Co. v. Mobil Oil Corp., 473 N.Y.S.2d 172 (1984).*

(n8)Footnote 101. *Keeley v. Manor Park Apts., Sec. 1, Inc., 99 A.2d 248 (Del. Ch. 1953).*

(n9)Footnote 102. *Roughton v. Thiele Kaolin Co., 74 S.E.2d 844 (Ga. 1953)* (successor knowingly continued the nuisance); *Union Texas Petroleum Corp. v. Jackson, 909 P.2d 131 (Okl. App. 1995)* (successor owners of property are liable for nuisances they acquire along with land if they knew or should have known about the existing nuisance).

See also Moore v. Texaco, Inc., 244 F.3d 1229 (10th Cir. 2001)(former landowner cannot be held liable for private nuisance concerning suit brought by subsequent landowner).

(n10)Footnote 103. *Wilshire Westwood Assocs. v. Atlantic Richfield Co., 24 Cal. Rptr. 2d 562 (1993).*

(n11)Footnote 104. *State Line Fishing & Hunting Club, Inc. v. City of Waskom, 754 F. Supp. 1104 (E.D. Tex. 1991)* (municipal corporation liable for maintaining nuisance); *Stein v. Highland Park Indep. Sch. Dist., 540 S.W.2d 551 (Tex. 1976)* .

(n12)Footnote 105. *Hogle v. H.H. Franklin Mfg. Co., 92 N.E. 794 (N.Y. 1910)* (employer liable for injuries to employee caused by other employees).

(n13)Footnote 106. *G. & H. Cattle Co. v. Commonwealth, 227 S.W.2d 420 (Ky. App. 1950)* (corporation could be liable for nuisance caused by officer).

(n14)Footnote 107. *Stiglianese v. Vallone, 637 N.Y.S.2d 284 (N.Y. City Civ. Ct. 1995), rev'd, 666 N.Y.S.2d 362 (1997)* (mother liable for nuisance caused by son's loud heavy metal music) *rev'd, 680 N.Y.S.2d 224 (N.Y. App. Div. 1998)* (reversing the appellate court and reinstating the trial court in part.).

(n15)Footnote 108. *Taggie v. Department of Nat. Resources, 276 N.W.2d 485 (Mich. App. 1979)* (governmental immunity not sufficient to prevent trial of claim).

(n16)Footnote 109. *Wayman v. Board of Educ., 215 N.E.2d 394 (Ohio 1966).*

(n17)Footnote 110. *Kurtigian v. City of Worcester, 203 N.E.2d 692 (Mass. 1965)* (city liable for nuisance arising on land owned and controlled by city).

(n18)Footnote 111. *Admiral Bldrs. Corp. v. Robert Hall Village, 427 N.E.2d 1032 (Ill. App. 1981)* (action for continuing nuisance, even though notice not given). *But see Milwaukee Metro. Sewage Dist. v. City of Milwaukee, 671 N.W.2d 345 (Wis. Ct. App. 2003)* (notice is a necessary component of a nuisance claim when the party being sued did not create the nuisance)

(n19)Footnote 112. *Garvey v. Public Serv. Coordinated Transp., 179 A. 33 (N.J. 1935)* (nuisance liability for either intentional or negligent conduct).

(n20)Footnote 113. *Kryger v. Dokken, 386 N.W.2d 481 (S.D. 1986)* (owner had no knowledge of abandoned well); *District of Columbia v. Fowler, 497 A.2d 456 (D.C. App. 1985).*

(n21)Footnote 114. *Baughman v. Cosler, 459 P.2d 294 (Colo. 1969)* (plaintiff injured by explosion on defendant's property).

(n22)Footnote 115. *Clinton v. Donnelly, 213 N.W. 262 (Iowa 1927)* (waiver of statutory notice requirement).

(n23)Footnote 116. *Clarke v. Boysen, 39 F.2d 800 (10th Cir. 1930), cert. denied, 282 U.S. 869, 51 S. Ct. 75, 75 L. Ed. 767 (1930)* (request to abate not required for one with prior notice).

(n24)Footnote 117. *Georgia Power Co. v. Moore, 170 S.E. 520 (Ga. App. 1933)* (exception to rule requiring request to abate).

(n25)Footnote 118. *City of Turlock v. Bristow, 284 P. 962 (Cal. App. 1930)* (notice not necessary).

(n26)Footnote 119. *Bishop v. Readsboro Chair Mfg. Co., 81 A. 454 (Vt. 1911)* (notice may be written or oral).

(n27)Footnote 120. *Bishop v. Readsboro Chair Mfg. Co., 81 A. 454 (Vt. 1911).*

(n28)Footnote 121. *Maynard v. Carey Constr. Co., 19 N.E.2d 304 (Mass. 1939)* (reasonable time to abate nuisance).

(n29)Footnote 122. *Childers v. New York Power & Light Corp., 89 N.Y.S.2d 11 (1949)* (notice required before self-help).

(n30)Footnote 123. *Corentin v. Town of Columbia, 294 A.2d 80 (Conn. Super. 1972)* (entry on land to abate).

(n31)Footnote 124. *Childers v. New York Power & Light Corp., 89 N.Y.S.2d 11 (1949)* (plaintiff abates when special harm threatened); *State v. Brown, 132 S.E. 5 (N.C. 1926); Lowth v. Town of Cheektowaga, 82 F.3d 563 (2d Cir.*

1996)(right to abate without notice is only available when injury is substantial and danger to health and life is imminent).

(n32)Footnote 125. *Sager v. Hunter Corp., 665 F. Supp. 575 (N.D. Ill. 1986)* (90-day statute of limitations).

(n33)Footnote 126. *Wood v. Alm, 516 P.2d 137 (Alaska 1973); Callaway v. City of Odessa, 602 S.W.2d 330 (Tex. App. 1980)* (cause of action not barred by statute of limitations); *Cutujian v. Benedict Hills Estates Ass'n, 49 Cal. Rptr. 2d 166 (1996)* (time of statute of limitations began to run when landowner demanded repair of slump in the surface of the land); *Pate v. Host LaJolla, Inc., 1998 U.S. Dist. Lexis 13976* (S.D. Ala) (statute bars claim against golf course); *Koehn v. Ayers, 26 F. Supp. 2d 953 (S.D. Tex. 1998)* (two year statute of limitations bars claim from 1935). *Benton v. Savannah Airport Comm'n, 525 S.E.2d 383 (Ga. App. 1999)* (action accrued when second runway was extended); *City of Macon v. Macrive Constr., Inc., 525 S.E.2d 418 (Ga. App. 1999)* (accrual when property first flooded); *Alfred v. The Right Stuff Food Stores, Inc., 525 S.E.2d 717 (Ga. App. 1999)* (action time barred); *Dabb v. Nynex Corp., 691 N.Y.S.2d 840 (1999)* (right of action accrued upon defendant's first interference with plaintiff's property).

(n34)Footnote 127. *City of Ottumwa v. Nicholson, 143 N.W. 439 (Iowa 1913).*

(n35)Footnote 128. *Baker v. Burbank-Glendale-Pasadena Airport Auth., 218 Cal. Rptr. 293 (1985), cert. denied, 475 U.S. 1017 (1986)* (action for inverse condemnation and nuisance). *Nieman v. NLO Inc., 108 F.3d 1546 (6th Cir. 1997)* (Statute of limitations caused dismissal in action for discharge of uranium from nuclear processing facility). *Blackburn v. Miller-Stephenson Chemical Co., Inc., 1998 Conn. Super LEXIS 2621* (Conn. Super. Sept. 11, 1998) (each injury causes new cause of action); *Southfund Partners v. City of Atlanta, 472 S.E.2d 499 (Ga. 1996)* (every continuance of the nuisance is a fresh nuisance); *Anderson v. State, 965 P.2d 783 (Haw. App. 1998)* (state diversion of stream may be continuing nuisance); *Sunnyside Fee Co., Inc. v. City of Portage, 588 N.W.2d 278 (Wisc. App. 1998). But see, Robertson v. City of High Point, 497 S.E.2d 300 (N.C. App. 1998)* (where city operated landfill adjacent to church's outdoor worship and social event area, suit dismissed because N.C. GEN. STAT. §1-52(3) provides that when "the trespass is a continuing one, the action shall be commenced within three years from the original trespass, and not therafter").

See also, Haas v. Sunset Ramblers Motorcycle Club, Inc., 726 N.E.2d 612 (Ohio Ct. App. 1999).

(n36)Footnote 129. *Aetna Cas. & Sur. Co. v. Gulf Resources & Chem. Corp., 600 F. Supp. 797 (D. Idaho 1985)* (environmental damage from smelting activity); *Campbell v. Anderson, 866 S.W.2d 139 (Mo. App. 1993)* (a five-year statute of limitations applied to actions against permanent nuisance, while a ten-year statute of limitations applied to actions against temporary, abatable nuisances). *Tri-County Inv. Group, Ltd. v. Southern States, Inc., 500 S.E.2d 22 (Ga. App. 1998)* (contamination of groundwater argued to be permanent nuisance from presence of landfill, but court held that it was a continuing nuisance).

See Castaic Lake Water Agency v. Whittaker Corp., 272 F. Supp. 2d 1053 (C.D. Cal. 2003) (if the nuisance is permanent, the statute of limitations begins to run on the creation of the nuisance and bars all claims after its passage)

(n37)Footnote 130. *McDaniel v. City of Cherryvale, 136 P. 899 (Kan. 1913). Carpenter v. Texaco, Inc., 646 N.E.2d 398 (Mass. 1995)* (seepage onto plaintiff's property began occurring more than three years before action was filed, and the action was barred by the statute of limitations).

(n38)Footnote 131. *Exxon Corp. v. Dunn, 474 So. 2d 1269 (Fla. App. 1985)* (action for damages arising from operation of industrial plant); *Filisko v. Bridgeport Hydraulic Co., 404 A.2d 889 (Conn. 1978).*

(n39)Footnote 132. *Chicago & E.I.R. Co. v. Loeb, 8 N.E. 460 (Ill. 1884)* (ashes and smoke thrown onto plaintiff's land).

(n40)Footnote 133. *Charnley v. Shawano Water-Power & River-Improvement Co., 85 N.W. 507 (Wis. 1901)*

(property damage from drain overflow).

(n41)Footnote 134. *Gibbs v. Gardner, 80 P.2d 370 (Mont. 1938)* (nuisance from maintaining a headgate in an irrigation ditch).

(n42)Footnote 135. *Moy v. Bell, 416 A.2d 289 (Md. App. 1980)* (seasonal surface water flooding), *cert. denied, 288 Md. 740 (1980).*

(n43)Footnote 136. *Riter v. Keokuk Electro-Metals Co., 82 N.W.2d 151 (Iowa 1957); Hostetter v. Sterner's Grocery, Inc., 134 A.2d 884 (Pa. 1957)* (slaughterhouse operated in residential neighborhood).

(n44)Footnote 137. *Wade v. Campbell, 19 Cal. Rptr. 173 (1962)* (injunction against operating dairy plant).

(n45)Footnote 138. *City of Wichita v. Boles, 135 P.2d 542 (Kan. 1943)* (building allegedly constructed in violation of zoning ordinance).

(n46)Footnote 139. *McQuail v. Shell Oil Co., 183 A.2d 581 (Del. 1962)* (complaint alleged only apprehension).

(n47)Footnote 140. *Strong v. Winn-Dixie Stores, Inc., 112 S.E.2d 646 (S.C. 1960)* (action to enjoin construction of supermarket).

(n48)Footnote 141. *Chessman v. Hale, 79 P. 254 (Mont. 1905)* (right to jury trial in action for damages). *But see* Armbruster v. Fitzgerald, Wis. App. LEXIS 185 (Wis. App. 2002) (no jury trial granted where damages were at issue but court entered default judgment).

(n49)Footnote 142. U.S. Const. Amend. 7.

(n50)Footnote 143. People *ex rel Lemon v. Elmore, 177 N.E. 14 (N.Y. 1931).*

(n51)Footnote 144. *Spaulding v. Cameron, 274 P.2d 177 (Cal. App. 1954)* (loose dirt washed onto plaintiff's property).

(n52)Footnote 145. State *ex rel Olson v. Guilford, 219 N.W. 770 (Minn. 1928), later appealed, 228 N.W. 326, rev'd on other grounds, Near v. Minnesota, 283 U.S. 697 (1931)* (no jury trial in equitable actions).

(n53)Footnote 146. *Guillot v. Town of Lutcher, 373 So. 2d 1385 (La. App. 1979).*

(n54)Footnote 147. *Soap Corp. of Am. v. Reynolds, 178 F.2d 503 (5th Cir. 1950)* (action against emission of nauseating odors).

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CHAPTER 67 THE PROPERTY LAW ASPECTS OF PRIVATE NUISANCE

8-67 Thompson on Real Property, Thomas Editions § 67.05

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§ 67.05 Trial Issues in Private Nuisance Actions.

[Go To Supp]

§ 67.05(a) Prima Facie Case; the Plaintiff's Burden of Proof.

In a private nuisance action the plaintiff has the burden of going forward to show that a nuisance exists, that an injury has occurred, and that the nuisance caused the injury. n148 If the private nuisance plaintiff is attacking conduct that also constitutes a public nuisance, the plaintiff must additionally show some special injury resulting from the public nuisance. n149 An example of such a public nuisance would be a business establishment that produces smells annoying the entire community, but a nearby landowner whose own business is adversely affected by the smells may also have a private nuisance right of action. n150

If the plaintiff's theory of the case rests upon nuisance in fact, rather than on nuisance as a matter of law, then, in addition to proving the existence of the nuisance, the plaintiff must show that the defendant's conduct in using property was unreasonable n151 and that the injury to the plaintiff's use of property was substantial. n152 Also, if the defendant did not create the nuisance, but only continued it, the plaintiff must show that adequate notice of the nuisance and opportunity to abate were given to the defendant before the action was filed. n153

If the relief sought by the plaintiff is for damages resulting from the nuisance, then, of course, the plaintiff must show the nature and extent of damages, usually in monetary terms, or at least in terms of how the plaintiff's use and enjoyment of land has been disturbed. n154

The plaintiff's burden of proof must be carried by a preponderance of the evidence. n155

COMPUTER-ASSISTED RESEARCH:

LEXIS: Private w/5 nuisance and burden w/5 proof w/10 plaintiff

§ 67.05(b) Defenses Available to Defendants.

Most of the defenses available to defendants in private nuisance actions are affirmative defenses that, in effect, concede

that a nuisance has occurred, but represent that no liability should flow from that nuisance because of one or more good reasons for the defendant's conduct. n156 In addition to those affirmative defenses described below, defendants also have available to them the various standard procedural defenses, such as defective service of process, improper jurisdiction, expired statute of limitations, and others. n157 Defendants have the burden of raising and establishing their various defenses. n158

§ 67.05(b)(1) Acquiescence, Consent, License.

The defense of acquiescence is closely related to and in some cases virtually indistinguishable from the doctrine of laches. Laches emphasizes the element of delay in showing that the plaintiff failed to oppose or object to the defendant's alleged nuisance; acquiescence emphasizes the plaintiff's knowledge of defendant's activities and their consequences while failing to object to them. In some cases the two doctrines are virtually merged because they are complementary: if a delay is unreasonable for purposes of a laches defense, the evaluation of reasonableness may be affected by whether the plaintiff had either actual or constructive knowledge of the defendant's activities; whether the plaintiff's knowledge of the defendant's activities is considered acquiescence may be affected by how long the awareness persisted.

If a prospective plaintiff knows of the defendant's activity on the defendant's land, and is or ought to be aware of the potential of that activity for causing a private nuisance, and yet the potential plaintiff raises no objection until the defendant's activity actually results in the nuisance, the plaintiff may, by acquiescence, be estopped from seeking relief against the defendant. Such a defense, however, will not be allowed unless the plaintiff's inactivity influenced or prompted the continuing of the defendant's conduct. n159 This point is illustrated by a case in which a landowner sold part of her property to the defendant, knowing that the defendant intended to build a carbon-black plant on the land; neither the seller nor her lessee could later complain about the soot and smoke from the plant's operation. n160

The defense of acquiescence is, in some states, available only against the party who actually engaged in acquiescence, but not against any successor in interest. n161

The defense of acquiescence is also not available against a defendant who knew of the conduct or activity that would eventually cause the nuisance, but did not know or could not have known that a nuisance would result from such conduct. n162 Thus, a plaintiff who acquiesces in certain activities conducted on the defendant's property, which activities then sometime later result in a nuisance, may not be vulnerable to the defense of acquiescence. n163

If an affirmative defense may rest upon the passivity of plaintiff's acquiescence, then naturally such a defense would be available where the plaintiff affirmatively permits the activity that results in the private nuisance. n164 If this permission or consent is in the form of a license, the defense for the defendant is complete, n165 especially if the defendant's activity cannot be carried on in any other way that does not create a private nuisance for the plaintiff. Some such licenses have been construed to permit the activity only if it can be carried on without creating a nuisance, in which case the existence of the license is not a defense. n166 A common setting in which consent or license may arise is where the plaintiff obtains a title to land already burdened with an easement or already subject to mineral rights held by another. When mineral rights are severed and the holder of the rights attempts to extract the minerals, the prior severance of the mineral rights often carries with it a consent or license to employ reasonable extraction techniques, and the landowner must endure activities on the surface of the land that would otherwise constitute both a nuisance and a trespass. n167 Another type of license also provides a defense to the defendant. When by zoning ordinance or other statutory authorization a city allows the construction of a potential public and private nuisance, a license permitting the nuisance is sometimes created. The plaintiff must meet a higher threshold to show actionable impact on his property. n168

COMPUTER-ASSISTED RESEARCH:

LEXIS: Private w/5 nuisance w/30 defense!

§ 67.05(b)(2) Prescription.

It is possible for a landowner to have carried on activities on the land that create private nuisances on other land for such a long time that the landowner obtains a prescriptive right to continue the nuisance activity. Such prescriptive rights are gained in the same way as prescriptive rights generally. The use must be exclusive, adverse to the landowner against whom it is asserted, under a claim of right (which means, essentially, that the user intends to assert the use), with the knowledge or acquiescence of the landowner against whom the use is exercised (meaning that the use must be openly conducted), and continuous for the prescriptive period. In the context of private nuisance, the alleged prescriptive use, throughout the entire prescriptive period, must have produced substantially the same harm. n169

The prescriptive right to engage in conduct that produces a public nuisance is broadly recognized, n170 unless the public nuisance is also a private nuisance. However, because one may not normally gain adverse possession title or prescriptive use rights against a governmental entity, prescription is usually not a defense against a charge of public nuisance. n171 In one older case whose decision would probably not be upheld today, a cannery operator who openly and continually dumped refuse into a non-navigable stream for more than thirty years obtained a prescriptive right to continue doing so over the protest of downstream landowners. n172 A few states allow the defense of prescription even if the private nuisance also constitutes a public nuisance. n173

As summarized above, in establishing a prescriptive right to continue use of land that constitutes a nuisance against some other landholder, a defendant must show n174 the usual elements that such a prescriptive right is exclusive, adverse n175 to the plaintiff, continuous and uninterrupted n176 for the prescriptive period, with the actual or constructive knowledge or the acquiescence n177 of the plaintiff. The prescriptive period begins to run from the time the plaintiff is injured. n178

COMPUTER-ASSISTED RESEARCH:

LEXIS: Private w/5 nuisance w/50 prescript!

§ 67.05(b)(3) Necessity.

Occasionally, a private nuisance defendant may claim that the continuation of the nuisance is compelled by a necessity, which term in its broader sense includes all of the self-interests of the defendant prompting the creation or the continuation of the nuisance, including necessity, convenience, and economic interest. Necessity is not a valid defense in an action for damages, n179 but in an action to abate a nuisance, necessity may be considered as one of the factors in achieving a balancing of the conveniences or assessing the comparative injury to the parties. n180 For instance, the operator of a chemical phosphate fertilizer plant was able to keep the plant in operation over complaints of nearby private landowners, because the plant emissions had already been reduced as much as technically possible. n181

COMPUTER-ASSISTED RESEARCH:

LEXIS: Private w/5 nuisance w/50 necessity

§ 67.05(b)(4) Legislative Authority.

Occasionally, certain activities conducted on real property are specifically authorized by legislation. A few courts have held that such specific legislative authorization for conduct that would normally create a private nuisance is a valid defense to an action for damages n182 or for abatement. n183 However, the majority of courts hold that even specific legislative authority for particular conduct on land does not authorize such conduct if it creates a private nuisance. n184 Occasionally, the statute which authorizes the specific activity also prohibits the activity being conducted in any way that creates a nuisance, and imposes nuisance liability if a nuisance arises. n185 It has also been held that, if an activity

conducted under specific legislative authority also creates a nuisance, the victim of the nuisance may have a claim for a compensable regulatory taking. n186 Thus, a property owner near a railroad tunnel that had been constructed under federal authority was compensated for damage caused by emissions from trains while they were in the tunnel. n187 An action in state court under state law may not be brought if the field has been properly preempted by federal legislation. n188

COMPUTER-ASSISTED RESEARCH:

LEXIS: Private w/5 nuisance w/100 legisl! w/5 author!

§ 67.05(b)(5) Priority.

That the plaintiff has "come to the nuisance," otherwise known as the defense of priority, has only limited life today. If the defendant's conduct becomes a private nuisance for the plaintiff, but only because the plaintiff moved to the area after the defendant's conduct began, this circumstance today is usually not deemed significant enough to constitute a defense, either against actions for damages n189 or for abatement. n190 However, even if not a complete defense, "coming to the nuisance" is still sometimes a significant factor in determining whether the defendant's conduct was reasonable. n191 "Coming to the nuisance" may also be a factor in acquiescence, if it shows that the plaintiff not only came to the area after defendant's conduct had commenced, but also had knowledge of the nuisance condition before arriving at the troubled site. n192

COMPUTER-ASSISTED RESEARCH:

LEXIS: Private w/5 nuisance w/100 (priority or (com! w/5 nuisance)) w/20 defense

FOOTNOTES:
(n1)Footnote 148. *Haenchen v. Sand Prods. Co., 626 P.2d 332 (Okla. App. 1981)* (action to recover damages to farmland and to abate flooding); *Cain v. Rust Indus. Cleaning Servs., 969 S.W.2d 464 (Tex. App. 1998)* (environmental remediation company not liable to landowner absent any evidence that the contamination was caused because of remediation company's action).

(n2)Footnote 149. *Anderson v. W. R. Grace & Co., 628 F. Supp. 1219 (D. Mass. 1986)* (private action for special damage from public nuisance), *aff'd, Anderson v. Beatrice Foods Co., 900 F.2d 388 (1st Cir. 1990), cert denied, Anderson v. Beatrice Foods Co., 498 U.S. 891 (1990); Hay v. Oregon Dept. of Transp., 719 P.2d 860 (Or. 1986),* abrogated by *Kay v. David Douglas School Dist., 738 P.2d 1389 (Or. 1987).*

(n3)Footnote 150. *Aldrich v. City of Minneapolis, 53 N.W. 1072 (Minn. 1893).*

(n4)Footnote 151. *Jewett v. Deerhorn Enters., 575 P.2d 164 (Or. 1978)* (action to enjoin operation of a pig farm).

(n5)Footnote 152. *Sandifer Motors, Inc. v. City of Roeland Park, 628 P.2d 239 (Kan. App. 1981)* (action for flood damage).

(n6)Footnote 153. *Castle v. Smith, 36 P. 859 (Cal. 1894)* (damages recovered for overflow of water onto plaintiff's land).

(n7)Footnote 154. *Shaw v. Owen, 90 So. 2d 179 (Miss. 1956)* (injunction regarding operation of cotton gin).

(n8)Footnote 155. *Dunlop v. Daigle, 444 A.2d 519 (N.H. 1982)* (dog kennel alleged to be a nuisance); *State ex rel. Pizza v. Carter, 622 N.E.2d 1194 (Ohio 1993)* (clear and convincing evidence required).

(n9)Footnote 156. *West v. CSX Transp., Inc., 498 S.E.2d 67 (Ga. App. 1998)* (one who creates nuisance is liable for

it even after selling the property); *A to Z Paper Co. v. Carlo Ditta, Inc., 720 So. 2d 703 (La. App. 1998)* (court was not wrong in denying preliminary injunction to enjoin construction since there could be no nuisance until the facility began operation).

(n10)Footnote 157. *Parker v. Barefoot, 502 S.E.2d 42 (N.C. App. 1998), rev'd, 519 S.E.2d 315 (N.C. 1999).*

(n11)Footnote 158. *Hawaii v. Nobriga, 873 P.2d 110 (Haw. App. 1994), overruled on other grounds by Hawaii v. Maelega, 907 P.2d 758 (Haw. 1995)* (a landowner was convicted of animal nuisance in keeping 25-50 roosters when he offered no evidence in support of his "defenses" that he kept the roosters as a commercial enterprise or for food purposes). *Parker v. Barefoot, 502 S.E.2d 42 (N.C. App. 1998), rev'd, 519 S.E.2d 315 (N.C. 1999)* (defense raised by defendants, namely that he used state-of-the-art technology and was not negligent, was not sufficient to defend the operation of an open pit lagoon for storing waste from hogs).

(n12)Footnote 159. *Kellogg v. Village of Viola, 227 N.W.2d 55 (Wis. 1975)* (notice precluded defendant from asserting estoppel as a defense).

(n13)Footnote 160. *Crawford v. Magnolia Petr. Co., 62 S.W.2d 264 (Tex. Civ. App. 1933).*

(n14)Footnote 161. *Curry v. Farmers Livestock Mkt., 343 S.W.2d 134 (Ky. 1961); Alabama Great S. R. Co. v. Barclay, 59 So. 169 (Ala. 1912)* (right of action against creation of a nuisance, and acquiescence to the nuisance, is attributed to the landowner at the time the nuisance is created and that attribution does not pass to a vendee).

(n15)Footnote 162. *Jones v. Rumford, 392 P.2d 808 (Wash. 1964)* (injunction against operation of a chicken breeding plant).

(n16)Footnote 163. *Ferguson v. City of Keene, 279 A.2d 605 (N.H. 1971)* (action against airport operator for using area behind plaintiff's house as a warm-up area); *Kellogg v. Village of Viola, 227 N.W.2d 55 (Wis. 1975).*

(n17)Footnote 164. *Crawford v. Magnolia Petr. Co., 62 S.W.2d 264 (Tex. Civ. App 1933)* (plaintiff estopped because of prior knowledge of nuisance).

(n18)Footnote 165. *Sierra Screw Prods. v. Azusa Greens, Inc., 151 Cal. Rptr. 799 (1979)* (discussion of consent in form of a license); *Beck Dev. Co. v. Southern Pac. Transp. Co., 52 Cal. Rptr. 2d 518 (Cal. App. 1996)*(defense of consent barred landowner from obtaining injunctive relief against a prior owner who obtained consent for conduct that polluted the premises); *Swanson v. Warner, 865 P.2d 493 (Or. App. 1993)* (as a matter of law, conduct that is permitted by agreement between the parties cannot be considered an unreasonable and substantial interference with plaintiff's use of land).

(n19)Footnote 166. *Pitsenbarger v. Northern Nat. Gas Co., 198 F. Supp. 665 (S.D. Iowa 1961)* (underground gas storage); *Mortkowitz v. Texaco, Inc., 842 F. Supp. 1232 (N.D. Cal. 1994)* (a prior property owner's consent for a service station operation on the property was not consent for use of a leaking pipe that caused a nuisance on plaintiff's nearby land).

(n20)Footnote 167. *Fourseam Coal Corp. v. Combs, 246 S.W.2d 988 (Ky. 1952)* (acceptance of title with mineral rights reserved in another creating estoppel against complaining of nuisance related to mineral rights).

(n21)Footnote 168. *Commerce Oil Refining Corp. v. Miner, 281 F.2d 465 (1st Cir. 1960).*

(n22)Footnote 169. *Curry v. Farmers Livestock Mkt., 343 S.W.2d 134 (Ky. 1961)* (livestock barn and market); *Beam v. Birmingham Slag Co., 10 So. 2d 162 (Ala. 1942); Hoffman v. United Iron & Metal Co., 671 A.2d 55 (Md. App. 1996)* (owners of auto shredding facility acquired by prescription a right to maintain a nuisance of excessive noise, explosions and air pollutants).

(n23)Footnote 170. *See, e.g., Goldstein v. Potomac Elec. Power Co., 578 F.2d 975 (4th Cir. 1978).*

(n24)Footnote 171. *City of Aberdeen v. Wellman, 352 N.W.2d 204 (S.D. 1984)* (injunction against gravel and road construction activities).

(n25)Footnote 172. *Anneberg v. Kurtz, 28 S.E.2d 769 (Ga. 1944).*

(n26)Footnote 173. *Anneberg v. Kurtz, 28 S.E.2d 769 (Ga. 1944)* (right to use water course on another's land may be acquired by prescription); *Felton v. Wedthoff, 151 N.W. 727 (Mich. 1915).*

(n27)Footnote 174. *Kafka v. Bozio, 218 P. 753 (Cal. 1923)* (defendant has burden of proving prescriptive right).

(n28)Footnote 175. *Prijatel v. SIFCO Indus., 353 N.E.2d 923 (Ohio 1974)* (activity was carried on openly and under claim of right).

(n29)Footnote 176. *Goldstein v. Potomac Elec. Power Co., 578 F.2d 975 (4th Cir. 1978)* (for prescriptive right, nuisance must be continuous and uninterrupted for at least twenty years).

(n30)Footnote 177. *Ricou v. International Paper Co., 117 F. Supp. 128 (W.D. La. 1953)* (attempted claim of servitude by prescription).

(n31)Footnote 178. *Barakis v. American Cyanamid Co., 161 F. Supp. 25 (N.D. Tex. 1958)* (limitation period could begin only when damage was incurred).

(n32)Footnote 179. *Smith v. Pittston Co., 127 S.E.2d 79 (Va. App. 1962); Evans v. Moffat, 160 A.2d 465 (Penn. Super. 1960)* (utility of defendant's conduct did not outweigh gravity of harm to plaintiff).

(n33)Footnote 180. *Farmers Ins. Exch. v. State, 221 Cal. Rptr. 225 (1985)* (necessity is a complete defense to the torts of trespass to chattels and nuisance).

(n34)Footnote 181. *Koseris v. J.R. Simplot Co., 352 P.2d 235 (Idaho 1960).*

(n35)Footnote 182. *Genco v. Connecticut Light & Power Co., 508 A.2d 58 (Conn. App. 1986)* (statute immunized defendant from liability for nuisance).

(n36)Footnote 183. *Farmers Ins. Exch. v. State, 221 Cal. Rptr. 225 (1985)* (the state and its agents were immune from liability under a nuisance theory).

(n37)Footnote 184. *Montgomery v. Bremer County Bd. of Supvrs., 299 N.W.2d 687 (Iowa 1980)* (governmental body may not authorize the creation of a nuisance by creating an industrial zone); *Payne v. Skaar, 900 P.2d 1352 (Idaho 1995)*(despite Right to Farm Act a cattle feedlot could still be found to be a nuisance); *Leaf River Forest Prods., Inc. v. Ferguson, 662 So. 2d 648 (Miss. 1995)* (right to farm legislation defined timber for paper mill as a "crop," but statute did not insulate mill from nuisance liability for dumping sludge into river); *Friends of H Street v. City of Sacramento, 24 Cal. Rptr. 2d 607 (1993)* (a statutorily authorized act cannot, by itself, give rise to nuisance liability, but the manner in which such an act is conducted can result in nuisance liability).

See also Jones v. Union Pacific Railroad Co., 94 Cal.Rptr.2d 661, (Cal. Ct. App. 2000).

Brown v. Scioto County Bd. of Comm'rs, 622 N.E.2d 1153 (Ohio App. 1993) (a licensed sanitary landfill cannot be a nuisance unless it is operated negligently). *Union Pac. R.R. v. Reilly Indus., Inc., 4 F. Supp. 2d 860 (D.C. Minn. 1998)* (claim of nuisance encompasses the infringement of legal rights or interest in property notwithstanding legal conduct); *Tiegs v. Watts, 954 P.2d 877 (Wash. 1998)* (although business not originally nuisance when authorized by proper authority, it may constitute nuisance if it is conducted in manner which violates nuisance statutes); *Horne v. Haladay,*

728 A.2d 954 (Penn. Super. 1999) (action barred by one-year statute of limitations under the Right to Farm Act).

See Milwaukee Metro. Sewage Dist. v. City of Milwaukee, 671 N.W.2d 345 (Wis. Ct. App. 2003) (legislative authority permitting the operation of a business does not permit the business to operate in a matter that would create or maintain a nuisance).

(n38)Footnote 185. *Borland v. Sanders Lead Co., 369 So. 2d 523 (Ala. 1979)* (compliance with state air pollution control act did not shield defendant from nuisance liability).

(n39)Footnote 186. *Steele v. Queen City Broadcasting Co., 341 P.2d 499 (Wash. 1959)* (erection of a television tower caused special damage to plaintiff).

(n40)Footnote 187. *Richards v. Washington Term. Co., 233 U.S. 546 (1914).*

(n41)Footnote 188. *Broyde v. Gotham Tower, Inc., 13 F.3d 994* (6th Cir.), *cert. denied, 511 U.S. 1128 (1994)* (a state nuisance action complaining of radio signal interference was held preempted by the Federal Communications Act, removing regulation of radio transmitting apparatus from state or local law). *United Water New York, Inc. v. Hudson Techs., Inc., 696 N.Y.S.2d 642 (1999)* (state court has concurrent jurisdiction over claims under federal Resource Conservation and Recovery Act (RCRA)).

(n42)Footnote 189. *Weida v. Ferry, 493 A.2d 824 (R.I. 1985)* (coming to the nuisance is not an absolute bar to recovery); *Egan v. Catholic Bishop of Lincoln, 363 N.W.2d 380 (Neb. 1985).*

(n43)Footnote 190. *Anne Arundel County Fish & Game Conservation Ass'n v. Carlucci, 573 A.2d 847 (Md. App. 1990)* (plaintiff's purchase of property after gun club was established does not bar suit for abatement), *cert denied, Fish & Game Ass'n v. Carlucci, 580 A.2d 218 (Md. 1990). See* City of Lebanon v. Georgia-Pacific Corp., 2004 D. Or. LEXIS 9054 (No. 02-6351-AA, May 11, 2004) (prior existence of an objectionable condition is one factor to be considered in determining whether a nuisance exists); *Weida v. Ferry, 493 A.2d 824 (R.I. 1985).*

(n44)Footnote 191. *Page County Appliance Ctr., Inc. v. Honeywell, Inc., 347 N.W.2d 171 (Iowa 1984)* (priority of location and occupation are circumstances of considerable weight); *Beck Dev. Co. v. Southern Pacific Transp. Co., 44 Cal. App. 4th 1160 (1996)* (consent of previous landowner to nuisance activities creates a bar analogous to priority for subsequent landowners); *Williams v. Oeder, 659 N.E.2d 379 (Ohio App. 1995)* ("coming to the nuisance" could be considered as a defense).

See Eaton v. Cormier, 748 A.2d 1006 (Me. 2000) (stating that "coming to the nuisance" does not bar a suit for nuisance, but it may be relevant in determining which remedy will be applied).

(n45)Footnote 192. *Patton v. Westwood Country Club, 247 N.E.2d 761 (Ohio App. 1969)* (nuisance action against abutting golf course denied partly because of plaintiff's prior knowledge of the golf course).

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CHAPTER 67 THE PROPERTY LAW ASPECTS OF PRIVATE NUISANCE

8-67 Thompson on Real Property, Thomas Editions § 67.06

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§ 67.06 Remedies in Private Nuisance Actions.

[Go To Supp]

One who complains of a private nuisance may obtain relief in the form of money damages, or abatement of the nuisance, or some combination of both.

§ 67.06(a) Damages.

§ 67.06(a)(1) Permanent and Temporary Damages.

In a private nuisance action where money damages are sought, the plaintiff must determine whether to request "permanent" or "temporary" damages. Permanent damages should be requested if the nuisance itself is permanent; permanent nuisances have been defined as nuisances that are constant and continuous, unabatable, and that produce all the identifiable damages at once. n193 A nuisance is permanent if the damage produced by the nuisance is permanent in nature and the damage can be anticipated and estimated with reasonable certainty. n194 In other words, the entire injury results all at once from the creation and continuance of the nuisance. n195

Permanent nuisances are typically caused by structures or activities that themselves are lawful and therefore cannot be abated. n196 Permanent nuisances have resulted from such legitimate structures or activities as dams, n197 sewer and drainage systems, n198 a lakeside loading dock, n199 a cement plant, n200 a public dump, n201 a railway embankment, n202 a concrete products plant, n203 gasoline and storage tanks, n204 an oil refinery, n205 and mining facilities. n206 Although a permanent nuisance may be created by an otherwise proper or legitimate structure or activity, the mere negligent construction or operation of an otherwise lawful structure or activity constitutes a temporary rather than a permanent nuisance. n207

Once it has been determined that a nuisance is permanent and that permanent damages are to be recovered, it must be remembered that such damages may be recovered only once. This single recovery consists of all damages which have been suffered up to the time of the action as well as of damages which will foreseeably occur in the future as a result of the nuisance. n208 Damages for temporary nuisances, on the other hand, consist only of those incurred up to the time of the action and do not include prospective damages. n209 Additional legal actions would be necessary to recover

damages resulting from recurrences of a temporary nuisance. n210 Damages for mental anguish resulting from a continuing nuisance may be recovered. n211

COMPUTER-ASSISTED RESEARCH:

LEXIS: Private w/5 nuisance w/100 (permanent or temporary w/3 damage)

§ 67.06(a)(2) Recovery for Harm to Property.

When a plaintiff recovers permanent damages for harm to property, those damages are measured by depreciation in the market value of the property. Those damages are measured by whatever depreciation in the market value of the property has been caused by the nuisance. n212 Loss of rental value may be the appropriate measure of damages, if the property itself is not harmed but its usefulness has been impaired. n213 A plaintiff may not recover permanent damages for both the loss of market value and loss of rental value. n214

If temporary damages are recovered for harm to property, those damages are measured by the loss of the rental value or loss of use value of the property as a result of or during the continuance of the nuisance. n215 A few courts have held that lost profits may be recovered for harm to real property, if the nuisance affects a business enterprise being conducted on the plaintiff's property. n216

COMPUTER-ASSISTED RESEARCH:

LEXIS: Private w/5 nuisance w/100 damages w/30 (harm or value) w/5 property

§ 67.06(a)(3) Recovery for Personal Injury and Inconvenience.

In addition to harm to property, the plaintiff may also recover money damages for personal injury, and for personal and family discomfort, annoyance and inconvenience, suffered because of the nuisance. In most jurisdictions, n217 personal injury for which money damages are recoverable may include sickness, stress, and injury to health. Even if no physical illness or monetary loss is shown, n218 a plaintiff may still qualify for damages as a result of discomfort, annoyance or inconvenience caused by the nuisance. n219 If a plaintiff occupies residential rental premises, some courts have denied recovery of money damages for loss of rental value and for personal discomfort, believing that this constitutes a double recovery. n220

COMPUTER-ASSISTED RESEARCH:

LEXIS: Private w/5 nuisance w/100 person! w/3 injur! w/50 damages

§ 67.06(a)(4) Recovery of Exemplary Damages.

A plaintiff may recover exemplary damages if it is shown that the nuisance was maintained willfully and maliciously. n221 These conditions may be shown circumstantially, as in the case where a turkey processing plant was required to pay adjacent landowners $25,000 in actual damages and $15,000 in punitive damages, when plaintiffs showed that the defendant's sewage treatment lagoons were overloaded to more than twice their capacity, which caused odors and significant infestation to interfere with the plaintiffs' use and enjoyment of their land. n222

COMPUTER-ASSISTED RESEARCH:

LEXIS: Private w/5 nuisance w/100 damages w/10 exemplary

§ 67.06(a)(5) Mitigation of Damages.

Most courts do not require mitigation of damages by the plaintiff, n223 but a plaintiff who failed to avoid the damage at a time when it was possible to do so may obtain only a reduced recovery. n224 If a plaintiff does attempt to avoid or mitigate the harm caused by a temporary nuisance, reasonable expenditures made in such attempts may be recovered as damages. n225 In a typical case showing that mitigation of damages is not usually required, a business plaintiff damaged by flooding from an inadequate municipal culvert was held under no duty to mitigate. n226

COMPUTER-ASSISTED RESEARCH:

LEXIS: Private w/5 nuisance and mitigat! w/10 damages

§ 67.06(a)(6) Pleading and Proof of Damages.

Damages may be awarded even if the plaintiff's complaint has included only a prayer for general relief. n227 Of course, a plaintiff seeking private nuisance damages from conduct that is a public nuisance must also allege special damage. n228 Also, if a plaintiff seeks special damages for stress, inconvenience, or discomfort caused by the alleged nuisance, those must be specifically pleaded. n229 Pleading of special damages does not require that specific dollar amounts be pleaded, only that the specific types of damages be pleaded and proved. Determination of the precise amounts of those types of damages may be left to the trier of fact. n230 As in other issues in private nuisance cases, the plaintiff is required to prove these matters by a preponderance of the evidence. n231 Parties can also recover for damages that accrue during court proceedings. n232

COMPUTER-ASSISTED RESEARCH:

LEXIS: Private w/5 nuisance w/100 (proof or pleading) w/3 damages

§ 67.06(b) Judicial Abatement of the Nuisance.

Plaintiffs are often more interested in obtaining the abatement of an existing nuisance than they are in recovering money damages therefor. A court's power to abate a nuisance may also be extended to abate a prospective nuisance, either if the alleged nuisance is a nuisance as a matter of law or if the alleged nuisance in fact will inevitably occur if not abated. n233

§ 67.06(b)(1) Abatement of Continuing or Recurring Nuisances.

The relief of abatement is unavailable for permanent nuisances, which are by definition unabatable. Temporary nuisances, sometimes referred to as continuing or recurring nuisances, are subject to abatement. n234 If a temporary nuisance occurs only sporadically or in isolated incidences, a court may not grant the relief of abatement. n235

COMPUTER-ASSISTED RESEARCH:

LEXIS: Private w/5 nuisance w/50 abate! (relief or remedy)

§ 67.06(b)(2) Requirement of Substantial Injury.

Not only will a court not enjoin a sporadic nuisance, a court will also not enjoin a trivial nuisance. n236 Nuisances whose injury to the plaintiff are prospective or only threatened will be enjoined only if the threatened damage is an inevitable consequence of the condition if continued, and not merely a possibility of future injury. n237 A retail shoe store owner did not qualify for an injunction against the construction of a canopy and sign over a movie theater on adjacent property, because the plaintiff could not prove presently diminished rental value of the store and the court also deemed the interference with the light, air and view as insubstantial and immaterial. n238

COMPUTER-ASSISTED RESEARCH:

LEXIS: Private w/5 nuisance w/100 substantial w/3 injury

§ 67.06(b)(3) Requirements of Irreparable Harm or Inadequate Remedy at Law.

As with other forms of equitable relief, to qualify for abatement a plaintiff in a private nuisance action must show either that failure to abate will result in irreparable harm to the plaintiff or that there is no adequate remedy at law. n239 The harm is considered irreparable if the injury is a continuing or a repeated injury producing inconvenience or damage, even though it may not be subject to a precise standard of measurement. n240 The irreparable injury that is shown as a qualification for injunctive relief need not be a large injury n241 nor an injury that is absolutely irremediable. n242

That the remedy at law is inadequate is usually easy to establish in many nuisance cases, because the plaintiff is only required to show that, without abatement, legal relief alone will recover damages only up to the time of the action, and this will probably result in a succession of law suits to obtain damages from the future continuance or repeated occurrences of the nuisance. n243

COMPUTER-ASSISTED RESEARCH:

LEXIS: Private w/5 nuisance and (irreparable or inadequate) w/3 (injury or remedy)

§ 67.06(b)(4) The Requirement of "Clean Hands."

The equitable character of injunctive relief requires that any plaintiff seeking such equity must also have conducted its affairs equitably. Under the so-called "clean hands" doctrine, a court will not grant equitable relief to the plaintiff or to just one party if it appears that both parties are at fault. n244 Familiar maxims have long expressed this point: "he who seeks equity must do equity," and "he who comes into equity must come with clean hands." There are limits to the application of this restraint, however: for instance, plaintiffs who were connected to a city sewer system were not therefor precluded from complaining about the city's discharge of sewage into a stream, which discharged pollution then interfered with the plaintiff's enjoyment of their land. n245

COMPUTER-ASSISTED RESEARCH:

LEXIS: Private w/5 nuisance and (clean hands or must do equity)

§ 67.06(b)(5) The Possibility of Election of Remedies.

Under some circumstances, a private nuisance plaintiff may be limited in the relief sought by the doctrine of election of remedies. Of course, both legal and equitable forms of relief arising out of the same private nuisance action are concurrent and not exclusive, and may be sought together or separately. n246 If legal and equitable forms of relief are pursued in separate actions, such as in a court of law and in a court of equity, a situation that would seldom arise today, they should be pursued in concurrent actions, because an action for abatement which is not joined with a claim for damages precludes a later action for damages relating to the same period of time. n247 However, recovering damages in one action does not bar a later action for injunction. n248

COMPUTER-ASSISTED RESEARCH:

LEXIS: Private w/5 nuisance and elect! w/3 remedy

§ 67.06(b)(6) Pleading and Proof of Entitlement to Equitable Relief.

A complaint seeking abatement of the nuisance as a form of relief should allege enough factual details to show the existence of the type of nuisance that warrants equitable relief. n249 Such allegations should not be merely conclusory, n250 but should be allegations that effectively show irreparable injury and an inadequate remedy at law. n251 As in other aspects of nuisance litigation, a plaintiff seeking equitable relief usually is held to a standard of proving these matters by a preponderance of the evidence, n252 but some courts that are concerned about the seriousness of the remedy of injunctive relief require that plaintiffs meet the higher standard of proof by clear and satisfactory evidence. n253

COMPUTER-ASSISTED RESEARCH:

LEXIS: Private w/5 nuisance w/100 (proof or pleading) w/20 equit!

§ 67.06(b)(7) Enforcement of Decrees.

A court that issues a decree for abatement of a private nuisance may empower specific persons to carry out or supervise the execution of the decree. n254 A defendant or other person who disobeys the injunction can be held guilty of contempt of court. n255 Appropriate punishments for such contempt are fines or jail time. n256

COMPUTER-ASSISTED RESEARCH:

LEXIS: Private w/5 nuisance w/100 (abate! or enjoin) w/20 (execute! or enforce!)

§ 67.06(c) Self-help or Non-judicial Abatement of the Nuisance.

Only in rare circumstances is a prospective plaintiff in a private nuisance action permitted to use self-help in carrying out the abatement of a nuisance. The party intending to use self-help must give prior notice to the person causing the nuisance, n257 and this is especially necessary if the party intends to enter onto the property where the nuisance is caused. n258 Any self-help abatement must be accomplished without breach of the peace. n259 In a few circumstances, especially emergencies, both notice and the peacefulness requirement may be excused if abatement is urgently necessary to protect health, life, or property. n260

COMPUTER-ASSISTED RESEARCH:

LEXIS: Private w/5 nuisance and abate! w/50 self-help

FOOTNOTES:

(n1)Footnote 193. *Frank v. Environmental San. Mgt., Inc., 687 S.W.2d 876 (Mo. 1985)* (failure of leachate control caused permanent damage); *Briscoe v. Harper Oil Co., 702 P.2d 33 (Okla. 1985); West v. Luna, 1998 Tenn. App. LEXIS 560* (Tenn. App. Aug. 12, 1998) (temporary nuisances may abated by expenditure of time or money, while permanent nuisances cannot be abated by time or money).

See Shamsian v. Atlantic Richfield Co., 132 Cal. Rptr. 2d 635 (Cal. Ct. App. 2003) (permanent nuisance is generally one where a single occurrence causes permanent injury and damages are assessed one time only).

(n2)Footnote 194. *Chicago & E.I.R. Co. v. Loeb, 8 N.E. 460 (Ill. 1884)* (throwing of smoke and cinders was a permanent nuisance).

(n3)Footnote 195. *Kelso v. C.B.K. Agronomics, Inc., 510 S.W.2d 709 (Mo. App. 1974)* (nuisance damage produced all at once); *Wilshire Westwood Assocs. v. Atlantic Richfield Co., 24 Cal. Rptr. 2d 562 (1993)* (describing a "permanent nuisance" as a nuisance by which a single occurrence produces a permanent injury and the damages are assessable once

and for all).

(n4)Footnote 196. *O'Brien v. City of O'Fallon, 400 N.E.2d 456 (Ill. App. 1980)* (nuisances caused by lawful structures are considered permanent). *See Archer v. Eiland, 64 Fed. Appx. 676 (10th Cir. 2003)* (damages for permanent injury cannot be allowed where the nuisance is removable).

(n5)Footnote 197. *Fletcher's Gin, Inc. v. Crihfield, 423 F.2d 1066 (6th Cir. 1970)* (backwater from a dam caused a permanent nuisance).

(n6)Footnote 198. *O'Brien v. City of O'Fallon, 400 N.E.2d 456 (Ill. App. 1980)* (sewer system considered a permanent nuisance).

(n7)Footnote 199. *Obrecht v. National Gypsum Co., 105 N.W.2d 143 (Mich. 1960)* (dock was a permanent nuisance).

(n8)Footnote 200. *Boomer v. Atlantic Cement Co., 257 N.E.2d 870 (N.Y. 1970), on remand, 340 N.Y.S.2d 97 (1972), aff'd, 349 N.Y.S.2d 199 (1973)* (damages paid for nuisance caused by cement plant).

(n9)Footnote 201. *Lubbock v. Tice, 517 S.W.2d 428 (Tex. App. 1974)* (operation of landfill regarded as a nuisance).

(n10)Footnote 202. *St. Louis & S.F.R. Co. v. Stephenson, 144 P. 387 (Okla. 1914)* (embankment as a permanent nuisance).

(n11)Footnote 203. *Caldwell v. Knox Concrete Prods., Inc., 391 S.W.2d 5 (Tenn. App. 1964)* (noise from concrete products plant constituted a nuisance).

(n12)Footnote 204. *Vestal v. Gulf Oil Corp., 235 S.W.2d 440 (Tex. 1951)* (escaped gasoline vapors from tanks constituted a nuisance).

(n13)Footnote 205. *Akers v. Ashland Oil & Ref. Co., 80 S.E.2d 884 (W. Va. 1954)* (damage to land from oil), superseded by statute as stated in *Carter v. Willis, 117 S.E.2d 594 (W. Va. 1960).*

(n14)Footnote 206. *Severt v. Beckley Coals, Inc., 170 S.E.2d 577 (W. Va. 1969)* (coal mining facility was a permanent nuisance).

(n15)Footnote 207. *Caldwell v. Knox Concrete Prods., Inc., 391 S.W.2d 5 (Tenn. App. 1964)* (noise subject to abatement). *State ex rel. Smith v. Kermit Lumber & Pressure Treating Co., 488 S.E.2d 901(W. Va. 1997); Mangini v. Aerojet-Gen., 12 Cal. 4th 1087, 912 P.2d 1220 (1996)* (distinction drawn between continuing and permanent nuisances).

(n16)Footnote 208. *Oakwood Homeowners Ass'n v. Marathon Oil Co., 305 N.W.2d 567 (Mich. App. 1981)* (future and past damages for permanent injury). However, in a case where the jury did not distinguish between past and future damages and also awarded injunctive relief, the court did not order remittitur when the amount awarded could be supported by past damages alone. *Gillison v. Farrin, 632 A.2d 143 (Me. 1993). Northern States Power Co. v. Franklin, 122 N.W.2d 26 (Minn. 1963)* (against a permanent nuisance, one action can be maintained, and the recovery allowed is for all damages, past and prospective).

(n17)Footnote 209. *Baker v. Burbank-Glendale-Pasadena Airport Auth., 218 Cal. Rptr. 293 (1985), cert. denied, 475 U.S. 1017 (1986)* (recovery limited to actual damage suffered prior to the commencement of each action); *Sundell v. Town of New London, 409 A.2d 1315 (N.H. 1979), King v. City of Independence, 64 S.W.3d 335 (Mo. App. 2002)* (temporary nuisance damages should be determined by the diminution in the value of the property during the duration of the nuisance); *Scheufler v. General Host Corp., 126 F.3d 1261, 45 ERC (BNA) 1346,* (10th Cir. 1997) (continuing groundwater polluter pays for past but not future damages to crops); *Morsey v. Chevron, 94 F.3d 1470 (10th Cir. 1996)*

(Permanent and temporary damages denied to leaseholder pumping oil from old field. Private nuisance water injection by neighboring oil company that impacted plaintiff's pumping); *Renz v. 33rd Dist. Agric. Ass'n, 46 Cal. Rptr. 2d 67 (1996)* (damages incurred between commencement and conclusion of continuing nuisance action could be recovered); *Blackburn v. Miller-Stephenson Chem. Co., 1998 Conn. Super. LEXIS 2621* (Conn. Super. Sept. 11, 1998) (for permanent nuisance, measure of damages is depreciation in value of property; for temporary nuisance, measure of damages is temporary reduction in rental value, not depreciation in market value).

(n18)Footnote 210. *Pate v. City of Martin, 614 S.W.2d 46 (Tenn. 1981)* (damages for temporary nuisance may be recovered until nuisance is abated).

(n19)Footnote 211. *Simmons v. Board of Comm'rs of Bossier Levee Dist., 624 So. 2d 935 (La. App. 1993)* (mental anguish from loss of land and trees and from damages to property caused by a dredging-induced canal bank failure, the damage occurring over a period of up to six years).

(n20)Footnote 212. *Exxon Corp. v. Dunn, 474 So. 2d 1269 (Fla. App. 1985)* (damages from operation of oil refinery); *Frank v. Environmental San. Mgt., Inc., 687 S.W.2d 876 (Mo. 1985); Wilson v. Key Tronic Corp., 701 P.2d 518 (Wash. App. 1985); Memphis Zane May Assocs. v. IBC Mfg. Co., 952 F. Supp. 541,* (W.D. Tenn. 1996); *DeSanctis v. Lynn Water & Sewer Comm'n, 423 Mass. 112, 666 N.E.2d 1292 (1996); Hartman v. Texaco Inc., 123 N.M. 220, 937 P.2d 979 (N.M. App. 1997); Andersen v. Village of Little Chute, 549 N.W.2d 737 (Wis. App. 1996); Ravan v. Greenville County, 434 S.E.2d 296 (S.C. App. 1993). Santa Fe Partnership v. ARCO Prods. Co., 46 Cal. App. 4th 967 (1996)* (where the nuisance is continuing rather than permanent, damages are not available for diminution in the value of property).

(n21)Footnote 213. *Staley v. Sagel, 841 P.2d 379 (Colo. App. 1992)* (nuisance action against hog farmer for temporary damage to plaintiff's property value); *Midwest City v. Eckroat, 387 P.2d 123 (Okla. 1963); Golen v. The Union Corp., 718 A.2d 298 (Pa. Super. Ct. 1998)* (where hazardous waste contamination of neighboring property impacted ability to sell property but did not impact use of property, this was a damage without a legal injury, and no nuisance was found); *Tri-County Inv. Group Ltd. v. Southern States, Inc., 500 S.E.2d 22 (Ga. App. 1998)* (depreciation in usable or rental value ordinarily furnishes the measure of damages).

(n22)Footnote 214. *Beam v. Birmingham Slag Co., 10 So. 2d 162 (Ala. 1942).*

(n23)Footnote 215. *Frank v. Environmental San. Mgt., Inc., 687 S.W.2d 876 (Mo. 1985)* (leachates from landfill escaped into stream and damaged plaintiff's land); *Guzzardi v. Perry's Boats, Inc., 460 N.Y.S.2d 78 (1983), King v. City of Independence, 64 S.W.3d 335 (Mo. App. 2002); Hall v. Lovell Regency Homes Ltd. Partnership, 708 A.2d 344 (Md. 1998)* (in temporary nuisance plaintiff may recover damages for decrease in value or use or rental of his property).

(n24)Footnote 216. *Page County Appliance Ctr., Inc. v. Honeywell, Inc., 347 N.W.2d 171 (Iowa 1984)* (radiation from computers interfered with display television reception).

(n25)Footnote 217. *Bradley v. American Smelting & Ref. Co., 635 F. Supp. 1154 (W.D. Wash. 1986); Sher v. Leiderman, 226 Cal. Rptr. 698 (1986)* (emotional distress as proper element of damages in a nuisance action); *Fletcher v. City of Independence, 708 S.W.2d 158 (Mo. App. 1986); Barrett v. Atlantic Richfield Co., 95 F.3d 375 (5th Cir. 1996)* (plaintiff's claim for personal injury fails for lack of sufficient evidence to avert summary judgment).

(n26)Footnote 218. *Exxon Corp. v. Dunn, 474 So. 2d 1269 (Fla. App. 1985)* (unnecessary to prove physical impact in order to recover damages).

(n27)Footnote 219. *Alderman v. Murphy, 486 So. 2d 1334 (Fla. App. 1986); Taylor v. Leardi, 502 N.Y.S.2d 514 (1986)* (damages awarded for personal distress and discomfort resulting from blasting activities); *Echternach v. D.H. Martin Petroleum Co., 1997 U.S. Dist. LEXIS 15677 (N.D. Ill. 1997)* (damages awarded for loss of sleep, inability to open windows and doors); *Heath v. E.I. DuPont de Nemours & Co., 1996 U.S. Dist. LEXIS 9689 (W.D.N.Y. 1996)*

(annoyance, physical discomfort, ill health and various characterizations of emotional harm); *Ahnert v. Getty, 1997 Conn. Super. LEXIS 890* (Conn. Super. Apr. 4, 1997) (plaintiffs unable to open windows due to dust, or to carry on a conversation due to noise); *Hall v. Rivera, 1996 Conn. Super. LEXIS 2819* (Conn. Super. Oct. 29, 1996) (lessee's child injured by lead-base paint); *Kuper v. Lincoln-Union Elec. Co., 557 N.W.2d 748 (1996)* (award for stray voltage effect on dairy cattle reversed on grounds that public utilities are immune from nuisance claims, and stray voltage determined not to be a nuisance); *Sramek v. Korth, 207 Wis.2d 642, 559 N.W.2d 924 (Wis. App. 1996)* (barking dogs held to be cause of sleep loss to group home patient); *City of Warner Robins v. Holt, 470 S.E.2d 238* (Ga. App.), *reh'g denied, 220 Ga. App. 913 (1996)* (measure of damages for discomfort, loss of peace of mind, and annoyance of plaintiff is for the enlightened conscience of the jury, and the court has no power to adjust the amount unless the finding was due to bias, prejudice or was influenced by corrupt means).

(n28)Footnote 220. *City of Wichita Falls v. Sullivan, 22 S.W.2d 982* (Tex. Civ. App.), *aff'd, 39 S.W.2d 882 (Tex. Com. App. 1931)* (evidence of discomfort relevant to loss of rental value but not to direct recovery of damages); *Miller v. Carnation Co., 564 P.2d 127 (Colo. App. 1977).*

(n29)Footnote 221. *Radcliff Homes, Inc. v. Jackson, 766 S.W.2d 63 (Ky. App. 1989)* (defendant made no effort to correct nuisance condition); *Miller v. Cudahy Co., 592 F. Supp. 976 (D. Kan. 1984), cert. denied, Cudahy Co. v. Miller, 492 U.S. 926 (1989); Exxon Corp. v. Yarema, 516 A.2d 990 (Md. 1986), cert. denied, Exxon Corp. v. Yarema, 522 A.2d 392 (Md. 1987); Taylor v. Leardi, 502 N.Y.S.2d 514 (1986); Tant v. Dan River, Inc., 345 S.E.2d 495 (S.C. 1986); Karpiak v. Russo, 676 A.2d 270 (Pa. Super. Ct. 1996)* (plaintiff failed to show evil, outrageous, or indifferent conduct required to win punitive awards). *Tri-County Inv. Group, Ltd. v. Southern States, Inc., 500 S.E.2d 22 (Ga. App. 1998)* (gross negligence does not suffice; plaintiff must show circumstances of aggravation or outrage, with willful misconduct, malice, fraud, wantonness, or oppression. *See also*, O.C.G.A. §51-12-5-1 (b)); *Seminole Pipeline Co. v. Broad Leaf Partners, Inc., 979 S.W.2d 730 (Tex. App. 1998)* (good discussion of exemplary damages, malice and negligence in case originally awarding over $100 million in punitive damages). *Ramik v. Darling Int'l, Inc., 60 F. Supp. 2d 680 (E.D. Mich. 1999)* (recovery of exemplary damages not authorized by statute).

(n30)Footnote 222. *Ruppel v. Ralston Purina Co., 423 S.W.2d 752 (Mo. 1968).*

(n31)Footnote 223. *S.C. Loveland, Inc. v. East West Towing, Inc., 608 F.2d 160 (5th Cir. 1979)* (barge struck bridge), *cert. denied, St. Paul Mercury Ins. Co. v. East West Towing, Inc., 446 U.S. 918 (1980).*

(n32)Footnote 224. *Schiro v. Oriental Realty Co., 76 N.W.2d 355 (Wis. 1956)* (failure to take steps to avoid injury may be considered in determining mitigation of damages issues); *Tiegs v. Boise Cascade Corp., 922 P.2d 115 (Wash. App. 1996), aff'd, Tiegs v. Watts, 954 P.2d 877 (Wash. 1998).*

(n33)Footnote 225. *City of Jackson v. Filtrol Corp., 624 F.2d 1384 (5th Cir. 1980)* (plaintiff entitled to recover costs of protecting sewer line).

(n34)Footnote 226. *City of Tucson v. Apache Motors, 245 P.2d 255 (Ariz. 1952).*

(n35)Footnote 227. *A. & P. Food Stores, Inc. v. Kornstein, 121 So. 2d 701 (Fla. App. 1960)* (attempt to enjoin operation of supermarket).

(n36)Footnote 228. *Jersey City Redev. Auth. v. P.P.G. Indus., 655 F. Supp. 1257 (D. N.J. 1987),* superseded by statute as stated in *Mayor and Council of Borough of Rockaway v. Klockner & Klockner, 811 F. Supp. 1039 (D. N.J. 1993), aff'd, International Fidelity Ins., Co. v. Ambrosio, 866 F.2d 1410 (3d Cir. 1988), aff'd, Jersey City Redevelopment Authority v. PPG Industries, Inc., 866 F.2d 1411 (3d Cir. 1988); San Luis Obispo County v. Abalone Alliance, 223 Cal. Rptr. 846 (1986)* (plaintiff could not show special damages).

(n37)Footnote 229. *Gennari v. Adres-Tucker Funeral Home, 488 N.E.2d 174 (Ohio 1986)* (nuisance action by homeowner because of cremations and other factors); *A. & P. Food Stores, Inc. v. Kornstein, 121 So. 2d 701 (Fla. App.*

1960).

(n38)Footnote 230. *Blevins v. Sorrell, 589 N.E.2d 438 (Ohio App. 1990)* (surveillance activities found to be a nuisance, but no damages awarded); *Shaw v. Owen, 90 So. 2d 179 (Miss. 1956).*

(n39)Footnote 231. *Gorman v. Sabo, 122 A.2d 475 (Md. 1956)* (damages for projection of radio noise into plaintiff's house).

(n40)Footnote 232. Renz v. 33rd Dist. Agric. Ass'n, 46 Cal. Rprtr. 2d 67 (Cal. App. 1995)(motorcycle fumes from continued motorcycle racing while action was underway).

(n41)Footnote 233. *Miniat v. McGinnis, 762 S.W.2d 390 (Ark. App. 1988)* (action to prevent construction of long-term care institution near plaintiff's land); *Matter of Chicago, R.I. & P.R. Co., 756 F.2d 517 (7th Cir. 1985); Roach v. Combined Util. Comm'n, 351 S.E.2d 168 (S.C. 1986);* Beck Dev. Co. v. Southern Pac. Transp. Co., 52 Cal. Rprtr. 2d 518 (Cal. App. 1996) (when an action is based on future injury, the plaintiff must show the likelihood and magnitude of the potential harm); *Parker v. Ashford, 661 So. 2d 213 (Ala. 1995)* (proposed racetrack enjoined before construction commenced); *West v. Luna, 1998 Tenn. App. LEXIS 560* (Tenn. App. Aug. 12, 1998) (anticipatory injunction appropriate where injury is imminent and certain). *Rutter v. Carroll's Foods of the Midwest, 50 F. Supp. 2d 876 (N.D. Iowa 1999)* (action to enjoin construction of a swine containment facility); *Superior Farm Mgmt. v. Montgomery, 513 S.E.2d 215 (Ga. 1999)* (action to abate construction of a hog breeding facility). *Muscatine v. Northbrook Partnership Co., 619 N.W.2d 362 (Iowa 2000)* (The city of Muscatine was allowed to recover from a landowner the demolition costs incurred while abating a nuisance on the landowner's property).

(n42)Footnote 234. *Racine v. Glendale Shooting Club, Inc., 755 S.W.2d 369 (Mo. App. 1988)* (action to prevent shooting and stray and ricocheting bullets); *Fletcher v. City of Independence, 708 S.W.2d 158 (Mo. App. 1986); Scott v. Jordan, 661 P.2d 59 (N.M. App. 1983)* (livestock operation as a nuisance in fact); *McCombs v. Joplin 66 Fairgrounds, Inc., 925 S.W.2d 946 (Mo. App. 1996)* (injunction requiring race cars to be fitted with mufflers to reduce noise levels). *Erwin v. Alvarez, 752 So. 2d 1261 (Fla. App. 2000)* (court's contempt order improperly authorized a nuisance to continue); *Stanton v. Town of Southold, 698 N.Y.S.2d 258 (1999).*

(n43)Footnote 235. *Senatore v. Blinn, 174 N.E.2d 437 (Mass. 1961)* (use of premises for occasional repair of old automobiles not a nuisance).

(n44)Footnote 236. *Crites v. Sho-Me Dragways, Inc., 725 S.W.2d 90 (Mo. App. 1987)* (alleged nuisance from operation of drag strip).

(n45)Footnote 237. *Freedman v. Braircroft Prop. Owners, Inc., 776 S.W.2d 212 (Tex. App. 1989)* (action for breach of deed restrictions); *Milligan v. General Oil Co., 738 S.W.2d 404 (Ark. 1987);* Jordan v. City of Santa Barbara, 54 Cal. Rprtr. 2d 340 (Cal. App. 1996) (no recovery for interference with use and enjoyment caused merely by fear of future injury). *Superior Farm Mgmt. v. Montgomery, 513 S.E.2d 215 (Ga. 1999)* (construction of hog breeding facility could be enjoined); *Rutter v. Carroll's Foods of the Midwest, Inc., 50 F. Supp. 2d 876 (N.D. Iowa 1999)* (action to enjoin construction of swine containment facility was a cognizable claim).

(n46)Footnote 238. *Klaber v. Lakenan, 64 F.2d 86 (8th Cir. 1933).*

(n47)Footnote 239. *St. Lucie County v. Town of St. Lucie Village, 603 So. 2d 1289* (Fla. App.), *review denied, 613 So. 2d 12 (Fla. 1992)* (action to prevent expansion of airport); *Cline v. Franklin Pork, Inc., 361 N.W.2d 566 (Neb. 1985)*
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(n48)Footnote 240. *Widmer v. Fretti, 116 N.E.2d 728 (Ohio App. 1952)* (action against operation of gambling resort).

(n49)Footnote 241. *Baum v. Coronado Condo. Ass'n, 376 So. 2d 914 (Fla. App. 1979)* (nuisance allegedly caused by uninsulated and uncovered terrazzo corridor within a lobby above an apartment in a condominium building).

(n50)Footnote 242. *Costas v. City of Fond Du Lac, 129 N.W.2d 217 (Wis. 1964)* (nuisance allegedly caused by operation of sewage disposal plant); *Peters v. Amoco Oil Co., 57 F. Supp. 2d 1268 (M.D. Ala. 1999)* (holding that in Alabama the plaintiffs could obtain injunctive relief even without showing *actual* irreparable harm, they merely needed to show *imminent* irreparable harm) (emphasis added).

(n51)Footnote 243. *Pate v. City of Martin, 614 S.W.2d 46 (Tenn. 1981)* (nuisance from operation of sewage lagoon).

(n52)Footnote 244. *Attorney Gen. v. Thomas Solvent Co., 380 N.W.2d 53 (Mich. App. 1985)* (nuisance caused by chemicals in the water supply); *Pennsylvania Ry. v. Sagamore Coal Co., 126 A. 386 (Pa. 1924), cert. denied, 267 U.S. 592 (1924).*

(n53)Footnote 245. *Platt v. City of Waterbury, 45 A. 154 (Conn. 1900); Thomsen v. Greve, 550 N.W.2d 49 (Neb. App. 1996)* (defendant required to raise smokey chimney three feet and burn only clean, dry firewood in addition to paying $4,000 in damages).

(n54)Footnote 246. *Arciero Ranches v. Meza, 21 Cal. Rptr. 2d 127 (1993); Woody v. Machin, 380 N.W.2d 727 (Iowa 1986).*

(n55)Footnote 247. *Gilbert v. Boak Fish Co., 90 N.W. 767 (Minn. 1902)* (action for injunction against storing fish; later action for damages).

(n56)Footnote 248. *Katenkamp v. Union Realty Co., 59 P.2d 473 (Cal. 1936)* (action against walls diverting deposit of sand on beach).

(n57)Footnote 249. *Hill v. Perkins, 353 S.E.2d 686 (N.C. App. 1987)* (nuisance action against diesel repair, but failed to state a claim); State *ex rel Dade Count Optometric Ass'n v. Family Optical Serv., 209 So. 2d 267 (Fla. App. 1968), cert. denied, 221 So. 2d 748 (Fla.1968).*

(n58)Footnote 250. *McGann v. Illinois Hosp. Ass'n, 526 N.E.2d 902* (Ill. App.), *appeal denied, 530 N.E.2d 248 (Ill. 1988)* (pleading contained only conclusory statements); *Village of Claycomo v. Kansas City, 635 S.W.2d 365 (Mo. App. 1982).*

(n59)Footnote 251. *Scoville v. Ronalter, 291 A.2d 222 (Conn. 1971)* (action to halt apartment construction); *Rush v. Concrete Materials & Constr. Co., 238 P.2d 704 (Kan. 1951).*

(n60)Footnote 252. *City of Newport v. Emery, 559 S.W.2d 707 (Ark. 1977)* (action to enjoin construction of sanitary landfill).

(n61)Footnote 253. *Smith v. Western Wayne County Conserv. Ass'n, 158 N.W.2d 463 (Mich. 1968)* (shooting club in rural, swampy area held to be not a nuisance).

(n62)Footnote 254. *Hutcherson v. Alexander, 70 Cal. Rptr. 366 (1968)* (action to enjoin competitor's business sign).

(n63)Footnote 255. *Klein v. Copeland, 482 So. 2d 613 (La. 1986)* (contempt proceeding to enforce order enjoining operation of a Christmas display that attracted heavy traffic and crowds of visitors), *cert. denied, Copeland v. Rodrigue, 475 U.S. 1046 (1986); Colley v. Tatum, 180 S.E.2d 346 (Ga. 1971); Osborne v. Powers, 908 S.W.2d 340 (Ark. 1995)* (defendant held in contempt of court for willfully violating injunction limiting massive Christmas light displays).

(n64)Footnote 256. *French v. Iowa Dist. Court for Jones County, 546 N.W.2d 911 (Iowa 1996)* (reimbursement to the city for costs of abatement inappropriate punishment for violation).

(n65)Footnote 257. *Corentin v. Town of Columbia, 294 A.2d 80 (Conn. Super. 1972)* (alleged nuisance damage from drainage facilities).

(n66)Footnote 258. *Holleman v. City of Tulsa, 155 P.2d 254 (Okla. 1945)* (attempted enforcement of zoning ordinance against signs by one resident against another).

(n67)Footnote 259. *Abbinett v. Fox, 703 P.2d 177* (N.M. App.), *cert. quashed, 702 P.2d 1007 (N.M. 1985)* (damage from tree roots).

(n68)Footnote 260. *Cook Indus. v. Carlson, 334 F. Supp. 809 (N.D. Miss. 1971)* (blocking of ditch to stop flow of effluents).

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CHAPTER 67 THE PROPERTY LAW ASPECTS OF PRIVATE NUISANCE

8-67 Thompson on Real Property, Thomas Editions § 67.07

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§ 67.07 Land Uses That Have Been Held to Be Private Nuisances in Fact.

[Go To Supp]

This section contains brief summaries of cases in which particular land uses have been held to be private nuisances in fact. The cases summarized are divided into broad subject headings, and the summaries describe the activity or condition that caused the nuisance along with any features of fact, proof, defense, or relief granted that are worthy of note.

The case summaries are arranged into the four major categories of agricultural use and commercial animal activities, commercial uses, industrial uses, and residential uses; within each of those categories the summaries are organized according to the particular activity or condition that caused the nuisance. If more than one case appears in such a sub-category, the cases are arranged chronologically, with the more recent listed first. If a group of cases from one state appears within a sub-category, the case summaries for that entire group will appear together in the chronological order determined by the most recent case in that group.

§ 67.07(a) Agricultural Uses and Commercial Animal Activities.

This section summarizes cases involving land uses related to agricultural uses and livestock and other commercial animal activities that have been challenged as private nuisances. In general, these activities that have been found to be nuisances have created conditions intolerable for human habitation, including insects, vermin, odors, dust and noise. The activities described in the cases are set forth in an alphabetical order of sub-categories, as follows: cotton gin, dog kennel, farm, feed factory, gristmill, hog farm and feed lot, livestock, poultry operations, rendering plant, rice farm, slaughterhouse, stockyard, meat packing plant, and stable and horses.

§ 67.07(a)(1) Cotton Gin.

A homeowner obtained a permanent injunction against a cotton gin being built or operated on adjoining land. The jury found that the land was unsuitable for the gin, and that the noise, traffic, smoke and odors to be created by the gin would make the use of the land for that purpose unreasonable. n261 Earlier Texas cases ruling on the same issue have reached varied results depending on the court's view of whether the gin operation generates a nuisance. In one case plaintiffs

could obtain an injunction against gin construction if they could prove it would be a nuisance when operated. n262 In another case, the court held that it would be a nuisance even if operated prudently. n263 And in a third case, the court believed the gin would be operated in a way that would not create a nuisance, but would permit a later action if a nuisance actually was created. n264

A cotton gin emitted seeds, lint, dirt, dust and trash into the yard, bed and furniture of a neighboring property owner. The gin owner was held subject to a nuisance action, even if the gin was operated in careful and prudent manner. n265 A similar earlier case also claimed that the cotton gin caused damage to the plaintiff property owner's nerves and health, and that the debris caused depreciation in property value. The gin owner was held subject to action for abatement, damages claims having been waived by plaintiff. n266

Nearby residential and business property owners sought to enjoin the construction of a cotton gin, complaining of the noise, waste, unsightliness, and odors it would cause. Abatement was denied because a gin is not a nuisance as a matter of law and cannot be enjoined before it actually causes a nuisance. n267

§ 67.07(a)(2) Dog Kennel.

A homeowner who complained of barking, odors, flies and crowds from a dog kennel, causing loss of property enjoyment and inability to sell or rent the house, obtained a permanent injunction against operation of the kennel. n268

A property owner near a dog kennel alleged that the howling and barking of the dogs, and the odors and flies from the kennels and kitchens caused annoyance, inconvenience, discomfort, loss of sleep and mental and physical suffering. The court granted an injunction against keeping the dogs in such a way as to cause a nuisance. n269 A permanent injunction was upheld against a dog kennel as source of barking, resulting in lack of quiet enjoyment of property. n270 Kenneling of numerous sled dogs on defendant's property could be a private nuisance. Because the nuisance was abatable, it was temporary as a matter of law. n271

§ 67.07(a)(3) Farm.

A farmer left piles of manure on the farm, which caused odors and flies to bother farmers residing across the road. The court required that the nuisance be enjoined, although the farming operation could continue. n272

§ 67.07(a)(4) Feed Factory.

An adjacent homeowner complained of loud and unusual noises, vibrations, noxious odors, dust and trucks blocking an alley, all from a feed grinding business. An injunction was denied on appeal, but plaintiff was awarded $3,605 in special damages for diminished rental value of plaintiff's premises. n273

A residential owner complained of the stench from the chicken and hog entrails processed at defendant's feed factory, alleging that they caused deprivation of peace, comfort, happiness and enjoyment of the residences in the area. No injunction was granted, but a new trial was permitted if a procedural defect were cured. n274

§ 67.07(a)(5) Gristmill.

Plaintiff's family suffered sickness because defendant's nearby gristmill included ponds from which diseases such as malaria were spread. The court ordered the mill pond destroyed. n275

§ 67.07(a)(6) Hog Farm and Feed Lot; Cattle Feed Lot.

Summer camp owners complained of an adjacent hog farm in which the stench from hogs kept within ten feet of the property line impaired their camp operation. They obtained a permanent injunction, but not compensatory damages. The

court, in granting the injunction, found that the gravity of harm to the plaintiff outweighed the utility of the defendant's conduct. n276

A nearby farmer sought an injunction against defendant's pig farm because of flies and odors, but the trial court judge monitored the farm and found that the nuisance was abated. The appellate court remanded for more thorough fact-finding. n277 Another farmer plaintiff was similarly unsuccessful after the trial judge inspected the hog feed lot and found that it was operated in a sanitary manner, that it was a necessary business in connection with the livestock market of Omaha, and that odors were carried to the plaintiff only in the summer. n278

Farm owners obtained an injunction and damages against a nearby hog feed lot, alleging odors, rodents and insects. Damages were measured by injury to use and diminished rental value of the property. n279

A nearby farmer sought an injunction and damages because the odors from hog waste reduced the value of his home. The court granted damages equal to the reduced value of the property, and if the money were not paid in 30 days, an injunction. The court, however, was prepared to allow the nuisance to continue in recognition of the "comparative nuisance doctrine," which weighs the injury to either party and to the public by granting or refusing the injunction. n280 An earlier case granted an injunction against a hog farm that was within the city limits, when it was shown that odors and flies from the hogs interfered with the use and enjoyment of property. n281

A landowner claimed that the nearby hog ranch polluted the water, ruined a garden, and caused diminished health and property value from odors, flies, maggots and garbage. In an action for injunction and general and exemplary damages, the defendant obtained a summary judgment. The appeals court remanded on the damages issue, particularly to determine if defendant's earlier disregard of a temporary injunction justified exemplary damages. n282

The trial court denied a plaintiff landowner an injunction against a hog farm, because the plaintiff had moved into the area with full knowledge of the hog farm and for many years had taken no action, and the hog farm operated according to all sanitation requirements. The appellate court noted that those factors were not a defense, but could be taken into consideration. n283

Residence owners obtained an injunction against a pig farm which was in the area before the residences, claiming that the odors impaired their enjoyment of the property and diminished property values. The court declared that the pig farm would have been a nuisance even if the plaintiffs had been farmers instead of homeowners. n284 In an earlier case, farmers obtained an injunction restraining piggery operators from hauling garbage to feed the pigs. However, the piggery could continue in operation if normal feed methods were used. n285

Property owners complained of sickness from the odors of the garbage used to feed nearby hogs. The feeding practice was enjoined. n286 Others complained that a hog farm polluted a stream that flowed through their property and obtained $1,000 damages for discomfort and annoyance. n287

A cattle feed lot constituted a private nuisance despite rights under the Right to Farm Act. The court imposed an injunction but did not close the feed lot. n288

A landowner began keeping hogs in his front yard much to the chagrin of the home owner on the other side of the road. The plaintiff claimed that moving the hogs worsened the smell and number of flies and diminished plaintiff's property value. Noting that the defendant owned land which was more suited to raising hogs, the court ordered the hogs be taken elsewhere. n289 Although a new trial was ordered, in an action against a hog farm for maintaining an open pit lagoon in which waste from the hogs was stored for future use as fertilizer, the court held that the defenses of non-negligence and use of state-of-the-art technology would not be valid defenses to a private nuisance action. n290

§ 67.07(a)(7) Livestock.

Proceeding on a nuisance theory, a plaintiff obtained an injunction against the "destructive and obnoxious" invasion by hogs, dogs and chickens kept by his neighbor. n291

A homeowner complained of an adjacent homeowner who kept livestock on the property for commercial purposes. Noise and odors from cows, horses, dogs and chickens deprived the plaintiff's family of sleep and comfortable enjoyment of their home. Defendant was required to abate the noise, odors and drainage of waste onto plaintiff's land, and to reduce the numbers of livestock. n292 A private nuisance claim for damages could be brought against dairy farm operators, and a neighboring owner's opinion that odors emanating from the dairy operation caused diminished value in property was admissible. n293

§ 67.07(a)(8) Poultry Operations.

Property owners who lived within a mile of defendant's poultry business complained of odors and insects from the chicken coops. The defendants were required to clean out the manure more frequently; plaintiffs were permitted to sue for damages if they wished. n294

Operators of a chicken farm were enjoined from dumping chicken waste in a manner that caused discomfort to the plaintiff adjoining landowners. The method of spreading chicken manure was both a private and public nuisance. n295

Property owners next to a poultry plant lost sleep and comfort from the noise and smell produced by the plant's slaughter and waste removal activities. The plant was required to remove the offal only in closed containers and to cease other improper practices. n296 Property owners' request for a permanent injunction against construction of two chicken houses on adjoining property was a question for the jury. n297

Fighting cocks are not included within the definition of poultry in the Texas statute, and therefore the landowners raising the cocks are not entitled to benefits of the statute which allow poultry owners to recover attorney's fees in defending nuisance claims. n298

§ 67.07(a)(9) Rendering Plant.

Residential landowners near a rendering plant complained that odors from the plant interfered with their enjoyment of life and property and obtained a temporary injunction. The plant, however, was given time to reduce its emissions to non-offensive levels and avoid a permanent injunction. n299

A rendering plant was permanently enjoined, because it omitted noxious odors and attracted flies and maggots, causing loss of enjoyment of property to nearby plaintiff homeowners. The trial court retained the right to review and modify the injunction if the defendant could show changed circumstances in which operation of the plant would not be a nuisance. n300

Landowners near a rendering plant complained of odors and flies "when the wind was right." The trial court's injunction against plant operation was dissolved on appeal, the appellate court stating that a permanent injunction was not appropriate for only an occasional nuisance. That court balanced the utility and need of the plant against the plaintiffs' peaceful enjoyment of their land. n301

Landowners near a rendering plant under construction sought to enjoin the construction and operation, citing threats to health and property values. The trial court granted the injunction, but the appeals court reversed, noting that the plant was to be built in a rural area and the damages were speculative. n302

Owners of houses and small businesses obtained an injunction and revocation of building permit against a rendering

plant under construction. After issuing the permit, the county zoning board became convinced the plant would be a public nuisance once it began operating. The permit was revoked despite substantial expenditures by the defendant. n303

§ 67.07(a)(10) Rice Farm.

The months of standing water on defendant's rice farm caused property damage from percolating water to plaintiff's nearby land. The court required the defendant to contain the water seepage and granted damages of $1,600. n304

§ 67.07(a)(11) Slaughterhouse, Stockyard, Meat Packing Plant.

An owner of apartment buildings was unsuccessful in enjoining the proposed construction of a slaughterhouse on nearby property. The equity court refused to interfere before the nuisance actually arose and where the injury was doubtful or contingent. n305

Defendant operated a slaughterhouse, stockyard and storage facility, all on the same "block" as plaintiffs. Animal parts were left outside, which dogs dragged to the neighbors' lands; flies, odors and rodents abounded. The defendant was permanently enjoined from using the land for slaughtering or for a stockyard. n306

Residents complaining of mosquitos and odors obtained an injunction against a nearby stockyard. n307

A hospital requested a permanent injunction against a meat packing plant as a nuisance per se, complaining that the convalescence of the patients was threatened. However, because a temporary injunction had stopped defendant from even starting up, evidence against the defendant was all anticipatory, and the permanent injunction was denied. n308

Declaring that there was no legitimate excuse for the location of a slaughterhouse in a residential district, this court permanently enjoined defendant's slaughterhouse, which was afflicting residential neighbors with noise, odors and flies. n309

A residential owner sought to enjoin a nearby slaughterhouse, because of stench and noise from the animals, but the court allowed the defendant to continue in business if it could eliminate the noise and smell. n310

§ 67.07(a)(12) Stables, Horses.

Defendant was enjoined from keeping one or two horses in her back yard, as permitted by a local zoning ordinance, when the nearby plaintiff proved that the flies and odors interfered with peaceful enjoyment of plaintiff's land. n311

An improperly maintained stable was enjoined from operation when it was proved that flies, rats and stench spread to the surrounding residential area. n312

A permanent injunction was ordered against defendant's stable and riding academy, which was located in a residential area. Plaintiffs complained of flies, odors, and noise. n313

Residents near a riding academy alleged that riders endangered children and pedestrians, trespassed, and used loud and insulting language. The trial court enjoined the operation of the academy, modified on appeal to give the academy time to be disassembled. n314

An apartment tenant near a horse barn complained of odors and flies from accumulated manure and was awarded an injunction against the defendant keeping horses in the barn. n315

Adjoining landowners who had experienced discomfort from the smells, flies, noise and waste of defendant's stable before it burned down, sought an injunction against construction of a new stable. The injunction was denied on the ground that there was no evidence that the new stable would be a nuisance. n316

Foul smells from an unsanitary stable on adjoining property made plaintiff's wife ill and diminished the value of plaintiff's property. Plaintiff sought $1,000 in damages and was awarded $225 for reduced property value. n317

A horse and mule market across the street from the plaintiff resident was enjoined, when it was shown that the market typically had 50-150 animals, and accumulated waste, stench, flies and noise. n318

A homeowner on property adjoining a stable sought damages and an injunction because of noise from horses and customers, dust, flies and removal of waste during mealtimes. Plaintiff was awarded $75 damages for discomfort and depreciation of property value and defendant was enjoined from operating the stable in that locality. n319

Odors and waste products from a livery stable caused annoyance to customers and loss of business to commercial establishments across the street. The trial court denied an injunction because the livery stable was not negligent, but the appellate court correctly ordered an injunction even without a showing of negligence. n320

A breeding stable surrounded by a high fence was nevertheless enjoined from breeding activities at the suit of neighbors 200-400 feet away, because the noises were deemed offensive, especially to women and small children. n321

A homeowner complained that breeding noises in an adjacent stable caused loss of quiet enjoyment of the residential property. The court agreed that such sounds offended the sensibilities of ordinary women and children, and in such proximity to the residences the defendant was enjoined from using the stables for breeding. n322

The owner of an apartment building constructed after a nearby stable went into operation complained that odors, unremoved waste and noise interfered with tenants' sleep, caused illness and reduced rental values. The stable was enjoined from operating in a way that interfered with sleep or allowed odors to affect their health. n323

In one case a stable next to plaintiff's property was altogether enjoined from operating. n324 In another case the plaintiff obtained damages and a limited injunction requiring the stable to not operate in a manner that would be a nuisance to the plaintiff. The damages were determined by the difference in rental value of plaintiff's property before and after the nuisance. n325

Plaintiff became feverish and nervous and lost rest because of odors from accumulated hay and manure at the stable on the adjacent lot, within 20 feet of plaintiff's house. The stable was enjoined from operating unless it could be placed differently on defendant's land to minimize plaintiff's suffering. n326

A feed stable in which breeding activities took place in plain view of plaintiff homeowner across the street was enjoined from permitting the breeding in view of the plaintiff. n327

A hotel owner obtained an injunction against the future construction of a stable nearby, alleging the unhealthy proximity of waste products and flies. n328

§ 67.07(b) Commercial Uses.

This section summarizes cases involving land uses related to commercial enterprises and establishments which have been challenged as private nuisances. The activities described in the cases are set forth in an alphabetical order of sub-categories, as follows: airport; bakery; eating establishment; entertainment establishment; explosives storage; fish market; gas station; grain business; hospital; ice cream business; laundry; lead company; meat market; music store;

printing establishment; prostitution; radio sales; soap business; supermarket; trapshooting club, gun club, rifle range; travel agency; used car lot; and welding business.

§ 67.07(b)(1) Airport.

Homeowners located in the flight path but 6,000 feet from the runway of an airport brought action against the airport owner for inverse condemnation through substantial interference with enjoyment of property. The trial court denied relief, but the appellate court reversed, holding that whether a noise nuisance created a taking was a question of fact to be decided by the jury, not the judge. n329

A resident sought to enjoin a city from condemning land for a municipal airport, anticipating noise and loss of property value. Relief was denied partly because the airport was declared to be not a nuisance per se. n330

A landowner near a municipal airport complained of danger, noise, and dust from flights over the land, seeking an injunction and damages of $52,500. The trial court denied all relief, but the appellate court said the allegation of dust was sufficient, if proved, to sustain an injunction. n331

Landowners obtained a limited injunction against neighbors using their property as an airfield. Planes were flying over plaintiffs' property at altitudes of less than 500 feet, causing noise, dust and other disturbance. The airfield continued to function, but limits were placed on approaches over plaintiffs' property. n332

§ 67.07(b)(2) Bakery.

A homeowner who, with tenants, lived next door to a bakery complained of the noise from the bakery's ventilating fan, alleging resultant nervous disorders and loss of rental value. Plaintiff sought an injunction and $15,000 damages. Relief was denied because of "a total failure" of proof of actual damages. n333

A bakeshop across an alley from plaintiff allegedly caused annoyance, loss of sleep and interference with plaintiff's enjoyment of property through its smoke, excessive noise and trash cans in the alleyway. Plaintiff sought an injunction against the entire operation of the bakery, but the defendant was only enjoined from boisterous talking, from using the alley for garbage cans, and from operating the machinery without first closing windows. n334

A boarding house owner adjacent to a large bakery complained of noise and vibration from the baking machines and disturbance from the loading and unloading of goods. Alleged damages included lost boarders, loss of sleep, and illness. The trial court denied an injunction and damages believing that there would be no such cause of action against a business so conducted in a city. The appellate court reversed and remanded for trial. n335

§ 67.07(b)(3) Eating Establishment.

Residents in the neighborhood of a drive-in cafe complained of loud, disturbing and obscene noises from the customers. The trial court granted $1,500 in damages and an injunction restricting the operation and hours of the drive-in. n336

A drive-in restaurant, separated from plaintiff's apartment and motel by a vacant lot, was accused of disturbing the quiet enjoyment of the plaintiff's property through operation of a jukebox and radio, emptying trash late at night and loud noises from customers' cars. The trial court's injunction against operating in a way that constituted a nuisance was remanded by the appellate court for clarification. The injunction was required to be specific enough to let the defendants know what is proper action. n337

The illumination of the street sign on defendant's drive-in property shone through plaintiff's window, disrupting sleep. The court's injunction required removal of the sign. n338

A homeowner near a restaurant and swimming pool complained of loud noises and bright lights late at night. Private relief from this public nuisance was granted through an injunction against the restaurant playing music or giving outside car service after midnight and requiring it to close from 2:00 a.m. to 7:00 a.m. Also electric lights were required to be dimmed so as not to annoy the plaintiff. n339

A resident adjacent to a 24-hour drive-in restaurant complained of excessive noises from loud speakers and mechanical devices, and sought abatement and $250 in attorney's fees. The court granted an injunction against unreasonable and excessive noise from the drive-in restaurant. n340

A drive-in and soft drink stand located near the plaintiff homeowner caused loss of sleep through the shouting, honking and other noises late at night, in addition to trash thrown in the plaintiff's yard and smoke and odors from the defendant's incinerator. The trial court granted an injunction against noise from the defendants' business late at night, but the appellate court held that the injunction was too broad and that it prohibited some legitimate aspects of conducting the business. n341

A landowner about 350 feet from a root beer stand complained of lights from the stand, late night noises from the cars, and odors from the cooking. The court denied the injunction because of insufficient evidence of substantial discomfort to the plaintiff. n342

A homeowner across the street from a root beer stand complained of lights, noise and odors from the stand, and requested damages and an injunction against operating the stand. The trial court permanently enjoined the radios and required defendant to use only low wattage bulbs in colored globes. The appellate court remanded for clarification because the injunction regarding lights was confusing and contradictory. n343

The owner of a refreshment stand near the plaintiff homeowner was accused of emitting offensive odors and loud and disturbing noise at night from the stand, depriving the plaintiff of the comfortable use and enjoyment of the premises. Defendant's stand, located in a mainly residential area, was enjoined from creating noises between 10:00 p.m. and 3:00 a.m. n344

§ 67.07(b)(4) Entertainment Establishment.

Property owners near a nightclub complained of loud noises, fights, offensive language and increased traffic from nightclub patrons. The defendant nightclub was enjoined from playing loud music and entertaining unruly patrons and was required to provide off-street parking and litter cans outside the premises. n345

An auto racing track under construction threatened to disrupt church services on nearby property. Further construction on the racetrack was temporarily enjoined, but the appellate court said that a permanent injunction would depend on a finding that the racetrack would be a nuisance per se if built. n346

A residential owner near a racetrack complained of loss of chinchillas from disturbances by the racetrack operations. The court granted an injunction and $9361 in damages, the value of the chinchillas. n347 Residents brought action to enjoin the construction of a nearby amusement park. The injunction was granted because the court believed that the location of the proposed park meant that great disturbance to the plaintiffs would be unavoidable. n348

Residential owners brought action against a municipality because night lights from a baseball field owned by the city disrupted their rest. The requested injunction would have banned night games, but instead the city was ordered to erect a screen to keep the lights from shining in plaintiffs' houses. n349

Landowners near a gambling resort complained of lost property values and decreased enjoyment of property from

operation of the resort. Traffic, honking horns, drinking and litter were among the complaints, for which they sought an injunction against operation of the resort and $40,000 damages for deprivation of enjoyment of property. The court granted a permanent injunction and assessed costs to the defendant. Although this was a public nuisance, the proximity of the resort to the plaintiffs made the harm to the plaintiffs more intense than the harm to the general public. n350

Landowners about four blocks from a theatre complained of loudspeaker announcements from the theatre publicizing coming attractions. An injunction prohibited the theatre from use of the loudspeaker system. n351

Residents less than two blocks from a stadium owned by a non-profit corporation complained that the noises from the racing, loud speakers and other stadium activities caused children to lose sleep and made people unable to carry on ordinary conversations. Cars also blocked driveways, and property values generally decreased. No injunction was issued when the jury failed to find that the stadium's operation was a nuisance. n352

The owner of a drive-in theatre near a racetrack complained of lights shining on the movie screen. A trespass cause of action was rejected and an injunction for the nuisance was denied when the court found that excess light has rarely been considered an actual nuisance and both the track and the theatre were constructed about the same time. n353

Residents complaining of disturbance from operation of the state fairgrounds were denied an injunction on the ground that a racetrack is not nuisance per se. n354

Residential owners near a municipal playground brought action against the city because of loss of sleep and destruction of fences, vegetables and fruit trees. The injunction was denied because playgrounds are not nuisances per se. n355

Residential owners near a clubhouse complained of lost sleep because of disturbance caused by dances, drunk patrons, and "indecent trespass." The clubhouse was enjoined from conducting dances after 9:00 p.m. n356

The trial court denied an injunction to land owners near a dance pavilion who complained of the music, dancing and noise of the people traveling to and from the pavilion. The appellate court reversed on the belief that the noise was continuous and loud enough to affect normal persons living near the dance pavilion. n357

A hotel operator complained of an illuminated sign on an adjacent building, which was disturbing hotel guests. The defendant was enjoined from operating the sign after midnight. n358 Residents near a ballpark were disturbed by traffic noise, cheering, shouting and profane language during the games. The ballpark was temporarily enjoined from operating on Sundays, until a final hearing could be held on the matter. n359

Homeowners near a dancehall complained of noise from the dancehall operation and obtained an injunction against the conduct of the dancehall activities. n360

A bystander who was injured by a ricocheting bullet from a shooting gallery leased to a tenant obtained personal injury damages from the owner of the shooting gallery on a nuisance theory. n361

A tenant in a building complained of business losses caused by operation of a shooting gallery and musical machines by another tenant in the same building. The court granted an injunction, but no money damages, limiting legal relief because the plaintiff tenant was not the freeholder. n362

After 20 years in and out of court, with one permanent injunction granted against racetrack that it not operate at a noise level that amounted to a nuisance, neighborhood sued for additional injunction to stop prospective nuisance of new stock car races at racetrack. Upon review, the injunction was vacated as overbroad, and the parties once again sent to court to determine whether the racetrack may even exist, and if so, what levels of noise and activity reasonably constitute a nuisance. n363

Fraternal society continually rented its lodge to fraternities, wedding receptions, nightclub operators, etc., and the frequently blocked access to plaintiff's property and resulting debris were enough to sustain an action for an injunction and damages in the amount of $25,000. n364

Plaintiffs alleged that noises from racetrack constituted private nuisance. The court refused to enjoin the racetrack from operating, however, based on the fact that the plaintiffs failed to show that their losses outweighed the adverse economic impact that the defendant would bear. n365

§ 67.07(b)(5) Explosives Storage.

Dynamite stored on defendant's property exploded during a fire, damaging plaintiff's adjacent store property. Plaintiff sued in nuisance, but obtained no relief when the court held that storing explosives was not a nuisance per se and that negligence would have to be proved to establish a nuisance in fact. n366

§ 67.07(b)(6) Fish Market.

A merchant near a neighboring fish market complained of the odors from the fish market, seeking damages for devaluation of property and detriment to his business. The trial court held that the fish market was not a nuisance, but the appellate court remanded for a new trial and instructions to award such damages as could be ascertained. The defendant had moved by this time, so the only relief at issue was damages for lost business. n367

§ 67.07(b)(7) Gas Station.

A church brought action to enjoin the proposed construction of a gas station, complaining that the fumes and noise from the station would disturb religious activities. Plaintiff was granted a permanent injunction against the construction of the gas station. n368 Nuisance action against owners and operators of a gas station because of leaks from their underground storage tanks was barred by statute of limitations. n369

§ 67.07(b)(8) Grain Business.

Homeowners on land adjoining defendant's grain business complained that dust and noise from the grinding of corn prohibited them from carrying on ordinary activities in their home. The children could not study and the laundry was soiled while on the line. The defendant was permanently enjoined from grinding corn within 150 feet of plaintiff's property and was required to pay $350 damages, representing the diminution of rental value caused by the noise. n370

§ 67.07(b)(9) Hospital.

Homeowners on land adjoining a hospital complained of moans, shrieks and groans from hospital rooms, which impaired plaintiffs' health, damaged their nerves and depreciated the property values. The court granted an injunction requiring the hospital to refrain from operations until the surgery and emergency rooms were moved farther away from plaintiffs' land. n371

§ 67.07(b)(10) Ice Cream Business.

Homeowners near the site of a proposed ice cream drive-in business obtained an injunction against the building of the drive-in in their residential area. Plaintiffs feared loud and unusual noise, exhaust fumes, lights or headlights, dangerous additional traffic, and violation of certain zoning ordinances. n372

§ 67.07(b)(11) Laundry.

A laundry and dry cleaning business made nearby homeowners sick and nervous and caused damage to the houses from vibrations caused by the laundry equipment. The court enjoined the business and awarded damages for property damage and personal injury. n373

The owners of a church near a laundry complained that the laundry was located in violation of city ordinance and sought an injunction against the laundry as a nuisance per se. The court, noting that the city ordinance forbade any laundry within 150 feet of the church, granted the injunction. n374

§ 67.07(b)(12) Lead Company.

Owners of agricultural land across the street from a lead company complained that dangerous accumulations of lead particles and deposits made their land unusable for raising cattle or growing crops. The trial court refused relief because the company complied with state law, but the appellate court said that such compliance would not relieve the defendant of liability for harm caused by their actions. n375

§ 67.07(b)(13) Meat Market.

Plaintiffs near a meat market complained of smoke and foul odors resulting from smoking meats and making sausage. The defendant was enjoined from conducting its business in such a way as to be offensive. n376

§ 67.07(b)(14) Music Store.

The owner of a medical clinic complained of a music store across the street, because noise from the store's amplifiers disturbed clinic patients. An injunction was granted against playing music over the loudspeakers. n377

§ 67.07(b)(15) Printing Establishment.

Noise and vibration from the defendant's printing establishment caused cracked walls in the plaintiff's nearby residence. The court granted an injunction against operation of the printing establishment. n378 However, in another case nearby residents complaining of noise and vibration from defendant's printing establishment obtained no injunction because the court believed that causing some noise and vibration in a city did not constitute a substantial and unjustifiable nuisance to the plaintiffs. n379

§ 67.07(b)(16) Prostitution.

The owner of a block on which were located businesses, storehouses and residential buildings, complained of prostitution being conducted on defendant's nearby property. The residents were being disturbed and the property values diminished. The court granted a permanent injunction against defendant's enterprise. n380

§ 67.07(b)(17) Radio Sales.

Defendant's radio sales business produced continuous music or noise which disturbed the employees of plaintiff's retail business across the street from the defendant. The defendant was enjoined from playing the radios so loud that they could be heard by the business personnel across the street. n381

§ 67.07(b)(18) Soap Business.

The owner of a subdivision complained that a nearby soap business produced unbearable odors, flies, and unsanitary conditions which were dangerous to health and harmful to property values. The court withheld an injunction while further evidence concerning defendant's efforts to correct the problem was taken and evaluated. n382

§ 67.07(b)(19) Supermarket.

Nearby residents sought an injunction and $5,000 damages against the operation of a supermarket. The trial court granted damages but no injunction. The Supreme Court reversed and remanded for new trial, noting that the supermarket was not a nuisance per se but could become a nuisance by reason of location or manner of operation. n383 A trial court granting an injunction against construction of a supermarket, at the request of nearby homeowners, was reversed by the Supreme Court because the anticipated nuisance was doubtful, contingent or conjectural. There was insufficient evidence to show that a nuisance would necessarily result from the operation of the supermarket. n384

Early morning deliveries to the defendant supermarket and odors from decaying vegetables caused nearby residential owners to complain of loss of sleep and of reduced enjoyment of property. The appellate court reversed an overly broad injunction issued by trial court and ordered the lower court to place specific limits on the injunction to minimize injury to the defendant. Excessive noise, for example, could be abated without enjoining all early morning deliveries. n385

A nearby homeowner sought to enjoin the further construction of a supermarket, fearing noise, lights and traffic to be generated by the defendant. Relief was denied as the court stated that neither the supermarket nor the parking lot would constitute a nuisance per se, even in a residential area. Possible depreciation of property values would not be a ground for relief. n386 On identical facts, the trial court in another case permanently enjoined the construction of a supermarket, but the injunction was dissolved and the action dismissed by the Pennsylvania Supreme Court. The Court stated that a community grocery store in a residential district is not a nuisance per se. n387

Employees in defendant's grocery store were shooting a rifle in the basement of the store, when a stray bullet killed a nearby homeowner. The decedent's administratrix sued on nuisance and negligence theories for damages. In reversing a dismissal by the trial court, the appellate court discouraged use of the nuisance theory by stating that nuisance generally requires continuity or recurrence and that a solitary act of negligence will not usually constitute a nuisance. n388

A residential owner across the street from a wholesale grocery company sued for $900 in damages because of odors from garbage and decayed vegetable and animal matter. The court granted $250 in damages for diminished value and use of property. n389

§ 67.07(b)(20) Trapshooting Club, Gun Club, Rifle Range.

The owner of a trailer park sought an injunction against a nearby rifle and pistol range, claiming possible loss of business. The court found that the rifle range caused no actual physical discomfort, and that it could be operated safely and therefore denied the injunction. n390 Similarly, the owner of a trailer court near a gun club could not obtain an injunction against the operation of the gun club by allegations that it interfered with plaintiff's reasonable enjoyment of property and created fears for safety. The court noted that the gun club was run according to strict safety requirements and was located in an agricultural area which created a higher tolerance for noise levels. n391

Farmers adjacent to a gun club obtained an injunction against the club because pellets from skeet shooters at the club damaged produce and created a danger to farm employees. The case was treated as a trespass action, or, alternatively, a possible prescriptive easement by defendants. n392

The owners of a trapshooting club were accused of creating a danger to passersby on the nearby road and causing annoyance from the noise of the guns. A permanent injunction against operation of the shooting club was denied. The case was a public nuisance action brought by the Attorney General but raised issues that would pertain to a private nuisance action. The jury did not find that public health or safety was injured by the trapshooting club. n393

A lessee of residential land and farmland obtained an injunction against the state National Guard's operation of a rifle range, claiming danger to life and property. n394

Owners of land adjacent to a firearm range brought action to enjoin range owner from operating the range. The court found that, under a state statute, the plaintiffs were barred from obtaining injunctive relief for private nuisance. n395

Bullets straying from a gun range onto landowner's property were found to be a temporary nuisance. n396

Operators of a shooting range were protected from an injunction by a new state statute that essentially gave immunity to certain gun ranges from nuisance suits, even though the statute was passed after the original injunction was issued. n397

A shooting range was held to be not a public or a private nuisance. n398

§ 67.07(b)(21) Travel Agency.

An appliance store owner across the street near the defendant travel agency could not get appliances to work properly because a computer in the agency leaked radiation. Although the trial court granted $71,000 actual damages and $150,000 exemplary damages, the appellate court reversed and remanded because the jury did not determine if the plaintiff's business was particularly sensitive to defendant's activities. n399

§ 67.07(b)(22) Used Car Lot.

The lights, noise and unsightliness connected with defendant's used car lot interfered with the quiet enjoyment of the property by plaintiffs located across the street from defendant. Plaintiffs obtained an injunction against defendant conducting its business in this residential area. n400

§ 67.07(b)(23) Welding Business.

Homeowners complained of a welding business being carried on by defendant on nearby property in an otherwise residential area. Plaintiffs asserted that the violation of the residential restrictive covenant caused a nuisance in that they lost the benefits of a purely residential neighborhood. The court granted an injunction against defendants using their land in violation of the restrictive covenant. n401

§ 67.07(b)(24) Golf Course.

Ninth hole of golf course contained an embankment that caused flooding on plaintiff's property. Hole was determined to be a permanent nuisance, not an abatable nuisance, barring plaintiff's claim under applicable statute of limitations. n402

§ 67.07(c) Industrial Uses.

This section summarizes cases involving land uses related to industrial enterprises and establishments which have been challenged as private nuisances. The activities described in the cases are set forth in an alphabetical order of sub-categories, as follows: brick plant; cement plant; chemical works; coal operations; construction operations; dairy operations; electric power plant; fertilizer operations; furniture factory; gas and oil works; ice and cold storage plant; metal and steel fabrication works; miscellaneous factories; railroad operations; salvage and junk operations; sand and gravel operations; saw mill and lumber operations; stone and quarry operations; textile mill; trucking and freight operations.

§ 67.07(c)(1) Brick Plant.

A greenhouse owner complained of decreased property value because of the noise, dust and odors emitted by a nearby brick company. The court granted nominal damages and no injunction, finding neither a public nor a private nuisance. The damages apparently resulted from the fact that the brick company was a nonconforming use. n403

Residential owners obtained a permanent injunction against nearby kilns, complaining that the smoke and soot from the kilns affected health and property. The injunction prohibited the defendant from operating the kilns in a way that caused dense smoke or soot to fall on the plaintiff's property, and the kiln directly adjacent to the plaintiff could only use smokeless fuel. n404

A landowner near a brick plant complained that trees were killed and other damage occurred from the smoke, dust and cinders thrown from the brick plant onto the plaintiff's land. The requested relief of injunction and damages was denied because the court found the defendant was operating in a reasonable manner and that the inconvenience and injury were not unreasonable. n405 A brick company which leased land from the plaintiff burned its bricks, emitting toxic fumes, which killed or blighted crops on plaintiff's adjacent land. The trial court denied the requested injunction and $2,000 damages, but the appellate court determined that the defendant was not operating in a careful and prudent manner and reversed. n406

Crops on a ten-acre plot located 75 feet south of a brick kiln were destroyed through the smoke, noise and toxic fumes emitted by the kiln. The owner of the crops obtained damages for injury to the crops through a private nuisance action. n407

A brick and tile manufacturer proposing to drill a gas well on the company property was enjoined by the trial court because the plaintiff homeowner, located 150 feet from the defendant's property, feared the threat of loud noise, stench, corroded household goods and depreciation of property value. The appellate court reversed and denied the injunction. n408

§ 67.07(c)(2) Cement Plant.

Landowners less than 400 feet from a cement plant complained of annoyance and physical discomfort from the noise and dust of the plant. The trial court denied an injunction, but the appellate court reversed, because the defendant's operations were an abatable nuisance, even though they were in a commercially zoned area and the plant was being lawfully operated. n409 Other plaintiffs similarly situated with the same complaints obtained an injunction and damages from the trial court, the damages being reduced on appeal to about $3,000 for decrease in the rental value of the property.

Homeowners near a large cement plant, complaining of dirt, smoke and vibrations, were awarded permanent damages but no injunction against the operation of the plant. In this important and leading case, the court held that the benefits of plant operation to the public outweighed the harm of the private nuisance. n410

A motel owner complaining of loss of rental value and patronage because of noise from a nearby concrete plant was denied relief by the trial court, which ruled that the statute of limitations had run on any action for permanent nuisance. The appellate court reversed and directed that a jury decide whether the nuisance was permanent or temporary. n411

A homeowner near a cement plant who obtained $500 in damages had his action dismissed by the appellate court which pointed out that the plaintiff had knowingly moved into this industrial area and that the smoke and dust complained of could not be separated from the other businesses in the area. n412

During construction of a cement batch plant, the nearby businesses sought a temporary restraining order, and preliminary and permanent injunctions against further construction, but no injunctions were awarded, although affidavits showed that businesses nearby anticipated future damages under certain conditions. n413

Plaintiffs sought to enjoin the construction of a new asphalt plant in an area that had been rezoned to allow such use nine years earlier. The trial court found for the defendant asphalt company on all accounts, but nonetheless imposed

restrictions on the permit to install the plant. On appeal the court found that the evidence did not support a claim of anticipatory nuisance, and the court could not set aside a permit to construct the plant that had been legally issued by the proper governing body. n414

§ 67.07(c)(3) Chemical Works.

Railroad workers injured by chemicals and gasses escaping from a nearby chemical and insecticide factory brought action for injunction on a nuisance theory. Relief was denied because the plaintiffs had no property right on which to base a nuisance action. n415

A residence owner sued a nearby neighboring chemical works for destruction of vegetation, damage to the residence, and loss of rents caused by odors and gasses emitted by the defendant's chemical works. The damages judgment by the trial court was remanded by the appellate court as excessive, with instruction to the plaintiff to prove the actual amount of any damages suffered. n416

Chemical company did not have the staff or motivation to dispose of waste materials off-site and instead kept drums stored in warehouse. Resulting leaks contaminated ground water and plaintiff's well water. Nuisance claim prevailed in court and defendant was ordered to remediate own property, reimburse plaintiff if plaintiff expended funds in remediation, but no damages were awarded as plaintiff failed to show either diminution in property value or loss of rental value. n417

§ 67.07(c)(4) Coal Operations.

The owner of a farm 3,000 feet from a coal plant complained that water and land were polluted, vegetation was killed and land values diminished from the coal dust and waste products emitted by the plant. The trial court denied damages, but the appellate court reversed because the jury instructions for determining damages were confusing and misleading. n418

A court granted $5,700 damages plus an additional sum for loss of property value because of physical annoyance and discomfort to homeowners located near an operating coal mine. The plaintiffs had suffered nausea, headaches, and irritation of nose and throat from the gases connected with the defendant's refuse dumps. n419 A farmer who owned land adjoining the defendant's coke company, complete with mines and factories, complained of crop and soil damage from the coke oven smoke and gasses. The trial court granted damages for diminished land value, but the appellate court reversed because the plaintiff had rented out the farm at full value for the entire period complained of. n420

A coal tipple and crusher business did not have to pay damages to landowners located 150 feet away when it was determined their business was run in a responsible way, that no negligence was involved, and that negligence was a proper standard for the jury to consider in determining that a nuisance had been created. With this unusual ruling, the plaintiff, who suffered coal particles in the home, furnishings, and clothing from the operation of the coal tipple ultimately obtained no relief. n421

Plaintiff with property next to a coal tipple was awarded $1,250 damages because of coal dust falling onto plaintiff's land from the coal tipple. n422 The owner of a coal ramp next to a general merchandising store was permanently enjoined from operating the coal ramp and a crushing machine. The dust, noise and traffic congestion interfered with the plaintiff's business. n423 A plaintiff property owner near a coal company, complaining of lost property value and dirty food and clothing, sought $20,000 in damages for interference with use of land and loss of property value. Witness evidence was contradictory, the jury found that there was no nuisance, and the court denied relief. n424 A homeowner near a coal business complaining of coal dust and noises obtained an injunction which required the defendant to wet down the coal in order to diminish the dust. The plaintiff's request for more extensive relief was denied because the company had operated for many years before plaintiff complained and had expended large amounts of money on

development of the business. n425

Homeowners near a coal yard operation obtained an injunction prohibiting the coal yard from operating in a way that caused a nuisance to the plaintiffs. The coal yard operations were causing dust from the coal piles to blow over to the plaintiff's property. n426

A homeowner near a coal company complained that the odors and traffic at unreasonable hours interfered with enjoyment of the property. Trial court damages of $282 were reduced to $50, equal to the diminished rental value of the property and reflecting that the nuisance occurred only for short periods of time. n427 Owners of lots and houses only a few feet from lots on which coal was stored complained of environmental damage and decreased rental value from gasses, sparks, smoke, soot, cinders, coal dust and dirt from the coal operations. Plaintiffs were granted $500 damages for loss of rental value to their property extending over a four-year period. n428

When the defendant planned to build a coal yard, the owner of adjoining property sought a permanent injunction against that construction. The injunction was denied when the court found no clear and convincing evidence that the plaintiff would suffer a substantial harm from coal dust. n429

Residential lot owners sought an injunction against construction of a coal yard on unrestricted land at the edge of the residential area, complaining that their property values would be reduced. The appellate court reversed an injunction granted by the trial court, noting that there was not enough evidence that the coal yard would be a nuisance per se. n430

In a public nuisance action, the owner of a coal washery was accused of allowing waste matter to pile up which, through burning and smoldering, gave off noxious gases and polluted the water. The requested injunction was denied when the court determined that an action at law was first necessary to establish the existence of the nuisance before an injunction could issue. n431 Defendant's operation of a coal hopper caused dust, smoke and cinders to fall onto the plaintiff's adjacent property. The court issued an injunction against the defendant piling coal against the plaintiff's wall and from operating the hopper in a way that caused particles to fall on plaintiff's property. n432 A court granted damages to a homeowner whose neighbor maintained a coal shed on adjoining property, with noise, dust and dirt from machinery in the coal shed impairing plaintiff's health and property enjoyment. Even though this was a public nuisance, the proximity of the plaintiff to the defendant's coal shed gave rise to special damages. n433

§ 67.07(c)(5) Construction Operations.

Plaintiff's building near a highway construction operation was damaged and pipes and tiles were cracked, while the defendant was driving piles to support a bridge. The plaintiff was awarded damages, the court noting that pile driving is considered an intrinsically dangerous activity, so no negligence is required to prove the nuisance. n434

The owner of a residence near a lot from which a road construction business was conducted, including tractors and trailers on the lot, complained of disturbance caused by smoke, vapors, noise and vibrations. An injunction was granted; the existence of other nearby similar nuisances was not a valid defense. n435

A construction company operated its crusher 24 hours a day, which interfered with the sleep of nearby homeowners. The company was enjoined from using the rock crusher between 7:00 p.m. and 7:00 a.m. n436 A developer could be liable for creating a private nuisance by filling in a drainage ditch, which action caused damage to plaintiff's property; such a nuisance action would be based on unreasonable use rather than on negligence. n437

§ 67.07(c)(6) Dairy Operations.

Damages and permanent injunction were awarded to homeowners who complained of a nearby dairy operation which produced odors, flies, mosquitoes, dust and noise. n438 However, a dairy operation near other landowners was only

prohibited from operating in a manner which caused a nuisance, the court concluding that there was sufficient space for such a business to be conducted without liability. The complaint against this dairy related to odors from manure piles and to loud noises. n439

A dairy and garage near a subdivision caused subdivision residents loss of sleep by noise and odors from its trucks and dairy activities. The court issued an injunction restricting conduct of the truck activities to the daytime hours. n440 A creamery which disturbed nearby residents through its noise, smoke and traffic congestion was enjoined against night operations. n441 Residents near a creamery plant claimed loss of sleep from nighttime noise. The court granted time for the creamery to reduce its noise, especially at night, or else have its operations completely enjoined. n442 The owners of an apartment building near a dairy with stables complained of rats, garbage, flies, odors and noise. However, failing to prove any injury, they obtained no relief. n443

A creamery plant located in the city polluted underground water, which killed the farm animals of the plaintiff who leased farmland outside the city. Plaintiff, even though only a tenant, was granted actual and punitive damages, because the defendant overloaded the sewage treatment plant. n444 Homeowners suffering loss of sleep and property damage from the operation of a nearby creamery, which emitted noise, odors and vibrations, obtained an injunction against the defendant's operation. n445

Drainage from a creamery destroyed vegetation and caused foul odors on the property of a nearby farmer. The trial court denied the requested injunction and damages, but the appellate court remanded for a trial, stating that the plaintiff was entitled to some relief. n446 The noise from the operation of an ice crusher connected with a dairy and ice cream business caused nearby residents loss of sleep. Plaintiffs were awarded $200 for discomfort and loss of health, and obtained an injunction against the defendant operating so that the noise disturbed the plaintiffs. n447

A landlord complaining of noise from a nearby dairy obtained $875 damages for loss of rental value and an injunction. Defendant was liable even though it was operating at the time plaintiff purchased the property. n448

The operations of a milk distributing plant disturbed nearby residents, but the court denied relief because the noise was not unreasonable and the plant was located in an industrial district. The defendant had taken reasonable measures to reduce the noise by building a high fence. n449 A defendant landowner who processed milk in the basement of the house caused noise which interfered with the neighbors' enjoyment of their homes and damaged their health. The court granted damages and an injunction. n450 The operations of an ice cream factory caused noise from machinery and trucks and water from spray to be blown onto plaintiffs' houses and onto pedestrians, which resulted in an injunction against the defendant's use of the spray pond and any machinery between 9:00 p.m. and 7:00 a.m. The business was found to be conducted in a manner that was materially detrimental to the reasonable use or value of plaintiffs' property. n451

Residence owners who complained of smoke, soot and cinders from the operation of a nearby creamery were ruled to have stated a cause of action. n452

A homeowner downstream from a dairy complained of water pollution from dairy operations. The trial court awarded $200 damages; the appellate court limited the judgment to abatement only. n453

Smoke, foul odors and noise from a dairy operation caused owners of nearby residences to lose sleep and enjoyment of property. The plaintiff sought an injunction, but the defendant was first given an opportunity to abate through its own actions. n454 A creamery which dumped refuse into a stream which flowed through plaintiff's land was ordered to pay $100 damages. The plaintiff's contribution to the pollution affected the amount of recovery, but not the right of recovery. n455

§ 67.07(c)(7) Electric Power Plant.

A fuel oil business adjacent to an electric power plant was damaged by the fumes, noise, smoke and vibrations emitted by use of the defendant's spur railroad track. The trial court ruled for the defendant, but the appellate court held that the question of the existence of a nuisance should have been submitted to the jury. n456

A homeowner near a transformer was disturbed by noise from the vibrating and humming of the transformer. The defendant was required to pay $500 in damages. n457 However, another homeowner adjacent to an electric plant, complaining of soot, smoke, and vibrations, was denied damages for injury to the house, a judgment that was reversed by the appellate court because the court's viewing of the property was distorted and unduly influenced the jury. n458

An electrical substation near the plaintiff's residence gave out a constant hum or noise and exploding balls of fire during electrical storms. The trial court awarded damages for the reduced value of plaintiff's land, and was reversed on the ground that the damage award should only have included depreciation in value caused by the noise and the fire-balls, not by other more general circumstances. n459 A homeowner who claimed lessened value of land and house from proximity to an electric power company, which emitted smoke, soot, steam, vibrations, and noise, was ruled entitled to damages equal to the lessened value of the property. n460

Homeowners near land on which the defendant proposed to construct an electric transforming station did not succeed in obtaining an injunction against the building and operating of the plant. The court found that the substation was not a nuisance per se and that the defendant had every intention of operating so as not to bother the plaintiffs. An injunction would not be appropriate until an actual nuisance could be shown. n461 An electrical plant accused of disrupting plaintiff's peaceful enjoyment of nearby land, and diminishing the property value of the land, escaped liability because the plant was run reasonably and because the plaintiff had failed to give defendant a chance to abate any nuisance. Damages, if awarded, could only relate to diminished property value, and the defendant could be enjoined only from operating in such a way as to cause a nuisance. n462 A lessor of property adjoining the defendant's electric power plant sought damages and injunction because of the noise, vibration, soot and steam emitted by the plant. Plaintiff represented that the rental value of the property was thus diminished, but the appellate court denied relief when it was shown that the same lessee had twice renewed the lease, with no proof that there was any lessened rental value relating to the conditions caused by the defendant's power plant. n463 Noise, vibrations and steam were the causes of the complaint from the lessor of property on which were situated a hotel and a Turkish bathing place. The plaintiff requested $80,000 in damages and an injunction because of decreased rental value of the property, and the trial court awarded $16,000 for injury to the property. n464 A tenant in possession of property adjoining the defendant's electric power plant obtained $4,000 damages and an injunction, but the appellate court held that only the lessor could recover damages for depreciation of rental value of the property. n465 A homeowner adjacent to the defendant's electrical power plant was disturbed by noise, vibrations, steam and soot. After the trial court granted injunction and damages, the appellate court reversed and remanded on the finding that the evidence introduced so far indicated only a slight inconvenience to plaintiff, making an injunction improper. n466

A resident in a partially industrial area located 150 feet from the city's operating power plant complained of the noise and vibrations from operation of the plant's gas engine compressor. The trial court refused relief, but the appellate court ruled that damages should be awarded, because the injury to the plaintiff was appreciable. n467

A homeowner near a power plant obtained damages for injuries to property caused by the negligent operation of the plant. Defendant claimed a bar by the statute of limitations, but the court ruled that the nuisance was occasional and only the damage occurring within the period of statute of limitations had been awarded. n468 A defendant claiming statutory permission to operate its power plant prevailed in the trial court against owners of a nearby lot, who complained of smoke, dust, cinders, sparks and soot emitted by the defendant's operation. The appellate court reversed judgment for the defendant in holding that permission to operate the plant was not permission to maintain a nuisance. n469

A property owner near a power plant complained of noises and vibrations from the plant's machinery. The trial court granted permanent damages, but the appellate court reversed because the nuisance was not necessarily permanent. n470 Another power plant, which emitted smoke, soot, noise and vibrations from operation of heavy machinery escaped an injunction because defendant had substantially decreased the injurious affects of its operation on the adjacent homeowner plaintiff. n471

A jury award of $700 in damages was granted to homeowners who lived within 15 feet of property on which a power plant was located. Their homes were vibrated and shaken, damaged by smoke and soot, and suffered decreases in property values. The case was reversed and remanded on appeal because of a procedural error in taking testimony. n472

Two thousand dollars damages for decreased property value was awarded to a homeowner near an electrical power plant which caused noise and vibrations. n473 The identical amount of damages, $2,000, was awarded another homeowner plaintiff in a similar setting with similar complaints. Despite the fact that most of the damage was done before the defendant bought the plant, the court held that the plaintiff had a right to recover all the damages from the present source of the nuisance. n474

Improper jury instructions which implied that shaking and vibrations from a power plant were only slight annoyances, caused an appellate court to reverse a trial court which had awarded no relief to owners of three houses near a power plant. Plaintiffs alleged that the noise and vibrations damaged the houses and destroyed their rental value. n475

A homeowner near the defendant's electric plant, located in an industrial area, obtained no relief against the operation of the plant, despite complaints of noxious vapors, cinders, soot and noise. The evidence conflicted over whether the operation of the plant actually caused any discomfort or material harm. n476

An owner of an office building located near transmission lines was unsuccessful in alleging that electromagnetic fields generated by the transmission and which allegedly affected computer monitors constituted a nuisance. n477

§ 67.07(c)(8) Fertilizer Operations.

The owner of a manufacturing plant complained that dust from a factory making fertilizer from castor beans caused asthma and allergic reactions in plaintiff's employees. Relief was denied because the injury to non-allergic persons was not substantial and allergic persons were considered extra-sensitive to the defendant's emissions. Also, both plaintiff's and defendant's operations were considered equally vital to the war effort in this heavily industrialized zone. n478 Property owners near a plant producing ammonium nitrate fertilizer claimed that the noises, dust and fumes from the plant restricted the use of their property and impaired their physical and mental well-being. Plaintiffs obtained a total of $43,600 in damages, measured by their loss of use or loss of rental value from this temporary nuisance. n479

A residential plaintiff was held to have a cause of action against a nearby fertilizer plant for deprived enjoyment and devaluation of property caused by noxious odors from the plant. n480 A landowner near a fertilizer and acid factory suffered destruction of crops, vegetation and habitation through gases escaping from the defendant's factory. The court granted an injunction and damages, holding that liability would exist even if the defendant was reasonably careful and even though some of plaintiff's damages came from other causes. n481

An owner of several residential properties near a guano factory obtained no relief for claimed devaluation of property caused by odors from the defendant's factory. n482

Homeowners near a fertilizer plant obtained an injunction against the operation of the plant, the odors from which were in violation of a local ordinance. n483

The owner of a farm near a newly constructed fertilizer factory obtained an injunction against the operation of the

factory because the stench made the plaintiff's farmhouse unfit for habitation. n484

Even though the plaintiff had the only residence in a mostly manufacturing district, judgment for damages was granted against a fertilizer factory near plaintiff's property for discomfort, sickness and damage to structures caused by vapors, smoke and gases emitted by the defendant's factory. The court said use of care, skill and prudence still would not prevent recovery by the plaintiff. n485 Although the relief granted was not described in the case report, a residential plaintiff near a fertilizer factory obtained a favorable verdict and judgment on a complaint for injury to health and property caused by fumes and gases from the defendant's plant. n486

§ 67.07(c)(9) Furniture Factory.

The incinerator of a furniture factory emitted smoke, dust and fumes onto plaintiff homeowner's adjoining property. An action for damages and injunction was unsuccessful after a jury's decision that the evidence supported a finding of no significant damage. n487

Noise from furniture factory machinery disturbed nearby homeowners, who obtained an injunction from the trial court. The appellate court dismissed and remanded so that a jury could decide whether the noise from the factory would have disturbed a person of ordinary sensitivities. n488

§ 67.07(c)(10) Gas and Oil Works.

A landowner used property to hold waste water from an oil drilling operation, but the water seeped into the plaintiff's nearby water supply. The trial court awarded $8,050 damages for pollution of well water, $700 damages for trespass, $10,000 damages for mental discomfort and annoyance, and $13,000 punitive damages. n489

Water flood operations by an oil company caused salt water and oil to migrate to the plaintiff's adjoining land. Plaintiff obtained a judgment of $12,000 for damages to a water well and property. Although the defendant was not negligent, water flood operations were deemed abnormally dangerous. n490 Noise and vibrations from defendant's compressor gas station resulted in an injunction for nearby residents after trial. However, a retrial was ordered for more evidence to determine if the defendant did all it could to reduce noise and vibration, after which damages could still be awarded. n491 Machines connected with a pipeline transport system caused violent shaking, quaking and trembling of the ground around the nearby plaintiffs' residence. The plaintiffs obtained a judgment for damages to the value of their property caused by the defendant's actions. n492

Salt water and oil from the defendant's oil well were permitted to run onto the plaintiff's land, ruining 15-20 acres of farm land. The trial court granted an injunction and $485 damages for injury to land and crops. n493

Plaintiff homeowner, an artist who worked at home, complained of dense smoke, noxious gas fumes and loud noises from the operation of a nearby gas works. The court enjoined the nuisance and granted $750 damages for lost enjoyment of plaintiff's home. n494

A gas compressing plant emitted smoke, soot, fumes and noise, which were carried by winds to plaintiff's land 135 feet away. Damages were denied because there was no evidence that the rental value of plaintiff's property had diminished; however, defendant was enjoined from operating the plant's boiler without a muffler. n495

A landowner complaining of odors from a nearby gas company was permitted to go to trial, even though no negligence was alleged and the defendant's business was lawful. n496

Saltwater disposal pit for oil, gas, and mineral operations claimed to be a nuisance by landowners. Plaintiffs' claims did not survive defendant's defenses of statute of limitations, privity, and consent, because pit had been constructed on

property in 1936, used until 1953, and plaintiffs' claim was not made until after 1992. n497

Explosion at underground salt-dome storage facility, with an estimated force of a three-kiloton bomb, created a permanent nuisance, and trial court awarded over $100 million in actual and punitive damages. Damages were reduced on remand, but the case gives a good discussion of malice, negligence, exemplary damages, and the standard of care regarding oil storage. n498

Gasoline leaked out of defendant's well 1000 feet from plaintiff's property. No evidence was found that the gas leak contaminated plaintiff's property. The court held that under Massachusetts law, "plaintiffs [must] show proof of actual contamination in order to maintain a private nuisance claim." n499

§ 67.07(c)(11) Ice and Cold Storage Plant.

The exhaust from a machine in defendant's ice and cold storage plant, which faced plaintiff's adjoining property, caused plaintiff's house to shake and rattle and the noise interfered with plaintiff's sleep and conversation. Plaintiff was granted $500 damages and an injunction prohibiting the defendant from operating the plant between 6:00 p.m. and 7:00 a.m. The money judgment apparently related to damage to the house. The injunction was dissolved on appeal. n500 Another owner adjacent to an ice plant also complained of noise and vibration from the plant, but obtained no relief when the evidence showed little or no noise or vibration from the plant. n501

§ 67.07(c)(12) Metal and Steel Fabrication Works.

A steel factory's heavy machinery operating 24 hours a day interfered with the sleep of property owners on adjacent land. Damages based on a trespass theory were denied, but the appellate court remanded for trial on a nuisance theory. n502

Fumes emitted by a steel works caused plaintiff's acute illness, killed trees and other plants and destroyed nails and paint on plaintiff's house. Plaintiff obtained an injunction against the defendants maintaining a nuisance with their steel works and which compelled the defendants to make reasonable efforts to abate the nuisance. Plaintiffs were also entitled to an unspecified amount of damages. n503 The owner of an inn complained that the dwelling was damaged and its use rendered uncomfortable from the noise, vibrations, smoke and cinders produced by a nearby rolling mill. The court held that a cause of action was stated. n504

An iron and steel plant whose operations damaged the residence of a nearby landowner through noise and vibrations was ordered to pay damages and was given a reasonable time to make changes in the effects of its operations. n505

A metal treatment business's demolition of barium-tainted furnaces was found to be intentional and unreasonable conduct resulting in contamination of a neighbor's land. The company continued its practices, even though it was substantially certain to contaminate. n506

Electroplating facility left barrels of hazardous substances on property and was sued under public and private nuisance claims. The release and continued threat of hazardous substances was not a public nuisance under Georgia law since it did not affect a common right of all members of the public, and the abandoned barrels were insufficient in themselves to constitute a continuing nuisance. n507

§ 67.07(c)(13) Miscellaneous Factories.

Noise and vibrations from the loading, unloading and processing of logs by the manufacturer of utility poles disturbed a nearby homeowner, causing loss of sleep, shaken and cracked walls, and interference with normal conversation. The trial court denied relief, but the appellate court reversed because the defendant had introduced hearsay evidence and

because the evidence sustained a finding of nuisance. n508 Homeowners near a factory were disturbed by the factory whistle. Their requested injunction against use of the whistle was denied by the trial court, but granted by the appellate court. n509

A lessee of a warehouse was situated near land used to receive and store bulk sulfur. The sulfur injured warehouse employees and rusted and pitted the steel kept in the warehouse. The plaintiff's private nuisance action resulted in a judgment of $500,000 damages related to the lost market value of the steel. n510 Homeowners who lived near where the defendant tested rocket engines complained of noise and vibrations and obtained a judgment of $25,605 compensatory and $75,000 punitive damages. The appellate court reversed the punitive damage judgment because no malice or wanton or willful disregard was shown by the defendants. n511 Defendant operated a steam cable used to pile up stones, the noise from which disturbed nearby homeowners. They were granted a temporary injunction until the defendant could find a way to muffle the noise. n512

A car dealership complained that its cars were damaged when lime dust from a nearby processing plant settled on the cars. A money award for damages to the cars was not upheld because of defects in the method of calculating damages. n513

A tavern operator in the light industrial area complained of fumes, smoke and gas from a nearby plant. The trial court's grant of $4,500 damages was reversed when the appellate court held that the trial court erroneously refused to instruct jurors to take locality into account in determining if the plant was a nuisance. n514 Discomfort and damage to shrubbery and trees in plaintiff's yard were complaints brought against a nearby glycerine factory. The complaint stated a cause of action, but a new trial was ordered because of procedural errors. n515

A homeowner situated 80 feet from a cigar factory complained of noise from the factory. No injunction was granted after plaintiff failed to show unreasonable loss of property value. n516

Landowners located 9 miles away from a smelter lost crops when gas, fumes and smoke were carried by wind from the smelter. The smelter paid damages of $3,553 for lost crops and lost rental value to the property. n517

A homeowner who complained that white paint on the tanks of defendant's neighboring mill reflected the afternoon sun toward plaintiff's front porch was unable to obtain relief. The court held that the plaintiff failed to show a cause of action. n518

A manufacturing plant on property next to plaintiff homeowner had placed its largest and heaviest machinery on the part of the property nearest to the plaintiff's land. The appellate court granted plaintiff an injunction against operation of that machinery until it was removed to a different part of defendant's property in order to minimize the disturbance to plaintiff. n519

Hammers from defendant's jewelry manufacturing factory caused noise and vibrations which disturbed neighboring homeowners. They obtained a temporary injunction which, when modified, allowed the defendant to use the hammers only four hours a day. n520

Landowners proposing to build a steam mill in a residential area were blocked by homeowners who claimed the proposed construction would violate a city ordinance. The trial court granted an injunction, but the appellate court reversed with instructions for the jury to determine the reasonableness of the ordinance which prohibited the construction. n521

Some operations of a machine shop and boiler works were conducted on defendant's lots between the shop and nearby homeowner. The plaintiff homeowner complained of interference with the family's rest and comfort and of vibrations jarring the house. Plaintiff obtained an injunction preventing defendant from working on the lots between the shop and

the plaintiff's property, plus $500 damages. n522

A boarding house operator located next to a plant was unable to use the back yard for laundry, resulting in loss of use of two rental units, because of vibrations, noise, smoke and gases from the defendant's plant. Plaintiff was awarded a judgment of $777 for loss of rental value. n523 The owner of several dwelling houses located near a city-owned pumping station could not rent out three houses because of noise and vibrations from the pumps and machinery in the station. The court awarded damages for loss of property value. The city was advised to place its pumping stations in areas not so close to residential property. n524

A prison dumped large quantities of waste materials into a stream which polluted the water flowing through a downstream dairy operation. The appellate court held that this public institution was liable for nuisance when it failed to take due precautions to guard against the consequences of its operation. n525

Brewery machinery caused offensive noise and vibrations, damaging the structure of plaintiff's nearby house. The plaintiff obtained a restraining order. n526

Although a corporate landowner had ceased the activity which caused salt pollution to freshwater on plaintiff's land, the damage continued and nuisance liability could still be imposed. n527

A tire factory caused leak of petroleum naptha into soil and groundwater of plaintiff's land. Judgment on nuisance claim was overturned at Court of Appeals. n528

A paper mill and pulp factory polluted well water used by potato farmers. The contaminated water caused poor crop yield, plaintiffs lost their lease option, and they recovered damages for lost profits, including the lost lease option. n529

A landowner was permitted to bring a private nuisance action against a corporation on the allegation that the defendant had dumped soil contaminated with PCBs on or near the plaintiff's property. n530

§ 67.07(c)(14) Railroad Operations.

Defendant had owned and operated a railroad line and coal bins near plaintiff's property for over 50 years before the plaintiffs built a residence. However, at the time of that construction, the tracks and property were used only very little, and when the use increased, the noise, dust and smoke from loading and unloading cars deprived the plaintiffs of the comfortable enjoyment of their home. Plaintiffs obtained an injunction against the defendant allowing loud noises and noxious fumes from their operations. n531

A homeowner near a railroad tunnel complained when trains passing through and stopping in or near the tunnel poured out smoke, dust, cinders and gases onto plaintiff's property. Plaintiff was awarded damages that related to emissions from the tunnel. n532 Church activities were disturbed by noise, smoke, cinders, ashes and vapors from locomotive repair operations on defendant's property, and access to plaintiff's property was sometimes blocked. Plaintiff was awarded damages of $6,000 for the preceding three years and $7,000 for the continuing nuisance. n533 An earlier nuisance action between these same parties produced a judgment of $4,500 damages for depreciation of the value of property and injury to its use. n534 A ditch created by the defendant railroad was blocked and the resultant flooding on plaintiff's land made the land marshy and boggy. Plaintiff obtained no relief when the court concluded that the defendant had not wrongfully maintained the nuisance and that plaintiff had contributed to the damage. n535 The plaintiff's church attendance and donations were diminished by the train passenger station owned and operated by the defendant on adjacent property. The operation caused smoke, soot, noise and obnoxious vapors and odors to come into the church and ruined furnishings and clothes, as well as rattled the buildings. Plaintiff was awarded damages for a taking of property. n536

The owner of a lot near defendant's railroad right of way complained of disturbance from cars being moved in the middle of the night and from locomotive exhaust. The question of liability was submitted to a jury. n537

Owners of property abutting defendant's railroad company suffered discomfort and diminished property value from the noise, smoke and smell of the engines coming into the station. Plaintiffs were awarded damages of $1,995 for diminished property value or rental value. n538

In this public nuisance action, the owner of a railroad station did not restrain its noisy and boisterous employees from shooting firearms in the streets and highways. The neighborhood was alarmed and disturbed and the defendant was convicted of maintaining a common nuisance. n539

The plaintiff's property value was decreased because of a railroad track running through property near the plaintiff's lot. No relief was granted because the property itself was not physically harmed. n540

A railroad company which left a dead animal in its right of way, the odors from which disturbed the plaintiff and his family on their nearby property, was required to pay damages of $150. The plaintiff could not reach the animal to remove it without destroying the defendant's fence and trespassing. n541 The defendant railroad built a track 37 feet from the plaintiff's property and the running trains produced disturbance which lowered the plaintiff's property value. Damages equal to the diminution of property values were granted. n542

A railroad culvert was too small to handle the water from heavy rains, which water then flooded the plaintiff's nearby land, being used as a brickyard. An injunction was refused because the court found that the plaintiffs had placed their brickyard where they knew it would be flooded and so were contributorily negligent. n543

When homeowners brought a nuisance action for noise emissions from the railyard, the court held that the common law nuisance claims were preempted by the Noise Control Act of 1972 and the Federal Railroad Safety Act, §17, *42 U.S.C. §4916.* This case only deals with a partial summary judgment motion. n544

A railroad loading facility built on property leased from railroad was built in violation of the county zoning code and deemed a nuisance; however, violation of an ordinance (county development code) as opposed to violation of a statute does not constitute nuisance per se. n545 Homeowners near railroad tracks sued for nuisance and negligence, claiming that railroad employees had sounded train horns and harassed them after the employees discovered that the homeowners had made complaints about the noise. The court held that neither the Interstate Commerce Commission Termination Act (ICCTA), nor the Federal Railroad Safety Authorization Act (FRSAA) preempted the homeowner's suits, since the homeowners claims were not safety related. n546

§ 67.07(c)(15) Salvage and Junk Operations.

In this due process case, landowners adjacent to a proposed sanitary landfill were awarded the right to have a public hearing before a permit to operate the sanitary landfill would be granted. n547

Plaintiff homeowners who complained of mosquito infestation from defendant's nearby junkyard obtained an injunction leading to abatement of the mosquito problem. n548 An automobile salvage yard disturbed nearby plaintiffs with the noises, dust, smoke, and stench from towing and dismantling wrecked cars. Defendant was enjoined from operating the salvage business in a way that produced excessive noise, dust or odors. n549

In this public nuisance case, homeowners were disturbed in their occupancy by the operations of the defendant company in reconditioning and salvaging used pipe. The noise, dust and odors from that operation had spread over the entire city. Defendants were enjoined from operating that particular business on the property. n550

Residents attempted to block the expansion of the defendant's auto wrecking business, fearing depreciation of property values and loss of quiet enjoyment from the noise of the wrecking facilities. No injunction was granted because the appellate court held the plaintiff had failed to prove that the business as practiced constituted a nuisance. n551

An abandoned quarry used as a dump harbored an infestation of cockroaches, diminishing the rental value of nearby residential property. Because the defendant did not introduce the species and was making reasonable efforts to abate the problem, no relief was granted to the plaintiff. n552

Plaintiffs who owned business property in the vicinity of a junkyard complained that the junkyard emitted offensive odors and was a breeding ground for mosquitos and other unhealthy and dangerous conditions. Plaintiffs obtained an injunction giving the defendant a period of time to clean up and cover up the junkyard and, if not done within that time, to remove it. n553 Owners of an auto shredding facility had acquired by prescription a right to maintain a nuisance consisting of excessive noise, explosions and air pollutants against persons who owned land or lived in the area for a continuous 20-year period. n554

Cleaning solvents leaked from defendant's landfill and contaminated pond and groundwater located on plaintiff's property. Nuisance claim overcame statute of limitations as a continuing nuisance, and defendant was ordered to pay compensatory damages (based on evidence at remanded trial), but no special damages or punitive damages were awarded. n555

Although a landfill may be a nuisance in fact, adjoining landowner's nuisance suit based on construction and operation of landfill failed where court held that county exercised reasonable care in location, construction, and operation of landfill. n556

Sewage treatment facility's composting operation constituted a nuisance where operation had been added to plant after most residents' occupancy and where residents complained of frequent and unbearable odors which brought about nausea. After weighing hardship to sewage treatment district against hardship to nearby residents, enjoining operation was appropriate remedy. n557

A waste transfer station filed a private nuisance suit against the neighboring property where industrial recycling of transformers had left environmental contamination resulting in the neighboring property being listed on the National Priorities List of CERCLA. Although the waste transfer station argued value diminution of property or even inalienability because of its proximity to the NPL site, no nuisance was found because the alleged nuisance only damaged ability to sell, not use of property. n558 Mountrail County brought an action against a landowner claiming his junkyard was a public nuisance and enjoining the storage of junk automobiles on the property. The Supreme Court of North Dakota held that the junkyard was a public nuisance and that County was authorized to bring the suit seeking to abate a public nuisance. The court further decided that the County was not estopped from bringing this claim even though the landowner had operated this junk business for the past 20 years. Additionally, the landowner was not allowed any compensation. n559

§ 67.07(c)(16) Sand and Gravel Operations.

Residential owners near a sand excavation complained of loss of sleep and enjoyment of the property from the noise, odors and vibrations of the excavation. In granting an injunction, the court discussed the "comparative injury rule," which comes into effect only after a nuisance has been found, and plays no part in deciding whether a nuisance exists. n560

A rock crusher in defendant's gravel pit disturbed adjacent residents. However, insufficient evidence of a nuisance resulted in no relief for the plaintiff. n561

Homeowners near a sand and gravel processing plant also complained of dust, noise, and flashes of light and obtained an injunction against the plant operating as a nuisance. When the defendants complained on appeal that the restraining order did not specify how they should operate their plant so as not to be a nuisance, the Supreme Court replied that the defendants never offered any evidence of their own as to how they might use the plant without creating a nuisance. n562

Owners of land used as a sand and gravel processing facility, an asphalt plant and a concrete plant could use a "coming to the nuisance" defense against plaintiffs who sought damages under nuisance and trespass theories. n563

Dirt excavation pits located near residences held to be private nuisance because of excessive noise, fumes, and dirt, as opposed to being mere inconveniences. n564

§ 67.07(c)(17) Saw Mill and Lumber Operations.

The owner of a private lake complained of water pollution from a nearby wood treating plant which discharged its waste into the water. The appellate court upheld an injunction against further pollution and remanded for damage determinations. The trial court determined that if the injury was permanent then damages based on the diminished property value would be granted. If the injury were temporary, then the plaintiff would qualify for decreased rental value of the property and any special damages related to annoyance, discomfort, inconvenience and sickness. n565 A homeowner across the street from a sawmill complained of sawdust blown into the home, but was unable to obtain an injunction because the nuisance had been abated by the end of the trial. n566

Landowners near a sawmill complained of shavings, sawdust and noise from the operation of the mill, and obtained an injunction requiring the mill to cease operations within 71/2 months. n567

A sawmill owner was accused of failing to provide proper sanitation facilities, which caused employees to deposit human waste on the plaintiff's land, which seeped into their residence. Also, the sawmill operation caused debris, soot and sawdust to fall on plaintiff's land. In a nuisance action, plaintiff obtained $1,750 damages as compensation for mental suffering, inconvenience, and depreciation of property value. n568

The owner of a plant nursery complained that the fine wood particles from a nearby sawmill adversely affected the appearance and growth of the nursery's plants. However, no injunction was granted when the court found no evidence that the operation of the sawmill was excessive, unreasonable, or produced actual physical discomfort and annoyance to a reasonable person. n569 Owners of a grocery store and residences across the highway from a sawmill complained of discomfort, annoyance and inconvenience, and damage to a roof, gutters and a paint job caused by emissions from the sawmill. The trial court granted damages equivalent to 10% of the costs of the paint job and the gutter damage, but did not grant an injunction, believing that the defendant had already abated the nuisance. The appellate court granted injunctive relief so the defendant would not resume the nuisance. n570

An action by homeowners against a nearby sawmill resulted in a contempt of court citation against the defendant. The defendant had failed to obey an earlier injunction to abate the nuisance, even though defendants asserted they had done everything they could to significantly decrease the noises which were the basis of the plaintiffs' complaints. n571

Farmers near a sawmill complained of particles, smells and noise from the sawmill, and obtained $1,000 in damages and an injunction against the unreasonable noise. The damages were to compensate for loss of enjoyment of property. The action was remanded to determine whether the cost of abating the fallout emission would force the mill to close, implying that injunctive relief would not be allowed to actually shut down the mill. n572 Likewise, a residential owner near a sawmill complained of burning cinders, sawdust and other deposits on land, houses, vegetables, trees and wooden fences, and obtained $100 in damages and a perpetual injunction restraining the defendant from burning waste within 500 feet of plaintiff's property. The money damages reflected the actual damage to plaintiff's property. n573

A homeowner near a planing mill was disturbed by the smoke, charred sawdust and soot carried by wind from the mill and its incinerator to plaintiff's property. Also, noise and vibrations contributed to plaintiff's disturbance. The court, however, found that the operation of the mill and incinerator was neither a public nor a private nuisance. n574

A homeowner near a planing mill complained that the mill's machinery operated too loudly at night and on Sundays. The action resulted in an injunction against the defendant operating the mill on Sundays and after 6:00 p.m. on weekdays. The defendant had been granted a nonconforming use in the neighborhood before the area was zoned for residential uses, but the business had since expanded well beyond the nonconforming use. n575

The owner of a fruit farm near a sawmill alleged damage to fruit trees, house and clothes from the smoke, sawdust and burning embers emitted by the mill and deposited on plaintiff's farm. The court refused to give an injunction because it found the sawmill was operating with care and prudence and the loss to plaintiff's property was relatively small. However, damages for injury and inconvenience were granted. n576

A resident near a saw and planing mill complained of noise, shavings, dust and smoke from the mill and obtained an injunction against the mill operating as a nuisance. n577

Owners of residential lots near a lumber yard and planing mill complained of noise and sawdust and blocking of roads and sidewalks because of loading and unloading operations. The offensive noises consisted of the shrill and penetrating noise from the saws and other machines and the noise of the factory whistle. These plaintiffs obtained an injunction against the offensive features of defendant's business. n578

The owner of a dwelling near a sawmill complained of smoke, soot, odors, noise, and vulgar language. Plaintiff obtained an injunction against the sawmill's operation and also indicated that damages could be awarded if the proper proof were forthcoming. n579

Loud noise, smoke and soot were the complaints of a homeowner against a nearby planing mill. Plaintiff obtained a judgment for damages to property and for inconvenience and discomfort. n580

Noise, smoke, soot, and dust from a planing mill resulted in a nuisance action by an owner/landlord of several lots, complaining of distress, discomfort, and decreased rental value. The court granted damages measured by the diminution in rental value of plaintiff's premises. n581 Noise, vibrations and dust from defendant's planing mill operations caused plaintiff's family nervous distress and allegedly destroyed the value of plaintiff's home. Plaintiff was ruled to have stated a cause of action. n582

A homeowner situated near a planing mill complained of smoke, ashes and cinders from burning sawdust and burnt shavings being blown onto plaintiff's property. Damages of $250 awarded by the trial court were reversed on appeal because they were equal to the entire value of the property. On remand, the court was instructed to determine the proper amount of compensatory damages based on the loss in property value caused by the nuisance. n583 Also, homeowners within a few blocks of a planing mill were unsuccessful in their action for an injunction because the court found that persons of ordinary sensibility would not be made uncomfortable by the noise, smoke, soot and cinders emitted by the mill. n584

Plaintiff homeowner, with only one set of windows in the house, complained that the defendant had piled lumber on the adjacent lot, obstructing light and air flowing to the plaintiff through those windows. The trial court denied the injunction on the ground that plaintiff had no easement for light and air, but the appellate court found that the conditions for an implied easement were met because both parties' lots were once owned by the same person and that person had intended that both parties have full use of their land. n585

A chute from the defendant's sawmill blew sawdust onto plaintiff's adjacent land. The sawdust drifted into the house,

clothes, furniture, and food of plaintiff, and was so thick that the plaintiff breathed it. Plaintiff's garden was killed and the home became almost uninhabitable. Plaintiff was awarded $500 for damage to the house, lot, trees, garden and furniture. The court noted that the chute was operated in willful disregard of plaintiff's rights and comfort. n586

A planing mill to be built within 90 feet of plaintiff's home would allegedly force the plaintiff to keep doors and windows closed and, if built, would render plaintiff's home unfit to live in. Plaintiff was adjudged entitled to bring an action for a permanent injunction against construction of the planing mill. n587

A steam planing mill was located only 21 feet from a homeowner/landlord. The mill operation produced smoke, cinders and vibrations which rattled windows, shook dishes, soiled furniture and carpets, injured health and made conversation difficult. The plaintiff obtained judgment for $1,000 in damages, reflecting the lost rental value and the inconvenience. An injunction was not granted, because in the meantime the defendant had modified the operation of its planing mill. n588

§ 67.07(c)(18) Stone and Quarry Operations.

After one test blast, residence owners near a limestone quarry sought an injunction against future blasting. The court denied the injunction, believing there was not enough evidence that future blasting would be a substantial invasion of plaintiffs' property. If a nuisance did in fact develop, the plaintiff would be entitled to return to court. n589

Blasting in a limestone quarry caused loss of land use for crops and damage to the water supply and grazing land of a nearby farmer. The farmer obtained an injunction and damages against the quarry. The injunction ordered the defendant to cease operating in a way that caused rocks and dust to be thrown and blown onto the plaintiff's land. n590 A hospital obtained an injunction against the use of explosives by a nearby rock quarry. n591 The vibration from two large diesel engines used in a plant where stone was cut and dressed interfered with the enjoyment and use of property owned by nearby residents. Those residents obtained an injunction against the operations which produced the vibrations. n592

Rock crushing operations which included blasting caused great quantities of "obnoxious dust" to damage the property, health and land use of nearby homeowners. Plaintiffs obtained damages in the amount of $3,691. n593 Homeowners on land adjoining defendant's limestone products plant complained of limestone dust, gases and other materials being blown onto their lands. Although they sought damages amounting to $31,850, they were awarded only $750. However, the appellate court remanded because the trial court permitted inflammatory remarks about the plaintiff to be introduced over plaintiff's objection so the amount of damages awarded was prejudiced against the plaintiff. n594

A limestone rock quarry caused dust, noise, vibration and rock propulsion by use of explosives and by rock crushing and loading. Nearby landowners who suffered property damage and interference with peaceful enjoyment of their property obtained an injunction ordering abatement of the operations after the quarry owner was given a time to reduce the adverse effects of its operations. During this time, the court visited the quarry site twice and, on finding no substantial improvements, shut down the quarry. A "coming to the nuisance" argument was rejected because most plaintiffs had bought their property before the quarry began operations or during the years it was dormant. n595

Blasting, dust and fumes from a quarry damaged the homes and health of nearby residence owners, who obtained an injunction against quarry operations. n596

A homeowner near a rock quarry complained of structural damage, injured health and frightened children caused by the quarry's blasting. The homeowner obtained an injunction against the blasting and also damages for discomfort, annoyance and lost property value. Continual fear of danger was also an element in those special damages. n597

The blasting and stone crushing activities at a quarry caused property damage, annoyance and distress to nearby landowners, who obtained an injunction and money damages for injury to property. n598 The noise and vibration of

machinery used in a stone and marble yard caused building damage at, and drove tenants away from, three nearby apartment houses. The appellate court refused to uphold an injunction, but did grant compensation for lost rentals. n599

Homeowners near a stone quarry and rock crusher who complained of injury to houses and health from the vibration and dust of explosives obtained a temporary injunction against the quarry. n600

Nearby homeowners complained of drilling, blasting and noises from defendant's stone crushing plant. The plaintiffs obtained an injunction which ordered the quarry to control its effect on the neighborhood, but the court refused to close the plant. n601

Machines used by the owner of a granite quarry and finishing plant to process the granite caused loud penetrating noises which disturbed summer residents in the area. The machines used air compressors and were located outdoors. Plaintiff summer residents obtained an injunction prohibiting defendant from using the machines in such a way that interfered with plaintiffs' reasonable comfort and enjoyment of property. n602

An owner of land on which were piled loads of broken stone used an engine and cable to pile the rocks, the noise from which disturbed occupants of nearby residences. The residents obtained a temporary injunction restraining the defendant from operating at a noise level that disturbed the neighborhood. The injunction was temporary because the defendant maintained that the use of the lot for that purpose was temporary. n603

Machinery used in a marble factory caused jarring and shaking which damaged buildings and annoyed nearby residents. The defendants were enjoined from conducting their business. n604

A rock quarry polluted nearby landowner's pond and came under summary judgment where its pollution was in violation of National Pollutant Discharge Elimination System (NPDES) permit, making the nuisance a nuisance per se in violation of the Clean Water Act (CWA). n605

Neighbors of a quarry operation succeeded in having the operation declared a nuisance and obtained damages and a permanent injunction limiting quarry activities (although permitting some of those activities to continue). n606

§ 67.07(c)(19) Textile Mill.

A textile mill produced noise and vibrations from use of heavy machinery and air conditioning, which caused loss of property value to a nearby homeowner. The court granted $1,200 damages for actual physical damage to the house. However, a new trial was ordered because of prejudicial jury instructions. n607 The plant whistle of a cotton mill, when blown between 9:00 p.m. and 6:30 a.m., startled a family who lived nearby. However, the court granted no relief when a jury determined that there was no special damage to the plaintiff. n608

§ 67.07(c)(20) Trucking and Freight Operations.

Homeowners disturbed by the operations of a nearby freight terminal obtained an injunction against trailers being hitched or unhitched between 11:00 p.m. and 7:00 a.m. Even though the defendants' land was zoned for commercial uses, the zoning did not give the defendant the right to create a nuisance with business operations. n609

Property owners near other property used by diesel trucks were disturbed by revving of truck engines at all hours of the day and night. They obtained a temporary injunction against revving of truck engines on defendant's property between 8:30 p.m. and 7:00 a.m. n610

The owner of an apartment building complained that a freight forwarding business on adjoining land interfered with the sleep of the plaintiff's tenants because of nighttime operations. Plaintiff obtained an injunction requiring defendant to

decrease or eliminate the noise at night. n611 A truck park near a residential area disturbed the sleep of residents through the noise of coupling and uncoupling of trailer trucks, revving of engines, vibration and fumes. Plaintiffs were granted an injunction against the defendant conducting business on the property between 8:00 p.m. and 7:00 a.m. The property had been zoned residential one year after the defendant had established the truck park. n612

Homeowners adjacent to a truck terminal complained of noise (shouting, engines, radios, compressors), vibrations, and floodlights shining in windows between 7:00 p.m. and 1:00 a.m. every night. The plaintiffs were disturbed in their sleep and restricted in the use of their porch and swimming pool. They obtained an injunction and $2,000 in damages to compensate them for the impaired use and enjoyment of their homes. n613

Property owners alleged that cracks in their walls were caused by the noise, vibrations and odors from a nearby trucking terminal. However, neighbors testified that odors and noise from the terminal were not bothersome, so the action was dismissed with no relief for plaintiffs. n614

Neighbors of a trucking and contracting business complained of dirt, dust, noise and fumes, but obtained no injunction based on nuisance in fact. n615 An oil, coal and trucking business produced acrid fumes, loud noises and vibrations from trucks operating late at night and early in the morning, which disturbed the sleep and health of nearby residents. Plaintiffs obtained an injunction prohibiting the trucking business from operating between 8:00 p.m. and 6:00 a.m. Although the defendant was in the oil and coal business before the area became residential, the trucking business was added later. n616

Homeowners near the proposed site for a truck terminal succeeded in obtaining an injunction against such construction, on the ground that the enterprise in that location would necessarily create a nuisance. n617

Homeowners sought to enjoin the construction of a motor freight terminal nearby, claiming that the enterprise would destroy the value of their property and make their homes unlivable because of noise, vibrations and pollution. Plaintiffs obtained no relief on the basis of nuisance; however, further proceedings were required on a zoning question. n618

Homeowners near a truck terminal obtained $2,500 in damages because of the inconvenience, discomfort, humiliation, worry, mental anguish, pain and suffering, and injury to health caused by the noise and disturbance from the operation of the truck terminal. One plaintiff's recovery was slightly less than the other because that plaintiff lived 50 feet farther away from the defendant terminal. n619

A lot owner who parked trucks and stored asphalt on the lot was accused of creating a nuisance for nearby homeowners. The plaintiffs complained of noise and smells which injured their health and affected their enjoyment of the property. They obtained an injunction against parking or operating trucks or storing asphalt on the lot. n620

The owner of a trucking business which required loading and unloading of heavy steel plate at night disturbed nearby homeowners in their sleep and prevented the quiet enjoyment of their property. The court enjoined the defendant from operating between 12:00 midnight and 6:00 a.m. in a way that would create such disturbing noise. n621 A hotel owner had business disturbed by the operation of a trucking business and freight terminal on adjacent land. Even though such an enterprise was permitted by zoning ordinances, the defendant was still liable for any private nuisance created. The court granted an injunction prohibiting the trucking and freight terminal from operating between 8:00 p.m. and 7:00 a.m. n622

§ 67.07(c)(21) Sewer Pumping Station.

A town's operation of a sewer pumping station on town property amounted to a private nuisance, but could continue to operate as long as plaintiffs were paid $400 a month in damages. n623

A private nuisance action could be based on odors emanating from the operation of a sewage treatment plant on adjacent property. n624

§ 67.07(c)(22) Pulp and Paper Mills.

A pulp and paper mill's discharge into a river was considered the likely source of dioxin in the fish that were caught and eaten forty miles downstream at plaintiff's riverside property. Summary judgment was granted for the defendant because plaintiff was unwilling to submit to medical tests to determine dioxin levels. n625

§ 67.07(d) Residential Uses.

This section summarizes those cases involving residential or other nonagricultural, noncommercial and nonindustrial activities which have been challenged as private nuisances. The activities described in the cases are set forth in an alphabetical order of subcategories, as follows: abandoned vehicles; barn; construction activities; defective buildings; dogs; embankment; garbage; lawnmower; open toilets; radio noise; roosters; shrubs; solar interference; trees; vegetation; vacant lot; wall; windmill.

§ 67.07(d)(1) Abandoned Vehicles.

A landowner kept trailers and old abandoned cars on land in violation of a restrictive covenant. A neighboring landowner sued on a private nuisance theory and obtained an injunction against keeping of the cars, found to be unsightly and obnoxious. n626 Plaintiff owned an apartment complex with an unobstructed view of the Hudson River. Defendant acquired the strip of property between the plaintiff's property and the river and planned to construct a new apartment complex. Plaintiff brought suit to enjoin the defendant from building. The court found that the construction of the building did not fall within the scope of a private nuisance claim. n627

§ 67.07(d)(2) Barn.

A landowner who maintained a barn which harbored flies, vermin and noxious odors, all of which disturbed the nearby plaintiff landowner on windy days, was enjoined from use of the barn within city limits. n628

§ 67.07(d)(3) Construction Activities.

Construction of a condominium apartment building, including driving of piles and other activities causing vibration, disturbed a nearby apartment building owner in enjoyment of property, for which a judgment for damages was obtained. n629

From construction activity on the defendant's land, smoke, sand and cement blew onto the nearby plaintiff's property, discoloring plaintiff's building and destroying paint. Plaintiff obtained $278 for damage to property. n630

§ 67.07(d)(4) Defective Buildings.

The defendant condominium association maintained an uninsulated and uncovered corridor, which allowed noises to invade apartments in the condominium building. Plaintiff apartment owners obtained an injunction against the noise. n631

Defendant had permitted a vacant building to deteriorate and become unsightly. The plaintiff owned a building across the street from defendant's building, and obtained a judgment for damages representing the difference between the market value of plaintiff's building before and after the deterioration. The court noted that the defendant's neglect of his building in an area where other property owners were working to improve their buildings made defendant's building a nuisance. n632

Defendant's house settled and leaned on plaintiff's house, resulting in an injunction for plaintiff. The court ruled that encroachment upon space by a leaning building is a nuisance, not a trespass. n633

Defendant's building collapsed onto the adjacent building of plaintiff. While the occurrence was clearly a nuisance, the city had already assumed liability, so the defendant was not liable. n634

Defendant maintained a building without gutters, and when rainwater ran off the roof, it ran onto the adjacent building of plaintiff. Plaintiff obtained an injunction against such damage. n635

§ 67.07(d)(5) Dogs.

Defendant kept and bred dogs on property next to the plaintiff's. The barking, smells and pollution of a stream running through plaintiff's land gave rise to an action based both on nuisance and on violation of a restrictive covenant. An injunction was denied because of the narrow construction of the restrictive covenant and insufficient evidence, in the view of the court, to show that keeping the dogs would offend a person of reasonable sensibilities. n636

A permanent injunction was upheld against a dog kennel as source of barking, resulting in lack of quiet enjoyment of property. n637

Barking dogs were held to be cause of sleep loss to group home patient. n638

Dispute between neighbors over barking dogs results in injunction forcing dog owner to abate. n639

Homeowner sued to prevent the noise from 12-18 barking dogs on neighbor's property. The lower court denied the injunction, but the appellate court reversed the decision. n640

§ 67.07(d)(6) Embankment; Dock.

An embankment on defendant's land caused flooding on the adjoining farmland. Damages were denied the plaintiff because the dam had been built by a previous owner and the defendant had not used it. The plaintiff, on the other hand, had previously used the trapped water for his own purpose and had not notified the defendant of the nuisance nor requested that it be removed. n641

A boat dock interfered with adjacent landowners' property rights and was held to be a private nuisance. n642

In a property boundary dispute, owner below ceased destroying beaver dams, resulting in the flooding of a portion of land belonging to owner above. This was held to be a private nuisance cause of action. n643

City conducted restoration project along canal, removing subsoil and large boulders between feed mill and water's edge. Gradual collapse of that portion of mill and ongoing damage to foundation deemed to be continuing nuisance, not time-barred, and proper remedy was both damages and an injunction ordering city to abate the nuisance. n644

After river authority released water from reservoir into river by raising floodgates on dam, resulting property damage led private property owners to sue for nuisance. Court held that there was no tort claim against the river authority in spite of damages. n645

§ 67.07(d)(7) Garbage.

Defendant property owner had filled a well behind the house with rubbish, with no provision for drainage. A tenant of

the defendant complained of bad odors, disease and filth, annoyance, and the death of a child. The appellate court held that the pleading disclosed an action in tort and defects in the property amounting to nuisance. n646

§ 67.07(d)(8) Lawnmower.

A defendant who operated a lawnmower at early hours had to pay $500 damages and refrain from early mowing at the complaint of a neighbor. In this case, the husband was held liable for the actions of the wife. n647

§ 67.07(d)(9) Open Toilets.

The defendant constructed open toilets on land next to plaintiff's property, which created offensive odors and attracted rats. The plaintiff obtained an injunction against the open toilets and piles of concrete kept near the property line. n648

§ 67.07(d)(9.5) Obstruction of Public Road.

The State of Kansas brought an action of criminal damage to property against the defendant for mowing over wheat planted on a public road/right of way. The court dismissed all claims against the defendant, stating that growing wheat on a public right of way constituted a nuisance per se and the defendant was justified in abating the nuisance. n649

§ 67.07(d)(10) Radio Noise.

Defendant played loud, blaring radio music intentionally and maliciously for several hours a day over several years. The plaintiff, a neighbor, complained on a nuisance theory and received $3,500 in punitive and compensatory damages. n650

Landowners' son who practiced with a heavy metal rock band and played amplified home stereo and guitar music caused a private nuisance over a three year period. Damage award of $25,000 was augmented by $5,000 punitive damages. n651

(This holding was reversed because the court concluded that the holding had been based on extraneous factors, including trial court's acceptance of unverified decibel reading from plaintiff while excluding similar reading from defendant and the court's consideration of the son's status as an amateur musician).

§ 67.07(d)(11) Roosters.

A homeowner who complained about the crowing of roosters in the morning on the neighbor's property was denied an injunction by a court, which believed a reasonable person would not be disturbed by "the cheerful and gallant qualities of the big red rooster." n652

Keeping 25 to 50 roosters at the defendant's house constituted an animal nuisance; keeping the roosters as a commercial enterprise for food purposes could be a defense or an exception to the animal nuisance law's general prohibition, but the defendant has the burden of coming within the exception. n653

Homeowners complained of new neighbors starting a gamecock operation on their property, alleging private nuisance and violation of state cock-fighting statutes. The Mississippi court of appeals held that the rooster-raising part of the operation was a nuisance and should be permanently enjoined, and issued an injunction limiting the neighbors to having two roosters on their property at any given time. n654

§ 67.07(d)(12) Shrubs.

The shrubbery on defendant's land grew to such height and with such overhanging branches that it deprived the

plaintiff's adjacent property of light and air. Plaintiff was denied an injunction, but was entitled to cut any branches which hung over his land. n655

A passenger injured in a motor vehicle accident allegedly caused by overgrown shrubs brought action based on private nuisance theory. n656

§ 67.07(d)(13) Solar Interference.

The owner of a solar heated residence brought action to restrain the adjoining landowner from building a house that would interfere with plaintiff's access to sunlight. In determining that plaintiff had stated a cause of action, the appellate court said that the factual circumstances and social priorities which have restricted the right to sunlight are now obsolete. Sunlight as a source of energy is more important now and sunlight cases should be subject to the reasonableness test for determining nuisance. n657

§ 67.07(d)(14) Trees.

Defendant's landscaping activities on hillside property resulted in erosion of land and exposure of the roots of a large tree. The plaintiff on adjacent land obtained an injunction requiring removal of the tree, because of the danger that the tree would collapse. The court held that an unsound tree standing near a property boundary line is a nuisance which a landowner on whose land the tree stands may be required to eliminate, regardless of whether it was planted or it grew naturally. n658

A tree planted on defendant's property hung over and interfered with plaintiff's property. Defendant was required to abate the nuisance. n659

Insects from defendant's tree impaired the adjacent plaintiff's comfortable enjoyment of property. However, no injunction was granted because the condition was a natural occurrence. n660

Trees on defendant's property were blown over and left lying across the boundary line with plaintiff's property. Plaintiff's legal action resulted in an order requiring defendant to remove the trees. n661 A branch of defendant's tree overhanging plaintiff's property broke off and damaged plaintiff's fence and garage. The defendant was ordered to cut off the overhanging branches, but no damages were allowed, because actual damages had been paid by an insurance company. n662 Roots from defendant's trees were stunting the growth of plaintiff's walnut trees. An injunction was issued requiring defendant to remove the harmful root growth. n663

The roots of a tree planted on the common boundary between plaintiff and defendant caused structural damage to the basement of plaintiff's residence. Defendant was required to remove the offending tree. n664

The roots of a tree on defendant's property were alleged to have clogged a sewer pipeline affecting the neighboring residential lot. No relief was granted to the plaintiff, but a new trial was ordered to determine with certainty whether the roots indeed caused the damage to the sewer line. n665

A tree infested with bugs and insects on defendant's property interfered with the plaintiff's use of adjoining land. The court denied an injunction because the tree had been pruned and sprayed, thus abating the nuisance, but the court required the defendant to maintain proper pruning and spraying as often as necessary to prevent the infestation. According to this court, if a tree is in such a condition as to actually threaten physical injury to persons or property on the adjoining premises, it is abatable as a nuisance. n666

Roots on plaintiff's land from a tree on defendant's land caused plaintiff to trip and suffer injury, which supported a cause of action for nuisance. n667

Defendant planted 40-foot trees that partially blocked plaintiff's view of the ocean. Despite defendant's claim that the trees were primarily planted for privacy, the court ordered the trees to be cut off at 6 feet or removed entirely. n668

Trial court found unconstitutional an ordinance authorizing the cutting of trees blocking views. Appeals court reversed. n669

§ 67.07(d)(15) Vacant Lot.

Plaintiff complained that a vacant lot owned by the city was used for dumping garbage and refuse collected from cleaning the streets. No injunction was granted because the plaintiff did not prove that any actual injury had been suffered. n670

§ 67.07(d)(16) Vegetation.

When the defendant removed sagebrush and natural growth from land, sand and dust blew onto the property of an adjoining landowner. No injunction was granted, because the court said the defendant would have difficulty in stopping the wind or replacing the sagebrush, and equitable principles could do no better. n671

Effluent from sewage treatment facilities was claimed to have caused excessive growth of vegetation in the river channel, creating a potential for flooding to plaintiff's land. Lower court rejected, appeals court affirmed. n672

§ 67.07(d)(17) Wall.

A wall on defendant's property caused soil on plaintiff's land to wash away, leaving a 6- to 12-inch fall next to the wall. Because of the dip, plaintiff's wife fell and was injured. Damages granted by trial court were reversed on appeal, because evidence of contributory negligence by the plaintiff should have been presented to the jury. Plaintiff was making use of the wall at the time she was injured. n673

A seawall raised to protect against flooding was not a private nuisance, despite the fact that it made adjoining landowners' property more susceptible to flooding. n674

§ 67.07(d)(18) Windmill.

A windmill operating on defendant's property caused noise levels from which the adjacent plaintiff landowners suffered stress and loss of comfortable enjoyment of their homes. The court held that the plaintiffs stated a cause of action in their attempt to obtain an injunction against the operation of the windmill. n675

§ 67.07(d)(19) Wood Stove.

The owners of a wood-burning stove were ordered to raise their chimney and burn only clean, dry wood. n676

§ 67.07(d)(20) Others.

A sewage treatment plant was held to have created a nuisance when the plaintiff proved the odors caused loss of a prospective purchaser, plaintiff's nausea and limitations on the plaintiff's use and enjoyment of the land. n677

A landlord was held liable, under a nuisance theory, for neighboring plaintiffs' mental distress caused by activities of non-tenant drug dealers and their customers conducted off the landlord's premises, because the landlord's apartments had become the hub of the activities and the landlord had not acted responsibly to deal with the problem. n678

Noise and dust from a motor speedway caused inconvenience and distress among neighboring landowners. Plaintiffs were entitled to an injunction limiting dust and noise and to pre-injunction damages. n679

Noise pollution emanating from air-conditioning equipment caused a substantial invasion of neighbors' use and enjoyment of their land and thus constituted a common law private nuisance. n680

Allegations that material containing asbestos flaked off buildings and interfered with railroad tracks beneath the buildings were sufficient to allege a private nuisance. n681

Developer built a pier into a lake on an easement across a parcel that according to one means of measuring riparian rights is acceptable. Buyer of lot affected sued under nuisance and trespass and won, using another method of measuring riparian rights. n682

Stray voltage from electrical service to a dairy barn causing unusual behavior in cows constitutes an unintentional invasion and therefore is actionable under private nuisance. n683

A class action was brought by landowners alleging that a speeding ferry produced large wakes that damaged the plaintiffs' shoreline property. A preliminary injunction limiting ferry speed was entered. n684

A city was liable to an infant for nuisance when it failed to enforce lead paint abatement regulations. n685

FOOTNOTES:

(n1)Footnote 261. *Lamesa Cooperative Gin v. Peltier, 342 S.W.2d 613 (Tex. Civ. App. 1961).*

(n2)Footnote 262. *Strieber v. Ward, 196 S.W. 720 (Tex. Civ. App. 1917).*

(n3)Footnote 263. *Moore v. Coleman, 195 S.W. 212 (Tex. Civ. App. 1917).*

(n4)Footnote 264. *Robinson v. Dale, 131 S.W. 308 (Tex. Civ. App. 1910).*

(n5)Footnote 265. *Pitner v. Shugart Bros., 103 S.E. 791 (Ga. 1920).*

(n6)Footnote 266. *Tate v. Mull, 93 S.E. 212 (Ga. 1917).*

(n7)Footnote 267. *Swain v. Morris, 125 S.W. 432 (Ark. 1910).*

(n8)Footnote 268. *Nichols v. Simpson, 308 S.W.2d 613 (Tex. Civ. App. 1957).*

(n9)Footnote 269. *Robertson v. Shipp, 50 So. 2d 699 (La. App. 1951).*

(n10)Footnote 270. *Tichenor v. Vore, 953 S.W.2d 171 (Mo. App. 1997).*

(n11)Footnote 271. *Van Deusen v. Seavey, 53 P.3d 596 (Alaska 2002).*

(n12)Footnote 272. *Botsch v. Leigh Land Co., 239 N.W.2d 481 (Neb. 1976); Buchanan v. Simplot Feeders, Ltd. Partnership, 952 P.2d 610 (Wash. 1998)* (if agricultural use interferes with use and enjoyment of neighboring property it may be protected by the Right to Farm Act; if it interferes with actual possession and if the activity physically damages property then the action is trespass).

(n13)Footnote 273. *Schlotfelt v. Vinton Farmers' Supply Co., 109 N.W.2d 695 (Iowa 1961).*

(n14)Footnote 274. *Poultryland, Inc. v. Anderson, 37 S.E.2d 785 (Ga. 1946).*

(n15)Footnote 275. *Richards v. Daugherty, 31 So. 934 (Ala. 1902).*

(n16)Footnote 276. *Mayes v. Tabor, 334 S.E.2d 489 (N.C. App. 1985).*

(n17)Footnote 277. *Cline v. Franklin Pork, Inc., 313 N.W.2d 667 (Neb. 1981).*

(n18)Footnote 278. *Vana v. Grain Belt Supply Co., 10 N.W.2d 474 (Neb. 1943).*

(n19)Footnote 279. *Yeager & Sullivan Co. v. O'Neill, 324 N.E.2d 846 (Ind. App. 1975).*

(n20)Footnote 280. *Baldwin v. McClendon, 288 So. 2d 761 (Ala. 1974).*

(n21)Footnote 281. *Evers v. Thomas, 137 So. 2d 39 (Ala. 1962).*

(n22)Footnote 282. *Faires v. Dupree, 197 S.W.2d 735 (Ark. 1946).*

(n23)Footnote 283. *Hall v. Budde, 169 S.W.2d 33 (Ky. 1943).*

(n24)Footnote 284. *Mitchell v. Hines, 9 N.W.2d 547 (Mich. 1943).*

(n25)Footnote 285. *Albaugh v. Abbott, 235 N.W. 263 (Mich. 1931).*

(n26)Footnote 286. *Kuhn v. Wood, 36 N.E.2d 1006 (Ohio App. 1941).*

(n27)Footnote 287. *Ohio Stock Food Co. v. Gintling, 153 N.E. 341 (Ohio App. 1926).*

(n28)Footnote 288. *Payne v. Skaar, 900 P.2d 1352 (Idaho 1995).*

(n29)Footnote 289. *O'Cain v. O'Cain, 473 S.E.2d 460 (S.C. App. 1996).*

(n30)Footnote 290. *Parker v. Barefoot, 502 S.E.2d 42 (N.C. App. 1998), rev'd, 519 S.E.2d 315 (N.C. 1999).*

(n31)Footnote 291. *White v. Lewis, 57 So. 2d 497 (Miss. 1952).*

(n32)Footnote 292. *Singer v. James, 100 A. 642 (Md. 1917).*

(n33)Footnote 293. *Pestey v. Cushman, 788 A.2d 496 (Conn. 2002).*

(n34)Footnote 294. *Woods v. Kahn, 420 N.E.2d 1028 (Ill. App. 1981).*

(n35)Footnote 295. *Gerrish v. Wishbone Farms of N.H., Inc., 231 A.2d 622 (N.H. 1967).*

(n36)Footnote 296. *Higgins v. Decorah Produce Co., 242 N.W. 109 (Iowa 1932).*

(n37)Footnote 297. *May v. Brueshaber, 466 S.E.2d 196 (Ga. 1995).*

(n38)Footnote 298. *Hendrickson v. Swyers, 9 S.W.3d 298 (Tex. Ct. App. 1999).*

(n39)Footnote 299. *Alfred Jacobshagen Co. v. Dockery, 139 So. 2d 632 (Miss. 1962).*

(n40)Footnote 300. *Ozark Bi-Prods., Inc. v. Bohannon, 271 S.W.2d 354 (Ark. 1954).*

(n41)Footnote 301. *Storey v. Central Hide & Rendering Co., 226 S.W.2d 615 (Tex. 1950).*

(n42)Footnote 302. *Demont v. Abbas, 32 N.W.2d 737 (Neb. 1948).*

(n43)Footnote 303. *Glogger v. Bell, 200 So. 100 (Fla. 1941).*

(n44)Footnote 304. *Kall v. Carruthers, 211 P. 43 (Cal. App. 1922).*

(n45)Footnote 305. *Plassey v. S. Lowenstein & Son, 48 N.W.2d 126 (Mich. 1951).*

(n46)Footnote 306. *Sarraillon v. Stevenson, 43 N.W.2d 509 (Neb. 1950).*

(n47)Footnote 307. *Bryson v. Ellsworth, 200 S.W.2d 504 (Ark. 1947).*

(n48)Footnote 308. *Basham v. Eureka Locker & Cold Storage, 187 P.2d 500 (Kan. 1947).*

(n49)Footnote 309. *Kramer v. Sweet, 169 P.2d 892 (Or. 1946).*

(n50)Footnote 310. *Bishop v. Banks, 33 Conn. 118 (1865).*

(n51)Footnote 311. *Hobbs v. Smith, 484 P.2d 804 (Colo. 1971), aff'd, 493 P.2d 1357 (Colo. 1972).*

(n52)Footnote 312. *Robichaux v. Hupperbauer, 231 So. 2d 626* (La. App.), *remanded on other grounds, 245 So. 2d 385 (La. App. 1970).*

(n53)Footnote 313. *Mahone v. Autry, 227 P.2d 623 (N.M. 1951).*

(n54)Footnote 314. *Robinson v. Westman, 29 N.W.2d 1 (Minn. 1942).*

(n55)Footnote 315. *Johnson v. Drysdale, 285 N.W. 301 (S.D. 1939).*

(n56)Footnote 316. *O'Keefe v. Shechan, 126 N.E. 822 (Mass. 1920).*

(n57)Footnote 317. *Simonetti v. Carlton, 82 So. 553 (Ala. App. 1919).*

(n58)Footnote 318. *Winbigler v. Clift, 172 P. 537 (Kan. 1918).*

(n59)Footnote 319. *Hall v. Carter, 157 S.W. 461 (Tex. Civ. App. 1913).*

(n60)Footnote 320. *Gus Blass Dry Goods Co. v. Reinman & Wolfort, 143 S.W. 1087 (Ark. 1912).*

(n61)Footnote 321. *McNulty v. Miller, 151 S.W. 208 (Mo. App. 1912).*

(n62)Footnote 322. *Williams v. Wolfgang, 132 N.W. 30 (Iowa 1911).*

(n63)Footnote 323. *Oehler v. Levy, 85 N.E. 271 (Ill. 1908).*

(n64)Footnote 324. *Hochestrasser v. Martin, 74 Hun. 338 (N.Y.S. 1893).*

(n65)Footnote 325. *Robinson v. Sinith, 53 Hun. 638 (N.Y.S. 1889).*

(n66)Footnote 326. *Gifford v. Hulett, 19 A. 230 (Vt. 1890).*

(n67)Footnote 327. *Farrell v. Cook, 20 N.W. 720 (Neb. 1884).*

(n68)Footnote 328. *Coker v. Birge, 9 Ga. 425 (1850).*

(n69)Footnote 329. *Thornburg v. Port of Portland, 376 P.2d 100 (Or. 1962). But see, Mark v. State Dept. of Fish and Wildlife, 974 P.2d 716 (Or. Ct. App. 1999)* (stating that the *Thornburg* case merely permits a plaintiff to claim

inverse condemnation based on a non-trespassory nuisance, but does not create a standard to determine what constitutes a taking) (Inverse condemnation suit against Air Force base); *Argent v. United States, 124 F.3d 1277 (9th Cir. 1997).*

(n70)Footnote 330. *Warren Twp. Sch. Dist. No. 7 v. Detroit, 14 N.W.2d 134 (Mich. 1944).*

(n71)Footnote 331. *Thrasher v. Atlanta, 173 S.E. 817 (Ga. 1934).*

(n72)Footnote 332. *Swetland v. Curtiss Airports Corp., 41 F.2d 929* (D. Ohio), *modified on other grounds, 55 F.2d 201 (6th Cir. 1930).*

(n73)Footnote 333. *Crutcher v. Taystee Bread Co., 174 S.W.2d 801 (Mo. 1943).*

(n74)Footnote 334. *Friedman v. Keil, 166 A. 194 (N.J. 1933).*

(n75)Footnote 335. *Dillon v. Cortland Baking Co., 230 N.Y.S. 289 (1928).*

(n76)Footnote 336. *Wade v. Fuller, 365 P.2d 802 (Utah 1961).*

(n77)Footnote 337. *Pizio v. Babcock, 76 So. 2d 654 (Fla. 1954).*

(n78)Footnote 338. *Maxwell v. Lax, 292 S.W.2d 223 (Tenn. App. 1954).*

(n79)Footnote 339. *Five Oaks Corp. v. Gathmann, 58 A.2d 656 (Md. 1948).*

(n80)Footnote 340. *Fos v. Thomassie, 26 So. 2d 402 (La. App. 1946).*

(n81)Footnote 341. *Gordy v. Armstrong, 10 S.E.2d 168 (Ga. 1940).*

(n82)Footnote 342. *Hall v. Putney, 10 N.E.2d 204 (Ill. App. 1937).*

(n83)Footnote 343. *Weber v. Mann, 42 S.W.2d 492 (Tex. Civ. App. 1931).*

(n84)Footnote 344. *Wilson v. Edwards, 256 P. 239 (Cal. App. 1927).*

(n85)Footnote 345. *Scott v. Le Compte, 260 So. 2d 345 (La. App. 1972).*

(n86)Footnote 346. *Hooks v. International Speedways, Inc., 140 S.E.2d 387 (N.C. 1965).*

(n87)Footnote 347. *Kohr v. Weber, 166 A.2d 871 (Pa. 1960).*

(n88)Footnote 348. *Edmunds v. Duff, 124 A. 489 (Pa. 1924).*

(n89)Footnote 349. *Downey v. Jackson, 65 So. 2d 825 (Ala. 1953).*

(n90)Footnote 350. *Widmer v. Fretti, 116 N.E.2d 728 (Ohio App. 1952).*

(n91)Footnote 351. *Biggs v. Griffith, 231 S.W.2d 875 (Mo. App. 1950).*

(n92)Footnote 352. *Smilie v. Taft Stadium Bd. of Control, 205 P.2d 301 (Okla. 1949).*

(n93)Footnote 353. *Amphitheaters, Inc. v. Portland Meadows, 198 P.2d 847 (Or. 1948).*

(n94)Footnote 354. *Rohan v. Detroit Racing Ass'n, 22 N.W.2d 433 (Mich. 1946).*

(n95)Footnote 355. *Casteel v. City of Afton, 287 N.W. 245 (Iowa 1939).*

(n96)Footnote 356. *Ritz v. Women's Club, 173 S.E. 564 (W. Va. 1934).*

(n97)Footnote 357. *Phelps v. Winch, 140 N.E. 847 (Ill. 1923).*

(n98)Footnote 358. *Shelburne, Inc. v. Crossan Corp., 122 A. 749 (N.J. Eq. 1923).*

(n99)Footnote 359. *McMillan v. Kuehnle, 73 A. 1054, rev'd on other grounds, 78 A. 185 (N.J. Eq. 1909).*

(n100)Footnote 360. *Parker v. Trueheart, 246 S.W. 428 (Tex. Civ. App. 1922).*

(n101)Footnote 361. *Larson v. Calder's Park Co., 180 P. 599 (Utah 1919).*

(n102)Footnote 362. *Grantham v. Gibson, 83 P. 14 (Wash. 1905).*

(n103)Footnote 363. *West v. Luna, 1998 Tenn. App. LEXIS 560* (Tenn. App. Aug. 12, 1998).

(n104)Footnote 364. *Woodmen of The World, Unit Number 3 v. Jordan, 499 S.E.2d 900 (Ga. App. 1998).*

(n105)Footnote 365. *Wheeler v. Lebanon Valley Auto Racing Corp., 755 N.Y.S.2d 763 (N.Y. Sup. Ct. 2003).*

(n106)Footnote 366. *Kinney v. Koopman, 22 So. 593 (Ala. 1896).*

(n107)Footnote 367. *Asia v. Pool, 92 P. 351 (Wash. 1907).*

(n108)Footnote 368. *McPherson v. First Presbyterian Church, 248 P. 561 (Okla. 1926).*

(n109)Footnote 369. *Carpenter v. Texaco, Inc., 646 N.E.2d 398 (Mass. 1995)* (underground tank leakage).

(n110)Footnote 370. *Kellerhals v. Kellenberger, 103 N.W.2d 691 (Iowa 1960).*

(n111)Footnote 371. *Kestner v. Homeopathic Med. & Surgical Hosp., 91 A. 659 (Pa. 1914).*

(n112)Footnote 372. *Brock v. Roskamp, 371 P.2d 465 (Okla. 1962).*

(n113)Footnote 373. *Proulx v. Basbanes, 238 N.E.2d 531 (Mass. 1968).*

(n114)Footnote 374. *Walcher v. First Presbyterian Church, 184 P. 106 (Okla. 1919).*

(n115)Footnote 375. *Borland v. Sanders Lead Co., 369 So. 2d 523 (Ala. 1979).*

(n116)Footnote 376. *Lorenzi v. Star Market Co., 115 P. 490 (Idaho 1911).*

(n117)Footnote 377. *Clinic & Hosp. v. McConnell, 236 S.W.2d 384 (Mo. App. 1951).*

(n118)Footnote 378. *Hustleton v. Park, 100 A. 798 (Pa. 1917).*

(n119)Footnote 379. *McCaffrey's Appeal, 105 Pa. 253 (1884).*

(n120)Footnote 380. *Wealkey v. Page, 53 S.W. 551 (Tenn. 1899).*

(n121)Footnote 381. *Stodder v. Rosen Talking Mach. Co., 135 N.E. 251 (Mass. 1922).*

(n122)Footnote 382. *Borgnemouth Realty Co. v. Gulf Soap Corp., 31 So. 2d 488 (La. 1947).*

(n123)Footnote 383. *Winget v. Winn-Dixie Stores, 130 S.E.2d 363 (S.C. 1963).*

(n124)Footnote 384. *Strong v. Winn-Dixie Stores, Inc., 125 S.E.2d 628 (S.C. 1962).*

(n125)Footnote 385. *A. & P. Food Stores, Inc. v. Kornstein, 121 So. 2d 701 (Fla. App. 1960).*

(n126)Footnote 386. *Hannum v. Oak Lane Shopping Ctr., Inc., 119 A.2d 213 (Pa. 1956).*

(n127)Footnote 387. *Essick v. Shillam, 32 A.2d 416 (Pa. 1943).*

(n128)Footnote 388. *Ford v. Grand Union Co., 270 N.Y.S. 162 (1934).*

(n129)Footnote 389. *Cumberland Grocery Co. v. Baugh, 152 S.W. 565 (Ky. 1913).*

(n130)Footnote 390. *Smith v. Western Wayne County Conserv. Ass'n, 158 N.W.2d 463 (Mich. 1968).*

(n131)Footnote 391. Oak Haven Trailer Court, *Inc. v. Western Wayne County Conservation Ass'n, 141 N.W.2d 645 (Mich. App. 1966) aff'd, 158 N.W.2d 463 (Mich. 1968).*

(n132)Footnote 392. *Digirolamo v. Philadelphia Gun Club, 89 A.2d 357 (Pa. 1952).*

(n133)Footnote 393. *Wolcott v. Doremus, 101 A. 868 (Del. 1917).*

(n134)Footnote 394. *Joos v. Illinois Nat'l Guard, 100 N.E. 505 (Ill. 1912). See also,* Cotter, David G. "Shooting Sports Versus Suburban Sprawl -- Is Peaceful Coexistence Possible?" T.M. Cooley L. Rev. Vol. 15 (1998) 21.

(n135)Footnote 395. *Miller v. Hill, 785 N.E.2d 532 (Ill. App. Ct. 2003).*

(n136)Footnote 396. *Vermillion v. Pioneer Gun Club, 918 S.W.2d 827 (Mo. App. 1996).*

(n137)Footnote 397. *Landolt v. Glendale Shooting Club, Inc., 18 S.W.3d 101 (Mo. Ct. App. 2000).*

(n138)Footnote 398. *Concerned Citizens of Cedar Heights-Woodchuck Hill Road v. DeWitt Fish and Game Club, Inc., 755 N.Y.S.2d 192 (2003).*

(n139)Footnote 399. *Page County Appliance Ctr., Inc. v. Honeywell, Inc., 347 N.W.2d 171 (Iowa 1984).*

(n140)Footnote 400. *Martin v. Williams, 93 S.E.2d 835 (W. Va. 1956).*

(n141)Footnote 401. *Bowers Welding & Hotshot, Inc. v. B., 699 P.2d 299 (Wyo. 1985).*

(n142)Footnote 402. *Pate v. Host LaJolla, Inc., 1998 U.S. Dist. LEXIS 13976 (S.D. Ala. 1998).*

(n143)Footnote 403. *Robinson Brick Co. v. Luthi, 169 P.2d 171 (Colo. 1946) , but see,* Hobbs v. Smith, 493 P.wd 1353 (Colo. 1972).

(n144)Footnote 404. *E. W. Face & Son v. Cherry, 84 S.E. 10 (Va. 1915).*

(n145)Footnote 405. *Phillips v. Lawrence Vitrified Brick & Tile Co., 82 P. 787 (Kan. 1905).*

(n146)Footnote 406. *Fogarty v. Junction City Pressed Brick Co., 31 P. 1052 (Kan. 1893).*

(n147)Footnote 407. *Powell v. Brookfield Pressed Brick & Tile Mfg. Co., 78 S.W. 646 (Mo. App. 1904).*

(n148)Footnote 408. *Windfall Mfg. Co. v. Patterson, 47 N.E. 2 (Ind. 1897).*

(n149)Footnote 409. *Helmkamp v. Clark Ready Mix Co., 214 N.W.2d 126 (Iowa 1974).*

(n150)Footnote 410. *Boomer v. Atlantic Cement Co., 257 N.E.2d 870 (N.Y. 1970) , aff'd, Kinley v. Atlantic Cement Co., 42 A.D.2d 496, 349 N.Y.S.2d 199 (1973).*

(n151)Footnote 411. *Caldwell v. Knox Concrete Prods., Inc., 391 S.W.2d 5 (Tenn. App. 1964).*

(n152)Footnote 412. *Powell v. Superior Portland Cement, 129 P.2d 536 (Wash. 1942).*

(n153)Footnote 413. *A To Z Paper Co., Inc. v. Carlo Ditta, Inc., 720 So. 2d 703 (La. App. 1998).*

(n154)Footnote 414. *City of Jackson v. Thompson-McCully Co., LLC 608 N.W.2d 531 (Mich. Ct. App. 2000).*

(n155)Footnote 415. *Page v. Niagara Chem. Div., 68 So. 2d 382 (Fla. 1953).*

(n156)Footnote 416. *Swift v. Broyles, 42 S.E. 277 (Ga. 1902).*

(n157)Footnote 417. *Blackburn v. Miller-Stephenson Chem. Co., 1998 Conn. Super. LEXIS 2621* (Conn. Super. Sept. 11, 1998).

(n158)Footnote 418. *Smith v. Pittston Co., 127 S.E.2d 79 (Va. App. 1962).*

(n159)Footnote 419. *Evans v. Moffat, 160 A.2d 465 (Pa. Super. 1960).*

(n160)Footnote 420. *Robb v. Carnegie Bros. & Co., 22 A. 649 (Pa. 1891).*

(n161)Footnote 421. *Harless v. Workman, 114 S.E.2d 548 (W. Va. 1960).*

(n162)Footnote 422. *Gem-Elk Horn Coal Co. v. Everidge, 309 S.W.2d 755 (Ky. 1958).*

(n163)Footnote 423. *Harman v. Allen, 297 S.W.2d 59 (Ky. 1957).*

(n164)Footnote 424. *Brumley v. Mary Gail Coal Co., 246 S.W.2d 148 (Ky. 1952).*

(n165)Footnote 425. *Strough v. Ideal Supplies Co., 187 S.W.2d 839 (Ky. 1945).*

(n166)Footnote 426. *Dolata v. Berthelet Fuel & Supply Co., 36 N.W.2d 97 (Wis. 1949).*

(n167)Footnote 427. *Spiak v. Mutual Coal Co., 38 N.Y.S.2d 779 (1942).*

(n168)Footnote 428. *Spring v. Delaware, L. & W. R. Co., 88 Hun. 385, aff'd, 51 N.E. 1094 (N.Y. 1895).*

(n169)Footnote 429. *Otto Seidner, Inc. v. Ralston Purina Co., 24 A.2d 902 (R.I. 1942).*

(n170)Footnote 430. *Daugherty v. Ward, 215 N.W. 526 (Mich. 1927).*

(n171)Footnote 431. *Pana v. Central Washed Coal Co., 102 N.E. 992 (Ill. 1913)*

(n172)Footnote 432. *Wente v. Commonwealth Fuel Co., 83 N.E. 1049 (Ill. 1908).*

(n173)Footnote 433. *Wiley v. Elwood, 25 N.E. 570 (Ill. 1890).*

(n174)Footnote 434. *Caporale v. C. W. Blakeslee & Sons, Inc., 175 A.2d 561 (Conn. 1961).*

(n175)Footnote 435. *Fox v. Ewers, 75 A.2d 357 (Md. 1950).*

(n176)Footnote 436. *East Ark. Constr. Co. v. James, 199 S.W.2d 589 (Ark. 1947).*

(n177)Footnote 437. *BNT Co. v. Baker Precythe Development Co., 564 S.E.2d 891 (N.C. App. 2002).*

(n178)Footnote 438. *Wade v. Campbell, 19 Cal. Rptr. 173 (1962).*

(n179)Footnote 439. *Cook v. Hatcher, 9 P.2d 231 (Cal. App. 1932).*

(n180)Footnote 440. *Borsvold v. United Dairies, 81 N.W.2d 378 (Mich. 1957).*

(n181)Footnote 441. *O'Connor v. Jersey Creamery Co., 248 N.W. 557 (Mich. 1933).*

(n182)Footnote 442. *Kobielski v. Belle Isle E. Side Creamery Co., 193 N.W. 214 (Mich. 1923).*

(n183)Footnote 443. *Shimberg v. Risdon Creamery Co., 183 N.W. 780 (Mich. 1921).*

(n184)Footnote 444. *Klassen v. Central Kan. Co-op. Creamery Ass'n, 165 P.2d 601 (Kan. 1946).*

(n185)Footnote 445. *Alster v. Allen, 42 P.2d 969 (Kan. 1935).*

(n186)Footnote 446. *Herrmann v. Larson, 7 N.W.2d 330 (Minn. 1943).*

(n187)Footnote 447. *Roukovina v. Island Farm Creamery Co., 200 N.W. 350 (Minn. 1924).*

(n188)Footnote 448. *Ruben v. Brighton Place Dairy, 13 N.Y.S.2d 833 (1939).*

(n189)Footnote 449. *Kasper v. Hood, 196 N.E. 149 (Mass. 1935).*

(n190)Footnote 450. *Ferreiter v. Herlihy, 191 N.E. 352 (Mass. 1934).*

(n191)Footnote 451. *Shea v. National Ice Cream Co., 182 N.E. 303 (Mass. 1932).*

(n192)Footnote 452. *Dixie Ice Cream Co. v. Blackwell, 116 So. 348 (Ala. 1928).*

(n193)Footnote 453. *Behmisch v. Cedarburg Dairy Co., 192 N.W. 447 (Wis. 1923).*

(n194)Footnote 454. *Mitchell v. Flynn Dairy Co., 151 N.W. 434 (Iowa 1915).*

(n195)Footnote 455. *Bowman v. Humphrey, 109 N.W. 714 (Iowa 1906).*

(n196)Footnote 456. *Lee v. Florida Pub. Utils. Co., 145 So. 2d 299 (Fla. App. 1962)* .

(n197)Footnote 457. *Kentucky & W. Va. Power Co. v. Anderson, 156 S.W.2d 857 (Ky. 1941).*

(n198)Footnote 458. *Huges v. General Elec. Light & Power Co., 54 S.W. 723 (Ky. 1900).*

(n199)Footnote 459. *Mississippi Power Co. v. Ballard, 153 So. 874 (Miss. 1934).*

(n200)Footnote 460. *King v. Vicksburg Ry. & Light Co., 42 So. 204 (Miss. 1906).*

(n201)Footnote 461. *Miranda v. Buffalo Gen. Elec. Co., 251 N.Y.S. 510 (1931).*

(n202)Footnote 462. *Peck v. Newburgh Light, Heat & Power Co. (1909), 116 N.Y.S. 433 (N.Y. App. Div. 1909).*

(n203)Footnote 463. *Miller v. Edison Elec. Illuminating Co., 76 N.E. 734 (N.Y. 1906).*

(n204)Footnote 464. *Pritchard v. Edison Elec. Illuminating Co., 72 N.E. 243 (N.Y. 1904).*

(n205)Footnote 465. *Bly v. Edison Elec. Illuminating Co., 64 N.E. 745 (N.Y. 1902).*

(n206)Footnote 466. *Riedeman v. Mount Morris Elec. Light Co., 67 N.Y.S. 391 (1900).*

(n207)Footnote 467. *Fendley v. Anaheim, 294 P. 769 (Cal. App. 1930).*

(n208)Footnote 468. *Virginia R. & Power Co. v. Ferebee, 78 S.E. 556 (Va. 1913).*

(n209)Footnote 469. *Townsend v. Norfolk R. & Light Co., 52 S.E. 970 (Va. 1906).*

(n210)Footnote 470. *Birmingham R. Light & Power Co. v. Bruce, 57 So. 1011 (Ala. App. 1912).*

(n211)Footnote 471. *English v. Progress Elec. Light & Motor Co., 10 So. 134 (Ala. 1891).*

(n212)Footnote 472. *Sherman Gas & Elec. Co. v. Beldon, 123 S.W. 119 (Tex. 1909).*

(n213)Footnote 473. *Chicago N. S. Street R. Co. v. Payne, 61 N.E. 467 (Ill. 1901).*

(n214)Footnote 474. *Hyde Park Thomson-Houston Light Co. v. Porter, 47 N.E. 206 (Ill. 1897).*

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(n217)Footnote 477. *Westchester Assocs. v. Boston Edison Co., 712 N.E.2d 1145 (Mass. App. 1999).*

(n218)Footnote 478. *Heppenstall Co. v. Berkshire Chem. Co., 35 A.2d 845 (Conn. 1944).*

(n219)Footnote 479. *Nitram Chems., Inc. v. Parker, 200 So. 2d 220 (Fla. App. 1967), cert. denied, 204 So. 2d 330 (Fla. 1967).*

(n220)Footnote 480. *Woods v. Rock Hill Fertilizer Co., 86 S.E. 817 (S.C. 1915).*

(n221)Footnote 481. *Frost v. Berkeley Phosphate Co., 20 S.E. 280 (S.C. 1894).*

(n222)Footnote 482. *Webb v. Virginia-Carolina Chem. Co., 87 S.E. 633 (N.C. 1916).*

(n223)Footnote 483. *Perrin v. Crescent City Stock Yard & Slaughterhouse Co., 43 So. 938 (La. 1907).*

(n224)Footnote 484. *Evans v. Reading Chem. & Fertilizing Co., 28 A. 702 (Pa. 1894).*

(n225)Footnote 485. *Susquehanna Fertilizer Co. v. Spangler, 39 A. 270 (Md. 1898).*

(n226)Footnote 486. *Susquehanna Fertilizer Co. v. Malone, 20 A. 900 (Md. 1890).*

(n227)Footnote 487. *Fargason v. Economy Furn., Inc., 356 S.W.2d 212 (Tex. Civ. App. 1962).*

(n228)Footnote 488. *Powell v. Bentley & G. Furn. Co., 12 S.E. 1085 (W. Va. 1891).*

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(n230)Footnote 490. *Mowrer v. Ashland Oil & Ref. Co., 518 F.2d 659 (7th Cir. 1975).*

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(n232)Footnote 492. *Kentucky W. Va. Gas Co. v. Lafferty, 174 F.2d 848 (1st Cir. 1949). But see, Arnoldt v. Ashland Oil, Inc., 412 S.E.2d 795 (W.Va. 1991).*

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(n240)Footnote 500. *Meyer v. Kemper Ice Co., 158 So. 378 (La. 1935).*

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(n242)Footnote 502. *Wilson v. Interlake Steel Co., 649 P.2d 922 (Cal. 1982).*

(n243)Footnote 503. *De Blois v. Bowers, 44 F.2d 621 (D. Mass. 1930).*

(n244)Footnote 504. *Wesson v. Washburn Iron Co., 13 Mass. (1 Allen) 95 (1866).*

(n245)Footnote 505. *Quinn v. American Spiral Spring & Mfg. Co., 141 A. 855 (Pa. 1928).*

(n246)Footnote 506. *Scribner v. Summers, 84 F.3d 554 (2d Cir. 1996).*

(n247)Footnote 507. *Briggs & Stratton Corp. v. Concrete Sales & Servs., 29 F. Supp. 2d 1372 (M.D. Ga. 1998).*

(n248)Footnote 508. *Roberts v. S. W. P. Co., 328 S.E.2d 391 (Ga. App. 1985).*

(n249)Footnote 509. *Hill v. McBurrey Oil & Fertilizer Co., 38 S.E. 42 (Ga. 1901).*

(n250)Footnote 510. *Associated Metals & Minerals Corp. v. Dixon Chem. & Research Inc., 197 A.2d 569 (N.J. Super. 1963), cert denied, 201 A.2d 580 (N.J. 1964).*

(n251)Footnote 511. *Berg v. Reaction Motors Div., Thiokol Chem. Corp., 181 A.2d 487 (N.J. 1962).*

(n252)Footnote 512. *Reilley v. Curley, 71 A. 700 (N.J. Eq. 1908).*

(n253)Footnote 513. *Hindman v. Texas Lime Co., 305 S.W.2d 947 (Tex. 1957).*

(n254)Footnote 514. *Fuchs v. Curran Carbonizing & Eng'g Co., 279 S.W.2d 211 (Mo. App. 1955).*

(n255)Footnote 515. *Danker v. Goodwin Mfg. Co., 77 S.W. 338 (Mo. App. 1903).*

(n256)Footnote 516. *Tortorella v. H. Traiser & Co., 188 N.E. 254 (Mass. 1933).*

(n257)Footnote 517. *United Verde Extension Mining Co. v. Ralston, 296 P. 262 (Ariz. 1931),* but see, *Harleysville Mut. Ins. Co. v. Lea, 410 P.2d 495 (Ariz. 1966).*

(n258)Footnote 518. *Shepler v. Kansas Milling Co., 278 P. 757 (Kan. 1929).*

(n259)Footnote 519. *Quinn v. American Spiral Spring & Mfg. Co., 141 A. 855 (Pa. 1928).*

(n260)Footnote 520. *Blomen v. N. Barstow Co., 85 A. 924 (R.I. 1913).*

(n261)Footnote 521. *Barger v. Smith, 72 S.E. 376 (N.C. 1911)* .

(n262)Footnote 522. *Froelicher v. Oswald Iron Works, 35 So. 821 (La. 1903).*

(n263)Footnote 523. *Hoffman v. Edison Elec. Illuminating Co., 84 N.Y.S. 437 (1903).*

(n264)Footnote 524. *Morton v. New York, 35 N.E. 490 (N.Y. 1893).*

(n265)Footnote 525. *Trevett v. Prison Ass'n of Va., 36 S.E. 373 (Va. 1900).*

(n266)Footnote 526. *Dittman v. Repp, 50 Md. 516 (1879).*

(n267)Footnote 527. *Scheufler v. General Host Corp., 881 F. Supp. 496 (D. Kan. 1995).*

(n268)Footnote 528. *Bradley v. Armstrong Rubber Co. 130 F.3d 168 (5th Cir. 1997).*

(n269)Footnote 529. *Tiegs v. Watts, 954 P.2d 877 (Wash. 1998); Anglado v. Leaf River Forest Prods., Inc., 716 So. 2d 543 (Miss. 1998)* (owners could not recover for nuisance due to unwarranted public perception of danger).

(n270)Footnote 530. *Lewis v. General Elec. Co., 37 F. Supp. 2d 55 (D. Mass. 1999).*

(n271)Footnote 531. *McClung v. Louisville & N. R. Co., 51 So. 2d 371 (Ala. 1951).*

(n272)Footnote 532. *Richards v. Washington Term. Co., 233 U.S. 546 (1914).*

(n273)Footnote 533. *Baltimore & P. R. Co. v. Fifth Baptist Church, 137 U.S. 568 (1891).*

(n274)Footnote 534. *Baltimore & P. R. Co. v. Fifth Baptist Church, 108 U.S. 317 (1883).*

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(n281)Footnote 541. *Missouri K. & T. R.R. v. Burt, 27 S.W. 948 (Tex. Civ. App. 1894).*

(n282)Footnote 542. *Gainseville, H. & W. Ry. v. Hall, 14 S.W. 259 (Tex. 1890).*

(n283)Footnote 543. *Emery v. Raleigh & G. R.R., 14 S.E. 352 (N.C. 1891), overruled in part, Hinshaw v. Raleigh & A.A.L.R. Co., 24 S.E. 426 (N.C. 1896).*

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(n285)Footnote 545. *Harper v. Summit County, 963 P.2d 768 (Utah App. 1998).*

(n286)Footnote 546. *Jones v. Union Pacific Railroad Co., 94 Cal.Rptr.2d 661 (Cal. Ct. App. 2000).*

(n287)Footnote 547. *Petition of St. George, 217 A.2d 45 (Vt. 1966).*

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(n289)Footnote 549. *Crabtree v. City Auto Salvage Co., 340 S.W.2d 940 (Tenn. App. 1960).*

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(n291)Footnote 551. *Kubby v. Hammond, 198 P.2d 134 (Ariz. 1948).*

(n292)Footnote 552. *Maynard v. Carey Constr. Co., 19 N.E.2d 304 (Mass. 1939).*

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(n294)Footnote 554. *Hoffman v. United Iron & Metal Co., 671 A.2d 55 (Md. App. 1996).*

(n295)Footnote 555. *Tri-County Inv. Group, Ltd. v. Southern States, Inc., 500 S.E.2d 22 (Ga. App. 1998).*

(n296)Footnote 556. *Chenango Inc. v. County of Chenango, 681 N.Y.S.2d 640 (App. Div. 1998).*

(n297)Footnote 557. *Penland v. Redwood Sanitary Sewer Serv. Dist, 965 P.2d 433 (Or. App. 1998).*

(n298)Footnote 558. *Golen v. The Union Corp., 718 A.2d 298 (Pa. Super. Ct. 1998).*

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(n300)Footnote 560. *Southwestern Constr. Co. v. Liberta, 385 So. 2d 633 (Ala. 1980).*

(n301)Footnote 561. *Hawkins v. Talbot, 80 N.W.2d 863 (Minn. 1957).*

(n302)Footnote 562. *Draper v. J.B. & R.E. Walker, Inc., 244 P.2d 360 (Utah 1952).*

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(n304)Footnote 564. *Begnaud v. Camel Contractors, Inc., 721 So. 2d 550 (La. App. 1998).*

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(n310)Footnote 570. *Travis v. Martin Bros. Container & Timber Prods. Corp., 143 So. 2d 830 (La. App. 1962).*

(n311)Footnote 571. *Bailey v. Miller, 195 A.2d 601 (Md. 1963).*

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(n315)Footnote 575. *Benjamin v. Lietz, 211 P.2d 449 (Utah 1949).*

(n316)Footnote 576. *Bartel v. Ridgefield Lumber Co., 229 P. 306 (Wash. 1924), overruled in part, Powell v. Superior Portland Cement, 129 P.2d 536 (Wash. 1942).*

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(n318)Footnote 578. *MacKenzie v. Frank M. Pauli Co., 174 N.W. 161 (Mich. 1919).*

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(n326)Footnote 586. *Mahan v. Doggett, 84 S.W. 525 (Ky. App. 1905).*

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(n328)Footnote 588. *Hurlbut v. McKone, 10 A. 164 (Conn. 1887).*

(n329)Footnote 589. *Green v. Castle Concrete Co., 509 P.2d 588 (Colo. 1973).*

(n330)Footnote 590. *Nally & Gibson Corp. v. Mulholland, 399 S.W.2d 293 (Ky. App. 1966).*

(n331)Footnote 591. *Associated Contractors Stone Co. v. Pewee Valley Sanitarium & Hosp., 376 S.W.2d 316 (Ky. 1964).*

(n332)Footnote 592. *Sam Warren & Son Stone Co. v. Gruesser, 209 S.W.2d 817 (Ky. 1948).*

(n333)Footnote 593. *Collins Constr. Co. of Texas, Inc. v. Tindall, 386 S.W.2d 218 (Tex. App. 1965).*

(n334)Footnote 594. *Wilmoth v. Limestone Prods. Co., 255 S.W.2d 532 (Tex. Civ. App. 1953).*

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(n336)Footnote 596. *Vulcan Materials Co. v. Griffith, 114 S.E.2d 29 (Ga. 1960), overruled, East Lands, Inc. v. Floyd County, 262 S.E.2d 51 (Ga. 1979).*

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(n338)Footnote 598. *Adams v. Snouffer, 87 N.E.2d 484 (Ohio App. 1949)* .

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(n341)Footnote 601. *Brede v. Minnesota Crushed Stone Co., 173 N.W. 805 (Minn. 1919).*

(n342)Footnote 602. *Stevens v. Rockport Granite Co., 104 N.E. 371 (Mass. 1914).*

(n343)Footnote 603. *Reilley v. Curley, 71 A. 700 (N.J. Eq. 1908).*

(n344)Footnote 604. *McKeon v. See, 51 N.Y. 300 (1873).*

(n345)Footnote 605. *Gill v. LDI, 19 F. Supp. 2d 1188 (W.D. Wash. 1998).*

(n346)Footnote 606. *Easton v. Cormier, 748 A.2d 1006 (Me. 2000). See also, Town of Stonington v. Galilean Gospel Temple, 722 A.2d 1269 (Me. 1999).*

(n347)Footnote 607. *Watts v. Pama Mfg. Co., 124 S.E.2d 809 (N.C. 1962).*

(n348)Footnote 608. *Redd v. Edna Cotton Mills, 48 S.E. 761 (N.C. 1904).*

(n349)Footnote 609. *De Nucci v. Pezza, 329 A.2d 807 (R.I. 1974).*

(n350)Footnote 610. *Muehlman v. Keilman, 272 N.E.2d 591 (Ind. 1971).*

(n351)Footnote 611. *Altman v. Ryan, 257 A.2d 583 (Pa. 1969).*

(n352)Footnote 612. *Firth v. Scherzburg, 77 A.2d 443 (Pa. 1951).*

(n353)Footnote 613. *O'Neill v. Carolina Freight Carriers Corp., 244 A.2d 372 (Conn. 1968).*

(n354)Footnote 614. *Minquadale Civic Ass'n v. Kline, 212 A.2d 811 (Del. Ch. 1965).*

(n355)Footnote 615. *Cahill v. Heckel, 208 A.2d 651 (N.J. Super. 1965).*

(n356)Footnote 616. *Protokowicz v. Lesofski, 174 A.2d 385 (N.J. Super. 1961).*

(n357)Footnote 617. *Koeber v. Apex-Albuq. Phoenix Express, 380 P.2d 14 (N.M. 1963).*

(n358)Footnote 618. *Gribben v. Interstate Motor Freight Sys., 151 N.E.2d 443 (Ill. App. 1958).*

(n359)Footnote 619. *Beauvis v. D. C. Hall Transp., Inc., 49 So. 2d 44 (La. App. 1950)* .

(n360)Footnote 620. *Fox v. Evers, 75 A.2d 357 (Md. 1950).*

(n361)Footnote 621. *Malm v. Dubrey, 88 N.E.2d 900 (Mass. 1949).*

(n362)Footnote 622. *Weltshe v. Graf, 82 N.E.2d 795 (Mass. 1948).*

(n363)Footnote 623. *Harris v. Town of Lincoln, 668 A.2d 321 (R.I. 1995).*

(n364)Footnote 624. *Walsh v. Town of Stonington Water Pollution Control Auth., 736 A.2d 811 (Conn. 1999).*

(n365)Footnote 625. *Leaf River Forest Prods., Inc. v. Simmons, 697 So. 2d 1083 (Miss. 1996).*

(n366)Footnote 626. *Foley v. Harris, 286 S.E.2d 186 (Va. 1982).*

(n367)Footnote 627. *Chatsworth Realty 344 L.L.C. v. Hudson Waterfront Co., 2003 N.Y. Misc. LEXIS 166* (No. 109992/02, Mar. 4, 2003).

(n368)Footnote 628. *Templeton v. Williams, 116 P. 1062 (Or. 1911).*

(n369)Footnote 629. *Vern H. Oja & Assocs. v. Washington Park Towers, Inc., 549 P.2d 63, aff'd, 569 P.2d 1141 (Wash. 1976), aff'd, 569 P.2d 1141 (Wash. 1977).*

(n370)Footnote 630. *Snow v. Marian Realty Co., 299 P. 720 (Cal. 1931).*

(n371)Footnote 631. *Baum v. Coronado Condo. Ass'n, 376 So. 2d 914 (Fla. App. 1979).*

(n372)Footnote 632. *Puritan Holding Co. v. Holloschitz, 372 N.Y.S.2d 500 (1975).*

(n373)Footnote 633. *Pahl v. Ribero, 14 Cal. Rptr. 174 (1961).*

(n374)Footnote 634. *Oxenrider v. Guoic, 66 N.W.2d 80 (Mich. 1954).*

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(n376)Footnote 636. *Aldridge v. Saxey, 409 P.2d 184 (Or. 1965).*

(n377)Footnote 637. *Tichenor v. Vore, 953 S.W.2d 171 (Mo. App. 1997).*

(n378)Footnote 638. *Sramek v. Korth, 207 Wis.2d 642, 559 N.W. 2d 924 (Wis. App. 1996).*

(n379)Footnote 639. *Martha Rae v. Flynn, 690 So. 2d 1341 (Fla. App. 1997).*

See also, Hernandez v. Richard, 772 So. 2d 994 (La. Ct. App. 2000).

(n380)Footnote 640. *Hernandez v. Richard, 772 So. 2d 994 (La. Ct. App. 2000).*

(n381)Footnote 641. *Philadelphia & R. R. v. Smith, 64 F. 679 (3d Cir. 1984).*

(n382)Footnote 642. *Paul v. Jackson, 910 S.W.2d 286 (Mo. App. 1995).*

(n383)Footnote 643. *Huff v. Smith, 679 So. 2d 259 (Ala. Civ. App. 1996).*

(n384)Footnote 644. *Sunnyside Feed Co., Inc. v. City of Portage, 588 N.W.2d 278 (Wisc. App. 1998).*

(n385)Footnote 645. *Wickham v. San Jacinto River Auth., 979 S.W.2d 876 (Tex. App. 1998).*

(n386)Footnote 646. *Kern v. Myll, 45 N.W. 587 (Mich. 1890).*

(n387)Footnote 647. *Burnett v. Rushton, 52 So. 2d 645 (Fla. 1951).*

(n388)Footnote 648. *Short v. Smithy, 273 S.W.2d 393 (Ark. 1954).*

(n389)Footnote 649. *State v. Deines, 997 P.2d 705 (Kan. 2000).*

(n390)Footnote 650. *Gorman v. Sabo, 122 A.2d 475 (Md. 1956).*

(n391)Footnote 651. *Stiglianese v. Vallone, 637 N.Y.S.2d 284 (1995), rev'd, 666 N.Y.S.2d 362 (1997), rev'd, 680 N.Y.S.2d 224 (N.Y. App. Div. 1998)* (reversing the appellate court and reinstating the trial court in part.).

(n392)Footnote 652. *Myer v. Minard, 21 So. 2d 72 (La. App. 1945).*

(n393)Footnote 653. *Hawaii v. Nobriga, 873 P.2d 110 (Haw. App. 1994), overruled on other grounds by Hawaii v. Maelega, 907 P.2d 758 (Haw. 1995).*

(n394)Footnote 654. *Lambert v. Matthews, 757 So. 2d 1066 (Miss. Ct. App. 2000).*

(n395)Footnote 655. *Granberry v. Jones, 216 S.W.2d 721 (Tenn. 1949).*

(n396)Footnote 656. *Jackson v. City of Blue Springs, 904 S.W.2d 322 (Mo. App. 1995).*

(n397)Footnote 657. *Prah v. Maretti, 321 N.W.2d 182 (Wis. 1982).*

(n398)Footnote 658. *Fabri v. Regis Forcier, Inc., 330 A.2d 807 (R.I. 1975).*

(n399)Footnote 659. *Holmberg v. Bergin, 172 N.W.2d 739 (Minn. 1969).*

(n400)Footnote 660. *Merriam v. McConnell, 175 N.E.2d 293 (Ill. App. 1961).*

(n401)Footnote 661. *Mattos v. Mattos, 328 P.2d 269 (Cal. App. 1958).*

(n402)Footnote 662. *Bonde v. Bishop, 245 P.2d 617 (Cal. App. 1952).*

(n403)Footnote 663. *Stevens v. Moon, 202 P. 961 (Cal. App. 1921).*

(n404)Footnote 664. *Lemon v. Curington, 306 P.2d 1091 (Idaho 1957).*

(n405)Footnote 665. *Forbus v. Knight, 163 P.2d 822 (Wash. 1945).*

(n406)Footnote 666. *Oyster v. Levy, 25 Pa. Dist. 1116 (1916).*

(n407)Footnote 667. *White v. Louviere, 664 So. 2d 603 (La. App. 1995).*

(n408)Footnote 668. *Dowdell v. Bloomquist, 2004 R.I. LEXIS 48* (No. 2002-630-Appeal, Mar. 15, 2004).

(n409)Footnote 669. *Kucera v. Lizza, 59 Cal. App. 4th 1141(1997), reh'g denied, 1998 Cal. LEXIS 1315* (Cal. Feb. 25, 1998).

(n410)Footnote 670. *Lane v. Concord, 49 A. 687 (N.H. 1901), overruled in part, Johnson v. Boston & M.R.R., 143 A. 516,* (N.H. 1928).

(n411)Footnote 671. *Robinson v. Whitelaw, 364 P.2d 1085 (Utah 1961).*

(n412)Footnote 672. *Jordan v. City of Santa Barbara, 46 Cal. App. 4th 1245 (1996).*

(n413)Footnote 673. *Schiro v. Oriental Realty Co., 76 N.W.2d 355 (Wis. 1956).*

(n414)Footnote 674. *Grundy v. Brack Family Trust, 2003 Wash. App. LEXIS 437* (No. 26347-5-II, Mar. 18, 2003).

(n415)Footnote 675. *Rose v. Chaikin, 453 A.2d 1378 (N.J. Super. 1982).*

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CHAPTER 67 THE PROPERTY LAW ASPECTS OF PRIVATE NUISANCE

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§ 67.02(a) Distinctions Between Private Nuisance and Public Nuisance. [Go To Main]

Add:

Wallace v. Lewis County, 137 P.3d 101 (Wash. App. 2006) (a private nuisance is an "unreasonable interference with another's use and enjoyment of property"); *Holder v. Gold Fields Mining Corp., 2007 U.S. Dist. LEXIS 7591 (D. Okla. 2007)* (defining common law nuisance as "the unwarrantable, unreasonable, or unlawful use by a person of his own property to the injury of another."); *Asche v. Bloomquist, 133 P.3d 475 (Wash. App. 2006)* (an actionable nuisance consists of an act or omission that injures another's property or unreasonably interferes with another's enjoyment of their property); *Pac. Sound Res. v. Burlington N. & Santa Fe Ry., 2006 U.S. Dist. LEXIS 37616 (D. Wash. 2006)* (denying recovery under nuisance claim in pollution-related nuisance case because the plaintiff lacked a substantial interest in the polluted property); *Iny v. Collom, 827 N.Y.S.2d 416 (2006)* (differentiating between a private and public nuisance, holding that private nuisances interfer with the enjoyment and use of property that affects one person or relatively few people); *Kinsale, LLC v. Tombari, 897 A.2d 646 (Conn. App. 2006)* (noting the similarity in the measure of damages in nuisance and trespassing cases); *Matter of Groat v. Brennan, 831 N.Y.S.2d 353 (2006)* (the right to quiet enjoyment of real property may give rise to a cause of action to enjoin a private nuisance); *Woodward v. Bd. of Dirs. of Tamarron Ass'n of Condo. Owners, 155 P.3d 621 (Colo. App. 2007)* (whether an alleged nuisance unreasonably interferes with a landowner's use and enjoyment of his property is the essential question in a nuisance claim); *City of Moses Lake v. United States, 430 F. Supp. 2d 1164 (D. Wash. 2006)* (to recover for nuisance, a claimant must demonstrate a "substantial interference with the use and enjoyment of his land."); *Walker Manor Envtl. Trust v. Oyster Landing Condo. Ass'n, 2006 Conn. Super. LEXIS 3876 (Conn. Super. Ct. 2006)* (whereas a public nuisance interferes with a public right to health and safety, a private nuisance interferes with a private property right); *Biglane v. Under the Hill Corp., 949 So. 2d 9 (Miss. 2007)* ("A private nuisance is a nontrespassory invasion of another' s interest in the use and enjoyment of his property."); *Iny v. Collom, 827 N.Y.S.2d 416 (2006)* ("To establish a cause of action for private nuisance, the plaintiff must show that the defendant's conduct causes substantial interference with the use and enjoyment of plaintiff's land and that defendant's conduct is (1) intentional and unreasonable, (2) negligent or reckless,

or (3) actionable under the laws governing liability for abnormally dangerous conditions or activities."); *Davis v. Taylor 132 P.3d 783 (Wash. App. 2006)* (defining a nuisance as an "obstruction to the free use of property, so as to essentially interfere with the comfortable enjoyment of [the property]."); *Rattigan v. Wile, 841 N.E.2d 680 (Mass. 2006)* ("[A]ctivities on one's property that create or maintain unreasonable aesthetic conditions for neighbors are actionable as a private nuisance.").

Add:

Wallace v. Lewis County, 137 P.3d 101 (Wash. App. 2006) (a public nuisance is a nuisance "that affects equally the rights of an entire community or neighborhood"); *State v. Lead Indus. Ass'n, 2007 R.I. Super. LEXIS 32 (R.I. Super. Ct. 2007)* (requiring a plaintiff to show unreasonable interference with a public right to recover for public nuisance. Four elements must be proven in a public nuisance cause of action: the alleged nuisance must (1) have "a natural tendency to create danger and inflict injury;" (2) be a continuing danger; (3) constitute unreasonable or unlawful use of land; and (4) be "the proximate cause" of the injury. Proving that the alleged nuisance created a continuing danger is irrelevant in an action for private nuisance, however, as requiring otherwise would be "imprudent," because "private nuisance claims simply do not fit comfortably within the same analytical rubric as public nuisance claims)". *In re Methyl Tertiary Butyl Ether ("MTBE") Products Liability Litigation 457 F. Supp. 2d 298 (S.D.N.Y. 2006)* ("[A] public nuisance need not affect the entire community so long as the nuisance interferes with those who come in contact with it in the exercise of a public right or it otherwise affects the interests of the community at large."); *Evergreen Intern., S.A. v. Marinex Const. Co., Inc., 477 F. Supp. 2d 681* (D.S.C., 2007) (ship owner recovered damages under a claim of public nuisance against a construction company after his ship collided with a submerged dredge pipeline, which created an obstruction to navigation).

Add:

Overcash v. South Carolina Elec. and Gas Co., 614 S.E.2d 619 (S.C. 2005) (purely personal injuries do not establish the special damages necessary for allowing private action on public nuisances; injury must be to real or personal property); *Mercury Skyline Yacht Charters v. Dave Matthews Band, Inc., 2005 U.S. Dist. LEXIS 29663 (D. Ill. 2005)* (Plaintiff showed special injury when his charter boat and passengers were soaked in human waste from a charter bus's refuse tank, as the bus crossed a bridge over a river)

Add:

Holt v. Hegwood, 708 N.W.2d 21 (Wis. App. 2005.) (private nuisance claim for falling tree branches was properly dismissed because statute did not authorize private claim for that public nuisance).

Delete:

In Re. Bloomingdale Partners, 160 B.R. 101 (N.D. Ill. 1993) (holding that, under Illinois law, invasion of another's land need not be physical for purposes of establishing a private nuisance)

Add:

City of Moses Lake v. United States, 430 F. Supp. 2d 1164 (D. Wash. 2006) (holding that trespass applies when an intrusion interferes with the right to exclusive possession of property, whereas, nuisance applies when an intrusion is to the interest in use and enjoyment of property); *Cedar Cove Homeowners Ass'n v. DiPietro, 628 S.E.2d 284 (S.C. App. 2006)* (distinguishing trespass from nuisance as an "intentional invasion" of property, and defining nuisance as a "substantial and unreasonable interference" with the use and enjoyment of property); *Johnson v. Knox County Partnership, 728 N.W.2d 101 (Neb. 2007)* (defining a private nuisance as "a nontrespassory invasion of another's interest in the private use and enjoyment of land."). But *see Kinsale, LLC v. Tombari, 897 A.2d 646 (Conn. App. Ct. 2006)* (damages for nuisance are similar to those for trespass).

Schiller v. Mitchell, 357 Ill.App.3d 435 (2d Dist. 2005) (showing of physical invasion by something perceptible to the senses is necessary for a private nuisance cause of action in Illinois (citing *In re Flood Litigation, 680 N.E.2d 265 (Ill. 1997))* .

Add:

Malin v. Conn. Zoological Soc'y, Inc., 2007 Conn. Super. LEXIS 832 (Conn. Super. Ct. 2007) (confirming four factors in *Petsey*).

Add:

Laster v. Norfolk S. Ry., 2007 Ala. LEXIS 3 (Ala. 2007) (defining an attractive nuisance as "a condition which is naturally attractive to children ... and is likely to be dangerous to such a person in the ordinary course of events, all of which is known to the defendant and not to the injured person and not obviously dangerous in itself").

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Supp. To CHAPTER 67 THE PROPERTY LAW ASPECTS OF PRIVATE NUISANCE

8-67 Thompson on Real Property, Thomas Editions Supp. to § 67.03

Supp. to § 67.03 Principles of Private Nuisance Law.

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Add:

Rittenhouse Row v. Aspite, 917 A.2d 880 (Pa.Cmwlth. 2006) (an inquiry into substantive due process must preserve the rights of property owners, "within constraints of the ancient maxim of our common law, *sic utere tuo ut alienum non laedas*").

Change:

S. Camden Citizens in *Action v. N.J. Dep't of Envtl. Prot., 254 F. Supp. 2d 486 (D. N.J. 2003)* .

Add:

Dumm v. Dahl, 913 A.2d 863, 867 (Pa. Super. Ct. 2006) (liability for a private nuisance arises only if an "invasion of another's interest in the private use and enjoyment of land ... is either (a) intentional and unreasonable, or (b) unintentional and otherwise actionable under the rules controlling liability for negligent or reckless conduct, or for abnormally dangerous conditions or activities).

§ 67.03(a) Private Nuisances as a matter of Law. [Go To Main]

§ 67.03(a)(1) Private Nuisances Forbidden by Law.

Add:

Gamble v. PinnOak Resources, LLC, 511 F. Supp. 2d 1111 (N.D. Ala. 2007) (private nuisance class action against coal preparation plant, alleging defendants violated federal and safety regulations).

Add:

Matter of Groat v. Brennan, 831 N.Y.S.2d 353 (2006) (since having a court determine a private nuisance suit is not a property right, due process does not require a hearing of such).

Add:

Harper **reversed in part** by *Harper v. Summit County, 26 P.3d 193 (Utah 2001)* ; *Harper, 963 P.2d 768* , also **overruled** by *Culbertson v. Bd. of County Comm'rs, 44 P.3d 642, 657 (Utah 2001)* ("[A] zoning violation is tantamount to irreparable injury in cases in which a county is seeking the injunction. This follows from the fact that a county is responsible for prosecuting a zoning violation. Harper erroneously extended this holding to cases in which a private individual seeks relief.").

§ 67.03(a)(3) Private Nuisances Motivated by Malice.

Add:

See also: Rattigan v. Wile, 841 N.E.2d 680 (Mass. 2006) (the intentional invasion of neighbor's land with a "composite of unpleasant odors, sounds, and visual conditions--constituted a nuisance").

Change:

Dowdell v. Bloomquist, 847 A.2d 827 (R.I. 2004) .

Add:

Austin v. Bald II, L.L.C., 658 S.E.2d 1 (N.C. App. 2008) (10-foot fence on the property line was a private nuisance).

Change:

Dowdell v. Bloomquist, 847 A.2d 827 (R.I. 2004) .

Add:

Austin v. Bald II, L.L.C., 658 S.E.2d 1 (N.C. App. 2008) (a 10-foot wooden fence on the property line was ordered removed or lowered to no more than six feet).

§ 67.03(b)(1) Unreasonableness of Defendant's Conduct in the Use of Land

Subsequent History:

Jupin v. Kask, 2004 Mass. Super. LEXIS 161 (2004) **reversed in part** by *Jupin v. Kask, 447 Mass. 141 (Mass. 2006)* .

Rose, 173 A. 627 , **overruled** by *Splendorio v. Bilray Demolition Co., 682 A.2d 461 (R.I. 1996)* .

City of Lawrenceville, 439 S.E.2d 95 (Ga. App. 1993) overruled in part (on other grounds) by *Clive v. Gregory, 635 S.E.2d 188 (Ga. App. 2006)* .

Add:

Schwan v. CNH Am. LLC, 2006 U.S. Dist. LEXIS 28516 (D. Neb. 2006) (imposing liability for private nuisance only when the defendant's interference is intentional and unreasonable, or abnormally dangerous) ("unreasonable and substantial interference tests ... necessarily include a consideration whether the questioned activity is reasonable under all the surrounding circumstances."); *Woodward v. Bd. of Dirs. of Tamarron Ass'n of Condo. Owners, 155 P.3d 621 (Colo. App. 2007)* (unreasonableness is an issue of fact); *Cook v. Rockwell Int'l Corp., 2006 U.S. Dist. LEXIS 89515 (D. Colo. 2006)* ("[A]n interference must be unreasonable to constitute a nuisance."); *Larson v. Tyson Fresh Meats, Inc., 2006 U.S. Dist. LEXIS 90487 (D. Neb. 2006)* (requiring an interference with property to be both intentional and unreasonable in order to constitute a nuisance); *In re Weinhold, 347 B.R. 887 (Bkrtcy. E.D.Wis. 2006)* (a raised concrete driveway, which caused an accumulation of snow, funneled water, leaves, weeds, and debris on neighboring property, and which created a "navigation hazard," did not constitute a private nuisance, but was merely an annoyance. Thus, it

"did not rise to level of 'substantial or unreasonable interference.' "); *Leitstein v. Hirt, 2006 Del. Ch. LEXIS 184 (Del. Ch. 2006)* (defining a private nuisance as "a civil wrong arising from an unreasonable, unwarranted or unlawful use of one's property producing material annoyance, inconvenience, discomfort or hurt to another in the use of his property.").

Add:

Concerned Area Residents for the Env't, 834 F. Supp. 1410 **reversed** in *Concerned Area Residents for the Env't v. Southview Farm, 34 F.3d 114 (2d Cir. 1994)* .

Change:

Kopecky, 510 N.W.2d 410 **should be** *Kopecky v. Nat'l Farms, 510 N.W.2d 41 (Neb. 1994)* .

Add:

Gallagher v. H.V. Pierhomes, LLC, 957 A.2d 628 (Md. App. 2008) (pile driving activity did not constitute a private nuisance).

Add:

Crowley Museum and Nature Center, Inc. v. Southwest Florida Water Management District, 993 So. 2d 605 (Fla. App. 2008) (private nuisance arising from flooding caused by irrigation).

§ 67.03(b)(2) Substantiality of Harm to the Plaintiff's Use and Enjoyment of Land.

Delete:

Delete duplicate "*See* Smith v. Muellner ..." explanatory citation.

Subsequent History:

In re Tutu Wells Contamination Lit, 909 F. Supp. 991 **reversed in part** by *In re Tutu Wells Contamination Litig., 120 F.3d 368 (3d Cir. 1997) , cert denied, Gal v. Plaskett, 540 U.S. 984 (U.S. 2003) .*

Add:

State v. Lead Indus. Ass'n, 2007 R.I. Super. LEXIS 32 (R.I. Super. Ct. 2007) (establishing that intent is not an element of nuisance, but rather that liability depends upon the substantiality of the defendant's conduct, and if that conduct is the proximate cause of the nuisance); *Johnson v. Knox County Partnership, 728 N.W.2d 101 (Neb. 2007)* (justifying the abatement of a nuisance if it causes "actual physical discomfort to one of ordinary sensibilities;" presumes that a plaintiff has "ordinary sensibilities.").

Add:

Saint John's Church in *Wilderness v. Scott, 194 P.3d 475 (Colo. App. 2008)* (private nuisance caused by protestors who interfered with church services; protestors' obstruction of access to the church during church services would cause irreparable harm).

Woodward v. Bd. of Dirs. of Tamarron Ass'n of Condo. Owners, 155 P.3d 621 (Colo. App. 2007) (an interference must be substantial, "as measured by a standard that it would be of definite offensiveness, inconvenience, or annoyance to a normal person in the community.")

Add:

Gellman v. Seawane Golf & Country Club, Inc., 24 A.D.3d. 415 (N.Y. App. Div. 2d Dept. 2005) (golf course driving range that allows balls to continuously escape and make adjacent landowner's use of own property uncomfortable and inconvenient constitutes a private nuisance)

Add:

A permanent nuisance inflicts permanent damage upon property, which warrants a damages award equal to the property's depreciation in value. *Kinsale, LLC v. Tombari, 897 A.2d 646 (Conn. App. Ct. 2006)*

Add:

Temporary interference with the use and enjoyment of property constitutes a temporary nuisance, which warrants a damages award equal to the property's reduction in its rental value. *Kinsale, LLC v. Tombari, 897 A.2d 646 (Conn. App. 2006)* .

Add:

Ruscito v. Swaine, Inc., 17 A.D.3d 560 (N.Y. App. Div. 2d Dept.) (no valid nuisance claim for mere presence on adjoining property of unsightly dumpsters, an abandoned icebox, car parts, or a fence that did not block plaintiff's right to light or air).

Add:

Anderson v. Elliott, 24 A.D.3d 400 (N.Y. App. Div. 2d Dept. 2005) (alleged disturbance that was caused by the defendants' television filming on several occasions did not, as a matter of law, rise to the level of substantial interference with the plaintiffs' use and enjoyment of their properties so as to constitute a private nuisance).

Add:

Woodward v. Bd. of Dirs. of Tamarron Ass'n of Condo. Owners, 155 P.3d 621 (Colo. App. 2007) (advising courts "to look at the character of the neighborhood, the magnitude, frequency, or duration of the defendant's activity exceeding neighborhood norms, and utility of the activity" to determine if an interference is substantial and unreasonable).

Elliott v. Muehlbach, 620 S.E.2d 266 (N.C. App. 2005) (ATV racetrack may be a nuisance per accidens; remanded for reasonableness determination based on an objective perspective of reasonableness and not upon the perspective of a reasonable person in plaintiff's or defendant's position).

Add:

Johnson v. Knox County Partnership, 728 N.W.2d 101 (Neb. 2007) (justifying the abatement of a nuisance if it causes "actual physical discomfort to one of ordinary sensibilities;" presumes that a plaintiff has "ordinary sensibilities. ").

Add:

But see Johnson v. Knox County Partnership, 728 N.W.2d 101 (Neb. 2007) ("[A] legitimate business enterprise is not a nuisance per se, but it may become a nuisance in fact by reason of the conditions implicit in and unavoidably resulting from its operation or because of the manner of its operation."). The Nebraska Supreme Court, in Johnson, further held that a "[a] legal and proper activity may be a nuisance in fact simply because of its location." A business's industrial or rural location does not excuse its offensive operation if it is conducted in a manner that materially prejudices another landowner. The governing principle in *Johnson* is that conducting a business operation that materially and injuriously affects another's property rights becomes a nuisance to the injured property owner and the business operation may be enjoined.

Add:

See also Farber, Daniel A. "The Story of Boomer: Pollution and the Common Law." *32 Ecology L.Q. 113 (2005).*

§ 67.03(b)(3) Defendant's Conduct as Proximate Cause of Plaintiff's Complaint.

Add:

State v. Lead Indus. Ass'n, 2007 R.I. Super. LEXIS 32 (R.I. Super. Ct. 2007) (establishing that intent is not an element of nuisance, but rather that liability depends upon the substantiality of the defendant's conduct, and if that conduct is the proximate cause of the nuisance); *Maravell v. R.J. Grondin & Sons, 914 A.2d 709, 714 (Me. 2007)* ("A landowner is subject to liability for nuisance or injury created by the activity of a third party on the land if the owner knows, or has reason to know, that the activity is causing, or will cause, an unreasonable risk of injury or nuisance and the landowner consents to the activity or fails to exercise reasonable care to prevent the injury or nuisance."); *Puckrein v. ATI Transport, Inc., 897 A.2d 1034 (N.J. 2006)* ("There are three exceptions to the general rule that principals are not liable for the actions of independent contractors [for private nuisance]: (1) where the principal retains control of the manner and means of doing the work subject to the contract; (2) where the principal engages an incompetent contractor; or (3) where the activity constitutes a nuisance per se.").

City of Lawrenceville, 439 S.E.2d 95 (Ga. App. 1993) overruled in part (on other grounds) by *Clive v. Gregory, 635 S.E.2d 188 (Ga. App. 2006)* .

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Supp. To CHAPTER 67 THE PROPERTY LAW ASPECTS OF PRIVATE NUISANCE

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Supp. to § 67.04 Procedural Principles of Private Nuisance Law.

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§ 67.04(a) Proper Parties. [Go To Main]

Add:

Birke v. Oakwood Worldwide, *87 Cal. Rptr. 3d 602 (2009)* (a minor daughter of the tenant who had a right to enjoy the premises was a proper plaintiff for a private nuisance claim); *Boyne v. Town of Glastonbury, 955 A.2d 645 (Conn. App. 2008)* (private nuisance plaintiff need not be in exclusive possession of the property).

Walker Manor Envtl. Trust v. Oyster Landing Condo. Ass'n, 2006 Conn. Super. LEXIS 3876 (Conn. Super. Ct. 2006) (property ownership, although common, is not a necessary prerequisite to nuisance liability); *Reidling v. City of Gainesville, 634 S.E.2d 862 (Ga.App. 2006)* (a mobile home owner, without an equitable interest in the mobile home park, lacked standing to bring a nuisance action for damage to the park).

Add:

Thorndike v. Thorndike, 910 A.2d 1224, 1227 (N.H. 2006) (recognizing the validity of a claim against a continuing nuisance); *Woldson v. Woodhead, 149 P.3d 361, 364 (Wash. 2006)* (rejecting the notion that future damages for a continuing nuisance must all be recovered in a single action, disapproving of prospective damages recovery). The common law in Kansas distinguishes between permanent and continuing nuisances, but does not distinguish between an offending object and the use of that object. Kansas courts define a continuing nuisance as one where the structure giving rise to the nuisance claim is abatable. *Browning v. MCI, Inc. (In re Worldcom, Inc.), 339 B.R. 836 (D.N.Y. 2006) . But see Brooks v. Chevron USA Inc., 2006 Tex. App. LEXIS 4479 (Tex. App. 2006)* ("[T]he right to sue for injury to real property is a personal right that belongs to the person owning the property at the time of injury." Personal rights do not pass to subsequent purchasers and do "not run with the land absent an express assignment of the cause of action to the

subsequent purchaser."); *Evans v. Lochmere Rec. Club, 627 S.E.2d 340 (N.C. App. 2006)* (property owner not able to enforce previous injunction against neighboring property because the injunction was not obtained against the current landowner, but their predecessor). *But see K & W Elec., Inc. v. State, 712 N.W.2d 107 (Iowa 2006)* (analogizing an inverse condemnation with a permanent nuisance and holding that all recoverable damages must be had in a single cause of action: " '[I]f injuries from a nuisance are of a permanent character and go to the entire value of the estate, there can be but one action, and all damages--past, present, and future--are recoverable therein.' ").

Add:

Evans v. Lochmere Rec. Club, 627 S.E.2d 340 (N.C. App. 2006) (property owner not able to enforce previous injunction against neighboring property because the injunction was not obtained against the current landowner, but their predecessor).

JP Morgan Chase Bank v. Whitmore, 838 N.Y.S.2d 142 (2007) (claim by condominium unit owner against condominium board of managers for noise generated by exhaust fans).

Add:

To recover against a municipality in a nuisance claim, the alleged nuisance must have been created by a positive act of the municipality, or, if involving environmental pollution, by an intentional failure to abate the alleged nuisance by the municipality. *Walker Manor Envtl. Trust v. Oyster Landing Condo. Ass'n, 2006 Conn. Super. LEXIS 3876 (Conn. Super. Ct. 2006)* .

Add:

Chee v. Amanda Goldt Prop. Mgmt., *50 Cal. Rptr. 3d 40, 51 (2006)* (a landlord may be held responsible for a lessee's actions if the landlord authorized or permitted the acts, or if the landlord failed to inspect the property, but a showing of the landlord's knowledge and his ability to prevent the hazard is necessary to impose liability); *Leitstein v. Hirt, 2006 Del. Ch. LEXIS 184 (Del. Ch. 2006)* (all participants in creating a nuisance may be held liable for the injury caused by the nuisance).

Add:

California Dept. of Toxic Substances Control v. Payless Cleaners, 368 F. Supp. 2d 1069 (E.D. Cal. 2005) (successor in interest to dry cleaning company knew of improper disposal of chemicals into the sewer system).

But see Quapaw Tribe of Okla. v. Asarco, Inc., 2007 U.S. Dist. LEXIS 30193 (D. Okla. 2007) ("[T]here is a possibility that [a landlord] could be held liable even if she were not actually aware of an alleged nuisance on the subject property.").

Stein v. Highland Park Indep. Sch. Dist., 540 S.W.2d 551 **overruled** (on other grounds) by *Schneider Nat'l Carriers, Inc. v. Bates, 147 S.W.3d 264 (Tex. 2004)* .

Change:

Milwaukee Metro. Sewerage Dist. v. City of Milwaukee, 671 N.W.2d 345 should be Milwaukee Metro. Sewerage Dist. v. City of Milwaukee, 671 N.W.2d 346 (Wis. App. 2003) .

§ 67.04(c) Statutes of Limitations and Laches [Go To Main]

§ 67.04(c)(1) Statute of Limitations in Actions for Damages

Add:

Harrison v. City of Sanford, 627 S.E.2d 672, 675 (N.C. App. 2006) (the cause of action for damage to property does not accrue until the property damage "becomes apparent or ought reasonably to have become apparent to the claimant."); *K & W Elec., Inc. v. State, 712 N.W.2d 107 (Iowa 2006)* ("Where injuries from the nuisance are intermittent rather than continual, a property owner may bring successive actions to recover damages for each intermittent injury."); *Faulise v. Smithkline Beecham Corp., 2006 U.S. Dist. LEXIS 57276 (D.N.C. 2006)* (action does not accrue until the harm "becomes apparent or ought reasonably to have become apparent to the claimant, whichever event first occurs."); *St. George v. Home Depot U.S.A., Inc., 2007 U.S. Dist. LEXIS 12530 (D. Ariz. 2007)* (a cause of action for a continuing tort accrues, and an applicable statute of limitations begins to run, when the continuing tortious conduct ceases); *Jones v. Town of Angier, 638 S.E.2d 607, 609 (N.C. App. 2007)* (if a claimant knew for more than three years that he had suffered damages, but fails to bring an action until the statute of limitations has run, further damage to his property does not create a new cause of action); *Thorndike v. Thorndike, 910 A.2d 1224, 1227 (N.H. 2006)* (recognizing the validity of a claim against a continuing nuisance); *Woldson v. Woodhead, 149 P.3d 361, 364 (Wash. 2006)* (rejecting the notion that future damages for a continuing nuisance must all be recovered in a single action, disapproving of prospective damages recovery). *But see K & W Elec., Inc. v. State, 712 N.W.2d 107 (Iowa 2006)* (disallowing a five-year statute of limitations to automatically start over after the plaintiff's property flooded a second time); *Moneypenney v. Dawson, 141 P.3d 549 (Okla. 2006)* (damages reasonably capable of being abated are temporary in nature and the statute of limitations will not begin to run until injury is suffered).

Add:

St. George v. Home Depot U.S.A., Inc., 2007 U.S. Dist. LEXIS 12530 (D. Ariz. 2007) (a cause of action for a continuing tort accrues, and an applicable statute of limitations begins to run, when the continuing tortious conduct ceases).

Add:

K & W Elec., Inc. v. State, 712 N.W.2d 107 (Iowa 2006) (disallowing a five-year statute of limitations to automatically

start over after the plaintiff's property flooded a second time). *But see Tenesaca v. C. Pierce Enters., LLC, 2006 Conn. Super. LEXIS 1664 (Conn. Super. Ct. 2006)* (refusing to allow a longer statute of limitations period for temporary nuisances since a permanent nuisance "involves greater damage than a temporary one.").

Add:

Lally v. BP Prods. N. Am., Inc., 615 F. Supp. 2d 654 (N.D. Ohio 2009) (claim of nuisance was time barred because plaintiff knew of contamination 14 years before filing the action against defendant).

Add:

When a nuisance-creating activity or business operation is to continue indefinitely, then a permanent nuisance exists. Whether a nuisance is temporary or permanent is a question of fact. *Manis v. Gibson, 2006 Tenn. App. LEXIS 153 (Tenn. App. 2006)* ; *Shaw v. Tampa Elec. Co., 949 So. 2d 1066, 1070 (Fla. App. 2007)* (permanent nuisance damage measured by the diminution in the value of the plaintiffs' homes); *Kinsale, LLC v. Tombari, 897 A.2d 646 (Conn. App. 2006)* (a permanent nuisance inflicts permanent damage upon property, which warrants a damages award equal to the property's depreciation in value); *Tenesaca v. C. Pierce Enters., LLC, 2006 Conn. Super. LEXIS 1664 (Conn. Super. 2006)* (defining a permanent nuisance as one that inflicts permanent injury upon property, which is remedied with damages equal to the depreciation in the value of the property); *K & W Elec., Inc. v. State, 712 N.W.2d 107 (Iowa 2006)* (analogizing an inverse condemnation with a permanent nuisance and holding that all recoverable damages must be had in a single cause of action: " '[I]f injuries from a nuisance are of a permanent character and go to the entire value of the estate, there can be but one action, and all damages--past, present, and future--are recoverable therein.' " (quoting *Weinhold v. Wolff, 555 N.W.2d 454 (Iowa 1996)* ; *Broadbent v. Allison, 626 S.E.2d 758 (N.C. App. 2006)* (plaintiffs awarded permanent damages may not recover in additional actions based on the same nuisance since the award is for all damages, past and future).

Add:

But see Iannucci v. City of N.Y., 2006 U.S. Dist. LEXIS 21117 (D.N.Y. 2006) (rejecting *Charnley*, and holding that New York does not preclude plaintiffs, based on a lapse of time and the statute of limitations period, from bringing an action to enjoin a public nuisance that also operates as a private nuisance against the plaintiff's property, assuming the plaintiff suffers special damages that are distinct from the general public).

Add, at the end of the subsection

A permanent nuisance inflicts permanent damage upon property, which warrants a damages award equal to the property's depreciation in value. Temporary interference with the use and enjoyment of property constitutes a temporary nuisance, which warrants a damages award equal to the property's reduction in its rental value. n133.1

§ 67.04(d) Right to Jury Trial [Go To Main]

Change:

Armbruster v. Fitzgerald, Wisc. App. LEXIS 185 should be *642 N.W.2d 646* .

FOOTNOTES:
(n1)Footnote 133.1. *Kinsale, LLC v. Tombari, 897 A.2d 646 (Conn. App. 2006)* ; *Fink v. Crean, 2006 Tenn. App. LEXIS 814 (Tenn. App. 2006)* (a nuisance is a temporary nuisance if it can be "corrected with the expenditure of labor and money." Damages for a temporary nuisance may be recovered until the nuisance is abated); *Broyles v. Standifer, 2006 Tenn. App. LEXIS 768 (Tenn. App. 2006)* (damages for a temporary nuisance are measured by the decrease in rental value of the property while the nuisance exists); When a nuisance-creating activity or business operation is to continue indefinitely, then a permanent nuisance exists. Whether a nuisance is temporary or permanent is a question of fact. *Manis v. Gibson, 2006 Tenn. App. LEXIS 153 (Tenn. App. 2006)* ; *Miller v. Rohling, 720 N.W.2d 562, 569 (Iowa 2006)* (measuring the damages for a temporary nuisance as the diminution in the rental value of the property, plus special damages, which include inconvenience, annoyance, discomfort, and the cost of removing the nuisance); *Tenesaca v. C. Pierce Enters., LLC, 2006 Conn. Super. LEXIS 1664 (Conn. Super. 2006)* (defining a permanent nuisance as one that inflicts permanent injury upon property, which is remedied with damages equal to the depreciation in the value of the property); *Miller v. Rohling, 720 N.W.2d 562 (Iowa 2006)* (using commercial grain bins during certain months of the year was held to be a temporary nuisance for which recovery was granted); *K & W Elec., Inc. v. State, 712 N.W.2d 107 (Iowa 2006)* (prescribing the measurement of damages in a temporary nuisance action as the decrease in the property's rental value together with special damages for the plaintiff's discomfort and annoyance) (analogizing an inverse condemnation with a permanent nuisance and holding that all recoverable damages must be had in a single cause of action: " '[I]f injuries from a nuisance are of a permanent character and go to the entire value of the estate, there can be but one action, and all damages--past, present, and future--are recoverable therein.").

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Supp. To CHAPTER 67 THE PROPERTY LAW ASPECTS OF PRIVATE NUISANCE

8-67 Thompson on Real Property, Thomas Editions Supp. to § 67.05

Supp. to § 67.05 Trial Issues in Private Nuisance Actions

[Go To Main]

§ 67.05(a) Prima Facie Case; the Plaintiff's Burden of Proof [Go To Main]

Add:

Dickens v. Oxy Vinyls, LP, 631 F. Supp. 2d 859 (W.D. Ky. 2009) (claim for private nuisance dismissed when plaintiff failed to show noxious smells were emanating from vinyl manufacturer.)

Add:

See e.g., Iannucci v. City of N.Y., 2006 U.S. Dist. LEXIS 21117 (D.N.Y. 2006) (requiring a plaintiff to prove special damages that are distinct from the general public in order to recover damages for a private nuisance cause of action that also gives rise to a public nuisance cause of action).

§ 67.05(b) Defenses Available to Defendants [Go To Main]

Add:

Green v. Eastland Homes, Inc., 2007 Ga. App. LEXIS 370 (Ga. App. 2007) (authorizing an action to recover damages for a nuisance created by water-runoff even though the property owner that created the nuisance had sold the property); *Walker Manor Envtl. Trust v. Oyster Landing Condo. Ass'n, 2006 Conn. Super. LEXIS 3876 (Conn. Super. 2006)*

(contributory negligence is a defense in an action for negligent nuisance, but not in a n action for absolute nuisance).

Add:

State v. Romano, 155 P.3d 1102 (Haw. 2007) (exceptions embodied in the language of statutes are an "integral part of the verbal description" and require a prima facie negation of the exception thus relieving the defendant of the burden to prove that the exception exists).

Add:

But see Iannucci v. City of N.Y., 2006 U.S. Dist. LEXIS 21117, 15-17 (D.N.Y. 2006) (denying a defendant's prescription defense because a prescription right cannot exist to maintain a public nuisance, even if the conduct also constitutes a private nuisance).

§ 67.05(b)(4). Legislative Authority

Add:

See Hill v. Koppers, Inc., 2010 U.S. Dist. LEXIS 5036 (N.D. Miss. Jan. 20, 2010) (In Mississippi, under statute, a wood processing plant is defined as an agricultural operation, and therefore plaintiff's claims for nuisance were denied as the operation was protected by the Mississippi Right to Farm statute).

Add:

Whaley v. Park City Municipal Corporation, 190 P.3d 1 (Utah App. 2008) (city permits for outdoor music concerts did not defeat private nuisance claims against the concert promoters).

See, e.g., Kistler v. City of Perry, 719 N.W.2d 804, (Iowa 2006) (holding that legislatures and city governments have "broad authority to define nuisances and to provide methods for their abatement," as long as their exercise of that authority is reasonable).

Change:

Milwaukee Metro. Sewerage Dist. v. City of Milwaukee, 671 N.W.2d 345 **should be** *Milwaukee Metro. Sewerage Dist. v. City of Milwaukee, 671 N.W.2d 346 (Wis. App. 2003)* .

§ 67.05(b)(5) Priority

Change:

City of Lebanon v. Georgia-Pacific Corp., 2004 D. Or. LEXIS 9054 **should be** *City of Lebanon v. Georgia-Pacific Corp., 2004 U.S. Dist. LEXIS 9054 (D. Or. 2004)* .

Add:

Davis v. Taylor, 132 P.3d 783 (Wash. App. Div. 2006) (observing that the Washington state Right-to-Farm Act was intended to be narrowly applied and "effectively codifie[s] the 'coming to the nuisance defense.' ").

Change:

Beck Dev. Co. v. S. Pac. Transp. Co., 44 Cal. App. 4th 1160 (Cal. App. 1996) **should be** *Beck Dev. Co. v. S. Pac. Transp. Co., 52 Cal. Rptr. 2d 518 (Cal. App. 1996)* .

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Supp. To CHAPTER 67 THE PROPERTY LAW ASPECTS OF PRIVATE NUISANCE

8-67 Thompson on Real Property, Thomas Editions Supp. to § 67.06

Supp. to § 67.06 Remedies in Private Nuisance Actions.

[Go To Main]

§ 67.06(a) Damages. [Go To Main]

§ 67.06(a)(1) Permanent and Temporary Damages.

Add:

Kinsale, LLC v. Tombari, 897 A.2d 646 (Conn. App. Ct. 2006) (allowing plaintiffs to recover the reasonable cost of their "own efforts to abate the nuisance or prevent future injury," but barring recovery of permanent damages if the plaintiff can abate the nuisance, or if it is abatable by an injunction).

Add:

The common law in Kansas distinguishes between permanent and continuing nuisances, but does not distinguish between an offending object and the use of that object. Kansas courts define a continuing nuisance as one where the structure giving rise to the nuisance claim is abatable. *Browning v. MCI, Inc. (In re Worldcom, Inc.), 339 B.R. 836 (D.N.Y. 2006)* ; *Tenesaca v. C. Pierce Enters., LLC, 2006 Conn. Super. LEXIS 1664 (Conn. Super. Ct. 2006)* (defining a permanent nuisance as one that inflicts permanent injury upon property, which is remedied with damages equal to the depreciation in the value of the property).

Cook v. DeSoto Fuels, Inc., 169 S.W.3d 94 (Mo. App. 2005) (Continued negligent seepage of contaminants from defendant's gas station onto plaintiff's land and into their water is a temporary nuisance); *Goode v. City of Atlanta, 617 S.E.2d 210 (Ga. App. 2005)* (an isolated act of negligence cannot form the basis of a nuisance claim).

Add:

See e.g., K & W Elec., Inc. v. State, 712 N.W.2d 107 (Iowa 2006) (analogizing an inverse condemnation with a permanent nuisance and holding that all recoverable damages must be had in a single cause of action: " '[I]f injuries from a nuisance are of a permanent character and go to the entire value of the estate, there can be but one action, and all damages--past, present, and future--are recoverable therein.' " (quoting *Weinhold v. Wolff, 555 N.W.2d 454 (Iowa 1996)* . *But see Woldson v. Woodhead, 149 P.3d 361, 364 (Wash. 2006)* (rejecting the notion that future damages for a continuing nuisance must all be recovered in a single action, disapproving of prospective damages recovery). *See also Moneypenney v. Dawson, 141 P.3d 549 (Okla. 2006)* (the statute of limitations does not begin for permanent damage until the damage becomes apparent to the property owner and it becomes apparent that the damage is likely permanent); *Citgo Ref. & Mktg. v. Garza, 187 S.W.3d 45, 77 (Tex. App. 2006)* ("Damages for permanent nuisance require a 'material or substantial injury.' ").

King v. City of Independence, 64 S.W.3d 335 (Mo. App. 2002) **overruled** (in-part and on other grounds) by *George Ward Builders, Inc. v. City of Lee's Summit, 157 S.W.3d 644 (Mo. App. 2004)* (nuisance-based claims are not viable against a public entity with condemning authority).

Kinsale, LLC v. Tombari, 897 A.2d 646 (Conn. App. Ct. 2006) (measuring the damages for a temporary nuisance by the reduction in the property's rental value); *Fink v. Crean, 2006 Tenn. App. LEXIS 814 (Tenn. App. 2006)* (damages for a temporary nuisance may be recovered until the nuisance is abated); *Broyles v. Standifer, 2006 Tenn. App. LEXIS 768 (Tenn. App. 2006)* (damages for a temporary nuisance are measured by the decrease in rental value of the property while the nuisance exists); *Miller v. Rohling, 720 N.W.2d 562, 569 (Iowa 2006)* (measuring the damages for a temporary nuisance as the diminution in the rental value of the property, plus special damages, which include inconvenience, annoyance, discomfort, and the cost of removing the nuisance); *K & W Elec., Inc. v. State, 712 N.W.2d 107 (Iowa 2006)* (prescribing the measurement of damages in a temporary nuisance action as the decrease in the property's rental value together with special damages for the plaintiff's discomfort and annoyance).

Add:

Moneypenney v. Dawson, 141 P.3d 549 (Okla. 2006) (a plaintiff may bring successive actions for temporary damage "each time the wrong occurs and the statute of limitations would bar recovery only for damage occurring more than two years prior to a suit's filing.")

§ 67.06(a)(2) Recovery for Harm to Property.

Add:

Shaw v. Tampa Elec. Co., 949 So. 2d 1066, 1070 (Fla. App. 2007) (permanent nuisance damage measured by the diminution in the value of the plaintiffs' homes); *Kinsale, LLC v. Tombari, 897 A.2d 646 (Conn. App. Ct. 2006)* (a permanent nuisance inflicts permanent damage upon property, which warrants a damages award equal to the property's

depreciation in value); *Tenesaca v. C. Pierce Enters., LLC, 2006 Conn. Super. LEXIS 1664 (Conn. Super. Ct. 2006)* (permanent injury to property is remedied with damages equal to the depreciation in the value of the property).

Change:

Santa Fe P'ship v. Arco Prods. Co., 46 Cal. App. 4th 967 (Cal. App. 1996) **should be** *Santa Fe P'ship v. Arco Prods. Co., 54 Cal. Rptr. 2d 214 (1996)* .

Add:

City of Atlanta v. Landmark Environmental Industries, Inc., 613 S.E.2d 131 (Ga. App. 2005) (city liable for lost rent in addition to the costs of restoring the property contaminated by raw sewage from leaking sewer lines); *Whiteside Estates, Inc. v. Highlands Cove, L.L.C., 609 S.E.2d 804 (N.C. App. 2005)* (for temporary injury, damages may include diminished rental value, reasonable costs of replacement or repair, or restoring the property to its original condition).

Add:

Fink v. Crean, 2006 Tenn. App. LEXIS 814 (Tenn. App. 2006) (damages for a temporary nuisance may be recovered until the nuisance is abated); *Broyles v. Standifer, 2006 Tenn. App. LEXIS 768 (Tenn. App. 2006)* (damages for a temporary nuisance are measured by the decrease in rental value of the property while the nuisance exists); *Miller v. Rohling, 720 N.W.2d 562, 569 (Iowa 2006)* (measuring the damages for a temporary nuisance as the diminution in the rental value of the property, plus special damages, which include inconvenience, annoyance, discomfort, and the cost of removing the nuisance); *K & W Elec., Inc. v. State, 712 N.W.2d 107 (Iowa 2006)* (prescribing the measurement of damages in a temporary nuisance action as the decrease in the property's rental value together with special damages for the plaintiff's discomfort and annoyance). *King v. City of Independence, 64 S.W.3d 335 (Mo. App. 2002)* **overruled** (inpart and on other grounds) by *George Ward Builders, Inc. v. City of Lee's Summit, 157 S.W.3d 644 (Mo. App. 2004)* (nuisance-based claims are not viable against a public entity with condemning authority).

Add:

Books Are Fun, Ltd. v. Rosebrough, 2006 U.S. Dist. LEXIS 64196 (D. Iowa 2006) (requiring a showing that a defendant's purpose in interfering with a business is to financially injure or destroy the plaintiff).

§ 67.06(a)(3) Recovery for Personal Injury and Inconvenience

Add:

Kinsale, LLC v. Tombari, 897 A.2d 646 (Conn. App. Ct. 2006) (allowing a jury's consideration of annoyance and discomfort in awarding damages for a nuisance); *Miller v. Rohling, 720 N.W.2d 562, 569 (Iowa 2006)* (including inconvenience, annoyance, and discomfort in special damages awards for nuisance); *K & W Elec., Inc. v. State, 712 N.W.2d 107 (Iowa 2006)* (including annoyance and discomfort in special damages awards for nuisance).

See Action Marine, Inc. v. Cont'l Carbon, Inc., 481 F.3d 1302, 1321 (11th Cir. 2007) (awarding attorney's fees as part of the measure of actual damages); *Day v. Gabriele, 101 Conn. App. 335 (Conn. App. Ct. 2007)* (awarding attorney's fees in a cause of action for nuisance and trespass); *Parker v. Scrap Metal Processors, Inc., 468 F.3d 733 (11th Cir. 2006)* (upholding award of attorney' s fees in claims of nuisance, trespass, and negligence); *Felton v. Morgan Stanley Dean Witter & Co., 429 F. Supp. 2d 684,* (S.D.N.Y. 2006) (the Private Securities Litigation Reform Act of 1995 ("PSLRA"), *15 U.S.C. §§ 77z-1, 78u*, limited the recovery of attorney's fees and sought to deter or quickly dispose of nuisance suits following abuses); *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Dabit, 547 U.S. 71 (2006)* (Congress intended to limit recoverable attorney's fees to curb tort abuses, including nuisance claims, in Title I of the PSLRA, captioned "Reduction of Abusive Litigation."); *Haufler v. Zotos, 845 N.E.2d 322 (Mass. 2006)* (award of attorney's fees uncontested on appeal). *But see Miller v. Rohling, 720 N.W.2d 562 (Iowa 2006)* (denying plaintiffs' recovery of attorney's fees in nuisance cause of action because no statute or agreement provided for them).

Change/Delete:

Omit parallel citation in *Sramek v. Korth, 207 Wis. 2d 645, 559 N.W.2d 924 (Wis. App. 1996)* .

§ 67.06(a)(4) Recovery of Exemplary Damages

Add:

Holubec v. Brandenberger, 214 S.W.3d 650 (Tex. App. 2006) (awarding exemplary damages against sheep feedlot based on evidence that the feedlot owners maliciously exacerbated the nuisance); *Gail v. New England Gas Co., Inc. 460 F. Supp. 2d 314 (D.R.I. 2006)* (allowing claim for exemplary damages where the plaintiff alleged the defendant "knew or should have known" that their conduct would cause harm and that their actions included a high degree of risk. The court held that although the standard for awarding exemplary damages requires evidence of willfill, reckless, or wicked conduct, those terms are not "magical."); *Vaughn v. Drennon 202 S.W.3d 308 (Tex. App. 2006)* (reversing award of exemplary damages, indicating that a plaintiff must prove that the defendant "desires to cause the consequences of his act, or that he believes the consequences are substantially certain to result from it" in order to award exemplary damages); Proctor v. 7- *Eleven, Inc., 180 Fed. Appx. 453 (4th Cir. 2006)* (reversing award of exemplary damages because property owners were unable to recover compensatory damages from gas leak and because defendant's conduct did not constitute reckless or intentional conduct).

Subsequent History:

Miller v. Cudahy Co., 592 F. Supp. 976 (D. Kan. 1984) **reversed in part** (on other grounds) **and affirmed in part** (affirming award of exemplary damages) by *Miller v. Cudahy Co., 858 F.2d 1449, 1458 (10th Cir. 1988)* .

§ 67.06(a)(5) Mitigation of Damages

Add:

But see Kinsale, LLC v. Tombari, 897 A.2d 646 (Conn. App. Ct. 2006) (barring recovery of permanent damages if the plaintiff can abate the nuisance but fails to do so).

Add:

Gumz v. N. States Power Co., 721 N.W.2d 515 (Wis. App. 2006) (failing to mitigate damages, at most, enhances the damages). *See also Broadbent v. Allison, 626 S.E.2d 758 (N.C. App. 2006)* (allowing benefits from nuisance to be considered in mitigation of damages).

Add:

Kinsale, LLC v. Tombari, 897 A.2d 646 (Conn. App. Ct. 2006) (allowing plaintiffs to recover the reasonable cost of their "own efforts to abate the nuisance or prevent future injury," but barring recovery of permanent damages if the plaintiff can abate the nuisance, or if it is abatable by an injunction).

§ 67.06(b) Judicial Abatement of the Nuisance [Go To Main]

Add:

Holder v. Gold Fields Mining Corp., 2007 U.S. Dist. LEXIS 7591 (D. Okla. 2007) (allowing injunctive relief under both statutory and common law nuisance claims); *Kistler v. City of Perry, 719 N.W.2d 804,* (Iowa 2006) (holding that legislatures and city governments have "broad authority to define nuisances and to provide methods for their abatement," as long as their exercise of that authority is reasonable); *Evans v. Lochmere Rec. Club, 627 S.E.2d 340 (N.C. App. 2006)* (property owner not able to enforce previous injunction against neighboring property because the injunction was not obtained against the current landowner, but their predecessor).

§ 67.06(b)(3) Requir ements of Irreparable Harm or Inadequate Remedy at Law

Add:

Vaughn v. Drennon, 202 S.W.3d 308 (Tex. App. 2006) (allowing injunctive relief to be granted "only on a showing of a wrongful act, imminent harm, irreparable injury, and the absence of an adequate remedy at law."); *The Woods at Wayne Homeowners Ass'n v. Gambone Bros. Const. Co., Inc., 893 A.2d 196 (Pa. Cmwlth. 2006)* (requiring courts to remedy private nuisances in a way "reasonably suited to abate the harm."); *Holder v. Gold Fields Mining Corp., 2007 U.S. Dist. LEXIS 7591 (D. Okla. 2007)* (allowing injunctive relief under both statutory and common law nuisance claims, in addition to money damages); *Shaw v. LDC Enterprises, 863 N.E.2d 424 (Ind. App. 2007)* (allowing an action to abate a nuisance to be brought if property is injured or the personal enjoyment of property is lessened by the nuisance, quoting *Ind. Code § 32-30-6-7(a)*).

Add:

Vaughn v. Drennon, 202 S.W.3d 308 (Tex. App. 2006) ("A n injunction should be broad enough to prevent a repetition of the evil sought to be corrected ... . However, it must not be so broad as to enjoin a defendant from activities that are a lawful and proper exercise of his rights."); *Fink v. Crean, 2006 Tenn. App. LEXIS 814 (Tenn. App. 2006)* (damages for a temporary nuisance may be recovered until the nuisance is abated).

§ 67.06(b)(4) The Requirement of "Clean Hands"

Add:

Cline v. Berg, 639 S.E.2d 231 (Va. 2007) (holding that the lower court abused its discretion by not applying the unclean hands doctrine).

Add:

Cline v. Berg, 639 S.E.2d 231 (Va. 2007) (defining the unclean hands doctrine as an "ancient maxim" that requires the plaintiff seeking an injunction to have clean hands and not be guilty of "any inequitable or wrongful conduct with respect to the transaction or subject matter sued on.")

§ 67.06(b)(5) The Possibility of Election of Remedies

Add:

Broadbent v. Allison, 626 S.E.2d 758 (N.C. App. 2006) ("Once all the relevant issues in the case have been determined

by the jury and the trial court, plaintiffs shall be allowed to elect between available remedies to the extent necessary to 'prevent double redress for a single wrong.' "); *Holder v. Gold Fields Mining Corp., 2007 U.S. Dist. LEXIS 7591 (D. Okla. 2007)* (recognizing claims for damages and injunctive relief under both statutory and common law nuisance claims).

Add:

Fink v. Crean, 2006 Tenn. App. LEXIS 814 (Tenn. App. 2006) (damages for a temporary nuisance may be recovered until the nuisance is abated).

§ 67.06(c) Self-help or Non-judicial Abatement of the Nuisance [Go To Main]

Add:

But see, Iny v. Collom, 827 N.Y.S.2d 416 (2006) (recognizing that under some rules, self-help is the only remedy available to a would-be plaintiff as a nuisance claim would not properly lie, and in New York, a plaintiff must first resort to self-help before sustaining a cause of action for nuisance, unless impractical); *Kinsale, LLC v. Tombari, 897 A.2d 646 (Conn. App. 2006)* (allowing plaintiffs to recover the reasonable cost of their "own efforts to abate the nuisance or prevent future injury," but barring recovery of permanent damages if the plaintiff can abate the nuisance, or if it is abatable by an injunction). *See generally, Kistler v. City of Perry, 719 N.W.2d 804 (Iowa 2006)* (invalidating an ordinance that permitted the abatement of nuisances "without notice and hearing," as a violation of due process); *The Woods at Wayne Homeowners Ass'n v. Gambone Bros. Const. Co., Inc., 893 A.2d 196 (Pa. Cmwlth. 2006)* (the creator of a nuisance is responsible for abating the nuisance).

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Supp. To CHAPTER 67 THE PROPERTY LAW ASPECTS OF PRIVATE NUISANCE

8-67 Thompson on Real Property, Thomas Editions Supp. to § 67.07

Supp. to § 67.07 Land Uses That Have Been Held to be Private Nuisances in Fact

[Go To Main]

§ 67.07(a) Agricultural Uses and Commercial Animal Activities [Go To Main]

§ 67.07(a)(3) Farm

Add:

When agricultural activities (i.e. an activity arising from commercial farming) are exempted by right-to-farm laws, they are not nuisances by definition. Agricultural activities are exempt in accordance with the Washington right-to-farm act when the activity is (1) consistent with agricultural practices; (2) practiced before the arrival of nonagricultural activities; and (3) void of a "substantial adverse effect on the public health and safety." While right-to-farm laws give farmers a "right-to-farm" defense, causes of action against activities that fail to meet the "agricultural activities" definition will not allow such a defense. *Davis v. Taylor 132 P.3d 783 (Wash. App. Div. 2006)* (disallowing a right-to-farm defense where a farmer produced excessive noise as a result of the use of propane cannons and cherry guns, which were not exempt from a nuisance claim).

§ 67.07(a)(6) Hog Farm and Feed Lot; Cattle Feed Lot

Add:

Holubec v. Brandenberger, 214 S.W.3d 650 (Tex. App. 2006) (granting a permanent injunction against a feedlot, in addition to actual damages and exemplary damages); *Johnson v. Knox County P'ship, 728 N.W.2d 101 (Neb. 2007)* (reversing the trial court and holding that genuine issues of material fact existed as to whether a cattle feedlot constituted a private nuisance).

§ 67.07(a) Missing [Go To Main]

§ 67.07(a)(7) Livestock.

At end of subsection, add new text:

Despite plaintiff's complaints of overbearing odor, cattle grazing 18 inches away from neighbor's house was found to be reasonable because the cows were being fed elsewhere, the strip of land was only a small part of a much larger pasture, and the complaining neighbors had previously grazed their own cows in that very place.

At end of new text, add new footnote 293.1:

Delancey v. Mallette, 912 So.2d 483 (Miss. App. 2005) .

§ 67.07(a)(8) Poultry Operations

Add:

State v. Romano, 155 P.3d 1102 (Hawaii 2007) (holding it unlawful to operate a poultry business); *Payne v. Terrell, 629 S.E.2d 839 (Ga. App. 2006)* (affirming the reversal of an order denying a permanent injunction against a commercial poultry venture and holding it a nuisance as a matter of law).

§ 67.07(a)(11) Slaughterhouse, Stockyard, Meat Packing Plant

Add:

State v. Schweda (Wis. App. 2006) (including slaughterhouses in the "traditional nuisance industries").

§ 67.07(b) Commercial Uses [Go To Main]

§ 67.07(b)(1) Airport

Add:

But see Biddle v. BAA Indianapolis, LLC, 860 N.E.2d 570 (Ind. 2007) ("Whether a taking occurred can be subject to summary judgment."); *Beck v. City of Evansville, 842 N.E.2d 856 (Ind. App. 2006)* (finding no taking of homeowners' property on review of trial court's grant of summary judgment to city); *McCarran Intern. Airport v. Sisolak 137 P.3d 1110 (Nev. 2006)* ("Where aircraft operations interfere with a property's existing use, a claim for nuisance ... may exist based upon the extent of the damage created by the overflights.").

Add:

But see Biddle v. BAA Indianapolis, LLC, 860 N.E.2d 570 (Ind. 2007) (affirming the trial court's summary judgment against an airport for nuisance based on excessive noise).

Add:

Broadbent v. Allison, 626 S.E.2d 758 (N.C. App. 2006) (reversing the trial court denial of a permanent injunction against a county airport).

§ 67.07(b)(3) Eating Establishment.

Add:

Biglane v. Under the Hill Corp., 949 So. 2d 9 (Miss. 2007) (saloon was a private nuisance to the neighbors).

Add:

Cafe Sevilla, Inc. v. OM Enterprises, 2006 Cal. App. Unpub. LEXIS 5350 (California Unpublished Opinions 2006) (cross-complaint for injunctive relief against a Cafe whose music was loud and patrons unruly was granted based on a private nuisance claim).

Add:

Shaw v. LDC Enterprises 863 N.E.2d 424 (Ind.App.,2007) (reversing the dismissal of a nuisance claim for injunctive relieve against a restaurant that intoxicated a motorist who killed the plaintiff's daughter).

§ 67.07(b)(4) Entertainment Establishment

Add:

Capitol Props. Group, LLC v. 1247 Ctr. St., LLC, 770 N.W.2d 105 (Mich. Ct. App. 2009) (holding that a nightclub's excessive noise at only certain hours is not a nuisance at all times and does not constitute a nuisance per se).

Add:

Adkins v. Boetcher, 2010 Ohio 554 (Ohio Ct. App., Ross County Feb. 12, 2010) (granting an injunction for private nuisance claim against a racetrack to limit the amount of noise and light emitted).

§ 67.07(b)(7) Gas Station

Add:

Banks v. Dunn, 630 S.E.2d 1 (N.C. App. 2006) (homeowner awarded damages against n eighboring gas station based on contaminated fill dirt). *But see Walden v. Morgan, 635 S.E.2d 616 (N.C. App. 2006)* ("The mere ownership and presence near adjacent residences of an above-ground storage tank for gasoline by landlord and tenant of gas station was not a nuisance.").

Add:

See also Lally v. BP Prods. N. Am., Inc., 615 F. Supp. 2d 654 (N.D. Ohio 2009) , where a nuisance claim for damages stemming from underground gas tanks and gas station operations was denied for exceeding the four-year statute of limitation.

§ 67.07(b)(8) Grain Business

Add:

Miller v. Rohling, 720 N.W.2d 562 (Iowa 2006) (commercial grain storage facility's grain drying and storage activities constituted a nuisance which warranted damages for the loss of use and enjoyment of property).

§ 67.07(b)(16) Prostitution

Add:

People v. Bhakta, *37 Cal. Rptr. 3d 652 (2006)* (affirming the city attorney' s authority to bring an abatement action against Los Angeles motels under the Red Light Abatement Law, *Cal. Penal Code § 11235*, which provides that "every building or place used for the purpose of prostitution, gambling, lewdness or assignation or upon which such conduct

occurs 'is a nuisance which shall be enjoined, abated, and prevented, ... whether it is a public or private nuisance.' ").

§ 67.07(b)(20) Trapshooting Club, Gun Club, Rifle Range

Add:

Brown v. Cedar Creek Rod & Gun Club, 298 S.W.3d 14 (Mo. Ct. App. 2009) (Gun club appealed district court's grant of an injunction for a nuisance claim for noise and vibrations. Club's appeal was on the basis of a statutory amendment that granted immunity to firearm ranges for civil liability from noise nuisance. Appellate court held that the statutory amendment only covered noise nuisance and not vibration nuisance and upheld the district court's injunction.)

§ 67.07(c) Industrial Uses [Go To Main]

§ 67.07(c)(2) Cement Plant

Add:

Darney v. Dragon Prods. Co., LLC, 640 F. Supp. 2d 117 (D. Me. 2009) (holding that property devaluation is not the only way to satisfy substantial interference with use and enjoyment of property. Other factors of substantial interference can include appreciable damages to property or evidence that property appreciation was lower than it would have been but for the alleged nuisance).

§ 67.07(c)(5) Construction Operations

Add:

McMullan v. HRH Const., LLC, 831 N.Y.S.2d 147 (N.Y.A.D. 2007) (enjoining a construction company from entering subject land because its operations there constituted a private nuisance).

§ 67.07(c)(7) Electric Power Plant

Add:

Oglethorpe Power Corp. v. Forrister, 2010 Ga. App. LEXIS 348 (Ga. Ct. App. Mar. 30, 2010) (affirming denial of summary judgment for a power company which was claiming that a nuisance claim was barred by statute of limitations because noise from a power plant constituted a permanent nuisance and therefore the statute of limitations began to run at the construction of the power plant. Court disagreed and held that noise from the power plant was a continuing nuisance and that a nuisance claim was proper as the statute of limitation did not apply)

§ 67.07(c)(12) Miscellaneous Factories

Add:

Hydrogen fluoride, released from a neighboring factory, caused fluorosis in dairy farmers' cows. Farmers subsequently sued the factory owner for nuisance and summary judgment was granted for the factory owner, but the Third Circuit Court of Appeals vacated that judgment. *Mest v. Cabot Corp., 449 F.3d 502 (3d Cir. 2006)* .

§ 67.07(c)(14) Railroad Operations

Add:

Norfolk Southern Ry. Co. v. City of Pittsburgh, 235 Fed. Appx. 907 (3d Cir. 2007) (in a role reversal, the railroad was permitted to bring a nuisance claim against the city, arising from landslides causing boulders and other objects to fall from city-owned property onto the railroad tracks).

Add:

Dismissing a private nuisance claim against a railroad, an appellate court in Texas held that the Interstate Commerce Commission Termination Act (ICCTA), *49 U.S.C. § 10501(b)*, "provided exclusive remedies with respect to regulation of rail transportation," which preempted a state law claim of private nuisance since the action would shut down railroad operations. The court also rejected the contention that awarding monetary damages would circumvent the preemption, indicating that such an allowance would open a floodgate of litigation and kill Congress's intent behind the *ICCTA. A & W Properties, Inc. v. Kansas City S. Ry. Co., 200 S.W.3d 342 (Tex. App. 2006)* ; *New England Cent. R.R., Inc. v. Springfield Terminal Ry. Co., 415 F. Supp. 2d 20 (D. Mass. 2006)* (recognizing the ICCTA's preemption of private nuisance claims).

§ 67.07(c)(18) Stone and Quarry Operations

Add:

The Alabama Supreme Court reversed the trial court's summary judgment that held that a quarry did not constitute a private nuisance and barred plaintiffs' nuisance claims. The court remanded the issue for determination by a jury, finding an issue of material fact whether the quarry injured plaintiffs' property by "emitting noise, dust, vibration, and pollution; dewatering the subsoil; and causing sinkholes to form in the area." *Davis v. Hanson Aggregates Southeast, Inc., 952 So.2d 330 (Ala. 2006)* .

Add:

See also Blackford v. Heman Const. Co., 112 S.W. 287 (Mo. Ct. App. 1908) , holding that although quarry had the right

to quarry stone on their property, their neighbors had a superior right to enjoy undisturbed possession of their home. And when those two rights were in conflict the quarry must yield to their neighbor's right.

Add:

Benton v. Kernan, 13 A.2d 825 (N.J. Ch. 1940) (holding that a quarry and asphalt mixing business operation constituted a nuisance. Vibrations from rock blasts, noise from machinery, and odors from the asphalt constituted a nuisance, even though the quarry had existed prior to a population moving near the quarry.)

§ 67.07(c)(20) Trucking and Freight Operations

Add:

But see Puckrein v. ATI Transport, Inc., 897 A.2d 1034 (N.J. 2006) (holding that trucking is not a nuisance per se).

§ 67.07(d)(3) Construction Activities.

Add:

See also Willmschen v. Trinity Lakes Improvement Ass'n., 840 N.E.2d. 1275 (Ill. App. 2d Dist. 2005) (lakes polluted by fertilizer and construction site runoff constituted a nuisance; homeowner's association held liable for failure to abate nuisance).

§ 67.07(d)(5) Dogs

Add:

City of Belfield v. Kilkenny, 729 N.W.2d 120 (N.D. 2007) ("[E]xcessive, continuous, or untimely" barking constitutes a nuisance).

§ 67.07(d)(6) Embankment; Dock

Add:

Dumm v. Dahl, 913 A.2d 863 (Pa. Super. 2006) (use of a private dock by neighbors through a public easement does not constitute a private nuisance); 9394, *LLC v. Kehler, 809 N.Y.S.2d 155 (2006)* (reconstruction of dock did not constitute a nuisance).

§ 67.07(d)(9.5) Obstruction of Public Road

Add:

Petre v. Norfolk S. Ry. Co., 458 F. Supp. 2d 518 (N.D. Ohio 2006) (a permanent obstruction that hinders regular travel on a public highway is a nuisance.

§ 67.07(d)(14) Trees

Add:

The Woods at Wayne Homeowners Ass'n v. Gambone Bros. Const. Co., Inc., 893 A.2d 196 (Pa. Cmwlth. 2006) (the creator of a nuisance is responsible for abating the nuisance).

Add:

Landowners, whose foundation was damaged by roots of trees on neighboring land, brought an action for nuisance that was dismissed because the neighboring landowner was not at fault. *Carvalho v. Wolfe, 140 P.3d 1161 (Or. App. 2006)* ; *Iny v. Collom, 827 N.Y.S.2d 416 (N.Y. Sup. App. Term 2006)* (requiring a plaintiff to show that overhanging branches or encroaching roots are causing damage that "a sensible person ... would find injurious" in order to recover for a private nuisance rooted in non-noxious trees or plants).

§ 67.07(d)(17) Wall.

At end of subsection, add new text:

Defendant's construction and maintenance of a retaining wall that encroached upon plaintiffs' property and threatened to collapse thereon constituted a private nuisance.

At end of new text, add new footnote 674.1:

Vacca v. Valerino, 16 A.D.3d 1159 (N.Y. App. Div. 4th Dept.) .

§ 67.07(d)(18) Windmill.

Add:

Rankin v. FPL Energy, LLC, 266 S.W.3d 506 (Tex. App. 2008) (action against wind farm for noise and loss of view).

Burch v. Nedpower Mount Storm, 647 S.E.2d 879 (W. Va. 2007) (noise of wind power electricity generating facility cognizable as a nuisance claim).

§ 67.07(d)(20) Others.

Add:

County of Santa Clara v. Atlantic Richfield Co., *40 Cal. Rptr. 3d 313 (2006)* (permitting the government to pursue nuisance action on behalf of citizens against lead manufacturers for nuisance posed by asbestos).

At end of subsection, add new text:

A city was liable for the nuisance created by an inadequate sewer line in residential neighborhood, which caused sewage to back up on plaintiff's property.

At end of new text, add new footnote 685.1:

Davis v. City of Forsyth, 621 S.E.2d 495 (Ga. App. 2005)

At end of subsection, add new text:

A decision from a city court in New York State may signal an interesting trend. A tenant who smoked in her apartment was held liable, under private nuisance theory, for interference with other tenants' enjoyment of their apartments caused by her smoking.

At end of new text, add new footnote 685.2:

Duntley v. Barr, 10 Misc.3d 206 (Syracuse N.Y. City Ct. 2005) .

Add:

Beachfront property owners succeeded in private nuisance claim against neighboring landowner after "unpleasant odors, sounds, and visual conditions" substantially interfered and injured the plaintiff's use and enjoyment of their property. n688

FOOTNOTES:
(n2)Footnote 688. *Rattigan v. Wile, 841 N.E.2d 680 (Mass. 2006)* .

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Annotation, *Keeping of Domestic Animal as Constituting Public or Private Nuisance, 90 A.L.R.5th 619* .

Annotation, Remedies for Sewage Treatment Plant Alleged or Deemed to Be Nuisance, *101 A.L.R.5th 287* .

Annotation, Vibrations Not Accompanied by Blasting or Explosion as Constituting Nuisance, *103 A.L.R.5th 157* .

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CHAPTER 68 TRESPASS ON LAND

8-68 Thompson on Real Property, Thomas Editions 68.syn

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§ 68.syn Synopsis to Chapter 68: TRESPASS ON LAND

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§ 68.02 Definition and Elements of Trespass on Land.

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§ 68.02(b) Entry.

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§ 68.05(c)(5) Cinders and Soot.

§ 68.05(c)(6) Sewage, Foul Air, Fumes, and Pesticides.

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CHAPTER 68 TRESPASS ON LAND

8-68 Thompson on Real Property, Thomas Editions § 68.01

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§ 68.01 Introduction.

Trespass is similar to nuisance, as discussed in Chapter 67, in that a trespass also interferes with the use and enjoyment of land; trespass is distinct from nuisance in that trespass is caused by an actual physical invasion of the property. While the interference caused by a nuisance may be actionable without an actual physical invasion of the property--through such means as noise, lights or smells--a trespass is actionable when any physical invasion at all can be proved, no matter how slight or inconsequential.

In a trespass action, only the plaintiff is necessarily the holder of an interest in land. The defendant may be any person who enters another's land, or who causes another or some other thing to enter a person's land. In this chapter, the discussion of the elements of a trespass action apply in all cases of trespass, but some sections of this chapter deal specifically with trespasses that arise between adjoining or nearby landowners. A highly specialized form of trespassory invasion, the loss of lateral or subjacent support, is discussed in Chapter 69, *infra.*

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CHAPTER 68 TRESPASS ON LAND

8-68 Thompson on Real Property, Thomas Editions § 68.02

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§ 68.02 Definition and Elements of Trespass on Land.

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§ 68.02(a) Intent.

Trespass is the physical invasion of another's property and, since many trespasses occur casually or inadvertently, the question immediately arises whether one can be liable for trespass without the intent to trespass. American courts consistently hold that a plaintiff in a trespass action need not show that the defendant actually intended to commit a trespass; it is sufficient to show that the defendant intended to enter the plaintiff's land. Even intent to enter the land need not be shown if the plaintiff shows that the defendant's activity was negligent, reckless, or extra-hazardous. Therefore, one may be guilty of trespass who, in most cases, intends the entry onto land but does not necessarily intend either the trespass or its resulting damage. n1

As mentioned, a trespasser may be liable for trespass without knowing or intending that a trespass is committed; when the trespass is a result of the trespasser's ignorance, mistake, or inadvertence, relief against the trespass will still be granted in most cases. n2 If not only the intent to trespass was absent, but the entry itself was unintended, some courts will not recognize a trespass unless the unintended entry n3 was negligent, reckless, or in the course of an extra-hazardous activity. n4 Examples of these latter situations include: damage to land caused by seismic vibration from a static firing rocket motor test, an extra-hazardous activity; n5 a fire which began on defendant's land and as a result of negligence spread to plaintiff's land; n6 and a neighboring landowner who, with consent, pruned back overhanging branches from the trees on adjacent land, but pruned the trees so severely that several died, a form of reckless conduct. n7

COMPUTER-ASSISTED RESEARCH:

LEXIS: Trespass! w/5 (land or real!) w/10 intent!

§ 68.02(b) Entry.

A trespass to land in the early common law was perceived as a breach of the peace resulting from the unlawful entry onto the land of another. If the entry onto the land of another was rightful, even a wrong act following that rightful entry

was not considered a trespass. This is still the view held by some courts. n8 Other courts consider a wrongful act committed even after a rightful entry to be a trespass. n9 In those jurisdictions, one who enters with license, authority, or consent, but who then exceeds the limits of that permission, may commit a trespass. n10 Similarly, a creditor who enters the debtor's premises to take possession of the collateral, but then, in addition, evicts the employees and changes the locks, will be considered a trespasser in some jurisdictions. n11

A slight variant of this split of judicial authority is found in the doctrine of trespass *ab initio*. If an entry on the land of another is made under authority--such as by permission, by agreement, or under authority of law, and the entrant subsequently abuses that authority in a trespassory manner, the entry is considered trespassory from the beginning. n12 Such a situation can commonly arise when one purchases and takes possession of real property pursuant to a real estate sales contract and then fails to make the payments or to vacate after a demand is made; in a jurisdiction that recognizes the doctrine of trespass *ab initio*, such an occupant, upon default, will be considered a trespasser from the time of the first entry. n13 Some jurisdictions adhere to the older rule that no trespass arises unless the original entry was unlawful, and these jurisdictions therefore reject the concept of trespass *ab initio*. n14

Every trespass involves some kind of entry onto plaintiff's land. n15 An entry onto the land of another may be made by a person or a thing n16 and any unauthorized or unlawful entry is a trespass. n17

COMPUTER-ASSISTED RESEARCH:

LEXIS: Trespass! w/5 (land or real!) w/10 entry

§ 68.02(c) Force.

In the early common law, every person's land was considered enclosed and an entry onto that land not permitted or authorized by the owner was considered to have necessarily broken or violated the enclosure. Thus, by definition, a trespassory entry was always forcible. Today, force is a required element of a trespassory entry, and an unauthorized or unlawful entry is presumed to be forcible. n18 The characteristic of force is attributed to an unlawful entry regardless of how much or little actual force may be used. n19

COMPUTER-ASSISTED RESEARCH:

LEXIS: Trespass! w/5 (land or real!) w/10 forc!

§ 68.02(d) Actual and Nominal Damage.

Just as the common law assumed that every unlawful entry onto another's property was forcible, the common law also assumed that such a forcible entry resulted in damage to the property. Thus even if little or no actual damage resulted from a trespass, the trespass was still actionable, n20 and in any trespass case nominal damages could be recovered. n21 While that basic doctrine still prevails today, some courts have departed from this traditional position and have held that not even nominal damages should be awarded if the trespass was inadvertent and no actual damage occurred. n22

COMPUTER-ASSISTED RESEARCH:

LEXIS: Trespass! w/10 (land or real!) w/5 damage

FOOTNOTES:
(n1)Footnote 1. *Withers v. Mobile Gas Serv. Corp., 567 So. 2d 253 (Ala. 1990); Armitage v. Decker, 267 Cal. Rptr. 399 (1990); Freese v. Buoy, 576 N.E.2d 1176 (Ill. App. 1991); Burt v. Beautiful Savior Lutheran Church, 809 P.2d 1064 (Colo. App. 1990); Hollis v. Norfolk S. Ry., 667 So. 2d 727 (Ala. 1995)* (action to recover for injury to child dismissed

because child was trespassing); *State of N.Y. v. Fermenta ASC Corp. and SDS Biotech Corp., 630 N.Y.S.2d 884 (1995)* (defendants who released herbicide into public water supply committed a trespass); *Commonwealth of Pa. v. Namack, 663 A.2d 191 (Pa. Super. 1995)* (conviction for defiant trespass reversed when it was not shown that defendant did not have bona fide belief in his right to use the trail). *Brady v. Cheltenham Twp., 1998 U.S. Dist. LEXIS 4519* (E.D. Pa. Apr. 9, 1998) (plaintiffs claimed trespass when police entered home without warrant. "Trespass to personal property may be committed by mere intentional physical contact with the chattel of another, and if ... without consent or any other privilege." *United States v. Montague, 75 F. Supp. 2d 670 (S.D. Tex. 1999)* (intent inferred for illegal alien who trespassed on U.S. Soil where mere presence showed intent to enter); *Easterling v. Awtrey Bldg. Corp., 770 So. 2d 606 (Ala. Civ. App. 1999)* (water was diverted onto adjacent property; the court held that intent to do the act which leads to the trespass is the requirement, not the intent to actually trespass). *Hollis v. Norfolk S. Ry., 667 So. 2d 727 (Ala. 1995)* (action to recover for injury to child dismissed because child was trespassing); *State of N.Y. v. Fermenta ASC Corp. and SDS Biotech Corp., 630 N.Y.S.2d 884 (1995)* (defendants who released herbicide into public water supply committed a trespass); *Commonwealth of Pa. v. Namack, 663 A.2d 191 (Pa. Super. 1995)* (conviction for defiant trespass reversed when it was not shown that defendant did not have bona fide belief in his right to use the trail). *Brady v. Cheltenham Twp., 1998 U.S. Dist. LEXIS 4519* (E.D. Pa. Apr. 9, 1998) (plaintiffs claimed trespass when police entered home without warrant. "Trespass to personal property may be committed by mere intentional physical contact with the chattel of another, and if ... without consent or any other privilege." *United States v. Montague, 75 F. Supp. 2d 670 (S.D. Tex. 1999)* (intent inferred for illegalalien who trespassed on U.S. Soil where mere presence showed intent to enter); *Easterling v. Awtrey Bldg. Corp., 770 So. 2d 606 (Ala. Civ. App. 1999)* (water was diverted onto adjacent property; the court held that intent to do the act which leads to the trespass is the requirement, not the intent to actually trespass).

(n2)Footnote 2. *Brown Jug, Inc. v. International Bhd. of Teamsters, Chauffers, Warehousemen Helpers of America, Local 959, 688 P.2d 932 (Alaska 1984)* (picketing union members trespassed onto retailer's place of business during consumer boycott); *Bullman v. D & R Lumber Co., 464 S.E.2d 771 (W. Va. 1995)* (treble damages and punitive damages awarded for wrongful cutting of timber). *Peterson v. Romine, 960 P.2d 1266 (Idaho 1998)* (Plaintiff parking in unauthorized spot during a shopping trip was a trespasser. No need for the owners of the spot to have signs posted showing ownership; *In re Jason Allen D., 733 A.2d 351 (Md. App. 1999)* (trespass occurred, even though the defendant was under the mistaken belief that he was on his own property, because he intended to be on the land where the trespass occurred).

(n3)Footnote 3. *Hoaglin v. Decker, 713 P.2d 674 (Or. App. 1986)* (action to recover damages for trespass when defendants placed sand, brush and debris on plaintiff's land); *Tissenbaum v. Aerovias Nacionales de Colombia, S.A. In re Air Crash Disaster at Cove Neck, L.I., N.Y. 885 F. Supp. 434 (E.D.N.Y. 1995)* (homeowners' nuisance action against airline whose airplane crashed on their property failed because there was no intent to unlawfully invade the property); *Fondren v. Redwine, 905 S.W.2d 156 (Mo. App. 1995)* (statutory trespass committed by motorist who lost control of vehicle).

(n4)Footnote 4. *Staples v. Hoefke, 235 Cal. Rptr. 165 (1987)* (plaintiffs leased space for computerized photography under a provision preventing the landlord from renting other units in the building to tenants using machinery that would cause the building to vibrate); *United Proteins, Inc. v. Farmland Indus., Inc., 915 P.2d 80 (Kan. 1996)* (chemical discharge from fertilizer manufacturer's plant did not constitute trespass because no intent was shown); *Baltimore Gas & Elec. Co. v. Flippo, 684 A.2d 456 (Md. App. 1996)* (boy did not trespass because there was no conscious intent to do the act that constitutes entry upon someone else's property).

(n5)Footnote 5. *Smith v. Lockheed Propulsion Co., 56 Cal. Rptr. 128 (1967); Yslava v. Hughes Aircraft Co., 1998 U.S. Dist. LEXIS 17228* (D. Ariz. June 26, 1998) (class action where aircraft polluted water in neighborhood: "the tort of trespass 'requires an intentional entry on the land of another.'" The plaintiff does not have to own the land, just have the right to possess the land).

(n6)Footnote 6. *Martin v. Union Pacific R. Co., 474 P.2d 739 (Or. 1970).*

(n7)Footnote 7. *Huling v. Henderson, 29 A. 276 (Pa. 1894).*

(n8)Footnote 8. *Koch Indus., Inc. v. Haxton, 414 F. Supp. 942 (D. Okla. 1976)* (construction company and drilling company damaged plaintiff's pipeline while repairing slush pit); *Edgar v. Riley, 725 So. 2d 982 (Ala. Civ. App. 1998)*(Child bitten by neighbor's dog while on the neighbor's property. Child was given earlier permission to go on land anytime -- no trespass). *Special Force Ministries v WCC TV, 584 N.W.2d. 789 (Minn App. 1998).* (to avoid trespass does not require ownership, just right to possess; defendant had permission to enter, but unlawfully and secretly video-taped the activities in the facility).

(n9)Footnote 9. *Cassinos v. Union Oil Co., 18 Cal. Rptr. 2d 574 (1993).* (Property owner injected waste water into adjacent land owner's mineral estate).

(n10)Footnote 10. *Davis v. Jefferson Sav. & Loan Ass'n, 820 S.W.2d 549 (Mo. App. 1991)* (landlord exceeded the right to enter premises when landlord destroyed tenant's crops). *Trustco Bank of New York v. S/N Precision Enters., Inc., 650 N.Y.S.2d 846 (1996)* (trespass occurred where lessee was aware of agreement to evacuate property by certain date but intentionally failed to do so). Kleppinger v. Anglican Catholic Church, Inc., 715 A.2d.1033 (N.J. Super. 1998) (Bishop under inhibition had no right to use and enjoy any church property and therefore his entry upon church land constituted trespass); *Medical Lab Mgmt. Consultants v. ABC, 30 F. Supp. 2d. 1182 (D. Ariz. 1998)* (Reporter brought a hidden camera into laboratory to expose errors in testing. She was posing as a buyer interested in bringing business to the lab. If the plaintiff "is induced to consent by a substantial mistake concerning the nature of the invasion or the extent of harm to be expected from it and the mistake is caused by the other's misrepresentation, the consent is not effective"). *United States v. Garfield County, 122 F. Supp. 2d 1201 (D. Utah 2000)* (Garfield County has a right of way, consisting of a roadway, over federal park lands. The court held that the County had exceeded its rights under the right of way and was liable for trespass when the County widened the roadway without permission of the federal authorities).

(n11)Footnote 11. *Civic Western Corp. v. Zila Indus., 135 Cal. Rptr. 915 (1970).*

(n12)Footnote 12. *Sedona Self-Realization Group v. Sun-Up Water Co., 598 P.2d 987 (Ariz. 1979)* (defendant dug up owner's water pipe, cut it and put a cap on the end without consent of owner). *Coodington v. Staab, 716 So. 2d. 850 (Fla. App. 1998)* (Trespass to real property when defendant entered plaintiff's apartment and ransacked personal property and deprived him of use of his apartment).

Duresa v. Commonwealth Edison Co., 2004 Ill. App. Lexis 317 (No. 1-03-0317, Mar. 30, 2004) (Power company exceeded its right of easement when it did more than trim bushes and vegetation and thereby committed a trespass.); *Singleton v. Haywood Elec. Mbrshp. Corp., 588 S.E.2d 871 (N.C. 2003)* (Power Company's installation of power poles and a low level power line constituted trespass when company only had authority to repair pre-existing high level line without poles.)

(n13)Footnote 13. *Williams v. Garnett, 608 S.W.2d 794 (Tex. Civ. App. 1980).*

(n14)Footnote 14. *Simpson v. Phillips Pipe Line Co., 603 S.W.2d 307 (Tex. Civ. App. 1980)* (landowner action against pipeline company for damages caused during pipeline replacement).

(n15)Footnote 15. *Crook v. Sheehan Enters., 740 S.W.2d 333 (Mo. App. 1987)* (backhoe operator drove onto property without permission and damaged a sewer pipe that later backed sewage up into plaintiff's basement); *NLRB v. Calkins, 187 F.3d 1080 (9th Cir. 1999)* (action in tespass when entry is "unauthorized"); *ABC v. Gill, 6 S.W.3d 19 (Tex. App. 1999), writ denied* (there can be no trespass without an entry upon land).

(n16)Footnote 16. *Staples v. Hoefke, 235 Cal. Rptr. 165 (1987)* (computerized photography corporation brought trespass action against a leather manufacturer whose punch press emitted vibrations); *Earley v. Roble, 1996 Conn. Super. LEXIS 3229* (No. CV 920334637, Dec. 6, 1996) (defendant enjoined from continuing to keep picnic tables, a shed and drainage pipes on plaintiff's property). *Rubin v. Walpate Constr. Mgmt., 1999 Mass. Super. LEXIS 319* (Mass.

Super. Aug. 23, 1999) (trespass where defendant caused water to enter onto land); *Hoffman v. Vulcan Materials Co., 91 F. Supp. 2d 881 (M.D.N.C. 1999)* (trespass may be unauthorized entry upon land for dust, flying rocks, and shockwaves if plaintiff can show damage); *But see, Adams v. Cleveland-Cliffs Iron Co., 602 N.W.2d 215 (Mich. App. 1999)* (Michigan law of trespass does not cover airborne particles, noise, or vibrations).

(n17)Footnote 17. *Plotkin v. Club Valencia Condo. Assoc., Inc., 717 P.2d 1027 (Colo. App. 1986)* (condominium association trespassed when its agent entered a unit and moved a storage locker on the owner's balcony); *Heathergreen Commons Condo. Assoc. v. Paul, 503 A.2d 636 (Del. 1985)* (action to prohibit adjoining property owners from building a hotel, motel, or restaurant); *Vecchiotti v. Tegetoff, 745 S.W.2d 741 (Mo. App. 1987)* (action against adverse possessors to prohibit them from entering disputed parcel); *United States v. Grabler, 907 F. Supp. 499 (D. Mass. 1995)*(private owner's tennis court built partially on public land caused a continuing trespass on the public land); *Mack v. Edens, 464 S.E.2d 124 (S.C. App. 1995)* (homeowner who failed to prove that road on adjacent land had been dedicated to the public was therefore a trespasser). *McDowell v. State, 957 P.2d 965 (Alaska 1998)* (Real property owners sued state for trespass upon real property when petroleum leaked onto their property).

(n18)Footnote 18. *Letterman v. English Mica Co., 107 S.E.2d 753 (N.C. 1959)* (mine owner dumped dirt in river, raising river bed and backing up water); *Chrysler Credit Corp. v. Koontz, 661 N.E.2d 1171 (Ill. App. 1996)* (repossesser's act of entering private property and repossessing a car was not a breach of the peace); *Johnson v. Marcel, 465 S.E.2d 815 (Va. 1996)* (landlord entered tenants' premises without consent, changed locks, ripped the telephone out of the wall socket, and continually intimidated and harassed the tenants, and was liable to them in common-law trespass); *Rosenfeld v. Thoele, 28 S.W.3d 446 (Mo. Ct. App. 2000)* (defendant constructed a debris area and eleven foot high tie wall on plaintiff's land).

(n19)Footnote 19. *Crook v. Sheehan Enters., 740 S.W.2d 333 (Mo. App. 1987)* (trespass action against backhoe owner); *Palace Properties, L.L.C. v. Sizeler Hammond Square Limited Partnership, 839 So. 2d 82 (La. App. 2002)* (a landowner did not trespass when its contractor rightfully entered plaintiff's property to maintain and improve a servitude of passage); *Thomas v. Harrah's Vicksburg Corp, 734 So. 2d 312 (Miss. App. 1999)* (plaintiff sought damages for common law trespass).

(n20)Footnote 20. *Nissan Motor Corp. v. Maryland Shipbuilding Drydock Co., 544 F. Supp. 1104 (D. Md. 1982), aff 'd, 742 F.2d 1449 (4th Cir. 1984)* (action against shipbuilder for smoke emissions). *In re Tutu Wells Contamination Litigation, 909 F. Supp. 991 (D. Virgin Islands 1995)* (oil companies accused of polluting aquifer, but harm is not a necessary element of the tort of trespass).

Public Service Co. of Colorado v. Van Wyk, 27 P.3d 377 (Colo. 2001) (holding that, in Colorado, an intangible intrusion may be actionable in trespass only if physical damages are proven to be caused by such intangible intrusion).

(n21)Footnote 21. *Brown Jug, Inc. v. International Bhd. of Teamsters, Chauffers, Warehousemen Helpers of America, Local 959, 688 P.2d 932 (Alaska 1984)* (trespass action for boycott picket); *Staples v. Hoefke, 235 Cal. Rptr. 165 (1987)* (press punch operation in violation of lease); *Suggs v. Carroll, 333 S.E.2d 510 (N.C. 1985)* (trespass action by parent against children who refused to leave the home).

(n22)Footnote 22. *Maddy v. Vulcan Materials Co., 737 F. Supp. 1528 (D. Kan. 1990)* (emission of gases and contamination of water); *Southern Mo. Dist. Council of Assemblies of God v. Hendricks, 807 S.W.2d 141 (Mo. App. 1991)* (fence built on plaintiff's property); *Jordan v. Georgia Power Co., 466 S.E.2d 601 (Ga. App. 1995)* (alleged electromagnetic fields could not be the basis for liability in trespass). *National Tel. Coop. Assn. v. Exxon Corp., 38 F. Supp. 2d 1 (D.D.C. 1998)* (Exxon did not commit trespass when its facility inadvertently leaked oil onto the property of National Telephone. "In cases involving an unintentional trespass by imperceptible deposits there must be real and substantial harm to property."); *Smith v. Carbide & Chems. Corp., 298 F. Supp. 2d 561 (W.D. Ky. 2004)* (Where plaintiffs failed to prove actual damage, trespass was not actionable, where trespass occurred by imperceptible particles).

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CHAPTER 68 TRESPASS ON LAND

8-68 Thompson on Real Property, Thomas Editions § 68.03

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§ 68.03 Trespass from Encroachment by Structures.

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§ 68.03(a) Encroachment by Objects Interfering with Structures on the Boundary Line.

Sometimes a landowner's boundary line is marked by a building, a fence, a wall, or some other structure, and any interference or even touching of that structure on the boundary line may constitute a trespass. Courts have found a trespass where dirt has been piled against such a structure, or a vine from adjacent land has been permitted to grow onto such a structure, or even where a sign has been painted on the building on the boundary line. n23 Attaching a wire to such a structure is a trespass. n24 Because a landowner's boundary line is considered to be a vertical boundary which extends upward from the boundary on the surface of the land itself, such a trespass can occur at any point along that vertical plane.

COMPUTER-ASSISTED RESEARCH:

LEXIS: Trespass! w/5 (land or real!) and (encroach! or interfere!) w/10 boundary

§ 68.03(b) Encroachment by Structures Extending over the Boundary Line.

A trespass against that vertical boundary line plane may be committed by means of any kind of structure that encroaches on, over or under the land of another. n25 Any object or structure that extends over the boundary line of adjacent land and violates the air space of adjacent land constitutes a trespass. n26 Examples of such trespasses by encroaching structures have included wires that extend across the air space of adjacent land, n27 and eaves, n28 shutters, n29 walls, n30 roofs, n31 and bay windows n32 that project over the boundary line and into the air space of adjacent land.

COMPUTER-ASSISTED RESEARCH:

LEXIS: Trespass! w/5 (land or real!) and (encroach! or interfere!) w/10 boundary

§ 68.03(c) Encroachment by Party Walls and Partition or Division Fences.

Often adjoining landowners will mark the division of their respective properties by some sort of boundary structure. Such a structure could be a partition or division fence or, if the property division is inside a building, the dividing structure will be referred to as a party wall. As between two interconnected buildings, a party wall connects and divides the two buildings, and ordinarily each of the adjoining landowners owns the portion of the wall resting in the owner's respective side of the boundary line. n33 In terms of ownership, usually each landowner has a separate title in the portion of the party wall resting on the owner's side of the dividing line, coupled with an easement interest in the portion held by the other owner. n34 Less commonly the adjoining landowners may hold ownership of the wall by tenancy in common. n35 If one landowner builds a party wall which rests partly on the land of the adjoining owner, and the construction is without the consent or authorization of the adjoining owner, a trespass has occurred. n36 Even if a party wall has been placed by consent of the adjoining landowners, if one of the owners has a duty to maintain the wall in good condition and from neglect of that duty the wall collapses so as to damage the adjoining property, again a trespass has occurred. n37

The partition or division fence is similar to a party wall, a kind of outdoor version of a party wall resting on the boundary line dividing two contiguous properties. n38 Often such a partition or division fence is used by each owner as a part of a larger enclosure on the owner's land. n39 Ordinarily, a landowner has no duty to construct or to maintain a partition or division fence, n40 although such an agreement and obligation can arise by agreement of the parties or even as a matter of prescriptive right between adjoining landowners. n41 Such a prescriptive right can arise when a landowner has been the sole provider of maintenance for a partition fence uninterruptedly during the prescriptive period in that jurisdiction; the other owner may thereby obtain a prescriptive right to have the maintenance activity continued. n42 If such a prescriptive right has arisen, the obligated party has a right to go onto the land of the one holding the right in order to conduct the necessary maintenance on the fence. n43

In an ideal world, a partition fence rests on exactly equal portions of the adjoining properties. n44 If a party or division fence is under construction, and one landowner perceives that the contiguous properties will bear unequal portions of the fence, the landowner is entitled to enjoin the construction of the fence until the inequality is corrected. n45 The theory of exactly equal support from adjoining properties is also applied to partition fences built in a zig-zag fashion, crossing and re-crossing a boundary line which is not in zig-zag form; n46 likewise when a ditch is used to mark a boundary between adjoining properties, it will be presumed that the ditch rests on equal portions of each parcel of land. n47

The adjoining landowners hold a title to a partition or a division fence as tenants in common, unless they have agreed otherwise or it is otherwise determined by statute or covenant. n48 If one of those tenants in common damages, removes, opens, or destroys any part of the fence, the other tenant or tenants in common have a right of action in trespass. n49

COMPUTER-ASSISTED RESEARCH:

LEXIS: Trespass! and encroach! and (party or common) w/5 (fence or wall)

FOOTNOTES:

(n1)Footnote 23. *Steiger v. Nowakowski, 227 N.W.2d 104 (Wis. 1975)* (ditch alongside wall caused collapse of wall).

(n2)Footnote 24. *Holt v. Crest Lincoln Mercury, Inc., 1990 Conn. Super.LEXIS 1957* (Dec. 10, 1990) (wire fence attached to neighbor's concrete wall); *Hennessy v. Amstock, 19 Pa. Super. 644 (1902).*

(n3)Footnote 25. *Steiger v. Nowakowski, 227 N.W.2d 104 (Wis. 1975)* (ditch alongside wall caused collapse of wall); *Goulding v. Cook, 661 N.E.2d 1322 (Mass. 1996)* (septic system built on disputed parcel of land); *Newmark v. Vogelgesang, 915 S.W.2d 337 (Mo. App. 1996)* (portion of newly constructed gas station encroached on adjoining

landowner's land). *Gildow v. Lord-Smith, 957 P.2d. 199 (Ore. App. 1998)* (Expanding of easement is trespass by unauthorized entry to land). *Blackburn v. MillerStephenson Chem. Co., 1999 Conn. Super. LEXIS 2621* (Conn. Super. Sept. 28, 1999) (Trespass may be committed on, beneath or above the surface of the earth [and] the phrase "surface of earth" includes soil, water, trees, and other growths. A trespass need not be inflicted directly on another's realty, but may be committed by discharging foreign polluting matter at a point beyond the boundary of such realty).

(n4)Footnote 26. *Jones v. Wagner, 624 A.2d 166 (Pa. Super. 1993)* (adjoining landowner trimmed encroaching tree limbs); *Herrin v. Sutherland, 241 P. 328 (Mont. 1925); Leckie v. Auger Timber Co., 707 So. 2d 459 (La. App. 1998)* (cutting of commercial timber that extended onto adjacent land); *Newmark v. Vogelgesang, 915 S.W.2d 337 (Mo. App. 1996)* (owner of land adjoining that of gas station owner brought trespass action alleging that structures built as part of construction of new gas station encroached on adjoining owner's land). *Braxton v. Guillory, 721 So. 2d 114 (La. App. 1998)* (Gas and water lines built through neighbor's road is a trespass).

(n5)Footnote 27. *Butler v. Frontier Tel. Co., 79 N.E. 716 (N.Y. 1906)* (wire strung across and left suspended over plaintiff's land).

(n6)Footnote 28. *Zerr v. Heceta Lodge No. 111, I.O.O.F., 523 P.2d 1018 (Or. 1974).*

(n7)Footnote 29. *Homewood Realty Corp. v. Safe Deposit Trust Co., 154 A. 58 (Md. 1931).*

(n8)Footnote 30. *Barberi v. Bochinsky, 128 A.2d 1 (N.J. Super. 1956); Rasch v. Noth, 74 N.W. 820 (Wis. 1898).*

(n9)Footnote 31. *Ariola v. Nigro, 156 N.E.2d 536 (Ill. 1959); Murphy v. Bolger Bros., 15 A. 365 (Vt. 1888).*

(n10)Footnote 32. *Shore v. Baumbach, 310 S.W.2d 901 (Mo. 1958); Codman v. Evans, 87 Mass. (5 Allen) 308 (1862).*

(n11)Footnote 33. *Lambert v. Emporia, 616 P.2d 1080 (Kan. App. 1980)* (damage when part of a party wall razed); 25 *West 74th St. Corp. v. Wenner, 702 N.Y.S.2d 282 (N.Y. App. 2000)*(chimneys on top of a common wall used exclusively by defendant were cause for action in trespass); *Sobien v. Mullin, 783 A.2d 795 (Pa. Super. Ct. 2001)* (party wall must be intended as such by the builder and cannot lie wholly on the property of one owner).

(n12)Footnote 34. *Cameron v. Perkins, 454 P.2d 834 (Wash. 1969)* (dispute over maintenance of party wall); *American Nat'l Bank Trust Co. v. General Outdoor Advertising Co., 153 N.E.2d 110 (Ill. App. 1958).*

(n13)Footnote 35. *Mary Jane Stevens Co. v. First Nat'l Bldg. Co., 57 P.2d 1099 (Utah 1936)* (thirteen story building constructed next to plaintiff's property).

(n14)Footnote 36. *Fowler v. Koehler, 43 App. D.C. 349 (1915).*

(n15)Footnote 37. *Theofilatos v. Koleci, 481 N.Y.S.2d 782 (1984)* (deterioration of retaining wall).

(n16)Footnote 38. *Kundel Farms v. Vir-Jo Farms, Inc., 467 N.W.2d 291 (Iowa App. 1991)* (dispute over maintenance of fence); *Hewit v. Jewell, 12 N.W. 738 (Iowa 1882).*

(n17)Footnote 39. *Little v. Laubach, 168 N.W. 155 (Iowa 1918)* (alleged breach of agreement by parties to maintain separate halves of fence).

(n18)Footnote 40. *Schnakenberg v. Schroeder, 367 N.W.2d 692 (Neb. 1985)* (action for repair and replacement of division fence); *Van Gorder v. Eastchester Estates, Inc., 137 N.Y.S.2d 789 (1955); Fogle v. Malvern Courts Inc., 722 A.2d 680 (Pa. 1999)*(neighbors do not have to pay for fence dividing property of single family home).

(n19)Footnote 41. *Matthews v. McVay, 234 S.W.2d 983 (Mo. App. 1950)* (agreement for division fence); *Deane v.*

Garniss, 200 N.E. 923 (Mass. 1936).

(n20)Footnote 42. *Titus v. Pennsylvania R. Co., 92 A. 944* (N.J. Errors & App. 1915).

(n21)Footnote 43. *See,* 1 Restatement (Second) of Torts, §190 (1965).

(n22)Footnote 44. *Laughlin v. Franc, 73 N.W.2d 750 (Iowa 1955)* (dispute over maintenance of fence); *Rose v. Linderman, 110 N.W. 939 (Mich. 1907); Grillot v. Maddox, 2000 Ark. App. LEXIS 289* (Ark. App. Apr. 12, 2000) (no trespass found when appellee's fence rested on appellant's property where appellant knew fence encroached on property and did nothing to recognize true boundary; appellant instead lost property to adverse possession).

(n23)Footnote 45. *Moss v. Thomson Co., 91 S.E.2d 485 (Ga. 1956)* (alleged trespass in constructing a fence on plaintiff's property); *Andres v. Todd, 296 S.W.2d 139 (Mo. App. 1956)* (alleged trespass on strip of land between parties' properties).

(n24)Footnote 46. *Johnson v. Szumowicz, 179 P.2d 1012 (Wyo. 1947); Morton v. Reynolds, 45 N.J.L. 326 (1883).*

(n25)Footnote 47. *Newell v. Hill, 43 Mass. (2 Met.) 180 (1841)* (trespass action for digging a ditch and carrying away the turf).

(n26)Footnote 48. *Thompson v. Mattuschek, 333 P.2d 1022 (Mont. 1959)* (removed fence allowed cattle to stray into fields of crops).

(n27)Footnote 49. *Laughlin v. Franc, 73 N.W.2d 750 (Iowa 1955)* (dispute over removal of fence).

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CHAPTER 68 TRESPASS ON LAND

8-68 Thompson on Real Property, Thomas Editions § 68.04

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§ 68.04 Trespass from Encroachment by Vegetation.

[Go To Supp]

§ 68.04(a) Encroachment by Vegetation on the Boundary Line.

§ 68.04(a)(1) The Right to Remove Vegetation on the Boundary Line.

When trees and shrubs are growing on and straddling the boundary line between contiguous parcels of land, the adjoining landowners hold ownership in those trees and shrubs as tenants in common. n50 Because the landowners are tenants in common, neither has the right to destroy or damage the vegetation without the permission of the other; n51 however, either owner may remove any portion of that vegetation that threatens serious damage to the owner's property. n52 In one case, the roots of a tree on the boundary line eventually pushed in the basement wall of a house on one of the parcels of land, and under those circumstances the houseowners were entitled to remove the entire tree, although at their own expense. n53 Even where such boundary line vegetation does threaten serious damage to one of the properties, the owner whose land is threatened may not by legal action compel the other owner to remove the vegetation. n54

COMPUTER-ASSISTED RESEARCH:

LEXIS: Trespass! and encroach! w/20 (vegetation or trees or plants or shrubbs or growth)

§ 68.04(a)(2) The Right to Cut Back Vegetation on the Boundary Line.

As mentioned in the preceding paragraph, one adjoining landowner may remove trees or shrubs straddling the boundary line if that vegetation threatens serious damage to the owner's property. Even without the threat of serious damage, one of the adjoining owners may cut back such roots and branches of the vegetation that extend beyond the boundary line onto the owner's property. However, that cutting back may not extend to cutting into and damaging the trunk itself. n55 In one case, an owner was restrained entirely from cutting back any portion of a row of trees that had been planted and was being used as a windbreak. n56 If one of the owners unnecessarily cuts back or damages boundary line vegetation, the other owner may sue in trespass, even though both owners hold the vegetation as tenants in common. n57

COMPUTER-ASSISTED RESEARCH:

LEXIS: Trespass! and encroach! and (vegetation or tree or plant or growth) w/10 cut or trim or remov!

§ 68.04(b) Encroachment by Vegetation Extending or Hanging over the Boundary Line.

§ 68.04(b)(1) The Right to Cut Back Vegetation Extending or Hanging over the Boundary Line.

Adjoining landowners, as discussed above, have a right to remove or to cut back vegetation that is situated on and straddles the property line between contiguous parcels of land. In some cases the vegetation is situated wholly upon one parcel of land, but extends roots or branches over onto adjoining land. While landowners are free to plant trees and shrubs as they wish on their own land, n58 they may be liable in trespass for damage caused by roots or branches which extend over the boundary line of adjoining property and encroach on that contiguous land. n59 If a tree that extends its branches or roots onto adjoining property was not planted but grew naturally in its location, trespass liability of the treeowner will usually be denied. n60 And in some jurisdictions recognizing a right of private self-help to cut back encroaching vegetation, a judicial right of action against the neighboring landowner who owns the vegetation for such relief has been denied altogether. n61

This private right of self-help to cut back encroaching vegetation means that a landowner may, without permission, cut back roots or overhanging branches encroaching on the property and which are part of vegetation growing on adjacent property. n62 This private right of self-help is a very limited right, and entitles the landowner only to abate the nuisance or cure the trespass created by the overextending roots and branches; n63 the landowner obtains no property right in the cuttings and the branches may not be converted to use by the owner of the encroached property. n64 Indeed, as this rule has developed in English law when overhanging branches have been cut, the owner of the tree has a right to go onto the encroached property and retrieve the cut branches and any fruit that they were bearing. n65

As noted before, in some jurisdictions courts deny a right of legal action against an owner of encroaching vegetation, because the prospective plaintiff has a right of self-help to remove the offending roots and branches. Nevertheless, even in those jurisdictions a right of judicial action exists if the encroaching roots or branches are extended from so-called noxious trees or plants. n66 "Noxious" vegetation is broadly defined as that which is "poisonous, destructive of health or otherwise pernicious." Even otherwise harmless vegetation which creates serious damage may be termed noxious; when the roots of an ornamental shade tree destroyed and polluted a well on adjoining land, the tree was deemed noxious. n67

COMPUTER-ASSISTED RESEARCH:

LEXIS: Trespass! and encroach! w/20 (vegetation or tree or plant or shrub or growth)

§ 68.04(b)(2) The Right to Take Fruit from Vegetation Extending or Hanging over the Boundary Line.

If, as was mentioned in the preceding section, the owner of encroaching vegetation has the right to go onto other land to retrieve cut branches and the fruit they are bearing, then, of course, the owner of encroached land who cuts off the overhanging branches may withhold from the owner of the tree neither the branches nor the fruit. n68 Accordingly, when the branch of a tree, growing on one parcel of land, overhangs onto adjoining land, the owner of the adjoining land may not take the fruit from that overhanging branch and, in fact, the owner of the tree is entitled to come onto the adjoining property to harvest the fruit. n69 Even if the fruit from an overhanging branch has fallen to the ground on adjoining land, the fruit may not be taken and converted by the owner of encroached land. Usually the owner of the tree and fruit may come onto the encroached land to take possession of the fruit which has fallen to the ground. n70

COMPUTER-ASSISTED RESEARCH:

LEXIS: Trespass! and encroach! w/20 (vegetation or tree or plant or shrub or growth)

FOOTNOTES:
(n1)Footnote 50. *Patterson v. Oye, 333 N.W.2d 389 (Neb. 1983)* (injunction against removing boundary line hedges and bushes).

(n2)Footnote 51. *Holmberg v. Bergin, 172 N.W.2d 739 (Minn. 1969)* (tree branches and roots encroached on adjacent land); *Patterson v. Oye, 333 N.W.2d 389 (Neb. 1983)* (injunction against removing hedges and shrubs on the boundary). *Haygood v. State, 483 S.E.2d 302 (Ga. App. 1997)* (landowner trimmed a hedge located on the property of her neighbor).

(n3)Footnote 52. *Melnick v. C.S.X. Corp., 540 A.2d 1133 (Md. 1988)* (damage to building caused by encroaching trees, roots, and vines); *Lemon v. Curington, 306 P.2d 1091 (Idaho 1957).*

(n4)Footnote 53. *Lemon v. Curington, 306 P.2d 1091 (Idaho 1957).*

(n5)Footnote 54. *Melnick v. C.S.X. Corp, 540 A.2d 1133 (Md. 1988)* (damage to building caused by encroaching trees, roots, and vines); *Harndon v. Stultz, 100 N.W. 329 (Iowa 1904).*

(n6)Footnote 55. *Doran v. Rugg, 164 A.2d 859 (Conn. Super. 1960)* (defendant cut down 26 trees on or near the boundary line); *Robinson v. Clapp, 32 A. 939 (Conn. 1895), later appealed, 35 A. 504 (Conn. 1896); Jones v. Wagner, 624 A.2d 166 (Pa. Super. 1993)* (no liability resulted when landowner exercised self-help right to cut back tree limbs to the extent they encroached on the landowner's land).

(n7)Footnote 56. *Weisel v. Hobbs, 294 N.W. 448 (Neb. 1940).*

(n8)Footnote 57. *Cathcart v. Malone, 229 S.W.2d 157 (Tenn. 1950)* (malicious cutting down of two shade trees owned as tenants in common).

(n9)Footnote 58. *Jones v. Wagner, 624 A.2d 166 (Pa. Super. 1993)* (encroaching tree limbs trimmed before damage occurred); *Merriam v. McConnell, 175 N.E.2d 293 (Ill. App. 1961).*

(n10)Footnote 59. *Jones v. Wagner, 624 A.2d 166 (Pa. Super. 1993)* (encroaching tree limbs trimmed before damage occurred); *D'Andrea v. Guglietta, 504 A.2d 1196 (N.J. 1986)* (masonry wall damaged by tree root from adjoining property); *Chandler v. Larson, 500 N.E.2d 584 (Ill. App. 1986)* (garage damaged by encroaching by encroaching tree root).

(n11)Footnote 60. *Melnick v. C.S.X. Corp., 510 A.2d 592 (Md. App. 1986)* (building damaged by encroaching trees), *aff'd, 540 A.2d 1133 (Md. 1988); Griefield v. Gibraltar, F.M. Ins. Co., 24 So. 2d 356 (Miss. 1946).*

(n12)Footnote 61. *Melnick v. C.S.X. Corp., 510 A.2d 592 (Md. App. 1986)* (building damaged by encroaching trees), *aff'd, 540 A.2d 1133 (Md. 1988).*

(n13)Footnote 62. *Cannon v. Dunn, 700 P.2d 502 (Ariz. App. 1985)* (encroachment by tree roots); *Pierce v. Casady, 711 P.2d 766 (Kan. App. 1985)* (encroachment by tree branches); *Gallo v. Heller, 512 So. 2d 215 (Fla. App. 1987)* (damage to building and sidewalks by encroaching tree limbs and roots); *Stewart v. Seedorff, 1999 Ohio App. LEXIS 2375* (Ohio App. May 27, 1999) (trees encroached on neighboring landowner).

(n14)Footnote 63. *Segraves v. Consolidated Elec. Coop., 891 S.W.2d 168 (Mo. App. 1995)* (power company lineman cut down and "topped off" landowner's trees, killing several trees, and was liable for treble damages in trespass).

(n15)Footnote 64. *Jurgens v. Wiese, 38 N.W.2d 261 (Neb. 1949)* (hedge trimmed by adjoining landowner).

(n16)Footnote 65. *Mills v. Brooker, 1 K.B. 555 (1919)* (conversion of overhanging apples).

(n17)Footnote 66. *Cannon v. Dunn, 700 P.2d 502 (Ariz. App. 1985)* (encroaching tree roots); *Smith v. Holt, 5 S.E.2d 492 (Va. 1939).*

(n18)Footnote 67. *Buckingham v. Elliott, 62 Miss. 296 (1884).*

(n19)Footnote 68. *Jurgens v. Wiese, 38 N.W.2d 261 (Neb. 1949)* (action to enjoin destruction of a hedge).

(n20)Footnote 69. *Hoffman v. Armstrong, 48 N.Y. 201 (1872)* (plaintiff tried to pick overhanging cherries from defendant's tree).

(n21)Footnote 70. *See* Annotation, *Rights and Remedies in Case of Encroachment of Trees, Shrubbery or Other Vegetation Across Boundary Line,* 76 A.L.R. 1111 (1932); Annotation, *Rights and Remedies in Case of Encroachment of Trees, Shrubbery or Other Vegetation Across Boundary Line,* 128 A.L.R. 1221 (1940); *Helwig v. Bork, 2003 U.S. Dist. Lexis 22237* (No. 02-885 (JNE/RLE), D. Minn. Dec. 8, 2003) (Where tenant had right to use land at time fruit trees were planted, and trees were property of tenant, tenant did not commit trespass when he removed trees.)

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CHAPTER 68 TRESPASS ON LAND

8-68 Thompson on Real Property, Thomas Editions § 68.05

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§ 68.05 Trespass from Encroachment by Objects Coming onto the Land.

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§ 68.05(a) Elements of Trespass Liability for Encroachment.

When tangible objects such as rocks or portions of a building fall or are projected onto the property of another, clearly a trespassory invasion has occurred. The trespassory nature of that invasion becomes less clear as the intruding object becomes less tangible, such as when fumes or ashes drift or migrate from one parcel of land to another. Some such interferences with land use are often considered nuisances rather than trespasses, and cases can be found in which either legal theory is appropriate. In those instances when the invasions of land are physical, yet ephemeral, plaintiffs may often pursue relief under either trespass or nuisance theories. In this section are described examples of tangible things coming onto land that are almost all represented by trespass cases, but an occasional nuisance case emerges.

COMPUTER-ASSISTED RESEARCH:

LEXIS: Trespass! w/5 (land or real!) and encroach! w/20 liab!

§ 68.05(b) Strict Liability for Trespass by Encroachment.

It is still the common law rule that no landowner liability results when water or other matter gathers naturally on one's land and then migrates to the land of another, causing damage. However, if the discharge of the water or other matter occurs even partially because of a building or other artificial structure, so that the migration is no longer completely natural, the owner of the land from which the discharge originates may be liable for damage caused on nearby land, at least if negligence occurred in the interfering with the natural migration. This common law rule of liability for negligence was altered by the English case of Rylands v. Fletcher, n71 which imposed strict liability on a landowner who intervened in the natural runoff or migration which caused damage on other land. In American jurisdictions which have adopted at least some aspects of this rule of strict liability, a landowner who makes some unusual or unnatural use of property will be liable for damage caused to nearby land if the use is not kept under close control. n72 A land use is considered unusual or inappropriate if the potential damage to nearby land is much greater than the potential benefit to the user. n73

In a related rule, most American courts impose strict liability for property damage caused by extra-hazardous activities or the use of dangerous instrumentalities on one's land. n74 In addition to the typical example of ultrahazardous or extra-hazardous activity of blasting operations which cause damage through seismic vibrations, n75 another example is depositing dangerous materials on land so that damage is caused when the materials explode. Thus when a landowner left railroad tanker cars loaded with propane near warehouses on other land, that owner was liable for damage to the warehouses that occurred when the propane exploded. n76

COMPUTER-ASSISTED RESEARCH:

LEXIS: Trespass! w/5 (land or real!) and strict! liab! w/10 damage

§ 68.05(c) Examples of Trespass by Moving Objects Coming onto the Land.

§ 68.05(c)(1) Dirt, Stones and Debris.

Dirt, stones and debris may normally move from one parcel of land to another, and thus cause a trespass, in two situations. In one, a landowner may deposit a pile of dirt near the boundary line and when the pile or portion of the pile slides onto adjacent land, trespass liability may result, at least if negligence is shown. n77 In the other situation, dirt, stones and debris may be cast onto the land of another as the result of blasting or some other similar extra-hazardous activity or through the use of a dangerous instrumentality. n78 In these situations strict liability may be imposed with no showing of negligence required. n79

COMPUTER-ASSISTED RESEARCH:

LEXIS: Trespass! w/5 (land or real!) w/50 (dirt or soil or stone or debris)

§ 68.05(c)(2) Changing Grade of Contiguous Land.

Although one landowner is usually free to change the grade or natural topography of the land, if that change forces an adjoining landowner to change the way the adjoining land is used, the landowner who forces the change may be liable in damages and also may be required to restore the original grade or topography. n80 If a landowner changed the grade or topography by raising the level of the land above its natural level, then that owner must take steps to see that the higher level is retained within the land's boundaries and does not subside over onto neighboring land. n81

COMPUTER-ASSISTED RESEARCH:

LEXIS: Trespass! w/5 (land or real!) and chang! w/10 (grade or topography)

§ 68.05(c)(3) Falling Wall or Building.

Trespass liability may be imposed when a wall n82 or a pile of lumber n83 or other material falls onto adjoining property, at least if damage is caused. If a landowner conducts an excavation on the land and causes a building or other structure on the land to collapse onto adjoining property, trespass liability will result. n84

COMPUTER-ASSISTED RESEARCH:

LEXIS: Trespass! w/5 (land or real!) w/50 (fall! or fell or collaps!)

§ 68.05(c)(4) Explosions and Fires.

Damage to nearby land resulting from explosions and fires is usually pursued on the basis of a nuisance theory, but a

trespass action is also available. n85 In addition to whatever seismic damage occurs, when blasting casts rocks and dirt and other debris onto adjoining property, a right of action in trespass arises for the property owner. n86

Fire enters into trespass litigation in quite another context. If an oncoming fire is threatening to property, and the threat can be reduced or eliminated by going onto other property to prepare a fire break or to destroy structures that would help spread the fire, liability for such a trespass may be excused on the basis that it was necessary or justified under the circumstances. n87

COMPUTER-ASSISTED RESEARCH:

LEXIS: Trespass! w/5 (land or real!) w/50 (explosion or fire)

§ 68.05(c)(5) Cinders and Soot.

The casting of cinders and soot onto neighboring property is frequently treated as a nuisance, but a trespassory invasion has also been held to occur when a smokestack or a cupola is functioning so close to another's land that it deposits cinders and soot particles on that other land. n88

COMPUTER-ASSISTED RESEARCH:

LEXIS: Trespass! w/5 (land or real!) w/50 (cinder or soot or ash)

§ 68.05(c)(6) Sewage, Foul Air, Fumes, and Pesticides.

Both trespass and nuisance liability, under the common law, can result from discharges of sewage, n89 harmful gases, or foul air from one's property onto other land. n90 If such discharges also violate various environmental and pollution laws and regulations, those violations may also give rise to various private rights of action.

The problem of drifting pesticides presents different issues. A landowner is entitled to use chemicals and other substances to protect premises, including farms and crops, from infestations of insects and weeds. n91 Even if chemical sprays drift onto adjoining land and present health or other problems, liability will usually result only if those insecticides and herbicides have been used negligently and in a manner that does not minimize the interference with other land. n92 Again, a modern element in these cases is the presence of numerous environmental laws and regulations, some of which may impose private party liability for their violation. When cotton farmers had crops damaged by aerial spraying of nearby rice fields, they were able to present evidence of non-compliance with state environmental regulations as one of their elements of proof. n93

COMPUTER-ASSISTED RESEARCH:

LEXIS: Trespass! w/5 (land or real!) w/50 (sewage or pollution or pesticide or fume or foul air)

§ 68.05(c)(7) Rainwater, Ice and Snow.

Liability for damage caused by rainwater runoff from one land onto other land is governed by two competing rules. Under one rule, the owner of the land discharging the rainwater is liable only if negligent and if the water actually causes damage to the adjoining land. This rule establishes a standard of only ordinary care in discharging the rainwater. n94

Under the other rule, strict liability is imposed for any damage caused by rainwater discharged from a building (but not from the land itself) onto adjoining land. n95 Other cases seem to have imposed trespass liability without so much

regard to formal rules as to a due regard for the equities of the particular facts of the case. Thus, if a landowner has constructed a roof or some other portion of a building so that it directly or indirectly forces water to run off onto adjoining land and that runoff causes damage, the runoff is considered a trespass. n96 Failure to contain runoff, when it is reasonable to expect such containment, may result in liability; when a landowner whose building does not have rain gutters for the eves or roof discharges runoff onto adjacent property, trespass liability for damage will be imposed. n97 If gutters or other conduits for rainwater are provided, they must have sufficient capacity for ordinary storms in order for liability for their runoff damage to be avoided. n98 If gutters of ordinary capacity have been provided, damage from discharges caused by extraordinarily heavy rainfall will not create trespass liability. n99

Similar liabilities attach to accumulations of snow and ice that slide from a roof or other structure onto adjoining property; ordinarily the owner of the structure will be liable for damage caused when those accumulations slide onto other property. n100

Another example of artificial creation of runoff occurs when a landowner allows piped water to flow onto adjacent property, which will also produce trespass liability for resulting damage. n101 If water flows naturally onto adjacent property without being piped or otherwise diverted, then no trespass liability results. Discharges caused by the natural features of the land are not actionable.

Some jurisdictions have accepted the rule announced in the English case of Rylands v. Fletcher, n102 which imposes strict liability on a landowner who brings anything onto the property, including water, that will likely cause damage if permitted to escape.

COMPUTER-ASSISTED RESEARCH:

LEXIS: Trespass! w/5 (land or real!) w/50 (rain! or ice or snow)

§ 68.05(c)(8) Trespass by Animals

A landowner's failure to restrain livestock or other animals from trespassing onto adjacent owners' land may result in liability for damages caused.. n103 A 1994 Illinois case raised the prospect that unrestrained cattle could cause liability under the state common law, under the state Running at Large Act, and under the state Fence Act, including punitive damages. The court in that case held only the common law applicable and denied punitive damages; however, the exposure to multiple liability is a real risk. n104

FOOTNOTES:

(n1)Footnote 71. Rylands v. Fletcher, L.R. 3, H.L. 330 (1868). *Francis v. Wilson, 1999 Ohio App. Lexis 224* (Ohio App. Jan. 25, 1999) (defendant cut down trees and placed sand and gravel on plaintiff's property). *See also Pruitt v. Douglas County, 66 P.3d 1111 (Wash. App. 2003)* (Where county altered natural flow of water onto landowner's property, county was liable for trespass).

(n2)Footnote 72. *T. & E. Indus. v. Safety Light Corp., 587 A.2d 1249 (N.J. 1991)* (action against radium processor's successor for abnormally dangerous activity); *Snow v. City of Columbia, 409 S.E.2d 797 (S.C. App. 1991)* (damage to house from leaking water main); *Breneman v. Tanner, 1998 Mass. Super. Lexis 6* (Mass. Super. June 30, 1998) (Creation of wetland, burial of organic waste, nuisance created by low-flying aircraft, destruction of timber and removal of gravel was a trespass).

(n3)Footnote 73. *Ainsworth v. Lakin, 62 N.E. 746 (Mass. 1902)* (falling wall). Abnormally dangerous activity may arise from the existence of a high degree of risk of harm to the person, land, or chattels of others, the likelihood that the resulting harm will be great, and the extent to which the activity's value to the community is outweighed by its dangerous attributes. *See, e.g., Albig v. Municipal Auth. of Westmoreland County, 502 A.2d 658 (Pa. Super. 1985);*

Bennett v. Mallinckrodt, Inc., 698 S.W.2d 854 (Mo. App. 1985), cert. denied, *476 U.S. 1176 (1986); Koos v. Roth, 652 P.2d 1255 (Or. 1982); Harper v. Regency Dev. Co., 399 So. 2d 248 (Ala. 1981).*

(n4)Footnote 74. *State Dep't of Envtl. Protection v. Ventron Corp., 468 A.2d 150 (N.J. 1983)* (alleged pollution of state waterways), but see, *Marsh v. New Jersey Spill Compensation Fund and Environmental Claims Admin., 670 A.2d 67 (N.J. Super. Ct. App. Div. 1996); Fletcher v. Conoco Pipe Line Co., 129 F. Supp. 2d 1255 (W.D. Mo. 2001)*(holding that operation of a pipeline with a kind of federally mandated cathodic protection did not constitute an abnormally dangerous activity).

(n5)Footnote 75. *Watson v. Mississippi River Power Co., 156 N.W. 188 (Iowa 1916)* (concussion damage from blasting); *Kempinski v. Massachusetts Turnpike Auth., 2000 Mass. Super. LEXIS 66* (Mass. Super. Jan. 6, 2000) (no strict liability found where no evidence of hazardous material contamination or personal injury).

(n6)Footnote 76. *National Steel Serv. Ctr., Inc. v. Gibbons, 319 N.W.2d 269 (Iowa 1982); CS&P Inc. v. City of Midland, 580 N.W.2d 468 (Mich. App. 1998), order vacated, 614 N.W.2d 585 (Mich. 2000)* (trespass occurred when water and sewage emanating from the toilets and floor drains invaded the premises of a commercial building).

(n7)Footnote 77. *McArthur v. Balas, 166 A.2d 640 (Pa. 1961).* Other cases: *Adjoining Landowners. Easterling v. Awtrey Bldg. Corp., 770 So. 2d 606 (Ala. Civ. App. 1999)*(natural topography of adjacent land may give rise to an indirect trespass claim against the owner of the adjoining land where surface water, red dirt, sand, and other debris entered onto plaintiff's land).

(n8)Footnote 78. *Ardoin v. Department of Transp. & Dev., 679 So. 2d 928 (La. App. 1996)* (action for trespass by the placement of dirt, vehicles, equipment and debris on neighboring property).

Lewis v. GE, 254 F. Supp. 2d 205 (D. Mass. 2003)(Defendant liable for trespass for depositing contaminated fill dirt on residential property.)

(n9)Footnote 79. *Hutchinson v. Shimmelfeder, 40 Pa. 396 (1861)* (subsidence of new fill over the boundary line); *Cook v. Rockwell Int'l Corp., 181 F.R.D. 473 (D. Colo. 1998)* (Hazardous substances invaded plaintiff's property and caused damage. One who engages in abnormally dangerous activity is strictly liable for any damages proximately caused to other persons, land, or chattels by that activity). *B & D Molded Prods., Inc. v. Vitek Research Corp., 1998 Conn. Super. Lexis 2363* (Conn. Super. Aug. 14, 1998) (Releases of hazardous waste were privileged when made, so no trespass resulted).

(n10)Footnote 80. *Moore v. Standard Paint & Glass Co., 358 P.2d 33 (Colo. 1960)* (flooding damage); *Easterling v. Awtrey Bldg. Corp., 770 So. 2d 606 (Ala. Civ. App. 1999)* (change of the natural topography of adjacent land will give rise to trespass claim where deposit of surface water and debris occurred as a result of the change).

Greenwald v. Kersh, 593 S.E.2d 381 (Ga. App. 2004) (Change in grade of land that caused water to drain onto adjacent property gave rise to trespass and nuisance claim.)

(n11)Footnote 81. *Sneddon v. Edwards, 335 P.2d 587 (Wash. 1959)* (land subsidence after heavy rains).

(n12)Footnote 82. *Lyons v. Walsh, 101 A. 488 (Conn. 1917)* (collapse of neglected retaining wall).

(n13)Footnote 83. *Bishop v. Readsboro Chair Mfg. Co., 81 A. 454 (Vt. 1911).*

(n14)Footnote 84. *Behrens v. W. S. Bills & Sons, 283 N.E.2d 1 (Ill. App. 1972)* (building collapse caused by adjacent excavation).

(n15)Footnote 85. *Koos v. Roth, 652 P.2d 1255 (Or. 1982)* (loss from fire spreading from defendant's land); *Enos*

Coal Mining Co. v. Schuchart, 188 N.E.2d 406 (Ind. 1963) (damage from explosions of strip mining operation); *Gerrard v. Porcheddu, 243 Ill. App. 562 (1927); Elton v. Anheuser-Busch Beverage Group, Inc., 58 Cal. Rptr. 2d 303 (1996)* (negligent invasion by fire which causes damage to real property is "trespass" within meaning of statute).

(n16)Footnote 86. *Enos Coal Mining Co. v. Schuchart, 188 N.E.2d 406 (Ind. 1963)* (damage from explosions of strip mining operation); *Rogers v. Gibson, 101 S.W.2d 200 (Ky. 1937); Beasley v. Pelmore, 631 N.E.2d 749 (Ill. App. 1994)* (recovery for damage to plaintiff's building allegedly resulting from defendant's demolition activities upheld on *res ipsa loquitur* theory).

(n17)Footnote 87. *Bowditch v. Boston, 101 U.S. 16 (1880)* (building was blown up in order to stop the spread of a great fire).

(n18)Footnote 88. *Sheppard Envelope Co. v. Arcade Malleable Iron Co., 138 N.E.2d 777 (Mass. 1956); Stevenson v. E.I. duPont Nemours and Co., 2003 U.S. App. LEXIS 6363* (5th Cir., No. 02-40569, Apr. 3, 2003) (heavy metal particulates emitted by a petrochemical plant constituted a trespass under state law).

Williams v. Oeder, 659 N.E.2d 379 (Ohio App. 1995) (trespass action against owners of land used for a sand and gravel processing facility, an asphalt plant, and a concrete plant).

Stevenson v. E.J. DuPont de Nemours & Co., 327 F.3d 400 (5th Cir. 2003) (heavy metal particulates emitted by a factory constituted a trespass).

(n19)Footnote 89. *Borland v. Sanders Lead Co., 369 So. 2d 523 (Ala. 1979)* (action for damages from air pollution); *Manchester Term. Corp. v. Texas TX Marine Transp., Inc., 781 S.W.2d 646 (Tex. Ct. App. 1989)* (action to abate air pollution); *Ritchhart v. Gleason, 672 N.E.2d 1064 (Ohio App. 1996)* (grant of permanent injunction based on damage that trespass would cause, prohibiting discharge of waste water treatment effluent into neighboring property owners' private ditch).

(n20)Footnote 90. *Frost v. Berkeley Phosphate Co., 20 S.E. 280 (S.C. 1894)* (action for damages from noxious gases).

(n21)Footnote 91. *See* Annotation, *Liability for Injury Consequent Upon Spraying or Dusting of Crop, 12 A.L.R.2d 436 (1950),* superseded by, Annotation, *Liability of manufacturer or seller for injury caused by animal feed or medicines, crop sprays, fertilizers, insecticides, rodenticides, and similar products, 81 A.L.R.2d 138 (1962);* Annotation, *Products liability: fertilizers, insecticides, pesticides, fungicides, weedkillers, and the like, or articles used in application thereof, 12 A.L.R.4th 462 (1982);* Annotation, *Products liability: animal feed or medicines, 29 A.L.R.4th 1045 (1984);* Annotation, *Liability for injury caused by spraying or dusting of crops, 37 A.L.R.3d 833 (1971).*

(n22)Footnote 92. *Smith v. Okerson, 73 A.2d 857 (N.J. 1950)* (sprayed pesticide settled on adjacent land).

(n23)Footnote 93. *J. L. Wilson Farms, Inc. v. Wallace, 590 S.W.2d 42 (Ark. App. 1979).*

(n24)Footnote 94. *Cox v. Cambridge Square Towne Houses, Inc., 236 S.E.2d 73 (Ga. 1977)* (storm drain altered water flow to cause erosion); *Shadow Group v. Heather Hills Home Owners Ass'n, 579 S.E.2d 285 (N.C. App. 2003)* (homeowner association committed trespass when it failed to alleviate a storm drainage problem onto plaintiff's land, and actions taken by association actually contributed to problem.)

(n25)Footnote 95. *Shea v. Gavitt, 94 A. 360 (Conn. 1915)* (rainwater runoff onto plaintiff's building).

(n26)Footnote 96. *Len Ran, Inc. v. Mellot, 577 N.E.2d 1185 (Ohio App. 1990)* (defendant constructed six downspouts for his house which drained into two drain lines that carried water to plaintiff's property).

(n27)Footnote 97. *Ciconte v. Shockley, 75 A.2d 242 (Del. 1950)* (the roof of defendant's house sloped toward plaintiff's adjoining lot without gutters and downspout allowing water to run off onto plaintiff's property).

(n28)Footnote 98. *Copper v. Dolvin, 28 N.W. 59 (Iowa 1886)* (plaintiff removed defendant's rain gutter which was located on plaintiff's property; it rained before defendant replaced the gutter, causing plaintiff's wall to fall).

(n29)Footnote 99. *Davis v. Niagara Falls Tower Co., 64 N.E. 4 (N.Y. 1902)* (accumulations of snow and ice fell on defendant's building that had a sky window, thereby endangering defendant's building and people's lives).

(n30)Footnote 100. *Cobai v. Young, 679 P.2d 121 (Colo. App. 1984)* (snow slid from defendant's house onto plaintiff's roof).

(n31)Footnote 101. *Ackerhalt v. National Sav. & Trust Co., 244 F.2d 760 (D.C. Cir. 1956)* (water from a bathtub in bad repair damaged wallpaper stored in adjoining landowner's warehouse); *Franklin County Dist. Bd. of Health v. Paxson, 787 N.E.2d 59 (Ohio App. 2003)*(land owner was successful in trespass claim where defendant constructed a pipe drainage system that forced water onto adjacent property, causing damage.)

(n32)Footnote 102. *Rylands v. Fletcher, L.R. 3 H.L. 330 (1868)* (defendant stored reservoirs of water on property). *See also, Washington Suburban San. Comm'n v. CAE-Link Corp., 622 A.2d 745 (Md. 1993)* (operator of sewage sludge composing facility filed declaratory judgment to determine whether beneficiaries of restrictive covenants had to be compensated for value of those property rights).

(n33)Footnote 103. *Fisel v. Wynns, 667 So. 2d 761 (Fla. 1996)* (action brought against livestock owner court held that showing of at least negligence is still required to establish liability).

(n34)Footnote 104. *In re Anderson & Kenyon P'ship, 165 B.R. 243 (C.D. Ill. 1994).*

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CHAPTER 68 TRESPASS ON LAND

8-68 Thompson on Real Property, Thomas Editions § 68.06

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§ 68.06 Procedural Rules for Actions Based on Trespass to Land.

[Go To Supp]

§ 68.06(a) Proper Parties.

§ 68.06(a)(1) Proper Plaintiffs.

A plaintiff in a trespass action must have some kind of actual or constructive possession of the land where the trespass occurred. n105 However, possession rather than ownership is the key requirement. If a plaintiff is in actual possession of the subject property, such possession need not be based on a legal title, or on a valid title, or on any title at all, as long as the defendant does not have superior title. n106 If a plaintiff brings the action as an actual occupant without title to the land, the right of action in trespass pertains only to the lands actually occupied by the plaintiff. n107

For those plaintiffs who have actual title or who are adverse possessors with color of title (such as an invalid deed), their actual possession of a portion of tract of land is constructively extended to the entire parcel represented by their title or color of title. n108 Such a plaintiff's right of action in trespass therefore extends to the lands described by the title or color of title. When a plaintiff is in purposeful adverse possession of a tract of land, but has not yet perfected or acquired title, actual possession of a portion of the tract is constructively extended to be possession of the entire tract. n109 Such an adverse possessor, even when title has not yet been acquired, is a proper plaintiff against any defendant except one with superior title. n110

Other parties with ownership interests in land, but who do not have present rights of occupancy, generally do not have the possessory rights to qualify as trespass plaintiffs. Included among these are landlords, n111 remaindermen, n112 and reversioners. n113 On the other hand, life tenants n114 and trustees (who hold legal title) n115 are deemed to be in possession and are therefore proper plaintiffs in a trespass action. Creditors, including mortgagees, who have assumed actual possession of the encumbered property or have a right to actual possession, are also considered to be in possession and are proper plaintiffs in a trespass action against third persons. n116

Possession of land can occur under many different circumstances, and one who enters land only sporadically or incidentally to other purposes, and not for the purpose of taking possession, does not possess the land for the purposes of qualifying as plaintiff in a trespass action. n117 Possession, once obtained, need not be exclusive and may be shared

with others. n118

The plaintiff in a trespass action must be able to show possession at the time the trespass is alleged to have occurred. n119 Usually a landowner may not bring action for a trespass that occurred while the land was occupied by the owner's predecessor in interest. n120 As applied to a continuous trespass, this means that a plaintiff in an action for such a trespass may seek recovery of damages sustained from the trespass that occurred during the plaintiff's time of possession. n121

All of these rules may be summarized in the statement that the proper plaintiff in a trespass action is one who holds possession of the property upon which the trespass occurred at the time the trespass occurred. Therefore, a plaintiff who has conveyed title but remains in possession at the time the trespass occurred is the proper plaintiff in a trespass action. n122 And a plaintiff who is divested of both title and possession after the trespass has occurred and the trespass action has commenced is still entitled to recover damages pertaining to the time of possession. n123

COMPUTER-ASSISTED RESEARCH:

LEXIS: Trespass! w/5 (land or real!) plaintiff w/10 proper w/30 possess!

§ 68.06(a)(2) Proper Defendants.

The proper defendant in a trespass action is the party or parties who actually commit or cause others to commit the act of trespass, n124 or whose actions result in trespasses by others. n125 In addition to the actual participants in a trespass as defendants, any others who assist, encourage, command or in some other way participate in committing the trespass are jointly and severally liable as co-trespassers. n126 Under the usual master-servant rules, an employer is liable for a trespass committed by an employee, if the trespassory acts were within the scope of employment and in furtherance of the employer's business. n127 If the trespass is to land, the trespassing employee is also individually liable. n128

In a broader sense, both principles and agents are liable for trespasses committed by the agents within the scope of the agency. n129 As to corporations, corporate officers or agents may be held individually liable for acts constituting trespass, n130 and the corporation is also liable if the acts were committed in the course of corporate business. n131

COMPUTER-ASSISTED RESEARCH:

LEXIS: Trespass! w/5 (land or real!) w/50 defendant w/10 proper

§ 68.06(b) Pleadings.

§ 68.06(b)(1) Elements of the Complaint.

The plaintiff's complaint in a trespass action is fairly straightforward and should include allegations of all the facts essential to constitute the cause of action, including a description of the activity that resulted in the invasion of plaintiff's land. n132 The complaint should also aver the particular possessory interest held by the plaintiff, n133 and a description of the plaintiff's land sufficient to establish that venue is proper. n134

COMPUTER-ASSISTED RESEARCH:

LEXIS: Trespass! w/5 (land or real!) and element w/10 (plead! or complaint)

§ 68.06(b)(2) Possible Defenses in a Trespass Action.

Because most defenses in a trespass action are not revealed in the general denials of complaint allegations, the defenses

should be pleaded specifically. This is even true of such general defenses as statute of limitations n135 and accord and satisfaction in trespass actions. n136

COMPUTER-ASSISTED RESEARCH:

LEXIS: Trespass! w/5 (land or real!) w/20 defense

§ 68.06(b)(2)(i) Title.

A defendant may present a complete defense to a complaint of trespass by proving ownership and right of possession of the property on which the trespass is alleged to have occurred. Not only could such a defendant not make an unauthorized entry on property owned by the defendant (except in certain landlord/tenant situations), but a plaintiff without ownership or right of possession of that land would not have the right to bring such a trespass action. n137 For this defense, however, it is required that the defendant affirmatively establish title rather than merely show weaknesses in the plaintiff's title. n138

§ 68.06(b)(2)(ii) Authority.

A defendant in a trespass action may allege that the trespass was committed under legal authority. A public official, for instance, may commit a trespass in the course of acting in a lawful manner within the scope of official authority or may even be acting under command of a public law or court order. n139 This defense will fail if the authority is determined to be unconstitutional or otherwise invalid. n140

COMPUTER-ASSISTED RESEARCH:

LEXIS: Trespass! w/50 defense w/20 authority

§ 68.06(b)(2)(iii) Consent.

A defendant in a trespass action will prevail if able to prove that the entry onto plaintiff's land occurred under the plaintiff's consent, n141 even if the consent was given under a mutual mistake of fact. n142 An example of trespassory entry under mutual mistake of fact is when both parties erroneously believe that the landowner's agent has authority to enter into a lease with the party accused of the trespass. n143 Consent will be a defense to a trespass action, even if the consent was obtained through misrepresentation, if previous entries had been permitted. n144 This would be an example of trespass not being the appropriate theory of the case where the entry was peaceable.

COMPUTER-ASSISTED RESEARCH:

LEXIS: Trespass! w/50 defense w/20 consent!

§ 68.06(b)(2)(iv) Estoppel.

The possibility of estoppel as a defense arises only in the context of the facts of each particular trespass case. A trespass plaintiff is estopped from pressing the charge if to grant relief would be inequitable under the circumstances. n145 In trespass actions, the defense of estoppel can be established by showing the plaintiff's consent to or acquiescence in the trespass, followed by the defendant's change in position by relying on that consent or acquiescence. n146 If a defendant has been admitted onto the land and is in occupancy, that occupancy cannot be used as defense to a trespass charge before the requirements for adverse possession have been met. n147

COMPUTER-ASSISTED RESEARCH:

LEXIS: Trespass! w/50 defense w/20 estopp!

§ 68.06(b)(2)(v) Necessity.

A defendant may claim that a trespass was justified or excused by either public or private necessity. n148 In an example of private necessity, one who holds a right of way easement as the dominant tenement may sometimes go onto the property of the servient tenement to clear an obstruction from the right of way. n149 It has also been noted that one may destroy a building on the land of another in order to stop the spread of a fire that threatens one's own land or the surrounding area in general. n150 In rare instances, a landowner may go onto nearby land to abate a nuisance, and this would give rise to the defense of necessity, if the other landowner complains of trespass.

COMPUTER-ASSISTED RESEARCH:

LEXIS: Trespass! w/50 defense w/20 necess!

§ 68.06(b)(2)(vi) Compulsion.

A defendant in a trespass action may plead as a defense that the defendant was forced to commit the trespass and had no reasonable alternative but to yield to that compulsion. n151 This defense is not appropriate and not available to an employee or agent who has been directed by the employer or principal to commit the trespass. n152

COMPUTER-ASSISTED RESEARCH:

LEXIS: Trespass! w/50 defense w/20 (compulsion or compel!)

§ 68.06(b)(2)(vii) Defenses Not Available.

Because an action in trespass is premised upon an invasion of one's land, without regard to motive in most cases, certain standard defenses available in other legal actions are not sufficient to excuse a trespass. Examples of these inappropriate defenses include intent, good faith, n153 advice of counsel, n154 qualified immunity, n155 contributory negligence, n156 infancy, n157 and mistake of law or fact, except in sustaining the defense of consent. n158 Although a plaintiff may base a trespass action on unperfected adverse possession, that same unperfected adverse possession is not an adequate defense to a complaint of trespass.

COMPUTER-ASSISTED RESEARCH:

LEXIS: Trespass! w/50 defense w/5 (invalid or not available)

§ 68.06(c) Burden and Standard of Proof.

In trespass actions, as in actions generally, plaintiff must prove the elements of the case, n159 including entitlement to relief, n160 by a preponderance of the evidence. n161 Likewise the defendant must establish any affirmative defenses also by a preponderance of the evidence. n162

§ 68.06(d) Remedies.

§ 68.06(d)(1) Recovery of Damages.

Because of the assumption, under medieval law, that every trespass necessarily included a violation of the enclosure around a parcel of land, and that violation was necessarily forcible and caused damage, the rule developed in legal actions that every trespass proved should be remedied by an award of damages, and even nominal damages could be

awarded without proof of actual injury. n163 Some courts in the modern era have taken the view that even nominal damages should not be awarded, if the trespass was inadvertent and did not result in actual damage. n164 The *Restatement (Second) of Torts* takes that reform even further with the position that an inadvertent and non-negligent trespass should not result in any liability, even if damage is caused. n165

In general, the measure of damages for trespass actions is whatever amount is required to place the plaintiff and the plaintiff's land in the same position as enjoyed before the trespass. n166 Damages calculated by this measure also take into account the principal purpose for which the property is used, n167 and the effect of the trespass on the entire parcel of property as well as the portion invaded. n168 Where a trespass renders a portion of the plaintiff's property unfit for use, the plaintiff may recover, among other items, damages equal to the fair rental value of the portion that cannot be used, n169 even if that portion was not being used at the time of the trespass. n170

When the trespass is repeated or continuing, damages for past offenses are awarded up to the time that the action was commenced, n171 although occasionally the damage award will cover up to the time of the trial. n172

Not all jurisdictions permit awards of exemplary damages in trespass cases, but in those that do, such damages can be awarded in cases where the defendant has acted with malice, fraud or some similar motivation. n173 In the jurisdictions that do permit awards of exemplary damages, some may not allow those awards if actual damages are not also recovered. n174 Where money damages are recovered, interest on the damage amount may be allowed from the time of the trespass, but some courts deny such pre-judgment interest. n175

Many states award multiple damages for cutting of timber. n176

COMPUTER-ASSISTED RESEARCH:

LEXIS: Trespass! w/5 (land or real) w/50 remedy w/10 damages

§ 68.06(d)(2) Injunctive Relief and Ejectment.

Injunctions to prevent or remove encroachments or a trespass are the usual relief in cases where encroachments by structures or vegetation or other continuing trespasses are proved. n177 Injunctions for removal of encroachments have been issued in cases involving buildings, n178 walls, n179 footings, n180 and roofs. n181 Theoretically, the old remedy of ejectment could also be used for this purpose, although some courts have questioned whether ejectment is the correct remedy for an encroaching structure that merely overhangs the plaintiff's property rather than occupying a portion of the surface of the land. n182 Ejectment has not been used as a remedy to remove the encroachment of overhanging vegetation. n183

If ejectment is available, then its availability as an adequate legal remedy could preclude the availability of injunction, n184 or an injunction could be granted based on the denial of the availability of ejectment as an adequate legal remedy.

In general, a plaintiff qualifies for injunctive relief by showing that no adequate legal remedy is available and that the harm that will be caused by the trespass, if it is allowed to continue, will be irreparable. n185 Harm is irreparable if the damage caused cannot be repaired or restored or compensated for by money or cannot be adequately measured. n186 By contrast, a plaintiff qualifies for the remedy of ejectment merely by showing that the defendant is in trespassory occupancy of plaintiff's land.

Injunctive relief may be denied or moderated if courts take into consideration the relative hardship or inconvenience to the parties that would be caused by granting the injunction. n187 No such balancing occurs, however, when it is established that the encroachment is intentional or willful. n188

As a form of equitable relief, the suit for injunction is subject to the usual equitable defenses of consent, n189 acquiescence, delay or laches, n190 and estoppel. n191 The defense of consent is also appropriate, if the plaintiff has given verbal permission to enter the property. n192 If the plaintiff has let overgrowing branches and shrubs intrude for so long that damage has occurred to the plaintiff's house and fence, the defendant may invoke acquiescence or laches as a defense in an action for equitable relief by the plaintiff. n193 Estoppel was an appropriate defense against a plaintiff who stood by while the defendant completed construction of a garage in violation of building regulations and then complained of the violations. n194 Also, the court purporting to grant an injunction may lack the requisite judicial power to do so. n195

If a plaintiff obtains a court order directing the defendant to remove an encroachment from the plaintiff's land, the plaintiff must usually permit the defendant to enter onto the land to effect the removal. n196 In a case where the plaintiff refused such entry to the defendant, the defendant simply paid for one-half of the cost of removing the encroachment. n197

COMPUTER-ASSISTED RESEARCH:

LEXIS: Trespass! w/5 (land or real!) w/50 remedy w/10 (injunc! or enjoin or eject or remov!)

FOOTNOTES:

(n1)Footnote 105. *Dunbar Corp. v. Lindsey, 905 F.2d 754 (4th Cir. 1990)* (plaintiff brought trespass action when armed military police entered property allegedly belonging to plaintiff, removed plaintiff's signs, posted signs forbidding trespassing on U.S. property, and erected a fence around the property); *Maintenance Equip. Co. v. Godley Bldrs., 420 S.E.2d 199 (N.C. App. 1992) review denied, 426 S.E.2d 707 (N.C. 1993)* (tenant who occupied land owned by railroad brought trespass action for damages resulting when adjacent property owner graded and bulldozed property); *Gowanus Indus. Park, Inc. v. Amerada Hess Corp., 2003 U.S. Dist. Lexis 15580* (No. 01-CV-0902 (ILG), E.D. N.Y., Sept. 5, 2003) (landowner who was unable to show constructive possession of waterway could not bring an action for trespass against a corporation which built a mooring on the disputed land).

(n2)Footnote 106. *Avery v. Geneva County, 567 So. 2d 282 (Ala. 1990)* (in action brought by father of drowning victim who brought action against county, it was held that the victim had no interest in the land and so could not sustain a trespass action); *Posey v. Leavitt, 280 Cal. Rptr. 568 (1991)* (condominium owner could not build a deck extension into the common area without the consent of all other owners); *Owens v. Smith, 541 So. 2d 950 (La. App. 1989)* (action brought to determine location of boundary between two lots; one neighbor claimed adverse possession).

(n3)Footnote 107. *Swinson v. Jones, 33 S.E.2d 376 (Ga. App. 1945)* (plaintiff was not entitled to recover on possession alone, where evidence did not show that plaintiff was in actual possession of land from which timber was cut).

(n4)Footnote 108. *Swinson v. Jones, 38 S.E.2d 878 (Ga. App. 1945)* (person who was in possession and had color of title and was able to prosecute a trespass action).

(n5)Footnote 109. *Firment v. Bryden, 387 N.Y.S.2d 737 (1976)* (trespass action brought against neighbor who placed debris on plaintiff's land and removed surveyor's pin on land).

(n6)Footnote 110. *Sloss-Sheffield Steel & Iron Co. v. Wilkes, 165 So. 764 (Ala. 1936)* (the roofs of two mines on defendant's land caved in, which drained all water from plaintiff's springs and wells and caused cracks and crevices to occur on plaintiff's land), overruled by *Henderson v. Wade Sand and Gravel Co., Inc., 388 So. 2d 900 (Ala. 1980).*

(n7)Footnote 111. *Gifford v. City of Colorado Springs, 815 P.2d 1008 (Colo. App. 1991)* (restaurant lessee brought inverse condemnation and trespass action against city arising out of alleged losses caused by city public works project).

(n8)Footnote 112. *Austin v. Hallstrom, 86 A.2d 549 (Vt. 1952)* (remaindermen could not bring action of trespass without joining life tenant).

(n9)Footnote 113. *Dieterich Int'l Truck Sales, Inc. v. J.S. & J. Services, 5 Cal. Rptr. 2d 388 (1992)* (adjoining landowner claimed prescriptive easement after twenty-two years of using a strip of land), but see, *Friends of the Trails v. Blasius, 93 Cal.Rptr.2d 193 (Cal. Ct. App. 2000)* (distinguishing between possessory and nonpossessory interests in property).

(n10)Footnote 114. *Schell v. Rice, 246 S.E.2d 61 (N.C. App. 1978) review denied, 248 S.E.2d 253 (N.C. 1978)* (adjoining landowner constructed building which encroached on part of plaintiff's land and the landowner also cut trees which were entirely on plaintiff's land).

(n11)Footnote 115. *Chicago Title & Trust Co. v. Weiss, 605 N.E.2d 1092 (Ill. App. 1992)* (trustee of land trust brought suit seeking to enjoin neighbor from maintaining basketball hoop on driveway and from trespassing onto lot owner's property); *Pan Coal Co. v. Garland Pocahontas Coal Co., 125 S.E. 226 (W. Va. 1924)* (dispute concerning chain of title).

(n12)Footnote 116. *McCorristin v. Salmon Signs, 582 A.2d 1271 (N.J. Super. 1990)* (mortgagees of real property brought action against third party for damage caused to property when third party bolted advertising sign through aluminum siding and plaster of building on property).

(n13)Footnote 117. *Bileu v. Paisley, 21 P. 934 (Or. 1889)* (sheep trespassed on respondent's property, causing damage to his ditches).

(n14)Footnote 118. *Kinney v. Service, 52 N.W. 53 (Mich. 1892)* (plaintiff, who possessed the land as a cotenant, brought a trespass action against an intruder).

(n15)Footnote 119. *Flobert Indus. v. Stuhr, 343 N.W.2d 917 (Neb. 1984)* (grantee of right-of-way brought action seeking to enjoin neighboring landowners from trespassing and encroaching upon its right-of-way and to recover damages); *Zanoni v. Hudon, 678 A.2d 12 (Conn. App. 1996)* (ward's child and child's spouse lacked standing to bring trespass action).

(n16)Footnote 120. *Vaughn v. Missouri Pub. Serv. Co., 616 S.W.2d 540 (Mo. App. 1981)* (location of anchors and guy wires on plaintiff's property in support of a permanent transmission line did not constitute a continuing trespass, but was a trespass against plaintiff's predecessor in title). *But see, Williams v. Lynd Tp., 312 N.W.2d 110 (Minn. 1981)* (where grantor assigned all legal causes of action arising from use or misuse of conveyed premises to grantee in a warranty deed); *Bassilakis v. Saland Corp., 1998 Conn. Super. Lexis 1064* (Conn. Super. Apr. 8, 1998) (plaintiffs are owners and lessors of the property).

(n17)Footnote 121. *Matthews v. James Lumber Co., 122 S.E. 480 (N.C. 1924)* (defendant negligently trespassed by burning parts of plaintiff's land).

(n18)Footnote 122. *Hayward v. Sedgley, 14 Me. 439 (1837)* (trespasser cut and removed timber).

(n19)Footnote 123. *Bowman v. Hibbard, 236 S.W.2d 938 (Ky. 1951)* (removal of coal from plaintiff's land).

(n20)Footnote 124. *Breiding v. Wells, 800 S.W.2d 789 (Mo. App. 1990)* (adjoining landowners allegedly trespassed and damaged landowner's trees). *Van Eck v. Whitney Village Nursery Sch., 1999 Conn. Super. LEXIS 2921* (Conn. Super. Oct. 28, 1999) (trespass could not be imputed to defendant where it had no duty to prevent damage to plaintiff's parking lot).

(n21)Footnote 125. *Freese v. Buoy, 576 N.E.2d 1176 (Ill. App. 1991)* (tenants under sharecropping agreement

brought action against landlord to recover for trespass by another tenant who destroyed tenant's crop and planted a different crop).

(n22)Footnote 126. *Parker v. Kangerga, 482 S.W.2d 43 (Tex. Civ. App. 1972)* (timber owners brought action against paper mill, pulpwood dealer and hauler to recover damages for conversion of timber).

(n23)Footnote 127. *Collum v. Argo, 599 So. 2d 1210 (Ala. Civ. App. 1992)* (action brought against septic tank installer and mobile home seller to recover damages for injuries to property when tank was installed); *Gittemeier v. Contractors Roofing & Supply Co., 932 S.W.2d 865 (Mo. App. 1996)* (drivers employed by carriers who delivered goods of roofing products firm to construction supply company were under control of carriers and not of roofing products firm, and thus, firm could not be held liable on trespass and nuisance claims asserted by owner of land adjoining that occupied by company); *Stevensen v. Goodson, 924 P.2d 339 (Utah 1996)* (mortgagees did not have standing to maintain trespass or encroachment cause of action against company whose land bordered land in which mortgage was held).

(n24)Footnote 128. *Russell v. American Rock Crusher Co., 317 P.2d 847 (Kan. 1957)* (action to recover for alleged trespass in quarry operations by the removal of a large quantity of rock from underneath plaintiff's land).

(n25)Footnote 129. *Blaen Avon Coal Co. v. McCulloh, 59 Md. 403 (1883)* (removal of coal from neighboring land).

(n26)Footnote 130. *Curlee v. Donaldson, 233 S.W.2d 746 (Mo. App. 1950)* (defendant individually liable for trespass).

(n27)Footnote 131. *Russell v. American Rock Crusher Co., 317 P.2d 847 (Kan. 1957)* (trespass in quarry operations by removal of rock from plaintiff's land).

(n28)Footnote 132. *Lennon v. Seaman, 63 F. Supp. 2d 428 (S.D.N.Y. 1999)* (court dismissed trespass claim where plaintiff failed to state an essential element of the claim); *Rutter v. Carroll's Foods of the Midwest, Inc., 50 F. Supp. 2d 876 (N.D. Iowa 1999)* (pleading for trespass must contain allegations of each element of the claim or should be dismissed); *Van Eck v. Whitney Village Nursery Sch., 1999 Conn. Super. LEXIS 2921* (Conn. Super. Oct. 28, 1999) (plaintiff's failure to allege all of the essential elements of a trespass claim led to dismissal of claims); *General Mills Restaurants, Inc. v. Texas Wings, Inc., 12 S.W.3d 827 (Tex. App. 2000)* (defendant need disprove only one element of trespass or establish each essential element of an affirmative defense to rebut action in trespass).

(n29)Footnote 133. *Schell v. Rice, 246 S.E.2d 61 (N.C. App. 1978)* (plaintiff averred that she had a life tenancy); *State v. Collins, 1998 Ohio App. LEXIS 4547* (Ohio App. Sept. 28, 1998) (No defense to criminal trespass that the land or premises involved were owned, controlled, or in the custody of a public agency).

(n30)Footnote 134. *Lapp v. Stanton, 81 A. 675 (Md. 1911)* (premises upon which trespasses were committed, were adequately marked).

(n31)Footnote 135. *Elk Garden Big Vein Coal Mining Co. v. Gerstell, 121 S.E. 569 (W. Va. 1924)* (plea of statute of limitations allowed to be filed); *McDowell v. Stater, 957 P.2d 965 (Alaska 1998)* (Property owners filed suit alleging injuries to real property caused by petroleum contamination. Defendants pleaded that the statute of limitations had run).

(n32)Footnote 136. *Heirn v. Carron, 19 Miss. (11 S. & M.) 361 (1848)* (plea of accord and satisfaction as bar to the action); *City of Shawnee, Kan v. A.T. & T. Corp., 910 F. Supp. 1546 (D. Kan. 1995)* (trespass action barred by statute of limitations).

(n33)Footnote 137. *Thomsen v. State, 422 P.2d 824 (Wash. 1966)* (possession is title as against a wrongdoer); *Jordan v. Stallings, 911 S.W.2d 653 (Mo. App. 1995)* (landowners who held easement had a sufficient interest to pursue

trespass claim); *Moore v. Dudley, 904 S.W.2d 496 (Mo. App. 1995)* (when adverse possession claim failed, the trespass counterclaim succeeded). *Felker v. Stewart Title Guar. Co., 1998 U.S. Dist. LEXIS 17937* (M.D. Pa. Mar. 30, 1998) (plaintiffs did not have life estate in property but had a license and could not be treated as a trespassers and could not bring a trespass action).

(n34)Footnote 138. *Carson v. Turk, 143 S.W. 393 (Ky. 1912)* (claim that title not signed by the proper party was not sufficient to bar the action); *Kraft v. Burr, 476 S.E.2d 715 (Va. 1996)* (trespassing defendant did not claim title to the property and merely relied upon the alleged weaknesses in the title of the plaintiff who was in prior possession of the property under color of title); *McGrath v. Hills, 662 A.2d 215 (Me. 1995)* (trespass defendant failed to establish superior title); *Angier v. Mathews Exploration Corp. 905 P.2d 826 (Okla. App. 1995)* (lower court was not allowed to reform contract so as to deprive plaintiff of title to land on which trespass claim was based).

(n35)Footnote 139. *Brassette v. Central La. Elec. Co., Inc., 383 So. 2d 120 (La. App. 1980); Mubarez v. New York, 453 N.Y.S.2d 549 (1982)* (tax authorities had authority to inspect cigarettes for fraudulent stamping); *Harris v. Carbonneau, 685 A.2d 296 (Vt. 1996)* (occupants of house sued deputy sheriff and state for trespass after being served process).

(n36)Footnote 140. *Paine v. Savage, 136 A. 664 (Me. 1927)* (authority cited by log haulers held invalid); *Potts v. Johnson, 654 So. 2d 596 (Fla. App. 1995)* (police officer's search was illegal, making the officer a trespasser on landowner's property); *United States v. Hatfield, 333 F.3d 1189 (10th Cir. 2003)* (where warrantless search by police officers was legal, police were not considered trespassers on land); *Misseldine v. Corporate Investigative Servs., 2003 Ohio App. Lexis 2488* (No. 81771, May 29, 2003) (authority of garbage collection service to enter property and take trash did not allow a private investigative company to do the same).

(n37)Footnote 141. *Salisbury Livestock Co. v. Colorado Cent. Credit Union, 793 P.2d 470 (Wyo. 1990)* (consent of possessor is absolute defense to trespass); *Hager v. Tire Recyclers, Inc., 901 P.2d 948 (Or. App. 1995)* (no evidence that landowners gave consent for a flow of silt onto their property); *Apel v. Katz, 697 N.E.2d 600 (Ohio 1998)* (defendants attempted to use the fact that they had an easement to the passageway as a defense to trespass); *Manor Enters. v. Vivid, Inc., 596 N.W.2d 828 (Wis. App. 1999)* (held that consent to entry onto land is a defense to an action for trespass); *American Transmission, Inc. v. Channel 7 of Detroit, Inc., 609 N.W.2d 607 (Mich. App. 2000)* (consent is an affirmative defense to a claim of trespass); *General Mills Restaurants, Inc. v. Texas Wings, Inc., 12 S.W.3d 827 (Tex. App. 2000)* (actual or apparent consent is an affirmative defense to trespass); *Weynand v. Foster, 2000 Wisc. App. LEXIS 199* (Wisc. App. Feb. 24, 2000) (found trespass where plaintiff did not give consent to defendant to put boulders on his property).

(n38)Footnote 142. *Dubuque Fire & Marine Ins. Co. v. Union Compress & Warehouse Co., 143 F. Supp. 128 (W.D. La. 1956), motion denied, 146 F. Supp. 482 (W.D. La. 1956)* (warehouse company was a licensee and therefore not a trespasser); *Dickinson v. Charter Oaks Tree & Landscaping Co., 2003 Ohio App. Lexis 1940* (No. 02AP-981, Apr. 24, 2003) (where ex-husband had apparent authority to allow neighbors to trim dead vegetation along property line, no trespass occurred when ex-husband actually had no authority).

(n39)Footnote 143. *Id.*

(n40)Footnote 144. *North v. Williams, 13 A. 723 (Pa. 1888)* (though agent made a misrepresentation to gain entry to premises, contract of sale provided for agent's entry); *Food Lion, Inc. v. Capital Cities/ABC, Inc., 194 F.3d 505 (4th Cir. 1999)*(may not assert consent as a defense where consent was obtained by misrepresentation).

(n41)Footnote 145. *Steel Creek Dev. Corp. v. Smith, 268 S.E.2d 205 (N.C. 1980)* (defense of equitable estoppel not established).

(n42)Footnote 146. *Steel Creek Dev. Corp. v. Smith, 268 S.E.2d 205 (N.C. 1980)* (estoppel defined).

(n43)Footnote 147. *Brandt v. Robertson, 266 F.2d 456 (D.C. Cir. 1959)* (evidence for adverse possession held to be equivocal); *Steel Creek Dev. Corp. v. Smith, 268 S.E.2d 205 (N.C. 1980)* (time of adverse possession not long enough).

(n44)Footnote 148. *N.O.W. v. Operation Rescue, 747 F. Supp. 760 (D.D.C. 1990)* (defense of necessity not available because abortion is a constitutionally protected activity), injunction dissolved, *NOW v. Operation Rescue, 929 F. Supp. 461* (D.D.C. May 30, 1996) *judgment aff'd in part and rev'd in part, 37 F.3d 646 (D.C. Cir. 1994),* injunction dissolved, *NOW v. Operation Rescue, 929 F. Supp. 461 (D.D.C. 1996); United States v. Gardner, 903 F. Supp. 1394 (D. Nev. 1995)* (necessity defense was not established). *United States v. Rockwood, 52 M.J. 98 (C.A.A.F. 1999)* (defense of necessity arises if situation is such that a reasonable person, under like circumstances, would have been impelled to do what was done by defendant); *Ohio v. Rooney, 1999 Ohio App. LEXIS 3129* (Ohio App. July 1, 1999) (no necessity found where defendant did not feel that the lives of him or his family were in danger if he did not trespass).

(n45)Footnote 149. *Johnson v. Borson, 46 N.W. 815 (Wis. 1890)* (bars installed by plaintiff were an unreasonable obstruction on defendant's right of way).

(n46)Footnote 150. *Bowditch v. Boston, 101 U.S. 16 (1880).*

(n47)Footnote 151. *Suss v. American Soc'y, for Prevention of Cruelty to Animals, 823 F. Supp. 181 (S.D.N.Y. 1993)* (defense of sovereign compulsion rejected); *Cunningham v. Pitzer, 2 W. Va. 264 (1867).*

(n48)Footnote 152. *Semonian v. Panoras, 116 A. 417, 117 A. 235 (R.I. 1922)* (agent liable for trespass at command of principal).

(n49)Footnote 153. *Paris Am. Corp. v. McCausland, 759 P.2d 1210 (Wash. App. 1988)* (good faith rejected as a defense); *Poggi v. Scott, 139 P. 815 (Cal. 1914).*

(n50)Footnote 154. *Havemeyer v. Superior Ct., 25 P. 433 (Cal. 1890)* (acting on legal advice rejected as a defense).

(n51)Footnote 155. *Wilson v. Layne, 526 U.S. 603 (1999)* (defense of qualified immunity not available where homeowner's right to protect against trespass clearly established before incident).

(n52)Footnote 156. *Smith v. McCullough Dredging Co., 152 So. 2d 194 (Fla. App. 1963)* (contributory negligence rejected as a defense), *cert. denied, 165 So. 2d 178 (Fla. 1964).*

(n53)Footnote 157. *Heller v. New York, N.H. & H.R. Co., 265 F. 192 (2d Cir. 1920)* (even a child of tender years may be a trespasser).

(n54)Footnote 158. *Gerdes v. Bohemia, Inc., 744 P.2d 275 (Or. App. 1987)* (rejection of mistake of law or fact as defense); *Gordon Creek Tree Farms, Inc. v. Layne, 368 P.2d 737 (Or. 1962).*

(n55)Footnote 159. *Chance v. BP Chems., Inc., 670 N.E.2d 985 (Ohio 1996)* (trespass claim against chemical refiner where property owners bore burden of proving all elements of their claim).

(n56)Footnote 160. *Johns v. Township of Shaler, 368 A.2d 339 (Pa. 1976)* (burden of proof on plaintiff).

(n57)Footnote 161. *Johns v. Township of Shaler, 368 A.2d 339 (Pa. 1976).* In *Ravan v. Greenville County, 434 S.E.2d 296 (S.C. App. 1993),* the plaintiff failed to prove a causal connection between the defendant's activities and the damage complained of. *Williamson v. City of Hays, 64 P.3d 364 (Kan. 2003)* (plaintiffs' claim for trespass failed when they failed to show any evidence in support of claim).

(n58)Footnote 162. *Breiding v. Wells, 800 S.W.2d 789 (Mo. App. 1990); Cunningham v. Brischke, 563 N.Y.S.2d*

230 (1990) (burden of proof on defendant to show probable cause for belief in ownership of land).

(n59)Footnote 163. *Johnson v. Martin, 423 So. 2d 868 (Ala. App. 1982)* (in the absence of actual damages, the landowner is entitled to nominal damages).

(n60)Footnote 164. *Staples v. Hoefke, 235 Cal. Rptr. 165 (1987)* (nominal damages need not be awarded where no actual loss has occurred); *Pluntz v. Farmington Ford-Mercury, Inc., 470 N.W.2d 709 (Minn. App. 1991).*

(n61)Footnote 165. Restatement (Second) of Torts, §166 (1965).

(n62)Footnote 166. *Kirchoff v. Moulder Bros., 391 So. 2d 347 (Fla. App. 1980); Uvalde County v. Barrier, 710 S.W.2d 740 (Tex. App. 1986)* (measure of permanent damages is difference in market value of land immediately before and after the trespass); *Ghant v. Morrow, 911 S.W.2d 733 (Tenn. App. 1995)* (measure of damages for cut timber). *Klingshirn v. McNeal, 520 S.E.2d 761 (Ga. App. 1999)* (the measure of damages is the diminution in the market value); *Kenneth Henes Special Projects Procurement v. Continental Biomass Indus., 86 F. Supp. 2d 721 (E.D. Mich. 2000)* (proper assessment of damages is actual damages); *Adams v. Cleveland-Cliffs Iron Co., 602 N.W.2d 215 (Mich. App. 1999)* (court ruled that in cases of trespass, damage is presumed and nominal damages should be awarded; any additional actual damages proved should also be awarded); *Amkco, Ltd. v. Welborn, 985 P.2d 757 (N.M. App. 1999)* (permanent damages to property by trespass are measured by the diminution in value of the victim's land caused by the trespass); Francis Corp. v. Sun Co., 1999 Ohio App. LEXIS (Ohio App. Dec. 23, 1999) (restoration costs were proper measure of damages where court looked at the diminution in value of the land caused by the trespass); *Day v. Tripp, 1999 Tex. App. LEXIS 5550* (Tex. App. July 29, 1999) (measure of damages is the difference in the market value of the land before and after the trespass). *Wright v. Wilcox, 586 S.E.2d 364 (Ga. App. 2003)* (Even when measure of damages is nominal, amount can vary widely).

(n63)Footnote 167. *Davis v. Sponhauer, 574 N.E.2d 292 (Ind. App. 1991)* (damages include loss of rental income); *Kratze v. Independent Order of Oddfellows, 475 N.W.2d 405 (Mich. App. 1991)* (damages for loss of use have historically included a reasonable rent, net rental loss, and lost profits), *aff'd in part, rev'd in part, 500 N.W.2d 115 (Mich. 1993)* ; *Salesian Soc. v. Ellenvill, 505 N.Y.S.2d 197 (1986)* ("The measure of damages in a trespass action is the diminution in the rental or usable value of the premises caused by the trespass, taking the property as is and as zoned.").

(n64)Footnote 168. *Waggener v. Leggett, 150 So. 2d 529 (Miss. 1963)* (proper measure of damages incorporates loss in value of entire parcel of real property, not just the land at the precise place of injury); *Ardoin v. Department of Transp. & Dev., 679 So. 2d 928 (La. App. 1996)* (business owner whose property was damaged by state highway-widening project was entitled to mental anguish damages for trespass).

(n65)Footnote 169. *Borland v. Sanders Lead Co., 369 So. 2d 523 (Ala. 1969)* (even if plaintiff is deprived of only a portion of the land, damages may property include the difference in the fair market value of the land "with and without such portion").

(n66)Footnote 170. *Pearl v. Pic Walsh Freight Co., 168 N.E.2d 571 (Ohio App. 1960)* (person who has beneficially occupied property "may be held liable for its fair rental value, even though the plaintiff was not hindered or obstructed in any use which he expected to make of the property").

(n67)Footnote 171. *Amax, Inc. v. Sohio Indus. Prods. Co., 469 N.Y.S.2d 282 (1983)* (damages recoverable for continuing trespass generally incorporate plaintiff's pecuniary loss up to the time of the suit); *Freemont E.M. Valley R. Co. v. Harlin, 70 N.W. 263 (Neb. 1897).*

(n68)Footnote 172. *Krejci v. Capriotti, 305 N.E.2d 667 (Ill. App. 1973)* (where the trespass continues beyond the date the action commences, the plaintiff may recover damages measurable up to the time of the trial); *Cosgriff Bros. v. Miller, 68 P. 206 (Wyo. 1902).*

(n69)Footnote 173. *Skelton v. Haney, 777 P.2d 733 (Idaho 1989)* (a trespass that was "deliberate, willful, and malicious" justified an award of punitive damages); *Bangert v. Osceola County, 456 N.W.2d 183 (Iowa 1990)* (where the county cut down landowner's trees in willful and deliberate disregard for the landowner's rights, the trial court could award treble damages; for the purpose of determining the "willful" of the trespass, the court must look for actions "done wantonly and without any reasonable excuse"); *Muehlstedt v. Lino Lakes, 473 N.W.2d 892 (Minn. App. 1991)* (willful failure to act sufficient to support an award of punitive damages occurred where the landowner's trees were removed by the city without the landowner's permission). *Bullman v. D & R Lumber Co., 464 S.E.2d 771 (W. Va. 1995)* (treble damages and punitive damages awarded for wrongful cutting of timber); It is proper to instruct a jury that violation of state and federal regulations may be sufficient evidence of willfulness and recklessness to justify an award of punitive damages. *Ravan v. Greenville County, 434 S.E.2d 296 (S.C. App. 1993). Golonka v. Plaza at Latham, L.L.C., 704 N.Y.S.2d 703 (N.Y. App. 2000)* (punitive damages may only be awarded where trespasser acted with actual malice involving intentional wrongdoing).

(n70)Footnote 174. *Rhodes v. Harwood, 544 P.2d 147 (Or. 1975)* (awarding punitive damages where no actual damages were recovered, but citing authorities that required actual damages to be proved before punitive damages could be awarded). *But see, Ernst v. Western States Chiropractic College, 1999 U.S. App. LEXIS 28500* (9th Cir. Nov. 1, 1999) (court held that plaintiffs did not need to show actual damages to support the award of punitive damages).

(n71)Footnote 175. *McConnell Bros. v. Slappey, 67 S.E. 440 (Ga. 1910)* (interest on the damage award allowed from the time of harm or injury); *Matanuska Elec. Ass'n, Inc. v. Weissler, 723 P.2d 600 (Alaska 1986)* (prejudgment interest on punitive damage award denied).

(n72)Footnote 176. *See, e.g., Beeman v. Marling, 646 N.E.2d 382 (Ind. App. 1995)* (statutory treble damages for wrongful cutting of timber).

(n73)Footnote 177. *Powe v. Merkel, 121 So. 2d 865 (Ala. 1960)* (where no question of disputed title exists and the nature of the injury is such that the remedy at law is inadequate, injunction is the appropriate remedy); *Bridges v. Henson, 116 S.E.2d 570 (Ga. 1960)* (where the remedy at law is an inadequate response to a continuing trespass, an injunction is necessary to provide relief); *Heaton v. Miller, 391 P.2d 653 (N.M. 1964)* (plaintiff entitled to injunction where the defendant knew that the boundary line location was questionable and built a structure encroaching on plaintiff's land); *Gulf Park Water Co. v. First Ocean Springs Dev. Co., 530 So. 2d 1325 (Miss. 1988)* (despite lack of demonstrable harm, an injunction was available to prevent or abate a nuisance); *Wabban, Inc. v. Brookhart, 921 P.2d 409 (Or. App. 1996)* (store owner was entitled to declaratory and injunctive relief for continuing trespass).

See also Stranahan v. Fred Meyer, Inc., 11 P.3d 228 (Or. 2000) (holding that a person collecting petitions was not entitled to stay on store premises over the store's objection).

(n74)Footnote 178. *Allen v. Virginia Hill Water Supply Corp., 609 S.W.2d 633 (Tex. Civ. App. 1980)* (although a building encroaching on plaintiff's land had been constructed by defendant's predecessor in interest, the encroaching improvement was of a continuing character, subject to injunction compelling removal); *Englert v. Zane, 848 P.2d 165 (Utah App. 1993)*(house). *Espahbod v. Town of Sudbury, 1998 Mass. Super. LEXIS 436* (Mass. Super. July 30, 1998) (Injunctive relief available to remedy a continuing trespass to real estate caused by an unauthorized drainage).

(n75)Footnote 179. *Pahl v. Ribero, 14 Cal. Rptr. 174 (1961)* (wall); *Hatanaka v. Struhs, 738 P.2d 1052* (Utah App.), *cert. denied, 765 P.2d 1277 (Utah App. 1987)* (fence) *Osborn v. Pine Mtn. Ranch, 766 P.2d 1165 (Wyo. 1989)* (fence); *Seid v. Ross, 853 P.2d 308 (Or. App. 1993)* (wall); *Hatanaka v. Struhs, 765 P.2d 1277 (Utah 1987).*

(n76)Footnote 180. *See* Annotation, *Mandatory Injunction to Compel Removal of Encroachments by Adjoining Landowner, 28 A.L.R.2d 679, 741 (1953),* superseded by Annotation, *Encroachment of Trees, Shrubbery, or Other Vegetation Across Boundary Line, 65 A.L.R.4th 603 (1988); Broadway-Wisconsin Inv. Co. v. Sentinel Co., 212 N.W. 646 (Wis. 1927).*

(n77)Footnote 181. *Beaty v. Gordon, 364 S.W.2d 311 (Ark. 1963). Ferrone v. Rossi, 42 N.E.2d 564 (Mass. 1942); Caliri v. Corvese, 153 A. 795 (R.I. 1931); Mayer v. Flynn, 150 P. 962 (Utah 1915); Huber v. Stark, 102 N.W. 12 (Wis. 1905).*

(n78)Footnote 182. *Beck v. Ashland Cigar Tobacco Co., 130 N.W. 464 (Wis. 1911)* (where the property of another is intruded upon either below or above ground, but the landowner is undisturbed in possession of the surface up to the boundary line, the proper remedy is in trespass, not in ejectment; if the trespass is continuous, equitable relief may be obtained), *overruled in part, Fisher v. Goodman, 237 N.W. 93 (Wis. 1931).*

(n79)Footnote 183. *Grandona v. Lovdal, 11 P. 623 (Cal. 1886).*

(n80)Footnote 184. *See* Annotation, *Mandatory Injunction to Compel Removal of Encroachments by Adjoining Landowner, 28 A.L.R.2d 679, 698 (1953),* superseded by Annotation, *Encroachment of Trees, Shrubbery, or Other Vegetation Across Boundary Line, 65 A.L.R.4th 603 (1988).*

(n81)Footnote 185. *Clinger v. Hartshorn, 911 P.2d 709 (Colo. App. 1996)* (preliminary injunction was not warranted absent showing of irreparable injury caused by hunting operations or inadequate remedy at law).

(n82)Footnote 186. *Pradelt v. Lewis, 130 N.E. 785 (Ill. 1921)* (irreparable harm means that the trespass complained of "cannot be repaired or restored or adequately compensated for in money or the compensation cannot be safely measured"); *New York State Nat'l Org. for Women v. Terry, 886 F.2d 1339 (2d Cir. 1989)* (the general rule is that for a permanent injunction to be granted, a "party must show the absence of an adequate remedy at law and irreparable harm if the relief is not granted"), *cert. denied, 495 U.S. 947 (U.S. 1990); Englert v. Zane, 848 P.2d 165 (Utah App. 1993)* (injunction to remove encroaching house denied, but money damages to compensate for loss of a portion of the plaintiff's lot to the encroachment could be awarded).

(n83)Footnote 187. *Ostrem v. Alyeska Pipeline Serv. Co., 648 P.2d 986 (Alaska 1982)* (trial court should consider the relative hardship to the parties if removal of an encroaching structure is ordered); *Penelko, Inc. v. John Price Assocs., 642 P.2d 1229 (Utah 1982)* (a defendant objecting to an order to remove an encroachment has the burden of showing that the removal will cause substantial economic waste); *Christopher v. Rosse, 458 N.Y.S.2d 8 (1982)* (minor encroachment of less than two inches not removed); *Seid v. Ross, 853 P.2d 308 (Or. App. 1993)* (an injunction to remove an encroaching wall was denied where the burden of removal was substantial and outweighed the benefits of removal).

(n84)Footnote 188. *Webster v. Dane Corp., 101 N.W.2d 616 (Wis. 1960)* (when the defendant trespasses wilfully and wrongfully, no equitable principle may thereafter be invoked to oppose an injunction); *Borrowmann v. Howland, 457 N.E.2d 103 (Ill. 1983)* (where the trespass is intentional or due to culpable negligence, the court may properly refuse to balance the equities).

(n85)Footnote 189. 116 *East 57th St., Inc. v. Gould, 79 N.Y.S.2d 243 (N.Y. App. Div. 1948), leave to app. denied, 81 N.Y.S.2d 189 (1948)* (based on proof presented by the plaintiffs, the defenses of laches, consent, and estoppel were property sustained by the trial court); *Ethan's Glen Community Ass'n v. Kearney, 667 S.W.2d 287 (Tex. App. 1984)* (consideration of equitable defenses, including consent).

(n86)Footnote 190. *City of Eustis v. Firster, 113 So. 2d 260 (Fla. 1959)* (laches barred action for injunction brought ten years after plaintiff acquired the property); *Heinrich v. Hinson, 600 S.W.2d 636 (Mo. App. 1980)* (acquiescence and laches).

(n87)Footnote 191. *Bright v. Michel, 137 So. 2d 155 (Miss. 1962)* (equitable estoppel).

(n88)Footnote 192. *Huber v. Stark, 102 N.W. 12 (Wis. 1905)* (verbal consent constituted revocable license); *Dunn v. Fletcher, 96 So. 2d 257 (Ala. 1957)* (verbal consent and subsequent acquiescence).

(n89)Footnote 193. *Granberry v. Jones, 216 S.W.2d 721 (Tenn. 1949).*

(n90)Footnote 194. *McCartney v. Schuette, 54 N.W.2d 462 (Iowa 1952).*

(n91)Footnote 195. *Cross v. McCurry, 859 S.W.2d 349 (Tenn. App. 1993)* (7-year statute of limitations applicable; chancery court lacked authority to require a landowner to execute a deed).

(n92)Footnote 196. *See* Annotation, *Mandatory Injunction to Compel Removal of Encroachments by Adjoining Landowner, 28 A.L.R.2d 679, 720 (1953),* superseded by Annotation, *Encroachment of Trees, Shrubbery, or Other Vegetation Across Boundary Line, 65 A.L.R.4th 603 (1988).*

(n93)Footnote 197. *Pile v. Pedrick, 31 A. 646 (Pa. 1895).*

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CHAPTER 68 TRESPASS ON LAND

8-68 Thompson on Real Property, Thomas Editions § 68.07

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§ 68.07 Bibliography.

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Supp. To CHAPTER 68 TRESPASS ON LAND

8-68 Thompson on Real Property, Thomas Editions Supp. to § 68.02

Supp. to § 68.02 Definition and Elements of Trespass on Land.

[Go To Main]

Add new text following the section heading:

In addition to the traditional elements of trespass discussed in the following subsections, a court may analyze a trespass to as either permanent or continuing. A permanent trespass occurs when the defendant's trespassory act has been fully accomplished, but injury to the plaintiff's land persists even in the absence of further conduct by the defendant. A continuing trespass results when the defendant's trespassory act is ongoing, perpetually creating fresh violations of the plaintiff's property rights. These circumstances can affect the choice of remedy and defenses, such as statute of limitations.

§ 68.02(a) Intent. [Go To Main]

Add:

Watson Land Co. v. Shell Oil Co., *29 Cal. Rptr. 3d 343 (2005)* (oil company committed trespass when gasoline leaked from the company's pipelines and contaminated property owner's land); *Railey v. State, 615 S.E.2d 609 (Ga. App. 2005)* (defendant committed trespass when he backed his car into plaintiff's garage and entered house without authorization); *Bullard v. Bouler, 612 S.E.2d 513 (Ga. App. 2005)* (The "innocent trespasser" rule states that an unintentional and nonnegligent entry onto another's land does not automatically subject an individual to liability, even though the entry causes harm to the possessor and protects individuals who enter the land of another under the mistaken belief that it is permissible to do so).

Add:

See Seals v. Amburgey, 2009 Ky. App. Unpub. LEXIS 925 (restating the common law rule that "it is irrelevant under the statute whether the trespasser was innocent or willful"); *Richard v. Richard, 23 So. 3d 292, 296 (La Ct. App. 2009)* (stating that "[a] defendant may be held liable for trespass even in the absence of intent ... when the plaintiff offers proof that the defendant was at fault in causing the trespass"); *but see Meece v. Feldman Lumber Co., 290 S.W.3d 631, 632-33 (2009)* (restating the common law rule that the measure of damages may depend on an intent to trespass).

Add:

See Fire Ins. Exchange v. Superior Court, 181 Cal. App. 4th 388, 392-393 (Cal. Ct. App. 2010) (finding that an insurer should have been granted summary judgment because an insured's mistaken belief that they owned property was insufficient to make their act unintentional); *Lee v. S. Telecom Co., 2010 Ga. App. LEXIS 308* (holding that "a trespasser is one who, though peacefully or by mistake, wrongfully enters ... property owned or occupied by another").

Add:

See Portland GE Co. v. Hick, 234 Ore. App. 1, 10 (2010) (holding an owner of a damaged sewer liable for trespass where the owner refused to repair the sewer).

§ 68.02(b) Entry. [Go To Main]

Add:

Estate of Cilley v. Lane, 985 A.2d 481, 486 (Me. 2009) (holding that a person initially invited into a trailer but who then refused to leave when asked to do so had trespassed).

Add:

Hanks v. Spann, 2009 Ala. Civ. App. LEXIS 458 (holding that defendant's dirt-hauling operation exceeded the purposes for which consent was given and thus made him liable for trespass).

Add:

Amaral v. Cuppels, 831 N.E.2d 915 (Mass. App. 2005) (projection of golf balls from the country club's property onto the owners' properties constituted a continuing trespass)

Add:

Bachelor v. Patterson, 2009 Cal App. Unpub. LEXIS 5753 (holding that "trespass ... may be accomplished by the casting of substances or objects upon the plaintiff's property"); *Hunter v. Mansell, 2010 Colo. App. LEXIS 274* ("[u]ntil the thing tortuously placed on the land, or underneath the land, is removed, the liability for trespass remains").

Add

In re Worldcom, Inc., 339 B.R. 836 (S.D. N.Y. 2006) (the use of fiber optic lines to transmit light pulses under an owner's land was not a trespass).

§ 68.02(c) Force [Go To Main]

Add:

Goerlitz v. City of Maryville, 2009 Mo. App. LEXIS 1742 ("[t]respass is the unauthorized entry upon the land of another ... regardless of the amount of force used").

§ 68.02(d) Actual and Nominal Damages. [Go To Main]

Add:

Mills v. Kimbley, 909 N.E.2d 1068, 1076 (Ind. Ct. App. 2009) (stating that a plaintiff may recover nominal damages even if there is no injury and may recover compensatory damages if there is actual injury); *Chang v. Baxter Healthcare Corp., 599 F.3d 728, 733 (7th Cir. 2010)* (stating that "purely nominal damages" may be awarded in a trespass action even "if there is no tangible harm"); *Rhodes v. E.I. Du Pont de Nemours & Co., 657 F. Supp. 2d 751, 771-772 (S.D.W.Va. 2009)* .

Add:

Kimberly Kempton v. Cooper, 2009 Cal. App. Unpub. LEXIS 4440 (stating that the jury may choose to award no damages where "a plaintiff suffers no harm whatsoever").

Add:

Herzberg v. County of Plumas, *34 Cal. Rptr. 3d 588 (2005)* (damages not recoverable for occasional use of and damage

to property caused by wandering cattle because landowners were not deprived of all economically beneficial or productive use of their land; where "fencing out" laws apply, a person in possession of unfenced land may neither seize estrays nor sue for trespass or injunctive relief; owner of the livestock is liable for all damages done by the livestock together with costs of suit if animals are herded or grazed on another person's property in violation of statute).

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Supp. To CHAPTER 68 TRESPASS ON LAND

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Supp. to § 68.03 Trespass from Encroachment by Structures.

[Go To Main]

§ 68.03(b) Encroachment by Structures Extending over the Boundary Line. [Go To Main]

Add

Florig v. Estate of O'Hara, 912 A.2d 318 (Pa. 2006) (a landfill operation using a portion of adjoining owner's property was a permanent trespass).

Add:

Fire Ins. Exchange v. Superior Court, 181 Cal. App. 4th 388, 390 (Cal. App. Ct. 2010) ("[b]uilding a structure that encroaches onto another's property is not an accident even if the owners acted in good faith").

Add

Johns v. Black Hills Power, Inc., 722 N.W.2d 554 (S.D. 2006) (trespass by placement of anchor pole and guy wires on another's property).

§ 68.03(c) Encroachment by Party Walls and Partition or Division Fences [Go To Main]

Add:

Chiodini v. Lock, 2010 Ark. App. 340 (holding that a builder of an encroaching fence had trespassed); *J&L Builders, LLC v. De Franzo, 2009 Conn. Super. LEXIS 1965* ; *Taylor v. Brown, 2009 Cal. App. Unpub. LEXIS 9311* .

Add:

See also Green v. Hooper, 149 Wis. App. 627 (2009) (parties acquiescing in boundary line).

Add:

Muhl v. BohiKan, 152 P.3d 93 (Kan. App. 2007) (one who has a statutory duty to maintain a partition fence may, without trespass, enter the adjoining land to carry out maintenance activities).

Add:

Goldstein v. Beck, 2009 Cal. App. Unpub. LEXIS 10183 .

Add:

Taylor v. Brown, 2009 Cal. App. Unpub. LEXIS 9311 ; *Kempton v. Cooper, 2009 Cal. App. Unpub. LEXIS 6801* .

Add:

Kempton v. Cooper, 2009 Cal. App. Unpub. LEXIS 6801 .

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Supp. To CHAPTER 68 TRESPASS ON LAND

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Supp. to § 68.04 Trespass from Encroachment by Vegetation.

[Go To Main]

§ 68.04(a) Encroachment by Vegetation on the Boundary Line [Go To Main]

§ 68.04(a)(1) The Right to Remove Vegetation on the Boundary Line

Add:

Young v. Ledford, 2009 Ala. Civ. App. LEXIS 554 .

Add:

Young v. Ledford, 2009 Ala. Civ. App. LEXIS 554 (holding that a tenant is liable for trespass for destroying the subject of the tenancy--a tree).

Annotation, *Validity, Construction, and Application of Right-to-Farm Acts, 8 A.L.R.6th 625* .

§ 68.04(a)(2) The Right to Cut Back Vegetation on the Boundary Line.

Add:

Tinnes v. Brand, 248 S.W.3d 113 (Mo. App. 2008) (action for defendants' trespass on land, obstruction of road and removal of trees and tree limbs).

§ 68.04(b) Encroachment by Vegetation Extending or Hanging over the Boundary Line. [Go To Main]

§ 68.04(b)(1) The Right to Cut Back Vegetation Extending or Hanging over the Boundary Line.

Add:

Young v. Ledford, 2009 Ala. Civ. App. LEXIS 554 (citing *Harding v. Bethesda Regional Cancer Treatment Center, 551 So. 2d 299 (Ala. 1989)* , in stating that one has a right to remove overhanging tree limbs).

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Supp. to § 68.05 Trespass from Encroachment by Objects Coming Onto the Land.

[Go To Main]

§ 68.05(b) Strict Liability for Trespass by Encroachment [Go To Main]

Add:

See also Sunset Ranchos Investors v. Mollison, 2009 Cal. App. Unpub. LEXIS 9457 (holding that water runoff caused by tree planting was a trespass).

Add:

Caesar v. Shelton Land Co., Inc., 646 S.E.2d 689 (Ga. App. 2007) (bulldozer operated by development company destroyed a family cemetery).

Add:

See also Mills v. Kimbley, 909 N.E.2d 1068, 1076 (Ind. Ct. App. 2009) (stating that "one who recklessly or negligently, or as a result of an abnormally dangerous activity, enters land in the possession of another or causes a thing ... to enter is subject to liability ... ").

§ 68.05(c) Examples of Trespass by Moving Objects Coming onto the Land. [Go To Main]

§ 68.05(c)(1) Dirt, Stones and and Debris

Add:

Whiteside Estates, Inc. v. Highlands Cove, L.L.C., 609 S.E.2d 804 (N.C. App. 2005) (defendant's construction activities caused owner's creek and lake to fill with silt and sediment)

§ 68.05(c)(3) Falling Wall or Building

Add:

Vento v. Marin, 2010 Conn. Super. LEXIS 843 (holding that the act of digging at the base of plaintiff's stone wall and causing it to fall "alone constituted a trespass").

§ 68.05(c)(6) Sewage, Foul Air, Fumes, and Pesticides.

Add:

Hale v. Klemp, 184 P.3d 1185 (Or. App. 2008) (unsuccessful trespass action from use of herbicide, brought by owners of organic farm against owner of adjacent commercial forest land).

§ 68.05(c)(7) Rainwater, Ice and Snow.

Add:

Quereguan v. New Castle County, 2009 Del. Ch. LEXIS 182 (holding that "[w]here a landowner creates an artificial condition on his property which increases the flow onto his neighbor's land, beyond the natural flow, he is liable only where ... the artificial use is unreasonable"); *Rogers v. Hood, 2009 Ohio App. LEXIS 4885* ("a land owner who alters the natural flow of water across his property so as to increase the volume and intensity of the flow onto adjoining property may be held liable in trespass").

Add:

Reith v. McGill Smith Punshon, Inc., 840 N.E.2d 226 (Ohio App. 2005) (there is no legal distinction between surface water above the ground and surface water temporarily channeled through underground pipes)

Add:

Ondovchik Family, L.P. v. Agency of Transp., 2010 VT 35 ("moving snow onto another's property might be a trespass").

Add:

Boyne v. Town of Glastonbury, 955 A.2d 645 (Conn. App. 2008) (trespass action from drainage from highway onto private land).

Crowell v. Kogut, 2005 Conn. Super. LEXIS 2783 (Conn. Super. Ct. 2005) (landowners who divert surface water from its natural flow in such a way as to substantially damage the property of their neighbors are liable regardless of whether their conduct is reasonable; neighbor constructed earth berm that diverted surface water into preexisting drainage ditch and cause ditch to overflow and damage owner's land)

Starrh and Starrh Cotton Growers v. Aera Energy LLC, *63 Cal. Rptr. 3d 165 (2007)* (continuing trespass resulting from energy company's ponding practice resulting in the migration of water); *Green v. Eastland Homes, Inc. 644 S.E.2d 479 (Ga. App. 2007)* (trespass action based on alleged mold exposure and excessive water runoff from higher adjoining land).

§ 68.05(c)(8) Trespass by Animals.

Add:

Herzberg v. County of Plumas, *34 Cal. Rptr. 3d 588 (2005)* (fencing laws typically govern right to recover trespass damages caused by estrays; if "fencing out" laws apply, the person in possession of unfenced land may not sue for trespass of estrays; owner is liable for damages if livestock is intentionally herded or grazed on another person's property in violation of statute; statute provided that an act to prevent trespass to real estate by livestock is not applicable to any livestock running at large on the ranges or commons)

Add:

Herzberg v. County of Plumas, *34 Cal. Rptr. 3d 588 (2005)* (a county open range ordinance was upheld because the ordinance and any damage from free roaming cattle did not deprive landowners of all economically beneficial or productive use of their land and did not extinguish any fundamental attribute of ownership).

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8-68 Thompson on Real Property, Thomas Editions Supp. to § 68.06

Supp. to § 68.06 Procedural Rules for Actions Based on Trespass to Land.

[Go To Main]

§ 68.06(a) Proper Parties. [Go To Main]

§ 68.06(a)(1) Proper Plaintiffs.

Add:

Abrams v. Ciba Specialty Chems. Corp., 663 F. Supp. 2d 1259, 1274 (S.D. Ala. 2009) (holding that "a plaintiff who dies before suit is filed is not a proper plaintiff").

Add:

Spinks v. Equity Residential Briarwood Apartments, *90 Cal. Rptr. 3d 453 (2009)* (stating that trespass protects possessory interests).

Add:

Adams v. Woods, 609 S.E.2d 429 (N.C. App. 2005) (owner acquired title without knowledge of current lease tenants and had a trespass action against defendants for invasion of his possessory rights)

Add:

But see *Smith v. Smith, 2009 Iowa App. LEXIS 1360* (holding that "[a] landowner may bring a trespass claim if his or her ownership interest has been affected, even if the landowner is not currently in possession").

§ 68.06(a)(2) Proper Defendants.

Add:

Huntingdon Life Sciences, Inc. v. Stop Huntingdon Animal Cruelty USA, Inc., *29 Cal. Rptr. 3d 521 (2005)* (party that provided transportation to alleged trespassers was not liable for trespass because his conduct did not direct or authorize their conduct)

Add:

Richard v. Richard, 24 So. 3d 292, 296 (La. Ct. App. 2009) (holding that "the party supervising and/or directing the work and ordering the trespass is liable").

Add:

Bullard v. Bouler, 612 S.E.2d 513 (Ga. App. 2005) (an unknowing contractor was not liable when a landowner employed a contractor to remove a neighbor's trees)

§ 68.06(b) Pleadings [Go To Main]

§ 68.06(b)(1) Elements of the Complaint

Add:

Hill v. Crowson, 2009 Tex. App. LEXIS 8924 (plaintiff need not plead any injury to be entitled to nominal damages).

Add:

McCloud v. Living Word Church, 2009 Ohio 2545 ("[i]n order to recover on a trespass claim, a plaintiff must prove that he or she had actual or constructive possession of the land at the time that the trespass occurred").

§ 68.06(b)(2) Possible Defenses in a Trespass Action.

Add:

Reith v. McGill Smith Punshon, Inc., 840 N.E.2d 226 (Ohio App. 2005) (under Ohio law, recovery for injury or damage to real property resulting from permanent trespass is subject to four-year statute of limitations and begins to run when damage to property is first discovered, or through the exercise of reasonable diligence it should have been discovered; claim for continuing trespass may be brought at any time until the claim has ripened into a presumptive right by adverse possession)

§ 68.06(b)(2)(iii) Consent

Add:

Harding County v. Frithiof, 575 F.3d 767, 777 (8th Cir. 2009) (stating that consent acts as a defense to a trespass claim in South Dakota).

§ 68.06(b)(2)(iv) Estoppel.

Add:

Reith v. McGill Smith Punshon, Inc., 840 N.E.2d 226 (Ohio App. 2005) (claim for continuing trespass may be brought at any time until the claim has ripened into a presumptive right by adverse possession)

§ 68.06(b)(2)(vii) Defenses Not Available

Add:

But see Bailey v. Annistown Rd. Baptist Church, Inc., 301 Ga. App. 677, 687 (2009) (stating that Georgia accepts the innocent trespasser defense, which "protects individuals who enter the land of another under the mistaken belief that it is permissible to do so").

§ 68.06(c) Burden and Standard of Proof [Go To Main]

Add:

Mills v. Kimbley, 909 N.E.2d 1068, 1076 (Ind. Ct. App. 2009) .

Add:

Caciapoli v. Lebowitz, 2010 Conn. Super. LEXIS 551 ("[t]he plaintiff has the burden of proving the nature and extent of the loss").

Add:

Simon v. Avenarius, 2009 Iowa App. LEXIS 927 (defendant has burden of proof in offering evidence in mitigation of damages).

§ 68.06(d) Remedies [Go To Main]

§ 68.06(d)(1) Recovery of Damages

Add:

Mills v. Kimbley, 909 N.E.2d 1068, 1076 (Ind. Ct. App. 2009) (stating that a plaintiff may recover nominal damages even if there is no injury and may recover compensatory damages if there is actual injury); *Chang v. Baxter Healthcare Corp., 599 F.3d 728, 733 (7th Cir. 2010)* (stating that "purely nominal damages" may be awarded in a trespass action even "if there is no tangible harm"); *Downs v. Lyles, 2009 Ala. Civ. App. LEXIS 512* .

Add:

Whiteside Estates, Inc. v. Highlands Cove, L.L.C., 609 S.E.2d 804 (N.C. App. 2005) (damages awarded to restore property to pre-silt condition when defendant's construction activities caused a creek and lake to fill with silt)

Add:

J.S.F. Props., LLC v. McCann, 2009 Del. Super. LEXIS 172 (stating that "damages for trespass ... are generally ... the difference between the value of the land before the trespass occurred and the value of the land after the trespass occurred").

Add:

City of Atlanta v. Landmark Envtl. Indus., 613 S.E.2d 131 (Ga. App. 2005) (damages owed by municipality limited to those incurred during the six months preceding the giving of such notice of trespass)

Add:

Hunter v. Mansell, 2010 Colo. App. LEXIS 274 ("[f]or continuing intrusions ... each repetition or continuance amounts to another wrong, giving rise to a new cause of action").

Add:

See Downs v. Lyles, 2009 Ala. Civ. App. LEXIS 512 ; *see also Betzner Family, LLC v. Midwest Amusement Park, LLC, 2009 WI App. 77* (stating that "[p]unitive damages are especially appropriate in cases of trespass [because] society has an interest in punishing and deterring intentional trespassers").

Add:

Bishop Eddie Long Ministries, Inc. v. Dillard, 613 S.E.2d 673 (Ga. App. 2005) (punitive damages awarded for removal of trees)

Add:

See Alexander v. Dunn, 15 So. 3d 302, 305 (La. Ct. App. 2009) (noting Louisiana's harsh statutory scheme penalizing "timber trespass").

§ 68.06(d)(2) Injunctive Relief and Ejectment.

Add:

Hunter v. Mansell, 2010 Colo. App. LEXIS 274 ("the traditional and preferred equitable remedy for a continuing trespass is a mandatory injunction requiring the removal of the encroachment").

Add:

Adams v. Woods, 609 S.E.2d 429 (N.C. App. 2005) (ejectment not an appropriate action to remove tenants who had a lease agreement with previous owner but not with current owner)

Add:

Hunter v. Mansell, 2010 Colo. App. LEXIS 274 ("[a] remedy at law is inadequate ... where further trespasses of the same kind are threatened"); *see also Harris Group v. Robinson, 209 P.3d 1188, 1205 (Colo. App. 2009)* .

Add:

Hunter v. Mansell, 2010 Colo. App. LEXIS 274 (quoting *Golden Press, Inc. v. Rylands, 124 Colo. 122, 126-27 (1951)* , "[s]ometimes a slight and harmless encroachment is held to be within the rule de minimis ... we think the court should weigh the circumstances so that it shall not act oppressively").

Add:

Hunter v. Mansell, 2010 Colo. App. LEXIS 274 (quoting *Golden Press, Inc. v. Rylands, 124 Colo. 122, 126-27 (1951)* , "[w]here the encroachment is deliberate and constitutes a willful and intentional taking of another's land, equity may well require its restoration regardless of the expense of removal as compared with damage suffered therefrom").

Add:

Amaral v. Cuppels, 831 N.E.2d 915 (Mass. App. 2005) (there is no notion of "coming to a trespass"; defendant golf course ordered to prevent stray balls from entering adjacent owner's land)

Add:

Amaral v. Cuppels, 831 N.E.2d 915 (Mass. App. 2005) (burden of modifying a portion of a golf course was not a hardship sufficient to relieve a country club of its obligation to eliminate a continuing trespass of golf balls onto adjacent owners' properties)

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Add to Articles:

Burkhart, Ann. "Takings and Trespass: Trespass Liability for Precondemnation Entries," *56 Drake L. Rev. 341 (Winter 2008).*

Coleman, Elizabeth Ann, "In re Hoery v. United States: Compensating Homeowners for Loss of Property Value Due to Toxic Pollution Under the Continuing Tort Doctrine," *16 Vill. Envtl. L.J. 35 (2005).*

Finley, Linda S. "Real Property," *57 Mercer L. Rev. 331 (Fall 2005).*

Gordon, Wendy J., "Trespass-Copyright Parallels and the Harm-Benefit Distinction," *122 Har. L. Rev. 62 (2009).*

Henderson, Jr., James A., "The Status of Trespassers on Land," *44 Wake Forest L. Rev. 1071 (2009).*

Parchomovsky, Gideon & Stein, Alex, "Reconceptualizing Trespass," *103 Nw. U. L. Rev. 1823 (2009).*

Sisk, Gregory C. "Returning to the Pruneyard: The Unconstitutionality of State-Sanctioned Trespass in the Name of Speech," *32 Harv. J.L. & Pub. Pol'y 389* (Winter, 2009).

Add to Annotations

Annotation, "Right of landowner to recover for personal injuries incidental to trespass on his land," 32 A.L.R. 921 .

Annotations

Annotation, *What Constitutes Willful Trespass by Stock on Land Not Enclosed by Legal Fence*, 158 A.L.R. 375 .

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CHAPTER 69 RIGHTS OF LATERAL AND SUBJACENT SUPPORT

8-69 Thompson on Real Property, Thomas Editions 69.syn

AUTHOR: Professor David A. Thomas J. Reuben Clark Law School Brigham Young University

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§ 69.04(b)(2) Loss of Lateral Support from Land with Structures.

§ 69.04(b)(2)(i) The English and American Rules.

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§ 69.04(b)(2)(iv) When Due Care Requires Prior Notice of Excavation.

§ 69.05 The Right to Subjacent Support.

§ 69.05(a) Definition and General Rule of Subjacent Support.

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§ 69.05(c) The Right to Subjacent Support for Land in Its Natural State.

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§ 69.06 Procedural Rules Governing Actions for Loss of Lateral and Subjacent Support.

§ 69.06(a) Proper Parties.

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§ 69.06(d)(2) Injunctions.

§ 69.07 Bibliography.

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CHAPTER 69 RIGHTS OF LATERAL AND SUBJACENT SUPPORT

8-69 Thompson on Real Property, Thomas Editions § 69.01

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§ 69.01 Introduction and Definitions.

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The rights and obligations pertaining to lateral support and subjacent support are rights pertaining exclusively to real property, and also pertaining only to adjoining landowners. The rights to lateral and subjacent support associated with land ownership are often termed natural rights, which means that they inhere in land ownership and are presumed to exist whether or not the parties explicitly refer to them in any land transactions. Even though rights to lateral and subjacent support have always been recognized in the common law as natural rights associated with property ownership, English and American jurisdictions have developed somewhat different rules for remedies when those rights have been violated. The English rules are favored in some American jurisdictions.

Lateral support is a landowner's right to have the soil in its natural condition supported by the soil of adjoining land in its natural condition. This right ordinarily applies only to the ground, and not to any artificial structures in or on the ground. n1 Inasmuch as rights to lateral and subjacent support are natural rights, it is unnecessary to mention them or to include provisions creating them in conveyances or other transactions concerning the land. n2

Land that is entitled to maintenance of lateral support from adjoining land is likewise held to a duty of providing its own lateral support for that same land. This has been termed a continuing obligation that runs with the land. n3

While the courts have been far from unanimous, the weight of judicial authority favors the view that liability for loss or withdrawal of lateral support is absolute, with no showing of negligence required. n4

Subjacent support is a landowner's right to have the soil in its natural state supported by the soil beneath it. n5 The applicability of the right of subjacent support to the surface soil is necessarily vague, but it has been held that "surface" means only the superficial part of the land. n6 By agreement, the parties can be more specific about how much surface stratum is entitled to the provision of subjacent support. Whether by common law or by agreement of the parties, then, it is possible for the owner of any upper stratum to have a right to the subjacent support from any of the lower strata. n7

FOOTNOTES:

(n1)Footnote 1. *Carrion v. Singley, 614 S.W.2d 916 (Tex. Civ. App. 1981)* (action to enjoin adjacent landowner from allowing further deterioration of retaining wall); *Keck v. Longoria, 771 S.W.2d 808 (Ark. App. 1989)* (excavation on common boundary without building retaining wall). *Com v. Salley, 121 A.2d 169 (Pa. 1956)* (holding that the right to lateral support extends to land in natural state and not to artificial improvements); *Namm v. City of New York, 5 N.Y.S.2d 233 (N.Y. Sup. 1938)* (holding that the right to lateral support extends to land in natural state and not to artificial improvements).

(n2)Footnote 2. *Holtz v. San Francisco Bay Area Rapid Transit Dist., 131 Cal. Rptr. 646 (1976)* (property damage caused by transit authority's excavation for sidewalk).

(n3)Footnote 3. *Klebs v. Yim, 772 P.2d 523 (Wash. App. 1989)* (retaining wall deteriorated when a swimming pool was constructed on adjoining land).

(n4)Footnote 4. *Catalano v. Woodward, 617 A.2d 1363 (R.I. 1992)* (excavation of a slope that had provided lateral support); *Noone v. Price, 298 S.E.2d 218 (W. Va. 1982)* (deterioration of stone retaining wall); *Urosevic v. Hayes, 590 S.W.2d 77 (Ark. App. 1979)* (part of retaining wall destroyed by lightning); *Crnkovich v. Scalletta, 277 N.W.2d 416 (Neb. 1979)* (landowner removed soil from adjoining land for construction project). *Bay v. Hein, 515 P.2d 536 (Wash. App. 1973)* (holding that violator of owner's right to subjacent support is liable for damage to land and improvements). *Royal Indem. Co. v. Schneider, 485 S.W.2d 452 (Mo. App. 1972)* (holding that whoever violates landowner's right to lateral support is liable to damage to land and improvements).

(n5)Footnote 5. *Island Creek Coal Co. v. Rodgers, 644 S.W.2d 339 (Ky. App. 1982)* (damage from blasting in underground coal mine); *Platts v. Sacramento N. Ry., 253 Cal. Rptr. 269 (1988)* (house damaged when railroad tunnel collapsed).

(n6)Footnote 6. *Island Creek Coal Co. v. Rodgers, 644 S.W.2d 339 (Ky. App. 1982)* (damage from blasting in underground coal mine).

(n7)Footnote 7. *Mellor v. Conklin Limestone Co., 205 A.2d 831 (R.I. 1964)* (company's right to remove limestone from plaintiffs property). *See also Island Creek Coal Co. v. Rodgers, 644 S.W.2d 339 (Ky. App. 1982)* (damage from blasting in underground coal mine).

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CHAPTER 69 RIGHTS OF LATERAL AND SUBJACENT SUPPORT

8-69 Thompson on Real Property, Thomas Editions § 69.02

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§ 69.02 The Natural Right of Lateral Support for Land.

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§ 69.02(a) Lateral Support of Land in Its Natural State.

The right to lateral support from adjoining soil usually applies only to land in its natural state, unencumbered by structures or other artificial improvements. This right of lateral support held by a landowner imposes a corresponding duty on the adjoining landowner to not remove the adjacent soil or otherwise weaken the lateral support. n8

COMPUTER-ASSISTED RESEARCH:

LEXIS: Right w/20 lateral w/5 support w/20 natural

§ 69.02(b) Lateral Support of Land That Has Been Altered or Filled.

When land is no longer in its natural state, but has been filled in or otherwise altered, the entitlement to lateral support from adjoining property is not thus forfeited, but the landowner is entitled only to such lateral support as the land would have needed in its natural state, before it was altered or filled. n9

If land has been partially altered or filled, but a portion of the land has not been so changed, the unchanged portion retains its natural right of lateral support from adjoining property. n10

With the passage of time, land that was earlier altered or filled may, in that condition, come to be considered once again in its natural state. Indeed, in areas of long human habitation, virtually no land is left in its pristine natural state, so most land that was altered or filled long ago is once again considered in its natural state and entitled to the corresponding lateral support. n11 In some cases the return of the full right of lateral support occurs after only a few years from the time of altering or filling. One landowner who excavated for a driveway near the land's boundary with the neighboring landowner was required to install a retaining wall to stop subsidence of the neighbor's line of property along the line of excavation, even though the subsiding soil itself had been placed as fill by the neighbor just five years earlier. n12

COMPUTER-ASSISTED RESEARCH:

LEXIS: Right w/20 lateral w/5 support w/20 (alter! or fill! or buil! or develop!)

§ 69.02(c) Lateral Support of Land with Buildings.

The rather firm common law rule prevailing in American courts is that no right of lateral support exists for the additional weight imposed on the land by buildings or other structures or improvements. n13 However, an adjoining landowner may not be negligent toward a neighbor's buildings; an excavator is under a duty to use care and also to give notice to the owner of a building on adjacent land before excavation is undertaken, in order that protective and preventive measures can be taken. n14 It has also been held that, if an excavation threatens the stability of buildings on non-contiguous land, the excavator must also give notice to those landowners. n15

COMPUTER-ASSISTED RESEARCH:

LEXIS: Right w/20 lateral w/5 support w/20 building

FOOTNOTES:
(n1)Footnote 8. *Urosevic v. Hayes, 590 S.W.2d 77 (Ark. App. 1979)* (part of retaining wall destroyed by lightning); *Pender v. Matranga, 1997 Conn. Super. LEXIS 423* (Conn. Super. Feb. 20, 1997) (defendant failed to prove that plaintiff's excavation encroached upon the natural lateral support enjoyed by the defendant' s easement). *Cecola v. Ruley, 12 S.W.2d 848 (Tex. App. 2000)* (adjoining landowner is owed lateral and subjacent support); *Weir v. Palm Beach County, 85 So. 2d 865 (Fla. 1956)* (holding that the right of lateral support applies to natural land).

(n2)Footnote 9. *Sanders v. State Hwy. Comm'n, 508 P.2d 981 (Kan. 1973)* (removal of lateral support caused by highway construction); *Bay v. Hein, 515 P.2d 536 (Wash. App. 1973)* (excavation near boundary invaded adjacent property). *Jennemann v. Hertel, 264 S.W.2d 911 (Mo. App. 1954)* (holding that the right to lateral support does not extend to filled land). *Nida v. American Rock Crusher Co., 855 P.2d 81 (Kan. 1993)* (absolute right to subjacent support, unless the right has been waived). *Feinzig v. Ficksman, 674 N.E.2d 1329 (Mass. App. 1997)* (denied plaintiff's request to build retaining wall on defendant's adjacent land to support construction of driveway); *Kim v. City of New York, 681 N.E.2d 312 (NY 1997)* (owner was obligated to fill his land to support adjacent public street).

(n3)Footnote 10. *Bradley v. Valicenti, 138 A.2d 238 (Pa. Super. 1958)* (driveway constructed on adjoining land).

(n4)Footnote 11. *Biel v. Metropolitan Life Ins. Co., 304 N.E.2d 449 (Ill. App. 1973)* (action to prevent land from sliding onto plaintiff's land).

(n5)Footnote 12. *Bradley v. Valicenti, 138 A.2d 238 (Pa. Super. 1958).*

(n6)Footnote 13. *Spall v. Janota, 406 N.E.2d 378 (Ind. App. 1980)* (excavation on adjoining land); *Noone v. Price, 298 S.E.2d 218 (W. Va. 1982)* (property damage from deteriorating retaining wall); *Wolcott v. State, 99 N.Y.S.2d 448 (1950); Sanders v. Schiffer, 46 A.D.2d 536 (N.Y.A.D. 1975)* (holding that owner of contiguous land not obligated to protect owner of land with buildings); *McCloud v. Salt Rock Water Public Service District, 533 S.E.2d 679, 683 (W. Va. 2000)* (the owner of a building has no right of support from the land of adjacent owners).

(n7)Footnote 14. *Waters v. Biesecker, 298 S.E.2d 746* (N.C. App.), *review allowed, 302 S.E.2d 249* (N.C.), *aff'd, 305 S.E.2d 539 (N.C. 1983)* (negligent excavation by city; no notice given); *Panhandle Eastern Pipe Line Co. v. Tishner, 699 N.E.2d 731 (Ind. App. 1998)* (holding that liability for damage to buildings resulting from the loss of lateral support must be based upon the negligence of the adjoining landowner in carrying on the activity which occasioned the loss of lateral support).

(n8)Footnote 15. *Puckett v. Sullivan, 12 Cal. Rptr. 55 (1961)* (landslides from loss of lateral support after

excavation).

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CHAPTER 69 RIGHTS OF LATERAL AND SUBJACENT SUPPORT

8-69 Thompson on Real Property, Thomas Editions § 69.03

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§ 69.03 The Created Right of Lateral Support for Buildings.

§ 69.03(a) Lateral Support Rights Created by Statute or by Express Grant.

In addition to the natural right of lateral support that inheres in land ownership generally, a landowner may acquire a right of lateral support by express grant, or have such a right conferred by statute. This situation arises most commonly if a landowner wishes to secure lateral support for structures on the land. n16 By agreement with an adjoining owner, a landowner may also secure a right of support for a building by an adjoining building. n17

COMPUTER-ASSISTED RESEARCH:

LEXIS: Right w/20 lateral w/5 support w/20 building w/20 (express! grant! or statute)

§ 69.03(b) Lateral Support Rights Created or Arising by Prescription or by Implication.

§ 69.03(b)(1) Prescriptive Lateral Support Rights for Buildings.

If a landowner wishes to obtain a right of lateral support for buildings on the land, a right not inherent in the common law right of lateral support, and the landowner has not obtained such a right by express agreement, it is still possible that by prescription or implied grant or reservation the landowner could secure a right of support for the buildings. English courts and a few American courts have recognized a prescriptive claim to a right of lateral support for a building, n18 but the majority of American courts do not recognize such a prescriptive right. n19

In those American jurisdictions that do recognize the possibility of obtaining a right of lateral support for buildings by prescription, the usual rules apply. The landowner who claims such a right for a building on the land must have placed the building in such a way that it requires the support of the neighboring land or a building on adjacent land, and that this need for support, by its openness, could have drawn the neighbor's objection at the time of construction. n20 Also, of course, the prescriptive use must be continuous for the time normally required of prescriptive easements. The requirement that, for a prescriptive right to arise, the structure be so placed that it actually relies for support on neighboring land or buildings is crucial; where one landowner constructed a building without a foundation wall on the side that was adjacent to a neighbor's building, but the building did not depend on the adjacent structure for support, no

prescriptive right to lateral support arose. Upon the removal of the neighbor's building 40 years later, leaving the owner's building exposed to weather, no cause of action based on a prescriptive lateral support right could be shown. n21

COMPUTER-ASSISTED RESEARCH:

LEXIS: Right w/20 lateral w/5 support w/20 building w/20 (prescri!)

§ 69.03(b)(2) Implied Grants and Reservations of Lateral Support Rights for Buildings.

An implied grant of a right to lateral support for buildings must meet essentially the same requirements as an implied easement. n22 The land with the building needing support and the land which is bound to provide the support must at one time have been in common ownership, and while in common ownership the owner must have constructed the building in such a way that it relied for its support on a portion of the owner's land, which portion was later severed and conveyed to another. These circumstances give rise to a presumed grant of a right of lateral support that arose at the time of severance. n23 The inferences giving rise to such an implied grant in a conveyance can be defeated by specific provision in the conveyance itself.

An implied grant of lateral support rights for buildings arises when the common owner builds two buildings on the land, each needing the support of the other. An implied reservation of a lateral support right for buildings may arise when a common owner of land builds a structure on one part of the land, which structure supposedly relies for support on the owner's other land, and then the owner conveys away the portion of the land needed for the support of the building. n24 Both the implied reservation and the implied grant for lateral support of structures apply only to structures that are in existence at the time the reservation or grant arises. n25

COMPUTER-ASSISTED RESEARCH:

LEXIS: Right w/20 lateral w/5 support w/20 building w/20 (impli! grant! or reserv!)

FOOTNOTES:
(n1)Footnote 16. *See* Annotation, *Liability of One Excavating on His Own Premises for Resulting Injury to Adjoining Building*, 50 A.L.R. 486 (1927); 59 A.L.R. 1252 (1929).

(n2)Footnote 17. *Royal Indem. Co. v. Schneider, 485 S.W.2d 452 (Mo. App. 1972)* (building collapsed after construction of a building on adjoining property); *Adams v. Marshall, 138 Mass. 228 (1885).*

(n3)Footnote 18. *Illinois State Bank of Quincy v. Neece, 357 N.E.2d 228 (Ill. App. 1976)* (demolition of wall prohibited); *Kennedy v. Rutland Aerie 1001, F.O.E., 18 A.2d 149 (Vt. 1941).*

(n4)Footnote 19. *Winn v. Abeles, 10 P. 443 (Kan. 1886)* (neighbor's wall on plaintiff's property). *See* dissenting opinion in *Schultz v. Byers, 22 A. 514 (N.J. 1891); Bergen v. Morton Amusement Co., 178 A.D. 400 (N.Y.A.D. 1917)* (holding that right to lateral support in New York can only be acquired by covenant or grant--express or implied.)

(n5)Footnote 20. *Illinois State Bank of Quincy v. Neece, 357 N.E.2d 228 (Ill. App. 1976)* (demolition of wall prohibited); *Kennedy v. Rutland Aerie 1001, F.O.E., 18 A.2d 149 (Vt. 1941).*

(n6)Footnote 21. *Kennedy v. Rutland Aerie 1001, F.O.E., 18 A.2d 149 (Vt. 1941).*

(n7)Footnote 22. *Manning v. New Jersey Short Line R.R. Co., 78 A. 200 (N.J. 1910)* (eminent domain taking by railroad).

(n8)Footnote 23. *Collins v. Stalmaker, 48 S.E.2d 430 (W. Va. 1948)* (implied grant of petroleum rights in deed).

(n9)Footnote 24. *Id.*; *Adams v. Marshall, 138 Mass. 228 (1885)* (building support rights when boundary runs through building).

(n10)Footnote 25. *Christensen v. Mann, 204 N.W. 499 (Wis. 1925)* (one support wall for several buildings).

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CHAPTER 69 RIGHTS OF LATERAL AND SUBJACENT SUPPORT

8-69 Thompson on Real Property, Thomas Editions § 69.04

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§ 69.04 Liability Imposed for Loss of Lateral Support.

[Go To Supp]

§ 69.04(a) Loss of Lateral Support Caused by Act of God.

Although the right to lateral support is a natural right under the common law, for the loss of which liability without negligence may be imposed, no liability attaches for loss of that support through a so-called act of God. When the lateral support is lost through the instrumentality of an act of God, or through any sudden, unforeseen natural force, then the owner of the land that did not provide the support is not held liable for the damage from the loss nor required to restore the support. n26 A loss of lateral support resulting from a combination of an act of God and the adjoining landowner's act or failure to act, will usually result in liability attaching to the adjoining landowner. n27

COMPUTER-ASSISTED RESEARCH:

LEXIS: Lateral w/5 support and act of god

§ 69.04(b) Loss of Lateral Support Caused by Excavation.

§ 69.04(b)(1) Loss of Lateral Support from Land Without Structures.

The most common cause of loss of lateral support is by excavation on adjoining land. When the adjoining landowner, by excavation, disturbs or removes the lateral support of neighboring land, the excavator is liable for all damages that proximately result from the excavation. n28 Liability attaches to the neighboring excavator when the soil falls of its own weight after the lateral support has been removed; n29 however, when the soil collapses only after a person has walked upon it, the excavator bears no liability for either personal injury or property damage. n30 Also, after the soil has subsided onto neighboring property because the lateral support was withdrawn, it may not be taken and used by the neighboring owner. If it is so taken, the neighboring owner will be liable for the value of the soil. n31

In most cases, the defendant landowner who by excavation causes loss of lateral support is an adjoining owner; however, the defendant's land need not be contiguous with the plaintiff's land, if the defendant's excavation nevertheless caused the subsidence of plaintiff's land. n32

Liability for loss of lateral support, as it pertains to land in its natural state, is absolute and, therefore, a plaintiff need not prove that the defendant was negligent in conducting the activities that caused the loss of support. n33 If a defendant excavator is liable without negligence, the liability extends only to the damage to the land itself. If the defendant excavator is liable and negligent, too, liability may extend to damage to structures as well as to damage to the land itself. n34

The absolute liability of an excavating landowner for damage to adjoining property from loss of lateral support may be reduced or eliminated by statute. n35

COMPUTER-ASSISTED RESEARCH:

LEXIS: Lateral w/5 support and liab! w/20 excavat!

§ 69.04(b)(2) Loss of Lateral Support from Land with Structures.

§ 69.04(b)(2)(i) The English and American Rules.

As already noted, the common law right to lateral support did not require the adjoining land to support the additional lateral pressure caused by buildings on land, but rather was a requirement of support for land only in its natural state. n36 However, it sometimes occurs that the weight of a building on land does not increase the lateral pressure against the neighboring land; when soil subsides onto neighboring land from land with one or more buildings on it, but the subsidence is caused solely by the neighboring excavation and not by the weight of any buildings, the excavator will be liable not only for the damage to the subsiding land, but in the English and in some American courts will also be liable for resulting damage to the plaintiff's buildings. n37 Some other American courts grant recovery in these circumstances, but only if the excavator was negligent. n38

COMPUTER-ASSISTED RESEARCH:

LEXIS: Lateral w/5 support and liab! w/20 excavat!

§ 69.04(b)(2)(ii) When Liability Only for Negligence Is Imposed.

One natural corollary of the common law right of lateral support is that the right to excavate on one's land is not reduced or eliminated by the presence of buildings on adjacent land, and not even by buildings next to the boundary. n39 However, even if the ability to excavate is uncompromised, the excavator may be under additional duties of care as a result of the presence of buildings on neighboring land. The principle additional duty of the excavator is to use due care in avoiding injury to the adjacent structures. The excavator may be liable for property damage if the damage results from negligence in the excavation. n40 When, during excavation, damage occurs to the plaintiff's building, but the plaintiff is unable to show negligence on the part of the excavator, the excavator will not be liable for the damage. n41

Because there is no liability for damage to buildings without showing negligence on the part of the excavator, there is, of course, no excavator liability for building damage when, without negligence in the course of excavation, the soil collapses entirely because of the extra weight of a building. n42

COMPUTER-ASSISTED RESEARCH:

LEXIS: Lateral w/5 support and liab! w/20 excavat! w/o50 negligen!

§ 69.04(b)(2)(iii) The Standard of Due Care.

The duty of due care imposed upon an excavator is almost always a jury question, n43 and the standard is usually identified in the context of the facts of each case. n44 The reported cases that have dealt with issue of excavator negligence have identified several factors relevant to the issue of negligence: whether the excavator investigated soil characteristics; n45 whether the excavation unnecessarily endangered the buildings; n46 whether the excavator used outdated or discredited methods; n47 whether the excavator took weather conditions into account; n48 whether the excavator proceeded as other experienced excavators with acquaintance with the site would have proceeded; n49 and whether the excavator took into account the condition and current use of any structure possibly threatened or affected by the proposed excavation. n50 The excavator's duty of care is enlarged when excavation occurs near a weakened structure, n51 but no liability is imposed on an excavator if a structure on adjoining land falls because of its own weakness, even when the collapse takes place during the excavation. n52

Excavators must sometimes act affirmatively to fulfill the standard of due care and to avoid negligence. Frequently an excavator must provide temporary shoring or underpinning support for adjoining land, both while the excavation is in progress and for as long as necessary until the land is no longer in danger of subsidence. n53 No standard rule requires an excavator in every case to provide shoring and underpinning; such a duty is entirely dependent upon the facts in each case. n54 Usually the owner of a threatened building has a concurrent right to take steps to protect the building while excavation proceeds on adjacent land and, in the reported cases, the owner of the building is more often held to the stronger duty to take such protective measures. n55 Because of these rules, adjacent landowners have reciprocal rights under the common law to go onto each other's lands for the purpose of shoring up buildings when one of them plans to excavate. n56 When either landowner undertakes protective measures or repairs, liability may result when those steps are carried out negligently. n57

One possible protective measure to be adopted by an excavator is to conduct the excavation one section at a time, which has the benefit of exposing only portions of adjoining land or structures to the risk of subsidence or damage, while other sections remain fully supported. n58 Conducting an excavation by sections is most often carried out -- and is sometimes required -- where the soil, such as sand or gravel, is brittle or crumbling. n59

These common law rights and reciprocal duties to provide support can be altered by statute or ordinance or by the agreement of the parties. n60 If the responsibility for protective measures has not been regulated by statute or parties' agreement, then the excavator who is required to undertake protective measures must also bear the expenses therefor. n61 Occasionally, a landowner who was given notice of the excavation, and then took no steps to protect buildings on the land, will be required to reimburse the excavator for the cost of protecting the buildings during the excavation. n62

COMPUTER-ASSISTED RESEARCH:

LEXIS: Lateral w/5 support and liab! w/20 excavat! w/50 negligen!

§ 69.04(b)(2)(iv) When Due Care Requires Prior Notice of Excavation.

The owner or excavator of land where excavation is intended should give notice to any adjoining landowner whose buildings may be threatened by the excavation. n63 Whether the notice must be given because of the type of excavation or the condition of the buildings is a determination dependent upon the facts in each case; n64 therefore, the duty to provide notice is not absolute. n65 It has been held that notice is *not* required if it is already obvious that the excavation will require that protective precautions must be undertaken for the protection of nearby buildings. n66

Naturally, no duty to give notice pertains if the adjoining landowner already knows of the intended excavation. n67 Also, notice of an intended excavation should be given to owners of buildings on non-contiguous land that might be threatened by the excavation. n68 Plaintiffs may cite the failure to give any required notice as evidence of negligence. n69

In order to meet the requirements of due care, the notice must be given sufficiently in advance so that protective measures can be taken, n70 and the notice must provide enough information about the excavation so that both excavator and adjoining landowner can take appropriate measures to prevent damage. n71 In addition to the timing of the excavation, most notices should also state the depth of the proposed excavation. n72 When excavation plans are changed, a new and timely notice of the changes must be given if the changes alter the exposure of the buildings to damage from the excavation. n73

COMPUTER-ASSISTED RESEARCH:

LEXIS: Neglig! w/30 excavat! w/30 duty w/10 (notice or notif!)

FOOTNOTES:

(n1)Footnote 26. *J. L. Simmons Co. v. Lumbermen's Mut. Life Ins. Co., 228 N.E.2d 227 (Ill. App. 1967)* (excavator action to recover expenses in protecting land from heavy rains during construction). *Spall v. Janota, 406 N.E. 2d 378 (Ind. App. 1980)* (holding that there is no absolute right to lateral support; liability must be based on negligence of the adjoining landowner).

(n2)Footnote 27. *Schultz v. Bower, 59 N.W. 631 (Minn. 1894)* (court suggested that actual damage caused by natural forces, after support was artificially removed, would be actionable); *Gilmore v. Driscoll, 122 Mass. 199 (1877)* (fence and shrubs washed away after excavation near the boundary).

(n3)Footnote 28. *Urosevic v. Hayes, 590 S.W.2d 77 (Ark. App. 1979)* (part of retaining wall destroyed by lightning); *Paul v. Bailey, 137 S.E.2d 337 (Ga. App. 1964)* (excavation of slope); *Spall v. Janota, 406 N.E.2d 378 (Ind. App. 1980)* (damage from distant excavation not foreseeable); *Franc v. Bethel Holding Co., 807 A.2d 519 (Conn. App. 2002)* (loss of lateral support caused by adjoining landowner's excavation); *D'Agostino v. Piasecki, No. CV 92-0128084, 1996 Conn. Super. LEXIS 631* (Conn. Super. Mar. 11, 1996) (defendants' excavation of boundary line caused continuous erosion and constituted a trespass and nuisance); *Franc v. Bethel Holding Co., No. CV 88-0295669, 1996 Conn. Super. LEXIS 485* (Conn. Super. Feb. 20, 1996) (defendants liable for loss of lateral support caused by blasting and excavation of adjacent land, leaving a cliff-like wall on the boundary). *Powers v. Olson, No. CV 960563230, 1998 Conn. Super. LEXIS 2094,* at *11 (Conn. Super. July 17, 1998) (holding that "Defendant is to provide at his cost an adequate lateral support to the two trees on Plaintiff's land"). *Grant v. Leith, 407 P.2d 157 (Wash. 1965)* (landslide occurred after neighbor removed lateral support); *Powers v. Olson, 742 A.2d 799 (Conn. 2000)* (action to compel developer to provide support for trees damaged during excavation); *MCI Telecommuns. Corp. v. Texas Utils. Elec. Co., 995 S.W.2d 647 (Tex. 1999)* (trenching activities to lay cable damaged previously installed utility poles, causing them to lean).

(n4)Footnote 29. *Sanders v. State Hwy. Comm'n, 508 P.2d 981 (Kan. 1973)* (property damage from highway excavation).

(n5)Footnote 30. *Pullan v. Stallman, 56 A. 116 (N.J. 1903)* (land collapse after nearby excavation); *but see Vennard v. Morrison, 209 A.2d 202 (Conn. App. 1964)* (court accepted *Pullan* rule, but added that a person should be able to walk on land without fear of falling into pit caused by neighbor's excavation).

(n6)Footnote 31. *Barber v. Hohl, 123 A.2d 785 (N.J. Super. 1956)* (adjoining landowner took possession of subsided sand); *Langhorne v. Turman, 133 S.W. 1008 (Ky. 1911).*

(n7)Footnote 32. *Puckett v. Sullivan, 12 Cal. Rptr. 55 (1961)* (landslides caused by nearby excavation); *Keating v. Cincinnati, 38 Ohio St. 141 (1882)* (excavation at the base of hill).

(n8)Footnote 33. *Spall v. Janota, 406 N.E.2d 378 (Ind. App. 1980)* (excavation distant from adjoining land; negligence liability and strict liability distinguished); *McKamy v. Bonanza Sirloin Pit, Inc., 237 N.W.2d 865 (Neb. 1976)*

(lateral support lost after excavation by former owner). However, *see Catalano v. Woodward, 617 A.2d 1363 (R.I. 1992)* (plaintiff held not strictly liable for causing loss of lateral support).

(n9)Footnote 34. *Hermanson v. Morrell, 252 N.W.2d 884 (N.D. 1977)* (excavation near boundary); *New York Cent. Ry. v. Marinucci Bros. & Co., 149 N.E.2d 680 (Mass. 1958)* (damage to railroad right of way); *Lyon v. Walker Boudwin Constr. Co., 503 P.2d 1219 (Nev. 1972).*

(n10)Footnote 35. *Sanders v. State Hwy. Comm'n, 508 P.2d 981 (Kan. 1973)* (damage caused by highway excavation); *Puckett v. Sullivan, 12 Cal. Rptr. 55 (1961)* (landslides allegedly caused by excavation on non-contiguous property).

(n11)Footnote 36. *Catalano v. Woodward, 617 A.2d 1363 (R.I. 1992)* (excavation damaged nearby improved land); *Lerner Jewelers, Inc. v. L.L. Glascock, Inc., 199 So. 2d 66 (Miss. 1967); Royal Indem. Co. v. Schneider, 485 S.W.2d 452 (Mo. App. 1972).*

(n12)Footnote 37. *Simons v. Tri-State Constr. Co., 655 P.2d 703 (Wash. App. 1982), review denied, 99 Wash. 2d 1001 (1983)* (improved property damaged when sewer line installed); *Noone v. Price, 298 S.E.2d 218 (W. Va. 1982).*

(n13)Footnote 38. *Spall v. Janota, 406 N.E.2d 378 (Ind. App. 1980)* (non-negligent excavation); *Hermanson v. Morrell, 252 N.W.2d 884 (N.D. 1977)* (excavation damage to land and improvements); *Lee v. Takao Bldg. Dev. Co., 220 Cal. Rptr. 782 (1985)* (owner purchased after excavation had occurred not liable for damage); *City of La Crosse v. Jiracek Cos., 324 N.W.2d 440 (Wis. App. 1982).*

(n14)Footnote 39. *Pacific Indem. Co. v. Rathje, 188 N.W.2d 338 (Iowa 1971)* (excavation exposed foundation of building on adjoining land); *Neyman v. Pincus, 267 P.2d 805 (Mont. 1958).*

(n15)Footnote 40. *Spall v. Janota, 406 N.E.2d 378 (Ind. App. 1980)* (non-negligent excavation); *Hermanson v. Morrell, 252 N.W.2d 884 (N.D. 1977)* (excavation damage to land and improvements); *Lyon v. Walker Boudwin Constr. Co., 503 P.2d 1219 (Nev. 1972)* (excavation despite weakness of structure on adjoining land).

(n16)Footnote 41. *Spall v. Janota, 406 N.E.2d 378 (Ind. App. 1980)* (non-negligent excavation); *Blake Constr. Co. v. United States, 585 F.2d 998 (Ct. Cl. 1978).*

(n17)Footnote 42. *Pacific Indem. Co. v. Rathje, 188 N.W.2d 338 (Iowa 1971)* (excavation exposed foundation of building on adjoining land).

(n18)Footnote 43. *See* Annotation, *Liability of One Excavating on His Own Premises for Resulting Injury to Adjoining Building*, 50 A.L.R. 486 (1927); 59 A.L.R. 1252 (1929).

(n19)Footnote 44. *Waters v. Biesecker, 298 S.E.2d 746 (N.C. App. 1983), review allowed, 302 S.E.2d 249 (N.C. 1983), aff'd, 305 S.E.2d 539 (N.C. 1983)* (negligent excavation caused damage to nearby window and walls); *Royal Indem. Co. v. Schneider, 485 S.W.2d 452 (Mo. App. 1972)* (excavator knew of weakness in adjacent construction); *Lerner Jewelers, Inc. v. L.L. Glascock, Inc., 199 So. 2d 66 (Miss. 1967); Schmidt v. Chapman, 131 N.W.2d 689 (Wis. 1964).*

(n20)Footnote 45. *DiNuzzo v. Gardner, 551 N.Y.S.2d 359 (1990), on appeal, 557 N.Y.S.2d 307 (1990)* (no excavator duty to inspect condition of soil unless requested to); *Baranowski v. Strating, 250 N.W.2d 744 (Mich. App. 1976)* (house built on unstable soil); *S.H. Kress & Co. v. Reaves, 85 F.2d 915* (4th Cir.), *cert. denied, 299 U.S. 616 (1936); New York Cent. Ry. v. Marinucci Bros. & Co., 149 N.E.2d 680 (Mass. 1958).*

(n21)Footnote 46. *Beaver v. Hitchcock, 153 S.E.2d 886 (W. Va. 1967); Walker v. Strosnider, 67 S.E. 1087 (W. Va. 1910).*

(n22)Footnote 47. *Christensen v. Mann, 204 N.W. 499 (Wis. 1925)* (excavator gave notice of need for shoring, then provided shoring, then brought action to recover cost).

(n23)Footnote 48. *Mullan v. Hacker, 49 A.2d 640 (Md. 1946)* (settling of ground because of wet weather).

(n24)Footnote 49. *Spall v. Janota, 406 N.E.2d 378 (Ind. App. 1980)* (non-negligent excavation).

(n25)Footnote 50. *Walker v. Strosnider, 67 S.E. 1087 (W. Va. 1910)* (excavating landowner should take into account nature and uses of adjoining land); *Mullan v. Hacker, 49 A.2d 640 (Md. 1946)* (weather and method of excavation considered in determining liability).

(n26)Footnote 51. *Walker v. Strosnider, 67 S.E. 1087 (W. Va. 1910)* (excavating landowner should take into account nature and uses of adjoining land).

(n27)Footnote 52. *Jamison v. Myrtle Lodge No. 355, A.F. & A.M., 139 N.W. 547 (Iowa 1913)* (weakness in plaintiff's building may have contributed to settling); *Smith v. Hardesty, 31 Mo. 411 (1861)* (plaintiff's own conduct considered in determining liability for collapsed wall).

(n28)Footnote 53. *Lugin v. Dobson, 104 A.2d 95 (Pa. 1954)* (liability for negligent excavation even though parties' land separated by a highway); *Olson v. Mullen, 68 N.W.2d 640 (Minn. 1955)* (defendants left a ledge sufficient to support adjoining land in its natural condition).

(n29)Footnote 54. *Truscott v. Peterson, 50 N.W.2d 245 (N.D. 1951)* (negligent excavation); *Pacific Indem. Co. v. Rathje, 188 N.W.2d 338 (Iowa 1971)* (excavation exposed foundation of adjacent building).

(n30)Footnote 55. *St. Joseph Light & Power Co. v. Kaw Valley Tunneling, Inc., 589 S.W.2d 260 (Mo. 1979), appeal after remand, 660 S.W.2d 26 (Mo. App. 1983)* (damages from sewer construction); *City of La Crosse v. Jiracek Cos. 324 N.W.2d 440 (Wis. App. 1982)* (landowner to provide supporting party wall for condemned adjacent building).

(n31)Footnote 56. *Exchange Nat'l Bank v. Code, 163 N.E.2d 554 (Ill. App. 1959)* (owner of 24-story building seeking to recover cost of shoring up adjacent buildings).

(n32)Footnote 57. *Durante v. Alba, 109 A. 796 (Pa. 1920)* (collapse of party wall after wet weather); *Colorado Fuel and Iron Corp. v. Salardino, 245 P.2d 461 (Colo. 1952)* (holding that an owner of land is entitled to damages where lateral or subjacent owner failed to exercise due care).

(n33)Footnote 58. *Walker v. Strosnider, 67 S.E. 1087 (W. Va. 1910)* (excavating landowner should take into account nature and uses of adjoining land).

(n34)Footnote 59. *Gildersleeve v. Hammond, 67 N.W. 519 (Mich. 1896)* (collapse of sand and gravel soil, with no preventive measures taken).

(n35)Footnote 60. *Behrens v. W.S. Bills & Sons, 283 N.E.2d 1 (Ill. App. 1972)* (strict liability under statute requiring protection of buildings during excavation); *Proud v. W.S. Bills & Sons, Inc., 255 N.E.2d 64 (Ill. App. 1970)* (statutory liability).

(n36)Footnote 61. *James Stewart Co. v. Garden Plaza Bldg. Corp., 356 P.2d 31 (Ariz. 1960)* (adjoining landowner failed to take protective measures); *Exchange Nat'l Bank v. Code, 163 N.E.2d 554 (Ill. App. 1960)* (action for declaratory judgment that excavator must take protective measures on adjoining land); *Smith v. Roberts, 370 N.E.2d 271 (Ill. App. 1977)* (action for shoring up costs).

(n37)Footnote 62. *Christensen v. Mann, 204 N.W. 499 (Wis. 1925)* (excavating owner liable for costs for shoring up adjacent building).

(n38)Footnote 63. *Waters v. Biesecker, 298 S.E.2d 746* (N.C. App.), *review allowed, 302 S.E.2d 249* (N.C.), *aff'd, 305 S.E.2d 539 (N.C. 1983)* (failure to notify intended excavation was negligence); *City of La Crosse v. Jiracek Cos., 324 N.W.2d 440 (Wis. App. 1982)* (landowner to provide supporting party wall for condemned adjacent building).

(n39)Footnote 64. *Hermanson v. Morrell, 252 N.W.2d 884 (N.D. 1977)* (excavation damage to land and improvements).

(n40)Footnote 65. *Smith v. Roberts, 370 N.E.2d 271 (Ill. App. 1977)* (notices were defective in failing to indicate depth of excavation).

(n41)Footnote 66. *S.H. Kress & Co. v. Reaves, 85 F.2d 915* (4th Cir.), *cert. denied, 299 U.S. 616 (1936)* (notice was too late for protective measures to be taken).

(n42)Footnote 67. *Michelsen v. Upton, 123 N.W.2d 850 (Neb. 1963)* (action for building damages, even though plaintiffs knew of nature and extent of excavation).

(n43)Footnote 68. *Puckett v. Sullivan, 12 Cal. Rptr. 55 (1961)* (action for excavation damages on non-contiguous land).

(n44)Footnote 69. *Waters v. Biesecker, 298 S.E.2d 746* (N.C. App.), *review allowed, 302 S.E.2d 249* (N.C.), *aff'd, 305 S.E.2d 539 (N.C. 1983)* (failure to notify intended excavation was negligence); *S.H. Kress & Co. v. Reaves, 85 F.2d 915* (4th Cir.) *cert. denied, 299 U.S. 616 (1936).*

(n45)Footnote 70. *Exchange Nat'l Bank v. Code, 163 N.E.2d 554 (Ill. App. 1959)* (action to recover cost of shoring up adjacent building).

(n46)Footnote 71. *Hermanson v. Morrell, 252 N.W.2d 884 (N.D. 1977)* (excavation without prior notice caused damage to adjacent land and improvements).

(n47)Footnote 72. *Smith v. Roberts, 370 N.E.2d 271 (Ill. App. 1977)* (notice failed to state depth of excavation, which determines which party has duty to provide shoring).

(n48)Footnote 73. *Larson v. Metropolitan St. Ry., 19 S.W. 416 (Mo. 1892)* (excavator gave assurance that buildings would not be harmed).

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CHAPTER 69 RIGHTS OF LATERAL AND SUBJACENT SUPPORT

8-69 Thompson on Real Property, Thomas Editions § 69.05

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§ 69.05 The Right to Subjacent Support.

[Go To Supp]

§ 69.05(a) Definition and General Rule of Subjacent Support.

The common law right to subjacent support is the right to have the surface in its natural state supported by the strata below. n74 The right of subjacent support is an absolute right, meaning that one responsible for the loss of subjacent support may be liable even without negligence. Issues concerning subjacent support may arise if subsurface ownership is severed from surface ownership, such as for mineral extraction or other excavations and tunnels.

COMPUTER-ASSISTED RESEARCH:

LEXIS: Subjacent support

§ 69.05(b) The Right to Subjacent Support as an Absolute Right.

The absolute nature of the right to subjacent support not only may result in imposing liability without negligence, but it may also require that the support be maintained despite technical difficulties in providing propping for the surface, or despite unexpected conditions in the soil strata or in the relative values of surface and subsurface rights. n75 However, as with the right to lateral support, no liability follows if the subjacent support is disturbed because of acts of God or other powerful natural forces. n76

The absolute nature of the right of subjacent support also means that even an owner of subsurface rights, with rights to engage in extraction of minerals or similar activities, may not do so in a way that disturbs the subjacent support owed to the surface owner. n77 Occasionally a reservation of mineral rights expressly alters the right of subjacent support, so that the holder of the rights is freer to excavate and extract. n78 Absent such modification of rights, if mining or other subsurface activities are conducted without negligence, disturbance of the subjacent support will still result in liability because of the absolute nature of the right. n79

The strict liability that flows from the absolute nature of the right to subjacent support applies only to disturbance of the surface of the land in its natural state and without buildings or other structures on it. n80

COMPUTER-ASSISTED RESEARCH:

LEXIS: Subjacent support w/20 right w/5 absolut!

§ 69.05(c) The Right to Subjacent Support for Land in Its Natural State.

As mentioned, the right to subjacent support applies to land in its natural state, n81 and liability for withdrawing this support may extend to damage from disturbing uses for which the land is naturally adapted. n82 A mining owner was held liable when it left a surface opening for its mining operations, and a horse grazing on the surface fell into the opening and was injured. n83

COMPUTER-ASSISTED RESEARCH:

LEXIS: Subjacent support w/20 right w/10 natural

§ 69.05(d) The Right to Subjacent Support for Land with Buildings.

Although the right to subjacent support applies to land in its natural state, a surface owner may recover compensation for damage to buildings on the surface caused by withdrawal of subjacent support, when the loss of support was caused by negligence in the subsurface activities. n84 In a few jurisdictions, subsurface owners are strictly liable for damage to surface buildings resulting from loss of subjacent support. n85 Even in a jurisdiction that does not grant recovery for damage to buildings, if the loss of subjacent support is so severe that the land would sink even without buildings on it, then damage to the structures on the land may often also be recovered by the surface owner. n86

The common law right of subjacent support as applied to land in its natural state has also been adapted in some jurisdictions to different levels of buildings. The owner of the upper portion of a building has a right to subjacent support from the lower portion of the building. n87 Because the owner of a lower portion of the building usually is not engaging in subsurface activities analogous to mining or other mineral extraction work, the duty to provide subjacent support in this context is mostly a passive one; the lower owner must do nothing that will disturb the subjacent support of the upper portions. Of course, the lower owner must keep the lower portion in good repair. n88 In some jurisdictions, even the duty to repair has become part of the duty to maintain subjacent support. n89 The duty to repair, and other expansions of the right of subjacent support, also can be created by agreement between the parties.

COMPUTER-ASSISTED RESEARCH:

LEXIS: Subjacent support w/20 right w/20 building

§ 69.05(e) The Right to Subjacent Support from Subsurface Waters.

If land surface is supported at least partially by subsurface waters and silt, that support, too, must be left intact according to the right of subjacent support. n90 This seems to be the rule in the relatively few American jurisdictions that have addressed the question; the English and common law rules are to the contrary. n91

COMPUTER-ASSISTED RESEARCH:

LEXIS: Subjacent support and water w/5 subsurface

FOOTNOTES:
(n1)Footnote 74. *City of Northglenn v. Grynberg, 846 P.2d 175 (Colo. 1993)* (attempt to extract coal from beneath

highway), *cert. denied, Grynberg v. City of Northglenn, 510 U.S. 815 (1993); Island Creek Coal Co. v. Rodgers, 644 S.W.2d 339 (Ky. App. 1982). In re Application of Pennsylvania Turnpike Commission, 715 A.2d 1219 (Pa. Commw. 1998)* (action to determine amount of vertical and lateral support to be provided by coal underlying a section of an expressway situated over a mine).

(n2)Footnote 75. *Marvin v. Brewster Iron Mining Co., 55 N.Y. 538 (1874)* (support duty exists even though mineral rights reserved in deed).

(n3)Footnote 76. *Carlin v. Chappel, 101 Pa. 348 (1882)* (defendants who mined the coal non-negligently were still liable when surface water broke in through openings made in the surface for the mining operations).

(n4)Footnote 77. *Platts v. Sacramento N. Ry., 253 Cal. Rptr. 269 (1988)* (action by landowner whose house collapsed into an old abandoned railroad tunnel); *Williams v. Hay, 14 A. 379 (Pa. 1888)* (reservation of mineral rights by grantor).

However, *see Schultz v. Consolidation Coal Co., 475 S.E.2d 467 (W. Va. 1996)* (absolute right of subjacent support may be modified through agreement, although defendant is still liable for damages); *Haseman v. Orman, 680 N.E.2d 531 (Ind. 1997)* (lessor of subsurface mineral rights jointly and strictly liable for subjacent support damage caused by lessee's exercise of rights). *Locklin v. City of Lafayette, 13 Cal. Rptr. 2d 889 (1992)* (a landowner who removed the subjacent support from its tunnel would be absolutely liable for damages caused by the subsidence; in this case, causation was not established).

(n5)Footnote 78. *Rocking M. Ranch, Inc. v. Saliana Coal Co., 576 N.E.2d 1120 (Ill. App. 1991)* (subsidence of grazing and crop land caused by coal mining); *Franklin v. Callicoat, 119 N.E.2d 688 (Ohio 1954).*

(n6)Footnote 79. *Gladin v. Von Engeln, 575 P.2d 418* (Colo.), *appeal after remand, 590 P.2d 76 (Colo. App. 1978)* (building damage from removal of support during transit); *Coleman v. Chadwick, 80 Pa. 81 (1875).*

(n7)Footnote 80. *Wright v. Buckeye Coal Co., 434 A.2d 728 (Pa. Super. 1981)* (action to recover damages to houses caused by subsidence from coal mining).

(n8)Footnote 81. *Island Creek Coal Co. v. Rodgers, 644 S.W.2d 339 (Ky. App. 1982)* (property damage from blasting in an underground coal mine); *Marin Mun. Water Dist. v. Northwestern Pac. R. Co., 61 Cal. Rptr. 520 (1967)* (damage to water lines from collapse of railroad tunnel underneath the lines); *Lerner Jewelers, Inc. v. L.L. Glascock, Inc., 199 So. 2d 66 (Miss. 1967)* (holding that right of lateral support during excavation on adjoining land applies to land only in its natural state).

(n9)Footnote 82. *Cole v. Signal Knob Coal Co., 122 S.E. 268 (W. Va. 1924)* (grazing horse fell through hole caused by subsidence from defendant's coal mine).

(n10)Footnote 83. *Cole v. Signal Knob Coal Co., 122 S.E. 268 (W. Va. 1924)* (grazing horse fell through hole caused by subsidence from defendant's coal mine).

(n11)Footnote 84. *Platts v. Sacramento N. Ry., 253 Cal. Rptr. 269 (1988)* (action by landowner whose house collapsed into an old abandoned railroad tunnel); *Wheat v. Freeman Coal Mining Corp., 319 N.E.2d 290 (Ill. App. 1974)* (property damage from smoke and coal dust).

(n12)Footnote 85. *Gladin v. Von Engeln, 575 P.2d 418* (Colo.), *appeal after remand, 590 P.2d 76 (Colo. App. 1978)* (lateral support removed by relocation of a creek channel); *Collins v. Gleason Coal Co., 115 N.W. 497, rehearing denied, 118 N.W. 36 (Iowa 1908)* (subjacent support damaged by coal operations).

(n13)Footnote 86. *Campbell v. Louisville Coal Mining Co., 89 P. 767 (Colo. 1907)* (surface damage caused by

unsupported coal mine).

(n14)Footnote 87. *Paola Lodge No. 147, I.O.O.F. v. Bank of Knob Nester, 176 S.W.2d 511 (Mo. App. 1943)* (decay in lower level of building caused damage on upper floor).

(n15)Footnote 88. *Maddock v. Chase, 51 A.2d 145 (N.H. 1947)* (affirmative duty of repair as between upper and lower owners denied).

(n16)Footnote 89. *Graves v. Berdan, 26 N.Y. 498 (1863)* (action by tenant to require restoration after destruction by fire).

(n17)Footnote 90. *New York Cent. Ry. v. Marinucci Bros. & Co., 149 N.E.2d 680 (Mass. 1958)* (damage to railroad right of way allegedly caused by nearby excavation).

(n18)Footnote 91. *See* Annotation, *Right of Property Owner to Repel or Remove Flood Water from Building*, 4 A.L.R. 1104 (1919); *Finley v. Teeter Stone, Inc., 248 A.2d 106 (Md. 1968)* (no liability for sinkholes caused by removal of percolating water). *New York Cent. R. Co. v. Marinucci Bros. & Co., 149 N.E. 2d 680 (Mass. 1958).*

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CHAPTER 69 RIGHTS OF LATERAL AND SUBJACENT SUPPORT

8-69 Thompson on Real Property, Thomas Editions § 69.06

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§ 69.06 Procedural Rules Governing Actions for Loss of Lateral and Subjacent Support.

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§ 69.06(a) Proper Parties.

When damage has occurred from loss of lateral or subjacent support, any party holding a possessory or ownership interest in that land is entitled to bring an action for the loss. n92 Therefore, present possessors, reversioners and remaindermen, n93 lessees, n94 and easement owners may hold concurrent rights of action. n95 Even a plaintiff who acquired title by adverse possession may bring an action for loss of lateral or subjacent support, but only for the damage that occurred after the adverse possession title was perfected. n96

This large group of possible plaintiffs is matched by a large group of possible defendants. Any party who participates in causing the damage through loss of the lateral or subjacent support can be made a defendant. Thus, owners, occupants and hired excavators are all potential defendants. n97 In rare circumstances, an owner or occupier of adjacent land may escape liability for loss of lateral support, if the loss was caused by an excavation that was begun before the occupant assumed possession. n98 A landowner who comes into possession after an excavation on the land has taken place may yet be liable for loss of lateral support, if the prior excavator established a retaining wall or other artificial support that needs to be kept in repair. n99

COMPUTER-ASSISTED RESEARCH:

LEXIS: (Lateral or subjacent) w/5 support w/50 (party or plaintiff or defendant) w/5 proper

§ 69.06(b) Limitations of Actions and Other Defenses.

A common defense raised by defendants in actions for loss of lateral or subjacent support is that the applicable statute of limitations has expired. Frequent conflict in this matter arises over when the cause of action accrued so that the period of the statute of limitations begins to run. Although American courts are divided on this question, most hold that the cause of action accrues when the subsidence first occurs, n100 and that repeated subsidences give rise to new and repeated causes of action. n101 But a few courts have held that the cause of action accrues earlier, when the excavation or other removal of the support occurs, even though the manifestation of damage occurs only later. However, these

courts apply this earlier accrual rule only if the excavation does not violate a law or ordinance. n102 Even in these minority jurisdictions, if the excavation was illegal, then the later accrual of the cause and, thus, the extended time of the statute of limitations, will be applied. Indeed, in those jurisdictions, the accrual of the cause of action is delayed either until the subsidence occurs or until the illegal removal of the support is discovered or reasonably could have been discovered. n103 In most states, the applicable statute of limitations is the statute pertaining to actions for real property generally.

Of the few other defenses available to defendants in actions for loss of lateral or subjacent support, occasionally a defendant may show that prior notice of an excavation was given as an affirmation of due care. n104 Also, by specific agreement, the parties may remove or limit the defendant's exposure to liability for damage from loss of support. n105

One other defense that may conform to the factual circumstances is that subsidence may have been caused by the extra weight and pressure posed by buildings on the surface of plaintiff's land.

COMPUTER-ASSISTED RESEARCH:

LEXIS: (Lateral or subjacent) w/5 support w/20 defense

§ 69.06(c) Pleadings and Proof.

In a typical complaint for loss of lateral or subjacent support, the pleading will describe the respective parcels of land where the damage occurred and where the cause of damage originated; the nature of the plaintiff's interest in the land that was damaged; the nature of the defendant's responsibility or rights in the land from which the damage originated; the specific nature of the defendant's accountability for the actual cause of the damage; the actual cause of the damage; the details of the damage; and, if a claim for recovery for structural damages is included, averments concerning the defendant's negligence. If structures are not involved, the plaintiff should aver that the damaged land was in its natural condition n106 and, if the land had buildings on it, the plaintiff should allege that the structures did not increase the lateral pressure, and thus contribute to the subsidence. n107 Special damages must be specifically pleaded. n108 The plaintiff must carry the burden of proof on a preponderance of the evidence. n109

COMPUTER-ASSISTED RESEARCH:

LEXIS: (Lateral or subjacent) w/5 support w/20 (pleading or complaint or proof or prove)

§ 69.06(d) Remedies for Loss of Lateral or Subjacent Support.

§ 69.06(d)(1) Compensatory and Exemplary Damages.

The successful plaintiff in an action for loss of lateral or subjacent support may recover compensation for all damages proximately caused by the removal of the support. n110 If the damage to the plaintiff's land is permanent, and the land is not to be restored to its prior undamaged condition, the measure of damages is the loss of property value. n111 If the land is to be restored or may be restored, then the cost of restoration is the measure of damages, and if the land may or may not be restored, then whichever measure of damages is less is applied in the case. n112 A few courts have taken the position that, because the land is simply to be restored to its natural state, the proper measure of damages is the value of the lost soil. n113

In those cases where the plaintiff has established liability for damaged structures, then the amount of those damages must also be taken into account. n114 Where the plaintiff is a tenant of a building, the proper measure of damages is the loss of the value of the rented premises. n115 In some jurisdictions the right to support is considered a servitude, rather than a natural right, and in those jurisdictions an award can be made for prospective damage from a wrongful

excavation. n116

There is no bar to recovering exemplary damages in an action for loss of lateral or subjacent support, as long as the right to compensatory damages has also been established. n117

COMPUTER-ASSISTED RESEARCH:

LEXIS: (Lateral or subjacent) w/5 support w/100 damage w/5 (compensat! or exemplary)

§ 69.06(d)(2) Injunctions.

Plaintiffs showing loss or threatened loss of lateral or subjacent support may also obtain injunctions to restrain the cause of such loss, even if the possible monetary loss would be small. n118 The right to such relief is established by pleading and proving the usual elements of (1) inadequacy of remedies at law and (2) irreparable harm from continuance of the condition or activity that threatens the support. n119 In the granting of such injunctions, a court will balance the right of a landowner to lateral or subjacent support against the right of an adjoining landowner to excavate on the land, and will attempt to limit the scope of such injunctions as much as possible. n120 Under most federal and state mining reclamation acts, the operator of an underground mine is required to correct material damage resulting from subsidence by restoring land, to the extent technologically and economically feasible, to a condition capable of maintaining the value and reasonably foreseeable uses it supported before the subsidence. n121

COMPUTER-ASSISTED RESEARCH:

LEXIS: (Lateral or subjacent) w/5 support w/100 damage w/5 (injunct! or enjoin)

FOOTNOTES:
(n1)Footnote 92. *Seal v. Aldredge, 111 S.E.2d 769 (Ga. App. 1959)* (loss of lateral support when grade of adjacent land was lowered). *Kim v. City of New York, 681 N.E.2d 312 (NY 1997).*

(n2)Footnote 93. *Gordon v. Automobile Club of Am., 167 N.Y.S. 585, aff'd, 167 N.Y.S. 588 (1917)* (failure to support building as required by statute).

(n3)Footnote 94. *Behrens v. W.S. Bills & Sons, 283 N.E.2d 1 (Ill. App. 1972)* (building collapse caused by nearby excavation); *Walker v. Strosnider, 67 S.E. 1087 (W. Va. 1910)* (building collapse damage equipment in the building).

(n4)Footnote 95. *Corley v. Exxon Pipeline Co., 821 S.W.2d 435 (Tex. App. 1991)* (sandpit collapse exposed a section of a pipeline); *San Jacinto Sand Co. v. Southwestern Bell Tel. Co., 426 S.W.2d 338 (Tex. Civ. App. 1968), cert. denied, 393 U.S. 1027 (1969)* (lateral and subjacent support for underground telephone line easements); *New York Cent. Ry. v. Marinucci Bros. & Co., 149 N.E.2d 680 (Mass. 1958)* (removal of support from railroad right of way).

(n5)Footnote 96. *Schiro v. Oriental Realty Co., 76 N.W.2d 355 (Wis. 1956), later appealed, 97 N.W.2d 385 (Wis. 1959)* (attempt by adverse possessor to recover damages for personal injuries).

(n6)Footnote 97. *Keck v. Longoria, 771 S.W.2d 808 (Ark. App. 1989)* (excavation by defendant's predecessor in title); *Waters v. Biesecker, 298 S.E.2d 746* (N.C.), *review allowed, 302 S.E.2d 249* (N.C.), *aff'd, 305 S.E.2d 539 (N.C. 1983)* (liability on landowner whose excavation was conducted by an independent contractor); *Haseman v. Orman, 660 N.E.2d 1041 (Ind. App. 1996)* (mineral lessor was a passive lessor and was not strictly liable to surface owners for removal of subjacent support caused by mineral lessee), *superseded by Haseman v. Orman, 680 N.E.2d 531 (Ind. 1997).*

(n7)Footnote 98. *Lee v. Takao Bldg. Dev. Co., 220 Cal. Rptr. 782 (1985)* (defendant purchased land after nearby damage had already occurred).

(n8)Footnote 99. *Klebs v. Yim, 772 P.2d 523 (Wash. App. 1989)* (duty to maintain retaining wall built by predecessor in interest); *Keck v. Longoria, 771 S.W.2d 808 (Ark. App. 1989); Gorton v. Schofield, 41 N.E.2d 12 (Mass. 1942).*

(n9)Footnote 100. *Nida v. American Rock Crusher Co., 855 P.2d 81 (Kan. 1993)* (removal of support occurred 30 years before subsidence occurred). *Lincoln Bank & Trust Co. v. Neustadt, 917 P.2d 1005 (Okla. App. 1996)* (summary judgment affirmed since claim was outside both statute of limitations and statute of repose); *Hall's Park Motel, Inc. v. Rover Constr., Inc., 460 S.E.2d 444 (W. Va. 1995)* (statute of limitations began to run when the property sustained a noticeable injury from a traumatic event).

(n10)Footnote 101. *Asiala v. City of Fitchburg, 505 N.E.2d 575 (Mass. App. 1987)* (building damage from negligently maintained retaining wall); *Bellman v. Contra Costa County, 5 Cal. Rptr. 692 (1960).*

(n11)Footnote 102. *Griffin v. New Orleans Drainage Comm'n, 34 So. 799 (La. 1903)* (limitations period began to run when the trench was dug).

(n12)Footnote 103. *Williams v. Southern Ry., 396 S.W.2d 98 (Tenn. 1965), appeal after remand, 417 S.W.2d 573 (Tenn. 1966)* (damage from earthslide into a railroad cut); *Lewey v. H.C. Fricke Coke Co., 31 A. 261 (Pa. 1895)* (subsidence from coal operations).

(n13)Footnote 104. *Hermanson v. Morrell, 252 N.W.2d 884 (N.D. 1977)* (notice given after excavation had begun); *Kim v. City of New York, 681 N.E.2d 312 (NY 1997).*

(n14)Footnote 105. *Stamp v. Windsor Power House Coal Co., 177 S.E.2d 146 (W. Va. 1970)* (deed to subsurface mineral rights did not include the duty to support overlying strata); *Pennsylvania Coal Co. v. Mahon, 260 U.S. 393 (1922); Feinzig v. Ficksman, 674 N.E.2d 1329 (Mass. App. 1997)* (denied plaintiff's request to build retaining wall on defendant's adjacent land to support construction of driveway).

(n15)Footnote 106. *Jennemann v. Hertel, 264 S.W.2d 911 (Mo. App. 1954)* (trees and shrubs allegedly removed).

(n16)Footnote 107. *Noone v. Price, 298 S.E.2d 218 (W. Va. 1982)* (purchasers knew of deteriorated condition of retaining wall).

(n17)Footnote 108. *Barr v. Smith, 598 So. 2d 438* (La. App.), *writ denied, 604 So. 2d 998 (La. 1992)* (special damages awarded for mental anguish and for survey expenses); *Hanrahan v. City of Baltimore, 80 A. 312 (Md. 1911)* (groundwater seepage caused by open trench).

(n18)Footnote 109. *B.A. Mtg. Co. v. McCullough, 590 S.W.2d 955 (Tex. Civ. App. 1979)* (insufficient evidence on amount of damages); *Seal v. Aldredge, 111 S.E.2d 769 (Ga. App. 1959)* (evidence sufficed to show title and damage). *Pender v. Matranga, 1997 Conn. Super. LEXIS 423,* (Conn. Super. Feb. 20, 1997) (defendant failed to prove that plaintiff's excavation encroached upon the natural lateral support for the defendant's easement); *Colorado Fuel & Iron Corp. v. Salardino, 245 P.2d 461 (Colo. 1952).*

(n19)Footnote 110. *Platts v. Sacramento N. Ry., 253 Cal. Rptr. 269 (1988)* (action by landowner whose house collapsed into an old abandoned railroad tunnel); *Kim v. City of New York, 681 N.E.2d 312 (NY 1997).*

(n20)Footnote 111. *Helm Bros. v. Trauger, 389 N.W.2d 600 (N.D. 1986)* (damages for diminution in value); *Tortolano v. DiFilippo, 349 A.2d 48 (R.I. 1975). Pugel v. Monheimer, 83 Wash. App. 688 (Wash. App. 1996)* (where damage to property is permanent, measure of damages is diminution in value); *Easter v. Dundalk Holding Co., 86 A.2d 477 (Md. App. 1952)* (damages for erosion could not be recovered in the absence of evidence showing loss of property value).

(n21)Footnote 112. *B. A. Mtg. Co. v. McCullough, 590 S.W.2d 955 (Tex. Civ. App. 1979)* (damages for diminution of land value); *Brewitz v. St. Paul, 99 N.W.2d 456 (Minn. 1959); Spall v. Janota, 406 N.E.2d 378 (Ind. App. 1980).*

(n22)Footnote 113. *McGettigan v. Potts, 24 A. 198 (Pa. 1892)* (house collapsed into excavation pit).

(n23)Footnote 114. *Waters v. Biesecker, 298 S.E.2d 746, review allowed, 302 S.E.2d 249, aff'd, 305 S.E.2d 539 (N.C. 1983)* (city's excavation caused loss of lateral support); *Noone v. Price, 298 S.E.2d 218 (W. Va. 1982)* (subsidence caused by deteriorated retaining wall).

(n24)Footnote 115. *Island Lime Co. v. Seattle, 211 P. 285 (Wash. 1922)* (damages based on rental value).

(n25)Footnote 116. *Williams v. Missouri Furnace Co., 13 Mo. App. 70 (1882)* (adjacent land subsided into excavation pit).

(n26)Footnote 117. *Kolodkin v. Griffin, 75 S.E.2d 197 (Ga. App. 1953)* (exemplary damages for willful and reckless trespass and excavation). In Louisiana, only compensatory damages are awarded. *Bentley v. Industrial Fire Protection Co., 338 So. 2d 1177 (La. App. 1976).*

(n27)Footnote 118. *Bradley v. Valicenti, 138 A.2d 238 (Pa. Super. 1958)* (injunction requiring construction of retaining wall); *Gorton v. Schofield, 41 N.E.2d 12 (Mass. 1942)* (money damages to pay for repair of retaining wall).

(n28)Footnote 119. *Ahern v. Warner, 450 N.E.2d 662 (Mass. App. 1983)* (action for damages and injunction); *Gladin v. Von Engeln, 575 P.2d 418* (Colo.) *appeal after remand, 590 P.2d 76 (Colo. App. 1978)* (damage from city's excavation); *Powers v. Olson, No. CV 960563230, 1998 Conn. Super. LEXIS 2094,* at *11 (Conn. Super. July 17, 1998) (holding that harm to Plaintiff's trees is irreparable and limited injunctive relief is appropriate because the harm is actual or imminent); Riverbluff Coop. v. City of Memphis & Mayor W.W. Herenton, No. 02*A01-9805-CH-00128, 1998 Tenn. App. LEXIS 558* (Tenn. App. July 24, 1998) (sustaining lower courts denial of injunctive relief because of a lack of proof of immediate and irreparable injury as required by the state procedural rules).

(n29)Footnote 120. *Farrand v. Marshall, 19 N.Y. (Barb.) 380 (1853), aff'd, 21 Barb. 409 (N.Y. 1855)* (action by owner of improved land against owner of industrial land).

(n30)Footnote 121. *Rose v. Oneida Coal Co., Inc., 466 S.E.2d 794 (W. Va. 1995).*

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CHAPTER 69 RIGHTS OF LATERAL AND SUBJACENT SUPPORT

8-69 Thompson on Real Property, Thomas Editions § 69.07

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§ 69.07 Bibliography.

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Supp. To CHAPTER 69 RIGHTS OF LATERAL AND SUBJACENT SUPPORT

8-69 Thompson on Real Property, Thomas Editions Supp. to § 69.01

Supp. to § 69.01 Introduction and Definition

[Go To Main]

Add:

Watson v. Michael Haskins Photography, Inc., 2005 Texas App. LEXIS 9838 (Tex. App. 2005) (Temporary injunction against an adjacent landowner for failure to repair a common wall).

Add:

Downs v. Lyles, 2009 Ala. Civ. App. LEXIS 512 (citing *Moody v. McClelland, 39 Ala. 45, 48 (1863)* in holding that the right applies "to the support of land in its natural state").

Add:

Pecanty v. Miss. S. Bank, 2010 Miss. App. LEXIS 232 (holding that "the duty to provide lateral support is ongoing and run[s] against the servient land").

Add:

XI Props. v. RaceTrac Petroleum, Inc., 151 S.W.3d 443, 447 (Tenn. 2004) (Holding that an adjacent landowner has no duty to replace the lateral support for artificial additions to land); *Lusardi v. Kensington Bldg. Corp., 2005 Mo. App. LEXIS 1730 (Mo. Ct. App. 2005)* (Holding that a showing of subsidence is necessary for a cause of action for damages for the withdrawal of lateral support).

Add:

Pecanty v. Miss. S. Bank, 2010 Miss. App. LEXIS 232 (requiring no showing of negligence to show a breach of duty of support).

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Supp. To CHAPTER 69 RIGHTS OF LATERAL AND SUBJACENT SUPPORT

8-69 Thompson on Real Property, Thomas Editions Supp. to § 69.02

Supp. to § 69.02 The Natural Right of Lateral Support for Land

[Go To Main]

§ 69.02(a) Lateral Support of Land in Its Natural State [Go To Main]

Add:

Downs v. Lyles, 2009 Ala. Civ. App. LEXIS 512 (quoting *Moody v. McClelland, 39 Ala. 45, 48 (1863)* in holding that "the adjacent proprietor cannot remove the earth to such an extent as to withdraw the natural support of his neighbor's soil").

§ 69.02(b) Lateral Support of Land That Has Been Altered or Filled [Go To Main]

Add:

XI Props. v. RaceTrac Petroleum, Inc., 151 S.W.3d 443, 448 (Tenn. 2004) (Holding that the right of lateral support does not extend to filled land); *Lusardi v. Kensington Bldg. Corp., 2005 Mo. App. LEXIS 1730 (Mo. Ct. App. 2005)* (Holding that a showing of subsidence is necessary for a cause of action for damages for the withdrawal of lateral support).

Add:

Morewood Point Cmty. Ass'n v. Port Auth., 2010 Pa. Commw. LEXIS 182 (quoting *Beal v. Reading Co., 370 Pa. 45, 51*

(Pa. 1952) in holding that "a landowner is under no duty affirmatively to supply lateral support"); *Pecanty v. Miss. S. Bank, 2010 Miss. App. LEXIS 232* .

§ 69.02(c) Lateral Support of Land with Buildings [Go To Main]

Add:

Lusardi v. Kensington Bldg. Corp., 2005 Mo. App. LEXIS 1730 (Mo. Ct. App. 2005) (Holding that a showing of subsidence is necessary for a cause of action for damages for the withdrawal of lateral support).

Add:

Pecanty v. Miss. S. Bank, 2010 Miss. App. LEXIS 232 (holding that "this principle [of lateral support] applies only to land in its natural state").

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Supp. To CHAPTER 69 RIGHTS OF LATERAL AND SUBJACENT SUPPORT

8-69 Thompson on Real Property, Thomas Editions Supp. to § 69.04

Supp. to § 69.04 Liability Imposed for Loss of Lateral Support

[Go To Main]

§ 69.04(b) Loss of Lateral Support Caused by Excavation [Go To Main]

§ 69.04(b)(1) Loss of Lateral Support from Land Without Structures

Add:

Great Northern Ins. Co. v. Leontarakis, 904 A.2d 846 (N.J. Super. 2006) (an excavating owner had a statutory duty to provide lateral support to a neighboring owner's wall).

Add:

Lusardi v. Kensington Bldg. Corp., 2005 Mo. App. LEXIS 1730 (Mo. Ct. App. 2005) (Holding that a showing of subsidence is necessary for a cause of action for damages for excavation of a neighboring land resulting in a withdrawal of lateral support).

Add:

Pecanty v. Miss. S. Bank, 2010 Miss. App. LEXIS 232 (affirming trial court's decision to hold original landowners liable for excavating in order to make improvements on their land).

Add:

But see Downs v. Lyles, 2009 Ala. Civ. App. LEXIS 512 (holding that runoff water from neighbor's construction of a driveway was a trespass and not a violation of the right of lateral support).

Add:

Bentley v. COP Construction Co.,, 2005 ML 423, 17 (Mont. Dist. 2005) (subsidence caused by nearby excavation).

Add:

Pecanty v. Miss. S. Bank, 2010 Miss. App. LEXIS 232 .

§ 69.04(b)(2) Loss of Lateral Support from Land With Structures

§ 69.04(b)(2)(ii) When Liability Only for Negligence is Imposed

Add:

Atlantic Exp. Transp. Corp. v. Weeks Marine, Inc., 869 N.Y.S.2d 326 (2008) (action for damages caused by loss of lateral support from drilling, blasting and dredging of channel adjacent to plaintiff's property).

Louthan v. Ekizian, 2005 Cal. App. Unpub. LEXIS 3641, 2-3 (California Unpublished Opinions 2005) (Natural and improved property damaged when sewer was installed).

Add:

Bentley v. COP Construction Co., 2005 ML 423, 25 (Mont. Dist. 2005) (liability for damages to a neighboring but noncontiguous tract must rest on negligence).

§ 69.04(b)(2)(iii) The Standard of Care

Add:

Bentley v. COP Construction Co., 2005 ML 423, 37 (Mont. Dist. 2005) (Jury should decide whether there was a loss of subjacent support due to negligence).

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Supp. To CHAPTER 69 RIGHTS OF LATERAL AND SUBJACENT SUPPORT

8-69 Thompson on Real Property, Thomas Editions Supp. to § 69.05

Supp. to § 69.05 The Right to Subjacent Support

First Amendment

§ 69.05(b) The Right to Subjacent Support as an Absolute Right [Go To Main]

Add:

Saddle Mt. Minerals, L.L.C. v. Joshi, 152 Wash. 2d 242, 255 (Wash. 2004) (Deed to extract minerals by any manner as long as it does not raise the issue of subjacent support).

Add:

Ambrosia Land Investments, LLC v. Peabody Coal Co., 521 F.3d 778 (7th Cir. 2008) (action by surface owner against mining company for loss of subjacent support).

§ 69.05(c) The Right to Subjacent Support for Land in Its Natural State [Go To Main]

Add:

Gary v. Braddock Cemetery, 517 F.3d 195 (3d Cir., 2008) (action for loss of support by mining beneath a cemetery and causing subsidence).

Add:

Bentley v. COP Construction Co., 2005 ML 423, 2 (Mont. Dist. 2005) (Excavation of a trench to install a sewer).

Add:

Ambrosia Land Investments, LLC v. Peabody Coal Co., 521 F.3d 778 (7th Cir. 2008) (action against mining company for withdrawal of subjacent support).

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Supp. To CHAPTER 69 RIGHTS OF LATERAL AND SUBJACENT SUPPORT

8-69 Thompson on Real Property, Thomas Editions Supp. to § 69.06

Supp. to § 69.06 Procedural Rules Governing Actions for Loss of Lateral and Subjacent Support

[Go To Main]

§ 69.06(a) Proper Parties [Go To Main]

Add:

DOT v. UTP Corp., 847 A.2d 801, 804 (Pa. Commw. Ct. 2004) (defendants acquired interest in land after the subsidence damage occurred).

§ 69.06(d) Remedies for Loss of Lateral or Subjacent Support [Go To Main]

§ 69.06(d)(1) Compensatory and Exemplary Damages

Add:

Lusardi v. Kensington Bldg. Corp., 2005 Mo. App. LEXIS 1730 (Mo. Ct. App. 2005) (Holding that a showing of subsidence is necessary for a cause of action for damages for the withdrawal of lateral support).

Hunter Melissa C. "Property-Rights of Land Owners-Owner's Right to Lateral Support of Land That has been Altered from its Natural State," *73 Tenn. L. Rev. 529 (2006).*

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Supp. To CHAPTER 69 RIGHTS OF LATERAL AND SUBJACENT SUPPORT

8-69 Thompson on Real Property, Thomas Editions Supp. to § 69.07

Supp. to § 69.07 Bibliography.

[Go To Main]

Articles: Add:

Duncan, Myrl L., "Reconceiving the Bundle of Sticks: Land as a Community-Based Resource," *32 Envtl. L. 773 (Fall 2002).*

Hunter, Melissa C., "Property-Rights of Land Owners--Owner's Right to Lateral Support of Land That Has Been Altered from Its Natural State," *73 Tenn. L. Rev. 529 (2006).*

Annotations

Delete first entry under Annotations and replace with:

Annotation, *Measure of Damages for Loss of or Interference with Lateral Support, 36 A.L.R.2d 1253*

Add the following:

Annotation, *Duty and Liability of Owner in Respect of Lateral or Surface Support as Affected by Excavation, or Other Conditions, Created by His Predecessor in Title*, 139 A.L.R. 1267 .

Annotation, *Liability of Adjoining Owner for Destruction or Weakening of Lateral Support by Act of God or Sudden Unforeseen Natural Force*, 132 A.L.R. 997 .

Annotation, *Limitation of Actions: When Does Statute Begin to Run Against Action Based on Removal of Lateral or Subjacent Support*, 26 A.L.R. 1235 .

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CHAPTER 70 WASTE

8-70 Thompson on Real Property, Thomas Editions 70.syn

AUTHOR: Professor David A. Thomas J. Reuben Clark Law School Brigham Young University

§ 70.syn Synopsis to Chapter 70: WASTE

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CHAPTER 70 WASTE

8-70 Thompson on Real Property, Thomas Editions § 70.01

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§ 70.01 Outline of the Chapter.

This chapter discusses the concept of waste as it applies to both real and personal property. Waste as a form of injury to property is defined in §70.03. The characteristics of waste that distinguish it from other causes of action are described in §70.04. The elements or requirements for a cause of action in waste are discussed in §70.05.

The various types of waste are distinguished in §70.06. In §70.07 the historical development of the concept of waste is set forth, including the English and American statutory influences. This section also includes a discussion of how waste has been characterized in the American Restatement of Property. Following this historical treatment, §70.08 gives a comprehensive review of the wide variety of circumstances that give rise to a cause of action in waste, in both real and personal property contexts.

Concluding the chapter are several sections on the procedural aspects of waste actions, including proper parties (§70.09), remedies (§70.10), defenses (§70.11), and practice and procedure considerations (§70.12), including drafting instructions (§70.13).

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CHAPTER 70 WASTE

8-70 Thompson on Real Property, Thomas Editions § 70.02

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§ 70.02 Overview of the Law of Waste.

The law of waste protects the owner of a future interest in property from depredations by the present possessor. It is one of the common law doctrines with deepest roots in feudalism and the Middle Ages. In medieval England land was almost always occupied by some type of tenant, so the law of waste performed the important function of defining the extent of occupants' rights of use and the consequences of misuse or neglect. Accordingly, an extraordinary number of early statutes defined and refined waste law. In the 13th century no fewer than six major statutory pronouncements dealt with waste law, beginning with the Magna Carta in 1215 and concluding with the Statute of Waste in 1292. Probably no other common law doctrine received such heavy statutory attention so early in its development.

The statutes introduced more convenient legal procedures for controlling waste and mandated the harsh remedies of treble damages and forfeiture of the property. While English jurisprudence eventually rejected multiple damages and forfeiture, the American colonies and states either received them into their common law or re-enacted them in many of their state statutes. In both countries, however, even with statutory sanction, the extreme remedies coupled with the traditional action of waste were left largely unused when the more facile action on the case for waste became acceptable; the action on the case yielded only single damages and no forfeitures.

Litigation in waste cases remained popular in the United States as long as American society was essentially agrarian. Many of the leading cases arose in the early decades of the 19th century. These cases reaffirm the basic principles of the old common law doctrine, especially that a present possessor is required to preserve the property essentially unchanged in value and character, in anticipation of the time when the future interest ripens into possession. Both misuse and neglect are prohibited; limited duties of repair and maintenance are imposed; payment of current taxes, mortgage interest, and insurance premiums is required; use of timber and extraction of mineral and other resources are permitted under limited circumstances; and some beneficial changes in the character of the property and its improvements are permitted. The rights of a future interest holder to control the use and condition of the property in the hands of present possessors weaken as the future interests become more remote or less likely to eventually vest.

Waste litigation has become relatively rare today, and waste cases may be affected by changes in other areas of the law. For instance, most states have now adopted some form of implied warranty of habitability, requiring landlords to maintain residential rental premises in minimally safe and habitable condition. These requirements effectively shift

from tenants to landlords many of the duties of maintenance and repair that, under the law of waste, rested with tenants as present possessors of the property.

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CHAPTER 70 WASTE

8-70 Thompson on Real Property, Thomas Editions § 70.03

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§ 70.03 Definition.

"Waste" is the technical term of law that describes a use of property, by one lawfully in possession of the property, that is detrimental to another's interest in the same property. n1 More specifically, waste is the destruction or alteration of property by an owner in possession, to the detriment of one or more others who hold an interest in the property and are usually not in possession. To constitute waste, an act or omission must be wrongful, unreasonable, or improper, and must be permanently harmful to the value of the premises, including impairment of evidence of title. Typical examples of waste are cutting of timber or neglect of buildings by a life tenant in possession, for which a reversioner or remainderman has a cause of action in waste.

Waste as a legal concept is only indirectly related to the modern popular meaning of waste, which refers to thoughtlessly or carelessly using or squandering some resource. The term waste probably came into English from similar Old French and Latin words signifying a place that was empty and desolate as well as a place that had been plundered, ravaged or destroyed. n2 The dual connotations of barrenness and damage are both elements in the modern legal concept of waste. According to that concept, waste is an act or omission that is wrongful, unreasonable, or improper, and is permanently harmful to the value of the premises, including impairment of evidence of title.

FOOTNOTES:
(n1)Footnote 1. *Virginia Vermiculite, Ltd. v. W.R. Grace & Co.-Conn., 965 F. Supp. 802 (W.D. Va. 1997), rev'd, 156 F.3d 535 (4th Cir. 1998)* (waste defined as a destruction or material alteration or deterioration of freehold, or of improvements forming material part thereof, by any person rightfully in possession, with less than fee title (citing *Chosar Corp. v. Owens, 370 S.E.2d 305 (Va. 1988)).*

(n2)Footnote 2. 12 The Oxford English Dictionary 139 (1970).

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CHAPTER 70 WASTE

8-70 Thompson on Real Property, Thomas Editions § 70.04

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§ 70.04 Distinctive Features of Waste Law.

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§ 70.04(a) Waste Distinguished from Tort.

It has been asserted that waste is a form of tort. n3 Because actions for waste existed long before the 19th century when torts were recognized as a distinct category of the law, waste typically is not included in major treatises on tort law. Most attempts to frame a comprehensive definition for torts as a class of conduct, however, are broad enough to include waste. n4 Where doubt exists about characterization of waste as a tort, the activity at issue has sometimes been called a "tort in the nature of waste." n5

§ 70.04(b) Waste Distinguished from Trespass.

In most cases waste is rather easily distinguished from trespass, even though similar conduct might be involved. Waste is based on privity of estate n6 and -- in theory -- can be committed only by one rightfully in possession of the damaged premises, whereas trespass is committed by one who is not in rightful possession of the premises. n7

Some confusion between the concepts of waste and trespass may arise in cases of wasteful conduct committed by one who is a stranger to the title. A few courts have permitted an action in waste by the remainderman or reversioner directly against the stranger, n8 such as a trespasser upon leased premises, even though privity of estate is lacking. n9

§ 70.04(c) Wasteful Conduct as Relative to Circumstances.

Acts or omissions that constitute waste in some circumstances may not be considered waste under all circumstances. Under common law, waste is a flexible concept influenced by the type of property and the reasonableness of the defendant's conduct under the circumstances. n10 In some jurisdictions this flexibility has been stiffened by statute, which may impose liability for certain types of waste conduct whenever and wherever it occurs. n11

FOOTNOTES:
(n1)Footnote 3. Powell on Real Property(R), ch. 56, *Waste* (Michael Allan Wolf ed., Matthew Bender).

Keesecker v. Bird, 490 S.E. 2d 754 (W. Va. 1997) (waste is a property damage tort (citing *Cecil v. Clark, 39 S.E. 202 (W. Va. 1901))* distinguished by *Boucher Inv., L.P. v. Annapolis-West Ltd. Partnership, 784 A.2d 39* (Md. App. Oct. 31, 2001).

(n2)Footnote 4. *See, e.g.,* William L. Prosser & Page Keeton, Prosser and Keeton on The Law of Torts §1, at 1-7 (5th ed. 1984).

(n3)Footnote 5. *See, e.g.,* Grant S. Nelson & Dale A. Whitman, Real Estate Finance Law §4.4, at 152 (2d ed. 1985). The question of waste as a tort can arise when a mortgagor is left in possession of the mortgaged premises in a jurisdiction that adheres to the common law view that waste can be committed only by a tenant for life or for years. A court in such an instance would characterize the wasteful conduct as a tort in the nature of waste for which the plaintiff might bring an action either in trespass or in trespass on the case. *Delano v. Smith, 92 N.E. 500 (Mass. 1910)* (an action by a mortgagee against a lessee that used the land as a smallpox hospital was "an action of tort in the nature of waste").

(n4)Footnote 6. *Stevens v. Mobil Oil Corp., 412 F. Supp. 809 (E.D. Mich. 1976)* ("the primary distinction between waste and trespass is that in [waste] the injury is done by one rightfully in possession").

(n5)Footnote 7. *See supra* Chapter 68.

(n6)Footnote 8. *See supra* §70.09(i).

(n7)Footnote 9. *California Dry-Dock Co. v. Armstrong, 17 F. 216 (D. Cal. 1883)* (shipowners declared liable in waste to lessors of land when their ship broke loose and damaged a marine railway on the leased premises).

(n8)Footnote 10. Coke's categorical pronouncement that cutting timber was waste probably led some English courts to take a more dogmatic approach toward this particular and rather common problem. Coke on Littleton *53a, *as discussed in* John Henry Merryman, *Part 20: Waste, in 5* American Law of Property 71 (A. James Casner ed. 1952).

(n9)Footnote 11. Statutory modifications of common law waste concepts are discussed *infra* §70.07(d) and (k).

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CHAPTER 70 WASTE

8-70 Thompson on Real Property, Thomas Editions § 70.05

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§ 70.05 Elements of Waste.

§ 70.05(a) Committed by One Who Is Lawfully in Possession of the Property.

Subject to certain trespass actions being characterized as waste actions, n12 waste can be committed only by a party lawfully in possession of the property. n13

§ 70.05(b) An Act or Omission That Is Wrongful.

Waste commonly arises from the destruction, misuse, alteration, or neglect of property. n14 Numerous types of wrongful acts or omissions have been held to constitute waste n15 and usually fall into several general categories that are mentioned frequently in published judicial opinions. These categories commonly are described in such terms as abuse or destructive use of property; consumption of things belonging to the inheritance; acts contrary to the ordinary course of good husbandry; unreasonable or improper use; mismanagement; unlawful acts or omissions of duty; destruction of things on the land not included in its temporary profits; spoliation, spoil or destruction in houses, gardens, trees, or other corporeal hereditaments; improper destruction or material alteration or deterioration of the freehold; acts which are willful and constitute lack of ordinary care; poor husbandry; employment of resources prodigally or without any considerable return or effect; and improper conversion of rents and profits by a mortgagor.

§ 70.05(c) Damage to the Property Interest of Another.

Not all misuse of property constitutes waste. The resultant harm from wasteful conduct must be prejudicial to the interests in the property held by another, such as a remainderman or co-owner of a concurrent estate. n16 The types of damage that have been held to constitute waste have been described as those tending to destroy security for mortgage; lasting damage or permanent loss to the freehold or its improvements or anything forming an essential part of the freehold; permanent injury to the inheritance; definite physical injury; depreciation of value; substantial injury; increase in the burden on the estate; acts causing the disherison n17 of the remainderman; acts or omissions which tend to destroy the identity of the property or impair evidence of title; and destruction of the corporeal hereditaments on the premises.

FOOTNOTES:

(n1)Footnote 12. *See infra* §70.09(i).

(n2)Footnote 13. *Genesco, Inc. v. Monumental Life Ins. Co., 577 F. Supp. 72 (D.S.C. 1983)* (cause of action for waste must be against one legally in possession of the property; a mortgagee who was also the assignee of landlord's interest in the leased premises was permitted to recover in a waste action against landlord).

See generally infra §70.09.

See North Am. Sec. Life Ins. Co. v. Harris Trust & Sav. Bank, 859 F. Supp. 1163 (N.D. Ill. 1994) (lawful possession required in action for waste) distinguished by *Boucher Inv., L.P. v. Annapolis-West Ltd. Partnership, 784 A.2d 39* (Md. App. Oct. 31, 2000); *Wright Motors, Inc. v. Marathon Oil Co., 631 N.E.2d 923 (Ind. 1994)* (lawful possession required in action for waste). *See generally Glass v. Kirkland, 29 F.3d 1266, 1271 (8th Cir. 1994)* (expounding difference between waste and trespass).

(n3)Footnote 14. *Genesco, Inc. v. Monumental Life Ins. Co., 577 F. Supp. 72 (D.S.C. 1983)* (failure to maintain roof in watertight condition, causing waste through physical damage and cancellation of lease).

Three & One Co. v. Geilfuss, 504 N.W.2d 393 (Wis. 1993) (urine-caused damage to carpet and flooring constituted waste). *Kimbrough v. Reed, 943 P.2d 1232 (Idaho 1997)* (real property includes waste of lawn, trees, and shrubs).

(n4)Footnote 15. *See infra* §70.08.

(n5)Footnote 16. *Genesco, Inc. v. Monumental Life Ins. Co., 577 F. Supp. 72 (D. S.C. 1983)* (landlord neglect leading to cancellation of a lease assigned as security for payment of a debt is waste as between landlord and mortgagee).

Carter v. Helmsley-Spear, Inc., 861 F. Supp. 303 (S.D.N.Y. 1994), aff'd in part, rev'd in part, 71 F.3d 77 (2d Cir. 1995) (but waste dismissal upheld), *cert. denied, 517 U.S. 1208 (1996)* (action not found to be waste because of lack of damage to a concurrent estate holder; also, in New York waste will only be found if damage alters the nature of the property).

(n6)Footnote 17. "Disherison" means to deprive an heir of the right to succeed to the estate of an ancestor, and is also referred to as "disinheritance."

Carter v. Helmsley-Spear, Inc., 861 F. Supp. 303, 335 (S.D.N.Y. 1994), aff'd in part, rev'd in part, 71 F.3d 77 (2d Cir. 1995), cert. denied, 517 U.S. 1208 (1996).

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CHAPTER 70 WASTE

8-70 Thompson on Real Property, Thomas Editions § 70.06

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§ 70.06 Types of Waste Recognized in Modern Law.

Waste as a legal concept appears in several forms, active and passive, concrete and abstract, present and prospective. These forms are embodied in the types of waste described in this section.

§ 70.06(a) Voluntary or Commissive Waste.

Voluntary or commissive waste consists of deliberate or voluntary destructive acts. n18 A common example is causing damage to or destruction of a building on the premises. n19

§ 70.06(b) Permissive Waste.

Permissive waste may be described as neglecting or failing to prevent injury to the property, or the failure to exercise ordinary care in preserving the property. n20 The propriety of a right of action for permissive waste was questioned after enactment of the Statutes of Marlborough and Gloucester in the 13th century because their provisions applied to those who "made" or "did" waste; however, early English courts concluded that permissive waste actions had been permitted under the common law even before those statutes and should be continued. The concept of permissive waste at that time included waste that occurred without the fault of the tenant in possession, such as damage caused by a trespasser. Under pressure of the harsh common law remedies of multiple damages and forfeiture, the permissive waste concept eventually came to exclude the instances of so-called innocent waste; for the same reason it also became inapplicable where no actual damage had occurred to the reversion or remainder. As the action on the case for waste became popular, some English courts took the somewhat arbitrary position that permissive waste could not come within the ambit of an action on the case. When the action on the case became the principal procedural remedy for waste in 19th century England, uncertainty existed about whether permissive waste would sustain a cause of action. In the United States, courts have consistently upheld a right of action for permissive waste. n21

§ 70.06(c) Equitable Waste.

Equitable waste consists of acts committed by the lawful possessor and within the rights of possession, but which are nevertheless harmful to the property. Courts of equity are said to act particularly against a tenant's acts which are wanton, malicious or unconscientious. For instance, the owner of a defeasible fee, at law not liable in waste to the

holder of the reversionary or executory interest, could be held liable for abusive conduct under a theory of equitable waste. n22 Equitable waste is today largely a theoretical concept, almost never invoked in modern cases. In no reported case of the twentieth century has a court decreed liability under a theory of equitable waste.

§ 70.06(d) Ameliorative Waste.

According to the controversial concept of ameliorative waste, some acts that increase the value of the premises can be considered waste under some circumstances. It is popularly believed that this concept requires that the inheritance be turned over to the remainderman or reversioner in condition essentially unchanged from the time it was granted, so that even a valuable alteration will violate the expectations of the remainderman or reversioner. n23 Such a conception has understandably brought the doctrine into some disrepute. A closer examination of the English origins of the concept, however, provides a more plausible foundation: not all changes benefitting the present possessory interest necessarily benefitted the future freehold; if the present change, even though adding value at the moment, actually injured the freehold's value, impaired its evidence of title, or added to its burdens, it could be charged as waste. The concept has lost much force in England and in the United States. n24

§ 70.06(e) Innocent Waste.

Originally included within the concept of permissive waste, innocent waste came to mean property damage that occurred without the fault (or neglect) or participation of the possessory tenant, such as damage caused by accident or by a trespasser. No liability for innocent waste attaches in England n25 or in the United States today. n26

§ 70.06(f) Eventual Waste.

Eventual waste is a rare label used to describe the wasteful conduct of one in possession of property which has become the subject of an action to try title. The common law procedural remedy to restrain such waste and to obtain damages for waste already caused since institution of the title action was a writ of estrepement. Thus, a court decreed, in dictum, that "all such acts as would be deemed waste, when done by an admitted particular tenant, if done after the institution of any suit involving title, or of a suit for partition, it may be well to denominate eventual waste." n27 In effect, then, any waste which could be the subject of a writ of estrepement, could be denominated eventual waste.

FOOTNOTES:
(n1)Footnote 18. *Moore v. Phillips, 627 P.2d 831 (Kan. App. 1981).*

Carter v. Helmsley-Spear, Inc., 861 F. Supp. 303, 335 (S.D.N.Y. 1994), aff'd in part, rev'd in part, 71 F.3d 77 (2d Cir. 1995) (but waste dismissal upheld), *cert. denied, 517 U.S. 1208 (1996). See Three & One Co. v. Geilfuss, 504 N.W.2d 393 (Wis. 1993)* (urine-caused damage to carpet and flooring constituted waste).

(n2)Footnote 19. *Dorsey v. Speelman, 459 P.2d 416 (Wash. App. 1969)* (interior of house destroyed by tearing out walls and ceilings, destroying cabinets, and ripping out wiring).

See Three & One Co. v. Geilfuss, 504 N.W.2d 393 (Wis. 1993) (urine-caused damage to carpet and flooring constituted waste). *McNeese v. Hutchinson, 724 So. 2d 451 (Miss. App. 1998)* (filling in swimming pool).

(n3)Footnote 20. *Prudential Ins. Co. of Am. v. Spencer's Kenosha Bowl, Inc., 404 N.W.2d 109 (Wis. App. 1987)* (non-assuming grantee of mortgagor liable in permissive waste to mortgagee for failing to keep building roof in good repair).

(n4)Footnote 21. *See infra* §70.07(j)(1) and (k)(2).

Kestel-Rauls v. Moore, 586 N.W.2d 699 (Wisc. App. 1998) (unpublished opinion listed in Table) (puppy, kitten,

cigarette, and iron damage to carpet).

(n5)Footnote 22. *Landers v. Landers, 151 S.W. 386 (Ky. 1912)* (the owner of a defeasible fee interest could be restrained from injurious acts which were wanton and unconscientious abuses of fee owner's rights).

(n6)Footnote 23. In *Palmer v. Young, 108 Ill. App. 252 (1903),* the court declared that any change in the character of the property would be waste, and if the change increased the value of the property, it would still be actionable as ameliorative waste. In Ohio, when the land occupant reduced a muck pond and created an artificial lake in its place, in preparation for a golf course, the court conceded it could be technically considered waste, but because of the increased value to the estate, no liability would result. *J.H. Bellows Co. v. Covell, 162 N.E. 621 (Ohio App. 1927).* Most authority on ameliorative waste is from British courts, cited for American courts in 27 Ruling Case Law *Waste,* §§3, 38 (1920). *See especially Meux v. Cobley, 2 Ch. 253 (1892),* holding that replacing meadowland and arable ground with a market garden was ameliorating waste, but denying damages or injunction.

(n7)Footnote 24. *See infra* §70.07(j)(2) and (k)(3).

(n8)Footnote 25. *See infra* §70.07(j)(1).

(n9)Footnote 26. A series of 19th century American cases included statements in dictum to the effect that a life tenant is liable to a remainderman for waste committed by a stranger. These were founded in part on a statement of Coke's that a "tenant by the curtesie, tenant in dower, tenant for life, yeares, etc. shall answer for the waste done by a stranger, and shall take their remedy over." Coke, 1 Institutes *54a. The most recent American case reaffirming this position, again only in dictum, is *Dix v. Jaquay, 88 N.Y.S. 228 (1904).* It seems safe to assume that the doctrine of liability for innocent waste is now dead in the United States.

(n10)Footnote 27. *Duvall v. Waters, 1 Bland. (Md. Ch.) 569, 575 (1827).*

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CHAPTER 70 WASTE

8-70 Thompson on Real Property, Thomas Editions § 70.07

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§ 70.07 History of Waste.

§ 70.07(a) Early Waste Actions Associated with Life Estates.

Although the origins of waste doctrine are obscure, the doctrine must have been important in the early common law, because the essential principles of it are mentioned in the earliest common law literature. Even by the time of Glanville and Bracton, however, the common law of waste struggled to meet the needs of landholders and was ripe for statutory modification. Because in its earliest form the action for waste was coupled with certain life estates that arose by law, examining the development of the life estate in English land law provides insight into how actions for waste may have evolved.

§ 70.07(b) Origins of Life Estates.

The common law life estate may have evolved from a property interest known in Dark Age Europe as the *precarium*, or the practice of one party possessing and using another party's land, for whatever consideration seemed appropriate. The precarium was one element of classic Roman property jurisprudence that survived the barbarian invasions. Inevitably this property relationship led to bonds of patronage within which the possessor, the holder of the beneficium, came under the protection and power of the owner. In the lower reaches of society this practice meant that the tenants obtained their land on heavy conditions and gradually slipped into serfdom, bound to the land. Among the more fortunate classes, many conferred lands on the church for the sake of their souls, but reserved rights of possession during their lifetimes. Also, in purely secular transactions, an important aristocrat might obtain possessory rights to a large tract of land from the monarch, perhaps as a reward for past service or in expectation of future service. n28

In Anglo-Saxon England property rights were distinguished as bookland, folkland and laenland, with laenland bearing close resemblance to the continental precarium. The word laen is likely related to the modern German Lehn, which means loan, although in the feudal context it is interpreted as fief or fee. Laenland in Anglo-Saxon England was literally loaned and, according to available documentation, was almost always loaned to individual tenants by the English church, which had received many grants from kings and others. Possession of these lands was typically loaned out to members of the nobility, sometimes even the king, for the span of one or more lives, but never more than three lives. n29 Lump sum payments, or rent, or services would be required in return. n30 The net effect of laenland holding, as well as Anglo-Saxon bookland and folkland practices, is best expressed by Holdsworth's assertion "that the rights of

landowners are beginning in many cases to be rather rights of tenants than of absolute owners." n31

While Anglo-Saxon and continental tenures and conveyances would have eventually merged in England, "the Conquest suddenly bridged a gap which at the time was still well-marked." n32 So even after the Conquest, the life estate continued to be the usual form of landholding. An ordinary gift of land to a person was considered to convey only a life estate. n33

In addition to conventional life estates created by private conveyance, certain life estates arose by operation of law. Dower, originally a voluntary, though customary, gift made by the husband to the wife, eventually came to be recognized as an estate created by operation of law. The dower right of the wife consisted of a life estate in one-third of the land held by the husband at the time of the marriage; by the time of Edward I the dower right also applied to any land acquired by the husband after the moment of marriage. n34 Curtesy, another form of life estate created by law, seems to have originated sometime after the Conquest; this somewhat obscure term describes the husband's right to a life estate in the lands held by his wife during the marriage, if issue were born alive during the marriage. Another limited estate that arose by operation of law was attached to guardianship rights in chivalry and in socage. Those entitled to exercise guardianship rights could possess and enjoy lands inherited by minors upon the death of the father and through the duration of minority. n35 These guardianships in chivalry were technically not life estates, but were similarly finite in duration.

Despite the uncertain and sometimes brief duration of these life estates -- both those that were privately created and those that arose by operation of law -- a life tenant had the powerful rights of seisin and was considered the "owner" of land for most purposes. n36 The right, under the early common law, of a reversioner or remainderman to complain of misuse of the property by a life tenant was uncertain and in any event very limited.

§ 70.07(c) Scope of Early Common Law Remedies for Waste.

Indeed, legal historians have carried on a warm dispute about the scope of common law remedies for waste available to remaindermen and reversioners before enactment of several major 13th-century statutes dealing with waste. All authorities agree that any life tenants whose conveyances prohibited waste could be held liable for waste. n37 However, absent such prohibitions, according to some authorities, only the tenants of the estates arising by operation of law -- guardians in chivalry, tenants in dower, and tenants by the curtesy -- could be liable in waste. n38 Other historians point out that even conventional life tenants could sometimes be held liable for waste, when a royal prohibition against the waste was issued. n39 However, a royal prohibition would not issue unless the waste was substantial. n40 Yet another scholar believes that conventional life tenants could be liable for waste under the same circumstances as legal life tenants, even if no royal prohibition were issued. n41 All of these authorities agree that in the period before the great 13th-century statues on waste were enacted, tenants for years were not subject to waste liability at common law. n42

§ 70.07(d) Medieval Statutory Changes in Waste Law.

§ 70.07(d)(1) Magna Carta (Version of 1225).

The earliest statutory response to this uncertainty of remedy is probably the provision of Magna Carta which rather severely penalizes guardians in chivalry who commit waste on their wards' property:

> (1) The keeper of the land of such an heir, being within age, shall not take of the lands of the heir, but reasonable issues, reasonable customs, and reasonable services, and that without destruction and waste of his men and his goods. (2) And if we commit the custody of any such land to the sheriff, or to any other, which is answerable unto us for the issues of the same land, and he make destruction or waste of those things that he hath in custody, we will take of him amends and recompence therefore, (3) and the land shall be committed to two lawful and discreet men of that fee, which shall answer unto us for the issues of the same land, or unto him whom we will assign. (4) And if we give or sell to any man the

> custody of any such land, and he therein do make destruction or waste, he shall lose the same custody; and it shall be assigned to two lawful and discreet men of that fee, which also in like manner shall be answerable to us, as afore is said. n43

§ 70.07(d)(2) Provisions of Westminster (1259).

After Magna Carta, a series of statutes later in the 13th century addressed the problem of waste more broadly, as waste was apparently a matter of frequent judicial concern. This concern is made evident from the large number of cases dealing with waste as reported in Bracton's Note Book. n44 The first of the statutory provisions to address this need was in the Provisions of Westminster, enacted in 1259:

> Also farmers during their farms, shall not make waste, or sale, or exile, in woods, houses, men, or in any thing else belonging to the tenements which they have to farm; unless they have a special grant in the writing of their covenant, making mention that they may do so. And if they do, and be convicted thereof, they shall restore damages in full. n45

§ 70.07(d)(3) Statute of Marlborough (or Marlbridge) (1267).

The regulation of waste actions in the Provisions of Westminster applied only to tenants for years. It was re-enacted in 1267, in the Statute of Marlborough (also called the Statute of Marlbridge), which enhanced the remedy by imposing a fine along with damages:

> Also fermors, during their terms, shall not make waste, sale, nor exile of house, woods, and men, nor of any thing belonging to the tenements that they have to ferm, without special licence had by writing of covenant, making mention, that they may do it; which thing if they do, and thereof be convict, they shall yield full damage, and shall be punished by amerciament [a money fine for official misconduct] grievously. n46

§ 70.07(d)(4) Statutes of Gloucester (1278).

Even after the Statute of Marlborough, the liability of a conventional life tenant for waste, absent a royal prohibition, may still have been in doubt. n47 Thus a short time later, in 1278, more extensive legislation followed in the Statutes of Gloucester:

> (1) It is provided also, that a man from henceforth shall have a writ of waste in the Chancery against him that holdeth by law of England, or otherwise for term of life, or for term of years, or a woman in dower. (2) And he which shall be attainted of waste, shall lose the thing that he hath wasted, and moreover shall recompense thrice so much as the waste shall be taxed at. (3) And for waste made in the time of wardship, it shall be done as is contained in the Great Charter. (4) And where it is contained in the Great Charter, that he which did waste during the custody, shall leese [lose] the wardship, (5) it is agreed that he shall recompense the heir his damages for the waste, if so be that the wardship lost do not amount to the value of the damages before the age of the heir of the same wardship. n48

This enactment thus resolved any lingering doubt about who could be liable for waste: life tenants and tenants for terms were included; both conventional life estates and estates arising by operation of law were included.

Even more important were the statute's innovations in procedures and remedies for waste. The writ of waste was a new procedure, although probably not the exclusive procedure, since, according to Coke, the writ of prohibition continued in use. n49 As with other common law writs of the time, the plaintiff applied for it in Chancery; however, the action was still an action at law rather than in equity. n50 A further remedy, the writ of estrepement, was provided by the Statutes of Gloucester against waste committed by persons who were adjudged to be no longer rightfully in possession of their

land:

> (1) It is provided also, That after such time as a plea shall be moved in the city of London by writ, the tenant shall have no power to make any waste or estrepement of the land in demand (hanging the plea) and if he do, the mayor and bailiffs shall cause it to be kept at the suit of the demandant. (2) And the same ordinance and statute shall be observed in other cities, boroughs, and every where throughout the realm. n51

§ 70.07(d)(5) Statute of Westminster II (1285).

Next, the Statute of Westminster II in 1285 extended the remedies for waste to joint tenants and tenants in common:

> (1) Whereas two or more do hold wood, turfland, or fishing, or other such thing in common, wherein none knoweth his several, and some of them do waste against the minds of the other, an action may lie by a writ of waste; (2) and when it is come unto judgement, the defendant shall choose either to take his part in a place certain, by the sheriff, and by the view, oath, and assignment of his neighbours sworn and tried for the same intent, or else he shall grant to take nothing from henceforth in the same wood, turf-land, and such other, but as his partners will take. (3) And if he do choose to take his part in a place certain, the part wasted shall be assigned for his part, as it was before he committed the waste. (4) And there is such a writ in this case... n52

An important change in procedure for waste cases was also introduced by Westminster II. The summons, or writ of waste, now replaced the prohibition, because of the belief by some that an action for waste would lie only after a prohibition had been violated. By means of the summons, relief could be obtained for waste committed at any time:

> (1) Whereas for waste done in the inheritance of any person, by guardians, tenants in dower, tenants by the courtesie of England, or otherwise for term of life, or years, a writ of prohibition of waste hath been used to be granted, by which writs many were deceived, thinking that such as had done the waste should not need to answer but only for waste done after the prohibition to them directed: (2) our lord the King, to remove from henceforth this error, hath ordained, That all manner of waste done to the damage of any person, there shall from henceforth be no writ of Prohibition awarded, by a writ of Summons, so that he of whom complaint is shall answer for waste done at any time; (3) and if he come not after the Summons, he shall be attached, and after the attachment he shall be distrained; (4) and if he come not after the distress, the sheriff shall be commanded that in proper person he shall take with him twelve, etc. and shall go to the place wasted, and shall enquire of the waste done, and shall return an inquest, and after the inquest returned, they shall pass unto judgement, like as is contained in the statute of Gloucester. n53

§ 70.07(d)(6) Statute of Waste (1292).

By means of these statutes the remedies for waste evolved from preventive to punitive. The old writ of prohibition had been used to prevent threatened waste. It was suddenly replaced by the writ of waste, or summons, by which waste committed in the past could result in forfeiture and treble damages. Another writ, the writ of estrepement, was useful against persons whose possession of the land was adjudged to be no longer rightful.

Further extension of waste remedies occurred by the Statute of Waste in 1292, which decreed that "every heir ... shall have his recovery by a writ of waste... ." n54 Thus the heir of a reversioner had a right of action for waste, overcoming the old requirement that the complainant must have the "immediate state of inheritance." n55

§ 70.07(e) Exclusivity of Common Law Waste Remedies.

According to Coke and a modern legal scholar, the old writ of prohibition for waste continued to be available to plaintiffs even after the writ of waste was introduced by the Statutes of Gloucester. n56 However, it is said that the law reports carry no evidence of any legal remedy other than the writ of waste being used until the action on the case developed. n57

§ 70.07(f) Deficiencies in Common Law Waste Remedies.

Undoubtedly, the harsher remedies of forfeiture and treble damages introduced by the Statutes of Gloucester sparked a reaction among conveyancers. Some property interests were created and conveyed with express declarations that the interests were without "impeachment of waste," thus freeing the grantees to use the property without any of the common law waste restraints. n58 Law courts consistently enforced the exculpatory provisions, even if the possessor acted unreasonably. n59 The reluctance of conveyancers to submit to common law remedies was probably matched by the reluctance of some English juries to impose such drastic remedies as forfeiture or treble damages in waste cases. Common law remedies were therefore less readily available; this in turn led to more frequent intervention by equity and eventually, in England, to repeal of the statutes whence the more extreme common law remedies sprang.

§ 70.07(g) Rise of Equitable Remedies.

When aggrieved reversioners and remaindermen could get no relief at law, the Chancellor began to intervene in cases of unconscionable abuse of the property. At first the Chancellor acted in equity only when no legal remedy was available at all. If a life tenancy was protected against "impeachment of waste," but was abused in an unconscionable manner, an equitable remedy could be granted. n60 Equity cognizance then expanded to cases for which a legal remedy was available, but was deemed inadequate. n61 Such equitable intervention was initially justified on the ground that a life tenant should not be allowed to destroy the tenancy, n62 but in some later cases it was based on the presumption that the grantor intend the life tenancy to be so restrained. n63 This later rationale was weak when applied to the many life estates reserved by grantors for themselves, because they could hardly be said to have denied themselves the freedom of action they were enjoying.

§ 70.07(h) Rise of the Action on the Case for Waste.

In the early decades of the thirteenth century, it became settled that one who had been wronged by another could seek compensation by way of a complaint in an action of trespass. Writs to open such actions fell into standard forms for the most common wrongs of assault, breach of close (the typical action for trespass against real property), or asportation (the act of carrying away goods). Writs for the great variety of other wrongs required individual introductory narratives and were known as actions for "trespass on the case," meaning that the claimed wrong derived from the circumstances of the particular case presented by the complaint. The writs for actions "upon the case" were distinguished by their inclusion of detailed descriptions of the circumstances giving rise to the complaints. n64

It is not known exactly when the action on the case was first employed in a waste case, but the earliest reported cases are from the Elizabethan era. n65 At that early time, use of the action on the case may have been restricted to those instances when no other action by writ was available. n66 However, during the ensuing century courts eventually accepted the action, even though other remedies were available. n67 During the century thereafter, it would be said "case has now become the usual action for ... waste." n68

§ 70.07(i) England's Repeal of the Writ of Waste, Forfeiture, and Multiple Damages for Waste.

The action on the case for waste differed from the traditional action based on the writ of waste in two important respects. First, a successful plaintiff in an action on the case for waste recovered only single damages, not the treble damages mandated for writ of waste actions by the Statutes of Gloucester. Second, the action on the case for waste was not limited in scope to only certain classes of defendants, as was the writ of waste under the Statutes of Gloucester. According to its statutory terms, the writ of waste applied only to tenants for life or term, holding by operation of law or

by private conveyance; this led to the doctrines that waste defendants must enjoy some sort of privity of estate and that waste plaintiffs must have the immediate estate of inheritance. The writ of waste would therefore not apply in an action against a stranger who damaged land possessed by a tenant for life or years; also outside the scope of the writ of waste was a waste action by a life tenant against a lessee. However, in both instances an action on the case for waste would lie. n69 The general utility of the action on the case for waste was undoubtedly a factor leading to England's eventual repeal, in the 19th century, of the writ of waste, and with it the Statutes of Gloucester remedies of treble damages and forfeiture. n70

§ 70.07(j) Other English Alterations of Waste Law.

§ 70.07(j)(1) Permissive Waste.

Both the Statute of Marlborough and the Statutes of Gloucester applied to those who "made" or "did" waste, suggesting that waste was achieved only by commission and not by omission. The question was raised in some early English cases as to whether mere passivity or neglect which resulted in property damage, so-called permissive waste, could be charged as waste. English courts initially accepted the concept of permissive waste, partly because -- even before enactment of the 13th century waste statutes -- the common law courts had recognized a right of action against permissive waste; these courts also held the view that the waste statutes had not really changed the common law definition of waste, only the procedures and remedies. n71 Thus the judges decided that enactment of the waste statutes recognized plaintiffs' rights against permissive waste, despite the harsh, new remedies provided by statute. n72 Moreover, the concept of permissive waste at that time was broad enough in those cases to include the waste of neglect which results in deterioration, the neglect which leaves property vulnerable to damage from natural forces, and the damage caused intentionally or unintentionally by a stranger.

From the rather sketchy case authority available, however, it appears that by the 14th century courts had become reluctant to apply the harsh statutory penalties for waste in those cases of permissive waste where the defendant was not in some way at fault, particularly in cases of damage done by a stranger. n73 Thus cases of so-called innocent waste became separated from the law applicable to permissive waste. It also appears from the cases that no action for permissive waste arising from neglect would lie unless some actual damage or destruction had occurred. n74

Then, in the first half of the 17th century, permissive waste cases virtually disappeared from the records, and it was during this time that the action on the case for waste was steadily growing in popularity. By the early years of the 19th century an English court could declare that an "action on the case does not lie for permissive waste." n75 That court's pronouncement was both criticized and followed and, when the old writ of waste was abolished a few years later, leaving the action on the case as the principal legal remedy against waste, the result was considerable confusion about whether a cause of action for permissive waste would lie in the courts of England. n76 Even more modern observers of English jurisprudence still disagree over the liability of a tenant for permissive waste. n77

§ 70.07(j)(2) Ameliorative Waste.

In its most simplistic form, the doctrine of ameliorative waste n78 teaches that even acts which increase the value of the premises can be considered waste under some circumstances. Cases explaining the origins of the doctrine suggested that some changes in the land which added present value to the land were considered waste because the changes destroyed "muniments of title," that is, the physical characteristics according to which conveyancing witnesses could give evidence of title. n79 Perhaps a more perceptive judicial explanation of the doctrine is that which recalls that no act can be waste which does not injure the inheritance (remainder or reversion), and that the same act which adds value to the present possessory interest may be waste because it also diminishes the value of the future estate, or adds to its burdens, or impairs its evidence of title. n80

Despite these underlying rationales, the doctrine of ameliorative waste fell into some disrepute in England because it

seemed to invite charges of waste, with accompanying penalties of forfeiture or multiple damages, in circumstances where no apparent injury had occurred. Decisions in some English courts diluted the doctrine n81 and, in 1927, the doctrine was by statute made inapplicable to leased business property. n82 Thus modern English jurisprudence has been left with much uncertainty about the vitality of both the concepts of ameliorative waste and permissive waste.

§ 70.07(k) Development of Waste Law in the United States.

§ 70.07(k)(1) Adoption of the Statutes of Marlborough and Gloucester.

England's explicit repeal of the Statutes of Gloucester in 1833 and 1879, and with it the rejection of forfeiture and multiple damages remedies as remedies for waste, has not been followed in the United States. Undoubtedly these 13th century statutes were considered part of the common law of England and received as such by some states. n83 In other states, comparable rights of action and remedies have been re-enacted in state legislation. n84 Therefore, the extraordinary remedies of forfeiture and multiple damages for waste still exist in the jurisprudence of many states, even if they are seldom used.

From the beginning, however, American jurisprudence was more tolerant of conduct that would be characterized as waste in England. In English courts it became axiomatic that cutting trees under almost any circumstance constituted waste. In America, with timber in such abundance, and clearing of land a compelling and constant task, the rigid rule quickly gave way to a rule of reason based on notions of good husbandry. A perceptive and succinct description of early American waste law was given by James Kent: "The American doctrine on the subject of waste is somewhat varied from the English law, and is more enlarged, and better accommodated to the circumstances of a new and growing country." n85

§ 70.07(k)(2) Recognition of Permissive Waste.

The English ambivalence over liability for various types of permissive waste has not spread to the United States. American decisions consistently recognize liability for at least those varieties of permissive waste in which some fault is involved. n86 Those decisions are in accord with Kent's view:

> Under the head of permissive waste, the tenant is answerable, if the house or other buildings on the premises be destroyed by fire, through his carelessness or negligence; and he must rebuild, in a convenient time, at his own expense... .
>
> Perhaps the universal silence of our courts on the subject of any such responsibility of the tenant for accidental fires, is presumptive evidence that the doctrine of permissive waste has never been introduced, and carried to that extent, in the common law jurisprudence of the United States. n87

§ 70.07(k)(3) Exception to Ameliorative Waste.

The doctrine of ameliorative waste, which assigns waste liability in some cases where the tenant has changed the land and added to its present value, but possibly damaged the inheritance, is probably the prevailing rule in the United States, but a significant exception to liability is recognized where major changes have occurred in the area surrounding the land at issue. n88

§ 70.07(k)(4) Statutory Enactment or Modification of the Common Law of Waste in the States.

Most of the statutory pronouncements in the American states simply reaffirm the liability for waste that may attach to certain possessory interests and which of the traditional common law remedies are in force in that state. A review of individual state waste legislation shows that common law liability and remedies for waste are still quite widespread in the United States. Indeed, one jurisdiction -- the District of Columbia -- has reenacted in verbatim form the key

provisions of the old Statutes of Marlborough and Gloucester, including the arcane 13th century language that is surely unintelligible to most modern lawyers and judges.

The statutes serve the additional purpose of expressing a state's positions on certain issues or choices that have arisen over the centuries of waste law development. These issues, some of which arise only in one or a few of the state statutory provisions, may be summarized as follows:

1. Whether the state authorizes recovery of multiple damages (either triple or double) for waste. The statutes often indicate whether multiple damages may be recovered in any waste action, or are available only if the waste was wanton or malicious, or under some other specialized circumstances.

2. Whether the state authorizes the extraordinary remedies of forfeiture and eviction for waste. Such remedies may be available for any waste case, or only if the waste was wanton or malicious, or under some other specialized circumstances. A common limitation is to permit forfeiture only where the value of the defendant's interest is less than the waste damage to the plaintiff 's interest. Another common limitation is to allow forfeiture of only that part of the possessory interest that was damaged by waste.

3. Whether the state permits waste actions only by a holder of the next immediate freehold estate of inheritance. Many state statutory provisions ensure potential plaintiffs that they have a right of action even in the face of an intervening estate for life or years, but even some of those statutory assurances seem to be limited to reversioners, excluding remaindermen by inference. Such actions may also be limited to single damages even in states where multiple damages would otherwise be awarded. A statute conferring a right of action on any aggrieved party presumably does not require that a plaintiff hold the next immediate estate of inheritance.

4. Whether the state recognizes permissive as well as voluntary waste. Many of the statutes confer a right of action against one who "commits or suffers" waste, the word "suffers" thus indicating that permissive waste is also actionable. Other statutes are silent on the matter, although in those jurisdictions presumably permissive waste is also actionable under some general authority other than the waste statute.

5. Whether property interests other than real property are subject to waste actions. Many statutes refer specifically to various types of tenants of real property, again leaving it uncertain whether a right of action in waste would also apply to equivalent interests in other than real property.

6. Whether a tenant in possession has a duty of repair, neglect of which can result in a right of action for waste. Some statutes set out an explicit duty of repair and maintenance by the tenant in possession, and also specify the standard or condition of the premises required to be maintained under that duty. These objections may in turn be modified by imposition of an implied warranty of habitability in residential rentals.

7. Whether the specific common law actions for waste have been subsumed into the generic action typical in modern civil procedure. A few statutes indicate that actions for waste are considered to be the same as actions for other wrongs. n89

8. Whether an action on the case for waste is explicitly recognized.

9. Whether a right of action for waste applies to possessory interests created by operation of law.

With these issues in mind, the following summaries of state statutory provisions on waste law from more than 40 states

and the District of Columbia will more meaningfully signify the policy choices made by the respective legislatures:

Alabama. State statutes contain no general waste provisions, but in an action for ejectment, the plaintiff may recover damages for waste or any other injury to the land. n90

Alaska. A waste action may be brought against a guardian, a tenant for life or years, or a tenant in common. Judgment may be for treble damages. If the plaintiff is a reversioner and the waste damage exceeds the value of the defendant's interest, or the waste is committed with malice, judgment may be for forfeiture. n91

Arizona. Arizona has no statutory provision for a specific action against waste, but does indicate in its venue statute that a waste action should be brought in the county in which the real property is located. n92 Another provision authorizes judicial restraint of waste while land is subject to a redemption period. n93

California. A waste action may be brought against a guardian, conservator, tenant for life or years, joint tenant or tenant in common of real property; n94 a reversioner or remainderman may have an action for waste notwithstanding an intervening estate for life or years. n95 Judgment may be for treble damages and may include an injunction to restrain waste. n96 Damages for cutting or damaging trees shall be trebled. n97 The owner of a life estate "must keep buildings and fences in repair from ordinary waste and must pay taxes and other annual charges and a just proportion of extraordinary assessments benefiting the whole inheritance." n98 A purchaser at a foreclosure sale is entitled to an order restraining waste until redemption occurs; n99 a person whose interest is subject to a mortgage may not commit waste. n100

Connecticut. A waste action may be brought against a person with a life estate, estate for years or lesser estate in real property, if the interest was created by act of the parties and not by operation of law, and if the waste committed was "beyond what tenants for years or life created by operation of law may do." n101

Delaware. A waste action may be brought against a tenant by the curtesy, a tenant in dower, or a tenant for life or years; n102 an assignee of a tenant; n103 a tenant in common, joint tenant or coparcener; n104 or heir, executor or administrator of a tenant. n105 An accidental fire in a house is not waste. n106 A waste action against a tenant making repairs is prohibited, if certain notice provisions are followed. n107 Cutting of timber or improper tillage on agricultural land may be waste, and judgment may be for double the value of damage done to the land, loss of value of the land, and loss of value of the crop or timber. n108 A writ of estrepement may be awarded to restrain waste upon premises during an action of ejectment or waste, or to restrain waste upon premises subject to a lien. n109 An injunction may be granted to prevent waste. n110

District of Columbia. This jurisdiction has re-enacted the Statutes of Gloucester n111 and Marlborough n112 verbatim, including provisions for a writ of waste, treble damages, and forfeiture. A joint tenant or tenant in common may also maintain an action for waste against a cotenant. n113

Idaho. A waste action may be brought against a guardian, tenant for life or years, joint tenant, or tenant in common of real property. Judgment may be for treble damages. n114 The owner of a life estate "must keep the buildings and fences in repair from ordinary waste, and must pay the taxes and other annual charges, and a just proportion of extraordinary assessments benefiting the whole inheritance." n115

Illinois. State statutes contain no general waste provisions, but they do declare that a personal representative may be liable for waste n116 and that no waste should be comitted on any property after a sale has been made and until a tax deed has been issued or until redemption has been made. n117

Indiana. Wrongs previously remediable by action against waste are now subjects of action as other wrongs. Such actions against waste may result in judgment for damages, forfeiture of the defendant's estate, and eviction from the

premises. Forfeiture and eviction shall be granted only to a reversioner if the damage equals the value of the defendant's interest. n118 A reversioner or remainderman may maintain an action for waste notwithstanding an intervening life estate or estate for years. n119 A personal representative or a purchaser at a sheriff's sale may maintain an action for waste. n120

Iowa. A waste action may be brought against a guardian, tenant for life or years, joint tenant, or tenant in common of real property. The person liable shall pay three times the resulting damage. n121 Judgment of forfeiture and eviction may be granted if the amount of damages recovered by a reversioner is more than two-thirds of the value of the defendant's interest in the estate. n122 Treble damages shall be paid for willfully injuring any tree or shrub. n123 A remainderman or reversioner may maintain an action for waste notwithstanding an intervening estate for life or years. n124

Kansas. A remainderman or reversioner may maintain an action for waste for injury to the inheritance, notwithstanding an intervening estate for life or years. n125

Kentucky. A waste action may be brought against a tenant for life or years; the defendant shall lose the thing wasted and pay treble the amount at which the waste is assessed. n126 A remainderman or reversioner for life or years or in fee simple after an intervening estate for life or years may bring an action for waste and recover such damages as have been suffered. n127 A vendor or tenant who commits waste while still in possession of the land, shall be liable in damages. n128 A tenant in common, joint tenant or parcener who commits waste shall be liable to cotenants for damages. n129 In any action for waste, if the jury finds the waste was wantonly committed, judgment shall be entered for treble damages. n130 If waste is being or about to be committed during an action to recover or charge land, the court may order a receiver to take possession, or may stay the committing of waste by issuing an injunction or restraining order. n131

Louisiana. Although not a common law jurisdiction, Louisiana provides that a lessee may be liable for injuries to land sustained through lessee's own fault or by action of lessee's family or subtenant. n132

Maine. A waste action may be brought by the person having the next immediate estate of inheritance against a tenant in dower, by curtesy, for life or for years, who commits or suffers any waste on the premises. The plaintiff may recover the place wasted and any damages done to the premises. n133 A waste action may be brought by a remainderman or reversioner for life or years only or in fee simple after an intervening life estate. n134 If any joint tenant or tenant in common commits waste by taking trees, minerals or other valuable things from the property without prior notice to all other persons with interest in the property, any or all of those persons may recover their proportion of treble damages. n135 However, if a jury finds that the defendant in such an action proceeded in good faith or had three years' exclusive possession, only single damages will be awarded. n136 A court in an action to recover possession of real estate may issue an injunction to stay waste committed or threatened by the person in possession of the real estate. n137 If a tenant commits waste by damaging trees during the pendency of an action to recover the land, judgment shall be for treble damages. n138 If an heir or devisee of a decedent commits waste on an estate which must be sold to pay debts, the estate may recover treble damages. n139

Maryland. A waste action may be brought against any mortgagor, trust deed grantor, any person in possession of land, life tenant, tenant for years, tenant at will, periodic tenant, tenant in common, or joint tenant who commits or permits waste. The judgment shall be for actual damages. If waste is committed after an injunction to stay waste, double damages will be assessed, some part of which may be considered as damages due the plaintiff, and some part as fine. Nonpayment of the fine may result in imprisonment. n140

Massachusetts. A waste action may be brought by the person having the next immediate estate of inheritance against a tenant in dower, by the curtesy, for life or for years who commits or suffers waste on the land held. The plaintiff may recover the place wasted and the amount of the damage. n141 Persons having the next immediate estate of inheritance, reversioners or remaindermen after an intervening life estate or for life or years, may have an action of tort in the nature

of waste to recover the amount of damage. n142 A joint tenant or tenant in common who commits waste without giving cotenants prior notice of such actions, or who commits waste while partition proceedings are pending, shall pay treble damages. n143 A person in possession who commits waste during the pendency of an action to recover land shall pay treble damages. n144 If a person commits or threatens to commit waste on land after an action is brought to recover the land or foreclose a mortgage on the land, a court may enjoin the waste. n145

Michigan. Any person who commits waste against the soil or vegetation of another's land shall pay treble damages, unless the trespass was inadvertent, in which case only single damages are awarded. A waste action may be brought against any guardian, tenant in dower, life tenant, tenant for years, joint tenant, or tenant in common who commits or suffers any waste to the land. The action may be brought by the person having the next immediate estate, by any person who has the remainder or reversion in fee or for life after an intervening estate for life or years, or by purchasers not yet in possession. Judgment may be for double damages. Injunctions may issue to stay and prevent waste, and violations of injunctions are treated as contempt. n146

Minnesota. A waste action may be brought against a guardian, tenant for life or years, joint tenant, or tenant in common of real property who commits waste on the property. Judgment may be for forfeiture of the property, treble damages, and eviction from the property. Forfeiture and eviction apply only in behalf of a reversioner, if the damage to the reversion is equal to the value of the defendant's estate or unexpired term, or if the damage to the reversion was done in malice. n147

Missouri. A waste action may be brought against any tenant for life or years. The defendant may lose the thing wasted and be required to pay treble the amount of the waste. n148 An action for waste may be brought by a reversioner or remainderman for life or years, or in fee simple after an intervening estate for life or years, for recovery of the damages suffered. n149 A person in possession who commits waste after having aliened the land is liable for damages. n150 A tenant in common, joint tenant, or parcener who commits waste is liable for damages. n151 If waste is committed pending a suit to recover or charge the land, a receiver may be appointed to take possession of the land. n152 One who is entitled to bring an action for waste against a conservator may recover the damages proved. n153 In any action for waste, if a jury finds the waste was wantonly committed, judgment for treble damages shall be assessed. n154

Montana. The owner of a life estate may use the land in the same manner as the owner of a fee simple, except that no injury to the inheritance may be committed. n155 A life tenant must keep buildings and fences in good repair from ordinary waste. n156 A remainderman or reversioner may maintain an action in waste notwithstanding an intervening estate for life or years. n157 If a guardian, tenant for life or years, joint tenant, or tenant in common commits waste, judgment for treble damages may be awarded. n158

Nebraska. Although Nebraska has no statute conferring a general right of action specifically for waste, individual statutory sections provide that permissive waste is actionable, n159 and that a remainderman or reversioner has an action for waste notwithstanding an intervening estate for life or years. n160 Waste actions are also available to an heir, for waste occurring while the ancestor held the estate, n161 and to a purchaser at an execution sale, for waste occurring after the sale, especially for excessive use of timber. n162

Nevada. A waste action may be brought against a guardian, tenant for life or years, joint tenant, or tenant in common of real property for waste committed on the property. Judgment for treble damages may be granted. n163

New Hampshire. New Hampshire has no general waste statute, but state law does provide that the superior courts have jurisdiction over waste actions n164 and that cotenants have an action in assumpsit if part of the estate is destroyed, severed or carried away by another cotenant. n165

New Jersey. A guardian who commits waste of the property of the ward shall be deprived of the trust and be liable in treble damages. n166 No tenant in dower or curtesy or for life or term shall make or suffer any waste without special

license in writing. A tenant who does commit waste shall lose the thing wasted and be assessed treble damages. n167 If waste occurs between parceners, tenants in common, or joint tenants, the defendant may elect to have the property partitioned, with the wasted part included in the defendant's portion, or to give security against further waste. If the waste exceeds the value of the defendant's share, the plaintiff may recover damages. n168 Any heir may maintain an action for waste of the inheritance, with judgment for recovery of the inheritance or its value and treble damages. n169 A tenant for term or life who grants the estate to another but continues to occupy, and who commits waste thereon, shall be liable to the remainderman or reversioner for forfeiture of the property wasted or its value and for treble damages, unless the tenant was exempt from waste liability before granting the estate. n170 If a tenant of a particular estate fails to take possession and waste results, the reversioner or remainderman may serve on the tenant a demand to take possession of the premises and keep them free from waste; if the tenant does not comply within two months the plaintiff has an action for relief. n171

New York. A general guardian or guardian in socage shall not make or suffer waste, or shall lose custody of the thing wasted and be liable to the ward for damage. n172 If a party commits waste on real property during the pendency of an action affecting title to the property, the court may by order restrain any further commission of waste; disobedience to the order may be punished as a contempt. n173 A waste action may be brought against a tenant by the curtesy, in dower, for life, or for years, or assignee, who commits waste on the real property held. n174 Judgment in such an action shall be for damages, unless the damage to the reversion equals or exceeds the value of the defendant's estate or unexpired term, in which case the estate shall be forfeited to a plaintiff who holds the next entitled reversion. n175 If waste is committed by a tenant in common or joint tenant against a co-tenant, the plaintiff is entitled to damages or to a partition; the partition may include compensation to the plaintiff for damages. n176 A tenant for life or years may, under certain conditions, replace or alter the premises without liability for waste. n177 A remainderman or reversioner may maintain an action for waste notwithstanding an intervening estate for life or years. n178

North Carolina. Wrongs formerly remediable as actions of waste, are subjects of legal action as are other wrongs; judgments may be for damages, forfeiture and eviction. n179 A waste action may be brought against any person committing the waste, as well as against the tenant for life or years or a guardian. n180 A tenant in common or joint tenant may be liable in waste to a cotenant. n181 A judgment for damages may require that treble damages be recovered and the property forfeited if the damages are not timely paid. n182

North Dakota. A waste action may be brought against a guardian, tenant for life or years, joint tenant, or tenant in common, of real property, for which a judgment of treble damages, forfeiture of the defendant's estate, and eviction from the premises may be awarded. n183 Judgment of forfeiture and eviction shall not be given to a reversioner unless the injury to the reversion is equal to the value of the tenant's estate or unexpired term, or the waste was done in malice. n184 A purchaser of real property sold on execution may have a waste action for damages against a tenant in possession, after sale and before possession is delivered. n185

Ohio. A tenant in dower or life tenant who commits or suffers waste will forfeit the wasted property and will be liable in damages. n186 One coparcener [tenant in common] may maintain an action in waste against another. n187

Oklahoma. Although Oklahoma has no general waste provision in its statutes, state law does provide that a remainderman or reversioner may maintain a waste action notwithstanding an intervening estate for life or years. n188 A life tenant must keep buildings and fences in repair from ordinary waste. n189 A waste action is available against a personal representative. n190

Oregon. A waste action may be brought against a guardian, conservator, tenant in severalty or in common, for life or for years, in real property. A judgment may award treble damages, forfeiture and eviction. Forfeiture and eviction will be granted only if the injury to the reversion is equal in value to the defendant's estate or unexpired term, or when the waste was committed with malice. n191 A reversioner or remainderman may bring an action for injury to the estate notwithstanding an intervening estate for life or years. n192

Pennsylvania. An owner of an undivided interest in timber may not remove or cut the timber without written consent of all cotenants. n193 A court may issue an injunction pendente lite to restrain waste. n194 The procedure in an action to restrain waste shall be as in any equity action. n195 Other specific and specialized statutory references to waste actions have been repealed, so that procedure and remedies for waste are now apparently the same as for other actions, generally.

Rhode Island. A tenant for life or years who commits waste shall forfeit the estate in the place so wasted and double damages to the person entitled to the next estate in remainder or reversion. n196 A joint tenant, tenant in common, or coparcener who commits waste shall forfeit double damages to the other cotenants. n197 In an action for ejectment, partition or waste, a court may issue a writ of estrepement requiring the sheriff to stay all waste on the estate described in the writ. n198

South Carolina. South Carolina has repealed its former code provisions for specific actions against waste, which are now treated as ordinary actions, but state law empowers a court to appoint persons to view and assess damage from waste.

South Dakota. A waste action may be brought against a conservator, tenant for life or years, joint tenant or tenant in common of real property; a judgment may award treble damages, forfeiture and eviction. n199 Forfeiture and eviction shall be awarded only to a reversioner when the injury to the reversion equals the value of the tenant's estate or unexpired term, or the waste was done maliciously. n200 A life tenant must keep the buildings and fences in repair from ordinary waste and must pay taxes and other charges. n201

Tennessee. Any person entitled to redress for waste has a right to enjoin the commission of waste and recover damages for the waste actually committed. n202 One who possesses land under a parol agreement to purchase, which agreement is later voided by that person, is liable for waste committed during the possession. n203

Utah. A waste action may be brought against a guardian, tenant for life or years, joint tenant or tenant in common, of real property. Judgment may be for treble damages. n204

Vermont. Vermont statutes make no specific provision for an action against waste, n205 but a purchaser at an execution sale may obtain an accounting for waste, and a personal representative may be held accountable for waste. n206

Virginia. A waste action for damages may be brought against any tenant of land or any person in possession of aliened land, n207 a tenant in common, joint tenant or parcener, n208 or guardian. n209 A person entitled to damages from waste may recover them in an action on the case; if a jury finds that the waste was wanton, double damages shall be assessed. n210 It is waste for a tenant at will or for years to remove manure from the premises. n211 A tenant in possession who commits waste during the pendency of an action to recover the land may be enjoined by the court and the injunction may be enforced by contempt punishment. n212

Washington. Wrongs formerly remediable by action of waste are now the subjects of actions as other wrongs. n213 A waste action may be brought against a guardian, tenant in severalty or in common, for life or for years, or by sufferance or at will, or a subtenant, of real property. The judgment may be for treble damages or fifty dollars, whichever is greater, and forfeiture and eviction. Forfeiture and eviction may be awarded only to a reversioner against the tenant in possession and only when the injury to the reversion is equal to the value of the tenant's estate or unexpired term or was done or suffered in malice. Costs may include a reasonable attorney's fee to be fixed by the court. n214

West Virginia. A waste action for damages may be brought against a tenant of land or any person in possession who has alienated land, n215 a tenant in common, joint tenant or parcener, n216 or guardian. n217 If a tenant in possession commits waste on land during an action to recover or charge the land, the plaintiff may recover treble damages. n218 A

person entitled to damages from waste may recover them in an action on the case; if a jury finds that the waste was wanton, double damages shall be assessed. n219

Wisconsin. A waste action may be brought against a tenant who commits waste while retaining possession after letting or granting the estate, or against a joint tenant or tenant in common who commits waste of the cotenancy. n220

Wyoming. Wyoming has no statutory provision for a specific action against waste, but does provide that one parcener [the term includes a tenant in common] may bring an action of waste against another [in the context of partition proceedings]. n221 Also, a jury is authorized to view land which is the subject of a claim for waste and shall find in its verdict the damages, if any, the land has sustained by waste. n222

COMPUTER-ASSISTED RESEARCH

In LEXIS, state codes may be searched for provisions dealing with waste. Using "waste" as a search term is essential but problematic: the term is also used in reference to waste disposal and management and when used without further qualifiers will retrieve the numerous statutory references to those activities; and waste as a search term will miss statutory provisions referring only to injury or damage to land. To sharpen the search, "waste" must be combined with other terms typically found in the provisions dealing with common law waste, such as tenant, lessee, remainderman, reversioner, guardian, inheritance or estate. Even this search will miss miscellaneous provisions associated with waste statutes but not containing any of those terms, or the occasional isolated provision, such as would be found in laws dealing with decedents' estates or execution sales. For best results, the direct search of code provisions should be combined with a search of the code's general index.

§ 70.07(k)(5) Non-Statutory Remedies for Waste.

It should not be assumed that the states that have not legislated on waste law have rejected the concept. In those states, either waste law jurisprudence continues with its common law features or the action has been subsumed into the law governing civil actions generally.

§ 70.07(k)(6) The Role of the *Restatement of Property* in American Waste Law.

The first *Restatement of Property* was issued in 1936 by the American Law Institute. The *Restatement of Property* does not review or revise any of the first restatement's sections related to waste law.

All of the restatements of law are difficult to characterize, but perhaps none more so than the property restatement, because of confusion of purpose. Not limiting themselves to mere iterations of the majority rules of American property law, the restatement authors have also attempted to identify competing rules and to express preferences, even if the rule of choice does not represent the weight of judicial authority. Occasionally, an innovative alternative is adopted, even if it has never been considered and accepted by the courts. Thus on the subject of waste, the Restatement of Property stands not only as authority for what the prevailing law is in American jurisprudence, but also for what the restatement authors believe the law ought to be, with little indication as to which description applies to each individual assertion. Careful scrutiny of the comments is required to discern which of the restatement pronouncements are believed to represent a current majority view, and which provisions are included for their value in improving or reforming the law. In any event, the Restatement of Property represents a thoughtful exposition of recommended rules of law for its various topics.

The provisions of the Restatement of Property that relate most directly to waste may be summarized as follows:

(1) *Duties of a life tenant.* The owner of a possessory or reversionary life estate, unless otherwise excused, has a duty to not diminish the market value of the future estate following the life estate. n223 The life tenant also has a duty to

preserve the land and structures in a reasonable state of repair to the extent the income from the property permits. n224 As to changes in the property, the life tenant has a duty to make no changes "in such a manner that the owners of the interests limited after the estate for life have reasonable ground for objection thereto." n225 In addition to all of the duties just described, the life tenant has a basic obligation to pay taxes and any other maintenance charges that will, if left unpaid, become liens upon the property. n226

(2) *Exceptions to life tenant's duties.* These basic duties may be modified by provisions in the instrument creating the life estate, n227 or by requirements of a valid police power regulation, n228 or by the privilege to take estovers. n229 Also, if minerals were extracted or timber cut from the land before the life estate was created, the life tenant may enjoy similar rights after entering into possession. n230 The life tenant may do acts on the property, such as cutting timber, without liability, if the proceeds from such activities are used to preserve the estate in the same way that an owner in fee might act. n231 The life tenant does not need to repair damage done "by the conduct of a stranger, by accident, or by extraordinary natural force," unless the life tenant could have acted to prevent the damage and did not. n232

(3) *Corresponding rights of future interest holders.* As a corollary to the life tenant responsibilities, the Restatement also lists corresponding rights held by the owner of an indefeasibly vested future interest in a fee simple absolute following a life estate. n233 However, if the life estate is followed by a future interest that is either subject to a condition precedent or defeasibly vested, the owner of the future interest may only obtain injunctive and not monetary relief, when the life tenant violates any of those rights; n234 despite this limitation, equitable relief can usually be granted. n235

None of these rights and duties are affected by the existence of an intervening future life estate between the present life estate and the future interest in fee; n236 however, the owner of such intervening life interest has enforcement rights against the waste of the present life tenant similar to those held by the owner of the fee simple future interest. n237

If the future interest fee simple is preceded by a defeasible or conditional fee, the future interest owner may combat actual or threatened waste by an injunction, if there is a "reasonable probability" that the future interest will become a present interest, n238 but damages cannot be recovered. n239 Two or more future interest holders can in concert assert the same rights as if their interests were held by a single owner, n240 and each concurrent owner of such a future interest has the same right as would exist in a single owner of the interest. n241 If the owner of the present interest has the power to destroy the future interests, as in a life estate with a presently exercisable power of appointment, then the holder of the future interest, according to the Restatement, may not act against the waste of the present tenant. n242

(4) *The Restatement positions on multiple damages and forfeiture.* The Restatement acknowledges that waste statutes from the beginning have provided for multiple damages, but criticizes the severity of those statutes and denies that they have automatically become part of the American common law through reception of early English statutes. States should re-enact such statutes if the legislative policy is to enforce multiple damages. n243 The same attitude is taken toward the remedy of forfeiture for waste, except that forfeiture is deemed more appropriate if the damage caused by waste is at least equivalent to the value of the unexpired life estate. n244

(5) *Rights of future interest holders in things other than land.* Where rights of future interest holders in things other than land are involved, the Restatement recognizes that the present possessor must act as "the owner of complete property in a like thing would act," n245 and confers corresponding enforcement rights on the future interest owner. n246 The owner of a future interest may also act against a third person whose conduct harms or threatens to harm the future interest. n247

FOOTNOTES:
(n1)Footnote 28. Heinrich Brunner, 1 Deutsche Rechtsgeschichte 209-12 (1887-92); Frederic William Maitland, Domesday Book and Beyond 300-01 (1897).

(n2)Footnote 29. Three lives did not mean the life spans of three persons living at the time of the loan, but meant the beneficiary of the loan and "two successive heirs." Frederic William Maitland, Domesday Book and Beyond 309 (1897).

(n3)Footnote 30. 2 William Searle Holdsworth, A History of English Law 70-71 (reprint 1971).

(n4)Footnote 31. 2 William Searle Holdsworth, A History of English Law 71 (reprint 1971).

(n5)Footnote 32. 1 Frederick Pollock & Frederick William Maitland, The History of English Law Before the Time of Edward I 62-63 (2d ed. 1909).

(n6)Footnote 33. *Bracton, Y.B. 15 Edw. 3* f. 27 (R.S.) 322.

(n7)Footnote 34. Theodore F. T. Plucknett, A Concise History of the Common Law 566-67 (5th ed. 1956).

(n8)Footnote 35. 1 Frederick Pollock & Frederick William Maitland, The History of English Law Before the Time of Edward I 318-29 (2d ed. 1909).

(n9)Footnote 36. 1 Frederick Pollock & Frederick William Maitland, The History of English Law Before the Time of Edward I 9 (2d ed. 1909).

(n10)Footnote 37. John Henry Merryman, *Part 20: Waste,* in 5 American Law of Property §20.15, at 108 (A. James Casner ed. 1952).

(n11)Footnote 38. Coke on Littleton *54b; Coke, Institutes *299; 2 William Blackstone, Commentaries 282 (1766).

(n12)Footnote 39. 2 Frederick Pollock & Frederick William Maitland, The History of English Law Before the Time of Edward I 9 (2d ed. 1911); 3 William Searle Holdsworth, A History of English Law 121 (reprint 1971).

(n13)Footnote 40. Bracton, fols. 315, 316, 316b; Bracton's Note Book, no. 607 (1231); Theodore F. T. Plucknett, A Concise History of the Common Law 570 (5th ed. 1956).

(n14)Footnote 41. George W. Kirchwey, *Liability for Waste, 8 Colum. L. Rev. 425 & 624, at 426 (1908).*

(n15)Footnote 42. John Henry Merryman, *Part 20: Waste, in 5* American Law of Property §20.15, at 109 (A. James Casner ed. 1952).

(n16)Footnote 43. *9 Hen. 3,* ch. 4 (1225).

(n17)Footnote 44. Bracton's Note Book is a selection of cases heard by only two judges, Pateshull and Raleigh, during the period 1217-40. The twenty-five cases of waste noted include five dealing with life tenants: numbers 443 and 540, 607 (also in Bracton, fol. 316b), 691, 718, and 1304 and 1371. George W. Kirchwey, *Liability for Waste, 8 Colum. L. Rev. 425 & 624, at 428-29 (1908);* 3 William Searle Holdsworth, A History of English Law; 121 (reprint 1971).

(n18)Footnote 45. "Provisions of Westminster," *43 Hen. 3,* ch. 23 (1259), text and translation from 1Statutes of the Realm 11 (reprint 1963).

(n19)Footnote 46. "Statute of Marlborough" (also called the "Statute of Marlbridge"), *52 Hen. 3,* ch. 23 (1267), text and translation from 1 The Statutes at Large 71 (1762).

The word "fermor" is obscure, possibly deriving from the old Scottish "fermoror" (farmer), or perhaps originally intended as "termor" (one who holds for a term, as in 2 Britton xxxiii, §4 (1292)). *See* 4 Oxford English Dictionary 164;

11 Oxford English Dictionary 207 (1970).

(n20)Footnote 47. 3 William Searle Holdsworth, A History of English Law; 121 (reprint 1971).

(n21)Footnote 48. "The Statutes of Gloucester," *6 Edw. 1,* ch. 5 (1278), text and translation from 1 The Statutes at Large 122 (1762).

(n22)Footnote 49. 2 Coke, Institutes *299.

(n23)Footnote 50. One American court mistakenly assumed that the action was equitable, because the writ was issued from the *Chancery. Smith v. Salvation Army, 140 A. 298 (N.J. 1928)* (the court denied treble damages in a common law waste action, because the remedy was thought to be equitable, deriving from a writ issued by the Chancery, according to the Statutes of Gloucester).

(n24)Footnote 51. 6Edw. 1, ch. 13 (1278), text and translation from 1 The Statutes at Large 127 (1762); 3 William Blackstone, Commentaries 225-26 (1768).

(n25)Footnote 52. 13Edw. 1, ch. 22 (1285), text and translation from 1 The Statutes at Large 196 (1762).

(n26)Footnote 53. 13Edw. 1, ch. 14 (1285), text and translation from 1 The Statutes at Large 192 (1762).

(n27)Footnote 54. 20Edw. 1, Stat. 2 (1292), text and translation from 1 The Statutes at Large 263-64 (1762).

(n28)Footnote 55. Coke on Littleton *53b.

(n29)Footnote 56. 2 Coke, Institutes *299; George W. Kirchwey, *Liability for Waste, 8 Colum. L. Rev. 425 & 624, at 434-35 (1908).*

(n30)Footnote 57. John Henry Merryman, *Part 20: Waste, in 5* American Law of Property §20.17, at 110 (A. James Casner ed. 1952). Even Kirchwey concedes that "it is probably also true that [the writ of prohibition] was seldom resorted to and soon fell into desuetude." George W. Kirchwey, *Liability for Waste, 8 Colum. L. Rev. 425 & 624, at 434 (1908).*

(n31)Footnote 58. Blackstone suggested in 1766 that the practice of protecting some lessees against "impeachment of waste" was at least 500 years old. 2 William Blackstone, Commentaries 283 (1766).

(n32)Footnote 59. Bowles's Case, 11 Co. Rep. 79 b, *77 Eng. Rep. 1252 (1616)* (tenant for life without impeachment for waste permitted to cut trees on the property and keep the timber; the life tenant was considered to have the property, and not merely to be exempt from waste penalties).

(n33)Footnote 60. *Vane v. Lord Barnard, 2 Vern. 738, 23 Eng. Rep. 1082 (1716)* (life tenant enjoined from removing a castle roof and required to pay for repairs); *Robinson v. Litton, 3 Atk. 209, 26 Eng. Rep. 922 (1744)* (one who held an interest subject to divestment if he did not reach age 21 was enjoined from cutting £3000 worth of timber on the land nine months before his 21st birthday).

(n34)Footnote 61. *Horner (Bampfield) v. Popham, Colles 1, 1 Eng. Rep. 150 (1697)* (an injunction that was granted to restrain timber cutting by a life tenant subjected to review a House of Lords decree at law terminating the estate of the life tenant).

(n35)Footnote 62. *Bishop of London v. Web, 1 P. Wms. 528, 24 Eng. Rep. 501 (1718)* (a life tenant was not permitted to strip off topsoil for brickmaking); *Aston v. Aston, 1 Ves. Sen. 264, 27 Eng. Rep. 1021 (1749)* (a life tenant "with full liberty to commit waste" was prohibited from taking timber so extensively as to cut even saplings).

(n36)Footnote 63. Turner v. Wright, 2 De G. F. & J. 234, *45 Eng. Rep. 612 (1860)* (the holder of a fee simple subject to an executory limitation was restrained from cutting trees that had been planted by the grantor for ornamental purposes); *Micklethwait v. Micklethwait, 1 De G. & J. 504, 44 Eng. Rep. 818 (1857)* (a life tenant was not restrained from cutting ornamental trees on land from which the testator had removed the mansion house and had turned into a game cover).

(n37)Footnote 64. Theodore F. T. Plucknett, A Concise History of the Common Law 372-73 (1956).

(n38)Footnote 65. One of the earliest reported actions on the case for waste is *Jeremy v. Lowgar, Cro. Eliz. 461, 78 Eng. Rep. 714 (1596)* (a life tenant in an action on the case recovered single damages from his tenant for years who burned the house on the premises).

(n39)Footnote 66. A contemporary example of an action on the case being denied because another remedy was available is the case of *Beswick v. Cunden, Cro. Eliz. 520, 78 Eng. Rep. 768 (1596)* (a landowner was not permitted to use an action on the case to seek damages for nuisance resulting from an adjoining landowner's overflowing brook, because another remedy by writ was available).

(n40)Footnote 67. One of the last cases to question the propriety of an action on the case for waste when other remedies were available is *Jefferson v. Jefferson, 3 Lev. 130, 83 Eng. Rep. 614 (1683)* (action in case by remainderman against life tenant for pulling down house and taking away the house timbers and other materials; the court divided 2-2 on whether action on the case was permissible).

(n41)Footnote 68. *Greene v. Cole, 2 Wms. Saund. 252, 85 Eng. Rep. 1037 (1799).*

(n42)Footnote 69. *Jeremy v. Lowgar, Cro. Eliz. 461, 78 Eng. Rep. 714 (1596)* (a life tenant could bring an action on the case for waste against his tenant who burned a house on the premises).

(n43)Footnote 70. 3 & 4 Will. IV, c. 27, §36 (1833) ; 42 & 43 Vict., c. 59 (1879).

(n44)Footnote 71. Coke, too, perpetuated this view in a later century. 2 Coke, Institutes 300, 301.

(n45)Footnote 72. Nine cases from the Year Books are cited in George W. Kirchwey, *Liability for Waste,* 8 Colum. L. Rev.; 425 & 624, at 436 n.53 (1908).

(n46)Footnote 73. George W. Kirchwey, *Liability for Waste, 8 Colum. L. Rev. 425 & 624, at 625-26 (1908).*

(n47)Footnote 74. George W. Kirchwey, *Liability for Waste, 8 Colum. L. Rev. 425 & 624, at 628 (1908).*

(n48)Footnote 75. *Herne v. Benbow, 4 Taunt. 764, 128 Eng. Rep. 531 (1813).*

(n49)Footnote 76. George W. Kirchwey, *Liability for Waste,* 8 Colum. L. Rev.; 425 & 624, at 632 (1908).

(n50)Footnote 77. Merryman concluded, "Although the decisions are not uniform there seems to be no liability on life tenants under the present English law of permissive waste. *In re Parry, [1900] 1 Ch. 160.*" John Henry Merryman, *Part 20: Waste,* in 5 American Law of Property §20.12, at 99 (A. James Casner ed. 1952). Kirchwey, however, cited the earlier case of *Davies v. Davies, 38 Ch. D. 499 (1888),* "as an assertion of the general liability of such a tenant for permissive waste, even in cases where no active negligence is imputed to him." George W. Kirchwey, *Liability for Waste,* 8 Colum. L. Rev.; 425 & 624, at 635 (1908).

(n51)Footnote 78. Alternative and equally acceptable labels are ameliorating, meliorative and meliorating waste.

(n52)Footnote 79. *Young v. Spencer, 10 B. & C. 145, 109 Eng. Rep. 405 (1829)* (the court asserted that the old authorities held waste would lie for anything that destroyed evidence of title; the case was remanded for a trial on the

issue of whether a new door in a house on the property affected the reversioner's title).

(n53)Footnote 80. *Doe dem. Grubb v. Earl of Burlington, 5 B. & Ad. 507, 110 Eng. Rep. 878 (1833).* In this case a copyhold tenant pulled down a dilapidated barn on the premises, but escaped liability to the lord of the manor for waste when a jury found that the removal of the barn did not injure the inheritance. The court stated: "Upon the whole, there is no authority for saying that any act can be waste which is not injurious to the inheritance, either, first, by diminishing the value of the estate, or, secondly, by increasing the burthen upon it, or thirdly, by impairing the evidence of title." *110 Eng. Rep. at 882.*

(n54)Footnote 81. *Meux v. Cobley, 2 Ch. 253 (1892)* (an agricultural lessee who converted part of the farm to a market garden with glass houses for hot-house produce, was absolved of waste; other farms nearby had undergone similar conversions to profitable market gardens and no injury to the inheritance was shown); Doherty v. Allman, 3 App. Cas. 709 (1878) (a lessee of land under a 999-year lease was permitted to convert dilapidated storage buildings, once used as military barracks, into dwelling houses, without liability for waste). The subsequent case of *West Ham Cent. Charity Bd. v. East London Waterworks Co., 1 Ch. 624 (1900),* could be viewed as a return to a traditional rule of ameliorative waste. The *West Ham* court distinguished the Meux and Doherty cases and held that the lessee of a 99-year lease, which obtained the lease for the purpose of building a reservoir but eventually used the land as a rubbish shoot (landfill), had committed waste. Waste was found because allegedly the only value of the property at the end of the lease term would be as factory land, which would require excavation to the original level of the land, although the question of whether the landfill operation actually enhanced the value of the land was never resolved. The *West Ham* case, therefore, possibly raised no issues of ameliorative waste, in any event. *West Ham* was criticized in *Notes, Ameliorating Waste, 14 Harv. L. Rev. 226 (1900),* for its result and incomplete analysis.

(n55)Footnote 82. Landlord and Tenant Act, 17 & 18 Geo. V,c. 36, §§3, 18 (1927).

(n56)Footnote 83. The first Restatement of Property, at §198, takes the rather arbitrary position that the Statutes of Gloucester did not "become a part of the law of an American state, in the absence of an express re-enactment thereof." According to the Restatement, automatic reception should be attributed only to those rules "suitable to the different conditions and situations of the New World." The severity of the remedies and the English rejection of them persuaded the Restatement authors that the remedies were too unsuitable for the New World to qualify for automatic reception. 2 Restatement of Property §198 cmt. a, at 808 (1936). However, the large number of American states that have re-enacted or judicially adopted these extraordinary remedies suggests just the opposite. *See infra* §70.07(k)(4). *See also* Morton Gitelman, *The Impact of the Statute of Gloucester on the Development of the American Law of Waste, 39 Ark. L. Rev. 669 (1986).*

(n57)Footnote 84. For a summary of state legislation directly related to waste actions and remedies, see *infra* §70.07(k)(4).

(n58)Footnote 85. 4 James Kent, Commentaries on American Law 78 (8th ed. 1854).

(n59)Footnote 86. The types of permissive waste for which liability attaches are discussed *infra* §70.08.

(n60)Footnote 87. 4 James Kent, Commentaries on American Law 84, 85 (8th ed. 1854).

(n61)Footnote 88. Cases shaping the American doctrine of ameliorative waste are discussed *infra* §70.08(a)(2).

(n62)Footnote 89. The important question of whether the waste statute provides the exclusive right of action and remedies for waste is discussed *infra* §70.07(k)(5).

(n63)Footnote 90. Ala. Code §6-6-280.

(n64)Footnote 91. Alaska Stat. §09.45.740. *McKibben v. Mohawk Oil Co., 667 P.2d 1223 (Alaska 1983). But see,*

Wien Air Alaska v. Bubbel, 723 P.2d 627 (Alaska 1986) (mining a large quantity of ore in short time considered waste).

(n65)Footnote 92. Ariz. Rev. Stat. Ann. §12-401.

(n66)Footnote 93. Ariz. Rev. Stat. Ann. §12-401, §12-1289.

Other sections stating actions for forcible detainer or forcible entry do not bar actions for waste. Ariz. Rev. Stat. Ann. §12-1183. If property of mentally incapacitated person were subject to waste, a conservator may be appointed. Ariz. Rev. Stat. Ann. §14-5401. Trustors or others abusing property they place in trust are subject to waste claims by trustees or beneficiaries in situations where trustor's property is placed in trust to assure trustor's fulfillment of a contractual obligation to trustee or beneficiary. Ariz. Rev. Stat. Ann. at §33-806.

(n67)Footnote 94. Cal. Civ. Proc. Code §732.

Old Republic Ins. Co. v. Superior Court, 77 Cal. Rptr. 308 (Cal. App. 1998). But see Vandenberg v. Superior Court, 982 P.2d 229 (Cal. 1999) (owner must show that possessor was under duty to protect and preserve property to state cause of action for waste).

(n68)Footnote 95. Cal. Civ. Code §826.

Smith v. Cap Concrete, 184 Cal. Rptr. 2d 642 (Cal. App. 1982)(found cause of action for waste where possessor deposited broken concrete debris on land).

(n69)Footnote 96. Cal. Civ. Proc. Code §§526, 732, 745.

Old Republic Ins. Co. v. Superior Court, 77 Cal. Rptr. 2d 642 (Cal. App. 1998) (held, no coverage for claims of waste where insured's potential liability was breach of contractual obligation not to commit waste, and the contractual liability was not under the insuring clause).

(n70)Footnote 97. Cal. Civ. Proc. Code §733.

(n71)Footnote 98. Cal. Civ. Code §840.

(n72)Footnote 99. Cal. Civ. Proc. Code §729.090.

(n73)Footnote 100. Cal. Civ. Code §2929.

In re Mills, 841 F.2d 902 (9th Cir. 1988) (found no reckless or intentional despoiler of property by tenant where he used rental income for other than repairs because of financial difficulty rather than in bad faith).

(n74)Footnote 101. Conn. Gen. Stat. Ann. §52-563.

Zauner v. Brewer, 596 A.2d 388 (Conn. 1991) (life tenant has duty both to make ordinary repairs to remedy present conditions, and also to prevent property from declining in value where deterioration is substantial or permanent).

(n75)Footnote 102. Del. Code Ann. tit. 25, §901.

(n76)Footnote 103. Del. Code Ann. tit. 25, §§902-903.

(n77)Footnote 104. Del. Code Ann. tit. 25, §904.

(n78)Footnote 105. Del. Code Ann. tit. 25, §905.

(n79)Footnote 106. Del. Code Ann. tit. 25, §906.

(n80)Footnote 107. Del. Code Ann. tit. 25, §5504.

(n81)Footnote 108. Del. Code Ann. tit. 25, §6722.

(n82)Footnote 109. Del. Code Ann. tit. 25, §§910-911.

Voss v. Green, 389 A.2d 273 (Del. Super. Ct. 1978) (waste defined as spoil or destruction of land, house, trees or other corporeal hereditaments, either committed or permitted).

(n83)Footnote 110. Del. Code Ann. tit. 25, tit. 10, §343.

(n84)Footnote 111. D.C. Code Ann. §45-1201.

(n85)Footnote 112. D.C. Code Ann. §45-1202.

(n86)Footnote 113. D.C. Code Ann. §45-1204.

(n87)Footnote 114. Idaho Code §6-201.

Kibrough v. Reed, 943 P.2d 1232 (Idaho 1997) (statutory reference to real property includes waste of trees, lawn, and shrubs); *Watts v. Krebs, 962 P.2d 387 (Idaho 1998)* (court ruled defendant committed waste when he harvested more than half of his share of timber on property co-owned with another tenant).

(n88)Footnote 115. Idaho Code §55-311.

(n89)Footnote 116. 755 Ill. Comp. Stat. 5/6-14..

(n90)Footnote 117. Ill. Comp. Stat. §200/21- 410.

(n91)Footnote 118. Ind. Code Ann. §32-15-4-1.

(n92)Footnote 119. Ind. Code Ann. §32-15-4-2.

(n93)Footnote 120. Ind. Code Ann. §§29-1-13-3.

(n94)Footnote 121. Iowa Code Ann. §658.1.

(n95)Footnote 122. Iowa Code Ann. §658.2.

(n96)Footnote 123. Iowa Code Ann. §658.4.

Hurley v. Youde, 503 N.W.2d 626 (Iowa App. 1993) (to warrant treble damages for injuries to timber, trees, or shrubs, defendant must act intentionally and deliberately without regard for rights of others); *Bangert v. Osceola County, 456 N.W.2d 183 (Iowa 1990)* (willful act for this statute is an act done wantonly and without any reasonable excuse); *Drew v. Lionberger, 508 N.W.2d 83 (Iowa App. 1993)* (held, market value of trees as lumber was correct measure of damages for logging another's trees, given that the trees were ordinary forest trees without special use).

(n97)Footnote 124. Iowa Code Ann. §658.5.

Bennett v. Johnson, 485 N.W.2d 481 (Iowa App. 1992) (remainder persons could maintain action for waste against life tenant when waste occurred; action accrued no later than date of last occurrence of waste), distinguished by *Hamilton v.*

Mercantile Bank of Cedar Rapids, 621 N.W. 2d 401 (Iowa Jan 18, 2001).

(n98)Footnote 125. Kan. Stat. Ann. §58-2523.

(n99)Footnote 126. Ky. Rev. Stat. Ann. §381.350.

(n100)Footnote 127. Ky. Rev. Stat. Ann. §381.360.

(n101)Footnote 128. Ky. Rev. Stat. Ann. §381.380.

(n102)Footnote 129. Ky. Rev. Stat. Ann. §381.390.

(n103)Footnote 130. Ky. Rev. Stat. Ann. §381.400.

(n104)Footnote 131. Ky. Rev. Stat. Ann. §381.420.

(n105)Footnote 132. La. Civ. Code Ann. arts. 2721, 2722.

(n106)Footnote 133. Me. Rev. Stat. Ann. tit. 14, §7501.

(n107)Footnote 134. Me. Rev. Stat. Ann. tit. 14, §7503.

(n108)Footnote 135. Me. Rev. Stat. Ann. tit. 14, §7505.

(n109)Footnote 136. Me. Rev. Stat. Ann. tit. 14, §7506.

(n110)Footnote 137. Me. Rev. Stat. Ann. tit. 14, §7507.

(n111)Footnote 138. Me. Rev. Stat. Ann. tit. 14, §7551.

Gammon v. Verrill, 651 A.2d 831 (Me. 1994) (held, treble damages for waste did not apply to neighbors of landowner who also removed timber from owner's property, because neighbors were not the property owner's tenants).

(n112)Footnote 139. Me. Rev. Stat. Ann. tit. 14, §7560.

(n113)Footnote 140. Md. Code Ann. Real Prop. §14-102.

(n114)Footnote 141. Mass. Gen. Laws Ann. ch. 242, §1.

(n115)Footnote 142. Mass. Gen. Laws Ann. ch. 242, §2.

(n116)Footnote 143. Mass. Gen. Laws Ann. ch. 242, §§4-5.

(n117)Footnote 144. Mass. Gen. Laws Ann. ch. 242, §6.

(n118)Footnote 145. Mass. Gen. Laws Ann. ch. 242, §9.

(n119)Footnote 146. Mich. Comp. Laws Ann. §600.2919.

(n120)Footnote 147. Minn. Stat. §561.17.

(n121)Footnote 148. Mo. Ann. Stat. §537.420.

Lustig v. U.M.C. Indus., Inc., 637 S.W.2d 55 (Mo. App. 1982) (liability may be imposed by statute for either commissive or permissive waste; sublessor liable to lessor for acts of waste committed by sublessee); *Brown v. Midwest*

Petro. Co., 828 S.W.2d 686 (Mo. App. 1992) (waste defined as the failure of a tenant to exercise ordinary care in the use of leased property that causes material and permanent injury above ordinary wear and tear); *Greeson v. Ace Pipe Cleaning, Inc., 830 S.W.2d 444 (Mo. App. 1992)* (treble damages for waste mandated where tenant for life or years commits waste to tenement, without requirement that waste was committed wantonly).

(n122)Footnote 149. Mo. Ann. Stat. §537.430.

(n123)Footnote 150. Mo. Ann. Stat. §537.450.

(n124)Footnote 151. Mo. Ann. Stat. §537.460.

(n125)Footnote 152. Mo. Ann. Stat. §537.500.

(n126)Footnote 153. Mo. Ann. Stat. §§537.470 and 537.480.

Lipton Realty, Inc. v. St. Louis Housing Auth., 705 S.W.2d 565 (Mo. App. 1986) (cost of repair for lessor in action for waste held improper where expense involved in restoring realty to original condition would greatly exceed the before-and-after value of the realty); *Lustig v. U.M.C. Indus., Inc., 637 S.W.2d 55 (Mo. App. 1982)* (difference in value of estate before and after waste is proper measure of damages in action for waste).

(n127)Footnote 154. Mo. Ann. Stat. §537.490.

RREEF Mid-America Fund III v. Distronics Corp., 652 F. Supp. 1490 (E.D. Mo. 1987) (treble damages awarded for waste where extreme damages to premises resulted from tenant's reckless disregard of landlord's rights and found wanton waste).

(n128)Footnote 155. Mont. Code Ann. §70-16-102.

(n129)Footnote 156. Mont. Code Ann. §70-16-103.

(n130)Footnote 157. Mont. Code Ann. §70-16-105.

(n131)Footnote 158. Mont. Code Ann. §70-16-106.

(n132)Footnote 159. Neb. Rev. Stat. §25-2129.

(n133)Footnote 160. Neb. Rev. Stat. §25-2132.

(n134)Footnote 161. Neb. Rev. Stat. §25-2133.

(n135)Footnote 162. Neb. Rev. Stat. §§25-2134, 25-2136.

(n136)Footnote 163. Nev. Rev. Stat. §40.150.

(n137)Footnote 164. N.H. Rev. Stat. Ann. §498:1.

(n138)Footnote 165. N.H. Rev. Stat. Ann. §507:2.

(n139)Footnote 166. N.J. Stat. Ann. §2A:65-1.

(n140)Footnote 167. N.J. Stat. Ann. §§2A:65-2 and 2A:65-3.

Birch v. Hanley, 735 A.2d 64 (N.J. Super. 1999) (treble damages awarded to landlord where damage by tenant was intentional).

(n141)Footnote 168. N.J. Stat. Ann. §2A:65-4.

(n142)Footnote 169. N.J. Stat. Ann. §2A:65-5.

(n143)Footnote 170. N.J. Stat. Ann. §2A:65-6.

(n144)Footnote 171. N.J. Stat. Ann. §§2A:65-8 and 2A:65-10.

(n145)Footnote 172. N.Y. Dom. Rel. Law §83. N.Y. Real Prop. Acts. Law §812.

(n146)Footnote 173. N.Y. Real Prop. Acts. Law §211.

(n147)Footnote 174. N.Y. Real Prop. Acts. Law §801.

Travelers Ins. Co. v. 633 Third Assocs., 14 F.3d 114 (2d Cir. 1994) (action for waste will lie against tenant who fails to undertake certain repairs on property as per N.Y. law); *Aetna Life Ins. Co. v. Avalon Orchards, Inc., 505 N.Y.S.2d 216 (1986)* (found action for waste against mortgagee in possession whose mismanagement of property damaged value of property).

(n148)Footnote 175. N.Y. Real Prop. Acts. Law §815.

(n149)Footnote 176. N.Y. Real Prop. Acts. Law §817.

(n150)Footnote 177. N.Y. Real Prop. Acts. Law §803.

Baker v. Latham Sparrowbush Assocs., 808 F. Supp. 992 (S.D.N.Y. 1992) (tenant must obtain court approval before making improvements on the property and approval will be granted only if lease does not prohibit making of improvements).

(n151)Footnote 178. N.Y. Real Prop. Acts. Law §831.

(n152)Footnote 179. N.C. Gen. Stat. §1-533.

Homeland, Inc. v. Backer, 337 S.E.2d 114 (N.C. App. 1985) (waste defined as implied obligation in every lease on the part of the lessee to use reasonable diligence to treat the premises in such a manner that no injury is done to the property; waste at common law includes any permanent injury to lands, houses, gardens, trees, or other corporeal hereditaments by the owner of an estate less than a fee).

(n153)Footnote 180. N.C. Gen. Stat. §1-534.

(n154)Footnote 181. N.C. Gen. Stat. §1-536.

(n155)Footnote 182. N.C. Gen. Stat. §1-538.

(n156)Footnote 183. N.D. Cent. Code §32-17-22.

(n157)Footnote 184. N.D. Cent. Code §32-17-23.

(n158)Footnote 185. N.D. Cent. Code §32-17-16.

(n159)Footnote 186. Ohio Rev. Code Ann. §§2103.07 and 2105.20.

(n160)Footnote 187. Ohio Rev. Code Ann. §5307.21.

(n161)Footnote 188. Okla. Stat. Ann. tit. 41, §22; tit. 60, §63. *See Creekmore v. Redman Industries, Inc., 671 P.2d 73 (Okla. App. 1983).*

(n162)Footnote 189. Okla. Stat. Ann. tit. 41, §22; tit. 60, §69.

(n163)Footnote 190. Okla. Stat. Ann. tit. 58, §§253, 254.

(n164)Footnote 191. Or. Rev. Stat. §105.805. *Vollersten v. Lamb, 732 P.2d 486 (Or. 1987)* (for this section, month-to-month tenant is treated as tenant for years).

(n165)Footnote 192. Or. Rev. Stat. §105.825.

(n166)Footnote 193. Pa. Stat. Ann. tit. 68, §115.

(n167)Footnote 194. Pa. R. Civ. P. 1576.

City of Philadelphia v. Pierre Uniforms, Inc., 535 A.2d 142 (Pa. Super. 1987) (preliminary injunction will be refused if threatened injury of waste is not imminent or is not permanent and irreparable).

(n168)Footnote 195. Pa. R. Civ. P. 1577.

(n169)Footnote 196. R.I. Gen. Laws §34-14-1.

(n170)Footnote 197. R.I. Gen. Laws §34-14-2.

(n171)Footnote 198. R.I. Gen. Laws §34-14-5.

(n172)Footnote 199. S.D. Codified Laws Ann. §21-7-1.

(n173)Footnote 200. S.D. Codified Laws Ann. §21-7-2.

(n174)Footnote 201. S.D. Codified Laws Ann. §43-8-2.

In re Estate of Jackson, 508 N.W.2d 374 (S.D. 1983) (remainder person able to institute action for waste against life tenant if life tenant fails to make necessary repairs to house).

(n175)Footnote 202. Tenn. Code Ann. §29-36-105.

(n176)Footnote 203. Tenn. Code Ann. §29-36-101.

(n177)Footnote 204. Utah Code Ann. §78-38-2.

(n178)Footnote 205. Vt. Stat. Ann. tit. 12, §§2796, 2797.

(n179)Footnote 206. Vt. Stat. Ann. tit. 14, §1063.

(n180)Footnote 207. Va. Code Ann. §55-211.

Chosar Corp. v. Owens, 370 S.E.2d 305 (Va. 1988) (in proper cases, courts of equity may grant remedies or an injunction to prohibit waste).

(n181)Footnote 208. Va. Code Ann. §55-212.

(n182)Footnote 209. Va. Code Ann. §55-213.

(n183)Footnote 210. Va. Code Ann. §55-214.

(n184)Footnote 211. Va. Code Ann. §55-215.

(n185)Footnote 212. Va. Code Ann. §55-216.

(n186)Footnote 213. Wash. Rev. Code Ann. §64.12.010.

(n187)Footnote 214. Wash. Rev. Code Ann. §64.12.020.

Fisher Props., Inc. v. Arden-Mayfair, Inc., 726 P.2d 8 (Wash. 1986) (treble damages awarded where lessee's commissive waste included shutting down refrigeration equipment with knowledge that doing so would cause damage due to ice melt; however, lessee's decision not to perform certain repairs and otherwise necessary maintenance at termination of lease did not constitute commissive waste and damages could not be trebled).

(n188)Footnote 215. W. Va. Code §37-7-1.

(n189)Footnote 216. W. Va. Code §37-7-2.

(n190)Footnote 217. W. Va. Code §37-7-3.

(n191)Footnote 218. W. Va. Code §37-7-5.

(n192)Footnote 219. W. Va. Code §37-7-4.

(n193)Footnote 220. Wis. Stat. Ann. §844.06.

(n194)Footnote 221. Wyo. Stat. §1-32-119.

(n195)Footnote 222. Wyo. Stat. §1-32-210.

(n196)Footnote 223. *Restatement of Property* §138 (1936).

(n197)Footnote 224. *Restatement of Property* §139.

(n198)Footnote 225. *Restatement of Property* §140.

(n199)Footnote 226. *Restatement of Property* §129.

(n200)Footnote 227. *Restatement of Property* §141.

(n201)Footnote 228. *Restatement of Property* §142.

(n202)Footnote 229. *Restatement of Property* §143. This is the privilege to take timber from the land to make repairs to structures that were on the land when the life estate commenced, and to maintain needed fires.

(n203)Footnote 230. *Restatement of Property* §144.

(n204)Footnote 231. *Restatement of Property* §145.

(n205)Footnote 232. *Restatement of Property* §146.

(n206)Footnote 233. *Restatement of Property* §187.

(n207)Footnote 234. *Restatement of Property* §188.

(n208)Footnote 235. *Restatement of Property* §§189, 190.

(n209)Footnote 236. *Restatement of Property* §191.

(n210)Footnote 237. *Restatement of Property* §192.

(n211)Footnote 238. *Restatement of Property* §193.

(n212)Footnote 239. *Restatement of Property* §194.

(n213)Footnote 240. *Restatement of Property* §195.

(n214)Footnote 241. *Restatement of Property* §196.

(n215)Footnote 242. *Restatement of Property* §197.

(n216)Footnote 243. *Restatement of Property* §198, especially comments a and b.

(n217)Footnote 244. *Restatement of Property* §199.

(n218)Footnote 245. *Restatement of Property* §204.

(n219)Footnote 246. *Restatement of Property* §§205-207.

(n220)Footnote 247. *Restatement of Property* §§211-214.

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CHAPTER 70 WASTE

8-70 Thompson on Real Property, Thomas Editions § 70.08

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§ 70.08 Conduct Constituting Waste.

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§ 70.08(a) Change in the Premises.

Because a reversioner or remainderman is entitled to obtain possession of the premises in essentially the same condition as when the estate was created, any change in the land or improvements presumptively threatened that right. As in England, the American common law attached waste liability to changes in the premises that impaired evidence of title, or added burdens to or diminished the value of the future estate.

If a remainderman or reversioner believes that waste is occurring or about to occur, a question may arise about a right to inspect the premises. No authority is directly on point, but in a related setting, a landlord with no duty or right to repair traditionally had had no right to inspect premises rented to a tenant; however, it has been held that a landlord has a right to enter the tenant's premises in order to prevent waste. n248

§ 70.08(a)(1) Change in the Land.

The decisions in American courts consistently hold that changes in the land will constitute waste if they cause permanent injury to the inheritance, if they are contrary to practices of good husbandry, or if they violate the present tenant's covenants. Not surprisingly, the cases dealing with change in the character of the land as an issue of waste are rare and old. Even though the cases arise out of agrarian circumstances less likely to be encountered today, the principles on which the decisions are based are still firmly in place in American jurisprudence.

In one case, clearing land of timber to prepare it for pasture was considered waste only because a jury found that the clearing in those circumstances did not represent good husbandry. n249 Conversion of arable land into a roadway, also exposing the reversioner's reserved fruit trees to depredations of passersby, was also waste, when the court concluded that the new use worked a permanent or present injury to the freehold. n250 Dredging by the shore of land bordering a stream, and removing land and trees above the high-water mark was adjudged an injury to the inheritance and therefore waste. n251 A tenant under covenant not to cut more timber than he could actually use on the farm, violated the covenant and committed waste when he cut timber and took clay to be used in making bricks for sale. n252 A singularly stern view of waste was taken by the court which ruled against a life tenant who took land as pasture, allowed it to

become woodland, and then cut the timber in order to return the land to pasture; the court rejected the trial court's jury instruction that the cutting of wood would not be waste if done in accordance with good husbandry. n253 This case is clearly out of harmony with other American decisions.

Also instructive are the more numerous reported cases in which change in the character of the land did not result in liability for waste. One tenant for years escaped waste liability even after transforming low, swampy land into residential property; the jury believed that even if the remainderman demanded removal of the houses and return of the property to agricultural use, the property would still be more valuable to him than in its former condition. n254 An early Missouri court declared it "is not waste in this country to convert arable land into meadow, nor vice versa; nor is it waste to clear land by a tenant for life"; n255 this ruling led a later court of that state to declare that plowing up blue grass sod in a farm was also not waste. n256 "Turning out" exhausted land has been declared not to be waste. n257 In another state, converting meadowland into pastureland was not waste when a jury would not find that the change injured the farm or that it was a change no good farmer would make; the jury would also not find waste when the pastures were permitted to become overgrown with brush. n258 As one court noted: "Hence it is well settled, that many things may be done by a tenant for life here, that if done in England would be waste; as, for example, the conversion of meadow or pasture into plowland, or woodland into a farm, etc." n259

The most conspicuous exception to waste liability for changing the land is in recognition that the area surrounding the land in question may have changed so much that a change in the land itself may be permanently beneficial. Thus, a leveling of former residential land to make it more suitable for use in the industrial area that had arisen in place of the surrounding residences was deemed beneficial to the inheritance and not waste. n260

COMPUTER-ASSISTED RESEARCH

LEXIS: waste w/30 land and injur! or chang!

waste w/30 husbandry or farm or pasture! or meadow!

NOTE: Many cases relevant to this section predate the earliest cases in the database.

§ 70.08(a)(2) Change in the Improvements.

This section deals with constructing or altering buildings or other improvements on the premises. n261 The issues of change in the improvements are more likely to arise in modern times than are the issues of change in the land, and the principal case authority for these situations is somewhat newer, but there is still a remarkable dearth of recent case authority for these rules. Modern courts are still challenged to apply rules fashioned in an agrarian society to situations arising in a vastly different industrialized society. It is intriguing to consider, though, that the old rules have worked well enough that even contemporary landowners with competing interests are able to enjoy their property without frequent resort to litigation over these issues.

The general statement of the rule of waste by a 19th century American legal scholar is still an adequate starting point for rules regarding changes in buildings and other improvements: "Waste is the destruction, or improper deterioration, or material alteration of things forming an essential part of the inheritance, done or suffered by a person rightfully in possession by virtue of a temporary or partial estate, as, for instance, a tenant for life or for years." n262

This rule as applied in cases dealing with changes in the improvements suggests that any change in existing improvements is presumptively waste. However, adding new improvements constitutes waste only if they injure the inheritance. Thus, construction of new buildings and other improvements on the premises is not waste if the construction does not injure the inheritance, including the existing improvements; presumably no such injury occurs if the new improvements can be removed at the end of the tenancy so that the inheritance is returned to its original

condition. n263 If new buildings or other improvements are constructed on premises with existing improvements, waste does not occur unless the new construction damages the existing improvements. n264 However, it is considered waste to remove or damage permanent improvements, even if they are old and dilapidated, unless the structures are dangerous n265 or are simply being repaired or replaced by better versions of the old improvements. n266 It has also been held waste merely to tear down an unrepairable improvement. n267 Of course, damage to improvements from accident or natural causes is not waste, n268 but in some older cases the tenant has been held liable for damage to improvements caused by acts of third parties. n269

Traditionally it has been considered waste to make any changes in improvements that permanently and materially alter the character of the property, n270 but an important exception has developed. If the character of the *surrounding* area has so changed that the change in the improvements is an appropriate and beneficial response to the changed conditions, no waste liability results. Of course, an ostensibly beneficial change that also burdens the inheritance may nevertheless be considered waste. n271

The most prominent case espousing this exception is Melms v. Pabst Brewing Co. n272 In that case, because the area surrounding the land in question had lost its residential character, it was not waste for a life tenant to remove the residence on the premises, and lower the grade 30-40 feet to street level and prepare the property for more appropriate business uses. Subsequent cases have followed this view. n273 The basic rule that, absent such change in the surrounding area, even a beneficial change in the improvements constitutes waste, was reaffirmed in Brokaw v. Fairchild. n274 That court recognized the holding of Melms v. Pabst Brewing Co., but distinguished it on its facts. In Brokaw the court denied permission for the life tenant to demolish a large residence on Manhattan's Fifth Avenue and replace the residence with a 13-story apartment house, worth about triple the value of the existing house. The principal point of departure from the facts of *Melms* was that no significant change in the character of the neighborhood had occurred in New York. The Brokaw court took the position that any change in the premises was still presumably waste, unless the change in the area made it pointless to return the property unchanged to the remainderman.

COMPUTER-ASSISTED RESEARCH

LEXIS: waste /30 chang! and building or improvement

waste /30 ameliorat! or meliorat!

NOTE: Many cases relevant to this section predate the earliest cases in the database.

§ 70.08(b) Misuse or Neglect of the Premises.

This subsection treats those instances of waste arising out of premises abuse or neglect other than change in the premises n275 or removal of resources or improvements from the premises. n276

§ 70.08(b)(1) Neglect of Financial Obligations Pertaining to the Premises Generally.

One type of neglect impacts on the premises generally, without respect to a distinction between land and improvements, and that is the failure by the tenant to pay financial obligations that pertain to preservation of title, such as taxes, mortgage interest and principal, insurance premiums, and certain assessments. The two major issues in determining tenant liability for such payments are whether the tenant is obligated at all to pay a particular type of charge or any portion of it, and whether there is some absolute limitation on the tenant's total financial liability for such charges.

§ 70.08(b)(1)(i) Charges for Which the Tenant Is Liable.

Taxes--Life Tenant. A life tenant has a common law duty to pay property taxes imposed on the estate generally

throughout the duration of the tenancy, and failure to fulfill this duty has been characterized as waste. n277 This duty is in recognition of the fact that taxes are a lien on the entire estate, and a tenant's failure to pay threatens the continuance of the reversion or remainder. n278 Taxes that accrued before the possessory estate began are not included in this obligation. n279 Also, any property tax which is considered under state law as imposing a lien on the life interest only should be paid by the life tenant, but not as a matter of duty to the reversioner or remainderman; n280 failure to pay such taxes is therefore not waste. Of course, all of these duties can be altered by the instrument which creates the life tenancy n281 or by agreement between the life tenant and reversioner or remainderman. n282

Taxes--Tenant for Years. A tenant for years, including in this context a periodic tenant, is not obligated by common law to pay property taxes, n283 except under special circumstances: a tenant who has installed improvements for the tenant's sole benefit must pay the portion of property taxes attributable to the improvements; a tenant under no obligation to pay rent must pay the property taxes; n284 and tenants with so-called perpetual leases or with long-term renewal options must pay the property taxes. n285 These duties and exceptions may be altered by agreement between the parties.

COMPUTER-ASSISTED RESEARCH

LEXIS: life tenant or tenant or lessee w/30 tax or tax w/5 property

Mortgage Interest and Principal--Life Tenant. If a mortgage or similar encumbrance was a lien on the entire estate when the life tenancy commenced, or was created jointly by the life tenant and reversioner or remainderman, the life tenant is obligated by common law to pay the interest that accrues on the encumbrance during the tenancy, n286 unless that duty is modified by agreement. If mortgage payments are amortized into equal periodic payments so that each payment falling due during the life tenancy consists partly of interest and partly of principal, or if payment of the mortgage principal falls due during the life tenancy, payment of principal must be apportioned between life tenant and reversioner or remainderman, although there are practical difficulties with such an arrangement. n287

Mortgage Interest and Principal--Tenant for Years. No court has held a tenant for years under a common law duty to pay mortgage interest or principal, and the view has been advanced that, in any event, the duty is imposed on the landlord by the implied covenant of quiet enjoyment. n288

COMPUTER-ASSISTED RESEARCH

LEXIS: life tenant or tenant or lessee w/30 mortgag!

Insurance Premiums--Life Tenant. Under common law in most states, the life tenant has no duty to maintain insurance on the estate for the benefit of the reversioner or remainderman. n289 However, if a mortgage encumbering the entire estate requires the mortgagor to insure the premises for the benefit of the mortgagee, the life tenant must pay the premiums for such insurance for the duration of the life estate. n290 In a few states, life tenants are under a common law duty to maintain insurance for the benefit of the reversioner or remainderman as part of the overall duty to preserve the inheritance. n291

Insurance Premiums--Tenant for Years. A tenant for years has no common law duty to pay insurance premiums on the estate. n292

COMPUTER-ASSISTED RESEARCH

LEXIS: life tenant or tenant or lessee w/30 insurance w/20 premium

Special Assessments--Life Tenant. The life tenant must pay the cost of special assessments for public improvements

related to the estate to the extent the life of the improvement does not exceed the probable duration of the life estate. n293 If the life of the improvement is in excess of the expected duration of the life estate, the duty to pay is apportioned between the life tenant and the reversioner or remainderman. n294

Special Assessments--Tenant for Years. A tenant for years has no common law duty to pay special assessments for public improvements. n295

COMPUTER-ASSISTED RESEARCH

LEXIS: life tenant or tenant or lessee w/30 assess!

§ 70.08(b)(1)(ii) Limitations on the Tenant's Liability.

A life tenant's common law duty to pay taxes, mortgage payments and interest, insurance premiums, and special assessments is subject to the firm limitation that such payments may not exceed the income received from the tenancy or the value of the life tenant's occupancy. The income amount or rental value is calculated cumulatively, so the limitation is not fixed at an inordinately high or low level because of the particular time period chosen. n296 Thus, current taxes must be paid even if current rental income is insufficient, if a surplus has been accumulated in previous years of the tenancy.

Because a tenant for years is obligated for such payments in only a few specialized situations relating to property taxes, it is not known whether the same limitation applies to payment of property taxes. Such a limitation, based on income received or rental value, does not apply to the repair obligation of a tenant for years, even though it applies to the life tenant's repair obligation, n297 so by such a tenuous analogy one might conclude that the duty of tenant for years to pay property taxes is likewise not subject to the income received or rental value limitation.

§ 70.08(b)(2) Misuse or Neglect of the Land.

Most of the early waste cases arising out of misuse of the land itself were concerned with agriculture. Those courts agreed, however, that so-called "ill husbandry" itself would not constitute waste, unless it resulted in material or permanent injury to the inheritance. n298 Older cases provide numerous examples of ill husbandry actionable as waste because the defendants did cause permanent injury to the estate. These examples include plowing up of all meadowland, n299 ruining fields by constant tillage, n300 tilling contrary to established rotations, n301 allowing hogs to root up a meadow and carry away fruit trees, n302 and removing bog grass from a farm. n303 In modern times, waste has been found when a carnival was operated on the premises, n304 when broken concrete was deposited on the premises, n305 and when a farm was neglected so the land became choked with weeds. n306

COMPUTER-ASSISTED RESEARCH

LEXIS: land and neglect! or abus! or misus! w/50 waste husbandry w/50 waste

§ 70.08(b)(3) Misuse or Neglect of the Improvements.

Misuse or abuse of buildings or other improvements on the premises may be considered waste according to the same principles as are applied to misuse of the land itself: if the conduct or neglect causes permanent injury to the inheritance, it is actionable as waste. Such misuse or neglect generally consists either of the failure to repair and maintain (typically forms of permissive waste) n307 or of some active but abusive use of structures or equipment on the premises.

§ 70.08(b)(3)(i) The Duty of Repair.

The duty of repair imposed on a life tenant or a tenant for years is limited, but may not be ignored. In general, a tenant

for life or years in possession is obliged under common law only to make all reasonable, ordinary and necessary repairs to preserve the estate or to prevent deterioration of the estate. The condition of the estate to be preserved is that condition which existed when the tenancy began. n308 Typical examples of required repairs are repairing a house that has become "run down," n309 repairing fences and outbuildings that have become decayed and dilapidated, n310 and putting improved real estate back in condition to be occupied. n311 The tenant is required to perform maintenance repairs that will effectively stop other damage from occurring, such as painting to stop further surface deterioration, or roof repairs. n312

The duty of tenants for life or years to repair damage caused by third parties has had an interesting history. In English jurisprudence, old cases holding tenants liable for damage caused by third parties appear to be based on the presumption that the tenant could eventually obtain recovery from the third party; tenant liability was therefore a convenience to the reversioners or remaindermen, who at the time did not have the right of action directly against a trespasser. This procedural disability was corrected with the rise of the action on the case, and actions on the case for waste became prominent at the same time cases holding tenants responsible to remaindermen for damage caused by a stranger disappeared. In American jurisprudence, several older cases have held tenants liable for damage caused by strangers, even where the possibility of recovery from the stranger is nonexistent, n313 but no courts in the last century have decreed such liability.

§ 70.08(b)(3)(ii) Limitations on the Duty of Repair.

A tenant for life or years is not required to repair damage that already existed when the tenancy began. n314 Even ordinary wear and tear need not be restored, unless repair is needed to prevent further deterioration. n315 A tenant also need not repair damage caused by natural forces or accidents for which the tenant is not responsible. n316 The most important limitation on the repair duty of a life tenant is the same limitation placed on the duty to pay taxes and other financial obligations: the life tenant is not required to spend more than the income received from the tenancy or, if in occupancy, the rental value of the tenant's occupancy. n317

This limitation on the amount that could be expended for repairs did not apply to a tenant for years, who was otherwise under the same duty of repair and entitled to the same limitations as a life tenant. n318 However, with the rise of the implied warranty of habitability in residential tenancies in most states, much of the repair duty of the tenant for years has been shifted to landlords, who are now obligated by usually unalterable rule of law to keep premises in habitable condition.

COMPUTER-ASSISTED RESEARCH

LEXIS: tenant and repair! w/50 waste

warranty w/5 habitability w/50 waste

§ 70.08(c) Removal of Resources from the Premises.

In this subsection are discussed the removal of several distinct types of resources from the premises: removal of manure, crops and other products of agricultural activity; removal of soil and minerals; removal of timber and other growing things; and removal of improvements. Slightly different rules apply to each category, although all rules proceed from the same basic premise that the tenant in possession may do nothing to harm the inheritance.

§ 70.08(c)(1) Removal of Products of Agricultural Activity.

Manure produced in ordinary husbandry activities belongs to the estate. In keeping with principles of good husbandry it may be used by the tenant on the estate, but may not be removed from the premises. n319 Straw, hay, and other crops

grown on the premises by the tenant are the property of the tenant until severed, and may be removed from the property without committing waste. n320 This is true even if the tenant removes such items from the premises in violation of an agreement with the reversioner, since the proper action in that case is for breach of covenant, not waste. n321

COMPUTER-ASSISTED RESEARCH

LEXIS: remov! or sever! and crop or manure w/50 waste

§ 70.08(c)(2) Removal of Soil and Minerals.

Mines, quarries and other operations for extraction and removal of mineral resources of the land may be carried on by the tenant if they are already in place or operative at the beginning of the tenancy (the so-called "open mine" rule), but no new operations may be commenced by the tenant, absent agreement with the owner of the inheritance. n322 This ostensible inconsistency is rationalized by the assertions that the prohibition against new operations is to prevent permanent damage to the inheritance, while the permission to continue existing operations is in recognition that such operations were an established right of present possession when the tenancy began and probably correspond to the intent of the parties. These basic rules have been applied to a wide variety of mineral extraction and removal operations. n323

These general rules are subject to modification by agreement of the parties showing an intent different from that implied by the common law rule, or by legislation. Also, a particular tenancy may by its nature preclude a presumption that the parties intended to include mineral extraction rights with the tenancy, such as when land is leased specifically for agricultural purposes, n324 or when the mineral operation was intended to exclude any tenant. n325 An open mine which has not been worked for some time is still considered an open mine, but if it has actually been abandoned, the tenant who re-opens it may commit waste. n326 A mine which is under lease to be opened, but has not yet actually been opened, is considered open for the tenant for life or years. n327 The common element of all these rules is their attempt to identify the intent of the parties when the parties have not bothered to express that intent.

COMPUTER-ASSISTED RESEARCH

LEXIS: mine or mineral or quarry or oil w/50 waste

§ 70.08(c)(3) Removal of Trees.

As opposed to the English rule making a tenant liable in waste for almost any cutting of trees, American courts find no waste in tree cutting unless the cutting damages the inheritance. n328 Historically, most cutting of trees in America was for the purpose of clearing land, which added value to the land, so usually cutting of trees was not waste. n329 The test of whether the inheritance was injured became a question of whether the cutting represented good husbandry, although some courts made separate inquiries into the issues of good husbandry and injury to the inheritance. For some of those courts, even good husbandry could be waste if the cutting damaged the inheritance; n330 for others, waste could be found only if the cutting represented both bad husbandry and damage to the inheritance. n331 The decisions in aggregate seem to form a rule that permits the tenant for life or years to cut trees as reasonably necessary for the enjoyment of the tenancy, as long as the inheritance is not damaged. n332 Thus originated the ancient agrarian rules that, barring damage to the inheritance, a tenant could take timber for fuel, n333 for making and repairing farm equipment, n334 and to make necessary repairs on the premises, n335 all traditionally referred to as estovers or the common of estovers. n336 Whether repairs justifying the cutting of timber must be necessary merely for enjoyment of the tenancy, or must be necessary to avoid liability for permissive waste is a question that has not been addressed by the courts. n337 Some courts have permitted a tenant to cut timber and use the proceeds from the sale of the timber for necessary repairs, without liability for waste, n338 while others have not. n339

COMPUTER-ASSISTED RESEARCH

LEXIS: tree or timber and cut! w/50 waste

§ 70.08(c)(4) Removal of Improvements.

Ordinarily, under the common law, a tenant for life or years who removes all or a part of a building or other improvements from the premises will be liable in waste. n340 Removal of fences, n341 floors, and things affixed to the estate has been found to be waste. n342 But large areas of exception have been recognized. Removal of old, useless buildings and replacement with new structures more valuable to the estate is possible without waste, but probably only if the removal is in response to change in the character of the surrounding area. n343 An old building in dangerous condition may be removed, n344 and a tenant may remove items of personal property from the premises, if they have not become affixed to the premises. If the items cannot be removed without injury to the estate, then they have acceded to the estate as fixtures and belong to the reversioner or remainderman, and their removal by the tenant is waste. n345

COMPUTER-ASSISTED RESEARCH

LEXIS: remov! w/20 improvement or building or fixture w/50 waste

§ 70.08(d) The Application of Waste Law to Personal Property.

In the area of fixtures the law of waste has an application to personal property. If personal property of the tenant for life or years accedes to the premises, becoming a fixture, then its removal by the tenant, with consequent injury to the premises, constitutes waste. Otherwise, the personal property may be removed by the tenant without liability for waste. n346

If ownership of personal property is divided into present possessory and future interests, the ready mobility and alienability of such property when in the possession of the tenant for life or years is afforded little restraint by the law of waste. Owners of the future interests do not have adequate protection against misuse or misappropriation by those in possession of the property. Therefore, it has become common in many jurisdictions, by statute or decision, to treat the present possessor as a trustee, or to require that some security be given for the duration of the possessory estate. n347 The traditional law of waste has been applied to personal property in a few older cases, either to award damages for injury to the property n348 or to enjoin threatened damage to the property. n349

COMPUTER-ASSISTED RESEARCH

LEXIS: waste w/100 trust! or security

waste w/100 fixture

FOOTNOTES:

(n1)Footnote 248. *Helvich v. George A. Rutherford Co., 114 N.E.2d 514 (Ohio App. 1953), appeal dismissed, 117 N.E.2d 439 (Ohio 1954); Rammell v. Bulen, 80 N.E.2d 167 (Ohio 1948)* (the landlord entered an apartment in the tenant's absence to shut off water and prevent pipes from freezing); *Flanders v. New Hampshire Sav. Bank, 7 A.2d 233 (N.H. 1939)* (the landlord has a right to enter rented premises to prevent waste, if the tenant's enjoyment of the premises is not disturbed).

(n2)Footnote 249. *Chase v. Hazelton, 7 N.H. 171 (1834)* (a jury found that it was not good husbandry when the life tenant cleared 50-60 trees from two acres to be turned into pasture).

(n3)Footnote 250. *Dills v. Hampton, 92 N.C. 565 (1885)* (a tenant for years gave a license to a roadbuilder to

construct a road, which required setting back the property's fence 18-27 feet, exposing apple trees reserved to the reversioner, and leaving the ground to be trampled and cut up by horse and wagon traffic; the road ran parallel to a public road that was impassable because of flooding).

(n4)Footnote 251. *Potomac Dredging Co. of Baltimore City v. Smoot, 69 A. 507 (Md. 1908)* (a tenant by the curtesy gave an easement for dredging the shore of land bordering a stream and for removal of land and trees above the high water mark, which was held to be waste).

(n5)Footnote 252. *Livingston v. Reynolds, 26 Wend. 115, 2 Hill 157 (N.Y. 1841)* (a covenant not to use more timber than needed for farming was violated when timber and clay were used for burning bricks for sale, rather than only for reasonable and necessary use and repairs on the premises).

(n6)Footnote 253. *Clark v. Holden, 73 Mass. 8 (1856)* (life tenant committed waste in cutting timber to return land to pasture; the timber belonged to the reversioner).

(n7)Footnote 254. *Pynchon v. Stearns, 52 Mass. (11 Metc.) 304 (1846)* (a tenant was not liable in waste even after opening a way over a meadow land and moving soil to make it passable, digging drainage ditches, constructing houses on elevated ground and excavating cellars for them, and filling in low, wet parts of the land).

(n8)Footnote 255. *Proffitt v. Henderson, 29 Mo. 325 (1860)* (dictum).

(n9)Footnote 256. *Mize v. Burnett, 145 S.W. 150 (Mo. 1912)* (this is phrased as a holding, although the plaintiff was also denied recovery because he was not the proper party to the action).

(n10)Footnote 257. *Thomas v. Thomas, 82 S.E. 1032 (N.C. 1914)* (dictum).

(n11)Footnote 258. *Clemence v. Steere, 1 R.I. 272 (1850)* (life tenant changed meadow land into pasture land and then allowed the pasture to become overgrown with brush). Regarding the overgrowth, the court instructed the jury:

> In England that would be waste, but you would not expect so high a state of cultivation in Burrillville as in England, or as in the vicinity of a populous city. There must be such neglect in cutting the brush as a man of ordinary prudence would not permit; and if there was in this case such neglect, it is waste.

Much more recently a court has declared that "To allow arable land to lie untilled and become weed infested is waste," and "Failure to care for an orchard is waste," and "Failure to irrigate is waste." *Hickman v. Mulder, 130 Cal. Rptr. 304 (1976).*

(n12)Footnote 259. *Crockett v. Crockett, 2 Ohio St. 180 (1853)* (dictum).

(n13)Footnote 260. *Melms v. Pabst Brewing Co., 79 N.W. 738 (Wis. 1899).*

(n14)Footnote 261. The problems associated with actual removal of improvements are discussed *infra* §70.08(b)(2).

(n15)Footnote 262. John Norton Pomeroy, A Treatise on Equity Jurisprudence §1348, at 379 (1883).

Trump Empire State Partners v. Empire State Bldg. Assoc., 665 N.Y.S.2d 891 (N.Y. App. Div. 1997)(holding that tortious claims for waste were insufficient because there had been no pleading of damage to the building that changed the nature of the property).

(n16)Footnote 263. *Pynchon v. Stearns, 52 Mass. (11 Metc.) 304 (1846)* (it was not waste when tenant filled in

low, swampy ground, built houses and excavated cellars for the houses, because the houses could be removed and the land returned in better condition to the remainderman); *Winship v. Pitts, 3 N.Y. (Paige Ch.) 259 (1832)* (it was not waste to build a livery stable on the vacant rear portion of a lot used for commercial and residential purposes).

Ruggles v. Sabe, 670 N.W.2d 356 (N.D. 2003) (a life tenant who also held a two-thirds remainder in the same property committed waste when he removed a structure from the property without the permission of the other remainderman). *Vereen v. Hargrove, 96 S.W.3d 762 (Ark. App. 2003)* (construction of a tail-water recovery system on the farm land did not constitute waste).

(n17)Footnote 264. *Hayman v. Rownd, 118 N.W. 328 (Neb. 1908)* (waste occurred when holes and pegs were driven into and damaged a brick wall in order to attach a sign).

(n18)Footnote 265. *Clemence v. Steere, 1 R.I. 272 (1850)* (it was not waste to tear down a barn that was so dilapidated that it threatened to collapse on the cattle). *Compare Bond v. Green, 401 So. 2d 639 (La. App. 1981)* (destroying old houses was not waste).

(n19)Footnote 266. *Sarles v. Sarles, 3 N.Y. (Sand. Ch.) 601 (1846)* (to build a new outhouse in place of an old, "ruinous" one was not waste).

McNeese v. Hutchinson, 724 So. 2d 451 (Miss. App. 1998) (waste to fill in inoperable swimming pool).

(n20)Footnote 267. *Clemence v. Steere, 1 R.I. 272 (1850)* (a life tenant with an unrepairable house on the premises may leave it in a dilapidated condition, but may not tear it down).

(n21)Footnote 268. *Barrera v. Barrera, 294 S.W.2d 865 (Tex. Civ. App. 1956)* (a life tenant was not responsible for repairing house damage caused by a flood); *Merritt v. Richey, 27 N.E. 131 (Ind. 1891)* (house accidentally burned, without negligence of occupant).

(n22)Footnote 269. *Cook v. Champlain Transp. Co., 1 Denio 91 (N.Y. 1845)* (a lessee was held liable for waste when a building on the premises was destroyed because of negligent acts of a third party; in this case sparks from a passing steamboat ignited a fire that destroyed a planing mill). *See infra* §70.09(i).

(n23)Footnote 270. *Davenport v. Magoon, 4 P. 299 (Or. 1884)* (the court enjoined a lessee who wanted to pull down a livery stable and replace it with a workers' dwelling).

(n24)Footnote 271. *Crewe Corp. v. Feiler, 146 A.2d 458 (N.J. 1958)* (when a building remodeled into an office resulted in higher property taxes for the lessor, the remodeling constituted waste).

(n25)Footnote 272. *79 N.W. 738 (Wis. 1899).*

(n26)Footnote 273. *Dodds v. Sixteenth Section Dev. Corp., 99 So. 2d 897 (Miss. 1958)* (a reservoir could be placed on lands formerly used exclusively for agricultural purposes); *J.H. Bellows Co. v. Covell, 162 N.E. 621 (Ohio App. 1927)* (reducing a muck pond and creating an artificial lake for a golf course would not injure the property).

(n27)Footnote 274. *237 N.Y.S. 6 (1929).*

(n28)Footnote 275. Discussed *supra* §70.08(a).

(n29)Footnote 276. Discussed *infra* §70.08(c).

(n30)Footnote 277. *Chapman v. Chapman, 526 So. 2d 131 (Fla. App. 1988)* (life tenants must pay property taxes during the continuance of their estate).

Thomas v. Thomas, 661 N.W.2d 1 (S.D. 2003) (a life tenant who failed to pay property taxes committed waste).

See Boillot v. Conyer, 887 S.W.2d 761 (Mo. 1994) (life tenant must pay taxes on property).

(n31)Footnote 278. *Monaghan v. Wagner, 487 So. 2d 815 (Miss. 1986)* (tax payments by life tenant were not effective to assert adverse possession against the remainderman, because the life tenant already had a duty to pay the taxes). *See* Lewis M. Simes & Allan F. Smith, 4 The Law of Future Interests §1693 n.5 (2d ed. 1956 & Supp. 1989).

(n32)Footnote 279. *Matter of Estate of Enright, 436 N.E.2d 681 (Ill. App. 1982)* (estate taxes accruing before period of probate could not be paid from income produced by probate property). *See* Lewis M. Simes & Allan F. Smith, 4 The Law of Future Interests §1693 n.10 (2d ed. 1956 & Supp. 1989).

(n33)Footnote 280. *Dixon v. Evans, 149 S.E.2d 124 (Ga. 1966)* (taxes were assessed and executions were issued in personam against the life tenant only). *See* Lewis M. Simes & Allan F. Smith, 4 The Law of Future Interests §1693 nn.3 & 4 (2d ed. 1956 & Supp. 1989).

(n34)Footnote 281. *Brinkley v. Day, 362 S.E.2d 587 (N.C. App. 1987)* (expenses to be paid from life tenancy income). *See* Lewis M. Simes & Allan F. Smith, 4 The Law of Future Interests §1693 n.14 (2d ed. 1956 & Supp. 1989).

(n35)Footnote 282. *Almeida v. Price, 236 P.2d 823 (Cal. App. 1951)* (life tenant, mother of reversioners, was not expected to pay taxes or insurance). *See* Lewis M. Simes & Allan F. Smith, 4 The Law of Future Interests §1693 n.16 (2d ed. 1956).

(n36)Footnote 283. *Deutsch v. Frey, 173 N.E. 40 (Ohio App. 1930)* (taxes are assessed against the estate as a whole).

(n37)Footnote 284. *Kelley v. Ball, 19 S.W. 581 (Ky. 1892)* (a devisee entitled to use of the property rent-free for a term of years was required to pay taxes).

(n38)Footnote 285. *Ocean Grove Camp Meeting Ass'n v. Reeves, 75 A. 782 (N.J. 1910)* (lessee under low rent agreed to pay tax assessments).

(n39)Footnote 286. *Hill v. Hill, 623 S.W.2d 779 (Tex. App. 1981)* (life tenant must pay interest on existing encumbrances to protect the remainder interest from forfeiture).

In re Felker, 211 B.R. 165, 1997 Bankr. LEXIS 1230 (U.S. Bankr. Pa. 1997) (holding "the life tenant must pay the taxes, municipal assessments for sidewalk paving, and mortgage interest accruing during his ownership").

(n40)Footnote 287. *Scotch v. Hurst, 437 So. 2d 497 (Ala. 1983)* (a life tenant who redeemed property at a foreclosure sale was entitled to contribution from the remainderman). By analogy, apportionment of the obligation for payment of principal between the life tenant and the reversioner or remainderman could be extended to the equal, amortized payments typical of modern long-term mortgages. *See* Roger A. Cunningham, et al., The Law of Property §4.3, nn.15-17 (2d ed. 1993).

(n41)Footnote 288. *Ganz v. Clark, 169 N.E. 100 (N.Y. 1929)* (an owner under covenant of quiet enjoyment was liable in damages to a lessee who was evicted by foreclosure); Roger A. Cunningham, et al., Law of Property §4.3, n.39 (2d ed. 1993).

(n42)Footnote 289. *Clark v. Childs, 321 S.E.2d 727 (Ga. 1984)* (a jury could decide if the standard of ordinary care required a life tenant to maintain insurance on the premises).

(n43)Footnote 290. *Livesay v. Boyd, 180 S.E. 158 (Va. 1935).*

(n44)Footnote 291. *See, e.g., Clark v. Leverett, 126 S.E. 258 (Ga. 1924),* as modified by *Clark v. Childs, 321 S.E.2d 727 (Ga. 1984)* (life tenant was guardian for the remainderman).

(n45)Footnote 292. *Ingold v. Phoenix Assur. Co., 52 S.E.2d 366 (N.C. 1949)* (tenant, not otherwise obligated, agreed to be a coinsurer with the landlord).

(n46)Footnote 293. *Holliday v. Phillips Petr. Co., 275 F. Supp. 686 (E.D. Ark. 1967)* (life tenant failed to construct or pay for required sidewalks).

(n47)Footnote 294. *Troy v. Protestant Episcopal Church, 56 So. 982 (Ala. 1911)* (assessment for sidewalks was apportioned between life tenant and remainderman).

(n48)Footnote 295. *Blake v. Metropolitan Chain Stores, 225 N.W. 587 (Mich. 1929)* (lessee not required to pay sidewalk assessment).

G & A Inc. v. Nahra, 514 N.W.2d 255 (Mich. 1994) (tenant required by agreement to pay property taxes was not thereby required to pay special assessment).

(n49)Footnote 296. *Nation v. Green, 123 N.E. 163 (Ind. 1919)* (a life tenant obligated to pay taxes during lifetime, only if sufficient income was received).

(n50)Footnote 297. *See infra* §70.08(b)(3).

(n51)Footnote 298. *American Nat'l Bank & Trust Co. v. Hacros Chems., Inc., 997 F. Supp. 994 (N.D. Ill. 1997), Serfecz v. Jewel Food Stores, 1997 U.S. Dist. LEXIS 13270* (N.D. Ill. Aug. 26, 1997) ((quoting *Pasulka v. Koob, 170 Ill. App. 3d 191, 524 N.E.2d 1227, 121 Ill. Dec. 179 (1988)* (holding "waste occurs when someone who lawfully has possession of real estate destroys it, misuses it, alters it or neglects it so that the interest of persons having a subsequent right to possession is prejudiced in some way or there is a diminution in the value of the land being wasted")) distinguished by *Boucher Inv., L.P. v. Annapolis-West Ltd. Partnership, 784 A.2d 39* (Md. App. Oct 31, 2001); *Kimbrough v. Reed, 943 P.2d 1232 (Idaho 1997)* (defining waste as "action or inaction by a possessor of land causing unreasonable injury to the holders of other estates in the same land. Abuse or a destructive use of property by one in rightful possession. Spoil or destruction, done or permitted, to lands, houses, gardens, trees, or other corporeal hereditaments, by the tenant thereof, to the prejudice of the heir, or of him in reversion or remainder"); *Gilman v. Abagnale, 235 A.D.2d 989, 653 N.Y.S.2d 176 (N.Y. App. Div. 1997)* (citing 107 N.Y. Jur. 2d, Waste, §1, at 386 "waste is any destruction, misuse, alteration, or neglect of premises by one lawfully in possession thereof to the prejudice of the ... interest therein of another"); *Keesecker v. Bird, 200 W.Va. 667, 490 S.E.2d 754 (W.Va. 1997)* distinguished by *Boucher Inv., L.P. v. Annapolis-West Ltd. Partnership, 784 A.2d 39* (Md. App. Oct 31, 2001). ((citing *Gwinn v. Rogers, 92 W.Va. 533, 115 S.E. 428 (1922)* (holding waste is "any permanent or lasting injury done or permitted to be done by the holder of the particular estate to lands, houses, or other corporeal hereditaments, to the prejudice of the heir or of him in remainder or reversion")).

(n52)Footnote 299. *Chapel v. Hull, 26 N.W. 874 (Mich. 1886)* (it was waste for the outgoing tenant, over the objection of the reversioner, to sow the entire farm in wheat, leaving the land worthless for renting as meadow and pasture the next season).

(n53)Footnote 300. *Sarles v. Sarles, 3 N.Y. (Sand. Ch.) 601 (1846).*

(n54)Footnote 301. *Wilds v. Layton, 1 Del. Ch. 226 (1882)* (improper tillage was waste, because it tended to depreciate the value of the inheritance).

(n55)Footnote 302. *Bellows v. McGinnis, 17 Ind. 64 (1861).*

(n56)Footnote 303. *Sarles v. Sarles, 3 N.Y. (Sand. Ch.) 601 (1846).*

(n57)Footnote 304. Allegheny County v. Township of Snowden, *113 Pa. L.J. 31 (Pa. Com. Pl. 1964).*

(n58)Footnote 305. *Smith v. Cap Concrete, 184 Cal. Rptr. 308 (1982)* (dumping concrete debris was waste, because it substantially and permanently devalued the property).

(n59)Footnote 306. *Lytle v. Payette-Oregon Slope Irrig. Dist., 152 P.2d 934 (Or. 1945).*

(n60)Footnote 307. *Dorsey v. Speelman, 459 P.2d 416 (Wash. App. 1969)* (permissive waste implies negligence in letting a house decay from lack of repair or deteriorate from other neglect).

See *Carter v. Helmsley-Spear, Inc., 861 F. Supp. 303, 335 (S.D.N.Y. 1994),* aff'd in part, rev'd in part, *71 F.3d 77 (1995)* (but waste dismissal upheld), cert. denied, *517 U.S. 1208 (1996)* (an example of permissive waste would be failure to prevent elements from causing damage to building). *Davidson v. Kenney, 971 S.W. 2d 896 (Mo. App. 1998)* (dog damage to carpet, floor and curtains); *Kestel-Rauls v. Moore, 586 N.W.2d 699 (Wisc. App. 1998)* (unpublished opinion listed in Table) (puppy, kitten, cigarette, and iron damage to carpet).

(n61)Footnote 308. *Savings Inv. & Trust Co. v. Little, 39 A.2d 392 (N.J. 1945)* (life tenant not required to replace furnace in house already beyond repair).

(n62)Footnote 309. *Stovall v. Edwards, 151 P.2d 385 (Okla. 1944)* (a tenant who let a residence become "run down" and who refused to make repairs was guilty of waste).

(n63)Footnote 310. *Prescott v. Grimes, 136 S.W. 206 (Ky. 1911)* (the court held that a life tenant who let a dwelling, outbuildings and fences become dilapidated could be liable for permissive waste).

(n64)Footnote 311. *Greene v. Greene, 35 A. 1042 (R.I. 1896)* (a life tenant, as an income beneficiary of a trust, was not permitted to charge tenantable repairs against the corpus of the trust).

(n65)Footnote 312. *Woolston v. Pullen, 102 A. 461 (N.J. 1917)* (roof in need of retinning).

(n66)Footnote 313. *White v. Wagner, 8 Md. (4 H. & J.) 373 (1812)* (the tenant, a newspaper publisher, committed waste when an angry mob destroyed the tenant's house on the premises). See discussion and citations to the older cases in John Henry Merryman, [it]Part 20: Waste, *in 5* American Law of Property §20.13, at 103-05 nn.1-10 (A. James Casner ed. 1952).

(n67)Footnote 314. *Savings Inv. & Trust Co. v. Little, 39 A.2d 392 (N.J. 1945)* (life tenant not required to replace furnace in house already beyond repair).

(n68)Footnote 315. *Matter of Steele, 19 N.J. Eq. 120 (1868)* (new roof and paint required of life tenant).

In re Felker, 211 B.R. 165 (Bankr. M.D. Penn. 1997) (finding a life tenant "may not disregard the rights of those who take when his life estate ends. So, he is responsible for ordinary course of business repairs and maintenance"); *Kimbrough v. Reed, 943 P.2d 1232 (Idaho 1997)* (citing Idaho Code §55-311 "the owner of a life estate must keep the buildings and fences in repair from ordinary waste").

(n69)Footnote 316. *In re Stout's Estate, 50 P.2d 768 (Or. 1935)* (vacant house of life tenant had been vandalized).

(n70)Footnote 317. *In re Stout's Estate, 50 P.2d 768 (Or. 1935)*

(n71)Footnote 318. *Van Wormer v. Crane, 16 N.W. 686 (Mich. 1883)* (tenant obligated to restore planing mill destroyed by fire); *Suydam v. Jackson, 54 N.Y. 450 (1873)* (tenant for years required to make ordinary repairs).

(n72)Footnote 319. *Brigham v. Overstreet, 57 S.E. 484 (Ga. 1907)* (manure is appurtenant to the realty; good husbandry requires that it be applied to increasing the productivity of the land where it was produced).

(n73)Footnote 320. *Munier v. Zachary, 114 N.W. 525 (Iowa 1908)* (the tenant is the owner of straw from crops raised on the premises); *Clark v. Strohbeen, 181 N.W. 430 (Iowa 1921)* (the tenant has the exclusive ownership in annual crops until they are severed).

(n74)Footnote 321. *Munier v. Zachary, 114 N.W. 525 (Iowa 1908).*

(n75)Footnote 322. *Haskell v. Wood, 64 Cal. Rptr. 459 (1967)* (the life interest was conveyed prior to the grant of an oil and gas lease).

Hynson v. Jeffries, 697 So. 2d 792 (Miss. App. 1997) (holding that "if a mine has been opened before the creation of the life estate and a future interest in land, the life tenant may be entitled to continue and operate the opened mine and retain the proceeds of such operation").

(n76)Footnote 323. *Rupel v. Ohio Oil Co., 95 N.E. 225 (Ind. 1911)* (oil and gas wells); *Williamson v. Jones, 27 S.E. 411 (W. Va. 1897)* (salt wells); *United States v. Bostwick, 94 U.S. 53 (1877)* (quarries); *Russell v. Merchants' Bank of Lake City, 50 N.W. 228 (Minn. 1891)* (excavating clay for bricks); *Halifax Drainage Dist. v. Gleaton, 188 So. 374 (Fla. 1939)* (sand and gravel operations).

Abraxas Petroleum Corp. v. Hornburg, 20 S.W.3d 741 (Tex. Ct. App. 2000) (oil operation's responsibilities were defined by a joint operating agreement and therefore an action in waste was precluded by the joint operating agreement).

(n77)Footnote 324. *Freer v. Stotenbur, 2 Abb. Dec. 189, 2 Keyes 467, 34 How. Prac. 440 (N.Y. 1866)* (land leased for agricultural purposes does not include the right to work a quarry).

(n78)Footnote 325. *Franklin Coal Co. v. McMillan, 49 Md. 549 (1878)* (an action by a remainderman against a life tenant when a coal mining company negligently mined under life tenant's property).

(n79)Footnote 326. *Gaines v. Green Pond Iron Mining Co., 33 N.J. Eq. 603 (1881)* (mere cessation of work in a mine, even for over 60 years, was not abandonment).

(n80)Footnote 327. *Kimbark Exploration Co. v. Von Lintel, 391 P.2d 55 (Kan. 1964)* (development of a mine was authorized before the life estate took effect); *Hembree v. Magnolia Petr. Co., 56 P.2d 851 (Okla. 1935)* (a lease and conveyances were executed before the homestead right vested).

(n81)Footnote 328. *King v. Miller, 6 S.E. 660 (N.C. 1888)* (a tenant in dower could use fallen and dead trees for firewood).

(n82)Footnote 329. *Whitehead v. Whitehead, 181 A. 684 (Del. Super Ct. 1935)* (timber was cut and sold to pay for taxes, insurance and repairs).

(n83)Footnote 330. *Thomas v. Thomas, 82 S.E. 1032 (N.C. 1914)* (some trees were cut for profit, which was used for repair costs).

(n84)Footnote 331. *Disher v. Disher, 63 N.W. 368 (Neb. 1895)* (cutting timber to make pastureland was not waste, if it was good husbandry and did not diminish the value of the inheritance).

(n85)Footnote 332. *Poole v. Union Trust Co., 157 N.W. 430 (Mich. 1916)* (in this country, the common law rules on timber cutting are relaxed).

(n86)Footnote 333. *Webster v. Webster, 33 N.H. 18 (1856)* (a tenant of a farm may take all necessary wood for fuel from the farm, even if he has other outlying woodland).

(n87)Footnote 334. *Thomas v. Thomas, 82 S.E. 1032 (N.C. 1914)* (some trees were cut for profit, which was used for repair costs).

(n88)Footnote 335. *Temple v. Carter, 165 S.E.2d 541 (N.C. App. 1969)* (a life tenant was restricted to cutting only timber needed for repairs); *Adams v. Adams, 371 S.W.2d 637 (Ky. 1963)* (a life tenant may cut trees only as needed for maintenance and domestic purposes).

(n89)Footnote 336. Common of estovers (from estoffer, to furnish) is a liberty of taking necessary wood, for the use of furniture of a house or farm, from off another's estate. The Saxon word, bote, is of the same significance with the French estovers; and therefore housebote is a sufficient allowance of wood, to repair, or to burn in, the house; which latter is sometimes called fire-bote: plough-bote and cart-bote are wood to be employed in making and repairing all instruments of husbandry: and hay-bote or hedge-bote is wood for repairing of hays, hedges, or fences. These botes or estovers must be reasonable ones; and such that any tenant or lessee may take off the land let or demised to the tenant, without waiting for any leave, assignment, or appointment of the lessor, unless the tenant be restrained by special covenant to the contrary. William Blackstone, Commentaries 35 (1766).

(n90)Footnote 337. The question was raised by Merryman, who concluded that both types of necessity are implicit in the decisions. John Henry Merryman, Part 20: Waste, *in 5* American Law of Property §20.4, at 82-86 (A. James Casner ed. 1952).

(n91)Footnote 338. *Whitehead v. Whitehead, 181 A. 684* (Del. Super. Ct. & Orphans' Ct. 1935) (timber was cut and sold to pay for taxes, insurance and repairs).

(n92)Footnote 339. *Dennett v. Dennett, 43 N.H. 499 (1862)* (a life tenant could not sell wood for money to use in necessary repairs).

(n93)Footnote 340. *Reams v. Henney, 97 N.E.2d 37 (Ohio App. 1950)* (a life tenant removed furniture from the premises); *Bass v. Metropolitan W. Side Elevated R.R., 82 F. 857 (7th Cir. 1897)* (a lease assignee cut off the corner of a building to accommodate railroad tracks).

(n94)Footnote 341. *United States v. Bostwick, 94 U.S. 53 (1877).*

(n95)Footnote 342. *White v. Wagner, 8 Md. (4 H. & J.) 373 (1812).*

(n96)Footnote 343. *Melms v. Pabst Brewing Co., 79 N.W. 738 (Wis. 1899).*

(n97)Footnote 344. *Clemence v. Steere, 1 R.I. 272 (1850)* (it is not waste to tear down a barn so dilapidated that it may fall on the cattle).

(n98)Footnote 345. *Pearson v. Harper, 392 P.2d 687 (Idaho 1964)* (shelving and a partition could not be removed without injury to the building).

(n99)Footnote 346. *Meyer v. Hansen, 373 N.W.2d 392 (N.D. 1985)* (the cost of replacing damaged or missing inventory from a leased hotel could be recovered in a waste action).

Norris v. Green, 656 A.2d 282 (D.C. App. 1995) (defaulted and evicted commercial tenant brought unsuccessful suit for unjust enrichment after the landlord sold the building containing equipment installed by the tenant).

(n100)Footnote 347. *See* Roger A. Cunningham, et al., The Law of Property §4.11 (2d ed. 1993).

(n101)Footnote 348. *Isler v. Isler, 88 N.C. 576 (1883)* (proceeds from the sale of property take the place of the property); *Wintuska v. Peart, 36 S.W.2d 50 (Ky. 1931)* (conversion of Liberty bonds could be waste against a remainderman).

(n102)Footnote 349. *Dillen v. Fancher, 102 S.W.2d 87 (Ark. 1937)* (injunction to enjoin conversion of personal property, money, notes and accounts).

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CHAPTER 70 WASTE

8-70 Thompson on Real Property, Thomas Editions § 70.09

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§ 70.09 Proper Parties.

[Go To Supp]

A plaintiff in a waste action must have the estate of inheritance and the defendant must have a lawful present possessory interest in the same property. n350 Although this statement covers the large majority of waste cases, it is an oversimplification, obscuring the fact that waste can arise in a surprisingly wide variety of relationships between present and future interest holders. The scope of the waste action and the range of available remedies often vary greatly, depending on the types of interests held by the parties. Rather than treating this subject by the traditional division between proper plaintiffs and proper defendants, this section describes the respective positions of plaintiffs and defendants in waste actions that can arise in the several types of property relationships with present and future interests.

§ 70.09(a) Waste Action by Reversioner or Remainderman, for Fee or for Life, Against Life Tenant, Tenant for Years or Periodic Tenant.

A reversioner or remainderman has the right to bring a waste action for full legal or equitable relief against a tenant for life or years in possession of the premises. However, the scope of the waste action -- and the respective rights of plaintiffs and defendants--change slightly if the property rights vary from the typical. n351 For instance, if the remainderman plaintiff has only a contingent remainder, an equitable action to prevent waste is available, but a legal action for damages is not, n352 unless the court agrees to assess and impound the damages until the remainder is vested. n353 A contingent remainderman may also bring an action for damages on behalf of all owners of future interests in the property, with the recovery proceeds to be held until the interests vest. n354

A life estate remainder interposed by conveyance between a possessory estate for life or years and a vested remainder or reversion raises two issues. The first issue is whether the life estate remainderman or reversioner has a right of action in waste against the possessory tenant. Such plaintiffs are treated as contingent remaindermen, with rights of action for equitable relief, but not for damages, unless the court agrees to assess and impound past damages. n355 Several states have by statute conferred upon a remainderman for life the right to bring a waste action for damages. n356 The second issue is whether the remainderman or reversioner in fee is entitled to bring a waste action as long as there exists an intervening future estate for life. The old common law rule was that the waste plaintiff must have the next immediate estate of inheritance, but many states have by statute modified the rule so that any reversioner or remainderman has a

right of action for waste. n357 The current rule in states without such statutes can only be guessed at, since reception of that part of the common law rule is uncertain and there is no recent reported case authority.

Another variant is the action brought against a tenant in possession under only a periodic tenancy, rather than a term for years. There is no case authority or other reason to apply a different rule of waste liability to periodic tenants than is applied to tenants for terms. Regarding all tenants of residential premises, potential permissive waste liability for failure to make repairs has been considerably reduced with the spread of the implied warranty of habitability through almost all American jurisdictions.

In these most typical waste actions, as in others arising out of less common relationships, it is not necessary that the plaintiff be seised of the interest at the time the action is brought, only at the time the waste occurred. n358 And one court has stated that a child *en ventre sa mere* qualified for injunctive relief to stay waste. n359

COMPUTER-ASSISTED RESEARCH

LEXIS: waste w/50 damage and remainder w/5 contingent

waste w/50 damage and remainder w/5 life

waste w/50 interven! w/5 estate or immediate w/5 estate

waste w/50 tenan! w/5 period!

waste w/50 tenan! w/5 will

waste w/50 tenan! w/5 sufferance

§ 70.09(b) Waste Action by Landlord Against Tenant at Will or Sufferance.

An action in waste will not lie against a tenant at will or sufferance, because potential plaintiffs have adequate protection through trespass actions. n360

COMPUTER-ASSISTED RESEARCH

LEXIS: waste w/50 tenan! w/5 will

waste w/50 tenan! w/5 sufferance

§ 70.09(c) Waste Action by Holder of Reversionary Interest or Executory Interest Against Owner of Defeasible Fee, or Action by Holder of Remainder in Defeasible Fee Against Tenant for Life or Years.

If the plaintiff in a waste action owns only a reversionary or executory interest in the property, the available remedies vary depending on the remoteness of the possibility that the interest will become a fee simple absolute. If vesting in possession could likely occur soon, if at all, the holders of these interests may bring waste actions for equitable relief and, in some circumstances, even recover damages. n361 Where vesting in possession is only a remote possibility, that is, where the possessor's estate could potentially last forever, no authority supports a right of action for damages, and actions for equitable relief would be rare. n362 By analogy the same rule of remedies should apply to actions against present possessors by those who hold remainders or reversions subject to defeasance: the more likely the interest will vest in possession, the broader the range of possible equitable and legal relief in a waste action; and relief, if available, will likely be only equitable relief. n363

COMPUTER-ASSISTED RESEARCH

LEXIS: waste w/50 reversion! or executor! or defeas!

§ 70.09(d) No Waste Action Against Possessor with Power to Extinguish Future Interest.

A waste action may not be brought against a present possessor of property who owns an estate in fee simple conditional, or in fee tail, because such an owner has power to convey the property in fee simple absolute and extinguish all future interests. Similarly, a waste action may not be brought against a life tenant with power to appoint or to consume, because that life tenant is also able to extinguish all future interests. n364

COMPUTER-ASSISTED RESEARCH

LEXIS: waste w/50 consume or power w/5 appoint!

§ 70.09(e) Waste Action by Secured Creditor Against Debtor in Possession.

In the so-called "title theory" states, in which the mortgagee or trust deed trustee is considered to have an ownership interest in the title to the premises, a waste action against the trustor or mortgagor may be brought as against a tenant for life or years. n365 In the so-called "lien theory" states, in which the mortgagee or trustee is considered only to have a security interest in the property, the mortgagee or trustee may have an action in waste for damages only if the security has been substantially impaired, which is a higher threshold of actionable injury than in the ordinary waste case. n366 In both groups of states, mortgagees and trustees may seek equitable relief, but only if the alleged waste threatens their security. n367 The test for impairment of security, as mentioned, may present a higher threshold of actionable injury. If any loss of value in the secured estate is considered impairment of security, then the ordinary standards for a waste action apply. However, if security is not considered impaired until the waste reduces the secured property's value to the level of the outstanding indebtedness, then the secured party may be severely limited in the right to bring a waste action. This latter standard, referred to as the debt equivalency test, is the more widely followed standard. n368

A number of states impose some statutory regulation over waste rights in these relationships by giving a right of action for waste against a mortgagor in possession during a post-foreclosure redemption period, or giving the mortgagee a right of action for waste only after foreclosure has occurred. n369

COMPUTER-ASSISTED RESEARCH

LEXIS: waste w/50 mortgag! or secur! w/10 impair!

§ 70.09(f) Waste Action by Ward Against Guardian.

Concerns about guardians' abuse of their wards' lands prompted the earliest common law statutes governing waste, n370 and in the modern era it is common for the American states to confer on wards a statutory right to bring actions of waste against their guardians. n371 If no statute governs, a guardian's liability for waste is defined by the same rules that apply to ordinary waste actions against tenants for life or years. n372

COMPUTER-ASSISTED RESEARCH

LEXIS: waste w/50 ward or guardian

§ 70.09(g) Waste Action Against Vendor in Possession.

If a landowner has entered into a contract to sell the land, but remains in possession until the transaction closes, the buyer may bring an action for any waste committed during the interim occupancy. n373 Similarly, a landowner who remains in possession after granting an option to purchase may not commit waste on the premises; however, the optionee must first exercise the option before bringing the action for waste. n374

COMPUTER-ASSISTED RESEARCH

LEXIS: waste w/50 vendor or buyer or purchaser

waste w/50 option!

§ 70.09(h) Waste Action Between Concurrent Owners.

Statutes in the majority of American states confer on concurrent owners a right of action against their cotenants who commit waste. n375 However, often these statutes only refer to actions for damages. Equitable relief against a wasting cotenant is usually not granted unless the conduct is particularly serious or malicious; this limitation on relief probably is in recognition that each cotenant has theoretically full ownership rights. n376

COMPUTER-ASSISTED RESEARCH

LEXIS: waste w/50 cotenan! and damage or injunct!

§ 70.09(i) Waste Action Against Stranger.

According to common law in most jurisdictions, the tenant in possession is liable for all wasteful conduct that occurs on the premises, even if committed by a third party, a stranger to the title. n377 A tenant so held liable is usually entitled to recover from the actual wrongdoer. n378 A few jurisdictions deny waste liability in such situations if the tenant was free from fault. n379 When a reversioner or remainderman or innocent tenant brings an action against the stranger or third party who committed waste on the premises, the action usually sounds in trespass rather than waste, because the wrongdoer was not in lawful possession of the premises when the damage occurred. n380 In an occasional departure from this rule a remainderman may bring an action on the case in waste directly against a stranger who has damaged the premises. n381 A tenant cannot be charged with waste for acts of God, or of the public enemy, n382 or of public authorities. n383

Anyone who commits waste after taking possession of the premises by permission of the tenant--such as an assignee, a subtenant, or a licensee--can be directly liable to the remainderman or reversioner, n384 and both legal and equitable relief can be granted. n385 A tenant who assigns is not liable to the remainderman for waste committed by the assignee, unless the tenant has assumed such liability n386 or remained in possession. n387 A tenant may recover from a subtenant the loss to the possessory interest as well as to the future interest. n388

COMPUTER-ASSISTED RESEARCH

LEXIS: waste w/50 stranger or party w/5 third

waste w/50 act w/5 god

waste w/50 act w/5 nature

waste w/50 assign! or subless! or subtenan! or licens!

FOOTNOTES:
(n1)Footnote 350. *See supra* §70.03.

Beiger Heritage Corp. v. Kilby, 676 N.E.2d 784 (Ind. App. 1997) (vendor could not bring action against purchaser's estate to recover for waste in failing to restore facade of building, because purchaser could not commit waste of purchaser's fee simple interest); *DeBardeleben v. DeBardeleben, 659 So. 2d 922 (Ala. 1995)* (widow of testator who remained in possession of the residence could bring an action against owners of the remainder interest in the residence for the cost of maintenance and repair made necessary by normal wear and tear).

(n2)Footnote 351. *Beiger Heritage Corp. v. Kilbey, 676 N.E.2d 784 (Ind. App. 1997)* (holding an action for waste vested with a remainder or reversionary interest).

(n3)Footnote 352. *Sermon v. Sullivan, 640 S.W.2d 486 (Mo. App. 1982)* ; *Godfrey v. Patrick, 174 S.E.2d 674 (N.C. App. 1970)* (to require an accounting for proceeds from the sale of timber was discretionary with the court).

(n4)Footnote 353. *Pedro v. January, 494 P.2d 868 (Or. 1972)* (proceeds from a sale of timber placed in trust).

(n5)Footnote 354. *Watson v. Wolff-Goldman Realty Co., 128 S.W. 581 (Ark. 1910)* (proceeds from timber cutting impounded).

(n6)Footnote 355. *Richardson v. Richardson, 68 S.E. 217 (N.C. 1910)* (a contingent remainderman cannot bring an action for waste, but must resort to remedy by injunction).

(n7)Footnote 356. *See supra* §70.07(k)(4).

(n8)Footnote 357. *See supra* §70.07(k)(4).

(n9)Footnote 358. *Hoolihan v. Hoolihan, 85 N.E. 1103 (N.Y. 1908)* (a tenant in common, after transferring the cotenancy interest, could sue a cotenant for waste committed prior to transfer).

(n10)Footnote 359. *Duvall v. Waters, 1 Bland. Ch. (Md.) 569, 576 (1827).*

(n11)Footnote 360. *Camden Trust Co. v. Handle, 26 A.2d 865 (N.J. 1942)* (dictum).

(n12)Footnote 361. *Dickson v. Renfro, 634 S.W.2d 104 (Ark. 1982)* (an action by the grantors' heirs could accrue after the death of the grantee's husband without children).

(n13)Footnote 362. *Brown v. Brown, 109 S.E. 815 (W. Va. 1921)* (an heir's contingent interest could vest only if the co-heir outlived all children and grandchildren).

(n14)Footnote 363. *Kollock v. Webb, 39 S.E. 339 (Ga. 1901)* (the holder of a vested remainder subject to divestment was entitled to equitable relief).

(n15)Footnote 364. *Cook v. Hardin County Bank Co., 63 N.E.2d 686 (Ohio App. 1945)* (it is possible for the holder of a tenancy in tail to commit waste).

(n16)Footnote 365. *Delano v. Smith, 92 N.E. 500 (Mass. 1910)* (an action by a mortgagee to prohibit leasing of a building for use as smallpox hospital).

See North Am. Sec. Life Ins. Co. v. Harris Trust & Sav. Bank, 859 F. Supp. 1163 (N.D. Ill. 1994) (waste includes non-payment of taxes by mortgagor under Illinois law) distinguished by*Boucher Inv., L.P. v. Annapolis-West Ltd. Partnership, 784 A.2d 39* (Md. App. Oct. 31, 2001).

(n17)Footnote 366. Cal. Civ. Code §2929.

(n18)Footnote 367. *Brown v. Critchfield, 161 Cal. Rptr. 342 (1980)* (a full credit bid showed that the mortgagee's security had not been impaired).

Boucher v. Sears, 1997 U.S. Dist. LEXIS 19134 (N.D.N.Y. Nov. 21, 1997) (holding "the tort of waste requires injury to real property. [This] include[s] claims for waste by a mortgagee against a mortgagor who impairs a mortgage").

(n19)Footnote 368. *Cornelison v. Kornbluth, 125 Cal. Rptr. 587 (Cal. 1975)* (if waste is committed in a rising market, there are no damages until the impairment exceeds the increase in property value); *Department of Transp. v. Redwood Baseline, Ltd., 149 Cal. Rptr. 11 (1978)* (value of property following a taking was still in excess of the amount of the indebtedness).

McNeese v. Hutchinson, 724 So. 2d 451, 456 (Miss. App. 1998) ("foreclosure will be appropriate only in those cases where the creditor can demonstrate that the waste committed by the debtor had the effect of diminishing the fair market value of the collateral below what it was at the time of inception of the loan").

(n20)Footnote 369. *See supra*§70.07(k)(4).

(n21)Footnote 370. *See supra* §70.07(d).

(n22)Footnote 371. *See supra* §70.07(k)(4).

(n23)Footnote 372. *Bond v. Lockwood, 33 Ill. 212 (1864)* (guardians are chargeable for waste committed or permitted by them); *Torry v. Black, 58 N.Y. 185 (1874)* (a guardian is not permitted to commit waste).

(n24)Footnote 373. *Walker v. Dibble, 409 S.W.2d 333 (Ark. 1966)* (timber cut after execution of sales contract).

(n25)Footnote 374. *McCarroll v. Newsham, 278 F. 4 (5th Cir. 1922)* (timber was cut after an option was granted).

(n26)Footnote 375. *See supra* §70.07(k)(4).

Watts v. Krebs, 962 P.2d 387 (Idaho 1998) (former spouses holding property as tenants in common, husband sold timber without knowledge or consent of wife and was found to have committed waste).

(n27)Footnote 376. *McCord v. Oakland Quicksilver Mining Co., 27 P. 863 (Cal. 1883)* (an action by a cotenant should be based on willful or unnecessary injury or destruction).

(n28)Footnote 377. *White v. Wagner, 8 Md. (4 H. & J.) 373 (1815)* (the tenant, a newspaper publisher, was liable for waste when an angry mob destroyed the tenant's house on the premises).

(n29)Footnote 378. *Powell v. Dayton, S. & G. R. R. Co., 16 P. 863 (Or. 1888)* (a lessee was liable for damage committed while the property was in the hands of a receiver, but had an action over against the receiver).

(n30)Footnote 379. *In re Stout's Estate, 50 P.2d 768 (Or. 1935)* (the vacant house of the life tenant had been vandalized); *Rogers v. Atlantic, G. & P. Co., 107 N.E. 661 (N.Y. 1915)* (the life tenant was not permitted to recover from a stranger the fire damages relating to both the life estate and the inheritance, because the tenant was not liable to the remainderman for damage caused by the stranger).

(n31)Footnote 380. *Duvall v. Waters, 1 Md. (Bland. Ch.) 569 (1827)* (an act of damage will be trespass when committed by one with no right to be on the land).

(n32)Footnote 381. *California Dry-Dock Co. v. Armstrong, 17 F. 216 (D. Cal. 1883)* (a ship ran upon a marine

railway).

(n33)Footnote 382. *United States v. Bostwick, 94 U.S. 53 (1877)* (building partially destroyed by fire).

(n34)Footnote 383. *Farrer v. Andrew Peterson & Co., 130 P. 753 (Wash. 1913)* (a barn was destroyed by public authorities because of a diseased animal), *adhered to, 133 P. 594 (Wash. 1913).*

(n35)Footnote 384. *Willey v. Laraway, 25 A. 436 (Vt. 1892)* (dictum).

(n36)Footnote 385. *Martin v. Humble Oil & Ref. Co., 199 F. Supp. 648 (S.D. Miss. 1960)* (the lessee of an oil and gas lease from the life tenant), *aff 'd, 298 F.2d 163 (5th Cir. 1961), reh'g denied, 301 F.2d 313 (5th Cir. 1962), cert. denied, 371 U.S. 825 (1962).*

(n37)Footnote 386. *Donald v. Elliott, 32 N.Y.S. 821 (1895)* (a waste action did not lie against the tenant for the assignee's cutting of trees and damaging improvements).

(n38)Footnote 387. *Beers v. Beers, 21 Mich. 464 (1870)* (a state statute authorized an action against the original tenant who remained in possession after the conveyance).

(n39)Footnote 388. *Dix v. Jaquay, 88 N.Y.S. 228 (1904)* (a life tenant recovered from the subtenant the full value of cut timber).

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CHAPTER 70 WASTE

8-70 Thompson on Real Property, Thomas Editions § 70.10

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§ 70.10 Remedies.

[Go To Supp]

As is revealed in the summary of state waste statutes in §70.07(k)(4), many states explicitly authorize an action for waste against various categories of defendants. All the statutes authorize damages, either single, double, or triple; several authorize the further remedies of forfeiture of the possessory estate and eviction from the premises in specified circumstances. Some of the statutes also authorize injunctive relief. A waste statute authorizing multiple damages will not be considered mandatory, so a court has discretion over whether to impose multiple damages. n389 Quite commonly, multiple damages, even when authorized by statute, will be awarded only when the defendant's conduct has been wanton, willful, or malicious. n390

It is uncertain whether remedies omitted from such statutes could be invoked by judicial authority, but that would seem unlikely with respect to the extraordinary remedies of multiple damages, forfeiture and eviction. n391 Insofar as the statutes address only the action for waste, it seems more likely that an ordinary civil action for waste would be available, even if not mentioned in the statute. Such an action would be limited to recovery of single damages.

COMPUTER-ASSISTED RESEARCH

LEXIS: waste w/50 damage w/10 treble or triple or

double or multiple

waste w/50 forfeit!

waste w/50 evict!

waste w/50 willful or wilful or wanton or malic!

Damages in waste cases are usually measured by diminution in the value of the property, in other words, the difference

between the property value from the time the possessory estate was created and the property value after commission of waste. n392 A court may choose to use the cost of restoration as the measure of damages, but if the restoration cost exceeds the value of the property, then diminution of property value should be the measure. n393 A court willing to consider either diminution in value or cost of restoration as the measure of damages will choose the least costly standard. n394

COMPUTER-ASSISTED RESEARCH

LEXIS: waste w/50 damage w/20 dimin! and estate

Equitable relief through injunction is, as always, available only if legal relief is inadequate, n395 although in some jurisdictions injunctions are readily granted even if money relief is available and adequate. n396 Injunction is appropriate if the waste is of a nature that cannot be easily measured or compensated by money. n397 Affirmative or mandatory injunctions commanding the premises to be restored in specified ways may issue in appropriate cases. n398 Equitable relief by injunction may also include the further equitable remedy of accounting for past damage, under the power of equity courts to grant complete relief. n399 Thus, the available equitable remedies can effectively eliminate the need for many actions at law.

COMPUTER-ASSISTED RESEARCH

LEXIS: waste w/50 injunct! w/10 affirm! or mandat!

In an appropriate case, the waste plaintiff may request a receivership. n400

FOOTNOTES:
(n1)Footnote 389. *Kanner v. Globe Bottling Co., 78 Cal. Rptr. 25 (1969)* (whether damages should be trebled was left to the court's discretion).

(n2)Footnote 390. *Ault v. Dubois, 739 P.2d 1117 (Utah App. 1987)* (a tenant using land for a boys' ranch was not sufficiently culpable for the damage done by the boys to warrant imposition of treble damages).

Serfecz v. Jewel Food Stores, 1997 U.S. Dist. LEXIS 13270 (N.D. Ill. Aug. 26, 1997) (holding if allegations that Jewel's conduct was "intentional and malicious" were proved, "these allegations would entitle Serfecz to punitive damages").

(n3)Footnote 391. The court in *Worthington Motors v. Crouse, 390 P.2d 229 (Nev. 1964),* held that the remedy of forfeiture was not part of the state's common law of waste adopted from England, but did so on the highly questionable authority of the Restatement of Property on this issue. It declined to decide whether a court of equity has inherent power to forfeit a life estate, because the issue was not properly raised on appeal.

(n4)Footnote 392. *Jowdy v. Guerin, 457 P.2d 745 (Ariz. App. 1969)* (loss in the property's market value was the measure of damages), see also, 333 *West Thomas Medical Bldg. Enterprises v. Soetantyo, 976 F. Supp. 1298 (D.Ariz. 1995); Lytle v. Payette-Oregon Slope Irrig. Dist., 152 P.2d 934 (Or. 1944)* (damages measured by difference in value between weed-infested land and land free from weeds).

Watts v. Krebs, 962 P.2d 387 (Idaho 1998) (where timber was removed, proper measure of damages was measure applied in timber trespass claims the net logging proceeds minus the expenses of the timber sale); *Davidson v. Kenney, 971 S.W.2d 896 (Mo. App. 1998)* (damages equal cost of repair for dog damage to carpet, floor and curtains).

(n5)Footnote 393. *Duckett v. Whorton, 312 N.W.2d 561 (Iowa 1981).* Where the property has special significance, cost of restoration may be chosen as the measure of damages even if it is costlier than the diminution in value measure.

Ault v. Dubois, 739 P.2d 1117 (Utah App. 1987) (historic building).

(n6)Footnote 394. *Meyer v. Hansen, 373 N.W.2d 392 (N.D. 1985).*

McNeese v. Hutchinson, 724 So. 2d 451, 456 (Miss. App. 1998) ("foreclosure will be appropriate only in those cases where the creditor can demonstrate that the waste committed by the debtor had the effect of diminishing the fair market value of the collateral below what it was at the time of inception of the loan").

(n7)Footnote 395. *Poindexter v. Henderson, 1 Miss. 176 (1824)* (an injunction to stay waste will be granted only to stop irreparable injury and where there is no adequate remedy at law).

(n8)Footnote 396. *Brigham v. Overstreet, 57 S.E. 484 (Ga. 1907)* (an injunction would be granted even if the threatened injury would be readily reparable in damages).

(n9)Footnote 397. *Powell v. Cheshire, 70 Ga. 357 (1883)* (an injunction may issue if the waste is so ruinous as to not be capable of actual measurement in money).

(n10)Footnote 398. *Union County Trust Co. v. Goerke Co., 147 A. 439 (N.J. 1929)* (decree for removal of encroachments).

Resource Consultants, Inc. v. Alamex, Inc., 620 So. 2d 634 (Ala. 1993) (injunction requiring cleanup of toxic waste was appropriate to remediate tenant's damage to rental property).

(n11)Footnote 399. *Williamson v. Jones, 27 S.E. 411 (W. Va. 1897)* (an accounting for oil unlawfully taken).

(n12)Footnote 400. *Kimberlin v. Hicks, 94 P.2d 335, 340 (Kan. 1939)* (dictum).

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CHAPTER 70 WASTE

8-70 Thompson on Real Property, Thomas Editions § 70.11

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§ 70.11 Defenses.

A defendant in a waste action may claim that the plaintiff has waived the right to pursue the waste action n401 or that the defendant has obtained the possessory interest "without impeachment for waste" or some modern equivalent that renders the possessor immune from all but an action for wanton waste. n402 An action may also be barred by a statute of limitations, laches, or estoppel. n403 Under a defense relying on a statute of limitations, usually the time begins to run when the damage occurs, n404 although at least one state delays running until the possessory estate terminates. n405 An action against permissive waste is considered to be against a continuing injury and usually the statute will not commence until the tenancy is terminated. n406 Alternatively, it has been held that even in a permissive waste case, the statute begins to run when the waste first occurs. n407

An occupant presently committing waste may not defend by the promise to restore the premises to their prior condition. n408

COMPUTER-ASSISTED RESEARCH

LEXIS: waste w/50 impeach!

waste w/50 limita!

waste w/50 laches

waste w/50 estop!

waste w/50 acquiesc!

FOOTNOTES:
(n1)Footnote 401. *Purton v. Watson, 2 N.Y.S. 661 (1888)* (the lessee was permitted to enter evidence that the lessor had approved alterations).

(n2)Footnote 402. *Robinson v. Kime, 70 N.Y. 147 (1877)* (the defense against a waste action was based on a disputed title).

Marshall v. Marshall, 492 S.E.2d 188 (Ga. 1997) (holding "the creator of a life estate for the benefit of another may provide that the life tenant shall not be held liable for waste"); *Keesecker v. Bird, 490 S.E.2d 754 (W. Va. 1997)* (holding "the applicable statute of limitations ... requires that an action for damage to property be brought within two years of the date the action accrued") distinguished by *Boucher Inv., L.P. v. Annapolis-West Ltd. Partnership, 784 A.2d 39* (Md. App. Oct 31, 2001).

(n3)Footnote 403. *Moore v. Phillips, 627 P.2d 831 (Kan. App. 1981)* (the defenses of laches and estoppel were permissible, but not established in this case).

(n4)Footnote 404. *Sherrill v. Connor, 12 S.E. 588 (N.C. 1890)* (a tenant in dower was liable for only such permissive waste as occurred during the previous three years, the period of limitation).

(n5)Footnote 405. *Meredith v. Ingram, 495 S.W.2d 171 (Ky. App. 1973)* (a remainderman has no duty to bring an action against the life tenant during the tenant's lifetime, and the cause of action does not accrue until the life tenant's death).

(n6)Footnote 406. *Prescott v. Grimes, 136 S.W. 206 (Ky. 1911)* (a remainderman was not required to file a waste claim until the death of life tenant).

(n7)Footnote 407. *Reams v. Henney, 97 N.E.2d 37 (Ohio App. 1950)* (a right of action accrues for each item of damage, when the damage occurs).

(n8)Footnote 408. *Agate v. Lowenbein, 57 N. Y. 604 (1874).*

Another defense is that the waste action itself was not wrongful. *See Virginia Vermiculite, Ltd. v. W.R. Grace & Co.-Conn., 965 F. Supp. 802 (W.D. Va. 1997),* rev'd, *156 F.3d 535 (4th Cir. 1998)* (without an allegation of wrongful conduct, there can be no cause of action for waste (citing *Vicars v. First Virginia Bank-Mountain Empire, 458 S.E.2d 293 (Va. 1995)).*

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CHAPTER 70 WASTE

8-70 Thompson on Real Property, Thomas Editions § 70.12

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§ 70.12 Practice and Procedure.

§ 70.12(a) Jurisdiction and Venue.

A waste action by a remainderman or reversioner against a life tenant is an action respecting title to land and usually must be brought in the jurisdiction in which the land is located. n409 If the waste action is by a lessor against a lessee, the action should be brought wherever the lessee can be found. n410

COMPUTER-ASSISTED RESEARCH

LEXIS: waste w/50 jurisdiction

waste w/50 venue

§ 70.12(b) Pleading.

Perhaps the only unusual characteristic of pleading in waste cases is that demands for multiple damages must be specifically stated, even in jurisdictions where multiple damages are explicitly authorized by statute. n411

§ 70.12(c) Trial.

In an action at law, what constitutes waste is a question of law, n412 but whether waste has actually occurred is a question for the trier-of-fact. n413

COMPUTER-ASSISTED RESEARCH

LEXIS: waste w/50 trial or jury

FOOTNOTES:
(n1)Footnote 409. *Brown v. Martin, 73 S.E. 495 (Ga. 1912)* (an action for forfeiture brought in the county where the land involved is located).

Madera Prod. Co. v. Atlantic Richfield Co., 107 S.W.3d 652 (Tex. App. 2003) (transfer of the case to the jurisdiction in which property was located was proper in this action for waste).

(n2)Footnote 410. *Campbell v. W.M. Ritter Lumber Co., 131 S.W. 20 (Ky. 1910)* (the action was maintainable in Kentucky, even though the land was in Virginia).

(n3)Footnote 411. *Chipman v. Emeric, 5 Cal. 239 (1855).*

(n4)Footnote 412. *Ward v. Sheppard, 2 N.C. (Hayw.) 283 (1803)* (the court described some American rules of waste and then said the jury would decide what would be deemed waste).

(n5)Footnote 413. *Judkins v. Charette, 151 N.E. 81 (Mass. 1926).*

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CHAPTER 70 WASTE

8-70 Thompson on Real Property, Thomas Editions § 70.13

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§ 70.13 Drafting Instructions.

Waste issues do not give rise to a wide variety of documentation. This section will provide guidelines and suggestions for the most important of those, including a covenant against liability for waste, a covenant to not commit or permit waste, a complaint against waste, answers and defenses against such a complaint, and a statute authorizing a specific cause of action for waste.

§ 70.13(a) Covenant Against Liability for Waste.

Typically a provision in a conveyance protecting a tenant for life or years against liability for waste will arise in the context of a reserved life estate: a grantor wishing to make an inter vivos gift of presently occupied property will convey only the remainder, while retaining a present life interest. It is also possible to convey that life estate, so protected, to a third party, or to simply create such a protected life estate by direct conveyance from the holder of the fee simple absolute interest.

The traditional common law term of art for a provision in a conveyance protecting against liability for waste is to convey "without impeachment for waste." However, greater clarity today may be achieved if the protective provision is simply worded "without liability for the commission of waste" or "without liability for waste"; the latter phrase presumably offers broader protection against complaints of permissive waste. The protective provision may extend to the entire premises or only to a certain portion of the premises, and may be limited to protection for only certain specified activities or conditions.

One who holds land without impeachment for waste may nevertheless be liable for conduct which is wanton or malicious. A protective provision which attempted to suppress liability for even wanton or malicious conduct would probably be unenforceable as encouraging landowner conduct below an acceptable standard of care.

§ 70.13(b) Covenant to Not Commit or Permit Waste.

The first issue to confront in drafting a covenant prohibiting waste is determining whether it extends only to voluntary waste, or also to permissive waste. A covenant prohibiting a tenant for life or years only from committing waste may protect only against voluntary waste, whereas more complete protection is afforded by a covenant to not commit or

permit (or "suffer" to use the older word that still occurs frequently in waste statutes) waste on the premises. In an agricultural or any other specialized setting, a covenant may itemize certain conduct which is prohibited, or certain affirmative acts which may be required under specified circumstances. In some circumstances, such as a covenant by a purchaser under a real estate contract not to commit waste, the covenant is limited in duration to only the period during which the contract remains executory.

Covenants against waste also frequently include other, affirmative promises, such as care, maintenance and repair; such covenants also usually spell out the required standard for compliance, such as reasonableness, or maintaining the condition prevailing at the beginning of the tenancy. A covenant may also include specific provisions for restoration or replacement of damaged improvements on the premises.

A general covenant against waste may also include certain exceptions to the general prohibition, such as permitting alterations to the premises by a lessee to enhance rental income. A lessor in such circumstances should, however, consider whether such exceptions should be made subject to the lessor's prior written or other approval. Likewise, from the lessor's or remainderman's perspective, any exceptions to broad prohibitions against waste should be described in precise detail to minimize possible conflicts over interpretation. Moreover, such exceptions should not be phrased in any way that would excuse a tenant for life or years from liability for the tenant's own negligence.

§ 70.13(c) Complaint Against Waste.

Any complaint against waste should specifically address the three basic requirements for a cause of action in waste: a wrongful act or omission, committed by one lawfully in possession (unless the jurisdiction permits the plaintiff to bring a waste action against a stranger or trespasser), and permanent harm to the inheritance. The complaint should recite the source of the plaintiff's standing to sue, which is usually as the owner of the inheritance. Even under statutes which permit a waste action by "any aggrieved party," standing must be established by describing the plaintiff's interest in the damaged party, in order to show that the alleged conduct damaged that interest so as to render the plaintiff an aggrieved party.

When the action is brought under the authority of a state statute, the statutory criteria should be cited and addressed in the complaint. Likewise, if the action is based on allegedly wasteful conduct which has also breached the terms of a conveyance or agreement between the parties, those terms should be recited and the actions or omissions described which show how the terms have been breached.

If the alleged injury to premises is merely a change in the land or improvements that is not clearly harmful, or is even ostensibly beneficial (so-called ameliorative waste), the allegation of harm must be precise and to the point. The complaint should carefully state in what way the change causes permanent injury to the inheritance, despite benefit to the present possessory interest, or at least allege harm to the right of the plaintiff to obtain possession of the property in essentially the same condition as when the estate was created.

When recovery of money damages is sought, the types and amounts of damages should be stated with particularity, including any claim for recovery of costs or attorney fees authorized by statute or agreement. The statement of damage should also describe the measure of damage employed, such as diminution in property value or cost of restoration, as appropriate. If the prayer for relief will seek multiple damages, the complaint should state the statutory or other warrant for such a request and also specific allegations of willfull, wanton or malicious conduct by the defendant. A demand for multiple damages, even though authorized by statute, must be specifically stated.

When injunctive relief is sought, the usual foundational showing of irreparable damage and inadequate remedy at law should be stated in the complaint, along with the precise terms of the injunction sought. The extraordinary remedies of forfeiture and eviction from the premises may be requested if the statutory or other authority for such relief is stated in the complaint.

§ 70.13(d) Answers and Defenses in Response to Complaint for Waste.

In addition to denying the veracity or accuracy of specific factual allegations in the complaint, as appropriate, the defendant named in a waste action may challenge other aspects of the complaint that are essential to the plaintiff's success. Not all wrongful conduct or neglect on the premises constitutes waste; the alleged waste must result in permanent, material harm to the inheritance in order to be actionable as waste. Not all changes in the land or improvements are waste; they must be beyond the range of conduct accorded the present possessor in full enjoyment of the premises, and they must be shown to work a permanent, material change in character of or injury to the inheritance. Beneficial changes, in particular, will be protected from liability, if the defendant can show that they are in reasonable response to changes in the area surrounding the premises.

The defendant may also invoke other appropriate defenses, such as statute of limitation or laches, estoppel by plaintiff's acquiescence or permission, a conveyance to the defendant "without impeachment for waste," or some force beyond the defendant's control as the cause of the alleged damage.

If extraordinary relief in the form of multiple damages or forfeiture is sought, the defendant may show, as appropriate, that the damaging conduct was not wanton or malicious under the circumstances, and that forfeiture, under the circumstances, would be inequitable and contrary to the public policy which discourages forfeitures. Also a defendant threatened with forfeiture may try to show that only the portion of the premises actually damaged should be subject to forfeiture.

§ 70.13(e) Statute Authorizing Actions for Waste.

From almost its earliest common law origins, waste concepts have been expressed in statutory language. Even today in the United States, the large majority of states have statutes expressly conferring rights of action for waste. Drafters and amenders of such statutes should give attention to all the significant issues and policy choices implicit in the waste statutes of the various states. These issues may be stated as follows:

- Does a right of action for waste extend to permissive as well as voluntary or commissive waste? Does the waste provision in the statutes constitute the exclusive remedy for waste, or is a more general action in tort or breach of contract also available? If so, is there any special need for an explicit waste statute, such as provision for extraordinary remedies? Does the right of action for waste extend only to real property interests?

- Who are the potential plaintiffs in a waste action, only reversioners and remaindermen, or any aggrieved party? Is the plaintiff required to hold the next immediate estate of inheritance, or may there be intervening estates for life or years? May cotenants have rights against each other for waste? May wards have waste actions against guardians?

- Who are the potential defendants in a waste action, only the party who actually commits or permits waste, or any party with present possessory rights? Should a waste action be limited to defendants who are lawfully in possession of the premises, or may a stranger or trespasser also be a defendant? Should a right of action for waste extend to those whose possessory interests arise by law as well as those whose interests are created by conveyance?

- Should the statute include the extraordinary remedies of forfeiture and eviction? Should those remedies be available upon any showing of waste or only upon egregious conduct? Should forfeiture, if granted, apply to the entire possessory estate or only to the part of the premises actually damaged by waste?

- Should the waste statute express a duty of maintenance or repair imposed on possessors of land subject to future interests, the breach of which duty gives rise to a cause of action in waste?

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CHAPTER 70 WASTE

8-70 Thompson on Real Property, Thomas Editions § 70.14

AUTHOR: Professor David A. Thomas J. Reuben Clark Law School Brigham Young University

§ 70.14 Bibliography.

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Annotation, *Construction, application, and effect of statutes regulating production of oil or gas in a manner or under conditions constituting waste,* 86 A.L.R. 431.

Annotation, *Duty and Liability of Trustee Under Mortgage or Deed of Trust to Holders of Bonds, or other Obligations Secured Thereby,* 57 A.L.R. 468, 71 A.L.R. 1413, *90 A.L.R. 2d 501* (addresses issue of duty of trustee toward bondholders to protect property securing those bonds from waste).

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Annotation, Exploration of oil or gas resources of land by mortgagor, or purchaser or lessee subsequently to mortgage, as waste as against mortgagee, 95 A.L.R. 957.

Annotation, Forfeiture of life estate for waste, 16 A.L.R.3d 1344.

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Annotation, *Interest on Damages for Period Before Judgment for Injury to, or Detention, Loss, or Destruction of, Property, 36 A.L.R.2d 337.*

Annotation, *Liability of Tenant for Damage to the Leased Property Due to His Acts or Neglect, 10 A.L.R.2d 1012.*

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Annotation, *Life Tenant's Liability for Waste As Affected By Assignment Or Transfer of His Interest,* 71 A.L.R. 1187.

Annotation, *Life Tenant's Right of Action for Injury to or Damage to Property, 49 A.L.R. 2d 1117.*

Annotation, Limitation of action against tenant for years or for life for waste or breach of obligation as to use and care of property, 53 A.L.R. 46.

Annotation, Measure of damages in landlord's action for waste against tenant, 82 A.L.R.2d 1106.

Annotation, *Propriety of Appointing Receiver, at Behest of Mortgagee, to Manage or Operate Property During Foreclosure Action, 82 A.L.R.2d 1075.*

Annotation, *Propriety of Sale of Trust Assets without Consent Despite Trust Provision Requiring Consent, 39 A.L.R. 4th 158* (includes discussion of waste being proper motive for non-consensual sale).

Annotation, *Protection of Inchoate Dower Against Exploitation of Mineral Resources or other Act in Nature of Waste or Which Impairs Value of Land*, 53 A.L.R. 309.

Annotation, *Remedy for Breach of Implied Duty of Oil and Gas Lessee to Protect Against Drainage, 18 A.L.R. 4th 147.*

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Annotation, *Annotation, What Constitutes Waste Justifying Appointment Of Receiver Of Mortgaged Property, 55 A.L.R.3d 1041.*

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Supp. To CHAPTER 70 WASTE

8-70 Thompson on Real Property, Thomas Editions Supp. to § 70.04

Supp. to § 70.04 Distinctive Features of Waste Law.

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§ 70.04(c) Wasteful Conduct as Relative to Circumstances. [Go To Main]

Add:

In re Estate of Schooler, 204 S.W.3d 338 (Mo. App. 2006) (a guardian's conducting of changing the ward's residence constituted waste or mismanagement of the estate).

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Supp. To CHAPTER 70 WASTE

8-70 Thompson on Real Property, Thomas Editions Supp. to § 70.08

Supp. to § 70.08 Conduct Constituting Waste

[Go To Main]

§ 70.08(a) Change in the Land [Go To Main]

Add:

Barkacs v. Perkins, 2006 Ohio 469, P15 (Ohio Ct. App. 2006) (landlord had the right to enter the leased premises to prevent severe waste resulting from substantial damage caused by the lessee).

§ 70.08(a)(2) Change in the Improvements

Add:

Coleman v. Regions Bank, 2005 Ark. App. LEXIS 197 (Ark. Ct. App. 2005) (it was not waste when a tenant expanded its building by constructing an overpass, because the tenant's lease expressly granted permission to make alterations that would not injure the underlying real estate).

§ 70.08(b) Misuse or Neglect of Premises [Go To Main]

Add:

Grimes v. Saikley, 904 N.E.2d 183 (Ill. App. 2009) (action alleging that an estate administrator breached his duty to

protect the estate from waste, loss and embezzlement); *U.S. Bank Nat. Ass'n v. American Realty Trust, Inc., 275 S.W.3d 647 (Tex. App. 2009)* (borrower who breached promissory note did not commit waste, so as to permit recovery against the guarantor).

§ 70.08(b)(1) Neglect of Financial Obligations Pertaining to the Premises Generally

§ 70.08(b)(1)(i) Charges for Which the Tenant is Liable

Add:

Ward v. Brown, 2005 Fla. App. LEXIS 9374 (Fla. Dist. Ct. App. 2005) (lessees with a lease term for 99 years with automatic renewals for additional 99-year periods in perpetuity were virtual owners of the property responsible for payment of taxes).

§ 70.08(b)(2) Misuse or Neglect of the Land

Add new text and footnote 306.1 at the end of the subsection:

Use of dwellings for methamphetamine-related activities may constitute waste. n306.1

§ 70.08(b)(3) Misuse or Neglect of the Improvements

§ 70.08(b)(3)(i) The Duty of Repair

Add:

CedarBridge, LLC v. Eason, 293 S.W.3d 462 (Mo. App. 2009) (successful bidder at tax sale, who also collected rents from the properties' tenants, was subject to ejectment for waste).

Add:

In re 114 Tenth Ave. Ass'n, Inc. ___ B. R. ___ (S.D. N.Y. 2010) (debtor's negligent mismanagement could constitute waste).

§ 70.08(b)(3)(iii) When Liability Only for Negligence is Imposed

Add:

Harness v. Curtis, 2004 Ark. App. LEXIS 635 (Ark. Ct. App. 2004) (finding the lessee's unsightly presence of vehicles did not amount to waste, because it did not involve any destruction to the property).

§ 70.08(c) Removal of Resources from the Premises [Go To Main]

§ 70.08(c)(2) Removal of Soil and Minerals

Add:

Exxon Corp. v. Miesch, 180 S.W.3d 299 (Tex. App. 2005) (Exxon committed waste on property by plugging oil wells).

FOOTNOTES:
(n2)Note 306.1. *See Goldiluxe, LLC v. Abbott, 306 S.W.3d 613 (Mo. App. 2010)* .

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Supp. To CHAPTER 70 WASTE

8-70 Thompson on Real Property, Thomas Editions Supp. to § 70.09

Supp. to § 70.09 Proper Parties

[Go To Main]

§ 70.09(c) Waste Action by Holder of Reversionary Interest or Executory Interest Against Owner of Defeasible Fee, or Action by Holder of Remainder in Defeasible Fee Against Tenant for Life or Years [Go To Main]

Add:

Hamilton v. Mercantile Bank, 621 N.W.2d 401, 409 (Iowa 2001) (finding a person holding a contingent remainder had no standing to bring a legal action for waste).

§ 70.09(e) Waste Action by Secured Creditor Against Debtor in Possession [Go To Main]

Add:

Bowen v. Yniguez, 2005 Cal. App. Unpub. LEXIS 4889 (California Unpublished Opinions 2005) (damages were calculated according to how the substantial harm impaired the value of the subject property so as to render it inadequate security for the mortgage debt).

§ 70.09(g) Waste Action Against Vendor in Possession. [Go To Main]

Add:

May v. Muroff, 483 So. 2d 772 (Fla. App. 1986) (different measure of damages if vendor's waste is deliberate).

§ 70.09(h) Waste Action Between Concurrent Owners [Go To Main]

Add:

Exxon Corp. v. Miesch, 180 S.W.3d 299 (Tex. App. 2005) (finding that Exxon committed waste on property or production in which the royalty owners owned an interest)

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Supp. To CHAPTER 70 WASTE

8-70 Thompson on Real Property, Thomas Editions Supp. to § 70.10

Supp. to § 70.10 Damages

[Go To Main]

Add:

Rhoades v. Snyder, 2005 N.C. App. LEXIS 2675, 1-2 (N.C. Ct. App. 2005) (court awarded treble damages for a waste claim against executrix of an estate); *Torrez v. Posada, 2005 UT App 444 (Utah Ct. App. 2005)* (upholding treble damages for waste in an unlawful detainer claim); *Shulgan v. Evangelical Lutheran Good Samaritan Soc'y, 2006 Wash. App. LEXIS 18, 28-29 (Wash. Ct. App. 2006)* (the plaintiffs were entitled to a trial on whether they were entitled to treble damages for waste)

Add:

Barkacs v. Perkins, 2006 Ohio 469, P16 (Ohio Ct. App. 2006) (forfeiture of a life tenant's interest in a lease was not an available remedy for waste in the absence of a forfeiture provision in the lease)

Add:

Fawcett v. Estate of Annette C. Meyer, 2005 Mich. App. LEXIS 2217, 41-42 (Mich. Ct. App. 2005) (where timber was removed, damages were measured according to the value of the lost timber).

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Supp. To CHAPTER 70 WASTE

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Supp. to § 70.14 Bibliography.

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Articles

Add the following:

Barr, Gary L. "Waste Land: The Antideficiency Rule in Foreclosures Does Not Apply in Cases of Bad Faith Waste," *30 L.A. Law. 20 (Feb. 2008).*

Lovett, John A. "Doctrines of Waste in a Landscape of Waste," 72 *Missouri L. Rev.* 1209 (Fall, 2007).

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CHAPTER 71 REAL PROPERTY ISSUES IN WEATHER CONTROL

8-71 Thompson on Real Property, Thomas Editions 71.syn

AUTHOR: Late Professor Ray Jay Davis J. Reuben Clark Law School Brigham Young University

§ 71.syn Synopsis to Chapter 71: REAL PROPERTY ISSUES IN WEATHER CONTROL

§ 71.01 Outline of the Chapter.

§ 71.02 Overview of Weather Resources Law.

§ 71.03 Relationships of Weather Resources Management and the Environment.

§ 71.03(a) Real Property.

§ 71.03(a)(1) Property Rights.

§ 71.03(a)(2) Property Values.

§ 71.03(b) Hydrologic Cycle.

§ 71.03(b)(1) Surface Water.

§ 71.03(b)(2) Ground Water.

§ 71.03(c) Other Atmospheric Changes.

§ 71.03(c)(1) Severe Weather Modification.

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§ 71.03(c)(1)(iii) Tropical Storms.

§ 71.03(c)(2) Air Pollution.

§ 71.03(c)(3) Acid Precipitation.

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§ 71.04 Weather Resources Management Technology.

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§ 71.04(d) Materials Delivery.

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§ 71.05(a) Funding.

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§ 71.06 Bibliography.

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CHAPTER 71 REAL PROPERTY ISSUES IN WEATHER CONTROL

8-71 Thompson on Real Property, Thomas Editions § 71.01

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§ 71.01 Outline of the Chapter.

This chapter commences with analysis of the relationship between weather modification and property rights and values. It then considers relationships to the hydrologic cycle and to other atmospheric changes (§ 71.03, *infra*). This places weather modification in its environmental setting. In § 71.04, *infra*, the technology of cloud seeding is addressed through consideration of natural precipitation, weather modification techniques, data collection and reporting, and evaluation of results. Legal practice and procedure are covered in § 71.05, *infra*, with examination of arrangements for funding operations, water rights, and legal liabilities.

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CHAPTER 71 REAL PROPERTY ISSUES IN WEATHER CONTROL

8-71 Thompson on Real Property, Thomas Editions § 71.02

AUTHOR: Late Professor Ray Jay Davis J. Reuben Clark Law School Brigham Young University

§ 71.02 Overview of Weather Resources Law.

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Development and use of technology for extensive surface and underground water resources management have been accompanied by changes in property rights and values and by interrelated growth of legal norms. The rise of modern weather resources management through initiation in the late 1940s of cloud seeding to enhance precipitation n1 has followed a similar pattern. During the past five decades, economics, property concepts, other legal norms, atmospheric science, and engineering have come together to form the shape of human weather control.

Neither weather modification capabilities nor weather resources law have been static; they have evolved with each other. Professional groups whose members have practiced weather modification have undertaken to express their views concerning human ability to alter the weather. n2 Their most recent statements indicate that much has been learned about methods to manipulate weather phenomena, but that ongoing research and continued learning from application of scientific principles will enhance their capabilities. Also it is clear that what has been learned about appropriate techniques in one geographic locale or climate regime does not necessarily transfer to different places and times. Effectiveness of currently developed technologies varies with the type of precipitation situation being treated. Cold ground fog dissipation over relatively small areas is now operational at a number of major airports; removal of warm fog is still in an experimental mode. Winter snowpack enhancement over mountainous areas can achieve 5-20% seasonal increases depending upon meteorological conditions. Evaluations of wintertime programs in more coastal environments indicate between 5 and 30% increases seasonally. Summer precipitation augmentation appears promising. Projects relying upon injection of seeding material directly into clouds meeting certain criteria generally indicate positive seeding effects on rainfall from the treated cloud and sometimes in area-wide rainfall. The scientific linkages involved in hail suppression are not well understood, but assessment of surface hail differences suggest reduction in the order of 20-50%. Correct placement and timing of seeding are of particular importance in hail suppression work. n3

The scientific and technological setting dominated the genesis of weather modification law during the first decade after the initial experiments in 1946. The dominant legal developments were in the judicial arena. Litigants sought either to enjoin seeding activities or to obtain damages for losses they asserted were caused by the weather modification activities. Although in none of the cases were claimants able to prove they were harmed by the seeding, in most of them

litigation had adverse effects upon the projects. The pattern for subsequent litigation was thus established. Plaintiffs have been unable to collect damages from cloud seeders or their sponsors because they have been unable to prove causation. But, by threatening to sue or actually bringing suit, opponents of weather modification projects often have been able to cause suspension of seeding activities. n4

During the decade from 1957 to 1966, legislatures got into the weather modification control act. Congress passed various appropriation laws which supplied funds for cloud seeding. It also enacted a requirement that persons conducting weather modification activities report them to the Department of Commerce. n5 The states commenced passing statutes and promulgating administrative regulations regulating weather control projects. At present two-thirds of the states have such legal rules requiring operational permits for projects and, in some cases, professional licenses for operators. n6 The bulk of the early laws came from the more arid states where there was more incentive to attempt precipitation enhancement than in comparatively well watered jurisdictions. The physical setting dominated the second decade of weather modification law.

The executive branch of government played the most significant role of official agencies during the golden decade of weather modification regulation, the third decade from 1966 to 1976. Administrative regulation, governmental support, and multi-jurisdictional agreements then were fashionable. But late in the 1970s the regulatory climate changed. Other than environmental regulation, during the years since then there has been less government involvement with weather control efforts -- less funding for research and operations, less invasive regulation, less litigation. The pace of legal development has slowed to a crawl. n7

FOOTNOTES:

(n1)Footnote 1. For accounts by the scientist who conducted the first cloud seeding experiments, *see* Vincent Schaefer, *The Early History of Weather Modification*, 49 Bull. American Meteor. Soc'y 337 (1968); Vincent Schaefer, T *The Production of Ice Crystals in A Cloud of Supercooled Water Droplets*, 104 Science 457 (1946).

(n2)Footnote 2. American Meteorological Society, *Planned and Inadvertent Weather Modification: A Policy Statement of the American Meteorological Society as Adopted by the Council on 5 January 1992*, 73 Bull. American Metero. Soc'y 331 (1992); *Weather Modification Ass'n, Weather Modification Capability Statement*, 25 J. Weather Modif. 11 (1993). *See also* a reprint of the *World Meteorological Organization Statement on the Status of Weather Modification*, 25 J. Weather Modif. 1 (1993); American Society of Civil Engineers, Policy Statement No. 275 on Atmospheric Water Resources Management, adopted by Board of Direction on Sept. 12, 1992.

(n3)Footnote 3. *See* American Meteorological Society, *Planned and Inadvertent Weather Modification: A Policy Statement of the American Meteorological Society as Adopted by the Council on 5 January 1992*, 73 Bull. American Metero. Soc'y 331 (1992).

(n4)Footnote 4. Ray Davis, *Four Decades of Weather Modification Law*, 19 J. Weather Modif. 102, 103 (1987).

(n5)Footnote 5. *15 U.S.C.A. §§330*-330(e).

(n6)Footnote 6. For discussion of state regulation of weather control, *see* §71.06(a)(1), *infra*.

(n7)Footnote 7. Ray Davis, *Four Decades of Weather Modification Law*, 19 J. Weather Modif. 102, 104-105 (1987). Despite the slow pace of legal developments, weather modification activity continues, especially internationally. *See, e.g.*, Seshagiri Mathang, "Cloud-Seeding Waters Down," *Times of India* (May 24, 2004); UN Integrated Regional Information Networks, "Water and Sanitation; Cloud Seeding Could Be Expanded Across the Sahei," *Africa News* (May 20, 2004).

Thompson on Real Property, Thomas Editions

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CHAPTER 71 REAL PROPERTY ISSUES IN WEATHER CONTROL

8-71 Thompson on Real Property, Thomas Editions § 71.03

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§ 71.03 Relationships of Weather Resources Management and the Environment.

Weather resources management activities have impacts upon and are otherwise related to real property, the hydrologic cycle, and other atmospheric changes. These relationships and their legal consequences are addressed in this section.

§ 71.03(a) Real Property.

The connection between cloud seeding and real property involves both property rights and property values. Rights in and values of realty may be either expanded or diminished.

§ 71.03(a)(1) Property Rights.

Property rights can be affected by airspace intrusion above the surface of real property in order to carry out the cloud seeding operation and by impacts upon the surface of the land from either increases or decreases in precipitation resulting from the seeding. To the extent there is no legal responsibility for such acts, the seeder's conduct has altered the property rights of the landowner. If the landowner and the seeding project sponsor are not the same person, property rights of the landowner have been potentially decreased; if they are the same person, or if they have acted in concert, property rights potentially have been increased.

Sir Edward Coke, over three hundred years ago uttered the famous dictum that " *cujus est solum, ejus est usque ad coelum*." n8 Understood literally, this means that he who owns the soil also owns into the heavens. If this expansive notion of landownership rights ever really meant anything beyond rights immediately above the surface of the ground, it had to and has given way in light of the advent of aviation. The Restatement (Second) of Torts §159 (2) advances the proposition that "Flight by aircraft in the air space above the land of another is a trespass if, but only if, (a) it enters into the immediate reaches of the air space next to the land, and (b) it interferes substantially with the other's use and enjoyment of his land." n9 Flying aircraft and rockets and introducing seeding materials into the atmosphere should not usually amount to invasion of the real property interests of the owner of the land over which the cloud seeding activity takes place.

Impacts on the surface of land either within or outside the targeted seeding area can amount to an increase or a decrease in precipitation with consequent resulting hydrologic impacts -- floods or droughts. Both kinds of claims have been

litigated. Except for a case involving granting a temporary restraining order shutting down a hail suppression project alleged to have reduced precipitation over the plaintiffs' lands, the defendant cloud seeders and their sponsors have won all such lawsuits. n10 Their victories, however, have not been the result of court rulings about the property rights involved. Rather the litigation has favored weather modifiers because complainants have been unable to prove that they were harmed due to the cloud seeding. Lack of proof of causation, rather than a property rights decision has been the basis for each such decision. n11 Given sufficient proof of harm and connection between the conduct of the defendants and that harm, liability for impacts on the surface of realty will result and weather modification to that extent will not constitute a restriction on property interests. Such proof, though, will require evidence that will be difficult to produce. n12

§ 71.03(a)(2) Property Values.

Weather modification is practiced for economic gain. It is a profession and a business for cloud seeders. The size of the profession is quite small; around 150 people are members of the Weather Modification Association, the professional organization to which many cloud seeders belong. These meteorologists, climatologists, chemists, engineers, hydrologists, and other professionals make their livings from cloud seeding. The economics of the business are important to them. n13

Similarly, monetary considerations motivate sponsors for cloud seeding projects. If sponsors perceive that weather-related losses will be decreased, they will support such activities. Sponsors have included ski areas interested in increased snowfall, electric power companies anticipating runoff enhancement that will increase hydropower generation, cities concerned about municipal water supplies, farmers and ranchers worried about hail losses and hopeful for added rainfall, and other waterusers, developers, and managers wishing to tap the "rivers in the sky." The bottom line, the cost/benefit ratio, is critical to all such sponsors of weather resources management projects. If their property values are increased, their involvement continues. If they gain nothing, or are unable to perceive that they have gained anything, their support for weather modification stops. n14

Property owners do not share completely congruent weather interests. Alterations in natural weather may disadvantage some landholders through reduction or increase in the precipitation affecting their lands. As has been noted in the previous subsection, quantification of such disadvantages and proof of their causation will be very difficult. n15

Because unmodified weather events can have severe negative impacts on economic activity, the gross benefits from successful precipitation enhancement and hail suppression activities appear to be high. By comparison the operational costs of weather modification efforts are small. Studies based upon econometric models bear out such favorable cost/benefit ratios. n16 Such studies should, however, look beyond the immediate impacts upon stakeholders and consider the broader regional effects and weigh other means for enhancing water resources and minimizing the overall impacts of weather and climate. n17

§ 71.03(b) Hydrologic Cycle.

To scientists and engineers, the hydrologic cycle is a single system, one in which water moves from the atmosphere to the surface and underground and then back into the atmosphere again. Traditionally American law has viewed water resources in segments rather than in a uniform manner. Diffuse surface water, water in watercourses on the surface of the land, and underground water are treated differently in law. n18 The ability to harvest atmospheric water now adds another facet to hydrologic management, one that is related to surface and ground water as another portion of the same hydrologic cycle. However, in the same fashion that physical connection has not resulted in integration of other water law, similarly the relationship has not resulted in atmospheric water resources law simply following the prior legal patterns for surface and ground water. In the eyes of the law, it is as different from them as they are different from each other.

§ 71.03(b)(1) Surface Water.

In spite of efforts to encourage uniformity among state water rights laws, n19 each jurisdiction has its own legal system. There are some commonalities which have provided models for atmospheric water resources law. Administrative permits are now required in most states to obtain surface water rights. n20 Permits, but not necessarily from the same agencies, are required under weather modification legislation in order to mount a project. n21 Reasonable and beneficial use are measures of the extent of surface water rights. n22 Comparisons among cloud seeding plans are authorized under permit legislation in order to judge the appropriateness of the projected activity. n23 Water, whether on the surface or in the atmosphere, is regarded as a renewable resource the development of which is subject to the public interest.

§ 71.03(b)(2) Ground Water.

Ground water, like water on the surface, is governed by a non-uniform legal system. Persons who drill wells and also the installation of the wells are regulated; professional well drillers need permits to practice their trade; development of the resource by drilling a well also requires administrative consent. n24 In those states that require both a weather modifier's license and an operational permit, there is a parallel system of dual regulation. n25 Substantive legal requirements that must be met to obtain a well drilling permit vary depending upon whether the state follows a reasonable use approach, prior appropriation, or correlative rights. n26 Substantive requirements imposed upon cloud seeding project permit applicants are much more uniform and appear to have little connection with what sort of ground water doctrine is followed in the jurisdiction. n27

§ 71.03(c) Other Atmospheric Changes.

In addition to cloud seeding intended to enhance precipitation, there are other human-induced changes in the atmosphere. Law relating to them often can be applied to intended weather resources management or at least may be useful as a basis for comparison with intended weather modification law. Among the other atmospheric changes for which there are legal norms are severe weather modification -- suppression of fog and hail and mitigation of tropical storms, air pollution, acid precipitation, unintended weather modification caused by the urban heat island effect, stratospheric ozone depletion, and global climate change.

§ 71.03(c)(1) Severe Weather Modification.

§ 71.03(c)(1)(i) Fog.

The earliest cloud seeding performed outside a laboratory was in essence fog seeding by a team of General Electric Company scientists lead by Vincent Schaefer. In November 1946, they flew an aircraft above a cloud bank and dispensed dry ice particles into it. Early photographs of cloud seeding show a racetrack-like cut in the fog bank below from seeding aircraft following such a course. n28 Subsequently different seeding materials and different operational techniques have been used to treat cold fog (fog at temperatures below freezing) with similar visible results. No sophisticated statistical design is required to demonstrate the effectiveness of the operations. n29 By keeping airports open when they otherwise would be closed to flights, cold fog clearance has some obvious benefits -- travellers who are not delayed, airlines who do not have to assist passengers, and airports that can maintain a smoother flow of traffic than otherwise. n30

Cold fog dispersal through seeding enhances visibility by causing fallout from clouds of ice particles. It has been hypothesized that aggregation of these particles on the ground could slicken roadways and be implicated in motor vehicle accidents. n31 There are, however, no reported legal actions involving collisions of that sort. Cold fog dissipation is a technology with so little downside that most permitting laws exempt such activities from obtaining administrative consent to operate. n32

Warm fog (fog above freezing temperatures) has proven to be a more difficult nut to crack than cold fog. The principles of seeding with hygroscopic materials (those that take up moisture such as salt) are well understood, but the manner and location of the seeding and the size distribution of the seeding agents are both critical and hard to specify in individual cases. Some hygroscopic materials are corrosive, but others (such as urea/ammonium nitrate) may be either benign or even beneficial as a fertilizer. n33 Warm fog treatment has been neither the subject of litigation nor of regulation.

§ 71.03(c)(1)(ii) Hail.

Hail suppression has been the most controversial form of weather modification. It is the subject of a current ongoing dispute between agencies of the states of North Dakota and Montana, n34 it has resulted in permitting and liability disputes in Texas, n35 it led to violence in Colorado, n36 and it has caused a long-lasting negative image of weather modification in the tri-state area of Pennsylvania, West Virginia, and Maryland with resulting legal restrictions on weather modification activities in those jurisdictions. n37 The source of the controversy is the belief that hail suppression diminishes overall precipitation if it is successful and may backfire causing more severe losses if it is not successful. Studies show such concerns unfounded, n38 large scale hail suppression is still practiced in the "hail alley" portions of the High Plains states, n39 and research and development of seeding techniques continue, but more research is needed, including obtaining a better understanding of hail embryo origin and growth and of hailstorm structure and dynamics. n40

Hail poses a considerable problem for crops and also causes property damage. Crop hail insurance rates have responded to hail suppression projects by rate reductions. n41 There also is evidence that increased precipitation may result from hail suppression seeding. n42 State and provincial funds are paying for operational hail suppression activities in North Dakota n43 and Alberta, n44 and there are widespread hail suppression projects in Europe, Africa, and South America. n45

§ 71.03(c)(1)(iii) Tropical Storms.

Hurricanes devastating large portions of many states have increased American concern with the awesome power of such tropical storms and their potential for causing loss of life and property damage. The possibility that cloud seeding could alter the composition, dynamics, and structure of hurricanes led early researchers to seed a hurricane. As such storms often do, it changed course. Concern over possible legal liability should such a storm come over land after altering its direction led private researchers on advice of legal counsel to get out of the hurricane seeding business. n46 Development of the technology was taken up by the United States Navy in cooperation with the Department of Commerce. They did some seeding in the Atlantic, but protected themselves by tight criteria concerning the direction and speed of the storms. In fact the criteria was so tight they could not often seed and sought to shift their operations to the Pacific and Indian Oceans. Their work never materialized because downwind countries were unwilling to go along with the American plans unless they were assured that the United States would hold them harmless from any resulting losses -- something that our negotiators were unable and unwilling to do. n47 Potential liability from treatment of such large tropical disturbances is just simply too great even for the United States to assume.

§ 71.03(c)(2) Air Pollution.

There is one superficial commonality between weather modification and air pollution: they both involve atmospheric emissions. The differences, though, are far greater than the similarities. Cloud seeding is intentional both in the sense that the acts involved in cloud seeding are intended and the consequences hoped for also are intended -- changes in the composition, dynamics, behavior, and movements of the atmosphere in order to alter precipitation. Pollution results generally from intentional conduct which is not designed to produce any particular consequences. In fact polluters usually are simply uninterested in the atmospheric consequences of their emissions.

Another and far more important difference is in the extent of the emissions. Pollutants are measured in tons. Weather

modification agents are used so sparingly that even corrosive or toxic materials are so diluted that it becomes difficult to detect their presence in the atmosphere, on the ground, or in runoff from a seeded target area. Reports from 1991 indicate that 19,561 kilograms of dry ice was used throughout the United States, but only 739 kilograms of silver iodide, and 5,342 gallons of liquid propane. n48 These amounts spread throughout the nation during a total of 1,115 weather modification days are indeed very dilute. n49

The Clean Air Act n50 and state air quality implementation plans based upon it have not dealt with such insignificant matters when there are really serious pollution concerns to attack. Neither have there been air pollution nuisance or trespass cases filed against weather modifiers or their sponsors.

§ 71.03(c)(3) Acid Precipitation.

Acidification of precipitation has been recognized as a serious problem in forests and lakes. Sulphur in the atmosphere due to coal combustion and other manmade causes is no longer being ignored. At the state, federal, and international level legal norms are now in place that are designed to reduce this environmental disaster. States have filed lawsuits against each other to force reductions in sulphur emissions, n51 the Environmental Protection Agency has required consideration of acid rain in state clean air plans, n52 the United States and Canada have negotiated an acid rain abatement agreement. n53 Although cloud seeding and acid precipitation are in most respects dissimilar, both involve the atmosphere and legal responses to acid rain which are illustrative of legal norms that can be directed toward artificially induced precipitation. There could be interstate litigation, n54 federal intervention, n55 and international agreement n56 patterned on the acid rain precedent.

§ 71.03(c)(4) Urban Weather Anomaly.

In addition to intentionally modifying the weather, human activities inadvertently modify weather. It has been long on record that urban areas are warmer than adjacent rural areas. English and French data going back at least two centuries demonstrate this fact. n57 It is now known that urbanization results in both localized and regional weather changes. For example, major cities with populations in excess of 1 million located in continental climates influence warm season clouds and increase precipitation by 10 to 20%, with a lesser impact on cold season precipitation. Urbanization affects not only cloud and precipitation processes, but also air quality, visibility, surface and low-level winds, humidities, and temperatures. In addition, agricultural activities such as cropping and irrigation practices, and industrial activities can modify local and sometimes regional weather conditions. n58

The relationship of inadvertent to intended weather modification is significant. There really is no such thing as "natural" weather, at least not in and around cities and agricultural areas and along transportation corridors. Neither losses nor benefits from weather events can be attributed readily to intended weather modification when there are probable inputs from such things as the urban weather anomaly. Evaluation is made even more difficult by inadvertent cloud seeding.

§ 71.03(c)(5) Stratospheric Ozone Depletion.

Emission of cholorfluorocarbons (CFCs) used in refrigerants and sprays has diminished the stratospheric ozone layer, the high level protection of the earth, from harmful solar radiation. n59 It is thought that among the adverse impacts of this ozone depletion is an increase in skin cancer incidence. n60 In response, the international community, acting through the United Nations, has taken steps toward regulation of CFC production and use. The 1985 Vienna Convention for the Protection of the Ozone Layer provided a framework for later negotiations. n61 In 1987 the Montreal Protocol placed limits on the consumption and use of CFCs in order to achieve a 50% reduction by developed nations in CFCs by 1998. The 1990 Clean Air Act was the response of the United States to its new international obligation. It provides for monitoring production and trade in ozone depleting substances, establishes a schedule (consistent with the Montreal Protocol) for phasing out CFC production and consumption, prohibits persons servicing, maintaining, or disposing of appliances from venting CFCs into the atmosphere, and encourages development of safer refrigerants. n62

International and national legal responses to stratospheric ozone depletion demonstrate the ability of the international and federal community to act when science shows that activities affecting the atmosphere require regulation. Scientists persuaded policy makers that a problem required their prompt attention. Thus far weather modification has not triggered such scientific concern. But should it do so, the ozone precedent is there.

§ 71.03(c)(6) Global Climate Change.

Global climate change is an additional type of anthropogenic atmospheric alteration. Scientific consensus is considerably less complete on climate change than it is concerning ozone depletion, acid rain, unintended weather change, or air pollution. n63 But there is sufficient evidence to convince many reputable (and, what is more important, influential) scientists that the greenhouse effect from world-wide emissions of certain trace gases into the atmosphere is responsible for global warming. They in turn have been able to convince lawmakers throughout the world to take steps to do something to stem the warming tide. n64 Congress has established the National Climate Program to help us "understand and respond to natural and man-induced climate processes and their implications." n65 The Global Change Research Act of 1990 was aimed at supporting research and development of technologies useful for reducing energy consumption, encouraging using renewable energy sources, and other techniques to reduce greenhouse gas emissions. n66 At the United Nations Conference on the Environment and Economic Development in Rio de Janeiro during the summer of 1992, the assembled delegates adopted a climate change convention which formally recognized the nature of the problem and proposed some non-binding national actions to cope with it. n67 This response was less than that of the ozone convention at least in part because of the different levels of scientific consensus about causes and cures and also partly due to economic considerations. The costs of shifting from coal which produces CO_2, a greenhouse gas, are very large compared with the costs of shifting from CFCs.

Weather is a short term phenomenon, one which is relatively localized. Climate is long term, an atmospheric parameter which is widespread. But both phenomena are part of our atmosphere. Laws relating to the one can logically be considered in dealing with the other. The hydrologic consequences of climate change give rise to concern about it. Likewise the hydrologic impacts of weather modification have been considered in assessing the extent to which it should be regulated. Floods and droughts have been the subject of litigation and are appropriate factors to be weighed by administrators in issuing or denying weather modification permits.

FOOTNOTES:

(n1)Footnote 8. 1 Edward Coke, Institutes ch. 1, §1 (4) (a) (19th ed. 1832).

(n2)Footnote 9. Restatement (Second) of Torts[esc] §159 (1965). The law of aviation and air space is covered in Ch. 51, *supra*.

(n3)Footnote 10. For discussion of these cases, *see* §71.06(a)(2), *infra.*

(n4)Footnote 11. *See* §71.05(d)(3), *infra*.

(n5)Footnote 12. Proof in weather modification litigation is discussed in Ray Davis and Pierre St. Amand, *Proof of Legal Causation in Weather Modification Litigation: Reinbold v. Sumner Farmers, Inc. and Irving P. Kirke, Inc.*, 7 J. Weather Modif. 127 (1975).

(n6)Footnote 13. The composition of the hail suppression industry is discussed in Stanley Changnon, et al., *Hail Suppression: Impacts and Issues* 107-109 (1977).

The Weather Modification Association, which is the professional organization to which most reputable cloud seeders belong lists in its annual publication its members, those of them who are certified as cloud seeders, and those certified to manage weather modification projects. *See, e.g.*, 25 J. Weather Modif. 116 and 120 (1993).

(n7)Footnote 14. For discussions of sponsorship of cloud seeding activities by stakeholder groups, see Dean Mann, *The Yuba City Flood: A Case Study of Weather Modification Litigation*, 49 Bull. American Meteor. Soc'y 690 (1968) (project sponsored by electric power company); Jerome Kirby, *Cloud Seeding in the Texas Panhandle*, 10 J. Weather Modif. 170 (1978).

(n8)Footnote 15. *See* §71.03(a)(1), *supra*, and §71.05(c), *infra*.

(n9)Footnote 16. Summary of the economic impacts of cloud seeding is provided by Olin Foehner in the American Society of Civil Engineers, *Guidelines for Cloud Seeding to Augment Precipitation*, 109 J. Irrig. & Drainage Engineering 111, 117-20 (1983). The Guidelines are currently undergoing revision and will be published in a forthcoming issue of the Journal of Irrigation and Drainage Engineering.

(n10)Footnote 17. Steven Sonka, *Economics of Weather Modification: A Review*, Rep. to Ill. Inst. Nat. Res. (1979).

(n11)Footnote 18. Leonard Rice and Michael White, Engineering Aspects of Water Law 13-18 (1987). *See* Chapter 50 of this treatise for discussion of water rights.

(n12)Footnote 19. Robert Beck, *The Legal Regimes*, §4.05(f), in 1 Waters and Water Rights (Robert Beck ed. 1991).

(n13)Footnote 20. This includes two-thirds of the riparian rights jurisdiction. Joseph Dellapenna, *Regulated Riparianism*, ch. 9, in *id*.

(n14)Footnote 21. State regulation of weather modification is covered in Ray Davis, *Weather Modification Law Developments, 27 Okla. L. Rev. 659 (1973);* Ray Davis, *State Regulation of Weather Modification, 12 Ariz. L. Rev. 35 (1970).*

(n15)Footnote 22. A. Dan Tarlock, Law of Water Rights and Water Resources §§3.12, 5.16 (1988).

(n16)Footnote 23. Draftsmen of the Illinois weather control law intended to provide for a broad legislative delegation of discretion to the administrators of the state's law. William Ackerman et al., *The New Weather Modification Law for Illinois*, 55 Bull. American Meteor. Soc'y 745 (1974). That law became the model for subsequent comprehensive state weather modification statutes.

(n17)Footnote 24. Frank Trelease and George Gould, Water Law 407 n.5 (1986).

(n18)Footnote 25. *See* §71.05(b)(1), *infra*, for consideration of state regulation.

(n19)Footnote 26. Earl Murphy, *Quantitative Groundwater Law Part IV*, in 3 Waters and Water Rights (Robert Beck ed. 1991).

(n20)Footnote 27. Although the groundwater laws of Colorado and Illinois are dissimilar, their weather control provisions are comparable.

(n21)Footnote 28. Such a photograph may be found at 13 J. Weather Modif. 65 (1981). Much of that issue of the journal is devoted to the early history of weather modification.

(n22)Footnote 29. With reference to cold fog seeding the World Meteorological Organization statement on weather modification says: "Because the effects of this type of seeding are easily measured and results highly predictable, randomized statistical verification generally has been considered unnecessary." *WMO Statement on the Status of Weather Modification* §4.3 reprinted at 25 J. Weather Modif. 1, 4 (1993).

(n23)Footnote 30. *See* W. Boynton Beckwith, *Impacts of Weather on the Airline Industry: The Value of Fog*

Dispersal Programs, in W. R. Derrick Sewell, Human Dimensions of Weather Modification 195 (1966).

(n24)Footnote 31. There has, however, been experimentation with fog dispersal in high traffic corridors, probably on the ground that some precipitation on the surface is a lesser evil than impaired visibility due to the fog. *See* Engineering News-Record, Aug. 12, 1965. at 107.

(n25)Footnote 32. *See* discussion in §71.05(b)(1), *infra*.

(n26)Footnote 33. *See WMO Statement on the Status of Weather Modification* §4.3 reprinted at 25 J. Weather Modif. §4.2 (1993).

(n27)Footnote 34. North Dakota Atmospheric Resources Bd. v. Board of Nat. Resources and Conserv., No. ADV-92-918 (1st Jud. Dist., Lewis & Clark County, Mont. 1992).

(n28)Footnote 35. Lumsden v. Atmospherics, Inc., No. 7594 (Dist. Ct. Lamb County, Tex. 1974); *Southwest Weather Research, Inc. v. Duncan, 319 S.W.2d 940 (Tex. Civ. App. 1958)*, both *aff'd sub nom. Southwest Weather Research, Inc. v. Jones, 327 S.W.2d 417 (Tex. 1959).*

(n29)Footnote 36. Hail suppression sponsored by Coors Brewery to protect their barley sources in the San Luis Valley of Colorado has led to litigation. Shawcroft v. Department of Nat. Resources, Civil A (Dist. Ct. Alamosa County, Colo. 1972). It also resulted in violence when the radar trailer of the weather modifier was dynamited and destroyed.

(n30)Footnote 37. Maryland's law, which is no longer in force, banned weather modification. Md. Ann. Code art. 66C, §110A (1967). For discussion of the Pennsylvania and West Virginia strict liability tort provisions, *see* §107.05(d)(2). The Tri-State Natural Weather Association, an organized group of cloud seeding opponents from the area was very active during the 1960s and 1970s. There has been no report of hail suppression in that part of the country since that time.

(n31)Footnote 38. Stanley Changnon, et al., *Hail Suppression: Impacts and Issues* 84 (1977).

(n32)Footnote 39. In 1991, projects to suppress hail were reported from North Dakota and Kansas. William Blackmore, *A Summary of Weather Modification Activities Reported in the United States During 1991*, 25 J. Weather Modif. 107, 108 (1993).

(n33)Footnote 40. *See WMO Statement on the Status of Weather Modification* §4.3 reprinted at 25 J. Weather Modif. §5.6 (1993).

(n34)Footnote 41. James Miller and Michael Fuhs, *Results of Hail Suppression Efforts in North Dakota As Shown by Crop Hail Insurance Data*, 19 J. Weather Modif. 45 (1987).

(n35)Footnote 42. *See* discussion at Stanley Changnon, et al., *Hail Suppression: Impacts and Issues* 84 (1977).

(n36)Footnote 43. The state/local North Dakota project is discussed at §71.05(a)(2), *infra*.

(n37)Footnote 44. R. G. Humphries, M. English and J. Renick, *Weather Modification in Alberta*, 19 J. Weather Modif. 13 (1987).

(n38)Footnote 45. A leading American cloud seeding company, Atmospherics, Inc., has conducted operations in Australia, Chile, Dominican Republic, Greece, India, Kenya, Namibia, Philippines, Republic of South African, and Sudan. *Atmospherics Inc., An International Company that Looks at the Weather... And Does Something About It!* 15 (1990). Colorado International Corporation activities are noted in Larry Davis, *CIC Operational Projects in Europe and North Africa, Proc. Ninth Ann. Meeting North American Interstate Weather Modif. Council* 1 (1982).

(n39)Footnote 46. As a part of Project Cirrus, a cloud seeding experiment conducted by General Electric Company under federal sponsorship, on October 13, 1947 dry ice was dropped into the wall clouds of a hurricane east of Jacksonville, Florida. R. Cecil Gentry, *Hurricane Modification*, in Wilmot Hess, Weather and Climate Modification 497, 505 (1974). The storm changed track about the time of the seeding (probably before) and headed overland in Georgia. Potential legal liability frightened General Electric legal counsel and the business of treating hurricanes became a federal government activity. *Id.* 507 *et seq*.

(n40)Footnote 47. The author, one of the persons dealing with the Australians, felt that a law professor was not in any position to commit the United States to the potentially huge number of claims if something did go wrong with seeding a cyclone and it ravaged Western Australia or the Northern Territory. Besides, the Federal Tort Claims Act does not provide for liability of the United States for harm to foreign nationals abroad from activities of American governmental employees.

(n41)Footnote 48. William Blackmore, *A Summary of Weather Modification Activities Reported in the United States During 1991*, 25 J. Weather Modif. 107, 108 (1993).

(n42)Footnote 49. William Blackmore, *A Summary of Weather Modification Activities Reported in the United States During 1991*, 25 J. Weather Modif. 107, 108 (1993).

(n43)Footnote 50. *42 U.S.C.A. §7671 et seq*.

(n44)Footnote 51. *See* discussion in Mark Squillace, Environmental Law: Air Pollution 133 (1988). The statute is *42 U.S.C.A. §7410* (Supp. 1993).

(n45)Footnote 52. *See* Mark Squillace, Environmental Law: Air Pollution 69 (1988) for presentation of materials about state implementation plans. *See also* Roger Findley and Daniel Farber, Environmental Law 295-345 (2d ed. 1985).

(n46)Footnote 53. Agreement of March 13, 1991 between the Government of the United States of America and the Government of Canada on Air Quality. *30 I.L.M. 678 (1991).*

(n47)Footnote 54. *See* discussion in Mark Squillace, Environmental Law: Air Pollution 133 (1988); *see also* §71.05(b)(2), *infra*.

(n48)Footnote 55. *See* §71.05(b)(2), *infra*.

(n49)Footnote 56. *See* Mark Squillace, Environmental Law: Air Pollution 69 (1988) for presentation of materials about state implementation plans; *see also* §71.05(b)(3), *infra*.

(n50)Footnote 57. Helmut Landsberg, *Inadvertent Atmospheric Modification Through Urbanization*, in Wilmot Hess, *supra* note 46, at 732-33. Ray Jay Davis, Great Lakes Symposium, *Law and Urban-Induced Weather Change*, *25 U. Tol. L. Rev. 379 (1994):*

> Human activities have been proven to increase precipitation and severe storms in urban areas, because of a combination of pollution, the urban heat island, higher metropolitan area humidity, and the mechanical effect of built-up areas. Each city has unique conditions, and urban-induced weather changes are variable. Governmental policy concerning unintended effects on weather can be implemented by law in three different approaches: (1) applying existing law to new weather parameters; (2) adapting to modified weather; and (3) making and enforcing new laws identifying causal factors as agents of inadvertent weather change. These legal approaches to urban-induced weather alteration can exist in tandem.

(n51)Footnote 58. Stanley Changnon, Summary of Metromex: Weather Anomalies and Impacts, Final Report on Metromex (1977). For the legal implications of such unintended weather modification, see Ray Davis, *The Legal Implications of Inadvertent Weather Modification: Metromex and the Law,* Rep. to Nat'l Sci. Found. (1990).

(n52)Footnote 59. *Ozone Depletion, Greenhouse Gases, and Climate Change* (Rep. Comm. on Global Change, Nat'l Res. Council (1989); *Stratospheric Ozone Depletion: Hearing on H.R. 2699 Before the Subcomm. on Health & the Env't of the Comm. on Energy & Comm.*, 101st Cong., 2nd Sess. (1990).

(n53)Footnote 60. *See* Deadly Skin Cancer Rises as Ozone Layer Thins, Deseret News, Mar. 27, 1990, at A7; Robert Engelman, *Melanoma Rising: "Catching Rays" Continues to be Risky Business*, Chi. Trib., Aug. 19, 1990, at Travel 9.

(n54)Footnote 61. S. Treaty Doc. No. 99-9, 99th Cong., 1st Sess. 2 (1985), reprinted in I.L.M. 1529 (1987). The United States ratified the convention on August 29, 1986. Treaties, Dep't State Bull., Nov. 1986, at 88.

(n55)Footnote 62. The Montr[acute]eal Protocol may be found at S. Treaty Doc. No. 100-10, 100th Cong., 1st Sess. 1 (1987), reprinted in *26 I.L.M. 1550 (1987).* The United States ratified the protocol on April 21, 1988. Treaties, Dep't State Bull., June 1988, at 68. The American legislation may be found at *42 U.S.C.A. §7671 et seq.*

(n56)Footnote 63. *See* Gary Bryner, Global Warming and the Challenge of International Cooperation: An Interdisciplinary Assessment (1992); Arnett Dennis, *Limits on Global Warming*, 24 J. Weather Modif. 106 (1992).

(n57)Footnote 64. For discussion of climate change law, *see* Ray Davis, *Climate Change Apocalypse and Law, 6 B.Y.U.J. Pub. L. 213 (1992);* Lakshman Guruswamy, *Global Warming: Integrating United States and International Law, 32 Ariz. L. Rev. 221 (1990).*

(n58)Footnote 65. *15 U.S.C.A. §2902* (1989).

(n59)Footnote 66. *15 U.S.C.A. §2931* (Supp. 1993). The research program is discussed by Robert Corell, *The U.S. Global Change Research Program: An Overview and Perspectives of the FY 1992 Program*, 72 Bull, American Meteor. Soc'y 605 (1991).

(n60)Footnote 67. Framework Convention on Climate Change, *31 I.L.M. 848 (1992).* For discussion of the agreement, *see* Edward Parson et al., *A Summary of the Major Documents Signed at the Earth Summit and the Global Forum*, 34(8) Environment 12 (1992).

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CHAPTER 71 REAL PROPERTY ISSUES IN WEATHER CONTROL

8-71 Thompson on Real Property, Thomas Editions § 71.04

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§ 71.04 Weather Resources Management Technology.

A precondition to effective weather resources management is understanding the natural precipitation processes. Weather modification technology seeks to manipulate those processes. This section considers such natural weather processes and then looks at cloud seeding agents and techniques used to enhance precipitation. It looks at the legal aspects of mounting a cloud seeding project and considers requirements about data collection, reporting, and evaluating such projects.

§ 71.04(a) Natural Precipitation Processes.

Natural precipitation processes involve two successive stages: cloud formation and precipitation formation.

§ 71.04(a)(1) Cloud Formation.

Often under drought conditions there are calls for undertaking weather modification projects, and when weather conditions provide normal or abundant precipitation, according to one prominent atmospheric scientist, "interest in weather modification is soluble in a drop of water." n68 But droughts are unlikely times for successful cloud seeding and more normal weather may provide greater opportunities to seed successfully. In order to achieve success, there must be the right sort of clouds to treat. Without them nothing can be done.

Clouds form when there is adequate water vapor in the atmosphere, some cooling mechanism to bring air parcels to saturation and beyond, and sufficient aerosol particles to act as nuclei upon which condensation of the water vapor into cloud droplets can start. n69 A common mechanism for cooling air parcels to saturation is their expansion as they rise to higher altitudes due to updrafts in cumulus clouds, lifting by winds flowing into low atmospheric pressure areas, or upward movement due to meeting rising terrain. Fog and low stratus clouds are formed by radiation cooling. The quantity of precipitation that a cloud can produce depends on the nature of the updraft, its intensity, extent, and longevity. Most of the microscopic aerosol particles serving as cloud condensation nuclei either are ammonium sulfate in continental air masses or sea salts in maritime air. n70

§ 71.04(a)(2) Precipitation Formation.

Unless cloud droplets become part of the precipitation process, they readily will evaporate and not fall to earth. They are extremely small. A typical raindrop is between one million and ten million times the size of a cloud droplet. Hence there must be another atmospheric physics process which converts such droplets into precipitation. In some maritime clouds, where a few droplets are larger initially than others, collisions and the consequent coalescence of a relatively few of the larger droplets helps them grow enough to sweep sufficient nearby droplets so they can become rain drops. n71

Most precipitation subjected to weather modification is produced through a process different from the all-water one. It is the product of an ice-crystal process in clouds that have been cooled below the normal zero degrees celsius freezing temperature. This so-called supercooled liquid water freezes when it touches ice. There must be present in clouds using the ice-crystal process sufficient ice-forming nuclei (small particles between. 00002 and. 00001 inches in diameter) onto which the droplets will freeze. Concentrations of such nuclei vary by more than a factor of a thousand within the supercooled parts of clouds. Their effectiveness depends both upon appropriate temperatures and the moisture conditions in the cloud. If sufficient crystals are nucleated in a supercooled cloud, water from a large number of cloud droplets will be transferred to the crystals. Thereupon the crystals will grow large enough to fall, collide with each other or with cloud droplets, grow, and form snowflakes. Temperatures at lower altitudes determine the form of precipitation reaching the ground. n72

Cloud seeding tries to encourage the natural precipitation process, to enhance its efficiency. The idea is to trigger precipitation when it otherwise would not be produced. Cloud seeding imitates the precipitation formation process.

§ 71.04(b) Agents Used for Precipitation Alteration.

Clouds are seeded by introducing certain chemicals into the atmosphere. Among those agents which have been used for precipitation alteration are salt, urea, ammonium nitrate, liquid nitrogen, lead iodide, silver iodide, carbon dioxide, and propane. Carbon dioxide and silver iodide were the first two used and remain the most widely employed in the United States. Propane is also now being used at some airports. It depends upon rapid expansion of the compressed gas to cool the air enough to form ice crystals. n73

§ 71.04(b)(1) Carbon Dioxide.

Production of ice crystals in a cloud can be enhanced by introducing into it a coolant such as dry ice (CO_2). Vincent Schaefer discovered that by inserting carbon dioxide into a laboratory cold box water vapor in the box would be converted into ice crystals. He used crushed CO_2 in the first cloud seeding flights. n74 Next to silver iodide, CO_2 is currently being used in the greatest number of weather modification projects.

§ 71.04(b)(2) Silver Iodide.

Bernard Vonnegut, a colleague of Schaefer's at General Electric Laboratories, pioneered use of silver iodide as a cloud seeding agent. His concept was that augmentation of natural ice crystals in a cloud with an agent that had a molecular structure similar to ice would cause cloud droplets to freeze onto it and initiate the precipitation process. From testing various substances, he discovered that silver iodide was the most effective artificial nucleus of them all. n75 Chemists have devised various silver iodide compounds in an effort to discover which is the most effective of them.

§ 71.04(c) Artificial Nucleation.

There are two approaches to conversion of supercooled liquid water in clouds into precipitation: static seeding and dynamic seeding. The static seeding strategy is to add to an insufficient number of natural ice-freezing nuclei so sufficient ice crystals will grow, fall out, and yield a maximum amount of precipitation. The seeder must identify those clouds that contain substantial supercooled liquid water but that without seeding will not be part of the precipitation process. If too many ice crystals are nucleated, competition for available cloud water may keep them from getting sufficiently large to interact with one another or with cloud droplets. n76

Dynamic seeding depends upon introduction of large enough quantities of artificial ice nuclei or coolant to cause rapid glaciation of the cloud. The resultant latent heat release from the vapor deposition growth of ice crystals and/or freezing of supercooled drops will then increase the cloud's buoyancy. Updrafts within the cloud are then extended to greater heights, air parcels are cooled to lower temperatures, and more water is condensed from the cloud. This technique is used primarily with wet cumulus clouds. The challenge is to identify the appropriate clouds. n77

In order to conduct a cloud seeding operation properly, it has been recommended that the following actions must take place:

1. Identification of a suitable seeding situation;

2. Reliable production of an appropriate cloud seeding agent;

3. Successful placement of the seeding agent in the supercooled parts of the cloud mass;

4. Availability within the cloud of sufficient supercooled liquid and cloud vapor, and adequate time before evaporation of the cloud so precipitation size particles can be produced; and

5. Eventual fallout to the ground of the precipitation before it evaporates, sublimates, or moves out of the desired target area. n78

§ 71.04(d) Materials Delivery.

Because of the significance to correct targeting, delivery of the seeding agent to the proper place in the cloud at the appropriate time is critical. There are various methods of delivery of materials from the ground and from the air. Propane is dispensed under high pressure from the ground. Carbon dioxide is dispensed from aircraft flying above the clouds as in the case of the first General Electric seeding, or a plane flying through the clouds. Penetrating clouds into the liquid supercooled water parcels is hazardous flying because of icing conditions. Silver iodide is normally dispensed in a smoke form by burning it in an acetone mixture either in a generator on the ground relying on updrafts to take the material into place, or by carrying generators aloft in planes. Also, flares can be dropped from planes, rockets can boost the silver iodide into place, or artillery has been used. n79 Aircraft are expensive to operate and there are crew safety concerns. Although rockets and guns have appealed to Europeans, n80 they have not to American cloud seeders. Ground-based generators must be correctly placed and turned on at the appropriate time. Meteorological conditions will determine whether the seeding agent arrives when and where it should in sufficient quantities to do the job correctly.

§ 71.04(e) Mounting a Project.

Mounting a weather modification project calls for skilled personnel who are knowledgeable in meteorology, cloud physics, cloud seeding techniques, and project management. They must enter into a cloud seeding contract with a sponsor and comply with applicable legal requirements.

§ 71.04(e)(1) Sponsorship Contracts.

Weather resources management usually involves a sponsoring organization and a professional cloud seeding organization. Their relationship is governing by contract between them. Usual terms include promises by the cloud seeder or the sponsor to secure the proper permit from the state government. n81 The seeder is to provide forecasting and meteorological services in order to ascertain proper seeding times. Delivery systems are agreed upon; they often are a mix between ground-based and aircraft seeding. The use of radar to determine when and where to seed and to help evaluate results is stipulated in the agreement. Other instrumentation, particularly in research contracts, may be called

for. The cloud seeder will undertake to keep records which will include cloud seeding data, weather information, and hydrologic data. A cloud seeding plan will be set forth and the cloud seeder will agree to seed with the established plan, to suspend seeding under certain meteorological conditions in order not to exacerbate a severe weather situation or to be perceived as doing so, to operate during the agreed upon cloud seeding season and within the prescribed operational area in an effort to effect results in a target area, and to report on all of this to the sponsor. Usually contracts require the operator to carry legal liability insurance. In return for the services of the weather modifier, the sponsor will promise to pay the required fee. n82

In their relationships with clients, weather modifiers must comply with professional ethical standards. They are not to sell their services through exaggeration of their capabilities or guaranteeing specific results. Their claims of capabilities should be kept within the bounds established by professional capability statements. n83 Also it is not proper for operators to enter into contingent fee contracts. They are not allowed to enter into agreements paying them a bonus for production of precipitation over certain contractually agreed levels. n84

§ 71.04(e)(2) Environmental Regulation.

Because weather modification takes place in the atmosphere and is intended to alter the environment, it is a natural for environmentally motivated regulation. Projected changes in snowpack depth, as an illustration of such environmental quality concerns, caused a Montana environmental organization to seek an injunction restraining seeding. n85 In mounting a project, seeders and their sponsors must conform to environmental laws and administrative rules. If they do not do so, their weather control activities can be enjoined.

State laws requiring a permit as a condition of operations, can serve environmental ends. Regulators can inquire whether the project is environmentally proper and, if it is, either call for a change in the operational plan or deny the permit. Environmental organizations frequently participate in permit hearings. Both through visitation of projects and consideration of required reports regulators can determine whether environmental requirements established in permits have been complied with. n86

When the federal government sponsors a cloud seeding project, there is a possibility that an environmental impact statement process may be required. The National Environmental Policy Act of 1969 mandates that federal agencies seeking to operate projects which have a "significant" impact upon the "quality of the human environment" file a "detailed" Environmental Impact Statement (EIS). n87 The process involves conducting an environmental assessment to determine if there will be such significant impact. If not, a statement to that effect is filed. If there will be, data from the assessment is used to prepare a draft EIS which is widely circulated to obtain responses from stakeholder groups. Hearings may be held to attract comments. The agency then considers the input received and prepares a final EIS which is filed with the appropriate federal agency. n88 Environmental impact statements must be complete or else the challengers of a project may be able to have a court enjoin launching the proposed action. n89

The National Environmental Policy Act requires statements to contain:

1. The environmental impact of the proposed action;

2. Any adverse environmental effects which cannot be avoided should the proposal be implemented;

3. Alternatives to the proposed action;

4. The relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity; and

5. Any irreversible and irretrievable commitments of resources which would be involved in the proposed

action should it be implemented. n90

Production of that sort of information adds to the costs of mounting a project. The process can be simplified by borrowing from other EIS's prepared for similar projects using federal funds. Studies of environmental issues have been made under government sponsorship. n91 These too can be used. Of course caution must be taken in using generic studies because conditions and projects vary from location to location.

Snowpack augmentation in or affecting wilderness areas also has given rise to legal difficulties. The Wilderness Act of 1964 set up the Wilderness System, units of which are included by congressional action placing them in the system. n92 In such wilderness areas, many of which because of their high mountain locations are prime target areas for maximum enhancement of snowpack, certain activities are banned on the ground that they are inconsistent with wilderness values. It is more efficient to use motorized equipment to install and service generators and instrumentation than it is to walk into the areas. Yet some federal officials have interpreted the Wilderness Act to ban such weather modification related activities. n93

§ 71.04(e)(3) Federal Aviation Administration Regulation.

Operation of cloud seeding aircraft is subject to regulation by the Federal Aviation Administration. In some countries, regulation by the civil aviation authorities has been an effective means for controlling cloud seeding activities. n94 In the United States, FAA regulation has come into play in three areas: airworthiness certification of seeding aircraft, flight regulation, and carrying hazardous substances. A cloud seeding aircraft must be specially equipped for its weather modification missions. Flare racks and/or cloud seeding generators must be mounted, and cloud physics instrumentation usually also is added in addition to normal flight instruments. These modifications must meet with FAA approval to be given airworthiness certification. n95 Flight control for carrying out weather modification missions is most effective when carried out from project radar operators and controllers on the ground. This must be integrated with normal FAA flight control. The agency has usually been very cooperative with weather modifiers and has allowed them latitude in directing their cloud seeding pilots. n96 The hazardous substances regulations of the FAA deal with explosives and combustibles -- an apt description of flares and burning generators. It has been necessary for operators to secure FAA waivers to carry out their flights. n97

Pilots are taught to avoid severe weather, to stay away from clouds which contain supercooled liquid water which might cause them icing problems. Weather modification ground controllers for cloud seeding flights might well direct their pilots to enter clouds in places where experience has taught the pilots that the ride will be a rough one. It is clear from operational weather resources management projects that pilots have the final word on their safety. It also is clear that they may be asked to do flight segments that in another context they would not undertake. Many American weather modification pilots have been trained at a special weather modification pilot training course offered at North Dakota University where they are taught how to seed and why they must comply with instructions from project directors when it is safe to do so. n98

§ 71.04(f) Data Collection and Reporting.

Weather resources management depends upon data collection by the operator so he can know what it is that he is doing and reporting to the sponsor, the state, and the federal government so they too can be aware of what activities are taking place.

§ 71.04(f)(1) Keeping Logs and Records.

Weather modifiers often have had prior experience as practicing meteorologists, engineers, or aircraft pilots. Training in all of those professions includes teaching practitioners to keep logs and records. Consequently, it was natural that cloud seeders follow their own earlier practices in the new setting. Without contractual or legal compulsion, they would

maintain records. Also there is among cloud seeders a healthy interest in knowing what they are doing, something that can be accomplished only if accurate records are kept.

Information is the life blood of effective administrative regulation. It can be collected either by government personnel going on the site and collecting it or by requiring keeping and submitting logs and records to the regulator. Information gathering by the cloud seeder is less expensive and less intrusive than exercise of the visitorial power. Even in those jurisdictions with statutory authority to monitor projects by on-site inspections, n99 the visitorial power has been used merely as an adjunct to police the record keeping requirement. n100

In addition to effective regulation, public awareness of what is happening in a regulated industry and how well public control of it is working is dependent upon having information through operator logs and other records. Sponsors as well need such information to be able to ascertain whether contractual obligations have been met by operators.

Federal regulations mandate keeping logs and records. Operators must maintain a chronological daily log which shall include the file number assigned to the project, the designation of each unit of weather modification apparatus, and the following information:

1. Date of the activity;

2. Position of each item of weather modification equipment during the activity;

3. Time when the seeding began and ended;

4. Duration of operation of each unit of weather modification apparatus;

5. Type of each cloud seeding agent used;

6. Rate of seeding agent dispersal;

7. Total amount of each agent employed; and

8. Number of days on which weather modification activities were conducted, segregated by the predominant types of weather phenomena. n101 Additional meteorological and seeding information applicable to specific types of seeding equipment must be recorded, but need not be a part of the daily logs -- who operated the equipment, the altitude and type of weather treated, release points and temperatures at them, aircraft identification numbers and names and addresses of crew members and pilots, descriptions of weather phenomena such as clouds, hail, rain, humidity, and temperature, and all measurements of precipitation made in target and control areas. n102

State rules for keeping logs and records are similar. In some cases they simply require operators to keep the data mandated by federal law. n103

§ 71.04(f)(2) Reporting.

Cloud seeders make reports to their sponsors, to state regulatory officials, and to the National Oceanic and Atmospheric Administration, an agency of the United State Department of Commerce.

§ 71.04(f)(2)(i) To Sponsor.

Usually by contract operators of weather control projects are required to report periodically to their sponsors. And,

whether it is required by contract or not, feedback to sponsors is essential to contract renewal. The timing and contents of such reporting depend upon contractual requirements and the nature of the relationship between the parties. Some contractor reports are rather complete. They have not only information about the seeding but also provide some assessment of the seeding effects. n104 Others are less formal, but even word of mouth reporting is better than no feedback to the persons or entities paying for the seeding.

§ 71.04(f)(2)(ii) To State.

State regulators either mandate periodic reporting of information from logs and records or require submission of copies to the state of the reports provided to the federal government. n105 It is through such reports that the state agencies are able to determine whether seeding has remained within the parameters prescribed in the operational plans for which cloud seeding permits were issued, and such reports are important information relied upon to help decision making concerning permit extensions or reissuance.

§ 71.04(f)(2)(iii) To the National Oceanic and Atmospheric Administration.

Unlike the states which have undertaken regulation of cloud seeding activities through permit systems, the federal government has declined repeated invitations to assume control over weather modification and weather modifiers. Rather it has financially underwritten research and development n106 and has instituted a reporting requirement. Public Law 92-205, n107 enacted in 1971, authorized the Commerce Department to promulgate rules requiring reporting to it of weather modification activities in the United States by non-federal cloud seeders. Federal agencies by agreement also report their projects. n108 The Department of Commerce delegated the enforcement of the law to the National Oceanic and Atmospheric Administration (NOAA), the federal agency that deals with climate and weather, and NOAA promulgated a set of reporting rules.

NOAA reporting rules apply to fog dispersal and precipitation enhancement activities and to hail suppression. They do not, however, apply to farm frost suppression efforts or to "activities of purely local nature that can reasonably be expected not to modify the weather outside of the area of operation." n109 At the start of an operation, initial reports are required; n110 thereafter by October 1 of each year there must be an interim report, n111 and, upon completion of a project, a final report must be filed. n112 The information required is substantially the same as that which must be present in logs and records. n113 What is not required, however, is any evaluation of the results of the seeding.

Periodically, usually each year, NOAA makes a public report of its compilation of information from the reports it receives. This now is being done through publication in the Journal of Weather Modification, the professional journal of the Weather Modification Association. n114 NOAA also reports the information received to the World Meteorological Organization which maintains a register of seeding projects throughout the world and publishes it from time-to-time. n115 Additionally NOAA provides information about seeding in American states along the Canadian border to Canada in accordance with an executive agreement between the United States and Canada. n116

§ 71.04(g) Evaluation.

Evaluation of the effectiveness of weather modification technology is both difficult and controversial. Evaluation requires data, analysis, and conclusions. There have been both physical and statistical analyses. Both will be discussed.

§ 71.04(g)(1) Physical Evaluation.

Sponsors of weather modification projects may be perfectly satisfied if there is ample water in reservoirs for hydropower generation, sufficient snow on the slopes to attract skiers, bounteous well-water crops, and adequate supplies for municipal needs. They continue their support of projects on the basis of such satisfaction. But, when they perceive that their economic needs are not being met, they may withdraw financial backing for the project. n117 In neither instance, that of sufficient precipitation or that of lacking rain, snowfall, and runoff, does it follow that the

weather regime would have been any different but for the cloud seeding. They are not comparing what would have happened if there had been no seeding (something contrary to fact) with what did in fact take place. Their only physical evaluation is based upon data (which may be inadequate) about events subsequent to the actual seeding. That simply does not establish enough to determine the efficacy of the treatment. It is, as it were, a "black box" approach, one focusing upon the ends and not the means.

Scientists, engineers, informed sponsors, and lawyers need a great amount of data to make intelligent conclusions about the consequences of particular cloud seeding activities. The data called for include information about the seeding activity in order to determine whether, given the meteorological conditions at the time and the seeding hypothesis, there is relatively strong scientific certainty that the natural precipitation processes were altered and the extent to which that transformation happened. This data includes information about temperatures, winds, concentrations of supercooled liquid water, extent to which ice crystal nuclei were present, extent to which artificial nuclei were introduced into the air mass (targeting the seeding material), and the like. Acquisition of this meteorological and cloud physics information requires sophisticated instrumentation. n118 Radar readouts before, during, and after seeding are needed too.

Physical data from the ground include that which can be obtained through snow courses and snow pillows to determine the nature of the snowfall and snowpack, rain gauges in sufficiently dense array, and stream gauges in the runoff areas to determine water flows. Reliance upon government instrumentation put in place by the United States Geologic Survey and NOAA is not usually adequate because their instrumentation is not dense enough to provide the details needed for reliable physical evaluation.

Historical data from the area targeted for treatment and from other areas that are geographically and meteorologically similar to the target area provides a basis for comparison with actual information about meteorological and hydrological conditions in the target area during and after seeding activities. It is unlikely this will be very complete, but any such data to use for comparisons with what happened in the seeded zone will add confidence in the physical evaluation and enhance credibility of the findings. n119

§ 71.04(g)(2) Statistical Evaluation.

Because of the inadequacies of even the most careful physical evaluation, weather modification research projects and some operational activities also use statistical evaluation, computer models, and mathematical analyses. Statisticians took exception to early physical evaluations of weather modification projects. n120 Their objections were well-founded. Research projects today are based upon pre-planned seeding activities that fit within a carefully drawn statistical format. Researchers also rely upon cloud and cloud seeding models to ascertain possible results from weather modification activities. Computers also make possible analysis of the vast amount of physical data acquired as part of research efforts. n121

Planning to attain maximum information for statistical analysis involves trade-offs. A plan can call for seeding only on a randomized basis, for foregoing seeding opportunities in order to compare data between seeded and unseeded events. Sponsors usually would prefer to seed whenever meteorological conditions are ripe for success and safe for the environment. They trade water (or at least the chance of getting it on the ground) for information. Researchers are not driven as much by the need to produce physical results and commonly use seeding protocols calling for randomized seeding and cross-over targeting -- all of which are compared with historical data from target and comparable "control" areas as well as actual measurements taken in conjunction with the experiment. After several seasons -- the length of time in part depends upon the number of seeded cases -- analysis of the statistics can give researchers some confidence in their reports of results and capabilities. n122

Operational cloud seeding in several states is being conducted with NOAA assistance in evaluation. Efforts to obtain further information about the effects of seeding are "piggy-backed" on the weather resources management projects. In essence a compromise is struck between getting all that is thought possible out of the seeding project in terms of hail

suppression or precipitation enhancement and learning more about the cloud seeding process and its impacts. In a time of limited funding for weather modification, such state-federal cooperation makes economic sense. n123

FOOTNOTES:

(n1)Footnote 68. Dr. Archie Kahan, long-time head of the Bureau of Reclamation atmospheric water resources development group, was fond of this wry remark which he regularly brought out with other salient comments on public interest or lack thereof in cloud seeding. Project Skywater, the program he directed for the Bureau was from time-to-time called upon with requests for emergency drought relief seeding and also was cut back when there appeared to be a good water year in the offing.

(n2)Footnote 69. Lewis O. Grant, *The Scientific Basis, in Committee on Weather Modification, Guidelines for Cloud Seeding to Augment Precipitation*, 109 Irrig & Drainage Engineering 111, 139 (1983). *See also* 1 Weather Modif. Advisory Bd., *The Management of Weather Resources: Proposals for A National Policy and Program* 36, Rep. to Sec'y Comm (1978) [hereinafter Weather Mod. Advisory Bd.].

(n3)Footnote 70. 1 Weather Modif. Advisory Bd., *The Management of Weather Resources: Proposals for A National Policy and Program* 37, Rep. to Sec'y Comm (1978) [hereinafter Weather Mod. Advisory Bd.].

(n4)Footnote 71. 1 Weather Modif. Advisory Bd., *The Management of Weather Resources: Proposals for A National Policy and Program* 37-38, Rep. to Sec'y Comm (1978).

(n5)Footnote 72. 1 Weather Modif. Advisory Bd., *The Management of Weather Resources: Proposals for A National Policy and Program* 38-40, Rep. to Sec'y Comm (1978) . For other descriptions of cloud and precipitation formation, *see* Louis Battan, Harvesting the Clouds: Advances in Weather Modification 31-58 (1969); Louis Battan, Cloud Physics and Cloud Seeding 23-74 (1962); Arnett Dennis, Weather Modification by Cloud Seeding 28-63 (1980). *See also* Dan Halacy, The Weather Changers (1968). For general discussions of cloud physics, *see John Day and Gilbert Sterns, Climate and Weather* (1970); N. Fletcher, The Physics of Rainclouds (1962); B. John Mason, Clouds, Rain and Rainmaking (1962).

(n6)Footnote 73. William Blackmore, *A Summary of Weather Modification Activities Reported in the United States During 1991*, 25 J. Weather Modif. 107, 108 (1993) lists only silver iodide, carbon dioxide and propane as being used in 1991.

(n7)Footnote 74. Vincent Schaefer, *The Early History of Weather Modification*, 49 Bull. American Meteor. Soc'y 337 (1968); Vincent Schaefer, T *The Production of Ice Crystals in A Cloud of Supercooled Water Droplets*, 104 Science 457 (1946).

(n8)Footnote 75. Bernard Vonnegut, *The Nucleation of Ice Formation by Silver Iodide*, 18 J. App. Phys. 593 (1947); William Finnegan and Richard Pitter, *Rapid Ice Nucleation by Acetone-Silver Iodide Generator Aerosols*, 20 J. Weather Modif. 51 (1988).

(n9)Footnote 76. Arnett Dennis, *Limits on Global Warming*, 24 J. Weather Modif. 81-95 (1992); 1 Weather Modif. Advisory Bd., *The Management of Weather Resources: Proposals for A National Policy and Program* 41-42, Rep. to Sec'y Comm (1978).

(n10)Footnote 77. *Id.*

(n11)Footnote 78. *See* American Soc'y Civil Engineers, *Guidelines for Cloud Seeding to Augment Precipitation*, 109 J. Irrig. & Drainage Engineering (1983).

(n12)Footnote 79. *See* American Soc'y Civil Engineers, *Guidelines for Cloud Seeding to Augment Precipitation*, 109 J. Irrig. & Drainage Engineering 152-60 (1983).

(n13)Footnote 80. The Soviet Union which was a major player on the international weather modification scene conducted hail suppression using rockets and artillery in the Caucasus for decades. Ye K. Fedorov, *Modification or Meteorological Processes*, in Wilmot Hess, Weather and Climate Modification 387 (1974). *See also* G.K. Sulakvelidze et al., *Progress of Hail Suppression Work in the USSR*, in *id.* at 410. Since the breakup of the Soviet Union, the anti-hail artillery has fallen into the hands of Armenia. It has given that country a distinct advantage in its struggle with Azerbaijan.

(n14)Footnote 81. *See* §71.05(b)(1), *infra*, for discussion of state permits.

(n15)Footnote 82. Information may be obtained by potential sponsors about which weather modification operators are available for projects by contacting either the Weather Modification Association, P.O. Box 8116 Fresno, CA 93747, tel. 209-291-8466 or the NOAA Office of Oceanic and Atmospheric Research, 1335 East West Highway, Silver Spring, MD 20910, attn.: Program Development and Coordination R/PDC, tel. 301-713-2465.

(n16)Footnote 83. *Weather Modification Ass'n, Statement of Standards and Ethics for Weather Modification Operators, Standard 3*, 25 J. Weather Modif. 112 (1993).

(n17)Footnote 84. *Id.* at Standard 4.

(n18)Footnote 85. *Montana Wilderness Ass'n v. Hodel, 380 F. Supp. 879 (D. Mont. 1974).*

(n19)Footnote 86. Typically state regulators are short-handed. Weather modification is but one of several programs they administer for the agency which has been delegated regulatory authority. Unless there are complaints, it is unlikely that they will do much investigation. As long as operators maintain good public relations, they will not be bothered.

(n20)Footnote 87. *42 U.S.C.A. §4332*(C).

(n21)Footnote 88. 40 C.F.R. Part 1500 *et seq.*.

(n22)Footnote 89. *Calvert Cliffs' Coordinating Comm., Inc. v. Atomic Energy Comm'n, 449 F.2d 1109 (D.C. Cir. 1971).*

(n23)Footnote 90. *42 U.S.C.A. §4332*(C). See also ch. 75, *infra*, environmental regulation.

(n24)Footnote 91. *E.g.*, Donald Klein, *Environmental Impacts of Artificial Ice Nucleating Agents*, Workshop Rep. (1978); Harold Steinhoff and Jack Ives, *Ecological Impacts of Snowpack Augmentation in the San Juan Mountain, Colorado*, Rep. to Bur. Rec. (1976); Kimball Harper, *Potential Ecological Impacts of Snowpack Augmentation in the Uinta Mountains, Utah*, Rep. to Water & Power Res. Serv. (1981).

(n25)Footnote 92. *16 U.S.C.A. §1131 et seq.*.

(n26)Footnote 93. Ray Davis, *Legal Response to Environmental Concerns About Weather Modification*, 14 J. App. Meteor. 681 (1975).

(n27)Footnote 94. *E.g.*, Israel and Kenya.

(n28)Footnote 95. Fully instrumented aircraft belonging to North Dakota University and to the University of Wyoming have been so approved. They frequently have been used in connection with research projects for collection of data.

(n29)Footnote 96. N.D. Atmospheric Resource Board, Cloud Seeding Operational Manual (Annually issued) describes cooperation procedures between FAA flight controllers and weather modification operators working on the North Dakota state weather notification project.

(n30)Footnote 97. Waivers were issued under 49 C.F.R. §175.113. Part 175 on carriage by aircraft of title 49 bans carrying certain hazardous materials, but exempts from its coverage hazardous materials which "are to be dispensed or expended during flight for weather control." 49 C.F.R. §175.10(a)(12). *See also* ch. 51, *supra,* on air space, aviation law.

(n31)Footnote 98. The weather modification pilot training course at North Dakota University in its Institute of Aerospace Sciences conducts classes in all phases of weather modification operations, including the legal aspects of cloud seeding. Students receive college credit for classroom course work and for on-the-job training in seeding aircraft.

(n32)Footnote 99. *See, e.g.,* Mich. Comp. Laws Ann. §295.109.

(n33)Footnote 100. In states with currently active weather modification programs, there usually is a working relationship between the regulators and the operators which has led to visits from time-to-time to operational sites just to see how things are going. Such informal inspections do not require specific statutory visitorial power.

(n34)Footnote 101. 15 C.F.R. §908.8(a).

(n35)Footnote 102. 15 C.F.R. §908.8(b) & (c).

(n36)Footnote 103. *E.g.,* Utah Admin. R. §R653-5-9 (1993).

(n37)Footnote 104. *E.g.,* Atmospheric, Inc., *A Summary of Weather Modification Activities Conducted Over the Counties of Box Elder, Cache and Rich in Utah and the Black Pine Area in Idaho May-September 1976,* Rep. to Utah-Idaho Weather Modification Corp. (1976).

(n38)Footnote 105. For analysis of state weather modification laws, *see* Ray Davis, *Weather Modification Law Developments, 27 Okla. L. Rev. 659 (1973);* Ray Davis, *State Regulation of Weather Modification, 12 Ariz. L. Rev. 35 (1970).*

(n39)Footnote 106. *See* §71.05(a)(3) *infra,* for discussion of federal funding.

(n40)Footnote 107. *15 U.S.C.A. §§330*-330(e).

(n41)Footnote 108. Harold Corsine, *Preliminary Data on Reported Weather Modification Activities in the U.S. for CY 1985,* 18 J. Weather Modif. 129 (1986).

(n42)Footnote 109. 15 C.F.R. §908.3.

(n43)Footnote 110. 15 C.F.R. §908.3.

(n44)Footnote 111. 15 C.F.R. §908.5.

(n45)Footnote 112. 15 C.F.R. §908.6.

(n46)Footnote 113. 15 C.F.R. §908.6.

(n47)Footnote 114. *See, e.g.* William Blackmore, *A Summary of Weather Modification Activities Reported in the United States During 1991,* 25 J. Weather Modif. 107, 108 (1993); Harold Corsine, *Preliminary Data on Reported Weather Modification Activities in the U.S. for CY 1985,* 18 J. Weather Modif. 129 (1986); Mason Charak, Preliminary Analysis of Reported Weather Modification Activities in the U.S. for CY 1979 and Comparison with Data for CY 1973-1978, 12 *J. Weather Modif.* 110 (1980).

(n48)Footnote 115. *E.g., World Meteorological Organization, Register of National Weather Modification Projects.*

(1990).

(n49)Footnote 116. Executive Agreement Relating to the Exchange of Information on Weather Modification Activities, March 26, 1975, United States-Canada, *26 U.S.T. 540,* T.I.A.S. No. 8056.

(n50)Footnote 117. Fluctuation in sponsorship over the years may be seen by analysis of reports to the National Oceanic and Atmospheric Administration. *See, e.g.* Mason Charak, Preliminary Analysis of Reported Weather Modification Activities in the U.S. for CY 1979 and Comparison with Data for CY 1973-1978, 12 *J. Weather Modif.* 110, 114 (1980).

(n51)Footnote 118. On instrumentation needs for a viable cloud seeding project, *see* Don Griffith, *Seeding Modes and Instrumentation,* 109 *J. Irrigation & Drainage Engr.* 148 (1983); *see also* Don Griffith, *Airborne Observations of A Summertime Ground-Based Tracer Gas Release,* 22 J. Weather Modif. 43 (1990); Arlin Super & Arlen Huggins, *Relationships between Storm Total Supercooled Liquid Water Flux and Precipitation on Four Mountain Barriers,* 25 *J. Weather Modif.* 82 (1993).

(n52)Footnote 119. *See* Roger Reinking & Rebecca Meitin, *Recent Progress and Needs in Obtaining Physical Evidence for Weather Modification Potentials and Effects,* 21 *J. Weather Modif.* 85 (1989).

(n53)Footnote 120. Jerzy Neyman, *A Statistician's View of Weather Modification Technology (A Review),* 74 *Proc. Nat'l Acad. Sci.* 4714 (1977); Jerzy Neyman, & Elizabeth Scott, *Note on Techniques of Evaluation of Single Rain Stimulation Experiments Symposium on Math., Statistics & Probability* (1967). *See also* Floyd Huff et al., *A Statistical-Meteorological Evaluation of Two Operational Seeding Projects,* 24 *J. Climate & App. Meteor* 452 (1985).

(n54)Footnote 121. Harold Orville et al., *The Simulation of Cloud Seeding Effects Using Numerical Models,* 23 *J. Weather Modif.* 17 (1991). *See also* Harold Orville & James Miller, *On the Cloud Seeding Potential of the Black Hills,* 24 *J. Weather Modif.* 66 (1992).

(n55)Footnote 122. The most global presentation and analysis of weather modification work is found in *Clement Todd & Wallace Howell, World Atlas and Catalog of Reported Results of Precipitation Management by Cloud Seeding* (1985).

(n56)Footnote 123. A report on such cooperation may be found in Paul Summers,*Recent Activities and Progress in the Utah/NOAA Cooperative Weather Modification Program,* in Proc. of Ann. Meeting of North American Interstate Weather Modif. Council 35 (1986).

Thompson on Real Property, Thomas Editions

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CHAPTER 71 REAL PROPERTY ISSUES IN WEATHER CONTROL

8-71 Thompson on Real Property, Thomas Editions § 71.05

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§ 71.05 Practice and Procedure.

The lawyer practicing weather modification law is most likely to encounter questions in four areas: funding (Where does the money for the project come from?); regulation (How do we go about getting the necessary state authorization to proceed?); water rights (Will we be able to realize a benefit from the seeding by having a legal right to any water generated by it?); and liability (Are we going to have to pay for claims made by persons asserting that the cloud seeding caused them harm?).

§ 71.05(a) Funding.

The costs of weather modification operations have been paid from non-governmental money, state and local governmental funds, and federal payments.

§ 71.05(a)(1) Non-governmental.

Although, as indicated previously, n124 potential benefits from weather modification as compared with costs make for attractive cost/benefit ratios, cloud seeding activities are simply too expensive to be undertaken by individuals. Some non-governmental entities, however, have sponsored projects. Ski resorts wish to augment snowfall, particularly early in the season. Modern snowmaking equipment that relies on spraying frozen water on the slopes is helpful. Cloud seeding also has been used. n125 Hydroelectric power generating companies need ample water to operate their turbines. Some of the longest running weather modification projects in the country have been sponsored by power companies. They and ski areas have the financial resources to pay the costs. n126

Farmers are used to working together informally as well as in farm organizations to enhance their profits. Some weather modification projects have been paid for by them passing the hat among themselves and relying on sufficient collections from volunteers to pay for the seeding. Unless they are convinced of positive results, the farmers may drop out and the project may die for lack of money to operate it. n127 And there is always the problem of the "free-loader" who does not contribute to support of the seeding, but who may reap the results where he has not sown.

§ 71.05(a)(2) State and Local Governments.

In order to evade the problem of the beneficiary of weather modification who does not pay for such activities, there has been resort to governmental funding. The tax collector secures the necessary money in the manner specified by law; the government agency supporting the project pays for it with the public funds provided. Payments must conform to appropriations laws and if the necessary appropriation law is not enacted or renewed, the project must be terminated. Accordingly, it is important to get and keep political support to launch and continue a governmental project. n128

There are three types of funding laws applicable to atmospheric water resources development and management:

1. General legislative grants to spend appropriated funds; n129

2. Authority specially granted to the sponsoring agency by law to spend money on weather modification activities; n130 and Such special authority coupled with power to establish legal entities which have taxing power to raise funds for cloud seeding. n131

State money for weather modification usually comes out of the general treasury and is appropriated to an agency of the state government to pay for the seeding. For example, in Utah the Division of Water Resources which is the water development agency of the state has for some years been given appropriations each year to pay the state's share of a snowpack enhancement project along the mountains in the central part of the state. The participating counties pay their shares from their own treasuries. n132

New York law authorizes municipalities to spend money on weather modification projects. n133 California has legislation allowing a named district in the state to contract for cloud seeding. n134 Such legislation specifically approves spending by the agencies named.

Through the High Plains states and in some other jurisdictions there are laws allowing formation for special weather modification districts or authorities. n135 If appropriate procedures are followed, n136 these governmental entities will function much like irrigation districts. They can raise money by assessing mill levies and are empowered to spend it contracting for weather modification services. In turn these special districts may combine with each other and the state to run projects over a large area. Such has been the case in North Dakota for many years. n137

§ 71.05(a)(3) Federal Government.

Apart from the reporting law, the major role of the federal government in weather modification has been underwriting research and development costs. The Bureau of Reclamation of the Interior Department and NOAA and its predecessors in the Commerce Department are currently the major players. Previously other agencies, such as the Navy and its work on hurricanes n138 and the Forest Service efforts to study lightning suppression n139 have also been involved. Specific appropriations laws have allowed the Bureau of Reclamation to work outside the traditional western "reclamation states" to which its activities traditionally have been restricted. Its Project Skywater has supported a great deal of research in the mountain West and the High Plains states. n140 NOAA in the Commerce Department currently operates the state/federal coop program designed to make federal money available to state projects in order to secure better evaluation of them. n141

The federal government has undertaken two major studies of weather modification technology and policy. The first, conducted by the Advisory Committee on Weather Control under the leadership of Howard T. Orville, during the 1950s gave impetuous to subsequent federal research and development funding and the federal reporting requirement. n142 The second, conducted by the Weather Modification Advisory Board established under *Public Law 94-490* under the chairmanship of Harlan Cleveland, during the 1970's made recommendations for creation of a formal federal weather modification policy. n143 None has been adopted. In addition to its early research support, the National Science Foundation funded a major review of the field n144 as the National Research Council. n145 Two federally funded technology assessments have been undertaken: one for mountain snowpack augmentation n146 and one for hail

suppression. n147 In addition to all of this, universities and other research organizations have widely benefitted from federal research grants. They have, however, significantly declined in recent years. Weather modification is no longer fashionable. n148

§ 71.05(b) Regulation.

As has been noted, most American weather modification regulation is carried out by the states. There also have been a few local regulatory efforts. Additionally, multi-jurisdictional regulation has taken place: interstate and federal and international.

§ 71.05(b)(1) Local and State.

Two-thirds of the states currently have weather modification laws in place. See the list in §71.06(a)(1) of the statutes and regulations in effect now. A few other states have had laws which now are no longer in force. And some local units of government have undertaken to control weather modification activities. n149 None are doing so now.

Regulation is carried out through control over who will be allowed to seed clouds under professional licenses and what projects will be permitted to operate under cloud seeding permits. In licensing, occupational competency is of primary public concern. State rules focus upon educational qualifications and operational experience. Professional certification by the Weather Modification Association is considered by some states. n150 In addition to competency, state regulators are concerned with the integrity of applicants for professional licenses. Information about applicants may be obtained from forms and documents accompanying their applications. Interviews and testing have not been employed. Licenses are normally valid for only a year, but are readily renewable. Suspension, revocation (after a hearing), and refusal to renew all are possibilities under state regulatory norms, n151 but as a practical matter the initial grant or denial of the professional license is the critical decision.

State laws regulating projects require sponsors wishing to undertake a cloud seeding project to apply for a permit to the regulatory department. Among the criteria that administrative agencies consider when deciding upon permit granting are:

1. Personnel -- licensed cloud seeder on the project premises, meteorologists, radar operators, pilots, and other employees;

2. Cloud seeding agents, rate of dispersal, timing, and method of delivery of the materials;

3. Equipment -- cloud seeding apparatus, airplanes, radar, and other monitoring and measuring instruments;

4. Target area, operational area, and control area(s) (if relevant);

5. Operational plan, including procedures for suspension of cloud seeding in the event of dangerous meteorological or hydrological conditions;

6. Plan for information gathering and evaluation;

7. Projected impact of weather modification activity including affect on any other permitted cloud seeding operation; and

8. Contract and cost information. n152

After an application is received, the agency should decide upon its action in a relatively prompt fashion so sponsors and their operators can either proceed or else look for other approaches to meet their needs. n153 Regulators may have information readily available to them in addition to that provided with the application. Past experience with the area, the operation, the sponsor, the cloud seeder, and with other persons in the area who may have a viewpoint about the project can help them decide about the application. In many states, including some which do not require permits, n154 notice by publication in newspapers in the target area about the proposal may cause members of the public to bring their concerns to the attention of regulators. Public hearings either may be required by law as part of the permitting process, or they may be optional at the discretion of the regulators. n155

Permits may be granted in the form requested, granted in an altered form, denied, suspended, revoked, or their renewal refused. n156 Like the licensing situation, the critical decision usually is the initial one on granting the permit. Regulatory laws provide for judicial review. When there have been errors of law or unreasonable fact findings, agency decisions will be reversed by the courts. n157 Usually they are not.

In three states there have been vigorous permit disputes in which sponsors and organized opponents of projects have battled. Opposition to hail suppression in the Texas panhandle led to permit denials and resulted in alteration in Texas legislation so protesters could more readily block permit issuance. n158 In Colorado a permit decision was appealed. n159 In Montana, a snowpack augmentation project was headed off by the mere filing of an action to enjoin it on environmental grounds, and in 1992 there was litigation over the efforts of North Dakota to seed inside the neighboring state just upwind from the North Dakota target area. The Montana court ordered issuance of the permit. n160

§ 71.05(b)(2) Interstate and Federal.

States usually have cooperated with each other with respect to weather modification control. Thus, Arizona and Texas have issued permits to operators targeting areas in adjacent states, and there is an arrangement among counties in Utah, Idaho, and Nevada for conduct of joint multi-state projects. n161 But some downwind states from cloud seeding projects have asserted that projects being allowed in upwind jurisdictions have or will adversely affect them. An Idaho official asserted that seeding being allowed by Oregon and Washington would harm Idaho and demanded that the two upwind states stop it. Minnesota residents have been heard to complain about seeding in the Dakotas. n162

The Commerce Clause of the Constitution *has been invoked to invalidate state laws prohibiting export to other states of ground water*. n163 By analogy it can be argued that atmospheric water, like underground water, is an "article of commerce" which no state can bar other states from sharing in. Of course, states can enter into compacts dealing with atmospheric water resources as they have concerning surface water streams that they share; n164 they can persuade Congress to enact legislation allocating the "rivers in the sky," just as the Boulder Canyon Project Act was held to divide the flow of the Colorado River; n165 and they can go to the Supreme Court challenging upwind permitting and seeking damages and/or an "equitable apportionment" of the atmospheric water resource. n166 None of these have happened.

§ 71.05(b)(3) International.

At a meeting in 1979 in Geneva, Switzerland, a group of experts designated by their governments offered eight "recommendations" for consideration by countries in dealing with each other in the context of weather modification. Although they never were officially promulgated by the sponsoring United Nations organizations -- the World Meteorological Organization and the United Nations Environment Program -- these recommendations represent the view of legal and meteorological experts about the international law of cloud seeding and can be used as raw material for further development of customary international regulation of artificial nucleation. The recommendations were:

1. Weather modification should be dedicated to the benefit of mankind and the environment;

2. There should be good faith international exchange of information and cooperation regarding weather modification;

3. Countries should report weather modification activities to the World Meteorological Organization which should prepare and distribute compilations of those reports;

4. Countries should provide timely notice to other nations about weather modification activities within their jurisdiction or control which are likely to have an effect on such nations;

5. Environmental assessments should be made by countries of cloud seeding projects within their jurisdiction or under their control and the results should be made to concerned nations;

6. Weather modification activities should be so conducted as not to cause damage to the environment of other countries;

7. Countries should enter into consultation with other nations who may be affected by cloud seeding planned or taking place within their borders; and

8. Nations should encourage international cooperation on weather modification, including joint research and multilateral agreements. n167

Further comment about international law respecting several of the recommendations is in order. International legal norms either dealing specifically with weather modification or with environmental, atmospheric, or hydrological matters which can by analogy be applied to cloud seeding are in place. The United Nations adopted a convention entitled "Prohibition of Military or Any Other Hostile Use of Environmental Modification Techniques" n168 in 1977 in response to wartime cloud seeding in Southeast Asia by the United States Navy designed to disrupt enemy transportation. The United States has ratified this agreement by which the parties undertook "not to engage in military or any other hostile use of environmental modification techniques having widespread, long-lasting, or severe effects as the means of destruction, damage or injury to any other" party to the convention. It can be argued that cloud seeding is not sufficiently "long-lasting," does not have such severe effects, and lacks sufficiently widespread impact to be banned from hostile military use. In view of the history of the convention, that might be a hard sell. n169

The countries of the world have been very cooperative in providing weather information for international use. World Weather Watch, operated through the World Meteorological Organization, is an international mechanism for gathering and exchanging meteorological data and has facilitated better forecasting. n170 Also weather modification information has been provided to the World Meteorological Organization from national weather services. That information is in turn distributed throughout the world through the Register of National Weather Modification Projects prepared by the World Meteorological Organization. n171

By virtue of international law, countries that are aware of dangers within their jurisdiction are obliged to give notice about them to nations which may be harmed by them. The International Court of Justice in the Corfu Channel Case expressed an obligation on the part of every nation to provide such notice. n172 Upon receiving notice, a country may wish to enter into diplomatic consultations with the nation where the project is being carried out or the country which proposes to do or allow the seeding. In the international arbitration between France and Spain concerning a shared river, the arbitrators noted that the potential offender was obliged to consult with the nation asserting that it might be harmed. But in the same decision, the Lake Lanoux Case, the country proposing the water project was allowed to proceed; it was not subjected to a veto from the other nation. n173 However, it is clear that any damage resulting from undertaking such an activity -- including cloud seeding projects -- subjects the country carrying out or allowing the project to liability to any damaged nation. That is the message of the Trail Smelter Arbitration which required Canadian payments to the United States for transboundary air pollution losses. n174 Downwind damage compensation also would be supported by

Principle 21 of the Stockholm Declaration on the Human Environment which imposes the responsibility on countries to ensure that activities within their jurisdiction or control do not cause damage in other nations. n175

§ 71.05(c) Water Rights.

A few cases, a handful of statutes, and some analogies support water rights claims by persons or groups involved in or affected by precipitation enhancement activities. If the purpose of a project is economic gain through augmenting water supplies, rights to the water assertedly generated by the cloud seeding activity can be critical. In any such case, claims to enhanced precipitation or runoff would face an initial hurdle of quantification. As has been discussed, statistical evaluation of a project is a complex matter, one that may take years and cost large sums. n176 Measurement of any augmented supply may sometime be within scientific capabilities. One legislative proposal speaks of quantification in terms of several factors:

1. Physical and statistical analysis of historic streamflow and augmented streamflow;

2. Analysis of precipitation data in the project area and similar control area;

3. Computer simulations;

4. Radar measurements;

5. Chain of events research; and

6. Such other technology or technique that currently exists or may be available in the future which comports with sound engineering and physical principles. n177

The following subsections assume that the augmented water can be identified and its quantity can be calculated. Those assumptions are the basis upon which the cases, statutes, and analogies appealed to by contestants for the water are founded.

§ 71.05(c)(1) Activity-Based.

Prior appropriation law of the western states grants water rights to the person who first would develop it. n178 This is an attractive analogy for those who would sponsor weather resources development. They could appropriate the water harvested under their weather modification permit. In Colorado, a jurisdiction following the prior appropriation doctrine, just such a result is possible under a provision of the weather modification law allowing application for appropriation of the augmented water. n179 Other western water law doctrines such as the developed water concept allowing someone who has added to stream flow a right to the augmented water n180 and the imported water doctrine which grants the importer of water exclusive right to its use n181 also would support the weather modification project sponsor's claim to the water.

Case law which talks in terms of no rights to atmospheric moisture merely by virtue of land ownership also tends to support cloud seeder claims. In Slutsky v. City of New York n182 one of the very early decisions about weather modification, the court held for the defendant city which was sponsoring a precipitation enhancement project to increase rainfall in the catchment area of municipal water works. The plaintiff who was complaining of flooding of his property in the target area did not prove that the seeding caused those losses. In addition to its actual decision, the court noted that property owners "clearly have no vested property rights in the clouds or the moisture therein." n183 If they do not have such rights, who better than the developer of the water?

§ 71.05(c)(2) Landowner-Based.

Although in Slutsky the court turned a deaf ear to the claim of a landowner concerning rights to atmospheric moisture, at least two cases and a statute support water rights on the part of land owners. In the Southwest Weather Case from Texas, the court said the landowner has a right to "such precipitation as Nature deigns to bestow... to such rainfall as may come from clouds over his own property that Nature, in her caprice, may provide." n184 In Pennsylvania, a court said that "every landowner has a property right in the clouds and the water in them." But it went on to indicate that it felt the right was subject to "weather modification activities undertaken... under... governmental authority." It further noted that a modifier cannot "determine for himself what his needs are and produce those needs by artificial means to the prejudice and detriment of his neighbors." n185 Finally, the state of North Dakota has provided by statute that artificial precipitation will be treated legally like natural precipitation. n186 A legislative proposal based on that provision declares that "water derived from atmospheric water resources management becomes part of the State's basic water supply subject to allocation and regulation in accordance with" the water allocation law of the state. n187 In a riparian jurisdiction where rights traditionally stem from land ownership, n188 such legislation would favor the claim of the property owner.

§ 71.05(c)(3) Surface Water Owner-Based.

The Utah Weather Control Law has a provision for water rights much like that of Colorado. It has, however, been interpreted differently. Utah is a prior appropriation state in which surface and ground water rights have priority in right based upon priority in time. The entitlements of senior water rights holders must be filled before juniors can take from streams or aquifers. Utah's weather modification law would assign the right to the next claimant in line whose priority has not otherwise been filled. It would benefit the holder of a surface water right who otherwise would not get any water because he was junior to persons with priorities being served ahead of him. n189 This gives incentive to the persons most likely to need the water to seed the clouds. The Utah weather modification program is a cooperative venture between the state and counties in its central region. It is designed to enhance the flow in the Sevier River, an over-appropriated intrastate stream. Local water users, particularly those at the bottom of the Sevier River water Priority list support the program. n190

§ 71.05(d) Liabilities.

The other side of the coin in water rights is weather modifier and sponsoring organization legal liabilities for harm from their activities. As is the case generally, most of the law respecting legal liabilities is general common law applicable across the board to losses from whatever source. There are, however, a handful of cases involving claims against weather modifiers in which the general principles have been applied specifically to this field. The emphasis herein is upon those cases.

§ 71.05(d)(1) Impacts from Weather Resources Management.

People who complain about weather modification and threaten to sue or actually do sue for damages for their losses or to obtain injunctive relief have asserted that they have been harmed in a number of ways. Such claims of actual harm are essential to a prima facie torts case. n191 Among those losses perceived to be associated with various cloud seeding projects have been loss of precipitation (the "robbing Peter to pay Paul" claim), increase in precipitation (some people do not want it to "rain on their parade"), avalanches and other effects of heavy snowfall (snow removal costs money), floods from heavy runoff, and other harmful alteration in the timing, amount, and distribution of precipitation. n192

§ 71.05(d)(2) Liability Theories.

Whatever the claim of harm from cloud seeding is, the plaintiff seeking damages or an injunction against further activities must have a liability theory on which to assert his case. The weather control laws of Nevada, Oklahoma, Washington, and Wyoming assert that they are not intended to affect private rights or liabilities. n193 Claimants in those jurisdictions are cast upon the common law for their liability theories. Several states immunize the state agency

issuing permits from any liability for the conduct of permit holders. n194 Of course the permittees might be subject to common law liability. And a number of states provide that holding state permission to seed is no defense in cases asserting legal liability. n195 Nine states have laws that do deal with liability theories. Pennsylvania and West Virginia have provisions which provide for strict liability for drought harming farmers and heavy downpours or storms causing damage to lands. n196 By way of contrast seven other states to one degree or another abolish in liability cases such theories as strict liability and nuisance for acts relating to weather modification and their consequences. They retain liability for negligence and intentionally harmful acts. n197

Apart from statute, possible theories include trespass, negligence, strict liability, and nuisance. Of the dozen cases that have been filed seeking damages or injunctive relief from cloud seeding, counts in the complaints have alleged all or some of those theories. Since the defendants won all but one of those cases on failure of the plaintiffs to establish causal linkage between the seeding and harm, it is only through dicta that they shed any light on the liability theory issue. n198 In that plaintiff victory, the Southwest Weather Research case from Texas, n199 the focus was upon issues relating to rights in atmospheric moisture and harm done to them, not to the liability theory.

Judicial language in Slutsky v. City of New York n200 supports the nuisance concept. The opinion speaks of balancing the interests of the rural complainant against the needs of the city for water supplies. Such a balancing test is part of the prima facie case for a nuisance. The impact upon the plaintiff must outweigh that from which the defendant would suffer if the activity were not to take place. n201

Strict liability based upon the notion of abnormally dangerous activity proceeds on the proposition that the activity is very risky, that such risk cannot be eliminated even with care, that it is somehow inappropriate in the location, and that is not a commonly performed activity. n202 It is not surprising that in severe flooding cases in which claimants have sought to implicate weather modifiers they have included strict liability counts in their pleadings. n203

Negligence or failure to live up to the standard of professional care in conducting the operation has been charged against cloud seeders. Plaintiffs have been none too successful in getting experts whose testimony was credible to fact finders. Weather modifiers, like such other professions as doctors, tend to stick together when it comes to litigation. The more impressive witnesses whose testimony is needed to establish the standard of care for negligence and to assess what departure, if any, from such standard was committed by the defendant have usually testified for the defendants. n204

Trespass requires proof of intrusion of some foreign matter upon the premises. n205 Precipitation may not be classified as "foreign matter" for purposes of this theory. Flood law might be a viable option in cases where flooding has been the basis of the claim. n206

§ 71.05(d)(3) Cause-in-fact.

As has been noted, it is hard for cloud seeders to prove that over a season or several seasons of operations they have effected changes in the weather. n207 The discussion of water rights and weather modification proceeded upon an assumption that changes in water amounts on the surface of the land could be established, something that obviously also is very difficult if not impossible. n208 By similar token, proof of causation of loss stemming from a particular seeding event or a course of events over all or part of a seeding season is terribly difficult. Proof of causation was insufficient in eleven of the twelve litigated cases. The floods and other heavy storm losses could not be connected to cloud seeding. n209 The alleged loss of precipitation similarly was not established to have been the consequence of the defendant's activities. n210 It is possible that better factual information and developments in tort law loosening causation requirements n211 might make proof of cause a practical reality some time. It is not so now.

§ 71.05(d)(4) Proximate Cause.

Proximate or legal cause is a concept used in negligence law to limit the extent of a defendant's legal responsibility for

losses he has caused to those that are sufficiently direct. n212 Investigators in the Rapid City Flood case concluded that a natural weather event which was so overwhelming that it alone would have caused the losses was the responsible author of the flood losses. n213 Assume, however, that the seeding played a role. The proximate cause question then would be whether the act of nature was an intervening act that superseded the defendant's negligence and cut off liability. The Restatement (Second) of Torts *section 451* says that the defendant could escape liability if the harm done was different from the harm threatened by the defendant's conduct. n214 Flooding was the risk from both the seeding and the act of nature. The latter does not then cut off the responsibility of the defendant whose conduct will be judged to be the proximate cause of the loss.

§ 71.05(d)(5) Immunity.

For the most part, governmental immunity has been abolished in America. The Federal Tort Claims Act, however, does not waive the liability of the United States of America for so-called "discretionary acts." n215 Weather forecasting has been held to be discretionary. n216 Improper instrumentation by NOAA in its weather buoy program has been held not to be discretionary. n217 Federal weather modification may very well be like instrumentation -- carrying out a program, rather than planning for it. The defense may not apply.

§ 71.05(d)(6) Necessity.

The privilege of public necessity has been applied to the acts of government officials who have caused property losses in order to avert a public disaster. n218 Inadequate water supplies may not fit the in the same manner as blowing up buildings to prevent the sweep of a wild fire. However, some state regulatory provisions exempt emergency situations such as fire, drought, and fog in which normal licensing and permitting procedures need not be followed by modifiers. n219 They are indicia of a policy like that of the doctrine of public necessity. The philosophy of public necessity may underlie the statement in the Pennsylvania Natural Weather Association case that "weather modification activities undertaken in the public interest (as opposed to private interests) and under the direction and control of governmental authority should and must be permitted." n220

§ 71.05(d)(7) Contribution and Indemnification.

Because they work together to bring about cloud seeding activities, weather modifiers and their sponsors are jointly liable for damages they have caused if claimants can fit them within a liability theory. n221 State laws require permit holders to carry liability insurance. n222 An insurer who pays for a loss is subrogated to the rights of the policy holder. The weather modifier may well have a claim against the sponsor for contribution, payment of its share of the judgment when it all has been paid by or on behalf of a joint defendant. n223

Assume that the sponsor and cloud seeder do not work together, but that the sponsor is merely the employer of the operator. It well may be that the employer and his employee are jointly liable under a concept of vicarious liability founded upon the master-servant relationship. n224 In such cases, a legally liable master who pays the judgment has a right to full indemnification from the servant for all damages paid. The key then is whether the two defendants are working together or whether the one is working for the other. Some weather modification contracts specifically provide that the weather modifier will indemnify the sponsor for any losses suffered by the employer, including legal liability. Federal contracts typically do so provide n225 -- even though the federal agency may be immune as noted in the subsection on immunity. n226

§ 71.05(d)(8) Remedies.

Damages making the plaintiff whole from financial losses are available to plaintiffs whose losses have been caused by the conduct of cloud seeders. Most cases have sought such compensation for property and personal losses. n227 Injunctive relief also is a possibility. In the case won by plaintiffs, a temporary restraining order was issued and then upheld on appeal. n228 It had the effect of stopping cloud seeding in the jurisdiction for years even though it was

directed only at the operators of a particular project. Neither they nor other cloud seeders were about to engage in seeding when the possibility of further injunctions hung over their heads. Only after the state enacted a cloud seeding control law did weather modification resume.

§ 71.05(d)(9) Insurance and Security for Damages.

Weather control laws usually require posting of bond or issuance of a liability insurance policy to pay for losses in case of liability of the permit holder. n229 Hence the ability to purchase liability insurance is essential to the weather modification industry. It has not always been easy and rates have not reflected losses (of which there have been none) and costs for defense of cases (which at times have been rather high). n230 Industry-wide bargaining with insurance brokers has helped.

Posting security for damages is an alternative under some state laws to obtaining liability insurance. n231 It has not been used because insurance is cheaper.

§ 71.05(d)(10) Procedural Issues.

In two cases, one in federal court stemming from the Rapid City flood, and the other in state court claiming flooding in central North Dakota from cloud seeding, the question of certification of the litigation for class action was raised. In both instances it failed, n232 and the lawsuits were not further prosecuted by the named plaintiffs individually because of their lack of financial resources to pay litigation costs -- money they may have been able to raise had the cases been certified for class actions.

Environmental organizations have sued to stop weather modification projects. n233 For them questions of standing to sue arise. Usually when such groups bring actions they have good enough lawyering to establish the right to bring the actions. n234

In states with permit requirements, it has not been unheard of for people who did not participate in the permit process, although they legally could have, to then seek injunctive relief to prevent projects from going forward. When they have had such administrative remedies and have not exhausted them, they cannot go to court. n235 The lesson for opponents of weather modification is to take their claims to the administrative agencies given regulatory authority over weather resources management, pursue them in the administrative arena, and, if they do not prevail there, then go to court seeking judicial review. Determination about whether permits should be issued and projects will be allowed to go forth are delegated by the legislative branch of government to the exclusive jurisdiction of the administrative branch.

FOOTNOTES:

(n1)Footnote 124. *See* §71.03(a)(2), *supra*.

(n2)Footnote 125. Joseph Howe, *Legal Moguls: Ski Areas, Weather Modification, and the Law, 33 U. Pitt. L. Rev. 59 (1971).*

(n3)Footnote 126. Among the public utilities sponsoring projects have been Southern California Edison and Pacific Gas & Electric Company. Five utilities were listed as sponsoring seeding activities in 1991. William Blackmore, *A Summary of Weather Modification Activities Reported in the United States During 1991*, 25 J. Weather Modif. 107, 108 (1993).

(n4)Footnote 127. The attitude of those who pay for cloud seeding was caught by one booster's comment that "the Primary color of Cloud Seeding is *GREEN*! -- Crops and Dollars. It is not the gray of reports on the shelf." James Eastgate, *Weather Modification Views of User-Payers in North Dakota*, 9 *J. Weather Modif.* 193, 196 (1977) [emphasis and capitalization in the original].

(n5)Footnote 128. John Donnan et al., *The Rise and Fall of the South Dakota Weather Modification Program*, 8 *J. Weather Modif.* 1 (1976) chronicles the relationship between political support, lack of it, and the fortunes of state-supported cloud seeding.

(n6)Footnote 129. *E.g.*, Cal. Water Code §53063;La. Rev. Stat. Ann. §3:15.

(n7)Footnote 130. *E.g.*, Nev. Rev. Stat. §§544.030, 544.040; Utah Code Ann. §17-8-7.

(n8)Footnote 131. Ill. Ann. Stat. ch. 120, para. 1310.1, 1310.2; Iowa Code Ann. §§361.1 - 361.3.

(n9)Footnote 132. Richard Dewsnup & Dallin Jensen, *Legal Aspects of Weather Modification, Rep. to Div. Water Res.* 11-13 (1977).

(n10)Footnote 133. N.Y. Gen. Mun. Law §119-P.

(n11)Footnote 134. The authority was in Cal. Water Code App. §48-9(13). It expired on October 1, 1957.

(n12)Footnote 135. *E.g.*, Idaho Code §§22-4301, 22-4302; Mont. Code Ann. §§85-3-401 to 85-3-424; Or. Rev. Stat. §§558.200-440. For discussion of support by local authorities and states of hail suppression in the northern plains states, *see* Martin Schock, *Weather Modification Activities in North Dakota, South Dakota, and Minnesota from 1951 through 1976*, Univ. N.D. Dep't Aviation Rep. No. 77-2 (1977).

(n13)Footnote 136. In one reported case, the enabling legislation was ruled unconstitutional because of the nature of the voting provisions for setting up the districts. *Summerville v. North Platte Valley Weather Control Dist., 101 N.W. 2d 748 (Neb. 1960).*

(n14)Footnote 137. North Dakota has been supportive of weather modification projects since they went operational. The jointly funded state and local authority program is coordinated through the North Dakota Atmospheric Resource Board.

(n15)Footnote 138. *See* §71.03(c)(3)(iii), *supra*.

(n16)Footnote 139. Donald Fuquay, Weather Modification and Forest Fires, in Ground Level Climatology 309 (1967).

(n17)Footnote 140. Skywater was launched late in 1961 and has been one of the long-term federal supporters of cloud seeding research. The blueprint for the project may be found in Office of Atmospheric Water Resources, Plan to Develop Technology for Increasing Water Yield from Atmospheric Sources (1966).

(n18)Footnote 141. State/Federal Weather Modification Related Programs, Proc. of Ann. Meeting of North American Interstate Weather Modif. Council (1982).

(n19)Footnote 142. Advisory Committee on Weather Control, final Report to Pres. (1957) (2 vols.).

(n20)Footnote 143. 1 Weather Modif. Advisory Bd., *The Management of Weather Resources: Proposals for A National Policy and Program* 36, Rep. to Sec'y Comm (1978).

(n21)Footnote 144. National Science Foundation, Special Comm'n on Weather Modification, Weather and Climate Modification (1965).

(n22)Footnote 145. National Academy of Science, Panel on Weather and Climate Modification, Weather and Climate Modification: Problems and Progress (1973); National Academy of Science, Panel on Weather and Climate Modification. The Atmospheric Sciences and Man's Needs: Priorities for the Future (1971); National Academy of

Sciences, Panel on Weather and Climate Modification, Weather and Climate Modification: Problems and Prospects (1966) (2 vols.).

(n23)Footnote 146. Leo Weisbecker, The Impacts of Snow Enhancement, Rep. of Technology Assessment of Winter Orographic Snow Augmentation (1974).

(n24)Footnote 147. Stanley Changnon, et al., *Hail Suppression: Impacts and Issues* 84 (1977).

(n25)Footnote 148. Janet C. Neuman, Beneficial Use, Waste, and Forfeiture: The Inefficient Search for Efficiency in Western Water Use, *28 Envtl. L. 919, 996* ("Weather modification and desalinization do not present large-scale, cost-effective options at this time").

(n26)Footnote 149. *See* Pennsylvania *ex rel.* Twp. of Ayr v. Fulk, No. 53 (Common Pleas, Fulton County, Penna. 1968).

(n27)Footnote 150. For a list of certified weather modification operators and a list of certified project managers, *see* 25 J. Weather Modif. 116 (1993).

(n28)Footnote 151. *See* Ray Davis, *Weather Modification Law Developments, 27 Okla. L. Rev. 659 (1973);* Ray Davis, *State Regulation of Weather Modification, 12 Ariz. L. Rev. 35 (1970).*

(n29)Footnote 152. *Id.*

(n30)Footnote 153. Delays in processing and deciding applications can have the same impact as denials of permits when such dilatory conduct extends into the cloud seeding season. Such was the case in North Dakota Atmospheric Resources Bd. v. Board of Nat. Resources and Conserv., No. ADV-92-918 (1st Jud. Dist., Lewis & Clark County, Mont. 1992); and in a hiatus in application processing in Colorado. Ray Davis, Administrative Inaction on License and Permit Applications, Rep. to Weather Modif. Ass'n, (1987).

(n31)Footnote 154. *E.g.*, Cal. Water Code §§410-11.

(n32)Footnote 155. Hearings typically have drawn few members of the public, except when a controversial project application is being considered. In the former situation, holding a hearing is a waste of time and money. In the latter, it is an important avenue for public input. Controversy over hail suppression in the Texas panhandle resulted in scores of attendees at permit hearings.

(n33)Footnote 156. *See* Ray Davis, *Weather Modification Law Developments, 27 Okla. L. Rev. 659 (1973);* Ray Davis, *State Regulation of Weather Modification, 12 Ariz. L. Rev. 35 (1970).*

(n34)Footnote 157. Zygmunt Plater et al., Environmental Law and Policy: Nature, Law, and Society 542-44 (1992) discusses administrative law rules applicable in administrative regulation of the environment.

(n35)Footnote 158. Jerome Kirby, *Cloud Seeding in the Texas Panhandle*, 10 J. Weather Modif. 170 (1978).

(n36)Footnote 159. Atmospherics, Inc. v. Ten Eyck, Civil A (Dist. Ct. Alamosa Co., CO, 1973).

(n37)Footnote 160. *Montana Wilderness Ass'n v. Hodel, 380 F. Supp. 879 (D. Mont. 1974);* North Dakota Atmospheric Resources Bd. v. Board of Nat. Resources and Conserv., No. ADV-92-918 (1st Jud. Dist., Lewis & Clark County, Mont. 1992).

(n38)Footnote 161. Ray Davis, *Weather Modification Interstate Legal Issues, 15 Idaho L. Rev. 555 (1979).*

(n39)Footnote 162. Ray Davis, *Weather Modification Interstate Legal Issues, 15 Idaho L. Rev. 555 (1979).* In the

dispute between agencies of North Dakota and Montana over issuance of a Montana permit for the North Dakota state hail suppression program, complaining Montanans complained that seeding would have an *upwind* effect reducing precipitation in their state. In the trial of the case seeking issuance of a seeding permit, the North Dakota expert witness testified (without contradiction from other experts) that such upwind effect was not a likely prospect. North Dakota Atmospheric Resources Bd. v. Board of Nat. Resources and Conserv., No. ADV-92-918 (1st Jud. Dist., Lewis & Clark County, Mont. 1992).

(n40)Footnote 163. *Sporhase v. Nebraska ex rel. Douglas, 458 U.S. 941 (1982); City of El Paso v. Reynolds, 597 F. Supp. 694 (D.N.M. 1984); City of El Paso v. Reynolds, 563 F. Supp. 379 (D.N.M. 1983).*

(n41)Footnote 164. For Supreme Court treatment of such a compact, *see Texas v. New Mexico, 462 U.S. 554 (1983).* The classic work on interstate compacts is Felix Frankfurter & James Landis, *The Compact Clause of the Constitution -- A Study in Interstate Adjustments, 34 Yale L.J. 685 (1925). See also* Clifford J. Villa, *California Dreaming: Water Transfers from the Pacific Northwest, 23 Envtl. L. 997, 998, n.7 (1993):* Interstate transfer of atmospheric or surface water creates concern in the western states. The California drought caused many water transfer projects to be proposed: seeding clouds, towing icebergs, desalination of seawater, shipping water in supertankers, and water transfer from the Pacific Northwest via pipeline or aqueduct. Most such ideas proved impractical on a large scale. Seawater desalination emerged as a popular alternative, and surface water transfers from the Pacific Northwest also received substantial support. Natural rainfall finally relieved the draught and with it, much concern for weather modification or water augmentation. Weather modification proposals have not been prominent among these proposals.

(n42)Footnote 165. *43 U.S.C.A. §§617*-617(t). The case so holding is *Arizona v. California, 373 U.S. 546 (1963).*

(n43)Footnote 166. *Colorado v. New Mexico, 467 U.S. 310 (1984); Nebraska v. Wyoming, 325 U.S. 589 (1945).*

(n44)Footnote 167. Ray Davis, *Atmospheric Water Resources Development and International Law,* 31 Natural Resources J. 11 (1991) discussing Report of WMO/UNEP Meeting of Experts Designated by Governments of the Legal Aspects of Weather Modification, U.N. doc. WMO/UNEP/WG.26 (1979).

(n45)Footnote 168. May 18, 1977, *31 U.S.T. 333,* T.I.A.S. No. 9614, 127 U.N.T.S. 143 Rev. 659 (1973).

(n46)Footnote 169. *See* Ray Davis, *Weather Warfare: Law and Policy, 14 Ariz. L. Rev. 659 (1973). See* Mark J.T. Caggiano, *The Legitimacy of Environmental Destruction in Modern Warfare: Customary Substance Over Conventional Form, 20 B.C. Envtl. Aff. L. Rev. 479 (1993);* Shilpi Gupta, *Iraq's Environmental Warfare in the Persian Gulf,* 6 Geo. L. Rev. (petroleum fires deliberately set by Iraqi soldiers affected local, but not global, weather patterns) 251, 253 (1993) (acid rain caused by deliberately set petroleum fires). According to Caggiano, the international community has taken note of deliberate environmental destruction during war. In reaction to environmental abuses by the United States during the Vietnam War, (forest defoliation and attempts to increase rainfall to hinder enemy troop movements), the United Nations held an international conference on the environment which prepared twenty-six principles relating to the rights of humankind during warfare. Later war-related environmental offenses by the Iraqis and Serbians have come under similar international scrutiny. The author proposes that all nations engaging in environmental warfare be subject to a war crimes tribunal. The Gupta article describes how, during the Gulf War, Saddam Hussein pumped crude oil into the Persian Gulf from the Sea Island Terminal. In addition, Iraq systematically set fire to Kuwait oil fields. Iraqi troops damaged or destroyed eighty to eighty-five percent of Kuwait's 950 oil wells, resulting in dire environmental consequences for the Persian Gulf area and beyond. The beaches in Kuwait and Saudi Arabia were coated with crude oil and littered with dead marine life and birds. Crude oil damaged sea grass beds, algae, and coral reefs. The entire Gulf ecosystem was affected, which effects will continue to harm the food chain and marine life for many years to come. The environmental and human consequences may never be determined due to the lack of technology available to the governments affected for accurately measuring the damage. Atmospheric pollution resulting from the burning oil slick and oil fields has affected climate and rainfall over a wide region.

(n47)Footnote 170. World Meteorological Organization, World Weather Watch: The Plan and Implementation Programme, 1976-1979 (1975).

(n48)Footnote 171. World Meteorological Organization, Register of National Weather Modification Projects (1988) (WMO/TD -- No. 208).

(n49)Footnote 172. 1949 I.C.J. 4, 22, *43 Am. J. Int'l L. 558, 570* (June 3, 1949).

(n50)Footnote 173. Lake Lanouz Arbitration (France v. Spain), *24 I.L.R. 101* (Nov. 16, 1957).

(n51)Footnote 174. 3 Rep. Int'l Arb. Awards 1964 (1949), 3 U.N. Reg.v, 35 Am. J. Int'l L. 684 (1941).

(n52)Footnote 175. 1972 Y.B. 320, 321. U.N. Sales No. 1972D.74. I.L. For discussions of the international legal ramifications of weather modification, *see* Ray Davis, *Atmospheric Water Resources Development and International Law*, 31 Natural Resources J. 11 (1991); Howard Taubenfeld, *The Atmosphere: Climate Change, Politics and World Law*, 10 Den. J. Int'l L. & Pol'y 469 (1981); Rita Taubenfeld & Howard Taubenfeld, *The International Implications of Weather Modification Activities*, Rep. to State Dep't (1968); Edith Weiss, *International Environmental Law: Contemporary Issues and Emergence of a New World Order, 81 Geo. L. Rev. 675 (1993);* Edith Weiss, *Management of Weather and Climate Disputes, 3 Envt'l L. 275 (1983).*

(n53)Footnote 176. *See supra* §§71.04(g)(1) & (2). There was early recognition by writers on the subject of cloud seeding law that quantification of the amount of water augmented through weather modification stood as a barrier to acquisition of streamflow rights. Among those earlier writings were James Corbridge & Rafael Moses, *Weather Modification: Law and Administration*, 8 Natural Resources J. 207 (1968); Ward Fischer, *Weather Modification and the Right of Capture*, 8 Nat. Res. J. 639 (1975); John Pierce, *Legal Aspects of Weather Modification Snowpack Augmentation in Wyoming, 2 Land & Water L. Rev. 273 (1967).*

(n54)Footnote 177. American Soc'y of Civil Engineers, Model State Water Rights Code §8A-2-05 (3d draft, 1993). The Model Code Project of the American Society of Civil Engineers will prepare a final draft of its proposed water rights allocation and transfer code by the end of 1994. Thereafter chapters of the code will be subjected to a balloting process prior to becoming formal standards of the civil engineering profession. Code provisions are being offered to state legislatures as models for altering their existing laws. Conrad Keyes, the author of the weather modification provisions of the code, has been a leading member of the weather modification community and is a member of the board of the American Society of Civil Engineers.

(n55)Footnote 178. For additional discussion of water rights generally, *see* Chapter 50 of this treatise. *See also* Robert Beck, *Introduction and Background [to Prior Appropriation]*, ch. 11 in 2 Waters & Water Rights (Robert Beck ed., 1991); A. Dan Tarlock, Law of Water Rights and Resources ch. 5 (1988).

(n56)Footnote 179. Colo. Rev. Stat. §36-20-103. *But see* discussion of Utah law which has a similar provision. §71.05(c)(3), *infra*.

(n57)Footnote 180. *Cresson Consol. Gold Mining & Mill Co. v. Whitten, 338 P.2d 278 (Colo. 1959); Hill v. Green, 274 P. 110 (Idaho 1928); West Side Ditch Co. v. Bennett, 78 P.2d 78 (Mont. 1938).*

(n58)Footnote 181. *City of Los Angeles v. City of Glendale, 142 P.2d 289 (Cal. 1943); but cf. Miller v. Wheeler, 103 P. 641 (Wash. 1909).*

(n59)Footnote 182. *Slutsky v. City of New York, 97 N.Y.S.2d 238 (1950).*

(n60)Footnote 183. *Slutsky v. City of New York, 97 N.Y.S.2d 238, 239 (1950).*

(n61)Footnote 184. *Southwest Weather Research, Inc. v. Rounsaville, 320 S.W.2d 211, 216,* and *Southwest*

Weather Research, Inc. v. Duncan, 319 S.W.2d 940, 945 (Tex. Civ. App. 1958), both *aff'd sub nom. Southwest Weather Research, Inc. v. Jones, 160 Tex. 104, 327 S.W.2d 417 (1959).*

(n62)Footnote 185. *Pennsylvania Nat. Weather Ass'n v. Blue Ridge Weather Modification Ass'n, 44 Pa. D. & C. 749, 759-60* (C.P. Fulton County, Pa. (1965). For analysis of the New York, Texas, and Pennsylvania decisions, *see* Ray Davis, *The Legal Implications of Atmospheric Water Resource Development and Management*, Rep. to Bur. Reclamation §4.1 (1968).

(n63)Footnote 186. N.D. Cent. Code §61-04.1-01.

(n64)Footnote 187. American Soc'y of Civil Engineers, Model State Water Rights Code §§8A-2-1, 9R-2-05 (3d Draft, 1993).

(n65)Footnote 188. Joseph Dellapenna, *Introduction to Riparian Rights* ch. 6 in 1 Waters & Water Rights(Robert Beck. ed. 1991).

(n66)Footnote 189. Utah Code Ann. §73-15-4 (1989); Richard Dewsmup & Dallin Jensen, *supra* note 132 at 73, referring to Utah Admin. R. §R653-5-2 (B).

(n67)Footnote 190. Utah has operated a state/county weather modification project in the Sevier River drainage area of central Utah for several decades. It is the longest tunning cloud seeding project in the history of the state. *See* Paul Summers, *Recent Activities and Progress in the Utah/NOAA Cooperative Weather Modification Program*, in Proc. of Ann. Meeting of North American Interstate Weather Modif. Council 35 (1986).

(n68)Footnote 191. *See* Dan Dobbs, Torts and Compensation: Personal Accountability and Social Responsibility for Injury 107 (2d ed. 1993).

(n69)Footnote 192. Perceptions of reality about cloud seeding impacts are important both politically and legally. J. Eugene Haas, *Sociological Aspects of Weather Modification, in* Weather and Climate Modification 787 (Wilmot Hess ed. 1974); Ronald Rinkle, *Relevant Societal Characteristics Affecting Acceptance of Weather Modification: Descriptions for Each State*, Rep. to Nat'l Sci. Foundation (1976). For studies about the northern plains states, *see* Orville Lanham, *Attitudes of North Central South Dakota Residents Toward Weather Modification*, Rep. on Nat. Res. & Envt., Series #2 (1974); W.L. Larson, *Social Impacts, Knowledge, Attitudes, and Expectations of Farmers and Ranchers in Eastern Montana toward Weather Modification and Impacts of Induced Rainfall*, Mont. Exper. Stat., Bull. 670 (1973). *See generally*, Barbara Farhar, Hail Suppression: Society and Environment (1977).

(n70)Footnote 193. Nev. Rev. Stat. §544.230; Okla. Stat. Ann. tit. 82, §1087.19; Wash. Rev. Code Ann. §43.37.190; Wyo. Stat. §9-1-909.

(n71)Footnote 194. *See, e.g.*, Colo. Rev. Stat. §36-20-122; Kan. Stat. Ann. §82a-1420; Mich. Comp. Laws Ann. §295.124 ; Mont. Code Ann. §85-3-104; [sc]Nev. Rev. Stat.[eit] §544.230; N.D. Cent. Code §61-04.1-36 ; Okla. Stat. Ann. tit. 82 §1087.19; Tex. Water Code Ann. §18.151 ; Wash. Rev. Code Ann. §43.37.190; Wis. Stat. Ann. §93.35 (13); Wyo. Stat. §9-1-909.

(n72)Footnote 195. Colo. Rev. Stat. §36-20-124; Kan. Stat. Ann. §82a-1422; Mich. Comp. Laws Ann. §295.125; Minn. Stat. Ann. §42.13 ; N.D. Cent. Code §64-04.1-37 (4); Tex. Water Code Ann. §18.152(b); Wis. Stat. Ann. §93.35(14)(e).

(n73)Footnote 196. Pa. Stat. Ann. tit. 3, §1114; W. Va. Code §29-2B-13.

(n74)Footnote 197. Colo. Rev. Stat. §36-20-123; Mich. Comp. Laws Ann. §295.127; N.D. Cent. Code §61.04.1.37; Tex. Water Code Ann. §18.152(a); Utah Code Ann. §73-15-7; Wis. Stat. Ann. §93.35(14).

(n75)Footnote 198. Liability theories, however, are noted in scholarly writings. *See, e.g.*, E.J. Ball, *Shaping the Law of Weather Control,* 57/*8 Yale L.J. 213 (1949);* Ray Davis, *Weather Modification Law Developments, 27 Okla. L. Rev. 659 (1973);* Ray Davis, *State Regulation of Weather Modification, 12 Ariz. L. Rev. 35 (1970);* Julie Ferdon, *Federal Weather Modification Projects; Compensating the Landowner, 26 Ariz. L. Rev. 681 (1984);* Edward Morris, *The Law of Weather Modification,* 46 Bull. American Meteor. Soc'y 618 (1965); Jack Oppenheimer, *The Legal Aspects of Weather Modification, 1958 Ins. L.J. 314.*

(n76)Footnote 199. *Southwest Weather Research, Inc. v. Rounsaville, 320 S.W.2d 211 (Tex. Civ. App. 1958)* and *Southwest Weather Research, Inc. v. Duncan, 319 S.W.2d 940 (Tex. Civ. App. 1958),* both *aff'd sub nom. Southwest Weather Research, Inc. v. Jones, 160 Tex. 104, 327 S.W.2d 417 (1959). Jaffe v. City and County of Denver, 15 P.3d 806 (Colo. App. 2001)* (city's failure to establish a foul weather detection system on a golf course did not create a dangerous condition for purposes of the governmental immunity act).

(n77)Footnote 200. *97 N.Y.S.2d 238 (1950).*

(n78)Footnote 201. Restatement (Second) of Torts §§822, 826-28 (1979). The law of private nuisance is discussed in Chapter 67 of this treatise.

(n79)Footnote 202. Restatement (Second) of Torts §§519-20 (1979).

(n80)Footnote 203. *See, e.g.,* Adams v. California, Civil No. 10112 (Superior Ct. Sutter County, Cal. 1964); *Lunsford v. United States, 570 F.2d 221 (8th Cir. 1977).* In *First English Lutheran Church of Glendale v. County of Los Angeles, 482 U.S. 304 (1987),* the state trial court granted a defense motion for a judgment on the pleadings on the count in the case concerning cloud seeding insofar as it rested on a strict liability theory. The case went to the United States Supreme Court where the issue was Regulatory Takings by the county zoning regulations. For discussion elsewhere in this treatise about Regulatory Takings, *see* Chapter 81.

(n81)Footnote 204. The imbalance of expertise was particularly striking in the trails in Lumsden v. Atmospherics, Inc., No. 7594 (Dist. Ct. Lamb County Tex. 1974); North Dakota Atmospheric Resources Bd. v. Board of Nat. Resources and Conserv., No. ADV-92-918 (1st Jud. Dist., Lewis & Clark County, Mont. 1992); and Reinbold v. Sumner Farmers, Inc. and Irving P. Krick, Inc., No. 2734-C (Cir. Ct. Tuscola County, Mich. 1974). For discussion by Jerome Kirby, the lawyer for sponsors and the operator of weather modification projects in Texas during the 1970's, of the importance to his defense in an action by opponents and in permit application hearings of the testimony of Dr. Pierre St.-Amand, *see* Jerome Kirby, *Cloud Seeding in the Texas Panhandle,* 10 J. Weather Modif. 170 (1978).

(n82)Footnote 205. Restatement (Second) of Torts §158 comment i (1965). *See* Chapter 68, *supra*, for analysis of the law of trespass to real property.

(n83)Footnote 206. *See* Ray Davis, *Flood Control and Floodplain Regulation*, ch. 21 in Environmental Law Practice Guide (1992).

(n84)Footnote 207. *See* §71.04(g), *supra*.

(n85)Footnote 208. *See* §71.05(c), *supra*.

(n86)Footnote 209. *Lunsford v. United States, 570 F.2d 221 (8th Cir. 1977); Saba v. Counties, 307 N.W.2d 590 (N.D. 1981);* Samples v. Irving P. Krick, Inc., Civil Nos. 6212, 6223, and 6224 (D. Okla. 1954); Adams v. California, Civil No. 10112 (Superior Ct. Sutter County, Cal. 1964); Reinbold v. Sumner Farmers, Inc. and Irving P. Krick, Inc., No. 2734-C (Cir. Ct. Tuscola County, Mich. 1974); *Slutsky v. City of New York, 97 N.Y.S. 2d 238 (1950);* Auvil Orchard Co. v. Weather Modification, Inc., Civil No. 19268 (Superior Ct. Chelan County, Wash. 1964). For consideration of flooding cases, *see* Gregory Jones, *Weather Modification: The Continuing Search for Rights and Liabilities, 1991 B.Y.U.L. Rev. 1163.*

(n87)Footnote 210. On relaxation of causation requirements, *see Hicks v. United States, 368 F.2d 626 (4th Cir. 1966); Bloomquist v. Wapello County, 500 N.W.2d 1 (Iowa 1993).* But causation requirements appear not to have been relaxed and consequently defendants prevailed in *Renaud v. Martin Marietta Corp., 972 F.2d 304 (10th Cir. 1992); Graham v. Canadian Nat'l Ry., 749 F. Supp. 1300 (D. Vt. 1990),* distinguished by, *K.C. 1986 Ltd. Partnership v. Reade Mfg., 33 F. Supp. 2d 820* (W.D. Mo. Sep. 16, 1998); *Gaines v. Pierce County, 834 P.2d 631 (Wash. App. 1992),* distinguished by, *DiBlasi v. City of Seattle, 969 P.2d 10* (Wash. Dec. 24, 1998). *See* Symposium, *Causation in the Law of Torts, 63 Chi.-Kent L. Rev. 397 (1987).*

(n88)Footnote 211. For cases in which diminution of precipitation was not proven to have been caused by cloud seeding, *see* Shawcroft v. Department of Nat. Resources, Civil A. (Dist. Ct. Alamosa County, Colo. 1972); North Dakota Atmospheric Resources Bd. v. Board of Nat. Resources and Conserv., No. ADV-92-918 (1st Jud. Dist., Lewis & Clark County, Mont. 1992); *Pennsylvania Nat. Weather Ass'n v. Blue Ridge Weather Modification Ass'n, 44 Pa. D. & C. 2d 749* (Common Pleas, Fulton County, Pa. 1968); Lumsden v. Atmospherics, Inc., No. 7594 (District Ct. Lamb County, Tex. 1974).

(n89)Footnote 212. Clarence Morris & C. Robert Morris, Morris on Torts 174-78 (2d ed. 1980).

(n90)Footnote 213. Pierre St.-Amand et al., *Report on Rapid City Flood of June 9, 1972,* 5 J. Weather Modif. 318 (1973); Pierre St.-Amand et al., *Report on Rapid City Flood of 9 June 1972 to South Dakota Weather Control Comm'n* (1972).

(n91)Footnote 214. Restatement (Second) of Torts §451 (1965).

(n92)Footnote 215. *28 U.S.C.A. §2680*(a). The leading case interpreting the exception is *Dalhite v. United States, 346 U.S. 14 (1953). See* Osborne Reynold, *The Discretionary Function Exception of the Federal Tort Claims Act, 57 Geo. L.J. 81 (1968).*

(n93)Footnote 216. *Williams v. United States, 504 F. Supp. 746 (E.D. Mo. 1980); Chanon v. United States, 350 F. Supp. 1039 (S.D. Tex. 1972);* and *Bartie v. United States, 216 F. Supp. 10 (W.D. La. 1963).*

(n94)Footnote 217. *Brown v. United States, 599 F. Supp. 877 (D. Mass. 1984) (liability issues), 615 F. Supp. 391 (D. Mass 1985)* (damages issues), *rev'd on appeal* by *790 F.2d 100 (1st Cir. 1986).* The litigation is reviewed in Ray Davis, *A Generous Helping of Crow,* 19 J. Weather Modif. 109 (1987); and Ray Davis, *Federal Liability for Negligent Maintenance of Weather Modification Equipment,* 17 J. Weather Modif. 72 (1985).

(n95)Footnote 218. Restatement (Second) of Torts §196 (1965).

(n96)Footnote 219. Ray Davis, *Weather Modification Law Developments, 27 Okla. L. Rev. 659 (1973);* Ray Davis, *State Regulation of Weather Modification, 12 Ariz. L. Rev. 35 (1970).*

(n97)Footnote 220. *Pennsylvania Nat. Weather Ass'n v. Blue Ridge Weather Modification Ass'n, 44 Pa. D. & C. 2d 749, 759-60* (Common Pleas, Fulton County, Pa. 1968).

(n98)Footnote 221. W. Page Keeton et al., Prosser & Keeton on the Law of Torts §46 (5th ed. 1984).

(n99)Footnote 222. *E.g.,* Colo. Rev. Stat. §36-20-112(c); Kan. Stat. Ann. §82a-1411 (4); Mich. Comp. Laws Ann. §295.118.

(n100)Footnote 223. W. Page Keeton et al., Prosser & Keeton on the Law of Torts §50 (5th ed. 1984). The leading article on the subject is Robert Laflar, *Contribution and Indemnity Between Tortfeasors, 81 U. Pa. L. Rev. 130 (1932).*

(n101)Footnote 224. Edward Kionka, Torts In A Nutshell §8-10 (2d ed. 1992).

(n102)Footnote 225. For example, the author was principal investigator on a project examining weather modification law for the Bureau of Reclamation. The contract required indemnification of the United States of America in the event any liability should be assessed against it because of the activities under the contract.

(n103)Footnote 226. *See* §71.05(d)(5) *supra*.

(n104)Footnote 227. *See, e.g., Lunsford v. United States, 570 F.2d 221 (8th Cir. 1977);* Adams v. California, Civil No. 10112 (Superior Ct. Sutter County, Cal. 1964); Reinbold v. Sumner Farmers, Inc. and Irving P. Krick, Inc., No. 2734-C (Cir. Ct. Tuscola County, Mich. 1974).

(n105)Footnote 228. *See, e.g., Southwest Weather Research, Inc. v. Rounsaville, 320 S.W.2d 211 (Tex. Civ. App. 1958)* and *Southwest Weather Research, Inc. v. Duncan, 319 S.W.2d 940 (Tex. Civ. App. 1958),* both *aff'd sub nom. Southwest Weather Research, Inc. v. Jones, 160 Tex. 104, 327 S.W.2d 417 (1959);* Lumsden v. Atmospherics, Inc., No. 7594 (Dist. Ct. Lamb County, Tex. 1974); Auvil Orchard Co. v. Weather Modification, Inc., Civil No. 19268 (Superior Ct. Chelan County, Wash. 1964).

(n106)Footnote 229. *E.g.,* Colo. Rev. Stat. §36-20-112(c); Kan. Stat. Ann. §82a-1411 (4); Mich. Comp. Laws Ann. §295.118.

(n107)Footnote 230. *See, e.g.,* Dean Mann, *The Yuba City Flood: A Case Study of Weather Modification Litigation*, 49 Bull. American Meteor. Soc'y 690 (1968), on the cost of litigation in the Yuba City flood litigation.

(n108)Footnote 231. *E.g.,* Colo. Rev. Stat. §36-20-112(c); Kan. Stat. Ann. §82a-1411 (4); Mich. Comp. Laws Ann. §295.118.

(n109)Footnote 232. *Lunsford v. United States, 570 F.2d 221 (8th Cir. 1977); Saba v. Counties, 307 N.W.2d 590 (N.D. 1981).*

(n110)Footnote 233. *E.g., Montana Wilderness Ass'n v. Hodel, 380 F. Supp. 879 (D. Mont. 1974).*

(n111)Footnote 234. *See, e.g., Nat'l Wildlife Fed'n v. Lujan, 928 F.2d 453 (D.C. Cir. 1991),* distinguished by, *Antco, Inc. v. Dodge Fuel Corp., 550 S.E.2d 622* (W.Va. Jun 29, 2001); *Save Our Community v. EPA, 741 F. Supp. 605 (N.D. Tex. 1990), rev'd, 971 F.2d 1155 (5th Cir. 1992);* but *cf. City of Los Angeles v. National Hwy. Traffic Safety Admin., 912 F.2d 478 (D.C. Cir. 1990), overruled by Florida Audubon Soc. v. Bentsen 94 F.3d 658 (D.C. Cir. 1996).*

(n112)Footnote 235. *See* Marcia Gelpe, Exhaustion of Administrative Remedies: Lessons from Environmental Cases, 53 Geo. Wn. L. Rev. 1 (1985).

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CHAPTER 71 REAL PROPERTY ISSUES IN WEATHER CONTROL

8-71 Thompson on Real Property, Thomas Editions § 71.06

AUTHOR: Late Professor Ray Jay Davis J. Reuben Clark Law School Brigham Young University

§ 71.06 Bibliography.

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A vast array of materials has been written about the technology and law of weather modification. This bibliography is merely representative of it. Except for the listing of statutes and regulations specifically dealing with cloud seeding, no effort has been made to present anything other than more recent materials and classics in the field.

Legal -- Statutes and Regulations.

The federal governments of the United States and Canada by statute and regulation each currently require periodic reporting of cloud seeding activities to a designated national agency. Additionally, as of 1993, there were in force in thirty-two states and three provinces statutes and administrative rules dealing specifically with weather modification.

FEDERAL UNITED STATES:

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15 C.F.R. §§908.1 - 908.21.

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Supp. To CHAPTER 71 REAL PROPERTY ISSUES IN WEATHER CONTROL

8-71 Thompson on Real Property, Thomas Editions Supp. to § 71.02

Supp. to § 71.02 Overview of Weather Resources Law.

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Add:

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CHAPTER 72 SOURCES OF GOVERNMENT POLICE POWER

8-72 Thompson on Real Property, Thomas Editions 72.syn

AUTHOR: Professor David A. Thomas J. Reuben Clark Law School Brigham Young University

§ 72.syn Synopsis to Chapter 72: SOURCES OF GOVERNMENT POLICE POWER

§ 72.01 Introduction to the Chapter.

§ 72.02 Common Law Origins of the Police Power: An Ancient, Fundamental Principle.

§ 72.03 Police Power in American Constitutional History.

§ 72.04 Police Power Cases in American Courts Before 1868.

§ 72.05 Bibliography.

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CHAPTER 72 SOURCES OF GOVERNMENT POLICE POWER

8-72 Thompson on Real Property, Thomas Editions § 72.01

AUTHOR: Professor David A. Thomas J. Reuben Clark Law School Brigham Young University

§ 72.01 Introduction to the Chapter.

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The term "police power" or its equivalent does not appear in the United States Constitution; it was not used in a U.S. Supreme Court opinion until 1827; and it was not the explicit basis for a decision by that Court until 1877. n1 Yet, in the late 19th and early 20th centuries, it attracted the attention of hundreds of judges and legal writers, and today, casting its influence in ever more subtle and diverse ways, it is a concept at the center of profound developments in the American law.

This chapter will briefly explore the origins of police power concepts in the United States, especially as that power is used to regulate and restrict private rights in real property. The chapter will show the slow emergence and development of state police power concepts in the 18th and 19th centuries. Subjects for further study are the key cases and legal writers that gave the police power new tasks and vigor to open the 20th century, and the judicial failures that have loosed it virtually without restraint over the land today.

Even though its philosophical basis lies at the very foundation of English common law, the notion of governmental police power attracted little attention in the United States until Thomas Cooley's watershed treatise describing constitutional limitations on state legislative power, first published in 1868. n2 Here he defined police power in phrases that immediately became standard language for the subject:

> The police of a state, in a comprehensive sense, embraces its system of internal regulation, by which it is sought not only to preserve the public order and to prevent offenses against the state, but also to establish for the intercourse of citizen with citizen those rules of good manners and good neighborhood which are calculated to prevent a conflict of rights, and to insure to each the uninterrupted enjoyment of his own, so far as is reasonably consistent with a like enjoyment of rights by others. n3

This chapter will examine the growing recognition of state police power principles that occurred in the United States from the colonial era until Cooley's important pronouncement.

FOOTNOTES:

(n1)Footnote 1. *Boyd v. Alabama, 94 U.S. 645,* (1877), on appeal from *Boyd v. State, 53 Ala. 601 (1875).*

(n2)Footnote 2. Thomas Cooley, A Treatise on the Constitutional Limitations (1868).

(n3)Footnote 3. Thomas Cooley, A Treatise on the Constitutional Limitations 572 (1868). *Ehrlich v. City of Culver City, 50 Cal. Rptr. 2d 242 (1996)*(a requirement that the developer provide art in the area of the development was held to be within the type of aesthetic control that the city was authorized to impose). *Atlanta Journal & Const. v. City of Atlanta Dep't of Aviation, 6 F. Supp. 2d 1359 (N.D. Ga. 1998)* (City has an interest in using its police power to regulate the aesthetic appearance of the airport).

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CHAPTER 72 SOURCES OF GOVERNMENT POLICE POWER

8-72 Thompson on Real Property, Thomas Editions § 72.02

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§ 72.02 Common Law Origins of the Police Power: An Ancient, Fundamental Principle.

If, as Cooley declared, the police power of a state enforces the state's system of internal regulation, not only to protect the state, but to ensure citizens' rights relative to one another, what principles govern the application of this power? The answer to this question is found in the earliest literature of English common law.

At the heart of a government's power to regulate its citizens' private property affairs is the ancient and familiar legal maxim: "*Sic utera tuo ut alienum non laedas*," loosely translated as, "Enjoy your property in such manner as to not injure that of another." n4 The maxim's earliest expression appears about 1187 in Glanville's *The Laws and Customs of the Kingdom of England*, where, by a series of examples, the author demonstrates that one may not use one's own property to the injury of another. For instance, he declares that if "any Dyke should be raised or thrown down ... to the injury of any person's freehold," then a King's writ should issue. n5

Henry of Bracton, writing about 1250, referred to some types of servitudes being imposed by law, "that is, that no one do anything on his own land by which damage or nuisance accrues to a neighbor." n6 In *Fleta, Commentarius Juris Anglicani*, an anonymous late 13th century book on English law which apparently borrowed heavily from Bracton and some contemporary tracts, the nearly identical statement and supporting examples appear: "a man is not to do anything on his land by which harm or nuisance may be caused to his neighbour." n7 Also appearing in about 1290, the same time as the *Fleta*, a book in French, purportedly penned by one Britton, likewise referred to servitudes "by law," requiring that "no one shall do anything in his own soil that may be a grievance or annoyance to his neighbors." n8

While this principle of restraint in the use of one's real property permeates much of our common law, the maxim "*sic utere tuo ut alienum non laedas*," does not appear in extant court records until the 1594 case of Edwards v. Halinder. n9 Later, Sir Edward Coke cited the maxim in reporting the decision of Aldred's Case in 1611, n10 and in the following century statements or examples of the principle appear several times in *Blackstone's Commentaries*. n11

Even more importantly, however, those *Commentaries* contain a major companion concept, by which Blackstone incorporates this maxim of private conduct into the regulatory powers of the kingdom:

> The last species of offenses that especially affect the commonwealth are those against the public

> police and economy. By the public police and economy I mean the due regulation and domestic order of the kingdom: whereby the individuals of the state, like members of a well governed family, are bound to conform their general behavior to the rules of propriety, good neighbourhood, and good manners; and to be decent, industrious, and inoffensive in their respective stations. n12

Thus Blackstone regarded the rule that one should not use one's property in any way that injures another as a rule properly enforced by the state and derived from the state's police powers. This, of course, goes beyond merely permitting private citizens access to the judiciary to compel one another's proper behavior; it interjects the power of the state directly into the citizens' affairs, whether invited or not.

In medieval times, as English monarchs established hegemony over factions of the aristocracy by declaring and maintaining the "king's peace," regulating private affairs of private citizens had an important public purpose. Therefore, Glanville could write in 1187 that violations of the rule against using one's property to the injury of another could be redressed by applying for a king's writ. n13 The use of such state police power in England during the ensuing centuries varied with the relative strength of the monarchy or national government, and by the 18th century it had not attracted much attention from English judges or lawyers. n14

FOOTNOTES:

(n1)Footnote 4. This translation is from Herbert Broom's Legal Maxims 327 (5th Am. ed.) *cited in* Thomas Cooley, A Treatise on the Constitutional Limitations 574, n.1 (1868). Perhaps the more common version of the maxim today would be: "Don't use your property in such a way as to injure the property of another."

(n2)Footnote 5. Ranulf de Glanville, The Laws and Customs of the Kingdom of England or De Legibus et Consuetudinibus Regni Angliae (1187-1189) bk. 13, chs. 32-39 at 334-343 (John Beame trans. 1812).

(n3)Footnote 6. An older edition of Bracton occasionally cited in the older treatises is 3 Bracton, De Legibus et Consuetudinibus Angliae bk. 4, ch. 37, fols. 221, 221B; bk. 4, chs. 42-47, fols. 231b-235b at 427-481, 552-593 (Sir Travers Twiss, ed., 1250). The quote in the text is from the more modern edition edited by George E. Woodbine, translated by Samuel E. Thorne (1977). As to the text provisions cited in the older version *supra*, fols. 220 and 222 appear in Vol. III at 163, and in the Calendar of the Thorne translation; fols. 231-235 appear in the Thorne translation at 187-199. The quote in the text is an excerpt from fol. 220.

(n4)Footnote 7. Fleta, Commentarius Juris Anglicani bk. 4, ch. 18 (ca. 1290-1293); also found in 89 The Publications of the Selden Society at 93 (1972). *See also* 1 Frederick Pollock and Frederic Maitland, The History of English Law Before the Time of Edward I 210 (2d ed. 1909). Fleta has been so denominated because it is supposed to have been written in the Fleet prison in London.

(n5)Footnote 8. Britton, bk. 2, ch. 23, 30-32 (1291-1292); *see* edition by Francis Morgan Nichols, Vol. 1 at 359-371, 397-416.

(n6)Footnote 9. *2 Leon. 93 (1594).*

(n7)Footnote 10. *9 Co. 57, 59 (1611).*

(n8)Footnote 11. 1 Blackstone's Commentaries 306, 307, 3 Blackstone's Commentaries 217-219.

(n9)Footnote 12. 4 Blackstone's Commentaries 162.

(n10)Footnote 13. 4 Blackstone's Commentaries 162.

(n11)Footnote 14. *See* Elmer E. Smead, *Sic Utere Tuo Ut Alienum Non Laedas: A Basis of the State Police Power*, 21 Cornell Law Quarterly 276 (1936).

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CHAPTER 72 SOURCES OF GOVERNMENT POLICE POWER

8-72 Thompson on Real Property, Thomas Editions § 72.03

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§ 72.03 Police Power in American Constitutional History.

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Likewise, the drafters of the United States Constitution seem to have had a police power concept firmly in mind during the creation and ratification of that document, but were not prompted to discuss it at length. Roger Sherman of Connecticut, in the convention debate of June 6, 1787, enumerated four categories of powers he thought ought to belong to the national government n15 and then declared that "[a]ll other matters civil and criminal would be much better in the hands of the States." n16

On June 8, 1787, James Madison of Virginia spoke in favor of a power in the national government to "negative" legislative acts of the states that conflicted with the powers assigned to the national government. Implicit in those comments is a very broad concept of state legislative power, confined only by the powers assigned to the national government. n17 Those debates concerned the provisions eventually included in the Tenth Amendment of the U.S. Constitution, reserving to the states or the people all powers not delegated to the national government or prohibited to the states. n18

Further discussion of the Tenth Amendment concepts during the period of ratification, by means of The Federalist Papers, also shows that state police power concepts were familiar to and accepted by the drafters. In Federalist Paper No. 17, Hamilton refers to the "residuary authorities" left with the states for local purposes and denies that the national government would ever want to divest the states of those authorities. In Federalist Paper No. 25, he gives specific examples of state police power used to maintain internal order. A plenary statement of inherent governmental powers, in Federalist Paper No. 31, initially referring to the national government but then extended to state governments, is his most precise justification for police power:

> A government ought to contain in itself every power requisite to the full accomplishment of the objects committed to its care, and to the complete execution of the trusts for which it is responsible, free from every other control but a regard to the public good and to the sense of the people... .The State governments by their original constitutions are invested with complete sovereignty. n19

He illustrated that sovereignty in Federalist Paper No. 32 by admitting that states "should possess an independent and

uncontrollable authority to raise their own revenues for the supply of their own wants." Indeed, "the State governments would clearly retain all the rights of sovereignty which they before had, and which were not, by that act, n20 *exclusively* delegated to the United States." This rule, by which most state powers "remain with them in full vigor ... is clearly admitted by the whole tenor of that instrument which contains the articles of the proposed Constitution." n21

James Madison declared that, in ratifying the Constitution, each state "is considered as a sovereign body independent of all others, and only to be bound by its own voluntary act." n22 The jurisdiction of the national government extends "to certain enumerated objects only, and leaves to the several States a residuary and inviolable sovereignty over all other objects." Finally, in Federalist Paper No. 45, Madison makes his most pointed reference to the police power of a state:

> The powers delegated by the proposed Constitution to the federal government are few and defined. Those which are to remain in the State governments are numerous and indefinite... . The powers reserved to the several States will extend to all the objects which, in the ordinary course of affairs, concern the lives, liberties, and properties of the people, and the internal order, improvement, and prosperity of the State. n23

The scant attention paid police power by the Founders was continued into the early 19th century by American lawyers, judges and legal writers. The U.S. Supreme Court rarely heard a case involving police power issues.

FOOTNOTES:

(n1)Footnote 15. Sherman's four categories were defense against foreign danger, defense against internal disputes and a resort to force, treaties, and regulating foreign commerce. 3 U.S. Dept. of State, Documentary History of the Constitution of the United States of America, 70-71 (1900).

(n2)Footnote 16. *See Curtis v. State, 549 S.E.2d 591 (S.C. 2001)* (statute criminalizing sale of urine to defraud drug screening test was constitutional and legitimate exercise of state's police powers). *State v. Arnold, 557 S.E.2d 119 (N.C. Ct. App. 2001)* (statute criminalizing act of participating as spectator at dogfight was valid exercise of police power).

(n3)Footnote 17. 3 U.S. Dept. of State, Documentary History of the Constitution of the United States of America 88-89 (1900). The indexers treat this passage, and the passage previously described, as references to police power, although the term "police power" nowhere appears in the text of the debates.

(n4)Footnote 18. U.S. Const. Amend. X.

(n5)Footnote 19. *See also State v. Vogt, 775 A.2d 551 (N.J. 2001)* (public trust doctrine was subject to police powers).

(n6)Footnote 20. The "act" referred to was the adoption of the national constitution.

(n7)Footnote 21. In Federalist Paper No. 33, Hamilton referred to the "residuary authorities of the smaller societies [states]."

(n8)Footnote 22. Federalist Paper No. 39.

(n9)Footnote 23. *See State v. Edwards, 787 So. 2d 981 (La. App. Ct. 2001)* (post conviction forfeiture of vehicle driven during motorist's third DWI offense was within state's police power under constitutional provisions regarding ownership of property); *Consolidated Gov't of Columbus v. Barwick, 549 S.E.2d 73 (Ga. 2001)* (ordinance governing alcoholic beverages licenses was constitutional exercise of city council's police power).

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CHAPTER 72 SOURCES OF GOVERNMENT POLICE POWER

8-72 Thompson on Real Property, Thomas Editions § 72.04

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§ 72.04 Police Power Cases in American Courts Before 1868.

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In the 1827 Supreme Court opinion written by John Marshall in Brown v. Maryland, n24 the term "police power" is first used by that court to designate the residual sovereign power of the American states. n25 In this case, a state act imposing licensing requirements on importers was struck down as contrary to the constitutional commands (1) that states should not burden the import and export trade without consent of Congress and (2) that Congress has the power to regulate foreign commerce. Marshall compared the prohibited legislation to other acts within the power of the states, such as removal of imported gunpowder for safety reasons, and called such power "police power." The police power, he declared, "unquestionably remains, and ought to remain, with the States." n26

The concept of state police power, however, had by then clearly been recognized in earlier Supreme Court cases, even though not denominated as police power. In Dartmouth College v. Woodward, n27 Marshall had earlier stated a view favorable to such implied state powers, holding void a state law materially altering the college's pre-Revolutionary War British charter. Declining to give unlimited scope to the constitutional prohibition of state laws impairing the obligation of contracts, Marshall asserted that "the framers of the constitution did not intend to restrain the States in the regulation of their civil institutions, adopted for internal government...." n28 And in Gibbons v. Ogden, n29 Marshall wrote against New York state laws giving exclusive river navigation rights to Robert Livingston and Robert Fulton, but he acknowledged "the power of a State to regulate its police, its domestic trade, and to govern its own citizens... ." n30

The words of Marshall in Brown v. Maryland were quoted with approval by Justice Barbour in the court's next prominent police power case, New York v. Miln, n31 wherein the court upheld a state law regulating passenger shipping in the port of New York. n32 Justice Thompson declared in a concurring opinion, "Can anything fall more directly within the police power and internal regulation of the state...?" n33 In another case later in that same term, n34 Chief Justice Taney defended state powers "over their own internal police and improvement which is so necessary to their well-being and prosperity." n35

Even when the court upheld federal action as superseding state authority, as in Prigg v. Pennsylvania, n36 it was careful to acknowledge the police power of the states:

> [W]e are by no means to be understood in any manner whatsoever to doubt or to interfere with the police power belonging to the states in virtue of their general sovereignty. That police power extends over all subjects within the territorial limit of the states; and has never been conceded to the United States ... [T]he operations of this police power ... [are] designed essentially ... for the protection, safety, and peace of the state... n37

The occurrence of so many police power cases in controversies over respective powers of the national and state governments led to the phrase "police power" being commonly equated with powers of sovereignty. n38

Meanwhile, state courts gave occasional signals that they, too, recognized a police power concept. An 1815 Massachusetts case discussed the power of a state to compel militia service by its citizens, a power which could even repeal exemptions from such service granted earlier by the state. n39 The New York Supreme Court, in 1826, upheld municipal legislative power prohibiting use of land as a cemetery. As noted by the court, clothed by the state with legislative powers, the "local Legislature ... are particularly charged with the care of public morals, and the public health within their own jurisdiction." n40

The same court the next year, in Vanderbilt v. Adams, n41 upheld as a valid police regulation a statute regulating harbor vessels, even at private wharves. Justice Woodworth delivered a lengthy but perceptive description of police power, n42 noting particularly that such rights had "been assumed and acted upon without a question, ever since we became an independent government." n43 He also referred, without citation, to "numerous cases in cities, much stronger than the present, where this power has been deemed constitutional, and never drawn in question... ." n44

Vanderbilt was cited later that year in support of another exercise of police power in Coates v. City of New York. n45

Undoubtedly numerous state and local courts of the early 19th century reached decisions and issued opinions that reflected in one way or another a recognition of state police power. The citation of only a few additional examples will suffice to make the point. In Commonwealth v. Worchester, n46 the Massachusetts State Court upheld a municipal ordinance regulating the driving of wagons:

> Surely the power of the legislature to pass a local act cannot be questioned. It is not only the right, but the duty of that branch of government, so to vary the provisions of law, as to meet, so far as is practicable, the peculiar exigencies of every portion of the community. n47

Two years later, the same court upheld another local ordinance, noting without comment that the trial "judge instructed the jury, that the subject of the regulation was one on which it was proper for the city to legislate, it having relation to the public convenience and the health of the inhabitants... ." n48 The court declared, "The great object of the city is to preserve the health of the inhabitants." n49 The court later sustained an ordinance regulating the selling of produce. n50 In Goddard's Case, n51 an ordinance requiring property owners to remove snow from city streets where they lived was upheld as a valid "police regulation." n52

In New York, the Supreme Court upheld a village ordinance regulating the selling of meat "as within the power conferred by the charter; it was reasonable in itself, and promotive of the public good." n53 That Court later sustained a prohibition of bowling alleys, acknowledging that the Constitution gives "all the accustomed powers of legislation" to a state, including "the power to create municipal corporations with the right to pass by-laws for local objects." n54

The cases described in the preceding paragraphs demonstrate that through the middle decades of the 19th century, judicial recognition of police power, in both federal and state supreme courts, became more explicit. For instance, Vermont's Chief Justice Redfield, in an 1854 opinion, depicted the maxim requiring use of one's property so as not to injure the property of another as the essence of the "police power of the state," which "extends to the protection of the lives, limbs, health, comfort, and quiet of all persons, and the protection of all property within the state." Therefore, "it

must of course, be within the range of legislative action to define the mode and manner in which every one may so use his own [property] as not to injure others." n55

The great American law commentator, James Kent, first wrote during this same era, and in his first edition of commentaries in 1826 declared that a state legislature, in order to prevent injury to the public, may prohibit nuisances and trades harmful to life, health, and peace. n56 However, it was not until the 12th edition in 1873, edited by Oliver Wendell Holmes, that this work contained explicit recognition of the state's police power and -- so far as it touches real property -- its basis in the maxim or principle, discussed earlier, that one should not use one's property so as to injure another:

> The government may, by general regulations, interdict such uses of property as would create nuisances, and become dangerous to lives, or health, or peace, or comfort of the citizens ... on the general or rational principle, that every person ought so to use his property as not to injure his neighbors, and that private interests must be made subservient to the general interests of the community. n57

By this time, Cooley's definitive statement concerning state police power, noted in the introduction to this chapter, had been issued, and this subject then entered the mainstream of American jurisprudence. n58

FOOTNOTES:

(n1)Footnote 24. *25 U.S. (12 Wheat.) 419,* (1827).

(n2)Footnote 25. Ruth L. Roettinger, in The Supreme Court and State Police Power 10 (1957), credits Marshall with this first use of the term.

(n3)Footnote 26. *25 U.S. at 433.*

(n4)Footnote 27. *17 U.S. (4 Wheat.) 518 (1819).*

(n5)Footnote 28. *4 Wheat. at 628, 629.* However, he declared, "contract" in its limited sense would at least constitutionally "restrain the legislature in future from violating the right to property." *17 U.S. at 628.*

(n6)Footnote 29. *22 U.S. (9 Wheat.) 1,* (1824).

(n7)Footnote 30. *22 U.S. at 208.* Not treated in this chapter is the controversy over whether the state and national powers defined in the Constitution were considered to be mutually exclusive, rather than being concurrent in some areas until federal preemption occurred. *Gibbons* advances the mutually exclusive powers theory, which -- although concentrating on the exclusive national powers -- actually is a states' rights doctrine, recognizing large areas of historical state governance from which the national government is excluded. Marshall's opinion, however, also concedes that, while the respective powers might be exclusive, the "necessary and proper" actions to execute those powers might be concurrent, and the federal actions would prevail over any conflicting "necessary and proper" state actions. Later Supreme Court cases, notably *New York v. Miln, 36 U.S. (11 Pet.) 102 (1837)* and *The License Cases, 46 U.S. (5 How.) 504 (1846),* instead emphasized that these state powers were sovereign and exclusive, meaning that the states' "necessary and proper" actions to carry out those powers were also exclusive of any supposedly concurrent federal powers and actions. Both of those cases are also significant in showing the developing state police power in general and are discussed herein from that perspective. This brief chapter thus is not intended to discuss state police power as it may come in conflict with federal powers. *See* William W. Crosskey and William Jeffrey, Jr., Politics and the Constitution in the History of the United States 695-696 (1953). *See also Walter v. City of Gulf Shores, 829 So. 2d 181 (Ala. Crim. App. 2001)* (city was entitled, under statute governing watercraft, to enact regulations governing licensure of businesses and advertising activities on its navigable waters under general police power).

(n8)Footnote 31. *36 U.S. (11 Pet.) 102 (1837).*

(n9)Footnote 32. *36 U.S. at 141-142.*

(n10)Footnote 33. *36 U.S. at 148.*

(n11)Footnote 34. *Charles River Bridge v. Warren Bridge, 36 U.S. (11 Pet.) 420 (1837).*

(n12)Footnote 35. *36 U.S. (11 Pet.) at 552.*

(n13)Footnote 36. *41 U.S. (16 Pet.) 539 (1842). But see LaPlante v. Wellcraft Marine Corp., 114 Cal. Rptr. 2d 196 (2002)* (federal act preempted state law contrary to usual presumption).

(n14)Footnote 37. *Prigg v. Pennsylvania, 41 U.S. (16 Pet.) 539, 625 (1842). See also Miller v. City of Town & Country, 62 S.W.3d 431 (Mo. Ct. App. 2002)* (ordinance governing hunting and trapping was valid exercise of police power and was not preempted by Wildlife Code). *State v. Olney, 72 P.3d 235* (Wash. App., 2003) (regulation of wild game conservation within the police power of state.)

(n15)Footnote 38. Ruth L. Roettinger, The Supreme Court and State Police Power 12 (1957), commenting on and citing the *Passenger Cases, 48 U.S. (7 How.) 283,* (1849), remarked: "What is the police power of the state? It is one of the means used by sovereignty to accomplish that great object, the good of the state... Police powers, then, and sovereign powers are the same."

(n16)Footnote 39. *Commonwealth v. Bird, 12 Mass. 443, 446-447 (1815).*

(n17)Footnote 40. *Brick Presbyterian Church v. City of New York, 5 Cow. (8 N.Y. Common Law Reports) 538, 540 (1826). See also Bzaps, Inc. v. City of Mankato, 268 F.3d 603 (8th Cir. 2001)* (precluding adult entertainment in establishments that held liquor license was valid exercise of police power); *Sanchez v. City of Caldwell, 20 P.3d 1 (Idaho 2001)*(ordinance denying retail license for sale of beer or wine to someone who within past five years had been convicted for DWI was rationally related to legitimate governmental purpose and did not exceed city's police powers). *Fly Fish, Inc. v. City of Cocoa Beach, 337 F.3d 1301 (11th Cir. 2003)* (City licensing and zoning of adult entertainment business related to health and morals of community and thus was a valid exercise of police power.); *Jordan v. City of Centerville, 119 S.W.3d 214 (Mo. App. 2003)* (City liquor licensing requirements within the scope of police power.); San Diego County Veterinary Medical Ass'n v. County of San Diego, *10 Cal. Rptr. 3d 885,* (2004) (Police power encompasses the right of county to require health vaccinations.)

(n18)Footnote 41. *7 Cow. (9 N.Y. Common Law Reports) 349, 351-353 (1827).*

(n19)Footnote 42. The right assumed under the law would not be upheld, if it exerted beyond what may be considered a necessary police regulation. The line between what would be a clear invasion of right on the one hand, and regulations not lessening the value of the right, and calculated for the benefit of all, must be distinctly marked. On the principle contended for here, I do not perceive on what ground various regulations for the better government of the police of a crowded population can be supported. And yet, to a certain extent, it has never been doubted that the Legislature were competent to direct. Police regulations are legal and binding, because for the general benefit, and do not proceed to the length of impairing any right in the proper sense of that term.

The sovereign power in a community, therefore, may and ought to prescribe the manner of exercising individual rights over property. It is for the better protection and enjoyment of that absolute dominion which the individual claims. The powers rest on the implied right and duty of the supreme power to protect all by statutory regulations, so that on the whole, the benefit of all is promoted. Every public regulation in a city may and does, in some sense, limit and restrict the absolute right that existed previously. But this is not considered as an injury. So far from it, the individual, as well as others, is supposed to be benefited.

It may then be said that such a power is incident to every well regulated society, and without which it could not well

exist. Is there a doubt that the Legislature have a right to authorize a road through the wild land of A without his consent? This right has been assumed and acted upon without a question, ever since we became an independent government. No compensation is allowed, in such cases, to the owner. Can he defeat the operation of the law, by saying that private right is invaded? The doctrine has not yet been advanced. Such a law, I apprehend, is constitutional and obligatory; because, in many cases, necessary for the public benefit, and not deemed injurious to the individual whose land is taken... . The numerous cases in cities ... where this power has been deemed constitutional and never drawn in question, goes strongly to prove, that regulations like those in question, do not fall within the principle contended for by the plaintiff in error... . Can the power, with impunity, violate such a law, because he has the absolute right of property? It has not been heretofore so considered.

Vanderbilt v. Adams, 7 Cow. (9 N.Y. Common Law Reports) 349, 351-353 (1827).

(n20)Footnote 43. *Vanderbilt v. Adams, 7 Cow. at 352.*

(n21)Footnote 44. *Vanderbilt v. Adams, 7 Cow. at 352.*

(n22)Footnote 45. *Coates v. City of New York, 7 Cow. (9 N.Y. Supreme Court Reports) 585, 604 (1827).*

(n23)Footnote 46. *Commonwealth v. Worchester, 3 Pick. (20 Mass.) 462 (1826).*

(n24)Footnote 47. *Commonwealth v. Worchester, 3 Pick. (20 Mass.) 462, 473 (1826).*

(n25)Footnote 48. *Vandine's Case, 23 Mass. (6 Pick.) 187 (1828).*

(n26)Footnote 49. *Vandine's Case, 23 Mass. (6 Pick.) 187, 192 (1828). Bliss v. Kraus, 16 Ohio St. 54 (Ohio 1864)* (dealing with municipal powers to adopt sanitary regulations for the health of its inhabitants).

(n27)Footnote 50. *Nightingale's Case, 28 Mass. (11 Pick.) 168 (1831).* The court's syllabus of the case referred to the regulation as a "salutary police regulation."

(n28)Footnote 51. *Goddard's Case, 16 Pick. (33 Mass.) 504 (1835).*

(n29)Footnote 52. *Goddard's Case, 16 Pick. (33 Mass.) 504 (1835); see also City of Lowell v. Hadley, 49 Mass. (8 Met.) 180 (1844).*

(n30)Footnote 53. *Village of Buffalo v. Webster, 10 Wend. (11 N.Y. Common Law Reports) 99, 101 (1833).*

(n31)Footnote 54. *Tanner v. Village of Albion, 5 Hill (16 N.Y. Common Law Reports) 121, 131 (1843). Cole v. Planning & Zoning Comm'n of the Town of Cornwall, 671 A.2d 844 (Conn. App. 1996)* (sawmill regulations); *Natural Aggregates Corp. v. Brighton Twp., 539 N.W.2d 761 (Mich. App. 1995)* (sand and gravel removal permit conditioned on filing of reclamation plan and surety bond); However, despite such broad characterizations of police power, a court is still able to find that a municipality has acted outside its police power. *Cellular Tel. Co., v. Village of Tarrytown, 624 N.Y.S.2d 170 (1995)* (local law imposing moratorium on installation of cellular telephone antenna was held invalid as an exercise of the village's police power).

Erb v. Maryland Dept. of Env't, 676 A.2d 1017 (Md. App. 1996) (sewage disposal regulation, proscribing a nuisance from coming into existence on landowner's property, is one facet of the State's power to regulate in order to protect the public health and safety).

Aztec Minerals Corp. v. Romer, 940 P.2d 1025 (Colo. App. 1996) (Actions of Colorado Department of Public Health and Environment (CDPHE) and Colorado Department of Natural Resources (DNR) in entering into response action agreements with Environmental Protection Agency (EPA) to abate nuisance by remedying environmental contamination

at former mining site and by providing technical and financial assistance to EPA did not rise to level of taking; property owners had no property right to permit continued degradation of environment surrounding site and thus creating hazard to public health).

Beck Dev. Co., Inc. v. Southern Pacific Transp. Co., 44 Cal. App. 4th 1160 (Cal. App. 3d Dist., 1996) (concept of a "nuisance per se" arises when a legislative body with appropriate jurisdiction, in the exercise of the police power, expressly declares a particular object or substance, activity, or circumstance, to be a nuisance), *review denied* (Jul. 31, 1996). *Rhod-A-Zalea & 35th, Inc. v. Snohomish County, 959 P.2d 1024 (Wash. 1998)* (owner subject to a grading permit requirement imposed on peat miners). *Hanna v. Town of Framingham, 802 N.E.2d 1061 (Mass. App. 2004)* (Amendment to city zoning plans within the scope of the police power.); *Plummer v. City of Fruitland, 87 P.3d 297* (Idaho, 2004) (Power of city to grant exclusive waste collection franchise within the Constitutional bounds of the police power).

(n32)Footnote 55. *Thorpe v. Rutland & B. R.R., 27 Vt. 140, 149-150 (1854). Barnhill, v. City of North Myrtle Beach, 333 S.C. 482, 511 S.E.2d 361 (S.C. 1999)* (ordinance prohibiting personal watercraft from launching off a public beach was within the city's police power); *Phillips v. Town of Oak Grove, 968 S.W.2d 600 (Ark. 1998)* (ordinance prohibiting emu farmers from keeping fowl within city limits for commercial use was upheld); *Curtis v. Town of South Thomaston, 708 A.2d 657 (Me. 1998)* (town fire ordinance which required them to build fire pond and grant town easement to use the pond was upheld as proper use of police power).

Smith v. City of Arkadelphia, 984 S.W.2d 392 (Ark. 1999) (City may regulate standards of construction following a tornado); *Development Servs. of America v. City of Seattle, 979 P.2d 387 (Wash. 1999)* (City's denial of a permit to construct a Helistop is a proper use of police power); *Rodeo Sanitary Dist. v. Board of Supervisors of Contra Costa County, 71 Cal. App. 4th 1443 (Cal. App. 1999)* (a county has no general police power to regulate a sanitary district; that power is with the state). *See Pennsylvania v. Siemel, 686 A.2d 899 (Pa. Commw. Ct. 1996), appeal denied, 698 A.2d 68 (Pa. 1997)* (holding that an ordinance prohibiting "excessive vegetation," which was defined as "any grass, weeds, bushes, brush, saplings or similar vegetation exceeding six inches in height except such as are planted for useful or ornamental purposes," was a valid exercise of police powers). *Baker v. Boston, 29 Mass. 184 (Mass. 1831)* (holding that police regulations to direct use of realty to prevent public harm, not void); In *Petition of Bailey, 626 N.W.2d 190 (Minn. Ct. App. 2001)* (contribution by adjoining landowners for construction of fence was reasonably necessary to achieve public purpose of keeping animals confined, was not unduly oppressive to adjoining landowners, and was thus valid exercise of state's police powers); *Paul's Lobster, Inc. v. Commonwealth, 758 N.E.2d 145 (Mass. App. Ct. 2001)* (reconfiguration of road that owner's loading docks directly abutted was not constructive taking but rather a reasonable exercise of police power); *Fisher v. Viola, 789 A.2d 782 (Penn. Commw. Ct. 2001)* (zoning ordinances which made changes relating to slopes, grades, and impermeability were reasonable exercises of police power); *Echevarrieta v. City of Rancho Palos Verdes, 103 Cal. Rptr. 2d 165 (2001)* (city's "view protection" ordinance, which prohibits city residents from significantly impairing view by permitting foliage to grow to heights exceeding limitations, was authorized by city's traditional police powers).

(n33)Footnote 56. 2 James Kent, Commentaries on American Law, pt. V, ch. XXXIV, 274 (1826). *See also* Benjamin F. Wright, The Contract Clause of the Constitution 198 (1938). *Miller v. Craig, 11 N.J. Eq. 175 (N.J. Ch. 1856)* (dealing with the powers of a legislature to condemn a mill dam detrimental to the public health); *Paul v. Carver, 24 Pa. 207 (Pa. 1855)* (dealing with legislative power to vacate streets and highways).

(n34)Footnote 57. 2 James Kent, Commentaries on American Law 340 (Oliver Wendell Holmes, ed., 12th ed. 1873). *K. Hope, Inc. v. Onslow County, 911 F. Supp. 948 (E.D.N.C. 1995)* (zoning regulation of adult and sexually oriented businesses); *Threatt v. Fulton County, 467 S.E.2d 546 (Ga. 1996)* (regulation requiring that vegetation be left undisturbed for 50 feet from the banks of a river); *Township of Concord v. Concord Ranch, Inc., 664 A.2d 640 (Pa. Commw. 1995)* (prohibition against using property as "gentleman's club"). *Graham v. Township of Knockville, 599 N.W.2d 793 (Mich. App. 1999)* (regulatory purpose of a connection fee).

(n35)Footnote 58. More recent U.S. Supreme Court decisions that significantly affect police power concepts include *City of Ladue v. Gilleo, 114 S. Ct. 2038 (1994)* (ordinance prohibiting residential signs violates free speech rights); *Dolan v. City of Tigard, 114 S. Ct. 2309 (1994)* (required dedication of private property for bicycle/pedestrian pathway).

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Supp. to § 72.01 Introduction to the Chapter.

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Add:

Ethan-Michael, Inc. v. Board of Supervisors of Union Tp., 918 A.2d 203 (Pa. Cmwlth. 2007) (an agricultural protection district ordinance, to preserve prime agricultural soils, was a valid exercise of police power).

Add:

See also Sprint PCS Assests, L.L.C. v. City of Palos Verdes Estates, 583 F.3d 716, 722 (9th Cir. 2009) (holding that "there is no question that the ... authority to regulate aesthetics [of a city] is contained within [the state's] broad constitutional grant of power"); *Mahoney v. District of Columbia, 662 F. Supp. 2d 74, 83 (D. D.C. 2009)* (holding that the state's police power allows the states to protect persons and property from the acts of other persons, or injurious use of property against the property of others).

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Supp. to § 72.03 Police Power in American Constitutional History.

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Add:

See also 1568 *Montgomery Highway, Inc. v. City of Hoover, 2010 Ala. LEXIS 40, 45-50* (quoting *Williams v. Pryor, 240 F.3d 944 (11th Cir. 2001))* in holding that the state could regulate "adult-only enterprises" under the police power); *People v. McKee, 223 P.3d 566 (Cal. 2010)* (holding that the State did not violate due process in re-confining a sexually violent predator because the State has police power authority to "protect the community from the dangerous tendencies of some who are mentally ill").

Add:

See also Chae v. SLM Corp., 593 F.3d 936, 944 (9th Cir. 2010) (holding that courts are "to start with the assumption that a state's historic police powers will not be superseded absent a clear and manifest purpose of Congress"); *accord, Demahy v. Actavis, 593 F.3d 428, 434-35 (5th Cir. 2010)* ; *Kearney v. City of Little Rock, 302 S.W.3d 629, 634 (Ark. Ct. App. 2009)* (holding that the City's police power allowed it to order the razing of buildings that became "detrimental to public welfare").

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Add:

See also Miller v. Bank of America, N.A., *88 Cal. Rptr. 3d 723 (Cal. Ct. App. 2009)* (recognizing a general presumption against federal preemption unless there is a "significant federal presence").

Add:

See also 1568 *Montgomery Highway, Inc. v. City of Hoover, 2010 Ala. LEXIS 40, 45-50* (quoting *Williams v. Pryor, 240 F.3d 944 (11th Cir. 2001))* in holding that the state could regulate "adult-only enterprises" under the police power).

Add:

Portage County Bd. of Comm'rs v. City of Akron, 109 Ohio St. 3d 106 (Ohio 2006) (police power properly used to restrict access to a lake); *Savage v. Prator, 921 So.2d 51 (La. 2006)* (police power properly used to prohibit cockfighting); Wal-Mart Stores, Inc. v. City of Turlock, 41Cal. Rptr. 3d 420 (2006) (police power properly used to enact a zoning ordinance that prohibited the development of discount superstores).

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Annotations

Add the following:

Annotation. *Extension of Police Power of Municipal Corporation Beyond Territorial Limits,* 55 A.L.R. 1182 .

Annotation. *Municipal License as Affecting Municipality's Exercise of Policy Power Adversely to Licensee,* 124 A.L.R. 523 .

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CHAPTER 73 PUBLIC NUISANCE

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§ 73.syn Synopsis to Chapter 73: PUBLIC NUISANCE

§ 73.01 Introduction to the Chapter.

§ 73.02 Historical Development of Concepts of Public Nuisance.

§ 73.03 Definitions of Public Nuisance.

§ 73.03(a) Various Definitions from the Past.

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§ 73.07 Examples of Different Types of Conduct Held to Be Public Nuisance.

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§ 73.07(b) Special Problems in Public Nuisance Prosecutions.

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§ 73.07(b)(2) Private Takings of Endangered Species.

§ 73.07(b)(3) Obscenity.

§ 73.07(b)(4) National Parks.

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§ 73.08 The Judicial Procedure of Public Nuisance Prosecutions.

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§ 73.08(b) Parties.

§ 73.08(b)(1) When a Private Plaintiff May Sue on a Public Nuisance.

§ 73.08(b)(2) Prosecution of Public Nuisance by Public Authority.

§ 73.08(c) Defenses.

§ 73.08(d) Remedies.

§ 73.08(e) Summary Abatement.

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CHAPTER 73 PUBLIC NUISANCE

8-73 Thompson on Real Property, Thomas Editions § 73.01

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§ 73.01 Introduction to the Chapter.

Even though a public nuisance is not necessarily an offense against real property, and may not emanate from real property, it is reasonable to include a discussion of public nuisance in this treatise, principally to distinguish the subject from that of private nuisance, covered extensively in Chapter 67, above. This chapter traces the common history of nuisances both private and public, identifies the elements of public nuisance, distinguishes public from private and attractive nuisance, describes illustrative public nuisance cases, and analyzes aspects of public nuisance prosecution and civil litigation. This latter topic includes the elements of the charge or complaint, parties, defenses, remedies, and special procedural issues.

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CHAPTER 73 PUBLIC NUISANCE

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§ 73.02 Historical Development of Concepts of Public Nuisance.

From the corrupted Latin term "nocumentum," meaning "harm," the Norman French term "nuisance" arose. Early common law records show courts acting to protect landholders from the most serious type of harm, that of dispossession. In Anglo-Saxon times complainants brought their actions in the principal Anglo-Saxon local courts, the hundred courts. After the Norman Conquest in 1066, A.D., the Norman kings recognized that threats to property rights also threatened the peace, and so it was in the king's interest to resolve such disputes with dispatch. This interest they pursued by establishing a royal court, whose justices traveled to court sessions throughout the realm to hear and decide cases important enough to endanger the peace. Private disputants could request a hearing before a royal justice, or the justices could assert "jurisdiction" on their own initiative. The cases were opened by writ, and the general writ seeking access to the king's court was known as the Writ of Right. In 1166, during the reign of Henry II (1154-1189), judges created a procedure especially for dealing with wrongful dispossession from land, the Assize n1 of Novel Disseisen. n2

When a complainant alleged no dispossession but that the accused interfered with the use of the land, the allegation was phrased as a harm or nuisance to the land, n3 a variant of the Assize of Novel Disseisin that eventually became known as the Assize of Nuisance. n4 Nuisance thus attained the special meaning of harm to land. n5 Judges later developed a new form of action known as "trespass on the case," or "case," to cover a wide variety of injuries resulting from wrongful acts, and to replace the assize of nuisance. For a time this new action was actually called an "action on the case for nuisance," and over time it was used for complaints of conduct that was not so serious as to render the complainant's land uninhabitable, but which rendered occupancy less convenient. n6 For Bracton, writing in the 12th century, the most common example was obstructing a private right of way. By easy analogy he was able to conclude that when a *public* way was obstructed, the remedy of removing the obstruction could be justified for the common good, or the good of the public, even though no private land was affected. n7 This reasoning was followed a century later by the writer known as Britton, n8 and by others who wrote about private nuisance. When writing about nuisance, they typically referred to conduct that offended the community in general as "common" nuisances and then as "public nuisances." n9

During the reign of Henry II in the late twelfth century, public nuisance cases were heard in the main royal court, or by royal justices sent out to the principal regional courts. Eventually, minor offenses were heard in court leet or sheriff's tourn, successor tribunals to the old Anglo-Saxon hundred courts. This assignment of jurisdiction became official in the

late fourteenth century by a statute enacted during the reign of Richard II, the first known statute dealing with public nuisances. n10 Considered criminal, such conduct was prosecuted through use of a presenting jury, and of presentment and indictment for offenses.

The private remedy implicit in this statute had been recognized even earlier. Although the earliest mentions of remedies for public nuisances, or purprestures, did not recognize a private right of action, n11 a case as early as 1411 suggested that a private plaintiff could sue on a public nuisance. n12 Some writers and judges believed that a public offense should not give rise to a private right, but such actions were included regularly in the expansion of actions for trespass on the case, because those actions lay when adequate remedies were not available under the other standard writs. With the English antipathy to overlapping remedies, private nuisance actions were brought under the Assize of Nuisance, and private actions for public nuisance were brought as actions for trespass on the case, all as mutually exclusive categories. The logical consistency of this arrangement was confirmed in the requirement that a plaintiff in a private nuisance action had to be seized of a free tenement; no such requirement existed for actions on the case.

FOOTNOTES:

(n1)Footnote 1. An assize is best described as a decree, edict or ordinance issued by a medieval legislative body; the term assize also denotes a legislative session.

(n2)Footnote 2. The form for the complaint under the Assize of Novel Disseisin alleged that the accused had wrongfully dispossessed the complainant from the land. *See, e.g.,* Ranulf Glanville, *De Legibus et Consuetudinibus Regni Angliae* fol. 13, c. 33.

(n3)Footnote 3. *See, e.g.,* Glanville, note 2 above, at fol. 13, c. 36.

(n4)Footnote 4. *See,* Janet Loengard, "The Assize of Nuisance: Origins of an Action of Common Law," *37 Cambridge L. J. 144 (1978);* William A. McRae, Jr., "The Development of Nuisance in the Early Common Law," *1 U. Fla. L. Rev. 27, 29-32 (1948).*

(n5)Footnote 5. Bracton, writing in the early thirteenth century, so used the term. Bracton, *De Legibus et Consuetedenibus Angliae,* fol. 232(b).

(n6)Footnote 6. *See, e.g.,* Aldred's Case (1611), 9 Co. Rep. F. 57b, 77 Engl. Rep. 816 (defendant held liable for erecting a pig-sty that blocked the plaintiff's windows and "stank him out").

(n7)Footnote 7. Bracton, fol. 232b.

(n8)Footnote 8. Britton, book II, ch. 30.8.

(n9)Footnote 9. J. R. Spencer, "Public Nuisance-A Critical Examination," *48 Cambridge L.J. 55, 58-59 (1989).*

(n10)Footnote 10. 12 Rich. II, c. 13 (1389): "If anyone cast dung etc. into Ditches, Water etc. which are next to any City, Borough or Town, he who will may sue forth a writ directed unto the Mayor Sheriff or Bayliff of such Town etc."

(n11)Footnote 11. Glanvill, ix. c. 11; Bracton f. 234.

(n12)Footnote 12. Y.B. 12 Hy. IV. 43 (1411); *see also* Y.B. 27 Hy. VIII. 26, 27 (1535).

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CHAPTER 73 PUBLIC NUISANCE

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§ 73.03 Definitions of Public Nuisance.

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§ 73.03(a) Various Definitions from the Past.

One early eighteenth-century writer defined "common nuisance" through examples such as "damaging a public highway, failing to repair a bridge, 'running a bawdy-house,' and operating a 'gaming house ...'" n13 Blackstone incorporated Hawkins's definition when he wrote that common nuisances are "Offences against the public health, and the public polic[y]" which included "building on real property owned by the crown; maintaining disorderly places; operating unlicensed lotteries; making, selling or using fireworks; eavesdropping; and being a 'common scold.'" n14

Hawkins's definition of public nuisance formed the basis of early American public nuisance law. n15 However, by the end of the nineteenth century, American courts were beginning to create a more specific definition of public nuisance. In 1918 a Kentucky court defined public nuisance as "the doing or the failure to do something that injuriously affects the safety, health or morals of the public, or works some substantial annoyance, inconvenience or injury to the public." n16

§ 73.03(b) Modern Definitions of Public Nuisance.

A prominent tort law scholar described the historical definition of public nuisance as any "act not warranted by law, or omission to discharge a legal duty, which inconveniences the public in the exercise of rights common to all [citizens]." n17

Courts have created a fundamental split over the issue of whether a public nuisance arises from the number of persons affected or derives from the character of the conduct. According to the majority of courts, a nuisance is public if the character of the conduct meets certain criteria, regardless of the number of persons affected. n18 A substantial minority of courts are reluctant to find a public nuisance unless a larger number of people are affected. n19

The most straightforward definition of a public nuisance is an "unreasonable interference with 'a right common to the general public,'" n20 or with a right to which the whole public is entitled, and causes injury to the general public. n21 Some judicial definitions break down public nuisance into its constituent elements. For example, public nuisance could

be defined as unreasonable interference with the exercise of a right common to the general public, and includes conduct that significantly interferes with public health, safety, peace, comfort, or convenience; conduct that is proscribed by law; and conduct of a continuing nature that produces a permanent or long-lasting effect, and, as the actor knows or has reason to know, has a significant effect on public rights. n22 Some courts emphasize the continuing nature of a public nuisance n23 declaring that public nuisances are by definition continuous. n24

For some courts the surroundings and place of the nuisance are key factors in determining the public nature of the nuisance. n25 Some courts require that a public nuisance have occurred in areas where the public frequents, or where the public is likely to come in contact or under its influence. n26 According to this view, a nuisance that is located in an isolated or unfrequented place is not a public nuisance, unless the court finds it *malum in se*, that is a nuisance under any circumstances. n27 This definition focuses on the public nature of the nuisance and not the number of people affected by it. n28 Such definitions also focus on the meaning of "public" as a right common to the public. n29 The right must be a common right that the public in general is free to exercise; therefore, a public nuisance does not include nuisances that damage an individual's property or numerous individuals' properties where the public in general does not have an exercisable right connected to that property. n30 However, a nuisance does not have to affect the whole community or injure the entire public for it to be a public nuisance. n31 So, if a nuisance affects a public place where the general public has a right to go, n32 and the public does frequent the place or is likely to be influenced by the nuisance in such a place, n33 and the nuisance annoys, injures, offends, or endangers those that come under its influence, n34 then it creates a public nuisance. n35

Some courts emphasize the character of the conduct as key to determining whether a public nuisance arises. Thus several decisions declare that a public nuisance includes an act or failure to act that affects or behavior that causes unreasonable interference with the community's safety, health, morals, peace, comfort, convenience or creates a substantial annoyance. n36 Or, a public nuisance is anything that causes danger to life, disease, or shocks public morals, decency or religious feeling. n37 A public nuisance may be characterized by unlawful acts or neglect of a duty that may offend the community's morals or decency, or prejudice health, property, or safety. n38 Where character of the conduct is at issue in determining whether a public nuisance exists, the inquiry is not into the illegality of the conduct, but rather into the reasonableness of the conduct. n39 Thus a public nuisance could include conduct that offends the senses, n40 or an act or failure to act that causes harm to health, comfort, convenience, the interests of the community, the free exercise of the public's rights, or the use of a public place. n41

FOOTNOTES:

(n1)Footnote 13. William Hawkins, *A Treatise of the Pleas of the Crown* 197 (2d ed. 1724).

(n2)Footnote 14. 4 William Blackstone, Commentaries *161, 167-69.

(n3)Footnote 15. Mary B. Spector, "Crossing the Threshold: Examining the Abatement of Public Nuisances Within the Home," *31 Conn. L. Rev. 547, 552 (1999).*

(n4)Footnote 16. *Commonwealth v. South Covington Ry., 205 S.W. 581 (Ky. 1918).*

(n5)Footnote 17. William L. Prosser, *Handbook of the Law of Torts* § 86, at 572 (4th ed. 1971), quoting Stephen, *General View of the Criminal Law of England* 105 (1890).

(n6)Footnote 18. *See, e.g., Prairie Hills Water and Development Co. v. Gross, 653 N.W.2d 745 (S.D. 2002)* (the court considered whether certain business activities constituted a public nuisance); *State v. Quality Egg Farm, Inc., 311 N.W.2d 650 (Wis. App. 1981); Couture v. Board of Education, 505 A.2d 432 (Conn. App. 1986); Costas v. Fond Du Lac, 129 N.W.2d 217 (Wis. 1964); Baltzeger v. Carolina M.R. Co., 32 S.E. 358 (S.C. 1899).*

(n7)Footnote 19. *See, e.g., Lussier v. San Lorenzo Valley Water Dist., 253 Cal. Rptr 470 (6th Dist. 1988)* ("A public nuisance is one that affects any considerable number of persons; and the rest are private nuisances."); *W. G.*

Duncan Coal Co. v. Jones, 254 S.W.2d 720 (Ky. 1953); Biggs v. Griffith, 231 S.W.2d 875 (Mo. App. 1950); State v. Turner, 18 S.E.2d 372 (S.C. 1942); Costas v. Fond Du Lac, 129 N.W.2d 217 (Wis. 1964); Spur Industries, Inc. v. Del E. Webb Dev. Co., 494 P.2d 700 (Ariz. 1972); In re Debs, 158 U.S. 564, 15 S. Ct. 900, 39 L. Ed. 1092 (1895) (disapproved on other grounds by *Bloom v. Illinois, 391 U.S. 194 (1968)); United States v. County Bd. of Arlington County, 487 F. Supp. 137 (E.D. Va. 1979); State v. Quality Egg Farm, Inc., 311 N.W.2d 650 (Wis. App. 1981)* (standing for the proposition that "when determining whether a nuisance is public or private, one looks to the number of persons injured and the degree to which they are affected. One does not look to the nature of the interest concerned."). *See also,* Powell on Real Property(R) § 64.01[1] (Michael Allan Wolf, ed., Matthew Bender) (stating, "A public nuisance, in its origins a criminal proceeding, exists where unlawful or antisocial conduct in some way injures a substantial number of people ... ."); *Pottawattamie County v. Iowa Dept. of Envtl. Quality, 272 N.W.2d 448 (Iowa 1978); State v. Waterloo Stock Car Raceway, Inc., 409 N.Y.S.2d 40 (1978)* (stating that a public nuisance is incapable of a concrete definition).

(n8)Footnote 20. *DeStefano v. Emergency Housing Group, Inc., 722 N.Y.S.2d 35 (2001)* (a facility serving as a homeless shelter, alcohol crisis center and aftercare program was held to not be a public nuisance); *County of Westchester v. Town of Greenwich, 76 F.3d 42 (2d Cir. 1996)* (stating that a public nuisance involves some offensive or obstructive situation interfering with the general public's right); *Chase Manhattan Bank, N.A. v. T & N PLC, 905 F. Supp. 107 (S.D.N.Y. 1995)* (holding that someone creating a public nuisance is liable for the public nuisance in addition to a private nuisance under New York law when the nuisance invades private property also); *Bolin v. Cessna Aircraft Co., 759 F. Supp. 692 (D. Kan. 1991); National Organization for Women v. Operation Rescue, 726 F. Supp. 1483 (E.D. Va. 1989); Docheff v. City of Broomfield, 623 P.2d 69 (Colo. Ct. App. 1980)* (stating that a public nuisance affects the public's health, safety, or morals or substantially annoys, injures, or inconveniences the public, and is caused by an individual and not the public in general); *State v. Tippetts-Abbett-McCarthy-Stratton, 527 A.2d 688 (Conn. 1987); Guy v. State, 438 A.2d 1250 (Del. Super. Ct. 1981); Hunnicutt v. Eton, 191 S.E. 919 (Ga. 1937); City of Evansville v. Rinehart, 233 N.E.2d 495 (Ind. App. 1968); Gates v. City of Bloomfield, 53 N.W.2d 279 (Iowa 1952); Buckmaster v. Bourbon County Fair Assoc., 256 P.2d 878 (Kan. 1953); Larson v. New England Tel. & Tel. Co., 44 A.2d 1 (Me. 1945); Lynn v. Hooper, 44 A. 127 (Me. 1899); Stop & Shop Companies, Inc., v. Fisher, 444 N.E.2d 368 (Mass. 1983); McKenna v. Andreassi, 197 N.E. 879 (Mass. 1935); Bronson v. Oscoda Tp., 470 N.W.2d 688 (Mich. App. 1991); Flaherty v. Great Northern R. Co., 16 N.W.2d 553 (Minn. 1944); Hanson v. Hall, 279 N.W. 227 (Minn. 1938); City of Lee's Summit v. Browning, 722 S.W.2d 114 (Mo. Ct. App. 1986); White v. Suncook Mills, 13 A.2d 729 (N.H. 1940); City of Albuquerque v. State, 808 P.2d 58 (N.M. 1991); Delaney v. Philhern Reality Corp., 21 N.E.2d 507 (N.Y. 1939); Irvine v. Wood, 51 N.Y. 224 (1872); Stock v. Ronan, 313 N.Y.S.2d 508 (1970); Bleichfeld v. Friedenthal, 268 N.Y.S.2d 192 (1966); Saari v. State, 125 N.Y.S.2d 507 (1953); Brown v. Scioto County Bd. of Comm'rs, 622 N.E.2d 1153 (Ohio App. 1993)* (holding that a public nuisance is an invasion of a right common to all the public, historically criminal in nature, and recovery of damages for private individuals is limited to those who are able to show a different harm than that suffered by the public. Also, the court compared this public nuisance definition to a private nuisance which is an interference with an interest in private land); *Frady v. Portland General Electric Co., 637 P.2d 1345 (Or. App. 1981); Freeley v. Borough of Ridley Park, 551 A.3d 373 (Pa. Commonw. 1988); Wayne County v. Tennessee Solid Waste Disposal Control Board, 756 S.W. 2d 274 (Tenn. Ct. App. 1988); Cottman v. Lochner, 278 P. 71 (Wyo. 1929). See also Friends of H St. v. City of Sacramento, 24 Cal. Rptr. 2d 607 (Cal. App. 1993)* (impairing a landowner's right of ingress and egress to and from an adjacent public street is both a private and a public nuisance); *Miller v. Cudahy Co. (D. Kan. 1987) 592 F. Supp. 976 (D. Kan. 1984),* later proceeding *656 F. Supp. 316 (D. Kan. 1987), aff'd in part and rev'd in part, 858 F.2d 1449 (10th Cir. 1988); Courture v. Board of Education, 505 A.2d 432 (Conn. App. 1986); People of Redford v. McGregor, 238 N.W.2d 183 (Mich. App. 1975).*

(n9)Footnote 21. *County of Westchester v. Town of Greenwhich, Conn., 870 F. Supp. 496 (S.D.N.Y. 1994),* aff'd, *76 F.3d 42 (2d Cir. 1996); Reinhard v. Lawrence Warehouse Co., 107 P.2d 501 (Cal. App. 1940); Echave v. City of Grand Junction, 193 P.2d 277 (Colo. 1948); Marsland v. Pang, 701 P.2d 175 (Haw. App. 1985), cert. denied, 744 P.2d 781 (Haw. 1985); Andersen v. University of Rochester, 458 N.Y.S.2d 404 (1982); Brown v. Scioto Cty. Bd. of Commrs., 622 N.E.2d 404 (Ohio App. 1993); Riggins v. District Court of Salt Lake County, 51 P.2d 645 (Utah 1935). See also, Wade v. Campbell, 19 Ca. Rptr. 173 (1962); Couture v. Board of Education, 505 A.2d 432 (Conn. App. 1986); Conlon*

v. Farmington, 280 A.2d 896 (Conn. Super. 1971); Andersen v. University of Rochester, 458 N.Y.S.2d 404 (1982); State *ex rel. Brown v. Rockside Reclamation, Inc., 351 N.E.2d 448 (Ohio App. 1975)* (holding that a public nuisance occurs with the violation of a public right or with unlawful acts); *State v. Waterloo Stock Car Raceway, Inc., 409 N.Y.S.2d 40 (1978); Philadelphia Electric Co. v. Hercules, Inc. 762 F.2d 303 (3d Cir. 1985), cert. den., 474 U.S. 980, 106 S. Ct. 384, 88 L. Ed. 2d 337 (1985)* (holding that a public nuisance occurs where a right common to the general public is violated and a public nuisance includes anything from blocking a highway to running a gaming-house or committing indecent exposure); *Marshland v. Pang, 701 P.2d 175 (Haw. App. 1985), cert denied, 744 P.2d 781 (Haw. 1985); Twitty v. State, 354 S.E.2d 296, review denied, 358 S.E.2d 69 (N.C. 1987); Parker v. Ft. Worth, 281 S.W.2d 721 (Tex. Civ. App. 1955); Dahlstrom v. Roosevelt Mills, Inc., 238 A.2d 431 (Conn. Super. 1967); Napro Development Corp. v. Berlin, 376 A.2d 342 (D.C. 1977)* (requiring a public nuisance to include an interference with a right common to the public generally); *Connerty v. Metropolitan Dist. Com., 495 N.E.2d 840 (Md. 1985); Chicago v. Cecola, 371 N.E.2d 955 (Ill. App. 1977), rev'd on other grounds, 389 N.E.2d 526 (Ill.1979).*

(n10)Footnote 22. *Mayor and Council of Borough of Rockaway v. Klockner & Klockner, 811 F. Supp. 1039 (D.N.J. 1993); Jacobs v. City of Jacksonville, 762 F. Supp. 327 (M.D. Fla. 1991); Armory Park Neighborhood Ass'n v. Episcopal Community Services in Arizona, 712 P.2d 914 (Ariz. 1985); Bronson v. Oscoda Tp., 470 N.W.2d 688 (Mich. App. 1991); Wagner v. Regency Inn. Corp., 463 N.W.2d 450 (Mich. App. 1990); Leaf River Forest Products, Inc. v. Ferguson, 662 So. 2d 648 (Miss. 1995);* State *ex inf. Ashcroft v. Kansas City Firefighters Local No. 42, 672 S.W.2d 99 (Mo. Ct. App. W.D. 1984); Padilla v. Lawrence, 685 P.2d 964 (N.M. Ct. App. 1984), cert. denied, 683 P.2d 1341 (N.M. 1984);* Com. *ex rel. Preate v. Danny's New Adam & Eve Bookstore, 625 A.2d 119 (Pa. Commw. 1993); Hydro-Manufacturing, Inc. v. Kayser-Roth Corp., 640 A.2d 950 (R.I. 1994); Wayne County v. Tennessee Solid Waste Disposal Control Bd., 756 S.W.2d 274 (Tenn. Ct. App. 1988).*

(n11)Footnote 23. *Nuchols v. Commonwealth, 226 S.W.2d 796 (Ky. 1950)* (overturned on other grounds by *Commonwealth, Dept. of Highways v. Ginsburg, 516 S.W.2d 868 (Ky. 1974))* (stating that a person committing an indecent exposure is not considered a common law public nuisance because that requires a continuous and repeated offense in a public area, which creates an environment of indecency); *Effingham County Bd. of Comm'rs v. Shuler Bros., 2004 Ga. App. Lexis 117* (No. A03A2381, January 30, 2004) (stating that where conduct is specifically allowed by statute or zoning approval, there can be no action for a public nuisance); *Town of Hull v. Mass. Port Auth., 806 N.E.2d 901 (Mass. 2004)* (stating that where authorizing legislation allowed for underlying action in nuisance claim, no public nuisance action could be brought).

(n12)Footnote 24. *Re Oswetgo Barge Corp. 439 F. Supp. 312 (N.D.N.Y. 1977).*

(n13)Footnote 25. *See, e.g., Marsland v. Pang, 701 P.2d 175 (Haw. App. 1985), cert. denied, 744 P.2d 781 (Haw. 1985).*

(n14)Footnote 26. *Jackson v. Morley, 606 F. Supp. 434 (S.D. Miss. 1985); Littleton v. State, 656 P.2d 1336 (Haw. 1982), later proceeding, 708 P.2d 829* (Haw. App.), *aff'd 708 P.2d 824 (Haw. App. 1985); Marsland v. Pang, 701 P.2d 175 (Haw. App. 1985), cert. denied, 744 P.2d 781 (Haw. 1985); Neal v. Darby, 318 S.E.2d 18 (S.C. Ct. App. 1984)* (holding that public nuisance involves a public place where the public is likely to gather or come under the influence of the public nuisance); *People v. Rubenfeld, 172 N.E. 485 (N.Y. 1930); Perkins v. Weibel, 42 A.2d 360 (Conn. 1945)* (an accumulation of restaurant grease on a public sidewalk); *Green v. State, 56 So. 2d 12 (Miss. 1952); Potashnick Trust Service, Inc. v. Sikeston 173 S.W.2d 96 (Mo. App. 1941); State v. Lee, 28 S.E.2d 402 (S.C. 1943); State v. Turner, 18 S.E.2d 372 (S.C. 1942); Soap Corp. of America v. Balis, 223 S.W.2d 957 (Tex. Civ. App. 1949).*

(n15)Footnote 27. *Littleton v. State, 656 P.2d 1336 (1982), related reference, 708 P.2d 829 (1985), decision aff'd, 708 P.2d 824 (1985); Croughwell v. Chase Brass & Copper Co., 20 A.3d 619 (Conn. 1941); State v. Luce, 32 A. 1076 (Gen. Sess. 1885); United Refrigerated Services, Inc. v. Emmer, 463 S.E.2d 535 (Ga. App. 1995); Twitty v. State, 354 S.E.2d 296 (N.C. App. 1987), review denied, 358 S.E.2d 69 (N.C. 1987); Miller v. State, 123 P.2d 699 (Okla. Crim. 1942); State v. Turner, 18 S.E.2d 372 (S.C. 1942);* State v. Quality Egg Farm, Inc., 311 N.W.3d 650 (Wis. 1981);

Marsland v. Pang, 701 P.2d 175 (Haw. App. 1985), cert. denied, 744 P.2d 781 (Haw. 1985); Village of Pine City v. Munch, 44 N.W. 197 (Minn. 1890); State *ex rel. Village of Los Ranchos de Albuquerque v. City of Albuquerque, 889 P.2d 185 (N.M. 1994).*

(n16)Footnote 28. Higgins v. Connecticut light & *Power Co., 30 A.2d 388 (Conn. 1943);* State *ex rel. Renfrow v. Service Cushion Tube Co., 291 S.W. 106 (Mo. 1927); City of Aberdeen v. Wellman, 352 N.W.2d 204 (S.D. 1984); City of Virginia Beach v. Murphy, 389 S.E.2d 462 (Va. 1990); State v. Quality Egg Farm, Inc., 311 N.W.2d 650 (Wis. 1981).*

(n17)Footnote 29. *Croughwell v. Chase Brass & Copper Co., 20 A.3d 619 (Conn. 1941); State v. Luce, 32 A. 1076 (Gen. Sess. 1885); United Refrigerated Services, Inc. v. Emmer, 463 S.E.2d 535 (Ga. App. 1995); State v. Turner, 18 S.E.2d 372 (S.C. 1942); People v. Rubenfeld, 172 N.E. 485 (N.Y. 1930); State v. Rodgers, 102 A. 433* (N.J. Ct. Err. & App. 1917); *Com. v. Webb, 27 Va. 726,* 6 Rand. 726 (1828).

(n18)Footnote 30. *Pennsylvania Coal Co. v. Mahon, 260 U.S. 393 (1922); City of Ft. Smith v. Western Hide & Fur. Co., 239 S.W. 724 (Ark. 1922); City of McAlester v. Grand Union Tea Co., 98 P.2d 924 (1940).*

(n19)Footnote 31. *People of Redford v. McGregor, 238 N.W.2d 183 (Mich. App. 1975); Parker v. Ft. Worth 281 S.W.2d 721 (Tex. Civ. App. 1955); State v. Waterloo Stock Car Raceway, Inc., 409 N.Y.S.2d 40 (1978). City of Chicago v. Latronica Asphalt & Grading, Inc., 805 N.E.2d 281 (Ill. App. 2004)* (stating that a public nuisance does not have to affect the entire community in order for an action for public nuisance to succeed).

(n20)Footnote 32. *Littleton v. State, 656 P.2d 1336 (Haw. 1982), related reference, 708 P.2d 829 (Haw. 1985), decision aff'd, 708 P.2d 824 (Haw. 1985); Marsland v. Pang, 701 P.2d 175 (Haw. App. 1985),* cert. denied, *744 P.2d 781 (Haw. 1985); Copart Industries, Inc., v. Consolidated Edison Co., 362 N.E.2d 968* (N.Y.) (holding that a public nuisance consists of interference with the public's right to use a public place); *Andersen v. University of Rochester, 458 N.Y.S.2d 404* (holding that a public nuisance consists of interference with the public's right to use a public place); State *ex rel. Hoffman v. Swift & Co., 275 P. 176* (Kan.). nuisance); *Dahlstrom v. Roosevelt Mills, Inc., 238 A.2d 431* (Conn.) (dealing with injuries to an infant by a soda machine at defendant's place of business).

(n21)Footnote 33. *Littleton v. State, 656 P.2d 1336 (Haw. 1982), related reference, 708 P.2d 829 (Haw. App. 1985), decision aff'd, 708 P.2d 824 (Haw. 1985); Marsland v. Pang, 701 P.2d 175 (Haw. App. 1985) cert. denied, 744 P.2d 781 (Haw. 1985).*

(n22)Footnote 34. State *ex rel. Hoffman v. Swift & Co., 275 P. 176* (Kan.).

(n23)Footnote 35. *Littleton v. State, 656 P.2d 1336 (Haw. 1982), related reference, 708 P.2d 829 (Haw. App. 1985), decision aff'd, 708 P.2d 824 (Haw. 1985); Marsland v. Pang, 701 P.2d 175 (Haw. App. 1985), cert. denied, 744 P.2d 781 (Haw. 1985);* State *ex rel. Hoffman v. Swift & Co., 275 P. 176* (Kan.). *See also, Maier v. Ketchikan, 403 P.2d 34* (Alaska) (overruled on other grounds by *Johnson v. Fairbanks 583 P.2d 181* (Alaska)); *Merritt v. Miller, 237 A.2d 381* (Conn.); *Nuchols v. Commonwealth, 226 S.W. 2d 796* (Ky.) (overruled on other grounds by *Commonwealth, Dept. of Hishways v. Ginsburg, 516 S.W.2d 868 (Ky. 1974)); People of Redford v. McGregor, 238 N.W.2d 183 (Mich. App. 1975); Potashnick Trust Service, Inc. v. Sikeston, 173 S.W. 96 (Mo. 1915); Frandsen v. Mayer, 155 N.W.2d 294 (N.D. 1967); State v. Lee, 28 S.E.2d 402 (S.C. 1943); Stoughton v. Ft. Worth, 277 S.W.2d 150 (Tex. Civ. App. 1955); Riggins v. District Court of Salt Lake County, 51 P.2d 645 (Utah 1935); Re Debs, 158 U.S. 564, 15 S.Ct. 900, 39 L. Ed. 1092 (1895)* (disapproved on other grounds by *Bloom v. Illinois, 391 U.S. 194, 88 S.Ct. 1477, 20 L. Ed. 522 (1968)); Armory Park Neighborhood Asso. v. Episcopal Community Services, 712 P.2d 914 (Ariz. 1985);* State *ex rel. Collet v. Errington 317 S.W.2d 326 (Mo. 1958), cert. den., 359 U.S. 992, 79 S.Ct. 1122,* L. Ed.2d 980 (1959); *Kansas City v. Mary Don Co. 606 S.W.2d 411 (Mo. App. 1980); Clabough v. Harris, 273 N.E.2d 923 (Ohio 1971); State v. Turner, 18 S.E.2d 463,* (S.C.); *Ellen v. Bryan 410 S.W.2d 463,* (Tex. Civ. App. 1966); *Sisco v. Iowa-Illinois Gas & Electric Co., 368 N.W.2d 853 (Iowa App. 1985)* (holding that a public nuisance requires unlawful or anti-social behavior); *New York v. Shore Realty Corp 759 F.2d 1032 (2d Cir. 1985), later proceeding 763 F.2d 49 (2d Cir. 1985), later proceeding 648 F. Supp.*

255 (E.D.N.Y. 1986); Pottawattamie County v. Iowa Dept. of Environmental Quality, Air Quality Com., 272 N.W.2d 448 (Iowa 1978) (holding that a public nuisance requires unlawful or anti-social behavior); People *ex rel. Busch v. Projection Room Theater, 550 P.2d 914* (Cal.), *cert den. 429 U.S. 922, 97 S.Ct. 320, 50 L.Ed.2d 289 (1976); Padilla v. Lawrence, 685 P.2d 964 (N.M. App. 1984); Aberdeen v. Wellman 352 N.W.2d 204 (S.D. 1984); Miller v. Cudahy Co. 592 F. Supp. 976 (D.C. Kan. 1984), later proceeding 656 F. Supp. 316,* (D. Kan. 1987), *aff'd in part and rev'd in part, 858 F.2d 1449 (10th Cir. 1988).*

(n24)Footnote 36. *United States v. County Bd. of Arlington County, 487 F. Supp. 137 (E.D. Va. 1979); Docheff v. Broomfield, 623 P.2d 69 (Colo. App. 1980); Barrier v. Troutman, 55 S.E.2d 923 (N.C. 1949);* State *ex rel. Chalfin v. Glick, 177 N.E.2d 293 (Ohio App. 1960), aff'd 175 N.E.2d 68 (Ohio 1961); Maxwell v. Laxd, 292 S.W.2d 223 (Tenn. App. 1954); Schiro v. Oriental Realty Co., 76 N.W.2d 355 (Wis. 1956), later app. 97 N.W.2d 385 (Wis. 1959); Robbie v. Lillis, 299 A.2d 155 (N.H. 1972); Citizens for Preservation of Waterman Lake v. Davis 420 A.2d 53 (R.I. 1980).*

(n25)Footnote 37. *Twitty v. State, 354 S.E.2d 296 (N.C. 1987), review den. 358 S.E.2d 69 (N.C. 1987); State v. Turner, 18 S.E.2d 372 (S.C. 1942).*

(n26)Footnote 38. State *ex rel. Swann v. Pack, 527 S.W.2d 99 (Tenn. 1975), cert. den., 424 U.S. 954, 96 S.Ct. 1429,* L. Ed.2d 360; *Hartung v. County of Milwaukee, 86 N.W.2d 475 (Wis. 1957), on reh., 87 N.W.2d 799 (Wis. 1958). See also Kansas City v. Mary Don Co., 606 S.W.2d 411 (Mo. App. 1980);* State *ex rel. Brown v. Rockside Reclamation Inc., 351 N.E.2d 448 (Ohio 1976); Sisco v. Iowa-Illinois Gas & Electric Co., 368 N.W.2d 853 (Iowa App. 1985)* (holding that a public nuisance requires unlawful or anti-social behavior); *Pottawattamie County v. Iowa Dept. of Environmental Quality, Air Quality Com., 272 N.W.2d 448 (Iowa 1978)* (holding that a public nuisance requires unlawful or anti-social behavior); *Masters v. Kansas City 294 S.W.2d 366 (Mo. App. 1956); Garrett v. State, 7 A. 29 (N.J. 1886), aff'd on op. below, 49 N.J.L. 693 (1887); Twitty v. State, 354 S.E.2d 296* (N.C. App.), *review den., 358 S.E.2d 69 (N.C. 1987); State v. Turner, 18 S.E.2d 372 (S.C. 1942); Commissioner of Dept. of Bldgs. v. Sidne Enterprises, Inc., 394 N.Y.S.2d 777 (N.Y. Supp. 1977);* Commonwealth *ex rel. Keator v. Clearview Coal Co., 100 A. 820 (Pa. 1917); Marion v. Tuell, 90 A. 484 (Me. 1914); Henson v. Denison 546 S.W.2d 898 (Tex. Civ. App. 1977).*

(n27)Footnote 39. *Pendergrast v. Aiken, 236 S.E.2d 787 (N.C. 1977); Twitty v. State, 354 S.E.2d 296 (N.C. App. 1987), review den., 358 S.E.2d 69 (N.C. 1987); Armory Park Neighborhood Asso. v. Episcopal Community Services, 712 P.2d 914 (Ariz. 1985); National Wood Preservers, Inc. v. Commonwealth Dept. of Environmental Resources, 414 A.2d 37 (Pa. 1980), app. dism'd, 449 U.S. 803, 101 S.Ct. 47, 66 L. Ed. 2d. 7 (1980).*

(n28)Footnote 40. People *ex rel. Busch v. Projection Room Theater, 550 P.2d 914* (Cal.), *cert den., 429 U.S. 922, 97 S.Ct. 320,* L. Ed. 2d, 289 (1976).

(n29)Footnote 41. *Mayor, etc., of Wilmington v. Vandergrift, 29 A. 1047 (Del. 1893); Brown v. Petrolane, Inc., 162 Cal. Rptr. 551 (Cal. 1980); Venuto v. Owens-Corning Fiberglas Corp., 99 Cal. Rptr. 350 (1971); Wayne County v. Tennessee Solid Water Disposal Control Bd. 756 S.W.2d 274,* (Tenn. App. 1988); *New York v. Shore Realty Corp., 759 F.2d 1032 (2d Cir. 1985), later proceeding, 648 F. Supp. 255 (E.D.N.Y. 1986); Hartung v. County of Milwaukee, 86 N.W.2d 475 (Wis. 1957), on reh., 87 N.W.2d 799 (Wis. 1958). See also Marsland v. Pang, 701 P.2d 175 (Haw. App. 1985), cert. denied, 744 P.2d 781 (Haw. 1985)* (referring to public nuisance acts as ones that are subversive of public order and decency or morals); *Twitty v. State, 354 S.E.2d 296 (N.C. App.1987), review den., 358 S.E.2d 69 (N.C. 1987); State v. Turner, 18 S.E.2d 372 (S.C. 1942)* (holding that swearing, dancing, and drunkenness creating disturbing noise constitute a public nuisance); *Parker v. Ft. Worth, 281 S.W.2d 721 (Tex. Civ. App. 1955).*

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CHAPTER 73 PUBLIC NUISANCE

8-73 Thompson on Real Property, Thomas Editions § 73.04

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§ 73.04 Public and Private Nuisance Distinguished.

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Public and private nuisances were distinguished as separate actions as early as the twelfth century. n42 In the view of some courts, a public nuisance is public because it is dangerous to the public, and a private nuisance is private because only a private individual is affected instead of the public generally. n43 Thus, a private nuisance affects a limited number of people and their rights to the land they possess. n44

Another distinction lies in the relationship of the nuisance to land. A private nuisance is an interference with the use and enjoyment of a person's land or the interest in the use or enjoyment of such land. n45 A private nuisance occurs when a person's use n46 of the land is so unreasonable that it causes a substantial interference with the use and enjoyment of another's land. n47 Thus a private nuisance originates with use of the defendant's land that substantially interferes with use and enjoyment of the plaintiff's land. A private nuisance interferes only with a private right. A public nuisance does not necessarily cause interference with the use or enjoyment of land, but more with a common public right, whether or not associated with land use. n48 A nuisance is public because the harm is to the public, n49 and is not necessarily connected with rights in land. n50 Another distinguishing factor between a private nuisance and a public nuisance is that a public nuisance is a criminal offense and a private nuisance is only a tort. n51 Because a public nuisance is a criminal offense, the remedy for a public nuisance rests in the state's hands. n52 A public nuisance liability cannot be transferred from one creator to another. n53 On the other hand, a private nuisance can be transferred from one nuisance creator to a buyer of the land. n54 Thus in public nuisance one normally finds no private right of action, either in equity or law. n55

FOOTNOTES:

(n1)Footnote 42. *See* William A. McRae, Jr., "The Development of Nuisance in the Early Common Law," *1 U. Fla. L. Rev. 27, 36 (1948).*

(n2)Footnote 43. *Kinney v. Koopman, 22 So. 593 (Ala. 1897); State v. Everhardt, 166 S.E. 738 (N.C. 1932); State v. Turner, 18 S.E.2d 372 (S.C. 1942); Harris v. Poulton, 127 S.E. 647 (W. Va. 1925); Mitchell Realty Co. v. West Allis, 199 N.W. 390 (Wis. 1924), later app., 206 N.W. 193 (Wis. 1925).*

(n3)Footnote 44. *New York v. Shore Realty Corp., 759 F.2d 1032 (2d Cir. 1985), later proceeding, 763 F.2d 49 (2d Cir. 1985), later proceeding, 648 F. Supp. 255 (E.D.N.Y. 1986); King v. Columbian Carbon Co., 152 F.2d 636 (5th Cir. 1945); Southwestern Constr. Co. v. Liberta, 385 So. 2d 633 (Ala. 1980); Chicago v. Cecola, 371 N.E.2d 955 (Ill. 1977), rev'd. on other grounds, 389 N.E.2d 526 (Ill. 1979); W. G. Duncan Coal Co. v. Jones, 254 S.W.2d 720 (Ky. 1953); Biggs v. Griffith, 231 S.W.2d 875 (Mo. App. 1950); Spring-Gar Community Civic Assoc. v. Homes for Homeless, Inc., 516 N.Y.S.2d 399 (1987); Copart Industries, Inc. v. Consolidated Edison Co., 394 N.Y.S.2d 169 (1977); Jordan v. Foust Oil Co., 447 S.E.2d 491 (N.C. 1994); Jerry Harmon Motors, Inc. v. Farmers Union Grain Terminal Assoc., 337 N.W.2d 427 (N.D. 1983), disagreed with on other grounds by multiple cases as stated in State ex rel. Spaeth v. Eddy Furniture Co., 386 N.W.2d 901 (N.D. 1986); Davis v. Palmetto Quarries Co., 48 S.E.2d 329 (S.C. 1948); McIntosh v. Goodwin, 292 S.W.2d 242 (Tenn. App. 1954); Brown Supply Co. v. Lester, 304 S.W.2d 192 (Tex. Civ. App. 1957); Riggins v. District Court of Salt Lake County, 51 P.2d 645 (Utah 1935); Schiro v. Oriental Realty Co., 76 N.W.2d 355 (Wis. 1956), later app., 97 N.W.2d 385 (Wis. 1959).*

(n4)Footnote 45. *B. & W. Management, Inc. v. Tasea Invest. Co., 451 A.2d 879 (D.C. 1982); Armory Park Neighborhood Assoc. v. Episcopal Community Services, 712 P.2d 914 (Ariz. 1985); State ex rel. Ashcroft v. Kansas City Firefighters Local No. 42, 672 S.W.2d 99 (Mo. App. 1984); Philadelphia Electric Co. v. Hercules, Inc., 762 F.2d 303 (3d Cir. 1985), cert. den., 474 U.S. 980, 106 S. Ct. 384, 88 L. Ed. 2d 337 (1985);* James H. Backman and David A. Thomas, *A Practical Guide to Disputes Between Adjoining Landowners* § 9.02[1], n. 1, pg 9-6 (Matthew Bender) (citing restatement of Torts 2d § 821B (1979) (stating that a typical "example[] of ...private nuisances would be the conduct of one landholder that causes loud noises or bright lights to annoy the occupants of other, nearby land."). *But see* the following case, stating that a public nuisance is an interference with a common right: *Philadelphia Electric Co. v. Hercules, Inc., 762 F.2d 303 (3d Cir. 1985), cert. den., 474 U.S. 980, 106 S. Ct. 384, 88 L. Ed. 2d 337 (1985).*

(n5)Footnote 46. The conduct complained of must be either an act or a failure to act. *Copart Industries, Inc. v. Consolidated Edison co., 394 N.Y.S.2d 169 (1977).*

(n6)Footnote 47. *See* James H. Backman and David A. Thomas, *A Practical Guide to Disputes Between Adjoining Landowners* § 9.02[2], n. 3, pp. 9-7 (Matthew Bender).

(n7)Footnote 48. *Id.* at n. 4.

(n8)Footnote 49. *State of New York v. Shore Realty Corp., 759 F.2d 1032 (2d Cir. 1985); State, Dept. of Health v. The Mill, 887 P.2d 993 (Colo. 1994), reh'g. denied and cert. denied, 515 U.S. 1159, 115 S. Ct. 2612, 132 L. Ed. 2d 855 (1995); Higgins v. Connecticut Light & Power Co., 30 A.2d 388 (Conn. 1943); Foley v. H. F. Farnham Co., 188 A. 708 (Me. 1936); Khoury v. Saratoga County, 277 N.Y.S. 3 (1935),* aff'd., *196 N.E. 299 (N.Y. 1935); Home Sales, Inc. v. City of North Myrtle Beach, 382 S.E.2d 463 (S.C. App. 1989).*

(n9)Footnote 50. *Philadelphia Elec. Co. v. Hercules, Inc., 762 F.2d 303 (3d Cir. 1985), cert. den., 474 U.S. 980, 106 S. Ct. 384, 88 L. Ed. 2d 337 (1985).*

(n10)Footnote 51. *Georgetown v. Alexandria Canal Co., 37 U.S. 91, 9 L. Ed. 1012 (1838); New York v. Shore Realty Corp., 759 F.2d 1032 (2d Cir. 1985), later proceeding, 763 F.2d 49 (2d Cir. 1985),* later proceeding, *648 F. Supp. 255 (E.D.N.Y. 1986); Philadelphia Elec. Co. v. Hercules, Inc., 762 F.2d 303 (3d Cir. 1985), cert. den., 474 U.S. 980, 106 S. Ct. 384, 88 L. Ed. 2d 337 (1985);* People v. Lim, 118 P.2s 472 (Cal. 1941); *People ex rel. Clancy v. Superior Court, 218 Cal. Rptr. 24 (1985), cert. den., 475 U.S. 1121, 106 S. Ct. 1638, 90* L. Ed. 2d (1986); *Dunn v. Wilmington, 212 A.2d 596 (Del Super. 1965), aff'd., 219 A.2d 153* (Del.); *B & W Management, Inc. v. Tasea Invest. Co., 451 A.2d 879 (D.C. 1982); Sopher v. State, 81 N.E. 913 (Ind. 1907); Acme Fertilizer Co. v. State, 72 N.E. 1037 (Ind. App. 1905); State ex rel. Remley v. Meek, 84 N.W. 3 (Iowa 1900); Sandifer Motors, Inc. v. Roeland Park, 628 P.2d 239 (Kan. App. 1981); People of Redford v. McGregor, 238 N.W.2d 183 (Mich. App. 1975); State ex rel. Maples v. Quinn, 64 So. 2d 711 (Miss. 1953); State ex rel. Ashcroft v. Kansas City Firefighters Local No. 42, 672 S.W.2d 99 (Mo. App. 1984); People v. Cifarelli, 454 N.Y.S.2d 525 (1982); Copart Industries, Inc. v. Consolidated Edison Co., 394 N.Y.S.2d*

169 (1977); Spring-Gar Community Civic Assoc. v. Homes for Homeless, Inc., 516 N.Y.S.2d 399 (1987); Twitty v. State, 354 S.E.2d 296 (N.C. 1987), review den., 358 S.E.2d 69 (N.C. 1987); Jones v. State, 132 P. 319 (Okla. 1912); State v. Elliott, 277 P.2d 754 (Or. 1954), cert. den. 349 U.S. 929, 75 S. Ct. 772, 99 L. Ed. 1260 (1955); State v. Turner, 18 S.E.2d 372 (S.C. 1942); Laws v. State, 404 S.W.2d 510 (Tenn. 1966); Hostetler v. Ward, 704 P.2d 1193 (Wash. 1985); State v. Primeau, 422 P.2d 302 (Wash. 1966); Schiro v. Oriental Realty Co., 76 N.W.2d 355 (Wis. 1956), later appealed, 97 N.W.2d 385 (Wis. 1959).

(n11)Footnote 52. *See* Louise A. Halper, "Public Nuisance and Public Plaintiffs: Ownership, Use, and Causation (Part III)," *17 Envtl. L. Rep. 10044 (1987).*

(n12)Footnote 53. *Id.* (noting that no agreement can release a creator of a public nuisance from an act putting the public at risk for some sort of harm).

(n13)Footnote 54. *Id.* (noting, however, in *Philadelphia Electric Co. v. Hercules, Ltd., 762 F.2d 303 (3d Cir. 1985),* the court states that the creator of the nuisance in some situations might be liable to the public for creating the nuisance, even though the nuisance creator later sold the land under the rule of *caveat emptor*).

(n14)Footnote 55. It may be said that public nuisances are indictable, while private nuisances are actionable: State *ex inf. Ashcroft v. Kansas City Firefighters Local no. 42, 672 S.W.2d 99 (Mo. App. 1984); State v. Turner, 18 S.E.2d 372 (S. C. 1942).*

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CHAPTER 73 PUBLIC NUISANCE

8-73 Thompson on Real Property, Thomas Editions § 73.05

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§ 73.05 Public Nuisance and Attractive Nuisance Distinguished.

An attractive nuisance occurs if a landowner maintains on the land a condition dangerous to children, but nevertheless attractive to them, which condition in fact causes injury to a child, if the landowner has not exercised reasonable care to provide protection against the occurrence. n56 Attractive nuisance is similar to private nuisance in that it requires that the defendant landowner has been negligent, which is analogous to the private nuisance requirement that the defendant has acted unreasonably. Attractive nuisance actions are similar to public nuisance in that they present a condition that is dangerous to at least a portion of the public and do not require that there has been any interference with the use and enjoyment of the plaintiff's land. n57

FOOTNOTES:
(n1)Footnote 56. *Thunder Hawk v. Union Pac. R. Co., 844 P.2d 1045 (Wyo. 1992)* (elements of attractive nuisance explained).

(n2)Footnote 57. Attractive nuisance appeared in § 339 of the Restatement of Torts (1934), and then was slightly modified in the Restatement (Second) of Torts (1965). As modified, the doctrine eliminated the requirement that the rule applied only to "young" children and the requirement that the condition on the defendant's land be attractive or enticing to children.

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CHAPTER 73 PUBLIC NUISANCE

8-73 Thompson on Real Property, Thomas Editions § 73.06

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§ 73.06 Nuisances That Are Both Public and Private.

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In some jurisdictions, private and public nuisance laws overlap, n58 leading to hybrid cases dealing with both types of actions from the same conduct, sometimes referred to as mixed nuisances. n59 In such jurisdictions, a mixed nuisance is one that affects a large number of people or a public interest and also injures private interests in a way unique or distinct from the public injury. n60 Mixed nuisances are public nuisances that cause special injuries to private rights. n61 The mixed nuisance may be public because it interferes with a right common to the public, but a private nuisance at the same time because it inflicts special injury on a particular citizen or limited number of citizens. n62 Therefore, the nuisance is public, but causes special injury to an individual. n63 Some courts focus on the number of people affected rather than the character of the injury. n64

FOOTNOTES:

(n1)Footnote 58. *See Armory Park Neighborhood Ass'n v. Episcopal Community Servs., 712 P. 2d 914, 917 (Ariz. 1985).*

(n2)Footnote 59. *See Riggins v. District Ct. of Salt Lake County, 51 P.2d 645, 662 (Utah 1935).*

(n3)Footnote 60. *See* State *ex rel. Ashcroft v. Kansas City Firefighters Local No. 42, 672 S.W.2d 99 (Mo. Ct. App. 1979).*

(n4)Footnote 61. *Armory Park Neighborhood Assoc. v. Episcopal Community Services, 712 P.2d 914 (Ariz. 1985); Ozark Poultry Products, Inc. v. Garman, 472 S.W.2d 714 (Ark. 1971); Acme Fertilizer Co. v. State, 72 N.E. 1037 (Ind. App. 1905); Pottawattamie County v. Iowa Dept. of Environmental Quality, Air Quality Com., 272 N.W.2d 448 (Iowa 1978); Hill v. Stokely-Van Camp, Inc., 109 N.W.2d 749 (Minn. 1961); Sarraillon v. Stevenson, 43 N.W.2d 509 (Neb. 1950); Robie v. Lillis, 299 A.2d 155 (N.H. 1972); Malhame v. Demarest, 392 A.2d 652 (N.J. Super. 1978), app. dismissed, 415 A.2d 358 (N.J. 1980); Ballenger v. Grand Saline, 276 S.W.2d 874 (Tex. Civ. App. 1955); Riggins v. District Court of Salt Lake County, 51 P.2d 645 (Ut. 1935); Costas v. Fond Du Lac, 129 N.W.2d 217 (Wis. 1964).*

(n5)Footnote 62. *Pennsylvania v. Wheeling & Belmont Bridge Co., 54 U.S. 518, 14 L. Ed. 249 (1851); City of*

Phoenix v. Johnson, 75 P.2d 30 (Ariz. 1938); B & W Management, Inc. v. Tasea Invest. Co., 451 A.2d 879 (D.C. 1982); Norton Shores v. Carr, 265 N.W.2d 802 (Mich. App. 1978); State ex rel. Ashcroft v. Kansas City Firefighters Local No. 42, 672 S.W.2d 99 (Mo. App. 1984); Boyle v. Neisner Bros., Inc., 87 S.W.2d 227 (Mo. App. 1935); Brown v. Scioto Cty. Bd. of Commrs., 622 N.E.2d 1153 (Ohio App. 1993); Adams v. City of Toledo, 96 P.2d 1078 (Or. 1939); Maxwell v. Lax, 292 S.W.2d 223 (Tenn. App. 1954); Riggins v. District Court of Salt Lake County, 51 P.2d 645 (Ut. 1935); Costas v. Fond Du Lac, 129 N.W.2d 217 (Wis. 1964).

(n6)Footnote 63. *Balsz v. Hall, 2002 Cal. App. Unpub. LEXIS 9810* (No. A097949, Oct. 23, 2002) (homeowners had standing because they alleged injuries different from those suffered by the community at large); 5th Avenue Chocolatiere, Ltd. v. 540 Acquisition Co., 712 N.Y.S.2d 8 (2000) (businesses adversely affected by a street closure could allege "special" or "peculiar" injury to assert a private cause of action for public nuisance); *City of Phoenix v. Johnson, 75 P.2d 30 (Ariz. 1938); Chicago Nt. Leage Ball Club, Inc. v. Thompson, 483 N.E.2d 1245 (Ill. 1985), Riggins v. District Court of Salt Lake County, 51 P.2d 645 (Utah 1935).* A nuisance may be both public and private when there the conduct interferes with the use and enjoyment of private land of numerous landholders. *Armory Park Neighborhood Ass'n. v. Episcopal Community Services in Arizona, 712 P.2d 914 (Ariz. 1985).*

(n7)Footnote 64. *Wheeler v. Lebanon Valley Auto Racing Corp., 755 N.Y.S.2d 763 (2003)* (speedway activities were not privately actionable as a public nuisance); *Armory Park Neighborhood Ass'n. v. Episcopal Community Services in Arizona, 712 P.2d 914 (Ariz. 1985).*

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CHAPTER 73 PUBLIC NUISANCE

8-73 Thompson on Real Property, Thomas Editions § 73.07

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§ 73.07 Examples of Different Types of Conduct Held to Be Public Nuisance.

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§ 73.07(a) The Wide Variety of Successful Public Nuisance Prosecutions.

Courts have held such a wide variety of conduct to be public nuisances that any definitions of public nuisance are necessarily general. This is evident in the following short list of the range and variety of conduct successfully prosecuted as public nuisances:

- keeping a diseased animal; n65
- storing explosives; n66
- shooting off fireworks in public streets; n67
- unlawfully practicing medicine; n68
- running a house of prostitution; n69
- running a gambling house; n70
- bullfighting; n71
- using profanity in public; n72
- causing loud noises; n73
- generating odors, smoke dust, and vibrations; n74
- blocking highways or navigable waterways; n75

- being a common scold; n76
- street gang activity; n76.1
- creating an unsightly appearance on private property; n76.2 and
- running a social hall. n76.3

Municipal and public interest organization public nuisance actions against firearm manufacturers are increasing in frequency, with mixed results. n76.4

§ 73.07(b) Special Problems in Public Nuisance Prosecutions.

§ 73.07(b)(1) Wetlands.

As with other attempts to protect the environment through land use regulation, protection of wetlands may require the public agency to pay just compensation resulting from a taking of private property rights. However, use of public nuisance as the basis for regulation, thus avoiding the expense of paying for a taking, has been suggested. n77 More commonly, however, courts have ruled that protecting wetlands does not fit within the nuisance law exceptions to the Takings Clause. n78 The doctrine of public nuisance law is based on protecting the public from harms. Therefore, unless one can show that a threat to wetlands also affirmatively threatens harm to the public, protecting wetlands will probably remain outside the scope of public nuisance doctrine. n79

§ 73.07(b)(2) Private Takings of Endangered Species.

In an ironic contradiction to the use of public nuisance doctrine in protecting wetlands, courts have approved the use of public nuisance theory in protecting endangered species of wildlife. Thus habitats of endangered species may be protected under public nuisance doctrine without meeting Takings Clause requirements that compensation be paid for adversely affected private property rights. To successfully show that a public nuisance has occurred, one must show substantial and unreasonable harm to the public. n80 Despite the obvious difficulty in demonstrating the harm caused by destroying a species of wildlife, n81 some experts do indeed make the argument--averring that the harm may be unknown because of benefits from the species that may be discovered later, n82 and some courts are receptive. n83

§ 73.07(b)(3) Obscenity.

The success of public nuisance prosecutions of obscenity has been mixed, with First Amendment protections impeding the effort; n84 however, some states are more receptive to public nuisance regulation of obscenity. n85 A variety of views have been expressed by both state courts n86 and the United States Supreme Court. n87

§ 73.07(b)(4) National Parks.

National parks are the best example of property where the general public has common rights to the enjoyment of such lands. In fact, the legislation creating the first national park, Yellowstone Park, specifically declares that the park was created for the enjoyment by every citizen. n88 Enabling legislation for several other national parks also noted the enjoyment by the general public as one of the purposes for the parks' creation. n89 National parks face unique public nuisance problems, in addition to the environmental damage caused by human visitation inside the parks. These unique problems arise from the commercial developments that are built to accommodate the millions of visitors to these parks. n90 The development of hotels, condominiums, stores, restaurants, and other facilities around the boundaries of national parks harm vegetation, air quality, water, and the aesthetics of the parks. n91 Theoretically, public nuisance prosecutions may be useful in controlling these conditions within the proximity of the parks.

§ 73.07(b)(5) Environmental Nuisances

Public nuisance prosecutions have been used to combat various--although not all--violations of environmental regulations. n92

FOOTNOTES:
(n1)Footnote 65. *See, e.g., Browning v. Belue, 116 So. 509 (Ala. App. 1928); Patterson v. Rosenwald, 6 S.W.2d 664 (Mo. App. 1928).*

(n2)Footnote 66. *See, e.g., State v. Excelsior Powder Mfg. Co., 169 S.W. 267 (Mo. 1914).*

(n3)Footnote 67. *See, e.g., Landau v. City of New York, 72 N.E. 631 (N.Y. 1904).*

(n4)Footnote 68. *See, e.g., State ex rel. Collet v. Scopel, 315 S.W.2d 515 (Mo. 1958).*

(n5)Footnote 69. *See, e.g., State v. Navy, 17 S.E.2d 626 (W. Va. 1941). But see City of St. Louis v. Varahi, Inc., 39 S.W.3d 531 (2001)* (hotel owner that maintained house of prostitution did not create public nuisance).

(n6)Footnote 70. *See, e.g.,* State *ex rel. Williams v. Karston, 187 S.W.2d 327 (Ark. 1945);* State *ex rel. Johnson v. Hash, 13 N.W.2d 716 (Neb. 1944).*

(n7)Footnote 71. *See, e.g., State ex rel. Att'y Gen. v. Canty, 105 S.W. 1078 (Mo. 1907).*

(n8)Footnote 72. *See, e.g., Wilson v. Parent, 365 P.2d 72 (Or. 1961).*

(n9)Footnote 73. *See, e.g., Patterson v. City of Richmond, 576 S.E.2d 759 (Va. App. 2003)* (barking dogs were a public nuisance). *People v. Rubenfeld, 172 N.E. 485 (1930). But see State v. Turner, 18 S.E.2d 372 (1942)* (playing music is not a nuisance per se, but can be a nuisance if the noise is so excessive that it annoys the neighborhood).

(n10)Footnote 74. South Camden Citizens in *Action v. New Jersey Department of Environmental Protection, 2003 U.S. Dist. LEXIS 6203* (Civil Action No. 01-702, April 18, 2003) (operation of a cement grinding facility in an area zoned industrial was neither a public nor a private nuisance). *Boyles v. City of Topeka, 21 P.3d 974 (Kans. 2001)* (a city ordinance prohibiting as a public nuisance the keeping of trash, junk and other items constituting an "unsightly appearance" was not unconstitutionally vague); *Mountrail County v. Hoffman, 607 N.W.2d 901 (N.D. 2000)* (owner of automobile junkyard and graveyard could be subject to public nuisance abatement order even though business had been allowed to operate for almost 20 years). *See, e.g.,* Transcontinental Gas Pipe Line Corp. v. Gault, 198 F.2d (4th Cir. 1952); *Soap Corp. v. Reynolds, 178 F.2d 503 (5th Cir. 1950); State v. Primeau, 422 P.2d 302 (Wash. 1966). See also* Molly McDonough, "Getting the Lead Out: Public Nuisance Claim Against Paint Industry Set for Trial," 1 ABA Journal E-Report 7 (Mar. 8, 2002).

(n11)Footnote 75. *Physicians Plus Ins. Corp. v. Midwest Mutual Ins. Co., 646 N.W.2d 777 (Wis. 2002)* (tree branches obstructing a stop sign constituted a public nuisance); *Howard v. Gourmet Concepts International, Inc., 529 S.E.2d 406 (Ga. App. 2000)* (a left-turning motorist injured in an intersection collision could not bring a public nuisance action for allegedly vision-obstructing vegetation on nearby private property). *See, e.g., Pilgrim Plywood Corp. v. Melendy, 1 A.2d 700 (Vt. 1938). But see Sloan v. City of Greenville, 111 S.E.2d 573 (S.C. 1959)* (ruling that the enclosure caused by constructing an overhang of a building is a public nuisance).

(n12)Footnote 76. *See, e.g., Commonwealth v. Mohn, 52 Pa. 243 (1866). But see State ex rel. Burgum v. Hooker, 87 N.W.2d 337 (N.D. 1957)* (involving a loan shark).

(n13)Footnote 76.1. *People v. Englebrecht, 106 Cal. Rptr. 2d 738 (2001).*

(n14)Footnote 76.2. *Boyles v. City of Topeka, 21 P.3d 974 (Kans. 2001).*

(n15)Footnote 76.3. *Jordan v. Commonwealth, 549 S.E.2d 621 (Va. Ct. App. 2001).*

(n16)Footnote 76.4. *City of Philadelphia v. Beretta U.S.A. Corp., 277 F.3d 415 (3d Cir. 2002)* (manufacturer's methods for distributing guns did not create public nuisance); Camden County Board of chosen *Freeholders v. Beretta U.S.A. Corp., 273 F.3d 536 (3d Cir. 2001); Ileto v. Glock, Inc.,194 F. Supp. 2d 1040* (C.D. Cal. Mar. 25, 2002) (victims could not state nuisance claim for distribution of firearms); *Penelas v. Arms Technology, Inc., 778 So. 2d 1042 (Fla. App. 2001); see also* Carolyn Magnuson, "Illinois Appeals Court Upholds Public Nuisance Claim in Gun Case," 38 Trial 76 (April 2002); Jean Hellwege, "Courts Issue Conflicting Decisions in Public-Entity Cases Against Gun Industry," 38 Trial 88 (February 2002); Molly McDonough, "Gun Industry Shot Down: Illinois Court Allows Nuisance Suit Against Firearm Makers, Dealers," 1 ABA Journal E-Report 6 (Jan. 11, 2002); *City of Philadelphia v. Beretta U.S.A., Corp., 126 F. Supp. 2d 882 (E.D. Penn. 2000)* (manufacturers not subject to public nuisance liability); *Camden County Board of Chosen Freeholders v. Beretta U.S.A. Corp., 123 F. Supp. 2d 245 (D.N.J. 2000)* (manufacturers not subject to public nuisance liability); *Mayor Michael R. White v. Smith & Wesson, 97 F. Supp. 2d 816 (N.D. Ohio 2000)* (city state claim for public nuisance).

(n17)Footnote 77. *Mugler v. Kansas, 123 U.S. 623, 8 S.Ct. 273, 31 L. Ed. 205 (1887).*

(n18)Footnote 78. *State ex rel R.T.G., Inc. v. State of Ohio, 753 N.E.2d 869 (Ohio Ct. App 2001)* (holding that coal mining was not a "qualified public nuisance" in area around village's water wells). *See Loveladies Harbor, Inc. v. United States, 15 Cl. Ct. 381, 388 (1990)* (holding that the filling and destruction of wetlands does not fit within the public nuisance exception to the the Takings Clause, because the Clean water Act's purpose is to maintain a public benefit instead of preventing a public harm, as required under public nuisance doctrine).

(n19)Footnote 79. *See Mugler v. Kansas, 123 U.S. 623, 8 S.Ct. 273, 31 L. Ed. 205 (1887).*

(n20)Footnote 80. *See* Robert Abrams and Val Washington, "The Misunderstood Law of Public Nuisance: A Comparison with Private Nuisance Twenty Years after *Boomer,*" *54 Alb. L. Rev. 359, 374 (1990).*

(n21)Footnote 81. *See* Paula C. Murray, "Private Takings of Endangered Species as Public Nuisance: *Lucas v. South Carolina Coastal Council* and the Endangered Species Act," 12 UCLA J. Envt. L. & Pol'y 119, 160 (1993).

(n22)Footnote 82. *See id.* at 161.

(n23)Footnote 83. *See Lucas v. South Carolina Coastal Council, 112 S. Ct. 436 (1991)* (especially the dissent of Justice Stevens, stating that legislatures should be allowed to implement the new learning of and appreciation for the significance of endangered species, wetlands, and coastal lands); *Pruitt v. Allied Chemical Corp., 523 F. Supp. 975 (E.D. Va. 1981)* (stating that the harm done by the chemical company to Chesapeake Bay is borne by wildlife there, and the defendants should be held to some liability for their actions); *State ex rel. Dresser Industries, Inc. v. Ruddy and 592 S.W.2d 789 (Mo. 1980)* (stating that public nuisance claims could be maintained to answer for the destruction of aesthetic values or natural resources).

(n24)Footnote 84. *See generally,* Steven T. Cattlett, Note, "Enjoining Obscenity as a Public Nuisance and the Prior Restraint Doctrine," *84 Colum. L. Rev. 1616 (1984).*

(n25)Footnote 85. *See e.g., City of Chicago v. Festival Theatre Corp., 438 N.E.2d 159, 163 (Ill. 1982)* (ruling that the common law doctrine of public nuisance can be used to regulate obscenity under the analogy that brothels are public nuisances per se under the common law). *But see, Grove Press, Inc., v. City of Philadelphia, 418 F.2d 82, 88 (3d Cir. 1969)* (holding that a common law nuisance claim cannot be used to regulate obscenity); and *Mapro Dev. Corp. v. Town of Berlin, 376 A.2d 342, 349 (Vt. 1977)* (holding that common law nuisance claims cannot be used to regulate obscenity).

(n26)Footnote 86. *See* Steven T. Catlett, Note, "Enjoining Obscenity as a Public Nuisance and the Prior Restraint Doctrine," *84 Colum. L. Rev. 1616 (1984).*

(n27)Footnote 87. *See, Id. at 1617-1624.*

(n28)Footnote 88. *See* William C. Everhart, *The National Park Service* 8 (1972); National Parks and Conservation Association, *A Race Against Time: Five Threats Endangering America's National Parks and the Solutions to Avert Them*, 4-25 (1991).

(n29)Footnote 89. *See* Everhart, *supra* note 88 at 8, 10, 13-16.

(n30)Footnote 90. *See* Everhart, *supra* note 88 at 4-25.

(n31)Footnote 91. *See* Everhart, *supra* note 88 at 7-8, 12 (stating that buildings block scenic vistas, increase water usage, drain water tables and harm water quality; increased visitors create more traffic, noise and air pollution, and litter).

(n32)Footnote 92. *City of Portland v. Boeing Co., 179 F. Supp. 2d 1190 (D. Ore. 2001)* (city could pursue common law public nuisance claim under CERCLA and state law to recover for contamination of groundwater); see also "Environmental Enforcement: Industry Should Not Be Complacent," 32 Env. Law Rep. 10488 (April 2002); *Flo-Sun, Inc. v. Kirk, 783 So. 2d 1029 (Fla. 2001)* (the Air and Water Pollution Act did not impliedly repeal the public nuisance statutes as they relate to air and water pollution); *Bologna v. Kerr-McGee Corporation, 95 F. Supp. 2d 197 (S.D. N. Y. 2000)* (public nuisance claim allowed against former owner who permitted environmental contamination to occur around an oil storage facility); *State v. Monoco Oil Company, Inc., 713 N.Y.S.2d 440 2000)* (emissions from an asphalt storage and transfer facility constituted a public nuisance). *See* Louise A. Halper, "Public Nuisance and Public Plaintiffs: Rediscovering the Common Law (Part I)," *16 Envtl. L. Rep. 10292, n. 23 (1986)* (citing several cases relating to various environmental violations that have been abated through public nuisance claims).

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CHAPTER 73 PUBLIC NUISANCE

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§ 73.08 The Judicial Procedure of Public Nuisance Prosecutions.

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§ 73.08(a) Elements of a Cause of Action.

The key element in a proceeding against a public nuisance suit is whether the accused conduct has caused interference with a common public right. n93 Of course, not all such interferences are considered public nuisances; n94 only substantial interferences may be prosecuted as public nuisances. n95 In other words, the prosecutor must show that the defendant's actions substantially and unreasonably interfered with public property or public rights in order to win a public nuisance case. Thus, in successful public nuisance cases the court usually finds that the defendant substantially damaged public property; n96 or disrupted, n97 offended n98 or threatened the health of the public. In some environmental cases, the court must find that the defendant's conduct has reduced the environment's quality below the reasonable expectation of the public. n99

The substantial interference element involves substantial or significant harm to the public, n100 determined by gauging the conduct's effect on the public by a reasonable person standard. n101 If the defendant's conduct threatens the public's sensibilities or harms the public, then the conduct satisfies this element. n102 Courts have ruled that conduct is significantly harmful to the public if it is visually offensive. n103 Whenever a defendant's conduct threatens the public's health, n104 emits odors or noises that makes an ordinary person in the community ill or uncomfortable or forces changes in work habits and lifestyle, n105 creates sights that offend the ordinary citizen's taste, n106 visual interferences, n107 or conduct that considerably damages public property by harming plants, air or soil, n108 such conduct meets the substantial interference element and may be considered a public nuisance.

Once the court decides that the defendant caused substantial interference, then it can move on to the unreasonableness of the interference. The unreasonable interference element is met when defendant's conduct is such that the environmental quality is reduced below what the plaintiff reasonably expects. n109 Another component of the unreasonableness of the interference is the lack of defendant's efforts to mitigate the harm caused by the nuisance. n110 A court might expect or require that a defendant will mitigate the harm by operating in another location n111 or reducing the level of interference causing the nuisance. n112

§ 73.08(b) Parties.

§ 73.08(b)(1) When a Private Plaintiff May Sue on a Public Nuisance.

Historically, a public nuisance proceeding could be brought only by the monarch as a criminal in the royal court, so private citizens acting on their own were not able to abate a public nuisance. n113 This changed in 1536, in the first case permitting a private citizen to bring an action to abate a public nuisance. n114 In this case, a tort action, the plaintiff was accorded standing to challenge someone who had blocked the king's highway and impeded access to the plaintiff's "close." n115 In this action, the private citizen was permitted to sue because he had suffered more than others, and should be allowed to recover damages for the special injury caused by the public nuisance. n116 Without a showing of special injury, the only party who could bring an action to abate a public nuisance was the monarch. The special injury rule, of course, means that not every public nuisance carries with it a private right of action. n117

The rule requiring special injury as a foundation to a private right of action may have been grounded on the notion that private citizens should not be allowed to vindicate the sovereign's rights, n118 that the numbers of such complaints should be limited, n119 and that courts should not be burdened with trivial complaints or with theoretical or speculative damages. n120 The requirement persists today and is still the chief obstacle or requirement that prospective private plaintiffs meet in bringing a private action based on a public nuisance.

The special injury rules has come under attack by legal scholars and is sometimes not enforced in the courts. According to one scholarly view, the special injury rule is not necessary to reduce frivolous suits or the number of suits because a plaintiff must prove substantial injury to maintain a public nuisance action to recover damages or obtain an injunction. n121 Also, frivolous suits are limited by the court's ability to deny certifying a class action n122 or to dismiss a frivolous suit and sanction attorneys who bring them. n123 Even where a public nuisance sparks numerous suits, it is no different when numerous actions follow a mass catastrophe, such as airliner crashes, n124 hotel fires, n125 pharmaceutical product liability cases, n126 cases over contamination of water, n127 or over asbestos exposure. n128 The United States Supreme Court has expressed reservations about the special injury rule, n129 as have various state courts. n130

Several courts have ruled that physical injury to a private individual caused by a public nuisance constitutes injury per se and satisfies the special injury rule automatically. n131

§ 73.08(b)(2) Prosecution of Public Nuisance by Public Authority.

Typically a federal or state government representative in the name of the governmental entity brings a public nuisance action. n132 In addition, laws and statutes can designate, within certain limits, a class or particular people who can bring a public nuisance action on behalf of the state. n133 Usually, the representative of the state is the attorney general, board of health, or a county municipal corporation; the United States can also bring the public nuisance action. n134 As stated in the preceding section, a public nuisance is unique in that it does not ordinarily give a private party the right to bring an action to abate a public nuisance. n135 Additionally, an organization, unless authorized by statute, cannot bring an action to abate the public nuisance. n136 However, some courts have authorized citizen groups to bring public nuisance actions on behalf of their members if they can show legitimate interests in the subject matter of the action, and the individual members could maintain a public nuisance claim if each one showed special injury. n137

As described in the preceding section, private parties can overcome the general rule prohibiting their bringing actions to abate a public nuisance, n138 if they can show that they have suffered special harm or damages differing from what the public in general has suffered.

The special injury must be caused by the nuisance. Some courts require the nuisance to be the proximate cause n139 and not a secondary cause, n140 and other courts allow consequential damages to satisfy the special damage requirement. n141 The special damages must be substantial n142 and different from what the community in common has suffered. n143 The injury must differ in kind and not merely in degree from the injury suffered by the general

public, n144 and the injury must relate to the use and enjoyment of the private party's land. n145 A private group can bring an action for damages for a public nuisance where that group suffered special injury different from the general public. n146

Courts differ in the specific requirements for showing special injury. n147 Some courts have found that a special injury to an individual requires the plaintiff to show "an invasion or violation of some private right" compared to the public right that has been violated. n148 In early cases, "special injury" meant that the injury to the individual plaintiff had to be direct rather than consequential. n149 However, recent cases focus on the injury being different in kind from that suffered by the general public or different in degree. n150 The majority of courts require the plaintiff to show that the injury is different in kind from the injury to the rest of the community. n151 Different in kind may include pecuniary harm, n152 personal injury, n153 interference with private property rights, n154 or interferences with a business n155 or contract. n156 The special injury in those jurisdictions is not met by plaintiffs who merely use the public right more than the rest of the community or whose land is damaged more. n157 However, some courts require only a showing that the plaintiff had greater exposure to an unpleasant or ugly condition. n158

In some jurisdictions, the special injury doctrine has required private plaintiffs to show physical injury to either property or their person in order to recover damages. n159 Some jurisdictions are changing the physical injury requirement and substituting a proximate cause approach. n160 Some courts have adopted a foreseeability test to satisfy the special injury rule. n161 Other courts have taken other more flexible approaches to the special injury rule. n162

Statutes may also confer private rights of action. n163 A statute may allow a private party to maintain a public nuisance suit without showing special injury n164 or without requesting the proper officers n165 or administrative proceedings first. n166 Private plaintiffs suing under statutory authority must show that they meet the qualifications imposed by the statute. n167

Where the statute authorizes a private action, the effect is that the private plaintiff is assisting the public authority in carrying out its enforcement function. n168 Therefore, the effect of a statute is usually to confer on the individual only the remedies and procedural requirements governing other equity suits available to the public in public nuisance suits. n169 A statutory right to bring a public nuisance action does not limit any private right otherwise available under the circumstances of the particular action. n170

Regardless of a transfer of ownership or title, if a public nuisance is a continuing nuisance, the current owner may be responsible for all past damage done by the nuisance. n171 However, if the public nuisance is caused as a result of a particular way an operation is conducted, then the new owner, to be held liable, must be continuing the operations in the same way. n172 The current owner's and the previous owner's actions are considered successive, n173 therefore, both owners cannot be held joint and severally liable. n174 An order to abate a nuisance may be enforced only against a party that has both the legal right and legal duty to abate the nuisance. n175

§ 73.08(c) Defenses.

One defense to a private nuisance action is that the defendant has a prescriptive right to act in the manner charged as a nuisance. However, courts do not recognize a prescriptive right to maintain a public nuisance, n176 therefore prohibiting the prescriptive right argument as a defense. n177 A defendant in a public nuisance action may not raise this defense either against public authorities n178 or private individuals. n179 Similarly, the innocent-owner defense used in environmental litigation is not available as a defense against an abatable public nuisance. n180 Courts may also entertain defenses based on First Amendment rights. n181

§ 73.08(d) Remedies.

Historically, until the mid-eighteenth century, the sovereign could prosecute public nuisances only in criminal court,

which would grant injunctions to the crown only in case of unauthorized building on the king's land. Because so many public nuisances could not be remedied by a fine or jail time, chancery courts began issuing permanent injunctions upon application by a proper government official. In more modern times, legislators have enacted measures emphasizing abatement more than criminal penalties.

For many public nuisance situations, injunctive relief or a suit in equity are the only meaningful remedies. With respect to applications for injunctions, the court has the discretion to award injunctions after considering all the facts and circumstances and relying on basic equity jurisprudence. n182 An injunction against a nuisance is not a matter of right and is left to a court's discretion, n183 because the rights of the defendant to use the property without undue interference must also be considered, and courts will not compel the defendant, beyond what is necessary, to protect the plaintiff's rights. n184 Some courts have ruled that where a defendant's activities are lawful and can be carried on without creating a nuisance, the court should not restrain the defendant at all from that particular activity. n185 However, the court has the discretion to compel the defendant to perform those lawful activities in a proper manner so as to minimize the nuisance. n186

Courts are able to enjoin defendants from using the premises or conducting the activity complained of after the plaintiffs have shown that there is no way to conduct such activities without causing a nuisance to occur. n187 Courts, when issuing the orders or injunction decrees, should state everything in general terms and only include such specific orders as are necessary to prevent the nuisance from continuing while allowing the activity to continue. n188

A court's discretion allows it to grant the defendant time to rectify the nuisance before an injunction against the use or business will take effect. n189 However, the court also may refuse to allow additional time to correct or abate the nuisance when the defendants have already had adequate time since the suit commenced to remedy the nuisance. n190 In cases where a business is unable to operate in a particular locality without causing a nuisance, the court may forbid such operations in that entire area and order the business to operate in a manner to cause as little annoyance as possible until the injunction takes effect. n191 A court is not likely to grant an injunction where the nuisance has been abated in good faith n192 by the end of the injunction hearings, even though the nuisance existed at the beginning of the suit. n193 In such a case, a temporary injunction may be issued by the court n194 or the court may still issue the injunction to enforce subsidiary rights. n195

Public nuisance injunctions differ from private nuisance injunctions. Public nuisance injunctions limit only the activity that is harmful to the public. n196 The power of a court's injunctive authority extends to prohibit the defendant's activity only to the extent necessary to abate the public nuisance, n197 unless the authority is extended by statute. n198 Where a defendant has created a nuisance prohibited by statute and continues in the behavior that is creating the nuisance prior to and up to the filing for injunction, the court's authority to grant injunctive relief against continuing such behavior remains. n199 Some courts have held that a court has no authority, in the absence of statute, to close the premises on which a nuisance is operated or maintained. n200 Contrary decisions have also been issued. n201 Courts have held that, absent statutory authorization, n202 in public nuisance cases a court may not destroy or confiscate property that contributes to or causes the nuisance. n203 However, other authority accords a court the power to do anything necessary to abate the public nuisance. n204 According to some statutes, courts may order the closure of the entire premises where the nuisance is for an extended period of time. n205

When a public nuisance suit is commenced, the court does not have the power to take possession or control of the premises causing the nuisance until after the trial and a judgement has been issued. n206 Some statutes prohibit a court from requiring closure of a building on which a public nuisance occurs until contempt proceedings have been initiated to enjoin or abate the nuisance. n207 The court may, however, order the reopening of premises where it is satisfied that the defendant has abated the nuisance properly and in good faith without being in contempt of that particular court in the proceedings. n208 In all of these matters, federal law is pre-emptive when dealing with airports or nuclear facilities. n209 Also, where interstate issues are concerned, federal statutes preempt common law; n210 however, the suit may be brought under state law of the state where the nuisance originates, even in cases of interstate pollution. n211

Where a defendant is guilty of maintaining a public nuisance after a permanent injunction has been issued against such a nuisance, a penalty or tax may be imposed on the defendant or the premises where the nuisance is maintained. n212 In order for the owner of a premises of a public nuisance to be liable for the penalty or tax, the owner must have actual or constructive knowledge of the continuance of such illegal nuisance. n213 Where the defendant is without such knowledge, the legislature is without the power to authorize the court to impose such a tax. n214 A defendant is liable for the tax even though the defendant files a bond for the release of the property or temporarily ceases the nuisance. n215

Courts do not order the destruction of real property to abate public nuisances where the use of the property is lawful. n216 However, where destruction is the only way to abate the public nuisance, courts can and do order the destruction of real property. n217 The courts prefer to preserve the ownership and rights to lawful and nuisance-free use of real property. Therefore, forfeiture of real property is also usually not allowed, unless authorized by statute. n218

These same rules apply to the seizure of personal property. For example, a third person owner who has no knowledge of the illegal nuisance use cannot have the property seized by the court; the third person owner has the burden of proving his or her innocence. n219 However, personal property differs from real property in that the prosecution for the confiscation of personal property is not a criminal proceeding, but may be considered quasi-criminal. n220 Usually, this proceeding of seizing property for abatement of a nuisance does not change the title of the owner until a decree is entered causing the owner to forfeit the personal property. n221

§ 73.08(e) Summary Abatement.

Summary abatement proceedings are often used in attempts to abate public nuisances. n222 The common law established the right to summary abatement proceedings, where the judicial process was not necessary, and is still considered good law under constitutional provisions respecting life, liberty, and property. n223 Every state's power allows the legislature to grant the authority to the courts to issue abatement or destruction decrees by summary proceedings, and the legislature may even grant the courts the power to abate a nuisance without judicial proceedings or processes. n224 When the court engages in summary proceedings, it must limit the scope of the remedy so that it suffices to abate, but does nothing beyond abatement. n225 When a threat to the public's health is at issue, the court may order destruction or summary abatement of the public nuisance. n226

In order for a summary abatement proceeding to be valid, it must afford the defendant due process of notice and a chance to be heard. n227 In situations where there is not a threat to life, health, or safety, due process requires the defendant or person ultimately responsible for the cost of the abatement have a chance to remedy the nuisance before proceedings are commenced and costs incurred. n228 Ultimately, the thing abated must actually be a nuisance for it to be subject to summary abatement proceedings. n229 In many cases of public nuisances, the nuisance can be abated only through destruction of the property. n230

Courts differ on what kinds of nuisances may be subject to summary abatement proceedings. Such proceedings may apply only to nuisances per se, to nuisances that are declared by common law or statutory law as nuisances per se, and all other nuisances are required by due process to have notice and a hearing. n231 In other courts, summary abatement proceedings may apply to actions that are not nuisances per se. n232 Private plaintiffs may apply for summary abatement. n233 To qualify, the private plaintiff must show that the conduct is a nuisance in fact and in law. n234

FOOTNOTES:

(n1)Footnote 93. *Andersen v. University of Rochester, 458 N.Y.S.2d 404 (1982); Napro Development Corp. v. Berlin, 376 A.2d 342 (Vt. 1977).*

(n2)Footnote 94. *Armory Park Neighborhood Assoc. v. Episcopal Community Services, 712 P.2d 914 (Ariz. 1985).*

(n3)Footnote 95. See the following cases stating that the injury, harm, or annoyance must be substantial enough to be the proper subject of a public suit): *Docheff v. Broomfield, 623 P.2d 69 (Colo. App. 1980); Spring-Gar Community Civic Assoc. v. Homes for Homeless, Inc., 516 N.Y.S.2d 399 (1987); State v. Waterloo Stock Car Raceway, Inc., 409 N.Y.S.2d 40 (1978); Barrier v. Troutman, 55 S.E.2d 923 (N.C. 1949); State ex rel. Chalfin v. Glick, 177 N.E.2d 293 (Ohio App. 1960), aff'd, 175 N.E.2d 68 (Ohio 1961); Maxwell v. Lax, 292 S.W.2d 223 (Tenn. App. 1954); Schiro v. Oriental Realty Co., 76 N.W.2d 355 (Wis. 1959), later app., 97 N.W.2d 385* (Wis.). Other courts, however, have held it is unnecessary that the nuisance actually actually annoy, harm, or interfere, so long as it has the tendency to do so: *Moses v. United States, 16 App. D.C. 428 (1900); Chicago v. Gunning System, 73 N.E. 1035 (Ill. 1905)* (overruled on other grounds by *La Salle Nat. Bank v. Evanston, 312 N.E.2d 625 (Ill 1974)).*

(n4)Footnote 96. *See e.g., Georgia v. Tennessee Cooper Co., 27 S. Ct. 618, 206 U.S. 230, 51 L. Ed. 1038, 619-20 (1907).*

(n5)Footnote 97. *See e.g., United States v. Luce, 141 F. 385, 407-09 (D. Del. 1905).*

(n6)Footnote 98. *See e.g., Parkersburg Builders Material Co. v. Barrack, 191 S.E. 368, 371 (W. Va. 1937)* (ruling that the standard for determining if there is an aesthetic nuisance is whether average people in the community are offended by the object or structure).

(n7)Footnote 99. *See e.g., Georgia v. Tennessee Copper Co., 206 U.S. 230, 51 L.Ed. 1038, 27 S. Ct. 618, 619 (1907); United States v. Luce, 141 F. 385, 408-11 (D. Del. 1905).*

(n8)Footnote 100. *See Georgia v. Tennessee Copper Co., 206 U.S. 230, 51 L. Ed. 1038, 27 S. Ct. 618, 619-20 (1907)* (holding that a public nuisance occurred when industrial emissions destroyed Georgia land); *United States v. Reserve Mining Co., 380 F. Supp. 11, 54-55 (D. Minn. 1974)* (holding that a public nuisance was created by defendant's discharge of harmful pollutants); *Robie v. Lillis, 299 P.2d 155, 158 (Or. 1975).*

(n9)Footnote 101. *See United States v. Luce, 141 F. 385, 409-10 (Del. Cir. 1905).*

(n10)Footnote 102. *See United States v. Reserve Mining, 380 F. Supp. at 54-55 (D. Minn. 1974)* (health threat); *United States v. Luce, 141 F. 385, 408 (D. Del. 1905)* (offensive odors).

(n11)Footnote 103. *See Hay v. Stevens, 530 P.2d 37, 39 (Or. 1975)* (holding that a public nuisance may be any interference that is visual and annoys or offends the average person in the community); *Parkersburg Builders Material Co. v. Barrack, 191 S.E. 368, 369-71 (W. Va. 1937)* (holding that an object that is offensive to the average person in the community could be a public nuisance); *United States v. County Board of Arlington County, 487 F. Supp. 137 (E.D. Va. 1979)* (stating that a public nuisance could be a building that detracted from the reasonable person's view of the Washington, D.C. monuments).

(n12)Footnote 104. *United States v. Reserve Mining Co., 380 F. Supp. 11, 54-55 (D. Minn. 1974)* (holding it a public nuisance where defendant discharged carcinogens into water causing an increased risk of cancer); *American Smelting & Ref. Co. v. Godfrey, 158 F. 225 (8th Cir. 1907), cert. den., 207 U.S. 597, 28 S.Ct. 262, 52 L.Ed. 357 (1907).*

(n13)Footnote 105. *See United States v. Luce, 141 F. 385, 407-10 (Del. Cir. 1905)* (holding that a fertilizer and fish company that created odors causing nearby workers and inmates of a quarantine station to get sick committed a a public nuisance); *Wade v. Fuller, 365 P.2d 802, 804-05 (Utah 1961)* (noise caused by defendant constituted a public nuisance).

(n14)Footnote 106. *See Parkersburg Builders Material Co. v. Barrack, 191 S.E. 368, 371 (W. Va. 1937)* (holding that defendant's ugly junkyard met the substantial interference test and constituted a public nuisance). *But see, United States v. County Bd. of Arlington County, 487 F. Supp. 137 (E.D. Va. 1979)* (holding that a high rise building across from the D.C. monuments is not a public nuisance merely because it blocks a visitor's view from only certain angles.

Also, unsightliness is usually not sufficient to constitute a public nuisance).

(n15)Footnote 107. *See Parkersburg Builders Material Co. V. Barrack, 191 S.E. 368, 370-71 (W. Va. 1937)* (holding that a junkyard in a residential community would offend the average community member and constitute a public nuisance).

(n16)Footnote 108. *See Georgia v. Tennessee Copper Co., 206 U.S. 230, 51 L. Ed. 1038, 27 S. Ct. 618, 619-20 (1907)* (holding that defendant's industry considerably damaged forests and plants in plaintiff state); *American Smelting & Ref. Co. v. Godfrey, 158 F. 225, 225-26 (8th Cir. 1907)* (holding that defendant's smelting operations created fumes that destroyed plaintiff's trees); and *City of Harrisonville v. W.S. Dickey Clay Mfg. Co., 53 S. Ct. 602, 77 L. Ed. 1208, 289 U.S. 334, 335-37 (1933)* (holding that defendant's act of dumping sewage into a lake on plaintiff's land, contaminating a pasture, was significant enough to constitute a public nuisance).

(n17)Footnote 109. See *Georgia v. Tennessee Copper Co.,206 U.S. 230, 51 L. Ed. 1038, 27 S. Ct. 618, 619 (1907); United States v. Luce, 141 F. 385, 408-11 (Del. Cir. 1905)* (ruling that odors caused by defendant's fish operations were unreasonable). *See also, U.S. v. Rainbow Family, 695 F. Supp. 314, 321 (E.D. Tex. 1988)* (applying a balancing of the equities test to determine whether the conduct was unreasonable and what remedy to award. The court balances the harm caused by the interference and the harm to defendant and the public under particular judicial remedies.); *St. Joseph Lead Co. v. Prather, 278 F.2d 301, 303 (8th Cir. 1956)* (holding that the storing of dangerous explosives creates excessive danger to life, thus, making the conduct unreasonable); *Robie v. Lillis, 299 A.2d 155, 157, 161 (N.H. 1972)* (ruling that the boat storage shed and trucks did not create enough of an interference to the plaintiff compared to the economical value of the boat storage operation to the public).

(n18)Footnote 110. *See United States v. Luce, 141 F. 385 at 417-18 (Del. Cir. 1905).*

(n19)Footnote 111. *See id.*; *Shaw v. Salt Lake County, 224 P.2d 1037, 1042 (Utah 1950)* (ruling that defendant could not build an asphalt plant near plaintiff because defendant has several other more suitable potential locations).

(n20)Footnote 112. *See United States v. Reserve Mining Co., 380 F. Supp. 11, 18 (D. Minn. 1974)* (stating that there is unreasonable interference causing a public nuisance where the defendant has not made a significant effort to employ safer methods of emitting pollutants).

(n21)Footnote 113. *See* David R. Hodas, "Private Actions for Public Nuisance: Common Law Citizen Suits for Relief From Environmental Harm," *16 Ecology L. Q. 883, 884 (1989);* William L. Prosser, "Private actions for Public Nuisance," *52 Va. L. Rev. 997, 1005 (1966).*

(n22)Footnote 114. *Y.B. 27 Hen. 8,* f. 26, pl. 10 (1536)).

(n23)Footnote 115. *Id.*

(n24)Footnote 116. *Id.* ("where one man has greater hurt or inconvenience than any other man had, ...then he who had more displeasure or hurt, etc., can have an action to recover his damages that he had by reason of this special hurt.").

(n25)Footnote 117. 532 *Madison Ave. Gourmet Foods, Inc. v. Finlandia Center, Inc, 727 N.Y.S.2d 49 (2001)* (plaintiffs did not suffer special injury beyond that of community, so as to support damages claims for public nuisance). *See, e.g., Akau v. Olohana Corp., 652 P.2d 1130, 1134, 1137 (Haw. 1982)* (holding that a special injury is not necessarily required to have standing. Someone who cannot show a special injury still may have standing if he or she can show injury-in-fact).

(n26)Footnote 118. *See* Hodas *supra* note 113, at 884, n. 10.

(n27)Footnote 119. *Id.*, at n. 11.

(n28)Footnote 120. *Id.*, at n. 12.

(n29)Footnote 121. *Id.*, at n. 39.

(n30)Footnote 122. *See, e.g., Palmer v. B.R.G. of Georgia Inc., 874 F.2d 1417 (11th Cir. 1989); Shores v. Sklar, 885 F.2d 760 (11th Cir. 1989); Gilpin v. American Fed'n of State, County, and Mun. Employees, 875 F.2d 1310 (7th Cir. 1989).*

(n31)Footnote 123. *See* Hodas, *supra* note 113, at 889, n. 40.

(n32)Footnote 124. *Id.*, at n. 44.

(n33)Footnote 125. *See In re MGM Grand Hotel Fire Litig., 570 F. Supp. 913 (D. Nev. 1983)* (standing issued on a class action where the plaintiff consolidated a claim on a fire that killed 26 people and injured over 1000).

(n34)Footnote 126. *See Sindell v. Abbott Laboratories, 607 P.2d 924 (Cal. 1980)* (suing drug companies in a class action suit by women for the injuries sustained by their mothers taking a harmful drug during pregnancy).

(n35)Footnote 127. *See Sterling v. Velsicol Chem. Corp., 855 F.2d 1188 (6th Cir. 1988)* (action against a chemical company for personal injuries and property damage brought by residents near the company's chemical waste dumping site); *Ayers v. Township of Jackson, 525 A.2d 287 (N.J. 1987)* (action against contamination of water, brought by nearby residents over a landfill leaking pollutants).

(n36)Footnote 128. *See Nicolet, Inc. v. Nutt, 525 A.2d 146 (Del. 1987)* (suit against manufactures of asbestos, brought by asbestos workers for injuries caused from exposure).

(n37)Footnote 129. *See United States v. Students Challenging Regulatory Agency Procedures (SCRAP), 93 S. Ct. 2405, 37 L. Ed.2d 254, 412 U.S. 669, 687-88 (1973)* (stating, "To deny standing to persons who are in fact injured simply because many others are also injured, would mean that the most injurious and widespread ...actions could be questioned by nobody.").

(n38)Footnote 130. *See, e.g., Burgess v. M/V Tamano, 370 F. Supp. 247 (D. Me. 1973), aff'd, 559 F.2d 1200 (1st Cir. 1977)* (suit allowed because of proximate cause rather than a showing of special injury to the private individual theory); *Pruitt v. Allied Chemical Corp., 523 F. Supp. 975 (E.D. Va. 1981)* (proximate cause); and *Louisiana ex rel. Guste v. M/V Testbank, 752 F.2d 1019 (5th Cir. 1985),* cert. denied, *477 U.S. 903 (1986)* (proximate cause standard).

(n39)Footnote 131. *See, e.g., Anderson v. W.R. Grace & Co., 628 F. Supp. 1219, 1233 (D. Mass. 1986)* (ruling that contamination to ground water is a harm to the public's right to have their water supply free from contamination and the injuries to the plaintiff's health are by nature a special injury and not common to the general public); *Wood v. Picillo, 443 A.2d 1244 (R.I. 1982)* (ruling that the defendants are strictly liable and did not require the plaintiffs to show negligence when defendants were polluting the ground water); *Burns v. Jaquays Mining Corp., 752 P.2d 28, 32 (Ariz. Ct. App. 1988)* (ruling that plaintiffs could maintain a public nuisance action where they had been exposed to asbestos and diagnosed with asbestos-related disease, and ordered defendants to pay for the monitoring of plaintiffs for future asbestos-related problems).

(n40)Footnote 132. *United States v. Olin Corp., 606 F. Supp. 1301 (N.D. Ala. 1985); Southwestern Constr. Co. v. Liberto, 385 So. 2d 633 (Ala. 1980); State ex rel. Burton v. Vandyne, 155 P.2d 458 (Kan. 1945); Morse v. Liquor Control Com., 29 N.W.2d 316 (Mich. 1947)* (overruled on other grounds by Bundo v.*Walled Lake, 238 N.W.2d 154 (Mich. 1976); Hill v. Stokely-Van Camp, Inc., 109 N.W.2d 749 (Minn. 1961); Spring-Gar Community Civic Assoc. v. Homes for Homeless, Inc., 516 N.Y.S.2d 399 (1987); Pennsylvania Soc. for Prevention of Cruelty to Animals v. Bravo*

Enterprises, Inc., 237 A.2d 342 (Pa. 1968); Philadelphia Electric Co. v. Hercules, Inc., 762 F.2d 303 (3d Cir. 1985); cert. den., 474 U.S. 980, 106 S. Ct. 384, 88 L. Ed. 2d 337 (1985).

(n41)Footnote 133. *California Oregon Power Co. v. Superior Court of Siskiyou County, 291 P.2d 455 (Cal. 1955), cert. den., 352 U.S. 823, 77 S. Ct. 80, 1 L. Ed. 2d 47 (1956)* (attorney general); *State ex rel. Fatzer v. Mills, 233 P.2d 720 (Kan.1951)* (attorney general); *Langridge v. Gassenberger, 183 So. 2d 411 (La. App. 1966)* (district attorney); *Hadfield v. Oakland County Drain Comr., 422 N.W.2d 205 (Mich. 1988); State ex rel. Maples v. Quinn, 64 So. 2d 711 (Miss. 1953)* (district attorney); *State ex rel. Replogle v. Joyland Club, 220 P.2d 988 (Mont. 1950)* (county attorney); *Mayor & Council of Alpine v. Brewster, 80 A.2d 297 (N.J. 1951)* (attorney general). *But see* Patrice Wade, "Agency May Bring Suit, Though Statute Does Not Expressly Grant Power: Powers May Be Derived from Express Provisions," *4 Lawyers J. 3* (Mar. 8, 2002).

(n42)Footnote 134. *Georgia v. Tennessee Copper Co., 240 U.S. 650, 36 S. Ct. 465, 60 L. Ed. 846 (1916); United States v. Petersen, 91 F. Supp. 209 (S.D. 1950),* aff'd, *191 F.2d 154 (9th Cir. 1951), cert. den., 342 U.S. 885, 72 S. Ct. 174, 96 L. Ed. 664 (1951); State ex rel. La Prade v. Smith, 29 P.2d 718 (Ariz. 1934),* modified on other grounds, *31 P.2d 102 (Ariz. 1934); People v. Wheeler, 106 Cal. Rptr. 260 (1973); Woods v. Johnson, 50 Cal. Rptr. 515 (1966); Massachusetts Soc. Of Optometrists v. Waddick, 165 N.E.2d 394 (Mass. 1960); Hill v. Stokely-Van Camp, Inc., 109 N.W.2d 749 (Minn. 1961); State ex rel. Maples v. Quinn, 64 So. 2d 711 (Miss. 1953); Board of Health v. Copcutt, 35 N.E. 443 (N. Y. 1893); Widmer v. Fretti, 116 N.E.2d 728 (Ohio App. 1952); Commonwealth ex rel. Lewis v. Allouwill Realty Corp., 478 A.2d 1334 (Pa. 1984).*

(n43)Footnote 135. *Southwestern Constr. Co. v. Liberto, 385 So. 2d 633 (Ala. 1980); Venuto v. Owens-Corning Fiberglas Corp., 99 Cal. Rptr 350 (1971); Mangini v. Aerojet-General Corp., 230 Cal. App.3d 1125 (1991); Embry-Bosse Funeral Home, Inc. v. Webster, 261 S.W.2d 682 (Ky. 1953); Plassey v. S. Loewenstein & Son, 48 N.W.2d 126 (Mich. 1951); Frady v. Portland General Electric Co., 637 P.2d 1345 (Or. App. 1981).*

(n44)Footnote 136. *City of Philadelphia v. Beretta U.S.A. Corp., 277 F.3d 415 (3d Cir. 2002); B & W Management, Inc. v. Tasea Invest. Co., 451 A.2d 879 (D.C. 1982); Pennsylvania Soc. For Prevention of Cruelty of Animals v. Bravo Enterprises, Inc., 237 A.2d 342 (Pa. 1968).*

(n45)Footnote 137. *See, e.g., Armory Park Neighborhood Association v. Episcopal Community Services, 712 P.2d 914 (Ariz. 1985).*

(n46)Footnote 138. *United States v. Olin Corp., 606 F. Supp. 1301* (N. D. Ala.); *Armory Park Neighborhood Assoc. v. Episcopal Community Services, 712 P.2d 914* (Ariz.).

(n47)Footnote 139. *Nelson v. Swedish Evangelical Lutheran Cemetery Ass'n., 126 N.W. 723 (Minn. 1910),* adhered to, *127 N.W. 626 (Minn 1910).*

(n48)Footnote 140. *South Carolina S. B. Co. v. South Carolina R. Co., 9 S.E. 650 (S.C. 1889).*

(n49)Footnote 141. *Venuto v. Owens-Corning Fiberglas Corp., 99 Cal. Rptr. 350 (1971); Abendroth v. New York E. R. Co., 25 N.E. 496 (N.Y. 1890); Baxtger v. Winooski Turnpike Col, 22 Vt. 114 (1849).*

(n50)Footnote 142. *Connerty v. Metropolitan Dist. Com., 495 N.E.2d 840 (Mass. 1986); Malhame v. Demarest, 392 A.2d 652 (N.J. Super. 1978),* app. dismissed, *415 A.2d 358 (N.J. 1980); Graceland Corp. v. Consolidated Laundries Corp., 180 N.Y.S.2d 644 (1958),* aff'd. *190 N.Y.S.2d 708 (1959); Lewis v. Pingree Nat. Bank, 151 P. 558 (Utah 1915); Davis v. Spragg, 79 S.E. 652 (W. Va. 1913).* However, some courts do not require that the damage be direct or subject to conclusive proof: *Van Fossen v. Clark, 84 N.W. 989 (Iowa 1901); Graceland Corp. v. Consolidated Laundries Corp., 180 N.Y.S.2d 644 (1958);* aff'd. *190 N.Y.S.2d 708 (1959).*

(n51)Footnote 143. *Nelson v. Swedish Evangelical Lutheran Cemetery Ass'n., 126 N.W. 723 (Minn. 1910),* adhered

to, *127 N.W. 626 (Minn. 1910);* Lewis v. Pingree Nat. Ban, 151 P.558 (Utah 1915); *Hazen v. Perkins, 105 A. 249 (Vt. 1918).*

(n52)Footnote 144. Mangini v.*Aerojet-General Corp., 281 Cal. Rptr. 827 (1991).*

(n53)Footnote 145. *Dozier v. Troy Drive-In-Theatres, Inc., 89 So. 2d 537 (Ala. 1956); Bowman v. Gunnells, 256 S.E.2d 782 (Ga. 1979),* on remand, *259 S.E.2d 211 (Ga. 1979).*

(n54)Footnote 146. *Ember v. B.F.D., Inc., 490 N.E.2d 764 (Ind. App. 1986),* reh. den., *521 N.E.2d 981 (Ind. 1988),* disagreed with on other grounds, *Snyder Elevators, Inc. v. Baker, 529 N.E.2d 855 (Ind. App. 1988).*

(n55)Footnote 147. *Louisiana ex rel. Guste v. M/V Testbank, 752 F.2d 1019 (5th Cir. 1985), cert. den., 477 U.S. 903, 106* s. *Ct. 3271, 91 L. Ed. 2d 562 (1986),* and disagreed with by multiple cases, according to *Pawtuxet Cove Marina, Inc. v. Ciba-Geigy Corp., 807 F.2d 1089 (1st Cir. 1986), cert. den., 108 S. Ct. 484, 98 L. Ed. 2d 483 (1987); Viebahn v. Board of Crow Wing County Com'rs., 104 N.W 1089 (Minn. 1905).*

(n56)Footnote 148. *Sullivan v. American Mfg. Co., 33 F.2d 690 (4th Cir. 1929); Innis v. Cedar Rapids, I. F. & N. W. R. Co., 40 N.W. 701 (Iowa 1888); Whitmore v. Brown, 65 A. 516 (Me. 1906); Swanson v. Mississippi & R. R. Boom Co., 44 N.W. 986 (Minn. 1890); Bouquet v. Hackensack Water Co., 101 A. 379* (N.J.L.); *Edmunds v. Duff, 124 A. 489 (Pa. 1924); Kuehn v. Milwaukee, 53 N.W. 912 (Wis. 1892).*

(n57)Footnote 149. *See South Carolina Steamboat Co. v. South Carolina Ry. Co., 9 S.E. 650 (S.C. 1889).*

(n58)Footnote 150. *See* Michael C. Skotnicki, "Private Actions for Damages Resulting From an Environmental Public Nuisance: Overcoming the Barrier to Standing Posed by the "Special Injury" Rule," *16 Am. J. Trial Advoc. 591, 595-96 (1992). See also, Venuto v. Owens-Corning Fiberglas Corp., 99 Cal. Rptr. 350 (1971)* (arguing the "different in kind" versus the "greater in degree" standard for the "special injury" rule).

(n59)Footnote 151. *Oppen v. Aetna Ins. Co., 485 F.2d 252 (9th Cir. 1973); United States v. Olin Corp., 606 F. Supp. 1301 (N.D. Ala. 1985); Birmingham v. Fairfield, 375 So. 2d 438 (Ala. 1979),* later appealed, *396 So. 2d 692 (Ala. 1981); Strickland v. Lambert, 109 So. 2d 664 (Ala. 1959); Venuto v. Owens-Corning Fiberglas Corp., 99 Cal. Rptr. 350 (1971); Page v. Niagara Chemical Div. F. M. & C. Corp. 68 So. 2d 382 (Fla. 1953); Westgate Terrace Community Associates, Inc. v. Burger King Corp., 383 N.E.2d 1355 (Ill. App. 1978); Rome City v. King, 450 N.E.2d 72 (Ind. App. 1983);* later proceeding, *468 N.E.2d 587 (Ind. App. 1984); Grommet v. St. Louis County, 680 S.W.2d 246 (Mo. App. 1984)* (referring to special injury requirement as applying to action for injunction to restrain a public nuisance); *Karpisek v. Cather & Sons Constr., Inc., 117 N.W.2d 322 (Neb. 1962); Malhame v. Demarest, 392 A.2d 652 (N.J. Super. 1978),* appeal dismissed, *415 A.2d 358 (N.J. Super. 1980); Burns Jackson Miller Summit & Spitzer v. Lindner, 464 N.Y.S.2d 712 (1983); Frady v. Portland General Electric Co., 637 P.2d 1345 (Or. App. 1981); Hostetler v. Ward, 704 P.2d 1193 (Wash. App. 1985).*

(n60)Footnote 152. *Philadelphia Electric Co. v. Hercules, Inc., 762 F.2d 303 (3d Cir. 1985), cert. den., 474 U.S. 980, 106 S. Ct. 384, 88 L. Ed. 2d 337 (1985).*

(n61)Footnote 153. *Guy v. State, 438 A.2d 1250 (Del. 1981); Anderson v. W. R. Grace & Co., 628 F. Supp. 1219 (D. Mass. 1986), Andersen v. University of Rochester, 458 N.Y.S.2d 404 (1982).*

(n62)Footnote 154. *Arizona Copper Co. v. Gillespie, 230 U.S. 46, 33 S. Ct. 1004, 57 L. Ed. 1384 (1913); Soap Corp. of America v. Reynolds, 178 F.2d 503* (5th Cir.); *Armory Park Neighborhood Assoc. v. Episcopal Community Services, 712 P.2d 914 (Ariz. 1985); Wade v. Campbell, 19 Cal. Rptr. 173 (1962); B & W Management, Inc. v. Tasea Invest. Co., 451 A.2d 879 (D. C. 1982); Surfside v. County Line Land Co., 340 So. 2d 1287* (Fla. App.), *cert. den., 352 So. 2d 175* (Fla.); *Karpisek v. Cather & Sons Constr., Inc., 117 N.W.2d 322 (Neb. 1962) Morris v. Haledon, 93 A.2d 781 (N.J. Super. 1952).*

(n63)Footnote 155. *Viebahn v. Board of Crow Wing County Com'rs., 104 N.W. 1089 (Minn. 1905); Knight v. Riverton, 259 P.2d 748* (Wyo.).

(n64)Footnote 156. *Burns Jackson Miller Summit & Spitzer v. Lindner, 464 N.Y.S.2d 712 (1983); Knowles v. Pennsylvania R. Co., 34 A. 974 (Pa. 1896); Sholin v. Skamania Boom Co., 105 P. 632 (Wash. 1909).*

(n65)Footnote 157. *Innis v. Cedar Rapids, I. F. & N. W. R. Co., 40 N.W. 701 (Iowa 1888); Whitmore v. Brown, 65 A. 516 (Me. 1906); Swanson v. Mississippi & R. R. Boom Co., 44 N.W. 986 (Minn. 1890); Bouquet v. Hackensack Water Co., 101 A. 379 (N.J.L. 1917); Edmunds v. Duff, 124 A. 489 (Pa. 1924); Kuehn v. Milwaukee, 53 N.W. 912 (Wis. 1892). But see, Carver v. San Pedro, L. A. & S. L. R. Co., 151 F. 334 (Cir. Cal. 1906); Louisiana ex rel. Guste v. M/V Testbank, 752 F.2d 1019 (5th Cir. 1985), cert. den., 477 U.S., 106 S. Ct. 3271, 91 L. Ed. 2d 562 (1986); Akau v. Olohana Corp., 652 P.2d 1130 (Haw. 1982).*

(n66)Footnote 158. *See Miotke v. City of Spokane, 678 P.2d 803, 817 (Wash. 1986).*

(n67)Footnote 159. *See Oppen v. Aetna Insurance Co., 485 F.2d 252 (9th Cir. 1973)* (holding that damage to fishermen's boats from an oil spill constituted a physical injury sufficient to satisfy the special injury requirement); *State ex rel. Guste v. M/V Testbank, 752 F.2d 1019 (5th Cir. 1985),* cert. denied, *477 U.S. 903 (1986)* (holding that commercial fishermen suing for a PCP spill were required to show physical injury to recover for damages from the spill); *Anderson v. W. R. Grace & Co., 628 F. Supp. 1219 (D. Mass. 1986)* (holding that, although the contamination of groundwater was a public nuisance, it had caused sickness and death allowing private individuals to sue for damages under the public nuisance doctrine).

(n68)Footnote 160. *See Burgess v. M/V Tamano, 370 F. Supp. 247 (S.D. Me. 1973)* (holding that an oil spill causing economic losses to clam diggers and fishermen satisfied the special injury rule requirement). *City of New York v. Beretta U.S.A. Corp., 2004 U.S. Dist. LEXIS 6058* (No. 00 CV 3641 (JBW), April 12, 2004) (stating that a the manufacture of guns was not too remote from the injury suffered by the public to defeat a public nuisance claim); *White v. Ga. Power Co., 2004 Ga. App. LEXIS 225* (No. A03A1829, February 18, 2004) (stating that a public nuisance is one that damages all people who come in contact with it, and conversely evidence to the contrary will negate the nuisance cause of action.)

(n69)Footnote 161. *See State ex rel. Guste v. M/V Testbank, 752 F.2d 1019 (5th Cir. 1985),* cert. denied, *477 U.S. 903, 106 S. Ct. 3271, 91 L. Ed.2d 562 (N.J. 1986); People Express Airlines, Inc. v. Consolidated Rail Corp., 495 A.2d 107 (1985)* (holding that the plaintiff suffered special injuries through economic damages when it had to evacuate its business because of a threat of explosion and fire from ethylene oxide in a nearby railroad car owned by defendant).

(n70)Footnote 162. *See Connerty v. Metropolitan District Commission, 495 N.E.2d 840 (Mass. 1986)* (injuries need only be greater in degree and not different in kind).

(n71)Footnote 163. *Buchanan v. Los Angeles County Flood Control Dist., 128 Cal. Rptr. 770 (1976); Robinson v. Westman, 29 N.W.2d 1,* (Minn. 1947); *State ex rel. Freeman v. Pierce, 573 N.E.2d 747 (Ohio 1991)).*

(n72)Footnote 164. *Sarasota County Anglers Club, Inc. v. Burns, 193 So. 2d 691 (Fla. App. 1967); McCollum v. Kolokotrones, 311 P.2d 780 (Mont. 1957).*

(n73)Footnote 165. *Pompano Horse Club, Inc. v. State, 111 So. 801 (Fla. 1927).*

(n74)Footnote 166. *Reynolds Metals Co. v. Martin, 337 F.2d 780 (9th Cir. 1964); Diercks v. Hodgdon, 390 P.2d 935 (Or. 1964).*

(n75)Footnote 167. *Dickey v. Alverson, 33 S.E.2d 135 (N. C. 1945).*

(n76)Footnote 168. *Pompano Horse Club, Inc. v. State, 111 So. 801* (Fla.); *Littleton v. Fritz, 22 N.W. 641 (Iowa 1885); Carleton v. Rugg, 22 N.E. 55 (Mass. 1889); Ex parte Allison, 90 S.W. 492* (Tex. Crim.).

(n77)Footnote 169. *Frost v. Los Angeles, 183 P. 342 (Cal. 1919).*

(n78)Footnote 170. *Northern P. R. Co. v. Whalen, 149 U.S. 157, 13 S. Ct. 822, 37 L. Ed. 686 (1893); Louisville & N. R. Co. v. Cowley, 50 So. 1015 (Ala. 1909); Johnson v. V. D. Reduction Co., 164 P. 1119 (Cal. 1917); Humphrey v. Dunnells, 131 P. 761 (Cal. App. 1913); Innis v. Cedar Rapids, I. F. & N. W. R. Co., 40 N.W. 701 (Iowa 1888); Harris v. Mackintosh, 133 Mass. 228 (1882); Neal v. Gilmore, 104 N.W. 609 (Mich. 1905); Welton & Edwards v. Martin, 7 Mo. 307 (1842).* But see *Swaim v. Morris, 125 S.W. 432 (Ark. 1910); Powell v. Foster, 59 Ga. 790 (1877).*

(n79)Footnote 171. *Lamont Storm Water District v. Pavich, 93 Cal. Rptr. 2d 288 (2000)* (the storm water district was held to not be a public body authorized by law to abate public nuisances). *See Pierce v. German Sav. & Loan Soc'y, 13 P. 478 (Cal. 1887); Ahern v. Steele, 22 N.E. 193 (N.Y. 1889); Midland Empire Packing Co. v. Yale Oil Corp., 169 P.2d 732 (Mont. 1946).*

(n80)Footnote 172. *Midland Empire Packing Co. v. Yale Oil Corp., 169 P.2d 732 (Mont. 1946).*

(n81)Footnote 173. *Id. at 735.*

(n82)Footnote 174. *See Citizens & Southern Trust Co. v. Phillips Petroleum Co., 385 S.E.2d 426 (Ga. 1989); New York Telephone Co. v. Mobil Oil Corp., 473 N.Y.S.2d 172 (1984); State of New York v. Shore Realty Corp., 759 F.2d 1032, 1051 (2d Cir. 1985).*

(n83)Footnote 175. *Jordan v. Commonwealth, 549 S.E.2d 621 (Va. App. 2001)* (action to abate public nuisance can be brought only against person or entity that holds actual title to property on which nuisance occurs); *Moore v. Texaco, Inc., 244 F.3d 1229 (10th Cir. 2001). See Vana v. Grain Belt Supply Co., 18 N.W.2d 669 (Neb. 1945); Keener v. Addis, 5 S.E.2d 695 (Ga. 1940). See also, New York v. Shore Realty Corp., 759 F.2d 1032, at 1051 (1985)* (requiring that the person be in exclusive control of the land where the nuisance is located before being required to abate the nuisance).

(n84)Footnote 176. *Fischer v. Atlantic Richfield Co., 774 F. Supp. 616 (W.D. Okla. 1989); Eaton v. Klimm, 18 P.2d 678 (Cal. 1933); Gundy v. Village of Merrill, 230 N.W. 163 (Mich. 1930); Potashnick Truck Service v. City of Sikeston, 173 S.W.2d 96 (Mo. 1943); White v. Suncook Mills, 13 A.2d 729 (N.H. 1940); Van Cortlandt v. New York Cent. R. co., 192 N.E. 401 (N.Y. 1934); Freedman v. Borough of West Hazleton, 146 A. 564 (Pa. 1929);* State by and through *Dept. of Transp. v. Garvin, 456 N.W.2d 779 (S.D. 1990); D'Ambrosia v. Acme Packing & Provision co., 37 P.2d 887 (Wash. 1934); Dolata v. Berthelet Fuel & Supply Co., 36 N.W.2d 97 (Wis. 1949).*

(n85)Footnote 177. *Dolata v. Berthelet Fuel & Supply Co., 36 N.W.2d 97 (Wis. 1949).*

(n86)Footnote 178. *City of Turlock v. Bristow, 284 P.2d 962 (Cal. App. 1930); Board of Health of Lyndhurst Tp. V. United Cork Cos., 172 A. 347 (N.J. Ch. 1934);* aff'd. *176 A. 142* (N.J. Ct. Err. & App. 1935).

(n87)Footnote 179. *Gundy v. Village of Merrill, 230 N.W. 163 (Mich. 1930); Van Cortlandt v. New York Cent. R. Co., 192 N.E. 401 (N.Y. 1934); Freedman v. Borough of West Hazleton, 146 A. 564 (Pa. 1929); Dolata v. Berthelet Fuel & Supply Co., 36 N.W.2d 97 (Wis. 1949).*

(n88)Footnote 180. Julie Barnes, Survey, "*Fifth and Fourteenth Amendments--Takings Clause and Due Process--Forfeiture of an Innocent Owner's Property Interest as an Abatable Nuisance Under State Law Violates Neither the Takings Clause nor the Due Process Clause--Bennis v. Michigan, 84 USLW 4124* (U.S. March 4,1996)," *6 Seton Hall Const. L. J. 1267 (1996).*

People v. Englebrecht, 106 Cal. Rptr. 2d 738 (2001) (court heard but ultimately rejected argument that prohibiting the

throwing of gang signs and wearing of gang-associated clothing violated First Amendment).

(n89)Footnote 181. Julie Barnes, Survey, "*Fifth and Fourteenth Amendments--Takings Clause and Due Process--Forfeiture of an Innocent Owner's Property Interest as an Abatable Nuisance Under State Law Violates Neither the Takings Clause nor the Due Process Clause--Bennis v. Michigan, 84 USLW 4124* (U.S. March 4, 1996)," *6 Seton Hall Const. L. J. 1267 (1996).*

People v. Englebrecht, 106 Cal. Rptr. 2d 738 (2001) (court heard but ultimately rejected argument that prohibiting the throwing of gang signs and wearing of gang-associated clothing violated First Amendment).

(n90)Footnote 182. *Five Oaks Corp. v. Gathmann, 58 A.2d 656 (Md. 1948); Hart v. Wagner, 40 A.2d 27 (Md. 1944); Matter v. Nelson, 478 N.W.2d 211 (Minn. App. 1991); Highview North Apartments v. Ramsey County, 323 N.W.2d 65 (Minn. 1982); Cline v. Franklin Pork, Inc., 361 N.W.2d 566 (Neb. 1985); Hase v. Summers, 295 P. 293 (N.M. 1930); Hohenberg v. 77 West 55th Street Associates, 456 N.Y.S.2d 4 (1982),* appeal after remand, *499 N.Y.S.2d 83 (1986),* appeal denied, *506 N.Y.S.2d 1026 (1986); Hopkins v. Stepler, 461 A.2d 1327 (Pa. 1983).*

(n91)Footnote 183. *See Cline v. Franklin Pork, Inc., 361 N.W.2d 566 (Neb. 1985). See also, Hase v. Summers, 295 P. 293 (N.M. 1930)* (stating that even in an action to recover damages and receive an injunction/abatement, it is not automatic that an injunction will be awarded when the plaintiff recovers damages).

(n92)Footnote 184. *Osborne v. Power, 890 S.W.2d 570 (Ark. 1994),* stay denied, *890 S.W.2d 574 (Ark. 1994),* cert. denied, *515 U.S. 1143, 115 S. Ct. 2580, 132 L. Ed. 2d 829 (1995),* opinion after remand, *908 S.W.2d 340 (1995); Vowinckel v. N. Clark & Sons, 13 P.2d 733 (Cal. 1932); Seaborard Rendering Co. v. Conlon, 12 So. 2d 882 (Fla. 1943); Burton-Brooks Orchard Corp. v. Kehoe, 377 S.E.2d 860 (Ga. 1989); Laux v. Chopin Land Associates, Inc., 550 N.E.2d 100 (Ind. App. 1990); Horn v. Seeger, 207 P.2d 953 (Kan. 1949); McCastle v. Rollins Environmental Services of Louisiana, Inc., 415 So. 2d 515 (La. App. 1982),* writ denied, *420 So. 2d 449 (La. App. 1982); Anne Arundel County Fish & Game Conservation Ass'n., Inc. v. Carlucci, 573 A.2d 847 (Md. App. 1990),* cert. denied, *580 A.2d 218 (Md. 1990); Flansburgh v. Coffey, 370 N.W.2d 127 (Neb. 1985); Hase v. Summers, 295 P. 293 (N.M. 1930); Peters v. Moses, 19 N.Y.S.2d 168 (1940); Harford Penn-Cann Service, Inc. v. Zymblosky, 549 A.2d 208 (Pa. 1988); Hannum v. Gruber, 31 A.2d 99 (Pa. 1943); Manchester Terminal Corp v. Texas TX TX Marine Transp., Inc., 781 S.W.2d 646 (Tex. App. 1989); Boyd v. City of San Angelo, 290 S.W. 833 (Tex. Civ. App. 1927); Lyons v. Viglianco, 8 S.E.2d 801 (W. Va. 1940).*

(n93)Footnote 185. *Vowinckel v. N. Clark & Sons, 13 P.2d 733 (Cal. 1932); Stone Man, Inc. v. Green, 435 S.E.2d 205 (Ga. 1993); Wilson v. Evans Hotel Co., 4 S.E.2d 155 (Ga. 1939); Payne v. Skaar, 900 P.2d 1352 (Ida. 1995); Strough v. Ideal Supplies Co., 187 S.W.2d 839 (Ky. 1945); Taulbee v. Miller, 9 S.W.2d 296 (Ky. 1928); Fantasy Valley Resort, Inc. v. Gaylord Fuel Corp., 607 A.2d 584 (Md. App. 1992),* cert. denied, *614 A.2d 83 (Md. 1992); Rohan v. Detroit Racing Ass'n., 22 N.W.2d 433 (Mich. 1946); Robinson v. Westman, 29 N.W.2d 1 (Minn. 1947); Racine v. Glendale Shooting Club, Inc., 755 S.W.2d 369 (Mo. App. 1988); Cline v. Franklin Pork, Inc., 361 N.W.2d 566 (Neb. 1985); Christensen v. Hilltop Sportsman Club, Inc., 573 N.E.2d 1183 (Ohio App. 1990); Kuhn v. Wood, 36 N.E.2d 1006 (Ohio App. 1941); Fidelity Laboratories v. Oklahoma City, 125 P.2d 757 (Okla. 1942); Lindley v. Hyland, 144 P.2d 295 (Or. 1943); Hannum v. Gruber, 31 A.2d 99 (Pa. 1943); Weber v. Mann, 42 S.W.2d 492 (Tex. Civ. App. 1931).*

(n94)Footnote 186. *Jones v. Kelley Trust Co., 18 S.W.2d 356 (Ark. 1929); Kuhn v. Wood, 36 N.E.2d 1006 (Ohio App. 1941); Lindley v. Hyland, 144 P.2d 295 (Or. 1943); Wilson v. Cinemark Corp., 858 S.W.2d 645 (Tex. App. 1993).*

(n95)Footnote 187. *Estep v. State ex rel. Caro, 23 So. 2d 482 (Fla. 1945); Seaboard Rendering Co. v. Conlon, 12 So. 2d 882 (Fla. 1943); Ensign v. Walls, 34 N.W.2d 549 (Mich. 1948); Robinson v. Westman, 29 N.W.2d 1 (Minn. 1947); Cline v. Franklin Pork, Inc., 361 N.W.2d 566 (Neb. 1985); West v. Selvey, 63 N.E.2d 922 (Ohio App. 1945); Fidelity Laboratories v. Oklahoma City, 125 P.2d 757 (Okla. 1942); Johnson v. Drysdale, 285 N.W. 301 (S.D. 1939); Rogers v. City of Abilene, 704 S.W.2d 145 (Tex. App. 1986).*

(n96)Footnote 188. *Du Blois v. Bowers, 44 F.2d 621 (D. Mass. 1930); Murphy v. Cupp, 31 S.W.2d 396 (Ark. 1930); Jones v. Kelley Trust Co., 18 S.W.2d 356 (Ark. 1929); Walter v. Howe, 168 N.W. 867 (Iowa 1918); Five Oaks Corp. v. Gathmann, 58 A.2d 656 (Md. 1948); Mitchell v. Hines, 9 N.W.2d 547 (Mich. 1943); Appeal of Czarniecki, 11 A. 660 (Pa. 1887).*

(n97)Footnote 189. *Manfredi v. S. & S. Corrugated Paper Machinery Co., 90 N.Y.S.2d 299 (1949); Kramer v. Sweet, 169 P.2d 892 (Or. 1946); Quinn v. American Spiral Spring & Mfg. Co., 141 A. 855 (Pa. 1928).*

(n98)Footnote 190. *People v. Selby Smelting & Lead Co., 124 P. 692 (Cal. 1912).*

(n99)Footnote 191. *City of Grand Rapids v. Weiden, 56 N.W. 233 (Mich. 1893); Robinson v. Westman, 29 N.W.2d 1 (Minn. 1947).*

(n100)Footnote 192. *Com. v. Brown, 39 S.W.2d 223 (Ky. 1931); Meadowbrook Swimming Club v. Albert, 197 A. 146 (Md. 1938); Dunbar v. O'Brien, 220 N.W. 278 (Neb. 1928); People ex rel. Rudd v. Rizzo, 262 N.Y.S. 635 (1933); State v. Schropfer, 142 P. 1199 (Wash. 1914).*

(n101)Footnote 193. *Com. v. Brown, 39 S.W.2d 223 (Ky. 1931); King v. Commonwealth, 238 S.W. 373 (Ky. 1922); Cimino v. Snider Packing Corp., 235 N.Y.S. 158 (1929); State v. City Club, 65 S.E. 730 (S.C. 1909).*

(n102)Footnote 194. *Spadafora v. Nolan Corp., 66 N.Y.S.2d 127 (1946).*

(n103)Footnote 195. *Fox v. Corbitt, 194 S.W. 88 (Tenn. 1917).*

(n104)Footnote 196. *Reaves v. City of Tuscumbia, 483 So. 2d 396 (Ala. 1986); People v. Mason, 177 Cal. Rptr. 284 (1981); Echave v. City of Grand Junction, 193 P.2d 277 (Colo. 1948); Blair v. Anderson, 570 N.E.2d 1337 (Ind. App. 1991); Lee v. Rolla Speedway, Inc., 668 S.W.2d 200 (Mo. App. 1984).*

(n105)Footnote 197. *City of Jackson v. Morley, 606 F. Supp. 434 (S.D. Miss. 1985); State v. Book-Cellar, Inc., 679 P.2d 548 (Ariz. App. 1984); Ridge v. State, 89 So. 742 (Ala. 1921); Echave v. City of Grand Junction, 193 P.2d 277 (Colo. 1948); State ex rel. Haugan v. Denis, 167 N.W. 151 (S.D. 1918).*

(n106)Footnote 198. *Ex Parte Moore, 8 P.2d 818 (Wyo. 1932);* but see *State ex rel. Schrunk v. Holm, 685 P.2d 477 (Or. App. 1984).*

(n107)Footnote 199. *Com. v. Brown, 39 S.W.2d 223 (Ky. 1931); King v. Commonwealth, 238 S.W. 373 (Ky. 1922); State v. Robinson, 229 N.W. 403 (Mich. 1930).*

(n108)Footnote 200. *Brindle v. Copeland, 89 S.E. 332 (1916).*

(n109)Footnote 201. *State v. Young, 234 P. 248 (Mont. 1925); State ex rel. Haugan v. Denis, 167 N.W. 151 (S.D. 1918).*

(n110)Footnote 202. *Hood v. State, 175 S.W.2d 205 (Ark. 1943); Chambers v. Com., ex rel. Twehues, 723 S.W.2d 868 (Ky. App. 1986); State ex rel. Nagle v. Antinoli, 63 P.2d 129 (Mont. 1936); Barker v. Humphrey, 11 S.E.2d 280 (N.C. 1940); Carpenter v. Boyles, 196 S.E. 850 (N.C. 1938);* State ex rel. Miller v. Anthony, 647 N.JE.2d 1368 (Ohio 1995).

(n111)Footnote 203. *Ridge v. State, 89 So. 742 (Ala. 1921); State v. Bennett, 163 N.W. 1063 (N.D. 1917).*

(n112)Footnote 204. *State v. Lane, 147 N.W. 951 (Minn. 1914); State ex rel. Haugan v. Denis, 167 N.W. 151 (S.D. 1918).*

(n113)Footnote 205. *Hood v. State, 175 S.W.2d 205 (Ark. 1943); People v. K. Hovden Co., 8 P.2d 481 (Cal. 1932); People v. Smith, 191 P. 996 (Cal. App. 1920); Ex parte Selowsky, 177 P. 301 (Cal. App. 1918); Chambers v. Com., ex rel. Twehues, 723 S.W.2d 868 (Ky. App. 1986); State v. Irving, 700 S.W.2d 529 (Mo. App. 1985); State ex rel. Nagle v. Antinoli, 63 P.2d 129 (Mont. 1936); Carpenter v. Boyles, 196 S.E. 850 (N.C. 1938); State ex rel. Miller v. Anthony, 647 N.E.2d 1368 (Ohio 1995); Com. ex rel. Lewis v. Allouwill Realty Corp., Inc., 478 A.2d 1334 (Pa. Super. 1984).*

(n114)Footnote 206. *People ex rel. Woolwine v. Feraud, 188 P. 843 (Cal. App. 1920).*

(n115)Footnote 207. *Futrell v. State, 181 S.W.2d 680 (Ark. 1944);* city of *Masonville v. Schmitt, 477 N.W.2d 874 (Iowa App. 1991).*

(n116)Footnote 208. *Ryan v. Superior Court of California in and for Sacramento County, 192 P. 1036 (Cal. App. 1920).*

(n117)Footnote 209. *See Kreuger v. Mitchell, 332 N.W.2d 733 (Wis. 1983)* (holding that federal aviation law preempts injunctive relief against an airport); *Pennsylvania v. General Pub. Utils. Corp., 710 F.2d 117 (3d Cir. 1983)* (holding that federal government has absolute jurisdiction over nuclear power plants, thus making state injunctive relief unavailable).

(n118)Footnote 210. *See Middlesex County Sewerage Auth. v. National Sea Clammers Ass'n, 453 U.S. 111 (1981)* (holding that the Federal Water Pollution Control Act and the Marine Protection, Research, and Sanctuaries Act of 1972 preempt federal common law of nuisance in the area of ocean pollution).

(n119)Footnote 211. *See Ouellette, 479 U.S. 481 (1987); Illinois v. City of Milwaukee, 406 U.S. 91, 92 S.Ct. 1385, 31 L. Ed.2d 712 (1972)* ("Milwaukee I") (stating that federal common law preempts state law when dealing with interstate water pollution); *Milwaukee v. Illinois, 451 U.S. 304, 101 S.Ct. 1784, 68 L. Ed.2d 114 (1981)* ("Milwaukee II") (holding that since the passage of the Clean Water Act the Act preempts the federal common law); and *Illinois v. Milwaukee, 731 F.2d 403, 414 (7th Cir. 1984)* (on remand) (stating that the Clean Water Act preserves the right of plaintiffs to bring a common law public nuisance suit under the law of the state where the discharge into the water occurred).

(n120)Footnote 212. *State v. McGraw, 183 N.W. 593 (Iowa 1921); State ex rel. Woodbury County Anti-Saloon League v. Ross, 173 N.W. 66 (Iowa 1919); City of New York ex rel. People v. Taliaferrow, 544 N.Y.S.2d 273 (1989),* judgment aff'd., *551 N.Y.S.2d 253 (1990); State ex rel. Miller v. Anthony, 647 N.E.2d 1368 (Ohio 1995); State v. Vlahakis, 217 P. 717 (Wash. 1923).*

(n121)Footnote 213. *State v. Stroup, 155 N.W. 90 (Minn. 1915); State v. Emerson, 155 P. 579 (Wash. 1916).*

(n122)Footnote 214. *State ex rel. Woodbury County Anti-Saloon League v. Clark, 178 N.W. 419 (Iowa 1920); State v. Rosen, 160 N.W. 783 (Minn. 1917); State v. Emerson, 155 P. 579 (Wash. 1916).*

(n123)Footnote 215. *State v. Humphrey, 162 P. 983 (Wash. 1917); State v. Jerome, 141 P. 753 (1914).*

(n124)Footnote 216. *Echave v. City of Grand Junction, 193 P.2d 277 (Colo. 1948); Davis v. State ex rel. Lanham, 35 S.E.2d 458 (Ga. 1945); Hancock v. City Council of Davenport, 392 N.W.2d 472 (Iowa 1986); Crossman v. City of Galveston, 247 S.W. 810 (Tex. 1923).*

(n125)Footnote 217. *People v. Ryan, 61 P.2d 360 (Cal. App. 1936); Echave v. City of Grand Junction, 193 P.2d 277 (Colo. 1948); Whitmore v. Brown, 65 A. 516 (Me. 1906); Orion Charter Tp. v. Burnac Corp., 431 N.W.2d 225 (Mich. App. 1988); City of Minot v. Freelander, 426 N.W.2d 556 (N.D. 1988); Lincoln Loan Co. v. City of Portland, 855 P.2d 151 (Or. 1993); Enloe v. Lawson, 31 P.2d 171 (Or. 1934); King v. Township of Leacock, 552 A.2d 741 (Pa. 1989); Wilke v. City of Appleton, 541 N.W.2d 198 (Wis. App. 1995),* review denied, *542 N.W.2d 156 (Wis. 1995).*

(n126)Footnote 218. *State v. 1920 Studebaker Touring Car, 251 P. 701 (Or. 1926); but see Schneider v. Com., 22 S.W.2d 587 (Ky. 1929).*

(n127)Footnote 219. *State v. McGraw, 183 N.W. 593 (Iowa 1921); State v. Lane, 147 N.W. 951 (Minn. 1914); Sinclair v. Croom, 8 S.E.2d 834 (N.C. 1940).*

(n128)Footnote 220. *Ridge v. State, 89 So. 742 (Ala. 1921).*

(n129)Footnote 221. *Abernethy v. Halk, 166 N.W. 218 (Minn. 1918).*

(n130)Footnote 222. *Engle v. Scott, 114 P.2d 236 (Ariz. 1941).*

(n131)Footnote 223. *Upton v. Felton, 4 F. Supp. 585 (D. Neb. 1932); McLaurine v. City of Birmingham, 24 So. 2d 755 (Ala. 1946); Hislop v. Rodgers, 92 P.2d 527 (Ariz. 1939); Hummel v. State, 99 P.2d 913 (Okla. 1940).*

(n132)Footnote 224. *Lawton v. Steele, 152 U.S. 133, 14 S. Ct. 499, 38 L. Ed. 385 (1894); State ex rel. Howes v. W. R. Peele, Sr. Trust, 876 F. Supp. 733 (E.D.N.C. 1995),* clarification denied, *889 F. Supp. 849 (E.D.N.C. 1995); Upton v. Felton, 4 F. Supp. 858 (D. Neb. 1932); Hislop v. Rodgers, 92 P.2d 527 (Ariz. 1939);* Contra *Costa County v. Cowell Portland Cement Co., 14 P.2d 606 (Cal. App. 1932); Davis v. Stark, 31 S.E.2d 592 (Ga. 1944); Application of Barkin, 71 N.Y.S.2d 267 (1947).*

(n133)Footnote 225. *Hislop v. Rodgers, 92 P.2d 527 (Ariz. 1939); Lawton v. Steele, 23 N.E. 878 (N.Y. 1890),* reargument denied, *23 N.E. 1151 (N.Y. 1890),* and aff'd, *152 U.S. 133, 14 S. Ct. 499, 38 L. Ed. 385 (1893).*

(n134)Footnote 226. *City of Erie v. Stelmack, 780 A.2d 824* (Commonwealth court of Penn. 2001) (demolition properly ordered to abate public nuisance that created unsafe and unfit apartment building for human habitation); *Patrick v. Riley, 287 P. 455 (Cal. 1930).*

(n135)Footnote 227. *Kornblum v. St. Louis County, Mo., 72 F.3d 661 (8th Cir. 1995),* cert. denied, *517 U.S. 1189, 116 S. Ct. 1677, 135 L. Ed. 2d 780 (1996); Schneider v. County of San Diego, 28 F.3d 89 (9th Cir. 1994),* cert. denied, *513 U.S. 1155, 115 S. Ct. 1112, 130 L. Ed. 2d 1077 (1995); Hancock v. City Council of City of Davenport, 392 N.W.2d 472 (Iowa 1986); People v. McKendrick, 468 N.W.2d 903 (Mich. App. 1991).*

(n136)Footnote 228. *City of New York v. Basil Co., 589 N.Y.S.2d 319 (1992). But see City of Erie v. Stelmack, 780 A.2d 824* (Commonwealth Court of Penn. 2001) (owner of apartment building that was unsafe and unfit for human habitation was given chance to repair building before demolition).

(n137)Footnote 229. *Hislop v. Rodgers, 92 P.2d 527 (Ariz. 1939); McLean v. City of Ft. Smith, 48 S.W.2d 228 (Ark. 1932); People ex rel. Copcutt v. Board of Health of City of Yonkers, 35 N.E. 320 (N.Y. 1893).*

(n138)Footnote 230. *Hislop v. Rodgers, 92 P.2d 527 (Ariz. 1939);* Lawton v.*Steele, 23 N.E. 878 (N.Y. 1890), aff'd, 152 U.S. 133, 14 S. Ct. 499, 38 L. Ed. 385 (1894).*

(n139)Footnote 231. *Hislop v. Rodgers, 92 P.2d 527 (Ariz. 1939); City of Denver v. Mullen, 3 P. 693 (Colo. 1884); City of Atlanta v. Aycock, 53 S.E.2d 744 (Ga. 1949); Creaser v. Durant, 29 S.E.2d 776 (Ga. 1944).*

(n140)Footnote 232. *Upton v. Felton, 4 F. Supp. 585 (D. Neb. 1932); Heyne v. Loges, 205 P.2d 586 (Ariz. 1949); Miller v. Foster, 11 N.W.2d 674 (Wis. 1943).*

(n141)Footnote 233. *Gaskins v. People, 272 P. 662 (Colo. 1928); Inhabitants of Marion v. Tuell, 90 A. 484 (Me. 1914); Abbinett v. Fox, 703 P.2d 177 (N.M. App. 1985); Griffith v. Holman, 63 P. 239 (Wash. 1900).*

(n142)Footnote 234. *Gaskins v. People, 272 P. 662 (Colo. 1928).*

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Supp. To CHAPTER 73 PUBLIC NUISANCE

8-73 Thompson on Real Property, Thomas Editions Supp. to § 73.03

Supp. to § 73.03 Definitions of Public Nuisance

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§ 73.03(b) Modern Definitions of Public Nuisance. [Go To Main]

Add:

Connecticut v. Am. Elec. Power Co., 582 F.3d 309, 369-70 (2d Cir. 2009) (following the Restatement (Second) of Torts § 821C in holding that "[c]onduct does not become a public nuisance merely because it interferes with the use and enjoyment of land by a large number of persons"); *Rhodes v. E.I. Du Pont de Nemours & Co., 657 F. Supp. 2d 751, 767-68 (S.D. W. Va. 2009)* .

Add:

Comer v. Murphy Oil USA, 585 F.3d 855 (5th Cir. 2009) ; *Connecticut v. Am. Elec. Power Co., 582 F.3d 309 (2d Cir. 2009)* ; 653 Quapaw Tribe of Okla. v. Blue Tee Corp., F. Supp. 2d 1166, 1186 (N.D. Okla. 2009).

Add:

Cole v. Asarco, Inc., 2010 U.S. Dist. LEXIS 17741 (holding that "the extent of the annoyance or damage inflicted upon the individuals may be unequal").

Change *State ex rel. Hoffman v. Swift & Co.* citation to *275 P. 176 (Kan. 1929)* .

Add:

Palco Invs., Inc. v. City of Springfield, 2005 Ohio 6838 (Ohio Ct. App. 2005) (ordinance requiring abatement and demolition of unsafe structures on private land); San Francisco v. Ballard, *39 Cal. Rptr. 3d 1 (2006)* (a building whose partial sprinkler system was inadequate under the building code to provide fire protection was a public nuisance).

Add:

Sanders v. Norfolk S. Corp., 2010 U.S. Dist. 4270.

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Supp. To CHAPTER 73 PUBLIC NUISANCE

8-73 Thompson on Real Property, Thomas Editions Supp. to § 73.04

Supp. to § 73.04 Public and Private Nuisance Distinguished

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Add:

K-Mart, Inc. v. Stewart, 2009 Ala. Civ. App. LEXIS 445 ; *Am. Energy Corp. v. Tex. Eastern Transmission, LP, 2010 U.S. Dist. LEXIS 28413* ; *Brockman v. Barton Brands, LTC., 2009 U.S. Dist. LEXIS 110387* .

Add:

Contreras v. 455 Pacific St., LLC, 2010 Conn. Super. LEXIS 645 (comparing public nuisance to private nuisance).

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Supp. To CHAPTER 73 PUBLIC NUISANCE

8-73 Thompson on Real Property, Thomas Editions Supp. to § 73.06

Supp. to § 73.06 Nuisances That Are Both Public and Private

[Go To Main]

Add:

Birke v. Oakwood Worldwide, *87 Cal Rptr. 3d 602 (Cal. Ct. App. 2009)* (refusing to apply the special injury requirement when a nuisance is both private and public).

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Supp. To CHAPTER 73 PUBLIC NUISANCE

8-73 Thompson on Real Property, Thomas Editions Supp. to § 73.07

Supp. to § 73.07 Examples of Different Types of Conduct Held to Be Public Nuisance

[Go To Main]

§ 73.07(a) The Wide Variety of Successful Public Nuisance Prosecutions. [Go To Main]

Add

Pless v. State, 633 S.E.2d 340 (Ga. App. 2006) (conviction for allowing an unrestrained animal to become a public nuisance).

Add

Edling v. Isanti County, 2006 Minn. App. Unpub. LEXIS 654 (Minn. Ct. App. Unpub. 2006) (mining and extraction activities found to be a public nuisance).

Add:

Connecticut v. Am. Elec. Power Co., 582 F.3d 309 (2d Cir. 2009) (vacating a motion to dismiss and holding that plaintiffs had standing to sue power corporations for their contribution to global warming).

Add:

Kempton v. City of Los Angeles, *81 Cal. Rptr. 3d 852 (2008)* (blocking a public sidewalk constitutes a public nuisance

per se).

Add:

Kuhns v. City of Allentown, 636 F. Supp. 2d 418, 438 (E.D. Pa. 2009) (holding that "obstruction of a public street constitutes a public nuisance").

Add:

People ex rel. Reisig v. Acuna, *106 Cal. Rptr. 3d 560 (Cal. Ct. App. 2010)* .

Add

Walker County v. Tri-State Crematory, 643 S.E.2d 324 (Ga. App. 2007) (county sought, on the basis of the public nuisance ordinance, to recover its costs in cleaning up human remains from the area of a crematorium; action denied, because the public nuisance ordinance authorized imposition only of a lien for abatement, not recovery of costs as damages).

Add:

Kleinman v. City of San Marcos, 597 F.3d 323 (5th Cir. 2010) (determining the validity of a city ordinance that made it a public nuisance to place or keep junked vehicles on their property).

Add:

City of New York v. A- 1 Jewelry & Pawn, Inc., 252 F.R.D. 130 (E.D. N.Y. 2008) (sales practices of a gun dealer could be a public nuisance).

§ 73.07(b) Special Problems in Nuisance Prosecutions. [Go To Main]

§ 73.07(b)(3) Obscenity.

Add:

Mutschler v. City of Phoenix, 129 P.3d 71 (2006) (sex club shut down under an ordinance declaring such clubs to be public nuisances).

§ 73.07(b)(5) Environmental Nuisances.

Angell v. Polaris Production Corp., 280 Fed. Appx. 748 (10th Cir. 2008) (allegation of public nuisance by contaminating groundwater).

Add:

Gail v. New England Gas Co., Inc., 460 F. Supp. 2d 314 (D. R.I. 2006) (action to recover damages for deposit of coal gasification waste material stated a public nuisance claim).

Town of Carbondale v. Gss Props., 140 P.3d 53 (Colo. Ct. App. 2005) (violation of watershed protection ordinance as a public nuisance and within the town's legislative authority).

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Supp. To CHAPTER 73 PUBLIC NUISANCE

8-73 Thompson on Real Property, Thomas Editions Supp. to § 73.08

Supp. to § 73.08 The Judicial Procedure of Public Nuisance Prosecutions.

[Go To Main]

§ 73.08(a) Elements of a Cause of Action [Go To Main]

Add:

Boyne v. Town of Glastonbury, 955 A.2d 645 (Conn. App. 2008) (no public nuisance because conduct did not interference with a right that was common to the general public).

Add:

Sanders v. Norfolk S. Corp., 2010 U.S. Dist. LEXIS 4270 (holding that the threat of chlorine exposure and subsequent confusion for "only a number of hours" was not enough to reach the "substantial interference" threshold).

Add:

City of Milwaukee v. NL Industries, 762 N.W.2d 757 (Wis. App. 2008) (liability for intentional public nuisance requires proof that defendant anticipated the public nuisance).

Diess v. Pennsylvania Dept. of Transp., 935 A.2d 895 (Pa. Cmwlth. 2007) (the defendant did not have control of the embankment built with power plant fly ash, which ash caused the alleged public nuisance, and therefore could not be held liable for the public nuisance).

Add:

Native Village of Kivalina v. Exxon Mobil Corp., 663 F. Supp. 2d 863, 874 (N.D. Cal. 2009) (citing *People ex rel. Gallo v. Acuna, 60 Cal. Rptr. 2d 277 (Cal. Ct. App. 1997)* in holding that the degree of interference is judged based on a reasonable person standard).

§ 73.08(b) Parties. [Go To Main]

§ 73.08(b)(1) When a Private Plaintiff May Sue on a Public Nuisance

In line 2 of the subsection, add the word "proceeding" after "criminal."

Add:

Kelsey v. Schoolground Three, 877 A.2d 963 (Conn. Super. 2005) (because the plaintiff's injuries were not sustained while the plaintiff was exercising a public right, no private right of action could be based on a public nuisance claim).

Norfolk Southern Ry. Co., v. City of Pittsburgh, 235 Fed. Appx. 907 (3d Cir. 2007) (public nuisance action by railroad against city arising from landslides of city-owned property, causing boulders and other object to fall onto the railroad tracks).

Add:

Sanders v. Norfolk S. Corp., 2010 U.S. Dist. LEXIS 4270 (stating that "a plaintiff must allege direct and special damages different in kind from what the public may sustain"); *Rhodes v. E.I. Du Pont de Nemours & Co., 657 F. Supp. 2d 751, 768-69 (S.D.W. Va. 2009)* .

Add:

Overcash v. South Caroline Electric and Gas Company, 614 S.E.2d 619 (S.C. 2005) (the special injury requirement is satisfied only by injury to the plaintiff's real or personal property).

Add:

Rhodes v. E.I. Du Pont de Nemours & Co., 657 F. Supp. 2d 751, 771 (S.D.W. Va. 2009) (refusing to grant plaintiffs'

attempt at class certification).

§ 73.08(b)(2) Prosecution of Public Nuisance by Public Authority.

Add:

New Jersey Dept. of Environmental Protection v. Exxon Mobil Corp., 923 A.2d 345 (N.J. Super. 2007) (public nuisance claim for natural resource damages from the discharge of hazardous substances).

Add

New York v. Ametek, Inc., 473 F. Supp. 2d 432 (S.D. N.Y. 2007) (state law public nuisance claim not pre-empted by CERCLA).

Add:

See Rowe v. E.I. Dupont De Nemours & Co., 262 F.R.D. 451, 463 (holding that the Court will certify a subclass of individuals and allow them to bring a public nuisance claim).

Add:

Quapaw Tribe of Okla. v. Blue Tee Corp., 653 F. Supp. 2d 1166, 1186 (citing *Okla. Stat. tit. 50 §§ 10, 11*, allowing private persons to file a public nuisance claim if the defendant's actions are "specially injurious to themselves").

Add:

Melton v. Boustred, *107 Cal. Rptr. 3d 481 (Cal. App. 2010)* (holding that "the critical question [in a public nuisance action] is whether the defendant created or assisted in the creation of the nuisance").

Add:

Kuhns v. City of Allentown, 646 F. Supp. 2d 418, 437 (E.D. Pa. 2009) (holding that a private plaintiff must show substantial damages and a different kind of harm as compared to members of the general public).

Add:

Connecticut v. Am. Elec. Power Co., 582 F.3d 309, 366 (2d Cir. 2009) .

§ 73.08(c) Defenses. [Go To Main]

RTM Media, L.L.C. v. City of Houston, 584 F.3d 220 (5th Cir. 2009) (holding that City's Sign Code was constitutional and did not violate the *First Amendment*).

§ 73.08(d) Remedies. [Go To Main]

Add:

Connecticut v. Am. Elec. Power Co., 582 F.3d 309, 327 n.7 (2d Cir. 2009) (holding that an injunction will only be issued upon a showing by the plaintiff of "determinate and satisfactory evidence").

§ 73.08(e) Summary Abatement. [Go To Main]

Add:

Tea v. City of St. Paul, 2009 Minn. App. Unpub. LEXIS 681 (holding that "notice and opportunity to be heard should be granted without restraint").

Add new section:

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Supp. To CHAPTER 73 PUBLIC NUISANCE

8-73 Thompson on Real Property, Thomas Editions Supp. to § 73.09

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Alex, Ken. "A Period of Consequences: Global Warming as Public Nuisance," 43A *Stan. J. Int'l L.* 77 (June 2007); 26A *Stan. Envtl. L.J.* 77 (June 2007) .

Bausinger, P. Leigh. "Welcome to the (Impenetrable) Jungle: Massachusetts v. EPA, the Clean Air Act and the Common Law of Public Nuisance," *53 Vill. L. Rev. 527 (2008).*

Carlson, Greg J. "Lead Paint: Who Will Bear the Cost of Abating the Latest Public Nuisance?" *59 Hastings L.J. 1533* (June, 2008).

Goldberg, Phil. "The Law of Public Nuisance: Maintaining Rational Boundaries on a Rational Tort," *45 Washburn L.J. 541* (Spring, 2006).

Kintner, Eric L. "Bad Apples and Smoking Barrels: Private Actions for Public Nuisance Against the Gun Industry," *90 Iowa L. Rev. 1163* (March, 2005).

Massaro, Brigid W. "Navigating the 'Impenetrable Jungle': Statutory Limits on Wisconsin Public Nuisance Actions," *90 Marquette L Rev. 95 (Fall 2006).*

Merrill, Thomas W. "Global Warming as a Public Nuisance," *30 Colum. J. Envtl. L. 293 (2005).*

Samsa, Matthew J. "Reclaiming Abandoned Properties: Using Public Nuisance Suits and Land Banks to Pursue Economic Redevelopment," *56 Clev. St. L. Rev. 189 (2008).*

Sarno, Steven. "In Search of a Cause: Addressing the Confusion in Proving Causation of a Public Nuisance," *26 Pace Envtl. L. Rev. 225 (Winter 2009).*

Sport, Morgan McCue. "An Inconvenient Suit: California v. General Motors Corporation and a Look at Whether Global Warming Constitutes an Actionable Public Nuisance or a Nonjusticiable Political Question," *38 Cumb. L. Rev. 583* (2007-2008).

Sprague, Aileen and Fidelma Fitzpatrick. "Getting the Lead Out: How Public Nuisance Law Protects Rhode Island's Children," *11 Roger Williams U. L. Rev. 603 (Spring 2006).*

Zasloff, Jonathan. "The Judicial Carbon Tax: Reconstructing Public Nuisance and Climate Change," *55 UCLA L. Rev. 1827* (August, 2008).

Annotations

Annotation, *Right, as between state and county or municipality, to maintain action to abate a public nuisance in a street or highway,* 65 A.L.R. 699 .

Annotation, *Right to Maintain Action to Enjoin Public Nuisance as Affected by Existence of Pollution Control Agency, 60 A.L.R.3d 665* .

Annotation, *Validity, construction, and application of statute or ordinance declaring plant or establishment which emits offensive odors to be a public nuisance,* 141 A.L.R. 285 .

Annotation, *What constitutes special injury that entitles private party to maintain action based on public nuisance--modern cases. 71 A.L.R.4th 131* .

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CHAPTER 74 AN OVERVIEW OF LAND USE REGULATIONS

8-74 Thompson on Real Property, Thomas Editions 74.syn

AUTHOR: Professor David A. Thomas J. Reuben Clark Law School Brigham Young University

§ 74.syn Synopsis to Chapter 74: AN OVERVIEW OF LAND USE REGULATIONS

§ 74.01 Introduction to the Chapter.

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§ 74.02(a) The Early Judicial Approval of Zoning.

§ 74.02(b) The Constitutional Basis for Zoning.

§ 74.02(c) The Common Law and Statutory Basis for Zoning.

§ 74.02(c)(1) Zoning as a Form of Police Power.

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CHAPTER 74 AN OVERVIEW OF LAND USE REGULATIONS

8-74 Thompson on Real Property, Thomas Editions § 74.01

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§ 74.01 Introduction to the Chapter.

The purpose of this chapter is to give an overview of various forms of public regulations intended to control use of land, especially to manage growth. The subject is a large one and has been treated in voluminous writings. Therefore, this rather brief chapter will describe the scope of the subject and point out the fundamental principles underlying these various forms of land use planning. The most important land use planning technique, of course, is zoning, so the chapter provides a more thorough background for zoning.

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CHAPTER 74 AN OVERVIEW OF LAND USE REGULATIONS

8-74 Thompson on Real Property, Thomas Editions § 74.02

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§ 74.02 Zoning.

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§ 74.02(a) The Early Judicial Approval of Zoning.

Comprehensive zoning ordinances in American municipalities are a phenomenon of the 20th century. Among the earliest zoning regulations were those of New York in 1916 and Washington, D.C., in 1920. In 1926, the Department of Commerce created the Standard Zoning Enabling Act and invited the states to prepare state legislation modeled on that act. Most states thereafter enacted legislation delegating zoning power to their municipalities; the state legislation was not only patterned closely after the standard act, but has changed very little since enactment.

The zoning arrangements contemplated in these enabling acts were "cumulative" in the sense that less restrictive zones could also theoretically be used in any of the ways authorized by the more strict zones described in the ordinance. Newer zoning ordinances often authorize a larger variety of zones with more flexible arrangements for certain zone classifications.

Before 1926, state courts ruled inconsistently on the constitutionality of comprehensive zoning ordinances. This was changed by the landmark U.S. Supreme Court decision in Euclid v. Ambler Realty Co. in 1926, which declared such ordinances constitutionally proper exercises of police power and not a deprivation of private property: n1

> The ordinance now under review and all similar laws and regulations must find their jurisdiction in some aspect of the police power, asserted for the public welfare. The line in which this field separates the legitimate from the illegitimate assumption of power is not capable of precise delimitation. It varies with circumstances and conditions. A regulatory zoning ordinance, which would be clearly valid as applied to the great cities, might be clearly invalid as applied to rural communities. n2

The following year two other high court cases affirmed the constitutionality of comprehensive zoning ordinances. n3

In addition to the general issue of the constitutionality of comprehensive zoning ordinances, it was also necessary for the courts to define when otherwise valid ordinances might be unconstitutional in their specific applications. If application of a zoning restriction to a particular landowner is excessively burdensome and, in that application, does not

promote the public health, safety or general welfare, that application will not be upheld. n4

§ 74.02(b) The Constitutional Basis for Zoning.

One of the fundamental but essentially unstated principles of the American constitution is that each state government possesses certain inherent powers enabling it to govern and keep order. Most of these powers fall under the heading of police power, which has come to mean the state's power to maintain the public health, safety, morals and general welfare. n5 Generally, this means that reasonable restrictions can be placed on use of private property, and that the reasonableness of restrictions is a fluid concept, especially with recent expansions of the notion of public welfare as a justification for broader restrictions.

The police power is a power held by state governments and, if it is to be exercised by political subdivisions within the state, must be properly delegated. Thus, whether a municipality has the authority to zone, or has exercised that authority within the scope of its delegated power, are also issues that are constitutional in nature. n6 A local zoning ordinance is, as a legislative act, presumed to be constitutional. n7

If a zoning ordinance as applied to an individual landowner or group of landowners imposes excessive hardship, it may not be upheld, or it may result in an unconstitutional "taking" of private property without just compensation. This limitation is based on the Fifth Amendment to the U.S. Constitution, which declares, "nor shall private property be taken for public use, without just compensation." n8 If the exercise of land use regulations under the state's police power bears no relationship to a legitimate public purpose, or if it effectively deprives the landowner of virtually all use and value of the land, it may be considered a "taking" that can be accomplished only by the acquiring governmental entity providing just compensation to the landowner. If zoning is exercised for proper purposes, it will not be invalidated on constitutional grounds if it also happens to cause incidental injury to property held by individual landowners. n9

An application of a zoning ordinance that is a serious interference with legitimate use of land and deprives the land of most of its value may be determined to be compensable. n10 The severity of the interference and the relative loss of value have been judged on the basis of several criteria, summarized as follows:

> (1) existing uses and zoning of nearby property, including land in another municipality; (2) how much property value is reduced by the subject restrictions; (3) suitability of plaintiff's property for zoned purposes; (4) public gain measured against private loss; and (5) length of time the property has been vacant in light of surrounding land development. n11

The constitutional mandate for due process of law requires that parties affected by application of land use regulations have adequate notice and opportunity for hearing as to both enactment of the legislation and application of the legislation to their land. n12

The constitutional principle that citizens enjoy equal protection of the laws means that the land use regulations must bear a rational relationship to legitimate and permissible governmental purposes n13 and, further, that the restrictions may not be discriminatory in their application.

At the state level, most constitutional issues focus on whether the authority to zone has been properly delegated to the local governmental entities. n14 A few state constitutions specifically give local governmental bodies the authority to zone. n15 In most states, however, zoning powers under the constitution are vested in the state legislatures, n16 which then delegate that power to local governments by means of zoning enabling acts.

COMPUTER-ASSISTED RESEARCH

LEXIS: state! w/5 power! w/5 zon! w/30 constitution!

§ 74.02(c) The Common Law and Statutory Basis for Zoning.

§ 74.02(c)(1) Zoning as a Form of Police Power.

The power to zone is an exercise of the police power which rests inherently with state governments so that they may provide for the health, safety and welfare of the people. This was confirmed in 1926, when the United States Supreme Court, on its first occasion to review a zoning ordinance for constitutionality, n17 affirmed that zoning power was a form of police power, and that police power was not subject to precise definition:

> The ordinance now under review, and all similar laws and regulations, must find their justification in some aspect of the police power, asserted for the public welfare. The line which in this field separates the legitimate from the illegitimate assumption of power is not capable of precise delimitation. It varies with circumstances and conditions. n18

This view of zoning power as a form of police power has been reiterated both by the United States Supreme Court n19 and by various state courts. n20 As with all other exercises of police power, zoning regulations, to be valid, must have a reasonable relation to the public health, safety, morals or general welfare. n21

The police power is an inherent power of each state but not of any of a state's political subdivisions. n22 Thus, a municipality may enact zoning regulations, as an exercise of police power, only if such power has been delegated to it by the state legislature. In many jurisdictions municipal zoning regulations are viewed as a valid exercise of the municipality's general police power, as it relates specifically to the regulation of land use. n23 In other jurisdictions, however, it has been held that zoning is purely statutory in nature and cannot be carried out under a general grant of police power. n24 Under either view, the delegation of zoning power from the state to the municipality must either be specific or be necessarily implied from the terms of a statute, charter or constitutional provision. n25

COMPUTER-ASSISTED RESEARCH

LEXIS: zon! w/15 police w/1 power! w/5 state!

§ 74.02(c)(2) The Statutory Foundation for Zoning.

§ 74.02(c)(2)(i) State Enabling Acts Generally.

The legislature of each state has delegated to local governments in the state the power to enact zoning regulations. n26 These enabling laws, modeled after the Standard State Zoning Enabling Act, typically authorize municipalities to enact comprehensive zoning ordinances. n27 The constitutionality of such enabling laws has consistently been upheld in the courts. n28

A typical state enabling act sets forth the purposes of zoning and the factors that justify a municipality exercising the zoning power. n29 The acts then usually prescribe procedures to be followed in adopting and administering zoning regulations, and impose limitations on the exercise of the zoning power by local governments. n30 If a municipality derives its zoning power entirely from an enabling statute, its zoning ordinance is enacted pursuant to the provisions of the enabling act. n31 Because a local zoning ordinance is an act of police power delegated from the state, the ordinance is subject to the same requirements that apply to any exercise of state police power, *i.e.*, the ordinance must reasonably relate to the health, safety, convenience, morals, or general welfare of the community. n32

§ 74.02(c)(2)(ii) The Standard State Zoning Enabling Act.

A Commerce Department advisory committee published the first standard State Zoning Enabling Act in 1926. This was to be available to the states as a model for their individual state enabling acts delegating zoning power to municipalities.

This model act was also revised in 1926. In this revised form, this model or standard act provides for a general delegation of power from the state to a municipality to regulate the use of property. The zoning enabling legislation in most states is patterned entirely or partially on the provisions of the Standard Act. These provisions are summarized as follows:

Section 1 grants to the legislative bodies of cities and incorporated villages the power to zone. n33 This section recognizes the relationship between zoning and traditional police power goals by declaring that the zoning power is delegated "[f]or the purpose of promoting health, safety, morals, or the general welfare of the community." It sets out specific uses that may be the subject of zoning regulations, while also broadly authorizing zoning for "other purposes." n34

Section 2 authorizes local legislative bodies to divide municipalities into districts or "zones," and requires uniformity or consistency of land use regulation within each district. n35 This division of the community into districts or "zones," with its resulting restrictions on land use, is a common characteristic of "Euclidian zoning." n36

Section 3 requires that zoning regulations be made in conformity with a "comprehensive plan," n37 and sets out the specific purposes -- relating to public safety, health and welfare -- for which zoning regulations may be enacted. Factors to be considered in fashioning zoning regulations include the character of the district, the suitability of the district for particular uses, the conservation of property values, and the encouragement of the most appropriate uses of land.

Section 4 requires each municipal legislature to create procedures for enacting, enforcing and amending zoning regulations, including provision for notice and hearing. n38

Section 5 confers on all the municipal legislatures specific authority to amend or repeal regulations, and also provides some procedural protections for those directly affected. n39

Section 6 requires the municipal legislature to appoint a zoning commission -- or to designate a city planning commission as a zoning commission -- to recommend a zoning plan for adoption, to conduct hearings on such plan, and to submit a final report to the local legislative body. n40 The legislature is not permitted to take any action on a zoning ordinance until after it receives the commission's final report. After receiving the zoning commission's report, the local legislative body must give notice and hold a public hearing on the proposed zoning action.

Section 7 authorizes a board of adjustment to be appointed, and contains detailed provisions concerning the board's powers. n41 This section, which constitutes nearly half the Act, also sets out detailed provisions governing the composition, jurisdiction and administrative procedures of the board. n42 The board of adjustment has original and appellate powers to hear and decide appeals from orders, decisions or determinations of administrative officials; to hear and decide requests for special exceptions to the terms of the ordinance; and upon appeal, to authorize variances from the terms of the ordinance, if the variances are not contrary to the public interest and if literal enforcement of the ordinance's provisions will result in unnecessary hardship.

Section 7 also sets forth the circumstances and procedures for taking an appeal to the board. Specifically, an appeal may be taken by "any person aggrieved" or by "any officer, department, board, or bureau of the municipality affected" by a decision of an administrative officer. n43 The appeal must be taken "within a reasonable time," and it stays all proceedings connected with the appealed action, unless the stay would possibly cause imminent danger to life or property. n44 The board must give public notice of the hearing of the appeal, as well as "due notice" to the parties in interest; the decision of the board -- following such hearing -- must be made "within a reasonable time." n45

Section 7 also allows judicial review of the board's decision. Within thirty days of the filing of the decision, certain specified aggrieved or interested persons may seek judicial review of the board's action and must specify the bases of the alleged error or errors. n46 The court may then issue a writ of certiorari to review the decision of the board of

adjustment, and may then reverse, affirm or modify the decision under review. n47

Section 8 authorizes local legislative bodies to enforce the enabling act and any zoning regulations made thereunder. n48 Thus, the question of how to deal with specific enforcement problems is left to local discretion. While acknowledging this discretion, however, the Standard Act declares, that violations of zoning ordinances are misdemeanors and recommends that local legislative bodies punish such conduct by both criminal and civil penalties. n49 For cases where such penalties may be ineffective, §8 also gives local authorities the right to commence proceedings to prevent unlawful erection, construction, reconstruction, alteration, repair, conversion, maintenance or use of buildings or land. n50

Section 9 provides that in the event of a conflict with other state or federal statutes or local ordinances, the more restrictive provisions will govern. n51

Some municipalities obtain their zoning powers from home rule provisions contained in state constitutions or state statutes. These home rule provisions typically give a municipality blanket authority to exercise all powers of local self-government that tend to promote public health and welfare, and to adopt and enforce local regulations that do not conflict with general laws. n52

When a municipality adopts a charter in conformity with the state's home rule provisions, the charter becomes the organic law of the municipality. A home rule charter may authorize adopting and amending zoning ordinances and may prescribe procedures to be followed in such adoption or amendment. n53 Even in those states with home rule charter provisions, a concurrently valid zoning enabling act will govern the exercise of zoning power where the charter does not authorize zoning by the local government, where a municipality has not adopted a charter, or where there is a conflict between local regulations and general laws. n54

COMPUTER-ASSISTED RESEARCH

LEXIS: state zoning enabling act

§ 74.02(c)(3) Limits on the Exercise of Zoning Power.

§ 74.02(c)(3)(i) Constitutional Limitations.

The zoning power of local governments is limited by the same constitutional limitations that restrict the police power of the state itself. n55 A zoning regulation must be substantially related to the public health, safety, morals or general welfare, and the regulation must be reasonable both by its terms and in its application. n56 Due process and equal protection guarantees must be observed so that zoning power is not exercised in an unreasonable, oppressive, arbitrary, or discriminatory manner. n57

No precise test is used to determine whether a particular zoning restriction is reasonable and non-discriminatory. Zoning restrictions are upheld if legitimate governmental objectives are intended to be served and if the means used to exercise the police power of zoning have any substantial relation to those objectives. n58 Therefore, a zoning ordinance will be held to violate due process if it interferes with the exercise of private property rights and has no substantial relation to a legitimate governmental purpose, n59 or if there is no reasonable relationship between the end sought to be achieved by the regulation and the means used to achieve that goal. n60

Despite those standards a zoning ordinance enjoys a strong presumption of validity, n61 unless it is arbitrary or unreasonable on its face. n62 A finding that a zoning ordinance is invalid is likely where there is no reasonable basis for the restriction and the public benefit is small compared to the hardship imposed upon the individual property owner. n63 The party attacking the validity of an ordinance has the burden of proving that the ordinance bears no reasonable

relationship to public health, morals, safety or welfare. n64

Courts ruling on the validity of an ordinance will consider such factors as the character of the neighborhood, the traffic conditions on adjacent streets, how nearby property is used, the authorized land usage or zoning of nearby property, the extent to which property values are diminished by the zoning restriction, the effect that removal of the restriction would have on the value of neighboring property, and the public benefits as compared to the hardships imposed on individual property owners. n65 Because of the strong presumption in favor of validity, a zoning ordinance will be struck down only if that presumption is overcome by a clear, affirmative showing that the law is arbitrary or unreasonable. n66

COMPUTER-ASSISTED RESEARCH

LEXIS: w/2 power! w/30 due process or equal protection

§ 74.02(c)(3)(ii) Statutory Limitations.

The exercise of zoning power is further limited by the terms of the state zoning enabling acts. A zoning ordinance will not be upheld to the extent it exceeds the powers delegated by the state enabling statute. n67 Thus, where an enabling statute prescribes a particular procedure to be followed in the enactment of an ordinance, the parties must adhere strictly to that procedure; n68 otherwise, the ordinance will be declared void. n69 A zoning ordinance need not include all restrictions authorized by the enabling act, n70 but may not impose any restrictions that the act does not authorize. The basic judicial test for the validity of a zoning ordinance is whether there is a substantial relationship between the ordinance and the furtherance of any of the general objectives enumerated in the enabling statute. n71 In resolving that question, the court will give effect to the presumption favoring the validity of the ordinance.

§ 74.02(c)(3)(iii) Territorial Limitation.

One further limitation of zoning ordinances is a territorial limitation. Unless there is specific authority to the contrary, zoning laws of a municipality may not effectively impose restrictions beyond the municipality's territorial boundaries. n72 However, it *is* proper for a zoning authority to consider regulatory needs in contiguous regions in fashioning a local zoning ordinance. n73 Because zoning must be exercised for the public welfare, when a zoning regulation has a substantial impact beyond the municipality's own borders, the welfare of neighboring citizens must also be considered. n74

§ 74.02(c)(3)(iv) The Limitations of Governmental Immunity.

A governmental entity may seek immunity from the application to itself of its own zoning ordinance or from zoning restrictions of other entities that are of equal, higher or lower status. n75 Such immunity, when granted, usually runs in favor of the governmental entity which enacted the regulation. n76 This immunity may not be extended to private parties, n77 except those leasing municipal property to perform municipal functions. n78 Conversely, where a governmental agency leases property from a private owner, there is no governmental exemption from zoning restrictions, even though the property will be used for governmental purposes.

Several tests have been formulated to determine whether governmental immunity applies in a particular situation: the governmental proprietary test; the superior sovereign test; the eminent domain theory; the statutory guidance test; and the balancing of interests test. n79 These tests are individually discussed below; however, one court has summarized the tests as follows:

> In deciding this type of case, the courts have used varying tests. One approach utilized by a number of courts is to rule in favor of the superior sovereign. Thus, where immunity from a local zoning ordinance is claimed by an agency occupying a superior position in the governmental hierarchy, it is presumed that immunity was intended in the absence of express statutory language to the contrary. A

> second test frequently employed is to determine whether the institutional use proposed for the land is "governmental" or "proprietary" in nature. If the political unit is found to be performing a governmental function, it is immune from the conflicting zoning ordinance. On the other hand, when the use is considered proprietary, the zoning ordinance prevails. Where the power of eminent domain has been granted to the governmental unit seeking immunity from local zoning, some courts have concluded that this conclusively demonstrates the unit's superiority where its proposed use conflicts with zoning regulations. Other cases are controlled by explicit statutory provisions dealing with the question of whether the operation of a particular governmental unit is subject to local zoning. [Citations omitted.] n80

The traditional, and formerly the prevailing, governmental immunity test is the governmental-proprietary concept. Under this approach, a governmental unit is considered immune from local zoning ordinances where the unit performs governmental functions, but will be subject to such laws when it acts in a proprietary capacity. n81 Governmental functions are municipal acts pursuant to obligations imposed by legislative mandate. Proprietary functions are permissive or discretionary -- that is, acts that the political unit has the discretionary power but not the duty to perform. n82

> The criteria used in determining whether an activity is governmental or proprietary are: (1) a municipality performs a governmental function when doing acts required by legislative mandate whereas it acts in a proprietary capacity when performing by legislative permission; and (2) a municipal function is governmental when the acts involve benefit to the general public as distinguished from acts which involve private benefits and in which public benefit is indirect. [Citations omitted.] n83

However, in applying these guidelines for determining whether a particular activity is immune from zoning regulations, the courts often reach different conclusions on similar facts. n84 Increasing dissatisfaction with this test has led some courts to avoid using this test, if there are other grounds on which to base their decision. n85

Courts in a few jurisdictions now apply the superior sovereign test to resolve governmental immunity questions. This approach presumes that governmental units or agencies occupying a superior position in the governmental hierarchy are not subject to zoning regulations enacted by a lower echelon of government, unless there is express statutory language to the contrary. n86 This presumption is based on the rationale that higher agencies have broader authority and a jurisdiction that transcends local boundaries. n87 Nevertheless, even under this test a governmental unit is not allowed to flagrantly disregard zoning restrictions of subordinate units in its regulation of land uses. Where the reasonableness of governmental action is subject to question, the presumption of immunity can be rebutted. n88

A third test, the eminent domain theory, is based on the notion that property taken by governmental eminent domain power or purchased in lieu of condemnation, is no longer subject to local zoning ordinances. n89 Therefore, any political unit with authority to condemn is automatically immune from zoning restrictions. Some courts do not accept any form of absolute immunity derived from this test, but do accept a case-by-case immunity based on this test as modified by a rule of reason. This requires the court to examine the reasonableness of the condemning authority's action in light of the nature of the use and the political and geographical context of the use. n90

Another test to determine whether governmental immunity from local zoning ordinances applies is the statutory guidance test. Under this test, state statutes that direct or authorize a local governmental agency to undertake a specified function are generally held to be superior to and immune from local zoning ordinances. n91 Some courts, however, are reluctant to assume a blanket immunity on this basis, and have held that a statutory grant of authority to perform a specified function does not automatically exempt the state agency from local zoning restrictions and that such exemption must be explicitly provided by the statute. n92

Some courts see all of the above tests as too rigid and have instead adopted a so-called "balancing of interests" test that

takes into consideration the nature of the instrumentality seeking immunity, the land use involved and its effects, and the public interest served by such use. n93

COMPUTER-ASSISTED RESEARCH

LEXIS: zon! w/15 government! w/3 immun! w/30 (governmental w/1 proprietary) or (superior w/1 sovereign) or eminent domain or (statutory w/1 guidance) or (balancing w/1 interests!)

§ 74.02(d) General Principles of Zoning in Application.

Zoning authority is usually exercised by a municipality, but other units of local government, such as a county or a region, may also have zoning and other land use regulatory authority delegated to them. In most zoning ordinances, a zoning commission or planning commission is established to advise the local city council or other legislative body on land use regulatory matters, and in many instances, the legislative body may not act until the commission has fulfilled its advisory function. n94

When the local legislative authority does act, it must first give notice of its intent to act, and adequate opportunity for public hearing on its proposed action. n95 If a building code or a housing code is considered to be in effect a building code, because it controls development and land use, then the due process requirements of notice and hearing for zoning ordinances must be employed, or else the code will not be upheld. n96 Under some ordinances, protests filed by a certain percentage of affected landowners will increase the margin of majority necessary to adopt the zoning ordinance. Virtually all zoning ordinances also establish a board of appeals that can grant variance relief in individual cases of hardship.

In typical application, a zoning ordinance will divide a municipality into areas, each with a specifically defined range of permissible uses, usually classed generally as residential, commercial, and industrial. Within each such general class of uses are variants of use classifications, and for each of these will be individual specifications, such as population density, bulk, height, setback and side clearance requirements. Strict uniformity is varied by exceptions included in the enabling act or zoning ordinance itself, legislative provisions for relief of undue hardship on individual landowners, exceptions decreed as a result of judicial action, and by accommodation of nonconforming uses.

Exceptions to specific provisions of a zoning ordinance are uses outside the specific requirements for a zoning district but which are otherwise compatible with the underlying purpose of that zoning classification. n97

The exceptions may be either categorically stated in the ordinance, or their granting may be left to the discretion of a local legislative or administrative body. In litigation over the statutory exceptions, courts have differed over whether statutory language should be strictly n98 or liberally construed. n99 If an administrative body is given discretion in granting exceptions, the legislation must also provide some guidance, in the form of statutory standards, in exercising this discretion. n100

Further discretionary authority is usually given in the statutory provisions for variances. n101

A variance, unlike an exception, is a deviation from the requirements of a specific zone that is prohibited by and generally inconsistent with the purpose and provisions of that zone. n102 Normally, use variances are granted only if the applicant can show that denial will cause unusual hardship, n103 and that granting the exception will not undermine the zoning plan generally. n104 A variance is granted as an administrative act. By contrast, the zoning ordinance itself may be amended by legislative authority, and an amendment, too, is a form of relief from the application of the zoning ordinance; however, an amendment to a zoning ordinance must still conform to the overall or comprehensive plan which the zoning ordinance should be implementing. n105

In many municipalities the question has arisen whether the municipality itself is bound by its own zoning ordinance. It has been held that a municipality which is exercising its governmental as opposed to its proprietary functions is exempt from its own zoning ordinance. n106 It has also been held that a higher governmental authority, such as a state, may not be subject to the zoning restrictions of a municipality, which has, after all, derived its authority from the state. n107

In addition to the exceptions, variances, amendments, and exemptions described above, zoning ordinances typically provide for acceptance of prior nonconforming uses. If certain land uses inconsistent with the zoning restrictions were practiced before enactment of the zoning ordinance, they will usually be allowed to continue. Continuation may either be limited to a specific finite period of time, n108 or until the use ceases once. n109 Usually, no great variation in or extension of the prior nonconforming use is permitted without endangering continuation. n110 A nonconforming use is usually defined within the zoning ordinance or the enabling legislation.

§ 74.02(e) Modern Developments in Zoning.

The essentially negative approach of traditional zoning, which defines what cannot be done within a distinct area, has not been adequate to meet the challenges of urban sprawl and huge new demands for municipal services, which seem to call for affirmative land use regulation measures. In general, the conflicts over newer, more assertive techniques of zoning are contested, on the one hand, by the governmental authorities acting in what they consider to be the common good and, on the other hand, by private developers seeking to maximize their return on real estate investments.

One of the techniques intended to add flexibility to the traditionally rigid "Euclidian" zoning is the so-called "floating zone":

> The concept of the floating zone involves a special detailed use district of undetermined location in which the proposed kind, size and form of buildings must be approved in advance. It is legislatively recognized to be compatible with the region in which it eventually locates if particular use limitations and development standards (such as site plan approval and large open space requirements) are met and the specific application is not unreasonable. n111

The floating zone is also sometimes referred to as an overlay district, and may be installed only after the ordinance requirements are completely fulfilled.

Another newer concept is cluster zoning, by which residential buildings are permitted to be clustered in more dense configurations, under the condition that compensatory open, common space is provided elsewhere in the development. n112 Thus the specific open space requirements for individual lots may be waived in order to provide larger and more effective open space resources for an entire development. The greater dwelling density may also reduce the need for certain common facilities, such as roads and utilities.

The related concept of contract zoning confers upon a landowner the benefit of an amendment in the zoning ordinance responsive to the wishes of the landowner, in return for which the landowner agrees to observe certain specific restrictions and conditions. A variant of this is conditional zoning, consisting of a pre-enacted amendment, which becomes effective when the specified conditions are met. n113

Zoning may also be enacted for special purposes, such as preserving wetlands or historic structures and sites. Under the rather common historic district ordinances, a community may subject to review any proposed alterations of structures within a designated historic district, and may retain the power to block disapproved changes or proposed demolitions. The major issue with such special purpose zoning is whether the impact of use restrictions on individual landowners is so severe that an unconstitutional uncompensated taking has occurred. n114

Another rather typical type of special purpose zoning is that intended to protect the public, such as floodplain zoning.

This type of zoning usually imposes significant restrictions on residential or commercial development in the designated area, thus drastically devaluing the affected land; consequently, the most restrictive of these measures may be considered unconstitutional. n115 The general trend, however, is to sustain such of these ordinances as are clearly linked to public health and safety. n116 A sub-specialty of this type of zoning is the so-called "airport zoning," which may limit the height of structures or other objects, may limit new residential construction in the proximity of landing zones, or may limit certain types of air operations and activities. As with other specialty zoning, it is possible that restrictions go so far that they will be considered as unconstitutional uncompensated takings. n117

Zoning techniques are themselves morally neutral, but can be used by parties or factions pursuing particular interests in ways that may be harmful or contrary to the public interest. Sometimes a residential zone is established with requirements concerning the size and expense of each dwelling; the resulting financial barriers to prospective landowners who may wish to obtain land located within that zone have the effect of excluding persons of lesser means. When such "exclusionary zoning" has the effect -- or, in some cases, the original purpose -- of excluding low income or minority persons from acquiring property within the zone, it may be subject to constitutional challenge. n118 However, for the most part, the following types of restrictions will be upheld, even if an incidental exclusionary effect is the result:

(1) the zoning of vacant residential land for acreage minimums, thereby reducing the total supply of development lots and increasing the overall cost of land in a community;

(2) requiring minimum building sizes, which necessitate the construction of bigger and more expensive housing;

(3) the exclusion of apartments and other types of multiple dwellings;

(4) prohibition of mobile homes;

(5) limitations on the number of bedrooms per housing unit;

(6) age restrictions;

(7) regulations that limit the number of persons unrelated by blood or marriage who may reside together; and the resulting prohibition of social welfare facilities such as group homes. n119

Other communities experiencing very rapid growth use zoning to control the pace of development. After preparing a master plan outlining the pattern of future development, the actual timing (and location) of building permits and other manifestations of growth is limited and controlled so that provision of public services and facilities can keep up. It is important that the communities find some basis in their delegated authority for imposing such restrictions and that the limits on development not extend over too long a time. n120

Variants of this so-called "time-controlled zoning" include quota limitations on the number of construction, water connection or sewer connection permits issued during specific periods of time, restrictions on approval of new subdivisions, imposition of maximum population limits, exclusion of development from zones indicated on official planning maps, and other forms of exclusions, such as multiple dwelling units and minimum lot size restrictions. n121

All restrictive and exclusionary techniques may encounter judicial disapproval if they are perceived as attempts to permanently exclude or restrict development. n122 The exclusionary practices of individual communities may be ameliorated and the growth burdens more evenly distributed if planning and control devices are conducted on a regional basis.

Considerable controversy has dogged another development restriction technique, which is the imposition of various

exactions from builders who actually construct the new dwellings or commercial areas. The rationale and operation of this form of control have been summarized as follows:

> The movement of new residents from major cities to the suburbs has forced local governments to provide new streets, water and sewer lines, recreational facilities, police and fire buildings and schools. In order to avoid placing an equitable share of the increased financial burden on established residents to provide these facilities, statutes empower local communities to exact dedications of land from subdividers, or fees in lieu of dedication.
>
> The dedication of streets, utility facilities and related easements by subdivision builders is not a new development in land use law. More recently, however, local governing bodies have been authorized to require new types of land dedication as a condition for subdivision approval. These new and more controversial exactions include dedication of parks and recreational land, school sites and open space generally. Developers have been required alternatively to pay fees in lieu of dedication.
>
> The rationale for dedication statutes is that a subdivider realizes a profit (in the form of increased land value) because of governmental approval of his subdivision. In return for this benefit, the developer is required to satisfy the increased need he has created in the community for facilities such as schools, parks, and the like. The ultimate cost of the land or fee exaction, is passed on by the developer to new homeowners, who will pay more than their "fair share" for community schools, parks and other community facilities financed by builder exactions. Despite this fact, courts have uniformly upheld the constitutionality of state dedication statutes, including those providing for dedication of park and recreational land, school sites and open space. n123

Local dedication ordinances, on the other hand, have not been upheld unless their delegated authority from the state is clear, n124 or dedication or exaction is not adequately justified. n125

COMPUTER-ASSISTED RESEARCH

LEXIS: zon! w/5 technique! w/30 (floating or euclidian or cluster or contract or floodplain or airport or time-controlled or exclusionary)

FOOTNOTES:

(n1)Footnote 1. *Euclid v. Ambler Realty Co., 272 U.S. 365 (1926).*

(n2)Footnote 2. *Euclid v. Ambler Realty Co., 272 U.S. 365, 388 (1926).*

(n3)Footnote 3. *Zahn v. Board of Pub. Works, 274 U.S. 325 (1927)* (specifically citing *Euclid* with approval); *Gorieb v. Fox, 274 U.S. 603 (1927)* (a setback restriction would not be held unconstitutional unless it was clearly arbitrary and unreasonable and had no relation to the health, safety, morals or welfare of the community).

(n4)Footnote 4. *Nectow v. Cambridge, 277 U.S. 183 (1928).*

(n5)Footnote 5. *See* ch. 72 *supra*.

See also Newton v. City of Asheboro, 524 S.E.2d 46 (N.C. App. 1999) (applicants entitled to special use permit for construction of mobile home park where plan did not endanger public health or safety and conformed to district's development plan). *Town of Grand Isle v. Patry, 2004 Vt. LEXIS 29* (No. 2002-468, Mar. 9, 2004) (an unbroken charter does not preclude the state from exercising its police powers).

(n6)Footnote 6. *See Citizens for Jobs and the Econ. v. County of Orange, 115 Cal. Rptr. 2d 90 (2002)* (initiative

impermissibly interfered with county's essential government functions regarding land use planning and fiscal management and was unconstitutionally vague on its face).

(n7)Footnote 7. *V.F.W. Post 4264 v. City of Steamboat Springs, 575 P.2d 835 (Colo. 1978), appeal dismissed, 439 U.S. 809 (1979); Home Bldrs. League v. Township of Berline, 385 A.2d 295 (N.J. Super. 1978), aff'd, 405 A.2d 381 (N.J. 1979).*

Bannum, Inc. v. City of St. Charles, 2 F.3d 267 (8th Cir. 1993) (city zoning ordinance held to be constitutional); *Rivervale Realty Co. v. Town of Orangetown, 816 F. Supp. 937 (S.D.N.Y. 1993)* (municipal zone ordinance valid, not unconstitutional); *Janra Enters. v. City of Reno, 818 F. Supp. 1361 (D. Nev. 1993)* (local governments have broad powers to control land use, and zoning ordinances are presumptively valid). *Open Door Baptist Church v. Clark County, 995 P.2d 33 (Wash. 2000)* (zoning regulation requiring church to apply for conditional use permit and pay accompanying fees did not unconstitutionally burden the church's religious freedom). *Bacon v. Town of Enfield, 840 A.2d 788 (N.H. 2004)* (zoning ordinances equally applying to all persons are constitutional); *Ten's Cabaret, Inc. v. City of New York, 768 N.Y.S.2d 786 (2004)* (while zoning ordinances are presumed constitutional, municipal authority cannot trump First Amendment rights); Haller, Stephen A. "Comment: On Sacred Ground: Exploring Congress's Attempts to Rein In Discriminatory State Zoning Practices." *33 Sw. U. L. Rev. 285 (2004)* (article examines constitutional questions arising from the Religious Land Use and Institutionalized Persons Act of 2000).

(n8)Footnote 8. Similar provisions are in most state constitutions. *Zealy v. City of Waukesha, 534 N.W.2d 917 (Wis. App. 1995)* (state may rely upon police power to impose restrictions on private land in order to promote public interest in efficient use of natural resources, provided that government compensate landowner if landowner is unduly burdened by such regulation by being deprived of all, or substantially all, of the land's beneficial use). *Spinell Homes, Inc. v. Municipality of Anchorage, 78 P.3d 692 (Alaska 2003)* (municipalities may require developers to meet mandates); *Wonders v. Pima County, 2004 Ariz. App. LEXIS 65* (No. 2 CA-CV 2003-0090, May 12, 2004) (county zoning ordinance barring the removal of native plants from private land deemed constitutional under the Fifth Amendment); *Twin Lakes Dev. Corp. v. Town of Monroe, 801 N.E.2d 821 (N.Y. 2003)* (municipal fees imposed on developers do not constitute a taking); *Hallmark Inns & Resorts, Inc. v. City of Lake Oswego, 88 P.3d 284 (Ore. App. 2004)* (provisions of building permit do not violate the Fifth Amendment); *Dudek v. Umatilla County, 69 P.3d 751 (Ore. App. 2003)* (county may use discretion in applying zoning ordinance); *Homebuilders Ass'n of Metro. Portland v. Tualatin Hills Park & Rec. Dist., 62 P.3d 404 (Ore. App. 2003).*

(n9)Footnote 9. *Schoen v. Hillside Twp., 382 A.2d 704 (N.J.L. 1977).*

Stubblefield Constr. Co. v. City of San Bernardino, 38 Cal. Rptr. 2d 413 (Cal. App. 1995) (municipality had not violated substantive due process or equal protection rights of developer by changing zoning to preclude type of construction developer was contemplating, passing emergency ordinance making revised zoning applicable to developer's project, and declaring moratorium on building in area in which developer had land); *Quirk v. Town of New Boston, 663 A.2d 1328 (N.H. 1995)* (held town's requirement of buffer zone around landowner's campground was not violation of substantive due process, did not effect taking, did not deny equal protection and did not interfere with landowner's property rights). *Town of Flower Mound v. Stafford Estates L.P., 135 S.W.3d 620 (Tex. 2004)* (municipality violated takings clause by requiring developer to rebuild a road to obtain a permit); *B.A.M. Dev., L.L.C. v. Salt Lake County, 87 P.3d 710 (Utah App. 2004)* (county violated Fifth Amendment by requiring an arbitrary dedication).

(n10)Footnote 10. *Shukovsky v. Clavin, 558 N.Y.S.2d 431 (1990). See Dolan v. City of Tigard, 114 S. Ct. 2309 (1994)* (land-use regulation that required a woman to dedicate a portion of her property for state purposes is a legitimate public purpose and can be allowed).

See also Animas Valley Sand and Gravel, Inc. v. Board of County Comm'rs of the County of La Plata, 38 P.3d 59 (Colo. 2002).

(n11)Footnote 11. 1 Zoning and Land Use Controls 1-85 to 1-86 (Eric Damian Kelly gen. ed., Matthew Bender).

See Twigg v. County of Will, 627 N.E.2d 742 (Ill. 1994); Harris Bank of Hinsdale v. County of Kendall, 625 N.E.2d 845 (Ill. 1993) (factors to consider in determining validity of zoning ordinances); *State Bank of Countryside v. Chicago, 679 N.E.2d 435 (Ill. App. 1997).*

(n12)Footnote 12. *See Board of County Comm'rs of Hamilton County v. City of Cincinnati, 1999 Ohio App. LEXIS 5445* (No. C-990431, Ohio App. Nov. 19, 1999) (court should weigh general public purposes to be served by governmental entities conflicting in zoning matters and give favor to power that will serve the needs of the greater number).

(n13)Footnote 13. *Town of Chesterfield v. Brooks, 489 A.2d 600 (N.H. 1985); Village of Belle Terre v. Boraas, 416 U.S. 1 (1974).*

Bannum, Inc. v. City of St. Charles, 2 F.3d 267 (8th Cir. 1993); Rivervale Realty Co. v. Town of Orangetown, 816 F. Supp. 937 (S.D.N.Y. 1993); Kawaoka v. City of Arroyo Grande, 17 F.3d 1227 (9th Cir. 1994); Cohen v. City of Des Plaines, 8 F.3d 484 (7th Cir. 1993); Birck v. County of Walworth, 856 F. Supp. 509 (E.D. Wis. 1994).

The preceding cases all state that land-use regulations must bear a rational relationship to legitimate governmental purposes. *Carpenter v. City of Petal, 699 So. 2d 928 (Miss. 1997)* (restricting mobile homes to designated mobile home parks bore no relationship to the Zoning Board's stated goal of preserving local residential property values).

(n14)Footnote 14. *See Board of County Comm'rs of Hamilton County v. City of Cincinnati, 1999 Ohio App. LEXIS 5445* (No. C-990431, Nov. 19, 1999) (court should weigh general public purposes to be served by governmental entities conflicting in zoning matters and give favor to power that will serve the needs of the greater number).

(n15)Footnote 15. *See* Cal. Const. art. XI, §7; Ga. Const. art. IX, §II, PIV; La. Const. art. VI, §17; Mich. Const. art. VII, §22; N.Y. Const. art. IX, §2(c)(ii)(10).

(n16)Footnote 16. Ala. Const. art. IV, §109; Alaska Const. art. X, §3; Ariz. Const. art. III; Ark. Const. art. V, §1, superseded by Amend. 7, §1; Colo. Const. art. XIV, §13; Conn. Const. art. X, §1; Del. Const. art. II, §25; Haw. Const. art. VIII, §2; Idaho Const. art. XII, §§§1, 2; Ind. Const. art. IV, §1; Iowa Const. art. III, §1; Kan. Const. art. XII, §5; Ky. Const. §29; Me. Const. art. VIII, pt. 2, §1; Md. Const. pt. XI-E, §1; Mass. Const. Amend. art. 60; Mich. Const. art. VII, §22; Minn. Const. art. XII, §4; Miss. Const. art. IV, §88; Mo. Const. art. 3, §1; Mont. Const. art. VI, §4; Neb. Const. art. II, §1; Nev. Const. art. IV, §1; N.H. Const. pt. 2, art. 2; N.J. Const. art. IV, §6; N.M. Const. art. X, §4; N.C. Const.; art. VII, §1; N.D. Const. art. VII, §1; Ohio Const. art. X, §1 (counties); art. XVIII, §2 (municipal corporations); Okla. Const. art. XVIII, §1; Or. Const. art. III, §1; Pa. Const. art. III, §20; R.I. Const. art. IV, §2; S.C. Const. art. VIII, §§7 (counties), 9 (municipal corporations); S.D. Const. art. III, §1; Tenn. Const. art. XI, §9; Tex. Const. art. III, §1; Utah Const. art. XI, §5; Vt. Const. ch. II, §6; Va. Const. art. VII, §§2, 3; Wash. Const. art. XI, §10, Amend. 40; W. Va. Const. art. VI, §39a; Wis. Const. art. II, §1.

(n17)Footnote 17. *Village of Euclid v. Ambler Realty Co., 272 U.S. 365 (1926).*

(n18)Footnote 18. *Village of Euclid v. Ambler Realty Co., 272 U.S. 365, 367 (1926).*

(n19)Footnote 19. *See, e.g., Village of Belle Terre v. Boraas, 416 U.S. 1 (1974).*

(n20)Footnote 20. *See, e.g., City of Milwaukee v. Leavitt, 142 N.W.2d 169 (Wis. 1966); State ex rel. Am. Oil Co. v. Bessent, 135 N.W.2d 317 (Wis. 1965).*

Trail Mining, Inc. v. Village of Sun, 619 So. 2d 118 (La. 1993); Hansen Bros. Enters. v. Board of Supvrs., 35 Cal. Rptr. 2d 358 (1994); Pizzo Mantin Group v. Township of Randolph, 645 A.2d 89 (N.J. 1994). King v. Caddo Parish

Comm'n, 719 So. 2d 410 (La. 1998) ("zoning is a legislative function, the authority for which flows from the police power of governmental bodies"); *City of Louisiana v. Branham, 969 S.W.2d 332 (Mo. App. 1998)* ("zoning ordinances constitute an exercise of the state's police power.")

(n21)Footnote 21. *See, e.g., Town of Hialeah Gardens v. Hebraica Community Ctr., Inc., 309 So. 2d 212 (Fla. App. 1975); Miller v. MacGill, 297 So. 2d 573 (Fla. App. 1974); Four States Realty Co., Inc. v. City of Baton Rouge, 309 So. 2d 659 (La. 1975); Ginsberg v. Yeshiva of Far Rockaway, 358 N.Y.S.2d 477, aff'd, 36 N.Y.2d 706, 366 N.Y.S.2d 418 (1975).*

Colorado Manufactured Hous. Ass'n v. City of Salida, 977 F. Supp. 1080 (N.D. Ga. 1997); Ardoin v. Department of Transp. & Dev., 679 So. 2d 928 (La. App. 1997); Stabler Dev. Co. v. Board of Supervisors, 695 A.2d 882 (Pa. Commw. 1997); Jones v. Village of Chagrin Falls, 674 N.E.2d 1388 (Ohio 1997); Sprenger, Grubb & Assoc., Inc. v. City of Hailey, 903 P.2d 741 (Idaho 1995) (rezoning ordinance bore reasonable relation to goals properly pursued by city through its police power); *City of New York v. Capri Cinema, Inc., 641 N.Y.S.2d 969 (N.Y. Sup. Ct. 1995)* (state's police power sustainable to zone adult oriented establishments when goal is to prevent spread of HIV); *Twigg v. County of Will, 627 N.E.2d 742 (Ill. 1994); Pizzo Mantin Group v. Township of Randolph, 645 A.2d 89 (N.J. 1994); City of New Orleans v. Board of Comm'rs, 640 So. 2d 237 (La. 1994). Homeowner/Contractor Consultants, Inc. v. The Ascension Parish Planning & Zoning Comm'n, 32 F. Supp. 2d 384* (M.D. La., 1999) ("[T]he outside limit upon a state's exercise of its police power and zoning decisions is that they must have a rational basis."). *Federation of Advertising Indus. Representatives v. City of Chicago, 189 F.3d 633 (7th Cir. 1999) aff'd, 326 F.3d 924 7t*h Cir. 2003), *cert. denied, 124 S. Ct. 302 (2003)* (ruling that ordinance regulating placement of outdoor advertisements was an exercise of traditional local police power and was not preempted by the federal cigarette advertising act); *McCollum v. City of Berea, 53 S.W.2d 106 (Ky. App. 2000)* (held, a city's zoning ordinance restricting the placement of manufactured homes within its boundaries was a proper exercise of its police powers to protect the value of neighboring properties).

(n22)Footnote 22. *See Business Ventures, Inc. v. Iowa City, 234 N.W.2d 376 (Iowa 1975).*

(n23)Footnote 23. *See, e.g., Ensign Bickford Realty Corp. v. City Council of Livermore, 137 Cal. Rptr. 304 (1977); Dur-Bar Realty Co. v. City of Utica, 394 N.Y.S.2d 913 (1977); Ullock v. City of Bremerton, 565 P.2d 1179 (Wash. App. 1977).*

(n24)Footnote 24. *See Stevens v. City of Salisbury, 214 A.2d 775 (Md. 1965).*

(n25)Footnote 25. *County of Platte v. Chipman, 512 S.W.2d 199 (Mo. App. 1974).*

State of Missouri ex rel. Philip A. Klawuhn v. Board of Zoning Adjustment of City of St. Joseph, 952 S.W.2d 725 (Mo. App. 1997); East/West Venture v. Borough of Fort Lee, 669 A.2d 260 (N.J. App. 1996) (municipalities have no power to zone except as delegated to them by the legislature, because zoning is inherently an exercise of the state's police power); *Rumson Estates, Inc. v. Mayor & Council of the Borough of Fair Haven, 795 A.2d 290 (N.J. Super. 2002), aff'd 828 A.2d 317 (N.J. 2003)* (zoning ordinances regulating maximum floor area of houses fell within powers given by Municipal Land Use Law). *State v. St. Croix County, 668 N.W.2d 743 (Wis. App. 2003)* (county zoning ordinance invalid because it exceeded the authority granted by the state).

(n26)Footnote 26. The zoning enabling statutes enacted in each of the states are as follows: Ala. Code §11-52-70 *et seq.* Alaska Stat., §29.33.070, *et seq.*; Ariz. Rev. Stat. Ann. §9-461 *et seq.*; Ark. Stat. Ann. §19-2801 *et seq.*; Cal. Gov't Code §65800 *et seq.*; Colo. Rev. Stat., §31-23-301 *et seq.*; Conn. Gen. Stat. Ann. §8-1 *et seq.*; Del. Code Ann. tit. 22, §301 *et seq.*; D.C. Code Ann. §5-412 *et seq.*; Fla. Stat. Ann. §163.3161 *et seq.*; Ga. Const. art. IX, §II, PIV; Haw. Rev. Stat., §46-4 *et seq.*; Idaho Code §67-6501 *et seq.*; Stat.[esc] Ill. Comp. Stat. ch. 65, §5/11-13-1 *et seq*. (cities); ch. 55, §5/5-12001 *et seq*. (counties); ch. 65, §1/110-5 *et seq*. (townships); ch. 34, §3151 *et seq* (counties); ch. 139; §301 *et seq* (townships); Ind. Stat. Ann. §36-7-2-1 *et seq.*; Iowa Code Ann. §414.1 *et seq.*; Kan. Stat. Ann. §12-701 *et seq.*; Ky. Rev. Stat., §100.111 *et seq.*; La. Rev. Stat. Ann. §33:4721 *et seq.*; Me. Rev. Stat. Ann., tit. 30, §4961 *et seq.*; Md. Code

Ann., art. 66B, §1.00 *et seq.*; Mass. Gen. Laws Ann., ch. 40A, §1 *et seq.*; Mich. Comp. Laws Ann. §125.581 *et seq* (cities and villages); § 125.201 *et seq.* (counties); §125.271 *et seq* (townships); Minn. Stat. Ann. §462.351 *et seq.*; Miss. Code Ann. §17-1-1 *et seq.*; Mo. Rev. Stat., §89.010 *et seq.* (cities, towns, villages); §64.010 *et seq* (counties, first class); §64.211 *et seq* (unchartered first class counties); Mont. Code Ann. §76-2-101 *et seq.* (counties); §76-2-310 *et seq* (cities); §76-2-201 *et seq.* (joint city-county plan); Neb. Rev. Stat., §14.401 *et seq*(cities, metropolitan class); §15.902 *et seq* (cities, primary class); §19.902 *et seq* (general, cities of first and second class and villages); §23.114 *et seq.*; §23.164 *et seq*(counties); §23.174.01 (county in which is located a city of primary class); Nev. Rev. Stat., §268.230 *et seq* (city); §278.010 *et seq* (city, county, regional); N.H. Rev. Stat. Ann. §31:60 *et seq.*; N.J. Rev. Stat. Ann. §40:55D-2 *et seq.*; N.M. Stat. Ann. §3-21-1 *et seq.*; N.Y. Gen. City Law §19 *et seq.*; N.Y. Village Law §7-700 *et seq.*; N.Y. Town Law §261 *et seq.*; N.C. Gen. Stat., §160-A-381 *et seq* (cities; towns); §153A-2340 *et seq* (counties); N.D. Cent. Code Ann. §40-47-01 *et seq* (cities); §58-03-11 *et seq* (townships); §11-33-01 *et seq* (counties); Ohio Rev. Code Ann. §303.01 *et seq* (counties); §713.01 *et seq* (municipalities); Okla. Stat. Ann., tit. 11, §43-101 *et seq* (cities and villages); tit. 19, §863.13 *et seq*(counties); Or. Rev. Stat., ch. 227 (cities); ch. 215 (counties); Pa. Stat. Ann. tit. 53, §10105; R.I. Gen. Laws §45-24-1 *et seq.*; S.C. Code Regs. §5-23-10 *et seq.*; S.D. Codified Laws §11-4-1 *et seq.* (municipalities); §11-2-1 *et seq.* (counties); Tenn. Code Ann. §13-7-201 *et seq* (municipalities); §13-7-101 *et seq* (counties); Tex. Civ. Stat. Ann., art. 1011a *et seq.*; Utah Code §10-9-1 *et seq* (cities and towns); Vt. Stat. Ann., tit. 24, §4301 *et seq.*; Wash. Rev. Code Ann. §35.63-010 *et seq* (planning commissions); §35.22.280 (power of first class cities); §35.23.440 (power of second class cities); W. Va. Code §8-24-1 *et seq.*; Wis. Stat. Ann. §59.97 (counties); §62.23 (cities); §61.35 (villages); Wyo. Stat., §15.1-601 *et seq.* (cities and towns); §18-5-102 *et seq* (counties).

(n27)Footnote 27. *See, e.g., Town of Arundel v. Swain, 374 A.2d 317 (Me. 1977); Stucki v. Plavin, 291 A.2d 508 (Me. 1972); Schaffer v. City of Omaha, 248 N.W.2d 764 (Neb. 1977);* Lawrence R. Ternan, *Amendments to the Zoning Enabling Acts: New Concepts and Procedures, 59 Mich. B.J. 100 (1980).*

Higdon v. City of Senoia, 538 S.E.2d 39 (Ga. 2000) (statutes on dispute resolution did not interfere with the constitutional delegation of zoning power to the city).

(n28)Footnote 28. *Oakwood at Madison, Inc. v. Township of Madison, 283 A.2d 353 (N.J. 1971).*

See Rivervale Realty Co. v. Town of Orangetown, 816 F. Supp. 937 (S.D.N.Y. 1993) (municipal zoning ordinance is presumed to be valid).

(n29)Footnote 29. *Maldini v. Ambro, 330 N.E.2d 403, appeal dismissed, 423 U.S. 993 (N.Y. 1975).*

(n30)Footnote 30. State *ex rel. Michigan City Planning Comm'n v. La Porte Superior Ct. No. 1, 297 N.E.2d 814 (Ind. 1973).*

Lewis v. Planning and Zoning Commission of Town of Ridgefield, 818 A.2d 889 (Conn. App. 2003) (zoning amendments were outside the existing zoning ordinances and therefore exceeded statutory authority). *Township of Bingham v. RLTD Railroad Corporation, 624 N.W.2d 725 (Mich. 2001)* (state law preempted the application of the township's zoning powers to a rail corridor).

(n31)Footnote 31. *See, e.g., Kline v. City of Harrisburg, 68 A.2d 182 (Pa. 1949).*

City of Louisiana v. Branham, 969 S.W.2d 332 (Mo. App. 1998) (municipality zoning ordinances must be enacted in accord with Missouri's state zoning enabling act).

(n32)Footnote 32. *Oakwood at Madison, Inc. v. Township of Madison, 283 A.2d 353 (N.J. 1971); Boardman v. Davis, 3 N.W.2d 608 (Iowa 1942).*

Ambassador Books & Video, Inc. v. City of Little Rock, 20 F.3d 858 (8th Cir. 1994) (zoning ordinance upheld unless

it bears no rational relationship to the public health, safety, or general welfare).

(n33)Footnote 33. Sec. 1. Grant of Power:

> For the purpose of promoting health, safety, morals, or the general welfare of the community, the legislative body of cities and incorporated villages is hereby empowered to regulate and restrict the height, number of stories, and size of buildings and other structures, the percentage of a lot that may be occupied, the size of yards, courts, and other open spaces, the density of population, and the location and use of buildings, structures, and land for trade, industry, residence, or other purpose.

(n34)Footnote 34. *Id.* Most enabling acts today contain a grant of power similar to that found in the Standard Act. In some cases, however, the specific types of regulation authorized by the Act have been omitted. Vermont, on the other hand, has gone beyond the Standard Act in permitting its municipalities that have adopted a comprehensive plan and created a planning commission under the Municipal and Regional Development Act (24 Vt. Stat. Ann. §§4301 *et seq.*) to prohibit, restrict, and regulate land development, including specific uses of land, water courses and other bodies of water. 24 Vt. Stat. Ann. §4401(b)(A).

(n35)Footnote 35. Sec. 2. Districts:

> For any or all of said purposes the local legislative body may divide the municipality into districts of such number, shape, and area as may be deemed best suited to carry out the purposes of this act; and within such districts it may regulate and restrict the erection, construction, reconstruction, alteration, repair, or use of buildings, structures, or land. All such regulations shall be uniform for each class or kind of building throughout each district, but the regulations in one district may differ from those in other districts.

(n36)Footnote 36. *See Village of Euclid v. Ambler Realty Co., 272 U.S. 365 (1926)* where such zoning by district was sanctioned by the Supreme Court. It was from this case that the term "Euclidean zoning" was derived.

(n37)Footnote 37. Sec. 3. Purposes in View:

> Such regulations shall be made in accordance with a comprehensive plan and designed to lessen congestion in the streets; to secure safety from fire, panic, and other dangers; to promote health and the general welfare; to provide adequate light and air; to prevent the overcrowding of land; to avoid undue concentration of population; and to facilitate the adequate provision of transportation, water, sewerage, schools, parks, and other public requirements. Such regulations shall be made with reasonable consideration, among other things, to the character of the district and its peculiar suitability for particular uses, and with a view to conserving the value of buildings and encouraging the most appropriate use of land throughout such municipality. *Price v. Dahl, 912 P.2d 541 (Alaska 1996)* (proposed referendum election challenging comprehensive plan).

(n38)Footnote 38. Sec. 4. Method of Procedure:

> The legislative body of such municipality shall provide for the manner in which such regulations and restrictions and the boundaries of such districts shall be determined, established, and enforced, and from time to time amended, supplemented, or changed. However, no such regulation, restriction, or boundary shall become effective until after a public hearing in relation thereto, at which parties in interest and citizens shall have an opportunity to be heard. At least 15 days' notice of the time and place of such hearing shall be published in an official paper, or a paper of general circulation, in such municipality.

(n39)Footnote 39. Sec. 5. Changes:

Such regulations, restrictions, and boundaries may from time to time be amended, supplemented, changed, modified, or repealed. In case, however, of a protest against such change, signed by the owners of 20 percent or more either of the area of the lots included in such proposed change, or of those immediately adjacent in the rear thereof extending ... feet therefrom, or of those directly opposite thereto extending ... feet from the street frontage of such opposite lots, such amendment shall not become effective except by the favorable vote of three-fourths of all the members of the legislative body of such municipality. The provisions of the previous section relative to public hearings and official notice shall apply equally to all changes or amendments.

(n40)Footnote 40. Sec. 6. Zoning Commission:

In order to avail itself of the powers conferred by this act, such legislative body shall appoint a commission, to be known as the zoning commission, to recommend the boundaries of the various original districts and appropriate regulations to be enforced therein. Such commission shall make a preliminary report and hold public hearings thereon before submitting its final report, and such legislative body shall not hold its public hearings or take action until it has received the final report of such commission. Where a city planning commission already exists, it may be appointed as the zoning commission.

(n41)Footnote 41. Sec. 7. Board of Adjustment:

Such local legislative body may provide for the appointment of a board of adjustment, and in the regulations and restrictions adopted pursuant to the authority of this act, may provide that the said board of adjustment may, in appropriate cases and subject to appropriate conditions and safeguards, make special exceptions to the terms of the ordinance in harmony with its general purpose and intent and in accordance with general or specific rules therein contained ...

The board of adjustment shall have the following powers:

To hear and decide appeals where it is alleged that there is error in any order, requirement, decision, or determination made by an administrative official in the enforcement of this act or of any ordinance adopted pursuant thereto.

To hear and decide special exceptions to the terms of the ordinance upon which such board is required to pass under such ordinance.

To authorize, upon appeal in specific cases, such variance from the terms of the ordinance as will not be contrary to the public interest, where, owing to special conditions, a literal enforcement of the provisions of the ordinance will result in unnecessary hardship, and so that the spirit of the ordinance shall be observed and substantial justice done.

(n42)Footnote 42. These provisions are set out in §7 of the Standard Act, as follows:

The board of adjustment shall consist of five members, each to be appointed for a term of three years and removable for cause by the appointing authority upon written charges and after a public hearing.

Vacancies shall be filled for the unexpired term of any member whose term becomes vacant.

The board shall adopt rules in accordance with the provisions of any ordinance adopted pursuant to this act. Meetings of the board shall be held at the call of the chairman and at such other times as the board may determine. Such chairman, or in his absence the acting chairman, may administer oaths and compel the attendance of witnesses. All meetings of the board shall be open to the public. The board shall keep minutes of its proceedings, showing the vote of each member upon each question, or if absent or failing to vote, indicating such fact, and shall keep records of its examinations and other official actions, all of which shall be immediately filed in the office of the board and shall be a public record.

Most states' enabling acts have followed the Standard Act's language for the authority and powers of boards of adjustment. Some states, however, use the terms "board of appeals" or "board of review" instead of "board of adjustment." In New York, the term "board of appeals" is used. *See* N.Y. Gen. City Law §81; N.Y. Village Law §7-700 *et seq.* N.Y. Town Law §261 *et seq.*

Curran v. Church Community Hous. Corp., 672 A.2d 453 (R.I. 1996)(the zoning board acted within its authority in approving a housing project for the elderly, even though the project was not in accordance with the then existing zoning ordinance).

(n43)Footnote 43. Section 7 of the Standard Act, in pertinent part, states:

Appeals to the board of adjustment may be taken by any person aggrieved or by any officer, department, board, or bureau of the municipality affected by any decision of the administrative officer. Such appeal shall be taken within a reasonable time, as provided by the rules of the board, by filing with the officer from whom the appeal is taken, and with the board of adjustment, a notice of appeal specifying the grounds thereof. The officer from whom the appeal is taken shall forthwith transmit to the board all the papers constituting the record upon which the action appealed from was taken.

(n44)Footnote 44. The effects of such appeals are set out in §7 as follows:

An appeal stays all proceedings in furtherance of the action appealed from, unless the officer from whom the appeal is taken certifies to the board of adjustment after the notice of appeal shall have been filed with him that by reason of facts stated in the certificate a stay would, in his opinion, cause imminent peril to life or property. In such case, proceedings shall not be stayed otherwise than by a restraining order which may be granted by the board of adjustment or by a court of record on application and notice to the officer from whom the appeal is taken and on due cause shown.

(n45)Footnote 45. Section 7 of the Act, in relevant part, provides:

The board of adjustment shall fix a reasonable time for the hearing of the appeal, give public notice thereof, as well as due notice to the parties in interest, and decide the same within a reasonable time. Upon the hearing any party may appear in person or by agent or by attorney ... .

(n46)Footnote 46. Provision is made for judicial review in §7 as follows:

Any person or persons, jointly or severally, aggrieved by any decision of the board of adjustment, or any taxpayer, or any officer, department, board, or bureau of the municipality, may present to a court of record a petition, duly verified, setting forth that such decision is illegal, in whole or in part, specifying

the grounds of the illegality. Such petition shall be presented to the court within 30 days after the filing of the decision in the office of the board.

(n47)Footnote 47. This role of the courts is described in §7 of the Standard Act, as follows:

Upon the presentation of such petition the court may allow a writ of certiorari directed to the board of adjustment to review such decision of the board of adjustment and shall prescribe therein the time within which a return thereto must be made and served upon the relator's attorney, which shall not be less than 10 days and may be extended by the court. The allowance of the writ shall not stay proceedings upon the decision appealed from, but the court may, on application, on notice to the board, and on due cause shown, grant a restraining order.

If, upon the hearing, it shall appear to the court that testimony is necessary for the proper disposition of the matter, it may take evidence or appoint a referee to take such evidence as it may direct and report the same to the court with his findings of fact and conclusions of law, which shall constitute a part of the proceedings upon which the determination of the court shall be made. The court may reverse or affirm, wholly or partly, or may modify, the decision brought up for review.

Costs shall not be allowed against the board unless it shall appear to the court that it acted with gross negligence, or in bad faith, or with malice in making the decision appealed from.

All issues in any proceeding under this section shall have preference over all other civil actions and proceedings.

(n48)Footnote 48. Sec. 8. Enforcement and Remedies:

The local legislative body may provide by ordinance for the enforcement of this act and of any ordinance or regulation made thereunder. A violation of this act or of such ordinance or regulation is hereby declared to be a misdemeanor, and such local legislative body may provide for the punishment thereof by fine or imprisonment or both. It is also empowered to provide civil penalties for such violations.

(n49)Footnote 49. Most state zoning enabling statutes incorporate at least some of the enforcement provisions of the Standard Act. Some declare that a statutory violation constitutes a misdemeanor punishable by criminal sanctions. A most effective method of enforcement where the proposed construction or alteration violates a zoning ordinance is the withholding of building permits. Although this method is not mentioned in the Standard Act, it has been statutorily adopted in a number of jurisdictions, including Massachusetts (Mass. Ann. Laws ch. 40A, §12) and Nevada (Nev. Rev. Stat., §278.570).

(n50)Footnote 50. These provisions are set out in §8, as follows:

In case any building or structure is erected, constructed, reconstructed, altered, repaired, converted, or maintained, or any building, structure, or land is used in violation of this act or of any ordinance or other regulation made under authority conferred hereby, the proper local authorities of the municipality, in addition to other remedies, may institute any appropriate action or proceedings to prevent such unlawful erection, construction, reconstruction, alteration, repair, conversion, maintenance, or use, to restrain, correct, or abate such violation, to prevent the occupancy of said building, structure, or land, or to prevent any illegal act, conduct, business, or use in or about such premises.

(n51)Footnote 51. Sec. 9. Conflict With Other Laws:

> Wherever the regulations made under the authority of this act require a greater width or size of yards, courts, or other open spaces, or require a lower height of building or less number of stories, or require a greater percentage of lot to be left unoccupied, or impose other higher standards than are required in any other statute or local ordinance or regulation, the provisions of the regulations made under the authority of this act shall govern. Wherever the provisions of any other statute or local ordinance or regulation require a greater width or size of yards, courts, or other open spaces, or require a lower height of building or a less number of stories, or require a greater percentage of lot to be left unoccupied, or impose other higher standards than are required by the regulations made under the authority of this act, the provisions of such statute or local ordinance or regulation shall govern.

(n52)Footnote 52. *MJR's Fare of Dallas, Inc. v. City of Dallas, 792 S.W.2d 569 (Tex. App. 1990); Zavala v. Denver, 759 P.2d 664 (Colo. 1988); Taylor v. Crane, 595 P.2d 129 (Cal. 1979); Miller v. City of Sacramento, 136 Cal. Rptr. 315 (1977).*

City of Charleston v. Government Employees Ins. Co., 869 F. Supp. 378 (D.S.C. 1994); Orange Lake Assocs. v. Kirkpatrick, 21 F.3d 1214 (2d Cir. 1994) (home-rule provision has power of local self-government, provided that its legislation is not inconsistent with general law); *see Dallas Merchant's Concessionaire's Ass'n v. City of Dallas, 852 S.W.2d 489 (Tex. 1993)* (home-rule cities possess full power of self-government; ordinance of home-rule city is unenforceable to the extent it conflicts with state statute).

(n53)Footnote 53. *Miller v. Eighth Utils. Dist., 427 A.2d 425 (Conn. 1980); Luery v. Zoning Bd. of City of Stamford, 187 A.2d 247 (Conn. 1962).*

State ex rel. Trotter v. Cirtin, 1996 Mo. App. LEXIS 815 (No. 20249, Apr. 30, 1996) (zoning ordinances not subject to initiative process); *DeVita v. County of Napa, 889 P.2d 1019 (Cal. 1995)* (held general county plan can be amended by initiative). City of Burbank v. Burbank-Glendale-Pasadena Airport, *6 Cal. Rptr. 3d 367 (Cal. App. 2003)* (zoning ordinance may not be amended with an invalid inititive).

(n54)Footnote 54. *State v. Bates, 305 N.W.2d 426 (Iowa 1981).*

(n55)Footnote 55. *Nucholls v. Board of Adj. of City of Tulsa, 560 P.2d 556 (Okla. 1977); Field v. Area Planning Comm'n of Grant County, 421 N.E.2d 1132 (Ind. App. 1981); Garcia v. Siffrin Residential Ass'n, 407 N.E.2d 1369 (Ohio St. 1980), cert. denied, 450 U.S. 911 (1981); Regin v. Bensalem Twp., 616 F.2d 680 (3d Cir. 1980), cert. denied, Mark-Garner Assocs. v. Bensalem Twp., 450 U.S. 1029 (1981).*

(n56)Footnote 56. *City of Russelville v. Vulcan Materials Co., 382 So. 2d 525 (Ala. 1980); Proctor v. City of Coral Springs, 396 So. 2d 771 (Fla. App. 1981); Cleys v. Village of Palatine, 411 N.E.2d 1161 (Ill. App. 1980); Sturges v. Town of Chilmark, 402 N.E.2d 1346 (Mass. 1980).*

McCollum v. City of Berea, 53 S.W.2d 106 (Ky. App. 2000) (a zoning ordinance restricting the placement of mobile homes to mobile home parks was a proper exercise of the city's police power to protect the values of neighboring properties); *Smith v. City of Eufala Planning Commission, 765 So. 2d 670 (Ala. App. 2000)* (grounds for disapproving PUD application were sufficiently connected to public health, safety, morals and general welfare).

(n57)Footnote 57. *Gorman Towers, Inc. v. Bogoslavsky, 626 F.2d 607 (8th Cir. 1981); Robertson v. City of Salem, 191 F. Supp. 604 (D. Or. 1961); Building Indus. Ass'n of S. Cal., Inc. v. City of Camarillo, 213 Cal. Rptr. 816 (1985); Ensign Bickford Realty Corp. v. City Council of Livermore, 137 Cal. Rptr. 304 (1977); Proctor v. City of Coral Springs, 396 So. 2d 771 (Fla. App. 1981); Davis v. Sails, 318 So. 2d 214 (Fla. App. 1975); Town of Hialeah Gardens v.*

Hebraica Community Ctr., Inc., 309 So. 2d 212 (Fla. App. 1975); Thompson v. Cook County Zoning Bd. of Appeals, 421 N.E.2d 285 (Ill. App. 1981); Hills v. Area Planning Comm'n of Vermillion County, 416 N.E.2d 456 (Ind. App. 1981).

Chung v. Sarasota County, 686 So. 2d 1358 (Fla. App. 1996) (held stipulated final judgment between private property owner and county invalid as contract zoning and therefore a violation of due process); *Prock v. Town of Danville, 655 N.E.2d 553 (Ind. App. 1996)* (agreement between town and disposal company was not contract zoning); *Harris v. City of Wichita, 862 F. Supp. 287 (D. Kan. 1994)* (zoning law does not violate due process as it is reasonable and not arbitrary); *Bannum, Inc. v. City of St. Charles, 2 F.3d 267 (8th Cir. 1993)* (ordinance not arbitrary or irrational, so ordinance does not violate the equal-protection right). *Santa Monica Beach, Ltd. v. Superior Court, 968 P.2d 993 (Cal. 1999)* (rent control law substantially advanced a legitimate state purpose of preventing rent increases); *Eastampton Center, LLC v. Township of Eastampton, 155 F. Supp. 2d 102 (D. N.J. 2001); Sunderland Family Treatment Services v. City of Pasco, 26 P.3d 955 (Wash. App. 2001); C.L.U.B. v. City of Chicago, 157 F. Supp. 2d 903 (N.D. Ill. 2001). City of Hobart Common Council v. Behavioral Inst. of Ind., LLC, 785 N.E.2d 238 (Ind. App. 2003)* (a proposed variance cannot be denied on discriminatory grounds); *Petra Presbyterian Church v. Vill. Of Northbrook, 2003 U.S. Dist. LEXIS 15105* (No. 03 C 1936, N.D. Ill., Aug. 28, 2003) (zoning ordinance prohibiting religious worship in industrial area is not unconstitutional because the ordinance applies to all religions).

(n58)Footnote 58. *J.D. Constr. Corp. v. Board of Adj. of Freehold, 290 A.2d 452 (N.J. Super. 1972); Schoen v. Hillside Twp., 382 A.2d 704 (N.J. Super. 1977).*

(n59)Footnote 59. *Goldblatt v. Town of Hempstead, 369 U.S. 590 (1962); Golden v. Planning Bd. of Town of Ramapo, 285 N.E.2d 291, appeal dismissed, 409 U.S. 1002 (N.Y. 1972).*

(n60)Footnote 60. *Dur-Bar Realty Co. v. City of Utica, 394 N.Y.S.2d 913 (1977).*

Damurjian v. Board of Adjustment of Township of Colts Neck, 299 N.J. Super. 84, 690 A.2d 655 (1997) (zoning ordinance held invalid for lack of definition and standards for application); *Hardin County v. Jost, 897 S.W.2d 592* (Ky. App., 1995) (held county planning and zoning ordinance invalid because it did not include sufficiently complete definition of the grounds on which conditional use was to be permitted or denied).

(n61)Footnote 61. *Zavala v. Denver, 759 P.2d 664 (Colo. 1988); Equity Assocs. v. Village of Northbrook, 524 N.E.2d 1119 (Ill. App. 1988); Springfield Park Dist. v. Buckley, 488 N.E.2d 1071 (Ill. App. 3d 1986); Lutheran High Sch. Ass'n of Greater Detroit v. City of Farmington Hills, 381 N.W.2d 417 (Mich. App. 1985); McMinn v. Town of Oyster Bay, 488 N.E.2d 1240 (N.Y. 1985).*

Shriver v. City of Okoboji, 567 N.W.2d 397 (Iowa 1997) (municipality's amendment to the definition of a "corner lot" in a zoning ordinance must be presumed valid absent a showing that the amendment was arbitrary, unreasonable, capricious, discriminatory, or bore no relation to the public health, morals, or safety); *City of McDonough v. Tusk, 492 S.E.2d 206 (Ga. 1997)* (ordinance presumed valid); *State Bank of Countryside v. City of Chicago, 679 N.E.2d 435 (Ill. App. 1997)* (zoning ordinance presumed valid); *Bell River Assocs. v. Charter China, 565 N.W.2d 695 (Mich. App. 1997)* (zoning ordinances presumed valid and constitutional).

(n62)Footnote 62. *People of Village of Cahokia v. Wright, 296 N.E.2d 30 (Ill. App. 1973), aff'd, 311 N.E.2d 153 (Ill. 1974); Mayor & Council of New Castle v. Rollins Outdoor Advertising, Inc., 475 A.2d 355 (Del. 1984); Town of Narrows v. Clear-view Cable TV, Inc., 315 S.E.2d 835 (Va. 1984).*

Ambassador Books & Video, Inc. v. City of Little Rock, 20 F.3d 858 (8th Cir. 1994) (zoning ordinance upheld unless arbitrary and unreasonable).

(n63)Footnote 63. *Village of Glenview v. Velasquez, 463 N.E.2d 873 (Ill. App. 1984); Troy Campus v. City of Troy,*

349 N.W.2d 177 (Mich. App. 1984).

(n64)Footnote 64. *Springfield Park Dist. v. Buckley, 488 N.E.2d 1071 (Ill. App. 1986); Lutheran High Sch. Ass'n of Greater Detroit v. City of Farmington Hills, 381 N.W.2d 417 (Mich. App. 1985); McMinn v. Town of Oyster Bay, 488 N.E.2d 1240 (N.Y. 1985).*

Oregon Entertainment Corp. v. City of Beaverton, 19 P.3d 918 (Or. App. 2001).

(n65)Footnote 65. *J.D. Constr. Corp. v. Board of Adj. of Freehold, 290 A.2d 452 (N.J. Super. 1972); Genusa v. City of Peoria, 475 F. Supp. 1199 (C.D. Ill. 1979), aff'd in part, rev'd in part, 619 F.2d 1203 (7th Cir. 1980).*

(n66)Footnote 66. *Cannon v. Coweta County, 399 S.E.2d 329 (Ga. 1990); Mayor & Council of New Castle v. Rollins Outdoor Advertising, Inc., 475 A.2d 355 (Del. 1984); Love v. Board of County Comm'rs of Bingham County, 701 P.2d 1293 (Idaho 1985); Gordon v. Zoning Bd. of Appeals of Clarkstown, 481 N.Y.S.2d 275 (1984); City of Portsmouth v. McGraw, 488 N.E.2d 472 (Ohio St. 1986).*

Carpenter v. City of Petal, 699 So. 2d 928 (Miss.1997) (ordinance which excluded manufactured homes from all residential areas for the stated purpose of protecting property values was arbitrary and unreasonable); *See Restigouche, Inc. v. Town of Jupiter, 845 F. Supp. 1540 (S.D. Fla. 1994)* (owner failed to establish that town's application of ordinance was arbitrary and capricious in violation of substantive due process); *Hatch v. Boulder Town Council, 21 P.3d 235 (Utah App. 2001).*

(n67)Footnote 67. *Lynnwood Prop. Owners Ass'n v. Lands Described in Complaint, 359 So. 2d 357 (Ala. 1978); Durant v. Town of Dunbarton, 430 A.2d 140 (N.H. 1981).*

(n68)Footnote 68. *Levitz v. State, 613 P.2d 1259 (Ariz. 1980).*

(n69)Footnote 69. *Nucholls v. Board of Adj. of City of Tulsa, 560 P.2d 556 (Okla. 1977).*

(n70)Footnote 70. *Zopfi v. City of Wilmington, 160 S.E.2d 325 (N.C. 1986).*

(n71)Footnote 71. *Taxpayers Ass'n of Weymouth Twp., Inc. v. Weymouth Twp., 364 A.2d 1016 (N.J. 1976).*

Rivervale Realty Co. v. Town of Orangetown, 816 F. Supp. 937 (S.D.N.Y. 1993) (zoning ordinance valid if it bears rational relationship to state objective).

(n72)Footnote 72. *Candid Enters. v. Grossmont Union High Sch. Dist., 705 P.2d 876 (Cal. 3d 1985).*

(n73)Footnote 73. *Amalgamated Trust & Sav. Bank v. Cook County, 402 N.E.2d 719 (Ill. App. 1980); Treme v. St. Louis County, 609 S.W.2d 706 (Mo. App. 1980);*

Town of Pleasant Valley v. Town of Poughkeepsie Planning Bd., 736 N.Y.S.2d 70 (2001).

(n74)Footnote 74. *Southern Burlington County NAACP v. Township of Mount Laurel, 336 A.2d 713 (N.J. 1975).*

(n75)Footnote 75. For discussions of governmental immunity from local zoning regulations, see generally: Marco Adelfio, *Governmental Immunity from Zoning, 22 B.C. L. Rev. 783 (1981);* Comment, *The Inapplicability of Municipal Zoning Ordinances to Governmental Land Uses, 19 Syracuse L. Rev. 698 (1968);* Comment, *The Applicability of Zoning Ordinances to Governmental Land Use, 39 Tex. L. Rev. 316 (1961);* Note, *Governmental Immunity from Local Zoning Ordinances, 84 Harv. L. Rev. 869 (1971);* Note, *State Immunity from Zoning: A Question of Reasonableness, 31 U. Miami L. Rev. 191 (1976).*

(n76)Footnote 76. *Berger v. State, 364 A.2d 993 (N.J. 1976), declined to follow by, Metzner v. Wojdyla, 886 P.2d 154 (Wash. 1994).*

(n77)Footnote 77. *Matter of County of Suffolk, 264 N.Y.S.2d 162 (1965), declined to follow by, Patel v. Broward County, 613 So. 2d 582 (Fla. 1993).*

Gache v. Town of Harrison, 813 F. Supp. 1037 (S.D.N.Y. 1993) (New York town not immune from violating zoning ordinance, because it crossed the line over to private behavior).

(n78)Footnote 78. *Matter of Wa-Wa-Yanda v. Dickerson, 239 N.Y.S.2d 473 (1963); Water Works Bd. of Birmingham v. Stephens, 78 So. 2d 267 (Ala. 1955); Howell v. Liebowitz, 116 N.Y.S.2d 537 (1952); Less v. Sampson Land Co., 92 A.2d 629 (Pa. 1952).*

USPS v. City of Hollywood, 974 F. Supp. 1459 (S.D.Fla. 1997) (Local zoning laws that would require USPS to obtain a building permit for renovation of its leased facility would be unduly intrusive into the government's power to operate mail service, and thus the USPS is not bound by such zoning laws).

(n79)Footnote 79. These tests were summarized by the court in Hillsborough Ass'n for Retarded Citizens, Inc. v. City of Temple Terrace, 322 So. 2d (Fla. 1975), *aff'd, 332 So. 2d 610 (Fla. 1976).*

(n80)Footnote 80. Hillsborough Ass'n for Retarded Citizens, Inc. v. City of Temple Terrace, 322 So. 2d (Fla. 1975), *aff'd, 332 So. 2d 610 (Fla. 1976).*

(n81)Footnote 81. *County Comm'rs of Bristol v. Conservation Comm'n of Dartmouth, 405 N.E.2d 637 (Mass. 1980).*

National Helicopter Corp. of Am. v. City of New York, 952 F. Supp. 1011 (S.D.N.Y. 1997) (city was acting in a proprietary role when it sought enforcement of a resolution that would place restrictions on use and operation of a heliport owned by the city and operated by a private entity).

(n82)Footnote 82. *Conners v. New York State Ass'n of Retarded Children, 82 Misc. 2d 861, 370 N.Y.S.2d 474 (1975).*

(n83)Footnote 83. James B. Sales, The Applicability of Zoning Ordinances to Governmental Land Use, *39 Texas L. Rev. 318 (1961).*

(n84)Footnote 84. For example, municipal functions such as sewage, garbage disposal, and the operation of water supply facilities have been categorized as both governmental and proprietary in different jurisdictions. *See, e.g., Lauderdale County Bd. of Educ. v. Alexander, 110 So. 2d 911 (Ala. 1959)* (construction and operation of a county barn as a repair and storage shop for the county school buses and supplies held to be a governmental function); *Water Works Bd. of Birmingham v. Stephens, 78 So. 2d 267 (Ala. 1955)* (operation of city water system held to be proprietary function); *Jefferson County v. City of Birmingham, 55 So. 2d 196 (Ala. 1951)* (operation of sewage disposal plant held to be a proprietary function); *Board of Regents of Univs. & State College v. City of Tempe, 356 P.2d 399 (Ariz. 1960)* (construction and operation of state university held to be a governmental function); *Pruett v. Dayton, 168 A.2d 543 (Del. Ch. 1961)* (operation of sanitary landfill held to be a governmental function); *A1A Mobile Home Park, Inc. v. Brevard County, 246 So. 2d 126 (Fla. App. 1971)* (construction and operation of sewage disposal system held to be a governmental function); *Mayor of Savannah v. Collings, 84 S.E.2d 454 (Ga. 1954)* (construction of fire station held to be a governmental function); *Baltis v. Village of Westchester, 121 N.E.2d 495 (Ill. 2d 1954)* (ownership and operation of municipal water system held to be a proprietary function); *Village of Niles v. City of Chicago, 401 N.E.2d 1235 (Ill. App. 1980)* (water sales are proprietary); *Tabor v. City of Benton Harbor, 274 N.W. 324 (Mich. 1937)* (operation and maintenance of waterworks system held to be a proprietary function); *Town of Oronoco v. City of Rochester, 197*

N.W.2d 426 (Minn. 1972) (operation of solid waste disposal system held to be a governmental function); *Nehrbas v. Incorporated Village of Lloyd Harbor, 140 N.E.2d 241 (N.Y. 1957)* (construction of municipal building to contain courtroom and meeting hall held to be a governmental function); *Ruderman v. Town Bd. of Rosendale, 397 N.Y.S.2d 21 (1977)* (disposal of waste is a governmental function); *Westchester v. Village of Mamaroneck, 22 A.D.2d 143, 255 N.Y.S.2d 290 (1964), aff'd, 264 N.Y.S.2d 925 (1965)* (operation of sewage disposal plant held to be a governmental function); *Barnathan v. Kramer, 253 N.Y.S.2d 144 (1964)* (erection of water tank held to be a governmental function); *Oswald v. Westchester County Park Comm'n, 234 N.Y.S.2d 465 (1962)* (establishment of sportsman's center held to be a governmental function); *McKinney v. City of High Point, 74 S.E.2d 440 (N.C. 1953)* (erection of water tank held to be governmental function); *City of Charleston v. Southeastern Constr. Co., 64 S.E.2d 676 (W. Va. 1950)* (construction of state office building held to be a governmental function); *Green County v. City of Monroe, 87 N.W.2d 827 (Wis. 1958)* (erection of a jail held to be a governmental function).

(n85)Footnote 85. *See, e.g., State ex rel. Askew v. Kopp, 330 S.W.2d 882 (Mo. 1960)* (the court based its decision on an analysis of the constitutional and statutory sources of power exercised by the governmental units involved); *Township of Washington v. Village of Ridgewood, 141 A.2d 308 (N.J. 1958)* (the court based its decision on a consideration of the reasonableness of ignoring the applicable zoning scheme); *Incorporated Village of Lloyd Harbor v. Huntingdon, 149 N.E.2d 851 (N.Y. 1958)* (the court looked at the statutes involved to determine legislative intent).

See Comment, *The Inapplicability of Municipal Zoning Ordinances to Governmental Land Uses, 19 Syracuse L. Rev. 698 (1968).*

(n86)Footnote 86. *Matter of Monroe County, 533 N.Y.S.2d 702 (1988); Davis County v. Clearfield City, 756 P.2d 704 (Utah App. 1988); County Comm'rs of Bristol v. Conservation Comm'n of Dartmouth, 405 N.E.2d 637 (Mass. 1980).*

See Orange Lake Assocs. v. Kirkpatrick, 21 F.3d 1214 (2d Cir. 1994) (town board, a legislative body, could supersede state statute); *Pentel v. City of Mendota Heights, 13 F.3d 1261 (8th Cir. 1994)* (city's zoning ordinance preempted by FCC ruling); *United States v. Village of New Hempstead, 832 F. Supp. 76 (S.D.N.Y. 1993)* (preempting local zoning law was reasonable under Homeless Assistance Act).

(n87)Footnote 87. Note, *Governmental Immunity from Local Zoning Ordinances, 84 Harv. L. Rev. 869, 878 (1971).*

(n88)Footnote 88. *O'Brien v. Town of Greenburgh, 268 N.Y.S. 173 (1933), aff'd, 195 N.E. 210 (N.Y. 1935); Town of Queensbury v. City of Glens Falls, 193 N.Y.S.2d 174 (1959), aff'd, 193 N.Y.S.2d 445 (1959).*

(n89)Footnote 89. State *ex rel. Askew v. Kopp, 330 S.W.2d 882 (Mo. 1960); O'Connor v. City of Rockford, 279 N.E.2d 356 (Ill. App. 1972); Witzel v. Village of Brainard, 302 N.W.2d 723 (Neb. 1981); South Hill Sewer Dist. v. Pierce County, 591 P.2d 877 (Wash. App. 1979).*

(n90)Footnote 90. This qualification was made by the Supreme Court of Missouri just two years after its Askew decision, in *St. Louis County v. City of Manchester, 360 S.W.2d 638 (Mo. 1962).*

See Anderson v. Douglas County, 4 F.3d 574 (8th Cir. 1993) (municipality had power of eminent domain to condemn county's land, but this power was outweighed by county's interest relating to public health, safety and welfare).

(n91)Footnote 91. *County Comm'rs of Bristol v. Conservation Comm'n of Dartmouth, 405 N.E.2d 637 (Mass. 1980); Village on the Hill, Inc. v. Massachusetts Tpk. Auth., 202 N.E.2d 602 (Mass. 1964), cert. denied, 380 U.S. 955 (1965); Dearden v. City of Detroit, 269 N.W.2d 139 (Mich. 1978).*

(n92)Footnote 92. *City of Treasure Island v. Decker, 174 So. 2d 756 (Fla. Dist. Ct. App. 1965).*

(n93)Footnote 93. *Rutgers State Univ. v. Piluso, 286 A.2d 697 (N.J. 1972); Hillsborough Ass'n for Retarded Citizens, Inc. v. City of Temple Terrace, 322 So. 2d 571 (Fla. 1975); Pal-Mar Water Mgt. Dist. v. Martin County, 377 So. 2d 752 (Fla. App. 1979); Town of Oronoco v. City of Rochester, 197 N.W.2d 426 (Minn. 1972); Berger v. State, 364 A.2d 993 (N.J. 1976); City of Fargo, Cass County v. Harwood Twp., 256 N.W.2d 694 (N.D. 1977).*

(n94)Footnote 94. *Bingham v. City of Flint, 165 N.W.2d 628 (Mich. App. 1968).*

(n95)Footnote 95. *Beverly Shores Plan Comm'n v. Enright, 435 N.E.2d 565 (Ind. App. 1982).*

(n96)Footnote 96. *Fountain v. City of Jacksonville, 447 So. 2d 353 (Fla. App. 1984).*

(n97)Footnote 97. *See, e.g., Keicher v. Clackamas County, 29 P.3d 1155 (Or. App. 2001).*

(n98)Footnote 98. *Capman v. Long Beach Twp., 231 A.2d 852 (N.J. Super. 1967).*

(n99)Footnote 99. *St. Sophia Religious Ass'n v. Township of Cheltenham, 365 A.2d 1389 (Pa. Commw. 1976).*

(n100)Footnote 100. *Parish of St. Andrews Protestant Episcopal Church v. Zoning Bd. of Appeals, 232 A.2d 916 (Conn. 1967).*

A.A. Shamah v. Hellam Twp. Zoning Hearing Bd., 648 A.2d 1299 (Pa. 1994) (quarry company was given special exception to zoning to expand quarrying operations and neighbors appealed); *Warner v. Jerusalem Twp. Bd. of Zoning Appeals, 629 N.E.2d 1137 (Ohio 1993)* (township's appeal of zoning board decisions to grant property owner a variance).

(n101)Footnote 101. *Lapid-Laurel, LLC v. Zoning Bd. of Adjustment of the Township of Scotch Plains, 284 F.3d 442 (3d Cir. 2002)* (FHAA does not require local land use authorities to engage in informal interactive process with developer seeking variance on behalf of the handicapped).

(n102)Footnote 102. *Selectmen of Ayer v. Planning Board of Ayer, 336 N.E.2d 388 (Mass. App. 1975).*

Tanana Oil Corp. v. Town Bd. of Irondequoit, 613 N.Y. Supp. 2d 107 (1994) (landowner suit to challenge refusal to grant special use permit); *Burke v. Village of Glenview, 628 N.E.2d 465 (Ill. 1994)* (action by property owners for declaratory judgment respecting village zoning variance).

(n103)Footnote 103. *Bienz v. City of Dayton, 566 P.2d 904 (Or. App. 1977).*

Williamson v. Board of Zoning Appeals of Newton Township, 2003 Ohio 848(landowner did not suffer such unnecessary hardship as would have qualified for a variance).*Allegheny West Civic Council, Inc. v. Zoning Bd. of Adjustment of Pittsburgh, 689 A.2d 225 (Pa. 1997)* (Variance granted upon showing that contaminated property either cannot be used for any purpose under current zoning or could be used only at a cost that would represent unnecessary hardship); *Abe Oil Co. v. Zoning & Hearing Bd. of Richmond Twp., 649 A.2d 182 (Pa. 1994)* (reversal of zoning board when plaintiff failed to show hardship); *Long v. Board of Adjustment of City of Columbia, 856 S.W.2d 390 (Mo. 1993)* (failure to show hardship).

(n104)Footnote 104. *Fail v. La Porte County Bd. of Zoning Appeals, 355 N.E.2d 455 (Ind. App. 1976).*

FW Triangle LP v. Zoning Hearing Board of Upper Dublin Township, 820 A.2d 823, 2003 Pa. Commw. LEXIS 146 (downzoning of property did not constitute impermissible spot zoning); Fisher v.*Cranberry Townshhip Zoning Hearing Board, 819 A.2d 181 (Pa. Commw. 2003).*

Anderson v. Witt, 692 A2d 292 (Pa. Commw. 1997) (inability to sell a house because of its large size and the

prohibitive cost of converting it to an apartment complex were facts that constituted an insufficient showing of hardship to warrant a variance from residential zoning to convert it to a synagogue); *Freedom Ranch Inc. v. Board of Adjustment City of Tulsa, 878 P.2d 380 (Okla. 1994)* (judgment affirming denial of request for special zoning for convict pre-release center).

See also Save Oregon's Cape Kiwanda Org. v. Tillamook County, 34 P.3d 745 (Or. App. 2001) (developer complied with ordinance requiring it to present geologic hazard assessment with information on bedding planes in its application for variance).

(n105)Footnote 105. *Udell v. Haas, 288 N.Y.S.2d 888 (1968).*

Pinecrest Homeowners Association v. Glen A. Cloninger Associates, 62 P.3d 938 (Wash. App. 2003) rev'd, 87 P.3d 1176 (Wash 2004) (rezoning could not be based on the authority of the comprehensive plan, in the absence of zoning regulations).

(n106)Footnote 106. *Johnson v. City of Geneva, 346 N.E.2d 444 (Ill. App. 1976); Nehrbas v. Incorporated Village of Lloyd Harbor, 140 N.E.2d 241 (N.Y. 1957); Village of Larchmont v. Town of Mamaroneck, 147 N.E. 191 (N.Y. 1924).*

(n107)Footnote 107. *Town of Bloomfield v. New Jersey Hwy. Auth., 113 A.2d 658 (N.J. 1955); Aviation Servs. v. Board of Adj., 119 A.2d 761 (N.J. 1956).*

City of New Orleans v. Board of Comm'rs of the Orleans Levee Dist., 640 So. 2d 237 (La. 1994) (action brought by city seeking declaration of zoning violation and injunction).*Township of Bingham v. RLTD Railroad Corporation, 624 N.W.2d 725 (Mich. 2001)* (state law preempted the application of the township's zoning powers to a rail corridor).

(n108)Footnote 108. *Hoffman v. Kinealy, 389 S.W.2d 745 (Mo. 1965).*

Poole v. Berkeley County Planning Comm'n, 488 S.E.2d 349 (W. Va. 1997) (conveyance of salvage yard that had been operated prior to the enactment of an ordinance requiring licensing of such sites did not terminate its status as a prior non-conforming use, so long as the salvage yard had been operated continuously and the use had not changed or been expanded); *Chekenian v. Town Bd. of Smithtown, 609 N.Y. Supp. 2d 280 (1994)* (action brought to have amortization period declared invalid); *Lawrence v. Clackamas County, 43 P.3d 1192 (Or. App. 2002)* (prior determination of an interruption of non-conforming use did not preclude finding continuous use under new 20-year rule).

(n109)Footnote 109. *See, e.g.,* Minn. Stat. Ann. §394.36.

See also County of Isanti v. Peterson, 469 N.W.2d 467 (Minn. App. 1991) (held that county was authorized to terminate nonconforming use after one-year period of discontinuance; proof of abandonment not necessary).

See also Fountain Village Dev. Co. v. Multnomah County, 31 P.3d 458 (Or. App. 2001) (vested right to construct nonconforming use may be lost by abandonment or discontinuance).

(n110)Footnote 110. *Gordon Paving Co. v. Blaine County Bd. of County Comm'rs, 572 P.2d 164 (Idaho 1977); Board of Selectmen of Blackston v. Tellestone, 348 N.E.2d 110 (Mass. App. 1976).*

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(n111)Footnote 111. 1 Zoning and Land Use Planning 1-41 (Eric Damian Kelly gen. ed., Matthew Bender).

(n112)Footnote 112. *Niccollai v. Planning Bd. of Wayne, 372 A.2d 352 (N.J. App. 1977).*

(n113)Footnote 113. *Michiels v. Fulton County, 405 S.E.2d 40 (Ga. 1991).*

City of New York v. Delafield 246 Corp., 662 N.Y.S.2d 286 (N.Y. App. Div. 1997) (declaration controlling the future development of certain property, executed in consideration of City Planning Commission's grant of permits for development were binding on successor owners who sought to develop the property).

(n114)Footnote 114. Lutheran Church in *Am. v. City of New York, 359 N.Y.S.2d 7 (1975).*

(n115)Footnote 115. *Dooley v. Town Planning & Zoning Comm'n of Town of Fairfield, 197 A.2d 770 (Conn. 1964).*

(n116)Footnote 116. *Beverly Bank v. Illinois Dep't of Transp., 579 N.E.2d 815 (Ill. 1991).*

(n117)Footnote 117. *Hills v. Corrigan, 278 N.E.2d 658 (Ohio 1972), cert. denied, Chongris v. Corrigan, 409 U.S. 919 (1972).*

(n118)Footnote 118. *League of Greater New Brunswick v. Mayor & Council, 456 A.2d 390 (N.J. 1983).*

Countrywalk Condos, Inc., v. City of Orchard Lake Village, 221 Mich. App. 19 (Mich. App. 1997) (Zoning regulation that totally excluded multiple-family dwellings in order to reduce traffic congestion on the city's already overburdened roads declared constitutional because it bore a rational relationship to health, safety, or general welfare of the community); *Trustees of Union College v. Members of Schenectady City Council, 230 A.D.2d 17 (N.Y. App. Div. 1997)* (Ordinance which excluded educational uses from the class of special permit uses is unconstitutional because it circumvents any mechanisms which would allow plaintiff to show that an educational use of the property does not injure the public welfare and is in furtherance of the public good).

Meyers, Mandara. "Comment: (Un)equal Protection for the Poor: Exclusionary Zoning and the Need for Stricter Scrutiny." *6 U. Pa. J. Const. L. 349 (2003)* (article proposes an expansion of the Equal Protection Clause to address the issue of exclusionary zoning and argues that state courts are not the proper forum for addressing the issue); *Landon Holdings, Inc. v. Grattan Twp., 667 N.W.2d 93 (Mich. App. 2003)* (ordinance deemed constitutional because it does not completely exclude manufactured homes).

(n119)Footnote 119. 1 Zoning and Land Use Planning, 1-49 to 1-50 (Eric Damian Kelly gen. ed., Matthew Bender).

(n120)Footnote 120. *Golden v. Planning Bd. of Town of Ramapo, 285 N.E.2d 291 (N.Y. 1972), appeal dismissed, 409 U.S. 1003 (1972).*

(n121)Footnote 121. *See, e.g., Construction Indus. Ass'n of Sonoma County v. City of Petaluma, 522 F.2d 897 (9th Cir. 1975), rev'g, 375 F. Supp. 574 (N.D. Cal. 1974).*

Toby's of Alexandria, Inc. v. County of Douglas, 545 N.W.2d 54 (Minn. App. 1996) (appeal from denial of conditional use permit); *Hansen v. Chelan County, 913 P.2d 409 (Wash. 1996)* (in connection with land designated as agricultural in the comprehensive plan, but zoned for general use, denial of permit for proposed golf course was improper).

(n122)Footnote 122. *National Land & Inv. Co. v. Kohn, 215 A.2d 597 (Pa. 1965).*

(n123)Footnote 123. 1 Zoning and Land Use Controls, 1-56 to 1-57 (Eric Damian Kelly gen. ed., Matthew

Bender). *See Associated Home Bldrs. v. City of Walnut Creek, 484 P.2d 606* (Cal.), *appeal dismissed, 404 U.S. 878 (1971).*

(n124)Footnote 124. *See, e.g., Admiral Dev. Corp. v. City of Maitland, 267 So. 2d 860 (Fla. 1972).*

See also City of Stafford v. Gullo, 886 S.W.2d 524 (Tx. 1994) (city appeals order declaring that it cannot require developer to dedicate additional right-of-way or pay to have street widened); *Dolan v. City of Tigard, 114 S. Ct. 2309 (1994)* (building permit conditions); *Miexell v. Ross Twp. Bd. of Supvrs., 623 A.2d 429 (Pa. Commw. 1993)* (landowner seeks judicial review of conditions for approval of subdivision).

(n125)Footnote 125. *See McClure v. City of Springfield, 28 P.3d 1222 (Or. App. 2001).*

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CHAPTER 74 AN OVERVIEW OF LAND USE REGULATIONS

8-74 Thompson on Real Property, Thomas Editions § 74.03

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§ 74.03 Planning.

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Planning is a broader term than zoning and embraces zoning as one of the land use techniques for carrying out the plan. Planning is also broader in the sense that it considers factors well beyond the immediate use of land, factors that both impact on land use and are impacted by land use. Conscientious planning, taking future circumstances sufficiently into account, is a major means of assurance that the zoning ordinances implementing the plan will not be arbitrary and capricious in their conception or application.

A basic component of any municipal planning regimen is a master plan, which sets forth the objectives for land use planning and the predictions or projections about future development. A component of the master plan is a comprehensive zoning plan, usually explicitly required by the state zoning enabling act. n126 Occasionally, the validity of a zoning ordinance may be measured by whether it comports with the comprehensive zoning plan. n127 The comprehensive plan is intended to achieve balance in the community by means of zoning restrictions that are not piecemeal and are therefore less likely to be arbitrary, capricious or unreasonable. n128 Proper planning usually eliminates most "spot zoning," which is special zoning for limited areas that is different from land use patterns in the surrounding areas.

It should also be made explicit that a thoughtful master plan or comprehensive plan is not limited by the objectives of merely eliminating nuisance situations, but may also affirmatively pursue conditions that enhance life in the municipality.

FOOTNOTES:
(n1)Footnote 126. The requirement is stated in §3 of the Standard State Zoning Enabling Act.

Enterprise Partners v. County of Perkins, 619 N.W.2d 464 (Neb. 2000) (the county's failure to adopt a comprehensive development plan before adopting its land use planning ordinances rendered the ordinances invalid).

(n2)Footnote 127. *City of Milford v. Schmidt, 120 N.W.2d 262 (Neb. 1963).*

City of Crystal v. Fantasy House, Inc., 569 N.W.2d 225 (Minn. App. 1997) (interim zoning ordinance which restricted adult-oriented businesses from locating in close proximity to a church, school, daycare, residential area, or park was constitutional as it provided alternative areas for location of such businesses and served a legitimate public interest of preventing negative secondary effects of such businesses).

(n3)Footnote 128. *Chapman v. City of Troy, 4 So. 2d 1 (Ala. 1941).*

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§ 74.04 Subdivision Regulations.

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An important adjunct to or component of comprehensive planning is subdivision control. The objectives of subdivision regulations are to establish some degree of uniformity in subdivision layout and standards, require proper construction of improvements and require adherence to standard procedures. Subdivision regulations usually include rules or standards for streets, lot size and clearances, improvements that are required, easements, environmental concerns, n129 reservations, utilities, endorsements, and review procedures. n130

In general, review of proposed subdivisions by planning commissions occurs in several stages. In the very preliminary stage, a developer may benefit from discussions with planning officials that describe the subdivision requirements. Next, the developer will seek conditional approval of a preliminary plat and more detailed design information. Finally, when the formal and full plat, with all required informational detail is submitted, final approval can be granted after public notice and hearing. An approved plat is recorded as a document related to real property title; recording of unapproved plats is not permitted, so, along with the granting of the building permit, final subdivision approval is a practical necessity for proceeding with the development. n131

FOOTNOTES:

(n1)Footnote 129. *See Moss v. City of Bellingham, 31 P.3d 703 (Wash. App. 2001).*

(n2)Footnote 130. *See Jones v. Nichols, 765 N.E.2d 153 (Ind. App. 2002)* (developer was not required to vacate and re-plat subdivision in order to grant easement that was not recorded on plat).

(n3)Footnote 131. *Noble Manor Co. v. Pierce County, 913 P.2d 417 (Wash. App. 1996)* (acceptance of developer's short plat application vested the right to develop the land).

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§ 74.05 Planned Unit Developments.

"Planned unit development" is a somewhat generic term for a variety of residential developments that impose density requirements only on the development as a whole, rather than on individual lots within the development. Typically, the dwelling units are clustered closer together than would normally be permitted by density requirements, and then larger areas of common open space, often with various amenities, are included within the development, open to all residents of the development. A planned unit development should not be approved unless the local zoning ordinance includes provision for a planned unit development, n132 along with adequate standards and guidelines to ensure that approvals are fairly granted. n133

FOOTNOTES:
(n1)Footnote 132. *Eves v. Zoning Bd. of Adj. of Lower Gwynedd Twp., 164 A.2d 7 (Pa. 1960).*

Citizens For Mt. Vernon v. City of Mt. Vernon, 947 P.2d 1208 (Wash. 1997)(proposed PUD which directly conflicted with current zoning regulations could not be approved absent a showing of significant changed circumstances which would justify rezoning).

See also Cherokee County v. Martin, 559 S.E.2d 138 (Ga. App. 2002). Pinecrest Homeowners Ass'n v. Glen A. Cloninger & Assocs., 87 P.3d 1176 (Wash. 2004) (city council may process rezoning application for a PUD before the enactment of the specific zoning ordinance allowing the PUD).

(n2)Footnote 133. *See Department of Transp. v. City of Klamath Falls, 34 P.3d 667 (Or. App. 2001).*

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§ 74.06 Maps.

By means of "official maps" municipalities place on record a depiction of the streets, waterways and public areas that have been authorized for the community. This has the effect of preserving rights of way for present and future streets and drainage and effectively blocks issuance of building permits for construction that would interfere with those rights of way.

An official map is subject to consultation from the planning board and review at properly noticed public hearings, and then it must be approved by the municipality's governing body. Amendments to the official map must go through a similar process. One form of indirect amendment, or at least a filling in of the map, is through adoption of subdivision plats; the details of a subdivision plat, once approved, become part of the official map.

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CHAPTER 74 AN OVERVIEW OF LAND USE REGULATIONS

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§ 74.07 Building and Housing Codes.

The adoption and enforcement of building codes and housing codes (and various other health and safety codes) comprise another land use regulation technique. While building codes help ensure that the buildings are safe, housing codes are more broadly concerned with achieving and maintaining standards of habitability in dwellings. Housing codes typically set standards for density of occupancy, lighting, ventilation, heating and sanitary facilities.

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CHAPTER 74 AN OVERVIEW OF LAND USE REGULATIONS

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§ 74.08 "Regulatory Takings."

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As was mentioned at the beginning of this chapter, n134 if a zoning ordinance as applied to an individual landowner or group of landowners imposes excessive hardship, it may not be upheld, or it may result in an unconstitutional "taking" of private property without just compensation. n135

The "taking" terminology derives from the Fifth Amendment to the U.S. Constitution, which declares, "nor shall private property be taken for public use, without just compensation." n136 If the exercise of land use regulations under the state's police power bears no relationship to a legitimate public purpose, or if it effectively deprives the landowner of virtually all use and value of the land, it may be considered a "taking" that can be accomplished only by the governmental entity providing just compensation to the landowner. n137

One of the most fertile fields of conflict in the "takings" area is land whose use is restricted by imposition of federal and state environmental regulations. n138 These restrictions are fully discussed in Chapter 75, "The Impact of Environmental Regulation on Real Property," and in Chapter 81, "Regulatory Takings," *infra*.

FOOTNOTES:
(n1)Footnote 134. §74.02(b), *supra.*

(n2)Footnote 135. *See City of Austin v. Travis County Landfill Co., 73 S.W.3d 234, 2002 Tex. LEXIS 34* (in absence of evidence that flights from city airport over landfill directly impacted property's surface and caused value to decline, alleged taking by overflights was not compensable); *Horan v. City of Federal Way, 39 P.3d 366 (Wash. App. 2002)* (city could not enforce sign-removal order until city complied with Scenic Vistas Act's requirements for providing for compensation to sign owners).

(n3)Footnote 136. Similar provisions are in most state constitutions.

(n4)Footnote 137. *See Tahoe-Sierra Preservation Council v. Tahoe Reg'l Planning Agency, 535 U.S. 302, 122 S. Ct. 1465, 152 L. Ed. 2d 517 (2002)* (question whether Takings Clause requires compensation when government enacts

temporary regulation denying property owner all viable economic use of property is to be decided by applying *Penn Central* factors).

Seiber v. United States, 364 F.3d 1356 (Fed. Cir. 2004) (denial of permit did not constitute a violation of the Takings Clause under *Penn Central* factors); *Cane Tenn., Inc. v. United States, 57 Fed. Cl. 115 (Ct. Cl. 2003)* (a diminution in value of 49.6 percent does not constitute a violation of the Takings Clause under the *Penn Central* test); *Am. Pelagic Fishing Co., L.P. v. United States, 55 Fed. Cl. 575 (Ct. Cl. 2003)* (legislation retroactively depriving owners use of commercial fishing boat constitutes a taking under the Penn Central test); *Friedenburg v. N.Y. State Dep't of Envtl. Conservation, 767 N.Y.S.2d 451 (2003)* (legislation resulting in a ninety-five percent diminution of value constitutes a taking).

(n5)Footnote 138. *Palazzolo v. Rhode Island, 533 U.S. 606 (2001).*

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Supp. to § 74.02 Zoning.

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§ 74.02(b) The Constitutional Basis for Zoning. [Go To Main]

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Union Land Owners Ass'n v. County of Union, 689 S.E.2d 504 (N.C. Ct. App. 2009) (The municipality's police power to regulate subdivisions must be granted by the state.); *Five C'S, Inc. v. County of Pasquotank, 672 S.E.2d 737 (N.C. Ct. App. 2009)* (Counties are instrumentalities of the state and possess only that power delegated by the state.)

Add:

Homebuilders Ass'n of Mississippi, Inc. v. City of Brandon, Miss., No. 3:07-cv-716- *WHB-LRA, 2009 U.S. Dist. LEXIS 49087* (S.D. Miss. June 10, 2009) (municipality statutorily permitted to regulate the size of buildings, but minimum square feet requirement may result in a discriminatory impact).

Add:

Union Land Owners Ass'n v. County of Union, 689 S.E.2d 504 (N.C. Ct. App. 2009) (A county may regulate land use when in so doing it believes it will promote the most appropriate use of the restricted property and protect the value of other properties.); *Five C'S, Inc. v. County of Pasquotank, 672 S.E.2d 737 (N.C. Ct. App. 2009)* (holding that the nexus between the county's intention in protecting property values and the actual effect of the zoning ordinance was too tenuous).

§ 74.02(c) The Common Law and Statutory Basis for Zoning. [Go To Main]

§ 74.02(c)(1) Zoning as Form of Police Power.

Add:

Tex. Midstream Gas Servs. LLC v. City of Grand Prairie, Tex., No. 08-11200, 2010 U.S. App. LEXIS 11108 (5th Cir. June 1, 2010) (eminent domain power does not supersede a city's generally applicable zoning ordinances); *Zimmerman v. Bd. of County Comm'rs of Wabaunsee County, Kan., No. 98,487, 2009 Kan. LEXIS 1073* (Kan. Oct. 30, 2009) (the county board acted reasonably in amending its zoning regulations to permit only small wind farms).

Add:

Union Land Owners Ass'n v. County of Union, 689 S.E.2d 504 (N.C. Ct. App. 2009) (the municipality's police power to regulate subdivisions must be granted by the state and may not exceed the authority granted); *Schefer v. City Council of Falls Church, 691 S.E.2d 778 (Va. 2010)* (a county ordinance may not exceed the authority granted by state); *Greater Wash. Park Neighborhood Ass'n v. Bd. of Adjustment of Montgomery, 24 So. 3d 443 (Ala. Civ. App. 2009)* (a municipality cannot extend, circumscribe, or alter the powers granted by the state).

Add:

Marianne Craft Norton Trust v. City Council of Hudson, Iowa, No. 9-450 / 08-1704, *2009 Iowa App. LEXIS 1436* (Iowa Ct. App. Oct. 7, 2009) (in granting a rezoning request the city council complied with the zoning code); Rude v. Bd. of Adjustment of Mapleton, Iowa, No. 9-060 / 08-1265, *2009 Iowa App. LEXIS 497* (Iowa Ct. App. May 29, 2009) (zoning amendments that allowed special use permits were properly enacted).

§ 74.02(c)(2) The Statutory Foundation for Zoning.

§ 74.02(c)(2)(i) State Enabling Acts Generally.

Add:

Sinkler v. County of Charleston, 690 S.E.2d 777 (S.C. 2010) (holding that a county ordinance did not fit within the parameters of a planned development according to the Local Government Comprehensive Planning Enabling Act).

§ 74.02(c)(2)(ii) The Standard State Zoning Enabling Act.

Add:

Anderson House, LLC v. Mayor and City Council of Rockville, Md., 939 A.2d 116 (Md. App. 2008) (newly enacted zone had to conform to provisions of state zoning enabling act); *Hendricks County Bd. of Com'rs v. Rieth-Riley Const. Co., Inc., 868 N.E.2d 844 (Ind. App. 2007)* (zoning ordinance was permitted to include provision not enumerated in the zoning enabling act, but did not meet the Act's specificity requirements).

Add:

Greater Wash. Park Neighborhood Ass'n v. Bd. of Adjustment of Montgomery, 24 So. 3d 443 (Ala. Civ. App. 2009) (standards prescribed for governing board in giving special exceptions).

Add:

Schefer v. City Council of Falls Church, 691 S.E.2d 778 (Va. 2010) (city ordinance regulating height of single-family dwellings did not conflict with state code); *Sinkler v. County of Charleston, 690 S.E.2d 777 (S.C. 2010)* (an ordinance rezoning agricultural land did not meet the requirements for a planned development district under the state enabling act).

§ 74.02(c)(3) Limits on the Exercise of Zoning Power.

§ 74.02(c)(3)(i) Constitutional Limitations.

Add

Festa v. New York City Department of Consumer Affairs, 830 N.Y.S.2d 133 (2007) (laws and regulations governing cabarets were rationally related to permissible governmental objectives); *Osborne v. Grussing, 477 F.3d 1002* (8th Cir. 2007) (allegation that zoning ordinances were selectively enforced was rejected); *Rittenhouse Row v. Aspite, 917 A.2d 880 (Pa. Cmwlth. 2006)* (a zoning ordinance regulating the uses of buildings within a designated area did not violate equal protection or due process of law).

Add:

For the People Theatres of NY, Inc. v City of New York, 897 N.Y.S.2d 618 (N.Y. Sup. Ct. 2010) (held that a zoning ordinance targeting establishments whose primary business is adult entertainment does not violate the constitution).

Add:

Schefer v. City Council of Falls Church, 691 S.E.2d 778 (Va. 2010) (discriminatory land use regulations not substantially related to the health, safety, and welfare of the public deny the equal protection of the laws); *Gypsum Res., LLC v. Masto, 672 F. Supp. 2d 1127 (U.S. Dist. Nev. 2009)* (a senate bill that would alter a county's zoning powers was declared unconstitutional).

Add:

Chicago Area Council, Inc. v. Blue Lake Twp. (Mich. App., March 18, 2010) (zoning ordinance may be unconstitutional if there is no legitimate governmental interest being advanced); *Coventry Woods Neighborhood Ass'n v. City of Charlotte, 688 S.E.2d 538 (N.C. Ct. App. 2010)* (constitutional protections against takings require a property interest on the part of those seeking protection).

Add:

Five C'S, Inc. v. County of Pasquotank, 672 S.E.2d 737 (N.C. Ct. App. 2009) (holding that the nexus between the county's intention in protecting property values and the actual effect of the zoning ordinance was too tenuous).

Add:

Risko v. Grand Haven Charter Twp. Zoning Bd. of Appeals, 773 N.W.2d 730 (Mich. Ct. App. 2009) (unless zoning ordinance promoting a reasonable governmental interest is arbitrary, capricious, or unfounded, it will generally pass constitutional muster).

§ 74.02(c)(3)(ii) Statutory Limitations.

Add:

Andrews v. Planning and Zoning Com'n of Town of Wallingford, 904 A.2d 275 (Conn. App. 2006) (planning and zoning commission exceeded its statutory authority); *Durham Land Owners Ass'n v. County of Durham, 630 S.E.2d 200 (N.C. App. 2006)* (statutes authorizing counties to adopt zoning ordinances did not provide the enabling legislation).

Cerrillos Gravel Products, Inc. v. Board of County Commissioners of Santa Fe County, 117 P.3d 932 (N.M. 2005) (under its statutory authority the county could enforce its land use ordinances by suspending mining land use permits); *N.W.D.A. v. City of Portland, 108 P.3d 589 (Ore. App. 2005)* (city decision on parking structures was not inconsistent with the comprehensive plan and therefore not in violation of state law).

Add:

Union Land Owners Ass'n v. County of Union, 689 S.E.2d 504 (N.C. Ct. App. 2009) (holding that a municipality exceeded the powers delegated by the state enabling statute in enacting a county public facilities ordinance); *Owens v. City Council of Norfolk, 78 Va. Cir. 436 (Va. Cir. 2009)* (zoning ordinance fell within city council's statutory authority).

§ 74.02(c)(3)(iii) Territorial Limitation

Add:

Century Ctr. at Braselton, LLC v. Town of Braselton, 677 S.E.2d 106 (Ga. 2009) (held that a zoning ordinance affecting property outside town's boundaries was invalid).

§ 74.02(d) General Principles of Zoning in Application.

Add:

Fasbender v. Lewis & Clark County Bd. of County Comm'rs, 218 P.3d 69 (Mont. 2009) (A permanent zoning regulation must be noticed to be in compliance with state enabling act).

Add:

Porter County Bd. of Zoning Appeals v. SBA Towers II, LLC (Ind. App., May 19, 2010) (held that the construction of a communications tower was within the spirit, purpose, and intent of the zoning ordinance and served the public welfare); *Pennsy Supply, Inc. v. Zoning Hearing Bd., 987 A.2d 1243 (Pa. Commw. Ct. 2009)* (An exception is a use permitted within the standards and criteria in the zoning ordinance).

Add:

Greater Wash. Park Neighborhood Ass'n v. Bd. of Adjustment of Montgomery, 24 So. 3d 443 (Ala. Civ. App. 2009)

(zoning regulations provide conditions for granting exceptions that should be followed by the decision-making body).

Add

Santos v. Zoning Bd. of Appeals of Town of Stratford, 918 A.2d 303 (Conn. App. 2007) (hardship required for variance not established); *Solebury Tp. v. Solebury Tp. Zoning Hearing Bd., 914 A.2d 972 (Pa. Cmwlth. 2007)* (variance granted due to hardship).

Add:

Morgan v. Zoning Bd. of Appeals of Town of Weymouth (Mass. Land Ct., July 31, 2009) (holding that no hardship existed sufficient to grant variance to landowner); *Lamb v. Zoning Bd. of Appeals, 923 N.E.2d 1078 (Mass. App. Ct. 2010)* (a property owner who transforms his property from a conforming parcel to a non-conforming parcel creates his own hardship and is not entitled to variance); *Boyer v. Zoning Hearing Bd. of Franklin Twp., 987 A.2d 219 (Pa. Commw. Ct. 2010)* (holding that a hardship existing due to natural conditions of the parcel, not those conditions imposed by the zoning ordinance, is not qualified for variance); *Greater Wash. Park Neighborhood Ass'n v. Bd. of Adjustment of Montgomery, 24 So. 3d 443 (Ala. Civ. App. 2009)* (a variance requires a showing of unnecessary hardship).

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Add:

Friends of the Bethany Place, Inc. v. City of Topeka, 222 P.3d 535 (Kan. Ct. App. 2010) (considerations in granting alteration to historical parcel include the availability of feasible and prudent alternatives and the amount of planning to minimize harm to historic property).

Add:

Schefer v. City Council of Falls Church, 691 S.E.2d 778 (Va. 2010) (holding that a discrepancy in height restrictions between standard and substandard single family dwelling lots was not facially discriminatory).

Add:

Foothills of Fernley, LLC v. City of Fernley, 2009 U.S. App. LEXIS 24468 (9th Cir. Nev. 2009) (dedication fees for city

water held to be constitutional as they are rationally related to a legitimate government purpose).

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Add:

Wilson v. City of Akron Council, 2006 Ohio 1483 (Ohio Ct. App. 2006) (the city properly relied on its land use plan to deny a requested conditional use); 1000 *Friends of Oregon v. Yamhill County, 126 P.3d 684 (Ore. App. 2005)* (county ordinances amended county comprehensive plan text and map and zoning ordinance text and map).

Add:

Lake County First v. Polson City Council, 218 P.3d 816 (Mont. 2009) (a zoning ordinance should comply substantially with master zoning plan).

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Add:

Jackson, Inc. v. Planning & Zoning Comm'n of Avon, 982 A.2d 1099 (Conn. App. Ct. 2009) (subdivision regulations must contain known and fixed standards to be applied uniformly to cases of a like nature).

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Supp. to § 74.08 "Regulatory Takings."

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Add:

Lamar Co., LLC v. City of Fremont, 771 N.W.2d 894 (Neb. 2009) (claims that a zoning regulation deprives an entity of a vested property right should be analyzed according to the *Takings Clause of the Fifth Amendment*).

Add:

Lake Pointe Constr. Co. v. City of Avon, 913 N.E.2d 1022 (Ohio Ct. App., Lorain County 2009) (where a land ordinance acts as a regulatory taking, by denying landowner the use of his land, the government is required to compensate for "use" of the land).

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CHAPTER 75 THE IMPACT OF ENVIRONMENTAL REGULATION ON REAL PROPERTY

8-75 Thompson on Real Property, Thomas Editions 75.syn

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§ 75.03(a)(4) Aviation Safety and Noise Abatement Act of 1979 *(49 U.S.C. §§ 47501* et seq.).

§ 75.03(a)(5) Clean Air Act *(42 U.S.C. §§7401* to 7642).

§ 75.03(a)(6) Clean Vessel Act of 1992 *(33 U.S.C. §1322* note).

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§ 75.03(a)(9) Comprehensive Environmental Response, Compensation, and Liability Act of 1980 *(42 U.S.C. §§9601* to 9675) [CERCLA].

§ 75.03(a)(10) Emergency Planning and Community Right to Know Act of 1986 *(42 U.S.C. §§11001* to 11050).

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§ 75.03(a)(12) Federal Facility Compliance Act of 1992 *(42 U.S.C. §6901* note) a.k.a. the Land Disposal Program Flexibility Act of 1996.

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§ 75.03(a)(15) Lead Exposure Reduction Act *(15 U.S.C. §§2681* to 2692).

§ 75.03(a)(16) Lead Contamination Control Act of 1988 *(42 U.S.C. §§300j-21* to 300j-25).

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CHAPTER 75 THE IMPACT OF ENVIRONMENTAL REGULATION ON REAL PROPERTY

8-75 Thompson on Real Property, Thomas Editions § 75.01

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§ 75.01 Introduction.

The purpose of this chapter is to point out the most significant ways that environmental regulation by governments impacts on privately held land. The chapter is not a comprehensive or methodical dissertation on how governments are attempting to combat environmental damage or conserve resources for the future; the huge body of technical information necessary for such an undertaking is well beyond the scope of the present chapter. n1 However, in recent years anciently derived rights and interests in real property have been profoundly affected by environmental regulation, and this chapter will describe those effects. Environmental regulation is a dynamic area, and property interests that may be free of regulation or in compliance with standards in one decade may be at risk a short time later. Therefore, the emphasis in this chapter will be on discussion of basic sources of law and regulation, with the hope that the use of this material as a reference resource may be prolonged. Because of the heavy reliance on statutory and regulatory sources for documentation in this chapter, computer-assisted research instructions are less essential for research and are not given.

FOOTNOTES:
(n1)Footnote 1. For coverage of the entire spectrum of federal and state environmental law, see Environmental Law Practice Guide: State and Federal Law (Michael B. Gerrard ed., Matthew Bender).

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CHAPTER 75 THE IMPACT OF ENVIRONMENTAL REGULATION ON REAL PROPERTY

8-75 Thompson on Real Property, Thomas Editions § 75.02

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§ 75.02 Brief History of Federal Environmental Regulation in the United States.

The 1899 Rivers and Harbors Act n2 was perhaps the first authentic federal environmental legislation; intended mostly to deal with obstructions in navigable waters, its purpose was quite narrow. The adverse environmental impacts of post-World War II industrialization began to be widely noticed in the 1960's, although some earlier environmental legislation had been enacted. Federal water pollution legislation appeared in 1948 and 1956, and federal air pollution laws were adopted in 1955 and 1963. Solid waste legislation was approved in 1965, further water pollution controls and noise controls in 1970, toxic substance control and resource conservation and recovery in 1976, and strengthened air and water pollution control in 1977. The National Environmental Policy Act of 1969 introduced the serious employment of environmental impact statements, assuring fuller consideration of environmental values in the nation's growth and development. Cleanup legislation followed in the 1980's.

Meanwhile, environmental litigation in the 1960's established that parties with environmental interests had standing to challenge those with traditional economic interests. Citizen suit provisions in the major statutes opened the way for public interest groups to influence the course of development through litigation. The spinoff from environmental litigation to other fields of law has been substantial:

> In the course of its development, the field of environmental law made reciprocal contributions to other fields of law. The efforts of citizens and citizen groups to participate in the enforcement of pollution control laws and regulations led to the institutionalization of the private attorney general in citizen suit provisions in the 1970 and 1972 air and water pollution legislation. The general gain for public interest litigation was immeasurable because there are now scores of citizen suit provisions in protective legislation, whether or not environmental. Environmental law has made major contributions, too, to the general area of administrative law. Environmental law, which involves standard setting and rulemaking of a sophisticated technical nature by government agencies, as well as administrative determination of controversies and the issuance of administrative orders and their enforcement, is clearly a field of administrative law. Because of the high level of activity in the field, and because of the complex nature of the area, decisions with environmental implications now make up the majority of administrative law decisions in the federal courts... n3

FOOTNOTES:
(n1)Footnote 2. *33 U.S.C. §401 et seq.*

(n2)Footnote 3. Frank P. Grad, Treatise on Environmental Law § 1.01 (Matthew Bender).

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CHAPTER 75 THE IMPACT OF ENVIRONMENTAL REGULATION ON REAL PROPERTY

8-75 Thompson on Real Property, Thomas Editions § 75.03

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§ 75.03 Summary of Federal Environmental Laws That Impact Real Property.

1986 Internal Revenue Code

Since the explosion of interest in environmental protection burst forth in enormous amounts of well-intended laws and regulations beginning in the 1970's, it has become increasingly difficult to maintain a comprehensive overview of this area of the law. This section is intended to point out and summarize the principal items of legislation that form the foundation of American environmental regulation, to summarize their respective intended purposes, and to show some of the interrelationships that have caused confusion. Quite often, a separate and distinct statute will be enacted to deal with an individual environmental problem, but will then be codified as part of a larger, older piece of environmental legislation, somewhat losing its identity and its claim on public awareness.

The legislation summarized in this section has been divided into two main groupings. The first contains the legislation dealing mainly with combatting hazards to the environment. The second consists of legislation intended to implement conservation measures. In each group, the individual items of legislation are listed and summarized in alphabetical order. The summaries are mostly drawn either from the text of the law itself or from the leading committee reports published as part of the statute's legislative history.

This material, presented in this fashion, will not present an orderly picture of how environmental regulation functions in this country, but will serve as a reference resource for the primary legal materials of that environmental regulation.

§ 75.03(a) Legislation for Combatting Environmental Hazards.

§ 75.03(a)(1) Acid Precipitation Act of 1980 *(42 U.S.C. §§8901* to 8912).

(b) The Congress declares that it is the purpose of this subchapter--

(1) to identify the causes and sources of acid precipitation;

(2) to evaluate the environmental, social and economic effects of acid precipitation; and

(3) based on the results of the research program established by this subtitle and to the extent

consistent with existing law, to take action to the extent necessary and practicable (A) to limit or eliminate the identified emissions which are sources of acid precipitation, and (B) to remedy or otherwise ameliorate the harmful effects which may result from acid precipitation.

(c) For purposes of this subtitle the term "acid precipitation" means the wet or dry deposition from the atmosphere of acid chemical compounds. n4

§ 75.03(a)(2) Act to Prevent Pollution from Ships *(33 U.S.C. §§1901* to 1912).

The purpose of this legislation is to implement the Protocol of the 1978 Relating to the International Convention for the Prevention of Pollution from Ships, 1973, and for other purposes. This Marpol Protocol has been partially implemented by the enactment of the Port and Tanker Safety Act of 1978 (Public Law 94-474). This bill will complete the required implementing legislation. Enactment should materially influence other maritime nations to ratify the treaty and thus assist in bringing it into force internationally ...

The 1973 Pollution Convention recognized ... that, even with the increasing use of methods to reduce the amounts of oil and water mixtures to be disposed of, there remained a need to provide sufficient shoreside reception facilities to receive polluting residues and mixtures. Under the Convention, as modified by the Marpol Protocol, signatory nations agreed to provide reception facilities for excessive oil residues in crude oil loading ports, in ports loading more than 1,000 metric tons of product oil, and ship repairs ports. [This legislation] will enable the United States to carry out this commitment. n5

§ 75.03(a)(3) Asbestos Hazard Emergency Response Act of 1986 (part of the Toxic Substances Control Act at §§201 to 214 *(15 U.S.C. §§2641* to 2654)).

The purpose of [this legislation] is to prevent unreasonable risks of injury to health or the environment associated with the manufacture, processing, distribution in commerce, use, or disposal of chemical substances. The bill is designed to fill a number of regulatory gaps which currently exist. They are:

1. PREMARKET REVIEW

While certain environmental health statutes may be used to protect health and the environment from chemical substances, only pesticides, drugs, and food additives undergo premarket scrutiny prior to first manufacture.

2. DIRECT REGULATION OF CHEMICALS

While air and water laws authorize limitations on discharges and emissions, the Occupational Safety and Health Act authorizes the establishment of ambient air standards for the workplace, and the Consumer Product Safety Act authorizes standards with respect to consumer products, there are no existing statutes which authorize the direct control of industrial chemicals themselves for their health or environmental effect (except section 211 of the Clean Air Act, which authorizes the regulation of fuel additives).

3. CONSIDERATION OF ALL THE RISKS

While individual agencies may be authorized to regulate occupational, environmental, or direct consumer hazards with respect to a chemical substance, there is no agency which has the authority to look comprehensively at the hazards associated with the chemical. Existing authority allows the agencies to only look at the hazards within their jurisdiction in isolation from other hazards associated with the

same chemical. The [legislation] would grant the Environmental Protection Agency the authority to look at the hazards in total.

4. COLLECTION OF TEST DATA

The [legislation] also provides a mechanism whereby information with respect to health and environmental effects can be collected from manufacturers and processors of chemical substances. While other statutes provide regulatory authority, they do not place the responsibility for gathering information in support of the regulatory program squarely with persons who are responsible for the manufacture or processing of the chemical substance or mixtures. n6

§ 75.03(a)(4) Aviation Safety and Noise Abatement Act of 1979 ***(49 U.S.C. §§ 47501 et seq.***).

This legislation is intended "to provide assistance to airport operators to prepare and carry out noise compatibility programs, to provide assistance to assure continued safety in aviation, to provide assistance to aircraft operators to aid them in complying with noise standards, and for other purposes." n7

§ 75.03(a)(5) Clean Air Act ***(42 U.S.C. §§7401*** **to 7642).**

The original Clean Air Act was approved in 1955, but was completely revised in 1977. The new legislation was intended to fulfill the following purposes:

(1) to extend authorizations of appropriations for non-research activities under the Clean Air Act;

(2) to provide a greater role and greater assistance for State and local governments in the administration of the Clean Air Act;

(3) to provide express recognition of the economic and energy factors which should be considered, and the manner in which they should be considered, under the act;

(4) to create incentives for the regulation of currently unregulated pollutants and unregulated sources of pollution;

(5) to provide more effective surveillance and enforcement tools for States and the administrator to bring existing stationary and mobile sources into compliance and to assure that they remain in compliance;

(6) to provide greater legislative guidance and clearer legislative intent with respect to certain issues on which there has been administrative or judicial dispute (that is, prevention of significant deterioration, new source standards of performance, tall stacks and intermittent controls, and so forth);

(7) to permit the extension of certain deadlines under the existing act, where justified;

(8) to establish uniform bases and procedures for standard setting under the act;

(9) to insure more effective, informed public involvement in decision making under the act;

(10) to promote the development and utilization of innovative technologies for pollution control or prevention, which are more effective, less costly, and less energy intensive than presently available technologies;

(11) to establish certain protections for free competition, consumer free choice, and small business in the administration of the act; and

(12) to provide appropriate employee protection measures under the act.

... [The] primary and overriding purpose of the [legislation] remains the prevention of illness or death which is air pollution related and protection of the public health. n8 *General Motors Corp. v. United States, 496 U.S. 530 (U.S. 1990)* (The EPA sued General Motors (GM) alleging violation of state plan to implement the Clean Air Act. Even though the EPA was required to conclude matters "within a reasonable time," the EPA was not barred from bringing suit on the allegation that GM unreasonably delayed revising its state implementation plan).

§ 75.03(a)(6) Clean Vessel Act of 1992 *(33 U.S.C. §1322* note).

33 U.S.C. §1322. Findings; Purpose.

(a) FINDINGS. -- The Congress finds the following:

(1) The discharge of untreated sewage by vessels is prohibited under federal law in all areas within the navigable waters of the United States.

(2) The discharge of treated sewage by vessels is prohibited under either federal or state law in many of the United States bodies of water where recreational boaters operate.

(3) There is currently an inadequate number of pumpout stations for type III marine sanitation devices where recreational vessels normally operate.

(4) Sewage discharged by recreational vessels because of an inadequate number of pumpout stations is a substantial contributor to localized degradation of water quality in the United States.

(b) PURPOSE. -- The purpose of this subtitle is to provide funds to States for the construction, renovation, operation, and maintenance of pumpout stations and waste reception facilities. n9

§ 75.03(a)(7) Clean Water Act of 1977.

This act amended the 1972 amendments to the Federal Water Pollution Control Act; its statement of purpose is in §75.03(1)(15), *infra.*

§ 75.03(a)(8) Community Environmental Response Facilitation Act *(42 U.S.C. §9620* note).

[This legislation] is intended to establish both a process and criteria for evaluating and identifying uncontaminated property on federal installations where government activities are scheduled to terminate. Such evaluation and identification shall be undertaken by the federal agency that owns such property. In the case of property on the National Priorities List (NPL), the U.S. Environment Protection Agency (EPA) shall have a concurrent role in determining when such property is not contaminated. In the case of property not included on the NPL, appropriate state agencies will have the opportunity to concur or non-concur in such determination. [This legislation] also clarifies that environmental restoration on any property transferred by the government shall be the responsibility of the federal government if contamination attributable to federal activities is discovered after the date of such transfer. Finally, [this legislation] clarifies the point at which all remedial action necessary to protect human health and the environment has been taken to satisfy the requirements of Section 120(h)(3). n10

§ 75.03(a)(9) Comprehensive Environmental Response, Compensation, and Liability Act of 1980 *(42 U.S.C. §§9601* to 9675) [CERCLA].

The [legislation] would amend the Solid Waste Disposal Act to provide for a national inventory of inactive hazardous waste sites and to establish a program for appropriate environmental response action to protect public health and the environment from the dangers posed by such sites. The bill would provide authorities to the Administrator of the Environmental Protection Agency to take emergency assistance and containment actions with respect to such sites and establish a $600 million, 4-year Hazardous Waste Response Fund to be drawn in equal amounts from industry-based fees and federal appropriations, to finance such actions undertaken by the Administrator. The legislation would also establish a federal cause of action in strict liability to enable the Administrator to pursue rapid recovery of the costs incurred for the costs of such actions undertaken by him from persons liable therefor and to induce such persons voluntarily to pursue appropriate environmental response actions with respect to inactive hazardous waste sites. n11

§ 75.03(a)(10) Emergency Planning and Community Right to Know Act of 1986 *(42 U.S.C. §§11001* to 11050).

[This legislation] amends the Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA" or "Superfund") to provide $10 billion in additional funding over the next five years to clean up the Nation's worst abandoned hazardous waste sites and uncontrolled leaking underground storage tanks. The bill establishes a schedule for the Environmental Protection Agency's (EPA) cleanup activities; establishes national cleanup standards for Superfund sites; establishes a program to insure the cleanup of waste sites owned by the federal government; establishes a program for research and training in relation to hazardous substances; clarifies the authorities of the EPA to enter into settlements with parties responsible for Superfund sites; provides assistance to the states in fulfilling their role in the Superfund program; enhances EPA response and enforcement authority; gives citizens the right to participate in cleanup decisions; strengthens the role of the Agency for Toxic Substances and Disease Registry in determining the effects of hazardous substances on human health; and insures the cleanup of leaking underground storage tanks where responsible parties cannot be identified. In addition to establishing certain taxes, the [legislation] authorizes appropriations of $250,000,000 in each of the next five years. [This legislation would] revitalize the Superfund program to permit substantial progress in addressing one of our most pressing environment problems -- the protection of the public from hazardous chemical substances. n12

§ 75.03(a)(11) Environmental Quality Improvement Act of 1970 *(42 U.S.C. §§4371* to 4375).

4371. Congressional findings, declarations, and purposes ...

(b) (1) The Congress declares that there is a national policy for the environment which provides for the enhancement of environmental quality. This policy is evidenced by statutes heretofore enacted relating to the prevention, abatement, and control of environmental pollution, water and land resources, transportation, and economic and regional development.

(2) The primary responsibility for implementing this policy rests with State and local government.

(3) The federal government encourages and supports implementation of this policy through appropriate regional organizations established under existing law.

(c) The purposes of this chapter are --

(1) to assure that each federal department and agency conducting or supporting public works activities which affect the environment shall implement the policies established under existing law; and

(2) to authorize an Office of Environmental Quality, which, notwithstanding any other provisions of

law, shall provide the professional and administrative staff for the Council on Environmental Quality established by Public Law 91-190. n13

§ 75.03(a)(12) Federal Facility Compliance Act of 1992 *(42 U.S.C. §6901* note) a.k.a. the Land Disposal Program Flexibility Act of 1996. n14

[This legislation] is intended to ensure greater compliance by federal facilities with requirements of the Resource Conservation and Recovery Act for management, treatment, storage and disposal of hazardous and solid wastes. The [legislation] accomplishes this by reaffirming the Act's original intent that each department, agency, and instrumentality of the United States is to be treated as a "person" for purposes of the Act. As a further reaffirmation of the original intent of the Act, the [legislation] explicitly provides that federal facilities are subject to all the same substantive and procedural requirements, including enforcement requirements and sanctions, to which state and local governments and private companies are subject. n15

§ 75.03(a)(13) Federal Insecticide, Fungicide, and Rodenticide Act *(7 U.S.C. §§136* to 136y).

This [legislation] completely revises the Federal Insecticide, Fungicide, and Rodenticide Act.

At the present time, this Act prohibits interstate commerce in unregistered pesticides, and permits registration only when if used as directed or in accordance with commonly recognized practice the pesticide is not injurious to man, vertebrate animals, or desirable vegetation. It does not prohibit the misuse of any registered pesticide, nor does it regulate pesticides moving only in intrastate commerce.

The [legislation] would --

(A) regulate the use of pesticides to protect man and his environment; and

(B) extend federal pesticide regulation to actions entirely within a single State. n16

§ 75.03(a)(14) Federal Water Pollution Control Act *(33 U.S.C. §§1251* to 1387).

§1251. Congressional declaration of goals and policy

(a) Restoration and maintenance of chemical, physical and biological integrity of Nation's waters; national goals for achievement of objective.

The objective of this chapter is to restore and maintain the chemical, physical, and biological integrity of the Nation's waters. In order to achieve this objective it is hereby declared that, consistent with the provisions of this chapter --

(1) it is the national goal that the discharge of pollutants into the navigable waters be eliminated by 1985;

(2) it is the national goal that wherever attainable, an interim goal of water quality which provides for the protection and propagation of fish, shellfish, and wildlife and provides for recreation in and on the water be achieved by July 1, 1983;

(3) it is the national policy that the discharge of toxic pollutants in toxic amounts be prohibited;

(4) it is the national policy that federal financial assistance be provided to construct publicly owned waste treatment works;

(5) it is the national policy that areawide waste treatment management planning processes be developed and implemented to assure adequate control of sources of pollutants in each State;

(6) it is the national policy that a major research and demonstration effort be made to develop technology necessary to eliminate the discharge of pollutants into the navigable waters, waters of the contiguous zone, and the oceans; and

(7) it is the national policy that programs for the control of non-point sources of pollution be developed and implemented in an expeditious manner so as to enable the goals of this act to be met through the control of both point and non-point sources of pollution. n17

§ 75.03(a)(15) Lead Exposure Reduction Act *(15 U.S.C. §§2681* to 2692).

The EPA and other appropriate federal agencies are to "conduct a comprehensive program to promote safe, effective, and affordable monitoring, detection, and abatement of lead-based paint and other lead exposure hazards." n18

§ 75.03(a)(16) Lead Contamination Control Act of 1988 *(42 U.S.C. §§300j-21* to 300j-25).

This legislation provides programs intended to help reduce lead contamination in drinking water, especially for children. Its major provisions include a mandate for the Consumer Product Safety Commission to recall drinking water coolers with lead-lined water reservoir tanks; a ban on the manufacture or sale of drinking water coolers that are not lead free; a federal program to help schools evaluate and respond to lead contamination problems, including federal technical and financial assistance; and a lead screening program for children to be administered by the Centers for Disease Control. n19

§ 75.03(a)(17) Low-Level Radioactive Waste Policy Amendments Act of 1985 *(42 U.S.C. §§2021b* to 2021d).

This [legislation] would amend the Low-Level Radioactive Waste Policy Act (LLRWPA) to lay out ground rules and clarify responsibilities as necessary to provide for a national low-level waste interstate compact system. In addition to proposing a compromise allowing access to operating disposal sites, the legislation clarifies federal and state responsibilities for low-level waste management, creates a uniform definition of low-level radioactive waste for purposes of determining state responsibility, and clarifies that no new state authority superseding federal law or regulatory authorities is intended to be created by the compacts, except the authority to control import or export of waste to or from compact regions. n20

§ 75.03(a)(18) Medical Waste Tracking Act of 1988 *(42 U.S.C. §§6992* to 6992k).

This legislation is intended to "ensure that those who generate, handle, or dispose of medical waste are accountable, and it will encourage proper handling and disposal of such potentially dangerous waste." n21

§ 75.03(a)(19) National Contaminated Sediment Assessment and Management Act *(33 U.S.C. §1271* note).

The EPA and other agencies are to "conduct a comprehensive national survey of data regarding aquatic sediment quality in the United States ... [including] pollutants in aquatic sediment ... " The EPA also "shall conduct a comprehensive and continuing program to assess aquatic sediment quality." n22

§ 75.03(a)(20) National Environmental Policy Act of 1969 *(42 U.S.C. §§4321* to 4370b).

The purpose of [this legislation] is to create a Council on Environmental Quality with a broad and

independent overview of current and long-term trends in the quality of our national environment, to advise the President, and through him the Congress and the American people on steps which may and should be taken to improve the quality of that environment.

In achieving the purpose, the [legislation] would require the transmission to the Congress by the President of an annual environmental quality report on the status of various aspects of the American environment, as well as on the foreseeable trends that may affect that status, and on their impact on other national requirements.

The [legislation] also would require the five-member Council to maintain a continuing review of federal policies and activities with environmental implications and to conduct such studies as may be necessary for it to carry out its statutory mandate. The results of this activity would be summarized in an annual report to the President as a means of augmenting and supplementing his report to the Congress. n23

§ 75.03(a)(21) National Ocean Pollution Planning Act of 1978 *(33 U.S.C. §§1701* to 1709).

The purpose of this legislation is:

(1) to establish a comprehensive 5-year plan for federal ocean pollution research and development and monitoring programs in order to provide planning for, coordination of, and dissemination of information with respect to such programs within the Federal Government;

(2) to develop the necessary base of information to support, and to provide for, the rational, efficient, and equitable utilization, conservation, and development of ocean and coastal resources;

(3)to provide for the effective coordination of research conducted to support the preservation and protection of the environmental quality of the Great Lakes, the Chesapeake Bay, Puget Sound, and other estuaries of national significance, and to encourage the use of such research in determinations that affect the environmental quality of the Great Lakes, the Chesapeake Bay, Puget Sound, and other estuaries of national significance; and

(4) to designate the National Oceanic and Atmospheric Administration as the lead federal agency for preparing the plan referred to in paragraph (1) and to require the Administration to carry out a comprehensive program of ocean pollution research and development and monitoring under the plan. n24

§ 75.03(a)(22) Noise Control Act of 1972 *(42 U.S.C. §§4901* to 4918).

... [I]t is the purpose of this Act to establish a means for effective coordination of federal research and activities in noise control, to authorize the establishment of federal noise emission standards for products distributed in commerce, and to provide information to the public respecting the noise emission and noise reduction characteristics of such products. n25

§ 75.03(a)(23) Non-indigenous Aquatic Nuisance Prevention and Control Act of 1990 *(16 U.S.C. §§4701* to 4751) a.k.a. the National Invasive Species Act of 1996.

(b) Purposes. -- The purposes of this Act are --

(1) to prevent unintentional introduction and dispersal of non-indigenous species into waters of the United States through ballast water management and other requirements;

(2) to coordinate federally conducted, funded or authorized research, prevention control, information dissemination and other activities regarding the zebra mussel and other aquatic nuisance species;

(3) to develop and carry out environmentally sound control methods to prevent, monitor and control unintentional introductions of non-indigenous species from pathways other than ballast water exchange;

(4) to understand and minimize economic and ecological impacts of non-indigenous aquatic nuisance species that become established, including the zebra mussel; and

(5) to establish a program of research and technology development and assistance to States in the management and removal of zebra mussels. n26

§ 75.03(a)(24) Nuclear Waste Policy Act of 1982 *(42 U.S.C. §§10101* to 10270).

The purpose of [this legislation] as amended by the Committee is to establish programs for the development of repositories for the safe permanent disposal of high level nuclear waste and spent fuel, and to provide for the safe stabilization and long-term protection of sites for the disposal of low level radioactive waste. n27

§ 75.03(a)(25) Ocean Dumping Ban Act of 1988 *(33 U.S.C. §§1414b,* 1414c).

This legislation amends title I of the Marine Protection, Research, and Sanctuaries Act which regulates the dumping, and the transportation for the purpose of dumping, of material into ocean waters.

The bill establishes a framework for ending the ocean dumping of sewage sludge. It prohibits any person who is not now ocean dumping sewage sludge from beginning to dump. For existing dumpers, the bill prohibits the dumping of sewage sludge within six months of the bill's enactment unless the dumper has entered into a compliance agreement to end the dumping of sewage sludge, and makes it unlawful to ocean dump sewage sludge after December 31, 1991 ...

The bill establishes civil penalties for violations which exceed the costs of implementing land-based alternatives, and permit fees to cover the costs of monitoring and any associated research and to determine compliance with the Act. Penalties and fees will be deposited in a newly established Clean Oceans Fund to be used by EPA and the Coast Guard to implement the Ocean Dumping Act and by EPA to implement technologies and management practices necessary for controlling pollutant inputs adversely affecting the New York Bight.

The bill also requires EPA and N.O.A.A. to conduct a monitoring program at sewage sludge dump sites and surrounding waters which may be affected by ocean dumping of sewage sludge. EPA is required to report on progress in using electronic surveillance to monitor sewage sludge dumping. n28

§ 75.03(a)(26) Oil Pollution Act of 1990 *(33 U.S.C. §§2701* to 2761).

This legislation was intended "to consolidate and improve Federal laws providing compensation and establishing liability for oilspills." n29

§ 75.03(a)(27) Organotin Antifouling Paint Control Act of 1988 *(33 U.S.C. §§2401* to 2410).

"The purpose of this Act is to protect the aquatic environment by reducing immediately the quantities of organotin entering the waters of the United States." n30

§ 75.03(a)(28) Residential Lead-Based Paint Hazard Reduction Act *(42 U.S.C. §4851 et seq.*).

§4851a. Purposes.

The purposes of this Act are --

(1) to develop a national strategy to build the infrastructure necessary to eliminate lead-based paint hazards in all housing as expeditiously as possible;

(2) to reorient the national approach to the presence of lead-based paint in housing to implement, on a priority basis, a broad program to evaluate and reduce lead-based paint hazards in the Nation's housing stock;

(3) to encourage effective action to prevent childhood lead poisoning by establishing a workable framework for lead-based paint hazard evaluation and reduction and by ending the current confusion over reasonable standards of care;

(4) to ensure that the existence of lead-based paint hazards is taken into account in the development of Government housing policies and in the sale, rental, and renovation of homes and apartments;

(5) to mobilize national resources expeditiously, through a partnership among all levels of government and the private sector, to develop the most promising, cost-effective methods for evaluating and reducing lead-based paint hazards;

(6) to reduce the threat of childhood lead poisoning in housing owned, assisted, or transferred by the Federal Government; and

(7) to educate the public concerning the hazards and sources of lead-based paint poisoning and steps to reduce and eliminate such hazards. n31

§ 75.03(a)(29) Safe Drinking Water Act *(42 U.S.C. §§300f* to 300j-11).

The purpose of the legislation is to assure that water supply systems serving the public meet minimum national standards for protection of public health. At present, the Environmental Protection Agency is authorized to prescribe federal drinking water standards only for water supplies used by interstate carriers. Furthermore, these standards may only be enforced with respect to contaminants capable of causing communicable disease. In contrast, this bill would (1) authorize the Environmental Protection Agency to establish federal standards for protection from all harmful contaminants, which standards would be applicable to all public water systems, and (2) establish a joint Federal-State system for assuring compliance with these standards and for protecting underground sources of drinking water. n32

§ 75.03(a)(30) Solid Waste Disposal Act *(42 U.S.C. §§6901* to 6991i) a.k.a. the Land Disposal Program Flexibility Act of 1996.

6902. Objectives and national policy.

(a) Objectives:

The objectives of this chapter are to promote the protection of health and the environment and to conserve valuable material and energy resources by --

(1) providing technical and financial assistance to State and local governments and interstate agencies for the development of solid waste management plans (including resource recovery and resource conservation systems) which will promote improved solid waste management techniques

(including more effective organizational arrangements), new and improved methods of collection, separation, and recovery of solid waste, and the environmentally safe disposal of non-recoverable residues;

(2) providing training grants in occupations involving the design, operation, and maintenance of solid waste and disposal systems;

(3) prohibiting future open dumping on the land and requiring the conversion of existing open dumps to facilities which do not pose a danger to the environment or to health;

(4) assuring that hazardous waste management practices are conducted in a manner which protects human health and the environment;

(5) requiring that hazardous waste be properly managed in the first instance thereby reducing the need for corrective action at a future date;

(6) minimizing the generation of hazardous waste and the land disposal of hazardous waste by encouraging process substitution, materials recovery, properly conducted recycling and reuse, and treatment;

(7) establishing a viable Federal-State partnership to carry out the purposes of this chapter and insuring that the Administrator will, in carrying out the provisions of subchapter III of this chapter, give a high priority to assisting and cooperating with States in obtaining full authorization of State programs under subchapter III of this chapter;

(8) providing for the promulgation of guidelines for solid waste collection, transport, separation, recovery, and disposal practices and systems;

(9) promoting a national research and development program for improved solid waste management and resource conservation techniques, more effective organizational arrangements, and new and improved methods of collection, separation, and recovery, and recycling of solid wastes and environmentally safe disposal of non-recoverable residues;

(10) promoting the demonstration, construction, and application of solid waste management, resource recovery, and resource conservation systems which preserve and enhance the quality of air, water, and land resources; and

(11) establishing a cooperative effort among the Federal, State, and local governments and private enterprise in order to recover valuable materials and energy from solid waste. n33

§ 75.03(a)(31) Toxic Substances Control Act *(15 U.S.C. §§2601* to 2692).

The purpose of this legislation is to prevent unreasonable risks of injury to health or the environment associated with the manufacture, processing, distribution in commerce, use, or disposal of chemical substances. The [legislation] is designed to fill a number of regulatory gaps which currently exist. They are:

(1) Premarket Review ...

(2) Direct Regulation of Chemicals ...

(3) Consideration of all the Risks ...

(4) Collection of Test Data... n34

§ 75.03(a)(32) United States Public Vessel Medical Waste Anti-Dumping Act of 1988 *(33 U.S.C. §§2501* to 2504). n35

§ 75.03(a)(33) Uranium Mill Tailings Radiation Control Act of 1978 *(42 U.S.C. §§2014,* 2021, 2021a, 2022, 2023, 2111, 2113, 2114, 5153e) (part of the Atomic Energy Act of 1954).

The Uranium Mill Tailings Control Act ... is intended to protect the public health and safety and the environment from hazards associated with wastes from the uranium ore milling process. If enacted, the legislation will require every reasonable effort to be made by the States, the Federal Government, and private industry to provide for the disposal, stabilization and control in a safe and environmentally sound manner of such tailings to prevent or minimize the diffusion of radon or the entry of other hazards into the environment.

Title I 1 ... in cooperation with interested States, Indian tribes, and persons who own or control inactive mill tailings sites, provides a program of assessment and remedial action at such sites. Such actions may include, where appropriate, the reprocessing of tailings to extract residual uranium and other valuable minerals.

Title II 1 clarifies and reinforces the authority of the Nuclear Regulatory Commission to regulate the production and disposal of uranium mill tailings at active sites, and provides for the application of minimum federal standards to such activities in States which regulate them under authority permitted by the Atomic Energy Act.

[The legislation] also provides that all final disposal areas for uranium mill tailings be treated in accordance with Federal policy regarding other nuclear wastes, in that such disposal sites would be transferred to the Federal Government for permanent custody and protection. n36

§ 75.03(b) Environmental Conservation.

§ 75.03(b)(1) Agricultural Act of 1970 *(16 U.S.C. §§1501* to 1510) (Rural Environmental Conservation Program).

Eligible farmers shall furnish a plan of farming operations or land use which incorporates such practices and principles as may be determined by the Secretary of Agriculture:

[T]o be practicable and which outlines a schedule of proposed changes, if any, in cropping systems or land use and of the conservation measures which are to be carried out on the farm, ranch, wetland, forests, or other land during the contract period to protect the farm, ranch, wetland, forests or other land and surrounding areas, its wildlife, and nearby populace and communities from erosion, deterioration, pollution by natural and manmade causes or to insure an adequate supply of timber and related forest products. Said plans may also ... conserve surface waters and preserve and improve habitat for migratory waterfowl and other wildlife resources and improve subsurface moisture ... n37

§ 75.03(b)(2) Antarctic Mineral Resources Protection Act of 1990 *(16 U.S.C. §§2461* to 2466).

(b) Purpose. -- The purpose of this Act is to --

(1) strengthen substantially overall environmental protection of Antarctica;

(2) prohibit prospecting, exploration, and development of Antarctic mineral resources by United

States citizens and other persons subject to the jurisdiction of the United States;

(3) urge other nations to join the United States in immediately negotiating one or more new agreements to provide an indefinite ban on all Antarctic mineral resource activities and comprehensive protection for Antarctica and its associated and dependent ecosystems; and

(4) urge all nations to consider a permanent ban on Antarctic mineral resource activities. n38

§ 75.03(b)(3) Coastal Zone Management Act of 1972 *(16 U.S.C. §§1451* to 1464).

[This legislation] has as its main purpose the encouragement and assistance of States in preparing and implementing management programs to preserve, protect, develop and whenever possible restore the resources of the coastal zone of the United States. The [legislation] authorizes federal grants-in-aid to coastal states to implement these management programs once approved, and States would be aided in the acquisition and operation of estuarine sanctuaries. Through the system of providing grants-in-aid, the States are provided financial incentives to undertake the responsibility for setting up management programs in the coastal zone. There is no attempt to diminish state authority through federal pre-emption. The intent of this legislation is to enhance state authority by encouraging and assisting the states to assume planning and regulatory powers over their coastal zones. n39

§ 75.03(b)(4) Endangered Species Act of 1973 *(16 U.S.C. §§1531* to 1544).

The purpose of this [legislation] is to provide for conservation, protection and propagation of endangered species of fish and wildlife by federal action and by encouraging the establishment of State endangered species conservation programs. The methods include authorization to the Secretaries of Interior and Commerce to list species which are either (1) endangered or (2) likely to become endangered within the foreseeable future, and authority to establish an Advisory Committee for consultation regarding this list; authorization to the Secretary to use certain existing legislation for land acquisition; provision for criminal and civil penalties for violation of its prohibitions; provision for the administrative implementation of the international convention on endangered species; management of endangered and threatened species by the States under State plans that are approved by the Secretary; and provisions for financial aid to State wildlife management agencies which enter into cooperative or management agreements with the Secretary. n40

§ 75.03(b)(5) Energy Supply and Environmental Coordination Act of 1974 *(15 U.S.C. §§791* to 798).

The purpose of this legislation is to grant specific authority to increase the use of coal resources so as to increase the energy supplies available to the Nation, to obtain information about the energy supplies available to the Nation, and to permit certain adjustment of environmental requirements, so that the Nation's essential energy needs may be met in a manner which is consistent with our national commitment to protect and improve the environment.

In brief summary, the [legislation] directs steps to be taken to make more effective use of our Nation's coal resources, authorizes and directs the Federal Energy Administrator to obtain information on the Nation's energy supply situation, and permits narrowly defined and limited variances from certain specific Clean Air requirements so as to effectuate proper coordination between measures taken with respect to energy supplies and measures respecting environmental protection and enhancement. n41

§ 75.03(b)(6) Federal Land Policy and Management Act of 1976 *(43 U.S.C. §§1701* to 1784).

This legislation is intended "to establish public land policy; to establish guidelines for its administration; to provide for the management, protection, development, and enhancement of the public

lands ...."

The underlying mission proposed for the public lands is the multiple use of resources on a sustained-yield basis. Corollary to this is the selective transfer of public lands to other ownerships where the public interest will be served thereby. The proper multiple use mix of retained public lands is to be achieved by comprehensive land use planning, coordinated with State and local planning. Planning decisions are to be made only after full opportunity for public involvement in the planning process. Management and disposal of the public lands are to be consistent with land use plans so developed. n42

§ 75.03(b)(7) Forest and Rangeland Renewable Resources Planning Act of 1974 *(16 U.S.C. §§1600* to 1614).

This legislation is intended "to provide for the Forest Service, Department of Agriculture, to protect, develop, and enhance the environment of certain of the Nation's lands and resources" and will "encourage wise and orderly development of the renewable resources of our forest, range, and associated lands." n43

§ 75.03(b)(8) Forest and Rangeland Renewable Resources Research Act of 1978 *(16 U.S.C. §§1641* to 1647).

In order that "scientific discoveries and technological advances ... be made and applied to support the protection, management, and utilization of the Nations' renewable resources," the legislation authorizes the Secretary of Agriculture "to expand research activities to encompass international forestry and natural resource issues on a global scale." n44

§ 75.03(b)(9) Forest Ecosystems and Atmospheric Pollution Research Act of 1988 *(16 U.S.C. §1641).*

This legislation is based on Congressional findings that:

(1) the health and productivity of forests in certain regions of the United States are declining;

(2) there is a special concern about the decline of certain hardwood species, particularly sugar maples and oaks, in the eastern United States and the effects of atmospheric pollutants on the health and productivity of these forests;

(3) declines in the productivity of certain commercially important Southern pine species have been measured;

(4) existing research indicates that atmospheric pollution, including ozone, acidic deposition, and heavy metals, may contribute to this decline;

(5) there is an urgent need to expand and better coordinate existing Federal, State, and private research, including research by private industry, to determine the cause of changes in the health and productivity of domestic forest ecosystems and to monitor and evaluate the effect of atmospheric pollutants on such ecosystems; and

(6) such research and monitoring should not impede efforts to control atmospheric pollutants. n45

[This legislation amends] the Forest and Rangeland Renewable Resources Research Act of 1978 to direct the Secretary of Agriculture to establish, through the Forest Service, a 10-year program to determine the effects of air pollutants, in addition to acid precipitation, on forest ecosystems. The [legislation] gives clear direction to the Forest Service to develop and implement this program and expand the agency's current research and survey efforts in this area beyond their limited focus on acid precipitation. n46

§ 75.03(b)(10) Geothermal Energy Research, Development, and Demonstration Act of 1974 *(30 U.S.C.*

***§§1101* to 1164).**

The purpose of the [legislation] is to create an administrative mechanism for federal coordination and management of research, development, and demonstration activities in geothermal energy, including those presently funded by the Atomic Energy Commission, the Department of the Interior, and the National Science Foundation; to direct the Administrator of the National Aeronautics and Space Administration to undertake in fiscal year 1975 a program definition for an integrated national program to demonstrate the utilization of several geothermal energy resources by the end of fiscal year 1980; and to initiate a loan guaranty program as one means to further research, development, and utilization of geothermal resources by the private sector. n47

§ 75.03(b)(11) Global Climate Protection Act of 1987 *(15 U.S.C. §2901* note).

This legislation is based on the following Congressional findings and goals:

Findings.

The Congress finds as follows:

(1) There exists evidence that manmade pollution -- the release of carbon dioxide, chlorofluorocarbons, methane, and other trace gases into the atmosphere -- may be producing a long-term and substantial increase in the average temperature on Earth, a phenomenon known as global warming through the greenhouse effect.

(2) By early in the next century, an increase in Earth temperature could --

(A) so alter global weather patterns as to have an effect on existing agricultural production and on the habitability of large portions of the Earth; and

(B) cause thermal expansion of the oceans and partial melting of the polar ice caps and glaciers, resulting in rising sea levels.

(3) Important research into the problem of climate change is now being conducted by various United States Government and International agencies, and the continuation and intensification of those efforts will be crucial to the development of an effective United States response.

(4) While the consequences of the greenhouse effect may not be fully manifest until the next century, ongoing pollution and deforestation may be contributing now to an irreversible process. Necessary actions must be identified and implemented in time to protect the climate.

(5) The global nature of this problem will require vigorous efforts to achieve international cooperation aimed at minimizing and responding to adverse climate change; such international cooperation will be greatly enhanced by the United States meeting of the Governing Council of the United Nations Environment Program, scheduled for June 1989, which will seek to determine a direction for worldwide efforts to control global climate change.

(6) Effective United States leadership in the international arena will depend upon a coordinated national policy.

Mandate for Action on the Global Climate.

(a) Goals of United States Policy. -- United States policy should seek to --

(1) increase worldwide understanding of the greenhouse effect and its environmental and health consequences;

(2) foster cooperation among nations to develop more extensive and coordinated scientific research efforts with respect to the greenhouse effect;

(3) identify technologies and activities to limit mankind's adverse effect on the global climate by --

(A) slowing the rate of increase of concentrations of greenhouse gases in the atmosphere in the near term; and

(B) stabilizing or reducing atmospheric concentrations of greenhouse gases over the long term; and

(4) work toward multilateral agreements. n48

§ 75.03(b)(12) Marine Protection, Research, and Sanctuaries Act of 1972 *(33 U.S.C. §§1401* to 1445).

[This legislation] is divided into two titles: Title I -- Ocean Dumping and Title II -- Comprehensive Research on Ocean Dumping.

The purpose of Title I of the [legislation] is to regulate the dumping and transportation for dumping of waste material in those parts of the oceans, coastal and other waters beyond the territorial jurisdiction of the United States. The [legislation] bans under all circumstances the transportation for dumping and dumping in waters beyond the territorial jurisdiction of the United States of radiological, chemical, or biological warfare agents and high level radioactive wastes. The [legislation] also bans the transportation for dumping and dumping beyond the territorial jurisdiction of the United States of all other waste materials unless authorized by a permit issued by the Administrator of the Environmental Protection Agency (EPA).

The Administrator is authorized to issue permits for the transportation for dumping and dumping of materials when he deems that such action will not degrade the marine environment or endanger human life, in accordance with criteria that he is to establish by regulation. Civil penalties may be assessed by the Administrator, after notice and opportunity for hearing, and an action may be brought to impose criminal penalties for knowingly violating Title I.

... Title II of the [legislation] authorizes and directs the Secretary of Commerce, in coordination with the Secretary of the department in which the Coast Guard is operating and the Administrator of EPA, to initiate a comprehensive program of research on the effects of ocean dumping. n49

§ 75.03(b)(13) Mining and Mineral Resources Research Institute Act of 1984 *(30 U.S.C. §§1221* to 1230).

The purpose of [this legislation] is to re-authorize the establishment of a State mining and mineral resources research institute program similar to that which was established pursuant to Title III of the Surface Mining Control and Reclamation Act of 1977 *(91 Stat. 445; 30 U.S.C. 1221).* The original authorization under the 1977 Act expires in fiscal year 1984. The bill, in pertinent part, provides that one public college or university in each State that meets the eligibility criteria established in section 10 would receive federal grants to be matched by State grants in order to assist those States in carrying on the work of a competent and qualified mining and mineral resources research institute. n50

§ 75.03(b)(14) Multiple-Use Sustained-Yield Act of 1960 *(16 U.S.C. §§528* to 531).

The purpose of this [legislation] is to provide a direction to the Secretary of Agriculture to

administer the national forests for multiple use and sustained yield of their several products and services. It would name in a single statute the renewable surface resources for which the national forests are established and shall be administered.

In the effectuation of the act, the Secretary of Agriculture would be authorized "to cooperate with State and local agencies and others." The expression of authority in the bill "to cooperate with State and local agencies and others" should be construed as encouragement to the Secretary of Agriculture to stimulate State and local agencies and others to cooperate in the development and management of the national forests, particularly where benefits to the local community and local use are great.

It is made clear that nothing in the [legislation] would affect the authority which the Secretary of the Interior has with respect to the mineral resources in the national forest lands. Thus, the [legislation] would not impair mining operations and activities under the authorities which the Secretary of the Interior has with respect to such mineral resources.

Although the [legislation] lists wildlife and fish among the purposes for which the national forests are established and administered, it should be understood that the enactment of this [legislation] would not in any way affect the jurisdiction or responsibilities of the several States and their wildlife and fish agencies with respect to wildlife and fish on the national forests. n51

§ 75.03(b)(15) National Climate Program Act *(15 U.S.C. §§2901* to 2908).

The purposes of the National Climate Act are to expand the Nation's understanding of natural and man-induced climate processes, to relate knowledge of climate and its implications and effects to human welfare and the environment, and to respond more effectively to climate-induced problems. Climate fluctuations and change can have serious and disruptive effects on food production, water resources, energy use and other important human activities. An effective climate policy and program would help reduce the Nation's vulnerability to such disruptions. n52

§ 75.03(b)(16) National Coastal Monitoring Act *(33 U.S.C. §§2801 et seq.*).

The purposes of this title are to --

(1) establish a comprehensive national program for consistent monitoring of the Nation's coastal ecosystems;

(2) establish long-term water quality assessment and monitoring programs for high priority coastal waters that will enhance the ability of Federal, State, and local authorities to develop and implement effective remedial programs for those waters;

(3) establish a system for reviewing and evaluating the scientific, analytical, and technological means that are available for monitoring the environmental quality of coastal ecosystems;

(4) establish methods for identifying uniform indicators of coastal ecosystem quality;

(5) provide for periodic, comprehensive reports to Congress concerning the quality of the Nation's coastal ecosystems;

(6) establish a coastal environment information program to distribute coastal monitoring information;

(7) provide state programs authorized under the Coastal Zone Management Act of 1972 *(16 U.S.C. §1451 et seq.*) with information necessary to design land use plans and coastal zone regulations that will

contribute to the protection of coastal ecosystems; and

(8) provide certain water pollution control programs authorized under the Federal Water Pollution Control Act *(33 U.S.C. §1251 et seq.*) with information necessary to design and implement effective coastal water pollution controls. n53

§ 75.03(b)(17) National Forest Management Act of 1976 *(16 U.S.C. §§1600,* 1611 to 1614).

The "Forest Service, Department of Agriculture, in cooperation with other agencies, [is charged with] assessing the Nation's renewable resources, and developing and preparing a national renewable resource program, which is periodically reviewed and updated...." n54

§ 75.03(b)(18) Outer Continental Shelf Lands Act Amendments of 1978 *(43 U.S.C. §§1801* to 1866).

The purposes of this Act are to --

(1) establish policies and procedures for managing the oil and natural gas resources of the Outer Continental Shelf which are intended to result in expedited exploration and development of the Outer Continental Shelf in order to achieve national economic and energy policy goals, assure national security, reduce dependence on foreign sources, and maintain a favorable balance of payments in world trade;

preserve, protect, and develop oil and natural gas resources in the Outer Continental Shelf in a manner which is consistent with the need (A) to make such resources available to meet the Nation's energy needs as rapidly as possible, (B) to balance orderly energy resource development with protection of the human, marine, and coastal environments, (C) to insure the public a fair and equitable return on the resources of the Outer Continental Shelf, and (D) to preserve and maintain free enterprise competition;

(3) encourage development of new and improved technology for energy resource production which will eliminate or minimize risk of damage to the human, marine, and coastal environments;

(4) provide States, and through States, local governments, which are impacted by Outer Continental Shelf oil and gas exploration, development, and production with comprehensive assistance in order to anticipate and plan for such impact, and thereby to assure adequate protection of the human environment;

(5) assure that States, and through States, local governments, have timely access to information regarding activities on the Outer Continental Shelf, and opportunity to review and comment on decisions relating to such activities, in order to anticipate, ameliorate, and plan for the impacts of such activities;

(6) assure that States, and through States, local governments, which are directly affected by exploration, development, and production of oil and natural gas are provided an opportunity to participate in policy and planning decisions relating to management of the resources of the Outer Continental Shelf;

(7) minimize or eliminate conflicts between the exploration, development, and production of oil and natural gas, and the recovery of other resources such as fish and shellfish;

(8) establish an oilspill liability fund to pay for the prompt removal of any oil spilled or discharged as a result of activities on the Outer Continental Shelf and for any damages to public or private interests caused by such spills or discharges;

(9) insure that the extent of oil and natural gas resources of the Outer Continental Shelf is assessed at the earliest practicable time; and

(10) establish a fishermen's contingency fund to pay for damages to commercial fishing vessels and gear due to Outer Continental Shelf activities. n55

§ 75.03(b)(19) Pollution Prevention Act of 1990 *(42 U.S.C. §§13101* to 13109).

Sec. 13101. FINDINGS AND POLICY.

(a) Findings -- The Congress finds that:

(1) The United States of America annually produces millions of tons of pollution and spends tens of billions of dollars per year controlling this pollution.

(2) There are significant opportunities for industry to reduce or prevent pollution at the source through cost-effective changes in production, operation, and raw materials use. Such change offer industry substantial savings in reduced raw material, pollution control, and liability costs as well as help protect the environment and reduce risks to worker health and safety.

(3) The opportunities for source reduction are often not realized because existing regulations, and the industrial resources they require for compliance, focus upon treatment and disposal, rather than source reduction; existing regulations do not emphasize multi-media management of pollution; and businesses need information and technical assistance to overcome institutional barriers to the adoption of source reduction practices.

(4) Source reduction is fundamentally different and more desirable than waste management and pollution control. The Environmental Protection Agency needs to address the historical lack of attention to source reduction.

(5) As a first step in preventing pollution through source reduction, the Environmental Protection Agency must establish a source reduction program which collects and disseminates information, provides financial assistance to States, and implements the other activities provided for in this subtitle.

(b) Policy. -- The Congress hereby declares it to be the national policy of the United States that pollution should be prevented or reduced at the source whenever feasible; pollution that cannot be prevented should be recycled in an environmentally safe manner, whenever feasible; pollution that cannot be prevented or recycled should be treated in an environmentally safe manner whenever feasible; and disposal or other release into the environment should be employed only as a last resort and should be conducted in an environmentally safe manner. n56

§ 75.03(b)(20) Renewable Resources Extension Act of 1978 *(16 U.S.C. §§1671* to 1676).

This legislation authorizing federal sponsorship of renewable resource educational programs from universities, colleges and cooperative extension services, is based on five findings:

The first finding states that the extension program of the Department of Agriculture and the extension activities of each State provide useful and productive educational programs for private forest and rangeland owners, processors, and consumptive and non-consumptive users of forest and rangeland renewable resources, and that these educational programs complement research and assistance programs conducted by the Department. The second finding states that in order to meet national goals it is essential that all forest and rangeland renewable resources be fully considered in designing educational programs

for landowners, processors, and users. The third finding states that more efficient utilization and marketing of renewable resources can extend available supplies of such resources, provide products to consumers at prices less than they would otherwise be, and promote reasonable returns on the investments of landowners, processors, and users. The fourth finding cites the benefits of trees and forests in urban areas. The fifth finding cites the benefits of trees and shrubs used as shelterbelts. n57

§ 75.03(b)(21) Resource Conservation and Recovery Act of 1976 *(42 U.S.C. §§6901* to 6991i).

This act, part of the Solid Waste Disposal Act, is intended to provide technical and financial assistance for the development of management plans and facilities for the recovery of energy and other resources from discarded materials and for the safe disposal of discarded materials, and to regulate the management of hazardous waste. n58

§ 75.03(b)(22) Shore Protection Act of 1988 *(33 U.S.C. §§2601* to 2609, 2621 to 2623).

This act was passed together with, and shares the means and objectives of, the Ocean Dumping Ban Act of 1988. n59

§ 75.03(b)(23) Soil and Water Resources Conservation Act of 1977 *(16 U.S.C. §§2001* to 2009).

[This legislation] establishes a mechanism whereby the Federal Government in conjunction with State soil and water conservation agencies, local land owners and users, local units of government, and other concerned agencies or persons can make informed, long-range policy decisions with respect to the conservation and improvement of our country's soil, water, and related resources. The principal elements of this mechanism include a continuing assessment of the condition and quality of these vital resources, the determination of a comprehensive national policy and set of priorities based on the information gained from the inventory, the development of a program tailored to meet these needs, and, finally, a continuing evaluation of what is or should be accomplished. [This legislation] is not, nor is it intended to be, a land use control bill. n60

§ 75.03(b)(24) Surface Mining Control and Reclamation Act of 1977 *(30 U.S.C. §§1201* to 1328).

[This legislation] would enact a set of national environmental performance standards to be applied to all coal mining operations and to be enforced by the State with backup authority in the Department of the Interior. More specifically, [this legislation] will implement a national system of coal mining regulation by --

(1) Covering all coal surface mining (contour, mountaintop, area stripping and open-pit operations) and the surface impacts from underground mines and coal processing;

(2) Establishing administrative, environmental, and enforcement standards for regulatory programs to be administered by the States on non-federal lands;

(3) Providing authority for a federal regulatory program to augment State programs if necessary on non-federal lands;

(4) Applying federal standards to operations on Indian lands and undertaking a study to develop a program under which Indian tribes may elect to assume full regulatory authority of coal mining operations on Indian lands;

(5) Establishing a program for the reclamation of previously mined and inadequately reclaimed lands;

(6) Establishing a program for designating areas unsuitable for surface coal mining and a more

limited program for minerals other than coal;

(7) Establishing a new Office of Surface Mining Reclamation and Enforcement for implementing provisions on this act;

(8) Establishing a federal grant-in-aid program to the States for State mining and mineral resource research institutes;

(9) Establishing procedures for public review of the administrative and enforcement program through access to data, hearings, inspections and standing to sue for damages for non-compliance with the act; and

(10) Recognizing the rights of surface owners and offsite water users. n61

§ 75.03(b)(25) Water Resources Research Act of 1984 *(42 U.S.C. §§10301* to 10309).

It is the purpose of this Act to assist the Nation and the States in augmenting their water resources science and technology as a way to --

(1) assure supplies of water sufficient in quantity and quality to meet the Nation's expanding needs for the production of food, materials, and energy;

(2) discover practical solutions to the Nation's water and water resources related problems, particularly those problems related to impaired water quality;

(3) assure the protection and enhancement of environmental and social values in connection with water resources management and utilization;

(4) promote the interest of State and local governments as well as private industry in research and the development of technology that will reclaim waste water and to convert saline and other impaired waters to waters suitable for municipal, industrial, agricultural, recreational, and other beneficial uses;

(5) promote more effective coordination of the Nation's water resources research program;

(6) promote the development of a cadre of trained research scientists, engineers, and technicians for future water resources problems; n62 and (7) encourage long-term planning and research to meet future water management, quality, and supply challenges.

§ 75.03(b)(26) Wood Residue Utilization Act of 1980 *(16 U.S.C. §§1681* to 1687).

The purpose of [this legislation] ... is to develop, demonstrate, and make available information on methods to increase and improve wood residue utilization. The emphasis is to be on methods that are feasible and that have potential for commercial application in homes, businesses, industries and power plants. n63

§ 75.03(b)(27) Cogeneration and Small Power Production *(16 U.S.C. §824a-3)*

Congress is instructed to issue rules to encourage cogeneration and small power production, and to encourage geothermal small power production facilities of not more than 80 megawatts capacity.

§ 75.03(c) Policy and Procedural Regulation.

The National Environmental Policy Act of 1969, which was actually signed by the President on January 1, 1970, is a

brief and somewhat general piece of legislation that has subsequently had monumental impact. The first part of this act declares national environmental policy and goals; the second part creates the Council on Environmental Quality and describes its responsibilities. This council has also issued federal regulations. n64

The declaration of policy and statement of responsibility were stated in very broad terms:

> In order to carry out the policy set forth in this chapter, it is the continuing responsibility of the Federal Government to use all practicable means, consistent with other essential considerations of national policy, to improve and coordinate Federal plans, functions, programs, and resources to the end that the Nation may --
>
> (1) fulfill the responsibilities of each generation as trustee of the environment for succeeding generations;
>
> (2) assure for all Americans safe, healthful, productive, and esthetically and culturally pleasing surroundings;
>
> (3) attain the widest range of beneficial uses of the environment without degradation, risk to health or safety, or other undesirable and unintended consequences;
>
> (4) preserve important historic, cultural, and natural aspects of our national heritage, and maintain, wherever possible, an environment which supports diversity and variety of individual choice;
>
> (5) achieve a balance between population and resource use which will permit high standards of living and a wide sharing of life's amenities; and
>
> (6) enhance the quality of renewable resources and approach the maximum attainable recycling of depletable resources. n65

The most substantive part of this Act was the section that introduced the requirement for environmental impact statements:

> [A]ll agencies of the Federal Government shall --
>
> ... (C) include in every recommendation or report on proposals for legislation and other major federal actions significantly affecting the quality of the human environment, a detailed statement by the responsible official on --
>
> (i) the environmental impact of the proposed action,
>
> (ii) any adverse environmental effects which cannot be avoided should the proposal be implemented,
>
> (iii) alternatives to the proposed action,
>
> (iv) the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity, and
>
> (v) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented. n66

While the reach of this act has been well beyond real property rights, this federal legislation and the numerous imitative state laws have had profound impact in the field of public regulation of land.

FOOTNOTES:
(n1)Footnote 4. *42 U.S.C. §§8901*(b) and (c).

(n2)Footnote 5. H.R. Rep. for H.R. 18546, 91st Cong., 2d Sess., at 1-3 (1970). *United States v. Royal Caribbean Cruises, Ltd., 11 F. Supp. 2d 1358 (S.D. Fla.1998)* (Although the Act to Prevent Pollution from Ships (AAPS) contains a more specific law concerning "false statements" it does not preclude prosecution under the False Statements Act. The AAPS was meant to supplement existing law, not repeal it).

(n3)Footnote 6. S. Rep. No. 698, 94th Cong., 2d Sess., 1-2 (1976). *Safe Bldgs. Alliance v. E.P.A., 846 F.2d 79 (D.C. Cir 1988)* (The EPA promulgated regulations under the Asbestos Hazard Emergency Response Act which called for inspections of schools, and allowing the school to choose the method of removal. Petitioners failed in their allegations that the regulations fell outside the authority granted in the Act).

(n4)Footnote 7. S. Rep. No. 52, 96th Cong., 1st Sess., at 1 (1979).

(n5)Footnote 8. H.R. Rep. No. 294, 95th Cong., 1st Sess., at 1-2 (1977).

(n6)Footnote 9. *United States v. West Indies Transport, Inc., 127 F.3d 299 (3d Cir. 1997)* (The barge where the defendants housed workers was not a "vessel" as defined in the Clean Water Act because it was permanently moored to the shore and partially submerged. Therefore the defendants could not be convicted for discharging untreated sewage into the bay).

(n7)Footnote 10. H.R. Rep. No. 814, 102d Cong., 2d Sess., at 4 (1992).

(n8)Footnote 11. H.R. Rep. No. 1016, Part I, 96 Cong., 2d Sess., at 17 (1980). *See also* §75.09, *infra*. *United States v. Bestfoods, 524 U.S. 51 (U.S. 1998)* (The U.S. brought an action against a parent company for the cost of cleaning up industrial waste generated by a subsidiary chemical company. The court held that when the corporate veil may be pierced, a parent could be liable for the CERCLA violations of its subsidiaries).

(n9)Footnote 12. H.R. Rep. No. 253(I), 99th Cong., 2d Sess., at 54 (1986). *Steel Co. v. Citizens for a Better Environment, 523 U.S. 83 (U.S. 1998)* (The community group brought an action under the EPCRA for failure to file a required report. The Supreme Court dismissed the action because the citizen's group did not meet the redressability requirement for standing).

(n10)Footnote 13. *42 U.S.C. §4371. Kennedy v. United States, 643 F. Supp. 1072 (E.D. N.Y. 1986)* (The design and construction of stone groins by the United States predated the passage of the Environmental Quality Improvement Act. However, the petitioners were not barred from bringing suit based on the erosion of their property caused by the groins because their claims were based not only on the faulty design of the groins but also on the Federal Government's failure to take action to remedy the wrong).

(n11)Footnote 14. The short title of this act was changed from the Federal Facility Compliance Act of 1992 to the Land Disposal Program Flexibility Act of 1996 by Act March 26, 1996, P.L. 104-119, §1, *110 Stat. 830.*

(n12)Footnote 15. H.R. Rep. No. 111, 102d Cong., 2d Sess., at 2 (1992).

(n13)Footnote 16. S. Rep. No. 838, 92d Cong., 2d Sess., at 1 (1972). *Redwing Carriers, Inc. v. Saraland Apartments, 94 F.3d 1489 (11th Cir 1996)* (Certain chemicals were allowed at the time they were applied under the Federal Insecticide, Fungicide and Rodenticide Act (FIFRA). The fact that these chemicals were subsequently removed from the FIFRA does not subject the applicator to liability under Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA)).

(n14)Footnote 17. *33 U.S.C. §1251*(a). As amended Feb. 4, 1987, P.L. 100-4, Title III, §316(b), *101 Stat. 60).*

(n15)Footnote 18. *15 U.S.C. §2685*(a). *See 42 U.S.C. §4852d,* requiring disclosure of information concerning lead upon transfer of residential property.

(n16)Footnote 19. H.R. Rep. No. 1041, 100th Cong., 2d Sess., at 5 (1988). *See 42 U.S.C. §4852d,* requiring disclosure of information concerning lead upon transfer of residential property.

(n17)Footnote 20. H.R. Rep. No. 314, 99th Cong., 1st Sess., at 15 (1985). *Appalachian States Low-Level Radioactive Waste Comm'n v. Pena, 126 F.3d 193 (3d Cir. 1997)* (The Appalachian States Radioactive waste commission petitioned the Department of Energy for a full rebate for satisfying all the requirements of the Low-Level Radioactive Waste Policy Amendments Act of 1985. The court held that they were not entitled to a full rebate because the commission did not "provide for" their waste by merely shipping it to South Carolina. South Carolina had waived its rights under the statute to exclude waste from outside the region).

(n18)Footnote 21. *Statement by President Ronald Reagan upon Signing H.R. 3515,* 24 Weekly Compilation of Presidential Documents 1418 (7 Nov. 1988).

(n19)Footnote 22. *33 U.S.C. §1271.*

(n20)Footnote 23. H.R. Rep. No. 378, 91st Cong., 1st Sess., at 1 (1969). *See* further discussion of this legislation in §75.03(c), *infra. Robertson v. Methow Valley Citizens Council, 490 U.S. 332 (U.S. 1989)* (The Forest Service issued a special permit to allow development of a ski resort and a citizen's group challenged based on the National Environmental Policy Act. The court held that the Act did not require the Forest Service to include a fully developed mitigation plan, nor did it require a "worst case scenario" analysis.)

(n21)Footnote 24. *33 U.S.C. §1701*(b), *repealed by* Pub. L. 102-567, Title II, §204, *106 Stat. 4282.*

(n22)Footnote 25. *42 U.S.C. §4901*(b).

Rushing v. Kansas City Southern Ry. Co., 185 F.3d 496 (5th Cir. 1999) (Stating that the Noise Control Act was not intended to replace all local control over noise. The statute preempts only those state laws that disparately govern the same areas as the federal regulations).

(n23)Footnote 26. *16 U.S.C. §4701.*

The short title of this act was changed to the National Invasive Species Act of 1996 by Act, Oct. 26, 1996, P.L. 104-332, §1(a), *110 Stat. 4073.*

(n24)Footnote 27. H.R. Rep. No. 491, 97th Cong., 2d Sess., at 26 (1982).

(n25)Footnote 28. S. Rep. No. 431, 100th Cong., 2d Sess., at 1-2 (1988). *Seaburn Inc. v. United States E.P.A., 712 F. Supp. 218 (D. D.C. 1989)* (The EPA made a valid interpretation of the Ocean Dumping Ban Act when it equated ocean incineration with ocean dumping).

(n26)Footnote 29. S. Rep. No. 94, 101st Cong., 2d Sess., at 1 (1990). *United States v. Hyundai Merchant Marine Co., Ltd., 172 F.3d 1187 (9th Cir. 1999)* (The United States sued a vessel owner under the Oil Pollution Act to recover costs incurred by the Coast Guard in response to the grounding of the vessel. The court held the United States could recover the costs incurred in monitoring the owner's removal of the damaged vessel, and the United States was not limited to recovering only the "necessary costs" but could also recover attorney's fees).

(n27)Footnote 30. *33 U.S.C. §2401.*

(n28)Footnote 31. *42 U.S.C. §4851a.*

(n29)Footnote 32. H.R. Rep. No. 1185, 93d Cong., 2d Sess., at 1 (1974).

(n30)Footnote 33. *42 U.S.C. §6902.* The short title of this act was changed to the Land Disposal Program Flexibility Act of 1996 by Act March 26, 1996, P.L. 104-119, §1, *110 Stat. 830.*

(n31)Footnote 34. S. Rep. No. 698, 94th Cong., 2d Sess., at 1-2 (1976). *Flue-Cured Tobacco Stabilization Corp. v. United States E.P.A., 4 F. Supp. 2d 435 (M.D. N.C. 1998)* (Although tobacco products are exempt from regulation under the Toxic Substances Control Act, the EPA was authorized to issue a report which classified second-hand-smoke as a carcinogen).

(n32)Footnote 35. *See* discussion under Ocean Dumping Ban Act of 1988, §75.03(a)(26), *supra.*

(n33)Footnote 36. H.R. Rep. No. 1480 -- Part I, 95th Cong., 2d Sess., at 13 (1978).

(n34)Footnote 37. *16 U.S.C. §1502.* This act was repealed by Act April 4, 1996, P.L. 104-127, Title III, Subtitle D, §336(d)(1), *110 Stat. 1006.*

(n35)Footnote 38. *16 U.S.C. §2461.*

(n36)Footnote 39. S. Rep. No. 753, 92d Cong., 2d Sess., at 1 (1972). *Secretary of the Interior v. California, 464 U.S. 312 (U.S. 1984)* (In a 5-4 decision, the Supreme Court held that the sale of oil and gas leases on the Continental shelf off the coast of California was not something that "directly affects" the coastal zone. Therefore a consistency determination under the Coastal Zone Management Act was not required).

(n37)Footnote 40. S. Rep. No. 307, 93d Cong., 1st Sess., at 1 (1973); *Coalition for Sustainable Resources, Inc. v. United States Forest Service, 48 F. Supp. 2d 1303 (D. Wyo. 1999)* (any harm suffered by the plaintiffs was sufficient to give standing to sue under the Endangered Species Act. The injuries claimed by the plaintiffs do not need to be within the zone of interest contemplated by the statute).

(n38)Footnote 41. H.R. Rep. No. 1013, 93d Cong., 2d Sess., at 1 (1974).

(n39)Footnote 42. H.R. Rep. No. 1163, 94th Cong., 2d Sess., at 1-2 (1976).

(n40)Footnote 43. S. Rep. No. 686, 93d Cong., 2d Sess., at 1 (1974).

(n41)Footnote 44. *16 U.S.C. §1641.*

(n42)Footnote 45. *16 U.S.C. §1642.*

(n43)Footnote 46. H.R. Rep. No. 241, 100th Cong., 2d Sess., at 1 (1988).

(n44)Footnote 47. H.R. Rep. No. 1112, 93d Cong., 2d Sess., at 1 (1974).

(n45)Footnote 48. *15 U.S.C. §2901.*

(n46)Footnote 49. S. Rep. No. 451, 92d Cong., 2d Sess., at 1 (1972). *United States v. Fisher, 977 F. Supp. 1193 (S.D. Fla. 1997)* (A treasure-hunting company violated the Marine Protection, Research, and Sanctuaries Act by destroying 1.63 acres of seagrass and removing artifacts from sanctuary. The United States was entitled to a permanent injunction).

(n47)Footnote 50. H.R. Rep. No. 437, 98th Cong., 2d Sess., at 5 (1984).

(n48)Footnote 51. H.R. Rep. No. 1551, 86th Cong., 2d Sess., at 1 (1960).

(n49)Footnote 52. S. Rep. No. 740, 95th Cong., 2d Sess., at 1 (1978).

(n50)Footnote 53. *33 U.S.C. §2801.*

(n51)Footnote 54. *16 U.S.C. §1600. Gregson v. United States Forestry Service, 19 F. Supp. 2d 925 (E.D. Ark. 1998)* (final agency decisions under the National Forest Management Act have a narrow standard of review, and courts must be careful not to replace the agency's judgment with its own. In this case, the plaintiffs who challenged the governmental agencies did not exhaust all possible administrative remedies, and the agencies involved complied with the notice and comment requirements; therefore, the government is entitled to summary judgment).

(n52)Footnote 55. *43 U.S.C. §1802.*

(n53)Footnote 56. *42 U.S.C. §13101.*

(n54)Footnote 57. S. Rep. No. 881, 95th Cong., 2d Sess., at 3-4 (1978).

(n55)Footnote 58. *Agricultural Excess & Surplus Ins. Co. v. A.B.D. Tank & Pump Co., 878 F. Supp. 1091 (N.D. Ill. 1995)* (Resource Conservation and Recovery Act provides a private right of action to compel remediation of soil and groundwater contamination from leaking underground petroleum storage tanks); *Craig Lyle Ltd. P'ship v. Land O'Lakes, Inc., 877 F. Supp. 476 (D. Minn. 1995)* (petroleum that spilled or leaked from an underground storage tank was solid waste under provisions of the Resource Conservation and Recovery Act).

Meghrig v. KFC Western, Inc., 516 U.S. 479 (U.S. 1996) (the citizen suit provision in the Resource Conservation and Recovery Act (RCRA) did not authorize a private suit for the cost of cleaning up toxic waste left by a previous owner, where the waste is not a current danger); *U.S. Dept. of Energy v. Ohio, 503 U.S. 607 (U.S. 1992)* (RCRA had not waived federal sovereign immunity for civil fines imposed by a State on past violations of RCRA).

(n56)Footnote 59. *See,* §75.03(a)(26), *supra.*

(n57)Footnote 60. H.R. Rep. No. 344, 95th Cong., 1st Sess., at 7 (1977).

(n58)Footnote 61. H.R. Rep. No. 218, 95th Cong., 1st Sess., at 57-58 (1977).

American Min. Congress v. United States E.P.A., 965 F.2d 759 (9th Cir. 1992) (a rule passed by the EPA under the Clean Water Act that required storm water discharge permits for all inactive mining operations did not conflict with the Surface Mining Control and Reclamation Act).

(n59)Footnote 62. *42 U.S.C. §10302.*

As amended by Act May 24, 1996, P.L. 104-147, §2, *110 Stat. 1375).*

(n60)Footnote 63. H.R. Rep. No. 913, 96th Cong., 2d Sess., at 4 (1980).

(n61)Footnote 64. 40 C.F.R. §1500 *et seq.*

(n62)Footnote 65. *42 U.S.C. §4331*(b).

(n63)Footnote 66. *42 U.S.C. §4332*(C).

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CHAPTER 75 THE IMPACT OF ENVIRONMENTAL REGULATION ON REAL PROPERTY

8-75 Thompson on Real Property, Thomas Editions § 75.04

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§ 75.04 Air Pollution Control.

The Clean Air Act n67 first appeared in 1955 and since then has grown into a gargantuan tangle of legislation, regulation, and judicial interpretation. As deftly described in one treatise:

> The Federal Clean Air Act (the Act) is an inordinately complex and confusing statute. In Act form it runs to nearly 200 pages. There are more than 2,700 pages of regulations of the United States Environmental Protection Agency (EPA) implementing the Act, and many hundreds of additional pages are always under development. In addition, there are hundreds of pages of EPA guidelines providing guidance on activities such as monitoring and predicting air quality concentrations. Unpublished interpretive memoranda and guidance, opinions of EPA's Office of General Counsel, and decided cases (already numbering in the hundreds) run into thousands of pages. n68

The principal purpose of the act is to establish and maintain national ambient air quality standards. Ambient air, as defined by the EPA is, "that portion of the atmosphere, external to buildings, to which the general public has access." n69 As interpreted by regulatory authority, ambient air has come to mean the air beyond the property boundaries of a pollution source, if adequate control of public access to the property is maintained. n70

The approach of the Clean Air Act is to require the EPA to identify specific pollutants, prescribe minimum air quality standards, setting maximum acceptable atmospheric concentrations for these specific pollutants, and identify control techniques for the pollutants. Standards for these particular pollutants in turn become part of models and computations for evaluating whether overall ambient air quality standards are being maintained. The act also requires states to create and submit for EPA approval state implementation plans providing for attainment of primary and secondary ambient air quality standards within designated time limits. If a state does not adopt an acceptable plan, the EPA theoretically adopts a plan for the state. n71

An important goal of requiring state implementation plans is to prevent air quality deterioration in those areas where acceptable air quality already exists. To achieve this objective, the state plans must have provision for a program of preconstruction permit review and issuance, periodic review of the plan and of the air quality to ensure that deterioration is not occurring, and adequate means to prevent deterioration that is either imminent or actually occurring. Another part

of the act is aimed at protecting and improving visibility values in the air. Provisions for visibility protection should be included in state implementation plans. n72

When an area does not meet established air quality standards, the possible consequences include withholding of certain federal funds (such as for highways and sewage treatment facilities) and preventing construction of facilities that may generate pollutants. The EPA has also established national performance standards for new, modified, or reconstructed facilities that have the potential to generate pollutants. After promulgation of such standards it becomes more difficult for individual states to recruit new industries by claiming relatively lower pollution control costs.

Emissions of hazardous air pollutants are subject to federal emission standards, n73 but the actual processes of regulation are conducted at the state level.

To aid in enforcement, the Clean Air Act provides for civil and criminal penalties -- including non-compliance penalties, and injunctions. Also, for areas that remain in non-compliance, sanctions in the form of moratoria on permits and withholding of federal funds for such projects as highways, sewage treatment plants, and air pollution control grants may be imposed. n74 The EPA administrator is required to bring enforcement actions against violators, n75 but may do so either by the notice process or by civil actions in federal court. n76 The criminal penalties may include either significant daily fines or imprisonment or both, n77 and those penalties may also be imposed on "any responsible corporate officer." n78 In most instances the penalty provisions of the act do not become operative until 30 days after a notice of violation has been issued by the administrator. n79

FOOTNOTES:

(n1)Footnote 67. *42 U.S.C. §§7401*-7642.

(n2)Footnote 68. David Sive & Frank Friedman, A Practical Guide to Environmental Law 18 (ALI-ABA 1987).

(n3)Footnote 69. 40 C.F.R. §50.1(e).

(n4)Footnote 70. David Sive & Frank Friedman, A Practical Guide to Environmental Law 19 (ALI-ABA 1987).

(n5)Footnote 71. *42 U.S.C. §7410*(c).

(n6)Footnote 72. *42 U.S.C. §7491*.

(n7)Footnote 73. *42 U.S.C. §7412*.

(n8)Footnote 74. *See, e.g., 42 U.S.C. §7506,* limits on certain federal assistance.

(n9)Footnote 75. *42 U.S.C. §7413*(b).

(n10)Footnote 76. *42 U.S.C. §7413*(a)(1).

(n11)Footnote 77. *42 U.S.C. §7413*(b) and (c).

(n12)Footnote 78. *42 U.S.C. §7413*(c)(3).

(n13)Footnote 79. *42 U.S.C. §7413*(a), (b) and (c).

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CHAPTER 75 THE IMPACT OF ENVIRONMENTAL REGULATION ON REAL PROPERTY

8-75 Thompson on Real Property, Thomas Editions § 75.05

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§ 75.05 Water Pollution Control.

Federal water pollution legislation dates back to 1899, when the Rivers and Harbors Act was enacted. n80 Building bridges and other structures and depositing solid waste were prohibited without Army Corps of Engineer approval or permit. With enactment of the Federal Water Pollution Control Act of 1948, n81 courts were empowered to order abatement of water pollution, and under the Water Quality Act of 1965, n82 water quality standards were established for interstate waters. A major reshaping of water pollution legislation occurred with the approval of the Clean Water Act n83 in 1972. This act continued, and provided for ongoing review of, water quality standards and placed limits on discharges of pollutants into waters. Further amendments were made in 1977 n84 and in 1987. n85 The latter amendments included new water quality controls for toxic pollutants, requirements for storm water discharges, civil penalties, and compliance deadline extensions.

Standards concerning the level of water quality are based either on the best available technology or on measurements of actual pollutant levels in the water. Usually the more stringent or restrictive of the two standards is deemed applicable. To secure compliance with these standards, a permit system has been established, applicable to those responsible for discharges into federal waters. n86 If discharges are made without the required permit, civil and criminal penalties at both federal and state levels may be imposed, and the offender may also be exposed to citizen suits. n87 Such discharges may also violate Environmental Protection Agency (EPA) standards for toxic pollutants and pretreatment processes, and the same consequences in terms of penalties and private litigation judgments may follow.

FOOTNOTES:
(n1)Footnote 80. *33 U.S.C. §401 et seq.*

Legislation on effluent limitations was approved January 24, 2002. *33 U.S.C. §1311.*

(n2)Footnote 81. Pub. L. No. 80-845, *62 Stat. 1155 (1948).*

(n3)Footnote 82. Pub. L. No. 89-234, *79 Stat. 903 (1965).*

(n4)Footnote 83. *33 U.S.C. §1251 et seq.,* Pub. L. No. 92-500, *86 Stat. 816 (1972).*

(n5)Footnote 84. Pub. L. No. 95-217, *91 Stat. 1567 (1977).*

(n6)Footnote 85. Water Quality Act of 1987, Pub. L. No. 100-4, *101 Stat. 7 (1987).*

(n7)Footnote 86. *33 U.S.C. §1342.*

(n8)Footnote 87. *33 U.S.C. §§1319,* 1365.

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CHAPTER 75 THE IMPACT OF ENVIRONMENTAL REGULATION ON REAL PROPERTY

8-75 Thompson on Real Property, Thomas Editions § 75.06

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§ 75.06 Noise Control.

The Noise Control Act of 1972 directs EPA "to promote an environment for all Americans free from noise that jeopardizes their health and welfare." It specifies that EPA shall regulate new products in commerce that are "major sources of noise" and shall establish noise labeling requirements for noisy products and products designed to reduce noise. In 1978, Congress amended this legislation with the Quiet Communities Act to encourage the development of noise control programs on the community and state level. The amendments provided a necessary link and balance between the federal regulatory program and local noise control activities.

EPA began the rulemaking process by examining transportation and construction noise, the primary concerns of most local communities. The agency studied various products -- such as trucks, motorcycles, and jack hammers -- and considered a broad range of factors, including the absolute magnitude of the noise emitted in typical environments and whether the product is used in the combination with other noisy products. EPA's principal objective was to improve the health and welfare benefits to the public by lowering noise emissions from products identified as major noise sources. This was the central theme of the 1972 Act. Also considered was the available technology and the costs to both the manufacturer and the consumer of reducing the noise levels of these products.

Since 1972, EPA has identified 10 products as major noise sources: medium and heavy trucks, motorcycles, buses, garbage trucks, wheel and crawler tractors (used in construction), portable air compressors, pavement breakers (or jack hammers), rock drills, power lawnmowers, and truck refrigeration units.

Besides standards on newly manufactured products, EPA has issued in-use regulations for locomotives and rail cars used in interstate commerce and has proposed standards for other railroad equipment and facilities. These regulations are enforced by the Federal Railroad Administration of the Department of Transportation.

Since 1975, interstate motor carriers also have been covered by EPA's in-use standards, which have proven effective in getting the worst noise offenders off the highways. The Bureau of Motor Carrier Safety of D.O.T. actively enforces these standards.

F.A.A. is responsible for issuing noise limits for new types of aircraft. The Federal Air Regulation noise limits on new

types of aircraft were established in 1969 and in 1977, and now cover most types of aircraft, including jet transports and propeller-driven aircraft. There is also a "retrofit or replacement" rule requiring all existing subsonic jet transport aircraft to meet at least the 1969 limits by 1985. In 1979 F.A.A. proposed noise limits for new helicopters:

> The protection of workers from excessive noise on the job is an area of increasing public concern and controversy. The Occupational Safety and Health Administration (OSHA) is charged with developing and enforcing rules to prevent excessive noise exposure. OSHA's mandate is that *no* employee should suffer material impairment of health or functional capacity even if the employee is regularly exposed to a hazard covered by an OSHA standard for the period of his working life ...

Because federal standard-setting alone cannot achieve desirable community noise levels, state and local programs are an essential complement. The Noise Control Act as modified by the Quiet Communities Act provides the framework for a federal partnership with states and localities in achieving a balanced national noise control program.

> One facet of this partnership is EPA's program for financial assistance to help communities launch noise control programs. This is not long-term assistance; instead it is designed to help communities identify their particular noise problems and build programs in response. n88

Noise control legislation is common at the state and local levels and, indeed, mostly at the local level:

> Almost every state has enacted laws requiring mufflers on vehicles to prevent excessive noise and to the extent that these muffler regulations require particular kinds of performance from new equipment, they are likely to be displaced by pre-emptive noise control regulations for motor vehicles to be issued by EPA under the 1972 Noise Control Act ... But in spite of a growing state interest in the area, enhanced considerably by the passage of the 1972 Federal Noise Control Act, regulatory activities are still mainly based on local ordinances. The local legislation regarding noise is generally part of a set of miscellaneous prohibitions collected in local codes. Frequently, they are composed of matters too trivial to appear in the state's general penal code and usually too neglected in modern times to be brought together in public health laws or similar legislation. n89

FOOTNOTES:

(n1)Footnote 88. Council on Environmental Quality Annual Report, 559-568 (1979).

(n2)Footnote 89. Frank P. Grad, Treatise on Environmental Law 827 (Matthew Bender).

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CHAPTER 75 THE IMPACT OF ENVIRONMENTAL REGULATION ON REAL PROPERTY

8-75 Thompson on Real Property, Thomas Editions § 75.07

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§ 75.07 Hazardous Substances Control.

To the extent that solid waste disposal includes cleanup of hazardous wastes, the actions have been dominated by the Comprehensive Environmental Response, Compensation, and Liability Act, known commonly as CERCLA actions have their own impetus and objectives and a similar but separate citizen suit provision. n90 One commentator has noted:

> To a large extent the role of [the Solid Waste Disposal Act citizen suit provisions] in the EPA enforcement effort has been diminished by the increased reliance on CERCLA [citizen suit] orders, which carry the possible penalty of treble the costs of the ordered cleanup. But the reach of [the Solid Waste Disposal Act action] probably is as broad as [the CERCLA action] -- for example, [the solid waste action] applies to *all* wastes (including liquids and gases) -- and it may be that EPA will routinely use both provisions to encourage the desired conduct at the same site. n91

So, even with a perhaps diminished role in environmental regulation and enforcement, solid waste disposal laws will continue to be important.

The Solid Waste Disposal Act n92 was significantly amended in 1976 by passage of the Resource Conservation and Recovery Act, n93 which, together with voluminous EPA regulations in 1980, n94 established programs to manage hazardous wastes.

Under these enactments and regulations hazardous wastes are defined and identified, and regulations and permit requirements for handling and disposal of wastes are established. States that have enacted programs similar to the federal program may also be authorized to administer the federal regulations. Amendments to the Act in 1984 n95 launched the federal government into a more aggressive program of containing and disposing of wastes.

Regulation of waste disposal usually takes the form of recordkeeping and reporting requirements for those who generate and transport waste materials, and a permit program for those who store and dispose of waste. The key to applicability of these regulations is the definitions of what is a solid waste, n96 and which solid wastes may be designated as hazardous. Material is considered hazardous if it appears on one of several itemized lists of hazardous material, n97 or,

more generally, if it possesses one of the characteristics of ignitability, corrosivity, reactivity or toxicity. n98

Although the federal regulatory program has been worked out in considerable detail, most states have implemented their own program in place of a federal program. However, the EPA will not authorize a state to administer such a waste program unless the state requirements are no less strict than the federal requirements, and, even after authorizing a state program, the EPA retains considerable enforcement authority. Among the devices that either state or federal agencies might use to compel compliance are restraining and compliance orders, permit requirements, requirements for reporting and testing at a site, court actions, and criminal penalties.

FOOTNOTES:
(n1)Footnote 90. *42 U.S.C. §9659.*

(n2)Footnote 91. David Sive & Frank Friedman, A Practical Guide to Environmental Law 104 (1987).

(n3)Footnote 92. *42 U.S.C. §6901 et seq.*

(n4)Footnote 93. Pub. L. No. 94-580, 90 Stat. §2395 *et seq.* (1976).

(n5)Footnote 94. §§260-267, 270-271.

(n6)Footnote 95. Pub. L. No. 98-616 (1984).

(n7)Footnote 96. *See* 40 C.F.R. §261.2(a), which defines, in considerable detail, solid waste as any discarded material not excluded by other definitions. Discarded materials are those that are abandoned, recycled or inherently wastelike. Abandoned materials are solid waste if they are disposed of, burned or incinerated, or accumulated, stored, or treated (but not recycled) before or in lieu of being abandoned by being disposed of, burned, or incinerated, and so on.

(n8)Footnote 97. 40 C.F.R. §§261.30 -- 261.33.

(n9)Footnote 98. 40 C.F.R. §§261.20 -- 261.24.

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CHAPTER 75 THE IMPACT OF ENVIRONMENTAL REGULATION ON REAL PROPERTY

8-75 Thompson on Real Property, Thomas Editions § 75.08

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§ 75.08 Radiation Control.

Under the first Atomic Energy Act in 1946, the federal government first asserted federal controls over nuclear power that pre-empt any regulation by state and local governments. Not until 1959 did the federal government begin to share some rulemaking and enforcement power with the state and local governmental entities.

According to the nuclear regulatory legislation, the Atomic Energy Commission and its successor, the Nuclear Regulatory Commission, were assigned to set radiation protection standards relating to nuclear installations. Now some of this responsibility is shared with the Environmental Protection Agency (EPA). The EPA sets limits on levels of radiation exposure for the general environment, apart from nuclear reactors, but, with respect to those facilities, emission controls are the responsibility of the Nuclear Regulatory Commission.

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CHAPTER 75 THE IMPACT OF ENVIRONMENTAL REGULATION ON REAL PROPERTY

8-75 Thompson on Real Property, Thomas Editions § 75.09

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§ 75.09 CERCLA: Responsibility for Clean-Up of Environmental Pollution.n99

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§ 75.09(a) Introduction to CERCLA

Certain uses of land subject the land user to complex environmental regulations, mostly aimed at controlling land uses that cause environmental harm; violations of these regulations can result in imposition of both civil and criminal penalties. For example, the Clean Water Act n100 (CWA) governs uses of land that discharge pollutants into "the waters of the United States, including the territorial seas." n101 The Safe Drinking Water Act n102 (SDWA) controls the injection of pollutants into underground water. n103 The Clean Air Act n104 (CAA) governs uses of land that release air pollutants. n105 Storage or disposal of solid and hazardous waste on land is regulated by the Resource Conservation and Recovery Act n106 (RCRA).

However, the Comprehensive Environmental Response, Compensation, and Liability Act n107 (CERCLA) affects all other major environmental legislation and goes well beyond regulating uses of land to reduce environmental harm. Instead of focusing on pollution control or regulating behavior, CERCLA focuses on responding to pollution that has already occurred, and it imposes liability for the costs of cleaning up land that has been contaminated with hazardous substances. n108 CERCLA is unequivocally the most important and troublesome environmental statute for both landowners and lenders who are secured by land, because it imposes such expansive liability.

CERCLA liability often extends to landowners or lenders who had little or nothing to do with hazardous materials being placed on the property and who were not traditionally thought of as perpetrators of environmental harm. Current landowners may be liable for the cleanup of hazardous waste that was released on the property by previous landowners, no matter how remote the chain of title and possession. n109 Mortgagees may be liable for cleaning up hazardous waste that was placed on the property by the mortgagor.

Moreover, in bankruptcy proceedings, the cost of cleanup may be assigned priority of access to the debtor's assets ahead of claims of secured creditors. Thus, even if lenders are not directly liable for cleanup costs, they may nevertheless face a type of indirect CERCLA liability, because their security interest in contaminated property may be compromised by CERCLA cleanup costs.

Because CERCLA liability extends to lenders or landowners who have had little experience with complex environmental statutes and regulations, it is essential that these parties obtain a basic understanding of CERCLA. Otherwise, lenders or landowners who do not think of themselves as polluters may be surprised to find that they are responsible for enormous cleanup costs n110 or that their security is worthless. n111

This section provides a basic outline of CERCLA and discusses issues relating to lender or landowner liability. The first part of the section provides an overview of CERCLA and the Superfund n112 program. The next part of the section examines the liability scheme under CERCLA, with special emphasis on lender or landowner liability. The final part of the chapter analyzes how CERCLA may threaten security interests.

§ 75.09(b) Overview of CERCLA

CERCLA was passed in December, 1980, during the final days of a lame duck Congress and Presidency. n113 Three bills were hurriedly combined to form CERCLA. n114 Thus, CERCLA's legislative history has been criticized by both courts and commentators as being confusing or even contradictory, n115 and the text of CERCLA has been lampooned as a quintessential example of a confusing, poorly drafted statute. n116 Nevertheless, the legislative history and text of CERCLA make clear that Congress intended to (1) provide the government with the authority to respond effectively to and clean up hazardous waste sites where releases have occurred or are likely to occur, and (2) impose liability for these cleanup or response costs on those responsible for the releases. n117

Under CERCLA, releases or threatened releases of a hazardous substance from a vessel or facility must be reported by the person in charge of the vessel or facility. Potentially responsible parties n118 (PRPs) may be forced to respond to or clean up the release in a manner consistent with the National Contingency Plan (N.C.P.), and the Environmental Protection Agency (EPA) or Coast Guard may issue an administrative order or seek an injunction to compel such PRP response. Alternatively, the EPA may respond to or clean up a release itself and recover its costs from the PRPs for all actions consistent with the NCP. In addition, third parties may respond to a release and seek recovery of their costs from the Superfund or PRPs if the response is consistent with the N.C.P. n119 The following subsections discuss in greater detail the elements of CERCLA that describe reporting duties, response and cleanup actions, and liability.

§ 75.09(b)(1) Determining What Is a Hazardous Substance.

For CERCLA purposes, hazardous substances include (1) toxic or hazardous pollutants designated under other environmental statutes n120 and (2) any other toxic or hazardous pollutants designated under CERCLA §102(a). n121 Materials designated as toxic pollutants n122 or hazardous substances under the CWA, n123 as hazardous waste under RCRA, n124 as hazardous air pollutants under the CAA, n125 or as an "imminently hazardous chemical substance or mixture" n126 under the Toxic Substance Control Act n127 (T.S.C.A.) are all hazardous substances under CERCLA. The §102 authority n128 to list additional hazardous substances fills in any gaps left by these environmental statutes. n129

The EPA also has authority to respond to a "release or substantial threat of release into the environment of any pollutant or contaminant which may present an imminent and substantial danger to the public health or welfare." n130 Pollutants or contaminants are defined under CERCLA §101(33). n131 However, PRPs are not liable under CERCLA for releases or threatened releases of these pollutants or contaminants. Under CERCLA, the EPA can only force PRPs to respond to or clean up a release of *hazardous substances*, n132 and PRPs are only liable for response costs incurred for *hazardous substance* releases. n133 Thus, there may be instances where the EPA has authority to respond to a release of pollutants but cannot impose CERCLA liability on PRPs for response costs.

However, EPA response to contaminant releases where PRPs are exculpated from liability is exceedingly rare. If a pollutant or contaminant is dangerous enough to warrant EPA response when released into the environment, it is likely that the pollutant or contaminant has already been determined to be a hazardous substance under CERCLA A review of

the hazardous substances list shows that it contains almost every known hazardous pollutant. n134

The most prominent exclusion from the CERCLA list of hazardous substances is the petroleum exclusion. The definition of "hazardous substance" n135 or a "pollutant or contaminant" n136 specifically excludes "petroleum, including crude oil and any fraction thereof...." n137 This exclusion can be attributed to both the considerable influence of the petroleum lobby and the EPA's authority to deal with oil spills under the CWA n138 The EPA has interpreted the petroleum exclusion to except all naturally occurring petroleum fractions from CERCLA coverage, even if these petroleum fractions contain listed hazardous substances. Moreover, the EPA excludes from CERCLA petroleum products that contain hazardous substances as additives as long as these additives are normally added during the refining process and do not exceed normal refining levels. Although the EPA's interpretation of the petroleum exclusion is not outlined in the regulations, it has been clearly articulated in EPA guidance documents. The petroleum exclusion encompasses hazardous substances (1) "which are inherent in petroleum" or (2) "which are normally mixed with or added to crude oil or crude oil fractions during the refining process." n139

Courts have generally accepted the EPA's interpretation of the petroleum exclusion. For example, the Ninth Circuit has held that the petroleum exclusion "does apply to unrefined and refined gasoline even though certain of its indigenous components and certain additives during the refining process have themselves been designated as hazardous substances within the meaning of CERCLA" n140 Thus, although they may contain benzene, lead, and other chemicals that are hazardous substances under CERCLA, gasoline, diesel fuel, and similar petroleum products are not hazardous substances under CERCLA n141

However, the petroleum exclusion does not extend to petroleum fractions that have been mixed with hazardous substances after the refining process. n142 This rule may remove most waste or used oil from the petroleum exclusion, because oil often comes in contact with and mixes with hazardous substances during use. Thus, PRPs have incurred CERCLA liability for releases of used crankcase oil. n143 In addition, waste oil emulsion containing hazardous substances added after the refining process does not qualify for the petroleum exclusion. n144 Moreover, the petroleum exclusion does not include pesticides, even though the pesticide may be produced from a petroleum fraction. n145 The addition of any hazardous substance to a petroleum fraction after the "normal" refining process removes the fraction from the petroleum exclusion.

In addition to petroleum, §§101(14) and 101(33) of CERCLA exclude "natural gas, natural gas liquids, liquefied natural gas, or synthetic gas usable for fuel (or mixtures of natural gas and such synthetic gas). n146 The EPA has no response authority under CERCLA for these substances, and there are no CERCLA reporting duties for releases of these substances.

If the substance at issue is a CERCLA hazardous substance which is not excepted by one of the statutory exclusions, the next issue is whether the substance has been released.

§ 75.09(b)(2) Determining Whether There Has Been a Release or Substantial Threat of Release.

Before the EPA has the authority to act under CERCLA and before liability may be imposed, there must be "an actual or threatened release of a hazardous substance from a facility." n147 The CERCLA definition of release is extremely broad and covers almost every conceivable way that a hazardous substance could be placed into the environment. CERCLA §101(22) states:

> The term "release" means any spilling, leaking, pumping, pouring, emitting, emptying, discharging, injecting, escaping, leaching, dumping, or disposing into the environment (including the abandonment of discarded barrels, containers, and other closed receptacles containing any hazardous substance or pollutant or contaminant)... n148

Although for CERCLA purposes a release must be "into the environment," n149 the definition of the environment under CERCLA §101(8) is also exceedingly broad. n150 A release into the "environment" is a release into any air, water, or land under the jurisdiction of the United States. n151

However, the definition of a release does place some limitations on CERCLA authority and liability. The releases excluded from CERCLA are usually regulated to some extent under other statutory schemes. First, releases confined solely to the workplace and affecting only employees are excluded from CERCLA to the extent such releases create claims against the employer. n152 These workplace releases are regulated under the Occupational Health and Safety Act n153 (OSHA) and state workers' compensation laws. Second, engine exhaust releases from mobile sources and pipeline pumping stations are regulated by the CAA n154 and do not come within the purview of CERCLA n155 Third, certain nuclear or radioactive releases are handled under the Atomic Energy Act of 1954 n156

or the Uranium Mill Tailings Radiation Control Act of 1980. n157 Finally, "the normal application of fertilizer" is simply exempted from CERCLA coverage. n158

In addition, there is no notification requirement or liability under CERCLA for federally permitted releases. n159 Federally permitted releases include releases under CWA National Pollutant Discharge Elimination System (N.P.D.E.S.) permits, n160 CWA §404 dredge and fill permits, n161 RCRA treatment, storage, and disposal (T.S.D.) permits, n162 ocean dumping permits, n163 SDWA underground injection control permits, n164 non-attainment or P.S.D. permits and CAA control regulations, n165 state energy production injection laws, n166 CWA pretreatment standards, n167 or Atomic Energy Act permits, licenses, regulations or orders. n168

After it has been established that a release, as defined by CERCLA, of a CERCLA hazardous substance has occurred, the next issue is whether the hazardous substances release occurred at a facility or vessel.

§ 75.09(b)(3) Determining Whether the Real Property is a "Facility."

EPA response authority under CERCLA §104 does not require the existence of a vessel or a facility. Thus, the EPA may respond to any release of a hazardous substance, as long as response is consistent with the N.C.P. However, PRPs can be compelled to respond to a release or be held liable for response costs only if the release is from a vessel n169 or facility. n170 Similarly, CERCLA reporting requirements also presuppose a vessel or facility. n171

The facility requirement offers PRPs little protection, however, because almost any structure, container, or property is classified as a facility under the broad definition supplied by CERCLA n172 "Simply put, the term 'facility' includes *every* place where hazardous substances come to be located." n173 Therefore, the definition of a facility under CERCLA is seldom a material issue. n174 Any real property where hazardous substances are located is unequivocally a hazardous waste facility.

§ 75.09(b)(4) Reporting Duties.

CERCLA creates certain reporting duties which are triggered by the release of a hazardous substance from a vessel or facility (onshore or offshore). n175 Failure to comply with the reporting requirements is punishable by both fines and imprisonment. n176 The reporting duty arises as soon as any person in charge of a vessel or facility has knowledge that a hazardous substance release has occurred. The person in charge of the vessel or facility must report such a release immediately by contacting the National Response Center in Washington, D.C. n177

However, each of the three elements discussed above must be present before the person in charge is required to report a release: (1) a hazardous substance, (2) a release, and (3) a facility or vessel. Moreover, there is no reporting duty if the hazardous substance is released (1) in an amount less than the "reportable quantity" n178 or (2) under a federal permit, or (3) if one of the three specific exemptions apply.

§ 75.09(b)(4)(i) Reportable Quantities.

To avoid the inefficient reporting of *de minimis* releases, CERCLA §102(a) n179 orders the Administrator to promulgate regulations establishing the reportable quantities for different hazardous substances. A hazardous substance release need not be reported unless the quantity released exceeds these threshold amounts. n180 Until the EPA had time to establish reportable quantities, §102(b) of CERCLA n181 set the initial reportable quantities at levels established under the CWA for those substances regulated under the CWA, n182 or at one pound for substances not regulated under the CWA However, the EPA has since promulgated regulations establishing reportable quantities for most hazardous substances. n183 These reportable quantities range from 1 to 5,000 pounds. The notification requirement is triggered by any release equal to or above the reportable quantity in any 24-hour period. n184

§ 75.09(b)(4)(ii) Exemptions.

Beyond the requirement of a reportable quantity, §103 sets forth four specific exemptions from CERCLA release reporting requirements. n185 First, no reporting duty arises if the release is pursuant to a federal permit. n186 Second, "the application of a pesticide product registered under the Federal Insecticide, Fungicide, and Rodenticide Act" n187 (FIFRA) is exempted from CERCLA reporting requirements. n188 Third, any release that is specifically exempted from RCRA reporting requirements n189 need not be reported under §103(a) of CERCLA n190 Finally, "a continuous release, stable in quantity and rate," which has already been reported is not subject to §103(a) notification requirements. n191

§ 75.09(b)(4)(iii) Facility Notification.

A related reporting duty is the facility notification requirement of CERCLA §103(c). The facility notification requirement is not created by a release of a hazardous substance but rather by the knowledge that hazardous waste has been treated, stored, or disposed of at the facility. The hazardous wastes (as opposed to hazardous substances) that trigger notification are identified and listed pursuant to RCRA §3001. n192 No release is required to create this notification requirement. The necessary elements to trigger the notification requirement are the (1) past or present treatment, storage, or disposal (TSD) of hazardous waste at (2) a facility. Notification is not necessary if the facility has received an interim status or final RCRA T.S.D. permit. n193 Again, the application of pesticides registered under F.I.F.R.A. is exempted from CERCLA reporting requirements. n194

The facility reporting duty extends to "any person who owns or operates or who at the time of disposal owned or operated, or who accepted hazardous substances for transport and selected, a facility at which hazardous [wastes] are or have been stored, treated or disposed of." n195 Although facility notification should have been filed by June 9, 1981, for facilities existing prior to that time, n196 the notification requirement is ongoing. Thus, any new knowledge that hazardous waste was treated, stored, or disposed of at a facility must be reported immediately.

If a release at a T.S.D. facility is reported, the next issue becomes whether response to the release is warranted or required.

§ 75.09(b)(5) Response Authority Under CERCLA §104.

CERCLA §104 n197 gives the government authority to respond to any release or substantial threat of release of either (1) a hazardous substance or (2) pollutants or contaminants "which may present an imminent and substantial danger to the public health and welfare." n198 This response authority is vested in the President, n199 and the President has delegated this authority to the Coast Guard for releases in coastal zones or certain navigable waters and to the EPA for almost all inland releases. n200 The response authority for *hazardous substances* under §104(a)(1)(A) is not based on any finding of "imminent and substantial danger" n201 because the danger is inherent in the definition of a hazardous substance. To respond under §104(a)(1)(A), there need only be a (1) release or threatened release of (2) a hazardous

substance. n202 However, response authority under §104(a)(1)(B) is conditioned on (1) a pollutant or contaminant, (2) a release or threatened release, and (3) imminent, substantial danger. n203

If the elements of §104(a)(1) are satisfied, the EPA may respond to or clean up a site using money from the Superfund, as long as this response is consistent with the N.C.P. n204 The Superfund was originally supplied with $1.6 billion under CERCLA §111 for the years 1981-1985; however, S.A.R.A. increased the fund to $8.5 billion for years 1986-1991. n205 The Superfund is financed by congressional appropriations; taxes on petroleum, petroleum products, and chemical feedstocks; an environmental tax on corporations; and costs and penalties recovered from PRPs. n206 If the EPA has responded to the release of a hazardous substance under §104(a)(1)(A), the agency may replenish the Superfund by suing PRPs to pay for response costs. However, the EPA cannot seek reimbursement from PRPs for §104(a)(1)(B) responses to pollutants and contaminants because PRP liability is predicated on the existence of a hazardous substance. n207

As part of the EPA's response authority, the EPA has the discretion to allow PRPs, rather than the EPA, to respond to or clean up a hazardous substance release if the EPA believes that the PRPs will respond "properly and promptly." n208 Like EPA response, PRP response actions must be consistent with the N.C.P. In addition, the EPA will appoint qualified personnel to oversee all PRP actions, and the PRP must reimburse the EPA for these oversight costs. n209

The appropriate response action is usually selected by the EPA PRPs cannot challenge the selected response action until EPA or another PRP seeks recovery of response costs by bringing a §107 action against the PRPs. n210 CERCLA §113(h) specifically provides that courts lack jurisdiction to review "removal or remedial action selected under §104" until response costs are incurred and some party seeks recovery under §107. n211 CERCLA divides response actions into the two broad categories of removal actions and remedial actions. n212

§ 75.09(b)(5)(i) Removal Actions.

Removal actions are generally short term solutions to hazardous substance releases and include steps "to prevent, minimize, or mitigate damage to the public health or welfare or the environment." n213 Removal actions specifically include such emergency operations as "temporary evacuation and housing of threatened individuals," providing uncontaminated water, and fencing off dangerous areas. n214 Other removal actions include the monitoring and evaluation of a release or threatened release and, of course, the actual removal of a hazardous substance. Section 104 provides that removal actions should "contribute to the efficient performance of any long term remedial action." n215

§ 75.09(b)(5)(ii) Remedial Actions.

Remedial actions are permanent, long term solutions to hazardous substance releases. Remedial actions include all cleanup and containment activities; permanent relocation of individuals, businesses, and community facilities; and "offsite storage, treatment, destruction, or secure disposition of hazardous substances and associated contaminated materials." n216 The EPA must consult with affected states before selecting an appropriate permanent remedy. n217 Selection of a remedial action is governed by the N.C.P. and CERCLA §121. n218 As discussed later in this section, the N.C.P. sets forth the procedures and standards for cleaning up hazardous substance releases. n219 One important restriction under the N.C.P. is that Superfund expenditures for remedial actions are limited to sites that have been placed on the National Priorities List (N.P.L.). n220 CERCLA §121 provides for remedial action cleanup standards in harmony with the N.C.P. n221

Section 121 requires releases to be cleaned to a contaminant level that "assures protection of human health and the environment." n222 Congress has directed that this threshold must be met by removing the hazardous substance until the level of the substance no longer exceeds any "legally applicable or relevant and appropriate standard, requirement, criteria, or limitation." n223 These applicable or relevant and appropriate requirements (A.R.A.R.s) include levels under federal environmental statutes (*e.g.*, T.S.C.A., SDWA, CAA, CWA, and RCRA) and levels under state environmental

laws that are more stringent than federal standards. n224

A.R.A.R.s can be divided into two subcategories: (a) applicable requirements and (2) relevant and appropriate requirements. If the A.R.A.R. is a legally applicable standard, determining the cleanup level under §121 is relatively easy. For example, a release of arsenic into groundwater would have to be cleaned up to a level of. 05 milligrams per liter, the level legally applicable under RCRA n225 However, determining A.R.A.R.s which are both relevant and appropriate is much more difficult and requires the EPA and courts to exercise a great deal of discretion. For example, under what circumstances should the level of cleanup be set by health and safety standards under OSHA? CERCLA specifically requires cleanup to attain Maximum Contaminant Level Goals under the SDWA or water quality criteria levels under the CWA if these levels are relevant and appropriate. n226 Thus, CERCLA may require cleanup to attain contaminant levels that are actually lower than levels permitted when there is no CERCLA release in the first place. In other words, the EPA can require PRPs to restore the environment to a cleaner level than the normal legally required level.

State A.R.A.R.s determine contaminant cleanup levels only if they are more stringent than any of the federal A.R.A.R.s. In addition, state A.R.A.R.s must be "of general applicability," promulgated "by formal means," based on "hydrologic, geologic, or other relevant considerations," and related to "protection of human health and the environment." n227 The state must also ensure that an adequate facility exists to implement the more stringent standard and must pay the incremental cost of the more stringent cleanup. n228 Finally, the state must notify the EPA of the more stringent standard "in a timely manner." n229

Even if an A.R.A.R. exists, the EPA may select another level that is protective of human health and the environment if compliance with the A.R.A.R. is excused under one of the statutory A.R.A.R. exemptions. n230 For example, compliance with an A.R.A.R. is excused if it is "technically impracticable from an engineering perspective." n231 Also, the EPA may excuse compliance from a state A.R.A.R. if the EPA finds that the state has not applied the A.R.A.R. consistently n232 or if the costs associated with obtaining an A.R.A.R. are not justified when balanced against the need for Superfund expenditures at other sites. n233

If there is no Federal or State A.R.A.R., the EPA and the courts are left to determine a cleanup level that protects human health and the environment. This determination will be based primarily on studies and risk assessments of the site which have been developed consistent with the N.C.P. Finally, if a remedial action involves transferring hazardous substances or pollutants or contaminants to another site, such materials must be sent only to facilities that are (1) operating in compliance with RCRA and all other applicable federal and state laws, (2) are not releasing any hazardous waste from the operating unit, and (3) have an approved corrective action program for releases from other units at the facility. n234

Section 121 also requires a remedial action or response that is "cost effective." n235 The statute compels the EPA to consider and compare both the long-term and short-term costs of different remedial actions. The EPA must take into account such factors as "the long-term uncertainties associated with land disposal; ... long-term maintenance costs; [and] the potential for future remedial action costs if the alternative remedial action in question were to fail...." n236

Congress expressed a clear preference for remedial actions that permanently decrease the volume, toxicity, or mobility of contaminants. n237 Therefore, CERCLA requires the EPA to select remedial actions that employ "permanent solutions and alternative treatment technologies or resource recovery technologies to the maximum extent practicable." n238 Simply transporting contaminants to another location without treatment is, by law, "the least favored alternative" and the last resort for the EPA

§ 75.09(b)(5)(iii) Limitations on Response Authority.

Subsection 104(c) sets forth three limitations on government response authority. However, these limitations are somewhat misleading, because the EPA can ignore them under emergency circumstances. First, the EPA lacks authority

to respond to naturally occurring releases of naturally occurring substances. n239 Second, the EPA cannot respond to releases of materials that form part of building. n240 This limitation prevents the EPA from depleting the Superfund by responding to indoor environment problems such as asbestos. Finally, the EPA cannot use the Superfund to respond to the deterioration and contamination of a drinking water supply through normal use. n241 Nevertheless, the EPA may respond to these releases if it is a "public health or environmental emergency and no other person with the authority and capability to respond to the emergency will do so in a timely manner." n242 Moreover, these limitations only apply to response authority under §104. Thus, the EPA could still order a response under §106 to the extent the EPA can find a PRP who is somehow liable for such a release.

§ 75.09(b)(5)(iv) Additional Authority: Entry and Inspection.

Section 104 also gives the EPA the authority to enter, inspect, and take samples "if there is a reasonable basis to believe there may be a release or threat of release of a hazardous substance or pollutant or contaminant." n243 Refusal to allow such actions will result in the issuance of a compliance order, n244 and failure to obey a compliance order in turn results in civil penalties. The EPA may also exercise discretionary authority to purchase, lease, or condemn real property if such action is necessary to conduct a remedial action. n245

§ 75.09(b)(6) Response Authority Under CERCLA §106.

Section 106 provides the EPA with abatement authority when (1) a release or threatened release of (2) hazardous substances n246 from (3) a facility presents (4) "an imminent and substantial endangerment to the public health or welfare or the environment" n247 and (5) a PRP exists who is responsible for the actual or threatened release under CERCLA §107. n248 If these five elements are satisfied, the EPA may either seek injunctions or issue administrative orders requiring PRPs to take response actions. The EPA has authority under §106 to order either removal action or remedial action, n249 or in other words, any response that is consistent with the N.C.P. However, §106 orders are often removal actions tailored to abate imminent, substantial danger.

Although §106 speaks of abatement actions, abatement is framed broadly to include any response necessary to remove or minimize the danger or to protect public health and the environment. n250 In the watershed decision of United States v. Price, n251 the court rejected arguments that §106 actions or orders are limited to abatement at operating facilities and do not apply to PRPs who are no longer actively involved with the facility. Under *Price*, the government may order any appropriate response to any site that poses an imminent and substantial danger, including "remedial action with respect to past sites." Thus, §106 authority extends to the cleanup of dormant facilities. The court also held that all PRPs are proper targets for §106 actions or orders, regardless of whether the PRPs involvement with the facility was entirely in the past and did not cause the release. As with §107 liability, §106 liability is strict, without regard to causation or fault. n252

Despite a statutory mandate to "establish and publish guidelines for using the imminent hazard, enforcement, and emergency response authorities," n253 the EPA has done little to delineate the scope of "imminent and substantial endangerment." n254 Courts have also been unable or unwilling to articulate a test for this authority. However, the clear trend is toward a very broad interpretation of "imminent and substantial endangerment." n255 Nevertheless, this requirement of endangerment is not an illusory limitation; the release of hazardous substances must actually pose an imminent and substantial endangerment to trigger §106 response authority.

§ 75.09(b)(6)(i) Injunctions.

The EPA's first option under §106 is to go directly to the United States District Court and bring an action seeking injunctive relief, when the five elements that trigger liability are present. This injunction option allows the EPA to procure a judicial finding that the required elements are present and forces the PRP to respond by eliminating any question over whether there is sufficient cause to ignore the EPA's order. However, actions under §106 for injunctive

relief are becoming less common, primarily because the EPA, as a matter of policy, has developed a preference for administrative orders.

One reason for this preference is that courts are not bound by the EPA's proposed remedies, if the EPA seeks an injunction for hazardous substances cleanup under §106. n256 The level of deference that must be given to the EPA's findings is much lower when the EPA proceeds by injunction rather than by administrative order. When the EPA seeks an injunction, the First Circuit has concluded that "the district court [is] free to make its own determinations of fact and to exercise its own judgment in fashioning relief." n257

§ 75.09(b)(6)(ii) Administrative Orders.

As mentioned *supra*, the second option available to the EPA under §106 is to issue an administrative order which forces PRPs to take the desired response action. When the EPA issues a final administrative order under §106 compelling PRPs to respond to a release, a court must enforce the order unless it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." n258 Thus, a court must give much deference to the EPA's findings concerning the appropriate response, if the court is reviewing an EPA administrative order. Moreover, the EPA has more control over the timing and swiftness of administrative proceedings. Finally, because CERCLA prohibits pre-enforcement judicial review of administrative orders and imposes large penalties for non-compliance, the EPA has inordinate leverage to force compliance even from PRPs who have colorable claims of "sufficient cause" for non-compliance. These considerations have shaped current EPA policy and more response actions now come in the form of §106(a) administrative orders.

A PRP need not comply with an administrative order, if there is "sufficient cause" for non-compliance. n259 This defense was codified by SARA in 1986 after courts had determined that a "good cause" defense must be read into CERCLA to enable the administrative order scheme to pass constitutional scrutiny. n260 Without the "good cause" defense, imposing large non-compliance penalties without pre-enforcement review would violate due process. Thus, PRPs who have "sufficient cause" to believe that they should not be responsible for the action ordered by the EPA may refuse to comply with the order without incurring any penalties.

The most promising defense is that the PRP is not a liable party under CERCLA §107(a). This liability question is ultimately determined by the court without deference to the EPA's finding of liability; responsible party status is always reviewed de novo by the court. PRPs may also have sufficient cause to disobey an EPA order if the EPA has selected an inappropriate remedy. However, unless a remedial action is inconsistent with the N.C.P., CERCLA §121 cleanup standards, or some other provision of law, PRPs have "sufficient cause" for non-compliance only if the selected remedy is arbitrary or capricious. n261 Moreover, the EPA's findings of fact are also accepted unless shown to be arbitrary, capricious or an abuse of discretion. n262 Thus, most judicial review will be highly deferential to the EPA's findings and conclusions, and establishing "sufficient cause" will often require showing facts and issues of law which could overcome such a deferential standard of review.

Section 113(h) of CERCLA expressly limits judicial review of §106 administrative orders to actions brought by the government to enforce orders, to recover penalties for non-compliance with orders, or to compel remedial action or actions brought by PRPs for reimbursement after complying with an order. n263 Federal courts simply lack jurisdiction to review a §106 administrative order under any other circumstance. n264 Thus, there is no pre-enforcement review of a §106 administrative order. A PRP must either obey an administrative order and later seek reimbursement from the Superfund or liable parties or disobey an order and risk harsh penalties by gambling that there is "sufficient cause" to disobey. Without pre-enforcement review, PRPs can never be certain that their defenses provide "sufficient cause" for non-compliance, but they face draconian penalties if they guess incorrectly. Nevertheless, this penalty and review scheme has withstood due process challenges. n265

As mentioned above EPA action and findings concerning the appropriate response are reviewable only under an

"arbitrary and capricious" standard and review is generally limited to the administrative record. n266 Therefore, judicial review should not be viewed as an alternative to aggressive participation in the administrative process. To protect their rights, PRPs must take full advantage of the available administrative procedures.

Unless there is "sufficient cause" for non-compliance, PRPs may be assessed a fine of $25,000 for each day they refuse to obey an EPA order. n267 More importantly, a PRP who, without sufficient cause, fails to comply with a §106 order requiring removal or remedial action may be responsible for punitive treble damages equal to three times the cleanup costs incurred by the Superfund. n268 If a PRP fails to undertake removal or remedial action under §106, the EPA can simply clean up the site itself and bill the PRP for three times the cost, unless there was sufficient cause for non-compliance. This penalty should persuade even the most confident PRPs to carefully analyze their "sufficient cause" defense.

A PRP can avoid the dilemma of harsh penalties and lack of pre-enforcement review by obeying even questionable orders and then seeking reimbursement from the Superfund. n269 To obtain reimbursement, a PRP must apply within 60 days after completion of the response action. n270 If the EPA initially denies reimbursement, which is almost a certainty, PRPs must seek reimbursement by filing an action within 30 days of the EPA's reimbursement denial and proving by a preponderance of the evidence that they are not liable parties under CERCLA §107(a). n271 Even if a PRP is a liable party under §107(a), the PRP is still entitled to reimbursement for any additional costs incurred because the response action imposed by the EPA was arbitrary or capricious or not otherwise in accordance with the law (e.g., the N.C.P.). n272 Although courts have held that response costs include the costs of litigating a CERCLA action when seeking recovery from a PRP, n273 it is unclear whether parties can recover litigation costs from the Superfund.

Although it avoids the harsh non-compliance penalties, the reimbursement approach raises problems of its own. PRPs may be forced to commit enormous amounts of capital to cleanup projects for which they actually have no legal responsibility. Moreover, courts may be even more deferential to the remedy selected by the EPA after the response action is completed. Simply put, it is more difficult to challenge a response action as inappropriate and argue that things should have been done differently if all the cleanup has already been completed successfully.

Nevertheless, post-cleanup reimbursement is the only practical option unless a PRP clearly has sufficient cause to disobey a §106 order for removal or remedial action.

§ 75.09(b)(6)(iii) RCRA §7003.

In addition to the problems discussed above, a §106 defendant's worries are not limited to CERCLA alone. If the EPA attempts to compel response action under §106, PRPs are likely to face a RCRA §7003 action as well.

Through judicial interpretation and legislative amendment, the scope of RCRA §7003 has been expanded so that it is virtually identical to CERCLA §106. n274 Both CERCLA §106(a) and RCRA §7003(a) provide for strict liability for response action when hazardous wastes present an "imminent and substantial endangerment" to human health or the environment. n275 In addition, RCRA §7003(a) allows the EPA to order the same type of injunctive relief as is authorized under CERCLA §106(a), n276 and the scope of liability under both injunctive provisions basically parallels liability under CERCLA §107(a). However, there are minor differences between the two provisions. For example, some solid wastes are covered under RCRA §7003 but not under CERCLA §106, and some hazardous substances under CERCLA may not be solid wastes under RCRA

§ 75.09(b)(7) Private Party Response Authority.

As long as their actions are consistent with the N.C.P., CERCLA allows private parties n277 to respond to releases of hazardous substances from a vessel or facility. If the private party is not a responsible party under CERCLA §107(a), the party can seek reimbursement for response costs from PRPs under §107(a) or from the Superfund. n278 However,

cumbersome procedural restrictions are imposed on the process of obtaining private party reimbursement from the Superfund.

CERCLA mandates that the Superfund shall be used to reimburse any person for *necessary* response costs incurred which are consistent with the N.C.P. n279 However, these response costs "must be approved under [the N.C.P.] and certified by the responsible official." n280 The EPA has interpreted this "approved under" and "certified" language to require EPA pre-approval of any private response action. n281 Thus, private parties are barred from Superfund reimbursement unless they had EPA approval prior to taking the response action. In addition, recovery from Superfund is barred unless recovery has already been sought from PRPs, and this bar continues as long as the action for recovery from a PRP is still pending. n282 These and other procedural hurdles to private recovery of response costs from the Superfund have led commentators to believe that private party recovery from the Superfund is seldom a workable option. n283

Parties seeking reimbursement from the Superfund must commence their actions within six years of the completion of all response action. n284 Actions for Superfund reimbursement for natural resource damages must be brought within three years of (1) "discovery of the loss and its connection with the release in question" or (2) promulgation of the regulations required under CERCLA §301(c). n285 Responsible parties cannot seek reimbursement from the Superfund because they are jointly and severally liable for response costs. n286

Recovery of private party response costs from PRPs is much more likely than Superfund reimbursement. CERCLA §107(a) provides that responsible parties under that section are liable for "*necessary* costs of response incurred by any other person consistent with the national contingency plan." n287 Courts have held that this language creates a private right of action for recovery of any necessary response costs consistent with the N.C.P. n288 Although the necessity of response has rarely been a material issue in private party cost recovery actions, n289 consistency with the N.C.P. has been vigorously contested in several cases. n290 Thus, private parties must ensure that their cleanup activities follow the procedures and standards mandated by the N.C.P., and judicial interpretation of the N.C.P. requirements is crucial.

However, courts have disagreed on exactly what is required to be consistent with the N.C.P. Most courts have determined that a site need not be on the N.P.L. before private parties are entitled to response costs under §107(a). n291 A more troublesome question is whether private parties must coordinate their response efforts with the EPA before recovery under §107(a) is authorized. Some courts have held that private party responses must be supervised or pre-approved by the EPA, n292 while other courts have reached the better result that consistency with the N.C.P. can be achieved without any EPA involvement. n293 Consistency with the N.C.P. is also a paramount concern for responsible parties under §107(a) who plan to seek contribution from other PRPs under CERCLA §113(f). n294

The relief obtainable under §107(a) is limited to recovery of costs for response actions. Injunctive relief is unavailable to private parties. n295 Although CERCLA allows citizen suits, very little injunctive relief is available in any practical sense.

§ 75.09(b)(7)(i) Citizen Suits.

CERCLA §310 n296 authorizes any person to bring an action against (1) any person (including the federal government) who is in violation of any CERCLA standard, regulation, condition, requirement, or order or (2) the EPA for failing to perform a non-discretionary duty. n297 Thus, citizens can force PRPs to comply with §106 orders or settlement agreements or force the EPA to undertake non-discretionary actions. The problem is that almost all of the EPA's authority under CERCLA is discretionary to some extent.

CERCLA citizen suits are subject to the usual constraints that accompany citizen suit provisions under federal environmental statutes. No citizen action can be brought prior to the expiration of 60 days notice to the EPA, to the state where the alleged violation is occurring, and to the alleged violator. n298 A citizen suit is also barred if the federal

government is already diligently prosecuting the alleged violator. n299 The court may award costs and attorneys' fees to the prevailing or substantially prevailing party "whenever the court determines such an award is appropriate." n300

§ 75.09(b)(7)(ii) State Enforcement.

In addition to citizen suit authority, CERCLA gives states authority to secure judicial enforcement of federal remedial action standards, requirements, or limitations. n301 States are also entitled to participate in negotiations with PRPs and intervene as a matter of right in any §106 remedial action proceedings. n302

§ 75.09(b)(8) The National Contingency Plan (N.C.P.).

The N.C.P. provides the procedures and standards which govern responses to hazardous substances releases. n303 The N.C.P. sets forth the responsibilities of the government agencies, n304 the organizational framework for government response, n305 emergency contingency plans, n306 response procedures for oil spills and hazardous substance releases, n307 regulations for natural resources trustees, n308 and rules for use of chemical dispersants. n309 The discovery, investigation, assessment, evaluation, priority ranking, removal, and remediation of hazardous substance releases are all regulated by Subpart F of the N.C.P. n310

A release of a hazardous substance may be discovered through notification under CERCLA §103, investigation under CERCLA §104(e), information given by federal and state permit holders, inventory efforts (*e.g.*, the CERCLA Information System (C.E.R.C.L.I.S.)) or random observation by any person. n311 All releases are investigated initially by an On-Scene Coordinator (O.S.C.), n312 who decides whether a preliminary assessment of the release is necessary. n313 The preliminary assessment determines whether further federal action, such as removal action or further site evaluation, is necessary. n314 If removal action is necessary, the procedures and standards for removal actions, as well as examples of appropriate actions, are outlined by the N.C.P. n315 A site evaluation may proceed concurrently with or in the absence of a removal action.

Site evaluations determine whether remedial action is necessary and whether the site should be placed on the NPL. n316 Information and samples are collected to ascertain and describe the hazardous substances released, the extent of contamination, and the environment that will be affected. n317 The priority assigned to a release is determined by the Hazard Ranking System (H.R.S.). n318 Under the H.R.S., each release is assigned a numerical score reflecting "the relative degree of risk to human health and the environment." n319 Determining the H.R.S. score requires a series of calculations derived from various risk factors. Hazard scores are calculated for risks of fire or explosion, direct contact, or migration. n320 The migration hazard score is calculated from the separately determined risk scores for groundwater, surface-water, and air migration. n321 The factors scored require extensive knowledge of the release and its surrounding area. For example, the groundwater migration hazard score examines such factors as the depth to the nearest aquifer, permeability of strata overlying the aquifer, average precipitation, adequacy of containment structures, waste characteristics (toxicity, persistence, ignitability, and reactivity), and distance to the nearest well (considering the population served). n322

If a release receives a H.R.S. score of 28.5 or greater, the site is placed on the N.P.L. n323 In addition, each state has the power to place one site of its choosing on the N.P.L. regardless of the H.R.S. score. n324 Moreover, a site may be placed on the N.P.L. regardless of its H.R.S. score if (1) the Agency for Toxic Substances and Disease Registry (A.T.S.D.R) issues a health advisory recommending that people stay away from the site, (2) the EPA decides that the release poses a significant threat to public health, or (3) the EPA decides that remedial action will be more cost-effective in the long run than removal action. n325 A site must be on the N.P.L. before the EPA can use the Superfund to perform remedial action at the site. n326

If remedial action is necessary, the N.C.P. sets forth the guidelines for conducting the Remedial Investigation/Feasibility Study (R.I./F.S.) that must be used to determine the appropriate remedial action. n327 The R.I.

determines the nature and extent of the release and the threat it poses to human health and the environment. The F.S. evaluates proposed remedies. The R.I./F.S. governs the procedures and outlines the considerations that, in conjunction with CERCLA §121 (cleanup standards), will be used to determine the appropriate permanent remedy. n328 The N.C.P. also provides examples of appropriate remedial actions. n329

Some, but limited, public participation in the selection of the remedial action through submission of comments is guaranteed by CERCLA §117. n330 The N.C.P. also provides for community relations plans to foster good community relations when response actions are necessary. n331 Finally, the N.C.P. outlines the documentation necessary for subsequent cost recovery actions under CERCLA §107(a). n332

§ 75.09(c) Specific Rules for Landowner and Lender Liability Under CERCLA

If response or cleanup costs consistent with the N.C.P. are incurred by the United States or any other person, if damages for destruction of natural resources should be recovered, or if the A.T.S.D.R incurs costs by performing a health assessment or health effects study under CERCLA §104(i), n333 CERCLA provides for liability. Six basic elements create CERCLA liability. Before any party is liable under CERCLA, there must be (1) a release or threatened release n334 of (2) a hazardous substance from (3) a facility or vessel which causes (4) the incurrence of response costs n335 (5) in a manner consistent with the N.C.P., n336 and (6) the PRP must be a responsible party under subsections 107(a)(1)-(4). n337 Again, there is a general exclusion for application of a pesticide product registered under F.I.F.R.A. n338

Actions under §107(a) for recovery of *removal* action costs must be brought within three years of the completion of the removal action, unless another three years is granted by the EPA pursuant to continued response action under §104(c)(1)(C). n339 Actions for recovery of *remedial* action costs must be initiated within six years after beginning physical onsite construction of the remedial action. Natural resources damage actions must be brought within three years of (1) "discovery of the loss and its connection with the release in question" or (2) promulgation of the regulations required under CERCLA §301(c). n340

§ 75.09(c)(1) Responsible Parties.

Before plaintiffs can recover their response costs, they must prove that the defendant PRPs are responsible parties under the statute. n341 Subsections 9607(a)(1)-(4) establish the four classes of persons who are strictly liable under CERCLA These classes include:

> (1) the owner and operator of a vessel or a facility,
>
> (2) any person who at the time of disposal of any hazardous substance owned or operated any facility at which such hazardous substances were disposed of,
>
> (3) any person who by contract, agreement, or otherwise arranged for disposal or treatment ... of hazardous substances ... and
>
> (4) any person who accepts or accepted any hazardous substance for transport to disposal or treatment facilities, incineration vessels or sites selected by such person, from which there is a release, or a threatened release which causes the incurrence of response costs, of a hazardous substance. n342

These four categories of parties who are strictly liable for the costs of cleaning up a vessel or facility are commonly summarized as:

> (1) current owners and operators,

(2) owners or operators at the time of disposal,

(3) generators or arrangers, and

(4) transporters.

§ 75.09(c)(1)(i) Current Owners and/or Operators.

Often, the material inquiry is whether a party is an operator or owner for purposes of CERCLA liability. According to CERCLA §101(20)(A), "[t]he term 'owner or operator' means ... in the case of an onshore facility or an offshore facility, any person owning or operating such facility...." n343 This circuitous, question-begging definition does not offer any clear guidelines for the imposition of liability, and courts have been forced to develop the law regarding owners and operators under CERCLA through statutory interpretation on a case-by-case basis.

The definition of a current owner and operator under §107(a)(1) has generated considerable confusion and controversy, because it simply states that "the owner and operator of a ... facility ... shall be liable...." n344 Although this language appears to suggest that subsection (a)(1) applies only to those parties who are both owners and operators since it speaks conjunctively of "the owner *and* operator" of a facility, the courts appear to have accepted a different interpretation of the language. It now seems well settled that §107(a)(1) imposes strict liability on either the current owner *or* current operator of a facility where hazardous waste has been deposited, n345 regardless of whether the hazardous waste was deposited long before the current owner or operator began owning or operating the facility.

The seminal opinion for this statutory interpretation was New York v. Shore Realty Corp.. n346 In *Shore Realty*, the current owner of a facility was held liable without regard to whether it was also the operator or the owner at the time of disposal. n347 However, the court did not address the problem of §107(a)(1) being conjunctively phrased in contrast to the disjunctive phrasing of §107(a)(2). Instead of arguing that Shore was not "the owner and operator" within the common meaning of that expression, Shore contended that subsection 107(a)(1) covered only owners "at the time of disposal." n348 The court rejected this interpretation of §107(a), stating "that §107(a)(1) unequivocally imposes strict liability on the current owner of a facility from which there is a release or threat of release...." n349

It is interesting to note that the court probably did not have to reach this result in order to find that Shore was a liable party. According to the facts set out in the opinion, Shore should have been liable under §107(a)(2), since "nearly 90,000 gallons of hazardous chemicals were" disposed of at the facility after "Shore took title." n350 The court apparently reached the conclusion that current owners are liable, so it could avoid the messier, more fact-bound questions of whether Shore was an owner at the time of disposal or whether Shore was also a current operator of the facility. n351

In United States v. Maryland Bank & Trust Co., n352 the operators of a trash and garbage business borrowed money from the bank to finance the purchase of the dump site property. n353 When the owner and operator of the facility failed to make the payments on the loan, the bank brought a foreclosure action and took title to the property at the foreclosure sale. n354 Then the operator notified the EPA that hazardous waste had been disposed of on the site, and the EPA demanded that the bank clean up the site. n355 When the bank refused to do so, the EPA removed the hazardous wastes and brought an action under CERCLA to compel the bank to pay for these response costs. The United States sought to pin liability on the bank as the current owner of the facility. n356

Relying partially on the precedent set by *Shore Realty*, the district court in *Maryland Bank* held "that current ownership alone brings a party within the ambit of [subsection 107(a)(1)]. Notwithstanding the language 'the owner and operator,' a party need not be both an owner and operator to incur liability under this subsection." n357

The *Maryland Bank* Court admitted "[p]roper usage dictates that the phrase 'the owners and operators' include only

those persons who are both owners and operators." n358 However, the court found that the *Shore Realty* precedent, legislative history, and hasty drafting of CERCLA supported a contrary result. n359 The court dismissed the plain meaning arguments by stating that "by no means does Congress always follow the rules of grammar when enacting the laws of this nation." n360 Thus, *Maryland Bank* directly confronted the conjunctive phrasing of subsection 107(a)(1) in reaching the holding and is the most frequently cited case on this issue.

Maryland Bank has established a strong precedent which appears to have been generally accepted. n361 This precedent is probably reinforced by the S.A.R.A., n362 because "legislative action by amendment ... with respect to other parts of a law which have received a contemporaneous and practical construction may indicate approval of interpretations pertaining to the unchanged and unaffected parts of the law." n363 Then again, this legislative inaction may just show unwillingness to address a thorny policy produced by poor statute drafting rather than clear Congressional consensus. n364 Nevertheless, any discussion of the proper interpretation of §107(a)(1) may be purely academic now, unless Congress directly addresses the matter in the future. n365

§ 75.09(c)(1)(ii) Owners or Operators at the Time of Disposal.

The second of the four broad categories of liable parties under CERCLA is set out under CERCLA §107(a)(2) and includes owners or operators *at the time of disposal*. n366 The disjunctive meaning of §107(a)(2) is discernable upon a simple reading of the statute. Because the statute proclaims that "any person who at the time of disposal of any hazardous substance owned *or* operated any facility at which such hazardous substances were disposed of" is liable, it is clear that a party need only be either an owner *or* an operator at the time of disposal, but not both, to incur CERCLA liability. n367

To incur response cost liability for a hazardous substance release under §107(a)(2), a party must have owned or operated a facility at the time of disposal of a hazardous substance. n368 The most surprising element of subsection (a)(2) may be the "at the time of disposal" requirement. n369 Disposal is defined very broadly under CERCLA to include "the discharge, deposit, injection, dumping, spilling, leaking, or placing" of solid or hazardous waste into the environment. n370 Therefore, the time of disposal is not limited to the time that the hazardous substance was brought onto the site. The time of disposal continues as long as the hazardous substance is being released into the environment.

For example, the time of disposal may extend to the entire period that a container of hazardous substances continues to leak material into the environment, even if the container was placed on the property long ago by another owner or operator. Courts have been willing to interpret "disposal" liberally and have imposed liability on owners and operators who somehow become remotely and inadvertently involved with a continuing past disposal. n371 Thus, many owners or operators have been surprised to learn that they were owners or operators at the time of disposal.

§ 75.09(c)(1)(iii) Generators or Arrangers.

The third broad category of liable parties under CERCLA is set out under §107(a)(3) and includes those who generated hazardous substances or arranged for their disposal. n372 To be liable as a generator or arranger of hazardous substances, a PRP must have sent hazardous substances to the facility for disposal and the hazardous substance release must contain the same kind of hazardous substances that the PRP sent to the facility. n373 Thus, a generator who only shipped lead to a facility cannot be held liable for a release of arsenic. However, a party seeking response costs under CERCLA §107(a) need not trace the ownership of the hazardous substances released. A generator is liable if a release contains "hazardous substances alike, similar, or of a like kind to those that were present in the generator defendant's wastes or that could have been produced by the mixture of defendant's waste with other waste present at the site." n374

Again, the courts have interpreted the term "disposal" broadly. Generators who "arranged for disposal" may include those who *sell* hazardous substances knowing that they will be disposed of by the buyer. Several courts have held that generators incur CERCLA liability for selling hazardous substances, if the sale primarily serves the purposes of

disposal. n375 On the other hand, courts have held that legitimate commercial transactions involving hazardous substances are not arrangements for disposal. n376 The distinction between the two lines of authority seems to rest on the immediacy of the disposal after the sale, the general usefulness of the material sold, and the sales price. n377

§ 75.09(c)(1)(iv) Transporters.

The fourth and final category of liable parties under CERCLA is outlined in subsection 107(a)(4) and includes persons who transported hazardous substances to a facility where they were subsequently released. Transporters of hazardous wastes have been statistically less likely to incur CERCLA liability than the other three classes of responsible parties. Nevertheless, there have been cases of transporter liability. n378

§ 75.09(c)(1)(v) Landowner Liability.

Although there are affirmative defenses to landowner liability, a landowner is usually liable as an "owner" under CERCLA §107(a)(1), n379 if the real property is contaminated with hazardous substances. As did the court in Tanglewood E. Homeowners v. Charles-Thomas, Inc., n380 most courts "find nothing in the wording of [section] 9607(a) to exclude present owners of properties previously contaminated." n381 And the broad definition of disposal ensnares past landowners who held title to the property during the "disposal" of a hazardous substance on the property. The entity seeking response costs need only show that the landowner currently has title to the property or had title at the time of disposal. Thus, a landowner's best hope of escaping liability rests in the affirmative defenses discussed later in this section. n382

§ 75.09(c)(1)(vi) Lenders as Owners (The Security Interest Exemption).

Section 9601(20) (A) states that the term owner "does not include a person, who, without participating in the management of a vessel or facility, holds indicia of ownership primarily to protect his security interest in the vessel or facility." n383 This language obviously indicates that a lender who simply maintains a mortgage on the property cannot be defined as an owner under CERCLA, even in title-theory states, where a mortgagee is deemed to hold a form of title under the common law. The critical inquiry is whether a mortgagee who forecloses on a mortgage may be treated as an owner for purposes of CERCLA liability.

Maryland Bank is the principal case on this issue as well. In *Maryland Bank*, the Maryland Bank & Trust Co. asserted that it was not the current owner under CERCLA, because it was exempted from the definition of an owner under §9601(20)(A). The bank claimed that it was not an owner for CERCLA liability purposes, since it only held "indicia of ownership primarily to protect [its] security interest in the ... facility." n384 The court rejected this reasoning, stating: "The exemption of subsection (20)(A) covers only those persons who, *at the time of the clean-up*, hold indicia of ownership to protect a then-held security interest in the land. The verb tense of the exclusionary language is critical. The security interest must exist at the time of the clean-up." n385 The court held that Maryland Bank & Trust ceased being a security interest holder and became the owner of the property for CERCLA purposes when it foreclosed on the property and took title to it. "The exclusion [of *42 U.S.C. §9601*(20)(A)] does not apply to former mortgagees currently holding title after purchasing the property at a foreclosure sale...." n386

The court in *Maryland Bank* reached this result despite the fact that two other federal courts which had examined this issue came to the opposite conclusion. In United States v. Mirabile, n387 the federal district court for the Eastern District of Pennsylvania held that:

> [A] hazardous waste site owner's secured creditors, *including one who foreclosed on the site*, may be held liable under [section 9607] only if they exercised control over the nuts-and-bolts operation of the site. The statutory definition of 'owner or operator' excludes persons who do not participate in management and hold indicia of ownership primarily to protect a security interest. n388

The Federal District Court in *Maryland Bank* tried to distinguish *Mirabile* on the grounds that the mortgagee in *Maryland Bank* "held title for nearly four years" n389 after the foreclosure whereas the mortgagee in *Mirabile* assigned [the property] within four months of the foreclosure. n390 The court in *Maryland Bank* stated that the *Mirabile* "holding pertained to a situation in which the mortgagee-turned-owner promptly assigned the property. To the extent to which that opinion suggests a rule of broader application, this Court respectfully disagrees." n391

It would be difficult to formulate a coherent rule for liability on the basis of the length of time such a mortgagee holds title, since there is no statutory or regulatory standard to guide the court. n392 Nevertheless, because the court in *Maryland Bank* did distinguish the *Mirabile* holding on this basis, instead of directly challenging the holding, a lender may still be able to escape liability even under the *Maryland Bank* rule as long as the lender assigns the title to the property soon after foreclosing. However, the fact that there are no subsequent cases in which a lender has successfully taken this approach may indicate the tenuous nature of this "length of time" distinction suggested in *Maryland Bank*.

Despite the attempts of the *Maryland Bank* court to distinguish *Mirabile*, it is clear that the two decisions are irreconcilable. *Mirabile* stands for the proposition that obtaining title through foreclosure is a normal and expected event in protecting a security interest and is included within the security interest exemption of CERCLA §101(20)(A). n393 *Mirabile* focuses on the reason why lenders hold title. If lenders hold title to protect their security interest, they are protected by the security interest exemption. *Maryland Bank*, on the other hand, stands for the proposition that the protection of the security interest exemption is directed only at lender/mortgagees in title-theory states and that the protection ends as soon as the lender/mortgagee forecloses and obtains full title to the property.

The other case which the court in *Maryland Bank* had to reject in reaching its conclusion was In re T.P. Long Chem., Inc. n394 In this case, the bankruptcy court stated that "even if [the bank] had repossessed its collateral pursuant to a security agreement it would not be an 'owner or operator' as defined under CERCLA" n395 The bankruptcy court reasoned that a bank which repossesses such collateral merely holds indicia of ownership primarily to protect its security interest in the facility. n396 Thus, the bank was shielded from liability by operation of §9601(20)(A). The *Maryland Bank* Court dismissed this conclusion as dictum. n397

Since *Maryland Bank*, there have been few cases which examine the issue of whether a lender who forecloses becomes an owner under CERCLA Lenders have simply been unwilling to challenge the *Maryland Bank* holding and risk liability by foreclosing. Although it is possible to convince a court to adopt the holding and reasoning from *Mirabile* or *T.P. Long Chem.*, it appears that the rule from *Maryland Bank* has become the lending industry standard by default. No lender will deliberately risk liability when it can easily avoid liability merely by not foreclosing on property contaminated by hazardous waste.

The two courts which have examined the scope of the security interest exemption since the *Maryland Bank* decision have also split on the issue. In Guidice v. BFG Electroplating & Mfg. Co., n398 the district court followed *Maryland Bank* and held that a lender is liable to the same extent as any other current owner if the lender purchases the property at a foreclosure sale. Like *Maryland Bank*, the *Guidice* court found that "[e]xtending the interest exemption to lenders holding full title to properties would frustrate the distribution of clean-up costs achieved under CERCLA as well as reallocate the risks assumed in owning real property." n399 This holding rested in part on Congressional inaction in the face of the *Maryland Bank* holding. n400 The court ignored the length of time distinction suggested in *Maryland Bank*, even though the lender had held the property for only eight months after foreclosure. n401

However, the Ninth Circuit ruled that a lender who holds title (warranty deed) to contaminated property for the purpose of protecting its security interest is not an owner under CERCLA n402 The court held that "under the security interest exception the court must determine *why* the [lender] holds such indicia of ownership." n403 Thus, the court took the *Mirabile* approach and focused on the purpose of the lender in holding title. In the Ninth Circuit, a lender may hold title to contaminated property without becoming an owner under CERCLA as long as the lender holds title "primarily to protect his security interest in the vessel or facility." n404 Given the conflicting law in the circuits, a Supreme Court

decision or Congressional clarification may be required to settle the confusion on this issue.

§ 75.09(c)(1)(vii) Lenders as Operators.

Even if lenders successfully avoid liability as *owners* under the *Maryland Bank* rule, they may nevertheless become liable under CERCLA as a *operators* by participating in the management of a hazardous waste facility. The protection afforded by the security interest exemption of CERCLA §101(20)(A) extends only to one "who, *without participating in the management of a vessel or facility*, holds indicia of ownership primarily to protect his security interest." n405 Therefore, a lender may become an "owner or operator" for purposes of CERCLA by participation in the management of the facility. However, the level of control a lender would have to exercise over the facility to become an owner or operator has not been clearly delineated. n406

In Mirabile, the court held that "before a secured creditor ... may be held liable, it must, at a minimum, participate in the day-to-day operational aspects of the site." n407 The *Mirabile* court did give some general guidelines for "determining how far a secured creditor may go in protecting its financial interests" before becoming an "operator within the meaning of [CERCLA]." n408 Judge Newcomer stated that "[m]ere financial ability to control waste disposal practices" n409 or "participation in purely financial aspects of the operation" n410 is not enough to subject a lender to CERCLA liability as an operator. Thus, the monitoring of and exercise of control over cash collateral accounts and accounts receivable is not participation in the management of a facility for CERCLA purposes. n411 "[T]he participation which is critical is participation in operational, production, or waste disposal activities." n412 The court found that a regular and frequent presence at the site (once a week), control over the priority of orders to be filled, insistence on certain manufacturing changes, and control over the assignment of personnel could together be sufficient participation in management to make a lender an operator of the facility. n413

This opinion leaves a vast, unexplored area between purely financial aspects of management and operational aspects of management where these distinctions will undoubtedly become blurred. It is sometimes difficult to determine where financial participation ends and participation in "day-to-day" operations begins. n414 Nevertheless, *Mirabile* remains a leading case and is one of the better sources of guidance on this issue.

Most courts that have examined the issue have followed *Mirabile*. In Guidice v. BFG Electroplating & Mfg. Co., n415 the court stated:

> Interpretation of "participation in the management" and "primarily to protect is [sic] security interest" has permitted secured creditors "to provide financial assistance and general, and even isolated instances of specific, management advice to its debtors without risking CERCLA liability if the secured creditor does not participate in the day-to-day management of the business or facility" ... n416

The court found that a meeting between the lender and operator to discuss the account status, personnel changes, and raw materials; communications between the lender and environmental regulatory authorities in an effort to assist operator compliance; an inspection of the property by the lender; and the lender's restructuring of the debtor's loans did not remove the lender from the protection of the security interest exemption. n417 Thus, the Guidice court adopted the *Mirabile* test and established a fairly high threshold for day-to-day management liability. Other courts have adopted similar tests. n418

The Ninth Circuit, in In re Bergsoe Metal Corp., n419 declined to articulate a day-to-day management rule or a test for "participating in the management." n420 The court simply stated: "whatever the precise parameters of 'participation,' there must be *some* actual management of the facility before a secured creditor will fall outside the [security interest] exception." n421 The court then made it clear that participation in the planning stages of a project was not management of a facility. Moreover, the Ninth Circuit held that a party "errs in equating the power to manage with actual management... Merely having the power to get involved in management, but failing to exercise it, is not enough." n422

The Eleventh Circuit established a lower threshold for lender liability when it rejected the *Mirabile* day-to-day operations rule in United States v. Fleet Factors Corp.; n423 the court held that the touchstone for lender management liability was any management participation, financial or operational, that shows that the lender had the ability to influence the debtor's hazardous substance activities. n424 The court reasoned that "participating in the management of a vessel or facility" n425 is a lower level of oversight and control than is required to become an operator of the facility. n426

Under this analysis, if the phrase "participating in the management" was simply referring to operator liability, it would not be needed. Parties who participate in the management of a facility to the extent of being an operator under CERCLA are liable as operators regardless of whether they hold indicia of ownership. Thus, the phrase must have some meaning apart from a direct reference to operator liability. n427

However, this interpretation of the security interest exemption ignores the fact that all of the language of CERCLA §101(20)(A), including the security interest exemption, is directed at the term "owner or operator." n428 If the statute simply excluded one who "holds indicia of ownership primarily to protect his security interest" from the definition of "owner or operator," n429 a secured creditor would be exempted from both owner and operator liability by holding indicia of ownership. The statutory definition therefore makes clear that the security interest exemption applies only to those secured parties who are not operators of the facility. Thus, the reasoning of the court is questionable.

Nevertheless, a party holding indicia of ownership in the Eleventh Circuit may become liable under CERCLA for even modest involvement in the financial management of the debtor's facility. The court outlined this low threshold for management liability by stating that:

> a secured creditor may incur section 9607(a)(2) liability, without being an operator, by participating in the *financial* management of a facility to a degree indicating a capacity to influence the corporation's treatment of hazardous wastes. It is not necessary for the secured creditor actually to involve itself in the day-to-day operations of the facility in order to be liable... Nor is it necessary for the secured creditor to participate in management decisions relating to hazardous waste. Rather, a secured creditor will be liable if its involvement with the management of the facility is sufficiently broad to support the inference that it could affect hazardous waste disposal decisions if it so chose. n430

The court also emphasized that participation in the financial affairs of the debtor may be enough to subject a lender to liability. n431 Thus, lenders in the Eleventh Circuit who had relied on *Mirabile* for guidance in dealing with debtors will be surprised to find that they are not protected by the security interest exemption, and lenders in other jurisdictions can only hope that the *Fleet Factors* reasoning remains confined to the Eleventh Circuit.

It is interesting to note that "operator" liability seems to be fundamentally at odds with the policy rationales advanced for holding a lender liable as an "owner." Lender "owner" liability gives lenders an incentive to closely monitor and supervise the activities of the mortgagor to ensure that there is no release of hazardous waste. n432 However, lender "operator" liability compels a lender to give the mortgagor free reign because the lender must avoid any management whatsoever of the mortgagor's facility to avoid liability. Therefore, the lender may be trapped in a hopeless predicament.

The lender may want to take steps to ensure that the mortgagor is responsible in handling any hazardous waste so that foreclosure remains a viable option in protecting the lender's security interest, but such action could cause the lender to become an "operator" under CERCLA Because the cost of clean-up often exceeds the value of the mortgage, the prudent course in many situations will simply be to write-off the mortgage and let the mortgagor do whatever it wants in its operations. This could actually encourage irresponsible handling of hazardous wastes, and commentators have criticized this "operator" liability problem. n433

In *Guidice*, the court recognized these policy considerations in holding that a high level of day-to-day participation in the management of a facility should be required before a lender is held liable under CERCLA n434 Judge McCune explained:

> A goal of CERCLA is safe handling and disposal of hazardous waste. To encourage banks to monitor a debtor's use of security property, a high liability threshold will enhance the dual purposes of protection of the bank's investments and promoting CERCLA's policy goals. Conversely, a low liability standard would encourage a lender to terminate its association with a financially troubled debtor and expedite loan payments in an effort to recover debts. n435

In contrast, the *Fleet Factors* court brushed these concerns aside by reasoning that a lower threshold for management liability would encourage banks to ensure hazardous substances are handled properly because the lender would always be worried that it would be a liable party. This analysis may be correct if the threshold is so low that a lender will always be liable for the hazardous substances releases of the debtor. However, even the *Fleet Factors* decision requires some participation in the management of a facility before liability attaches to the lender. Thus, *Fleet Factors* may frustrate one of the primary goals of CERCLA by compelling lenders to exercise no oversight whatsoever at facilities where debtors handle hazardous substances.

§ 75.09(c)(1)(viii) Successor Liability.

If a corporation acquires another entity through a merger, consolidation, or the sale of stock, the corporation also acquires the CERCLA liability of the entity. n436

§ 75.09(c)(1)(ix) Parent Corporations.

In United States v. Bestfoods, n437 the Supreme Court held that under §107(a)(2), a parent corporation that actively participates in and controls the operations of a subsidiary may not be held derivatively liable as an operator of a polluting facility, unless the corporate veil can be pierced. However, a parent corporation that actively participated in and controlled the operations of the facility may be directly liable as an operator of that facility. Nothing in CERCLA rejects general principles of corporate law that a parent corporation is not liable for actions of its subsidiaries and that the corporate veil may be pierced if the corporate form would otherwise be misused to commit misconduct.

§ 75.09(c)(2) Strict Liability.

The PRPs under CERCLA §107(a) n438 are strictly liable for all necessary response costs. n439 CERCLA simply states that these persons "shall be liable for all costs of removal or remedial action incurred by the United States Government or a state or an Indian tribe ... [or for] any other necessary costs of response incurred by any other person consistent with the national contingency plan...." n440 Because there is no mention of any culpability requirement in the statute, the courts have held that §107 was intended to impose strict liability on the specific classes of persons covered by the statute. In United States v. Bliss, n441 the court succinctly articulated the current law by stating that "[l]iability under CERCLA is strict, without regard to the liable party's fault or state of mind." n442

§ 75.09(c)(3) Joint and Several Liability.

The majority of courts have held that CERCLA imposes joint and several liability on all parties described under §107(a). n443 Unless the defendant can prove that there is a rational basis for apportioning the costs or harm among the different liable parties, the defendant is jointly and severally liable for the full amount. n444 Although this requirement does not appear in CERCLA itself, most courts have decided that CERCLA liability should be joint and several under common law principles. n445 These courts usually invoke the *Restatement (Second) of Torts* §433 in holding that the CERCLA defendant bears the burden of proving that "there is a reasonable basis for determining the contribution of each cause of a single harm." n446

This joint and several liability motivates the entity seeking reimbursement for response costs under CERCLA to bring the action against the liable party with the deepest pocket, making lending institutions particularly likely defendants if they are owners or operators of a contaminated facility. Most mortgagees become owners because the previous owner and operator no longer has adequate funding to pay its basic debts, CERCLA response costs notwithstanding. Thus, joint and several liability poses a significant problem for mortgagees. Although CERCLA expressly mandates the right to contribution, n447 contribution will not be of any value when the other liable parties do not have adequate funds. Therefore, a deep pocket mortgagee is likely to be burdened with the full amount of the response costs under CERCLA Other current owners and operators are also likely to feel the burden of joint and several liability as CERCLA defendants because the burden of proving that an entity is a *current* owner or operator is minimal.

In United States v. Ottati & Goss, Inc., n448 the Federal District Court of New Hampshire became the first court to actually find "a reasonable basis for determining the contribution" of each CERCLA defendant. n449 Because the response costs for removing barrels of hazardous substances could be directly calculated according to the number of barrels, the court based individual liability for these costs on the number of barrels each defendant generator had sent to the facility. However, other response costs incurred at the site were indivisible and dictated joint and several liability. n450

A few jurisdictions take an even more flexible approach to liability and hold that the court has the discretion to "reject joint and several liability, regardless of the indivisibility of the harm, where the peculiar facts of the case point to a more fair apportionment of liability." n451 However, this view is clearly a minority rule; in other jurisdictions, joint and several liability is almost always imposed. Thus, PRPs are normally jointly and severally liable for response costs and usually must file a claim for contribution from other PRPs. n452

§ 75.09(c)(3)(i) Contribution.

CERCLA expressly provides for a right of contribution among liable parties under §113(f). n453 Thus, parties who have been held jointly and severally liable for response costs under §107(a) or who have been forced to take response action under §106 may recover some of their costs through a contribution action. n454 Courts have rejected arguments that the equitable doctrine of "unclean hands" should bar some liable parties from seeking contribution from other PRPs. n455 "*Any* person may seek contribution from any other person who is liable or potentially liable under section [107(a)]." n456 However, the court may consider the extent of a party's culpability or irresponsible conduct in apportioning liability. "In resolving contribution claims, the court may allocate response costs among liable parties using such equitable factors as the court determines are appropriate." n457

The statute of limitation for contribution actions requires that the action be brought within three years of (1) the date of the judgment against the PRP for response costs, natural resources damages, or A.T.S.D.R. costs or (2) the date of an administrative order under §122 (relating to settlement) or judicially approved settlement. n458 Interestingly, the statute fails to mention §106 injunctions or administrative orders. Thus, assuming that a three-year period would be applied to §106 response actions as well, it is unclear when the three year period begins. The time could start running when the injunction or order is entered or when the response action is completed.

§ 75.09(c)(3)(ii) Settlement with the Government.

A PRP may also avoid the effects of joint and several liability by entering into a settlement agreement with the EPA If PRPs settle with the government, they can only be held liable for their settlement amount or duties and they are protected from the contribution claims of other PRPs. n459 Sheltering settling PRPs from subsequent actions promotes early settlement and cleanup. The enormous litigation expenses associated with contesting CERCLA liability also push PRPs toward settlement. CERCLA §122 provides procedures and guidelines for settlements. n460

§ 75.09(c)(3)(iii) Indemnification.

Parties are free to allocate liability among themselves by contracting for releases from or indemnification for CERCLA liability. n461 However, no agreement can shield a PRP from liability to the EPA or other parties who have not contracted with the PRP n462 Thus, indemnification will be of little value unless the indemnifier has adequate capital to honor the agreement. Moreover, a hold harmless agreement is of no value if the PRP is named as a defendant in a §107(a) action or a §106 action or order. A hold harmless agreement is only a defense against the party who signed the agreement.

§ 75.09(c)(4) Affirmative Defenses.

Three affirmative defenses under CERCLA are set out in §107(b). n463 CERCLA provides:

> There is no liability under [CERCLA] for a person otherwise liable who can establish by a preponderance of the evidence that the release or threat of release of a hazardous substances ... w[as] caused solely by -- (1) an act of God; (2) an act of war; [or] (3) an act or omission of a third party other than an employee or agent of the defendant, or than one whose act or omission occurs in connection with a contractual relationship, existing directly or indirectly, with the defendant ...." n464

The first defense -- the "act of God" defense -- has been interpreted rather narrowly. Section 101(1) limits the defense to "an unanticipated grave natural disaster or other natural phenomenon of an exceptional, inevitable, and irresistible character, the effects of which could not have been prevented or avoided by the exercise of due care or foresight." n465 Thus, the EPA has taken the position that lightning strikes are not acts of God under CERCLA n466

The second defense, "an act of war," has never been successfully asserted and has received little attention.

However, the third defense, commonly called the "third party defense," has received a great deal of attention as the most important protection for completely blameless parties. This defense exculpates PRPs from liability for the unsanctioned actions of third parties.

The problem with this third party defense as applied to landowners is that the third party act or omission is often found to occur "in connection with a contractual relationship," which renders the defense unavailable. Thus, CERCLA carves out an exception for innocent landowners to the contractual relationship limitation on the third party defense. This subcomponent of the third party defense is known as the "innocent landowner defense." Section 101(35)(A) states:

> The term "contractual relationship," for purposes of section 9607(b)(3) of this title includes, but is not limited to, land contracts, deeds or other instruments transferring title or possession, *unless* the real property on which the facility was located was acquired by the defendant after the disposal or placement of the hazardous substance on, in, or at the facility... n467

In addition to proving that the property was acquired after the disposal of the waste, the landowner must also establish "by a preponderance of the evidence [that] [a]t the time the defendant acquired the facility the defendant did not know *and had no reason to know* that any hazardous substance which is the subject of the release or threatened release was disposed of on, in, or at the facility." n468 Section 9601(35)(B) lists a number of factors that the court could use to find that a landowner had no reason to know that the site was contaminated.

> To establish that the defendant has no reason to know, ... the defendant must have undertaken, at the time of acquisition, all appropriate inquiry into the previous ownership and uses of the property consistent with good commercial or customary practice in an effort to minimize liability. For purposes of the preceding sentence the court shall take into account any specialized knowledge or experience on the part of the defendant, the relationship of the purchase price to the value of the property if

> uncontaminated, commonly known or reasonably ascertainable information about the property, the obviousness of the presence or likely presence of contamination at the property, and the ability to detect such contamination by appropriate inspection. n469

Thus, landowners may have an exceptionally difficult time proving that they had "no reason to know" and are therefore deserving of the innocent landowner defense. n470

Moreover, a commercial lender as landowner will undoubtedly be held to a high standard of care due to its "specialized knowledge or experience" in commercial real estate transactions and its "ability to detect" hazardous waste through "appropriate inspections." n471 The standard of care will also be influenced by the level of inquiry the judge believes to be good commercial practice. In some cases, the inquiry will simply be whether an environmental consultant would have been able to detect hazardous waste on the property before it was acquired by the mortgagee. In most circumstances, the answer to that question will be yes and the third party defense will be unavailable. The cases in which a landowner or mortgagee will be able to show that the unobvious nature or unlikely presence of contamination outweighs the other factors will be truly exceptional.

PRPs must meet two additional requirements before they are exculpated from liability by the third party defense. Section 107(b) requires that the party also show that "(a) he exercised due care with respect to the hazardous substance concerned ... and (b) he took precautions against foreseeable acts or omissions of any such third party and the consequences that could foreseeably result from such acts or omissions." n472 This provides for yet another limitation on the use of the third party defense for the rare defendant who has made it over the previous hurdles. Also, because issues of due care and foreseeability, along with the fact questions to be considered in §9601(35)(B), must normally be determined by a trier of fact, all of this language almost ensures that a party asserting the third party defense will be subjected to a trial before escaping liability. n473

As the preceding discussion should indicate, PRPs face a legal obstacle course when asserting the third party defense, and successful assertions of the defense are almost non-existent. Rejections of third party defense claims have dominated the reported decisions on the issue. Courts have strictly enforced the requirement that the third party be the *sole* cause of the release. n474 Moreover, courts have held that subsequent purchasers of property have reason to know that the property was contaminated if the purchasers were aware of any prior industrial use of the property. n475 In addition, courts have rejected the defense because the PRP failed to take precautions against foreseeable acts of third parties. n476

However, International Clinical Laboratories, Inc. v. Stevens n477 offers PRPs a ray of hope. In this case, International Clinical Laboratories (ICL) purchased industrial property without performing an environmental audit of the site. "[T]here were no visible environmental problems at the site," and neither the previous owner nor operator disclosed the existence of any environmental problems to ICL. n478 Only after ICL closed on the property did it learn that the New York Department of Environmental Conservation (D.E.C.) has previously filed a complaint against operators of the site discharging hazardous substances onto the property and that the property was listed on the DEC Inactive Hazardous Waste Disposal Sites list. n479 Despite ICL's only limited inspection of the property and cursory inquiry into prior uses, the court held that ICL was exculpated from liability by the innocent landowner's defense of §§9607(b)(3) and 9601(35)(A). n480 Thus, there are courts willing to interpret the third party defense broadly. n481

§ 75.09(d) Bankruptcy and Security Interests.

As discussed *supra*, lenders are often subject to liability as owners or operators of a facility from which a hazardous substance has been released, even though lenders are not thought of as "owners" or "operators" within the normal use of those terms. However, even if lenders are sophisticated and manage to avoid liability under CERCLA §107(a), they still face the prospect of having their security interests attacked for response costs. Moreover, the claims of general creditors are usually subordinated to hazardous substance response costs.

General creditors and creditors with perfected security interests in uncontaminated property face two main problems. First, their claims may be subordinated through super-priority liens for hazardous substance response costs. Second, even if there is no super-priority lien, the claims of general (and perhaps secured) creditors may be subordinated to response costs which are classified as administrative expenses under the bankruptcy code.

Creditors with perfected security interests in contaminated property will usually have their security invaded to pay for response costs, such as administrative expenses, associated with the contaminated property. Even if the property is abandoned and security interests are not invaded to clean up the contaminated property, the security interest may still be eviscerated in a practical sense, because the market value of the property is still reduced by the costs of any response action that could be taken under CERCLA

This section examines the liens associated with CERCLA liability and their impact on general and secured creditors. This section also discusses how the administrative expense provisions of the bankruptcy code may be used to subordinate the claims of both general and secured creditors.

§ 75.09(d)(1) The CERCLA Lien.

Section 107(1) of CERCLA provides for a federal lien in favor of the United States which attaches to any real property that is subject to removal or remedial action and is owned by a PRP under §107(a). n482 The federal lien arises the later of (1) the time the federal government incurs response costs associated with the property or (2) the time the PRP first receives written notice by certified or registered mail of the potential liability. The United States may bring an action in rem in the federal district court where the real property is located to recover any response costs or natural resources damages. n483

However, the lien must still be filed with the county clerk or other appropriate government official. Moreover, the federal lien does not have priority over other security interests or judgment liens that are perfected before the federal lien is filed. n484 Thus, although response costs will be given priority over the claims of general creditors, the actual lien provisions of CERCLA are seldom a cause for concern for secured creditors. The effects of CERCLA on secured creditors, however, range far beyond the federal lien authorized in the statute.

§ 75.09(d)(2) State Super Liens.

In Ohio v. Kovacs, n485 Justice O'Connor wrote a concurring opinion inviting states to enact statutes giving response costs incurred by state agencies priority over secured creditors. Justice O'Connor noted that property rights in the assets of the bankruptcy estate are determined by state law and that this allowed a state to "protect its interest" in reimbursement for response costs. n486 However, only a few states have responded enthusiastically to this challenge by enacting state super-priority lien statutes. Some of the states which have enacted super-priority liens appear to have been predisposed toward super-priority liens before *Kovacs*.

For example, shortly after the *Kovacs* decision, New Jersey amended and clarified the super-priority lien provision n487 that already existed in the New Jersey Spill Compensation and Control Act. n488 The New Jersey lien law provides that any expenditure by the state to respond to or clean up discharges of hazardous substances may be secured by a super-priority lien that takes precedence over all other secured and unsecured claims against the property. n489 Residential property containing six or fewer dwelling units is exempted from the super-priority lien. n490 Connecticut's super-priority lien provision was also enacted before *Kovacs*. n491

New Hampshire did enact a super-priority lien statute after *Kovacs* which is very similar to the New Jersey provision. The New Hampshire statute elevates the priority of the hazardous materials lien above other encumbrances, but it does not give the hazardous materials lien priority over perfected security interests in residential property. n492 Arkansas and

Massachusetts also adopted a hazardous substance liability scheme and super-priority lien provision after *Kovacs*, n493 although Arkansas later amended the super-priority lien provision to cancel the first priority status of environmental cleanup liens. n494

Similarly, Tennessee explicitly rejected Justice O'Connor's invitation in *Kovacs*. Tennessee amended its existing hazardous waste lien provision to clarify lien filing requirements and priority status and to prevent Justice O'Connor's statement in *Kovacs* from eviscerating prior perfected security interests. n495 The Tennessee statute now provides that the lien shall not have priority over valid liens or interests in property that are perfected before the filing of the hazardous waste lien. Before these changes, the Tennessee statute would have been read as a super-priority lien in light of *Kovacs*. n496

The state super-priority liens do not emanate directly from CERCLA, but rather from independent state liability schemes. However, the state schemes are usually very similar to CERCLA and often borrow much from CERCLA. For example, both the Arkansas and Massachusetts statutory schemes define hazardous materials as those materials or substances which are defined or listed as hazardous substances under CERCLA. n497 Moreover, the New Hampshire statute adopts the CERCLA §107(a) liability scheme almost word for word, setting forth the same four categories of liable parties under CERCLA n498

Thus, a party that is liable under CERCLA will often be liable under a similar state scheme, and creditors must examine state law to determine what priority hazardous substance response costs will be given in bankruptcy proceedings. In Connecticut, Massachusetts, New Hampshire, and New Jersey, hazardous substance response or cleanup costs will take priority over all other claims, whether secured or general. If a state lien provision does not govern the priority of environmental response costs, the bankruptcy code and bankruptcy case law will determine the priority of claims.

§ 75.09(d)(3) Response Costs as Administrative Expenses.

The United States Bankruptcy Code provides that "the actual, necessary costs and expenses of preserving the estate" may be charged against the bankruptcy estate as an administrative expense. n499 Under §507 of the Bankruptcy Code, these administrative expenses are given first priority over all unsecured claims against the estate. n500 Moreover, such administrative expenses may be recovered from secured property as long as the holder of the security interest derives some benefit from the administrative expense. n501

The subordination of general creditors' claims to CERCLA response costs usually proceeds in a two-stage analysis. First, the court determines that the contaminated property cannot be abandoned by the bankruptcy trustee. Second, because the estate is strictly liable for contaminated property that is not abandoned, as an owner or operator under CERCLA, the court, find that the cleanup of hazardous substances released on estate property is a necessary administrative expense in preserving the estate.

Before a secured claim is subordinated to CERCLA response costs, a third stage of analysis is required -- an actual benefit to the holder of the security interest. Thus, a perfected security interest cannot be invaded unless (1) the contaminated property cannot be abandoned, (2) response costs are found to be allowable administrative expenses, and (3) the holder of the security interest derives a benefit from the response action.

In re T.P. Long Chem., Inc. n502 provides an excellent example of this analysis. In *T.P. Long Chem.*, hazardous substances had been released into the environment from drums which were part of the bankruptcy estate. n503 The EPA responded by excavating and disposing of the drums and surrounding contaminated soil and then it sought recovery of response costs for this removal action. n504

The bankruptcy court first reasoned that the estate was an "owner or operator" under CERCLA §107(a) based upon the "broad construction" the courts have given those terms and the broad definition of "person" in CERCLA §101(21). n505

Thus, the court found that the estate could not discharge its CERCLA liability by abandoning the drums and contaminated property because the estate would still be an owner or operator at the time of disposal under CERCLA §107(a)(2). n506 The court also relied on other cases which held that the power to abandon property is subject to laws or equitable principles that are designed to protect public health or safety. n507

Proceeding to the second stage of the analysis, Judge White held that the CERCLA response costs were allowable administrative expenses: "Since the estate cannot avoid the liability imposed by CERCLA, it follows that the cost incurred by the [EPA] in discharging this liability is an actual necessary cost of preserving the estate entitled to administrative expense priority." n508 Thus, the claims of general creditors were subordinated to the CERCLA response costs.

However, because the estate's unencumbered assets were inadequate to satisfy the CERCLA administrative expense, the EPA sought to invade the perfected security interest of BancOhio in the equipment, fixtures, inventory, and accounts receivable of the estate. n509 Under this third stage of analysis, the court determined that BancOhio had not received any real benefit from EPA's response action other than the health and safety benefits enjoyed by the general public. n510 Judge White noted that BancOhio had no interest in the drums and that preserving the drums did not benefit BancOhio. Moreover, BancOhio had no interest in the contaminated property and did not stand to benefit financially from any cleanup of the property. Thus, Judge White ruled that the CERCLA administrative expense could not be given priority over perfected security interests under Bankruptcy Code §506(c). A perfected security interest in uncontaminated property could not be invaded to respond to or clean up contaminated property in the bankruptcy estate. n511

Although courts have not always followed the specific holdings of *T.P. Long Chem.*, the framework set forth by Judge White seems to be the dominant analysis. The priority given to CERCLA response costs under the Bankruptcy Code continues to depend on three main issues: (1) whether the contaminated property can be abandoned by the bankruptcy trustee, (2) whether CERCLA response costs are allowable administrative expenses, and (3) whether the holder of the security interest received any benefit from the CERCLA removal or remedial action.

§ 75.09(d)(3)(i) Abandonment.

Section 554 of the Bankruptcy Code provides for abandonment of property either by the trustee or on motion of a creditor:

> (a) After notice and a hearing, the trustee may abandon any property of the estate that is burdensome to the estate or that is of inconsequential value and benefit to the estate.
>
> (b) On request of a party in interest and after notice and a hearing, the court may order the trustee to abandon any property of the estate that is burdensome to the estate or that is of inconsequential value and benefit to the estate. n512

A straightforward reading of §554 seems to conflict with the holding in T.P. Long Chem., that property burdened with CERCLA liability cannot be abandoned by the bankruptcy estate. Indeed, many bankruptcy courts had simply allowed the bankruptcy trustee to abandon contaminated property under §554 if cleanup costs were actually greater than the market value of the property after decontamination. n513 Nevertheless, it is now well settled that the statutory abandonment power is limited by a duty to protect public health and safety. n514

The most authoritative treatment of the abandonment issue is found in Midlantic Nat'l Bank v. New Jersey Dep't of Envtl. Protection. n515 In a five-four decision, the Supreme Court held that state and local laws may limit the bankruptcy trustee's power to abandon property as long as the statute or regulation is "reasonably designed to protect the public health or safety from identified hazards." n516 However, in a footnote the Court cautioned that this exception to

the trustee's §554 abandonment power should not be read too broadly. The trustee's abandonment power may only be limited when state action is "reasonably calculated to protect the public health or safety from *imminent* and *identifiable* harm." n517

The narrowness of the public health and safety limitation on the abandonment power is open to debate. In the proceedings *infra*, the Third Circuit had held that contaminated property could not be abandoned under §554: n518 "If trustees in bankruptcy are to be permitted to dispose of hazardous wastes under the cloak of the abandonment power, compliance with environmental protection laws will be transformed into governmental cleanup by default." n519 This broad rationale would preclude almost all abandonment of contaminated property, because abandonment to the bankrupt prior owner will always require governmental cleanup; the prior owner will have lost any assets to use in cleaning up the property.

In affirming the Third Circuit, it is clear that the Supreme Court did not preclude all abandonment of contaminated property. However, the Third Circuit may still give this "narrow" health and safety exception a rather broad reading. Other courts since *Midlantic* have refused to allow abandonment under §554 without careful and detailed findings of *imminent and identifiable harm*. n520 These courts appear to logically assume that any lawful hazardous substance response or cleanup action is "reasonably calculated to protect the public health or safety from imminent and identifiable harm." n521

However, other courts have read *Midlantic* very narrowly and have allowed abandonment when the contaminated property "does not present immediate and menacing harm to the public health and safety." n522 In the Fourth Circuit, abandonment under §554 is only limited "when there is an *immediate* threat to the public health and safety and an imminent danger of death or illness." n523 This line of authority does indeed render the *Midlantic* exception a narrow one.

In re Franklin Signal Corp., n524 sets forth an approach somewhere between the broadest and narrowest readings of *Midlantic*. n525 According to Judge Kressel, *Midlantic* requires at a minimum (1) a thorough investigation to determine the extent of hazardous substances contamination and (2) notification to federal and state authorities. n526 The court must then examine:

> (1) the imminence of any danger to the public health and safety,
>
> (2) the extent of probable harm,
>
> (3) the amount and type of hazardous waste,
>
> (4) the costs to bring the property into compliance with environmental laws, and
>
> (5) the amount and type of funds available for cleanup n527 before allowing abandonment of contaminated property. Although seldom cited, this five-factor test appears to include the most important considerations in the abandonment decision.

If the property is abandoned, title reverts back to the bankrupt debtor. n528 General creditors and holders of security interests in other property should be protected from any response costs associated with the contaminated property. However, a few courts have speculated in dicta that response costs could still be charged against the estate even if the contaminated property is properly abandoned under §554. n529

Because the cost of cleanup exceeds the value of the property, the property is virtually worthless until it is cleaned up. The secured interest in such property is similarly of little value until some entity (most likely the state or federal government) cleans up the property. Thus, the secured creditor must wait until cleanup before it will reap any benefit from its security interest in the property. Ironically, the wait will be shorter if the property is dangerously contaminated

and is assigned a high priority on the N.P.L. However, if the danger is not extensive and the property receives a low H.R.S. score, the secured creditor may be in for a long wait before it can capitalize on its security interest.

If the property is not abandoned, the claims of both general and secured creditors may still be subordinated to cleanup costs that are held to be administrative expenses under the bankruptcy code. Thus, the next issue becomes whether response or cleanup costs are entitled to administrative expense priority.

§ 75.09(d)(3)(ii) Administrative Expenses: The Actual and Necessary Costs of Preserving the Estate.

In Midlantic, the Supreme Court explained that the limitations it placed on the abandonment power were entirely consistent with and followed from its holding in Ohio v. Kovacs. In *Kovacs*, the court held that a state cleanup order was dischargeable in bankruptcy proceedings as a general, unsecured claim. However, *Kovacs* also made it clear that anyone in possession of a contaminated site cannot violate state environmental laws, maintain a nuisance, pollute waters, or refuse to abate hazardous conditions. n530 Thus, the abandonment holding in *Midlantic* is consistent with *Kovacs*.

However, the *Midlantic* Court refused to address the issue of cleanup costs as administrative expenses, n531 implying that *Kovacs* offered little controlling precedent as to the priority of response costs in bankruptcy. The *Midlantic* Court treated abandonment and administrative expense priority as two easily separable issues. By refusing to address the issue, the court implied that contaminated property which cannot be abandoned under §554 is not automatically entitled to administrative expense priority. Nevertheless, courts have disregarded these implications; courts have relied on *Kovacs* to find that cleanup costs are not entitled to administrative expense priority, while other courts have merged the abandonment and administrative expense issues into one question. n532

In In re Dant & Russell, Inc., n533 the Ninth Circuit relied on *Kovacs* for the general proposition that cleanup costs for prepetition releases of hazardous substances are simply general claims and are not entitled to administrative expense priority unless the contaminated property is part of the bankruptcy estate. n534 Similarly, the Third Circuit relied on *Kovacs* in Southern Ry. v. Johnson Bronze Co. n535 to hold that prepetition claims could not be given administrative expense priority status. This use of *Kovacs* is somewhat troublesome, because *Kovacs* did not address the administrative expense issue. Indeed, other courts have recognized that *Kovacs* and *Midlantic* offer little guidance on the question of administrative expense priority. n536 Moreover, other courts have reached a similar conclusion without relying on *Kovacs*. n537

However, the reasoning of the Ninth Circuit does not depend on inferences drawn from *Kovacs*. The Ninth Circuit correctly notes that administrative expenses must be necessary to preserve the estate and must be incurred after the filing of the bankruptcy petition. Thus, if the contaminated property is not part of the bankruptcy estate, money spent to clean up prepetition hazardous substance releases does nothing to preserve the bankruptcy estate; cleanup preserves property that is not part of the bankruptcy estate. In effect, the contaminated property is abandoned because it never was actually part of the estate in the first place. Other cases denying administrative expense status for environmental cleanup costs may also be harmonized with the Ninth Circuit's analysis. n538

Thus, response costs are not entitled to administrative expense priority if (1) the hazardous substance release occurred before the bankruptcy petition was filed *and* (2) the contaminated property is not part of the estate. If a bankruptcy estate fails to meet one of these two conditions, response costs may be granted administrative expense priority.

In Pierce Coal & Construction, the bankruptcy court held that clean up costs for environmental damage that occurred after the petition for bankruptcy was filed are entitled to administrative expense status, regardless of whether the damaged or contaminated property is actually a part of the estate. n539 The court relied on §§503 and 507 of the Bankruptcy Code to distinguish between pre- and post-petition environmental damage. n540

When the contaminated property is part of the bankruptcy estate, the courts appear to be unanimous in holding that response or cleanup costs are entitled to administrative expense priority. n541 The courts have not required a showing that the hazardous substance release occurred after the bankruptcy petition was filed. If the contaminated property is part of the bankruptcy estate, all post-petition response or clean up costs are entitled to administrative expenses status, regardless of when the damage to the environment actually occurred. n542

However, it may be impossible to adequately reconcile and categorize all the cases on this issue. Contrary to the Ninth Circuit, many courts strain to classify response costs as administrative expenses with little analysis of any pre-petition/post-petition distinction or of whether the contaminated property is part of the estate. For example, courts may focus on the hazardous substances themselves as being contaminated property that is part of the estate. n543 Thus, response or cleanup costs are always necessary to preserve the bankruptcy estate. n544 This analysis would render the Ninth Circuit rule meaningless.

In the end, the question of whether response costs are necessary costs of preserving the estate is not easily answered. Like the abandonment question, the answer to the administrative expense issue may also be influenced by the public health and safety concerns associated with the contaminated property. n545 Moreover, it is unclear whether response costs for property that is part of the estate are always necessary to preserve the estate. *Midlantic* at least left open the possibility that response costs for part of the estate need not receive administrative expense priority. Creditors should be aware that the EPA, n546 state authorities, n547 or private parties n548 may be entitled to stand in the place of the trustee and receive administrative expense priority for response costs.

If administrative expense priority is granted, all of the unsecured claims of general creditors will be subordinated to response or cleanup costs. However, before the claims of secured creditors are subrogated to administrative expense response costs, an additional finding is necessary.

§ 75.09(d)(3)(iii) Benefit to Secured Creditors.

Before a security interest can be invaded to pay for administrative expenses, the holder of the security interest must receive a benefit from the administrative expense. Generally, administrative expenses cannot be charged against a perfected security interest, unless the secured creditor is directly benefitted by the expenditure. n549 The bankruptcy courts have consistently held that secured creditors must be directly and primarily benefitted before their security interests may be eviscerated to pay for response or cleanup costs that have obtained administrative expense status. n550

If secured creditors have no interest in the contaminated property, the courts have held that the secured creditors do not receive a sufficient benefit from cleanup to invade their security interests in the uncontaminated property of the estate. Thus, a secured creditor is generally protected from response costs for property unless the creditor has some interest in or association with the contaminated property. n551

However, the analysis is different when the security interest is actually in the contaminated property. Before cleanup, the secured creditor is unable to foreclose on the property without incurring CERCLA liability, and the market value of the property will reflect any cleanup costs that may be imposed under CERCLA Thus, the secured creditor receives a direct benefit from cleanup of the contaminated property and the security interest may be invaded to cover cleanup costs. n552

Finally, at least one court has speculated that the security interests of secured creditors may be invaded regardless of whether they actually have an interest in the contaminated property if the health and safety concerns are great enough. n553

FOOTNOTES:
(n1)Footnote 99. The contents of this section were mainly prepared by Clay W. Stucki, Esq., under the author's

supervision.

(n2)Footnote 100. *33 U.S.C. §§1251*-1387.

(n3)Footnote 101. *33 U.S.C. §1362*(7). *See 33 U.S.C. §§1311*(a), 1312, 1316, 1317, 1328, 1342(a), (1), 1344(a), (f).

(n4)Footnote 102. *42 U.S.C. §§300f* to 300j-26.

(n5)Footnote 103. *See 42 U.S.C. §§300h* to 300h-7.

(n6)Footnote 104. *42 U.S.C. §§7401*-7626.

(n7)Footnote 105. *See 42 U.S.C. §§7401*-7508.

(n8)Footnote 106. *42 U.S.C. §§6901*-6992.

(n9)Footnote 107. *42 U.S.C. §§9601*-9675. CERCLA was originally enacted in 1980 as Pub. L. No. 96-510, *94 Stat. 2767*. In 1986, CERCLA was revised by the Superfund Amendments and Reauthorization Act (S.A.R.A.), Pub. L. No. 99-499, *100 Stat. 1615*. These two acts are codified at *42 U.S.C. §§9601*-9675.

(n10)Footnote 108. Remedial or corrective action for releases of pollutants is required under pollution control acts such as the CWA, *33 U.S.C. §§1321*(a)(6), (b)-(c), (f)-(i), and RCRA, *42 U.S.C. §§6924*(u)-(v), 6972, 6973, 6991b-d. However, these acts focus primarily on pollution prevention instead of cleanup. Moreover, these acts provide a more limited range of authority and scope of liability.

Under the CWA, the government is only authorized to respond to releases of hazardous substances into "navigable waters of the United States," *33 U.S.C. §1321*(c)(1), and only the owner or operator of the facility or vessel is liable for cleanup costs. Under RCRA, the government is limited to seeking or ordering injunctive remedies and cannot clean up the site and later impose liability.

(n11)Footnote 109. *Pittston Co. v. Allianz Ins. Co., 905 F. Supp. 1279 (D.N.J. 1995), rev'd, 124 F.3d 508 (3d. Cir. 1997)* (action by vendor of polluted property against vendor's insurer).

(n12)Footnote 110. The average CERCLA cleanup cost has been estimated at $25 million to $30 million. *See* William K. Reilly, A Management Review of the Superfund Program (United States Environmental Protection Agency 1989).

(n13)Footnote 111. Ann M. Burkhart, *Lender/Owners and CERCLA: Title and Liability*, 25 Harv. J. on Legis. 317, 321 (1988) ("CERCLA has proven to be an unexpected source of liability for lenders, because this is the first time that a government agency has pursued lender/wners in court for conditions on the property.").

(n14)Footnote 112. The Superfund is the trust fund established under CERCLA to pay for the EPA's cleanup of hazardous substance releases. The term "Superfund" has become a nickname for CERCLA.

(n15)Footnote 113. Most commentators credit the media attention and public outcry at Love Canal for sowing the seeds of CERCLA. *See* Sheldon M. Novick, Donald W. Stever & Margaret G. Mellon, Law of Environmental Protection rev. 1990); Ann M. Burkhart, and CERCLA: Title and Liability," Harv. J. on Legis. 318, n.2 (1988); Superfund at Square One: *Promising Statutory Framework Requires Forceful EPA Implementation, 11 Envtl. L. Rep. (Envtl. L. Inst.) 10101 (1981).* There is certainly enough discussion of Love Canal in the legislative history of CERCLA to support such a conclusion. *See* 126 Cong. Rec. 26, 39-51 (1980).

Love Canal was an unfinished and inactive canal in Niagara Falls, New York. From the mid-1940s until 1953, the

Hooker Chemical Co. and others dumped hazardous wastes, including dioxin, into the canal. Hooker Chemical filled in the canal in 1953 and donated the land to the Niagara Falls Board of Education, and a school was subsequently built on the site. In 1976, residents near the school and parents of school children began to realize that they were being contaminated by hazardous leachate leaking from the site. More than 600 families had to be permanently evacuated from the site. *See* Adeline Levine, Love Canal: Science, Politics, and People (1982); *Sheldon M. Novick, Donald W. Stever & Margaret G. Mellon, supra,* §13.01[6].

(n16)Footnote 114. The three bills that were merged so hastily were H.R. 85, 96th Cong., 2nd Sess., 126 Cong. Rec. 26, 369-392 (1980); H.R. 7020, 96th Cong., 2d Sess., 126 Cong. Rec. 26,757 (1980); and S. 1480, 96th Cong., 1st Sess., 125 Cong. Rec. 17, 989 (1979). *See* Frank P. Grad, *A Legislative History of the Comprehensive Environmental Response, Compensation and Liability ("Superfund") Act of 1980, 8 Colum. J. Envtl. L. 1 (1982);* Ann M. Burkhart, *Lender/Owners and CERCLA: Title and Liability,* 25 Harv. J. on Legis. 333 n.54 (1988).

(n17)Footnote 115. *United States v. Mottolo, 605 F. Supp. 898, 902 (D.N.H. 1985)* ("CERCLA has acquired a well-deserved notoriety for vaguely-drafted provisions and an indefinite, if not contradictory, legislative history."); *Bulk Distrib. Ctrs., Inc. v. Monsanto Co., 589 F. Supp. 1437, 1441 (S.D. Fla. 1984)* ("CERCLA's legislative history is riddled with uncertainty"); *United States v. Reilly Tar & Chem. Corp., 546 F. Supp. 1100, 1111 (D. Minn. 1982)* (CERCLA's legislative history "must be read with some caution."); Comment, Patricia L. Quentel, *The Liability of Financial Institutions for Hazardous Waste Cleanup Costs Under CERCLA, 1988 Wis. L. Rev. 139, 145 n.28* ("Because of Congress' hasty passage of CERCLA, there exists no full committee report on which the courts can rely in construing the statute.").

(n18)Footnote 116. *See In re Acushnet River & New Bedford Harbor Proceedings Re Alleged PCB Pollution, 675 F. Supp. 22 (D. Mass. 1987).*

> Certain statutes stand out as models of the art of legislative draftsmanship. Others, frequently those enacted in the "harried and hurried" atmosphere prevalent during the final days of a legislative session achieve a certain quirky notoriety precisely because they are so badly drafted as to be virtually incomprehensible... Prominent among this latter group is C.E.R.C.L.A...

Id. at 25 n.2 (citations omitted). *See also Smith Land Imp. Corp. v. Celotex Corp., 851 F.2d 86 (3d Cir. 1988)* (CERCLA is a "hastily conceived and briefly debated piece of legislation"); *Mottolo, 605 F. Supp. at 902* ("CERCLA has acquired a well-deserved notoriety for vaguely-drafted provisions"); *Violet v. Picillo, 648 F. Supp. 1283, 1288 (D. R.I. 1986)* ("CERCLA is a hastily-drawn statute quickly passed through a lame-duck Congressional session.").

(n19)Footnote 117. *Violet v. Picillo, 648 F. Supp. at 1288* (CERCLA was enacted "to give the federal government the tools necessary for a prompt and effective response to hazardous waste problems and to force those responsible for creating hazardous waste problems to bear the cost of their actions.") (citing S. Rep. No. 848, 96th Cong., 2d Sess. 13 (1980) and H.R. Rep. No. 1016, 96th Cong., 2d Sess. pt. 1, at 25 (1980)). *See also* H.R. Rep. No. 172, 96th Cong., 1st Sess., pt. 1, *reprinted in* 1980 U.S. Code Cong. & Admin. News 6119; 126 Cong. Rec. 26,338 (1980) (CERCLA "assures that the costs of chemical poison releases are borne by those responsible for the releases.").

The *Violet* holding was overruled by *United States v. Davis, 794 F. Supp. 67 (D.R.I. 1992),* and is no longer accurate in the sense that equitable defenses are now not available in CERCLA cost recovery actions. *United States v. Domenic Lombardi Realty, Inc., 204 F. Supp. 2d 318 (D. R.I. 2002)* (CERCLA held constitutionally enacted according to Congress' power to regulate interstate commerce).

(n20)Footnote 118. PRPs are those parties thought to be liable under CERCLA §107(a), *42 U.S.C. §9607*(a). PRPs become liable parties after the government or other plaintiffs succeed in proving that the PRPs do indeed fall within one of the categories of liable parties under §107(a).

(n21)Footnote 119. Similarly, PRPs may respond to or clean up a hazardous substance release and seek contribution from other PRPs for the costs incurred.

(n22)Footnote 120. *See* CERCLA §101(14), *42 U.S.C. §9601*(14).Annotation, *Determination Whether Substance Is "Hazardous Substance" Within Meaning Of Sec. 101(14) of Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) (42 U.S.C.A. Sec. 9601(14)), 118 A.L.R. Fed. 293,* (1994).

(n23)Footnote 121. CERCLA §102(a) states:

> The Administrator shall promulgate and revise as may be appropriate, regulations designating as hazardous substances, in addition to those referred to in section 9601(14) of this title, such elements, compounds, mixtures, solutions, and substances which, when released into the environment may present a substantial danger to the public health or welfare or the environment ...

42 U.S.C. §9602(a). *See 42 U.S.C. §9601*(14)(B).

(n24)Footnote 122. *33 U.S.C. §1317*(a).

(n25)Footnote 123. *33 U.S.C. §1321*(b)(2)(A).

(n26)Footnote 124. *42 U.S.C. §6921.*

(n27)Footnote 125. *42 U.S.C. §7412.* To date, the National Emission Standards for Hazardous Air Pollutants (NESHAPs) list under *42 U.S.C. §9612*(b)(1)(A) includes only eight pollutants: asbestos, benzene, beryllium, coke oven emissions, inorganic arsenic, mercury, radionuclides, and vinyl chloride. *See 40 C.F.R. §§61.01 et seq.*

(n28)Footnote 126. *15 U.S.C. §2606.*

(n29)Footnote 127. *15 U.S.C. §§2601*-2671.

(n30)Footnote 128. *42 U.S.C. §9602.*

(n31)Footnote 129. For a complete list of all designated hazardous substances, *see* 40 C.F.R. §302.4 (1989) and accompanying Table 302.4.*B.F. Goodrich v. Betkoski, 99 F.3d 505 (2d Cir. 1996)* (The definition of "hazardous substance" under CERCLA includes even miniscule or nominal amounts of the "hazardous substance")

(n32)Footnote 130. *42 U.S.C. §9604*(a)(1)(B).

(n33)Footnote 131. CERCLA §101(33) provides:

> The term "pollutant or contaminant" shall include, but not be limited to, any element, substance, compound, or mixture, including disease causing agents, which after release into the environment and upon exposure, ingestion, inhalation, or assimilation into any organism, either directly from the environment or indirectly by ingestion through foodchains, will or may reasonably be anticipated to cause death, disease, behavioral abnormalities, cancer, genetic mutation, physiological malfunctions (including malfunctions in reproduction) or physical deformations, in such organisms or their offspring ...

42 U.S.C. §9601(33).

(n34)Footnote 132. *See 42 U.S.C. §9606*(a).

(n35)Footnote 133. *See 42 U.S.C. §9607*(a).

(n36)Footnote 134. *See* 40 C.F.R. §302.4 (1989).

(n37)Footnote 135. *42 U.S.C. §9601*(14).

B.F. Goodrich v. Betkoski, 99 F.3d 505 (2d Cir. 1996) (includes even minuscule or nominal amounts), *cert. denied, 118 S. Ct. 2318 (1998).*

(n38)Footnote 136. *42 U.S.C. §9601*(33).

(n39)Footnote 137. *42 U.S.C. §§9601*(14), 9601(33).

(n40)Footnote 138. *See* CWA §311, *42 U.S.C. §1321.*

(n41)Footnote 139. EPA General Counsel Memorandum, Scope of the CERCLA Petroleum Exclusion under Sections 101(14) and 104(a)(2) (July 31, 1987) (Office of Solid Waste Emergency Response Directive No. 9838.1). *See 50 Fed. Reg. 13,460* (April 4, 1985) ("EPA interprets the petroleum exclusion to apply to materials such as crude oil, petroleum feedstocks, and refined petroleum products, even if a specifically listed or designated hazardous substance is present in such products.").

(n42)Footnote 140. *Welshire Westwood Assocs. v. Atlantic Richfield Corp., 881 F.2d 801, 810 (9th Cir. 1989). See also Equitable Life Assur. Soc. of United States v. Greyhound Corp., 31 Env't Rep. Cas. (BNA) 1079, 1080 (E.D. Pa. 1990)* ("CERCLA's petroleum exclusion applies to diesel fuel").

(n43)Footnote 141. Moreover, unused cutting oil is not a hazardous substance under CERCLA *See Marmon Group, Inc. v. Rexnord, Inc.*, No. 85 C 7838 (N.D. Ill. 1986) ("cutting oil is a form of oil" and "is specifically excluded from CERCLA" by the petroleum exclusion) *rev'd on other grounds, 822 F.2d 31 (7th Cir. 1987).*

(n44)Footnote 142. *50 Fed. Reg. 13,469* (April 4, 1985) ("EPA does not consider materials such as waste oil to which listed CERCLA substances have been added to be within the petroleum exclusion.").

(n45)Footnote 143. *See Industrial Indem. Ins. Co. v. Crown Auto Dealerships, 731 F. Supp. 1517, 1518-19 (M.D. Fla. 1990)* (PRPs entered into administrative orders to clean up a release of used crankcase oil).

(n46)Footnote 144. *City of N.Y. v. Exxon Corp., 744 F. Supp. 474, 489-490 (S.D.N.Y. 1990).*

(n47)Footnote 145. *See 50 Fed. Reg. 13,460* (April 4, 1985).

(n48)Footnote 146. *42 U.S.C. §§9601*(14), 9601(33).

(n49)Footnote 147. *42 U.S.C. §9606*(a). *See also 42 U.S.C. §§9604*(a)(1), 9607(a)(4).

(n50)Footnote 148. *42 U.S.C. §9601*(22). *Burlington Northern R. Co. v. Woods Indus., 815 F. Supp. 1384 (E.D. Wash. 1993)* (The fact that only a minute amount of hazardous substance was "released" is not a defense under CERCLA. The definition of release can not be held to mean that there is a threshold requirement).

(n51)Footnote 149. *Id.*

(n52)Footnote 150. Section 101(8) provides:

> The term "environment" means (A) the navigable waters, the waters of the contiguous zone, and the ocean waters to which the natural resources are under the exclusive management authority of the United

> States under the Magnuson Fishery Conservation and Management Act *[16 U.S.C. §1801 et seq.*], and (B) any other surface water, ground water, drinking water supply, land surface or subsurface strata, or ambient air within the United States or under the jurisdiction of the United States.

42 U.S.C. §9601(8).

(n53)Footnote 151. *42 U.S.C. §9601*(8).

(n54)Footnote 152. CERCLA excludes "any release which results in exposure to persons solely within a workplace, with respect to a claim which such persons may assert against the employer of such persons." *42 U.S.C. §9601*(22)(a).

(n55)Footnote 153. *29 U.S.C. §651 et seq.*

(n56)Footnote 154. *42 U.S.C. §1857et seq.*

(n57)Footnote 155. CERCLA excludes "emissions from the engine exhaust of a motor vehicle, rolling stock, aircraft, vessel, or pipeline pumping station." *42 U.S.C. §9601*(22)(B).

(n58)Footnote 156. *42 U.S.C. §2011 et seq.*

(n59)Footnote 157. Pub. L. No. 95-604 (codified at *42 U.S.C. §§7901,* 7912(a)(1), 7942). Section 101(22)(C) excludes:

> release of source, byproduct, or special nuclear material from a nuclear incident ... if such release is subject to [the financial responsibility] requirements ... [of *42 U.S.C. §2210],* or for the purposes of section 9604 of this title or any other response action, any release of source byproduct, or special nuclear material from any processing site designated under section 7912(a)(1) or 7942(a) of this title.

42 U.S.C. §9601(22).

(n60)Footnote 158. *42 U.S.C. §9601*(22)(D).

(n61)Footnote 159. *42 U.S.C. §§9603*(a), 9607(j).

(n62)Footnote 160. CWA §102, *33 U.S.C. §1342.* N.P.D.E.S. permits set forth the pollutants that can be legally discharged from a point source into the waters of the United States. *Id.*

(n63)Footnote 161. *33 U.S.C. §1344.*

(n64)Footnote 162. RCRA §§3005(a)-3005(d), *42 U.S.C. §6925*(a)-(d).

(n65)Footnote 163. *33 U.S.C. §§1412*-1413.

(n66)Footnote 164. *42 U.S.C. §§300h*-300h-7.

(n67)Footnote 165. *42 U.S.C. §§7410*-7412, 7470-7508.

(n68)Footnote 166. *See 42 U.S.C. §9601*(10)(I).

(n69)Footnote 167. *33 U.S.C. §§1317*(b)-1317(c).

(n70)Footnote 168. *42 U.S.C. §§2011 et seq.*

(n71)Footnote 169. A vessel is defined as "every description of watercraft or other artificial contrivance used, or capable of being used, as a means of transportation on water." *42 U.S.C. §9601*(28). Since this chapter is concerned primarily with CERCLA and real property, no discussion of vessels is provided.

(n72)Footnote 170. *See 42 U.S.C. §9606*(a) (injunctive relief and administrative orders are proper when there is "an actual or threatened release of a hazardous substance from a facility"); *42 U.S.C. §9607*(a) (linking CERCLA liability to the existence of a facility or vessel).

(n73)Footnote 171. *See 42 U.S.C. §9603*(a).

(n74)Footnote 172. *42 U.S.C. §9601*(9) provides:

> The term "facility" means (A) any building, structure, installation, equipment, pipe or pipeline ... well, pit, pond, lagoon, impoundment, ditch, landfill, storage container, motor vehicle, rolling stock, or aircraft, or (B) any site or area where a hazardous substance has been deposited, stored, disposed of, or placed, or otherwise come to be located ...

(n75)Footnote 173. *United States v. Conservation Chem. Co., 619 F. Supp. 162, 185 (W.D. Mo. 1986)* (emphasis added). This case has been rejected by other courts, e.g., *United States v. Northwestern Pharm. & Chem. Co., Inc., 810 F.2d 726 (8th Cir. 1986)* cert. denied, *484 U.S. 848 (1987). See also United States v. Bliss, 667 F. Supp. 1298, 1303, 1305 (E.D. Mo. 1987)* (finding that roadways sprayed with hazardous waste oil to suppress dust were facilities for purposes of CERCLA liability); *New York v. General Elec. Co., 592 F. Supp. 291 (N.D.N.Y. 1984)* ("[T]he broad language employed in §109(9) dispels any notion that CERCLA was designed to cover only traditional dump sites... Congress sought to deal with every conceivable area where hazardous substances come to be located."). *Amcast Indus. Corp. v. Detrex Corp., 2 F.3d 746,* (7th Cir. 1993) (holding hazardous materials spilled from trucks as a CERCLA "facility"), cert. denied, *114 S.Ct. 691 (1994); KN Energy, Inc. v. Rockwell Int'l Corp., 840 F. Supp. 95 (D. Colo. 1993)* (natural gas pipelines as a CERCLA "facility"); *Reading Co. v. City of Phila., 823 F. Supp. 1218 (E.D. Pa. 1993)* (rolling stock held to be a CERCLA "facility").

(n76)Footnote 174. The definition of a facility does exclude "any consumer product in consumer use." *42 U.S.C. §9601*(9). Thus, PRPs cannot be held liable under *42 U.S.C. §9607*(a) for releases of hazardous substances from consumer products or forced to respond to such releases under *42 U.S.C. §9606*(a). Moreover, there is no reporting requirement for releases from consumer products. However, these issues have not been litigated.

(n77)Footnote 175. *42 U.S.C. §9603*(a).

(n78)Footnote 176. *42 U.S.C. §9603*(b).

(n79)Footnote 177. *See* 40 C.F.R. §302.6(a) (1989).

(n80)Footnote 178. *42 U.S.C. §9602.*

(n81)Footnote 179. *42 U.S.C. §9602*(a).

(n82)Footnote 180. *See 42 U.S.C. §9603*(a) (setting forth reporting duties for hazardous substance releases from a facility or vessel "in quantities equal to or greater than those determined pursuant to section 9602 of this title"). *United States v. Alcan Aluminum Corp., 990 F.2d 711 (2d Cir. 1993)* (The reportable quantities only refer to the reporting requirements, and have no bearing on CERCLA liability).

(n83)Footnote 181. *42 U.S.C. §9602*(b).

(n84)Footnote 182. *See 33 U.S.C. §1321*(b)(4).

(n85)Footnote 183. *See* 40 C.F.R. §302.4 (1989). Table 302.4 (List of Hazardous Substances and Reportable Quantities) lists all CERCLA hazardous substances and their respective reportable quantities.

(n86)Footnote 184. 40 C.F.R. §302.6 (1989).

(n87)Footnote 185. *42 U.S.C. §§9603*(e)-9603(f).

(n88)Footnote 186. *42 U.S.C. §§9601*(10), 9603(a).

(n89)Footnote 187. *7 U.S.C. §§136*-136y.

(n90)Footnote 188. *42 U.S.C. §9603*(e).

(n91)Footnote 189. *See 42 U.S.C. §6930.*

(n92)Footnote 190. *See 42 U.S.C. §9603*(f)(1).

(n93)Footnote 191. *42 U.S.C. §9603*(f)(2).

(n94)Footnote 192. *42 U.S.C. §6921. See* 40 C.F.R. §§261.1-261.3, 261.4(a)-261.4(b), 261-.20-261.33.

(n95)Footnote 193. *42 U.S.C. §9603*(c).

(n96)Footnote 194. *42 U.S.C. §9603*(e).

(n97)Footnote 195. *42 U.S.C. §9603*(c). Because the definition of a hazardous waste (RCRA §3001, *42 U.S.C. §6921* (1988)) is narrower than the definition of a hazardous substance, the facility reporting requirement is narrower than the CERCLA release reporting requirement.

(n98)Footnote 196. *See 42 U.S.C. §9603*(c).

(n99)Footnote 197. *42 U.S.C. §9604.*

(n100)Footnote 198. *42 U.S.C. §9604*(a). *G.J. Leasing Co. v. Union Elec. Co., 854 F. Supp. 539 (S.D. Ill. 1994)* (The jurisdictional limitations of the response authority under CERCLA apply to either the EPA or to private parties responding to the situation).

(n101)Footnote 199. *Id.*

(n102)Footnote 200. *See* Exec. Order No. 12,316, *45 Fed. Reg. 42237 (1981). See also* 40 C.F.R. §§300.21-.22 (1989). The EPA responds to the vast majority of CERCLA problems. Although the Coast Guard does have CERCLA authority, the Coast Guard's use of CERCLA is extremely limited as compared to the EPA's use of CERCLA The Department of Defense's CERCLA authority is even more limited.

(n103)Footnote 201. *42 U.S.C. §9604*(a)(1)(B).

(n104)Footnote 202. *42 U.S.C. §9604*(a)(1)(A).

(n105)Footnote 203. *42 U.S.C. §9604*(a)(1)(B).

(n106)Footnote 204. *42 U.S.C. §9604*(a)(1). *See infra* notes 217-250. EPA's authority to perform Superfund-financed remedial actions is also conditioned on obtaining certain assurances and a cost sharing agreement

from the state where the site is located. *See 42 U.S.C. §9604*(c)(3).

(n107)Footnote 205. *42 U.S.C. §9611*(a).

(n108)Footnote 206. *See* S.A.R.A. §§511-517, Pub. L. No. 99-499, §§511-517, *100 Stat. 1615 (1986).*

(n109)Footnote 207. *See 42 U.S.C. §9607*(a)(4).

(n110)Footnote 208. *42 U.S.C. §9604*(a).

(n111)Footnote 209. *42 U.S.C. §9604*(a).

(n112)Footnote 210. *42 U.S.C. §9613*(h).

(n113)Footnote 211. *42 U.S.C. §9613*(h).

(n114)Footnote 212. For criticism of CERCLA's two-response system, see Jerry L. Anderson, *Removal or Remedial? The Myth of CERCLA's Two-Response System, 18 Colum. J. Envtl. L. 103 (1993)* (distinguishing between the two types of actions and discussing the court's confusion about the purpose of the removal/remedial distinction).

(n115)Footnote 213. *42 U.S.C. §9601*(23). *ABB Indus. Sys. v. Prime Tech. Inc., 32 F. Supp. 2d 38 (D. Conn. 1998)* (Removal actions and remedial actions can be factually distinguished. Removal actions are typically an immediate response to an emergency situation while remedial actions focus on permanent remedies to the releases).

(n116)Footnote 214. *Id.*

(n117)Footnote 215. *42 U.S.C. §9604*(a)(2).

(n118)Footnote 216. *42 U.S.C. §9601*(24). *Gussack Realty Company v. Xerox Corporation, 224 F.3d 85 (2d Cir. 2000)* (expert and attorney fees incurred in remediating a site are not a necessary cost and not recoverable under CERCLA).

(n119)Footnote 217. *42 U.S.C. §§9604*(c)(2), 9621(f)(1). Although the state must have a meaningful opportunity to help develop and review the selected remedy, the EPA need not obtain state approval of the remedial action.

(n120)Footnote 218. *See 42 U.S.C. §§9604*(a), 9604(c)(4).

(n121)Footnote 219. *See* §75.09(b)(8), *infra.*

(n122)Footnote 220. *See* 40 C.F.R. §300.68(a)(1) ("Fund-financed remedial action, excluding remedial planning activities pursuant to CERCLA section 104(b), may be taken only at sites listed on the NPL.").

(n123)Footnote 221. *42 U.S.C. §9621*(a). The statutory text actually states that remedial actions need only be consistent with the NCP "to the extent practicable." *Id.* Prior to the enactment of SARA in 1986, cleanup standards were determined solely under the NCP. After Congress provided new cleanup guidelines under SARA §121(a) (codified at *42 U.S.C. §9621),* the existing NCP was not entirely consistent with the new statutory mandate regarding cleanup standards. Thus, a remedial action was not governed by the NCP to the extent it conflicted with revised *42 U.S.C. §9621.* However, because EPA has since revised the NCP, there should no longer be circumstances where *42 U.S.C. §9621* conflicts with the NCP. Thus, cleanup standards must comply with both CERCLA §121 and the NCP.

(n124)Footnote 222. *42 U.S.C. §9621*(d)(1).

(n125)Footnote 223. *42 U.S.C. §9621*(d)(2)(A).

(n126)Footnote 224. *42 U.S.C. §9621*(d)(2)(A).

(n127)Footnote 225. *See* 40 C.F.R. §§264.92 - 264.96 (1989) (Groundwater-water protection standard).

(n128)Footnote 226. *Id.*

(n129)Footnote 227. *42 U.S.C. §9621*(b)(2)(C)(iii). *United States v. City and County of Denver, 100 F.3d 1509 (10th Cir. 1996)* (The United States brought suit and the court agreed that a city's cease and desist order (based on alleged violations of zoning ordinances) was null and void. The zoning ordinances did not fall under the category of "state environmental or facility siting law" according to the definition of "applicable or relevant and appropriate requirements" of state law, with which EPA must comply if the state requirements are more stringent than federal law.)

(n130)Footnote 228. *Id.* The state can recover these incremental costs from PRPs in an action under CERCLA §107.

(n131)Footnote 229. *42 U.S.C. §9621*(d)(2)(A)(ii).

(n132)Footnote 230. *42 U.S.C. §9621*(d)(4).

(n133)Footnote 231. *42 U.S.C. §9621*(d)(4)(C).

(n134)Footnote 232. *42 U.S.C. §9621*(d)(4)(E).

(n135)Footnote 233. *See 42 U.S.C. §9621*(d)(4)(F).

(n136)Footnote 234. *42 U.S.C. §9621*(d)(2)(C)(3).

(n137)Footnote 235. *42 U.S.C. §9621*(a), (b)(1).

(n138)Footnote 236. *42 U.S.C. §9621*(b)(1).

(n139)Footnote 237. *42 U.S.C. §9621*(b)(1).

(n140)Footnote 238. *42 U.S.C. §9621*(b)(1).

(n141)Footnote 239. *42 U.S.C. §9604*(a)(3)(A).

(n142)Footnote 240. *42 U.S.C. §9604*(a)(3)(B).

(n143)Footnote 241. *42 U.S.C. §9604*(a)(3)(C).

(n144)Footnote 242. *42 U.S.C. §9604*(b)(4).

(n145)Footnote 243. *42 U.S.C. §9604*(e)(1).

(n146)Footnote 244. *42 U.S.C. §9604*(e)(5).

(n147)Footnote 245. *42 U.S.C. §9604*(j).

(n148)Footnote 246. Consistent with CERCLA §§104 and 107, which base PRP liability on the existence of a hazardous substance, EPA cannot force PRPs to respond to a release of pollutants or contaminants under CERCLA §106.

(n149)Footnote 247. *42 U.S.C. §9606*(a).

(n150)Footnote 248. *See United States v. Price, 577 F. Supp. 1103 (D.N.J. 1983)* (holding that §107 standards of liability determine liability under §106); *United States v. Northeastern Pharm. & Chem. Co., 579 F. Supp. 823 (W.D. Mo. 1984) aff'd in part and rev'd in part, United States v. Northwestern Pharm. & Chem. Co., Inc., 810 F.2d 726 (8th Cir. 1986); United States v. Outboard Marine Corp., 556 F. Supp. 54 (N.D. Ill. 1982). See also 42 U.S.C. §9606*(b)(1), (b)(2)(C). If a PRP is not a responsible party under CERCLA §107(a) (codified at *42 U.S.C. §9607*(a)), then the PRP has "sufficient cause" to refuse to comply with an EPA administrative order to take response action. *42 U.S.C. §9606*(b)(1).

(n151)Footnote 249. *See 42 U.S.C. §9621*(a) (EPA "shall select appropriate remedial actions determined to be necessary to be carried out under section 9604 ... or secured under section 9606").

(n152)Footnote 250. *42 U.S.C. §9606*(a).

(n153)Footnote 251. *577 F. Supp. 1103 (D.N.J. 1983).*

(n154)Footnote 252. *See also United States v. Ottati & Goss, Inc., 630 F. Supp. 1361 (D. N.H. 1985) judgment aff'd in part, vacated in part United States v. Ottati & Goss, Inc., 900 F.2d 429 (1st Cir. 1990); United States v. Northeastern Pharm. & Chem. Co., 579 F. Supp. 823 (W.D. Mo. 1984).*

(n155)Footnote 253. *42 U.S.C. §9606*(c).

(n156)Footnote 254. *42 U.S.C. §9606*(a).

(n157)Footnote 255. *Ottati & Goss, Inc., 630 F. Supp. 1361 (D. N.H. 1985)* judgment aff'd in part, vacated in part *United States v. Ottati & Goss, Inc., 900 F.2d 429 (1st Cir. 1990). See also United States v. Vertac Chem. Corp., 489 F. Supp. 870 (E.D. Ark. 1980)* (discussion of imminent and substantial endangerment under RCRA §7003).

(n158)Footnote 256. *United States v. Ottati & Goss, Inc., 900 F.2d 429 (1st Cir. 1990).*

(n159)Footnote 257. *United States v. Ottati & Goss, Inc., 900 F.2d 429 (1st Cir. 1990).*

(n160)Footnote 258. *5 U.S.C. §706. See United States v. Ottati & Goss, Inc., 900 F.2d 429 (1st Cir. 1990); See also 42 U.S.C. §9606*(b)(2)(D).

(n161)Footnote 259. *See 42 U.S.C. §9606*(b)(1).

(n162)Footnote 260. *See, e.g., Wagner Seed Co. v. Daggett, 800 F.2d 310,* (2d Cir. 1986); *Wagner Elec. Corp. v. Thomas, 612 F. Supp. 736 (D. Kan. 1985); United States v. Reilly Tar & Chem. Corp., 606 F. Supp. 412, 417-420 (D. Minn. 1985).*

(n163)Footnote 261. *42 U.S.C. §9613*(j)(2); *5 U.S.C. §706.*

(n164)Footnote 262. *See 5 U.S.C. §706.*

(n165)Footnote 263. *42 U.S.C. §9613*(h).

(n166)Footnote 264. *42 U.S.C. §9613*(h).

(n167)Footnote 265. *See, e.g., Solid State Circuits, Inc. v. United States, 812 F.2d 383 (8th Cir. 1987).*

(n168)Footnote 266. *42 U.S.C. §§9613*(j)(1)-9613(j)(2); *5 U.S.C. §706.*

(n169)Footnote 267. *42 U.S.C. §9606*(b)(1).

(n170)Footnote 268. *42 U.S.C. §9607*(c)(3).

(n171)Footnote 269. *See 42 U.S.C. §9606*(b)(2).

(n172)Footnote 270. *42 U.S.C. §9606*(b)(2)(A).

(n173)Footnote 271. *42 U.S.C. §§9606*(b)(2)(B)-9606(b)(2)(C).

(n174)Footnote 272. *42 U.S.C. §9606*(b)(2)(D).

(n175)Footnote 273. *See, e.g., United States v. Northernaire Plating Co., 685 F. Supp. 1410 (W.D. Mich. 1988).*

(n176)Footnote 274. *See United States v. Prive, 688 F.2d 204, 213-214 (3d Cir. 1982);* William Rosbe & Robert L. Gulley, *The Hazardous and Solid Waste Amendments of 1984: A Dramatic Overhaul of the Way America Manages Its Hazardous Wastes, 14 Envtl. L. Rep. (Envtl. L. Inst.) 10458 (1984).*

(n177)Footnote 275. *See 42 U.S.C. §6973*(a).

(n178)Footnote 276. Although RCRA §7003(a) seems to authorize only injunctive relief, some courts have begun interpreting §7003(a) to allow Superfund financed cleanup and cost recovery actions. *See, e.g., United States v. Aceto Agrl. Chem. Corp., 872 F.2d 1373 (8th Cir. 1989) but see Mathews v. Dow Chemical Co., 947 F. Supp. 1517,* (D. Colo. 1996).

(n179)Footnote 277. For purposes of this section, the term "private party" includes state and local governments. In other words, a private party is any person or entity that does not have CERCLA response authority pursuant to CERCLA §§104 and 106.

(n180)Footnote 278. Responsible parties are barred from seeking reimbursement from the Superfund.

(n181)Footnote 279. *42 U.S.C. §9611*(a)(2).

(n182)Footnote 280. *42 U.S.C. §9611*(a)(2).

(n183)Footnote 281. *See* 40 C.F.R. §300.25(d)(1) (1989).

(n184)Footnote 282. *42 U.S.C. §9612*(a).

(n185)Footnote 283. *See, e.g.,* Frank M. Thomas, Jr. *Municipal and Private Party Claims Under Superfund, 13 Envtl. L. Rep. (Envtl. L. Inst.) 10272 (1983).* Apparently, the EPA has decided that its interest in controlling the cleanup process outweighs the benefits of private party response and reimbursement.

(n186)Footnote 284. *42 U.S.C. §9612*(d)(1).

(n187)Footnote 285. *42 U.S.C. §9612*(d)(2).

(n188)Footnote 286. If a responsible party performs response actions in which less than all responsible parties participate or pay their fair share, the responsible party must seek contribution from other PRPs instead of reimbursement from the Superfund. *See 42 U.S.C. §9613*(f).

However, there is one limited circumstance where a responsible party actually has recourse to the Superfund. As noted in the discussion of CERCLA §106 response authority, a responsible party may recover response costs from the Superfund if the costs were incurred as the result of an arbitrary, capricious, or unlawful administrative order. *See 42 U.S.C. §9606*(b)(2)(D).

(n189)Footnote 287. *42 U.S.C. §9607*(a)(4)(B) (emphasis added). State governments and Indian tribes are also entitled to recover response costs not inconsistent with the NCP under *42 U.S.C. §9607*(a)(4)(B).

(n190)Footnote 288. *Tanglewood E. Homeowners v. Charles-Thomas, Inc., 849 F.2d 1568, 1574-1575 (5th Cir. 1988); New York v. Shore Realty Corp., 759 F.2d 1032, 1045-1048 (2d Cir. 1985); Walls v. Waste Resource Corp., 761 F.2d 311 (6th Cir. 1985); Pinole Point Props., Inc. v. Bethlehem Steel Corp., 596 F. Supp. 283, 289-290 (N.D. Cal. 1984); Jones v. Inmont Corp., 584 F. Supp. 1425 (S.D. Ohio 1984); United States v. Reilly Tar & Chem. Corp., 546 F. Supp. 1100 (D. Minn. 1982); City of Philadelphia v. Stephan Chem. Co., 544 F. Supp. 1135 (E.D. Pa. 1982); DMJ Assocs., L.L.C. v. Capasso, 288 F. Supp. 2d 262 (E.D. N.Y. 2003).*

(n191)Footnote 289. *See Tanglewood E. Homeowners v. Charles-Thomas, Inc., 849 F.2d 1568, at 1574-1575 (5th Cir. 1988)* (court dismissing, with almost no discussion, arguments that response was not necessary).

(n192)Footnote 290. *See, e.g., Tanglewood E. Homeowners, 849 F.2d at 1574-1575; Shore Realty, 759 F.2d at 1045-48; United States v. Reilly Tar & Chem. Corp., 546 F. Supp. 1100 (D. Minn. 1982).*

Because CERCLA §107(a)(4)(B) requires that the response action be "consistent with" the NCP, most private parties seeking response costs bear the burden of proving consistency with the NCP. *42 U.S.C. §9607*(a)(4)(B). On the other hand, if the federal government, a state government, or a Native American tribe is seeking response costs, the defendant bears the burden of proving inconsistency with the NCP, because federal, state, and Native American government response actions need only be "not inconsistent with" the NCP. *42 U.S.C. §9607*(a)(4)(A).

(n193)Footnote 291. *Shore Realty, 759 F.2d at 1045-1047* (private parties may recover all response costs which are consistent with the NCP, regardless of whether the site is on the NPL); *Pinole Point Properties, 596 F. Supp. at 289-90* (private party response not limited to sites on the NPL); *United States v. Reilly Tar & Chem. Corp., 546 F. Supp. 1100 (D. Minn. 1982)* (liability under CERCLA §107(a) is independent of and broader than authorized uses of the Superfund under §111).

As indicated by the above cases, most courts have held that private recovery of response costs under §107(a) is available for all response costs incurred consistent with the NCP, including remedial action at sites not on the NPL. These decisions reject the argument that recovery under §107(a) should be limited to NPL sites because Superfund expenditures are limited to NPL sites under 40 C.F.R. §300.68(a)(1) (1989). For other cases holding that liability under §107 is independent of §111 Superfund expenditure limitations, *see United States v. Northeastern Pharm. & Chem. Co., 579 F. Supp. 823, 850-51 (W.D. Mo. 1984); United States v. Wade, 577 F. Supp. 1326, 1334-1336 (E.D. Pa. 1983).*

(n194)Footnote 292. *Bulk Distrib. Ctrs., Inc. v. Monsanto Co., 589 F. Supp. 1437, 1446-1448 (S.D. Fla. 1984). Cf. Wickland Oil Terms. v. ASARCO, Inc., 590 F. Supp. 72, 77-78 (N.D. Cal. 1984), rev'd, 792 F.2d 887 (9th Cir. 1986).*

(n195)Footnote 293. *Tanglewood E. Homeowners, 849 F.2d at 1575; Wickland Oil Terms. v. ASARCO, Inc., 792 F.2d 887, 892 (9th Cir. 1986); Shore Realty, 759 F.2d at 1045-48; Pinole Point Properties, 596 F. Supp. at 289-290.*

(n196)Footnote 294. *42 U.S.C. §9613*(f).

(n197)Footnote 295. *Shore Realty, 759 F.2d at 1049; Cadillac Fairview/California, Inc. v. Dow Chem. Co., 840 F.2d 691, 697 (9th Cir. 1988).*

(n198)Footnote 296. *42 U.S.C. §9659.*

(n199)Footnote 297. *42 U.S.C. §9659*(a).

(n200)Footnote 298. *Meghrig v. KFC Western, Inc., 516 U.S. 479 (U.S. 1996)* (the citizen suit provision in the Resource Conservation and Recovery Act (RCRA) did not authorize a private suit for the cost of cleaning up toxic

waste left by a previous owner, where the waste is not a current danger); *42 U.S.C. §9659*(d)(1).

(n201)Footnote 299. *42 U.S.C. §9659*(d)(2). *Illinois v. Grigoleit Company, 104 F. Supp. 2d 967 (C.D. Ill. 2000)* (in a state action to recover cleanup costs, the CERCLA limitations for either removal or remediation action had not run); *Texans United for a Safe Economy Education Fund v. Crown Central Petroleum Corporation, 207 F.3d 789 (5th Cir. 2000)* (a state environmental agency's administrative against a defendant did not preclude a citizen suit).

(n202)Footnote 300. *42 U.S.C. §9659*(f).

(n203)Footnote 301. *42 U.S.C. §9621*(e)(2).

(n204)Footnote 302. *42 U.S.C. §9621*(f).

(n205)Footnote 303. The EPA recently revised the N.C.P. by promulgating new regulations governing responses to hazardous substance releases. *See 55 Fed. Reg. 8,813-65* (March 8, 1990).

(n206)Footnote 304. 40 C.F.R. §§300.21 - 300.25 (1989).

(n207)Footnote 305. 40 C.F.R. §§300.31 - 300.40.

(n208)Footnote 306. 40 C.F.R. §§300.41 - 300.43.

(n209)Footnote 307. 40 C.F.R. §§300.51 - 300.71.

(n210)Footnote 308. 40 C.F.R. §§300.72 - 300.74.

(n211)Footnote 309. 40 C.F.R. §§300.81 -. 86.

(n212)Footnote 310. *See* CERCLA §105 (codified at *42 U.S.C. §9605);* 40 C.F.R. §§300.61 - 300.71 (1989).

(n213)Footnote 311. *See* 40 C.F.R. §300.63.

(n214)Footnote 312. 40 C.F.R. §300.68(c).

(n215)Footnote 313. 40 C.F.R. §300.68(d).

(n216)Footnote 314. *See* 40 C.F.R. §§300.64, 300.66(a)(3).

(n217)Footnote 315. *See* 40 C.F.R. §300.65.

(n218)Footnote 316. 40 C.F.R. §300.66(a).

(n219)Footnote 317. 40 C.F.R. §300.66(a).

(n220)Footnote 318. 40 C.F.R. §300.66(b).

(n221)Footnote 319. CERCLA §105(c)(1) (codified at *42 U.S.C. §9605*(c)(1)).

(n222)Footnote 320. *See* 40 C.F.R. pt. 300, app. A (1989).

(n223)Footnote 321. 40 C.F.R. pt. 300, app. A (1989).

(n224)Footnote 322. 40 C.F.R. pt. 300, app. A (1989).

(n225)Footnote 323. 40 C.F.R. pt. 300, app. B (1989).

(n226)Footnote 324. CERCLA §105(a)(8)(B) (codified at *42 U.S.C. §9605*(a)(8)(B)). Each state may make only one designation notwithstanding the differing populations, land areas, and hazardous waste problems of the states.

(n227)Footnote 325. 40 C.F.R. §300.66(b)(4).

(n228)Footnote 326. 40 C.F.R. §300.68(a).

(n229)Footnote 327. 40 C.F.R. §300.68(d)(1). *Yellow Freight Sys., Inc. v. ACF Indus., Inc., 909 F. Supp. 1290 (E.D. Mo. 1995)* (a land purchaser's costs incurred in investigating and cleaning up PCBs and asbestos were not necessary and consistent with the national contingency plan, and recovery of such costs under CERCLA were thus precluded).

(n230)Footnote 328. *Id.*

(n231)Footnote 329. 40 C.F.R. §300.68(j).

(n232)Footnote 330. *See 42 U.S.C. §9617.*

(n233)Footnote 331. *See* 40 C.F.R. §300.67.

(n234)Footnote 332. *See* 40 C.F.R. §300.69.

(n235)Footnote 333. *See 42 U.S.C. §9604*(i).

(n236)Footnote 334. PRPs do not incur CERCLA liability for federally permitted releases CERCLA provides that recovery "for response costs or damages resulting from a federally permitted release shall be pursuant to existing law in lieu of [CERCLA §107(a)]." *42 U.S.C. §9607*(j).

(n237)Footnote 335. As pointed out above CERCLA §107(a) liability also extends to natural resources damages and ATSDR costs. Response costs include removal and remedial activities as well as investigations and evaluations performed under the NCP. Response costs may also include the costs of litigating §107(a) recovery actions. *See United States v. Northernaire Plating Co., 685 F. Supp. 1410 (W.D. Mich. 1988).*

(n238)Footnote 336. Federal, state, or Native American government response actions need only be "not inconsistent" with the NCP, while response actions of other parties must be "consistent with" the NCP. *42 U.S.C. §9607*(a)(4)(A)-(B). This difference in language has been interpreted to require defendants to bear the burden of proving inconsistency with the NCP in actions brought by the federal, a state, or Native American government under *42 U.S.C. §9607*(a)(4)(B). Thus, consistency with the NCP is not an element of a prima facie case in *42 U.S.C. §9607*(a)(4)(A) actions but is instead an affirmative defense.

(n239)Footnote 337. *See 42 U.S.C. §9607*(a). *See also United States v. Aceto Agrl. Chem. Corp., 872 F.2d 1373 (8th Cir. 1989)* (condensing the six factors into four elements by including "hazardous substance" in one of the other elements and failing to mention consistency with the NCP because the defendant bears the burden of proof on that issue); *United States v. New Castle County, 727 F. Supp. 854, 859 (D. Del. 1989)* (same); *United States v. Bliss, 667 F. Supp. 1298 (E.D. Mo. 1987)* (same), *but see Mathews v. Dow Chemical Co., 947 F. Supp. 1517,* (D. Colo. 1996); Annotation, *Secured Lender Liability: Application of Security Interest Exemption From Definition Of "Owner Or Operator" Under Sec. 101(20)(A) of Comprehensive Environmental Response, Compensation, and Liability Act, 131 A.L.R. Fed. 293 (1996).*

(n240)Footnote 338. *See 42 U.S.C. §9607*(i).

(n241)Footnote 339. *42 U.S.C. §9613*(g)(2)(A). *United States v. Kayser-Roth Corp., Inc., 103 F. Supp. 2d 74 (D. R.I. 2000)* (a former corporate parent was an "operator" under CERCLA).

(n242)Footnote 340. *42 U.S.C. §9613*(g)(1).

(n243)Footnote 341. *Acushnet Co. v. Mohasco Corp., 191 F.3d 69 (1st Cir. 1999)* (Defendants could not be considered a potentially responsible party because there was not enough evidence to permit the court to make a rational allocation of the response costs to the defendants); *Axel Johnson, Inc. v. Carroll Carolina Oil Co., 191 F.3d 409 (4th Cir. 1999)* (The former operator and owner of a refinery could be a responsible party even though most of the prohibited materials were deposited on the site after the operator had left).

(n244)Footnote 342. *42 U.S.C. §9607*(a). *G.J. Leasing Co. v. Union Elec. Co. 54 F.3d 379 (7th Cir. 1995)* (in a purchaser's successor action against the vendor, the vendor was not liable under CERCLA, because the vendor did not dispose or arrange for disposal of asbestos); *Yellow Freight Sys., Inc. v. A.C.F. Indus. Inc., 909 F. Supp. 1290 (E.D. Mo. 1995)* (vendor not a "covered person" for purpose of private cost recovery action under CERCLA).

(n245)Footnote 343. *42 U.S.C. §9601*(20)(A).

(n246)Footnote 344. *42 U.S.C. §9607*(a)(1). *United States v. C.D.M.G. Realty Co., 875 F. Supp. 1077 (D.N.J. 1995)* (some element of active human participation is necessary before owner liability for disposal can attach under CERCLA).

(n247)Footnote 345. *See United States v. Fleet Factors Corp., 901 F.2d 1550, 1554 n.3 (11th Cir. 1990)* ("Although the 'owner and operator' is in the conjunctive, we construe this language in the disjunctive ...."); *Tanglewood E. Homeowners v. Charles-Thomas, Inc., 849 F.2d 1568, 1572-73 (5th Cir. 1988)* ("§9607(a)(1) applies to current owners of adulterated sites"); *New York v. Shore Realty Corp., 759 F.2d 1032, 1043-45 (2d Cir. 1985)* (current owner of a facility held liable without regard to whether it was also the current operator or the owner at the time of disposal); *Guidice v. BFG Electroplating & Mfg. Co., 732 F. Supp. 556, 561 (W.D. Pa. 1989)* ("The party does not need to be both an owner and an operator to be liable under CERCLA"); *Artesian Water Co. v. Government of New Castle County, 659 F. Supp. 1269, 1280-81 (D. Del. 1987)* ("a party need not be both an owner and an operator to be held liable under [1 *42 U.S.C. §9607*(a)(1)]"); *United States v. Tyson, 17 Envtl. L. Rep. (Envtl. L. Inst.) 20527, 20531 (E.D. Pa. 1986)* ("The current owner of a facility is within section 9607(a)(1) even if it never operated that facility as a hazardous waste dump site and even if no hazardous wastes were ever dumped at the facility during its period of ownership."); *United States v. Maryland Bank & Trust Co., 632 F. Supp. 573, 577-80 (D. Md. 1986)* ("a party need not be both an owner and operator to incur liability under *[42 U.S.C. §9607*(a)(1)]"); *United States v. Mirabile, 15 Envtl. L. Rep. (Envtl. L. Inst.) 20994, 20995 (E.D. Pa. 1985)* ("Potentially liable parties include those who owned or operated the site at the time the cleanup activities occurred, *42 U.S.C. §9607*(a)(1)."); *United States v. Northeastern Pharm. & Chem. Co., 579 F. Supp. 823, 848 n.29* ("either an owner or operator or both can be held liable" under *42 U.S.C. §9607*(a)(1)) *aff'd in part and rev'd in part, United States v. Northwestern Pharm. & Chem. Co., Inc., 810 F.2d 726 (8th Cir. 1986). United States v. New Jersey Dept. of Envtl. Protection, 939 F. Supp. 1157 (D.N.J. 1996)* (New Jersey Department of Environmental Protection was not "owner and/or operator" under CERCLA merely for approving use of landfill, inspecting its operations periodically, and ultimately shutting it down). Annotation, *Liability of Individual Shareholder, or Director of Corporation That Owned Contaminating Facility in Action Pursuant to Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), 122 A.L.R. Fed. 321 (1994).*

(n248)Footnote 346. *New York v. Shore Realty Corp., 759 F.2d 1032 (2d Cir. 1985)but see United States v. Kramer, 757 F. Supp. 397 (D. N.J. 1991).*

(n249)Footnote 347. *New York v. Shore Realty Corp., 759 F.2d 1032, 1043-1045 (2d Cir. 1985).*

(n250)Footnote 348. *New York v. Shore Realty Corp., 759 F.2d 1032, 1043 (2d Cir. 1985).*

(n251)Footnote 349. *New York v. Shore Realty Corp., 759 F.2d 1032, 1044 (2d Cir. 1985).*

(n252)Footnote 350. *New York v. Shore Realty Corp., 759 F.2d 1032, 1039 (2d Cir. 1985).* However, Shore still

argued that it was not an owner "at the time of disposal" within the meaning of *42 U.S.C. §9607*(a)(2). *See Id. at 1043.*

(n253)Footnote 351. *See New York v. Shore Realty Corp., 759 F.2d 1032, 1045 (2d Cir. 1985).*

> [W]e need not address whether Shore is also subject to liability under [§] 9607(a)(2) because some 90,000 gallons of waste were disposed of, apparently by unauthorized tenants, after Shore took title on October 13, 1983. Nor need we decide whether hazardous waste substances have been "disposed of" after Shore employees entered the property in January, 1984.

New York v. Shore Realty Corp., 759 F.2d 1032, 1045 (2d Cir. 1985).

(n254)Footnote 352. *United States v. Maryland Bank & Trust Co., 632 F. Supp. 573 (D. Md. 1986) but see In re DuFrayne, 194 B.R. 354 (Bankr. E.D. Pa. 1996).*

(n255)Footnote 353. *United States v. Maryland Bank & Trust Co., 632 F. Supp. 573, 575 (D. Md. 1986).*

(n256)Footnote 354. *United States v. Maryland Bank & Trust Co., 632 F. Supp. 573, 575 (D. Md. 1986).*

(n257)Footnote 355. *United States v. Maryland Bank & Trust Co., 632 F. Supp. 573, 575 (D. Md. 1986).*

(n258)Footnote 356. *United States v. Maryland Bank & Trust Co., 632 F. Supp. 573, 577 (D. Md. 1986).*

(n259)Footnote 357. *United States v. Maryland Bank & Trust Co., 632 F. Supp. 573, 577 (D. Md. 1986).*

(n260)Footnote 358. *United States v. Maryland Bank & Trust Co., 632 F. Supp. 573, 578 (D. Md. 1986).*

(n261)Footnote 359. *United States v. Maryland Bank & Trust Co., 632 F. Supp. 573, 578 (D. Md. 1986).*

(n262)Footnote 360. *United States v. Maryland Bank & Trust Co., 632 F. Supp. 573, 577 (D. Md. 1986).*

(n263)Footnote 361. *See* cases cited *supra* note 262. *See also* Ann Burkhart, *supra* note 106, at 329-37; Elliott H. Levitas & John Vance Hughes, *Hazardous Waste Issues in Real Estate Transactions, 38 Mercer L. Rev. 581, 603-06 (1987);* George Pendygraft, George M. Plews, James W. Clark & Peter C. Wright, *Who Pays for Environmental Damage: Recent Developments in CERCLA Liability and Insurance Coverage Litigation, 21 Ind. L. Rev. 117, 120 (1988)* (actually misquoting *42 U.S.C. §9607*(a)(1) to read "owner or operator"); Comment, *supra* note 110, at 151 ("the current owner or operator of a hazardous waste site or facility is potentially liable under CERCLA"). *New York v. National Services Industries, Inc., 134 F. Supp. 2d 275 (E.D. N.Y. 2001)* (a corporation which purchased a company as a going business and acquired almost all its assets, and was on notice of the company's potential environmental liabilities, was the company's legal successor for CERCLA purposes).

But cf. United States v. Moore, 698 F. Supp. 622 (E.D. Va. 1988).

> Although §9607(a)(1) speaks in terms of "the owner *and* operator of a vessel or a facility," §9607 is framed in the disjunctive... Thus, under §9607(a)(2), [the defendant] may be held liable as one who owned the [site at the time of disposal], regardless of whether she participated in the operation of the facility."

Id. at 624 (emphasis in original) (footnote omitted). The only fair reading of this statement is that the court found that the text of *42 U.S.C. §9607*(a)(1) requires a conjunctive interpretation.

(n264)Footnote 362. Pub. L. No. 99-499, *100 Stat. 1760-1774.*

(n265)Footnote 363. 2A J. G. Sutherland, Statutes and Statutory Construction §49.10, at 408 (4th ed. 1984) (footnote omitted).

(n266)Footnote 364. Legislation introduced in both the House and Senate indicate that liability under *42 U.S.C. §9707*(a)(1) has been extended much farther than Congress intended.

(n267)Footnote 365. *But cf. United States v. Moore, 698 F. Supp. at 624 (E.D. Va. 1988).*

(n268)Footnote 366. *42 U.S.C. §9607*(a)(2). *ABB Indus. Sys. v. Prime Tech. Inc., 120 F.3d 351 (2d Cir. 1997)* (Any prior owner or operator is potentially liable as a responsible party if it controlled the site at the time of disposal of the hazardous substance).

(n269)Footnote 367. *Id.* (emphasis added).

(n270)Footnote 368. *Id.*

(n271)Footnote 369. *42 U.S.C. §9607*(a)(2).

(n272)Footnote 370. RCRA §1004, *42 U.S.C. §6903*(3). *See* CERCLA §101(23), *42 U.S.C. §9601*(23). Although this definition speaks of solid or hazardous waste instead of hazardous substances, the RCRA definition of solid waste is so broad that it includes almost any "discarded material, including solid, liquid, semisolid, or contained gaseous material." RCRA §1004(27), *42 U.S.C. §6903*(27). Thus, any hazardous substance that has been released should be a solid waste because it is a discarded material. Annotation, *What Constitutes "Disposal" For Purposes Of Owner Or Operator Liability Under Sec. 107(a)(2) of Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), 136 A.L.R. Fed. 117 (1997).*

(n273)Footnote 371. *Tanglewood E. Homeowners v. Charles-Thomas, Inc., 849 F.2d 1568, 1573 (5th Cir. 1988).* (The "definition of disposal does not limit disposal to a one-time occurrence -- there may be other disposals when hazardous materials are moved, dispersed, or released during landfill excavations and fillings."); *Guidice v. BFG Electroplating & Mfg. Co., 732 F. Supp. 556, 564 (W.D. Pa. 1989)* (water dripping from the ceiling, which caused open drums of hazardous waste left by previous owner to overflow into cracks in the floor, is enough to make the subsequent owner liable as an owner at the time of disposal). *United States v. CDMG Realty Co., 96 F.3d 706 (3d Cir. 1996)* (however passive was the migration of contamination that was dumped before prior owner's ownership, it did not constitute disposal under CERCLA).

(n274)Footnote 372. *42 U.S.C. §9607*(a)(3). Annotation, *Liability of generators pursuant to sec. 107(a)(3) of Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), 126 A.L.R. Fed. 265 (1995).*

(n275)Footnote 373. *United States v. Monsanto Co., 858 F.2d 160, 169-70 (4th Cir. 1988), cert. denied, 490 U.S. 1106 (1989); United States v. Wade, 577 F. Supp. 1326 (E.D. Pa. 1983)* (Plaintiff need show only that "defendant's waste was disposed of at the site and that the substances that make the defendant's waste hazardous are present at the site."). *Transportation Leasing Co. v. California, 861 F. Supp. 931 (C.D. Cal. 1993)* (cities might still be liable under CERCLA as "arrangers" even though the cities' contract with the waste haulers did not mention hazardous waste).

(n276)Footnote 374. *Monsanto Co., 858 F.2d at 169.*

(n277)Footnote 375. *See New York v. General Elec. Co., 592 F. Supp. 291 (N.D.N.Y. 1984)* (generator "arranged for disposal" by selling used transformer oil to a drag strip track that immediately deposited the oil on the land surrounding the race track) (*superseded by statute, as noted in Kelley v. Thomas Solvent Co., 714 F. Supp. 1439 (W.D. Mich. 1989); United States v. A & F Materials Co., 582 F. Supp. 842 (S.D. Ill. 1984)* (generator "arranged for disposal" by selling hazardous substances at $0.072 per gallon to an oil recycling company that released the substances).

(n278)Footnote 376. *Prudential Ins. Co. v. United States Gypsum Co., 711 F. Supp. 1244 (D.N.J. 1989); Florida Power & Light Co. v. Allis Chalmers Corp., 27 Env't Rep. Cas. (BNA) 1558 (S.D. Fla. 1988); United States v. Westinghouse Elec. Corp., 14 Envtl. L. Rep. (Envtl. L. Inst.) 20483 (S.D. Mo. 1983). South Florida Water Mgmt. Dist. v. Montalvo, 84 F.3d 402 (11th Cir. 1996)* (landowners that had contracted for aerial spraying services did not "arrange for" disposal under CERCLA).

(n279)Footnote 377. *But cf. Jersey City Redev. Auth. v. P.P.G. Indus., 866 F.2d 1411 (3d Cir. 1988)* (selling contaminated soil for fill was not an arrangement for disposal). *Jersey City* blurs the distinction between the two lines of cases because the fill was a low price product with very limited utility and was immediately released.

(n280)Footnote 378. *United States v. Northeastern Pharm. & Chem. Co., 810 F.2d 726, 732 (8th Cir. 1986)* ("the district court found Mills liable as a 'person who ... accepted any hazardous substances for transport to disposal'") *aff'd in part, rev'd in part, United States v. Northeastern Pharm. & Chem.Co., 810 F.2d 726,* (8th Cir. 1986); *United States v. Hardage, 750 F. Supp. 1444* (W.D. Okla. Oct. 16, 1990) (USPCI found liable as a transporter of hazardous waste)*aff'd in part, rev'd in part, United States v. Hardage, 982 F.2d 1436 (10th Cir. 1992).* ; *United States v. Chrysler Corp., 31 Env't Rep. Cas. (BNA) 1997* (D. Del. Aug. 28, 1990) (Knotts, Inc. held liable as a transporter of hazardous substances). *United States v. Davis, 31 F. Supp. 2d 45 (D. R.I. 1998)* (The generator brought a contribution claim against various parties. Certain transporters were not held liable because they played no role in the selection of the site, but merely followed the instructions of the generator and did not actively participate in the decision. Even if the generator made the ultimate decision concerning the site, transporters may be liable if they actively participated in the decision); *Browning-Ferris Indus. v. Ter Maat, 13 F. Supp. 2d 756 (N.D. Ill. 1998)* (Even without considering evidence of the transporter's control over the operator, there was enough evidence to determine that the transporter was at least a joint operator of the facility and therefore subject to CERCLA liability), *aff'd in part, rev'd in part, Browning-Ferris Indus. v. Ter Maat, 195 F.3d 953 (7th Cir. 1999).*

(n281)Footnote 379. *42 U.S.C. §9607*(a)(1).

(n282)Footnote 380. *849 F.2d 1568, 1572-1573 (5th Cir. 1988).*

(n283)Footnote 381. *Id. at 1572.*

(n284)Footnote 382. *See,* §75.09(c)(4), *infra.*

(n285)Footnote 383. *42 U.S.C. §9601*(20)(A). *Organic Chem. Site PRP Group v. Total Petroleum Inc., 58 F. Supp. 2d 755 (W.D. Mich. 1999)* (The party seeking to invoke the Security Interest Exemption has the burden of proof of showing that it owns only a security interest in the property and did not participate in management); Annotation, *Secured Lender Liability: Application of Security Interest Exemption From Definition of "Owner or Operator" under Sec. 101(20)(A) of Comprehensive Environmental Response, Compensation, and Liability Act, 131 A.L.R. Fed. 293 (1996).Monarch Tile, Inc. v. City of Florence, 212 F.3d 1219 (11th Cir. 2000)* (the city qualified for CERCLA's "secured creditor" liability exception).

(n286)Footnote 384. *United States v. Maryland Bank & Trust Co., 632 F. Supp. 573, 578 (D. Md. 1986)* (quoting *42 U.S.C. §9601*(20)(A)).

(n287)Footnote 385. *United States v. Maryland Bank & Trust Co., 632 F. Supp. 573, 578, 579 (D. Md. 1986).* (emphasis added).

(n288)Footnote 386. *United States v. Maryland Bank & Trust Co., 632 F. Supp. 573, 578, 579 (D. Md. 1986).*

(n289)Footnote 387. *15 Envtl. L. Rep. (Envtl. L. Inst.) 20994 (E.D. Pa. 1985)* (emphasis added); *see also Bancamerica Commercial Corp. v. Trinity Indus., 900 F. Supp. 1427 (D. Kan 1995), aff'd in part, rev'd in part, Bancamerica Commercial Corp. v. Mosher Steel Inc., 100 F.3d 792,* (10th Cir. 1996).

(n290)Footnote 388. *15 Envtl. L. Rep. (Envtl. L. Inst.) 20994 (E.D. Pa. 1985).*

(n291)Footnote 389. *632 F. Supp. at 579.*

(n292)Footnote 390. *Id. at 580.*

(n293)Footnote 391. *Id.*.

(n294)Footnote 392. *See generally* Comment, *The Impact of the 1986 Superfund Amendments and Reauthorization Act on the Commercial Lending Industry: A Critical Assessment*, *41 Miami L. Rev. 879 (1987)* (discussing the inconsistency between *Maryland Bank* and *Mirabile* and the dilemma that commercial lenders now face).

(n295)Footnote 393. *42 U.S.C. §9601*(20)(A).

(n296)Footnote 394. *45 B.R. 278 (Bankr. N.D. Ohio 1985).*

(n297)Footnote 395. *Id. at 288.*

(n298)Footnote 396. *Id. at 288-289.*

(n299)Footnote 397. *See United States v. Maryland Bank & Trust, 632 F. Supp. 573, 580 (D. Md. 1986).*

(n300)Footnote 398. *732 F. Supp. 556, 563 (W.D. Pa. 1989).*

(n301)Footnote 399. *Id.*. (citing *Maryland Bank, 632 F. Supp. at 580).*

(n302)Footnote 400. *Id.*.

(n303)Footnote 401. *Id.* at 557 ("owners including the National Bank of the Commonwealth (Bank) as an eighth-month record title owner"). *See also Id.* at 559.

(n304)Footnote 402. *In re Bergsoe Metal Corp., 910 F.2d 668, 671 (9th Cir. 1990).*

(n305)Footnote 403. *Id.*.

(n306)Footnote 404. *42 U.S.C. §9601*(20)(A).

(n307)Footnote 405. *42 U.S.C. §9601*(20)(A).

(n308)Footnote 406. The EPA promulgated an interpretive rule in an attempt to protect lenders from liability arising from lending activities and to resolve the confusion over interpretations of the Security Interest Exemption. *See* 40 C.F.R. 300.1100 *et seq.*(defining "indicia of ownership," "primarily to protect a security interest" and "participation in management"). For analysis and criticism of the new rule, see Roger D. Staton, *EPA's Final Rule on Lender Liability: Lenders Beware, 49 Bus. Law. 163 (1993);* George A. Nation III, *EPA's Final Rule Interpreting CERCLA's Secured Party Exemption: More Confusion for Lenders, 110 Banking L.J. 92 (1993);* Cathy Stricklin Krendl, *The Impact of the New EPA Regulation on Lender Liability*, 21 Colo. Law. 2339 (1992).

(n309)Footnote 407. *15 Envtl. L. Rep. (Envtl. L. Inst.) 20994, 20996 (E.D. Pa. 1985).*

(n310)Footnote 408. *Id. at 20995.*

(n311)Footnote 409. *Id.*.

(n312)Footnote 410. *Id. at 20997.*

(n313)Footnote 411. *See Id.*

(n314)Footnote 412. *Id. at 20995.*

(n315)Footnote 413. *Id. at 20997.*

(n316)Footnote 414. *Id. at 20996.*

(n317)Footnote 415. *732 F. Supp. 556 (W.D. Pa. 1989).*

(n318)Footnote 416. *Id. at 561* (quoting *United States v. Fleet Factors Corp., 724 F. Supp. 955, 960 (S.D. Ga. 1988))* order amended and superseded by *United States v. Fleet Factors Corp., 819 F. Supp. 1079, 821 F. Supp. 707 (S.D. Ga. 1993).*

(n319)Footnote 417. *Id.* at 562.

(n320)Footnote 418. *See United States v. Nicolet, Inc., 712 F. Supp. 1193, 1205 (E.D. Pa. 1989)* ("Thus, existing caselaw suggests that a mortgagee can be held liable under CERCLA only if the mortgagee participated in the management and operational aspects of the facility in question."). *Cf. United States v. New Castle County, 727 F. Supp. 854, 866 (D. Del. 1989)* ("[M]ere ability to exercise control as a result of the financial relationship of the parties is insufficient for liability to attach. The entity or person sought to be strapped with liability must *actually exercise control.* " (emphasis in original)) (quoting *Rockwell Int'l Corp. v. IU Int'l Corp., 702 F. Supp. 1384, 1390 (N.D. Ill. 1988))* see also *United States v. Township of Brighton, 153 F.3d 307,* (6th Cir. 1998); *United States v. Alliedsignal, Inc., 62 F. Supp. 2d 713,* (N.D. N.Y. 1999); *United States v. Consolidated Rail Corp., 729 F. Supp. 1461, 1468 (D. Del. 1990)* ("[T]he statute requires that a person be actively participating in the management of the facility to be held liable for the disposal of hazardous wastes.") *Stearns & Foster Bedding Co. v. Franklin Holding Corp., 947 F. Supp. 790 (D. N.J. 1996)* (Complete ownership and general control are not enough to impose CERCLA liability based on the "actual control" test).

(n321)Footnote 419. *910 F.2d 668, 672 (9th Cir. 1990).*

(n322)Footnote 420. *42 U.S.C. §9607*(20)(A).

(n323)Footnote 421. *Id.* (emphasis in original).

(n324)Footnote 422. *Id. at 673 n.3.*

(n325)Footnote 423. *901 F.2d 1550 (11th Cir. 1990)* order amended and superseded by *United States v. Fleet Factors Corp., 819 F. Supp. 1079, 821 F. Supp. 707 (S.D. Ga. 1993).*

(n326)Footnote 424. *Id.* at 1557-60.

(n327)Footnote 425. *42 U.S.C. §9601*(20)(A).

(n328)Footnote 426. *901 F.2d at 1556-57 & n.6* order amended and superseded by *United States v. Fleet Factors Corp., 819 F. Supp. 1079, 821 F. Supp. 707 (S.D. Ga. 1993).*

(n329)Footnote 427. *Id.* at 1557.

(n330)Footnote 428. *42 U.S.C. §9601*(20)(A).

(n331)Footnote 429. *Id.*.

(n332)Footnote 430. *Fleet Factors, 901 F.2d at 1557-58* (emphasis added) (footnotes omitted) order amended and

superseded by *United States v. Fleet Factors Corp., 819 F. Supp. 1079, 821 F. Supp. 707 (S.D. Ga. 1993).*

(n333)Footnote 431. *Id.* at 1559 n.13.

(n334)Footnote 432. *See* Ann Burkhart, *Lender/Owners and CERCLA: Title and Liability,* 25 Harv. J. on Legis. 317, 336 (1988) ("Imposing CERCLA liability on lender/wners also furthers CERCLA's goals by creating substantial incentives for lenders to act as hazardous waste watchdogs.").

(n335)Footnote 433. *See* Roslyn Tom, *Interpreting the Meaning of Lender Management Participation Under Section 101(20)(A) of CERCLA 98 Yale L.J. 925 (1989).*"Without clear standards defining the degree of control a lender can safely exercise over the debtor's operations, banks will be deterred from monitoring sites." *Id. at 927.* Thus, to promote the close supervision of those mortgagors who handle hazardous substances, "the court should find that *total control* amounting to ownership is what exposes the creditor to liability." *Id. at 943* (emphasis added).

(n336)Footnote 434. *732 F. Supp. at 561-562.*

(n337)Footnote 435. *Id. at 562.*

(n338)Footnote 436. *Smith Land Imp. Corp. v. Celotex Corp., 851 F.2d 86 (3d Cir. 1988) cert. denied, 488 U.S. 1029, 109 S. Ct. 837, 102 L. Ed. 2d 969 (1989). See also* William P. Ingram, *Corporate Successor Liability Under CERCLA: Who's Next?, 43 Sw. L.J. 887 (1990).Washington v. United States, 930 F. Supp. 474 (W.D. Wash. 1996)* (corporation was liable under CERCLA as successor of prior operators of shipyard, even absent notice to corporation of potential liability for contamination).

(n339)Footnote 437. *524 U.S. 51 (1998).*

(n340)Footnote 438. *42 U.S.C. §9607*(a).

(n341)Footnote 439. *See* Lynda J. Oswald, *Strict Liability of Individuals Under CERCLA: A Normative Analysis, 20 B.C. Envtl. Aff. L. Rev. 579 (1993)* (discussing the rationales underlying strict liability and liability standards for corporate officers and individual shareholders under CERCLA); *State v. Westwood-Squibb Pharmaceutical Co., Inc., 138 F. Supp. 2d 372 (W.D. N.Y. 2000)* (a prior owner was not free of CERCLA liability simply because it leased the property to a third party); *Franklin County Convention Facilities Authority v. American Premier Underwriters, Inc., 240 F.3d 534 (6th Cir. 2001)* (retroactive application of CERCLA does not violate due process or takings clauses).

(n342)Footnote 440. *42 U.S.C. §9607.*

(n343)Footnote 441. *667 F. Supp. 1298 (E.D. Mo. 1987).*

(n344)Footnote 442. *Id. at 1304. See also United States v. Monsanto Co., 858 F.2d 160, 168 (4th Cir. 1988); J.V. Peters & Co. v. Administrator, EPA, 767 F.2d 263, 266 (6th Cir. 1985); New York v. Shore Realty Corp., 759 F.2d 1032, 1044 (2d Cir. 1985)* (CERCLA "unequivocally imposes strict liability"); *United States v. Marisol, Inc., 725 F. Supp. 833, 838 (M.D. Pa. 1989); United States v. Maryland Bank & Trust Co., 632 F. Supp. 573, 576 (D. Md. 1986); United States v. Northeastern Pharm. & Chem. Co., 579 F. Supp. 823, 844 (W.D. Md. 1984); In re Sterling Steel Treating, Inc., 94 B.R. 924, 928 (Bankr. E.D. Mich. 1989)* ("CERCLA imposes strict liability"); *In re T.P. Long Chem., Inc., 45 B.R. 278, 282 (Bankr. N.D. Ohio 1985); Prisco v. A & D Carting Corp., 168 F.3d 593 (2d Cir. 1999)* (Although the strict liability provision of CERCLA is quite broad, it is not so broad as to include everyone who ever transferred waste to a site, regardless of whether the waste was hazardous or not).

(n345)Footnote 443. *42 U.S.C. §9607*(a).

(n346)Footnote 444. *See Marisol, 725 F. Supp. at 842; Kelly v. Thomas Solvent Co., 714 F. Supp. 1439, 1448 (W.D. Mich. 1989); United States v. Bliss, 667 F. Supp. 1298 (E.D. Mo. 1987); United States v. Ottati & Goss, Inc., 630*

F. Supp. 1361 (D.N.H. 1985); United States v. Shell Oil Co., 605 F. Supp. 1064, 1083 (D. Colo. 1985); United States v. South Carolina Recycling & Disposal, Inc., 653 F. Supp. 984 (D.S.C. 1984) aff'd in part and vacated in part, United States v. Monsanto Co., 858 F.2d 160 (4th Cir. 1988).; Northeastern Pharm. & Chem. Co., 579 F. Supp. 823 aff'd in part, *rev'd in part, United States v. Northeastern Pharm. & Chem.Co., 810 F.2d 726,* (8th Cir. 1986); *United States v. A & F Materials Co., 578 F. Supp. 1249 (S.D. Ill. 1984); United States v. Wade, 577 F. Supp. 1326 (E.D. Pa. 1983); United States v. Chem-Dyne, 572 F. Supp. 802, 810-811 (S.D. Ohio 1983); Consolidated Rail Corp. v. United States, 883 F. Supp. 1565* (Special Court, Regional Rail Reorganization Act of 1973, 1995) (action seeking declaration of nonliability for acts of environmental contamination).

(n347)Footnote 445. *See Monsanto, 858 F.2d at 171-173* (discussion on the common law principles of joint and several liability as applied to CERCLA defendants), *cert. denied, 490 U.S. 1106 (1989); Wade, 577 F. Supp. at 1338-1339* (using the Restatement (Second) of Torts §433 as a Restatement of the Federal Common Law on joint polluter liability).

(n348)Footnote 446. *See, e.g., Monsanto, 858 F.2d at 171-172; Wade, 577 F. Supp. at 1338-1339* (quoting *Restatement (Second) of Torts* §433). *See also* Michael D. Green, *Successors and CERCLA: The Imperfect Analogy to Products Liability and an Alternative Proposal, 87 NW. U. L. REV. 897,* (1993) (criticizing the expansion of CERCLA liability to include successor corporations, based on the analogy of products liability).

(n349)Footnote 447. *42 U.S.C. §9613*(f).

(n350)Footnote 448. No. C-80-225-L (D.N.H. March 3, 1986).

(n351)Footnote 449. *Id.*

(n352)Footnote 450. *United States v. Ottati & Goss, Inc., 630 F. Supp. 1361 (D.N.H. 1985).* Cf. *Monsanto, 858 F.2d 160 at 172 n.27* ("Volumetric contributions provide a reasonable basis for apportioning liability only if it can be reasonably assumed, or it has been reasonably demonstrated, that independent factors had no substantial effect on the harm to the environment.").

(n353)Footnote 451. *Allied Corp. v. Acme Solvents Reclaiming, Inc., 691 F. Supp. 1100, 1116 (N.D. Ill. 1988). See also United States v. A & F Materials Co., 578 F. Supp. 1249 (S.D. Ill. 1984).* For a trend in limiting the imposition of joint and several liability, see Suzanne S. Dickey, *U.S. EPA v. Sequa Corp. (In Re Bell Petroleum Services, Inc.): The Fifth Circuit Limits the Imposition of Joint and Several Liability on CERCLA Defendants, 68 Tul. L. Rev. 1663 (1994);* David A. Aikens, *Environmental Law -- Third Circuit Ruling May Foreclose Imposition of Joint and Several Liability on Summary Judgement Under CERCLA, 38 Vill. L. Rev. 1241 (1993).*

(n354)Footnote 452. *United States v. Hunter, 70 F. Supp. 2d 1100 (C.D. Cal. 1999)* (The United States can bring an action for joint and several liability even if the government agency is a PRP itself).

(n355)Footnote 453. *42 U.S.C. §9613*(f)(1); *Signature Combs, Inc. v. United States, 2003 U.S. Dist. LEXIS 2303* (No. 98-CV-2777D, Feb. 14, 2003, W.D. Tenn.) (PRPs not authorized to bring cost recovery actions against other PRPs).*Premium Plastics v. LaSalle Nat'l Bank, 904 F. Supp. 809 (N.D. Ill. 1995)* (a "responsible person" under CERCLA is an owner or operator of a facility at which hazardous substances, rather than hazardous wastes, are disposed of).

(n356)Footnote 454. *Id. Plaskon Elec. Materials, Inc. v. Allied-Signal, Inc., 904 F. Supp. 644* (N.D. Ohio, 1995) (proper action for contribution is a contribution claim rather than a cost recovery action); *Reichhold Chems., Inc. v. Textron, Inc., 888 F. Supp. 1116 (N.D. Fla. 1995)* (the exclusive remedy under CERCLA for a potentially responsible party (PRP) seeking contribution from other PRPs is a contribution claim).

(n357)Footnote 455. *E.g., Chemical Waste Mgt., Inc. v. Armstrong World Indus., 669 F. Supp. 1285 (E.D. Pa.*

1987).

(n358)Footnote 456. *42 U.S.C. §9613*(f)(1) (emphasis added).

(n359)Footnote 457. *Id. Redwing Carriers, Inc. v. Saraland Apts., 94 F.3d 1489 (11th Cir. 1996)* (original owner failed in a contribution action against the general and limited partners of the current owner, contractor which built apartment complex, and managing agent of the complex). *W. Props. Serv. Corp. v. Shell Oil Co., 358 F.3d 678 (9th Cir. 2004)* (oil Companies were not jointly and severally liable for the entire amount of the property owner's clean-up costs where the owner was not an innocent land owner under the statute, instead equities of case should determine the extent of liability.)

(n360)Footnote 458. *42 U.S.C. §9613*(g)(3).

(n361)Footnote 459. *42 U.S.C. §9613*(f)(2). *Bedford Affiliates v. Sills, 156 F.3d 416 (2d Cir. 1998)* (An owner's state law restitution and indemnification claims were preempted by CERCLA If the court allowed a state remedy, the state laws would bypass the detailed settlement requirements in CERCLA).

(n362)Footnote 460. *See 42 U.S.C. §9622.*

(n363)Footnote 461. *42 U.S.C. §9607*(e)(1). *Cf. Chemical Waste Mgt., Inc. v. Armstrong World Indus., 669 F. Supp. 1285 (E.D. Pa. 1987); American Special Risk Ins. ex rel. South Macomb Disposal Auth. v. Centerline, 69 F. Supp. 2d 944 (E.D. Mich. 1999)* (In order for a plaintiff to bring an indemnification claim, the plaintiff must show that the plaintiff is not a potentially responsible party by establishing that voluntary cleanup of the site is under way or that the plaintiff is a truly innocent party).

(n364)Footnote 462. *Id.*

(n365)Footnote 463. *42 U.S.C. §9607*(b); *Gould, Inc. v. A & M Battery & Tire Serv., 954 F. Supp. 1014 (M.D. Penn. 1997)* ("useful product" defense); *Oyster Bay v. Occidental Chem. Corp., 987 F. Supp. 182 (E.D. N.Y. 1997)* (No affirmative defenses other than those stated in CERCLA will be allowed as defenses to CERCLA liability. However, the affirmative defenses raised by a party that are not listed in CERCLA still may be considered with respect to apportionment of the costs).

(n366)Footnote 464. *Id.*

(n367)Footnote 465. *42 U.S.C. §9601*(1).

(n368)Footnote 466. *See Wagner Seed Co. v. Daggett, 800 F.2d 310 (2d Cir. 1986)* (EPA ordered PRP to clean up a release under §106 despite the fact that the release was caused by a bolt of lightning striking the PRP's warehouse).

(n369)Footnote 467. *42 U.S.C. §9601*(35)(A) (emphasis added).

(n370)Footnote 468. *Id.* (emphasis added).

(n371)Footnote 469. *42 U.S.C. §9601*(35)(B).

(n372)Footnote 470. For articles illustrating the narrow scope of the exception, *see* R. Patrick Quinn, *All Appropriate Inquiry & CERCLA's Innocent Purchaser Defense: The Need For a Legislative Standard,* 5 Hofstra Prop. L.J. 65 (1992); Baker & Baroody, *What Price Innocence? A Realistic View of the Innocent Landowner Defense Under CERCLA, 22 St. Mary's L.J. 115 (1990).*

(n373)Footnote 471. *Id.*.

(n374)Footnote 472. *42 U.S.C. §9607*(b).

(n375)Footnote 473. *See, e.g., United States v. Moore, 703 F. Supp. 460, 462 (E.D. Va. 1988)* (issues concerning due care and the reasonableness of conduct require a trial); *United States v. Domenic Lombardi Realty, Inc., 290 F. Supp. 2d 198 (D. R.I. 2003)* (Concerning due care and reasonableness in regard to contamination).

(n376)Footnote 474. *See Dedham Water Co. v. Cumberland Farms Dairy, Inc., 805 F.2d 1074, 1079 n.10 (1st Cir. 1986); United States v. Marisol, Inc., 725 F. Supp. 833 (M.D. Pa. 1989); O'Neil v. Picillo, 682 F. Supp. 706, 728 (D.R.I. 1988); United States v. Stringfellow, 661 F. Supp. 1053, 1061 (C.D. Cal. 1987).*

(n377)Footnote 475. *In re Sterling Steel Treating, Inc., 94 B.R. 924, 929-930 (Bankr. E.D. Mich. 1989)* (third party defense unavailable because owners knew of prior industrial use of property).

(n378)Footnote 476. *See New York v. Shore Realty Corp., 759 F.2d 1032, 1049 (2d Cir. 1985). Cf. United States v. Bliss, 667 F. Supp. 1298, 1304-1305 & n.3 (E.D. Mo. 1987)* (defendant failed to produce evidence showing they took precautions against the foreseeable acts of others).

(n379)Footnote 477. No. CV 87-3472 (E.D.N.Y 1990).

(n380)Footnote 478. Stevens, No. CV 87-3472, slip op. at 4.

(n381)Footnote 479. *Id.*, slip op. at 2-4.

(n382)Footnote 480. *Id.*, slip op. at 9.

(n383)Footnote 481. *Cf. United States v. Serafini, 706 F. Supp. 346, 353 (M.D. Pa. 1988)* (failure to conduct an on-site inspection is not necessarily an inappropriate inquiry under *42 U.S.C. §9601*(35)(b); EPA must show that such failure is inconsistent with good commercial or customary practice); *Town of New Windsor v. Tesa Tuck, Inc., 935 F. Supp. 310 (S.D.N.Y. 1996).*

(n384)Footnote 482. *42 U.S.C. §9607*(1)(1). Owners or operators of a vessel under CERCLA §107(a)(1) are exempted from §107(1) and dealt with under §107(m) which provides for maritime liens.

(n385)Footnote 483. *42 U.S.C. §9607*(1)(4); *United States v. Glidden Co., 3 F. Supp. 2d 823 (N.D. Ohio 1997)* (the placement of a federal lien on the site did not constitute a violation of due process).

(n386)Footnote 484. *42 U.S.C. §9607*(1)(3). *See, e.g., In re Better-Brite Plating, Inc., 105 B.R. 912, 917 (Bankr. E.D. Wis. 1989) vacated, In re Better Brite Plating, Inc., 136 B.R. 526 (Bankr. E.D. Wis. 1990).Southern Pacific Transportation Company v. Voluntary Purchasing Groups, Inc., 252 B.R. 373 (E.D. Tex. 2000)* (a bankruptcy court lacked jurisdiction to approve and then issue mandatory injunctions regarding claims under CERCLA).

(n387)Footnote 485. *469 U.S. 274 (1985).*

(n388)Footnote 486. *Id. at 286* (O'Connor, J. concurring).

(n389)Footnote 487. *See* N.J. Stat. §58:10-23.11f.

(n390)Footnote 488. N.J. Stat. §§58:10-23.11 - 58:10-23.11u.

(n391)Footnote 489. *See* §58:10-23.11f(f).

(n392)Footnote 490. *Id.*

(n393)Footnote 491. *See* Conn. Gen. Stat. Ann. §22a-452a.

(n394)Footnote 492. *See* N.H. Rev. Stat. Ann. §147-B:10-b.

(n395)Footnote 493. *See* Ark. Stat. Ann. §§8-7-401 - 8.7-522; Mass. Gen. L. Ann. ch. 21E, §§1 - 18.

(n396)Footnote 494. *See* Ark. Stat. Ann. §§8-7-417, 8-7-516.

(n397)Footnote 495. *See* Tenn. Code Ann. §68-46-209(d).

(n398)Footnote 496. *See e.g.*, Joseph L. Cosetti & Jeffrey M. Friedman, *Midlantic National Bank, Kovacs and Penn Terra: The Bankruptcy Code and State Environmental Law -- Perceived Conflicts and Options for the Trustee and State Environmental Agencies, 7 J.L. & Com. 65, 92 & n.147 (1987)* (listing Tennessee as a super-priority lien state); Margaret Murphy, *The Impact of "Superfund" and Other Environmental Statutes on Commercial Lending and Investment Activities, 41 Bus. Law. 1133, 1152-1160 (1986)* (same).

(n399)Footnote 497. *See* Ark. Stat. Ann. §8-7-403(8); Mass. Gen. L. Ann. ch. 21E, §2.

(n400)Footnote 498. *See* N.H. Rev. Stat. Ann. §147-B:10.

(n401)Footnote 499. *11 U.S.C. §503*(b)(1)(A). Section 503 reads in pertinent part:

> (a) An entity may timely file a request for payment of an administrative expense, or may tardily file such request if permitted by the court for cause. (b) After notice and a hearing, there shall be allowed administrative expenses, other than claims allowed under section 502(f) of this title, including--
>
> (1) (A) the actual, necessary costs and expenses of preserving the estate, including wages, salaries, or commissions for services rendered after the commencement of the case;

§§503(a) - 503(b)(1)(A) (subsection letters and numerals omitted).

(n402)Footnote 500. *11 U.S.C. §507*(a)(1).

(n403)Footnote 501. Section 506(c) of the Bankruptcy Code provides: "The trustee may recover from property securing an allowed secured claim the reasonable, necessary costs and expenses of preserving, or disposing of, such property to the extent of any benefit to the holder of such claim." *11 U.S.C. §506*(c).

(n404)Footnote 502. *45 B.R. 278 (Bankr. N.D. Ohio 1985).*

(n405)Footnote 503. *See Id. at 280-281.*

(n406)Footnote 504. *Id. at 281.*

(n407)Footnote 505. *Id. at 283-284.*

(n408)Footnote 506. *T.P. Long Chem., 45 B.R. at 285.*

(n409)Footnote 507. *See T.P. Long Chem., 45 B.R. at 286.*

(n410)Footnote 508. *Id.*

(n411)Footnote 509. *See Id. at 280.*

(n412)Footnote 510. *Id. at 288.*

(n413)Footnote 511. Of course, a benefit to the secured creditor may be found if the security interest is in the contaminated property; a perfected security interest in contaminated property may be invaded to clean up the property.

(n414)Footnote 512. *11 U.S.C. §§554*(a) - 554(b).

(n415)Footnote 513. *See In re 82 Milbar Blvd., Inc., 91 B.R. 213, 218 (Bankr. E.D.N.Y. 1988)* ("Prior to *Midlantic*, case law reflects that trustees would typically seek to abandon property pursuant to §554 where the estimated cleanup cost exceeded the projected market value of the unpolluted asset."). "Abandonment of toxic sites was the general rule ...." *Id. at 218 n.16.*

(n416)Footnote 514. *United States v. Iron Mountain Mines, Inc., 812 F. Supp. 1528 (E.D. Cal. 1992)* (Abandonment of hazardous materials constitutes a "disposal" under CERCLA).

(n417)Footnote 515. *474 U.S. 494 (1986).*

(n418)Footnote 516. *Id. at 507* (footnote omitted).

(n419)Footnote 517. *Id. at 507 n.9* (emphasis added).

(n420)Footnote 518. *In re Quanta Resources Corp., 739 F.2d 912 (3d Cir. 1984), aff'd sub nom. Midlantic Nat'l Bank v. New Jersey Dept. of Envtl. Protection, 474 U.S. 494 (1986).*

(n421)Footnote 519. *Id. at 921-22.*

(n422)Footnote 520. *In re Wall Tube & Metal Prods. Co., 831 F.2d 118 (6th Cir. 1987); In re Stevens, 68 B.R. 774 (D. Me. 1987); In re* 82 Milbar Blvd. Inc., 91 B.R. 213 (Bankr. E.D.N.Y. 1988); *In re Peerless Plating Co., 70 B.R. 943 (Bankr. W.D. Mich. 1987).*

(n423)Footnote 521. *Midlantic, 474 U.S. at 507 n.9.*

(n424)Footnote 522. *In re Oklahoma Ref. Co., 63 B.R. 562, 565 (Bankr. W.D. Okla. 1986); see also In re Better-Brite Plating, Inc., 105 B.R. 912, 917 (Bankr. E.D. Wis. 1989)* vacated, *In re Better Brite Plating, Inc., 136 B.R. 526 (Bankr. E.D. Wis. 1990); In re Purco, Inc., 76 B.R. 523 (Bankr. W.D. Pa. 1987).* Another rationale for allowing abandonment in this case was that the estate had few or no unencumbered assets to pay for any response action.

(n425)Footnote 523. *In re FCX, Inc., 96 B.R. 49, 54 (Bankr. E.D.N.C. 1989)* (citing *In re Smith-Douglas, Inc., 856 F.2d 12, 16 (4th Cir. 1988)).*

(n426)Footnote 524. *65 B.R. 268 (Bankr. D. Minn. 1986).*

(n427)Footnote 525. *Id. at 272 n.4* ("the *Midlantic* decision requires something more than mere consideration of state law, but something less than complete compliance").

(n428)Footnote 526. *Id. at 273.*

(n429)Footnote 527. *Id. at 272.*

(n430)Footnote 528. *See, e.g., Ohio v. Kovacs, 469 U.S. 274, 284 n.12 (1985); Franklin Signal, 65 B.R. at 274.*

(n431)Footnote 529. *See Franklin Signal, 65 B.R. at 274* (entity performing cleanup may ultimately have a claim against the estate even though the property was abandoned under §554); *see also In re T.P. Long Chem., Inc., 45 B.R. 278 (Bankr. N.D. Ohio 1985)* ("abandonment or transfer of the drums does not transfer the estates [CERCLA] liability").

(n432)Footnote 530. *Id. at 285,* quoted in *Midlantic, 474 U.S. at 502.*

(n433)Footnote 531. *Midlantic, 474 U.S. at 498 n.2.*

(n434)Footnote 532. *See infra* note 469.

(n435)Footnote 533. *853 F.2d 700 (9th Cir. 1988).*

(n436)Footnote 534. *See Id. at 708.*

(n437)Footnote 535. *758 F.2d 137 (3d Cir. 1985).*

(n438)Footnote 536. *See, e.g., In re Pierce Coal & Constr., Inc., 65 B.R. 521, 530 (Bankr. N.D. W. Va. 1986)* ("After reviewing the *Kovacs* case and the *Midlantic* case, this court concludes that the question of priority status for every environmental clean-up cost has not been answered by the United States Supreme Court."); *id. at 529* ("this Court cannot find this determination in the decision of Ohio v. Kovacs "); *see also In re Wall Tube & Metal Prods. Co., 831 F.2d 118, 123-24 (6th Cir. 1987)* (resolving the administrative expense issue without reliance on *Kovacs*).

(n439)Footnote 537. *See, e.g., Pierce Coal & Constr., 65 B.R. at 529-531.*

(n440)Footnote 538. *See Johnson Bronze, 758 F.2d at 137; In re Security Gas & Oil, Inc., 70 B.R. 786 (Bankr. N.D. Cal. 1987); Pierce Coal & Constr., 65 B.R. at 521.*

(n441)Footnote 539. *65 B.R. at 530-531.*

(n442)Footnote 540. *Id. at 530.*

(n443)Footnote 541. *In re Smith-Douglas, Inc., 856 F.2d 12, 17 (4th Cir. 1988); In re Wall Tube & Metal Prods. Co., 831 F.2d 118, 123-124 (6th Cir. 1987); In re Stevens, 68 B.R. 774 (D. Me. 1987); In re Better-Brite Plating, Inc., 105 B.R. 912, 916 (Bankr. E.D. Wis. 1989) vacated, In re Better Brite Plating, Inc., 136 B.R. 526 (Bankr. E.D. Wis. 1990); In re T.P. Long Chem., Inc., 45 B.R. 278, 286-287 (Bankr. N.D. Ohio 1985).*

(n444)Footnote 542. *See, e.g., Stevens, 68 B.R. at 782* (holding that post-petition expenditures for clean up were administrative expenses even though the release (improper storage) occurred and state authorities knew of the improper storage before the bankruptcy petition was filed); *In re Hemingway Transp., Inc., 73 B.R. 494, 503-505 (Bankr. D. Mass. 1987) order aff'd in part and vacated in part, In re Hemingway Transport, Inc, 993 F.2d 915 (1st Cir. 1993).* ; *In re Peerless Plating Co., 70 B.R. 943, 948 (Bankr. W.D. Mich. 1987); see also Wall Tube & Metal Prods., 831 F.2d at 120, 123-124.*

(n445)Footnote 543. *See In re Kent Holland Die Casting & Plating, Inc., 25 B.R. 493,* No. 89-0326 (Bankr. W.D. Mich. 1991).

(n446)Footnote 544. *See Id.; cf. T.P. Long Chem., Inc., 45 B.R. at 286-287.*

(n447)Footnote 545. *See, e.g., Wall Tube & Metal Prods., 831 F.2d at 123-124; see also In re Vermont Real Estate Inv. Trust, 25 B.R. 804 (Bankr. D. Vt. 1982).* Indeed, many courts have found that the abandonment question is so closely related that response costs are automatically granted administrative expense status by the court if the property cannot be abandoned. *See In re Kent Holland Die Casting & Plating, Inc., 125 B.R. 493,* No. 89-0326 (Bankr. W.D. Mich. 1991); *T.P. Long Chem., Inc., 45 B.R. at 286.* Thus, whether the response cost is a necessary cost of preserving the estate depends upon whether the contaminated property is part of the estate, which in turn depends upon the health and safety concerns associated with the property.

(n448)Footnote 546. *See, e.g., In re Better-Brite Plating, Inc., 105 B.R. 912 (Bankr. E.D. Wis. 1989) vacated, In re*

Better Brite Plating, Inc., 136 B.R. 526 (Bankr. E.D. Wis. 1990); T.P. Long Chem., Inc., 45 B.R. at 278.

(n449)Footnote 547. *See, e.g., In re Wall Tube & Metal Prods. Co., 831 F.2d 118, 123-124 (6th Cir. 1987); Better-Brite Plating, 105 B.R. at 912; In re Stevens, 68 B.R. 774 (D. Me. 1987)vacated, In re Better Brite Plating, Inc., 136 B.R. 526 (Bankr. E.D. Wis. 1990).*

(n450)Footnote 548. *See, e.g., In re Kent Holland Die Casting & Plating, Inc., 125 B.R. 493 (Bankr. W.D. Mich. 1991); In re Diamond Reo Trucks, Inc., 115 B.R. 559, 563-564 (Bankr. W.D. Mich. 1990).*

(n451)Footnote 549. *See, e.g., In re Hospitality Ltd., 86 B.R. 59, 63 (Bankr. W.D. Pa. 1988).*

(n452)Footnote 550. *See, e.g., In re Corona Plastics, Inc., 99 B.R. 231, 236-237 (Bankr. D.N.J. 1989); Better-Brite Plating, 105 B.R. at 916* vacated, *In re Better Brite Plating, Inc., 136 B.R. 526 (Bankr. E.D. Wis. 1990); T.P. Long Chem., Inc., 45 B.R. at 287-289; see also In re Smith-Douglas, Inc., 856 F.2d 12, 17 (4th Cir. 1988); In re Paris Indus. Corp., 80 B.R. 2, 5 (Bankr. D. Me. 1987).*

(n453)Footnote 551. *Stearns & Foster Bedding Co. v. Franklin Holding Corp., 947 F. Supp. 790 (D. N.J. 1996)* (secured creditors cannot be liable under the CERCLA "actual control" standard unless they have participated in management).

(n454)Footnote 552. *See, e.g., Better-Brite Plating, 105 B.R. at 917-918* vacated, *In re Better Brite Plating, Inc., 136 B.R. 526 (Bankr. E.D. Wis. 1990); In re Mowbray Eng'g Co., 67 B.R. 34 (Bankr. M.D. Ala. 1986).*

(n455)Footnote 553. *In re Pierce Coal & Constr., Inc., 65 B.R. 521, 521 (Bankr. N.D. W. Va. 1986)* ("it is reasonable to expect that under a given set of circumstances, the necessary costs of protecting the public health or safety from imminent and identifiable harm may be elevated to administrative priority and, perhaps, even to a type of secured priority.").

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CHAPTER 75 THE IMPACT OF ENVIRONMENTAL REGULATION ON REAL PROPERTY

8-75 Thompson on Real Property, Thomas Editions § 75.10

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§ 75.10 Land Policy and Management.

1986 Internal Revenue Code

The land policy and management aspect of environmental regulation primarily concerns public lands. Perhaps the most concise official survey of public land issues in the context of environmental regulation is in the 1982 Report of the Council on Environmental Quality:

> The onshore public lands (i.e., those owned by the federal government) comprise approximately one-third of the nation or approximately 700 million acres ... These lands are found in every state in the Union, but are unevenly distributed, ranging from over 80 percent of Alaska and Nevada to less than 1 percent of Iowa, Maine, and Connecticut. These public lands are managed by several departments and their respective agencies. However, the predominant land-holding agencies are the so-called "multiple-use agencies," the Bureau of Land Management (BLM) of the U.S. Department of the Interior and the Forest Service of the U.S. Department of Agriculture.

Multiple-Use Planning

Although the origins of the Bureau of Land Management (B.L.M.) and the Forest Service and the history of their legislative mandates are quite different, the two now share many problems and much future potential. They manage huge land-holdings with a commitment to multiple-use development and elaborate land use planning. They are also faced with increasing recreational demands on their lands.

The public lands hold rich reserves of energy resources and other minerals. The B.L.M. controls the leasing on all on-shore lands, and the Minerals Management Service controls leasing of the 1.1 billion acres of the Outer Continental Shelf (O.C.S.). In 1980, the O.C.S. accounted for 9 percent of domestic oil production and 23 percent of domestic natural gas production. The U.S. Geological Survey (U.S.G.S.) estimates that about 30 percent of the undiscovered oil and gas in the United States is on O.C.S. lands... Major shale oil and tar sand reserves are also on public lands, though these have not yet proved economical to develop.

Western public lands hold 33 percent of total U.S. coal reserves, mostly in low sulfur coal. Currently the federal lands

account for about 10 percent of total U.S. coal production, which may rise to 25 percent by 1990.

These energy resources make major contributions to the federal treasury through royalties, and bonus bids totaled more than $9 billion in 1980. Fifty percent of these revenues (except for those from the O.C.S.) is shared with the states. In terms of job creation, government resources and overall contribution to the energy supply of the nation, these are exceptionally productive lands.

Untold quantities of non-fuel, hardrock minerals, subject to patenting under the 1872 mining law, are also found on federal lands. In the last few decades, hundreds of millions of acres of public land have been withdrawn from entry, restricting the mineral exploration efforts of the American mining industry. Estimates vary widely on the amount of undeveloped minerals on the public lands, because substantial exploration and development are necessary to compile good predictive data.

The federal lands are rich in other resources too, though these are, perhaps, less important economically than the energy resources. About 54 percent of the nation's softwood sawtimber inventory is found on federal land, though normally only a fifth to a quarter of the U.S. annual timber harvest is federal timber. About 86 percent of the federal harvest comes from the rich timber lands of both the Forest Service and B.L.M. in northern California, Oregon, and Washington.

Both the B.L.M. and the Forest Service lands have become important recreational playgrounds for hikers, campers, skiers, hunters, and fishermen. The Forest Service has become one of the nation's largest purveyors of outdoor recreation. Its hiking and horse trails, fishing lakes and streams, scenic rivers, and roadside campgrounds attracted 233.4 million recreational visitor days in 1982. The Forest Service has 25 million acres of special wilderness lands where access is limited and no public travel by motorized vehicles is permitted. Forest Service wilderness acreage will probably grow to between 34 and 41 million acres over the next few years. The B.L.M. is currently in the early stages of an assessment of the wilderness quality of 24 million acres of its lands. When the new wilderness areas of the B.L.M. and the Forest Service are added to the existing wildernesses in the parks, forests, and refuges, the completed wilderness system will probably total more than 100 million acres, an area larger than the state of California.

Finally, many Americans who never plan to visit the public lands gain substantial benefits from the nation's scenic and wild lands through reading, films, pictures, and just from knowing they are there. There is real value in knowing that grizzly bears still roam the Yellowstone Plateau as they did in the days of the mountain men, and that in Alaska a venturesome hiker can still wander through land reminiscent of the late Pleistocene glaciation. This "existence value" is difficult to measure, but existence value should be added to any list of the economic resources of the federal lands.

Economists would argue that another factor to be considered in calculating the economic value of the federal lands is the opportunity costs of non-development, i.e., the value of foregone economic opportunities. Preservationists with their view of existence value and intrinsic values, and the economists with their concept of opportunity costs, often seem to be talking past each other without much sympathy for the opposing point of view. Yet both sides speak to a common underlying theme -- not all things are possible with the same plot of land. The decision as to what is the proper use for these lands when the value of forage, timber, minerals, recreation, foregone opportunities, and intrinsic worth are all totaled up is the challenge facing the land manager today.

Proper management of the public lands is of the utmost importance if public benefits are to be maximized. With the passage of the Federal Land Policy Management Act of 1976 (FLPMA), the Forest and Rangeland Renewable Resources Planning Act of 1974 (R.P.A.), and the National Forest Management Act of 1976 (N.F.M.A.), the Congress clearly established a policy that the public lands shall generally be retained in federal ownership and managed for all Americans under the principles of multiple-use and sustained yield.

B.L.M. Planning

The B.L.M. manages an intricate combination of natural resources -- from coal and caribou to watershed and cultural resources. The F.L.P.M.A. requires that decisions on public land use be based on inventories of the resource base and on analysis of alternative levels and types of use. Such decisions are to be made with full participation by the public and a careful balance of the interests of competing users. The F.L.P.M.A. also requires an approach which reflects the sensitivity to and complexity of multiple use of resources...

Forest Service Planning

The Forest and Rangeland Renewable Resources Planning Act of 1974 (R.P.A.), as amended, directs the Secretary of Agriculture to prepare a comprehensive, long-range assessment of the nation's renewable resources and to develop a program for Forest Service activities. The R.P.A. assessment, required every 10 years, provides detailed information on renewable forest and rangeland resources -- timber, range, water, fish, wildlife, outdoor recreation, and wilderness. It includes projections of future supply and demand for each of those resources, and spells out potential opportunities to meet the nation's future needs.

The National Forest Management Act (N.F.M.A.) of 1976 directed the Secretary of Agriculture to develop a land and resource management plan for each administrative unit of the National Forest System by 1985. Regulations were developed in 1979 to guide this effort. The regulations require integrated planning for all resources, i.e., recreation, fish and wildlife habitat, water, timber, range, wilderness, and minerals. In the last year the regulations were revised to streamline the land management planning process, and the final rules became effective November 1, 1982.

Forest plans for 121 administrative units of the National Forest System are being prepared. Forest plans will constitute the land and resource management plans required by N.F.M.A. Fourteen draft environmental impact statements for Forest plans were issued for public comment in FY 1982 (8 others were issued in FY 1981). However, because of the reevaluation of roadless and under developed areas recommended in 1979 for wilderness designation or non-wilderness uses, forest planning schedules will be delayed by six months to one year. The reevaluation will be accomplished through the forest planning process. The goal is to complete the remainder of the 121 forest plans in FY 1984, although some of these plans will not be published until 1985.

Alaska Lands

The Alaska Statehood Bill, the first of 3 laws passed since 1958 affecting disposition of 374 million acres of public land in Alaska, authorized conveyance of 104 million acres to the then new state. During 1982, B.L.M. conveyed nearly 12 million acres to the state of Alaska, bringing to 65.5 million the total acreage actually conveyed since passage of the Alaska Statehood Bill.

In 1971, the Alaska Native Claims Settlement Act authorized conveyance of an additional 40 million acres of federal land in Alaska to native organizations. During 1982, B.L.M. conveyed 4.7 million acres to Alaskan natives, bringing the total acreage conveyed to over 23 million acres.

In December 1980, nearly two and a half decades of debate over public lands in Alaska were settled by passage of the Alaska National Interest Lands Conservation Act. The 1980 Act expanded the National Park System by 45 million acres; the wildlife refuges administered by the Fish and Wildlife Service were increased by 54 million acres; and the Forest Service gained about 3 million acres.

When the state and native land entitlements are fulfilled, approximately 75 million acres of public land will remain in Alaska under B.L.M. administration. Approximately 23 million of these acres are within Alaska's National Petroleum Reserve.

Rangeland and Timber Management

In 1982, B.L.M. adopted new rangeland management regulations that make livestock managers stronger partners in maintaining a healthier rangeland environment. The Bureau also returned to the states the primary authority to allocate state water resources, which reaffirmed that the individual states shall govern how Department of the Interior agencies acquire new water sources.

B.L.M. also issued a final grazing management policy designed to place federal resource management investments where most needed, resulting in more effective and efficient management while protecting and improving rangeland condition and productivity. To date, B.L.M. is expected to complete 144 grazing environmental impact statements covering over 174 million acres.

More than 9,300 wild horses and burros were removed from the public lands in 1982, and approximately 7,000 of these animals have been placed in private maintenance through the Bureau's "Adopt-A-Horse" program. In addition, new wildlife management policies were implemented that reaffirm states' rights to manage resident wildlife populations.

The downward trend in the demand for lumber greatly affected the harvest of sawtimber in calendar year 1982. Housing starts reached the lowest level in 36 years at slightly less than 1.1 million units. This economic slump was reflected by a sharp decrease in the amount of timber harvested from the National Forest. Although 10.5 billion board feet of sawtimber were sold, only 6.4 billion board feet were harvested.

Interest has continued to increase in the Forest Service firewood program. This program allows people to obtain permits to cut timber for their personal use as firewood. During 1982, more than 860,000 permittees removed over 4.7 million cords of fuelwood valued at about $7.5 million from National Forest System land. This firewood harvest was 5 percent larger than during 1981, and it provided the heating equivalent of about 16.2 million barrels of fuel oil.

In the case of B.L.M., the Bureau's responsibilities for timber and woodlands, or non-commercial forests, are limited to public domain lands throughout the western United States and to the revested Oregon and California railroad grant lands. In managing the timber resource of these lands, the Bureau, like the Forest Service, is obligated to obtain a fair market price for government timber, while still retaining a sensitivity to other resource values such as watersheds, wildlife habitat, and recreation.

B.L.M.'s new policy also recognizes woodlands as distinct ecosystems having value for wood products, livestock forage, wildlife habitat, recreation use, watershed protection, and minerals development. Under the new policy, B.L.M. develops and maintains an inventory and classification of the public woodlands to achieve a positive cost/benefit ratio and to facilitate the management of other resources.

As in the case of the Forest Service, another B.L.M. responsibility is the issuance of permits authorizing the private and commercial harvest of fuelwood from B.L.M. lands. In 1982, B.L.M. decided to make the program self-sufficient by charging each person who wanted a permit $10 for the privilege of the harvesting fuelwood.

Wilderness Areas

The Federal Land Policy and Management Act directed that the lands administered by B.L.M. be inventoried for wilderness characteristics. By November 1980, the inventory was largely completed in the western states. Of 174 million acres inventoried, nearly 24 million acres, in a thousand separate tracts, were identified as wilderness study areas, and approximately 149 million acres were found not to possess wilderness characteristics. The law required further that those areas to be studied for potential wilderness designation should be managed, with some specified exceptions, so that no impairment of wilderness suitability would occur prior to final congressional action on their status.

During the study period, all wilderness study areas are being managed under B.L.M.'s Interim Management Policy. The main thrust of this policy is to prevent impairment of the areas' suitability for wilderness designation, but there are exceptions for valid existing rights and previously existing mineral and grazing uses.

Once an area is designated by the Congress as part of the National Wilderness Preservation System, B.L.M. will manage it under the same provisions of the Wilderness Act of 1964 that apply to designated wilderness areas managed by the Forest Service. B.L.M.'s Wilderness Management Policy was published on September 24, 1981.

Recreational Use of the Public Lands

As indicated earlier, quite apart from the National Parks general public lands are being used more and more for recreational purposes. This is particularly true of the National Forest System. Of the 554 million visitors days of use in 1982 for all federal lands, approximately 43 percent occurred in the National Forests and National Grasslands.

Recreation activities in national forests vary from camping at constructed facilities to backpacking in primitive settings. In the past 5 years, recreational use of National Forest System lands has increased 7 percent. In FY 1982, 233.4 million recreation visitor days occurred in National Forest System lands, almost unchanged from the previous year. Of the total use in 1982, 11.2 million recreation visitor days occurred in wilderness and primitive areas and 222.2 million in other National Forest System lands.

The National Parks

The National Parks represent a national heritage which most Americans hold dear. Over the years, the National Park System has grown to include not only the great national treasures such as Yellowstone, the Everglades and the Grand Canyon, but also many national monuments, battlefield parks, historic sites, seashores, rivers and recreational areas.

The National Park System began 111 years ago with the creation of Yellowstone National Park. It now comprises 334 areas totalling 77 million acres, of which 54 million acres are located in Alaska. Park visits in 1982 alone equalled more than 245 million visitor days.

Acquisition and Development

In 1965 Congress established the Land and Water Conservation Fund (L.W.C.F.) to provide federal dollars for park land acquisition. Although the congressionally established Outdoor Recreation Resources Review Commission had recommended focusing the LWCF on grants to states for necessary park land purchases, Congress also provided a federal share of the Fund.

Since the Fund was created, 123 park areas have been added to the System. The National Park System has grown dramatically over the past two decades. The number of parks has almost doubled and the acreage in the system has increased by over 5 million acres (not including Alaska). Many of the newer additions to the system have required billions of dollars from the LWCF to purchase private lands.

This rapid growth of the National Park System has caused much controversy. It has always been the desire of the National Park Service (NPS) to include resources in the system which possess national significance, but as the System grew, a number of parks were added despite opposition from the Service and those who felt these newer parks were more of state or local value.

Another criticism is that this seemingly unlimited expansion has been at the expense of System resources and facilities. Appropriations from the federal budget during several Administrations have not kept pace with the costs of purchasing,

protecting, maintaining, and staffing the expanded National Park System. For example, in 1980 the U.S. General Accounting Office (GAO) reported that the infrastructure and visitor facilities in many parks had deteriorated to the point of being hazardous to visitors. To correct these health and safety problems, the Department of the Interior established a 5-year, $1 billion Park Restoration and Improvement Program. Thus far, $433.3 million has been appropriated by Congress for this program, and in 1982 GAO issued a further report which indicated that considerable progress has been made in the restoration and improvement of park facilities.

In recent years, as a result of new strategies for land protection, management of many of the additions to the System containing sizeable amounts of privately owned land has become more of a partnership arrangement between federal, state, and local governments, and the private sector. Protection of these areas involves zoning, cooperative agreements, easements, and other alternatives to full fee federal ownership of land.

Recognizing the need for a new land protection strategy, the Department of the Interior, in 1981, adopted a Land Protection Policy to guide use of the federal portion of the LWCF. NPS is presently applying the policy's concepts to park areas containing non-federal lands, and land protection plans will be prepared for 195 units in the System. These plans will enable N.P.S. to:

Identify what land or interests in land need to be in federal ownership to achieve park management objectives consistent with the public purposes established by Congress;

Use to the maximum extent practical, cost-effective alternatives to direct federal purchase of private lands, and, when federal acquisition is necessary, acquire or retain only the minimum interests necessary to meet management objectives;

Cooperate with landowners, other federal agencies, states, local governments, and the private sector to manage land for public use or protect it for resource conservation; and

Formulate, or revise as necessary, plans for land acquisition, resource protection, and park use to insure that the most outstanding areas are adequately managed.

Implementation of land protection planning is likely to be one of the more innovative and significant actions in the recent history of public lands management and policy.

Park Protection

Because improved management is the key to the protection of resources in the Park System, the Department of the Interior is placing renewed emphasis on park resource management. Within 2 years, all units of the system will have prepared resource management plans. To increase the professional expertise available for solving resource problems, the Service has instituted a comprehensive training program for park specialists in resource management.

Offshore Oil and Gas

The oceans bordering the United States are one of America's greatest multiple use resources, serving the nation as a vast source of energy, minerals, fish protein, and recreation and transportation opportunities. The management of ocean resources is required and authorized by numerous statutes, including the Outer Continental Shelf (O.C.S.) Lands Act of 1953. Under that Act, as amended in 1978, the responsibility for the balanced development of energy and minerals is vested in the Secretary of the Interior.

Despite the presence in the offshore area of approximately two-thirds of America's oil and gas resources, over the past 30 years little effort was expended to develop that potential... In fact, between 1954 and 1981, only 4 percent of the O.C.S. was made available for oil and gas exploration and only 2 percent was leased for such development.

Because U.S. offshore oil production fell by 33 percent between 1970 and 1980, the Department of the Interior has worked to develop environmentally sensitive methods of increasing America's domestic energy resources, assist national defense, preserve environmental quality, and promote domestic growth and revitalization.

Over the past decade, the Department of the Interior, in consultation with numerous other agencies, has spent over $300 million on an environmental studies program to ensure the protection of the multiple-use resources of the O.C.S. Since its inception in 1973, the program has supported prelease studies in all areas on the O.C.S. leasing schedules, and the information has been used in the analysis of risks and benefits of O.C.S. leasing as well as in the development of sale-specific and programmatic Environmental Impact Statements and other decision documents. In 1980, the environmental studies program began to focus on issues more related to post-lease management decisions. This was possible because most lease areas had several years of completed study, and opportunities for scientifically credible monitoring experiments became available. Monitoring for biological and chemical effects of exploratory and development activities was initiated on Georges Bank and in southern California. Programs to observe the effects of O.C.S. operations on endangered species (bowhead and gray whales, sea otters, and ringed seals) were also initiated. The information from these studies is used in post-lease determinations on the effectiveness of stipulations to protect the environment under such requirements as the Endangered Species Act (E.S.A.), the Marine Mammal Protection Act (M.M.P.A.), and the National Pollutant Discharge Elimination System (N.P.D.E.S.).

In 1981, the Interior Department announced a new 5-year offshore oil and gas leasing program, as required by law, after a 19-month environmental review process. In consultations with the governors of 23 coastal states, Congress, and numerous other groups, the Department developed a leasing program that will consider almost the entire Outer Continental Shelf for possible leasing. Of the total acreage involved, only a portion will be offered for leasing; less will actually be leased; far less will be drilled, and only a fraction will see any production. From that small fraction will come the energy and revenues from the O.C.S. program. As a result of the 41 lease offerings in this new program, in 5 years America will have made great strides in inventorying the entire offshore area for hydrocarbon potential.

Most experts assert that 90 percent of America's hydrocarbon potential will come from 9 percent of the fields, some as large as Prudhoe Bay and others much smaller. The importance of these smaller offshore fields cannot be overlooked, since nearly 99 percent of all the onshore fields ever discovered in the lower 48 states have contained less than 300 million barrels of oil. It is the cumulative contribution of the smaller onshore fields that has made the largest domestic contribution to the nation's energy needs in the past, and it is expected that the small to medium-sized offshore fields will play a similar role in the nation's energy future.

Onshore Oil and Gas

In January 1981, America was importing almost 40 percent of its crude oil needs, while production from public lands was declining. Less than 15 percent of U.S. onshore public lands were under lease for oil and gas development, and no federal onshore oil and gas leases had been issued in Alaska for 15 years. The annual national energy bill for imported crude oil had reached $80 billion, and it had become obvious that if the United States intended to reduce this outflow of American wealth to foreign nations, it had to increase oil and gas production from public lands...

In 1981, B.L.M. leased 150 percent more onshore acres than were leased in 1980. In 1982, leased acreage nearly doubled again, thus equalling in 1982 alone the number of acres leased for the entire period of 1977-1980... These leases were issued with more environmental safeguards than ever before in the history of this country.

Under this aggressive leasing plan, 259 onshore oil and gas leases, encompassing 2.8 million acres, were issued on public lands in Alaska. Furthermore, more than 100 million acres in Alaska were opened for geophysical exploration, and more than 4.25 million acres were offered in two sales in the Alaska National Petroleum Reserve, the largest competitive oil and gas offering in history.

Coal

One of America's greatest energy assets is its abundance of coal. It is estimated that 40 percent of the nation's coal reserves are federally owned. In the West, the federal government owns or controls, due to land ownership patterns, 80-90 percent of the coal reserves. Currently, these public lands account for about 10 percent of all U.S. coal production.

Geothermal Energy

The development and use of geothermal energy is proving to be a viable energy alternative. In 1981 and 1982, B.L.M. issued over 1,100 geothermal leases on 2.1 million acres, an increase of 508 leases from 1979 and 1980 ... Bonus bids from competitive geothermal lease sales jumped from $3.4 million in 1979 and 1980 to nearly $30.5 million in 1981 and 1982. In addition, new regulations to encourage development of locally important geothermal resources were implemented. The new regulations affect lands where the federal government currently shares ownership of the resources or where ownership will vest in the government at a future date.

During 1982, the first comprehensive national assessment of low temperature geothermal resources of the United States, useful for space heating and industrial heat processes, was completed. Furthermore, a geophysical survey was made of the Cascade Range in Oregon and California, as part of a major regional geothermal assessment.

Strategic Minerals

In April 1982, the President announced the first national minerals policy in 30 years. The policy states that cost-effective approaches will be followed in dealing with America's reliance on foreign sources for strategic minerals and encourages development of its own rich mineral resources. The adoption of this policy has been coupled with a dramatic increase in research on strategic and critical minerals.

While Congress authorized the development of offshore strategic and critical minerals over 30 years ago, no action was taken regarding that resource area until the announcement in January 1982 of an offshore mineral leasing program. The first area of interest for future leasing is the sand and gravel potential of the Beaufort Sea, Alaska.

The President's recent proclamation of an Exclusive Economic Zone confirming U.S. sovereign rights and control over the living and non-living natural resources of the seabed within 200 nautical miles of U.S. coasts will assure future opportunities for development of America's strategic and critical mineral resources, including zinc and copper in offshore Oregon and Washington, and cobalt near the Hawaiian Islands.

In recent years, the regulation of wetlands has become a prominent issue. In 1975 the federal jurisdiction over "waters of the United States" was judicially expanded to include most wetland areas, n554 so now the permit process under the Clean Water Act, administered by the Army Corps of Engineers, applies to any activity that involves dredging or filling wetlands. n555 The impact of all of this on real property rights has been aptly described as follows:

> Generally, a property owner may object to the Army Corps of Engineers' requirement of a §404 dredge and fill permit on only two grounds. First, the owner may claim that the Corps lacks jurisdiction over the owner's property. However, in *Riverside Bayview* the Supreme Court made it clear that the Corps' broad interpretation of its own jurisdiction is a reasonable one. As long as the property is sufficiently saturated to support wetland vegetation and is also adjacent to a navigable body of water, the Corps may require a §404 permit before the owner may develop the property. The property needs to be inundated or frequently flooded before it will be considered a wetlands subject to the Corps' jurisdiction.

Second, the owner may claim that the Corps' denial of the owner's application for a §404 permit constitutes a Regulatory Taking. However, an owner will be successful in its claim of a Regulatory Taking only in extreme circumstances. In order to be successful in such a claim, an owner must make one of two showings. The owner may attempt to show that the denial of a permit has left that owner without any economically viable use of his property. However, most courts have no problem finding some remaining economically viable use if they believe that equities in a particular case require such a result. The owner may also attempt to show that the denial of a permit has not substantially advanced legitimate government interest. However, as the Supreme Court held in *Riverside Bayview*, "there is no identifiable set of instances in which mere application of the permit requirement will necessarily or even probably constitute a taking."

These developments seem to constitute a large setback to land developers, potentially affecting millions of acres of saturated property across the country. Swamps, marshes, bogs, and the like are now clearly entitled to federal protection. Owners of such properties must obtain a dredge and fill permit from the Corps before filling and, therefore, before any construction may begin. If a permit application is denied, the developer is unlikely to obtain relief from the courts. n556

FOOTNOTES:

(n1)Footnote 554. *Natural Resources Defense Council, Inc. v. Callaway, 392 F. Supp. 685 (D.D.C. 1975).*

(n2)Footnote 555. *33 U.S.C. §1344.*

(n3)Footnote 556. Simeon D. Rapoport, *The Taking of Wetlands Under Section 404 of the Clean Water Act, 17 Envtl. L. 111, 122-124 (1986).*

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CHAPTER 75 THE IMPACT OF ENVIRONMENTAL REGULATION ON REAL PROPERTY

8-75 Thompson on Real Property, Thomas Editions § 75.11

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§ 75.11 Protection of Wildlife.

Regulation of wildlife in the United States has been a subject of some conflict between federal and state jurisdictions. It has now been determined that a state has an interest in and the power to regulate wildlife within its own borders, but that regulation may not directly or indirectly burden interstate commerce if alternative conservation measures are available. n557

The various federal statutes regulating wildlife also promote a variety of purposes: protection of the environment, protection of endangered species, protection of food sources, protection of commercial enterprises based on fish and animals, and protection of recreational resources.

Wildlife conservation received early statutory attention in the Fish and Wildlife Coordination Act of 1934, n558 which sought to assure "that wildlife conservation will receive equal consideration and be coordinated with other features of water resource development programs through the effectual and harmonious planning, development, maintenance and coordination of wildlife conservation and rehabilitation." This consideration must be taken into account whenever a body of water is to be modified by any federal agency.

Individual species protection has been promoted by statutes such as the Marine Mammal Protection Act n559 and the Wild Free-Roaming Horse and Burros Act. n560 These and other miscellaneous items of legislation were succeeded by the Endangered Species Act of 1973, n561 which was the first comprehensive statutory protection for endangered species, including plants.

Under the act federal agencies periodically update lists of endangered and threatened species, and then regulations for their protection are issued. Much enforcement activity is delegated to the states, which also receive financial assistance therefor.

FOOTNOTES:
(n1)Footnote 557. *Hughes v. Oklahoma, 441 U.S. 322 (1979).*

(n2)Footnote 558. *16 U.S.C. §661 et seq.*

(n3)Footnote 559. *16 U.S.C. §§1361*-1407.

(n4)Footnote 560. *16 U.S.C. §§1331*-1340.

(n5)Footnote 561. *16 U.S.C. §§1531*-1543.

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CHAPTER 75 THE IMPACT OF ENVIRONMENTAL REGULATION ON REAL PROPERTY

8-75 Thompson on Real Property, Thomas Editions § 75.12

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§ 75.12 Citizen Suits.

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§ 75.12(a) The Role of Citizen Suits in Environmental Protection.

It is now well-recognized that the natural environment is fragile and that human activities impacting on the environment often impact on private property rights. The various attempts to regulate by law the types of conduct that affect the environment emphasize the role of public authority in creating and executing the laws and regulations.

It should also be recognized that private rights are often at issue in environmental regulation and protection, and that what is harmful to the environment generally is also likely to be harmful to specific private rights. Thus it should not be surprising that the main environmental legislative enactments also make some provision for so-called "citizen suits," that is, legal actions brought by one private party against another, complaining of private injury arising out of violation of public environmental law.

In most situations where one property owner is impeded in use of property by the activities of a nearby property owner which violate environmental law, a remedy may be sought by a private nuisance action. n562 In those nuisance actions the plaintiff's burden of proof can be heavy: a plaintiff in a nuisance action must usually show that the defendant's conduct was unreasonable and that the interference with or injury to plaintiff's use of land caused by that conduct was substantial. By contrast, in private litigation under environmental laws, the plaintiff's burden of proof may be much lighter: the plaintiff in most such cases need show only a violation of the law and resulting injury to or interference with the plaintiff's property in order to secure injunctive relief. However, a private action under environmental law may also have disadvantages, such as limitations on the scope of proper issues or on compensatory remedies.

In this section several of the principal federal environmental laws are summarized as to that law's citizen suit provisions. Those summaries highlight the scope of the right of action, proper parties, available remedies, and special procedural considerations relating to the background or purpose of the legislation.

Similar state legislation and rights of action also exist, but because of the wide variety of subjects for environmental legislation, it is beyond the scope of this section to survey in detail the state citizen suit legislation in each of those areas. The state approach to these topics may be very generally summarized as follows:

> Federal environmental legislation encourages private enforcement through "citizen suit" provisions authorizing enforcement litigation by private individuals, and a few states have followed the federal lead in this area ... Some hazardous waste laws also include a private right of action allowing private individuals to recover cleanup or removal costs for a hazardous waste site, although private actions seeking injunctive relief or penalties are rare. For the most part, however, state environmental laws do not include explicit "citizen suit" provisions, relying instead on enforcement by government agencies. n563

A couple of states have enacted "environmental rights" acts that are designed to encourage private enforcement on a broader basis. Unlike the typical "citizen suit" provision, which authorizes private enforcement of a single piece of state environmental legislation, these laws broadly empower private individuals to sue for violations of any environmental law. n564

§ 75.12(b) Private Litigation to Enforce the Clean Water Act.

§ 75.12(b)(1) Citizen Suits Under the Clean Water Act.

Specific statutory authority for citizen suits over clean water violations was introduced by the 1972 Clean Water Act and has since been used "as the basis for hundreds of suits against dischargers." n565

§ 75.12(b)(1)(i) Scope of the Action.

A citizen suit under the Clean Water Act may be based on any allegation that the defendant is violating an effluent standard n566 or limitation under the act or is violating an order of the federal administrator or an order of a state with respect to such a standard or limitation. n567 Also a citizen may bring an action against the Administrator based on an allegation that the Administrator is failing to perform a non-discretionary duty under the act. n568 The act ostensibly refers to current violations as being the subjects of citizen suits, and the U.S. Supreme Court held in 1987 that a citizen suit may not be maintained for *wholly* past violations. n569 However, other federal courts -- even after 1987 -- have held that the actions may be maintained for past violations. Sometimes environmental groups acting as plaintiff have been formed after the occurrence of the violations in order, as plaintiffs, to allege those violations in the groups' citizen suits. n570

The Act also preserves any right of action a plaintiff may have under "any statute or common law" for enforcement of an effluent standard or limitation or for other relief. It has been claimed that these broad citizen suit provisions imply an intent by Congress to preserve a private right of action under federal common law, but the U.S. Supreme Court has held that federal common law rights of action in this area are pre-empted by the citizen suit provisions; thus a citizen plaintiff must comply with the statutory procedural requirements. n571 It has already been judicially determined that any private right of action under the federal common law of nuisance in the area of water pollution has been pre-empted by these statutes. n572

§ 75.12(b)(1)(ii) Procedural Considerations.

The statute authorizing citizen suits contains an explicit waiver of federal sovereign immunity:

> any citizen may commence a civil action on his own behalf --
>
> (1) against any person (including (i) the United States, and (ii) any other government instrumentality or agency to the extent permitted by the eleventh amendment of the Constitution)... n573

This limited waiver of sovereign immunity applicable to federal governmental entities does not extend to pollution-related actions brought by a state under the federal common law of nuisance. n574 Nevertheless, a federal

district court in a later case held that an action against the administrator based both on this act and on the federal common law of nuisance was not barred by sovereign immunity, even though the plaintiff had not complied with the statutory notice requirements. n575

The act also provides an additional waiver of sovereign immunity in that any citizen may commence a civil action "against the Administrator where there is alleged a failure of the Administrator to perform any act or duty under this chapter which is not discretionary with the Administrator...." n576

Even though the waivers of sovereign immunity in the act apply only to citizen suits brought under the act, one federal court has waived federal immunity on behalf of the state by allowing imposition of state civil penalties on a federal facility on the premise that the act waives sovereign immunity to *all* civil claims under the act. n577 A different federal court, however, has maintained the federal facility sovereign immunity from civil penalties, because the supposed waiver was not unambiguous. n578

Federal district courts have jurisdiction of actions under the act, "without regard to the amount in controversy or the citizenship of the parties." n579 But jurisdiction complications arise when actions under the act also include related or similar claims under state environmental statutes, so that the federal court must decide whether to adjudicate or abstain from such claims. Abstention may be justified where joinder of the claims presents difficult questions of state law; usually, however, the federal court will not abstain from the state-based claim. n580 The timing of the alleged violations and of the litigation may be important, as the U.S. Supreme Court has held that the federal court has no jurisdiction over a citizen suit based only on wholly past violations. n581

Venue for most actions under this law is laid in the district where the alleged violation is occurring:

> Any action respecting a violation by a discharge source of an effluent standard or limitation or an order respecting such standard or limitation may be brought ... only in the judicial district in which such source is located. n582

This provision does not specify venue for actions by a citizen against the administrator, which are thus governed by the usual venue rules. n583

The act sets out no specific statute of limitations for the bringing of citizen suits, n584 but if the forum court takes the position that no citizen suit may be brought for wholly past violations, then that position acts as a sort of limitation of action. n585 Ordinarily, when a federal act contains no limitations provisions, the federal court should apply the most appropriate state statute of limitations, unless a relevant and analogous federal limitations provision is available. It has been held that the general federal five-year limitations period n586 is relevant and thus applicable to citizen suits under the Clean Water Act for which no other statute of limitation is appropriate. n587

To commence a citizen suit against an alleged violator, the plaintiff must give at least 60 days' notice of the alleged violation to the prospective defendant, to the Administrator, and to the State in which the alleged violation occurred. n588 The notice provision is theoretically jurisdictional, that is, the court may not hear the action if the notice requirement has not been met. n589 However, because the citizen suit is not the exclusive remedy, n590 actions seeking similar relief under other statutes or under common law have been accepted, even though no notice or only inadequate notice was given. n591

A private action may not be commenced at all if the administrator or a state "has commenced and is diligently prosecuting a civil or criminal action," in either federal or state court, to require compliance with the standard, limitation, or order whose alleged violation would have been the object of the private plaintiff's action. n592 However, in that circumstance the private prospective plaintiff has a right to intervene in the action brought by the administrator or the state.

When the plaintiff proposes to bring an action against the administrator for alleged failure to perform a non-discretionary act or duty, the plaintiff must give at least 60 days' notice of such action to the administrator. n593 However, if this proposed action relates to national performance standards n594 or to toxic effluent standards, n595 no waiting period is required after the notice, and the plaintiff may file the action immediately after giving notice. Theoretically, the occasions on which no notice is required are assumed to be situations in which the need to deal with threats to clean water is urgent. In the more ordinary cases, however, the purpose of the waiting period following notice is to afford the defendant, either the state or the appropriate agency of the federal government, an opportunity to commence an action that would eliminate the need for a separate citizen suit. n596

The content of the notice and requirements for serving the notice are prescribed by regulation. n597 If the notice is of an alleged violation of a standard, limitation or order, the notice must identify which of those criteria have been violated, what activity constituted the violations, the persons responsible for the violations, the dates and locations of violations, and the name, address and telephone number of the person giving notice. n598 The notice shall also state the name, address and telephone number of the legal counsel, if any, representing the person giving notice. n599 If the notice is to the administrator for failure to perform a non-discretionary duty, the notice shall cite the statutory provision establishing the duty, describe the action taken or not taken by the administrator, and provide the name, address, and telephone number of the person giving notice. n600 This notice, too, must give information concerning legal counsel.

The notice requirement is jurisdictional, so the federal court is not empowered to adjudicate the action if the notice requirements have not been met. n601 Sufficiency of the notice is not so much a matter of strict compliance with technical content requirements as it is of giving adequate notice to the defendant of the circumstances of the alleged violation and identifying the complainant. n602 In a case brought by multiple plaintiffs, it has been held that notice from only one of the plaintiffs is adequate as substantial compliance with the notice requirements. n603 After the action is commenced, additional similar violations may be added by amendment to the complaint, without the necessity of meeting the pre-litigation notice requirements. n604

Upon commencement of a citizen suit in federal court, the plaintiff "shall serve a copy of the complaint on the Attorney General and the Administrator." n605 Also, if a consent judgment is to be entered in the action, and the United States is not a party, the Attorney General and the Administrator must be provided a copy of the proposed consent judgment at least 45 days before that judgment is to be entered. n606

§ 75.12(b)(1)(iii) Proper Plaintiffs.

A plaintiff may be "any citizen," n607 which "means a person or persons having an interest which is or may be adversely affected." n608 To show an adversely affected interest plaintiffs must have suffered some injury in order to have standing to sue; however, that includes persons whose injuries are non-economic but who have standing under the holding of Sierra Club v. Morton, n609 as well as those who have suffered actual economic injury. n610 A right of action under §1983 of the Civil Rights Act, n611 to challenge actions of state officials allegedly violating rights created by federal law, may not be implied under this act.

Standing issues have focused on environmental groups seeking to assert citizen suits on behalf of their members. Quite consistently such groups enjoy standing if they are able to represent that any of their members live in the areas affected by the alleged violations. n612 The federal courts are in conflict over whether a state is a "citizen" for purposes of bring a citizen suit under this statute. n613

Under certain situations, the prospective plaintiff is precluded from commencing an action under the citizen suit provisions, but may intervene as a matter of right in an already pending action adjudicating the same issues. Specifically, if the administrator has already commenced and is diligently prosecuting a court action for compliance with the same standard or limitation on which the plaintiff bases a claim, the plaintiff may intervene. n614 If the

administrator is seeking such enforcement only through an administrative forum, the plaintiff is not barred from commencing judicial action, n615 unless the administrative forum has authority similar to that of a court. n616

Just as a private complainant may intervene as a matter of right in certain actions brought by the administrator or by a state, so the administrator, if not already a party, may intervene as a matter of right in any action respecting a violation by a discharge source brought under the act. n617

§ 75.12(b)(1)(iv) Proper Defendants.

Defendants in a citizen suit may be:

> (1) the administrator in an action alleging the administrator's failure to perform any non-discretionary act or duty under this law, n618 or
>
> (2) any person alleged to be in violation of an effluent standard or limitation under the act, or in violation of an order from the administrator or a state respecting such standard or limitation. n619 "Any person" includes the United States and also includes "any other governmental instrumentality or agency to the extent permitted by the eleventh amendment to the Constitution." n620 The Eleventh Amendment to the Constitution, prohibiting federal actions by citizens of one state against another state, declares:
>
> The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

In an action not fitting neatly into any of the categories described above, it has been held that a citizen suit under this section may be brought against the Army Corps of Engineers for alleged failure to perform non-discretionary duties arising out of its dredge and fill program. n621

§ 75.12(b)(1)(v) Remedies.

In a citizen suit respecting a violation of or order concerning an effluent standard or limitation, the district court "shall have jurisdiction ... to enforce such an effluent standard or limitation, or such an order." n622 In a suit brought against the administrator for failure to perform a non-discretionary act or duty, the court may order the administrator to perform the act or duty. n623 The court is also authorized to "apply any appropriate civil penalties under §1319(d) of this title." n624 A citizen plaintiff seeking compensatory damages would have to do so by action or claim under some other statute or common law right, n625 which could possibly be joined with the citizen suit action against violations of clean water laws by a defendant.

§ 75.12(b)(2) Actions to Review Administrator's Actions.

In provisions separate from the citizen suit provisions, the act authorizes "any interested person" to bring an action for review of the administrator's actions in promulgating certain standards of performance, in making certain determinations, in promulgating certain effluent standards, prohibitions or pretreatment standards, in making determinations as to state permit programs, in approving certain effluent or other limitations, and in issuing or denying certain permits. n626 Any administrator action which could have been the subject of such a review, but was not, may not be subjected to subsequent judicial review "in any civil or criminal proceeding for enforcement." n627

§ 75.12(b)(3) Civil Action by the Governor of a State.

The act also gives specific permission for the governor of a state to commence a civil action:

> [A]gainst the Administrator where there is alleged a failure of the Administrator to enforce an effluent standard or limitation under this chapter the violation of which is occurring in another State and is causing an adverse effect on the public health or welfare in his State, or is causing a violation of any water quality requirement in his State. n628

§ 75.12(b)(4) Costs and Attorney's Fees.

The act contains an explicit provisions for costs and attorney's fees:

> The court, in issuing any final order in any action brought pursuant to this section, may award costs of litigation (including reasonable attorney and expert witness fees) to any prevailing or substantially prevailing party, whenever the court determines such award is appropriate. The court may, if a temporary restraining order or preliminary injunction is sought, require the filing of a bond or equivalent security in accordance with the Federal Rules of Civil Procedure. n629

This section was amended in 1987 to authorize the court to award costs to a "substantially prevailing party" in addition to a prevailing party, although case law had already adopted that position. n630

§ 75.12(b)(5) State Regulation.

The federal act expressly does not "preclude or deny the right of any State or political subdivision thereof ... to adopt or enforce" similar clean water standards, except that state standards may not be "less stringent" than federal standards, nor may state laws impair federal jurisdiction over state waters. n631

§ 75.12(c) Private Litigation Under the Clean Air Act.

§ 75.12(c)(1) Citizen Suits Under the Clean Air Act.

The citizen suit provision in the Clean Air Act was an important legislative milestone:

> The inclusion of a citizen suit provision in the Clean Air Act in 1970 was a development that revolutionized public interest litigation, not only in the field of environmental law, but quite generally. Since 1970, almost every law that provides for public health, safety and consumer protection has included a citizen suit provision. The right of citizen enforcement has become so widely accepted that there is little general discussion of the issue... n632

§ 75.12(c)(1)(i) Scope of the Action.

A citizen suit is often based on an allegation that a person (including the United States or other governmental instrumentalities and agencies) is violating an emission standard or limitation or is violating an order based on such a standard or limitation. n633 The act includes an elaborate and broad definition of emission standard or limitation. These terms can mean:

> (1) a schedule or timetable of compliance, emission limitation, standard of performance or emission standard,
>
> (2) a control or prohibition respecting a motor vehicle fuel or fuel additive, or
>
> (3) any condition or requirement of a permit under [various enumerated sections of the Clean Air Act]. n634

The plaintiff in a citizen suit may also bring an action against the administrator that alleges the administrator's failure to

perform any non-discretionary act or duty under the act. n635 Finally, the plaintiff may bring an action against any person proposing to construct a facility that will produce emissions, either without a required permit or in violation of an existing permit. n636 Except for this latter provision, which permits a private legal action against proposed construction allegedly to be in violation of a permit, a citizen suit is not ripe for adjudication unless a violation has actually occurred. n637

In the context of the Clean Water Act, federal courts disagreed over whether a citizen suit could be maintained for violations wholly in the past. This matter was effectively resolved by the *Gwaltney* case, requiring that the action could be based only on present or intermittent violations. n638 The holding of *Gwaltney* has now been applied to citizen suits under the Clean Air Act. n639

As is the case under the Clean Water Act, this act preserves other existing rights of private enforcement:

> Nothing in this section shall restrict any right which any person (or class of persons) may have under any statute or common law to seek enforcement of any emission standard or limitation or to seek any other relief (including relief against the Administrator or a State agency). n640

This section clearly preserves common law private rights of action in the states, and it has been held that federal common law rights also remain intact, because the act did not clearly abolish them. n641 However, a subsequent U.S. Supreme Court case reviewing a similar question under the Clean Water Act held that the federal common law of nuisance in the area of water pollution was pre-empted by the Clean Water Act and related statutes. n642

Private citizens in the form of citizen groups may bring action for judicial review of administrator actions under a separate provision of the Clean Air Act. n643

§ 75.12(c)(1)(ii) Special Procedural Considerations.

A citizen suit against the federal government or a federal agency is made possible by an explicit waiver of federal sovereign immunity in the Clean Air Act:

> ... [A]ny person may commence a civil action on his own behalf --
>
> (1) against any person (including (i) the United States, and (ii) any other governmental instrumentality or agency to the extent permitted by the Eleventh Amendment to the Constitution)... n644

As an additional waiver of sovereign immunity, the act also provides that any person may commence a civil action "against the Administrator where there is alleged a failure of the Administrator to perform any act or duty under this Act which is not discretionary with the Administrator...." n645

Jurisdiction in Clean Air Act citizen suits is conferred on federal district courts, "without regard to the amount in controversy or the citizenship of the parties," to enforce an emission standard or limitation, or an order, or to order the administrator to perform an act or duty, as may be required by the act. n646 If a petition to review an agency action or an agency's failure to act has been filed in the court of appeals, the proper jurisdiction still lies first with the federal district court. n647 The district court is clearly a better forum for this type of action than is the court of appeals, because for some actions no prior record of the administrative processes will have been created. n648 This jurisdiction of the district courts is to be distinguished from the jurisdiction conferred on the Court of Appeals in Washington, D.C., to review EPA actions in promulgating national standards, rules, and regulations. n649

Legal actions concerning violations of emission standards, limitations and orders, as distinguished from actions against the administrator, are to be brought only in the district where the source of the emissions is located. n650

No statute of limitations is indicated in the provisions of the act authorizing citizen suits. Ordinarily, when a federal act contains no limitations provisions, the federal court should apply the most appropriate state statute of limitations, unless a relevant federal limitations provision is available. In the context of the Clean Water Act, it has been held that the general federal five-year limitations period n651 is relevant and thus applicable to citizen suits. n652 This same reasoning may apply to Clean Air actions.

The *Gwaltney* case, decided under the Clean Water Act, has also clarified that violations alleged in citizen suits must be intermittent or ongoing, and may not be wholly past violations. n653 This has been followed in clean air citizen actions. n654 The rule that no action can be brought for violations that are wholly past also functions as a sort of statute of limitations.

No citizen suit against a person alleged to be in violation of emission standards, limitations or orders can be commenced unless at least 60 days earlier the plaintiff has given notice of the alleged violation to the alleged violator, as well as to the administrator and to the state in which the violation occurs. n655 The purpose of this notice is to provide time for correction of the violation, which would thus render further judicial action unnecessary, n656 and to that end the notice requirement is construed "flexibly and realistically." n657 There is disagreement among the courts about whether the notice requirement is jurisdictional, n658 but it does appear that citizen suits filed before the 60-notice requirement is met will generally be dismissed as premature. n659

If the plaintiff is commencing an action against the administrator for failure to perform a non-discretionary act or duty under the act, 60 days prior notice of the action must be given to the administrator, n660 again to permit corrective action to be taken before litigation is actually commenced.

In a violations case requiring the 60 days' notice, the 60-day waiting period may be ignored and the action filed immediately after giving notice, if the alleged violation relates to urgent conditions arising from certain emission standard violations n661 or from an order concerning such violations. n662

Although the notice prescribed by this act "shall be given in such manner as the Administrator shall prescribe by regulation." n663

Even prior notice is ineffective to authorize commencement of a citizen suit if the administrator or a state has already commenced *and is diligently prosecuting* n664 a compliance action with respect to a violation that might otherwise be the basis for a citizen suit. n665 In that circumstance, the citizen plaintiff is not permitted to commence a separate action, but is authorized to intervene as a matter of right in the administrator's or state's civil action in federal court. n666 Conversely, if the citizen suit is first commenced, then the administrator who is not already a party may intervene as a matter of right. n667

In contrast to the Clean Water Act, the Clean Air Act's citizen suit provisions impose no requirement that the citizen plaintiff serve a copy of the complaint on either the Attorney General or the EPA administrator after commencement of the action. n668

§ 75.12(c)(1)(iii) Proper Plaintiffs.

Under the usual rules for standing, n669 environmental organizations have standing to bring actions under the Clean Air Act citizen suit provisions, if they demonstrate that organizational members live in close proximity to the areas which are the subject of the action. n670 It should also be noted that "any person" may commence a citizen suit under the Clean Air Act, n671 whereas the terminology under the Clean Water Act is that any "citizen" may commence a citizen suit thereunder. n672 However, even under the Clean Water Act a "citizen" is defined as a "person" with an adversely affected interest, n673 so the respective acts' terminology apparently creates a distinction without a difference. "Person"

is not defined in the Clean Air Act.

§ 75.12(c)(1)(iv) Proper Defendants.

Defendants in a citizen suit under the Clean Air Act may be:

(1) the administrator in an action that alleges the administrator's failure to perform a non-discretionary act or duty under the Clean Air Act, n674 or

(2) any person allegedly in violation of an emission standard or limitation under the act, or in violation of an order from the administrator or a state with respect to such standard or limitation. n675 "Any person" includes the United States and, to the extent permitted by the Eleventh Amendment to the United States Constitution, "any other governmental instrumentality or agency." n676 The Eleventh Amendment, however, prohibits a federal court action in which a state is sued by a citizen of another state or by a foreign national.

It has been held that "any person" against whom a Clean Air Act citizen suit may be brought does not include individual corporate officers of an enterprise alleged to be in violation of emission standards. n677 However, it should be noted that individual, "responsible corporate officers" are among the persons subject to penalties for violations of Clean Air Act provisions. n678

§ 75.12(c)(1)(v) Remedies.

In a citizen suit brought under the Clean Air Act for violation of an emission standard or limitation, or an order with respect to such a standard or limitation;

> The district courts shall have jurisdiction ... to enforce such an emission standard or limitation, or such an order, or to order the Administrator to perform such act or duty, as the case may be. n679

Compensatory damages are not available as remedies in citizen suits, n680 but separate legal actions for causes of action under common law or some other statutory authorization may enable a plaintiff to seek damages.

§ 75.12(c)(2) Actions for Review of Administrator's Actions.

Distinct from the citizen suit provisions is a section of the Clean Air Act authorizing a

> petition for review of action of the Administrator in promulgating any national primary or secondary ambient air quality standard [and various other enumerated emission standards and requirements under the Clean Air Act]. n681

This section does not address the question of who may file such a petition, so courts have assumed that the usual rules of standing apply, and that the plaintiff must show some adverse impact on an interest of the plaintiff in order to be qualified to file a review petition. n682 Administrator's actions which can be reviewed under this section, but are not, are thereafter protected from subsequent judicial review in civil or criminal enforcement proceedings. n683

§ 75.12(c)(3) Costs and Attorney's Fees.

The costs and attorney's fees of any party are expressly recoverable in a citizen suit under the Clean Air Act:

> The court, in issuing any final order in any action brought pursuant to subsection (a) of this section, may award costs of litigation (including reasonable attorney and expert witness fees) to any party, whenever the court determines such award is appropriate. The court may, if a temporary restraining order

> or preliminary injunction is sought, require the filing of a bond or equivalent security in accordance with the Federal Rules of Civil Procedure. n684

This section has not been amended, as the Clean Water Act was in 1987, n685 to authorize the court to award costs to a "substantially prevailing party," although the court may make the award to any party as it deems appropriate.

§ 75.12(c)(4) State Regulation.

State regulation is an important element of the federal clean air legislation. State implementation plans n686 are vital to the effective implementation of national standards, and the federal regulatory scheme relies on concurrent environmental regulation by the states.

In some circumstances the federal regulation is quite assertive. For instance, states may not adopt standards relating to new motor vehicle emissions without a waiver of federal authority, n687 and a state may not adopt aircraft emission standards that are not identical to the federal standards. n688 The most sweeping limitation imposed by the federal legislation is the requirement that state standards not be less stringent than the federal standards:

> Except as otherwise provided in [certain enumerated sections] nothing in this Act shall preclude or deny the right of any State or political subdivision thereof to adopt or enforce (1) any standard or limitation respecting emissions of air pollutants or (2) any requirement respecting control or abatement of air pollution; except that if an emission standard or limitation is in effect under an applicable implementation plan or under *[42 U.S.C. §7411* or §7412], such State or political subdivision may not adopt or enforce any emission standard or limitation which is less stringent than the standard or limitation under such plan or section. n689

Overall state involvement in clean air regulation may be summarized as follows:

> In view of the pervasive impact of the Clean Air Act on air quality programs since 1970, there is considerable uniformity among the state schemes. Each of them is intended to allow the state to meet the national ambient air quality standards promulgated by E.P.A. In some states regulations set more stringent standards for the same pollutants as are covered by the federal promulgations. Some states also have adopted ambient standards on pollutants not addressed on a national scale. It should not be overlooked, however, that many states have statutory prohibitions on the adoption of regulations more stringent than federal restrictions. n690

§ 75.12(d) Private Litigation over Solid Waste Under the Resource Conservation and Recovery Act.

§ 75.12(d)(1) Citizen Suits Under the Resource Conservation and Recovery Act.

§ 75.12(d)(1)(i) Scope of the Action.

The Resource Conservation and Recovery Act 's citizen suit provision authorizes three types of actions. n691

First, the citizen plaintiff, described as "any person," may commence a civil action on his own behalf against "any person" (including the United States and other governmental instrumentalities and agencies) allegedly in violation of any permit, standard, regulation, condition, requirement, prohibition, or order which has become effective under the act. n692 Second, a citizen plaintiff may also commence an action against any person, including the United States and any other governmental instrumentality or agency (to the extent permitted by the Eleventh Amendment to the Constitution) or against any past or present owner, generator or transporter of solid or hazardous waste "which may present an imminent and substantial endangerment to health or environment." n693 Third, the citizen plaintiff may commence a civil action against the administrator for failure to perform a non-discretionary duty under the act. n694 The constraint

of the Eleventh Amendment on actions against governmental instrumentalities or agencies refers to the prohibition against actions against a state brought by citizens of another state or of a foreign country.

As with citizen suit provisions under other environmental legislation, it has been determined that the action may be brought only for present or ongoing violations, n695 although there is earlier authority to the contrary. n696 The statute itself also contains a major exception to this restriction in its provision permitting citizen suits against "past or present" owners, generators or transporters of solid or hazardous waste that presents endangerment to health or the environment. n697

§ 75.12(d)(1)(ii) Special Procedural Considerations.

Clearly the citizen suit provisions amount to a waiver of sovereign immunity by the United States. A plaintiff is authorized to bring suit against the United States if the federal government has violated the provisions of the act, or has been involved with waste that may present a danger to health or the environment, and also against the administrator if that official has failed to perform a non-discretionary act or duty under the act. It has been held that this waiver of sovereign immunity extends to civil claims under the Resource Conservation and Recovery Act, n698 but not with respect to the imposition of civil penalties against federal facilities. n699

Jurisdiction in citizen suits under this act rests with the federal district courts, "without regard to the amount in controversy or the citizenship of the parties." n700 Venue for such an action is appropriate in either the district where the violation occurs or where the endangerment occurs. If the action is one brought against the administrator for failure to perform a non-discretionary duty, it may be brought either in the district where the "violation," i.e., the failure to perform a required act or duty, occurred, or in the District Court for the District of Columbia. n701 Where venue is appropriate in more than one district, consolidation of actions with venue in different jurisdictions would be appropriate to avoid conflicting and duplicative litigation. n702

No limitation of actions is specified in the citizen suit provisions of the Resource Conservation and Recovery Act. Actions for violations completely in the past would be time based, if only ongoing or intermittent present violations may be the basis for an action against a violator or an administrator. n703 However, as has been mentioned with respect to the other environmental citizen suit provisions in this section, when a federal act contains no limitations provision, the court should apply an appropriate state statute of limitations or a relevant federal limitations statute. The general federal five-year limitations period n704 has been held relevant and applicable to citizen suits under the Clean Water Act n705 and is presumably also applicable to actions under the Solid Waste Disposal Act.

As with the citizen suit provisions in other environmental regulation statutes, a notice of violation followed by a 60-day waiting period must usually precede the action. Indeed, the U.S. Supreme Court has held that the notice requirement under this act *is* jurisdictional. n706 Under this act, before commencing an action for violations, a 60-day notice of the violation must be given to the administrator, n707 to the state in which the alleged violation occurs, n708 and to the alleged violator. n709 Even if the alleged violator signals an intent to do nothing to correct the alleged violation during the 60-day period, the waiting period must still be observed. n710 If the alleged violation relates to the provisions regarding hazardous waste management, n711 the action may be commenced any time after the notice is given, without the 60-day waiting period. n712

Although the notice requirement must be fulfilled before the court can proceed with the case, n713 courts have been fairly flexible as to the required contents of the notice. n714

If the proposed action relates not to a violation (an action brought under §6972(a)(1)(A)) but to the generation or management of any solid or hazardous waste that may endanger health or environment (an action brought under §6972(a)(1)(B)), a 90-day notice must be given to the administrator, the state allegedly endangered and the person whose conduct is the object of the complaint. n715 In neither case may an action be commenced if the administrator or

the state has commenced and is diligently prosecuting a civil or criminal action in federal or state court to address the problem that is the object of the proposed citizen suit. n716 Also, with respect to hazardous waste situations that may endanger health or environment, no citizen suit may be commenced, if the administrator or the state is pursuing remedies under the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA), n717 and only a state or local government can commence an action "with respect to the siting of a hazardous waste treatment, storage, or a disposal facility. n718

If a citizen plaintiff seeks to bring a civil action with respect to waste management practices that may present danger to health or the environment, n719 and the citizen suit is not permitted because an action by the public authority has already been commenced, the prospective citizen plaintiff may nevertheless intervene as a matter of right in the pending proceeding, n720 if it can be shown that intervention can protect an interest of the intervenor related to the subject matter of the action. n721 A similar but broader right rests in the administrator, who can intervene as a matter of right in any citizen suit, if the administrator is not already a party. n722

If the plaintiff is able to commence an action against a party whose involvement with solid or hazardous waste presents endangerment to health or the environment, n723 then copies of the complaint must be served on the attorney general and the administrator. n724

§ 75.12(d)(1)(iii) Proper Plaintiffs.

"Any person" may commence a citizen suit, but "person" is not defined in the statute. However, based on the interpretation of the term as used in similar, related environmental statutes, plaintiffs must be persons having an interest which is or may be adversely affected. n725 As was stated in the context of the Clean Water Act, to show an adversely affected interest plaintiffs must have suffered some injury in order to have standing to sue; however, that includes persons whose injuries are non-economic but who have standing under the holding of Sierra Club v. Morton, n726 as well as those who have suffered actual economic injury. n727

§ 75.12(d)(1)(iv) Proper Defendants.

As is the case under the citizen suit provisions in other environmental statutes, the possible defendants include parties who are violating the pertinent laws and regulations as well as the administrators and agencies responsible for enforcing those laws and regulations. It has been held that, because of similarity in citizen suit provisions, potential defendants under this act should be the same as under CERCLA n728 These provisions are also powerful enough to reach beyond some traditional barriers, so that even an Indian tribe operating a solid waste disposal facility on a reservation is a potential defendant. n729

§ 75.12(d)(1)(v) Remedies.

The court in a citizen suit has jurisdiction to order injunctive relief and impose civil penalties, but not to grant compensatory damages to the private plaintiff:

> The district court shall have jurisdiction ... to enforce the permit, standard, regulation, condition, requirement, prohibition, or order, referred to paragraph (1)(A), to restrain any person who has contributed or who is contributing to the past or present handling, storage, treatment, transportation, or disposal of any solid or hazardous waste referred to in paragraph (1)(B), to order such person to take such other action as may be necessary, or both, or to order the Administrator to perform the act or duty referred to in paragraph (2), as the case may be, and to apply appropriate civil penalties under §6928(a) and (g) of this title. n730

§ 75.12(d)(2) Actions for Review of Administrator's Actions.

Private citizens have statutory authority to commence an action for the purpose of subjecting to review the administrator's actions or failure to act. First, "any person may petition the Administrator for the promulgation, amendment, or repeal of any regulation under this chapter." n731 Second, a party may seek review of the Administrator's actions "in promulgating any regulation or requirement ... or denying any petition for promulgation." n732 Third, any interested person may seek judicial review of the administrator's action in issuing, denying, modifying or revoking permits or other authorizations under the act. n733

§ 75.12(d)(3) Costs and Attorney's Fees.

The court "may award costs of litigation (including reasonable attorney and expert witness fees) to the prevailing or substantially prevailing party, whenever the court determines such an award is appropriate." n734 This provision, introduced by amendment in 1984, is a more precise and restrictive approach to attorney fees than the original provision, which empowered the court to award these costs of litigation "whenever the court determines the award is appropriate."

§ 75.12(e) Summary of the Comparable Citizen Suit Provisions of Major Environmental Laws.

The provisions for citizen suits in the major federal environmental laws are so ostensibly similar that it may be questioned whether there are any *significant* differences between them. There are in fact some differences, although they are not major, and the approach of the acts remains substantially identical. Each confers on a plaintiff with standing the right to sue individual violators as well as the government officials responsible for control of the violations. Relief available in suits against the violators is in each case injunctive, with private compensatory damages available only through some other statutory or common law action, which remedies are preserved by the citizen suit laws.

Citizen suits are generally prohibited unless and until a 60-day notice is first given to the violator; if a responsible administrator has already commenced an action against the violator, the citizen plaintiff may not commence an independent action, but has a right to intervene in the administrator's action. Costs and attorney's fees may be recovered in citizen suits.

Among the differences to be found in these essentially similar statutes are:

1. The plaintiff may be denominated as "any person" or "any citizen." The difference may not be meaningful if "citizen" is then defined as any person whose interests are adversely affected by the alleged violations. In any event, the plaintiff in a citizen suit is often a public interest organization whose first hurdle, whether as citizen or person, is to establish standing.

2. The citizen suit provisions generally authorize a private action to review the action of the pertinent administrator. A civil action by the governor of a state may also be authorized, such as under the Clean Water Act. 3. Some acts enable a court to award recovery of costs and attorney's fees "as appropriate" (according to the court's discretion); other acts require costs and attorney's fees to be awarded only to the "prevailing" or the "substantially prevailing" party.

4. All of the acts contain language preserving rights of action under other statutes and under common law, but the terminology differs according to environmental area being regulated and interpretive court decisions under each act may vary in which rights of action are preserved. For instance, a citizen's clean water action under the federal common law of nuisance has been held pre-empted by the federal legislation.

5. Slight differences may appear in the wording of provisions requiring the 60-day notice, or preventing commencement of an action if an administrator or state action is already pending, or waiving the post-notice waiting period for certain violations.

6. Although service of a copy of the complaint on the attorney general and the appropriate administrator is sometimes not required, an environmental law may include a provision, for the protection of federal interests, that the citizen plaintiff serve a copy of the complaint on the attorney general and the appropriate administrator. A companion provision may require prior notice to the attorney general of any proposed consent judgment.

7. Each act contains some definition of key terms unique to its particular area of the environment.

8. The action which a citizen suit plaintiff may commence against government officials for failure to perform non-discretionary duties may simply name the administrator as potential defendant or may, as in CERCLA, name the "President or any other office of the United States."

9. The act may specify proper venue for an action against the administrator, or it may not, in which case normal federal venue rules apply.

§ 75.12(f) Sources of Citizen Suit Provisions in Federal Environmental Statutes.

Clean Air Act: *42 U.S.C. §7604.*

Clean Water Act: *33 U.S.C. §1365.*

Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA): *42 U.S.C. §9601 et seq*.

Deepwater Port Act: *33 U.S.C. §1515.*

Endangered Species Act: *16 U.S.C. §1504*(g).

Noise Control Act: *42 U.S.C. §4911.*

Ocean Dumping Act: *33 U.S.C. §1415*(g).

Outer Continental Shelf Land Act: *43 U.S.C. §1349.*

Safe Drinking Water Act: *42 U.S.C. §300j-8.*

Solid Waste Disposal Act: *42 U.S.C. §6972.*

Surface Mining Control and Reclamation Act: *30 U.S.C. §1270.*

Toxic Substances Control Act: *15 U.S.C. §2619.*

FOOTNOTES:

(n1)Footnote 562. Private nuisance actions are discussed in ch. 67, *supra*. *Presque Isle Harbor Dev. Co. v. Dow Chem. Co., 875 F. Supp. 1312 (W.D. Mich. 1995)* (possible common law action for environmental contamination under state law).

(n2)Footnote 563. Daniel P. Selmi & Kenneth A. Manaster, State Environmental Law §16.08[1], pp. 16-130 to 16-131 (1989).

(n3)Footnote 564. Daniel P. Selmi & Kenneth A. Manaster, State Environmental Law §16.08[1], pp. 16-83 to 16-86 (1990). *See, e.g., Baird v. County of Contra Costa, 38 Cal. Rptr. 2d 93 (1995)* (action under California

Environmental Quality Act).

(n4)Footnote 565. David Sive & Frank Friedman, A Practical Guide to Environmental Law 84 (ALI-ABA, 1987). *See also* Karen H. Edgecombe, *Recent Developments Relating to Citizens Suits Under the Clean Water Act*, C473 ALI-ABA 373 (1990).

(n5)Footnote 566. This section has been interpreted to allow suits based on alleged violation of water quality standards, and not only on violations of effluent standards. *Brown v. Callaway, 497 F.2d 1235 (6th Cir. 1974); Montgomery Envtl. Coalition v. Fri, 366 F. Supp. 261 (D.D.C. 1973).*

(n6)Footnote 567. *33 U.S.C. §1365*(a)(1); *Mississippi River Revival, Inc. v. Administrator, United States EPA, 107 F. Supp. 2d 1008 (D. Minn. 2000)* (Clean Water Act does not authorize a citizen suit challenging the adequacy of a city's permit application).

(n7)Footnote 568. *33 U.S.C. §1365*(a)(2).

(n8)Footnote 569. *Gwaltney of Smithfield v. Chesapeake Bay Found., Inc., 484 U.S. 49 (1987), on remand, 844 F.2d 170 (4th Cir.), 688 F. Supp. 1078 (E.D. Va. 1988)* j*udgment aff'd in part, rev'd in part, Chesapeake Bay Found., Inc. v. Gwaltney of Smithfield, Ltd., 890 F.2d 690 (4th Cir. 1989), superseded* by statute as recognized in *Glazer v. American Ecology Envtl. Serv. Corp., 894 F. Supp. 1029 (E.D.Tex. 1995). U.S. Public Interest Research Group v. Atlantic Salmon of Maine, LLC, 339 F.3d 23* (lst Cir. 2003) (only citizen suits alleging violation at time suit is brought are cognizable but once action has been brought and present violation established, court may order relief for past wrongs as well.) . *See also, Pennsylvania Envtl. Defense Found. v. Bellefonte Borough, 718 F. Supp. 431 (M.D. Pa. 1989); Brewer v. Ravan, 680 F. Supp. 1176 (M.D. Tenn. 1988).*

(n9)Footnote 570. *Natural Resources Defense Council, Inc. v. Texaco Ref. & Mktg., Inc., 719 F. Supp. 281 (D. Del. 1989) judgment aff'd in part, rev'd in part, Natural Resources Defense Council, Inc. v Texaco Refining and Marketing, Inc., 2 F.3d 493 (3d Cir. 1993).* ; *Student Pub. Interest Research Group of N.J., Inc. v. A.T. & T. Bell Labs., 617 F. Supp. 1190 (D.N.J. 1985); Sierra Club v. Simkins Indus., 617 F. Supp. 1120 (D. Md. 1985), aff'd, 847 F.2d 1109 (4th Cir. 1988).*

(n10)Footnote 571. *Middlesex County Sewerage Auth. v. National Sea Clammers Ass'n, 453 U.S. 1 (1981).*

(n11)Footnote 572. *City of Milwaukee v. Illinois, 451 U.S. 304 (1981).*

(n12)Footnote 573. *33 U.S.C. §1365*(a)(1).

(n13)Footnote 574. *Commonwealth of Mass. v. United States Vet. Admin., 541 F.2d 119 (1st Cir. 1976).*

(n14)Footnote 575. *Long Beach Twp. v. City of New York, 445 F. Supp. 1203 (D.N.J. 1978).*

(n15)Footnote 576. *33 U.S.C. §1365*(a)(2). *Preserved Endangered Areas of Cobb's History, Inc. v. Unites States Army Corps of Eng'rs, 87 F.3d 1242 (11th Cir. 1996)* (EPA administrator had sovereign immunity against portion of Clean Water Act suit concerning administrator's decision not to overrule Corps' determination on wetlands permit).

(n16)Footnote 577. *Ohio v. United States Dep't of Energy, 689 F. Supp. 760 (S.D. Ohio 1989) rev'd, United States Dep't of Energy v. Ohio, 503 U.S. 607 (1992).*

(n17)Footnote 578. *McClellan Ecological Seepage Situation v. Weinberger, 655 F. Supp. 601 (E.D. Cal. 1986) judgment vacated by McClellan Ecological Seepage Situation v. Perry, 47 F.3d 325 (9th Cir. 1995).*

(n18)Footnote 579. *33 U.S.C. §1365*(a); *Cross Timbers Concerned Citizens v. Saginaw, 991 F. Supp. 563 (N.D. Tex. 1997)* (The duty of the EPA under the clean water act to issue compliance orders is discretionary, not mandatory.

Therefore the federal court has no jurisdiction over this claim).

(n19)Footnote 580. *Lake Carrier's Ass'n v. MacMullan, 406 U.S. 498 (1972); Connecticut Fund for Env't, Inc. v. Upjohn Co., 660 F. Supp. 1397 (D. Conn. 1987); Brewer v. City of Bristol, Tenn., 577 F. Supp. 519 (E.D. Tenn. 1983).*

(n20)Footnote 581. *Gwaltney of Smithfield v. Chesapeake Bay Found., Inc., 484 U.S. 49 (1987), on remand, 844 F.2d 170 (4th Cir. 1988), 688 F. Supp. 1078 (E.D. Va. 1988)* superseded by statute as recognized in *Glazer v. American Ecology Envtl. Serv. Corp., 894 F. Supp. 1029 (E.D.Tex. 1995).*

(n21)Footnote 582. *33 U.S.C. §1365*(c)(1).

(n22)Footnote 583. *Long Beach Twp. v. City of New York, 445 F. Supp. 1203 (D.N.J. 1978).*

(n23)Footnote 584. *Student Pub. Interest Research Group of N.J., Inc. v. United States Metals Ref. Co., 681 F. Supp. 237 (D.N.J. 1987).*

(n24)Footnote 585. *Gwaltney of Smithfield v. Chesapeake Bay Found., Inc., 484 U.S. 49 (1987), on remand, 844 F.2d 170 (4th Cir. 1988), 688 F. Supp. 1078 (E.D. Va. 1988)* superseded by statute as recognized in *Glazer v. American Ecology Envtl. Serv. Corp., 894 F. Supp. 1029 (E.D.Tex. 1995).ONRC Action v. Columbia Plywood, Inc., 286 F.3d 1137 (9th Cir. 2002)* (notice of citizen suit was not specific enough to alert the defendant to the claims); *Pennsylvania Envtl. Defense Found. v. Bellefonte Borough, 718 F. Supp. 431 (M.D. Pa. 1989).*

(n25)Footnote 586. *28 U.S.C. §2462.*

(n26)Footnote 587. *Sierra Club v. Chevron U.S.A., Inc., 834 F.2d 1517 (9th Cir. 1987).*

(n27)Footnote 588. *33 U.S.C. §1365,* (b)(1)(A).

(n28)Footnote 589. *Protect Our Eagles' Trees (POETs) v. City of Lawrence, Kansas, 715 F. Supp. 996 (D. Kan. 1989); Pymatuning Water Shed Citizens for a Hygienic Env't v. Eaton, 506 F. Supp. 902 (W.D. Pa. 1980), aff'd, 644 F.2d 995 (3d Cir. 1981); Biederman v. Scharbarth, 483 F. Supp. 809 (E.D. Wis. 1980); Save Our Sound Fisheries Ass'n v. Callaway, 429 F. Supp. 1136 (D.R.I. 1977).*

(n29)Footnote 590. *33 U.S.C. §1365*(e).

(n30)Footnote 591. *Natural Resources Defense Council v. Train, 510 F.2d 692 (D.C. Cir. 1974); Environmental Defense Fund v. Alexander, 501 F. Supp. 742 (N.D. Miss. 1980); Evansville v. Kentucky Liquid Recycling, Inc. 604 F.2d 1008* (7th Cir.), *cert. denied, 444 U.S. 1025 (1979); Long Beach Twp. v. City of New York, 445 F. Supp. 1203 (D. N.J. 1978).*

(n31)Footnote 592. *33 U.S.C. §1365*(b)(1)(B); *Knee Deep Cattle Co. v. Bindana Inv. Co., 94 F.3d 514 (9th Cir. 1996)* (citizen suit allowed because the state was not diligently prosecuting action), *cert. dismissed, 117 S. Ct. 1027 (1997); Old Timer, Inc. v. Blackhawk-Central City Sanitation Dist., 51 F. Supp. 2d 1109 (D. Colo. 1999)* (The Clean Water Act bars commencement of citizen suits if a State is seeking an administrative penalty. However, the court is not retroactively stripped of its jurisdiction if a State seeks an administrative penalty after a citizen suit was commenced).

(n32)Footnote 593. *33 U.S.C. §1365*(b)(2); *Community Ass'n for Restoration of the Env't v. Henry Bosma Dairy, 65 F. Supp. 2d 1129 (E.D. Wash. 1999)* (One of the main reasons for the 60-day notice requirement is to allow the alleged violator time to comply with the Clean Water Act and thus eliminate the need for the suit).

(n33)Footnote 594. *33 U.S.C. §1316.*

(n34)Footnote 595. *33 U.S.C. §1317*(a).

(n35)Footnote 596. *Connecticut Fund for the Env't v. Job Plating Co., 623 F. Supp. 207 (D. Conn. 1985).*

(n36)Footnote 597. 40 C.F.R. §§135.1, 135.2.

(n37)Footnote 598. 40 C.F.R. §135.3(a).

(n38)Footnote 599. 40 C.F.R. §135.3(c).

(n39)Footnote 600. 40 C.F.R. §135.3(b).

(n40)Footnote 601. *Protect Our Eagles' Trees (POETs) v. City of Lawrence, Kansas, 715 F. Supp. 996 (D. Kan. 1989).*

(n41)Footnote 602. *Comite Pro Rescate De La Salud v. Puerto Rico Aqueduct & Sewer Auth., 693 F. Supp. 1234 (D.P.R. 1988); National Wildlife Fed'n v. Consumers Power Co., 657 F. Supp. 989 (W.D. Mich. 1987), rev'd on other grounds, 862 F.2d 580 (6th Cir. 1988).*

(n42)Footnote 603. *Student Pub. Interest Research Group of N.J., Inc. v. A.T. & T. Bell Labs., 617 F. Supp. 1190 (D.N.J. 1985).*

(n43)Footnote 604. *Chesapeake Bay Found., Inc. v. Bethlehem Steel Corp., 652 F. Supp. 620 (D. Md. 1987).*

(n44)Footnote 605. *33 U.S.C. §1365*(c)(3).

(n45)Footnote 606. *33 U.S.C. §1365*(c)(3)

(n46)Footnote 607. *33 U.S.C. §1365*(a).

(n47)Footnote 608. *33 U.S.C. §1365*(g); *Friends of the Earth, Incorporated v. Laidlaw Environmental Services (TOC), Inc., 528 U.S. 167 (2000)* (plaintiff groups had standing to bring citizen suit).

(n48)Footnote 609. *405 U.S. 727 (1972).* Under *Sierra Club*, standing exists if it can be shown that the plaintiff is within the class of persons intended to be protected by the statute and has been actually aggrieved by the administrative action or inaction. This latter criterion means the plaintiff must show some special interest in the area subject to the administrative action.

(n49)Footnote 610. *Middlesex County Sewerage Auth. v. National Sea Clammers Ass'n, 453 U.S. 1 (1981); Puerto Rico Campers' Association v. Puerto Rico Aqueduct and Sewer Authority, 219 F. Supp. 2d 201 (D. P. R. 2002)* (the association met the requirements for associational standing); *Association to Protect Hammersley, ELD, and Totten Inlets v. Taylor Resources, Inc., 299 F.3d 1007 (9th Cir. 2002)* (organization had standing to bring citizen's suit); *Maine People's Alliance v. Holtrachem Manufacturing Company, LLC, 211 F. Supp. 2d 237 (D. Maine 2002)* (organization had standing to bring citizen suit unter RCRA).

(n50)Footnote 611. *42 U.S.C. §1983.*

(n51)Footnote 612. *Chesapeake Bay Found., Inc. v. American Recovery Co., Inc., 769 F.2d 207 (4th Cir. 1985); Friends of the Earth v. Consolidated Rail Corp., 768 F.2d 57 (2d Cir. 1985); Atlantic States Legal Found. v. A1 Tech Specialty Steel Corp., 635 F. Supp. 284 (N.D.N.Y. 1986); Student Pub. Interest Research Group of N.J., Inc. v. A.T. & T. Bell Labs., 617 F. Supp. 1190 (D.N.J. 1985); Student Pub. Interest Research Group of N.J., Inc. v. Georgia-Pacific Corp., 615 F. Supp. 1419 (D.N.J. 1985); Friends of the Earth, Inc. v. Crown Central Petroleum Corp., 95 F.3d 358 (5th Cir. 1996)* (an organization whose members birdwatch and fish at a lake 18 miles from the source of the unlawful water pollution failed to meet the fairly traceable component of the standing doctrine to sue); *Friends of Earth, Inc. v. Gaston Copper Recycling Corp., 9 F. Supp. 2d 589 (D. S.C. 1998)* (The Clean Water Act that allows for a citizen suit by

anyone who "may be adversely affected" is limited by the injury prong of the Constitutional standing test).*The Piney Run Preservation Association v. County Commissioners of Carroll County, Maryland, 82 F. Supp. 2d 464 (D. Md. 2000)* (members of the plaintiff group living in the vicinity of a polluted stream suffered particularized injury for standing purposes).

(n52)Footnote 613. Holding that a state may bring a citizen suit: *Commonwealth of Mass. v. United States Vet. Admin., 541 F.2d 119 (1st Cir. 1976); People v. State of Ill. ex rel. Scott v. Hoffman, 425 F. Supp. 71 (S.D. Ill. 1977).* Holding that a state may not bring a citizen suit: *California v. Department of the Navy, 631 F. Supp. 584 (N.D. Cal. 1986), aff'd, 845 F.2d 222 (9th Cir. 1988).*

(n53)Footnote 614. *33 U.S.C. §1365*(b)(1)(B); *Solid Waste Agency of Northern Cook County v. United States Army Corps of Eng'rs, 101 F.3d 503 (7th Cir. 1996)* (village and citizens group allowed to intervene because outcome of action could sufficiently impair interests to support intervention as of right).

(n54)Footnote 615. *Friends of the Earth v. Consolidated Rail Corp., 768 F.2d 57 (2d Cir. 1985).*

(n55)Footnote 616. *Student Pub. Interest Research Group v. Fritzsche, Dodge & Olcott, 759 F.2d 1131 (3d Cir. 1985).*

(n56)Footnote 617. *33 U.S.C. §1365*(c)(2).

(n57)Footnote 618. *33 U.S.C. §1365*(a)(2).

(n58)Footnote 619. *33 U.S.C. §1365*(a)(1).

(n59)Footnote 620. *Id. Northwest Environmental Defense Center v. U.S. Army Corps of Engineers, 118 F. Supp. 2d 1115 (D. Ore. 2000)* (Clean Water Act does not permit citizen suit against private defendants).

(n60)Footnote 621. *Golden Gate Audubon Soc'y v. United States Army Corps of Eng'rs, 18 Envtl. L. Rep. 20992 (N.D. Cal. 1988) order amended, Golden Gate Audubon Soc'y v. United States Army Corps of Eng'rs, 717 F. Supp. 1417 (N.D. Cal. 1998).*

(n61)Footnote 622. *33 U.S.C. §1365*(a).

(n62)Footnote 623. *33 U.S.C. §1365*(a).

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(n64)Footnote 625. *33 U.S.C. §1365*(e).

(n65)Footnote 626. *33 U.S.C. §1369*(b)(1).

(n66)Footnote 627. *33 U.S.C. §1369*(b)(2).

(n67)Footnote 628. *33 U.S.C. §1365*(h).

(n68)Footnote 629. *33 U.S.C. §1365*(d).

(n69)Footnote 630. *See, e.g., Stoddard v. Western Carolina Regional Sewer Auth., 784 F.2d 1200 (4th Cir. 1986).*

(n70)Footnote 631. *33 U.S.C. §1370.*

(n71)Footnote 632. 1 Frank P. Grad, Treatise on Environmental Law §2.03[19][a] (Matthew Bender).

(n72)Footnote 633. *42 U.S.C. §7604*(a)(1).

(n73)Footnote 634. *42 U.S.C. §7604*(f).

(n74)Footnote 635. *42 U.S.C. §7604*(a)(2); *Mountain States Legal Found. v. Costle, 630 F.2d 754* (10th Cir.), *cert. denied, 419 U.S. 1034 (1980).*

(n75)Footnote 636. *42 U.S.C. §7604*(a)(3).

(n76)Footnote 637. *North Hempstead v. North Hills, 482 F. Supp. 900 (E.D.N.Y. 1979); Citizens for Clean Air, Inc. v. Corps of Eng'rs, United States Army, 356 F. Supp. 14 (S.D.N.Y. 1973).*

(n77)Footnote 638. *Gwaltney of Smithfield v. Chesapeake Bay Found., Inc., 484 U.S. 49 (1987)* superseded by statute as recognized in *Glazer v. Am. Ecology Envtl. Serv. Corp., 894 F. Supp. 1029 (E.D.Tex. 1995). Environmental Council of Sacramento v. Slater, 184 F. Supp. 2d 1016 (E.D. Cal. 2003), on remand, 844 F.2d 170 (4th Cir. 1988), 688 F. Supp. 1078 (E.D. Va. 1988).*

(n78)Footnote 639. *Moran v. Vaccarro, 684 F. Supp. 1201 (S.D.N.Y. 1988); Patton v. General Signal Corp., 984 F. Supp. 666 (W.D. N.Y. 1997)* (Plaintiffs under the Clean Air Act can base their suit on past violations if there were repeated violations).

(n79)Footnote 640. *42 U.S.C. §7604*(e).

(n80)Footnote 641. *U.S. v. Atlantic-Richfield Co., 478 F. Supp. 1215 (D. Mont. 1979).*

(n81)Footnote 642. *City of Milwaukee v. Illinois, 451 U.S. 304 (1981).*

(n82)Footnote 643. *42 U.S.C. §7607.*

(n83)Footnote 644. *42 U.S.C. §7604*(a)(1).

(n84)Footnote 645. *42 U.S.C. §7604*(a)(2).

(n85)Footnote 646. *42 U.S.C. §7604*(a); *Sierra Club v. Tri-State Generation and Transmission Ass'n, Inc., 173 F.R.D. 275 (D. Colo. 1997)* (The primary jurisdiction doctrine, if applied to citizen suits under the Clean Air Act, would frustrate Congress's intent to provide for a broad range of potential plaintiffs).

(n86)Footnote 647. *Citizens for a Better Env't v. Costle, 610 F. Supp. 106 (N.D. Ill. 1985).*

(n87)Footnote 648. *Indiana & Mich. Elec. Co. v. U.S.E.P.A., 733 F.2d 489 (7th Cir. 1984).*

(n88)Footnote 649. *42 U.S.C. §7607*(b)(1).

(n89)Footnote 650. *42 U.S.C. §7604*(c)(1).

(n90)Footnote 651. *28 U.S.C. §2462.*

(n91)Footnote 652. *Sierra Club v. Chevron U.S.A., Inc., 834 F.2d 1517 (9th Cir. 1987).*

(n92)Footnote 653. *Gwaltney of Smithfield v. Chesapeake Bay Found., Inc., 484 U.S. 49 (1987), on remand, 844 F.2d 170 (4th Cir. 1988), 688 F. Supp. 1078 (E.D. Va. 1988) judgment aff'd in part, rev'd in part, Chesapeake Bay Found., Inc. v. Gwaltney of Smithfield, Ltd., 890 F.2d 690 (4th Cir. 1989), superseded* by statute as recognized in *Glazer v. Am. Ecology Envtl. Serv. Corp., 894 F. Supp. 1029 (E.D.Tex. 1995).*

(n93)Footnote 654. *Moran v. Vaccarro, 684 F. Supp. 1201 (S.D.N.Y. 1988). See also Sierra Club v. Union Oil Co. of Cal., 19 Envtl. L. Rep. 20362 (N.D. Cal. 1988).* Refusing to apply the *Gwaltney* position (when the case was still in the court of appeals) to Clean Air Act cases is *Alabama ex rel. Graddick v. Veterans Admin., 18 Envtl. L. Rep. 20011 (M.D. Ala. 1986).*

(n94)Footnote 655. *42 U.S.C. §7604*(b)(1)(A).

(n95)Footnote 656. *Friends of the Earth v. Potomac Elec. Power Co., 546 F. Supp. 1357 (D.D.C. 1982).*

(n96)Footnote 657. *Wilder v. Thomas, 659 F. Supp. 1500 (S.D.N.Y. 1987).*

(n97)Footnote 658. Holding that the notice requirement is *not* jurisdictional, *see Kennecott Copper Corp. v. Train, 424 F. Supp. 1217 (D. Nev. 1976) rev'd, Kennecott Copper Corp. v. Costle, 572 F.2d 1349 (9th Cir. 1978).* . Holding that the notice requirement *is* jurisdictional, *see Philadelphia Council of Neighborhood Orgs. v. Coleman, 437 F. Supp. 1341 (E.D. Pa. 1977), motion denied, 451 F. Supp. 114* (E.D. Pa.), *aff'd without opinion, 578 F.2d 1375 (3d Cir. 1978).*

(n98)Footnote 659. *See, e.g., Highland Park v. Train, 519 F.2d 681 (7th Cir. 1975), cert. denied, 424 U.S. 927 (1976); Pinkney v. Ohio E.P.A., 375 F. Supp. 305 (N.D. Ohio 1974).*

(n99)Footnote 660. *42 U.S.C. §7604*(b)(2).

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(n101)Footnote 662. *42 U.S.C. §7413*(a).

(n102)Footnote 663. *42 U.S.C. §7604*(b).

(n103)Footnote 664. *Maryland Waste Coalition v. SCM Corp., 616 F. Supp. 1474 (D. Md. 1985); Kentucky Resources Council, Inc. v. U.S.E.P.A., 304 F. Supp. 2d 290 (W.D. Ky. 2004).*

(n104)Footnote 665. *Maryland Waste Coalition v. SCM Corp., 616 F. Supp. 1474 (D. Md. 1985).*

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(n106)Footnote 667. *42 U.S.C. §7604*(c).

(n107)Footnote 668. For further information regarding the Clean Air Act and the citizen suit provisions, see David T. Buente, *Citizen Suits and the Clean Air Act Amendments of 1990: Closing the Enforcement Loop, 21 Envtl. L. 2233 (1991);* Roger A. Greenbaum & Anne S. Peterson, *The Clean Air Act Amendments of 1990: Citizen Suits and How They Work,* 2 Fordham Envtl. L. REP. 79 (1991).

(n108)Footnote 669. *See Sierra Club v. Morton, 405 U.S. 717 (1972).*

(n109)Footnote 670. *Sierra Club v. Ruckelshaus, 602 F. Supp. 892 (N.D. Cal. 1984).*

(n110)Footnote 671. *42 U.S.C. §7604*(a).

(n111)Footnote 672. *33 U.S.C. §1365*(a).

(n112)Footnote 673. *33 U.S.C. §1365*(g); *Sugarloaf Citizens' Assoc. v. Department of Env't, 686 A.2d 605 (Md. 1996)* (farm owners near an incinerator had standing to sue) *cert. denied, 689 A.2d 58 (Md. App. 1997).*

(n113)Footnote 674. *42 U.S.C. §7604*(a)(2).

(n114)Footnote 675. *42 U.S.C. §7604*(a)(1).

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(n121)Footnote 682. *Dressman v. Costle, 759 F.2d 548 (6th Cir. 1985).*

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(n123)Footnote 684. *42 U.S.C. §7604*(d).

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(n133)Footnote 694. *42 U.S.C. §6972*(a)(2); *Spillane v. Commonwealth Edison Co., 291 F. Supp. 2d 728 (N.D. Ill. 2003)* (Imminence of danger does not require existing harm, only an ongoing threat of future harm.)

(n134)Footnote 695. *Lutz v. Chromatex, Inc., 718 F. Supp. 413 (M.D. Pa. 1989).*

(n135)Footnote 696. *Tanglewood E. Homeowners v. Charles-Thomas, Inc., 849 F.2d 1568 (5th Cir. 1988); Meghrig v. KFC Western, Inc., 116 S. Ct. 1251 (1996)* (the citizen suit provision of the Resource Conservation and Recovery Act does not authorize a private cause of action to recover prior costs for cleaning up waste that does not continue to pose a threat to health or environment at the time of the action); *Dydio v. Hesston Corp., 887 F. Supp. 1037 (N.D. Ill. 1995)* (although the Resource Conservation and Recovery Act does not permit suits based on wholly past violations, the plaintiff properly alleged an ongoing violation by the prior owner of the property for failing to take corrective action).

(n136)Footnote 697. *42 U.S.C. §6972*(a)(1)(B); *Meghrig v. KFC Western, Inc., 116 S. Ct. 1251 (1996)* (the citizen

suit provision of the Resource Conservation and Recovery Act does not authorize a private cause of action to recover prior costs for cleaning up waste that does not continue to pose a threat to health or environment at the time of the action).

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(n145)Footnote 706. *Hallstrom v. Tillamook County, 493 U.S. 20* ;, (1989). *See also* Michael T. Caljouw, Case Comment, *Environmental Law -- Failure to Comply with Sixty-Day Notice Provision for Citizen Suits Under Resource Conservation and Recovery Act Requires Dismissal -- Hallstrom v. Tillamook County, 110 S. Ct. 304 (1989), 24 Suffolk U. L. Rev. 875 (1990).*

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(n152)Footnote 713. *Ascon Props., Inc. v. Mobil Oil Co., 866 F.2d 1149 (9th Cir. 1989); McGregor v. Industrial Excess Landfill, Inc., 856 F.2d 39 (6th Cir. 1988).*

(n153)Footnote 714. *Proffit v. Township of Bristol, 754 F.2d 504 (3d Cir. 1985); Brewer v. Ravan, 680 F. Supp. 1176 (M.D. Tenn. 1988); Fishel v. Westinghouse Elec. Corp., 617 F. Supp. 1531 (M.D. Pa. 1985).*

(n154)Footnote 715. *42 U.S.C. §6972*(b)(2)(A).

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(n158)Footnote 719. *42 U.S.C. §6972*(a)(1)(B).

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(n160)Footnote 721. *42 U.S.C. §6972*(b)(2)(E); *Herdman v. Town of Angelica, 163 F.R.D. 180 (W.D.N.Y. 1995)* (environmental group allowed to intervene as defendant).

(n161)Footnote 722. *42 U.S.C. §6972*(d).

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(n165)Footnote 726. *405 U.S. 727 (1972).* Under *Sierra Club*, standing exists if it can be shown that the plaintiff is within the class of persons intended to be protected by the statute and has been actually aggrieved by the administrative action or inaction. This latter criterion means the plaintiff must show some special interest in the area subject to the administrative action.

(n166)Footnote 727. *Middlesex County Sewerage Auth. v. National Sea Clammers Ass'n, 453 U.S. 1 (1981).*

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CHAPTER 75 THE IMPACT OF ENVIRONMENTAL REGULATION ON REAL PROPERTY

8-75 Thompson on Real Property, Thomas Editions § 75.13

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Annotations

Annotation, *Air Pollution Control: Sufficiency of Evidence of Violation in Administrative Proceeding Termination in Abatement Order, 48 A.L.R.3d 795.*

Annotation, *Application of Requirement in §107(a) of Comprehensive Environmental Response, Compensation, and Liability Act(42 U.S.C.S. at 9607*(a)) *That Private Cost-Recovery Actions be Consistent with National Contingency Plan, 107 A.L.R. Fed. 562.*

Annotation, *Environmental and Conservation Groups' Standing to Challenge Omission or Adequacy of Environmental Impact Statement Required by §102(2)(c) of National Environmental Policy Act of 1969 (42 U.S.C.S. at 4332*(2)(C)), 63 A.L.R. 446.

Annotation, *Establishing "Release or Threatened Release" of Hazardous Substance from Facility for Purposes of Liability Pursuant to § 107 of Comprehensive Environmental Response, Compensation, and Liability Act (42 U.S.C.S. at 9607), 120 A.L.R. Fed. 1.*

Annotation, *General Principles Governing Standing to Maintain Action Challenging Omission or Adequacy of Environmental Impact Statement Required by §102(2)(C) of National Environmental Policy Act of 1969(42 U.S.C.S. at*

4332(2)(C)), *61 A.L.R. Fed. 87.*

Annotation, *Liability of Federal Government Under §107(a) of Comprehensive Environmental Response, Compensation, and Liability Act, (42 U.S.C.S. at 9607*(a)), *127 A.L.R. Fed. 511.*

Annotation, *Liability of Generators Pursuant to §107(a)(3) of Comprehensive Environmental Response, Compensation and Liability Act (CERCLA), (42 U.S.C.S. at 9607*(a)(3)), *126 A.L.R. Fed. 265.*

Annotation, *Liability Insurance Coverage for Violations of Anti-Pollution Laws, 87 A.L.R.4th 444.*

Annotation, *Liability Under §7003 of Resource Conservation and Recovery Act (42 U.S.C.S. at 6973) Pertaining to Imminent Hazards from Solid or Hazardous Waste, 115 A.L.R. Fed. 491.*

Annotation, *Private Individual's Standing to Challenge Omission or Adequacy of Environmental Impact Statement Required by §102(2)(C) of National Environmental Policy Act of 1969(42 U.S.C.S. at 4332*(2)(C)) *62 A.L.R. Fed. 337.*

Annotation, *Standing of Private Citizen, Association, or Organization to Maintain Action in Federal Court for Injunctive Relief Against Commercial Development or Activities, or Construction of Highways, or Other Governmental Projects, Alleged to be Harmful to Environment in Public Parks, Other Similar Recreational Areas, or Wildlife Refuges, 11 A.L.R. Fed. 556.*

Annotation, *Validity and Construction of §§106(a) and (b)(1) of Comprehensive Environmental Response, Compensation, and Liability Act (42 U.S.C.S. at 9606(a) and (b)(1)), Authorizing Equitable Abatement Actions and Administrative Orders and Prescribing Fines for Noncompliance with Such Orders, 87 A.L.R. Fed. 217.*

Annotation, *Validity, Construction, and Application of State Hazardous Waste Regulations, 86 A.L.R.4th 401.*

Annotation, *Validity, Construction, and Application of Statutes Requiring Assessment of Environmental Information Prior to Grants of Entitlements for Private Land Use, 76 A.L.R. 3d 388.* Annotation, *Validity, Construction, and Application of Variance Provisions in State and Local Air Pollution Control Laws and Regulations, 66 A.L.R.4th 711.*

Annotation, *What Are "Necessary Costs of Response" Within Meaning of 107(a)(4)(b) of Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) (42 U.S.C.S. at 9607(a)(4)(B)), 113 A.L.R. Fed. 1.*

Annotations Organized by Act

The annotations listed below have been arranged according to the environmental act referred to in their respective titles.

Clean Air Act Annotations

Annotation, *Application of Air Quality Modeling to Decisionmaking Under Clean Air Act (42 U.S.C.A. §§7401-7626), 84 A.L.R. Fed. 710.*

Annotation, *Application of §165 of Clean Air Act (42 U.S.C.A. §7475), Pertaining to Preconstruction Requirements for Prevention of Significant Deterioration, To Particular Emission Sources, 86 A.L.R. Fed. 255.*

Annotation, *Award of Costs and Attorney's Fees in Judicial Review of Administrative Proceedings Under §307(F) of Clean Air Act (42 U.S.C.A. §7607(F)), 146 A.L.R. Fed. 531.*

Annotation, *Clean Air Act Implementation Plans for Nonattainment Areas, 90 A.L.R. Fed. 481.*

Annotation, *Construction and Application of 42 U.S.C.A. §7604 (D) Pertaining to Recovering Costs of Litigation in Suits Under Clean Air Act, 85 A.L.R. Fed. 118.*

Annotation, *Construction and Application of Preemption Sections (§§208, 210(C)(4)) of Clean Air Act (42 U.S.C.A. §§1875F-6A, 1857F-6(c)(4)), 18 A.L.R. Fed. 971.*

Annotation, *Construction and Application of §307(B)(1) of Clean Air Act (42 U.S.C.A. §7607(B)(1) Pertaining to Judicial Review by Courts of Appeals, 86 A.L.R. Fed. 604.*

Annotation, *Control of Interstate Pollution Under Clean Air Act as Amended in 1977 (42 U.S.C.A. §§7401-7626), 82 A.L.R. Fed. 316.*

Annotation, *Decisions of Environmental Protection Agency (EPA) Approving or Disapproving State Implementation Plans As Interfering With Primary Role of States To Determine How National Ambient Air Quality Standards Should Be Met Under Clean Air Act (42 U.S.C.A. §§7401 et seq)., 151 A.L.R. Fed. 495.*

Annotation, *Environmental Protection Agency's Classifications of Air Quality Control Regions Under §107(D)(2) of Clean Air Act (42 U.S.C.A. §7407(D)(2)), 75 A.L.R. Fed. 328.*

Annotation, *Federal Requirements for Public Participation in Adoption, Submission, and Approval of State Implementation Plans and Revisions Pursuant to §110 of Clean Air Act (42 U.S.C.A. §7410), 151 A.L.R. Fed. 445.*

Annotation, *Orders or Penalties Against State or Its Officials For Failure to Comply With Regulations Directing State to Regulate Pollution-Creating Activities of Private Parties, Under §113 of Clean Air Act (42 U.S.C.A. §1857C-8), 31 A.L.R. Fed. 79.*

Annotation, *Preemption, by Provisions of Clean Air Act (42 U.S.C.A. §§7401 et seq)., of Federal Common Law of Nuisance in Area of Air Pollution, 61 A.L.R. Fed. 859.*

Annotation, *Private Contractor as "Authorized Representative" of Administrator of Environmental Protection Agency for Purpose of Inspections Conducted Under §114 of Clean Air Act (42 U.S.C.A. §7414), 72 A.L.R. Fed. 176.*

Annotation, *Standing of Air Pollution Source to Challenge Clean Air Act (42 U.S.C.A. §§7401-7626) or Its Implementation, 85 A.L.R. Fed. 515.*

Annotation, *What Are "Land-Use and Transportation Controls" Which May Be Imposed, Under §110(A)(2)(B) of Clean Air Act of 1970 (42 U.S.C.A. §1875C-5(A)(2)(B)), to Insure Maintenance of National Primary Ambient Air Quality Standards, 30 A.L.R. Fed. 156.*

Annotation, *What Constitutes Modification of Stationary Source, Under §111(A)(3), (4) of Clean Air Act (42 U.S.C.A. §7411(A)(3), (4)), so as to Subject Source to Environmental Protection Agency's New Source Performance Standards, 94 A.L.R. Fed. 750.*

CERCLA Annotations

Annotation, *Application of Requirement in §107(A) of Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) (42 U.S.C.A. §9607(A)) That Private Cost-Recovery Actions Be Consistent With National Contingency Plan, 107 A.L.R. Fed. 562.*

Annotation, *Application of Statutes of Limitations (42 U.S.C.A. §9613(G)) in Action Under §113(F) of Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) (42 U.S.C.A. §9613(F)) for Contribution for Response Costs or Damages, 143 A.L.R. Fed. 591.*

Annotation, *Application of Statutes of Limitations (42 U.S.C.A. §9613(G)) in Action Under §113(F) of Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) (42 U.S.C.A. §9613(F)) for Contribution for Removal or Remedial Action, 142 A.L.R. Fed. 115.*

Annotation, *Arranger Liability of Sellers Pursuant to §107(A)(3) of Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) (42 U.S.C.A. §9607 (A)(3)), 125 A.L.R. Fed. 315.*

Annotation, *Arranger Liability of State Government Under §107(A) of Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) (42 U.S.C.A. §9607(A)), 130 A.L.R. Fed. 431.*

Annotation, *Arranger Liability of Nongenerators Pursuant to §107(A)(3) of Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) (42 U.S.C.A. §9607(A)(3)), 132 A.L.R. Fed. 77.*

Annotation, *Construction and Application of Statute of Limitations (42 U.S.C.A. §9613(G)(1)) for Action Under §107 of Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) (42 U.S.C.A. §9607), 144 A.L.R. Fed. 285.*

Annotation, *Determination Whether Substance Is "Hazardous Substance" Within Meaning of §101 (14) of Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) (42 U.S.C.A. §9601(14)), 118 A.L.R. Fed. 293.*

Annotation, *Equitable Allocation of Response Costs in Contribution Action Under §113(f) of the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), 42 U.S.C.A. §9613(F): Factors Affecting Response Cost Liability of Generator, Broker or Arranger, and Transporter in Single, 146 A.L.R. Fed. 363.*

Annotation, *Equitable Considerations in Allocating Response Costs to Owner or Occupant of Previously Contaminated Facility in Action Pursuant to §113(F) of Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) (42 U.S.C.A. §9613(F), 148 A.L.R. Fed. 203.*

Annotation, *Establishing "Release or Threatened Release" of Hazardous Substance From Facility for Purposes of Liability Pursuant to §107 of Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) (42 U.S.C.A. §9607), 120 A.L.R. Fed. 1.*

Annotation, *Government Recovery of Cost of Hazardous Waste Removal Under Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) (42 U.S.C.A. §§9601 et. seq)., 70 A.L.R. Fed. 329.*

Annotation, *Indemnification or Release Agreement As Covering Liability Under §107(A) of Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) (42 U.S.C.A. §9607(A)), 139 A.L.R. Fed. 123.*

Annotation, *Liability of Dissolved Corporation or Corporation That Forfeited Charter in Action Pursuant to Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) (42 U.S.C.A. §§9601-9675), 123 A.L.R. Fed. 461.*

Annotation, *Liability of Federal Government Under §107(A) of Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) (42 U.S.C.A. §9607*(A)), *127 A.L.R. Fed. 511.*

Annotation, *Liability of Individual Shareholder, or Director of Corporation That Owned Contaminating Facility in Action Pursuant to Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) (42 U.S.C.A. §§9601-9675), 122 A.L.R. Fed. 321.*

Annotation, *Liability of Generators Pursuant to §107(A)(3) of Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) (42 U.S.C.A. §9607(A)(3)), 126 A.L.R. Fed. 265.*

Annotation, *Liability of Local Government Under §107(A) of Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) (42 U.S.C.A. §9607(A)), 133 A.L.R. Fed. 293.*

Annotation, *Liability of Parent or Successor Corporation, or Corporate Shareholders, in Action Pursuant to Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) (42 U.S.C.A. §§9601-9675), 121 A.L.R. Fed. 173.*

Annotation, *Private Entity's Status as Owner or Operator Under §107 (A) (1,2) of Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) (42 U.S.C.A. §9607(A)(1,2)), 140 A.L.R. Fed. 181.*

Annotation, *Secured Lender Liability: Application of Security Interest Exemption From Definition of "Owner or Operator" Under §101(20)(A) of Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) (42 U.S.C.A. §9601*(20)(A)), *131 A.L.R. Fed. 293.*

Annotation, *Third-Party Defense To Liability Under §107 of Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) (42 U.S.C.A. §9607), 105 A.L.R. Fed. 21.*

Annotation, *Transporter Liability Under §107(A)(4) of Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) (42 U.S.C.A. §9607(A)(4)), Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) (42 U.S.C.A. 112* A.L.R. Fed. 49.

Annotation, *Validity and Construction of §106(A) and (B)(1) of Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) (42 U.S.C.A. §9606(A) and (B)(1), Authorizing Equitable Abatement Actions and Administrative Orders and Prescribing Fines for Noncompliance With Such Orders, 87 A.L.R. Fed. 217.*

Annotation, *What Claims Fall Within Limitation Imposed by §113(H) of Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) (42 U.S.C.A. §9631(H)) on Judicial Review of Cases Arising Under CERCLA, 116 A.L.R. Fed. 1.*

Annotation, *What Constitutes "Disposal" for Purposes of Owner or Operator Liability Under §107(A)(2) of Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) (42 U.S.C.A. §9607(A)(2)), 136 A.L.R. Fed. 117.*

Annotation, *What Constitutes "Facility" Within Meaning of §101(9) of the Comprehensive, Environmental Response, Compensation, and Liability Act (CERCLA) (42 U.S.C.A. §9601(9)), 146 A.L.R. Fed. 469.*

Federal Insecticide, Fungicide, and Rodenticide Act Annotation

Annotation, *What Constitutes Use of Pesticide in Manner Inconsistent With Its Labeling, so as to Violate §12(A)(2)(G) of Federal Insecticide, Fungicide, and Rodenticide Act (7 U.S.C.A. §136J(A)(2)(G)), 69 A.L.R. Fed. 835.*

Federal Water Pollution Control Act Annotations

Annotation, *Citizen's Action Under 33 U.S.C.A. §1365(A)(1) for Violation of Effluent Standards or Limitations Under Federal Water Pollution Control Act (33 U.S.C.A. §§1251 et. seq). or Orders With Respect Thereto, 68 A.L.R. Fed. 701.*

Annotation, *Availability of Court of Appeals Review, Under §509(B)(1)(E) of Federal Water Pollution Control Act (33 U.S.C.A. §1369(B)(1)(E)), of Action By Administrator of Environmental Protection Agency in Approving or Promulgating Effluent and Other Limitations, 62 A.L.R. Fed. 906.*

Annotation, *Citizen's Action Against Administrator of Environmental Protection Agency to Compel Performance of Nondiscretionary Duty Under §505(A)(2) of Federal Water Pollution Control Act (33 U.S.C.A. §1365(A)(2)), 57 A.L.R. Fed. 851.*

Annotation, *Construction and Application of Provision of Federal Water Pollution Control Act (33 U.S.C.A. §1321(B)(5) and Similar Predecessor, Formerly Designated as 33 U.S.C.A. §1161(B)(4) Requiring Person in Charge of Vessel, or Onshore or Offshore Facility, to Notify Federal Agency of Prohibited..., 17 A.L.R. Fed. 804.*

Annotation, *Construction of "Transacts Such Business" For Purposes of §509(B)(1) of the Federal Water Pollution Control Act (33 U.S.C.A. §1369(B)(1)) Which Authorizes Judicial Review of Action By Administrator of Environmental Protection Agency, 50 A.L.R. Fed. 887.*

Annotation, *Criminal Proceedings, Under §309(C)(1,3) of the Federal Water Pollution Control Act (33 U.S.C.A. §1319(C)(1,3)), Based on Violation of §301(A) of the Act (33 U.S.C.A. §1311(A)), Prohibiting Discharge of Pollutants Without a Permit, 53 A.L.R. Fed. 481.*

Annotation, *Direct Review By Federal Courts of Appeals of Action By Administrator of Environmental Protection Agency Not Specifically Enumerated in §508(B)(1) of the Federal Water Pollution Control Act (33 U.S.C.A. §1369(B)(1)), Which Authorizes Direct Review of Specified Actions Taken by the..., 56 A.L.R. Fed. 918.*

Annotation, *Liability, Under §311(B)(6) of Federal Water Pollution Control Act (33 U.S.C.A. §1321(B)(6)), of Owner, Operator, or Person in Charge of Onshore or Offshore Facility, or Vessel, for Discharge of Oil or Hazardous Substance, 55 A.L.R. Fed. 141.*

Annotation, *Liability, Under §311(F,G) of Federal Water Pollution Control Act (33 U.S.C.A. §1321(F,G)), to United States of Owner or Operator of Onshore or Offshore Facility or Vessel, for Discharge of Oil or Hazardous Substance, 56 A.L.R. Fed. 343.*

Annotation, *Liability, Under §311(I) of Federal Water Pollution Control Act (33 U.S.C.A. §1321(I)), of United States to Owner or Operator of Onshore or Offshore Facility, or Vessel, for Removal Costs of Oil or Hazardous Substance, 59 A.L.R. Fed. 282.*

Annotation, *What Are "Navigable Waters" Subject to the Provisions of the Federal Water Pollution Control Act, as Amended (33 U.S.C.A. §1251 et. seq), 52 A.L.R. Fed. 788.*

Annotation, *What Constitutes Discharge of Dredged or Fill Material Into Navigable Waters, so as to Subject to Permit Requirements under §404(A) of Federal Water Pollution Control Act (33 U.S.C.A. §1344(A)), 72 A.L.R. Fed. 703.*

Annotation, *What Constitutes "Issuing or Denying" Permit for Discharge of Pollutants Within Meaning Of §509(b)(1)(f) of the Federal Water Pollution Control Act (33 U.S.C.A. §1369(B)(1)(F)) Which Authorizes Judicial Review of Such Action by Administrator of Environmental Protection Agency, 67 A.L.R. Fed. 365.*

NEPA Annotations

Annotation, *Affirmative Defenses in Actions Challenging Omission or Adequacy of Environmental Impact Statement Required by §102(2)(C) of National Environmental Policy Act of 1969 (42 U.S.C.A. §4332(2)(C)), 63 A.L.R. Fed. 18.*

Annotation, *Construction and Application of §§101-1-5 of National Environmental Policy Act of 1969 (42 U.S.C.A. §§4331-4335) Requiring All Federal Agencies to Consider Environmental Factors in Their Planning and Decisionmaking, 17 A.L.R. Fed. 33.*

Annotation, *Environmental and Conservation Group's Standing to Challenge Omission or Adequacy of Environmental Impact Statement Required by §102(2)(C) of National Environmental Policy Act of 1969 (42 U.S.C.A. §4332(2)(C)), 63 A.L.R. Fed. 337.*

Annotation, *General Principles Governing Standing to Maintain Action Challenging Omission or Adequacy of Environmental Impact Statement Required by §102(2)(C) of National Environmental Policy Act of 1969 (42 U.S.C.A. §4332(2)(C)), 61 A.L.R. Fed. 87.*

Annotation, *Governmental Entity's Standing to Challenge Omission or Adequacy of Environmental Impact Statement Required by §102(2)(C) of National Environmental Policy Act of 1969 (42 U.S.C.A. §4332(2)(C)), 64 A.L.R. Fed. 521.*

Annotation, *Necessity and Sufficiency of Environmental Impact Statements Under §102(2)(C) of National Environmental Policy Act of 1969 (42 U.S.C.A. §4332(2)(C)), in Cases Involving Defense, Military, and Related Projects, 75 A.L.R. Fed. 119.*

Annotation, *Necessity and Sufficiency of Environmental Impact Statements Under §102(2)(C) of National Environmental Policy Act of 1969 (42 U.S.C.A. §4332(2)(C)), in Cases Involving Herbicide, Pesticide, and Related Projects, 74 A.L.R. Fed. 702.*

Annotation, *Necessity and Sufficiency of Environmental Impact Statements Under §102(2)(C) of National Environmental Policy Act of 1969 (42 U.S.C.A. §4332(2)(C)), in Cases Involving Highway Projects, 64 A.L.R. Fed. 15.*

Annotation, *Necessity and Sufficiency of Environmental Impact Statements Under §102(2)(C) of National Environmental Policy Act of 1969 (42 U.S.C.A. §4332(2)(C)), in Cases Involving Housing and Urban Renewal Projects, 65 A.L.R. Fed. 121.*

Annotation, *Necessity and Sufficiency of Environmental Impact Statements Under §102(2)(C) of National Environmental Policy Act of 1969 (42 U.S.C.A. §4332(2)(C)), in Cases Involving Hunting, Fishing, and Related Projects, 74 A.L.R. Fed. 852.*

Annotation, *Necessity and Sufficiency of Environmental Impact Statements Under §102(2)(C) of National Environmental Policy Act of 1969 (42 U.S.C.A. §4332(2)(C)), in Cases Involving Logging, Mining, and Related Projects, 74 A.L.R. Fed. 702.*

Annotation, *Necessity and Sufficiency of Environmental Impact Statements Under §102(2)(C) of National Environmental Policy Act of 1969 (42 U.S.C.A. §4332(2)(C)), in Cases Involving Park, Recreational, Wilderness, and Related Projects, 75 A.L.R. Fed. 738.*

Annotation, *Necessity and Sufficiency of Environmental Impact Statements Under §102(2)(C) of National Environmental Policy Act of 1969 (42 U.S.C.A. §4332(2)(C)), in Cases Involving Pollution Abatement and Related Projects, 76 A.L.R. Fed. 563.*

Annotation, *Necessity and Sufficiency of Environmental Impact Statements Under §102(2)(C) of National Environmental Policy Act of 1969 (42 U.S.C.A. §4332(2)(C)), in Cases Involving Power Projects, 66 A.L.R. Fed. 395.*

Annotation, *Necessity and Sufficiency of Environmental Impact Statements Under §102(2)(C) of National Environmental Policy Act of 1969 (42 U.S.C.A. §4332(2)(C)), in Cases Involving Projects Relating to Acquisition, Construction, Alteration, or Disposition of Government Facilities, 76 A.L.R. Fed. 279.*

Annotation, *Necessity and Sufficiency of Environmental Impact Statements Under §102(2)(C) of National Environmental Policy Act of 1969 (42 U.S.C.A. §4332(2)(C)), in Cases Involving Regulation of Private Enterprise, 76 A.L.R. Fed. 902.*

Annotation, *Necessity and Sufficiency of Environmental Impact Statements Under §102(2)(C) of National Environmental Policy Act of 1969 (42 U.S.C.A. §4332(2)(C)), in Cases Involving Transportation Projects, 62 A.L.R. Fed. 664.*

Annotation, *Necessity and Sufficiency of Environmental Impact Statements Under §102(2)(C) of National Environmental Policy Act of 1969 (42 U.S.C.A. §4332(2)(C)), in Cases Involving Water and Waterworks Projects, 67 A.L.R. Fed. 54.*

Annotation, *Private Individual's Standing to Challenge Omission or Adequacy of Environmental Impact Statement Required by §102(2)(C) of National Environmental Policy Act of 1969 (42 U.S.C.A. §4332(2)(C)), 62 A.L.R. Fed. 337.*

Annotation, *Standing of Entity, Other Than Governmental or Environmental Entity, to Challenge Omission or Adequacy of Environmental Impact Statement Required by §102(2)(C) of National Environmental Policy Act of 1969 (42 U.S.C.A. §4332(2)(C)), 61 A.L.R. Fed. 657.*

Noise Control Act Annotation

Annotation, *Judicial Review Under §16 of Noise Control Act of 1972 (42 U.S.C.A. §4915) of Action of Administrator of Environmental Protection Agency, 59 A.L.R. Fed. 705.*

Oil Pollution Act Annotation

Annotation, *What Constitutes a Violation of the Prohibition, in the Oil Pollution Act of 1924 (33 U.S.C.A. §§431 et seq)., of Discharge of Oil Into Navigable Waters and Adjoining Shorelines, 2 A.L.R. Fed. 794.*

Toxic Substances Control Act Annotation

Annotation, *State or Local Regulation of Toxic Substances as Pre-Empted by Toxic Substances Control Act (15 U.S.C.A. §§2601 et. seq)., 84 A.L.R. Fed. 913.*

Endangered Species Act Annotations

Annotation, *Criminal Prosecution Under Endangered Species Act of 1973 (16 U.S.C.A. §§1531-1543), 128 A.L.R. Fed. 271.*

Annotation, *Validity, Construction, and Application of Endangered Species Act of 1973 (16 U.S.C.A. §§1531 -1543), 32 A.L.R. Fed. 332.*

Federal Land Policy and Management Act (FLPMA) Annotation

Annotation, *"Compliance With State Standards" as Requirement to Granting Right-of-Way Over Federal Public Lands Under §505(A)(IV) of the Federal Land Policy and Management Act of 1976 (43 U.S.C.A. §1765(A)(IV)), 60 A.L.R. Fed. 386.*

Outer Continental Shelf Lands Act Annotations

Annotation, *Construction and Application of §4 of Outer Continental Shelf Lands Act of 1953 (43 U.S.C.A. §1333), Relating to Laws Applicable to Subsoil and Seabed of Outer Continental Shelf and Artificial Islands and Fixed Structures Erected Thereon, 30 A.L.R. Fed. 615.*

Annotation, *Grant, Administration, and Construction, Under Outer Continental Shelf Lands Act of 1953 (43 U.S.C.A. §§1331 et seq). of Leases to Explore for Oil and Gas Deposits Under Continental Shelf, 31 A.L.R. Fed. 615.*

Resource Conservation and Recovery Act (RCRA) Annotations

Annotation, *Liability Under §7003 of Resource Conservation and Recovery Act (42 U.S.C.A. §6973) Pertaining to Imminent Hazards From Solid or Hazardous Waste, 115 A.L.R. Fed. 491.*

Annotation, *Right to Maintain Action Based on Violation of §7003 of Resource Conservation and Recovery Act (42 U.S.C.A. §6973) Pertaining to Imminent Hazards From Solid or Hazardous Waste, 105 A.L.R. Fed. 800.*

Annotation, *Right to Maintain Citizen Suit Under §7002 of Resource Conservation and Recovery Act (42 U.S.C.A. §6972), 91 A.L.R. Fed. 436.*

Annotation, *Sovereign Immunity of United States Under §6001 of Resource Conservation and Recovery Act of 1976 (42 U.S.C.A. §6961) With Respect to Criminal Penalties or Noninjunctive Relief, 108 A.L.R. Fed. 632.*

Annotation, *What Constitutes "Hazardous Waste" Subject to Regulation Under Resource Conservation and Recovery Act (42 U.S.C.A. §§6901 et seq), 135 A.L.R. Fed. 197.*

Surface Mining Control and Reclamation Act (SMCRA) Annotations

Annotation, *Award of Attorneys' Fees Pursuant to §§520(D), 520(F), or 703(C) of Surface Mining Control and Reclamation Act of 1977 (30 U.S.C.A. §§1270(D), 1270(F), 1275(E)), 89 A.L.R. Fed. 171.*

Annotation, *Liability for Reclamation Fees Under §402 of Surface Mining Control and Reclamation Act (30 U.S.C.A. §1232), 117 A.L.R. Fed. 377.* Annotation, *Penalties Under 30 U.S.C.A. §1268 for Violating Surface Mining Control and Reclamation Act, 82 A.L.R. Fed. 218.*

Thompson on Real Property, Thomas Editions

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Supp. To CHAPTER 75 THE IMPACT OF ENVIRONMENTAL REGULATION ON REAL PROPERTY

8-75 Thompson on Real Property, Thomas Editions Supp. to § 75.03

Supp. to § 75.03 Summary of Federal Environmental Laws That Impact Real Property

1986 Internal Revenue Code

§ 75.03(a) Legislation for Combatting Environmental Hazards [Go To Main]

§ 75.03(a)(1) Acid Precipitation Act of 1980 *(42 USC §§ 8901* to 8912).

Add serial comma after "social" in line 3, below:

(b) The Congress declares that it is the purpose of this subchapter--

(1) to identify the causes and sources of acid precipitation;

(2) to evaluate the environmental, social and economic effects of acid precipitation; and

Replace the word subtitle with subchapter in §§ (b)(3) and (c)

(b) The Congress declares that it is the purpose of this subchapter-- ... .

(3) based on the results of the research program established by this **subchapter** (not subtitle) and to the extent consistent ... .

(c) For purposes of this **subchapter** (not subtitle) the term "acid precipitation" means the wet or dry deposition from the atmosphere of acid chemical compounds.

§ 75.03(a)(2) Act to Prevent Pollution from Ships *(33 U.S.C. §§ 1901* to 1912).

Add:

United States v. Abrogar, 459 F.3d 430 (2006) (the Act to Prevent Pollution from Ships did not make foreign vessels liable for actions committed outside the boundaries of U.S. waters).

§ 75.03(a)(5) Clean Air Act *(42 USC §§ 7401* to 7642).

In the heading, as written above, change sections from "§§ 7401 to 7642" to "§§ 7401 to 7671."

§ 75.03(a)(6) Clean Vessel Act of 1992 *(33 U.S.C. § 1322* note).

Change to read as follows:

United States v. West Indies Transport, Inc., 127 F.3d 299 (3d Cir. 1997) (The barge where the defendants housed workers was not a "vessel" as defined by the Clean Vessel Act of 1992, because the barge was permanently moored to the shore and partially submerged, making it incapable of being used for transport. Therefore, the Clean Vessel Act of 1992 did not apply, and the defendants were properly convicted of discharging sewage as a point of source polluter under the Clean Water Act).

§ 75.03(a)(7) Clean Water Act of 1977.

In the last line, change "§ 75.03(1)(15)" to "§ 75.03(a)(14)".

§ 75.03(a)(8) Community Environmental Response Facilitation Act *(42 U.S.C. § 9620* note).

Add:

In *Jessco Corp. v. Chrysler Corp., 829 F. Supp. 224, 227-28 (W.D. Mich. 1993)* (government agencies can be held liable for cleanup costs under the Community Environmental Response Facilitation Act only if the facility is currently owned or operated by that agency.

§ 75.03(a)(10) Emergency Planning and Community Right to Know Act of 1986 *(42 U.S.C. §§ 11001* to 11050).

The text for this section should read as follows:

Originally part of the Superfund Amendments and Reauthorization Act of 1986 (SARA), the Emergency Planning and Community Right to know act of 1986 (EPCRA) has emerged as an important free standing law designed to help communities protect themselves from the harms of chemical pollutants. The EPCRA does this by requiring state and local communities to plan for emergencies involving chemical hazards. Each state is required to form a State

Emergency Response Commission (SERC), which is responsible for dividing the state into emergency districts, and appointing a Local Emergency Planning Committee (LERC) to oversee each district. Each LERC must devise a comprehensive emergency plan for their district, which is to be reviewed and updated every year. In addition to a planning element, the EPCRA also contains a reporting requirement.

Any facility that uses, stores, transfers, or releases a hazardous chemical is required to report this to the LERC within which it resides. The reporting requirements are different depending on the amount and hazardous nature of the substance being used. In addition, any accidental spills or discharges of any of these substances must be reported. This reporting element is designed to make communities more aware of the potential hazards they face, as well as give them an opportunity to avoid unnecessary harm in the future. FN 12

Footnote 12 should read as follows:

H.R. Rep. No. 253(I), 99th Cong., 2d Sess., at 44 (1986) . *Steel Co. v. Citizens for a Better Environment, 523 U.S. 83 (U.S. 1998)* (The community group brought an action under the EPCRA for failure to file a required report. The Supreme Court dismissed the action because the citizen's group did not meet the redressability requirement for standing).

§ 75.03(a)(11) Environmental Quality Improvement Act of 1970 *(42 USC §§ 4371* to 4375).

In the last line, change "provisions" to "provision"

§ 75.03(a)(13) Federal Insecticide, Fungicide, and Rodenticide Act *(7 U.S.C. §§ 136* to 136y).

The heading should read as follows:

§ 75.03(a)(13) Federal Insecticide, Fungicide, and Rodenticide Act (*7 U.S.C. §§ 136 to 136y*) a.k.a. the Pesticide Registration Improvement Act of 2003.

§ 75.03(a)(14) Federal Water Pollution Control Act *(33 U.S.C. §§ 1251* to 1387).

The section heading should read:

§ 75.03(a)(14) Federal Water Pollution Control Act (1986 Internal Revenue Code) a.k.a. The Clean Water Act of 1977.

§ 75.03(a)(15) Federal Water Pollution Control Act *(33 USC §§ 1251* to 1387).

Change note 18 to read:

See *42 U.S.C. § 4852(d)*

§ 75.03(a)(18) Medical Waste Tracking Act of 1988 *(42 U.S.C. §§ 6992* to 6992k).

In section (a)(7) replace the word "act" with the word "chapter."

Add:

This act was intended to last only 2 years, and consequently expired in 1991.

§ 75.03(a)(22) Noise Control Act of 1972 *(42 U.S.C. §§ 4901* to 4918).

Add:

While the Noise Control Act of 1972 remains in effect, it is essentially unfunded because the Environmental Protection Agency has transferred the primary responsibility of regulating noise to the state and local governments. U.S. Environmental Protection Agency, Noise Control Act, http://www.epa.gov/ history/topics/nca/index.htm (last visited May 10, 2007).

The case in footnote 25 (Rushing v. Kansas City) has been overruled on a point of law regarding expert testimony.

§ 75.03(a)(26) Oil Pollution Act of 1990 *(33 U.S.C. §§ 2701* to 2761).

Add:

Rice v. Harken Exploration Co., 89 F. Supp. 2d 820 (N.D. Tex., 1999) (The court held that a landowner was unable to sue an oil exploration company under the Oil Pollution Act (OPA) for damages to his land caused by an offshore oil spill because the OPA applies to damage caused to navigable channels of water, not land).

§ 75.03(a)(29) Safe Drinking Water Act *(42 U.S.C. §§ 300f* to 300j-11)

Add:

United States v. Mass. Water Res. Auth. 256 F.3d 36 (1st Cir, 2001) (There is no statute of limitations for violations of

the Safe Drinking Water Act; therefore there is no limitations period within which the government must bring an enforcement suit).

§ 75.03(a)(30) Solid Waste Disposal Act *(42 U.S.C. §§ 6901* to 6991i) a.k.a. the Land Disposal Program Flexibility Act of 1996.

The title should include the following:

See § 75.03(b)(21) Resource Conservation and Recovery Act of 1976 (*42 U.S.C. §§ 6901 to 6991i*).

§ 75.03(a)(31) Toxic Substances Control Act *(15 U.S.C. §§ 2601* to 2692).

Add:

The case, *Flue-Cured Tobacco Stabilization Corp. v. United States E.P.A., 4 F. Supp. 2d 435 (M.D.N.C. 1988)* was vacated with no subsequent treatment. *See Flue-Cured Tobacco Coop. Stabilization Corp. v. United States EPA, 313 F. 3d 852* (4*th* Cir. N.C. 2002) .

§ 75.03(b)(3) Coastal Zone Management Act of 1972 *(16 U.S.C. §§ 1451* to 1464).

Add:

Case overturned by statute. See *California v. Norton, 311 F.3d 1162 (9 Cal. App. 2002*).

§ 75.03(b)(6) Federal Land Policy and Management Act of 1976 *(43 U.S.C. §§ 1701* to 1784).

Add:

S. Utah Wilderness Alliance v. BLM, 425 F.3d 735 (10th Cir. 2005) (any holder of a legitimate right of way across federal land must consult with the appropriate federal land management agency before making improvements that would be classified as more than routine).

§ 75.03(b)(13) Mining and Mineral Resources Research Institute Act of 1984 *(30 U.S.C. §§ 1221* to 1230).

Add:

According to the text of the act, federal funding for this research ended in 1994.

§ 75.03(b)(21) Resource Conservation and Recovery Act of 1976 *(42 U.S.C. §§ 6901* to 6991i).

Add:

U.S. Dept. of Energy v. Ohio, 503 U.S. 607 (U.S. 1992) has been superseded by statute. *See Crowley Marine Servs. v. FEDNAV, Ltd., 915 F. Supp. 218 (E.D. Wash. 1995)* .

§ 75.03(b)(22) Shore Protection Act of 1988 *(33 U.S.C. §§ 2601* to 2609, 2621 to 2623).

should read as follows:

See § 75.03(a)(25), supra.

Thompson on Real Property, Thomas Editions

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Supp. To CHAPTER 75 THE IMPACT OF ENVIRONMENTAL REGULATION ON REAL PROPERTY

8-75 Thompson on Real Property, Thomas Editions Supp. to § 75.09

Supp. to § 75.09 CERCLA: Responsibility for Clean-up of Environmental Pollution

[Go To Main]

§ 75.09(a) Introduction to CERCLA [Go To Main]

Change lender/wners to lender/owners

§ 75.09(b) Overview of CERCLA [Go To Main]

First Paragraph of footnote 113 should read as follows:

Most commentators credit the media attention and public outcry at Love Canal for sowing the seeds of CERCLA. *See* Sheldon M. Novick, Donald W. Stever & Margaret G. Mellon, Law of Environmental Protection (rev. 1990); Ann M. Burkhart, *Lenders/Owners and CERCLA: Title and Liability*, 25 Harv. J. on Legis. 318, n.2 (1988); Superfund at Square One: *Promising Statutory Framework Requires Forceful EPA Implementation, 11 Envtl L. Rep. (Envtl. L. Inst.) 10101 (1981).* There is certainly enough discussion of Love Canal in the legislative history of CERCLA to support such a conclusion. *See* 126 Cong. Rec. 26, 39-51 (1980).

Second Paragraph of footnote 117 should read as follows:

The *Violet* holding was overruled by *United States v. Davis, 794 F. Supp. 67 (D.R.I. 1992)* , and is no longer accurate in the sense that equitable defenses are now not available in CERCLA cost recovery actions. *United States v. Domenic Lombardi Realty, Inc., 204 F. Supp. 2d 318 (D.R.I. 2002)* (CERCLA held constitutionally enacted according to

Congress' power to regulate interstate commerce).

Footnote 120 should read as follows:

See CERCLA § 101(14), *42 U.S.C. § 9601(14)*. Annotation, *Determination Whether Substance Is "Hazardous Substance" Within Meaning of Sec. 101(14) of Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) (42 U.S.C.A. § 9601(14)), 118 A.L.R. Fed. 293 (1994)* .

§ 75.09(b)(1) Determining What is a Hazardous Substance

Add:

Arkema, Inc. v. Asarco, Inc. 2007 U.S. Dist. LEXIS 25985 (W.D. Wa., 2007) (Summary judgment was improper in case where it was not yet determined whether wood containing a hazardous substance was considered "hazardous substance" according to CERCLA).

Add:

Cariddi v. Consol. Aluminum Corp., 2007 U.S. Dist. LEXIS 19959 (D. Mass. 2007) (CERCLA claims were dismissed because the discharge fell within the exception for petroleum contained in CERCLA; however, the state law claims remained because the discharge was waste oil, which was expressly excluded from the state petroleum exception).

Footnote 141 should read as follows:

Moreover, unused cutting oil is not a hazardous substance under CERCLA. *See* Marmon Group ...

§ 75.09(b)(2) Determining Whether There Has Been a Release or Substantial Threat of Release.

Indented block quote in paragraph one of this section should read as follows:

The term "release" means any spilling, leaking, pumping, pouring, emitting, emptying, discharging, injecting, escaping, leaching, dumping, or disposing into the environment (including the abandonment or discarding of barrels, containers, and other closed receptacles containing any hazardous substance or pollutant or contaminant) ... .

§ 75.09(b)(3) Determining Whether the Real Property is a "Facility."

Add:

Consol. Cos. V. Union Pac. R.R. Co., 2006 U.S. Dist. LEXIS 8795 (W.D. La. 2006) (Both RCRA and CERCLA definitions of "facility" include contiguous or adjacent property, and do not distinguish residential from commercial or industrial "facilities"); *Otay Land Co. v. U.E. Ltd. LP, 440 F. Supp. 2d 1152* (S.D. Ca., 2006) (A trap and skeet range containing lead shot and clay debris is not considered a "facility" under CERCLA because it falls within the consumer product exception contained in CERCLA; therefore, no contribution claim could be made by current owners against former owners for clean-up of the contaminated site.)

§ 75.09(b)(5) Response Authority Under CERCLA § 104.

Insert the following directly after the sentence ending with footnote 206:

However, Congress failed to renew both the taxes on petroleum and petroleum products and the corporate environmental taxes, and as a result, the superfund ran out of money in 2003. Since then, superfund money comes from general funds and money reimbursed by responsible parties. Since 2005, the EPA has faced financial constraints, which has required it to focus most of its attention on projects that are currently ongoing. This lack of funding has made it difficult for the EPA to initiate new clean-up projects.

§ 75.09(b)(6) Response Authority Under CERCLA § 106.

Footnote 255 should read as follows:

United States v. Ottati & Goss, Inc., 630 F. Supp. 1361 (D.N.H. 1985) judgment aff'd in part, vacated in part United States v. Ottati & Goss, Inc., 900 F.2d 429 (1st Cir. 1990) . See also United States v. Vertac Chem. Corp., 489 F. Supp. 870 (E.D. Ark. 1980) (discussion of imminent and substantial endangerment under RCRA § 7003).

§ 75.09(b)(6)(iii) RCRA § 7003

Footnote 274 should read as follows:

United States v. Price, 688 F.2d 204 (3d Cir. 1982) ; William Rosbe & Robert L. Gulley, *The Hazardous and Solid Waste Amendments of 1984: A Dramatic Overhaul of the Way American manages Its Hazardous Wastes, 14 Envtl. L. Rep. (Envtl. L. Inst.) 10458 (1984).*

§ 75.09(b)(8) The National Contingency Plan (N.C.P.).

Footnote 317 should read as follows:

Id.

Footnote 322 should read as follows:

Id.

§ 75.09(c) Specific Rules for Landowner and Lender Liability Under CERCLA [Go To Main]

In footnote 337, "but see Mathews v. Dow Chemical Co." should read "but see Mathews v. Dow Chemical Co.".

§ 75.09(c)(1) Responsible Parties.

Add:

Sycamore Indus. Park Assoc. v. Ericsson, Inc., 2007 Dist. LEXIS 23881 (N.D. Ill., 2007) (A seller of a parcel of land was deemed not to have disposed of hazardous materials according to CERCLA when he left an old heating system on the property that contained asbestos in its construction). *But See Sycamore Indus. Park Assocs. V. Ericsson, 2007 U.S. Dist. LEXIS 31614* (N.D. Ill., 2007) (The court granted a motion for reconsideration because the earlier ruling was based on the assumption that the asbestos contained in the heating system was built in, when in fact the plaintiffs had alleged that the asbestos was found in and around various pipes, boilers, and equipment located within the several buildings, which inference by the court did not afford plaintiffs all reasonable inferences, and therefore was considered manifest error).

§ 75.09(c)(1)(i) Current Owners and/or Operators

***United States v. C.D.M.G. Realty Co., 875 F. Supp. 1077 (D.N.J. 1995)* has been vacated and remanded without any further treatment. Therefore, footnote 344 should read simply: *42 U.S.C. § 9607*(a)(1)**

Add:

Maine v. Kerramerican, Inc., 2007 U.S. Dist. LEXIS 16258 (D. Me., 2007) (parent corporations generally cannot be held liable for the actions of their subsidiaries, unless the parent, by its own right, can be held liable as an owner. Parent ownership can be shown where the parent has directed the workings of, managed, or conducted the affairs of the facility. The existence of common directors in the parent corporation and the subsidiary, alone is not enough to establish liability as an owner). *Ameripride Services, Inc. v. Valley Industrial Service, Inc., 37 ELR 20058* (E.D. Ca., 2007) (For the purposes of CERCLA liability as an owner, a corporation that held title to a facility for less than a day was not considered an "owner" for the purposes of CERCLA liability because the corporation never actually exercised any control or exclusive use of the property, and liability in this case would defeat CERCLA's purpose of holding

responsible parties liable). *See also United States v. Capital Tax Corp., 37 ELR 20015* (N.D. Ill., 2007) .

Footnote 348 should read as follows:

Id. at 1043 .

Footnote 349 should read as follows:

Id. at 1044 .

Footnote 350 should read as follows:

Id. at 1032 . However, Shore still argued that it was not an owner "at the time of disposal" within the meaning of *42 U.S.C. § 9607(a)(2). See Id.* at 1043 .

Footnote 354 should read as follows:

Id.

Footnote 355 should read as follows:

Id.

Footnote 356 should read as follows:

Id. at 577.

Footnote 357 should read as follows:

Id.

Footnote 358 should read as follows:

Id. at 578.

Footnote 359 should read as follows:

Id.

Footnote 360 should read as follows:

Id. at 577.

§ 75.09(c)(1)(ii) Owners or Operators at the Time of Disposal.

Add:

U.S. v. Honeywell Intern. Inc., 542 F. Supp. 2d 1188 (E.D. Cal. 2008) (subdivision developer was an owner and subdivision development was a disposal under CERCLA).

§ 75.09(c)(1)(iii) Generators or Arrangers.

Add:

Agere Sys. v. Advanced Envt'l Tech. Corp., 2006 U.S. Dist. LEXIS 84114 (E.D. Pa., 2006) (In order to establish liability as an arranger, the plaintiff must show first, that the defendant owned or possessed the waste, and second, that the defendant knew that the processing of the waste could or would result in the release of hazardous waste, or the defendants' control over the production process. The possession element does not mean actual possession, and liability

may be established by showing constructive ownership or possession. In addition, the defendant need not know that a release will occur at a specific location, and it is enough that he know that a release is likely to occur). *Tex Tin Corp. v. United States, 2006 U.S. Dist. LEXIS 62349* (S.D. Tx., 2006) (Within the 5th circuit, factors to consider when deciding arranger liability include the following: (1) an obligation or authority to exercise control over the disposal of the hazardous substance; (2) ownership of the substance; (3) the intent of the parties to the transaction who decided to place the substance at the facility, e.g., whether the transaction was engaged in for the purpose of waste disposal. Where a substance is categorized as hazardous, but is transported for a useful purpose other than disposal, CERCLA liability as an arranger is not established). *See also Vine St., LLC v. Keeling, 460 F. Supp. 2d 728* (E.D. Tx., 2006) .

Add:

Burlington Northern & Santa Fe Railway Co. v. United States, 129 S.Ct. 1870 (2009) (a company is not liable as an "arranger" under CERCLA if it merely knows that some hazardous chemicals it delivers spill during the transfer from truck to storage tank).

§ 75.09(c)(1)(iv) Transporters.

Add:

Action Manufacturing Co. v. Simon Wrecking Co., 428 F. Supp. 2d 288 (E.D. Pa., 2006) (to establish liability as a transporter, the transporter must have at least actively participated in deciding where to dispose of the waste).

§ 75.09(c)(1)(vi) Lenders as Owners (The Security Interest Exemption).

Footnote 384 should read as follows:

United States v. Maryland Bank & Trust Co., 632 F. Supp. 573, 578 (D. Md. 1986) (quoting *42 U.S.C. § 9601(20)(A)*).

Footnote 385 should read as follows:

Id. at 578-79 (emphasis added).

Footnote 386 should read as follows:

Id.

Second paragraph should read as follows:

The two courts which have examined the scope of the security interest exemption since *Maryland Bank* decision have also spit on the issue. In *Guidice v. BFG Electroplating & Mfg. Co.*, the district ...

§ 75.09(c)(vii) Lenders as Operators.

Footnote 410 should read as follows:

Id. at 20997 .

Footnote 412 should read as follows:

Id. at 20995 .

Footnote 413 should read as follows:

Id. at 20997 .

Footnote 414 should read as follows:

Id. at 20996 .

Footnote 417 should read as follows:

Id. at 562.

The last sentence in the first paragraph on this page should read as follows:

Nevertheless, *Mirable* remains a leading case and is one of the better sources of guidance on this issue.

Footnote 418 should read as follows:

See United States v. Nicolet, Inc., 712 F. Supp 1193, 1205 (E.D. Pa. 1989) ("Thus, existing caselaw suggests that a mortgagee can be held liable under CERCLA only if the mortgagee participated in the management and operational aspects of the facility in question."). *Cf. United States v. New Castle County, 727 F. Supp 854, 866 (D. Del. 1989)* ("[M]ere ability to exercise control as a result of the financial relationship of the parties is insufficient for liability to attach. The entity or person sought to be strapped with liability must *actually exercise control*." (emphasis in original)) (quoting *Rockwell Int'l Corp. v. IU Int'l Corp., 702 F. Supp. 1384, 1390 (N.D. Ill. 1988))* ; *see also United States v. Township of Brighton, 153 F.3d 307 (6th Cir. 1998)* ; *United States v. Alliedsignal Inc., 62 F. Supp. 2d 713 (N.D.N.Y 1999)* ; *United States v. Consolidated Rail Corp., 729 F. Supp. 1461, 1468 (D. Del. 1990)* ("[T]he statute requires that a person be actively participating in the management of the facility to be held liable for the disposal of hazardous wastes."). *Stearns & Foster Bedding Co. v. Franklin Holding Corp., 947 F. Supp. 790 (D.N.J. 1996)* (Complete ownership and general control are not enough to impose CERCLA liability based on the "actual control" test).

The second sentence in the first paragraph should read as follows:

The court simply state: "whatever the precise parameters of 'participation,' there must be *some* actual management of the facility before a secured creditor will fall outside the [security interest] exception."

Footnote 423 should read as follows:

901 F.2d 1550 (11th Cir. 1990) order amended and superseded by United States v. Fleet Factors Corp., 819 F. Supp. 1079, 821 F. Supp. 707 (S.D. Ga. 1993) .

Footnote 426 should read as follows:

901 F.2d at 1556-57 & n.6 order amended and superseded by United States v. Fleet Factors Corp., 819 F. Supp. 1079, 821 F. Supp. 707 (S.D. Ga. 1993) .

Footnote 430 should read as follows:

Fleet Factors, 901 F.2d 1557-58 (emphasis added) (footnotes omitted) *order amended and superseded by United States v. Fleet Factors Corp., 819 F. Supp. 1079, 821 F. Supp. 707 (S.D. Ga. 1993)* .

Footnote 433 should read as follows:

See Roslyn Tom, *Interpreting the Meaning of Lender Management Participation Under Section 101(20)(A) of CERCLA, 98 Yale L.J. 925 (1989).* "Without clear standards defining the degree of control a lender can safely exercise over the debtor's operations, banks will be deterred from monitoring sites." *Id. at 927.* Thus, to promote the close supervision of those mortgagors who handle hazardous substances, "the court should find that *total control* amounting to ownership is what exposes the creditor to liability." *Id. at 943* (emphasis added).

§ 75.09(c)(1)(viii) Successor Liability.

Add:

New York v. Nat. Serv. Indus., 460 F.3d 201, (U.S. App. 2d, 2006) (Allegations that a de facto merger occurred, for the purposes of establishing CERCLA successor liability necessarily fail if there is no continuity of ownership). *K.C. 1986 L.P. v. Reade Mfg., 472 F. 3d 1009, 37 ELR 20009* (U.S. App. 8th, 2006) (An arms' length transaction breaks the chain of successor liability under the mere continuation test). For a general discussion of successor liability and tests used by different courts, *see also Tex. Tin. Corp. v. United States, 2006 U.S. Dist. LEXIS 26782* , 62 Envtl. Rep. Cas. (BNA) 2017 (S.D. Tx., 2006). *See also Vine St., LLC v. Keeling, 460 F. Supp. 2d 728* (E.D. Tx., 2006) .

§ 75.09(c)(2) Strict Liability.

Add:

See also United States v. Capital Tax Corp., 2007 U.S. Dist. LEXIS 1184, 37 ELR 20015 (N.D. Ill., 2007) ; *United States v. Alcan Aluminum Corp. 2006 U.S. Dist. LEXIS 24309* (N.D.N.Y., 2006) .

§ 75.09(c)(3) Joint and Several Liability

Footnote 446 should read as follows:

See, e.g., Monsanto, 858 F.2d at 171-72; Wade, 577 F. Supp. at 1338-39 (quoting *Restatement (Second) of Torts* § 433). *See also* Michael D. Green, *Successors and CERCLA: The Imperfect Analogy to Products Liability and an*

Alternative Proposal, 87 N.W. U.L. Rev. 897 (1993) (criticizing the expansion of CERCLA liability to include successor corporations, based on the analogy of products liability).

Footnote 450 should read as follows:

United States v. Ottati & Goss, Inc., 630 F. Supp. 1361 (D.N.H. 1985) . Cf. Monsanto, 858 F.2d at 170 n. 27 ("Volumetric contributions provide a reasonable basis for apportioning liability only if it can be reason ably assumed, or it has been reasonably demonstrated, that independent factors had no substantial effect on the harm to the environment.").

§ 75.09(c)(3)(i) Contribution.

Add:

K.C. 1986 Ltd. Partnership v. Reade Mfg., 472 F.3d 1009 (8th Cir. 2007) (allocation of liability and contribution ordered); *Cooper Industries, Inc. v. Aviall Services, Inc., 543 U.S. 157 (2004)* (private party who had not been sued in CERCLA administrative or cost recovery action could not obtain contribution from other liable parties).

Add:

Elementis Chromium L. P. v. Coastal States Petroleum Co., 450 F. 3d 607 (U.S. App. 5th 2006) (Liability for contribution actions under § 113(f) are several only, not joint and several).

§ 75.09(c)(3)(ii) Settlement with the Government.

The first sentence in the first paragraph on this page is missing a period at the end.

Footnote 459 should read as follows:

42 U.S.C. § 9613(f)(2). Bedford Affiliates v. Sills, 156 F.3d 416 (2d Cir. 1998) (An owner's state law restitution and indemnification claims were preempted by CERCLA. If the court allowed a state remedy, the state laws would bypass the detailed settlement requirements in CERCLA).

Add:

Asarco Inc. v. Union Pac. R.R. Col., 2006 U.S. Dist. LEXIS 2626, 62 ERC (BNA) 1092 (D. Az., 2006) (any settlement with a Government entity must be done with the approval of the EPA, or else it will not have the effect of resolving CERCLA liability).

Shell Oil Co. v. U.S., 80 Fed. Cl. 411 (2008) (oil companies which supplied aviation fuel during World War II were able to charge acid waste cleanup costs to the government).

§ 75.09(c)(3)(iii) Indemnification.

U.S. v. Burlington Northern & Santa Fe Ry. Co., 520 F.3d 918 (9th Cir. 2008), 502 F.3d 781 (9th Cir. 2007), 479 F.3d 1113 (9th Cir. 2007) (various liability apportionment issues).

§ 75.09(c)(4) Affirmative Defenses.

The first full block quote should read as follows:

The term "contractual relationship," for purposes of section 9607(b)(3) of this title includes, but is not limited to, land contracts, deeds, easements, leases, or other instruments transferring title or possession, unless the real property on which the facility concerned is located was acquired by the defendant after the disposal or placement of the hazardous substance on, in, or at the facility ... .

Add:

United States v. Capital Tax Corp., 37 ELR 20015 (N.D. Ill., 2007) (discussing generally the third party defense, and illustrating the difficulty of successfully asserting this defense). *See also United States v. Timmons Corp., 2006 Dist. LEXIS 7642* (N.D.N.Y., 2006) .

§ 75.09(d)(1) The CERCLA Lien

Footnote 484 should read as follows:

42 U.S.C. § 9607(l)(3). See, e.g., In re Better-Brite Plating, Inc., 105 B.R. 912, 917 (Bankr. E.D. Wis. 1989) vacated, In re Better Brite Plating, Inc., 136 B.R. 526 (Bankr. E.D. Wis. 1990) . S. Pac. Transp. Co. v. Voluntary Purchasing Groups, Inc., 252 B.R. 373 (E.D. Tex. 2000) (a bankruptcy court lacked jurisdiction to approve and then issue mandatory injunctions regarding claims under CERCLA).

§ 75.09(d)(3) Response Costs as Administrative Expenses.

Footnote 499 should read as follows:

Section 503 now reads in pertinent part:

> (b) After notice and a hearing, there shall be allowed administrative expenses, other than claim allowed under section 502(f) of this title, including--
>
> > (1) (A) the actual necessary costs and expenses of preserving the estate including--
> > (i) wages, salaries, and commissions for services rendered after the commencement of the case.

Footnote 500 should read as follows:

11 U.S.C. § 507(a)(1), amended by Pub. L. 109-8, Title II, § 212, 223, Title VII, §§ 705, 706, Title XIV, § 1401, Title XV, § 1502(a)(1), *119 Stat. 51, 62, 126, 214, 216.*

Footnote 506 should read as follows:

Id. at 285 .

Footnote 507 should read as follows:

See id. at 286 .

Footnote 509 should read as follows:

See id. at 280 .

At the end of the section, add new footnote 511.1:

FN 511.1 *In re United Soil Recycling, Inc., 2006 Bankr. LEXIS 1753* (D. Or., 2006) .

§ 75.09(d)(3)(i) Abandonment

Add:

For a fairly detailed treatment of the issue of abandonment, *see* Hillinger, Ingrid Michelsen & Michael G. "Environmental Affairs in Bankruptcy: 2004." *12 Am. Bankr. Inst. L. Rev. 331 (2004).*

Footnote 518 should read as follows:

In re Quanta Resources Corp., 739 F.2d 912 (3d Cir. 1984) , aff'd sub nom. Midlantic Nat'l Bank v. New Jersey Dept. of Envtl. Protection, 474 U.S. 494 (1986) .

Add:

See also Minn. Pollution Control Agency v. Gouveia (In re Globe Bldg. Materials, Inc.) 345 B.R. 619, 2006 Bankr. LEXIS 1445 (N.D. Ind., 2006) .

Add:

See also In re Eagle-Picher Holdings, Inc., 345 B.R. 860, 46 Bankr. Ct. Dec. 250 (S.D. Oh., 2006) .

Footnote 523 should read as follows:

In re FCX, Inc., 96 B.R. 49, 54 (Bankr. E.D.N.C. 1989) (citing *In re Smith-Douglass, Inc., 856 F.2d 12, 16 (4th Cir. 1988)) .*

Footnote 529 should read as follows:

See In re Franklin Signal, 65 B.R. at 274 (entity performing cleanup may ultimately have a claim against the estate even though the property was abandoned under § 554); *see also In re T.P. Long Chem., Inc., 45 B.R. 278 (Bankr. N.D. Ohio 1985)* ("abandonment or transfer of the drums does not transfer the estates [CERLCA] liability").

§ 75.09(d)(3)(ii) Administrative Costs: The Actual and Necessary Costs of Preserving the Estate

Footnote 534 should read as follows:

See id. at 708 .

Footnote 540 should read as follows:

Id. at 530 .

Footnote 541 should read as follows:

In re Smith-Douglass, Inc., 856 F.2d 12, 17 (4th Cir. 1988) ; *In re Wall Tube & Metal Prods. Co., 831 F.2d 118, 123-24 (6th Cir. 1987)* ; *In re Stevens, 68 B.R. 774 (D. Me. 1987)* ; *In re Better-Brite Plating, Inc., 105 B.R. 912, 916 (Bankr. E.D. Wis. 1989) vacated, In re Better Brite Plating, Inc., 136 B.R. 526 (Bankr. E.D. Wis. 1990)* ; *In re T.P. Long Chem., Inc., 45 B.R. 278, 286-87 (Bankr. N.D. Ohio 1985)* .

Footnote 542 should read as follows:

See, e.g., Stevens, 68 B.R. at 782 (holding that post-petition expenditures for clean up were administrative expenses even though the release (improper storage) occurred and state authorities knew of the improper storage before the bankruptcy petition was filed); *In re Hemingway Transp., Inc., 73 B.R. 494, 503-05 (Bankr. D. Mass. 1987) order aff'd in part and vacated in part, In re Hemingway Transp., Inc., 993 F.2d 915 (1st Cir. 1993)* ; *In re Peerless Plating Co., 70 B.R. 943, 948 (Bankr. W.D. Mich. 1987)* ; *see also Wall Tube & Metal Prods., 831 F.2d at 120* , 123-24.

Footnote 547 should read as follows:

See, e.g., In re Wall Tube & Metal Prods., Co., 831 F.2d 118, 123-24 (6th Cir. 1989) ; *Better-Brite Plating, 105 B.R. at*

912 vacated, *In re Better Brite Plating, Inc., 136 B.R. 526 (Bankr. E.D. Wis. 1990)* ; *In re Stevens, 68 B.R. 774 (D. Me. 1987)* .

§ 75.09(d)(3)(iii) Benefit to Secured Creditors.

Add:

In re United Soil Recycling, Inc., 2006 Bankr. LEXIS 1753 (D. Or., 2006) .

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Supp. to § 75.10 Land Policy and Management.

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At the end of the second sentence in Paragraph 2, add new footnote 553.1:

FN 553. ***1*** *In 1995* , federal lands accounted for roughly 35 percent of total U.S. coal production. (United States Geological Service, Central Region Energy Resources Team, A Digital Database of Coal Ownership Status, http://energy.cr.usgs.gov/fedland/FS12-98/index.html (last visited May 23, 2007).

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Supp. to § 75.12 Citizen Suits.

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§ 75.12(b) Private Litigation to Enforce the Clean Water Act. [Go To Main]

§ 75.12(b)(1) Citizen Suits Under the Clean Water Act.

§ 75.12(b)(1)(i) Scope of the Action

Add:

Peconic Baykeeper, Inc. v. Suffolk County, 600 F.3d 180 (2d Cir. 2010) (citizen suit against county under the Clean Water Act alleging discharge of dredged spoils without permit, discharge of pollutants, and spraying pesticides into U.S. waters).

Add:

Envtl. Conservation Org. v. City of Dallas, 529 F.3d 519 (5th Cir. Tex. 2008) (citizen enforcement action by environmental organization alleging the city failed to develop an effective program to monitor and reduce discharge of storm water pollutants); *Friends of the Earth, Inc., v. Gaston Copper Recycling Corp., 263 Fed. Appx. 348* (4th Cir. 2008) (citizen suit brought by nonprofit environmental organizations against operator of smelting facility).

Add:

Our Children's Earth Foundation v. U.S.E.P.A, 527 F.3d 842 (9th Cir. 2008) (citizen suit by environmental advocates against E.P.A. alleging the agency abandoned a mandatory review function).

Footnote 569 should read as follows:

Patterson v. Barden & Robeson Corp., 2007 U.S.Dist. LEXIS 11225 (W.D.N.Y., 2007) (defendant had not obtained proper permit until after the case was initiated, and therefore, was considered to be committing an ongoing violation).

Gwaltney of Smithfield v. Chesapeake Bay Found., Inc., 484 U.S. 49 (1987) , on remand 844 F.2d 170 (4th Cir. 1988), 688 F. Supp. 1078 (E.D. Va. 1988) judgment aff'd in part, rev'd in part, Chesapeake Bay Found., Inc. v. Gwaltney of Smithfield, Ltd., 890 F.2d 690 (4th Cir. 1989) , superseded by statute as recognized in *Glazier v. American Ecology Envtl. Serv. Corp., 894 F. Supp. 1029 (E.D. Tex. 1995) . U.S. Public Interest Research Group v. Atlantic Salmon of Maine, LLC, 339 F.3d 23 (1st Cir. 2003)* (only citizen suits alleging violation at time suit is brough tar cognizable but once action has been brought and present violation established, court may order relief for past wrongs as well.). *See also Pennsylvania Envtl. Defense Found. V. Bellefonte Borough, 718 F. Supp. 431 (M.D. Pa. 1989)* ; *Brewer v. Ravan, 680 F. Supp. 1176 (M.D. Tenn. 1988) .*

Footnote 570 should read as follows:

Natural Resources Defense Council, Inc. v. Texaco Ref. & Mktg., Inc., 719 F. Supp. 281 (D. Del. 1989) judgment aff'd in part, rev'd in part, Natural Resources Defense Council, Inc. v. Texaco Ref. & Mktg., Inc., 2 F.3d 493 (3d Cir. 1993) ; *Student Pub. Interest Research Group of N.J., Inc. v. A.T. & T. Bell Labs., 617 F. Supp. 1190 (D.N.J. 1985)* ; *Sierra Club v. Simkins Indus., 617 F. Supp. 1120 (D. Md. 1985) , aff'd, 847 F.2d 1109 (4th Cir. 1988) .*

§ 75.12(b)(1)(ii) Procedural Considerations

Add:

Sierra Club v. United States EPA, 475 F. Supp. 2d 29 (D. D.C., 2007) .

Add:

Pennsylvania v. Allegheny Energy, Inc., 2006 U.S. Dist. LEXIS 38377 (W.D. Pa., 2006) (applying the federal five year limitation in a Clean Air Act case where the statute of limitations was at issue); *Nat'l Parks Conservation Ass'n v. TVA, 480 F. 3d 410* (U.S. App. 6 *th*, 2007).

Footnote 588 should read as follows:

33 U.S.C. § 1365(b)(1)(A).

Add:

Carney v. Gordon County, 63 ERC (BNA) 1907, (N.D. Ga., 2006) (the mere fact that notice was given in a form letter does not render the notice ineffectual for the purposes of the statute, although the notice still must be sufficiently specific regarding the alleged violations of the Clean Water Act). *Natural Res. Council of Me. V. Int'l. Paper Co., 424 F. Supp. 2d 235, 62 ERC (BNA) 1589* (D. Me., 2006) (Most of plaintiff's allegations were dismissed because the notice given to defendants was not sufficiently specific enough to inform the violator about what it was doing wrong, and how to remedy the violations in order to avert the lawsuit).

Add:

City of Newburgh v. Sarna, 690 F. Supp. 2d 2136 (S.D. N.Y. 2010) (Citizen suit action against developer and town alleging violation of the Clean Water Act; dismissed sua sponte for failure to comply with the 60-day notice provision).

Footnote 592 should read as follows:

33 U.S.C. § 1365(b)(1)(B); *Knee Deep Cattle Co. v. Bindana Inv. Co., 94 F.3d 514 (9th Cir. 1996)* (citizen suit allowede because the state was not diligently prosecuting action), *cert. dismissed, 519 U.S. 1144 (1997)* ; *Old Timer, Inc. v. Blackhawk-Central City Sanitation Dist., 51 F. Supp. 2d 1109 (D. Colo. 1999)* (The Clean Water Act bars commencement of citizen suits if a state is seeking an administrative penalty. However, the court is not retroactively stripped of its jurisdiction if a state seeks an administrative penalty after a citizen suit was commenced).

Add:

But see Paper, Allied-Industrial, Chem. & Energy Workers Int'l Union v. Cont'l Carbon Co., 2003 U.S. Dist. LEXIS 26858 (W.D. Ok., 2003) (Where state has commenced and is diligently prosecuting an administrative action based on state law that is comparable to a Clean Water Act action, a citizen suit is barred from pursuing civil claims based on the

same violations in the state action, but is allowed to continue with its claims for declaratory and injunctive relief).

Add:

See supra note 588.

§ 75.12(b)(1)(iii) Proper Plaintiffs.

Add:

Envirowatch, Inc. v. Fukino, 2007 U.S. Dist. LEXIS 14140 (D. Hi., 2007) (holding that the plaintiffs had not pleaded any adverse effect sufficiently to state a claim under the Clean Water Act citizen suit provisions); *Sierra Club v. El Paso Props., Inc., 2007 U.S. Dist. LEXIS 1191* (D. Co., 2007) (Where one plaintiff group has met the standing requirements, the court does not have to inquire into the standing of a second group when the groups are asserting the same claims for relief and the allegations are the same, the groups were represented by the same council, and their arguments were presented jointly throughout the trial); *See also S. Utah Wilderness Alliance v. BLM, 425 F. 3d 735* (10th Cir. 2005) .

Add:

Northwest Envtl. Def. Ctr. v. Brown, 476 F. Supp. 2d 1188 (D. Or., 2007) (reviewing the requirements for standing when an organization represents the interests of its members in a citizen suit under the Clean Water Act). *Bldg. & Constr. Trades Council of Buffalo v. Downtown Dev., Inc., 448 F. 3d 138* (U.S. App. 2d, 2006) (When bringing a citizen suit as an organization, during the motion to dismiss stage, the members names need not be presented in order to establish standing).

Envtl. Protection Info. Center v. Pacific Lumber Co., 469 F. Supp. 2d 803 (N.D. Calif. 2007) (action by non-profit environmental organization against two lumber companies, alleging illegal discharge of pollutants into a creek).

Add:

Karr v. Hefner, 475 F.3d 1192 (10th Cir. 2007) (Clean Water Act citizen suit against various non-governmental entities; action barred because EPA was diligently prosecuting the violations against the defendants).

§ 75.12(b)(1)(iv) Proper Defendants.

Add:

Id. Northwest Environmental Defense Center v. U.S. Army Corps of Engineers, 118 F. Supp. 2d 1115 (D. Ore., 2000) (There are no implied private causes of action under the CWA; All causes of action must be based on a violation of the appropriate NPDES permit system, not some other permitting scheme).

Northern California River Watch v. City of Healdsburg; *496 F.3d 993 (9th Cir. 2007)* (citizen suit against city); *Sierra Club, Hawaii Chapter v. City and County of Honolulu, 486 F. Supp. 2d 1185* (D. Hawai'i 2007) (citizen suit against city and county).

§ 75.12(b)(4) Costs and Attorney's Fees.

Add:

Sierra Club v. Hamilton County Bd. of County Com'rs, 504 F.3d 634 (6th Cir. 2007) (action by environmental group seeking attorney fees and costs, which were awarded).

§ 75.12(c)(1) Citizen Suits Under the Clean Air Act

§ 75.12(c)(1)(i) Scope of the Action

Add:

Sierra Club v. Portland General Elec. Co., 663 F. Supp. 2d 983 (D. Ore. 2009) (citizen suit action by environmental agencies against electric company for alleged violations of the Clean Air Act).

Add:

St. Bernard Citizens for Environmental Quality, Inc. v. Chalmette Refining, L.L.C., 500 F. Supp. 2d 592 (E.D. La. 2007) (citizen suit under Clean Air Act against refinery for illegal emissions).

Add:

New York v. Am. Elec. Power Serv. Corp., 2006 U.S. Dist. LEXIS 32829 (S.D. Oh., 2006) (1990 amendments to the Clean Air Act effectively overrule the Gwaltney decision, and allow citizen suits to be brought both for ongoing violations and wholly past violations as long as the past violations occurred more than once).

Add:

Sierra Club v. Korleski, 654 F. Supp. 2d 722 (S.D. Ohio 2009) (citizen suit against director of state environmental protection agency alleging violations of the state implementation plan, federally approved under the Clean Air Act).

§ 75.12(c)(1)(ii) Special Procedural Considerations

Add:

But see New York v. Am. Elec. Power Serv. Corp., supra note 639 .

Footnote 658 should read as follows:

Holding that the notice requirement is *not* jurisdictional, *see Kennecott Copper Corp. v. Train, 424 F. Supp. 1217 (D. Nev. 1976) rev'd, Kennecott Copper Corp. v. Costle, 572 F.2d 1349 (9th Cir. 1978)* . Holding that the notice requirement *is* jurisdictional, *see Philadelphia Council of Neighborhood Orgs. V. Coleman, 437 F. Supp. 1341 (E.D. Pa. 1977) , motion denied, 451 F. Supp. 114* (E.D. Pa.) , *aff'd without opinion, 578 F.2d 1375 (3d Cir. 1978)* .

Footnote 666 should read as follows:

Const. Art. 9, § 4.

Footnote 669 should read as follows:

See Sierra Club v. Morton, 405 U.S. 727 (1972) .

Add:

For a detailed discussion of standing under the Clean Air Act, *see Northwest Env'tl Def. Ctr. v. Owens Corning Corp., 434 F. Supp. 2d 957* (D. Ore., 2006) . *See also Massachusetts v. EPA, 127 S. Ct. 1438 (2007)* ; *Nat'l Council of La Raza*

v. Gonzales, 468 F. Supp. 2d 429 (E.D.N.Y., 2007) ; *Sierra Club v. Johnson, 436 F. 3d 1269* (11th Cir. Ga., 2006) .

§ 75.12(c)(1)(iv) Proper Defendants.

Add:

National Parks and Conservation Ass'n, Inc. v. Tennessee Valley Authority, 502 F.3d 1316 (11th Cir. 2007) (Clean Air Act citizen suit against Tennessee Valley Authority).

Add:

But see Franklin v. Birmingham Hide & Tallow Co., 1999 U.S. Dist. LEXIS 22489 (N.D. Al., 1999) (refusing to find People of State of Ill. v. Commonwealth Edison Co. persuasive, holding that a corporate officer may be held civilly liable for violations of the CWA).

§ 75.12(d)(1) Citizen Suits Under the Resource Conservation and Recovery Act.

Add:

Crandall v. City and County of Denver, Colorado, 594 F.3d 1231 (10th Cir. 2010) (citizen action under the Resource Conservation and Recovery Act to prevent full-plane deicing at the Denver airport; dismissed under standard of no imminent danger); *Francisco Sanchez v. Esso Standard Oil Co., 572 F.3d 1 (1st Cir. 2009)* (gas station owners brought citizen suit action under Resource Conservation and Recovery Act against former suppliers who allegedly allowed underground gasoline storage tanks to discharge hazardous waste into the soil and groundwater; suit not precluded by Puerto Rico's civil action against the supplier).

§ 75.12(d)(1)(ii) Special Procedural Considerations

Footnote 706 should read as follows:

Hallstrom v. Tillamook County, 493 U.S. 20 (1989) . See also Michael T. Caljouw, Case Comment, *Environmental Law--Failure to Comply with Sixty-Day Notice Provision for Citizen Suits Under Resource Conservation and Recovery Act Requires Dismissal-- Hallstrom v. Tillamook County, 110 S. Ct. 304 (1989) , 24 Suffolk U. L. Rev. 875 (1990).*

Footnote 714 should read as follows:

Proffit v. Township of Bristol, 754 F.2d 504 (3d Cir. 1984) abrogated by Hallstrom v. Tillamook County, 493 U.S. 20

(1989) ; *Brewer v. Ravan, 680 F. Supp. 1176 (M.D. Tenn. 1988)* ; *Fishel v. Westinghouse Elec. Corp., 617 F. Supp. 1531 (M.D. Pa. 1985)* .

Add:

Eckardt v. Gold Cross Serv's, 2007 U.S. Dist. LEXIS 3848 (D. Ut., 2007) (the 90-day notice required for RCRA claims related to the generation or management of solid or hazardous waste must describe the endangerment involved).

§ 75.12(d)(1)(iii) Proper Plaintiffs.

Add:

Envirowatch, Inc. v. Fukino, 2007 U.S. Dist. LEXIS 14140 (D. Hi., 2007) (Plaintiff's claim that it was barred from participating in settlement discussions regarding the enforcement of RCRA violations could not, on its own, constitute an injury in fact for the purposes of standing).

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Add the following:

Articles

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Burrows, Matthew. "The Clean Air Act: Citizen Suits, Attorneys' Fees, and the Separate Public Interest Requirement," *36 B.C. Envtl. Aff. L. Rev. 103 (2009).*

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Gitler, Stefanie. "Settling the Tradeoffs Between Voluntary Cleanup of Contaminated Sites and Cooperation with the Government Under CERCLA," *35 Ecology L.Q. 337 (2008).*

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331 (2004).

Klass, B. Alexandra. "Bees, Trees, Preemption, and Nuisance: A New Path to Resolving Pesticide Land Use Disputes," *32 Ecology L. Q. 763 (2005)*

Kriewaldt, David. "Recent Treatment of the Challenges Clause in CERCLA § 113(h)," 3 *Envt'l & Energy L. & Pol'y* 169 (Summer 2008).

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Luria, Amy. "CERCLA Contribution: An Inquiry Into What Constitutes an Administrative Settlement," *84 N.D. L. Rev. 333 (2008).*

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Nastich, Summer L. and Diane R. Smith. "Can You Trust a Trust? The Potential CERCLA Liability of Trustees and Beneficiaries," *23 J. Envtl. L. & Litig. 401 (2008).*

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Reed, Michael H. "Supreme Court's Recent CERCLA Decision Could Affect Bankruptcy Cases," 26 *Am. Bankr. Inst.* 40 (October, 2007).

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Tolan, Patrick E., Jr. "Natural Resource Damages Under CERCLA: Failures, Lessons Learned, and Alternatives," *38 N.M. L. Rev. 409* (Spring, 2008).

Yost, Christine A. "Liability Under CERCLA § 9601(35)(c) for Intermediate Landowners Who Discover Contamination, Do Not Disclose, and Sell to Innocent Buyers," *35 B.C. Envtl. Aff. L. Rev. 141 (2008).*

Annotations

Annotation, *Innocent Owner Status Under Comprehensive Environmental Response, Compensation, and Liability Act,*

12 A.L.R. Fed.2d 161 .

CERCLA Annotations

Annotation, *Right of Private Party to Seek Cost Recovery Under CERCLA § 107(a), 42 U.S.C.A. § 9607(a), or Contribution Under CERCLA § 113(f)(1), (42 U.S.C.A. § 9613(f)(1)),in Connection with Environmental Response--Cooper Industries, Inc. v. Aviall Services, Inc., 543 U.S. 157, 125 S. Ct. 577, 160 L.Ed. 2d 548 (2004) , 22 A.L.R. Fed 2d 233* .

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Chapter 76 TAXATION OF REAL PROPERTY

9-76 Thompson on Real Property, Thomas Editions 76.syn

AUTHOR: Professor David A. Thomas J. Reuben Clark Law School Brigham Young University

§ 76.syn Synopsis to Chapter 76: TAXATION OF REAL PROPERTY

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§ 76.08(o) Indiana.

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§ 76.08(o)(2) Estate Tax.

§ 76.08(o)(3) Inheritance Tax.

§ 76.08(p) Iowa.

§ 76.08(p)(1) Property Tax.

§ 76.08(p)(2) Tax on Instruments Conveying Real Property.

§ 76.08(p)(3) Estate Tax.

§ 76.08(p)(4) Generation-skipping Transfer Tax.

§ 76.08(p)(5) Inheritance Tax.

§ 76.08(q) Kansas.

§ 76.08(q)(1) Property Tax.

§ 76.08(q)(2) Tax on Real Estate Mortgages.

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§ 76.08(q)(4) Generation-skipping Tax.

§ 76.08(q)(5) Inheritance Tax.

§ 76.08(r) Kentucky.

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§ 76.08(t) Maine.

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§ 76.08(t)(3) Estate Tax.

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§ 76.08(u)(3) Estate Tax.

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§ 76.08(v) Massachusetts.

§ 76.08(v)(1) Property Tax.

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§ 76.08(v)(3) Estate Tax.

§ 76.08(v)(4) Estate Transfer Tax.

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§ 76.08(w)(4) Estate Tax.

§ 76.08(w)(5) Inheritance Tax.

§ 76.08(x) Minnesota.

§ 76.08(x)(1) Property Tax.

§ 76.08(x)(2) Transfer Taxes.

§ 76.08(x)(2)(i) Tax on Instruments Conveying Real Property Interests.

§ 76.08(x)(2)(ii) Tax on Mortgages.

§ 76.08(x)(3) Estate Tax.

§ 76.08(y) Mississippi.

§ 76.08(y)(1) Property Tax.

§ 76.08(y)(2) Tax on Instruments Conveying Mineral Interests.

§ 76.08(y)(3) Estate Tax.

§ 76.08(z) Missouri.

§ 76.08(z)(1) Property Tax.

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§ 76.08(aa) Montana.

§ 76.08(aa)(1) Property Tax.

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§ 76.08(bb)(1) Property Tax.

§ 76.08(bb)(2) Tax on Transfer of Certain Real Property Interests.

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§ 76.08(cc) Nevada.

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§ 76.08(cc)(3) Estate Tax.

§ 76.08(cc)(4) Generation-skipping Transfer Tax.

§ 76.08(dd) New Hampshire.

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§ 76.08(dd)(2) Tax on Transfer of Real Property Interests.

§ 76.08(dd)(3) Estate Tax.

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§ 76.08(ee) New Jersey.

§ 76.08(ee)(1) Property Tax.

§ 76.08(ee)(2) Tax on Transfer of Real Property Interests.

§ 76.08(ee)(3) Estate Tax.

§ 76.08(ee)(4) Inheritance Tax.

§ 76.08(ff) New Mexico.

§ 76.08(ff)(1) Property Tax.

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§ 76.08(gg) New York.

§ 76.08(gg)(1) Property Tax.

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§ 76.08(gg)(2)(iii) Mortgage Recording Tax.

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§ 76.08(hh) North Carolina.

§ 76.08(hh)(1) Property Tax.

§ 76.08(hh)(2) Tax on Instruments Conveying Real Property Interests.

§ 76.08(hh)(3) Estate Tax.

§ 76.08(hh)(4) Generation-skipping Inheritance Tax.

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§ 76.08(ii) North Dakota.

§ 76.08(ii)(1) Property Tax.

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§ 76.08(jj) Ohio.

§ 76.08(jj)(1) Property Tax.

§ 76.08(jj)(2) Tax on Recordation of Transfers of Real Property.

§ 76.08(jj)(3) County Tax on Recordation of Transfers of Real Property Interests.

§ 76.08(jj)(4) Estate Tax.

§ 76.08(jj)(5) Generation-skipping Transfer Tax.

§ ;76.08(kk) Oklahoma.

§ 76.08(kk)(1) Property Tax.

§ 76.08(kk)(2) Transfer Taxes.

§ 76.08(kk)(2)(i) Tax on Instruments Conveying Real Property Interests.

§ 76.08(kk)(2)(ii) Registration Tax on Mortgages.

§ 76.08(kk)(3) Estate Tax.

§ 76.08(ll) Oregon.

§ 76.08(ll)(1) Property Tax.

§ 76.08(ll)(2) Inheritance Tax.

§ 76.08(mm) Pennsylvania.

§ 76.08(mm)(1) Property Tax.

§ 76.08(mm)(2) Tax on Transferors of Real Property Interests.

§ 76.08(mm)(3) Estate Tax.

§ 76.08(mm)(4) Inheritance Tax.

§ 76.08(nn) Rhode Island.

§ 76.08(nn)(1) Property Tax.

§ 76.08(nn)(2) Tax on Instruments Conveying Real Property Interests.

§ 76.08(nn)(3) Estate Tax.

§ 76.08(nn)(4) Generation-skipping Transfer Tax.

§ 76.08(oo) South Carolina.

§ 76.08(oo)(1) Property Tax.

§ 76.08(oo)(2) Tax on Instruments Conveying Real Property Interests.

§ 76.08(oo)(3) County Tax on Real Property Transfers.

§ 76.08(oo)(4) Estate Tax.

§ 76.08(oo)(5) Generation-skipping Transfer Tax.

§ 76.08(pp) South Dakota.

§ 76.08(pp)(1) Property Tax.

§ 76.08(pp)(2) Tax on Transfers of Real Property Titles.

§ 76.08(pp)(3) Estate Tax.

§ 76.08(pp)(4) Inheritance Tax.

§ 76.08(qq) Tennessee.

§ 76.08(qq)(1) Property Tax.

§ 76.08(qq)(2) Transfer Taxes.

§ 76.08(qq)(2)(i) Tax on Transfers of Real Property Interests.

§ 76.08(qq)(2)(ii) Tax on Instruments of Indebtedness.

§ 76.08(qq)(3) Estate Tax.

§ 76.08(qq)(4) Generation-skipping Transfer Tax.

§ 76.08(qq)(5) Inheritance Tax.

§ 76.08(qq)(6) Gift Tax.

§ 76.08(rr) Texas.

§ 76.08(rr)(1) Property Tax.

§ 76.08(rr)(2) Estate Tax.

§ 76.08(rr)(3) Generation-skipping Transfer Tax.

§ 76.08(ss) Utah.

§ 76.08(ss)(1) Property Tax.

§ 76.08(ss)(2) Estate Tax.

§ 76.08(tt) Vermont.

§ 76.08(tt)(1) Property Tax.

§ 76.08(tt)(2) Transfer Taxes.

§ 76.08(tt)(2)(i) Tax on Transfer of Real Property Titles.

§ 76.08(tt)(2)(ii) Capital Gains Tax on Land.

§ 76.08(tt)(3) Estate Tax.

§ 76.08(uu) Virginia.

§ 76.08(uu)(1) Property Tax.

§ 76.08(uu)(2) Transfer Taxes.

§ 76.08(uu)(2)(i) Tax on Instruments Conveying Real Property Interests.

§ 76.08(uu)(2)(ii) Tax on Documents Transferring Real Property Interests.

§ 76.08(uu)(2)(iii) Tax on Leases and Contracts.

§ 76.08(uu)(3) Estate Tax.

§ 76.08(uu)(4) Generation-skipping Transfer Tax.

§ 76.08(uu)(5) Tax on Wills and Administrators.

§ 76.08(vv) Washington.

§ 76.08(vv)(1) Property Tax.

§ 76.08(vv)(2) Tax on the Sale of Property.

§ 76.08(vv)(3) Estate Tax.

§ 76.08(vv)(4) Generation-skipping Transfer Tax.

§ 76.08(ww) West Virginia.

§ 76.08(ww)(1) Property Tax.

§ 76.08(ww)(2) Tax on Transfers of Real Property Titles.

§ 76.08(ww)(3) Estate Tax.

§ 76.08(xx) Wisconsin.

§ 76.08(xx)(1) Property Tax.

§ 76.08(xx)(2) Tax on Transfers of Real Property.

§ 76.08(xx)(3) Estate Tax.

§ 76.08(xx)(4) Inheritance Tax.

§ 76.08(xx)(5) Gift Tax.

§ 76.08(yy) Wyoming.

§ 76.08(yy)(1) Property Tax.

§ 76.08(yy)(2) Estate Tax.

§ 76.09 Bibliography.

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Chapter 76 TAXATION OF REAL PROPERTY

9-76 Thompson on Real Property, Thomas Editions § 76.01

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§ 76.01 Introduction to the Chapter.

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Most types of real property interests are subject to some form of taxation, imposed either by the federal government or by state and local governments. Income taxes may be imposed when property represents or produces some type of income for its owner or owners; some type of state or local transfer tax may be imposed when ownership of real property changes; and some type of inheritance or estate tax may be imposed on real property whose owner dies. This chapter is intended to alert the reader and researcher to the various kinds of taxes that are imposed upon real property in American jurisdictions, to some notion of how heavy these impositions are, and to the sources where further information may be obtained. It is not the objective of this chapter to give a full discussion of any of these taxing schemes, because they tend to be extremely detailed, complex, and changeable. Because of the nature of the chapter as a broad survey of a huge topic, and the fact that the principal sources are specific federal statutes, regulations, and agency rulings, no bibliography and no computer-assisted research instructions are included with this chapter.

The first part of the chapter reviews the types of federal taxation that may be imposed on real property, principally the income tax, and also briefly describes the estate and gift tax rules. The latter part of the chapter summarizes the enormous number of state transfer, recording, and estate and inheritance taxes that are imposed upon real property.

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Chapter 76 TAXATION OF REAL PROPERTY

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§ 76.02 Federal Income Taxation of Non-residential Real Property.

[Go To Supp]

Under the federal income tax law, real property is subject to taxation according to several laws and rules that will be discussed in this section. However, it should be noted that a separate discussion for the federal income taxation of residential real property is provided because of certain special provisions applying to transfers of a taxpayer's principal residence and some tax advantages for individual taxpayers that are related to residential real property. The general rules of federal income taxation pertaining to real property that are discussed in the section on non-residential real property also apply to residential real property, except where specifically noted otherwise.

§ 76.02(a) Taxation of Non-residential Real Property Acquisition.

§ 76.02(a)(1) Tax Treatment of Acquisition Costs.

A taxpayer who acquires real property often has a number of tax perspectives in mind, but usually paramount among them is whether the consideration given for the acquisition of real property can be treated as a deduction against the acquirer's tax liability in the year of acquisition, or must be treated as a capital expense to be deducted only in portions throughout the years of the life of the property acquired. Alternatively, sometimes the cost of acquisition must be capitalized over the life of the loan used to obtain the property.

Since 1981, the tax rules have required that expenses and costs of acquisition that are related to a loan used for acquiring property must be treated in the same manner as escrow fees, loan processing fees and other service fees, which is that they must be capitalized over the life of the loan. n1

To the extent such fees relate specifically to obtaining a loan commitment, rather than to the loan itself, and the loan commitment is deemed to begin and end within a relatively brief period of time, a taxpayer may be able to treat the fees connected with the loan commitment as fully deductible in the year incurred. n2 Such a result is almost necessitated in the circumstances where the loan is eventually declined, and the fees expended in obtaining the loan commitment are treated as deductible losses. n3

Another common variety of acquisitions costs is what are known as "points." A "point" is an amount equal to 1% of the amount borrowed, and a lender frequently charges one or more "points" as a special additional fee for making the loan; certain types of subsidized or guaranteed loans are made at below the market interest rate by commercial lenders, who seek to increase their incentive for making such loans by obtaining payment of "points." Some "points" are fully deductible in the year paid as business expenses, while others must be amortized or deducted in piecemeal fashion as capital expenses attributable to the entire life of the loan. In the situation where "points" are paid as a fee for the privilege of obtaining the loan, such "points" may be treated either as fully deductible current business expenses or as capital expenses whose deductibility is amortized over the life of the loan. n4 "Points" that consist of fees for the privilege of obtaining a loan are treated under the tax code as amounts paid for the use of money or forbearance from collection of money. n5 In some instances these "points" are considered additional interest and are completely deductible in the year of the loan, because they are fully paid at the beginning of the loan process. n6 In other cases, however, the "points" are considered at least partially to be additional interest allocable to future years of the loan and must be ratably deducted for each of those years. n7

If a taxpayer pays deferred interest on a discount loan, that deferred interest is deductible in the year paid. n8 "Points" that are not considered as fees for the privilege of obtaining the loan, but rather are designated for particular services provided by the lender, must be capitalized over the life of the loan. n9 For taxpayers to whom the characterization of "points" may be critical in terms of tax liability, it is possible to structure the loan documents in such a way that the desired form of deductibility can be achieved. n10 Some restrictions exist, however; a taxpayer who pays "points" as part of refinancing a mortgage is required to amortize the deductibility of those "points" over the life of the new loan, except to the extent the refinancing is used in improving a mortgaged residence. n11

If a taxpayer who transfers real property is required to pay some sort of transfer tax imposed by a state or local governmental entity, and if the transfer tax is based upon the actual consideration paid for the transfer, the amounts of such transferred taxes are usually deductible if the property is used in a trade or business or some other income-producing activity. n12 Where the property that is transferred was held only as an investment or for income production, and not specifically used in a trade or business, the deductibility of the transfer taxes applies only to an individual taxpayer and only as an itemized deduction. n13 If the property being transferred produces rental or royalty income, then any transfer taxes are fully deductible. n14

Since 1986, a taxpayer who holds real property for resale may not deduct the direct cost and the property's share of indirect costs of the transfer, including taxes, but must capitalize those expenses over the life of the property. n15

If such a taxpayer is conducting new construction on the property which is to be held for resale, then the interest costs attributable to the construction loan must also be capitalized if paid or incurred during the construction period and if the production period exceeds two years n16 or exceeds at least one year and has a cost of over one million dollars, n17 or the property has a long useful life. n18 The full details of these rules are still being announced. n19

§ 76.02(a)(2) The Definition and Role of Basis.

A very significant concept in the rules for federal income taxation of real property is that of "basis." Basis is the value assigned to property and generally represents the cost of acquiring or investing in the property. n20 One who acquires property must know the basis in order to compute taxable gain and certain credits against tax upon retransfer of the property. The basis of the property is not a static number, but may be adjusted up or down to reflect capital expenses, losses, and depreciation.

In most instances, the cost of acquiring property is the basis, although property that is obtained through an exchange has its fair market value as its basis. When property is obtained for corporation stock, the basis of the property is the value of the stock given in consideration, which may be defined as the fair market value of the property in an arm's-length transaction. n21 When property consists of a building that has been constructed on land, the basis consists of the cost of

the building, the cost of the land, and the cost of acquiring title. Building costs will include not only the interest and taxes pertaining to the period of construction, but also insurance premiums, salaries of officers needed to guide the construction activity, n22 and depreciation of the equipment used in construction. n23 Some construction expenses that would normally be part of the basis and then subject to a capitalized deduction schedule, are assigned shorter amortization periods if placed in service prior to November 6, 1990 n24 and often can be treated as business expense deductions in the year incurred. n25

The basis may also be modified because of liabilities that encumber the real property. Basis is not altered by the existence of contingent liabilities, n26 but can be affected by liabilities to which the property itself is susceptible, whether or not the taxpayer who has acquired the property interest is personally liable. n27

Thus, debt instruments with nonrecourse liability, n28 which are free of the "at risk" limitations on loss deductions as they relate to real property, would modify the cost basis of the property. n29 Where the basis would exceed the real value of the property if it included such nonrecourse liabilities, those liabilities will normally not be treated as part of the basis. n30

Properties traded through a tax-free exchange or through an involuntary conversion have a basis defined as the basis of the property given in the exchange or conversion, enhanced by any gain recognized in the transfer itself. n31

When property is transferred by gift, the property has the same basis as it had in the hands of the donor, n32 which basis is then adjusted if gift tax consequences are incurred in the donation. n33 If property obtained by gift is further transferred, its basis may not exceed the fair market value of the property and thus produce a loss. n34 When property is obtained from a decedent's estate, its basis in the hands of the heir or devisee is the fair market value of the property on the date of decedent's death or on the alternative valuation date listed in Internal Revenue Code § 2032. n35

If the basis of the property is established as of the time the property was acquired, but the property is later transferred in portions, then the basis must be allocated according to the value of the portions transferred. n36 When the property consists of both non-depreciable land and of improvements, which may be depreciable property, the basis must also be allocated in order to account for the depreciation deductions claimed for the improvements. If the basis has been allocated under these circumstances and then adjustments are made to the basis, the adjustments are apportioned in the same way as the allocation of the underlying basis. n37

§ 76.02(b) Taxation of Non-residential Real Property Ownership.

§ 76.02(b)(1) Deductions.

When real property is used in a trade, a business, or in certain income-producing activities, some expenses related to that real property are currently deductible in the year incurred as business expenses. n38 Examples of these expenses are the costs of repairs and the costs of insurance premiums. A taxpayer must carefully distinguish between repairs that may be deducted as current business expenses and "repairs" that are really capital improvements and whose deductibility must be apportioned over the life of the improvement. n39 Also, the deductibility of multi-year insurance premiums must be apportioned over the period of the premiums' coverage. n40

If the deductions that are permitted for expenses related to real estate activities produce a loss for the taxpayer, the loss is deductible for that taxpayer only up to the amount for which the taxpayer is at risk. A taxpayer is at risk for the amount of cash invested, the amount of indebtedness for which the taxpayer is personally liable, n41 and the amount of certain non-recourse loans from qualified lenders. n42

Among the most common deductible business expenses are real property taxes, n43 but not all assessments against property that appear to be taxes are actually deductible as taxes. In order to be deductible, the tax must be levied against

the ownership of the property, not against the exercise of some privilege of ownership. Therefore, if the state where the property is located imposes a tax on the gain from the sale or transfer of the property, such a tax does not qualify as a deductible real property tax for federal income tax purposes. n44 Such state transfer taxes, however, may still be deductible as expenses of doing business. Likewise, an assessment against property to pay for a specific service may not be deductible as a real property tax n45 but may still be deductible as a business expense. n46 Taxes assessed against property for specific improvements and facilities are also not deductible as property taxes. n47

If a taxpayer makes interest payments in connection with the property, those interest payments are deductible in the year paid (or accrued, for accrual taxpayers). n48 Fees other than interest paid in connection with loans are not necessarily deductible. If a fee, unlike interest, is not for the use of the borrowed funds, but is a fee for processing the loan or for part of the price of the land, it is not deductible as interest. n49 Interest paid is not deductible if the indebtedness to which the interest is attributed is not genuine and is not the taxpayer's. n50 Where the proceeds of the loan to which the interest is attributed are placed in a passive investment, certain limitations on the available deductions may apply. n51 These investment interest limitations are also coordinated with passive loss rules. n52

§ 76.02(b)(2) Credits.

Both deductions and credits reduce a taxpayer's ultimate tax liability, but they do so in different ways. A deduction reduces the amount of the taxpayer's income that may be exposed to tax liability. A credit is applied against the tax liability which has already been calculated and directly reduces or offsets that tax liability. In recent years, credits pertaining to real property have been significantly restricted. Generally, credits related to real property are limited by the taxpayer's tax liability for the tax year, by the taxpayer's use of non-recourse financing for qualified expenditures, and by the taxpayer's derivation of income from passive activities. n53

§ 76.02(b)(2)(i) Investment Credit.

Formerly a major consideration in large real estate transactions, the investment credit has been mostly eliminated for tax years after 1985.

§ 76.02(b)(2)(ii) Rehabilitation Credit.

A rehabilitation credit is available for qualified expenditures for buildings first placed in service before 1936; certified historic structures are entitled to a 20% rehabilitation credit. n54 The credit is intended to encourage restoration rather than reconstruction of older buildings that are not certified as historic, and thus the requirements for the credit include retaining most of the external walls and the internal structural framework. n55 If such a credit is taken, the basis of the property must usually be reduced by the amount of the credit. A taxpayer qualifies for this credit by making expenditures for the property, its improvements, or its additions. The rehabilitation credit is not available when an existing building is enlarged, when property is acquired, or when the expenditure pertains to property which is given accelerated depreciation treatment. n56

§ 76.02(b)(2)(iii) Low-income Housing Credit.

A credit is available for expenditures for qualified low-income housing projects. n57 The rules to qualify for this credit and to compute the credit are quite complex, and the credit may be subject to recapture if the qualifications later dissipate. Generally, the low-income housing credit may only be used to offset taxes on passive income. n58 The low-income housing credit has had a limited life and must be extended by legislation from time to time. Additional guidance for owners of rent-restricted units is imposed by the Revenue Reconciliation Act of 1993. n59

§ 76.02(b)(2)(iv) Energy Investment Credit.

If certain real property qualifies as alternative energy property, solar wind energy property, and other specially defined

property relating to energy conservation, it may qualify for the energy investment credit. n60 Real property may qualify for the rehabilitation credit and the energy investment credit concurrently.

§ 76.02(b)(2)(v) Credit for Disability Access.

Certain small businesses are eligible for a tax credit of up to $5,000 for expenditures in making their facilities accessible to the disabled. n61 Businesses may also deduct as much as $1,500 per year of expenditures incurred in making facilities more accessible to the handicapped or elderly. n62

§ 76.02(b)(3) Depreciation.

An owner of property may usually depreciate the costs incurred in acquiring the property, but may not deduct the acquisition costs as current expenses. Several different systems of computing depreciation have been enacted over the years, each with its own set of complexities and vagaries, and the applicability of each system depends upon the date the property was "placed in service." For instance, property placed in service on or before December 31, 1980, is depreciated according to instructions in the Internal Revenue Code itself. n63 Depreciation for property placed in service after December 31, 1980, is calculated according to the accelerated cost recovery system. n64 Because the land itself is not subject to decay or exhaustion and is therefore not depreciable, the amount of basis subject to depreciation consists only of those costs relating to the improvements on the land. n65

In theory, the depreciation is related to the useful life of the item being depreciated as that item is used in the taxpayer's trade, business, or income activity. When an item has been fully used or depreciated, it still has a salvage value, which is the value left in the item once it is no longer useful in the trade, business, or income activity. Once the salvage value has been identified, the difference between the basis and the salvage value over the useful life of the item is the amount of depreciation that can be deducted, or "recovered." Enormous complexity afflicts taxpayers attempting to determine and apply the methods by which they identify the useful life of an item and how much of the depreciable value may be deducted in any one year. Sometimes detailed tables of property types have been promulgated, such as the Class Life Asset Depreciation Range System (CLADR or ADR), introduced in 1972. n66 Other methods of apportioning depreciation over the years of the property's life have included straight line, 200 percent declining balance, and 150 percent declining balance. n67

The taxpayer's objective in most of these matters is to disproportionately increase the amount of depreciation deduction in the early years of the property's life. This objective was given statutory approval for tax years after 1980 by enactment of the Accelerated Cost Recovery System (ACRS), which has established specific and somewhat limited useful life periods for various sorts of real property. Most depreciable real property (including non-residential real property with an ADR class life of at least 27.5 years) has either a 31.5-year recovery period, or a 27.5-year period (generally consisting of residential rental property), or a 20-year period (consisting of most other kinds of real property). n68

Salvage value is no longer used in calculating depreciable value, and the depreciable value is deducted in shares over the period of time specified under the ACRS. n69 The two longest-life real property categories are depreciated by using the straight-line method, but the 20-year property category may be depreciated by use of either the straight-line or the 150% declining balance method. n70 The rules for calculating depreciation deductions are very complex and should be studied in the primary sources, beginning with the code sections. n71

§ 76.02(b)(4) Alternative Minimum Tax.

An additional tax known as the alternative minimum tax is imposed on certain items of tax liability called tax preference items. The alternative minimum tax is imposed if and to the extent that a specially calculated minimum tax on certain items of income exceeds the taxpayer's regular tax liability. n72 Owners of real property may be liable for

payment of the alternative minimum tax, because certain tax preference items relate directly to real property. These include depletion, charitable contributions of appreciated property, and certain accelerated depreciation and amortization amounts. n73

§ 76.02(c) Taxation of Non-residential Real Property Leases.

§ 76.02(c)(1) Costs of Leasehold Acquisitions.

Certain costs of acquiring a leasehold may be deductible as current business expenses, or may be later deductible as capital improvements whose deductibility is amortized over the life of the improvement. Typical costs incurred in acquiring a leasehold include professional fees, commissions, and payments to buy out existing leases.

If the party obtaining a leasehold is a landlord, the acquisition costs must generally be capitalized. n74 Also a tenant who incurs costs in acquiring or entering into a lease must usually capitalize those costs over the life of the lease. n75 Where the costs of leasehold acquisition are divided between direct acquisition costs and costs for improving the leasehold, the amortization of those expenses may be related to the life of the improvement period, if that period is shorter than the lease term. n76

If a tenant under a commercial lease is required to make certain payments to the landlord in addition to the ordinary rent, those additional payments are considered deductible expenses for the tenant and ordinary income for the landlord. n77 If a security deposit, which is intended to enhance the likelihood that lease terms will be performed, is held by the landlord, the deposit is generally not treated as income, n78 but if the security deposit is eventually treated as advance rent and applied against the tenant's later rental obligation, then it may be taxable to the landlord as ordinary income. n79 A tenant who incurs expenditures in making improvements to the lease may capitalize those costs over the term of the lease, unless there is an option to renew the lease, in which case it may be advantageous to amortize those costs over the life of the improvement. The lease term used for calculating capitalization should not include any period for which the lease may be renewed, extended or continued pursuant to an option exercisable by the lessee. n80

§ 76.02(c)(2) Taxation of Sale-leasebacks.

Special federal income tax rules apply when an owner of property sells the property to another, but immediately receives the property back as lessee of the property. In most sale-leaseback arrangements, the property is leased back to the seller for a long term, and the seller pays all the operational expenses while the rent paid usually offsets the purchase price, giving an acceptable rate of return to the buyer-lessor. Usually the seller-lessee prefers to treat the two portions of the transaction independently, with the sale resulting in gain or loss, and the lease rent considered as an ordinary business expense. If so, then the other ordinary expenses of leasing, such as repairs and insurance, are also deductible. n81 In addition to the deductions for the seller-lessee, the buyer-lessor may claim depreciation deductions, credits, and interest deductions for associated mortgages; rent payments must be reported and taxed as ordinary income.

Because sale-leasebacks are often used by the parties as alternatives for conventional financing, and because the position of the seller changes little after the transaction, the Internal Revenue Service may characterize the transaction as simply a form of borrowing, rather than a change of ownership. This is quite likely to happen if the seller has a right to reacquire the property on favorable terms during or at the conclusion of the lease. For the seller, adverse tax consequences may result from characterizing the transaction as a loan. The parties may not claim a loss on the sale, n82 and the buyer would be a lender and therefore not entitled to some of the tax advantages of ownership. No firm guidance is available to help determine under what circumstances sale-leaseback transactions are considered loans rather than sales. n83

§ 76.02(d) Taxation of Non-residential Real Property Transfers.

§ 76.02(d)(1) Sales.

A major revision in real estate investment strategies occurred in 1986 when the Tax Reform Act repealed the deduction for capital gains. Capital gains, which consist of the appreciation and value of capital assets held for investment, were, through the capital gains deduction, subject to effectively lower rates of taxation when the capital assets were transferred to others. With the elimination of the capital gains deduction in 1986, all net capital gains were required to be completely included in income at the taxpayer's usual rate of taxation. Under present rules, capital gains can be offset by capital losses, and those losses can also offset up to $3,000 per year of ordinary income.

Another important tax consequence related to sales of non-residential real property was promulgated in 1986. For depreciable real property placed in service after 1986, it is no longer necessary to account for depreciation recapture when the property is sold. n84

Property sold by corporate sellers may be subject to double tax, the first tax imposed on the proceeds of the sale as held by the corporation, and, when the proceeds are distributed to shareholders, a second tax on the personal income of the shareholders. If the property, rather than its sale proceeds, is distributed to shareholders, the property's basis determines its fair market value. n85

§ 76.02(d)(2) Installment Sales.

If a taxpayer sold property and received in consideration a cash down payment and a note for the balance, the gain from this entire consideration would be subject to tax in the year the transaction took place. However, federal income tax law includes special rules for installment sales, which generally permit sellers to defer taxation on the unpaid balance until each installment is paid. n86 Property transactions by dealers do not qualify for installment treatment. n87 The installment method is also not available where real property is sold under a revolving credit plan arrangement. Except for certain installment sales of time shares, installment treatment is denied for purposes of the alternative minimum tax. n88

§ 76.02(d)(3) Exchanges.

Under so-called tax-free exchanges, real property that is held for productive use in a trade or business or that is held for investment may be traded for similar property (so-called "like kind" property) without incurring recognition of gain or loss and the usual accompanying tax consequences. n89 Property that is held primarily for sale n90 or exchange n91 does not qualify for the tax-free exchange treatment. While the exchange of properties does not need to occur concurrently, there are time limits within which the exchange must be completed. n92 Generally the transaction must be completed within 180 days. n93 The property obtained in a tax-free exchange assumes the same basis as the property that was given in the exchange, with adjustments for cash consideration or for recognized loss. n94 The tax laws give a broad definition to "like kind" property, permitting, for example, improved property to be exchanged for unimproved property. n95 In recent years, some restrictions have been imposed upon tax-free exchanges of property, so that related persons are not qualified for this tax benefit, if either party disposes of the exchanged property within two years after the exchange, n96 and domestic real property may not be exchanged for foreign real property and qualify for this tax treatment. n97

§ 76.02(d)(4) Foreclosures.

Occasionally real property changes ownership by means of foreclosure. If a borrower-owner defaults on a mortgage, or abandons the property so that a conveyance in lieu of foreclosure has occurred, certain tax consequences for either party may arise. Sometimes the default will be settled by discounting the mortgage obligation, and that results in taxable gain to the mortgagor in the amount of the advantage gained by the favorable discharge terms. n98 A business mortgagor may avoid this attribution of gain if the debt is a qualified business indebtedness, n99 and the basis of the depreciable property is reduced by the excluded amount. n100 For the mortgagee, a discount settlement is deemed a bad debt to the

extent of the discount. This bad debt may be either fully deductible as a business bad debt or treated as a capital loss. n101 If the mortgage as held by the mortgagee was a capital asset and then is sold at a discount to a third party, the discount is treated as a capital loss. n102

When the property is sold at foreclosure sale, the sale proceeds may be either greater or less than the basis of the property, producing a corresponding gain or loss to the mortgagor. n103 The loss may be capital loss or ordinary loss, depending upon the nature of the asset as held by the mortgagor. The potential gain to the mortgagor is reduced to the extent sale proceeds are used to pay property tax or any interest connected with the mortgage. n104

In addition to the gain or loss recognized by the mortgagor, a mortgagee may realize gain or loss at a foreclosure sale to the extent that the fair market value of the property exceeds the amount of the purchase price applied to the indebtedness. If the mortgaged property is actually transferred from the mortgagor to the mortgagee, or abandoned, such transfers are considered sales. n105

§ 76.02(d)(5) Involuntary Conversions.

In addition to the usual method of condemnation by use of eminent domain power, involuntary conversions of real property can also occur by means of destruction, theft, seizure, requisition, or sale under threat of requisition or condemnation. n106 Involuntary conversion also occurs if a property owner negotiates a voluntary sale under threat or imminence of condemnation. n107 While a taxpayer ordinarily must recognize gain or loss (usually gain).

From receipt of awards in condemnation proceedings, this gain may be deferred if, within two years after the year of the involuntary conversion, the conversion proceeds are used to acquire property which is similar to or related in service or use to the converted property. n108 Deferral of gain will occur only if the taxpayer files an election therefor. n109

FOOTNOTES:

(n1)Footnote 1. *Rev. Rul. 81-160, 1981-1 C.B. 312*

(n2)Footnote 2. *Duffy v. United States, 690 F.2d 889 (Ct. Cl. 1982).*

(n3)Footnote 3. *See* I.R.C. § 165.

(n4)Footnote 4. *Rev. Rul. 69-188, 1969-1 C.B. 54.*

(n5)Footnote 5. I.R.C. § 163.

(n6)Footnote 6. *Id.* § 163(a).

(n7)Footnote 7. *Id.* §§ 163(g), 461(g).

(n8)Footnote 8. *Moore v. Commissioner, 68 T.C. 909 (1994); Cleaver v. Commissioner, 6 T.C. 452, aff'd 158 F.2d 342 (7th Cir. 1946), cert. denied, 330 U.S. 849 (1947).*

(n9)Footnote 9. *Enoch v. Commissioner, 57 T.C. 781 (1972).*

(n10)Footnote 10. *Rev. Rul. 69-189, 1969-1 C.B. 55.*

(n11)Footnote 11. *Rev. Rul. 87-22, 1987-1 C.B. 146; Rev. Proc. 87-15, 1987-1 C.B. 624.*

(n12)Footnote 12. I.R.C. § 184(a); *Rev. Rul. 80-121, 1980-1 C.B. 3.*

(n13)Footnote 13. I.R.C. § 63(c); *Rev. Rul. 65-313, 1965-2 C.B. 47.*

(n14)Footnote 14. I.R.C. § 62(a)(4).

(n15)Footnote 15. *Id.* § 263A(a).

(n16)Footnote 16. *Id.* § 263A(f)(1)(B)(ii).

(n17)Footnote 17. *Id.* § 263A(f)(1)(B)(iii).

(n18)Footnote 18. *Id.* § 263A(f)(1)(B)(i).

(n19)Footnote 19. *See, e.g.*, Temp. Treas. Reg. § 1.263A-1T.

(n20)Footnote 20. I.R.C. § 1012. Fair market value, rather than purchase price, is the basis where the non-arm's-length purchase price is much higher than a recent previous arm's-length sale of the same property. *Pleasant Summit Land Corp. v. Commissioner, 54 Tax Ct. Mem. Dec. (CCH) 566 (1987), modified, 863 F.2d 263 (3d Cir. 1988), cert. denied, 493 U.S. 901 (1989).*

(n21)Footnote 21. *Philadelphia Park Amusement Co. v. United States, 126 F. Supp. 184 (Ct. Cl. 1954).*

(n22)Footnote 22. *Acer Realty Co. v. Commissioner, 132 F.2d 512 (8th Cir. 1942).*

(n23)Footnote 23. *Commissioner v. Idaho Power Co., 418 U.S. 1 (1974).*

(n24)Footnote 24. Omnibus Budget Reconciliation Act of 1990, P.L. 101-508, § 118112(a)(1)-(2).

(n25)Footnote 25. I.R.C. § 179. This section permits up to $17,500 of the cost of qualifying personal property to be deducted as a current expense. If the expense deduction exceeds the taxpayer's trade or business income, the excess may be carried forward to a subsequent tax year.

(n26)Footnote 26. *Denver & Rio Grande W.R.R. v. United States, 505 F.2d 1266 (Ct. Cl. 1974).*

(n27)Footnote 27. *Crane v. Commissioner, 331 U.S. 1 (1947).*

(n28)Footnote 28. *Mayerson v. Commissioner, 47 T.C. 340 (1966).*

(n29)Footnote 29. I.R.C. §§ 465(b)(3), 465(c)(3)(D).

(n30)Footnote 30. *Narver v. Commissioner, 75 T.C. 53, aff'd, 670 F.2d 855 (9th Cir. 1980).*

(n31)Footnote 31. I.R.C. §§ 362, 1031, 1033.

(n32)Footnote 32. *Id.* § 1015(a).

(n33)Footnote 33. *Id.* § 1015(d).

(n34)Footnote 34. *Id.* § 1015(a).

(n35)Footnote 35. *Id.* § 1014(a).

(n36)Footnote 36. *See, e.g.*, Dahling v. Commissioner, T.C.M. 1988-430.

(n37)Footnote 37. *Soelling v. Commissioner, 70 T.C. 1052 (1978).*

(n38)Footnote 38. I.R.C. §§ 162, 212.

(n39)Footnote 39. *Concord Invs. Corp. v. Commissioner, TC Memo 1994-248 (1994); Appeal of Illinois Merchants Trust Co., 4 B.T.A. 103 (1926).*

(n40)Footnote 40. *Rev. Rul. 70-413, 1970-2 C.B. 104.*

(n41)Footnote 41. I.R.C. § 465(b).

(n42)Footnote 42. *Id.* § 465(a).

(n43)Footnote 43. *Id.* § 164(a)(1).

(n44)Footnote 44. Treas. Reg. § 1.164-3(b); *Rev. Rul. 80-121, 1980-1 C.B. 43; Rev. Rul. 75-558, 1975-2 C.B. 67; Rev. Rul. 73-600, 1973-2 C.B. 47.*

(n45)Footnote 45. *Mahler v. Commissioner, 119 F.2d 869* (2d Cir.), *cert. denied, 314 U.S. 660 (1941); Roth v. Commissioner, 17 T.C. 1450 (1952); Rev. Rul. 79-201, 1979-1 C.B. 97; Rev. Rul. 77-29, 1977-1 C.B. 44; Rev. Rul. 75-346, 1975-2 C.B. 66.* Payments in lieu of taxes made by condominium owners to a tax-exempt public authority, used only for public purposes and not including any special assessments, are deductible as property taxes to the extent the condominium would otherwise have been subject to property tax. Priv. Ltr. Rul. 88-11-028 (Mar. 28, 1988).

(n46)Footnote 46. I.R.C. § 162; *Mahler v. Commissioner, 119 F.2d 869* (2d Cir.), *cert. denied, 314 U.S. 660 (1941).*

(n47)Footnote 47. Treas. Reg. § 1.164-4(a).

(n48)Footnote 48. I.R.C. § 163(a).

(n49)Footnote 49. *Deputy v. du Pont, 308 U.S. 488 (1940); Old Colony R.R. v. Commissioner, 284 U.S. 552 (1932); Rev. Rul. 77-417, 1977-2 C.B. 60; Rev. Rul. 74-187, 1974-1 C.B. 48; Rev. Rul. 71-98, 1971-1 C.B. 57.*

(n50)Footnote 50. I.R.C. § 163(a); *Gatto v. Commissioner, 1 F.3d 826 (9th Cir. 1993); Karme v. Commissioner, 673 F.2d 1062 (9th Cir. 1982).*

(n51)Footnote 51. I.R.C. § 163(d).

(n52)Footnote 52. *Id.* § 469.

(n53)Footnote 53. *Id.* § 46(c).

(n54)Footnote 54. *Id.* § 46(b).

(n55)Footnote 55. *Id.* § 48(g).

(n56)Footnote 56. *Id.* § 48(g)(2).

(n57)Footnote 57. *Id.* § 42.

(n58)Footnote 58. *Id.* § 469.

(n59)Footnote 59. Pub. L. No. 103-66; *Rev. Proc. 94-9, 1994-1 C.B. 555; Rev. Proc. 94-10, 1994-1 C.B. 556.*

(n60)Footnote 60. I.R.C. § 48(a).

(n61)Footnote 61. *Id.* § 44.

(n62)Footnote 62. *Id.* § 190.

(n63)Footnote 63. *Id.* § 167.

(n64)Footnote 64. *Id.* § 168.

(n65)Footnote 65. *Rev. Rul. 74-265, 1974-1 C.B. 56; Rev. Rul. 65-265, 1965-2 C.B. 52* (as clarified by *Rev. Rul. 68-193, 1968-1 C.B. 79).*

(n66)Footnote 66. Originally under *Rev. Proc. 72-10, 1972-1 C.B. 721,* which was superseded by *Rev. Proc. 83-35, 1983-1 C.B. 745* which was superseded (and now obsolete for property that is subject to I.R.C. § 168) by *Rev. Proc. 87-56, 1987-2 C.B. 674.*

(n67)Footnote 67. I.R.C. § 168(b).

(n68)Footnote 68. *Id.* § 168(e).

(n69)Footnote 69. *Id.* § 168(b)(3), (4).

(n70)Footnote 70. *Id.* § 168(b)(2).

(n71)Footnote 71. *See id.* §§ 167, 168, 1250.

(n72)Footnote 72. *Id.* §§ 55(a), 56.

(n73)Footnote 73. *Id.* § 57(a).

(n74)Footnote 74. *Rev. Rul. 81-161, 1981-1 C.B. 313; Renwick v. United States, 87 F.2d 123 (7th Cir. 1936); Young v. Commissioner, 59 F.2d 691* (9th Cir.), *cert. denied, 287 U.S. 652 (1932); Cockburn v. Commissioner, 16 T.C. 775 (1951); Prince v. Commissioner, 32 Tax Ct. Mem. Dec. (CCH) 117 (1973); Davidson v. Commissioner, 27 B.T.A. 158 (1932); Bourg v. Commissioner, 20 Tax Ct. Mem. Dec. (CCH) 425 (1961).*

(n75)Footnote 75. *Appeal of D.N. & E. Walter & Co., 4 B.T.A. 142 (1926).*

(n76)Footnote 76. *Rev. Rul. 61-217, 1961-2 C.B. 49.*

(n77)Footnote 77. I.R.C. § 61(a)(5).

(n78)Footnote 78. *City Gas Co. v. Commissioner, 689 F.2d 943 (11th Cir. 1982); Clinton Hotel Realty Corp. v. Commissioner, 128 F.2d 968 (5th Cir. 1942); Harcum v. United States, 164 F. Supp. 650 (E.D. Va. 1958); Mantell v. Commissioner, 17 T.C. 1143 (1952).*

(n79)Footnote 79. *Rev. Rul. 72-519, 1972-2 C.B. 32; Hirsch Imp. Co. v. Commissioner, 143 F.2d 912* (2d Cir.), *cert. denied, 323 U.S. 750 (1944); H & G Amusement Co. v. Commissioner, 46 B.T.A. 1095 (1942); J. & E. Enters., Inc. v. Commissioner, 26 Tax Ct. Mem. Dec. (CCH) 191 (1967).*

(n80)Footnote 80. I.R.C. § 178(a).

(n81)Footnote 81. *Id.* § 162(a)(3).

(n82)Footnote 82. *See id.* § 1031.

(n83)Footnote 83. *Frank Lyon Co. v. United States, 435 U.S. 561 (1978); American Realty Trust v. United States, 498 F.2d 1194 (4th Cir. 1974). Cf. Sun Oil Co. v. Commissioner, 562 F.2d 258 (3d Cir. 1977), cert. denied, 436 U.S.*

944 (1978); Estate of Franklin v. Commissioner, 544 F.2d 1045 (9th Cir. 1976); Hilton v. Commissioner, 74 T.C. 305 (1980), aff'd, 671 F.2d 316 (9th Cir.), *cert. denied, 459 U.S. 907 (1982).*

(n84)Footnote 84. I.R.C. §§ 1245, 1250.

(n85)Footnote 85. *Id.* § 346(b).

(n86)Footnote 86. *Id.* § 453.

(n87)Footnote 87. *Id.* § 453(l)(1)(B).

(n88)Footnote 88. *Id.* § 453(1).

(n89)Footnote 89. *Id.* § 1031(a).

(n90)Footnote 90. *Id.* § 1031(a).

(n91)Footnote 91. *Rev. Rul. 75-291, 1975-2 C.B. 332.*

(n92)Footnote 92. *See Starker v. United States, 602 F.2d 1341 (9th Cir. 1979).*

(n93)Footnote 93. I.R.C. § 1031(a)(3).

(n94)Footnote 94. *Id.* § 1031(d).

(n95)Footnote 95. Treas. Reg. §§ 1.1031(a) - 1.1031(b). In *Paullus v. Commissioner, T.C. Memo. 1996-419,* a taxpayer who was engaged primarily in the business of operating a golf course and country club also acquired real estate for investment purposes, in connection with which the taxpayer had infrequent but substantial sales of real property. When used in a property exchange, such real property qualified for non-recognition-of-gain treatment as investment property, because the taxpayer's real estate activity was incidental to its primary business. The exchanged property had been held for approximately four years and was not considered part of the taxpayer's inventory.

(n96)Footnote 96. I.R.C. § 1031(f)(1), added by the Revenue Reconciliation Act of 1989, § 7601.

(n97)Footnote 97. I.R.C. § 1031(h), added by the Revenue Reconciliation Act of 1989, § 7601.

(n98)Footnote 98. I.R.C. § 61(a)(12). Such a discount, while resulting in discharge of indebtedness income, is not "realized" in calculating gain on the sale of a residence. *Michaels v. Commissioner, 87 T.C. 1412 (1986).*

(n99)Footnote 99. I.R.C. § 108(d)(2)(A)(ii).

(n100)Footnote 100. *Id.* § 108(b)(2)(B).

(n101)Footnote 101. *Id.* § 166.

(n102)Footnote 102. *Yates Holding Co. v. Commissioner, 39 Tax Ct. Mem. Dec. (CCH) 303 (1979).*

(n103)Footnote 103. *Rev. Rul. 73-36, 1973-1 C.B. 372.*

(n104)Footnote 104. *Rev. Rul. 72-237, 1972-1 C.B. 51; Malmstedt v. Commissioner, 578 F.2d 520 (4th Cir. 1978).*

(n105)Footnote 105. Treas. Reg. §§ 1.1001 - 1.1002.

(n106)Footnote 106. I.R.C. § 1033(a).

(n107)Footnote 107. *Rev. Rul. 74-8, 1974-1 C.B. 200; Rev. Rul. 63-221, 1963-2 C.B. 332.*

(n108)Footnote 108. I.R.C. §§ 1033(a)(2)(A) - 1033(a)(2)(B).

(n109)Footnote 109. Treas. Reg. §§ 1.1033(a)(2) - 1.1033(c)(2).

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Chapter 76 TAXATION OF REAL PROPERTY

9-76 Thompson on Real Property, Thomas Editions § 76.03

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§ 76.03 Federal Income Taxation of Residential Real Property.

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§ 76.03(a) Taxation of Residential Real Property Ownership.

§ 76.03(a)(1) Deduction for Moving Expenses.

Ownership of residential real property can make a number of deductions available to individual taxpayers, and among those is the deduction for moving expenses (although a taxpayer does not need to be an owner of real property to qualify for this deduction). The deduction for moving expenses is available upon a change of residence, whether the residence is rented or owned, and it is attractive because it is available even to taxpayers who itemize deductions. In order to qualify as a deduction, the moving expenses must have been incurred by the taxpayer in connection with employment, although employment can include self-employment. The taxpayer must also meet the following additional criteria: the distance between the taxpayer's new principal place of work and former residence must be at least 50 miles farther than the distance between the former residence and the former place of work; and the taxpayer must meet tests of full-time employment for either 39 weeks, or 78 weeks if the taxpayer is self-employed, after the move. n110 In order to qualify for the moving expense deduction, the move must be a requirement of the taxpayer's employment; an employee-initiated transfer is not deductible, even if it benefits the employer and is therefore partially reimbursed. n111

§ 76.03(a)(2) Deduction for Casualty Losses.

The owner of a personal residence, as other taxpayers, may deduct losses caused to the residential property by casualty. n112 A casualty is some sudden, unexpected or unusual event, n113 and there must be a direct relationship between the loss and the cause, n114 and the damage must be permanent. n115 Thus, a steadily operating cause with gradual loss caused by the taxpayer's neglect would not constitute a casualty loss.

The deduction for casualty losses is limited in several ways. It may be computed by one of two alternative formulas, n116 it is subject to reduction by $100 per cause, n117 and further reduced by 10% of the taxpayer's adjusted gross income, n118 by any insurance reimbursements, and by any other contributions or compensation received for replacing the loss. The casualty loss deduction should be claimed in the year in which the loss was sustained n119 or in which the loss was first discovered. n120 The casualty loss deduction does not include incidental expenses connected with the

casualty, n121 and the deduction may not exceed the basis of the property on which the casualty loss was inflicted. n122 Special tax relief provisions are in effect for property owners in federally designated disaster areas. n123

§ 76.03(a)(3) Deduction for Mortgage Interest.

A taxpayer who pays interest on a mortgage that encumbers a personal residence may usually deduct the amount of interest paid from taxable personal income. This deduction may be claimed by a taxpayer who itemizes deductions, n124 and in the tax code the deductible mortgage interest is referred to as "qualified residence interest." The mortgage interest is deductible if it is interest on a security interest, perfected under local law on a qualified residence. n125 The interest deduction applies to interest paid or accrued on "acquisition indebtedness," of up to one million dollars, when that debt is used to buy, build or improve the taxpayer's qualified residences and the debt is secured by those residences. n126 The interest paid on "home equity indebtedness," which is any other debt secured by qualified residence, is also deductible by the taxpayer to the extent that such indebtedness does not exceed the fair market value of the residence, is reduced by any outstanding acquisition indebtedness, and, in any event does not exceed $100,000. n127

Various kinds of payments have been deemed to be deductible mortgage interest. Among these are interest on a loan to purchase stock in a housing cooperative, n128 "points" paid by the taxpayer n129 unless the "points" are paid for separately identifiable services n130 (as is always the case with VA or FHA loans), n131 prepayment penalties, n132 and certain other payments considered to be penalties, such as for collection forbearance. n133 Penalties generally are not deductible for individual taxpayers, and a taxpayer who pays interest on an assumed debt is considered to have made a non-deductible capital expenditure, rather than having paid interest. n134

Mortgage interest is not deductible unless and until it is actually paid. If the mortgage debtor merely increases the amount of the loan from the creditor to cover current interest without actually making the payment, that is not considered a deductible payment. n135 Also the deduction must be taken in the year that the interest is actually paid. n136

§ 76.03(a)(4) Deduction for Property Taxes.

Property taxes are deductible by the taxpayer on whom the property taxes are imposed. n137 Some assessments against property that are labeled as "property taxes" are not deductible because they are considered to be assessments other than property taxes. For instance, taxes that are assessed for local benefits and improvements are not deductible but rather are considered as fees for services or payments for capital assets or improvements. n138 Thus, a tax imposed for the purpose of retiring municipal bonds is a deductible tax, n139 but a real estate transfer tax n140 or a tax which is being contested and has not yet been paid is not deductible. n141

If a tax or assessment is used to repair or maintain an improvement, or to pay interest charges attributed to the improvement, a deduction will be allowed. n142

If an assessment against property, which would ordinarily not be deductible as a tax, is eventually used for services that benefit the public generally, the assessment will be considered a tax and treated as deductible. n143

If a property tax deduction applies to property that is sold during the tax year, the deduction is apportioned between the buyer and seller taxpayers. n144

§ 76.03(a)(5) Deductions for Business Use of Personal Residence.

Under certain rather narrow circumstances, expenses incurred by a taxpayer using residential property for business or for the production of income may qualify for business use deductions. Such situations commonly arise when part of the personal residence is used as an office, or as a house on a farm, or an apartment in a multiple-unit dwelling owned by

the taxpayer, or an apartment connected with the taxpayer's store. Among the strict limitations on this deduction are that the business use of the residence must be regular, n145 and exclusive, n146 as the principal place of business, or as a place where business is conducted. n147

If the business use of a residence deduction is claimed by an employee, the business use of the residence must be for the convenience of the employer. n148 If a deduction is claimed for business use of the residence that is merely storage of inventory, the residence must be the sole fixed location of the business. n149

The deduction for business use of residence is usually limited in amount by the amount of gross income from that use, as reduced by certain expenses. n150 Examples of business expense deductions relating to use of the residence include repairs, utilities, loss of property, and depreciation. n151

§ 76.03(b) Taxation of Residential Real Property Transfers.

The starting point or initial presumption of federal tax treatment of residential real property transfers is that the "gain" from the sale or exchange of that property is a taxable capital gain. Under some circumstances, that gain from the sale or purchase of a residence may qualify for nonrecognition. Most of the nonrecognition rules apply to the gain from the sale of a "principal residence." n152

The tax laws and rulings give no comprehensive definition of what constitutes a "principal residence," because of the great variety in forms of home ownership. n153

If the sale or exchange of residential real property results in a loss, that loss is not deductible to the individual taxpayer, except to the extent that the residential property was used for business or for production of income. n154

Determining that gain has resulted from a sale of a personal residence is only the first step in calculating the tax. Next it must be determined if the gain has been realized. Gain from the sale of a principal residence is realized only to the extent that the "amount realized" (which is the purchase price of the old residence less the expenses of the sale) n155 exceeds the adjusted basis of the old residence. n156 Then it must be determined to what extent the gain realized is also the gain recognized. Realized gain is recognized gain only to the extent that the "adjusted sales price" (which is the amount obtained for the old residence reduced by the sale and fixing-up expenses) exceeds the cost of purchasing the new residence. n157 Sale expenses usually include such items as advertising costs, commissions, document preparation fees, other service and professional fees, title insurance, and telephone expenses. n158 Sometimes the distinction must be made between expenses which are used simply to fix up an old residence, n159 and those that add a substantial improvement and which would then be capital expenditures adding to the basis of the residence. n160 Fixing up expenses are not included among the deductible expenses of sale, unless they have been incurred not more than 90 days before the contract of sale is executed and paid within 30 days after the sale takes place. n161

In calculating the cost of purchasing a new residence, the taxpayer may include the cash consideration paid, the indebtedness on the property which has been assumed, and any other liabilities assumed by the taxpayer as part of the consideration for the purchase. n162 Other purchase expenses such as commissions are also deductible. n163 Some purchase expenses such as escrow fees, loan charges, attorney fees, and title costs, may be deductible under other provisions of the tax law, such as the provisions creating a tax deduction for moving expenses. If such expenses are so deducted under some other provision, they should not be added to the cost of purchasing the new residence. Purchase costs may also include any capital expenditures for the reconstruction or improvement of the premises. n164

Nonrecognition of gain rules do not apply if the taxpayer sells the land, but keeps the dwelling and moves it to a new lot which has been purchased within the appropriate time period specified by the tax law. n165 If one residence is exchanged for another residence, the cost of the purchase is the fair market value of the new residence. n166 If a residence is acquired by gift, inheritance or devise, that acquisition is not considered a purchase. n167

As mentioned above, the gain from the sale or exchange of a principal residence is recognized only to the extent that the sale price or the exchange value, reduced by certain costs and expenses, exceeds the purchase consideration and the costs associated with the new property obtained, and so long as the new purchase occurs within certain time limits. The basic time limit is that the purchase and occupancy of the new residence must take place within two years after sale of the old residence, whether the new residence already exists or must be newly constructed. n168

In the case of an installment sale, the applicable state property transfer law determines the date of the sale. n169 If the construction of the new residence has begun before the sale of the old residence, only those construction costs that were incurred within the applicable statutory period are considered to be costs of the new purchase. n170 Accordingly only those costs of improvements and reconstruction that are made within the applicable time period are considered costs of purchase. n171 The cost of the new residence to the taxpayer is its basis, unless some gain from the sale of the old residence has not been recognized; in that case, the basis for the new residence is reduced by the amount of the unrecognized gain. n172 If the real property that is obtained is only partially used as a residence, then appropriate allocations of costs and gains must be made. n173

In order to qualify for this nonrecognition treatment, the taxpayer who sells the old residence must be the same taxpayer who buys the new residence, unless one of the parties is the taxpayer's spouse. Married taxpayers may sell a residence which one of them holds solely or which they hold in concurrent ownership, and the married taxpayers may also acquire the new property individually or in concurrent ownership, if the proper consent has been filed with the Internal Revenue Service. n174 Except for certain grantor trusts, a trust does not usually qualify for the benefit of the nonrecognition provisions. n175

Other special tax benefits for the sale of a principal residence also apply to older taxpayers. A taxpayer who is at least 55 years old and who sells a dwelling that was used as the principal residence for at least three of the five years preceding the sale, may exclude up to $125,000 of the gain from the sale of that residence. n176 A taxpayer who wishes to rely on this exclusion is not required to purchase a new residence for that purpose. When a residence is held by married taxpayers, only one of whom is at least 55 years old, the exclusion provision still applies upon the sale of that property. n177 The taxpayer is not required to take this exclusion, but is required to file an election to take advantage of the exclusion; such election may be made only once by the taxpayer or the taxpayer's spouse, n178 unless any previous elections have been revoked. n179 Other rules relate to the reporting of recognized gain on installment sales n180 and limit or defer the recognition of gain when property is reacquired in order to satisfy indebtedness. n181

In installment sales, a seller who receives at least one payment in the year after the year of the sale may recognize gain but not loss. n182 Thus, the income recognized in the year it is received is that "proportion of the payments received in that year which the gross profit (realized or to be realized when the payment is completed) bears to the total contract price." n183

FOOTNOTES:

(n1)Footnote 110. I.R.C. § 217.

(n2)Footnote 111. *Rev. Rul. 88-47, 1988-1 C.B. 111.*

(n3)Footnote 112. I.R.C. §§ 165(a), 165(h); Treas. Reg. § 1.165-7(a).

(n4)Footnote 113. I.R.C. § 165(c)(3).

(n5)Footnote 114. *Rev. Rul. 76-134, 1976-1 C.B. 54.*

(n6)Footnote 115. *Dow v. Commissioner, 16 T.C. 1230 (1951).*

(n7)Footnote 116. Treas. Reg. § 1.165-1(c)(1); Treas. Reg. § 1.165-7(b).

(n8)Footnote 117. I.R.C. § 165(h)(1).

(n9)Footnote 118. *Id.* § 165(h)(2).

(n10)Footnote 119. *Id.* § 165(a).

(n11)Footnote 120. *Henry F. Cate, 62 Tax Ct. Mem. Dec. (P-H) 214 (1962).*

(n12)Footnote 121. *E.g., Rev. Rul. 59-398, 1959-2 C.B. 76.*

(n13)Footnote 122. *Helvering v. Obici, 97 F.2d 431 (4th Cir. 1938), aff'd, 305 U.S. 468 (1939).*

(n14)Footnote 123. I.R.C. § 165(j).

(n15)Footnote 124. I.R.C. § 163(h). The references to I.R.C. § 163(h) are to the statute as it was originally enacted, as part of the Tax Reform Act of 1986; § 163(h) was later revised and renumbered by the Revenue Act of 1987, P.L. 100-203, and further amended by the Technical and Miscellaneous Revenue Act of 1988, P.L. 100-647.

(n16)Footnote 125. I.R.C. §§ 163(h)(3) - 163(h)(5), 1034. Effective for sales or exchanges occurring after May 6, 1997, I.R.C. § 1034 is repealed and is not available to define the characteristics of a qualified residence. Now taxpayers should refer to I.R.C. § 121. *See* the Taxpayer Relief Act of 1997, P.L. 105-34, § 312.

(n17)Footnote 126. *Id.* § 163(h)(3)(A)(i); Temp. Treas. Reg. § 1.163-8T; *Notice 88-74, 1988-27 I.R.B. 27.*

(n18)Footnote 127. I.R.C. § 163(h)(3)(A)(ii).

(n19)Footnote 128. *Id.* § 163(h)(5)(B).

(n20)Footnote 129. *Rev. Rul. 86-67, 1986-1 C.B. 238.*

(n21)Footnote 130. I.R.C. § 461(g)(2).

(n22)Footnote 131. *Rev. Rul. 69-188, 1969-1 C.B. 54; Rev. Rul. 67-297, 1967-2 C.B. 87.* If "points" qualify as deductible interest, but when paid at the beginning of the loan life are considered prepaid interest, the deduction must be amortized over the tax years to which the prepayment applies. *Lay v. Commissioner, 69 T.C. 421 (1977).* However, such "points" are fully deductible when paid, if they pertain to a loan for purchasing or improving the taxpayer's principal residence. I.R.C. § 461(g)(2). Points paid in acquiring a VA loan are not considered deductible interest. *Rev. Rul. 67-297, 1967-2 C.B. 87.* The IRS takes a position that points paid or withheld for loan proceeds in financing an existing home mortgage are not considered as buying, building, or improving a residence, but rather are considered as simply repaying an existing debt, and so are not deductible. *Rev. Rul. 87-22, 1987-14 I.R.B. 41.*

(n23)Footnote 132. *Rev. Rul. 57-198, 1957-1 C.B. 94.*

(n24)Footnote 133. *Rev. Rul. 60-128, 1960-1 C.B. 85.*

(n25)Footnote 134. *Joell Co. v. Commissioner, 41 B.T.A. 825 (1940).*

(n26)Footnote 135. *Hart v. Commissioner, 21 B.T.A. 1001 (1930), aff'd, 54 F.2d 848 (1st Cir. 1932); Bramer v. Commissioner, 6 T.C. 1027 (1946), aff'd, 161 F.2d 185 (3d Cir. 1947); Appeal of Utah Orpheum Co., 3 B.T.A. 1041 (1926).*

(n27)Footnote 136. I.R.C. § 461(g); *Massachusetts Mut. Life Ins. Co. v. United States, 288 U.S. 269 (1933).* An

exception to this statement in the text arises from the Revenue Reconciliation Act of 1989, in which § 7210 limits the amount of the deduction for interest expense when the interest is paid by a corporation to a taxpayer who is a related person and not subject to taxation on the interest received. As to any part of the interest deduction thus qualified, the deduction may be taken in subsequent tax years under carryforward rules. These deduction and carryforward rules apply to tax years beginning after July 10, 1989. I.R.C. §§ 163(j), 267(a)(2).

(n28)Footnote 137. I.R.C. § 164(a); Treas. Reg. § 1.164-1(a).

(n29)Footnote 138. Treas. Reg. § 1.164-4; *Rev. Rul. 77-29, 1977-1 C.B. 44.*

(n30)Footnote 139. *Rev. Rul. 74-52, 1974-1 C.B. 50.*

(n31)Footnote 140. *Black v. Commissioner, 60 T.C. 108 (1973).*

(n32)Footnote 141. I.R.C. § 461.

(n33)Footnote 142. *Id.* § 164(c)(1); Treas. Reg. § 1.164-4(b)(1); *Rev. Rul. 79-201, 1979-1 C.B. 97; Rev. Rul. 76-45, 1976-1 C.B. 51; Rev. Rul. 74-52, 1974-1 C.B. 50.*

(n34)Footnote 143. *Rev. Rul. 61-152, 1961-1 C.B. 42.*

(n35)Footnote 144. I.R.C. § 164(d)(1).

(n36)Footnote 145. *Id.* § 280A(c)(1).

(n37)Footnote 146. *Id.* § 280A(c)(1); *Sharon L. Gomez, 80 Tax Ct. Mem. Dec. (P-H) 565 (1980); Frankel v. Commissioner, 82 T.C. 318 (1984).*

(n38)Footnote 147. I.R.C. § 280A(c)(1)(B).

(n39)Footnote 148. *Id.* §§ 280A(a), 280A(c)(1)(C).

(n40)Footnote 149. *Id.* § 280A(c)(2).

(n41)Footnote 150. *Id.* § 280A(c)(5).

(n42)Footnote 151. The charge for the first line of basic local telephone service to the dwelling is now not deductible, even if used exclusively for business purposes. The Technical and Miscellaneous Revenue Act of 1988, § 5073, P.L. 100-647, amending I.R.C. § 262.

(n43)Footnote 152. I.R.C. § 1034(a); Treas. Reg. § 1.1034-1(c)(3)(i); *Stanley v. Commissioner, 33 T.C. 614 (1959).* Effective for sales or exchanges occurring after May 6, 1997, I.R.C. § 1034 is repealed and nonrecognition provisions are found in an amended I.R.C. § 121, under the Taxpayer Relief Act of 1997, P.L. 105-34, § 312.

(n44)Footnote 153. *Rev. Proc. 88-3, 1988-1 C.B. 579; Rev. Proc. 80-22, 1980-1 C.B. 654.* A sale of a life estate in a principal residence may be entitled to non-recognition treatment if the life estate is the taxpayer's entire interest. *Rev. Rul. 84-43, 1984-1 C.B. 522,* applying to I.R.C. § 121, but extended to § 1034 by private letter ruling.

(n45)Footnote 154. Treas. Reg. §§ 1.262-1(b)(4), 1.165-9(a); *Koehn v. Commissioner, 16 T.C. 1378 (1951).*

(n46)Footnote 155. Treas. Reg. § 1.1034-1(b)(4). Effective for sales or exchanges occurring after May 6, 1997, I.R.C. § 1034 is repealed and nonrecognition provisions are found in an amended I.R.C. § 121, under the Taxpayer Relief Act of 1997, P.L. 105-34, § 312.

(n47)Footnote 156. *Id.* § 1.1034-1(b)(5); see also I.R.C. § 1001. Effective for sales or exchanges occurring after May 6, 1997, I.R.C. § 1034 is repealed and nonrecognition provisions are found in an amended I.R.C. § 121, under the Taxpayer Relief Act of 1997, P.L. 105-34, § 312.

(n48)Footnote 157. I.R.C. § 1034; Treas. Reg. §§ 1.1034-1(c)(1), 1.1034-1(c)(2). Effective for sales or exchanges occurring after May 6, 1997, I.R.C. § 1034 is repealed and nonrecognition provisions are found in an amended I.R.C. § 121, under the Taxpayer Relief Act of 1997, P.L. 105-34, § 312.

(n49)Footnote 158. *Rev. Rul. 54-380, 1954-2 C.B. 155; Martin v. Commissioner, 19 Tax Ct. Mem. Dec. (CCH) 724 (1960).*

(n50)Footnote 159. Treas. Reg. § 1.1034-1(b)(6). Effective for sales or exchanges occurring after May 6, 1997, I.R.C. § 1034 is repealed and nonrecognition provisions are found in an amended I.R.C. § 121, under the Taxpayer Relief Act of 1997, P.L. 105-34, § 312.

(n51)Footnote 160. *Id. See also* I.R.C. § 1016 and accompanying regulations. Effective for sales or exchanges occurring after May 6, 1997, nonrecognition provisions are found in an amended I.R.C. § 121, under the Taxpayer Relief Act of 1997, P.L. 105-34, § 312.

(n52)Footnote 161. I.R.C. §§ 1034(b)(2)(A), 1034(b)(2)(B); Treas. Reg. § 1.1034-1(b)(6). Effective for sales or exchanges occurring after May 6, 1997, I.R.C. § 1034 is repealed and nonrecognition provisions are found in an amended I.R.C. § 121, under the Taxpayer Relief Act of 1997, P.L. 105-34, § 312.

(n53)Footnote 162. *Rev. Rul. 72-266, 1972-1 C.B. 227.* Effective for sales or exchanges occurring after May 6, 1997, nonrecognition provisions are found in an amended I.R.C. § 121, under the Taxpayer Relief Act of 1997, P.L. 105-34, § 312.

(n54)Footnote 163. Treas. Reg. §§ 1.1034-1(b)(7), 1.1034-1(c)(4)(i). Effective for sales or exchanges occurring after May 6, 1997, I.R.C. § 1034 is repealed and nonrecognition provisions are found in an amended I.R.C. § 121, under the Taxpayer Relief Act of 1997, P.L. 105-34, § 312.

(n55)Footnote 164. Treas. Reg. § 1.1034-1(b)(7). Effective for sales or exchanges occurring after May 6, 1997, I.R.C. § 1034 is repealed and nonrecognition provisions are found in an amended I.R.C. § 121, under the Taxpayer Relief Act of 1997, P.L. 105-34, § 312.

(n56)Footnote 165. *Rev. Rul. 85-30, 1983-1 C.B. 41,* revoking *Rev. Rul. 54-156, 1954-1 C.B. 112.* Effective for sales or exchanges occurring after May 6, 1997, nonrecognition provisions are found in an amended I.R.C. § 121, under the Taxpayer Relief Act of 1997, P.L. 105-34, § 312.

(n57)Footnote 166. I.R.C. § 1034(c)(1); Treas. Reg. § 1.1034-1(c)(4)(i). Effective for sales or exchanges occurring after May 6, 1997, I.R.C. § 1034 is repealed and nonrecognition provisions are found in an amended I.R.C. § 121, under the Taxpayer Relief Act of 1997, P.L. 105-34, § 312.

(n58)Footnote 167. *Id.* Effective for sales or exchanges occurring after May 6, 1997, I.R.C. § 1034 is repealed and nonrecognition provisions are found in an amended I.R.C. § 121, under the Taxpayer Relief Act of 1997, P.L. 105-34, § 312.

(n59)Footnote 168. I.R.C. § 1034(a). Effective for sales or exchanges occurring after May 6, 1997, I.R.C. § 1034 is repealed and nonrecognition provisions are found in an amended I.R.C. § 121, under the Taxpayer Relief Act of 1997, P.L. 105-34, § 312.

(n60)Footnote 169. *Awalt v. Commissioner, 42 Tax Ct. Mem. Dec. (CCH) 1468 (1987).*

(n61)Footnote 170. *Elam v. Commissioner, 58 T.C. 238 (1972), aff'd, 447 F.2d 1333 (6th Cir. 1973).*

(n62)Footnote 171. I.R.C. § 1034(c)(2); Treas. Reg. § 1.1034-1(c)(4)(ii); *Rev. Rul. 78-147, 1978-1 C.B. 261; Rev. Rul. 55-90, 1955-1 C.B. 348; Kern v. Grandquist, 291 F.2d 29 (9th Cir. 1961); Shaw v. Commissioner, 69 T.C. 1034 (1978).* Effective for sales or exchanges occurring after May 6, 1997, I.R.C. § 1034 is repealed and nonrecognition provisions are found in an amended I.R.C. § 121, under the Taxpayer Relief Act of 1997, P.L. 105-34, § 312.

(n63)Footnote 172. I.R.C. § 1034(e); Treas. Reg. §§ 1.1034-1(a), 1.1034-1(e)(1). Effective for sales or exchanges occurring after May 6, 1997, I.R.C. § 1034 is repealed and nonrecognition provisions are found in an amended I.R.C. § 121, under the Taxpayer Relief Act of 1997, P.L. 105-34, § 312.

(n64)Footnote 173. Treas. Reg. § 1.1034-1(c)(3)(ii). Effective for sales or exchanges occurring after May 6, 1997, I.R.C. § 1034 is repealed and nonrecognition provisions are found in an amended I.R.C. § 121, under the Taxpayer Relief Act of 1997, P.L. 105-34, § 312.

(n65)Footnote 174. I.R.C. § 1034(g)(1)(A); Treas. Reg. § 1.1034-1(f)(1). If one spouse dies after the old residence is sold but before a new residence is acquired, non-recognition treatment is accorded the surviving spouse who acquires the new residence within the standard time limitation. The Technical and Miscellaneous Revenue Act of 1988, § 6002, P.L. 100-647, amending I.R.C. § 1034(g). Effective for sales or exchanges occurring after May 6, 1997, I.R.C. § 1034 is repealed and nonrecognition provisions are found in an amended I.R.C. § 121, under the Taxpayer Relief Act of 1997, P.L. 105-34, § 312.

(n66)Footnote 175. I.R.C. §§ 673-677; *Rev. Rul. 66-159, 1966-1 C.B. 162; Rev. Rul. 54-583, 1954-2 C.B. 158; Mitchell v. United States, 79-2 U.S.T.C. & 9667* (CCH), 44 A.F.T.R.2d (P-H) & 79-5735 (C.D. Cal. 1979).

(n67)Footnote 176. I.R.C. § 121.

(n68)Footnote 177. I.R.C. §§ 121(d)(1)(A) - § 121(d)(1)(C); Treas. Reg. §§ 1.121-5(a)(1)(i) - 1.121-5(a)(1)(iii).

(n69)Footnote 178. Treas. Reg. §§ 1.121-2(b)(i), 1.121-2(b)(ii).

(n70)Footnote 179. *Id.* § 1.121-4(a).

(n71)Footnote 180. I.R.C. § 453.

(n72)Footnote 181. *Id.* § 1038.

(n73)Footnote 182. *Id.* § 453(b)(1). Installment treatment is permissible even if only one payment is required, if that payment occurs in the year after the sale. Temp. Treas. Reg. § 15A.453-0(b); *Rev. Rul. 70-430, 1970-2 C.B. 51; Martin v. Commissioner, 61 F.2d 942 (2d Cir. 1932),* cert. denied, *289 U.S. 737 (1933).*

(n74)Footnote 183. I.R.C. § 453(c); Temp. Treas. Reg. § 15A.453-1(b)(2)(i).

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Chapter 76 TAXATION OF REAL PROPERTY

9-76 Thompson on Real Property, Thomas Editions § 76.04

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§ 76.04 Federal Estate Taxation of Real Property.

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No special federal estate tax rules apply to real property; the same rules apply to both real and personal property. It also does not matter whether a decedent's estate is submitted to probate or not; the estate tax may be imposed on property whether or not it has been probated. Not all property of the decedent is subject to federal estate tax. The estate must determine what property is subject to estate tax by first determining the gross estate and then reducing that amount by various available deductions.

The gross estate, for federal estate tax purposes, consists of "the value of all property to the extent of the interests therein of the decedent at the time of his death." n184 Even property with conditional or limited ownership by the decedent is included in this definition, e.g., property transferred with a retained life estate, n185 property transferred at death, n186 and property transferred with a retained power to alter, amend, or revoke. n187 Property that was held by the decedent in joint tenancy is included in the estate to the extent of the value the decedent contributed to its acquisition or improvement. n188 In order to discourage certain transfers to avoid the estate tax, federal estate tax law includes within the decedent's gross estate the value of property interests transferred by the decedent within three years of the decedent's death. n189

Once the gross estate has been calculated, that amount may be reduced by certain expenses; the resulting amount is the "taxable estate." The expenses usually deducted from the amount of the gross estate include funeral and estate administration expenses, n190 the amounts of valid claims against the estate, n191 the amounts of mortgages and other indebtedness relating to the property in the gross estate, marital property settlement amounts, n192 losses, n193 charitable contributions, n194 and bequests to the surviving spouse. n195 Both the value of the gross estate and the value of the taxable estate (which is the amount of the gross estate less the amount of qualified deductions), are determined as of the date of the decedent's death or, at the election of the executor, as of six months after the date of decedent's death. n196

Once the taxable estate has been determined, then an estate tax may be computed according to a rate table showing tax rates, ranging from 18% of the first $10,000 of the taxable estate to 55% of taxable estate amounts over $3,000,000.

n197 From this amount of tax are then deducted various credits, including most importantly the unified credit. The unified credit is a credit against the first $192,800 of the federal estate tax n198 and, if fully applied, would mean that the taxable estate would have to amount to about $600,000 before federal estate taxation would have any impact. Indeed, a federal estate tax return is not even required, unless the decedent's estate amounts to more than $600,000. n199

This unified credit is a credit that is also shared under the rules for the federal gift tax. The credit is "unified" in the sense that if any of the credit has been used to excuse payment of gift tax during the decedent's lifetime, then to that extent the credit is not available against the decedent's estate's federal estate tax liability.

In addition to the unified credit, other credits available under the federal estate tax rules are credits for state death taxes, n200 federal gift taxes, n201 taxes on prior transfers, n202 and foreign death taxes. n203

A special estate tax lien attaches to all the property included in the decedent's gross estate as of the date of decedent's death. n204 This lien comes into existence immediately upon the death of the decedent, and exists without assessment, demand or determination of the tax. Even though the lien is not normally filed, foreclosure of the lien may be enforced even against parties who purchase the property without knowledge of the lien. n205 Rather than be saddled with such a lien, an executor may apply for a special lien on property that will suffice to pay for the taxes and the interest connected with the estate and which payment would then release the executor from personal liability. n206 In addition to the special estate tax lien, a general lien for other taxes is imposed upon the property of any person liable for tax. n207

FOOTNOTES:

(n1)Footnote 184. I.R.C. § 2033.

(n2)Footnote 185. *Id.* § 2036.

(n3)Footnote 186. *Id.* § 2037.

(n4)Footnote 187. *Id.* § 2038.

(n5)Footnote 188. *Id.* § 2040.

(n6)Footnote 189. *Id.* § 2035(d).

(n7)Footnote 190. *Id.* § 2053.

(n8)Footnote 191. *Id.*

(n9)Footnote 192. *Id.* § 2043(b)(2).

(n10)Footnote 193. *Id.* § 2054.

(n11)Footnote 194. *Id.* § 2055.

(n12)Footnote 195. *Id.* § 2056.

(n13)Footnote 196. *Id.* §§ 2031, 2032.

(n14)Footnote 197. *Id.* § 2001.

(n15)Footnote 198. *Id.* § 2010.

(n16)Footnote 199. *Id.* § 6018. The return, if required, is due nine months after decedent's death. I.R.C. § 6075(a).

(n17)Footnote 200. I.R.C. § 2011.

(n18)Footnote 201. *Id.* § 2012.

(n19)Footnote 202. *Id.* § 2013.

(n20)Footnote 203. *Id.* § 2014.

(N21)Footnote 204. *Id.* § 6324.

(n22)Footnote 205. *T.K.B. International, Inc. v. United States, 995 F.2d 1460 (9th Cir. 1993); United States v. Vohland, 675 F.2d 1071 (9th Cir. 1982).*

(n23)Footnote 206. I.R.C. § 6324A.

(n24)Footnote 207. *Id.* § 6321.

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Chapter 76 TAXATION OF REAL PROPERTY

9-76 Thompson on Real Property, Thomas Editions § 76.05

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§ 76.05 Federal Gift Taxation of Real Property.

Certain gifts of real property made by a taxpayer are subject to the federal gift tax. n208 From this liability for gift taxation, a taxpayer may exclude up to $10,000 of taxable gifts per donee per year, when the gifts are of present interests in property. n209 If the taxpayer's spouse joined in making the gift, the exclusion is doubled to $20,000 per donee per year. n210 Also excluded from liability for gift tax are all amounts paid for tuition on behalf of a donee to an educational institution, or amounts paid for medical services on behalf of a donee to a health care provider. n211 Additional exclusions apply to donative transfers between spouses, if the parties are married at the time of the gift, if the donor is a citizen or resident of the United States, and if the interest donated is not subject to termination upon the passage of time or upon the occurrence of particular circumstances or events. n212

The same tax rate in effect for the federal estate tax is also in effect for the federal gift tax. n213 Once the property subject to federal gift tax has been determined, and the federal gift tax rate has been applied, the gift tax is established and then the taxpayer may offset against that gift tax any available credits, including the unified credit referred to in the discussion on federal estate tax. The gift tax is paid and the gift tax return must be filed, if required at all, annually and not later than April 15. n214 A gift tax return is required for any year in which a gift is made other than gifts covered by the annual exclusion or by the exclusion of gifts for educational and medical purposes. n215

FOOTNOTES:
(n1)Footnote 208. *Id.* § 2501.

(n2)Footnote 209. *Id.* § 2503(b).

(n3)Footnote 210. *Id.* § 2513. However, once such gift-splitting is employed, it must be used for all other gifts made by those donors during their tax year.

(n4)Footnote 211. I.R.C. § 2503(e).

(n5)Footnote 212. *Id.* §§ 2523, 2056(b)(7).

(n6)Footnote 213. *Id.* § 2001.

(n7)Footnote 214. *Id.* § 6075(b)(1).

(n8)Footnote 215. *Id.* § 6019.

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Chapter 76 TAXATION OF REAL PROPERTY

9-76 Thompson on Real Property, Thomas Editions § 76.06

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§ 76.06 Federal Taxation of Entities That Own Real Estate.

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§ 76.06(a) Corporations.

New "Simplification of Entity Classification Rules" became effective January 1, 1997, promulgated as Internal Revenue Regulations § 301.7701-1 to § 301.7701-3. These "check-the-box" rules automatically classify certain organizations as corporations, while other organizations may choose their classification. A business entity -- any entity not classified as a trust -- with only a single member is classified as a corporation or treated as an entity not separated from its owner, such as a sole proprietorship, or a branch or division of the owners. A business entity with two or more members can be classified as either a corporation or a partnership.

Corporations may own real estate and may be taxed as realty-owning entities. Corporations are subject to some special rules for determining taxable income and are also subject to a separate tax rate structure. n216 An entity is treated as a corporation for federal tax purposes if its organization exhibits most of the characteristics of corporations, including the presence of associates, the pursuit of business, the division of profits, continuity, centralized management, limited liability, and transferability of interests. n217 For tax purposes, corporate entities may consist of associations, joint stock companies, and insurance companies. n218

Under some circumstances, smaller corporations may elect not to be taxed as corporations. These entities are known as small business corporations or sub-chapter S Corporations, and rather than being taxed as corporations, they are treated as conduits of income, losses deductions, and credits for the individual shareholders. n219

§ 76.06(b) Partnerships.

Partnerships as entities are not taxable, but they are required to report information relating to tax liability, which information may then be used to establish tax liability of partners for their partnership activities. A partnership tends to be a catch-all entity, a label attached to an entity which is not a corporation, an estate, or a trust. n220 Partnerships are treated as conduits for the income, losses, deductions, and credits pertaining to individual partners. Thus, the income items and deductions generated by partnership activities are included by partners in their individual tax returns as appropriate for their respective partnership or distributed shares. n221 Accordingly, a partner may claim a loss

deduction relating to partnership activities only up to the amount of the adjusted basis of the partner's interest in the partnership. n222 These principles apply to limited partnerships as well as to general partnerships. n223

§ 76.06(c) Trusts.

Trusts may also own property, although the form of ownership usually involves title in the name of the trustee, who then holds the property for passive beneficiaries. Such trusts are entities subject to taxation, but any taxable income of such a trust is reduced by deductions for distributions of income to beneficiaries. n224 Beneficiaries in turn, are taxed on their distributions from the trust, and any such distributions from a trust have the same character in the hand of the beneficiaries as they had for the trust. n225

If a trust has been created for the purpose of carrying on a business, and the trustees are active managers of the business, the trust may be considered a business trust and subject to tax treatment as a corporation. n226 As an owner of real property, a real estate investment trust would normally be taxable as a corporation, but may avoid the so-called "double tax" on corporations by deducting from income any amount distributed to the investors as dividends. n227

§ 76.06(d) Limited Liability Companies (LLC).

The limited liability company (LLC), an entity that offers limitation on liability to its members, is taxed as a partnership. To qualify to be taxed as a partnership, the LLC must have not more than two of the following characteristics of a corporation: continuity, limited liability, free transferability of interests, and centralized management. Some states have LLC enabling statutes that are especially flexible, and to these the Internal Revenue Service gives no automatic assurance that LLCs authorized in those states will enjoy partnership taxation status. n228 In some LLCs a member is able to receive a property distribution with no tax liability on either the member or on the LLC. n229 An LLC can also offer greater flexibility in allocating gains, losses, deductions, and credits. LLCs have no shareholder restrictions, and the basis of each membership is tied to the member's share of LLC debt, which may increase the opportunity for the member to deduct losses.

FOOTNOTES:
(n1)Footnote 216. *Id.* § 11.

(n2)Footnote 217. Treas. Reg. § 301.7701-2(a)(1).

(n3)Footnote 218. I.R.C. § 7701(a)(3).

(n4)Footnote 219. *Id.* § 11.

(n5)Footnote 220. *Id.* § 761.

(n6)Footnote 221. *Id.* § 701.

(n7)Footnote 222. *Id.* § 704; Treas. Reg. § 1.704-1(d).

(n8)Footnote 223. *Larson v. Commissioner, 66 T.C. 159 (1976), acq., 1977-1 C.B. 1; Rev. Rul. 79-106, 1979-1 C.B. 448.*

(n9)Footnote 224. I.R.C. §§ 651, 661.

(n10)Footnote 225. *Id.* §§ 643, 652, 662.

(n11)Footnote 226. Treas. Reg. § 301.7701-4.

(n12)Footnote 227. I.R.C. §§ 856-858.

(n13)Footnote 228. *Rev. Rul. 94-5, 1994-1 C.B. 312* (Louisiana); *Rev. Rul. 93-93, 1993-2 C.B. 321* (Arizona); *Rev. Rul. 93-92, 1993-2 C.B. 318* (Oklahoma); *Rev. Rul. 93-91, 1993-2 C.B. 316* (Utah); *Rev. Rul. 93-81, 1993-2 C.B. 314* (Rhode Island).

(n14)Footnote 229. I.R.C. §§ 731(a), 737(a).

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Chapter 76 TAXATION OF REAL PROPERTY

9-76 Thompson on Real Property, Thomas Editions § 76.07

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§ 76.07 Federal Taxation of Foreign Ownership in U.S. Real Property.

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Under older American tax law, it was possible for foreign investors in American real property to avoid most gains from transfer of that property. Consequently, Congress in 1980 enacted the Foreign Investment and Real Property Tax Act (FIRPTA), to correct those conditions. n230 FIRPTA governs real property transactions occurring after June 18, 1980. The general approach of FIRPTA is to subject foreign investors in real property to the same tax rules that would apply if the transactions were conducted by a domestic trade or business. To certain transactions, FIRPTA also attaches a special alternative minimum tax. FIRPTA also imposes additional withholding and reporting requirements for real estate transactions conducted by foreign entities.

FIRPTA applies to transactions in foreign-held American real property interests, including those interests that are owned directly by a taxpayer or owned by a United States real property holding corporation. n231 An ordinary corporation is deemed to be a holding corporation if the fair market value of its American real property interests is one-half or more of all the corporation's real property interests and its assets are used in a trade or business. Real property interests here included are fee ownership, leaseholds, options to require either a fee or leasehold interest, and related personal property. n232

When a foreign investor directly disposes of an American real property interest, the investor is taxed on the value received as if the investor were connected with an American trade or business.

The property interest subject to that tax may include stock in the United States real property holding corporation. If any of those taxable interests are held by partnerships, trusts, or estates, the tax is to be apportioned among the beneficial owners of those business associations when those respective interests are distributed. n233 If the foreign investor is also a non-resident alien, a special alternative minimum tax applies to the lesser of the taxpayer's alternative minimum taxable income or to the gain from American real property for the taxable year. n234 The foreign investor subject to the FIRPTA tax is also entitled to the benefits of any applicable nonrecognition provision for exchanges of American property interests, unless those interests, if sold, would not be subject to taxation. n235

After 1984, FIRPTA overrides the terms of American tax treaties exempting foreign investors from taxation of gain from transactions involving American real property interests. n236 Any foreign company affected by the overriding of these treaties may elect to be treated as a domestic company for purposes of FIRPTA. n237

FIRPTA also imposes certain withholding requirements, so that the transferee of an American real property interest which has been conveyed by a foreign taxpayer must deduct and withhold 10% of the amount realized on the transaction, unless otherwise exempt. n238 Exceptions from these withholding requirements exist in the following situations: (1) If the transferor gives an affidavit along with the transferor's United States tax identification number stating that the transferor is not a foreign person; n239 (2) if the interest disposed of is in a domestic corporation, and the corporation provides an affidavit stating that it is not and has not been a United States real property holding corporation during a specified particular period of time; n240 (3) if the transferee obtains from the Secretary of the Treasury a qualifying statement to the effect that the transferor is tax exempt, has paid the tax, or has provided adequate security for the tax; n241 (4) if the property being sold is a residence which is to be used as a residence and the amount realized is under $300,000; and (5) if the transaction includes stock regularly traded on an established securities market. n242

The trustee or executor of an American partnership, trust, or estate must withhold 35% (or, in some instances, 28%) of the gain realized by a foreign person who is a partner or beneficiary of an American partnership, trust, or estate. n243 More comprehensive withholding requirements have generally replaced most of the older reporting requirements under FIRPTA. Only those foreign persons holding direct investments in American real property are required to submit an information return. n244 This requirement is applied to foreign persons not engaged in an American trade or business during the tax year and whose domestic property interests are valued at more than $50,000. n245

FOOTNOTES:

(n1)Footnote 230. Pub. L. No. 96-499, *94 Stat. 2599; 26 U.S.C. § 897.*

(n2)Footnote 231. I.R.C. §§ 897(c)(1)(A)(ii), 1445, 6039C. *See* Temporary Regulations for sample certification at the closing, *49 Fed. Reg. 50,6677 et seq*. These were adopted as permanent regulations in 1986 and 1987, 26 C.F.R. § 1.1445-1 *et seq.* at1, amended in past by temporary rules, *53 Fed. Reg. 16,230-16,231.*

(n3)Footnote 232. I.R.C. § 897(c)(6).

(n4)Footnote 233. *Id.* § 897(c)(4)(B).

(n5)Footnote 234. *Id.* § 897(a)(2)(A).

(n6)Footnote 235. *Id.* § 897(e). Normally, the I.R.S. will not issue rulings or letters concerning the application of non-recognition provisions unless the matters are governed by I.R.C. § 897(e)(1). *Rev. Proc. 87-6, 1987-1 C.B. 541.*

(n7)Footnote 236. Pub. L. No. 96-499, I.R.C. § 1125(c)(2).

(n8)Footnote 237. I.R.C. § 897(i). If a foreign corporation converts to a domestic corporation under state law, non-recognition treatment may still depend on compliance with I.R.C. §§ 897 and 367(b). *Rev. Rul. 88-25,* I.R.B. 1988-16, 8.

(n9)Footnote 238. I.R.C. § 1445(a).

(n10)Footnote 239. *Id.* § 1445(b)(2).

(n11)Footnote 240. *Id.* § 1445(b)(3).

(n12)Footnote 241. *Id.* § 1445(b)(4).

(n13)Footnote 242. *Id.* § 1445(b)(6). Stock regularly traded on an established securities market is treated as a U.S. property interest only if the stockholder holds more than five percent of that class of stock. I.R.C. § 897(c)(3).

(n14)Footnote 243. I.R.C. § 1445(e)(1).

(n15)Footnote 244. *Id.* § 6039C(a).

(n16)Footnote 245. *Id.* § 6039C(b).

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Chapter 76 TAXATION OF REAL PROPERTY

9-76 Thompson on Real Property, Thomas Editions § 76.08

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§ 76.08 State Taxation of Real Property Interests.

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The following summary indicates the types of tax imposed on real property by each of the states. The descriptions of items taxed are intended to highlight the types of real property that are taxed, and are not comprehensive descriptions of all other types of property subject to that tax.

§ 76.08(a) Alabama.

§ 76.08(a)(1) Property Tax.

Property subject to tax: All nonexempt real property. n246

Rate of state levy: 0.65% of assessed value. n247

Ratio of assessed value to fair market value: 30% for property of utilities used in the utility business; 20% for property not otherwise classified; 10% for agricultural, forest, single-family owner-occupied residential property, historic buildings and sites; 15% for private passenger cars and pickup trucks of 8,000 pounds or less not operated for hire, rent or compensation. n248

§ 76.08(a)(2) Transfer and Recording Taxes.

§ 76.08(a)(2)(i) Tax on Instruments Conveying Real Property.

Items subject to tax: Deeds, bills of sale, and other instruments conveying real property interests, except mortgage transfers on which the mortgage tax has been paid, deeds for nominal consideration to perfect title; re-recordations to correct deeds or mortgages. n249

Rate: 50 cents per $500 or fraction thereof of the actual value of the property at the time of the conveyance. n250

§ 76.08(a)(2)(ii) Tax on Instruments Securing Debt With Real Property in the State.

Items subject to tax: Mortgages, deeds of trust, and other instruments security debt with real property in the state. n251

Rates: 15 cents per $100 or fraction thereof of initial indebtedness. On instruments securing open-ended or revolving indebtedness on residential real property, 15 cents per $100 or fraction thereof of the maximum principle indebtedness to be secured. n252

§ 76.08(a)(2)(iii) Tax on Mineral Documents.

Items subject to tax: Leases, deeds, or other instruments creating, conveying, extending, excepting, or reserving an interest in and to any non-producing oil, gas, or other minerals in the states, except foreclosure instruments or other instruments that create a lien on such interests. n253

Rates: 5 cents per acre conveyed for terms of 10 years or less, 10 cents per acre for terms of 10 to 20 years, and 15 cents per acre for terms of more than 20 years. n254

§ 76.08(a)(3) Estate Tax.

Equal to the credit allowed under federal estate tax law. n255

§ 76.08(a)(4) Generation-skipping Transfer Tax.

Equal to the credit allowed under federal generation-skipping tax law. n256

§ 76.08(b) Alaska.

§ 76.08(b)(1) Property Tax.

Property subject to tax: No state general property tax. Cities may assess property taxes. Real property used or committed for use in oil and gas activities is subject to state and local tax. n257

Rate of state levy: For property used in oil and gas activities 20 mills for each dollar of full value.

§ 76.08(b)(2) Estate Tax.

Equal to the credit allowed under federal estate tax law. n258

§ 76.08(c) Arizona.

The following Arizona property tax provisions are repealed effective January 1, 1999.

§ 76.08(c)(1) Property Tax.

Property subject to tax: All nonexempt real property. n259

Rate of state levy: Varies.

Ratio of assessed value to fair market value: 13 classes of property, with ratios varying from 25% to 1%. n260

§ 76.08(c)(2) Estate Tax.

Equal to the credit allowed under federal estate tax law. n261

§ 76.08(c)(3) Generation-skipping Transfer Tax.

The state tax is a fraction of the amount of tax allowed under federal law, the fraction being comprised of the value of the estate subject to Arizona tax divided by the value of all property in the generation-skipping transfer. n262

§ 76.08(d) Arkansas.

§ 76.08(d)(1) Property Tax.

Property subject to tax: All nonexempt real property. n263

Rate of state levy: None.

§ 76.08(d)(2) Tax on Instruments Conveying Real Property.

Items subject to tax: Instruments conveying interests in real property. n264

Rate: $3.30 per $1000 or fraction thereof when the consideration paid is in excess of $100. n265

§ 76.08(d)(3) Estate Tax.

Equal to the credit allowed under the federal estate tax law. n266

§ 76.08(e) California.

§ 76.08(e)(1) Property Tax.

Property subject to tax: All nonexempt real property. n267

Rates of state levy: None.

§ 76.08(e)(2) Tax on Instruments Conveying Real Property.

Items subject to tax: Counties and cities may tax instruments conveying real property when the consideration in the transaction exceeds $100. n268

Rates: 55 cents per $500 or fraction thereof. Some reciprocal credits are allowed. n269

§ 76.08(e)(3) Estate Tax.

Equal to the credit allowed under the federal estate tax law. n270

§ 76.08(e)(4) Generation-skipping Tax.

Equal to the federal credit allowed. n271

§ 76.08(f) Colorado.

§ 76.08(f)(1) Property Tax.

Property subject to tax: All nonexempt real property. n272

Rate of state levy: Varies.

Ratio of assessed value to fair market value: Varies from 21% to 29%. n273

§ 76.08(f)(2) Tax on Instruments Conveying Real Property.

Items subject to tax: Instruments conveying title to real property. n274

Rates: 1 cent per $100 or major fraction thereof when the total net consideration exceeds $500. n275

§ 76.08(f)(3) Estate Tax.

Equal to the credit allowed under federal estate tax law. n276

§ 76.08(f)(4) Generation-skipping Transfer Tax.

Equal to the maximum credit allowed under federal law. n277

§ 76.08(g) Connecticut.

§ 76.08(g)(1) Property Tax.

Property subject to tax: All nonexempt real property. n278

Rate of state levy: Varies.

Ratio of assessed value to fair market value: 70%. n279

§ 76.08(g)(2) Tax on Transfers.

§ 76.08(g)(2)(i) Tax on Instruments Conveying Real Property.

Items subject to tax: Instruments conveying interests in real property. n280

Rates: If property is not residential except unimproved land the tax is 1% of consideration, but if property is residential then tax rate is .5% for amount less than or equal to $800,000 and 1% for portion exceeding $800,000. If mortgage is secured by property and delinquent greater than 6 months then rate to be .5%. n281

§ 76.08(g)(2)(ii) Tax on Farm and Forest Land Conveyances.

Items subject to tax: Sales or reclassifications of land classified as open space, farmland, or forest land, if the transfer or change occurs within 10 years of acquisition. n282

Rates: The rates are varying percentages applied to the sales price, or if there was no sale, to the fair market value. The percentage rate indicated below is applied according to how long after ownership or acquisition the sale or classification change occurs:

Within first year:
10%.

Within second year:

9%.

Within third year: 8%.

Within fourth year: 7%.

Within fifth year: 6%.

Within sixth year: 5%.

Within seventh year: 4%.

Within eighth year: 3%.

Within ninth year: 2%.

Within tenth year: 1%.

After tenth year: No tax. n283

§ 76.08(g)(3) Succession and Transfer Tax.

A tax is imposed on transfers by will, by descent and distribution of property upon the death of the owner, in contemplation of the death of the owner, and similar transactions. The rate of tax varies with the class of donee and the application of exemptions and includes a surcharge. n284

§ 76.08(g)(4) Estate Tax.

Equal to the credit allowed under the federal estate tax law. n285

§ 76.08(h) Delaware.

§ 76.08(h)(1) Property Tax.

Property subject to tax: All nonexempt real property. n286

Rate of state levy: None.

§ 76.08(h)(2) Tax on Instruments Conveying Real Property.

Items subject to tax: Any document presented for a recording, certain condominium agreements, and transfers of beneficial real property interests through conveyances of certain intangible interests in corporations, partnerships, and trusts. n287

Rates: 2% of the value of the property, if the value is more than $100. The rate of tax on documents for construction is 1% on amounts in excess of $10,000. n288

§ 76.08(h)(3) Estate Tax.

Equal to the difference between the state inheritance tax and the maximum credit under the federal estate tax law. n289

§ 76.08(h)(4) Inheritance Tax.

The amount of this tax varies according to the share of the gross estate obtained and the class of the heir. n290

§ 76.08(i) District of Columbia.

§ 76.08(i)(1) Property Tax.

Property subject to tax: All nonexempt real property. n291

Rate of district levy: Varies.

Ratio of assessed value to fair market value: 100%. n292

§ 76.08(i)(2) Transfer Taxes.

§ 76.08(i)(2)(i) Tax on Deeds.

Items subject to tax: Deeds submitted for recording. n293

Rates: 1.1% of the consideration paid for the deed, except that for deeds evidencing a transfer of an economic interest in real property in the District of Columbia, the rate is 2.2% of the higher of the assessed value or the sales price. n294

§ 76.08(i)(2)(ii) Transfer Tax on Real Property.

Items subject to tax: All transfers of real property interests. n295

Rates: 1.1% of the consideration paid for the transfer, with a minimum $1.00 tax. n296

§ 76.08(i)(3) Estate Tax.

Equal to the credit allowed under federal estate tax law. n297

§ 76.08(j) Florida.

§ 76.08(j)(1) Property Tax.

Property subject to tax: All nonexempt real property. n298

Rate of state levy: None. n299

§ 76.08(j)(2) Transfer Taxes.

§ 76.08(j)(2)(i) Tax on Instruments Relating to Land.

Items subject to tax: Deeds, instruments, or writings conveying any interest in real property, including documents granting occupancy to a tenant-stockholder in a cooperative apartment corporation. n300

Rates: 70 cents per $100 or fraction thereof of the consideration for the transaction. n301

§ 76.08(j)(2)(ii) Tax on Evidences of Indebtedness.

Items subject to tax: Mortgages, trust deeds, security arrangements, and other evidences of indebtedness filed or recorded in the state. n302 A conveyance between spouses of an interest in the marital home pursuant to a divorce action is not subject to this tax.

Rates: 35 cents on each $100 or fraction thereof of the indebtedness or obligation. n303

§ 76.08(j)(2)(iii) Tax on Notes and Other Payment Obligations Secured by Real Property.

Items subject to tax: Notes, bonds, and other obligations for payment of money to the extent they are secured by a mortgage, deed of trust, or other lien upon real property in the state. n304

Rates: Two mills for each dollar of the value of the obligation. n305

§ 76.08(j)(3) Estate Tax.

Equal to the credit allowed under federal estate tax law. n306

§ 76.08(j)(4) Generation-skipping Transfer Tax.

Equal to the amount allowed as a credit for state legacy taxes. n307

§ 76.08(k) Georgia.

§ 76.08(k)(1) Property Tax.

Property subject to tax: All nonexempt real property. n308

Rate of state levy: Varies.

Ratio of assessed value to fair market value: 40%, except agricultural land, which is assessed at 75% of the value of other land. n309

§ 76.08(k)(2) Tax on Instruments Conveying Real Property.

Items subject to tax: Instruments conveying real property interests for any net consideration over $100. n310

Rates: $1.00 for the first $1,000 or fraction thereof, and 10 cents for each additional $100 or fraction thereof of the net consideration for, or net value of, the interest conveyed. n311

§ 76.08(k)(3) Estate Tax.

Equal to the credit allowed under federal estate tax law. n312

§ 76.08(l) Hawaii.

§ 76.08(l)(1) Property Tax.

Property subject to tax: All nonexempt real property. n313

Rate of state levy: None. n314

§ 76.08(l)(2) Transfer Taxes.

§ 76.08(l)(2)(i) Tax on Instruments Conveying Real Property.

Items subject to tax: Instruments conveying real property interests. n315

Rates: 10 cents per $100 of actual consideration, with a minimum of $1.00. Special rules exist for computing the taxable values of leaseholds. n316

§ 76.08(l)(2)(ii) Withholding Tax on Transfers by Non-residents.

Items subject to tax: A transferee must withhold the tax if the transferor is a non-resident. n317

§ 76.08(l)(3) Estate Tax.

Equal to the credit allowed under federal estate tax law. n318

§ 76.08(m) Idaho.

§ 76.08(m)(1) Property Tax.

Property subject to tax: All nonexempt real property. n319

Rate of state levy: None.

§ 76.08(m)(2) Estate Tax.

Equal to the credit allowed under federal estate tax law. n320

§ 76.08(n) Illinois.

§ 76.08(n)(1) Property Tax.

Property subject to tax: All nonexempt real property. n321

Rate of state levy: None.

§ 76.08(n)(2) Transfer Taxes.

§ 76.08(n)(2)(i) State Tax on Real Property Transfers.

Items subject to tax: Transfers of real property interests. n322

Rates: 50 cents per $500 or fraction of value, which value does not include the value of outstanding mortgages on the property at the time of the transfer. n323

§ 76.08(n)(2)(ii) County Tax on Real Property Transfers.

Items subject to tax: Counties are authorized to tax real estate transfers and transfers of beneficial interests in land trusts within the county. n324

Rates: 25 cents per $500 of the full consideration. n325

§ 76.08(n)(3) Estate Tax.

Equal to the maximum credit allowed under federal estate tax law, with adjustments for portions of the estate not in Illinois. n326

§ 76.08(n)(4) Generation-skipping Transfer Tax.

Equal to the maximum credit allowed under federal law, with adjustments for portions of the transferred property outside Illinois. n327

§ 76.08(o) Indiana.

§ 76.08(o)(1) Property Tax.

Property subject to tax: All nonexempt real property. n328

Rates: *State:* Tax rate is limited to one cent on each $100 of valuation. Effective March 1, 2001, the limit is $.0033 per $100 of assessed valuation. n329

Local: In all incorporated cities and towns, the total tax rate is limited to $.6667 on each $100 of valuation, n330 and in all unincorporated areas the total tax rate is limited to $1.25 (effective March 1, 2001, $.4167) on each $100 of valuation. n331

Ratio of assessed value to fair market value: 33 1/3%. n332

§ 76.08(o)(2) Estate Tax.

Equal to the credit allowed under federal estate tax law. n333

§ 76.08(o)(3) Inheritance Tax.

Varies according to the class of donee and applicable exemptions. n334

§ 76.08(p) Iowa.

§ 76.08(p)(1) Property Tax.

Property subject to tax: All nonexempt real property. n335

Rate of state levy: Varies.

Ratio of assessed value to fair market value: 100%, with variations for agricultural, residential, commercial, and industrial property. n336

§ 76.08(p)(2) Tax on Instruments Conveying Real Property.

Items subject to tax: Instruments conveying real property interests. n337

Rates: 80 cents per $500 or fraction thereof of consideration exceeding $500. n338

§ 76.08(p)(3) Estate Tax.

Equal to the credit allowed under federal estate tax law. n339

§ 76.08(p)(4) Generation-skipping Transfer Tax.

Equal to the credit allowed under federal law. n340

§ 76.08(p)(5) Inheritance Tax.

Varies according to the class of donee and applicable exemptions. n341

§ 76.08(q) Kansas.

§ 76.08(q)(1) Property Tax.

Property subject to tax: All nonexempt real property. n342

Rate of state levy: Varies.

Ratio of assessed value to fair market value: Varies between 11.5% and 30% for 7 classes of real property. n343

§ 76.08(q)(2) Tax on Real Estate Mortgages.

Items subject to tax: All real estate mortgages. n344

Rates: 0.26% of principal debt or obligation secured by instrument or major fraction thereof. n345

§ 76.08(q)(3) Estate Tax.

Equal to the credit allowed under federal estate tax law as of 1981. n346

§ 76.08(q)(4) Generation-skipping Tax.

Equal to the credit allowed under federal law. n347

§ 76.08(q)(5) Inheritance Tax.

Varies according to the class of donee and the applicable exemptions. n348

§ 76.08(r) Kentucky.

§ 76.08(r)(1) Property Tax.

Property subject to tax: All nonexempt real property. n349

Rate of state levy: Up to 31.5 cents per $100.

Ratio of assessed value to fair market value: 100%. n350

§ 76.08(r)(2) Tax on Instruments Conveying Real Property Interests.

Items subject to tax: Any instrument, except a will or lease, by which any Kentucky real property interest is conveyed. n351

Rates: 50 cents per $500 or a fraction thereof of value. n352

§ 76.08(r)(3) Estate Tax.

Equal to the credit allowed under federal estate tax law. n353

§ 76.08(r)(4) Inheritance Tax.

Varies according to the class of donee and the applicable exemptions. n354

§ 76.08(s) Louisiana.

§ 76.08(s)(1) Property Tax.

Property subject to tax: All nonexempt real property. n355

Rate of state levy: Varies.

Ratio of assessed value to fair market value: Varies from 10% to 25%. n356

§ 76.08(s)(2) Estate Tax.

Equal to the credit allowed under federal estate tax law. n357

§ 76.08(s)(3) Inheritance Tax.

Varies according the class of donee and the applicable exemptions. n358

§ 76.08(s)(4) Gift Tax.

For amounts that exceed the annual exclusion and lifetime exemptions, 2% for gifts up to $15,000, and 3% for gifts over $15,000. n359

§ 76.08(t) Maine.

§ 76.08(t)(1) Property Tax.

Property subject to tax: All nonexempt real property. n360

Rate of state levy: Varies.

Ratio of assessed value to fair market value: 100%. n361

§ 76.08(t)(2) Tax on Transfers of Real Property Interests.

Items subject to tax: Documents which transfer title to real property. n362

Rates: $2.20 per $500 or a fraction thereof, the tax to be imposed 2 on the grantor and 2 on the grantee. n363

§ 76.08(t)(3) Estate Tax.

Equal to the credit allowed under federal estate tax law. n364

§ 76.08(u) Maryland.

§ 76.08(u)(1) Property Tax.

Property subject to tax: All nonexempt real property. n365

Rate of state levy: Varies.

Ratio of assessed value to fair market value: 40% for most real property. n366

§ 76.08(u)(2) Transfer Taxes.

§ 76.08(u)(2)(i) Tax on Recording of Written Documents.

Items subject to tax: Written instruments transferring real property interests, which instruments are submitted for recording or filing. n367

Rates: The rates vary but must be applied to each $500 or fraction thereof of consideration. The rate is $1.65 for articles of transfer, articles of merger, or articles of consolidation relating to foreign corporations or foreign limited partnerships. n368

§ 76.08(u)(2)(ii) Tax on Real Property Transfers.

Items subject to tax: Any written instrument transferring a real property interest submitted for recording. n369

Rates: The rate is one-half of 1% of the consideration payable for the transfer, except that the first $30,000 of consideration paid for residentially improved owner-occupied property is not taxed. n370

§ 76.08(u)(2)(iii) Agricultural Land Transfer Tax.

Items subject to tax: Written instruments transferring title to agricultural land. n371

Rates: For transfers of agricultural land, 5%; for transfers of less than 20 acres of agricultural land, 4%; for transfers of less than 20 acres assessed as improved agricultural land, 3%, further reduced by 25% for each consecutive full tax year in which the real property taxes were paid on the basis of a non-agricultural use assessment. n372

§ 76.08(u)(3) Estate Tax.

Equal to the credit allowed under federal estate tax law. n373

§ 76.08(u)(4) Generation-skipping Transfer Tax.

Equal to the credit allowed under federal law. n374

§ 76.08(u)(5) Inheritance Tax.

Varies according to class of donee and applicable exemptions. n375

§ 76.08(v) Massachusetts.

§ 76.08(v)(1) Property Tax.

Property subject to tax: All nonexempt real property. n376

Rate of state levy: Varies.

Ratio of assessed value to fair market value: Varies between classifications. n377

§ 76.08(v)(2) Tax on Instruments for Sale of Real Property.

Items subject to tax: Any person who makes an instrument for the sale of any real property interests. n378

Rates: $2.28 if the consideration is between $100 and $500, and $2.28 for each additional $100 or fraction thereof, and an additional 14% surtax. n379 Except in Barnstable County, in which the rate is $1.50 if the consideration is between $100 and $500, and $1.50 for each additional $100 or fraction thereof.

§ 76.08(v)(3) Estate Tax.

Varies according to class of donee and applicable exemptions. n380

§ 76.08(v)(4) Estate Transfer Tax.

Equal to credit allowed under federal estate tax law. n381

§ 76.08(v)(5) Generation-skipping Transfer Tax.

Equal to the credit allowed for state death taxes under federal law. n382

§ 76.08(w) Michigan.

§ 76.08(w)(1) Property Tax.

Property subject to tax: All nonexempt real property. n383

Rate of state levy: Varies.

Ratio of assessed value to fair market value: 50%. n384

§ 76.08(w)(2) Recordation Tax on Instruments Conveying Real Property.

Items subject to tax: Instruments conveying real property interests wholly in Michigan. n385

Rates: 55 cents per $500 or fraction thereof of the total value in a county with a population of less than 2 million and not more than 75 cents per $500 or fraction thereof of the total value in any county with a population of 2 million or more. n386

§ 76.08(w)(3) Tax on Real Estate Transfers.

Items subject to tax: Recording of written contracts for transfer of any interest in realty, and recording of written deeds or instruments for conveyance of any interest in realty for consideration.

Exemptions: Instruments with consideration under $100; instruments for out-of-state land; instruments exempt under U.S. law; transfers securing or discharging debts; transfers of personalty or certain mineral rights; transfers by government agencies; transfers given in foreclosure proceedings and government insured proceedings; conveyances between spouses and between certain related persons; transfers pursuant to court order; instruments to straighten

boundary lines; certain transfers pre-dating January 1, 1995.

Rate: $3.75 per $500.00 or fraction thereof of the value of the property transferred.

Payment: Paid to county registrar of deeds when instrument is recorded.

§ 76.08(w)(4) Estate Tax.

Equal to the credit allowed under federal estate tax law. n387

§ 76.08(w)(5) Inheritance Tax.

Varies according to class of donee and applicable exemptions. n388

§ 76.08(x) Minnesota.

§ 76.08(x)(1) Property Tax.

Property subject to tax: All nonexempt real property. n389

Rate of state levy: Varies.

Ratio of assessed value to fair market value: 100%. n390

§ 76.08(x)(2) Transfer Taxes.

§ 76.08(x)(2)(i) Tax on Instruments Conveying Real Property Interests.

Items subject to tax: Instruments conveying interests in real property in Minnesota. The tax applies to the total consideration for the transaction, including what is paid for personal property on the premises, less the value of any liens and encumbrances on the property. n391

Rates: $1.65 for transfers resulting from corporate mergers, consolidations, or reorganizations, and for transfers with consideration of $500 or less. If the consideration is in excess of $500, the tax is $1.65 plus $1.65 for each additional $500. n392

§ 76.08(x)(2)(ii) Tax on Mortgages.

Items subject to tax: Mortgages on real property in the state. n393

Rates: 23 cents per $100 or fraction thereof of the principle debt secured. n394

§ 76.08(x)(3) Estate Tax.

Equal to the credit allowed under federal estate tax law. n395

§ 76.08(y) Mississippi.

§ 76.08(y)(1) Property Tax.

Property subject to tax: All nonexempt real property. n396

Rate of state levy: None.

§ 76.08(y)(2) Tax on Instruments Conveying Mineral Interests.

Items subject to tax: All instruments conveying leasehold or mineral or royalty interests in any non-producing oil, gas or other minerals. n397

Rates: 3 cents per acre, if the primary term expires 10 years or less after the date the instrument was executed; 6 cents per acre if the term is 10-20 years; 8 cents per acre if the term is more than 20 years. A minimum tax of $1.00 is imposed. n398

§ 76.08(y)(3) Estate Tax.

Varies according to class of donee and applicable exemptions. n399

§ 76.08(z) Missouri.

§ 76.08(z)(1) Property Tax.

Property subject to tax: All nonexempt real property. n400

Rate of state levy: Varies.

Ratio of assessed value to fair market value: Between 12% and 32%. n401

§ 76.08(z)(2) Estate Tax.

Equal to the credit allowed under federal estate tax law. n402

§ 76.08(z)(3) Generation-skipping Transfer Tax.

Equal to the credit for state death taxes allowed under federal estate tax law. n403

§ 76.08(aa) Montana.

§ 76.08(aa)(1) Property Tax.

Property subject to tax: All nonexempt real property. n404

Rate of state levy: Varies.

Ratio of assessed value to fair market value: Varies between 3% and 100% among several classes of property. n405

§ 76.08(aa)(2) Estate Tax.

Equal to the credit allowed under federal estate tax law. n406

§ 76.08(aa)(3) Inheritance Tax.

Varies according to class of donee and applicable exemptions. n407

§ 76.08(bb) Nebraska.

§ 76.08(bb)(1) Property Tax.

Property subject to tax: All nonexempt real property. n408

Rate of state levy: None.

§ 76.08(bb)(2) Tax on Transfer of Certain Real Property Interests.

Items subject to tax: Any deed transferring a beneficial interest in or legal title to real estate. n409

Rates: $1.75 per $1,000 of value or fraction thereof. n410

§ 76.08(bb)(3) Estate Tax.

The excess of federal estate tax credit over amount of state inheritance taxes. n411

§ 76.08(bb)(4) Inheritance Tax.

Varies according to class of donee and applicable exemptions. n412

§ 76.08(cc) Nevada.

§ 76.08(cc)(1) Property Tax.

Property subject to tax: All nonexempt real property. n413

Rate of state levy: Varies.

Ratio of assessed value to fair market value: Most real property is assessed at 35%. n414

§ 76.08(cc)(2) Tax on Instruments Conveying Real Property Interests.

Items subject to tax: Instruments conveying real property interests valued at over $100. n415

Rates: 65 cents per $500 or fraction thereof of value. n416

§ 76.08(cc)(3) Estate Tax.

Equal to the credit allowed under federal estate tax law, less the death taxes on the estate imposed by any other states. n417

§ 76.08(cc)(4) Generation-skipping Transfer Tax.

Equal to the credit allowed under federal law. n418

§ 76.08(dd) New Hampshire.

§ 76.08(dd)(1) Property Tax.

Property subject to tax: All nonexempt real property. n419

Rate of state levy: Varies.

Ratio of assessed value to fair market value: 100%. n420

§ 76.08(dd)(2) Tax on Transfer of Real Property Interests.

Items subject to tax: Transfers of real property interests other than by devise or intestate succession. n421

Rates: 35 cents per $100 or fraction thereof of the consideration or price; if the consideration is $4,000 or less, the minimum tax is 14 dollars. n422

§ 76.08(dd)(3) Estate Tax.

Equal to the difference between the credit allowed under federal estate tax law and the amount of the state inheritance tax. n423

§ 76.08(dd)(4) Inheritance Tax.

Eighteen percent on all property passed by will, intestate succession, or by transfer in contemplation of death. n424

§ 76.08(ee) New Jersey.

§ 76.08(ee)(1) Property Tax.

Property subject to tax: All nonexempt real property. n425

Rate of state levy: None.

§ 76.08(ee)(2) Tax on Transfer of Real Property Interests.

Items subject to tax: Transfers of freehold property interests (including leases for 99 years or more and proprietary leases of cooperative units) in New Jersey, if the transfers are by written instrument. n426

Rates: $0.50 to $1.75 per $500 of consideration or fraction thereof, plus 75 cents for each $500 in excess of $150,000. n427

Certain exemptions apply to low and moderate income housing, residences owned and occupied by senior citizens, by blind or disabled persons, and also to certain new construction. n428

§ 76.08(ee)(3) Estate Tax.

The difference between the maximum credit under federal estate tax law and the amount of all state and inheritance taxes paid. n429

§ 76.08(ee)(4) Inheritance Tax.

Varies according to the class of donee and the applicable exemptions. n430

§ 76.08(ff) New Mexico.

§ 76.08(ff)(1) Property Tax.

Property subject to tax: All nonexempt real property. n431

Rate of state levy: Varies.

Ratio of assessed value to fair market value: 100%. n432

§ 76.08(ff)(2) Estate Tax.

Equal to the credit for state death taxes under federal estate tax law. n433

§ 76.08(gg) New York.

§ 76.08(gg)(1) Property Tax.

Property subject to tax: All nonexempt real property. n434

Rate of state levy: None.

§ 76.08(gg)(2) Transfer Taxes.

§ 76.08(gg)(2)(i) New York State Real Property Transfer Tax.

Items subject to tax: Transfers of real property interests when consideration exceeds $500. Also taxed are transfers of controlling interests and entities which own real property, a creation of certain leaseholds and sub-leases, and cooperative housing corporation activities in some circumstances. n435

Rates: 1 to 2 dollars per $500 or fraction thereof. n436

§ 76.08(gg)(2)(ii) New York State Real Property Transfer Gains Tax.

Items subject to tax: The New York State real property transfer gains tax on 10% of the gain applies to certain transfers of interests in New York real property or interests in entities having an interest in New York real property, if the consideration exceeds 1 million dollars. n437

Rates: The tax is applied to 10% of the gain.

§ 76.08(gg)(2)(iii) Mortgage Recording Tax.

Items subject to tax: Any principle debt or obligation that is or may be secured by a mortgage or a deed of trust on real property in the state. Taxable transactions also include executory real estate sale contracts when the purchaser is in possession, deeds of trust, agreements increasing mortgage indebtedness, supplemental mortgages for new or further indebtedness, and corporate mortgages and trusts securing corporate indebtedness. n438

Rates: 50 cents per $100 or a major fraction thereof imposed on each mortgage. n439 An additional tax of 25 cents per $100 or major fraction thereof is imposed on each mortgage, payable by the mortgagor, but if the mortgagor is an exempt organization or if the tax is imposed on mortgaged properties with six or fewer units with separate cooking facilities, the tax shall be paid by the mortgagee. n440 Certain charitable organizations are exempt from this tax. n441 For mortgages recorded after July 1, 1969, an additional tax is imposed at the rate of 25 cents for each $100 or major fraction thereof, except on the first $10,000 of a mortgage obtained principally to improve a 1- or 2-family dwelling. This second additional tax may be suspended from time to time by local ordinance and counties outside New York City and in some of the larger counties in the state. n442 Cities of one million or more population may impose yet another recording tax. n443

§ 76.08(gg)(3) Estate Tax.

Varies according to the property transferred and the relationship of the decedent to the transferee. n444

§ 76.08(gg)(4) Gift Tax.

Same rates as for state estate tax. n445

§ 76.08(hh) North Carolina.

§ 76.08(hh)(1) Property Tax.

Property subject to tax: All nonexempt real property. n446

Rate of state levy: None.

§ 76.08(hh)(2) Tax on Instruments Conveying Real Property Interests.

Items subject to tax: Any instrument transferring real property interest. n447

Rates: 55 cents per $500 or fraction thereof of the net consideration or value. n448

§ 76.08(hh)(3) Estate Tax.

Equal to the difference between the credit allowed under federal estate tax law and the amount of state inheritance tax imposed. n449

§ 76.08(hh)(4) Generation-skipping Inheritance Tax.

Equal to the credit allowed under federal generation-skipping transfer tax law. n450

§ 76.08(hh)(5) Inheritance Tax.

Varies according to the class of donee and the applicable exemptions. n451

§ 76.08(hh)(6) Gift Tax.

Same rates as the inheritance tax. n452

§ 76.08(ii) North Dakota.

§ 76.08(ii)(1) Property Tax.

Property subject to tax: All nonexempt real property. n453

Rate of state levy: Varies.

Ratio of assessed value to fair market value: 50%. n454

§ 76.08(ii)(2) Estate Tax.

Equal to the credit allowed under federal estate tax law. n455

§ 76.08(jj) Ohio.

§ 76.08(jj)(1) Property Tax.

Property subject to tax: All nonexempt real property. n456

Rate of state levy: Varies.

Ratio of assessed value to fair market value: Not more than 35%. n457

§ 76.08(jj)(2) Tax on Recordation of Transfers of Real Property.

Items subject to tax: Recordation of deeds conveying real property.

Rates: $1.00 minimum or 10 cents per $100 of value or fraction thereof.

§ 76.08(jj)(3) County Tax on Recordation of Transfers of Real Property Interests. n458

Items taxed: Recordation of deed conveying real property.

Rates: Up to 30 cents per $100 or fraction thereof of value, as authorized by the county.

§ 76.08(jj)(4) Estate Tax.

Varies according to value of property transferred. n459 An additional estate tax is imposed, equal to the difference between the credit allowed under federal estate tax law and the amount of the death taxes paid in all states. n460

§ 76.08(jj)(5) Generation-skipping Transfer Tax.

Equal to the credit allowed under federal law. n461

§ ;76.08(kk) Oklahoma.

§ 76.08(kk)(1) Property Tax.

Property subject to tax: All nonexempt real property. n462

Rate of state levy: Varies.

Ratio of assessed value to fair market value: Not more than 35%. n463

§ 76.08(kk)(2) Transfer Taxes.

§ 76.08(kk)(2)(i) Tax on Instruments Conveying Real Property Interests.

Items subject to tax: Instruments conveying real property interests with a net value of more than $100. n464

Rates: 75 cents per $500 of value or fraction thereof. n465

§ 76.08(kk)(2)(ii) Registration Tax on Mortgages.

Items subject to tax: All mortgages, mortgages in trust, mortgages in real property only partially in the state, mortgages

recorded prior to July 1, 1913, and advances under existing mortgages. n466

Rates: 10 cents per $100 or fraction thereof on mortgages of 5 years or more; 8 cents per $100 or fraction thereof on mortgages of 4 to 5 years; 6 cents per $100 or fraction thereof on mortgages of 3 to 4 years; 4 cents per $100 or fraction thereof on mortgages of 2 to 3 years; 2 cents per $100 or fraction thereof on mortgages of 2 years and less. The minimum tax is 10 cents. When the mortgage is executed to secure bond payments and used to create property that will be subject to ad valorem taxes, the recording fee is 25 cents for the first folio and 10 cents for each additional folio and fifty cents for the indexing and recorder's certificate. The county treasurer imposes an additional $5 fee for each mortgage to be certified. n467

§ 76.08(kk)(3) Estate Tax.

Varies according to the class of donee and the applicable exemptions. n468

§ 76.08(ll) Oregon.

§ 76.08(ll)(1) Property Tax.

Property subject to tax: All nonexempt real property. n469

Rate of state levy: Varies.

Ratio of assessed value to fair market value: 100%. n470

§ 76.08(ll)(2) Inheritance Tax.

Equal to the difference between the federal estate tax credit and the amount of the state death taxes. n471

§ 76.08(mm) Pennsylvania.

§ 76.08(mm)(1) Property Tax.

Property subject to tax: All nonexempt real property. n472

Rate of state levy: None.

§ 76.08(mm)(2) Tax on Transferors of Real Property Interests.

Items subject to tax: Persons who transfer, or on whose behalf is transferred, any real property interests. n473

Rates: 1% of the value of the property. n474

§ 76.08(mm)(3) Estate Tax.

Equal to the difference between the credit under federal estate tax law and the amount of state inheritance tax. n475

§ 76.08(mm)(4) Inheritance Tax.

Varies according to the class of the donee and the applicable exemptions. n476

§ 76.08(nn) Rhode Island.

§ 76.08(nn)(1) Property Tax.

Property subject to tax: All nonexempt real property. n477

Rate of state levy: Varies.

Ratio of assessed value to fair market value: 100% unless local assessor determines otherwise. n478

§ 76.08(nn)(2) Tax on Instruments Conveying Real Property Interests.

Items subject to tax: Instruments conveying real property interests valued at over $100. n479

Rates: For purchase price values over $100, $1.40 for each $500 or fraction thereof. n480

§ 76.08(nn)(3) Estate Tax.

Equal to the credit allowed under federal estate tax law. n481

§ 76.08(nn)(4) Generation-skipping Transfer Tax.

Equal to the credit available under federal tax law for generation-skipping transfers. n482

§ 76.08(oo) South Carolina.

§ 76.08(oo)(1) Property Tax.

Property subject to tax: All nonexempt real property. n483

Rate of state levy: None.

§ 76.08(oo)(2) Tax on Instruments Conveying Real Property Interests.

Items subject to tax: Instruments conveying real property interests valued at over $100. n484

Rates: For conveyances, $1.30 for $100 to $500 of value and $1.30 for each additional $500 of value. n485

§ 76.08(oo)(3) County Tax on Real Property Transfers. n486

Items subject to tax: Transfers of real property interests.

Rates: 55 cents on consideration or value of $100 to $500; 55 cents for each added $500.

§ 76.08(oo)(4) Estate Tax.

Equal to the credit allowed under federal estate tax law. n487

§ 76.08(oo)(5) Generation-skipping Transfer Tax.

Equal to the credit allowed under federal law. n488

§ 76.08(pp) South Dakota.

§ 76.08(pp)(1) Property Tax.

Property subject to tax: All nonexempt real property. n489

Rate of state levy: Varies, but the tax may not equal more than 2 mills per dollar of valuation in any one year. n490

Ratio of assessed value to fair market value: 100%. n491

§ 76.08(pp)(2) Tax on Transfers of Real Property Titles.

Items subject to tax: Transfers of title to real property in the state. n492

Rates: 50 cents per $500 of value or fraction thereof. n493

§ 76.08(pp)(3) Estate Tax.

Equal to the credit available under federal estate tax law. n494

§ 76.08(pp)(4) Inheritance Tax.

Varies according to class of donee and available exemptions. n495

§ 76.08(qq) Tennessee.

§ 76.08(qq)(1) Property Tax.

Property subject to tax: All nonexempt real property. n496

Rate of state levy: None.

§ 76.08(qq)(2) Transfer Taxes.

§ 76.08(qq)(2)(i) Tax on Transfers of Real Property Interests.

Items subject to tax: All transfers of realty, except that only one tax is imposed on several deeds used to convey a single tract of land. n497

Rates: 37 cents per $100 or major fraction thereof of the consideration or the value of the property, whichever is greater. n498

§ 76.08(qq)(2)(ii) Tax on Instruments of Indebtedness.

Rates: 11.5 cents per $100 of the amount secured over $2,000 on property within the state. The maximum tax is $500,000.

§ 76.08(qq)(3) Estate Tax.

Equal to the credit allowed under federal estate tax law. n499

§ 76.08(qq)(4) Generation-skipping Transfer Tax.

Equal to the credit available under federal law. n500

§ 76.08(qq)(5) Inheritance Tax.

Varies according to the class of donee and available exemptions. n501

§ 76.08(qq)(6) Gift Tax.

Varies according to the amounts of the gifts. n502

§ 76.08(rr) Texas.

§ 76.08(rr)(1) Property Tax.

Property subject to tax: All nonexempt real property. n503

Rate of state levy: Varies.

Ratio of assessed value to fair market value: 100%. n504

§ 76.08(rr)(2) Estate Tax.

Equal to the credit allowed under federal estate tax law. n505

§ 76.08(rr)(3) Generation-skipping Transfer Tax.

A fraction of the federal credit, determined by the value of the Texas property divided by the value of all property in the transfer. n506

§ 76.08(ss) Utah.

§ 76.08(ss)(1) Property Tax.

Property subject to tax: All nonexempt real property. n507

Rate of state levy: Varies, but may not exceed .00048 per dollar of taxable value of taxable property in the state. n508

Ratio of assessed value to fair market value: 100%, except that residential property assessments are reduced by 32%. n509

§ 76.08(ss)(2) Estate Tax.

Equal to the credit allowed under federal estate tax law. n510

§ 76.08(tt) Vermont.

§ 76.08(tt)(1) Property Tax.

Property subject to tax: All nonexempt real property. n511

Rate of state levy: None.

Rate of assessed value to fair market value: 1% of appraised value. n512

§ 76.08(tt)(2) Transfer Taxes.

§ 76.08(tt)(2)(i) Tax on Transfer of Real Property Titles.

Items subject to tax: Transfers of real property titles by deed. n513

Rates: One and one-quarter percent of the value of the property transferred, with a minimum tax of $1.00, except that the tax for a principal residence is one-half of one percent of the first $100,000 and one and one-quarter percent thereafter. Effective until July 1, 2000, the tax on the first $100,000 in value of the principal residence is not imposed if a certain guaranty fee is paid to the Vermont home mortgage guarantee program. These rates also apply to the principal residence of a member or shareholder in a housing cooperative. n514

§ 76.08(tt)(2)(ii) Capital Gains Tax on Land.

Items taxed: Gains from sales or exchanges of land. n515

Rates: the tax is determined by how long the seller had held the property and by the magnitude of the gain, according to the following table:

Years held	0-99% gain	100-199% gain	200 + gain
Less than 4 mos.	60%	70%	80%
4 but less than 8 mos.	35%	52.5%	70%
8 mos. but less than 1 yr.	30%	45%	60%
1 yr. but less than 2 yrs.	25%	37.5%	50%
2 yrs. but less than 3 yrs.	20%	30%	40%
3 yrs. but less than 4 yrs.	15%	22.5%	30%
4 yrs. but less than 5 yrs.	10%	15%	20%
5 yrs. but less than 6 yrs.	5%	7.5%	10%

§ 76.08(tt)(3) Estate Tax.

Equal to the federal credit for state death taxes less amounts for death taxes paid. n516

§ 76.08(uu) Virginia.

§ 76.08(uu)(1) Property Tax.

Property subject to tax: All nonexempt real property. n517

Rate of state levy: None.

§ 76.08(uu)(2) Transfer Taxes.

§ 76.08(uu)(2)(i) Tax on Instruments Conveying Real Property Interests.

Items taxed: Instuments transferring real property interests valued at more than $100. n518

Rates: Fifty cents per each $500 or fraction thereof, not including any lien or other encumbrance attached at the time of sale. n519 Counties and cities are authorized to impose an additional tax equal to one third of the state tax. n520

§ 76.08(uu)(2)(ii) Tax on Documents Transferring Real Property Interests.

Items taxed: Deeds, deeds of trust, mortgages, construction loan deeds of trust or mortgages, leases, contracts and agreements. n521

Rates: Fifteen cents for each $100 or fraction thereof of the consideration or the actual value of the property conveyed, whichever is greater. For property partially in Virginia, the tax is only applicable to the value of the part of the property located in Virginia. n522 On contracts and deeds of lease of real and personal property, the tax is based on the consideration or value contracted for, except that the tax on oil and gas leases may not exceed twenty-five dollars, and the tax on coal and other mineral rights may not exceed fifty dollars. n523 On deeds of trust or mortgages secured by bonds, the tax is based on the amount of bonds secured or, if not ascertainable, on the fair market value of the property conveyed.

Maximum tax schedule:

1st $10 million	$.15 per $100 of value
2nd $10 million	$.12 per $100 of value
3rd $10 million	$.09 per $100 of value
4th $10 million	$.06 per $100 of value
Over $40 million	$.03 per $100 of value n524

On deeds of release or any deed of partition, any deed transferring property pursuant to a decree of divorce or separate maintenance or any deed of conveyance to a new corporation, the tax is fifty cents per deed. n525

§ 76.08(uu)(2)(iii) Tax on Leases and Contracts.

Items subject to tax: Leases, contracts, and assignments that are recorded. n526

Rates: Rates vary according to the consideration or value contracted for with a dollar limit on mineral leases. n527

§ 76.08(uu)(3) Estate Tax.

Equal to the credit allowed under federal estate tax law. n528

§ 76.08(uu)(4) Generation-skipping Transfer Tax.

Equal to the federal credit for state legacy taxes. n529

§ 76.08(uu)(5) Tax on Wills and Administrators.

Except for estates valued at $5,000 or less, 10 cents for every $100 of value of an estate or fraction thereof, upon the probate of a will or grant of administration. n530

§ 76.08(vv) Washington.

§ 76.08(vv)(1) Property Tax.

Property subject to tax: All nonexempt real property. n531

Rate of state levy: Varies.

Ratio of assessed value to fair market value: 100%. n532

§ 76.08(vv)(2) Tax on the Sale of Property.

Items taxed: An excise tax is imposed on each sale of property, including any conveyance, grant, assignment, quitclaim, or transfer of the ownership of or title to real property or any estate or interest therein for a valuable consideration, including any contract, or lease with an option to purchase, or transfers of possession, with the remaining in the vendor for security purposes. n533

Rates: 1.28% of sales price. In addition, any county may impose a tax on the sale of real property in the unincorporated area of the county, or any city may impose a tax on the sale of real property within the corporate limits of the city at a rate not to exceed .25% of the selling price. n534

§ 76.08(vv)(3) Estate Tax.

Equal to the credit allowed under federal estate tax law. n535

§ 76.08(vv)(4) Generation-skipping Transfer Tax.

Equal to the credit allowed under federal law. n536

§ 76.08(ww) West Virginia.

§ 76.08(ww)(1) Property Tax.

Property subject to tax: All nonexempt real property. n537

Rate of state levy: Varies.

Ratio of assessed value to fair market value: 60%. n538

§ 76.08(ww)(2) Tax on Transfers of Real Property Titles.

Items taxed: Transfers of title to real estate located in West Virginia. n539

Rates: $1.10 per $500 of actual consideration, including any liens assumed, or, for gifts, of actual monetary value of the property, plus an additional county excise tax of fifty-five cents per $500 of value or fraction thereof. n540

§ 76.08(ww)(3) Estate Tax.

Equal to the credit allowed under federal estate tax law. n541

§ 76.08(xx) Wisconsin.

§ 76.08(xx)(1) Property Tax.

Property subject to tax: All nonexempt real property. n542

Rate of state levy: Varies.

Ratio of assessed value to fair market value: 100%. n543

§ 76.08(xx)(2) Tax on Transfers of Real Property.

Items subject to tax: Transfers of real property. n544

Rates: Thirty cents per $100 of value or fraction thereof. n545

§ 76.08(xx)(3) Estate Tax.

Equal to the credit allowed under federal estate tax law. n546

§ 76.08(xx)(4) Inheritance Tax.

Varies according to the class of the donee and the available exemptions. n547

§ 76.08(xx)(5) Gift Tax.

Varies according to the value of the gift and to the class of the donee and the applicable exemptions. n548

§ 76.08(yy) Wyoming.

§ 76.08(yy)(1) Property Tax.

Property subject to tax: All nonexempt real property. n549

Rate of state levy: Varies, plus a state annual levy of up to 12 mills for school support. n550

Ratio of assessed value to fair market value: 9.5% for most property; 11.5% for industrial property. n551

§ 76.08(yy)(2) Estate Tax.

The Wyoming estate tax is equal to the maximum credit for state death tax allowed as a credit under federal law, times the ratio that the Wyoming gross estate bears to the federal gross estate, or times the maximum state death tax credit allowed to the Wyoming gross estate, whichever is greater. n552

FOOTNOTES:
(n1)Footnote 246. Ala. Code § 40-11-1.

(n2)Footnote 247. *Id.* § 40-8-2.

(n3)Footnote 248. *Id.* § 40-8-1.

(n4)Footnote 249. *Id.* § 40-22-1.

(n5)Footnote 250. *Id.*

(n6)Footnote 251. *Id.* § 40-22-2.

(n7)Footnote 252. *Id.*

(n8)Footnote 253. *Id.* § 40-20-31.

(n9)Footnote 254. *Id.* § 40-20-32.

(n10)Footnote 255. *Id.* §§ 40-15-2, 40-15-3.

(N11)Footnote 256. *Id.* § 40-15A-2.

(n12)Footnote 257. Alaska Stat. § 43.56.010.

(n13)Footnote 258. *Id.* §§ 43.31.021, 43.31.031.

(n14)Footnote 259. Ariz. Rev. Stat. Ann. §§ 42-202, 42-271.

(n15)Footnote 260. *Id.* §§ 42-162, 42-227.

(n16)Footnote 261. *Id.* §§ 42-1521, 42-1522.

(n17)Footnote 262. *Id.* § 42-1532.

(n18)Footnote 263. Ark. Code Ann. § 26-3-201.

(n19)Footnote 264. *Id.* § 26-60-105.

(n20)Footnote 265. *Id.*

(n21)Footnote 266. *Id.* §§ 26-59-106, 26-59-107.

(n22)Footnote 267. Cal. Rev. & Tax. Code § 201.

(n23)Footnote 268. *Id.* §§ 11911, 11912.

(n24)Footnote 269. *Id.* § 11911.

(n25)Footnote 270. *Id.* §§ 13302, 13303.

(n26)Footnote 271. *Id.* § 16720.

(n27)Footnote 272. Colo. Rev. Stat. § 39-1-102.

(n28)Footnote 273. *Id.* § 39-1-104.

(n29)Footnote 274. *Id.* § 39-13-102.

(n30)Footnote 275. *Id.*

(n31)Footnote 276. *Id.* §§ 39-23.5-103 - 39-23.5-106.

(n32)Footnote 277. *Id.* § 39-23.5-106.

(n33)Footnote 278. Conn. Gen. Stat. §§ 12-64, 12-71; *The Loomis Inst. v. Town of Windsor, 661 A.2d 1001 (Conn. 1995)* (faculty houses owned by day and boarding school were exempt from local property taxes under the educational real property tax exemption).

(n34)Footnote 279. *Id.* § 12-62a(b).

(n35)Footnote 280. *Id.* § 12-494.

(n36)Footnote 281. *Id.*

(n37)Footnote 282. *Id.* §§ 12-504(a), 12-504(e).

(n38)Footnote 283. *Id.* § 12-504(a).

(n39)Footnote 284. *Id.* §§ 12-340, 12-341b,12-343, 12-344, 12-344a, 12-345, 12-345b - 12-345f, 12-376.

(n40)Footnote 285. *Id.* § 12-391.

(n41)Footnote 286. Del. Code Ann. tit. 9, § 8101.

(n42)Footnote 287. *Id.* tit. 30, §§ 5401, 5402.

(n43)Footnote 288. *Id.* tit. 30, § 5402.

(n44)Footnote 289. *Id.* tit. 30, § 1502.

(n45)Footnote 290. *Id.* tit. 30, §§ 1321 - 1322.

(n46)Footnote 291. D.C. Code Ann. §§ 47-811, 47-1002.

(n47)Footnote 292. *Id.* § 47-820.

(n48)Footnote 293. *Id.* § 45-923.

(n49)Footnote 294. *Id.*

(n50)Footnote 295. *Id.* § 47-903.

(n51)Footnote 296. *Id.*

(n52)Footnote 297. *Id.* § 47-3702.

(n53)Footnote 298. Fla. Stat. Ann. § 192.011.

(n54)Footnote 299. Fla. Const. art. VII, § 1.

(n55)Footnote 300. Fla. Stat. Ann. §§ 201.02(1), 201.02(2).

(n56)Footnote 301. *Id.* § 201.02(1).

(n57)Footnote 302. *Id.* § 201.08(1).

(n58)Footnote 303. *Id.*

(n59)Footnote 304. *Id.* § 99.133(1).

(n60)Footnote 305. *Id.*

(n61)Footnote 306. *Id.* § 198.02.

(n62)Footnote 307. *Id.* §§ 198.021, 198.031.

(n63)Footnote 308. Ga. Code Ann. § 48-5-3.

(n64)Footnote 309. *Id.* § 48-5-7.

(n65)Footnote 310. *Id.* § 48-6-1.

(n66)Footnote 311. *Id.* at n.2

(n67)Footnote 312. *Id.* § 48-12-2.

(n68)Footnote 313. Haw. Rev. Stat. § 246-1.

(n69)Footnote 314. *Id.* § 246-2.

(n70)Footnote 315. *Id.* § 247-1.

(n71)Footnote 316. *Id.* § 247-2.

(n72)Footnote 317. *Id.* § 235-68.

(n73)Footnote 318. *Id.* § 236D-3

(n74)Footnote 319. Idaho Code §§ 63-101, 63-922.

(n75)Footnote 320. *Id.* § 14-403.

(n76)Footnote 321. Ill. Rev. Stat. ch. 35, & 205/18.1; *Boone County Bd. of Review v. Property Tax Appeal Bd., 659 N.E.2d 72 (Ill. App. 1995)* (canopies, decks, porches, and garages added to mobile homes may not be assessed as real property); *DuPage County Bd. of Review v. Joint Comm'n on Accreditation of Healthcare Orgs., 654 N.E.2d 240 (Ill. App. 1995)* (hospital accreditation institution did not qualify for charitable exemption from real property tax).

(n77)Footnote 322. *Id.* ch. 35, § 200/31-10.

(n78)Footnote 323. *Id.*

(n79)Footnote 324. *Id.* ch. 55, § 5/5-1038.

(n80)Footnote 325. *Id.*

(n81)Footnote 326. *Id.* ch. 35, § 405/3.

(n82)Footnote 327. *Id.* ch. 35, § 405/4.

(n83)Footnote 328. Ind. Code § 6-1.1-2-1.

(n84)Footnote 329. Ind. Code Ann. § 6-1.1-18-3.

(n85)Footnote 330. *Id.*

(n86)Footnote 331. However, political subdivisions can declare emergency levies with no limit.

(n87)Footnote 332. *Id.* §§ 6-1.1-1-3, 6-1.1-2-2.

(n88)Footnote 333. *Id.* § 6-4.1-11-2.

(n89)Footnote 334. *Id.* §§ 6-4.1-3-1 - 6-4.1-3-12, 6-4.1-5-1.

(n90)Footnote 335. Iowa Code § 427.13; *Burlington N. R.R. v. Bair, 60 F.3d 410 (8th Cir. 1995)* (Iowa's real property tax law, which denominates all real and personal railroad property as real property, is discriminatory and illegal); *Holy Spirit Retirement Home, Inc. v. Board, 543 N.W.2d 907 (Iowa App. 1995)* (the apartment division of a religious institution's nursing home development was not exempt from real property taxes, because the division did not have a charitable or benevolent purpose).

(n91)Footnote 336. *Id.* § 441.21.

(n92)Footnote 337. *Id.* § 428A.1.

(n93)Footnote 338. *Id.*

(n94)Footnote 339. *Id.* § 451.2.

(n95)Footnote 340. *Id.* § 450A.2.

(n96)Footnote 341. *Id.* §§ 450.3-450.7, 450.9, 450.10.

(n97)Footnote 342. Kan. Stat. Ann. § 79-101; *Famous Brands Distribs., Inc. v. Board of County Comm'rs of Shawnee County, 894 P.2d 925 (Kan. App. 1995)* (property used to store wines, spirits, and beer shipped from out of state for distribution within the state did not qualify for the tax exemption applicable to goods sold or traded in interstate commerce).

(n98)Footnote 343. *Id.* § 79-501.

(n99)Footnote 344. *Id.* § 79-3102.

(n100)Footnote 345. *Id.*

(n101)Footnote 346. *Id.* § 79-1539.

(n102)Footnote 347. *Id.* § 79-1581.

(n103)Footnote 348. *Id.* § 79-1537.

(n104)Footnote 349. Ky. Rev. Stat. Ann. § 132.190.

(n105)Footnote 350. *Id.*

(n106)Footnote 351. *Id.* § 142.050.

(n107)Footnote 352. *Id.*

(n108)Footnote 353. *Id.* § 140.130.

(n109)Footnote 354. *Id.* §§ 140.063, 140.064, 140.070.

(n110)Footnote 355. La. Rev. Stat. Ann. § 47:1951.

(n111)Footnote 356. La. Const. art. VII, § 18.

(n112)Footnote 357. La. Rev. Stat. Ann. § 47:2432.

(n113)Footnote 358. *Id.* §§ 2402, 2403.

(n114)Footnote 359. *Id.* §§ 1205 - 1207.

(n115)Footnote 360. Me. Rev. Stat. Ann. tit. 36, §§ 502, 551, 601; *Episcopal Camp Found., Inc. v. Town of Hope, 666 A.2d 108 (Me. 1995)* (church summer camp held exempt from property tax).

(n116)Footnote 361. *Id.* tit. 36, § 201.

(n117)Footnote 362. *Id.* tit. 36, § 4641-A.

(n118)Footnote 363. *Id.*

(n119)Footnote 364. *Id.* tit. 36, §§ 4063, 4064.

(n120)Footnote 365. Md. Code Ann., Tax-Prop. §§ 6-101 - 6-104.

(n121)Footnote 366. *Id.* §§ 1-101, 8-103.

(n122)Footnote 367. *Id.* §§ 12-101, 12-102.

(n123)Footnote 368. *Id.* § 12-103.

(n124)Footnote 369. *Id.* §§ 13-101, 13-202.

(n125)Footnote 370. *Id.* § 13-203.

(n126)Footnote 371. *Id.* §§ 13-301, 13-302.

(n127)Footnote 372. *Id.* § 13-303.

(n128)Footnote 373. Md. Code Ann., Tax-Gen. § 7-304.

(n129)Footnote 374. *Id.* § 7-403.

(n130)Footnote 375. *Id.* §§ 7-203, 7-204.

(n131)Footnote 376. Mass. Gen. L. ch. 59, § 2.

(n132)Footnote 377. *Id.* ch. 59, §§ 2A, 38.

(n133)Footnote 378. *Id.* ch. 64D, § 7.

(n134)Footnote 379. *Id.* ch. 64D, § 1.

(n135)Footnote 380. *Id.* ch. 65C, §§ 2, 3.

(n136)Footnote 381. *Id.* ch. 65A, § 1.

(n137)Footnote 382. *Id.* ch. 65C, § 4A.

(n138)Footnote 383. Mich. Comp. Laws § 211.1; *United States v. State of Mich., 882 F. Supp. 659 (E.D. Mich. 1995)* (lands with reservation boundaries and owned by Native Americans in fee simple absolute are not "reservation lands" and are subject to taxation).

(n139)Footnote 384. *Id.* § 211.27a.

(n140)Footnote 385. *Id.* §§ 207.502, 207.503.

(n141)Footnote 386. *Id.* § 207.504.

(n142)Footnote 387. Mich. Stat. Ann. §§ 7.456(21) *et seq.*

(n143)Footnote 388. *Id.* § 205.202a.

(n144)Footnote 389. *Id.* §§ 205.202, 205.202c, 205.202d.

(n145)Footnote 390. Minn. Stat. § 272.01.

(n146)Footnote 391. *Id.* § 273.11.

(n147)Footnote 392. *Id.* § 287.21.

(n148)Footnote 393. *Id.*

(n149)Footnote 394. *Id.* § 287.05.

(n150)Footnote 395. *Id.*

(n151)Footnote 396. *Id.* § 291.03.

(n152)Footnote 397. Miss. Const. art. 4, § 112.

(n153)Footnote 398. Miss. Code Ann. §§ 27-31-73, 27-31-77, 27-31-79.

(n154)Footnote 399. *Id.* § 27-31-79.

(n155)Footnote 400. *Id.* § 27-9-5.

(n156)Footnote 401. Mo. Rev. Stat. § 137.075; *Central States Christian Endeavors Ass'n v. Nelson, 898 S.W.2d 547 (Mo. 1995)* (a house owned by a religious organization and in which three bedrooms were rented to the organization's student leaders was used exclusively for religious purposes and exempt from property taxation).

(n157)Footnote 402. *Id.* § 137.115.

(n158)Footnote 403. *Id.* § 145.011.

(n159)Footnote 404. *Id.* § 145.995.

(n160)Footnote 405. Mont. Code Ann. § 15-6-101.

(n161)Footnote 406. *Id.* § 15-6-101.

(n162)Footnote 407. *Id.* § 72-16-905.

(n163)Footnote 408. *Id.* §§ 72-316-312, 72-316-313, 72-316-321, 72-316-322.

(n164)Footnote 409. Neb. Rev. Stat. § 77-201.

(n165)Footnote 410. *Id.* §§ 76-901, 76-907.

(n166)Footnote 411. *Id.* § 76-901.

(n167)Footnote 412. *Id.* § 77-2101.01.

(n168)Footnote 413. *Id.* §§ 77-2004, 77-2005, 77-2007.02 - 77-2007.04.

(n169)Footnote 414. Nev. Rev. Stat. § 361.045.

(n170)Footnote 415. *Id.* §§ 361.225, 361.260.

(n171)Footnote 416. *Id.* § 375.020.

(n172)Footnote 417. *Id.*

(n173)Footnote 418. *Id.* § 375A.100.

(n174)Footnote 419. *Id.* § 375B.100.

(n175)Footnote 420. N.H. Rev. Stat. Ann. §§ 72:6 - 72:13; *Appeal of Kiwanis Club of Hudson, Inc., 663 A.2d 90 (N.H. 1995)* (taxpayer's rental of its hall to other charitable organizations for fund raising did not justify reducing its exemption from property taxes to 25%).

(n176)Footnote 421. *Id.* § 75:1.

(n177)Footnote 422. *Id.* § 78-B:1.

(n178)Footnote 423. *Id.* at n.2

(n179)Footnote 424. *Id.* § 87:1.

(n180)Footnote 425. *Id.* § 86.6.

(n181)Footnote 426. N.J. Rev. Stat. § 54:4-1; *New Jersey Carpenters Apprentice Training & Educ. Fund v. Borough of Kenilworth, 665 A.2d 1128 (N.J. Super. 1995)* (a training program which benefits the public is considered a school and is therefore exempt from property tax).

(n182)Footnote 427. *Id.* §§ 46:15-5, 46:15-6.1, 46:15-7.

(n183)Footnote 428. *Id.* § 46:15-7.

(n184)Footnote 429. *Id.* § 46:15-10.1.

(n185)Footnote 430. *Id.* § 54:38-1.

(n186)Footnote 431. *Id.* § 54:34-1.

(n187)Footnote 432. N.M. Stat. Ann. § 7-37-2.

(n188)Footnote 433. *Id.* § 7-36-7.

(n189)Footnote 434. *Id.* § 7-7-3.

(n190)Footnote 435. N.Y. Real Prop. Tax Law § 300.

(n191)Footnote 436. N.Y. Tax Law §§ 1401, 1402.

(n192)Footnote 437. *Id.* § 1402.

(n193)Footnote 438. *Id.* §§ 1440-1442.

(n194)Footnote 439. *Id.* §§ 250, 255, 256, 259.

(n195)Footnote 440. *Id.* § 253.1.

(n196)Footnote 441. *Id.* § 253.1-a(a).

(n197)Footnote 442. *Id.* § 253.1-a(b).

(n198)Footnote 443. *Id.* § 253.2(a).

(n199)Footnote 444. *Id.* § 253-a.1.

(n200)Footnote 445. *Id.* §§ 952, 955, 958a, 959.

(n201)Footnote 446. *Id.* § 1002.

(n202)Footnote 447. N.C. Gen. Stat. § 105-274; In the *Matter of the Appeal of Mt. Shepherd Methodist Camp, 462 S.E.2d 229 (N.C. App. 1995)* (undeveloped portion of a church summer camp was also qualified for exemption from property tax).

(n203)Footnote 448. *Id.* § 105-228.30.

(n204)Footnote 449. *Id.*

(n205)Footnote 450. *Id.* § 105-7.

(n206)Footnote 451. *Id.* § 105-7.1.

(n207)Footnote 452. *Id.* §§ 105-3 - 105-6.

(n208)Footnote 453. *Id.* § 105-188.

(n209)Footnote 454. N.D. Cent. Code § 57-02-03.

(n210)Footnote 455. *Id.* § 57-02-01.

(n211)Footnote 456. *Id.* § 57-37.1-04.

(n212)Footnote 457. Ohio Rev. Code Ann. § 5709.01; *Warman v. Tracy, 648 N.E.2d 833 (Ohio 1995)* (nonprofit charitable hospital's off-site house used as a residence for nuns employed at the hospital was also entitled to charitable purpose exemption from property tax).

(n213)Footnote 458. *Id.* § 5715.01.

(n214)Footnote 459. Ohio Rev. Code Ann. §§ 317.22-322.99.

(n215)Footnote 460. *Id.* §§ 5731.02, 5731.161, 5731.17.

(n216)Footnote 461. *Id.* § 5731.18.

(n217)Footnote 462. *Id.* § 5731.18.1.

(n218)Footnote 463. Okla. Stat. tit. 68, § 2804.

(n219)Footnote 464. Okla. Stat. tit. 68, § 2817.

(n220)Footnote 465. Okla. Stat. tit. 6, § 3201.

(n221)Footnote 466. *Id.* at n.2

(n222)Footnote 467. *Id.* tit. 68, §§ 1901 - 1909.

(n223)Footnote 468. *Id.* tit. 68, § 1904.

(n224)Footnote 469. *Id.* tit. 68, §§ 803, 807 - 809.

(n225)Footnote 470. Or. Rev. Stat. § 307.030; *Bayridge Assocs. Ltd. P'ship v. Department of Revenue, 892 P.2d 1002 (Or. 1995)* (a federal low-income housing tax credit program is a "governmental restriction as to use" which should be taken into account in determining the property's value for tax purposes).

(n226)Footnote 471. *Id.* § 308.232.

(n227)Footnote 472. *Id.* §§ 118.020, 118.100.

(n228)Footnote 473. Pa. Stat. Ann. tit. 72, § 5020 - 201; *Appeal of the City of Washington v. Board of Assessment Appeals, 666 A.2d 352 (Pa. 1995)* (an independent liberal arts college was exempt from property tax as a "purely public charity"); *In re Appeal of Sheetz, Inc. 657 A.2d 1011 (Pa. 1995)* (canopies bolted to concrete foundations to protect customers and equipment were "fixtures" and subject to real property tax).

(n229)Footnote 474. *Id.* tit. 72, § 8102-C.

(n230)Footnote 475. *Id.*

(n231)Footnote 476. *Id.* tit. 72, app. § 1717.

(n232)Footnote 477. *Id.* tit. 72, app. §§ 1711, 1716.

(n233)Footnote 478. R.I. Gen. Laws §§ 44-3-1, 44-3-2.

(n234)Footnote 479. *Id.* § 44-5-12.

(n235)Footnote 480. *Id.* § 44-25-1.

(n236)Footnote 481. *Id.* at n.2

(n237)Footnote 482. *Id.* § 44-22-1.1.

(n238)Footnote 483. *Id.* § 44-40-3.

(n239)Footnote 484. S.C. Code Ann. § 12-43-220.

(n240)Footnote 485. *Id.* § 12-21-380.

(n241)Footnote 486. *Id.*

(n242)Footnote 487. S.C. Code Ann. §§ 12-21-310 *et seq.*

(n243)Footnote 488. *Id.* §§ 12-16-510, 12-16-520, 12-16-530.

(n244)Footnote 489. *Id.* § 12-16-720.

(n245)Footnote 490. S.D. Codified Laws Ann. § 10-4-1.

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(n247)Footnote 492. *Id.* § 10-6-33.

(n248)Footnote 493. *Id.* § 43-4-21.

(n249)Footnote 494. *Id.*

(n250)Footnote 495. *Id.* §§ 10-40A-3, 10-40A-4.

(n251)Footnote 496. *Id.* §§ 10-40-21 - 10-40-23.1.

(n252)Footnote 497. Tenn. Code Ann. § 67-5-101.

(n253)Footnote 498. *Id.* § 67-4-409.

(n254)Footnote 499. *Id.*

(n255)Footnote 500. *Id.* § 67-8-204.

(n256)Footnote 501. *Id.* § 67-8-603.

(n257)Footnote 502. *Id.* §§ 67-8-314 - 67-8-316.

(n258)Footnote 503. *Id.* §§ 67-8-103 - 67-8-106.

(n259)Footnote 504. Tex. Tax Code Ann. § 11.01; *Laurel Land Mem'l Park, Inc. v. Dallas Cent. Appraisal Dist., 911 S.W.2d 783 (Tex. App. 1995)* (publicly dedicated cemetery property is statutorily exempt from property taxation); *Williamson County Appraisal Dist. v. Nootsie, Ltd., 905 S.W.2d 289 (Tex. App. 1995)* (defining a college ecology laboratory as open-space land property violated the uniformity requirement and was not exempt from property tax applicable to agricultural property).

(n260)Footnote 505. *Id.* §§ 211.051 - 211.053.

(n261)Footnote 506. *Id.* § 211.054.

(n262)Footnote 507. Utah Code Ann. § 59-2-901.

(n263)Footnote 508. *Id.*

(n264)Footnote 509. *Id.* §§ 59-2-102, 59-2-103.

(n265)Footnote 510. *Id.* §§ 59-11-103, 59-11-104.

(n266)Footnote 511. Vt. Stat. Ann. tit. 32, § 3604.

(n267)Footnote 512. Vt. Stat. Ann. tit. 1, § 3756(a).

(n268)Footnote 513. *Id.* § 3604.

(n269)Footnote 514. *Id.* § 9602.

(n270)Footnote 515. *Id.* § 10001.

(n271)Footnote 516. *Id.* tit. 32, § 7442a.

(n272)Footnote 517. Va. Code Ann. § 58.1-100 *et seq.*

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(n274)Footnote 519. *Id.*

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(n277)Footnote 522. *Id.* § 58.1-801.

(n278)Footnote 523. *Id.* § 58.1-807.

(n279)Footnote 524. *Id.* § 58.1-803.

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(n281)Footnote 526. *Id.* § 58.1-807.

(n282)Footnote 527. *Id.*

(n283)Footnote 528. *Id.* § 58.1-903.

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(n287)Footnote 532. *Id.* § 84.40.030.

(n288)Footnote 533. *Id.* §§ 82.45.010, 82.45.060, 82.46.010.

(n289)Footnote 534. *Id.* § 82.45.010.

(n290)Footnote 535. *Id.* § 83.100.030.

(n291)Footnote 536. *Id.* § 83.100.045.

(n292)Footnote 537. W. Va. Code § 11-5-3.

(n293)Footnote 538. W. Va. Const. art. X, § 1b.

(n294)Footnote 539. *Id.* at § 11-22-2.

(n295)Footnote 540. *Id.*

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(n298)Footnote 543. *Id.* § 70.34.

(n299)Footnote 544. *Id.* § 77.22.

(n300)Footnote 545. *Id.*

(n301)Footnote 546. *Id.* § 72.02.

(n302)Footnote 547. *Id.* §§ 72.13 - 72.19.

(n303)Footnote 548. *Id.* §§ 72.76 - 72.84.

(n304)Footnote 549. Wyo. Stat. § 39-1-102.

(n305)Footnote 550. *Id.* § 21-13-303.

(n306)Footnote 551. *Id.* § 39-1-101.

(n307)Footnote 552. *Id.* §§ 39-6-810, 39-6-812.

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Chapter 76 TAXATION OF REAL PROPERTY

9-76 Thompson on Real Property, Thomas Editions § 76.09

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Annotation, *Tax Exemption of Property of Educational Body as Extending to Property Used by Personnel as Living Quarters, 55 A.L.R.3d 485.*

Annotation, *Taxation: Exemption of Parsonage or Residence of Minister, Priest, Rabbi, or Other Church Personnel, 55 A.L.R.3d 356.*

Annotation, *Validity, Construction, and Effect of State Statutes Affording Preferential Property Tax Treatment to Land Used for Agricultural Purposes, 98 A.L.R.3d 916.*

Annotation, *What are Educational Institutions or Schools Within State Property Tax Exemption Provisions, 34 A.L.R.4th 698.*

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Supp. To CHAPTER 76 TAXATION OF REAL PROPERTY

9-76 Thompson on Real Property, Thomas Editions Supp. to § 76.01

Supp. to § 76.01 Introduction to the Chapter.

[Go To Main]

In line 14 of the first paragraph, remove the words:

"no bibliography and."

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Supp. To CHAPTER 76 TAXATION OF REAL PROPERTY

9-76 Thompson on Real Property, Thomas Editions Supp. to § 76.02

Supp. to § 76.02 Federal Income Taxation of Non-residential Property.

[Go To Main]

§ 76.02(a) Taxation of Non-residential Real Property Acquisition. [Go To Main]

§ 76.02(a)(1) Tax Treatment of Acquisition Costs.

Delete:

"*Moore v. Commissioner, 68 T.C. 909 (1994)*"

Add:

Rev. Rul. 69-582, 1969-2 C.B. 29 (A 'loan processing fee' paid by a mortgagor-borrower as compensation

Delete:

§ 184(a).

Add:

26 U.S.C § 164.

Change I.R.C. § 63(c) to:

I.R.C. § 63(d).

Add:

§ 63 Amended by P.L. 107-147, *116 Stat. 21* (Mar. 9, 2002).

Add:

§ 62 Amended by P.L. 107-147, *116 Stat. 21* (Mar. 9, 2002).

Change Temp. Treas. Reg. § 1.263A-1T to:

Treas. Reg. §§ 1.263A-2, 1.263A-2.

§ 76.02(a)(2) The Definition and Role of Basis.

Add:

2008 *I.R.S. C.C.A. LEXIS 119 (I.R.S. 2008)* (applying Idaho Power).

Change footnote to read:

I.R.C. § 179, Amended by P.L. 111-147, *124 Stat. 71* (Mar. 18, 2010). This section permits up to $25,000 ($250,000 in

the case taxable years beginning after 2007 and before 2011) of the cost of qualifying personal property to be deducted as a current expense. If the expense deduction exceeds the taxpayer's trade or business income, the excess may be carried forward to a subsequent tax year subject to certain limitations. *I.R.C. § 179(a)(3)*.

Add:

§ 1031 Amended by P.L. 110-234, *122 Stat. 923* (May 22, 2008).

§ 76.02(b) Taxation of Non-residential Real Property Ownership. [Go To Main]

§ 76.02(b)(1) Deductions.

Add:

§ 162 Amended by P.L. 111-152, *124 Stat. 1029* (Mar. 30, 2010).

Change § 465(a) to:

§ 465

Add:

Wells Fargo & Co. v. United States, 91 Fed. Cl. 35 (Fed. Cl. 2010) (holding a taxpayer could not claim an interest deduction on a loan because full proceeds were paid to the debt payment undertaker as a fee).

Add:

§ 469 Amended by P.L. 107-147, *116 Stat. 21* (Mar. 9, 2002).

§ 76.02(b)(2) Credits.

Change "Id. § 46(c)" to "Id. § 469(c)"

§ 76.02(b)(2)(ii) Rehabilitation Credit.

Change § 46(b) to:

§ 47(a)(2).

Change § 48(g) to:

§ 47(c).

Change § 48(g)(2) to:

§ 47.

§ 76.02(b)(2)(iii) Low-income Housing Credit.

Add:

§ 42 Amended by P.L. 107-147, *116 Stat. 21* (Mar. 9, 2002).

§ 76.02(b)(2)(iv) Energy Investment Credit

Add:

§ 48 Amended by P.L. 111-5, *123 Stat. 115* (Feb. 17, 2009) (American Recovery and Reinvestment Act).

§ 76.02(b)(2)(v) Credit for Disability Access.

Change $1,500 per year to:

$15,000 per year

Change $5,000 to:

$10,250

§ 76.02(b)(3) Depreciation.

Add:

§ 168 Amended by P.L. 107-147, *116 Stat. 21* (Mar. 9, 2002).

Add:

§ 168 Amended by P.L. 107-147, *116 Stat. 21* (Mar. 9, 2002).

Add:

§ 168 Amended by P.L. 107-147, *116 Stat. 21* (Mar. 9, 2002).

Change § 168(e) to:

§ 168

Change "Id. § 168(e)." to:

Id. § 168(c), (e).

Add:

§ 168 Amended by P.L. 107-147, *116 Stat. 21* (Mar. 9, 2002).

Add:

§ 168 Amended by P.L. 107-147, *116 Stat. 21* (Mar. 9, 2002).

Add:

§ 168 Amended by P.L. 107-147, *116 Stat. 21* (Mar. 9, 2002).

§ 76.02(b)(4) Alternative Minimum Tax.

Add:

§ 56 Amended by P.L. 107-147, *116 Stat. 21* (Mar. 9, 2002).

In the second paragraph, line 7, change text from 31.5 to:

39

Change text wording from "20-year property category" to:

15 and 20 -year property categories.

§ 76.02(c) Taxation of Non-Residential Real Property Leases. [Go To Main]

§ 76.02(c)(1) Cost of Leasehold Acquisitions.

Change J. & E. Enters., Inc. to:

Stanton

Delete reference to charitable contributions of appreciated property from second to last line of page. (1993 Amendments. Subsec. (a)(6). Pub.L. 103-66, § 13171(a), redesignated former par. (7) as (6) and struck out former par. (6) which detailed the appreciated property charitable deduction.)

Change § 178(a) to:

§ 178(b).

§ 76.02(c)(2) Taxation of Sale-leasebacks.

Add to Frank Lyon Co. v. United States, 435 U.S. 561 (1978), **"distinguished by *940 F.2d 1094 (7th Cir. 1991)*"**

"*distinguished by 16 F.3d 821 (7th Cir. 1994)* ."

Add:

Consolidated Edison Co. of N.Y., Inc. & Subsidiaries v. United States, 90 Fed. Cl. 228 (Fed. Cl. 2009) (holding a sale-leaseback arrangement did not lack economic substance and thus the arrangement qualified for the tax deductions claimed); *Tyson v. Comm'r of Internal Revenue, 2009 Tax Ct. Memo LEXIS 178* ; *BB&T Corp. v. United States, 523 F.3d 461 (4th Cir. 2008)* (holding a sale-leaseback transaction to be a financing arrangement and not a genuine lease and sublease, thus implicating tax liabilities).

Add:

$1,500 for a married individual filing separately. Id. § 1211(b)(1).

§ 76.02(d) Taxation of Non-residential Real Property Transfers. [Go To Main]

§ 76.02(d)(1) Sales.

At the end of third line, add new footnote 83.1 after ordinary income: n83.1

Change § 346(b) to:

§ 356(b).

§ 76.02(d) Taxation of Non-residential Real Property Transfers. [Go To Main]

§ 76.02(d)(2) Installment Sales.

Change § 453(l)(1)(B) to:

§ 453(*l*)(1)(B).

Change § 453(l) to:

§ 453(*l*).

§ 76.02(d)(3) Exchanges.

At the end of the 6th line in the first paragraph of the section, add new footnote 91.1 after "tax-free exchange treatment": n91.1

Change § 1031(a) to:

§ 1031(a)(2)(A).

Add:

"*declined to follow by T.C. Memo. 1998-421 , distinguished by 914 F.2d 265 (9th Cir. 1990), distinguished by 33 Fed. Cl. 384 (1995)* ."

Add:

Goldberg v. Ojeda, 2009 U.S. Dist. LEXIS 21590 (analyzing an attempted "Starker Trust").

Add:

"*distinguished by T.C. Memo. 1998-302* ."

Change §§ 1.1031(a)-1.1031(b) to:

§ 1.1031(a)-1.

Add:

Teruya Bros., Ltd. v. Comm'r of Internal Opinion Revenue, 580 F.3d 1038 (9th Cir. 2009) (holding "[t]axpayers cannot escape [liability] simply by hiding the benefits of improper like-kind exchanges with a related party").

§ 76.02(d)(4) Foreclosures.

Add:

§ 108 Amended by P.L. 107-147, *116 Stat. 21* (Mar. 9, 2002).

Change § 108(d)(2)(A)(ii) to:

§ 108(a)(1)(D).

Add:

§ 108 Amended by P.L. 107-147, *116 Stat. 21* (Mar. 9, 2002).

Change § 108(b)(2)(B) to:

§ 108(c).

FOOTNOTES:
(n1)Footnote 83.1. *I.R.C. § 1211*.

(n2)Footnote 91.1. Similarly, use of real property solely as a personal residence is "antithetical to its being held for investment." *T.C. Memo 2010-64* .

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Supp. To CHAPTER 76 TAXATION OF REAL PROPERTY

9-76 Thompson on Real Property, Thomas Editions Supp. to § 76.03

Supp. to § 76.03 Federal Income Taxation of Residential Real Property.

[Go To Main]

President Bush signed into law the American Housing Rescue and Foreclosure Prevention Act of 2008, on July 30, 2008. This law includes the Housing Assistance Tax Act of 2008, which provides a credit for first--time home buyers, a property tax deduction for non--itemizing taxpayers, rule changes for excluding gain on the sale of a principal residence, rule changes for real estate investment trusts, changes for the low income housing tax credit, and other more specific and technical changes. More details are provided in the Special Tax Alert in Volume 15 of this treatise.

§ 76.03(a) Taxation of Residential Real Property Ownership. [Go To Main]

Add:

I.R.C. § 165(h)(3).

§ 76.03(a)(2) Deduction for Casualty Losses

Add:

§ 165 Amended by P.L. 110-343, *122 Stat. 3765* (Oct. 3, 2008) (Emergency Economic Stabilization Act of 2008).

Add:

Net casualty loss allowed only to the extent it exceeds 10 percent of adjusted gross income. (clarifies reading)

***Change 62 Tax Ct. Mem. Dec. (P-H) 214* to:**

21 Tax Ct. Meme Dec. (CCH) 1146

Change § 165(j) to:

§ 165(i).

Add:

§ 165 Amended by P.L. 110-343, *122 Stat. 3765* (Oct. 3, 2008) (Emergency Economic Stabilization Act of 2008).

Change note 124 to read:

The references to *I.R.C. § 163(h)* are to the statute as it was originally enacted as part of the Tax Reform Act of 1986; § 163(h) was later revised and renumbered by the Revenue Act of 1987, P.L. 100-203, further amended by the Technical and Miscellaneous Revenue Act of *1988 P.L. 100-647*, and most recently amended by the Emergency Economic Stabilization Act of 2008, P.L. 110-343.

Add following "I.R.C. § 163(h)(3)-163(h)(5), 1034": § 165 Amended by P.L. 110-343, *122 Stat. 3765* (Oct. 3, 2008).

§ 76.03(a)(3) Deduction for Mortgage Interest.

Change § 163(h)(3)(A)(i) to:

§ 163(h)(3)(B)(ii).

Add:

§ 165 Amended by P.L. 110-343, *122 Stat. 3765* (Oct. 3, 2008) (Emergency Economic Stabilization Act of 2008).

Change I.R.C. § 163(h)(3)(A)(ii) to:

I.R.C. § 163(h)(3)(C)(ii)

Add:

§ 165 Amended by P.L. 110-343, *122 Stat. 3765* (Oct. 3, 2008) (Emergency Economic Stabilization Act of 2008).

Change § 163(h)(5)(B) to:

§ 163(h)(4)(b)

Add:

§ 165 Amended by P.L. 110-343, *122 Stat. 3765* (Oct. 3, 2008) (Emergency Economic Stabilization Act of 2008).

Remove second citation to

Rev. Rul. 67-297, 1967-2 C.B. 87

§ 76.03(a)(4) Deduction for Property Taxes.

Change first aff'd to rev'd in part

Change I.R.C. § 461 to:

I.R.C. § 164

§ 76.03(b) Taxation of Residential Real Property Transfers. [Go To Main]

Add:

Pilaria v. Commissioner, 84 Tax Ct. Mem. Dec. (CCH) 305 (2002).

Add:

Guinan v. United States, 2003 U.S. Dist. LEXIS 11923 (Arizona) , Apr. 9, 2003 (court looks at facts and circumstances of each case); *Treas. Reg. 1.121-1(b)(2)* (lists factors to determine whether a principal residence exists).

Add:

Saunders v. Commissioner, 83 Tax Ct. Mem. Dec. (CCH) 1795 (2002), aff'd, 2003 U.S. App. LEXIS 19564 (6th Cir.) .

Dorothy A. Brown, "Shades of the American Dream," *87 Wash. U. L. Rev. 329 (2009)* (describing taxation issues related to *Treas. Reg. § 1.262-1(b)(4)*).

Delete last sentence of first paragraph, and add to text:

The amount of gain excluded is limited to $250,000 for individuals and $500,000 for certain joint returns.[168] Generally, the property must have been owned and used by the taxpayer as a principal residence for at least 2 of the 5 years preceding the date of sale.[168a]

Change to:

I.R.C. § 121(b).

Add:

I.R.C. § 121(a).

Change 42 Tax Ct. to:

52 Tax Ct.

Add:

Parker v. Commissioner, 78 Tax Ct. Mem. Dec. (CCH) 621 (1999).

In line 3 of the second full paragraph, change three of the five years to:

two of the five years

In line 3 of the second full paragraph, change $125,000 to:

$250,000

Add:

Amended by P.L. 110-289, *122 Stat. 2654* (July 30, 2008).

Add:

§ 121 Amended by P.L. 110-289, *122 Stat. 2654* (July 30, 2008).

Add:

Delucchi v. Franchise Tax Board, 2009 Cal. App. LEXIS 142 ("[T]he method for allocating tax liability for an installment sale of a capital investment calculates the percentage that the gain represents of the total sales price and applies this percentage to each payment received to determine the amount of the total gain that is recognized for tax liability in any particular taxable year.")

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Supp. To CHAPTER 76 TAXATION OF REAL PROPERTY

9-76 Thompson on Real Property, Thomas Editions Supp. to § 76.04

Supp. to § 76.04 Federal Estate Taxation of Real Property.

[Go To Main]

Add:

Estate of Malkin v. Comm'r of Internal Revenue, 2009 Tax Ct. Memo LEXIS 214 .

Change § 2053 to:

§ 2053(a).

First full paragraph.

Change 55% of taxable estate amounts over $3,000,000 to:

50% of taxable estate amounts over $2,500,000.

In lines 7 and 10 of the second paragraph, change $600,000 to:

$675,000 in both instances

Add parenthetical:

(Tax rates are set to be phased down for decedents dying between 2002 and 2010. In 2003, the maximum estate tax rate will be 49% and by 2009, the maximum rate will be 45%).

First full paragraph.

Delete last two sentences and replace with:

Under the unified tax credit, a tax credit is given to the estate of every decedent.[198] For decedents dying during 2002 and 2003, the exclusion amount is $1,000,000.[199] This amount is set to increase every two or three years until it reaches $3,500,000 for decedents dying in 2009.[199.1]

Change to:

I.R.C. § 2010(c).

Change § 6018 to:

§ 2010.

Add:

The current provisions of § 2010 do not apply to estates of decedents, dying gifts, or generation skipping transfers after December 31, 2010; rather the *1986 Internal Revenue Code* applies. P.L. 107-16, *115 Stat. 38* (June 7, 2001).

Add:

Id.

Add:

The current provisions of *I.R.C. § 2011* do not apply to estates of decedents, dying gifts, or generation skipping transfers after December 31, 2010; rather the *1986 Internal Revenue Code* applies. P.L. 107-16, *115 Stat. 38* (June 7, 2001).

Add:

The current provisions of *I.R.C. § 2012* do not apply to estates of decedents, dying gifts, or generation skipping transfers after December 31, 2010; rather the *1986 Internal Revenue Code* applies. P.L. 107-16, *115 Stat. 38* (June 7, 2001).

Add:

The current provisions of *I.R.C. § 2013* do not apply to estates of decedents, dying gifts, or generation skipping transfers after December 31, 2010; rather the *1986 Internal Revenue Code* applies. P.L. 107-16, *115 Stat. 38* (June 7, 2001).

Add:

The current provisions of *I.R.C. § 2014* do not apply to estates of decedents, dying gifts, or generation skipping transfers after December 31, 2010; rather the Wyo. Stat. § 39-6-810 applies. P.L. 107-16, *115 Stat. 38* (June 7, 2001).

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Supp. To CHAPTER 76 TAXATION OF REAL PROPERTY

9-76 Thompson on Real Property, Thomas Editions Supp. to § 76.06

Supp. to § 76.06 Federal Taxation of Entities That Own Real Estate.

Wyo. Stat. § 39-6-812

§ 76.06(a) Corporations. [Go To Main]

last line, second full paragraph.

Add comma after "losses"

Add:

The current provisions of Bill of Rights do not apply to estates of decedents, dying gifts, or generation skipping transfers after December 31, 2010; rather the *1986 Internal Revenue Code* applies. P.L. 107-16, *115 Stat. 38* (June 7, 2001).

Add:

The current provisions of *I.R.C. § 6075* do not apply to estates of decedents, dying gifts, or generation skipping transfers after December 31, 2010; rather the *1986 Internal Revenue Code* applies. P.L. 107-16, *115 Stat. 38* (June 7, 2001).

Add:

The current provisions of *I.R.C. § 6019* do not apply to estates of decedents, dying gifts, or generation skipping transfers

after December 31, 2010; rather the *1986 Internal Revenue Code* applies. P.L. 107-16, *115 Stat. 38* (June 7, 2001).

Change Treas. Reg. § 301.7701.2(a)(1) to:

Treas. Reg. § 301.7701.2(b).

The current provisions of *I.R.C. § 7701* do not apply to estates of decedents, dying gifts, or generation skipping transfers after December 31, 2010; rather the *1986 Internal Revenue Code* applies. P.L. 107-16, *115 Stat. 38* (June 7, 2001).

Change § 11 to:

§ 1366.

Add:

Pierre v. Comm'r, 133 T.C. 2 (2009) .

§ 76.06(b) Partnerships. [Go To Main]

Change § 761 to:

§ 761(a).

§ 76.06(c) Trusts. [Go To Main]

§ 857 Amended by P.L. 107-147, *116 Stat. 21* (Mar. 9, 2002).

§ 76.06(d) Limited Liability Companies. [Go To Main]

Add to each Rev. Rul.

"*obsolete by, Rev. Rul. 98-37* ."

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Supp. To CHAPTER 76 TAXATION OF REAL PROPERTY

9-76 Thompson on Real Property, Thomas Editions Supp. to § 76.07

Supp. to § 76.07 Federal Taxation of Foreign Ownership in U.S. Real Property.

[Go To Main]

Add:

; Amended by P.L. 110-343, *122 Stat. 3765* (Oct. 3, 2008).

In the last paragraph, change 28% to:

15%.

Add:

The current 15% rate in *I.R.C. § 1445(e)(1)* sunsets on December 31, 2010.

In the last paragraph, change 28% to:

20%.

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Supp. To CHAPTER 76 TAXATION OF REAL PROPERTY

9-76 Thompson on Real Property, Thomas Editions Supp. to § 76.08

Supp. to § 76.08 State Taxation of Real Property Interests.

[Go To Main]

§ 76.08(a) Alabama. *8 USC § 1824*(b)

§ 76.08(a)(1) Property Tax.

Add:

See Ex parte Lake Forest Property Owners Ass'n., 659 So. 2d 607 (Ala. 1995) .

§ 76.08(a)(2) Transfer and Recording Taxes.

§ 76.08(a)(2)(ii) Tax on Instruments Securing Debt With Real Property in the State.

In "Rates" change residential real property to:

real property

§ 76.08(c) Arizona. [Go To Main]

Remove

"The following property tax provisions are repealed effective January 1, 1999."

§ 76.08(c)(1) Property Tax.

Modify Ariz. Rev. Stat. Ann. §§ 42-202, 42-271 to

"*Ariz. Rev. Stat. Ann. §§ 42-11002 - 42.11023*."

Modify from "13 classes of property" to

"9 classes of property."

Modify from "Id. §§ 42-162, 42-227" to

"Id. § 42-12009, § 42-15001 - § 42-15009."

§ 76.08(c)(3) Estate Tax

Change §§ 42.1521, 42.1522 to:

§§ 42.4051, 42.4052.

Modify from "Id. §§ 42-1521, 42-1522" to

"Id. § 42-4051."

Modify to

"A tax is imposed upon every generation skipping transfer in the amount computed by multiplying the maximum amount allowable under § 2604 of the internal revenue code as a credit for state taxes by a fraction, the numerator of which is the value of the estate subject to Arizona tax under this chapter and the denominator of which is the value of all the property included in the generation-skipping transfer."

§ 76.08(c)(4) Generation-skipping Transfer Tax.

Change § 42.1532 to:

§ 42.4102.

modify from "Id. § 42-1532" to:

"Id. § 42-4102."

§ 76.08(f) Colorado. [Go To Main]

§ 76.08(f)(1) Property Tax.

Change § 39.1.102 to:

§ 39.1.102(16)

Add:

City and County of Denver v. Board of Assessment Appeals of the State of Colo., 30 P.3d 177 (Colo. 2001) (Fire and Police Pension Assoc.'s ownership interest in real or personal property held to be exempt from ad valorem taxation as property of state).

Farny v. Board of Equaliz., 985 P.2d 106 (Colo. App. 1999) (Primary factor to be considered in determining proper classification of property for property tax purposes is the actual use of the property on the relevant assessment date).

§ 76.08(f)(2) Tax on Instruments Conveying Real Property.

Add on to end of "Items subject to tax:"

for which consideration was paid; no documentary fee is payable when there is no consideration.

Change § 39.13.102 to:

§ 39.13.102(2)(b).

Change Id. to:

§ 39.13.102(2)(a).

§ 76.08(f)(3) Estate Tax

Change "Equal to the credit allowed under federal estate tax law" to:

"Determined by multiplying the maximum amount allowable under [federal estate tax law] by a fraction, the numerator of which is the value of the property located in Colorado included in the generation-skipping transfer and the denominator of which is the value of all property included in the generation-skipping transfer."

§ 76.08(f)(4) Generation-skipping Transfer Tax

Change "Equal to the maximum credit allowed under federal law" to:

"Determined by multiplying the maximum amount allowable under [federal estate tax law] by a fraction, the numerator of which is the value of the property located in Colorado included in the generation-skipping transfer and the denominator of which is the value of all property included in the generation-skipping transfer."

§ 76.08(g) Connecticut. [Go To Main]

§ 76.08(g)(2) Tax on Transfers.

§ 76.08(g)(2)(i) Tax on Instruments Conveying Real Property.

Add on to end of "Items subject to tax:"

; with a value equal to or exceeding two thousand dollars.

Change "§§ 12-504(a), 12-504(e)" to: § 12-504a(b), (c).

Change "§ 12-504(a)" to: § 12-504a(b).

§ 76.08(g)(2)(ii) Tax on Farm and Forest Land Conveyances.

Change footnote to read 2005 Ct. ALS 190 (Jan 2005).

Change footnote to read 2005 Ct. ALS 190 (Jan 2005).

§ 76.08(g)(3) Succession and Transfer Tax.

§ 12-344, subsections (d) and (e) were repealed and replaced by 2005 Ct. ALS 251 (Jan 2005).

Add:

§ 12-344b.

§ 12-391 was repealed and replaced by 2005 Ct. ALS 3 (June 2005).

Change § 12.504(a) to:

12.504a.

§ 76.08(h) Delaware. IC34-24-1

§ 76.08(h)(1) Property Tax

Add following 2% of the value of the property, if the value is more than $100" unless municipality or county taxes apply, in which case the tax rate is modified.

§ 76.08(h)(3) Estate Tax.

Delete the wording under "Estate Tax" and replace with:

Equal to the credit allowed under the federal estate tax law.

§ 76.08(h)(4) Inheritance Tax.

Delete this entire section and accompanying footnote, 290. It has been repealed.

§ 76.08(i) District of Columbia [Go To Main]

§ 76.08(i)(1) Property Tax.

Add:

Subsequent History

D.C. Code Ann. § 47-1002 **Amended** by D.C. Legis. 16-191 (2006) ("Tax Exemption Clarification Act of 2004 is amended by striking the word 'company' the first time it appears and inserting the phrase 'of the type' in its place.").

District of Columbia v. Helen Dwight Reid Educ. Found., 766 A.2d 28 (D.C. 2001) (taxpayer's publishing activities were not "activities of" those other potentially exempt institutions and fact that "principal impact" of taxpayer's charitable activities was not in District precluded exemption of building as one used for purposes of public charity principally in District).

§ 76.08(i)(2) Transfer Taxes.

§ 76.08(i)(2)(i) Tax on Deeds.

Change § 45-923 to:

§ 42-1103

Under "Rates," replace "1.1% of the consideration paid for the deed" with:

1.5% of the consideration paid for the deed or the fair market value of the property if there is no consideration or nominal consideration;

§ 76.08(i)(2)(ii) Transfer Tax on Real Property.

Subsequent History

D.C. Code Ann. § 47-903 Amended by D.C. Legis. 16-192 (2006) ("Section 47-903 of the District of Columbia Official Code is amended by adding a new subsection (a-3) to read as follows: '(a-3)(1) Beginning October 1, 2006, except for residential properties transferred for a consideration less than $400,000, an additional tax of.35% is imposed upon a deed that is subject to the tax under subsection (a)(1) of this section.'").

Under "Rates," replace "with a minimum $1.00 tax" with

or the fair market value of the real property if there is no consideration or nominal consideration.

§ 76.08(j) Florida. [Go To Main]

§ 76.08(j)(1) Property Tax.

Add:

Zapo v. Gilreath, 779 So. 2d 651 (Fla. Dist. Ct. App. 2001) (statute subjecting mobile homes affixed to real property owned by homeowner to ad valorem taxation did not violate equal protection, and classifying permanently fixed mobile homes as real property did not conflict with section of constitution exempting mobile homes from ad valorem taxes).

Add:

Dep't of Revenue v. Pinellas VP, LLC, , 3 So. 3d 361 (holding the principal balance of a mortgage is classified as taxable consideration under § 201.02(1)).

§ 76.08(j)(2) Transfer Taxes.

§ 76.08(j)(2)(i) Tax on Instruments Relating to Land.

Add on to the end of "Rates:"

, which consideration is presumed to be equal to the fair market value of the real property or interest there in.

§ 76.08(j)(2)(ii) Tax on Evidences of Indebtedness.

Add on to the end of "Rates:"

, not to exceed $2,450.

Change "99.133(1)" to: 201.01.

§ 76.08(j)(2)(iii) Tax on Notes and Other Payment Obligations Secured by Real Property.

Delete this entire section and accompanying footnotes, 304 and 305, they have been repealed.

§ 76.08(k) Georgia. [Go To Main]

§ 76.08(k)(1) Property Tax.

Add:

United States v. DeKalb County, 729 F.2d 738 (11th Cir. 1984) (contract created a security interest not subject to Georgia taxation); *Clayton County Bd. of Tax Assessors v. King, 397 S.E.2d 293 (Ga. 1990)* (attorney's law library associated with practice, not exempted from ad valorem taxation); *Coweta County Bd. of Tax Assessors v. EGO Prods., Inc., 241 Ga. App. 85 (1999)* (no statutory or constitutional authority allowed a lease to circumvent taxing provisions under the constitution nor empowered an authority to excuse a taxpayer from paying a substantial portion of its property tax obligation without notice to the county); *Lamad Ministries, Inc. v. Dougherty County Bd. of Tax Assessors, 268 Ga. App. 798 (2004)* (a "place of religious worship" exemption applied to other parts of the property, specifically an old-age home, for a tax-exempt corporation).

Add:

Bellsouth Telecommunications, Inc. v. Henry County Bd. of Assessors, 458 S.E.2d 705 (Ga. App. 1995) (although statistical evidence showed that assessment of other property was at 38.84% of fair market value or lower, an assessment of 40% did not violate the constitutional requirement of uniformity).

§ 76.08(k)(2) Tax on Instruments Conveying Real Property.

Add:

Bankers Tust Co. v. Jackson, 512 S.E.2d 378 (Ga. App. 1999) (the real estate tax is an excise tax based on increments in the value of the instrument being recorded and being calculated in the same manner).

§ 76.08(l) Hawaii. [Go To Main]

§ 76.08(l)(1) Property Tax.

Delete: "Page 45 note 313.:

Change to § 246-1 to: 246-2

Add after "Rate of State Levy:"

Ratio of assessed value to fair market value: 60%.[314.5]

Delete: "Add: § 248-2"

Change "Rates" to read:

Starting at 10 cents per $100 for properties valued less than $600,000, increasing to $1 per $100 for properties valued at $10 million or greater. An increased regime exists for the sale of a condominium or single family residence for which the purchaser is not eligible for a county level homeowner's property tax exemption.

§ 76.08(l)(2) Transfer Taxes.

§ 76.08(l)(2)(i) Tax on Instruments Conveying Real Property.

Change "Rates:" to read:

varies.

§ 76.08(l)(2)(ii) Withholding Tax on Transfers by Non-residents

Change "Items subject to tax:" to read:

A transferee must withhold the tax if the transferor is a non-resident, unless the transferor used the property as a principal place of residence the year preceding the sale and the value of the property does not exceed $300,000.

Add after "Items subject to tax:"

Rates: 5% of the amount realized on the disposition of Hawaii real property.[318.5]

§ 76.08(m) Idaho. [Go To Main]

§ 76.08(m)(1) Property Tax.

Replace §§ 63.101, 63.922 with:

§§ 63.203, 63.601.

§ 76.08(n) Illinois. North Dakota--N.D. Cent. Code § 19-031-36

§ 76.08(n)(1) Property Tax.

Replace Ill. Rev. Stat. ch. 35, & 205/18.1 with:

Ill. Ohio Rev. Code Ann. 21.

§ 76.08(n)(2)(ii) County Tax on Real Property Transfers.

Modify from "25 cents per $500 of the full consideration" to

"50 cents per $500 of the full consideration."

Page 46 note 324, modify from "Id. Ch. 55. § 5/5/-1038" to

"Id. Ch. 35 § 200/31-10"

§ 76.08(o) Indiana. [Go To Main]

§ 76.08(o)(1) Property Tax.

Add:

W.H. Paige & Co. v. State Bd. of Tax Comm'rs, 711 N.E.2d 552 (1999) (The leasor of musical instruments had a duty to pay personal property tax because leasor owned the instruments, which were used in the production of income.)

Change § 6-1.1-18-3 to:

Subsequent History

Ind. Code Ann. § 6-1.1-18-3 **Amended** by P.L.2-2006, § 41, eff. July 1, 2007 (amended by adding a new subsection (a-3) to read as follows: '(a-3)(1) Beginning October 1, 2006, except for residential properties transferred for a consideration less than $400,000, an additional tax of.35% is imposed upon a deed that is subject to the tax under subsection (a)(1) of this section.").

Add:

Id. § 6-1.1-18-3(b)(3)(A).

§ 76.08(o)(2) Estate Tax

Change "Equal to the credit allowed under federal estate tax law" to:

The estate tax is determined according to a formula found in the statute.

§ 76.08(o)(2) Estate Tax.

Add:

State, Dep't of Revenue v. Estate of Eberbach, 535 N.E.2d 1194 (Ind. 1989) (Dep't of Revenue is not entitled to tax the estate based on the difference between the maximum allowable federal estate tax and the state inheritance tax paid).

§ 76.08(o)(3) Inheritance Tax.

Add:

In re Grotrian's Estate, 405 N.E.2d 69 (Ind. App. 1980) (relationship between transferor and transferee is the measuring stick to use for inheritance tax).

Modify from "Id. §§ 6-4.1-3-1 - 6-4.1-3-12" to

"Id. §§ 6-4.1-3-1 - 6-4.1-3-4, 6-4.1-3-7 - 6-4.1-3-8, 6-4.1-3-10 - 6-4.1-3-12."

§ 76.08(p) Iowa. [Go To Main]

§ 76.08(p)(1) Property Tax.

Add:

City of Newton v. Board of Review for Jasper County, 532 N.W.2d 771 (Iowa 1995) (Taxable real property must be assessed in one of the following six categories: agriculture, residential, commercial, industrial, utilities, or railroads).

§ 76.08(p)(3) Estate Tax

Change "Equal to the credit allowed under federal law" to:

The estate tax in Iowa has been repealed.

§ 76.08(p)(5) Inheritance Tax.

Add:

In re Estate of Kirk, 591 N.W.2d 630 (Iowa 1999) (under the statute, only a surviving joint tenant's accretive interest is taxable).

§ 76.08(q) Kansas. [Go To Main]

§ 76.08(q)(1) Property Tax.

Add:

In re Tax Exemption Application of Kaul, 933 P.2d 167 (Kansas 1997) (if Indian land has been excluded from boundaries of state, it is not subject to taxation unless specifically included by treaty or act of Congress's power; state taxation of fee-patented Indian-owned land may be proper). *In re Appeal of Inter-Faith Villa, L.P. 2008 Kan. App. LEXIS 91* (holding "taxation is the rule and exemption from taxation is the exception" and "any doubts are to be resolved against the exemption").

Add:

§ 79-1439

And the following case:

Board of Douglas County Comm'rs v. Cashatt, 933 P.2d 167 (Kansas 1997) (proper means to value real property used for residential purposes).

§ 76.08(q)(3) Estate Tax.

Change § 79-1539 (repealed) to:

§ 79-15,203.

§ 76.08(q)(4) Generation-skipping Tax.

Change § 79-1581 (repealed) to:

§ 79-15,114

§ 76.08(q)(5) Inheritance Tax.

Remove this section and its accompanying footnote, 348. It has been repealed

§ 76.08(r) Kentucky. [Go To Main]

§ 76.08(r)(1) Property Tax.

Change Id. to:

Id. § 132.020

§ 76.08(r)(4) Inheritance Tax.

Subsequent History

Ky. Rev. Stat. Ann. § 140.064 **Repealed** by Ky. L. Reg. Sess. Ch. 151 (H.B. 545) (2000) (Exemption of $7,500 received by surviving spouse or surviving children from testator's estate--Repealed).

§ 6-1.1-18-2

Add:

Griffin v. Department of Local Gov't Fin., 765 N.E.2d 716 (Ind. Tax Ct. 2002) (HCI tax statute by implication repealed any inconsistent limitation provision of state tax rate limit statute, and HCI tax was unconstitutional state tax that resulted in nonuniform and unequal taxation of substantially similar property).

Change Id. to:

Id. § 6-1.1-18-3

Add:

(on March 1, 2001, this percentage changes to the true tax value of the property).

§ 76.08(s) Louisiana. [Go To Main]

§ 76.08(s)(1) Property Tax.

Add:

Moonmaid Marine, Inc. v. Larpenter, 605 So. 2d 1120 (La. App. 1992) (unapportioned tax on all properties situated within the state is not a violation of *equal protection clause* or due process clause; the unapportioned tax is levied against domestic vessels engaged in foreign trade, and apportioned tax on vessels engaged in interstate commerce in inland waterways).

Add:

Erich Sternberg Realty Co., Inc. v. Louisiana Tax Comm'n, 560 So. 2d 868 (La. App. 1992) (uniformity does not require similar lands located in different areas of state to have uniform fair market value, because location is only one of several factors which influence fair market value of land).

§ 76.08(s)(3) Inheritance Tax.

Add:

Matter of Succession of Smith, 589 So. 2d 16 (La. App. 1991) (taxation exemptions have to be expressly and clearly conferred in plain terms and will be strictly construed against taxpayer; because nieces and great nieces and nephews are not given tax exemption status for state inheritance taxes by affinity, they must be taxed as strangers to the estate).

Subsequent History

LA. REV. STAT. ANN. §§ 2402, 2403 were repealed by Acts 2008, No. 822, § 1, eff. January 1, 2010.

§ 76.08(s)(4) Gift Tax

Add:

Subsequent History

Gift tax repealed by Acts 2007, No. 371, § 3, eff. July 1, 2008. However, income derived from a gift is included in an

individualAEs gross income. *LA. REV. STAT. ANN. § 47:45*.

§ 76.08(t) Maine. [Go To Main]

§ 76.08(t)(1) Estate Tax

Change "Equal to the credit allowed under federal law" to:

Equal to the federal credit, multiplied by a fraction comprised of "that portion of the decedent's federal gross estate that consists of real and tangible personal property located in the State plus the value of all intangible personal property and the denominator of which is the value of the decedent's federal gross estate." For nonresidents owning property in the State, the credit is equal to the federal credit in relation to the value of the federal gross estate.

§ 76.08(t)(2) Tax on Tranfers of Real Property Interests.

Modify from "Rates: $2.20 per $500 or a fraction thereof, the tax to be imposed 2 on the grantor and 2 on the grantee." to:

"Rates: $2.20 per $500 or a fraction thereof, the tax to be imposed 50% on the grantor and 50% on the grantee."

§ 76.08(u) Maryland. [Go To Main]

§ 76.08(u)(1) Property Tax.

Change "Ratio of assessed value to fair market value:" to read:

phased in value to 100%.

Add:

Supervisor of Assmts. v. Trustees of Bosley Methodist Church Graveyard, 443 A.2d 91 (Md. 1982) (charitable groups enjoy no inherent right to exemption from property taxation, for all real property (except expressly exempt property) within state is liable to taxation); *Mayor & City Council of Baltimore v. Boitnott, 741 A.2d 1079 (Me. 1999)* (City ordinance granting tax exemption is valid).

§ 76.08(u)(2)(i) Tax on Recording of Written Documents.

Add:

Scott v. Clerk of Circuit Court, 684 A.2d 896, (Md. App. 1996) (Maryland imposes two separate taxes on the transfer of real property: a recordation tax under this section, and a transfer tax under § 13-202; transfers made by family members to family limited partnerships for estate planning purposes are not exempt from this tax).

Add:

B.F. Saul Real Estate Inv. Trust v. Clerk of Circuit Court, 677 A.2d 660 (Md. App. 1996) (consideration payable by the transferee is taxable. If the property transferred is subject to a mortgage, the consideration payable by the transferee may include not only the consideration payable to the transferor but also the consideration eventually payable to the mortgagee).

§ 76.08(u)(2)(ii) Tax on Real Property Transfers.

Change wording of "Rates" to read:

The rate is one-half of 1% of the consideration payable for the transfer, except for first-time home buyers, who are subject to a rate of one-quarter of 1%.

§ 76.08(u)(3) Estate Tax

Add to the end of the sentence:

reduced by the proportion of the estate not located in Maryland.

§ 76.08(u)(5) Inheritance Tax.

Add:

McGarvey v. State, 533 A.2d 690 (Md. 1987) (the term "children" includes formally adopted children; children who are "equitably adopted" do not receive the same favorable inheritance tax treatment).

§ 76.08(v) Massachusetts. [Go To Main]

§ 76.08(v)(1) Property Tax.

Change § 2A to:

§ 2A(b).

§ 76.08(v)(2) Tax on Instruments for Sale of Real Property.

Change wording of "Rates" to read:

$2.00 if the consideration is between $100 and $500, and $2.00 for each additional $500 or fraction thereof, except in Barnstable County, in which the rate is $1.50 if the consideration is between $100 and $500, and $1.50 for each additional $500 or fraction thereof.

Add:

Martha's Vineyard Land Bank Comm'n v. Board of Assessors, 62 Mass. App. Ct. 25 (2004) (under the plain and unambiguous language of its enabling act, the Martha's Vineyard Land Bank Commission was exempt from and did not have to pay any real property taxes on property that it acquired).

Change "Id. ch. 64D, § 7" to: *Id.* ch. 64D, § 1.

Change "Items subject to tax:" to read:

any instrument for the sale of real property interests.

§ 76.08(w) Michigan. [Go To Main]

§ 76.08(w)(1) Property Tax.

Add:

Subsequent History

United States ex rel. Saginaw Chippewa Tribe v. Michigan, 882 F. Supp. 659 **reversed** by *United States ex rel. Saginaw Chippewa Tribe v. Michigan, 106 F.3d 130 (6th Cir. 1997)* .

Chauncey and Marion Deering McCormick Foundation v. Wawatam Tp., 492 N.W.2d 751 (Mich. App. 1992) (statutes

providing tax exemption will be strictly construed in favor of taxing authority; organizations seeking tax exemptions have the burden of showing that requirements for the exemptions have been met); Mich. Stat. Ann. § 7.1.

§ 76.08(w)(2) Tax on Instruments Conveying Real Property.

Add:

Taxpayers Allied for Constitutional Taxation v. Wayne County 537 N.W. 2d 596 (Mich. 1995) (action for refund of real property transfer taxes begins accruing at time tax is due; for real property transfer tax, the date the tax is due will necessarily be the date the tax is paid, because payment is a condition of registering title).

§ 76.08(w)(3) Tax on Real Estate Transfers.

Change Mich. Stat. Ann. §§ 7.456(21) et seq. to:

Id. §§ 207.523-207.526

§ 76.08(w)(4) Estate Tax.

Add:

Hill v. Department of Treasury, 509 N.W.2d 905 (Mich. App. 1993) (statutory exemption of marital deduction transfers from inheritance tax also exempts estates from liability for Michigan's "pickup tax," which is equal to maximum of credit for state death taxes allowable to decedent's estate against federal tax).

§ 76.08(w)(5) Inheritance Tax.

Add:

Matter of Estate of Mooney, 397 N.W.2d 329 (Mich. App. 1986) (two children adopted out by their natural father were subject to preferential tax treatment); *Matter of Estate of Walther, 517 N.W.2d 841 (Mich. App. 1994)* (trust beneficiary partners each held proportionate, beneficial interest in trust property transferred to limited partnership from testamentary trust, and, thus, preferential tax rates applied to partners as lineal descendants of testator).

§ 76.08(x) Minnesota. [Go To Main]

§ 76.08(x)(1) Property Tax.

Add:

Cass County v. Leech Lake Bank of Chippewa Indians, 118 S. Ct. 1904 (1998) (tax exempt status declared for Indian land that has been reacquired by tribe after conveyance to non-Indians); *Crown CoCo Inc. v. Commissioner of Revenue, 336 N.W.2d 272 (Minn. 1983)* (canopy over self-service gasoline pumps considered "structure" subject to tax on real property); *County of Ramsey v. Lincoln Fort Road Housing Ltd. Partnership, 494 N.W.2d 276 (Minn. 1992)* (partnership subject to taxation on property for which it made 30 years of lease payments with option to buy for $1.00 at end of lease period, regardless of whether the transaction is considered a lease or an equitable mortgage); *White Earth Land Recovery Project v. County of Becker, 544 N.W.2d 778 (Minn. 1996)* (all property presumed taxable, and charities seeking tax-free status must prove entitlement to claimed exemption); *ILHC of Eagan, LLC v. County of Dakota, 693 N.W.2d 412 (Minn. 2005)* (taxpayer, an assisted living facility, was not eligible for a partial tax exemption because it was not in existence before the 1991 tax levy).

HealthEast v. County of Ramsey, 770 N.W.2d 153 (Minn. 2009) (explaining all property is presumed taxable and the taxpayer bears the burden of proving it is exempt; and holding taxpayers had not met their burden of proving they were a "benevolent society" whose property is exempt from taxation).

Add:

Marquette Bank Nat'l Ass'n v. County of Hennepin, 589 N.W.2d 301 (Minn. 1999) (property tax assessors may consider a property's value-in-use to the extent that present use reflects the property's value to buyers in the marketplace); *TMG Life Ins. Co. v. County of Goodhue, 540 N.W.2d 848 (Minn. 1995)* (taxpayer required to determine value de novo instead of using the foreclosure sale appraisal); *Equitable Life Assur. Soc. of U.S. v. County of Ramsey, 530 N.W.2d 544 (Minn. 1995)* (when possible, two approaches should be used by appraisers when valuing property for real property tax purposes).

§ 76.08(x)(2) Transfer Taxes.

§ 76.08(x)(2)(i) Tax on Instruments Conveying Real Property Interests.

Change "If the consideration is in excess of $500, the tax is $1.65 plus $1.65 for each additional $500" to:

If the consideration exceeds $500, the tax is .0033 of the net consideration.

Change "Rates" to read:

$1.65 for transfers resulting from corporate mergers, consolidations, or designated transfers, and for transfers if $500 or less. If the net consideration exceeds $500, the tax is 0.33% of the net consideration.

§ 76.08(x)(2)(ii) Tax on Mortgages.

Delete the last line of the subsection entitled: "Rates," including footnote 395 (it is no longer applicable).

§ 76.08(y) Mississippi. [Go To Main]

§ 76.08(y)(1) Property Tax.

Add:

Rebelwood, Ltd. v. Hinds County, 544 So. 2d 1356 (Miss. 1989) (identical properties with disparate revenue generating capabilities may be evaluated differently without violating provision of State Constitution requiring uniformity and equality in taxation); *Riley v. Jefferson Davis County, 669 So. 2d 748 (Miss. 1996)* (although land was zoned as residential, it was used as agricultural land and was therefore improperly classified as residential land for tax purposes); *Washington County Bd. of Sup'rs v. Greenville Mill, a Div. of Mohasco Corp., 437 So. 2d 401 (Miss. 1983)* (once true value is determined, a uniform and equal ratio of assessment must be applied to property so as to arrive at assessed value for purposes of taxation).

Change "Rate of State Levy:" to read:

Varies.[397.1]

§ 76.08(z) Missouri. [Go To Main]

§ 76.08(z)(1) Property Tax.

Change:

Central States Christian Endeavors Ass'n v. Nelson, 898 W.2d 547 (Mo. 1995) should be *Central States Christian Endeavors Ass'n v. Nelson, 898 S.W.2d 547 (Mo. 1995)* .

State ex rel. City of Cabool v. Texas County Bd. of Equalization, 850 S.W.2d 102 (Mo. 1993) (property tax should be reduced by fair apportioning formula if tax situs exists in another jurisdiction); *Brookside Estates v. State Tax Comm'n of Missouri, 849 S.W.2d 29 (Mo. 1993)* (that mobile homes situated on real estate owned by homeowner are treated as real property for tax purposes, but personal property when resting on leased property, does not violate *equal protection clause*).

§ 76.08(z)(2) Estate Tax.

Add:

In re Estate of Nease, 643 S.W.2d 97 (Mo. App. W.D. 1982) (doctrine of equitable apportionment operates to prorate the burden of estate taxes among the recipients of property in such proportion as the amount of property contributes to the tax; testator may designate by will who should bear the burden of inheritance and estate taxes).

§ 76.08(aa) Montana. [Go To Main]

§ 76.08(aa)(1) Property Tax.

Change:

§ 15-6-101 to § 15-6-201.

Change § 15-6-101 to:

§ 15-6-201.

§ 76.08(aa)(2) Estate Tax.

Add:

in proportion to the percentage of the decedent's estate located in the state.

§ 76.08(aa)(3) Inheritance Tax.

Delete the wording under "Inheritance Tax" and replace with:

Equal to the credit allowed under the federal tax law.

Replace all with:

Id. § 72-16-1002

§ 76.08(bb) Nebraska. [Go To Main]

§ 76.08(bb)(1) Property Tax

Add:

Amendment:

Neb. Rev. Stat. § 77-201 **amended** by NE Legis 166 (2007) ("Except as provided in subsections (2) through (4) of this section, all real property in this state, not expressly exempt therefrom, shall be subject to taxation and shall be valued at its actual value.").

Lincoln Tel. & Tel. Co. v. County Board of Equalization, 308 N.W.2d 515 (Neb. 1981) (taxpayer carries burden of proof to establish that value of the property has not been fairly and proportionately equalized with all other property); *Richman Gordman v. Board of Equalization, 334 N.W.2d 447 (Neb. 1983)* (actual value, market value, and fair market value mean exactly the same thing for purposes of taxation); *Schmidt v. Thayer County Bd. of Equalization, 624 N.W.2d 63 (Neb. Ct. App. 2001)* (TERC's approval of valuation of taxpayer's property based upon its location in higher-valued market area, without relation to soil classification, was not supported by competent evidence and was arbitrary); *Firethorn Inv. v. Lancaster County Bd. of Equalization, 622 N.W.2d 605 (Neb. 2001)* (sale to political subdivision can reflect current market value and serve as a comparable sale for an assessment, and single sale may in some instances provide evidence for market value); *Garvey Elevators, Inc. v. Adams County Bd. of Equalization, 621 N.W.2d 518 (Neb. 2001)* (board was not required to produce evidence to show how it determined actual value of taxpayer's property, and taxpayer failed to establish that valuations were grossly excessive and result of systematic exercise of intentional will or failure of plain duty); *Livingston v. Jefferson County Bd. of Equalization, 640 N.W.2d 426 (Neb. Ct. App. 2002)* (commission reviewing valuation of house required to specifically consider external depreciation due to a nearby hog facility, nearby manure easement and house's remote location).

§ 76.08(bb)(2) Tax on Transfer of Certain Real Property Interests.

Under "Rates" replace $1.75 with:

$2.25

§ 76.08(bb)(3) Estate Tax

Change "The excess of federal tax credit over amount of state inheritance taxes" to:

The amount varies depending on when the decedent died.

§ 76.08(bb)(4) Inheritance Tax

Change to: Id. § 77-2002 to:

§ 77-2040.

§ 76.08(cc) Nevada. [Go To Main]

§ 76.08(cc)(2) Tax on Instruments Conveying Real Property Interests.

Change "Rates" section to read:

65 cents per $500 or fraction thereof of value in countries whose population is less than 400,000 and $1.25 per $500 in counties whose population exceeds 400,000.

§ 76.08(dd) New Hampshire. [Go To Main]

§ 76.08(dd)(1) Property Tax.

Change:

Appeal of the Kiwanis Club, Inc., 663.2d 90 (N.H. 1995) **should be** *Appeal of the Kiwanis Club, Inc., 663* ***A.2d*** *90 (N.H. 1995)* .

Crown Paper Co. v. City of Berlin 703 A.2d 1387 (N.H. 1997) (in some circumstances factory machinery may be subject to real property taxation where the factory machinery has a special use or multiple uses, independent of or unrelated to the process of production, that are intimately intertwined with the underlying realty); *Appeal of Town of Pelham, 736 A.2d 1223,* (N.H. 1999) (truck trailers used as storage sheds were not taxable as fixtures).

Add:

Town of Ossipee v. Whittier Lifts Trust, 827 A.2d 989 (N.H. 2003) .

§ 76.08(dd)(2) Tax on Transfer of Real Property Interests.

Add:

Appeal of Lorden 594 A.2d 1303 (N.H. 1991) (transfers of assets by a corporation to its stockholders by deed upon dissolution of the corporation do not constitute a transfer within meaning of the transfer tax statute).

In "Rates," change 35 cents to:

75 cents.

And change 14 dollars to:

20 dollars.

§ 76.08(dd)(3) Estate Tax.

Delete wording under "Estate Tax" and replace with:

Equal to the credit allowed under federal estate tax law with respect to property within the state.

§ 76.08(dd)(4) Inheritance Tax.

Remove this section and its accompanying footnote, 425. It has been repealed.

86:6

§ 76.08(ee) New Jersey. [Go To Main]

§ 76.08(ee)(1) Property Tax.

Add:

Subsequent History:

N.J. Carpenters Apprentice Training & Educ. Fund v. Borough of Kenilworth, 665 A.2d 1128 (N.J. Super. 1995) **reversed** by *N.J. Carpenters Apprentice Training & Educ. Fund v. Borough of Kenilworth, 685 A.2d 1309 (N.J. 1996)* .

Jersey City, Div. of Water v. Parsippany, Troy Hills Tp., 16 N.J. Tax 504 (1997) (property valuation should have some relationship to reality; it should be valued in the actual physical condition in which owner holds it); *City of Camden v. Camden Masonic Ass'n, 9 N.J. Tax 331 (1987)* (property not used for a tax exempt purpose by a tax exempt corporation is not entitled to benefits of tax exemption); *B.F. Goodrich Co. v. Oldmans Twp., 733 A.2d 1204 (N.J. Super 1997)* (while real property included piping and electrical wiring, it did not include pipe racks that supported pipes that transported raw materials, steam, and cooling to latex manufacturing building). *Hunterdon Med. Ctr. v. Twp. of Readington, 2008 N.J. LEXIS 890* (holding a hospital's offsite wellness center was exempt property because its purpose was a core hospital purpose exempt from taxation).

§ 76.08(ee)(2) Tax on Transfer of Real Property Interests.

Change "Rates" to read:

$0.90 to $2.15 per $500 of consideration or faction thereof, plus 75 cents for each $500 in excess of $150,000.

Add:

Grand Chester Associates v. Taxation Div. Director, 6 N.J. Tax 336 (1984) (exemption on transfer fee for newly constructed buildings applies only to "entirely new" building and not to construction work on existing structures).

§ 76.08(ee)(4) Inheritance Tax.

Add:

54:34-2, 54:34-4

§ 76.08(gg) New York. [Go To Main]

§ 76.08(gg)(1) Property Tax.

Add:

CSX Transp., Inc. v. New York State Office of Real Property, 150 F. Supp. 2d 605 (S.D.N.Y. 2001) (Regulatory Reform Act was enacted through valid exercise of Congress, state agency's determination of "railroad ceiling," which represented maximum assessed value at which railroad property could be taxed, was assessment under Act).

§ 76.08(gg)(2)(i) New York State Real Property Transfer Tax.

Add:

Trefoil Capital Corp. v. Creed Taylor, Inc., 479 N.Y.S.2d 308 (1984) (referee at mortgage foreclosure sale required to pay transfer and duty taxes as the transferor grantor); *Kaufman v. Shorris, 162 A.D. 2d 399 (N.Y. Dept. 1 1990)* (when a tenant-in-common transferred property to partnership in return for an interest in the partnership, the transferred property was subject to real property transfer tax).

§ 76.08(gg)(2)(ii) New York State Real Property Transfer Gains Tax.

Delete this entire section and its accompanying footnote, 438. It has been repealed.

§ 76.08(gg)(2)(iii) Mortgage Recording Tax.

Add:

Home Sav. of America v. Weingrad, 248 A.D. 2d 253 (N.Y. Dept. 1 1998) (no mortgage tax due on recording of modification agreement that only altered interest and payment terms of mortgage but did not advance new monies); *City of New York v. State Tax Comm'n, 130 A.D. 2d 890 (N.Y. Dept. 3 1987)* (no mortgage tax due on substitution of one mortgage for another as long as secured amount stays the same).

§ 76.08(gg)(3) Estate Tax.

Change wording of this section to read:

Equal to the credit allowed under federal estate tax laws.

§ 76.08(gg)(4) Gift Tax.

Delete this entire section and its accompanying footnote, 446. It has been repealed.

Add:

Gift tax provision has been repealed. *N.Y. TAX LAW § 1009*.

§ 76.08(hh) North Carolina. [Go To Main]

§ 76.08(hh)(2) Tax on Instrument Conveying Real Property Interests.

In Rates: change 55 cents to:

One dollar.

§ 76.08(hh)(3) Estate Tax.

Change wording to read:

Equal to the full amount of credit allowed under federal estate tax law, but only until December 31, 2001. Estate taxes

have been repealed after December 31, 2001.

Change § 105-7 to:

105-32.2

§ 76.08(hh)(4) Generation-skipping Inheritance Tax.

Change § 1057-1 to:

105-32.7

§ 76.08(hh)(5) Inheritance Tax.

Delete this entire section and its accompanying footnote, 452. It has been repealed.

§ 76.08(ii) North Dakota. [Go To Main]

§ 76.08(ii)(1) Property Tax.

Change § to:

§ 57-02-01(3).

§ 76.08(jj) Ohio. [Go To Main]

§ 76.08(jj)(1) Property Tax.

Add:

County of Yakima v. Confederated Tribes and Bands of Yakima Indian Nation, 502 U.S. 251 (1992) (counties of a state may impose ad valorem taxes on Indian reservation land but may not enforce an excise tax on the sale of those lands).

Add:

Black v. Board of Revision of Cuyahoga County, 475 N.E.2d 1264 (Ohio 1985) (all real property must be assessed on basis of same uniform percentage of actual value); *Cincinnati School Dist. Bd. of Educ. v. Hamilton Cty. Bd. of Revision, 660 N.E.2d 1179 (Ohio 1996)* (doubts regarding reading of statute must be resolved in favor of the taxpayer).

§ 76.08(jj)(4) Generation-skipping Transfer Tax.

Change § 5731.18.1 to:

§ 5731.181

§ 76.08(kk) Oklahoma. First Amendment

§ 76.08(kk)(1) Property Tax.

Change "Ratio of assessed value to fair market value" from "Not more than 35%" to:

100%.

Add:

Sizemore v. Cleveland County Assessor, 690 P.2d 1054 (Ok. 1984) (Property under construction possesses value and should be assessed for tax purposes).

Add:

Subsequent History

Okla. Stat. tit. 68, § 2817 ***Held Unconstitutional by*** *Save Ad Valorem Funding For Students v. Oklahoma Dept. of Environmental Quality, 135 P.3d 823 (Okla. Civ. App. 2005)* .

Sizemore v. Cleveland County Assessor, 690 P.2d 1054 (Ok. 1984) (Property classification from prior year met statutory requirement even though property had burned down and was now under construction). *Liddell v. Heavner, 180 P.3d 1191 (Okla. 2008)* (holding provision § 2817(I) unconstitutional with respect to zoning authorities).

§ 76.08(kk)(2)(i) Tax on Instruments Conveying Real Property Interests.

In re Assessments for Year 2005 of Certain Real Property Owned by Askins Properties, 161 P.3d 303 (Okla. 2007)

(conveyance of real property from a person to a limited liability company controlled by that person was not a transfer for purposes of local ad valorem taxation).

Change tit. 6 to:

tit. 68.

§ 76.08(ll) Oregon. [Go To Main]

§ 76.08(ll)(1) Property Tax.

note 470, add:

Smith v. Department of Revenue, 998 P.2d 675 (Or. 2000) (Real property granted by a federal mining patent is subject to tax).

§ 76.08(ll)(2) Inheritance Tax.

Delete entire section. The section was repealed.

§ 76.08(mm) Pennsylvania. [Go To Main]

§ 76.08(mm)(1) Property Tax.

Add:

BFC Hardwoods, Inc. v. Board of Assessment Appeals of Crawford County, 771 A.2d 759 (Pa. 2001) (dry kilns were excluded, in their entirety, from real estate taxation as "machinery and equipment contained in an industrial establishment").

§ 76.08(mm)(2) Tax on Transferors of Real Property Interests.

Add:

Steidle v. Com., 717 A.2d 1084 (Pa. 1998) (transfer of real property to stepchildren subject to real estate transfer tax); *Comach Const., Inc. v. City of Allentown, 633 A.2d 1336 (Pa. 1993)* (recording of deed is event which triggers realty transfer tax); *Shenandoah Mobile Co. v. Cumberland County Bd. of Assessment Appeals, 68 Pa. D. & C. 4th 529 (2004)* (because telecommunication towers were securely fixed, vital to the use of the property, and intended to serve the population indefinitely, they were fixtures and could be treated as real property subject to real estate tax assessment.);

Shenandoah Mobile Co. v. Dauphin County Bd. of Assessment Appeals, 68 Pa. D. & C. 4th 140 (2004) .

§ 76.08(mm)(3) Estate Tax.

Change tit. 72, app. § 1717 to:

tit. 72, § 9117

§ 76.08(mm)(4) Inheritance Tax.

Replace all sections with:

tit. 72, § 9116

Add:

In re Estate of Lesko, 69 Pa. D. & C. 4th 174 (2004) (despite being labelled "annuities," two insurance contracts were intended as life insurance by the decedent and were considered exempt from state inheritance tax).

§ 76.08(nn) Rhode Island. [Go To Main]

§ 76.08(nn)(1) Property Tax.

Add:

City of Providence v. Killoran, 447 A.2d 369 (R.I. 1982) (municipally owned property used for nongovernmental function receives no exemption and is taxable).

§ 76.08(nn)(2) Tax on Instruments Conveying Real Property Interests

Change "$1.40" to:

$2.00

§ 76.08(oo) South Carolina. *31 U.S.C. 5223*

§ 76.08(oo)(1) Property Tax.

Change § 12.43.220 to:

§ 12.37.210

§ 76.08(oo)(2) Tax on Instrument Conveying Real Property Interests.

Delete this entire section and its accompanying footnotes, 485 and 486. It has been repealed.

§ 76.08(oo)(3) County Tax on Instruments Conveying Real Property Interests

Delete this section and accompanying footnotes 487 and 488. The sections have been repealed.

§ 76.08(pp) South Dakota. [Go To Main]

§ 76.08(pp)(1) Property Tax.

Add:

Amert v. Lake County Bd. of Equalization, 580 N.W.2d 616 (S.D. 1998) (property owners overcame assessor's determination of property value where the assessor did not view the properties and used an improper depreciation schedule in valuing the property).

§ 76.08(pp)(2) Estate Tax

Delete:

10-40A-4 (repealed)

§ 76.08(qq) Tennessee. [Go To Main]

§ 76.08(qq)(2) Missing

§ 76.08(qq)(2)(i) Tax on Transfers of Real Property Interests.

Add:

Subsequent History

Tenn. Code Ann. § 67-4-409 **Amended** by 2007 Tennessee Laws Pub. Ch. 79 (S.B. 2165), 2007 Tennessee Laws Pub. Ch. 153 (H.B. 2288), and 2007 Tennessee Laws Pub. Ch. 180 (S.B. 1373)

FDIC v. Rivergate Executive Park, 49 Bankr. 686 (M.D. Tenn. 1985) (this section taxes the principal amount plus accumulated interest, attorney's fees, and other amounts secured under the security agreement); *Health & Educ. Facilities Bd. v. King 678 S.W.2d 14 (Tenn. 1984)* (recording more than one instrument for the same indebtedness does result in multiple transfer taxes assessed on the instruments); *Spring Hill, L.P. v. Tenn. State Bd. of Equalization, 2003 Tenn. App. LEXIS 952 (Tenn. App. 2003)* (the agreements of tax credit for low-income housing projects run with the land, and the credits are used in assessing the value of the property).

§ 76.08(rr) Texas. [Go To Main]

§ 76.08(rr)(1) Property Tax.

Add:

Subsequent History

Williamson County Appraisal Dist. v. Nootsie, Ltd., 905 S.W.2d 289 (Tex. App. 1995) ***Reversed*** *by Nootsie, Ltd. v. Williamson County Appraisal Dist., 925 S.W.2d 659 (Tex. 1996)* .

Gifford, Hill & Co., Inc. v. Wise County Appraisal Dist., 827 S.W.2d 811 (Tex Sup. 1991) (tax units may not arbitrarily decide not to tax otherwise taxable property unless property is exempt by law; value of land with nonproducing limestone determined on a per acre value by the number of acres assessed); *Orange County Appraisal Dist. v. Agape Neighborhood Improvement, Inc., 57 S.W.3d 597 (Tex. App. 2001)* (organization qualified as community housing development organization, and thus was entitled to exemption from ad valorem taxation for real property).

[IMPORTANT NOTE FROM THE EDITOR: NOTE 505 SHOULD BE SIMPLY Id. WHAT IS NOW NOTE 505 SHOULD BE CHANGED TO BE NOTE 506, AND EVERY NOTE THEREAFTER TO THE END OF THE CHAPTER SHOULD BE INCREASED BY ONE FOOTNOTE NUMBER (SO THAT THE LAST FOOTNOTE IN THE CHAPTER BECOMES FOOTNOTE 553.]

§ 76.08(ss) Utah. [Go To Main]

§ 76.08(ss)(1) Property Tax.

Change "Ratio of assessed value to fair market value" from 32% to:

45%

Change to

"Id."

Change § 59-2-102 to:

§§ 59-2-102 (26), 59-2-103

And add:

Alta Pac. Assocs. v. Utah State Tax Comm'n, 931 P.2d 103 (Utah 1997) (no constitutional violation where use of market rents was rejected in favor of actual contractual rents collected in determination of apartment building's fair market value).

note 511, change to:

"§§ 59-11-103, 59-11-104"

§ 76.08(tt) Vermont. [Go To Main]

§ 76.08(tt)(1) Property Tax.

note 512, change to:

"*Vt. Stat. Ann. tit. 32, §§ 3604 - 3620*."

Add:

Berkshire School v. Town of Reading, 781 A.2d 282 (Vt. 2001) (Accredited private high school did not come within

lands owned exemption from property taxation).

note 513, change to:

"*Vt. Stat. Ann. tit. 32, § 3701*."

§ 76.08(tt)(2)(ii) Capital Gains Tax on Land.

Subsequent History

Vt. Stat. Ann. tit. 32, § 7442(a) **Repealed**.

Add new footnote to give reference to the table:

516.1. *Id*. § 10003.

§ 76.08(uu) Virginia. [Go To Main]

§ 76.08(uu)(2) Transfer Taxes

§ 76.08(uu)(2)(ii) Tax on Documents Transferring Real Property Interests

Change in table:

"$.15 per $100 of value" to "$.25 per $100 of value"

"$.12 per $100 of value" to "$.22 per $100 of value"

"$.09 per $100 of value" to "$.19 per $100 of value"

"$.06 per $100 of value" to "$.16 per $100 of value"

"$.03 per $100 of value" to $.13 per $100 of value"

§ 76.08(uu)(3) Estate Tax

Change "Equal to the credit allowed under federal estate tax law" to:

Determined by multiplying the federal estate tax credit by a fraction, the numerator being the value of the gross estate subject to Virginia law, and the denominator being the value of the gross estate.

§ 76.08(uu)(5) Tax on Wills and Administrators.

Change $5,000 or less to:

$15,000 or less

§ 76.08(vv) Washington. [Go To Main]

§ 76.08(vv)(1) Property Tax.

Add:

Carpenter v. Franklin County Assessor, 638 P.2d 619 (Wash. App. 1981) (property encumbered by irrigation ditches was considered valueless so county assessor subtracted the valueless acreage from the total acreage for taxation purposes); *Washington Mut. Sav. Bank v. Department of Revenue, 893 P.2d 654 (Wash. App. 1995)* (private party made improvements on land leased from government and was assessed property taxes on the improvements because the lease agreement stated that improvements would be property of the lessee until expiration of the lease).

Add:

Sahalee Country Club, Inc. v. State Bd. of Tax Appeals, 735 P.2d 1320 (Wash. 1987) (golf course was not allowed to value property at zero for tax purposes on theory that value of the golf course was "shifted" to neighboring properties when their value was increased as a result of residing next to the golf course); *University Village Ltd. Partners v. King County, 23 P.3d 1090 (Wash. Ct. App. 2001)* (challenge to assigned land value component of improved real property appraised by income method, without more, is insufficient to sustain constitutional claim of non-uniform taxation).

§ 76.08(vv)(2) Tax on the Sale of Property.

Subsequent History

Wash Rev. Code § 83.100.030 **Repealed** by Laws 2005, Ch. 516, § 17, eff. May 17, 2005 ("The repealed sections in section 17 of this act do not affect any existing right acquired or liability or obligation incurred under the statutes repealed or under any rule or order adopted under those statutes nor do they affect any proceeding instituted under them ... . This act applies prospectively only and not retroactively. Sections 2 through 17 of this act apply only to estates of decedents dying on or after the effective date of this section.").

§ 76.08(vv)(3) Estate Tax.

Subsequent History

Wash Rev. Code § 83.100.045 **Repealed** by Laws 2005, Ch. 516, § 17, eff. May 17, 2005 ("The repealed sections in section 17 of this act do not affect any existing right acquired or liability or obligation incurred under the statutes

repealed or under any rule or order adopted under those statutes nor do they affect any proceeding instituted under them... . This act applies prospectively only and not retroactively. Sections 2 through 17 of this act apply only to estates of decedents dying on or after the effective date of this section.").

§ 76.08(vv)(4) Generation-skipping Transfer Tax

Subsequent History

WASH. REV. CODE § 83.100.045 Repealed by Laws 2005, Ch. 516, § 17, eff. April 22, 2005.

§ 76.08(ww) West Virginia [Go To Main]

Change "Equal to the credit allowed under federal estate tax law" to:

Determined by multiplying the federal estate tax credit by a fraction, the numerator being the value of the portion of the estate subject to West Virginia law, and the denominator being the value of the gross estate.

§ 76.08(xx) Wisconsin. [Go To Main]

§ 76.08(xx)(1) Property Taxes.

Change § 70.34 to:

§ 70.32.

Ahrens v. Town of Fulton, 641 N.W.2d 423 (Wis. 2002) (Mobile home "set upon a foundation" within meaning of statute permitting such homes to be subject to taxation as real property when home is resting for more than temporary time, in whole or in part, on some other means of support than its wheels, makes owners subject to taxation for improvements to real property).

§ 76.08(xx)(2) Tax on Transfers of Real Property.

Add:

Wisconsin Dep't of Revenue v. Mark, 483 N.W.2d 302 (Wis. App. 1992) (conveyance and consideration with value must be present before real estate transfer fee obligation arises).

Add following the first sentence:

If the entire estate is not located within the state, the tax is determined by multiplying the federal estate tax credit by a fraction, the numerator being the value of the portion of the estate subject to Wisconsin law, and the denominator being the value of the gross estate.

§ 76.08(xx)(4) Inheritance Tax.

Remove this section and its accompanying footnote, 548. It has been repealed.

§ 76.08(xx)(5) Gift Tax.

Remove this section and its accompanying footnote, 549. It has been repealed.

§ 76.08(yy) Wyoming. [Go To Main]

§ 76.08(yy)(1) Property Tax.

note 550, change to:

Wyo. Stat. § 39-11-103; *Amoco Prod. Co. v. Wyoming State Bd. of Equalization, 15 P.3d 728 (Wyo. 2001)* (underground flow lines were not appurtenances and, therefore, were taxable as tangible personal property, rather than real property).

Add:

Subsequent History

Wyo. Stat. § 39-1-101 **Repealed** by Laws 1998, Sp. Sess., Ch. 5, § 4, eff. March 6, 1998.

Subsequent History

Wyo. Stat. § 39-6-810 **Repealed** by Laws 1998, Sp. Sess., Ch. 5, § 4, eff. March 6, 1998.

Wyo. Stat. § 39-6-812 **Repealed** by Laws 1998, Sp. Sess., Ch. 5, § 4, eff. March 6, 1998.

note 552, change to:

"*Id.* § 39-11-101."

Footnote 553, change to:

"*Id.* § 39-19-103."

§ 76.08(yy)(2) Estate Tax.

Change title of section from Estate Tax to:

Inheritance Tax

Add:

§ 76.08(yy)(3) Inheritance Tax.

Equal to the credit allowed under federal estate taxes.

Change §§ 39.6.810, 39.6.812 to:

§ 39.19.103.

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Supp. To CHAPTER 76 TAXATION OF REAL PROPERTY

9-76 Thompson on Real Property, Thomas Editions Supp. to § 76.09

Supp. to § 76.09 Bibliography.

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CHAPTER 77 FORFEITURES

9-77 Thompson on Real Property, Thomas Editions 77.syn

AUTHOR: Professor Stephen A. Spitz The author would like to acknowledge the invaluable assistance of a number of U.S.C. Law School law students, including Thomas Shelley, III, Bruce Haynes, Henry Cabaniss, Constance Boken, Lauren Ferrari and Mark Fava and would also like to thank Celeste Jones, Esquire of McNair and Sanford, P. A. All these individuals were extraordinarily helpful, and the least that can be done is a public note of appreciation. University of South Carolina Law School

§ 77.syn Synopsis to Chapter 77: FORFEITURES

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§ 77.05 Rights of Successful Claimant.

§ 77.06 Bibliography.

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FOOTNOTES:

(n1)Footnote 1.

The author would like to acknowledge the invaluable assistance of a number of U.S.C. Law School law students, including Thomas Shelley, III, Bruce Haynes, Henry Cabaniss, Constance Boken, Lauren Ferrari and Mark Fava and would also like to thank Celeste Jones, Esquire of McNair and Sanford, P. A. All these individuals were extraordinarily helpful, and the least that can be done is a public note of appreciation.

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CHAPTER 77 FORFEITURES

9-77 Thompson on Real Property, Thomas Editions § 77.01

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§ 77.01 Early History.

A forfeiture is the "divestiture of property without compensation, in consequence of a default or an offense." n2 The concept has ancient roots. Forfeitures existed in the Bible, in ancient Athens, in medieval England, and in early America.

In the Bible a well-known passage in the Old Testament commands that "if an ox gore a man or a woman, that they die; then the ox shall be surely stoned, and his flesh shall not be eaten." n3 In ancient Athens, the rule was that "among the Athenians, whatever was the cause of a man's death, by falling upon him, was exterminated or cast out of the dominions of the republic." n4 In medieval England, at the time of Edward III, it was the rule that "[i]f my dog kills your sheep and I freshly after the fact tender you the dog you are without recourse against me." n5

In addition, it was the law that "[t]he convicted felon forfeited his chattels to the Crown and his lands escheated to his lord [and] the convicted traitor forfeited all of his property, real and personal, to the Crown." n6 Finally, as the Supreme Court recently noted "English Law provided for statutory forfeitures of offending objects used in violation of the customs and revenue laws." n7

In America, Congress enacted statutory forfeitures in both the 18th and 19th centuries. A law of 1789 declared the forfeit of goods, wares, and vessels when custom rules were violated. n8 And a revenue law of 1866 called for forfeitures when goods subject to federal taxation were removed or concealed with the intent to defraud the United States. The law commanded that when taxes were unpaid, goods and commodities as well as "casks, vessels, cases or other packages ... containing such goods or commodities ... and every vessel, boat, cart, carriage or other conveyance ... used in the removal ... or concealment thereof ... shall be forfeited." n9

In 1920, in a rare use of the Revenue Law of 1866, the government seized an automobile in an *in rem* proceeding, asserting the automobile had been used in the "removal" of distilled spirits without payment of federal taxes. n10 The

titleholder of the seized car, a corporation, intervened in the forfeiture proceeding. The corporation argued that because it held title to the unpaid vehicle, and because the revenue violation was committed by the buyer and not the corporation or its officers, a forfeiture of the automobile would violate due process of law. n11

The United States Supreme Court disagreed. It upheld the statutory forfeiture rejecting the owner's argument of innocence as constitutionally irrelevant. It found an analogy between the statute and the ancient law of *deodand*, under which a personal chattel that caused the death of any creature was forfeited, n12 and held forfeitures were a valid legal remedy under American law. n13

However, forfeitures have not always been held in favor. In England, William Blackstone, in his famous Commentaries, was clearly ambivalent on the subject. Although he concluded that the crime of treason justified forfeiture on principles of "natural justice," n14 he lamented in his concluding chapter of the Commentaries n15 the "unheard-of forfeitures ... arbitrarily extracted" that followed the Norman Conquest. n16 And, as Justice Harlan once noted in a 1971 United States Supreme Court decision, "Blackstone ... condemned the seizure of the property of the innocent as based upon a superstition inherited from the blind days of feudalism". n17

In this country, Chancellor James Kent, in his famous Commentaries on American Law, summarized American thinking on the subject by concluding that "the tendency of public opinion has been to condemn forfeiture of property, at least in cases of felony, as being an unnecessary and hard punishment of the felon's posterity." n18 To support this conclusion, Kent observed that forfeitures of estates and corruption of blood, even in cases of treason, were abolished by federal statute in 1790. n19 And in many states, including his own, New York, laws were passed abolishing every type of forfeiture of property, except treason. n20 Dean Bernard Gavit, n21 in his twentieth century commentary on Blackstone, n22 noted that as of 1941 title by forfeiture "has had no acceptance in this country" n23 and has been "almost completely repudiated in modern law." n24

The early American dislike of forfeitures has not lasted. Since 1970, Congress has dramatically increased the use of civil forfeitures, enacting numerous new statutory forfeitures and expanding the scope of these statutes to new situations. This expansion and the modern developments in this ancient remedy are discussed subsequently.

FOOTNOTES:

(n1)Footnote 2. 36 Am. Jur. 2d *Forfeitures and Penalties* § 1 (1968); *see also United States v. United States Currency In the Amount of $228,536.00, 895 F.2d 908, 911 (2d Cir. 1990)* (defining forfeiture as divestiture without compensation of property used in a manner contrary to the laws of the sovereign).

(n2)Footnote 3. Exodus 21:28.

(n3)Footnote 4. *J. W. Goldsmith-Grant, Jr., Co. v. United States, 254 U.S. 505, 511 (1921)* (quoting Blackstone).

(n4)Footnote 5. *Liverpool, Brazil & River Plate Steam Navigation Co. v. Brooklyn E. Dist. Terminal, 251 U.S. 48, 53 (1919)* (quoting Fitz. Als., Barre 290).

(n5)Footnote 6. *Calero-Toledo v. Pearson Yacht Leasing Co., 416 U.S. 663, 682 (1974)* (citing 3 W. Holdsworth, History of English Law 68-71 (3d ed. 1927)).

(n6)Footnote 7. *Austin v. United States, 113 S. Ct. 2801, 2807* (quoting *Calero-Toledo v. Pearson Yacht Leasing Co., 416 U.S. 663, 682 (1974)).*

(n7)Footnote 8. *Id.*

(n8)Footnote 9. *J. W. Goldsmith-Grant, Jr., Co. v. United States, 254 U.S. 505, 508 (1920)* (quoting § 3450 Revised Statutes [Comp. St. § 6352]).

(n9)Footnote 10. *Id. at 508-09.*

(n10)Footnote 11. *Id. at 509.*

(n11)Footnote 12. *Id. at 510.*

(n12)Footnote 13. *Id.*

(n13)Footnote 14. "The natural justice of forfeiture or confiscation of property for treason(s) is founded on this consideration: that he who hath thus violated the fundamental principles of government, and broken his part of the original contract between king and people, hath abandoned his connections to society, and hath no longer any right to those advantages which before belonged to him purely as a member of the community among which social advantages the right of transferring or transmitting property to others is one of the chief." 4 William Blackstone, Commentaries 382.

(n14)Footnote 15. Entitled *The Rise, Progress, and Gradual Improvements of the Laws of England*, 4 William Blackstone, Commentaries, Ch. 33.

(n15)Footnote 16. *Id.* at 419.

(n16)Footnote 17. *United States v. United States Coin & Currency, 401 U.S. 715, 721 (1971)* (citing 1 William Blackstone, Commentaries, cmt. 8, #300).

(n17)Footnote 18. Kent Commentaries, Lecture XXXVII (Little Brown, 14th ed. 1886).

(n18)Footnote 19. *Id.*

(n19)Footnote 20. *Id.*

(n20)Footnote 21. Then Dean of Indiana University School of Law.

(n21)Footnote 22. Bernard Gavit, Modern Notes on Blackstone's Commentaries (Washington Law Books 1941).

(n22)Footnote 23. *Id.* at 388.

(n23)Footnote 24. *Id.*

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CHAPTER 77 FORFEITURES

9-77 Thompson on Real Property, Thomas Editions § 77.02

AUTHOR: Professor Stephen A. Spitz The author would like to acknowledge the invaluable assistance of a number of U.S.C. Law School law students, including Thomas Shelley, III, Bruce Haynes, Henry Cabaniss, Constance Boken, Lauren Ferrari and Mark Fava and would also like to thank Celeste Jones, Esquire of McNair and Sanford, P. A. All these individuals were extraordinarily helpful, and the least that can be done is a public note of appreciation. University of South Carolina Law School

§ 77.02 The Modern Statutes.

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§ 77.02(a) Federal Civil Statutes.

In modern times, Congress has greatly expanded the role of civil forfeitures in its fight against crime. n25 For example, Justice Kennedy, in his dissent in *Alexander v. United States*, n26 noted that the federal Racketeer Influenced and Corrupt Organizations Act (RICO) contains forfeiture penalties "novel for their punitive character as well as for their unprecedented sweep," n27 and that this statute is only one of many new federal laws creating vast forfeitures in a large number of novel situations. n28 Civil forfeitures now exist in Titles 16, 18, 19, 21, 26, 28, 30, 39, and 49 of the United States Code, and include: *16 U.S.C. §§ 65,* 117d, 128, 171 (guns or other property used unlawfully in national parks); *16 U.S.C. § 773h* (forfeitures under Northern Pacific Halibut Act of 1982); *16 U.S.C. § 1417* (forfeitures under Global Moratorium to prohibit certain tuna harvesting practices); *16 U.S.C. §§ 1823,* 1851, 1860 (forfeitures under international fishery agreements and national fishery management programs); *16 U.S.C. § 3606* (forfeitures under North Atlantic Salmon Fishing); *16 U.S.C. § 5010* (forfeitures under North Pacific Anadromous Stocks Convention); *18 U.S.C. § 981* (various civil forfeitures); *18 U.S.C. § 984* (civil forfeiture of fungible property); *18 U.S.C. § 1082* (forfeiture of property used in connection with illegal gambling); *18 U.S.C. § 1963*(a) (forfeiture of property used in RICO violations); *18 U.S.C. § 2254* (forfeitures resulting from Sexual Exploitation and Other Abuses of Children); *18 U.S.C. § 3322* (forfeitures for disclosure of certain matters occurring before grand jury); *18 U.S.C. § 3666* (forfeitures for property used in connection with illegal bribes); *19 U.S.C. § 1305* (forfeitures under customs law for certain immoral articles); *19 U.S.C. § 1453* (forfeitures for property smuggled in violation of customs laws); *21 U.S.C. § 881* (forfeiture of property connected to drug offenses); *26 U.S.C. § 6103* (forfeitures under revenue law); *28 U.S.C. § 524* (forfeitures of several varieties); *28 U.S.C. § 1355* (new rules about forfeitures); *30 U.S.C. § 1466* (civil forfeitures concerning mining of certain minerals); *39 U.S.C. § 2003* (forfeitures under the Postal Service Fund); *49 U.S.C. § 80303* (forfeiture of vessels used to transport or convey contraband).

Collectively, these statutes have created an exponential increase in forfeitures. Statistics tell the story. In the fiscal year

ending September 30, 1990, the Department of Justice's Asset Forfeiture Fund held a balance of approximately $478 million. n29 In the time period between 1984 and 1990, the government confiscated money and goods worth approximately $1.5 billion. n30 Many of the largest seizures have taken place under the Comprehensive Drug Abuse Prevention and Control Act of 1970. n31

The enactment of this law has been superbly described by Alice Marie O'Brien in her Note, "*Caught in the Crossfire: Protecting the Innocent Owner of Real Property from Civil Forfeiture Under 21 U.S.C § 881(a)(7).*" n32 O'Brien notes that "Congress recognized that routine criminal sanctions such as fines and imprisonment were an inadequate deterrent to participants in the drug trade." n33 She concludes that "Congress sought to supplement the more traditional criminal penalties by providing a law enforcement device that would not only punish, but would also strip offenders of their economic gains," n34 and to further this purpose Congress enacted subsection 881(a)(7), permitting the forfeiture of real property. n35 As currently enacted, the scope of forfeitures under *21 U.S.C. § 881* is extremely broad, encompassing at least 14 separate categories of property that can be confiscated:

(1) The controlled substances themselves; n36

(2) The raw materials, products, and equipment used in the manufacture, distribution, importing, exporting, or delivery of such substances; n37

(3) Property used as a container for such substances; n38

(4) Property intended to be used as a container; n39

(5) "Conveyance" used to transport or facilitate the transportation of the sale, possession, or concealment of an illegal substance, including airplanes, cars, boats, and other "vehicles" or "vessels"; n40

(6) "Conveyances" intended to be used to transport or facilitate such transportation of such illegal substances; n41

(7) The books, records, and research, used or intended to be used in violation of the Act; n42

(8) Property acquired with the proceeds of illegal drug transactions, including all "things of value" in exchange for a controlled substance and "all proceeds" traceable to such an exchange; n43

(9) Real property (including leaseholds) used in any manner to commit violations of the drug law punishable by more than one year's imprison-ment; n44

(10) Real property (including leaseholds) intended to be used in any manner to commit violations of drug law punishable by more than one year's imprisonment; n45

(11) Real property used to facilitate the commission of violations of drug law punishable by more than one year's imprisonment; n46

(12) Drug paraphernalia and certain listed chemicals; n47

(13) Firearms used to facilitate the transportation, sale, or possession of property that can be seized under § 881(1)(2); and n48

(14) Firearms intended to be used to facilitate activities discussed just above. n49

As one lower court n50 summed up this new law:

> One of the most effective "weapons" in the government's arsenal is the law of forfeiture. Through this obscure, but effective law, the government is able to confiscate property that drug traffickers use to further their trade, as well as any profit that may result. In recent years the government has successfully forfeited businesses, commercial real estate, family homes, vehicles, airplanes, boats, negotiable instruments, currency, bank accounts and virtually any other property linked to violation of the drug laws. n51

§ 77.02(b) State Statutes.

Every state and the District of Columbia has enacted at least one forfeiture statute. A partial list follows:

Alabama -- Ala. Code § 20-2-93.

Alaska -- Alaska Stat. §§ 17.30.100 - 17.30.126.

Arizona -- Ariz. Rev. Stat. Ann. § 13-3415.

Arkansas -- Ark. Code Ann. § 5-64-501.

California -- Cal. Health & Safety Code § 11470.

Colorado -- Colo. Rev. Stat. Ann. § 16-13-501.5.

Connecticut -- Conn. Gen. Stat. Ann. § 21a-246d.

Delaware -- Del. Code Ann. tit. 16, § 4784.

District of Columbia -- D.C. Code Ann. § 33-552.

Florida -- Fla. Stat. Ann. § 893.12.

Georgia -- Ga. Code Ann. § 79A-828.

Hawaii -- Haw. Rev. Stat. § 329-55.

Idaho -- Idaho Code § 37-2744.

Illinois -- Ill. Ann. Stat. ch. 561/2, paras. 1505 - 2912.

Indiana -- Ind. Code Ann. § 16-6-8.5-5.1.

Iowa -- Iowa Code Ann. § 809.1-21.

Kansas -- Kan. Stat. Ann. § 60-4107.

Kentucky -- Ky. Rev. Stat. Ann. §§ 218A.405-.460.

Louisiana -- La. Rev. Stat. Ann. § 32.1550.

Maine -- Me. Rev. Stat. Ann. tit. 15, § 5821.

Maryland -- Md. Code Ann. § 10-203.

Massachusetts -- Mass. Gen. Laws Ann. ch. 272, § 98.

Michigan -- Mich. Comp. Laws Ann. § 500.1371.

Minnesota -- Minn. Stat. Ann. § 41-29-181.

Mississippi -- Miss. Code Ann. § 41-29-101.

Missouri -- Mo. Ann. Stat. § 513.607.

Montana -- Mont. Code Ann. § 44-13-103.

Nebraska -- Neb. Rev. Stat. § 28-431.

Nevada -- Nev. Rev. Stat. § 207.460.

New Hampshire -- N.H. Rev. Stat. Ann. § 141-E:16.

New Jersey -- N.J. Stat. Ann. § 2C:41-3.

New Mexico -- N.M. Stat. Ann. § 30-31A-10.

New York -- N.Y. Penal Law § 480.00.

North Carolina -- N.C. Gen. Stat. § 750-5.

North Dakota -- N.D. Cent. Code § 12-46-20.

Ohio -- Ohio Rev. Code Ann. § 2925.43.

Oklahoma -- Okla. Stat. Ann. tit. § 1658.2(b).

Oregon -- Or. Rev. Stat. § 166.725.

Pennsylvania -- 42 Pa. Cons. Stat. Ann. § 6802.

Rhode Island -- R.I. Gen. Laws § 21-28-5.04.2.

South Carolina -- S.C. Code Ann. § 38-21-340(b).

South Dakota -- S.D. Codified Laws Ann. § 58-19-37.

Tennessee -- Tenn. Code Ann. § 39-12-206(5)(b).

Texas -- Tex. Tax Code Ann. § 159.205.

Utah -- Utah Code Ann. § 58-37-13.

Vermont -- Vt. Stat. Ann. tit. 18, § 4241.

Virginia -- Va. Code Ann. § 19.2-368.20.

Washington -- Wash. Rev. Code Ann. § 69.50.505.

West Virginia -- W. Va. Code § 60-6-20.

Wisconsin -- Wis. Stat. Ann. § 100.26(4).

Wyoming -- Wyo. Stat. § 35-7-1049.

FOOTNOTES:
(n1)Footnote 25. *United States v. Twelve Thousand, Three Hundred Ninety Dollars, 956 F.2d 801, 809-10 (8th Cir. 1992)* (citing numerous examples).

(n2)Footnote 26. *113 S. Ct. 2766, 2777 (1993).*

(n3)Footnote 27. *Id. at 2778.*

(n4)Footnote 28. *Id.*

(n5)Footnote 29. *United States v. Twelve Thousand, Three Hundred Ninety Dollars, 956 F.2d at 807, n. 6 (8th Cir. 1992).*

(n6)Footnote 30. *Id.*

(n7)Footnote 31. Currently codified as *21 U.S.C. § 881.*

(n8)Footnote 32. *65 St. John's L. Rev. 521, 525 (1991)* (This note has an outstanding discussion of the legislative history of *21 U.S.C. § 881* and an insightful review of the difficulties in prevailing under the innocent owner defense).

(n9)Footnote 33. *Id.*

(n10)Footnote 34. *Id. at 526* (citing S. Rep. No. 225, 98th Cong., 1st Sess. 191, *reprinted in* 1984 U.S.C.C.A. n. 3374).

(n11)Footnote 35. *Id. at 528.*

(n12)Footnote 36. §§ 881(a)(1) and 881(a)(8) ("Controlled substance" is a defined term; *see 21 U.S.C. § 802).*

(n13)Footnote 37. § 881(a)(2) (The terms "manufacture," "delivery" and many others discussed in § 881 are expressly defined in *21 U.S.C. § 802).*

(n14)Footnote 38. § 881(a)(3).

(n15)Footnote 39. *Id.*

(n16)Footnote 40. § 881(a)(4) (there are several exceptions listed in the statute, including common carriers, unlawful possession by another, and owners without knowledge or consent and who have not engaged in "willful blindness").

(n17)Footnote 41. § 881(a)(4).

(n18)Footnote 42. § 881(a)(5).

(n19)Footnote 43. § 881(a)(6).

(n20)Footnote 44. § 881(a)(7).

(n21)Footnote 45. *Id.*

(n22)Footnote 46. *Id.*

(n23)Footnote 47. *21 U.S.C. §§ 881*(9) and (10).

(n24)Footnote 48. *21 U.S.C. § 881*(11).

(n25)Footnote 49. *Id.*

(n26)Footnote 50. *United States v. $80,760.00 in U.S. Currency, 781 F. Supp. 462 (N.D. Tex. 1991).*

(n27)Footnote 51. *Id. at 463.*

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CHAPTER 77 FORFEITURES

9-77 Thompson on Real Property, Thomas Editions § 77.03

AUTHOR: Professor Stephen A. Spitz The author would like to acknowledge the invaluable assistance of a number of U.S.C. Law School law students, including Thomas Shelley, III, Bruce Haynes, Henry Cabaniss, Constance Boken, Lauren Ferrari and Mark Fava and would also like to thank Celeste Jones, Esquire of McNair and Sanford, P. A. All these individuals were extraordinarily helpful, and the least that can be done is a public note of appreciation. University of South Carolina Law School

§ 77.03 The Seizure of Property.

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§ 77.03(a) Prior Notice and Meaningful Hearing.

In 1970, and again in 1972, the United States Supreme Court held that due process may demand that the loss of property only take place after prior notice and a meaningful hearing. n52

The court described prior notice and a hearing as "central" to due process, n53 a "basic aspect of the duty of government," n54 and that prior notice and a meaningful hearing ensure fair play, avoid arbitrary encroachment, and reduce the possibility of mistaken deprivation. n55 As Justice Frankfurter once observed, "fairness can rarely be obtained by secret, one-sided determination of facts decisive of rights." n56

Nonetheless, exceptions do exist. In 1974, the United States Supreme Court discussed one such exception in *Calero-Toledo v. Pearson Yacht Leasing Co.* n57 There, upon discovering marijuana on board a pleasure yacht, Puerto Rican authorities seized the yacht under a Puerto Rico law authorizing seizure without prior notice or a prior hearing.

A three-judge lower-court panel held the seizure violated due process. The United States Supreme Court, however, disagreed. It concluded that a seizure for purposes of forfeiture is one of those "extraordinary situations" that justifies postponing notice and opportunity for a hearing. n58 Drawing upon dictum in the Fuentes case, the court noted that immediate seizures may be justified in the following situations:

> First, the seizure has been directly necessary to secure an important governmental or general public interest. Second, there has been a special need for very prompt action. Third, the State has kept the strict control over its monopoly of legitimate force: the person initiating the seizure has been a governmental official responsible for determining, under the standards of a narrowly drawn statute, that it was necessary and justified in the particular instance. n59

Applying this test in *Calero-Toledo*, the court upheld the seizure of the yacht without prior hearing or notice. The court first noted that the immediate seizure advanced the important governmental interest of preventing continued illicit use of the yacht. In addition, the court noted that the need for prompt action and the necessity to forego advance warning existed because the yacht "could be removed to another jurisdiction, destroyed, or concealed, if advance warning of confiscation were given." n60 Finally, the court was persuaded that because public officials and not private parties controlled the seizure process, the situation was distinct from the private seizure in *Fuentes* upon which the lower court had relied in finding the Puerto Rico law unconstitutional.

Calero-Toledo has been widely accepted by federal courts in personal property seizures. n61

Until a recent United States Supreme Court, however, the lower courts were split on whether real as compared to personal property seizures should be allowed without notice. One approach, illustrated by *United States v. Property at 4492 S. Livonia Rd.*, n62 was that real estate in general, and personal residences in particular, require prior notice. The court in *Livonia* urged that the question of pre-seizure notice called for the balancing of a variety of factors, including the significance of the property interest at stake, the risk of an erroneous deprivation, the probable value of additional procedural safeguards, and the government's interest in the avoidance of burdensome procedures. n63

Applying this test to the personal residence sought to be forfeited in Livonia, the court concluded prior notice was necessary. n64 The court found that the inherent personal nature of a private home heavily weighed the test in favor of prior notice because "one's reasonable expectation of privacy in the home is entitled to a unique sensitivity from federal courts." n65

Moreover, the court stated that prompt action in the forfeiture of real property is not as necessary as in the forfeiture of personal property because real property cannot be concealed or removed. Finally, the court reasoned that any concern about the property being transferred, after the notice but before the seizure, could be avoided by the filing of a lis pendens or a restraining order. n66 Other lower courts, however, disagreed, holding the seizure of real property without prior notice or hearing was constitutional. In *United States v. 900 Rio Vista Blvd.*, n67 for example, the court held an immediate seizure of real property without prior notice was justified under *Calero-Toledo* because: "it is well settled that no prior judicial determination that seizure is justified is required when the government seizes items subject to forfeiture." n68

The Supreme Court resolved this split of authority in the lower courts in *United States v. James Daniel Good Real Property*. n69 There, after police found drug paraphernalia and marijuana in a private home and after the owner of the home pled guilty to violation of state law, the United States filed an *in rem* action in Federal District Court, seeking forfeiture of the home and four-acre parcel on which it was situated on the ground that the property had been used to commit or facilitate the commission of a federal drug offense.

Following an *ex parte* proceeding, a Magistrate Judge issued a warrant authorizing the property's seizure, and the government seized the property without prior notice. The owner of the property argued due process had been violated. The Supreme Court agreed, holding that due process requires the government to afford notice and a meaningful opportunity to be heard before seizing real property subject to civil forfeiture, absent exigent circumstances. n70

The government argued that because civil forfeiture serves a "law enforcement purpose" the government need only comply with the Fourth Amendment when seizing forfeitable property. The court rejected this argument, holding that "where the government seizes property not to preserve evidence of wrongdoing but to assert ownership and control over the property, its action must also comply with the Due Process Clause." n71

The government also claimed that civil forfeiture is an exception to the general rule because there is a valid governmental interest at stake that justifies postponing the hearing until after the seizure. In answering this contention,

the court used the inquiry set forth in *Mathews v. Eldridge*, n72 which requires the court to consider the private interests affected by the civil action; the risk of erroneous deprivation of that interest through the procedures used; the probable value of additional safeguards; and the government's interest, including the administrative burden that additional procedural requirements would impose.

The court found that the personal right to maintain control over one's own home, and to be free from governmental interference, is a private interest of historic and continuing importance. n73 The court also found that the practice of an *ex parte* hearing creates an unacceptable risk of error because it affords little or no protection to an innocent owner. n74

Finally, the court found that the government's interest in seizing Mr. Good's property before a forfeiture hearing did not further purposes of forfeiture. n75 Because real property is not as easily disposed of as personal property, the court noted that there is typically no need for extraordinary expediency. Moreover, the court concluded that the government's only legitimate interests at the beginning of forfeiture proceedings are to ensure that the property not be sold, destroyed, or used in further illegal activity prior to the forfeiture judgment. n76 These interests can often be secured by means other than immediate seizure. For example, filing a notice of *lis pendens* can prevent sale, and a restraining order can prevent destruction. Therefore, in most cases, the court found that there was no need to assert control over the property without first affording notice and an adversary hearing. n77

The consequences of *James Daniel Good* are significant. First, several courts have already held that *Good* should be applied retroactively to those cases not finally decided. n78

There is, however, disagreement concerning the legal effect of a failure to hold a preseizure hearing. One court has concluded that lack of notice and hearing requires the action to be dismissed. n79 Other courts disagree. n80

Good leaves unanswered what happens when a prior hearing is excused for "exigent circumstances." In *Organizacion JD LTDA v. United States*, n81 the government seized numerous electronic fund transfers claiming the funds were proceeds of illicit drug trafficking. The Second Circuit held that these seizures satisfied the "exigent circumstances" test because the property at issue was fungible and capable of rapid motion. n82

COMPUTER-ASSISTED RESEARCH

LEXIS: seiz! w/15 property w/50 hearing or notice

§ 77.03(b) Methods of Forfeiture.

One court has said that "civil forfeiture is a creature unto itself." n83

This adage is certainly true with regard to the complex procedural requirements found in civil forfeitures. n84 The government has three options when it initiates a civil forfeiture under the Comprehensive Drug Abuse Prevention and Control Act of 1970. n85 First, it can elect to file a complaint pursuant to the Supplemental Rules for Certain Admiralty and Maritime Claims. Under this method, a summons and warrant by a court clerk is issued without requiring a certificate of exigent circumstances. n86

As the court in *United States v. United States Currency Totalling $3,817.49* n87 explained, the Supplemental Rules for Certain Admiralty and Maritime Claims works roughly as follows: The United States commences a judicial forfeiture by filing a complaint in the district where the seizure occurred. n88 Upon the filing of the complaint, the district court clerk issues a warrant for the arrest of the property at issue. n89 The United States must then publish the notice of the action and arrest in a newspaper of general circulation within the district. The notice must specify the time within which the party filing the claim must file an answer. n90 A claimant must file an answer within twenty days after filing the claim, n91 and that claim must be verified on oath or solemn affirmation. n92 A second method is for the government to

"commence a criminal forfeiture proceeding ... in the same manner as provided for a search warrant under the Federal Rules of Criminal Procedure." n93

The third method arises when the Attorney General is authorized to seize property under applicable law, as provided by §§881(b) and (d). n94 Numerous regulations govern this type of proceeding. n95 Under §§881(b) and (d), all special agents of the DEA and FBI are authorized to seize property. n96 Upon seizure, there are specific rules concerning impoundment, custody and disposal. n97 A duty to appraise the property exists. The appraisal occurs "at the time and place of seizure." n98 When the appraised value is under $500,000, n99 the seized merchandise must be described. n100 Notice of the seizure and the government's intention to forfeit, sell or otherwise dispose of the property should be published for three successive weeks in the judicial district in which the processing for forfeiture is brought. n101

When a claim is made concerning the seized property and a satisfactory bond with sureties is posted, n102 the administrative forfeiture proceedings are stopped. n103 Assuming no claim or bond is filed, the property is declared forfeit. n104 The forfeited property is retained, delivered, or disposed of in accordance with official instructions of DEA Asset Forfeiture Section n105 or the official instructions of the FBI Property Management Officer. n106 There is a procedure for "petition for remission or mitigation of forfeiture," n107 and a petition for "restoration of proceeds of sale." n108 Time requirements exist for both types of petitions. n109 This type of procedure is sometimes referred to as "summary forfeiture" because it is essentially an administrative procedure brought pursuant to customs laws found at *19 U.S.C. §1607*. In addition to the regulations discussed above, the agency in charge of the seizure must also send written notice to parties the agency is aware of and who appear to have an interest in seized property. n110

For claimants, these procedures can cause confusion. In *United States v. $80,760.00 in U.S. Currency*, n111 the court discussed the procedure claimants must ordinarily follow to reclaim seized property and then addressed the consequences of a failure to follow the appropriate procedure. In that case, the claimant had properly filed a claim and bond to perfect on administrative claim n112 but failed to file an additional claim in the judicial forfeiture itself as mandated by Supplementary Rule C(6). Because such an additional filing was necessary, the government moved to dismiss. The court refused to grant the motion, holding that pleadings and procedural practices under the Supplemental Rules should be liberally interpreted and that when defects in following the law are the result of confusion rather than bad faith, it is the better practice to reach the merits of the claim. n113 Some, but certainly not all, courts agree. n114 One recent case has openly called for reform. The Court in *United States v. 8771 Lake Rd.*, n115 noted that "I am disturbed by the high number of default judgments ... entered in §881 forfeiture cases." n116 The Court suggested that notice to claimants should "demystify the legal process" n117 and that such notice should advise claimants of available defenses, clearly explain what must be filed, when such a filing is required, and the consequences of failure to file. n118 The Court added:

> Finally, it might be helpful to enclose copies of the pertinent statutes, rather than simply referring the recipient to the Supplemental Rules for Certain Admiralty and Maritime Claims. What lawyer or judge, not to mention a person unskilled in the law, would ever imagine that Admiralty and Maritime "law" governs the forfeiture of land allegedly used for drug transactions? Dickens' comment comparing the law to an ass seems particularly appropriate. n119

COMPUTER-ASSISTED RESEARCH

LEXIS: civil or judicial w/5 forfeiture! criminal w/5 forfeiture! attorney general w/30 seiz! w/5 property

§ 77.03(c) *In Rem* Jurisdiction.

Historically, a forfeiture was an "*in rem*" proceeding. One important consequence of an *in rem* proceeding is that it is immaterial whether the persons whose misconduct gave rise to the forfeiture are indicted, charged, convicted, or even acquitted. n120 It is property and not the person that is the subject matter of the civil action. A second important

consequence is that the *in rem* nature of civil forfeitures means that a court's power to exercise jurisdiction is derived from control over the property itself. n121 Accordingly, a valid initial seizure of the *res* was long held necessary to commence an *in rem* forfeiture. n122

Until recently, however, the lower courts disagreed on whether *in rem* forfeiture proceedings required continuing control of the *res* throughout the litigation process. Some courts concluded that jurisdiction might be lost should the res be removed from the territorial jurisdiction of the court. Other courts disagreed. n123

The Supreme Court resolved the question in *Republic Nat'l Bank of Miami v. United States*. n124 There the government commenced a forfeiture action against a single-family residence, claiming that the property had been acquired with proceeds from drug trafficking and thus was subject to forfeiture under the Comprehensive Drug Abuse Prevention and Control Act of 1970. n125 In turn, the bank argued that it was an innocent lienholder and that its mortgage interest in the property should not be subject to forfeiture. Awaiting the court's decision on this question, the bank and the government agreed that the residence should be sold. A sale ensued, and the proceeds were retained by the United States Marshal. n126

Ultimately, the district court denied the Bank's claim. Although the Bank appealed, it failed to file either a supersedeas bond or a stay of execution. While the appeal was pending, the government requested that the United States Marshal transfer the proceeds of the sale to the Assets Forfeiture Fund of the United States Treasury. After this transfer, the government moved to dismiss the appeal for lack of jurisdiction, relying on cases that held that jurisdiction over *in rem* forfeitures continues only so long as the court retains control of the *res*. n127 The Supreme Court found the government's argument to be without merit, holding:

> In a civil forfeiture proceeding, where the government has the power to confiscate private property on a showing of mere probable cause, the right to appeal is a crucial safeguard against abuse. No settled rule requires continuous control of the res for appellate jurisdiction in an *in rem* forfeiture proceeding. Nor does the Appropriations Clause place the money out of reach. Accordingly, we hold that the Court of Appeals did not lose jurisdiction when the funds were transferred from the Southern District of Florida to the Assets Forfeiture Fund of the United States Treasury. n128

The *Republic Nat'l Bank* holding is in accord with a recent amendment to *28 U.S.C. §1355* which provides in pertinent part that "[i]n any case in which a final order disposing of property in a civil forfeiture action or proceeding is appealed, removal of the property by the prevailing party shall not deprive the court of jurisdiction." n129

Other amendments to *28 U.S.C. §1355* have further expanded jurisdiction and venue in civil forfeiture cases. In *United States v. One 1978 Piper Cherokee Aircraft*, n130 for example, the court noted that even though the aircraft in question may never have been brought within the geographical confines of the lower court, §1355(b)(1)(B) n131 now permitted venue in that court because that was the judicial district in which the criminal prosecution was brought. n132

COMPUTER-ASSISTED RESEARCH

LEXIS: jurisdiction or venue w/30 forfeiture!

§ 77.03(d) Probable Cause.

Many civil forfeiture statutes require that the government demonstrate "probable cause" to justify seizure and ultimate forfeiture. For example, under *21 U.S.C. §881*(a)(7), the government's burden is to demonstrate a "probable cause" belief that a connection n133 exists between the property to be seized and an illegal drug transaction. Similarly, under §881(a)(6), a showing of "probable cause" is also needed. Likewise, under *18 U.S.C. §1955*(d), the government is entitled to bring a civil forfeiture claim against property that houses an illegal gambling business upon "probable cause."

Probable cause has been defined as "reasonable ground for belief of guilt, supported by less than prima facie proof, but more than mere suspicion." n134 It has been recognized that probable cause is to be judged "not with clinical detachment, but with a commonsense view to the realities of normal life." n135

In many situations, the government can establish probable cause by relying on a prior criminal case. For example in *United States v. Three Tracts of Property*, n136 the government filed a civil complaint for forfeiture of real estate and of United States currency. In the civil forfeiture, the government offered as proof of probable cause the prior convictions of several individuals. The district court concluded that probable cause existed to believe that properties and currency were subject to forfeiture based on the criminal trial record. On appeal, the Sixth Circuit held that the use of such prior convictions was appropriate, and that the prior convictions along with the doctrine of collateral estoppel n137 fully supported the probable cause finding. The court added, however, that a prior criminal conviction does not always prove probable cause in every instance. n138

Probable cause does not, however, always demand a prior criminal conviction. As early as 1827, the United States Supreme Court n139 rejected the conclusion that a criminal conviction is always a necessary prerequisite to a forfeiture. Modern law is in accord. n140 The government need not prove an owner committed a crime, n141 and a forfeiture may be commenced where no criminal action is brought. n142 For the government to obtain a judgment of forfeiture, it need only demonstrate a probable cause nexus between the seized property and illegal activity. n143

The probable cause showing need not be linked to a particular transaction. n144 Concerning questions of proof, courts have accepted affidavits, hearsay, and circumstantial evidence in civil forfeiture proceedings. *United States v. 228 Acres* n145 is illustrative. There, the government sought forfeiture of tracts of real property, farming equipment, antiques, and other items. n146 Proof that these items were linked to proceeds traceable to an illegal situation was limited, and the trial court had as testimonial evidence only the affidavit of a single DEA agent and the claimant's own testimony to support the government's claim. Nonetheless, the Second Circuit affirmed the District Court's conclusion that there was sufficient direct and circumstantial evidence to support the inference that real and personal properties were "proceeds traceable" to monies furnished in exchange for a controlled substance under federal law, n147 and therefore could be forfeited. One factor the Second Circuit panel noted was that at the time of the civil proceeding the claimant was in prison based on a guilty plea relating to an illegal drug transaction. Although that conviction, by itself, might have been insufficient to establish probable cause, because much of the property sought to be forfeited had been purchased before the crime, the Second Circuit noted that illegal transaction resulted in the seizure of heroin that was "unusually pure." n148 From this fact, the court concluded that it could be inferred that the defendant was in a fairly high position in an illegal drug distribution chain. Other matters in the record also suggested involvement in illegal narcotics activities for a substantial period of time. n149

The court also found significant the unusually large amounts of cash used to acquire the real estate sought to be seized. The court concluded that this behavior is characteristic of drug trafficking. n150 Moreover, reported legitimate income, necessary to finance such unusual cash purchases, was altogether lacking in the claimant's prior tax returns. The purchases of real property for just one year, 1985, actually exceeded the supposed after-tax monies for an entire eight-year period.

Concluding there was ample evidence of probable cause, the court summed up the activities that supported such finding:

> In sum, [the defendant's] attempts to conceal his income and assets, his drug arrest in possession of a kilogram of high-purity heroin followed by his guilty plea of conspiracy to distribute heroin, his unexplained accumulation of the substantial cash used to acquire the forfeited parcels, and his demonstrably false claim that he had paid for these parcels with income from businesses on which the "income taxes were paid," together provided the district court with probable cause to believe that the forfeited properties were ... forfeitable under §881(a)(6). n151

The probable cause standard has been criticized. As Judge George Pratt and his law clerk, William Petersen, in their excellent article, *Civil Forfeiture In The Second Circuit*, n152 have noted the "link" between seizure and the question of illegal activity can be very slight. Indeed, as they so vividly point out in *United States v. One Mercedes-Benz*, n153 the Second Circuit affirmed the forfeiture of the car in that case on evidence of marijuana so small in amount as not to be a crime where the discovery took place. n154

COMPUTER-ASSISTED RESEARCH

LEXIS: forfeiture! w/30 probable cause

§ 77.03(e) Burdens of Proof.

In a civil forfeiture action, the government has the initial burden of showing probable cause to institute the forfeiture action. n155 If the government meets its initial burden, a majority of courts n156 have concluded that the burden then shifts to the claimant to show by a preponderance of the evidence that the property was not subject to forfeiture, or that an innocent owner defense can be established. In fact, under *19 U.S.C. §1615* (in certain forfeitures), the burden shifts to claimant by express statutory language. n157

Thus, the government is entitled to a judgment of forfeiture upon an unrebutted showing of probable cause. n158 The requirement that government need only make "a showing of probable cause" to prevail makes forfeitures unlike most civil cases, where the plaintiff's burden is proof by a preponderance of evidence. Rejecting this standard explicitly in *United States v. One 56-Foot Motor Yacht*, n159 the court noted "that the various levels of burden of proof have no application to the question of probable cause... Perhaps it is for this reason that courts and legislatures have almost universally spoken in terms of a 'showing' of probable cause." n160

Claimants have urged that shifting the burden of proof to the claimant violates due process. As the court in *United States v. 686.64 Acres of Property*, n161 observed, however, the First, Second, Fourth, Ninth and Tenth Circuits have all rejected any argument that shifting the burden of proof violates due process. n162

§ 77.03(f) Civil and Criminal Distinctions.

When Congress enacts a civil forfeiture in one situation and a criminal forfeiture in another situation, it is reasonable to presume that each statute was intended to reach a different end and was enacted for a distinct purpose. Certainly a strong argument exists that at least historically criminal sanctions and civil remedies are fundamentally distinct.

However, civil forfeitures seem to fall in both areas. In an insightful article, n163 Professor Kenneth Mann notes that one basic legal assumption in our society is that distinct responses normally ensue when a crime, as compared to a mere legal wrong, is committed.

If a crime is committed, a proceeding is filed for the purpose of punishment. n164 But if only a legal wrong has occurred, a civil proceeding is filed for the purpose of compensation. n165 Professor Mann notes that these two proceedings typically proceed forward in different courts, with different rules of procedure, under distinct substantive rules, and separate burdens of proof. n166 As Professor Mann persuasively argues, however, the "bifurcation of legal sanctions into [these] two categories is [sometimes] misleading." n167

In discussing a "middle ground," where proceedings are typically a hybrid of a criminal wrong and a civil remedy, many of Professor Mann's examples are drawn from forfeiture cases. n168 His conclusion is that in a growing number of areas of the law civil cases are filed for purposes of punishment and not just compensation. This conclusion seems to accurately describe any number of civil forfeiture cases, and raises the fundamental question whether the historical

distinctions between criminal law and civil actions truly apply to forfeiture proceedings. At one time, most commentators and courts would agree that distinctions between civil and criminal forfeitures existed. For example, the Ninth Circuit has held one basic distinction between civil and criminal forfeitures is whether a penalty was assessed against the person or against an inanimate object. n169 According to *United States v. Seifuddin*, criminal forfeitures are filed against the person. Such actions operate *in personam*, require a conviction before property is seized, and are filed to punish. n170 Civil forfeitures, by contrast, are filed against objects of property. n171 The forfeiture is grounded upon the unlawful use of the *res*. The owner's culpability is irrelevant and the purpose of the action is remedial. n172

However, notwithstanding the distinctions between civil and criminal forfeitures often discussed in some cases, n173 the reality appears to be that the line between civil and criminal forfeitures has been substantially blurred. In *United States v. Elgersma*, n174 for example, an *en banc* court upheld a criminal forfeiture based only upon a preponderance of the evidence. Rejecting the traditional criminal standard of proof beyond a reasonable doubt, the court justified its decision by finding that criminal forfeiture is only part of the sentencing process, and not a substantive offense. Accordingly, the court concluded that "due process does not require the beyond a reasonable doubt standard to apply to the sentencing process, [and] Congress has the authority to apply a less strenuous standard of proof than the beyond a reasonable double standard to criminal forfeiture." n175

Indeed, the Supreme Court has categorically accepted the fact that some former distinctions between civil and criminal forfeitures no longer apply. *Austin v. United States* n176 is illustrative. In this case, the owner of a auto body shop and mobile home appealed a judgment for the government in a action brought against these properties under *21 U.S.C. §§881*(a)(4) and (a)(7). He had previously pled guilty under state law to one count of possession of cocaine with intent to distribute, but argued that the subsequent federal forfeiture violated the Excessive Fines Clause of the Eighth Amendment. In response, the government contended that the Eighth Amendment could not apply because the forfeiture was only civil. n177

The Supreme Court disagreed. Ignoring the "civil" label, the Supreme Court held that all forfeitures, civil or criminal, existed in part as punishments which were subject to Eighth Amendment limitations. Reaffirming its prior holding in *United States v. Halper*, where the court began the process of disengaging former civil and criminal distinctions, the court stated, "[i]t is commonly understood that civil proceedings may advance both punitive and remedial goals, and, conversely, that both punitive and remedial goals may be served by criminal penalties." n178 The Austin Court also noted that in *Calero-Toledo* it had previously held that forfeiture serves both "punitive and deterrent purposes." n179 The court concluded by holding that statutory *in rem* forfeitures under *21 U.S.C. §§881*(a)(4) and (a)(7) are considered punishment today, and that any forfeiture, whatever its label, may be punishment enough to warrant Eighth Amendment review. n180

COMPUTER-ASSISTED RESEARCH

LEXIS: forfeiture! w/30 punish! w/15 civil w/15 criminal

§ 77.03(g) Criticism of Forfeitures.

Criticism of forfeiture statutes abounds. n181 Calls for reform legislation have been made. n182 The press has written a number of stories, including reporters Andrew Schneider's and Mary Pat Flaherty's series in Pittsburgh with headlines such as "Government Seizures Victimize Innocent," n183 and "Police Profit By Seizing Homes of Innocent." n184 A recent New York Times Magazine article n185 suggests abuses continue. Not all persons, of course, agree. Whether or not the forfeitures laws will be modified is a question for the future.

FOOTNOTES:
(n1)Footnote 52. *See, e.g., Fuentes v. Shevin, 407 U.S. 67 (1972)* and *Goldberg v. Kelly, 397 U.S. 254 (1970).*

(n2)Footnote 53. *Fuentes, 407 U.S. at 80.*

(n3)Footnote 54. *Id.*

(n4)Footnote 55. *Fuentes, 407 U.S. at 81.*

(n5)Footnote 56. *Joint Anti-Fascist Refugee Comm. v. McGrath, 341 U.S. 123, 170-72 (1951)* (Frankfurter, J., concurring).

(n6)Footnote 57. *416 U.S. 663 (1974).*

(n7)Footnote 58. *Id. at 677.*

(n8)Footnote 59. *Id. at 678* (quoting *Fuentes, 407 U.S. at 91).*

(n9)Footnote 60. *Id.* at 679.

(n10)Footnote 61. *See, e.g., United States v. Lot 41, Berryhill Farm Estates, 128 F.3d 1386 (10th Cir. 1997); United States v. James Daniel Good Property, 971 F.2d 1376, 1383 (9th Cir. 1992),* (referring to *Calero-Toledo,* and stating "[t]his case has been relied upon to establish the general proposition that due process does not require government officials to conduct hearings before seizing items of personal property that are subject to forfeiture"), *judgment aff'd in part, rev'd in part, 510 U.S. 43, 126 L. Ed. 2d 490 (1993).*

(n11)Footnote 62. *889 F.2d 1258 (2d Cir. 1989).*

(n12)Footnote 63. *Id. at 1264.*

(n13)Footnote 64. *Id. at 1265.*

(n14)Footnote 65. *Id. at 1264* (quoting *United States v. Reed, 572 F.2d 412, 422* (2d Cir.), *cert. denied sub nom. Goldsmith v. United States, 439 U.S. 913 (1978)).*

(n15)Footnote 66. *Id.* at 1265.

(n16)Footnote 67. *803 F.2d 625 (11th Cir. 1986).*

(n17)Footnote 68. *Id. at 632* (citing *United States v. Eight Thousand Eight Hundred and Fifty Dollars in United States Currency, 461 U.S. 555, 562 n.12 (1983)).*

(n18)Footnote 69. *114 S. Ct. 492 (1994).*

(n19)Footnote 70. *Id. at 497. Gete v. INS, 121 F.3d 1285 (9th Cir. 1997).*

(n20)Footnote 71. *See, e.g., Calero-Toledo, 416 U.S. 663 (1974); Fuentes, 407 U.S. 67 (1972).*

(n21)Footnote 72. *424 U.S. 319 (1976).*

(n22)Footnote 73. *Id.* at 501.

(n23)Footnote 74. *Id.; see also* the interesting case of *United States v. $40,878.59 in U.S. Currency, 32 F.3d 1151 (7th Cir. 1994)* (noting that "[i]f the fugitive cannot prove the innocent ownership of the property he will lose that property. If he can prove innocent ownership, the property should not be forfeited in any event. The only way to make a just determination of whether that property is forfeitable is to afford the claimant an opportunity to be heard"). *Id. at 1157.*

(n24)Footnote 75. *Id.* at 503.

(n25)Footnote 76. *Id. Aronson v. City of Akron, 116 F.3d 804 (6th Cir. 1997)* (upholding Ohio's "Corrupt Activity Lien Statute" which permits the filing of a corrupt activity lien notice on property subject to forfeiture in a pending criminal case).

(n26)Footnote 77. *Id.* The court did add that, in a particular case, if there is evidence that an owner is likely to destroy property, when advised of a pending action, the Government might then obtain *ex parte* relief upon a proper showing.

(n27)Footnote 78. *United States v. All Assets & Equip. of W. Side Bldg. Corp., 58 F.3d 1181 (7th Cir. 1995)* (holding that although parties raised it late, issue of predeprivation hearing arising from *James Daniel Good* was not waived); *United States v. One Parcel of Real Property at 9638 Chicago Heights, 27 F.3d 327 (8th Cir. 1994);* United States v. 77 E. 3d St., 849 F. Supp. 876 (S.D.N.Y. 1994).

(n28)Footnote 79. *United States v. 2751 Peyton Woods Trail, 66 F.3d 1164 (11th Cir. 1995); United States v. One Parcel of Real Property at 9638 Chicago Heights, 27 F.3d 327 (8th Cir. 1994),* adding that "[i]f statutory time constraints permit, however, the government is free to procure a valid arrest warrant after a *Good* hearing and thus to commence the forfeiture proceedings anew. " *Id. at 330.*

(n29)Footnote 80. *See, e.g., Boero v. DEA, 111 F.3d 301 (2d Cir. 1997)* (lack of notice remedy restores right to seek hearing in district court); *United States v. All Assets & Equip. of W. Side Bldg. Corp., 58 F.3d 1181 (7th Cir. 1995);* United States v. 20832 Big Rock Dr., 51 F.3d 1402 (9th Cir. 1995); *United States v. 51 Pieces of Real Property, 17 F.3d 1306 (10th Cir. 1994); United States v. Marsh, 105 F.3d 927 (4th Cir. 1997);* United States v. 77 E. 3d St., 849 F. Supp. 876 (S.D.N.Y. 1994).

(n30)Footnote 81. *18 F.3d 91 (2d Cir. 1994).*

(n31)Footnote 82. *18 F.3d at 94* (quoting from *United States v. Daccarett, 6 F.3d 37, 49 (2d Cir. 1993)).*

(n32)Footnote 83. *United States v. One 1987 Jeep Wrangler Auto, 972 F.2d 472, 476 (2d Cir. 1992).*

(n33)Footnote 84. *See* David Taube, *Civil Forfeiture, 30 Am. Crim. L. Rev. 1025 (1993)* for an outstanding discussion of forfeiture procedures under *21 U.S.C. §881, 18 U.S.C. §981, 19 U.S.C. §1305,* and *17 U.S.C. §509.*

(n34)Footnote 85. United States v. 785 St. Nicholas Ave., 983 F.2d 396, 402 (2d Cir. 1993), *cert. denied sub nom., Beckford v. United States, 113 S. Ct. 2349 (1993).*

(n35)Footnote 86. *Id.*

(n36)Footnote 87. *826 F.2d 785 (8th Cir. 1987).*

(n37)Footnote 88. *Id. at 786.* (Or where newly amended *28 U.S.C. §1355* now allows).

(n38)Footnote 89. *826 F.2d at 786; see* Supp. Rule C(3).

(n39)Footnote 90. *826 F.2d at 786; see* Supp. Rule C(4).

(n40)Footnote 91. *826 F.2d at 786; see* Supp. Rule C(6).

(n41)Footnote 92. *Id.*

(n42)Footnote 93. *United States v. Approximately 2538.85 Shares of Stock, 988 F.2d 1281, n. 2 (1st Cir. 1993).*

(n43)Footnote 94. *See* United States v. 4492 S. Livonia Rd., 889 F.2d 1258 (2d Cir. 1989).

(n44)Footnote 95. 21 C.F.R. §§1316.71 -- 1316. 99.

(n45)Footnote 96. 21 C.F.R. §1316.72.

(n46)Footnote 97. 21 C.F.R. §1316.73.

(n47)Footnote 98. 21 C.F.R. §1316.74.

(n48)Footnote 99. If the appraised value is greater than jurisdictional limits of 21 C.F.R. §1316.75(a) (that is more than $500,000) then a "judicial forfeiture" takes place under 21 C.F.R. §1316.78.

(n49)Footnote 100. The description should include the motor and serial numbers, if any, the time, cause, and place of seizure, and directions as to when to file a claim. *See* 21 C.F.R. §1316.75.

(n50)Footnote 101. *Id.*

(n51)Footnote 102. 21 C.F.R. §1316.75(B) provides the bond should be in the sum of $5,000, or ten percent of the value of the claimed property whichever is lower, but not less than $250.

(n52)Footnote 103. 21 C.F.R. §1316.76.

(n53)Footnote 104. 21 C.F.R. §1316.77.

(n54)Footnote 105. 21 C.F.R. §1316.77(a).

(n55)Footnote 106. 21 C.F.R. §1316.77(G).

(n56)Footnote 107. 21 C.F.R. §1316.79.

(n57)Footnote 108. 21 C.F.R. §1316.80.

(n58)Footnote 109. *Id.*

(n59)Footnote 110. Failure to send proper notice at the known location to an obviously interest party can vacate the forfeiture. *See Aero-Medical, Inc. v. United States, 23 F.2d 328, 331 (1994)* (concluding it was unacceptable for DEA to send notice to address known not to be current address of plaintiff); *Gutt v. United States, 641 F. Supp. 603, 606 (W.D. Va. 1986)* (holding that notice sent to claimant at a known invalid address was insufficient when government knew the claimant was represented by counsel).

(n60)Footnote 111. *781 F. Supp. 462, 465-70 (N.D. Tex. 1991).*

(n61)Footnote 112. *Id. at 468.*

(n62)Footnote 113. *Id. at 469-70.* The Court set out a six-factor test that could excuse or extend the time for filing a claim.

(1) The claimant, in good faith, attempted to file a claim on time or inform the government of his interest;

(2) The claimant relied to his detriment on misinformation from a government source;

(3) The claimant actively pursued his interest in the seized property and expended considerable resources preparing the case for trial;

(4) The claimant was acting pro se;

(5) The government itself failed to follow the proper procedures;

(6) The excuse or extension would not prejudice the government.

Id. at 469.

(n63)Footnote 114. *See, e.g., United States v. One Urban Lot, 885 F.2d 994, 999-1000 (1st Cir. 1989)* (court may excuse absence of timely claim under circumstances where a verified answer, containing all the information required in a claim, is timely filed); *United States v. One Parcel of Real Property, 942 F.2d 74, 77 (1st Cir. 1991)* (district courts permitted to exercise discretion), *but see United States v. Beechcraft Queen Airplane, 789 F.2d 627, 630 (8th Cir. 1986)* (filing a timely claim necessary to contest the forfeiture); *United States v. United States Currency in the Amount of $2,875.00, 754 F.2d 208 (7th Cir. 1985)* (favoring strict compliance).

(n64)Footnote 115. *818 F. Supp. 199 (W. D. Mich. 1992).*

(n65)Footnote 116. *Id. at 203.*

(n66)Footnote 117. *Id.*

(n67)Footnote 118. *Id.*

(n68)Footnote 119. *Id.*

(n69)Footnote 120. *United States v. One 1987 Mercedes-Benz 300E, 820 F. Supp. 248 (E. D. Va. 1993).*

(n70)Footnote 121. *United States v. $506,231 in U.S. Currency, 125 F.3d 442 (7th Cir. 1997)* (where the federal court may not take jurisdiction over seized property until termination of state proceedings, a holding also followed in the Fifth, Eighth, and Ninth Circuits. *Id. at 447. United States v. One Lear Jet Aircraft, 836 F.2d 1571 (11th Cir. 1988), cert. denied, 487 U.S. 1204 (1988).*

(n71)Footnote 122. *Republic Nat'l Bank of Miami v. United States, 113 S. Ct. 554 (1992).*

But see United States v. $7,850 in U.S. Currency, 7 F.3d 1355, 1356 (8th Cir. 1993) (where the court explains that although evidence seized in violation of the Fourth Amendment may not be relied upon to sustain a forfeiture, "the fact that the monies may have been illegally seized does not immunize them from forfeiture").

(n72)Footnote 123. Many of the conflicting authorities can be found in *Republic Nat'l Bank, 113 S. Ct. 554, 557 n. 3 (1992); see also* United States v. One Parcel of Real Property with *Buildings, 34 F. Supp. 2d 107 (D. R. I. 1999)* (property purchased with traceable proceeds); *United States v. Four Parcels of Real Prop., 941 F.2d 1428, 1435 (4th Cir. 1991).*

(n73)Footnote 124. *113 S. Ct. 554 (1992).*

(n74)Footnote 125. *21 U.S.C. §881*(a)(6). *Salem v. State of Georgia, 503 S.E.2d 62 (Ga. App. 1998)* (property used for drug trafficking).

(n75)Footnote 126. *113 S. Ct. 556.*

(n76)Footnote 127. *Id. at 557.*

(n77)Footnote 128. *Id. at 562.*

(n78)Footnote 129. *28 U.S.C. §1355.*

(n79)Footnote 130. *37 F.3d 489 (9th Cir. 1994).*

(n80)Footnote 131. Section 1355(b)(1) provides, in part, that a forfeiture action or proceeding may be brought in ... any other district where venue for the forfeiture action or proceeding is specifically provided for in Section 1395 of this title or any other statute.

(n81)Footnote 132. *37 F.3d at 492; see also United States v. 105,800 Shares of Common Stock, 825 F. Supp. 191, 196 (N.D. Ill. 1993)* where the Court noted that expanded jurisdiction of federal district courts now exists under the new amendments to §1355.

(n82)Footnote 133. The various circuits disagree about the nature of the connection needed under § 881. Some of the conflicting authorities are collected in United States v. Approximately 50 Acres, 920 F.2d 900, 902 (11th Cir. 1991). The First, Fourth, and Eighth Circuits hold that a "substantial connection" requirement exists and that the government must prove such a connection between real property and the illegal activity. The Seventh Circuit requires only that government show that the connection is more than incidental or forfeitous. *Id.* at 902. The Second Circuit has held that "[t]here need not be a substantial connection between the drug activities and the property in question but only a nexus between them." United States v. 785 St. Nicholas Ave., 983 F.2d 396, 403 (2d Cir. 1993), *cert. denied, 508 U.S. 913 (1993); United States v. Lot 41, Berryhill Farm Estates, 128 F.3d 1386 (10th Cir. 1997); Gete v. INS, 121 F.3d 1285 (9th Cir. 1997); United States v. One Lot of United States Currency ($36,634), 103 F.3d 1048, 1053 (1st Cir. 1997)* (note 6 explains that the court "need not resolve whether, as some cases suggest, 'nexus' means something less than 'substantial connection.'"); *United States v. $506,231 in United States Currency, 125 F.3d 442 (7th Cir. 1997); United States v. 3814 N.W. Thurman Street, Portland, Oregon, A Tract of Real Property, 164 F.3d 1191 (9th Cir. 1999)* (probable cause to believe that statute was violated).

(n83)Footnote 134. *United States v. North 48 Feet of Lots 19 and 20 in Block 8 of M.J. Hammett's Addition to the City of Pine Bluff, Arkansas, 138 F.3d 1268 (8th Cir. 1998)* (probable cause that property was used for prohibited purpose); *United States v. Three Hundred Sixty-Four Thousand Nine Hundred Sixty Dollars in United States Currency, 661 F.2d 319, 323 (5th Cir. 1981).*

(n84)Footnote 135. *United States v. $129,727.00 in United States Currency, 129 F.3d 486 (9th Cir. 1997)* (basing probable cause on a "totality of the circumstances" or "aggregate of facts" test); *United States v. Four Million, Two Hundred Fifty-Five Thousand Dollars in United States Currency, 762 F.2d 895, 904 (11th Cir. 1985)* (quoting *Wilson v. Attaway, 757 F.2d 1227 (11th Cir. 1985)).*

(n85)Footnote 136. *994 F.2d 287 (6th Cir. 1993).*

(n86)Footnote 137. In *United States v. Smith, 730 F.2d 1052 (6th Cir. 1984),* the court noted that *collateral estoppel* or issue preclusion normally requires: (1) the same issue in the prior trial, (2) the issue actually be litigated, and (3) the issue is necessary and essential to the judgment on the merits. *See also United States v. One Parcel of Real Property, 128 F.3d 1386 (10th Cir. 1997)* (prior criminal conviction for conspiracy estops defendant from denying the actions of which he had been convicted).

(n87)Footnote 138. *See Three Tracts of Property, 994 F.2d at 290* (finding that the $29,100 in currency seized in that case required a full trial and could not be decided on the government's motion for summary judgment).

(n88)Footnote 139. *The Palmyra, 25 U.S. (12 Wheat) 1 (1827).*

(n89)Footnote 140. *See, e.g.,* United States v. 900 Rio Vista Blvd., 803 F.2d at 630 (holding that in the world of

drug trafficking, "things are often not what they appear to be" and that even legal title in an entity other than the drug trafficker does not of itself insulate the property from the reach of civil forfeiture). *Id.*

(n90)Footnote 141. *Aronson v. City of Akron, 116 F.3d 804 (6th Cir. 1997)* (during the pendency of a criminal proceeding, Ohio RICO permits the state, by filing appropriate notice, to acquire a lien on property that is subject to forfeiture); United States v. One Assortment of 89 Firearms, 465 U.S. 354 (1984) (noting that not even an acquittal bars a subsequent civil forfeiture).

(n91)Footnote 142. United States v. One 1987 Jeep Wrangler Auto., 972 F.2d 472 (2d Cir. 1992).

(n92)Footnote 143. *See, e.g., United States v. 228 Acres of Land, 916 F.2d 808 (2d Cir. 1990), cert. denied sub nom., Moreno v. United States, 498 U.S. 1091 (1991).*

(n93)Footnote 144. *Id. at 812* (citing *United States v. Banco Cafetero Panama, 797 F.2d 1154, 1160 (2d Cir. 1986)).*

(n94)Footnote 145. *916 F.2d 808 (2d Cir. 1990).*

(n95)Footnote 146. *Id. at 809.*

(n96)Footnote 147. *Id. at 811* (citing §881(a)(6)).

(n97)Footnote 148. *916 F.2d at 812.*

(n98)Footnote 149. *Id.*

(n99)Footnote 150. A number of courts fully agree, and have repeatedly held that when large amounts of cash are used in purchase of property, or found on a person, that this may be considered a factor in establishing probable cause that money represents the proceeds of drug transactions. *See, e.g.*, United States v. 785 St. Nicholas Ave., 983 F.2d 396, 403 (2d Cir. 1993) collecting authorities on the point; *see also United States v. $364,960.00 in United States Currency, 661 F.2d 319 (5th Cir. 1981)* (Two illegal aliens ... were apprehended in an apartment ... with narcotics, guns, and $364,906.00. From the sheer quantity of currency seized under these circumstances, the court concluded that it could permissibly infer a connection with illegal narcotics trafficking).

United States v. $506,231 in United States Currency, 125 F.3d 442, 453 (7th Cir. 1997) ("the government may not seize money... based on the bare assumption that most people do not have huge sums of money lying about").

(n100)Footnote 151. *916 F.2d at 813.*

(n101)Footnote 152. *65 St. John's Law Review 653 (1991).*

(n102)Footnote 153. *846 F.2d 2 (2d Cir. 1988).*

(n103)Footnote 154. *65 St. John's Law Review 653.*

(n104)Footnote 155. *See* United States v. 566 Hendrickson Blvd., 986 F.2d 990 (6th Cir. 1993); *United States v. Twenty-Two Thousand, Two Hundred Eighty-Seven Dollars, 709 F.2d 442 (6th Cir. 1983).*

(n105)Footnote 156. *See* Annotation, *104 A.L.R. Fed. 273, 371 (1991)* and the following cases:

First Cir.: *United States v. One Lot of United States Currency ($36,634), 103 F.3d 1048 (1st Cir. 1997); United States v. TWP, R4, 970 F.2d 984, 989 (1st Cir. 1992).* **Second Cir.:** United States v. Property Located at 15 Black Ledge Dr., 897 F.2d 97, 101 (2d Cir. 1990). **Third Cir.:** *United States v. 1988 Chevrolet Silverado, 16 F.3d 660 (3d*

Cir. 1994). **Fourth Cir.:** *United States v. Santoro, 866 F.2d 1538 (4th Cir. 1989).* **Eleventh Cir.:** *Nnadi v. Richter, 976 F.2d 682, 690, n. 7 (11th Cir. 1992).* D. C. Cir.: United States v. $29,959. 00 in *U.S. Currency, 931 F.2d 549, 553 (D. C. Cir. 1991).*

(n106)Footnote 157. As the court in United States v. TWP 17 R4, 970 F.2d 984 (1st Cir. 1992) noted: Section 881(d) makes the burden of proof rules of *19 U.S.C. §1615* applicable to the forfeiture of real estate. In turn, *19 U.S.C. §1615* provides, in part that "[i]n all suits or actions (other than those arising under §1592 of this title) brought for the forfeiture of any vessel, vehicle, aircraft, merchandise, or baggage seized under the provisions of any law relating to the collection of duties on imports or tonnage, where the property is claimed by any person, *the burden of proof shall lie upon such claimant*...." (Emphasis added).

(n107)Footnote 158. *See, e.g., United States v. Little Al, 712 F.2d 133 (5th Cir. 1983); United States v. One 56-Foot Motor Yacht, 702 F.2d 1276 (9th Cir. 1983).*

(n108)Footnote 159. *702 F.2d 1276 (1983).*

(n109)Footnote 160. *Id. at 1282. See also United States v. Two Parcels of Property at Castle Street, 31 F.3d 35, 39 (2d Cir. 1994)* (government's showing does not require proof by a preponderance of evidence).

(n110)Footnote 161. *820 F. Supp. 1433 (M. D. Ga. 1993).*

(n111)Footnote 162. *Id. at 1439. See also United States v. $129,727.00 United States Currency, 129 F.3d 486 (9th Cir. 1997);* United States v. One Beechcraft King Air 300 Aircraft, 107 F.3d 829 (11th Cir. 1997).

(n112)Footnote 163. Kenneth Mann, *Punitive Civil Sanctions: The Middleground Between Criminal and Civil Law, 101 Yale L. J. 1795 (1992).*

(n113)Footnote 164. *Id. at 1796.*

(n114)Footnote 165. *Id.*

(n115)Footnote 166. *Id. at 1797.*

(n116)Footnote 167. *Id.*

(n117)Footnote 168. Among the cases he cites are *United States v. Halper, 490 U.S. 435 (1989)* (a civil penalty case); United States v. 40 Moon Hill R., 884 F.2d 41, 43 (1st Cir. 1989) (a civil forfeiture case); and *United States v. 141st St. Corp., 911 F.2d 870, 880-81 (2d Cir. 1990)* (forfeiture of six-story building).

(n118)Footnote 169. *United States v. Seifuddin, 820 F.2d 1074 (9th Cir. 1987).*

(n119)Footnote 170. *Id. at 1076.*

(n120)Footnote 171. *Id.*

(n121)Footnote 172. *Id. at 1076-77.*

(n122)Footnote 173. *See United States v. Real Property, 832 F. Supp. 43 (N. D. N. Y. 1993)* which discusses several distinctions between civil and criminal forfeitures. *Id. at 48.* Interestingly, that court also added that "[w]hether these doctrinal underpinnings have now converged into a single jurisprudence of 'forfeiture' undistinguishable by their criminal or civil nature is a question left completely unanswered by controlling authority." *Id. at 49.*

(n123)Footnote 174. *971 F.2d 690 (11th Cir. 1992).*

(n124)Footnote 175. *Id.* at 674. *See also United States v. Bieri, 21 F.3d 819, 823 (8th Cir. 1994)* (holding that criminal forfeiture need only be proved by preponderance of evidence).

(n125)Footnote 176. *113 S. Ct. 2801 (1993).*

(n126)Footnote 177. *Id. at 2803.*

(n127)Footnote 178. *Id. at 2806* (quoting *Halper, 490 U.S. at 447).*

(n128)Footnote 179. *Id.* at 2810 (quoting *Calero-Toledo v. Pearson Yacht Leasing Co., 416 U.S. 663, 686 (1974)).*

(n129)Footnote 180. *Id.* at 2812. *See also* United States v. One Beechcraft King Air 300 Aircraft, 107 F.3d 829 (11th Cir. 1997) (The First, Second, Fourth, Seventh, Ninth, Tenth, and Eleventh Circuits view in rem forfeiture as a civil proceeding).

(n130)Footnote 181. J. William Snyder, *Reining In Civil Forfeiture and Protecting Innocent Owners From Civil Asset Forfeiture: United States v. 92 Buena Vista Avenue, 72 N.C. L. Rev. 1333 (1994);* Arthur W. Leach & John G. Malcolm, *Criminal Forfeiture: An Appropriate Solution to the Civil Forfeiture Debate, 10 Ga. St. U. L. Rev. 241 (1994);* Steven L. Schwarcz & Alan E. Rothman, *Civil Forfeiture: A Higher Form of Commercial Law?, 62 Fordham L. Rev. 287 (1993);* Gary R. Brown, *Reforming Civil Forfeiture Law: The Case For An Automatic Stay Provision, 67 St. John's L. Rev. 705 (1993);* Christine Meyer, *Zero Tolerance For Forfeiture: A Call For Reform of Civil Forfeiture Law*, 5 Notre Dame J. L. Ethics & Pol'y 883 (1991).

(n131)Footnote 182. *See A Law Run Wild, 79 A.B.A. J. 24 (Oct. 1993)* reporting on proposals for new legislation to avoid situations discussed in congressional hearings in the article, including a rancher who was shot dead during the confusion of an early morning raid of his 200-acre property. No illegal substance was ever found and in a subsequent investigation the motivation for the raid, in part, was found to be based on a desire to seize and forfeit the ranch.

(n132)Footnote 183. Pittsburgh Press, August 11, 1991.

(n133)Footnote 184. *Id.*, August 13, 1991.

(n134)Footnote 185. David Heilbroner, *The Law Goes On a Treasure Hunt*, N.Y. Times Magazine, Dec. 11, 1994.

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CHAPTER 77 FORFEITURES

9-77 Thompson on Real Property, Thomas Editions § 77.04

AUTHOR: Professor Stephen A. Spitz The author would like to acknowledge the invaluable assistance of a number of U.S.C. Law School law students, including Thomas Shelley, III, Bruce Haynes, Henry Cabaniss, Constance Boken, Lauren Ferrari and Mark Fava and would also like to thank Celeste Jones, Esquire of McNair and Sanford, P. A. All these individuals were extraordinarily helpful, and the least that can be done is a public note of appreciation. University of South Carolina Law School

§ 77.04 Defenses to the Seizure.

[Go To Supp]

§ 77.04(a) Standing.

A claimant must have "standing" to contest a forfeiture and assert a personal claim. The question of standing can arise in a number of settings. In *United States v. Approximately Two Thousand, Five Hundred Thirty-Five Point Eighty-Nine Shares of Stock*, n186 for example, the government filed an in rem proceeding pursuant to *21 U.S.C. §881* (a)(6) and *18 U.S.C. §981*. n187 The court noted that these statutes call for the seizure of property pursuant to Supplemental Rules for Admiralty and Maritime Claims. n188 The court further noted that under this procedure, "before a claimant in a forfeiture case can file an answer and defend on the merits, the claimant must file a proper claim" n189 and "if no claim is properly filed, a putative claimant lacks standing to contest forfeiture of the property." n190 Thus, a question of standing may turn merely on the timely filing of a specific claim under a particular statute.

Questions of standing, however, may also be raised in other contexts. The area is unsettled with some courts requiring a claimant demonstrate a "legitimate" property interest in the seized property. n191 On the other hand, some courts have held that bare legal title, by itself, does not confer standing. n192 A classic example of nominal ownership can be found in the case of *United States v. One 1990 Chevrolet Corvette*. n193 The car, which sold for almost $42,000, was registered to an elderly cleaning woman who only earned between six and ten thousand dollars a year. n194 Although title was registered in her name, she demonstrated at trial "a complete lack of familiarity with the car and its features and controls." n195 Nor did she demonstrate the ability to buy a $42,000 car. Under these circumstances, the court concluded that no reasonable finder of fact could conclude that the registered owner was anything other than a nominal owner. Because she lacked standing to challenge the forfeiture, the court held it need not consider the merits of her claim that the government failed to show probable cause for the seizure. n196

Standing can also be lacking because the ownership claim is only based on possibility of future ownership. For example, a child's future expectation of ownership of a home was held to be insufficient to confer standing to contest

the forfeiture, n197 and in *United States v. Four Million Two Hundred Fifty-Five Thousand Dollars in United States Currency*, n198 the court concluded that claimants holding checks written on a forfeited bank account lacked the right to contest the seizure because under Florida law an uncashed check is not an assignment of the funds on deposit. Thus, no ownership or possessory interest in the fund had been proved. n199 Along the same lines, the court in *United States v. $20,193.39 in U.S. Currency* held that an unsecured creditor lacked standing to challenge a civil forfeiture. n200 Other courts are in agreement. n201

Some courts have adopted a broad definition of standing. In *United States v. Forfeiture, Stop Six Ctr.*, n202 the court found that standing to contest a forfeiture was met by a "facially colorable interest in the proceeding sufficient to satisfy the case-or-controversy requirement and prudential considerations defining and limiting the role of the court." n203 Applying this test, the court concluded that the claimant had standing based on her legal title and allegations of a financial stake in the outcome of the forfeiture, even after having delegated management of the property to her brother. n204 Other courts have held that standing can be based upon a possessory interest n205 or a claim of constructive trust. n206

A recent United States Supreme Court decision, *United States v. 92 Buena Vista Ave.*, has settled the question of whether a donee of a gift of real property had standing to challenge a forfeiture, by holding that standing is not limited to merely persons who are purchasers but can include any owner, including a donee. n207 In turn, however, this decision has generated its own uncertainty. In *United States v. 2350 N.W. 187 St.*, n208 for example, the Eleventh Circuit considered whether an unpaid county ad valorem property tax granted the county tax collector standing to qualify as an innocent owner to challenge a civil forfeiture. Vacating two district judgments that held standing did not exist, the court remanded for reconsideration in light of *92 Buena Vista Ave.* n209

COMPUTER-ASSISTED RESEARCH

LEXIS: forfeiture! w/30 contest! or defen! w/30 standing

§ 77.04(b) Innocent Owner.

The Supreme Court has had difficulty with the question of innocent owners and civil forfeitures. On the one hand, in *Austin v. United States*, the court reaffirmed that innocence as a defense to a civil forfeiture has "uniformly been rejected." n210 Indeed, in the 1974 case of *Calero-Toledo*, the court even hinted that seizure of property from innocent parties may not be altogether undesirable because "[t]o the extent that such forfeiture provisions are applied to lessors, bailors, or secured creditors who are innocent of any wrongdoing, confiscation may have the desirable effect of inducing them to exercise greater care in transferring possession of their property." n211

On the other hand, the Supreme Court, in dicta on more than one occasion, has expressed concern that innocence should be a defense in some situations. Even in *Calero-Toledo*, the court noted in dictum that "it would be difficult to reject the constitutional claim of an owner whose property subjected to forfeiture has been taken from him without his privity or consent." n212 And in further dictum in that case, the court suggested that an innocent owner defense may exist when an owner proved "not only that he was uninvolved in and unaware of the wrongful activity, but also that he had done all that reasonably could be expected to prevent the proscribed use of the property." n213 Under such circumstances, the Supreme Court has asserted that it "would be difficult to conclude that forfeiture served legitimate purposes and was not unduly oppressive." n214 In fact, the court reemphasized the unsettled nature of this question in a footnote in *Austin*, when it suggested that "[b]ecause the forfeiture provisions at issue here exempt innocent owners, we again have no occasion to decide in this case whether it would comport with due process to forfeit the property of a truly innocent owner." n215

Whether or not the Due Process Clause protects at least some innocent owners, and if it does what the scope of that protection might be, Congress has elected to include such a defense in a number of forfeiture statutes. The statutory

definition of an innocent owner in §881(a)(7) provides that "... no property shall be forfeited under this paragraph, to the extent of an interest of an owner, by reason of any act or omission established by that owner to have been committed or omitted without the knowledge or consent of that owner." n216

The innocent owner defense has, however, been difficult for the courts to consistently apply. An extensive Annotation, *Who Is Exempt From Forfeiture of Real Property Under "Innocent Owner" Provision of 21 U.S.C.S. §881(a)(7)?* n217 highlights the problems in this area of forfeiture law. One question that has arisen with some frequency is whether the "innocent owner" exception contemplates an actual knowledge inquiry, rather than an objective knowledge test. n218 A second question of critical importance is the necessary elements of the innocent owner defense. Some courts have held that to prevail as an innocent owner, claimants must establish: (1) they were not involved in the wrongful activity and (2) they were unaware of the wrongful activity. n219 Other courts, however, have required that claimants also prove that they did all that reasonably could be expected to prevent the illegal use of property. n220 This third requirement, that an "innocent owner" must affirmatively take steps to prevent illicit use of premises has been defended by some and criticized by others.

Some courts have argued that requiring an innocent owner to undertake affirmative steps to rid the property of illegal activity comes from dictum in *Calero-Toledo*, n221 where the court suggested that forfeiture of an innocent owner's property might be unconstitutional if the owner "had done all that reasonably could be expected to prevent the proscribed use of the property." n222

The courts that have read this requirement into the innocent owner of §881 have concluded that "[t]he illicit sale and use of drugs is taking an ever-increasing toll on our nation ... [and] [g]iven the present circumstances, defining consent in §881(a)(7) as the failure to take all reasonable steps to prevent illicit use of premises once one acquires knowledge of that use is entirely appro-priate." n223 Others strongly disagree. n224 The lower courts are split on the question. n225

Just as "innocence" has been difficult to define, so has the word "owner." Questions have arisen whether "owner" refers to the person who owns the property at the time it was illegally used or the person who owns the property at the time of the forfeiture proceeding. n226

However, at least one aspect of "ownership," long in dispute, was settled in *92 Buena Vista Ave.* n227 There, the government filed an in rem action against a $240,000 personal residence, asserting the property had been acquired with proceeds traceable to an unlawful drug exchange. The owner of record acquired the residence by gift. She admitted that she was not a bona fide purchaser but argued that as a donee, without knowledge of the alleged unlawful origin of the $240,000 gift, she qualified under the statute as an "innocent owner." n228 The court agreed and held that a donee could be an innocent owner, noting that the text of the statute required only the status of "owner," not "purchaser."

The government argued, however, that in this case the donee was not an "owner" at all. The government relied on the "relation-back" rule that forfeiture of the property relates back in time to the illegal activity itself. Under this theory at that very instance the property is subject to forfeiture and lost to all current and future owners. n229 A plurality disagreed. Reaching back into the court's earliest history, the plurality relied upon an 1806 case decided by Chief Justice Marshall n230 for the rule that forfeiture does not automatically vest title to property in the government, and that the "relation-back" fiction was never intended to defeat a true innocent owner. n231 The court remanded the case for the donee to prove her lack of knowledge. n232

In many situations, proof of innocent ownership is a difficult undertaking. As discussed in a previous section, once the government has established probable cause, the burden is squarely on the claimant to establish an innocent owner defense. n233 And, in at least some circuits, the defense requires proof of both lack of knowledge and lack of consent. n234 Other issues about the defense are also unsettled. In *92 Buena Vista Ave.*, for example, the government argued that the innocent owner defense requires on-going innocence and that a claimant may lose innocent owner status by after-the-fact knowledge. n235 The Supreme Court in *92 Buena Vista Ave.* left this question unresolved.

The question of on-going innocence has been especially troublesome in the co-owner situation. *United States v. 15603 85th Ave. N.* n236 illustrates the difficulties of proving the innocent ownership defense in this situation. In that case, two brothers jointly purchased and improved real property in Palm Beach, Florida. The district court found that one brother contributed legitimate funds towards the purchase and improvement of the real property while the funds from the other brother were proceeds traceable to illegal activities. The Eleventh Circuit held that mere purchase of an interest in real estate with legitimate funds did not establish an innocent owner defense. When a claimant "has actual know-ledge at any time prior to the initiation of the forfeiture proceeding, that claimant's legitimate funds are commingled with drug proceeds and traceable in accord with the forfeiture statute, the legitimate funds are subject to forfei-ture." n237 Thus, "legitimate funds are forfeitable when knowingly commingled with forfeitable funds." n238

The co-owner problem can also arise in the difficult situation of a husband and wife who hold property as tenants by the entirety. If one spouse is innocent, and the other is not, the possibilities include immediate forfeiture, delayed forfeiture, partial forfeiture, or no forfeiture at all. The lower courts are divided on the appropriate response. n239 As to lienholders, the Eleventh Circuit in *United States v. 6960 Miraflores Ave.* n240 has rejected a requirement that a lender can be denied "innocent owner" status on what the lender "should have known," and has similarly rejected an argument based upon after-the-fact knowledge in holding that an innocent investor who "learns too late" is still entitled to protection. n241 Section *18 U.S.C. 981*(a)(2), protecting innocent lienholders, has been held to include recovery of lienholder's principal sum, costs, fees, and interests, if applicable state law would provide for such recovery. n242

COMPUTER-ASSISTED RESEARCH

LEXIS: forfeiture! w/30 contest! or defen! w/30 innocent w/5 owner! or part!

§ 77.04(c) Excessive Fine.

The Eighth Amendment to the United States Constitution reads, "excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted." In *Austin v. United States* n243 the Supreme Court broke new ground and held that civil forfeitures may violate the excessive fine clause of the Eighth Amendment. After reviewing the history of the Eighth Amendment, the court in *Austin* held that one of the central purposes of the Amendment was to limit "the government's power to punish," n244 and that punishment not only cuts across the division between the civil and criminal law but that "forfeiture generally and statutory *in rem* forfeiture in particular, historically have been understood ... as punishment." n245 Thus, because punish-ment is a part of statutory forfeiture, the court found the Eight Amendment Excessive Fine Clause may be a defense to a civil forfeiture proceeding. n246

Having answered this question; however, the court in *Austin* declined to establish a definitive test of "excessive," leaving that issue for the lower courts to develop. Some commentators have already written on this subject. n247 Although questions of definition are difficult, Judge Pratt, n248 in his excellent article, *Civil Forfeiture in the Second Circuit*, n249 has suggested one illustration of an excessive fine, noting that "when an expensive automobile is forfeited on the strength of less than twenty-five grams of marijuana, one must swallow hard to maintain that the punishment is proportionate to the crime." n250

Justice Scalia, in his concurrence in *Austin*, suggested that the proper inquiry to determine whether an excessive fine has been imposed is to focus on "not how much the confiscated property is worth, but whether the confiscated property has a close enough relationship to the offense." n251 Some lower courts have found this test persuasive and have adopted it. n252 Other courts have suggested that the excessive question be determined by an inquiry "into the proportionality between the value of the [property] sought to be forfeited and the amount needed to effectuate the legitimate remedial purposes of the forfeiture." n253

In *Alexander v. United States*, n254 the Supreme Court directed that the forfeiture in that case be reexamined under the

excessive fines clause and remanded the case to the Eighth Circuit for that purpose. On remand, the Eighth Circuit n255 held that defendants have the initial burden of making a *prima facie* showing of "gross disproportionality." n256 Upon such a showing, the lower courts should then consider the government's evidence of "just proportionality." n257

In considering this latter issue, the court suggested the inquiry should include the gravity of the offense, the extent of criminal activity, and the quantum of property forfeited. n258 The court also noted, however, that forfeiture of proceeds from illegal activity itself "cannot be considered punishment, and thus, subject to the excessive fines clause, as it simply parts the owner from the fruits of the criminal activity." n259 Further, the court suggested that the relationship between the forfeiture ordered and the sentences imposed be considered in any determination of whether the forfeiture has been grossly disproportionate. n260

COMPUTER-ASSISTED RESEARCH

LEXIS: forfeiture! w/30 contest! or defen! w/30 excess! w/5 fine!

§ 77.04(d) Double Jeopardy.

The Double Jeopardy Clause of the United States Constitution provides that "nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb." n261 The Double Jeopardy Clause embodies three protections. It protects against a second prosecution for the same offense after acquittal. It protects against a second prosecution for the same offense after conviction. And it protects against multiple punishments for the same offense. n262 Until recently, double jeopardy was not accepted as a defense in a civil forfeiture proceeding. n263 This conclusion was reached by various courts on four separate grounds.

First, a number of courts concluded that the Double Jeopardy Clause protects only a "person" subject to the same offense, whereas civil forfeiture is an *in rem* proceeding directed solely against property. This distinction led some courts to conclude that double jeopardy simply did not, by its terms, apply to property forfeitures. n264

Second, other courts rejected double jeopardy challenges on the ground that civil forfeitures are not crimes. Thus, double jeopardy did not attach and civil proceedings were simply beyond Double Jeopardy Clause protections and concerns. n265

Third, the court in *United States v. 38 Whalers Cove Drive*, n266 noted that since claimant pled guilty under state law, and the forfeiture took place under federal law "[t]he Double Jeopardy Clause is inapplicable when separate governments prosecute the same defendant, for the defendant has offended both sovereigns." n267

Finally, still other courts relied upon cases that insist that a criminal and civil sanction for the same wrongful act is fully constitutional and concluded that double jeopardy did not apply in such a situation. n268 In *United States v. Dixon*, n269 for example, the court held without hesitation that "[c]learly Congress may impose both a criminal and a civil sanction in respect to the same act; this is neither unusual nor constitutionally objectionable." n270

Similarly, almost 40 years ago, in *Kingsley Books, Inc. v. Brown*, n271 the Supreme Court held constitutional a New York law that not only criminally punished ownership of "obscene literature" but also authorized the civil seizure and destruction of the literature itself. The Supreme Court noted that the seizure and destruction was a legal remedy sanctioned by the "long history of Anglo-American law" and "[i]f New York chooses to subject persons who disseminate obscene literature to criminal prosecution and also to deal with such books as deodand of old, or both, with due regard, of course to appropriate opportunities for the trial of the underlying issue, it is not for us to gainsay its selection of remedies." n272

Notwithstanding these cases, the Double Jeopardy Clause may now clearly be a valid defense in civil forfeiture

proceedings. In *United States v. Halper*, n273 the United States Supreme Court held that a criminal conviction followed by a huge civil penalty violated the Double Jeopardy Clause. In *Halper*, the defendant was convicted of submitting false claims to an agency of the federal government in the total sum of $585. Subsequently, the government sought a civil penalty of over $130,000 against Halper under the False Claims Act. n274 The Supreme Court denied the government's right to this huge penalty under the Double Jeopardy Clause, holding this case was one of those rare cases "where a fixed penalty provision subjects a prolific but small-gauge offender to a sanction overwhelmingly disappropriate to the damages he has caused." n275

The full scope of the *Halper* opinion is unclear. In *United States v. McCaslin*, n276 the court noted that the Halper rule should be limited, stating:

> *Halper* has no application to the very ancient practice by which instrumentalities of a crime may be declared forfeit to the government. The forfeiture of such instrumentalities is "independent of, and wholly unaffected by any criminal proceedings *in personam*."

The Second Circuit has continued to rely on *McCaslin*, and only recently rejected a double jeopardy argument made in *United States v. $145,139.00 in U.S. Currency*. n277

The Ninth Circuit, however, has had second thoughts about the continued validity of *McCaslin*, noting in a 1994 case that:

> *Halper* involved a civil action brought under the False Claims Act. In *United States v. McCaslin, 959 F.2d 786* (9th Cir.), [*cert. denied, 506 U.S. 942, 113 S.Ct. 382, 121 L.Ed.2d 292 (1992)],* we underestimated its force and refused to apply its rationale in a civil forfeiture action brought under *21 U.S.C. §881*(a)(7). We held that "*Halper* has no application to the very ancient practice by which instrumentalities of a crime may be declared forfeit to the government." *McCaslin, 959 F.2d at 788.* However, in its subsequent decision in Austin, the supreme court said that we were wrong and directly rejected our *McCaslin* analysis. In Austin, the court specifically applied the *Halper* test to determine whether a civil forfeiture under *21 U.S.C. §§ 881*(a)(4) & (a)(7) constituted "punishment," and it concluded that those provisions did in fact misuse punishment under that test. n278

Disagreement about *Halper* also extends to the question whether a Halper defense might apply in a situation where a civil action precedes instead of follows a criminal prosecution. At this time, there is no certain answer to this question as well. n279

Finally, the scope of *Halper* was discussed again in *Department of Revenue of Montana v. Kurth Ranch*, n280 where a divided Supreme Court further struggled with the question when the Double Jeopardy Clause should apply outside criminal proceedings. The issue in *Kurth Ranch* was whether a substantial state tax imposed on the possession and storage of dangerous drugs, but only after the State had already imposed a criminal penalty for the same conduct, violated double jeopardy. The Montana Dangerous Drug Tax Act expressly provided that the tax was to be collected only after all state and federal fines and forfeitures had been satisfied. n281 The Kurth family filed bankruptcy, claiming the Montana tax was unconstitutional as successive "punishment" for their prior drug convictions. Relying primarily on *United States v. Halper*, the Bankruptcy Court concluded that the tax was a form of double jeopardy. The District Court and the Court of Appeals both affirmed; the Court of Appeals basing its conclusion largely on the State's refusal to offer evidence justifying the tax. n282

The majority in *Kurth Ranch* noted that "criminal fines, civil penalties, civil forfeitures and taxes all share certain features" n283 because they each generate government revenue, impose fiscal burdens on individuals, and deter certain behavior. At the same time, the court noted that taxes are typically different than fines, penalties and forfeitures, n284 because taxes are usually motivated by revenue-raising rather than punitive purposes. n285 Nonetheless, the court

con-cluded "at some point, an exaction labeled as a tax approaches punishment, and our task is to determine whether Montana's drug tax crosses that line." n286 In that regard, the court found the Montana tax was assessed at eight times the market value of dangerous drugs and was, therefore, "a remarkably high tax." n287 Equally unusual was that the "so-called tax was conditioned on the commission of a crime." n288 Finally, because this tax was only exacted after the taxpayers had been arrested for the precise conduct that gives rise to the tax obligation in the first place, the court determined that the drug tax was not the kind of remedial sanction that may follow the first punishment of a criminal offense; but, instead it was a second punishment within the contemplation of a constitutional protection that has "deep roots in our history and jurisprudence," n289 and therefore must be imposed during the first prosecution or not at all.

In separate opinions, Chief Justice Rehnquist, Justice O'Connor, and Justice Scalia dissented. Justice Thomas joined Justice Scalia's dissenting opinion. Chief Justice Rehnquist argued that the court's conclusion that the tax was a punishment was "very much at odds with the purpose and effect of the Montana Statute." n290 Justice O'Connor argued that the court had greatly expanded double jeopardy jurisprudence unnecessarily, and suggested that the appropriate analysis was to remand the case for further proceedings under *Halper*. n291 Justices Scalia and Thomas went further, holding that *Halper* itself was in error. According to Justice Scalia's viewpoint:

> It is time to put the *Halper* genie back in the bottle and to acknowledge what the text of the Constitution makes perfectly clear: The Double Jeopardy Clause prohibits successive prosecution, not successive punishment. Multiple punishment is, of course, restricted by the Cruel and Unusual Punishments Clause insofar as its nature is concerned, and by the Excessive Fines Clause insofar as its cumulative extent is concerned. n292

Although it is safe to conclude that forfeitures, fines, and even taxes may now be subject to double jeopardy limitations and concerns, it is also fair to note that much of the law in this area, at least at the present time, is unsettled. n293 In June, 1996, the United States Supreme Court more or less swept the field clear of these conflicts by holding that in rem civil forfeitures are neither "punishment" nor criminal for purposes of the Double Jeopardy Clause. n294

COMPUTER-ASSISTED RESEARCH

LEXIS: forfeiture! w/30 contest! or defen! w/30 double jeopardy

§ 77.04(e) Undue Delay.

A substantial government delay between the seizure of property and the initiation of forfeiture proceedings may bar a civil forfeiture. n295 In a 1983 decision, *United States v. Eight Thousand Eight Hundred & Fifty Dollars*, n296 that the United States Supreme Court held that whether a delay in commencing a civil forfeiture might be so unreasonable as to violate due process turned on balancing four factors: (1) length of delay, (2) reason for delay, (3) timing of claimant's assertion of the claimant's own rights, (4) prejudice to claimant. In weighing these factors, the court stated in *Eight Thousand Eight Hundred & Fifty Dollars* that the "overreaching factor is the length of the delay." n297 But, closely related to this factor, the court noted was "the reason the Government assigns to justify the delay." n298 The court suggested several matters that would be "weighty factors" in finding a delay justified, particularly a pending criminal proceedings that may well justify delay in commencing a civil forfeiture, n299 and awaiting the results of any petition for remission or mitigation. n300

The court also noted that the government must be allowed some time to decide whether to institute forfeiture proceedings. n301 At the same time, the court stated that "this reason alone could only rarely justify a lengthy delay." n302 In *$8,850 in U.S. Currency*, the government offered as justification both a pending petition for mitigation or remission and a pending criminal proceeding. n303 The court found of significance that the record contained no evidence that the government was responsible for the slow pace of either of these proceedings, nor was there any indication these matters were not pursued with diligence. n304

The final balancing factor is the question of prejudice. The court noted "[t]he primary inquiry here is whether the delay has hampered the claimant in presenting a defense on the merits, through, for example, the loss of witnesses or other important evidence." n305

Lower courts have looked at all these factors. In *United States v. $228,536.00*, n306 for example, a forfeiture action was brought almost four years after the arrest, and almost three years after a guilty plea. The government argued that, for much of this period of time, both state and federal criminal proceedings were pending against the claimant and others, and that contemporaneous civil proceedings might have forced the government to reveal "sensitive information about the criminal prosecutions." n307

The court concluded that, although the delay was lengthy, it was reasonable "because the government has offered a valid explanation for it and the delay did not prejudice [the claimant's] forfeiture defense." n308 The court also noted that claimant did not assert his own rights in an expedited manner. n309 As one might expect, there are numerous lower cases on the question of delay and the issue is fact-sensitive in the final analysis. n310

COMPUTER-ASSISTED RESEARCH

LEXIS: forfeiture! w/30 contest! or defen! w/30 undue or substantial w/5 delay!

§ 77.04(f) Statutes of Limitations.

As discussed, the government's undue delay in commencing a civil forfeiture may provide a due process defense in appropriate situations. So, too, may *19 U.S.C. §1621*, which is the statute of limitations for custom seizures. When the laws of customs apply to a specific seizure, n311 the five-year statute of limitation of §1621 is applicable. n312 Section 1621 reads in part:

No suit or action to recover any ... pecuniary penalty or forfeiture of property accruing under the customs laws shall be instituted unless such suit or action is commenced with five years after the time when the alleged offense was discovered. ...

One question about this statute, which up to *United States v. James Daniel Good Real Property* n313 was in dispute, has now been settled. In *Good*, the Supreme Court considered whether a dismissal was proper if the case was filed within the five-year time period, but the government failed to comply with other statutory timing directives found in customs regulations and rules.

There, local authorities arrested Good in 1985 upon the discovery of 89 pounds of marijuana at his residence. n314 Under state law, Good was sentenced to one year in jail, placed on five years' probation, and required to forfeit $3,187 in cash found on the premises. n315 Four and one-half years later, the United States sought to declare Good's house and the four-acre parcel on which it was situated subject to forfeiture under *28 U.S.C. §881*(a)(7).

The government and the claimant acknowledged that under §1621, the government filed its action within the proper statutory period. However, in addition to the five-year statute, the customs laws governing forfeitures contain a number of internal requirements relating to the timing of forfeitures. The Court of Appeals held that failure to comply with these additional requirements mandated dismissal of the forfeiture. The Supreme Court disagreed. Concluding that it was up to Congress to specify consequences for noncompliance with internal timing requirements, the court held that lower courts should not dismiss a forfeiture action on this ground.

§ 77.04(g) Self-Incrimination.

The Fifth Amendment provides that "[n]o person ... shall be compelled in any criminal case to be a witness against himself." n316 As applied to civil forfeitures, the problem of self-incrimination is a perplexing one. *United States v. 566 Hendrickson Blvd.* presents a typical situation. n317 There, the government filed a complaint seeking forfeiture of certain real property. The owner of that property argued he faced a predicament. On the one hand, because there was a parallel criminal proceeding pending against him while the civil forfeiture was being litigated, he had asserted his Fifth Amendment privilege in discovery proceedings in the civil forfeiture. n318 On the other hand, by exercising his Fifth Amendment right of silence, he claimed that he was unable to defend the civil forfeiture. The court acknowledged that a dilemma might exist, if a claimant is actually required to choose between "remain[ing] silent and allow[ing] the forfeiture or testify[ing] against the forfeitability of his property and expos[ing] himself to incriminating admissions." n319 In such situations, the Fifth Amendment has proven to be a defense in some cases, but not in others. *United States v. United States Coin & Currency*, n320 illustrates one situation where the Fifth Amendment defense was successful. Donald J. Angelini was arrested for failing to register as a gambler and for failing to pay a federal gambling tax. n321 At the time of his arrest, he had in his possession $8,674 of United States currency. The government filed a civil forfeiture claiming this sum of money. He argued that he could not defend the forfeiture without further incriminating himself. The Supreme Court agreed. n322

In two prior cases, n323 the Supreme Court had concluded that gamblers had the right under the Fifth Amendment to invoke their privilege against self-incrimination as a ground for their failure to comply with federal registration and federal gambling tax. Recognizing these two precedents, the government argued that neither case applied to Angelini because the government was not seeking a criminal forfeiture. The court, however, held that:

> ... [f]rom the relevant constitutional standpoint there is no difference between a man who forfeits $8,674 because he has used the money in illegal gambling activities and a man who pays a criminal fine of $8,674 as a result of the same course of conduct ... in both instances, money liability is predicated upon a finding of the owner's wrongful conduct; in both cases, the Fifth Amendment applies with equal force. n324

Thus, it is now well-settled that the privilege against compulsory self-incrimination applies in civil forfeiture proceedings. n325 However, it has been repeatedly said that a blanket assertion of the privilege is no defense to a forfeiture proceeding, and does not provide a sufficient basis, by itself, for a district court to grant a stay of the proceedings. n326 In support of this conclusion, lower courts have pointed to a 1983 decision, where the Supreme Court held that although the privilege may preclude a claimant from answering questions, it cannot excuse a claimant's burden under Fed. R. Civ. P. 56(e) of controverting the government's proof. n327

As a result, in any number of situations, the Fifth Amendment privilege of self-incrimination has not been successful. In *United States v. Kordel* n328 for example, the government filed a civil forfeiture and at the same time put interested parties on notice that criminal proceedings were being contemplated. One party, claiming the right to avoid self-incrimination, moved to stay the civil proceeding and be relieved of duty to respond to interrogatories until the criminal proceedings. The Supreme Court rejected this approach, holding the public interest would be served if both civil and criminal investigations were promptly carried out. n329

Still, district courts have the discretion, when parallel state and federal proceedings are pending concurrently, to accommodate the constitutional privilege and the legislative intent behind the forfeiture provision. n330 Typically, relief must be requested, or it will be deemed waived. n331 A court may stay a civil forfeiture action pending the resolution of the criminal proceedings. At the same time, the district court is under no obligation to take affirmative steps to protect the claimant's privilege (i.e., grant a stay) when the claimant, by his words or actions, has chosen to waive the privilege. n332 Use of immunity for testimony in the civil forfeiture proceeding is also a possibility. n333

COMPUTER-ASSISTED RESEARCH

LEXIS: forfeiture! w/30 contest! or defen! w/30 self-incrimination or fifth amendment

§ 77.04(h) First Amendment.

The First Amendment to the United States Constitution provides, in part, that "Congress shall make no law ... abridging the freedom of speech." n334 In Alexander v. United States, n335 the Supreme Court considered whether the First Amendment provided a defense to a civil forfeiture proceedings brought under RICO. n336 A very divided Court found no First Amendment defense existed.

In a prior proceeding, Ferris Alexander had been convicted by a jury of owning a business that distributed and sold obscene magazines and videotapes, and of substantive obscenity offenses and RICO offenses which were predicated on the obscenity convictions. n337 Sentenced to six years in prison, fined $100,000, and ordered to pay the cost of prosecution and incarceration in the criminal proceeding, n338 Alexander was then made a defendant in a subsequent forfeiture brought pursuant to §1963 (a)(2). The District Court reconvened the same jury that had just convicted Alexander on criminal charges and proceeded to permit that jury to decide whether the government was entitled to the forfeiture of business, real estate, and other assets worth millions. The jury found that Alexander had an interest in ten pieces of commercial real estate and 31 current or former businesses, all of which the jury found had been used to conduct his racketeering enterprise. Sitting without the jury, the District Court then found that petitioner had acquired a variety of assets as a result of racketeering. n339

The defendant made two arguments. He asserted that the Excessive Fine Clause of the Eighth Amendment applied to civil forfeitures. As discussed earlier in this chapter, n340 the Supreme Court agreed and remanded the case for further proceedings on that issue. He also claimed the forfeiture of "expressive materials" violated the First Amendment. A bare majority of the court disagreed. The majority held that the RICO civil forfeiture statute did not violate the First Amendment because the statute "calls for the forfeiture of assets because of the financial role they play in the operation of the racketeering enterprise. The statute is oblivious to the expressive or non-expressive nature of the assets forfeited; books, sports cars, narcotics, and cash are all forfeitable alike under RICO." n341

The court distinguished its decision in *Fort Wayne Books, Inc. v. Indiana*, n342 in which the court held that the First Amendment precluded the seizure of expressive materials. Contrasting the factual setting in *Fort Wayne Books* with that in *Alexander*, the court noted that in *Fort Wayne Books* it had only discussed a pretrial seizure. In *Alexander*, the government's goal of permanent forfeiture followed a prior jury conviction for obscenity and RICO violations. n343 Thus, unlike *Fort Wayne Books* , this was not a pretrial seizure but a post-conviction proceeding. This distinction, the majority concluded, made the issue "altogether different." n344 The court found it "quite clear" that the First Amendment is not a defense to "either stringent criminal sanctions for obscenity offenses or forfeiture of expressive materials as punishment for criminal conduct." n345

The court also addressed the argument that civil forfeitures, such as Mr. Alexander's, had the clear potential for a "chilling effect" on free expression. n346 The majority found that "the threat of forfeiture has no more of a 'chilling' effect on free expression than the threat of a prison term or a large fine." n347 In dictum, the majority added that "[n]o doubt the monetarily large forfeiture in this case may induce cautious booksellers to practice self-censorship and remove marginally protected materials from their shelves out of fear that those materials could be found obscene and thus subject them to forfeitures." n348

Justice Kennedy, in a forceful dissent joined by Justices Blackmon, Stevens, and in part, by Justice Souter, rejected the majority's premises, assumptions, and conclusions. Finding the First Amendment squarely to be violated, the dissent noted, "What is happening here is simple: [b]ooks and films are condemned and destroyed not for their own content but for the content of the owner's prior speech." n349

§ 77.04(i) Other Defenses.

A number of other defenses have been attempted in civil forfeitures. For a time, the defenses of *res judicata* and collateral estoppel appeared to have some validity. n350 In *United States v. One Assortment of 89 Firearms*, n351 however, the Supreme Court held that collateral estoppel did not bar a civil forfeiture from being initiated following an acquittal on related criminal charges, and disapproved *Coffey*. Sometimes, partial defenses may exist. For example, in *United States v. Santoro*, n352 the court addressed under the amount of land that is subject to forfeiture *(18 U.S.C. §881*(a)(7)). The authority in *21 U.S.C. § 881* (a)(7) to condemn extends to "[a]ll right, title and interest (including any leasehold interest) in the whole of lot or tract of land." The court found in *Santoro* that the property, although divided by a road, was legally described as a single, undivided tract. n353 The *Santoro* Court concluded that the "whole of any lot or tract of land" must be determined from the duly recorded instruments and documents filed in the county offices where the defendant property is located. The Sixth Circuit has adopted a similar rule. n354

Using this logic, one court has denied forfeiture of a 686.64-acre farm holding that even though the claimant treated the acreage as a single farm, and even though the source of claimant's title was a single will, since the will divided the property into nine separate parcels, one or more tracts, but not the entire farm, could be forfeited. n355

COMPUTER-ASSISTED RESEARCH

LEXIS: forfeiture! w/30 contest! or defen! w/30 first amendment or free! w/2 speech

FOOTNOTES:
(n1)Footnote 186. *988 F.2d 1281 (1st Cir. 1993).*

(n2)Footnote 187. *Id. at 1282.*

(n3)Footnote 188. *Id. at 1283.*

(n4)Footnote 189. *Id. at 1284.*

(n5)Footnote 190. *Id. See also United States v. Lido Motel, 135 F.3d 1312 (9th Cir. 1998)* (defendant's failure to notify government until one year after receiving notice of forfeiture proceedings precludes standing to contest proceedings); United States v. 8136 S. Dobson Street, 125 F.3d 1076 (7th Cir. 1997) (absent a properly filed claim, a putative claimant lacks standing).

(n6)Footnote 191. *See, e.g., United States v. Contents of Accounts Nos. 30345-04504 and 144-07143, 971 F.2d 974, 985 (3d Cir. 1992), cert. denied sub nom., Friko Corp. v. United States, 113 S. Ct. 1580 (1993)* (only those with legitimate possessory or ownership interests have standing); *Torres v. $36,256.80 in United States Currency, 827 F. Supp. 197 (S.D.N.Y. 1993)* (holding that neither the status of a lawful spouse nor the status of general unsecured creditor created standing), *vacated 25 F.3d 1154 (2d Cir. 1994)* (holding that standing did exist on grounds of constructive trust); *United States v. Christunas, 126 F.3d 765, 769 (6th Cir. 1997)* ("it is well-established that the defendant has no standing to assert his wife's (third-party) rights"); United States v. Premises & Real Property with *Bldgs., 113 F.3d 310 (2d Cir. 1997)* (father who purchased property for one dollar before forfeiture proceedings could be commenced had no standing to contest forfeiture because he was a "straw owner").

(n7)Footnote 192. *See, e.g., United States v. Contents of Accounts Nos. 30345-04504 and 144-07143, 971 F.2d 974 (3d Cir. 1992), cert. denied, sub nom. Friko Corp. v. United States, 113 S. Ct. 1580 (1993)* (holding that corporation had no standing to contest forfeiture as it was nominal party); *United States v. Real Property at 5000 Palmetto Drive, 928 F.2d 373, 375 (11th Cir. 1991)* (recognizing the rule that bare legal title by one who does not exercise dominion and control over the property does not establish standing to challenge forfeiture, but holding that this rule did not apply to facts of the case).

(n8)Footnote 193. *37 F.3d 421 (8th Cir. 1994).*

(n9)Footnote 194. *Id. at 422.*

(n10)Footnote 195. *Id.*

(n11)Footnote 196. *Id. at 423* (A dog trained to detect controlled substances alerted to two locations in the car, but no drugs were found and the police did not test for any residue of controlled substance).

(n12)Footnote 197. In United States v. 14.5 Acres More or Less Located at 485 N. Rd., 857 F. Supp. 22 (D. Vt. 1994).

(n13)Footnote 198. *762 F.2d 895 (11th Cir. 1985).*

(n14)Footnote 199. *Id. at 895.*

(n15)Footnote 200. *16 F.3d 344 (9th Cir. 1994).*

(n16)Footnote 201. *Id. at 346* (collecting authorities and noting that federal courts have consistently held that unsecured creditors do not have standing to challenge the civil forfeiture of their debtors' property); *United States v. Ribadeneira, 105 F.3d 833 (2d Cir. 1997)* (legitimate Ecuadorian businesses unable to redeem checks purchased from seized account in United States).

(n17)Footnote 202. *781 F. Supp. 1200 (N. D. Tex. 1991).*

(n18)Footnote 203. *Id. at 1201* (quoting *United States v. $321,470.00 in United States Currency, 874 F.2d 298, 302 (5th Cir. 1989)).*

(n19)Footnote 204. *Id.* at 1204.

(n20)Footnote 205. *United States v. $191,910 in United States Currency, 16 F.3d 1051, 1057 (9th Cir. 1994)* (Morgan has clearly claimed at least a possessory interest in the money at issue here).

(n21)Footnote 206. *Torres v. $36,256.80 in United States Currency, 25 F.3d 1154 (2d Cir. 1994).*

(n22)Footnote 207. *113 S. Ct. 1126 (1993).*

(n23)Footnote 208. *996 F.2d 1141 (11th Cir. 1993).*

(n24)Footnote 209. *Id. at 1144.* Fleeing the country does not destroy a defendant's standing to contest a civil forfeiture action. In *Degen v. United States, 517 U.S. 820 (1996),* the Supreme Court held that a criminal defendant who had fled to Switzerland, protected by extradition laws favorable to him, would not lose his right to defend property in a civil forfeiture action under the fugitive disentitlement doctrine. This decision has been strongly criticized by the Fifth Circuit in United States v. 14301 Gateway Blvd. W., 123 F.3d 312, 313 (5th Cir. 1997), requesting that the Supreme Court reconsider its decision and "consider Degen's application on the southwestern border of the United States."

(n25)Footnote 210. *Austin, 113 S. Ct. at 2808.*

(n26)Footnote 211. *Calero-Toledo v. Pearson Yacht Leasing Co., 416 U.S. 663, 687-88 (1974).*

(n27)Footnote 212. *Id. at 689.* Arguably, by virtue of this language, stolen or lost property should not be forfeited if an innocent owner was unconnected to subsequent illegal use of such property.

(n28)Footnote 213. *Id.*

(n29)Footnote 214. *Id. at 690.*

(n30)Footnote 215. *Austin, 113 S. Ct. 2809 n.10.*

(n31)Footnote 216. *21 U.S.C. §881*(a)(7).

(n32)Footnote 217. Annotation, *110 A.L.R. Fed. 569 (1992).*

(n33)Footnote 218. See Annotation, *110 A.L.R. Fed. 578-81.*

(n34)Footnote 219. *United States v. Certain Real Property, 724 F. Supp. 908, 914 (S. D. Fla. 1989).*

(n35)Footnote 220. *Id. at 914.*

(n36)Footnote 221. *416 U.S. 663 (1974).*

(n37)Footnote 222. *Id. at 689.*

(n38)Footnote 223. *United States v. 141st St. Corp., 911 F.2d 870, 879, cert. denied, 498 U.S. 1109 (1990).*

(n39)Footnote 224. *See* Alice Marie O'Brien, *Caught In The Crossfire, 65 St. John's L. Rev. 521, 543-48.*

(n40)Footnote 225. Annotation, *110 A.L.R. Fed. 581-86* (collecting cases on both sides of the question).

(n41)Footnote 226. This issue arose in *United States v. One Parcel of Land In Name of Mikell, 33 F.3d 11 (5th Cir. 1994)* (holding that the owner referred to in §881(a)(7) is the person who holds title when the forfeiture proceedings are instituted).

(n42)Footnote 227. *113 S. Ct. 1126 (1993).*

(n43)Footnote 228. *Id. at 1130.*

(n44)Footnote 229. *Id. at 1131.*

(n45)Footnote 230. *United States v. Grundy, 7 U.S. (3 Cranch) 337 (1806).*

(n46)Footnote 231. *92 Buena Vista Ave.*, 113 S. Ct. at 1135.

(n47)Footnote 232. *Id.* at 1138.

(n48)Footnote 233. *United States v. North 48 Feet of Lots 19 and 20 in Block 8 of M.J. Hammett's Addition to the City of Pine Bluff, Arkansas, 138 F.3d 1268 (8th Cir. 1998)* (not qualified for innocent landowner defense); *Salem v. State of Georgia, 503 S.E.2d 62* (Ga. App. 1998 (innocent owner defense not accepted); *United States v. 1988 Chevrolet Silverado, 16 F.3d 660 (5th Cir. 1994).*

(n49)Footnote 234. As the court in United States v. One Parcel Property Located at 427 & 429 Hall St., 842 F. Supp. 1421 (M. D. Ala. 1994) has noted the lower courts are split on whether an innocent owner must demonstrate lack of knowledge or lack of consent or both. Some courts require proof of both elements while others require proof of only one or the other, but not both. The authorities are collected at *Id.* 1427, n. 13. See also *United States v. One Parcel of Real Estate, 831 F. Supp. 1578, 1583 (S. D. Fla. 1993)* (discussing the difficulties in applying the innocent owner defense to post-illegal act transferees).

(n50)Footnote 235. *113 S. Ct. at 1142.*

(n51)Footnote 236. *933 F.2d 976 (11th Cir. 1991).*

(n52)Footnote 237. *Id. at 982.*

(n53)Footnote 238. *Id.*

(n54)Footnote 239. *See* United States v. Parcel of Real Property Known as 1500 Lincoln Ave., 949 F.2d 73 (3d Cir. 1991) (collecting authorities on the question).

(n55)Footnote 240. *995 F.2d 1558 (11th Cir. 1993).*

(n56)Footnote 241. *Id. at 1564.*

(n57)Footnote 242. *United States v. 1980 Lear Jet, 25 F.3d 795, 796 (9th Cir. 1994)* (In the context of real property forfeitures costs, fees, and interest are part and parcel of an innocent owner's compensable interest under the forfeiture statutes).

(n58)Footnote 243. *113 S. Ct. 2801 (1993).*

(n59)Footnote 244. *Id. at 2805.*

(n60)Footnote 245. *Id. at 2802.*

(n61)Footnote 246. *Id. Gete v. INS, 121 F.3d 1285 (9th Cir. 1997)* (holding that the Excessive Fines Clause of the Eighth Amendment may be a defense to an administrative forfeiture); *United States v. Land, Winston County, 163 F.3d 1295 (11th Cir. 1998)* (right to raise excessive fine defense not waived).

(n62)Footnote 247. *See, e.g.,* William W. Taylor, III, *The Problem of Proportionality in RICO Forfeitures, 65 Notre Dame L. Rev. 885 (1990).*

(n63)Footnote 248. Judge, United States Court of Appeals for the Second Circuit.

(n64)Footnote 249. George C. Pratt and William B. Patterson, *Civil Forfeiture in the Second Circuit, 65 St. John's L. Rev. 653 (1991).*

(n65)Footnote 250. *Id. at 669.*

(n66)Footnote 251. *Austin v. United States, 113 S. Ct. 2801, 2812 (1993).*

(n67)Footnote 252. United States v. One Parcel of Property Located at 427 & 429 Hall St., 842 F. Supp. 1421, 1429 (M. D. Ala. 1994).

(n68)Footnote 253. *United States v. Borromero, 1 F.3d 219, 221 (4th Cir. 1994).*

(n69)Footnote 254. *113 S. Ct. 2766 (1993).*

(n70)Footnote 255. *32 F.3d 1231 (8th Cir. 1994).*

(n71)Footnote 256. *Id. at 1235. United States v. One Parcel of Property, 106 F.3d 336 (10th Cir. 1997);* United States v. 6040 Wentworth Ave. S., 123 F.3d 685 (8th Cir. 1997); *United States v. Lot 41, Berryhill Farm Estates, 128 F.3d 1386 (10th Cir. 1997).*

(n72)Footnote 257. *Id.* at 1236.

(n73)Footnote 258. *Id.*

(n74)Footnote 259. *Id.*

(n75)Footnote 260. *Id.* at 1237.

(n76)Footnote 261. U.S. Const. amend. V.

(n77)Footnote 262. *See Grady v. Corbin, 495 U.S. 508, 516 (1990)* (citing *North Carolina v. Pearce, 395 U.S. 711, 717 (1969)).* But see *United States v. Various Computers & Computer Equip., 82 F.3d 582 (3d Cir. 1996), cert. denied, 117 S. Ct. 406 (1996); United States v. Emerson, 128 F.3d 557 (7th Cir. 1997)* (each court permitting both restitution and forfeiture punishments against a defendant).

(n78)Footnote 263. *See* William S. McAninch, *Unfolding the Law of Double Jeopardy, 44 S.C. L. Rev. 411, 421-27 (1993)* (an excellent and comprehensive discussion about proceedings to which double jeopardy attaches). *United States v. Grist, 112 F.3d 451 (10th Cir. 1997)* (a person in a criminal proceeding is not placed in jeopardy by a previous judicial forfeiture unless he contests it).

(n79)Footnote 264. *United States v. Cullen, 979 F.2d 992, 994 (4th Cir. 1992); United States v. McCaslin, 959 F.2d 786, 788* (9th Cir.) *cert. denied, 113 S. Ct. 382 (1992).*

(n80)Footnote 265. *See One Lot Emerald Cut Stones v. United States, 409 U.S. 232 (1972); United States ex rel. Marcus v. Hess, 317 U.S. 537, 551 (1943).* The Court noted there that "[s]pecial consequence cannot be drawn from the use of the word 'forfeit.' While this might under other circumstances be an appropriate word to suggest a fine upon the failure to pay which an individual might be imprisoned, no such punishment is provided here upon default in payment. The words 'forfeit and pay' are wholly consistent with a civil action for damages."

(n81)Footnote 266. *954 F.2d 19* (2d Cir), *cert. denied sub nom., Levin v. United States, 112 S. Ct. 55 (1992).*

(n82)Footnote 267. *Id. at 38.*

(n83)Footnote 268. The general concept was established as long ago as *Moore v. Illinois, 55 U.S. (14 How.) 13, 19-20 (1852),* in which the Supreme Court said "A man may be compelled to make reparations in damages to the injured party, and be liable also to punishment for a breach of the public place, in consequence of the same act; and may be said, in common parlance to be twice punished for the same offense."

(n84)Footnote 269. *347 U.S. 381 (1954).*

(n85)Footnote 270. *Id. at 385.*

(n86)Footnote 271. *354 U.S. 436 (1957).*

(n87)Footnote 272. *Id. at 441.*

(n88)Footnote 273. *490 U.S. 435 (1989).*

(n89)Footnote 274. *31 U.S.C. §§3729*-31.

(n90)Footnote 275. *Halper, 490 U.S. at 449.*

(n91)Footnote 276. *959 F.2d 786* (9th Cir.), *cert. denied, 121 L. Ed. 2d 292 (1992).*

(n92)Footnote 277. *18 F.3d 73 (2d Cir. 1994).*

(n93)Footnote 278. *United States v. $405,089.23 in United States Currency, 33 F.3d 1210, 1219 (9th Cir. 1994).*

(n94)Footnote 279. See, e.g., *United States v. Mayers, 897 F.2d 1126* (11th Cir.) *cert. denied, 498 U.S. 865 (1990); United States v. Amiel, 995 F.2d 367 (2d Cir. 1993)* (not deciding the question, but noting the argument that *Halper* should be limited only to civil forfeitures that follow criminal prosecutions); *United States v. Morgan, 845 F. Supp. 934, 939 (D. Conn. 1994)* (holding that sequence of proceedings is immaterial to a *Halper* analysis).

(n95)Footnote 280. *128 L. E. 2d 767 (1994).*

(n96)Footnote 281. *Id. at 773.*

(n97)Footnote 282. *Id. at 776.*

(n98)Footnote 283. *Id. at 778.*

(n99)Footnote 284. *Id. at 779.*

(n100)Footnote 285. *Id.*

(n101)Footnote 286. *Id.*

(n102)Footnote 287. *Id.*

(n103)Footnote 288. *Id. at 780.*

(n104)Footnote 289. *Halper, 490 U.S. at 440.*

(n105)Footnote 290. *Id.* at 786.

(n106)Footnote 291. *Id.* at 790.

(n107)Footnote 292. *Id.* at 794.

(n108)Footnote 293. For example, Judge Reinhardt's opinion discussed at footnote 278 has caused an enormous stir. *See Inmates Win in Forfeiture Case Stuns Prosecutors*, Legal Times, December 12, 1994, at 8, where Howard Mintz suggests that the implications from that case might be compared to having "tossed a grenade to every U.S. attorney's office from Arizona to Alaska." *Id.* at 8. (The entire article is well worth reading).

(n109)Footnote 294. *United States v. Ursery, 518 U.S. 267, 116 S. Ct. 2135; 135 L. Ed. 2d 549 (1996).*

(n110)Footnote 295. *See* Annotation, *Delay Between Seizure of Personal Property by Federal Government and Institution of Proceedings for Forfeiture Thereof as Violative of Fifth Amendment Due Process Requirements, 69 A.L.R. Fed. 373 (1984).*

(n111)Footnote 296. *461 U.S. 555 (1983).*

(n112)Footnote 297. *461 U.S. at 565.*

(n113)Footnote 298. *Id. at 565.*

(n114)Footnote 299. *Id. at 567.*

(n115)Footnote 300. *Id. at 566.*

(n116)Footnote 301. *Id. at 565.*

(n117)Footnote 302. *Id. at 566.*

(n118)Footnote 303. *Id. at 567.*

(n119)Footnote 304. *Id. at 568.*

(n120)Footnote 305. *Id. at 569.*

(n121)Footnote 306. *895 F.2d 908 (2d Cir. 1990), cert. denied sub nom., Parker v. United States, 495 U.S. 958 (1990).*

(n122)Footnote 307. *Id. at 917.*

(n123)Footnote 308. *Id. at 917.* See also United States v. 2401 S. Claremont, 724 F. Supp. 670, 673, n. 3 (W. D. Mo. 1989) (finding no prejudice because claimant continued to live in the home located on the property).

(n124)Footnote 309. In *United States v. $874,938.00 United States Currency, 999 F.2d 1323, 1326 (9th Cir. 1993),* the Court addressed three methods to speed up the forfeiture process. First, a claimant may file an equitable action seeking an order compelling the filing of a forfeiture action or the return of seized property. Second, the claimant may simply request that the Customs Service refer the matter to the United States attorney. Third, if a claimant believes that seizure was clearly improper, a motion under Fed. R. Crim. P. 41(e) for the return of the seized property may be filed.

(n125)Footnote 310. *See 69 A.L.R. FED. 378-93. United States v. David, 131 F.3d 55 (2d Cir. 1997)* (a five year delay is held to be permissible).

(n126)Footnote 311. *See, e.g., 19 U.S.C. §§1600*-1623.

(n127)Footnote 312. *See, e.g.,* United States v. 92 Buena Vista Ave., 937 F.2d 98 (3d Cir. 1991), *aff'd, 113 S. Ct. 1126 (1993).*

(n128)Footnote 313. *114 S. Ct. 492 (1993). Bruett v. Real Property Known as 18328 11th Avneue N.E., 968 P.2d 913 (Wash. App. 1998)* (strict compliance with statute required).

(n129)Footnote 314. *Id.*

(n130)Footnote 315. *Id.*

(n131)Footnote 316. U.S. Const. amend. V.

(n132)Footnote 317. *986 F.2d 990 (6th Cir. 1993);* see also the excellent discussion of this entire topic by Paul E. Becker, *The Fifth Amendment Dilemma in Forfeitures*, 39 No. 2. Prac. Law. 35 (1993).

(n133)Footnote 318. *Id. at 992.*

(n134)Footnote 319. *Id. at 996.*

(n135)Footnote 320. *401 U.S. 715 (1971).*

(n136)Footnote 321. *Id. at 716.*

(n137)Footnote 322. *Id. at 717.*

(n138)Footnote 323. *Marchetti v. United States, 390 U.S. 39 (1968); Grosso v. United States, 390 U.S. 62 (1968).*

(n139)Footnote 324. *United States Coin & Currency, 401 U.S. at 718.*

(n140)Footnote 325. *See United States v. Lot 5, 23 F.3d 359, 364 (11th Cir. 1994)* (the privilege against compulsory self-incrimination applies in civil forfeiture proceedings); United States v. 6250 Ledge Rd., 943 F.2d 721, 729 (7th Cir. 1991) (same rule); *In re Kaye, 760 F.2d 343, 354 (1st Cir. 1985)* (although the constitution couches this privilege in terms of criminal cases, it is now beyond question that the right of a witness not to give incriminating answers applies with equal force to any proceeding, be it criminal or civil, administrative or judicial, investigatory or adjudicatory, whenever the answer to a question put to a witness might tend to subject him to criminal responsibility).

(n141)Footnote 326. *E.g., United States v. Lot 5, 23 F.3d 359, 364 (11th Cir. 1994);* United States v. 6250 Ledge Rd., 943 F.2d 721, 729 (7th Cir. 1991).

(n142)Footnote 327. *United States v. $506,231 in United States Currency, 125 F.3d 442 (7th Cir. 1997); People v. $1,124,905 United States Currency, 685 N.E.2d 1370 (Ill. 1997);* "(T)he Fifth Amendment does not forbid adverse inferences against civil litigants, including claimants in civil forfeiture proceedings, who assert the privilege against self-incrimination." *Arango v. United States Dep't of the Treasury, 115 F.3d 922, 926 (11th Cir. 1997); see also United States v. Two Parcels of Real Property, 92 F.3d 1123 (11th Cir. 1996); United States v. Rylander, 460 U.S. 752, 758 (1983)* (noting that while the assertion of the Fifth Amendment privilege against compulsory self-incrimination may be a valid ground upon which a witness ... declines to answer questions, it has never been thought to be in itself a substitute for evidence that would assist in meeting a burden of production).

(n143)Footnote 328. *397 U.S. 1 (1970).*

(n144)Footnote 329. *Rylander, 460 U.S. at 769.*

(n145)Footnote 330. *See* United States v. 566 Hendrickson Blvd., 986 F.2d 990 (6th Cir. 1993).

(n146)Footnote 331. *Id.*

(n147)Footnote 332. *Id.* at 996. *See also* United States v. 6250 Ledge Rd., 943 F.2d 721 (7th Cir. 1991), where the Court held that a waiver occurred by agreeing to go to trial on stipulated facts without objecting to the procedure on Fifth Amendment grounds.

(n148)Footnote 333. *Id.*

(n149)Footnote 334. U.S. Const. amend. I.

(n150)Footnote 335. *113 S. Ct. 2766 (1993).*

(n151)Footnote 336. *Id. at 2769.*

(n152)Footnote 337. *Id. at 2769-70.*

(n153)Footnote 338. *Id. at 2770.*

(n154)Footnote 339. *Id.*

(n155)Footnote 340. See page 109.

(n156)Footnote 341. *Alexander, 113 S. Ct. at 2772.*

(n157)Footnote 342. *489 U.S. 46 (1989).*

(n158)Footnote 343. *Alexander, 113 S. Ct. at 2770.*

(n159)Footnote 344. *Id.*

(n160)Footnote 345. *Id. at 2773.*

(n161)Footnote 346. *Id. at 2774.*

(n162)Footnote 347. *Id.*

(n163)Footnote 348. *Id.*

(n164)Footnote 349. *Id. at 2783-84.*

(n165)Footnote 350. *See, e.g., Coffey v. United States, 116 U.S. 436 (1886).*

(n166)Footnote 351. *465 U.S. 354 (1984).*

(n167)Footnote 352. *866 F.2d 1538 (4th Cir. 1989).*

(n168)Footnote 353. *Id. at 1543.*

(n169)Footnote 354. *United States v. Smith, 966 F.2d 1045, 1053 (6th Cir. 1992).*

(n170)Footnote 355. *United States v. 686.64 Acres of Property, 820 F. Supp. 1433, 1443 (M. D. Ga. 1993).* The Court in this case further rejected the government's argument that six of the nine tracts were used to shield two tracts found to be used to grow marijuana and, therefore, all six tracts could be forfeited on the ground that these tracts were used to "facilitate" the commission of an offense under the drug laws. The Court held that "[t]aking advantage of the natural conditions on property, which may make the tract a natural shield for a marijuana field, is not the same as doing something to the land, like planting corn, to shield a marijuana field. " *Id. at 1444.* **See also** United States v. 133 Willington Hill Rd., 855 F. Supp. 552 (D. Conn. 1994).

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CHAPTER 77 FORFEITURES

9-77 Thompson on Real Property, Thomas Editions § 77.05

AUTHOR: Professor Stephen A. Spitz The author would like to acknowledge the invaluable assistance of a number of U.S.C. Law School law students, including Thomas Shelley, III, Bruce Haynes, Henry Cabaniss, Constance Boken, Lauren Ferrari and Mark Fava and would also like to thank Celeste Jones, Esquire of McNair and Sanford, P. A. All these individuals were extraordinarily helpful, and the least that can be done is a public note of appreciation. University of South Carolina Law School

§ 77.05 Rights of Successful Claimant.

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The Equal Access to Justice Act (EAJA), n356 took effect on October 1, 1981. Its purpose was to change the American Rule, which has long prevailed in this country, that each party pays its own attorney's fees except in the most unusual situations. The EAJA modifies the American Rule, but only in part. Under the statute, a party that is a prevailing party in a civil action against the United States may recover attorney's fees from the Federal Government unless the position of the United States was "substantially justified" in the litigation. n357

As one might anticipate, when a civil forfeiture does not succeed, successful claimants have sought to find rights under EAJA. In *United States v. Real Property Located at 2323 Charms Rd.* n358 for example, the United States filed a verified complaint and affidavit against a Beech Aircraft, alleging the plane had been used to supply cocaine and seeking forfeiture under *21 U.S.C. § 881*(a)(4). n359 The district court, having first concluded that the government lacked evidence the plane was linked to any illegal transaction, ordered the plane returned to its owner and granted the complainant expenses and attorney's fees under EAJA. n360 However, a divided Court of Appeals reversed. The Court of Appeals held the government was "substantially justified" even if unsuccessful. n361

Although there was a powerful dissent, n362 it appears that the mere failure of the government to achieve forfeiture raises no automatic presumption that the government's position lacked substantial justification. n363 However, when the government does not prevail, and when there is a true lack of evidence to justify the seizure, relief may well be warranted. n364

FOOTNOTES:
(n1)Footnote 356. *28 U.S.C. §2412.*

(n2)Footnote 357. *Id.* at (d)(1)(a).

(n3)Footnote 358. *946 F.2d 437 (6th Cir. 1991).*

(n4)Footnote 359. This statute permits the government to seize aircraft used, or intended for use, in transportation or concealment of controlled substances.

(n5)Footnote 360. United States v. Certain Real Property at 2323 Charms Rd., 728 F. Supp. 1326, 1329-30 (E. D. Mich. 1990).

(n6)Footnote 361. *946 F.2d at 441.*

(n7)Footnote 362. Judge Merritt argued that "the government should not be able to confiscate a citizen's property summarily -- whether a home, a car, or an airplane -- on the vague and indefinite allegations of the complaint in this case. If it can do so, every citizen's property is in peril, not just alleged drug dealers."

(n8)Footnote 363. *See United States v. B & M Used Cars, 860 F.2d 121 (4th Cir. 1988).*

(n9)Footnote 364. *See* United States v. Certain Real Property Known as and Located at 1461 West 42nd Street, Miami, Florida, 998 F. Supp. (S.D. Fla. 1998) (innocent owners entitled to rents and profits of which they were deprived during the period of the illegal seizure, to damages for loss of use and enjoyment of the property, and to lost principal, default interest and late fees); *United States v. $38,000.00 in United States Currency, 816 F.2d 1538 (11th Cir. 1987). See also* Claudio Riedi, *To Shift or To Shaft: Attorney Fees for Prevailing Claimants In Civil Forfeiture Suits, 47 U. Miami L. Rev. 147 (1992)* (an excellent discussion of this subject).

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CHAPTER 77 FORFEITURES

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AUTHOR: Professor Stephen A. Spitz The author would like to acknowledge the invaluable assistance of a number of U.S.C. Law School law students, including Thomas Shelley, III, Bruce Haynes, Henry Cabaniss, Constance Boken, Lauren Ferrari and Mark Fava and would also like to thank Celeste Jones, Esquire of McNair and Sanford, P. A. All these individuals were extraordinarily helpful, and the least that can be done is a public note of appreciation. University of South Carolina Law School

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Annotation, *Who Is Exempt from Forfeiture of Drug Proceeds Under 'Innocent Owner' Provision of 21 U.S.C.S. § 881(a)(4), 109 A.L.R. Fed. 322.*

Annotation, *Who is Exempt from Forfeiture of Real Property Under 'Innocent Owner' Provision of 21 U.S.C.S. §881(a)(7),* 110 A.L.R. fed. 569.

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Supp. To CHAPTER 77 FORFEITURE

9-77 Thompson on Real Property, Thomas Editions Supp. to § 77.02

Supp. to § 77.02 The Modern Statutes.

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§ 77.02(a) Federal Civil Statutes. [Go To Main]

Add to the text after "Civil forfeitures now exist in Titles 16 ... : ... in Titles 7, 8, ..."

7 USC § 1379(i) (forfeiture of marketing certificates by a wheat producer who violates agricultural statutes)

8 USC § 1824(b) (forfeiture of any vessels, vehicle or aircraft used in the transportation of illegal aliens)

Add:

United States v. Hooper, 229 F.3d 818 (9th Cir. 2000) (even assuming that the state would recognize a community property interest asserted by a wife, the federal criminal forfeiture statute precluded innocent owner relief); *United States v. Land, Winston County, 221 F.3d 1194 (11th Cir. 2000)* (forfeiture statute is remedial in nature and does not abate upon property owner's death).

Add:

United States v. One Single Family Residence at 2200 SW 28th Avenue, Fort Lauderdale, Florida, 204 F. Supp. 2d 1361 (S.D. Fla. 2002) (homestead property was subject to federal forfeiture).

§ 77.02(b) State Statutes [Go To Main]

Corrections to the citations in the text:

Arkansas--*Ark. Code Ann. § 5-64-505*

District of Columbia-D.C. Code Ann. § 48-905.02

Georgia--*Ga. Code Ann. § 16-14-7*

Illinois--Ill. Ann. Stat. 720 ILLS § 1.46/85

Indiana--Ind. Code Ann. *IC34-24-1*

Iowa--*Iowa Code Ann. § 809A.4*

Louisiana--La. Rev. Stat. Ann. § 15:1405.2

Maryland--765 Ill. Comp. Stat. Ann. 606/22

Minnesota--*Minn. Stat. Ann. § 609.5311*

Montana--*Mont. Code Ann. § 44-12-102*

New Hampshire--*N.H. Rev. Stat. Ann. § 141-E:17*

North Carolina--*N.C. Gen. Stat. § 75D-5*

North Dakota--N.D. Cent. Code § 19-031-36

Ohio--*Ohio Rev. Code Ann. 21* 2981.03

Pennsylvania--*61 Pa. Code 39.9*

Rhode Island--*R.I. Gen. Laws § 11-17-13*

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Supp. To CHAPTER 77 FORFEITURE

9-77 Thompson on Real Property, Thomas Editions Supp. to § 77.03

Supp. to § 77.03 The Seizure of Property.

[Go To Main]

§ 77.03(a) Prior Notice and Meaningful Hearing. Ky. Rev. Stat. Ann. § 324-020

Add:

See Kind Hearts for Charitable Humanitarian Dev., Inc. v. Geithner, 2010 U.S. Dist. LEXIS 45175 (Ohio 2010) . See also United States v. Approximately $ 37,000.00 in *United States Currency, 2005 U.S. Dist. LEXIS 24009 (D. Cal. 2005)* (affirming a motion for default judgment against defendants who were given adequate notice and opportunity to be heard). *Habich v. City of Dearborn, 2004 U.S. Dist. LEXIS 5020* (No. 00-74221, E.D. Mich., Mar. 26, 2004); *Hanson v. Educ. Credit Mgmt. Corp. (In re Hanson), 308 B.R. 903 (W.D. Wis. 2004)* ; *Grayden v. Rhodes, 345 F.3d 1225,* (11th Cir. 2003) ; *Espindola v. State, 855 So. 2d 1281 (Fla. App. 2003)* .

Also:

Goldburg v. Kelly 397 U.S. 254 (1970) is superseded in West Virginia by statute as stated in *State ex rel. K.M. v. W.Va. Dep't of Health & Human Res., 575 S.E. 2d 393 (W. Va. 2002)* .

After second paragraph which states "Nonetheless, exceptions do exist." add new note 56.1 n56.1

Add: n*

Add

See also United States v. 1461 West 42nd Street, Hialeah, Fla., 251 F.3d 1329 (11th Cir. 2001) .

Add:

Cagle v. King County, 70 Fed. Appx. 450, 453 (9th Cir. 2003) (affirming a seizure of property without prior notice or hearing to protect the public from contaminated properties where chemical residues commonly associated with the manufacture of illegal drugs may be present).

§ 77.03(b) Methods of Forfeiture. [Go To Main]

Add

United States v. Mondragon, 313 F.3d 862, 864 (4th Cir. 2002) (requiring that a complaint against property allegedly connected to drug trafficking state the circumstances from which the complaint arises with such particularity that the defendant or claimant will be able to commence investigation of the facts and frame a responsive pleading); United States v. $ 4,096.00 in *U.S. Currency, 2005 U.S. Dist. LEXIS 40333* (M.D. Ga. May 6, 2005) (requiring the government to meet its substantive obligation to allege facts in the complaint sufficient to establish that the property has been properly forfeited).

United States v. Vasquez-Ruiz, 136 F. Supp. 2d 941 (N.D. Ill. 2001) (the bill of particulars is required to identify the property subject to forfeiture). *U.S. v. Approximately $24,260.00 in U.S. Currency, 2010 U.S. LEXIS 43949 (E.D. Cal. 2010)* (The complaint filed met the requirements of the Supplemental Rules for Admiralty or Maritime Claims and Asset Forfeiture Actions.); *U.S. v. 2007 Chevrolet Tahoe SUV, 2010 U.S. Dist. LEXIS 9959 (E.D. Cal. 2010)* .

Add

See also United States v. Loe, 248 F.3d 449 (5th Cir. 2001) (indictment sufficiently identified real property that was subject to forfeiture).

Add:

Add

Dusenbery v. United States, 534 U.S. 161 (2002) (*Mullane* test of reasonableness under the circumstances, rather than

Mathews v. Eldridge balancing test, applied in determining whether notice of forfeiture sent through certified mail to federal prison where claimant was incarcerated, residence where arrest occurred, and address in town where his mother lived, satisfied due process requirements); *State v. All Real Property, 37 P.3d 276 (Utah Ct. App. 2001)* (claimant was properly served by certified mail with notice of state forfeiture action).

Add:

United States v. Approximately $ 37,000.00 in *United States Currency, 2005 U.S. Dist. LEXIS 24009 (D. Cal. 2005)* (affirming a motion for default judgment brought by Attorney General against defendants under § 881).

See Jorge G. Aristotelidis, *Article: Trained Canines at the U.S.-- Mexico Border Region: A Review of Current Fifth Circuit Law and a Call for Change, 5 Scholar 227 (2003)* .

Add:

David W. Duke and Richard Shane Strabala, *Survey Criminal Law*, 22 U. Ark. Little Rock L. Rev. (Winter 2000); Roger M. Young, *An Overview of Real Property Tax Sales in South Carolina*, 11 S.C. Law. 25 (1999); Emily L. Dimperio, *When a State Seizes Property During a Criminal Investigation, Due Process Requires Notice that the Property Was Seized, But Does Not Require Detailed Notice of Post-Seizure Remedies:* City of West Covina v. Perkins, *45 Wayne L. Rev. 1159 (1999).*

§ 77.03(c) *In Rem* Jurisdiction. [Go To Main]

Add:

United States v. Funds from *Prudential Sec., 362 F. Supp. 2d 75, 83 (D.D.C. 2005)* (upholding a decree for forfeiture against a defendant whose activity was sufficiently suspicious but did not give rise to criminal charges). *Settle v. Com., 685 S.E.2d 182, 185 (Va. App. 2009)* (Forfeiture is a civil action against the res and remains distinct from prosecution of its owner).

Add:

P.R. Ports Auth. v. Barge KATY-B, 427 F.3d 93, 102 (1st Cir. 2005) (jurisdiction was perfected by the initial seizure of the res and was not divested by the subsequent sailing of a boat out of the court's jurisdiction); *Ventura Packers, Inc. v. F/V Jeanine Kathleen, 424 F.3d 852, 861 (9th Cir. 2005)* (upholding in rem jurisdiction after the district court ordered the return of security for the confiscated vessel).

Thomas v. Troy City Bd. of Educ., 302 F. Supp 2d. 1303 (M.D. Ala. 2004) .

Add:

See Vicki C. Jackson, *Symposium: The United States Court of Federal Claims 20th Anniversary Conference: Suing the Federal Government: Sovereignty, Immunity, and Judicial Independence, 35 Geo. Wash. Int'l L. Rev. 521 (2003).*

Add:

See generally Charmin Bortz Shiely, *Note, Unites States v. Bajakajian: Will a New Standard for Applying the Excessive Fines Clause to Criminal Forfeitures Affect Civil Forfeiture Analysis?, 77 N.C. L. Rev. 1595 (1999).*

Add:

See Linn, Courtney J. *International Asset Forfeiture and the Constitution: The Limits of Forfeiture Jurisdiction Over Foreign Assets Under 28 U.S.C. 1355(b)(2). 31 Am. J. Crim. L. 251 (Spring 2004).*

Republic Nat'l Bank is not without its critics, however. *See United States v. Thomas, 319 F.3d 640 (3d Cir. 2003)* (allowing for federal agents to convert seized monies to a cashier's check as it was not "abandonment" of the res).

§ 77.03(d) Probable Cause. [Go To Main]

Modify the second sentence of the footnote as follows:

"First, Fourth, [delete 'and'] Eighth, [add 'and'] Eleventh Circuits hold ... "; and then at end of footnote add: *United States v. Carrell, 252 F.3d 1193 (11th Cir. 2001)* (requires a "substantial connection").

Add:

U.S. v. Jones, 502 F.3d 388 (6th Cir. 2007) (the government failed to establish a nexus between the criminal activity and the property owned by the defendant); *State ex rel. Peterson v. Crawshaw, 165 P.3d 356 (Okla. App. 2007)* (state established that defendant's property was used to commit or facilitate drug trafficking).

Add:

U.S. v. $186,416.00 in U.S. Currency, 583 F.3d 1220, 1226 (9th Cir. 2009) ; *Return of Seized Property v. U.S., 625 F. Supp. 2d 949, 952-953 (C.D. Cal. 2009)* ; See also *State v. Martin, 2010 La. App. LEXIS 443 (La. App. 1 Cir. 2010)* (Police vehicle search that found $46,750 hidden in a broken VCR player and smelling of marijuana satisfied probable cause for forfeiture of the currency).

Add:

See also United States v. $ 17,771.00 in *United States Currency, 2005 U.S. Dist. LEXIS 19323 (D. Ga. 2005)* (finding probable cause that the property was used for illicit drugs).

Add:

See generally Audrey Benison, et al., *Warrantless Searches and Seizures 87 Geo. L.J. 1124 (1999);* Melissa A. Rolland, *Comment, Forfeiture Law,* The *Eighth Amendment's* Excessive Fines Clause and United States v. Bajakajian *74 Notre Dame L. Rev. 1371 (1999).*

Add:

United States v. St. George, 241 F. Supp. 2d 875 (E.D. Tenn. 2003) (government not required at subsequent hearings in a forfeiture proceeding to re-establish probable cause to believe that defendant is guilty of underlying offense); *United States v. All Funds on Deposit in Dime Sav. Bank of Willamsburg Account No. 58-400738-1 in the Name of Ishar Abdi and Barbara Abdi, 255 F. Supp. 2d 56 (E.D. N.Y. 2003)* (claimant's opposition to forfeiture proceeding was insufficient to entitle him to a probable cause hearing).

Add:

United States v. 1948 South Martin Luther King Drive, 270 F.3d 1102 (11th Cir. 2001) ; *Beaston v. Ebersole, 986 A.2d 876 (Pa. Super. 2009)* (Nexus existed between the seized computers and criminal activity); *U.S. v. $200,500.00 in U.S. Currency, 659 F. Supp. 2d 309, 310 (D. P.R. 2009)* (Sufficient nexus was created to establish probable cause against currency being used in a drug offense).

Add:

See United States v. One "Piper" Aztec "F" DeLuxe Model 250PA 23 Aircraft, 321 F.3d 355 (3d Cir. 2003) ; *In re Best Payphones, Inc., 2003 Bankr. LEXIS 180* (No. 01-15472(SMB), Bankr. S.D.N.Y., Mar. 10, 2003); United States v. $ 7,300 in *United States Currency, 2003 U.S. Dist. LEXIS 10968* (No. 02 Civ. 3633 (GEL), S.D.N.Y., June 26, 2003); *United States v. Parcel of Property, 337 F.3d 225 (2d Cir. 2003)* ; *United States v. United States Currency in the Amount of Two Hundred Forty-Eight Thousand Four Hundred Thirty Dollars, 2004 U.S. Dist. LEXIS 7072* (No. CV-01-5036 (SJF) (ASC), E.D.N.Y., Apr. 14, 2004).

§ 77.03(e) Burdens of Proof. [Go To Main]

Add:

Brewer v. Com. of Ky., 206 S.W.3d 313 (Ky. 2006) (property used for several counts of trafficking in marijuana was subject to forfeiture).

Add:

See also Commonwealth of Penn. v. 1992 Chevrolet, 844 A.2d 583 (Pa. Commw. Ct. 2004) (on the switching of the burden of proof from the government to the claimant and back again).

Add:

255 F. Supp. 2d 56 (E.D. N.Y. 2003) ; *United States v. $1,790,021 in U.S. Currency, 261 F. Supp. 2d 310 (M.D. Pa. 2003)* ; *United States v. Contents in Account No. 059-644190-69, 253 F. Supp. 2d. 789 (D. Vt. 2003)* .

Add:

United States v. Parcel of Property, 337 F.3d 225 (2d Cir. 2003) .

§ 77.03(f) Civil and Criminal Distinctions. [Go To Main]

Add:

See also *U.S. v. 867 County Road 2010 U.S. Dist. LEXIS 33466* (Burden of proof for the government is different in civil forfeiture cases than criminal ones).

correct text at the end of the 2nd paragraph:

"beyond a reasonable double" to "beyond a reasonable doubt"

Add:

For additional discussion between the distinctions between civil and criminal forfeiture proceedings, *see United States v. Vondette, 352 F.3d 772 (2d Cir. 2003)* ; United States v. One "Piper" Aztec "F" Deluxe Model 250PA 23 Aircraft,

321 F.3d 355 (3d Cir. 2003) ; *In re* One Residence at 319 E. Fairgrounds Dr., 71 P.3d 930 (Ariz. App., 2003) ; *United States v. Saccoccia, 354 F.3d 9 (1st Cir. 2003)* ; *United States v. Parcel of Property, 337 F.3d 225 (2d Cir. 2003)* .

Add:

State v. Caulfield, 2001 Del. Super. LEXIS 63 (Del. Super. 2001) (right to jury trial in forfeiture proceeding recognized). While some courts have questioned *Austin* (*see Bennis v. Michigan , 516 U.S. 442 (1996)* ; *People v. Hernandez, 694 N.E.2d 1082 (Ill. App. 1998)* ; *People v. Baptist, 672 N.E.2d 398 (Ill. App. 1996)* ; *State ex rel. Macy v. 1990 Honda Accord, 934 P.2d 376 (Okla. App. 1996)* ; *Garcia v. State, 1997 Tex. App. LEXIS 5891* (No. 01-96-00712 CR, Nov. 13, 1997)), other recent courts have upheld and followed it, (*see In re* One Residence at 319 E. Fairgrounds Dr., 71 P.3d 930 (Ariz. App. 2003) ; *Wilson v. Comm'r of Revenue, 656 N.W.2d 547 (Minn. 2003) aff'd, 707 N.W.2d 695 , reh'g denied, 2003 Minn. LEXIS 190* .

§ 77.03(g) Criticism of Forfeitures. [Go To Main]

Add:

Kathrine J. Standburg, *Article: Deterence and the Conviction of Innocents 35 Conn. L. Rev. 1321* (Spring, 2003); Amitabh Agarwal, Adam Gusman and James Pyle, *Article: Financial Institutions Fraud, 40 Am. Crim. L. Rev. 637 (2003);* Brandon Bortner & Douglas Miller, *Article: Procedural Issues, 40 Am. Crim. L. Rev. 933 (2003);* Michael A. Cavanagh and M. Jason Williams *Article: Low-Income Grandparents as the Newest Draftees in the Government's War on Drugs: A Legal and Rhetorical Analysis of Department of Housing and Urban Development V. Rucker 10 Geo. J. Poverty Law & Pol'y 157 (2003);* Rachel A. Van Cleave, *Article: "Death Is Different," Is Money Different? Criminal Punishments, Forfeitures and Punitive Damages Shifting Constitutional Paradigms for Assessing Proportionality, 12 S. Cal. Interdis. L.J. 217 (2003).*

FOOTNOTES:

(n2)Footnote 56.1. *U.S. v. One Hundred Thirty-Eight Thousand, Three Hundred Eighty-One Dollars, 240 F. Supp. 2d 220 (E.D. N.Y. 2003)* (where claimant was barred by fugitive disentitlement statute from challenging, in civil forfeiture proceedings, propriety of government's seizure of funds that he was convicted of illegally transporting out of country, where claimant had notice that a warrant had been issued for his arrest for a probation violation.)

(n3)Footnote *. *See* Evan Williford, *The Basics of Forfeiture: Testing the Limits of Constitutionality, 14 Crim. Just. 26 (Winter 2000);* Robert H. Freilich, et al., *Federalism at the Millennium: A Review of U.S. Supreme Court Cases Affecting State and Local Government, 38 Duq. L. Rev. 139 (1999); Morgenthau v. A. J. Travis, Ltd., 708 N.Y.S.2d 827 (2000)* (injunction and attachment granted if success in forfeiture proceeding is likely and there is a risk that the property will be unavailable).

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Supp. To CHAPTER 77 FORFEITURE

9-77 Thompson on Real Property, Thomas Editions Supp. to § 77.04

Supp. to § 77.04 Defenses to the Seizure.

[Go To Main]

§ 77.04(a) Standing. [Go To Main]

Add:

U.S. v. 40 Acres of Real Property, More or Less, 629 F. Supp. 2d 1264, 1275 (S.D. Ala. 2009) (Claimant was deprived of statutory standing to pursue a claim to property after failing to file an answer).

Add:

U.S. v. Browne, 552 F. Supp. 2d 1342 (S.D. Fla. 2008) (the wife, a joint owner of the property with her husband, who was convicted of racketeering, was held to have no interest in the property).

United States v. Eight Hundred Sixty Thousand Three Hundred and Ten Dollars in U.S. Currency, 2001 U.S. App. LEXIS 13253 (10th Cir., Jun. 13, 2001) (claimant who acquired title to seized properties through forged documents did not have sufficient interest in the properties to establish standing to challenge civil forfeiture); *United States v. One Lucite Ball Containing Lunar Material, 252 F. Supp. 2d 1367 (S.D. Fla. 2003)* (Claimant had standing to contest forfeiture of moon rock, despite government's assertion that he had not abided by the contract to sell the materials); United States v. $ 1,790,021 in *U.S. Currency, 261 F. Supp. 2d 310 (M.D. Pa. 2003)* (Claimant did not have standing to request suppression of evidence obtained in alleged violation, as he disclaimed ownership in the target vehicle); United States v. $ 746,198 in *United States Currency, 299 F. Supp. 2d 923* (S.D. Iowa, 2004) (neither the son, in possession of a large sum of cash, nor the father, the alleged finder, had standing to claim the seized money since neither had complied with state's finder's laws); *Wash. County Water Conservancy Dist. v. Morgan, 82 P.3d 1125 (Utah 2003)* (finding that a water conservation administrative body lacked standing to make a claim on the granting of water rights by the state engineer to private parties).

Add:

United States v. 8402 W. 132nd Street, Palos Park, Illinois, 103 F. Supp. 2d 1040 (N.D. Ill. 2000) (neither beneficiary nor trustee of trust had standing to contest forfeiture of property).

Add:

See also United States v. 100,348.00 in U. S. Currency, 354 F.3d 1110 (9th Cir. 2004) (where a bailee of cash was declared to have an interest in the money as to bring suit to claim its recovery).

§ 77.04(b) Innocent Owner. [Go To Main]

Add to text:

The statutory definition of innocent owner formerly set forth in *21 U.S.C. § 881(a)(7)* was deleted in 2000. However, *18 U.S.C. § 983(d)* provides an innocent owner provision which reads, in part:

(1) An **innocent owner's** interest in property shall not be forfeited under any civil forfeiture statute. The claimant shall have the burden of proving that the claimant is an **innocent owner** by a preponderance of the evidence.

(2) (A) With respect to a property interest in existence at the time the illegal conduct giving rise to forfeiture took place, the term **"innocent owner"** means an **owner** who--

(i) did not know of the conduct giving rise to forfeiture; or

(ii) upon learning of the conduct giving rise to the forfeiture, did all that reasonably could be expected under the circumstances to terminate such use of the property.

Add:

U.S. v. Shefton, 548 F.3d 1360, (11th Cir. 2008) (forfeiture was invalid, because another party had a superior interest in the property).

Add:

But see Conservation Force v. Salazar, 677 F. Supp. 2d 1203, 1208 (N.D. Cal. 2009) (innocent owner defense is not available under *18 USC § 983(d)(4)* for property that is illegal to possess).

Add:

United States v. Gilbert, 244 F.3d 888 (11th Cir. 2001) (forfeiture reaches only the defendant's interest in the property); United States v. Real Property, Buildings, Appurtenances and Improvement located at 221 *Dana Avenue, Hyde Park, Massachusetts, 239 F.3d 78 (1st Cir. 2001)* (dower interest was sufficient basis for innocent owner defense); *Williams v. Auto Owners Insurance Company, 779 So. 2d 563 (Fla. App. 2001)* (the relation-back provision of a forfeiture statute did not divest an assignee of her interest); *State v. Burgraff, 542 S.E.2d 909 (W. Va. 2000)* (evidence must show a connection between the property and the crime); *United States v. Brooks, 112 F. Supp. 2d 1035 (D. Haw. 2000)* (defense claimant had to prove that her interest vested before the commission of the criminal acts); *United States v. Real Property Known as 1700 Duncanville Road, 1703 South Main Street, and 1707 Main Street, in Duncanville, Texas, 90 F. Supp. 2d 737 (N.D. Tex. 2000)* (forfeiture of property purchased in party with non-tainted funds did not violate the *8th Amendment*); *United States v. Real Property, Buildings, Appurtenances and Improvements Located at 221 Dana Avenue, Hyde Park, Massachuseetts, 81 F. Supp. 2d 182 (D. Mass. 2000)* (a wife was not an innocent owner if she did not acquire an interest in the property until after becoming aware of the husband's criminal activities).

Add:

See also U.S. v. United States Currency in the Amount of United States, 2004 U.S. Dist. LEXIS 7072 (No. CV-01-5036 (SJF) (ASC), Apr. 14, 2004) (where a suspected drug smuggler's claim of innocence to the knowledge of illegal activity regarding the money in question was tainted by the man's criminal history);

Add:

United States v. Funds from *Prudential Sec., 362 F. Supp. 2d 75, 83 (D.D.C. 2005)* (upholding a decree for forfeiture against a defendant who failed to prove she was not involved in illicit drug trade).

United States v. Twenty One Thousand Dollars in United States Postal Money Orders and*United States, 298 F. Supp. 2d 597 (E.D. Mich. 2004)* .

Add:

See also United States v. Cleckler, 270 F.3d 1331 (11th Cir. 2001) (holding that "without knowledge or consent" owner had to be read in the disjunctive, and citing Civil Asset Forfeiture Act of 2000, stating that innocent owner defense available to owner who (i) has no knowledge of illegal conduct; or (ii) upon learning of illegal conduct, takes no steps to terminal illegal conduct; *see 18 U.S.C. § 983(d)*); *but see United States v. Carrell, 252 F.3d 1193 (11th Cir. 2001)* (read conjunctively).

Add:

U.S. v. Brewer, 591 F. Supp. 2d 864 (N.D. Tex. 2008) (the wife could not claim an ownership interest in the propery based on the mortgage or on the payments she had made).

United States v. Nava, 404 F.3d 1119 (9th Cir. 2005) (claimant's success in having forfeiture set aside depending on claimant's proving ownership of the property).

Add:

See also United States v. $746,198 in U.S. Currency, 299 F. Supp. 2d 923 (S.D. Iowa, 2004) (where it was held that a bailee cannot be, by definition, an innocent owner).

Add:

See also United States v. $100,348 in U. S. Currency, 354 F.3d 1110 (9th Cir. 2004) (even though the petitioner was not the true "owner" of the seized money, he did have a strong enough interest in the money as the courier to justify his assertion of the "innocent owner" defense).

Add:

See also United States v. Real Property in Section 9, Town 29, North, Range United States, 308 F. Supp. 2d 791 (E.D. Mich. 2004) .

Add:

U.S. v. Wahlen, 459 F. Supp. 2d 800 (E.D. Wis. 2006) (forfeiture included certain substitute property and directly-forfeitable property in the account of defendant's wife). *See Laase v. 2007 Chevrolet Tahoe, 776 N.W.2d 431 (Minn. 2009)* (reversed lower court ruling, and held that innocent owner defense does not apply when one joint owner of property is the offender that caused forfeiture).

See also United States v. Bennett, 2004 U.S. Dist. LEXIS 6595 (No. 97 Cr. 639 (SAS), S.D. N.Y., Apr. 14, 2004); United States v. Real Property Identified as: PARCEL 03179-005R, Legal Description Sec 19 TWN 9, *RNG 10, Port St. Joe, Florida, With All Appurtenances and Attachments Thereon 287 F. Supp. 2d 45 (D.D.C. 2003)* ; *United States v. Wendling, 359 F. Supp. 2d 850 (D. N.D. 2005)* (property used for growing marijuana and owned jointly with another was forfeited); *Pacheco v. Serendensky, 393 F.3d 348 (2d Cir. 2004)* (partial forfeiture of real estate).

Add:

U.S. v. Carmichael, 433 F. Supp. 2d 1259 (M.D. Ala. 2006) (materialmen's lien against forfeited property was not extinguished).

United States v. Harris, 246 F.3d 566 (6th Cir. 2001) (mortgage lenders were entitled to agreed upon prepayment premiums upon forfeiture of the mortgaged property).

§ 77.04(c) Excessive Fine. [Go To Main]

Add:

Cody Discount, Inc. v. Merritt, 629 S.E.2d 697 (S.C. App. 2006) (forfeiture held to be a penalty and not enforceable in equity).

United States v. 1948 South Martin Luther King Drive, 270 F.3d 1102 (11th Cir. 2001) (Punitive forfeitures are subject to excessive fines clause of *8th Amendment*); *Hooper v. State, 555 S.E.2d 842 (Ga. Ct. App. 2001)* ; *United States v. Bernitt, 392 F.3d 873 (7th Cir. 2004)* (forfeiture held to not violate *8th Amendment*).

Add:

But see United States v. One 1995 Grady White 22' *Boat, 2006 U.S. Dist. LEXIS 6069 (D. Md. 2006)* (forfeiture of a residence, boat, and trailer used in connection with marijuana production was not grossly excessive).

Rabern v. State, 531 S.E.2d 373 (Ga. 2000) (forfeiture of house and 5.2 acres of land held excessive); *State v. Real Property at 633 East 640 North, Orem, Utah, 2000 UT 17, 994 P.2d 1254 (Utah 2000)* (forfeiture of residence was held to be a grossly disproportionate penalty).

Add:

See U.S. v. Sabhnani 559 F.3d 215 (2d Cir. 2010) (forfeiture of entire home was not grossly disproportionate to the offense of forced labor and peonage and therefore not a violation of the Excessive Fines Clause).

Add:

United States v. One Hundred & Twenty Thousand Eight Hundred & Fifty Six Dollars in United States Currency More Or Less, 394 F. Supp. 2d 687, 694 (D.V.I. 2005) (forfeiture of property held to be "totally unconscionable" because the government did not produce any evidence connecting the forfeiture to any illegal activities).

In re One Residence at 319 E. Fairgrounds Dr., 71 P.3d 930, (Ariz. App. 2003) ; *Wilson v. Comm'r of Revenue, 656 N.W.2d 547 (Minn. 2003)* ; *One Car, 1996 Dodge X-Cab Truck v. State, 122 S.W.3d 422,* (Tex. App. 2003) .

Add:

See United States v. Santosdedios, 240 F. Supp. 2d 414, 422-423 (D. Md. 2002) (finding the administrative costs of $200 demanded from Defendant for theft were not excessive in relation to the purpose of the demand).

Add:

United States v. Approximately 600 Sacks of Green Coffee Beans, 381 F. Supp. 2d 57, 64 (D.P.R. 2005) (holding that an in rem forfeiture that was both remedial and punitive did not violate the *Eighth Amendment*).

Add:

Howell v. State, 656 S.E.2d 511 (Ga. 2008) (forfeiture was not an excessive fine). *See also U.S. v. Hull, 2010 U.S. App. LEXIS 10696 (8th Cir. 2010)* (forfeiture of nineteen acres of property for distribution of child pornography was not a violation of the Excessive Fines Clause, because the offense was especially serious, and the value of the property was within the maximum fine for such an offense); *U.S. v. Sabhnani, 599 F.3d 215 (2d Cir. 2010)* (forfeiture of home was not in violation of the Excessive Fines Clause because the forfeiture was not grossly disproportionate to the severity of the offenses relating to forced labor and peonage); *U.S. v. Cheeseman 600 F.3d 270 (3d Cir. 2010)* (forfeiture of 609 firearms was not grossly disproportionate to the offense of abusing drugs while illegally possessing firearms).

United States v. 32 Medley Lane, 372 F. Supp. 2d 248, 272 (D. Conn. 2005) (forfeiture of residence was held not to be unconstitutionally excessive).

§ 77.04(d) Double Jeopardy. [Go To Main]

Add:

U.S. v. Venturella, 585 F.3d 1013 (7th Cir. 2009) (enforcement of restitution and forfeiture for mail fraud did not create double jeopardy).

Add:

Dye v. Frank, 355 F.3d 1102 (7th Cir. 2004) ; United States v. Real Prop. Identified As Parcel 03179-005*R, 287 F. Supp. 2d 45* (D.D.C., 2003) ; *Davis v. State, 819 N.E.2d 863 (Ind. App. 2005)* (criminal convictions after civil forfeiture of property did not constitute double jeopardy).

Add:

U.S. v. Wittig, 575 F.3d 1085, 1096 (10th Cir. 2009) ("Double jeopardy does not apply to the forfeiture findings

because forfeiture is a component of a sentence rather than an 'offense' for which the defendants were tried").

Add:

United States v. Santosdedios, 240 F. Supp. 2d 414, 421-422 (D. Md. 2002) (holding the defendant subject to both civil penalty and criminal punishment for the same theft).

United States v. One Parcel Property Located at 7079 Chilton County Road 37, Clanton, Chilton County, Alabama, 123 F. Supp. 2d 602 (M.D. Ala. 2000) (forfeiture of property held to be not unconstitutionally excessive).

After the first two full paragraphs, delete the balance of the subsection and replace with the following:

Halper has since been overruled by *Hudson v. United States, 522 U.S. 93 (U.S. 1997)* . *Halper's* test proved unworkable, creating confusion by attempting to distinguish between "punitive" and "nonpunitive" penalties. The Court thus returned to the "traditional" methods of determining double jeopardy; determining if the case was primarily civil or criminal in nature, and evaluating the statute to determine whether it provided for, what amounted to, a criminal sanction.

See Megan R. Wischmeier, *Protecting Individuals from "Double Jeopardy" in a Post-Hudson Era, 90 Iowa L. Rev. 1275 (2005);* Troy D. Cahill, Note, *The Supreme Court's Decision in Hudson v. United States: One Step Up and Two Steps Back for Multiple Punishment Protection Under the Double Jeopardy Clause , 33 Wake Forest L. Rev. 439 (1998).*

Add:

See also Royal C. Gardner, *Invoking Private Property Rights For Environmental Purposes: The Takings Implications of Government-Authorized Aerial Pesticide Spraying, 18 Stan. Envtl. L.J. 65 (1999).*

Dye v. Frank, 355 F.3d 1102, 1108 (7th Cir. 2004) (finding the reasoning from *Kurth Ranch* still applicable post *Hudson* and holding that a tax statute applicable to possession of narcotics was so punitive that it qualified as a criminal punishment subject to double jeopardy analysis).

§ 77.04(e) Undue Delay [Go To Main]

Add:

United States v. Tunkara, 385 F. Supp. 2d 1119, 1124-1125 (D. Kan. 2005) (disallowing the forfeiture of cash seized more than three years before the marijuana offense at issue).

United States v. Ninety-Three Firearms, 330 F.3d 414 (6th Cir. 2003) ; *United States v. Assorted Computer Equip.,*

2004 U.S. Dist. LEXIS 6334 (No. 03-2356V, W.D. Tenn., Jan. 9, 2004); *Crawford v. State, 859 A.2d 624 (Del. 2004)* (expiration of one-year statute of limitations resulted in state's waiver of its entitlement to seek forfeiture of property).

Add:

See U.S. v. $131,551.03 Plus Accrued Interest from *Sale of 10 Table Bluff Road, 2010 U.S. Dist. LEXIS 26524 (N.D. Cal. 2010)* (four-year delay between the seizure of property and trial did not constitute undue delay because the government was able to present sufficient reasons for the lengthy delay).

§ 77.04(f) Statutes of Limitations. [Go To Main]

After first sentence " ... in appropriate situations," add new footnote: n310.1

Modify Text. Add, at the end of the second paragraph:

The statute was modified in 2000 to include the text: "or in the case of forfeiture, within 2 years after the time when the involvement of the property in the alleged offense was discovered, whichever was later."

§ 77.04(g) Self-Incrimination. [Go To Main]

Add:

United States v. Twelve Pieces of Real Prop., 54 Fed. Appx. 461 (9th Cir., 2003) ; *United States v. All Meat & Poultry Prods., 2003 U.S. Dist. LEXIS 17677* (No. 02 C 5145, N.D. Ill., Oct. 3, 2003).

§ 77.04(h) First Amendment. [Go To Main]

Add:

See also United States v. Ganley, 300 F. Supp. 2d 200 (D. Me., 2004) (claimant asserted his *First Amendment* rights after he had property seized for broadcasting without a license).

§ 77.04(i) Other Defenses. [Go To Main]

Add:

Rashid v. Powell, 210 F.3d 201 (3d Cir. 2000) (forfeiture did not qualify as a fraudulent conveyance under the Bankruptcy Code).

After the end of the second sentence in the first paragraph, " ... and disapproved Coffey." add new footnote: n351.1

Add:

Carlisle v. One (1) Boat, 195 P.3d 1177 (Haw. 2008) (forfeiture denied because seizure was under authority of an administrative regulation that did not authorize forfeiture as a remedy).

Add:

Silver Chevrolet Pickup v. State, 99 S.W.3d 874 (Tex. App. 2003) (failure to timely file a lis pendens on seized real property deprived the court of jurisdiction to conduct forfeiture proceeding).

Add:

Hooper v. State, 572 S.E.2d 340 (Ga. App. 2002) (forfeiture applied to only the mobile home and the real property on which it rested).

FOOTNOTES:

(n4)Footnote 310.1. *See United States v. Rodriguez-Aguirre, 264 F.3d 1195 (10th Cir. 2001)* (motions for return of seized property are governed by six-year statute of limitations, which generally may not be shortened by laches; limitations period begins to run when claimant has reasonable inquiry notice about forfeiture, but where no forfeiture proceeding is brought, limitations period begins to run when criminal proceedings have concluded); *United States v. Carrell, 252 F.3d 1193 (11th Cir. 2001)* (limitations period did not commence running until government discovered connection between drug sales and properties, not on earlier date when properties were titled in names of drug dealer's family members); but see *United States v. Twenty-seven Parcels of Real Property Located in Sikeston, Scott County, Mo., 236 F.3d 438 (8th Cir. 2001)* (Limitations period began to run when drug offense was discovered, not at the later time when connection of properties to offense was discovered).

(n5)Footnote 351.1. *See also United States v. Real Property Located at U.S. Highway South, Maryville, Tennessee, 2001 U.S. App. LEXIS 26673* (6th Cir., Dec. 12, 2001) (government was not prohibited from filing civil forfeiture complaints by the holding of *Apprendi* on the ground that the forfeiture actions had not been part of criminal trial process, civil forfeiture proceeding not an extension of criminal proceedings and penalties); *United State v. Cabeza, 258 F.3d 1256 (11th Cir. 2001)* (*Apprendi* rule does not apply to forfeiture proceedings following a criminal conviction).

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Supp. To CHAPTER 77 FORFEITURE

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Add:

United States v. $293,316 in United States Currency, 2005 U.S. Dist. LEXIS 22860, 5-6 (D.N.Y. 2005) (denying a reward of attorney's fees under EAJA based on its finding that the United States was substantially justified in the litigation); *United States v. Pease, 137 Fed. Appx. 220 (11th Cir. 2005)* (finding the district court did not abuse its discretion in denying the defendants' motion for attorney's fees under EAJA because the matter was substantially justified).

United States v. $30,006.25, etc., 236 F.3d 610 (10th Cir. 2000) (sovereign immunity prohibited awarding interest upon return of property).

Add:

United States v. Harris, 246 F.3d 566 (6th Cir. 2001) (mortgage lenders were entitled to prepayment premiums upon forfeiture of the mortgaged property); *United States v. 100,348.00 in U.S. Currency, 354 F.3d 1110, 1124* (9th Cir., 2004) ; *Krecioch v. United States, 316 F.3d 684* (7th Cir., 2003) ; *In re Mgndichian, 2003 U.S. Dist. LEXIS 25260* (No. CV 02-09580 MMM (Shx), C.D. Calif., Oct. 21, 2003); United States v. $ 60,201.00 *United States Currency, 291 F. Supp. 2d 1126* (C.D. Calif., 2003) .

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Supp. to § 77.06 Bibliography.

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Annotation, *Pendency of Criminal Prosecution as Ground for Continuance or Postponement of Civil Action Involving Facts or Transactions upon which Prosecution is Predicated --State Cases, 37 A.L.R. 6th 511.*

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Annotation, *When does forfeiture of real property violate excessive fines clause of Eighth Amendment-- Post-Austin Cases, 168 A.L.R. Fed. 375 .*

Annotation, *When does forfeiture of real property violate excessive fines clause of Eighth Amendment or state constitutions --State Cases, 124 A.L.R.5th 509.*

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CHAPTER 78 REGULATION OF TRANSACTIONS

9-78 Thompson on Real Property, Thomas Editions 78.syn

AUTHOR: Professor Richardson R. Lynn School of Law Pepperdine University

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CHAPTER 78 REGULATION OF TRANSACTIONS

9-78 Thompson on Real Property, Thomas Editions § 78.01

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§ 78.01 Overview of the Regulation of Transactions.

The regulation of land sales protects the buyer of land from abuses in land sales. Congress initiated regulations in response to the inadequate remedies available to the buyer. n1 Federal regulation, followed by state regulation, was initially prompted by the marketing of underdeveloped and raw land primarily to senior citizens for retirement homes, as well as to other consumers for investment purposes. n2

There were concerns about the sales techniques being employed. Often, sales were made, sight unseen, via the mail, advertisements in magazines, and by telephone solicitation. n3 These techniques left open wide opportunities for fraud. Consumers were lured into purchasing through misleading property descriptions, including material omissions or blatant deception. Often, out-of-state consumers were solicited and were, thus, more susceptible to sight unseen techniques, and were more willing to let the seller handle the details of the sale.

Consumers were purchasing land which was uninhabitable. Often land purchased for home sites was not fit for development due to its location in deserts, on swampland, or in remote areas. Also, large tracts of completely undeveloped land were sold. Consumers were purchasing future home sites in areas which had no utilities, sewage systems, or roads. Further, many of the larger development plans presented to potential buyers were not feasible for development. When a large tract is subdivided into several small lots a great demand is imposed upon the local government to immediately supply drainage facilities, proper sanitation, roads, water, and other utilities. A demand is also created for schools, hospitals, police, and other public services. These increased demands were difficult to meet in the proposed site for development, due to the unavailability of an adequate tax base, which would be necessary to finance such services. In many instances potential buyers were not given this information.

The problem first arose during a short boom of land sales in the 1920's. n4 Another boom occurred during the 1940's, and the problem came to a head during the 1960's. n5 By 1963, it was estimated that the sale of sight unseen land was $500 million annually. n6 This figure was revised to $1 billion by 1967. n7 Consumers were spending their lifesavings on home sites to find that the land they purchased was either unfit for development, or not suitable for habitation.

FOOTNOTES:
(n1)Footnote 1. *Hearings Before the Senate Special Comm. on Aging*, 88th Cong., 1st Sess. (1963) (hereinafter cited as

1963 *Hearings*).

(n2)Footnote 2. *Id.* at 188. *See Hearings on § 2672 Before the Subcomm. on Securities of the Senate Comm. on Banking and Currency*, 89th Cong., 2d Sess. (1966).

(n3)Footnote 3. *Id.* at 141-50, 162, 184-235, 238-47, 253, 299-310, 482-89.

(n4)Footnote 4. *Id.* at 302-03 *quoting* Attorney General Walter F. Mondale, address to National Association of Licensed Law Officials, in Minneapolis, May 10, 1962.

(n5)Footnote 5. *Id.* at 302.

(n6)Footnote 6. *Id.* at 291.

(n7)Footnote 7. *Hearings on § 275 Before the Subcomm. on Securities of the Senate Comm. on Banking and Currency*, 90th Cong., 1st Sess. 2 (1967).

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CHAPTER 78 REGULATION OF TRANSACTIONS

9-78 Thompson on Real Property, Thomas Editions § 78.02

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§ 78.02 Outline of the Chapter.

This chapter discusses the regulation of transactions as it applies to real estate -- primarily subdivided land. A brief history of regulations which either directly or indirectly affect property is discussed in § 78.03. Section 78.04 discusses the hearings held by the Senate Special Committee on Aging. The Interstate Land Sales Full Disclosure Act which resulted from the Special Committee is comprehensively set forth in § 78.05. The Federal Trade Commission is briefly covered in § 78.06. Regulations put forth by the Securities Exchange Commission which may pertain to property transactions are addressed in § 78.07. Section 78.08 is an overview of state regulations which pertain to property transactions. Although individual state regulations are set forth, this section is organized according to the predominant type of regulation in each state. Accordingly, this section is an overview of state disclosure requirements, specific regulations dealing with out-of-state land transactions, the Uniform Land Sales Act, real estate licensing, blue sky laws, laws requiring compliance with other state regulations, regulations affecting planned communities, state condominium acts, time share acts, membership camping practices, horizontal property acts, mobile home parks, senior citizen housing, and recovery funds. Section 78.09 contains information regarding procedures and drafting complaints.

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CHAPTER 78 REGULATION OF TRANSACTIONS

9-78 Thompson on Real Property, Thomas Editions § 78.03

AUTHOR: Professor Richardson R. Lynn School of Law Pepperdine University

§ 78.03 History of Regulation.

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§ 78.03(a) Caveat Emptor.

Under the common law, the purchaser usually has no remedy against a seller under the doctrine of Caveat Emptor. n8 This doctrine dictates "let the buyer beware." n9 The buyer bears the burden of proof to establish that the seller has intentionally misrepresented a material fact upon which the buyer relied. Failure to meet this burden allows the buyer virtually no recourse. Another problem is that the tort action of misrepresentation is limited to false statements regarding a present fact, thus false representations regarding future development is not covered. n10 Therefore, a buyer who purchases raw or semi-developed land has no remedy, under this doctrine, against a seller who makes material misrepresentations upon which the buyer relies, regarding future development.

COMPUTER-ASSISTED RESEARCH:

LEXIS: caveat emptor w/50 misrepres! misrepresentation w/50 false statement w/50 present fact

§ 78.03(b) Warranty of Habitability.

Under case law, and statutory law, the buyer can find some relief through the warranty of habitability. Under this doctrine, the courts imply that the seller warrants that the premises are fit for habitation. n11 However, protection under the warranty of habitability can be denied by disclaiming reliability. n12 Protection can also be denied due to the date of the contract vis-a-vis the stage of completion of the building at the time of the contract. n13 Further problems arise as the courts distinguish between active misrepresentation and passive non-disclosure. n14 In these situations the buyer has no adequate remedy.

COMPUTER-ASSISTED RESEARCH:

LEXIS: warranty of habitability w/50 disclaim! warranty of habitability w/50 date w/50 contract w/50 complete! warranty of habitability w/50

§ 78.03(c) Federal Mail Fraud Statutes.

The Post Office Department had developed two devices which can be used against fraudulent land sales practices. One is the issuance of civil and criminal sanctions which allow fines to be levied for fraudulent use of the mails. n15 The other is the "fraud order," which is used upon a finding that the mails are being used to perpetuate fraudulent schemes. n16 The "fraud order" permits the local postmaster, under the direction of the Postmaster General, to return fraudulent mail to its sender, and to refuse payment of money orders and postal notes which are payable to the fraudulent promoter. n17 However these devices are only appropriate in cases where the mail is used to perpetuate the scheme. It is not appropriate for fraudulent land sales practices which do not use the mails. Further, a specific intent to defraud must first be established in order to trigger the use of the fraud order. n18 Establishing specific intent can take time, which allows the promoter of a fraudulent scheme more opportunities to defraud before being stopped. The fraudulent promoter can eventually be fined, jailed, or stopped from further solicitation through the mails. However, this device only protects future buyers, but is an ineffective remedy to those already defrauded.

COMPUTER-ASSISTED RESEARCH:

LEXIS: fraud! w/10 land sale w/50 mail mail fraud w/50 fraud order mail w/10 fraudulent scheme w/50 specific intent

§ 78.03(d) Federal Trade Commission Act.

Section 5 of the Federal Trade Commission Act (FTCA) allows the Federal Trade Commission (FTC) to take administrative steps against fraudulent and deceptive land sales brochures and printed advertisements. n19 However there is a waiting period of ninety days before the FTC can block the furtherance of deceptive land sales literature. n20 Further, during the waiting period, the commission is not permitted to issue temporary cease and desist orders. Thus, as with the mail fraud statutes, the promoter is permitted time to continue fraudulent practices, and those buyers already defrauded are not given an effective remedy.

§ 78.03(e) Federal and State Securities Regulation.

With the exception of state blue sky laws, which specifically refer to land sales transactions, the typical land sale agreement is not seen as a security. However, certain dispositions of land may meet all the criteria of a security. For example, a buyer sells a lot at a price which reflects the completion of improvements which the seller has promised. n21 The price is only realistic if the buyer in fact makes those improvements. The initial price paid by the buyer includes a portion which is based upon the buyer improving the land. In this case, the buyer is actually financing the seller, with the portion of the purchase price which exceeds the present value of the unimproved land, so that the seller can improve the land to the extent that the land will eventually equal or exceed what the buyer paid. Another example is where lots are sold on the basis of supposed oil or mineral exploration. n22 In some instances, installment lot transactions where the buyer does not take possession or title of the land until all installments are paid, can also be seen as a security interest. n23 This applies when payments are not escrowed to guarantee their application against encumbrances upon the land, penalties are applied for early payment, and no title search is made, or title insurance offered. n24 In this case, the buyer is in fact making a loan to the developer in exchange for a debt from the buyer which will be repaid with the specific property. n25 This type of transaction is distinguishable from a typical installment sale of property where the buyer takes immediate possession. The latter could not be construed as a security. However, land sale transactions which can be construed as securities may be subject to security laws. In those cases the buyer may be required to make certain disclosures under the Securities Act of 1933, or applicable state security laws.

COMPUTER-ASSISTED RESEARCH:

LEXIS: securit! w/50 land or property w/5 sale w/5 transaction

§ 78.03(f) State Regulation of Land Sales.

Prior to 1963, state regulation of land sales was either non-existent, uneven, or inadequate. For those states that did have regulations, they generally fell into three categories: The first required registration of land information. n26 The second type required registration plus the use of administratively approved selling reports. n27 By requiring the selling report, the state agency was given the opportunity to supply an editorial regarding the quality of the land offered. n28 The third type was most protective of the purchaser. It not only required registration of land information and a seller's report, but also gave the administrative agency the power to prohibit advertisements and land offerings which, in the agency's opinion were not "fair, just, and equitable." n29 In addition to the absence of land sales regulations in some states, there was also the problem of inconsistencies with respect to the differing state laws. This problem arose with respect to interstate land sales. For example, problems arose when the developer operated in another state, or where the offeree was situated in another state. The worst scenario was when the developer operated from one state, made the offer of land located in another state, to offerees located in a third state. In such a scenario problems arose with respect to jurisdiction for service of process, jurisdiction to regulate, choice of law, full faith and credit, and practical enforcement. Because of such problems, state regulation alone appeared inadequate.

COMPUTER-ASSISTED RESEARCH:

LEXIS: interstate w/25 land sale w/50 jurisdiction

§ 78.03(g) Industry Self-Regulation.

Traditionally, when an entire industry is faced with the inevitable possibility of federal regulation, the response is usually an attempt to voluntarily regulate itself. In the case of land sales, the industry had more than five years to initiate and establish industry standards. Five years transpired from the time Congress began hearings on the matter and time they passed federal legislation. n30 Yet, from the commencement of the hearings until the passage of legislation, any attempts at self-regulation were insufficient. The industry had attempted to voluntarily provide purchasers with full disclosure of material information prior to their purchases. However, the less reputable sellers, those individuals whom consumers most needed protection from, were not furnishing potential purchasers with full disclosure. n31

FOOTNOTES:

(n1)Footnote 8. *See* Leo Bearman, *Caveat Emptor in Sales of Realty? Recent Assaults Upon the Rule, 14 Vand. L. Rev. 541 (1961);* Paul G. Haskell, *Implied Warranty of Quality in Sales of Real Property, 53 Geo. L.J. 633 (1965).*

(n2)Footnote 9. *Id.*

(n3)Footnote 10. Note, *The Interstate Land Sales Full Disclosure Act, 21 Rutgers L. Rev. 714, 718-19 (1967).*

(n4)Footnote 11. *Id.;* Paul G. Haskell, *The Case for an Implied Warranty of Quality in Sales of Real Property, 53 Geo. L.J. 633 (1965).*

(n5)Footnote 12. *Id.*

(n6)Footnote 13. *Id.*

(n7)Footnote 14. *Id.*

(n8)Footnote 15. *18 U.S.C. § 1341; 39 U.S.C. § 3012.*

(n9)Footnote 16. *Id.*

(n10)Footnote 17. *Reilly v. Pincuss, 338 U.S. 269 (1949).* See Ronald Coffey & James Welch, *Federal Regulation*

of Land Sales: Full Disclosure Comes Down to Earth, *21 Case W. Res. L. Rev. 5 (1969)* at 11. *See also* 1963 Hearings 239-45.

(n11)Footnote 18. *15 U.S.C. § 45.*

(n12)Footnote 19. *15 U.S.C. § 45*(b)(c).

(n13)Footnote 20. Coffey & Welch, *supra* note 17, at 12. (In this example it is suggested that the developer is actually using part of the purchase price to finance completion of developments which will ultimately make the lot worth the purchase price.)

(n14)Footnote 21. *Id.*

(n15)Footnote 22. *Id.* at 12-13.

(n16)Footnote 23. *Id.* at 13.

(n17)Footnote 24. *Id.*

(n18)Footnote 25. Coffey & Welch, *supra* note 17, at 16.

(n19)Footnote 26. *See* 1967 Hearings 218; 1966 Hearings 53-54; 1965 Report 38-39; for a compilation of each state's regulations, *see* § 78.08, *infra*.

(n20)Footnote 27. *Id.*

(n21)Footnote 28. *Id.*

(n22)Footnote 29. *Id.*

(n23)Footnote 30. *Id.*

(n24)Footnote 31. 1963 Hearings.

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CHAPTER 78 REGULATION OF TRANSACTIONS

9-78 Thompson on Real Property, Thomas Editions § 78.04

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§ 78.04 Hearings Before the Senate Special Committee on Aging.

§ 78.04(a) 1963 Hearings.

By 1963, two things were clear: present regulations were insufficient to deal with less than reputable promoters, and federal regulation of the industry was necessary. Originally prompted by the exploitation of elderly purchasers, Congress began hearings on the problem. n32 The hearings revealed that a large segment of the population was being defrauded, not just the elderly. n33 The primary problems were in the marketing of raw and semi-developed land. n34 Abuses appeared to be rampant.

§ 78.04(b) Full Disclosure or Paternalism.

By 1968, Congress was ready to enact some sort of legislation. The question was what form should it take? Consumers needed protection; this much was clear. However, the sale of land was viewed as an industry essential and favorable to the economy. n35 Thus, heavy regulation, it was feared, could be detrimental to the industry. n36 Further, it seemed that state authorities were actually in a better position to regulate due to their close proximity to land within their state. n37 However, it was also clear that state regulation had proven to be insufficient -- especially when more than one state was involved.

There were arguments from the industry for preemption from state regulation if federal regulations were complied with. This argument had merit. Absolute preemption would establish a uniform system of regulation for those who complied with federal regulation. Also, it would eliminate the uncertainties created when state laws were applied to interstate transactions, e.g., choice of law, etc. However, Congress had already expressed concern regarding a complete heavy-handed federal takeover. n38 It could stifle the industry. Therefore, Congress decided against absolute preemption. n39 Deciding against total preemption would allow states, who were in a better proximity to the individual land offerings, room for local regulation as well.

This is not to say that Congress decided against federal regulation. The hearings indicated that some sort of federal regulation was necessary. The next step was to decide which kind of regulation was in order. There were arguments in favor of requiring full disclosure on the part of the land promoters. This faction was led by New Jersey's Senator Williams and supported by then Chairman of the Securities Exchange Commission, Manuel Cohen. n40 Full disclosure

would require promoters of land to file a comprehensive informational report, and would mandate supplying potential buyers with this information as well. The theory was "Inform the buyer fully and give him liberal fraud remedies, but don't babysit with him." n41

The alternative was a more paternalistic regulatory scheme that would require not only full disclosure, but also an opportunity for administrative comments on land offerings, as well as the authority to prohibit certain land offerings which were deemed unfair. However, requiring this paternalistic approach would be fought by states having no laws, and those states which required disclosure only. Additionally, Congress wanted to encourage states to come up with their own regulation in addition to federal regulation of land sales, and a too paternalistic federal takeover might discourage additional regulation on the part of the states. n42

§ 78.04(c) Senate Bill 2672

In 1965, Senator Williams introduced bill 2672 which reflected the full disclosure philosophy and approach. n43 It was inspired by, and closely paralleled, the Securities Act of 1933, but was applied to the sale of land. n44 This bill contained two main components. The first provided liberal fraud remedies to those purchasers who detrimentally relied on fraudulent representations. The second required full disclosure. Full disclosure required a registration statement and the use of a prospectus. n45

§ 78.04(d) Senate Bill 275.

In 1967, Senate bill 2672 was succeeded by Senate bill 275. n46 Despite minor changes in the bill, the basic approach and structure still paralleled the Securities Act of 1933. There was opposition to Senate bill 275. Land, it was argued, was not like securities. Securities were viewed as something intangible, while land could be seen and touched. Proponents of the bill pointed out the similarities between land purchased sight unseen, with no opportunity to inspect, and securities. Even an inspection of land might not reveal quality of title, hidden geographical characteristics, weather trends, or the reliability of the land promoter who promised future development. In those respects, land sales were similar to security interests.

Opponents also argued that requiring disclosure would affect the industry by forcing promoters to charge purchasers higher prices to compensate for the cost of registration and providing a prospectus. However, as SEC Chairperson Cohen pointed out, many legitimate developers were already providing this information to potential purchasers of their own volition, or in accordance with state regulations, and it did not appear to adversely affect land costs. n47 The less than reputable land promoters, those individuals who avoided disclosure, and the individual purchasers who needed protection most, were not voluntarily providing this information. n48 On balance, any slight increase in land costs would be offset by the benefits to those purchasers who would be protected by the act. During discussions on the bill, alternatives to full disclosure were considered. Allowing states to sue in federal court when interstate land sales resulted in violation of the state's regulations was one alternative. n49 Another was the imposition of federal criminal penalties for state violations. n50 A third alternative was to create a federal agency to take action against promoters who violated state law. n51 There were problems with those alternatives however. Federal decision makers did not want to take on the task of developing, interpreting, and applying state law. n52 The alternatives to federal disclosure regulations did not address land sale abuses occurring in states with no regulations. Further, none of the alternatives were prophylactic in nature and Congress recognized the need for some sort of preventive measure. Full disclosure and liberal fraud remedies provided a preventive mechanism as well as remedy for those purchasers who had been victimized by detrimentally relying on fraudulent representations.

FOOTNOTES:
(n1)Footnote 32. *Id.* at 148-49, 188.

(n2)Footnote 33. *Id.* at 148-49, 203.

(n3)Footnote 34. Coffey & Welch, *supra* note 17, at 16.

(n4)Footnote 35. *Id.*

(n5)Footnote 36. *Id.* at 17.

(n6)Footnote 37. *Id.* at 16-17.

(n7)Footnote 38. *Id.* at 17.

(n8)Footnote 39. *Id.* at 17-18.

(n9)Footnote 40. *Id.* at 18 (citing 1966 Hearings 191).

(n10)Footnote 41. *Id.* at 17.

(n11)Footnote 42. 111 Cong. Rec. 27 (Jan. 4, 1965); 111 Cong. Rec. 310-13 (Jan. 6, 1965).

(n12)Footnote 43. *Id.* at 27, 310.

(n13)Footnote 44. 1966 Hearings 91-100, 247.

(n14)Footnote 45. 113 Cong. Rec. 315-24 (1967).

(n15)Footnote 46. 1967 Hearings 52; 1966 Hearings 303.

(n16)Footnote 47. *Id.*

(n17)Footnote 48. 1966 Hearings 115-16; 1964 Hearings 27.

(n18)Footnote 49. 1966 Hearings 40, 219-20.

(n19)Footnote 50. 1967 Hearings 55-57, 153-54.

(n20)Footnote 51. Coffey & Welch, *supra* note 17, at 20.

(n21)Footnote 52. Codified in *15 U.S.C. 1701*-20 (the act was passed as Title XIV of the Housing and Urban Development Act of 1968 and became effective April 28, 1969).

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CHAPTER 78 REGULATION OF TRANSACTIONS

9-78 Thompson on Real Property, Thomas Editions § 78.05

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§ 78.05 The Interstate Land Sales Full Disclosure Act.

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§ 78.05(a) 1968 Passage of the Act.

In 1968, Congress passed the Interstate Land Sales Full Disclosure Act. n53 Consistent with Congressional proposals during discussions, this act was modeled after the Securities Act of 1933. n54 Elements requiring full disclosure via a registered report and prospectus to be filed, coupled with a report to be given to the potential purchaser were included in the act. Liberal fraud remedies, derived from Congressional discussions, were also included in the final version passed by Congress. n55 The Department of Housing and Urban Development (HUD) would oversee the act, and the Office of Interstate Land Sales Registration (OILSR) was established as the administrative body to monitor compliance and file the required property report and prospectus. n56

§ 78.05(b) 1979 Revision.

By 1979, the act had been in effect for over a decade. The act appeared overly broad. Problems were also found with the effectiveness of the act because HUD tended to rely on voluntary compliance. n57 Although the act mandated informational disclosure reports to be supplied to the potential purchaser of land, many purchasers were not being supplied with those disclosure reports. n58

Due to the ineffectiveness of the act as it stood, Congress proposed and passed several amendments by the end of 1979. n59 The amendments were designed to aid in the effectiveness of the act by making its provisions more specific, particularly in regard to enforcement. The effects of the 1979 amendments were fourfold.

First, amendments were added which increased damages. n60 Revisionists saw that allowing for increased damages as a vehicle to encourage compliance would ultimately increase the effectiveness of the act.

Second, more comprehensive contractual rights were established which allowed for private enforcement. n61 The new contractual provisions would make it easier for individuals to sue on their own behalf.

The 1968 version of the act only applied to land sales of subdivisions which included more than one hundred lots. n62

Thus, the act was not an effective remedy to purchasers who were defrauded by promoters whose subdivisions included fewer lots. The third set of amendments lowered the applicability of the fraud provisions to subdivisions with twenty-five or more lots. n63

Because the 1968 version of the act required separate filing procedures from state regulations, there were, in some cases, duplicate registration requirements. The fourth group of amendments passed in 1979 allowed for state certification procedures which eliminated the need to register twice. n64

§ 78.05(c) Overview of the Act.

The underlying purpose of the Interstate Land Sales Full Disclosure Act is twofold. One purpose is to ensure that a purchaser of land, prior to purchasing certain types of real estate, is fully disclosed of facts which will enable the purchaser to make an informed decision with regard to purchasing such property. n65 To fulfill this goal, the act establishes rigorous disclosure provisions and requirements. A second purpose of the act is to provide a means by which to prohibit and punish fraud in land development sales and offerings. n66

The basic provisions of the act are designed with an emphasis on protecting the consumer. In particular, the act is aimed at protecting the consumer from abuse by real estate developers through interstate commerce, the use of mails, and other advertising techniques, in promotion and sales of property, with emphasis given to properties offered as part of a common promotional plan. n67 The act is a flexible, widely encompassing statute. n68 Its construence should be liberal, rather than technical, to allow the greatest leeway to effectuate its remedial purpose. n69

Finally, officers or directors of corporate developers of real estate projects, as well as any participating planners, can be held liable for violations of the act, notwithstanding that they do not fall within the statutory definition of developers or selling agents. n70

§ 78.05(d) Definitions.

For purposes of construing the act, § 1701 provides the following definitions:

(1) "Secretary" means the Secretary of HUD;

(2) "person" means an individual, or an unincorporated organization, partnership, association, corporation, trust, or estate;

(3) "subdivision" means any land which is located in any state or in a foreign country and is divided or is proposed to be divided into lots, whether contiguous or not, for the purpose of sale or lease as part of a common promotional plan;

(4) "common promotional plan" means a plan undertaken by a single developer or a group of developers acting in concert, to offer lots for sale or lease; where such land is offered for sale by such a developer or group of developers acting in concert, and such land is contiguous or is known, designated, or advertised as a common unit or by a common name, such land shall be presumed, without regard to the number of lots covered by each individual offering, as being offered for sale or lease as part of a common promotional plan;

(5) "developer" means any person who, directly of indirectly, sells or leases, or offers to sell or lease, or advertises for sale or leases any lots in a subdivision; n71

(6) "agent" means any person who represents, or acts for or on behalf of, a developer in selling or leasing, or offering to sell or lease, any lots in a subdivision; but shall not include an attorney at law whose representation of another person consists solely of rendering legal services;

(7) "blanket encumbrance" means a trust deed, mortgage, judgment, or any other lien or encumbrance, including an offer to contract to sell or a trust agreement, affecting a subdivision or affecting more than one lot offered within a subdivision, except that such term shall not include any lien or other encumbrance arising as the result of the imposition of any tax assessment by any public attorney;

(8) "interstate commerce" means trade or commerce among the several states or between any foreign country and any state;

(9) "state" included the several states, the District of Columbia, the Commonwealth of Puerto Rico, and the territories and possessions of the United States;

(10) "purchaser" means an actual or potential purchaser or lessee of any lot in a subdivision;

(11) "offer" includes any inducement, solicitation, or attempt to encourage a person to acquire a lot in a subdivision. n72

§ 78.05(e) Exemptions.

§ 78.05(e)(1) General Exemptions.

In regard to the sale or lease of lots, the act provides for several exceptions to its disclosure and anti-fraud provisions. n73 However, if the disposition of an exception arises for the purpose of evading the provisions of the act, the exception will not apply. n74

The sale or lease of lots in a subdivision containing fewer than twenty-five lots is excepted from the provisions of the act. n75 The sale of any improved land which contains a residential, commercial or industrial building, or a condominium is also excluded, as is the sale or lease of land under a contract which obligates the seller or lessor to erect such a building within a time period not exceeding two years. n76 The sale of evidences of indebtedness secured by a mortgage or deed of trust on real estate, the sale of securities issued by a real estate investment trust, and the sale or lease of real estate by any government or government agency is also excluded. n77 Additionally, the sale or lease of cemetery lots is excluded from the act. n78

Further exemptions to the act include the sale or lease of lots to those persons who purchase the lots with the intention of engaging in the business of constructing residential, commercial or industrial buildings, or with the intention of reselling or leasing to such persons. n79

Additional exemptions apply to the sale or lease of real estate which is zoned by an appropriate governmental authority for industrial or commercial development, or which is restricted to such use by covenants, conditions, or restrictions which are officially recorded when local authorities have approved access from such real estate to a public road or highway; the purchaser of such land is a corporation, partnership, trust, or business entity engaged in commercial or industrial practice; the purchaser of such real estate is represented in the transaction by a representative of the purchaser's own choosing; the purchaser of such real estate affirms in writing to the seller or lessor that it either is purchasing or leasing such land substantially for its own use, or has a binding commitment to sell, lease, or sublease such real estate to a corporation, partnership, trust, or business entity, is engaged in commercial or industrial business, and is not affiliated with the seller, lessor, or agent thereof; and a title insurance policy or a title opinion is issued in connection with the transaction showing that title to such land is vested in the seller or lessor, subject only to those exemptions which are approved in writing by such purchaser prior to recordation of the instrument of conveyance or signing of the lease. n80 Any purchaser may waive, via a separate written document, this requirement of issuing a title insurance policy or opinion in connection with the transaction. n81

COMPUTER-ASSISTED RESEARCH

LEXIS: interstate land sales full disclosure act w/50 exempt! or except!

§ 78.05(e)(2) Exemption for Lots Subject to Other Disclosure Requirements.

Other provisions of the Act exempt transactions from the disclosure and registration requirements, but not from the anti-fraud or mandatory contract provisions of the Act. n82 However, if the disposition of an exception under this category arises for the purpose of evading the provisions of the act, the exception will not apply. n83

Among exemptions under this category are the sale or lease of lots in a subdivision containing fewer than one hundred lots, the sale or lease of lots in a subdivision in which not more than twelve lots are sold in a twelve month period, and the sale or lease of lots in a subdivision if each non-contiguous part contains not more than twenty lots and a personal inspection has been made by the purchaser or lessee prior to signing any agreement. n84 Also included in this category of exemptions is the sale or lease of lots in a subdivision in which each of the lots is at least twenty acres. n85

Further exemptions include the sale or lease of lots located within a municipality or county where a unit of local government specifies minimum standards for the development of subdivision lots taking place within its boundaries when each lot is zoned or limited to single family residences; the lot is situated on a paved street of highway; potable water, sanitary sewage disposal, and electricity have been extended to the lot; the contract for sale includes delivery of a general warranty deed; a title insurance binder or opinion is issued which indicates that marketable title is vested in the seller; an on-lot inspection by the purchaser has been made prior to signing the contract or agreement; there are no offers by direct mail or telephone solicitation of gifts, trips, dinners, or other such promotional techniques to induce the prospective purchasers or lessees to visit the subdivision or to purchase or lease a lot. n86

The sale or lease of a lot is also exempted if a mobile home is to be erected or placed thereon as a residence within a period of two years, and provisions are made for all funds received by the seller to be placed in an escrow account, controlled by an independent party, until the transactions are completed. n87 Further, the escrowed funds are to be released to the buyer on demand without prejudice if the mobile home is not erected or placed on the property within two years, or if potable water, sanitary sewage disposal, electricity, access to roads, or marketable title are not provided. n88 If common facilities are non-existent, but are to be provided, they must be fully funded. n89

The sale or lease of real estate by a developer who is engaged in intrastate development is exempt if the lot is free and clear of all liens, encumbrances, and adverse claims; the purchaser has made an on lot inspection; and prior to signing any agreement, the purchaser has received a written good faith estimate of the cost of providing electric, water, sewer, gas, and telephone services to the lot. n90

The sale or lease of a lot in a subdivision containing fewer than three hundred lots is exempt if the principal residence of the purchaser or lessee is within the same standard metropolitan area; the lot is free and clear of liens at the time of the signing of the contract or agreement and until a deed is delivered to the purchaser, or the lease expires; the purchaser or lessee has made a personal inspection of the premises; the purchase agreement contains a clear and specific statement as to when utilities will be available, and a seven day option to revoke the agreement; the purchaser has received a written statement by the developer setting forth in concise terms all liens, reservations, tax assessments, beneficial property restrictions which would be enforceable by other lot owners in the subdivision, adverse claims which are applicable to the particular lot, and a good faith estimate of the cost of providing electric, water, sewer, gas, and telephone services to such lot. n91

COMPUTER-ASSISTED RESEARCH

LEXIS: interstate land sales full disclosure act w/10 requirement w/50 exempt! or except! interstate land sales full

disclosure act w/10 requirement

§ 78.05(e)(3) Secretary's Exemption.

The Secretary of HUD may from time to time, pursuant to the rules and regulations issued by HUD, exempt from any of the provisions of the Act any subdivision or any lots in a subdivision, if the Secretary finds that the enforcement of the Act with respect to such subdivisions or lots is not necessary in the public interest and for the protection of purchasers by reason of the small amount involved, or the limited character of the public offering. n92

§ 78.05(f) Requirements Respecting Sale or Lease of Lots.

§ 78.05(f)(1) Prohibited Activities.

Under the Act, it is unlawful for any developer, either directly or indirectly, to use any instrument of transportation or communication in interstate commerce, or of the mails to sell any lot or subdivision, which does not fall within one of the exemptions without first filing the required statement of record or providing a printed property report to the prospective purchaser. n93 The Act also prohibits selling or leasing any lot if either the statement of record or property report contains a false statement or omitted material fact, or if advertising or promotional material is inconsistent with the statement of record or property report. n94

The Act further prohibits the sale or lease or offer to sell or lease any land if any device or scheme to defraud is attempted. n95 Further, any attempt to acquire property or money is prohibited if false material statements are made, or if material facts are omitted. n96 It is also unlawful, under the Act, to represent that any roads, sewers, water, gas, electric, or recreational amenities will be provided without stipulating such in the contract. n97

COMPUTER-ASSISTED RESEARCH

LEXIS: interstate land sales full disclosure act w/50 developer w/50 interstate commerce or mail w/50 sell or sale w/50 lot or subdivision interstate land sales full disclosure act w/50 sell! or sale or leas! w/50 lot or subdivision w/50 false or material interstate land sales full disclosure act w/50 sell! or sale or leas! w/50 lot or subdivision w/50 advertising or ad or promotion

§ 78.05(f)(2) Revocation of Non-exempt Contract.

Any contract or agreement for the sale or lease of land which does not fall within one of the exemptions of the Act may be revoked at the option of the purchaser or lessee within seven days of signing, or any later time which state laws may mandate. n98 The contract must stipulate this. n99

§ 78.05(f)(3) Revocation Where Property Report Supplied.

Under the Act, where a property report is required, but not supplied to the purchaser prior to signing any contract or agreement, such contract or agreement may be revoked at the option of purchaser within two years of signing. n100

§ 78.05(f)(4) Additional Authority for Revocation.

The Act further stipulates that any contract for the sale or lease of a lot, which is not exempt from the Act, and which does not include an adequate description of the lot allowing for clear identification and recording, may be revoked within two years of signing at the option of the purchaser or lessee. n101 Revocation within two years is also available to the purchaser or lessee in the event of a default or breach of the agreement by the purchaser or lessee in which the seller or lessor did not provide written notice to the purchaser or lessee which allowed at least twenty days to remedy such default or breach. n102 Revocation within two years is also available to the purchaser or lessee if the purchaser or

lessee loses rights and interest in the lot as a result of a breach, which occurs after the purchaser has paid 15% of the purchase price. n103 In that case, the seller may not keep more than 15% of the purchase price as liquidated damages. n104

This entire section does not apply if within one hundred and eighty days after the signing, the purchaser receives a general warranty deed, or in jurisdictions where such deeds are not commonly used, the purchaser receives a deed or grant that warrants that the grantor has not conveyed the lot to another person, and that the lot is free from encumbrances made by the grantor or any agent thereof. n105

§ 78.05(f)(5) Repayment of Money Paid.

If a contract is revoked pursuant to the revocation provisions of the Act, and if the rights and interest in the lot are in a condition similar to the condition in which they were conveyed, or purported to be conveyed, to the purchaser or lessee, such purchaser or lessee shall be entitled to all money paid by the purchaser under the contract or agreement. n106

§ 78.05(g) Registration of Subdivisions.

§ 78.05(g)(1) Filing of Statement of Record.

The act allows a subdivision to be recorded by filing a statement of record with the secretary, or by meeting the requirements of the Act, and such rules and regulations as may be prescribed by the secretary in furtherance of the provisions of the Act. n107 The statement of record is only deemed effective to those lots specified in such statement. n108

§ 78.05(g)(2) Payment of Fees.

The Act mandates a payment not to exceed $1000 at the time of registration, in accordance with a schedule to be fixed by the secretary. n109 Such fees are to be used to cover the costs of rendering services consistent with the Act which are not to be considered administrative. n110

§ 78.05(g)(3) When Filing Deemed to Take Place.

Filing is deemed to take place upon the receipt of filing the statement of record and payment of the required fee. n111

§ 78.05(g)(4) Public Access to Information.

The information provided in, or filed with, the statement of record shall be made available to the public under regulations prescribed by the secretary. n112 Copies of such statements shall be furnished to every applicant at a reasonable charge to be determined by the secretary. n113

§ 78.05(h) Information Required in Statement of Record.

Under the Act, the statement of record, in the interest of informing and protecting the purchaser, shall contain information, and be accompanied by the specified documents, which include the name and address of each person having an interest in the lot or subdivision and the extent of such interest. n114 The statement shall also contain a legal description of the total area included in the lot or subdivision together with a map showing the division proposed, and dimensions of the lots to be covered, and their relation to existing streets and roads. n115

The Act also mandates that the statement include the condition of title to the land comprising the subdivision, including all encumbrances, deed restrictions, and applicable covenants; a statement of general terms and conditions, including the range of selling prices or rents at which it is proposed to dispose of the lots in the subdivision; and a statement of the

present condition of access to the subdivision, the existence of any unusual conditions relating to noise or safety which affect the subdivision and are known to the developer, the availability of sewage disposal facilities and other public utilities in the subdivision, the proximity in miles of the subdivision to nearby municipalities, the nature of any improvements to be installed by the developer, and the developer's estimated date of completion. n116

In the case of any subdivision against which there exists a blanket encumbrance, the Act requires a statement of the consequences for an individual purchaser of the developer's failure to fulfill obligations under the instrument or instruments creating the encumbrances and the steps, if any, taken to protect the purchaser in such eventuality. n117

According to the Act, a copy of its articles of incorporation with all amendments must be included if the developer is a corporation. n118 This includes copies of all instruments by which the trust is created or declared, if the developer is a trust, or copies of its articles of partnership or association and all other papers pertaining to its organization if the developer is a partnership, incorporated association, joint stock company, or any other form of organization. n119

Copies of the deed or other instrument establishing title to the subdivision in the developer or other person, and copies of any instrument creating any lien or encumbrance upon the title of developer or other person, or copies of the opinion or opinions of counsel in respect to the title to the subdivision in the developer or other person, or copies of a title insurance, must be included in the statement of record. n120

The statement of record, under the Act, must also include copies of all forms of conveyance to be used in selling or leasing lots to purchasers, copies of instruments creating easements or other restrictions, certified and uncertified financial statements of the developer which the Secretary deems necessary, and any other information, documents, or certifications which the Secretary reasonably believes is necessary or appropriate to protect the purchaser. n121

§ 78.05(i) Effective Date of Statements of Record and Amendments Thereto.

§ 78.05(i)(1) Thirtieth Day After Filing.

The effective date of filing the statement of record, or any amendment thereto, shall be thirty days after filing. n122 However, the Secretary has the discretion to set an earlier date, although the Secretary must take into consideration the public interest and protection of the purchaser. n123 If an amendment is filed after the original report, such report will be effective thirty days after the filing of the amendment unless the Secretary permits otherwise. n124 When a developer records additional lands, the subsequent statement may be consolidated with the earlier statement. n125 If there are any material changes in the original statement, they must be included in the consolidated statement. n126

§ 78.05(i)(2) Incomplete or Inaccurate Statements.

The Secretary has a reasonable time with which to notify the developer if the statement, on its face, appears materially inaccurate or incomplete. n127 However, the Secretary must notify the developer prior to the date the statement would otherwise become effective. n128 This notification will suspend the effective date of the statement or amendment until thirty days after the developer makes the required changes or corrections. n129 Upon receipt of such notification, the developer may request a hearing which will be held within twenty days of the receipt of such request by the Secretary. n130

§ 78.05(i)(3) Amendment of Statement of Record.

The developer is required to file an amendment to the statement if a change occurs which will have a material effect on any fact which is required, and contained, in the statement. n131 The Secretary has the discretion to suspend the statement until the amendment becomes effective. n132

§ 78.05(i)(4) Untrue Statement or Omission of Material Fact.

If there appears to be an untrue statement of a material fact or omission of a material fact, the Secretary may issue an order suspending the statement of record. n133 Prior to suspension, the Secretary must give notice, and an opportunity for a hearing within fifteen days after such notice. n134 When the statement has been appropriately amended, the order shall cease to be effective. n135

§ 78.05(i)(5) Power of Secretary to Examine.

Under the Act, the Secretary is also empowered to make an examination to determine if an order of suspension should be issued. n136 In making this examination, the Secretary or a designee is permitted access to, and may compel, the production of any relevant books or papers. n137 Failure to produce requested materials is sufficient grounds for issuing an order of suspension. n138

§ 78.05(i)(6) Service of Notice.

Any required notice is to be sent to, or served on the developer or the developer's agent. n139

§ 78.05(j) Information Required in Property Report; Use for Promotional Purposes.

The Act stipulates that the property report which is to be supplied to purchasers and lessees shall contain the information included in the statement of record and its amendments which the Secretary deems necessary. n140 To protect the purchaser, the property report must contain this warning: "READ THIS PROPERTY REPORT BEFORE SIGNING ANYTHING." This warning must occupy three vertical lines, be centered and printed in one half inch capital letters in red type with one quarter inch space between the lines. The report must also contain a section entitled: "Risks of Buying Land, Warnings." The Secretary may also require the report to contain additional relevant information which is not necessarily contained in the statement of record in the interest of the public, and to protect the purchaser. n141

Until the property report becomes effective, the Act does not permit its contents to be used for promotional purposes. n142 Once the report does become effective, its contents may be used for promotional purposes only if the report is used in its entirety. n143 Further, the Act stipulates that no portion of the report may be underscored, italicized, or printed in larger or bolder type unless the Secretary requires or permits it. n144

COMPUTER-ASSISTED RESEARCH

LEXIS: interstate land sales full disclosure act w/50 property report

§ 78.05(k) Certification of Substantially Equivalent State Law.

§ 78.05(k)(1) Criteria; Request by State.

The Secretary has the authority to certify a state whereby those who meet the certified state's regulation are relieved of the duty to also file under the federal provisions. n145 The Secretary may certify a state upon determination that the laws and regulations of the state which apply to the sale of lots or subdivisions require the seller or lessor to disclose information which is substantially equivalent to the disclosure requirement of the Act. n146 Further, the administration of the state's law and regulations must provide that such disclosure is accurate to the greatest degree that practicality permits. n147

If this determination is not made, the Secretary may still certify the state upon a determination that the state's laws and regulations provide sufficient protection for purchasers and lessees with respect to the matters for which disclosure is required under the Act. n148 The administration of the state's law and regulations must still provide that such disclosure is accurate to the greatest degree that practicality permits. n149

Any state which requests certification must agree to accept a property report covering land located in another certified state which is offered in the state requesting certification so long as the other certified state has approved the report. n150 Such report will be the only report required. n151

§ 78.05(k)(2) Filing of State Material for Purposes of Federal Requirements.

After a state has been certified within the provisions of the Act, the Secretary will accept for filing, and declare effective as the Federal statement of record and property report, such materials and documents which meet the state requirements. n152 A second filing with HUD is not necessary. n153

§ 78.05(k)(3) Failure by State to Meet Requirements.

If a state fails to meet the standards for certification as stipulated in this Act, the Secretary will notify the state in writing. n154 The writing will state the changes in law regulation and administration that are necessary to obtain certification. n155

§ 78.05(k)(4) Review of State Certification.

The Secretary is also under a duty to periodically review the laws and regulations, and their administration, of certified states. n156 Certification may be withdrawn upon a finding that such laws and regulations, and their administration, no longer meet the certification requirements of the Act. n157

§ 78.05(k)(5) State and Local Governmental Authorities Affected.

The Act should not be construed to prevent or limit the authority of any state or local government to enact or enforce its own regulations which do not conflict with the federal Act. n158

§ 78.05(l) Civil Liabilities.

§ 78.05(l)(1) Violations; Relief Recoverable.

The Act provides for strong enforcement provisions, particularly by allowing for stiff remedies against those who contain untrue material facts or omit material facts in their statement of record or property report. n159 The relief provisions are designed to assure that the statement of record and property report are prepared with extraordinary diligence. n160 A purchaser or lessee may bring an action at law or in equity against a developer or agent if the sale was made in violation of the Act. n161 The court may order damages, specific performance, or such other relief as it deems fair, equitable, and just. n162 To determine damages the court is free, but not limited to, consider the following: the contract price of the lot or leasehold, the amount the purchaser or lessee actually paid, the cost of any improvements to the lot, the fair market value of the lot or leasehold at the time relief is determined, and the fair market value of the lot or leasehold at the time such lot was purchased or leased. n163

COMPUTER-ASSISTED RESEARCH

LEXIS: interstate land sales full disclosure act w/50 material fact interstate land sales full disclosure act w/50 material fact w/50 damage or remed!

§ 78.05(l)(2) Enforcement of Rights.

In addition to bringing suit for sale violations, the purchaser or lessee may bring an action at law or in equity for any violation of the Act. n164

§ 78.05(l)(3) Amounts Recoverable.

The amount recoverable in a suit under this Act may also include interest, court costs, and reasonable amounts for attorney's fees, independent appraiser's fees, and travel to and from the lot. n165

COMPUTER-ASSISTED RESEARCH

LEXIS: interstate land sales full disclosure act w/50 amount recoverable

§ 78.05(l)(4) Contribution.

Any person found financially liable in a suit brought under the Act may recover contribution from any person who would have been liable, if sued separately, to make the same payment. n166

§ 78.05(m) Review of Orders; Modifications of Findings; Stay.

Any person found in violation of the Act by an order or determination of the Secretary, after a hearing has been held, may appeal to the United States Court of Appeals by filing with the court within sixty days of such order or determination a written petition. n167 The petition may ask that the order or determination be modified or set aside in whole or in part. No objection to such request will be considered unless made by the court. The findings of the Secretary, as to the facts, if supported by substantial evidence, shall be conclusive. n168 The court may order additional evidence if it finds such evidence to be material. n169 The jurisdiction of the court is exclusive, and its judgment shall be considered final, subject to review by the Supreme Court of the United States upon certiori or certification as provided by section 1254 of Title 28. n170

The commencement of proceedings of this portion of the Act shall not operate as a stay of the Secretary's orders unless specifically ordered by the court. n171

§ 78.05(n) Statute of Limitations.

No action for violations of the Act, with respect to the sale or lease of a lot or subdivision, may be maintained more than three years after signing the contract for sale or lease. n172

No action for any other violation under the Act may be maintained more than three years after discovery of such violation, or after discovery should have been made by the exercise of reasonable diligence. n173

No action in law, or in equity, may be maintained unless brought within three years of signing the contract, notwithstanding delivery of the deed to the purchaser. n174

COMPUTER-ASSISTED RESEARCH

LEXIS: interstate land sales full disclosure act w/50 statute of limitations

§ 78.05(o) Waiver of Act.

Compliance with any provision of the Act may not be waived by any condition, stipulation, or provision which binds any person acquiring any lot in a subdivision. n175 The rights and remedies provided by the Act are to be considered in addition to all other rights and remedies which exist in law or equity. n176

§ 78.05(q) Investigations, Injunctions, and Prosecution.

§ 78.05(q)(1) Injunction or Restraining Order.

If it appears that a person is engaged, or about to be engaged, in any act which would constitute a violation of the Act, the Secretary has the discretion to bring an action in any district court of the United States to enjoin such practices. n177 Upon a proper showing, the court shall grant a permanent or temporary injunction without bond. n178 The Secretary may also submit such evidence to the Attorney General who has the discretion to institute appropriate criminal proceedings. n179

§ 78.05(q)(2) Investigations.

The Secretary also has discretion to make necessary investigations to determine whether any person has violated or is about to violate any provision of the Act. n180 The Secretary may require any person to file a written statement, under oath, as to all the relevant facts and circumstances. n181 The Secretary has further discretion to publish any information concerning violations, and to make any investigations to secure information which will serve as a basis for recommending further legislation consistent with the Act. n182

§ 78.05(q)(3) Oaths; Subpoena Power.

For purposes of any such investigation, or any proceeding under the Act, the Secretary or a designee is empowered to administer oaths and affirmations, subpoena witnesses, compel their attendance, take evidence, and require the production of any books, papers, or other records deemed material to the inquiry. n183 The attendance of witnesses and production or records may be required from any place in the United States, or any state at the designated place of hearing. n184

§ 78.05(q)(4) Contempt.

During hearings and investigations consistent with the Act, cooperation with the Secretary is mandatory. n185 In the case of willful disobedience of a summons, or refusal to obey a subpoena, the Secretary may invoke assistance from any court of the United States within the relevant jurisdiction. n186 The court is authorized to issue orders requiring cooperation with the Secretary. n187 Those failing to obey such court orders may be held in contempt. n188

COMPUTER-ASSISTED RESEARCH

LEXIS: interstate land sales full disclosure act w/50 contempt

§ 78.05(r) Administration.

§ 78.05(r)(1) Delegation.

The authority to administer the Act lies with the Secretary of HUD. n189 The Secretary may delegate any functions, duties, or powers to any employees within HUD. n190

§ 78.05(r)(2) Hearings.

All hearings arising from the laws, rules, and regulations of the Act are required to be public. Appropriate records are to be kept, and orders issued after such hearings shall be based on those records. n191

§ 78.05(r)(3) Applicable Procedures.

The Secretary is required to conduct all actions under the Act in accordance with chapter 5 of Title 5. n192 Notice shall be given of any adverse action or final disposition. n193 Such notice and the entry of any order must be accompanied by

a written statement of supporting facts and legal authority. n194

§ 78.05(s) Unlawful Representations.

The filing of a statement of record is not to be construed as a presumption that the statement is true and accurate on its face. n195 Nor should it be presumed that the Secretary has passed judgment on the merits of, or given approval to, the subdivision. n196 However, it is unlawful to make, to any prospective purchaser, any representation which is contrary to the foregoing. n197

§ 78.05(t) Penalties for Violations.

The Act allows little tolerance for those who deliberately violate its provisions. n198 Any person who willfully violates any of the provisions of the Act, or the rule and regulations prescribed pursuant to the Act, or any person who willfully, in a statement of record filed under the Act, makes an untrue statement or willful omission of a material fact, is to be fined not more than $1,000 for each violation, except that the maximum penalty during any one year period shall not exceed $1,000,000, imprisonment for more than five years, or both. n199

§ 78.05(u) Rules, Regulations, and Orders.

The Act gives the Secretary the authority to make, issue, amend, and rescind such rules and regulations and such orders as deemed necessary. n200 The Secretary may also classify persons and matters within jurisdiction of the Act, and prescribe different requirements for different classes of people or matters. n201

§ 78.05(v) Jurisdiction.

The district courts of the United States, the United States courts of any territory, and the United States District Court for the District of Columbia have jurisdiction of offenses and violations surrounding the Act. n202 Any suit may be brought to enforce any liability or duty created under the Act. n203 The suit must be brought in the district where the defendant is found or is an inhabitant or transacts business, or in the district where the offer or sale took place. n204 Process may be served in any other district where the defendant is an inhabitant or wherever the defendant may be found. n205 Judgments and decrees regarding such matters are subject to review as provided in sections 1254 and 1291 of Title 28. n206 No costs may be brought against the Secretary in any proceeding under the Act in the United States Supreme Court or any other court. n207

COMPUTER-ASSISTED RESEARCH

LEXIS: interstate land sales full disclosure act w/50 jurisdiction

§ 78.05(w) Appropriations.

The Act also authorizes such appropriations of money as may be necessary to carry out the Act. n208

FOOTNOTES:
(n1)Footnote 53. Coffey & Welch, *supra* note 17 at 21.

(n2)Footnote 54. 1967 Hearings 55-57, 153-54.

(n3)Footnote 55. 24 C.F.R. §§ 1700.1-.85; *34 Fed. Reg. 5722-23 (1969).*

(n4)Footnote 56. Robin Malloy, *The Interstate Land Sales Full Disclosure Act: Its Requirements, Consequences and Implications For Persons Participating in Real Estate Development, 24 B.C. L. Rev. 1187, 1189 (1983).*

(n5)Footnote 57. *Id.*

(n6)Footnote 58. *Id. at 1187;* Dept. of Housing and Urban Development, OILSR Biennial Rep. to Congress (March 1981).

(n7)Footnote 59. *15 U.S.C. § 1702,* 1704.

(n8)Footnote 60. *15 U.S.C. § 1703*(a)(2)(d).

(n9)Footnote 61. *15 U.S.C. § 1702*(a)(1).

(n10)Footnote 62. *Id.*

(n11)Footnote 63. *15 U.S.C. § 1708.*

(n12)Footnote 64. *Law v. Royal Palm Beach Colony, Inc., 578 F.2d 204 (Fla. 1978).*

(n13)Footnote 65. *Las Campanas Ltd. P'ship v. Pribble, 943 P.2d 554 (N.M. 1997)* (where technical violation [failure to attach properly a receipt] of disclosure requirements do not frustrate the information-providing purposes of the act, purchaser was not entitled to rescission); *Pierce v. Apple Valley, Inc., 597 F. Supp. 1480 (S.D. Ohio 1984); Samara Dev. Corp. v. Marlow, 556 So. 2d 1097 (Fla. 1990); McCown v. Herdler, 527 F.2d 204 (Okla. 1975).*

(n14)Footnote 66. *Pierce v. Apple Valley, Inc., 597 F. Supp. 1480 (S.D. Ohio 1984); Nargez v. Henlopen Devs., 380 A.2d 1361 (Del. 1977).*

(n15)Footnote 67. *Timmreck v. Munn, 433 F. Supp. 396 (N.D. Ill. 1977).*

(n16)Footnote 68. *Supra*, n.65.

(n17)Footnote 69. *Samara Dev. Corp. v. Marlow, 556 So. 2d 1097 (Fla. 1990); Bartholemew v. North Hampton Nat'l Bank of Easton, 584 F.2d 1288 (1978).*

(n18)Footnote 70. *15 U.S.C. § 1701* (1982).

(n19)Footnote 71. *United States Dep't of Hous. & Urban Dev. v. Cost Control Mktg. & Sales Mgt. of Va., 64 F.3d 920 (4th Cir. 1995)* (defendants determined to be developers).

(n20)Footnote 72. *15 U.S.C. § 1701* (1982). *Orsi v. Kirkwood, 999 F.2d 86 (4th Cir. 1993); Hammar v. Cost Control Mktg. & Sales Mgt. of Va., 757 F. Supp. 698 (W.D. Va. 1990); Beauford v. Helmsley, 740 F. Supp. 201 (S.D.N.Y. 1990); Schatz v. Jockey Club Phase III, Ltd., 604 F. Supp. 537 (S.D. Fla. 1985); N & C Properties v. Windham, 582 So. 2d 1044 (Ala. 1991); N & C Properties v. Pritchard, 525 So. 2d 1346 (Ala. 1988), cert. denied, 488 U.S. 856, 109 S. Ct. 146, 102 L. Ed. 2d 118 (1988); Ackmann v. Merchants Mortgage & Trust Corp., 645 P.2d 7 (Colo. 1982); Appalachian, Inc. v. Olsen, 468 So. 2d 266 (Fla. App. 1985); Grove Towers, Inc. v. Lopez, 467 So. 2d 358 (Fla. App. 1985); Dorchester Dev., Inc. v. Burk, 439 So. 2d 1032 (Fla. App. 1983).*

(n21)Footnote 73. *Id.* at § 1702(a).

(n22)Footnote 74. *Id.*

(n23)Footnote 75. *Id.* at § 1702(a)(1).

(n24)Footnote 76. *Id.* at § 1702(a)(2). *Atterberry v. Maumelle Co., 60 F.3d 415 (8th Cir. 1995)* (a provision of the sales contract that the vendor would construct a home on the lot purchased when the purchaser presented evidence of construction financing sufficed to exempt the sale from the provisions of the Interstate Land Sales Full Disclosure Act).

(n25)Footnote 77. *Id.* at § 1702(a)(3-5).

(n26)Footnote 78. *Id.* at § 1702(a)(6)

(n27)Footnote 79. *Id.* at § 1702(a)(7).

(n28)Footnote 80. *Id.* at § 1702(a)(8)(A-E).

(n29)Footnote 81. *Id.* at § 1702(b)(8)(E)(ii).

(n30)Footnote 82. *Id.* at § 1702(b).

(n31)Footnote 83. *Id.*

(n32)Footnote 84. *Id.* at § 1702(b)(1) to (3). *N & C Properties v. Windham, 582 So. 2d 1044 (Ala. 1991).*

(n33)Footnote 85. *Id.* at § 1702(b)(4).

(n34)Footnote 86. *Id.* at § 1702(b)(5)(A-G).

(n35)Footnote 87. *Id.* at § 1702(b)(6).

(n36)Footnote 88. *Id.*

(n37)Footnote 89. *Id.*

(n38)Footnote 90. *Id.* at § 1702(b)(7)(i-iv).

(n39)Footnote 91. *Id.* at § 1702(b)(A-E).

(n40)Footnote 92. *Id.* at § 1702(c).

(n41)Footnote 93. *15 U.S.C. at § 1703*(a)(1).

(n42)Footnote 94. *Id.*

(n43)Footnote 95. *Id.* at § 1703(a)(2).

(n44)Footnote 96. *Id.*

(n45)Footnote 97. *Id.*

(n46)Footnote 98. *Id.* at § 1703(b).

(n47)Footnote 99. *Id.* at § 1703(c).

(n48)Footnote 100. *Id.* at § 1703(d).

(n49)Footnote 101. *Id.*

(n50)Footnote 102. *Id.*

(n51)Footnote 103. *Id.*

(n52)Footnote 104. *Id.*

(n53)Footnote 105. *Id.*

(n54)Footnote 106. *Id.* at § 1703(e).

(n55)Footnote 107. *15 U.S.C. at § 1704*(a).

(n56)Footnote 108. *Id.*

(n57)Footnote 109. *Id.* at § 1704(b).

(n58)Footnote 110. *Id.*

(n59)Footnote 111. *Id.* at § 1704(c).

(n60)Footnote 112. *Id.* at § 1704(d).

(n61)Footnote 113. *Id.*

(n62)Footnote 114. *15 U.S.C. at § 1705*(1).

(n63)Footnote 115. *Id.* at § 1705(2).

(n64)Footnote 116. *Id.* at § 1705(3-5).

(n65)Footnote 117. *Id.* at § 1705(6).

(n66)Footnote 118. *Id.* at § 1705(7)(A).

(n67)Footnote 119. *Id.* at § 1705(7)(A-B).

(n68)Footnote 120. *Id.* at § 1705(8).

(n69)Footnote 121. *Id.* at § 1705 (9-12).

(n70)Footnote 122. *15 U.S.C. at § 1706*(a).

(n71)Footnote 123. *Id.*

(n72)Footnote 124. *Id.*

(n73)Footnote 125. *Id.*

(n74)Footnote 126. *Id.*

(n75)Footnote 127. *Id.* at § 1706(b).

(n76)Footnote 128. *Id.*

(n77)Footnote 129. *Id.*

(n78)Footnote 130. *Id.*

(n79)Footnote 131. *Id.* at § 1706(c).

(n80)Footnote 132. *Id.*

(n81)Footnote 133. *Id.* at § 1706(d).

(n82)Footnote 134. *Id.*

(n83)Footnote 135. *Id.*

(n84)Footnote 136. *Id.* at § 1706(e).

(n85)Footnote 137. *Id.*

(n86)Footnote 138. *Id.*

(n87)Footnote 139. *Id.* at § 1706(f).

(n88)Footnote 140. *Id.* at § 1707(a).

(n89)Footnote 141. *Id.*

(n90)Footnote 142. *Id.*

(n91)Footnote 143. *Id.*

(n92)Footnote 144. *Id.*

(n93)Footnote 145. *Id.* at § 1708(a)(1).

(n94)Footnote 146. *Id.* at 1.

(n95)Footnote 147. *Id.* at 1.

(n96)Footnote 148. *Id.* at § 1708(a)(2).

(n97)Footnote 149. *Id.*

(n98)Footnote 150. *Id.* at § 1708(a)(3).

(n99)Footnote 151. *Id.*

(n100)Footnote 152. *Id.* at § 1708(b).

(n101)Footnote 153. *Id.*

(n102)Footnote 154. *Id.* at § 1708(c).

(n103)Footnote 155. *Id.*

(n104)Footnote 156. *Id.* at § 1708(d).

(n105)Footnote 157. *Id.*

(n106)Footnote 158. *Id.* at § 1708(e).

(n107)Footnote 159. *Id.* at § 1709(a). *Becherer v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 43 F.3d 1054 (6th Cir. 1995)* (securities violations may also be violations of fraud provisions of Land Sales Act).

(n108)Footnote 160. *Id.*

(n109)Footnote 161. *Id.*

(n110)Footnote 162. *Id.*

(n111)Footnote 163. *Id.*

(n112)Footnote 164. *Id.* at § 1709(b).

(n113)Footnote 165. *Id.* at § 1709(c).

(n114)Footnote 166. *Id.* at § 1709(d).

(n115)Footnote 167. *Id.* at § 1710(a).

(n116)Footnote 168. *Id.*

(n117)Footnote 169. *Id.*

(n118)Footnote 170. *Id.*

(n119)Footnote 171. *Id.* at § 1710(b).

(n120)Footnote 172. *15 U.S.C. at § 1711*(a)(1).

(n121)Footnote 173. *Id.* at § 1711(a)(2).

(n122)Footnote 174. *Id.* at § 1711(b).

(n123)Footnote 175. *15 U.S.C. at § 1712.*

(n124)Footnote 176. *15 U.S.C. at § 1713.*

(n125)Footnote 177. *15 U.S.C. at § 1714*(a).

(n126)Footnote 178. *Id. United States Dep't of Hous. & Urban Dev. v. Cost Control Mktg. & Sales Mgt. of Va., 64 F.3d 920 (4th Cir. 1995)* (asset freeze was justifiable as an equitable remedy); *Pierce v. Amaral, 938 F.2d 94 (8th Cir. 1991).*

(n127)Footnote 179. *Id.*

(n128)Footnote 180. *15 U.S.C. at § 1714*(b).

(n129)Footnote 181. *Id.*

(n130)Footnote 182. *Id.*

(n131)Footnote 183. *Id.* at § 1714(c).

(n132)Footnote 184. *Id.*

(n133)Footnote 185. *Id.* at § 1714(d).

(n134)Footnote 186. *Id.*

(n135)Footnote 187. *Id.*

(n136)Footnote 188. *Id.*

(n137)Footnote 189. *15 U.S.C. at § 1715*(a).

(n138)Footnote 190. *Id.*

(n139)Footnote 191. *Id.* at § 1715(b).

(n140)Footnote 192. *Id.* at § 1715(c).

(n141)Footnote 193. *Id.*

(n142)Footnote 194. *Id.*

(n143)Footnote 195. *15 U.S.C. at § 1716.*

(n144)Footnote 196. *Id.*

(n145)Footnote 197. *Id.*

(n146)Footnote 198. *15 U.S.C. at § 1717* (update).

(n147)Footnote 199. *Id.*, and § 1717a.

(n148)Footnote 200. *15 U.S.C. at § 1718.*

(n149)Footnote 201. *Id.*

(n150)Footnote 202. *15 U.S.C. at § 1719* (1982).

(n151)Footnote 203. *Id.*

(n152)Footnote 204. *Id.*

(n153)Footnote 205. *Id.*

(n154)Footnote 206. *Id.*

(n155)Footnote 207. *Id.*

(n156)Footnote 208. *15 U.S.C. at § 1720.*

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CHAPTER 78 REGULATION OF TRANSACTIONS

9-78 Thompson on Real Property, Thomas Editions § 78.06

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§ 78.06 Federal Trade Commission Act.

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The Federal Trade Commission has also responded to problems in real estate transactions by coming forth with its own set of regulations. Section 5 of the Federal Trade Commission Act gives the FTC authority to prohibit unfair or deceptive practices in commerce. n209 The FTC is particularly concerned with certain practices employed by the real estate industry, including anti-competitive practices and improper tactics in the area of sales promotion. In one case, the FTC took action against one of the largest land developers in the country for using unfair, deceptive, and misleading practices. n210 The FTC secured a judgment totaling over $17 million in refunds and land exchanges. n211

COMPUTER-ASSISTED RESEARCH

LEXIS: federal trade commission or ftc w/50 real estate or land or property w/50 sell! or sale w/50 anticompetitive or unfair or deceptive or misleading

FOOTNOTES:
(n1)Footnote 209. *15 U.S.C. § 45.*

(n2)Footnote 210. The FTC took action against G.A.C. Corp. for using false, misleading, deceptive, and unfair practices. Through a consent decree, more than $17 million in benefits were provided to past purchasers including $2 million in refunds, $14 million in land exchanges and $1 million in subdivision improvements.

(n3)Footnote 211. *Id.*

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CHAPTER 78 REGULATION OF TRANSACTIONS

9-78 Thompson on Real Property, Thomas Editions § 78.07

AUTHOR: Professor Richardson R. Lynn School of Law Pepperdine University

§ 78.07 The Securities Exchange Commission.

In response to the need for regulations regarding real estate, and the uncertainty surrounding the applicability of security laws to the sale of land, the SEC issued its own guidelines. Specifically, the SEC guidelines apply to the offering and sale of condominiums or units in real estate developments. n212 The SEC requires that certain condominium or other similar real estate offerings be registered as securities. n213 Any offering which involves "a contract, transaction or scheme whereby a person invests ... money in a common enterprise and is led to expect profits solely from the efforts of the promoter or a third party, ..." must be registered as a security. n214 Thus, the SEC's focus on the substantive nature of the transaction, which holds that "the expected return need not be solely from the efforts of others" allows some basis for reasoning that certain land sales lie within the scope of the SEC's regulatory power.

Once security laws are found to be applicable, certain advertising practices are prohibited. Prohibited practices include the dissemination of sales literature, brochures, or publicity concerning the land offered for sale. Further, after the filing of the registration statement but before its effective date, a written offer to sell need only be made via a statutory prospectus. n215

COMPUTER-ASSISTED RESEARCH

LEXIS: securities exchange commission or sec w/50 offer! or sale w/50 condominium or real estate w/50 register! w/10 securit!

FOOTNOTES:

(n1)Footnote 212. S.E.C. Securities Act of 1933, Release No. 5347 (January 4, 1973).

(n2)Footnote 213. *Id.*

(n3)Footnote 214. *328 U.S. 293, 298 (1956).*

(n4)Footnote 215. S.E.C. Securities Act of 1933, Release No. 5382 (April 9, 1973).

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CHAPTER 78 REGULATION OF TRANSACTIONS

9-78 Thompson on Real Property, Thomas Editions § 78.08

AUTHOR: Professor Richardson R. Lynn School of Law Pepperdine University

§ 78.08 State Regulations.

[Go To Supp]

§ 78.08(a) Introduction.

Most states have adopted some sort of land sale regulations. Many require disclosure which is similar to, or stronger than the Federal Land Sales Full Disclosure Act. Some states with their own disclosure acts have been certified by the Secretary of HUD, and meeting their statutes are a sufficient alternative to registering with HUD. A few states have adopted the Uniform Land Sales Act. Other states require only that a real estate broker be licensed. Those states not specifically requiring disclosure must still meet federal disclosure requirements. A few states do not have specific land sale regulations, although certain real estate transactions may fall under their blue sky laws. Additionally, some states have specific regulations for planned communities, condominium sales, time shares, membership camping grounds, horizontal property, and disclosure requirements for psychologically impacted land.

§ 78.08(b) Disclosure.

§ 78.08(b)(1) Overview.

Many states have legislated their own specific land sale acts to deal with fraudulent land sale practices. Some of those states go so far as to prohibit transactions which are deemed unjust. Other states have not passed comprehensive acts, although they still have passed some disclosure regulations. The following is a compilation of states which have passed disclosure legislation.

§ 78.08(b)(2) Arizona.

In Arizona, an offer to sell or lease any subdivided land must be made by a licensed real estate broker. n216 The seller must also provide a statement of record, and deliver a deed in good form to convey marketable and merchantable title. n217 Permanent access to subdivided land is also required. n218 The purchaser is allowed seven days after signing a contract or agreement to rescind the transaction without cause, or six months if the purchaser has not inspected the property. n219 Any person who knowingly violates any provision of Arizona's regulation or omits or misstates a material fact in the statement of record is subject to felonious prosecution. n220

COMPUTER-ASSISTED RESEARCH

LEXIS: A.R.S. w/5 [relevant section]

§ 78.08(b)(3) California.

Before selling land in California, the owner must disclose a legal description of the land, statement as to the condition of land and title, and a statement of the terms and conditions on which the vendor intends to dispose of the land. n221 The owner must also include any provisions for public utilities and facilities, location of all airports within two miles, and indebtedness or possible liens on the property. n222 It is deemed unlawful to sell lots in a subdivision subject to a blanket encumbrance, unless the encumbrance is unconditionally released upon the purchaser's compliance with the terms and conditions of the agreement. n223 Upon meeting the Commissioner's requirements, the Commissioner will then issue a public report authorizing the sale of such lot. n224

COMPUTER-ASSISTED RESEARCH

LEXIS: BUS w/5 [relevant statute]

§ 78.08(b)(4) Colorado.

Any developer desiring to do business in Colorado must register with the Real Estate Commission. n225 The application must include any felony which the developer has been convicted of in the preceding ten years; evidence that the subdivision has been registered with the state in it which is located; if there is a blanket encumbrance, documentary evidence that any mortgage or deed of trust will release the lot from the blanket encumbrance; a true statement providing for legal access, sewage disposal, and public utilities; a true statement as to whether or not the land has been surveyed; and the required registration fee. n226

COMPUTER-ASSISTED RESEARCH

LEXIS: C.R.S. w/5 [relevant statute]

§ 78.08(b)(5) Florida.

Florida's Land Sales Practices legislation will be repealed on October 1, 1995, pursuant to § 11.61 of the Regulatory Sunset Act. n227

The legislative intent of Florida's land sales regulations is to balance the interests of encouraging the industry while at the same time protecting purchasers. n228 To sell land in Florida, the seller must file disclosure documents. n229 Registration, property reports, or other disclosure documents required by other states are acceptable, as are meeting the federal requirements. n230 If it appears that a person is in violation of any provision of the state regulations, the division may bring an action in circuit court to enjoin the violation and to enforce compliance with the regulations. n231 Upon a proper showing, injunctive relief or temporary restraining orders may be granted, and a receiver or conservator may be appointed without posting a bond. n232

COMPUTER-ASSISTED RESEARCH

LEXIS: F.S.A. w/5 [relevant statute]

§ 78.08(b)(6) Georgia.

Georgia has passed the Georgia Land Sales Act. n233 This act requires a registration statement to be made for non-exempt land which must include the name, address, and phone number of the subdivider; the total acreage in the subdivision including land held for future expansion; statements with respect to existing or contemplated improvements, including drainage control systems, streets, roads, sewage facilities, sidewalks, electrical services, telephone connections, water supply, gas supply, clubhouses, golf courses, and other recreational facilities; the provisions of any applicable zoning ordinances; and a statement of all existing taxes or assessments affecting the subdivided land. n234

A property report must also be provided to the purchaser. n235 Language substantially similar to the following is required in tenpoint type on the top two-thirds of the property report:

> UNLESS YOU RECEIVED THIS PROPERTY REPORT PRIOR TO OR AT THE TIME YOU ENTER INTO A CONTRACT, YOU MAY VOID THE CONTRACT BY WRITTEN NOTICE TO THE SELLER. IF YOU RECEIVED THE PROPERTY REPORT LESS THAN 48 HOURS PRIOR TO SIGNING A CONTRACT OR AGREEMENT YOU HAVE UNTIL MIDNIGHT OF THE SEVENTH DAY FOLLOWING THE SIGNING OF SUCH CONTRACT OR AGREEMENT TO REVOKE YOUR CONTRACT BY WRITTEN NOTICE TO THE SELLER. n236

The following language must be overprinted in light red type over the paragraph cited above, in the style used to mark sample documents, and in letters one-half inch in size with one-half inch space between the lines:

**"PURCHASER
SHOULD READ
THIS DOCUMENT
BEFORE SIGNING
ANYTHING."**

The following must appear on the cover page in boldface print or capital type:

> THIS LAND HAS BEEN REGISTERED WITH THE GEORGIA REAL ESTATE COMMISSION. THE GEORGIA REAL ESTATE COMMISSION, BY ACCEPTING REGISTRATION, DOES NOT IN ANY WAY ENDORSE OR RECOMMEND THE PURCHASE OF ANY OF THIS LAND. n237

COMPUTER-ASSISTED RESEARCH

LEXIS: O.C.G.A. w/5 [relevant statute]

§ 78.08(b)(7) Illinois.

Under Illinois sunset legislation, the Land Sales Registration Act of 1989 will be repealed December 31, 1999. n238

Under the Act, subdivided lands must be registered before they are offered for sale. n239 The application must include the name and address of the owner and subdivider; the name and address of an agent located in the state to accept service of process on behalf of the subdivider; and a legal description of the land showing its relation to existing streets or roads, waterways, schools, churches, shopping centers, bus, rail, and other local transportation, and a statement of distance to each. n240 A proposed property report is also required which must include information concerning improvements such as utilities; significant encumbrances, liens, and restrictions; financial statements; and additional information which the department deems necessary. n241

COMPUTER-ASSISTED RESEARCH

LEXIS: [Ill.] subdivi! w/10 land or property w/50 register!

§ 78.08(b)(8) Michigan.

Michigan's regulations regarding the disposition of lots, parcels, units, or interests in lands within real estate subdivisions are codified under the Land Sales Act. n242 The authority to enforce land sales regulations which was once under the Department of Licensing and Regulations is now under the Department of Commerce. n243

The Act does not permit offering any land for sale within the state or any land offered outside the state to anyone within the state prior to registering in accordance with the Act. n244 An application for registration must contain an irrevocable appointment of the department to receive service of any legal process in any civil proceeding arising under the act; the applicant's occupation for the past five years and of each agent with a 10% or greater interest; a legal description of the property based on a professional survey; a statement as to the condition of the title which includes encumbrances, deed restrictions, and covenants; proof of marketable title; and a statement of the present condition of access to the subdivision, the availability of sewage disposal facilities and other public utilities, and the proximity in miles to nearby municipalities. n245 Additionally, a narrative description of the promotional plan for disposition of the land including copies of all advertising materials must be included. n246 The administrative department may require additional materials they deem fit. n247

A current property report must be delivered to the purchaser, and the purchaser is permitted a reasonable time to examine such report. n248 Further, each contract or agreement for the disposition of a lot, parcel, unit, or, interest in a subdivision shall prominently contain upon its face the following notice printed in at least eight point type which shall be at least four point bold type larger than the body of the document:

NOTICE TO PURCHASER

> YOU ARE ENTITLED TO CANCEL THIS AGREEMENT AT ANY TIME IF YOU HAVE NOT RECEIVED THE PROPERTY REPORT IN ADVANCE OF YOUR SIGNING THIS AGREEMENT. IN ADDITION, YOU ARE ENTITLED TO CANCEL THIS AGREEMENT FOR ANY REASON WITHIN FIVE DAYS FROM THE DAY YOU ACTUALLY RECEIVE A LEGIBLE COPY OF THIS DOCUMENT. n249

COMPUTER-ASSISTED RESEARCH

LEXIS: MCLA w/5 [relevant statute]

§ 78.08(b)(9) Minnesota.

Minnesota's legislation regarding the sale of subdivided land is administered by the commissioner of commerce. n250 At least twenty days prior to sale, the subdivider must submit to the commissioner the subdivider's name and address; location and legal description of the land; a title opinion or title insurance; a copy of each instrument which will be delivered to the purchaser to evidence the purchaser's interest in the subdivided land and a copy of each contract or other agreement that the purchaser will be required to sign; and a list of fees the purchaser will be required to pay for any amenities or memberships in groups. n251 Furthermore, a public offering statement must disclose fully and accurately the subdivided land being offered, and must make known to prospective purchasers all unusual and material circumstances or features affecting the subdivided land. n252

Advertisements are also strictly regulated, and many specific acts are prohibited, including advertisements that are considered deceptive or misleading; that offer travel, accommodations, gifts, meals, or entertainment to encourage prospective purchasers to visit; that describe offers or inducements to purchase as "prizes" or "awards;" that refer to

purchasers as "specially selected" or "winners;" and that contain the words "free" or "without obligation," unless the offer is unequivocally without condition. n253

COMPUTER-ASSISTED RESEARCH

LEXIS: [Minn.] subdivide! w/10 land w/50 sale or sell!

§ 78.08(b)(10) Nebraska.

Nebraska's regulations are known as the Nebraska Real Estate License Act. n254 It is unlawful for any person other than a licensed real estate broker to offer or sell any lot in a subdivision. n255 In addition to heavy regulations regarding licensing of brokers, there are also disclosure requirements designed to protect the purchaser. n256

Prior to the time when land in a subdivision is offered for sale, the broker must apply for a subdivision certificate to the commission. n257 The application must include a legal description of the area to be offered, including maps and recorded plats; the name and address of the legal owner, the applicant, and, if the applicant is a partnership, the names and addresses of the partners; a certified, audited financial statement fully and fairly disclosing the current financial condition of the developer; copies of the instruments by which the land was acquired; and a true statement of the terms and conditions on which it is intended to dispose of the real estate together with copies of any contracts to be used, which contracts shall contain a provision entitling the purchaser to an unconditional right of refund of all payments made under the contract if the purchaser has not seen the land prior to signing, and if after inspection, if made not less than four months after signing, the purchaser rescinds within fourteen days. n258 If the land is located outside the state, a provision must be included to limit the right of recovery to foreclosure without a deficiency judgment against the purchaser. n259 A statement of zoning and other governmental regulations must additionally be disclosed, and a copy of an offering statement must be included which sets forth the material facts regarding the land to be sold. n260

The commission is given the authority to investigate all relevant matters, and no application shall be approved by the commission unless the subdivider offers satisfactory proof of the ability to provide promised public improvements such as, but not limited to, water, sewer, gas, and streets. n261 Obtaining a certificate of registration constitutes sufficient contact with the state for the exercise of personal jurisdiction over such applicant in any action arising out of the applicant's activity in the state. n262 The Attorney General may maintain an action in the name of the state when, in the judgment of the commission, a person has engaged or is about to engage in violations of the Act. n263

COMPUTER-ASSISTED RESEARCH

LEXIS: nebraska real estate license act w/5 [relevant statute]

§ 78.08(b)(11) Nevada.

For the sale of subdivided land in Nevada the developer is exempt from filing a statement of record if such statement has been registered with HUD in compliance with the federal Act. n264 Aside from such statement, the developer must meet all other state requirements including applying for a license to sell any subdivision or lot. n265

Such application shall include the name, principal occupation, and address of every officer, partner, director, owner, associate, or trustee of the subdivider, and a legal description of the area of the lands. n266 Further, true statements must be supplied as to the condition of title including any encumbrances; terms and conditions on which the land is to be disposed; provisions, if any, for public utilities; for what purposes the land is to be offered; the maximum depth of fill used, or proposed to be used on each lot which must also include the soil conditions supported by engineering reports; the amount of indebtedness which is a lien upon the subdivision; and any agricultural activities in the area which may adversely affect residents of the subdivision including odors, cultivation, related dust, agricultural burning, application

of pesticides, or irrigation and drainage. n267 Further, purchasers must be disclosed as to public services, and all advertising must be approved. n268

The division must fully investigate each application before issuing a license, and has the authority to deny such licensing for non-compliance, fraud, or deceit. n269 The division may also order cease and desist orders. n270

COMPUTER-ASSISTED RESEARCH

LEXIS: NRS w/5 [relevant statute]

§ 78.08(b)(12) New Hampshire.

New Hampshire's regulations fall under its Land Sales Full Disclosure Act. n271 Under the provisions of the Act, a subdivider must apply for registration. n272 The application must include all required documents and information, and an irrevocable appointment of the agency to receive service of any lawful process. n273 Required information in the application includes information regarding public utilities, encumbrances, relevant zoning regulations, a statement as to provisions for access, a description of the promotional plan, the proposed offering statement, and copies of the instruments which will be delivered to the purchaser to evidence interest in the subdivided land, and of contracts and other documents the purchaser will be required to sign, in addition to any other information deemed required by the agency. n274 The public offering statement must also fully and fairly disclose relevant information to the purchaser. n275

Upon failing to conform with any provision of the Act, the agency may order cease and desist orders, and willful violations can result in prosecution for a class B felony. n276

§ 78.08(b)(13) New Jersey.

New Jersey's predominant land sales regulation can also be found in the state's Land Sales Full Disclosure Act. The Act is administered by the Bureau of Subdivided Land Sales Control. n277 Under the Act, registration fees range from $500 to $3,000. n278 The application for registration must include naming the New Jersey brokers who are authorized representatives of the subdivider, accompanied by the appropriate fee, and a statement of record. n279 The bureau has 60 days to approve or decline registration. n280 During this period, the bureau will initiate an examination to determine that the subdivider can convey or cause to be conveyed the interest in the subdivided land being offered; that there are reasonable assurances that all proposed improvements will be completed as represented; the advertising material and the general promotional plan are not false, misleading, or discriminatory and comply with the standard prescribed by the commission in its rules and afford full and fair disclosure; that vacation certificates or similar visitor campaigns contain a full disclosure of pertinent information; that the subdivider and any agents have not been convicted of a crime or civil defense regarding land dispositions; and that the public offering statement of this act have been satisfied. n281

The statement of record, which is available to the public, must contain information including the name and address of each person having an interest in the property; a legal description of, and total area included in, the subdivision, and a statement of the topography thereof; a statement as to the condition of title including all encumbrances and restrictions; a statement as to the present condition of access to the subdivision, the existence of any unusual conditions relating to noise and safety, the availability of sewage disposal facilities and other public utilities; a statement by a licensed civil engineer that the overall plan of the subdivision is adequate to prevent damage to property by reason of flooding, erosion, and other natural occurrences which are usual or predictable for the area. n282

Additionally, the statement must include, if there exists a blanket encumbrance, a statement of the consequences of the individual purchaser of a failure, by the persons bound to fulfill the obligation, and the steps taken, if any, to prevent such eventuality; copies of the deed or instrument establishing title to the subdivision, copies of all forms of conveyance

to be used in selling or leasing the lot, and any other information the commission requires. n283

COMPUTER-ASSISTED RESEARCH

LEXIS: N.J.S.A. w/5 [relevant statute]

§ 78.08(b)(14) New Mexico.

New Mexico regulates the sale of subdivisions under the Land Subdivision Act. Specific county regulations regarding the sale of subdivisions fall within the New Mexico Subdivision Act. Both Acts provide for subdivision approval, disclosure, advertising standards, road development, schedule of compliance, and penalties for violations. n284

COMPUTER-ASSISTED RESEARCH

LEXIS: [N.M.] subdivision act w/5 [relevant statute]

§ 78.08(b)(15) New York.

Before a subdivider may sell, lease, or offer for sale or lease to the public, the broker or agent must file in the department of state an offering statement, business and personal data regarding the subdivider, a complete description of the land offered, including a certified survey map, and a title search including liens, encumbrances, and covenants. n285

Advertising is also regulated, and must contain a reference that the offering statement exists and is on file with the department. n286

The offering statement must be received by the purchaser prior to consummation of the sale or lease, and must include the name, address, and business background of the subdivider, the subdivider's financial statement, a description of the subdivision, material terms of any liens, encumbrances, or restrictions, information concerning improvements such as access and public utilities in existence, and the estimated cost and date of completion. n287 The department may also require any other additional information it deems necessary. n288

COMPUTER-ASSISTED RESEARCH

LEXIS: [N.Y.] prop! w/s law w/5 337

§ 78.08(b)(16) North Dakota.

North Dakota regulates property transactions through its Subdivided Lands Disposition Act. n289 Unless the subdivided land is exempt from the act, it is unlawful to offer or dispose of an interest in land without registering the subdivided land, and delivering a public offering statement to the purchaser. n290 The purchaser must be allowed a reasonable time to examine the public offering statement prior to disposition of the offered land. n291

The application for registration must include an irrevocable appointment of the commission to receive legal process; a legal description of the land with a map which shows the land's relation to streets, roads, waterways, schools, churches, shopping centers, public transportation facilities, and other off-site improvements; any adverse judgments against the applicant respecting land dispositions from other jurisdictions, the applicant's principal occupation for the past five years; the condition of title of the land, including any encumbrances; copies of the instruments that will be delivered to the purchaser to evidence interest and of the contracts and other documents which will be signed; information concerning blanket encumbrances and their consequences, liens, restrictions, other encumbrances, and applicable zoning information; a statement of provisions for physical access to the land; a narrative description of the promotional

plan; the proposed offering statement; and any financial statements or other information which the commission may require. n292

The public offering statement must accurately disclose the physical characteristics of the land, and all unusual and material features of the land. n293

The commission has the authority to issue cease and desist orders, and may revoke registration for failure to comply with such orders. n294 Civil remedies are also available, and a purchaser may rescind within five years for certain violations. n295

COMPUTER-ASSISTED RESEARCH

LEXIS: NDCC w/5 [relevant statute]

§ 78.08(b)(17) Oklahoma.

Oklahoma's code regarding land sales is known as the Oklahoma Subdivided Land Sales Code. The Code requires registration and delivery of a public offering statement to the purchaser. n296

The application for registration must contain the name, address, and occupation of the subdivider and agents thereof; whether the subdivider and any agents have been disciplined, debarred, censured, suspended, or convicted in connection with any land sales or securities sales dealing; a copy of any statements filed with other jurisdictions or with the Federal Land Sales Full Disclosure Act; a legal description of the land and the recorded plat thereof; a satisfactory statement as to the condition of title including all encumbrances, liens, restrictions, and covenants; copies of the instruments by which the subdivider acquired the land; copies of the instruments which will evidence the purchasers interest in the land and all appropriate contracts and agreements that will be required; a statement of compliance with any zoning regulations; a statement as to provisions for access to the subdivision, sewage disposal, and other public utilities, the proximity in miles to nearby municipalities, the availability and scope of fire and police protection, and the location of schools; a narrative description of the promotional plan to be used; three copies of the public offering statement; and any other information the administrator may require. n297

The public offering must disclose fully and accurately all material circumstances of features which affect the subdivided lands or would be a material consideration in making the purchasing decision. n298 The public offering statement may not be used for any promotional purposes before registration, and afterward it may only be used in its entirety. n299

Advertising is also regulated by the Act. n300

§ 78.08(b)(18) Oregon.

Prior to negotiating within the state for the sale or lease of subdivided lands located outside the state, or prior to the sale or lease of any subdivided or series partitioned lands located within the state, the subdivider, partitioner, or agent must by a "Notice of Intention" notify the commissioner in writing of such intention, and include required information as the legislation dictates. n301 The commissioner may also require additional information. Further, the commissioner is authorized to make an examination of the land. n302 Before land may be sold by means of a land sale contract, a collection escrow must be established within the state with a person authorized to receive escrow under the laws of Oregon. n303 As required by legislation, additional information and documents may also be required to be deposited into escrow. n304 A purchaser has three days to cancel any contract for the sale or lease of subdivided or partitioned land. n305

COMPUTER-ASSISTED RESEARCH

LEXIS: [Ore.] sale or lease w/20 subdivi! w/20 land or property or real estate

§ 78.08(b)(19) Virginia.

Virginia enacted the Subdivided Land Sales Act of 1978. n306 Under the provisions of the Act, it is unlawful for any developer or agent to offer or dispose of land without first filing a notice of intention to offer or dispose of real property with the Virginia Real Estate Board. n307 Notice shall include an irrevocable appointment of the Board to receive service of any relevant lawful process; a legal description of the lots offered together with a plat showing the division made, the dimensions of the lots, and the relationship of lots to existing streets, roads, and other off-site improvements; the name and address of each principal, officer, partner, or trustee of the developer, along with a list of any violations, bankruptcy, or disciplinary actions for the preceding five years; and a copy of the developer's effective HUD Property Report, certified as such by the developer, if it has been filed in compliance with the registration requirements of the Interstate Land Sales Full Disclosure Act. n308

The Act makes it unlawful to sell or lease lots in a subdivision that is subject to a blanket encumbrance, unless the blanket encumbrance or effective supplemental agreement contains a release provision permitting legal title to individual lots to be obtained free and clear of the blanket encumbrance. n309

The Board may issue cease and desist orders or bring an action in the appropriate circuit court for violations of the Act. n310

§ 78.08(b)(20) Washington.

Under Washington's Land Development Act, unless exempt, no person may offer or dispose of any interest in a development located within or without the state, prior to the time the development is registered in accordance with the Act. n311 Furthermore, any contract or agreement to purchase any interest is void at the option of the purchaser if the purchaser has not received a public offering statement in advance of signing. n312

The application for registration must include all required documents and information including, but not limited to, an irrevocable appointment of the director to receive process for related legal proceedings; a legal description of the offered land and its relation to existing streets, roads, and other off-site improvements; the states or jurisdictions where similar filings have occurred, and whether any adverse order, judgment, or decree has been entered in connection with land development; the name and address of all persons holding an interest of at least five percent; a statement as to provisions for access, sewage, and public utilities; a statement as to the condition of title including easements of record, encumbrances, liens of record, blanket encumbrances, and the existence of partial release clauses; copies of instruments which will be delivered to the purchaser to evidence interest, and copies of all contracts and agreements which must be signed; a statement as to applicable zoning ordinances; a narrative description of the promotional plan for the disposition of the development, together with copies of all advertising materials prepared for public distribution; a statement of any hazard on or around the development; the proposed public offering statement; and any other required information.

The proposed public offering statement must include the name and principal address of the developer; a general description of the development; the significant terms of any encumbrances, easements, liens, or restrictions; a statement of the use for which the property is offered, information concerning improvements, their estimated cost, means of financing, date of completion, and responsibility for construction and maintenance; a statement as to hazards on or around the development; and any other required information. n313

The director may issue cease and desist orders for violations of the Act, or in the event it appears a violation is about to occur. n314 Upon proper showing, injunctive relief or temporary restraining orders may be granted, and a receiver or

conservator may be appointed. n315 Legal remedies are also available. n316

COMPUTER-ASSISTED RESEARCH

LEXIS: RCW w/5 [relevant statute]

§ 78.08(c) Out-of-State Regulation.

§ 78.08(c)(1) Overview.

In addition to general licensing or disclosure requirements, the following states have enacted specific regulations pertaining to out-of-state land transactions.

§ 78.08(c)(2) California.

Out-of-state land promotions are regulated through section 10249 of Section 8 of the California Business and Professional Code. n317 Before such land is offered for sale, the owner must apply for a permit from the Real Estate Commissioner. n318 To receive a permit, the owner must disclose a legal description of the land, a statement as to the condition of land and title, and a statement of the terms and conditions on which the vendor intends to dispose of the land. n319 Additionally, the owner must pay the maximum reimbursement rate per mile authorized for an employee of the state using a privately owned automobile on official state business to aid the prospective purchaser to personally inspect the land. n320 The owner must also include any provisions for public utilities and facilities, location of all airports within two miles, and indebtedness or possible liens on the property. n321 It is deemed unlawful to sell lots in a subdivision subject to a blanket encumbrance, unless the encumbrance is unconditionally released upon the purchaser's compliance with the terms and conditions of the agreement. n322 Upon meeting the Commissioner's requirements, the Commissioner will then issue a public report authorizing the sale of such lots. n323

COMPUTER-ASSISTED RESEARCH

LEXIS: [Cal.] out of state w/20 land w/50 transaction or promotion or sale

§ 78.08(c)(3) Connecticut.

Out-of-state developers are exempt from Connecticut's regulations if they have complied with the federal Act. n324 Under Connecticut's land sales regulations, an out-of-state developer must appoint the secretary of state to receive service of process; submit documents, promotional plans, and advertising materials to the real estate commission; submit to an investigation by the commission prior to obtaining a license; and pay the appropriate fee. n325

§ 78.08(c)(4) Delaware.

No subdivision, lot, parcel, unit, or interest in any subdivision located in whole, or in part, outside of the state may be promoted, offered, or disposed of within the state until such person has appointed the Delaware Secretary of State to receive service of process, submitted an application with the commission which includes a property report, prospectus, or any offering statement which the commission deems necessary, submitted a license application, and paid a filing fee of $100 for each subdivision or portion thereof to be offered or disposed of. n326 The commission is authorized to make appropriate investigations. n327 Further, no promotions or advertisements are permitted until the commission inspects, approves, or otherwise passes on the offered land. n328

§ 78.08(c)(5) Idaho.

Idaho's Subdivided Land Disposition Act is specific legislation geared to the sale or disposition of land located outside

the state. n329 No land, unless exempt, may be offered for sale within the state prior to registering within the provisions of the act, and providing a current offering statement to the purchaser. n330 The statement must include the name and address of the subdivider; a general description of the land; a statement for the use of which the land is offered; the significant terms of any encumbrances, easements, liens, and restrictions; information regarding streets, water supply, levees, drainage control systems, irrigation systems, sewage disposal facilities, customary utilities; and the estimated cost, date of completion, and responsibility for construction and maintenance of existing and proposed improvements. n331 The commission has the authority to make inquiries and examinations to determine that the conveyer has the power to convey, proposed improvements will be as represented, advertising materials are not false and misleading, the subdividers have not been convicted of crimes involving land disputes, and that there is no evidence which would reasonably lead the commissioner to believe the subdivider is contemplating a fraudulent or misleading sales promotion. n332 The commission may issue cease and desist orders in appropriate circumstances. n333

COMPUTER-ASSISTED RESEARCH

LEXIS: [Idaho] subdivided land disposition

§ 78.08(c)(6) Iowa.

Iowa has specific legislation in respect to sales of subdivided land outside of Iowa. n334 To sell land in Iowa, a subdivider must apply with the real estate commission and include an offering statement. n335 No business may take place until the application is accepted. n336 Unless the land offered qualifies as an exemption, the developer must additionally meet the requirements of the Federal Land Sales Full Disclosure Act. n337 Civil as well as criminal penalties may be imposed for violations. n338

No person may sell land inside or outside of Iowa, in the capacity of a real estate broker without first obtaining a real estate broker's license. n339

§ 78.08(c)(7) Montana.

Montana has bifurcated regulation in this area. Subdivision regulation is classified as either "out-of-state sales of in-state subdivisions" or "in-state sales of out-of-state subdivisions." n340

Prior to selling or leasing in-state subdivisions out-of-state, the owner must notify the board in writing of that intention. n341 The notice shall contain the name and address of the owner and subdivider; a legal description of the area of lands including a map showing the layout proposed and relation to existing streets; a true statement to the existence of title including any encumbrances; a true statement of the provision for legal access, sewage disposal, and public utilities; and copies of any advertising, information, promotional brochures, or similar materials which may cause or induce purchase of the property. n342 A filing fee of $50 must accompany the notice of intent. n343 If the board decides more information is necessary, it may require an additional questionnaire to be filed with an additional fee attached of $100. n344

To protect purchasers, a proper release must be supplied for any blanket encumbrances, and a bond in the amount of $2500 must be furnished to the state. n345 Willful violations are punishable as misdemeanors. n346

Legislation regarding in-state sales of out-of-state land may be cited as the Foreign Land Sales Act. Under the Act, the board may intervene in all suits regarding subdivided land. n347 The board must cooperate with other states to establish uniform filing procedures, public offering statements, advertising standards, and common administrative practices. n348 The board may make necessary public or private investigations within or outside the state to determine if a person has violated or is about to violate any rule under the Act, and upon its own motion may administer necessary oaths, affirmations, and subpoenas. n349

Unless the land qualifies as an exemption, no offer to dispose such land may be made until the land is registered. n350 The application for registration must contain a legal description of the property with a map showing its relation to roads and off-site improvements; a statement as to the condition of title including any encumbrances; copies of the instruments which will be delivered to the purchaser to evidence the purchaser's interest in the land, and of the contracts which will be signed; if there is a lien or encumbrance, a statement of the consequences for a purchaser for failure to discharge the lien, and the steps taken to protect the purchaser in case of this eventuality; a statement of zoning and other regulations which affect the land; and a statement of existing provisions for access, sewage disposal, and other public utilities. n351

The application must also include an irrevocable appointment of the department to receive service of any lawful process in any relevant non-criminal proceeding, a narrative description of the promotional plan for the disposition of the land, together with copies of all advertising materials, the proposed public offering statement, and any other information, including a financial statement which the board requires for the protection of purchasers. n352

The public offering statement must include a statement for the use which the property is offered, and information regarding, but not limited to, improvements including streets, water supply, levees, drainage control systems, irrigation systems, sewage disposal facilities, and customary utilities, and the estimated cost, date of completion, and responsibility for its construction and maintenance. n353

Advertising is also regulated. n354 Additionally, a bond of not less than $50,000 must be posted. n355 The board may also issue cease and desist orders for the prevention of unlawful activities. n356 In addition to civil remedies and injunctive relief, one who willfully violates the law may be extradited, fined not less than $1,000 nor more than $5,000, or may be imprisoned for no more than two years, or both. n357

§ 78.08(c)(8) Rhode Island.

Rhode Island has adopted specific legislation for out-of-state real estate sales and dispositions. Before any person or broker may advertise, offer, or dispose of any subdivided land within the state, the person must submit such particulars as the department may require including, but not limited to, a prospectus, property report, or offering statement embodying all the terms relative to the offering and disposition; a detailed statement of intended and proposed advertising and sale methods and techniques; a complete license application; and a filing fee. n358 Further, the director of business regulation must be appointed in writing to receive legal process. n359 Any broker, real estate salesperson, or developer who violates any provision of this chapter will be guilty of a misdemeanor, and in addition to any other penalties imposed by law, have his or her real estate license suspended or revoked. n360

§ 78.08(c)(9) Wisconsin.

Under Wisconsin legislation, offerings and sales of out-of-state land require meeting the state's disclosure requirements, and submitting a conforming property report. n361

§ 78.08(d) Uniform Land Sales Practices Act.

§ 78.08(d)(1) Overview.

The following states have adopted the Uniform Land Sales Practices Act.

§ 78.08(d)(2) Alaska.

Alaska has adopted the Uniform Land Sales Practices Act in addition to incorporating some provisions of the Federal Land Sales Full Disclosure Act. n362 A seller of land in Alaska is required to disclose the access of existing streets or

roads; liens or encumbrances; access to sewage disposal, water, and other public utilities; and a current financial statement for the protection of the purchaser. n363 An inquiry is also made to determine that the offeror has the power to convey. n364 Any out-of-state real estate broker must be licensed. n365 To sell land in Alaska, an out-of-state developer must also appoint a representative within the state to receive service of process for legal proceedings. n366

COMPUTER-ASSISTED RESEARCH

LEXIS: [Alaska] uniform land sales or 34.55

§ 78.08(d)(3) Hawaii.

Hawaii has enacted the Uniform Land Sales Practices Act. Under Hawaii's legislation, no purchaser may offer land for sale without first registering such land with the commissioner of securities unless the land qualifies as one of the exemptions. n367 The purchaser must receive a current public offering statement which must stipulate all unusual and material circumstances or features affecting the subdivided land. n368 The statement must also include information concerning improvements including streets, water supply, levees, drainage control systems, irrigation systems, sewage disposal facilities, customary utilities, and the estimated cost and date of completion, and responsibility for construction and maintenance of existing and proposed improvements. n369 Additional information is also required by the director to ensure full disclosure including zoning regulations, and a seven day period to rescind the contract. n370 If the administrative director finds violations, the director may issue a cease and desist order. n371 Willful violations are punishable by both civil and criminal penalties. n372

§ 78.08(d)(4) Kansas.

Under Kansas' Uniform Land Sales Practices Act, a developer must apply for registration with the real estate commission. n373 Disclosure of material facts concerning the land must be included in a required public offering statement. n374 Required information includes information concerning improvements such as streets, water supply, levees, drainage control systems, irrigation systems, sewage disposal facilities, customary utilities, and the estimated cost and date of completion, and responsibility for construction and maintenance of existing and proposed improvements. n375 The commissioner may issue cease and desist orders for violations of the Act, or for fraudulent or misleading advertisement practices. n376 Willful violations are punishable by both civil and criminal penalties including not less than one thousand dollars, or double the amount of gain from the transaction, whichever is larger, but not to exceed fifty thousand dollars. n377 A violator may also be imprisoned for up to three years. n378

COMPUTER-ASSISTED RESEARCH

LEXIS: [Kan.] uniform land sales

§ 78.08(d)(5) South Carolina.

South Carolina has passed the Uniform Land Sales Practices Act. According to South Carolina's Act, no person may offer or sell land, unless exempt under the provisions of the Act, prior to registering with the South Carolina Real Estate Commissioner, and delivering a public offering statement to the purchaser. n379 The application, aside from requiring documentation and disclosure as to title, easements, restrictions, encumbrances, other covenants, zoning regulations, provisions for access and public utilities, and a narrative description of the promotional plan, also requires an irrevocable appointment of the real estate commissioner to receive service of lawful process. n380

The public offering statement must disclose fully and accurately the physical characteristics of the subdivided land, and make known to purchasers all unusual and material circumstances or features affecting the land. n381

The commissioner may issue cease and desist orders, and one who willfully violates any provision of this Act may be found guilty of a misdemeanor, and may be fined not less than $1,000, or double the amount of gain from the transaction but not more than $50,000. n382

COMPUTER-ASSISTED RESEARCH

LEXIS: [S.C.] uniform land sales

§ 78.08(d)(6) Utah.

In 1973, Utah adopted the Uniform Land Sales Practices Act. n383 The Act is administered by the Division of Real Estate of the Department of Commerce. n384 Unless a subdivision falls under one of the exemptions of the Act, no person may offer or dispose of such land located or offered in the state prior to registering the subdivision in accordance with the Act. n385 However, the division may grant a temporary permit allowing the developer to begin a sales program while the registration is in process. n386

Any contract or agreement for the disposition of a subdivision may be rescinded by the purchaser without cause by midnight of the fifth calendar day after the execution of the contract or agreement. n387 This right may not be waived. The contract or agreement must state in boldface type on the signature page above all signatures:

> YOU HAVE THE OPTION TO CANCEL YOUR CONTRACT OR AGREEMENT OF DISPOSITION BY NOTICE TO THE SELLER UNTIL MIDNIGHT OF THE FIFTH CALENDAR DAY FOLLOWING THE SIGNING OF THE CONTRACT OR AGREEMENT. WRITTEN NOTICE OF CANCELLATION MUST BE PERSONALLY DELIVERED OR SENT BY CERTIFIED MAIL, POSTMARKED BY MIDNIGHT OF THE FIFTH CALENDAR DAY FOLLOWING THE SIGNING OF THE CONTRACT OF THE AGREEMENT, TO THE SELLER AT: (address of the seller). n388

Furthermore, no person may dispose of any interest in subdivided land without delivering to the purchaser an effective public offering statement. n389 The statement must disclose fully and accurately the physical characteristics of the subdivided lands offered, and must make known to prospective purchasers all unusual circumstances or features affecting the subdivided lands. n390 The proposed public offering statement must include all specific information and documentation required by the terms of the Act, and any other information which the division may require. n391

For violations of the Act, the division may issue cease and desist orders, revoke registration, or suspend or revoke the subdivider's real estate license. n392 Willful violations are subject to criminal penalties of not less than $1,000 or double the amount of the gain from the transaction, whichever is more, but not to exceed $50,000, two years imprisonment, or both. n393 Civil remedies are also available. n394

COMPUTER-ASSISTED RESEARCH

LEXIS: [Utah] uniform land sales

§ 78.08(e) Real Estate Broker's License.

§ 78.08(e)(1) Overview.

Some states do not have specific disclosure acts or regulations. In such states a real estate broker or salesperson generally must be licensed, and adhere to licensing requirements set forth by that state's real estate commission.

§ 78.08(e)(2) Alabama.

To sell any lot or land situated within or without Alabama, a vendor must purchase a business license, and pay the applicable license and tax. n395 Further, certified records of any encumbrances affecting the land must be provided. n396

COMPUTER-ASSISTED RESEARCH

LEXIS: [Ala.] real estate w/20 broker w/50 license w/50 sell or sale w/50 land or lot or property

§ 78.08(e)(3) Arkansas.

Land sales in Arkansas are under the authority of the Real Estate Commission, and its rules and regulations. n397 Unless an owner is selling or leasing the owner's property, a licensed real estate broker must make the transaction. n398

COMPUTER-ASSISTED RESEARCH

LEXIS: [Ark.] real estate w/20 broker w/50 license w/50 sell or sale w/50 land or lot or property

§ 78.08(e)(4) Delaware.

To offer, sell, or dispose of subdivided land within the state, a developer must be registered with the Real Estate Commission. n399

COMPUTER-ASSISTED RESEARCH

LEXIS: [Del.] real estate w/20 broker w/50 license w/50 sell or sale w/50 land or lot or property

§ 78.08(e)(5) District of Columbia.

The District of Columbia requires real estate brokers to be licensed to sell land within the District of Columbia or elsewhere. n400 The mayor has the authority to investigate real estate brokers charged with misconduct. n401

COMPUTER-ASSISTED RESEARCH

LEXIS: [D.C.] real estate w/20 broker w/50 license w/50 sell or sale w/50 land or lot or property

§ 78.08(e)(6) Indiana.

The Indiana Real Estate Commission is authorized to establish standards of conduct for real estate practitioners. n402 Practitioners must comply with those standards and be licensed. n403

COMPUTER-ASSISTED RESEARCH

LEXIS: [Ind.] real estate w/20 broker w/50 license w/50 sell or sale w/50 land or lot or property

§ 78.08(e)(7) Kentucky.

Except for owners acting on their own behalf or employees acting in reference to a corporation's real property, any land sales in Kentucky must be made through a licensed real estate broker. n404

COMPUTER-ASSISTED RESEARCH

LEXIS: [Ky.] real estate w/20 broker w/50 license w/50 sell or sale w/50 land or lot or property

§ 78.08(e)(8) Louisiana.

Under Louisiana Real Estate License Law, it is unlawful for any person, directly or indirectly to engage in conduct of a real estate broker without first obtaining a license as such broker or salesman, unless the person is exempt. n405

COMPUTER-ASSISTED RESEARCH

LEXIS: [La.] real estate w/20 broker w/50 license w/50 sell or sale w/50 land or lot or property

§ 78.08(e)(9) Maine.

Under Maine's Real Estate License Act, enacted in 1988, it is unlawful for anyone to engage in real estate brokerage without a current license issued within the provisions of the Act. n406 Licensees are supervised by the Real Estate Commission, and the commission is responsible for overseeing that licensees meet standards which promote public understanding and confidence in the business of real estate brokerage. n407

COMPUTER-ASSISTED RESEARCH

LEXIS: [Me.] real estate w/20 broker w/50 license w/50 sell or sale w/50 land or lot or property

§ 78.08(e)(10) Maryland.

It is unlawful to engage in or carry on the business of a real estate broker without first obtaining a license to do so. n408 To be licensed, a broker must present reasonable proof of having successfully completed a course approved by the Real Estate Commission, or of being duly qualified to practice law in the state. n409

COMPUTER-ASSISTED RESEARCH

LEXIS: [Md.] real estate w/20 broker w/50 license w/50 sell or sale w/50 land or lot or property

§ 78.08(e)(11) Massachusetts.

Except as otherwise noted, no person shall engage in the business of or act as a broker or salesperson, either directly or indirectly, temporarily, as an incident to any other transaction, or otherwise, unless licensed. n410 Except as otherwise provided, no person shall recover in any suit or action in the courts of the commonwealth for services as a broker performed within the commonwealth unless such person was a duly licensed broker at the time such services were performed. n411 No broker shall engage in a sale in the commonwealth of real property located in a land development in another state which is the subject of promotional advertising in the commonwealth unless the owner or developer of such land has submitted particulars to the board of registration of real estate brokers. n412

COMPUTER-ASSISTED RESEARCH

LEXIS: [Mass.] real estate w/20 broker w/50 license w/50 sell or sale w/50 land or lot or property

§ 78.08(e)(12) Mississippi.

Under the Real Estate Broker's License Law of 1954, it is unlawful for any person, partnership, or corporation to engage in or carry on, directly or indirectly, or to advertise or to hold themselves out as engaging in or carrying on the business, or act in the capacity of, a real estate broker, or a real estate salesperson, without first obtaining a license. n413 A

non-resident may not act except in cooperation with a licensed broker of the state. n414 Unless licensed, one cannot sue in court for the recovery of compensation for services rendered in the buying, selling, leasing, renting, or negotiating a loan upon any real estate. n415

COMPUTER-ASSISTED RESEARCH

LEXIS: [Miss.] real estate w/20 broker w/50 license w/50 sell or sale w/50 land or lot or property

§ 78.08(e)(13) North Carolina.

In North Carolina, it is unlawful for any person, partnership, association, or corporation to act as a real estate broker or salesperson without first obtaining a license, and passing an examination from the North Carolina Real Estate Commission. n416 An applicant from another state, which offers licensing privileges to residents of North Carolina, may be licensed by conforming to North Carolina's terms and conditions. n417 The commission may exempt out of state applicants from taking the required state examination if a similar exemption is extended by the other state to licensed brokers and salespersons from North Carolina. Each non-resident licensee must irrevocably consent to the executor of the commission to receive process of legal action on the licensee's own behalf. n418

COMPUTER-ASSISTED RESEARCH

LEXIS: [N.C.] real estate w/20 broker salesperson salesman w/50 license

§ 78.08(e)(14) Ohio.

In Ohio, no person may act as a real estate broker or salesman, or advertise as such without first being licensed within Ohio regulations. n419 To receive a license, the applicant must have received a grade of seventy-five or higher on the real estate brokers license examination; or be qualified, as determined in the discretion of the superintendent, to be licensed without examination as one who was licensed as a real estate broker at some time during the two-year period immediately preceding the date of the current application; or be qualified to be licensed without examination as a non-resident real estate broker as provided by Ohio regulations. n420

COMPUTER-ASSISTED RESEARCH

LEXIS: [Ohio] real estate w/20 broker w/50 license w/50 sell or sale w/50 land or lot or property

§ 78.08(e)(15) Pennsylvania.

Pennsylvania's Real Estate Broker's Act requires all real estate brokers and salespersons who engage in land sales within or without the state to be licensed by the real estate commission. n421

COMPUTER-ASSISTED RESEARCH

LEXIS: [Pa.] real estate w/20 broker w/50 license w/50 sell or sale w/50 land or lot or property

§ 78.08(e)(16) Tennessee.

All brokers who sell real estate within or without the state of Tennessee must be licensed, and are subject to the regulations put forth by the Tennessee Real Estate Commission. n422

COMPUTER-ASSISTED RESEARCH

LEXIS: [Tenn.] real estate w/20 broker w/50 license w/50 sell or sale w/50 land or lot or property

§ 78.08(e)(17) Texas.

Texas has passed the Real Estate License Act. n423 The Act requires that real estate brokers and salespersons be licensed, and subjects all licensees' land transactions to the authority of the Real Estate Commission. n424

COMPUTER-ASSISTED RESEARCH

LEXIS: [Tex.] real estate w/20 broker w/50 license w/50 sell or sale w/50 land or lot or property

§ 78.08(e)(18) Vermont.

In Vermont, a person may not engage in the business or act in the capacity of real estate broker or salesperson within the state without first obtaining a license. n425

COMPUTER-ASSISTED RESEARCH

LEXIS: [Vt.] real estate w/20 broker w/50 license w/50 sell or sale w/50 land or lot or property

§ 78.08(e)(19) Virgin Islands.

To engage in, or carry on the business, or act in the capacity of a real estate broker or salesperson with the Virgin Islands, any person, partnership, association, or corporation must be licensed by the Real Estate Commission, and is subject to the commission rules, laws, and regulations. n426 Further, no person shall maintain an action in any court of the Virgin Islands for the recovery of a commission, fee, or compensation for any act done, the doing of which is prohibited without a license. n427

COMPUTER-ASSISTED RESEARCH

LEXIS: [V.I.] real estate w/20 broker w/50 license w/50 sell or sale w/50 land or lot or property

§ 78.08(e)(20) Wisconsin.

No person may engage in or follow the business or occupation of a broker or salesperson unless licensed by the Real Estate Board. n428 The Board will only issue a license to those persons found competent to transact business in a manner which safeguards the public interest, and only after proof thereof is presented to the department. n429

COMPUTER-ASSISTED RESEARCH

LEXIS: [Wisc.] real estate w/20 broker w/50 license w/50 sell or sale w/50 land or lot or property

§ 78.08(e)(21) Wyoming.

Under the Real Estate License Act of 1971, all real estate brokers, associate brokers, and real estate salespersons who engage in real estate conduct within the state must be licensed, and comply with the provisions of the Act. n430

COMPUTER-ASSISTED RESEARCH

LEXIS: [Wy.] real estate w/20 broker w/50 license w/50 sell or sale w/50 land or lot or property

§ 78.08(f) Blue Sky Laws.

§ 78.08(f)(1) Overview.

Blue sky laws are a popular name for state statutes which provide for the regulation and supervision of securities offerings and sales. They are designed to protect consumers from investing in fraudulent companies, and to stop the sale of such stock in fly-by-night concerns, visionary oil wells, distant gold mines, and other fraudulent exploits. n431 A statute is called a "blue sky law" because it pertains to speculative schemes which have no more basis than so many feet of blue sky. n432 The following is a compilation of some states that regulate land transactions primarily through blue sky laws.

§ 78.08(f)(2) Missouri.

Any contract for any deferred payment sale of any interest in out-of-state real estate falls within the state's securities regulation. n433 A securities broker-dealer must be registered with the state. The land to be offered or sold must also be registered with the Missouri secretary of state prior to offering or selling the land. n434 The prospectus and other materials are subject to filing requirements, and investigation are made as necessary. n435

COMPUTER-ASSISTED RESEARCH

LEXIS: [Mo.] blue sky w/5 law

§ 78.08(f)(3) Vermont.

Lands which are considered securities must comply with Vermont's Securities Act. n436 This act regulates, and requires disclosure, for securities offerings. Securities as applied to land is defined as "land situated outside of the state." n437

COMPUTER-ASSISTED RESEARCH

LEXIS: [Vt.] blue sky w/5 law

§ 78.08(f)(4) West Virginia.

West Virginia requires that lands located outside the state which are to be offered or sold within the state, or any unimproved or undeveloped lands, the value of which materially depends on the future performance of a stipulation or promise to provide or furnish improvements, must register and meet the disclosure requirements of the state's securities regulations. n438 False advertising is also prohibited. n439

COMPUTER-ASSISTED RESEARCH

LEXIS: [W.Va.] blue sky w/5 law

§ 78.08(g) Compliance with Other State Regulation.

§ 78.08(g)(1) Overview.

Although a state may not have specific legislation regarding an out-of-state land transaction, they may require compliance with the regulations of the state where the land is located. The following is Puerto Rico's compliance requirement.

§ 78.08(g)(2) Puerto Rico.

Under Puerto Rico's legislation which is known as "An Act To Regulate the Sale on the Island of Real Estate Located Outside Puerto Rico," any person who offers for sale in Puerto Rico any land located outside Puerto Rico must comply with the laws, regulations, and orders of the jurisdiction of where the land is located. n440 Willful violations are punishable as misdemeanors. n441 As such, the violator may be fined not less than $100 nor more than $5,000, be jailed for time of not less than one month nor more than five years, or both. n442 It is also unlawful to use false, exaggerated, or misleading information in advertising materials, and violators are subject to misdemeanor prosecution. n443

§ 78.08(h) Planned Communities.

§ 78.08(h)(1) Overview.

Planned communities are regulated by laws which deal with specific acreage to be developed under a single plan. They usually contain one or more residential clusters, and/or one or more public, quasi-public, commercial, or industrial areas. Planned communities are subject to municipal zoning regulations enacted pursuant to the conventional zoning enabling act of the state. The following is a brief overview of Oregon's regulations regarding planned communities.

§ 78.08(h)(2) Oregon.

Oregon has substantial regulations regarding planned communities. The creation of planned communities are regulated, and many of the laws affecting subdivisions are applied to planned communities. n444 The developer's control of administrative associations, homeowner associations, and management of planned communities are also regulated under this legislation. n445

§ 78.08(i) Condominium Regulation.

§ 78.08(i)(1) Overview.

The following states, in addition to other regulations regarding the sale of land, have substantial legislation with respect to condominium transactions. Many have adopted the Uniform Condominium Act.

§ 78.08(i)(2) Alabama.

Alabama has enacted the Uniform Condominium Act. n446

COMPUTER-ASSISTED RESEARCH

LEXIS: [Ala.] uniform condominium act

§ 78.08(i)(3) Arizona.

Arizona has enacted the Uniform Condominium Act. n447

COMPUTER-ASSISTED RESEARCH

LEXIS: [Ariz.] uniform condominium act

§ 78.08(i)(4) Georgia.

Georgia has specific legislation dealing with condominium land transactions. The regulations address sales for residential occupancy, information to be disclosed to the buyer, the buyer's right to void the contract, statute of

limitations, and penalties for willful violation. n448

COMPUTER-ASSISTED RESEARCH

LEXIS: [Ga.] condominium w/15 transaction or sale

§ 78.08(i)(5) Maine.

Maine has enacted the Uniform Condominium Act. n449

COMPUTER-ASSISTED RESEARCH

LEXIS: [Me.] uniform condominium act

§ 78.08(i)(6) Minnesota.

Minnesota has enacted the Uniform Condominium Act. n450

COMPUTER-ASSISTED RESEARCH

LEXIS: [Minn.] uniform condominium act

§ 78.08(i)(7) Missouri.

Missouri has enacted the Uniform Condominium Act. n451

COMPUTER-ASSISTED RESEARCH

LEXIS: [Mo.] uniform condominium act

§ 78.08(i)(8) New Hampshire.

New Hampshire's regulation is known as New Hampshire's Condominium Act. The provisions of the Act provide for regulating the creation, execution, recordation, and validity of condominium instruments. n452 To dispose of units, an application for registration must be made, a public offering statement is required, and inquiry and investigation will be held. n453 Unit Owners' Associations are regulated under this act. n454

COMPUTER-ASSISTED RESEARCH

LEXIS: [N.H.] condominium act

§ 78.08(i)(9) New Mexico.

New Mexico's Uniform Condominium Act provides for the creation, alteration, and termination of condominiums. n455 Management of condominiums is also regulated under the provisions of the Act. n456 Article 7D of the Act provides regulations aimed at the protection of condominium purchasers. n457

COMPUTER-ASSISTED RESEARCH

LEXIS: [N.M.] uniform condominium act

§ 78.08(i)(10) New York.

New York's Condominium Act requires filing with the board prior to selling or leasing condominium units. n458 The contents of deeds and leases are also regulated through the Act, and a copy of the floor plan must be provided. n459 The board also requires disclosure of blanket encumbrances, repairs or construction, and books of receipts and expenditures. n460

COMPUTER-ASSISTED RESEARCH

LEXIS: [N.Y.] condominium act

§ 78.08(i)(11) Pennsylvania.

Pennsylvania has enacted the Uniform Condominium Act. n461

COMPUTER-ASSISTED RESEARCH

LEXIS: [N.M.] uniform condominium act

§ 78.08(i)(12) Rhode Island.

Rhode Island has enacted the Uniform Condominium Act. n462

COMPUTER-ASSISTED RESEARCH

LEXIS: [R.I.] uniform condominium act

§ 78.08(i)(13) Virginia.

Virginia has enacted the Uniform Condominium Act. n463

COMPUTER-ASSISTED RESEARCH

LEXIS: [Va.] uniform condominium act

§ 78.08(i)(14) Washington.

Washington has enacted the Uniform Condominium Act. n464

COMPUTER-ASSISTED RESEARCH

LEXIS: [Wash.] uniform condominium act

§ 78.08(j) Time Shares.

§ 78.08(j)(1) Overview.

Some states also regulate time shares. The following is a brief overview of such regulations.

§ 78.08(j)(2) California.

California's "Qualified Resort Vacation Club" is deemed a time share project under § 11003.5. n465 To sell a time share in California, the owner must qualify for a permit with the Real Estate Commissioner, and follow applicable laws and regulations. n466

COMPUTER-ASSISTED RESEARCH

LEXIS: [Cal.] time share w/50 11003

§ 78.08(j)(3) Georgia.

Georgia has specific legislation dealing with time shares. The General Provisions include recording transfers and encumbrances, and the application of zoning and other local codes. n467 Annual reports must be filed by exchange companies and multilocation developers, and a public offering statement must be provided to the purchaser with provisions for cancellation of the sales agreement. n468

§ 78.08(j)(4) Louisiana.

It is unlawful for a person to engage directly in the business of selling timeshares without first registering as a timeshare interest salesperson, unless such person is exempt as specified within the legislation. n469

COMPUTER-ASSISTED RESEARCH

LEXIS: [La.] time share w/50 [relevant statute]

§ 78.08(j)(5) Maine.

Before a developer may convey a timeshare in Maine, specific disclosure requirements must be met. n470 A written statement disclosing all required information shall be provided to the purchaser. n471 The front cover or first page of such document must contain only the following: the name and address of the developer, the project, and the location of the time share property; and the following statements in conspicuous type:

> (a) THIS CONTAINS IMPORTANT MATTERS TO BE CONSIDERED IN ACQUIRING A TIME SHARE. STATE OF MAINE LAW REQUIRES THAT THESE DISCLOSURES BE MADE BUT NO STATE AGENCY OR OFFICIAL HAS REVIEWED THE INFORMATION CONTAINED IN THIS BOOKLET.
>
> (b) YOU MAY CANCEL THE PURCHASE TRANSACTION WITHIN FIFTEEN DAYS FOLLOWING THE DATE OF EXECUTION OF THE CONTRACT OR THE RECEIPT OF A CURRENT WRITTEN STATEMENT, WHICHEVER IS LATER.
>
> (c) THE STATEMENTS CONTAINED INSIDE ARE ONLY SUMMARY IN NATURE. IF YOU ARE THINKING OF BUYING A UNIT, YOU SHOULD TALK TO YOUR ATTORNEY AND LOOK AT ALL EXHIBITS INCLUDING THE DECLARATION, PROJECT INSTRUMENT FLOOR PLAN, PLOT PLAN, BYLAWS AND CONTRACTS.
>
> (d) YOU SHOULD ASK YOUR ATTORNEY AND THE DEVELOPER TO TELL YOU WHAT WILL HAPPEN TO YOUR DEPOSIT, INTEREST IN THE UNIT, OR COSTS AND EXPENSES IF THE DEVELOPER OR OWNER IS DECLARED BANKRUPT. OBTAIN THE ANSWER FROM THE DEVELOPER IN WRITING. n472

COMPUTER-ASSISTED RESEARCH

LEXIS: [Me.] time share w/50 [relevant statute]

§ 78.08(j)(6) Nevada.

To sell time shares in Nevada, sales agents must be licensed and have the necessary permits. n473 Public offering statements must be supplied, and the permit must be issued before completion of the project. n474 All advertising must be approved, and information must be provided to the purchasers regarding programs for exchange of occupancy rights. n475

COMPUTER-ASSISTED RESEARCH

LEXIS: [Nev.] time share w/50 [relevant statute]

§ 78.08(j)(7) North Carolina.

Time shares are deemed real estate under the North Carolina Time Shares Act. n476 It is unlawful for any person in the state to engage in the business of a time share salesperson without obtaining a real estate broker's or salesperson license issued by the North Carolina Real Estate Commission. n477 Each developer shall fully and conspicuously disclose in a public offering statement the total financial obligation of the purchaser; any person who may have a right to alter or amend, or add to charges to which the purchaser may be subject; the nature and duration of each agreement between the developer and the person managing the time share, the date of availability of each amenity and facility of the time share program when they are not completed at the time of sale of the time share; the specific term of the time share; the purchasers right to cancel within five days of execution of the contract; a statement that under North Carolina law an instrument conveying a time share must be recorded in the Register of Deeds office to protect that interest, and any other information the commission may require. n478

COMPUTER-ASSISTED RESEARCH

LEXIS: [Nev.] time share w/50 [relevant statute]

§ 78.08(j)(8) Oregon.

The sale of a timeshare is prohibited in Oregon before issuance of a public report, and a purchaser is permitted five days to cancel the purchase. n479 Oregon's timeshare legislation addresses the following: valuation of timeshare property; when condominiums or planned community owners may prohibit timeshare plans; the character of timeshare estates; the prohibition of partitions; information on exchange programs; the designation of the managing entity; payment of common expenses; insurance coverage; and escrow regulations. n480

COMPUTER-ASSISTED RESEARCH

LEXIS: [Ore.] time share w/50 sale or sell

§ 78.08(k) Membership Camping Practices Acts.

§ 78.08(k)(1) Overview.

Laws and statutes relating to contracts for membership camping generally apply to agreements to offer or sell, within a state, a right or license to use for more than one year a campground owned or operated by a membership camping operator. The following is an overview of some of the regulations for such transactions by states which have substantial regulations in this area.

§ 78.08(k)(2) Minnesota.

In Minnesota, a membership campground operator must apply for registration. n481 The application involves substantial disclosure including, but not limited to, whether the operator or any agent thereof in the last ten years has been convicted of a felony, enjoined or received an adverse administrative order relating to the sale of land or campgrounds; the availability of sewage disposal facilities and other public utilities; a statement of amenities which will be installed and constructed and who will be responsible for their cost; the operators financial statement for the last fiscal year; and any other information the commissioner deems appropriate. n482 Advertisements are also strictly regulated, and many specific acts are prohibited including advertisements which are considered deceptive or misleading, those that offer travel, accommodations, gifts, meals, or entertainment to encourage prospective purchasers to visit, describe offers of inducement to purchase as "prizes," "awards," or refer to purchasers as "specially selected" or "winners," or contain the words "free" or "without obligation" unless the offer is equivocally without condition. n483 Pictorial advertisements for off-site distribution which depict more than the on-site condition of the campgrounds, unless labeled as such, are also prohibited. n484

COMPUTER-ASSISTED RESEARCH

LEXIS: [Minn.] membership w/10 campground

§ 78.08(k)(3) Nevada.

A permit is required to sell memberships in campgrounds, and the seller must be a licensed broker. n485 The permit application must include the description in the public offering statement, and other disclosure. n486 The applicant is then investigated before a permit is issued. n487 All advertising materials must be approved, and prospective members must be supplied with certain information concerning development of the campground, and programs for exchange of occupancy rights. n488 Cease and desist orders may be issued for non-compliance, fraud, or deceit. n489

COMPUTER-ASSISTED RESEARCH

LEXIS: [Nev.] membership w/10 campground

§ 78.08(k)(4) Oregon.

Registration is required in order to sell membership camping contracts in Oregon. n490 Written disclosure is also required, and the application for registration as well as the membership contract must contain specific information and documents as required by Oregon's legislation. n491

COMPUTER-ASSISTED RESEARCH

LEXIS: [Ore.] membership w/10 campground

§ 78.08(l) Horizontal Property Act.

§ 78.08(l)(1) Overview.

Horizontal property acts deal with condominiums, as well as cooperatives. The following states regulate land sales primarily under this category, or have substantial regulation in this area.

§ 78.08(l)(2) Hawaii.

Horizontal property pursuant to chapter 514A of Hawaii's Revised Statutes is exempted from the state's Uniform Land

Sales Practices Act. n492

COMPUTER-ASSISTED RESEARCH

LEXIS: [Hawaii] horizontal property

§ 78.08(l)(3) South Carolina.

Once property, such as an apartment, is submitted to the horizontal property regime, such property may be individually conveyed and encumbered and may be the subject of ownership, possession or sale independent of other apartments. n493 Who may own; the master deed or lease; provision required in bylaws, and systems of administration; records of receipts and expenditures; liability; liens; insurance; and sharing expenses in cases of disaster are all regulated under the Act. n494

COMPUTER-ASSISTED RESEARCH

LEXIS: [S.C.] horizontal property

§ 78.08(m) Mobile Home Parks.

§ 78.08(m)(1) Overview.

Some states also regulate land transaction which specifically apply to mobile home parks. New Mexico is one such state. The following is a brief overview of New Mexico's regulation respecting mobile home parks.

§ 78.08(m)(2) New Mexico.

Under New Mexico's Mobile Home Parks Act, entry fees, selling fees, and closed parks are expressly prohibited. New developments and parks and rentals to dealers are also regulated, as are mobile home park common areas. n495 Mediation as an alternative to court actions for dispute resolution is permitted under certain circumstances within the provisions of the Act. n496

COMPUTER-ASSISTED RESEARCH

LEXIS: [N.M.] mobile home park w/50 sale or transaction

§ 78.08(n) Senior Citizen Housing Developments.

§ 78.08(n)(1) Overview.

As brought out in the Senate Special Committee on Aging, senior citizens have notoriously been victims of land fraud and deceit. n497 The following is a brief reference to California's specific legislation to protect senior citizens who make land transactions.

§ 78.08(n)(2) California.

Section 11010.05 of article 2 of the Code of Business and Professions regulates the sales of senior citizen housing developments in California. n498

COMPUTER-ASSISTED RESEARCH

LEXIS: [Cal.] 11010.05

§ 78.08(o) Recovery Fund.

§ 78.08(o)(1) Overview.

To compensate victims of fraudulent or deceptive land sales practices, most states have established real estate recovery funds. Generally, real estate brokers and salespersons are required to pay a fee into the fund when such persons become licensed or renew their licenses. The following is a brief overview of a few selected recovery fund programs.

§ 78.08(o)(2) Colorado.

When renewing a license, each licensee must pay, in addition to any other fees, a license renewal fee of $40 which is deposited in the state's real estate recovery fund. n499 For those persons renewing their license, a fee of $30 is required which is deposited in the real estate recovery fund.

A person who obtains a final judgment in court against a real estate broker or salesperson may file a verified application in such court directing payment out of the recovery fund. n500 The fund is liable for reimbursement of actual direct loss excluding loss for pain and suffering and mental anguish, and include court costs and attorney's fees which remain unpaid upon the judgment. n501 The real estate recovery fund is not liable for more than $15,000 with respect to any one transaction, nor is the fund liable for any one licensee for more than $50,000. n502

COMPUTER-ASSISTED RESEARCH

LEXIS: [Colo.] real estate w/50 recovery fund

§ 78.08(o)(3) Indiana.

Indiana has established a real estate recovery fund to be administered by the real estate commission. n503 The treasurer of the state invests the money not currently needed to meet the obligations of the fund in the same manner as other public funds may be invested. n504 Generally, money left at the end of the fiscal year does not revert to the state general fund. n505

COMPUTER-ASSISTED RESEARCH

LEXIS: [Ind.] real estate w/50 recovery fund

§ 78.08(o)(4) Minnesota.

Minnesota's fund is actually a real estate education, research, and recovery fund which is administered by the commissioner of commerce. n506 Any person who receives a real estate license must pay a fee of $50 in addition to other fees payable. n507 If the amount in the fund is at any time less than the commissioner believes is necessary to carry out the purposes of this section, then those renewing their license can be required to pay a further sum, in addition to other required fees, not to exceed $100. n508

COMPUTER-ASSISTED RESEARCH

LEXIS: [Minn.] real estate w/50 recovery fund

§ 78.08(o)(5) Wyoming.

In the case of fraud, willful misrepresentation, deceit, or conversion of trust funds, Wyoming's real estate recovery fund will pay up to $4,000 for the amount of unpaid actual damages included in a court judgment against a real estate broker or salesperson licensed in Wyoming. n509

COMPUTER-ASSISTED RESEARCH

LEXIS: [Wyo.] real estate w/50 recovery fund

FOOTNOTES:
(n1)Footnote 216. Ariz. Rev. Stat. Ann. § 32-2122 (1986).

(n2)Footnote 217. *Id.* at §§ 32-2185 to 32-2185.01.

(n3)Footnote 218. *Id.* at § 32-2185.02.

(n4)Footnote 219. *Id.* at § 32-2185.01.

(n5)Footnote 220. *Id.* at § 32-2185.04.

(n6)Footnote 221. Cal. Bus. & Prof. Code § 11010.

(n7)Footnote 222. *Id.*

(n8)Footnote 223. *Id.*

(n9)Footnote 224. *Id.*

(n10)Footnote 225. Colo. Rev. Stat. § 12-61-402-03.

(n11)Footnote 226. *Id.* at § 12-61-403.

(n12)Footnote 227. Fla. Stat. Ann. § 11.61. The Florida Land Sales Practices Act, Fla. Stat. Ann. § 498.005 *et seq.*, continues in effect after continued legislative enactment, the most recent effective October 1, 1997.

(n13)Footnote 228. *Id.* at § 498.003.

(n14)Footnote 229. *Id.* at § 498.027.

(n15)Footnote 230. *Id.*

(n16)Footnote 231. *Id.* at § 498.047.

(n17)Footnote 232. *Id.* at §§ 498.049, 498.051.

(n18)Footnote 233. Ga. Code Ann. § 44-3-1.

(n19)Footnote 234. *Id.* at § 44-3-3.

(n20)Footnote 235. *Id.*

(n21)Footnote 236. *Id.*

(n22)Footnote 237. *Id.*

(n23)Footnote 238. Ill. Rev. Stat. ch. 50, para. 80/4.10.

(n24)Footnote 239. *Id.* at ch. 765, para. 85/6.

(n25)Footnote 240. *Id.*

(n26)Footnote 241. *Id. at2*

(n27)Footnote 242. Mich. Comp. Laws. Ann. § 565.801.

(n28)Footnote 243. *Id.* at § 16.*732 P 3.*

(n29)Footnote 244. *Id.* at § 565.806.

(n30)Footnote 245. *Id.* at § 565.807.

(n31)Footnote 246. *Id.*

(n32)Footnote 247. *Id.*

(n33)Footnote 248. *Id.* at § 565.806.

(n34)Footnote 249. *Id.*

(n35)Footnote 250. MINN. STAT. ANN. § 83.21.

(n36)Footnote 251. *Id.* at § 83.23.

(n37)Footnote 252. *Id.* at § 83.24.

(n38)Footnote 253. *Id.* at § 83.45.

(n39)Footnote 254. Neb. Rev. Stat. § 81-885.47.

(n40)Footnote 255. *Id.* at § 81-885.02.

(n41)Footnote 256. *Id.* at § 81-885.34.

(n42)Footnote 257. *Id.*

(n43)Footnote 258. *Id.*

(n44)Footnote 259. *Id.*

(n45)Footnote 260. *Id.*

(n46)Footnote 261. *Id.* at § 885.35.

(n47)Footnote 262. *Id.*

(n48)Footnote 263. *Id.* at § 81-885-43.

(n49)Footnote 264. Nev. Rev. Stat. § 119.119.

(n50)Footnote 265. *Id.* at § 119.120.

(n51)Footnote 266. *Id.* at § 119.140.

(n52)Footnote 267. *Id.*

(n53)Footnote 268. *Id.* at §§ 119.183, 119.184.

(n54)Footnote 269. *Id.* at §§ 119.150, 119.160.

(n55)Footnote 270. *Id.* at § 119.260

(n56)Footnote 271. N.H. Rev. Stat. Ann. § 356-A:21.

(n57)Footnote 272. *Id.* at § 356-A:5

(n58)Footnote 273. *Id.*

(n59)Footnote 274. *Id.*

(n60)Footnote 275. *Id.* at § 356-A:6

(n61)Footnote 276. *Id.* at § 356-A:12.

(n62)Footnote 277. N.J. Stat. Ann. § 45:15-16.5.

(n63)Footnote 278. *Id.* at § 45:15-16.27.

(n64)Footnote 279. *Id.* at § 45:15-16.7.

(n65)Footnote 280. *Id.*

(n66)Footnote 281. *Id.*

(n67)Footnote 282. *Id.* at § 45:15-16.10.

(n68)Footnote 283. *Id.*

(n69)Footnote 284. N.M. Stat. Ann. § 47-6-1.

(n70)Footnote 285. N.Y. Real Prop. Law § 337.

(n71)Footnote 286. *Id.*

(n72)Footnote 287. *Id.*

(n73)Footnote 288. *Id.*

(n74)Footnote 289. N.D. Cent. Code § 43-23.1-01.

(n75)Footnote 290. *Id.* at § 43-23.1-04.

(n76)Footnote 291. *Id.* at § 43-23.1-06.

(n77)Footnote 292. *Id.* at § 43-23.1-06.

(n78)Footnote 293. *Id.* at § 43-23.1-07.

(n79)Footnote 294. *Id.* at § 43-23.1-14.

(n80)Footnote 295. *Id.* at § 43-23.1-18.

(n81)Footnote 296. Okla. Stat. Ann. tit. 71, § 601.

(n82)Footnote 297. *Id.* at § 625.

(n83)Footnote 298. *Id.* at § 626.

(n84)Footnote 299. *Id.*

(n85)Footnote 300. *Id.* at § 653.

(N86)Footnote 301. Or. Rev. Stat. § 92.345.

(n87)Footnote 302. *Id.* at § 92.385.

(n88)Footnote 303. *Id.* at § 92.425.

(n89)Footnote 304. *Id.*

(n90)Footnote 305. *Id.* at § 92.427.

(n91)Footnote 306. Va. Code Ann. § 55-336; *High Knob Assocs. v. Douglas, 457 S.E.2d 349 (Va. 1995)* (the sale of lots at issue was not a land installment sales contract subject to the Subdivided Land Sales Act).

(n92)Footnote 307. *Id.* at § 55-339.

(n93)Footnote 308. *Id.*

(n94)Footnote 309. *Id.* at § 55-342.

(n95)Footnote 310. *Id.* at § 55-345.

(n96)Footnote 311. Wash. Rev. Code Ann. § 58.19.050. This section has been amended and renumbered § 58.19.055

(n97)Footnote 312. *Id.* at § 58.19.045(3).

(n98)Footnote 313. *Id.* at § 58.19.055.

(n99)Footnote 314. *Id.* at § 58.19.265.

(n100)Footnote 315. *Id.*

(n101)Footnote 316. *Id.* at § 58.19.280.

(n102)Footnote 317. Cal. Bus. & Prof. Code § 10249.

(n103)Footnote 318. *Id.*

(n104)Footnote 319. *Id.*

(n105)Footnote 320. *Id.*

(n106)Footnote 321. *Id.*

(n107)Footnote 322. *Id.*

(n108)Footnote 323. *Id.*

(n109)Footnote 324. Conn. Gen. Stat. Ann. § 20-329(b).

(n110)Footnote 325. *Id.*

(n111)Footnote 326. Del. Code Ann. tit. 24 § 2950-51.

(n112)Footnote 327. *Id.* at § 2952.

(n113)Footnote 328. *Id.* at § 2954.

(n114)Footnote 329. Idaho Code § 55-1801.

(n115)Footnote 330. *Id.* at § 55-1804.

(n116)Footnote 331. *Id.* at § 55-1807.

(n117)Footnote 332. *Id.* at § 55-1808.

(n118)Footnote 333. *Id.* at § 55-1814.

(n119)Footnote 334. Iowa Code Ann. § 543C.1.

(n120)Footnote 335. *Id.* at § 543C.2.

(n121)Footnote 336. *Id.*

(n122)Footnote 337. *Id.*

(n123)Footnote 338. *Id.* at § 543C.5.

(n124)Footnote 339. *Id.* at § 543C.6.

(n125)Footnote 340. Mo. Ann. Stat. §§ 76-4-1101 to -1117, 76-4-1201 to -1251, respectively (1991).

(n126)Footnote 341. *Id.* at § 76-4-1103.

(n127)Footnote 342. *Id.* at § 76-4-1104.

(n128)Footnote 343. *Id.* at § 76-4-1105.

(n129)Footnote 344. *Id.* at § 76-4-1106-7.

(n130)Footnote 345. *Id.* at § 76-4-1113.

(n131)Footnote 346. *Id.* at § 76-4-1115.

(n132)Footnote 347. *Id.* at § 76-4-1201.

(n133)Footnote 348. *Id.* at § 76-4-1205.

(n134)Footnote 349. *Id.* at § 76-4-1206.

(n135)Footnote 350. *Id.* at § 76-4-1226.

(n136)Footnote 351. *Id.* at § 76-4-1228.

(n137)Footnote 352. *Id.* at § 76-4-1230.

(n138)Footnote 353. *Id.* at § 76-4-1233.

(n139)Footnote 354. *Id.* at § 76-4-1234.

(n140)Footnote 355. *Id.* at § 76-4-1239.

(n141)Footnote 356. *Id.* at § 76-4-1241.

(n142)Footnote 357. *Id.* at § 76-4-1245.

(n143)Footnote 358. R.I. Gen. Laws Ann. § 34-38-3.

(n144)Footnote 359. *Id.* at § 34-38-9.

(n145)Footnote 360. *Id.* at § 34-38-10.

(n146)Footnote 361. Wis. Admin. Code ch. Reb §§ 5.01, 5.04 (1973).

(n147)Footnote 362. As prepared by the National Conference of Commissions on Uniform State Laws, Alaska Stat. § 34.55.044.

(n148)Footnote 363. *Id.* at § 34.55.010.

(n149)Footnote 364. *Id.* at § 34.55.161.

(n150)Footnote 365. *Id.* at § 34.55.010.

(n151)Footnote 366. Haw. Rev. Stat. § 484.4.

(n152)Footnote 367. *Id.* at § 484.5.

(n153)Footnote 368. *Id.*

(n154)Footnote 369. *Id.*

(n155)Footnote 370. *Id.*

(n156)Footnote 371. *Id.* at § 484.12.

(n157)Footnote 372. *Id.* at § 484.15.

(n158)Footnote 373. Kan. Stat. Ann. § 58-3305.

(n159)Footnote 374. *Id.*

(n160)Footnote 375. *Id.*

(n161)Footnote 376. *Id.* at § 58-3312.

(n162)Footnote 377. *Id.* at § 58-3315.

(n163)Footnote 378. *Id.*

(n164)Footnote 379. S.C. Code Ann. §§ 27-29-50, 60.

(n165)Footnote 380. *Id.* at § 27-29-50.

(n166)Footnote 381. *Id.* at § 27-29-60.

(n167)Footnote 382. *Id.* at § 27-29-120, 150.

(n168)Footnote 383. Utah Code Ann. § 57-11-1.

(n169)Footnote 384. *Id.* at § 57-11-3.

(n170)Footnote 385. *Id.* at § 57-11-5.

(n171)Footnote 386. *Id.*

(n172)Footnote 387. *Id.*

(n173)Footnote 388. *Id.*

(n174)Footnote 389. *Id.* at § 57-11-6.

(n175)Footnote 390. *Id.*

(n176)Footnote 391. *Id.* at § 57-11-7.

(n177)Footnote 392. *Id.* at §§ 57-11-13, 14.

(n178)Footnote 393. *Id.* at § 57-11-16.

(n179)Footnote 394. *Id.* at § 57-11-17.

(n180)Footnote 395. Ala. Code §§ 40-12-149, -150 (1991 Pocket Part).

(n181)Footnote 396. *Id.*

(n182)Footnote 397. Ark. Code Ann. §§ 17-35 *et seq*.

(n183)Footnote 398. *Id.*

(n184)Footnote 399. Del. Code Ann. tit. 24, § 2906.

(n185)Footnote 400. D.C. Code § 45-1926.

(n186)Footnote 401. *Id.* at § 45-1924.

(n187)Footnote 402. Ind. Code Ann. § 25-34.1-2-5.

(n188)Footnote 403. *Id.* at § 25-34.1-3-2.

(n189)Footnote 404. Ky. Rev. Stat. § 324-020.

(n190)Footnote 405. La. Rev. Stat. § 37:1436.

(n191)Footnote 406. Me. Rev. Stat. Ann. tit. 32, § 13003.

(n192)Footnote 407. *Id.* at § 13061.

(n193)Footnote 408. Md. Bus. Occ. & Prof. Code Ann. § 17-301.

(n194)Footnote 409. *Id.* at § 17-305.

(n195)Footnote 410. Mass. Ann. Laws ch. 112, § 87RR.

(n196)Footnote 411. *Id.*

(n197)Footnote 412. *Id.*

(n198)Footnote 413. Miss. Code Ann. ch. 35, § 73-35-1.

(n199)Footnote 414. *Id.* at § 73-35-11.

(n200)Footnote 415. *Id.* at § 73-35-33.

(n201)Footnote 416. N.C. Gen. Stat. §§ 93A-1, A-4.

(n202)Footnote 417. *Id.* at § 93A-9.

(n203)Footnote 418. *Id.* at §§ 93A-9, 93A-10.

(n204)Footnote 419. Ohio Rev. Code Ann. § 4735.02.

(n205)Footnote 420. *Id.* at § 4735.06.

(n206)Footnote 421. Pa. Stat. Ann. § 455.301.

(n207)Footnote 422. Tenn. Code Ann. § 62-13-103.

(n208)Footnote 423. Tex. Rev. Civ. Stat. Ann. tit. 113A, art. 6573a, § 1.

(n209)Footnote 424. *Id.*

(n210)Footnote 425. Vt. Stat. Ann. ch. 26, § 2212.

(n211)Footnote 426. V.I. Code Ann. tit. 27, § 423.

(n212)Footnote 427. *Id.* at § 431.

(n213)Footnote 428. Wis. Adm. Code § 452.03.

(n214)Footnote 429. *Id.*

(n215)Footnote 430. Wyo. Stat. Ann. ch. 28, § 33-28-101.

(n216)Footnote 431. Black's Law Dictionary, 5th ed. 157.

(n217)Footnote 432. *State v. Cushing, 15 A.2d 740 (Me. 1940).*

(n218)Footnote 433. Mo. Ann. Stat. § 409.401(1).

(n219)Footnote 434. *Id.* at § 409.301.

(n220)Footnote 435. *Id.*

(n221)Footnote 436. Vt. Stat. Ann. tit. 9, §§ 4202a(12), 4205.

(n222)Footnote 437. *Id.*

(n223)Footnote 438. W. Va. Code § 32A-1-1.

(n224)Footnote 439. *Id.* at § 32A-1-2.

(n225)Footnote 440. P.R. Laws Ann. tit. 10, ch. 8, § 101.

(n226)Footnote 441. *Id.* at § 102.

(n227)Footnote 442. *Id.*

(n228)Footnote 443. *Id.* at § 103.

(n229)Footnote 444. Or. Rev. Stat. § 94.565.

(n230)Footnote 445. *Id.* at §§ 94.600-733.

(n231)Footnote 446. U.L.A. Vol. 7.

(n232)Footnote 447. *Id.*

(n233)Footnote 448. Ga. Code Ann. § 44-3-111.

(n234)Footnote 449. U.L.A. Vol. 7 (1980).

(n235)Footnote 450. *Id.*

(n236)Footnote 451. *Id.*

(n237)Footnote 452. *Id.* at §§ 356-B:7, 10, 11, 14.

(n238)Footnote 453. *Id.* at §§ 356-5:51 - 356- 5:53.

(n239)Footnote 454. *Id.* at §§ 356-B:35 - 356-B:69.

(n240)Footnote 455. N.M. Stat. Ann. § 47-7B *et seq*.

(n241)Footnote 456. *Id.* at § 47-7C *et seq*.

(n242)Footnote 457. *Id.* at § 47-7D *et seq*.

(n243)Footnote 458. N.Y. Real Prop. Law § art. 9-B § 339-q.

(n244)Footnote 459. *Id.* at § 339-o-p.

(n245)Footnote 460. *Id.* at § 339-r, w, cc.

(n246)Footnote 461. U.L.A. Vol. 7 (1980).

(n247)Footnote 462. *Id.*

(n248)Footnote 463. *Id.*

(n249)Footnote 464. *Id.*

(n250)Footnote 465. Cal. Bus. & Prof. Code § 11003.5.

(n251)Footnote 466. *Id.*

(n252)Footnote 467. GA. CODE ANN. §§ 44-3-163, -164.

(n253)Footnote 468. *Id.* at §§ 44-3-173, 4.

(n254)Footnote 469. La. Rev. Stat. § 37:1436.

(n255)Footnote 470. Me. Rev. Stat. Ann. tit. 33, § 592.

(n256)Footnote 471. *Id.*

(n257)Footnote 472. *Id.*

(n258)Footnote 473. Nev. Rev. Stat. § 119A.210.

(n259)Footnote 474. *Id.* at § 119A.300.

(n260)Footnote 475. *Id.* at § 119A.370.

(n261)Footnote 476. N.C. Stat. § 93A-39.42.

(n262)Footnote 477. *Id.* at § 93A-40.

(n263)Footnote 478. *Id.* at § 93A-44.

(n264)Footnote 479. Or. Rev. Stat. §§ 94.803 *et seq*.

(n265)Footnote 480. *Id.*

(n266)Footnote 481. MINN. STAT. ANN. § 82A.03.

(n267)Footnote 482. *Id.* at § 82A.04.

(n268)Footnote 483. *Id.* at § 82A.09.

(n269)Footnote 484. *Id.*

(n270)Footnote 485. Nev. Rev. Stat. § 119B.220 *et seq*.

(n271)Footnote 486. *Id.* at § 119B.130.

(n272)Footnote 487. *Id.* at § 119B.150.

(n273)Footnote 488. *Id.* at § 119B.420.

(n274)Footnote 489. *Id.* at § 119B.370.

(n275)Footnote 490. Or. Rev. Stat. § 94.956.

(n276)Footnote 491. *Id.* at §§ 94.974, 94.880, 94.886.

(n277)Footnote 492. Haw. Rev. Stat. § 514A.

(n278)Footnote 493. S.C. Code Ann. § 27-31-40.

(n279)Footnote 494. Id., ch. 31 *et seq*.

(n280)Footnote 495. N.M. STAT. ANN. § 47-10 *et seq*.

(n281)Footnote 496. *Id.* at § 47-10-17.

(n282)Footnote 497. 1963 Hearings.

(n283)Footnote 498. Cal. Code Bus. & Prof. Code art. 2 § 11010.05.

(n284)Footnote 499. Colo. Rev. Stat. §§ 12-61-301 *et seq*.

(n285)Footnote 500. *Id.*

(n286)Footnote 501. *Id.*

(n287)Footnote 502. *Id.*

(n288)Footnote 503. Ind. Code Ann. § 25-34.1-7-1.

(N289)Footnote 504. *Id.*

(n290)Footnote 505. *Id.* at § 25-34.1-7-2.1.

(n291)Footnote 506. Minn. Stat. Ann. § 82-34 *et seq*.

(n292)Footnote 507. *Id.*

(n293)Footnote 508. *Id.*

(N294)Footnote 509. Wyo. Stat. Ann. § 33-28-202.

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CHAPTER 78 REGULATION OF TRANSACTIONS

9-78 Thompson on Real Property, Thomas Editions § 78.09

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§ 78.09 Bibliography.

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Annotation, Cancellation of Patent or Entry Under Desert Land Act Because of Attempts to Improperly Assign or Convey, 25 A.L.R. Fed. 801.

Annotation, Circumstances Justifying Delay in Rescinding Land Contract After Learning of Ground of Rescission, 1 A.L.R.3d 542.

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Annotation, Duty To Disclose Identity of Purchaser or Lessee, 2 A.L.R. 3d 1119.

Annotation, Failure of Vendor To Comply With Statute or Ordinance Requiring Approval or Recording of Plat Prior To Conveyance of Property As Rendering Sale Void or Voidable, 77 A.L.R. 3d 1058.

Annotation, Landlord's Fraud, Deceptive Trade Practices, and the Like, In Connection With Mobile Home Owner's Lease or Rental of Land Site, 39 A.L.R. 4th 859.

Annotation, Liability of Building or Real Estate Developer Who Sells New Dwelling for Failure To Provide Potable Water, 16 A.L.R.4th 1246.

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Annotation, Liability To Real Property Purchaser for Negligent Appraisal of Property's Value, 21 A.L.R. 4th 867.

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Partners, Co-Adventurers, Employees, or Other Associates, 8 A.L.R. 3d 523.

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Annotation, Necessity of Having Real Estate Broker's License In Order To Recover Commission As Affected by Fact That Business Sold Includes Real Property, 82 A.L.R. 3d 1139.

Annotation, Procurement of Real-Estate Broker's License Subsequent To Execution of Contract for Services As Entitling Broker To Compensation for Service, 80 A.L.R. 3d 318.

Annotation, Real Estate Broker's Liability To Purchaser for Misrepresentation or Nondisclosure of Physical Defects In Property Sold, 46 A.L.R. 4th 546.

Annotation, Recovery for Mental Anguish or Emotional Distress, Absent Independent Physical Injury, Consequent Upon Breach of Contract In Connection With Sale of Real Property, 61 A.L.R.3d 922.

Annotation, Regulation of Time-Share or Interval Ownership Interests In Real Estate, 6 A.L.R. 4th 1288.

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Annotation, Requirement Under § 1404(a)(1)(A), (B) of the Interstate Land Sales Full Disclosure Act, That Statement of Record Be In Effect and Property Report Be Furnished To Purchaser Prior To the Sale or Lease of A Lot In A Subdivision Covered by the Act, 48 A.L.R. Fed. 827.

Annotation, Rule Denying Recovery As Applicable Where Claim Which Motivated Conveyance Was Never Established, 6 A.L.R. 4th 862.

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Annotation, Validity of Municipality's Ban On Construction Until Public Facilities Comply With Specific Standards, 92 A.L.R. 3d 1073.

Annotation, Vendor's Obligation To Disclose To Purchaser of Land Presence of Contamination From Hazardous Substances or Wastes, 12 A.L.R. 5th 630.

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Supp. To CHAPTER 78 REGULATION OF TRANSACTIONS

9-78 Thompson on Real Property, Thomas Editions Supp. to § 78.03

Supp. to § 78.03 History of Regulation.

[Go To Main]

§ 78.03(c) Federal Mail Fraud Statutes [Go To Main]

Add:

IND. CODE ANN § 32-1-7

Add:

15 U.S.C. § 45; *but see Rayex Corp. v. FTC, 317 F.2d 290, 292 (2d Cir. 1963)* (holding that the Commission need not find an intent to deceive).

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Supp. To CHAPTER 78 REGULATION OF TRANSACTIONS

9-78 Thompson on Real Property, Thomas Editions Supp. to § 78.05

Supp. to § 78.05 The Interstate Land Sales Full Disclosure Act.

IOWA CODE § 567.1

§ 78.05(a) 1968 Passage of the Act IOWA CODE § 567.1

Add:

See also IOWA CODE § 567.1.

§ 78.05(b) Revision [Go To Main]

Add:

For cases construing §§ 1702, 1704, see *Stein v. Paradigm Mirasol, LLC, 586 F3d 849 (11th Cir. 2009)* ; *Gentry v. Harborage Cottages-Stuart, LLLP, 602 F. Supp. 2d 1239 (S.D. Fla. 2009)* ; *Pilato v. Edge Investors, L.P., 609 F. Supp. 2d 1301 (S.D. Fla. 2009)* .

Add:

See also Fortunato v. Windjammer Homebuilders, Inc., 2006 U.S. Dist. LEXIS 5216 (M.D. Fla. Jan. 25, 2006) (*Citing 15 U.S.C. § 1702*)

§ 78.05(c) Overview of the Act. MONT. REV. STAT § 72-2-214

note 65, add:

Dongelewicz v. PNC Bank Nat'l Ass'n, 104 Fed. Appx. 811 (3d Cir. 2004) ; *Burns v. Duplin Land Dev., Inc., 621 F. Supp. 2d 292 (E.D. Ky. 2009)* (construing the Act broadly in declining to imply an ignorance requirement).

See also Fortunato v. Windjammer Homebuilders, Inc., 2006 U.S. Dist. LEXIS 5216 (M.D. Fla. Jan. 25, 2006) (holding that exemptions should be narrowly and strictly construed.)

Add:

Trotta v. Lighthouse Point Land Co., LLC, 2008 U.S. Dist. LEXIS 25906 (S.D. Fla. Mar. 19, 2008) (a purchase agreement was governed by the provision of Interstate Land Sales Full Disclosure Act requiring the contract to include a lot description); Goldberg v. 401 North Wabash Venture LLC, No. 09 C 6455, *2010 U.S. Dist. LEXIS 39774, at 28* (N.D. Ill. Apr. 22, 2010) .

Add

See Aikin v. WCI Cmtys., Inc., 26 So. 3d 691 (Fla. App. 2010) (applying the Act to condominiums).

Add

Akers v. Classic Props., 2003 Ohio 5436 (Ohio Ct. App., 2003) (the Interstate Land Sales Full Disclosure Act was inapplicable to a lot purchased from a builder who had purchased the lot from a developer and the company he managed); *Tomlinson v. Vill. Oaks Dev. Co., LLC, 2003 U.S. Dist. LEXIS 8488 (D. Ind. 2003) See Aboujaoude v. Poinciana Dev. Co. II, 505 F. Supp. 2d 1266 (S.D. Fla 2007)* (holding that a buyer could assert a § 1703(a)(2) claim against a president of a corporation)..

§ 78.05(d) Definitions [Go To Main]

Add:

See also Board of Supervisors v. Royal (In re Royal), 137 Fed. Appx. 537, 2005 U.S. App. LEXIS 9618 (2005) (holding that the county is not trying to comply or have the intention of correcting any violations of the public benefit law and that the county is not "enforcing" its police and regulatory power. Therefore, the county is not entitled to the Section 362(b)(4) exception.)

Add:

Johnson v. Orr, 551 F.3d 564 (7th Cir. 2008) (the Interstate Land Sales Full Disclosure Act was inapplicable to a state tax sale, which did not involve a transfer of an interest of the property owner in the land).

[Go To Main]

§ 78.05(e)(1) General Exemptions.

Add:

200 *East Partners, LLC v. Gold, 997 So. 2d 466 (Fla. App. 2009)* (no exemption could be claimed for circumstances that would materialize in the future).

Add:

See also Sun Kyung Ahn v. Merrifield Town Ctr. Ltd., 584 F. Supp. 2d 848 (E.D. Va. 2008) (holding that the buyer's signing of the sales contract triggers the two-year period under § 1702(a)(2).

Add:

See also Jankus v. Edge Investors, L.P., 619 F. Supp. 2d 1328 (S.D. Fla. 2009) (holding that a buyer who had closed on only two properties in nine years was not in the land sales business), vacated, *650 F. Supp. 2d 1248 (2009)* .

§ 78.05(e)(2) Exemption for Lots Subject to Other Disclosure Requirements.

Add:

Bush v. Bahia Sun Assocs., Ltd. P'ship, *, 543 F. Supp. 2d 1295* ***543 F. Supp. 2d 1295 (M.D. Fla. 2008)*** (contract did not fall within statutory exemption of Interstate Land Sales Full Disclosure Act).

[Go To Main]

§ 78.05(f)(3) Revocation Where Property Report Supplied.

Add:

Mayersdorf v. Paramount Boynton, L.L.C., 910 So. 2d 887 (Fla. App. 2005) (holding that the interpretation of the word "exempt" should not be too narrow. Also, because there was undisputed evidence that the subdivision had fewer than 100 lots which would allow the sale under the "100--lot" exemption allowed in *15 U.S.C. 1702(b)(1)*. Therefore because both *15 U.S.C 1702(b)* and *15 U.S.C. 1702(d)* expressly applied to contracts which are not exempt under Ind. Code Ann. § 32-17 these sections did not apply.)

Add:

See Degirmenci v. Sapphire-Fort Lauderdale, LLLP, 642 F. Supp. 2d 1344 (S.D. Fla. 2009) (holding that a claim could not be brought under § 1703(d) where the purchaser sought return of her deposit and did not claim that she was not informed of her right to seek a return of her deposit).

§ 78.05(l)(2) Enforcement of Rights.

Add:

See Murray v. Holiday Isle, LLC, 620 F. Supp. 2d 1302 (S.D. Ala 2009) (holding that buyers were damaged as matter of law because they were not told about their rescission rights until it was too late to exercise them).

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Supp. to § 78.06 Federal Trade Commission Act.

31-1-8-2

§ 78.06(d) Federal Trade Commission Act [Go To Main]

Add:

See also Ill. Tool Works, Inc. v. Indep. Ink, Inc., 2006 U.S. LEXIS 2024 (U.S. Mar. 1, 2006) (exemplifying the FTC and holding that in all cases involving a typical arrangement between two parties the plaintiff must prove that the defendant controls the marketing power in the product. Some arrangements will be held unlawful, such as those that were a true monopoly or a marketwide conspiracy.)

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Supp. To CHAPTER 78 REGULATION OF TRANSACTIONS

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Supp. to § 78.08 State Regulations.

[Go To Main]

§ 78.08(b) Disclosure. Iowa Code §567.1

§ 78.08(b)(2) Arizona.

delete § 32-2185.04. The civil penalties are set out in Ariz. Rev. State. Ann.§ 32-2185.09.

§ 78.08(b)(4) Colorado.

delete:

Delete the "-03" at the end of the citation.

§ 78.08(b)(5) Florida.

In the first sentence, change "will be" to "was."

These Florida statutes referenced in the footnotes have been repealed.

§ 78.08(b)(6) Georgia.

Add after the first sentence:

The text of the George act was substantially rewritten in 1995.

Add:

Mancuso v. Steyaard, 640 S.E.2d 50 (Ga. App. 2006) (a subdivision lot was held to be exempt from the land sale act).

Delete the provision beginning UNLESS YOU RECEIVED. ... Replace it with the following language:

I hereby acknowledge that I have received the property report of (insert name of subdivision) on (insert date) at (time). If I receive the property report less than 48 hours prior to signing any contract or agreement, I understand that my right to cancel that contract or agreement is midnight of the seventh day, Sundays and holidays excepted, following the signing of such contract or agreement. I understand that I must notify the developer or the developer's agent in writing within the cancellation period of my intent to cancel by sending notice by certified mail or statutory overnight delivery, return receipt requested, to (insert name and address of developer or developer's agent). Notice will be effective on the date that it is mailed.

GA. CODE ANN. § 44-3-3.

change:

The Georgia statute does not require this statement below to be in light red type, nor does it require letters to be one-half inch in size with one-half inch space between the lines:

"THE PURCHASER SHOULD READ THIS DOCUMENT BEFORE SIGNING ANYTHING";

Instead, it requires: "A conspicuous statement on the bottom third of the front cover of the property report which reads as follows: 'THE PURCHASER SHOULD READ THIS DOCUMENT BEFORE SIGNING ANYTHING'"

GA. CODE ANN. § 44-3-3.

change:

The statement in the text "THIS LAND HAS BEEN REGISTERED" is no longer in the text of the statute.

GA. CODE ANN. § 44-3-3.

§ 78.08(b)(7) Illinois.

Add:

The Condominium Property Act requires the seller of a condominium to "make full disclosure of, and provide copies to the prospective buyer of" various information items relating to the condominium. *See 765 Ill. Comp. Stat. Ann. 606/22* (LexisNexis 2010).

Add:

In 1999 Illinois created the Land Sales Registration Act of 1999. This act will be repealed in 2020.

765 Ill. Comp. Stat. Ann. 86/1-1 (LexisNexis 2010).

change the citations to:

765 ILL. COMP. STAT. ANN. 86/5-10 (LexisNexis 2010).

§ 78.08(b)(10) Nebraska.

The section cited has been repealed, the correct section is *NEB. REV. STAT. § 81-885*.

§ 78.08(b)(11) Nevada.

The section that should be cited is *NEV. REV. STAT. § 119.130*.

§ 78.08(b)(13) New Jersey.

change the citation to N.J. STAT. ANN. § 45:15-16.29.

change the citation to § 45:15-16.34.

change the citation to § 45:15-16.30a.

change the citation to § 45:15-16.33. The bureau now has 90 days to reject the registration.

change the citation to § 45:15-16.35.

change the citation to § 45:15-16.36.

§ 78.08(b)(19) Virginia.

delete Section 55-339

Add:

The penalties for violation of the Act are now in § 55-347. There is no longer any provision for a cease and desist order. The section merely makes a violation a Class 2 misdemeanor.

§ 55-345 has been repealed.

§ 78.08(c) Out-of-State Regulation [Go To Main]

§ 78.08(c)(4) Delaware.

delete notes 326-328.

§ 78.08(c)(7) Montana

delete this subsection. Montana no longer has any provisions regulating either in-state or out-of-state subdivided

real property sales.

§ 78.08(c)(9) Wisconsin.

delete this subsection.

§ 78.08(d) Uniform Land Sales Practices Act. [Go To Main]

§ 78.08(d)(2) Alaska.

change the citation to § 34.55.014

§ 78.08(d)(3) Hawaii.

Add:

Western Sunview Props., LLC v. Federman, 338 F. Supp. 2d 1106 (D. Haw. 2004) (where the defendants themselves did not "offer or dispose of an interest in subdivided land," as required by the state's Uniform Land Sales Practices Act, if they were found to have conspired with the developer about a misreported sale price of the home, defendants could be held jointly and severally liable for violation of the Act).

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Supp. to § 78.08 Real Estate Broker's License.

[Go To Main]

Real Estate Broker's License. [Go To Main]

§ 78.08(e)(3) Arkansas.

change the citation to § 17-42-203.

change the citation to § 17-42-104.

§ 78.08(e)(5) District of Columbia

delete this subsection.

§ 78.08(e) Kentucky [Go To Main]

Add:

See also Ky. Real Estate Comm'n v. Milgrom, 2005 Ky. App. LEXIS 219 (Ky. Ct. App. Oct. 7, 2005) (interpreting *Ky. Rev. Stat. Ann. § 324-020* and stating that the commission found a broker to be in violation of K. Rev. Ann. §

324.160(1)(h),(r) and *Ky. Rev. Stat. Ann. § 324.111*, and therefore the appellate court correctly found that the broker purchased the property for himself.)

delete this subsection.

§ 78.08(e)(15) Pennsylvania.

change the citation to 49 Pa. Code § 35.201 (2010).

§ 78.08(e)(17) Texas.

change the citation to the Real Estate License Act to TEX. CODE. ANN. § 1101.004 (Lexis 2010).

§ 78.08(e)(20) Wisconsin.

change the citations to Wis. Adm. Code RL 25.02 (Lexis 2010).

§ 78.08(f) Blue Sky Laws. [Go To Main]

§ 78.08(f)(2) Missouri.

Add:

The Missouri provisions were repealed in 2003 and Missouri adopted The Missouri Securities Act of 2003 (Uniform Securities Act) *Mo. Ann. Stat. § 409.1-101* (Lexis 2010).

§ 78.08(f)(4) Vermont.

Add:

The Vermont statutes were repealed in 2005.

§ 78.08(i) Condominium Regulation. [Go To Main]

§ 78.08(i)(2) Alabama.

change the citation to ALA. CODE § 35-8A-101 (Lexis 2010).

§ 78.08(i)(3) Arizona.

change the citation to ARIZ. REV. STAT. ANN. § 33-1201 (Lexis 2010).

§ 78.08(i)(5) Maine.

change the citation to the Maine Condominium Act - ME. REV. STAT. ANN. tit. 33, § 1601-101 (Lexis 2009).

§ 78.08(i)(6) Minnesota.

change the citation to MINN. STAT. ANN. § 515A.1-101 (Lexis 2009).

§ 78.08(i)(7) Missouri.

change the citation to MO. REV. STAT. § 448.1-101 (Lexis 2010).

§ 78.08(i)(8) New Hampshire.

change the citation to N.H. REV. STAT. ANN. § 356-B:2 (Lexis 2010).

§ 78.08(i)(11) Pennsylvania.

change the citation to 68 PA. STAT. ANN. § 3101 (Lexis 2010).

§ 78.08(i)(12) Rhode Island.

change the citation to R.I. GEN. LAWS § 34-36.1-1.01 (Lexis 2010).

§ 78.08(i)(13) Virginia.

change the citation to VA. CODE ANN. § 55-79.39 (Lexis 2010).

§ 78.08(i)(14) Washington.

change the citation to WASH. REV. CODE § 64.34.010 (Lexis 2010).

§ 78.08(j) Time Shares. [Go To Main]

§ 78.08(j)(2) California.

delete this subsection; the cited laws have been repealed.

§ 78.08(j)(7) North Carolina.

change the citation to § 93A-39, not 39.42

§ 78.08(l) Horizontal Property Act. [Go To Main]

§ 78.08(l)(3) South Carolina.

Add:

Windsor Green Owners Ass'n v. Allied Signal, Inc., 362 S.C. 12 (S.C. App. 2004) (the Horizontal Property Act makes the lease of an individual condominium unit serve to also lease the owner's undivided interest in the common elements to the lessee, whether or not use of the common elements is addressed in the lease, but such does not make the homeowner's association a third-party beneficiary to the lease contract).

§ 78.08(o) Recovery Fund. [Go To Main]

§ 78.08(o)(2) Colorado.

delete this subsection; the Colorado statute has been repealed.

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Supp. to § 78.09 Bibliography

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Fischer, Rebecca Anderson. "Interstate Land Sales Full Disclosure Act Summary of Exemptions from Registration Requirements," *American Bar Association Continuing Legal Education* SF30 *ALI-ABA* 511 (February 1, 2001).

Muniz, H. Michael, "Are Real Estate Speculators Entitled to Affirmative Relief Under the Federal Interstate Land Sales Full Disclosure Act as Interpreted by Florida Courts?," *11 Fl. Coastal L. Rev. 29 (Fall 2009).*

Stubblefield, Jo Anne P. "Checklist for Request for Regulatory Exemption Under the Interstate Land Sales Full Disclosure Act Based on Substantial Compliance with *15 U.S.C. Section 1702(b)(5),*" *American Law Institute-American Bar Association Continuing Legal Education*, SG074 *ALI-ABA* 805 (Feb. 28-Mar. 1, 2003).

Stubblefield, Jo Anne P. "Checklist for Single Family Residence Exemption--Interstate Land Sales Full Disclosure Act," *American Bar Association Continuing Legal Education* SE60 *ALI-ABA* 1003 (March 2, 2000).

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Disclosure Act," *American Bar Association Continuing Legal Education*, SE60 *ALI-ABA* 1009 (March 2, 2000).

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Stubblefield, Jo Anne P. "Federal Regulation of Land Sales Under the Interstate Land Sales Full Disclosure Act," *American Law Institute-American Bar Association Continuing Legal Education*, SH034 *ALI-ABA* 1101 (Jan. 30-Feb. 1, 2003).

Stubblefield, Jo Anne P. "Federal Regulation of Land Sales Under the Interstate Land Sales Full Disclosure Act," *American Law Institute-American Bar Association Continuing Legal Education*, Sm029 ALI-ABA 869 (August 17-18, 2006).

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Sklar, William P. and Dolce, Jennifer L. "The Interstate Land Sales Full Disclosure Act's Two-Year Completion Exemption," *73 Fla. B.J. 56* (February, 1999).

Annotations

Annotation, Construction and Application of "Chevron Deference" to Administrative Action by United States Supreme Court, *3 A.L.R. Fed. 2d 25.*

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Annotation, Grounds for Revocation or Suspension of License of Real-Estate Broker or Salesperson, *7 A.L.R. 5th 474.*

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CHAPTER 79 FOREIGN OWNERSHIP OF LAND

9-79 Thompson on Real Property, Thomas Editions 79.syn

AUTHOR: Professor James B. Wadley School of Law Washburn University

§ 79.syn Synopsis to Chapter 79: FOREIGN OWNERSHIP OF LAND

§ 79.01 General.

§ 79.02 Typical Reasons for Foreign Interest in American Land.

§ 79.03 Typical Concerns Regarding Foreign Investment in United States Land in General.

§ 79.04 History of Restrictions on Foreign Ownership of Land.

§ 79.04(a) Colonial Period.

§ 79.04(b) Early Settlement Periods.

§ 79.04(c) Anti-Oriental Period.

§ 79.04(d) Iron Curtain Restrictions.

§ 79.04(e) Oil Embargo Hysteria.

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§ 79.05 Defining Alienage for Purposes of Restriction.

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§ 79.08 Restrictions on the "Acquisition, Holding or Transfer" of Land by Alien Individuals.

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§ 79.12(a) Equal Protection Concerns, Generally.

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CHAPTER 79 FOREIGN OWNERSHIP OF LAND

9-79 Thompson on Real Property, Thomas Editions § 79.01

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§ 79.01 General.

[Go To Supp]

Throughout the history of our nation, there have been varying amounts of concern over the extent to which individuals from foreign countries are or have been investing in land in this country. n1 Although the amount of such investments has tended to be somewhat small at any one time, n2 concern over such matters has prompted a variety of responses at both the state and the federal level. It is interesting that there appears to have been somewhat less concern throughout our history regarding foreign investment in or ownership of businesses n3 in this country. While that investment may be more significant in some respects than is investment in land, this chapter explores only efforts to regulate foreign ownership of and investment in land.

In recent years, the most intense concern has been over the level or foreign ownership of United States farmland. Most recent reports indicate that approximately 14.5 million acres of privately-owned agricultural land were held by foreign interests. n4 This is approximately 1% of all privately-owned United States agricultural land, a percentage which has remained fairly constant since 1981. n5 Forest land, most of which is located in Maine, accounts for nearly half of all foreign owned acreage. n6 Canadian investors are the largest group of foreign owners, at 25%, with Japanese investors holding only 3% of the foreign-held acreage. n7 The restrictions considered in this chapter relate to the issue of ownership of land by foreign individuals or other legal persons. In jurisdictions that have such restrictions, it appears that the restrictions are grounded in the notion that land ownership is a significant issue. Historically, that has been the case more than it appears to be at the present. Today, access to land may be more significant than actual ownership. This is so even among citizens of our own country. Farmers, who are the largest single land user in the nation, appear less concerned with ownership and therefore increasingly rent the land that they use.

That may diminish the significance of restrictions on land ownership by foreigners. Where there are still strong feelings about excluding foreigners or particular groups of foreigners, there may be an increase in the use of alternate strategies, such as restrictions on foreign business entities or on tax policies n8 that create economic disincentives for locating the activity within the United States. n9 One area that appears to be generating concern regarding foreign businesses is trade policy. With the recent adoption of the North American Free Trade Agreement (N.A.F.T.A.), n10 the Canadian Free Trade Agreement, known as the Canada-U.S. Trade Agreement (C.U.S.T.A.) n11 and the ratification of the new

General Agreement on Tariffs and Trade, there seems to be a growing concern that foreign businesses in the free trade area may be more than able to merely compete with domestic industries and may actually cause domestic industries to fail. While this is not the same kind of issue that the law of foreign ownership had to deal with, it represents a resurgence of the same "anti-foreign" attitude that has been prevalent in the past, that foreigners should be somehow excluded. In this case, however, both the expression of the attitude and the battleground are different. It is now more a question of excluding goods and services than excluding the entity from owning land in this country. n12 And as such, the battle will be fought in the arena of trade policy (which is a matter to be dealt with at the national level) rather than in the arena of restrictions on the location of foreign entities within the United States (which tends to be a state-level issue).

Another emerging issue that invokes the old attitude but in a somewhat different scenario, is the concern with illegal immigration. Here, the fear is that "illegals" will enter the country and supplant the "natives." But, like the trade issue, this battle does not involve questions of land ownership as much as simply the presence of such individuals in the local economy or society. One final development merits initial consideration. In recent years, there has been a definite move toward a global economy. As part of this movement, many businesses are now structured so that they are truly global in nature. In that situation, it becomes increasingly difficult to determine whether the entity is truly "foreign" or simply a domestic entity that has moved abroad to better compete on a global scale. Such moves may have important advantages to the businesses that have little to do with the issue of where or under what circumstances they own or have access to land in the United States. One need only recall that not much more than a decade ago, the primary group of foreign investors in United States farmland were businesses in the Netherland Antilles. As it turned out, most of these entities were simply U.S. corporations that had gone abroad to take advantage of favorable tax laws. Since that time, most of the loop holes in the tax structure that had prompted that movement have been eliminated. The result was to significantly reduce the number of Netherland Antilles corporations that were owners of farmland in this country. Two interesting points should be noted. First, not every "foreign" entity may be truly "foreign," and the decision to locate abroad may be based on policies that have very little to do with the question of land ownership. From this, it is probable that jurisdictions that are seriously interested in excluding foreign entities will increasingly turn to restrictions or policies which relate directly to those issues rather than to the now somewhat narrow matter of land ownership as the primary means by which to exclude such entities. n13

In recent years, the locus of interest in the area of foreign ownership appears to have centered on the taxation and financial aspects of international trade. For example, in 1996, Congress amended the Internal Revenue Code to impose a tax on certain transfers of property by a citizen or resident of the United States, or by a domestic corporation or partnership or by an estate or trust to a foreign corporation. n14 It has recently been reported by the American Peace Network that foreign investment in the United States has grown from $276 billion in 1976 to $2 trillion in 1990. n15 This compares with official State Department figures that put direct foreign investment by the United States in the rest of the world at $805 billion in 1996. n16 According to the Bureau, the amount of foreign investment by the United States increased 15% between 1995 and 1996. In contrast, according to the Bureau, the United States is the world's largest recipient of foreign direct investment, slightly over $85 billion in 1996. However, nearly one quarter of the world's total ($349 billion) flowed into the United States, nearly double that of the nearest competitor, China, with $42 billion. This foreign investment constituted 6% of total private direct investment in the United States in 1996. The Bureau of Economic Analysis collects three broad sets of data on foreign direct investment in the United States: new investment data, financial and operating data of U.S. affiliates and balance of payments and direct investment position data. n17 At the end of the reporting period, foreign persons owned 14.3 million acres. Forest lands account for approximately 45 percent of this ownership, cropland 17 percent, pasture and other agricultural uses 35 percent and nonagricultural land for 3 percent. n18 The remaining 3 percent is held by trusts, institutions and associations. n19

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LEXIS: foreign! w/15 invest! or own! w/50 land w/15 america! or united states

FOOTNOTES:

(n1)Footnote 1. *See, e.g.*, William Fisch, *State Regulation of Alien Land Ownership, 42 Mo. L. Rev. 407 (1978);* James Huizinga, *Alien Land Laws: Constitutional Limitations on State Power to Regulate, 32 Hastings L.J. 251 (1980);* Bruce Zagaris, *Investment by Nonresident Aliens in United States Real Estate, 31 U. Miami L. Rev. 565 (1977);* Joshua Weisman, *Restrictions on the Acquisition of Land by Aliens*, 28 Am. J. of Comp. L. 39 (1980); Comment, *Alien Ownership of South Dakota Farmland: A Menace to the Family Farm?, 23 S.D. L. Rev. 735 (1978);* Comment, *Our Land is Your Land: Ineffective State Restrictions of Alien Land Ownership and the Need for Federal Legislation*, 13 John Marshall L. Rev. 679 (1980); Fred Morrison & Kenneth Krause, *State and Federal Legal Regulation of Alien and Corporate Land Ownership and Farm Operation*, U.S. Dept. of Agric., Econ. Rep. No. 284 (1975); Christopher Stern, *Invasion of the American Heartland*, Saturday Review at 22 (Oct. 15, 1977); Myrl Duncan & James Wadley, *Foreign Ownership of Kansas Land*, 61 Wichita Bus. Magazine 29 (1983). *See also* James R. Mason, Jr., *"Pssst, Hey Buddy, Wanna Buy a Country?" An Economic and Political Policy Analysis of Federal and State Laws Governing Foreign Ownership of United States Real Estate, 27 Vand. J. Transnat'l L. 453 (1994);* Hartwin Bungert, *Equal Protection for Foreign and Alien Corporations: Towards Intermediate Scrutiny for a Quasi-Suspect Classification, 59 Mo. L. Rev. 569 (1994).*

(n2)Footnote 2. United States Department of Agriculture estimates that foreign interests own between 12 and 13 million acres of agricultural land -- about half being forests. *See Foreign Ownership of Farmland In Kansas Minimal*, Topeka Capital-Journal, Sept. 8, 1987 at A-8.

(n3)Footnote 3. *But see* discussion of the International Investment Survey Act of 1976 at § 79.13(a), *infra*.

(n4)Footnote 4. Farm Broadcast Letter, No. 2612, May 28, 1993 at 2.

(n5)Footnote 5. *Id.*

(n6)Footnote 6. *Id.*

(n7)Footnote 7. *Id.* For further discussion, *see* James R. Mason, Jr. *"Pssst, Hey Buddy, Wanna Buy a Country?" An Economic and Political Policy Analysis of Federal and State Laws Governing Foreign Ownership of United States Real Estate, 27 Vand. J. Transnat'l L. 453 (1994);* Pat K. Chew, *Asian Americans: the "Reticent" Minority and their Paradoxes, 36 Wm. & Mary L. Rev. 1 (1994);* Christopher F. Corr, *A Survey of United States Controls on Foreign Investment and Operations: How Much is Enough?, 9 Am. U. J. Int'l L. & Pol'y 417 (1994);* Robert W. McGee, *Some Thoughts on the Relationship Between Property Rights and Immigration Policy, 42 Clev. St. L. Rev. 495 (1994);* Carolyn S. Bratt, *A Primer on Kentucky Intestacy Laws, 82 Ky. L.J. 29 (1994);* Hartwin Bungert, *Equal Protection for Foreign and Alien Corporations: Towards Intermediate Scrutiny for a Quasi-Suspect Classification, 59 Mo. L. Rev. 569 (1994).*

(n8)Footnote 8. Cynthia Blum, *U.S. Transfer Taxation of Nonresident Aliens: Too Much of Too Little?, 14 U. Pa. J. Int'l Bus. L. 469 (1994).*

(n9)Footnote 9. Janet Patricia Farmer, *NAFTA and the Textile and Apparel Industries: "Made in North America," 19 N.C. J. Int'l L. & Com. Reg. 293 (1994).*

(n10)Footnote 10. Alan Barkema, *The North American Free Trade Agreement: What is at Stake for U.S. Agriculture?*, Fed. Res. Bank of Kan. City Econ. Rev., 3d Qtr. 1992.

Negotiations are currently underway under the auspices of the Organization for Economic Cooperation and Development (OECD) to establish a broad, high-standard multilateral framework for international investment. The goal of this negotiation is to eliminate discrimination against foreign investors regarding the establishment, expansion and operation of the investments. The Bureau of Economic and Business Affairs has noted that the proposed Multilateral Agreement on Investments will not compel any of its members to allow unrestricted foreign investment in any or all

economic sectors. *See Multilateral Agreement on Investment (MAI): The Facts*, released by the Bureau of Economic and Business Affairs, March 23, 1998 and available at http://www. state.gov./www/issues/ economics/fs_980323_multilat.html.

(n11)Footnote 11. Henricus A. Strating, *The GATT Agricultural Dispute: A European Perspective*, 18 N.C. J. Int'l & Com. Reg. 305 (1993).

(n12)Footnote 12. For some discussion of these changing attitudes, *see* Diana C. Chiu, *The Cultural Defense: Beyond Exclusion, Assimilation, and Guilty Liberalism, 82 Cal. L. Rev. 1053 (1994);* Gloria L. Sandarino, *The NAFTA Investment Chapter and Foreign Direct Investment in Mexico: A Third World Perspective, 27 Vand. J. Transnat'l L. 259 (1994);* Garrett Epps, *Essay of Constitutional Seances and Color-blind Ghosts, 72 N.C. L. Rev. 401 (1994);* Karla D. Whalen, *Exxon-Florio and Open Investment: Are They at Odds in a World Where National Security No Longer Revolves Around Military Might?, 17 Suffolk Transnat'l L. Rev. 59 (1994).*

(n13)Footnote 13. *See* Janet Patricia Farmer, *NAFTA and the Textile and Apparel Industries: "Made in North America," 19 N.C. J. Int'l L. & Com. Reg. 293.*

Since the law requires that corporations in which foreign holdings amount to 10 percent or more must register their land ownership, approximately 61 percent of reported foreign holdings are actually held by U.S. corporations. Only 39 percent of the foreign-held land is owned by investors that are not affiliated with United States firms. When the 14.3 million acre total is adjusted for these partial interests, the amount drops to approximately 13.1 million acres. Agriculture Fact Book: 1998, United States Department of Agriculture, Office of Communications. Chapter 2-H. *See also* Charles Barnard, *"Foreign Ownership of U.S. Agricultural Land Through December 1, 1996,"* Economic Research Service, United States Department of Agriculture, SD #941, July 1998.

(n14)Footnote 14. 20 Aug. 1966, Pub. L. 104-188, Title I, § 1907(b)(1), *110 Stat. 1916,* codified at *26 U.S.C. § 1491*. This tax is an excise tax in the amount of 35% of the excess of the fair market value of the property transferred over the sum of the adjusted basis of the property plus the amount of gain recognized to the transferor. *See* K. Myres, *Property Transfers to Foreign Entities Potentially Subject to New U.S. Penalty, 13 Tax Notes Int'l 1755* (Nov. 25, 1996); Seitz, *Avoiding the 35% Penalty on Failure to Report Outbound Transfers to Foreign Entities under Sec. 1494(c)*. 28 Tax Adviser 294 (I) (May 1997); Brewer, *Reigning In the Terror of Section 1491*, Tax Notes 1725 (Mar. 31, 1997).

For additional discussion of concerns regarding land that may arise from economic aspects of foreign enterprise, *see* Paladini, *Foreign Ownership Restrictions Under Section 310(b) of the Telecommunications Act of 1996, 14 B.U. Int'l L. J. 341 (Fall 1996);* Brewer, *Final and Proposed Passive Foreign Investment Company Regulations, 26 Tax Mgmt. Int'l J. 160* (Apr. 11, 1997); Shuler, Ruhlin & Karr, *Obstacles to Foreign Investment in U.S. Agriculture*, 7 Cal. Int'l Prac. 36 (1996); Johnson, *Why Alienage Jurisdiction? Historical Foundations and Modern Justifications for Federal Jurisdiction Over Disputes Involving Noncitizens, 21 Yale J. Int'l L. 1 (1996);* Geist, *Toward a General Agreement on the Regulation of Foreign Direct Investment, 26 Law & Pol'y Int'l Bus. 673 (1995);* Brodkey, *Land Title Issues for Countries in Transition: The American Experience, 29 J. Marshall L. Rev. 799 (1996).*

For further discussion of tax advantages and disadvantages of foreign investments by investors in countries with which there exist no applicable treaties with the United States, *see* Irwin D. Segal, Eli Fink and Craig Stern, *Foreign Investment in U.S. Real Estate: Structuring for Non-treaty County Foreign Investors, 25 J. Real Est. Tax'n 211 (1998).*

(n15)Footnote 15. www.apn.org/beyond/ref306.html.

(n16)Footnote 16. *See Multilateral Agreement on Investment (MAI): The Facts*, released by the Bureau of Economic and Business Affairs, March 23, 1998 and available at http://www.state.gov. /www/issues/ economics/fs_980323_multilat.html.

(n17)Footnote 17. Detailed discussion of the differences between these data is found in Alicia M. Quijano, *A Guide to BEA Statistics on Foreign Direct Investment in the United States*, Survey 70 (Feb. 1990): 29-37. This guide is available at the BEA website. *See* www.bea.doc.gov/bea/ai/ 0698iid/box1.htm.

According to the Agriculture Fact Book: 1998, published by the U.S. Department of Agriculture, Office of Communications, the level of foreign ownership of U.S agricultural land has remained relatively steady from 1981 through 1997 and has been slightly above or below 1 percent of the privately owned agricultural land in the United States. The total currently stands at 14.3 million acres, up 199,419 from 1996. *Id.* Chapter 2-H. *See also* Charles Barnard, *Foreign Ownership of U.S. Agricultural Land Through December 1, 1996*," Economic Research Service, United States Department of Agriculture, SD #941, July 1998.

(n18)Footnote 18. Agriculture Fact Book: 1998, United States Department of Agriculture, Office of Communications. Chapter 2-H. *See also* Charles Barnard, "*Foreign Ownership of U.S. Agricultural Land Through December 1, 1996*, Economic Research Service, United States Department of Agriculture, SD #941, July 1998. Corporations own 79 percent of foreign held acreage, partnerships own 12 percent and individuals own 6 percent.

(n19)Footnote 19. Agriculture Fact Book: 1998, United States Department of Agriculture, Office of Communications. Chapter 2-H.

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CHAPTER 79 FOREIGN OWNERSHIP OF LAND

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§ 79.02 Typical Reasons for Foreign Interest in American Land.

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American land, particularly farmland, appears to be quite attractive to foreign investors for a variety of reasons. The primary incentives to invest might be broadly enumerated as follows: n20

1. The historic stability of United States governments allows investment in American land to be considered safer than a corresponding investment in the land of the investor's origin.

2. The popular perception that the United States is very protective of private property rights suggests that investments in land will be highly regarded and protected.

3. The popular perception that the economic system of the United States encourages capital development and protects capitalistic investments suggests that investment in land will be profitable and can be used to achieve meaningful economic objectives of the investor.

4. There is much land that is readily available for purchase at reasonable prices, in contrast to the situation in many foreign countries where land may be held in the same family for generations and therefore is simply not available, or may be a relatively scarce and very expensive commodity.

5. The relative cheapness of the United States dollar in relation to currencies of other countries makes investment in the United States even cheaper.

Other reasons include the possibility that an investment in United States land may be an effective hedge against inflation; that it may provide a refuge against land reform efforts and political disorders abroad; that the investment will significantly appreciate as a result of increases in United States land values relative to land prices throughout the world; that the investments will safely balance investment portfolios in terms of income and capital appreciation; that strategic resources may be controlled; that there may be a basis for political and economic influence within the United States; and that there is somehow prestige associated with owning land in this country. n21

From time to time there have been significant tax-related reasons for foreign investment, but in recent years most of those have been eliminated or restructured. n22

The reasons for foreign investment appear to be largely economic in nature and do not appear to suggest that the investment is politically motivated. This is important to note since the concerns regarding foreign investment tend to be broader than the reasons for the investments and do tend to raise issues regarding political and other matters. With the development of a truly global economy, there may be a shift away from an interest in American land from an investment basis to an interest simply as a "local physical plant" for the business activity. In that sense, the issue of "ownership" will be less significant than the question of "access." This may stimulate the law to be more interested in the idea of reciprocity as a basis for admitting the foreign entity. In the past, except with respect to the matter of inheritance, n23 reciprocity has tended not to be an issue. To the extent that reciprocity becomes a concern, it becomes increasingly necessary to understand the possible restrictions at the other end. That this is happening is reflected in the growing body of literature relating to foreign investment and the restrictions on doing business abroad. n24

The interests of foreigners in United States land appears to remain strong from an economic point of view. This interest runs a very broad range from pure investment concerns to strategic tax planning. In many cases, the object is not necessarily the acquisition of land title for any particular purpose but the achievement of international business objectives. n25

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LEXIS: reason! w/30 foreign! w/15 invest! or own! w/50 land w/15 america! or united states

FOOTNOTES:
(n1)Footnote 20. For additional discussion of reasons for foreign investment in land in the United States, *see* Bruce Zagaris, *Investment by Nonresident Aliens in United States Real Estate, 31 U. Miami L. Rev. 565 (1977);* Peter DeBraal & Kenneth Krause, *Corporate, Foreign and Financial Investors in U.S. Agriculture, 29 S.D. L. Rev. 378 (1984). See* Jeremy D. Smith, The Foreign Investor's Guide to U.S. Real Estate (New York: Oceana Pubs., Inc., 1990); George F. Bernardi, *A Foreign Investor's Guide to Real Property Investments in the United States*, 20 Int'l Tax J. 39 (1994); Benjamin A. Jablow, *Counseling the Foreign Investor in the Acquisition of U.S. Real Property, 68 Fla. B.J. 55 (1994);* David L. Callies, *Land Ownership, Use and Property Rights: The Balance Between Local Ownership and Foreign Investor Security*, 21 Int'l Bus. Law. 535 (1993); Steven A. Musher, *Revenue Reconciliation Act of 1989 from the Perspective of the Foreign Investor in U.S. Real Estate, 6 Tax Mgmt. Real Est. J. 67* (April 4, 1990).

The real estate that foreign-born citizens are most likely to invest in apparently is homes. *See* Pamela Reeves, *Foreign-Born Citizens Establish Stake in U.S. Land*, The Detroit News, Monday, Sept 22, 1997. In fact, according to the survey, done by the Census Department, foreign-born citizens are more likely to be home owners than are native born citizens.

(n2)Footnote 21. *See* Christopher Stern, *Invasion of the American Heartland*, Saturday Review, (Oct. 15, 1977), at 19.

(n3)Footnote 22. *See* Bruce Zagaris, *Investment by Nonresident Aliens in United States Real Estate, 31 U. Miami L. Rev. 565 (1977).*

(n4)Footnote 23. *See* § 79.09 *infra*.

There appears to be considerable foreign investment in commercial, rather than agricultural, real estate. It has been reported that international firms bought $1.77 billion worth of commercial real estate in Arizona alone in 1995 and an

additional $1.87 billion in 1994. *See* Catherine Reagor, *Foreign Investors Skip Valley This Time*, The Arizona Republic, Sunday May 17, 1998 (Special Section). *1998 WL 7772349.* Much of this appears to be in the form of purchases of existing buildings or structures rather than raw land. These non-agricultural investments in United States real estate seem to be growing. In a recent survey of foreign investors, 67 percent said they planned to increase the level of investment in properties here in 1998. Robert Burgess, *Foreign Investors More Bullish on the U.S. Real Estate Market*, The Commercial Appeal, (Memphis Tenn), Sunday, Nov. 9, 1997. Non-farm foreign investments in real estate have tended to occur in cities and increasingly involve office buildings. In the past, non-farm foreign investments in real estate have tended to occur in the retail area. This type of investment ranked first from 1992 to 1995 but slipped to fourth in 1996 and was second to office buildings in 1997. *Survey of Foreign Investors Show Confidence*, Real Estate Weekly, Wed. Nov. 19, 1997 (Vol. 44, No. 16).

In 1997, for the first time ever, foreign investors selected Boston as their first choice of cities in which to invest. Second on the list was Washington D.C, followed by San Francisco, and then Atlanta, which had headed the list for the past three years. New York was in fifth place. Both Los Angeles and Chicago have dropped significantly in popularity in recent years. *Survey of Foreign Investors Show Confidence*, Real Estate Weekly, Wed. Nov. 19, 1997 (Vol. 44, No 16). Across the United States, the total investment in commercial real estate appears historically to have been dominated by Japanese investments. With current problems in the Far East, Japanese investments seem to be diminishing. Non-Japanese investments have grown sharply since the mid-1990's, totaling $6.3 billion between 1993 and 1996. The bulk of the non-Japanese investment appears to come from Hong Kong, which totaled $2.9 billion. *See* Catherine Reagor, *Foreign Investors Skip Valley This Time*, The Arizona Republic, Sunday May 17, 1998 (Special Section). *1998 WL 7772349.*

(n5)Footnote 24. *See* Sarah E. Fandell, *Foreign Investment, Logging, and Environmentalism in Developing Countries: Implications of Stone Container Corporation's Experience in Honduras, 35 Harv. Int'l L.J. 499 (1994);* Gloria L. Sandarino, The *NAFTA Investment Chapter and Foreign Direct Investment in Mexico: A Third World Perspective, 27 Vand. J. Transnat'l L. 259 (1994);* Kistor Uprety & Ruven de Alwin, *Legal and Policy Aspects of Private Foreign Investment in Nepal, 7 Transnat'l Law 103 (1994);* Paul D'Arelli, *Entering the Construction Services Industry in Mexico: Laws Affecting Foreign Participation, NAFTA, and Other Concerns, 7 Transnat'l Law 227 (1994);* Jon D. Van Gorp, *Collateral in Eastern Europe: Problems and Solutions, 28 Int'l Law. 83 (1994);* Michael E. Hooton, *Structuring and Negotiating International Joint Ventures, 27 Creighton L. Rev. 1013 (1994);* Steven N. Kaplan, *Top Executives, Turnover, and Firm Performance in Germany*, 10 James L. Econ. & Org. 142 (1994); James L. Ammeen, Jr., *Modern Russian Secured Transaction Law and Foreign Investor's Rights Thereunder, 4 Ind. Int'l & Comp. L. Rev. 371 (1994);* Rodolpho Sandoval, *Chapter Eleven: Investments Under the North American Free Trade Agreement, 25 St. Mary's L.J. 1195 (1994).*

It has recently been reported by the American Peace Network that foreign investment in the United States has grown from $276 billion in 1976 to $2 trillion in 1990. www.apn.org/ beyond/ref306.html. This compares with official State Department figures that put direct foreign investment by the United States in the rest of the world at $805 billion in 1996. *See Multilateral Agreement on Investment (MAI): The Facts*, released by the Bureau of Economic and Business Affairs, March 23, 1998 and available at http://www.state.gov./www/issues/ economics/ fs_980323_multilat.html. According to the Bureau, the amount of foreign investment by the United States increased 15% between 1995 and 1996. In contrast, according to the Bureau, the United States is the world's largest recipient of foreign direct investment, slightly over $85 billion in 1996. However, nearly one quarter of the world's total ($349 billion) flowed into the United States, nearly double that of the nearest competitor, China, with $42 billion. This foreign investment constituted 6% of total private direct investment in the United States in 1996. The Bureau of Economic Analysis collects three broad sets of data on foreign direct investment in the United States: new investment data, financial and operating data of U.S. affiliates and balance of payments and direct investment position data. Detailed discussion of the differences between these data is found in Alicia M. Quijano, *A Guide to BEA Statistics on Foreign Direct Investment in the United States*, SURVEY 70 (Feb. 1990): 29-37. This guide is available at the BEA website. *See* www.bea.doc.gov/bea/ai/0698iid/box1.htm.

(n6)Footnote 25. For further discussion, *see* Shuler, Ruhlin & Karr, *Obstacles to Foreign Investment in U.S. Agriculture*, 7 Cal. Int'l Pract. 36 (1996); Paladini, *Foreign Ownership Restrictions Under Section 310(b) of the Telecommunications Act of 1996, 14 B.U. Int'l L.J. 341 (Fall 1996);* Brewer, *Final and Proposed Passive Foreign Investment Company Regulations, 26 Tax Mgm't Int'l J. 160* (Apr. 11, 1997); K. Myres, *Property Transfers to Foreign Entities Potentially Subject to New U.S. Penalty, 13 Tax Notes Int'l 1755* (Nov. 25, 1996); Seitz, *Avoiding the 35% Penalty on Failure to Report Outbound Transfers to Foreign Entities under Sec. 1494(c)*, 28 Tax Adviser 294 (I) (May 1997); Brewer, *Reigning In the Terror of Section* 1491, Tax Notes 1725 (Mar. 31, 1997); Geist, *Toward a General Agreement on the Regulation of Foreign Direct Investment, 26 Law & Pol'y Int'l Bus. 673 (1995); Brodkey, Land Title Issues for Countries in Transition: The American Experience, 29 J. Marshall L. Rev. 799 (1996).*

For further discussion of tax advantages and disadvantages of foreign investments by investors in countries with which there exist no applicable treaties with the United States, *see* Irwin D. Segal, Eli Fink and Craig Stern, *Foreign Investment in U.S. Real Estate: Structuring for Non-treaty County Foreign Investors, 25 J. Real Est. Tax'n 211 (1998).* For a discussion of issues affecting foreign investment structure, *see* Irwin D. Segal, Eli Fink and Craig Stern, *Foreign Investment in U.S. Real Estate: No Perfect Structure, 9 J. Int'l Tax'n 22 (1998).*

The American Bar Association is currently engaged in a project to publish a series of monographs to help U.S. practitioners deal with foreign clients in the United States. For further information, contact Peter A. Gelles (Chair) 1801 Century Park East, 16th Floor, Los Angeles, CA 90067 or Richard Fijolek (Vice Chair) 3100 Nationsbank Plaza, 901 Main Street, Dallas TX, 75202-3714.

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CHAPTER 79 FOREIGN OWNERSHIP OF LAND

9-79 Thompson on Real Property, Thomas Editions § 79.03

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§ 79.03 Typical Concerns Regarding Foreign Investment in United States Land in General.

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Concerns regarding foreign investment in land in the United States appear to be more varied than the reasons for the investment. This might suggest that some of the concerns are unfounded. Nevertheless, they appear to be widely held and have had an impact upon the nature of regulation, especially at the state level. The most common specific concerns appear to be the following:

1. The ability to own land vests the landowner with a significant measure of control over that land and how it is used. As a result, there is some concern regarding the extent to which economic control over the land may be usurped from United States citizens or from the state or federal governments. n26

2. The comparative low price of United States land suggests a potential for "bidding-up" the value of land for United States citizens who may not have the investment resources that the foreigner does. This may have the effect of driving United States citizens out of the market, which could pose serious problems for family-sized farmers. n27

3. There is some fear that foreign investors will own larger (and therefore possibly more efficient) areas of land than United States citizens and will therefore have a correspondingly larger control over that particular sector of the economy. n28

4. The level of protection given to aliens under the law may restrict the level of control a community or the city may have in determining its own land use patterns and future development.

5. There appears to be a significant concern that the productive capacity on foreign-owned farmland might be diverted from meeting the needs of the population of the United States to supplying the food needs of the foreign countries from which the investors originate. n29

6. There appears to be some sentiment that economic activities of foreigners ought to be generally restricted as they pose a potential threat to our general economic structure n30 or because their allegiance might be suspect. n31

Other reasons include fears that foreign investors will use their financial clout to undermine the United States' economic sovereignty; that foreign ownership may result in the establishment of feudal land control systems, a system of absentee landlords, and foreign control of rural communities. n32

These reasons, in contrast to the reasons typically given for foreign investment, suggest that our national fears regarding foreign investment tend to be dominated by concerns regarding the extent of control asserted by outsiders over land within this country and the extent to which foreign landowners should influence decisions regarding our nation's land use patterns and food production capacity. Indeed, it has been suggested that most concerns simply reflect emotional responses to what is perceived as a foreign threat to American economic stability, n33 to dominate and control domestic agricultural production, n34 or force small, family farmers n35 out of business. n36 It is clear that although these fears have and will play a major role in legislative decisions regarding alien ownership of land, there is and has been little basis for most of these fears. n37

The most restrictive statutes relating to foreign ownership tend to operate in much the same fashion as restrictions on corporations in that they tend to exclude a particular group or class n38 from the ownership privilege. n39 With the shift in focus toward a global economy, the issue of fear regarding "foreign" interests in the United States necessarily changes somewhat from that of fear regarding control over land (with its attendant political baggage and overtones) to that of fear regarding economic competition (with perhaps, some attendant cultural baggage). n40 However, in that scenario, ownership is far less significant than the question of access and in some ways less threatening.

One area of access and ownership continues to cause a fair amount of concern, and that is the issue of access to the public domain for purposes of acquiring valuable mineral resources. Historically, there have been restrictions on alien ownership of mineral claims. n41 These restrictions have been fairly easy to circumvent because once title to the land upon which the minerals were located was perfected, it was considered to be like any other private title to land and could be sold, transferred, leased, etc. to anyone, including foreigners. This, however, has resulted in the acquisition of major deposits of gold and other minerals by foreign corporations. n42

In recent years, the major concerns regarding foreign investment seem to focus on the investment dimensions rather than the purely ownership dimensions. That is, the concerns tend to be more of a social and economic nature than that the foreign entity becomes a physical presence with which our system must contend. That is, there seems to be more of a fear that various aspects of the economic structure of an industry will be dominated or controlled by investors from outside this country than that there will be any monopoly over the land base itself. n43

One factor that may moderate attitudes toward foreign ownership of land in the United States is the interest in protecting the possibility that citizens of the United States should have the opportunity of owning land in other countries. Indeed, there is a strong sense that investment opportunities for citizens of the United States need to be expanded and there may be a concern that restrictions at home may translate into restrictions abroad. n44

Finally, there seems to be an emerging concern that foreign entities with ownership interests in the United States have not acquired them for purposes of tax evasion or that the transfers to the foreign entities are not made for purposes of tax avoidance. n45 In at least one state, it has recently been determined that corporate ownership of farmland (whether domestic or foreign) is inimical to the public welfare. In Kansas, by statute, most corporations are barred from owning an interest, directly or indirectly, in farmland. Recent amendments have given counties the option of permitting dairy and swine corporations to locate within the county. The issue before the Attorney General was whether the county could rescind such a grant of permission and, if the county did so, whether it would constitute a "taking" of a property interest from the corporation. The Attorney General found that the state may exercise its police power to totally prohibit persons from engaging in occupations or businesses that are detrimental to the public welfare. n46

COMPUTER-ASSISTED RESEARCH

LEXIS: concern! w/30 foreign! invest! or own! w/50 land w/15 america! or united states

FOOTNOTES:
(n1)Footnote 26. For a discussion of similar concerns regarding ownership of farmland by corporations, *see* ch. 47, *supra*.

(n2)Footnote 27. *See* discussion of the family farm problem in ch. 47, *supra*.

(n3)Footnote 28. For a discussion of this fear in the context of regulation of corporate ownership of farmland, *see* ch. 47, *supra*.

(n4)Footnote 29. Although the data suggests that the amount of agricultural land held by foreign interests is small and appears to be quite stable, and interest in further restrictions has waned since the mid 1980's, a number of states have considered changing statutes regarding foreign ownership. It is presently estimated that approximately 1% of privately-owned agricultural land in the United States, or about 14.8 million acres, is held by foreign interests. This level has remained constant since 1981. Further, much of the land is actually held by U.S. corporations that are partly owned by foreigners. Federal reporting law requires that a corporation be identified as foreign if as little as 10% of the stock is held by foreign investors. Only 47% of all foreign-held land is actually owned by investors not affiliated with domestic firms. Peter DeBraal, *Foreign Ownership of U.S. Agricultural Land in '91*, *Agricultural Law Update* 6 (April 1992).

(n5)Footnote 30. Joshua Weisman, *Restrictions on the Acquisition of Land by Aliens, 28 Am. J. Comp. L. 39 (1980).*

(n6)Footnote 31. *See Terrace v. Thompson, 263 U.S. 197 at 221:* "The quality and allegiance of those who own, occupy and use the farm lands within its borders, are matters of highest importance, and affect the safety and powers of the state itself."

(n7)Footnote 32. For further discussion, *see* Clifton B. Luttrell, *The "Danger" from Foreign Ownership of U.S. Farmland*, 61 Fed. Res. Bank., St. Louis Rev. 2 (1979).

It has been reported by the American Peace Network that foreign investment in the United States has grown from $276 billion in 1976 to $2 trillion in 1990. www.apn.org/ beyond/ref306.html. Official State Department figures that put direct foreign investment by the United States in the rest of the world at $805 billion in 1996. *See Multilateral Agreement on Investment (MAI): The Facts*, released by the Bureau of Economic and Business Affairs, March 23, 1998 and available at http://www.state.gov./www/issues/ economics/fs_ 980323_multilat.html. According to the Bureau, the amount of foreign investment by the United States increased 15% between 1995 and 1996. In contrast, according to the Bureau, the United States is the world's largest recipient of foreign direct investment, slightly over $85 billion in 1996. However, nearly one quarter of the world's total ($349 billion) flowed into the United States, nearly double that of the nearest competitor, China, with $42 billion. This foreign investment constituted 6% of total private direct investment in the United States in 1996. The Bureau of Economic Analysis collects three broad sets of data on foreign direct investment in the United States: new investment data, financial and operating data of U.S. affiliates and balance of payments and direct investment position data. Detailed discussion of the differences between these data is found in Alicia M. Quijano, *A Guide to BEA Statistics on Foreign Direct Investment in the United States*, Survey 70 (Feb. 1990): 29-37. This guide is available at the BEA website. *See* www.bea.doc.gov/bea/ai/ 0698iid/box1.htm.

Across the United States, the total investment in commercial real estate appears historically to have been dominated by Japanese investments. With current problems in the Far East, Japanese investments seem to be diminishing. Non-Japanese investments have grown sharply since the mid-1990's, totaling $6.3 billion between 1993 and 1996. The bulk of the non-Japanese investment appears to come from Hong Kong, which totaled $2.9 billion. *See* Catherine

Reagor, *Foreign Investors Skip Valley This Time*, The Arizona Republic, Sunday May 17, 1998 (Special Section). *1998 WL 7772349.* On the other hand, investment in agricultural land tends to be from Canada or Western Europe. Most (57 percent) of the investors in United States farmland are from the countries of Canada, the United Kingdom, Germany and France, in that order. Agriculture Fact Book: 1998, United States Department of Agriculture, Office of Communications. Chapter 2-H. *See also* Charles Barnard, *Foreign Ownership of U.S. Agricultural Land Through December 1, 1996*, Economic Research Service, United States Department of Agriculture, SD #941, July 1998.

Concerns regarding the impact of foreign investment on national economic independence have produced significant restrictions that apply to specific industries. Most of these restrictions affect the aviation industry, telecommunications, maritime commerce, power generation, banking, insurance, and real estate, including agricultural land and minerals. For further discussion of the general restrictions affecting these areas, *see* Peter Burkard, *Foreign Direct Investments: Restrictions and Reporting Requirements* (Jan. 22, 1993), at http://www.eskimo.com/ larrygj/ burkard.html. A further discussion of foreign investment in the U.S. airline industry is found in Angela Edwards, *Foreign Investment in the U.S. Airline Industry: Friend or Foe?* available online at http://www.law.emory.edu/ EILR (reprinted from 9 Emory International Law Review 1995). Regarding alien ownership in the telecommunications industry, *see* Edwin Krasnow and Andres Martinez, *An Alien Ownership Primer: A Fifth Here, a Fourth There*, (File Papers, Communications Media Center at New York Law School. Available at www.cmcnyls. edu/ PUBLIC/papers/ALIENOWN.HTM.)

(n8)Footnote 33. *See* Clifton B. Luttrell, *The "Danger" from Foreign Ownership of U.S. Farmland*, 61 Fed. Res. Bank, St. Louis Rev. 2 (1979); *Invasion of the American Heartland*, Saturday Review (Oct. 15, 1977); Foreign Investment Legislation: Hearings on S. 329, S. 995 and S.1303 Before the Subcomm. on Foreign Commerce and Tourism of the Senate Comm. on Commerce, 94th Cong., 1st Sess. 142 (1975).

(n9)Footnote 34. John Davidson, *Report: Agricultural Foreign Investment Disclosure Act of* 1978, 1 Agricultural L.J. 228, 235 (1979). In *Invasion of the American Heartland*, Saturday Review, (Oct. 15, 1977), the author states on p. 19 that: "In a few decades of harvesting, foreign investors in U.S. farmland could eclipse American ownership. Then the nation's single greatest source of power would pass from the hands of American citizens."

(n10)Footnote 35. For further discussion of the significance of the family farm to American agriculture, *see* ch. 47, *supra*.

(n11)Footnote 36. *See* Clifton B. Luttrell, *The "Danger" from Foreign Ownership of U.S. Farmland*, 61 Fed. Res. Bank, St. Louis Rev. 2 (1979).

(n12)Footnote 37. *Id.*

(n13)Footnote 38. In *Lendorff Geneva, Inc., v. Warren, 246 N.W.2d 815 (Wis. 1976)* it is stated that it is constitutional to exclude non-resident aliens from land ownership since non-resident aliens are not a "suspect" class.

(n14)Footnote 39. *See, e.g.*, Iowa Code Ann. §§ 567.1 - 567.11, which is generally regarded as one of the most restrictive of the state statutes. This statute excludes non-resident aliens, foreign businesses and foreign governments from acquiring any interest in agricultural land in Iowa. If such land is acquired, it must be divested within two years or it will escheat to the state. Land acquired for non-agricultural purposes is limited to 320 acres and must be put to such use within five years.

(n15)Footnote 40. *See, e.g.*, Daina C. Chiu, *The Cultural Defense: Beyond Exclusion, Assimilation, and Guilty Liberalism, 82 Cal. L. Rev. 1053 (1994);* James R. Mason, Jr., *"Pssst, Hey Buddy, Wanna Buy a Country?" An Economic and Political Policy Analysis of Federal and State Laws Governing Foreign Ownership of United States Real Estate, 27 Vand. J. Transnat'l L. 453 (1994).*

Foreign owners do not appear to be taking the land out of agricultural production and no change has occurred in 94

percent of the acres. Agriculture Fact Book: 1998, United States Department of Agriculture, Office of Communications. Chapter 2-H. *See also* Charles Barnard, *Foreign Ownership of U.S. Agricultural Land Through December 1, 1996*, Economic Research Service, United States Department of Agriculture, SD #941, July 1998.

(n16)Footnote 41. The General Mining Law of 1872, *22 U.S.C. § 22* has limited the acquisition of valuable hard rock minerals to "citizens of the United States and those who have declared their intention to become such...."

In addition to the issue of acquisition of mineral rights, there has been some concern regarding foreign interests in the aviation industry, telecommunications, maritime commerce, power generation, banking, insurance, and real estate, including agricultural and mineral land. For further discussion of the general restrictions affecting these areas, *see* Peter Burkard, *Foreign Direct Investments: Restrictions and Reporting Requirements* (Jan. 22, 1993), at http://www.eskimo.com/ larrygj/burkard.html. A further discussion of foreign investment in the U.S. airline industry is found in Angela Edwards, *Foreign Investment in the U.S. Airline Industry: Friend or Foe?* available online at http://www.law.emory.edu/ EILR (reprinted from 9 Emory International Law Review 1995). Regarding alien ownership in the telecommunications industry, *see* Edwin Krasnow and Andres Martinez, *An Alien Ownership Primer: A fifth Here, a Fourth There*, (File Papers, Communications Media Center at New York Law School. Available at www.cmcnyls. edu/PUBLIC/papers/ALIENOWN.HTM.)

(n17)Footnote 42. *See, e.g., The Last Great Giveaway*, Newsweek, pp. 66-67 (May 30, 1994).

(n18)Footnote 43. *See, e.g.*, Shuler, Ruhlin & Karr, *Obstacles to Foreign Investment in U.S. Agriculture*, 7 Cal. Int'l Pract. 36 (1996); Silby, *"Let Them Eat Cake" Globalization, Postmodern Colonialism and the Possibilities of Justice, 31 Law & Soc'y Rev. 207 (1997);* Sorg, *Global Hunger, a Doubling of Population, and Environmental Degradation: Justifying Radical Change in U.S. Farm Policy, 6 Ind. Int'l & Comp. L. Rev. 679 (1996);* Paladini, *Foreign Ownership* Restrictions Under Section 310(b) of the Telecommunications Act of 1996, *14 B.U. Int'l L. J. 341 (Fall 1996);* Brewer, *Final and Proposed Passive Foreign Investment Company Regulations, 26 Tax Mgmt. Int'l J. 160* (Apr. 11, 1997); K. Myres, *Property Transfers to Foreign Entities Potentially Subject to New U.S. Penalty, 13 Tax Notes Int'l 1755* (Nov. 25, 1996); Johnson, *Why Alienage Jurisdiction? Historical Foundations and Modern Justifications for Federal Jurisdiction over Disputes Involving Noncitizens, 21 Yale J. Int'l L. 1 (1996);* Geist, *Toward a General Agreement on the Regulation of Foreign Direct Investment, 26 Law & Pol'y Int'l Bus. 673 (1995).*

(n19)Footnote 44. *See* Ayllon, *Impact of International Trade Agreements in the Legal Systems of the American Continent*, 19 Hous. J. Int'l Law 761 (1997); Gibbs, *Prospect for Sustainable Liberalization of Foreign Investment Laws as a Concomitant of Hemispheric Integration in the Americas*, 28 U. Miami Inter-Amer. Rev. 95 (1996); Silby, *"Let Them Eat Cake" Globalization, Postmodern Colonialism and the Possibilities of Justice, 31 Law & Soc'y Rev. 207 (1997);* Tausinda, *EC Eleventh Company Law Directive and Overseas Companies*, 18 Company Law. 98 (1997); Sorg, *Global Hunger, a Doubling of Population, and Environmental Degradation: Justifying Radical Change in U.S. Farm Policy, 6 Ind. Int'l & Comp. L Rev. 679 (1996);* Geist, *Toward a General Agreement on the Regulation of Foreign Direct Investment, 26 Law & Pol'y Int'l Bus. 673 (1995);* Brodkey, *Land Title Issues for Countries in Transition: The American Experience, 29 J. Marshall L. Rev. 799 (1996).*

(n20)Footnote 45. *See* Brewer, *Final and Proposed Passive Foreign Investment Company Regulations, 26 Tax Mgm't Int'l J. 160* (Apr. 11, 1997); K. Myres, *Property Transfers to Foreign Entities Potentially Subject to New U.S. Penalty, 13 Tax Notes Int'l 1755* (Nov. 25, 1996); Seitz, *Avoiding the 35% Penalty on Failure to Report Outbound Transfers to Foreign Entities under Sec. 1494(c)*, 28 Tax Adviser 294 (I) (May 1997); Brewer, *Reigning In the Terror of Section 1491*, Tax Notes 1725 (Mar. 31, 1997).

(n21)Footnote 46. *Citing Mugler v. Kansas, 123 U.S. 623 (1887)*, the Attorney General found that the adoption of the restrictions against corporations was well within the bounds of law and that "there was no vested right in carrying on a business that was legislatively declared detrimental to the public, and that the property owner was not entitled to compensation or a stay of the law's application." Att'y Gen. Op. 96-21 (March 5, 1996). This view was reaffirmed in

Att'y Gen. Op. 97-92 (Sept. 15,1997).

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CHAPTER 79 FOREIGN OWNERSHIP OF LAND

9-79 Thompson on Real Property, Thomas Editions § 79.04

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§ 79.04 History of Restrictions on Foreign Ownership of Land.

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The ability of a nation to exclude citizens from other nations from owning land within its boundaries is well-settled and frequently done throughout the world. n47 In our legal system, we have had a series of periods in which extensive measures to exclude aliens were adopted. These periods have been followed by periods of relaxation of the restrictions.

The intensity of exclusionary efforts tends to ebb and flow with the strength of perceived threats of the kind noted *supra*. Thus, the history of regulation of alien ownership of land is a history of periods of intense concern followed by periods of relative disinterest.

§ 79.04(a) Colonial Period.

The English feudal system, which was the precursor of our common law heritage, gave rise to rules which disfavored alien land ownership. n48 These rules generally provided that land could be granted to individuals only upon an oath of loyalty. n49 This predilection toward exclusion became a part of American law during the colonial period and was an important part of our legal system in the early decades of United States history. n50

During the early and middle decades of the 19th century, the country enjoyed a period of amelioration in the severity of the restrictions on alien ownership and, indeed, in some cases, favorable treatment was extended to alien landowners. n51

§ 79.04(b) Early Settlement Periods.

Speculation in Western lands was fairly rampant during the colonial period, with such dignitaries as George Washington himself a major player. n52 After the Civil War, as intense settlement occurred in the Great Plains and Rocky Mountains, it was discovered that foreign investors had begun to acquire substantial land holdings in these areas. n53 This sparked a variety of responses, fueled undoubtedly by fears that the foreign interests would control much of the prime new settlement areas of the country. These included statutes such as the Territorial Land Act of 1887 n54 which limited landholdings by aliens unless they had applied for citizenship. Other statutes of this period which

restricted alien ownership included the Homestead Act, n55 grazing statutes, n56 and mining laws. n57

These statutes became the pattern for many mid-western state restrictions on alien ownership. n58

§ 79.04(c) Anti-Oriental Period.

Shortly after the turn of the century, a second period of restriction of alien ownership occurred. This period focused almost exclusively upon aliens of Oriental ancestry and appears to have been motivated by racial intolerance or fear of competition from such aliens. n59 Restrictions of this period were framed in terms of eligibility for citizenship and denied the right to own land to aliens who were ineligible for citizenship under federal immigration laws. At the time, Orientals were the only racial class excluded from citizenship. n60 These statutes were initially upheld as constitutional, n61 but in *Oyama v. California*, n62 at least four Justices suggested that the legislation may be susceptible to challenge. Most states who patterned their restrictions after this approach n63 found that these statutes were rendered ineffective when the federal immigration laws were amended in 1952 to eliminate the class of "ineligible aliens." n64

There has been little interest in restricting Oriental investment in United States land in recent years, and data suggests that investments have been relatively small. n65 In a recent situation in Nebraska, however, a century-old state statute barring alien ownership of land was invoked to force Japanese investors to give up ranchland in Lincoln County. n66 The County Attorney who brought suit to block the purchase of the 3,680-acre ranch land said that the suit was not racially motivated, though that was disputed by the eventual purchaser of the land -- a Japanese-American. n67

§ 79.04(d) Iron Curtain Restrictions.

After World War II, a period of restriction commenced that was primarily concerned with the possible diversion of American wealth to citizens residing in countries ruled by totalitarian governments. Statutes of this period typically did not proscribe aliens from owning land *per se* but rather sought to allow probate courts to impound the proceeds of inherited lands where it was apparent that an alien heir would not have the real enjoyment of the lands. n68

§ 79.04(e) Oil Embargo Hysteria.

The most recent period of activity in this area followed the successful oil embargo of the mid-1970's. There was considerable concern that the new-found wealth of the oil-producing nations would translate into a high level of petrodollars being invested in American land -- especially farmland. n69 This hysteria soon became a xenophobic attitude toward foreign investment generally n70 and prompted legislatures in a number of states to revisit their efforts to restrict aliens. At least one state made major revisions in an effort to further restrict such ownership. n71 During this period, it was reported that more than half the states had restrictions of some kind on alien ownership of land. n72

§ 79.04(f) The Present.

As discussed *supra*, the intensity of restriction on alien ownership varies directly with the strength of the perceived threat from such alien ownership. After the adoption of the International Investment Survey Act of 1976 n73 and the Agricultural Foreign Investment Disclosure Act of 1978, n74 it was discovered: 1) that the actual level of investment was somewhat less than initially feared n75 and 2) that the land holdings were primarily owned by our "friends" rather than our enemies. n76 The data generated by these acts revealed that the bulk of the land was held by foreigners from Canada, West Germany, Hong Kong, Netherlands Antilles, and the United Kingdom -- not O.P.E.C. or Eastern European nations as popularly feared. As a result, a number of states that at the time were considering legislation that would have intensified restrictions on aliens refused to adopt the proposed statutory changes n77 or actually relaxed the restrictions that were already in place. n78

Since the late 1970's and early 1980's, very little new legislation has been adopted at either the federal or the state level that would suggest that the nation is in another period of intense concern over foreign investment in United States land,

though there are some indications of growing concern relative to the acquisition of mineral patents on the public domain by foreign interests which may develop into significant efforts to restrict such ownership. n79

FOOTNOTES:
(n1)Footnote 47. For a discussion of relatively recent restrictions in other countries, *see* Joshua Weisman, *Restrictions on the Acquisition of Land by Aliens, 28 Am. J. Comp. L. 39 (1980).*

Negotiations are currently underway under the auspices of the Organization for Economic Cooperation and Development (OECD) to establish a broad, high-standard multilateral framework for international investment. The goal of this negotiation is to eliminate discrimination against foreign investors regarding the establishment, expansion and operation of the investments. The Bureau of Economic and Business Affairs has noted that the proposed Multilateral Agreement on Investments will not compel any of its members to allow unrestricted foreign investment in any or all economic sectors. *See Multilateral Agreement on Investment (MAI): The Facts*, released by the Bureau of Economic and Business Affairs, March 23, 1998 and available at http://www.state.gov./ www/issues/ economics/ fs_980323_multilat.html.

(n2)Footnote 48. *See* Fred Morrison, *Limitations on Alien Investment in American Real Estate, 60 Minn. L. Rev. 621 (1976).*

(n3)Footnote 49. *See* 1 Julian Juergensmeyer and James Wadley, Agricultural Law, Boston: Little, Brown & Co., 134, 1982. *See also* Fred Morrison, *Limitations on Alien Investment in American Real Estate, 60 Minn. L. Rev. 621, 623 (1976);* Charles Sullivan, *Alien Land Laws: A Re-Evaluation*, 36 Temp. L. Q. (1962). In Later Times, According to Blackstone, Aliens Were Allowed to Purchase Land But Could Not Take By Inheritance. 2 William Blackstone, Commentaries, 249-250.

(n4)Footnote 50. *See* Charles Sullivan, *Alien Land Laws: A Re-Evaluation, 36 Temp. L. Q. 15:*

> When the first English colonists crossed the Atlantic, they carried in their legal baggage a complete set or restrictions on alien landholding. These restrictions were a product of medieval England. They were without relevance to the conditions of an unsettled wilderness.

(n5)Footnote 51. *See* Fred Morrison, *Limitations on Alien Investment in American Real Estate, 60 Minn. L. Rev. 621 (1976).*

(n6)Footnote 52. *See* generally Gates, History of Public Land Law Development (1968); Hibbard, History of the Public Land Policies (1924); Paul Taylor, *Public Policy and the Shaping of Rural Society, 20 S.D. L. Rev. 475 (1975).*

(n7)Footnote 53. Charles Sullivan, *Alien Land Laws: A Re-Evaluation, 36 Temp. L. Q. 15 (1962).*

(n8)Footnote 54. *48 U.S.C. §§ 1501*-1507.

(n9)Footnote 55. *43 U.S.C. § 161*.

(n10)Footnote 56. *43 U.S.C. § 315 et seq*.

(n11)Footnote 57. *30 U.S.C. § 22 et seq*.

(n12)Footnote 58. Fred Morrison, *Limitations on Alien Investment in American Real Estate, 60 Minn. L. Rev. 621, 626 (1976).*

(n13)Footnote 59. *See* Edwin Furguson, *The California Alien Land Law and the Fourteenth Amendment, 35 Cal.*

L. Rev. 61 (1947); Dudley McGovney, *The Anti-Japanese Laws of California and Ten Other States, 35 Cal. L. Rev. 7 (1947).*

(n14)Footnote 60. Fred Morrison, *Limitations on Alien Investment in American Real Estate, 60 Minn. L. Rev. 621, 627 (1976).*

(n15)Footnote 61. *Terrace v. Thompson, 263 U.S. 197 (1923); Porterfield v. Webb, 263 U.S. 225 (1923).*

(n16)Footnote 62. *332 U.S. 633 (1948).*

(n17)Footnote 63. *See, e.g.*, Kan. Stat. Ann. § 59-511.

(n18)Footnote 64. Immigration and Nationality Act, ch. 477, § 311, *66 Stat. 239 (1952),* codified at *8 U.S.C. § 1422.*

(n19)Footnote 65. It has been estimated that Japanese investors hold only 3% of the foreign-held acreage in the United States. Farm Broadcast Letter, No. 2612, May 28, 1993 at 2.

(n20)Footnote 66. *See* Clark Miller, *Foreign Ownership, Japanese Businessmen, County Settle Brady Ranch Dispute*, North Platte Telegraph, April 22, 1991; James Allen Flannery, *Japanese Shift Ownership, Brady Ranch Back in American Hands*, Omaha World-Herald, April 22, 1991; James Allen Flannery, Ranchers' Priority: Sales in Japan, Not Who Owns Land, Omaha World-Herald, April 23, 1991; James Allen Flannery, *Settlement Dismays New Owner of Ranch*, Omaha World-Herald, April 24, 1991.

(n21)Footnote 67. For further discussion, *see* Pat K. Chew, *Asian Americans: the "Reticent" Minority and their Paradoxes, 36 Wm. & Mary L. Rev. 1 (1994);* Robert W. McGee, *Some Thoughts on the Relationship Between Property Rights and Immigration Policy, 42 Clev. St. L. Rev. 495 (1994).*

Across the United States, the total investment in commercial real estate appears historically to have been dominated by Japanese investments. With current problems in the Far East, Japanese investments seem to be diminishing. Non-Japanese investments have grown sharply since the mid-1990's, totaling $6.3 billion between 1993 and 1996. The bulk of the non-Japanese investment appears to come from Hong Kong, which totaled $2.9 billion. *See* Catherine Reagor, *Foreign Investors Skip Valley This Time, The Arizona Republic*, Sunday May 17, 1998 (Special Section). *1998 WL 7772349.*

(n22)Footnote 68. *See* Austin Heyman, *The Nonresident Alien's Right to Succession Under the "Iron Curtain Rule," 52 Nw. U. L. Rev. 221 (1957).*

(n23)Footnote 69. *See* William Fisch, *State Regulation of Alien Land Ownership, 43 Mo. L. Rev. 407 (1978).*

(n24)Footnote 70. *See, e.g., National Sentiment Against Land Holdings of Foreigners Strikes Chord in Oklahoma*, Wall Street Journal, July 7, 1980, pt. 2 at 1:

> [The Attorney General of Oklahoma warned the public that] "Idi Amin could be your next door neighbor. What's to keep them from taking over political influence, expanding our city limits and taking over rural lands? What's to prevent foreign ownership of our banks, oil interests and communications?"

See also Irving, *Mysterious Big Spenders: Aliens Buying Our Farms*, San Francisco Examiner, Sept. 8, 1978, at C-1; Yoshihara, *Real Estate a Big Draw for Foreigners*, Los Angeles Times, May 31, 1978, pt. I at 1; *The Selling of America*, Time, May 29, 1978, at 71.

(n25)Footnote 71. *See* Iowa Code ch. 567 as amended by Acts 1979 (68 6.A) ch. 133, § 1.

(n26)Footnote 72. *Farm Buys by Aliens Raise Fears*, State Government News, April 1979 at 3.

(n27)Footnote 73. *22 U.S.C. §§ 3202*-3208.

(n28)Footnote 74. *7 U.S.C. §§ 3501*-3508.

(n29)Footnote 75. *See, e.g., Foreign Ownership of Farm Land in Kansas Minimal*, Topeka Capital-Journal, Sept. 8, 1987, A-8; *Bergland believes foreign investors have 4 million acres of U.S. farms*, Topeka Capital-Journal, Sept. 21, 1979, A-14.

(n30)Footnote 76. *See, e.g.*, Alexander Majchrowicz & Peter DeBraal, *Foreign Ownership of U.S. Agricultural Land Through December 31, 1983: County-Level Data*, U.S.D.A. Economic Research Service, Natural Resource Economics Division, (1984). Data revealed that much of the land was held by foreigners from Canada, West Germany, Hong Kong, Netherlands Antilles, and the United Kingdom, not O.P.E.C. or Eastern European nations as popularly feared.

Most (57 percent) of the investors in United States farmland are from the countries of Canada, the United Kingdom, Germany and France, in that order. Agriculture Fact Book: 1998, United States Department of Agriculture, Office of Communications. Chapter 2-H. *See also* Charles Barnard, *Foreign Ownership of U.S. Agricultural Land Through December 1, 1996*, Economic Research Service, United States Department of Agriculture, SD #941, July 1998.

Maine is the state that continues to have the largest number of acres owned by foreign persons: 3,037,198. This amounts to 17 percent of the state's privately owned agricultural land and 21 percent of all the reported foreign holdings of agricultural land nationwide. Ninety-one percent of the foreign holdings in Maine are owned by four companies. Two of these companies are Canadian, one is a combined United States-French venture and one is a combined United States-Canadian enterprise. Agriculture Fact Book, 1998, United States Department of Agriculture, Office of Communications. Chapter 2-H. *See also* Charles Barnard, *Foreign Ownership of U.S. Agricultural Land Through December 1, 1996*, Economic Research Service, United States Department of Agriculture, SD #941, July 1998.

There appears to be considerable foreign investment in commercial, rather than agricultural, real estate. It has been reported that international firms bought $1.77 billion worth of commercial real estate in Arizona alone in 1995 and an additional $1.87 billion in 1994. Much of this appears to be in the form of purchases of existing buildings or structures rather than raw land. Across the United States, the total investment in commercial real estate appears historically to have been dominated by Japanese investments. With current problems in the Far East, Japanese investments seem to be diminishing. Non-Japanese investments have grown sharply since the mid-1990's, totaling $6.3 billion between 1993 and 1996. The bulk of the non-Japanese investment appears to come from Hong Kong, which totaled $2.9 billion. *See* Catherine Reagor, *Foreign Investors Skip Valley This Time*, The Arizona Republic, Sunday May 17, 1998 (Special Section). *1998 WL 7772349.* Non-farm foreign investments in real estate have tended to occur in cities and increasingly involve office buildings. In 1997, for the first time ever, foreign investors selected Boston as their first choice of cities in which to invest. Second on the list was Washington D.C, followed by San Francisco and then Atlanta, which had headed the list for the past three years. New York was in fifth place. Both Los Angeles and Chicago have dropped significantly in popularity in recent years. *Survey of Foreign Investors Show Confidence*, Real State Weekly, Wed. Nov. 19, 1997 (Vol. 44, No. 16).

In the past, non-farm foreign investments in real estate have tended to occur in the retail area. This type of investment ranked first from 1992 to 1995 but slipped to fourth in 1996 and was second to office buildings in 1997." *Survey of Foreign Investors Show Confidence*, Real State Weekly, Wed. Nov. 19, 1997 (Vol. 44, No. 16). In a recent survey of foreign investors, 67 percent said they planned to increase the level of investment in properties here in 1998. Robert Burgess, *Foreign Investors More Bullish on the U.S. Real Estate Market*, The Commercial Appeal, (Memphis Tenn), Sunday, Nov. 9, 1997.

(n31)Footnote 77. For example, in Kansas, H.B. No. 2930 was defeated in 1978 and H.B. No. 2758 died on the Senate Floor in 1980.

(n32)Footnote 78. *See, e.g.*, Connecticut which repealed §§ 42-57, 54-57 and 45-278a in 1985. These provisions, which restricted alien ownership of land, were replaced by § 45-58a which provides that any alien, whether or not a resident in the United States, may acquire, lease, inherit or transfer any real estate in the state in the same manner as citizens.

(n33)Footnote 79. *See The New Gold Rush*, U.S. News and World Report 44-56, October 28, 1991, detailing the extent to which the gold mining industry is dominated by foreign investors. It is claimed that 15 of the biggest 25 gold mines are foreign-owned and that overseas owners hold 40 to 90% of three others.

This has occurred despite restrictions in federal mining law that allows only citizens of the United States or those who have applied for citizenship to patent mining claims on public domain land. The fear of foreign domination of the industry has motivated some efforts to reform and update the General Mining Law. *Id*.

Philip Hocker, President of Mineral Policy Center in Washington, D.C., is quoted as saying that "in the next 10 years, more than $10 billion in gold owned by the taxpayers will pass into private hands in Nevada alone. No other country flat gives away its resources like this. Would we allow domestic or foreign corporations to mine coal, pump oil or cut timber free?" *Id*.

See also The Last Great Giveaway, Newsweek, pp. 66-67 (May 30, 1994); Shuler, Ruhlin & Karr, *Obstacles to Foreign Investment in U.S. Agriculture*, 7 Cal. Int'l Pract. 36 (1996); Johnson, *Why Alienage Jurisdiction? Historical Foundations and Modern Justifications for Federal Jurisdiction over Disputes Involving Noncitizens*, *21 Yale J. Int'l L. 1 (1996);* Geist, *Toward a General Agreement on the Regulation of Foreign Direct Investment*, *26 Law & Pol'y Int'l Bus. 673 (1995);* Brodkey, *Land Title Issues for Countries in Transition: The American Experience*, *29 J. Marshall L. Rev. 799 (1996).*

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CHAPTER 79 FOREIGN OWNERSHIP OF LAND

9-79 Thompson on Real Property, Thomas Editions § 79.05

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§ 79.05 Defining Alienage for Purposes of Restriction.

[Go To Supp]

Provisions of state and federal statutes which restrict foreign ownership of land tend to apply to "aliens." It is necessary to understand who is or is not covered by such provisions.

A number of factors may be relevant to the determination of alienage. For example, with respect to individuals, it may make a difference:

1) whether the individual is eligible for citizenship; n80

2) where the individual resides; n81

3) whether the individual has become a bona fide resident of the state; n82

4) whether an individual has expressed an intention to become a United States citizen; n83 or

5) whether the affected individual is acting in a representative capacity n84 for foreign interests. n85

In most cases, where individuals are concerned, citizenship and residence factors tend to dominate such that the determination of alienage will be based on both citizenship and place of residence. For example, the Agricultural Foreign Investment Disclosure Act n86 applies to:

1) Individuals who are not U.S. Citizens or citizens of the Northern Mariana Islands or the Trust Territory of the Pacific Islands;

2) Individuals who are not lawfully admitted to the United States for permanent residence or who are not paroled into the United States under the Immigration and Nationality Act. n87

Thus, "aliens" are commonly defined as any persons who are not citizens of the United States and who are not residents of the United States or of some state, territory, trusteeship, or protectorate of the United States. n88

"Non-resident aliens" are typically defined as individuals who are not citizens of the United States and who have not been classified as permanent resident aliens by the United States Immigration and Naturalization Service. n89 "Citizenship" tends to be defined in terms of United States citizenship. n90 In some states, the acceptable class of individuals is those from nations "at peace" with the United States n91 or "not enemies" of the United States. n92 Residence may be defined as simply lawful admittance to the country or the state for purposes of permanent residence. n93 In some states, the residency must be "bona fide." n94 The class of residents may also include those who have stated their intent to become citizens. n95

Foreign business entities may also be subject to restriction as "aliens." In some cases, the entity must be truly foreign in the sense that it is owned or controlled by individuals who reside in a country other than the United States to qualify. n96 In others, however, all that may be required is that the corporation be organized outside of the state in which the restriction has been adopted -- even though that may simply be another state within the United States. n97 In a case in Oklahoma, n98 it was argued that "aliens" included only natural persons and therefore excluded corporations. The District Court agreed, but on appeal, the Oklahoma Supreme Court affirmed that the corporation in question was not barred by the Constitution from holding land, but for a different reason. The court found that although corporations were "persons" and "aliens" under the terms of the provision, the corporation had become "domesticated" by virtue of becoming licensed in the state.

Definitions of foreign entities tend to be broader than those involving individuals. This reflects the fact that there is greater fear of outside control from business entities than from individuals. n99

The general result of approaching the problem of alienage as a matter of both citizenship and residence has been to structure the restrictions such that they may apply differently to resident aliens than to non-resident aliens, with the latter being more severely restricted. n100 The Telecommunications Act of 1966 restricts ownership opportunities by aliens in two ways. First, it adds a restriction to Section 310 which limits the granting of certain licenses to corporations in which more than a specified amount of capital stock is owned by aliens. n101 No broadcast, common carrier, aeronautical en route or aeronautical fixed radio station license is to be granted to or held by any corporation in which more than one fifth of the capital stock is directly or indirectly held by an alien, or a representative thereof, or by a foreign government or by a corporation organized under the laws of a foreign country. Similarly, such licenses cannot be held by corporations that in turn are controlled by such foreign interests. Second, it includes within the categories of exclusion, not only "aliens" but entities such as foreign governments and corporations organized under the laws of foreign countries. n102

As a general rule, foreign investors enjoy the same rights and privileges as U.S. citizens in that there are very few restrictions on foreign investors in the United States regarding repatriation of capital, the remittance of profits and dividends, or the transfer of royalties from the United States. Most of the restrictions affect the aviation industry, telecommunications, maritime commerce, power generation, banking, insurance, and real estate, including agricultural land and mineral. n103

COMPUTER-ASSISTED RESEARCH

LEXIS: alien! w/15 defin! or determin!

FOOTNOTES:

(n1)Footnote 80. *See* Kan. Stat. Ann. § 59-511.

(n2)Footnote 81. *See Lehndorff Geneva, Inc. v. Warren, 246 N.W.2d 815 (Wis. 1976).*

(n3)Footnote 82. *Cartwright v. Hillcrest Inv. Ltd., 630 P.2d 1253 (Okla. 1981).*

(n4)Footnote 83. 1978 Op. Att'y Gen. Ky., Lexis 162 (OAG 78-678).

(n5)Footnote 84. The status of the person holding title to the land on behalf of an alien may be relevant in some states. Missouri provides that no person may hold agricultural land as an agent, trustee or other fiduciary for an alien or foreign business. Mo. Ann. Stat. 442.571.

(n6)Footnote 85. *See Yang Bi Kei v. American Int'l Knitters Corp., 789 F. Supp. 1074 (D.N. Mariana I. 1992).*

(n7)Footnote 86. *7 U.S.C. §§ 3501*-3508.

(n8)Footnote 87. *See, e.g., Foreign Investors Who Hold Agricultural Land: What They Should Know About The Agricultural Foreign Investment Disclosure Act of 1978,* United States Department of Agriculture, Agricultural Stabilization and Conservation Service, Oct. 1984.

(n9)Footnote 88. *See* Mo. Ann. Stat. § 442.566.

(n10)Footnote 89. *See 1979-80 Op. Att'y Gen. Iowa 462* (Nov. 2, 1979).

(n11)Footnote 90. *See, e.g.,* Minn. Stat. § 500.221.

(n12)Footnote 91. Ga. Code Ann. § 79-303 [1-2-11].

(n13)Footnote 92. Md. Code Ann. [Real Prop.] § 14-101; Va. Code § 55-1.

(n14)Footnote 93. Ga. Code Ann. § 113-1206.

(n15)Footnote 94. Okla. Stat. Ann. tit. 60, § 122.

(n16)Footnote 95. Ind. Code Ann. § 32-1-7; Ky. Rev. Stat. § 381.290.

(n17)Footnote 96. The International Investment Survey Act of 1976, *22 U.S.C. §§ 3202*-3208, applies to business entities in which foreign investors hold, directly or indirectly, a 10 percent or greater interest.

(n18)Footnote 97. *See, e.g.,* Kan. Stat. Ann. § 17-5902 *et seq. See also* Op. Att'y Gen. Kan. No. 88-54 (April 8, 1988) (corporations domiciled in foreign countries are subject to the Kansas restrictions on foreign corporations); Op. Att'y Gen. Kan. No. 92-148 (Nov. 25, 1992) (corporations organized outside the state are subject to restrictions); Op. Att'y Gen. Kan. No. 83-160 (Oct. 31, 1983) (foreign corporations, authorized to do business within the state, are subject to restrictions.) *See also* Op. Att'y Gen. Ky. 82-291 (June 7, 1982): "The term 'foreign corporation' includes corporations that are organized and created under the laws of another nation as well as corporations created under the laws of another state." Citing Ky. Rev. Stat. 271A.101(2).

(n19)Footnote 98. *State v. Hillcrest Inv., Ltd., 444 U.S. 984 (1979).*

(n20)Footnote 99. Since the law requires that corporations in which foreign holdings amount to 10 percent or more must register their land ownership, approximately 61 percent of reported foreign holdings are actually held by U.S. corporations. Only 39 percent of the foreign-held land is owned by investors that are not affiliated with United States firms. When the 14.3 million acre total is adjusted for these partial interests, the amount drops to approximately 13.1 million acres. Agriculture Fact Book: 1998, United States Department of Agriculture, Office of Communications. Chapter 2-H. *See also* Charles Barnard, *Foreign Ownership of U.S. Agricultural Land Through December 1, 1996,* Economic Research Service, United States Department of Agriculture, SD #941, July 1998.

(n21)Footnote 100. *See Jalif v. Industrial Comm'n of Ariz., 644 P.2d 1319 (Ariz. 1982); Lehndorff Geneva, Inc. v. Warren, 246 N.W.2d 815 (Wis. 1976). See also* Cynthia Blum, *U.S. Transfer Taxation of Nonresident Aliens: Too Much of Too Little? 14 U. Pa. J. Int'l Bus. L. 469 (1994);* Carolyn S. Bratt, *A Primer on Kentucky Intestacy Laws, 82 Ky. L.J. 29 (1994);* Hartwin Bungert, Equal *Protection for Foreign and Alien Corporations: Towards Intermediate Scrutiny for a Quasi-Suspect Classification, 59 Mo. L. Rev. 569 (1994);* James R. Mason, Jr., "*Pssst, Hey, Buddy, Wanna Buy a Country*?" *An Economic and Political Policy Analysis of Federal and State Laws Governing Foreign Ownership of United States Real Estate, 27 Vand. J. Transnat'l L. 453 (1994).* For further discussion, *see* Christopher F. Corr, *A Survey of United States Controls on Foreign Investment and Operations: How Much is Enough?*, 9 Am. U. J. Int'l L. & Pol. 417 (1994); Shuler, Ruhlin & Karr, *Obstacles to Foreign Investment in U.S. Agriculture*, 7 Cal. Int'l Pract. 36 (1996); Johnson, *Why Alienage Jurisdiction? Historical Foundations and Modern Justifications for Federal Jurisdiction over Disputes Involving Noncitizens, 21 Yale J. Int'l L. 1 (1996);* Geist, *Toward a General Agreement on the Regulation of Foreign Direct Investment, 26 Law & Pol'y Int'l Bus. 673 (1995).*

(n22)Footnote 101. *43 U.S.C. § 310*(b).

(n23)Footnote 102. For further discussion, *see* Palidini, *Foreign Ownership Restrictions Under Section 310(b) of the Telecommunications Act of 1996, 14 B.U. Int'l L. J. 341 (1996).*

(n24)Footnote 103. For further discussion of the general restrictions affecting these areas, *see* Peter Burkard, *Foreign Direct Investments: Restrictions and Reporting Requirements* (Jan. 22, 1993), at http://www.eskimo.com/ larrygj/burkard.html. A further discussion of foreign investment in the U.S. airline industry is found in Angela Edwards, *Foreign Investment in the U.S. Airline Industry: Friend or Foe?* available online at http://www.law.emory.edu/ EILR (reprinted from 9 Emory International Law Review 1995). Regarding alien ownership in the telecommunications industry, *see* Edwin Krasnow and Andres Martinez, *An Alien Ownership Primer: A fifth Here, a Fourth There*, (File Papers, Communications Media Center at New York Law School. Available at www.cmcnyls.edu/PUBLIC/papers/ALIENOWN.HTM.)

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CHAPTER 79 FOREIGN OWNERSHIP OF LAND

9-79 Thompson on Real Property, Thomas Editions § 79.06

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§ 79.06 Defining Land for Purposes of Restriction.

[Go To Supp]

Many statutes proscribe the "indirect" as well as "direct" "ownership" of any "interest" in the land though such terms are often undefined in the statutes themselves. n104 These acts may exclude security interests, n105 leaseholds of short duration, n106 contingent future interests, non-contingent future interests which do not become possessory upon the termination of the present possessory interest, surface or subsurface easements, and mineral rights. n107

Some statutes proscribe the ownership of any interests in any land. For example, one state restricts aliens not eligible for citizenship from transmitting or inheriting any "real estate, or any interest therein" in that state. n108 In Wyoming, non-resident aliens are prohibited from "acquiring, possessing, transferring, transmitting or inheriting real property or having in whole or in part the beneficial use thereof except for use as a personal residence and not in excess of one acre." n109 Even indirect interests may be covered by the statutes. For example, in Wisconsin, n110 non-resident aliens and certain corporations n111 may not "acquire, own or hold any interest, directly or indirectly, except for debt security purposes, in more than 640 acres of land except as authorized by this section. The section contains a number of exceptions, such as for railroad and pipeline corporations, mineral interests, oil and gas leases and so forth." Similarly, it has been argued in at least one jurisdiction that a contract between a farmer and a corporation to raise hogs for the corporation constituted an indirect acquisition of an interest in agricultural land and was therefore subject to the statutory prohibition. n112

In contrast, some statutes may restrict only the foreign "ownership" of a particular kind of land. These statutes typically enjoin the ownership of "agricultural land." n113 Where the restriction is limited to agricultural land, that land tends to be broadly defined as land "which is capable, without substantial modification to the character of the land, of supporting an agricultural enterprise." n114 What constitutes an "agricultural enterprise" may be similarly broadly defined. n115 The land, to be defined as agricultural land, may be required to meet minimum size n116 or location criteria. n117 In Alaska, n118 classes of people are listed who can acquire mineral rights in public land.

In some states, the location of the land may be critical. In Nebraska, the prohibition has been construed to apply to land located more than three miles outside the city limits of an incorporated city. n119

Liens have posed an interesting problem. In one situation, n120 the Missouri statute was construed such that a mortgage-type lien was not considered to be an interest in real property subject to the statute since it was considered to be neither an estate in land nor a right to any beneficial interest therein. Thus, an alien did not violate the statute by purchasing land with the proceeds of a loan from an alien that was secured with a deed of trust. However, it was opined that the alien lender could not acquire an interest in the land in the event of foreclosure either directly or through an agent, trustee or other fiduciary.

In contrast, it has been held n121 that the acquisition of land as a result of foreclosure of a lien did not violate restrictions on alien ownership since the original purpose of the lien was to secure satisfaction of the debt and not for the purpose of acquiring land.

Licenses may also be treated as not representing an interest in the land. In one case, n122 it was held that a one-year license to fish held by a corporation, the majority of the capital stock of which was held by aliens, which entitled the corporation to locate and occupy a fishing site for the duration of the license, did not violate restrictions against alien ownership since the holder of the license did not acquire a title interest of any kind in real property.

In some jurisdictions, it has been held that restrictions on the ownership of realty will not bar the ownership of stock in a corporation where the stock may be considered personalty instead of realty and where the corporation is considered to be a legal entity distinct from its shareholders. n123

COMPUTER-ASSISTED RESEARCH

LEXIS: restrict! w/15 alien! w/15 own! w/5 land!

FOOTNOTES:

(n1)Footnote 104. Agricultural Foreign Investment Disclosure Act of 1978, *7 U.S.C. 3501*-3508; 7 C.F.R. § 781.2(c). In some states, the restriction on ownership pertains only to agricultural land. The Attorney General in Kansas has recently ruled that swine finishing facilities do not constitute "farming" under the Kansas statute restricting the ability of certain corporations to own farmland in the state. The opinion cited as authority *T-Bone Feeders, Inc. v. Martin, 236 Kan. 641 (1985),* which held that there was a distinction between a commercial feedlot and farming. The commercial feedlot was a specialized agri-business that was engaged in an agricultural endeavor but not engaged in farming. Att'y Gen. Op. 97-72 (Sept. 15, 1997). In exactly the opposite manner, the Iowa Supreme Court recently eliminated the distinction between traditional and commercial agriculture for purposes of zoning restrictions. In *Thompson v. Hancock County, 539 N.W.2d 181 (Iowa 1995),* and *Keuhl v. Cass County, 555 N.W.2d 686 (Iowa 1996),* the Iowa Supreme Court determined that large commercial hog facilities were engaged in agriculture for purposes of zoning laws. In so doing, the court overturned long-standing precedent, *Farmegg Products, Inc. v. Humboldt County, 190 N.W.2d 454 (Iowa 1971).* The rule in Iowa had been that agricultural use was to be defined in terms of "traditional" activities.

(n2)Footnote 105. *But see* Op. Att'y Gen. Mo. 89-84 (August 1, 1984) which extends the foreign ownership restriction to land acquired as a result of enforcement of security provisions in a trust deed.

(n3)Footnote 106. *Id.* Leases of less than 10 years are excluded. Iowa Code § 567.1 *et seq.*, excludes leases which do not exceed 5 years in duration.

(n4)Footnote 107. *Id.*

(n5)Footnote 108. Kan. Stat. Ann. § 59-511.

(n6)Footnote 109. Wyo. Stat. § 34-15-101.

(n7)Footnote 110. Wis. Stat. Ann. § 710.02.

(n8)Footnote 111. Affected are such corporations that are owned in excess of 20% by aliens not residents of a state of the United States or by corporations not created under the laws of the United States or a state of the United States. *Id*.

(n9)Footnote 112. Op. Att'y Gen. 87-160 (Kansas, Oct. 30, 1987).

(n10)Footnote 113. Mo. Ann. Stat. § 442.560. Minn. Stat. § 500.221, subd. 2, limits rights to acquire, directly or indirectly, any interest in agricultural land to those who are permanent citizens of the United States or permanent residents. Land acquired for security interests or taken by devise or inheritance is excluded.

(n11)Footnote 114. Mo. Ann. Stat. § 442.556(1).

(n12)Footnote 115. *See, e.g.*, Mo. Ann. Stat. § 442.556(1) in which "agricultural enterprise" is defined to include but is not limited to "land used for the production of agricultural crops or fruit or other horticultural products, or for the raising or feeding of animals for the production of livestock or livestock products, poultry or poultry products, or milk or dairy products."

(n13)Footnote 116. Mo. Ann. Stat. § 442.566(1) requires that the land be more than 5 acres. Iowa Code § 567.1 *et seq*. allows for the purchase of up to 320 acres so long as the land is converted to a non-farm use within five years. Adjacent parcels of land under the same ownership may be deemed part of a single tract. Mo. Ann. Stat. § 442.566(1).

(n14)Footnote 117. For example, prior to the adoption of the present version of Iowa Code § 567.1 *et seq*., non-resident aliens were allowed to acquire up to 640 acres outside the corporate limits of a city and unlimited holdings inside city limits.

(n15)Footnote 118. Alaska Stat. § 38.05.190.

(n16)Footnote 119. *Shames v. Nebraska, 323 F. Supp. 1321 (D. Neb. 1971), aff'd* mem., *408 U.S. 901 (1972).*

(n17)Footnote 120. Op. Att'y Gen. Mo. 89-84 (August 1, 1984).

(n18)Footnote 121. *Oregon Mtg. Co. v. Carstens, 47 P. 421 (Wash. 1896).*

(n19)Footnote 122. *Hastings v. Anacortes Packing Co., 69 P. 776 (Wash. 1902).*

(n20)Footnote 123. Op. Att'y Gen. Ky. 78-585 (Aug. 23, 1978).

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CHAPTER 79 FOREIGN OWNERSHIP OF LAND

9-79 Thompson on Real Property, Thomas Editions § 79.07

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§ 79.07 State Power Over Alien Landowners, Generally.

[Go To Supp]

The authority of states to restrict aliens is well settled. It has been held that:

> [t]he law of nations recognizes the liberty of every government to give foreigners only such rights, touching immovable property within its territory, as it may see fit to concede... In our country, this authority is primarily in the States where the property is located. n124

Likewise, it has been held that "[t]he power of the State to regulate the tenure of real property within her limits, and the modes of its acquisition and transfer ... is undoubted." n125 This has been extended to grant to the states great latitude regarding the ability to limit, condition or even abolish the power of testamentary disposition. n126

Nevertheless, the power of the states to regulate is not unlimited and may be affected by the federal constitutional principles of equal protection and due process n127 and by potentially pre-emptive federal authority over commerce and foreign affairs. n128

As noted *infra*, n129 many states do not restrict alien ownership of land. Indeed, in these jurisdictions, the statutes simply affirm the right of aliens to be treated in the same manner as citizens.

COMPUTER ASSISTED RESEARCH

LEXIS: state! w/15 restrict! w/10 alien! w/30 land!

FOOTNOTES:
(n1)Footnote 124. *Hauenstein v. Lynham, 100 U.S. 483, 484 (1880). See also United States v. Burnison, 339 U.S. 87 (1950); Irving Trust Co. v. Day, 314 U.S. 556 (1941);* Clarke v. *Clarke, 178* U.S. 186 (1900).

(n2)Footnote 125. *United States v. Fox, 94 U.S. 315 at 320 (1877).*

(n3)Footnote 126. *See Irving Trust Co. v. Day, 314 U.S. 556 (1941).*

(n4)Footnote 127. *See Fujii v. State, 242 P.2d 617 (Cal. 1952); Kenji Namba v. McCourt, 204 P.2d 569 (Or. 1949).*

As a general rule, foreign investors enjoy the same rights and privileges as U.S. citizens. There are very few restrictions on foreign investors in the United States regarding repatriation of capital, the remittance of profits and dividends, or the transfer of royalties from the United States. Most of the restrictions affect the aviation industry, telecommunications, maritime commerce, power generation, banking, insurance, and real estate, including agricultural and mineral land. For further discussion of the general restrictions affecting these areas, *see* Peter Burkard, *Foreign Direct Investments: Restrictions and Reporting Requirements* (Jan. 22, 1993), at http://www.eskimo. com/ larrygj/burkard.html. A further discussion of foreign investment in the U.S. airline industry is found in Angela Edwards, *Foreign Investment in the U.S. Airline Industry: Friend or Foe?* available online at http://www.law.emory.edu/ EILR (reprinted from 9 Emory International Law Review 1995). Regarding alien ownership in the telecommunications industry, *see* Edwin Krasnow and Andres Martinez, *An Alien Ownership Primer: A fifth Here, a Fourth There*, (File Papers, Communications Media Center at New York Law School. Available at www.cmcnyls.edu/PUBLIC/papers/ALIENOWN.HTM.)

(n5)Footnote 128. *See, e.g., Havenstein v. Lynham, 100 U.S. 483 (1880)* where a state succession law which attempted to abolish rights of aliens to inherit property guaranteed by treaty was struck down under the supremacy clause.

(n6)Footnote 129. *See* discussion of various states at § 79.11 *infra*.

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CHAPTER 79 FOREIGN OWNERSHIP OF LAND

9-79 Thompson on Real Property, Thomas Editions § 79.08

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§ 79.08 Restrictions on the "Acquisition, Holding or Transfer" of Land by Alien Individuals.

[Go To Supp]

Many statutes which limit the right of aliens to own land appear to restrict the "acquisition," "holding," or "transfer" of land by or to aliens. In a number of states, the prohibition is rather absolute n130 -- particularly for non-resident aliens. n131 In some states, statutes limit the time and/or amount of such holdings. n132

"Acquisition" tends to be defined broadly to include taking title or any lesser-covered interest by grant, purchase, devise, descent or otherwise. n133 Kentucky includes aliens who have "contracted to purchase" within the regulated class. n134 Oklahoma provides that an alien may not hold title in fee simple but may hold it under certain other circumstances, such as where the purchase is made under any legal proceeding foreclosing liens in favor of the aliens. n135

Even though the land may be lawfully acquired, restrictions on "holding" may limit ownership to a specific length of time. For example, in Iowa, aliens may acquire up to 320 acres of farmland so long as that land is converted to a non-farm use within five years. n136 If the status of the alien changes such that ownership is no longer permitted, divestiture of the land must occur within two years. n137 Similarly, land inherited by aliens in Kentucky must be divested within eight years from the date of the final settlement of the decedent's estate from which it was acquired. n138

Restrictions on "transfers" generally do not refer to the disposition of land improperly acquired by aliens. Rather, they tend to address transfers to aliens and in most respects seems to be designed to cover anything that the term "acquisition" may overlook.

COMPUTER-ASSISTED RESEARCH

LEXIS: restrict! w/15 acquisition! or holding! or transfer! w/5 land! w/15 alien!

FOOTNOTES:

(n1)Footnote 130. *See* Neb. Rev. Stat. Ann. § 76-402, which prohibits aliens and corporations not organized in the state of Nebraska from acquiring title to (or any lesser interest in) or a leasehold interest of more than 5 years in any land in the state. Land acquired by aliens must be disposed of within 5 years.

(n2)Footnote 131. At the height of restriction in the late 1970's, six states were reported as having restrictions of this type. These included Alaska, Hawaii, Mississippi, New Hampshire, New Jersey and Oklahoma. *See* Note, *Our Land is Your Land: Ineffective State Restriction of Alien Land Ownership and the Need for Federal Legislation, 13 J. Marshall L. Rev. 679, 689 (1980).*

The Alaska and Hawaii restrictions were the result of *48 U.S.C. § 1501,* which prohibited alien ownership of land in United States territories, which had not been repealed at the time of statehood. Alaska now provides that aliens, resident or non-resident, have the same rights as citizens. Ala. Code § 35-1-1. Haw. Stat. § 560:2-112 provides that no person is disqualified to take as an heir because the person or a person through whom the person claims is or has been an alien.

Mississippi currently limits ownership only by non-resident aliens from Syria and Lebanon. Miss. Code Ann. § 89-1-23. Currently, Okla. Const. art. 22, § 1 provides that no alien or person who is not a citizen of the United States shall acquire title to or own land in the state. There is an exception for aliens who become bona fide residents of the state. In *State v. Hillcrest Inv., Ltd., 444 U.S. 984 (1979)* it was held that this restriction applies only to alien natural persons and not to corporations. On appeal, the Oklahoma Supreme Court affirmed that the corporation in question was not barred by the Constitution from holding land. The court reasoned, however, that although corporations were "persons" and "aliens" under the terms of the provision, the corporation had become "domesticated" by virtue of becoming licensed in the state.

In New Hampshire, N.H. Rev. Stat. § 477:20 allows alien residents to obtain and grant land as citizens. However, non-resident aliens have been held to be barred from inheriting land by virtue of this restriction. *Lazarou v. Moraros, 143 A.2d 669 (N.H. 1958); In re Estate of Constan, 384 A.2d 495 (N.H. 1978).*

(n3)Footnote 132. At the height of the most recent hysteria regarding alien landownership, 9 jurisdictions reported having restrictions of this type. *See* Note, *Our Land is Your Land: Ineffective State Restriction of Alien Land Ownership and the Need for Federal Legislation, 13 J. Marshall L. Rev. 679, 689 (1980).*

These included Illinois, Indiana, Kentucky, Missouri, Nebraska, Pennsylvania, South Carolina, South Dakota and Wisconsin.

Of these states, Illinois has made the most extensive revisions in recent years. While the provisions in some of the other listed states have remained intact, there have been changes in several other states as well.

For example, non-resident aliens in Indiana are still limited to hold the land only 5 years before it must be sold. Ind. Code Ann. § 32-1-7. Ind. Code Ann. § 31-1-8-2 limits aliens to the acquisition of 320 acres. The excess must be sold within 5 years or it escheats to the state.

Likewise, in Kentucky, Ky. Rev. Stat. § 381.300 provides that land of non-resident aliens escheats to the state after 8 years unless the alien becomes a citizen. Ky. Rev. Stat. § 381.320 limits resident aliens landownership for residence, business, trade or manufacturing purposes to not more than 21 years.

In Mississippi, Miss. Code Ann. § 89-1-23 grants resident aliens the same rights to own property as are possessed by citizens. Non-residents (except non-resident Syrian and Lebanese) are not given the same rights and if the property is taken for security, they may not hold it more than 20 years. Acreage acquired is limited to 320 acres for industrial development and 5 acres for residential purposes.

In Wyoming, Wyo. Stat. § 34-15-101 prohibits non-resident aliens from acquiring, possessing, transferring, transmitting or inheriting real property or having in whole or in part the beneficial use thereof except for use as a personal residence and not in excess of one acre.

(n4)Footnote 133. Iowa Code § 567.1 *et seq*.

(n5)Footnote 134. Ky. Rev. Stat. § 381.300. *See also* Op. Att'y Gen. Ky. 81-248 (July 10, 1981).

(n6)Footnote 135. Op. Att'y Gen. Okla. 74-214. Citing Okla. Const. art. 22, § 1 and Okla. Stat. Ann. tit. 60, § 121.

(n7)Footnote 136. Iowa Code, § 567.1 *et seq*.

(n8)Footnote 137. *Id.*

(n9)Footnote 138. Ky. Rev. Stat. § 381.330.

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CHAPTER 79 FOREIGN OWNERSHIP OF LAND

9-79 Thompson on Real Property, Thomas Editions § 79.09

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§ 79.09 Restrictions on Inheritance.

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Many states restrict the right of aliens, especially non-resident aliens, to inherit land in the United States. This is done in a variety of ways. In some states, the ability to inherit may be denied outright or severely restricted unless the alien is a resident or a citizen. n139 In other states, the right to inherit may be predicated upon eligibility for citizenship. n140 In a number of states, the right to inherit land may be based upon a determination of whether the recipient will actually receive the benefit, use or control of the land. n141 Finally, the right to inherit may depend upon whether the foreign nation grants reciprocal rights to American citizens. n142 The statutes of these last two kinds of jurisdictions are of questionable validity in light of the Supreme Court's decision in *Zschernig v. Miller*. n143

COMPUTER-ASSISTED RESEARCH

LEXIS: restrict! w/15 inherit! w/5 land! w/15 alien!

FOOTNOTES:
(n1)Footnote 139. *See, e.g.,* Ky. Rev. Stat. § 381.330. (The land inherited by a non-resident alien escheats to the state after 8 years unless the alien becomes a citizen.) Ky. Rev. Stat. § 381.320. (Resident aliens may hold land for not more than 21 years).

N.H. Rev. Stat. § 477:20 appears to grant the same rights to aliens as to non-aliens. However, this has been interpreted to exclude non-resident aliens from inheriting land. *See Lazarou v. Moraros, 143 A.2d 669 (N.H. 1958); In re Estate of Constan, 384 A.2d 495 (N.H. 1978).*

See also Carolyn S. Bratt, *A Primer on Kentucky Intestacy Laws, 82 Ky. L.J. 29 (1994);* Christopher F. Corr, *A Survey of United States Controls on Foreign Investment and Operations: How Much is Enough?, 9 Am U. J. Int'l L. & Pol'y 417 (1994);* James R. Mason, Jr., *"Pssst, Hey Buddy, Wanna Buy a Country?" An Economic and Political Policy Analysis of Federal and State Laws Governing Foreign Ownership of United States Real Estate, 27 Vand. J. Transnat'l L. 453 (1994).*

(n2)Footnote 140. Kan. Stat. Ann. § 59-511:

All aliens eligible to citizenship under the laws of the United States may transmit and inherit real estate, or any interest therein, in this state, in the same manner and to the same extends citizens of the United States. All other aliens may transmit and inherit real estate or any interest therein, in this state, in the manner and to the extent and for the purpose prescribed by any treaty existing between the government of the United States and the nation or country of which such alien is a citizen or subject, and not otherwise.

(n3)Footnote 141. *See* N.Y. Surr. Ct. Proc. Act § 2218.

(n4)Footnote 142. N.C. Gen. Stat. §§ 64-3, 64-4, 64-5.

Montana is interesting because the statute there, Mont. Rev. Stat. § 72-2-214, provides that no person will be disqualified to take property as an heir because the country in which he or she resides *does not* grant reciprocal rights to United States citizens. [emphasis added]

(n5)Footnote 143. *389 U.S. 429 (1968). But see Shames v. Nebraska, 323 F. Supp. 1321 (D. Neb. 1971), aff'd mem., 408 U.S. 901 (1972).* For further discussion, *see* Carolyn S. Bratt, *A Primer on Kentucky Intestacy Laws, 82 KY. L. J. 29 (1994).*

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CHAPTER 79 FOREIGN OWNERSHIP OF LAND

9-79 Thompson on Real Property, Thomas Editions § 79.10

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§ 79.10 Restrictions of Alien Business Entities.

[Go To Supp]

Business entities such as corporations may also be restricted under state and federal statutes. Several states, n144 primarily in the midwest, have adopted statutes that restrict corporate ownership of farmland or otherwise limit the farming activities of corporations. n145 These statutes apply to corporations or other covered business entities regardless of where the entity may be organized and as a result are a primary means by which land ownership by foreign corporations is restricted. n146

Many of these statutes seek to restrict the *ownership* n147 of farmland while others seek to discourage corporations from engaging in *farming activities*. n148 In the latter case, of course, there may be serious questions as to what constitutes farming, which is generally broadly defined. n149

Most of the statutes which restrict corporate ownership of farmland actually permit corporations to own farmland to the extent that they comply with such limitations as the size or nature of the business, the family status of the incorporators, or engage in a particular agricultural activity. n150 Many of these statutes n151 appear designed to prevent corporations not actually engaged in farming from owning farmland. This apparently is designed to exclude corporations, such as insurance companies and banks, from investing in farming and thereby removing the land from availability to individual farmers. Even though the land may be leased to individuals for farming purposes, and perhaps actually farmed, these statutes appear to be more concerned that farmers not be denied an opportunity to own the land than that the land actually be used for farming purposes.

Generally, the corporate restriction statutes typically exempt interests taken for security purposes, or land acquired in the process of debt collection, land operated for research or experimental purposes, acreage needed for normal non-farm business n152 expansion purposes, and so forth, n153 from the prohibition against owning land or engaging in agriculture. On the other hand, it has been argued in at least one jurisdiction that a contract between a farmer and a corporation to raise hogs for the corporation constituted an indirect acquisition of an interest in agricultural land, and therefore, such contracts are subject to the statutory prohibition. n154

In some states, the prohibition against foreign corporations acquiring land within the jurisdiction does not seem to restrict individual aliens from owning stock in domestic corporations which own land within the jurisdiction. n155 The rationale for such an approach appears to be that the stock is to be considered personalty instead of realty and the corporation is considered to be a legal entity distinct from its shareholders. n156

Under some statutes, even when land acquired is lawfully acquired by corporations pursuant to stated exceptions, that land may not be held beyond a specified time or must be disposed of within a certain period of time. n157 If the land is not disposed of during that time, the jurisdiction orders that the land be sold at public sale, n158 or it may escheat to the state. n159 In a recent case, the North Dakota three-year holding period that required a bank to divest itself of land acquired as a result of the foreclosure of a mortgage n160 was challenged on the ground that it was different from and therefore pre-empted by the longer n161 (five-year) federal holding period of the National Bank Act. n162 The court held that there was no pre-emption. n163 The court reasoned that both provisions essentially served the same function -- to prevent the accumulation of farmland and ranchland by corporations -- and that the state law actually enhances the primary purpose of the federal law. n164

A recent Kansas Attorney General opinion considered whether the acquisition of farmland by an insurance company constituted land "necessary for the operation of the business" under exceptions to the statute which restricts corporate ownership of farmland. n165 In this case, an insurance company had acquired farmland as a result of the foreclosure of a loan. The company understood that under Kansas law, that land had to be disposed of within 10 years. n166 It determined that the value of the land could be enhanced if additional land was added to it. It therefore wanted to purchase adjacent property to sell with the foreclosed land. The Attorney General ruled that later acquisition was not essential to the company's non-farm business purposes and would be barred by the statute. n167

In 1988, the Attorney General had ruled that hog production contracts between farmers and corporations resulted in the creation of an interest in farmland on the part of the corporation that violated the Kansas corporation statute. In response, the legislature enacted Kan Stat. Ann. § 17-5904(b) which provides:

Production contracts entered into by a corporation, trust, limited liability company, limited partnership or corporate partnership and a person engaged in farming for the production of agricultural products shall not be construed to mean ownership, acquisition, obtainment or lease, either directly or indirectly, of any agricultural land in this state.

In 1994, the legislature adopted Kan. Stat. Ann. § 17-5908 which permitted swine production facilities to locate in counties upon approval of a local ordinance authorizing the same. The question was whether a production contract that involves the raising of swine constitutes a "production contract" under § 17-5904(b), which is exempt from the statute, or constitutes a "swine production facility" under § 17-5908, which can be permitted only by local option. In the case at issue, the land, structures and related equipment would be owned by the farmer and the nursery pigs would be owned by the corporation. The Attorney General ruled that under those circumstances, the facility was not a swine production facility nor is it subject to the general prohibition against corporate farming because of § 17-5904(b). n168 In a related opinion, the Attorney General held that "swine finishing facilities" were not even considered "farming" for purposes of the corporate farm statute. In that opinion, the Attorney General ruled that finishing facilities were commercial feedlots and therefore not considered farming as defined in Kan. Stat. Ann. § 17-5903(h). n169

In an opinion relating to the procedures necessary to allow hog corporations to locate in a particular county under Kan. Stat. Ann. § 17-5908, the Kansas Attorney General has ruled that timely publication is jurisdictional in nature. Thus, an ordinance adopted by the county will not be effective until it has been published as required by the statute. The statute requires that a notice be published twice, in consecutive weeks, after the ordinance has been enacted. In a case arising in Hodgeman County, a local option was adopted in 1994 but the notice was only published once at that time. In January 1997, the ordinance was published again, this time two consecutive times as required by statute. The Attorney General ruled that that publication was valid and resulted in the institution of the ordinance, notwithstanding that more than two years had passed between the time of the adoption of the ordinance and the publication. The ordinance did not lapse

because of that delay, nor was the defect cured by the passage of time because the statute did not set a time frame within which publication must occur. n170 As a result of the fact that the ordinance took affect upon publication in 1997, a statutory 60-day period in which opponents could protest began to run. As a result of a timely protest petition, an election was held pursuant to the statute and the county residents voted against the resolution. According to the terms of the statute, that rendered the county ordinance invalid.

The Kansas corporate farming statute which permits the local option regarding swine and dairy production allows for a protest election, after the adoption of an ordinance permitting hog farms to locate in a particular county. n171 Whether or not such a protest is held, the Attorney General has ruled that the county may rescind its own resolution giving that permission. n172 The question has arisen whether the question of rescission may be delegated to the electorate by placing the matter on the ballot and making the outcome dependent upon the outcome of the vote. Here, the Attorney General has ruled that home rule powers will only permit an advisory election rather than a binding one since the matter at law is not a charter resolution. n173

The primary concern regarding corporations appears to be directed at land used for agricultural purposes. There has been little historic concern regarding ownership of non-agricultural land by foreign investors. In fact, foreign investment in commercial real estate has been considerable throughout the recent history of our nation and seems to be growing. n174 Except in the areas of aviation, telecommunications, maritime commerce, power generation, banking, insurance and mineral rights, the investments have generally been unrestricted and, as a general rule, foreign investors in non-agricultural land tend to enjoy the same rights and privileges as U.S. citizens. n175

COMPUTER-ASSISTED RESEARCH

LEXIS: restrict! w/15 alien! w/15 business! w/30 land!

FOOTNOTES:

(n1)Footnote 144. Although federal legislation has been proposed from time to time, none has been adopted. *See, e.g.*, the Family Farm Antitrust Act of 1979, § 334, which would have limited corporate investment in farmland, banned foreign ownership of U.S. farms and would have mandated periodic reporting requirements; H.R. 941 (1977); H.R. 6526 (1975).

For further discussion, *see* Brian Stayton, *A Legislative Experiment in Rural Culture: The Anti-Corporate Farming Statutes, 59 UMKC L. Rev. 679 (1991);* Winston Smart & Allen C. Hoberg, *Corporate Farming in the Anti-Corporate Farming States*, Nat'l Center for Agric. L. Res. & Info., (1989). *See also* Christopher F. Corr, *A Survey of United States Controls on Foreign Investment and Operations: How Much is Enough?, 9 Am. U. J. Int'l L. & Pol'y 417 (1994);* James R. Mason, Jr., *"Pssst, Hey Buddy,Wanna Buy a Country?" An Economic and Political Policy Analysis of Federal and State Laws Governing Foreign Ownership of United States Real Estate, 27 Vand. J. Transnat'l L. 453 (1994).*

Corporations own 79 percent of foreign held acreage, partnerships own 12 percent and individuals own 6 percent. The remaining 3 percent is held by trusts, institutions and associations. Agriculture Fact Book: 1998, United States Department of Agriculture, Office of Communications. Chapter 2-H. Since the law requires that corporations in which foreign holdings amount to 10 percent or more must register their land ownership, approximately 61 percent of reported foreign holdings are actually held by U.S. corporations. Only 39 percent of the foreign-held land is owned by investors that are not affiliated with United States firms. When the 14.3 million acre total is adjusted for these partial interests, the amount drops to approximately 13.1 million acres. Charles Barnard, *Foreign Ownership of U.S. Agricultural Land Through December 1, 1996*, Economic Research Service, United States Department of Agriculture, SD #941, July 1998.

(n2)Footnote 145. These include Iowa, Kansas, Michigan, Minnesota, Missouri, Nebraska, North Dakota, Oklahoma, South Dakota, and Wisconsin. In 1982, the voters in Nebraska adopted a constitutional amendment in a

statewide referendum that restricted corporate ownership of farmland. In addition, a number of states considered but did not adopt such legislation: Colorado, Illinois, Indiana, Tennessee, Montana and Kentucky. Virginia, and Oregon have had minor restrictions. Some states, such as California, Kentucky, Michigan, Mississippi, and Texas have limited, from time to time, the length of time farmland can be owned, leased or farmed. For further discussion, *see* Edmonson & Krause, *State Regulation of Corporate Farming*, Agricultural Economic Report No. 419, Economics, Statistics & Cooperative Service, U.S. Dep't of Agriculture (1978); Note, *An Equal Protection Analysis of the Classifications in Initiative 300: The Family Farm Amendment to the Constitution of the State of Nebraska, 62 Neb. L. Rev. 770 (1983);* Morrison, *State Corporate Farm Legislation, 7 U. Tol. L. Rev. 961 (1976);* Phelps, *Corporate Farming Statutes*, 2 Whitier L. Rev. 441 (1980); Note, *The Family Farm: Regulating Farm Act Avoidance Techniques Through Restrictions on Vertical Integration and Production Contracting, 16 Val. U. L. Rev. 277 (1981);* Note, *North Dakota's Corporate Farming Statute: An Analysis of the Recent Change in the Law, 58 N.D. L. Rev. 282 (1982);* Stanton, *A Legislative Experiment in Rural Culture: The Anti-Corporate Farming Statutes, 59 UMKC L. Rev. 679 (1991).* Shuler, Ruhlin & Karr, *Obstacles to Foreign Investment in U.S. Agriculture*, 7 Cal. Int'l Pract. 36 (1996); Geist, *Toward a General Agreement on the Regulation of Foreign Direct Investment, 26 Law & Pol'y Int'l Bus. 673 (1995).*

(n3)Footnote 146. *See, e.g.*, Op. Att'y Gen. Kan. 88-54 (April 8, 1988), holding that a corporation domiciled in a foreign country is affected by the provisions of the Kansas Farm Corporation statute in the same manner as domestic corporations and a change in the place of incorporation will not cause the corporation to lose any exempt status it may enjoy under the Kansas statute.

(n4)Footnote 147. *Id.*

(n5)Footnote 148. Compare Minn. Stat. Ann. § 500.24 subd. 3:

"No corporation or pension or investment fund shall engage in farming; nor shall any corporation or pension fund, directly or indirectly, own, acquire or otherwise obtain an interest, whether legal, beneficial or otherwise, in any title to real estate used for farming or capable of being used for farming in this state...."

(n6)Footnote 149. In at least one case, a court has held that land leased on a cash-rent basis did not constitute "farming" since there was no control over or involvement with any of the farming activities. *See* Kansas ex rel. Stephan v. E.I. Du Pont de Nemours & Co., #80 CV 893 (Dist. Ct. Shawnee County, Kan., Feb. 18, 1981).

Farming is typically defined fairly broadly under these statutes to include the cultivation of and the production of agricultural crops, the raising of poultry, the production of eggs, the production of milk, the production of fruit or other horticultural crops, grazing or the production of livestock. Kan. Stat. Ann. § 17-5903(h). Farming may not include the production of timber, forest products, nursery products or sod or include contracts to provide spraying, harvesting or other farm services. *Id.* For further discussion of what constitutes farming, *see* ch. 47, *supra*.

(n7)Footnote 150. *See, e.g.*, Kan. Stat. Ann. § 17-5904(a):

No corporation, trust, limited partnership or corporate partnership, *other than a family farm corporation, authorized farm corporation, limited agricultural partnership, family trust, authorized trust or testamentary trust* shall, either directly or indirectly, own, acquire or otherwise obtain or lease any agricultural land in this state. [emphasis added]

Family farm corporations are defined to include only those operations that are founded for the purpose of farming, and in which the majority of voting stock is held by natural persons related to each other, all of whom have a common ancestor within the third degree of relation, either by blood or adoption, or are the spouses or stepchildren of such persons. At least one of the stockholders must reside on the farm or be actively engaged in the labor or management of the farming operation. § 17-5903(j).

Authorized farm corporations are defined as corporations founded for the purpose of farming, other than family farm

corporations, in which all of the incorporators (which must be natural persons and cannot exceed 15 in number) are Kansas residents. At least 30% of the stockholders must be persons residing on the farm or actively engaged in the day-to-day labor or management of the farm. § 17-5903(k).

Limited agricultural partnerships are defined as partnerships founded for the purpose of farming which do not involve more than 10 partners, who must be natural persons and at least one of which must reside on the farm or be actively engaged in the labor or management of the farming operation. § 17-5903(d).

Family trusts are trusts in which a majority of the equitable interest is held by and the majority of the beneficiaries are natural persons related to each other, all of whom have a common ancestor within the third degree of relation, either by blood or adoption, or are the spouses or stepchildren of such persons. § 17-5903(m).

Authorized trusts are trusts, other than family trusts, in which the beneficiaries are natural persons, not exceeding 15 in number, and the income thereof is not exempt from taxation under either state or federal law. § 17-5903(n).

Testamentary trust is a trust created by bequeathing or devising property in a will.

(n8)Footnote 151. *See, e.g.*, Kan. Stat. Ann. § 17-5904.

(n9)Footnote 152. *See* Op. Att'y Gen. 88-170 (Dec. 20, 1988), holding that land an insurance company wished to purchase that was located adjacent to farmland acquired through foreclosure in order to enhance the value of the foreclosed land was not "necessary to the operation of the business and therefore prohibited by the act."

(n10)Footnote 153. *See, e.g.*: Kan. Stat. Ann. § 17-5904; Minn. Stat. Ann. § 500.24 subd. 3; Neb. Const. art. XII, § 8(1).

(n11)Footnote 154. Op. Att'y Gen. 87-160 (Kansas, Oct. 30, 1987).

(n12)Footnote 155. *See, e.g.*, Op. Att'y Gen. Ky. 78-585 (Aug. 23, 1978).

(n13)Footnote 156. Op. Att'y Gen. Ky. 78-585 (Aug. 23, 1978).

(n14)Footnote 157. *See, e.g., Asbury Hosp. v. Cass County, 7 N.W.2d 438 (N.D. 1943), aff'd, 326 U.S. 207 (1945),* upholding forced divestiture against a due process challenge. The rationale for the holding was that due process did not guarantee a return on the investment, only a fair opportunity for the same, and that the time provided by the statute, during which the owner could enjoy the land and seek a buyer, gave the owner ample time in which to seek to maximize the return from the property.

(n15)Footnote 158. *See, e.g.*, Minn. Stat. Ann. § 500.25 subd. 5.

(n16)Footnote 159. *See* Ky. Rev. Stat. § 381.300.

(n17)Footnote 160. North Dak. Cent. Code § 10-06-13(5).

(n18)Footnote 161. *12 U.S.C.A. § 29.*

(n19)Footnote 162. *12 U.S.C.A. § 21 et seq.*

(n20)Footnote 163. *State v. Liberty Nat'l Bank & Trust Co., 427 N.W.2d 307 (N.D. 1988).*

(n21)Footnote 164. *Id. See also National Bank v. Matthews, 98 U.S. 621 (1878).* For further discussion, *see* Hartwin Bungert, *Equal Protection for Foreign and Alien Corporations: Towards Intermediate Scrutiny for a Quasi-Suspect Classification, 59 Mo. L. Rev. 569 (1994).*

(n22)Footnote 165. Att'y Gen. Op. 88-170 (Dec. 20, 1988).

(n23)Footnote 166. Kan. Stat. Ann. § 17.5904(4).

(n24)Footnote 167. Att'y Gen. Op. 96-42 (April 29, 1996).

(n25)Footnote 168. Att'y Gen. Op. 96-42 (April 29, 1996).

(n26)Footnote 169. The opinion cited as authority, *T-Bone Feeders, Inc. v. Martin, 236 Kan. 641 (1985),* held that there was a distinction between a commercial feedlot and farming. The commercial feedlot was a specialized agri-business that was engaged in an agricultural endeavor but not engaged in farming. Att'y Gen. Op. 97-72 (Sept. 15, 1997).

(n27)Footnote 170. Att'y Gen. Op. 97-27.

(n28)Footnote 171. Kan. Stat. Ann. § 17-5908.

(n29)Footnote 172. Att'y Gen. Op. 97-83 (Oct. 8, 1997).

(n30)Footnote 173. Att'y Gen. Op. 97-72 (Sept. 15, 1997).

(n31)Footnote 174. It has been reported that international firms bought $1.77 billion worth of commercial real estate in Arizona alone in 1995 and an additional $1.87 billion in 1994. *See* Catherine Reagor, *Foreign Investors Skip Valley This Time*, The Arizona Republic, Sunday May 17, 1998 (Special Section). *1998 WL 7772349.* Much of this non-agricultural investment seems to be in the form of purchases of existing buildings or structures rather than raw land. Across the United States, the total investment in commercial real estate appears historically to have been dominated by Japanese investments. With current problems in the Far East, Japanese investments seem to be diminishing. Non-Japanese investments have grown sharply since the mid-1990's, totaling $6.3 billion between 1993 and 1996. The bulk of the non-Japanese investment appears to come from Hong Kong, which totaled $2.9 billion. *See* Catherine Reagor, *Foreign Investors Skip Valley This Time*, The Arizona Republic, Sunday May 17, 1998 (Special Section). *1998 WL 7772349.*

(n32)Footnote 175. For further discussion of the general restrictions affecting these areas, *see* Peter Burkard, *Foreign Direct Investments: Restrictions and Reporting Requirements* (Jan. 22, 1993), at http://www.eskimo.com/larrygj/burkard.html. A further discussion of foreign investment in the U.S. airline industry is found in Angela Edwards, *Foreign Investment in the U.S. Airline Industry: Friend or Foe?* available online at http://www.law.emory.edu/ EILR (reprinted from 9 Emory International Law Review 1995). Regarding alien ownership in the telecommunications industry, *see* Edwin Krasnow and Andres Martinez, *An Alien Ownership Primer: A fifth Here, a Fourth There*, (File Papers, Communications Media Center at New York Law School. Available at www.cmcnyls.edu/PUBLIC/papers/ALIENOWN.HTM.)

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CHAPTER 79 FOREIGN OWNERSHIP OF LAND

9-79 Thompson on Real Property, Thomas Editions § 79.11

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§ 79.11 A State-by-State Look at Some Statutes.

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If there is one thing that characterizes the manner in which states deal with aliens, it appears to be the variety with which the issue is addressed. Not every state has restrictions limiting aliens. Indeed, an examination of the little legislative activity there has been in recent years suggests that the trend appears to be toward fewer restrictions. Indeed, many of the statutory provisions that are present in the various states affirm that aliens have the same rights to own, dispose of, and inherit real property as citizens. n176

Alabama:	Ala. Code § 35-1-1 provides that aliens, resident or non-resident, have the same rights as citizens.
Alaska:	Alaska Stat. § 38.05.190 lists the classes of people who can acquire mineral rights in public land; allows aliens to own land if their country of origin grants similar rights to United States citizens.
	Alaska Stat. § 34.15.160 validates conveyances executed out of state or in foreign countries if they are valid under the laws of those states or countries.
Arizona:	Ariz. Rev. Stat. § 33-411 validates conveyances and deeds executed in foreign states.
Arkansas:	Ark. Const. Art. 2, § 20 provides that no distinction shall ever be made by law between resident aliens and citizens in regard to the possession, enjoyment or descent of property. n177
	Ark. Stat. § 28-9-211 provides that aliens can inherit and transmit property by inheritance.
	Ark. Stat. § 2-3-101 (Arkansas Agricultural Foreign Investment Act). requires registration and notice of the acquisition of an interest in agricultural land.)
California:	Cal. Const., Art 1, § 20 provides that noncitizens have the same prop-

erty rights as citizens.

Cal. Civ. Code § 671 provides that any person may take, hold or dispose of property in California.

Colorado: Colo. Const., Art. 2, § 27 allows bona fide residents the same property rights as native-born citizens.

Colo. Rev. Stat. § 15-11-112 makes alienage irrelevant in intestate or testamentary succession.

Connecticut: Conn. Gen. Stat. Ann. § 47-58a provides that any alien, whether resident or not, may hold, acquire, lease, inherit and transfer real estate in this state in the same manner as native-born citizens.

Delaware: Del. Code Ann. tit. 25, § 305 grants foreign corporations the right to hold or convey land the same as a Delaware corporation.

Del. Code Ann. tit. 25, § 306 provides that all real and personal property situated in this state may be taken, acquired, held and disposed of by an alien in the same manner as by a citizen.

Del. Code Ann. tit. 25, § 307 grants aliens the same rights to inherit as are granted to citizens. n178

Florida: Fla. Const., Art. I, § 2 grants aliens that are eligible for citizenship constitutionally protected property rights.

Georgia: Ga. Code Ann. § 79.303 [1-2-11] grants the same rights as are granted citizens to citizens of any country that is at peace with the United States.

Ga. Code Ann. § 113-1206 includes among those who may act as an executor of a will of a resident of Georgia "aliens lawfully admitted to the United States for permanent residence."

Hawaii: Hawaii Rev. Stat. § 560:2-112 provides that no person is disqualified to take as an heir because the person or a person through whom the person claims is or has been an alien.

Idaho: Idaho Code § 15-2-112 allows aliens to inherit property.

Idaho Code § 55-103 allows any person, whether a citizen or alien, to take, hold and dispose of real or personal property.

Illinois: Illinois recently repealed the Property Owned by Aliens Act and replaced it with reporting requirements contained in the Agricultural Land Ownership Act, 765 I.L.C.S. 55/5 and the Illinois Agricultural Foreign Investment Disclosure Act, 765 I.L.C.S. 50/1 et seq.

Indiana: Ind. Code Ann. § 32-1-7 allows aliens to hold and convey real estate, provided they have declared their intention to become United States citizens. Other aliens may hold land for 5 years and then must sell or dispose of the land unless the alien becomes a naturalized citizen. n179

Ind. Code Ann. § 31-1-8-2 limits aliens to the acquisition of 320 acres. The excess must be sold within 5 years or it escheats to the state.

Iowa: Iowa Const. Art. I § 22 grants the same rights to own property as are possessed by citizens to "foreigners who are, or may hereafter become

residents of this state."

Iowa Code Ann. § 567.1 generally prohibits non-resident aliens, foreign businesses and foreign govern-ments, or their agents, trustees or fiduciaries, from acquiring agricultural land in the state unless the land is converted to non-agricultural use within 5 years of the date of acquisition.

Iowa Code Ann. § 567.3 limits leasehold interests to 640 acres.

Iowa Code Ann. § 567.5 requires that aliens who acquire an interest in land in violation of the statute divest within 2 years.

Kansas: Kan. Stat. Ann. § 59-511 grants rights to inherit property to all aliens who are eligible for citizenship.

Kentucky: Ky. Rev. Stat. § 381.290 allows aliens who have declared their intention to become citizens to acquire or transfer real estate.

Ky. Rev. Stat. § 381.300 provides that land of non-resident aliens escheats to the state after 8 years unless the alien becomes a citizen.

Ky. Rev. Stat. § 381.320 limits resident aliens landownership for residence, business, trade or manufacturing purposes to not more than 21 years. n180

Maine: Me. Rev. Stat. tit. 33, § 451 gives aliens the same rights as citizens.

Maryland: Md. [Real Prop.] Code Ann. § 14-101 grants the same rights to aliens who are not "enemies" as are granted to citizens.

Massachusetts: Mass. Gen. Laws, Ann. ch. 184 § 1 allows aliens to take, hold, transfer and convey real property.

Minnesota: Minn. Stat. § 500.221, subd. 2 limits rights to acquire, directly or indirectly, any interest in agricultural land to those who are permanent citizens of the United States or permanent residents. Land acquired for security interests or taken by devise or inheritance is excluded.

Minn. Stat. § 524.2-112 provides that no person is disqualified to take as an heir because that person or the person through whom that person claims is, or has been, an alien.

Michigan: Mich. Const. Art. 10, § 6 grants the same rights as citizens to aliens who are residents.

Mississippi: Miss. Const. Art. 4, § 84 allows the state to limit rights of aliens to own real property.

Miss. Code Ann. § 89-1-23 grants resident aliens the same rights to own property as are possessed by citizens. Non-residents (except non-resident Syrian and Lebanese) are not given the same rights, and if the property is taken for security, they may not hold it more than 20 years. Acreage acquired is limited to 320 acres for industrial development and 5 acres for residential purposes.

Missouri: Mo. Ann. Stat. § 442.560 prohibits aliens from owning farmland except 1) that person is or shall become a citizen; or 2) the farmland is no longer used as farmland.

Mo. Ann. Stat. § 442.560 allows foreign corporations to acquire, hold

	or alienate real estate, except agricultural land.
Montana:	Mont. Rev. Stat. § 72-2-214 provides that no person will be disqualified to take property as an heir because the country in which the person resides does not grant reciprocal rights to United States citizens.
Nebraska:	Neb. Rev. Stat. Ann. § 76-402 prohibits aliens and corporations not organized in the state of Nebraska from acquiring title to (or any lesser interest in), or a leasehold interest of more than 5 years, in any land in the state. Land acquired by aliens must be disposed of within 5 years.
Nevada:	Nev. Rev. Stat. § 111.055 allows non-resident aliens, persons and corporations to hold real property.
New Hampshire:	N.H. Rev. Stat. § 477:20 allows alien residents to obtain and grant land like citizens. Non-resident aliens have been held not to be able to inherit land by virtue of this restriction. n181
New Jersey:	N.J. Stat. Ann. § 46-3-18 grants alien "friends" the same property rights as citizens. (Alien "friends" are considered to be residents of the United States.)
New Mexico:	N.M. Stat. Ann. § 45-2-112 provides that aliens may acquire, hold, grant and inherit land the same as citizens.
New York:	N.Y. [Real Prop.] Laws § 10.2 grants the same rights to aliens as to non-aliens to take, hold, transmit and dispose of real property.
	N.Y. [Real Prop.] Laws § 15 provides that the alienage of a person shall not be grounds to question or impeach the right of an individual to acquire title to land.
Oklahoma:	Okla. Const. Art. 22, § 1 provides that no alien or person who is not a citizen of the United States shall acquire title to or own land in the state. There is an exception for aliens who become bona fide residents of the state. n182
North Carolina:	N. C. Gen. Stats. § 64-1 makes it lawful for aliens to take real property by purchase, descent, or by operation of law any interest in land and to convey the same as fully as any citizen of the state.
	N.C. Gen. Stats. § 64-3, however, limits rights of aliens living outside the United States unless the laws of the nation of which the alien is resident grant reciprocal rights to citizens of the United States. n183
North Dakota:	N.D. Cent. Code § 47-01-11 grants the right to own land to anyone, limited by the restrictions found in § 47-10.1 et seq.
Ohio:	Ohio Rev. Code Ann. § 2105.16 grants heirs of aliens the right to hold land.
Pennsylvania:	Pa. Stat. Ann. tit. 61, § 41 limits aliens to the ownership of not more than 100 acres of agricultural land.
Rhode Island:	R.I. Gen. Laws § 34-2-1 grants aliens the same rights as citizens.
South Carolina:	S.C. Const. Art. 3, § 35 authorizes the general assembly to limit the rights of aliens.
	S.C. Code § 27-13-30 prohibits aliens from owning or controlling more than 500,000 acres of land.

	S.C. Code § 27-13-40 allows aliens to hold land in excess of 500,000 acres if acquired in foreclosure proceedings and if not held longer than 5 years.
South Dakota:	S.D. Const. Art. VI, § 14 provides that no distinction shall ever be made by law between resident aliens and citizens in reference to the possession, enjoyment or descent of property.
	S.D. Comp. Laws § 43-2A-1 et seq. limits non-resident aliens to the ownership of not more than 160 acres of agricultural land except where the land is inherited or acquired as security for a debt. Such inherited or security lands must be disposed of within 3 years of the time of acquisition. Lands held in violation of these restrictions are forfeited to the state.
Tennessee:	Tenn. Code Ann. § 66-2-101 grants aliens, whether resident or non-resident, the same rights to take or hold real property as are held by citizens.
	Tenn. Code Ann. § 66-2-102 grants the same inheritance rights to aliens as are held by citizens.
Texas:	Tex. Rev. Civ. Stat. § 1527 limits the extent to which aliens may control international trading corporations.
	Tex. Tax Code denies preferential tax appraisals for open space land to land owned by corporations controlled by non-resident aliens. n184
	Tex. Tax Code § 211.053 imposes a tax on the transfer, at death, of property located in the state but owned by non-resident aliens.
Utah:	Utah Code Ann. § 75-2-112 provides that no person will be disqualified to take as an heir because the heir or the person through whom the heir takes is or has been an alien.
Vermont:	1989 Adj. Sess. Amendment, Subsection (e), effective May 31, 1990, amended tit. 32, § 5847 to impose a transfer withholding tax of 2.5% of the transfer consideration of the purchase if by a non-resident of the state of Vermont.
Virginia:	Va. Code § 55-1 provides that any alien, not an enemy, may acquire property by purchase or descent in the same manner as citizens. This provision was amended in 1993 to restrict the rights of non-resident aliens in countries where the individual will not receive the use, benefit or control of the property.
Washington:	Wash. Rev. Code § 64.16.005 recognizes that aliens have the same rights as citizens of the State of Washington or the United States.
West Virginia:	W. Va. Const. Art II, § 5 provides that no distinction shall be made between resident aliens and citizens regarding the acquisition, tenure, disposition or descent of property. n185
	W. Va. Code § 36-1-21 grants any alien the same inheritance rights as enjoyed by citizens.
Wisconsin:	Wis. Const. Art. I, § 15 provides that no distinction shall be made between resident aliens and citizens regarding the acquisition, tenure, disposition or descent of property.

Wis. Stat. Ann. § 710.01 grants aliens generally the right to own and dispose of property subject to the limitations in § 710.02.

Section 710.02 provides that non-resident aliens and certain corporations n186 may not acquire, own or hold any interest, directly or indirectly, except for debt security purposes, in more than 640 acres of land except as authorized by this section. The section contains a number of exceptions, such as for railroad and pipeline corporations, mineral interests, oil and gas leases and so forth.

Wyoming: Wyo. Const. Art I, § 29 prohibits any distinction between resident aliens and citizens regarding the possession, taxation, enjoyment and descent of property.

Wyo. Stat. § 34-15-101 prohibits non-resident aliens from acquiring, possessing, transferring, transmitting or inheriting real property or having in whole or in part the beneficial use thereof except for use as a personal residence and not in excess of one acre.

Wyo. Stat. § 2-4-105 limits non-resident alien inheritance rights to aliens of countries that grant reciprocal rights to United States citizens.

FOOTNOTES:

(n1)Footnote 176. For further discussion, *see* James R. Mason, Jr., *"Pssst, Hey Buddy, Wanna Buy a Country?" An Economic and Political Policy Analysis of Federal and State Laws Governing Foreign Ownership of United States Real Estate, 27 Vand. J. Transnat'l L. 453 (1994);* Christopher F. Corr, *A Survey of United States Controls on Foreign Investment and Operations: How Much is Enough?, 9 Am. U. J. Int'l L. & Pol'y 417 (1994);* Carolyn S. Bratt, *A Primer on Kentucky Intestacy Laws, 82 Ky. L.J. 29 (1994);* Shuler, Ruhlin & Karr, *Obstacles to Foreign Investment in U.S. Agriculture*, 7 Cal. Int'l Pract. 36 (1996).

Maine is the state that continues to have the largest number of acres owned by foreign persons: 3,037,198. This amounts to 17 percent of the state's privately owned agricultural land and 21 percent of all the reported foreign holdings of agricultural land nationwide. Ninety-one percent of the foreign holdings in Maine are owned by four companies. Two of these companies are Canadian, one is a combined United States-French venture and one is a combined United States-Canadian enterprise. Agriculture Fact Book 1998, United States Department of Agriculture, Office of Communications. Chapter 2-H. *See also* Charles Barnard, *Foreign Ownership of U.S. Agricultural Land Through December 1, 1996*, Economic Research Service, United States Department of Agriculture, SD #941, July 1998.

(n2)Footnote 177. *See also Applegate v. Lum Jung Luke, 291 S.W. 978 (Ark. 1927).*

(n3)Footnote 178. *See also* Del. Code Ann. tit. 25, § 308 and ch. 12, § 507.

(n4)Footnote 179. *See also Lehman v. State, 88 N.E. 365 (Ind. App. 1909).*

(n5)Footnote 180. For further discussion, *see* Carolyn S. Bratt, *A Primer on Kentucky Intestacy Laws, 82 Ky. L.J. 29 (1994).*

(n6)Footnote 181. *Lazoru v. Moraros, 101 N.H. 383 (1958); In re Estate of Constan, 384 A.2d 495 (N.H. 1978).*

(n7)Footnote 182. In *State v. Hillcrest Inv., Ltd., 444 U.S. 984 (1979)* it was held that this restriction applies only to alien natural persons and not to corporations. On appeal, the Oklahoma Supreme Court affirmed that the corporation in question was not barred by the Constitution from holding land. The court reasoned, however, that although corporations were "persons" and "aliens" under the terms of the provision, the corporation had become "domesticated"

by virtue of becoming licensed in the state.

(n8)Footnote 183. This provision was upheld as constitutional in *In re Johnson, 190 S.E.2d 879 (N.C. App. 1972).* The legislature rewrote the section in 1985 to clarify that, apart from the reciprocity provision, non-resident aliens have the same inheritance rights as citizens.

(n9)Footnote 184. *See Alexander Ranch, Inc. v. Central Appraisal Dist., 733 S.W.2d 303 (Tex. App. 1987), cert. denied, 108 S. Ct. 2005.*

(n10)Footnote 185. *See also State ex rel. Hamstead v. Dostert, 313 S.E.2d 409 (W. Va. 1984).*

(n11)Footnote 186. Affected are such corporations that are owned in excess of 20% by aliens not a resident of a state of the United States or by corporations not created under the laws of the United States or a state of the United States.

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CHAPTER 79 FOREIGN OWNERSHIP OF LAND

9-79 Thompson on Real Property, Thomas Editions § 79.12

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§ 79.12 Constitutionality of Restrictions.

[Go To Supp]

Aliens, including foreign corporations, n187 are clearly within the definition of "persons" n188 as used in the United States Constitution and are therefore protected by the equal protection and due process clauses thereof since the Constitution protects "all persons within the territorial jurisdiction, without regard to any difference of race or color, or of nationality." n189

Nevertheless, it has been held that, in the absence of a treaty provision to the contrary, a state may deny non-resident aliens the right to own land within the state even though both the equal protection and due process clauses of the Fourteenth Amendment apply to resident aliens as well as to citizens. n190 The Supreme Court was persuaded that control over the land by aliens was within the scope of issues that could be addressed under the police power of the state, and that "[t]he quality and allegiance of those who own, occupy, and use farmlands within its borders are matters of highest importance, and affect the safety and power of the state itself." n191 Further, it has been held n192 that non-resident aliens are not entitled to equal protection of the law under the same terms as resident aliens since "the Fourteenth Amendment, by its own terms, has no application to aliens not within the jurisdiction of the United States." n193

In at least one state, it has recently been determined that corporate ownership of farmland (whether domestic or foreign) is contrary to the public welfare. In Kansas, by statute, most corporations, including foreign corporations, are barred from owning an interest in farmland, directly or indirectly. Recent amendments to the farm corporation statute have given counties the option of permitting dairy and swine corporations to locate within the county. This requires the adoption of a resolution by the County Commission permitting the location of the businesses. The issue before the Attorney General was whether the county could rescind such a grant of permission and, if the county did so, whether it would constitute a "taking" of a property interest from the corporation. The Attorney General found that the state may exercise its police power to totally prohibit persons from engaging in occupations or businesses that are detrimental to the public welfare. n194

COMPUTER-ASSISTED RESEARCH

LEXIS: constitution! w/30 restrict! w/15 alien! w/30 land!

§ 79.12(a) Equal Protection Concerns, Generally.

As a general rule, the equal protection doctrine is not an absolute bar to disparate treatment. Laws may be adopted which apply different rules to different individuals or classifications of individuals so long as the treatment is not constitutionally repugnant. n195

For most classifications, all that is required is that there be a rational relation to a legitimate state interest in order to justify the separate classes. This approach tends to be used where economic interests, as opposed to fundamental rights, are involved. n196

On the other hand, where the class involves a "suspect" class for which additional protection may be necessary, the law will scrutinize closely the classification and require that a compelling state interest be present to support the distinctions. n197

It has been argued that non-resident aliens lack standing to invoke the equal protection of the laws since they do not reside within the jurisdiction. This argument has been rejected as without substance where there are minimal contacts with the jurisdiction. n198

It has also been argued that the equal protection doctrine applies only to constitutional rights and not to privileges and benefits that the law itself may create. This, too, has generally been rejected. n199

COMPUTER-ASSISTED RESEARCH

LEXIS: equal protection w/30 alien!

§ 79.12(b) Alienage as a Suspect Class.

Under some circumstances, alienage has been held to be a "suspect" classification, such that the state has been required to demonstrate that there is a compelling public policy in having that status restricted in order to justify disparate treatment between aliens and non-aliens. In one case, n200 the Court dealt with an Arizona statute which prohibited aliens from receiving public assistance payments. The state argued that it had a legitimate interest in insuring that citizens received a portion of the state's limited welfare funds before non-citizens. The Court disagreed, holding that the state must show a compelling reason for the distinction between citizens and non-citizens and that it had not done so. Further, the court was persuaded that the resident aliens in question were not different, in some respects, from the citizens of the state. For example, the court found that the resident aliens did contribute to the tax revenues of the state just as did citizens. In addition, they may be compelled to serve in the military and contribute to the general economic growth of the state.

In a later case, n201 the court applied this holding to strike down a New York statute which prohibited all aliens from holding state civil service positions in the state. The court conceded that the state had the right to limit alien involvement in government but felt that the statute was too restrictive, since it disallowed aliens access to even the lowest, non-policy making positions. A similar rationale was used by the court to invalidate a Connecticut statute which prohibited aliens from membership in the state bar, n202 and a Puerto Rican statute which restricted engineering licenses to U.S. citizens or to those educated in Puerto Rico. n203

All of these cases suggest that aliens will receive a fair amount of protection. The common denominator throughout these cases, however, is that they involved *resident* aliens who bore the burdens imposed by society but could not claim

the sought-after benefits, nor could they participate in the political process which is the normal avenue of redress for citizens who are displeased with the imposed burdens. Where this situation has occurred, courts repeatedly have therefor held that "Heightened judicial solicitude" is appropriate.

At least two reasons suggest that the protections accorded to resident aliens should necessarily be greater than those extended to *non-resident* aliens:

1) Non-resident aliens will generally not qualify as a suspect class since they do not constitute a "discrete minority" within this country for which heightened judicial solicitude is required. They have their own government to protect them and oversee their rights and, where they reside, they actually constitute a majority capable of protecting their own rights.

2) Non-resident aliens typically do not pay taxes (other than those associated with the development of the land itself), serve in the United States military nor do they reside permanently in the United States. As such, their participation in local and national affairs is limited, and the role they play in local economics and politics is obviously less significant than those who permanently reside in the area. If protected status were based on the fact of ownership alone, non-resident aliens could exercise a disproportionate influence over local policy and perhaps disrupt decision-making that would otherwise be in the best interest of the resident population.

This suggests that states may well restrict non-resident aliens from the ownership of land so long as that power is not exercised arbitrarily or without a reasonable purpose. n204 This comports with the position taken by the United States Supreme Court in a case dealing with a New York statute which forbade permanent certification as a public school teacher to any person not a citizen of the United States. n205 There, the court held that there must be a rational relationship between the statute and a legitimate state interest. n206 The court found that the state's interest in insuring the loyalty of its public school teachers was a legitimate state interest. A similar relationship between the owner of the land and the local government may be found in such interests as the need to promote the preservation of open-space land, the desirability of protecting the family farm, the need to control local taxation of the land, and so forth. n207

Applying the equal protection tests, in light of the general proposition that any resident aliens constitute a "suspect class," it is likely that a restriction limiting the rights of non-resident aliens to invest in United States land would be judged on the basis of the "rational relation" test, rather than the "strict scrutiny" test, because the proprietary interests at stake are purely economic in nature. n208 On the other hand, the right to inherit land as a resident alien may involve a more fundamental right and therefore be more likely to require a compelling state interest before the rights could be abrogated. n209

COMPUTER-ASSISTED RESEARCH

LEXIS: suspect class w/30 alien!

§ 79.12(c) Due Process Concerns, Generally.

The due process requirements of the Constitution specifically protect against laws that are unfairly enacted or implemented. Substantive due process addresses the legitimacy of the purpose of the law and assures that the purposes are consistent with good government and order. Procedural due process addresses the adequacy of the manner in which the law is executed and assures that laws will not unfairly impinge upon free activity. In the context of alien ownership, substantive due process guards against the adoption of arbitrary or capricious laws. Due process protects against the unreasonable confiscation of their interests in the land.

Substantive due process is generally satisfied if there is a rational relation between the purpose of the restriction and a legitimate state interest. n210 Acceptable purposes would appear to be similar to those required to satisfy the rational

relation test of the Equal Protection Clause.

The law has been somewhat less certain regarding the manner in which the requirements of procedural due process may be satisfied. For example, one court, in upholding a state statute which absolutely barred ownership of land by non-resident aliens, noted that "[t]he Supreme Court has never indicated in unequivocal terms whether a State is required to give [procedural] due process to non-resident aliens." n211

COMPUTER-ASSISTED RESEARCH

LEXIS: due process w/30 alien!

§ 79.12(d) Restrictions on Ownership as a Denial of Procedural Due Process.

The Fourteenth Amendment requires that no state shall "deprive any person of life, liberty, or property without due process of law." n212 The issue regarding alien landownership tends to arise most frequently either in the context of forced disposition provisions of the statutes which compel the alien to dispose of the land within a specified period, n213 or where there are prohibitions that would prevent someone from otherwise taking title to the land.

In *Shames v. Nebraska*, n214 the United States District Court upheld a Nebraska statute which prohibited aliens from owning land more than three miles from the corporate limits of any city. In this case, a resident alien who owned land covered by the statute died intestate. The only heirs were four nationals and residents of Syria. While the estate was being probated, the State of Nebraska intervened and asked that the land escheat to the state because there were no heirs that could lawfully own the land. The court upheld the statute on the basis of the United State Supreme Court's decision in *Terrace v. Thompson*, noted *supra*. n215 The court specifically held that:

> a state's absolute bar of ownership of land by non-resident aliens has been held by the Supreme Court to be within the valid exercise of that state's police power, and not violative of due process of law under the Fourteenth Amendment. n216

In *Asbury Hospital v. Cass County*, n217 *Id.* at 212-213, the Supreme Court dealt with a statute which required that all corporations holding farm lands divest such lands within ten years from the date of the act. If divestiture did not occur, the lands would escheat to the county in which they were located. The court upheld the statute, holding that:

> [t]he due process clause does not guarantee that a foreign corporation when lawfully excluded as such from ownership of land in the state shall recapture its costs. It is enough that the corporation, in complying with the lawful command of the state to part with ownership, is afforded a fair opportunity to realize the value of the land, and that the sale, when required, is to be under conditions reasonably calculated to realize its value at the time of the sale. n218

COMPUTER-ASSISTED RESEARCH

LEXIS: restrict! or prohibit! w/15 alien! w/15 land! w/50 due process

§ 79.12(e) Restrictions that Interfere with Federal Foreign Affairs Powers.

It is well settled that the federal government has the exclusive authority to conduct the foreign affairs of the nation "entirely free from local interference." n219 Several cases have explored the extent to which state restrictions on the ability of aliens to inherit land in the United States interfere with the ability of the federal government to conduct foreign affairs.

In *Zschernig v. Miller*, n220 the court considered an Oregon statute which provided that when a resident died with

non-resident aliens as the sole heirs, the land would escheat to the state unless specific requirements were met. These requirements were:

> 1) that American citizens were determined to have reciprocal rights to inherit in the alien's country;
>
> 2) that United States citizens had the right to receive payments within the United States from estates of decedents dying in the subject foreign country; and
>
> 3) that there be proof that the alien heir of the American decedent would receive the benefit, use, control and enjoyment of the inheritance without fear of confiscation by the government of that nation.

Whether the above conditions were satisfied was a determination to be made by the court in the district where the estate was being probated. This required an extensive study of the law of the foreign country and the rendering of a specific judgment as to the satisfaction of the relevant restrictions. The Supreme Court struck the statute down as being in conflict with the federal government's exclusive power to conduct the foreign affairs of the nation since the court found that Oregon courts had consistently engaged in:

> [J]udicial inquiries into the type of governments that obtain in particular foreign nations ... whether the so-called "rights" are merely dispensations turning upon the whim or caprice of government officials, whether the representations of consuls, ambassadors, and other representatives of foreign nations is credible or made in good faith, whether there is in the actual administration in the particular foreign system of law any element of confiscation. n221

As a result of inquiries of this type, the court said that "[t]he statute as construed seems to make unavoidable judicial criticism of nations established on a more authoritarian basis than our own." n222

The court did make clear that statutes which required only a cursory reading of foreign laws would not interfere with the federal government's ability to conduct the foreign affairs of the nation. n223

> In *Mora v. Battin* n224 another court considered another so-called "Iron Curtain" statute and gave similar direction as to specific matters that were not to be considered cursory. There, the court held that: [W]here a statute permits inquiry into the type of government existing in a foreign nation, or into the question of whether the legal "rights" guaranteed by that nation are rights in fact, or into the question of whether statements by the representatives of the foreign nation are credible or made in good faith, or into the likelihood that the legatees will actually receive the property left to them, such a statute, so applied, intrudes into the exclusive right of Congress to regulate foreign policy.

Courts have not always been consistent in interpreting statutes of this type. A Nebraska statute n225 was upheld in *Shames v. Nebraska* n226 as valid even though it "may have an incidental or indirect effect on the relations of the United States and foreign nations." The statute was considered not to intrude upon the federal power over foreign affairs since the statute "left no room for judicial comment of any kind about foreign governments." n227 In contrast, a similar statute was held to interfere in *In re Estate of Kraemer*. n228

COMPUTER-ASSISTED RESEARCH

LEXIS: foreign w/1 affairs w/30 alien! w/15 land!

§ 79.12(f) Preemption by Federal Treaties.

Treaties with foreign nations are considered to be the supreme law of the land n229 and have long been held to prevail

over state laws that are inconsistent therewith. n230 A number of foreign governments have negotiated treaties which permit foreign citizens to engage in a variety of business activities in the United States. Some of these agreements permit the foreign citizens to purchase or lease such real estate as may be necessary for those commercial or industrial activities. n231 What is more likely to be of concern, however, are the "Treaties of Friendship" n232 which grant "most favored nation status" to those nations and which therefore provide the beneficiary countries the same treatment under the laws of the United States as is given to the nationals of those nations with which the United States has negotiated preferential treaty provisions -- including those which permit the owning of land for factories and other business activities.

Treaties typically defer to state inheritance laws but tend to stipulate that the foreigner who receives such lands be given ample time to sell the land, and that it cannot be taken except for public benefit and then only in return for just compensation. n233 State statutes contrary to such treaty provisions would necessarily be invalid. In at least one state, n234 the rights of aliens that are not eligible for citizenship to inherit land in the United States are granted, if at all, only by treaties between the government of the Untied States and the country in which the alien resides.

COMPUTER-ASSISTED RESEARCH

LEXIS: treaties w/30 state! w/2 law! or statute! w/30 alien! w/15 land!

§ 79.12(g) Preemption by Federal Statutes or Regulatory Power.

The federal government enjoys the status of being the superior sovereign in our federal system. The Constitution grants the federal government extensive power over activities that may involve aliens. Some of this authority, such as to provide for naturalization n235 and citizenship and for the deportation of aliens, n236 is vested exclusively in the federal government. n237 Other powers, such as the authority to regulate foreign and interstate commerce, n238 or to provide for the national defense n239 are potentially preemptive of state action.

Federal authority over immigration also empowers Congress to regulate the conduct of alien residents and the specific terms of their residency. n240 It is possible for the federal government, though it has not yet chosen to do so, to condition the entry and residence of an alien upon the fact that no interest in property be acquired in the United States. Nevertheless, states must be careful in their regulation of aliens not to intrude upon the federal authority. Where such occurs, the state restriction on resident aliens will be invalidated. n241

Federal authority over foreign and interstate commerce likewise gives Congress considerable authority over economic activities of aliens within the United States, and indeed, it has been suggested that foreign commerce perhaps is in need of greater protection against state interference. n242

Unless the power is vested exclusively in the federal government, states are generally free to act unless or until such action is inconsistent or contrary to federal interests or objectives. Thus, unless the federal government has taken action in these areas which has the effect of preempting state action, states are typically free to act within the sphere of their own legitimate powers. As yet, the federal government has not legislated in the general area of landownership by aliens. n243

With respect to the question of landownership by corporations, a recent case dealt with the possible preemption of state restrictions posed by federal banking laws. In *State v. Liberty National Bank and Trust Co.*, n244 a court dealt with a challenge to a North Dakota statute n245 that required that banks divest themselves of foreclosed farmland within three years. It was argued that this provision was preempted by federal banking laws which gave the bank five years in which to dispose of the property. n246 The court upheld the North Dakota statute, finding them both to promote the same objective: to prevent the accumulation of farmland and ranchland by corporations. As such, the state law was found to actually enhance the primary purpose of the federal law since the time period was shorter. n247

COMPUTER-ASSISTED RESEARCH

LEXIS: federal w/5 pre-empt! w/15 state w/30 alien! w/15 land!

§ 79.12(h) Commerce Clause Restrictions.

It is arguable that state restrictions against alien ownership of land purposefully discriminates against foreign commerce by curbing foreign competition in the local marketplace. n248 If such is the case, state restrictions may be considered impermissible barriers to both interstate and foreign commerce. n249 On the other hand, the state interest in keeping prices of land, particularly farmland, in line with the productive capacity of the land, such that the local farmer is not precluded from purchasing land as a result of the propensity of the foreign investor to pay more, may well be seen as within the legitimate powers of the state to define land tenure within its borders, n250 and to provide for the health, safety, and well-being of its populace. n251

COMPUTER-ASSISTED RESEARCH

LEXIS: commerce clause w/30 alien! w/5 land!

§ 79.12(i) Specific Challenges to Restrictions on Foreign Corporations.

The limitations on foreign corporate ownership of land or from engaging in farming activity have survived a variety of legal challenges. At the state level, there has been a long history of approval of such restrictions. n252 In at least one case, n253 a very restrictive corporation landownership statute has been upheld by the United States Supreme Court against a challenge that the restrictions violated due process guarantees of the Constitution. Similar challenges have been rebuffed including those relating to equal protection, n254 privileges and immunities clauses, n255 pre-emption by federal banking laws n256 and violations of interstate commerce protection. n257

COMPUTER-ASSISTED RESEARCH

LEXIS: challenge! w/15 statute w/30 foreign w/5 corporat! w/15 land! w/5 own!

FOOTNOTES:

(n1)Footnote 187. *Southern R.R. v. Greene, 216 U.S. 400 (1910).*

(n2)Footnote 188. *See Truax v. Raich, 239 U.S. 33 (1915); Wong Wing v. United States, 163 U.S. 228 (1986).*

(n3)Footnote 189. *Yick Wo v. Hopkins, 118 U.S. 356 (1886).*

(n4)Footnote 190. *Terrace v. Thompson, 263 U.S. 197 (1923); accord Porterfield v. Webb, 263 U.S. 225 (1923).*

(n5)Footnote 191. *Id.* at 221.

(n6)Footnote 192. *De Tenorio v. McGowan, 510 F.2d 92 (5th Cir. 1975).*

(n7)Footnote 193. *See also Cockrill v. California, 268 U.S. 258 (1925); Metropolitan Cas. Ins. Co. v. Brownell, 294 U.S. 580 (1935).* In Metropolitan Cas. Ins. Co. v. Brownell, the court held that: "The equal protection clause does not prohibit legislative classification and the imposition of statutory restraint on one class which are not imposed on another." *Id. at 583. See also, generally*, James R. Mason, Jr., *"Pssst, Hey Buddy, Wanna Buy a Country?" An Economic and Political Policy Analysis of Federal and State Laws Governing Foreign Ownership of United States Real Estate, 27 Vand. J. Transnat'l L. 453 (1994);* Louis Henkin, *Economic Rights Under the United States Constitution, 32*

Colum. J. Transnat'l L. 97 (1994).

(n8)Footnote 194. Citing *Mugler v. Kansas, 123 U.S. 623 (1887),* the Attorney General found that the adoption of the restrictions against corporations was well within the bounds of law and that "there was no vested right in carrying on a business that was legislatively declared detrimental to the public, and that the property owner was not entitled to compensation or a stay on the law's application." Att'y Gen. Op. 96-21 (March 5, 1996). This view was reaffirmed in Att'y Gen. Op. 97-92 (Sept. 15, 1997).

See also Shuler, Ruhlin & Karr, *Obstacles to Foreign Investment in U.S. Agriculture,* 7 Cal. Int'l Pract. 36 (1996).

(n9)Footnote 195. *Metropolitan Cas. Ins. Co. v. Brownell, 294 U.S. 580 (1935):* "The equal protection clause does not prohibit legislative classification and the imposition of statutory restraints on one class which are not imposed on another." *See also Cockrill v. California, 268 U.S. 258 (1925).*

(n10)Footnote 196. *See, e.g., Dandridge v. Williams, 397 U.S. 471 (1970).*

(n11)Footnote 197. *See, e.g., Graham v. Richardson, 403 U.S. 365 (1971). See also, generally,* Louis Henkin, *Economic Rights Under the United States Constitution, 32 Colum. J. Transnat'l L. 97 (1994);* Hartwin Bungert, *Equal Protection for Foreign and Alien Corporations: Towards Intermediate Scrutiny for a Quasi-Suspect Classification, 59 Mo. L. Rev. 569 (1994).*

(n12)Footnote 198. *See Shaffer v. Heitner, 433 U.S. 186 (1977). But see Shames v. Nebraska, 323 F. Supp. 1321 (D. Neb. 1971), aff'd mem., 408 U.S. 901 (1972):*

> [B]efore a state must accord Fourteenth Amendment Equal Protection Rights to any person, that person must be physically within its borders. Therefore, while aliens residing within the state are clearly entitled to the equal protection of its laws, the same is not true of non-resident aliens, and a state is not constitutionally required to accord the equal protection of its laws to this latter group of aliens." *Id. at 1333.*

(n13)Footnote 199. *See Graham v. Richardson, 403 U.S. 365 (1971)* where the court eliminated the distinction between privileges and constitutional rights as a justification for invidious discrimination, holding that "the concept that constitutional rights turn upon whether a governmental benefit is characterized as a 'right' or as a 'privilege'" is an improper distinction. For further discussion, *see* Hartwin Bungert, *Equal Protection for Foreign and Alien Corporations: Towards Intermediate Scrutiny for a Quasi-Suspect Classification, 59 Mo. L. Rev. 569 (1994).*

(n14)Footnote 200. *Graham v. Richardson, 403 U.S. 365 (1971).*

(n15)Footnote 201. *Sugarman v. Dougall, 413 U.S. 634 (1973).*

(n16)Footnote 202. *In re Griffiths, 413 U.S. 717 (1973).*

(n17)Footnote 203. *Examination Bd. of Eng'rs v. de Otero, 426 U.S. 572 (1976).*

(n18)Footnote 204. *See Lehndorff Geneva, Inc. v. Warren, 246 N.W.2d 815 (Wis. 1976); De Tenorio v. McGowan, 510 F.2d 92 (5th Cir. 1975); Martinez v. Industrial Comm'n of State of Utah, 720 P.2d 416 (Utah 1986); Pedrazza v. Sid Fleming Contractor, 607 P.2d 597 (N.M. 1980).*

(n19)Footnote 205. *Ambach v. Norwick, 441 U.S. 68 (1979).*

(n20)Footnote 206. The Court concluded that: "the Constitution requires only that a citizenship requirement applicable to teaching in the public schools bear a rational relationship to a legitimate state interest." *Id.*

(n21)Footnote 207. *See, e.g., Gragg v. Cayuga Indep. Sch. Dist, 539 S.W.2d 861 (Tex. 1976), San Marcos Consol. Indep. Sch. Dist. v. Nance, 459 S.W.2d 335 (Tex. Civ. App. 1973).*

(n22)Footnote 208. *See Lehndorff Geneva, Inc. v. Warren, 246 N.W.2d 815 (Wis. 1976).*

(n23)Footnote 209. *See also generally* Louis Henkin, Economic Rights Under the United States Constitution, *32 Colum. J. Transnat'l L. 97 (1994);* Cynthia Blum, *U.S. Transfer Taxation of Nonresident Aliens: Too Much of Too Little?, 14 U. Pa. J. Int'l Bus. L. 469 (1994);* Hartwin Bungert, *Equal Protection for Foreign and Alien Corporations: Towards Intermediate Scrutiny for a Quasi-Suspect Classification, 59 Mo. L. Rev. 569 (1994);* James R. Mason, Jr., *"Pssst, Hey Buddy, Wanna Buy a Country?" An Economic and Political Policy Analysis of Federal and State Laws Governing Foreign Ownership of United States Real Estate, 27 Vand. J. Transnat'l L. 453 (1994).*

(n24)Footnote 210. Morrison, *Limitations on Alien Investment in American Real Estate, 60 Minn. L. Rev. 621 at 644-45 (1976).*

(n25)Footnote 211. *Shames v. Nebraska, 323 F. Supp. 1321 at 1333 (D. Neb. 1971), aff'd mem., 408 U.S. 901 (1972).*

(n26)Footnote 212. U.S. Const. amend. XIV, § 1.

(n27)Footnote 213. *See, e.g.,* Iowa Code § 567.6; Mo. Ann. Stat. §§ 442, 586.

(n28)Footnote 214. *323 F. Supp. 1321 (1971), aff'd mem., 408 U.S. 901 (1972).*

(n29)Footnote 215. *263 U.S. 197 (1923). See also Porterfield v. Webb, 263 U.S. 225 (1923).*

(n30)Footnote 216. *323 F. Supp. at 1335.*

(n31)Footnote 217. *326 U.S. 207 (1945).*

(n32)Footnote 218. *Id. at 212-213.* Robert W. McGee, *Some Thoughts on the Relationship Between Property Rights and Immigration Policy, 42 Clev. St. L. Rev. 495 (1994).*

(n33)Footnote 219. *Hines v. Davidowitz, 312 U.S. 52, 62-63 (1941).*

(n34)Footnote 220. *389 U.S. 429 (1968).*

(n35)Footnote 221. *Id. at 434.*

(n36)Footnote 222. *389 U.S. at 440.*

The court also held that:

> [i]t seems inescapable that the type of probate law that Oregon enforces affects international relations in a persistent and subtle way. The practice of state courts in withholding remittances to legatees residing in Communist countries or in preventing them from assigning them is notorious. The several States, of course, have traditionally regulated the descent and distributions of estates. But those regulations must give way if they impair the effective exercise of the Nation's foreign policy.

Id. at 440.

(n37)Footnote 223. *Id.* at 433. *See also Clark v. Allen, 331 U.S. 503 (1947),* where the court assumed that the

application of the statute involved only a "routine reading" of foreign laws.

(n38)Footnote 224. *303 F. Supp. 660, 664 (N.D. Ohio 1969).*

(n39)Footnote 225. Neb. Rev. Stat. § 4-107, which provided in part:

[1] The right of an alien not residing within the United States or its territories to take either real or personal property of the proceeds thereof in this state by succession or testamentary disposition, upon the same terms and conditions as inhabitants and citizens of the United States, is dependent in each case:

[a] Upon the existence of a reciprocal right upon the part of citizens of the United States to take real and personal property and the proceeds thereof upon the same terms and conditions as inhabitants and citizens of the country of which such alien is an inhabitant.

(n40)Footnote 226. *323 F. Supp. 1321 (D. Neb. 1971), aff'd mem., 408 U.S. 901 (1972).*

(n41)Footnote 227. *Id. at 1332.*

(n42)Footnote 228. *81 Cal. Rptr. 287 (Cal. App. 1969).* For further discussion, *see* James R. Mason, Jr. *"Pssst, Hey Buddy, Wanna Buy a Country?" An Economic And Political Policy Analysis of Federal and State Laws Governing Foreign Ownership of United States Real Estate, 27 Vand. J. Transnat'l L. 453 (1994).*

(n43)Footnote 229. U.S. Const. art. 6, P 2.

(n44)Footnote 230. *See Fairfax's Devisee v. Hunter's Lessee, 11 U.S. (7 Cranch) 603 (1812). See generally* Gloria L. Sandarino, *The NAFTA Investment Chapter and Foreign Direct Investment in Mexico: A Third World Perspective, 27 Vand. J. Transnat'l L. 259 (1994);* James R. Mason, Jr., *"Pssst, Hey Buddy, Wanna Buy a Country?" An Economic and Political Policy Analysis of Federal and State Laws Governing Foreign Ownership of United States Real Estate, 27 Vand. J. Transnat'l L. 453 (1994).*

(n45)Footnote 231. *See* Note, *Alien Ownership of Kansas Farmland: Can it be Prohibited, 20 Washburn L.J. 514 at 527 (1981).*

(n46)Footnote 232. *See* Fisch, *State Regulation of Alien Land Ownership, 43 Mo. L. Rev. 407 (1978).*

(n47)Footnote 233. *Id.*

(n48)Footnote 234. Kan. Stat. Ann. § 59-511:

All aliens eligible to citizenship under the laws of the United States may transmit and inherit real estate, or any interest therein, in this state, in the same manner and to the same extent as citizens of the United States. All other aliens may transmit and inherit real estate or any interest therein, in this state, in the manner and to the extent and for the purpose prescribed by any treaty existing between the government of the United States and the nation or country of which such alien is a citizen or subject, and not otherwise.

(n49)Footnote 235. U.S. Const. art I, § 8, cl. 4.

(n50)Footnote 236. *See Fiallo v. Bell, 430 U.S. 787 (1977); Kleindeinst v. Mardel, 408 U.S. 753 (1972).*

(n51)Footnote 237. *See, e.g., Oceanic Nav. Co. v. Stranahan, 214 U.S. 320 (1909).*

(n52)Footnote 238. U.S. Const. art. I, § 8, cl. 3.

(n53)Footnote 239. U.S. Const. art. I, § 8, cl. 12.

(n54)Footnote 240. *See Chan Ping v. United States, 130 U.S. 581 (1889):*

> That the government of the United States, through the action of the legislative department, can exclude aliens from its territory is a proposition which we do not think open to controversy. Jurisdiction over its own territory to that extent is an incident of every independent nation. It is a part of its independence. If it could not exclude aliens, it would be to that extent subject to the control of another power... The United States, in their relation to foreign countries and their subjects or citizens are one nation, invested with powers which belong to independent nations, the exercise of which can be invoked for the maintenance of its absolute independence and security throughout its entire territory.

(n55)Footnote 241. *See Takahashi v. Fish & Game Comm'n, 334 U.S. 410 (1948).*

(n56)Footnote 242. *See Brown v. Maryland, 25 U.S. (12 Wheat.) 419 (1927). See also Michelin Tire Corp. v. Wages, 423 U.S. 276 (1976); Japan Line, Ltd. v. County of Los Angeles, 441 U.S. 434 (1979). But see United States v. Carolene Prods. Co., 303 U.S. 144 (1938),* holding that the powers to regulate interstate and foreign commerce are generally considered to be equal.

(n57)Footnote 243. *But see* federal mining law, according to which certain mineral claims located on public domain land cannot be owned by foreign interests. *See 30 U.S.C.A. § 22:*

Except as otherwise provided, all valuable mineral deposits in lands belonging to the United States, both surveyed and unsurveyed, shall be free and open to exploration and purchase, and the lands in which they are found to occupation and purchase, by citizens of the United States and those who have declared their intention to become such, under regulations prescribed by law, and according to the local customs or rules of miners in the several mining districts, so far as the same are applicable and not inconsistent with the laws of the United States.

Other restrictions are found in the Mineral Land Leasing Act of 1920, *30 U.S.C. § 181;* Taylor Grazing Act, *43 U.S.C. § 315b;* Geothermal Steam Act of 1970, *30 U.S.C. §§ 1001*-1025; Alien Land Act of 1887, *48 U.S.C. §§ 1501*-1502; Trading with the Enemy Act, *50 U.S.C. app. 1*-44.

(n58)Footnote 244. 427 N.W.3d 307 (N.D. 1988).

(n59)Footnote 245. N.D. Cent. Code § 10-06-13(5).

(n60)Footnote 246. *12 U.S.C. § 29.*

(n61)Footnote 247. The court also found that the state statute has a narrower purpose than the federal statute -- protecting farmers. The statute was therefore considered to be contained within the broader federal law and not in conflict therewith. For further discussion, *see* Christopher F. Corr, *A Survey of United States Controls on Foreign Investment and Operations: How Much is Enough?*, 9 Am. U. J. Int'l L. & Pol. 417 (1994); James R. Mason, Jr. *"Pssst, Hey Buddy, Wanna Buy a Country?" An Economic And Political Policy Analysis of Federal and State Laws Governing Foreign Ownership of United States Real Estate, 27 Vand. J. Transnat'l L. 453 (1994).*

(n62)Footnote 248. Huizinga, *Alien Land Laws: Constitutional Limits on State Power to Regulate, 32 Hastings L.J. 251 (1980). See also* James R. Mason, Jr., *"Pssst, Hey Buddy, Wanna Buy a Country?" An Economic and Political*

Policy Analysis of Federal and State Laws Governing Foreign Ownership of United States Real Estate, 27 Vand. J. Transnat'l L. 453 (1994); Hartwin Bungert, *Equal Protection for Foreign and Alien Corporations: Towards Intermediate Scrutiny for a Quasi-Suspect Classification, 59 Mo. L. Rev. 569 (1994).*

(n63)Footnote 249. *See, e.g., Baldwin v. G.A.F. Seelig, Inc., 294 U.S. 511 (1935); Hale v. Bimco Trading Co., 306 U.S. 375 (1939).*

(n64)Footnote 250. *See, e.g., Terrace v. Thompson, 263 U.S. 197 (1923).*

(n65)Footnote 251. *See Euclid v. Ambler Realty Co., 272 U.S. 365 (1926).*

(n66)Footnote 252. *See, e.g.*: *State v. Wheat, 22 P.2d 1093 (Kan. 1933);* State v. Fisher, (Kan. 1934); *Coal Harbor Stock Farms, Inc. v. Meier, 191 N.W.2d 583 (N.D. 1971); State v. Liberty Nat'l Bank & Trust Co., 427 N.W.2d 307 (N.D. 1988); Allegheny Corp. v. Richardson, 463 N.W.2d 678 (S.D. 1990).*

(n67)Footnote 253. *Asbury Hosp. v. Cass County, 7 N.W.2d 438 (N.D. 1943), aff'd, 326 U.S. 207 (1945).*

(n68)Footnote 254. *Id.*

(n69)Footnote 255. *Id.*

(n70)Footnote 256. *State v. Liberty Nat'l Bank & Trust Co., 427 N.W.2d 307 (N.D. 1988).*

(n71)Footnote 257. *MSM Farms, Inc. v Spire, 927 F.2d 330 (8th Cir. 1991).*

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CHAPTER 79 FOREIGN OWNERSHIP OF LAND

9-79 Thompson on Real Property, Thomas Editions § 79.13

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§ 79.13 Federal Statutes.

[Go To Supp]

Apart from provisions of the Homestead, n258 Mining, n259 Mineral Leasing, n260 Grazing n261 and a few miscellaneous statutes n262 which were adopted during the last century, the federal government has not had the extensive involvement in the question of alien ownership of land that states have had. Nevertheless, there are two important federal statutes that specifically address the issue. These were adopted in the late 1970's to identify and monitor the extent of foreign interests in United States land. n263 Two recent federal statutes deal with issues of foreign ownership in areas where there heretofore has been little concern. In 1996, Congress amended the Internal Revenue Code to impose a tax on certain transfers of property by a citizen or resident of the United States, or by a domestic corporation or partnership or by an estate or trust to a foreign corporation. n264

The Telecommunications Act of 1966 added a restriction to Section 310 which limits the granting of certain licenses to corporations in which more than a specified amount of capital stock is owned by aliens. n265 No broadcast, common carrier, aeronautical en route or aeronautical fixed radio station license is to be granted to or held by any corporation in which more than one fifth of the capital stock is directly or indirectly held by an alien, or a representative thereof, or by a foreign government or by a corporation organized under the laws of a foreign country. Similarly, such licenses cannot be held by corporations that in turn are controlled by such foreign interests.

§ 79.13(a) The International Investment Survey Act of 1976.

The International Investment Survey Act of 1976 n266 was adopted to identify the location, nature, and magnitude of and changes in the total investment activity, primarily of multinational corporations, in the United States. n267 This act is not designed to restrict foreign investment but rather to identify the extent and source of such investment. n268 The act, which is administered by the Department of Commerce, is structured to generate information regarding investments in two different ways. First, not more frequently than once every five years, the President is to conduct a comprehensive benchmark survey of direct foreign investment and foreign portfolio investment in the United States in which the following information is obtained: n269

1) the location and magnitude of total investment of parent n270 companies into their United States affiliates; n271

2) the gross sales by primary line of business of parent corporations and affiliates in each country where they have significant operations;

3) employment data, including the number of United States and foreign employees and their compensation;

4) tax payments by these businesses.

Second, the President is to conduct a regular data collection program to secure current information on international capital flows and to conduct such surveys and studies as may be necessary to assess the adequacy of that information. n272

Information is detailed in forms that may be required to be filed by "any person subject to the jurisdiction of the United States." n273 As implemented, the primary disclosure forms are required from any foreign investor, called a "parent," n274 who has acquired a 10% or greater interest in an American business. n275

Most of the disclosure requirements relate to the ownership and operational structure of the enterprise. Thus, the "chain of ownership" of the business enterprise will be disclosed which will include information about the ultimate beneficial ownership of the parent. If more than 50% of the parent is owned by another person, the ownership chain must be traced back to a point at which an owner is disclosed who, in turn, is not owned more than 50% by another person. In each such link in the chain, the name of each beneficial owner must be reported. n276

Where land is purchased exclusively for personal use and not for profit-making purposes, no report will be required unless the purchaser is a corporation. n277

When investment involves real estate, information to be disclosed includes: n278

1) the name and location of the real estate;

2) the amount of debt and equity invested;

3) the names and addresses of the foreign investors;

4) gross annual operating revenues, net income, number of employees and employee compensation.

Persons, such as attorneys for the seller of land, who "intervene" in the transaction must also be disclosed. n279

Failure to file a report n280 as required may result in a civil penalty of not less that $2,500 nor more than $25,000. Where the failure is willful, imprisonment for not more than a year may be imposed, in addition to a fine of not more than $10,000. n281 These reports are confidential n282 and also appear to be exempt n283 from discovery under the Freedom of Information Act. n284 Even though the reports are considered confidential, the President is charged with the responsibility of making the aggregate information available for the use of the general public in the form of periodic, regular and comprehensive statistical reports. n285 This information on foreign investment is to be reported by country and is to disclose business entities the ownership or control of which by foreign countries is more than 50% of the voting securities, and the business entities in which the control is less than 50%. n286

Where the parties may be concerned about the disclosure of the purchase price or the identity of the parties to the transaction, it is unlikely that the confidential nature of the forms will totally prevent some of that information from becoming public since some, at least, will be revealed as a result of the recording of the deeds and the filing of ad valorem tax information.

COMPUTER-ASSISTED RESEARCH

LEXIS: international investment survey act w/1 1976

§ 79.13(b) Agricultural Foreign Investment Disclosure Act of 1978.

The Agricultural Foreign Investment Disclosure Act of 1978, n287 like the International Investment Survey Act of 1976, n288 was adopted to identify who is investing in United States real estate. This act, which is administered through the United States Department of Agriculture, is limited to generating information about who is purchasing agricultural land, how much is being purchased, and for what purpose.

The act requires that any foreign "person" holding, acquiring or transferring an "interest" in United States agricultural land must file a report with the Agricultural Stabilization and Conservation Service in the county where the land is located. n289

"Person" is defined to include any individual, corporation, company, association, partnership, society, joint stock company, trust, estate, or any other legal entity. n290 Person, however, appears to be defined so as to exclude permanent resident aliens. "Foreign" persons include only individuals who are not citizens or nationals of the United States, those who are not lawfully admitted for permanent residence in this country, foreign governments and persons created under the laws of a foreign nation or have their principal place of business in a foreign country. n291

"Interest" is defined to include "all interest acquired, transferred or held in agricultural lands by a foreign person." n292

The act specifically excludes the following from the definition of a reportable interest: n293

1) security interests;

2) leaseholds of less than ten years;

3) contingent future interests;

4) non-contingent future interests which do not become possessory upon termination of the present possessory estate;

5) surface or subsurface easements; and

6) any interest solely in mineral rights.

"Agricultural land" is defined as land in the United States that is currently used or has been used within the last five years for farming, ranching, forestry or timber production. n294 Specifically excluded is land which does not exceed ten acres, land which failed to generate gross receipts of at least $1000 per year, and land, the products of which are produced for the personal or household use of the person holding the interest in the agricultural land. n295

Reports are required from a significant interest or if substantial control over the interest is vested in the foreign person. For purposes of this requirement, a significant interest or substantial control is deemed to exist when the interest held by the person is a 10% or greater interest in the land. n296 Any individual named in any report must also file their own limited report. n297 Information required to be reported includes the name and address of the foreign person acquiring the interest being reported, the type of interest held, the legal description and acreage of the land, the purchase price, the intended purpose for the land, the date acquired, and, if the foreign person intends to transfer the land to another, the

name of the transferee. n298

If the foreign person acquiring the interest in agricultural land intends to change the use of the land from agriculture to some non-agricultural use, a report detailing the same must be filed within 90 days from the time the land ceases to be used for agricultural purposes. n299 A similar report must be filed if the land use is changed from non-agricultural use to agricultural use.

Civil penalties may be imposed for failure to file a report, for knowingly omitting information in a report or for including false or misleading information in the report. The penalty may be an amount not to exceed 25 percent of the fair market value of the agricultural land involved in the violation. n300

The information generated from reports filed pursuant to the Agricultural Foreign Investment Disclosure Act of 1978 is specifically available for public inspection and is collected by the United States Department of Agriculture and is periodically disseminated to the states. n301 These reports are to be made to the respective state departments of agriculture within 30 days after the end of each six months beginning with the effective date of the statute, and will identify the holdings of foreign persons in each county of the state, the acreage involved and the country of origin. n302

COMPUTER-ASSISTED RESEARCH

LEXIS: agricultural foreign investment disclosure act w/1 1978

FOOTNOTES:
(n1)Footnote 258. *43 U.S.C. § 161 et seq.*, (repealed 1976).

(n2)Footnote 259. The Mining Act of 1872, *30 U.S.C. § 22:*

Except as otherwise provided, all valuable mineral deposits in lands belonging to the United States, both surveyed and unsurveyed, shall be free and open to exploration and purchase, and the lands in which they are found to occupation and purchase, by citizens of the United States and those who have declared their intention to become such, under regulations prescribed by law, and according to the local customs or rules of miners in the several mining districts, so far as the same are applicable and not inconsistent with the laws of the United States.

(n3)Footnote 260. Mineral Land Leasing Act of 1920, *30 U.S.C. § 181.*

(n4)Footnote 261. Taylor Grazing Act, *43 U.S.C. § 315b.*

(n5)Footnote 262. *See* Geothermal Steam Act of 1970, *30 U.S.C. §§ 1001*-1025; Alien Land Act of 1887, *48 U.S.C. §§ 1501*-1502; Trading with the Enemy Act, *50 U.S.C. app. 1*-44.

There are significant restrictions that apply to specific industries. Most of these restrictions affect the aviation industry, telecommunications, maritime commerce, power generation, banking, insurance, and real estate, including agricultural land and mineral land. For further discussion of the general restrictions affecting these areas, *see* Peter Burkard, *Foreign Direct Investments: Restrictions and Reporting Requirements* (Jan. 22, 1993), at http://www.eskimo.com/ larrygj/burkard.html. A further discussion of foreign investment in the U.S. airline industry is found in Angela Edwards, *Foreign Investment in the U.S. Airline Industry: Friend or Foe?* available online at http://www.law.emory.edu/ EILR (reprinted from 9 Emory International Law Review 1995). Regarding alien ownership in the telecommunications industry, *see* Edwin Krasnow and Andres Martinez, *An Alien Ownership Primer: A fifth Here, a Fourth There*, (File Papers, Communications Media Center at New York Law School. Available at www.cmcnyls.edu /PUBLIC/papers/ALIENOWN.HTM.)

(n6)Footnote 263. For further discussion of federal statutes relating to investment generally, *see* Christopher F.

Corr, *A Survey of United States Controls on Foreign Investment and Operations: How Much is Enough?*, 9 Am. U. J. Int'l L. & Pol. 417 (1994); James R. Mason, Jr. *"Pssst, Hey Buddy, Wanna Buy a Country? An Economic And Political Policy Analysis of Federal and State Laws Governing Foreign Ownership of United States Real Estate," 27 Vand. J. Transnat'l L. 453 (1994).*

Negotiations are currently underway under the auspices of the Organization for Economic Cooperation and Development (OECD) to establish a broad, high-standard multilateral framework for international investment. The goal of this negotiation is to eliminate discrimination against foreign investors regarding the establishment, expansion and operation of the investments. The Bureau of Economic and Business Affairs has noted that the proposed Multilateral Agreement on Investments will not compel any of its members to allow unrestricted foreign investment in any or all economic sectors. *See Multilateral Agreement on Investment (MAI): The Facts* released by the Bureau of Economic and Business Affairs, March 23, 1998 and available at http://www.state.gov. /www/issues/ economics/ fs_980323_multilat.html.

(n7)Footnote 264. 20 Aug. 1966, Pub. L. 104-188, Title I, § 1907(b)(1), *110 Stat. 1916,* codified at *26 U.S.C. § 1491*. This tax is an excise tax in the amount of 35% of the excess of the fair market value of the property transferred over the sum of the adjusted basis of the property plus the amount of gain recognized to the transferor. *See* K. Myres, *Property Transfers to Foreign Entities Potentially Subject to New U.S. Penalty, 13 Tax Notes Int'l 1755* (Nov. 25, 1996); Seitz, *Avoiding the 35% Penalty on Failure to Report Outbound Transfers to Foreign Entities under Sec. 1494(c)*. 28 Tax Adviser 294 (I) (May 1997); Brewer, *Reigning In the Terror of Section 1491*, Tax Notes 1725 (Mar. 31, 1997); Brewer, *Final and Proposed Passive Foreign Investment Company Regulations, 26 Tax Mgm't Int'l J. 160* (Apr. 11, 1997); Shuler, Ruhlin & Karr, *Obstacles to Foreign Investment in U.S. Agriculture*, 7 Cal. Int'l Pract. 36 (1996).

(n8)Footnote 265. *43 U.S.C. § 310*(b). For further discussion, *see* Palidini, *Foreign Ownership Restrictions Under Section 310(b) of the Telecommunications Act of 1996, 14 B.U. Int'l L.J. 341 (1996). See also* Johnson, *Why Alienage Jurisdiction? Historical Foundations and Modern Justifications for Federal Jurisdiction over Disputes Involving Noncitizens, 21 Yale J. Int'l L. 1 (1996);* Geist, *Toward a General Agreement on the Regulation of Foreign Direct Investment, 26 Law & Pol'y Int'l Bus. 673 (1995);* Brodkey, *Land Title Issues for Countries in Transition: The American Experience, 29 J. Marshall L. Rev. 799 (1996).*

(n9)Footnote 266. *22 U.S.C. §§ 3101*-3108. *See also* 31 C.F.R. pt. 128.

(n10)Footnote 267. *See* H.R. Rep. No. 1490, 94th Cong., 2d Sess. 1. The act specifically is addressed to "business enterprises" which are defined as any organization, association, branch or venture which exists for profit-making purposes or to otherwise secure economic advantage, and any ownership of any real estate. *22 U.S.C. § 3102*(6).

For a discussion of issues affecting foreign investment structure, *see* Irwin D. Segal, Eli Fink and Craig Stern, *Foreign Investment in U.S. Real Estate: No Perfect Structure, 9 J. Int'l Tax'n 22 (1998).* For a detailed discussion of how data regarding direct foreign investment is collected and interpreted, *see* Sylvia E. Bargas, *Direct Investment Positions for 1997*, Survey of Current Business (July 1998) pp 35-67.

(n11)Footnote 268. *22 U.S.C. § 3101.*

(n12)Footnote 269. *22 U.S.C. § 3103.*

(n13)Footnote 270. "Parent" is defined as a person in one country who directly or indirectly owns or controls 10% or more of the voting stock of an incorporated business enterprise, or an equivalent ownership interest in an unincorporated business enterprise which is located outside that country. *22 U.S.C.§ 3102*(7).

(n14)Footnote 271. *22 U.S.C. § 3101*(b) provides that:

[i]t is the purpose of this chapter to provide clear and unambiguous authority for the President to collect information on international investment and United States foreign trade in services, whether directly or by affiliates, including related information necessary for assessing the impact of such investment and trade ... It is the intent of Congress that information which is collected from the public under this chapter be obtained with a minimum burden on business and other respondents and with no unnecessary duplication of effort, consistent with the national interest in obtaining comprehensive and reliable information on international investment and trade in services.

(n15)Footnote 272. *Id.*

(n16)Footnote 273. *22 U.S.C. § 3104*(b).

(n17)Footnote 274. *22 U.S.C. § 3102*(7).

(n18)Footnote 275. 15 C.F.R. §§ 806.7(g), (h), (i).

(n19)Footnote 276. 1 Juergensmeyer & James Wadley, Agricultural Law 155 (1982).

(n20)Footnote 277. *Id.* The President was specifically charged in the statute with the responsibility of studying the feasibility of establishing a system to monitor foreign direct investment in agricultural, rural, and urban real property. The Agricultural Foreign Investment Disclosure Act of 1978, *7 U.S.C. §§ 3501*-3508, has become the primary vehicle for monitoring foreign investment in agricultural land.

(n21)Footnote 278. *Id.*

(n22)Footnote 279. *Id.*

(n23)Footnote 280. Form BE-12 is the "benchmark survey" form and is filed every five years (1992, 1997, etc.) unless the reporting entity owns less than 200 acres and its total operating revenues, sales or assets, after taxes, was less than $1 million.

Form BE-13 is filed within 45 days following an acquisition unless the acquisition only involves residential real estate, is made by an existing United States affiliate and the total cost of the acquisition is less than $1 million and does not involve more than 200 acres. Form BE-14 must be filed within 45 days of the acquisition by any U.S. person who assists or intervenes in the transaction that requires reporting. Form BE-15 is an annual report that must be filed by each consolidated U.S. affiliate unless the reporting entity owns less than 1,000 acres and its total assets, net sales or gross operating revenues or net income (after U.S. income tax) is less than $5 million. Form BE-606 is a follow-up quarterly report utilized for balance of payments data.

(n24)Footnote 281. *22 U.S.C. § 3105*(a), (c).

(n25)Footnote 282. *22 U.S.C. § 3104*(c).

See also Irwin, *Foreign Investment in U.S. Real Estate: Recent Reporting and Disclosure Requirements, 53 Fla. B.J. 715 (1979).*

(n26)Footnote 283. *See 22 U.S.C. § 3104*(d).

(n27)Footnote 284. *5 U.S.C. § 552*(b).

(n28)Footnote 285. *22 U.S.C. § 3103*(a)(5).

(n29)Footnote 286. *Id.*

(n30)Footnote 287. *7 U.S.C. §§ 3501*-3508. *See also* 7 C.F.R. pt. 781.

(n31)Footnote 288. *22 U.S.C. §§ 3101*-3108. *See also* 31 C.F.R. pt. 128.

(n32)Footnote 289. 7 C.F.R. § 781.3(a).

(n33)Footnote 290. 7 C.F.R. § 781.2(h).

(n34)Footnote 291. 7 C.F.R. § 781.2(g).

(n35)Footnote 292. *Id.* at (c).

(n36)Footnote 293. *Id.*

(n37)Footnote 294. 7 C.F.R. § 781.2(b).

(n38)Footnote 295. *Id.*

(n39)Footnote 296. 7 C.F.R. § 781.2(1).

(n40)Footnote 297. *7 U.S.C. § 3501*(e).

(n41)Footnote 298. 7 C.F.R. § 781.3(e).

(n42)Footnote 299. *7 U.S.C. § 3501*(c).

(n43)Footnote 300. *7 U.S.C. § 3502*(b).

(n44)Footnote 301. *7 U.S.C. § 3505.*

(n45)Footnote 302. *7 U.S.C. § 3505.*

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Supp. to § 79.01 General.

[Go To Main]

Change § 79.01 heading to read: "Restrictions on Alien Business Entities"

Add at end of note 1:

For further discussion of problems of foreign investors, *see* David K.Y. Tang., *Special Concerns of Foreign Investors in Sophisticated Real Estate Transactions,* 453 PLI/Real 473 (2000). *See also* D. Tang, *Special Concerns of Foreign Investors in Sophisticated Real Estate Transactions,* 468 PLI/Real 495 (2001).

Add to n. 1

Michael J. Robinson, *The Trail Smelter: Is What's Past Prologue? EPA Blazes a New Trail for CERCLA, 14 N.Y.U. Envt'l. L.J. 233 (2006);* Peter D. Ehrenhaft, *International Joint Ventures: Setting Them Up, Taking Them Apart.* 2 American Law Institute-American Bar Association Continuing Legal Education. Sept. 29-Oct 1, 2005 Going International: Fundamentals of International Business Transactions.

Change § 79.01 heading to read: "Restrictions on Alien Business Entities

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Supp. to § 79.01 General

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Add:

Foreign ownership of farmland has remained relatively steady since 1981. For most recent data regarding foreign ownership of farmland, see USDA Agricultural Fact Book at www.petrik.com/PUBLIC/library/USDA_fact-1998/ch2h.htm. For a discussion of the history of alien restrictions on land ownership, *see* Peter J. Spiro, *Foreign Affairs Law at the End of the Century. Part II: Role of the State in Foreign Affairs,* 70 U. Colo. L.R. 1223 (1999).

Add:

The actual amount of farmland has varied since 1993. In 1995, it was calculated that approximately 15.1 million acres were foreign owned. *See* USDA, ERS [Economic Research Service], Agricultural Foreign Investment Disclosure Act data. At the end of 1997, it was reported as 14.3 million acres of land. *See* USDA Agricultural Fact Book at www.petrik.com/PUBLIC/library/USDA_fact-1998/ch2h.htm. When foreign ownership is adjusted for partial interests, the total foreign-owned acreage drops to 13.8 million acres. *See* www. econ.ag.gov/epubs/htmlsum/krupa.htm.

Add at end of Note 8:

For further discussion of problems of foreign investors, *see* David K.Y. Tang., *Special Concerns of Foreign Investors in*

Sophisticated Real Estate Transactions, 453 PLI/Real 473 (2000). *See also* D. Tang, *Special Concerns of Foreign Investors in Sophisticated Real Estate Transactions,* 468 PLI/Real 495 (2001).

Add:

Holy Land Found. for Relief & Dev. v. Ashcroft, 333 F.3d 156 (D.C. Cir. 2003) , cert. denied, 124 S. Ct. 1506 (2004) (the Treasury Department's Office of Foreign Asset Control blocked a charitable foundation's assets and property because it had been designated a "Specially Designated Global Terrorist").

Add:

Permanent Mission of India to the United Nations v. City of New York, 127 S. Ct. 2352 (2007) (upholding liability of country's U.S. property for city property tax); *Af-Cap, Inc. v. Chevron Oveseas (Congo) Ltd, 475 F.3d 1080* (9th Cir. 2007) (judgment creditor's action against property belonging directly to a foreign state). *See,* Annotation, *Local Property of Insolvent Foreign Corporation for Which a Liquidator or Receiver Has Been Appointed in Another State as Subject to Sequestration or Seizure Under Execution or Attachment,* 98 A.L.R. 351 .

Add:

26 U.S.C. § 1491 has been repealed.

Add:

See also D. Tang, *Special Concerns of Foreign Investors in Sophisticated Real Estate Transactions,* 468 PLI/Real 495 (2001).

add

See Alireza Falsafi, "The International Minimum Standard of Treatment of Foreign Investors' Property: A Contingent Standard," *30 Suffolk Transnat'l L. Rev. 317 (Summer 2007).*

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Supp. to § 79.02 Typical Reasons for Foreign Interest in American Land

[Go To Main]

Add:

See also Peter D. Ehrenhaft, *International Joint Ventures: Setting Them Up, Taking Them Apart.* 2 American Law Institute-American Bar Association Continuing Legal Education. Sept. 29-Oct 1, 2005 Going International: Fundamentals of International Business Transactions.

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Supp. to § 79.03 Typical Concerns Regarding Foreign Investment in United States Land in General.

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Add at end of note 29:

For specific data on foreign investment in agricultural land, see *Foreign Ownership of U.S. Agricultural Land Through December 1997: County-Level Data.* (Department of Agriculture, Economic Research Service). This information is available on diskette. Number ERS-98005INC. The data shows approximately 14.3 million acres in 1,938 of the nations 3,041 counties. A summary of the data is available online at www.ers.usda.gov/publications/summaries/SB943.HTM. For a discussion of the broad question of foreign ownership in the United States, *see* Douglas Woodward and Douglas Nigh, eds., Foreign Ownership and the Consequences of Direct Investment in the United States: Beyond Us and Them, Quorum Books, Westport Conn. 1998.

For further discussion of problems of foreign investors, *see* David K.Y. Tang., *Special Concerns of Foreign Investors in Sophisticated Real Estate Transactions,* 453 PLI/Real 473 (2000). For a discussion of the broad question of foreign ownership in the United States in general, *see* Douglas Woodward and Douglas Nigh, eds., Foreign Ownership and the Consequences of Direct Investment in the United States: Beyond Us and Them, Quorum Books, Westport Conn. 1998.

Add:

Holy Land Found. For Relief & Dev. v. Ashcroft, 333 F.3d 156 (D.C. Cir. 2003) , cert. denied, 124 S. Ct. 1506 (2004) (the Treasury Department's Office of Foreign Asset Control blocked a charitable foundations assets and property because it had been designated a "Specially Designated Global Terrorist" based on information that it was closely linked to Hamas).

Add:

For a discussion concerning the constitutionality of laws which restrict foreign corporations from owning farmland see Anthony B. Schutz, "Corporate-Farming Measures in a Post-Jones World," *14 Drake J. Agric. L. 97 (2009).*

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Supp. to § 79.04 History of Restrictions on Foreign Ownership of Land.

[Go To Main]

Add:

For further discussion, *see* Peter J. Spiro, *Foreign Affairs Law at the End of the Century. Part II: Role of the State in Foreign Affairs*, 70 U. Colo. L.R. 1223 (1999).

Add:

(now repealed.)

§ 79.04(c) Anti-Oriental Period. [Go To Main]

Add:

For further discussion, *see* Peter J. Spiro, *Foreign Affairs Law at the End of the Century. Part II: Role of the State in Foreign Affairs*, 70 U. Colo. L.R. 1223 (1999); Keith Aoki, *No Right to Own- The Early Twentieth-Century "Alien Land Laws" as a prelude to Internment. 19 B.C. Third World L.J. 37 (1998);* Randall S. Jeffrey, *Equal Protection in State Courts: The New Economic Equality Rights*, 17 Law And Ineq. 234 (1999).

Add:

(now repealed)

§ 79.04(f) The Present. [Go To Main]

Add:

7 U.S.C. § 3504 has been repealed.

Add:

At the end of 1997, (the last year for which comprehensive data has been generally released by USDA), it was reported as 14.3 million acres of land. *See* USDA Agricultural Fact Book at www.petrik.com/PUBLIC/ library/USDA_fact-1998/ch2h.htm. When foreign ownership is adjusted for partial interests, the total foreign-owned acreage drops to 13.8 million acres. *See* www.econ.ag.gov/ epubs/htmlsum/krupa.htm. Further, the data suggests that only 16 percent of foreign owned land is in cropland and 31 percent in pasture and other agricultural purposes. Forest land accounts for fully 50 percent of foreign owned land and nonagricultural land constituted 3 percent. *See* www.econ.ag.gov/epubs/htmlsum/ krupa.htm.

In 2008, it was reported by the USDA that foreign persons hold an interest in 20.9 million acres of U.S. agricultural land. This was a 1.4 million-acre increase from 2007. Canadians own 7.3 million acres, the most of any other country. Other notable countries include: the Netherlands (about 3.9 million acres), the United Kingdom (over 1.5 million acres), and Germany (almost 1.4 million acres.) See Greg Lamp, "Foreigners own more U.S. Farmland" available at http://cornandsoybeandigest.com/mag/1101-foreigners-own-us-farmland/

Add:

In the early 1990's there was a brief concern over ownership by individuals from Japan. This concern appears to have dissipated. Anecdotal evidence suggests that the current concern over foreign ownership, at least in the Midwest and Great Plains, appears be focused more on the structure of the entity claiming the interest than the purpose for which the land was acquired, and tends to reflect concerns in those areas over generally increasing corporate domination of agriculture. Current data suggests that corporations in which foreign persons have a significant interest or substantial control owned 56 percent of the foreign-held acreage. Most of these interests (60 percent) are claimed by persons from Canada, the United Kingdom, Germany, Switzerland, the Netherlands Antilles and the British Virgin Islands. Persons from Japan accounted for only 3 percent. *See* www.econ.ag.gov/epubs/htmlsum/krupa.htm. *See also* David K.Y. Tang., *Special Concerns of Foreign Investors in Sophisticated Real Estate Transactions*, 453 PLI/Real 473 (2000); Douglas Woodward and Douglas Nigh, eds., Foreign Ownership and the Consequences of Direct Investment in the United States: Beyond Us and Them, Quorum Books, Westport Conn. 1998.

See, Karl B. Holtzschue (ed.), Chapter 43, "Foreign Party Transactions," in 12B *Purchase and Sale of Real Property.*

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Supp. to § 79.05 Defining Alienage for Purposes of Restriction.

[Go To Main]

Add:

K.S.A. § 59-511 has been repealed.

Add:

7 U.S.C. § 3504 has been repealed.

Add:

Ind. Code Ann. § 32-1-7 has been repealed.

Add:

(630 P. 2d 1253).

7 U.S.C. § 3504 has been repealed.

Add:

It should be noted that there is generally more fear about corporations owning farmland than individuals owning farmland, regardless of whether the corporation is foreign or domestic. Nine states have passed legislation prohibiting corporations from owning 312 million acres of farm land (approximately one third of all the farm land in the United States.). Anthony B. Schutz, "Corporate-Farming Measures in a Post-Jones World," *14 Drake J. Agric. L. 97 (2009).*

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Supp. to § 79.06 Defining Land for Purposes of Restriction.

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Add at end of footnote:

7 U.S.C. § 304 repealed. T-Bone Feeders, Inc. v. Martin, *supra* , and Farmegg Products, Inc. v. Humboldt County, *supra* , have both been overruled.

Add:

(now repealed).

Add:

(now repealed).

Add:

(this statute was repealed and recreated with modifications.)

Add:

(this statute has been amended).

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Supp. to § 79.07 State Power over Alien Landowners, Generally.

[Go To Main]

Add at end of note 100:

See also D. Tang, *Special Concerns of Foreign Investors in Sophisticated Real Estate Transactions*, 468 PLI/Real 495 (2001).

Add:

See also Peter D. Ehrenhaft, *International Joint Ventures: Setting Them Up, Taking Them Apart.* 2 American Law Institute-American Bar Association Continuing Legal Education. Sept. 29-Oct 1, 2005 Going International: Fundamentals of International Business Transactions

Add:

See also Von Kerssenbrock-Praschma v. Saunders, 48 F.3d 323 (8th Cir. 1995) and *Von Kerssenbrock-Praschma v. Saunders, 121 F.3d 373 (8th Cir. 1997)* upholding a Missouri statute which provided that "no alien or foreign business shall acquire by grant, purchase, devise, descent or otherwise agricultural land in this state. No person may hold agricultural land as an agent, trustee, or other fiduciary for an alien or foreign business." *Missouri Rev. Stat. § 442.571.1*. In the 1995 case, the court held that where the alien owner of farmland owned the land on the effective date of the statute and disposed of the land to his two sons, who were also aliens, the grandfather clause of the statute

provided the alien with a legally protected interest in the land and to exclude such aliens from the class of potential grantees would limit the right of the owner to dispose of the land, one of the recognized incidents of property ownership. In the 1997 case, the court held that the statute is rationally related to a legitimate state interest and is not unconstitutional.

Add:

For further discussion, *see* Peter J. Spiro, *Foreign Affairs Law at the End of the Century*. *Part II: Role of the State in Foreign Affairs*, 70 U. Colo. L.R. 1223 (1999); Keith Aoki, *No Right to Own--The Early Twentieth-Century "Alien Land Laws" as a Prelude to Internment, 19 B.C. Third World L.J. 37 (1998);* Randall S. Jeffrey, *Equal Protection in State Courts: The New Economic Equality Rights*, 17 Law And Ineq. 234 (1999).

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Supp. to § 79.08 Restrictions on the "Acquisition, Holding or Transfer" of Land by Alien Individuals.

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Add:

See also Missouri Rev. Stat. 442.571.1 (as of Aug. 28, 1999), which provides that "except as provided in sections 442.586 and 442.591, no alien or foreign business shall acquire by grant, purchase, devise, descent or otherwise agricultural land in this state. No person may hold agricultural land as an agent, trustee, or other fiduciary for an alien or foreign business." This statute was interpreted and upheld against constitutional challenges as rationally related to a legitimate state interest in *Von Kerssenbrock-Praschma v. Saunders, 48 F.3d 323 (8th Cir. 1995)* ; *Von Kerssenbrock-Praschma v. Saunders, 121 F.3d 373 (8th Cir. 1997)* . In the 1995 case, the court held that where the alien owner of farmland owned the land on the effective date of the statute and disposed of the land to his two sons, who were also aliens, the grandfather clause of the statute provided the alien with a legally protected interest in the land and to exclude such aliens from the class of potential grantees would limit the right of the owner to dispose of the land, one of the recognized incidents of property ownership.

Add:

IND. CODE ANN § 32-1-7 has been repealed; *Wyo. Stat. § 34-15-101* has been repealed.

Add:

IOWA CODE § 567.1 has been transferred to I.C.A. § 91.1-91.2.

Add:

IOWA CODE § 567.1 has been transferred to I.C.A. § 91.1-91.2.

Add:

IOWA CODE § 567.1 has been transferred to I.C.A. § 91.1-91.2.

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Supp. to § 79.09 Restrictions on Inheritance.

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Add:

See also Missouri Rev. Stat. 442.571.1 (as of Aug. 28, 1999), which provides that "except as provided in sections 442.586 and 442.591, no alien or foreign business shall acquire by grant, purchase, devise, descent or otherwise agricultural land in this state. No person may hold agricultural land as an agent, trustee, or other fiduciary for an alien or foreign business." This statute was interpreted and upheld against constitutional challenges as rationally related to a legitimate state interest in *Von Kerssenbrock-Praschma v. Saunders, 48 F.3d 323 (8th Cir. 1995)* .

Add:

MONT. REV. STAT § 72-2-214 has been renumbered and is currently M.R.S. § 72-2-121.

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Supp. to § 79.10 Restrictions on Alien Business Entities.

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Amend first sentence of third paragraph to read:

Corporations currently own 72 percent of foreign-held acreage, partnerships 20 percent and individuals own 16 percent. The remaining two percent is owned by estates, trusts, institutions, associations and others. USDA, ERS, Agricultural Foreign Investment Disclosure Act data (1999).

Add:

William Meade Fletcher, Chapter 67, "Foreign Corporations V. Particular Rights and Powers of Foreign Corporations B. Rights and Powers with Respect to Real Property." 17 *Fletcher Cyc. Corp.* § 8353; Annotation, "State Regulation of Land Ownership by Alien Corporation," *21 A.L.R. 4th 1329.*

Add:

In the case of *State v. Hillcrest Investment, Ltd, 630 P.2d 1253 (Okla. 1981)* , the state sought to force a foreign corporation to divest itself of farmland. The court held that once the corporation had lawfully completed the domestication process required by law for corporations, it was a bonafide resident of the state for purposes of the foreign restrictions on land statutes.

Add:

See e.g., Missouri Rev. Stat. 442.571.1 (as of Aug. 28, 1999), which provides that "except as provided in sections 442.586 and 442.591, no alien or foreign business shall acquire by grant, purchase, devise, descent or otherwise agricultural land in this state. No person may hold agricultural land as an agent, trustee, or other fiduciary for an alien or foreign business."

Missouri Rev. Stat. 442.571.2 provides that "[a]ny alien or foreign business who acquires agricultural land in violation of sections 442.560 to 442.591 remains in violation of sections 442.560 to 442. 591 for as long as he holds an interest in the land. This statute was interpreted and upheld against constitutional challenges as rationally related to a legitimate state interest in *Von Kerssenbrock-Praschma v. Saunders, 48 F.3d 323 (8th Cir. 1995)* ; *Von Kerssenbrock-Praschma v. Saunders, 121 F.3d 373 (8th Cir. 1997)* .

Add:

This statute was amended to prohibit certain tax exemptions for entities such as poultry and rabbit confinement facilities.

Add to note 168:

See L. Cox, "The Legal Limbo of Indefinite Detention: How Long Can it Go?," *50 Am. U. L. Rev. 725 (2001);* K. Coffey, "The Due Process Right to Seek Asylum in the United States: The Immigration Dilemma and Constitutional Controversy," *19 Yale L. & Pol'y Rev. 303 (2001);* M. G. Montague, "Should Aliens Be Indefinitely Detained Under *8 U.S.C. § 1231*? Suspect Doctrines and Legal Fictions Come Under Renewed Scrutiny," *69 Fordham L. Rev. 1439 (2001). See also Patel v. Zemski, 275 F.3d 299 (3d Cir. 2001)* .

Add to note 175.

See also David K.Y. Tang., *Special Concerns of Foreign Investors in Sophisticated Real Estate Transactions,* 453 PLI/Real 473 (2000); Douglas Woodward and Douglas Nigh, eds., *Foreign Ownership and the Consequences of Direct Investment in the United States: Beyond Us and Them*, Quorum Books, Westport Conn. 1998; Erin K. Healy, "*All's Fair in Love and Bankruptcy? Analysis of the Property Requirement for Section 109 Eligibility and Its Effect on Foreign Debtors Filing in U.S. Bankruptcy Courts*," *12 Am. Bankr. Inst. L. Rev. 535 (Winter 2004).*

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Supp. to § 79.11 A State-by-State Look at Some Statutes.

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Add after first paragraph:

One author summarized the variety among the states as follows: twenty-eight states have some type of law restricting alien ownership of land, These states include California, Georgia, Idaho, Illinois, Indiana, Iown, Kansas, Kentucky, Maryland, Minnesota, Missouri, Montana, Nebraska, Nevada, New Hampshire, New Jersey, New York, North Carolina, North Dakota, Oklahoma, Oregon, Pennsylvania, South Carolina, South Dakota, Virginia, Wisconsin and Wyoming. Fifteen of these states restrict the extent to which aliens can own farmland and/or engage in farming. *See* J. David Aiken, *State Laws Relating to the Ownership of U.S. Land by Aliens and Business Entities, as of December 31, 1989*, Economic Research Service, U.S. Department of Agriculture, Staff Report No. AGES 9111, March 1991, as reported at www/ssu.missouri.edu/courses/ fs97/agec256/alienld.htm (Dec. 12, 1999).

Nine states require aliens to report their landholdings within the state. These include Arkansas, Georgia, Illinois, Iowa, Minnesota, Missouri, North Carolina, North Dakota and Virginia. *See* J. David Aiken, *State Laws Relating to the Ownership of U.S. Land by Aliens and Business Entities, as of December 31, 1989*, Economic Research Service, U.S. Department of Agriculture, Staff Report No. AGES 9111, March 1991, as reported at www/ssu.missouri.edu/courses/ fs97/agec256/alienld.htm (Dec. 12, 1999).

Revise last paragraph of note to read as follows:

Maine continues to have more acres of foreign owned land than any other state though the percentages are changing. According to most recent data, foreign holdings in Maine now account for 16 percent of all privately owned agricultural land in the state and one-fifth of all foreign owned agricultural land in the United States. These holdings are primarily forest land and are still owned by relatively few companies. Four companies continue to own 91 percent of the foreign

land in Maine. Two of these companies are Canadian, one French and one is a United States corporation that is partially Canadian owned. *See* www.econ.ag.gov/epubs/htmlsum/krupa.htm. Outside of Maine, foreign holdings tend to be concentrated in the West (with 34 percent) and the South (with 32 percent). USDA ERS, Agricultural Foreign Investment Data (1995).

About 61 percent of the reported foreign holdings involve land actually owned by U.S. Corporations which are required to register if as little as 10 percent of their stock is held by foreign investors. The remaining 39 percent of foreign-held land is owned by investors with no U.S. firm affiliation. *USDA Agricultural Fact Book (1998) Ch 2-H,* available at www. petrik.com/PUBLIC/library/USDA_fact_1998/ch2h.htm.

Change: Colo. Rev. Stat §15-11-112 to Colo. Rev. Stat. § 15-11-111.

Add to Connecticut:

Conn. Gen. Stat. Ann. § 47-58a has been transferred to C.G.S.A. § 47-7a.

Add to Indiana:

Ind. Code Ann. § 32-17 and *31-1-8-2* have been repealed.

Add to Kansas:

K.S.A. § 59-511 has been repealed.

Add new footnote 179.1 after Iowa Section: n179.1

Add new footnote to entry for the state of Missouri: n180a

Change: N.M. Stat. Ann. § 45-2-112 to N.M. Stat. Ann. § 45-2-11

Add to Pennsylvania:

61 P.S. § 41 has been repealed.

Add to Texas:

Vernon's Ann. Tex. Civ. St. Art 1527 has been repealed.

Add to Wyoming:

W.S. 1977 § 34-15-101 has been repealed.

FOOTNOTES:
(n1)Footnote 179.1. *Iowa Code §567.1* was transferred to §§ 9I.1 to 9I.12

(n2)Footnote 180a. According to *Missouri Rev. Stat. 442.571.1* (as of Aug. 28, 1999), "except as provided in sections 442.586 and 442.591, no alien or foreign business shall acquire by grant, purchase, devise, descent or otherwise agricultural land in this state. No person may hold agricultural land as an agent, trustee, or other fiduciary for an alien or foreign business.

Missouri Rev. Stat. 442.571.2 provides: Any alien or foreign business who acquires agricultural land in violation of sections 442.560 to 442.591 remains in violation of sections 442.560 to 442. 591 for as long as he holds an interest in the land.

This statute was interpreted and upheld against constitutional challenges as rationally related to a legitimate state interest in *Von Kerssenbrock-Praschma v. Saunders, 48 F.3d 323 (8th Cir. 1995)* ; *Von Kerssenbrock-Praschma v. Saunders, 121 F.3d 373 (8th Cir. 1997)* .

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Supp. To Chapter 79 FOREIGN OWNERSHIP OF LAND

9-79 Thompson on Real Property, Thomas Editions Supp. to § 79.12

Supp. to § 79.12 Constitutionality of Restrictions.

First Amendment

Add:

For further discussion, *see* Peter J. Spiro, *Foreign Affairs Law at the End of the Century. Part II: Role of the State in Foreign Affairs*, 70 U. Colo. L.R. 1223 (1999); Keith Aoki, *No Right to Own- The Early Twentieth-Century "Alien Land Laws" as a Prelude to Internment, 19 B.C. Third World L.J. 37 (1998);* Randall S. Jeffrey, *Equal Protection in State Courts: The New Economic Equality Rights*, 17 Law And Ineq. 234 (1999).

Add:

But see Von Kerssenbrock-Praschma v. Saunders, 48 F.3d 323 (8th Cir. 1995) . In this case, the court held that where the alien owner of farmland owned the land on the effective date of the statute and disposed of the land to his two sons, who were also aliens, the grandfather clause of the statute provided the alien with a legally protected interest in the land and to exclude such aliens from the class of potential grantees would limit the right of the owner to dispose of the land, one of the recognized incidents of property ownership.

Add

See also Peter D. Ehrenhaft, *International Joint Ventures: Setting Them Up, Taking Them Apart.* 2 American Law Institute-American Bar Association Continuing Legal Education. Sept. 29-Oct 1, 2005 Going International:

Fundamentals of International Business Transactions

Add:

In *Jones v. Gale, 470 F.3d 1261 (8th Cir. 2006)* , the 8th Circuit Court of Appeals held that a Nebraska law which prohibited corporations from owning farmland was unconstitutional because it violated the dormant *commerce clause*.

§ 79.12(a) Equal Protection Concerns, Generally. [Go To Main]

Add:

For further discussion, *see* Peter J. Spiro, *Foreign Affairs Law at the End of the Century. Part II: Role of the State in Foreign Affairs*, 70 U. Colo. L.R. 1223 (1999); Keith Aoki, *No Right to Own- The Early Twentieth-Century "Alien Land Laws" as a Prelude to Internment, 19 B.C. Third World L.J. 37 (1998) ;* Randall S. Jeffrey, *Equal Protection in State Courts: The New Economic Equality Rights*, 17 Law and Ineq. 234 (1999); *Headley v. INS, 92 Fed. Appx. 35 (3d Cir. 2003)* (appellate court denied an alien's equal protection claim that was based on a provision that denied lawful permanent resident aliens but permitted non-lawful permanent resident aliens to obtain waivers of removal); *Tovar-Landin v. Ashcroft, 361 F.3d 1164 (9th Cir. 2004)* (court found here was no violation of an equal protection interest because the alien had not shown that the different treatment for aliens that had been present in the U.S. for longer than a year was wholly irrational).

Add:

Soskin v. Reinertson, 353 F.3d 1242 (10th Cir. 2004) (Colorado bill that repealed optional Medicaid coverage, terminating Medicaid benefits to approximately 3,500 aliens, survived under rational basis scrutiny, because the aliens were within a non-suspect classification).

Add:

In the case of *Von Kerssenbrock-Praschma v. Saunders, 48 F.3d 323 (8th Cir. 1995)* , the court held that where the alien owner of farmland owned the land on the effective date of the statute and disposed of the land to his two sons, who were also aliens, the grandfather clause of the statute provided the alien with a legally protected interest in the land and to exclude such aliens from the class of potential grantees would limit the right of the owner to dispose of the land, one of the recognized incidents of property ownership. However, in *Von Kerssenbrock-Praschma v. Saunders, 121 F.3d 373 (8th Cir. 1997)* , the court did not apply a strict scrutiny test but rather held that the statute was rationally related to a legitimate state interest and therefore was not unconstitutional.

§ 79.12(b) Alienage as a Suspect Class. [Go To Main]

Add new footnote 199.1 after first sentence: n199.1

Add:

In recent decisions, the 5th and the 6th Circuit Courts of Appeal have held that nonimmigrant aliens should not be analyzed under strict scrutiny but rational scrutiny. See *LULAC v. Bredesen, 500 F.3d 523, 533 (6th Cir. 2007)* ; *LeClerc v. Webb, 419 F.3d 405, 417-19 (5th Cir. 2005)* ; see also Adam B. Wall, "Justice for All?: The *Equal Protection Clause* and Its Not-So-Equal Application to Legal Aliens." *84 Tul. L. Rev. 759 (2010).*

§ 79.12(c) Due Process Concerns, Generally. [Go To Main]

Add:

For further discussion, *see* Peter J. Spiro, *Foreign Affairs Law at the End of the Century. Part II: Role of the State in Foreign Affairs*, 70 U. Colo. L.R. 1223 (1999); Keith Aoki, *No Right to Own- The Early Twentieth-Century "Alien Land Laws" as a Prelude to Internment, 19 B.C. Third World L.J. 37 (1998);* Randall S. Jeffrey, *Equal Protection in State Courts: The New Economic Equality Rights*, 17 Law And Ineq. 234 (1999).

Add:

In the Missouri case of *Von Kerssenbrock-Praschma v. Saunders, 48 F.3d 323 (8th Cir. 1995)* , the court held that where the alien owner of farmland owned the land on the effective date of the statute and disposed of the land to his two sons, who were also aliens, the grandfather clause of the statute provided the alien with a legally protected interest in the land and to exclude such aliens from the class of potential grantees would limit the right of the owner to dispose of the land, one of the recognized incidents of property ownership. However, in *Von Kerssenbrock-Praschma v. Saunders, 121 F.3d 373 (8th Cir. 1997)* , the court upheld the statute as being rationally related to a legitimate state interest. *See R.L. Investment Limited Partners v. Immigration and Naturalization Service., 86 F. Supp. 2d 1014 (2000)* where the Immigration and Naturalization Service denied a petition for preferred visa status as a foreign investor. This denial was upheld against challenges that INS abused its discretion and that the action violated the Administrative Procedures Act. The reason the petition was denied was because the alien refused to document the source of his capital.

§ 79.12(d) Restrictions on Ownership as a Denial of Procedural Due Process. [Go To Main]

Add

For a discussion on Nebraska farming law and its relation to the due process law see Anthony Shutz, "Nebraska's Corporate-Farming Law and Discriminatory Effects Under the Dormant *Commerce Clause*," *88 Neb. L. Rev. 50 (2009).*

§ 79.12(e) Restrictions that Interfere with Federal Foreign Affairs Powers. [Go To Main]

Add

For further discussion, *see* Peter J. Spiro, *Foreign Affairs Law at the End of the Century. Part II: Role of the State in Foreign Affairs*, 70 U. Colo. L.R. 1223 (1999). *See also* D. Tang, *Special Concerns of Foreign Investors in Sophisticated Real Estate Transactions*, 468 PLI/Real 495 (2001).

§ 79.12(g) Preemption by Federal Statutes or Regulatory Power. [Go To Main]

Add:

Where the issue is whether the laws of foreign states rather than those of the states govern, the state law may be preempted by the laws of the foreign state. In *Wong v. Tenneco, Inc., 702 P.2d 570 (Cal 1985)* , the Mexican restrictions against foreign ownership of land in that country precluded an action by a U.S. citizen who owned farmland in Mexico against a produce broker. The court held that based upon the principles of comity, the Mexican law would govern and denied relief to both parties.

FOOTNOTES:
(n3)Footnote 199.1. For a discussion of immigrant and nonimmigrant aliens being treated as a suspect class see Adam B. Wall, "Justice for All?: The *Equal Protection Clause* and Its Not-So-Equal Application to Legal Aliens." *84 Tul. L. Rev. 759 (2010).*

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Supp. To Chapter 79 FOREIGN OWNERSHIP OF LAND

9-79 Thompson on Real Property, Thomas Editions Supp. to § 79.13

Supp. to § 79.13 Federal Statutes.

[Go To Main]

Add after statute citation:

(now repealed).

Add:

26 U.S.C.1491 has been repealed.

§ 79.13(a) The International Investment Survey Act of 1976. [Go To Main]

Add:

See Wisialowski, Thomas S., "Foreign Investments in U.S. Real Property Structuring Alternatives," Practicing Law Institute PLI order No. j0-005B (Feb. 7, 2002).

Add to note 272.

In a 2000 case, the Immigration and Naturalization Service denied a petition for preferred visa status as a foreign investor. This denial was upheld against challenges that INS abused its discretion and that the action violated the Administrative Procedures Act. The reason the petition was denied was because the alien refused to document the source of his capital. *See R.L. Investment Limited Partners v. Immigration and Naturalization Service., 86 F. Supp. 2d 1014 (2000)* .

§ 79.13(a) The International Investment Survey Act of 1976. [Go To Main]

Add:

7 U.S.C. § 3504 has been repealed.

Add:

5 U.S.C. § 552 has been repealed.

§ 79.13(b) Agricultural Foreign Investment Disclosure Act of 1978. [Go To Main]

***Add*:.7 U.S.C.**

§ 504 has been repealed.

Add:

7 U.S.C. § 3504 has been repealed.

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CHAPTER 80 THE POWER OF EMINENT DOMAIN

9-80 Thompson on Real Property, Thomas Editions 80.syn

AUTHOR: Professor David A. Thomas J. Reuben Clark Law School Brigham Young University

§ 80.syn Synopsis to Chapter 80: THE POWER OF EMINENT DOMAIN

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§ 80.01(a)(2) Distinguished from Police Power.

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§ 80.11 Bibliography.

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CHAPTER 80 THE POWER OF EMINENT DOMAIN

9-80 Thompson on Real Property, Thomas Editions § 80.01

AUTHOR: Professor David A. Thomas J. Reuben Clark Law School Brigham Young University

§ 80.01 Introduction.

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§ 80.01(a) Definition of Eminent Domain.

The term eminent domain is first found in the works of Grotius. n1

Eminent domain is the right of the sovereign to acquire title to property through the process of condemnation and is based upon the concept that the state is the ultimate owner of all realty. This sovereign power resides in and may be wielded by a federal or state government, or agency or subdivision or nominee thereof. The power of eminent domain is inherent in all sovereignties, and is defined as the right of the nation or state, or of those to whom the power has been lawfully delegated, to condemn private property for public use, and to appropriate the ownership or possession of such property for such use upon paying the owner due compensation, to be ascertained according to law. n2 Rights in real property cannot ordinarily be taken from the owner except through eminent domain. n3 When those rights are taken, however, it is somewhat equivalent to a forced sale for an amount of money equal to the value of the rights. n4 This sovereign right is vested in the people. n5

The concept of eminent domain includes nothing in the nature of contract between the landowner and the state, or the corporation to which the power is delegated; n6 it is, in effect, a compulsory sale. n7 The owner of the realty cannot prevent its taking, and the right of the public is independent of the owner's consent. n8 It is not unconstitutional for the power of eminent domain to require the acceleration of a mortgage. n9

The power to exercise eminent domain is not itself a property right and can be taken away without compensation. n10

COMPUTER-ASSISTED RESEARCH

LEXIS: "eminent domain" w/5 definition

§ 80.01(a)(1) Distinguished from Taxation Power.

It is distinguished from the power of taxation in that its exercise operates upon an individual person without reference to

what is exacted from any other person or class of persons, and without reference to a person's ability to contribute toward the necessities of government. n11

COMPUTER-ASSISTED RESEARCH

LEXIS: "eminent domain" w/20 "tax! power"

§ 80.01(a)(2) Distinguished from Police Power.

It is also distinguished from the police power, by which the state assumes to direct the use that a landowner shall make of the property so as not to interfere with the reasonable use and enjoyment by others of their property. In the exercise of eminent domain, private property is taken for a public use and the owner is compensated, while the police power regulates the owner's use and enjoyment of property or deprives the owner of the property for the public welfare, usually without compensation. n12 When police power regulation becomes too oppressive, a "regulatory taking" may be said to have occurred and compen-sation must be paid; when the state's use of its own property too adversely affects the rights of nearby landowners, a compensable taking also occurs. n13

The difference between the police power and the power of eminent domain is mostly one of degree, n14 and there is no set formula to determine where regulation ends and a taking begins. n15

The power of eminent domain is superior to zoning power, which is an exercise of police power. n16 Some courts have confused the police power and the eminent domain power. n17

COMPUTER-ASSISTED RESEARCH

LEXIS: "eminent domain" w/20 "police power"

§ 80.01(a)(3) Distinguished from War Powers.

And the power of eminent domain is further distinguished from the sovereign power to take and destroy property in the course of actual warfare; n18 in such situations the owner of the property taken or damaged is not entitled to compensation, n19 whereas the eminent domain power may be exercised only if compensation is given. Indeed, the destruction of property in wartime where necessary for the safety of the armed forces is an exercise of police power and not a taking for which compensation should be paid. n20

If property is taken for public use without compensation, the owner may claim damages for inverse condemnation. n21 To constitute inverse condemnation, the public interest must suffer if a use already attached is discontinued. n22

COMPUTER-ASSISTED RESEARCH

LEXIS: "eminent domain" w/20 "war power!"

§ 80.01(b) The Origin and Basis of the Power.

The power of eminent domain is a very ancient prerogative of the sovereign, antedating American state and federal constitutions and surviving their adoption. n23 In Anglo-American common law, the power is a logical outgrowth of the king's prerogative, which later was inherent in the fundamental conception of feudalism. n24 Eminent domain is a power reserved as an inherent attribute of sovereignty rather than a power granted to the state. n25 The power is not conferred by, but only limited by, the federal n26 and state constitutions. n27 It has been held that the power of eminent domain was originally founded on state or political necessity, but most courts now hold that its exercise can be justified

only by the public benefit, safety, necessity, convenience, or welfare. n28

The existence of the power of eminent domain and the exercise thereof are justified on the theory that the rights of individual persons must yield to the public good, and that the welfare of the state is paramount to that of the individual citizen. n29

The power of eminent domain is innate, and is not derived through conferral by a constitution. It is said to lie dormant until its use is ordered by legislative enactment. n30

COMPUTER-ASSISTED RESEARCH

LEXIS: "eminent domain" w/10 origin

§ 80.01(b)(1) Based on Sovereign Ownership of the Land.

The state power to resume possession and ownership of property, whenever the public good requires it, n31 is perhaps a natural result of William the Conqueror's asserting ultimate ownership of almost all English land following the Norman conquest, 1066-1085A.D. This rendered the sovereign state the fundamental owner of all realty, and the individual person as holder of only such rights in the land for such period of time as the sovereign permits. The power to recall such land for the benefit of the state is an essential element of sovereignty. n32

The United States may take possession of land without formal condemnation proceedings. The property owner's remedy is to determine just compensation. n33

COMPUTER-ASSISTED RESEARCH

LEXIS: "eminent domain" w/10 sovereign w/10 land

§ 80.01(b)(2) Based on Political Necessity.

The power of eminent domain is also founded on important political considerations. n34 It arises out of the conflict between the interest of the people in public projects and the principle of indemnity to the landowner. n35 It is based on the theory that all sovereignties acquire property they need in order to perform governmental functions. n36 Sovereign states have the inherent right to appropriate private property for the purpose of promoting the general welfare. n37 In this country, the power has always been recognized as a necessary but distinct right of sovereignty. n38 A state possesses the power of eminent domain for uses over which it has a sovereign right of control and regulation. n39 The right of condemnations cannot be surrendered by grant or contract, n40 since its continued exercise is essential to the existence of organized society. n41

§ 80.01(c) Limitations on the Power.

In the United States, the power of the sovereign to take private property is limited by the conditions of public purpose and just compensation, n42 imposed by the Fifth and Fourteenth Amendments of the federal constitution and by similar state constitutional provisions. The public purpose requirement is also innate in the common law.

According to one theory, the power of eminent domain may be exercised only if the land taken is for public use and even public necessity, not merely public benefit. n43 The determination of necessity can be made by the entity exercising the power, and the determination can be overturned only if arbitrary or capricious. n44

If an entity with eminent domain power attempts to take possession without first following the condemnation procedure,

no title is acquired. n45 Because the condemnation is a governmental function, the condemnor is usually entitled to immunity, even if the ultimate function served by the condemnation is a proprietary function. n46

COMPUTER-ASSISTED RESEARCH

LEXIS: "eminent domain" w/20 limitations

FOOTNOTES:
(n1)Footnote 1. Hugo Grotius, De Jure Belli et Pacis, lib. 1, c. 1 (1625).

(n2)Footnote 2. *Scott v. City of Toledo, 36 Fed. 385 (C.C.D.Ohio 1888); United States v. 4,450.72 Acres of Land, 27 F. Supp. 167 (D.Minn. 1939); Johnston v. Alabama Pub. Serv. Comm., 252 So. 2d 75 (Ala. 1971)* (eminent domain is an element of basic sovereignty antedating constitutions); *Gerson v. Howard, 21 So. 2d 693 (Ala. 1945); Brock v. City of Anniston, 14 So. 2d 519 (Ala. 1943); In re Forsstrom, 38 P.2d 878 (Ariz. 1934); Ex Parte Martin, 13 Ark. 198 (1853); Tulare Irr. Dist. v. Superior Court, 242 P. 725 (Cal. 1925)* (the suspension of the operation of an injunction pending on appeal of the case does not deprive the one in whose favor the injunction was issued of the property without due process of law and without adequate compensation); *Alfred Atmore Pope Foundation v. New York, N.H. & H. R.R., 138 A. 444 (Conn. 1927)* (a railroad causing fires in a forest adjacent to its right of way is not the taking of property for public use without compensation); *Thomison v. Hillcrest Athletic Ass'n, 5 A.2d 236 (Del. Super. 1939); Yellowstone Pipe Line Co. v. Drummond, 287 P.2d 288 (Idaho 1955)* (taking prior to trial held unconstitutional); *Department of Pub. Works & Bldgs. v. Diggins, 27 N.E.2d 826 (Ill. 1940); Limits Indus. Ry. v. American Spiral Pipe Works, 151 N.E. 567 (Ill. 1926)* (the owner must receive a just compensation for the property taken); *Litchfield & M. Ry. v. Alton & S. Ry., 137 N.E. 248 (Ill. 1922)* (eminent domain is the power of a sovereign to take or to authorize the taking of private property within its jurisdiction for public use without the owner's consent; it is essential to the exercise of the power that the property be taken for a public and not a private use and any legislation that attempts to grant the right to take private property for private use is void); *Western Union Tel. Co. v. Louisville & N. R. Co., 110 N.E. 583 (Ill. 1915); Board of Comm'rs of Hamilton County v. Blue Ribbon Ice Cream & Milk Corp., 109 N.E.2d 88 (Ind. 1952); Southern Ind. Gas & Elec. Co. v. Boonville, 20 N.E.2d 648 (Ind. 1936)* (the power of eminent domain is superior to all property rights and extends to all property within the jurisdiction of the state, and every contract whether made between the state and an individual or between individuals only must yield to it whenever the necessity for its exercise occurs); *Glover v. State Hwy. Comm'n, 77 P.2d 189 (Kan. 1938); Bell's Comm. v. Board of Educ., 234 S.W. 311 (Ky. 1921); Riden v. Philadelphia, B. & W. R.R., 35 A.2d 99 (Md. 1943); New England T. & T. Co. v. Department of Pub. Utils., 159 N.E. 743 (Mass. 1928)* (the property of a public service corporation cannot be taken without compensation, nor its rights of management be unreasonably curtailed under the guise of supervision, regulation, and control); *In re Petition of Detroit (Airport Site), 14 N.W.2d 140 (Mich. 1944); In re Kansas City Ordinance No. 39946, 252 S.W. 404 (Mo. 1923)* (the taking for public use when applied to land is not limited to actual occupation by the public); *State Dep't of Roads v. Dillon, 121 N.W.2d 798 (Neb. 1963); State ex rel. Nelson v. Butler, 17 N.W.2d 683 (Neb. 1945); Schrader v. Third Judicial Dist. Court, 73 P.2d 493 (Nev. 1937); Sundeen v. Rogers, 141 A. 142 (N.H. 1928)* (under the law of eminent domain no one is entitled to compensation for injuries, however serious they may be, caused by public improvements, if no part of the land or property is taken therefor); *People ex rel. New York, O. & W. R.R. v. State Tax Comm'n, 191 N.Y.S. 464 (1921)* (a state legislature has the power to appropriate by force of its own enactment any flowing stream to the use of the public as a highway, subject, however, to the qualification that if a stream is, in fact, not navigable, a statute declaring it to be navigable will not make it so in law against the pre-existing right of riparian owners unless compensation is paid to such owners for the value of the right so destroyed or injured); *Virginia Elec. & Power Co. v. King, 130 S.E.2d 318 (N.C. 1963); Griffith v. Southern Ry., 131 S.E. 413 (N.C. 1926)* (eminent domain is the right of the state or of the person acting for the state to use, alienate, or destroy the property of a citizen for the ends of public utility or necessity; the power is one of the highest attributes of sovereignty and the extent of its exercise is limited to the express terms or necessary implications of the statute delegating the power); *Jacobson v. State, 278 N.W. 652 (N.D.1936); Blackman v. Cincinnati, 42 N.E.2d 158 (Ohio 1940); Eichman v. Oklahoma City, 202 P. 184 (Okla. 1921)* (eminent domain is an attribute of sovereignty exercised for a variety of purposes, some of which are for governmental

uses, either by the state at large, or by local municipal bodies or by private persons or corporations authorized to exercise some function of a public character, technically known as "public use"; it is the right retained by the people or government over the real estate of individual parties to reclaim the same for the public good; but in no case may the right be exercised without making just compensation to the owner of the property); *Groff v. Bird-in-Hand Tpk. Co., 18 A. 431 (Pa. 1889); State v. Hale, 146 S.W.2d 731 (Tex. 1941); Brazos River Conserv. & Reclamation Dist. v. Harmon, 178 S.W.2d 281 (Tex. App. 1944); Holderbaum v. Hidalgo County Water Imp. Dist., 297 S.W. 865 (Tex. App. 1927)* (in the case of a taking of property under the power of eminent domain the owner must be compensated before the act of taking, while in the case of trespass or of damage or destruction of the property the act may precede the compensation; in this case the property was damaged or destroyed by seeping of water from an irrigation canal); *Williams v. Hudson, 262 N.W. 607 (Wis. 1935); Muscoda Bridge Co. v. Worden-Allen Co., 219 N.W. 428 (Wis. 1928). See* Raymond F. Rice, *Eminent Domain From Grotius to Gettysburg, 53 ABA J. 1039 (1967);* Gerald Corbett Parker, *Eminent Domain in North Carolina -- A Case Study, 35 N.C. L. Rev. 296 (1957).*

See also Osage Water Co. v. Miller County Water Auth., Inc., 950 S.W.2d 569 (Mo. App. 1997) (holding "eminent domain is the power to take property for public use and is an inherent power of the state"); *Boise Cascade Corp. v. Board of Forestry, 935 P.2d 411,* (Or. 1997) (holding that eminent domain is the power inherent in a sovereign state of taking or of authorizing the taking of any property within its jurisdiction for a public use or benefit); *Cohen v. City of Hartford, 710 A.2d 746 (Conn. 1998).* (The 5th Amendment requires that just compensation be paid when any permanent, physical occupation of property occurs, regardless of how tiny the invasion or how great the purpose behind the taking).

(n3)Footnote 3. *Chesarone v. Pinewood Bldrs., 196 N.E.2d 713 (Mass. 1962); Gergosian v. Union Realty Co., 193 N.E. 726 (Mass. 1935).*

(n4)Footnote 4. *United States v. Becktold Co., 129 F.2d 473 (8th Cir. 1942); Beeland Wholesale Co. v. Kaufman, 174 So. 516 (Ala. 1937).* The destruction of private property rights through governmental act makes police power rules applicable, but when private property rights are taken from the individual and given to the public, eminent domain principles apply. *Hageman v. Board of Trustees of Wayne Twp., 251 N.E.2d 507 (Ohio 1969).* Destruction of a private right is an exercise of the police power but a transfer of a right from a private person to the public is an exercise of eminent domain. *Ackerman v. Port of Seattle, 348 P.2d 664 (Wash. 1960).* Police power exercised does not require compensation. *Horne v. City of Cordele, 230 S.E.2d 333 (Ga. App. 1976); Simpson Timber Co. v. Department of Revenue, 953 P.2d 366 (Or. 1998)* (condemnation is basically a forced sale of property).

(n5)Footnote 5. *Dennis Long & Co. v. Louisville, 32 S.W. 271 (Ky. 1895); Board of Health v. Van Hoesen, 49 N.W. 894 (Mich. 1891); Tacoma v. Nisqually Power Co., 107 P. 199 (Wash. 1910).*

(n6)Footnote 6. *Haig v. Wateree Power Co., 112 S.E. 55 (S.C. 1922).*

(n7)Footnote 7. *United States v. Becktold Co. 129 F.2d 473 (8th Cir. 1942); Albuquerque v. Huning, 225 P. 580 (N.M. 1924); Haig v. Wateree Power Co., 112 S.E. 55 (S.C. 1922).*

(n8)Footnote 8. *St. Paul Trust & Sav. Bank v. American Clearing Co., 291 F. 212 (S.D.Fla. 1923); United States v. Certain Parcels of Land, 44 F. Supp. 936 (S.D.Cal. 1942); State v. Johnson, 254 P. 61 (Okla. 1927).*

(n9)Footnote 9. And the mortgagee is not entitled to further interest after payment of the award. *Shavers v. Duval County, 73 So. 2d 684 (1954).*

(n10)Footnote 10. *United States ex rel. T.V.A. v. Powelson, 319 U.S. 266 (1943).*

(n11)Footnote 11. *Cumnock v. Alexander, 213 S.W. 767.* (Ark. 1919); *Aurora v. West, 9 Ind. 74 (1857); Cincinnati, W. & Z. R.R. v. Clinton, 1 Ohio St. 77 (1852).* Special assessments for betterments are also referable to the power of taxation and not that of eminent domain. *Davidson v. New Orleans, 96 U.S. 97 (1877); Hagar v. Yolo, 47 Cal.*

222 (1974); White v. People, 94 Ill. 604 (1880); Baltimore v. Green Mount Cemetery, 7 Md. 517 (1855); State v. Blake, 35 N.J.L. 208 (1871); Hill v. Higdon, 5 Ohio St. 243 (1855).

(n12)Footnote 12. *Phillips v. King County, 943 P.2d 306 (Wash. App. 1997)* (holding that the police power is a regulation and not a taking. "Whatever restraints the legislature imposes upon the use and enjoyment of property within the reason and principle of this duty, the owner must submit to, and for any inconvenience or loss which he sustains thereby, he is without remedy); *Horne v. City of Cordele, 230 S.E.2d 333 (Ga. App. 1976); Cooper v. State, 48 N.Y.S.2d 212.* (N.Y. Ct. Cl. 1944) (police power exercised does not require compensation).

(n13)Footnote 13. *Richardson v. City & County of Honolulu, 124 F.3d 1150,* (9th Cir. 1997) (holding that a police power regulation will be treated as a taking if the regulation goes too far or if the regulation does not have the right fit); *Sullivant v. City of Oklahoma City, 940 P.2d 220 (Okla. 1997)* (holding that if the use of police power sufficiently interferes with the landowner's use and enjoyment of his property to cause a taking, the landowner may collect compensation); *Gazza v. New York State Dep't of Envtl. Conservation, 657 N.Y.S.2d 555 (N.Y. 1997)* (holding that "the legitimate exercise of police power to advance the general welfare may result in the redefinition of property interests in favor of the public. It is this redefinition of a landowner's title that can serve as the basis of a takings claim"); *Dayton v. Asheville 115 S.E. 827 (N.C. 1923);* Alabama City v. Vetter (Okla. 1919) p. 473.

(n14)Footnote 14. *Fegursky v. Historic Dist. Comm'n of City of Norwich, 368 A.2d 163 (Conn. 1976).*

(n15)Footnote 15. *Goldblatt v. Hempstead, 369 U.S. 590 (1962).*

(n16)Footnote 16. *Stabler Dev. Co. v. Board of Supervisors of Lower Mt. Bethel Township, 695 A.2d 882 (Pa. Commw. Ct. 1997)* (holding that "takings" through zoning do not amount to compensable takings unless the owner's rights have been unreasonably restricted. The valid exercise of the zoning power is predicated upon its exercise for a legitimate public purpose); *Seward County Bd. of Comm'rs v. City of Seward, 242 N.W.2d 849 (Neb. 1976)*

(n17)Footnote 17. *See In re Resolution of the City of Austin, 567 N.W.2d 529 (Minn. App. 1997)* (holding that the question of whether a taking has occurred is one for the trial court to answer); *Peavy-Wilson Lbr. Co. v. Brevard County, 31 So. 2d 483 (Fla. 1947).*

See also Milagra Ridge Partners, Ltd. v. City of Pacifica, 72 Cal. Rptr. 2d 394 (Cal. Ct. App. 1998). (A regulatory taking is not established unless a developer proves that it has submitted at least one legitimate application for a feasible development project which has been denied, and that a similarly legitimate application for zoning variance has also been submitted and denied).

(n18)Footnote 18. *George v. Consolidated Lighting Co., 89 A. 635 (Vt. 1914).*

(n19)Footnote 19. *Conner v. Reed Bros., Inc., 567 So. 2d 515 (Fla. App. 1990); Lertora v. Riley, 57 P.2d 140 (Cal. 1936); Aitken v. Wells River, 40 A. 829 (Vt. 1898).*

(n20)Footnote 20. *See* Joseph Sax, *Takings and the Police Power, 74 Yale L.J. 6 (1964); Castro v. United States, 500 F.2d 436 (Ct. Cl. 1974); United States v. Caltex, Inc., 344 U.S. 149 (1952); United States v. Atlanta & Pacific R.R., 120 U.S. 241 (1887).*

(n21)Footnote 21. *Ehrlander v. States, 797 P.2d 629 (Alaska 1990); Hamer v. State Hwy. Comm'n, 304 S.W.2d 869 (Mo. 1957); Grunwaldt v. Modern Wrecking Co., 118 N.W.2d 188 (Wis. 1962); Bellon v. Monroe County, 577 N.W.2d 877 (Iowa Ct. App. 1998).* (When no condemnation proceedings have been instituted, an injured landowner acquires just compensation through an inverse condemnation action).

(n22)Footnote 22. *Hiji v. City of Garnett, 804 P.2d 950 (Kan. 1991); Cothran v. San Jose Water Works, 375 P.2d 449 (Cal. 1962).*

(n23)Footnote 23. *City of Ocala v. Nye, 608 So. 2d 15 (Fla. 1992); Duerson v. East Ky. Power Co-op, Inc., 843 S.W.2d 340 (Ky. App. 1992); Fifth Ave. Coach Lines, Inc. v. New York City, 229 N.Y.S.2d 400 (1962); Haig v. Wateree Power Co., 112 S.E. 55 (S.C. 1922)* (it is one of the unwritten laws of all civilized nations). *See Fountain Park Co. v. Hensler, 155 N.E. 465 (Ind. 1927).*

(n24)Footnote 24. 2 BL. Comm. 408, 409. *See George v. Consolidated Lighting Co., 89 A. 635 (Vt. 1916).*

(n25)Footnote 25. *Evans v. Smyth-Wythe Airport Comm'n, 495 S.E.2d 825 (Va. 1998).* (The power of eminent domain is an inherent power vested in the sovereign); *Sullivan v. Ulysses, 932 P.2d 456 (Kan. App. 1997)* (holding that "the State has inherent powers of eminent domain"); *Osage Water Co. v. Miller County Water Auth., Inc. 950 S.W.2d 569 (Mo. App. 1997)* (holding that "eminent domain ... is an inherent power of the state"); *Nature Conservancy v. Kolb, 853 S.W.2d 864 (Ark. 1993); Shavers v. Duval County, 73 So. 2d 684 (1954).*

(n26)Footnote 26. United States v. 0.95 Acres, 994 F.2d 696 (9th Cir. 1993); *Smith v. Cameron, 210 P. 716 (Or. 1922).*

(n27)Footnote 27. *Fort Leavenworth R.R. v. Lowe, 114 U.S. 525 (1885); United States v. Jones, 109 U.S. 513 (1883); United States v. Federal Land Bank of St. Paul, 127 F.2d 505 (8th Cir. 1942); Gerson v. Howard, 21 So. 2d 693 (Ala. 1945); Young v. Gurdon, 275 S.W. 890 (Ark. 1925); Rose v. State, 123 P.2d 505 (Cal. 1942); Sholl v. German Coal Co., 10 N.E. 199 (Ill. 1887); Fountain Park Co. v. Hensler, 155 N.E. 465 (Ind. 1927); Central Branch U. P. R.R. v. Atchison, T. & S.F. R.R., 28 Kan. 453 (Kan. 1882); Riden v. Philadelphia, B. & W. R.R., 35 A.2d 99 (Md. 1943); Hendershott v. Rogers, 211 N.W. 905 (Mich. 1927); In re Niagara Lockport & Ontario Power Co., 210 N.Y.S. 748 (1925);* In re Waterfront Imp. in *Borough of Richmond, City of New York, 194 N.Y. 857 (N.Y. App. Div. 1922); Greensboro Redev. Comm'n v. Hagins, 128 S.E.2d 391 (N.C. 1962); City of Tulsa v. Richmond, 253 P. 279 (Okla. 1926); Smith v. Cameron, 210 P. 716,* (Or. 1922); *Trustees of New Pulaski Cemetery v. Ballentine, 271 S.W. 38 (Tenn. 1925); Miller v. City of Tacoma, 378 P.2d 464 (Wash. 1963); State by State Road Comm'n v. Boggess, 126 S.E.2d 26 (W. Va. 1962).* In Texas the right to take land for public use must come from some constitutional power which authorizes the taking of private property. *Black v. State, 253 S.W. 576 (Tex. App. 1923).*

(n28)Footnote 28. *Chappell v. United States, 160 U.S. 499 (1986).*

(n29)Footnote 29. *Department of Hwys. v. Southwestern Elec. Power Co., 145 So. 2d 312 (La. App. 1961); see State Constitutional Limitations on the Power of Eminent Domain, 77 Harv. Law. Rev. 717 (1964);* Roy Rutland, Jr., *Eminent Domain Litigation in Texas, 17 Baylor L. Rev. 168 (1965); Todd v. Rogers, 198 N.W. 945 (Mich. 1924); People ex rel. Horton v. Prendergast, 222 N.Y.S. 29 (1927); Spencer v. City of Portland, 235 P. 279 (Or. 1925); Haig v. Wateree Power Co., 112 S.E. 55 (S.C. 1922); Trustees of New Pulaski Cemetery v. Ballentine, 271 S.W. 38 (Tenn. 1925).*

(n30)Footnote 30. *City of Prior Creek v. Public Serv. Co. of Okla., 536 P.2d 343 (Okla. 1975).*

(n31)Footnote 31. *United States v. Jones 109 U.S. 513 (1883); Board of Health v. Van Hoesen, 49 N.W. 894 (Mich. 1891); Antl v. State, 19 N.W.2d 77 (Minn. 1945); New York City Hous. Auth. v. Muller, 279 N.Y.S. 299 (1935); Healy Lumber Co. v. Morris, 74 P. 681 (Wash. 1903). See* Julius L. Sackman, *The Right to Condemn, 29 Alb. L. Rev. 177 (1965);* Frank M. Covey, *French Law of Eminent Domain, 35 N.D.L. Rev. 209 (1959);* Donald Heaney, *New Eminent Domain Law and the Wisconsin Practitioner,* Wis. L. Rev. 430 (1960).

See also James B. M. McNally & Bernard L. Bermant, *Eminent Domain Symposium, 54 Iowa L. Rev. 737 (1969);* John J. Ghinger, Jr. & John J. Ghinger, III, *A Contemporary Appraisal of Condemnation in Maryland, 30 MD. L. Rev. 301 (1970);* Arvo Van Alstyne, *Symposium: Eminent Domain, 20 Hastings L.J. 431 (1969); See* James B. M. McNally & Bernard L. Berman, *The Necessity for One Statewide Eminent Domain Act, 39 Brooklyn L. Rev. 265 (1972);* Johnnie M. Haley, *Mississippi Eminent Domain Law, 44 Miss L.J. 692 (1973).*

(n32)Footnote 32. *James v. Dravo Contracting Co., 302 U.S. 134,* (power inherent in United States) (1937); *Blanton v. Fagerstrom, 31 So. 2d 330 (Ala. 1947); Codd v. McGoldrick Lumber Co., 279 P. 298 (Idaho 1929); Leonard v. Autocar Sales & Serv. Co., 64 N.E.2d 477 (Ill. 1945), cert. denied, 327 U.S. 804 (1946); City of Mesa v. Salt River Project Agric. Imp. & Power Dist., 373 P.2d 722 (Ariz. 1962); Evans v. Smyth-Wythe Airport Comm'n, 495 S.E.2d 825 (Va. 1998).* (The power of eminent domain is an inherent power vested in the sovereign).

(n33)Footnote 33. *United States v. Holmes, 414 F. Supp. 831 (D.Md. 1976).*

(n34)Footnote 34. *City of Bozeman v. Vaniman, 869 P.2d 790 (Mont. 1994).* In every political sovereign community there inheres necessarily the right and duty of guarding its own existence and protecting the interests and welfare of the community at large. This power and this duty are to be exerted not only in the highest acts of sovereignty and in the internal relations of government, but also the interior policy and relations of social life which should be regulated with reference to the advantage of the whole society. This power denominated "eminent domain" of the state is, as its name imports, paramount to all private rights vested under the government held in subordination to this power and must yield in every instance to its proper exercise. *West River Bridge Co. v. Dix, 47 U.S 507 (1848); Blanton v. Fagerstrom, 31 So. 2d 330 (Ala. 1947). See also* James B. M. McNally & Bernard L. Barmant, *The Necessity for One Statewide Eminent Domain Act, 39 Brooklyn L. Rev. 265 (1972);* Madison S. Rayburn, *Legal Rights and Legal Fictions in Condemnation, 10 Hous. L. Rev. 251 (1972).*

(n35)Footnote 35. *Shelden v. United States, 7 F.3d 1022 (Fed. Cir. 1993). See* Joseph M. Cormack, *Legal Concepts in Cases of Eminent Domain, 41 Yale L. Rev. 221 (1931);* Orrin L. Helstad, *Recent Trends in Highway Condemnation Law, 1964 Wash U. L.Q. 58.*

(n36)Footnote 36. *United States v. 243.22 Acres of Land, 43 F. Supp. 561 (E.D.N.Y. 1942); Wegner v. Milwaukee Mut. Ins. Co., 464 N.W.2d 543 (Minn. App. 1990).*

(n37)Footnote 37. *Obendorf v. City & County of Denver, 900 F.2d 1434 (10th Cir. 1990); Pollard v. Hagen, 44 U.S. 212 (1845); Consumers Gas Trust Co. v. Harless, 29 N.E. 1062 (Ind. 1892); East Tenn. & V. R.R. v. Love, 40 Tenn. 63 (1859). See Police Power, Eminent Domain, and the Preservation of Historic Property, 63 Colum. L. Rev. 708 (1963).*

(n38)Footnote 38. *United States v. Acquisition of Condemned Land, 753 F. Supp. 50* (D.Puerto *Rico 1990);* Const., amends. 5, 14. *Garrow v. United States, 131 F.2d 724 (5th Cir. 1942); Brock v. Anniston, 14 So. 2d 519 (Ala. 1943); State by Burnquist v. Flach, 6 N.W.2d 805 (Minn. 1942).* Eminent domain is an inherent sovereign power limited, not conferred, by constitutional provision. *New Utrecht Realty Corp. v. New York City Transit Auth., 351 N.Y.S.2d 589 (1974).*

(n39)Footnote 39. *United States v. Certain Land, 873 F. Supp. 1050 (E.D.Mich. 1994); Shedd v. Northern Ind. Pub. Serv. Co., 188 N.E. 322 (Ind. 1934); State ex rel. State Hwy. Comm'n v. Rascher, 169 S.W.2d 941.* (Mo. 1943).

(n40)Footnote 40. *Georgia v. Chattanooga, 264 U.S. 472 (1924); Pennsylvania Hosp. v. Philadelphia, 245 U.S. 20 (1917); Long Island Water Supply Co. v. Brooklyn, 166 U.S. 685 (1897); Alabama & F. R.R. v. Kenney, 39 Ala. 307 (1864); Direct Mail Servs., Inc. v. Best, 729 F.2d 672 (Colo. App. 1984); Baltimore & H. Tpk. Co. v. Union R.R., 35 Md. 224 (1872); Mobile & O. R.R. v. Union City, 194 S.W. 572 (Tenn. 1917).* When the power of eminent domain has been delegated to a municipality by the state, the municipality has the same power as the state acting through any legally constituted authority and when the municipality has been clothed with this right by legislative enactment it cannot, by contract with a private individual, deprive itself of the right to exercise the right of eminent domain for the benefit of the public. *Herman v. Board of Park Comm'rs, 206 N.W. 35 (Iowa 1925).* To same effect, *see City of Moberly v. Hogan, 298 S.W. 237 (Mo. 1927).* Restrictive covenants contained in the dedication of an addition to a city do not affect or limit the power of the city to condemn the property for fire protection purposes. *Wynne v. Houston, 281 S.W. 544 (Tex. 1926).*

(n41)Footnote 41. *Hobgood v. Parish of E. Baton Rouge, 563 So. 2d 413 (La. 1990); Water Works Co. v. Burkhart, 41 Ind. 364 (1872).*

(n42)Footnote 42. *Dimino v. Secretary of Com., 695 N.E.2d 659 (Mass. 1998).* (The exercise of the power of eminent domain requires the payment of compensation when private property is taken).

(n43)Footnote 43. *Green v. High Ridge Assoc., 346 Md. 65, 695 A.2d 125 (Md. 1997)* (holding the statutory provisions applicable to eminent domain cases expressly provide that the property must be "needed" or "required"); *Greenwood County v. McDonald, 394 S.E.2d 325 (S.C. 1990); State v. Fortune Fed. Sav. & Loan Ass'n, 507 So. 2d 1172 (Fla. App. 1987).* Refusal to permit filling in of salt marsh was a proper exercise of police power and not a taking under eminent domain. *Sibson v. State, 336 A.2d 239 (N.H. 1975).* In Utah the state may destroy a property interest without just compensation under the police power theory (lowering street grade). *Fairclough v. State Lake County, 354 P.2d 105 (Utah 1960).* Closing of contaminated wells was a proper exercise of police power and not a taking under eminent domain. *Village of Sussex v. Department of Nat. Resources, 228 N.Y.2d 173 (1975); Smith v. Cameron, 210 P. 716 (Or. 1922). Contra* (to the *effect that "real" and "benefit" are synonymous) Nash v. Clark, 75 P. 371 (Utah 1904); Peavy-Wilson Lumber. Co. v. Brevard County, 31 So. 2d 483 (Fla. 1947).* Billboards create a road hazard sufficient to justify police power. *Schulman v. People, 176 N.E.2d 817 (N.Y. 1961).*

(n44)Footnote 44. *United States v. Carmack, 329 U.S. 230 (1946); County Comm'rs v. Schrodel, 577 A.2d 39 (Md. 1990); Board of Regents v. Palmer, 204 S.W.2d 291 (Mo. 1947).*

(n45)Footnote 45. *Del-Rio Drilling Programs, Inc. v. United States, 37 Fed.Cl. 157 (Fed. Cl. Ct. 1997)* (holding that if "the action is legally vulnerable for some reason, for example because the Government's agents acted without authority, or because the sovereign power was improperly exercised, the preferred remedy should be to reverse the action"); *Dimmock v. City of New London, 245 A.2d 569 (Conn. 1968)* (requiring a municipality to use eminent domain or purchase to acquire the right from riparian owners to divert water from a stream for storage for municipal use).

(n46)Footnote 46. *Mirshak v. Joyce, 562 F. Supp. 359 (N.D.Ill. 1987); Weast v. Budd, 349 P.2d 912 (Kan. 1960).*

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CHAPTER 80 THE POWER OF EMINENT DOMAIN

9-80 Thompson on Real Property, Thomas Editions § 80.02

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§ 80.02 The Source of Authority for the Power of Eminent Domain.

[Go To Supp]

§ 80.02(a) Inherent or Common Law Authority.

The power of eminent domain is an inherent power of sovereignty, so no constitutional or statutory source is necessary for its creation or existence. n47 Thus a state or federal government has a right to take and apply the private property of its citizens to public uses, n48 subject to the condition that just compensation therefor be paid. n49 Even though the eminent domain power itself is inherent, the authority for specific applications or exercise of the power may still require direction from constitutional or statutory provisions.

COMPUTER-ASSISTED RESEARCH

LEXIS: "eminent domain" w/20 "common law"

§ 80.02(a)(1) Eminent Domain Power in the States.

Each of the states holds this power as an attribute of the state's sovereignty, and the power is independent of constitutional or statutory expression; n50 with this power a state may even take lands of the federal government that are located within the state. n51

§ 80.02(a)(2) Eminent Domain Power in the Federal Government.

The federal government also has an inherent power of eminent domain that may be used in exercises of the government's own constitutional purposes and powers. n52 What the proper purposes may be for exercise of eminent domain power by the federal government is to be determined by federal law, not state law. n53 Just as a state may exercise its power of eminent domain to take federal land, so may the federal government condemn lands owned by a state or one of its political subdivisions. n54

§ 80.02(b) Constitutional or Statutory Authority.

According to the prevailing view, the inherent eminent domain power of the state necessarily lies dormant until legislative action specifies the occasions, modes, conditions and agencies for exercise of the power; n55 only when the state legislatively determines that a public purpose exists requiring use of the eminent domain power can the power be actually applied. n56

Another view holds that the eminent domain power, being inherent in the sovereign, may also be exercised without statutory authority, and that such statutory provisions as are made to apply to the power are in fact in derogation of and restrictions upon the power. n57

Whether eminent domain legislation is viewed as affirmatively authorizing exercise of the condemning power or simply limiting an inherently broad power, n58 states, considering themselves as governments of limited powers, have traditionally taken a restrained approach toward exercise of the power. The restraint is usually manifested by a strict construction of the enabling statutes themselves, n59 as if they were the ultimate source of the power rather than merely defining its exercise. The early common law reflected this attitude with the rule that the power of condemnation is a harsh remedy, and that the statutes authorizing its exercise are in derogation of the common law and should be strictly construed. n60 Thus the common law rule was that the right to exercise the power of eminent domain would not be extended beyond, and must conform in every respect to, the statutory authority. n61 Despite this common law rule, some courts have held for a liberal construction of eminent domain statutes, n62 and others hold that a rule of strict interpretation properly applies only to those statutes defining delegations of the power. n63

§ 80.02(b)(1) Constitutional Limitations.

The 5th Amendment to the federal Constitution imposes three limitations on exercise of the eminent domain power over private property: the power is to be exercised by means of a taking; just compensation must be paid for any taking; and the taking must be only for public use. n64 The state constitutions impose similar limitations, n65 and most also require that the compensation be paid or secured before the property is taken. n66

Both constitutional and statutory authority must be present to sustain an exercise of the eminent domain power. If the power can be exercised only according to the law of the land and with due process of law, the valid statute constitutes the law of the land n67 and its proper and orderly execution constitutes due process of law. n68 When the legislature determines which projects are appropriate for exercise of the eminent domain power, the legislature is acting within its constitutional authority. n69

Other issues may arise within the sphere of constitutional governance of eminent domain. A constitutional right to jury trial does not require jury trials for condemnation proceedings, n70 although some states authorize jury trials to determine compensation amounts. The presence of condemnation authority does not limit the state's right to obtain property rights by means of prescriptive easement or adverse possession, n71 although this view has been questioned. n72 The constitution is a guarantee that compensation will be paid for a taking, n73 so a claim in federal court for a taking by the federal government may be based either on implied contract to pay n74 or directly on the 5th Amendment to the constitution itself. n75 The 5th Amendment does not require payment in advance of the taking. n76 The payment provisions of the federal and state constitutions are considered self-executing, requiring no additional statutory authority either to waive govern-mental immunity or to create the remedy. n77 Condemnation to anticipate future needs and to reduce future costs of eminent domain has been held unconstitutional, n78 although contrary authority exists. n79

§ 80.02(b)(2) Statutory Limitations.

When the power of domain is exercised, it is done so by legislative authority. The legislature may exercise this power either directly n80 or by delegation. To exercise the power directly, the legislature may by enactment specify the property required and the use to which it is to be devoted. n81 Such an enactment is considered the law of the land and no further finding or adjudication on the matter is required, unless additional requirements are imposed by the

constitution of that jurisdiction. n82

If the power is delegated to an agency or subordinate governmental entity, n83 the exercise remains subject to control and regulation by the legislature. n84 A state or its agency may acquire property by eminent domain for public use or authorize a private person to so acquire property, if the property is to be dedi-cated to a public use. A private business which is given the power of eminent domain is obligated to serve the public without discrimination and at a reasonable rate. n85 A state may delegate the right to exercise eminent domain power to other agencies performing public service; if such agency is a private corporation, its duties must be of such a public nature as to make it expedient for the corporation to possess such power. n86 Accordingly, the power of eminent domain may be conferred upon municipal corporations n87 and political subdivisions such as counties, n88 drainage and water districts, n89 public utility districts, n90 school districts, n91 and also public officials, boards and commissions. n92 Valid delegations have also been made to private corporations, n93 railroads, n94 foreign corporations, n95 and even some private persons. n96 However delegated, the power remains primarily and immediately the act of the state; delegees of the power are but agents of the state. n97

The power of eminent domain may also be delegated by a general act which confers the power upon any parties complying with the conditions for the delegation. n98 The legislature may declare the purpose for which property may be taken and delegate to other persons or agencies the power of actually selecting the property. n99 At the federal level, those determinations have been held not subject to judicial review. n100

When the state has reached a decision to exercise the power of eminent domain, it is free to choose the means for exercising that power, if that means effectively provides for ascertaining just compensation for the owner. n101 The legislative authority, of course, has the power to revoke or change a statutory delegation. n102

Once a valid delegation of the power has been made, the delegee may exercise the power without judicial interference or control, unless to curb an abuse of the power. n103 The courts usually will not enjoin a corporation from condemning land for a public purpose on the ground that the corporation was irregularly organized, n104 nor will they, in many jurisdictions, allow the legality of the incorporation of a de facto company to be questioned in condemnation proceedings. n105 Some contrary authority exists. n106 A landowner is usually not permitted to prove that a private corporation with delegated eminent domain power was not organized for a public use. n107

§ 80.02(b)(3) Inverse Condemnation Compared.

A direct or indirect taking of a private interest in property by an agency of the government without legal proceedings is a de facto taking and leads to compensable inverse condemnation. n108 Where an action by the sovereign injures real property without there being an actual physical invasion, the question of inverse condemnation arises, and the term regulatory taking is often applied to that situation.

COMPUTER-ASSISTED RESEARCH

LEXIS: "eminent domain" w/20 "inverse condemnation"

FOOTNOTES:

(n1)Footnote 47. *Pepper v. King County, 810 P.2d 527 (Wash. App. 1991); Gohld Realty Co. v. Hartford, 104 A.2d 365 (Conn. 1954); Reter v. Davenport, R.I. & N.W. R.R., 54 N.W.2d 863 (Iowa 1952); State ex rel. Eastvold v. Superior Court, 269 P.2d 560 (Wash. 1954).* The power of eminent domain is an essential attribute of sovereignty. *County of Freeborn v. Bryson, 210 N.W.2d 290 (Minn. 1973); See* Robert E. Phay, *The Eminent Domain Procedure of North Carolina: The Need for Legislative Action, 45 N.C. L. Rev. 587 (1967).*

(n2)Footnote 48. *Adirondack R. Co. v. New York, 176 U.S. 335 (1900); United States v. Jones, 109 U.S. 513*

(1883); Mississippi & Rum River Boom Co. v. Patterson, 98 U.S. 403 (1878); United States v. .8688 *Acre of Land, 42 F. Supp. 91 (E.D.S.C. 1941); Brock v. Anniston, 14 So. 2d 519 (Ala. 1943); Steel v. Madison, 3 So. 761 (Ala. 1888); Rose v. State, 123 P.2d 505 (Cal. 1942); Moran v. Ross, 21 P. 547 (Cal. 1889); Joint Ventures, Inc. v. Department of Transp., 563 So. 2d 622 (Fla. 1990); Sanitary Dist. v. Manasse, 42 N.E.2d 543 (Ill. 1942); Southern Ind. Gas & Elec. Co. v. Boonville, 20 N.E.2d 648 (Ind. 1939); State v. Pollitt, 45 N.E.2d 480 (Ind. 1942); Liddick v. Council Bluffs, 5 N.W.2d 361 (Iowa 1942); Sisson v. Buena Vista, 104 N.W. 454 (Iowa 1905); Hobgood v. Parish of E. Baton Rouge, 563 So. 2d 413 (La. App. 1990); Antl v. State, 19 N.W.2d 77 (Minn. 1945); State ex rel. Nelson v. Butler, 17 N.W.2d 683 (Neb. 1945); Trustees of Phillips Exeter Acad. v. Exeter, 11 A.2d 569 (N.H. 1940); Oklahoma City v. Local Fed. Sav. & Loan Ass'n, 134 P.2d 565 (Okla. 1943); Byrd Irr. Co. v. Smythe, 146 S.W. 1064 (Tex. App. 1912);* Wayne County Court, *W. Va. v. Louisa & Fort Gay Bridge Co., 46 F. Supp. 1 (S.D.W. Va. 1942). See* the following cases: *State ex rel. Hwy. Comm'n v. Gordon, 36 S.W.2d 105 (Mo. 1931); State v. Aitchison, 30 P.2d 805 (Mont. 1934); Hennen v. State ex rel. Short, 267 P. 636 (Okla. 1928); McInnis v. Brown County Water Imp. Dist. No. 1, 41 S.W.2d 741 (Tex. App. 1931); Muscoda Bridge Co. v. Worden-Allen Co., 219 N.W. 428 (Wis. 1928); see* Samuel L. Samuel, *State and Federal Power of Eminent Domain, 4 Geo. Wash. L. Rev. 130 (1935); West Penn. Power Co. v. Pennsylvania Pub. Util. Comm'n, 184 A.2d 143 (Pa. Super 1962)* (denying the right of eminent domain where an electric transmission line would create a hazard to the use of the farm). Denying on the ground of sovereign immunity the right to bring inverse condemnation. *State v. Parker, 368 P.2d 585 (Utah 1962), overruled* in 1990. *See* Terri Calvani, *Eminent Domain and the Environment, 56 Cornell L. Rev. 651 (1971).*

(n3)Footnote 49. *Russian Volunteer Fleet v. United States, 282 U.S. 481 (1931); Schertel v. Rex, 764 F. Supp. 1002 (E.D.Pa. 1991); Love v. United States, 141 F.2d 981 (8th Cir. 1944); Brown v. State, 5 N.E.2d 527 (Ind. 1937); State ex rel. Peterson v. Bentley, 12 N.E.2d 347 (Minn. 1943); Moose v. Carson, 10 S.E. 689 (N.C. 1889); Hammer v. Department of Roads, 120 N.W.2d 909 (Neb. 1963)* (the only limitation on the power of eminent domain is the requirement of just compensation).

(n4)Footnote 50. *Mississippi & Rum River Boom Co. v. Patterson, 98 U.S. 403 (1878); Reter v. Davenport R.I. & N.W. R.R., 54 N.W.2d 863 (Iowa 1952); Riden v. Philadelphia, B. & W. R.R., 35 A.2d 99 (Md. 1943); Wegner v. Milwaukee Mut. Ins. Co., 479 N.W.2d 38 (Minn. 1991); Board of Regents v. Palmer, 204 S.W.2d 291 (Mo. 1947); Peters v. Reading, 184 A. 23 (Pa. 1936); Winona & St. P. R.R. v. Watertown 56 N.W. 1077 (S.D.1893); State v. Superior Court, 137 P. 994 (Wash. 1914).* An entity which has the authority to acquire property by eminent domain cannot alienate or terminate such authority. *Waynesburg & S. R.R. v. Lemley, 178 S.E.2d 833 (W. Va. 1970).*

(n5)Footnote 51. *South Dakota v. United States Dep't of Interior, 69 F.3d 878 (8th Cir. 1995);* United States v. Railroad Bridge Co., Fed. Cas. No. 16114, 6 McLean 517 (C.C.D.Ill. 1855).

(n6)Footnote 52. *Chappell v. United States, 160 U.S. 499 (1896); United States v. Gettysburg Elec. R.R. 160 U.S. 668 (1896); United States v. Jones, 109 U.S. 513 (1883); Kohl v. United States, 91 U.S. 367 (1875); Multi-Channel T.V. Cable Co. v. Charlottesville Quality Cable Corp, 65 F.3d 1113 (4th Cir. 1995); United States v. 60,000 Square Feet of Land, 53 F. Supp. 767 (N.D.Cal 1943); Stubbs v. United States, 21 F. Supp. 1007 (M.D.N.C. 1938); United States v. First Nat'l Bank, 250 F. 299 (D.C. Ala. 1918); United States v. Oregon R.R. & Nav. Co., 16 F. 524 (C.C. Or. 1893); Nahant v. United States, 136 F. 273 (1st Cir. 1805); Stubbs v. Derby Tpk. Co. v. Parks, 10 Conn. 522 (1835); Cotten v. County Comm'rs, 6 Fla. 610 (1856); Macon & W.R. Co. v. Davis, 13 Ga. 68 (1853); Challis v. Atchison, T.& S. F. R.R., 16 Kan. 117 (1876); Durham v. Lewiston, 4 Me. 140 (1926); Central R.R. v. Hetfield, 29 N.J.L. 206 (N.J. 1861); Columbia Gas Transmission Corp. v. An Exclusive Nat. Gas Storage Easement, 747 F. Supp. 401 (N.D.Ohio 1990); Yancy v. Yancy, 5 Heisk (52 Tenn) 353 (1871); Danville v. Pace, 25 Gratt 1 (Va. 1874); State ex rel. Bremerton Bridge Co. v. Superior Court, 76 P.2d 990 (Wash. 1938); Baltimore & O. R.R. v. Pittsburgh, W. & K. R. Co., 17 W. Va. 812 (1881); Zealy v. City of Wankesha, 534 N.W.2d 917 (Wis. Ct. App. 1995).* Federal eminent domain statute has priority over zoning ordinances. *Rassi v. Trunkline Gas Co., 240 N.W.2d 49 (Ind. 1968).* Holding that the federal government cannot give a local unit of government power of eminent domain where the state itself has not done so. *Tacoma v. Taxpayers of Tacoma, 307 P.2d 567.* (Wash. 1957). *See* James M. Olson, *The Role of Fairness in Establishing a Constitutional Theory of Taking, 3 Urb. Law. 440 (1971); OroFino Consol. Mines v. United States, 92 F. Supp. 1016*

(Ct. Cl. 1950); Lester v. G.L. Tarlton Contractor, Inc., 45 F. Supp. 994 (W.D.Mo. 1942).

(n7)Footnote 53. *United States v. Acquisition of Condemned Land, 753 F. Supp. 50* (D.Puerto *Rico 1990); National R.R. Passenger Corp. v. Two Parcels, 822 F.2d 1261 (2d Cir. 1987); United States v. Certain Interests in Property, 271 F.2d 379 (7th Cir. 1959); Tuscarora Nation of Indians v. Power Auth., 257 F.2d 885 (2d Cir. 1958).*

(n8)Footnote 54. *Oklahoma ex rel. Phillips v. Atkinson Co., 313 U.S. 508 (1941); United States v. 385 Acres of Land, 61 F. Supp. 746 (E.D.Wis. 1945); Rock County v. Spire, 455 N.W.2d 763 (Neb. 1990); Sanitary & Imp. Dist. No. 1 of Fillmore County v. Nebraska Public Power Dist., 573 N.W.2d 460 (Neb. 1998)* (statute defines method for acquisition of right-of-way for electric power line and method eminent domain proceedings should follow; statute authorizes use of eminent domain power); *City of Virginia Beach v. Giant Square Shopping Center Co., 498 S.E.2d 917 (Va. 1998).* (Eminent domain proceedings should be effected in a manner that promotes the constitutional integrity of the procedure).

(n9)Footnote 55. *Dean v. County Bd. of Educ., 97 So. 741 (Ala. 1923)* (right to exercise power must be conferred by statute either by express words or by necessary implication, and is not granted by words of doubtful inference); *Cox Cable San Diego, Inc. v. Bookspan, 195 Cal. App. 3d 22 (1987); Board of Comm'rs of Bibb County v. Harris, 71 Ga. 250 (1883); Zurn v. City of Chicago, 59 N.E.2d 18 (Ill. 1945); Gillette v. Aurora Ry., 81 N.E. 1005 (Ill. 1907); Whelan v. Johnston, 6 So. 2d 300 (Miss. 1942); State of Missouri ex rel. Missouri Cities Water Co. v. Hodge, 878 S.W.2d 819 (Mo. 1994); State ex rel. State Hwy. Comm'n v. Rascher, 169 S.W.2d 941 (Mo. 1943); Little v. Loup River Pub. Power Dist., 36 N.W.2d 261 (Neb. 1949); May v. City of Kearney, 17 N.W.2d 448 (Neb. 1945); Dayton Gold & Silver Min. Co. v. Seawell, 11 Nev. 394 (1876); Township of Hillsborough v. Robertson, 614 A.2d 1374 (N.J. 1992); Abbott v. Beth Israel Cemetery Ass'n, 100 A.2d 532 (N.J. 1953); State ex rel. Red River Valley Co. v. District Court of Fourth Judicial Dist., 51 P.2d 239 (N.M. 1935); Application of Cohen, 55 N.Y.S.2d 337 (1945); In re Thompson, 33 N.Y.S. 467 (1895); City of Syracuse v. Stacey, 33 N.Y.S. 929 (1895); In re Union Elev. R.R., 21 N.E. 81 (N.Y. 1889); In re Poughkeepsie Bridge Co., 15 N.E. 601 (N.Y. 1888); Brazos River Conserv. & Reclamation Dist. v. Harmon, 178 S.W.2d 281 (Okla. 1944); Oklahoma City v. Local Fed. Sav. & Loan Ass'n, 134 P.2d 565 (Okla. 1943); GTE NW, Inc. v. Public Util. Comm'n, 900 P.2d 495 (Or. 1995); State ex rel. Olcott v. Hawk, 208 P. 709 (Or. 1922); Bridal Veil Lumbering Co. v. Johnson, 46 P. 790 (Or. 1896); Haig v. Wateree Power Co., 112 S.E. 55 (S.C. 1922); Schreiner v. City of Spokane, 874 P.2d 883 (Wash. App. 1994); Alexandria & F. R.R. v. Alexandria & W. R.R., 75 Va. 780 (1881); Varner v. Martin, 21 W. Va. 534 (1883); Highway Comm'n v. Guist, 292 N.W. 226 (Wis. 1940). See St. Louis Connected R.R. v. Blumberg, 156 N.E. 298 (Ill. 1927); Trustees of New Pulaski Cemetery v. Ballentine, 271 S.W. 38 (Tenn. 1925); School Board v. Buford, 124 S.E. 286 (Va. 1924).* The time of taking is when the condemnor interferes with any substantial right growing out of ownership. *Woodside v. City of Atlanta, 103 S.E.2d 108 (Ga. 1958); Gerson v. Howard, 21 So. 2d 693 (Ala. 1945); Brazos River Conserv. & Reclamation Dist. v. Harmon, 178 S.E.2d 281 (Tex. App. 1944); H.A. Bosworth & Son, Inc. v. Tamiola, 190 A.2d 506 (Conn. Super 1963); Reilly Tar Chem. Corp. v. St. Louis Park, 121 N.W.2d 393 (Minn. 1963).* But the nature and extent of the interest to be acquired is within the discretion of those condemning and cannot be increased or decreased by courts. *United States v. Winnebago Tribe of Neb., 542 F.2d 1002 (8th Cir. 1976); and similar: Great Baton Rouge Air Port Dist. v. Hays, 339 So. 2d 431 (La. App. 1976).* Mere fact that some other property might have been taken is not sufficient objection to eminent domain. *KEM Elec. Co-op, Inc. v. Materi, 247 N.W.2d 668 (N.D.1976); United States v. 194.08 Acres of Land, More or Less, Situated in St. Martin Parish, State of La., 135 F.3d 1025 (5th Cir. 1998)* (The Declaration of Taking Act does not provide authority to condemn property, but only codifies the procedure by which government can take possession of condemned land); *Sanitary & Imp. Dist. No. 1 of Fillmore County v. Nebraska Public Power Dist., 573 N.W.2d 460 (Neb. 1998).* (statute defines method for acquisition of right-of-way for electric power line and method eminent domain proceedings should follow; statute authorizes use of eminent domain power).

(n10)Footnote 56. *Delaware, L. & W. R.R. v. Town of Morristown, 276 U.S. 182 (1928); Bangor & P. R.R. v. McComb, 60 Me. 290 (1872); Mitton v. Wisconsin Dep't of Transp., 507 N.W.2d 126 (Wis. App. 1993).* The power of eminent domain must be specifically granted and is strictly construed. *Department of Pub. Works & Bldgs. v. Neace, 301 N.E.2d 509 (Ill. 1973).*

(n11)Footnote 57. *City of Ocala v. Nye, 608 So. 2d 15 (Fla. 1992); Fountain Park Co. v. Hensler, 155 N.E. 465 (Ind. 1927); Father Flanagan's Boys' Home v. Millard Sch. Dist., 242 N.W.2d 637 (Neb. 1976).*

(n12)Footnote 58. *See Sanitary & Imp. Dist. No. 1 of Fillmore County v. Nebraska Public Power Dist., 573 N.W.2d 460 (Neb. 1998).* (statute defines method for acquisition of right-of-way for electric power line and method eminent domain proceedings should follow; statute authorizes use of eminent domain power); *City of St. Charles, Mo. v. DeVault Management, 959 S.W.2d 815 (Mo. Ct. App. 1998)* (statutes conferring the right of eminent domain should be strictly construed by the courts); *Harness v. Arkansas Public Service Comm'n, 962 S.W.2d 374 (Ark. Ct. App. 1998)* (Eminent domain statutes should be strictly construed in favor of the owner of the condemned land); *Lehnen v. State, 693 N.E.2d 580 (Ind. Ct. App. 1998)* (Where eminent domain proceedings are statutory and a fixed procedure is set forth in the statute, that procedure should be strictly followed); *Duerson v. East Ky. Power Co-op, Inc., 843 S.W.2d 340 (Ky. App. 1992); Brazos River Conserv. & Reclamation Dist. v. Costello, 143 S.W.2d 577 (Tex. 1940).*

(n13)Footnote 59. *Delaware, L. & R.R. v. Town of Morristown, 276 U.S. 182 (1928); Nature Conservancy v. Kolb, 853 S.W.2d 864 (Ark. 1993); Peavy-Wilson Lumber Co. v. Brevard Co., 31 So. 2d 483 (Fla. 1947); A.T. & T. v. Proffitt, 903 S.W.2d 309 (Tenn. App. 1995).* Constitutional requirements demand strict construction. *Pontiac Imp. Co. Bd. of Comm'rs of Cleveland v. Metropolitan Park Dist., 135 N.E. 635 (Ohio 1922).* Strict construction of expropriation statutes as in derogation of common right to own property. *Texas Gas Transmission Corp. v. Soileau, 251 So. 2d 104 (La. App. 1971).*

(n14)Footnote 60. *Peavy-Wilson Lumber Co. v. Brevard Co., 31 So. 2d 483 (Fla. 1947); Caruthersville v. Faris, 146 S.W.2d 80 (Mo. App. 1940); Greenwood County v. Watkins, 12 S.E.2d 545 (S.C. 1940); Joyce v. School Dist. of Hudson, 487 N.W.2d 41 (Wis. App. 1992); Maxey v. Redevelopment, 353 N.W.2d 812 (Wis. App. 1984).* Eminent domain statutes as being in derogation of common law must be strictly construed. *City of Indianapolis v. Schmid, 240 N.E.2d 66 (Ind. 1968).*

(n15)Footnote 61. *City of Des Moines v. Geller Glass & Upholstery, Inc., 319 N.W.2d 239 (Iowa 1982); Reilly Tar & Chem. Corp. v. St. Louis Park, 121 N.W.2d 393 (Minn. 1963); State of Missouri ex rel. Mo. Hwy. & Transp. Comm'n v. Keeven, 895 S.W.2d 587 (Mo. 1995); State ex rel. Chesterley v. Superior Court, 144 P.2d 916 (Wash. 1944).* Still placing restraints on discretion and holding that a declaration of taking act prevented the state from reviewing necessity of taking absent clear showing of fraud, bad faith, arbitrariness or abuse of discretion in exercise of power. Arco Pipeline Corp. v. 3.60 Acres more or less, *539 P.2d 64.* (Alaska 1975); *Sanitary & Imp. Dist. No. 1 of Fillmore County v. Nebraska Public Power Dist., 573 N.W.2d 460 (Neb. 1998).* (statute defines method for acquisition of right-of-way for electric power line and method eminent domain proceedings should follow; statute authorizes use of eminent domain power).

(n16)Footnote 62. *See City of Houston v. Adams, 279 S.W.2d 308 (Tex. 1955); Brazos River Conserv. & Reclamation Dist. v. Costello, 143 S.W.2d 577 (Tex. 1940). See Alexander v. State Hwy. Comm'n, 381 P.2d 780 (Mont. 1963); Public Serv. Co. v. Shannon, 192 A.2d 608 (N.H. 1963); Sanitary & Imp. Dist. No. 1 of Fillmore County v. Nebraska Public Power Dist., 573 N.W.2d 460 (Neb. 1998).* (statute defines method for acquisition of right-of-way for electric power line and method eminent domain proceedings should follow; statute authorizes use of eminent domain power).

(n17)Footnote 63. *County of DeKalb v. Smith, 572 N.E.2d 379 (Ill. App. 1991); McCord v. Housing Auth. of Dallas, 234 S.W.2d 108 (Tex. App. 1950). Contra* eminent domain statutes are to be liberally construed in favor of the state. *Hedrick v. Graham, 96 S.E.2d 129 (N.C. 1957).*

Sanitary & Imp. Dist. No. 1 of Fillmore County v. Nebraska Public Power Dist., 573 N.W.2d 460 (Neb. 1998) (eminent domain statutes should be strictly construed); *City of St. Charles, Mo. v. DeVault Management, 959 S.W.2d 815 (Mo. Ct. App. 1998)* (statutes conferring the right of eminent domain should be strictly construed by the courts); *Harness v. Arkansas Public Service Comm'n, 962 S.W.2d 374,* Ark. App. 265 (Ark. Ct. App. 1998) (eminent domain

statutes should be strictly construed in favor of the owner of the condemned land); *Lehnen v. State, 693 N.E.2d 580 (Ind. Ct. App. 1998)* (where eminent domain proceedings are statutory and a fixed procedure is set forth in the statue, that procedure should be strictly followed).

(n18)Footnote 64. *See Hot Springs Ry. v. Williamson, 136 U.S. 121 (1890).* An act providing that no trial shall be had to recover damages for six months after roadway is completed is unconstitutional. *Catlett v. State, 336 S.W.2d 8 (Tenn. 1960). Karam v. State, Dep't of Environmental Protection, 705 A.2d 1221 (N.J. Super. Ct. App. Div. 1998)* (Taking clause does not limit government right to interfere with private property rights, but requires that compensation be paid in the event of a taking).

(n19)Footnote 65. The constitution of Washington specifically provides that private property shall not taken for private use, except for private ways of necessity, and for drains, flumes, or ditches over and across the lands of others for agricultural, domestic or sanitary purposes. *State ex rel. Huntoon v. Superior Ct., 260 P. 527 (Wash. 1927); State ex rel. Puget Sound Power & Light v. Superior Ct., 233 P. 651 (Wash. 1925).* In Alabama a private landowner has the power to condemn a right-of-way across another's land but only where there is not adequate way of ingress and egress. *Southern Ry. v. Hall, 100 So. 2d 722 (Ala. 1958).* Condemnation must be limited to reasonable necessities of the case. *Texas E. Transmission Corp. v. Wildlife Preserves, Inc., 225 A.2d 130 (N.J. 1966).* Gross abuse of eminent domain where more property is condemned than needed for a lake and the intent was to use the upper land for urban sites. *City of Wichita Falls v. Thompson, 431 S.W.2d 909 (Tex. App. 1968). See* Note, *Police Power, Eminent Domain, and the Preservation of Historic Property, 63 Colum. L. Rev. 708 (1963).*

(n20)Footnote 66. *Henderson v. Bryan, 46 F. Supp. 682 (S.D. Cal. 1942); Rudder v. Limestone County, 125 So. 670 (Ala. 1929); Arkansas State Hwy. Comm'n v. Southwestern Bell Tel., 178 S.W. 1002 (Ark. 1944); Pacific Tel. & Tel. v. Eshleman, 137 P. 1119 (Cal. 1913); Crane v. Harrison, 232 P. 578 (Idaho 1925); State by Burnquist v. Flach, 6 N.W.2d 805 (Minn. 1942); Yancey v. North Carolina State Hwy. & Pub. Works Comm'n, 22 S.E.2d 256 (N.C. 1942); Ghaster v. City of Fostoria, 152 N.E. 651 (Ohio 1926); Smith v. Cameron, 210 P. 716 (Or. 1922)* (limitation upon the power of eminent domain); *McCammon & Lang Lumber v. Trinity & Brazos V. Ry., 133 S.W. 247 (Tex. 1911); Hanks v. Port Arthur, 48 S.W.2d 944 (Tex. 1932).*

(n21)Footnote 67. *Secombe v. Milwaukee & St. P. R.R., 90 U.S. 108 (1874); Gillette v. Aurora Ry., 81 N.E. 1005 (Ill. 1907); Sisson v. Board of Sup'rs., 104 N.E. 454 (Iowa 1905); Paine v. Savage, 136 A. 664 (Me. 1927); Paris Mtn. Water Co. v. City of Greenville, 96 S.E. 545 (S.C. 1918); Alexandria & F. Ry. v. Alexandria & W. R.R., 75 Va. 780 (1881). See State by Peterson v. Severson, 261 N.W. 469 (Minn. 1935); Ramsey v. Leeper, 31 P.2d 852 (Okla. 1933). See also* Dayton D.McKean, *Constitutional Limitations upon the Power of Eminent Domain, 6 Rocky Mtn. L. Rev. 16 (1933).* But the nature and extent of the interest to be acquired is within the discretion of those condemning and cannot be increased or decreased by the courts. *United States v. Winnebago Tribe, 542 F.2d 1002 (8th Cir. 1976); and similar*: *Greater Baton Rouge Air Port Dist. v. Hayes, 339 So. 2d 431 (La. App. 1976).*

(n22)Footnote 68. *People ex rel. Horton v. Prendergast, 222 N.Y.S. 29 (1927); Joslin Mfg. Co. v. Providence, 262 U.S. 668 (1923); Rindge County v. Los Angeles County, 262 U.S. 700 (1923); Marblehead Land Co. v. Superior Ct., 217 P. 536 (Cal. App. 1923); Thompson v. City of New Haven, 124 A. 247 (Conn. 1924); Central Ill. Pub. Serv. v. Vollentine, 149 N.E. 580 (Ill. 1925); Baxter v. City of Louisville, 6 S.W.2d 1074 (Ky. 1928); Ziegel v. Bd. of Rd. Comm'rs, 216 N.W. 426 (Mich. 1927); McKeen v. City of Minneapolis, 212 N.W. 202 (Minn. 1927); May v. City of Kearney, 17 N.E.2d 448 (Neb. 1945); Landell v. State, 128 A. 380 (N.J. Super. Ct. 1925); Smith v. Cameron, 210 P. 716 (Or. 1922); Fonticello Mineral Springs Co. v. City of Richmond, 137 S.E. 458 (Va. 1927); State ex rel. Eastern Ry. & Lumber v. Super. Ct., 219 P. 857 (Wash. 1923); State ex rel. Chelan Elec. v. Super. Ct., 253 P. 115 (Wash. 1927); State ex rel. White Pine Sash Co. v. Super. Ct., 255 P. 1025 (Wash. 1927).* That the right of eminent domain is allowed to be exercised by a corporation which has clearly a major part of the head and useful flow of a stream as against a minor holder, is not such a discrimination against the minor holder as denies it equal protection of the law. An existing property right cannot be taken adversely, in whole or in part, without legal proceedings flowing from the exercise of the power of eminent domain, or otherwise, save under the police power in the case of a public emergency. *Stuart v. Gimbel*

Bros., 131 A. 728 (Pa. 1926) (uncondemned easements in street may not be impaired by temporary closing of street even though authorized by ordinance).

(n23)Footnote 69. *Courtesy Sandwich Shop v. Port of N.Y. Auth., 240 N.Y.S.2d 1 (1963).*

(n24)Footnote 70. *Backus v. Fort St. Union Depot, 169 U.S. 557 (1898); Long Island Water Supply Co. v. Brooklyn, 166 U.S. 685 (1897); Bauman v. Ross, 167 U.S. 548 (1897); Secombe v. Milwaukee & St. P. Ry., 90 U.S. 108 (1874); Board of Water Comm'rs v. Roselawn Cemetery, 165 N.W. 279 (Minn. 1917); State v. Lyle, 6 S.E. 379 (N.C. 1888).* Annotation, *How To Obtain Jury Trial in Eminent Domain -- Waiver, 12 A.L.R. 3d 7; see also Evidentiary Effect of View by Jury in Condemnation Proceedings, 1 A.L.R. 3d 1397. See* Sidney Z. Searles & Sidney O. Raphael, *Current Trends in the Law of Condemnation, 27 Fordham L. Rev. 529* (1958-59).

(n25)Footnote 71. *Boyce v. Missouri Pac. Ry., 68 S.E. 920 (Mo. 1902).*

(n26)Footnote 72. *Contrast Covert v. Pittsburgh & W. Ry., 54 A. 170 (Pa. 1903)* (adverse possession recognized) *and Branklin v. Philadelphia, N. & N.Y. R.R., 133 A. 563 (Pa. 1926).*

(n27)Footnote 73. *Hunter v. City of Mobile, 13 So. 2d 656 (Ala. 1943).* Necessity of taking is not a question for the court. *Alabama Power v. Hamilton, 342 So. 2d 8 (Ala. 1977); Dimino v. Secretary of Com., 695 N.E.2d 659 (Mass. 1998)* (the exercise of the power of eminent domain requires payment of compensation when private property is taken).

(n28)Footnote 74. *See 28 U.S.C. § 1491.*

(n29)Footnote 75. *Yearsley v. Ross Constr., 309 U.S. 18 (1940).*

(n30)Footnote 76. *Garrow v. United States, 131 F.2d 724 (5th Cir. 1942), cert. denied, 318 U.S. 765 (1943).* In Indiana, it is held that under the constitution, the state must pay just compensation for condemned real estate, but not necessarily before it is taken. *State v. Pollitt, 45 N.E.2d 480 (Ind. 1942).*

(n31)Footnote 77. *Bacich v. Bd. of Control, 144 P.2d 818 (Cal. 1943).*

(n32)Footnote 78. *Lackman v. Hall, 364 A.3d 1244 (Del. Ch. 1976).*

(n33)Footnote 79. *United States v. 1.94 Acres of Land, 51 F. Supp. 162 (M.D.Pa. 1943).*

(n34)Footnote 80. *State by Kashiwa v. Chang, 378 P.2d 882 (Haw. 1963); Burnham v. Mayor & Alderman of Beverly, 35 N.E.2d 242 (Mass. 1941); Northern Pac. R.R. v. Pioneer Fuel Co., 181 N.W. 341 (Minn. 1921); People ex rel. Horton v. Prendergast, 222 N.Y.S. 29 (1927); Raleigh Court Corp. v. Faucett, 124 S.E. 433 (Va. 1924).* Legislative opinion as to purpose of the condemnation is not reviewable by the courts. *Breiner v. City of Los Angeles, 99 Cal. Rptr. 180 (Cal. App. 1971).*

(n35)Footnote 81. *Mississippi & Rum River Boom Co. v. Patterson, 98 U.S. 403 (1878); Mims v. Macon & W. R.R., 3 Ga. 333 (1847); Genet v. City of Brooklyn, 1 N.E. 777 (N.Y. 1885); In re City of New York, 2 N.E. 642 (N.Y. 1885); Baltimore & O. R.R. v. Pittsburgh W & K. R.R., 17 W. Va. 812 (1881).*

(n36)Footnote 82. *Secombe v. Milwaukee & St. P .R.R., 90 U.S. 108 (1873); Kramer v. Cleveland & P. R.R., 5 Ohio St. 140 (1855); Alexandria & F. R.R. v. Alexandria & W. R.R., 75 Va. 780 (1881).* A defense of social utility is inconsistent with eminent domain. *Thornburg v. Port of Portland, 415 P.2d 750 (Or. 1966); Evans v. Smyth-Wythe Airport Comm'n, 495 S.E.2d 825 (Va. 1998)* (Power of eminent domain is an inherent power vested in the sovereign; because this is so, the Airport Commission cannot relinquish this power; a judgment which purports to limit the commission's power in future eminent domain proceedings is thus void).

(n37)Footnote 83. *Gilmer v. Lime Point, 18 Cal. 229 (1861); Cushman v. Smith, 34 Me. 247 (1852); Burnham v.*

Mayor & Alderman of Beverly, 35 N.E.2d 242 (Mass. 1941).

(n38)Footnote 84. *State ex rel. Nelson v. Butler, 17 N.W.2d 683 (Neb. 1945).*

(n39)Footnote 85. *Foltz v. City of Indianapolis, 130 N.E.2d 650 (Ind. 1955).* State may delegate power of eminent domain through the legislature to any public authority to be utilized as directed. *Housing Auth. of Cherokee Nation of Okla. v. Langley, 555 P.2d 1025 (Okla. 1976); State v. City of Denton, 542 S.W.2d 224.* (Tex. App. 1976).

(n40)Footnote 86. *Young v. Bunnell Cemetery Ass'n, 46 N.E.2d 825 (Ind. 1943); Browneller v. Natural Gas Pipeline Co., 8 N.W.2d 474 (Iowa 1943); Bell's Comm. v. Board of Educ., 234 S.W. 311 (Ky. 1921)* (power is delegated by legislature through a statutory enactment and such statutes are to be strictly construed, since the power will not be conferred by implication); *State ex rel. State Hwy. Comm'n v. Eakin, 357 S.W.2d 129 (Mo. 1962)* (petroleum pipelines are a public use); *State ex rel. Nelson v. Butler, 17 N.W.2d 683 (Neb. 1945); Brown v. McMorran, 241 N.Y.S.2d 483 (1963); Courtesy Sandwich Shop, Inc. v. Port of N.Y. Auth., 237 N.Y.S.2d 820 (1963); Oklahoma City v. Local Fed. Sav. & Loan Ass'n, 134 P.2d 565 (Okla. 1943); Northern Pac. R.R. v. Pioneer Fuel Co., 181 N.W. 341 (Minn. 1921); Raleigh Court Corp. v. Faucett, 123 S.E 433 (W. Va. 1939); Sease v. Spartanburg, 131 S.E.2d 683 (S.C. 1963).*

(n41)Footnote 87. *Long Beach v. Pauli, 241 P. 549 (Cal. 1925); Los Angeles v. Koyer, 192 P. 301 (Cal. App. 1920); Thompson v. New Haven, 124 A. 247 (Conn. 1924); Palmetto v. Katsch, 98 So. 352 (Fla. 1923); Avery v. Atlanta, 136 S.E. 789 (Ga. 1927); Sheppard v. Edison, 142 S.E. 535 (Ga. 1928)* (taking of property for school purposes); *Halstead v. Brazil, 147 N.E. 629 (Ind. App. 1925); Herman v. Boone, 206 N.W. 35 (Iowa 1925)* (extent of power); *Detroit v. Oakland Circuit Judge, 212 N.W. 207 (Mich. 1927); In re Duluth, 189 N.W. 937 (Minn. 1922); In re Inwood Hill Park, 220 N.Y.S. 298 (1927); Lee v. Waynesville, 115 S.E. 51 (N.C. 1922); Hartsfield v. New Bern, 119 S.E. 15 (N.C. 1923); Chapman v. Hood River, 196 P. 467 (Or. 1921); Texas & N.O. R.R. v. Beaumont, 285 S.W. 944 (Tex. App. 1926); Carstens v. Public Util. Dist. No. 1, 111 P.2d 583 (Wash. 1941)* (a municipal corporation may exercise the power beyond its boundary); *Welch v. Norfolk & W. R.R., 140 S.E. 839 (W. Va. 1927); Superior Water, Light & Power Co. v. Superior, 181 N.W. 113, 183 N.W. 254 (Wis. 1921).* A municipal corporation may be given the power to condemn property lying beyond its corporate boundaries. *Hunt Drainage Dist. v. Harness, 148 N.E. 44 (Ill. 1925)* (diversion of channel of drainage district); *Halstead v. Brazil, 147 N.E. 629 (Ind. App. 1925); Detroit v. Oakland Circuit Judge, 212 N.W. 207 (Mich. 1927); White Bear Lake v. Leuthold, 214 N.W. 930 (Minn. 1927);* but the existence of power is dependent upon statutory authority, *Detroit v. Oakland Circuit Court Judge, 212 N.W. 207 (Mich. 1927); Hardwick v. Wocott, 129 A. 159 (Vt. 1925). Compare*, however, *La Mesa Lemon Grove Irr. Dist. v. Superior Court, 238 P. 117 (Cal. App. 1925).* A statute conferring on a city the right to own or accept by gift land for a public park does not by implication or otherwise confer upon the city the power of eminent domain in order to establish a public road leading to such park. *State ex rel. McLeod v. Dist. Court, 215 P. 240 (Mont. 1927).* Statutes conferring the power of eminent domain upon municipalities are considered as being in derogation of the state's sovereignty and are strictly construed. *In re New York City, 194 N.Y.S. 857 (1922).* A city, being a creature of the state, cannot condemn land belonging to the state. *In re New York City, 194 N.Y.S. 857 (1922).* Statutes confer the power of eminent domain upon boroughs for specific and designated purposes; the purposes of the power thus conferred will not be extended to include purposes not mentioned. *In re Solar Elec. Co., 138 A. 845 (Pa. 1927).* A municipal corporation having the right of eminent domain stands no differently before the court than a private corporation holding such right, except that the municipality may, when so authorized, take land devoted to a public use, and apply it to the same use, which the private corporation cannot do. *Vermont Hydro-Elec. Corp. v. Dunn, 112 A. 223 (Vt. 1921).* The State may delegate the power of eminent domain through the legislature to any public authority to be utilized as directed. *Housing Auth. of Cherokee Nation of Okla. v. Langley, 555 P.2d 1025 (Okla. 1976); State v. City of Denton, 542 S.W. 224 (Tex. Civ. App. 1976); Charlotte v. Heath, 40 S.E.2d 600 (N.C. 1946); Burnham v. Mayor and Alderman of Beverly, 35 N.E.2d 242 (Mass. 1941); State ex rel. Northwestern Elec. Co. v. Superior Court, 183 P.2d 802 (Wash. 1947).* City may condemn land for municipal purposes though outside the city. *Hansen v. Havre, 114 P.2d 1053 (Mont. 1941).* The legislature can, however, grant this right specifically. *Narragansett Elec. Lighting Co. v. Sabre, 146 A. 777 (R.I. 1929).* A municipality and a public service company have the same power of eminent domain except that the latter cannot acquire property already devoted to a public use. *Vermont Hydro-Elec. Corp. v. Dunn, 112 A. 223 (Vt. 1921).* Municipality may be delegated the right to

condemn by the state. *Davidson v. Stough, 127 S.E.2d 762 (N.C. 1962).*

(n42)Footnote 88. *Burden v. Stein. 27 Ala. 104 (1855); Lebanon v. Public Serv. Co., 14 N.E.2d 719 (Ind. 1938); Police Jury v. Thibodeaux, 104 N.E.2d 372 (La. 1925); In re Board of Water Supply, 14 N.E.2d 789 (N.Y. 1938); Paris Mtn. Water Co. v. Greenville, 96 S.E. 545 (S.C. 1918); Adams v. Rockwall County, 280 S.W. 759 (Tex. Com. App. 1926)* (extent of power); *Conger v. Pierce County, 198 P. 377 (Wash. 1921)* (liability of county for resulting injuries); *State v. Superior Court 124 P. 127 (Wash. 1912); State ex rel. Bare v. Schinz, 216 N.W. 509 (Wis. 1927).*

(n43)Footnote 89. *East Bay Mun. Util. Dist. v. Railroad Comm'n, 229 P. 949 (Cal. 1924)* (water district); *Newberry v. Evans, 245 P. 227 (Cal. App. 1926); Hunt Drainage Dist. v. Harness, 148 N.E. 44 (Ill. 1925); Mann v. Trinity Farm Co., 270 S.W. 923 (Tex. Civ. App. 1925); State ex rel. Northwestern Elec. Co. v. Superior Court, 183 P.2d 802 (Wash. 1947). See* Richard P. Wolfe, *The Appropriation of Property for Levees: A Louisiana Study in Taking Without Just Compensation, 40 Tul. L. Rev. 233 (1966); Colberg, Inc. v. State ex rel. Dep't of Pub. Works, 62 Cal. Rptr. 401 (1967).*

(n44)Footnote 90. *State ex rel. Northwestern Elec. Co. v. Superior Court, 183 P.2d 802 (Wash. 1947).* Delegation of a power of eminent domain may be modified or withdrawn by the legislature. *County of Freeborn v. Bryson, 210 N.W.2d 290 (Minn. 1973).* Public utility must show legal necessity of exercise of power of eminent domain. *Aeroville Corp. v. Lincoln County Power Dist. No. 1, 290 P.2d 970 (Nev. 1955).* Where the utilities' charter in its grant of authority limits the proposed power line route the utility cannot later exercise eminent domain to change the route. *Aeroville Corp. v. Lincoln County Power Dist. No. 1, 290 P.2d 970 (Nev. 1955).*

(n45)Footnote 91. *In re Oronoco Sch. Dist., 212 N.W. 8 (Minn. 1927).* A power of eminent domain is an inherent attribute of sovereignty. *Anaheim Union High Sch. Dist. of Orange County v. Vieira, 51 Cal. Rptr. 94 (1966); Georgia S. & Fla. Ry. v. Duval Connecting R.R., 187 So. 2d 405 (Fla. App. 1966); City of San Antonio v. Congregation of Sisters of Charity of the Incarnate Word, Inc., 404 S.W.2d 333 (Tex. App. 1966); King County v. City of Seattle, 414 P.2d 1016 (Wash. 1966).*

(n46)Footnote 92. *Alabama Power Co. v. Gulf Power Co., 283 F. 606 (D. Ala. 1922); In re Military Training Camp, 260 F. 986 (D.Va. 1919)* (secretary of war); *Dean v. County Bd., 97 So. 741 (Ala. 1923)* (board of education); *Fulton Ferry & Bridge Co. v. Blackwood, 293 S.W. 2 (Ark. 1927); Yeshiva Torath Emeth Acad. v. University of S. Cal., 25 Cal. Rptr. 422 (1962)* (a private elementary school cannot condemn); *Waterbury v. Macken, 123 A. 5 (Conn. 1924)* (board of park commissioners); *De Witt County v. Greene, 151 N.E. 372 (Ill. 1926)* (public works department); *Herman v. Boone, 206 N.W. 35 (Iowa 1925)* (park commissioners); *Ladner v. Road Protection Comm'n, 116 So. 602 (Miss. 1928)* (board of supervisors); *Dummer Power Co. v. International Paper Co., 124 A. 556 (N.H. 1924)* (public service commission); *Black River Regulating Dist. v. Ogsbury, 196 N.Y.S. 281 (1922); Neiman v. Elmore-Harris Sch. Dist., 153 N.E. 918 (Ohio App. 1925)* (board of education); *Hennen v. State ex rel. Short, 267 P. 636 (Okla. 1928)* (highway commission); *Kerns v. Union County, 261 P. 76 (Or. 1927)* (county court); *Erie R.R. v. Public Serv. Comm'n, 114 A. 357 (Pa. 1921)* (public service commission); *Benat v. Dallas County, 266 S.W. 539 (Tex App. 1924)* (commissioner's court).

(n47)Footnote 93. *Hagans v. Excelsior Elec. Membership Corp, 60 S.E.2d 162 (Ga. 1950); Hand Gold Min. Co v. Parker, 59 Ga. 419 (1877); St. Louis Connecting R.R. v. Blumberg, 156 N.E. 298 (Ill. 1927)* (gas company); *Central Ill. Pub. Serv. Co. v. Vollentine, 149 N.E. 580 (Ill. 1925); Chicago, B. & Q. R.R. v. Abens, 137 N.E. 443 (Ill. 1922); Public Serv. Co. v. Rechtenwald, 125 N.E. 271 (Ill. 1919); In re Opinion of the Justices, 159 N.E. 55 (Mass. 1927)* (railroad company); *Essex Co. v. Commonwealth, 141 N.E. 38 (Mass. 1923)* (canal corporation); *Southern Ill. & M. Bridge Co. v. Stone, 73 S.W. 453 (Mo. 1903); People ex rel. Horton v. Prendergast, 222 N.Y.S. 29 (1927)* (bridge company); *In re Niagara, L. & O. Power Co., 210 N.Y.S. 748 (1925)* (light and power company); *State ex rel. Pressler v. Superior Court, 250 P. 466 (Wash. 1926)* (railroad company). *See Johnson v. Consolidated Gas, Elec. Light & Power Co., 50 A.2d 918 (Md. 1947).* Condemnation statute to be strictly construed against condemnor. *Northwest Quadrant Pure Waters Dist. No. 1 v. Payne Beach Ass'n, 327 N.Y.S.2d 128 (1971).*

(n48)Footnote 94. *Reter v. Davenport, R. I & N.W. R.R., 54 N.W.2d 863 (Iowa 1952); Oregon Short Line R.R. v. Denver & Rio Grande W. Ry., 237 P.2d 829 (Utah 1951).* Even to condemn right-of-way across another railroad. *Kansas City, S. & G. R.R. v. Louisiana W. R.R., 40 So. 627 (La. 1905).*

(n49)Footnote 95. *Goose Creek Lbr. Co. v. White, 294 S.W. 494 (Ky. 1927); Potter v. Gardner, 1 S.W.2d 537 (Ky. 1927)* (telephone and telegraph company). Upon the consolidation of two railroads, the railroad company formed by the consolidation succeeds to all the rights of each of the corporations of which it is composed, including the power of condemning land for railroad purposes. *Chicago, N.S.M. R.R. v. Chicago Title & Trust Co., 160 N.E. 226 (Ill. 1928).*

(n50)Footnote 96. *Clark v. Nash, 198 U.S. 361 (1904); United States v. 243.22 Acres of Land, 43 F. Supp. 561 (E.D.N.Y. 1941)* (power delegated to corporations and individuals); *Magee v. Overshiner, 49 N.E. 951 (Ind. 1898); Smith v. Cameron, 262 P. 946 (Or. 1928); State ex rel. Kirkendall v. Superior Court, 228 P. 695 (Wash. 1924)* (landowners, condemnation of way for irrigation purposes). A court of equity cannot force one owner to sell a boundary strip to an adjoining owner in absence of waiver, estoppel or inequitable conduct of owner. *Sokel v. Nickoli, 79 N.W.2d 485 (Mich. 1956).*

(n51)Footnote 97. *Reilly Tar & Chem. Corp. v. St. Louis Park, 121 N.W.2d 393 (Minn. 1963).*

(n52)Footnote 98. *Hagans v. Excelsior Elec. Membership Corp., 60 S.E.2d 162 (Ga. 1950); National Docks R.R. v. Central R.R., 32 N.J.Eq. 755 (1880).* The legislature may delegate the power to condemn to a municipality, private corporation, transportation corporation, or individual, if only the use to which the property, when condemned, is to be put, is a public use. *People ex rel. Horton v. Prendergast, 222 N.Y.S. 29 (1927).*

(n53)Footnote 99. *Gilmer v. Lime Point, 18 Cal. 229 (1861).*

(n54)Footnote 100. *United States v. 1.94 Acres of Land, 51 F. Supp. 162 (M.D.Pa. 1943).*

(n55)Footnote 101. *United States v. Jones, 109 U.S. 513 (1883); Richie v. Bar Harbor Water Co., 75 Me. 91 (1883); see* Terry Calvani, *Eminent Domain and the Environment, 56 Cornell L. Rev. 651 (1971).*

(n56)Footnote 102. *State ex rel. Olcott v. Hawk, 208 P. 709, 209 P. 607 (Or. 1922).* Valid, though seven years elapsed between condemnation and beginning of development of land. *Carlor Co. v. Miami, 62 So. 2d 897 (Fla. 1953) cert. denied, 346 U.S. 861, 74 S. Ct. 107 (1953).*

(n57)Footnote 103. *United States ex rel. T.V.A. v. Welch, 150 F.2d 613 (4th Cir. 1945); Pittsburgh, Ft. W. & C. R.R. v. Sanitary Dist. 75 N.E. 892 (Ill. 1905); Chicago & A. R.R. v. Pontiac, 48 N.E. 485 (Ill. 1897); Chicago & E. I. R.R. v. Wiltse, 6 N.E. 49 (Ill. 1886); Ellis v. Public Serv. Co., 342 N.E.2d 921 (Ind. 1976); Fifth Ave. Coach Lines, Inc. v. New York City, 229 N.Y.S.2d 400 (1962); Harkness v. Arkansas Public Service Comm' n, 962 S.W.2d 374, 60 Ark. App. 265 (Ark. Ct. App. 1998).* (Parties given the power of eminent domain have broad discretion in how it is used).

(n58)Footnote 104. *Oregon Short Line R.R. v. Postal Tel. Cable R.R., 111 F. 842 (9th Cir. 1901); Reisner v. Strong, 24 Kan. 410 (1880).*

(n59)Footnote 105. *Central Ga. R.R. v. Union Springs & N.R.R., 39 So. 473 (Ala. 1905); Cairo, T. & S. R.R. v. Arkansas Short Land, 288 S.W. 715 (Ark. 1926)* (when a corporation is organized as the statutes require, neither its purpose nor its validity is questionable, and any proceeding which challenges its right to exist must be instituted and maintained by the state under whose laws it is organized). In a proceeding for the purpose of acquiring private property for public purposes, the sole question before the assessor is the amount of compensation to be paid. In such a proceeding the assessor cannot pass upon the legal power of the company to institute such proceedings. Injunction is the proper remedy if the proceeding is unauthorized. *Rogers v. Toccoa Power Co, 131 S.E. 517 (Ga. 1926). Neimeyer v. Little Rock Junction R., 43 Ark. 111 (1884); Western Union Tel. Co. v. Louisville & N. R.R., 110 N.E. 583 (Ill. 1915); Illinois State Trust Co. v. St. Louis, I. M. & S. R.R., 70 N.E. 357 (Ill. 1904); Brown v. Calumet River R.R., 18 N.E. 283*

(Ill. 1888); Morrison v. Indianapolis & W. R.R., 76 N.E. 961 (Ind. 1906); National Docks R.R. v. Central R.R., 32 N.J. Eq. 755 (1880); Oregon Cascade R.R. v. Baily, 3 Or. 164 (1864); Twin City Power Co. v. Savannah River Elec. Co., 161 S.E. 750 (S.C. 1930). A statute relating to incorporation of cemetery associations and the exercise of eminent domain indicates the intention on the part of the legislature not only to legalize an imperfectly incorporated association, but vest the right of eminent domain in any owner of any public cemetery which has been in existence for 30 years or more, whether incorporated or not. *Young v. Bunnell Cemetery Ass'n, 46 N.E.2d 825 (Ind. 1943).*

(n60)Footnote 106. *Rogers v. Toccoa Power Co., 131 S.E. 517 (Ga. 1926); Parkside Cemetery Ass'n v. Cleveland, B. & G. L. Trac. Co., 112 N.E. 596 (Ohio 1915).*

(n61)Footnote 107. *Powers v. Hazelton & L. R.R., 33 Ohio St. 429 (1878).*

(n62)Footnote 108. *City of Lake Elsinore v. Ranel Dev. Corp., 1998 Cal. App. LEXIS 25* (holding that "eminent domain proceedings and inverse condemnation actions are merely different manifestations of the same governmental power... The substantive rights at issue in both types of actions are the same"); *Villas of Lake Jackson, Ltd. v. Leon County, 121 F.3d 610 (11th Cir. 1997)* (holding that "while the typical taking occurs when the government acts to condemn property in the exercise of its power of eminent domain, the entire doctrine of inverse condemnation is predicated on the proposition that a taking may occur without such formal proceedings"); *Odello Bros. v. County of Monterey, 73 Cal. Rptr. 2d 903 (Ct. App. 1996)* (An action for inverse condemnation may be appropriate to determine damages if private property is damaged or destroyed as a result of government activity; such an action is based on the constitutional requirement of just compensation); *Bellon v. Monroe County, 577 N.W.2d 877 (Iowa Ct. App. 1998).* (When no condemnation proceedings have been instituted, an injured landowner acquires just compensation through an inverse condemnation action).

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CHAPTER 80 THE POWER OF EMINENT DOMAIN

9-80 Thompson on Real Property, Thomas Editions § 80.03

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§ 80.03 The Requirement That the Eminent Domain Power Be Exercised for a Public Use.

[Go To Supp]

§ 80.03(a) General Rules.

The sovereign authority may exercise the right eminent domain condemnation only in order to devote the property to a public use. While it was once said that private property thus taken could not be given to another private party, that restriction is relaxed if the purpose of the taking is for a public use. The property taken must actually be used, and the use must be for public purpose. n109 Even if an owner of private property is fully compensated for a taking, the taking may not occur, unless it is for a public use. n110 A public use is a use in which the public interest is involved. n111 The constitutional authority for the public use restriction is not wholly straightforward.

COMPUTER-ASSISTED RESEARCH

LEXIS: "eminent domain" w/20 public use or purpose

§ 80.03(b) Constitutional Limitations.

The Fifth Amendment to the U.S. Constitution simply commands: "... nor shall private property be taken for public use, without just compensation." While the natural inference from this statement is that no takings, compensated or otherwise, may be for other than a public use, n112 the statement as expressed does not absolutely foreclose the possibility that takings could be for purposes other than public use. Indeed, some states have permitted takings for private benefit. n113 It has been held, however, that unless the power to condemn property for private uses has been expressly delegated by a provision in the constitution, n114 private property cannot be taken for what is only an ostensible public use, n115 or given in the first instance to a public grantee to be ultimately conveyed to a private party. n116 The words "public use" in the constitutional provisions means use by the public and not necessarily benefit to the public. n117 They imply possession, occupation, and enjoyment of the property by the public or by public agencies to be used for public purposes. n118 Condemnation to anticipate possible future needs and to reduce future costs of eminent domain is unconstitutional. n119

COMPUTER-ASSISTED RESEARCH

LEXIS: "eminent domain" w/20 public use or purpose w/20 constitution!

§ 80.03(c) "Public Use" as Interpreted by the Courts.

Courts have often referred to the meaning of "public use" in the eminent domain context as a perplexing and difficult question, n120 incapable of exact definition. n121 The meanings of both the words "public" and "use" have been thoroughly scrutinized and debated in the courts.

§ 80.03(c)(1) The Meaning of "Public Use."

The traditional, conservative approach of the meaning of "public" in "public use" has been that the property may be taken and used only by the sovereign, and not for the benefit of any private persons or even for the benefit of the citizens as a group. n122 This last distinction injects more confusion than clarity into the discussion, as illustrated by the example of condemnation for highway purposes, routinely approved as "public." n123 Some courts have also held to an even stricter standard, insisting that a taking must be for public necessity, rather than merely in the public interest. n124 A more liberal view holds that it is sufficient if there is a public purpose, which is a less exacting standard than public use. n125

For a use to be public, it is not required that all members of the public be directly benefited, n126 but the use must be available in common to all members of the public or community who choose to avail themselves of it. n127 In those states which equate public use with public benefit, it is not necessary that the whole community or any large part of it should actually use or be benefited by the property condemned. n128 Property may be condemned for a use that benefits only a small group or even a single person. n129

A use may be public even if public use is not its sole object. n130 The fact that the advantage of a particular public improvement also inures to a particular individual or group of individuals does not deprive the use of its public character. n131 However, a use or service in whose benefits only a few directly participate must still be of such a nature that it affects all as a community and not merely as individuals. n132 Thus the use of water power for the development of electricity for private domestic, mining and manufacturing purposes is a public use justifying the exercise of eminent domain. n133 It has also been held that a condemnation of private property for lease of parking facilities to private operators is for public use despite preclusion of state control over parking rates, and still subject to a privately enforceable common law duty to serve the public at reasonable rates. n134 Some state constitutions provide that any use that is necessary to complete the development of the state's material resources is a public use. n135

The use that is deemed public must be in the nature of a right. The general rule is that the general public must have the right to a definite and fixed use of the property appropriated, not as a mere matter of favor or by permission of the owner, but as a matter of right. n136 The public must have a legal right to the use, which cannot be denied or withdrawn at the pleasure of the owner. n137 The term public use pertains not only to such purposes as have to do with public health or public safety, but also includes public need and welfare. n138

§ 80.03(c)(2) Judicial Review of Legislative "Public Use" Deter-minations.

The initial determination of what is public use is within the legislative power, but that determination is subject to judicial review. n139 Not only is the legislature the proper authority for determining whether the power may or should be exercised, but that determination, when made within constitutional limits, is often held to be conclusive. n140 Other courts have held the legislative determination to be entitled to great respect, n141 but is not conclusive. n142 According to those courts, no amount of authority can change a non-public use into a public use. n143 While courts may review a legislative determination of the propriety of using eminent domain power in a particular situation, n144 the means for exercising that power is usually not subject to judicial review. n145 The exercise of the power, however, must be

reasonable, not arbitrary or capricious, and must be based on need. n146

§ 80.03(d) The Element of Necessity in Public Use.

Some jurisdictions hold that a public use also be necessary, n147 and they disa-gree over whether necessary means essential or merely useful. n148 In other words, must the condemnor establish whether the property is necessary for the public or is only expedient or reasonable. n149 If necessity is a required element in con-demnation, it is only a reasonable necessity rather than an absolute necessity. n150

In those jurisdictions where necessity is an element of public use or purpose, states differ over whether the determination of necessity is an administrative, legislative or judicial function. n151 Where this function is legislative, the legislature may empower another body, such as a public utility, to decide the question of necessity, and that is subject to judicial review only if the decision was arbitrary. However, some courts claim a fuller power to prevent abuse in the exercise of the right of eminent domain. n152 The Fourteenth Amendment does not require a hearing to determine the necessity of use in those situations. n153

COMPUTER-ASSISTED RESEARCH

LEXIS: "eminent domain" w/20 public use or purpose w/1-necess!

§ 80.03(e) Examples of Public Use.

At opposite ends of the conceptual spectrum of public use are the strict view which limits public use to actual use by the general public, and the more liberal view which equates public use with public benefit. n154 The examples of public use described in this subsection reflect those positions and positions in between.

The problem of aesthetics as a public use is present in some eminent domain takings as in some applications of police power regulation. n155 Traditionally, aesthetic purposes were not considered to be within the meaning of public use. n156 However, the removal by taking of a "public eyesore" or elimination of visual pollution are now considered public purposes in many situations. n157 A military purpose is a public use for which land may be condemned. n158 Private property may be taken for a railroad right of way, n159 for improvement of watercourses, lakes or ponds, n160 for producing and supplying electric power, n161 for school purposes, n162 and to establish or enlarge a cemetery or a public monument. n163 The establishment of an airport is a public purpose, n164 even if a municipality eventually leases its airport to a private person for a term. n165 Likewise, low-level flying over land adjacent to an airport is the taking of an easement for a public purpose, n166 although courts have disagreed over whether there can be a taking without a physical trespass. n167 The construction, maintenance, and operation of airports or landing fields is a public purpose justifying use of eminent domain power to acquire lands for such uses; n168 the public purpose is not diminished by the fact that the benefit of the facility may extend beyond the borders of the state whose eminent domain power is exercised. n169

The taking of property in furtherance of a governmental project for slum clearance and the providing of housing accommodations to be rented to a class designated as "persons of low income" or to be leased or sold to limited dividend corporations is for a public use in some courts. n170 The fact that the property taken might be resold to private parties at a later date does not prevent condemnation. n171 When land was condemned primarily to permit private development of a shopping center and air space over the parking facilities for which there would have been no public need absent the shopping center, the taking was held unconstitutional. n172 Increasingly, the courts and legislatures permit eminent domain to be used for projects that may ultimately provide indirect benefits to private parties. n173 It is common now for land to be condemned for slum clearance and then ultimately sold or leased to private parties. n174 This is rationalized in some courts by the notion that public use is determined by the manner and purpose for which the property is used, rather than who the precise grantee happens to be. n175 Other courts still resist this position. n176 And

courts are divided as to whether a condemnation for the purpose of a housing development site is a public purpose or whether it is an appropriation of one's property for the benefit of the inhabitants or the housing site. n177 Some statutes permit condemnation of a right of way for the benefit of others than the general public, n178 but a statute which permits establishment of a private road upon application of public authorities over the private land of another may be unconstitutional. n179 However, in a substantial number of states statutes now permit as a public use the condemnation of an easement to reach privately owned landlocked property. These all require the condemnor to pay for the way. n180 Courts have disagreed as to constitutionality of such statutes. n181 A public use is not limited to surface of land, but may include areas both above and below to the extent necessary. n182

§ 80.03(f) Excess Takings.

The condemning authority usually may not take more property than is necessary to meet the requirements of the approved public use. For example, a municipality that has acquired a determinable fee is usually not permitted to condemn the possibility of reverter, if that reversionary interest is in excess of the property interest that is required for the public use. n183 However, some courts have permitted a taking of excess land upon one of three theories: to protect the utility, safety and beauty of an improvement even where the excess land is sold to a private person; where the excess is merely a remnant of a parcel and is so small as to justify taking the whole; and to enable the condemnor to recoup the value of the benefits made to the property by sale to a private person. n184 Some courts take the position that an excess taking may not occur in the absence of statutory authorization, n185 and other courts view such statutes as unconstitutional. n186

The United States government, in taking by eminent domain, is not restricted to take only the land that would be actually used, but may take additional land for industrial and recreational development to be resold to private parties as demand for such land increases. n187 Thus the Tennessee Valley Authority had power to condemn land beyond that which was actually to be inundated, such excess land to be later sold to private parties for industrial and recreational purposes, pursuant to congressional determination that such acquisitions and dispositions reflected the need for the project to speed the growth of employment in the area. n188 Nevertheless, eminent domain usually cannot be employed to take private property for predominantly private use. n189

A statute authorizing a municipal authority to condemn vacant land that is unmarketable, clear the land and sell it to a private corporation for development and construction of new homes has been upheld as permitting takings for public use. n190

If only part of a parcel of land is required in the taking, the rest of the parcel usually may not be taken. It is most often the prerogative of the condemnor to determine how much property is to be taken. n191 Some jurisdictions have attempted "substitute condemnation," taking private land for private use to substitute for land condemned elsewhere. n192 Land that is sold to the state under threat of condemnation is not under the restriction of public use.

COMPUTER-ASSISTED RESEARCH

LEXIS: "eminent domain" w/20 excess w/5 taking!

FOOTNOTES:
(n1)Footnote 109. Resume of the rules adhered to in various jurisdictions in determining what constitutes public use, *Producers Pipe Line Co. v. Martin, 22 F. Supp. 44 (W.D.Ky. 1938); Heinz v. City of Davenport, 296 N.W. 783 (Iowa 1941); Fountain Park Co. v. Hensler, 155 N.E 465 (Ind. 1927); Kessler v. City of Indianapolis, 157 N.E. 547 (Ind. 1927); New York City Hous. Auth. v. Muller, 1 N.E.2d 153 (N.Y. 1936); Smith v. Cameron, 210 P. 716 (Or. 1922); Hirsch v. Block, 267 F. 614, cert. denied, 254 U.S. 640 (App. D.C. 1920).* Taking must be for a public purpose. *Brest v. Jacksonville Expressway Auth., 194 S.E.2d 914 (Fla. App. 1967).* A statute authorizing a taking for a private use was held unconstitutional. *Clemson Univ. v. First Provident Corp, 197 S.E.2d 914 (S.C. 1973); Young v. Wiggins, 126 So.*

2d 658 (S.C. 1962).

For a general discussion of "public purpose," *see* Lewis R. Mills, *Public Purpose Doctrine of Wisconsin, 1957 Wis. L. Rev. 282;* James P. White & James D.Schlosser, *Public Needs and Private Rights; Eminent Domain and Land Condemnation in North Dakota, 38 N.D.L. Rev. 36 (1962);* Michael R. Klein, *Eminent Domain: Judicial Response to the Human Disruption*, 46 J. Urb. Law 1 (1968-69); Martin J. King, *Rex Non Protest Peccare??? The Decline and Fall of the Public Use Limitation on Eminent Domain, 76 Dick. L. Rev. 266* (1971-72). If property is taken for a proper public purpose it may be permitted to revert to private ownership when the public purpose is discharged. In re Taking in Eminent Domain As Certain Parcels of Real Estate In North Side Urban Renewal Area #1, Project, Pa., R389 in the *City of Bethlehem, Northhampton County, 349 A.2d 781 (Pa. 1976).* Even though it cannot be taken for the sole purpose of being devoted to a private use. *Belovsky v. Redevelopment Auth. of Phila., 54 A.2d 277 (Pa. 1947).* No taking for private use. *City of Atlanta v. Atlanta Gas & Light Co., 240 S.E.2d 730 (Ga. App. 1977).* The legislature cannot authorize a taking for a use that is not public. *Falkner v. Northern States Power Co., 248 N.W.2d 885 (Wis. 1977).* No right of private condemnation. *Borland v. Sanders Lead Co., 369 So. 2d 523 (Ala. 1979).* No condemnation for private purposes. *Continental Enters. v. Cain, 387 N.E.2d 86 (Ind. App. 1979). See* Lawrence Berger, *The Public Use Requirement in Eminent Domain, 57 Or. L. Rev. 203 (1978); City of Charlotte v. Cook, 498 S.E.2d 605 (N.C. 1998)* (condemnation proceedings can only be instituted when the taking is for a public purpose; it is up to the courts to determine whether a taking is for a public purpose).

(n2)Footnote 110. *City of Medora v. Goldberg, 569 N.W.2d 257 (N.D.1997)* (holding that "before an authorized entity may take private property for public use, the proposed use must be authorized by law and the taking must be necessary for the public use"); *Columbia Hills Corp. v. Mercantile-Safe Deposit & Trust Co., 190 A.2d 635 (Md. 1963); Johnson City v. Cloninger, 372 S.W.2d 281 (Tenn. 1963); Vittetoe v. Iowa S. Utils. Co., 123 N.W.2d 878 (Iowa 1963);* Heinz v. City of Davenport, 296 N.W.783 (Iowa 1941); *Producers Pipe Line Co. v. Martin, 22 F. Supp. 44 (W.D.Ky. 1938); New York City Hous. Auth. v. Muller, 1 N.E.2d 153 (N.Y. 1936); Kessler v. City of Indianapolis, 157 N.E. 547 (Ind. 1927); Hirsch v. Block, 267 F. 614, cert. denied, 254 U.S. 640 (1920).* In Alabama a landowner can condemn title to an outlet to a public road over another's land if there is no reasonable adequate existing way of ingress and egress. *Southern Ry. v. Hall, 100 So. 2d 722* (dictum) (Ala. 1957). A subsequent transfer to private parties of property taken for slum clearance purposes for redevelopment incidental or ancillary to the slum clearance is a public use. *Rowe v. Housing Auth. of City of Little Rock, 249 S.W.2d 551 (Ark. 1952); Chicago Land Clearance Comm'n v. White, 104 N.E. 236 (Ill. 1952).* Where property would become landlocked through eminent domain, an access road could be condemned. *Illinois State Toll Hwy. Auth. v. Karn, 293 N.E.2d 162 (Ill. App. 1973).* Property cannot be taken by eminent domain for private use. *Simpson v. Low-Rent Hous. Agency of Mount Ayr, 224 N.W.2d 624 (Iowa 1974); Borough of Big Run v. Shaw, 330 A.2d 315 (Pa. 1975); Phillips v. Foster, 211 S.W.2d 93 (Va. 1975).* Mississippi has a substitute condemnation statute which permits the taking of A's property for the use of B in order to compensate for loss resulting from condemnation for a public use. *Mississippi State Hwy. Comm'n v. Morgan, 175 So. 2d 606 (Miss. 1965).* One may not force others to give one a right-of-way across their land. *Kanupp v. Land, 102 S.E.2d 779 (N.C. 1958).* Eminent domain cannot be exercised to give access to a private tract. *O'Neil v. Board of County Comm'rs, 209 N.E.2d 393 (Ohio 1965).* Surrounded landowner's economic use of hisproperty is not a public use and a statute granting right of access across private property is contrary to the Texas constitution. *Estate of Waggoner v. Gleghorn, 378 S.W.2d 47 (Tex. 1964);* Eugene C. Marshall, *Surrounded Landowner's Economic Use of His Property is Not a Public Use and Statute Granting Right of Access Across Private Property is Contrary to the Texas Constitution, 2 Houston L. Rev. 401* (1964-65). Condemning a drainage easement across private land to drain another tract of private land was not a public taking. *Phillips v. Foster, 211 S.E.2d 93 (Va. 1975). See* James P. White & James D.Schlosser, *Public Needs and Private Rights: Eminent Domain and Land Condemnation in North Dakota, 38 N.D.L. Rev. 36 (1962);* John Allen Stephens, *Public Use for Purpose of Eminent Domain in Iowa, 13 Drake L. Rev. 95 (1963).*

(n3)Footnote 111. *Old Dominion Land Co. v. United States, 269 U.S. 55 (1925)* (implied declaration of public service); *Western Union Tel. Co. v. Pennsylvania Ry., 123 F. 33 (3d Cir. 1903); In re Condemnations of Imp. of Rouge River, 266 F. 105 (D.Mich. 1920); Hirsch v. Block, 267 F. 614, cert. denied, 254 U.S. 640 (App. D.C. 1920). United*

States ex rel. McCathran v. Doyle, 267 F. 631 (App. D.C. 1920); Beck v. Patterson, 21 F.2d 72 (D.Or. 1927); General Petr. Corp. v. Hobson, 23 F.2d 349 (D.Cal. 1927); Barnidge v. United States, 101 F.2d 295 (8th Cir. 1939); United States v. Marin, 136 F.2d 388 (9th Cir. 1943); United States ex rel. T.V.A. v. Welch, 150 F.2d 613 (4th Cir. 1943); Producers Pipe Line Co. v. Martin, 22 F. Supp. 44 (W.D.Ky. 1938); United States v. 243.22 Acres of Land, 43 F. Supp. 561 (E.D.N.Y. 1942), cert. denied, 254 U.S. 640 (1920); United States v. Certain Interests in Land, 58 F. Supp. 739 (E.D.Ill. 1945); Alabama Power Co. v. Cullman County Elec. Membership Corp, 174 So. 866 (Ala. 1937); Harvey v. Warren, 102 So. 899 (Ala. 1925); Steel v. Madison, 3 So. 761 (Ala. 1887); Sadler v. Langham, 34 Ala. 311 (1859); Tarpey v. McClure, 213 P. 983 (Cal. 1923) (water storage district act not invalid); *Lorenz v. Jacob, 84 So. 83 (Fla. 1920); United States v. Baltimore & O. Ry., 27 App. D.C. 105 (1906); Thomison v. Hillcrest Athletic Ass'n, 5 A.2d 236 (Del. 1939);* Isleworth Grove Co. v. Orange County (Fla. 1920); *Rogers v. Toccoa Power Co., 131 S.E. 517 (Ga. 1926); Hand Gold Min. Co. v. Parker, 59 Ga. 419 (1877); Limits Indus. Ry. v. American Spiral Pipe Works, 151 N.E. 567 (Ill. 1926); Litchfield & M. Ry. v. Alton & S. Ry. 137 N.E. 248 (Ill. 1922); Town of Kingston v. Anderson 133 N.E. 347 (Ill. 1921);* Smith v. Claussen Park Drainage & Levee Dist. (Ill. 1907); *Chaplin v. Highway Comm'rs, 22 N.E. 484 (Ill. 1889); Great Western Nat. Gas & Oil Co. v. Hawkins, 66 N.E. 765 (Ind. App. 1903); Tuttle v. Moore, 64 S.W. 585 (Indian Terr. 1901); Ferguson v. Illinois Cent. Ry., 210 N.W. 604 (Iowa 1926); Goose Creek Lbr. v. White, 294 S.W. 494 (Ky. 1927); McIntosh Coal Co. v. Blue Grass Coal Co., 263 S.W. 346 (Ky. 1924); Zella Min. Co. v. Collins 261 S.W. 1090 (Ky. 1924); Bell's Comm. v. Board of Educ., 234 S.W. 311 (Ky. 1924).* La. Civ. Code art. 699 permits expropriation over other land to give access to landlocked land. *Rockholt v. Keaty, 237 So. 2d 663 (La. 1970); Paine v. Savage, 136 A. 664 (Me. 1927); Riden v. Philadelphia, B. & W. R.R., 35 A.2d 99 (Md. 1943); Arnsperger v. Crawford, 61 A. 413 (1905); Townsend v. Epstein, 49 A 629 (Md. 1901); Witson v. Gutman, 29 A. 608 (Md. 1874); In re Opinion of the Justices, 8 N.E.2d 753 (Mass. 1937); Wright v. Walcott, 131 N.E. 291 (Mass. 1921); In re Opinion of Justices, 131 N.E. 25 (Mass. 1921); In re Petition of Detroit (Airport Site), 14 N.W.2d 140 (Mich. 1944); Board of Health v. Van Hoesen, 49 N.W. 894 (Mich. 1891); City of Kirkwood v. Venable, 173 S.W.2d 8 (Mo. 1943); State ex rel. Penrose Inv. Co. v. McKelvey, 256 S.W. 474 (Mo. 1923); City of Kirksville v. Hines 225 S.W. 950 (Mo. 1920); Vetter v. Broadhurst, 160 N.W. 109 (Neb. 1916); Fourney v. Fremont, E. & M. v. R.R., 36 N.W. 806 (Neb. 1888); Gibson v. Mason, 5 Nev. 283 (1869); Hale v. Lawrence, 21 N.J.L. 714 (1848); In re Auditore's Estate, 229 N.Y.S. 414 (1928); Waterford Elec. Light Heat & Power Co. v. State, 203 N.Y.S. 858 (1924); Golde Clothes Shop v. Loews Buffalo Theatres, 141 N.E. 917 (N.Y. 1923); City of Charlotte v. Heath, 40 S.E.2d 600 (N.C. 1946); Blakemore v. Cincinnati Metro. Hous. Auth., 57 N.E.2d 397 (Ohio App. 1943); Witham v. Osburn, 4 Or. 318 (1873); Cain v. Aspinwall-Delafield Co., 137 A. 610 (Pa. 1927); Stuart v. Gimbel Bros., 131 A. 728 (Pa. 1926); Vally Ry. v. City of Harrisburg, 124 A. 644 (Pa. 1924); Ormsby Land Co. v. City of Pittsburgh, 119 A. 730 (Pa. 1923); In re Rhode Island Suburban Ry., 48 A. 590 (R.I. 1901); Bates v. City of Houston, 189 S.W.2d 17 (Tex. App. 1945); Marrs v. Railroad Comm'n, 177 S.W.2d 941 (Tex. 1944); Dallas Cotton Mills v. Industrial Co., 252 S.W. 821 (Tex. App. 1923); Leathers v. Craig, 228 S.W. 995 (Tex. App. 1921); City of Richmond v. Carneal, 106 S.W. 403 (Va. 1921); Fry v. O'Leary, 252 P. 111 (Wash. 1927); State ex rel. Puget Sound Power & Light Co. v. Superior Court 233 P. 651 (Wash. 1925); Reed v. City of Seattle, 213 P. 923 (Wash. 1923); State ex rel. Nunley v. Mayor of Montgomery, 117 S.W. 888 (W. Va. 1923); Lamasco Realty Co. v. City of Milwaukee, 8 N.W.2d 372 (Wis. 1943); Piper v. Ekern, 194 N.E. 159 (Wis. 1923).* A street may not be closed and the fee condemned solely for the benefit of a private use. *Stahl Soap Corp. v. New York City, 156 N.W.2d 443 (N.Y. 1959).* To be a constitutional taking, there must be a relationship between community needs and the restriction imposed on property used. *Pure Oil Div. of Union Oil Co. v. City of Brook Park, 269 N.E.2d 853 (Ohio App. 1971).* Richard A. Lavine, *Extent of Judicial Inquiry into Power of Eminent Domain, 28 S. Cal. L. Rev. 369 (1955). See also Public Use as a Limitation; Eminent Domain in Urban Renewal, 68 Harv. L. Rev. 1422 (1955).*

(n4)Footnote 112. *Edens v. City of Columbia, 91 S.E.2d 280 (S.C. 1956); W.S. Ranch Co. v. Kaiser Steel Corp., 388 F.2d 257 (10th Cir. 1967).* Private property cannot be taken for private use. *County of Orange v. Metropolitan Transp. Auth., 337 N.Y.S.2d 178 (1971).*

(n5)Footnote 113. *Tomten v. Thomas, 232 P.2d 723 (Mont. 1951)* (acquisition of a private way by necessity permitted by constitution); *Piper v. Ekern, 194 N.W. 159 (Wis. 1923); Southern Ry. v. Hall, 100 So. 2d 722.* (Ala. 1957); *McGowin Inv. Co. v. Johnstone, 306 So. 2d 286 (Ala. App. 1974).* Louisiana permits a private landowner to

secure a right-of-way from landlocked property. *Collins v. Reed, 316 So. 2d 134 (La. App. 1975).*

(n6)Footnote 114. *State ex rel. Huntoon v. Superior Ct., 260 P. 527 (Wash. 1927).* The power of eminent domain cannot be delegated to another. Bristol County Water Co. v.*Oliviera, 141 A.2d 443 (R.I. 1958).* Under certain circumstances, private persons have the right of condemnation where the public good is involved.

(n7)Footnote 115. *United States v. 243.22 Acres of Land, 43 F. Supp. 561 (E.D.N.Y. 1942), cert. denied, Lambert v. United States, 317 U.S. 698; City of Richmond v. Carneal, 106 S.W. 403 (Va. 1921)* (private property cannot be taken for private use with or without compensation). The power of eminent domain may not be used to acquire title for land to be used by private individuals for private use. *Department of Transp. v. Livaditis, 199 S.E.2d 573 (Ga. App. 1973).* Private property cannot be taken for other than public use. *Pulos v. James, 302 N.W.2d 768 (Ind. 1973).* Private persons permitted to condemn private land for access to timberland. *Moore Mill & Lumber Co. v. Foster, 336 P.2d 39, 337 P.2d 810 (Or. 1959).* A statute authorizing one to enter upon the lands of another to open drainage is unconstitutional as a taking of private property for private use. *Clemson Univ. v. First Provident Corp, 197 S.E.2d 914 (S.C. 1973).*

(n8)Footnote 116. *Wright v. Walcott, 131 N.E. 291 (Mass. 1921).* See, however, the slum clearance projects discussed herei*N.H.A. Bosworth & Son, Inc. v. Tamiola, 190 A.2d 506 (Conn. Super. 1963).* A statute authorizing a taking for a private use was held unconstitutional in *Clemson Univ. v. First Provident Corp, 197 S.E.2d 914 (S.C. 1973).* Statute authorizing landlocked owner to open a right-of-way held unconstitutional. *Estate of Waggoner v. Gleghorn, 378 S.W.2d 47 (Tex. 1964).*

(n9)Footnote 117. *Riden v. Philadelphia, B. & W. R.R., 35 A.2d 99 (Md. 1943); Machado v. Board of Pub. Works of Arlington, 71 N.W.2d 886 (Mass. 1947)* (condemnation of easement for sewer line to connect one house to a public sewer held to be for public purpose).

(n10)Footnote 118. *Blakemore v. Cincinnati Metro. Hous. Auth., 57 N.W.2d 397 (Ohio App. 1943).* Eminent domain may be exercised for a future use that is fairly and reasonably needed. *Meyer v. Northern Ind. Pub. Serv. Co., 258 N.W.2d 57 (Ind. 1970).*

(n11)Footnote 119. *Lackman v. Hall, 364 A.2d 1244 (Del.Ch. 1976).*

(n12)Footnote 120. *Howard Mills Co. v. Schwartz Lumber & Coal Co., 95 P. 559 (Kan. 1908); Chicago & N.W. Ry. v. Morehouse, 87 N.W. 849 (Wis. 1901). See* Daniel B. Benbow, *Public Use as a Limitation on the Power of Eminent Domain in Texas, 44 Tex. L. Rev. 1499* (1965-66).

(n13)Footnote 121. *People ex rel. Dep't of Public Works v. Superior Court, 436 P.2d 342,* (Cal. 1968) (avoidance of excessive severance damages held a valid public use); *Tanner v. Treasury Tunnel Min. & Reduction Co., 83 P. 464 (Colo. 1906); Litchfield & M. Ry. v. Alton & S. Ry., 137 N.W. 248 (Ill. 1922); Sholl v. German Coal Co., 10 N.E. 199 (Ill. 1887); Paxton & Hershey Irr. Canal & Land Co. v. Farmers & Merchants Irr. & Land Co., 64 N.W. 343 (Neb. 1895); In re Niagara Falls & W. Ry., 15 N.E. 429 (N.Y. 1888); Johnson City v. Cloninger, 372 S.W.2d 281 (Tenn. 1963); Ryan v. Louisville & N. Terminal Co., 50 S.W. 744 (Tenn. 1899); Valley City Salt Co. v. Brown, 7 W. Va. 191 (W. Va. 1874).*

(n14)Footnote 122. *Peavy-Wilson Lumber Co. v. Brevard County, 31 So. 2d 483 (Fla. 1947).* Holding under statute authorizing eminent domain to acquire easement for pipeline, that the ultimate use of the water must be for public benefit, not for private use. *W.S. Ranch Co. v. Kaiser Steel Corp., 388 F.2d 257 (10th Cir. 1967), rev'd 391 U.S. 593, 88 S. Ct. 1753 (1968).* For "public use" does not necessarily entail actual use for the public if the use is beneficial to the public. *State ex rel. Allerton Parking Corp v. City of Cleveland, 211 N.W.2d 203 (Ohio App. 1965).*

(n15)Footnote 123. *Rand v. Mississippi State Hwy. Comm'n, 199 So. 374 (Miss. 1941); State v. Hale, 146 S.W.2d 731 (Tex. 1941).* Issue of public use is a judicial question. *State v. Bank of Cal., 491 P.2d 697 (Wash. App. 1971); State v. Lauman, 490 P.2d 450 (Wash. App. 1971). See* William A. Gregory, *The Public Purpose Doctrine As it Relates to*

Development Rights, 10 Tulsa L.J. 45 (1974-75).

(n16)Footnote 124. To the effect that public use in eminent domain need not be equated to public necessity. *People v. Lagiss, 324 P.2d 926 (Cal. App. 1958).* But equating public use with necessity. *State Hwy. Comm'n v. Yost Farm Co., 384 P.2d 277 (Mont. 1963); State v. Totowa Lumber & Supply Co., 232 A.2d 655 (N.J. Super 1967)* (equating to "public interests"). Prohibition on billboard was improper use of police power and constituted a taking. *People ex rel. Dep't of Public Works v. Ryan Outdoor Adver., Inc., 114 Cal. Rptr. 499 (1974).* Clearing of blighted area held valid reason for eminent domain. Housing & Redev. Auth. v. Froney, 234, N.E.2d 894 (Minn. 1975).

(n17)Footnote 125. *Blakeley v. Gorin, 313 N.E.2d 903 (Mass 1974).* The test for the validity of eminent domain is "public purpose," not actual public use. *Texas Pipe Line Co. v. Stein, 190 So. 2d 244 (La. App. 1966).*

(n18)Footnote 126. *Rindge County v. Los Angeles County, 262 U.S. 700 (1923); Sadler v. Langham, 34 Ala. 311 (Ala. 1859); Sherman v. Buick, 32 Cal. 241 (1867); Gilmer v. Lime Point, 18 Cal. 229 (1861); Township of Madison v. Gallagher, 42 N.W. 316 (Ill. 1895); Westport Stone Co. v. Thomas, 94 N.W. 406 (Ind. 1911); Zigler v. Menges, 22 N.E. 782 (Ind. 1889); Chesapeake Stone Co. v. Moreland, 104 S.W. 762 (Ky. 1907); Riche v. Bar Harbor Water Co., 75 Me. 91 (1883); Cox v. Revelle, 94 A. 203 (Md. 1915); Moore v. Sanford, 24 N.E. 323 (Mass. 1890); State v. Houghton, 176 N.W. 159 (Minn. 1920); Chicago, B. & N. Ry. v. Porter, 46 N.W. 75 (Minn. 1890); In re Kansas City v. Liebi, 252 S.W. 404 (Mo. 1923); Paxton & Hershey Irr. Canal & Land Co. v. Farmers & Merchants Irr. & Land Co., 64 N.W. 343 (Neb. 1895); New York City Hous. Auth. v. Muller, 279 N.Y.S. 299 (1935); Cozad v. Kanawha Hardwood Co., 51 S.E. 932 (N.C. 1905); McQuillen v. Hatton, 42 Ohio St. 202 (1884); Shaver v. Starrett, 4 Ohio St. 494 (1855); Zircle v. Southern Ry., 45 S.E. 802 (Va. 1903); State v. Superior Court, 145 P. 421, 148 P. 7 (Wash. 1915).*

(n19)Footnote 127. *Rindge County v. Los Angeles County, 262 U.S. 700 (1923); Alabama Power Co. v. Gulf Power Co., 283 F. 606 (D.C. Ala. 1923); In re Gladstone Blvd., 252 S.W. 404 (Mo. 1923); Black River Regulating Dist. v. Ogsbury, 196 N.Y.S. 281 (1922); Moody v. Benson, 220 P. 561 (Or. 1923); Pioneer Coal Co. v. Cherrytree & D.Ry., 116 A. 45 (Pa. 1922); West v. Whitehead, 238 S.W. 976 (Tex. App. 1922).* A mere statement by the condemnor that certain activity constituted public purpose was not sufficient to establish such purpose. *Amen v. City of Dearborn, 363 F. Supp. 267, cert. denied, 465 U.S. 1101 (E.D.Mich. 1973).*

(n20)Footnote 128. *Madera Ry. v. Raymond Granite Co., 87 P. 27 (Cal. App. 1906); Tanner v. Treasury Tunnel Min. & Reduction Co., 83 P. 464 (Colo. 1906); Olmstead v. Camp, 33 Conn. 532 (Conn. 1866); Brown v. Gerald, 61 A. 785 (Me. 1905); Ulmer v. Lime Rock Ry., 57 A. 1001 (Me. 1904); State v. Houghton, 176 N.W. 159 (Minn. 1920); Kettle River Ry. v. Eastern Ry., 43 N.W. 469 (Minn. 1889); Butte, A. & P. Ry. v. Montana Union Ry., 41 P. 232 (Mont. 1895); Coster v. Tide Water Co., 18 N.J. Eq. 54 (1866); City of Charlotte v. Heath, 40 S.E.2d 600 (N.C. 1946); McQuillen v. Hatton, 42 Ohio St. 202 (1884); Delfeld v. City of Tulsa, 131 P.2d 754 (Okla. 1942); Arcola Sugar Mills Co. v. Houston Lighting & Power Co., 153 S.W.2d 628 (Tex. App. 1941); Carnegie Natural Gas Co. v. Seiger, 79 S.E. 3 (W. Va. 1913).*

(n21)Footnote 129. *United States v. Boyle, 52 F. Supp. 906 (N.D.Ohio 1943).*

(n22)Footnote 130. *Riche v. Bar Harbor Water Co., 75 Me. 91 (Me. 1883); Allydonn Realty Corp. v. Holyoke Hous. Auth., 23 N.E.2d 665 (Mass. 1939); Mueller v. Supervisors of Courtland, 135 N.W. 996 (Minn. 1912); Denihan Enters. v. O'Dwyer, 100 N.Y.S.2d 512 (1950); Miller v. City of Tacoma, 378 P.2d 464 (Wash 1963). See* Michael John Matheson, *Excess Condemnation in California: Proposals for Statutory and Constitutional Change, 42 S. Cal L. Rev. 421* (1968-1969). Slum clearance is a proper purpose regardless of subsequent use of the property. *City of Chicago v. Gorham, 400 N.E.2d 42 (Ill. App. 1980).*

(n23)Footnote 131. *In re Kansas City Ordinance No. 39946, 252 S.W. 404 (Mo. 1923); Denihan Enters. v. O'Dwyer, 99 N.E.2d 235 (N.Y. 1951). See Kaskel v. Implellitteri, 115 N.E.2d 659 (N.Y. 1953)* (urban development). A railroad spur is a public use though it benefits but a single industry. *Reter v. Davenport, R.I. & N.W. Ry., 54 N.W.2d 863 (Iowa 1952).* A public parking garage to be leased to a private party was a "public purpose" for eminent domain. The

incidental private benefit is immaterial. *Denihan Enters. v. O'Dwyer, 99 N.E.2d 235 (N.Y. 1951).* That private parties or private interests may be benefited is not fatal, so long as the use intended is not restricted to such parties or interests but is open to the whole public. *Hudson River Regulating Dist. v. Fonda, J. & G. Ry. 217 N.Y.S. 781 (1926).* Incidental benefit of a private use does not defeat exercise of eminent domain for a public purpose. *Berger v. Howlett, 182 N.E.2d 673 (Ill. 1962).*

(n24)Footnote 132. *In re Opinion of the Justices, 8 N.E.2d 753 (Mass. 1937).* Supplying of electricity is a public purpose. *Public Serv. Co. v. Shannon 192 A.2d 608 (N.H. 1963). In re Opinion of Justices, 131 N.E. 25 (Mass. 1921)* (public use implies public service); *Mumpower v. Hous. Auth., 11 S.E.2d 732 (Va. 1940)* Aesthetic reasons may be considered as justification for eminent domain. *Berman v. Parker, 348 U.S. 26 (1954).* Eminent domain lies even though the school corporation condemning the land proposed to convey the realty so acquired to privately owned leasing company, and to lease the premises under a situation by which at the expiration of the lease title would revert to the condemning authority. The public purpose was not defeated by the fact that incidental private use would result. *First Nat'l Bank v. Penn-Harris-Madison Sch. Corp., 231 N.E.2d 238 (Ind. 1967).* Taking property by eminent domain is proper even though portion of the property will be devoted to production of incidental income. *Courtesy Sandwich Shop, Inc. v. Port of N.Y. Auth., 190 N.E.2d 402 (N.Y. 1963).*

(n25)Footnote 133. *State ex rel. Chelan Elec. Co. v. Superior Court, 253 P. 115 (Wash. 1927).*

(n26)Footnote 134. *Foltz v. City of Indianapolis, 130 N.E.2d 650 (Ind. 1955).* Private corporation for profit can develop slum clearance area. *Chicago Land Clearance Comm'n v. White, 104 N.E.2d 236 (Ill. 1952), cert. denied, 344 U.S. 824 (1952),* and also in "conversation areas" in danger of becoming slum areas. *People ex rel. Gutknecht v. City of Chicago, 121 N.E.2d 791 (Ill. 1954); Zisook v. Maryland-Drexel Neighborhood Redev. Corp., 121 N.E.2d 804 (Ill. 1954).* Land taken by eminent domain may be later devoted to private purposes as in condemnation of blighted areas. *People ex rel. Adamowski v. Chicago Land Clearance Comm'n, 150 N.E.2d 792 (Ill. 1958). Contra Adams v. Housing Auth., 60 So. 2d 663 (Fla. 1952); Housing Auth. v. Johnson, 74 S.E.2d 891 (Ga. 1953); Edens v. City of Columbia, 91 S.E.2d 280 (S.C. 1956).* Off-street parking is a proper subject for eminent domain. *Sammons v. Beaufort, 83 S.E.2d. 153 (S.C. 1954).*

(n27)Footnote 135. *Codd v. McGoldrick Lumber Co., 279 P. 298 (Idaho 1929).*

(n28)Footnote 136. *Rogers v. Toccoa Elec. Power Co., 137 S.E. 272 (Ga. 1927).* The mere fact that the legislature has authorized the taking of private property for private purposes, as well as public, will not in itself nullify the authority to take for the public use alone, at least where they are separable. *Smith v. Western Maine Power Co., 132 A. 740 (Me. 1926).* If a private use is combined with a public one, in such a way that the two cannot be separated then the right of eminent domain cannot be invoked to aid the state. *State ex rel. Puget Sound Power & Light Co. v. Superior Court, 233 P 651 (Wash. 1925).* The courts have the authority to determine whether a "public use" is involved in the taking. *United States v. 58.16 Acres of Land, 478 F.2d 1055 (7th Cir. Ill. 1973). See* Erwin E. Leiter, 51 Chicago-Kent L. Rev. 645 (1974-1975). Mere fact that some other property might have been taken is not sufficient objection to eminent domain. *KEM Elec. Co-op, Inc. v. Materi, 247 N.W.2d 668 (N.D.1976).*

(n29)Footnote 137. *Fountain Park Co. v. Hensler, 155 N.E. 465 (Ind. 1927)* (statute attempting to confer power of eminent domain on a Chautauqua Association held unconstitutional).

See Ferguson v. Illinois Cent. Ry., 210 N.W. 604 (Iowa 1926); Paine v. Savage, 136 A. 664 (Me. 1927); Pontiac Imp. Co. v. Cleveland Metro. Park Dist., 135 N.E. 635 (Ohio 1922); Smith v. Cameron, 210 P. 716 (Or. 1922) (irrigation of private land not a public use); *Nichols v. Power Co., 130 S.E. 764 (Va. 1925).* When the public use is not sufficiently specific and definite but is remote and undefined it is insufficient to form the basis of condemnation proceedings. *Wise v. Abilene Water Co., 261 S.W. 549 (Tex. App. 1924). See also* Osborne M. Reynolds, Jr., *Is Public Necessity Necessary? 29 Okla. L. Rev. 861 (1976).*

(n30)Footnote 138. *United States v. Certain Parcels of Land, 54 F. Supp. 943 (W.D.Pa. 1944); In re Petition of City of Detroit, 14 N.W.2d 140 (Mich. 1944).*

(n31)Footnote 139. *City of Charlotte v. Cook, 498 S.E.2d 605 (N.C. 1998)* (condemnation proceedings can only be instituted when the taking is for a public purpose; it is up to the courts to determine whether a taking is for a public purpose); United States v. 1603 Acres, 26 F.3d 349 (2d Cir. 1994); *United States ex rel. T.V.A. v. Three Tracts of Land, 377 F. Supp. 631 (N.D.Ala. 1974).* Nature and extent of the interest to be acquired lies within the discretion of authorized federal officials and cannot be changed by the courts. *United States v. Winnebago Tribe of Neb., 542 F.2d 1002 (8th Cir. 1976); Greenwood County v. McDonald, 394 S.E.2d 325 (S.C. 1990).*

(n32)Footnote 140. *United States ex rel. T.V.A. v. Welch, 327 U.S. 546 (1946); Joslin Mfg. Co. v. Providence, 262 U.S. 668 (1923); Rindge County v. Los Angeles County, 262 U.S. 700 (1923); Shoemaker v. United States, 147 U.S. 282 (1893); Hirsch v. Block, 267 F. 614 (App. D.C. 1920); United States ex rel. McCathran v. Doyle, 267 F. 631 (D.C. 1920); Old Dominion Land Co., United States, 296 F. 20 (4th Cir. 1924); United States v. Oregon R. & Nav. Co., 16 F. 524 (C.C. Or. 1883); In re Condemnations for Imp. of Rouge River, 266 F. 105 (E.D. Mich. 1920);* Aldridge v.*Tuscumbia, C. & D. Ry., 2 Stew & P. 199 (Ala. 1832); Young v. Gurdon, 275 S.W. 890 (Ark. 1925); Los Angeles v. Rindge County, 200 P. 27 (Cal. App. 1906); Lent v. Tilson, 14 P. 71 (Cal. 1887); Whiteman v. Wilmington & S.R.R., 2 Harr. 514 (Del. 1939); Village of Wheeling v. Exchange Nat'l Bank, 572 N.W.2d 966 (Ill. App. Ct. 1991); Limits Indus. Ry. v. American Spiral Pipe Works, 151 N.E. 567 (Ill. 1926); Bierbaum v. Smith, 147 N.E. 896 (Ill. 1925); Litchfield & M. Ry. v. Alton & S. Ry., 137 N.E. 248 (Ill. 1922); Fountain Park Co. v. Hensler, 155 N.E. 465 (Ind. 1927); Lewis v. Bunnell, 131 N.E. 396 (Ind. 1921); First Nat'l Bank v. Paducah, 258 S.W. 938 (Ky. 1924); United States v. Certain Land, 873 F. Supp. 1050 (E.D. Mich. 1994); Bergen County v. S. Goldberg Co., 185 A.2d 38 (N.J. Super 1962); People ex rel. Horton v. Predergast, 220 A.D. 351 (N.Y. App. Div. 1927); Board of Educ., Sch. Dist. No. 1 v. Harper, 191 N.Y.S. 273 (1918); State ex rel. Dabney v. Johnson, 254 P. 61 (Okla. 1927); Williamson County v. Franklin & Spring Hill Tpk. Co., 228 S.W. 714 (Tenn. 1921);* West v. Whitehead, 238 S.W.976 (Tex. App. 1922); *Vermont Hydro-Elec.Corp. v. Dunn, 112 A. 223 (Vt. 1921); Richmond v. Carneal, 106 S.E. 403 (Va. 1921); State ex rel. Northwestern Elec. Co. v. Superior Court, 183 P.3d 802 (Wash. 1947); United States v. Acquisition of Condemned Land, 753 F. Supp. 50 (D. P.R. 1990).* In the absence of bad faith the question of necessity or expediency of a taking in eminent domain is not justifiable. *United States v. Certain Parcels of Land in Ingham County, Mich., 233 F. Supp. 544 (W.D. Mich. 1964).* However, in *Stanpark Realty Corp v. Norfolk, 101 S.E.2d 527 (Ca. 1958),* the court took upon itself the right to determine whether the state was correct in determining that a necessity for condemnation existed. *See Necessity in Eminent Domain Proceedings: Four Cases, 29 Mont. L. Rev. 69 (1967).*

(n33)Footnote 141. *Strickley v. Highland Boy Gold Min. Co., 200 U.S. 527 (1906); United States v. Frame, 885 F.2d 1119 (3d Cir. 1989); Alabama Power Co. v. Gulf Power Co., 283 F. 606 (D.C. Ala. 1922); Young v. Gurdon, 275 S.W. 890 (Ark. 1925); Tanner v. Treasury Tunnel Min. & Reduction Co., 83 P. 464 (Colo. 1906); New York, N.H. & H. R.R. v. Offield, 59 A. 510 (Conn. 1904); Clendaniel v. Conrad, 83 A. 1036 (Del. Super. Ct. 1912);* Spafford v. Brevard County, *110 S. 451 (Fla. 1926); Mull v. Indianapolis & C. Trac. Co., 81 N.E. 657 (Ind. 1907); Sisson v. Buena Vista, 104 N.W. 454 (Iowa 1905); Baxter v. Louisville, 6 S.E.2d 1074 (Ky. 1928); Burnham v. Beverly, 35 N.W.2d 242 (Mass. 1941); Mayor v. Thomas, 645 So. 2d 940 (Miss. 1994); Landell v. State, 128 A. 380 (N.J. Super. Ct. 1925); Albright v. Sussex County Lake & Park. Comm'n, 57 A. 398 (N.J. 1904); State ex rel. Olcott v. Hawk, 208 P. 709 (Or. 1922); Smith v. Cameron, 210 P. 716 (Or. 1922); West v. Whitehead, 238 S.W. 976 (Tex. App. 1922); State v. White River Power Co., 82 P. 150 (Wash. 1905); Chicago & N.W. Ry. v Morehouse, 87 N.W. 849 (Wis. 1901).* The determination of this question is influenced by local conditions, and the Supreme Court of the United States, while enforcing the Fourteenth Amendment, keeps in view the diversity of such conditions and regards with great respect the judgments of the state courts relative to what should be deemed public uses in any state. *Rindge County v. Los Angeles County, 262 U.S. 700 (1923).*

(n34)Footnote 142. *State ex rel. Hawks v. Topeka, 270 P.3d 270 (Kan. 1954); Governor's Office v. Carter, 573 So. 2d 736 (Miss. 1990); State ex rel. Olcott v. Hawk, 208 P. 709 (Or. 1922).*

(n35)Footnote 143. *Dallas Cotton Mills v. Industrial Co., 296 S.W. 503 (Tex. App. 1927).*

(n36)Footnote 144. *Rindge County v. Los Angeles County, 262 U.S. 700 (1923); Boston & Main Corp. v. I.C.C. 911 F.2d 743 (D.C. Cir. 1995); Morgan v. Hines, 260 F. 585 (D.Okla. 1919); In re Condemnations for Imp. of Rouge River, 266 F. 105 (D.Mich. 1920); Hirsch v. Block, 267 F. 614 (App. D.C. 1920); United States ex rel. McCathran v. Doyle, 267 F. 631 (App. D.C. 1920); United States v. 1,177 Acres of Land, 51 F. Supp. 84 (S.D.Fla. 1947); Young v. Gurdon, 275 S.W. 890 (Ark. 1925); San Mateo v. Coburn, 63 P. 78 (Cal. 1900); In re Madera Irr. Dist., 28 P. 272 (Cal. 1891); State v. Denver & Rio Grande W. R.R., 789 P.2d 1088 (Colo. 1990);* Spafford v. Brevard County, *110 S. 451 (Fla. 1926); Tift v. Atlantic Coast Line Ry., 131 S.E. 46 (Ga. 1925); Poole v. Kankakee, 94 N.E.2d 416 (Ill. 1950); Limits Indus. Ry. v. American Spiral Pipe Works, 151 N.E. 567 (Ill. 1927); St. Louis Connecting Ry. v. Blumberg, 156 N.E. 298 (Ill. 1927); Litchfield & M. Ry. v. Alton & S. Ry., 137 N.E. 248 (Ill. 1922); Inter-State Water Co. v. Adkins, 158 N.E. 685 (Ill. 1921); Fountain Park Co. v. Hensler, 155 N.E. 465 (Ind. 1927); Lewis v. Bunnell, 131 N.E. 386 (Ind. 1921); Logan v. Stogsdale, 24 N.E. 135 (Ind. 1890); Ferguson v. Illinois Cent. R.R., 210 N.W. 604 (Iowa 1927); State ex rel. Smith v. Kemp, 261 P. 556 (Kan. 1927); Jefferson County v. Clauson, 180 S.W.2d 297 (Ky. 1944); Paine v. Savage, 136 A. 664 (Me. 1927); Van Witson v. Gutman, 29 A. 608 (Md. 1894); City of Center Line v. Chmelko, 416 N.W.2d 401 (Mich. App. 1987); Kirkwood v. Venable, 173 S.W.2d 8 (Mo. 1943); Hart v. Bothe, 247 S.W. 256 (Mo. App. 1923); Caruthersville v. Ferguson, 226 S.W. 912 (Mo. 1920); Komposh v. Powers, 244 P. 298 (Mont. 1926); Fifth Ave. Coach Lines, Inc. v. New York City, 183 N.E.2d 684 (N.Y. 1962); Schulman v. People, 176 N.E.2d 817 (N.Y. 1961)* (statute does not authorize general condemnation of easements for billboards); *In re Niagara, Lockport & Ontario Power Co., 210 N.Y.S. 748 (1925); People ex rel. Horton v. Prendergast, 229 N.Y.S. 414 (1927); Hudson River Regulating Dist. v. Fonda, J. & G. Ry., 217 N.Y.S. 781 (1926); Black River Regulating Dist. v. Ogsbury, 196 N.Y.S. 281 (1922); School Dist. No. 1 v. Hobson, 191 N.Y.S. 273 (1918); Waterloo Woolen Mfg. Co. v. Shanhan, 28 N.E. 358 (Ohio App. 1943); Blakemore v. Cincinnati Metro. Hous. Auth., 57 N.E.2d 397 (Ohio App. 1943); State ex rel. Olcott v. Hawk, 206 P. 607 (Or. 1922); Smith v. Cameron, 210 P. 716 (Or. 1922); Appeal of Swidzinski, 579 A.2d 1352 (Pa. 1990); Young v. Wiggins, 126 S.E.2d 360 (S.C. 1962); West v. Whitehead, 238 S.W. 976 (Tex. App. 1922); Richmond v. Carneal, 106 S.E. 403 (Va. 1921); State Hwy. Comm'r v. Kreger, 105 S.E. 217 (Va. 1920); Petition of Southwest Suburban Sewer Dist., 377 P.2d 431 (Wash. 1963); State ex rel. Puget Sound Power & Light Co. v. Superior Court, 233 P. 651 (Wash. 1925)* (court looks to the substance rather than the form). The constitution of Washington expressly provides that the question whether the contemplated use is really public is a judicial question to be determined as such without regard to any legislative assertion that the use is public. *State ex rel. Puget Sound Power & Light Co., 233 P. 651 (Wash. 1925).* Decision of governing body to whom legislature has delegated power to condemn is final in absence of clear abuse of power. *Trustees of Schs. of Twp. No. 37 v. First Nat'l Bank, 274 N.E.2d 56 (Ill. 1971).* While the question of necessity or expediency of taking by eminent domain lies within the discretion of the legislature and is not of condemnation may be raised. *Meyer v. Northern Ind. Pub. Serv. Co., 278 N.E.2d 561 (Ind. 1972).* Issue of public use is a judicial question. *State v. Bank of Cal., 491 P.2d 697 (Wash. App. 1971); State v. Lauman, 490 P.2d 450 (Wash. App. 1971). See* William A. Gregory, *The Public Purpose Doctrine as it Relates to Development Rights, 10 Tulsa L.J. 45 (1974).* Taking not void merely because private individuals may benefit. *Hegedic v. Commonwealth Dep't of Transp., 304 A.2d 181 (Pa. 1973).*

(n37)Footnote 145. *Forest Preserve Dist. v. Wike, 119 N.E.2d 734 (Ill. 1954).* Judicial review is limited to site necessity and does not encompass project necessity. *State Hwy. Comm'n v. Vanderkloot, 204 N.W.2d 22 (Mich. App. 1972).* Holding that where the existence or nonexistence of public use is placed in issue, the matter is properly one of judicial determination. *Square Butte Elec. Co-op v. Hilken, 244 N.W.2d 519 (N.D.1976). Challiss v. Atchison, T. & S. F. R.R., 16 Kan. 117 (1876); State v. Rapp, 38 N.W. 926 (Minn. 1888); Wang v. Patterson, 469 N.W.2d 577 (S.D.1991); State v. Stewart, 43 N.W. 947 (Wis. 1889).* To the effect that it may be so delegated, *see Sears v. Akron, 246 U.S. 242 (1918); Bemis v. Guirl Drainage Co., 105 N.E. 496 (Ind. 1914); Richland Sch. Twp. v. Overmyer, 73 N.E. 811 (Ind. 1905); Wheeling & L.E.R.R. v Toledo Ry. & Terminal Co., 74 N.E. 209 (Ohio 1905).* Landowners have right to question whether public utility (1) is empowered to condemn property, and (2) "taking" is for public use. *Illinois Power Co. v. Walter, 220 N.E.2d 755 (Ill. App. 1966).* Necessity of taking is not a question for the court. *Alabama Power Co. v. Hamilton, 342 S.2d 8 (Ala. 1977).* Holding that a declaration of taking act prevented the state from reviewing necessity

of taking absent clear showing of fraud, bad faith, arbitrariness or abuse of discretion in exercise of power. *Arco Pipeline Corp. v. 3160 Acres More or Less, 539 P.2d 64 (Alaska 1975).*

(n38)Footnote 146. *Winger v. Aires, 89 A.2d 521 (Pa. 1952)* (condemnation for purpose of investment when no needs shown). The courts generally, however, permit condemnation to meet future needs where reasonable. *Martin v. Portland Pipe Line Co., 158 F.2d 848 (1st Cir. 1946); County Comm'rs v. Schrodel, 577 A.2d 39 (Md. 1990); Ewin v. Mississippi State Hwy. Comm'n, 58 So. 2d 52 (Miss. 1952); Wisconsin Chapter House Ass'n v. Sachtjen, 50 N.W.2d 469 (Wis. 1951).*

(n39)Footnote 147. *City of Duluth v. Alexander, 404 N.W.2d 24 (Minn. App. 1987); see* Casenote, *Necessity in Eminent Domain Proceedings, 29 Mont. L. Rev. 69 (1967).*

(n40)Footnote 148. Tennessee Gas Pipeline Co. v. 104 Acres, 749 F. Supp. 427 (D.R.I. 1990); *Ohio Edison Co. v. Gantz, 159 N.E.2d 478 (Ohio App. 1958).*

(n41)Footnote 149. *Wechsler v. Dep't of Envtl. Conservation, 564 N.E.2d 660 (N.H. 1990); Ohio Edison Co. v Gantz, 159 N.E.2d 478 (Ohio App. 1958).*

(n42)Footnote 150. *Test v. Broward Co., 616 So. 2d 111 (Fla. App. 1993); Timmons v. South Carolina Tricentennial Comm'n, 175 S.E.2d 805 (S.C. 1970).*

(n43)Footnote 151. *United States v. Frame, 885 F.2d 1119 (3d Cir. 1989); United States ex rel. T.V.A. v. Three Tracts of Land, 377 F. Supp. 631 (N.D.Ala. 1974).*

(n44)Footnote 152. *Appeal of Swidzinski, 579 A.2d 1352 (Pa. 1990); United States ex rel. T.V.A. v. Three Tracts of Land, 377 F. Supp. 631 (N.D.Ala. 1974).*

(n45)Footnote 153. *Berne v. Town of Stratford, 583 A.2d 136 (Conn. App. 1990); Dahl v Northern Ind. Pub. Serv. Co., 157 N.E.2d 194 (Ind. 1989).*

(n46)Footnote 154. *See Necessity in Eminent Domain Proceedings: Four Cases, 29 Mont. L. Rev. 69 (1967).*

(n47)Footnote 155. Holding that landmarks preservation is a legitimate police power goal and valid if a reasonable return or equivalent private use is promised the owner. *Penn Central Transp. Co. v. City of New York, 336 N.E.2d 1271 (N.Y. 1977).*

(n48)Footnote 156. *Murphy, Inc. v. Westport, 40 A.2d 177 (Conn. 1944).* Purely aesthetic consideration does not justify a destruction of property interests without compensation. *Olson v. Minneapolis, 52 N.W. 734 (Minn. 1962).*

(n49)Footnote 157. *Berman v. Parker, 348 U.S. 26 (1954); Obendorf v. City and County of Denver, 900 F.2d 1434 (10th Cir. 1990); County of Dakota v. City of Lakeville, 559 N.W.2d 716 (Minn. App. 1997)* (highway expansion in possible violation of environmental requirements).

(n50)Footnote 158. United States v. 18.67 Acres, 793 F. Supp. 582 (M.D.Pa. 1992); *United States v. 72 Acres of Land, 37 F. Supp. 297 (N.D.Cal. 1941).*

(n51)Footnote 159. *Chicago & N.W. R.R. v. Ochs, 249 U.S. 416 (1919); Toledo P. & W. R.R. v. Brown, 31 N.E.2d 767 (Ill. 1940); Reter v. Davenport, R.I. & N.W. R.R., 54 N.W.2d 863 (Iowa 1952)* (even for a private spur); *Greenwich Assocs. v. Metropolitan Transp. Auth., 152 A.2d 216 (N.Y. App. Div. 1989); Texas & N.O. R.R. v. Schoenfeld, 146 S.W.2d 724 (Tex. 1941).*

(n52)Footnote 160. *Farmers New World Life Ins. Co. v. Bountiful City, 803 P.2d 1241 (Utah 1990); Seward v. Margules, 9 Alaska 354 (1938).* Improvement of navigation is a public purpose. *Courtesy Sandwich Shop, Inc. v. Port of*

N.Y. Auth., 190 N.E.2d 402 (N.Y. 1963).

(n53)Footnote 161. *Alabama Elec. Co-op, Inc. v. Jones, 574 So. 2d 734 (Ala. 1990); State ex rel. Washington Water Power Co. v. Superior Court, 111 P.2d 577 (Wash. 1941); Carstens v. Public Util. Dist. No. 1, 111 P.2d 583 (Wash. 1941).*

(n54)Footnote 162. *Vernocy v. T.W. Phillips Gas & Oil Co., 545 A.2d 969 (Pa. 1988); Ouachita Parish School Board v. Clark, 1 So. 2d 54 (La. 1941).*

(n55)Footnote 163. United States v. 13.10 Acres, 737 F. Supp. 212 (S.D.N.Y. 1990); *City of Mesa v. Smith Co., 816 P.2d 939 (Ariz. App. 1991); Caruthersville v. Faris, 146 S.W.2d 80 (Mo. Ct. App. 1940); Flaccomio v. Baltimore, 71 A.2d 12 (Md. 1950).* Taking for the World Trade Center was a public use though facilities were to be leased to private industry. *Courtesy Sandwich Shop, Inc. v. Port of N.Y. Auth., 190 N.E.2d 402 (N.Y. 1963).*

(n56)Footnote 164. *Baker v. Burbank-Glendale-Pasadena Airport, 705 P.2d 866 (Cal. 1985); Fresno v. Hedstrom, 229 P.2d 809 (Cal. Ct. App. 1957); Fishel v. Denver, 108 P.2d 236 (Colo. 1940); Wichita v. Clapp, 263 P. 12 (Kan. 1928); New Orleans v. Crawford, 9 So. 2d 82 (La. App. 1942)* (land for enlargement of airfield as necessary for national defense); *Douty v. Baltimore, 141 A. 499 (Md. 1928); In re Petition of Detroit, 14 N.W.2d 140 (Mich. 1944); Hesse v. Utica, 230 N.Y.S. 676 (N.Y. App. Div. 1928); Gissel v. Kenmore Twp., 512 N.W.2d 470 (N.D.1994); State ex rel. Hile v. Cleveland, 160 N.E. 241 (Ohio App. 1927); Delfeld v. City of Tulsa, 131 P.2d 754 (Okla. 1942); Town of Wheatland v. Bellis Farms, Inc., 806 P.2d 281 (Wyo. 1991).*

(n57)Footnote 165. *Wilson Coalition v. Summit, 586 A.2d 346 (N.J. Super. Ct. 1990); Daytona Beach v. Dygert, 1 So. 2d 170 (Fla. 1941).* Statute authorizing condemnation of a right-of-way for a public highway to any navigable water was constitutional. *Branch v. Oconto County, 109 N.W.2d 105 (Wis. 1961).*

(n58)Footnote 166. *Grey v. Coastal States Holding Co., 578 A.2d 1080 (Conn. App. 1990); United States v. Causby, 328 U.S. 256,* (1946). In private hands this could be a nuisance. *Swetland v. Curtiss Airports Corp., 55 F.2d 201 (6th Cir. 1932); Hinman v. Pacific Air Transport, 84 F.2d 755 (9th Cir. 1936);* Smith v. New England Air Transport, 170 N.E.385 (Mass. 1961). Increase of number of airflights over land, *Davis v. United States 295 F.2d 931 (Ct. Cl. 1961),* or use of a new type of aircraft, *Avery v. United States 330 F.2d 640 (Ct. Cl. 1964),* may be a new "taking" of airspace. Low and frequent air flights are a taking. *Davis v. United States, 295 F.2d 931 (Ct. Cl. 1961); American Airlines, Inc. v. Town of Hempstead, 272 F. Supp. 266 (E.D.N.Y. 1967); Loma Portal Civic Club v. American Airlines, 394 P.2d 548 (Cal. Ct. App. 1964); Jacksonville v. Schumann, 199 So. 2d 727 (Fla. App. 1967), cert. denied, 390 U.S. 981 (1968); State ex rel. Royal v. City of Columbus, 209 N.E.2d 405 (Ohio 1965).* Air activity up to navigable airspace is a taking. *Johnson v. Omaha Airport Auth., 115 N.W.2d 426 (Neb. 1962).* Inverse condemnation resulting from low airflights from airport. *Hoyle v. City of Charlotte, 172 S.E.2d 1 (N.C. 1970). Contra* and to effect noise from aircraft may be a nuisance though not coming from the perpendicular. *Thornburg v. Port of Portland, 376 P.2d 100 (Or. 1962).* Extension of airport runway which resulted in increase of noise over adjoining property was a taking. *City of Houston v. McFadden, 420 S.W.2d 811 (Tex. App. 1967).* Noise from low-flying aircraft resulting in diminished value of land is a taking though the flights are not directly over the land. *Martin v. Port of Seattle, 391 P.2d 540 (Wash. 1964). See* William B. Stoebuck, *Condemnation by Nuisance: The Airport Cases in Retrospect and Prospect, 71 Dick L. Rev. 207 (1966).*

(n59)Footnote 167. *State by Comm'r of Transp. v. Carroll, 587 A.2d 260 (N.J. 1991). Affirmative. Batten v. United States, 306 F.2d 580 (10th Cir. 1962),* on the theory of inverse condemnation. *Negative. Ferguson v. City of Keene, 238 A.2d 1 (N.H. 1968).* Noise and smoke of jet airplane operations did not constitute a taking. *Batten v. United States, 306 F.2d 580 (10th Cir. 1962).* Perogative of a jury to balance the gravity of the harm against social utility of the airport's conduct. *Thornburg v. Port of Portland, 376 P.2d 100 (Or. 1962); Louisville & Jefferson County Air Bd. v. Porter, 397 S.W.2d 146 (Ky. 1965).*

(n60)Footnote 168. *Fishel v. Denver, 108 P.2d 236 (Colo. 1940);* Central Hanover Bank & Trust Co. v. Pan American Airways, *188 S. 820 (Fla. 1939); Howard v. Atlanta, 10 S.E.2d 190 (Ga. 1940); Wichita v. Clapp, 263 P. 12 (Kan. 1928); Burnham v. Mayor & Aldermen, 35 N.E.2d 242 (Mass. 1941); Albany v. Bol, 19 N.Y.S.2d 522 (1940); Lutz v. Allegheny County, 153 A. 903 (Pa. 1930); Spokane v. Williams, 288 P. 258 (Wash. 1930).*

(n61)Footnote 169. *Adams v. Greenwich Water Co., 83 A.2d 177 (Conn. 1951).*

(n62)Footnote 170. *Obendorf v. City & County of Denver, 900 F.2d 1434 (10th Cir. 1990); W. & G. Co. v. Redevelopment Agency, 802 P.2d 755 (Utah Ct. App. 1990); Opinion of the Justices, 48 So. 2d 757 (Ala. 1950); In re Opinions of Justices, 179 So. 535 (Ala. 1938);* Humphrey v. Phoenix, 102 P.2d (Ariz. 1940); *Housing Auth. v. Dockweiler, 94 P.2d 794 (Cal. 1939); Lott v. Orlando, 196 So. 313 (Fla. 1939); Williamson v. Housing Auth., 199 S.E. 43 (Ga. 1938); Berger v. Howlett, 182 N.E.2d 673 (Ill. 1962); Spahn v. Stewart, 103 S.W.2d 651 (Ky. 1937); Matthaei v. Housing Auth., 9 A.2d 835 (Md. 1929); Stockus v. Boston Hous. Auth., 24 N.E.2d 333 (Mass. 1939); Tax Increment Financing Comm'n v. J.E. Dunn Constr. Co., Inc., 781 S.W.2d 70 (Me. 1990); In re Brewster Street Hous. Site, 289 N.W. 493 (Mich. 1939); Laret Inv. Co. v. Dickmann, 134 S.W.2d 65 (Mo. 1939); Rutherford v. Great Falls, 86 P.2d 656 (Mont. 1939); Lennox v. Housing Auth., 290 N.W. 451, 291 N.W. 100 (Neb. 1940); Wells v. Housing Auth., 197 S.E. 693 (N.C. 1938); Sunrise Props., Inc. v. Jamestown Urban Renewal Agency, 614 N.Y.S.2d 841 (N.Y. App. Div. 1994); Ryan v. Housing Auth., 15 A.2d 647 (N.J. Sup. Ct. 1940); Courtesy Sandwich Shop, Inc. v. Port of N.Y. Auth., 190 N.E.2d 402 (N.Y. 1963); New York City Hous. Auth. v. Muller, 1 N.E.2d 153 (N.Y. 1936); State ex rel. Ellis v. Sherrill, 25 N.E.2d 844 (Ohio 1940); Dornan v. Philadelphia Hous. Auth., 200 A. 834 (Pa. 1938); Matter of Condemnation, 658 A.2d 481 (Pa. 1995); McNulty v. Owens, 199 S.E. 425 (S.C. 1938); Nashville Hous. Auth. v. Nashville, 237 S.W.2d 946 (Tenn. 1951); Knoxville Hous. Auth.v. Knoxville, 123 S.W.2d 1085 (Tenn. 1939); Housing Auth. v. Higginbotham, 143 S.W.2d 79 (Tex. 1940); Mumpower v. Housing Auth., 11 S.E.2d 732 (Va. 1940); Chapman v. Huntington Hous. Auth., 3 S.E.2d. 502 (W. Va. 1939). See Oklahoma City v. Sanders, 94 F.2d 323 (10th Cir. 1938); Krause v. Peoria Hous. Auth., 19 N.E.2d 193 (Ill. 1939); Edwards v. Housing Auth., 19 N.E.2d 741 (Ind. 1939). See also* Bennett D.Brown, *The Power of Eminent Domain in Slum Clearance and Low-cost Housing Projects, 10 St. John's L. Rev. 280 (1935).* This is true even though generally the state cannot condemn land for resale for private use. *Crommett v. Portland Me., 107 A.2d 841 (Me. 1954); Papadinis v. Somerville, 121 N.E.2d 714 (Mass. 1954).* Taking for a world trade center was a public use. *Courtesy Sandwich Shop, Inc. v. Port of N.Y. Auth., 190 N.E.2d 402 (N.Y. 1963).* As to factors in determination of "blighted" areas, *see Yonkers Community Dev. Agency v. Morris, 335 N.E.2d 327 (N.Y. 1975).* Taking of land for purpose of urban redevelopment or renewal of blighted areas is taking for public use. City of Dayton v. Keys, 252N.E.2d 655 (Ohio 1969). *See Urban Renewal; Acquisition of Redevelopment Property by Eminent Domain, 1964 Duke L.J. 123 (1964). See also Eminent Domain: New Statutory Directives are Necessary to Streamline Urban Renewal Condemnation Procedures to Avoid Delay-Induced Property Deterioration and Depreciation, 22 Syracuse L. Rev. 1091 (1971). In re Glen Cove Urban Renewal Agency, 375 N.Y.S.2d 327 (N.Y. Super. 1975);* a subsequent transfer to private individuals of property taken for slum clearance purposes for redevelopment incidental or ancillary to the slum clearance is a public use. *Rowe v. Housing Auth. of City of Little Rock 249 S.W.2d 551 (Ark. 1952); Chicago Land Clearance Comm'n v. White, 104 N.E.2d 236 (Ill. 1952). Contra Adams v. Housing Auth. of Daytona Beach, 60 So. 2d 663 (Fla. 1952); Housing Auth. v. Johnson, 74 S.E.2d 891 (Ga. 1953); Edens v. City of Columbia, 91 S.E.2d 280 (S.C. 1956).*

(n63)Footnote 171. *United States ex rel. T.V.A. v. Two Tracts of Land, 387 F. Supp. 319 (E.D.Tenn. 1974); Village of Wheeling v. Exchange Nat'l Bank, 572 N.E.2d 966 (Ill. App. Ct. 1991).*

(n64)Footnote 172. *County of DeKalb v. Smith, 572 N.E.2d 379 (Ill. Ct. 1991); White Pine Hunting Club v. Schalkofski, 237 N.W.2d 223 (Mich. App. 1975).*

(n65)Footnote 173. *Hall v. City of Santa Barbara, 833 F.2d 1270 (9th Cir. 1986); Curators v. Brown, 809 S.W.2d 64 (Mo. App. 1991); State ex rel. Bruestle v. Rich, 110 N.E.2d 778 (Ohio 1953); Courtesy Sandwich Shop, Inc. v. Port of N.Y. Auth., 237 N.Y.S.2d 820 (N.Y. App. Div. 1973).* To the effect that a municipality could condemn property for off-street parking and then lease to a private party. *Ballantine v. Town of Falmouth, 298 N.W.2d 695 (Mass. 1973); City*

of Bozeman v. Vaniman, 898 P.2d 1208 (Mont. 1995). Upholding the power to give to private parties long term leases of property taken by condemnation which is not immediately needed for public use. *Cuglar v. Power Auth., 163 N.Y.S.2d 902 (1957).* The mere fact that there may exist some feature of private gain is immaterial if the public good is enhanced. *Borough of Big Run v. Shaw, 330 A.2d 315 (Pa. 1975). Moore v. Commissioner, Dep't of Envtl. Resources, 660 A.2d 677 (Pa. 1995).* Taking for the World Trade Center was a public use though the facilities were to be leased to private industry. *Courtesy Sandwich Shop, Inc. v. Port of N.Y. Auth., 190 N.E.2d 402 (N.Y. 1963). Katz v. Brandon, 245 A.2d 579 (Conn. 1968). See* Osborn M. Reynolds, Jr., *Is Public Necessity Necessary?, 29 Okla. L. Rev. 861 (1976).* Redevelopment authority could not condemn property under guise of urban renewal for a private use. *Golden Dawn Shops, Inc. v. Redevelopment Auth., 282 A.2d 395 (Pa. 1971).*The urban renewal statute was held constitutional. *Rabinoff v. District Court, 360 P.2d 114, 509 P.2d 1250 (Colo. 1973).* Slum clearance as distinguished from blighted areas is sufficient public use to justify that exercise of eminent domain and condemnation is not for private use merely because it involves lease or sale of property for private interest. *Grubstein v. Urban Renewal Agency, 115 So. 2d 745 (Fla. 1959).* Vacant land may be condemned as a part of slum clearance. *Housing Auth. v. Hall, 126 S.E.2d 223 (Ga. 1962).* Constitutionality of use of public funds to take undeveloped land for renewal use. *Opinion of the Justices, 168 N.E.2d 858 (Mass. 1960); Dodge v. Prudential Ins. Co., 179 N.E.2d 234 (Mass. 1961).* Where the primary purpose was for a public use, the incidental private benefit from subsequent resale of the property was immaterial. *Culley v. Pearl River Indus. Comm'n, 108 So. 2d 390 (Miss. 1959).* Prevention of incipient blight proper purpose of eminent domain. *Cannata v. New York City, 182 N.E.2d 395 (1962).* Permitting property to be taken for public purpose where the ultimate is for private property for the erection of office buildings. *Schenck v. Pittsburgh, 70 A.2d 612 (Pa. 1950); Ajootian v. Providence Redev. Agency, 91 A.2d 21 (R.I. 1952)* (construction of industrial plant). An agency may sell or lease to private interests after land has been cleared for redevelopment. *Grubstein v. Urban Renewal Agency of Tampa, 115 So. 2d 745 (Fla. 1959).*

(n66)Footnote 174. *Chicago Steel Rule v. Vaniman, 898 P.2d 1208 (Mont. 1995); Velishka v. Nashua, 106 A.2d 571 (N.H. 1954). But see Edens v. City of Columbia, 91 S.E.2d 280 (S.C. 1956),* to effect that power of eminent domain could not be used to condemn blighted area and sell to private parties. To the effect that a municipality could condemn property for off-street parking and then lease to a private party, *Ballantine v. Town of Falmouth, 298 N.E.2d 695 (Mass. 1973).* Urban renewal held a proper purpose. *In re Baden-Ormand Area Urban Renewal Project, 231 N.Y.S.2d 679 (N.Y. Sup. Ct. 1962),* also slum clearance. *Greensboro Redev. Comm'n v. Hagins, 128 S.E.2d 391 (N.C. 1962).* An agency may sell or lease to private interests after land has been cleared for redevelopment. *Grubstein v. Urban Renewal Agency, 115 So. 2d 745 (Fla. 1959).*

(n67)Footnote 175. *City of Oakbrook Terrace v. LaSalle Nat'l Bank, 542 N.E.2d 478 (Ill. App. 1989); Black Rock Placer Min. Dist. v. Summit Water & Irr. Co., 133 P.2d 58 (Cal. App. 1943).*

(n68)Footnote 176. *State Dep't of Transp. v. Fortune Federal Savings & Loan, 507 So. 2d 1172 (Fla. Dist. Ct. App. 1987); Adams v. Housing Auth., 60 So. 2d 663 (Fla. 1952).*

(n69)Footnote 177. *Tierney v. Planned Indus. Expansion Auth., 742 S.W.2d 146 (Mo. 1987); Russon v. Town of Union, 133 A.2d 1014 (N.Y. App. Div. 1987); Consumers Pub. Power Dist. v. Eldred, 22 N.W.2d 188 (Neb. 1946).* Housing site statute held constitutional. *In re Opinion of the Justices, 98 N.E. 611 (Mass. 1912)* (*but see Allydonn Realty Corp. v. Holyoke Hous. Auth., 23 N.E.2d 665 (Mass. 1939)); Belovsky v. Redev. Auth., 54 A.2d 277 (Pa. 1947)* (on theory that incidental private benefit does not affect right if a public purpose is primarily involved). The power to acquire land by eminent domain for purposes of slum clearance and low-cost housing projects is a constitutional exercise of the power of eminent domain, though the taking may be justified only under the police power of the state. *In re Brewster Street Housing Site, 289 N.W. 493 (Mich. 1939).*

(n70)Footnote 178. *State Dep't of Hwys. v. Denver & Rio Grande W. R.R., 757 P.2d 181 (Colo. App. 1988).* Under a New Mexico statute, a private corporation has the right to acquire by eminent domain a right-of-way over private property for the purpose of laying a pipeline to transport water to be used in a coal mine. *Kaiser Steel Corp. v. W.S. Ranch Co., 467 P.2d 986 (N.M. 1970).* Georgia permits condemnation of a way over private land to give access of

landlocked property. *Jordan v. Ridgdill, 169 S.E.2d 675 (Ga. App. 1969).*

(n71)Footnote 179. *Maycol, Inc. v. Downtown Dev. Auth. of the City of Ft. Lauderdale, 315 So. 2d 451 (Fla. 1975); Prince Georges County v. Collington Crossroads, Inc., 339 A.2d 278 (Md. 1975).* City cannot take water for purpose of resale to an industry outside of the city, and eminent domain proceedings therefore are invalid. *Burger v. City of Beatrice, 147 N.W.2d 784 (Neb. 1967).* Where the predominant purpose or effect of a particular condemnation action is to benefit private interests the taking is unconstitutional. But this does not mean that the public must literally or physically be permitted to use the property or that the title to the condemned property be in the government.

(n72)Footnote 180. Cal. Civ. Proc. Code, § 1238;Cal. Sts. & High. Code, § § 128, 132; Mont. Rev. Code § 83-9902; N.Y. Consol. High. Laws § § 300, 301; Ohio Rev. Code § § 5511.02, 5537.01; *May v. Ohio Tpk. Comm'n, 178 N.E.2d 920 (Ohio 1962);* Pa. Stat., tit. 36, § § 2731, 2732. Aesthetic purposes are valid for eminent domain. *Yarborough v. North Carolina Park Comm'n, 145 S.E. 563 (N.C. 1928); L.U. Sheep Co. v. Board of County Comm'rs, 790 P.2d 663 (Wyo. 1990).* In Georgia persons who are landlocked may, by following statutory procedures, condemn an easement of access not exceeding 20 feet in width over the land of another by paying compensation therefor (Ga. Code, ch. 83-1). *Jordan v. Ridgdill, 169 S.E.2d 675 (Ga. App. 1969).* Mississippi has a substitute condemnation statute which permits the taking of A's property for the use of B in order to compensate B for loss resulting from condemnation for a public use. *Mississippi State Hwy. Comm'n v. Morgan, 175 So. 2d 606 (Miss. 1965).* Alabama will permit the use of eminent domain to give access to a privately owned tract provided there is no other access but not if there is a reasonably adequate road. *Southern Ry. v. Hall, 100 So. 2d 722 (Ala. 1957).* Burden of proof is on those opposing the condemnation on environmental grounds. *Concerned Citizens United, Inc. v. Kansas Power & Light Co., 523 P.2d 755 (Kan. 1974). See* John C. Sherman, *Environmental Law & Burden Established to Eminent Domain Property, 14 Washburn L.J. 355 (1975).* Permitting condemnation of private property of an easement to give access to other private property upon the theory that public use means public benefit or advantage, not merely public employment. *State Hwy. Comm'n v. Thornton, 156 S.E.2d 248 (N.C. 1967);* Lawrence V. Senn, Jr., *Real Property-Eminent Domain-The Public Use Requirement, 46 N.C. L. Rev. 663 (1967).* Private persons permitted to condemn private land for access to timberland. *Moore Mill & Lumber Co. v. Foster, 336 P.2d 39, 337 P.2d 810 (Or. 1959).* A statute authorizing one to enter upon the lands of another to open drainage is unconstitutional as a taking of private property for private use. *Clemson Univ. v. First Provident Corp., 197 S.E.2d 914 (S.C. 1973).* In Alabama a landowner can condemn title to an outlet to public road over another's land if there is no reasonable adequate existing way of ingress and egress. *Southern Ry. v. Hall, 100 So. 2d 722 (Ala. 1957)* (dictum). A subsequent transfer to private individuals of property taken for slum clearance purposes for redevelopment incidental or ancillary to the slum clearance is a public use. *Rowe v. Housing Auth. of City of Little Rock, 249 S.W.2d 551 (Ark. 1952); Chicago Land Clearance Comm'n v. White, 104 N.E.2d 236 (Ill. 1952).* Where property would become landlocked through eminent domain, an access road could be condemned. *Illinois State Toll Hwy. Auth. v. Karn, 293 N.E.2d 162 (Ill. App. 1973).* Under a New Mexico statute, a private corporation has the right to acquire by eminent domain a right-of-way over private property for the purpose of laying a pipeline to transport water to be used in a coal mine. *Kaiser Steel Corp. v. W.S. Ranch Co., 467 P.2d 986 (N.M. 1970).* Slum elimination is a public use. *Amsterdam Urban Renewal Agency v. Bohlke, 336 N.Y.S.2d 725 (N.Y. App. Div. 1972).*

(n73)Footnote 181. Held invalid. *Estate of Waggoner v. Gleghorn, 378 S.W.2d 47 (Tex. 1964). Upheld. Sherman v. Buick, 32 Cal. 241 (1867); Bassett v. Swenson, 5 P.2d 722 (Idaho 1931); Komposh v. Powers, 244 P. 298 (Mont. 1926).*

(n74)Footnote 182. *Grey v. Coastal States Holding Co., 578 A.2d 1080 (Conn. App. 1990); Michigan Blvd. Bldg. Co. v. Chicago Park Dist., 106 N.E.2d 359 (Ill. 1952); Peoples Gas Light & Coke Co. v. Chicago, 109 N.E.2d 777 (Ill. 1952); Cleveland v. Detroit, 37 N.W.2d 625 (Mich. 1949); Kraus v. Halle Bros. Co, 100 N.E.2d 103 (Ohio 1950), modified & aff'd, 117 N.E.2d 175 (Ohio App. 1951); Anderson v. Stuarts Draft Water Co., 87 S.E.2d 756 (Va. 1955).* Condemnation for subsurface storage of gas. *Peoples Gas Light & Coke Co. v. Buckles, 182 N.E.2d 169 (Ill. 1962).* Condemnation of underground strata for gas storage. *Iroquois Gas Corp. v. Gernatt, 281 N.Y.S.2d 896 (N.Y. App. Div. 1967).*

(n75)Footnote 183. *Livonia Twp. Sch. Dist. v. Wilson, 64 N.W.2d 563 (Mich. 1954).* But in *Cleveland v. Detroit, 33 N.W.2d 747 (Mich. 1948),* the court permitted a taking of a fee over the objection that the city needed only the subsurface for a bus terminal and that the surface was not necessary for public purpose.

(n76)Footnote 184. Condemnation of an amount in excess of what is needed is unconstitutional. *Cincinnati v. Vester, 33 F.2d 242 (6th Cir. 1929). Contra* results where the remnant left would otherwise be valueless. *People v. Thomas, 239 P.2d 914 (Cal. App. 1952); Excelsior Needle Co. v. City Council of Springfield, 108 N.E. 497 (Mass. 1915).*

(n77)Footnote 185. *See An Expanded Use of Excess Condemnation, 21 U. Pitt. L. Rev. 60 (1956);* and *Excess Condemnation -- Right to Condemn Property in Excess of Needs for a Particular Purpose, 6 A.L.R. 3d 297.*

(n78)Footnote 186. *Unconstitutional. Cincinnati v. Vester, 33 F.2d 242 (6th Cir. 1929). Contra* where remainder is rendered valueless. *People v. Thomas, 239 P.2d 914 (Cal. App. 1952); Excelsior Needle Co. v. City Council of Springfield, 108 N.E. 497 (Mass. 1915).*

(n79)Footnote 187. *United States ex rel. T.V.A. v. 2 Tracts of Land Containing a Total of 146.4 Acres More or Less in Loudon Co., Tennessee, 532 F.2d 1083 (6th Cir. 1976).*

(n80)Footnote 188. *16 U.S.C. § § 831* - 831dd. *United States ex rel. T.V.A. v. Two Tracts of Land Containing a Total of 146.4 Acres More or Less in Loudon Co., Tenn., 532 F.2d 1983 (6th Cir. 1976).*

(n81)Footnote 189. *Baycol, Inc. v. Downtown Dev. Auth. of City of Ft. Lauderdale, Fla., 315 So. 2d 451 (Fla. 1975).* Off-street parking was held not proper purpose for a taking where not operated by the taker itself. *Ballantine v. Town of Falmouth, 294 N.E.2d 524 (Mass. App. 1973) rev'd, 298 N.E.2d 695 (Mass. 1973).* In Alabama a person can condemn title to way to an outlet to public road over another's land if there is no reasonable adequate existing way of ingress and egress. *Southern Ry. v. Hall, 100 So. 2d 722 (Ala. 1957)* (dictum). Surrounded landowner's economic use of property is not a public use and a statute granting right of access to the *Texas Constitution. Estate of Waggoner v. Gleghorn, 378 S.W.2d 47 (Tex. 1964).* One may not force others to give him a right-of-way across their land. *Kanupp v. Land, 102 N.E.2d 779 (N.C. 1958).* Property right created by a restrictive covenant cannot be taken for private use. *Pulos v. James, 302 N.E.2d 768 (Ind. 1973).* Property cannot be taken by eminent domain for private use. *Simpson v. Low-Rent Housing Agency of Mount Ayr, La., 224 N.W.2d 624 (Iowa 1974); Borough of Big Run v. Shaw, 330 A.2d 315 (Pa. 1975); Phillips v. Foster, 211 S.E.2d 93 (Va. 1975).* Urban renewal taking was upheld even though property would ultimately go into private hands. *Gibson & Perin Co. v. City of Cincinnati, 480 F.2d 936 (6th Cir. 1973).* Condemning a drainage easement across private land to drain another tract of private land was not a public taking. *Phillips v. Foster, 211 S.W.2d 93 (Va. 1975).* Eminent domain cannot be exercised to give access to a private tract. *O'Neil v. Board of County Comm'rs, 209 N.E.2d 393 (Ohio 1965).*

(n82)Footnote 190. *Claim of Kincade, 19 N.E.2d 314 (Ohio App. 1953).* A mere statement by the condemnor that certain activity constituted public purpose was not sufficient to establish such purpose. *Amen v. City of Dearborn, 363 F. Supp. 1267 (E.D.Mich. 1973). See Foltz v. City of Indianapolis, 130 N.E.2d 650 (Ind. 1955)* (permitting condemnation for parking facilities, leased to private parties though no regulation of rates, justified on common-law duty to serve public a reasonable rates). An attempted application of valid zoning order so interfered with and restricted use and enjoyment of owner's property as to constitute a taking for public use. *Jackson Municipal Airport Auth. v. Evans, 191 So. 2d 126 (Miss. 1966).* Prevention of overcrowding of land and avoidance of undue concentration of population is a proper zoning concept as promoting the general welfare in "conservation areas" in danger of becoming slum areas. *People ex rel. Gutknecht v. Chicago, 121 N.E.2d 791 (Ill. 1954); Zisook v. Maryland-Drexel Neighborhood Redev. Corp., 121 N.E.2d 804 (Ill. 1954).*

(n83)Footnote 191. *Richland School Twp. v. Overmyer, 73 N.E. 811 (Ind. 1905).*

(n84)Footnote 192. *Brest v. Jacksonville Expressway Auth., 194 So. 2d 658 (Fla. App. 1967), aff'd, 202 So. 2d 748*

(Fla. 1967) (denying substitute condemnation). Annotation, *Substitute condemnation -- Power to Condemn Property or Interest Herein to Replace other Property Taken for Public Use, 20 A.L.R. 3d 862.*

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CHAPTER 80 THE POWER OF EMINENT DOMAIN

9-80 Thompson on Real Property, Thomas Editions § 80.04

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§ 80.04 Property Rights That May Be Taken by Eminent Domain.

[Go To Supp]

Theoretically, all types of property and property rights -- both personal and real -- are subject to condemnation by eminent domain power. n193

§ 80.04(a) Property Rights That May Be Taken by Eminent Domain.

The following list of property rights that have been held subject to condemnation demonstrates, in miscellaneous order, the huge range of rights over which eminent domain power may be exercised:

An adjoining landowner's interest in fee in a street n194

Church property n195

Contractual rights n196

The top of a dike taken for road purposes n197

Designation of a historical landmark, curtailing development rights n198

Dower rights n199

Easements n200

Fixtures n201

Franchises n202

Intangible property n203

Interests held by a toll-bridge company n204

Interests held by a turnpike company n205

Land held by a state other than where the land is located n206

Mortgaged property n207

Native American claims to land n208

Any possessory or future interest in realty n209

Property held under a lease n210

Property in the hands of a receiver n211

Property rights held by municipalities n212

Railroad property n213

Rights of reversion to land n214

Rights of way n215

Subsurface stratum for storage of gas by a public utility n216

Turnpike roads n217

Other cases have held that materials stored may be condemned for road building purposes. Intergovernmental relations are often at stake in certain condemnation situations. For instance, property held by a state or governmental subdivision of the state may be condemned by the federal government. n218 Likewise, property of a municipal corporation may be taken by the state. n219 Under some rare circumstances, property held by the federal government is subject to taking by the state. n220

COMPUTER-ASSISTED RESEARCH

LEXIS: "eminent domain" w/20 rights w/3 property

§ 80.04(b) Property Rights Whose Susceptibility to Eminent Domain Power is Disputed or Conditional.

Condemnation of some property rights is approved in some jurisdictions and not permitted in others. Many courts, for instance, hold that options to purchase realty can be condemned, n221 while other courts disagree. n222 Likewise, some courts approve condemnation of utility easements n223 or other property, n224 and other courts do not; n225 and a public utility franchise is also permitted in some states, n226 but not in others. n227 According to some courts, a public utility having facilities on public highways is not entitled to compensation when relocation is required, while other courts disagree. n228

In some jurisdictions property already devoted to a public use is protected from further condemnation, but some courts disagree. Generally, property already devoted to a public use is protected from invasion by other uses if such new uses

will be so substantial as to amount to destruction of the original use, unless express legislative action permits the new eminent domain proceeding. n229 However, the federal government may, by eminent domain, take property already devoted to a public use. n230 And as a general rule, property devoted to a public use may not be taken by eminent domain for an inconsistent public use, n231 unless the property taken is not in active public use n232 and there is express statutory authority for such a taking. n233 Under this so-called "prior public use" doctrine, therefore, one arm of the sovereign cannot condemn property held by another arm, n234 unless the legislature decrees otherwise. n235 However, under the so-called "superior use" doctrine, land previously devoted to public use may, by the exercise of the power of eminent domain, be condemned for another public use, when the latter use is more beneficial to the general public and not destructive of the rights of the public under the first use. n236 Some courts reject this doctrine. n237 A mere general grant of eminent domain power, without express legislative authorization to take property already in public use, does not permit such condemnation. n238

Land held by a public service corporation for purposes other than those pertaining to its franchise may be taken, n239 but in some states property of such corporations is considered as being devoted to or held for a public use, so as to exempt it from condemnation for a different public use under general authority. n240

Personal property that is party of condemned realty may also be condemned, but only if conditions of annexation, adaptability and intent are met. n241

§ 80.04(c) Property Rights That Are Not Subject to Eminent Domain Takings or to Compensation.

Some property rights are not subject to condemnation or, if terminated, are not considered as having been taken. For instance, termination of a revocable franchise or permit is not a taking. If a condemning authority takes the subject matter of a contract, but does not assume the rights and obligations under the contract, there is no condemnation of the contract. The contract is considered at an end and the loss that follows is noncompensable. n242

If the federal government takes or destroys property, or diminishes property's value, under the war or commerce powers, the losses are not takings and are not compensable to the owners. Destruction of property order by the U.S. military authorities to prevent the property's use by invading military forces of an enemy nation does not constitute a compensable taking. n243 Likewise, regulations limiting use of property during wartime are not compensable takings.

A traditional rule was that Native American claims to land could be extinguished without compensation unless the federal government recognized the claims. n244 The United States Supreme Court has since ruled, however, that certain original Native American claims, even though never officially recognized by Congress, are property rights for the taking of which the owners must be compensated. n245

Under the rule of comity, property in the hands of a federal court receiver cannot be condemned in a state court. n246 Indeed, without express federal authority, a state cannot condemn any federal property, including that not being used for governmental purposes. n247 And a state is without authority to interfere with the federal exercise of eminent domain. n248

Each state holds all the property within its boundaries free from the eminent domain of all other states, so that no state can take or authorize the taking of property located in another state. n249 On the other hand, all the rights and powers of a municipality are derived from the state, and all its property is held subject to the inherent right of the state to appropriate it to public use whenever the public good may require it. If the municipality holds property in a governmental capacity, it is held as an agency of the state, and the property so held may be reclaimed by the state under superior right at any time without compensation. n250 If the property is held by the municipality in its private or proprietary capacity such property may be appropriated to public use the same as any other privately-owned property but cannot be taken without compensation. n251

FOOTNOTES:

(n1)Footnote 193. *United States v. 19.86 Acres of Land, 141 F.2d 344 (7th Cir. 1944); Georgia v. Chattanooga, 264 U.S. 472 (1924); Long Island Water-Supply Co. v. Brooklyn, 166 U.S. 685 (1897); United States v. 385 Acres of Land, 61 F. Supp. 746 (E.D.Wis. 1945); Alabama & F. R.R. v. Kenney, 39 Ala. 307 (1864); New York, H. & N.R.R. v. Boston, H. & E.R.R., 36 Conn. 196 (1869); Leonard v. Autocar Sales & Serv. Co., 64 N.E.2d 477 (Ill. 1945); Chicago v. Cunnea, 160 N.E. 559 (Ill. 1928); Water Works Co. v. Burkhart, 41 Ind. 364 (1872); Pittsburgh, C., C. & St. L. R.R. v. Railroad Comm'n, 86 N.E. 328 (Ind. 1908); Halstead v. Brazil, 147 N.E. 629 (Ind. App. 1925); State v. Noyes, 47 Me. 189 (1859); Petition of Burnquist, 19 N.W.2d 394 (Minn. 1945); Minnesota Canal & Power Co. v. Koochiching Co., 107 N.W. 405 (Minn. 1906). People v. Adirondack R.R., 54 N.E. 689 (N.Y. 1899); Kramer v. Cleveland & P. R.R., 5 Ohio St. 140 (1855).* The legislature has the power to designate what property may be taken. *State v. McCook, 147 A. 126 (Conn. 1929).* Dower was destroyed by eminent domain. *Dal Brun v. City of West Palm Beach, 227 So. 2d 347 (Fla. App. 1969).* Predial leases are compensable in eminent domain. *Columbia Gulf Transmission Co. v. Hoyt, 215 So. 2d 114 (La. 1968).* Cost of removal of fixtures is compensable. *Rose v. State, 298 N.Y.S.2d 968 (1969).* Personalty is not the subject of condemnation award, being removable, but condemnor is responsible for moving costs. *City of Buffalo v. J.W. Clement Co., 321 N.Y.S.2d 345 (1971).* Billboards are personalty, not fixtures, in eminent domain. *City of Cleveland v. Zimmerman, 253 N.E.2d 327 (Ohio Prob. 1969).* Buildings, though owned separately from the fee, are "real estate" within the meaning of condemnation statutes. *United States v. 19.86 Acres of Land, 141 F.2d 344 (7th Cir. 1944).* Leasehold estate in office space was an interest in land subject to condemnation. *United States v. 284, 392 Square Feet of Floor Space, 203 F. Supp. 70 (E.D.N.Y. 1962).*

(n2)Footnote 194. *Faulks v. Allenhurst, 1 A.2d 6 (N.J. Sup. 1938); Donough v. Mansfield Tel. Co., 32 N.E.2d 480 (Ohio App. 1937).*

(n3)Footnote 195. *Denver Urban Renewal Auth. v. Pillar of Fire, 552 P.2d 23 (Colo. 1976); Father Flanagan's Boys Home v. Millard Sch. Dist., 242 N.W.2d 637 (Neb. 1976).*

(n4)Footnote 196. *Narragansett Elec. Lighting Co. v. Sabre, 146 A. 777 (R.I. 1929).* Options in leases are compensable when the leasehold is condemned. *United States v. Certain Land, 214 F. Supp. 148 (M.D.Ala. 1963).*

(n5)Footnote 197. *State ex rel. Seaborg v. Superior Court, 199 P. 755 (Wash. 1921).*

(n6)Footnote 198. Lutheran Church in *Am. v. City of New York, 359 N.Y.S.2d 7 (1974).*

(n7)Footnote 199. *Dal Brun v. City of West Palm Beach, 227 So. 2d 347 (Fla. App. 1969).*

(n8)Footnote 200. *Springfield v. Springfield Consol. R.R., 129 N.E. 82 (Ill. 1920); State ex rel. Peterson v. Kansas State Bd. of Agric., 149 P.2d 604 (Kan. 1944); Beals v. Brookline, 139 N.E. 492 (Mass. 1923); Gund Realty Co. v. Cleveland, 160 N.E. 101 (Ohio App. 1927); Ponca City v. Drummond, 221 P. 466 (Okla. 1923); Bailey v. Wilkinsburg Real Estate & Trust Co., 129 A. 445 (Pa. 1925).* Under the minority rule, adjoining landowners had no property right in a restrictive covenant compensable on condemnation of the servient estate, since such interests are contractual only. *United States v. Certain Lands, 112 F. 622 (1st Cir. 1899); Smith v. Clifton Sanitation Dist., 300 P.2d 548 (Colo. 1956).* A license is not property subject to compensation in eminent domain. *Tidwell v. State ex rel. Herman, 514 P.2d 1260 (Ariz. App. 1973).* The condemnation of an equitable servitude is not compensable. *Board of Pub. Instr. v. Bay Harbor Islands, 81 So. 2d 637 (Fla. 1955).* The majority rule allows compensation on the theory that a property right is created by the restrictive covenant. *Ladd v. Boston, 24 N.E. 858 (Mass. 1890); Peters v. Buckner, 232 S.W 1024 (Mo. 1921).* State could not by eminent domain proceedings prohibit the use of signboards on abutting properties. *Ellis v. Ohio Tpk. Comm'n, 120 N.E.2d 719 (Ohio 1954).* Creation of a perpetual easement is a taking in eminent domain. *Crane v. Brintnall, 278 N.E.2d 703 (Ohio 1972). Rensselaer v. Leopold, 5 N.E. 761 (Ind. 1886); Johnston v. Old Colony R.R., 29 A. 594 (R.I. 1894).*

(n9)Footnote 201. A chattel becomes part of the realty for the purpose of a condemnation award as it does for

determination between a vendor and purchaser. *In re Lincoln Square Slum Clearance Project, 198 N.Y.S.2d 260 (1960).*

(n10)Footnote 202. *Greenwood v. Union Freight R.R., 105 U.S. 13 (1881); Richmond F. & O. R.R. v. Louisa R.R., 54 U.S. 71 (1851); West River Bridge Co. v. Dix, 47 U.S. 507 (1848); Alabama & F. R.R. v Kenney, 39 Ala. 307 (1864); Lebanon v. Public Serv. Co., 14 N.E.2d 719 (Ind. 1938); Kennebeck Water Dist. v. Waterville, 54 A. 6 (Me. 1902); State v. Noyes, 47 Me. 189 (1859); Baltimore & F. Tpk. R.R. v. Baltimore, C. & E. M. Pass R.R., 31 A. 854 (Md. 1895); Eighth Ave. Coach Corp. v. New York, 10 N.Y.S.2d 170 (1939); Bohl v. Schenectady, 220 N.Y.S. 349 (1927).* Trade routes are of value in temporary taking of laundry for eminent domain by United States government. *Kimball Laundry Co. v. United States, 338 U.S. 1 (1949).* Destruction of a franchise right in a highway is a taking. *Bellville v. St. Clair County Tpk. Co., 84 N.E. 1049 (Ill. 1908).* In general, franchises are not property for which compensation must be paid when eminent domain renders them useless. *Greater Wilmington Transp. Auth. v. Kline, 285 A.2d 819 (Del. 1971).*

(n11)Footnote 203. *Leonard v. Autocar Sales & Serv.Co., 64 N.E.2d 477 (Ill. 1945).*

(n12)Footnote 204. *Fulton Ferry Bridge Co. v. Blackwood, 293 S.W. 2 (Ark. 1927); Muscoda Bridge Co. v. Worden-Allen Co., 219 N.W 428 (Wis. 1928).*

(n13)Footnote 205. *Williamson County v. Franklin & Spring Hill Tpk. Co., 228 N.W. 714 (Tenn. 1921).*

(n14)Footnote 206. *State ex rel. Chelan Elec. Co. v. Superior Court, 253 P. 115 (Wash. 1927).*

(n15)Footnote 207. *State v. St. Louis S.W. R.R., 165 S.W. 491 (Tex. App. 1913); Alabama & F.R.R. v. Kenney, 39 Ala. 307 (1864).*

(n16)Footnote 208. *Northwestern Shoshone Indians v. United States, 324 U.S. 335 (1945); Tee-Hit-Ton Indians v. United States, 120 F. Supp. 202 (Ct. Cl. 1954); United States v. Alcean Band of Tillamooks, 329 U.S. 40 (1946).*

(n17)Footnote 209. *Houston North Shore Ry. v. Tyrrell, 98 S.W.2d 786 (Tex. 1936).* Loss of easement is not compensable where easement rights are not condemned, nor would the condemnation operate directly on such easements, even though the condemnation of the fee nullified the intended use of the easement. *United States v. 40.60 Acres of Land, 324 F. Supp. 573 (N.D. Cal. 1971).* Lease from year to year terminable on 60 days' notice by either party created a property right requiring condemnation. *Batcheller v. Iowa State Hwy. Comm'n, 101 N.W.2d 30 (Iowa 1960).*

(n18)Footnote 210. *Houston North Shore Ry. v. Tyrrell, 98 S.W.2d 786 (Tex. 1936).* So in the case of cemeteries. *Clarendon County v. Holliday, 189 S.E. 885 (S.C. 1937).* Covenant of quiet enjoyment in lessee is not breached by a taking in eminent domain. *Dolman v. United States Trust Co., 138 N.E.2d 784 (N.Y. 1956).* Taylor Grazing Act permits are not property subject to compensation. *United States v. 40,021.64 Acres of Land, 387 F. Supp. 839 (D.N.M. 1975).*

(n19)Footnote 211. *Western Union Tel. Co. v. Atlantic & Pacific Tel. Co., Fed Cas. No. 17445, 7 Biss 367 (C.C. Ind. 1877); Central R.R. v. Pennsylvania R.R., 31 N.J. Eq. 475 (1879).*

(n20)Footnote 212. *Reclamation Dist. v. Superior Court, 154 P. 845 (Cal. 1916).* The cases are divided as to whether the United States must compensate a state for property taken from the state. *Cass v. Morgan Counties, 62 N.E. 207 (Ill. 1901)* (no compensation required); *St. Louis v. Western Union Tel. Co., 148 U.S. 92 (1893); Bedford v. United States, 23 F.2d 453 (1st Cir. 1927); see also United States v. Des Moines County, 148 F.2d 448 (8th Cir. 1945).* County commissioners were authorized to condemn so much of the land owned by incorporated village as was necessary for park and recreational purposes, but not that which the village intended to use for municipal buildings. *Richmond Heights v. Board of County Comm'rs, 166 N.E.2d 143 (Ohio App. 1960); Nahant v. United States, 136 F. 273 (1st Cir. Mass. 1905); State Hwy. Comm'n v. Elizabeth, 140 A. 335 (N.J. 1928).* The rule is that a municipality is not entitled to compensation for land held by it and devoted to a public use when the property is taken by the state, but a public use does not apply when such property is condemned by virtue of the authority of United States and not under authority delegated to the United States by the states. *Beford v. United States, 23 F.2d 453 (1st Cir. 1927).* Where the taking by

the state is for a proprietary and not for a sovereign purpose, a public utility is entitled to damages for its installations, though made on a public highway. *In re Gillen Place, 106 N.E.2d 897 (N.Y. 1952).*

(n21)Footnote 213. *Ferguson v. Illinois Cent. R.R., 210 N.W. 604 (Iowa 1926); Houston N. Shore Ry., v. Tyrrell, 98 S.W.2d 786 (Tex. 1936).* Unexercised option to purchase or renew lease must be valued in eminent domain. *Sholom, Inc. v. State Rds. Comm'n, 229 A.2d 576 (Md. 1967).*

(n22)Footnote 214. The value of a possibility of reverter is so low that a state must pay the full value though it takes but a determinable fee. *State v. Cheyenne County, 60 N.W.2d 593 (Neb. 1953); North Carolina State Hwy. v. Black, 79 S.E.2d 778 (N.C. 1954).* Apportionment of the award between the immediate estate and future interest has been allowed in *United States v. 1,119.15 Acres of Land, 44 F. Supp. 449 (E.D.Ill. 1942); United States v. 2,184.81 Acres of Land, 45 F. Supp. 681 (W.D.Ark. 1942); United States v. 2,086 Acres of Land, 46 F. Supp. 411 (W.D.S.C. 1942); United States v. 16 Acres of Land, 47 F. Supp. 603 (D.Mass. 1942).* The courts upon condemnation have refused to give condemnation awards to the possibility of reverter or right of re-entry. *First Reformed Dutch Church v. Croswell, 206 N.Y.S. 132 (1924); In re Cook's Will, 277 N.Y.S. 26 (1935); Lutes v. Louisville & N. R.R., 164 S.W. 792 (Ky. 1914);* unless the breach has occurred prior to the condemnation. *In re Opening and Extending of North Conduit Ave., 27 N.Y.S.2d 841 (1941).*

(n23)Footnote 215. *Gwin v. Greenwood, 115 So. 890 (Miss. 1928); State ex rel. Colyn v. Superior Court, 232 P. 282 (Wash. 1925)* (private road); *In re Condemnation of Lands, 196 N.W. 575 (Wis. 1923).* In Montana a private individual can condemn a right-of-way across another's property. *Simonson v. McDonald, 311 P.2d 982 (Mont. 1957).*

(n24)Footnote 216. *Wilcox v. Illinois Commerce Comm., 178 N.E.2d 873 (Ill. 1961); Peoples Gas Light & Coke Co. v. Buckles, 182 N.E.2d 169 (Ill. 1962).* State may give a public utility right to condemn underground reservoirs. *Iroquois Gas Corp. v. Gernatt, 272 N.Y.S.2d 291 (1966).* Taking by eminent domain of means of access to land otherwise landlocked held valid as substitute condemnation. *North Carolina State Hwy. Comm'n v. Asheville Sch., Inc.,169 S.E.2d 193 (N.C. App. 1969).*

(n25)Footnote 217. *Greiner v. Commonwealth, 6 A.2d 67 (Pa. 1939).*

(n26)Footnote 218. *United States v. Carmack, 329 U.S. 230 (1946); United States v. Montana, 134 F.2d 194 (9th Cir. 1943); Oklahoma ex rel. Phillips v. Atkinson Co., 313 U.S. 508 (1941);* Stockton v. Baltimore & N.Y. R.R., 32 F.9 (C.C. N.J. 1887); *Kohl v. United States, 91 U.S. 367 (1875).* The federal government may acquire for public purposes such property as it may elect and take such interest therein or use of the property as it may determine and fix the term of use. *United States v. 60,000 Square Feet of Land, 53 F. Supp. 767 (N.D. Ca. 1943); Burger v. City of St. Paul, 64 N.W.2d 73 (Minn. 1954). Contra Anderson v. Lynch, 3 S.E. 85 (Ga. 1939). Davenport v. Three-Fifths of an Acre of Land, 147 F. Supp. 794 (S.D.Ill. 1957)* (granted to federal agency by necessary implication, the eminent domain power of the federal government being superior to that of a state). *Mack v. Adams County Board of Comm'rs, 381 P.2d 987 (Colo. 1963); Georgia So. & Fla. Ry. v. City of Warner Robins, 130 S.E.2d 151 (Ga. App. 1963); Amityville v. Suffolk County, 132 N.Y.S.2d 845 (1954)* (state can condemn lands belonging to town); *School Dist. of Borough of Speerrs v. Commonwealth, 117 A.2d 702 (Pa. 1955)* (school district entitled to compensation). A public utility cannot condemn land for use if it violates the zoning law. *Graham Farms, Inc. v. Indianapolis Power & Light Co., 233 N.E.2d 656 (Ind. 1968);* Scattering Fork Drainage Dist. in *County of Douglas v. Ogilvie, 311 N.E.2d 203 (Ill. App. 1974).* The United States may condemn property already devoted to a public use. *United States v. Certain Parcels of Land, 209 F. Supp. 483 (S.D.Ill. 1962).*

(n27)Footnote 219. *State ex rel. State Hwy. Comm'n v. Albuquerque, 355 P.2d 925 (N.M. 1960).* "Greater public interest" is permitting taking of an existing public use. *Louisiana Power & Light Co. v. City of Houma, 229 So. 2d 202 (La. App. 1969).* Property may be condemned though used by another government body for an inferior purpose. *Heland v. Ives, 228 A.2d 502 (Conn. 1967).*

(n28)Footnote 220. *Vincent v. General Dynamics Corp., 427 F. Supp. 786 (N.D.Tex. 1977).*

(n29)Footnote 221. *County of San Diego v. Miller, 119 Cal. Rptr. 491 (1975).*

(n30)Footnote 222. *Phillips Petr. Co. v. Omaha, 106 N.W.2d 727 (Neb. 1960).*

(n31)Footnote 223. Paying compensation. *Arkansas State Hwy. Comm'n v. Arkansas Power & Light Co., 330 S.W.2d 77 (Ark. 1959).*

(n32)Footnote 224. *Minneapolis Gas Co. v. Zimmerman, 91 N.W.2d 642 (Minn. 1958).*

(n33)Footnote 225. Denying compensation. *North Dade Water Co. v. Florida State Tpk. Auth., 114 So. 2d 458 (Fla. 1959); Minneapolis Gas Co. v. Zimmerman, 91 N.W.2d 642 (Minn. 1958).*

(n34)Footnote 226. Holding compensation payable. *City of Little Rock v. Arkansas-Louisiana Gas Co., 548 S.W.2d 133 (Ark. 1977).*

(n35)Footnote 227. Held not compensable. *Public Serv. Co. of Indiana v. Morgan County Rural Elec. Membership Corp., 360 N.E.2d 1022 (Ind. App. 1977).*

(n36)Footnote 228. *Artesian Water Co. v. State Dep't of Hwys. & Transp., 330 A.2d 432 (Del. 1974);* Legislation unconstitutional, *State Hwy. Comm'n v. Southern Union Gas Co., 332 P.2d 1007 (N.M. 1958).* Legislation constitutional, *Opinion of the Justices, 132 A.2d 440 (Me. 1957).*

(n37)Footnote 229. *Washington Metro. Area Transit Auth. v. One Parcel of Land, 514 F.2d 1350 (D.C. Cir. 1975); City of Las Cruces v. El Paso Elec. Co., 954 P.2d 72 (N.M. 1998)* (the "prior public use" doctrine precludes a municipality from condemning property already dedicated to a public use unless specific power is conferred by Legislature; the "prior public use" doctrine only applies when the proposed use would destroy the current public use).

(n38)Footnote 230. Scattering For Drainage Dist. in *Co. of Douglas v. Ogilvie, 311 N.E.2d 203 (Ill. App. 1974).*

(n39)Footnote 231. The power of eminent domain does not authorize the condemnation of property already devoted to public use. *Medial Center Comm'n v. Powell, 260 N.E.2d 261 (Ill. App. 1970); Yadkin County v. High Point, 8 S.E.2d 470 (N.C. 1940); see Southern R.R. v. Greensboro, 101 S.E.2d 347 (N.C. 1957).*

(n40)Footnote 232. *Florida E. Coast R.R. v. City of Miami, 321 So. 2d 545 (Fla. 1975); Goldsboro v. Atlantic Coast Line R.R., 97 S.E.2d 486 (N.C. 1957).* Property may be condemned though used by another government body for an inferior purpose. *Heland v. Ives, 228 A.2d 502 (Conn. 1967).*

(n41)Footnote 233. *Commonwealth v. Massachusetts Tpk. Auth., 191 N.E.2d 481 (Mass. 1963); State ex rel. State Hwy. Comm'n v. Dona Ana County Bd. of Comm'rs, 380 P.2d 830 (N.M. 1963).*

(n42)Footnote 234. *New York Cent. & H. R.R. v. City of Buffalo, 93 N.E. 520 (N.Y. 1910).*

(n43)Footnote 235. *Board of Educ. v. Pace College, 276 N.Y.S.2d 162 (1966); Denver Power & Irr. Co. v. Denver R. G. R.R., 69 P. 568 (Colo. 1902); In re Cruger Avenue, 143 N.E. 799 (N.Y. 1924)* (right of city to condemn state land); *Scranton Gas & Water Co. v. Northern Coal & Iron Co., 43 A. 470 (Pa. 1899); Vermont Hydro-Elec. Corp. v. Dunn, 112 A. 223 (Vt. 1921). See Huffman v. State Road Comm'n, 137 A. 358 (Md. 1927)* (a grant of the right to acquire "of any person or of any corporation, public or private," all property necessary does not ordinarily include the state but may include the state when such an intention is manifested); *Cochrane v. Wilson, 229 S.W. 1050 (Mo. 1921)* (property owned by board of education cannot be condemned by city for street purposes); *City of Las Cruces v. El Paso Elec. Co., 954 P.2d 72 (N.M. 1998)* (The "prior public use" doctrine precludes a municipality from condemning property already dedicated to a public use unless specific power is conferred by Legislature; the "prior public use" doctrine only applies

when the proposed use would destroy the current public use).

(n44)Footnote 236. Adhering to the "balance of convenience" doctrine permitting one governmental subdivision to condemn land held by another. *Richmond Heights v. Board of County Comm'rs., 166 N.E.2d 143 (Ohio App. 1960); Elberton S. R.R. v. State Hwy. Dep't, 89 S.E.2d 645 (Ga. 1955).* Doctrine of paramount use. *City of Mesa v. Salt River Project Agric. Imp. & Power Dist., 373 P.2d 722 (Ariz. 1962); El Paso County v. El Paso, 357 S.E.2d 783 (Tex. App. 1962),* but not unless the legislative intent is express or clearly implied. *United States v. 929.70 Acres of Land, 205 F. Supp. 456 (D.S.D.1962).* In order to take property already devoted to a public use the legislative intent must be clear. *State ex rel. State Hwy. Comm'n v. Hoester, 362 S.W.2d 519 (Mo. 1962).* A municipal corporation may not condemn land devoted to a public use. *Tacoma v. Taxpayers of Tacoma, 307 P.2d 567 (Wash. 1957).* The common-law rule that property already devoted to a public use is protected from invasion by other uses except by express legislative action applies only where the proposed use will either destroy the existing use or be so substantial as to be tantamount to destruction. *Washington Metro. Area Transit Auth. v. One Parcel of Land, 514 F.2d 1350 (D.C. Cir. 1975).* Where property used for a public purpose is condemned for a higher purpose (school condemned for highway), the original public purpose must be compensated. *State v. Salt Lake City Bd. of Educ., 368 P.2d 468 (Ut. 1962); Chicago West Div. R.R. v. Metropolitan West Side Elev. R.R., 38 N.E. 736 (Ill. 1894);* Washington Metro. Area Transit Auth. v. One Parcel of Land in D.C., Vestry of Rock Creek Parish, 514 D.2d 1350 (D.C. Cir. 1975).

(n45)Footnote 237. *Denver v. Board of Comm'rs, 156 P.2d 101 (Colo. 1945); Winchester v. Cox, 26 A.2d 592 (Conn. 1942); White Bear Lake v. Leuthold, 214 N.W. 930 (Minn. 1927); Northern Pac. R.R. v. Duluth, 189 N.E. 937 (Minn. 1922); State Hwy. Comm'n v. Elizabeth, 140 A. 335 (N.J. Ch. 1928); Hudson River Regulating Dist. v. Fonda, J. & G. Ry., 217 N.Y.S. 781 (1926); In re New York City, 220 N.Y.S. 298 (1926); Gund Realty Co. v. Cleveland, 160 N.E. 101 (Ohio App. 1927); Incorporated Town v. Cochrane, 159 P.2d 534 (Okla. 1945); Narragansett Elec. Lighting Co. v. Sabre, 146 A. 777 (R.I. 1929); Clarendon County v. Holliday, 189 S.E. 885 (S.C. 1937); Williamson County v. Franklin & Spring Hill Tpk. Co., 228 S.E. 714 (Tenn. 1921); Kingsville Indep. Sch. Dist. v. Crenshaw, 164 S.W.2d 49 (Tex. App. 1942); Missouri, K. & T. R.R. v. Rockwall Co., 297 S.W. 206 (Tex. 1927); Texas & N.O. R.R. v. Beaumont, 285 S.W. 944 (Tex. App. 1926); State ex rel. Northwestern Elec. Co. v. Superior Court, 183 P.2d 802 (Wash. 1947).* Land already devoted to a public use should not be taken except for exceptional and special reasons. *Nassau Elec. R.R. v. Riegelmann, 205 N.Y.S. 81 (1924).* State may condemn property of public utility. *Elberton S. R.R. v. State Hwy. Dep't, 89 S.E.2d 645 (Ga. 1955).* Second taking refused. *Clarendon County v. Holliday, 189 S.E. 885 (S.C. 1937); Vermont Hydro-Elec. Corp v. Dunn, 112 A. 223 (Vt. 1921).* A superior governmental body may condemn property of an inferior governmental body. *Harrison County Sch. Bd. v. State Hwy. Comm'n, 284 So. 2d 50 (Miss. 1973).*

(n46)Footnote 238. *Department of Pub. Works & Bldgs. v. Ells, 179 N.E.2d 679 (Ill. 1962).*

(n47)Footnote 239. *Vermont Hydro-Elec. Corp. v. Dunn, 122 A. 223 (Ct. Cl. 1921).*

(n48)Footnote 240. *Id.* Under the provisions of the statutes of Indiana, condemnation of a public utility is held impossible. *Montgomery Light & Power Co. v. Linden, 29 N.E.2d 209 (Ind. 1940).* It is not essential that property owned by a railroad shall be actually in use, in order to exempt it from condemnation for a street if the property will be needed for the purposes of the railroad in the future. *In re 221st Street, 190 N.Y.S. 234 (1921).* A levee district may condemn a part of the right-of-way of a railroad for the construction and maintenance of a levee when the same does not materially impair or interfere and is not inconsistent with the use of the right-of-way for railroad purposes. *Missouri, K. & T. R.R. v. Rockwall County Levee Imp. Dist, 266 S.W. 163 (Tex. App. 1924).* The property of one public service corporation may be protected from condemnation for a similar use by another public service corporation. *Wisconsin Trac. Light, Heat & Power Co. v. Green Bay & Miss. Canal Co., 205 N.W. 551 (Wis. 1925)* (canal company owning right to surplus water of river and furnishing hydro-electric power to public, property protected from condemnation).

(n49)Footnote 241. *In re Bellvue S. Urban Renewal, 274 N.Y.S.2d 820 (1966).* Where installations have been made under a license that does not give compensation on termination of the license, compensation is still payable in eminent domain. *State of Vt. v. Brinegar, 379 F. Supp. 606 (D. Vt. 1974),* relying on *Fletcher v. Wypiski, 94 N.E.2d 916 (Ind.*

App. 1950).

(n50)Footnote 242. *Omnia Commercial Co. v. United States, 261 U.S. 502 (1923); Klein v. United States, 375 F.2d 825 (Ct. Cl. 1967).* For a contra result, *see In re Mackie's Petition, 147 N.W.2d 441 (Mich. App. 1967).*

(n51)Footnote 243. *Douty v. Baltimore, 141 A. 499 (Md. 1928); Hesse v. Utica, 230 N.Y.S. 676 (N.Y. App. Div. 1928); State ex rel. Hile v. Cleveland, 160 N.E. 241 (Ohio App. 1927).*

(n52)Footnote 244. *Northwestern Shoshone Indians v. United States, 324 U.S. 335 (1945); Tee-Hit-Ton Indians v. United States, 120 F. Supp. 202 (Ct. Cl. 1954).*

(n53)Footnote 245. *United States v. Alcean Band of Tillamooks, 329 U.S. 40 (1946).*

(n54)Footnote 246. *In re 221st Street, 190 N.Y.S. 234 (1921).*

(n55)Footnote 247. A drainage district has a property right which is subject to compensation in eminent domain in addition to the compensation to be paid to landowner. *Ft. Leavenworth Ry. v. Lowe, 114 U.S. 525 (1885); Texas & P. R.R. v. Kirk, 115 U.S. 1 (1885); United States v. Chicago, 48 U.S. 185 (1849); Arkansas State Hwy. Comm'n v. Sub-District No. 3 of Grassy Lawk, 376 S.W.2d 259 (Ark. 1964); Union Pac Ry. v. Leavenworth N. & S. R.R., 29 F. 728 (C.C. Kan. 1877); Flint & P. M. R.R. v. Gordon, 2 N.W. 648 (Mich. 1879);* Thies v. Platte Valley Pub. Power & Irr. Dist., 289 N.W.386 (Neb. 1939).

(n56)Footnote 248. *Utah Power & Light Co. v. United States, 242 U.S. 389 (1917); Ft. Leavenworth Ry. v. Lowe, 114 U.S. 525 (1885)* (devoted to government use).

(n57)Footnote 249. Wayne County Court, *W. Va. v. Louisa & Fort Gay Bridge Co., 46 F. Supp. 1 (S.D. W. Va. 1942).*

(n58)Footnote 250. *Reclamation Dist. v. Superior Court, 154 P. 845 (Cal. 1916).* The cases are divided as to whether the United States must compensate a state for property taken from the state. *Cass v. Morgan Counties, 62 N.E. 207 (Ill. 1901)* (no compensation required); *St. Louis v. Western Tel. Co., 148 U.S. 92 (1893)* (compensation required); *Beford v. United States, 23 F.2d 453 (1st Cir. 1927). See also U.S. v. Des Moines County, 148 F.2d 448 (8th Cir. 1945).* County commissioners were authorized to condemn so much of the land owned by incorporated village as was necessary for park and recreational purposes, but not that which the village intended to use for municipal buildings. *Richmond Heights v. Board of County Comm'rs., 166 N.E.2d 143 (Ohio App. 1960).*

(n59)Footnote 251. *Nahant v. United States, 136 F. 273 (1st Cir. 1905); State Hwy. Comm'n v. Elizabeth, 140 A. 335 (N.J. Ch. 1928).* The rule that a municipality is not entitled to compensation for land held by it and devoted to a public use when the property is taken by the state for a public use does not apply when such property is condemned by virtue of the authority of the United States and not under authority delegated to the United States by the states. *Beford v. United States, 23 F.2d 453 (1st Cir. 1927).* Where the taking by the state is for a proprietary and not for a sovereign purpose a public utility is entitled to damages for its installations though made on a public highway. *In re Gillen Place, 106 N.E.2d 897 (N.Y. 1952).*

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CHAPTER 80 THE POWER OF EMINENT DOMAIN

9-80 Thompson on Real Property, Thomas Editions § 80.05

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§ 80.05 What Constitutes a Taking.

first amendment

§ 80.05(a) Introduction.

Uncompensated takings of private property by the sovereign are prohibited by the Fifth and Fourteenth Amendments to the United States Constitution and by similar provisions in state constitutions. The limitations thus imposed on state power are absolute, except for takings by forfeiture and restrictions imposed by police power regulations.

Takings may be in form of actual seizures of property, limitations of possessory interests not actually seized, damage to other property, and inverse condemnation. n252 Some restrictions on property interest imposed by police power regulations are serious enough to constitute takings, but others are not. n253 When only a portion of a parcel of land is actually taken, the part not taken may be so severely limited in use that the entire parcel may be considered taken and compensation for the whole required. n254 Generally, the damage to property that gives rise to a taking means some direct physical disturbance of a right which owners enjoy in connection with their property. n255 Thus a limitation imposed on property by federal environmental legislation has usually not been held to constitute a taking. n256

COMPUTER-ASSISTED RESEARCH

LEXIS: "eminent domain" w/20 "taking"

§ 80.05(b) The Types of Deprivations That May Be Takings.

Although states differ widely in application of taking principles, they generally agree that any deprivation of an owner's interest in or right to land may be considered a taking. n257

Stated another way, any interference with ownership, enjoyment, or the value of private property is usually considered a taking, n258 but the breadth of that formulation has been limited by the courts. n259

§ 80.05(b)(1) Takings That May Result From Exercise of Police Power.

A taking may occur when a property owner is deprived of the property's use, n260 following an invasion of the property by public authority and damage or deprivation resulting from the invasion. n261 A taking may also occur even if no actual entry takes place, n262 a situation frequently arising when property is regulated under exercise of governmental police power. n263 Such land regulations may produce a change of title, destruction of a substantial right, imposition of an easement or other burden, or interference with use and enjoyment of the property, all of which have been held to be takings. n264 Therefore, an obstruction on or restriction upon use of property may be as much a taking as actual seizure of the property. n265

If police power regulation of private property is exercised within constitutional restraints, then no compensation need be paid. n266 One of those restraints is whether the use of the police power is to promote or preserve the health, morals, safety or general welfare of the community. n267 Ordinarily, no compensable taking occurs when the damage to property results incidentally from governmental activities or from laws passed to promote the general welfare. n268 However, even lawful activities may be so conducted as to inflict compensable injury on property. n269 Some actions held not to be compensable takings have included regulation of hazardous conditions, n270 the creation of a mere inconvenience, infringement upon lateral support n271 (although destruction of the lateral support right may be compensable), n272 or building a limited access highway on a new right of way. n273 On the other hand, takings have been found in pollution of water, n274 prohibiting renovation of a historic structure under a land-marks statute, n275 and overburdening by new uses an easement held by the state. n276

Courts have persistently disagreed over whether certain actions constitute takings or noncompensable exercises of police power. For instance, only in some jurisdictions does the use of highways by public utilities entitle the owner to additional compensation; n277 authorities divide over whether destruction or invasion of a restrictive covenant is a compensable taking; n278 and legislative requirements for developers to dedicate portions of their projects for certain public purposes have also received varying treatments in the courts. n279

A special set of takings problems has resulted from airplane flights, including problems of overflights, pollution, noise and nuisance. n280 The traditional theory that a landowner has rights in the space above the land has resulted in compensation when low flights interfered with those rights. n281 This theory has been extended to the problems on nearby lands, not directly under the flight approaches, which have suffered from noise and fumes of the airplanes. n282 Low-flying aircraft have been held to have taken an easement, n283 or to have constituted a trespass, n284 for which compensation must be given. Airflights even within navigable airspace have been held to be takings, n285 and the prohibition of building structures above a certain height when within certain proximity to the airport has also been held to be a taking. n286

Another type of interference with air or airspace rights is obstruction of view. Most courts hold that no compensation is owed for mere obstruction of view, but a minority view disagrees. n287 Where a landowner holds an easement that effectively preserves access to light, air, and view, interference is com-pensable. n288 When an easement is sought by condemnation, in order for an improvement to be constructed, evidence as to the unsightliness of the proposed improvement may be introduced as relevant to the amount of just compensation. n289

However, no compensation is required when the condemnation is shown to likely cause a general depreciation of property values in a neighborhood. n290 A viaduct that carried a highway over a railroad line and obstructed the view from nearby property created a right to compensation under a statute authorizing takings payments for injuries to property not taken. n291

COMPUTER-ASSISTED RESEARCH

LEXIS: "eminent domain" w/20 taking w/10 "police power"

§ 80.05(b)(2) Takings by Inverse Condemnation.

Inverse condemnation generally consists of the taking of property rights-through interference with the use and enjoyment of property n292 - rather than taking the property itself. n293

When the sovereign, by action other than the proper exercise of the police power, interferes with or takes a property right without paying compensation, inverse condemnation results and the property owner may sue for damages. n294 However, inverse condemnation is based on the constitutional requirement of just compensation, not on tort theory. n295 Most inverse condemnation cases require that, whatever the diminution of property value, the damage to property rights be severe and not a mere inconvenience. n296 To be a taking by inverse condemnation, the action must be either a physical taking or a physical injury. n297

Many actions that result in takings are treated as inverse condemnations. n298 Thus a taking and inverse condemnation results when the state increases the burden of a servitude which it has acquired, n299 such as installing power lines along a public highway. n300 Under the concept of transferable development rights, taking occurs when a property is designated as a historical landmark and such rights are thus taken by inverse condemnation. n301

If a government action that allegedly resulted in a taking was negligent, it must usually be challenged in a tort action of trespass or nuisance. n302 Thus, an abutting landowner whose property was damaged by a nearby taking but not actually taken may sue for damages, if the bar of sovereign immunity as applied in tort actions can be overcome, n303 but some cases have found injury resulting from negligent acts of government to be takings rather than ordinary tort actions. n304

Despite these cases, and even though inverse condemnation is raised in some actions where the "taking" is inadvertent and negligent, inverse condemnation is not appropriate to avoid sovereign immunity in a true tort action against the government. n305

Inverse condemnation has been invoked as a weapon against zoning ordinances and other land use regulation interferences with use of property that do not involve physical invasion. n306 When an actual taking significantly alters a neighborhood, owners of land not taken may not claim damages to their portion under a theory of inverse condemnation. n307

Also, temporary inconvenience suffered during construction of public improvements is not a taking unless the landowner's property rights in remaining property were seriously impaired. n308

COMPUTER-ASSISTED RESEARCH

LEXIS: "eminent domain" w/20 taking w/10 "inverse condemnation"

§ 80.05(b)(3) Takings by Denial of Access.

In many situations, a taking that denies access to or from other land not taken is treated as a taking with respect to that other land, and damages for loss of access are not necessarily confined to adjacent landowners. n309 A landowner who is denied access to a highway may be compensated, n310 but a taking that causes mere inconvenience rather than completely eliminating access will not be entitled to compensation. n311

A temporary inconvenience of diminished access caused by construction of public improvements is not compensable in the absence of severe or permanent damage to the property not taken. n312 In general, a permanent loss of access --whether caused by grade elevation, street closing, obstruction or by a non-accessible highway -- is considered a taking, n313 although contrary authority exists. n314 The same competing rules prevail with respect to water access. n315

As an example of how the general rules just stated are applied, in some jurisdictions one who owns property abutting a public street has a right to an easement of access to that street and compensation for damage to property caused by lowering the grade of that street. n316 Other jurisdictions treat the mere lowering of the grade of street as noncompensable unless access is actually destroyed. n317 This latter situation arises frequently with the construction of nonaccess freeways, which usually requires payment of compensation to owners of adjacent land who are deprived of access to an established highway. n318 Construction of statutes authorizing such payments is usually liberal. n319 However, if access is not completely destroyed, the common law denies damages for discontinuance of a street which still leave suitable access by another street, n320 and a taking which merely creates an inconvenience is usually not compensable. n321 A mere casual and limited interference with access does not usually constitute a taking. n322

Thus, it is not a taking if a property owner is required to travel a greater distance to reach a street. n323 The changing of the route of a highway in such a manner that the highway no longer passes a landowner's property does not constitute a compensable taking, if the landowner is not deprived of ingress and egress. n324 Some courts, however, have awarded damages resulting from increased circuitry of travel caused by closing an access. n325

One whose property abuts an established road may not have that access denied by police power without compensation. n326 Courts are split as to whether one who has lost access to a freeway because the access road was closed is entitled to damages. n327 However, the access point on an existing highway may be controlled either through condemnation n328 or through police power. n329

When an easement for access is taken, that interest, too, is a property right whose taking is compensable. n330 There is no *right* of access to a new highway. n331

Taking of air access or interference with airspace may also be compensable. n332 When a right of way by necessity through the air was taken by an executive order that barred air travel lower than 4,000 feet, those who held the right of way were entitled to compensation. n333 Control of traffic patterns can give rise to a taking. n334 There is usually no property right in a particular traffic pattern, n335 and the construction of a median strip that interferes with the free flow of traffic past particular property is not a taking. n336 However, loss of business caused by construction of a median divider has given rise to damages. n337 Neither the establishment of one-way streets n338 nor the denial of access to traffic in one direction is a taking in eminent domain. n339

Some states impose limitations on circumstances in which recovery for loss of access may be awarded. In those states, the right of access is not absolute, but is limited to reasonable ingress and egress so that existing access can be frozen and future access points limited under the police power, with no compensation required. n340 If the denial of existing access merely restricts the existing access to reasonable access, it is a proper and noncompensable exercise of police power. n341 But if the regulation denies completely existing access or destroys its utility, compensation for condemnation is necessary. n342 If a public highway has once been legally abandoned to the adjoining landowners, any reopening of the highway constitutes a taking by the state. n343

COMPUTER-ASSISTED RESEARCH

LEXIS: "eminent domain" w/20 taking w/10 "access"

§ 80.05(b)(4) Takings of Water and Water Rights.

A water right is a property right which cannot be taken without the payment of just compensation. n344 Subject to the federal right of control of navigation, interference with water rights is a taking. Thus, the construction of a public way which deprives the owner of the use of a nonnavigable stream is a compensable taking. n345 So also is a destruction of the right of wharfage, n346 the flooding of land with water, n347 and the subjecting of land to overflow n348 or

subterranean seepage. n349 Riparian or littoral water rights as well as appropriation rights may be the subject of eminent domain, n350 as may the right to divert water in a running stream. n351 An interest in accretion lands is property and may be condemned for public use. n352

The cases, however, are inconsistent as to condemnation of water rights. One line of authority holds that as far as navigable waters are concerned the sovereign has an absolute right of control. n353 This is in some cases limited by the theory that some riparian rights attach to the soil and hence any taking requires compensation. n354 There is division of authority as to whether riparian owners can recover for consequential damages caused by changes in the stream bed. n355 The taking of the foreshore has been held compensable, n356 but a taking of water below the owner's boundary in a flowing stream is not. n357 Regulation of a public water supply is not a taking. n358

Flooding of land is a compensable taking, n359 even when it was caused by a change in grade to fend off surface water. n360 Subterranean flooding caused by a rising water table following construction of a government dam was compensable. n361

A constitutional amendment affecting reasonable water use is not a taking of riparian rights. n362

COMPUTER-ASSISTED RESEARCH

LEXIS: "eminent domain" w/20 taking w/10 "water!"

§ 80.05(b)(5) "De Facto" Takings.

A legal interference with the owner's power of disposition over property which constitutes a substitution of the condemnor's dominion and control over property is a de facto taking. n363 Thus, a condemnor's actions in threatening eminent domain may go so far as to amount to a de facto taking. n364 The de facto taking concept exists in a narrow or federal version n365 and a more liberal version. n366

Where condemnation is projected but not carried through, the owner may be able to claim injury because of the threat. Depending upon the applicable statute and the extent to which eminent domain proceedings have progressed, the courts differ as to the liability of the condemnor to the owner for damages and expenses if condemnation proceedings are abandoned. n367

Where condemnation proceedings are instituted and the owner moves in anticipation of such proceedings and condemnation is thereafter abandoned, the condemnor is usually not liable to the owner for expenses and damages incurred in anticipation of the forced move. n368 Thus, no compensation is payable where there is no condemnation, even though the landowner has changed his position in expectation of the taking. n369 However, it has also been held that the condemnor may not abandon the proceedings without liability after there has been detrimental reliance on the proceedings. n370 Compensation may be owed in some instances where the threat of a taking results in a diminution of property value, even though the condemnation never occurs. n371 Courts are divided as to whether the owner is entitled to compensation for undue delay in beginning a condemnation action. n372

The mere enactment of legislation authorizing condemnation of property is not a taking of the property, n373 nor is the filing of a municipality's general plan n374 or the sovereign's refusal to consent to an action to clear a title. n375 Other municipal actions may informally impact on property but do not constitute taking. Examples are statutes permitting utilities to make surveys for establishing the line of an easement, n376 planning in anticipation of a public improvement, n377 and publicity regarding proposed urban redevelopment plans, even though the publicity hinders the sale of the property. n378

FOOTNOTES:

(n1)Footnote 252. *Goodenow v. City Council of Maquoketa, 574 N.W.2d 18 (Iowa 1998)* (holding that takings cases generally fall into two categories. The first is where the government regulates private property for the benefit of public health and welfare. The second type is where the government seeks to obtain a portion of the property through condemnation proceedings.)

(n2)Footnote 253. *Georgia v. Chattanooga, 264 U.S. 472 (1924); Long Island Water-Supply Co. v. Brooklyn, 166 U.S. 685 (1897); United States v. 385 Acres of Land, 61 F. Supp. 746 (E.D.Wis. 1945); Alabama & F. R.R. v. Kenney, 39 Ala. 307 (1864); New York, H. & N. Ry. v. Boston, H & E. R.R., 36 Conn. 196 (1869); Sprenger, Grubb & Assocs. v. City of Hailey, 903 P.2d 741 (Idaho 1995); Templeton Coal Co., v. Shalala, 882 F. Supp. 799 (D.Ind. 1995); Halstead v. Brazil, 147 N.E. 629 (Ind. App. 1908); Pittsburgh C., C., & St. L. Ry. v. Railroad Comm'n, 86 N.E. 328 (Ind. 1908); Water Works Co. v. Burkhart, 41 Ind. 364 (Ind. 1908); Petition of Burnquist, 19 N.W.2d 394 (Minn. 1945); Stabler Dev. Co. v. Board of Supervisors of Lower Mt. Bethel Township, 695 A.2d 882 (Pa. Commw. Ct. 1997)* (holding that "reasonable restrictions are valid exercises of the police power and not unconstitutional takings under the power of eminent domain"); *Balent v. City of Wilkes-Barre, 669 A.2d 309 (Pa. 1995).* The legislature has the power to designate what property may be taken. *State v. McCook, 147 A. 126 (Conn. 1929). Long v. Rockingham, 121 S.E. 461 (N.C. 1924); Pennsylvania Coal Co. v. Mahon, 260 U.S. 393 (1922)* (statute prohibiting mining of coal under dwellings and streets of a city when such right was reserved was held unconstitutional); *Pennsylvania-Reading Seashore Lines v. Board of Pub. Util. Comm'rs, 74 A.3d 265 (N.J. 1950), cert. denied, 340 U.S. 876 (1950); State ex rel. Carter v. Harper, 196 N.W. 451 (Wis. 1923); Eggebeen v. Sonnenburge, 1 N.W.2d 84 (Wis. 1941).* Any regulation which imposes a restriction upon an owner may be a sufficient impairment of enjoyment to constitute a taking. *In re Kansas City Ordinance No. 39946, 252 S.W. 404 (Mo. 1923). Brannon v. City of Tulsa, 932 P.2d 44 (Okla. App. 1996)* (the city's temporary and unplanned occupation of an apartment building while police tried to apprehend an armed murder suspect in another building was not a taking).

Goodenow v. City Council of Maquoketa, Iowa, 574 N.W.2d 18 (Iowa 1998) (local ordinances requiring landowners to trim grass and weeds on city-owned property at their own expense promoted public health, safety, and welfare, and thus did not constitute a taking of their property); *Cohen v. City of Hartford, 710 A.2d 746 (1998)* (When the government simply regulates the use of property instead of taking physical occupation, compensation must be paid only if the regulation forces the landowner to bear a burden individually which should be borne by the general public); *City of Laredo v. R. Vela Exxon, Inc., 966 S.W.2d 673 (Tex. App. 1998)* (no taking results from inhibiting of traffic where the government has not directly limited plaintiff's use of the property); *Karam v. State, Dep't of Environmental Protection, 705 A.2d 1221 (N.J. Super. App. Div. 1998)* (where government regulation substantially eliminates or bars all economic use of the land, a taking has occurred and just compensation must be paid to the landowner); *White v. North, 708 A.2d 1093 (Md. Ct. App. 1998)* (denial of an application for a permit to construct a swimming pool did not amount to a taking because enjoyment of the land is still possible; the swimming pool would simply be an additional luxury); *Bass Enterprises Production Co. v. United States, 133 F.3d 893 (Fed. Cir. 1998)* (when government regulation precludes all economically beneficial use of a property, a 5th Amendment taking has occurred and compensation must be paid); *Eastern Enterprises v. Apfel, 118 S. Ct. 2131 (1998)* (economic regulation can effect a taking when it alters economic life for one individual in order to benefit the public as a whole (opinion written by Justice O' Connor with three justices concurring and one justice concurring in the judgment)).

(n3)Footnote 254. *Schwartz v. State, 900 P.2d 939 (Nev. 1995).* Creation of possibly dangerous future conditions held compensable in eminent domain. *Northeastern Gas Transmission Co., v. Lapham, 117 A.2d 441 (Conn. Super. 1955).* Where the vendee, a municipal corporation, has threatened condemnation of real estate, then purchased from the vendor, the vendor was not entitled to file suit for rescission where the vendee later sold the property to a private party, since this should not constitute violation of due process of law. *Beistline v. San Diego, 256 F.2d 421 (9th Cir. 1958).* Church property is private property for eminent domain. *Pillar of Fire v. Denver Urban Renewal Auth., 509 P.2d 1250 (Colo. 1973) appeal after remand, aff'd, 52 P.2d 23 (Colo. 1976). See* J. Nelson Happy, *Damnum Absque Injuria -- When Private Property May be Damaged Without Compensation in Missouri, 36 Mo. L. Rev. 453 (1971);* Zygmunt J. B. Plater, *The Takings Issue in a Natural Setting: Floodlines and the Police Power, 52 Tex. L. Rev. 201* (1973-74). A

license or privilege which is not enforceable against the fee owner is not a proper subject of condemnation. *Belmont City Water Dist. v. Steel, 135 Cal. Rptr. 1653 (1977).*

Eastern Enterprises v. Apfel, 118 S. Ct. 2131 (1998) (In evaluating a regulation's constitutionality (whether or not it is a taking), the court must take into account the fairness of the action claimed to be a taking (economic impact resulting from the regulation, interference with investment expectations, and the general nature of the government's action); there is no set formula for making these determinations of constitutionality; claims should be examined on a case by case basis); *Karam v. State, Dep't of Environomental Protection, 705 A.2d 1221 (N.J. Super. App. Div. 1998)* (when making a determination of whether a taking has occurred as a result of government regulation, the court should consider whether the regulation deprived the owner of all economically feasible use of the property, whether the owner had any investment expectations linked to the land that were nullified by the regulation, and whether the owner truly possessed the interest claimed to have been taken); *City of Laredo v. R. Vela Exxon, Inc., 966 S.W.2d 673 (Tex. App. 1998)* (no taking results from inhibiting of traffic where the government has not directly limited plaintiff's use of the property).

(n4)Footnote 255. *Clare v. Florissant Water & San. Dist., 879 P.2d 471 (Colo. App. 1994); Citizens Util. Co. of Ill. v. Metropolitan San. Dist. of Greater Chicago, 322 N.W.2d 857 (Ill. App. 1974).* Building and safety codes are not a taking. City of Gary by and through *Dep't of Redev. v. Roberto, 354 N.E.2d 786.* (Ind. App. 1976).

Maritrans, Inc. v. United States, 40 Fed. Cl. 790 (1998) (the first step in analyzing a takings claim is to determine whether or not the plaintiff has a legal interest in the property); *Cohen v. City of Hartford, 710 A.2d 746 (1998)* (When the government simply regulates the use of property instead of taking physical occupation, compensation must be paid only if the regulation forces the landowner to bear a burden individually which should be borne by the general public); *Manufactured Housing Communities of Washington v. State, 951 P.2d 1142 (Ct. App. 1998).* (A statutory right of first refusal belonging to mobile home park tenants giving them the right to buy the park is not a taking of the park owner's property by means of physical occupation); *Bass Enterprises Production Co. v. United States, 133 F.3d 893 (Fed. Cir. 1998)* (When government regulation precludes all economically beneficial use of a property, a 5th Amendment taking has occurred and compensation must be paid); *Eastern Enterprises v. Apfel, 118 S. Ct. 2131 (1998).* (economic regulation can effect a taking when it alters economic life for one individual in order to benefit the public as a whole (opinion written by Justice O'Connor with three justices concurring and one justice concurring in the judgment)).

(n5)Footnote 256. *Cohen v. City of Hartford, 710 A.2d 746 (1998)* (when the government simply regulates the use of property instead of taking physical occupation, compensation must be paid only if the regulation forces the landowner to bear a burden individually which should be borne by the general public); *Bass Enterprises Production Co. v. United States, 133 F.3d 893 (Fed. Cir. 1998)* (when government regulation precludes all economically beneficial use of a property, a 5th Amendment taking has occurred and compensation must be paid); *Eastern Enterprises v. Apfel, 118 S. Ct. 2131 (1998)* (economic regulation can effect a taking when it alters economic life for one individual in order to benefit the public as a whole (opinion written by Justice O'Connor with three justices concurring and one justice concurring in the judgment)); *Florida Rock Indus. v. United States, 18 F.3d 1560 (Fed. Cir. 1994); Sierra Club v. Environmental Protection Agency, 540 N.E.2d 1114 (D.C. Cir. 1976).*

(n6)Footnote 257. *Persyn v. United States, 34 Fed. Cl. 187 (Fed. Cl. 1995); Kunkes v. United States, 32 Fed. Cl. 249 (Fed. Cl. 1994); In re Acquisition of Billboard Leases and Easements, 517 N.W.2d 872 (Mich. App. 1994); Pumpelly v. Green Bay & M. Canal Co., 80 U.S. 166 (1871); Sebastian Bridge Dist. v. Missouri Pac. Ry., 292 F. 345 (8th Cir. 1923), cert. denied, 263 U.S. 711, 44 S. Ct. 37 (1923); Alabama Power Co. v. Christian, 112 So. 63 (Ala. 1927); Arizona Hercules Copper Co. v. Protestant Epis. Church Corp., 190 P. 85 (Ariz. 1920); Wolff v. Los Angeles 193 P. 862 (Cal. App. Ct. 1920); Denver v. Bayer, 2 P. 6 (Colo. 1883); Augusta City Council v. Lamar, 140 S.E. 763 (Ga. App. 1927); State Hwy. Dep't v. Morton, 121 S.E.2d 275 (Ga. App. 1961)* (destruction of a license to run water pipes was a taking); *Chicago & W. I. R.R. v. Englewood Connecting R.R., 4 N.E. 246,* (Ill. 1886); *Letcher County v. Hogg, 272 S.W. 423 (Ky. 1925)* (land washed away as a result of the diversion of a stream caused by the county permitting drift to accumulate against a trestle which supported a highway bridge); *Baltimore Belt R.R. v. Sattler, 59 A.*

654 (Md. 1905); Saltonstall v. New York Cent. R.R., 130 N.E. 185 (Mass. 1921); Horn v. State, 104 So. 452 (Miss. 1925); State ex rel. Penrose Inv. Co. v. McKelvey, 256 S.W. 474 (Mo. 1923); Prairie Pipe Line Co. v. Shipp, 267 S.W. 647 (Mo. 1924); Moulton v. Irish, 218 P. 1053 (Mont. 1923); Dumont v. Town of Wolfeboro, 622 A.2d 1238 (N.H. 1993); American Wollen Co. v. State, 187 N.Y.S. 341 (1926); In re City of New York, 216 N.Y.S. 2 (1926); Pattison v. Buffalo R. & P. R.R., 112 A. 101 (Pa. 1920); Stuart v. Gimbel Bros., 131 A. 728 (Pa. 1926) (uncondemned easement in street, impairment by temporary closing of street); *Amarillo v. Tutor, 267 S.W. 697 (Tex. App. 1924); Muscoda Bridge Co. v. Worden-Allen Co., 219 N.W. 428.* (Wis. 1928). Under the United States Constitution if the government takes one's property, admitting ownership, then the owner is entitled to compensation, but if the property is taken by the government under a claim of right the owner is not entitled to compensation. *Blumenthal v. United States, 4 F.2d 808 (D.C. Cal. 1925).* It is only the taking of specific parcels of property of an individual by virtue of the right of eminent domain without compensation that is prohibited by the constitution. *Indiana Ref. Co. v. Taylor, 143 N.E. 682 (Ind. 1924).* The absence of filing of lis pendens can amount to a taking by eminent domain. *Clinton St. Greater Bethlehem Church v. City of Detroit, 484 F.2d 185 (6th Cir. 1973).* Use of artificial breakwaters resulting in erosion of a beach was not a "taking." *Miramar Co. v. Santa Barbara, 143 P.2d 1 (Cal. 1943); Los Angeles Athletic Club v. Long Beach, 17 P.2d 1061 (Cal. App. 1932)* (*dictum*), to the contrary. Court divided on the question of whether the washing of the tides caused by the erection of a breakwater on adjoining land was a "taking." *Drew v. Mumford, 325 P.2d 240 (Cal. App 1958).* Mere planning for condemnation is not a taking. *Hilltop Props., Inc. v. State, 43 Cal. Rptr. 605 (Cal. App. 1965).* The removal of lateral support from approved realty, by the state, and interference with property owner's rights of ingress and egress and view were not a taking. *Weir v. Palm Beach County, 85 So. 2d 865 (Fla. 1956).* The character of the invasion on the property and not the amount of damage resulting from it determines the question of whether there has been a taking. *Phelps v. Board of Supvrs. of County of Muscatine, 211 N.W.2d 274 (Iowa 1973).* A statute creating a public right of passage along the shore between mean high waterline and extreme low waterline without compensation to the owner of the upland was an unconstitutional taking. *Opinion of the Justices, 313 N.E.2d 561 (Mass. 1974).* Creation of a perpetual easement is a taking in eminent domain. *Crane v. Brintnall, 278 N.E.2d 703 (Ohio 1972).* Any serious interference with the use of property is a taking; actual invasion is not required. *Masheter v. Boehm, 295 N.E.2d 917 (Ohio App. 1973); Central Bucks Jt. Sch. Bldg. Auth. v. Rawls, 303 A.2d 863 (Pa. 1973).* Flights of aircraft so low and frequent as to be a direct and immediate interference with the use and enjoyment of land are a "taking." *Gardner v. Allegheny County, 114 A.2d 491 (Pa. 1955).* Mere devaluation of property caused by condemnor's acts is not sufficient to constitute a formal taking unless there is physical injury by the condemnor or physical ouster of the owner of illegal interference with physical use, compensation or enjoyment of property or legal interference with the owner's power of disposition of the property. *Central Bucks Jt. Sch. Bldg. Auth. v. Rawls, 303 A.2d 863 (Pa. 1973).* An abutting property owner has no property right in the continuing flow of traffic past the property. *Walker v. State, 295 P.2d 328 (Wash. 1956).* A statute authorized a utility to make a preliminary survey before damaging the property in *Indiana and Mich. Electric Co. v. Stevenson, 337 N.E.2d 150 (Ind. App. 1975). See* Joseph L. Sax, *Takings, Private Property and Public Rights, 81 Yale L.J. 149 (1972). See also* Daniel R. Mandelker, *Inverse Condemnation: The Constitutional Limits of Public Responsibility, 1966 Wis. L. Rev. 3.* James L. Magavern, *The Evolution and Extension of the New York Law of Inverse Condemnation, 24 Buff. L. Rev. 273 (1975).* Inverse condemnation through loss of access occurs only when all existing accesses have been effectively blocked. *Biff's Grills, Inc. v. Michigan State Hwy. Comm'n, 254 N.W.2d 824 (Mich. App. 1977).*

Manufactured Housing Communities of Washington v. State, 951 P.2d 1142 (Wash. App. 1998) (a statutory right of first refusal belonging to mobile home park tenants giving them the right to buy the park is not a taking of the park owner's property by means of physical occupation); *City of Laredo v. R. Vela Exxon, Inc., 966 S.W.2d 673 (Tex. App. 1998)* (no taking results from inhibiting of traffic where the government has not directly limited plaintiff's use of the property); *Maritrans, Inc. v. United States, 40 Fed. Cl. 790 (1998)* (the first step in analyzing a takings claim is to determine whether or not the plaintiff has a legal interest in the property); *Brewer for Value-Added Communications, Inc. Litigation Trust v. State, 672 N.Y.S.2d 650* (N.Y. Ct. of Claims 1998) (the appropriation of funds does not constitute a taking under New York's state constitution as money is a fungible commodity); *Karam v. State, Dep't of Environmental Protection, 705 A.2d 1221 (N.J. Super. App. Div. 1998)* (where government regulation substantially eliminates or bars all economic use of the land, a taking has occurred and just compensation must be paid to the

landowner).

(n7)Footnote 258. *United States v. Lynah, 188 U.S. 445,* (1903); *Prescott v. Northeast Utils., 1998 Conn. Super. LEXIS 29* (holding that "a constitutional taking occurs when there is a substantial interference with private property which destroys or nullifies its value or by which the owner's right to its use or enjoyment is in a substantial degree abridged or destroyed"); *U.S. West Communs., Inc. v. City of Longmont, 1997 Colo. LEXIS 1009* (holding that "a taking occurs when an entity with the power of eminent domain substantially deprives a property owner of the use and enjoyment of that property"); *County of Anoka v. Blaine Bldg. Corp., 566 N.W.2d 331 (Minn. 1997)* (holding that a taking "includes every interference, under the right of eminent domain, with the possession, enjoyment, or value of private property"); *Finke v. State, 521 N.W.2d 371 (Minn. App. 1994); Burger v. St. Paul 64 N.W.2d 73 (Minn. 1954); Zettlemoyer v. Transcontinental Gas Pipeline Corp., 657 A.2d 920 (Pa. 1995); Harris v. Town of Lincoln, 668 A.2d 321 (R.I. 1995); Piper v. Ekern, 194 N.W. 159 (Wis. 1923).* Settlement by a condemner with one whose property has been appropriated is equivalent to the full and complete exercise of the power of eminent domain. Formal entry is not requisite to a taking. *Pennsylvania R.R. v. Sagamore Coal Co., 126 A. 386 (Pa. 1924).* The rule is not limited to a permanent taking only but includes a temporary destruction or injury. *Stuart v. Gimbel Bros., 131 A. 728 (Pa. 1926).* Under the constitution of Utah the damages for which compensation is allowed are those that are the direct consequence of the lawful exercise of the right of eminent domain. *Lund v. Salt Lake County, 200 P. 510 (Utah 1921)* (property totally destroyed or rendered valueless considered as taken). An "entry" under the West Virginia statutes concerning the taking of land for road purposes means the establishment of the road on, and an appropriation of, the land by a proper order of the county court. To effect an entry under the statutes it is not necessary that the county court go upon the land and begin the work of construction. *McGibson v. Roane County Court, 121 S.E 99 (W. Va. 1924). Rothwell v. Linzell, 127 N.E.2d 524 (Ohio 1955).* A "taking" implies acquisition of property by government without regard for wishes of the owner and can be accomplished by use of governmental powers of eminent domain or other forms of action. *Amen v. City of Dearborn, 363 F. Supp. 1267 (E.D.Mich. 1973).* A taking is not necessarily an appropriation of the fee but anything that substantially deprives one of the use and enjoyment of the property or a portion thereof. *Phelps v. Board of Suprs. of County of Muscatine, 211 N.W.2d 274 (Iowa 1973); Foss v. Maine Tpk. Auth., 309 A.2d 339 (Me. 1973).* Arbitrary, unreasonable or capricious conduct by government authority constitutes a taking even though there has been no physical taking. *Arnold v. Prince George's County, 311 A.2d 223 (Md. 1973).* Airport noise and air pollution diminishing property value are a taking, even where there was no direct overflight. Overflights resulting in a definite and measurable diminution of the market value and limiting the practical enjoyment of the property constitute inverse condemnation. *Alevizos v. Metropolitan Airports Comm'n of Minneapolis & St. Paul, 216 N.W.2d 651 (Minn. 1974).* Termination of a nonconforming use may be so onerous as to be a "taking" in eminent domain. *North Castle v. Windmill Farm Homes, Inc., 232 N.Y.S.2d 551 (N.Y. Sup. 1962).* To be a taking it is not essential that there be a physical seizure or appropriation; any actual or material interference with private property rights constitutes a taking. *Board of Comm'rs of Lake County v. Mentor Lagoons, Inc., 216 N.E.2d 643 (Ohio 1965); see Jackson Municipal Airport Auth. v. Evans, 191 So. 2d 126 (Miss 1966).* A statute prohibiting deposit of strip-mine waste in public waters amounted to a taking because it prohibited mining. *State v. Consolidation Coal Co., Cent. Div., 335 N.E.2d 403 (Ohio Co. 1974).* Enforcement of building codes is not a taking. City of Gary by and through *Dep't of Redev. v. Roberto, 354 N.E.2d 786 (Ind. App. 1976).* See also *Compensation for a Lessee's Trade Fixtures in Condemnation Proceedings, 1966 Wis. L. Rev. 1215.*

Karam v. State, Dep't of Environmental Protection, 705 A.2d 1221 (N.J. Super. App. Div. 1998) (where government regulation substantially eliminates or bars all economic use of the land, a taking has occurred and just compensation must be paid to the landowner); *White v. North, 708 A.2d 1093 (Md. Ct. App. 1998)* (denial of an application for a permit to construct a swimming pool did not amount to a taking because enjoyment of the land is still possible; the swimming pool would simply be an additional luxury); *Maritrans, Inc. v. United States, 40 Fed. Cl. 790 (1998)* (the first step in analyzing a takings claim is to determine whether or not the plaintiff has a legal interest in the property); *Manufactured Housing Communities of Washington v. State, 951 P.2d 1142 (Ct. App. 1998)* (a statutory right of first refusal belonging to mobile home park tenants giving them the right to buy the park is not a taking of the park owner's property by means of physical occupation).

(n8)Footnote 259. *Peterman v. State Dep't of Nat. Resources, 521 N.W.2d 499 (Mich. 1994).* The United States having a dominant servitude over water power of a navigable stream need not pay compensation to adjoining landowners when a power-plant site is destroyed by the building of a dam by the *United States. United States v. Twin Cities Power Co., 350 U.S. 222 (1956), rev'g 221 F.2d 299 (5th Cir. 1955).* Interference with owner's use may go to the extent of being a taking. *Benenson v. United States, 548 F.2d 939 (Ct. Cl. 1977).*

Maritrans, Inc. v. United States, 40 Fed. Cl. 790 (1998) (The first step in analyzing a takings claim is to determine whether or not the plaintiff has a legal interest in the property); *Manufactured Housing Communities of Washington v. State, 951 P.2d 1142 (Ct. App. 1998)* (a statutory right of first refusal belonging to mobile home park tenants giving them the right to buy the park is not a taking of the park owner's property by means of physical occupation); *White v. North, 708 A.2d 1093 (Md. Ct. App. 1998)* (denial of an application for a permit to construct a swimming pool did not amount to a taking because enjoyment of the land is still possible; the swimming pool would simply be an additional luxury).

(n9)Footnote 260. *Cohen v. City of Hartford, 710 A.2d 746 (Conn. 1998)* (when the state, in exercise of police power, authorizes a physical taking of property or title, just compensation must be paid); *Harris v. Town of Lincoln, 668 A.2d 321 (R.I. 1995); Early v. South Carolina Pub. Serv. Auth., 90 S.E.2d 472 (S.C. 1955)* (overflow caused by dam upstream created a compensable taking). An unreasonable government regulation under the police power may amount to a taking. *Charles v. Diamond, 366 N.Y.S.2d 921 (N.Y. App. Div. 1975).*

(n10)Footnote 261. *Cohen v. City of Hartford, 710 A.2d 746 (Conn. 1998)* (when the state, in exercise of police power, authorizes a physical taking of property or title, just compensation must be paid); *Ehrlich v. City of Culver City, 911 P.2d 429 (Cal. 1996); Miller Levee Dist. No. 2 v. Wright, 111 S.W.2d 469 (Ark. 1937).* Prohibiting of erection of structures below high watermark in salt marsh was not a taking. *United States v. Lewis, 355 F. Supp. 1132 (S.D.Ga. 1973).* Mere enactment of a general plan for future development of an area is not a taking or inverse condemnation of some valuable property right which directly and especially affects and landowner. *Selby Realty Co. v. City of San Buenaventura, 514 P.2d 111 (Cal. 1973).* No compensation for inability to sell caused by official highway proposal. *Bakken v. State Hwy. Comm'n, 382 P.2d 550 (Mont. 1963).* Requirement for a permit to fill in "wetlands" was not a taking. *Just v. Marinette County, 201 N.W.2d 761 (Wis. 1972).*

(n11)Footnote 262. *Manufactured Housing Communities of Washington v. State, 951 P.2d 1142 (Wash. App. 1998)* (A statutory right of first refusal belonging to mobile home park tenants giving them the right to buy the park is not a taking of the park owner's property by means of physical occupation); *Cohen v. City of Hartford, 710 A.2d 746 (1998)* (When the state, in exercise of police power, authorizes a physical taking of property or title, just compensation must be paid); *Harris v. Town of Lincoln, 668 A.2d 321 (R.I. 1995).* A landlord is not entitled to compensation for damage sustained by reason of the release, by a county, of logs, trees and stumps after their removal from the pier of a bridge at a place where they would be swept across the complainant's land instead of following the main channel of the river. *Xidis v. Gulfport, 72 So. 2d 153 (Miss. 1954); Milhous v. State Hwy. Dep't, 8 S.E.2d 852 (S.C. 1940); White v. Southern Ry., 140 S.E. 560 (S.C. 1927); Gearin v. Marion County, 223 P. 929 (Or. 1924)* (deprivation of access to water of owners of land bordering on road along water was not a "taking"). If an abuse of the power of eminent domain contributes to or hastens and aggravates, acting alone or in combination with other causes, the decline of property values in the neighborhood, there is a taking by inverse condemnation. *Sayre v. United States, 282 F. Supp. 175 (N.D.Ohio 1967).* Destruction of lateral support is a "taking." *Sanders v. State Hwy. Comm'n, 508 P.2d 981 (Kan. 1973).* Whenever a special assessment exceeds the special benefits to the property assessed there is a taking. *Hylen v. Owens, 251 N.W.2d 858 (Minn. 1977).* A statute authorizing a utility to make a preliminary survey before instituting eminent domain did not justify damaging the property. *Indiana & Mich. Elec. Co. v. Stevenson, 337 N.E.2d 150 (Ind. App. 1975).* Where the value of property is affected by unsightliness of power lines and living next to the power lines is disturbed, there is a taking. *Southwest La. Elec. Membership Corp. v. Duhan, 313 So. 2d 366 (La. App. 1975).*

(n12)Footnote 263. *Bass Enterprises Production Co. v. United States, 133 F.3d 893 (Fed. Cir. 1998)* (when government regulation precludes all economically beneficial use of a property, a 5th Amendment taking has occurred

and compensation must be paid); *Eastern Enterprises v. Apfel, 118 S. Ct. 2131 (1998)* (economic regulation can effect a taking when it alters economic life for one individual in order to benefit the public as a whole (opinion written by Justice O'Connor with three justices concurring and one justice concurring in the judgment)); *Manufactured Housing Communities of Washington v. State, 951 P.2d 1142 (Wash. App. 1998)* (a statutory right of first refusal belonging to mobile home park tenants giving them the right to buy the park is not a taking of the park owner's property by means of physical occupation); *Hoeck v. City of Portland, 57 F.3d 781 (9th Cir. 1995); Alexander v. Town of Jupiter, 640 So. 2d 79 (Fla. App. 1994). Pennsylvania Coal Co. v. Mahon, 260 U.S. 393 (1922)* (statute prohibiting mining of coal under dwellings and streets of a city when such right was reserved was held unconstitutional.) *Pennsylvania-Reading Seashore Lines v. Board of Pub. Util. Comm'rs, 74 A.2d 265 (N.J. 1950), cert. denied, 340 U.S. 876 (1950); Eggebeen v. Sonnenburg, 1 N.W.2d 84 (Wis. 1941); State ex rel. Carter v. Harper, 196 N.W. 451 (Wis. 1923).* Any regulation which imposes a restriction upon an owner may be a sufficient impairment of enjoyment to constitute a taking. *In re Kansas City Ordinance No. 39946, 252 S.W. 404 (Mo. 1923).* A valid regulation requiring exceptionally restrictive land use classifications for protection of public interests may nevertheless constitute a taking of private property for public use, entitling the owner to compensation. *Brown v. Tahoe Reg'l Planning Agency, 385 F. Supp. 1128 (D.Neb. 1973).* Mere enactment of a general plan for future development of an area is not a taking. *Selby Realty Co. v. City of San Buenaventura, 514 P.2d 111 (Cal. 1973).* Only when police power restriction is so great that the landowner ought not to bear such a burden does restriction become a constructive taking. *Omernik v. State, 218 N.W.2d 734 (Wis. 1974).* Enforcement of building codes is not a taking. City of Gary by and through *Dep't of Redev. v. Roberto, 354 N.W.2d 786 (Ind. App. 1976).* Mere diminution of profits through zoning is not a taking. *LaSalle Nat'l Bank v. City of Evanston, 312 N.E.2d 625 (Ill. 1974).*

(n13)Footnote 264. *Northern Transp. Co. v. Chicago, 99 U.S. 635 (1878); Akins v. State, 50 Cal. Rptr. 2d 531 (Cal. App. 1996); Dible v. City of Lafayette, 678 N.E.2d 1271 (Ind. App. 1997)* (holding that "a taking by eminent domain or inverse condemnation includes any substantial interference with private property which destroys or impairs one's free use, enjoyment, or interest in the property"); Walker v. Old Colony & N. R.R., 51 N.H. (1969); *Finke v. State, 521 N.W.2d 371 (Minn. App. 1994); Dumont v. Town of Wolfeboro, 622 A.2d 1238 (N.H. 1993); Eaton v. Boston, C. & M. Ry., 51 N.H. 504 (1872); Smith v. Rochester, 92 N.Y. 463 (1883); Reeves v. Treasurer of Wood, 8 Ohio St. 333 (Ohio 1858); East Pennsylvania Ry. v. Schollenberger, 54 Pa. 144 (1867); Pettigrew v. Evansville, 25 Wis. 223 (1869).* State could not grant a pipeline easement over a road on which the state had only a right-of-way without a taking in eminent domain. *Wells v. Air Products & Chems., Inc., 383 F. Supp. 146 (N.D.W. Va. 1974).* Limitation of sanitary sewer leaving property owner without lateral sewer connection was a taking. *Hanser v. Metropolitan Sewage Dist. of Milwaukee County, 190 N.W.2d 161 (Wis. 1971). Contra* loss of tenants due to publicity of intended condemnation resulted in a taking. *Conroy-Prugh Glass Co. v. Commonwealth, 321 A.2d 598 (Pa. 1974).* Damage for future use is compensable. *Bowen v. Ives, 368 A.2d 82* (Conn. 176). All capabilities of future use must be considered. *State ex rel. Dep't of Transp. Bureau of Hwys. v. Brevard, 545 S.W.2d 431 (Tenn. App. 1976).*

Cohen v. City of Hartford, 710 A.2d 746 (1998) (when the government simply regulates the use of property instead of taking physical occupation, compensation must be paid only if the regulation forces the landowner to bear a burden individually which should be borne by the general public); *City of Laredo v. R. Vela Exxon, Inc., 966 S.W.2d 673 (Tex. App. 1998)* (no taking results from inhibiting of traffic where the government has not directly limited plaintiff's use of his property); *Manufactured Housing Communities of Washington v. State, 951 P.2d 1142 (Wash. App. 1998)* (a statutory right of first refusal belonging to mobile home park tenants giving them the right to buy the park is not a taking of the park owner's property by means of physical occupation); *Karam v. State, Dep't of Environmental Protection, 705 A.2d 1221 (N.J. Super. App. Div. 1998)* (where government regulation substantially eliminates or bars all economic use of the land, a taking has occurred and just compensation must be paid to the landowner); *Cohen v. City of Hartford, 710 A.2d 746 (1998)* (when the state, in exercise of police power, authorizes a physical taking of property or title, just compensation must be paid); *Bass Enterprises Production Co. v. United States, 133 F.3d 893 (Fed. Cir. 1998)* (when government regulation precludes all economically beneficial use of a property, a 5th Amendment taking has occurred and compensation must be paid); *Eastern Enterprises v. Apfel, 118 S. Ct. 2131 (1998)* (economic regulation can effect a taking when it alters economic life for one individual in order to benefit the public as a whole

(opinion written by Justice O'Connor with three justices concurring and one justice concurring in the judgment)).

(n14)Footnote 265. *Cienega Gardens v. United States, 33 Fed. Cl. 196 (Fed. Cl. 1995); Pumpelly v. Green Bay & M. Canal Co., 80 U.S. 166 (1871); Hoover v. New Haven & N. Co., 14 Conn. 146 (1877); Ashley v. Port Huron, 35 Mich. 296 (1876); Brisbine v. St. Paul & S.C. R.R., 23 Minn. 114 (1876); State Dep't of Roads v. Dillon, 121 N.W.2d 798 (Neb. 1963)* (mere damage is compensable even though there is not physical invasion); *Correy v. Town of Merrimack, 666 A.3d 1359 (N.H. 1995); Silverman v. Rent Leveling Bd. of Cliffside Park, 649 A.2d 1342 (N.J. Super. 1994); Miller v. Beaver Falls, 82 A.2d 34 (Pa. 1951); Arimond v. Green Bay & M. Canal Co., 31 Wis. 316 (1872). See McKinney v. High Point, 74 S.E.2d 440 (N.C. 1953).* Allowing damages for discomfort, disturbance, inconvenience and financial loss resulting from highway construction. *Reymond v. State Dep't of Hwys., 231 So. 2d 375 (La. 1970).* Sovereign liable for damage due to vibration from public works. *Chaney v. Travelers Ins. Co., 249 So. 2d 181 (La. 1971). But see Bakken v. State Hwy. Comm'n, 382 P.2d 550 (Mont. 1963),* right of compensation is for the physical taking of property. Lacking a relationship between community needs and a restriction imposed on property used, an unconstitutional taking results. *Pure Oil Div. of Union Oil Co. v. City of Brook Park, 269 N.E.2d 853 (Ohio App. 1971).* The New York Historical Preservation Act held to effect an unconstitutional taking. Lutheran Church in *Am. v. City of New York, 316 N.E.2d 305 (N.Y. 1974).* Increase in noise as decreasing value in severance damages is allowable evidence. *State Road Comm'n v. Rohan, 487 P.2d 857 (Utah 1971).* Interference with owner's use may go to the extent of being a taking. *Benenson v. United States, 548 F.2d 939 (U.S. Ct. Cl. 1977).* Statute requiring cessation of strip mining may be a "taking." *Bureau of Mines of Md. v. Georgia Creek Coal & Land Co., 321 A.2d 748 (Md. 1974). See* William B. Stoebuck, *Condemnation by Nuisance: The Airport Cases in Retrospect and Prospect, 71 Dick. L. Rev. 207 (1971).*

Dodd v. Hood River County, 136 F.3d 1219 (9th Cir. 1998) (when government regulation results in a partial limitation in economic use instead of a complete destruction of use, the fact that there has not been an overt taking does not preclude the continuation of a takings analysis under federal law); *Cohen v. City of Hartford, 710 A.2d 746 (1998)* (when the government simply regulates the use of property instead of taking physical occupation, compensation must be paid only if the regulation forces the landowner to bear a burden individually which should be borne by the general public); *City of Laredo v. R. Vela Exxon, Inc., 966 S.W.2d 673 (Tex. App. 1998)* (No taking results from inhibiting of traffic where the government has not directly limited plaintiff's use of the property); *Karam v. State, Dep't of Environmental Protection, 705 A.2d 1221 (N.J. Super. App. Div. 1998)* (where government regulation substantially eliminates or bars all economic use of the land, a taking has occurred and just compensation must be paid to the landowner); *Manufactured Housing Communities of Washington v. State, 951 P.2d 1142 (Wash. App. 1998)* (A statutory right of first refusal belonging to mobile home park tenants giving them the right to buy the park is not a taking of the park owner's property by means of physical occupation); *Bass Enterprises Production Co. v. United States, 133 F.3d 893 (Fed. Cir. 1998)* (when government regulation precludes all economically beneficial use of a property, a 5th Amendment taking has occurred and compensation must be paid); *Eastern Enterprises v. Apfel, 118 S. Ct. 2131 (1998)* (economic regulation can effect a taking when it alters economic life for one individual in order to benefit the public as a whole (opinion written by Justice O'Connor with three justices concurring and one justice concurring in the judgment)).

(n15)Footnote 266. *Manufactured Housing Communities of Washington v. State, 951 P.2d 1142 (Wash. App. 1998)* (A statutory right of first refusal belonging to mobile home park tenants, giving them the right to buy the park, is not a taking of the park owner's property because the statute advances a bona fide public interest in providing inexpensive housing and the owner of the property is not subject to any financial detriment); *Karam v. State, Dep't of Environmental Protection, 705 A.2d 1221 (N.J. Super. App. Div. 1998)* (A regulation restricting land use will not always constitute a taking, and thus no compensation need be paid, even if the land is made less profitable to the owner as a result of the taking; this is particularly true when the regulation is one of benefit to the public as a whole); *White v. North, 708 A.2d 1093 (Md. Ct. App. 1998)* (Denial of an application for a permit to construct a swimming pool did not amount to a taking because enjoyment of the land is still possible; the swimming pool would simply be an additional luxury); *City of Virginia Beach v. Bell, 498 S.E.2d 414 (Va. 1998)* (Because a city's zoning ordinance was instituted well before a

landowner's acquisition of property within the area, a decision by the Wetlands Board to deny an application for property development does not constitute a taking by inverse condemnation, this despite developer's claim that all potential economic benefit the land may have is gone with the ordinance in place).

Balent v. City of Wilkes-Barre, 669 A.2d 309 (Pa. 1995); Giddens v. City of Shreveport, 912 F. Supp. 953 (D.La. 1995); Spitler v. Munster, 14 N.E.2d 579 (Ind. 1938). Rezoning of property from residential to industrial use does not constitute a taking of eminent domain by lowering the value of the property. *Smith v. County of Santa Barbara, 52 Cal. Rptr. 292 (Cal. App. Div. 2 1996); In re City of Austin, 567 N.W.2d 529 (Minn. App. 1997)* (holding that "the construction of the proposed grade crossing without compensation to Soo Line would not be an unconstitutional taking of property because the state has authority under its police power to establish new grade crossings without compensating railroads"); *Jackson Municipal Airport Auth. v. Evans, 191 So. 2d 126 (Miss. 1966).* Refusal on health grounds to grant an application for building a refinery was not taking. *In re Maine Clean Fuels, Inc., 310 A.2d 736 (Me. 1973).* Prohibition of signs on private property is within the meaning of the police power and does not constitute taking. *Whitmier & Ferris Co. v. State, 230 N.E.2d 904 (N.Y. 1967).* Denial of a curb cut and driveway permit across a sidewalk area held a valid exercise of police power and not an act of eminent domain. *City of San Antonio v. Pigeonhole Parking of Texas, Inc., 311 S.W.2d 218 (Tex. 1958).* Indicating that compensation might be allowed where taking was by a public utility but would not be if it was a government or government agent. *State ex rel. Wells v. City of Dunbar, 95 S.E.2d 457 (W. Va. 1956).* If damage resulting from exercise of the police power is so great that the owner should not bear it for the public good, there is a "taking." *Just v. Marinette County, 201 N.W.2d 761 (Wis. 1972),* limited by *City of Milwaukee v. Wroten, 466 N.W.2d 861 (Wis. 1991).*

(n16)Footnote 267. *Goodenow v. City Council of Maquoketa, Iowa, 574 N.W.2d 18 (Iowa 1998)* (local ordinances requiring landowners to trim grass and weeds on city-owned property at their own expense promoted public health, safety, and welfare, and thus did not constitute a taking of their property); *Balent v. City of Wilkes-Barre, 669 A.2d 309 (Pa. 1995); Cienega Gardens v. United States, 33 Fed. Cl. 196 (Fed. Cl. 1995).* Prohibition of apartment houses held taking. *Youngstown v. Kahn Bros. Bldg. Co., 148 N.E. 842 (Ohio 1925).* Statute prohibiting billboards was not a taking. *National Advertising Co. v. State Hwy. Dep't, 195 S.E.2d 895 (Ga. 1973).* Where adjoining landowner has right of access to highway, such owner cannot insist on right of access at any place the owner sees fit, since the owner holds such right subject to the superior right of the state; nevertheless, access must be suitable and mere inconvenience of property owner does not stamp a means of access unsuitable. *Meloon Bronze Foundry v. State, 166 N.Y.S.2d 586 (1957).* There may be uncompensated diminution of a property right if it is accomplished by valid exercise of the state's police power. *Knight v. Grimes, 127 N.W.2d 708 (S.D.1964).*

(n17)Footnote 268. *State v. Heller, 196 A. 337 (Conn. 1936). See Mansfield v. West Orange, 196 A. 225 (Conn. 1937).* Economic loss caused by urban renewal does not constitute a taking under the *Fifth and Fourteenth Amendments. Sayre v. City of Cleveland, 493 F.2d 64 (6th Cir. 1974), cert. denied, 419 U.S. 837 (1974).* Every prohibitory regulation to some extent diminishes the owner's right to property, but such diminution is not necessarily a taking. *Minden Beef Co. v. Cost of Living Council, 362 F. Supp. 298 (D.Neb. 1973).* A taking can result from action of the sovereign other than by eminent domain. *Amen v. City of Dearborn, 363 F. Supp. 1267 (E.D.Mich. 1973).* Prohibition against open burning on property did not constitute taking of property without due compensation. *Cobin v. Pollution Control Board, 307 N.E.2d 292 (Ill. App. 1974).* Acquisition by the city from a power company of a power plant upon expiration of the company's franchise is not taking by eminent domain but instead is a statutory option that arises only upon termination of the franchise contract. *City of Kiowa v. Central Tel. & Utils. Corp., W. Power Div., 515 P.2d 795 (Kan. 1973). See* Note, *Land Use Regulation and the Concept of Takings in Nineteenth Century America, 40 U. Chi. L. Rev. 854 (1973).*

Lee County v. Kiesel, 705 So.2d 1013 (Fla. Ct. App. 1998) (when government regulation affects a piece of property, compensation will be awarded only when the regulation substantially precludes all beneficial use of the property); *Goodenow v. City Council of Maquoketa, Iowa, 574 N.W.2d 18 (Iowa 1998)* (local ordinances requiring landowners to trim grass and weeds on city-owned property at their own expense promoted public health, safety, and welfare, and thus

did not constitute a taking of their property); *Manufactured Housing Communities of Washington v. State, 951 P.2d 1142 (Wash. App. 1998)* (a statutory right of first refusal belonging to mobile home park tenants, giving them the right to buy the park, is not a taking of the park owner's property because the statute advances a bona fide public interest in providing inexpensive housing and the owner of the property is not subject to any financial detriment); *City of Virginia Beach v. Bell, 498 S.E.2d 414 (Va. 1998)* (because a city's zoning ordinance was instituted well before a landowner's acquisition of property within the area, a decision by the Wetlands Board to deny an application for property development does not constitute a taking by inverse condemnation, this despite developer's claim that all potential economic benefit the land may have is gone with the ordinance in place).

(n18)Footnote 269. *Lee County v. Kiesel, 705 So.2d 1013 (Fla. Ct. App. 1998)* (when government regulation affects a piece of property, compensation will be awarded only when the regulation substantially precludes all beneficial use of the property); *Zealy v. City of Waukesha, 534 N.W.2d 917 (Wis. App. 1995); Interstate Cigar Co. v. United States, 32 Fed. Cl. 66 (Fed. Cl. 1994); Schuler v. Wilson, 153 N.E. 737 (Ill. 1926); Winchester v. Ring, 144 N.E. 333 (Ill. 1924).* The entry upon private property by a water company for the purpose of making excavations and boring test wells in order to determine whether or not the property is suitable for its purposes constitutes a taking for which the owner of the property entered upon is entitled to compensation. *Jacobsen v. Superior Court, 219 P. 986 (Cal. 1923).* A city which, by the construction and maintenance of an incinerator, reduces the value of neighboring property may be held liable as for a taking of property by right of eminent domain. *See also Dayton v. Asheville, 115 S.E. 827 (N.C. 1923); Schuler v. Wilson, 153 N.E. 737 (Ill. 1926);* school playground as depreciating value of adjoining property. "*Sic utere tuo ut alienum non laedas*" as applied to public agencies requires eminent domain. *Beckley v. Reclamation Board, 23 Cal. Rptr. 428 (1962).* Salting operations on street which damaged neighboring property were taking. *Foss v. Maine Tpk Auth., 309 A.2d 339 (Me. 1973).* The designation of property as a "landmark" by the Landmarks Preservation Commission, thus preventing its sale, was a "taking." Lutheran Church in *Am. v. City of New York, 316 N.E.2d 305 (N.Y. 1974).* Increase in power load over electric transmission easement was an improper burden of the easement and required condemnation. *Yoder v. Columbus & S. Ohio Elec. Co., 316 N.E.2d 477 (Ohio App. 1974).* A purported assessment for public which is greater than the value of the property after the improvement is a taking. *Arvidson v. Board of County Comm'rs, 269 N.E.2d 432 (Kan. 1977).*

(n19)Footnote 270. *Starzenski v. City of Elkhart, 659 N.E.2d 1132 (Ind. App. 1996); Dayton v. Asheville, 115 S.E. 827 (N.C. 1923); Oklahoma City v. Vetter, 179 P. 473 (Okla. 1919).* The mere fact that the owner has need to travel a short distance further to reach the remaining property as the result of a road being closed on a nonaccess highway is not subject to damages. *In re Appropriations of Land of Mitchell, 228 A.2d 53 (Pa. Super. Ct. 1967).*

(n20)Footnote 271. *State ex rel. Missouri Hwy. & Transp. Comm'n v. Behle, 863 S.W.2d 898 (Mo. App. E.D.1993).* The removal of lateral support from approved realty by the state and interference with property owner's rights of ingress and egress and view were not a taking. *Weir v. Palm Beach County, 85 So. 2d 865 (Fla. 1956).*

(n21)Footnote 272. *Holtz v. San Francisco Bay Area Rapid Transit Dist., 552 P.2d 430 (Cal. 1976); Sanders v. State Hwy. Comm'n, 508 P.2d 981 (Kan. 1973).*

(n22)Footnote 273. *Perrin v. Los Angeles County Transp. Comm'n, 50 Cal. Rptr. 2d 488* (Cal. App. 2 Dist. 1996); *Los Angeles v. Geiger, 210 P.2d 717 (Cal. App. 1941); State ex rel. State Hwy. Comm'n v. Clevenger, 291 S.W.2d 57 (Mo. 1956); State by and Through State Hwy. Comm'n v. Burk, 265 P.2d 783 (Or. 1954); State v. Calkins, 314 P.2d 449 (Wash. 1957). Contra* compensation allowed for loss of access to new highway cut through owners' land. *St. Clair County v. Bukacek, 131 So. 2d 683 (Ala. 1961).*

(n23)Footnote 274. *City of Walla Walla v. Conkey, 492 P.2d 589 (Wash. App. 1971); Clinard v. Town of Kernersville, 3 S.E.2d 267 (N.C. 1939); Sheriff v. Easley, 183 S.E. 311 (S.C. 1936).* Damage caused by rupturing a gas line in the course of widening a street was a "taking" by eminent domain. *Kline v. City of Columbia, 155 S.E.2d 597 (S.C. 1967). But see Lehan v. Department of Transp., 349 A.2d 492 (Pa. 1975).*

(n24)Footnote 275. The New York Historical Preservation Act, held to effect an unconstitutional taking. Lutheran Church in Am. v. City of New York, 3 (N.Y. 1974). *See* Note,*Urban Landmarks: Preserving Our Cities' Aesthetic and Cultural Resources, 39 Alb. L. Rev. 521 (1975). Contra Maher v. City of New Orleans, 371 F. Supp. 653 (E.D.La. 1974), cert. denied, 426 U.S. 905 (1976). But see Russo v. Beckelman, 611 N.Y.S.2d 869 (N.Y. App. Div. 1994).*

(n25)Footnote 276. *Persyn v. United States, 32 Fed. Cl. 579 (Fed. Cl. 1995); Otter Tail Power Co. v. Von Bank, 8 N.W.2d 599 (N.D.1942).* The enlargement of an easement requires compensation. *United States v. 3.08 Acres of Land, 209 F. Supp. 652 (D.Utah 1962).* The increase of a servitude is a taking. *Beckley v. Reclamation Bd., 23 Cal. Rptr. 428 (1962); McCubbin v. Gretna, 116 N.W.2d 287 (Neb. 1962)* (purchaser from original condemnor). Loss of access through a street vacation is a compensable taking. *People v. Guimarra Vineyards Corp., 53 Cal. Rptr. 902 (Cal. App. 1966); Roth v. Wilkie, 354 P.2d 510 (Colo. 1960).* Loss of windbreak was compensable. *Ventura County Flood Control Dist. v. Security First Nat'l Bank, 93 Cal. Rptr. 653 (1971).* The condemnation of an equitable servitude is not compensable. *Board of Public Instr. v. Bay Harbor Islands, 81 So. 2d 637 (Fla. 1955).* Destruction of a license by eminent domain is a taking of a property interest. *State Hwy. Dep't v. Morton, 121 S.E.2d 275 (Ga. App. 1961).* The destruction of easements is a taking. *Gulf Interstate Gas Co. v. Garvin, 368 S.W.2d 309 (Ky. 1963); State ex rel. Dep't of Hwys. v. Caldwell Bros. Real Est., Inc., 155 So. 2d 231 (La. App. 1963)* (easement is property). The adjacent owner is entitled to reasonable, convenient and suitable access. *Hendrickson v. State, 127 N.W.2d 165 (Minn. 1964).* Any interference by the holder of a public utility easement with the use of the land which use interferes with the proper exercise of the easement itself is a de facto appropriation. *Clark v. State of N.Y., 207 N.E.2d 606 (N.Y. 1965).* Use of highway easement for gas mains entitled holder of underlying fee to inverse condemnation damages. *Heyert v. Orange & Rockland Utils., 218 N.E.2d 263 (N.Y. 1966).* The taking of equitable rights of owners of lots in subdivision was compensable. *Minner v. Lynchburg, 129 S.E.2d 673 (Va. 1963).* Owner of dominant tenement was not entitled to compensation for the taking of servient tenement where the servitude claimed was the restrictive covenant in the deed limiting its use to residential purposes, and the taking of such tenement was for purpose of erecting a bridge, such use being a governmental activity as distinguished from a proprietary use. *State ex rel. Wells v. Dunbar, 95 S.E.2d 457 (W. Va. 1956).* City may construct sewers and gas, water or other piping in streets without compensation to adjoining landowners so long as the construction does not materially affect the owner's use or enjoyment. *Awbrey v. City of Panama City Beach, 283 So. 2d 114 (Fla. App. 1973).* After condemnation, the highway cannot be constructed in a manner not in accordance with the plans and specifications introduced by the state in a prior condemnation action. *Fauske v. Dean, 101 N.W.2d 769 (S.D.1960).* Statute of limitations held to bar recovery of damages for injuries not anticipated in previous condemnation action. *Polk v. Davidson County, 281 S.W.2d 257 (Tenn. App. 1955).* State could not grant a pipeline easement over a road on which the state had only a right-of-way without a taking by eminent domain. *Wells v. Air Products & Chems., Inc., 383 F. Supp. 146 (N.D.W. Va. 1974).*

(n26)Footnote 277. *Boehm v. Backes, 493 N.W.2d 671 (N.D.1992); Reisenauer v. State Dep't of Hwys., 813 P.2d 375 (Idaho App. 1991); Harris County v. Felts, 881 S.W.2d 866 (Tex. App. 1994).* Requiring additional payment. *Heyert v. Orange & Rockland Utils., 218 N.E.2d 263 (N.Y. 1966). Contra Pittsburgh Nat'l Bank v. Equitable Gas Co., 220 A.2d 12 (Pa. 1966).* City may construct sewers and gas, water or other piping in streets without compensation to adjoining landowners so long as the construction does not materially affect the owner's use or enjoyment. *Awbrey v. City of Panama City Beach, 283 So. 2d 114 (Fla. App. 1973).*

(n27)Footnote 278. *Manufactured Housing Communities of Washington v. State, 951 P.2d 1142 (Wash. App. 1998)* (a statutory right of first refusal belonging to mobile home park tenants giving them the right to buy the park is not a taking of the park owner's property even though the owners claim that their interest in the land has been detrimentally affected); *Bowles v. United States, 31 Fed. Cl. 37 (Fed. Cl. 1994); Bourque v. City of Yonkers, 790 F. Supp. 486 (S.D.N.Y. 1992); Rubano v. Department of Transp., 656 So. 2d 1264* (Fla., 1995); *Morley v. Jackson Redev. Auth., 632 So. 2d 1284 (Miss. 1994).* A restriction against use as a "stable" was lost by the passage of time; a garage was not a stable. *Blakeley v. Gorin, 313 N.E.2d 903 (Mass. 1974).* Restrictive covenants are property rights compensable in eminent domain. *Southern Cal. Edison Co. v. Bourgerie, 507 P.2d 964 (Cal. 1973), overruling, Friesen v. City of Glendale, 288 P. 1080 (Cal. 1930); disapproving Sackett v. Los Angeles City Sch. Dist., 5 P.2d 23 (Cal. App. 1931).*

Circuity of travel not compensable. *Department of Pub. Works & Bldgs. v. Grenwell, 359 N.E.2d 780* (Ill. 921). Allowing recovery. *Board of Pub. Instr. v. Bay Harbor Islands, 81 So. 2d 637 (Fla. 1955); Arkansas State Hwy. Comm'n v. McNeill, 381 S.W.2d 425 (Ark. 1964). Contra Adaman Mutual Water Co. v. United States, 278 F.2d 842 (9th Cir. 1960); City of Shelbyville v. Kilpatrick, 322 S.W.2d 203 (Tenn. 1959).* Compensation must be paid to the owner of an affirmative equitable servitude on condemnation. *Adaman Mut. Water Co. v. United States, 278 F.2d 842 (9th Cir. 1960).* Property rights created by restrictive covenant cannot be taken for private use. *Pulos v. James, 302 N.E.2d 768 (Ind. 1973).* A restrictive covenant creates a property right that must be compensated in eminent domain. *Pulos v. James, 302 N.E.2d 768 (Ind. 1973).* Requiring compensation to owners of other lots when the purpose for which the use was condemned violated these restrictions on the plan. *Shelbyville v. Kilpatrick, 322 S.W.2d 203 (Tenn. 1959).* Restrictive covenant is a real property interest in eminent domain. *City of Houston v. McCarthy, 464 S.W.2d 381 (Tex. App. 1971).* Allowing compensation to dominant estates where a restrictive covenant of use is affected by condemnation. *Stamford v. Vuono, 143 A. 245 (Conn. 1928); Department of Pub. Works & Bldgs. v. Wilson & Co., 340 N.E.2d 12 (Ill. 1975); Ladd v. Boston, 24 N.E. 858 (Mass. 1890); Allen v. Detroit, 133 N.W. 317 (Mich. 1911); Burger v. St. Paul, 64 N.W.2d 73 (Minn. 1954); Peters v. Buckner, 232 S.W. 1024 (Mo. 1921); Hughes v. Cincinnati, 195 N.E.2d 552 (Ohio 1964); Flynn v. New York, W. & B. R.R., 112 N.E. 913 (N.Y. 1916); Raleigh v. Edwards, 71 S.E.2d 396 (N.C. 1952); Meagher v. Appalachian Elec. Power Co., 77 S.E.2d 461 (Va. 1953); Fuller v. Town Bd. of Madison, 214 N.W. 324 (Wis. 1927). Contra* and denying compensation. *Friesen v. Glendale, 288 P. 1080 (Cal. 1930); Anderson v. Lynch, 3 S.E.2d 85 (Ga. 1939); Doan v. Cleveland Short Line R.R., 112 N.E. 505 (Tex. App. 1925); Houston v. Wynne, 279 S.W. 916 (Tex. App. 1925).* Restrictive covenant is a real property interest in eminent domain. *City of Houston v. McCarthy, 464 S.W.2d 381 (Tex. App. 1971). See* Arlvo Van Alstyne, *Taking or Damaging by Police Power: The Search for Inverse Condemnation Criteria, 44 So. Cal. L. Rev. 1 (1971). State ex rel. Wells v. City of Dunbar, 95 S.E.2d 457 (W. Va. 1956).* Property rights created by restrictive covenant cannot be taken for private use. *Pulos v. James, 302 N.E.2d 768 (Ind. 1973).* View criticized in Ralph W. Aigler, *Measure of Compensation for Extinguishment of Easements by Condemnation, 1945 Wis. L. Rev. 5.* Holding personal restrictive covenants that do not run with the land are compensable. *Hartford Nat'l Bank & Trust Co. v. Redevelopment Agency of the City of Bristol, 321 A.2d 469 (Conn. 1973). Board of Pub. Instr. v. Town of Bay Harbor Islands, Fla., 81 So. 2d 637 (Fla. 1955)* and *Anderson v. Lynch, 3 S.E.2d 85 (Ga. 1939)* (holding a right to enforce a restrictive covenant is not entitled to compensation when the servient is taken by eminent domain). *Restrictive Covenant or Right to Enforcement Thereof as a Compensable Property Right, 4 A.L.R. 2d 1137.* Holding no property right in a restrictive covenant ruined by eminent domain. *Arkansas State Hwy. Comm'n v. McNeill, 381 S.W.2d 425 (Ark. 1964).*

(n28)Footnote 279. *Nollan v. California Coastal Comm'n, 483 U.S. 825 (1986).* Held burdensome in the case of school dedication. *Pioneer Trust & Sav. Bank v. Village of Mount Prospect, 176 N.E.2d 799 (Ill. 1961).* Upheld: *Malmar Assocs. v. Board of County Comm'rs, 272 A.2d 6 (Md. 1971).*

(n29)Footnote 280. *Persyn v. United States, 34 Fed. Cl. 187 (Fed. Cl. 1995).* Increase of number of air flights over land, *Davis v. United States, 295 F.2d 931 (Ct. Cl. 1961),* or use of a new type of aircraft, *Avery v. United States, 330 F.2d 640 (Ct. Cl. 1964)* may be a new "taking" of airspace. Low and frequent air flights are a taking. *Davis v. United States, 295 F.2d 391 (Ct. Cl. 1961); American Airlines, Inc. v. Town of Hempstead, 272 F. Supp 226 (E.D.N.Y. 1967), cert. denied, Town of Hempstead v. American Airlines, Inc., 393 U.S. 1017 (1969); Loma Portal Civic Club v. American Airlines, 394 P.2d 548 (Cal. 1964); Jacksonville v. Schumann, 199 So. 2d 727 (Fla. App. 1967) cert. denied, 390 U.S. 981 (1968); State ex rel. Royal v. City of Columbus, 209 N.E.2d 405 (Ohio 1965), cert. denied, City of Columbus v. Royal, 383 U.S. 925 (1966).* Air activity up to navigable airspace is a taking. *Johnson v. Omaha Airport Auth., 115 N.W.2d 426 (Neb. 1962).* Inverse condemnation resulting from low airflights from airport. *Hoyle v. City of Charlotte, 172 S.E.2d 1 (N.C. 1970). Contra* and to effect noise from aircraft may be a nuisance though not coming from the perpendicular. *Thornburg v. Port of Portland, 376 P.2d 100 (Or. 1962).* Extension of airport runway which resulted in increase of noise over adjoining property was a taking. *City of Houston v. McFadden, 420 S.W.2d 811 (Tex. App. 1967).* Noise from low flying aircraft resulting in diminishing value of land is a taking though the flights are not directly over the land. *Martin v. Port of Seattle, 391 P.2d 540 (Wash. 1964), cert. denied, Port of Seattle v. Martin, 379 U.S. 989 (1965). See* William B. Stoebuck, *Condemnation by Nuisance: The Airport Cases in Retrospect and Prospect, 71 Dick.*

L. Rev. 207 (1967). Flights under 500 feet were held a "taking." *Aaron v. United States, 311 F.2d 798 (Ct. Cl. 1963); Bowling Green-Warren County Airport Bd. v. Long, 364 S.W.2d 167 (Ky. 1962).* Continuous low flights by government-owned helicopters over others' property constituted a taking. *Speir v. United States, 485 F.2d 643 (Ct. Cl. 1973).* Noise of jet aircraft constituted inverse condemnation. *City of Jacksonville v. Schumann, 167 So. 2d 95 (Fla. App. 1964).* Low altitude flights constitute a taking through adverse condemnation. *City of Atlanta v. Donald, 141 S.E.2d 560 (Ga. App. 1965), overruled on other grounds, 143 S.E.2d 737 (Ga. 1965).* Interference with easements of air, light and view may be compensable. *Department of Pub. Works v. Horejs, 223 N.E.2d 207 (Ill. App. 1966).* Owners of land adjoining airport are entitled to compensation for invasion of airspace. *Bowling Green-Warren County Airport Bd. v. Long, 364 S.W.2d 167 (Ky. 1962).* Condemnation of an incorporeal aviation easement is a "taking." *Johnson v. Omaha Airport Auth., 115 N.W.2d 426 (Neb. 1962).* Landowner may have cause of action against a municipal corporation for nuisance from noise and vibration, but, in the absence of overflights, there is no cause of action for inverse condemnation. *Ferguson v. City of Keene, 238 A.2d 1 (N.H. 1968).* Inverse condemnation resulting from low airflights from airport. *Hoyle v. City of Charlotte, 172 S.E.2d 1 (N.C. 1970).* Airport noise and air pollution diminishing property value is a taking, even where there was not direct overflight. Overflights resulting in a definite and measurable diminution of the market value and limiting the practical enjoyment of the property constitute inverse condemnation. *Alevizos v. Metropolitan Airports Comm'n of Minneapolis & St. Paul, 216 N.W.2d 651 (Minn. 1974).* Flights of aircraft so low and frequent as to be a direct and immediate interference with the use and enjoyment of land are a "taking." *Gardner v. Allegheny County, 114 A.2d 491 (Pa. 1955).* Low flights by landings and takeoffs constitute a "taking." *Ackerman v. Port of Seattle, 348 P.2d 664 (Wash. 1960).*

(n30)Footnote 281. *Persyn v. United States, 34 Fed. Cl. 187 (1995); Fitzgerald v. City of Iowa City, 492 N.W.2d 459 (Iowa 1992); Ackerman v. Port of Seattle, 348 P.2d 664 (Wash. 1960).* Frequent low altitude flights are an inverse condemnation. *City of Jacksonville v. Schumann. 167 So. 2d 95 (Fla. App. 1964). See* Vincent J. Rossi, *Inverse Condemnation and Nuisance: Alternative Remedies for Airport Noise Damage, 24 Syracuse L. Rev. 793 (1973).*

(n31)Footnote 282. *Persyn v. United States, 34 Fed. Cl. 187 (Fed. Cl. 1995); Thornburg v. Port of Portland, 376 P.2d 100 (Or. 1962).* Substantial interference with beneficial use of property from noise and fumes caused by adjacent military aircraft operations held not constitutional taking. *Batten v. United States, 306 F.2d 580 (10th Cir. 1962). See* Vincent J. Rossi, *Inverse Condemnation and Nuisance: Alternative Remedies for Airport Noise Damage, 24 Syracuse L. Rev. 793 (1973).*

(n32)Footnote 283. *Institoris v. City of Los Angeles, 210 Cal. App. 3d 10 (Cal. App. 1989); United States v. Causby, 328 U.S. 256 (1946); Trippe v. Port of N.Y. Auth., 231 N.Y.S.2d 818 (N.Y. Sup. 1962); Ackerman v. Port of Seattle, 348 P.2d 664 (Wash. 1960).* Airport airflights resulting in reduction of fair market value were inverse condemnation. *Thornburg v. Port of Portland, 415 P.2d 750 (Or. 1966). See* Note, *Inverse Condemnation and Nuisance: Alternative Remedies for Airport Noise Damage, 24 Syracuse L. Rev. 793 (1973).*

(n33)Footnote 284. *Brenteson Wholesale, Inc. v. Arizona Pub. Serv. Co., 803 P.2d 930 (Ariz. App. 1990); Ackerman v. Port of Seattle, 348 P.2d 664 (Wash. 1966).* No compensation for diminution in value due to bombing on adjacent federal proving ground. *Nunnally v. United States, 239 F.2d 521 (4th Cir. 1956).* Landowners not on a glide path are not entitled to compensation for noise of airplanes. Vibration, noise and smoke from jets on adjoining airbase which did not render house inhabitable is not a taking. *Batten v. United States, 306 F.2d 580 (10th Cir. 1962), cert. denied, 371 U.S. 955 (1963).* To be taking by low flights, they must be so frequent as to be permanent or of indefinite duration. *Wilfong v. United States, 480 F.2d 1326 (Ct. Cl. 1973).* Overflights resulting in a definite and measurable diminution of the market value and limiting the practical enjoyment of the property constitute inverse condemnation. *Alevizos v. Metropolitan Airports Comm'n of Minneapolis & St. Paul, 216 N.W.2d 651 (Minn. 1974).* Air activity up to navigable airspace is a taking. *Johnson v. Omaha Airport Auth., 115 N.W.2d 426 (Neb. 1962).* Inverse condemnation results from low flights from airport. *Hoyle v. City of Charlotte, 172 S.E.2d 1 (N.C. 1970). See The Airport Noise Cases: Condemnation by Nuisance and Beyond, 7 Wake Forest L. Rev. 271 (1971).*

(n34)Footnote 285. *Jackson v. Metropolitan Knoxville Airport Auth., 1996 W.L. 31005 (Tenn. 1996); Thornburg v.*

Port of Portland, 376 P.2d 100 (Or. 1962). Too low airflights on approaches to airfield constitute a "taking." *State ex rel. Royal v. City of Columbus, 209 N.E.2d 405 (Ohio 1965), cert. denied, City of Columbus v. Royal, 383 U.S. 925 (1966).* Condemned low flights over land adjacent to an airport were a taking. *Ackerman v. Port of Seattle, 348 P.2d 664 (Wash. 1960).*

(n35)Footnote 286. *Indiana Toll Road Comm'n v. Jankovice, 193 N.E.2d 237 (Ind. 1963).* Ordinance regulating height of structures adjacent to airport is a taking. *Roark v. City of Caldwell, 394 P.2d 641 (Idaho 1964).*

(n36)Footnote 287. *Lee County v. Kiesel, 705 So.2d 1013 (Fla. Ct. App. 1998)* (a compensable taking can occur when a bridge, though not physically occupying any of plaintiff's property, substantially obstructs plaintiff's view from the property); *State v. Weiswasser, 149 N.J. 320, 693 A.2d 864 (N.J. 1997)* (holding that generally the right to receive compensation for loss of visibility has been denied, principally on the theory that one does not have control over his neighbor's property and therefore could not prevent him from erecting some structure that would effect his visibility); *Pierce v. Northeast Lake Washington Sewer and Water Dist., 870 P.2d 305 (Wash. 1994); State v. Munday Enters., 868 S.W.2d 319 (Tex. 1993)* (compensation). 8.960 *Square Feet, More or Less v. State, Dep't of Transp. and Public Facilities, 806 P.2d 843 (Alaska 1991)* (no compensation). Where the value of properties is affected by unsightliness of power lines and by living next to the power lines there is a taking. *Southwest La. Elec. Membership Corp. v. Duhan, 313 So. 2d 366 (La. App. 3 Cir. 1975).* Change of grade which interferes with the adjacent owner's unobstructed view was not a taking. *State ex rel. Schiederer v. Preston, 166 N.E.2d 748 (Ohio. 1960).* Unsightliness of power lines and fear of power lines may reduce value of the remaining property. *Southwest La. Elec. Membership Corp. v. Duhan, 313 So. 2d 366 (La. App. 3 Cir. 1975). Contra Liddick v. Council Bluffs, 5 N.W.2d 361 (Iowa 1942); Smith v. State Hwy. Comm'n, 346 P.2d 259 (Kan. 1959); Collins v. Mississippi State Hwy. Comm'n, 102 So. 2d 678 (Miss. 1958). Cutting off a view. Barnes v. Commonwealth, 25 N.E.2d 737 (Mass. 1940); Champlin Ref. Co. v. Donnell, 49 P.2d 208 (Okla. 1935). Drilling a well. Calor Oil & Gas Co. v. Franzell, 109 S.W. 328 (Ky. 1908). Earl v. Arkansas State Hwy. Comm'n, 405 S.W.2d 931 (Ark. 1966); State by Mondale v. Gannons, Inc., 145 N.W.2d 321 (Minn. 1966).*

(n37)Footnote 288. *Lee County v. Kiesel, 705 So.2d 1013 (Fla. Ct. App. 1998)* (a compensable taking can occur when a bridge, though not physically occupying any of plaintiff's property, substantially obstructs plaintiff's view from the property); *People ex rel. Dep't of Transp. v. Wilson, 25 Cal. App. 4th 977 (Cal. App. 1994); Collins v. Mississippi State Hwy. Comm'n, 102 So. 2d 678 (Miss. 1958); Crowell v. State, 238 N.Y.S.2d 72 (N.Y. App. Div. 1963).* Increase of traffic, speed, fumes and noise is not compensable. *Berkeley v. Von Adelung, 29 Cal. Rptr. 802 (Cal. App. 1963); State ex rel. State Hwy. Comm'n v. Turk, 366 S.W.2d 420 (Mo. 1963).* Impairment of light, air and view is compensable; loss of privacy is also a compensable element. *Sacramento & San Joaquin Drainage Dist. ex rel. Reclamation Board v. Reed, 29 Cal. Rptr. 847 (Cal App. 1963).* To the effect that increased traffic noise, lights and odors are part of damages in inverse condemnation. *Dennison v. State, 239 N.W.2d 708 (N.Y. 1968).* Abutters on highways have right of access, light, air and view. *State ex rel. Dep't of Hwys. v. Allison, 372 P.2d 850 (Okla. 1962).* No compensation for loss of light, air and view arising from bridge construction where there was not actual taking and legislature had not authorized consequential damages. *In re Delaware River Bridge, 182 A.2d 514 (Pa. 1962).* No damage for noise caused by passing of vehicles on new highway. *Sperry v. State, 374 N.Y.S.2d 421 (N.Y. App. Div. 1975).* Increase of noise gives rise to severance damages. *State Dep't of Hwys. v. United Pentecostal Church of Hodge, 313 So. 2d 886 (La. App. 1975).* No compensation for noise arising from highway where there had been no physical taking of property. *Washington Market Enter., Inc. v. City of Trenton, 343 A.2d 408 (N.J. 1975).*

(n38)Footnote 289. *Central Illinois Pub. Serv. Co. v. Westervelt, 342 N.E.2d 463 (Ill. App. 1976), cert. denied, 434 U.S. 1070 (1978).*

(n39)Footnote 290. *Hurst v. Starr, 607 N.E.2d 1155 (Ohio App. 1992). Berkeley v. Von Adelung, 29 Cal. Rptr. 802 (Cal. App. 1963); Tift County v. Smith, 131 S.E.2d 527 (Ga. 1963); Department of Pub. Works & Bldgs. v. Bloomer, 191 N.E.2d 245 (Ill. 1963).*

(n40)Footnote 291. *Barnes v. Commonwealth, 25 N.E.2d 737 (Mass. 1940).*

(n41)Footnote 292. *City of Virginia Beach v. Bell, 498 S.E.2d 414 (Va. 1998)* (Because a city's zoning ordinance was instituted well before a landowner's acquisition of property within the area, a decision by the Wetlands Board to deny an application for property development does not constitute a taking by inverse condemnation, this despite developer's claim that all potential economic benefit the land may have is gone with the ordinance in place); *Dible v. City of Lafayette, 678 N.E.2d 1271 (Ind. App. 1997)* (holding that "a taking by eminent domain or inverse condemnation includes any substantial interference with private property which destroys or impairs one's free use, enjoyment, or interest in the property"); *Township of West Windsor v. Nierenberg, 667 A.2d 362 (N.J. Super 1995); Locklin v. City of Lafayette, 867 P.2d 724 (Cal. 1994).* Inverse condemnation was found. *Gregory v. City of New York, 346 F. Supp. 140 (S.D.N.Y. 1972); Levine v. City of New Haven, 294 A.2d 644 (Conn. Super. 1972).* An action in trespass is an alternative to inverse condemnation. *Ossman v. Mountain States T. & T. Co., 520 P.2d 738 (Colo. 1974).* A prohibition of taking of sand and gravel is not a public taking unless it prohibits the only possible use. *Potomac Sand & Gravel Co. v. Governor of Md., 293 A.2d 241 (Md. 1972); Flanagan v. Town of Hollis, 293 A.2d 328 (N.H. 1972).* Inverse condemnation will not lie where there is an adequate remedy, such as liability insurance, in the construction contract. *Lowry Hill Props., Inc. v. State, 200 N.W.2d 295 (Minn. 1972). See* Vincent J. Rossi, Jr., *Inverse Condemnation and Nuisance: Alternative Remedies for Airport Noise Damage, 24 Syracuse L. Rev. 793 (1973); Klopping v. City of Whittier, 500 P.2d 1345 (Cal. 1972).* Stewart H. Foreman, *Improving the Valuation Process for Inverse Condemnation, 25 Hastings L.J. 768 (1974);* Joseph Irion Worsham, *Problems Peculiar to a Partial Taking in Condemnation, 13 S.W. L.J. 412 (1959);* Carl N. Grow, *Inverse Condemnation and the Right of Access of Abutting Property Owners, 9 Ind. L. Rev. 859 (1976);* William Swank, *Inverse Condemnation: The Case for Diminution in Property Value As Compensable Damage, 28 Stan. L. Rev. 779 (1976);* T.S. Banngardner, *Takings Under the Police Power -- The Development of Inverse Condemnation As A Method of Changing Zoning Ordinances, 30 S.W. L.J. 723 (1976).* Stream pollution by a municipality was inverse condemnation. Damages for inverse condemnation by air and water pollution. *City of Walla Walla v. Conkey, 492 P.2d 589 (Wash. App. 1971). Contra City of Valparaiso v. Hagen, 153 Ind. 337, 54 N.E. 1062 (Ind. 1899).* Salting operations on streets which damages neighboring property were a taking. *Foss v. Maine Tpk. Auth., 309 A.2d 339 (Me. 1973).* Dumping and spilling of service water resulting from highway improvement constituted a taking. *Spradley v. South Carolina State Hwy. Dep't, 182 S.E.2d 735 (S.C. 1971).* Taking in excess condemnation proceeding justified to avoid excessive or consequential damages. *People ex rel. Dep't Pub. Works v. Superior Court, 436 P.2d 342 (Cal. 1968); Hyline Sch. Dist., No. 401 King County v. Port of Seattle, 548 P.2d 1085 (Wash. 1976).* Inverse condemnation resulting from recurrent overflights on property adjoining airfield. *Alevizos v. Metropolitan Airports Comm'n of Minneapolis-St Paul, 216 N.W.2d 651 (Minn. 1974).*

(n42)Footnote 293. *City of Lake Elsinor v. Ranel Development Co., 70 Cal. Rptr. 2d 715 (Ct. App. 1998)* (In order to continue to prosecute a claim for pre-condemnation damages after condemnation proceedings have been abandoned, a separate inverse condemnation action must be filed); *Mississippi State Hwy. Comm'n v. Gilich, 609 So. 2d 367 (Miss. 1992); City of Louisville v. Munro, 475 S.W.2d 479,* (Ky. 1971); *Bensch v. Metropolitan Dade County, 952 F. Supp. 790 (S.D.Fla. 1996)* (taking of easement for water flowage).

(n43)Footnote 294. *Wynat Dev. Co.v. Board of Levee Comm'rs for Orleans, 696 So. 2d 163 (La. App. 1997)* (holding that "the action for inverse condemnation is available in all cases where there has been a taking or damaging of property and where just compensation has not been paid, without regard to whether the property is corporeal or incorporeal"); *Sarasota Welfare Home, Inc. v. City of Sarasota, 666 So. 2d 171 (Fla. App. 1995); Vern Reynolds Const., Inc. v. City of Champlin, 539 N.W.2d 614 (Minn. App. 1995).* Inverse condemnation was found. *Gregory v. City of New York, 346 F. Supp. 140 (S.D.N.Y. 1972); Levine v. City of New Haven, 294 A.3d 644 (Conn. Super. 1972); Hoover v. Pierce County, 903 P.2d 464 (Wash. App. 1995). See* James L. Magavern, *The Evolution and Extension of New York Law of Inverse Condemnation, 24 Buffalo L. Rev. 273 (1974);* Arvo Van Alstyne, *Modernizing Inverse Condemnation: A Legislative Prospective, 8 Santa Clara L. Rev. 1 (1967);* Arvo Van Alstyne, *Statutory Modification of Inverse Condemnation: Deliberately Inflicted Injury or Destruction, 20 Stan. L. Rev. 617 (1968).* Sonic boom does not create absolute liability under the Federal Tort Claims Act *(28 U.S.C. § 1346* (B)). To establish inverse condemnation by the federal government as a "taking," it must be estimated that the injury was permanent, both as to the activity and the resulting burden. *Wilfong v. United States, 480 F.2d 1326 (Ct. Cl. 1973).* Inverse condemnation of nonconforming use

over a reasonable period of time does not necessarily deprive a property owner of due process. *Board of Supervisors v. Miller, 170 N.W.2d 358 (Iowa 1969).* A private corporation is not liable in eminent domain for inverse condemnation. *Fisher v. Gulf Coast Mach. & Supply Co., 400 S.W.2d 941 (Tex. App. 1966).* Stream pollution by a municipality was inverse condemnation. *City of Walla Walla v. Conkey, 492 P.2d 589 (Wash. App. 1971). Contra City of Valparaiso v. Hagen, 54 N.E. 1062 (Ind. 1899). See* James H. Russell, *Recent Developments in Inverse Condemnation of Airspace,* 39 J. Air. L. 81 (1973); Harold A. Feder & Christi Weiland, *Inverse Condemnation -- A Viable Alternative, 51 Denver L. J. 529 (1974).* Holding that a requirement that a developer devote a percentage of the project to low or moderate income housing was a taking. *Board of Supervisors v. Degross, Inc., 198 S.E.2d 600 (Va. 1973); Golden Rule Ins. Co. v. Stephens, 912 F. Supp. 261 (D.Ky. 1995); Bodin v. City of Stanwood, 901 P.2d 1065 (Wash. App. 1995); Donahoe Constr. Co., Inc. v. Maryland-Nat'l Capital Park & Planning Comm'n, 298 F. Supp. 21 (D.Md. 1975);* James L. Magavern, *The Evolution and Extension of the New York Law of Inverse Condemnation, 24 Buffalo L. Rev. 273 (1974).*

(n44)Footnote 295. *Wolff v. Secretary of S. D., Game, Fish and Parks Dev., 544 N.W.2d 531 (S.D.1996); Patel v. United States, 823 F. Supp. 696 (N.D.Cal. 1993); Holtz v. San Francisco Bay Area Rapid Transit Dist., 552 P.2d 430 (Cal. 1976).*

(n45)Footnote 296. *Klein v. State Dep't Transp., 624 A.2d 618 (N.J. Super A.D.1993); Alevizos v. Metropolitan Airports Comm'n of Minneapolis and St. Paul, 452 N.W.2d 492 (Minn. App. 1990); Town of Hempstead v. Village of Rockville Center, 67 Misc. 2d 123, 323 N.Y.S.2d 872 (N.Y. Sup. Ct. 1971).*

(n46)Footnote 297. *City of Louisville v. Munro, 475 S.W.2d 479 (Ky. 1971); Harris v. Town of Lincoln, 668 A.2d 321 (R.I. 1995); Bodin v. City of Stanwood, 901 P.2d 1065 (Wash. App. 1995).*

(n47)Footnote 298. *Barket v. City of St. Louis, 903 S.E. 269 (Mo. App. 1995); James Emory, Inc. v. Twiggs County, 883 F. Supp. 1546 (D.Ga. 1995).* Inverse condemnation where a taking resulted in a zoning ordinance violation. *State v. Stefaniak, 238 N.E.2d 451 (Ind. 1968); Schuh v. State, 241 N.E.2d 362 (Ind. 1968).* Inverse condemnation may arise from nonphysical damage. *Reymond v. State Dep't of Hwys., 231 So. 2d 375 (La. 1970). See* Arvo Van Alstyne, *Taking or Damaging by Police Power: The Search for Inverse Condemnation Criteria, 44 So. Cal. L. Rev. 1 (1970).*

(n48)Footnote 299. *City of Statesville v. Cloaninger, 415 S.E.2d 111 (N.C. App. 1992); Akins v. State, 50 Cal. Rptr. 2d 1546 (Cal. App. 1996); State by Lord v. Casey, 115 N.W.2d 749 (Minn. 1962); Blue Ash v. Cincinnati, 182 N.E.2d 557 (Ohio 1962).* Increase in power load over electric transmission easement was an improper burden of the easement and required condemnation. *Yoder v. Columbus & S. Ohio Elec. Co., 816 N.E.2d 477 (Ohio App. 1974); Grimes v. Virginia Elec. & Power Co., 96 S.E.2d 713 (N.C. 1957).* (Landowner granted easement to power company and second power company attached additional wires to first company's electric light poles. Any additional burden beyond that granted entitles the landowner to just compensation. City may construct sewers, gas, water or other piping in streets without compensation to adjoining landowners to long as the construction does not materially affect the owner's use and enjoyment). *Awbrey v. City of Panama City Beach, 283 So. 2d 114 (Fla. App. 1973).* Landowner entitled to damages for construction of second pipeline on easement. *Baker v. Columbia Gulf Transmission Co., 218 So. 2d 39 (Miss. 1969).*

(n49)Footnote 300. *Minot v. United States, 546 F.2d 378 (Ct. Cl. 1976); Berry v. Southern Pine Elec. Power Ass'n, 76 So. 2d 212 (Miss. 1954).*

(n50)Footnote 301. *Russo v. Beckelman, 204 A.D.2d 160 (N.Y. App. Div. 1994); Deltona Corp. v. United States, 657 F.2d 1184 (Ct. Cl. 1981); Fred F. French Investing Co., Inc. v. City of New York, 352 N.Y.S.2d 762 (1973). See The Unconstitutionality of Transferable Development Rights, 84 Yale L. Rev. 1101 (1975).*

(n51)Footnote 302. *Peterman v. State Dep't of Natural Resources, 521 N.W.2d 499 (Mich. 1994).* An action in trespass is an alternative to inverse condemnation. *Ossman v. Mountain States Tel. & T. Co., 520 P.2d 738 (Colo. 1974). See* Harold A. Feder & Christi Wieland, *Inverse Condemnation -- A Viable Alternative, 51 Denver L. J. 529*

(1974).

(n52)Footnote 303. *See* Vincent J. Rossi, Jr., *Inverse Condemnation and Nuisance: Alternative Remedies for Airport Noise Damage, 24 Syracuse L. Rev. 793 (1973).*

(n53)Footnote 304. *Jenkins v. County of Shenandoah, 436 S.E.2d 607 (Va. 1993); Warner/Elektra/Atlantic Corp, v. County of Dupage, 991 F.2d 1280 (7th Cir 1993); Bauer v. Ventura, 272 P.2d 916 (Cal. App. 1954); Atlanta v. Kenny, 64 S.E.2d 912 (Ga. App. 1951); Department of Hwys. v. Corey, 247 S.W.2d 389 (Ky.1952); Tomasek v. State, 248 P.2d 703 (Or. 1952); Griswold v. School Dist., 88 A.2d 829 (Vt. 1952); Peterson v. King County, 252 P.2d 797 (Wash. 1953). See State and Local Wetlands Regulation:The Problem of Taking Without Just Compensation, 58 Va. L. Rev. 876 (1972).* Reduction in drainage of property adjoining highway improvements was a taking. *Spradley v. South Carolina State Hwy. Dep't, 182 S.E.2d 735 (S.C. 1971); Klopping v. City of Whittier, 104 Cal. Rptr. 1 (1972).* If an abuse of the power of eminent domain contributes to or hastens and aggravates, acting alone or in combination with other causes, the decline of property values in the neighborhood, there is a taking by inverse condemnation. *Sayre v. United States, 282 F. Supp. 175 (N.D.Ohio 1967).*

(n54)Footnote 305. *City of Houston v. Crabb, 905 S.W.2d 669 (Tex. App. 1995); State v. Biggar, 848 S.W.2d 291 (Tex. App. 1993), aff'd, 873 S.W.2d 11 (Tex. 1994); Harris v. United States, 205 F.2d 765 (10th Cir. 1953); McNeil v. Montague, 286 P.2d 497 (Cal. App. 1954); Texas Hwy. Dep't v. Weber, 219 S.W.2d 70 (Tex. 1949).* Damage done by blasting by the state was not a "taking" so the plaintiff had no liability. *Moeller v. Multnomah County, 345 P.2d 813 (Or. 1959).* No property right in either the pattern or flow of traffic. *State by Comm'r of Transp. v. Charles Inv. Co., 363 A.2d 944 (N.J. Super. 1976).*

(n55)Footnote 306. *City of Virginia Beach v. Bell, 498 S.E.2d 414 (Va. 1998)* (because a city's zoning ordinance was instituted well before a landowner's acquisition of property within the area, a decision by the Wetlands Board to deny an application for property development does not constitute a taking by inverse condemnation, this despite developer's claim that all potential economic benefit the land may have is gone with the ordinance in place); *James Emory, Inc. v. Twiggs County, Ga., 883 F. Supp. 1546 (D.Ga. 1995). Long Beach Equities, Inc. v. County of Ventura, 282 Cal. Rptr. 877 (Cal. App. 1991).* A prohibition of taking of sand and gravel is not a public taking unless it prohibits the only possible use. *Potomac Sand & Gravel Co. v. Governor of Md., 293 A.2d 241 (Md. 1972); Flanagan v. Town of Hollis, 293 A.2d 328 (N.H. 1972).*

(n56)Footnote 307. *Pierce v. Northeast Lake Washington Sewer & Water Dist., 870 P.2d 305 (Wash. 1994); State Dep't of Hwys. v. Cangelosi, 290 S.2d 806 (La. App. 1974).* No damages should be awarded for market value of property adjoining that taken. *Commonwealth Dep't of Hwys. v. Williams, 487 S.W.2d 290 (Ky. 1972).* Decrease in value of adjoining property due to contemplated condemnation use. In re South Twelfth Street in *City of Allentown, 66 A. 568 (Pa. 1907). See* James Cada, *Depreciation Damages: A Condemnor's Windfall, 51 Neb. L. Rev. 147 (1971).* Urban renewal plan is not violative of the *United States Constitution. Dilley v. City of Des Moines, 247 N.W.2d 187 (Iowa 1976).*

(n57)Footnote 308. *Gifford v. City of Colorado Springs, 815 P.2d 1008 (Colo. App. 1991); Hay's Western Wear, Inc. v. State Dep't of Transp. & Dev., 624 So. 2d 975 (La. App. 1993); DeBruin v. Green County, 241 N.W.2d 167 (Wis. 1976).* Property which is rendered without any practical value is considered to be taken. State Hwy. Comm'n in *Novi Twp. v. Mobarak, 211 N.W.2d 539 (Mich. App. 1973).* Historical Landmarks Designation Law preventing use of by owner of historic property was a taking. Lutheran Church in *Am. v. City of New York, 316 N.E.2d 305 (N.Y. 1974).*

(n58)Footnote 309. *But see Finke v. State, 521 N.W.2d 371 (Minn. App. 1994)* (no compensable right of access where property didn't abut the street or road); *State ex rel. State Hwy. Comm'n v. Kemper, 542 S.W.2d 798 (Mo. App. 1976); Bowden v. State Dep't of Transp., 556 So. 2d 1343 (La. App. 1990)* (abutment on public road not necessarily a prerequisite to recover damages for loss of access); *accord State ex rel. State Hwy. Comm'n v. Zahn, 633 S.W.2d 185 (Mo. Ct. App. 1982).*

(n59)Footnote 310. *City of Laredo v. R. Vela Exxon, Inc., 966 S.W.2d 673 (Tex. App. 1998)* (The 5th Amendment requires that compensation be paid whenever access to a piece of property is substantially and materially restricted); *Schwartz v. State, 900 P.2d 939 (Nev. 1995)* (property owner's right of easement to public highway abutting his or her property may not be substantially impaired without payment of damages to affected property owner); *Sebree v. Board of County Comm'rs, 840 P.2d 1125 (Kan. 1992)* (property owner whose land abuts existing highway has compensable right to access); *People ex rel. Gutknecht v. City of Chicago, 111 N.E.2d 626 (Ill. 1953); Hover v. City of Warren, 1997 Ohio App. LEXIS 6032* (holding that "substantial loss of access to a property owner's land will constitute a taking... The interference with access to or from the property must be substantial, material or unreasonable").

(n60)Footnote 311. *Kemp v. City of Claxton, 496 S.E.2d 712 (Ga. 1998)* (a landowner can collect for an inconveniencing of access to the property only when that inconvenience is limited to the landowner and not to the public as a whole); *Landsman v. State, 671 N.Y.S.2d 868 (N.Y. App. Div. 1998)* (when following a government taking adequate access to a highway was provided after the closest access was blocked, the state was not liable for consequential damages resulting from the loss of close access); *City of Laredo v. R. Vela Exxon, Inc., 966 S.W.2d 673 (Tex. App. 1998)* (no taking results from an impairment of access where the government has not directly restricted the use of the plaintiff's property); *Liontos v. County Sanitation Districts of Los Angeles County, 72 Cal. Rptr. 2d 107 (Ct. App. 1998);* (no right of recovery exists when access to a restaurant is temporarily impeded by construction); *Cohen v. City of Hartford, 710 A.2d 746 (Conn. 1998)* (when reviewing a takings claim, a court must determine to what extent access is impaired by government regulation, including the difference in convenience of access before and after the regulation); *San Diego Metro. Transit Dev. Bd. v. Price Co., 44 Cal. Rptr. 705 (Cal. App. 1995)* (increased travel time to property alone is not compensable taking); *Jackson Gear Co. v. Com. Dep't of Transp., 657 A.2d 1370 (Pa. 1995)* (detour of 6 miles is compensable); *Rubano v. Department of Transp., 656 So. 2d 1264 (Fla. 1995)* (detour of 2 miles is not compensable); *Cody v. North Dakota Dep't of Transp., 472 N.W.2d 467 (N.D.1991)* (way of access is not substantially impaired, then no compensable injury). It has been held also that inconvenience of going to and from condemnee's remaining land after location of a highway is a compensable item. *State ex rel. State Hwy. Comm'n v. Casey, 490 S.W.2d 373 (Mo. Ct. App. 1973).* No compensation for limitation of access to a limited-access highway where ingress and egress, after the creation of the highway, were not unreasonably circuitous. *State ex rel. Herman v. Schaffer, 467 P.2d 66 (Ariz. 1970).* Landowner entitled to damage on condemnation where access is materially and substantially impaired, even though there has not been a deprivation of all reasonable access. *City of Waco v. Texland Corp., 446 S.W.2d 1 (Tex. 1969).* Denying compensation in the absence of deprivation of access to abutting highway; "a reasonable access to the highway": the access had only been limited, but not shut-off. *Wilson v. Iowa State Hwy. Comm'n, 90 N.W.2d 161 (Iowa 1958); Hanson v. City of Omaha, 59 N.W.2d 622 (Neb. 1953).*

(n61)Footnote 312. *Kemp v. City of Claxton, 496 S.E.2d 712 (Ga. 1998)* (A closing of two railroad crossings is not a compensable taking for neighboring landowners when none of the landowners' properties are adjacent to the closed sections, even though the closings make access to the properties less convenient and direct); *State v. Traina, 537 So. 2d 792 (La. Ct. App. 1989)* (temporary impairment is not compensable); *accord Hay's Western Wear, Inc. v. State Dep't of Transp., 624 So. 2d 975 (La. App. 1993); DeBruin v. Green County, 241 N.W.2d 167 (Wis. 1976).* Property which is rendered without any practical value is considered to be taken. State Hwy. Comm'n in *Novi Twp. v. Mobarak, 211 N.W.2d 539 (Mich. App. 1973).* Deprivation of the ordinary beneficial use and enjoyment of property is a taking. *Spradley v. South Carolina State Hwy. Dep't, 182 S.E.2d 735 (S.C. 1971).* Historical Landmarks Designation Law preventing use of owner of historic property was a taking. Lutheran Church in *Am. v. City of New York, 316 N.E.2d 305 (N.Y. 1974). See* Edward E. LeinClueber, *Environmental Control -- Land Use -- Historical Preservation, 1975 Wis. L. Rev. 260.*

(n62)Footnote 313. *Campbell v. Lower Providence Township, 1997 Pa. Commw. LEXIS 123* (holding that the change in grade on the paved portion of a street amounted to a taking because "the plaintiff's access to the newly paved street was substantially impaired." However, the court found no taking because the plaintiff had access to the property from an intersecting street upon which his property abutted); *Taub v. City of Deer Park, 912 S.W.2d 395 (Tex. App. 1995)* (impaired access is compensable special damage in situations in which normal access is still reasonably available,

but access for which property was specially intended is rendered unreasonably deficient; landowner can recover compensation when access to property is materially and substantially impaired); *Behlman v. City of Florissant, 548 S.W.2d 619 (Mo. Ct. App. 1977). See Right of Way Acquisition, Damage Problem Created by the Limited Access Hwy., 35 Ind. L. Rev. 508 (1960); Dick & Bros. Quincy Brewing Co. v. City of Quincy, 167 N.E. 40 (Ill. 1929)* (change in grade); *Gohman v. City of St. Bernard, 146 N.E. 291 (Ohio 1924); Cabell v. City of Cottage Grove, 130 P.2d 1013 (Or. 1942)* (vacation of street); *White v. Southern Ry., 140 S.E. 560 (S.C. 1927); Fry v. O'Leary, 252 P 111 (Wash. 1927)* (vacating).

(n63)Footnote 314. *Crane v. Harrison, 232 P. 578 (Idaho 1925)* (change of grade); *Wine v. Commonwealth, 17 N.E.2d 545 (Mass. 1938); Barrett v. Union Bridge Co., 243 P. 93 (Or. 1926). See In re Hull, 204 N.W. 534 (Minn. 1925)* (to the effect that owner must show special damage). If a limitation by a city as to what vehicles shall pass over a certain street impairs or prevents access to adjoining property there is a taking. *Metropolitan Atlanta Rapid Transit Auth. v. Datry, 220 S.E.2d 905 (Ga. 1975).*

(n64)Footnote 315. *In re Ford, 313 N.Y.S.2d 42 (N.Y. App. Div. 1970)* (access to water compensable interest). Denial of access held a taking. *Hewitt-Lea Lumber Co. v. King County, 194 P. 77 (Wash. 1920).* Not a taking. Peck v. Alfred Olsen Constr. Co., 245 N.W.131 (Iowa 1932). Construction of a median causing circuitous route of access was not a taking. *Commonwealth of Pa. v. Nod's, Inc., 321 A.2d 373 (Pa. 1974).*

(n65)Footnote 316. *D.S.S. Enters. v. State, 557 N.Y.S.2d 811 (N.Y. App. Div. 1990)* (change of grade of street and sidewalk compensable). *City of Gulfport v. Anderson, 554 So. 2d 873 (Miss. 1989)* (change in grade compensable). *Bruener v. Los Angeles County Metro. Transp. Auth., 43 Cal. Rptr. 2d 314 (Cal. App. 1995)* (major change in grade -- highway underpass, overpass, off-ramps -- that prevent direct access to property is compensable). To effect that a taking of a right of access must be compensated, *see State by Burnquist v. Miller Home Dev., 65 N.W.2d 900 (Minn. 1954).* Michigan now holds that if a change in highway grade so impairs an access that there is a diminution of the value of an abutting owner's property there is a "taking compensable."

Thom v. State, 138 N.W.2d 322 (Mich. 1965), overruling Pontiac v. Carter, 32 Mich. 164 (1875). Denying damages on construction of controlled access highway. *Busby v. State ex rel. Herman, 420 P.2d 173 (Ariz. 1966).* Allowing compensation for material impairment of ingress and egress because of controlled access highway. *State ex rel. Morrison v. Thelberg, 350 P.2d 988 (Ariz. 1960).* Diversion of traffic in naming a new highway as a controlled access facility was an element of damages. *Riddle v. State Hwy. Comm'n., 339 P.2d 301 (Kan. 1959).* Landowner along county road has property right of reasonable access to public highway system but he has no property right in continued maintenance of county road. *Department of Hwys. v. Jackson, 302 S.W.2d 373 (Ky. 1957).*

(n66)Footnote 317. *Oddo v. State, 912 S.W.2d 831 (Tex. App. 1995)* (change of grade not compensable). Lowering of grade of highway is not compensable unless access is cut off. *Young v. State, 246 N.E.2d 377 (Ind. 1969), cert. denied, 396 U.S. 1938, 90 S. Ct. 685 (1970); State v. Lovett, 257 N.E.2d 298 (Ind. 1970); Behlman v. City of Florissant, 548 S.W.2d 619 (Mo. App. 1977).*

(n67)Footnote 318. *County of Anoka v. Maego, Inc., 541 N.W.2d 375 (Minn. App. 1996)* (property owners cannot be denied access to abutting public highway without compensation); *Bruener v. Los Angeles County Metro. Transp. Auth., 43 Cal. Rptr. 2d 314 (Cal. App. 1995)* (major change in grade of road, such as construction of highway underpasses, overpasses, and freeway off-ramps, which prevents direct access to property abutting the new construction is substantial impairment of access); *Mississippi State Hwy. Comm'n. v. Spencer, 101 So. 2d 489 (Miss. 1958). But see Muse v. Mississippi State Hwy. Comm'n., 103 So. 2d 839 (Miss. 1958) and Harreld v. Mississippi State Hwy. Comm'n., 103 So. 2d 852 (Miss. 1958)* (permitting police power to regulate rights of ingress and egress). No compensation payable for taking of an easement of access. *State v. Calkins, 314 P.2d 449 (Wash. 1957). Bacich v. Board of Control, 144 P.2d 818 (Cal. 1943); Beals v. Los Angeles, 144 P.2d 839 (Cal. 1943)* (right of access treated as a property interest); *State ex rel. Rich v. Dunclick, Inc., 286 P.2d 1112; Claim of Kincade, 119 N.E.2d 314 (Ohio App. 1953).* No deprivation where access still remains, though not as convenient as formerly. *United States v. Alderson, 53 F. Supp. 528*

(S.D.W. Va. 1944). One who has no access to a highway before its conversion into a limited, accessible freeway has no action for compensation for loss of access. *Schnider v. State, 241 P.2d 1 (Cal. 1952); United States v. General Motors Corp., 323 U.S. 373 (1945); White v. Southern Ry., 140 S.E. 560 (S.C. 1927). See Hanks v. Port Arthur, 48 S.W.2d 944 (Tex. 1932); Alexander Co. v. City of Owatonna, 24 N.W.2d 244 (Minn. 1946)* (upon theory that this is a valid exercise of police power). *Mississippi State Hwy. Comm'n v. Spencer, 101 So. 2d 499 (Miss. 1958); Hendrick v. Graham, 96 S.E.2d 129 (N.C. 1957); Rothwell v. Linzell, 127 N.E.2d 524 (Ohio 1955); Farmers-Kissinger Market House Co. v. City of Reading, 165 A. 398 (Pa. 1933).* Conversion from an unlimited to a limited access highway gave right of action to filling station. *Clayton County v. Billups Petr. Co., 123 S.E.2d 187 (Ga. 1961).* Unreasonable impairment of ingress and egress is compensable. *Department of Transp. v. Galley, 299 N.E.2d 810 (Ill. App. 1973).* Denial of access as a taking. *State by Mondale v. Gannons, Inc., 145 N.W.2d 321 (Minn. 1966). See* Kerry R. Brittain , *Navigation Servitude -- The Shifting Rule of No Compensation, 7 Land & Water L. Rev. 501 (1972);* Larry W. Harrison, *Municipal Corporations -- Eminent Domain -- Public Impairment of Right to Access is Compensable, 5 St. Mary's L.J. 400 (1973).* No definite right of access to through highway. *Brock v. State Hwy. Comm'n., 404 P.2d 934 (Kan. 1965).* Abutters have property right in easement of street so loss of access is compensable in eminent domain. *People v. Guimarra Vineyards Corp., 53 Cal. Rptr. 902 (Cal. App. 1966); State by Mondale v. Gannons, Inc., 145 N.W.2d 321 (Minn. 1966); Mississippi State Hwy. Comm'n v. Irby, 190 So. 2d 445 (Miss. 1966).* Loss of access is measurable in severance damages. *Santa Clara County v. Curtner, 54 Cal. Rptr. 257 (Cal. App. 1966).* Compensation for ten years' loss of access. *Anhoco Corp. v. Dade County, 144 So. 2d 793 (Fla. 1962).* Loss of access compensable. *State Dep't of Transp. v. Stubbs, 285 So. 2d 1 (Fla. 1973); Arnold v. Prince George's County, 311 A.2d 223 (Md. 1973).* Taking by eminent domain covers abutting owner's rights in adjacent street. *Langston v. City of Miami Beach, 242 So. 2d 481 (Fla. App. 1971).* Rights of access are property rights so that one is entitled to compensation where the building of street grade cuts off his right of access. *Hughes v. State, 328 P.2d 397 (Idaho 1928), overruling Crane v. City of Harrison, 232 P. 578 (Idaho 1928)* which held that the city could change the level of the street grade without paying compensation. *Farris v. City of Twin Falls, 347 P.2d 996 (Idaho 1959)* (impairment of access to residential property was a taking of property for public use). Substantial and material loss of access is compensable. *State v. Diamond Lanes, Inc., 242 N.E.2d 632 (Ind. 1986).*

(n68)Footnote 319. *Schwartz v. State, 900 P.2d 939 (Nev. 1995)* (Property owner abutting public highway has special right of easement in public road for access purposes, and has a compensable interest under eminent domain law). *But see Commonwealth v. Richards, 556 A.2d 510 (Pa. 1989)* (statute permitting compensation of landowners with respect to permanent interference with access to a road or highway resulting from Commonwealth's road building activities is limited to cases where interference is substantial). Loss of access through a street vacation is a compensable taking. *People v. Guimarra Vineyards Corp., 53 Cal. Rptr. 902 (Cal. App. 1966); Roth v. Wilkie, 354 P.2d 510 (Colo. 1960).* Dead ending of streets caused by condemnation is not damage peculiar to the land abutting the cul *de sac. Tift County v. Smith, 131 S.E.2d 527 (Ga. 1963).* Loss of access compensable if substantial. *State v. Tolliver, 205 N.E.2d 672 (Ind. 1965).* Noise and other inconvenience of temporary duration during construction are not recoverable as damages in eminent domain unless unduly prolonged. *Masheter v. Yake, 225 N.E.2d 540 (Ohio App. 1967).* Substantial damage to value of property caused by loss of easement of access is compensable. *Arkansas State Hwy. Comm'n v. Rye, 499 S.W.2d 624 (Ark. 1973); City of Los Angeles v. Ricards, 515 P.2d 585 (Cal. 1973).* Where the code did not differentiate between consequential and inconsequential violations, taking of right of ingress and egress is taking by eminent domain. *State v. Lovett, 257 N.E.2d 298 (Ind. 1970).* Right of access to a highway is a property right for which compensation must be paid in eminent domain. *Creasy v. Stevens, 160 F. Supp. 404 (W.D.Pa. 1958), rev'd, 360 U.S. 219 (1959),* holding unconstitutional a limited access law. Impairment of freedom of access is compensable. *State ex rel. Morrison v. Thelberg, 350 P.2d 988 (Ariz. 1960).* Property not damaged by being denied access to limited access highway where there was another frontage road. *State v. Wineberg, 444 P.2d 787 (Wash. 1968). See* Larry W. Harrison, Note, *Municipal Corporations -- Eminent Domain -- Public Impairment of Right to Access Is Compensable, 5 St. Mary's L.J. 400 (1973).*

Normally, the right of access to and from a public highway is one of the incidents of the ownership or occupancy of the land abutting thereon, and it exists when the title to the way is in the public as well as when it is in private ownership subject to public easement. *County Park Comm'n. of Camden County v. Kimble, 93 A.2d 647 (N.J. Super.*

1952). Limited access highway approved. *Hedrick v. Graham, 96 S.E.2d 129 (N.C. 1957).* Abutting owner has right of ingress and egress to highway, subject to state's paramount right to improve and control highway in public interest but he cannot insist on such right at any place he sees fit, since he holds such right subject to superior right of the state. *Little v. Burleigh County, 82 N.W.2d 603 (N.D.1957).* Owner of property has no right to continuation of maintenance or flow of traffic past his property. *New Way Family Laundry, Inc. v. Toledo, 168 N.E.2d 885 (Ohio 1960).*

Movement of bridges was not consequential damages and not entitled to eminent domain compensation. *City of Columbus v. Farm Bureau Co-op Ass'n, 273 N.E.2d 888 (Ohio App. 1971).* Right of access may be regulated under the police power. *Farmers-Kissinger Market House Co., Inc. v. City of Reading, 165 A. 398 (Pa. 1933).* Denying parking lot's entire access to one street in order to protect pedestrians was valid. *City of San Antonio v. Pigeonhole Parking of Texas, Inc., 311 S.W.2d 218 (Tex. 1958). See* Laurence W. Knowles, *Loss of Access: A Twentieth Century Enigma, 6 St. Louis U. L.J. 204 (1961);* William B. Stoebuck, *The Property Right of Access Versus the Power of Eminent Domain, 47 Tex. L. Rev. 733 (1969);* J. Thomas Carroll Jr., *Compensability for Impairment of Abutting Owner's Easement of Access: A Century of Michigan Supreme Court Analysis*, 52 J. Urb. L. 505 (1972); *Condemnation Blight and the Abutting Landowner, 73 Mich. L. Rev. 583 (1975).* Complete destruction of access is a taking. *Department of Pub. Words & Bldgs. v. Wilson & Co., 340 N.E.2d 12 (Ill. 1975).* Mere inconvenience resulting from clogging of exit is not a taking. *State ex rel. Noga v. Masheter, 330 N.E.2d 439 (Ohio 1975).*

(n69)Footnote 320. *Kemp v. City of Claxton, 496 S.E.2d 712 (Ga. 1998)* (a closing of two railroad crossings is not a compensable taking for neighboring landowners when none of the landowners' properties are adjacent to the closed sections, even though the closings make access to the properties less convenient and direct); *Landsman v. State, 671 N.Y.S.2d 868 (N.Y. App. Div. 1998)* (when following a government taking adequate access to a highway was provided after the closest access was blocked, the state was not liable for consequential damages resulting from the loss of close access); *City of Grapevine v. Grapevine, 804 S.W.2d 675 (Tex. Ct. App. 1991)* (no compensation if still access by other means). Where adjoining landowner has right of access to highway, such owner cannot insist on right of access at any place deemed fit, since the right is held subject to the superior right of the state; nevertheless, access must be suitable, and mere inconvenience of property owner does not stamp a means of access unsuitable. *Meloon Bronze Foundry v. State, 166 N.Y.S.2d 586 (N.Y. Ct. Cl. 1957).* Mere circuity of travel caused by road vacation is not a taking. *In re Appropriation for Hwy. Purposes, 261 N.E.2d 142 (Ohio App. 1970).* Diversion of traffic caused by closing of a street is not compensable. *City of San Antonio v. Olivares, 505 S.W.2d 526 (Tex. 1974).* Holding that:

a. There is no property right to direct access to a highway.

b. There is a right of reasonable access.

c. Such right is not infringed unless the access provided is unduly circuitous.

State ex rel. Herman v. Schaffer, 467 P.2d 66 (Ariz. 1970).

(n70)Footnote 321. *Landsman v. State, 671 N.Y.S.2d 868 (N.Y. App. Div. 1998)* (when following a government taking adequate access to a highway was provided after the closest access was blocked, the state was not liable for consequential damages resulting from the loss of close access); *Kemp v. City of Claxton, 496 S.E.2d 712 (Ga. 1998)* (a closing of two railroad crossings is not a compensable taking for neighboring landowners when none of the landowners' properties are adjacent to the closed sections, even though the closings make access to the properties less convenient and direct); *Department of Transp. v. First Interstate Commercial Mtg. Co., 881 P.2d 473 (Colo. App. 1994)* (Mere circuity of route and inconvenience do not constitute compensable damages); *State v. Schmidt, 867 S.W.2d 769 (Tex. 1993)* (inconvenience of access constituted "community" injury for which eminent domain damages were not available). *But see Department of Transp. v. Taylor, 440 S.E.2d 652 (Ga. 1994)* (inconvenience which is special to landowner is compensable). It has been held also that inconvenience of going to and from condemnee's remaining land after location

of a highway is a compensable item. *State ex rel. State Hwy. Comm'n v. Casey, 490 S.W.2d 373 (Mo. App. 1973).* No compensation for limitation of access to a limited-access highway where ingress and egress, after the creation of the highway, were not unreasonably circuitous. *State ex rel. Herman v. Schaffer, 467 P.2d 66 (Ariz. 1970).* Landowner entitled to damage on condemnation where access is materially and substantially impaired, even though there has not been a deprivation of all reasonable access. *City of Waco v. Texland Corp., 446 S.W.2d 1 (Tex. 1969); A.E. Ottaviano, Inc. v. State, 273 N.Y.S.2d 789 (N.Y. App. Div. 1966).*

(n71)Footnote 322. *City of Laredo v. R. Vela Exxon, Inc., 966 S.W.2d 673 (Tex. App. 1998)* (No taking results from an impairment of access where the government has not directly restricted the use of the plaintiff's property); *Kemp v. City of Claxton, 496 S.E.2d 712 (Ga. 1998)* (a closing of two railroad crossings is not a compensable taking for neighboring landowners when none of the landowners' properties are adjacent to the closed sections, even though the closings make access to the properties less convenient and direct); *State v. Westgate, Ltd., 798 S.W.2d 903 (Tex. App. 1990)* (temporary limited restriction of access is only compensable if brought about by illegal activity or one that is negligently performed or unduly delayed). A road vacation is a taking only if it results in damage to residue or to real property to which the property right pertains. *In re Appropriation for Hwy. Purposes, 261 N.E.2d 142 (Ohio App. 1970).* Holding unreasonable interference with right of access is a compensable taking, even though temporary. *San Antonio River Auth. v. Garrett Bros., 528 S.W.2d 266 (Tex. App. 1976); Boulder v. Kahn's, Inc., 543 P.2d 711 (Colo. 1975).* Requirement of mere security of highway access does not justify allowance and an award. *Sun Oil Co. of Pa. v. State, 377 N.Y.S.2d 252 (N.Y. App. Div. 1975).* Denying compensation for inconvenience caused by street vacation where another but more convenient access removed. *Hanson v. Omaha, 59 N.W.2d 622 (Neb. 1953).*

(n72)Footnote 323. *Landsman v. State, 671 N.Y.S.2d 868 (N.Y. App. Div. 1998)* (when following a government taking adequate access to a highway was provided after the closest access was blocked, the state was not liable for consequential damages resulting from the loss of close access); *San Diego Metro. Transit Dev. Bd. v. Price Co., 44 Cal. Rptr. 2d 705 (Cal. App. 1995)* (increased distance of travel from property is not compensable interest); *Commonwealth v. Comer, 824 S.W.2d 881 (Ky. App. 1991)* (increased travel time not compensable). Landowner's access to a highway may be limited under the police power, with no compensable interest in the flow of traffic. *Commonwealth v. Carlisle, 363 S.W.2d 104 (Ky. 1962).* The municipalities have, under the police power, a reasonable right to control access of an abutting owner to a street and to prohibit it without payment. *City of San Antonio v. Pigeonhole Parking of Texas, Inc., 311 S.W.2d 218 (Tex. 1958).* Allowing compensation for loss of right of access. *State ex rel. Morrison v. Thelberg, 350 P.2d 988 (Ariz. 1960), overruling, Grande v. Casson, 72 P.2d 676 (Ariz. 1937). Commonwealth Dep't of Transp. v. Gayeski, 344 A.2d 730 (Pa. Commw. 1975).*

(n73)Footnote 324. *Maloley v. City of Lexington, 536 N.W.2d 916 (Neb. App. 1995)* (When owner's ingress and egress to property abutting street or highway has been destroyed or substantially impaired, owner may recover damages that are nominal or severe). *United States v. 19.86 Acres of Land, 141 F.2d 344 (7th Cir. 1944); State v. Noyes, 47 Me. 189 (1859); Minnesota Canal & Power Co. v. Koochiching Co., 107 N.W. 405 (Minn. 1906); People v. Adirondack R.R., 54 N.E. 689 (N.Y. 1899); Kramer v. Cleveland & P. R.R., 5 Oh. St. 140 (1855).* Buildings, though owned separately from the fee, are "real estate" within the meaning of condemnation statutes. *United States v. 19.86 Acres of Land, 141 F.2d 344 (7th Cir. 1944).*

(n74)Footnote 325. *City of Laredo v. R. Vela Exxon, Inc., 966 S.W.2d 673 (Tex. App. 1998)* (no taking results from an impairment of access where the government has not directly restricted the use of the plaintiff's property); *State v. Regard, 567 So. 2d 1174 (La. Ct. App. 1990)* (compensable interest when landowners would have to travel additional 8.5 miles on public roads to reach best location for proposed new access road). *See Taylor v. Department of Transp., 429 S.E.2d 108 (Ga. App. 1993)* (compensable damage when owner suffers circuity of travel and loses access to property). *State Hwy. Dep't v. Irvin, 112 S.E.2d 216 (Ga. App. 1959); Hendrickson v. State, 127 N.W.2d 165 (Minn. 1964).* The mere fact that the route available after the condemnation is more circuitous does not permit the award of consequential damages. *A. E. Ottaviano, Inc. v. State, 273 N.Y.S.2d 789 (N.Y. App. Div. 1966);* Richard S. Mayberry & Frank A. Aloi, *Compensation of the Loss of Access by Eminent Domain in New York, 16 Buff. L. Rev. 603* (1966-67). Loss of access is compensable. *State ex rel. Ashworth v. State Road Comm'n, 128 S.E.2d 471 (W. Va. 1962). Ward v.*

Georgia Terminal Co., 84 SE 374 (Ga. 1915) (where cul de sac results from a limited access highway only the properties in the first block are entitled to damages for circuity of access). *Tift County v. Smith, 129 S.E.2d 172 (Ga. App. 1962)* applied the "first block" rule to rural property, but it was reversed by the supreme court; *Tift County v. Smith, 131 S.E.2d 527 (Ga. 1963). Giarrusso v. State, 240 N.Y.S.2d 579 (N.Y. App. Div. 1963)* (resulting circuity of access is damnum absque injuria); *American Oil Co. v. Mississippi State Hwy. Comm'n, 146 So. 2d 355 (Miss. 1962)* (loss of access compensable only when there is no other suitable means of access); *State by Mondale v. Gannons, Inc., 145 N.W.2d 321 (Minn. 1966).* Riparian rights are property rights, not to be taken without adequate compensation. *Mud Creek Irr., Agric. & Mfg. Co. v. Vivian, 11 S.W. 1078 (Tex. 1889); Arverne Bay Constr. Co. v. Thatcher, 15 N.E.2d 587 (N.Y. 1938); Vernon Park Realty, Inc. v. Mt. Vernon, 125 N.Y.S.2d 112 (N.Y. App. Div. 1953).*

(n75)Footnote 326. *San Diego Metro. Transit Dev. Bd. v. Price Co., 44 Cal. Rptr. 2d 705 (Cal. App. 1995)* (substantial interference of property access by police power is compensable right). *But see Dickie's Sportsman's Centers, Inc. v. Department of Transp., 477 So. 2d 744 (La. App. 1985)* (Limitation of the abutting owner's right of access to the highway by the Department of Transportation and Development in exercise of its police power to make improvements to the highway did not amount to a substantial interference). *Huff v. Indiana State Hwy. Comm'n, 149 N.E.2d 299 (Ind. 1958); State v. State Hwy. Comm'n, 346 P.2d 259 (Kan. 1959); Moorlane Co. v. State, 360 S.W.2d 918 (Tex. App. 1962)* (access to public highway may be denied without compensation under the police power); *State ex rel. Ashworth v. State Road Comm'n., 128 S.E.2d 471 (W. Va. 1962)* (taking of right of access requires compensation).

(n76)Footnote 327. Held, compensable interest. *County of Anoka v. Maego, Inc., 541 N.W.2d 375 (Minn. App. 1996). Bruener v. Los Angeles County Metro. Transp. Auth., 43 Cal. Rptr. 2d 314 (Cal. App. 1995)* (where proposed access road is too narrow for the intended use of property there may be a compensable interest); *State v. Munday Enters., 824 S.W.2d 643 (Tex. App. 1992).* Held, not compensable. *Rubano v. Department of Transp., 656 So. 2d 1264 (Fla. 1995)* (Severance of interchange between interstate highway and road on which landowners' property fronted did not constitute a taking). Damages allowed. *State ex rel. Morrison v. Thelberg, 350 P.2d 988 (Ariz. 1960). Denied. Arkansas State Hwy. Comm'n v. Bingham, 333 S.W.2d 728 (Ark. 1960); Gilmore v. State, 143 N.Y.S.2d 873 (N.Y. Ct. Cl. 1955).* Farm road and spring held property compensable in eminent domain. *Texas E. Transmission Corp. v. Allen, 282 S.W.2d 338 (Ky. 1955).* A mere change in mode of access is not compensable if it does not result in impairment to the access. *Streeter v. Winnebago County, 357 N.E.2d 1371 (Ill. App. 1976).*

(n77)Footnote 328. 0.958 *Acres More or Less v. State, 762 P.2d 96 (Alaska 1988)* (after state condemned land to construct controlled access highway, including strip in which it already owned section line right-of-way easement, property owners did not have right of direct access to controlled access highway); *State ex rel. Eastvold v. Superior Court, 287 P.2d 494 (Wash. 1955).*

(n78)Footnote 329. *High Horizons Dev. Co. v. State, 575 A.2d 1360 (N.J. 1990)* (right of access must be consonant with traffic conditions and reasonable and uniform police requirements). *City and County of San Francisco v. Safeway Stores, In., 310 P.2d 68 (Cal. App. 1957).* Holding that a regulation of passage by vehicles over streets is compensable if access to adjoining properties is prevented or impaired. *Metropolitan Atlanta Rapid Transit Auth. v. Datry, 220 S.E.2d 905 (Ga. 1975).*

(n79)Footnote 330. *Schwartz v. State, 111 Nev. 998, 900 P.2d 939 (Nev. 1995)* (right of access is an easement which is compensable if taken); *Department of Transp. v. Taylor, 440 S.E.2d 652 (Ga. 1994); Sebree v. Board of County Comm'rs, 840 P.2d 1125 (Kan. 1992).* The change in grade of street is compensable only where injury results to an existing structure. *In re Appropriation of Easement, 185 N.E.2d 485 (Ohio App. 1961).* The fact that a property owner is required to use a frontage road is not a taking. *State v. Wineberg, 444 P.2d 787 (Wash. 1968); Mississippi State Hwy. Comm'n. v. Spencer, 101 So. 2d 499 (Miss. 1958); Pauly v. State, 179 N.Y.S.2d 88 (1958)* (where portion of tract taken was utilized for widening public highway and became part thereof, condemnee was entitled to enter upon highway from any point at which remainder of tract abutted new highway line); *State ex rel. State Hwy. Comm'n v. Silva, 378 P.2d 595 (N.M. 1962)* (requiring a more circuitous route is not a taking of access); *Slicker v. Board of Educ., 187 N.E.2d 392 (Ohio App. 1961)* (mere circuity of travel caused by loss of access is not actionable); *Sease v. City of*

Spartanburg, 131 S.E.2d 683 (S.C. 1963). Reasonable loss of access as damage. *Stom v. City of Council Bluffs, 189 N.W.2d 522 (Iowa 1971); Boney v. State Dep't of Transp., 250 So. 2d 650 (Fla. Dist. Ct. App. 1971).* But mere circuity of access is not compensable. *Commonwealth Dep't of Hwys. v. Diuguid, 469 S.W.2d 707 (Ky. 1971); Dr. T. C. Smith Co. v. North Carolina State Hwy. Comm'n., 182 S.E.2d 383 (N.C. 1971). Creasy v. Stevens, 160 F. Supp. 404 (W.D.Pa. 1958); State by Mondale v. Ohman, 116 N.W.2d 101 (Minn. 1961)* (adjacent landowners' access to trunk highways may be cut off by condemnation).

While denial of access of travel from one direction is not of itself a "taking," recovery may be had under a measure of interference with the access of travel from another direction. *Prow's Motel, Inc. v. State, 200 N.W.2d 910 (Minn. 1972); Huff v. Indiana State Hwy. Comm'n., 149 N.E.2d 299 (Ind. 1958); State ex rel. Rich v. Fonburg, 328 P.2d 60 (Idaho 1958); Moore v. State Hwy. Comm'n. 383 P.2d 549 (Kan. 1963).* Inconvenience to residue in use of property resulting from a condemnation of a portion of the tract. *Arkansas State Hwy. Comm'n v. Coffman, 473 S.W.2d 873 (Ark. 1971).* Even where a loss of access is compensable, though there is no taking of property, *State v. Geiger & Peters, Inc., 196 N.E.2d 740 (Ind. 1964).* A loss of profits resulting from such denial is not compensable. *State v. Hastings, 206 N.E.2d 874 (Ind. 1965).*

Puyper v. Pure Oil Co., 60 So. 2d 569 (Miss. 1952). Damages for loss of access cannot be claimed unless the claimant's land abuts on the land taken. *Earl v. Arkansas State Hwy. Comm'n, 405 S.W.2d 931 (Ark. 1966). Gilmore v. State, 143 N.Y.S.2d 873 (N.Y. Ct. Cl. 1955).* Farm road and spring held property compensable in eminent domain. *Texas E. Transmission Corp. v. Allen, 282 S.W.2d 338 (Ky. 1955).* Limited access highways are a public purpose. *State ex rel. State Hwy. Dep't v. George F. Lang Co., 191 A.2d 322 (Del. 1963); Utah Rd. Comm'n v. Hansen, 383 P.2d 917 (Utah 1963); State ex rel. Eastvold v. Superior Court, 287 P.2d 494 (Wash. 1955).*

(n80)Footnote 331. *Williams v. Arkansas State Hwy. Comm'n, 730 S.W.2d 245 (Ark. App. 1987)* (landowner is not entitled to compensation for the loss of access to the new highway). An abutting property owner has no property right in the continuing flow of traffic past the property. *Walker v. State, 295 P.2d 328 (Wash. 1956); Los Angeles v. Geiger, 210 P.2d 717 (Cal. App. 1949); State ex rel. State Hwy. Comm'n v. Clevenger, 291 S.W.2d 57 (Mo. 1956);* State by and through *State Hwy. Comm'n v. Burk, 265 P.2d 783 (Or. 1954); State v. Calkins, 314 P.2d 449 (Wash. 1957); Carazalla v. State, 70 N.W.2d 208, 71 N.W.2d 276 (Wis. 1955); Prow's Motel, Inc. v. State, 200 N.W.2d 910 (Minn.1972); Hendrickson v. State, 127 N.W.2d 165 (Minn. 1964); State ex rel. Dep't of Hwys. v. Strickland, 290 So. 2d 714 (La. App. 1974).*

(n81)Footnote 332. *Humphrey v. Strom, 493 N.W.2d 554 (Minn. 1992)* (dealing with construction of controlled access highways for public use, requires compensation of owners for "any elimination of existing access, air, view, light, or other compensable property rights"). *Eller v. Board of Educ., 89 S.E.2d 144 (N.C. 1955).* Noise, vibrations and smoke which interfere with the use and enjoyment of property without a physical invasion do not constitute a compensable "taking." *Batten v. United States, 306 F.2d 580 (10th Cir. 1962), cert. denied, 371 U.S. 955 (1983).*

One who conveys property to the state for right-of-way is not precluded from recovering damages from the state in inverse condemnation if it is proved that additional damages were occasioned by either improper or negligent construction of the right-of-way. *State v. Lovett, 257 N.E.2d 298 (Ind. 1970).* Landowner entitled to damages for construction of second pipeline on easement. *Baker v. Columbia Gulf Transmission Co., 218 So. 2d 39 (Miss. 1969).* Construction of sewage disposal plant resulting in reduction in value of land was a taking regardless of negligence. *City of Abilene v. Downs, 359 S.W.2d 642 (Tex. App. 1962) rev'd, 367 S.W.2d 153 (Tex. 1963).* Contamination of wells by sewage disposal plant was a taking. *Cunningham v. Town of Tieton, 374 P.2d 375 (Wash. 1962). See* Orval C. Harrison, *Use and Enjoyment of Land -- Compensation for Noise Damage,* 4 Nat. Resources L. 429 (1971).

(n82)Footnote 333. *Persyn v. United States, 34 Fed. Cl. 187 (Fed. Cl. 1995)* (frequent flying over property results in an easement for the government at the lowest level usually flown and applies to all types of aircraft that do not substantially interfere with the use and enjoyment of the property); *Jackson v. Metropolitan Knoxville Airport Auth.,*

1996 WL 31005 (Tenn. 1996) (noise, vibration, pollution that is caused by air traffic near, but not over property is a compensable interest); *Bydlon v. United States, 175 F. Supp. 891 (Cl. Ct. 1959).* Planes flying high over property was not a taking. *Kirk v. United States, 451 F.2d 690* (10th Cir. Okla.). Frequent low flights of aircraft into airport was a taking, but not noise and soot from aircraft in airport. *Town of East Haven v. Eastern Airlines, Inc., 331 F. Supp. 16 (D. Conn. 1971).* Air activity up to navigable airspace is a taking. *Johnson v. Airport Auth., 115 N.W.2d 426 (Neb. 1962).* Where compensation is payable for a change of grade of a highway any change from that of an established highway is compensable. *City of Fayettewille v. Stone, 148 S.W. 524 (Ark. 1912); Folmsbee v. City of Amsterdam, 36 N.E. 821 (N.Y. 1894).* A property owner has a state constitutional right of access extending in both directions to the next intersecting street, so that an act creating a cul-de-sac, whether by the sovereign or an individual, is improper. *Breidert v. Southern Pac. Co., 394 P.2d 719 (Cal. 1964).* Access right is to be considered as part of the property taken. *Klumok v. State Hwy. Dep't, 167 S.E.2d 722 (Ga. App. 1969).* No compensation for loss or impairment to easements of light and air due to change in highway grade. *Crowell v. State, 238 N.Y.S.2d 72 (N.Y. App. Div. 1963).* Alteration of grade by the state causing washing by surface water was a "taking." *Lucas v. Carney, 149 N.E.2d 238 (Ohio 1958).* Loss of access is compensable if the access is materially and substantially impaired even though there has not been a deprivation of all reasonable access. *City of Waco v. Texland Corp., 446 S.W.2d 1 (Tex. 1969).* But mere improvement to make the road usable does not establish a compensable claim. *Schrock v. King County, 349 P.2d 594 (Wash. 1960).*

(n83)Footnote 334. *State v. Austex, Ltd., 862 S.W.2d 1 (Tex. App. 1991)* (change in traffic pattern admissible as evidence of taking). No compensation for diminution of traffic. *Meltzer v. Hilsborough County, 167 So. 2d 54 (Fla. App. 1964). Stevenson v. Downey, 23 Cal. Rptr. 127 (Cal. App. 1962); Iowa State Hwy. Comm'n v. Smith, 82 N.W.2d 755 (Iowa 1957); Nelson v. Iowa State Hwy. Comm'n., 115 N.W.2d 695 (Iowa 1962)* (circuity of access not compensable); *Morton v. State, 181 A.2d 831 (N.H. 1962); Creasy v. Stevens, 160 F. Supp. 404 (W.D.Pa. 1958).*

(n84)Footnote 335. *City of Laredo v. R. Vela Exxon, Inc., 966 S.W.2d 673 (Tex. App. 1998); Circle K Gen. Inc. v. Dep't of Transp., 396 S.E.2d 572 (Ga. App. 1991)* (no right to traffic flow past a business); *see also Bruener v. Los Angeles County Metro. Transp. Auth., 43 Cal. Rptr. 2d 314 (Cal. App. 1995); Northern Lights Shopping Inc. v. State, 247 N.Y.S.2d 333 (N.Y. App. Div. 1964)* (divided highways are not a taking by diminishing traffic), *cert. denied, 382 U.S. 826 (1965).*

(n85)Footnote 336. *Bruener v. Los Angeles County Metro. Transp. Auth., 43 Cal. Rptr. 2d 314 (Cal. App. 1995)* (concrete separator not a taking); *County of Anoka v. Maego, Inc., 541 N.W.2d 375 (Minn. App. 1996)* (Property owners are not entitled to damages resulting from construction of median in abutting highway if they continue to have access in one direction). The construction of a median strip on a highway is a proper exercise of police power and is not a taking, even though circuity of access results. *Richley v. Jones, 310 N.E.2d 236 (Ohio 1974); State v. Cheris, 287 N.E.2d 777 (Ind. App. 1972).*

(n86)Footnote 337. *See Brown v. City of Twin Falls, 855 P.2d 876 (Idaho 1993)* (Placement of road median barriers by city and state, which restrained business traffic flow to shopping center, did not amount to compensable taking). Right of access in private owners' abutting pre-existing road. *Royal Transit, Inc. v. Village of West Milwaukee, 63 N.W.2d 62 (Wis. 1954); Carazalla v. State, 70 N.W.2d 208, 71 N.W.2d 276 (Wis. 1955).* Severance damage is not payable where the property was not taken for the highway proper. *People ex rel. Dep't of Public Works v. Symons, 357 P.2d 451 (Cal. 1960). See Wolfram v. State by Burnquist, 74 N.W.2d 510 (Minn. 1956),* to the effect that the establishment of a heavily travelled highway adjacent to land does not set up compensable injury; William L. Weismantel, *Public Power to Close Residential Streets to Through Traffic, 25 Mo. L. Rev. 37 (1960).* An abutting landowner has no personal easement in a highway which interest must be compensated when the highway is abandoned. *State ex rel. Merrett v. Linzell 126 N.E.2d 53 (Ohio 1955),* but deprivation of access by construction of a limited-use highway is a taking compensable in eminent domain. *Rothwell v. Linzell, 127 N.E.2d 524 (Ohio 1955), appeal dis., 350 U.S. 1012 (1956).* Compensation given when all direct access is denied to limited access highway. *McMoran v. State, 345 P.2d 598 (Wash. 1959).* Damages for loss of access. *State ex rel. Riddle v. Department of Hwys., 179 S.E.2d 10 (W. Va. 1971).* Loss of business caused by construction of median divider gives rise to severance damages. *State ex rel. Dep't of Hwys. v. Strickland, 290 So. 2d 714 (Cal. App. 1974).* Traffic diverted from lessee's service station as a result of

road improvement was a circumstance which could be considered in determining the compensation for loss of business. *State Hwy. Comm'n v. Keneally 384 P.2d 770 (Mont. 1963).*

(n87)Footnote 338. Loss of access is not compensable. *County of Winnebago v. Rico Corp., 296 N.E.2d 867 (Ill. App. 1973).* Changing to a one-way street is a valid exercise of police power and not a taking of a right of ingress and egress. *City of Memphis v. Hood, 345 S.W.2d 887 (Tenn. 1961).* Designation of a one-way street is not a "taking." *Goycoolea v. City of Los Angeles, 24 Cal. Rptr. 719 (Cal. App. 1962).*

(n88)Footnote 339. *Cobb County v. Princeton Assocs., 421 S.E.2d 102 (Ga. App. 1992)* (denying property owners left hand turn out of property is not compensable). Closing of one end of street was the "taking" of an easement of adjoining landowners. *Bacich v. Board of Control, 144 P.2d 818 (Cal. 1943).* Title does not pass until compensation is paid except under "quick take" statute. *Board of Junior College v. Carey, 250 N.E.2d 644 (Ill. 1969).* When freedom of access is impaired to the extent that property value is affected, there is a taking. *Arkansas State Hwy. Comm'n v. Rye, 499 S.W.2d 624 (Ark. 1973).* Substantial temporary impairment of access results in an award for reduction of use or rental value during the period of impairment. *City of Los Angeles v. Ricards, 515 P.2d 585 (Cal. 1973).* Denial of access is a taking. *Arnold v. Prince George's County, 311 A.3d 223 (Md. 1973).* Refusing to allow compensation for vacating an alley vacation resulting in denial of access as contrasted with vacating a street vacation. *Phillips Merc. Co. v. City of Albuquerque, 287 P.2d 77 (N.M. 1955). See Kirby Terminal Co. v. City of Detroit, 63 N.W.2d 601 (Mich. 1954). Contra Beals v. Los Angeles, 144 P.2d 839 (Cal. 1943).* Damages caused by temporary obstruction of streets during period of construction of public project are not compensable. *Hill v. State Hwy. Comm'n, 516 P.2d 199 (N.M. 1973).* There is no property right in the flow of traffic past the owner's land. *Department of Pub. Works & Bldgs. ex rel. People v. Bills, 213 N.E.2d 110 (Ill. App. 1965); Department of Pub. Works & Bldgs. v. Wilson & Co., 340 N.E.2d 12 (Ill. 1975).* Diversion of traffic is not compensable. *Traendly v. State, 382 N.Y.S.2d 365 (N.Y. App. Div. 1976).* There is no vested interest in the flow of traffic past the premises. *Deyle v. State Dep't of Roads, 194 Neb. 36, 229 N.W.2d 565 (Neb. 1975).* There is no vested right in traffic passing in front of an owner's property. *Labriola v. State, 351 N.Y.S.2d 464 (N.Y. App. Div. 1974). See Deyle v. State Dep't of Roads, 229 N.E.2d 565 (Neb. 1975).* No compensation where change in highway results in a diversion of traffic. State through *Dep't of Hwys. v. Chesson, 229 So. 2d 763 (La. App. 1969).* Adjoining landowners have no right to control the type of traffic on public highways. *Rust v. Reeher, 198 N.E.2d 783 (Ohio App. 1963).* Property owners have no right in the continuation or maintenance of the flow of traffic past their property. *Walker v. State, 295 P.2d 328 (Wash. 1956).*

(n89)Footnote 340. *Commonwealth v. Comer, 824 S.W.2d 881 (Ky. App. 1991)* (property owner was not denied reasonable ingress, thus no compensable harm was done); *State v. Ensley, 164 N.E.2d 342 (Ind. 1960); State Hwy. Comm'n v. Smith, 82 N.W.2d 755 (Iowa 1957); State ex rel. State Hwy. Comm'n v. Silva, 378 P.2d 595 (N.M. 1962).* Temporary interference with adjacent property during construction of portion of interstate highway was not a taking by eminent domain. *Hill v. State Hwy. Comm'n, 516 P.2d 199 (N.M. 1973).* The construction of a median strip on a highway is a proper exercise of police power and is not a taking, even though circuity of access results. *Richley v. Jones, 310 N.E.2d 236 (Ohio 1974).*

(n90)Footnote 341. *State v. Allen, 870 S.W.2d 1 (Tex. 1994)* (restriction of access is not compensable unless illegal or negligent); *Hillerege v. City of Scottsbluff, 83 N.W.2d 76 (Neb. 1957).*

(n91)Footnote 342. *State. ex rel. Comm'r of Dep't of Transp.v. Vanatta, 728 S.W.2d 341 (Tenn. App. 1986)* (total denial of access is compensable); *Boxberger v. State Hwy. Comm'n, 251 P.2d 920 (Colo. 1952); Simmons v. State Hwy. Comm'n, 283 P.2d 392 (Kan. 1955).* The question of loss of access is a jury issue. *Department of Pub. Works & Bldgs. v. Wilson & Co., 340 N.E.2d 12 (Ill. 1975).*

(n92)Footnote 343. *Glass v. Carnes, 398 S.E.2d 7 (Ga. 1990)* (After declaring county road abandoned, County Board of Commissioners lacked authority to reopen road). *See Appeal of Gaus, 611 A.2d 696 (Pa. 1992)* (Roadway formally accepted by township, but not opened or used in 21 years, reverted to adjacent landowners; thus, township was required to provide compensation to landowners for utility line easement over roadway); *Woody v. Barnett, 79 S.E.2d*

789 (N.C. 1954).

(n93)Footnote 344. *Stupak-Thrall v. Glickman, 988 F. Supp. 1055 (W.D.Mich. 1997)* (holding "riparian rights involve property rights that, if interfered with by the government, requires the payment of compensation"); *Wernberg v. State, 519 P.2d 801 (Alaska 1974)* (riparian rights may be taken without compensation in exercise of navigational servitude).

(n94)Footnote 345. A riparian owner on a nonnavigable stream has a property right in the flow, the "taking" of which must be compensated. *Grand River Dam Auth. v. Grand-Hydro, 335 U.S. 359 (1948); United States v. Cress, 243 U.S. 316 (1917).* The federal "superior navigational easement" prevents compensation for property or value "on the flow of a stream" taken by eminent domain. *United States v. Rands, 389 U.S. 121 (1967); Colberg, Inc. v. State ex rel. Dep't of Pub. Works, 62 Cal. Rptr. 401 (1967), cert. denied, 390 U.S. 949,* (1968). Riparian landowner's right to eminent domain relief for state impairment of access to a navigable waterway. *Colberg, Inc. v. State ex rel. Dep't of Pub. Works, 62 Cal. Rptr. 401 (1967).* Compensation payable for taking of riparian rights by eminent domain. *Rose v. State, 298 N.Y.S.2d. 968,* (1969). *See* Weinberg, *Eminent Domain -- Taking or Injury of Property as Grounds for Compensation -- Navigational Servitude, 19 Case. W. Res. L. Rev. 1116 (1968);* Richard S. Harnsberger, *Eminent Domain and Water Law, 48 Neb. L. Rev. 325 (1969);* Kerry R. Brittain, *Navigation Servitude -- The Shifting Rule of No Compensation, 7 Land & Water L. Rev. 501 (1972). Yates v. Milwaukee, 77 U.S. 497 (1870).*

(n95)Footnote 346. Riparian rights may be taken without compensation in exercise of navigational servitude. *Wernberg v. State, 519 P.2d 80 (Alaska 1974). Lewis v. Portland, 35 P. 256 (Or. 1893).*

(n96)Footnote 347. *United States v. Kansas City Life Ins. Co., 339 U.S. 799 (1950); United States v. Chicago, M., St. P. & P. R.R., 312 U.S. 592 (1941); United States v. Welsh, 217 U.S. 333 (1910); United States v. Lynah, 188 U.S. 445 (1903); Clement v. State Reclamation Bd., 220 P.2d 897 (Cal. 1950); Norwood v. Sheen, 186 N.E. 102 (Ohio 1933); Milhous v. State Hwy. Dep't., 8 S.E.2d 852 (S.C. 1940); Beckley v. Reclamation Board, 23 Cal. Rptr. 428 (1962).* Construction of a bridge and causeway over river so as to increase danger of flooding was a taking. *Phelps v. Board of Supvrs. of County of Muscatine, 211 N.W.2d 274 (Iowa 1973).* Shore loss by artificial accretion compensable. *Coastal Indus. Water Auth. v. York, 532 S.W.2d 949 (Tex. App. 1976).*

(n97)Footnote 348. *Jacobs v. United States, 290 U.S. 13 (1933); Hurley v. Kincaid, 285 U.S. 95 (1932).* Diversion of water from or change in course of flow in a natural watercourse by the sovereign is a "taking." *Beckley v. Reclamation Board of State, 23 Cal. Rptr. 428 (1962).* Periodic flooding caused by public construction of a ditch is a taking. *DeKalb County v. McFarland, 154 S.E.2d 203 (Ga. 1967).* Diversion of water onto property is a "taking." *Winnebago County v. Kennedy, 208 N.E.2d 612 (Ill. App. 1965)* (A "physical invasion" occurs if the property is physically invaded by superinduced additions of materials so as to impair its usefulness.) Flooding of land by inadequate construction of drainage ditches was a "taking" not a tort. *State v. Sparks, 296 S.W.2d 609 (Tex. App. 1956).* In *Colella v. King County, 433 P.2d 154 (Wash. 1967)* (In a case of inundation caused by one on adjoining land discharging water onto the property, if the flooding continued less than 45 days, the measure of damages was for loss of use, but thereafter was a diminution in value of the property; if the flooding continued less than 45 days, the measure of damages was for the loss of use, but thereafter was a diminution in value of the property. Denying owner right to rechannel creek was not a taking when creek flooded.) *Rains v. Washington Dep't of Fisheries, 575 P.2d 1057 (Wash. 1978).*

(n98)Footnote 349. *United States v. Dickinson, 331 U.S. 745 (1947); United States v. Kansas City Life Ins. Co., 339 U.S. 799 (1950); Eller v. Board of Educ., 89 S.E.2d 144 (N.C. 1955).*

(n99)Footnote 350. *Dimmock v. City of New London, 245 A.2d 569 (Conn. 1968).*

(n100)Footnote 351. *Id.*

(n101)Footnote 352. *Beckley v. Reclamation Board, 23 Cal. Rptr. 428 (1962).* Construction of a bridge and

causeway over river so as to increase danger of flooding was a taking. *Phelps v. Board of Supvrs. of County of Muscatine, 211 N.W.2d 274 (Iowa 1973).*

(n102)Footnote 353. Compensation allowed. *Conger v. Pierce County, 198 P. 377 (Wash. 1921). Denied. San Gabriel Valley Country Club v. Los Angeles County, 188 P. 554 (Cal. 1920).* The federal "superior navigational easement" prevents compensation for property or value "on the flow of a stream" taken by eminent domain. United States v. Rands, 389 U.S. (1967); *Colberg, Inc. v. State ex rel. Dep't of Pub. Works, 62 Cal. Rptr. 401 (1967), cert. denied, 390 U.S. 949 (1968).* Riparian landowner's right to eminent domain relief for state impairment of access to a navigable waterway. *Colberg, Inc. v. State ex rel. Dep't of Pub. Works, 62 Cal. Rptr. 401 (1963).*

(n103)Footnote 354. *Hillebrand v. Knaupp, 274 N.W. 821 (S.D.1937).* Impounding of water for irrigation purposes held a "taking" of riparian right. *United States v. Gerlach Live Stock Co., 339 U.S. 725 (1950).* Riparian rights adjacent to a navigable stream are sometimes held property rights compensable in eminent domain. Where the erection of a dam on a nonnavigable stream interfered with drainage from plaintiff's farm, such interference was held a "taking," compensable in eminent domain. *Kansas City Life Ins. Co. v. United States, 74 F. Supp. 653 (Ct. Cl. 1947).* Flood damage resulting from navigation and flood control improvements by the United States is not compensable. *B. Amusement Co. v. United States, 180 F. Supp. 386 (Ct. Cl. 1960).* Diversion of well or spring or percolating water is not a taking. *Suffield v. State ex rel. Morrison, 375 P.2d 263 (Ariz. 1962).* Flood damage resulting from flood control by a state agency is compensable. *Brazos River Auth. v. Graham, 335 S.W.2d 247 (Tex. App. 1960). See* Stanley V. Kinyon and Robert C. McClure, *Interference with Surface Waters, 24 Minn. L. Rev. 891 (1940);* Robert Corontzos, *Compensation for Taking of Flowage Easements by Condemnation, 23 Mont. L. Rev. 212 (1962); Compensable Values in Federal "Taking" of Damsites, 14 Stan. L. Rev. 800 (1962).*

(n104)Footnote 355. Compensation allowed. *Conger v. Pierce County, 198 P. 377 (Wash. 1921). Denied. San Gabriel Valley Country Club v. Los Angeles County, 188 P. 554 (Cal. 1920).* Damages for loss of direct access. *Department of Pub. Works & Bldgs. v. First Nat'l Bank of Joliet, 292 N.E.2d 487 (Ill. App. 1973); State Dep't of Hwys. v. Hoyt, 272 So. 2d. 768 (La. App. 1972).*

(n105)Footnote 356. *Orange v. Resnick, 109 A. 864 (Conn. 1920).*

(n106)Footnote 357. *Pennsylvania R.R. v. Sagamore Coal Co., 126 A. 386 (Pa. 1924).* The subsurface flooding of land adjoining a dam is a "taking." *United States v. Kansas City Life Ins. Co., 339 U.S. 799 (1950).*

(n107)Footnote 358. *Bountiful City v. De Luca, 292 P. 194 (Utah 1930).*

(n108)Footnote 359. *Wray v. Stvartak, 1997 Ohio App. LEXIS 2742* (holding that government improvements resulting in the "flooding of landowners' property during and immediately after every rain can constitute a pro tanto taking of property where it deprives the owners of the use of their property"); *King v. United States, 504 F.2d 1138 (Ct. Cl. 1974); United States v. Chicago, B. & Q. R.R., 82 F.2d 131 (8th Cir. 1936)* (owners of land which becomes subject to overflow as the result of erection of a dam, though exposed to likelihood of frequent flooding, must be compensated for value of flowage easements)

(n109)Footnote 360. *Milhous v. State Hwy. Dep't, 8 S.E.2d 852 (S.C. 1940).* Denial of permit to drill for oil on state-owned land leased to driller was not a taking. *Michigan Oil Co. v. Natural Resources Comm'n, 249 N.W.2d 135 (Mich. App. 1976).* Interference with owner's use may extend to being a taking. *Benenson v. United States, 548 F.2d 939 (Ct. Cl. 1977).* Statute requiring cessation of strip mining may be a "taking." *Bureau of Mines of Md. v. George Creek Coal & Land Co., 321 A.2d 748 (Md. 1974).*

(n110)Footnote 361. *Tri-State Material Corp. v. United States, 550 F.2d 1 (Ct. Cl. 1977).*

(n111)Footnote 362. Concerning navigable waters *see Colberg, Inc. v. State ex rel. Dep't of Pub. Works, 62 Cal. Rptr. 401 (1967).*

(n112)Footnote 363. *See* Shelby A. Jordan, *Eminent Domain -- Urban Renewal -- De Facto Taking, 3 St. Mary's L.J. 339 (1971).* Zoning ordinance which precluded any use of property was a taking. *Schwartz v. City of Flint, 285 N.W.2d 344 (Mich. App. 1979).*

(n113)Footnote 364. No de facto taking found. *Commonwealth Dep't of Transp. v. Securda & Co., Inc., 329 A.2d 296 (Pa. Commw. 1974).* Where the vendee, a municipal corporation, has threatened condemnation of real estate, then purchased from the vendor, the vendor was not entitled to file suit for rescission where the vendee later sold the property to a private party, since this should not constitute violation of due process of law. *Beistline v. San Diego, 256 F.2d 421 (9th Cir. 1958).*

(n114)Footnote 365. *City of Louisville v. Munro, 475 S.W.2d 479 (Ky. 1971); Commonwealth Dep't of Transp. v. Securda & Co., Inc., 329 A.2d 296 (Pa. Commw. 1974).* Rezoning of property from residential to industrial use does not constitute a taking of eminent domain by lowering the value of the property. *Smith v. County of Santa Barbara, 52 Cal. Rptr. 292 (1966); Jackson Mun. Airport Auth. v. Evans, 191 So. 2d 126 (Miss. 1966).*

(n115)Footnote 366. *Petition of Cornell Indus. Elec., Inc., 338 A.2d 752 (Pa. 1975).*

(n116)Footnote 367. *See* Annotation, *92 A.L.R. 2d 355.*

(n117)Footnote 368. *Weast v. Budd, 349 P.2d 912 (Kan. 1960).*

(n118)Footnote 369. *Hamer v. State Hwy. Comm'n, 304 S.W.2d 869 (Mo. 1957).* Mere planning and preliminary steps without actual invasion of real estate are not a taking. *City of Chicago v. Loitz, 295 N.E.2d 478 (Ill. App. 1973).* Holding that owners who rely upon premature announcement of condemnation which is later abandoned have no recourse. *State ex rel. State Hwy. Comm'n v. Aramcost Motors, Inc., 552 S.W.2d 360 (Mo. App. 1977).*

(n119)Footnote 370. *Times-Mirror Co. v. Superior Court of Los Angeles County, 44 P.2d 547 (Cal. 1935).*

(n120)Footnote 371. Loss of tenants due to publicity of intended condemnation resulted in a taking. *Conroy-Prugh Glass Co. v. Commonwealth, 321 A.2d 598 (Pa. 1974).* Condemnor's actions in threatening eminent domain may go so far as to amount to a "de facto taking." No de facto taking found. *Commonwealth Dep't of Transp. v. Securda & Co., Inc., 329 A.2d 296 (Pa. Commw. 1974).* A plan of acquisition or a filing of a map under a plan of acquisition constitutes a taking. *Klamath & Modoc Tribes v. United States, 436 F.2d 1008 (Ct. Cl. 1971).* Mere announcement of an intended taking is not a de facto taking. *City of Buffalo v. J.W. Clement Co., 321 N.Y.S.2d 345 (1971).* Moving on premature disclosure of condemnation is not a taking. *In re Incorporated Village of Lynbrook, Nassau County, 348 N.Y.S.2d 115 (1973).* An announcement that property is to be taken, even though it reduces marketability as a practical matter, is not of itself a taking. *Thurow v. City of Dallas, 499 S.W.2d 347 (Tex. App. 1973).*

(n121)Footnote 372. *Negative. R.E. Adams Properties, Inc. v. City of Gainesville, 189 S.E.2d 114 (Ga. App. 1972); State v. Vaughan, 319 S.W.2d 349 (Tex. App. 1958). Affirmative. In re Elmwood Park Project, 136 N.W.2d 896 (Mich. 1965).* No liability to condemnor where delay in perfecting the taking. There is no recovery for manifestation of intent to condemn on theory of de facto taking. *City of Buffalo v. J.W. Clement Co., 321 N.Y.S.2d 345 (1971). See* Bernard R. Adams, *Eminent Domain, Police Power and Urban Renewal: Compensation for Interim Depreciation in Land Values, 7 Ga. L. Rev. 226 (1971).* Allowing detention damages for period between time of taking and time of judgment. *Kinter v. United States, 156 F.2d 5 (3d Cir. 1946). See* Jacob Schiffman & Patrick J., Toole, Jr., *Detention Damage in Eminent Domain Proceedings, 68 Dick. L. Rev. 55 (1963).*

(n122)Footnote 373. Shelby A. Jordan, *Eminent Domain -- Urban Renewal -- De Facto Taking, 3 St. Mary's L. J. 339 (1971).*

(n123)Footnote 374. *Amen v. City of Dearborn, 363 F. Supp. 1267 (W.D.Mich. 1973); Martin v. Port of Seattle, 391 P.2d 540 (Wash. 1964).* Plan had not sufficiently progressed. *Shelby Realty Co. v. City of San Buenaventura, 100*

Cal. Rptr. 799 (1972).

(n124)Footnote 375. *Carlson v. United States, 566 F.2d 489 (Ct. Cl. 1977).*

(n125)Footnote 376. *Duke Power Co. v. Herndon, 217 S.E.2d 82 (N.C. 1975).* Comprehensive noise population control is not a taking. *Union Oil Co. of California v. Illinois Pollution Control Bd, 257 N.E.2d 715 (Ill. App. 1976).* Enforcement of building codes is not a taking. City of Gary by and through *Dep't of Redev. v. Ruberto, 354 N.E.2d 786 (Ind. App. 1976).*

(n126)Footnote 377. *See* Shelby A. Jordan, *Eminent Domain -- Urban Renewal -- De Facto Taking, 3 St. Mary's L.J. 339 (1971).* Mere enactment of a general plan for future development of an area is not a taking or inverse condemnation unless there is an invasion or appropriation of some valuable property right which directly and especially affects the landowner to his injury. *Selby Realty Co. v. City of San Buenaventura, 109 Cal. Rptr. 799 (1973); City of Chicago v. Loitz, 329 N.E.2d 208 (Ill. 1975).* A de facto taking does not necessarily occur when property is included in the planning stage of a program, but factors involved in the planning stage should be considered when further actions in the acquisition stage have occurred that might constitute a de facto taking. *Petition of Cornell Indus. Elec, Inc., 338 A.2d 752 (Pa. 1975).* Mere planning for condemnation is not a taking. *Hilltop Props., Inc. v. State, 43 Cal. Rptr. 605 (1965).*

(n127)Footnote 378. A mere frustration of an owner's hopes or plans for the future by partial taking for highway purposes is not compensable. *State ex rel. Hwy. Dep't v. Kistler Co., 88 N.M. 221, 539 P.2d 611 (N.M. 1975).* Mere publicity regarding proposed urban redevelopment plans is not a taking even though the publicity hinders the sale of the property. *City of Muskegon v. DeVries, 229 N.W.2d 479 (Mich. App. 1975); Textron, Inc. v. Wood, 355 A.2d 307 (Conn. 1974).* Holding that owners who rely upon premature announcement of condemnation which are later abandoned have no recourse. *State ex rel. State Hwy. Comm'n v. Aramcost Motors, Inc., 552 S.W.2d 360 (Mo. App. 1977).*

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CHAPTER 80 THE POWER OF EMINENT DOMAIN

9-80 Thompson on Real Property, Thomas Editions § 80.06

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§ 80.06 The Permissible Extent of a Taking.

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It is an established rule of eminent domain that the amount of property to be taken, the extent of the interest to be obtained and the time it is to be held are linked to the necessity of the taking, n379 and the power of the condemning authority. n380 The state, however, has the right to declare upon what property or to what extent the right of eminent domain is to be exercised; n381 through its legislature, the state may determine the amount of land to be taken and its location. n382 If the legislature has not fixed the amount of land to be taken, then no more property may be condemned than the public use requires. n383 The legislature may leave the determination of the particular property and the amount needed "to the discretion of those upon whom the authority is conferred, with or without limitation." n384

If a corporation has statutory power of eminent domain, with the estate and exact quantity of land to be taken statutorily prescribed, no other estate or amount of land than that prescribed can be seized under such authority. n385 However, if the authorizing statute does not definitely declare what estate or what quantity of property shall be taken, the general rule is that the corporation may take only so much land as is reasonably necessary for its corporate purposes. n386 No precise rule is available for determining what is an appropriate amount of land in the absence of specific statutory authority, n387 and, within the general rule, the company usually has broad discretion in the selection of the land and the amount to be taken. n388

The right to take is limited to present or reasonable future needs n389 to carry out the public purpose. n390 However, the power of eminent domain, at least in the case of streets, is a continuing one, to be exercised when and to the extent that the public good may require, and streets previously condemned may be straightened and widened under a subsequent exercise of the power. n391 It is usually provided by statute that the question shall be tried and determined by appraisers, commissioners, or a jury, or some other tribunal. Usually the condemnor does not acquire mineral rights. n392 The rules against excess takings are gradually weakening. n393

FOOTNOTES:

(n1)Footnote 379. *Department of Health, State of Colo. v. Helca Mining Co., 781 P.2d 122 (Colo. App. 1989); Murray v. State Dep't of Transp., 716 P.2d 540 (Kan. 1986); Englehaupt v. Village of Butte, 539 N.W.2d 430 (Neb. 1995).*

(n2)Footnote 380. *Town of Parker v. Colorado Div. of Parks & Outdoor Recreation, 860 P.2d 584 (Colo. App. 1993); A.T.& T. v. Proffitt, 903 S.W.2d 309 (Tenn. App. 1993); Saunders v. Titus Co. Fresh Water Supply Dist. No. 1, 847 S.W.2d 424 (Tex. App. 1993).*

(n3)Footnote 381. *Harness v. Arkansas Public Service Comm'n, 962 S.W.2d 374 (Ark. App. 1998)* (the possessor of eminent domain power has wide discretion as to how a taking will be effected, and condemnor's decisions will not be disturbed unless it is obvious that there has been an injurious abuse of power); *Western Union Tel. Co. v. Louisville & N. R.R., 258 U.S. 13 (1922); Sanitary Dist. v. Manasse, 42 N.E.2d 543 (Ill. 1926); Lewis v. Bunnell, 131 N.E. 386 (Ind. 1921); Hendershott v. Rogers, 211 N.W. 905 (Mich. 1927); Pauchogue Land Corp. v. Long Island State Park Comm'n, 152 N.E. 451 (N.Y. 1926); St. Louis & S. F. R.R. v. Mann, 192 P. 231 (Okla. 1920); School Bd. of Roanoke City v. Buford, 124 S.E. 286 (Va. 1924).* The power of eminent domain is one of the highest attributes of sovereignty and the extent of its exercise is limited to the express terms of necessary implications of the statutes delegating the power. *Johnson v. Minneapolis & St. P. S. R.R., 192 N.W. 187 (Minn. 1927); Griffith v. Southern Ry., 131 S.E. 413 (N.C. 1926).* In condemnation the United States is not limited to terms known to state law but property may be condemned in terms of federal law. *United States v. Certain Interests in Property in Champaign County, 271 F.2d 379 (7th Cir. 1959). Matter of Village at Poland to Acquire Certain Real Property, 637 N.Y.S.2d 575 (1996); Hobgood v. Parish of E. Baton Rouge, 563 So. 2d 413 (La. App. 1990); Sutton v. Frasier, 325 P.2d 338 (Kan. 1958); Town of Parker v. Colorado Div. of Parks & Outdoor Recreation, 860 P.2d 584 (Colo. App. 1993).*

(n4)Footnote 382. *St. Louis & S.F. R.R. v. Mann, 192 P. 231 (Okla. 1920); City of Tulsa v. Williams, 227 P. 876 (Okla. 1924)* (when the question is raised as to the necessity for taking any particular piece of property for public use, such a question presents matter for judicial determination). *See Alabama Power Co. v. Gulf Power Co., 283 F. 606 (D.C. Ala. 1922). Sutton v. Frasier, 325 P.2d 338 (Kan. 1958); Town of Parker v. Colorado Div. of Parks & Outdoor Recreation, 860 P.2d 584 (Colo. App. 1993); City of Springfield v. Brechbuhler, 895 S.W.2d 583 (Mo. 1995); Saunders v. Titus Co. Fresh Water Supply Dist. No. 1, 847 S.W.2d 424 (Tex. App. 1993); Hobgood v. Parish of E. Baton Rouge, 563 So. 2d 413 (La. App. 1990).*

(n5)Footnote 383. *Harness v. Arkansas Public Service Comm'n., 962 S.W.2d 374 (Ark. App. 1998)* (condemnation proceeding cannot result in the taking of any more property or interest in property for public use than is absolutely needed); *Curtis v. City of Boston, 142 N.E. 95 (Mass. 1924); City of Springfield v. Brechbuhler, 895 S.W.2d 583 (Mo. 1995); Burkhart v. United States, 227 F.2d 659 (9th Cir. 1955); Waukegan v. Stanczak, 6 Ill. 2d 594 (Ill. 1955); City of Cushing v. Gillespie, 256 P.2d 418 (Okla. 1953).*

(n6)Footnote 384. *Board of Supvrs. v. Gorrell, 61 Va. 484 (1871); Walker v. Gateway Pipeline Co. 601 So. 2d 970 (Ala. 1992); Town of Parker v. Colorado Div. of Parks and Outdoor Recreation, 860 P.2d 584 (Colo. App. 1993); Forest Preserve Dist. v. Estes, 583 N.E.2d 640 (Ill. App. 1991); Sutton v. Frasier, 325 P.2d 338 (Kan. 1958); Murray v. State Dep't of Transp., 716 P.2d 540 (Kan. 1986); Hobgood v. Parish of E. Baton Rouge, 563 So. 2d 413 (La. App. 1990); Dare Co. Bd. of Educ. v. Sakaria, 456 S.E.2d 842 (N.C. App. 1995); A.T. & T. v. Proffitt, 903 S.W.2d 309 (Tenn. App. 1993).*

(n7)Footnote 385. *Phillips Natural Gas Co. v. Cardiff, 823 S.W.2d 314 (Tex. App. 1991); Sutton v. Frasier, 325 P.2d 338 (Kan. 1958); De Camp v. Hibernia Underground R.R., 47 N.J.L. 43 (1885); Currier v. Mariette & C. R.R., 11 Oh. St. 228 (1860); Miller v. Windsor Water Co., 23 A. 1132 (Pa. 1892); Roanoke v. Berkowitz, 80 Va. 616 (Pa. 1892); Lamasco Realty Co. v. Milwaukee, 8 N.W.2d 372, 865 (Wis. 1943).*

(n8)Footnote 386. *Case v. Kelly, 133 U.S. 21 (1890); Georgia Pac. Ry. v. Wilks, 6 So. 34 (Ala. 1889); Thomison v. Hillcrest Athletic Ass'n, 5 A.2d 236 (Del. 1939); Johnston v. Chicago, M. & St. P. Ry., 12 N.W. 576 (Iowa 1882); Tyler v. Town of Hudson, 18 N.E. 582 (Mass. 1888); Fourney v. Fremont E. & M.V. R.R., 36 N.W. 806 (Neb. 1888); In re South Beach Ry., 23 N.E. 486 (N.Y. 1890). See City of Cushing v. Gillespie, 256 P.2d 418 (Okla. 1953)* (holding that only easement, not fee was taken by condemnation of land for reservoir). Land taken in fee simple in condemnation conveyed the fee simple absolute with no reverter to the owners. *LaSalle Nat'l Bank v. County Bd. of Sch. Trustees, 337*

N.E.2d 19 (Ill. 1975). A condemnor may not take land in excess of that reasonably needed. *City of Carlsbad v. Ballard, 378 P.2d 814 (N.M. 1963).* Pennsylvania has adopted the rule that a taking of land in rural areas is for a mere right of passage so that any other use of the surface or subsurface other than the building of a new improved road is a new taking requiring eminent domain and further compensation. *Sterling's Appeal, 2 A. 105 (Pa. 1886)* (gas pipes); *Pennsylvania Ry. v. Montgomery County Passenger Ry., 31 A. 468 (Pa. 1895)* (street railway); *Brewer v. Commonwealth, 27 A.2d 53 (Pa. 1942).* In urban areas, however, if the additional use is only a consequential injury, there is no taking. But if the injury is direct such as interference with light and air, drainage or access, there is a taking. *Jones v. Erie & W.V. Ry. Co., 25 A. 134 (Pa. 1892); Pennsylvania S.V. R.R. v. Walsh, 17 A. 186 (Pa. 1889).*

(n9)Footnote 387. *Colorado E. Ry. v. Union Pac. Ry., 41 F. 293 (C.C. Colo. 1890). J.F.R. Invest. v. Delray Beach Community Redevelopment Agency, 652 So. 2d 1261 (Fla. App. 1995); Murray v. State Dep't of Transp, 716 P.2d 540 (Kan. 1986); Illinois Power Co. v. Rhein, 17 N.E.2d 582 (Ill. 1938); Chicago & A. R.R. v. Pontiac, 48 N.E. 485 (Ill. 1897); Richland School Twp. v. Overmyer, 73 N.E. 811 (Ind. 1905); Hayford v. Municipal Offices of City of Bangor, 66 A. 731 (Me. 1907); Deitricks v. Lincoln & N.W. R.R., 13 N.W. 624 (Neb. 1882); Board of Educ. of Hickey Admin. Sch. Unit v. Seagle, 463 S.E.2d 277 (N.C. App. 1995); Dare Co. Bd. of Educ. v. Sakaria, 456 S.E.2d 842 (N.C. App. 1995); Coit v. Owenby-Wofford Co., 81 S.E. 1067 (N.C. 1914); A.T. & T. Co. v. Proffitt, 903 S.W.2d 309 (Tenn. App. 1993); Boswell v. Brazos Electric Power Coop., 910 S.W.2d 593 (Tex. App. 1995).* In a condemnation action, the court can properly determine the boundaries of several tracts being condemned. *State Hwy. Bd. v. Jamac Corp., 310 A.2d 120 (Vt. 1973).* The extent of taking under eminent domain is ordinarily discretionary with the condemning authority and may not be modified by the judiciary. *United States v. 21.54 Acres of Land, More or Less in Marshall Co., 491 F.2d 301 (4th Cir. 1973).*

(n10)Footnote 388. *Colorado E. Ry. v. Union Pac. Ry., 41 F. 293 (C.C. Colo. 1890). J.F.R. Invest. v. Delray Beach Community Redev. Agency, 652 So. 2d 1261 (Fla. App. 1995); Murray v. State Dep't of Transp, 716 P.2d 540 (Kan. 1986); Illinois Power Co. v. Rhein, 17 N.E.2d 582 (Ill. 1938); Richland School Twp. v. Overmyer, 73 N.E. 811 (Ind. 1905); Chicago & A. R.R. v. Pontiac, 48 N.E. 485 (Ill. 1897); Hayford v. Municipal Offices of City of Bangor, 66 A. 731 (Me. 1907); Deitricks v. Lincoln & N.W. R.R., 13 N.W. 624 (Neb. 1882); Board of Educ. of Hickey Admin. Sch. Unit v. Seagle, 463 S.E.2d 277 (N.C. App. 1995); Dare Co. Bd. of Educ. v. Sakaria, 456 S.E.2d 842 (N.C. App. 1995); Coit v. Owenby-Wofford Co., 81 S.E. 1067 (N.C. 1914); A.T. & T. Co. v. Proffitt, 903 S.W.2d 309 (Tenn. App. 1993); Boswell v. Brazos Elec. Power Coop., 910 S.W.2d 593 (Tex. App. 1995).* The extent of taking under eminent domain is ordinarily discretionary with the condemning authority and may not be modified by the judiciary. *United States v. 21.54 Acres of Land, More or Less in Marshall Co., 491 F.2d 301 (4th Cir. 1973). Redevelopment Comm'n of Greensboro v. Johnson, 500 S.E.2d 118 (N.C. Ct. App. 1998)* (a party with condemnation power has broad discretion as to how to effect the taking, and its practices are not subject to judicial review unless there is a showing of abuse of power or bad faith).

(n11)Footnote 389. *Palmer Water Co. v. Lehighton Water Supply Co., 124 A. 747 (Pa. 1924)* (extent of rights acquired, and manner of acquisition under color of right of eminent domain and use, are subject to a strict construction).

(n12)Footnote 390. *Department of Health, State of Colo. v. Hecla Mining Co., 781 P.2d 122 (Colo. App. 1989); J.F.R. Invest. v. Delray Beach Community Redev. Agency, 652 So. 2d 1261 (Fla. App. 1995); De Penning v. Iowa Power & Light Co., 33 N.W.2d 503 (Iowa 1948)* (anything beyond what is reasonably necessary is a taking for private use); High Ridge Assocs. v. County Comm'rs at Corral Co. (Md. App. 1995); *A.T. & T. Co. v. Proffitt, 903 S.W.2d 309 (Tenn. App. 1993); Saunders v. Titus Co. Fresh Water Supply Dist. No. 1, 847 S.W.2d 424 (Tex. App. 1993); Texas Fruit Palace, Inc. v. City of Palestine, 842 S.W.2d 319 (Tex. App. 1993).*

(n13)Footnote 391. *Town of Parker v. Colorado Div. of Parks and Outdoor Recreation, 860 P.2d 584* (Colo. Ct. of App. 1993); *Lee v. Waynesville, 115 S.E. 51 (N.C. 1922).*

(n14)Footnote 392. *Murray v. State Dep't of Transp., 716 P.2d 540 (Kan. 1986); Sutton v. Frasier, 325 P.2d 338 (Kan. 1958); City of Cushing v. Gillespie, 256 P.2d 418 (Okla. 1953).*

(n15)Footnote 393. Taking in excess condemnation proceeding held constitutional if such taking was justified to avoid excessive or consequential damages. *People ex rel. Dep't. of Public Works v. Superior Court, 436 P.2d 342 (Cal. App. 1967).* Hawaii provides standards by which disposition of property may be made when in excess of public use. This is analogous to the convenience vs. necessity rule.

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CHAPTER 80 THE POWER OF EMINENT DOMAIN

9-80 Thompson on Real Property, Thomas Editions § 80.07

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§ 80.07 Nature of the Title or Interest Acquired.

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§ 80.07(a) General Rules.

§ 80.07(a)(1) Legislative Power to Determine Interest Taken.

The legislature has the sole right to determine to what extent the exercise of the power shall be carried, that is, whether an easement or fee is taken. n394 If the use is a public one, the legislature is the exclusive judge of the amount of land and the estate therein which the public end to be served requires to be taken. n395 Its power to withdraw property from private control and subject it to public use, whatever interest or estate is necessary to accomplish the intended purpose, is complete and perfect. n396 The interest taken, according as the legislature may determine, may be purely temporary, n397 or may consist of an estate for years, for life, a mere easement, a conditional fee, or a fee simple absolute. n398 Thus the legislature may, in its discretion, authorize land to be taken in fee simple, for a public use, although such use is special, and not necessarily permanent or perpetual. n399 So land condemned in fee simple did not revert to the original condemnees on failure of use for the purpose originally condemned. n400 The same rule applies where the title is taken by deed in lieu of condemnation.

COMPUTER-ASSISTED RESEARCH

LEXIS: "eminent domain" w/20 interest w/20 legislat!

§ 80.07(a)(2) Easement Rather Than Fee Is Taken.

The general rule is that the exercise of the power of eminent domain, particularly when exerted in behalf of corporations, extends only to the use of the property appropriated, and does not include the fee. n401 In the absence of an express statutory provision to the contrary, the taker under eminent domain proceedings acquires only a right to use and occupy the land for the purposes for which it is taken, that is to say, only an easement is required, n402 or at most a determinable fee or a fee subject to a condition subsequent. n403 Where land is taken for school purposes, in the absence of special circumstances, a fee title is presumed to be taken. n404

COMPUTER-ASSISTED RESEARCH

LEXIS: "eminent domain" w/20 taking w/10 easement

§ 80.07(b) Incidents of Eminent Domain Titles Generally.

A new title, not based on that of the previous owner, arises out of eminent domain. n405 Title acquired by eminent domain is independent of infirmities of and claims against the original owner. n406 The title of eminent domain is a new and independent one and the taker is not in privity with the former owner as the taker would be if the title were derivative. n407 Where, however, the proceedings are directed against only the holder of an immediate estate, the rights of those owning future interests are not affected. n408 The nature of the title or rights acquired by the condemnor depends upon the extent of the title or rights which may be adjudged under the pleadings in the particular action. n409 When a part of mortgaged property is taken in condemnation proceedings the award is subject to the lien of the mortgage on the whole. n410

In condemnation the time of taking is when the condemnor interferes with any substantial elemental right growing out of ownership. n411 Under some rules title to property condemned does not vest until the damages awarded by the judgment are paid. n412 When this happens it relates back to the time the action was instituted. n413 Under a prepayment statute title vests in the condemnor when the consideration is paid. n414

A decree condemning a right of way for use as a public highway is held to have the force and effect of a deed. n415 The condemnor acquires title to all personal property on the condemned premises which cannot be removed. n416

An eminent domain action does not of itself bar an action for earlier trespasses, n417 but some contrary authority holds that the award in condemnation is all embracing. n418

COMPUTER-ASSISTED RESEARCH

LEXIS: "eminent domain" w/20 title w/10 incidents

§ 80.07(c) Incidents of Easements Condemned.

If an easement is taken, possession and control are usually limited to the purpose for which the easement was taken. n419 However, the condemnor of an easement acquires all rights which are necessary for the contemplated use of the land. n420

The easement is often expanded beyond the usual easement concept by permitting the condemnor to use the subsurface as long as it is not sold or given away. Thus the "easement" or "right of way" obtained by condemnation often is a hybrid interest with characteristics of both an easement and a fee. A further problem is the extent to which the condemnor can "overburden" the easement by permitting others to use it for power or telephone lines buses or similar public utility purposes.

Ordinarily only an easement is obtained when condemnation is for a high-way, n421 street, n422 railroad purpose, n423 transmission line of a power company, n424 or a reservoir site. n425 Because ordinarily only an easement is obtained by condemnation, the common easement problems of overburdening and termina-tion of use are often encountered.

Once the easement is obtained, the owner of the underlying fee may use the land for every purpose not incompatible with the use to which the easement has been appropriated. n426 When such use becomes impossible or is abandoned, the right of the easement holder ceases, and the property reverts to the original owner. n427

If an easement is taken, the material beneath the surface belongs to the owner; however, some states recognize a superior easement or right of way whereby although only an easement is condemned, the holder of the easement acquires the subsurface and any minerals. This gives the condemnor the right to use the profits, earth, sand and gravel for the proper purposes of the easement as long as those resources are not sold or given away. n428 Sometimes a distinction is made between a condemnation for utilities purposes in an urban area, often of fee title, and in rural areas, usually of easements only. n429 When a utility easement is taken in that portion of a strip of land that is not to be physically occupied by poles and towers, the taking is equivalent to condemnation of a fee. n430

A condemnation for highway purposes usually only takes an easement. n431 However, under some statutes the state acquires a fee upon condemnation of the land for highway purposes. n432 Once the highway easement is acquired, courts are divided on the question of the state's right to make or grant to others the right to make additional use of the highway easement without giving additional compensation to the owners of the subjacent fee. n433 Courts generally agree that uses of the easement for sewer, gas and water pipes were contemplated under the original highway or roadway easement and were not additional servitudes requiring additional compensation.

Except in those states where the fee passes as an incident of condemnation and excludes any remaining rights in the former owner, n434 any language in the authorizing statutes that clearly shows an intention that title in fee shall pass in condemnation proceedings sufficiently provides for title in fee to the taker. n435

COMPUTER-ASSISTED RESEARCH

LEXIS: "eminent domain" w/20 easement w/10 incidents

§ 80.07(d) Incidents of Fee Titles That Are Condemned.

If compensation is made for the fee, and the fee is necessary for the full use of the property under the authorizing act, the fee will be deemed to have been taken even in the absence of express words. n436 In such a case the property does not revert to the former owner when the original case closes. n437 If full and complete consideration was paid, the right of reverter does not arise except from the clearest and most explicit language. n438

When an unlimited use of the property taken is contemplated, all interest in the land taken is abrogated except such interest as is specifically excepted. n439 Thus, a condemnation in fee generally passes riparian rights n440 and minerals. n441

COMPUTER-ASSISTED RESEARCH

LEXIS: "eminent domain" w/20 title w/10 incidents

FOOTNOTES:

(n1)Footnote 394. *Harness v. Arkansas Public Service Comm'n, 962 S.W.2d 374 (Ark. App. 1998)* (the possessor of eminent domain power has wide discretion as to how a taking will be effected, and condemnor's decisions will not be disturbed unless it is obvious that there has been an injurious abuse of power); *City of Charlotte v. Cook, 498 S.E.2d 605 (N.C. 1998)* (a city's decision to condemn an entire fee simple estate, rather than simply creating an easement across that estate, done for the purpose of laying pipe as a part of a waterline project, is not an abuse of eminent domain power or the city's discretion as to the use of that power); *Shoemaker v. United States, 147 U.S. 282 (1893); Bennett v. City of Marion, 76 N.W. 844 (Iowa 1898); St Louis v. Griswold, 58 Mo. 175 (1874); State ex. Missouri Cities Water Co. v. Hodge, 878 S.W.2d 819 (Mo. 1994); Jones v. Oklahoma City, 137 P.2d 233 (Okla. 1941); In re Rhode Island Suburban Ry., 48 A. 590 (R.I. 1901); Samish River Boom Co. v. Union Boom Co., 73 P. 670 (Wash. 1903); Varner v. Martin, 21 W. Va. 543 (1883).*

(n2)Footnote 395. *Elliot v. City of Guthrie, 725 P.2d 861 (Okla. 1986)* (legislative intent determines the title to be condemned); *Jones v. Oklahoma City, 137 P.2d 233 (Okla. 1941); Fairchild v. City of St. Paul, 49 N.W. 325 (Minn. 1891); Challiss v. Atchison, T. & S. F. R.R., 16 Kan. 117 (1876); Carroll v. City of Newark, 158 A. 458 (N.J. App. 1932).*

(n3)Footnote 396. *Pepper v. King Co., 810 P.2d 527 (Wash. App. 1991), cert. denied, 883 P.2d 326 (Wash. 1994); Giesy v. Cincinnati, Wilmington Zanesville Ry., 4 Ohio St. 308 (1854).*

(n4)Footnote 397. *United States v. Banisadr Bldg. Joint Venture, 65 F.3d 374 (4th Cir. 1995); Kimball Laundry Co. v. United States, 338 U.S. 1 (1944); United States v. Pewee Coal Co., 341 U.S. 114 (1951); City of Cape Girardeau v. Hunze, 284 S.W. 471 (Mo. 1926).*

(n5)Footnote 398. Thomas Cooley, Constitutional Limitations, § 558 (1868). Acquisition of an easement right by condemning realty results in a possessory interest subordinate to landowner in reversion; claim cannot be made adverse to reversion owner even if made in error; easement ceases when occupier abandons use of property. *Miceli v. Foley, 575 A.2d 1949 (Md. App. 1990); In re Harlem River Drive, 121 N.E.2d 414 (N.Y. 1954).* Condemnation was not a "transfer" under operation of law clause terminating lease. *Peter C. Reilly Trust v. Anthony Wayne Oil Corp., 574 N.W.2d 318 (Ind. App. 1991); Carlstrom v. Lyon Van & Storage Co., 313 P.2d 645 (Cal. App. 1957).* Where land is flooded by tide gates owner does not lose title but the state condemns an easement. *In re Hutchinson River Parkway Extension, 14 N.Y.S.2d 692 (Sup. Ct. 1939), modified, 24 N.Y S.2d 991 (N.Y.A.D 1940), aff'd, 33 N.E.2d. 252 (N.Y. 1941); Nagel v. Emmons Co. N. D.Water Dist., 474 N.W.2d 46 (N.D.1991)* (flooding results in an easement). *But see Baranick v. North Fork Reservoir Co., 903 P.2d 71 (Idaho 1995)* (flooding does not require an easement). *Meyers v. Kissner, 594 N.E.2d 336 (Ill. 1992)* (prescriptive right to flood only after 20 years if continuous, adverse, and with owners' knowledge.) Agreed condemnation proceedings did not violate covenant of quiet enjoyment in a lease. *Dolman v. United States Trust Co., 138 N.E.2d 784 (N.Y. 1956); United States v. Bedford Assocs., 548 F. Supp. 732 (S.D.N.Y. 1982).* Condemnation takes only easement for highway purposes. *Alemany v. Commissioner of Transp., 576 A.2d 503 (Conn. 1990); Ashland Oil & Ref. Co. v. State, 310 N.Y.S.2d 500 (1970).* After the public has acquired fee simple absolute title for public use either by eminent domain or purchase, the former owner retains no rights in the land and the use may be changed. *Mainer v. Canal Auth., 467 So. 2d 989 (Fla. 1985); Gilbert v. Franklin County Water Dist., 520 S.W.2d 503 (Tex. App. 1975).*

(n6)Footnote 399. *Eldridge v. City of Binghamton, 24 N.E. 462 (N.Y. 1890); In re Marivitz, 636 A.2d 1241 (Pa. 1994)* (state can condemn land for the sole purpose of facilitating alienation of state's interest in land). If property is taken for a proper public purpose, it may be permitted to revert to private ownership if the public purpose is discharged. *See Board of Comm'rs v. Department of Nat. Resources, 46 So. 2d 281 (La. 1986)* (state has power to divest itself of property held for state purposes); *In re City of Bethlehem, North, 349 A.2d 781 (Pa. 1976).*

(n7)Footnote 400. *Sierra Club v. Davies, 743 F.Supp. 1334 (E.D.Ark. 1990); Sadtler v. City of Atlanta, 223 S.W.2d 819 (Ga. 1976).*

(n8)Footnote 401. *United States v. Crown Zellerbach Corp., 60 F. Supp. 853 (D.Or. 1945); Alabama & F. R.R. v. Burkett, 42 Ala. 83 (1868); Dantzler v. Mississippi State Hwy. Comm'n, 199 So. 367 (Miss. 1941).* The easement so obtained is superior to a private right-of-way, however, and can be burdened with an additional servitude. In Mississippi a deed to the state for land intended to be used for highway purposes gives only an easement, though it purports to convey a fee. *Whitworth v. Mississippi State Hwy. Comm'n, 33 So. 2d 612 (Miss. 1948)* (title to the minerals). Under the weight of authority such additional burden requires additional compensation to the owner of the fee. *Berry v. Southern Pine Elec. Power Ass'n, 76 So. 2d 212 (Miss. 1954); Eels v. American Tel. & Tel. Co., 38 N.E. 202 (N.Y. 1894). Contra* and requires no compensation. *United States v. Oklahoma Gas & Elec. Co., 318 U.S. 206, 716 (1943).* Least property interest available that will most adequately serve condemnor is the use granted. *Miller v. Transcontinental Gas Pipe Line Corp. 358 F. Supp. 1357 (W.D.La. 1973).* The extent of the interest taken and its use are determined by the commissioner's report. *Roberts v. Upper Verdigris Watershed Joint Dist. No. 24, 392 P.2d 914 (Kan. 1964).* When only

an easement is required, the fee cannot be acquired. *Hallock v. State, 347 N.Y.S.2d 60 (1973).* Condemnee retains an insurable interest in the land as long as condemnee holds title. *Dursie v. American Union Ins. Co., 218 A.2d 87 (Pa. 1966).* Eminent domain does not give a fee except where statutes expressly authorize. *Stroud v. State, 279 S.W.2d 82 (Tenn. App. 1955)* (statute so authorized). *Missouri Pacific R.R. v. 55 Acres of Land Located in Crittenden County, Arkansas, 947 F. Supp. 1301 (E.D.Ark. 1996)* (proposed taking of property for intermodal facility was considered as a taking for a right of way).

(n9)Footnote 402. *Matter of Reading Co., 77 B.R. 452* (E.D.Pa., 1987); *Warm Springs Irr. Dist. v. Pacific Live Stock Co., 270 F. 560 (9th Cir. 1921); Downing v. State, 107 So. 80 (Ala. 1925); Cienega Cattle Co. v. Atkins, 126 P.2d 481 (Ariz. 1942); Hutson v. Agric. Ditch & Reservoir Co., 723 P.2d 736 (Colo. 1986); Alemany v. Commissioner of Transp., 576 A.2d 503 (Conn. 1990); Arborio v. Hartford Elec. Light Co., 36 A.2d 384 (Conn. 1944); Abens v. Chicago Burlington & Quincy Ry., 57 N.E.2d 883 (Ill. 1944);* Tennessee *Gas Transmission Co. v Million, 234 S.W.2d 152 (Ky. 1950); Miceli v. Foley, 575 A.2d 1249 (Md. App. 1990); Beals v. Inhabitants of Brookline, 139 N.E. 492 (Mass. 1923); Hoffman v. State, 45 N.Y.S.2d 8 (N.Y. Ct. Cl. 1943); Crouch v. State, 218 N.Y.S. 173 (N.Y. App. Div. 1926); In re Forty-Second St. Spur of Manhattan R.R., 216 N.Y.S. 2 (1926); Thomas v. Morris, 129 S.E. 623 (N.C. 1925); Henry v. Columbus Depot Co., 20 N.E.2d 921 (Ohio 1939); Robinson v. Kent Mfg. Co.,128 A. 501 (Pa. 1925); Boney v. Cornwell, 109 S.E. 271 (S.C. 1921); Seattle v. Faussett, 212 P. 1085 (Wash. 1923); Hark v. Mountain Fork Lumber Co., 34 S.E.2d 348 (W. Va. 1945).* Where the condemnation statute authorizes a taking for a limited purchase only an easement, not a fee, is given. *Isley v. Boart, 338 F.2d 33 (10th Cir. 1945).* Route selection of eminent domain is subject to judicial review. Against arbitrariness. *Texas E. Transmission Corp. v. Wildlife Preserves, Inc., 225 A.2d 130 (N.J. 1966).* Condemnation of land for railway purposes carried only an easement. *Fleck v. Universal-Cyclops Steel Corp., 156 A.2d 832 (Pa. 1959).*

(n10)Footnote 403. *Forest Preserve Dist. v. City of Chicago, 513 N.W.2d 22 (Ill. App. 1987), cert. denied, 517 N.E.2d 1086 (1987); McMechan v. Board of Educ., 105 N.E.2d 270 (Ohio 1952); Downing v. State, 107 So. 80 (Ala. 1925); Citizens Elec. Co. v. Susquehanna Boom Co., 113 A. 559 (Pa. 1921).* The award may contemplate the use of the easement created by the servient owner. *Redevelopment Agency of City of Concord v. Tobriner, 264 Cal. Rptr. 481 (Cal. App. 1989); Lexington & E. R.R. v. Williams, 251 S.W. 849 (Ky. 1923)* (a taking by the state in eminent domain does not terminate a fee simple determinable); *State by Mondale v. Independent Sch. Dist. No. 31, 123 N.W.2d 121 (Minn. 1963).*

(n11)Footnote 404. *Scheller v. Trustees of Schs., 384 N.E.2d 971 (Ill. App. Dist. 1978); O'Hara v. District of Columbia, 147 F.2d 146 (D.C.Cir. 1944).*

(n12)Footnote 405. *United States v. 194.08 Acres of Land, More or Less, Situated in St. Martin Parish, State of La., 135 F.3d 1025 (5th Cir. 1998)* (the general rule in an eminent domain taking in fee simple is that a new title is established in the condemning authority and all previous possessory interests are void); *County of Bernalillo v. Morris, 872 P.2d 371 (N.M. App. 1994); United States v. 99.66 Acres of Land, 970 F.2d 651 (9th Cir. 1992); City of Alameda v. Todd Shipyards Corp., 635 F.Supp. 1447 (N.D.Calif. 1986); Trickey v. Zumwalt, 491 P.2d 166 (N.M. 1971); Amusements, Inc. v. Assaro, 322 N.Y.S.2d 524 (N.Y. App. Div. 1971) aff'd, 282 N.E.2d 890 (N.Y. 1971); United States v. Chatham, 298 F.2d 499 (4th Cir. 1960)* (title does not pass until award is paid); *People ex rel. Dep't of Pub. Works v. Peninsula Title Guar. Co., 301 P.2d 1 (Cal. 1956)* (award stands in place of land taken and is subject to liens on the land); *Independent Consol. Sch. Dist. No. 27 v. Waldron, 63 N.W.2d 555 (Minn. 1954)* (eminent domain does not pass after-acquired interests of the condemnee).

(n13)Footnote 406. *United States v. 194.08 Acres of Land, More or Less, Situated in St. Martin Parish, State of La., 135 F.3d 1025 (5th Cir. 1998)* (the general rule in an eminent domain taking in fee simple is that a new title is established in the condemning authority and all previous possessory interests are void); *Cadorette v. United States, 988 F.2d 215 (1st Cir. 1993); Swetland v. Curry, 188 F.2d 841 (6th Cir. 1951)* (docketing and cross indexing of federal judgments of condemnation with state court accords is not required as a condition of validity as against subsequent purchasers from condemnee in absence of an act of Congress so providing); *Norman Lumber Co. v. U.S., 223 F.2d 868*

(4th Cir. 1955), cert. denied, 350 U.S. 902, (1955). Upon entry of judgment in condemnation proceedings in federal court records and payment in court of compensation awarded for the taking of the land, government acquired good title thereto as against the world as well as the heirs of the owner which could not be impaired except by law of *United States. Norman Lumber Co. v. United States, 223 F.2d 868 (4th Cir. 1955), cert. denied, 350 U.S. 902 (1955). See A.W. Duckett & Co. v. United States, 266 U.S. 149 (1924);* United States v. 19.86 Acres, 141 F.2d 344 (7th Cir. 1944); *Beeland Wholesale Co. v. Kaufman, 174 So. 516 (Ala. 1937); Allen v. Henshaw, 168 P.2d 625 (Okla. 1946).*

(n14)Footnote 407. *United States v. 194.08 Acres of Land, More or Less, Situated in St. Martin Parish, State of La., 135 F.3d 1025 (5th Cir. 1998)* (the general rule in an eminent domain taking in fee simple is that a new title is established in the condemning authority and all previous possessory interests are void); *Swetland v. Curry, 188 F.2d 841 (6th Cir. 1951)* (injunction against use in private lands did not apply where condemned by state for same purpose). *See Commonwealth v. Thornbury, 399 S.W.2d 728 (Ky. 1966).*

(n15)Footnote 408. *Stephenson v. Cavendish, 59 S.E.2d 459 (W. Va. 1950).*

(n16)Footnote 409. *Maguire v. Police Jury of Caddo Parish, 1 So. 2d 92 (La. 1941).*

(n17)Footnote 410. *In re D'Ellena, 640 A.2d 530 (R.I. 1994); In re East 29th St. City of New York, 6 N.E.2d 98 (N.Y. 1932).*

(n18)Footnote 411. *Department of Transp. v. Department of Equities Corp, 353 S.W.2d 603 (Ga. App. 1987); Woodside v. City of Atlanta, 103 S.E.2d 108 (Ga. 1958).*

(n19)Footnote 412. *County of Bernalillo v. Morris, 872 P.2d 371 (N.M. App. 1994); Chicago Park Dist. v. Downey Coal Co., 115 N.E.2d 223 (Ill. 1953); People ex rel. Carolfiglio v. Gill, 9 N.E.2d 581 (Ill. Ct. 1937); United States v. 10,060.92 Acres of Land, 215 F. Supp. 811 (W.D.Ark. 1963).*

(n20)Footnote 413. *See Security Co. v. Rice, 9 P.2d 817 (Cal. 1932).* Title does not pass until compensation is paid except under "quick take" statute. *Forest Preserve Dist. v. West Suburban Bank, 621 N.E.2d 215 (Ill. App. 1993) rev'd on other grounds, 641 N.E.2d 493 (Ill. 1994); Board of Jr. College v. Carey, 250 N.E.2d 644 (Ill. 1969).* Date of take is time jury is impaneled. *West Jefferson Level Dist. v. Coast Quality Constr. Corp, 620 So. 2d 319 (La. App. 1993)* (date of take is when deposit is made into the court); *Municipal Light Co. v. Commonwealth, 608 N.E.2d 743 (Mass. App. 1993)* (date of take is when government deprives owner of virtually all of that owner's interest in the property), *rev. denied, 616 N.E.2d 469 (Mass. 1993), cert. denied, 114 S. Ct. 187 (1993); Forest Preserve Dist. of DuPage Co. v. West Suburban Bank, 641 N.E.2d 495 (Ill. 1993)* (where there is even the slightest physical intrusion onto property by government, taking requiring just compensation has occurred); *City of Cleveland v. Hurwitz, 249 N.E.2d 562 (Ohio Prob. 1969).*

(n21)Footnote 414. *County of Bernalillo v. Morris, 872 P.2d 371 (N.M. App. 1994); Ex parte Lance, 103 So. 2d 753 (Ala. 1958).*

(n22)Footnote 415. *Hildebrand v. Southern Bell Tel. & Tel. Co., 18 S.E.2d 827 (N.C. 1942).*

(n23)Footnote 416. In re Slum Clearance in *City of Detroit, 52 N.W.2d 195 (Mich. 1952). See Texas Pipe Line Co. v. Johnson, 65 So. 2d 884 (La. 1953); National R.R. Passenger Corp. v. Faber Enters., 931 F.2d 458 (8th Cir. 1991)* (taking does not affect ownership of personal property not affixed to the premises). Cost of removal of personal property from real property taken by eminent domain not compensable. *State ex rel. State Hwy. Comm'n v. Superbilt Mfg. Co., 281 P.3d 707 (Or. 1955). See* Uniform Relocation Assistance and Real Property Acquisitions Policy Act of 1970 *(42 U.S.C. § 4621).*

(n24)Footnote 417. *Adams v. Canterra Petroleum, 439 N.W.2d 540 (N.D.1989). But see Lawless v. Pierce, 455 N.E.2d 113 (Ill. App. 1983), cert. denied, 467 U.S. 1241 (1984)* (where damages are included in the condemnation

award, the action is barred); *Wehrum v. Village of Lincolnwood Cook County, 235 N.E.2d 343 (Ill. App. 1968).*

(n25)Footnote 418. *Beverly v. United States, 24 Cl. Ct. 197 (U.S. Claims Ct. 1991); Brown v. Davis County, 195 N.W. 363 (Iowa 1923).*

(n26)Footnote 419. *Citizens for Conservation v. Village of Lake Barrington, 608 N.E.2d 653 (Ill. App. 1993). See* however, *Collins v. Alabama Power Co., 108 So. 868 (Ala. 1926).* If a fee and not an easement is taken the damages awarded must be on the basis of the fee. *Carolina Cent. Gas Co. v. Hyder, 86 S.E.2d 458 (N.C. 1955).*

(n27)Footnote 420. *Hudson v. City of Shawnee, 790 P.2d 933 (Kan. 1990).*

(n28)Footnote 421. *Department of Transp. v. First Interstate Commercial Mtg. Co., 881 P.2d 473 (Colo. Ct. App. 1994); Kratochvil v. Cox, 27 A.2d 382 (Conn. 1942); Dierksen v. Pahl, 190 N.W. 423 (Iowa 1922); Keown v. Brandon, 266 S.W. 889 (Ky. 1924); Louisiana Hwy. Comm'n v. Bullis, 200 So. 805 (La. 1941); Tolchester Beach Imp. Co. v. Boyd, 156 A. 795 (Md. 1931); Appleton v. City of New York, 114 N.E. 73 (N.Y. 1916).*

(n29)Footnote 422. *Kottschade v. City of Rochester, 537 N.W.2d 301 (Minn. App. 1995); Nevins v. Friedaner, 184 N.Y.S. 894 (1920).*

(n30)Footnote 423. *Atchison, T. & S.F. R.R. v. Humburg, 675 P.2d 375 (Kan. 1984); Harvey v. Missouri P. R.R., 207 P. 761 (Kan. 1922); Keown v. Brandon, 266 S.W. 889 (Ky. 1924); Alabama & V. R.R. v. Jackson & E. R.R., 101 So. 553 (Miss. 1924); Brown v. Weare, 152 S.W.2d 649 (Mo. 1941); Crouch v. State, 218 N.Y.S. 173 (N.Y. App. Div. 1926); Griffith v. Southern Ry., 131 S.E. 413 (N.C. 1926); Jones v. Oklahoma City, 137 P.2d 233 (Okla. 1941); Brightwell v. International G.N. R.R., 48 S.W.2d 437 (Tex. 1932); Houston N. Shore Ry. v. Tyrrell, 98 S.W.2d 786 (Tex. 1936).* Condemnation by railroad gave only a right-of-way for permanent easement. *Erie Lackawanna Ry. v. State, 330 N.Y.S.2d 700 (N.Y. App. Div. 1972).* Railroad can acquire a fee by purchase but, by condemnation, only an easement is acquired. *North Carolina State Hwy. Comm'n v. Farm Equip. Co., 189 S.E.2d 272 (N.C. 1972).* Condemnation of land for railway purposes carried only an easement. *Fleck v. Universal-Cyclops Steel Corp.,156 A.2d 832 (Pa. 1959).* But holding that condemnation by an improvement district did not carry the mineral estate. *Sutton v. Frazier, 325 P.2d 338 (Kan. 1958).*

(n31)Footnote 424. *Star Farms, Inc. v. Southwestern Elec. Power Co., 607 S.W.2d 391 (Ark. 1980); Patterson Orchard Co. v. Southwest Ark. Util. Corp, 18 S.W.2d 1028 (Ark. 1929); Shedd v. Northern Indiana Pub. Serv. Co., 188 N.E. 322 (Ind. 1934); Carolina Power & Light Co. v. Bowman, 51 S.E.2d 191 (N.C. 1949); De Penning v. Iowa Power & Light Co., 33 N.W.2d 503 (Iowa 1948).*

(n32)Footnote 425. *Georgia Neurosurgical Clinic, et al. v. Rockdale County, 453 S.E.2d 88 (Ga. App. 1995); Warm Spring Irr. Dist. v. Pacific Live Stock Co., 270 F. 560 (Ala. 1914).*

(n33)Footnote 426. *United States v. Harris, 26 F. Cas. 185,* No. 15315 (C.C. Mass 1830); *Besneatte v. Gourdin, 21 Cal. Rptr. 2d 82 (Cal. App. 1993); Abens v. Chicago, Burlington & Quincy R.R, 57 N.E.2d 883 (Ill. 1944); Henry v. Dubuque & P. R.R., 2 Ia. 288 (Iowa 1855); Kansas Cent. R.R. v. Allen, 22 Kan. 285 (1879); Hoffman v. State, 45 N.Y.S.2d 8 (N.Y. Ct. Cl. 1943); Otter Tail Power Co. v. Baker, 8 N.W.2d 610 (N.D.1943); Aycock v. Houston Lighting & Power Co., 175 S.W.2d 710 (Tex. 1943).*

(n34)Footnote 427. *Colgate v. Philadelphia Elec. Power Co., 20 F.2d 263 (D.Pa. 1927). Benham v. Potter, 52 Conn. 248 (1884); Dean v. Mod Props., Ltd., 528 So. 2d 432 (Fla. 1988); Hastings v. Burlington & M. R.R., 38 Iowa 316 (1874); Skillman v. Chicago, M. & St. P. R.R., 43 N.W. 275 (Iowa 1889); Keown v. Brandon, 266 S.W. 889 (Ky. 1924); Jackson v. City of Abilene, 281 S.W.2d 767 (Tex. 1955).* Under the Rhode Island Constitution if the state does not use the property taken it must first offer the land for sale to the condemnee before selling to another. *M.S. Alper & Son, Inc. v. Capaldki, 206 A.2d 859 (R.I. 1965).*

(n35)Footnote 428. *McDonald v. Board of Miss. Levee Comm'r, 646 F. Supp. 449 (N. D. Miss. 1986); Captline v. County of Allegheny, 459 A.2d 1298 (Pa. 1983); Hall v. Delaware L. & W. R.R., 113 A. 669 (Pa. 1921).* But holding that condemnation by an improvement district did not carry the mineral estate. *Sutton v. Frazier, 325 P.2d 338 (Kan. 1958).*

(n36)Footnote 429. *Anderson v. Beech Aircraft Corp., 699 P.2d 1023 (Kan. 1985).*

(n37)Footnote 430. Condemnor may later close an underpass where only an easement taken. *Harford Twp. v. Bandurick, 660 A.2d 189 (Pa. 1995); Wilson v. St. Louis-San Francisco Ry., 292 P.2d 725 (Kan. 1956); Nebraska Elec. Generation & Transmission Co-op v. Tinant, 241 N.W.2d 134 (S.D.1976).*

(n38)Footnote 431. *Alabama Power Co. v. Bern, 130 So. 541 (Ala. 1930); State Hwy. Comm'n of Miss. v. Jones, 649 So. 2d 201 (Miss. 1995); Maples v. Mississippi State Hwy. Comm'n., 617 So. 2d 265 (Miss. 1993); Houston N. Shore Ry. v. Tyrrell, 98 S.W.2d 786 (Tex. 1936).*

(n39)Footnote 432. *Sauer v. New York, 206 U.S. 536 (1907)* (such statutes are valid); *Daly v. Georgia, S & F. R.R., 7 S.E. 146 (Ga. 1888); Smith v. Rome, 63 Am. Dec. 298 (Ga. 1855); Gould v. Topeka, 4 P. 822 (Kan. 1884); Kamby v. Dawson Springs, 104 S.W. 259 (Ky. 1907); In re Mott Haven Houses, 227 N.Y.S.2d 858 (1960); In re Condemnation by the Pa. Dep't of Transp., 636 A.2d 1241 (Pa. 1994); Western Union Tel. Co. v. Williams, 11 S.E. 106 (Va. 1890); Kiser v. Douglas County, 126 P. 622 (Wash. 1912). See New Haven v. Sargent, 9 Am. Rep. 360 (Conn. 1871); Campbell v. Monaco Coal Min. Co., 85 N.E.2d 138 (Ohio 1948)* (permitting state to use minerals for highway purposes). Reverse condemnation is not limited to holders abutting interests but is also available to nearby non-abutting property for damage by a street closing action. *Chevy Chase Citizens Ass'n v. District of Columbia Council, 307 A.2d 740 (D.C. App. 1973).* A judgment in eminent domain without limitation as to title conveys a fee simple absolute. *LaSalle Nat'l Bank v. County Bd. of Sch. Trustees, 319 N.E.2d 593 (Ill. App. 1974).* Eminent domain carries fee simple unless otherwise stated. *Curtis v. Redevelopment Auth. of Phila., 367 A.3d 401 (Pa. 1976).*

(n40)Footnote 433. *King County v. Squire Inv. Co., 801 P.2d 1022 (Wash. 1991). See Peabody v. Boston, 107 N.E. 952 (Mass. 1915); Ponca City v. Drummond, 221 P. 466 (Okla. 1923); Quigley v. Pennsylvania S.V. R.R., 15 A. 478 (Pa. 1888).* City may construct sewers and gas, water or other piping in streets without compensation to adjoining landowners so long as the construction does not materially affect the owner's use or enjoyment. *Awbrey v. City of Panama City Beach, 283 So. 2d 114 (Fla. App. 1973).* After condemnation, the highway cannot be constructed in a manner not in accordance with the plans and specifications introduced by the state in a prior condemnation action. *Fauske v. Dean, 101 N.W.2d 769 (S.D.1960).*

(n41)Footnote 434. *Challiss v. Atchison, T. & S.F. R.R, 16 Kan. 117 (1876); Collector of Taxes v. Revere Bldg., 177 N.E. 577 (Mass. 1931); Valentine v. Lamont, 100 A.2d 668 (N.J. 1953); Jones v. Oklahoma City, 137 P.2d 233 (Okla. 1941).* Condemnee is tenant at will of condemnor after title vests. *Redevelopment Agency of City & County of San Francisco v. Superior Court, 91 Cal. Rptr. 886 (1970).* Condemnation for a schoolhouse site conveyed a fee simple absolute and not a fee simple determinable. *Devena v. Common Sch. Dist. No. R-16, 348 P.2d 827 (Kan. 1960).*

(n42)Footnote 435. *Town of Libertyville v. Bank of Waukegan, 504 N.E.2d 1305 (Ill. 1987); Downing v. State, 107 So. 80 (Ala. 1925).* Some statutes provide that either the fee or a lesser interest may be acquired. *People v. Allen, 176 N.W. 468 (Mich. 1920)* (condemnation for purposes of cemetery, under express terms of statute fee acquired); *Pontiac Imp. Co. v. Cleveland Metro. Park Dist., 135 N.E. 635 (Ohio 1922)* (the term "lesser estate" does not authorize the subscribing of regulations from time to time concerning the manner in which the owner, while in possession, may use or improve the property). The general rule is that, when land has been acquired for public use in fee simple by the exercise of the power of eminent domain, the former owners retain no rights in the land. *School Bd. of Roanoke City v. Buford, 124 S.E. 286 (Va. 1924).*

(n43)Footnote 436. *Goodwyn v. United States, 32 Fed. Cl. 409 (Ct. Cl. 1994); Warner v. Hoffman, 38 N.Y.S.2d*

457 (N.Y. Sup. 1942).

(n44)Footnote 437. *Community College Dist. of Monroe County v. Lennard, 516 N.W.2d 146 (Mich. 1994); Carroll v. City of Newark, 158 A. 458 (N.J. App. 1932).*

(n45)Footnote 438. *United States v. 194.08 Acres of Land, More or Less, Situated in St. Martin Parish, State of La., 135 F.3d 1025 (5th Cir. 1998)* (a government taking in fee simple through eminent domain power is a taking of all interests in the land, including those not specified in the taking order. When less than fee simple is taken, the condemnation order must specify which interests are to be taken or which are to be excluded from the taking); *Valentine v. Lamont, 96 A.2d 417 (N.J. 1954); Concord & Baypoint Land Co. v. City of Concord, 229 Cal. Rptr. 623 (Cal. App. 1991); Binder v. County Bd. of Educ., 5 S.W.2d 903 (Ky. 1928); Belovsky v. Redevelopment Auth. of Phila., 54 A.2d 277 (Pa. 1947).*

(n46)Footnote 439. *Mille Lacks Band of Chippewa Indians v. State of Minnesota, 861 F. Supp. 784 (Minn. 1994); United States v. Gossler, 60 F. Supp. 971 (D.Or. 1942).*

(n47)Footnote 440. *Belvedere Dev. Corp. v. Division of Admin. State of Fla. Dep't of Transp., 413 So. 2d 847 (Fla. 1982); Hanford v. St. Paul & D.Ry., 44 N.W. 114 (Minn. 1890).*

(n48)Footnote 441. *Wallace v. Missouri Improve. Co., 740 S.W.2d 920 (Ark. 1987); Sparkill Realty Corp v. State, 197 N.E. 192 (N.Y. 1935).* Condemnation did not take minerals since only that interest is taken as is necessary to make a good and sufficient operating plan for the public. *Sutton v. Frazier, 325 P.2d 338 (Kan. 1958); City of Cushing v. Gillespie, 256 P.2d 418 (Okla. 1953).* Condemnation proceedings of railroad carried only an easement and not a fee with title to minerals. *Oklahoma City-Ada-Atoka Ry. v. Rooker, 355 P.2d 552 (Okla. 1960).*

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CHAPTER 80 THE POWER OF EMINENT DOMAIN

9-80 Thompson on Real Property, Thomas Editions § 80.08

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§ 80.08 Compensation.

[Go To Supp]

§ 80.08(a) General Principles.

Eminent domain compensation is one of the most confused areas of the law. It has been described by such terms as "fair," "fair market," "just replacement," "highest and best use," "adequate," "loss to the landowner," "most profitable use," "before and after," and "substituted facilities." To meet constitutional requirements, a taking must be accompanied by the payment of just or adequate compensation. n442 This is imposed by the Fifth Amendment, n443 and similar requirements are found in many state constitutions. n444 "Compensation," whether used singly or in connection with the intensifying adjectives "just" or "adequate," means a full indemnity for the loss sustained by the owner of the property when it is taken or injured for public use. n445 In general, compensation is based on the damage suffered by the owner, not the benefit received by the condemnor. n446 Further, the damages recoverable are those arising as a consequence of the condemnation, and from no other cause. n447 The measure of damages is the owner's loss, not the state's gain, n448 but future profits are too remote to be counted as part of the loss. n449

Compensation involves four factors: (a) direct compensation for the land or interest therein actually taken, (b) actual injury or damage to adjoining land not taken, (c) incidental consequential injury or damage to such adjoining land, and (d) inverse condemnation. n450

Compensation is a matter of judicial determination. The legislature cannot fix an arbitrary amount. n451 The court on condemnation may determine the interests of the parties entitled to the award, but may not distribute more than the full amount of the award. n452 Compensation is not required when the state grants its lands to a corporation for the construction of public improvement works. n453

The court decisions vary widely as to the extent a state and the federal government are liable for damages as between themselves in condemnation cases. The traditional test is the extent of participation in the construction that takes place on the condemned land. n454

COMPUTER-ASSISTED RESEARCH

LEXIS: "eminent domain" w/10 compensation

§ 80.08(b) Compensation That Is Just.

§ 80.08(b)(1) Constitutional Origin of Just Compensation Guaranty.

The expression "just compensation" under the Fifth Amendment of the Constitution is synonymous with "due process of law" under the Fourteenth Amendment, as far as eminent domain proceedings are concerned. n455 Because of this constitutional source for the requirement of compensation, a state statute that authorizes the taking of private property by eminent domain usually provides that the owner shall be compensated for the property taken, and unless such provision is made the statute is invalid. n456 Stated otherwise, the constitutional guaranty of just compensation is paramount to any statute and a statute not in keeping with such guaranty would be unconstitutional. n457 When the state has not appropriated sufficient money to compensate a taking of the land an entry thereon is illegal, but if a subsequent appropriation makes the money available, a lawful recondemnation of the land will terminate the illegality of the entry. n458

COMPUTER-ASSISTED RESEARCH

LEXIS: "eminent domain" w/10 compensation w/2 just

§ 80.08(b)(2) Meaning of the Term "Just."

§ 80.08(b)(2)(i) In General.

Although the usual test for appropriate compensation is "just," n459 "just" cannot be determined by exact rules. n460 "Just compensation" as called for under the constitution cannot be reduced to inexorable rules. n461 Market value is the ordinary standard used, n462 but if there is no "market value" establishable, resort must be had to other means of establishing value. n463 Always, however, it is the value of the interest taken, not the owner's interest therein, which is of importance, n464 and it is the owner's loss, not the taker's gain, which must be considered. n465 Peculiar needs or attachment of the owner to the property are of no importance, such loss being part of the burden of common citizenship. n466 "Just compensation" means the market value of the property at the time of the taking and may be more or less than the investment. n467 Just compensation includes the increment of value resulting from the completed government project to lands originally outside but later drawn into the project. n468 As stated, the value of the land taken by condemnation is fixed as of the date the suit is filed. n469

§ 80.08(b)(2)(ii) "Before and After" Rule.

Where the taking is not total, the "before and after" rule is commonly used. n470 Just compensation for a partial taking is calculated either at (a) the value of the remainder before taking minus the value of the remainder after taking, or (b) the value of the entire tract before the taking minus the value of the remainder after the taking. n471

COMPUTER-ASSISTED RESEARCH

LEXIS: "eminent domain" w/10 compensation w/50 "before and after"

§ 80.08(b)(2)(iii) "Highest and Best Use."

"Market" or "Fair Market" is a standard commonly applied, n472 and while market value is the value in view of all available uses, and not necessarily value for the best use, n473 there is strong authority for the "highest and best use" test. n474 Proof of highest and best use of condemned property only requires a showing that the property is physically adaptable to that use and that there is a need for that use in the area as shown in the property's market at the time of

condemnation. n475 Courts speak of the value as determined by the highest and most valuable use for which the land is suited, n476 plus the amount of damage to the remainder of the tract less the general or special benefits accruing thereto by reason of the condemnation. n477 It means a fair equivalent in money for the property taken as nearly as its nature will permit, and the market value is generally the measure of compensation, although it is not necessarily so. n478

"Highest and best use" raises the question of present versus potential future uses. n479 Therefore, the possibility of increased values resulting from a potential zoning change is a property factor in determining valuation. n480 Land's potential for subdivision development is also a proper factor in valuation. n481 However, some courts oppose considering possible future uses in determining compensation as too speculative. n482 A possible change in zoning is a factor in determining highest and best use. n483

COMPUTER-ASSISTED RESEARCH

LEXIS: "eminent domain" w/10 compensation w/50 "highest and best"

§ 80.08(b)(2)(iv) Fair Market Value.

"Market value" and "highest and best use" are not identical. n484 In arriving at market value of land for condemnation purposes the courts have considered rental value, n485 actual use of the land, and values peculiar to a particular use so long as not speculative. n486 It includes not only the actual cash value or market value of the property taken, but also the actual cash value of the use of such property from the date of the taking of possession up to the date of the judgment, if possession is taken by the condemnor prior to the judgment. n487 Just compensation includes all elements of value that inhere in the property taken, but it does not exceed the market value fairly determined. n488 The sum required to be paid the owner does not derive from subjective considerations, that is, the value does not depend upon the uses to which the owner has devoted the land, or because its strategic location makes it desirable or indispensable for the owner's purposes; the value is to be arrived at upon a just consideration of all the uses for which it is suitable. n489 Nevertheless, nonconforming uses from which the owner derives positive and demonstrative economic value are considered in reaching the value for condemnation. n490 Similarly, the existence of a restrictive covenant burdening the property taken is also considered in determining fair market value for an eminent domain award. n491

The measure of damages for land taken for public use is the fair and reason-able market value of the land actually appropriated and the difference in the fair and reasonable market value of the remainder of the land before and after taking. n492 In determining that amount, the value of the land for the most advantageous uses to which it may be applied is to be taken as the measure of damages. n493 The value of the property taken controls, not the value of the right acquired. n494

For income-producing property, net income is the best test of value. n495 Comparable sales are also a well-accepted measure of compensation. While mere inconvenience is not "damage" for purposes of compensation, n496 the jury, in fixing damages, may take into account every element of annoyance and disadvantage resulting from the improvement which would influence an intending purchaser's estimate of the market value of the property. n497

COMPUTER-ASSISTED RESEARCH

LEXIS: "eminent domain" w/10 compensation w/50 "market value"

§ 80.08(b)(2)(v) Value of Interests Affected But Not Taken.

The constitutional prohibition against the taking of private property without just compensation extends not only to the property actually taken, but to damages, if any, done to property not taken. n498 Where a part of a tract of land is taken from the owner of the entire tract, the adaptability of the part not taken for use in view of the improvement to be made

may be a proper element to be considered, and hence any expenditures reasonably necessary to make such adaptation may enter into the damages awarded. n499

Where the taking is only partial, the question of consequential damages becomes important. n500 The whole question of compensation for damage to interests not taken is complicated, because as property interests they are damaged, but not taken. The result depends partially on the extent to which the statute awards "damages" as compensation for the land actually taken. But there is sound authority for the giving of constitutional protection against the taking of property rights on adjoining land without compensation. If the taking is of an estate less than a fee, then the problem is whether the measure of compensation is the amount of injury done to the interests not taken or whether it is the entire value of the land less the value of the undisturbed interests. n501 Where the issue concerns land not taken, such as adjoining properties, the issue is drawn between actual but incident injury, on the one hand, and speculation damages, on the other hand. n502

§ 80.08(b)(2)(vi) Other Elements of Just Compensation.

Interest is an allowable factor in the award, but attorney fees are not, unless the condemning authority has abused its power, or abandons the action, or it is determined that the property cannot be taken. n503 Thus, where condemnation is provided for to gain private ways of necessity, attorney fees are not included among the "expenses to be paid by the party to be benefited." n504

Just compensation requires payment of interest on the eminent domain award from the date thereof until time of payment. n505 Interest on the award between time of taking and date of rendition of judgment is a constitutional right but post-judgment interest is a matter of legislative grace. n506 Conversely, if interest is a part of "just compensation," payment cannot be denied by statute. n507

§ 80.08(c) The Date for Taxing the Award of Damages.

States differ as to whether the time for fixing the award and the consequent running of interest is the time of taking, n508 the time of judgment, n509 the time of notice of taking, n510 or the time of passing of title. n511 If the time of taking is the pivotal point, the taking is complete when there is an entry made upon the property by the condemnor and an act committed which indicates an intent to appropriate. n512

Where there has been a taking prior to institution of the condemnation, the value is of the date of taking, together with interest. n513 Some courts, however, hold that value is fixed as of the time of condemnation rather than at the time of tortious entry, n514 especially when the taking is by a private corporation. n515 And the date of damages for inverse condemnation is the time the owner sends a demand letter. n516

Where the threat of condemnation and the actions by the condemnor constitute an unlawful taking of property, a landowner is entitled to compensation from the time such threat and actions constitute a taking. n517 If the sovereign actually takes possession before beginning a condemnation proceeding, the owner is entitled to compensation even if the condemnation is later abandoned. n518 In that case, the date of taking is fixed as of the date of payment rather than the time the action is started. n519

Even where the state's planning has not reached the taking stage the resulting activities may be considered in fixing the damages ultimately awarded when the condemnation is finally completed. Under federal eminent domain statutes the right to an award arises not at the time of taking but at the time of filing the declaration of taking. n520

COMPUTER-ASSISTED RESEARCH

LEXIS: "eminent domain" w/10 compensation w/50 date

§ 80.08(d) The Time When Compensation Is to Be Paid.

To be constitutionally sufficient, a provision authorizing eminent domain must also authorize compensation in such a way that the landowner has power to coerce the payment without unreasonable delay, either through the courts or otherwise. n521 Where such a provision is applicable, its associated procedures must be followed. n522

By the common law, and by statute in some states, the payment of compensation must be concurrent with or precede the taking. n523 However, the general rule today is that where adequate provision is made for the certain payment of the compensation without unreasonable delay, the taking may precede payment. n524 Aside from any constitutional prohibition, in some states compensation need not be paid or the amount of compensation be ascertained before the rights of the condemnor become fixed, provided that a reasonably certain, prompt, and adequate provision for payment is made, or the public faith is pledged for such payment, n525 such as land with proper sureties. n526 In any event, the owner is entitled to have the compensation determined and paid at the earliest time possible. n527

The legislature cannot indefinitely postpone the payment of the compensation for the land taken under the power of eminent domain. n528 Indeed, in those states where either constitutional or statutory provisions require that the compensation be ascertained and paid in advance of the taking, payment or tender of payment is a condition precedent to the taking. n529 The landowner may waive a right to prepayment. n530

A special problem of timing for payment arises with respect to owners of adjacent tracts or future interests in the taken land, who may seek to recover for injury resulting from the taking after the condemnation has taken place. Courts are divided on this question. n531

The date of taking rather than the time the action is started, is the time of payment. n532 The war and the commerce powers may also avoid the paying of compensation by the federal government. Likewise, public safety may dispense with compensation. The constitutional requirement that the government must pay just compensation for what it takes is one which war does not suspend, n533 but there is no obligation to make compensation where the taking is what would, if not taken, be destroyed by the force of nature or by an enemy, n534 or where buildings are pulled down or blown up by the authorities to prevent the spread of fire. n535

COMPUTER-ASSISTED RESEARCH

LEXIS: "eminent domain" w/10 compensation w/50 time

§ 80.08(e) Including the Value of Personal Property in the Award.

Early cases limited recovery in eminent domain proceedings to the value of the real estate, and excluded the value of personal property from the award. n536 Later cases sometimes included in the condemnation awards amounts for any personal property destroyed, injured or taken, or for the cost of removing the personal property. n537 Under a variety of other special circumstances, payment for personal property may be required, n538 although, in general, payment for movable personal property is not required. n539

Where the personal property is not taken or paid for, but must be removed, courts are still divided as to the extent, if any, the condemnee is entitled to damages for the cost of removal. n540 Under the common law, if property of a public utility is condemned by a higher sovereign power, there is no allowance for relocation expenses unless the condemnation was for a proprietary as proposed to a governmental function. n541 This rule does not apply if the company's private easement is condemned. n542 The value of nonremovable fixtures is usually taken into consideration in fixing damages. n543

COMPUTER-ASSISTED RESEARCH

LEXIS: "eminent domain" w/10 compensation w/50 "personal property" or "personalty"

§ 80.08(f) Awards for Taking of Business Property.

Where business properties are condemned there are two conflicting considerations as to value: (1) past and prospective earnings must be considered, n544 and (2) income cannot be used as the basis of an award. n545 Even though the state takes an easement instead of a fee, the measure of damages is the same. There is further disagreement as to the extent there can be compensation for intangible losses when the business is taken. n546

Where a business is conducted on the property taken, the weight of authority denies compensation for the value of the business or for prospective profits as too speculative, n547 and courts further refuse to consider profits as an element in calculation of damages. n548 But it has been held that loss of profits caused when eminent domain forces relocation of the business is compensable. n549 Although there is much authority for the proposition that injury to or loss of business resulting from a taking is not subject to compensation, n550 a business may be interlocked with the value of the land so that loss of the business may be compensable. n551 Where the going concern value did not derive primarily from the location of the leased premises, no damages were payable in eminent domain for a loss of good will. n552 Courts differ as to the admissibility of evidence on loss of business or diminution of traffic flow in limited access highways. n553 The cases are also not in agreement as to whether a liquor license loss, because of a change in location, in eminent domain is compensable. n554

As a general rule, where a leasehold is taken by eminent domain there is no compensation for the going concern value of a business conducted on the property. n555

COMPUTER-ASSISTED RESEARCH

LEXIS: "eminent domain" w/10 compensation w/50 "business property"

§ 80.08(g) Awards for Taking of Easements.

In condemning an easement, not limited to a term of years, the rule is to award to the owner the value of the entire fee at the time of taking. n556 The general rule is further that damages to land by reason of a taking for a right-of-way for a power line must be direct and proximate and not merely remote, contingent, or speculative. n557 But the damages should not be diminished by reason of the fact that the state may possibly abandon the easement sometime in the future. n558 Special damages to land located outside of an easement may be allowed where it is shown that a physical disturbance of a right enjoyed in connection with the land not taken is causing damage in excess of that sustained by the public generally. n559

COMPUTER-ASSISTED RESEARCH

LEXIS: "eminent domain" w/10 compensation w/50 easement!

§ 80.08(h) Awards for Improvements.

Improvements situated on the realty taken are an element of damages. n560 A condemnor who has placed improvements on the land prior to the taking is not required to compensate the landowner therefor, n561 but compensation is required if the improvements were made to the land rather than being placed on the land. n562 Courts have divided on the question of whether an owner can be denied compensation for improvements made by the owner with knowledge of the impending condemnation. n563 Upon a partial taking, the condemnee may recover for injury caused to improvements on that part of the land not taken. n564 And these severance damages may be recovered even

though a condemned parcel may be physically separated from the remaining parcel. n565 For determining the amount of such severance damages, the reduction in market value is the proper measure of damages; however, "cost to cure" may be used if curing truly restores the landowner to as good a position as before and such cost is less than the decrease in market value or the market value cannot be determined. n566

COMPUTER-ASSISTED RESEARCH

LEXIS: "eminent domain" w/10 compensation w/50 improvement!

§ 80.08(i) Awards for Taking of Use Restrictions.

Where equitable servitudes are considered as being part of a taking, the value to the dominant tenement of the equitable servitudes condemned is the diminution in value of the dominant tenement as the result of the servitude's loss. n567 If land taken has been subject to a use restriction, the compensation for the taking is based on the land's normal value. n568

COMPUTER-ASSISTED RESEARCH

LEXIS: "eminent domain" w/10 compensation w/50 restriction!

§ 80.08(j) Awards When the Taking Includes Mineral Rights.

If the interest taken is underlain by valuable minerals, the minerals are included in the award, n569 but if the mineral estate has already been separated from the surface, the owner of the minerals is entitled to be compensated separately. n570

Where land is condemned, the owners of mineral rights must show special damages to be entitled to compensation. This is because mineral deposits have value for condemnation purposes only to the extent they enhance the market value of the land, not from the standpoint of their own value in place or when extracted. n571 The value of minerals under land is compensable, n572 but should be considered as part of the land itself and not taken separately. n573

COMPUTER-ASSISTED RESEARCH

LEXIS: "eminent domain" w/10 compensation w/50 mineral!

§ 80.08(k) Compensation for Special Uses or Features of the Land.

The older viewpoint did not permit aesthetic considerations to enter into the calculation of damages, so loss of view was not compensable. More modern courts disagree, n574 and aesthetic injury to the remaining property may be compensable. n575 Trees planted for aesthetic, shading, and screening purposes and taken by condemnation are items of severance damage in a partial taking. n576

Under modern rules, courts must now take into consideration the special uses to which property is put in fixing damages in eminent domain. n577 Some courts hold that special use may enhance market value but not exclude it. n578 Sometimes the special use is simply that the property has a special value to the owner, either practical or merely sentimental. n579 Historical landmarks, for instance, may have a special value, n580 although a few courts deny such "special value" to the condemnee. n581

§ 80.08(l) Condemnor's Rights to Set Off.

Many states give the condemnor a right to set off for benefits the owner received to other property as a result of the

condemnation. n582 So in some states where only a portion of the owner's property is taken, the condemnor may set off against severance damages any special benefits accruing to the remainder of the property by reason of the improvements resulting from the condemnation. n583

States differ over whether the benefits may be set off against only the severance damages relating to the land taken or only against damages to the land remaining. The rule in some states is that benefits may be deducted from both the value of the land taken and the remainder. In other states it is the rule that the benefits may be a setoff only to damages awarded to the remainder. n584 A more specific variant of that rule is applied by those courts holding the offsets based on benefits to the remainder may be set off only against damages to the remainder. n585 A few states permit both special and general benefits from a partial taking to be set off against the value of the land taken as well as to the remainder. n586 If the land eventually to be taken is enhanced in value merely by the proposition of a taking, the condemnor is not required to pay that enhancement value as part of the condemnation award. n587 Likewise, a lowering of value because of imminent condemnation is not the proper value for the condemned land. n588

Courts vary considerably in the extent to which they entitle a condemnor to have set off against the award special benefits arising to other land of the condemnee from the new public use. n589 It has been held that, to be deductible, the benefits must be reasonably certain, n590 and must be special to the particular property. n591 Under this latter rule, benefits cannot be set off against damages to remaining land if the benefits accrue to all the property in the area, whether or not abutting on the improvement. n592 Because the test for the amount of the award is reduction in market value, there is no separate rule for consequential injuries and thus no setoff for consequential injuries. n593

COMPUTER-ASSISTED RESEARCH

LEXIS: "eminent domain" w/10 compensation w/50 "set off"

FOOTNOTES:

(n1)Footnote 442. *Town of Cheektowaga v. Starlite Builders, Inc., 668 N.Y.S.2d 293 (N.Y. App. Div. 1998)* (the Constitution requires that just compensation be paid for any property taken in eminent domain proceedings; compensation must be just as to all parties involved in the action); *Dimino v. Secretary of Com., 695 N.E.2d 659 (Mass. 1998)* (payment of just compensation is required when private property is taken in eminent domain action); *Cohen v. City of Hartford, 710 A.2d 746 (Conn. 1998)* (compensation is required under the 5th Amendment when there is a permanent, physical occupation of property, no matter how small the size of the taking or how great the purpose behind it); *Karam v. State, Dep't of Environmental Protection, 705 A.2d 1221 (N.J. Super. 1998)* (the Constitution requires just compensation be paid whenever land is taken in condemnation proceedings); *State v. Southwind Auto Sales, 951 S.W.2d 849 (Tex. App. 1997)* (holding "when the government lawfully acquires property under authority other than the power of eminent domain, no compensation is required"); *Fulton County v. Funk, 463 S.E.2d 883 (Ga. 1995); Cline v. McMullan, 431 S.E.2d 368 (Ga. 1993)* (power of eminent domain is derived from Constitution.). *See United States v. Wallace, 201 F.2d 65 (10th Cir. 1952).*

Charles T. McCormick, *The Measure of Compensation in Eminent Domain, 17 Minn. L. Rev. 461 (1933);* Edward B. Hanify, *Elements of Damages in Eminent Domain -- A New England View, 34 B.U. L. Rev. 146 (1954);* Clifton E. Speir, *Eminent Domain Proceeding Legal Basis for Appraising, 10 Baylor L. Rev. 1 (1958);* Sidney Goldstein, *Economic Evidence in Right-of-Way Litigation, 50 Geo. L.J. 205 (1961);* Henry B. Curtis, *Just Compensation in Eminent Domain Proceedings, 35 Neb. L. Rev. 250 (1956);* Jerome Dasso, *Changing Economic Conditions and the Condemnation Value of Real Property, 48 Or. L. Rev. 237 (1969);* John Worsham, *Problems Peculiar to a Partial Taking in Condemnation Proceedings, 14 U. Fla. L. Rev. 28 (1961);* as to valuation *see* Frank S. Sengstock & John W. McAuliffe, *What is the Price of Eminent Domain? An Introduction to the Problems of Valuation in Eminent Domain Proceedings,* 44 J. URB. L. 185 (1966); Garner, *Compensation Law Reform, 117 New. L.J. 1315 (1973);* John F. Sullivan, *The Montana Law of Valuation in Eminent Domain, 34 Mont. L. Rev. 90 (1973); Commonwealth Dep't of Hwys. v. Fultz, 360 S.W.2d 216 (Ky. 1962).* There is no constitutional requirement that money must be paid in advance of taking. *Gigliotti v.*

Redevelopment Auth. of City of New Castle, 362 F. Supp. 764 (W.D. Pa. 1973); Gray v. State Dep't of Hwys., 202 So. 2d (La. 1967). Loss of tenants due to publicity of intended condemnation resulted in a taking. *Conroy-Prugh Glass Co. v. Commonwealth, 321 A.2d 598 (Pa. 1974).*

(n2)Footnote 443. *Karam v. State, Dep't of Environmental Protection, 705 A.2d 1221 (N.J. Super. Ct. App. Div. 1998)* (taking clause does not limit government right to interfere with private property rights, but requires that compensation be paid in the event of a taking); *Town of Cheektowaga v. Starlite Builders, Inc., 668 N.Y.S.2d 293 (N.Y. App. Div. 1998)* (the Constitution requires that just compensation be paid for any property taken in eminent domain proceedings; compensation must be just as to all parties involved in the action); *Dimino v. Secretary of Com., 695 N.E.2d 659 (Mass. 1998)* (Payment of just compensation is required when private property is taken in eminent domain action); *Cohen v. City of Hartford, 710 A.2d 746 (Ct. 1998)* (compensation is required under the 5th Amendment when there is a permanent, physical occupation of property, no matter how small the size of the taking or how great the purpose behind it).

Bowles v. United States, 31 Fed. Cl. 37 (1994) (property owner filed eminent domain action seeking just compensation under 5th amendment); *NRG Co. v. United States, 31 Fed. Cl. 659 (1994)* (under 5th amendment, property owners are entitled to just compensation for taking of property); *Russian Volunteer Fleet v. United States 282 U.S. 481 (1931).* The rule of damages is the same whether the property is expropriated by law or taken by eminent domain. *Gray v. State Dep't of Hwys., 202 So. 2d 24 (La. 1967).* To receive damages in condemnation the landowner must show that the injury is special and peculiar to his real estate and not some inconvenience suffered by the public generally. *Young v. State, 17 246 N.E.2d 377 (Ind. 1969), cert. denied, Young v. Indiana 396 U.S. 1038 (1970).* The extent of the damages is the use for which the condemnor acquires the right, not merely that which the condemnor intends. *Henderson v. Iowa State Hwy. Comm'n, 151 N.W.2d 473 (Iowa 1967).* Traffic noise is a proper element for consideration in determining consequential damages in a partial condemnation of land if the noise element cannot be separated from other factors reducing the market value of the remaining property. *Dennison v. State, 239 N.E.2d 708 (N.Y. 1968). See* W. Reeves Lewis, *The Phantom of Federal Liability for Pollution Abatement in Condemnation Actions, 17 Mercer L. Rev. 364 (1966);* Note, *Judicial Review of Displacee Relocation in Federal Urban Renewal Projects: A New Approach?,* 3 Va. U. L. Rev. 258 (1969).

(n3)Footnote 444. *Richardson v. City & County of Honolulu, 124 F.3d 1150 (9th Cir. 1997)* (citing the Hawaii Constitution that "when a government uses its powers of eminent domain to condemn property, it must provide the property owner with 'just compensation'"); *Customer Co. v. City of Sacramento, 895 P.2d 900 (Cal. 1995); Providential Mut. Life Ins. Co. v. City of Atlanta, 864 F. Supp. 1274 (N.D.Ga. 1994); DeKalb County v. United Family Life Ins. Co., 219 S.E.2d 707 (Ga. 1975); White v. Southern Ry., 140 S.E. 560 (S.C. 1927).*

(n4)Footnote 445. *Richardson v. City & County of Honolulu, 124 F.3d 1150 (9th Cir. 1997)* (holding that "just compensation is the full monetary equivalent of the property taken"); *Community Redev. Agency of Hawthorne v. Force Elecs., 64 Cal. Rptr. 2d 209 (Cal. App. 1997)* (holding "the just compensation to which the owner is constitutionally entitled is the full and perfect equivalent of the property taken"); *Lee County v. Pierpont, 693 So. 2d 994 (Fla. App. 1997)* (holding "the guiding light of every proceeding in eminent domain or ancillary thereto is to secure to the owner of the property taken full compensation -- to make him whole -- nothing less, nothing more"); *Township of West Windsor v. Niereberg, 695 A.2d 1344 (N.J. 1997)* (holding "in order to make the condemnee whole, eminent domain proceedings are required to produce a 'fair market value' for the property"); *United States v. Miller, 317 U.S. 369 (1943); Phelps v. United States 274 U.S. 341 (1927); In re South Carolina Pub. Serv. Auth., 37 F. Supp. 28 (E.D.S.C. 1941); United States ex rel. T.V.A. v. Southern States Power Co., 33 F. Supp. 519 (W.D.N.C 1940); Chesapeake & O. Canal Co. v. Key, 3 Cranch CC 599 (D.C. Cir. 1929); Laflin v. Chicago, W. & W. Ry. Co, 33 F. 415 (E.D.Wis. 1887); Peckwith v. LaVezzola, 122 P.2d 678 (Cal. App. 1942); San Francisco A. & S. Ry. v. Caldwell, 31 Cal. 367 (1866); Alton & S. Ry. v. Carpenter, 14 Ill. 190 (1852); Henry v. Dubuque & P. Ry., 2 Iowa 288 (1855); Wood v. Syracuse Sch. Dist., 193 P. 1049 (Kan. 1920); Bangor & P. R.R. v. McComb, 60 Me. 290 (1872); In re Condemnation of Private Property, 536 N.W.2d 598 (Mich. App. 1995); Olsen v. Dearborn, 299 N.W. 295 (Mich. 1939); Humphrey v. Strom, 493 N.W.2d 554*

(Minn. 1992); Asche v. Loup River Pub. Power Dist., 287 N.W. 64 (Neb. 1939); Loehr v. Alamito Dairy Co., 275 N.W. 596 (Neb. 1937); Taylor v. Trenton, 128 A. 228 (N.J. 1925); In re Board of Water Supply Co., 13 N.E.2d 789 (N.Y. 1948); Petition of Gillespie, 32 N.Y.S.2d 96 (N.Y. App. Div. 1940); Arverne Bay Constr. Co. v. Thatcher, 15 N.E.2d 587 (N.Y. 1938); In re Bronx River Pkwy., 29 N.E.2d 465 (N.Y. 1938); Champlain Stone & Sand Co. v. State, 123 N.Y.S. 546 (N.Y. Ct. Cl. 1910); Raleigh v. Hatcher, 18 S.E.2d 207 (N.C. 1942). Donaldson v. Bismarck, 3 N.W.2d 808 (N.D.1942); Symonds v. Cincinnati, 14 Ohio 147 (1846); Bragg v. Yeargin, 238 S.W. 78 (Tenn. 1922); Southern R.R. v. Memphis, 148 S.E. 662 (Tenn. 1912); State v. Hale, 146 S.W.2d 731 (Tex. 1941); Parks v. Wisconsin Cent. R.R., 33 Wis. 413 (1873). No damages in condemnation for loss of view. *Earl v. Arkansas State Hwy. Comm'n, 405 S.W.2d 931 (Ark 1966); State by Mondale v. Gannons, Inc., 145 N.W.2d 321 (Minn. 1966),* but treated as an element of damages in determining value of property remaining. *State ex rel. Dep't of Hwys. v. Singletary, 185 So. 2d 642 (La. App. 1966); State ex rel. Dep't of Hwys. v. Allison, 372 P.2d 850 (Okla. 1962).* To receive damages in condemnation the landowner must show that the injury is special and peculiar to his real estate and not some inconvenience suffered by the public generally. *Young v. State, 246 N.E. 377 (Ind. 1969).* The extent of the damages is the use to which the condemnor acquires the right, not merely that which he intends. *Henderson v. Iowa State Hwy. Comm'n, 151 N.W.2d 473 (Iowa 1967).* Traffic noise is a proper element for consideration in determining consequential damages in a partial condemnation of land if the noise element cannot be separated from other factors reducing the market value of the remaining property. *Dennison v. State, 239 N.E.2d 708 (N.Y. 1968). See* W. Reeves Lewis, Sr. *The Phantom of Federal Liability for Pollution Abatement in Condemnation Action, 17 Mercer L. Rev. 364 (1966);* Note, *Judicial Review of Displacee Relocation in Federal Urban Renewal Projects: A New Approach?* 3 Va. U. L. Rev. 258 (1969).

(n5)Footnote 446. *Property Owners Imp. Dist., No. 247 of Pulaski County v. Williford, 843 S.W.2d 862 (Ark. App. 1992).* True test is value of land to the condemnee, not the condemnor. *Greystone Heights Redev. Corp. v. Nicholas Inv. Co., Inc., 500 S.W.2d 292 (Mo. App. 1973).* It is the owners's loss not the taker's gain which is the measure of compensation in eminent domain. *State Hwy. Dep't v. Thomas, 154 S.E.2d 812 (Ga. App. 1967); Mathis v. State Dep't of Roads, 135 N.W.2d 17 (Neb. 1965).* Compensation for land taken must rest on its loss to the landowner, not its benefit to the condemnor. *State v. Howald, 315 S.W.2d 786 (Mo. 1958).* Value to owner as basis for condemnation. *Housing Auth. of Savannah v. Savannah Iron & Wire Works, 87 S.E.2d 671 (Ga. App. 1955).* The value of the property to the condemnor or its need is not an element of damages. Value is what owner lost not what condemnor gained. *St. Agnes Cemetery v. State, 143 N.E.2d 377 (N.Y. 1957).*

(n6)Footnote 447. *Humphrey v. Strom, 493 N.W.2d 554 (Minn. 1992).* Damages for lost profits, goodwill or income are too speculative to be considered. *Miller v. Campbell County, 854 P.2d 71 (Wyo. 1993).* Proper measure of compensation is fair market value of property taken and personal loss; particularly recovery for emotional distress is not allowed. *Gissel v. Kenmore Twp., 512 N.W.2d 470 (N.D.1994).* Landowners' compensation for damages incurred included substantial impairment of established access. *In re Platte Valley Pub. Power & Irr. Dist. 289 N.W. 383 (Neb. 1939).* In Michigan the condemnor who discontinues proceedings must pay expenses and reasonable attorney's fees. *Kent County v. Ryan, 118 N.W.2d 824 (Mich. 1962).* Consequential damage is a diminution of the market value of the remaining property after the taking. *Weeks v. DeKalb Co., 230 S.E.2d 79 (Ga. App. 1976).*

(n7)Footnote 448. *Azul Pacifico, Inc. v. City of Los Angeles, 740 F. Supp. 772 (C.D. Cal. 1990); Matter of County of Clinton, 612 N.Y.S.2d 496 (1994); United States v. Chandler-Dunbar Water Power Co., 229 U.S. 53 (1913).* Where Indian lands are taken by eminent domain, the court must consider, in addition to fair market value, the fact that the lands were exempt from taxation. *United States v. Certain Parcels of Land, 327 F. Supp 181 (W.D.N.Y. 1970).* Value to owner as basis for condemnation. *Housing Auth. of Savannah v. Savannah Iron & Wire Works, 87 S.E.2d 671 (Ga. App. 1955).* It is the owner's loss not the taker's gain which is a measure of compensation in eminent domain. *Mathis v. State Dep't of Roads, 135 N.W.2d 17 (Neb. 1965).* Compensation for land taken must rest on its loss to the landowner, not its benefit to the condemnor. *State v. Howald, 315 S.W.2d 786 (Mo. 1958).* Loss of view is compensable. *State ex rel. State Hwy. Comm'n v. Hesselden Inv. Co., 504 P.2d 634 (N.M. 1972).* No liability to condemnor because of delay in perfecting the taking. There is no recovery for manifestation of intent to condemn on theory of de facto taking. *City of Buffalo v. J.W. Clement Co., 269 N.E.2d 895 (N.Y. 1971).* Restricting the "cost to cure" formula to temporary damage.

San Antonio River Auth. v. Hunt, 405 S.W.2d 700 (Tex. App. 1966). See Bernard R. Adams, *Eminent Domain, Police Power and Urban Renewal: Compensation for Interim Depreciation in Land Values, 7 Ga. L. Rev. 226 (1973).*

(n8)Footnote 449. *City of Blue Springs v. Central Dev. Ass'n, 831 S.W.2d 655 (Mo. Ct. App. 1992).* Evidence of damages and its effect on future sales was too speculative and remote to be considered. *Fonticello Mineral Springs Co. v. Richmond, 137 S.E. 458 (Va. 1927).* Loss of business is not a proper element in eminent domain. Loss of a liquor license as the result of condemnation is not compensable. *Restaurants, Inc. v. City of Wilmington, 274 A.2d 137 (Del. 1971).* Loss of profits caused by reduction in traffic flow, standing alone, is not subject to compensation in eminent domain. *Weldon v. State 279 N.E.2d 554 (Ind. 1972).* If the value of the business operated on a leasehold being condemned and the value of the leasehold itself cannot readily be separated, good will can be taken as an element. *In re Larned-Bates Rehab. Project, 202 N.W.2d 816 (Mich. App. 1972).* Overflow caused by storm sewer construction was compensable as damage to remainder of property. *Department of Transp. v. Jones, 358 N.E.2d 402 (Ill. App. 1976).* Loss of profits is compensable if not too remote and speculative. *Venable v. State Hwy. Dep't 227 S.E.2d 509 (Ga. App. 1976).* Public fear of pipeline explosion is an element of value to adjacent land. *Louisiana Interstate Gas Corp. v. Broussard, 336 So. 2d 1049 (La. App. 1976).*

(n9)Footnote 450. *Locklin v. City of Lafayette, 867 P.2d 724 (Cal. 1994); Texas v. Schmidt, 805 S.W.2d 25 (Tex. App. 1991); Hope v. United States, 23 Cl. Ct 776 (1991).* Damages for inverse condemnation are measured as of the date on which notice of the action was served on the state rather than on the date the state entered and took possession of the property. *State Hwy. Comm'n v. Blackiston Land Co., Inc., 301 N.W.2d 663 (Ind. App. 1973).* Severance damages are not allowable because an assessment lien will be placed on the remaining property to finance the improvement for which the land is taken. *City of Baldwin Park v. Stoskus, 503 P.2d 1333 (Cal. 1972).* License not compensable in a condemnation proceeding. *Belmont County Water Dist. v. State, 135 Cal. Rptr. 163 (Cal. App. 1976).* Contra *Costa Water Dist. v. Vaquero Farms, 68 Cal. Rptr. 2d 272 (Cal. App. 1997)* (holding "when a condemnation action severs the land by taking only a part of it, the owner may be entitled to an additional sum as compensation for the economic effect of the condemnation on the value of the remaining property").

(n10)Footnote 451. *Sintra, Inc. v. City of Seattle, 935 P.2d 555 (Wash. 1997)* (holding the determination of compensation "must be guided by equitable principles and the measures of such compensation will vary with the facts"); *McDonald's v. State Hwy. Comm'n of Miss., 592 So. 2d 927 (Miss. 1991); Glendale Redev. Agency v. Parks, 23 Cal. Rptr. 2d 14 (1993); State Plant Bd. v. Smith, 110 So. 2d 401 (Fla. 1959).*

(n11)Footnote 452. *State of Idaho ex rel. Ohman v. Talbot Family Trust, 820 P.2d 695 (Idaho 1991); Arlen of Nanuet, Inc. v. State, 272 N.Y.S.2d 565 (N.Y. Ct. Cl. 1966).*

(n12)Footnote 453. *Patrick Media Group, Inc. v. DuPage Water Comm'n, 630 N.E.2d 958 (Ill. App. 1994); Kaw Valley Drainage Dist. v. Kansas City Terminal Ry., 123 P. 991 (Kan. 1912).*

(n13)Footnote 454. *Persyn v. United States, 32 Fed. Cl. 579 (1995). See Griggs v. Allegheny County, 369 U.S. 84 (1962); Vuljan v. Board of Comm'n, 70 So. 2d 910 (La. App. 1965), cert. denied, 172 So. 2d 701 (La. 1965); Clement v. State Reclamation Board, 220 P.2d 897 (Cal. 1950); Owens v. South Carolina State Hwy. Dep't, 121 S.E.2d 240 (S.C. 1961). See* Comment, *Allocation of Liability to Uncompensated Landowners for Damages Arising in the Interstate Hwy. System, 1965 Wash. U. L.Q. 236.*

(n14)Footnote 455. *Forest Preserve Dist. v. West Suburban Bank, 621 N.E.2d 215 (Ill. App. 1993); Hope v. United States, 23 Cl. Ct. 776 (1991); Plattsmouth Bridge Co. v. Globe Oil & Ref. Co, 7 N.W.2d 409 (Iowa 1943); Simms v. Dillon, 193 S.E. 331 (W. Va. 1937).*

(n15)Footnote 456. *Peale v. Davis, 19 F.2d 695 (D.C. Cir. 1927), cert. denied, 275 U.S. 525, 48 S. Ct. 19 (1927); Del Oro Hills v. City of Oceanside, 37 Cal. Rptr. 2d 677 (Cal. App. 1995); Kittinger v. Rossman, 112 A. 388 (Del. 1921); Sheppard v. City of Edison, 132 S.E. 218 (Ga. 1926); Brewer v. Bowman, 9 Ga. 37 (1850); Schnull v.*

Indianapolis Union Ry., 131 N.E. 51 (Ind. 1921); State v. Chicago, M. & St. P. R.R., 31 N.W. 365 (Minn. 1887); Hinds County v. Johnson, 98 So. 95 (Miss. 1923); Pauchogue Land Corp. v. Long Island State Park Comm'n, 152 N.E. 451 (N.Y. 1926); Amarillo v. Tutor, 267 S.W. 697 (Tex. Com. App. 1924); Richmond v. Goodwyn, 112 S.E. 787 (Va. 1922); State Hwy. Comm'n v. Kreger, 105 S.E. 217 (Va. 1920); Presbytery of Seattle v. King County, 787 P.2d 907 (Wash. 1990). There is no presumption that the legislature intended to provide an inadequate compensation to the owners of property taken. *Allison v. Sutton County, 278 S.W. 928 (Tex. App. 1925). See Woodruff v. Glendale, 1 N.W. 581 (Minn. 1879); People v. Loew, 7 N.E. 297 (N.Y. 1886); In re Flannery, 135 N.Y.S. 612 (N.Y. App. Div. 1912); Watson Ex'rs v. Trustees of Pleasant Twp., 21 Oh. St. 667 (1871).*

(n16)Footnote 457. *Poudre Valley Rural Elec. Ass'n, v. City of Loveland, 807 P.2d 547 (Colo. 1991); Schnull v. Indianapolis Union Ry., 131 N.E. 51 (Ind. 1921); Saratoga Water Serv., Inc. v. Saratoga Water Auth., 608 N.Y.S.2d 952 (N.Y. App. Div. 1994).*

(n17)Footnote 458. *State Hwy. Comm'n v. Hammock, 148 S.W. 324 (Ark. 1941); Broward County v. Carney, 586 So. 2d 425 (Fla. App. 1991); Pauchogue Land Corp. v. Long Island State Park Comm'n, 152 N.E. 451 (N.Y. 1926).*

(n18)Footnote 459. *Dolan v. City of Tigard, 114 S. Ct. 2309 (1994).* On the question of just valuation for compensation, see the discussion in *Wilmot v. State, 297 N.E.2d 90 (N.Y. 1973). See also* Thomas L. Dettelback, *Just Compensation for Real Estate Condemnation*, 15 Clev.-Marshall L. Rev. (1966); Abraham D.Slavitt, *Just Compensation Update, 48 Conn. B.J. 241 (1974).*

(n19)Footnote 460. *See NRG Co. v. United States, 31 Fed. Cl. 659 (1994)* (To be "just," compensation awarded in takings case must include not only value of property on date of taking, but also compensation for any significant delay in government's payment of the award to property owner). *See* Thomas R. Jones, *Just Compensation Via Fair Market Value May not Include the Kitchen Sink -- It Could be Noncompensable, 48 Miss. L.J. 1 (1975).*

(n20)Footnote 461. *United States v. Toronto, Hamilton & Buffalo Navigation Co., 338 U.S. 396 (1949); Saratoga Water Servs., Inc. v. Saratoga County Water Auth., 608 N.Y.S.2d 952 (N.Y. 1994). See* Henry B. Curtis, *Just Compensation in Eminent Domain Proceedings, 35 Neb. L. Rev. 250 (1955);* Richard P. Nelson, *Real Estate Valuation in Condemnation Cases -- The Place for the Expert, 43 Neb. L. Rev. 137 (1963);* Addison M. Bowman, III, *Valuation in Eminent Domain Proceedings in Pennsylvania, 66 Dick. L. Rev. 453 (1962);* Abraham D.Slavitt, *Just Compensation -- Updated, 48 Conn. B.J. 241 (1974).*

(n21)Footnote 462. *Bass Enterprises Production Co. v. United States, 133 F.3d 893 (Fed. Cir. 1998)* (fair market value is the standard for determining just compensation for a permanent taking; rental value is the standard for determining just compensation for a temporary taking); *Good v. United States, 39 Fed. Cl. 81 (1997)* (holding "just compensation is, in most cases, set according to the fair market value of the property taken by the government"); *Los Angeles County, Metro. Transp. Auth. v. Continental Dev. Corp., 16 Cal. 4th 694, 941 P.2d 809 (Cal. 1997)* (holding "just compensation requires only that the owner be paid the fair market value of the property, measured on the date of valuation"); *United States v. 158.76 Acres of Land, 298 F.2d 559 (2d Cir. 1962); Calvo v. United States, 303 F.2d 902 (9th Cir. 1962); United States v. 1,108 Acres of Land, 204 F. Supp. 737 (E.D.N.Y. 1962);* United States v. 206.82 Acres of land, 30 F.R.D.512 (M.D.Pa. 1962); *United States v. Certain Interests in Property, 205 F. Supp. 745 (D.Mont. 1962); Kinter v. United States, 156 F.2d 5 (3d Cir. 1946); People ex rel. Dep't of Pub. Works v. Thompson, 271 P.2d 507 (Cal. 1954); People ex rel. State Park Comm'n v. Johnson, 22 Cal. Rptr. 149 (Cal. App. 1962), cert. denied, 372 U.S. 703 (1963); People ex rel. Dep't. of Pub. Works v. City of Fresno, 26 Cal. Rptr. 853 (Cal. App. 1962); Peoples Gas Light & Coke Co. v. Buckles, 182 N.E.2d 169 (Ill. 1962), cert. denied, 371 U.S. 185 (1962); Freshwater v. Wildman, 117 N.W.2d 910 (Iowa 1962); State Dep't of Transp. and Dev. v. Oswald, 665 So. 2d 668 (La. App. 1995)* (market value is the ordinary standard used); *State ex rel. Dep't of Hwys. v. Bundy, 143 So. 2d 785 (La. App. 1962); Lee v. Indian Creek Drainage Dist. No. 1, 148 So. 2d 663 (Miss. 1963); State ex rel. State Hwy. Comm'n v. Warner, 361 S.W.2d 159 (Mo. Ct. App. 1962); State Dep't of Roads v. Mahloch, 116 N.W.2d 305 (Neb. 1962); State ex. rel. Comm'r of Transp. v. Shein, 662 A.2d 1020 (N.J. App. 1995)* (fair market value means a willing buyer and a willing seller); *City of Cleveland*

v. Carcione, 190 N.E.2d 52 (Ohio App. 1963); State Hwy. Comm'n v. Anderson, 381 P.2d 707 (Or. 1963); contra Garner v. Gwinnett County, 125 S.E.2d 563 (Ga. App. 1962). Market value, not the "substituted site," is the proper eminent domain theory. *South Dakota Game, Fish & Parks Dep't v. United States, 329 F.2d 665, cert. denied, 379 U.S. 900 (1964).* Fair market value means a willing buyer and a willing seller. *United States v. 147.47 Acres of Land, 352 F. Supp. 1055 (M.D.Pa. 1972).* Fair cash market value in eminent domain. *Department of Pub. Works & Bldgs. ex rel. People v. Hufeld, 215 N.E.2d 312 (Ill. App. 1966).* Willing buyer vs. willing seller determines fair market value for eminent domain. *Department of Pub. Works & Bldgs. v. Oberlaender, 247 N.E.2d 888 (Ill. 1969).* Value of property at forced sale is not fair market value for purposes of eminent domain. *Masheter v. Brewer, 318 N.E.2d 849 (Ohio 1974).* Market value may not be based solely on capitalization of income expected to be realized from newly constructed buildings. *Arlen of Nanuet, Inc. v. State, 258 N.E.2d 890 (N.Y. 1970).*

(n22)Footnote 463. *Landau, Inc. Co. v. City of Overland Park, 261 Kan. 394, 930 P.2d 1065 (Kan. 1997)* (providing "the landowner shall have a right to have a fair appraisal by fair and impartial commissioners who are possessed of all the facts necessary to determine what just and full compensation for the landowners shall be under the circumstances"); *Granite Valley Hotel L.P. v. Jackpot Junction Bingo & Casino, 559 N.W.2d 135 (Minn. App. 1997)* (providing "just compensation can be determined by pretrial agreement or either side can demand a right to a jury trial and the appellate process on what is fair compensation"); *Sheldon v. United States, 34 Fed. Cl. 355 (Fed. Cl. 1995)* (market value not an absolute test); *United States v. Cors, 337 U.S. 325 (1949); Kimball Laundry Co. v. United States, 338 U.S. 1 (1949).* The market value is not an absolute test. United States v. 45,131.44 Acres of Land, 483 F.2d (19th Cir. 1973). Burden of determining value of fixture taken in condemnation is on the lessor. *United States v. Certain Land in Manhattan, 357 F. Supp. 1382 (S.D.N.Y. 1972).* Concerning valuation in condemnation, Pennsylvania holds strictly to the "before and after" rule. *Dyer v. Commonwealth, 152 A.2d 760 (Pa. 1959). See* Donald E. Wintrode, *Determination of Just Compensation in Eminent Domain Proceedings for Land Subjected to Illegal Uses or Conditions, 38 Notre Dame Law 196 (1963);* Keith Miller, *Land Condemnation -- Federal Income Tax Consequences, 38 Neb. L. Rev. 507 (1958). State Dep't of Transportation and Development v. Latiolais, 690 So. 2d 66 (La. App. 1996)* (the value of a bulk fuel facility located within the city limits was required to be based on the cost of constructing a new facility within the city limits).

(n23)Footnote 464. *Richardson v. City & County of Honolulu, 124 F.3d 1150 (9th Cir. 1997)* (holding "just compensation is the full monetary equivalent of the property taken"); *Community Redev. Agency of Hawthorne v. Force Elecs., 64 Cal. Rptr. 2d 209 (Cal. App. 1997)* (holding "the just compensation to which the owner is constitutionally entitled is the full and perfect equivalent of the property taken. This means substantially that the owner shall be put in as good position pecuniarily as he would have been if his property had not been taken."); *United States v. 50 Acres of Land, 469 U.S. 24 (1984); Kinter v. United States, 156 F.2d 5 (3d Cir. 1946); United States ex rel T.V.A. v. Powelson, 319 U.S. 266 (1943); Mississippi State Hwy. Comm'n v. Gilich, 609 So. 2d 367 (Miss. 1992)* (historical, architectural or aesthetic aspects not to be considered unless they enhance market value of house); *State v. Resolution Trust Corp., 827 S.W.2d 106 (Tex. App. 1992)* (unaccepted offer represents opinion of offeror and is not conclusive as to for market value). Historical and architectural aspects of house were not items of value unless they enhanced its market value as a residence. *City of Mechanicsville v. Fort, 349 N.Y.S.2d 215 (N.Y. App. Div. 1973).*

Landowner entitled to compensation on basis of most advantageous use to which the land can be put. *City of Orangeburg v. Buford, 87 S.E.2d 822 (S.C. 1955).* Unaccepted offer to purchase land merely represents the opinion of the offeror and is not evidence of the value in a condemnation action. *Hans v. Gulf, Colo. & Santa Fe Ry., 320 S.W.2d 333 (Tex. 1959).*

(n24)Footnote 465. *Bass Enterprises Production Co. v. United States, 133 F.3d 893 (Fed. Cir. 1998)* (just compensation should put the property owner in as good a position economically as the owner would have been if the taking had never occurred); *Fulton County v. Funk, 463 S.E.2d 883 (Ga. 1995)* (owners' loss, not takers' gain is to be considered); *State v. 3M Nat'l Adver. Co., 653 A.2d 1092 (N.H. 1995)* (special benefits may be offset against damages); *Brooklyn E. Dist. Terminal v. New York, 139 F.2d 1007 (2d Cir. 1944), cert. denied, 322 U.S. 747 (1944).* True test is

value of land to the condemnee, not the condemnor. *Greystone Heights Redev. Corp. v. Nicholas Inv. Co., 500 S.W.2d 292 (Mo. App. 1973).* Special benefits may be offset against damages, even those directly attributable to the value of the land taken. *Smith v. City of Greenville, 92 S.E.2d 639 (S.C. 1956).*

(n25)Footnote 466. *Kimball Laundry Co. v. United States, 338 U.S. 1 (1949); City of Houston v. Religious of the Sacred Heart, 811 S.W.2d 734 (Tex. App. 1991)* (peculiar needs or attachment of owner to property not considered); *Lucre Corp. v. County of Gibson, 657 N.E.2d 150 (Ind. App. 1995)* (enhancement due to the projected improvement not computed into condemnation damages); *Department of Transp. v. George, 414 S.E.2d 307 (Ga. App. 1991)* (destruction of business in partial taking compensable). Denying any enhancement due to the projected improvements in computing damages in condemnation from the *United States v. Miller, 317 U.S. 369 (1943),* to the "Wait and See Doctrine," in the rule against remoteness. *Phelps v. Shropshire, 183 So. 2d 158 (Miss. 1966).* The potential value of property by reason of being an historical landmark should be taken into consideration in affixing in fair value for the property. *Scott v. State ex rel. Pea Ridge Nat'l Park Comm'n, 326 S.W.2d 812 (Ark. 1959).* Georgia has held that in computing damages condemnation, the court must consider the enhancement of the value of the property which could result from the projected use by the condemnor for highway purposes. *Howard v. Housing Auth. of College Park, 140 S.E.2d 885 (Ga. 1965).* Upholding the theory of increasing market value due to the unique use or benefit to the owner. *Housing Auth. of Atlanta v. Troncalli, 142 S.E.2d 93 (Ga. App. 1965).* Declining to place monetary value on historical situations. *Frontier Town Properties, Inc. v. State, 296 N.Y.S.2d 90 (Ct. Cl. 1968).* Recovery denied where the taking by eminent domain changed the grade of a part of the street so as to interfere with the view of the street. *State ex rel. Shiederer v. Preston, 166 N.E.2d 748 (Ohio 1960). See Eminent Domain: Compensated for Partial Taking of Farm Land in Constructing Limited Access Hwys., 42 Minn. L. Rev. 106 (1957).* Destruction of business through partial taking was compensable. *Young v. Hillsborough County, 215 So. 2d 300 (Fla. 1962). See also* William E. Williams, *Eminent Domain -- Compensation for Business Damages in Florida, 22 U. Fla. L. Rev. 163 (1969).* Adopting the "Assembled Industrial Plant Doctrine" in eminent domain. *Gottus v. Redevelopment Auth., 229 A.2d 869 (Pa. 1967).*

(n26)Footnote 467. *United States v. Eltzroth, 124 F.3d 632 (4th Cir. 1997)* (holding "just compensation for the taking so accomplished must be determined as of the date of the government's statutory election"); *State ex rel. Missouri Hwy. & Transp. Comm'n v. Edelen, 872 S.W.2d 551 (Mo. App. 1994)* (fair market value computed by considering comparable sales, cost of replacement, and capitalization of income); *Lynch v. Commonwealth Transp. Comm'r, 442 S.E.2d 388 (Va. 1994)* (market value at the time of taking is the test); *Love v. United States, 141 F.2d 981 (8th Cir. 1944).* Sales of comparable property at or near time of taking is best evidence. *United States v. 100 Acres of Land, 468 F.2d 1261 (9th Cir. 1972), cert. denied, 414 U.S. 822 (1973).* Even though the use of the land is subject to a restriction, the compensation in eminent domain is the value of the land for commercial uses. *In re Appropriation of Easement for Hwy. Purposes, 159 N.E. 612 (Ohio 1959).* Depreciation in value caused by the condemnation work is not a proper factor in condemnation. *City of Cleveland v. Carcione, 190 N.E.2d 52 (Ohio App. 1963).* Market value as of time of taking is the test. *City of Medina v. Cook, 418 P.2d 1020 (Wash. 1966). See* Karl K. Hoagland, Jr, M. Edward Keefe, Jr., & Joseph A. Morrissey, *Symposium on "Just Compensation" in Eminent Domain in Illinois, 1957 U. Ill. L.F. 289 (1957).* Even though the condemning authority failed to pay compensation before taking, the condemning authority could not be subjected to penalty, for the owner receiving just compensation, recovers all the law allows; the measure of damages was market value plus severance or consequential damages by reason of the diminution in market value of the remaining property taken. *Gray v. State Dep't of Hwys., 202 So. 2d 24 (La. 1967).* The normal methods for fair market value are comparable sales, cost of replacement, and capitalization of income. *Northeast Mo. Elec. Co-op v. Fulkerson, 542 S.W.2d 26 (Mo. App. 1976).*

(n27)Footnote 468. *City of Kenai v. Burnett, 860 P.2d 1233 (Alaska 1993)* (Landowners were entitled to some project-enhanced value as result of "general knowledge" that city planned to build golf course in vicinity of their property). Evidence as to sale of property was excluded where values were enhanced by projected improvement. *Socony Vacuum Oil Co. v. State, 170 N.W.2d 378 (Iowa 1969). See* Karl K. Hoagland, Jr, M. Edward Keefe, Jr. & Joseph A. Morrissey, *Symposium on "Just Compensation" in Eminent Domain in Illinois, 1957 U. Ill. L.F. 289 (1957).*

(n28)Footnote 469. *Board of Comm'rs of New Orleans Exhibition Hall Auth. v. Missouri Pac. R.R., 625 So. 2d*

1070 (La. App. 1993) (owner not entitled to more compensation based on higher value after date suit was filed), *cert. denied, New Orleans 2000 Partnership v. Board of Comm'rs of New Orleans Exhibition Hall Auth., 114 S. Ct. 2707 (1994); People ex rel. Harding v. Atwater, 1 N.E.2d 46 (Ill. 1936).* Where the physical seizure method is followed instead of other condemnation proceedings, the taking occurs at the moment of seizure, even though title does not pass until compensation is actually paid. *Stringer v. United States, 471 F.2d 381* (5th Cir.), *cert. denied, 412 U.S. 943 (1973).* The value of the property is fixed at the time of filing the petition for condemnation. *Jefferson County v. Adwell, 103 So. 2d 143 (Ala. 1956).* The increased value to the condemned tract which would result from the urban renewal profit must be considered. *Housing Auth. v. York, 126 S.E.2d 246 (Ga. Ct. App. 1962).* Increment in value to condemned property which would result from the improvement for which the property is taken is not a proper element of consideration. *State ex rel. Dep't of Hwys. v. Johnson, 141 So. 2d 54 (La. App. 1962); In re Throgs Neck Expressway, 229 N.Y.S.2d 947 (N.Y. App. Div. 1962).* Value is what owner lost not what condemnor gained. *St. Agnes Cemetery v. State, 143 N.E.2d 377 (N.Y. 1957).* Acceptance of payment of the amount of the award, where tender into court is not necessary to a quick taking, waives objection to the amount of the award. *North Carolina State Hwy. & Pub. Works, Comm'n v. Pardington, 88 S.E.2d 102 (N.C. 1955).* Unless possession has been taken, the date of trial for appropriation proceedings is the day of taking. *In re Appropriation of Easement for Hwy. Purposes, 221 N.E.2d 476 (Ohio App. 1966). City of Newburgh v. Kirchner, 651 N.Y.S.2d 100 (1996)* (the price paid for property at a recent sale is not dispositive of the issue of its current value).

(n29)Footnote 470. *Matter of County of Nassau, 533 N.Y.S.2d 781 (N.Y. App. Div. 1988).* "Before and after" as the test of fair market. *Mississippi State Hwy. Comm'n v. Hillman, 198 So. 565 (Miss. 1940).* Before and after taking rule in partial taking. *Arkansas State Hwy. Comm'n v. Ptak, 364 S.W.2d 794 (Ark. 1963). Hunter Press, Inc. v. Ives, 183 A.2d 842 (Conn. 1962)* (cost of moving presses and other equipment should be considered); *Department of Pub. Works & Bldgs. v. Divit, 182 N.E.2d 749 (Ill. 1962)* (replacement value is an element); *Comstock v. Iowa State Hwy. Comm'n, 121 N.W.2d 205 (Iowa 1963); Commonwealth Dep't of Hwys. v. Tyree, 365 S.W. 472 (Ky. 1963); City of Baltimore v. State Roads Comm'n, 192 A.2d 271 (Md. 1963); State by Lord v. North Star Concrete Co., 122 N.W.2d 118 (Minn. 1963); Connor v. State Dep't of Roads, 120 N.W.2d 916 (Neb. 1963).* Where there has been a partial taking the owner is entitled to the difference between the market value of the remainder after the taking. *Schwartz v. City of New London, 120 A.2d 84 (Conn. 1955);* Boldt v. State, 230 N.Y.S.2d (N.Y. Ct. Cl. 1962). Or as otherwise stated the market value of the land taken plus the diminution in value of the remainder. *Valentino v. Commonwealth, 108 N.W.2d 556 (Mass. 1952).* If part not taken is injured, owner is entitled to difference in value before and after taking. *Department of Pub. Works & Bldgs. v. Crumbaugh, 274 N.W.2d 161 (Ill. App. 1971); Orleans Parish Sch. v. Montegut, Inc., 255 So. 2d 613 (La. App. 1971).* Strict "before and after" rule in damages on condemnation. *Brown v. Commonwealth, 159 A.2d 881 (Pa. 1960).* Granting of an aviation easement over the appellant's land limited damage to the difference between the value of the property before and after the easement rather than a taking of the fee. *Minkowitz v. City of West Memphis, 406 S.W.2d 887 (Ark. 1966).* Concerning valuation in condemnation, Pennsylvania holds strictly to the "before and after" rule. *Dyer v. Commonwealth, 152 S.2d 760 (Pa. 1959).* Where only part of a tract is taken damage to the balance is measured on the before and after rule. *Sanderson Farms, Inc. v. State Hwy. Comm'n, 324 So. 2d 243 (Miss. 1975).*

(n30)Footnote 471. *Walkenhorst v. State, Dep't of Roads, 573 N.W.2d 474 (Neb. 1998)* (when trees are planted for a special purpose (windbreaks, shade, aesthetics) the proper measure of the value of condemned land is the difference in value of the land before and after the removal of the trees; any evidence of this nature that is presented to the court must be relevant to a determination of the fair market value of the land); *In re Condemnation by Com., Dep't of Transp., 709 A.2d 939 (Pa. Cmwlth. 1998);* (the proper measure of just compensation is effected through a comparison of the fair market value of the property immediately before and immediately after the taking); *Danamere Farms, Inc. v. Iowa DOT, 567 N.W.2d 231 (Iowa 1997)* (holding "the ordinary measure of compensation in eminent domain cases involving a partial taking is the difference between the fair market value of the condemnee's property immediately before the taking and the value of the property that remains following the taking"); *County of Anoka v. Blaine Bldg. Corp., 566 N.W.2d 331 (Minn. 1997)* (defining the "before and after rule" as "the difference in market value of the land before the taking and the market value of the remaining land after the taking"); *Lantis v. Omaha, 467 N.W.2d 649 (Neb. 1991)* (fair market value of the remainder of the land before and after the taking is proper measure of damages); *United States v.*

Banisadr Bldg. Joint Venture, 65 F.3d 374 (4th Cir. 1995) (just compensation is the difference between the fair and reasonable market value of the land immediately before the taking and the fair and reasonable market value of portion that remains after the taking); *St. Clair County v. Bukacek, 131 So. 2d 683 (Ala. 1961).* Depreciation suffered in common by all land in vicinity of highway is not comparable. *Department of Pub. Works & Bldgs. v. Horejs, 223 N.E.2d 207 (Ill. App. 1976).* For severance damages to be awarded there must be a unity of title, use and contiguity. *State v. Church of Nazarene, 354 N.E.2d 320 (Ind. App. 1976).*

(n31)Footnote 472. *Trustees of Wade Baptist Church v. Mississippi State Hwy. Comm'n, 469 So. 2d 1241 (Miss. 1985)* ("Value," used in eminent domain proceedings, refers to appraisal and economic concept of fair market value). Fair market value in eminent domain. *Department of Pub. Works & Bldgs. ex rel. People v. Hufeld, 215 N.E.2d 312 (Ill. App. Ct. 1966).* Measure of damages in eminent domain is diminution of market value by reason of taking. *Western Slope Gas Co. v. Lake Eldora Corp., 512 P.2d 641 (Colo. App. 1973).* Market value as of time of taking is the test. *City of Medina v. Cook, 418 P.2d 1020 (Wash. 1966).* Market value not the "substituted site" is the proper eminent domain theory. *United States v. South Dakota Game, Fish & Parks Dep't, 329 F.2d 665 (8th Cir. 1964), cert. denied, 379 U.S. 900 (1964);* George S. Mickelson, S.D.L. Rev. 1965 (1965). Test in eminent domain is market value at time of taking. *Kinney v. Commonwealth, 126 N.E.2d 365 (Mass. 1955); Tigar v. Mystic River Bridge Authority, 109 N.E.2d 148 (Mass. 1952).* The fair market value is a proper test in condemnation regardless of whether the property is actually being used for its highest possible use. *Suffolk County v. Firester, 339 N.E.2d 154 (N.Y. 1975).*

(n32)Footnote 473. *Frazee v. C.I.R., 98 T.C. 554 (T.C. 1992)* (The fair market value of property is not affected by whether the owner has actually put the property to its highest and best use, nor whether the owner ever intends to do so). *But see Robinson v. Town of Westport, 610 A.2d 611 (Conn. 1992)* (The "highest and best use" concept, chiefly employed as a starting point in estimating the value of real estate by appraisers, has to do with the use which will most likely produce the highest market value). The market value is not an absolute test. *United States v. 45,131.44 Acres of Land, 483 F.2d 569 (10th Cir. 1973). Davidson County Bd. of Educ. v. First Am. Nat'l Bank, 301 S.W.2d 905 (Tenn. 1957).* Market value is the true test. *Speir v. United States, 485 F.2d 643 (Ct. Cl. 1973); State ex rel. Dep't of Hwys. v. Entre Nous, Inc., 283 So. 2d 291 (La. App. 1973); Thurow v. City of Dallas, 499 S.W.2d 347 (Tex. App. 1973).* Market value at time of actual taking of possession. *People ex rel. Dep't of Public Works v. Simon Newman Co., 112 Cal. Rptr. 298 (Cal. App. 1974).* Highest and best use. *State ex rel. Dep't of Hwys. and Spillman, 276 So. 2d 905 (La. App. 1973).* Highest and best use value may be commercial, though zoned for residential. *State ex rel. Dep't of Hwys. v. Strickland, 290 So. 2d 714 (La. App. 1974). See* Sidney Z. Searles, *Highest and Best Use: The Keystone of Valuation in Eminent Domain, 45 N.Y. St. B.J. 36 (1973).*

(n33)Footnote 474. *Town of Cheektowaga v. Starlite Builders, Inc., 668 N.Y.S.2d 293 (N.Y. App. Div. 1998)* (in an eminent domain proceeding, property must be appraised at its highest and best use and paid for accordingly as the value of highest and best use is value of just compensation to be paid); *Mississippi Transp. Comm'n v. Bridgforth, 709 So.2d 430 (Miss. 1998)* (testimony concerning the value of land for a purpose other than that for which the land is currently being used will only be allowed if the landowner demonstrates adaptability to the proposed other use, probability that the use of the property will be changed to conform to that proposed use within a reasonable time, and that the value of the land would be increased if the use were changed); *People ex rel. Dep't of Transp. v. Tanczos, 50 Cal. Rptr. 2d 70 (Cal. App. 1996); Morr v. State, 667 So. 2d 888 (Fla. Dist. App. 1996); United States v. Lewis, 308 F.2d 453* (highest and best use) (9th Cir. 1962); *State Hwy. Dep't v. Thomas, 128 S.E.2d 520 (Ga. App. 1962); State ex rel. Dep't of Hwys. v. D.H. Sanders Realty Co., 155 So. 2d 24 (La. 1963)* (highest and best use); *State ex rel. Dep't of Hwys. v. Brooks, 152 So. 637 (La. App. 1963)* (most profitable use); *Roy v. State, 191 A.2d 522 (N.H. 1963)* (most advantageous use); *Kirkman v. State Hwy. Comm'n, 126 S.E.2d 107 (N.C. 1962)* (highest and most profitable use to which property is adaptable). Compensation in eminent domain is highest and best use to which the property is presently adopted. *Department of Pub. Works & Bldgs. v. Rogers, 223 N.E.2d 177 (Ill. App. 1966).* Condemnee is entitled to highest cash value for best and most valuable use to which land is adapted. *Department of Pub. Works & Bldgs. ex rel. People v. Brockmeier, 262 N.E.2d 345 (Ill. App. 1970).* "Highest and best use." *Colonial Acres, Inc. v. Inhabitants of North Reading, 331 N.E.2d 549 (Mass. App. Ct. 1975). See* Allan T. Brinkerhoff, *Eminent Domain: Proving Highest and Best*

Use of Undeveloped Land in Utah, 1973 Utah L. Rev. 705 (1973). Landowner entitled to compensation on basis of most advantageous use to which the land can be put. *City of Orangeburg v. Buford, 87 S.E.2d 822 (S.C. 1955).* Highest and best use. *State ex rel. Dep't of Hwys. v. Spillman, 276 So. 2d 905 (La. App. 1973).* Highest and best use value may be commercial, though zoned for residential. *State ex rel Dep't of Hwys. v. Strickland, 290 So. 2d 714 (La. App. 1974). See* Sidney Z. Searles, *Highest and Best Use: The Keystone of Valuation in Eminent Domain, 45 N.Y. St. B.J. 36 (1973).* Highest and best use in eminent domain. *State Hwy. Comm'n v. Compton, 490 P.2d 743 (Or. App. 1971).* Best use is a proper element of damages if there is likelihood that the zoning ordinance would be amended to permit such use. *Morgan v. City of Overland Park, 483 P.2d 1079 (Kan. 1971).* "Highest and best use" must not be in the too distant future. *Dixie Elec. Membership Corp. v. Riddle, 277 So. 2d 476 (La. App. 1973).* It was held in *Lynch v. Town of West Hartford, 355 A.2d 42 (Conn. 1974),* that even though parcel taken had been actually devoted to prohibited use this did not prevent the consideration being given to the probability that the legal prohibition would be removed had it been requested. A reasonable possibility that a zoning classification might be changed may be considered in testimony as to valuation on condemnation. *In re Mackie's Petition, 127 N.W.2d 890 (Mich. 1964).*

(n34)Footnote 475. *Pritchard v. Ontario County Indus. Development Agency, 669 N.Y.S.2d 1004 (N.Y. App. Div. 1998)* (a failure by landowners to prove or show a reasonable probability that a piece of land can be used for industrial and commercial use, rather than a mere possibility for that use, precludes those uses from being treated as the highest and best use of the land in an analysis of the value of the land); *Mississippi Transp. Comm'n v. Bridgforth, 709 So.2d 430 (Miss. 1998)* (when determining the value of land for condemnation purposes, the appraising authority should take into consideration the highest and best use to which the land can be reasonably put. This does not necessarily have to be the current use of the land, but there must be reason to believe that such a use could be made of the land either at the present time or in the near future); *Appeal of Andorra Assocs., 562 A.2d 953 (Pa. 1989); McAshan v. Delhi Gas Pipeline Corp., 739 S.W.2d 130 (Tex. App. 1987).* Increased value of the land occasioned by plans for improvement to the area increasing farm value should be taken into consideration with reference to establishing the value of the condemned land. *In re Legislative Route 1094, 352 A.2d 244 (Pa. 1976); Weber Basin Water Conservancy Dist. v. Ward, 347 P.2d 862 (Utah 1959). Board of County Comm'rs v. Cashatt, 933 P.2d 167 (Kan. App. 1997)* (suitability of agricultural property for commercial development taken into consideration in determining the property's fair market value).

(n35)Footnote 476. *Good v. United States, 39 Fed. Cl. 81 (1997)* (determining "highest and best use" of the property to be "either the current use of the property at the time of the taking, or a use other than the existing use if the property is clearly adaptable to that use"); *Boom Co. v. Patterson, 98 U.S. 403 (1878); Metropolitan Water Dist. v. Adams, 116 P.2d 7 (Cal. 1941); United States v. Lewis, 308 F.2d 453 (9th Cir. 1962)* (highest and best use); *People ex rel. Dep't of Water Resources v. Andresen, 238 Cal. Rptr. 826 (Cal. App. 1987); State ex rel. Dep't of Hwys. v. D.H. Sanders Realty Co., 155 So. 2d 637 (La. App. 1963)* (most profitable use); *Kirkman v. State Hwy. Comm'n, 126 S.E.2d 107 (N.C. 1962)* (highest and most profitable use to which property is adaptable); *Roy v. State, 191 A.2d 522 (N.H. 1963)* (most advantageous use); *Ford Motor Co. v. Edison Twp., 10 N.J.Tax 153 (N.J. Tax Ct. 1988).* Compensation in eminent domain is highest and best use to which the property is presently adopted. *Department of Pub. Works & Bldgs. v. Rogers, 223 N.E.2d 177 (Ill. App. 1966).* Condemnee is entitled to highest cash value for best and most valuable use to which land is adapted. *Department of Pub. Works & Bldgs. ex rel. People v. Brockmeier, 262 N.E.2d 345 (Ill. App. 1970).* "Highest and best use." *Colonial Acres, Inc. v. Inhabitants of North Reading, 331 N.E.2d 549 (Mass. App. Ct. 1975). See* Allan T. Brinkerhoff, *Eminent Domain: Proving Highest and Best Use of Undeveloped Land in Utah, 1973 Utah L. Rev. 705.* Where one had an option to purchase only part of a tract of which a part was taken, option holder was not entitled to damages for eminent domain. *Department of Conservation v. Frandsen, 356 N.E.2d 1245 (Ill. App. 1976).* Where the land is contiguous or near subject property which has been rezoned, reasonable probability of rezoning is an element of damages. *Spriggs v. State, 388 N.Y.S.2d 749 (App. Div. 1976).*

(n36)Footnote 477. *Los Angeles County Metro. Transp. Auth. v. Continental Dev. Corp., 48 Cal. Rptr. 2d 466 (Cal. App. 1995); Taub v. City of Deer Park, 912 S.W.2d 395 (Tex. App. 1995); North Carolina State Hwy. Comm'n v. Black, 79 S.E.2d 778 (N.C. 1954).* Consequential benefits in excess of consequential damages cannot be set off against

value of condemned part. *Fulton County v. Bailey, 130 S.E.2d 800 (Ga. App. 1963).* Detriment to the "looks" of the property is not a proper element of damages in condemning an electric power easement. *Kamo Elec. Coop. v. Brooks, 337 S.W.2d 444 (Mo. App. 1960).* Condemnor need not plead benefits to condemnee to be entitled to set off. *State Hwy. Comm'n v. Bailey, 319 P.2d 906 (Or. 1957).*

(n37)Footnote 478. *In re Condemnation of Private Property, 536 N.W.2d 598 (Mich. App. 1995)* (Purpose of just compensation for private property taken for public use is to put property owner in as good a position as the owner would have been had taking not occurred); *L.U. Sheep Co. v. Board of County Comm'rs, 790 P.2d 663 (Wyo. 1990)* (Landowner should be compensated for all losses that can be established as attributable to taking); *Town of Winchester v. Cox, 26 A.2d 592 (Conn. 1942).* The measure of compensation is a sum of money that is the equivalent of the value of the property, which means such a sum as the property would sell for cash under ordinary circumstances, assuming that the owner is willing to sell and the purchaser is willing to buy. *City of Chicago v. Cunnea, 160 N.E. 559 (Ill. 1928)* (just compensation means the payment of such sum of money as will make the owner whole, so that on the receipt of the compensation the owner will not be poorer by reason of the property being taken). If the land has an enhanced value by reason of the minerals it contains or by reason of the use or uses for which it may be adopted, but to which it has not been put, the owner is entitled to the market value as so increased. *Alberson Cemetery Ass'n v. Fuhrer, 137 N.E. 545 (Ind. 1923).* The measure of damages is the difference between the value of the land before and immediately after the appropriation. *Wood v. Syracuse School Dist., 193 P. 1049 (Kan. 1920). Compare Schuler v. Wilson, 153 N.E. 737 (Ill. 1926)* (depreciation in value of property resulting from location of school playground on adjoining land). In the absence of a constitutional provision or statute providing for compensation in case of damage to property by reason of use by the public of abutting property, the common-law rule against the recovery of consequential damage when no part is taken prevails. *Barrett v. Union Bridge Co., 245 P. 308 (Or. 1926).* Cost of removal of personal property from realty taken in eminent domain is compensable. *General Ice Cream Corp. v. State, 99 N.Y.S.2d 312 (Ct. Cl. 1950);* Colorado M. Ry. v. Brown, 26 P.87 (Colo. 1890); *Harvey Textile Co. v. Hill, 67 A.2d 851 (Conn. 1949); Chicago, M. & St. P. Ry. v. Hock, 9 N.E. 205 (Ill. 1886); New York, N.H. & N.R. Ry. v. Blackstone, 69 N.E. 315 (Mass. 1904).* Evidence of gross income is improper. *Commonwealth Dep't of Hwys. v. Smith, 358 S.W.2d 487 (Ky. 1962).*

(n38)Footnote 479. *Mississippi Transp. Comm'n v. Bridgforth, 709 So.2d 430 (Miss. 1998)* (When determining the value of land for condemnation purposes, the appraising authority should take into consideration the highest and best use to which the land can be reasonably put. This does not necessarily have to be the current use of the land, but there must be reason to believe that such a use could be made of the land either at the present time or in the near future); *City of New Orleans v. McKendrick, 485 So. 2d 653 (La. App. 1986)* (consider highest and best use of property, rather than only present value of property, in determining value of homeowner's property); *Ford Motor Co. v. Edison Twp., 10 N.J. Tax 153 (N.J. Tax Ct. 1988)* (potential, but likely use is considered). Reasonable probability of rezoning is a factor to be considered in valuing land for eminent domain. *Masheter v. Kebe, 295 N.E.2d 429 (Ohio App. 1973).* "Highest and best use" must not be in the too distant future. *Dixie Elec. Membership Corp v. Riddle, 277 So. 2d 476 (La. App. 1973).* Value of condemned land at its total future permissive use immediately before and after expropriation. *Parish of E. Baton Rouge v. S & H. Heating Co., 216 So. 2d 360 (La. App. 1968).* In determining the value of the property for future use the court may take into account the prospective future use where there is a reasonable probability of a change in a zoning ordinance. *State Roads Comm'n v. Warriner, 128 A.2d 248 (Md. 1957); People ex rel. Dep't of Public Works v. Dunn, 297 P.2d 964 (Cal. 1956); Hall v. City of West Des Moines, 62 N.W.2d 734 (Iowa 1954);* In re Armory Site in *Kansas City, 282 S.W.2d 464 (Mo. 1955). Contra Euclid v. Lakeshore Co., 133 N.E.2d 372 (Ohio App. 1956), cert. denied, 352 U.S. 1025 (1957).* A "conjunctive use" of the parcel taken would give rise to the value at the most profitable use in connection with other land, but only if the proposed conjunctive use was reasonably probable at the time of the taking. *County of Hawaii v. Sotomura, 517 P.2d 57 (Haw. 1973), cert. denied, 419 U.S. 372 (1974).* An increase in market value attributable to a change in the highest and best use of the property is a deductible benefit. *State ex rel. State Hwy. Comm'n v. Bailey, 319 P.2d 906 (Or. 1957).* Evidence of intent to subdivide farm was admissible. *Commonwealth Dep't of Hwys. v. Vincent, 357 S.W.2d 678 (Ky. 1962).* Permitting evidence in eminent domain of possible future use. *Iske v. Metropolitan Utils. Dist., 157 N.W.2d 887 (Neb. 1968).* Proof of highest and best use of condemned property only requires a showing that the property is physically adaptable to that use and that there is need

for that use in the area as shown in the properties market at the time of condemnation. *In re Legislative Route 1094, 352 A.2d 244 (Pa. 1976).* Property owner given compensation based on possible increase in value because of pending zoning change. *Palazzi v. State, 319 A.2d 658 (R.I. 1974).* Evidence of potential uses for which the property may readily be converted is admissible. *United States v. 158.24 Acres of Land, 515 F.2d 230 (5th Cir. 1975).*

(n39)Footnote 480. *West Jefferson Levee Dist. v. Coast Quality Constr. Corp., 640 So. 2d 1258 (La. 1994)* (where such uses are not speculative, remote or contrary to law, may be considered as part of damages), *cert. denied, Bayou Des Familles Dev. Corp. v. West Jefferson Levee Dist., 115 S. Ct. 736 (1995); State by Comm'r of Transp. v. Caoili, 639 A.2d 275 (N.J. 1994)* (Reasonable probability of a zoning change occurring to allow for that higher use). The fact that zoning or other regulations limit the use of the land does not prevent a showing that it is better suited to other uses which increase its valuation. *Swift & Co. v. Housing Auth. of Plant City, 106 So. 2d 616 (Fla. Dist. App. 1958).* Impending zoning regulations may be considered in fixing market value. *Civils v. Fulton County, 134 S.E.2d 453 (Ga. App. 1963).*

(n40)Footnote 481. *United States v. 2,175.86 Acres of Land, 687 F. Supp. 1079 (E.D.Tex. 1988); West Jefferson Levee Dist. v. Coast Quality Const. Corp., 640 So. 2d 1258 (La. 1994)* (where such uses are not speculative, remote or contrary to law, may be considered as part of damages), *cert. denied, Bayou Des Familles Dev. Corp. v. West Jefferson Levee Dist., 115 S. Ct. 736 (1995).* Where subdivision has progressed to the point of lots being ready for sale to the public, the owner, on condemnation, is entitled to value as lots, not merely as raw land. *United States v. 147.47 Acres of Land, 352 F. Supp. 1055 (M.D.Pa. 1972).*

(n41)Footnote 482. *Bellevue Plaza, Inc. v. City of Bellevue, 851 P.2d 662 (Wash. 1993); United States v. Consolidated Mayflower Mines, Inc., 60 F.3d 1470 (10th Cir. 1995).* Market value, not income potential is the true test, future income being too speculative. *In re Appropriation of Easements for Hwy. Purposes, 190 N.E.2d 446 (Ohio 1963).* Availability for future use is not an element unless it affects its present market value. *Carolina Power & Light v. Clark, 91 S.E.2d 569 (N.C. 1956).*

(n42)Footnote 483. *West Jefferson Levee Dist. v. Coast Quality Const. Corp., 640 So. 2d 1258 (La. 1994)* (where such uses are not speculative, remote or contrary to law, may be considered as part of damages), *cert. denied, Bayou Des Familles Devel. Corp. v. West Jefferson Levee Dist., 115 S. Ct. 736 (1995); State by Comm'r of Transp. v. Caoili, 639 A.2d 275 (N.J. 1994)* (reasonable probability of a zoning change occurring to allow for that higher use). Recognizing that the cost of substitute land may be used where public facilities are taken under eminent domain. *State Road Comm'n v. Board of Park Comm'rs of Huntington, 173 S.E.2d 919 (W. Va. 1970). See Just Compensation and the Public Condemnee, 75 Yale L.J. 1053 (1966).* A minority rule is *contra, Union Free Sch. Dist. No. 8 v. State, 230 N.Y.S.2d 416 (8th Cir. 1964),* permitting substitution cost under limited circumstance. *United States v. South Dakota Game, Fish & Parks Dep't, 329 F.2d 665* (8th Cir.), *cert. denied, 379 U.S. 900 (1964).*

(n43)Footnote 484. *Estate of Lloyd v. C.I.R., T.C. Memo. 1996-30,* (T.C. 1996) (The fair market value of property is not governed by whether the owner has actually put the property to its highest and best use, nor whether he or she ever intends to do so.); *Davidson County Bd. of Educ. v. First Am. Nat'l Bank, 301 S.W.2d 905 (Tenn. 1957).* Market value is the true test. *Speir v. United States, 485 F.2d 643 (Ct. Cl. 1973); State ex rel. Dep't of Hwys. v. Entre Nous, Inc., 283 So. 2d 291 (La. App. 1973); Thurow v. City of Dallas, 499 S.W.2d 347 (Tex. App. 1973).* Market value at time of actual taking of possession. *People ex rel. Dep't. of Public Works v. Simon Newman Co., 112 Cal. Rptr 298 (Cal. App. 1974);* Housing Auth. of Bridgeport v. Lustig, 90 A.2d (Conn. 1952). The fair market value is a proper test in condemnation regardless of whether the property is actually being used for its highest possible use. *Suffolk County v. Firester, 339 N.E.2d 154 (N.Y. 1975).*

(n44)Footnote 485. *Bass Enterprises Production Co. v. United States, 133 F.3d 893 (Fed. Cir. 1998)* (fair market value is the standard for determining just compensation for a permanent taking; rental value is the standard for determining just compensation for a temporary taking); *Smith v. Papio-Missouri River Natural Resources Dist., 576 N.W.2d 797 (Neb. 1998)* (fair market value is the price a piece of property would fetch on the open market when no

party is obligated to buy or sell); *Shoemaker v. United States, 147 U.S. 282 (1893); Columbia Gas Transmission Corp. v. An Exclusive Natural Gas Storage Easement, 620 N.E.2d 48 (Ohio 1993); Wray v. Parsson, 655 N.E.2d 1365 (Ohio App. 1995).* Compensation for growing crops. *Department of Water Resources v. Gianni, 105 Cal. Rptr. 248 (Cal. App. 1972).* Even though the use of the land is subject to a restriction, the compensation in eminent domain is the value of the land for commercial uses. *In re Appropriation of Easement for Hwy. Purposes, 159 N.E.2d 612 (Ohio 1959). Bill Ledford Motors v. Dep't of Transportation, 484 S.E.2d 510 (Ga. App. 1997)* (fair market rental value is the measure for value of leasehold).

(n45)Footnote 486. *Department of Transp. v. Sharpe, 445 S.E.2d 343 (Ga. App. 1994)* (peculiar value of land not considered); *Kankakee County Bd. of Review v. Property Tax Appeal Bd., 544 N.E.2d 762 (Ill. 1989)* (actual rents received are element to be considered); *Olson v. United States, 292 U.S. 246 (1934)* (set as "the highest and most profitable use for which the property is adaptable and needed or likely to be needed in the near future"). Evidence of intent to subdivide farm was admissible. *Commonwealth Dep't of Hwys. v. Vincent, 357 S.W.2d 678 (Ky. 1962).* Change in market value attributable to a change in the highest and best use of the property is to be considered *State ex rel. State Hwy. Comm'n v. Bailey, 319 P.2d 906 (Or. 1957).*

(n46)Footnote 487. *City of Hollister v. McCullough, 31 Cal. Rptr. 2d 415 (Cal. App. 1994); Metropolitan Water Dist. v. Adams, 107 P.2d 618 (Cal. 1945); McArthur v. State Hwy. Dep't, 69 S.E.2d 781 (Ga. App. 1952); Board of Equalization of Salt Lake County v. Utah State Tax Comm'n ex rel. Benchmark, Inc., 864 P.2d 882 (Utah 1993)* (fair market value as the amount at which property would change hands between a willing buyer and a willing seller). Market value is what a willing buyer would pay in cash to a willing seller. *United States v. 60.14 Acres of Land, 362 F.2d 660 (3d Cir. 1966); State ex rel. Dep't of Hwys. v. Babineaux, 189 So. 2d 450 (La. App. 1966); City of Medina v. Cook, 418 P.2d 1020 (Wash. 1966).* In determining the value of the property for future use the court may take into account the prospective future use where there is a reasonable probability of a change in a zoning ordinance. *People ex rel. Dep't of Public Works v. Duun, 297 P.2d 964 (Cal. 1956); Hall v. City of West Des Moines, 62 N.W.2d 734 (Iowa 1954); State Roads Comm'n v. Warriner, 128 A.2d 248 (Md. 1957);* In re Armory Site in *Kansas City, 282 S.W.2d 464 (Mo. 1955). Contra City of Euclid v. Lakeshore Co., 133 N.E.2d 372 (Ohio App. 1956).* The value of the property to the condemnor or its need is not an element of damages. *State v. Howald, 315 S.W.2d 372 (Mo. 1958).* Strict "before and after" rule in damages on condemnation. *Brown v. Commonwealth, 159 A.3d 881 (Pa. 1960).* Fair market value is not a proper approach where the subject property is so unique as to be classified as specialty property without a recognizable market. *Congregation of Sons of Israel v. State, 387 N.Y.S.2d 786 (N.Y. App. Div. 1976).*

(n47)Footnote 488. *Los Angeles County Metro. Transp. Auth. v. Continental Dev. Corp., 16 Cal. 4th 694, 66 Cal. Rptr. 2d 630 (Cal. 1997)* (determining a person whose land is taken in the exercise of the right of eminent domain shall not "be entitled to anything beyond a just compensation. He is to be paid the damage he actually suffers, and nothing more").

(n48)Footnote 489. *But see United States v. 69.1 Acres of Land, 942 F.2d 290 (4th Cir. 1991)* (unless there is evidence to the contrary, highest and best use of property is presumed to be its current use); *Matter of County of Clinton, 612 N.Y.S.2d 496 (N.Y. App. Div. 1994)* (strategic location of land not considered in determining compensation for eminent domain purposes); *McGovern v. New York, 229 U.S. 363 (1913); Alabama Power Co. v. Herzfeld, 114 So. 49 (Ala. 1927); Joint Hwy. Dist. No. 9 v. Ocean Shore, 18 P.2d 413 (Cal. App. 1933); Union Exploration Co. v. Moffat Tunnel Improvement Dist., 89 P.2d 257 (Colo. 1939); State Hwy. Bd. v. Shierling, 181 S.E. 885 (Ga. App. 1935); Rawon-Works Lumber Co. v. Richardson, 141 P. 74 (Idaho 1914); Decatur Park Dist. v. Becker, 14 N.E.2d 490 (Ill. 1938); Tracy v. City of Mt. Pleasant, 146 N.W. 78 (Iowa 1914); Calor Oil & Gas Co. v. Franzell, 109 S.W. 328 (Ky. 1908); Gilmore v. Central Me. Power Co., 145 A. 137 (Me. 1929); Sargent v. Merrimac, 81 N.E. 970 (Mass. 1907); Brack v. Baltimore, 93 A. 994 (Md. 1915); Emmons v. Utilities Power Co., 141 A. 65 (N.H. 1928).* Severance damages are predicated on the enhanced value of the remainder tract because of the relationship to the whole prior to the taking and its resulting damage to the remainder of the tract. *State v. Church of Nazarene, 354 N.W.2d 320 (Ind. App. 1976).*

(n49)Footnote 490. *Morr v. State, 667 So. 2d 888 (Fla. App. 1996)* (non-conforming use to which county had

stipulated permission is a proper element of eminent domain); *Pennsylvania Northwestern Distribs., Inc. v. Zoning Hearing Bd. of Twp. of Moon, 584 A.2d 1372 (Pa. 1991)* (Lawful nonconforming use establishes vested property right in property owner which cannot be abrogated or destroyed, unless use is a nuisance, abandoned, or is extinguished by eminent domain); *Gebrian v. Bristol Redev. Agency, 370 A.2d 1055 (Conn. 1976).*

(n50)Footnote 491. *Washington Suburban San. Comm'n v. CAE-Link Corp., 622 A.2d 745 (Md. 1993)* (restrictive covenants are a compensable interest in eminent domain); *George K. Baum Properties, Inc. v. Columbian Nat'l Title Ins. Co., 763 S.W.2d 194 (Mo. App. 1988)* (Fair market value of restrictive covenant); *Staninger v. Jackson Expressway Auth., 182 S.2d 483 (Fla. App. 1966).*

(n51)Footnote 492. *Walkenhorst v. State, Dep't of Roads, 573 N.W.2d 474 (Neb. 1998)* (the landowner in an eminent domain action is entitled to receive the fair market value of the property being taken and any decrease in fair market value which results from the taking); *In re Condemnation by Com., Dep't of Transp., 709 A.2d 939 (Pa. Cmwlth. 1998)* (the proper measure of just compensation is effected through a comparison of the fair market value of the property immediately before and immediately after the taking).

In re Condemnation by the Commw. of Pa., 701 A.2d 535 (Pa. 1997) (defining just compensation as "the difference between the fair market value of the condemnee's entire property interest immediately before the condemnation and as unaffected thereby and the fair market value of the property interest immediately after such condemnation and as affected thereby"); *In re Condemnation by Penn Township, 702 A.2d 614 (Pa. Commw. Ct. 1997)* (defining just compensation as "the difference between the fair market value of the condemnee's entire property interest before the condemnation and after condemnation"); *People ex rel. Dep't of Public Works v. Volunteers of America, 98 Cal. Rptr. 423 (Cal. App. 1971)* (holding that an increase in traffic noise is an element of damages to the remaining portion not taken for highway purposes); *Arkansas State Hwy. Comm'n v. Ptak, 364 S.W.2d 794 (Ark. 1963); Hunter Press, Inc. v. Ives, 183 A.2d 842* (cost of moving presses and other equipment should be considered); *Department of Pub. Works & Bldgs. v. Divit, 182 N.W.2d 749 (Ill. 1962); Commonwealth Dep't of Hwys. v. Tyree, 365 S.W.2d 472 (Ky. 1963); State ex rel. Dep't of Hwys. v. Caldwell Bros. Real Estate, Inc., 155 So. 2d 231 (La. App. 1963)* (reasonable cost of restoration as an alternative test to diminution of market value); *Schulz v. Central Neb. Pub. Power & Irr. Dist., 293 N.W. 409 (Neb. 1940); In re Platte Valley Pub. Power & Irr. Dist., 278 N.W. 492 (Neb. 1938); State by Comm'r of Transp. v. Weiswasser, 671 A.2d 121 (N.J. App. 1996)* (proper measure of damages in partial taking is value of entire tract before the taking and value of remainder after the taking); *State Dep't of Roads v. Dillon, 189 N.W.2d 606 (N.Y. 1963)* (the value of trade fixtures taken by condemnation is reproduction cost less depreciation); *Humble Oil & Ref. Co. v. State, 187 N.W.2d 791 (N.Y. 1962)* (diminution of rental value as a proper test); *Taub v. City of Deer Park, 912 S.W.2d 395 (Tex. App. 1995).* Granting of an aviation easement over the appellant's land limited damage to the difference between the value of the property before and after the easement rather than a taking of the fee. *Minkowitz v. City of West Memphis, 406 S.W.2d 887 (Ark. 1966).* Evidence of sales of similar property is proper in eminent domain. *Los Angeles County v. Faus, 312 P.2d 680 (Cal. 1957).* When the value of property is admissible to show market value in eminent domain. *Mark v. City of Indianapolis, 219 N.W.2d 434 (Ind. 1966).* "Benefit," as used in property assessments, refers to enhancing value of real property, not to general, remote, or incidental benefits. *Indiana v. City of Indianapolis, 269 N.E.2d 552 (Ind. App. 1971).* Value of condemned land is at its total future permissive use immediately before and after expropriation. *Parish of E. Baton Rouge v. S & H. Heating Co., 216 So. 2d 360 (La. App. 1968).* Heavy traffic on a highway should not be taken into account in depreciating values for eminent domain. *White v. Township of Southfield, 79 N.W.2d 863 (Mich. 1956).* Permitting evidence in eminent domain of possible future use. *Iske v. Metropolitan Utils. Dist., 157 N.W.2d 887 (Neb. 1968).* In eminent domain proceedings the lessee is entitled to the market value of the right to use the property for the unexpired term, over and above the amount of the rent that the lessee is obligated to pay for the lease. *Director of Hwys. v. Caperton, 220 N.E.2d 699 (Ohio App. 1965).* Before and after test where only part taken. *Kayo Oil Co. v. State, 340 So. 2d 756 (Ala. 1976); Bowen v. Ives, 368 A.2d 82 (Conn. 1976); State ex rel. Dep't of Hwys. v. Finkelstein, 340 So. 2d 1040 (La. App. 1976).* The before and after rule applies to partial taking of cemetery lands. *Diocese of Buffalo v. State, 248 N.W.2d 155 (N.Y. 1969).* Awarding severance damages to remainder of tract after condemning an easement for flight over one portion. *Provo City Corp. v. Knudsen, 558 P.2d 1332 (Utah 1977).* Fair

market is a willing buyer and a willing seller. *Village of South Orange v. Alden Corp., 365 A.3d 469 (N.J. Super. 1976); State v. Roher, 366 A.2d 1017 (N.J. Super. 1976).*

(n52)Footnote 493. *Boom Co v. Patterson, 98 U.S. 403 (1878); United States v. Wallace, 201 F.2d 65 (10th Cir. 1952); People ex rel. Dep't of Pub. Works v. Hurd, 23 Cal. Rptr. 67 (Cal. App. 1962)* (reasonable probability of rezoning may be considered in fixing market value); *State Hwy. Dep't v. Thomas, 128 S.E.2d 520 (Ga. App. 1962); Williams v. Amoco Prod. Co., 734 P.2d 1113 (Kan. 1987)* (Most advantageous use determines amount of damages); *Hewitt v. State, 239 N.Y.S.2d 522 (N.Y. App. Div. 1963)* (potential subdivision site recognized); *Albany Country Club v. State, 241 N.Y.S.2d 604 (App. Div. 1963)* (present and prospective zoning is a proper factor); *Goodin v. Cincinnati & Whitewater Canal Co., 18 Oh. St. 169 (1868); Snyder v. Commonwealth, 192 A.2d 650 (Pa. 1963)* (present and prospective zoning is a proper factor); *Lower Nueces River Water Supply Dist. v. Collins, 357 S.W.2d 449 (Tex. App. 1962)* (present use for subdivision purposes is to be considered). *And see Department of Pub. Works & Bldgs. v. Barton, 19 N.E.2d 935 (Ill. 1939); Muskingum Watershed Conservancy Dist. v. Funk, 16 N.E.2d 454* (Ohio, 1938). The accessibility of public lands available for grazing leases was not an element of damages in condemnation of lands owned in fee. *United States v. Cox, 190 F.2d 293* (10th Cir.), *cert. denied, 342 U.S. 867 (1951).*

Value as a going business is compensable in eminent domain. *Priolo v. City of Dallas, 234 S.W.2d 1014 (Tex. App. 1950).* Reasonable probability that contiguous land might be incorporated into main areas of a developed and integrated plant permitted consideration of integration into the whole industrial complex for valuation purposes. *United States v. 105.40 Acres of Land, 471 F.2d 207 (7th Cir. 1972).* Impoundment of water, impairment of surface drainage, decreased value of improvements, difficulty in travel by cattle over land and increased difficulty of cultivation are elements of damage. *Arkansas Louisiana Gas Co. v. McGaughey Bros., Inc. 468 S.W.2d 754 (Ark. 1971).* Evidence of potential uses to which property may readily be converted is admissible. *United States v. 158.23 Acres of Land, 515 F.2d 230 (5th Cir. 1975).* In determining the "highest and best possible use," the possibility of zoning change may be considered. *Sayers v. City of Mobile, 165 So. 2d 371 (Ala. 1964).* Permitting evidence of possible rezoning in eminent domain action. *Department of Pub. Works & Bldgs. v. Rogers, 233 N.E.2d 409 (Ill. 1968).* Price obtained seven years and two months prior to condemnation was proper evidence as against complaint that passage of time made it inadmissible. *State v. Valley Dev. Co., 268 N.E.2d 73 (Ind. 1971).* The amount of damages in eminent domain is determined not by what condemnor intends to do but what condemnor acquires the right to do. *Henderson v. Iowa State Hwy. Comm'n, 151 N.W.2d 473 (Iowa 1967).* Best use is a proper element of damages if there is likelihood that the zoning ordinance would be amended to permit such use. *Morgan v. City of Overland Park, 483 P.2d 1079 (Kan. 1971).* "Highest and best use" must not be in the too distant future. *Dixie Elec. Membership Corp. v. Riddle, 277 So. 2d 476 (La. App. 1973).* Growing trees may not be valued separately from the property taken, and recovery for growing trees is limited to the extent to which they enhance the value of the property. *Montgomery County v. Old Farm Swim Club, Inc., 313 A.2d 458 (Md. 1974). See* Sidney Goldstein, *Economic Evidence in Right-of-Way Litigation, 50 Geo. L.J. 205 (1961).* Cost of substitute where public property taken. *State Road Comm'n v. Board of Park Comm'rs, 173 S.E.2d 919 (W. Va. 1970).*

(n53)Footnote 494. *Wheeler v. City of Pleasant Grove, 896 F.2d 1347 (11th Cir. 1990)* (accurate measure of damages had to be based on difference in fair market value of right to develop apartment complex when building permit was received and fair market value of what remained after city withdrew permit and passed ordinance forbidding construction of new apartments); *Broadway Coal Mining Co. v. Smith, 125 S.W. 157 (Ky. 1910); Tri-State Tel. & Tel. Co. v. Cosgriff, 124 N.W. 75 (N.D.1909).* The rental income from the property taken is always an important element in determining the value of property, yet that cannot be made the sole basis of calculation. *Department of Pub. Works & Bldgs. v. Diggins, 27 N.E.2d 826 (Ill. 1940).* In eminent domain, on navigable waters, the owner's right is valued subject to federal navigational servitude regardless of the purpose of federal taking. *United States v. Stoeco Homes, Inc., 498 F.3d 597 (3d Cir. 1974), cert. denied, 420 U.S. 927 (1975).* Damage to leasehold is the difference between market value during the remainder of the term less any amount to be paid to the lessee. *Peek v. Dep't of Transp., 229 S.E.2d 554 (Ga. App. 1976).*

(n54)Footnote 495. *United States v. 6.321 Acres of Land, 479 F.2d 404 (1st Cir. 1973); In re Cool, 81 B.R. 614*

(Bankr. D.Mont. 1987) (Income producing capacity of real estate is one of the most, if not the most important consideration in determining the value of real estate); *In re James Madison Houses, 234 N.Y.S.2d 799 (N.Y. App. Div. 1962).* Capitalization of income is a factor in measuring damages. *Johnson v. State, 474 S.W.2d 327 (Tex. App. 1971).* Evidence of gross income is improper. *Commonwealth Dep't of Hwys. v. Smith, 358 S.W.2d 487 (Ky. 1962).*

(n55)Footnote 496. *Rubano v. Department of Transp., 656 So. 2d 1264 (Fla. 1995)* (community has obligation to suffer inevitable inconveniences associated with public works construction without compensation); *City of Winchester v. Ring, 144 N.W. 333 (Ill. 1924); Felts v. Harris County, 915 S.W.2d 482 (Tex. 1996)* (landowners cannot recover damages from inconveniences incident to building of highway).

(n56)Footnote 497. *Oddo v. State, 912 S.W.2d 831 (Tex. App. 1995)* (damages were not for state's use of preexisting right-of-way, diversion of traffic, increased circuitry of travel, lessened visibility or inconvenience due to construction, nor were the damages community damages, since injuries affected value of remaining property uniquely); *Maloley v. City of Lexington, 536 N.W.2d 916 (Neb. App. 1995)* (Diversion of travel, inconvenience of access, and diminution of business carried on upon property, should not be considered as independent items of damage, but considered for purpose of determining market value of property before and after construction of improvement); *Chicago, R.I. & P. Ry. v. O'Neill, 78 N.W. 521 (Neb. 1899); Adirondack Power & Light Corp. v. Evans, 235 N.Y.S. 569 (N.Y. App. Div. 1929); United States v. 6.321 Acres of Land, 479 F.2d 404 (1st Cir. 1973).* Where property taken has unique value but such value exceeds the market value, intrinsic value and actual value to the owner are the proper measures and not speculations on probable market value. *Kind v. United States, 292 F. Supp. 767 (D.Colo. 1968).* Holding that one whose property was not taken by eminent domain was not subject to compensation as being specially damaged where both his own property and the property taken was subject to a restrictive covenant of use. *Arkansas State Hwy. Comm'n v. McNeill, 381 S.W.2d 425 (Ark. 1964).* Fair market value of shrubs, trees and flowers growing in nursery and cost of relocation thereof was proper evidence as to value of parcel taken and severance damage to remainder. *City of Riverside v. Kraft, 21 Cal. Rptr. 425 (Cal. App. 1962).* Loss of view, while not compensable *per se,* is an element of damages. *State ex rel Dep't of Hwys. v. Singletary, 185 So. 2d 642 (La. App. 1966).* Changes in value due to enactment of eminent domain statutes or the filing of the petition for condemnation prior to actual taking are no more than incidents of ownership. Values determined and interest begins to run when there is an entry and possession. *Town of Swampscott v. Remis, 215 N.W.2d 777 (Mass. 1966);* this is also the federal rule. *Bauman v. Ross, 167 U.S. 548 (1897).* A reasonable possibility that a zoning classification might be changed may be considered in testimony as to valuation on condemnation. *In re Mackie's Petition, 127 N.W.2d 890 (Mich. 1964).* Missouri courts have disagreed whether the unsightliness of power transmission lines in the appurtenances is an element of damage to be awarded when there is a condemnation for a power line easement over farm land. *Kamo Elec. Coop, Inc. v. Cushard, 416 S.W.2d 646 (Mo. App. 1967)* (affirmative); *Kamo Elec. Coop v. Brooks, 337 S.W.2d 444 (Mo. App. 1960)* (negative). Under the leading rule, the valuation time is the date of the actual taking. *State ex rel. State Hwy. Comm'n v. Jones, 142 A.2d 232 (N.J. 1958).* General as well as special benefits may be set off against severance damages by eminent domain. *State ex rel. State Hwy. Comm'r v. Atchison, T. & S. F. R.R., 417 P.2d 68 (N. M. 1966).* Market value may not be based solely on capitalization from newly constructed buildings. *Arlen of Nanuet, Inc. v. State, 258 N.W.2d 890 (N.Y. 1970).* On the question of just valuation for compensation,*see* the discussion in *Wilmot v. State, 297 N.W.2d 90 (N.Y. 1973).* Market value, not income potential is the true test, future income being too speculative. *In re Appropriation of Easements for Hwy. Purposes, 190 N.E.2d 446 (Ohio 1963).* Fear is an element of damages in eminent domain. *Heddin v. Delhi Gas Pipeline Co., 522 S.W.2d 886 (Tex. 1975). See* Gardner Cromwell, *Some Elements of Damage in Condemnation, 43 Iowa L. Rev. 738 (1958);* Ralph E. Boyer & John P. Wilcox, *Economic Appraisal of Leasehold Valuation in Condemnation Proceedings, 17 U. Miami L. Rev. 245 (1963).* Under one rule, compensation is required where separate ascertainment of damages is impossible. *Andrews v. Cox, 29 A.2d 587 (Conn. 1942).*

(n57)Footnote 498. *Walkenhorst v. State, Dep't of Roads, 573 N.W.2d 474 (Neb. 1998)* (the landowner in an eminent domain action is entitled to receive the fair market value of the property being taken and any decrease in fair market value which results from the taking); *United States v. 99.66 Acres of Land, 970 F.2d 651 (9th Cir. 1992); United States v. 27.7 Acres of Land, 214 F. Supp. 707 (W.D.Ark. 1963)* (severance damages); *Thompson v. City of Mobile, 199*

So. 862 (Ala. 1941); State Life Ins. Co. v. Arkansas State Hwy. Comm'n, 148 S.W.2d 671 (Ark. 1941); People ex rel. Dep't of Public Works v. Hayward Bldg. Materials Co., 28 Cal. Rptr. 782 (Cal App. 1963) (severance damages); *Andrews v. Cox, 17 A.2d 507 (Conn. 1941); City of Detroit v. Grigg Hanna Lumber & Box Co., 296 N.W. 310 (Mich. 1941); In re Town Ditch No. 1, 295 N.W. 47 (Minn. 1940); Mississippi State Hwy. Comm'n v. Colonial Inn, Inc., 149 So. 2d 851 (Miss. 1963)* (severance damages) (severance damages are properly allowable in a condemnation action); *Arkansas State Hwy. Comm'n v. Union Planters Nat'l Bank, 333 S.W.2d 904 (Ark. 1960)* (overflow caused by storm sewer construction was compensable as damage to remainder of property); *Department of Transp. v. Jones, 358 N.E.2d 402 (Ill. App. 1976).*

(n58)Footnote 499. Tennessee *Gas Pipeline Co. v. 104 Acres of Land, 780 F. Supp. 82 (D.R.I. 1991); Andrews v. Cox, 17 A.2d 507 (Conn. 1941).*

(n59)Footnote 500. *United States v. Bodcaw Co., 440 U.S. 202 (1979). See* A. Chris Heinrichs, *Compensation For Partial Takings in Texas, 6 St Mary's L.J. 206* (1974-75). Where only an easement is condemned the consideration is the market value of the property before and after taking. *Denman v. Colorado Interstate Gas Co., 294 P.2d 207 (Kan. 1956).* If partial taking destroys usable value of land, corpus may be used to restore the premises. *Bradley v. Bradley, 185 So. 2d 655 (Miss. 1966).* Non-consequential damages are payable in absence of legislative authority. *In re Delaware River Bridge, 182 A.2d 514 (Pa. 1962).* Valuation for the taking of an easement is the difference between the market value of the land free of the easement and the market value of the land burdened with the easement. *United States v. 1,129.75 Acres of Land, 473 F.2d 996 (8th Cir. 1973).* Damages for taking of an easement are not equivalent to those for the taking of a fee. *Carolina Power & Light Co. v. Clark, 91 S.E.2d 569 (N.C. 1956).* Damages to part not taken are allowable whether the taking is of a fee or an easement. *State by Lord v. North Star Concrete Co., 122 N.W.2d 118 (N.C. 1971); City of Charlotte v. Charlotte Park & Recreation Comm'n, 178 S.E.2d 601 (N.C. 1971).* Holding that landowner subject to partial taking was not entitled to aesthetic damages resulting from taking of adjoining property. *Department of Hwys. v. Williams, 487 S.W.2d 290 (Ky. 1972).*

(n60)Footnote 501. *Villas of Lake Jackson, Ltd. v. County of Leon, 906 F. Supp. 1509 (N.D.Fla. 1995).* Generally, timber fixtures and improvements are to be valued together with the land as a whole. In re Civic Center in *City of Detroit, 56 N.W.2d 375 (Mich. 1953); Minneapolis-St. Paul Metro. Airports Comm'n v. Hedberg-Friedheim Co., 32 N.W.2d 569 (Minn. 1948); Dougherty v. Allegheny County, 88 A.2d 73 (Pa. 1952).* In Nebraska it is held that the measure of damages from land taken for public use is the fair and reasonable market value of the land actually appropriated and the difference in the fair and reasonable market value of the remainder of the land before and after taking, and that dual or speculative or excessive damages are not recoverable for consequential depreciation in the value of the land not taken. *Woodgate v. Central Neb. Pub. Power & Irr. Dist., 292 N.W. 461 (Neb. 1940); United States v. 5139.5 Acres of Land, 200 F.2d 659 (4th Cir. 1952); United States ex rel. T.V.A. v. Powelson, 319 U.S. 266,* (1943); *Hollister v. Vox, 41 A.2d 93 (Conn. 1945); State v. Platte Valley Pub. Power & Irr. Dist., 23 N.W.2d 300 (Neb. 1946); In re Dodge's Application, 103 N.Y.S.2d 517 (1951).* Where eminent domain proceedings were commenced and completed against property during a period of redemption and tax sale, the tax purchaser was only entitled to the amount necessary to redeem, not the entire award. *Delano, Inc. v. Arnold, 263 N.E.2d 830 (Ill. 1970), cert. denied, 401 U.S. 994, 91 S. Ct. 1233 (1971).* Where only an easement is condemned the consideration is the market value of the property before and after taking. *Denman v. Colorado Interstate Gas Co., 294 P.2d 207 (Kan. 1956).* No damages should be awarded for market value of property adjoining that taken. *Commonwealth Dep't of Hwys. v. Williams, Ky. 487 S.W.2d 290 (Ky. 1972).* Damages to part not taken are allowable whether the taking is of a fee or an easement. *State by Lord v. North Star Concrete Co., 122 N.W.2d 118 (Minn. 1963); City of Charlotte v. Charlotte Park & Recreation Comm'n, 178 S.E.2d 601 (N.C. 1971). See* David S. Willenzik, *The Possessor's Right to Compensation, 31 La. L. Rev. 491 (1971).* Another line of authority permits deduction from award only for land not taken. *People v. Pera, 12 Cal. Rptr. 129 (Cal. App. 1961).* Denying severance damages for lack of access where property had frontage on two roads. *Maykut v. Saugure, 370 A.2d 923 (Conn. 1976).* One who had an option to purchase only part of a tract of which a part was taken, he was not entitled to damages for eminent domain. *Department of Conservation v. Frandsen, 356 N.E.2d 1245 (Ill. App. 1976).*

(n61)Footnote 502. *Kemp Industries, Inc. v. Safety Light Corp., 857 F. Supp. 373 (D.N.J. 1994).* Likening proximity of government grazing land to riparian rights on navigable streams, compensation for loss of proximity to grazing land has been denied on condemnation. *United States v. Cox, 190 F.2d 293 (10th Cir. 1951). See Wine v. Commonwealth, 17 N.E.2d 545 (Mass. 1938), cert. denied, 342 U.S. 867 (10th Cir. 1951).* Held too remote. *People v. Ocean Shore Ry., 196 P.2d 570 (Cal. 1948).* Indirect damages allowed. *Dunlap v. Loup River Public Power Dist., 284 N.W. 742 (Neb. 1939). See* Thomas J. Dempsey, *Evidence of Prices in Pennsylvania Eminent Domain Proceedings, 63 Dick. L. Rev. 5 (1959).*

(n62)Footnote 503. *City of Lake Elsinore v. Ranel Development Co., 70 Cal. Rptr. 2d 715 (Cal. Ct. App. 1998)* (Litigation expenses should not be awarded to a landowner when there is no concrete evidence of an abuse of power by the taking authority or an unreasonable offer of compensation by the same authority); *Department of Transp. v. Woods, 494 S.E.2d 507 (Ga. 1998)* (eminent domain statute permits an award of attorney's fees when there is evidence of abuse of power, impropriety, or an intent to delay or harass); *St. Tammany Parish Hosp. Service, Dist. No. 2 v. Schneider, 707 So.2d 156 (La. Ct. App. 1998)* (landowner is not entitled to an award of attorney's fees unless it is determined that the property cannot be taken or the proceedings are abandoned by the condemning authority); *State, Dep't of Transp. v. Hall, 707 So.2d 1163 (Fla. Ct. App. 1998); In re Condemnation of Property for Highway Purposes, 576 N.W.2d 719 (Mich. Ct. App. 1998); Pierpont v. Lee County, 710 So.2d 958 (Fla. 1998); State v. Trask, 957 P.2d 781 (Wash. Ct. App. 1998); Brevard County v. Caveral Props., Inc., 696 So. 2d 1244 (Fla. App. 1997)* (holding "there is no basis for an excessive appellate attorney's award in eminent domain"); *Resolution Trust Corp. v. Town of Highland Beach, 18 F.3d 1536 (11th Cir. 1994); Wolf v. Commonwealth, 170 A.2d 557 (Pa. 1961).* Condemnee was not entitled to attorney fees. *Bowers v. Fulton County, 183 S.E.2d 347 (Ga. 1971). Department of Transportation v. Pitman, 479 S.E.2d 112 (Ga. App. 1996)* (condemnee had duty to minimize or mitigate damages). Regarding attorney fees, *see Application of New York Convention Ctr. Dev. Corp., 651 N.Y.S.2d 479 (1996)* (award of only $40,000 in attorney fees was arbitrary and an abuse of discretion); *Georgia Dep't of Transp. v. Edwards, 482 S.E.2d 260 (Ga. 1997)* (condemnor's bad faith allowed condemnee to recover attorney fees).

(n63)Footnote 504. *City of Lake Elsinore v. Ranel Development Co., 70 Cal. Rptr. 2d 715 (Cal. Ct. App. 1998)* (Litigation expenses should not be awarded to a landowner when there is no concrete evidence of an abuse of power by the taking authority or an unreasonable offer of compensation by the same authority); *Department of Transp. v. Woods, 494 S.E.2d 507 (Ga. 1998)* (eminent domain statute permits an award of attorney's fees when there is evidence of abuse of power, impropriety, or an intent to delay or harass); *St. Tammany. Parish Hosp. Service, Dist. No. 2 v. Schneider, 707 So.2d 156 (La. Ct. App. 1998)* (landowner is not entitled to an award of attorney's fees unless it is determined that the property cannot be taken or the proceedings are abandoned by the condemning authority); *Wyser-Pratte v. Van Dorn Co., 49 F.3d 213 (6th Cir. 1995); Tomten v. Thomas, 232 P.2d 723 (Mont. 1951); Garber v. State of Florida, 687 So. 2d 2 (Fla. App. 1996)* (marketing expert's services were reasonably required in determining property value and could be included as awarded costs).

(n64)Footnote 505. *Lucien v. Johnson, 61 F.3d 573 (7th Cir. 1995).* Interest is allowable from date of taking to date of payment. *United States v. 14.83 Acres of Land, 204 F. Supp. 613 (D.N.H. 1962); Smithrock Quarry, Inc. v. State, 374 P.2d 168 (Wash. 1962).* In condemnation proceedings interest is payable from the date of judgment to the date of actual payment. *Woodworth v. Commonwealth, 230 N.E.2d 814 (Mass. 1967).*

(n65)Footnote 506. *Lucien v. Johnson, 61 F.3d 573 (7th Cir. 1995); NRG Co. v. United States, 31 Fed. Cl. 659 (Fed. Cl. 1994); Rochester Carting Co. v. Levitt, 326 N.E.2d 808 (N.Y. 1975).* The right to compensation dates from the time of notice of condemnation although the property may not be occupied until a later date. *State ex rel. State Hwy. Comm'n v. Chavez, 419 P.2d 759 (N.M. 1966).*

(n66)Footnote 507. *J.B.K., Inc. v. City of Kansas City, 641 F. Supp. 893 (W.D.Mo. 1986); Atlantic Coast Line Ry. v. United States, 132 F.2d 959 (5th Cir. 1943).* Interest is allowable from date of taking to date of payment. *United States v. 14.83 Acres of Land, 204 F. Supp. 613 (D.N.H. 1962); Smithrock Quarry, Inc. v. State, 374 P.2d 168 (Wash. 1962).* In condemnation proceedings interest is payable from the date of judgment to the date of actual payment.

Woodworth v. Commonwealth, 230 N.E.2d 814 (Mass. 1967). In Ohio, interest is payable on condemnation awards only from the date of the award. *City of Cincinnati v. Dale, 252 N.E.2d 287 (Ohio 1969).* "Compensation" means full payment and interest from the time possession is taken. *City of Athens v. Warthman, 266 N.E.2d 583 (Ohio App. 1970).* "Just compensation" in eminent domain requires payment of interest on the award from date thereof until time of payment. *Wolf v. Commonwealth, 170 A.2d 557 (Pa. 1961), overruling Culver v. Commonwealth, 35 A.2d 64 (Pa. 1944).* In absence of statute interest in condemnation is payable from time of taking. *Nashville Hous. Auth. v. Doyle, 276 S.W.2d 722 (Tenn. 1955). See* George K. Black, *Interest in Land Damage Cases, 40 Mass. L. Q. 33 (1955);* Will Allen Wilkerson, *Condemnation Suits: Accrual of Interest, 28 Tenn. L. Rev. 516 (1961).* Value in eminent domain is figured as of date of taking. *Johnson v. State, 474 S.W.2d 327 (Tex. App. 1971); City of Walla Walla v. Conkey, 492 P.2d 589 (Wash. App. 1971).*

(n67)Footnote 508. *K.L.K., Inc. v. United States, 35 F.3d 454 (9th Cir. 1994).* Compensation is determined as of date of taking. *Schey Enters. v. State, 190 N.W.2d 149 (Wis. 1971); Gluckman v. State, 325 N.Y.S.2d 99 (N.Y. App. Div. 1971).* Where the physical seizure method is followed instead of other condemnation proceedings, the taking occurs at the moment of seizure, even though title does not pass until compensation is actually paid. *Stringer v. United States, 471 F.2d 381 (5th Cir. 1973), cert. denied, 412 U.S. 943 (1973).* The value of the property is fixed at the time of filing of the petition for condemnation. *Jefferson County v. Adwell, 103 So. 2d 143 (Ala. 1956).* Severance damages are determined as of the date of trial. *State Dep't of Hwys. v. Christy, 293 So. 2d 533 (La. App. 1973).* Value is determined as of time of taking. *Western Robidoux Printing & Litho. Co., v. Missouri State Hwy. Comm'n, 498 S.W.2d 745 (Mo. 1973); Housing Auth. of City of E. Orange v. Leff, 311 A.2d 213 (N.J. Super. 1973).* Value in eminent domain is figured as of date of taking. *Johnson v. State, 474 S.W.2d 327 (Tex. App. 1971); City of Walla Walla v. Conkey, 492 P.2d 589 (Wash. App. 1971).* Time of valuation is date of entry with interest from that date. *State v. Stumbo, 352 P.2d 478 (Or. 1960); Ellis v. City of Grand Rapids, 257 F. Supp. 564 (W.D.Mich. 1966).* A property owner is not entitled to compensation prior to the United States government's taking possession of the land. *Stringer v. United States, 471 F.2d 381* (5th Cir.), *cert. denied, 412 U.S. 943 (1973).* Under the leading rule, the valuation time is the date of the actual taking. *State by State Hwy. Comm'r v. Jones, 142 A.3d 232 (N.J. 1958).* Just compensation is determined as of the date of taking, not some future date. *United States v. Streets, Alleys & Public Ways in Village of Stoutsville, 531 F.2d 882 (8th Cir. 1976).*

(n68)Footnote 509. Time of taking is the date of trial unless the condemnor has taken prior possession. *Shelden v. United States, 7 F.3d 1022 (Fed. Cir. 1993); Director of Hwys. v. Olrich, 213 N.E.2d 823 (Ohio 1966).* "Compensation" means full payment and interest from the time possession is taken. *City of Athens v. Warthman, 266 N.E.2d 583 (Ohio App. 1970).* Unless possession has been taken, the date of trial for appropriation proceedings is the date of taking. *In re Appropriation of Easement for Hwy. Purposes, 221 N.E.2d 476 (Ohio App. 1966).* Date of taking is time jury is impaneled. *City of Cleveland v. Hurwitz, 249 N.E.2d 562 (Ohio Prob. 1969).* In absence of statute, interest in condemnation is payable from time of taking. *Nashville Hous. Auth. v. Doyle, 276 S.W.2d 722 (Tenn. 1955). See* George K. Black, *Interest in Land Damage Cases, 40 Mass. L.Q. 33 (1955);* Will Allen Wilkerson, *Condemnation Suits: Accrual of Interest, 28 Tenn. L. Rev. 516 (1961).*

(n69)Footnote 510. Date of deposit is correct time for valuation of property. *City Nat'l Bank v. United States, 33 Fed. Cl. 759 (1995); Thurow v. City of Dallas, 499 S.W.2d 347 (Tex. App. 1973).*

(n70)Footnote 511. Title does not pass until award is paid. *Cadorette v. United States, 988 F.2d 215 (1st Cir. 1993); Amusements, Inc. v. Assaro, 322 N.Y.S.2d 524 (N.Y. App. Div. 1971).* Condemnee has a right to interest only from the time title passes. *La Porte v. State, 159 N.E.2d 540 (N.Y. 1959).*

(n71)Footnote 512. *Kaiser Dev. Co. v City of Honolulu, 913 F.2d 573 (9th Cir. 1990); City of Albuquerque v. Chapman, 419 P.2d 460 (N.M. 1966).* Time of taking is the date of trial unless the condemnor has taken prior possession. *Director of Hwys. v. Olrich, 213 N.E.2d 823 (Ohio 1966).* Time of valuation is date of entry with interest from that date. *State v. Stumbo, 352 P.2d 478 (Or. 1960).*

(n72)Footnote 513. *Stephenson v. United States, 33 Fed. Cl. 63 (1994); State Hwy. Comm'n v. Stumbo, 352 P.2d 478 (Or. 1960).*

(n73)Footnote 514. *Shelden v. United States, 7 F.3d 1022 (Fed. Cir. 1993); Nichols v. City of Cleveland, 135 N.E. 291 (Ohio 1922).*

(n74)Footnote 515. *Shelden v. United States, 7 F.3d 1022 (Fed. Cir. 1993); Newgoss v. St. Louis A. & T. Ry., 15 S.W. 188 (Ark. 1891).*

(n75)Footnote 516. *K.L.K., Inc. v. United States, 35 F.3d 454 (9th Cir. 1994).* In inverse condemnation the owner may select the date of damages. *Department of Transp. v. Shaw, 345 N.W.2d 153 (Ill. App. 1976).*

(n76)Footnote 517. *Dolan v. City of Tigard, 114 S. Ct. 2309 (1994); Ellis v. City of Grand Rapids, 257 F. Supp. 564 (W.D.Mich. 1966).* State's declaration of a blighted area, reducing values of property, is not a taking. *Jersey City Redev. Agency v. Bancroft Realty Co., 285 A.3d 48 (N.J. Super. 1971).* But requiring compensation is a taking. 8109 *Hough, Inc v. City of Cleveland, 277 N.E.2d 90 (Ohio 1971).* Statements by city officials as to the proposed date of taking of property for an urban renewal project are sufficient to establish a de facto taking of the property when the property owner is damaged by reliance on the statements. *City of Buffalo v. J.W. Clement Co., 311 N.Y.S.2d 98 (1971).* "Condemnation blight" is compensable as resulting from threatened condemnation. *In re Searingtown Road, Town of North Hemstead, 326 N.Y.S.2d 946 (N.Y. 1971). See* Shelby A. Jordan, *Eminent Domain -- Urban Renewal -- De Facto Taking, 3 St. Mary's L. J. 339;* Paul A. Nemann, *Pre-Condemnation Governmental Activity Must Be Considered in Determining Just Compensation for Public Taking in New York but Announcement of Planned Condemnation Cannot Constitute Taking, 72 Colum. L. Rev. 772 (1972); City of Buffalo v. J.W. Clement Co., Inc., 269 N.E.2d 895 (N.Y. 1971).*

(n77)Footnote 518. Condemnation proceedings cannot be abandoned without compensation once condemnor has taken possession of the property. *United States v. 959.29 Acres of Land, 495 F. Supp. 212 (E.D.Tex. 1980); Southern Natural Gas Co. v. Ross, 275 So. 2d 143 (Ala. 1973).* Eminent domain cannot be terminated after title has passed. *Michigan State Hwy. Comm'n v. Cronenwett, 216 N.W.2d 597 (Mich. App. 1974).*

(n78)Footnote 519. *JBK, Inc. v. City of Kansas Vity, 641 F. Supp. 893 (W.D. Mo. 1986); Orono-Veazie Water Dist. v. Penobscot County Water Co., 348 A.2d 249 (Me. 1975).*

(n79)Footnote 520. *Columbia Gas Transmission Corp v. Exclusive Natural Gas Storage Easement, 747 F. Supp. 401 (N.D. Ohio 1990); 40 U.S.C. § 258a.* So the anti-assignment act, *31 U.S.C. § 203,* did not apply where the property was sold after the taking of possession but before the filing of the declaration. *Dow v. United States, 238 F.2d 898 (5th Cir. 1956), cert. granted, 353 U.S. 972, 77 S. Ct. 1057 (1957), judg. rev'd, 357 U.S. 17, 78 S. Ct. 1039 (1958).* Severance damages are determined as of the date of trial. *State Dep't of Hwys. v. Christy, 282 So. 3d 533 (La. App. 1973).* Value is determined as of time of taking. *Western Robidoux Printing & Litho. Co. v. Missouri State Hwy. Comm'n, 498 S.W.2d 745 (Mo. 1973); Housing Auth. of City of E. Orange v. Leff, 311 A.2d 213 (N.J. Super. 1973).*

(n80)Footnote 521. *L.U. Sheep Co. v. Board of County Comm'rs, 790 P.2d 663 (Wyo. 1990).*

(n81)Footnote 522. *Spring v. Russell, 7 Me. 273 (1831); Hull v. Chicago Ry., 32 N.W. 162 (Neb. 1887); Red Oak Farm, Inc. v. City of Ocala, 636 So. 2d 97 (Fla. App. 1994).*

(n82)Footnote 523. *Community Redev. Agency of Hawthorne v. Force Elecs., 55 Cal. App. 4th 622, 64 Cal. Rptr. 2d 209 (Cal. App. 1997)* (holding "the owners are entitled to have the full equivalent of the value of the land's use at the time of the taking paid contemporaneously with the taking"); *City of Needles v. Griswold, 8 Cal. Rptr. 2d 753 (Cal. App. 1992); Sala v. City of Pasadena, 124 P. 539 (Cal. 1912); Andrews v. Cox, 17 A.2d 507 (Conn. 1941); Big Lost River Irr. Co. v. Davidson, 121 P. 88 (Idaho 1912); Noorman v. Department of Public Works & Bldgs., 8 N.E.2d 637 (Ill. 1937); Eldred Drainage & Levee Dist. v. Wilcoxson, 6 N.E.2d 149 (Ill. 1936); McCormick v. West Chicago Park Comm'rs, 8 N.E. 818 (Ill. 1886); Henry v. Dubuque & P. Ry., 10 Iowa 540 (1860); Muldoon v. Mid-Bronx Holding*

Corp. 25 N.Y.S.2d 36 (N.Y. Sup. 1941). See also Murray v. United States, 130 F.2d 442 (App. D.C. 1942); United States v. 813.96 Acres of Land, 45 F. Supp. 535 (W.D.Ark. 1942); In re East River Drive, 35 N.Y.S.2d 990 (N.Y. App. Div. 1942). In condemnation actions the time for valuation is not the date of notice but the time title was transferred by the condemnation proceedings. *Application of Westchester County, 127 N.Y.S.2d 24 (1953).* A property owner is not entitled to compensation prior to the United States government's taking possession of the land. *Stringer v. United States, 471 F.2d 381* (5th Cir.), *cert. denied, 412 U.S. 943 (1973).* Deed in lieu of condemnation does not necessarily preclude subsequent action for damages to land not taken. *Hassler v. Overton County, 311 S.W.2d 206 (Tenn. 1958).*

(n83)Footnote 524. *Hulsey v. Department of Transp., 498 S.E.2d 122 (Ga. Ct. App. 1998)* (under the Georgia state constitution, compensation need not be paid before the taking, but can be paid afterwards; the amount of compensation to be awarded is determined as of the date of the taking); *Bay View ex rel. Ak. Native Village Corps. v. Ahtna, Inc., 105 F.3d 1281 (9th Cir. 1997)* (determining "the government need not provide immediate compensation at the time of the taking; it must simply provide an adequate process for obtaining compensation"); *Joslin Mfg. Co. v. Providence, 262 U.S. 668,* (1923); *Bragg v. Weaver, 251 U.S. 57 (1919); Midnight Sessions, Ltd v. City of Philadelphia, 945 F.2d 667 (3d Cir. 1991); United States v. 9.94 Acres of Land, 51 F. Supp. 478 (E.D.S.C. 1943); In re Condemnation for Imp. 226 F. 105 (E.D.Mich. 1920); Jefferson County v. City of Birmingham, 115 So. 422 (Ala. 1928); Bugbee v. Superior Court, 267 P. 420 (Ariz. 1928); Los Angeles County v. Rindge County, 230 P. 468 (Cal. 1924); Marblehead Land Co. v. Los Angeles County, 230 P. 468 (Cal. App. 1924), error dismissed, 273 U.S. 646 (1926); Hinds County v. Johnson, 98 So. 95 (Miss. 1923); Liles v. Creveling, 268 S.W. 625 (Tenn. 1925); Schooler v. State, 175 S.W.2d 664 (Tex. App. 1943); McGivson v. Roane County Court, 121 S.E. 99 (W. Va. 1924).* Even though the condemning authority failed to pay compensation before taking, the condemning authority could not be subjected to penalty, for the owner who receives just compensation, recovers all the the law allows; the measure of damages was market value plus severance or consequential damages by reason of the diminution in market value of the remaining property taken. *Gray v. State Dep't of Hwys., 202 So. 2d 24 (La. 1967).*

(n84)Footnote 525. *Schertel v. Rex, 764 F. Supp. 1002 (E.D.Pa. 1991); Scribner v. Wikstrom, 34 A.2d 658 (N.H. 1943).*

(n85)Footnote 526. *Hope v. United States, 23 Cl. Ct. 776 (Cl. Ct. 1991); Hays v. Port of Seattle, 251 U.S. 233 (1920); Bragg v. Weaver, 251 U.S. 57 (1919); Lowndes County Com'rs Court v. Bowie, 34 Ala. 461 (1859); East Shore Land Co. v. Peckham, 82 A. 487 (R.I. 1912).* Damages for future use are compensable. *Bainen v. Ives, 368 A.2d 82 (Conn. 1976).* All capabilities of future use must be considered. *State ex rel. Dep't of Transp. v. Brevard, 545 S.W.2d 431 (Tenn. App. 1976).*

(n86)Footnote 527. *NRG Co. v. United States, 31 Fed. Cl. 659 (1994); Milwaukee Elec. Ry. & Light Co. v. Becker, 196 N.W. 575 (Wis. 1923).*

(n87)Footnote 528. *United States v. 50.50 Acres of Land, 931 F.2d 1349 (9th Cir. 1991); Rutsen v. Hundson County, 131 A. 637 (N.J. Sup. 1926) And see State v. Hale, 146 S.W.2d 731 (Tex. 1941).*

(n88)Footnote 529. *Anderson v. City of Alpine, 804 F. Supp. 269 (D.Utah 1992); City of Winchester v. Ring, 146 N.E. 541 (Ill. 1925); Cleveland, C. C. & St. L. Ry. v. Beck 139 N.E. 705 (Ind. App. 1923); Schnull v. Indianapolis Union Ry., 131 N.E. 51 (Ind. 1921); Scott v. Price Bros. Co. 217 N.W. 75 (Iowa 1927); Barrettt v. Union Bridge Co., 243 P. 93 (Or. 1926).*

(n89)Footnote 530. *Carpenter v. Tahoe Regional Planning Agency, 804 F. Supp. 1316 (D.Nev. 1992); Henry Shenk Co. v. City of Erie, 43 A.2d 99 (Pa. 1945); Sonken v. Gemmill, 151 N.E. 355 (Ind. App. 1926). See* Lorin J. Broadbent, *Eminent Domain Valuation of Land Containing Minerals, 6 Utah L. Rev. 345 (1959).*

(n90)Footnote 531. *Board of County Supvrs. v. United States, 27 Fed. Cl. 339 (1992).* Consequential damages to land by the ocean where lost by avulsion may be considered in condemnation of part above water. *In re Point Lockout,*

144 N.Y.S.2d 440 (N.Y. Sup. 1954). An owner of land who consented by deed to the taking of the property for public use is presumed to have been compensated for all reasonably foreseeable damage to the property that could result from such use. *Mehl v. People, 112 Cal. Rptr. 151 (Cal. App. 1974).* Condemnor may later close an underpass where only an easement was taken. *Wilson v. St. Louis-San Francisco Ry., 292 P.2d 725 (Kan. 1956).*

(n91)Footnote 532. *Argier v. Nevada Power Co., 952 P.2d 1390 (Nev. 1998)* (the constitutional right to receive just compensation takes effect when transfer of possession occurs); *Kobaly v. Slone, 142 B.R. 743 (Bankr W.D.Pa. 1992); Orono-Veazie Water Dist. v. Penobscot County Water Co., 348 A.3d 249 (Me. 1975).*

(n92)Footnote 533. *Hedler v. United States, 952 F.2d 1364 (Fed. Cir. 1991); United States v. McFarland, 15 F.2d 823 (4th Cir. 1926), cert. granted, 273 U.S. 688 (1927), cert. revoked, 275 U.S. 485, 275 U.S. 530 (1927)* (in the absence of agreement between the parties just compensation is a judicial question).

(n93)Footnote 534. *National Bd. of Young Men's Christian Ass'ns v. United States, 396 F.2d 467 (Ct. Cl. 1968); Field v. City of Des Moines, 39 Iowa 575 (1874); Surocco v. Geary, 3 Cal. 69 (1953); Parham v. Justices of the Inferior Court, 9 Ga. 341 (1851).*

(n94)Footnote 535. *Africa v. City of Philadelphia, 49 F.3d 945 (3d Cir. 1995).*

(n95)Footnote 536. *Brewer for Value-Added Communications, Inc. Litigation Trust v. State, 672 N.Y.S.2d 650* (N.Y. Ct. of Claims 1998) (the appropriation of funds does not constitute a taking under New York's state constitution as money is a fungible commodity); Personal property is compensable only if attached as a fixture. *Oregon ex. rel. Dep't of Transp. v. Glenn, 602 P.2d 253 (Or. 1979). See State ex rel. Fisher v. Waterfront Elec. Ry., 635 N.E.2d 81 (Ohio 1993)* (where good faith intention of landowner to keep personal property attached to real property, its value is compensable); *Butte Country Club v. Metropolitan Sanitary & Storm Sewer Dist. No. 1, 519 P.2d 408 (Mont. 1974).*

(n96)Footnote 537. *Granite Valley Hotel L.P. v. Jackpot Junction Bingo & Casino, 559 N.W.2d 135 (Minn. App. 1997)* (holding "personal property is subject to the exercise of the power of eminent domain"). Tenant's unsold merchandise after property taken by condemnation was not compensable. *State ex rel. Willey v. Chun, 372 P.2d 324 (Ariz. 1962)* (lessee entitled to compensation on eminent domain for nursery trees and shrubs as fixtures even though he had a right to remove them at the end of the lease); *Dorsey v. Donohoo, 615 N.E.2d 239 (Ohio App. 1992)* (in general, trees are not properly subject to valuation in an appropriation proceeding apart from their effect on value of land); *Kelder v. State, 254 N.Y.S.2d 895 (1964)* (cost of fencing is proper damage measure in condemnation); *Schafer v. Cocklin, 504 N.W.2d 454 (Iowa 1993)* (statute requiring condemnor to fence right of way on both sides at request of owner of condemned property when right of way passes through "enclosed lands"); *Tillamook County v. Johnson, 190 P. 159 (Or. 1920)* (damages were equal to the value of the rock materials which had been severed and could be sold and removed before the expiration of the lease); *Smithrock Quarry, Inc. v. State, 374 P.2d 168 (Wash. 1962).*

See Edward L. Snitzer, *Valuation and Condemnation Problems Involving Trade Fixtures, 16 Vill. L. Rev. 467 (1971);* Michael Hardler Noe, *Singer v. Redevelopment Authority: The Assembled Economic United Doctrine Under the Eminent Domain Code, 32 U. Pitt. L. Rev. 104 (1970);* Benson A. Snaider, *Recognition of Fixture Loss in Condemnation Proceedings, 47 Conn. B.J. 136 (1973). Baldwin Park Redev. Agency v. Irving, 202 Cal. Rptr. 792 (Cal. App. 1984)* (Where removal or relocation of either tangible or intangible personal property, under circumstances of a particular case, is made impossible by the condemnatory act itself, and owner's just compensation should not be limited by an arbitrary notion that in eminent domain any particular form of recognized property right is not compensable. Cost of removal of personal property from realty taken in eminent domain is compensable). *Harvey Textile Co. v. Hill, 67 A.2d 851 (Conn. 1949); Colorado M. Ry. v. Brown, 25 P. 87 (Colo. 1890); Chicago, M. & St. P.R.R. v. Hock, 9 N.E. 205 (Ill. 1886). New York, N.H. & H. R.R. v. Blackstone, 69 N.E. 315 (Mass. 1904); General Ice Cream Corp v. State, 99 N.Y.S.2d 312 (N.Y. Ct. Cl. 1950); Blincoe v. Choctaw, O & W. R.R., 83 P. 903 (Okla. 1905); State v. Lowrie, 56 S.W.2d 676 (Tex. App. 1933).* But denying compensation for certain drugs kept in open containers which could not be sold to other pharmacists and where the pharmacy was taken by eminent domain. *Community Redev. Agency v. Abrams,*

543 P.2d 905 (Cal. 1975), cert. denied, 429 U.S. 869 (1976).

(n97)Footnote 538. Heavy machinery whose removal would result in material injury to the freehold held to be real property. *United States v. Certain Property, 306 F.2d 439 (2d. Cir. 1962).* Improvements by short term lessee which enhance value of the freehold are to be considered in damages in eminent domain. *Whitehall Corners, Inc. v. State, 620 N.Y.S.2d 126 (N.Y. App. Div. 1994)* (valuation of standing crops separate and apart from land is generally excluded on basis that determination of market value is too dependent upon speculation as to future events). *United States v. 15.3 Acres of Land, 154 F. Supp. 770 (M.D.Pa. 1957).* State by and through *State Hwy. Comm'r City Service, 385 P.2d 604 (Mont. 1963).* Personal property subject to eminent domain. *City of Atlanta Parking Co., 167 S.E.2d 145 (Ga. 1969).* Allowing damages for removal of personal property in condemnation action. *Housing Auth. of Clementon v. Myers, 280 A.2d 216 (N.J. Super. App. Div. 1971). Contra* no compensation for personal property. *William J. Kline & Son, Inc. v. State, 317 N.Y.S.2d 401 (N.Y. App. Div. 1971).* Where chattels and realty have a sufficient nexus, condemnation of realty requires payment for personalty. *Masheter v. Boehm, 295 N.E.2d 917 (Ohio App. 1973), rev'd, 307 N.E.2d 533 (Ohio 1974).* Compensation for growing crops. *Department of Water Resources v. Gianni, 105 Cal. Rptr. 248 (Cal. App. 1972); but see Dorsey v. Donohoo, 615 N.E.2d 239 (Ohio App. 1992)* (valuation of standing crops and apart from land is generally excluded on basis that determination of market value is too dependent upon speculation as to future events). Nature of property, manner of annexation, purpose for which used and intention of parties govern as to fixtures together with extent of damage on removal and degree of economic loss. *Masheter v. Boehm, 295 N.E.2d 917 (Ohio App. 1973), rev'd, 307 N.E.2d 533 (1974).* Personal property held compensable. *Warner/Elektra/Atlantic Corp. v. County of DuPage, 991 F.2d 1280 (7th Cir. 1993); State v. Hammer, 550 P.2d 820 (Alaska 1976).* Trees and shrubbery are not appraised independently and only when they have a unique value do they add to the market value of the appropriated property. *State Dep't of Hwys. v. Miltenberger, 344 So. 2d 705 (La. App. 1977).*

(n98)Footnote 539. Allowing damages for removal of personal property in condemnation action. *Housing Auth. of Clementon v. Myers, 280 A.2d 216 (N.Y. App. Div. 1971).* Cabin barges on a lake were held not real estate in taking of the real estate by eminent domain, even though it was not feasible to remove the boats from the lake. *United States v. 967.905 Acres of Land, 447 F.2d 764 (8th Cir. 1971), cert. denied, 405 U.S. 974 (1974).* No compensation for personal property on land taken by eminent domain. *State v. Ness, 516 P.2d 1212 (Alaska 1973).* No compensation for personalty not incorporated in realty, though used in connection with realty. *City of Buffalo v. J. W. Clement Co., 321 N.Y.S.2d 345 (1971).* De facto taking is a direct legal restraint on use. Personal property is not compensable in eminent domain proceedings. *County of San Diego v. Cabrillo Lanes, Inc., 12 Cal. Rptr. 2d 613 (Cal. App. 1992)* (general rule is that constitution does not require compensation for personal property not affixed to condemned realty). *State by Humphrey v. Kouri, 415 N.W.2d 412 (Minn. App. 1987)* (Personal property which is to be removed upon termination of lease is not compensable interest in eminent domain proceeding); *Hunterfly Realty Corp. v. State, 346 N.Y.S.2d 455 (1973).* Personal property and cost of removing same are not compensable. *City of New York v. Atlantic Terminal Renewal, 338 N.Y.S.2d 504 (1972).* Personal property compensable. *Warner/Elektra/Atlantic Corp. v. County of DuPage, 991 F.2d 1280 (7th Cir. 1993); Vivid, Inc. v. Fiedler, 494 N.W.2d 153 (Wis. App. 1993), aff'd, 512 N.W.2d 771 (Wis. 1994).*

(n99)Footnote 540. Allowing damages. *Jacksonville Expressway Auth. v. Henry G. Du Pree Co., 108 So. 2d 289 (Fla. 1958).* Denying damages where the plaintiffs were only stockholders of the corporation owning the personal property in question. *Humphrey v. Argraves, 143 A.2d 432 (Conn. 1958).* Cost of removal of property is not compensable in eminent domain. *Pilgrim Equip. Co. v. State, 473 S.W.2d 945* (Tex. App.), *cert. denied, 409 U.S. 982, 20 (1972).* Fair market value of shrubs, trees and flowers growing in nursery and cost of relocation thereof was proper evidence as to value of parcel taken and severance damage to remainder. *City of Riverside v. Kraft, 21 Cal. Rptr. 425 (Cal. App. 1962). See* Gilbert S. Solomon, *Moving Expenses in Condemnation Proceedings, 21 U. Pitt. L. Rev. 97 (1959).* Cost of removal of personal property taken by eminent domain not compensable. *State ex rel. State Hwy. Comm'n v. Superbilt Mfg. Co., 281 P.2d 707 (Or. 1955).* Property which was affixed to realty became personalty by seeking damages for removal. *In re City of Rochester, 255 N.Y.S. 801 (N.Y. App. Div. 1932).* Cost of moving personalty not compensable. *State ex rel. State Hwy. Comm'n v. Lynch, 471 S.W.2d 261 (Mo. 1971).* But, items which would lose substantial value are compensable, though readily removable. *In re Ruppert Brewery Urban Renewal Project, 325*

N.Y.S.2d 438 (1921). Condemnation award need not include machinery. *State v. Hammer, 550 P.2d 820 (Alaska 1976);* In re Whitlock Ave. in *City of New York, 16 N.E.2d 281 (N.Y. 1938); City of Huron v. Jergeruis, 97 N.W.2d 314 (S.D.1954).* Owner entitled to compensation for cost of removing personal property. *State Road Dep't v. Thibaut, 190 So. 2d 53 (Fla. Dist. App. 1966).* Permitting damages for cost of removal of business. *Bowers v. Fulton County, 146 S.E.2d 884 (Ga. 1966).* Cost of moving property is not a separate element of damages. *Skaff v. Sioux City, 120 N.W.2d 439 (Iowa 1963).* Denying removal costs. *Port of N.Y. Auth. v. Howell, 157 A.2d 731 (N.J. 1960), aff'd, 173 A.2d 310 (N.J. Super. 1961), cert. denied, 174 A.2d 927 (N.J. 1961).* A municipality that condemns for school purposes is exercising in a public not a proprietary function, and hence is not liable to public utility for costs of removal of transmission lines. *Consolidated Edison Co. v. Lindsay, 300 N.Y.S.2d 321 (1969).* While the cost of removal of property of land condemned is not allowable as a separate element of damage, it may be taken into account in fixing the before and after value. *Dyer v. Commonwealth, 152 A.2d 760 (Pa. 1959).* The right of renewal is a factor in determining the value of a leasehold. *Almota Farmers Elevator & Warehouse Co. v. United States 409 U.S. 470 (1973).* Allowing costs of removal. *Naegle Outdoor Adver. Co. v. City of Lakeville, 532 N.W.2d 249 (Minn. App. 1995)* (statute governing billboards requires upon removal of billboards compensation only for those who have property rights). *Plastic Distribs, Inc. v. Burns, 497 A.2d 1005 (Conn. App. 1985)* (Uniform Relocation Assistance Act [C.G.S.A. §§ 8-226 to 8-282], was designed to compensate those displaced by state agency for actual and reasonable costs of relocating). A majority of the State Courts hold that, "in the absence of a statute or agreement to the contrary, the removal costs of ... personal property ... cannot be considered as an element of damage, since such loss is not a taking of property." *City of North Charleston v. Claxton, 431 S.E.2d 610 (S.C. App. 1993). State by Humphrey v. Kouri, 415 N.W.2d 412 (Minn. App. 1987); Drax Servs., Ltd v. Webb/Henne Dayton Arcade Ctr., 1994 Wl 220394 (Ohio App. 1994); Hawkins v. City of La Gerade, 843 P.2d 400 (Or. 1992);* 1 Orgel on Valuation Under the Law of Eminent Domain 306, § 69 (1953); *State v. Teasley, 1995 WL 416988 (Tenn. App. 1995); State v. Weber-Connelly, Naegele, Inc. 448 N.W.2d 380 (Minn. App. 1989).*

(n100)Footnote 541. *HHM Assocs. v. Appleton, 597 N.Y.S.2d 894 (N.Y. Sup. Ct. 1993)* (the utility company must relocate its facilities at its own expense when public necessity comes into play); Consolidated Edison Co. v. Lindsay, 300 N.Y.S.2d (1969).

(n101)Footnote 542. *Sussex Rural Elec. Coop. v. Township of Wantage, 526 A.2d 269 (N.J. App. 1987)* (where utility lines originally placed on private property are required to be relocated to accommodate a subsequently created public right of way, the utility is entitled to be compensated for its relocation costs); *City of Grand Prairie v. American Tel. & Tel. Co., 405 F.2d 1144 (5th Cir. 1969).*

(n102)Footnote 543. Holding that articles of personal property are not compensable unless they cannot be removed without material injury to themselves or to the improvements of the realty, or are so designed, constructed or specially adapted to the purpose for which the improved realty is used that they are essential accessory parts of the improved realty not capable of use elsewhere and which would substantially lose all value if removed. *Town of Montclair, Montclair Redev. Agency v. D'Andrea, 351 A.2d 397 (N.J. 1976).* Corporation's just compensation included value of any nonremovable improvements that corporation owned under terms of lease. *State v. Teller Native Corp., 904 P.2d 847 (Alaska 1995).* Right to just compensation in condemnation action includes property owner's choice regarding whether to remove movable trade fixtures and be compensated for their removal and reattachment at new location, or to leave trade fixtures behind and be compensated for their value-in-place. *In re Condemnation of Private Property, 536 N.W.2d 598 (Mich. App. 1995).* Fixtures are compensable in eminent domain proceeding only to the extent that they enhance the value of the land. *United States v. Five Parcels, 1.11195 Acres of Land, 765 F. Supp. 1283 (E.D.Mich. 1991).*

(n103)Footnote 544. *United States v. Brooklyn Union Gas Co., 168 F.2d 391 (2d Cir. 1948); Columbia Delaware Bridge Co. v. Geisse, 38 N.J.L. 39 (N.J. Super. Ct. 1875).* Where land was being condemned, court reversed lower court and refused to admit in evidence the net profit that could be made therefrom if it were devoted to market gardening. Court admitted a split of authority as to admissibility of evidence on projects on agricultural land, but said no law will admit potential profits. *State v. Cerruti, 214 P.2d 346 (Or. 1950).* To be able to use reproduction value it must be shown that reproduction would be a successful business venture. *United States v. Buhler, 305 F.2d 319 (5th Cir. 1972).*

"Income return" approach is an acceptable property valuation method. State through *Dep't of Hwys. v. Gras, 41 So. 2d 35 (La. App. 1962). Lucre Corp. v. County of Gibson, 657 N.E.2d 150 (Ind. App. 1995)* ("capitalization" is method of computation for determining property's fair market value which gives value to land in relation to income it produces). *See* Comment, *Valuing an Unprofitable Business Taken for Continuing Public Use, 68 Colum. L. Rev. 977 (1968). See also Matter of City of Albany, 523 N.Y.S.2d 652 (N.Y. App. Div. 1988)* (use of capitalization of income method for valuation of income-producing rental property was proper, absent comparable sales upon which to base market data approach). *But see In re Cool, 81 B.R. 614 (Bankr. D.Mont. 1987)* (generally, evidence of profits derived from business conducted on land is too speculative, uncertain, or remote to be considered as a basis for computing market value, since such profits depend on particularized considerations such as market conditions, skill and knowledge of operation, and managerial competency).

(n104)Footnote 545. *United States v. 561.14 Acres of Land, 206 F. Supp. 816 (W.D.Ark. 1962)* (damage to business is not a proper element); *United States v. Certain Land, 209 F. Supp. 50 (D.Md. 1962)* (frustration of business opportunity is not compensable); *DeFreitas v. Town of Suisun, 149 P. 553 (Cal. 1915); Ogden v. Pennsylvania Ry., 78 A. 929 (Pa. 1911); Kirkman v. State Hwy. Comm'n, 126 S.E.2d 107 (N.C. 1962)* (loss of profits is not an element except as it renders land less valuable for any use to which it is adopted). Frustration of future business plans is not compensable in eminent domain. *United States ex rel. T.V.A. v. T. Indus., Inc., 489 F.2d 921 (6th Cir. 1974). See* Frank A. Arthur, *Aloi & Goldberg, A Re-Examination of Value, Goodwill and Business Losses in Eminent Domain, 53 Cornell L. Rev. 604 (1968).* Business damages that are intangible do not constitute property under eminent domain. *Jamesson v. Downtown Dev. Auth., 322 So. 2d 510 (Fla. 1975); State by Comm'r of Transp. v. Copper Alloy Co., 347 A.2d 365 (N.J. App. 1975); State Dep't of Roads v. Dillon, 122 N.W.2d 223 (Neb. 1963)* (all nonspeculative elements of inconvenience, annoyance and disadvantage which influence the value of property for sale are compensable). Imposition of special assessment lien upon remaining property is not an element of damages. *City of Baldwin Park v. Stoskus, 503 P.2d 1333, 105 Cal. Rptr. 325 (Cal. 1972). Department of Transp. v. Fleming, 436 S.E.2d 407 (N.C. App. 1993)* (Generally, loss of profits from operation of business conducted on property is not element of recoverable damages in award pursuant to eminent domain taking); *Workman v. Agency of Transp., 657 A.2d 174 (Vt. 1994)* (Business losses were not compensable in condemnation action for property on which landowner had intended to construct warehouses where landowner had merely obtained permits and had graded land in preparation of construction, and landowner had been compensated for permits and grading in trial court's award; further compensation would be either duplicative or for business activity that never existed).

(n105)Footnote 546. *People ex rel. DOT v. Leslie, 55 Cal. App. 4th 918, 64 Cal. Rptr. 2d 252 (Cal. App. 1997)* (citing statute which "provides compensation for loss of goodwill in eminent domain proceedings by a whole or partial taking"). Loss of business profits is not applicable in eminent domain proceedings. *State ex rel. State Hwy. Comm'n v. Schwartz, 526 S.W.2d 952 (Mo. App. 1975).* Permitting allowance of loss of good will in a taking by eminent domain, valued with relation to business volume not to profit and loss. *Matthews v. Division of Admin. State Dep't of Transp., 324 So. 2d 664 (Fla. App. 1975).* Loss of business is not a proper element in eminent domain. Loss of a liquor license as the result of condemnation is not compensable *Restaurants, Inc. v. City of Wilmington, 274 A.2d 137 (Del. 1971).* Loss of profits caused by reduction in traffic flow, standing alone, is not subject to compensation in eminent domain. *Weldon v. State, 279 N.E.2d 554 (Ind. 1972).* If the value of the business operated on a leasehold being condemned and the value of the leasehold itself cannot readily be separated, good will can be taken as an element. *In re Learned-Bates Rehab. Project 202 N.W.2d 816 (Mich. App. 1972). United States v. Miller, 317 U.S. 369 (1943); Cullum v. Van Buren County, 267 S.W.2d 14 (Ark. 1954); Collins v. State Hwy. Comm'n, 66 P.2d 409 (Kan. 1937); Wayne Co., Inc. v. Newo, Inc., 182 A.2d 369* (lessee is not entitled to damages for loss of business good will, fixtures and cost of removal); *Board of Comm'rs v. Gardner, 260 P.2d 682 (N.M. 1953); Yancey v. North Carolina State Hwy. & Pub. Works Comm'n, 19 S.E.2d 489 (N.C. 1942);* State by and through *State Hwy. Comm'n v. Bailey, 319 P.2d 906 (Or. 1957).* Pennsylvania allows damages for business dislocation. *Mobil Oil Corp. v. Dep't of Transp., 315 A.2d 639 (Pa. 1974).* Some states permit the offset of benefits against both the value of the land actually taken and severance damages. *Commonwealth Dep't of Hwys. v. Sherrod, 367 S.W.2d 844 (Ky. 1963); Smith v. City of Greenville, 92 S.E.2d 639 (S.C. 1956);* however, in most states benefits subject to offset can only be deducted from severance damages. *State v. Meyer, 391 S.W.2d 471*

(Tex. App. 1965), aff'd, 403 S.W.2d 366 (Tex. 1966); State v. Ahaus, 63 N.E.2d 199 (Ind. 1945); City of Hayward v. Unger, 15 Cal. Rptr. 301 (Cal. App. 1961). No compensation for loss of good will of business. *Auraria Businessmen Against Confiscation, Inc. v. Denver Urban Renewal Auth., 517 P.2d 845 (Colo. 1974).* When the business is so inextricably related to the land that a taking of the lands is a taking of the business, loss of business is compensable. City of St. Louis v. Union Quarry & Constr. Co., 394 S.W.2d (Tex. App. 1968). *See* Frank A. Arthur, *Aloi & Goldberg, A Re-examination of Value, Good Will, and Business Losses in Eminent Domain, 53 Cornell L. Rev. 604 (1968).* Injury to or destruction of business taken by eminent domain is not compensable, but if land has special value owing to its adaptability of particular use, this must be considered. *Seferi v. Ives, 236 A.3d 83 (Conn. 1967), appeal dismissed, 391 U.S. 359 (1967).* Destruction of business through partial taking was compensable. *Young v. Hillsborough County, 215 So. 2d 300 (Fla. 1962). See also* William E. Williams, *Eminent Domain -- Compensation for Business Damages in Florida, 22 U. Fla. L. Rev. 163 (1969). Outdoor Graphics, Inc. v. City of Burlington, Iowa, 103 F.3d 690 (8th Cir. 1996)* (no recovery for city ordinance prohibiting billboards).

(n106)Footnote 547. *Department of Pub. Works & Bldgs. v. Bloomer, 191 N.E.2d 245 (Ill. 1963); Commonwealth Dep't of Hwys. v. Fultz, 360 S.W.2d 216 (Ky. 1962)* (loss of business is not compensable); *Commonwealth Dep't of Hwys. v. Sherrod, 367 S.W.2d 844 (Ky. 1963); Green Acres Mem'l Park, Inc. v. Mississippi State Hwy. Comm'n 153 So. 2d 286* (anticipated profits are not a proper consideration); *Cleveland Boat Serv., Inc. v. City of Cleveland, 136 N.E.2d 274 (Ohio 1956)* (injury to business and loss of profits are too speculative to be damages in eminent domain). Business losses are not compensable. *A.S. Davis Ice Co., Inc. v. United States, 362 F.2d 934 (1st Cir. 1966); United States v. 620.98 Acres of Land, 255 F. Supp. 427 (W.D.Ark. 1966); State Hwy. Comm'n v. Peters, 416 P.2d 390 (Wyo. 1966).* Profits are not an element of damages. *State v. Nelson, 296 N.E.2d 908 (Ind. App. 1973).* Loss of profits, business and good will are not compensable. *Indiana & Mich. Elec. Co. v. Whitley County Rural Elec. Membership Corp., 312 N.E.2d 503 (Ind. App. 1974).* No right to loss of profits caused by impassability of streets where widening and repairing operations were being conducted when there was no taking of realty. *Papp v. City of Hammond, 230 N.E.2d 326 (Ind. 1967).* Evidence of volume or profits on business conducted on the property is not proper in eminent domain proceedings. *City of Chicago v. Budd, 257 N.E.2d 161 (Ill. App. 1970).* But holding that loss of business value per se as separately and independently from fair market is improper. *State ex rel. Secretary of Dep't of Hwys. and Transp. v. Davis Concrete of Del., Inc., 355 A.2d 883 (Del. 1976).* Loss of business is not compensable. *Kayo Oil Co. v. State, 340 So. 2d 756 (Ala. 1976).*

(n107)Footnote 548. *See* Franklin L. Wright, Jr., *Non-compensable Business Losses in Eminent Domain Proceedings: A Time for Reevaluation, 46 Temp. L.Q. 72 (1972).*

(n108)Footnote 549. Business, goodwill, or profits are not property covered by eminent domain compensation. *Hladek v. City of Merced, 138 Cal. Rptr. 194 (Cal. App. 1977).* Temporary loss of profits due to relocation is compensable. *State v. Hammer, 550 P.2d 820 (Alaska 1976).* Loss of profits not compensable. State through *Dep't of Hwys. v. Shuff, 332 So. 2d 529 (La. App. 1976); City of Lansing v. Wery, 242 N.W.2d 51 (Mich. App. 1976).*

(n109)Footnote 550. *City of Berkeley v. Von Adelung, 29 Cal. Rptr. 802 (Cal. App. 1963); Wilmington Hous. Auth. v. Nos. 312-314 East Eighth Street, 191 A.2d 5 (Del. 1963); Department of Public Works & Bldgs. v. Bloomer, 191 N.E.2d 245 (Ill. 1963); Commonwealth Dep't of Hwys. v. Sherrod, 367 S.W.2d 844 (Ky. 1963); Green Acres Mem'l Park, Inc. v. Mississippi State Hwy. Comm'n, 153 So. 2d 286 (Miss. 1963).* Loss of profits or damage to business is not compensable in eminent domain. *State v. Heslar, 274 N.E.2d 261 (Ind. 1971).* Permanent injury to a business cannot be recovered separate from depreciation of the portion not taken. *Pilgrim Equip. Co. v. State, 473 S.W.2d 945 (Tex. App. 1972).*

(n110)Footnote 551. *O'Brien v. State Hwy. Bd. 190 A.2d 699 (Vt. 1963).* "Income return" approach is proper. State through *Dep't of Hwys. v. Gras, 141 So. 2d 35 (La. App. 1962). See Valuing an Unprofitable Business Taken for Continuing Public Use, 68 Colum. L. Rev. 977 (1968); United States v. 561.14 Acres of Land, 206 F. Supp. 816 (W.D.Ark. 1962)* (damage to business is not a proper element); *United States v. Certain Land, 209 F. Supp. 50 (D.Md. 1962)* (frustration of business opportunity is not compensable); *Kirkman v. State Hwy. Comm'n, 126 S.E.2d 107 (N.C.*

1962) (loss of profits is not an element except as it renders land less valuable for any use to which it is adopted.). Frustration of future business plans is not compensable in eminent domain. United States ex rel.*T.V.A. v. T. Industries, Inc. 489 F.2d 921 (6th Cir. 1974).* Frank A. Arthur, *Aloi & Goldberg, A Re-Examination of Value, Goodwill and Business Losses in Eminent Domain, 53 Cornell L. Rev. 604 (1968).* Loss of profits or damage to business are not compensable in eminent domain. *State v. Heslar, 274 N.E.2d 261 (Ind. 1971).* Permanent injury to a business cannot be recovered separate from depreciation of the portion not taken. *Pilgrim Equip. Co. v. State, 473 S.W.2d 945 (Tex. App. 1972).* Loss of business is not compensable. *Kayo Oil Co. v. State, 340 So. 2d 756 (Ala. 1976).* While loss of business is not included, the fact that a given business was in operation would be taken into account if the use was a factor in establishing market value. *Gebrian v. Bristol Dev. Agency, 370 A.2d 1055 (Conn. 1976).*

(n111)Footnote 552. *In re Larned-Bates Rehab. Project, 202 N.W.2d 816 (Mich. App. 1972).* Inconvenience may be a factor in condemnation. *DeBruin v. Green County, 241 N.W.2d 167 (Wis. 1976).*

(n112)Footnote 553. Evidence as to traffic flow admissible. *State ex rel. Herman v. Wilson, 438 P.2d 760 (Ariz. 1968).* Loss of business inadmissible. *State v. Hastings, 206 N.E.2d 874 (Ind. 1965).*

(n113)Footnote 554. Not compensable. *Restaurants, Inc. v. City of Wilmington, 274 A.2d 137 (Del. Super. Ct. 1971) Compensable. State by Mattson v. Saugen, 169 N.W.2d 37 (Iowa 1918).*

(n114)Footnote 555. *In re Larned-Bates Rehab Project, 202 N.W.2d 816 (Mich. App. 1972); City of Newark v. Eisner, 135 A. 86 (N.J. Ch. 1926). Contra Michigan State Hwy. Comm'n v. L & L Concession Co., 187 N.W.2d 465 (Mich. App. 1971).*

(n115)Footnote 556. *Cumbaa v. Town of Geneva, 179 So. 227 (Ala. 1938).* Allowing detention damages for period between time of taking and time of judgment. *Kinter v. United States, 156 F.2d 5 (3d Cir. 1946). See* Jacob Schiffman & Patrick J. Toole, Jr., *Detention Damages in Eminent Domain Proceedings, 68 Dick. L. Rev. 55 (1963).* Valuation for taking of an easement is the difference between the market value of the land free of the easement and the market value burdened with the easement. *United States v. 1,129.75 Acres of Land, 473 F.2d 996 (8th Cir. 1973).* Damages for taking of an easement are not equivalent to those for the taking of a fee. *Carolina Power & Light Co. v. Clark, 91 S.E.2d 569 (N.C. 1956).*

(n116)Footnote 557. *East St. Louis Light & Power Co. v. Cohen, 164 N.E. 182 (Ill. 1928); United Power & Light Corp. v. Murphy, 9 P.2d 658 (Kan. 1932); Missouri Power & Light Co. v. John Hancock Mut. Life Ins. Co., 58 S.W.2d 321 (Mo. App. 1931).* Under certain circumstances, the taking of public facilities through eminent domain proceedings can be compensated by payment of the cost of substitute. *State Road Comm'n v. Board of Park Comm'rs, 173 S.E.2d 919 (W. Va. 1970).* Where there was no direct physical invasion or encroachment upon riparian property owners, the riparian owners were not entitled to compensation resulting from the construction of low level parallel bridges which prevented many vessels from reaching owners' shipyards. *Colberg, Inc. v. State ex rel. Dep't of Pub. Works, 62 Cal. Rptr. 401 (1967), cert. denied, 390 U.S. 949, 88 S. Ct. 1037 (1968).* Recovery denied where the taking by eminent domain changed the grade of a part of the street so as to interfere with the view of the street. *State ex rel. Schiederer v. Preston, 166 N.E.2d 748 (Ohio 1960).*

(n117)Footnote 558. *Proctor v. State Hwy. Comm'n, 55 S.E.2d 479 (N.C. 1949)* (the cases are not in agreement as to whether condemnation of an agreement for a special purpose as a power line gives exclusive possession). *Held not. Collins v. Alabama Power Co., 108 So. 868 (Ala. 1926); Patterson Orchard Co. v. Southwest Ark. Utils. Corp., 18 S.W.2d 1028 (Ark. 1929).* Held exclusive possession given (probably minority view). *Carolina Power & Light Co. v. Bowman, 51 S.E.2d 191 (N.C. 1949).*

(n118)Footnote 559. *Illinois-Iowa Power Co. v. Guest, 18 N.E.2d 193 (Ill. 1938).*

(n119)Footnote 560. In eminent domain, in the case where the lessee has erected structures or fixtures on the property, the lessee is entitled to remove the same upon the cost of removal but if they are unmovable then the award

must be apportioned between the lessor and the lessee. *Empire Bldg. Corp. v. Orput & Assocs., 336 N.E.2d 82 (Ill. App. 1975).* If industrial equipment is a functional unit of the property taken the condemnor must pay either the moving expenses of the machinery and equipment or the value thereof as a functional unit but not to exceed the amount by which it enhances the value of the land and the buildings. *State by Comm'r of Transp. v. Copper Alloy Co., 347 A.2d 365 (N.J. App. 1975).*

(n120)Footnote 561. *Searl v. School Dist. No. 2, 133 U.S. 553 (1890).* But generally, compensation must be paid for fixtures. *Fechet v. Drake, 12 P. 694 (Ariz. 1887); Frost v. Schinkel, 238 N.W. 659 (Neb. 1931).* Improvements made after notice of taking are not compensable. *City of Santa Barbara v. Petras, 98 Cal. Rptr. 635 (Cal. App. 1971).* But they are compensable if owner merely knew condemnation was being considered. *Orleans Parish Sch. v. Montegut, Inc., 255 So. 2d 613 (La. App. 1971).*

(n121)Footnote 562. *United States v. Five Parcels of Land, 180 F.2d 75 (5th Cir. 1950), cert. denied, 340 U.S. 812 (1950).*

(n122)Footnote 563. Compensation denied if improvements made in bad faith. *Arkansas State Hwy. Comm'n v. Dean, 425 S.W.2d 563 (Ark. 1968).* Property owners are entitled to value of improvements made, even though they had knowledge of impending eminent domain; but not of such improvements made in bad faith to increase value. *Babinec v. State, 512 P.2d 563 (Alaska 1973).* Landowner may not recover for bad-faith improvements made for the sole purpose of enhancing damages to be recovered in eminent domain proceedings. *State ex rel. Herman v. Schaffer, 515 P.2d 593 (Ariz. 1973).* Absolute right to improve. *State Hwy. Dep't v. Owens, 171 S.E.2d 770 (Cal. App. 1969).* Can obtain damages for improvements though not removable. *United States v. 0.64 Acres of Land, 54 F. Supp. 562 (S.D.Cal. 1944).* But where the property has not been included in the original project and increases in value as the result thereof upon a subsequent taking the increased value must be considered. *Andrews v. State, 217 N.Y.S.2d 9 (N.Y. 1961).* Improvements may be made though there is knowledge that condemnation may be instituted. *See Property -- Condemnation -- Improvements Made with Prior Knowledge, 22 Mercer L. Rev. 616 (1971); State Hwy. Dep't v. Owens, 171 S.E.2d 770 (Ga. App. 1969).* Denied compensation if improvements made in bad faith. *Arkansas State Hwy. Comm'n v. Dean, 425 S.W.2d 306 (Ark. 1968).* Property owners are entitled to value of improvements made, even though they had knowledge of impending eminent domain, but not of such improvements made in bad faith to increase value. *Babinec v. State, 512 P.2d 563 (Alaska 1973).* Landowner may not recover from bad-faith improvements made for the sole purpose of enhancing damages to be recovered in eminent domain proceedings. *State ex rel. Herman v. Shaffer, 515 P.2d 593 (Ariz. 1973).* Absolute right to improve. *State Hwy. Dep't v. Owens, 171 S.E.2d 770 (Ga. App. 1969).*

(n123)Footnote 564. *Shinault v. McLeannan County, 330 S.W.2d 486 (Tex. Civ. App 1959).* Improvements made after notice of taking are not compensable. *City of Santa Barbara v. Petras, 21 Cal. App 3d 506, 98 Cal. Rptr. 635 (1971).* But are compensable if owner merely knew condemnation was being considered. *Orleans Parish Sch. v. Montegut, Inc., 225 So. 2d 613 (La. App 1971).*

(n124)Footnote 565. *KEM Elec. Co-op, Inc. v. Materi, 247 N.W.2d 668 (N.D.1976).*

(n125)Footnote 566. State through *Dep't of Hwys. v. Alexandria Volkswagen, Inc., 348 So. 2d 176 (La.. App. 1977).*

(n126)Footnote 567. *United States v. Certain Land, 220 F. Supp. 696 (D.Me. 1963).* Restrictive covenants are property rights protected in eminent domain. *Southern Cal. Edison Co. v. Bourgerie, 107 Cal. Rptr. 76 (1973), overruling, Friesen v. City of Glendale, 288 P. 1080 (Cal. 1930). Contra Moses v. Hazen, 69 F.2d 842 (D.C.Cir. 1934).* Owner of a restrictive covenant is entitled to compensation on a taking by eminent domain. *Meredith v. Washoe County Sch. Dist., 435 P.2d 750 (Nev. 1968). See Navigation Servitude -- The Shifting Rule of No Compensation, 7 Land & Water L. Rev. 501 (1974); Southern Cal. Edison Co. v. Bourgerie, 107 Cal. Rptr. 76 (1973).* But holding that one whose property was not taken by eminent domain was not subject to compensation as being specially damaged where both

one's own property and the property taken was subject to a restrictive covenant of use. *Arkansas State Hwy. Comm'n v. McNeill, 381 S.W.2d 425 (Ark. 1964).*

(n127)Footnote 568. Destruction of restrictive covenant is compensable. *Adaman Mut. Water Co. v. United States, 278 F.2d 842 (9th Cir. 1960); City of Shelbyville v. Kilpatrick, 322 S.W.2d 203 (Tenn. 1954).* Restrictive covenants bind public agencies and must be taken by eminent domain. *Ashland-Boyd County City-County Health Dep't v. Riggs, Ky, 252 S.W.2d 922 (Ky. 1952); Burger v. City of St. Paul, 64 N.W.2d 73 (Minn. 1954); City of Raleigh v. Edwards, 71 S.E.2d 396 (N.C. 1952); Meagher v. Appalachian Elec. Power Co., 77 S.E.2d 461 (Va. 1953).* The holder of an unexercised option does not have a compensable interest in condemnation proceedings. *Carroll v. Louisville, 354 S.W.2d 291 (Ky. 1962); State v. New Jersey Zinc Co., 193 A.2d 244 (N.J. 1963). See* Richard I. Brickman, *The Compensability of Restrictive Covenants in Eminent Domain, 13 U. Fla. L. Rev. 147 (1960).* Restrictive covenants are property rights compensable in eminent domain. *Southern Cal. Edison Co. v. Bourgerie, 507 P.2d 964 (Cal. 1973), overruling, Friesen v. City of Glendale, 288 P. 1080 (Cal. 1930), disapproving, Sackett v. Los Angeles City Sch. Dist., 5 P.2d 23 (Cal. App. 1931).* Taking of a building restriction against an electric power station was compensable. Southern Cal. Edison Co. v. Bourgerie, 107 Cal. Rptr. (Cal. 1973), *overruling, Friesen v. City of Glendale, 288 P. 1080 (Cal. 1930); Lombardy v. Peter Keiwit Sons' Co., 72 Cal. Rptr. 240 (Cal. App. 1968).*

(n128)Footnote 569. *See* Lorin J. Broadbent, *Eminent Domain Valuation of Land Containing Minerals, 6 Utah L. Rev. 345 (1959);* Roger D.Graham, *Eminent Domain: Approaches to Valuation of Real Estate with Emphasis on Mineral Properties, 74 W. Va. L. Rev. 307 (1972);* Fred M. Lange, *The Mineral Estate in Condemnation, 10 Houston L. Rev. 266 (1973); Valuation in Eminent Domain Cases -- Use of the Multiplication Method in Valuing Mineral Deposits, 36 Alb. L. Rev. 753 (1972). State ex rel. State Hwy. Comm'n v. Myers, 383 P.2d 274 (N.M. 1963).* Where leased property is condemned, the interests of the lessee and the lessor are ordinarily obtained at the same time and compensation paid as though the property belonged to one person, with the sum then being apportioned between lessor and lessee. *Western Robidoux Printing & Litho. Co., Inc. v. Missouri State Hwy. Comm'n, 498 S.W.2d 745 (Mo. 1973).* The value of the mineral estate can only be calculated as a part of the market value of the land. *Gulf Interstate Gas Co. v. Garvin, 368 S.W.2d 309 (Ky. 1963).* Gas royalties, present and prospective, are a part of value. *Michigan Consol. Gas Co. v. Muzeck, 145 N.W.2d 266 (Mich. App. 1966), aff'd, 154 N.W.2d 448 (Mich. 1967).*

(n129)Footnote 570. Owners of minerals should be joined with surface owner in eminent domain proceedings. *In re Appropriation for Hwy. Purposes, 267 N.E.2d 829 (Ohio App. 1930).*

(n130)Footnote 571. *See Ross v. Commissioners of Palisades Interstate Park, 101 A. 60 (N.J. 1917); Sparkill Realty Corp v. State, 197 N.E. 192 (N.Y. 1935);* John P. Horan, *Mineral Valuation in Eminent Domain Cases, 7 Hastings L.J. 163 (1956).*

(n131)Footnote 572. *Campbell v. Monaco Coal Min. Co, 85 N.E.2d 138 (Ohio 1948).* Anderson v. Chesapeake Ferry Co., 43 S.6.2d 10 (Va. 1947); *United States v. 4.553 Acres of Land, 208 F. Supp. 127 (N.D.Cal. 1962).* While the existence of valuable mineral deposits is a proper consideration for value, the amount of the minerals cannot be estimated and multiplied by a fixed price per unit. *Seaboard Coast Line R.R. v. Harrelson, 202 S.E.2d 1 (S.C. 1974).*

(n132)Footnote 573. *Commonwealth Dep't of Hwys. v. Davis, 400 S.W.2d 515 (Ky. 1966).*

(n133)Footnote 574. No damages in condemnation for loss of view. *Earl v. Arkansas State Hwy. Comm'n, 405 S.W.2d 931 (Ark. 1966); State by Mondale v. Gannons, Inc., 145 N.W.2d 321 (Minn. 1966),* but treated as an element of damages in determining value of property remaining. State through *Dep't of Hwys. v. Singletary, 185 So. 2d 642 (La. App. 1966); State ex rel. Dept of Hwys. v. Allison, 372 P.2d 850 (Okla. 1962).* Illinois permits condemnation to preserve "natural beauty." *Department of Pub. Works & Bldgs. ex rel. People v. Keller, 316 N.E.2d 794 (Ill. App. 1974).* Evidence may be introduced as to the unsightliness of the improvement to be constructed on an easement being sought by condemnation. *Central Ill. Pub. Service Co. v. Westervelt, 342 N.E.2d 463 (Ill. App. 1926), aff'd 367 N.E.2d 661 (Ill. 1977), cert. denied 434 U.S. 1070 (U.S. 1978).*

(n134)Footnote 575. Missouri courts have disagreed whether the unsightliness of power transmission lines in the appurtenances is an element of damage to be awarded when there is a condemnation for a power line easement over farm land. *Kamo Elec. Coop., Inc. v. Cushard, 416 S.W.2d 646 (Mo. 1967)* (affirmative); *Kamo Elec. Coop v. Brooks, 337 S.W.2d 444 (Mo. App. 1960)* (negative); Cochran v. Kavanaugh, 252 S.W.84 (Mo. 1923) (denying the theory). *Winger v. Aires, 89 A.2d 521 (Pa. 1952).*

(n135)Footnote 576. *Walkenhorst v. State, Dep't of Roads, 573 N.W.2d 474 (Neb. 1998)* (when trees are planted for a special purpose (windbreaks, shade, aesthetics) the proper measure of the value of condemned land is the difference in value of the land before and after the removal of the trees; any evidence of this nature that is presented to the court must be relevant to a determination of the fair market value of the land); Growing trees are compensable. State through *Dep't of Hwys. v. Luster, 277 So. 2d 181 (La. App. 1973).* Value of trees is included in value of the land taken instead of debiting value of the trees as an item of damage. *State ex rel. Dep't of Hwys. v. Strickland, 290 So. 2d 714 (La. App. 1974).* The measure of damages for removal of ornamental trees is the difference in the value of the property immediately before and after the taking. *Fiske v. Moczik, 329 So. 2d 35 (Fla. App. 1976);* State through *Dep't of Hwys. v. Shackelford, 331 So. 2d 884 (La. App. 1976); Oughton v. Gaddis, 683 So. 2d 390 (Miss. 1996)* (necessity of fence was included in calculating damages).

(n136)Footnote 577. *Newton Girl Scout Council, Inc. v. Massachusetts Tpk. Auth., 138 N.E.2d 769 (Mass. 1956).*

(n137)Footnote 578. Where there is a legal obligation that the land be used for a specific purpose, the compensation is the cost of restoring the premises not taken to their former utility. *State v. Waco Indep. Sch. Dist., 364 S.W.2d 263 (Tex. App. 1963).* Damages to future use are compensable. *Bowen v. Ives, 368 A.2d 82 (Conn. 1976).* All capabilities of future use must be considered. *State ex rel. Dep't of Transp. v. Brevard, 545 S.W.2d 431 (Tenn. App. 1976).* Prospective enhancement of market value because of contemplated uses is a proper factor. *City of Indianapolis ex rel. Dep't of Metro. Dev. v. Heeter, 355 N.E.2d 429 (Ind. App. 1976).* The proximity of the property taken to a proposed building improvement which, if completed, would have increased the value of the land taken is an element of damages. *Missouri State Park Bd. v. McDaniel, 473 S.W.2d 774 (Mo. App. 1971); State ex rel. Kansas City v. Power & Light Co. Parma, 467 S.W.2d 43 (Mo. 1971). Contra Erie v. County Moran, 306 N.Y.S.2d 981 (N.Y. Sup. 1971).* Expenses of planning for shopping center were not compensable since they did not increase the value of the land itself. *Schnier v. Commissioner of Transp., 374 A.2d 1087 (Conn. 1977).* Holding loss of intended use of property to arise in the future was not compensable. *Public Serv. Co. of Indiana, Inc. v. Morgan County Rural Elec. Membership Corp., 360 N.E.2d 1022 (Ind. App. 1977).* Holding that loss of business value *per se* as separately and independently calculated from fair market value is improper. *State ex rel. Secretary of Dep't of Hwys. and Transp. v. Davis Concrete of Del., Inc., 355 A.2d 883 (Del. 1976).*

(n138)Footnote 579. Where Indian lands are taken by eminent domain, the court must consider, in addition to fair market market value, the fact the lands were exempt from taxation. *United States v. Certain Parcels of Land, 327 F. Supp. 181 (W.D.N.Y. 1970), aff'd 443 F.2d 375 (2nd. Cir. 1970).* Holding that the owner of coast lands cannot demand portsite evaluation as part of the compensation in eminent domain. *United States v. Twin Cities Power Co., 350 U.S. 222 (1956); United States v. Rands, 389 U.S. 121 (1967).* Where property taken has unique value but such value exceeds the market value, intrinsic value and actual value to the owner are the proper measures and not speculations on probable market value. *King v. United States, 292 F. Supp. 767 (D.Colo. 1968).* Upholding the theory of increasing market value due to the unique use or benefit to the owner. *Housing Auth. v. Troncalli, 142 S.E. 93 (Ga. App. 1965). See also 13 A.L.R. 3d 1149.* Declining to place monetary value on historical considerations. *Frontier Town Properties, Inc. v. State, 296 N.Y.S.2d 90 (N.Y. Ct. Cl. 1968).* Evidence admissible to show possible zoning change to increase value in condemnation. *Department of Pub. Works & Bldgs. v. Rogers, 233 N.E.2d 409 (Ill. 1968).*

(n139)Footnote 580. Historic significance may be used to enhance market value on property condemned. *State v. District Court, 517 P.2d 359 (Mont. 1973).* The potential value of property by reason of being an historical landmark should be taken into consideration in affixing a fair value for property. *Scott v. State ex rel. Pea Ridge Nat'l Park Comm'n, 326 S.W.2d 812 (Ark. 1954).*

(n140)Footnote 581. Historical and architectural aspects of house were not items of value unless they enhanced its market value as a residence. *City of Mechanicville v. Fort, 349 N.Y.S.2d 215 (N.Y. App. Div. 1973). See* Donald E. Wintrole, *Determination of Just Compensation in Eminent Domain Proceedings for Land Subjected to Illegal Uses or Conditions, 38 Notre Dame Law. 196 (1963);* Keith Miller, *Land Condemnation -- Federal Income Tax Consequences, 38 Neb. L. Rev. 507 (1959).* No compensation for value peculiar to condemnee. *United States v. 121.20 Acres of Land, 333 F. Supp. 21 (E.D.N.C. 1971).* "Benefit," as used in property assessments, refers to enhancing value of real property, not to general, remote, or incidental benefits. *Indiana v. City of Indianapolis, 269 N.E.2d 552 (Ind. App. 1971).*

(n141)Footnote 582. Destruction of restrictive covenant is compensable. *Adaman Mut. Water Co. v. United States, 278 F.2d 842 (9th Cir. 1960); City of Shelbyville v. Kilpatrick, 322 S.W.2d 203 (Tenn. 1954).* Restrictive covenants bind public agencies and must be taken by eminent domain. *Ashland-Boyd County City-County Health Dep't v. Riggs, Ky, 252 S.W.2d 922 (Ky. 1952); Burger v. City of St. Paul, 64 N.W.2d 73 (Minn. 1954); City of Raleigh v. Edwards, 71 S.E.2d 396 (N.C. 1952); Meagher v. Appalachian Elec. Power Co., 77 S.E.2d 461 (Va. 1953).* The holder of an unexercised option does not have a compensable interest in condemnation proceedings. *Carroll v. Louisville, 354 S.W.2d 291 (Ky. 1962); State v. New Jersey Zinc Co., 193 A.2d 244 (N.J. 1963). See* Richard I. Brickman, *The Compensability of Restrictive Covenants in Eminent Domain, 13 U. Fla. L. Rev. 147 (1960).* Restrictive covenants are property rights compensable in eminent domain. *Southern Cal. Edison Co. v. Bourgerie, 507 P.2d 964 (1973), overruling, Friesen v. City of Glendale, 288 P. 1080,* (Cal. 1930); *disapproving, Sackett v. Los Angeles City Sch. Dist., 5 P.2d 23 (Cal. App. 1931).* Taking of a building restriction against an electric power station was compensable. *Southern Cal. Edison Co. v. Bourgerie, 507 P.2d 964 (Cal. 1973), rev'g, Friesen v. City of Glendale, 288 P. 1080 (Cal. 1930); Lombardy v. Peter Keiwit Sons' Co., 72 Cal. Rptr. 240 (1968). See Griggs v. Allegheny County, 369 U.S. 84 (1962); Vuljan v. Board of Comm'rs, 70 So. 2d 910 (La. App. 1965); Clement v. State Reclamation Bd., 220 P.2d 897 (Cal. 1950); Owens v. South Carolina State Hwy. Dep't, 121 S.E.2d 240 (S.C. 1961).*

(n142)Footnote 583. *See* Lorin J. Broadbent, *Eminent Domain Valuation of Land Containing Minerals, 6 Utah L. Rev. 345 (1959);* Roger D.Graham, *Eminent Domain: Approaches to Valuation of Real Estate with Emphasis on Mineral Properties, 74 W. Va. L. Rev. 307 (1972);* Fred M. Lange, *The Mineral Estate in Condemnation, 10 Hous. L. Rev. 266 (1973); Valuation in Eminent Domain Cases -- Use of the Multiplication Method in Valuing Mineral Deposits, 36 Alb. L. Rev. 753 (1972). State ex rel. State Hwy. Comm'n v. Myers, 383 P.2d 274 (N.M. 1963).* Where leased property is condemned, the interests of the lessee and the lessor are ordinarily obtained at the same time and compensation paid as though the property belonged to one person, with the sum then being apportioned between lessor and lessee. *Western Roubidoux Printing & Litho. Co., Inc. v. Missouri State Hwy. Comm'n, 498 S.W.2d 745 (Mo. 1973).* The value of the mineral estate can only be calculated as a part of the market value of the land. *Gulf Interstate Gas Co. v. Garvin, 368 S.W.2d 309 (Ky. 1963).* Gas royalties, present and prospective, are a part of value. *Michigan Consol. Gas Co. v. Muzeck, 145 N.W.2d 266 (Mich. App. 1966), aff'd, 154 N.W.2d 448 (Mich. 1967); Arkansas State Hwy. Comm'n v. Arkansas Power & Light Co., 330 S.W.2d 77 (Ark. 1959).*

(n143)Footnote 584. *Newton Girl Scout Council, Inc. v. Massachusetts Tpk. Auth., 138 N.E.2d 769 (Mass. 1956).*

(n144)Footnote 585. Missouri courts have disagreed whether the unsightliness of power transmission lines in the appurtenances is an element of damage to be awarded when there is a condemnation for a power line easement over farm land. *Kamo Elec. Co-op., Inc. v. Cushard, 416 S.W.2d 646 (Mo. 1967)* (affirmative); *Kamo Elec. Co-op v. Brooks, 337 S.W.2d 444 (Mo. App. 1960)* (negative); *Cochran v. Kavanaugh, 252 S.W. 84 (Mo. 1952)* (denying the theory).

(n145)Footnote 586. No damages in condemnation for loss of view. *Earl v. Arkansas State Hwy. Comm'n, 405 S.W.2d 931 (Ark. 1966); State by Mondale v. Gannons, Inc., 145 N.W.2d 321 (Minn. 1966),* but treated as an element of damages in determining value of property remaining. State through *Dep't of Hwys. v. Singletary, 185 So. 2d 642 (La. App. 1966); State ex rel. Dep't of Hwys. v. Allison, 372 P.2d 850 (Okla. 1962).* Illinois permits condemnation to preserve "natural beauty." *Department of Pub. Works & Bldgs. ex rel. People v. Keller, 316 N.E.2d 794 (Ill. App. 1974).* Evidence may be introduced as to the unsightliness of the improvement to be constructed on an easement being sought by condemnation. *Central Ill. Pub. Serv. Co. v. Westervelt, 342 N.E.2d 463 (Ill. App. 1926), aff'd, 367 N.E.2d 661 (Ill.*

1977), cert. denied, 434 U.S. 1070 (U.S. 1978).

(n146)Footnote 587. Where there is a legal obligation that the land be used for a specific purpose, the compensation is the cost of restoring the premises not taken to their former utility. *State v. Waco Indep. Sch. Dist., 364 S.W.2d 263 (Tex. App. 1963).* Damages for future use are compensable. *Bowen v. Ives, 368 A.2d 82 (Conn. 1976).* All capabilities of future use must be considered. *State ex rel. Dep't of Transp. v. Brevard, 545 S.W.2d 431 (Tenn. App. 1976).* Prospective enhancement of market value due to contemplated uses is a proper factor. *City of Indianapolis ex rel. Dep't of Metro. Dev. v. Heeter, 355 N.E.2d 429 (Ind. App. 1976).* The proximity of the property taken to a proposed building improvement which, if completed, would have increased the value of the land taken is an element of damages. *Missouri State Park Bd. v. McDaniel, 473 S.W.2d 774 (Mo. App. 1971); State ex rel. Kansas City v. Power & Light Co Parma, 467 S.W.2d 43 (Mo. 1971). Contra Erie v. County Moran, 306 N.Y.S.2d 981 (N.Y. Sup. Ct. 1971).* Expenses of planning for shopping center were not compensable since they did not increase the value of the land itself. *Schnier v. Commissioner of Transp., 374 A.2d 1087 (Conn. 1977).* Holding losses of intended use of property to arise in the future were not compensable. *Public Serv. Co. of Indiana, Inc. v. Morgan County Rural Elec. Membership Corp., 360 N.E.2d 1022 (Ind. App. 1977).* Holding that loss of business value per se as calculated separately and independently from fair market is improper. *State ex rel. Secretary of Dept of Hwys. and Transp. v. Davis Concrete of Del., Inc. 355 A.2d 883 (Del. 1976).*

(n147)Footnote 588. Where Indian lands are taken by eminent domain, the court must consider, in addition to fair market market value, the fact the lands were exempt from taxation. *United States v. Certain Parcels of Land, 327 F. Supp. 181 (W.D.N.Y. 1970), aff'd 443 F.2d 375 (2d Cir. 1970).* Holding that the owner of coast lands cannot demand portsite evaluation as part of their compensation in eminent domain. *United States v. Twin Cities Power Co., 350 U.S. 222 (1956); United States v. Rands, 389 U.S. 121 (1967).* Where property taken has unique value but such value exceeds the market value, intrinsic value and actual value to the owner are the proper measures and not speculations on probable market value. *King v. United States, 292 F. Supp. 767 (D.Colo. 1968).* Upholding the theory of increasing market value due to the unique use or benefit to the owner. *Housing Auth. v. Troncalli, 142 S.E. 93 (Ga. App. 1965).* Declining to place monetary value on historical consideration. *Frontier Town Properties, Inc. v. State, 296 N.Y.S.2d 90 (N.Y. Ct. Cl. 1968).* Evidence admissible to show possible zoning change to increase value in condemnation. *Department of Pub. Works & Bldgs v. Rogers, 233 N.E.2d 409 (Ill. 1968).*

(n148)Footnote 589. Owners of minerals should be joined with surface owner in eminent domain. *In re Appropriation for Hwy. Purposes, 267 N.E.2d 829 (Ohio App. 1930). See Ross v. Commissioners of Palisades Interstate Park, 101 A. 60 (N.J. 1917); Sparkill Realty Corp v. State, 197 N.E. 192 (N.Y. 1935);* John P. Horan, *Mineral Valuation in Eminent Domain Cases,* 7 Hastings L.J.163 (1956).

(n149)Footnote 590. *United States v. 4.553 Acres of Land, 208 F. Supp. 127 (N.D.Cal. 1962); Campbell v. Monaco Coal Mining Co, 85 N.E.2d 138 (Ohio 1948); Anderson v. Chesapeake Ferry Co., 43 S.E.2d 10 (Va. 1947).* While the existence of valuable mineral deposits is a proper consideration for value, the amount of the minerals cannot be estimated and multiplied by a fixed price per unit. *Seaboard Coast Line R.R. v. Harrelson, 202 S.E.2d 1 (S.C. 1974).*

(n150)Footnote 591. *Commonwealth Dep't of Hwys. v. Davis, 400 S.W.2d 515 (Ky. 1966).*

(n151)Footnote 592. *See* A. Chris Heinricks, *Compensation For Partial Takings In Texas, 6 St. Mary's L.J. 206 (1974).* Where only an easement is condemned the consideration is the difference in market value of the property before and after taking. *Denman v. Colorado Interstate Gas Co., 294 P.2d 207 (Kan. 1956).* If partial taking destroys usable value of land corpus may be used to restore the premises. *Bradley v. Bradley, 185 So. 2d 655 (Miss. 1966).* No consequential damages are payable in absence of legislative authority. *In re Delaware River Bridge, 182 A.2d 514 (Pa. 1962).* Valuation for taking of an easement is the difference between the market value of the land free of the easement and the market value burdened with the easement. *United States v. 1,129.75 Acres of Land, 473 F.2d 996 (8th Cir. 1973).* Damages for taking of an easement are not equivalent to those for the taking of a fee. *Carolina Power & Light Co. v. Clark, 91 S.E.2d 569 (N.C. 1956). See also State by Lord v. North Star Concrete Co., 122 N.W.2d 118 (Minn.*

1963); City of Charlotte v. Charlotte Park & Recreation Comm'n, 178 S.E.2d 601 (N.C. 1971). Holding that landowner subject to partial taking was not entitled to aesthetic damage resulting from taking of adjoining property. *Commonwealth Dep't of Hwys. v. Williams, 487 S.W.2d 290 (Ky. 1972).*

(n152)Footnote 593. *Commonwealth Dep't of Hwys. v. Sherrod, 367 S.W.2d 844 (Ky. 1963).*

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CHAPTER 80 THE POWER OF EMINENT DOMAIN

9-80 Thompson on Real Property, Thomas Editions § 80.09

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§ 80.09 Parties Entitled to the Proceeds of the Condemnation Award.

[Go To Supp]

§ 80.09(a) In General.

In addition to a single owner being compensated for the entire interest in a single parcel of land, four situations face courts in determining the parties entitled to damages in a "taking": (a) where the entire parcel is taken and there are several owners; (b) where different parties own different types of interest in the parcel taken; (c) where only a partial interest is taken; and (d) where there is no physical taking but only injury to the particular property from the action. Additionally, some questions about entitlement to compensation arise even between a single condemnor and single condemnee.

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LEXIS: "eminent domain" or "condemnation" w/10 award w/20 part!

§ 80.09(b) When a Single Condemnee's Entitlement is Questioned.

As a matter of practice, the state may take without compensation any property that is held and used by a local entity for governmental purposes. n594 However, where the property is held by a condemnee other than a governmental unit, such as a privately owned public utility, and a "higher use" justifies condemnation, the utility is entitled to compensation. And it is held that if a municipality holds title to property through a private proprietary interest rather than for general public use as an agency of the state, it is entitled to compensation for property taken for a superior use by the state. n595 Where the sovereign holds the property in a fiduciary capacity for others, the beneficiaries are entitled to compensation. n596

If the owner of the land condemned waives the right to be compensated at or before the time of the taking, an action for the price of the land may be brought after the taking. n597

Where land has been entered upon without a resort to proper proceedings, the measure of compensation will be the same as if it had been duly condemned, except where the circumstances are as such as to call for vindicatory damages.

n598

§ 80.09(c) Rights to Compensation Among Several Interest Holders.

§ 80.09(c)(1) Rights Among Parties to a Sale of the Property.

The right to an award in eminent domain is personal and does not run with the land upon sale of the property. n599 The owner at the time of the taking, not those who acquired an interest subsequently, is entitled to the condemnation award, n600 and, with the exception of leases, n601 it is not the responsibility of the condemnor to be concerned with the rights of different parties in the land. n602 The vendee under a sales contract has been held entitled to the difference between the condemnation award and the sales price, n603 but if property subject to an executory sales contract is condemned, the vendee is limited to recovery of the purchase price if the vendee has not yet gone into possession. n604 A lessee with an unexercised option to purchase is not entitled to such excess amount. n605

However, where the property has completely changed hands after the action of condemnation is filed, the purchaser is entitled to the award. If a sale for the land is entered into during the pendency of the condemnation action, the award is paid to the original owner, n606 but the buyer's rights to that award depend on the terms of the sale agreement. n607 If the sale is involuntary, then the buyer's rights are limited to the purchase price. n608

A purchaser of property in the process of condemnation is entitled to become a party to the proceedings; the eminent domain action does not terminate the liability of the purchaser as to the sales contract. n609 Where a landowner issues a license for a right of way and later sells the land and the buyer revokes the license, the buyer, rather than the predecessor in interest, is entitled to damages in eminent domain. n610

COMPUTER-ASSISTED RESEARCH

LEXIS: "eminent domain" or "condemnation" w/10 award w/20 sale

§ 80.09(c)(2) Rights of Mortgagees and Other Lienholders.

If there is a lien on the damaged or taken property, the lien attaches to the condemnation award. n611 The mortgagee is not entitled to the entire award, but only to a proportionate part by which the security is diminished. n612 The condemnation extinguishes a mortgage the lien of which attaches to the purchase price; n613 however, if the mortgagee has not been made a party to the condemnation proceedings, the mortgagee may recover the debt from the condemnor even though the mortgagor has been paid the full proceeds. n614 Upon condemnation after tax sale, the original owner is entitled to the eminent domain compensation, subject to the tax lien. n615

COMPUTER-ASSISTED RESEARCH

LEXIS: "eminent domain" or "condemnation" w/10 award w/20 mortgag!

§ 80.09(c)(3) Rights of Servitude and Future Interest Holders.

If there is an outstanding future interest of sufficient quality to constitute a property right, the compensation must be divided between the possessory estate and the future interest. n616

A future interest, to be compensable, must be capable of evaluation and the owner must own a compensable interest in the condemned property. n617 In some jurisdictions, the rule persists that all proceeds of the condemnation award are given to the holder of the fee, n618 and where the land condemned is a fee simple determinable, a fee simple subject to a condition subsequent, or a fee simple subject to an executory limitation, the leading rule is that the holder of the future interest is not entitled to any of the proceeds of the condemnation award in the absence of a showing that the defeasance

of the possessory estate is probable. n619

Where the property has been dedicated for a specific purpose so that a reverter arises upon condemnation of the property, the original grantor or the grantor's heirs are entitled to the proceeds of the eminent domain award to the extent that the value of the award exceeds the value of the land as so restricted. n620 Compensation has been refused for a contingent future interest.

Where defeasible fees are involved and either held by the condemnee or taken by the condemnor, the problem of apportionment of the award arises. A condemnor who condemns only a defeasible fee must pay the full value, because the value of a possibility of reverter is so low. n621 Similarly, no compensation is payable to the holder of a right of re-entry upon a condition subsequent. n622 For condemnation of other future interests, court have employed various approaches. n623

The courts have reached four results where property subject to a future interest is taken by condemnation: (a) the immediate estate takes the entire award; n624 (b) the future interest receives the award; n625 the immediate estate is required to hold the proceeds in trust; n626 and (d) the proceeds should be apportioned between the immediate estate and the future interest. n627

Usually, where there are several estates in the land condemned, each holder of an interest is entitled to compensation in accordance with the value of his estate. n628 With this variety of approaches, therefore, some courts invest the proceeds in trust for the duration of the life estate. n629

Others divide the proceeds using mortality tables to calculate the respective interests. A voluntary sale of the premises during the pendency of the condemnation carries the right to the entire proceeds. n630 Sale of the life estate entitles the new life tenant to receive compensation.

Where a covenant is held to be a property right, the holder or owner is entitled to compensation. Whether this is in addition to a full value award given to the servient estate or whether the award must be divided is questionable, just as there is a division as to whether there is a compensable property in such a restrictive covenant of use in favor of the owners of the dominant tenement. n631

Some courts hold that the owners of property adjacent to that taken are entitled to damages if the property taken was subject to an equitable servitude in favor of the adjoining property arising out of restrictive covenants, where the use for which the land was condemned violates such covenant, n632 and the covenant created a property right. n633 Contrary authority is based on the theory that the rights are only contractual in nature. n634 A beneficiary of a donor's land trust is not a necessary party to condemnation actions. n635

COMPUTER-ASSISTED RESEARCH

LEXIS: "eminent domain" or "condemnation" w/10 award w/20 servitude! or "future interest!"

§ 80.09(c)(4) Rights of Parties to a Leasehold.

Where a lease is taken, the problem arises as to apportionment of the value between the lessor and the lessee, the method of determining the value of the lessee's interest, n636 the incidental expenses payable, the inclusion of personal property in the valuation, and what must be the extent of the lessee's interest. n637 Courts do not agree on the proper method for establishing value of leaseholds. Determination of value is not a matter of formula, but of sound discretionary judgment, based on the relevant facts in each case. n638 Some courts value the lessor's and lessee's interests separately n639 while others lump the value of the lease and the reversion together. n640 It has been held that a reversion after a long-term lease has no value. n641 In the absence of a statute, where the fee subject to a leasehold is

condemned, the fee is valued as a unit and the award is apportioned between the lessor and lessee. n642 When the reversion is valued separately, the terms of the lease are considered n643 so a lease favorable to the owner will enhance the value of the property and the reversion.

Under the majority rule, if there is a partial taking of a leasehold by eminent domain, the relationship of landlord and tenant continues and the lessee must look to the condemnor for damages. The rent is not abated. n644 In that situation, the lessee has been allowed moving costs when the lessee remained liable to the lessor. The tenant is not entitled to moving expenses if the entire leasehold is taken. n645 It is further questioned whether a lessee is entitled to the value of the lessee's leasehold improvements. n646 Usually, the value of a leasehold is its fair market value in excess of the rental paid, n647 plus fixtures, n648 and improvements. n649 Under one theory, trade fixtures are to be considered in valuing the realty, even though they may be removed by the tenant. n650

By another rule, the owner of removable fixtures is entitled to the difference between their value in place and their value after removal. n651 The measure of value of a leasehold is its fair market value in excess of rental to be paid, n652 plus fixtures n653 and improvements. n654

The value of non-removable fixtures is not recoverable. n655 The cases are not in accord, however, as to whether the lessee can upon condemnation of the leased premises claim as an element of damages improvements which the lessee is not entitled to remove prior to or at the termination of the lease. n656 The loss of business goodwill and profits and the costs of removal are not proper elements of damage to the lessee. n657 However, costs of removal and reinstallation are allowable, if only a part of the term outstanding is condemned. n658 The general rule values leasehold estates for condemnation purposes at the difference between the economic rent -- that is, the price which could be obtained on a sale of the lease in the open market less the contract rent. n659

Where ranchers owned land in fee with grazing licenses on adjacent public lands (which licenses could be restricted or withdrawn by the Secretary of the Interior), and the fee could be taken by eminent domain, the availability and accessibility of the public land could be considered in evaluating the fee. Considering this factor, however, was permissible only if the project for which the fee was taken did not include the licensed land; the availability and accessibility of the public land could not be considered in evaluating the fee where the proposed project was to include the fee and the public land licensed to the owner of the fee. n660 Where the taking is only temporary, the measure of damages is the fair rental value under the peculiar circumstances, not the profits the state derives during the taking. n661

As a general rule the lessee is limited to the difference between the rental value of the lease and the actual rent. n662 Where land under a lease contract for a term of years is condemned, the amount payable to the lessor and the lessee is generally considered to be the respective values which the thing taken has to the lessor and lessee. n663

Where the entire leasehold is taken by eminent domain the universal rule seems to be that the lease is terminated and the obligation of the lessee is discharged. n664

Under a partial taking, the obligation to pay rent continues, n665 and the lessee's sole remedy is to share in the award. n666 Under the minority view, the rent is abated proportionately on a partial taking. n667

A tenant at will has been held not entitled to damages, n668 but it has also been held otherwise. n669 The right of renewal in a lease is to be considered in deter-mining the value of the leasehold. n670

COMPUTER-ASSISTED RESEARCH

LEXIS: "eminent domain" or "condemnation" w/10 award w/20 lease!

FOOTNOTES:

(n1)Footnote 594. *Housing Auth. of Sunnyside v. Sunnyside Valley Irr. Dist., 753 P.2d 1005 (Wash. App. 1988)* (A state may, "at its pleasure," modify or withdraw the powers of a subdivision of a state, may take without compensation such property, hold it in itself, or vest it in other agencies and no unconstitutional taking will result), *quoting Moses Lake Sch. Dist. 161 v. Big Bend Community College, 503 P.2d 86 (Wash. 1972), appeal dismissed, 412 U.S. 934 (1973); Randolph County v. Alabama Power Co., 784 F.2d 1067 (11th Cir. 1986), cert. denied, 479 U.S. 1032 (1987)* (county had no federally protected right against state's taking of public property without paying compensation). *But see City of New Orleans v. State, 443 So. 2d 562 (La. 1983)* (section of Constitution providing that property shall not be taken by state except for public purposes and with just compensation is not limited to private properties; it prohibits state from taking any property including public property owned by political subdivisions, except upon payment of just compensation). *Urban Renewal Agency of the City of Monterey v. California Coastal Zone Conservation Comm'n, 121 Cal. Rptr. 446 (1975).*

(n2)Footnote 595. *School Dist. of Borough of Speers v. Commonwealth, 117 A.2d 702 (Pa. 1955)* (school taken for highway purposes). A drainage district has a property right which is subject to compensation in eminent domain in addition to the compensation to be paid to the landowner. *Arkansas State Hwy. Comm'n v. Sub-District No. 3 of Grassy Lake, 376 S.W.2d 259 (Ark. 1964).*

(n3)Footnote 596. *Attakai v. United States, 746 F. Supp. 1395 (D.Ariz. 1990)* (government holds legal title to Indian lands, but it cannot treat land as its own or use it for Government purposes without just compensation). *But see United States v. Cherokee Nation of Okla., 480 U.S. 700 (1987)* (tribe had no right to be compensated for damage to interest allegedly resulting from government's exercise of servitude, notwithstanding government's fiduciary obligation not to appropriate tribal land for its own purpose without providing just compensation). Where the state condemns school trust lands, the trust must be compensated for the full appraised value. *Lassen v. Arizona ex rel. Ariz. Hwy. Dep't, 385 U.S. 458 (1967).* Public sale of Indian lands under an erroneous survey was a "taking." *Sioux Tribe of Lower Brule Reservation v. United States, 315 F.2d 378 (Ct. Cl. 1963).* Property held in trust by the United States for an Indian tribe cannot be taken without just compensation. *United States v. City of Pawhuska, 502 F.2d 821 (10th Cir. 1974).*

(n4)Footnote 597. *See Carpenter v. Tahoe Reg'l Plan. Agency, 804 F. Supp. 1316 (D. Nev. 1992)* (Landowner did not waive her "takings" claim against regional planning authority by selling her property to state for fair market value, where landowner declared at time of sale that she did not waive any claim against authority and was only selling out of desperation because she felt that authority had foreclosed any chance for her to do anything with her property); *Borough of South Greensburg v. Pennsylvania Pub. Util. Comm'n, 544 A.2d 82 (Pa. 1988)* (Rail company was not estopped from receiving damages for property appropriated for at-grade railroad crossing, even though rail company had never requested reimbursement for taking); *Conaway v. Yolo Water & Power Co. , 204 Cal. 125, 266 P. 944 (Cal. 1928); Sala v. Pasadena, 124 P. 539 (Cal. 1912); City of Rome v. Perkins, 30 Ga. 154 (1860).*

(n5)Footnote 598. *Murray v. State, Dep't of Transp., 716 P.2d 540 (Kan. 1986)* (Issues relative to proper measure of damages utilized in determining fair market value of property taken by eminent domain lie in appeal from appraisers' award, not independent action against condemnor). *See Dorsey v. Donohoo, 615 N.E.2d 239 (Ohio App. 1992)* (where government acts in bad faith, party entitled to attorney's fees and expenses).

(n6)Footnote 599. *Riley v. Town of Hamilton, 451 N.W.2d 454 (Wis. App. 1989)* (When the original owner conveys what remains of the realty, the owner does not transfer the right to compensation for the portion the owner has lost without a separate assignment of such right); *Captline v. County of Allegheny, 662 A.2d 691 (Pa. 1995)* (Right to compensation for taking of property is personal interest which does not run with land and is not normally transferred to subsequent purchasers); *Brooks Inv. Co. v. City of Bloomngton, 232 N.W.2d 911 (Minn. 1975).*

(n7)Footnote 600. *Palm Corp. v. Commonwealth, 688 A.2d 251 (Pa. Commw. Ct. 1997)* (holding "the right to compensation in eminent domain belongs solely to the owner of the property at the time of the taking and does not pass to subsequent owners"); *Riley v. Town of Hamilton, 451 N.W.2d 454 (Wis. App. 1989)* (when the original owner

conveys what remains of the realty, the owner does not transfer the right to compensation for the portion the owner has lost without a separate assignment of such right); *Captline v. County of Allegheny, 662 A.2d 691 (Pa. 1995)* (Right to compensation for taking of property is personal interest which does not run with land and is not normally transferred to subsequent purchasers); *United States v. 1,060.92 Acres of Land, 215 F. Supp. 811 (W.D.Ark. 1963).*

(n8)Footnote 601. *K-Mart Corp. v. State Dep't of Transp., 636 So. 2d 131 (Fla. App. 1994)* (diminution of leasehold interest by governmental taking is compensable); *Clark v. Erich, 31 Cal. Rptr. 628 (1963); Comstock v. Iowa State Hwy. Comm'n, 121 N.W.2d 205 (Iowa 1963)* (in condemnation the interests of the lessor and lessee are several and not joint).

(n9)Footnote 602. *Kern River Gas Transmission Co. v. Clark County, 757 F. Supp. 1110 (D.Nev. 1990)* (court required gas company to amend its complaint to name land at issue as defendant so as to put all potentially affected parties on notice, and did not have to join all parties); *Vivian v. Trustees of Colo. Sch. of Mines, 383 P.2d 801 (Colo. 1963); West Whiteland Assocs. v. Commonwealth, Dep't of Transp., 690 A.2d 1266 (Pa. Commw. 1997).*

(n10)Footnote 603. *United States v. 1,060.92 Acres of Land, 215 F. Supp. 811 (Ark. 1963); Alhambra Redev. Agency v. Transamerica Fin. Servs., 261 Cal. Rptr. 248 (Cal. App. 1989)* (purchaser of real property under land sales contract is considered equitable owner of property and is vested with right to any condemnation award); *State v. New Jersey Zinc, Co., 193 A.2d 244 (N.J. 1963).*

(n11)Footnote 604. *Simmons v. Krall, 412 S.E.2d 559 (Ga. App. 1991)* (vendors under executory sale contract would be entitled to recover condemnation proceeds if condition precedent to purchaser's duty to close had been satisfied, but purchaser had not closed within period specified in contract); *Westchester County v. P. & M. Materials Corp, 248 N.Y.S.2d 539 (N.Y. App. Div. 1964).*

(n12)Footnote 605. *Pro-Eco, Inc. v. Board of Comm'rs of Jay County, 57 F.3d 505* (7th Cir.) (option to buy real estate was not "property interest" protected by takings clause), *cert. denied, 116 S. Ct. 672 (1995). But see Town of Dandridge v. Patterson, 827 S.W.2d 797 (Tenn. Ct. App. 1991)* (County's unexercised option to purchase real property created legally protected property interest or right therein.); *Haney v. Denny, 193 N.E.2d 648 (Ind. App. 1963).*

(n13)Footnote 606. *See Alhambra Redev. Agency v. Transamerica Fin. Servs., 261 Cal. Rptr. 248 (Cal. App. 1989)* (purchaser's interest in land is limited to interest of seller, not including outstanding balance on loan); *Akins v. State, 50 Cal. Rptr. 2d 531 (Cal. App. 1996)* (Where property is purchased which is subject to pending condemnation proceedings and deed conveying said property is silent as to award money to be paid in proceedings, said money belongs to and is payable to purchaser). Vendor takes the gain or loss if the property is condemned while the contract is executory. *Westchester County v. P. & M. Materials Corp., 248 N.Y.S.2d 539 (N.Y. App. Div. 1964). Akins v. State, 71 Cal. Rptr. 2d 314 (Ct. App. 1998)* (when a deed conveying property subject to impending condemnation is silent as to the recipient of the condemnation award, the compensation is paid to the buyer).

(n14)Footnote 607. *First Western Fin. Corp. v. Vegas Continental, 692 P.2d 1279 (Nev. 1984)* (Despite a clause purporting to assign an entire condemnation award to a mortgagee or beneficiary of a deed of trust, the effectiveness of such a contract term is limited by the legal and equitable interest of the mortgagee or beneficiary in the award.); *In re Department of Transp., 527 N.E.2d 958 (Ill. App. 1988)* (Vendor was entitled to proceeds of condemnation award by virtue of agreement whereby purchaser granted vendor right to proceeds.)

(n15)Footnote 608. Where eminent domain proceedings were commenced and completed against property during a period of redemption and tax sale, the tax purchaser was only entitled to the amount necessary to redeem, not the entire award. *Delano, Inc. v. Arnold, 263 N.E. 830 (Ill. 1970), cert. denied, 401 U.S. 994 (1971).*

(n16)Footnote 609. *See* United States v. 21.5 Acres, 584 F. Supp. 1093 (S.D.N.Y. 1984) (Standing to oppose the condemnation depends on who has possession); *Spadea v. Stewart, 214 N.E.2d 72 (Mass. 1966).*

(n17)Footnote 610. *See City of Needles v. Griswold, 8 Cal. Rptr. 2d 753 (Cal. App. 1992)* (licensee has compensable interest in condemnation proceeding); *City of Anchorage v. Nesbett, 530 P.2d 1324 (Alaska 1975).*

(n18)Footnote 611. *Beutel v. Dallas County Flood Control Dist. No. 1, 916 S.W.2d 685 (Tex. App. 1996)* (lienholder may intervene in eminent domain proceedings).

(n19)Footnote 612. *State v. First Interstate Bank of Tex., 880 S.W.2d 427 (Tex. App. 1994)* (mortgagee is then entitled to first of any proceeds realized, to extent of unpaid debt when whole of property is taken, or to extent of any impairment of the security interest when only part of property is taken); *Investors Syndicate of Am. v. Dade County, 98 So. 2d 889 (Fla. App. 1957); United States v. Nine Parcels of Land, 215 F. Supp. 771 (D.N.D.1973)* (lien for special assessments arising after title passed eminent domain attached to award); *Consumers Holding Co. v. Los Angeles County, 22 Cal. Rptr. 106 (Cal. App. 1962)* (mechanics' lien transferred to award, taxes which are a lien are to be deducted from the award); *City of Chicago v. Mardat, 182 N.E.2d 716 (Ill. 1962)* (lien for taxes transferred to award); *City of Chicago v. Robertson, 198 N.E.2d 192 (Ill. 1964)* (mortgagee has equitable lien on proceeds of condemnation award); *Security Nat'l Bank of Long Island v. Sabatelli, 236 N.Y.S.2d 775 (1962)* (condemnation of the realty terminates the mortgage lien which then becomes an equitable lien on the proceeds); *Application of Haber, 230 N.Y.S.2d 755 (1962)* (lien of mortgage on condemned land is transferred to the award); *State ex rel. Moulton v. Holland, 367 S.W.2d 791 (Tenn. App. 1962)* (mortgagee given an equitable lien on condemnation award). Surviving tenant by the entireties was entitled to the entire proceeds of condemnation award as against a mortgagee from husband alone. *People v. Nogarr, 330 P.2d 858 (Cal. App. 1958).* Lien mortgagee not a necessary party in condemnation. *Shavers v. Duval County, 73 So. 2d 684 (Fla. 1954).* Mortgage not being an estate in realty, mortgagee is not a real party in interest in condemnation. *State ex rel. State Hwy. Comm'n v. District Court of 13th Judicial Dist., 499 P.2d 1228 (Mont. 1972).* Where the land condemned is covered by a mortgage, the court has the sole right to decide how the proceeds of the condemnation action shall be applied upon the mortgage. *Adams v. Taylor, 117 S.E.2d 27 (N.C. 1960).* Lessee is entitled to share in condemnation award. *City of Columbus v. Huntington Nat'l Bank, 143 N.E.2d 874 (Ohio App. 1956).* A mortgagee is not a necessary party to a condemnation action. *Kosciusko County Elec. Membership Corp v. Northern Ind. Pub. Serv. Co., 229 N.E.2d 811 (Ind. 1967); Board of Educ. v. Pace College, 276 N.Y.S.2d 162 (N.Y. App. Div. 1966).*

(n20)Footnote 613. *See Collins v. Town of Webster, 522 N.E.2d 12 (Mass. App. 1988)* (mortgagee's interest in compensation fund awarded in eminent domain proceeding for taking is protected to extent of amount due on the mortgage); *Security Nat'l Bank of Long Island v. Sabatelli, 236 N.Y.S.2d 775 (N.Y. 1962).* Lien on land taken attaches to the condemnation award. *Hampel v. Gleason, 225 N.W.2d 844 (Minn. 1975). Muldoon v. Mid-Bronx Holding Corp, 25 N.Y.S.2d 36 (1941); United States v. Nine Parcels of Land, 215 F. Supp. 771 (D.N.D.1973)* (lien for special assessments arising after titled passed by eminent domain attached to award); *Consumers Holding Co. v. Los Angeles County, 22 Cal. Rptr. 106 (1962)* (mechanics' lien transferred to award, taxes which are a lien are to be deducted from the award); *City of Chicago v. Mardat, 182 N.E.2d 716 (Ill. 1962)* (lien for taxes transferred to award); *City of Chicago v. Robertson, 198 N.E.2d 192 (Ill. 1964)* (mortgagee has equitable lien on proceeds of condemnation award).

(n21)Footnote 614. *In re D'Ellena, 640 A.2d 530 (R.I. 1994)* (Mortgagee is entitled to condemnation proceeds to full amount of any deficiency that exists after foreclosure); *State ex rel. Moulton v. Holland, 367 S.W.2d 791 (Tenn. App. 1962).*

(n22)Footnote 615. *City of Detroit v. Katz, 371 N.W.2d 860 (Mich. App. 1985)* (condemnation statute provides that award shall first be applied to payment of all delinquent taxes and/or delinquent special assessments and current taxes and current special assessments which have become due and payable); *Weinstein v. Taylor, 234 N.Y.S.2d 926 (N.Y. Sup. Ct. 1962).*

(n23)Footnote 616. *Port of Gray's Harbor v. Bankruptcy Est. of Roderick Timber Co., 869 P.2d 417 (Wash. App. 1994)* (only those with estate or interest at law or in equity may share in condemnation award. Where public land is subject to a condition subsequent on cessation of the specific public use, the holder of the reverter has an interest in

condemnation proceeds as to the excess above the value of the land for the limited use); *Ink v. City of Canton, 212 N.E.2d 574 (Ohio 1965)* (where a developer attempted to reserve any reversionary interest in platted roads dedicated to the use of the public, describing the lots with reference to the plat, and this reversionary interest was conveyed together with the lots, such an interested developer had no interest in the property entitled to compensation); *United States v. 13.33 Acres of Land in Dade County, 342 So. 2d 476 (Fla. 1977).*

(n24)Footnote 617. *United States v. 99.66 Acres of Land, 970 F.2d 651 (9th Cir. 1992)* Generally, only persons with ownership interest at time of taking are entitled to compensation for taking. *United States v. 125.07 Acres of Land, More or Less Situated In Towns of Truro and Wellfleet, County of Barnstable, Com. of Mass., 753 F. Supp. 1034 (D.Mass. 1991)* Only that individual who meets burden of establishing ownership interest in property at time of taking is entitled to receive just compensation. *Hemphill v. Mississippi State Hwy. Comm'n, 145 So. 455 (Miss. 1962). See* Douglas Ayer, *Allocating the Costs of Determining "Just Compensation," 21 Stan. L. Rev. 694 (1969);* Albert Tate, Jr., *Legal Criteria of Damages and Benefits -- The Measurement of Taking-Caused Damages to Untaken Property, 31 La. L. Rev. 431 (1971);* David S. Willenzik, *The Possessor's Right to Compensation, 31 La. L. Rev. 491 (1971).*

(n25)Footnote 618. *United States v. 726.23 Acres of Land, More or Less, Situated in Marion, Newton and Searcy Counties, State of Ark., 746 F.2d 1363 (8th Cir. 1984).* Holder of possibility of reverter was not entitled to share in condemnation proceeds where the event on which the defeasible fee was to terminate, a sale or other disposition of the property by owner of the defeasible fee, was not imminent at the time of condemnation. *Hamman v. Houston, 362 S.W.2d 402 (Tex. App. 1962).*

(n26)Footnote 619. Restatement, Property, § 53 b.

(n27)Footnote 620. *Leeco Gas & Oil Co. v. Nueces County, 736 S.W.2d 629 (Tex.1987); United States v. 50.822 Acres of Land, More or Less, in Nueces County, State of Tex., 950 F.2d 1165 (5th Cir. 1992); Ink v. City of Canton, 212 N.E.2d 574 (Ohio 1965); Woodville v. United States, 152 F.2d 735 (10th Cir. 1946); Puerto Rico v. United States, 132 F.2d 220 (1st Cir. 1942); Santa Monica v. Jones, 232 P.2d 55 (Cal. App. 1954); Lyford v. Laconia, 72 A. 1085 (N.H. 1909); State, by State Hwy. Comm'r v. Cooper, 131 A.2d 756 (N.J. 1957); In re Appropriation of Easement for Hwy. Purposes, 159 N.E.2d 612 (Ohio 1950); Oklahoma City v. Local Fed. Sav. & Loan Ass'n, 134 P.2d 565 (Okla. 1943)* (the warranty deed which does not mention the earlier condemnation action is not an assignment of the condemnation award); *Vroman v. United States, 177 F. Supp. 257 (Ct. Cl. 1959)* (an abutting owner's right of compensation for loss of access does not pass upon the conveyance of property to a third party); *Monen v. State Dep't of Hwys., Div. of Hwys., 515 P.2d 1246 (Colo. App. 1973)* (such right must be specifically assigned to the subsequent grantees to be exercised by them. Lessor's reversion in a 99-year lease held without value in condemnation); *Department of Pub. Works & Bldgs. v. Metropolitan Life Ins., Co., 192 N.E.2d 607 (Ill. App. 1963)* (lessee was entitled to proceeds under valid exercise of option to purchase real estate; lessee exercised option after condemnation suit was filed but before fee simple title vested in condemnor); *Department of Pub. Works & Bldgs. v. Halls, 210 N.E.2d 226 (Ill. App. 1965)* (proceeds from condemnation award where taking was subsequent to testatrix's death were real estate in testator's estate passing to his devisees); *In re Georgen's Estate, 277 N.E.2d 341 (Ill. App. 1971)* (unity of ownership, unity of use and contiguity are required to entitle party to severance damages on condemnation); *State v. Heslar, 274 N.E.2d 261 (Ind. 1971)* (on condemnation a lessee is entitled to recompense for the option to buy or loss of the balance of the term but not for both); *Sholom, Inc. v. State Roads Comm'n, 229 A.2d 576 (Md. 1967)* (a property owner is not entitled to an abatement of taxes for the period between declaration of a "blight area" and prior to a declaration of taking); *Jersey City Redev. Agency v. Bancroft Realty Co., 285 A.2d 48 (N.J. Super. 1971)* (the filing of a plat which dedicated easement for street shown thereon, did not waive city's liability to pay compensation to owners, even though owners sold land prior to entry of judgment confirming the taking); *City of Albuquerque v. Chapman, 419 P.2d 460 (N.M. 1966)* (under the Uniform Vendor and Purchaser Act the vendee in a condemnation action can only recover the deposit); *Westchester County v. P. & M. Materials Corp., 248 N.Y.S.2d 539 (1963)* (lessee not entitled to compensation in eminent domain if lease provides for termination or condemnation, and if lessor is to receive award in condemnation the lease is terminated); *Cooney Bros., Inc. v. State, 276 N.Y.S.2d 337 (1966)* (vendor recovers excess value or bears the loss if the property is condemned while the contract is executory); *Westchester County v. P. & M. Materials Corp., 238 N.Y.S.2d 896 (1963)*

(sublessee in possession entitled to share in lessee's compensation on condemnation); *Cincinnati v. H. & S. Pogue Co., 221 N.E.2d 717 (Ohio App. 1966). See* Barry P. Waldman, *Eminent Domain -- Options -- Rights of Optionee to Compensation in a Condemnation Proceeding When Option is Exercised After the Taking, 14 Wayne L. Rev. 660 (1968).*

(n28)Footnote 621. *State v. Cheyenne County, 60 N.W.2d 593 (Neb. 1953); North Carolina State Hwy. Comm'n v. Black, 79 S.E.2d 778 (N.C. 1954).* Owner of defeasible fee entitled to full commercial value of unrestricted fee in condemnation proceeding. *In re Appropriation of Easement for Hwy. Purposes, 159 N.E.2d 612 (Ohio 1950).*

(n29)Footnote 622. *Fixel v. United States, 26 Cl. Ct. 353 (Cl. Ct. 1992).* Compensation for taking is only due to person who owns property at time taking occurred, not to person who owns property at either earlier or later date. *Santa Monica v. Jones, 232 P.2d 55 (Cal. App. 1951).* Only nominal damages where title to bed of street subject to street easement was taken by eminent domain. *In re India Street, Borough of Brooklyn, 324 N.Y.S.2d 1 (1971). City of Charlotte v. Charlotte Park & Recreation Comm'n, 178 S.E.2d 601 (N.C. 1971).* But held that taking of only a determinable fee reduces amount of the award. *Ink v. City of Canton, 212 N.E.2d 574 (Ohio 1965).* No compensation to holders of possibility of reverter. *Land Clearance for Redev. Auth. of City of St. Joseph v. City of St. Joseph, 560 S.E.2d 285 (Mo. App. 1977).*

(n30)Footnote 623. Devise to son and if he died before his wife and she remarried and died then to grandchildren, gave grandchildren a property interest compensable in condemnation. *Hemphill v. Mississippi State Hwy. Comm'n, 145 So. 2d 455 (Miss. 1962).*

(n31)Footnote 624. *First Reformed Dutch Church v. Croswell, 206 N.Y.S. 132 (1924).* (Unless the event which would determine a fee simple upon condition subject had not sired or conceived child in over quarter of century); *State v. Alvin Constr. Co., 221 N.E.2d 732 (Ohio 1966).*

(n32)Footnote 625. *Blaze Const., Inc. v. United States, 27 Fed. Cl. 646 (Fed. Cl. 1993).* Owner of property at time of taking is entitled to compensation. *Fixel v. United States, 26 Cl. Ct. 353 (Cl. Ct. 1992).* Compensation for taking is only due to person who owns property at time taking occurred, not to person who owns property at either earlier or later date. *Lancaster Sch. Dist. v. Lancaster County, 144 A. 901 (Pa. 1929).*

(n33)Footnote 626. *Lutes v. Louisville & N. R.R., 164 S.W. 792 (Ky. 1914); In re Cook's Will, 277 N.Y.S. 26, aff'd, 198 N.E. 404 (N.Y. 1935).* Under the laws of the Virgin Islands a life estate is a valuable property right, the sale of which entitles the tenant to receive compensation. *Jacobs v. Jacobs, 408 F. Supp. 846 (D.V.I. 1976).*

(n34)Footnote 627. *Baxley v. Moody, 394 S.E.2d 623 (Ga. App. 1990); People v. United States, 132 F.2d 220 (1st. Cir. 1942);* United States v. 2,086 Acres of land, *46 F. Supp. 411 (W.D.S.C. 1942); United States v. 16 Acres of Land, 47 F. Supp. 603 (D.Mass. 1942).* Condemnation award belongs to remainderman, interest to life tenant. *Redevelopment Comm'n of City of Greenville v. Capehart, 150 S.E.2d 62 (N.C. 1966).*

(n35)Footnote 628. *Motley v. Calhoun, 521 So. 2d 28 (Ala. 1988)* (Remaindermen were entitled to distribution of funds paid in eminent domain proceedings as compensation for taking of remainder interest, even though class of remaindermen was subject to open if life tenants had more children; equitable trust was imposed upon life estate for afterborn children of life tenants who had not sired or conceived child in over quarter of century). *State v. Alvin Constr. Co., 221 N.E.2d 732 (Ohio 1966).*

(n36)Footnote 629. *Grand River Dam Auth. v. Brogna, 827 P.2d 901 (Okla. App. 1991).* All owners of estate being condemned are entitled to be heard and to claim their share of condemnation money. *United States v. 380 Acres of Land, 47 F. Supp. 6 (W.D. Ky. 1942). See State ex rel. Scott v. Trimble, 272 S.W. 66 (Mo. 1925); In re Gilroy, 112 N.Y.S. 111 (1908)* (requiring security for life tenant); *In re Smith's Will, 11 N.Y.S. 2d 945 (1939)* (making life tenant the trustee). The widow was devised a life estate in certain real estate. The realty was taken by eminent domain. The court held that the proceeds should be placed in trust and the widow given the income therefrom rather than dividing the

principal according to the mortality tables. *In re Giacomelos' Estate, 13 Cal. Rptr. 245 (1961).* Life tenant entitled to interest or income on damages for condemnation. *Redevelopment Comm'n of City of Greenville v. Capehart, 150 S.E.2d 62 (N.C. 1966). See* Olin L. Browder, Jr., *Condemnation of Future Interests, 48 Va. L. Rev. 461 (1962).* Where trust property was condemned, the court held the fund intact and refused to apportion between life tenant and remaindermen or allow the life tenant reimbursement for taxes paid out of income. *In re Hostetter's Estate, 131 A.2d 360 (Pa. 1957)* (under theory that the trustee was not under the "duty to sell" given by RESTATEMENT OF TRUSTS 241 as the ground for apportionment). Life tenant is entitled to interest, and at death, the remainderman takes the fee simple of the corpus. *Redevelopment Comm'n of City of Greenville v. Capehart, 150 S.E.2d 62 (N.C. 1966).*

(n37)Footnote 630. *Chandler v. Morey, 63 N.E. 512 (Ill. 1902).* Where a mortgage foreclosure is completed during pendency of the condemnation action, the mortgagee is entitled only to the amount of the debt out of the condemnation proceeds and the mortgagor gets the balance, though title passed by the foreclosure to the mortgagee. *Chicago v. Salinger, 47 N.E.2d 725 (Ill. App. 1943).* The warranty deed which does not mention the earlier condemnation action is not an assignment of the condemnation award. *Vroman v. United States, 177 F. Supp. 257 (Ct. Cl. 1959).* An abutting owner's right of compensation for loss of access does not pass upon conveyance of property to a third party. *Monen v. State Dep't of Hwys., Division of Hwys., 515 P.2d 1246 (Colo. App. 1973).* Such right must be specifically assigned to the subsequent grantees to be exercised by them.

Lessor's reversion in a 99-year lease held without value in condemnation. *Department of Pub. Works & Bldgs. v. Metropolitan Life Ins. Co., 192 N.E.2d 607 (Ill. App. 1963).* Lessee was entitled to proceeds under valid exercise of option to purchase real estate; lessee exercised option after condemnation suit was filed but before fee simple title vested in condemnor. *Department of Pub. Works & Bldgs. v. Halls, 210 N.E. 226 (Ill. App. 1965).* Proceeds from condemnation award where taking was subsequent to testatrix's death were real estate in testator's estate passing to his devisees. *In re Georgen's Estate, 277 N.E.2d 341 (Ill. App. 1971).* Unity of ownership, unity of use and contiguity are required to entitle party to severance damages on condemnation. *State v. Heslar, 274 N.E.2d 261 (Ind. 1971).* On condemnation a lessee is entitled to recompense for the option to buy or loss of the balance of the term but not for both. *Sholom, Inc. v. State Roads Comm'n, 229 A.2d 576 (Md. 1967).* A property owner is not entitled to an abatement of taxes for the period between declaration of a "blight area" and prior to a declaration of taking. *Jersey City Redev. Agency v. Bancroft Realty Co., 285 A.2d 48 (N.J. Super 1971).* The filing of a plat which dedicated easement for street shown thereon, did not waive city's liability to pay compensation to owners even though owners sold land prior to entry of judgment confirming the taking. *City of Albuquerque v. Chapman, 419 P.2d 460 (N.M. 1966).* Under the Uniform Vender and Purchaser Act, the vendee in a condemnation action can only recover the deposit. *Westchester County v. P. & M. Materials Corp., 248 N.Y.S. 2d 539 (1964).* Lessee not entitled to compensation in eminent domain if lease provides for termination, and if lessor is to receive award in condemnation the lease is terminated. *Cooney Bros., Inc. v. State, 276 N.Y.S. 2d 337 (1966).*

Vendor recovers excess value or bears the loss if the property is condemned while the contract is executory. *Westchester County v. P. & M. Materials Corp., 238 N.Y.S. 2d 896 (1963).* Sublessee in possession entitled to share in lessee's compensation on condemnation. *Cincinnati v. H. & S. Pogue Co., 221 N.E.2d 717 (Ohio App. 1966). See* Barry P. Waldman, *Eminent Domain -- Options -- Rights of Optionee to Compensation in a Condemnation Proceeding When Option is Exercised After the Taking, 14 Wayne L. Rev. 660 (1968).*

(n38)Footnote 631. *United States v. 11.06 Acres of Land in City of St. Louis, Mo., 89 F. Supp. 852 (E.D. Mo. 1950). In re Appropriation of Easement for Hwy. Purpose, 159 N.E.2d 612 (Ohio 1959)* (owner of a fee which restricted the use of the property held entitled to all compensation on condemnation disregarding any depreciation in market value caused by the restricted use); *School Dist. 3 v. Country Club, 127 S.E.2d 625 (S.C. 1962)* (noting the conflict in other jurisdictions and holding that a restrictive covenant is a property right compensable in condemnation).

(n39)Footnote 632. *Morley v. Jackson Redev. Auth., 632 So. 2d 1284 (Miss. 1994); Stamford v. Vuono, 143 A. 245 (Conn. 1928); Raleigh v. Edwards, 71 S.E.2d 396 (N.C. 1952).* Destruction of restrictive covenant is compensable.

Adaman Mut. Water Co. v. United States, 278 F.2d 842 (9th Cir. 1960); Shelbyville v. Kilpatrick, 322 S.E.2d 203 (Tenn. 1959). Restrictive covenants bind public agencies and must be taken by eminent domain. *Ashland-Boyd County City-County Health Dep't v. Riggs, 252 S.W.2d 922 (Ky. 1952); Burger v. St. Paul, 64 N.E.2d 73 (Minn. 1954); Raleigh v. Edwards, 71 S.E.2d 396 (N.C. 1952); Meagher v. Appalachian Elec. Power Co., 77 S.E.2d 461 (Va. 1953).* The holder of an unexercised option does not have a compensable interest in condemnation proceedings. *Carroll v. Louisville, 354 S.W.2d 291 (Ky. 1962); State v. New Jersey Zinc. Co., 193 A.2d 244 (N.J. 1963). See* Richard I. Brickman, *The Compensability of Restrictive Covenants in Eminent Domain, 13 U. Fla. L. Rev. 147 (1960).*

(n40)Footnote 633. *Riverbank Imp. Co. v. Chadwick, 117 N.E. 244 (Mass. 1917); Sipes v. McGhee, 25 N.E.2d 638 (Mich. 1947); Peters v. Buckner, 232 S.W. 1024 (Mo. 1921).* If a short-term leasehold is condemned in property which was subject to a long-term private lease, the landlord is entitled to the reserved rent and the tenant to the annual rental value during the period of the taking. *United States v. Right to Use and Occupy 3.38 Acres of Land, 484 F.2d 1140 (4th Cir. 1973).* Restrictive covenants are property rights compensable in eminent domain. *Southern Cal. Edison Co. v. Bourgerie, 507 P.2d 964 (1973), overruling, Freisen v. City of Glendale, 288 P. 1080 (Cal. 1930), disapproving, Sackett v. Los Angeles City Sch. Dist., 5 P.2d 23 (Cal. App. 1931).* Taking of a building restriction against an electric power station was compensable. *Lombardy v. Peter Kiewit Sons' Co., 72 Cal. Rptr. 240 (Cal. App. 1968); Southern Cal. Edison Co. Bourgerie, 507 P.2d 964 (1973), rev'g, Friesen v. City of Glendale, 288 P. 1080 (Cal. 1930), disapproving, Sackett v. Los Angeles City Sch. Dist., 5 P.2d 23 (Cal. App. 1931).*

(n41)Footnote 634. *Anderson v. Lynch, 3 S.E.2d 85 (Ga. 1939).*

(n42)Footnote 635. *Department of Conservation v. Frandsen, 356 N.E.2d 1245 (Ill. App. 1976).* Land trust beneficiaries are not necessary parties in condemnation. *In re Romano, 426 F. Supp. 1123 (N.D. Ill. 1977).*

(n43)Footnote 636. Lessee to be paid out of the appropriation, not in addition thereto. State through *Dep't of Hwys. v. Holmes, 221 So. 2d 811 (La. 1969); Fulton County v. Funk, 463 S.E.2d 883 (Ga. 1995). See* Milton Broadman, *Providing the Lease for the Event of Condemnation, 14 Prac. Law 27 (1968). State v. Robinson, 123 N.W.2d 812 (Minn. 1963)* (fair market value of leasehold at time of taking); *State Hwy. Comm'n v. Crow, 384 P.2d 273 (Mont. 1963)* (fair market value of lease at time of taking); *Lee v. City of Atlanta, 464 S.E.2d 879 (Ga. App. 1995); In re Appropriation of Easement for Hwy. Purposes, 194 N.E.2d 60 (Ohio App. 1964)* (reasonable value of use of real estate for period of lease less rental to be paid). *See* John P. Horgan & William R. Edgar, *Leasehold Valuation Problem in Eminent Domain*, 4 U. San Francisco L. Rev. 1 (1969). Lessee entitled to share in damage award in condemnations. *State Hwy. Dep't v. Bell, 149 S.E.2d 752 (Ga. App. 1966); Carter v. State Road Dep't, 189 So. 2d 793 (Fla. 1966).* Where a lease has an automatic termination clause the lessee is not entitled to share in a condemnation award or recover for loss of leasehold. *R. & R. Welding Supply Co. v. City of Des Moines, 129 N.W.2d 666 (Iowa 1964).* Value of lease taken in eminent domain is difference between fair market value of the lease and the amount of the rent. *Barnini v. Sun Oil Co., 283 A.2d 217 (Conn. 1971);* State by and through *Dep't of Transp. v. Weston Inv. Co., 896 P.2d 3 (Or. App. 1995).* When the lessor dies, the lessee with an unexercised option to purchase cannot claim the award on condemnation as against the lessor's estate. *Haney v. Denny, 183 N.E.2d 346 (Ind. App. 1962).*

(n44)Footnote 637. Surrender by lessee under threat of condemnation prevented compensation. *Government of Virgin Islands v. 4738 Square Feet, 879 F. Supp. 542 (D.V.I. 1995); State ex rel. State Hwy. and Transp. Comm'n v. Barley, 806 P.2d 32 (N.M. 1991); Hawbaker v. State Hwy. Comm'n, 113 N.W.2d 296 (Iowa 1962).*

(n45)Footnote 638. *Fulton County v. Funk, 463 S.E.2d 883 (Ga. 1995); State Hwy. Comm'r v. Eilender, 108 N.W.2d 755 (Mich. 1961).*

(n46)Footnote 639. If a short-term leasehold is condemned in property which was subject to a long-term private lease, the landlord is entitled to the reserved rent and the tenant to the annual rental value during the period of the taking. *United States v. Right to Use and Occupy 3.38 Acres Of Land, 484 F.2d 1140 (4th Cir. 1973); Berrios v. City of Lancaster, 798 F. Supp. 1153 (Pa. 1992); State Hwy. Comm'n v. Samborski, 463 S.W.2d 896 (Mo. 1971).* On

condemnation leasehold value less rent reserved is proper. *Wayne Co., Inc. v. Newo, Inc., 182 A.2d 369 (N.J. Super. A.D. 1962).* The value of a leasehold in eminent domain is the difference between rental to be paid and reasonable value of the lease. *State Hwy. Dep't v. Lawford, 611 So. 2d 847 (Ala. 1992); City of Lakewood v. Rogolsky, 252 N.E.2d 872 (Ohio Prob. 1969).* In condemnation, evidence of a sale had after the taking is admissible to show value. *Mannig v. Redevelopment Agency of Newport, 238 A.2d 378 (R.I. 1968).* Lessee has no right to share in compensation if lease provided for termination on eminent domain. *St. Louis County v. Frank, 908 S.W.2d 847 (Mo. App. 1995); Carroll Weir Funeral Home, Inc. v. Miller, 207 N.E.2d 747 (Ohio 1965).*

(n47)Footnote 640. Where property could not be rented because of contemplated eminent domain, the lessor was entitled to compensation for rental loss. *City of Phoenix v. Leroy's Liquors, Inc., 868 P.2d 958 (Ariz. App. 1993); Luber v. Milwaukee County, 177 N.W.2d 380 (Wis. 1970).*

(n48)Footnote 641. *Devers v. Chateau Corp., 792 F.2d 1278 (4th Cir. 1986); Department of Pub. Works & Bldgs. v. Metropolitan Life Ins. Co., 192 N.E.2d 607 (Ill. 1963).* Leasehold and reversion valued separately in condemnation. *State Hwy. Dep't v. Thomas, 154 S.E.2d 812 (Ga. 1967).*

(n49)Footnote 642. *State v. Trask, 957 P.2d 781 (Wash. Ct. App. 1998)* (a lessee is entitled to receive a portion of a just compensation award following a taking of the leasehold property unless the contract specifies otherwise); *St. Louis County v. Frank, 908 S.W.2d 847,* (Mo. App. 1995); *Bauermeister v. Tunison, 161 N.E.2d 460 (Ohio App. 1959).* Where lessee has, under his lease, made improvements prior to condemnation, he is not entitled to any specific allocation therefore but must look to the landlord's share of the condemnation award for compensation. *City & County of Honolulu v. Market Place, Ltd., 517 P.2d 7 (Haw. 1973).* Apportionment of condemnation award between landlord and tenant. *Airport Lodge of Rochester v. Brooks-Buell, Inc., 323 N.Y.S. 2d 894 (1971).* A lessee can only share in a eminent domain award if the fair market value of the unexpired term of the lease exceeds the amount of contract rental. *Pokorny v. Local No. 310, Int'l Hod Carriers, Bldg. & Common Laborers Union of Am., 311 N.E.2d 866 (Ohio 1974).* A tenant, in a case of condemnation, incurs no damages where the condemnor allows the tenant to stay until the termination of the term. *State Dep't of Transp. & Dev. v. Sanders, 628 So. 2d 1207 (La. App. 1993); Cherry Press, Inc. v. Redevelopment Auth. of Phila., 312 A.2d 477 (Pa. 1973). See* Alan N. Polasky, *The Condemnation of Leasehold Interests, 48 Va. L. Rev. 477 (1962).* Lessor's loss of rents due to a taking was compensable. *Luber v. Milwaukee County, 177 N.W.2d 380 (Wis. 1970).*

(n50)Footnote 643. A leasehold interest should not be appraised separately from a fee in determining the value of the land for condemnation purposes. Land Clearance for Redev. Auth. of Kan. v. Ridge (Mo. App. 1989); *In re Appropriation for Highway Purposes, 142 N.E.2d 219 (Ohio 1957).*

(n51)Footnote 644. *Pasadena v. Porter, 257 P. 526 (Cal. 1927); Corrigan v. Chicago, 33 N.E. 746 (Ill. 1893); F. W. Woolworth Co. v. Berlin, 130 A. 741 (N.H. 1925); Elliott v. Joseph, 351 S.W.2d 879 (Tex. 1961). Contra* and partially reduces rent. *Board of Miss. Levee Comm'rs v. Johnson, 6 So. 199 (Miss. 1889); Stein v. W. T. Grant Co., 56 N.Y.S. 2d 582 (N.Y. App. Div. 1945).* The landlord, on the eve of condemnation has no right, in the case of eminent domain, to evict the tenant and deprive the tenant of the opportunity to share in the damages. *Saugus Auto Theatre Corp. v. Munroe Realty Corp., 206 N.E.2d 463 (Mass. App. Ct. 1974).* If a short-term leasehold is condemned in property which was subject to a long-term private lease, the landlord is entitled to the reserved rent and the tenant to the annual rental value during the period of the taking. *United States v. Right to Use and Occupy 3.38 Acres of Land, 484 F.2d 1140 (4th Cir. 1973).*

(n52)Footnote 645. Exception: *G. P. Show Prods. v. Arlington Sports Facilities Dev. Auth., Inc., 873 S.W.2d 120 (Tex. 1994); Wah Chang Corp. v. United States, 282 F.2d 728 (1960).* Expenses of a corporation incurred in moving under eminent domain are compensable. Exception: *Brown v. City of N. Charleston, 442 S.E.2d 633 (S.C. App. 1994); City of Richmond v. Old Dominion Iron & Steel Corp, 186 S.E.2d 30 (Va. 1972).* Tenant's moving expenses were not compensable. *Broward County v. Carney, 586 So. 2d 425 (Fla. App. 1991); Slavitt v. Ives, 303 A.2d 13 (Conn. 1972).* But where the condemnation required removal of personalty the owner was entitled to such cost. *Jacksonville Express*

Auth. v. Henry G. DuPree Co., 108 So. 2d 289 (Fla. 1958).

(n53)Footnote 646. *Lil Champ Food Stores, Inc. v. Department of Transp., 498 S.E.2d 94 (Ga. App. 1998)* (There is no requirement that a lessee of condemned property be awarded compensation for improvements that would go to the lessor at the termination of the lease).

Just compensation for a leasehold bearing improvements owned by the lessee is measured by the willing buyer-willing seller rule, including the possibility of renewal. *National R.R. Passenger Corp. v. 10,178 Square Feet of Land, 781 F. Supp. 234 (S. D.N.Y. 1991); Almota Farmers Elev. & Warehouse Co. v. United States, 409 U.S. 470 (1973).* Tenant at will not entitled to loss of improvements made by tenant on taking by eminent domain. *Gifford v. Mercantile Wharf Corp, 246 N.E.2d 171 (Mass. 1969); Central States Health & Life Co. of Omaha v. Miracle Hills Ltd. P'ship, 456 N.W.2d 474 (Neb. 1990).* Lessee entitled on eminent domain to value of improvements which tenant is entitled to remove. *State v. Teller Native Corp., 904 P.2d 847 (Alaska 1995); Texas Pig Stands, Inc. v. Krueger, 441 S.E.2d 940 (Tex. App. 1969). See Eminent Domain: Depreciated Reproduction Cost in the Valuation of Trade Fixtures, 14 Wm. & Mary L. Rev. 430 (1972).* Improvements made on real estate taken by eminent domain by tenant will are not compensable. *Gifford v. Mercantile Wharf Corp, 246 N.E.2d 171 (Mass. 1969).* Lessee is not entitled to reasonable market value of improvements for the unexpired term of the lease, where the improvements were economically obsolete at the time of taking. *State ex rel. State Hwy. Comm'n v. Samborski, 463 S.W.2d 896 (Mo. 1971).*

(n54)Footnote 647. *Naegle Outdoor Adver. Co. v. City of Lakeville, 532 N.W.2d 249 (Minn. App. 1995); Williams v. Jefferson County, 72 So. 2d 920 (Ala. 1954); Department of Pub. Works & Bldgs. v. Bohne, 113 N.E.2d 319 (Ill. 1953); In re Bronx River Expressway, 104 N.Y.S. 2d 554 (N.Y. A. D.1951).*

(n55)Footnote 648. *In Re Condemnation of Private Property, 536 N.W.2d 598 (Mich. App. 1995); George F. Stein Brew. Co. v. State, 103 N.Y.S. 2d 946 (N.Y. Ct. Cl. 1951).*

(n56)Footnote 649. *United States v. 425,031 Square Feet of Land, 187 F.2d 798 (3d Cir. 1951); Metropolitan Transit Auth. v. Funk, 435 S.E.2d 196 (Ga. 1993).* Availability to other similar timberland is material to issue of severance damages in an eminent domain proceeding. *International Paper Co. v. United States, 227 F.2d 201 (5th Cir. 1955).*

(n57)Footnote 650. *State v. Dillon, 119 N.W.2d 87 (Neb. 1962); Marraro v. States, 239 N.Y.S. 2d 105 (1963), 189 N.E.2d 606* (the value of trade fixtures taken by condemnation is reproduction cost less depreciation); *Humble Oil & Ref. Co. v. State, 187 N.E.2d 791 (N.Y. 1962)* (diminution of rental value as a proper test).

(n58)Footnote 651. *Del-Mar Redev. Corp. v. Associated Garages, Inc., 726 S.W.2d 866 (Mo. App. 1987); United States v. Certain Property, 225 F. Supp. 498 (S. D.N.Y. 1963).*

(n59)Footnote 652. *Texas Fruit Palace, Inc. v. City of Palestine, 842 S.W.2d 319 (Tex. App. 1992); Williams v. Jefferson County, 72 So. 2d 920 (Ala. 1954); Department of Pub. Works & Bldgs. v. Bohne, 113 N.E.2d 319 (Ill. 1953); In re Bronx River Expressway, 104 N.Y.S. 2d 554 (N.Y. A. D.1951).* Value of leasehold is the fair market value of the unexpired term of the lease less the rent. *Lemmons v. United States, 496 F.2d 864 (Ct. Cl. 1971).* Where a building is condemned for a year with short-term options of renewal, the condemnee must establish direct economic loss from existence of the options in addition to fair rental value. *United States v. Improved Premises Located at the NW Corner of Irving Pl. & 16th St., Borough of Manhattan, 359 F. Supp. 528 (S.D.N.Y. 1973). McGhee v. Floyd County, 97 S.E.2d 529 (Ga. App. 1957).* Fair market value of unexpired term of lease is valuation of leasehold in eminent domain. *State v. Heslar, 274 N.E.2d 261 (Ind. 1971).* Leasehold is realty for purpose of compensation in eminent domain. *Comstock v. Iowa State Hwy. Comm'n, 121 N.W.2d 205 (Iowa 1963).* In a lease with option to purchase, the lessee is entitled upon condemnation to payment for the unexpired portion of the lease or the value of the option to purchase but not to both. *Sholom, Inc. v. State Roads Comm'n, 229 A. 3d 576 (Md. 1967).* Leasehold on condemnation is valud at difference between the value of the use and occupancy for the original term plus the value of the right to renew less the agreed

rent. *Indiana Grocery Co, Inc., v. Crosby Properties Co., 578 N.E.2d 780 (Ind. App. 1991); New Jersey Hwy. Auth. v. J. & F. Holding Co., 123 A.2d 25 (N.J. Super A. D.1956).* Provision in lease giving lessor option to terminate lease on appropriation by eminent domain denied tenant right to participate in condemnation proceedings. *Carroll Weir Funeral Home v. Miller 207 N.E.2d 747 (Ohio 1965).* In the absence of an acceleration clause in the lease, damages received by the lessor are only those periodic payments due as of the date of the bringing of the action. *General Dev. Corp. v. Wilbur-Rogers Atlanta Corp., 273 N.E.2d 908 (Ohio App. 1971).* Lessee is entitled to the portion of damages awarded as compensation to the extent of the title of the lease. *City of Cincinnati v. Spangenberg, 300 N.E.2d 457 (Ohio App. 1973).* The sum of the value of the leasehold and the reversion on condemnation shall not exceed the value of the fee. *State Dep't of Hwys. & Pub. Works v. Texaco, Inc., 354 S.W.2d 792 (Tenn. App. 1961).* The Uniform Eminent Domain Act adheres to the unit valuation rule in leaseholds. The measure of damage of the leasehold is the excess in value of the unexpired leasehold over and above the rentals which were due for the unexpired term. *Shelby County v. Bardon, 527 S.W.2d 124 (Tenn. 1975).* Taking of leasehold interest valued on the amount of money that a reasonably prudent purchaser would normally pay for the leasehold interest considering the rental obligations that they would thereby assume. *State ex rel. Moore v. Baskin, 546 P.2d 399 (Idaho 1976).*

(n60)Footnote 653. Value of lease taken in eminent domain is the difference between the fair market value of the lease and the amount of the rent. *Whiteco Indus., Inc. v. City of Tucson, 812 P.2d 1075 (Ariz. App. 1990); Barnini v. Sun Oil Co., 283 A.2d 217 (Conn. 1971); George F. Stein Brew, Co. v. State, 103 N.Y.S. 2d 946 (N.Y. Ct. Cl. 1951).*

(n61)Footnote 654. *National R.R. Passenger Corp. v. 10,178 Square Feet of Land, 781 F. Supp. 234 (S.D.N.Y. 1991); United States v. 425,031 Square Feet of Land, 187 F.2d 798 (3d Cir. 1951).* Availability of other similar timberland is material to issue of severance damage in an eminent domain proceeding. *International Paper Co. v. United States, 227 F.2d 201 (5th Cir. Ga. 1995).*

(n62)Footnote 655. *United States v. Certain Space in Rand McNally Bldg. in Chicago, 295 F.2d 381 (7th Cir. 1961); National R.R., Passenger Corp. v. 10,178 Square Feet of Land, 781 F. Supp. 234 (S.D.N.Y. 1991); Whiteco Indus., Inc. City of Tucson, 812 P.2d 1075 (Ariz. App. 1990); United States v. 425,031 Square Feet of Land, 187 F.2d 798 (3d Cir. 1951).*

(n63)Footnote 656. *Lil Champ Food Stores, Inc. v. Department of Transp., 498 S.E.2d 94 (Ga. App. 1998)* (there is no requirement that a lessee of condemned property be awarded compensation for improvements that would go to the lessor at the termination of the lease); *Exxon Corp. v. M. & Q. Holding Corp., 269 S.E.2d 371 (Va. 1980); United States v. Westinghouse Elec. & Mfg. Co., 339 U.S. 261 (1950).* A long-term lease is not terminated by a temporary condemnation of the leased premises. *Leonard v. Autocar Sales & Serv. Co., 64 N.E.2d 477 (Ill. 1945);* in case of such temporary condemnations, removal costs to the lessee are constituent elements of value but are not independent items. *United States v. General Motors Corp., 323 U.S. 454 (1945);* cost of removal by lessee is a proper element of damages. *United States v. Westinghouse, 170 F.2d 752 (1st Cir. 1948). See* Harry T. Dolan, *Just Compensation and the General Motors Case, 31 Va. L. Rev. 539 (1945).*

(n64)Footnote 657. Allowance for moving and selling equipment and loss of goodwill where a business was totally destroyed. *Department of Transp. v. 2,953 Acres of Land, 463 S.E.2d 912 (Ga. App. 1995); Matthews v. Division of Admin., State Dep't of Transp., 324 So. 2d 664 (Fla. App. 1975).* Holding that a lessee required to move non-condemned property will be repaid relocation expenses but not for cost for loss of business. *New Jersey Sports & Expo. Auth. v. Borough of E. Rutherford, 348 A.2d 825 (N.J. Super 1975); Los Angeles v. Geiger, 210 P.2d 717 (Cal. App. 1949); State v. Cerruti, 214 P.2d 346 (Or. 1950).*

(n65)Footnote 658. *Hedler v. United States, 952 F.2d 1364 (Fed. Cir. 1991); United States v. General Motors Corp., 323 U.S. 454 (1945).* Can obtain damages for improvements not removable if they increase value of leasehold. *United States v. 40.558 Acres of Land, 62 F. Supp. 98 (D.Del. 1945).* Can only obtain damages for irremovable improvements. *In re Triborough Bridge, City of New York, 293 N.Y.S. 223 (N.Y. App. Div. 1937).*

(n66)Footnote 659. *John Hancock Mut. Life Ins. Co. v. United States, 155 F.2d 977 (1st Cir. 1946); Fulton County v. Funk, 463 S.E.2d 883 (Ga. 1995); State v. Platte Valley Pub. Power & Irr. Dist., 23 N.W.2d 300 (Neb. 1946).* But holding that proper value of a leasehold is its worth to the owner, not its fair market value. *Housing Auth. of Savannah v. Savannah Iron & Wire Works, 87 S.E.2d 671 (Ga. App. 1955).*

(n67)Footnote 660. *United States v. Cox, 190 F.2d 293* (10th Cir.), *cert. denied*, U.S. 867 (1951); *United States v. Jarmillo, 190 F.2d 300 (10th Cir. 1951).*

(n68)Footnote 661. *United States v. Banisadr Bldg. Joint Venture, 65 F. 3d 374 (1995); Cape Girardeau v. Heinze, 288 S.W. 471 (Tex. App. 1926).*

(n69)Footnote 662. *Drummond Coal Co. v. State, 548 So. 2d 430 (Ala. 1989); United States v. Westinghouse Elec. & Mfg. Co., 170 F.2d 752 (1st Cir. 1948).*

(n70)Footnote 663. *Naegle Outdoor Adver. Co. v. City of Lakeville, 532 N.W.2d 249 (Minn. App 1995); State Hwy. Dep't v. Thomas, 154 S.E.2d 812 (Ga. App. 1967).* Even though the lessee had contracted not to claim damages from a lessor in loss of leasehold through eminent domain, the lessee still is entitled to compensation for loss of fixtures. *United States v. Certain Property in Manhattan, 344 F.2d 142 (2d Cir. 1965). See Landmark Preservation Laws: Compensation for Temporary Taking, 35 U. Chi. L. Rev. 362 (1968).* In eminent domain proceedings the lessee is entitled to the market value of the right to use the property for the unexpired term, over and above the amount of the rent that lessee is obligated to pay for the lease. *Director of Hwys. v. Caperton, 220 N.E.2d 699 (Ohio 1965).*

(n71)Footnote 664. *State Dep't of Transp. & Dev. v. Orleans Oil Co., 520 So. 2d 1163 (La. App. 1987); Pasadena v. Porter, 257 P. 526 (Cal. 1927); Corrigan v. Chicago, 33 N.E. 746 (Ill. 1893); Goodyear Shoe Machin. Co. v. Boston Terminal Co., 33 N.E. 214 (Mass. 1900); Hudson County v. Emmerich, 42 A. 107 (N.J. Ch. 1898); Mellis v. Berman, 9 N.Y.S. 2d 553 (N.Y. Sup. 1938).* Lessee is entitled to damages for taking of property by eminent domain. *New Haven Unified Sch. Dist. v. Taco Bell Corp., 24 Cal. App. 4th 1473 (1994); Universal Container Corp. v. City of Cambridge, 278 N.E.2d 727 (Mass. 1972).*

(n72)Footnote 665. *Department of Transp. v. Idol, 440 S.E.2d 863 (N.C. App. 1994); Yellow Cab Co. v. Stafford-Smith Co., 150 N.E. 670 (Ill. 1926); Leonard v. Autocar Sales & Serv. Co., 64 N.E.2d 477 (Ill. 1945).*

(n73)Footnote 666. *Texaco Ref. & Mktg. v. Crown Plaza Corp., 845 S.W.2d 340 (Tex. App. 1992); P.J.W. Moodie Lumber Corp. v. A. W. Banister Co., 190 N.E. 727 (Mass. 1934); F. W. Woolworth Co. v. Berlin, 130 A. 741 (N.H. 1925). See* Robert Schuster, *The Doctrine of Consequential Loss as Affected by Valuation Formulas, 4 Land & Water L. Rev. 539 (1969).*

(n74)Footnote 667. *Stein v. W. T. Grant Co., 56 N.Y.S. 2d 582 (N.Y. A. D.1945).*

(n75)Footnote 668. It has been held that if the lease contract provides for cancellation on a taking the lessee is not entitled to damages. *See* Alan N. Polasky, *The Condemnation of Leasehold Interests, 48 Va. L. Rev. 477.*

(n76)Footnote 669. *Bagford v. Ephraim City, 904 P.2d 195 (Utah 1995);* tenant at will entitled to compensation for taking of tenant's interest. *Lee v. Venable, 213 S.E.2d 188 (Ga. App. 1975); Ammons v. Central of Georgia Ry. Co., 113 S.E.2d 438 (Ga. 1960); City of Charlotte v. Charlotte Park & Recreation Comm'n, 178 S.E.2d 601 (N.C. 1971).*

(n77)Footnote 670. United States v. 57.09 Acres of Land, more or less, situated in *Skamania County, State of Wash., 757 F.2d 1025 (9th Cir. 1985); Almota Farmers Elevator & Warehouse Co. v. United States, 409 U.S. 470 (1973).*

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CHAPTER 80 THE POWER OF EMINENT DOMAIN

9-80 Thompson on Real Property, Thomas Editions § 80.10

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§ 80.10 Procedure in Condemnation Actions.

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§ 80.10(a) Applicable Law.

Proper procedure in eminent domain proceedings is a matter of the law of the jurisdiction applicable to the condemnor. In the case of the federal government or its authorized agencies and instrumentalities, federal law governs. Otherwise, the particular state statutes control.

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LEXIS: "eminent domain" or "condemnation" w/10 procedure w/20 law

§ 80.10(b) Proper Parties.

Condemnation proceedings have two purposes: (a) to transfer to the condemnor the possession of and the essential degree of interest in the land taken; and (b) to fix the amount of compensation to be paid the owner for the taking. n671 The only necessary parties in condemnation proceedings are the record owners and the parties in possession. n672 All persons whose interests are to be condemned must be made parties to determine their rights. n673 But if the condemnation is had subject to outstanding interests, the holders thereof are not indispensable parties. n674 The power of eminent domain may be exercised by the state without notice to the interested landowner, n675 but a statute which undertakes to determine the matter of compensation without notice is void. n676

Usually the statute designates the necessary parties. But anyone having an interest in the land to be taken is a proper party. n677 Since a mortgagee merely has a lien and not an interest in the land, the mortgagee is not a proper party in eminent domain proceedings. n678 The holder of an option to purchase the land to be condemned is entitled to damages received for an eminent domain taking where the option precedes the taking but is not exercised until afterwards. n679

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§ 80.10(c) Prelitigation Requirements.

Eminent domain proceedings are purely statutory, and a trial in court, in the first instance, is not necessary to an appropriation. So long as an impartial tribunal is provided so that the claim for damages can be fairly considered and awarded, whether by disinterested viewers, commissioners, or assessors, the condemning party need not resort to the court. n680

Before a condemnation proceeding can be instituted, there must have been a good faith attempt to agree with the owner and a bona fide offer and reasonable effort made to induce the owner to accept it. A perfunctory attempt to purchase or settle is not sufficient. n681

Where no proceedings have been instituted, but an actual or threatened entry upon private land under color of eminent domain has occurred, an injunction will lie to restrain such actual or threatened entry. n682 An injunction will also lie to restrain a municipal or other corporation from taking land in excess of the power granted by the legislature, n683 or the taking of property not subject to appropriation because already devoted to a public use. n684

Some statutes permit a forceful taking and relegate the landowner to an action for damages. n685 Others permit an entry on the filing of an action and permit damages to be awarded later. n686 In such a case there is a question as to whether the damages are to be measured as of the time of entry or time of the award. n687 Such "quick taking" statutes are upheld generally where (a) the court fixes the initial deposit, (b) the deposit is made with the court, and (c) the condemnor is required to furnish a bond to cover additional allowances. The statutes often make an attempt to agree with the owner on the amount of compensation to be paid a condition precedent to the filing of a petition to condemn. n688 A statutory requirement of this character is jurisdictional and there can be no failure or inability to agree, within the meaning of the statutes, unless some effort to agree has been made in good faith. A perfunctory offer for the property, or one not genuine, or one made upon conditions that are impossible is insufficient. n689 The petitioner has the burden of proving compliance with the conditions precedent essential to the right to condemn the property. n690

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§ 80.10(d) Nature of the Proceeding.

Eminent proceedings depend so much upon different statutory provisions in the various states that the procedure is not by any means the same in detail in all jurisdictions; but there are certain general principles, and many features or provisions common to a number of statutes, in regard to which decisions have been rendered by the courts. n691 Subject to constitutional restrictions, the legislature may prescribe the procedure for condemnation, n692 which must be strictly followed before an owner can be deprived of the property involuntarily. n693 A proceeding to condemn land, either for a public use or for a private way of necessity, is not an action at law nor a suit in equity as these terms are commonly understood. In its nature, the action is a proceeding *sui generis*, or of its own kind. n694 Such proceedings are, however, judicial in character. n695 Normally, the purpose of such proceedings is to regain possession, and incidentally some degree of ownership, of particular real property. n696 The purpose is to determine without undue delay the right to condemn and fix the amount of compensation to be paid the owner for the property taken, and not to try controversies as to the title. n697 Ordinarily, there must be a strict compliance with the statutes regulating the exercise of the power of eminent domain, but mere informalities in procedure are not necessarily fatal to the validity of the proceeding. n698 Moreover, such statutes prescribing the procedure are not to be construed with such strictness as to defeat their purpose and intent. n699

Eminent domain proceedings are usually considered as being strictly in rem, n700 and not in personam, n701 the res being within the jurisdiction of the state. n702 And, being essentially an adversary proceeding, some kind of notice is

requisite to its validity. n703 Other courts, however, have denied that such proceedings are proceedings in rem, since the court itself never assumes possession or dominion over the property. n704 Whatever the precise nature of the proceeding, it has been held that publication for three successive weeks in three successive issues of some newspaper circulating generally in the county of notice of the initiation of eminent domain proceedings satisfies all the requirements of due process of law. n705

§ 80.10(e) Stages of the Proceeding.

The usual proceeding for condemnation consists of a petition or application to the court, upon due notice to all persons interested in the land to be affected, which, if successful, results in a judgment or decree to the effect that, upon making just compensation to such persons, the petitioner shall take the property for the uses and purposes set forth in the petition. A petition under the exercise of eminent domain must describe the land or easement sought to be appropriate with such particularity as to enable the court to determine that no more property is being appropriated than is reasonably necessary for the purposes for which it is being acquired. n706

It is not proper to allege in defense of a petition to condemn property that the petitioner will apply the property to a use different from that for which it is being appropriated. n707 The court having once obtained jurisdiction over the subject matter, the parties may retain jurisdiction until final judgment. n708 The consolidation by the court of a number of actions brought by the same plaintiff to condemn land of various owners is within the discretion of the court. n709

After the petition is filed, commissioners are appointed by the court, who view the land, receive evidence as to its value, and determine upon the amount of compensation to be paid; and, upon having their report confirmed and making provision for payment of the award the petitioner becomes entitled to the use and possession of the land.

In the absence of a specific constitutional provision granting the right of trial by jury in condemnation proceedings, such right does not exist as a constitutional right. n710 In the absence of any provision in the statutes submitting the matter to a court or jury, the decision of the question lies with the body or parties to whom the state has delegated the authority to take. They have the same power as the state would have, acting through any regularly constituted authority, n711 and there is no restraint in this power except as to compensation. Generally, the only issue before the jury is the reasonable value of the property to be taken. n712 Under the law of some states, the state as well as the property owner is entitled to a trial by jury upon the issue of compensation, unless such trial is waived. n713 After the land has been appropriated and bond filed to secure the payment of the compensation awarded, the condemnor cannot, without the landowner's consent, decrease the amount of recovery by surrendering any of the rights acquired by the filing of the bond or by discontinuing or abandoning the whole or any part of the condemned property. n714

The decree of condemnation passes title to the realty and no further conveyance by the former owner is necessary. n715 Under the rule in most states, title does not vest in the condemnor until the judgment for condemnation is entered and paid, n716 but then it relates back to the time the petition was filed. n717

In the absence of a statutory provision on the question, discontinuance of the proceedings may be had at any time before the rights of the parties have become reciprocally vested. n718 A judgment of a federal court in a condemnation action of the United States need not be recorded in the state court records to be binding upon subsequent purchasers. n719 Condemnation proceedings which are fatally defective are subject to collateral attack. n720

The courts will review condemnation proceedings to determine whether the requirements of the constitution have been complied with, but beyond that they have no power to interfere with the exercise of a purely legislative function. n721 Thus virtually the only substantive question for judicial review in a condemnation proceeding is whether the purpose for which property was taken is an authorized public use. n722

FOOTNOTES:

(n1)Footnote 671. *Hope v. United States, 23 Cl. Ct. 776 (1991);* Transcontinental Gas Pipeline Corp. v. 118 Acres, 745 F. Supp. 366 (E.D.La. 1990); *Houston N. Shore Ry. v. Tyrrell, 98 S.W.2d 786 (Tex. 1936).* Preliminary offer to purchase in eminent domain must be in good faith. *Wolfe v. State Dep't of Roads, 137 N.W.2d 721 (Neb. 1965); Kistler v. City of Raleigh, 136 S.E.2d 78 (N.C. 1964).*

(n2)Footnote 672. *State ex rel. Dep't of Hwys. v. Pate, 555 P.2d 1040 (Okla. 1976); Campbell v. Edinger, 607 P.2d 967 (Okla. 1980).*

(n3)Footnote 673. P.C. Mgmt., Inc. v. City of Indianapolis, 573 N.E.2d (Ind. App. 1991); Minnesota v. United States (1939). The owners of several mineral rights may be joined with the surface owner in one eminent domain proceeding. *Ohio Sand & Gravel Co. v. Masheter, 199 N.E.2d 573 (Ohio 1964).*

(n4)Footnote 674. *Kern River Gas Transmission Co. v. Clark County, 757 F. Supp. 1110 (D.Nev. 1990); Burton-Sutton Oil Co. v. Commissioner Internal Revenue, 150 F.2d 621 (5th Cir. 1945).*

(n5)Footnote 675. Tennessee *Gas Pipeline Co. v. 104 Acres of Land, 32 F. 3d 632 (1st Cir. 1994); State Hwy. Comm'n v. Hammock, 148 S.W.2d 324 (Ark. 1941).*

(n6)Footnote 676. *Sinaloa Lake Owners Ass'n v. Tudor, 864 F.2d 1475 (9th Cir. 1989); State Life Ins. Co. v. Arkansas State Hwy. Comm'n, 148 S.W.2d 671 (Ark. 1941).* An Illinois statute which merely required a deposit as determined by the condemner was unconstitutional. *Department of Public Works & Bldgs. v. Gorbe, 98 N.E.2d 730 (Ill. 1951).* Notice by publication is insufficient in eminent domain as against a resident. *Walker v. City of Hutchinson, 352 U.S. 112 (1956).* But publication is valid where names and addresses are unknown. *Standard Oil Co. v. State of New Jersey, 341 U.S. 428 (1951).* Improper mailing is not due process. *Elliott v. City of Indianapolis, 142 N.E.2d 911 (Ind. 1957).* But proper mailing of notices is due process. *Nelson v. New York, 352 U.S. 103 (1956).*

(n7)Footnote 677. *Quileute Indian Tribe v. Babbitt, 18 F. 3d 1456 (9th Cir. 1994); Board of Educ. City of Holland v. Van Der Veen, 135 N. W 241 (Mich. 1912); Seaboard Air Line Ry. v. Garrett, 67 S.E. 903 (S.C. 1910); In re Barkhausen, 124 N.W. 649 (Wis. 1910).*

(n8)Footnote 678. *Homestead Savs. v. Ozark Fin. Corp., 699 F. Supp. 1547 (S. D.Fla. 1988); Shavers v. Duval County, 73 So. 2d 684 (Fla. 1954).*

(n9)Footnote 679. *Shaffer v. Flick, 520 A.2d 50 (Pa. 1987); Appeal of Powell, 123 A.2d 650 (Pa. 1956).*

(n10)Footnote 680. *Stephenson v. United States, 33 Fed. Cl. 63 (1994); City of Portland v. Hirsch Weis Mfg. Co., 263 P. 901 (Or. 1928). See State v. Superior Court for Ferry County, 261 P. 110 (Wash. 1927).*

(n11)Footnote 681. *City of Lake Elsinore v. Ranel Development Co., 70 Cal. Rptr. 2d 715 (Ct. App. 1998)* (The mere fact that a condemning authority did not "make every reasonable effort" to obtain the property by negotiation does not require dismissal of the eminent domain action); *National R.R. Passenger Corp. v. Boston and Maine Corp., 503 U.S. 407 (1992);* Transcontinental Gas Pipeline Corp. v. 118 Acres, 745 F. Supp. 366 (E.D.La. 1990); *Southside Water & Sewer Dist. v. Murphy, 555 P.2d 1148 (Idaho 1976).*

(n12)Footnote 682. *Love v. United States, 889 F. Supp. 1548 (E.D.N.C. 1994); Rosenthal v. City of Crystal Lake, 525 N.E.2d 1176 (Ill. App. 1988); Consarc Corp. v. Iraqi Ministry, 27 F. 3d 695 (D.C. Cir. 1994); Far West Fed. Bank v. Director, 951 F.2d 1093 (9th Cir. 1991); Utah Power & Light Co. v. United States, 243 U.S. 389 (1917); Dancy v. Alabama Power Co., 73 So. 901 (Ala. 1916); Newberry v. Evans, 275 P. 465 (Cal. App. 1929); Del Monte Live Stock v. Ryan, 133 P. 1048 (Colo. App. 1913); Baya v. Town of Lake City, 33 So. 400 (Fla. 1902); Springer v. Chicago, 139 N.E. 414 (Ill. 1923); Chesapeake & Potomac Tel. Co. v. Tyson, 153 A. 271 (Md. 1931); Kipp v. Van Wagoner, 281 N.W. 592 (Mich. 1938); Ates v. Wills, 243 S.W. 187 (Mo. App. 1922); Goff v. Weiss, 203 N.W. 955 (Neb. 1925); Stafford v. Multnomah County Drainage Dist. No. 1, 204 P. 158 (Or. 1922); Stuart v. Gimbel Bros, 131 A. 728 (Pa. 1926).*

(n13)Footnote 683. *Golden Gate Hotel Assoc. v. City and County of San Francisco, 836 F. Supp. 707 (N. D.Cal. 1993); South Dade Land Corp. v. Sullivan, 853 F. Supp. 404 (S. D.Fla. 1993); Burr v. Maclay Rancho Water Co., 116 P. 715 (Cal. 1911); Iowa Power Co. v. Hoover, 147 N.W. 858 (Iowa 1914); Larson v. Minnesota N.W. Elec. Ry., 154 N.W. 948 (Minn. 1915).* One whose property has been taken or damaged may bring mandamus to compel eminent domain. *State ex rel. Phoenix Ins. Co. v. Ritchie, 175 S.E.2d 428 (W. Va. 1970).*

(n14)Footnote 684. *Walsh v. United States Army Corps of Eng'rs., 757 F. Supp. 781 (W.D.Tex. 1990); Denver & Rio Grande R.R. of N.M. v. Arizona & Colo. Ry., 233 U.S. 61 (1914).*

(n15)Footnote 685. *Provident Mutual Life Ins. Co. v. City of Atlanta, 864 F. Supp. 1274 (N.D.Ga. 1994); Carolina & N.W. Ry. v. Piedmont Wagon & Mfg. Co., 51 S.E.2d 301 (N.C. 1949)* (holding statute of limitations barred landowner's claim). "Quick taking" by eminent domain is constitutional. *Department of Pub. Works & Bldgs. v. Butler Co., 150 N.E.2d 124 (Ill. 1958), overruling, Department of Pub. Works & Bldgs. v. Gorbe, 98 N.E.2d 730 (Ill. 1951).*

(n16)Footnote 686. *Raymond v. Chittenden County Circumferential Hwy., 604 A.2d 1281 (Vt. 1992); County of Bernalillo v. Morris, 872 P.2d 371 (N. M. App. 1994); Narragansett Elec. Lighting Co. v. Sabre, 146 A. 777 (R. I. 1929).*

(n17)Footnote 687. Calmat of Ariz. v. State of Ariz. (Ariz. 1993) (damage formula adopts date of government's entry as date of valuation). Date of taking. *Bauman v. Ross, 167 U.S. 548 (1897).*

(n18)Footnote 688. *Department of Transp. & Dev. v. Oswald, 665 So. 2d 668 (La. App. 1996); Baylin v. United States, 30 Fed. Cl. 248 (1993); City of Chicago v. Collin, 134 N.E. 751 (Ill. 1922).* The wife and tenant of a landowner are not "owners" of land sought to be condemned so as to require that an effort be made to purchase their interests before commencing a proceeding to condemn the land for public use. *Lowe v. Indiana Hydro-Elec. Power Co., 151 N.E. 220 (Ind. 1926)* (electric light and power company may appropriate land and easements necessary to carry on purpose for which it was organized without securing declaration by public service commission of convenience and necessity). Allegation of an inability to agree with the owners upon the price to be paid for the land and an easement, exclusive of improvements, held sufficient under the circumstances of the particular case. *State ex rel. Kendall v. Mohler, 237 P. 690 (Or. 1925).* "Quick taking" by eminent domain is constitutional. *Department of Pub. Works & Bldgs. v. Butler Co., 150 N.E.2d 124 (Ill. 1958), overruling, Department of Pub. Works & Bldgs. v. Gorbe, 98 N.E.2d 730 (Ill. 1951).* Acceptance payment of the amount of the award, where tender into court is not necessary to a quick taking, waives objection to the amount of the award. *North Carolina State Hwy. & Public Works Comm'n v. Pardington, 88 S.E.2d 102 (N.C. 1955).*

(n19)Footnote 689. *Goodwill Community Chapel v. General Motors Corp., 503 N.W.2d 705 (Mich. App. 1993); City of Long Beach v. Long Beach Water Co., 205 N.Y.S. 420 (1924).*

(n20)Footnote 690. *Hensler v. City of Glendale, 876 P.2d 1043 (Cal. 1994); Lewis v. City of Mercer Island, 817 P.2d 408 (Wash. App. 1991); Department of Pub. Works & Bldgs. v. Engle, 146 N.E. 521 (Ill. 1925).* In some states the condemnor must make a bona fide attempt to purchase before instituting proceedings. *Tiller v. Norfolk & W. Ry., 110 S.E.2d 209 (Va. 1959).*

(n21)Footnote 691. *Richardson v. City and County of Honolulu, 868 P.2d 1193 (Haw. 1994); McDonald's v. State Hwy. Comm'n of Miss., 592 So. 2d 927 (Miss. 1991).*

(n22)Footnote 692. *Sanitary & Imp. Dist. No. 1 of Fillmore County v. Nebraska Public Power Dist., 573 N.W.2d 460 (Neb. 1998)* (eminent domain statutes should be strictly construed); *City of St. Charles, Mo. v. DeVault Management, 959 S.W.2d 815 (Mo. Ct. App. 1998)* (statutes conferring the right of eminent domain should be strictly construed by the courts); *Harness v. Arkansas Public Service Comm'n, 962 S.W.2d 374 (Ark. Ct. App. 1998)* (eminent domain statutes should be strictly construed in favor of the owner of the condemned land); *Lehnen v. State, 693 N.E.2d 580 (Ind. Ct. App. 1998)* (where eminent domain proceedings are statutory and a fixed procedure is set forth in the statue, that procedure should be strictly followed).

Rummage v. Oklahoma ex rel. Dep't. of Transp., 849 P.2d 1009 (Okla. App. 1993); American Tel. & Tel. Co. v. Purcell Co., 606 So. 2d 93 (Miss. 1990); City of Oakland v. United States, 124 F.2d 959 (9th Cir. 1942); Pierce v. Bangor, 74 A. 1039 (Me. 1909); Norway Water Dist. v. Norway Water Co., 30 A.2d 601 (Me. 1943); Southern R.R. v. Memphis, 148 S.W. 662 (Tenn. 1912).

(n23)Footnote 693. *Rummage v. Oklahoma ex rel. Dep't of Transp., 849 P.2d 1109 (Okla. App. 1993); Big Lost River Irr. Co. v. Davidson, 121 P. 88 (Idaho 1912); Hemenway v. Shoonmaker, 118 N.Y.S. 931 (1909); Roeh v. Milwaukee, 124 N.W. 400 (Wis. 1910).*

(n24)Footnote 694. *Pelley v. King County, 821 P.2d 536 (Wash. App. 1991); Suffness v. United States, 974 F.2d 608 (5th Cir. 1992); State ex rel. White Pine Sash Co. v. Superior Ct., 261 P. 110 (Wash. 1927).*

(n25)Footnote 695. *Gissel v. Kenmore Twp., 512 N.W.2d 470 (N. D.1994); Redevelopment Agency of City of Emeryville v. Arvey Corp., 5 Cal. Rptr. 2d 161 (1992); People ex rel. O'Meara v. Smith, 29 N.E.2d 274 (Ill. 1940).*

(n26)Footnote 696. *United States v. 125.07 Acres of Land, 753 F. Supp. 1034 (D.Mass. 1991); Leitch v. New York Cent. R.R., 58 N.E.2d 16 (Ill. 1944).*

(n27)Footnote 697. *City of Virginia Beach v. Giant Square Shopping Center Co., 498 S.E.2d 917 (Virginia 1998)* (eminent domain proceedings should be effected in a manner that promotes the constitutional integrity of the procedure); *Texas & City of Austin v. Schmidt, 805 S.W.2d 25 (Tex. App. 1991); McDonald's v. Robinson Indus, Inc., 592 So. 2d 927 (Miss. 1991); Houston N. Shore Ry. v. Tyrrell, 98 S.W.2d 786* (Tex. 1936.)

(n28)Footnote 698. *Sanitary & Imp. Dist. No. 1 of Fillmore County v. Nebraska Public Power Dist., 573 N.W.2d 460 (Neb. 1998)* (eminent domain statutes should be strictly construed); *City of St. Charles, Mo. v. DeVault Management, 959 S.W.2d 815 (Mo. Ct. App. 1998)* (statutes conferring the right of eminent domain should be strictly construed by the courts); *Harness v. Arkansas Public Service Comm'n, 962 S.W.2d 374 (Ark. Ct. App. 1998)* (eminent domain statutes should be strictly construed in favor of the owner of the condemned land); *Lehnen v. State, 693 N.E.2d 580 (Ind. Ct. App. 1998)* (where eminent domain proceedings are statutory and a fixed procedure is set forth in the statue, that procedure should be strictly followed).

John v. Texas, 826 S.W.2d 138 (Tex. 1992); Commonwealth Transp. Comm'r of Va. v. Klotz, Inc., 425 S.E.2d 508 (Va. 1993); Byfield v. City of Newton, 141 N.E. 658 (Mass. 1923) (defect held waived by petitioners going to hearing on the merits). The necessity and expediency of the taking of property for public use are legislative questions, no matter who may be charged with their decision, and a hearing thereon is not essential under the due process clause of the *United States Constitution. North Laramie Land Co. v. Hoffman, 268 U.S. 276 (1925).* When the statutory provisions concerning the taking have been followed, and the question of necessity is not made a judicial question by either the constitution or the statutes, the property owner is not entitled to be heard on the question of the necessity or advisability of the route chosen for a public street. *Oakland v. Parker, 233 P. 68 (Cal. App. 1924).* Amendment of resolution and report so as to conform to statutes, *see Conners v. New Haven, 125 A. 375 (Conn. 1924); State ex rel Kendall v. Mohler, 237 P. 690 (Or. 1925).* Held that condemnor was not required to obtain a variance for a use that violated a zoning ordinance. *Graham Farms, Inc. v. Indianapolis Power & Light Co., 233 N.E.2d 656 (Ind. 1968).* There must be good-faith effort to purchase the property before condemnation proceedings can be instituted. *Blaize v. Public Co. of Ind., Inc., 301 N.E.2d 863 (Ind. 1973); Western Roubidoux Printing & Litho. Co. v. Missouri State Hwy. Comm'n, 498 S.W.2d 745 (Mo. 1973).* Good faith attempt to purchase land is a statutory prerequisite. *State Dep't of Roads v. Mahloch, 116 N.W.2d 305 (Neb. 1962).* Attempt to acquire property by negotiation is a prerequisite to eminent domain. *City of Charlotte v. Robinson, 163 S.E.2d 289 (N.C. App. 1968).* Judicial review is limited to site necessity and does not encompass project necessity. *State Hwy. Comm'n v. Vanderkloot, 204 N.W.2d 22 (Mich. App. 1972).*

(n29)Footnote 699. *L. U. Sheep Co. v. Board of County Comm'rs of Hot Springs, 790 P.2d 663 (Wyo. 1990).*

Calumet Nat'l Bank v. American Tel. & Tel. Co. & AT & T Commun. of Ind., 647 N.E.2d 689 (Ind. App. 1995); Holliston v. Holliston Water Co., 27 N.E.2d 194 (Mich. 1974); State ex rel. White Pine Sash Co. v. Superior Ct., 261 P. 110 (Wash. 1927) (property owner had no right to complain of splitting of causes of action).

(n30)Footnote 700. *Cadorette v. United States, 988 F.2d 215 (1st Cir. 1993); Fairfax County Park Auth. v. Virginia Dep't of Transp., 440 S.E.2d 610 (Va. 1994); United States v. 19.86 Acres of Land, 141 F.2d 344 (7th Cir. 1994); United States v. 625.91 Acres of Land 49 F. Supp. 997 (E.D.Mo. 1943); State Hwy. Comm'n v. Hammock, 148 S.W.2d 324 (Ark. 1941); Harrington v. Superior Court, 228 P. 15 (Md. 1924); Cook v. State Hwy. Bd., 132 S.E. 902 (Ga. 1926); Todd v. State Hwy. Comm'n, 198 N.W. 945 (Mich. 1924); In re Oronoco Sch. Dist. 212 N.W. 8 (Minn. 1927); In re Improvement of Third St., 225 N.W. 86 (Minn. 1929); Minyard v. Pelucia Drain. Dist., 98 So. 225 (Miss. 1923); State ex rel. Scott v. Trimble, 272 S.W. 66 (Mo. 1925); City of Moberly v. Hogan, 298 S.W. 237 (Mo. 1927); Sowers v. Schaeffer, 99 N.E.2d 313 (Ohio 1951); Grand River Dam Auth. v. Gray, 138 P.2d 100 (Okla. 1943); United States v. 127.03 Acres of Land, 148 F. Supp. 904 (D.P.R. 1957).*

(n31)Footnote 701. *Sheldon v. United States, 19 Cl. Ct. 247 (1990); Nevada v. United States, 463 U.S. 110 (1983); In re Oronoco Sch. Dist., 212 N.W. 8 (Minn. 1927).*

(n32)Footnote 702. *Florida Rock Indus., Inc. v. United States, 18 F. 3d 1560 (Fed. Cir. 1994); Ohio v. Penrod, 611 N.E.2d 996 (Ohio 1992); District of Columbia v. Jones, 38 App. D.C. 560 (1912); Appelton v. City of Newton, 59 N.E. 648 (Mass. 1901).*

(n33)Footnote 703. *Reel Pipe & Valve Co., v. Consolidated City of Indianapolis-Marion County, 633 N.E.2d 274 (Ind. App. 1994); Minneapolis Community Dev. Agency v. Golden Spike Inc., 536 N.W.2d 30 (Minn. App. 1995); Undinger v. Saginaw, 26 N.W. 634 (Minn. 1886).* Notice by publication is sufficient in eminent domain if address is unknown. *Walker v. City of Hutchinson, 352 U.S. 112 (1956).* Road commissioner's order should be published in some manner of notice thereof given or made available to the property owners. *State ex rel. Ashworth v. State Road Comm'n, 128 S.E.2d 471 (W. Va. 1962).*

(n34)Footnote 704. In the matter of *East Thirteenth Street Community Assoc. v. New York State Urban Dev. Corp, 641 N.E.2d 1368 (N.Y. App. 1994); Alabama Power Co. v. Gulf Power Co., 283 F. 606 (D.Ala. 1922).* Doctrine of virtual representation upheld in eminent domain proceedings. *Sanford v. Louisville & Nashville R.R., 469 S.W.2d 363 (Tenn. 1971).*

(n35)Footnote 705. In the matter of *Yellowstone River, 832 P.2d 1210 (Mont. 1992); North Laramie Land Co. v. Hoffman, 268 U.S. 276 (1925).*

(n36)Footnote 706. The Port of Gray's Harbor v. Bankruptcy Est. of roderick *Timber Co., 869 P.2d 417 (Wash. App. 1994); County of St. Clair v. Faust, 662 N.E.2d 584 (Ill. App. 1996); Swicegood v. Feezell, 196 S.W.2d 713 (Tenn. App. 1946); Postal Tel. Cable Co., v. Oregon S. L. R.R., 65 P. 735 (Utah 1901); Monongahela Power Co. v. Shackelford, 73 S.E.2d 809 (W. Va. 1952). See Otter Tail Power Co. v. Von Bank, 8 N.W.2d 599 (N. D.1942).* Defective description in condemnation does not render court's jurisdiction void. *State ex rel. Morton v. Allison, 357 S.W.2d 733 (Mo. App. 1962).*

(n37)Footnote 707. *Sisters of Providence of St. Mary's of the Woods v. Lower Vein Coal Co., 154 N.E. 659 (Ind. 1926)* (action cannot be defeated by merely charging a secret intention to violate a criminal statute in no way connected with the subject of making such appropriation).

(n38)Footnote 708. *Manges v. McCamish, Martin, Brown, and Loeffler, 37 F. 3d 221 (5th Cir. 1994); Sisters of Providence of St. Mary's of the Woods v. Lower Vein Coal Co., 154 N.E. 659 (Ind. 1926).* A special statute which is nothing more than one prescribing the method for condemnation of a particular piece of property for public use under the right of eminent domain does not deprive a court of equity of jurisdiction already acquired over an action to quiet title to the piece of property involved. *Hoxie v. Gibson, 234 S.W. 490 (Ark. 1921).* The trial court does not lose

jurisdiction through long delay during which there was no objection made nor action taken by either party. *Los Angeles v. Hannon, 251 P. 247 (Cal. App. 1926).* When the title of the state to certain lands is disputed it may proceed to condemn such land before settlement of the conflicting claim, since the question of title may be determined in the eminent domain proceedings and if it is found that title is not in the state the owner may be awarded compensation. *Miller v. Walsh, 186 N.Y.S. 636 (1921).*

(n39)Footnote 709. *Massey v. Massey, 465 S.E.2d 313, 319 (N.C. App. 1996); State ex rel. Woodruff v. Superior Ct., 259 P. 379 (Wash. 1927).*

(n40)Footnote 710. *Koppikus v. State Capital Comm'rs, 16 Cal. 248 (1860); Oliver v. Union Point & W. P. R.R., 9 S.E. 1086 (Ga. 1889); Savannah, F. & W. R.R. v. Postal Tel. Cable Co., 38 S.E. 353 (Ga. 1901); Portneuf Irr. Co. v. Budge, 100 P. 1046 (Idaho 1909); Central Branch Union P. R.R. v. Atchison, T. & S. F. R.R., 28 Kan. 453 (1882); Lynch v. Forbes, 37 N.E. 437 (Mass. 1894); Cornish Town v. Koller, 817 P.2d 305 (Utah 1991); State v. Oshkosh, 54 N.W. 1095 (Wis. 1893).*

(n41)Footnote 711. Thomas Cooley, Constitutional Limitations, § 538 (1868). *Boom Co. v. Patterson, 98 U.S. 403 (1878); East Thirteenth St. Community Ass'n v. New York State Hous. Fin. Agency, 630 N.Y.S. 2d 517 (N.Y. App. 1995).*

(n42)Footnote 712. *K & K Const., Inc. v. Department of Natural Resources, 575 N.W.2d 531 (Mich. 1998)* (determining the size and coordinates of a parcel to be analyzed in a takings analysis is a question of fact); *Cleveland Metro. Hous. Auth. v. Sacheroff, 40 N.E.2d 951 (Ohio App. 1942); Department of Transp. v. Wolfe, 449 S.E.2d 11 (N.C. App. 1994); Parallax Corp. v. City of El Paso, 910 S.W.2d 86 (Tex. App. 1995).* A property owner is not an expert witness as to the value of the property in the absence of special proof. *Commonwealth Dep't of Hwys. v. Fister, Ky., 373 S.W.2d 720 (Ky. 1963).* Where qualifications of an expert witness are duly established, the expert's testimony as to comparable sales and prices paid is not hearsay. *State Hwy. Comm'n v. Greenfield, 399 P.2d 989 (Mont. 1965). See* Will Allen Wilkerson, *Condemnation -- Appeal from Award of Jury of View, 29 Tenn. L. Rev. 528 (1962).*

(n43)Footnote 713. *United States v. 21 Acres of Land, 61 F. Supp. 268 (S.D.Cal. 1945); Petrolia v. Estate of Nova, 666 A.2d 163 (N.J. 1995); Richland County v. Lowman, 415 S.E.2d 433 (S.C. App. 1992).* Jury view of premises is within sound discretion of court. *City of Riverside v. Kraft, 21 Cal. Rptr. 425 (Cal. App. 1962).*

(n44)Footnote 714. *McGunnegle v. Pittsburgh & L. E. R.R., 112 A. 553 (Pa. 1921).*

(n45)Footnote 715. *Atlanta v. Fulton County, 82 S.E.2d 850 (Ga. 1954); Board of Supervisors v. Parsons, 428 S.E.2d 905 (Va. 1993).*

(n46)Footnote 716. *County of Bernalillo v. Morris, 872 P.2d 371 (N.M. App. 1994); Heidisch v. Globe & Republic Ins. Co., 84 A.2d 566 (Pa. 1951).*

(n47)Footnote 717. *City of Crystal Lake v. LaSalle Nat'l Bank, 459 N.E.2d 643 (Ill. App. 1984); Chicago Park Dist. v. Downey Coal Co., 115 N.E.2d 223 (Ill. 1953).*

(n48)Footnote 718. *State by Ervin v. Appleton, 294 N.W. 418 (Minn. 1940); County of Bernalillo v. Morris, 872 P.2d 371 (N. M. App. 1994).*

(n49)Footnote 719. Federal judgment in eminent domain not subject to Federal Lien of Judgments Act nor state recording statute. *Norman Lumber Co. v. United States, 223 F.2d 868 (4th Cir. 1955).* Eminent domain proceedings cannot be transferred to federal courts on diversity of citizenship theory. *Chicago, R.I. & Pac. R.R. v. Stude, 346 U.S. 574 (1954).*

(n50)Footnote 720. *Eastland County v. Eberhart, 272 S.W. 575 (Tex. App. 1925).*

(n51)Footnote 721. *Barmel v. Minneapolis-St. Paul Sanitary Dist., 277 N.W. 208 (Minn. 1938).*

(n52)Footnote 722. *United States v. 416.81 Acres of Land, 514 F.2d 627 (7th Cir. 1975); Town of Vidalia v. Unopened Succession of Ruffin, 663 So. 2d 315 (La. App. 1995).*

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CHAPTER 80 THE POWER OF EMINENT DOMAIN

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4 A.L.R. 3d 1137.

Annotation, *Eminent Domain: Right of Owner of Land Not Originally Taken or Purchased as Part of Adjacent Project of Recover, on Enlargement of Project to Include Adjacent Land, Enhanced Value of Property by Reason of Proximity to Original Land -- State Cases, 95 A.L.R. 2d 752.*

Annotation, *Eminent Domain: Right to Condemn Property Owned or Used by Private Education, Charitable, or Religious Organization, 80 A.L.R. 3d 833.*

Annotation, *Eminent Domain: Right to Enter Land for Preliminary Survey or Examination,* 29 A.L.R. 1104.

Annotation, *Eminent Domain: Use or Improvement of Highway as Establishing Grade Necessary to Entitle Abutting Owner to Compensation on Subsequent Change, 2 A.L.R. 3d 985.*

Annotation, *Eminent Domain: Validity of Appropriation of Property for Anticipated Future Use, 80 A.L.R. 3d 1085.*

Annotation, *Eminent Domain: Validity of "Freezing" Ordinances or Statutes Preventing Prospective Condemnee from Improving, or Otherwise Changing, the Condition of His Property, 36 A.L.R. 3d 751.*

Annotation, *Existence of Restrictive Covenant as Element in Fixing Value of Property Condemned, 22 A.L.R. 3d 961.*

Annotation, *Federal Courts: Federal or State Law as Applicable in Determining What is Property for Which Compensation Must be Paid Upon its Taking by the Federal Government, 1 A.L.R. Fed. 479.*

Annotation, *Good Will as Element of Damages for Condemnation of Property on Which Private Business is Conducted, 81 A.L.R. 3d 198.*

Annotation, *Good Will or "Going Concern" Value as Element of Lessee's Compensation for Taking Leasehold in Eminent Domain, 58 A.L.R. 3d 566.*

Annotation, *How to Obtain Jury Trial in Eminent Domain: Waiver, 12 A.L.R. 3d 7.*

Annotation, *Inverse Condemnation State Court Class Actions, 49 A.L.R. 4th 618.*

Annotation, *Measure of Damages for Condemnation of Cemetery Lands, 42 A.L.R. 3d 1314.*

Annotation, *Measure of Damages or Compensation in Eminent Domain as Affected by Premises Being Restricted to Particular Education, Religious, Charitable, or Noncommercial Use, 29 A.L.R. 5th 36.*

Annotation, *Method of Determining Rate of Interest Allowed on Award to Owner of Property Taken by United States in Eminent Domain Proceeding, 56 A.L.R. Fed. 477.*

Annotation, *Necessity of Trial or Proceeding, Separate from Main Condemnation Trial or Proceeding, to Determine Divided Interest in State Condemnation Award, 94 A.L.R. 3d 696.*

Annotation, *Power of Eminent Domain as Between State and Subdivision or Agency Thereof, or as Between Different Subdivisions or Agencies Themselves, 35 A.L.R. 3d 1293.*

Annotation, *Property and Effect, in Eminent Domain Proceeding, of Argument or Evidence as to Source of Funds to Pay for Property, 19 A.L.R. 3d 694.*

Annotation, *Property and Effect, in Eminent Domain Proceeding, of Instruction to the Jury as to Landowner's Unwillingness to Sell Property, 20 A.L.R. 3d 1081.*

Annotation, *Propriety and Effect of Argument or Evidence as to Financial Status of Parties in Eminent Domain Proceeding, 21 A.L.R. 3d 936.*

Annotation, *Propriety of Court's Consideration of Ecological Effects of Proposed Assessment of Adjacent Propert, 46 A.L.R. 3d 127.*

Annotation, *Right in Eminent Domain Proceeding to Call As Witness Expert Engaged But Not Called As Witness by Opposing Party, 71 A.L.R. 3d 1119.*

Annotation, *Right to Condemn Property in Excess of Needs for a Particular Public Purpose,* 6 A.L.R. 297.

Annotation, *Rights and Liabilities of Parties to Executory Contract for Sale of Land Taken by Eminent Domain, 27 A.L.R. 3d 572.*

Annotation, *Salting for Snow Removal as Taking or Damaging Abutting Property for Eminent Domain Purposes, 64 A.L.R. 3d 1239.*

Annotation, *State Statutes of Limitations Applicable to Inverse Condemnation or Similar Proceedings by Landowner to Obtain Compensation for Direct Appropriation of Land Without the Institution or Conclusion of Formal Proceedings Against Specific Owner, 26 A.L.R. 4th 68.*

Annotation, *Substituted Condemnation: Power to Condemn Property or Interest Therein to Replace Other Property Taken for Public Use, 20 A.L.R. 3d 862.*

Annotation, *Sufficiency of Condemnor's Negotiations Required as Preliminary To Taking in Eminent Domain, 21 A.L.R. 4th 765.*

Annotation, *Unsightliness of Powerline or Other Wire, or Related Structure, as Element of Damages in Easement Condemnation Proceeding, 97 A.L.R. 3d 587.*

Annotation, *Validity and Construction of "Zoning with Compensation" Regulation, 41 A.L.R. 3d 636.*

Annotation, *Valuation at Time of Original Wrongful Entry by Condemnor or at Time of Subsequent Initiation of Condemnation Proceedings, 2 A.L.R. 3d 1038.*

Annotation, *What Constitutes Abandonment of Eminent Domain Proceeding so as to Charge Condemnor with Liability for Condemnee's Expenses or the Like, 68 A.L.R. 3d 610.*

Annotation, *What Law Determines Just Compensation When Licensee of Federal Power Commission Exercises Power of Eminent Domain in Federal Court Under § 21 of Federal Power Act (16 U.S.C. § 814), 51 A.L.R. Fed. 929.*

Annotation, *Zoning as a Factor in Determination of Damages in Eminent Domain,* 9 A.L.R. 291.

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9-80 Thompson on Real Property, Thomas Editions Supp. to § 80.01

Supp. to § 80.01 Introduction.

[Go To Main]

§ 80.01(a) Definition of Eminent Domain. [Go To Main]

Replace "167 (D. Minn. 1939)," with:

167, *aff'd by Minnesota v. United States, 125 F.2d 636 (8th Cir. 1942)* .

Add:

Forest Preserve District of Du Page County v. Brown Family Trust, 753 N.E.2d 1110 (Ill. App. 2001) (the district's ordinance authorizing its staff to acquire property by condemnation did not improperly delegate eminent domain power); *Condemnation of 110 Washington St., etc., 767 A.2d 1154 (Pa. Commw. 2001)* (unlawful delegation of eminent domain power).

Add:

The generally accepted definition of eminent domain is, "[T]he power of a sovereign state to take private property for a public use without the owner's consent, conditioned upon the payment of just compensation." *25 A.L.R 4th 671* .

Add:

People By and Through Dep't of Public Works v. Glen Arms Estate, Inc., 41 Cal. Rptr. 303 , Cal. App. 1965 (1964). The controversial case of *Poletown Neighborhood Council v. City of Detroit, 304 N.W.2d 455 (Mich. 1981)* , which resulted in destruction of residential areas to make way for an automobile manufacturing plant, was unanimously overturned by the Michigan Supreme Court in *County of Wayne v. Hathcock, 684 N.W.2d 765 (Mich. 2004)* , the latter court emphasizing that an eminent domain taking must be for a public use; *Kelo v. City of New London, 843 A.2d 500 (Conn. 2004)* (the city's delegation of eminent domain power to a private, non-profit economic development corporation was held constitutional).

§ 80.01(a)(2) Distinguished from Police Power.

Add:

Seeman v. Iowa Dept. of Human Services, 604 N.W.2d 53 (Iowa 1999) ; *Santa Monica Beach, Ltd. v. Superior Court, 81 Cal. Rptr. 2d 93 (Cal. 1999)* ; *Phillips v. King County, 943 P.2d 306 (Wash. Ct. App. 1997)* .

In *Brutsche v. City of Kent, 193 P.3d 110 (Wash. 2008)* , the court stated that its decision rested upon the "distinction between police power and the power of eminent domain." It reasoned that eminent domain takes private property for public use, whereas police power regulates the use of private property. In *Englewood v. Turner 897 N.E.2d 213 (Ohio App. 2008)* , the court explained that state police power is "entirely separate and distinct" from the power of eminent domain.

§ 80.01(a)(3) Distinguished from War Powers.

Add:

Santa Monica Beach, Ltd. v. Superior Court, 81 Cal. Rptr. 2d 93 (Cal. 1999) .

§ 80.01(b) The Origin and Basis of Power. [Go To Main]

Add:

City of Smithville v. St. Luke's Northland Hosp. Corp., 972 S.W.2d 416 (Mo. Ct. App. 1998) .

§ 80.01(b)(1) Based on Soverign Ownership of Land.

Add:

Cenex Pipeline L.L.C. v. Fly Creek Angus, Inc., 971 P.2d 781, (Mont. 1998) .

§ 80.01(b)(2) Based on Political Necessity.

Add

City of Phoenix v. Harnish, 150 P.3d 245 (Ariz. App. 2006) (city, seeking to establish a nature preserve, was not permitted to exercise its eminent domain power outside of its boundaries).

§ 80.01(c) Limitations on the Power. [Go To Main]

Add:

City of Annapolis v. Waterman, 745 A.2d 1000 (Md. 2000) .

Add:

In *Board of County Commissioners of Muskogee County v. Lowery, 136 P.3d 639 (Okla. 2006)* , the court explained that the eminent domain power does not allow the government to take property for the purpose of conferring a private benefit on a private party; *Mt. San Jacinto Community College District v. Superior Court, 151 P.3d 1166 (Cal. 2007)* ("The only constitutional limitations on the right of eminent domain are that the taking be for public use, and that just compensation be paid.").

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Supp. to § 80.02 The Source of Authority for the Power of Eminent Domain.

[Go To Main]

§ 80.02(a) Intent or Common Law Authority. [Go To Main]

Add:

State *ex rel. Dept. of Transp. v. Moore, 217 P.3d 165 (Okla. Civ. App. 2009)* ("Eminent domain provisions are not grants of power, but are limitations upon the government's exercise of power.").

§ 80.02(a)(1) Eminent Domain Power in the States.

Add:

But see Oxford v. Northeast Mississippi Elec. Power Ass'n, 704 So. 2d 59 (Miss. 1997) (municipalities' authority for eminent domain must be statutory because they do not have the inherent power).

Add to the list of cases:

Montara Water and sanitary *District v. County of San Mateo, 598 F. Supp 2d. 1070 (N.D. Cal. 2009)* ;

§ 80.02(b) Constitutional or Statutory Authority. [Go To Main]

Add:

State ex rel. Dept. of Transp. v. Moore, 217 P.3d 165 (Okla. Civ. App. 2009) .

§ 80.02(b)(1) Constitutional Limitations.

Add:

Opinion of the Justices, 555 A.2d 1095 (N.H. 1989) .

Add:

Dakota, Minnesota & Eastern Railroad Corp. v. South Dakota, 236 F. Supp. 2d 989 (D. S.D. 2002) (exercise of eminent domain held unconstitutional on several grounds).

Add:

Adelphia Cablevision Associates of Readnor, L. P., v. University City Housing Authority, 755 A.2d 703 (Pa. Super. 2000) (Tenants' Right to Cable Television Act held consistent with the constitutional requirement of just compensation for a taking of property).

Add:

But see Housing Fin. & Dev. Corp. v. Ferguson, 979 P.2d 1107 (Haw. 1999) (noting a state constitutional right to jury trial).

§ 80.02(b)(2) Statutory Limitations.

Add:

See Edward Imperatore, "Discriminatory Condemnations and the Fair Housing Act," *96 Geo. L.J. 1027, 1038 (March 2008)* (arguing that states have taken a piecemeal approach to narrowing and redefining the eminent domain power).

Add:

In re Condemnation by Borough of Hanover of Land, 950 A.2d 373 (Penn. Comm. 2008) (the borough had no statutory authority to acquire property from the school district by eminent domain).

Department of Transp. v. Callender Const. Co., 711 N.E.2d 1199 (Ill. Ct. App. 1999) .

Add:

Eggleston v. Pierce County, 64 P.3d 618 (Wash. 2003) (state constitution's eminent domain provision does not require compensation to be paid for seizure and preservation of evidence); *General Building Contractors, L.L.C. v. Board of Shawnee County Commissioners of Shawnee County, 2003 Kan. LEXIS 191* (No. 89,029, Apr. 18, 2003) (counties have power of eminent domain under home rule and related statutes); *Kelo v. City of New London, 843 A.2d 500 (Conn. 2004)* (the city's delegation of eminent domain power to a private, non-profit economic development corporation was held constitutional).

Add:

City of Long Branch v. Anzalone, 2008 N.J. Super. Unpub. LEXIS 2204 (App.Div. 2008) (city's eminent domain authority properly delegated to a developer).

Add:

Mercies v. Midtexas Pipeline Company, 28 S.W.3d 712 (Tex. App. 2000) (a pipeline partnership qualified as a gas corporation imbued with a statutory right of eminent domain to obtain a right of way for a natural gas pipeline); *Burbank-Glendale-Pasadena Airport Authority v. Hensler, 99 Cal. Rptr. 2d 729 (2000)* (three cities could delegate their eminent domain authority to a joint-power airport authority).

Add:

City of Arnold v. Tourkakis, 249 S.W.3d 202 (Mo. App. 2008) (non-charter city authorized to exercise power of eminent

domain).

Add:

Water Dist. No. 1 of Johnson County v. Mission Hills Country Club, 960 P.2d 239 (Kan. 1998) .

Add:

West Linn-Wilsonville School Dist. 3 J T v. Seida, 968 P.2d 1268 (Or. 1998) .

Add:

Appeal of Condemnation of 110 Washington Street, Borough of conshohocken, *Pennsylvania, 767 A.2d 1154 (Pa. Comm. 2001)* (agreements with a developer requiring the developer's prior written consent to a condemnation were unlawful delegations of eminent domain powers).

Add:

City & County of Honolulu v. Sherman, 129 P.3d 542 (Haw. 2006) (city council's delegation of eminent domain power to the Department of Community Services was permissible); Wight-Axling, Heather G. "Will the Durational Element Endure: Only Time Will Tell: Temporary Regulatory Takings in the Court of Federal Claims and Federal Circuit after Sierra-Tahoe," 45 *Nat. Resources J.* 201 (Winter 2005).

Department of Transp. v. Callender Const. Co., 711 N.E.2d 1199 (Ill. Ct. App. 1999) .

§ 80.02(b)(3) Inverse Condemnation Compared.

Add:

People ex rel. Dep't of Transp. v. Southern Cal. Edison Co., 996 P.2d 711 (Cal. 2000) .

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Supp. to § 80.03 The Requirement that the Eminent Domain Power Be Exercised for a Public Use.

[Go To Main]

§ 80.03(a) General Rules. [Go To Main]

Add:

Greater Omaha Realty Co. v. City of Omaha, 605 N.W.2d 472 (Neb. 2000) .

Add:

Port Authority of City of St. Paul v. RLR, Inc., 758 N.W.2d 604 (Minn. App. 2008) (eminent domain requirement invalid because a public use was not identified).

Add:

Ranauro v. Town of Owasco, 735 N.Y.S.2d 332 (2001) (the condemnation was rationally related to a conceivable public purpose); *Dept. of Transportation v. Stapleton, 2004 Colo. LEXIS 22* (No. 03SC616, Jan. 12, 2004) (condemning land for transit parking falls within the authority to condemn land for state highway purposes).

§ 80.03(b) Constitutional Limitations. [Go To Main]

Add:

Aspen Creek Estates v. Town of Brookhaven, 904 N.E.2d 816 (N.Y. 2009) (holding that the *Fifth Amendment* was not offended when a town took farmland through its eminent domain power.)

Add:

But see City of Bozeman v. Vaniman, 898 P.2d 1208 (Mont. 1995) (a public use is required by statute).

§ 80.03(c) "Public Use" as Interpreted by the Courts. [Go To Main]

§ 80.03(c)(1) The Meaning of "Public Use."

Add:

Kelo v. City of New London, 125 S. Ct. 2655 (2005) (use of eminent domain power to further an economic development plan satisfied the constitutional "public use" requirement).

Christiansen v. Gerrish, 608 N.W.2d 83 (Mich. Ct. App. 2000) ; *Wong v. City of Long Beach, 82 P.3d 259 (Wash. App. 2004)* (the city was permitted to condemn land for a recreational trail that fell within the definition and purpose of a park).

Add:

Village of Round Lake v. Amann, 725 N.E.2d 35 (Ill. Ct. App. 2000) .

The controversial case of *Poletown Neighborhood Council v. City of Detroit, 304 N.W.2d 455 (Mich. 1981)* , which resulted in destruction of residential areas to make way for an automobile manufacturing plant, was unanimously overturned by the Michigan Supreme Court in *County of Wayne v. Hathcock, 684 N.W.2d 765 (Mich. 2004)* , the latter court emphasizing that an eminent domain taking must be for a public use; *Kelo v. City of New London, 843 A.2d 500 (Conn. 2004)* (the city's delegation of eminent domain power to a private, non-profit economic development corporation was held constitutional).

§ 80.03(c)(2) Judicial Review of Legislative "Public Use" Determinations.

Add:

State v. Collom, 720 N.E.2d 737 (Ind. Ct. App. 1999) ; *Port Authority of City of St. Paul v. RLR, Inc, 758 N.W.2d 604 (Minn. App. 2008)* (holding that a port authority did not fulfill the statutory requirements of eminent domain.)

Add:

American Tel. & Tel. Co. v. Proffitt, 903 S.W.2d 309 (Tenn. Ct. App. 1995) .

§ 80.03(d) The Element of Necessity in Public Use. [Go To Main]

Add:

Rabun County v. Georgia Transportation Corporation, 575 S.E.2d 474 (Ga. 2003) (showing of reasonable necessity not required to exercise eminent domain); *St. Andrew's Epispocal Day School v. Mississippi Transportation Commission, 806 So. 2d 1105 (Miss. 2002)* (condemnation was justified by public necessity).

Condemnation by Valley Rural Electric Cooperative, Inc. v. Shanholtzer, 982 A.2d 566 (Pa. Cmwlth. 2009) . For a discussion of what historically has constituted a "necessity," see Robert C. Bird and Lynda J. Oswald, "Necessity as a Check on State Eminent Domain Power," *12 U. Pa. J. Const. L. 99* (October, 2009).

Add:

Banks v. Georgia Power Co., 481 S.E.2d 200 (Ga. 1997) .

Add:

Aspen Creek Estates v. Town of Brookhaven, 904 N.E.2d 816 (N.Y. 2009) (Holding that the taking of farmland in order to support a policy of farmland preservation was a public purpose.); *Whittaker v. County of Lawrence, 674 F.Supp.2d 668 (W.D.Pa. 2009)* (development of a high technology business park was a public purpose); *Goldstein v. Pataki, 516 F.3d 50,* (2d Cir. 2008) (development of blighted areas, creation of affordable housing, and various mass-transit improvements were public purposes).

§ 80.03(e) Examples of Public Use. [Go To Main]

Add

Board of County Com'rs of Muskogee County v. Lowery, 136 P.3d 639 (Okla. 2006) (under Oklahoma law, economic development alone does not constitute a public use or public purpose).

Add:

Hill v. City of Bethlehem, 909 A.2d 439 (Pa. Cmwlth. 2006) (a city properly exercised its eminent domain power when it condemned and demolish a private owner's property, making it unimproved real estate); *Mount Laurel Tp. v. MiPro Homes, L.L.C., 910 A.2d 617 (N.J. 2006) , cert. denied, 188 N.J. 531, 910 A.2d 617* (eminent domain power could be used to condemn property for open space).

Mount Laurel Township v. Mipro Homes, L.L.C., 878 A.2d 38 (N.J. Super. 2005) (eminent domain power could be used to acquire land for open space).

Add:

Bingham Township v. RLTD Railroad Corp., 603 N.W.2d 795 (Mich. App. 1999) .

Add:

J.C. Penney Corp., Inc. v. Carousel Center Co., L.P., 306 F. Supp. 2d 274 (N.D. N.Y. 2004) (under New York law, community renovation was a proper public purpose).

Rukab v. City of Jacksonville Beach, 811 So. 2d 727 (Fla. App. 2002) (landowners entitled to a full hearing in an eminent domain action even if other opportunities to challenge the action have already been given).

Add:

Pequonnock Yacht Club, Inc. v. City of Bridgeport, 790 A.2d 1178 (Conn. 2002) (the agency failed to establish that the taking of the property was essential to the redevelopment plan); *Redevelopment Agency of the City of Chula Vista v. Rados Bros., 115 Cal. Rptr. 2d 234 (2002)* (taking of property by eminent domain for redevelopment was for a public use).

Add

Norwood v. Horney, 853 N.E.2d 1115 (Ohio 2006) (in Ohio, economic benefit alone does not satisfy the public use requirement).

Add:

Stockman v. Unified Government of Wyandotte County/Kansas City, Kansas, 6 P.3d 900 (Kan. App. 2000) (the development of a race track was a public purpose within the eminent domain powers); *D'Addario v. Truskoski, 749 A.2d*

38 (Conn. App. 2000) (condemnation of right of way by landowner of landlocked property).

§ 80.03(f) Excess Takings. [Go To Main]

Add

Michael v. City of Bloomington, 804 N.E.2d 1225 (Ind. App. 2004) (board of public works could perhaps have condemned less land, but that would not show that it acted arbitrarily or capriciously).

Add:

Grunwald v. Community Dev. Auth., 551 N.W.2d 36 (Wis. Ct. App. 1996) .

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Supp. to § 80.04 Property Rights That May Be Taken by Eminent Domain.

[Go To Main]

Add:

Outdoor Systems Advertising, Inc. v. Korth, 607 N.W.2d 729 (Mich. Ct. App. 1999) .

§ 80.04(a) Property Rights That May be Taken by Eminent Domain. [Go To Main]

Add:

Harrington v. Commonwealth, 792 A.2d 669 (Pa. Commw. 2002) (claim for damage caused by roadway grade change could be brought under the eminent domain statute).

Add:

Leigh v. Village of Los Lunas, 108 P.3d 525 (N.M. App. 2004) (restrictive covenants are property rights subject to eminent domain protection).

Add:

Kaufman's Carousel, Inc. v. City of Syracuse Industrial Development Agency, 750 N.Y.S.2d 212 (2002) (under eminent

domain a tenant's rights under a lease could be acquired without acquiring the underlying real property).

Add

Michael v. City of Bloomington, 804 N.E.2d 1225 (Ind. App. 2004) (condemning land for a multi-use pathway was for a public purpose).

§ 80.04(b) Property Rights Whose Susceptibility to Eminent Domain Power Is Disputed or Conditional. [Go To Main]

Add:

Mount Juneau Enterprises, Inc. v. City and Borough of Juneau, 923 P.2d 768 (Alaska 1996) .

Add:

The *takings clause* can apply to both tangible property and intangible property. *See* 29 Cal. Jur. 3d Eminent Domain § 20.

Add:

Mack v. Eldorado Water Dist., 354 P.2d 917 (Wash. 1960) .

§ 80.04(c) Property Rights That Are Not Subject to Eminent Domain Takings or to Compensation. [Go To Main]

Add:

The reverse is also true; the federal government cannot interfere with states' exercise of eminent domain. *See, e.g.*, *Santini v. Connecticut Hazardous Waste Management Serv., 739 A.2d 680 (Conn. 1999)* .

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Supp. to § 80.05 What Constitutes a Taking.

[Go To Main]

§ 80.05(a) Introduction. [Go To Main]

Add:

Wells v. Consolidated Judicial Retirement System, 526 S.E.2d 486 (N.C. Ct. App. 2000) .

§ 80.05(b) The Types of Deprivations That May Be Takings. [Go To Main]

Add:

Aladdin, Inc. v. Black Hawk County, 562 N.W.2d 608 (Iowa 1997) .

Add:

Santini v. Connecticut Hazardous Waste Management Serv., 739 A.2d 680 (Conn. 1999) ; *Armadillo Partners, Inc. v. State of Florida Department of Transportation, 780 So. 2d 234 (Fla. App. 2001)* (appraiser was required to consider loss of aesthetic value of a landscaped area severed from a lot); *Harrington v. Commonwealth, 792 A.2d 669 (Pa. Commw. 2002)* (a landowner's claim for damage caused by a roadway grade could be brought under the eminent domain statute).

§ 80.05(b)(1) Takings That May Result from Exercise of Police Power.

Add:

Bezayiff v. City of St. Louis, 963 S.W.2d 225 (Mo. Ct. App. 1997) .

Add:

409 *Land Trust v. City of South Bend, 709 N.E.2d 348 (Ind. Ct. App. 1999)* .

Add:

Department of Transport. v. Blevins, 670 S.E.2d 621 (N.C. App 2009) ("The state must compensate for property rights taken by eminent domain; damages resulting from the exercise of police power are noncompensable.").

§ 80.05(b)(2) Takings by Inverse Condemnation.

Add:

Mendenhall v. City of Indianapolis, 717 N.E.2d 1218 (Ind. App. 1999) .

Add:

Wickham v. San Jacinto River Auth., 979 S.W.2d 876 (Tex. App. 1998) .

Add:

Paterno v. State of California, 87 Cal. Rptr. 2d 754 (Cal. App. 1999) .

§ 80.05(b)(3) Takings by Denial of Access.

Add:

Isla Verde Intern. Holdings, Inc. v. City of Camas, 990 P.2d 429 (Wash. Ct. App. 1999) .

Add:

Pande Cameron and Co. of Seattle, Inc. v. Central Pugent Sound Regional Transit Authority, 610 F. Supp. 2d 1288 (W.D. Wash 2009) (holding that the effects of a construction project did not constitute a taking).

Add:

State *ex rel. Hilltop Basic Resources, inc. v. City of Cincinnati, 886 N.E.2d 839 (Ohio 2008)* (holding that the cities' denial of access to the plaintiff's property was not a taking).

Add:

Ocean City v. Maffucci, 740 A.2d 630 (N.J. Super. A.D. 1999) .

Add:

Vinciguerra v. State, 693 N.Y.S.2d 634 (N.Y.A.D. 1999) .

Add:

State *ex. rel. Thieken v. Proctor, 904 N.E.2d 619 (Ohio App. 2008)* (holding that the construction of a concrete curb which would prevent customers from accessing the plaintiff's property from the highway was a taking).

Add:

State ex rel. Dep't of Transp. v. Hanson, 987 P.2d 538 (Or. App. 1999) .

§ 80.05(b)(4) Takings of Water and Water Rights.

Add:

Intracoastal North Condominium Ass'n, Inc. v. Palm Beach County, 698 So. 2d 384 (Fla. Ct. App. 1997) .

Add:

Kennedy v. City of Seattle, 617 P.2d 713 (Wash. 1980) .

In *The Estate of Hage v. U.S., 90 Fed. Cl. 388 (Fed. Cl. 2009)* the court held that a change in the Forest Service's policy which limited ranchers' ability to graze livestock constituted a taking of water rights.

Add:

Arkansas Game and Fish Com'n v. U.S., 87 Fed. Cl. 594 (Fed. Cl. 2009) (holding that inevitable recurring floods constituted a taking); *Scureman v. Judge, 747 A.2d 62 (Del. Ch. 1999)* .

§ 80.05(b)(5) "De Facto" Takings.

Add:

In re Flowers, 734 A.2d 69 (Pa. Commw. Ct. 1999) ; *Manufactured Housing Communities of Washington v. State, 13 P.3d 183 (Wash. 2000)* (statute granting first-refusal right to mobile home park tenants violated state constitutional eminent domain provision).

Add:

In *Colombari v. Port Authority of Allegheny County, 951 A.2d 409 (Pa. Cmwlth. 2008)* , the court upheld the lower court's decision that a de facto taking occurred when a county's port authority changed the flow of a stream, causing

erosion to the shoreline.

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Supp. to § 80.06 The Permissible Extent of a Taking.

[Go To Main]

Add:

Pendarvis Const. Corp. v. Cobb County-Marietta Water Authority, 520 S.E.2d 530 (Ga. Ct. App. 1999) .

Add

Michael v. City of Bloomington, 804 N.E.2d 1225 (Ind. App. 2004) (board of public works could perhaps have condemned less land, but that would not show that it acted arbitrarily or capriciously).

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9-80 Thompson on Real Property, Thomas Editions Supp. to § 80.07

Supp. to § 80.07 Nature of the Title or Interest Acquired.

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Add:

Northeastern Gas Transmission Co. v. Collins, 87 A.2d 139 (Conn. 1952) .

§ 80.07(a) General Rules. [Go To Main]

§ 80.07(a)(1) Legislative Power to Determine Interest Taken.

Add:

49 *WB, LLC v. Village of Haverstraw, 839 N.Y.S.2d 127 (2007)* (condemnation of nonblighted private property did not serve a public use, benefit or purpose).

§ 80.07(a)(2) Easement Rather Than Fee Is Taken.

Add:

Near v. Calkins, 946 P.2d 537 (Colo. Ct. App. 1997) .

§ 80.07(b) Incidents of Eminent Domain Titles Generally. [Go To Main]

Add:

Thompson v. City of Osage, 421 N.W.2d 529 (Iowa 1988) .

§ 80.07(c) Incidents of Easements Condemned. [Go To Main]

Add:

In re Burlington Northern and Santa Fe Ry. Co., 12 S.W.3d 891 (Tex. Ct. App. 2000) .

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Supp. to § 80.08 Compensation.

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§ 80.08(a) General Principles. [Go To Main]

Add:

Minneapolis v. Meldahl, 607 N.W.2d 168 (Minn. Ct. App. 2000) . For an overview of condemnation compensation see Yun-chien Chang, "An Empirical Study of Compensation Paid in Eminent Domain Settlements: New York City, 1990-2002," *39 J. Legal Stud. 201 (January 2010);* see also Ashley Owens, "The Jury's Role in Eminent Domain Compensation as Explained in Metropolitan Water District of Southern California v. Campus Crusade for Christ, Inc.," 22 *J. Nat. Resources & Envtl. L.* 219 (2009).

Add:

Palazzolo v. State ex rel. Tavares, 746 A.2d 707 (R.I. 2000) .

Add:

Los Angeles County Metro. Transp. Auth. v. Continental Dev. Corp., 941 P.2d 809 (Cal. 1997) .

Add:

Land Clearance For Redevelopment Auth. v. W.F. Coen & Co., 773 S.W.2d 465 (Mo. Ct. App. 1989) .

Add:

Although the legislature cannot fix an arbitrary amount it may require that condemnors and condemnees make reasonable efforts to settle the amount in trying to find a fair amount of compensation. *See* John Chalk and Sadie Harrison-Fincher, "Eminent Domain Power Granted to Private Pipeline Companies meets with Greater Resistance from Property Owners in Urban Rather than Rural Areas," *16 Tex. Wesleyan L. Rev. 17, 25- 26 (Fall 2009)* .

§ 80.08(b) Compensation That Is Just. [Go To Main]

§ 80.08(b)(1) Constitutional Origin of Just Compensation Guaranty.

Add:

L.A. Ray Realty v. Town Council, 698 A.2d 202 (R.I. 1997) .

§ 80.08(b)(2) Meaning of the Term "Just."

§ 80.08(b)(2)(i) In General.

Add:

Strom v. City of Oakland, 583 N.W.2d 311 (Neb. 1998) .

Add:

Board of County Supervisors of Prince William County v. United States, 47 Fed. Cl. 714 (Ct. Ct. 2000) (just compensation for 16.05 acres taken by the federal government for the Manassas National Battlefield Park was $1.65 per square foot).

Add:

Burgan v. City of Jacksonville, 920 So. 2d 70 (Fla. App. 2006) (jury did not fulfill its duty under eminent domain when it awarded an amount less than the lowest value in evidence).

Mamo v. District of Columbia, 934 A.2d 376 (D.C. 2007) (an owner was not entitled to compensation for business losses, goodwill and other such consequential damages).

§ 80.08(b)(2)(ii) "Before and After" Rule.

Add:

Ocean City v. Maffucci, 740 A.2d 630 (N.J.Super. 1999) .

Add:

In *Liberty Development Corp. v. Metropolitan, 751 N.W.2d 608 (Neb. 2008)* the court explained that the value of real property taken by eminent domain can be determined by one of three methods: "(1) ascertaining the value of the property for the period it is held by the condemnor, (2) ascertaining the difference in the value of the property before and after the taking, or (3) looking at the fair market rental value of the property during the time it was taken."

§ 80.08(b)(2)(iii) "Highest and Best Use."

Add:

Revocor Corp. v. Commw. Transp. Comm'r, 526 S.E.2d 4 (Va. 2000) .

State, ex rel. Dept. of Transp. v. Pilothouse 60, LLC, 185 P.3d 487, 491-92 (Or. App. 2008) ("Oregon condemnation law requires that just compensation be based on the value of the property at hits highest and best use.");

Add:

State ex rel. Dep't of Transp. v. El Dorado Properties, 971 P.2d 481 (Or. Ct. App. 1998)

§ 80.08(b)(2)(iv) Fair Market Value.

Add:

Shields v. Garrison, 957 P.2d 805 (Wash. App. 1998) .

Add;

The court in *Walter C. Diers Partnership v. State of Nebraska, Department of Roads, 767 N.W.2d 113 (Neb. App. 2009)* , explained that there are three main approaches to arrive at a the fair market value of real property: "(1) the market data approach, or comparable sales method, which establishes value on the basis of recent comparable sales of similar properties: (2) the income, or capitalization of income, approach which establishes value on the basis of what the property is producing or is capable of producing in income; and (3) the replacement or reproduction cost method, which establishes value upon what it would cost to acquire the land and erect equivalent structures, reduced by depreciation."

Add:

Morley v. Jackson Redevelopment Auth., 632 So. 2d 1284 (Miss. 1994) .

§ 80.08(b)(2)(v) Value of Interests Affected But Not Taken.

Add:

Williams Natural Gas Co. v. Perkins, 952 P.2d 483 (Okla. 1997) .

§ 80.08(b)(2)(vi) Other Elements of Just Compensation.

Add:

Jersey City Redevelopment Agency v. Clean-O-Mat Corp., 673 A.2d 1360 (N.J.Super. 1996) ; *People v. Woodson, 113 Cal. Rptr. 2d 559 (2001)* (the transportation department's offer was not reasonable, so it was appropriate to award litigation expenses). Attorney fees may be awarded if expressly permitted by statute. For a list of cases regarding attorney fees in eminent domain cases see 27 Am. Jur. 2d Eminent Domain § 672.

Delete "for."

Add:

People ex rel. Dept. of Transp. v. Southern Cal. Edison Co., 996 P.2d 711 (Cal. 2000) .

§ 80.08(c) The Date for Taxing the Award of Damages.

Add:

Arkansas Game and Fish ComAEn v. U.S., 87 Fed. Cl. 594 (Fed. Cl. 2009) .

Add:

People ex rel. Department of Transportation v. Southern California Edison Co., 94 Cal. Rptr. 2d 609 (2000) (the proper date for accrual of interest to begin was the date the owner asserted a statutory right to compensation).

Add:

Normandy Corp. v. South Carolina Department of Transportation, 688 S.E.2d 136 (S.C. App. 2009) .

§ 80.08(d) The Time When Compensation Is to Be Paid. [Go To Main]

Add:

County of Los Angeles v. Smith, 127 Cal. Rptr. 666 (Cal. Ct. App. 1976) .

Add:

Many states allow for interest to be paid if there is a delay between the taking and the date the compensation is paid. *See, e.g., Town of Branford v. Santa Barbara, 988 A.2d 221 (Conn. 2010)* .

Add:

Hartleb v. Department of Transportation, 778 So. 2d 1063 (Fla. App. 2001) (landowner entitled to post--judgment interest on deposited money).

§ 80.08(e) Including the Value of Personal Porperty in the Award. [Go To Main]

Add:

Seminole County v. Sanford Court Investors, Ltd., 743 So. 2d 1165 (Fla. Ct. App. 1999) .

Alternative Networking, Inc. v. Solid Waste Authority of Palm Beach County, 758 So. 2d 1209 (Fla. Ct. App. 2000) (the incidental frustration of a personal contract between the landowner and a company was not a property interest compensable in eminent domain).

Add:

In re Condemnation of 1. 169 Acres, 745 A.2d 66 (Pa. Commw. 2000) .

§ 80.08(f) Awards for Taking Business Property. [Go To Main]

Add:

Siding Sales, Inc. v. Warren County Water Dist., 984 S.W.2d 490 (Ky. Ct. App. 1998) .

§ 80.08(g) Awards for Taking of Easements. [Go To Main]

Add:

Scureman v. Judge, 747 A.2d 62 (Del. Ch. 1999) .

Add:

Scureman v. Judge, 747 A.2d 62 (Del. Ch. 1999) .

§ 80.08(h) Awards for Improvements. [Go To Main]

Add:

In re Condemnation of 1. 169 Acres, 745 A.2d 66 (Pa. Commw. 2000) .

§ 80.08(i) Awards for Taking of Use Restrictions. [Go To Main]

Add:

See Abraham Bell and Gidean Parchomovsky, "Taking Compensation Private," *59 Stan. L. Rev. 871 (2007).*

Add:

Peter Rock Associates v. Town of North Haven, 756 A.2d 290 (Conn. App. 2000) (evidence concerning an option to purchase and a proposed zoning change was not admissible).

§ 80.08(j) Awards when the Taking Includes Mineral Rights. [Go To Main]

Add:

Captline v. County of Allegheny, 727 A.2d 169 (Pa. Commw. 1999) .

§ 80.08(k) Compensation for Special Uses or Features of the Land. [Go To Main]

Add:

Armadillo Partners, Inc. v. State of Florida Department of Transportation, 780 So. 2d 234 (Fla. App. 2001) (appraiser was required to consider loss of aesthetic value of a landscaped area severed from a lot).

Add:

In the *Matter of Queens West Development Corporation, 734 N.Y.S.2d 208 (2001)* (the condemnee was not entitled to compensation for air rights more than 22 feet above the surface).

Add:

United Artists' Theater Circuit, Inc. v. City of Philadelphia, 635 A.2d 612 (Pa. 1993) .

Add:

Bi-State Development Agency of Missouri-Illinois Metropolitan Dist. V. Ames Realty Co., 258 S.W. 3d 99 (Mo. App. 2008) ; *Clark Cty. Bd. of Commrs. v. Seminole Ave. Realty, 900 N.E.2d 672 (Ohio App. 2008)* .

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Supp. to § 80.09 Parties Entitled to the Proceeds of the Condemnation Awards.

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§ 80.09(c) Rights to Compensation Among Several Interest Holders. [Go To Main]

§ 80.09(c)(1) Rights Among Parties to a Sale of the Property.

Add:

City of Virginia Beach v. Bell, 498 S.E.2d 414 (Va. 1998) .

§ 80.09(c)(2) Rights of Mortgagees and Other Lienholders.

Add:

City of Long Beach v. Aistrup, 330 P.2d 282 (Cal. Ct. App. 1958) . *City of Englewood v. Exxon Mobile Corp., 966 A.2d 1082 (N.J. Super. 2009)* ("[A] condemnation award is a substitute for the land when all or part of the mortgaged land is taken for public use; the lien of a mortgage attaches to the condemnation award.").

§ 80.09(c)(3) Rights of Servituede and Future Interest Holders.

Add:

Lawson v. State, 730 P.2d 1308 (Wash. 1986) .

§ 80.09(c)(4) Rights of parties to a Leasehold.

Add:

Seminole County v. Sanford Court Investors, Ltd., 743 So. 2d 1165 (Fla. Ct. App. 1999) .

Add:

Tilden Groves Holding Corp. v. Orlando/Orange County Expressway, 2002 Fla. App. LEXIS 2875 (Mar. 8, 2002) (rights of lessee required to be included in assessing value of land). Courts will typically enforce condemnation clauses which provide that a lease terminates upon condemnation of the land. *See, e.g., Metropolitan Airports Com'n v. Noble, 763 N.W. 2d 639 (Minn. 2009)* ; *New York City School Construction Authority v. The Slane Co., 877 N.Y.S.2d 47 (2009)* .

Add:

In re Condemnation of Right of Way for State Route 0060, Section A01, 720 A.2d 154 (Pa. Commw. 1998) .

City of Roeland Park v. Jasan Trust (In re Acquisition of Prop. by Eminent Domain), 281 Kan. 668 (Kan. 2006) (No. 94,987, Kan., Apr. 28, 2006) (a tenant is entitled to eminent domain compensation if the taking damages the leasehold).

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§ 80.10(b) Proper Parties. [Go To Main]

Add:

Smith v. Jackson State University, 995 So. 2d 88 (Miss. 2008) (eminent domain proceeding was defective when a party with a clear interest was not notified).

§ 80.10(c) Prelitigation Requirements. [Go To Main]

Add:

Rhode Island Economic Development Corp. v. The Parking Co., L.P., 892 A.2d 87 (R.I. 2006) (an eminent domain statute that did not provide for a pre-deprivation hearing or for judicial review of the question of public use was not unconstitutional).

§ 80.10(e) Stages of the Proceeding. [Go To Main]

Add:

Carlson v. Westoff, 3 P.3d 1268 (Kan. 2000) (neight additur not remittitur are appropriate in an eminent domain proceeding.

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Annotations

Add to Annotations

Annotation, Changes in purchasing power of money as affecting compensation in eminent domain proceedings, *92 A.L.R.2d 772* .

Annotation, Elements and measure of compensation in eminent domain proceeding for temporary taking of property, *2002 A.L.R.5th 3* .

Annotation, Elements and measure of compensation in eminent domain for temporary use and occupancy, *7 A.L.R.2d 1297* .

Annotation, Eminent domain: elements and measure of compensation for oil or gas pipeline through private property, *38 A.L.R.2d 788* .

Annotation, Eminent domain: industrial park or similar development as public use justifying condemnation of private property, *62 A.L.R.4th 1183* .

Annotation, Eminent domain: payment or deposit of award in court as affecting condemnor's right to appeal, *40 A.L.R.3d 203* .

Annotation, *Eminent Domain: Power to Condemn Against Particular Use of Property,* 8 A.L.R. 594 .

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Annotation, Eminent domain: valuation of land and improvements and fixtures thereon separately or as unit, *1 A.L.R.2d 878* .

Annotation, Liability, upon abandonment of eminent domain proceedings, for loss or expenses incurred by property owner, or for interest on award or judgment, *92 A.L.R.2d 355* .

Annotation, *Power of Eminent Domain Conferred Upon Municipality as Authorizing Taking Fee or Merely Easement,* 79 A.L.R. 515

Annotation, *Power of Eminent Domain as Exercisable by State or One of Its Political Subdivisions for Benefit of Federal Government, or by Federal Government Exclusively Under State Authority,* 143 A.L.R. 1040 .

Annotation, *Price at Which One Whose Land is Taken or Damaged Under Power of Eminent Domain Has Sold, Contracted to Sell, or Optioned Land in Question to Third Person as Evidence of Its Market Value in Condemnation Proceeding or Related Action for Damages,* 155 A.L.R. 262 .

Annotation, *Public Benefit or Convenience as Distinguished From Use by Public as Ground for Exercise of the Power of Eminent Domain,* 54 A.L.R. 7 .

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CHAPTER 81 REGULATORY TAKINGS

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AUTHOR: Professor Michael J. Davis, Esq. University of Kansas School of Law

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CHAPTER 81 REGULATORY TAKINGS

9-81 Thompson on Real Property, Thomas Editions § 81.01

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§ 81.01 Introduction.

§ 81.01(a) Overview of Regulatory Takings.

The law of regulatory takings concerns when, if ever, a property owner can seek judicial redress for a statutory or administrative regulatory action that results in a diminution in the uses to which the claimant's property may be put, or results in a consequent diminution of its value.

For most of the 200+ years of the development of property law under the United States Constitution, the subject of regulatory takings was of little importance. For the first century the issue did not exist in the federal courts and was raised only rarely in state tribunals. The second century brought increasing, though highly diverse, activity in the state courts, activity in which the courts frequently held an imposition to be a "taking" without reference to the specific constitutional standard that had been offended. For the first several decades of the same period, regulatory takings were recognized in the federal courts only in cases involving public utility rate limitations. After a landmark decision finally established that mere diminution of value of property could be a taking, federal court activity again receded from the forefront until a 1978 decision marked the beginning of a flurry of United States Supreme Court attention. n1

Yet in the period since 1978 no aspect of property law -- and few of constitutional law -- has received more notice from the courts, the commentators, and even the popular press. The principal source of this attention has been a series of U.S. Supreme Court decisions that have struggled to define the concept of a regulatory taking and its constitutional base, and to apply the doctrine to an ever-burgeoning series of regulatory schemes, especially ones aimed at preserving historical and environmentally important properties. This struggle has spread to the lower federal courts and to the state appellate courts as well, and the issue of when a regulation is declared a taking has evolved into nothing less than a major battleground of both legal philosophy and public policy.

COMPUTER-ASSISTED RESEARCH

LEXIS: regulatory taking

§ 81.01(b) Outline of the Chapter.

The modern law of regulatory takings cannot be comprehended in a jurisprudential vacuum. Its historical roots are deep, if obscure, and its definition is linked to the exercise of the police power in the modern state. The ancestry of the doctrine may be traced through several important nineteenth century Supreme Court decisions interpreting the Due Process Clause of the Fourteenth Amendment, as well as through related decisions marking the Court's acceptance of the idea of inverse condemnation under the Fifth Amendment.

Review of the current law begins with an analysis of the historic 1922 Supreme Court decision that established the regulatory takings doctrine as a matter of federal constitutional law, and then follows the takings doctrine through its significant interpretations and reinterpretations over the subsequent seventy years. This section is followed by a directly related but more eclectic section tracing the development and current status of the principal factors encompassed within modern regulatory takings jurisprudence. Each subset of constitutional orthodoxy is examined as it has ebbed and flowed through Supreme Court opinions. The final section on current federal law reviews the procedural limitations and remedies issues concerning regulatory takings that have sprung up over the past two decades.

The final section moves from a federal to a state focus. As indicated above, state courts have declared regulatory takings for a longer period of time and more frequently than federal courts. These decisions are summarized in this section, after which follows a discussion of the growing tendency of state tribunals to follow the newer federal standards.

FOOTNOTES:
(n1)Footnote 1. *Penn Central Transp. Co. v. City of New York, 438 U.S. 104 (1978).*

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CHAPTER 81 REGULATORY TAKINGS

9-81 Thompson on Real Property, Thomas Editions § 81.02

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§ 81.02 Historical Development of Takings Law.

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§ 81.02(a) Early History of Takings Law.

In early eighteenth century Britain, property was considered by many as an inherent right of every Englishman. The origins of the United States Constitution's Fifth Amendment were nourished in versions of this premise developed in the years following the American Revolution. But its roots were much deeper.

Grotius and other early writers recognized that when a state, exercising its sovereign power, deprived a citizen of property rights, the state could do so only for some public advantage, and the citizen had to be compensated for the deprivation. n2

Yet the concept of compensation for governmental deprivation of private property did not originate as a protection against government intrusion into property rights per se. It emerged, rather, as a byproduct of action taken in furtherance of the government's duty to regulate and adjust economic power to "make life pleasant and agreeable for all fellow creatures in society." n3 Objections to government action stemmed primarily from specific situations in which the state seized houses and goods for use by the army during wartime. n4 The solution required the government, when taking property for the public good, to pay the owner a "just price." Thus parity was achieved on behalf of the property owner by placing the state in the position of a party to a sales transaction.

Legislatures took responsibility for compensating their citizens according to their own criteria. n5 Courts, however, hesitated to impose compensatory fines where the legislatures chose not to award the owner for property taken. n6

Colonial America did not embrace these earlier notions of fairness, and uncompensated takings occurred regularly throughout the Revolutionary War. Indeed, the republican ideology that dominated the era was highly suspicious of property and the power it bestowed. Thomas Jefferson and Benjamin Franklin relegated property rights to a position vulnerable to the "calls of society." Legislatures had the duty to promote and protect the common good, including property, but in the democratic society they envisioned, the concentration of wealth and power possessed by the property owners would not overwhelm the interests of the common good. n7

Over time that view changed, and the concept of government as protector of the public good gave way to the colonists' distrust of any government action adversely affecting their self-interests. This reflected a change in the fundamental approach to the relationship between government and its citizenry, out of which came laws to protect several individual freedoms from government interference.

One of these was the Just Compensation Clause of the Fifth Amendment, though it almost certainly was designed only to limit physical takings by the federal government. n8 In practice the amendment forced courts to evaluate the constitutional justifications for legislation that impaired existing property rights by weighing the private and public interests at stake. n9 But most courts found that the amendment left little deference to the legislatures.

In 1837 the United States Supreme Court (the "Court") held in *Charles River Bridge v. Warren Bridge* that the Massachusetts Legislature did not violate the constitutional rights of Harvard College when it authorized construction of a second bridge, adjacent to the plaintiff's bridge, across the Charles River. n10 The decision was based on the state's obligations under contract law, and all but ignored the takings arguments set forth by the plaintiffs. Justice Taney, writing for the majority, stated:

> [I]t is apparent that the plaintiffs [cannot establish] that vested rights of property have been divested ... They must show that the state entered into a contract with them ... not to establish a free bridge at the place where the Warren bridge is erected. Such, and such only, are the principles upon which the plaintiffs in error can claim relief in this case. n11

In his concurring opinion Justice M'Lean explained that because the legislation did not directly involve the plaintiff's bridge, no taking could be found: n12

> Had this court established the doctrine that where an act of a state legislature affected vested rights held by a grant from the state, the act is repugnant to the constitution of the United States, the same principle must have applied to all vested rights. n13

So it was established early in constitutional history that legislation that merely affected property values would not be held a taking under the Fifth Amendment or its state equivalents. Given the origin of the amendment as a check on the authority of the federal government to expropriate the property of private citizens, that is hardly a remarkable conclusion.

COMPUTER-ASSISTED RESEARCH

LEXIS: just w/1 compensation w/1 clause w/50 fifth w/1 amendment

§ 81.02(b) Foundations of Modern Takings Law, 1865-1922.

The history set out above reflects a Fifth Amendment Taking Clause seldom invoked and not very relevant to questions of the day concerning economic rights. All that changed after the Civil War when two tributaries of constitutional law, each with an important and separate history and identity, gradually flowed together to establish the mainstream of the current federal law of regulatory takings. The first of these branches involved the definition, exercise and restraint of the states' police power; the second concerned the gradually expanding definition of the Takings Clause and its eventual application to state and local activity. The first two subsections below discuss the police power and its chief restraints. Subsection 81.04(c) then discusses the Fifth Amendment expansion. Much of these analyses applies equally to state court developments during the same time period, which will be covered in § 81.06.

COMPUTER-ASSISTED RESEARCH

LEXIS: taking! w/1 clause

§ 81.02(b)(1) The Police Power of the States.

The idea that the legislative bodies of sovereign governments have the inherent authority to restrain, regulate and prohibit private conduct that negatively affects the public welfare is deeply embedded in Anglo-American law. In the mid-eighteenth century Blackstone summarized how the concept had developed in Great Britain by referring to "the due regulation and domestic order of the kingdom, whereby the individuals of the state, like the members of a well governed family, are bound to conform their general behavior to the rules of propriety, good neighborhood, and good manners, and to be decent, industrious, and inoffensive in their respective stations." n14

How this authority came to be called the police power seems lost to history, though it was clearly related to the traditional "police" function of protecting the citizenry. n15 Neither the term nor any working definition was written into the U.S. Constitution, an appropriate absence given that the federal government was created as one of limited, enumerated powers. Thus, whether Congress has exercised the police power is a semantic question -- it can legislate only through its express powers or the Necessary and Proper Clause, regardless of the nomenclature applied to its actions.

So it was the several states, and later their governmental delegates, that became the sole repositories of police power authority. Whether the authority never left the states when the enumerated powers were delegated to the federal government, or whether it was specifically reserved to the states through the Tenth Amendment again seems unimportant. n16 What became both important and very clear by the early nineteenth century was that the federal courts were recognizing and deferring to an exclusive state power to legislate in myriad areas of social and economic concern. An early and principal example of this view came in the headwater case of *Gibbons v. Ogden* when Chief Justice Marshall wrote that "state governments ... retain and exercise all powers not delegated to the Union," while noting that the Union had "no claim of a direct power ... to act directly on [a state's] system of police." n17

For some time the Court had difficulty giving precise definition to the power or powers in question. Surely the widest-sweeping example was that offered by Chief Justice Taney in the License Cases:

> But what are the police powers of a state? They are nothing more or less than the powers of government inherent in every sovereignty to the extent of its dominions. n18

Within a quarter century, however, the Court, while admitting that the [police] power was "incapable of any very exact definition," had modified Taney's view toward a more traditional one:

> [The police power] extends ... to the protection of ... all persons, and the protection of all property within the State; ... and persons and property are subjected to all kinds of restraints and burdens in order to secure the general comfort, health, and prosperity of the State. n19

By 1887 the Court had again modified its formula, coming very close to what has been considered the working definition of the police power ever since:

> It belongs to [the legislative branch] to exert what are known as the police powers of the State, and to determine, primarily, what measures are appropriate or needful for the protection of the public morals, the public health, or the public safety. n20

By the turn of the century the "general welfare" n21 was added to health, safety and morals to form what has become known as the "orthodox quartet" of values that can be the object of valid state legislative actions restraining, regulating or prohibiting private acts for the common good.

The police power is the most general, far-reaching and intrusive authority recognized by our constitutional system, and the exercise of this powerful authority lies at the heart of regulatory takings claims. But the police power is not unfettered. The federal courts have long found at least two constitutional limitations on its exercise, one of which has played a pivotal role in the development of the law of regulatory takings.

COMPUTER-ASSISTED RESEARCH

LEXIS: police w/1 power! w/15 state!

§ 81.02(b)(2) Federal Courts Restraining the Police Power: Substantive Due Process.

The first constitutional limitation imposed on the police power by the federal courts had little to do with regulatory takings. In *Gibbons v. Ogden*, Chief Justice Marshall opined that the police power, whatever its source, did not give states exclusive authority over matters within the power's reach. Congress, too, could regulate matters of state concern if those fell within one of its express or implied powers. And if Congress so chose to regulate, federal regulation was supreme. n22

The more relevant limitation began developing a half-century later when the federal courts had to determine whether the newly-ratified Fourteenth Amendment to the U.S. Constitution created any *substantive* limitation on the police power. The critical language in the amendment was: "[n]or shall any State deprive any person of ... property, without due process of law...." n23 It was evident from the beginning that this restraining language imposed new procedural limitations on state activity. n24 What was not evident was whether it also imposed a limitation on the overall reach of the police power.

The idea that the ancient right to "due process" was a restraint on legislative -- as opposed to judicial or executive -- action sprang up without either warning or stated foundation in a pre-Civil War federal case interpreting the Fifth Amendment. n25 But that interpretation involved procedural protection, and the only case in which the concept was employed as a substantive limitation was discredited by the war itself. n26 Thus, by the time the Fourteenth Amendment was ratified there was no particular reason to believe that the Due Process Clause would be interpreted as a substantive limitation on the exercise of state legislative authority.

And it was not, at least for some time. The argument was raised and answered in the *Slaughter-House Cases*, n27 where New Orleans butchers and citizens argued that they had been denied due process by an act of the Louisiana Legislature granting an exclusive slaughtering franchise to a single entity. n28 The response from the majority of the Court was direct:

> [U]nder no construction of [the Due Process Clause] that we have ever seen, or any that we deem admissible, can the restraint imposed by the State of Louisiana ... be held to be a deprivation of property with the meaning of that provision. n29

Yet only four years later the court's view began to change. As more states passed more extensive legislation regulating the harmful effects of both unrestrained capitalism and the industrial revolution, now in full bloom, legal representatives of those regulated continued to push the federal courts to recognize a due process limitation on state legislative authority. The breakthrough came in *Munn v. Illinois*, where the Court, while holding the particular rate regulations before it constitutional, did so because the grain elevators involved were "affected with a public interest." n30 As Professor Currie has written:

> By stressing the public interest in grain elevators, the Court seemed to imply that they were extraordinary, and that similar regulation of other businesses might not pass muster. By employing the rhetoric of substantive due process without ever having justified its acceptance, moreover, Waite made it

> easy for his successors to argue that the principle had already been established...." n31

On several occasions over the next decade the Court teetered on the edge of formally declaring a substantive due process limitation on state legislation. But it was not until the *Minnesota Rate Case* in 1890 that the Court actually invalidated an act on that ground. n32 The final step came seven years later when it struck down legislation prohibiting insurance sales to companies not admitted to business in the regulating state. n33 While most of that unanimous opinion centered on state authority over foreign corporations, the Court also offered a broad interpretation of the Due Process Clause as a limitation on police power legislation. A new era was formally underway, one in which the Court took a very active role in reconciling state legislation with its own (quite conservative) economic and social views.

The case that would give this era its nickname also contained the clearest exposition of the Court's vision:

> It must, of course, be conceded that there is a limit to the valid exercise of the police power by the State. There is no dispute concerning this general proposition. Otherwise the Fourteenth Amendment would have no efficacy and the legislatures of the States would have unbounded power, and it would be enough to say that any piece of legislation was enacted to conserve the morals, the health, or the safety of the people ... n34

The so-called *"Lochner era"* lasted for over three decades after that statement, and several more police power measures were struck down during its time at center stage. n35

The Court used many different word combinations to describe its formulation of the substantive due process limitation during its development. n36 Fundamentally, though, as the *Lochner* quote indicates, the doctrine required police power legislation to have an objective related to protection of health, safety, welfare or morals, and for the means employed in the legislation to advance that legitimate purpose.

The Court's adoption of the substantive due process doctrine had several lasting effects on the development of regulatory takings law. First, for the next several decades substantive due process was the principal federal limitation on state laws restricting or prohibiting certain land uses (see § 81.03(a), *infra*). Second, the ends/means substantive due process formulation became the first half of the modern definition of when a statute or regulation effects a regulatory taking under the Fifth and Fourteenth Amendments (see § 81.03(d), *infra*). Third, this close historical relationship with substantive due process became the centerpiece of an important modern issue regarding the very nature of regulatory takings (see § 81.04(g), *infra*). Finally, in a recent, highly controversial decision, certain violations of the substantive due process standard may have become the automatic equivalents of regulatory takings without regard to other, more traditional tests (see § 81.04(h), *infra*).

COMPUTER-ASSISTED RESEARCH

LEXIS: limit! or restraint! w/15 police w/1 power! substantive due
process w/15 police w/1 power! substantive due process w/15
regulatory taking!

§ 81.02(b)(3) From Title to Invasion: The Early Federal Appropriation Cases.

The Fifth Amendment Takings Clause reads as a limitation on an unstated, but assumed, power. n37 By the end of the nineteenth century, however, any question of authority was well settled, with the Court having recognized that all sovereigns have the inherent authority to condemn property for public use. n38

But what if the government in question simply took the property without bothering to condemn it? Is the landowner protected nevertheless? What if the government only used the property rather than appropriating title? What if it

physically invaded, but only briefly? Permanently? Such questions seldom arose during the initial constitutional era when the federal government took little interest in acquiring private interests in land. But the expansion of regulatory controls that accompanied the industrial explosion after the Civil War eventually raised all these questions, and others. And the answers the Court gave became the basic jurisprudence that would join with the concept of substantive due process to form modern regulatory takings law.

The question of whether the government could destroy an existing property interest through confiscatory legislation rather than condemnation was decided early in American constitutional history. In one of his many watershed opinions, Chief Justice Marshall stated:

> It may well be doubted whether the nature of society and of government does not pre-scribe some limits to the legislative power; and, if any be prescribed ... if the property of an individual ... may be seized without compensation. n39

The next step, and the Court's first significant interpretation of any takings clause, came shortly after the Civil War when a landowner sued because his land had been flooded by the overflow from defendant's dam. Defendant relied significantly on a Wisconsin statute that had permitted the dam to be constructed, maintaining that the Wisconsin Takings Clause was irrelevant because plaintiff's land was not "taken or appropriated." In *Pumpelly v. Green Bay Co.*, the Court rejected the defense as an overly narrow reading of the state takings provision, and hinted that the action would likewise violate the Fifth Amendment provision: "[B]y the construction now sought to be placed upon the Constitution it would become an instrument of oppression rather than protection of individual rights." n40 Two later flooding cases made clear that permanent, governmentally-sanctioned occupation constituted a taking under the Federal Takings Clause, whether or not condemnation was invoked. n41

The Court's final important Fifth Amendment interpretation of the nineteenth century was significant in two ways. First, *Chicago, B. & Q. R.R. v. Chicago* n42 reemphasized Chief Justice Marshall's point that the mandatory appropriation of title was a taking, adding that the procedure employed could not change that outcome:

> The mere form of proceeding against the owner, even if he be admitted to defend, cannot convert the process used into due process of law, if the necessary result be to deprive him of his property without compensation. n43

Of even greater long-term importance, the Court ruled that the Fifth Amendment Takings Clause would henceforth be applicable to state actions, thereby reversing its own position announced in *Pumpelly*. n44

And so it was that there developed three distinct lines of cases that eventually came together to form the law of regulatory takings. Early judicial interpretations of the police power gave the states great authority to restrict the private use of property, without compensation, through legislation designed to protect health, safety and morals. Later, the federal courts began using their own judicially-created substantive due process doctrine to curtail use of the police power by carefully examining both the ends of police power legislation and the means employed to achieve those ends. And finally, the Fifth Amendment Takings Clause was interpreted to protect property owners against "invasions" that were something less than outright appropriations of title, and to apply that protection against regulation by all levels of government.

The stage was thus set; the players were all in place. The next question was inevitable, and it came to the Court again and again in those formative years.

COMPUTER-ASSISTED RESEARCH

LEXIS: invasion! or appropriat! w/15 taking! clause w/15 protection!

FOOTNOTES:

(n1)Footnote 2. Joseph Sax, *Takings and Police Power, 74 Yale L.J. 36, 58-59 (1974).*

(n2)Footnote 3. *Id. at 55.*

(n3)Footnote 4. Note, *The Origins and Original Significance of the Just Compensation Clause of the Fifth Amendment, 94 Yale L.J. 694, 698 (1985).*

(n4)Footnote 5. *See supra*, note 4 at 700-01.

(n5)Footnote 6. Harry N. Scheiber, *Property Law, Expropriation, and Resource Allocation by Government 1789-1910, in* Lawrence M. Friedman & Harry N. Scheiber, American Law and The Constitutional Order at 132-133 (1978).

(n6)Footnote 7. *See supra*, note 4 at 699-701.

(n7)Footnote 8. Douglas W. Kmiec, *"The Original Understanding of the Taking Clause Is Neither Weak Nor Obtuse," 88 Colum. L. Rev. 1630, 1635 (1988).*

(n8)Footnote 9. Richard A. Epstein, Takings: Private Property and The Power of Eminent Domain (1985).

(n9)Footnote 10. *36 U.S. 420 (1837).*

(n10)Footnote 11. *Id.* at 553.

(n11)Footnote 12. *Id.* at 581 (M'Lean, J. concurring).

(n12)Footnote 13. *Id.*

(n13)Footnote 14. Blackstone IV, 162-175.

(n14)Footnote 15. Ernst Freund, The Police Power §§ 2, 3 at pp. 2, 3 (1904).

(n15)Footnote 16. *Compare Gibbons v. Ogden, 22 U.S. 1 (1824) with Fry v. United States, 421 U.S. 542, 547 (1975).*

(n16)Footnote 17. *22 U.S. at 13.*

(n17)Footnote 18. *Thurlow v. Massachusetts, 46 U.S. 504, 583 (1847).*

(n18)Footnote 19. *Butchers' Ass'n v. Crescent City Live-Stock (the Slaughter-House Cases), 83 U.S. 36, 63 (1873) quoting Thorpe v. Rutland & B.R.R., 27 Vt. 149 (1854).*

(n19)Footnote 20. *Mugler v. Kansas, 123 U.S. 623, 661 (1887).*

(n20)Footnote 21. *Chicago, B. & Q. R.R. v. Illinois ex rel. Drainage Comm'n, 200 U.S. 561, 592 (1906).*

(n21)Footnote 22. *22 U.S. 1 (1824).*

(n22)Footnote 23. U.S. Const. amend. XIV, § 1.

(n23)Footnote 24. *Pennoyer v. Neff, 95 U.S. 714, 733 (1878).*

(n24)Footnote 25. *Murray's Lessee v. Hoboken Land & Imp. Co., 59 U.S. 272 (1856).*

(n25)Footnote 26. *Scott v. Sandford (the Dred Scott case), 60 U.S. 393 (1857).*

(n26)Footnote 27. *83 U.S. 36 (1873).*

(n27)Footnote 28. Francis H. Heller, Introduction to Constitutional Law at 301-308 (1952).

(n28)Footnote 29. *83 U.S. at 80-81.*

(n29)Footnote 30. *94 U.S. 113 (1877).*

(n30)Footnote 31. David D. Currie, The Constitution in The Supreme Court: The First Hundred Years 1789-1888, at 373 (1985).

(n31)Footnote 32. *Chicago, Milwaukee & St. P. Ry. v. Minnesota, 134 U.S. 418 (1890).*

(n32)Footnote 33. *Allgeyer v. Louisiana, 165 U.S. 578 (1897).* Ironically, Louisiana was the same state that brought the *Slaughter-House Cases, supra* at note 27.

(n33)Footnote 34. *Lochner v. New York, 198 U.S. 45, 56 (1905).*

(n34)Footnote 35. Geoffrey R. Stone et al., Constitutional Law 802-804 (2d ed. 1991).

(n35)Footnote 36. The means must be "reasonably necessary for the accomplishment of the [valid] purpose ...," *Lawton v. Steele, 152 U.S. 133, 137 (1894);* there must be "a real and substantial relation between the ... avowed objects and the means derived for attaining those objects ...," *Minnesota v. Barber, 136 U.S. 313, 320 (1890);* there must be a "real and substantial relation" between end and means, *Powell v. Pennsylvania, 127 U.S. 678, 684 (1888).*

(n36)Footnote 37. "Nor shall private property be taken for public use, without just compensation." U.S. Const. amend. v.

(n37)Footnote 38. *Chicago, B. & Q. R.R. v. Chicago, 166 U.S. 226 (1897).*

(n38)Footnote 39. *Fletcher v. Peck, 10 U.S. 87, 135 (1810).*

(n39)Footnote 40. *80 U.S. 166, 179 (1872).*

(n40)Footnote 41. *United States v. Welch, 217 U.S. 333 (1910); United States v. Lynah, 188 U.S. 445 (1903).*

(n41)Footnote 42. *166 U.S. 226 (1897).*

(n42)Footnote 43. *Id. at 236-37.*

(n43)Footnote 44. *Id. at 241. Compare Pumpelly, 80 U.S. at 176-77.*

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CHAPTER 81 REGULATORY TAKINGS

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§ 81.03 Development of Modern Takings Law.

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§ 81.03(a) Can Regulation Alone Be A Taking? The Supreme Court Says "No."

Between the Civil War and World War I, new technologies in manufacturing, communication and transportation changed the face of the American continent. But, as usual, progress came at a price, and a substantial part of the price of the industrial revolution was a shocking explosion of urban problems, environmental ravaging, and novel health and safety hazards.

To deal with this "Brave New World" the states and their local delegates flexed their police power muscles and began a far more detailed regulation of daily life than had ever before occurred in America. A full list of subject matters of "reform" legislation passed during that era would fill a tomb. Put simply, state and local governments, all of which had previously been concerned primarily with building an occasional road or public building, now found themselves regulating everything from what their citizens ate and drank to where and how long they could work, to how they could or could not use their real and personal property. In a nation built on individualism and "Governing Best by Governing Least," this new perspective of public responsibility was bound to face a series of stiff legal challenges.

One of the early challenges came from a Chicago transportation company blocked from its docks by tunnel work being performed by the city. The owner also alleged that the work had directly damaged some of the docks' structures. In *Transportation Co. v. Chicago*, the Court held that the owner had no claim under the Takings Clause for either set of alleged damages because:

> [A]cts done in the proper exercise of governmental powers, and not directly encroaching upon private property, are universally held not to be a taking within the meaning of the [takings] provision. They do not entitle the owner of such property to compensation from the State ... n45

The Court referred to Cooley's famous treatise on constitutional law for an authoritative explanation of this doctrine, and cited *Pumpelly* as the notable and distinguishable exception to this holding, emphasizing the permanency of the invasion there. n46

This and other similar cases were constructed and decided on an assumption, only partially articulated in its early stages, that became the cornerstone of regulatory takings jurisprudence during that initial era. The assumption was that in taking claims involving neither direct appropriation nor permanent occupation, the only issue before the Court was the legitimacy of the governmental conduct involved. The severity of the impact of that conduct on the plaintiff/owner was irrelevant so long as the governmental activity was legitimate. In other words, these cases were treated simply as substantive due process cases, focusing exclusively on the relationship of the regulation to the police power. On rare occasions the Court seemed to stray from this viewpoint, and at a later time its position would be explained more narrowly. n47 But a careful reading reveals that these cases were decided purely and simply on due process grounds, with no mention made of, and no consideration given to, the impact of the regulation on the claimant.

Any doubt about the dominance of this viewpoint within the Court was erased a decade after the *Transportation Co.* decision, when an unhappy brewery owner challenged Kansas's early experiment with prohibition. Peter Mugler claimed that the constitutional amendment and executing legislation creating prohibition had taken his brewery without compensation. In *Mugler v. Kansas* n48 the Court upheld the state's position. After reiterating its decision in *Transportation Co.* and again distinguishing *Pumpelly*, the Court offered a clearer exposition of a view of the relationship between substantive due process and takings that would dominate this early period:

> [T]he present case must be governed by principles that do not involve the power of eminent domain... A prohibition simply upon the use of property for purposes that are declared, by valid legislation, to be injurious to the health, morals, or safety of the community, cannot, in any just sense, be deemed a taking or appropriation of property for public benefit. Such legislation does not disturb the owner in the control or use of his property for lawful purposes, nor restrict his right to dispose of it ... Nor can legislation of that character come within the Fourteenth Amendment ... unless it is apparent that its real object is not to protect the community, or to promote the general well-being, but, under the guise of the police regulation, to deprive the owner of his liberty and property, without due process of law. n49

Roughly translated, the Court held that so long as a police power regulation met its substantive due process ends/means test, the regulation could not be a Fifth Amendment taking, regardless of its impact on the claimant.

With only occasional exception, the Court maintained this position on regulatory takings claims until the 1920s. In the very case in which it incorporated the Fifth Amendment takings limitations into the Fourteenth Amendment Due Process Clause, it held that the Takings Clause "imposes no restriction upon the inherent power of the State by reasonable regulations to protect the lives and secure the safety of the people." n50 Eight years later it flatly stated that "uncompensated obedience to a [police power] regulation ... was not taking property without due compensation." n51 Sometimes the Court seemed to be stating a narrower rule, one holding that a state could always regulate a nuisance out of existence. n52 But as late as its famous 1926 decision upholding the constitutionality of zoning, the Court upheld a challenge solely through the substantive due process test, even though there were unchallenged allegations of serious diminution in value and despite the fact that at least some of the owner's desired uses would not have been nuisances if allowed to develop. n53

So for a half century, from the early days of the substantive due process doctrine until after World War I, the dominant view on the Court was that there was really no such thing as a regulatory taking -- a property owner might bring an inverse condemnation action if a government appropriated the title without bothering to condemn the interest, or if it permanently occupied the property without payment or permission. But pure regulation of use was not, could not be, an unconstitutional taking of the regulated property.

Only occasionally was there a hint of a different view, one that considered the impact of the regulation on the property owner as part of the calculus, thus anticipating the possibility of a regulatory taking. In *Lawton v. Steele*, for example, the Court stated for the first time in a land use context that "unduly oppressive" regulations could be considered a taking. n54 Fourteen years later, writing a unanimous opinion upholding the contested regulation in *Hudson Water Co.*

v. McCarter, Justice Holmes noted in dictum that if a regulation did not permit a property owner a reasonable use the "police power would fail." n55 In a third case, a somewhat jumbled opinion by Justice Harlan not only made reference to both the traditional view and the idea that regulations could be takings, but added a third way that the Court might view the relationship between Fourteenth Amendment Due Process and the now incorporated takings clause. n56

COMPUTER-ASSISTED RESEARCH

LEXIS: regulation w/15 taking! w/5 fifth w/1 amendment regulation
w/15 appropriat! w/15 invasion w/50 unconstitutional

§ 81.03(b) Directions Change: Regulations As Takings.

Holmes' opinion in *McCarter* was not the first indication that this Justice had a somewhat different view of the due process/taking relationship than the one that had predominated the Court. While serving as a Justice on the Supreme Judicial Court of Massachusetts, Holmes wrote an opinion reflecting a view that the difference between a valid police power restriction and a taking of property was one of degree rather than kind:

> It may be said that the difference is only one of degree; most differences are when nicely analyzed. At any rate, the difference is one of the distinctions by which the right of the legislature to exercise the police power is determined.

Some small limitations of previously existing rights incident to property may be imposed for the sake of preventing manifest evil; larger ones could not be except by the exercise of eminent domain. n57

Holmes brought this view to the Court, though he participated as a member of the majority in many opinions of the era treating regulatory takings claims solely as substantive due process cases. The first mention was in *McCarter,* some eight years after his arrival on the Court, and it was not until after World War I that he successfully promoted the concept among the other justices.

The initial indication that something new was afoot came, as is often the case, in an opinion upholding the restriction in question. Faced with an acute shortage of rental property and the resultant rapid increase in rents in the District of Columbia after the war, Congress responded by imposing emergency rent control legislation. Holmes wrote for a 5-4 majority upholding the restrictions. The nub of the opinion was prosaic; the anti-gouging provisions were no different than many restrictions that had previously been upheld under due process challenges. But he did not stop there. Uncharacteristically, the usually pithy Holmes added a brief lecture on constitutional theory:

> All the elements of a public interest justifying some degree of public control are present. The only matter that seems to us open to debate is whether the statute goes too far. For just as there comes a point at which the police power ceases and leaves only that of eminent domain, it may be conceded that regulations of the present sort pressed to a certain height might amount to a taking without due process of law. n58

The next year, though, the world of takings jurisprudence permanently changed to accommodate Holmes' relativist view. After long study of the terrible subsidence problems in the northeast corner of the state of Pennsylvania caused by mining the rich beds of anthracite coal there, in 1921 the Pennsylvania Legislature passed a statute which, among other things, prohibited mining that caused subsidence of public or private property. Much of the private property in the area had originally been owned in fee by coal companies, which had then sold off the surface rights to homeowners. One owner of such surface rights sought an injunction under the legislation to prevent the coal company that owned the mining rights from digging beneath the property. The coal company claimed that the operation of the Act in such circumstances effected a taking of its property. The Pennsylvania Supreme Court disagreed, holding that the legislation

was within the police power, and that the usual substantive due process analysis was unaffected by the nature of the title holding. The coal company appealed to the U.S. Supreme Court, where Justice Holmes awaited the opportunity to change the course of takings jurisprudence. n59

Pennsylvania Coal v. Mahon n60 instantly became the headwater case of regulatory takings law, and Justice Holmes' majority opinion included several concepts that have dominated all regulatory takings decisions since. Yet nothing about the opinion was more important than what it did *not* discuss, which was the chilling evidence brought forth by those defending the statute concerning the perils to health and safety from subsidence, evidence that had convinced the Pennsylvania Legislature to pass the law in the first place. n61 Unlike any previous "takings" decision, the Court showed little interest in the substantive due process link between the harm the regulation targeted and the means selected to serve that end. If the validity of the governmental conduct had been the question, the legislation would easily have fallen within constitutional bounds.

Holmes actually began within the traditional analysis by stating that the case involved only "a single private house," concluding that the public interest in protecting such a small interest failed to justify the considerable intrusion into the Company's property rights. Had the opinion ended there, little would be remembered of the decision. But it did not. Having rendered his decision, Holmes proceeded, again characteristically, to offer the Court's views on the "general validity of the Act." It was this second aspect of the opinion, arguably dictum, that formed the foundation of modern regulatory takings law.

Holmes first noted that the regulation made it "commercially impracticable" to mine the affected coal, which had "very nearly the same effect as appropriating or destroying it." n62 He then distinguished another Court decision upholding a Pennsylvania regulation requiring each operator to leave a support pillar along its property line. As all operators left a pillar, thereby protecting the safety of all employees collectively, this latter legislation "secured an average reciprocity of advantage" to the regulatee that the legislation did not bring. n63

Preliminaries dispensed with, Holmes brought his relativist philosophy to center stage. Property can only be taken through the Fifth Amendment with just compensation, he noted, except as "qualified by the police power." n64 But the police power must itself be qualified to protect individuals against the natural tendency of governments to destroy private interests for public gains "until at last private property disappears." n65 He then announced the "general rule" that became the modern standard: "[W]hile property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking." n66 After a paragraph of review of cases that did not "go too far," he ended with an assurance that Pennsylvania could battle subsidence in the chosen way so long as it was prepared to give just compensation for coal owners' losses.

Several aspects of Holmes' majority opinion troubled dissenting Justice Brandeis. He first reminded the Court that the accepted test of police power legislation was the validity of the governmental act, not its impact on the property owner, especially when the restriction was "merely the prohibition of a noxious use." n67 In such instances "[t]he State does not appropriate [the property] ... [it] merely prevents the owner from making a use which interferes with paramount rights of the public." n68

He was no more impressed with Holmes' view that the right to mine was separately protected by the Fifth Amendment. By limiting mining, the regulation unquestionably destroyed some of the value of the fee simple interest. But it also improved the value of the surface rights, perhaps to an even greater extent. Thus, had the same person owned the entire fee, no taking could possibly have been found. Yet regulation was held unconstitutional because the fee had been divided between the mineral owner and the surface owner. In an argument that directly foreshadowed the next great regulatory takings case, Brandeis asked:

> [N]o one would contend that by selling his interest above one hundred feet from the surface he could prevent the State from limiting, by the police power, the height of structures in a city. And why should a

> sale of underground right bar the State's power? n69

Brandeis finally challenged the idea that a police power regulation had to carry "an average reciprocity of advantage" to be constitutional. That might be so, he conceded, when the purpose of legislation is to confer a public benefit: "But when the police power is exercised, not to confer benefits ... but to protect the public from detriment and danger ... there is no room for considering reciprocity of advantage." n70 To bolster his point he cited several cases in which the Court had upheld extremely burdensome regulations without mention of reciprocity of advantage "unless [it was] the advantage of living and doing business in a civilized community." n71

It was not apparent immediately after *Pennsylvania Coal* that the jurisprudence of takings law had changed dramatically. Indeed, before five more years passed, Holmes had voted with the majority in two cases that reverted to a pure substantive due process analysis for determining the constitutionality of regulations that severely reduced the value of private property. (*See* § 81.03(c), *infra*). But over time its importance grew until it had become the bellwether of all regulatory takings cases.

The reasons for this ascension to prominence were several. First and most important, the opinion recognized that a regulation could take property without either appropriating title or causing a physical invasion. Second, it introduced a nebulous test to determine when a regulation crossed the invisible line to unconstitutionality. Third, it gave birth to the idea of reciprocity of advantage as a key element in takings decisions. Fourth, it set off an argument about how the nature of the "property" taken should be evaluated. Fifth, it initiated a debate about whether regulatory takings were qualitatively different than traditional takings for the purpose of invoking a remedy. Finally, it introduced the concept of the "nuisance exception," the idea that some uses could be regulated out of existence without compensation. All six of these aspects of the decision came back again and again to affect future Court determinations of how *Pennsylvania Coal* should be invoked, and each will be analyzed separately in the sections below.

§ 81.03(c) 1928-1978: A Half-Century of Drift.

As indicated above, the Court seemed to forget *Pennsylvania Coal* once it had been decided. Four years later in *Village of Euclid v. Ambler Realty Co.,* n72 virtually the same Justices upheld the facial constitutionality of zoning through a straight due process analysis, despite evidence that the mere imposition of the ordinance reduced the plaintiff's land values between 67-75%. Regulatory takings went unmentioned even though the nub of the case was that some of the uses the ordinance barred from plaintiff's tracts would not have been nuisances. Two years later the Court upheld the state of Virginia's right to destroy a landowner's cedar trees because their spores were despoiling nearby apple orchards. n73 Again there was no reference to either *Pennsylvania Coal* or regulatory takings, and the Court was very definite in its views:

> [W]here the public interest is involved, preferment of the [legislatively determined] interest over the property interest of the individual, to the extent even of its destruction, is one of the distinguishing characteristics of every exercise of the police power which affects property. n74

Justice Holmes was in the majority in both this decision and *Ambler Realty*.

During the fifty years following the Virginia decision, the Court took few opportunities to review the constitutionality of land use regulations. In the two most significant cases when it did, the confusion left over from the Holmes era was apparent. In *United States v. Central Eureka Mining Co.* n75 it denied gold mine owners' request for compensation for a government-ordered closing of non-essential mines during World War II. Striking a pose it asserted to be "traditional" but which was, in fact, brand new, the Court said regulatory takings claims were "a question properly turning on the particular facts of each case," citing *Pennsylvania Coal*. n76 The next sentence recognized that regulations "can so diminish the value of property as to constitute a taking," but cited two physical invasion cases for the proposition. n77 Then to muddle matters totally, the majority cited *Mugler* for the proposition that depriving an owner of the "most

profitable use" did "not necessarily" create a taking.

The second decision, *Goldblatt v. Hempstead* n78 began no better. In holding constitutional a regulation effectively terminating plaintiff's profitable sand dredging business, the Court first repeated *Central Eureka's* dictum about prohibiting the most profitable use, then cited *Pennsylvania Coal*, for the proposition that "[t]here is no set formula to determine when regulation ends and taking begins." n79

But the *Goldblatt* decision went beyond *Central Eureka*, adding a passage that would lead to a significant development. The plaintiff's fundamental claim was based on impact, alleging a taking by significant diminution in value. The Court found insufficient proof for such a claim; it then added that the regulation was therefore constitutional "if it is otherwise a valid police regulation." n80 This unheralded, perhaps accidental, analysis was the first time the Court had melded the Holmes' "too far" test with the traditional substantive due process test as a *combined* test of constitutionality.

Thus, while little happened between 1928 and 1978, the era was not totally without influence, for in *Central Eureka* and *Goldblatt* the Court offered a preview of the modern era to come, both by refusing to develop a formula clarifying what regulating "too far" meant, and by suggesting that regulations would thereafter be required to pass both *Pennsylvania Coal* and the traditional ends/means test to be constitutional.

§ 81.03(d) Development of the Modern Takings Test.

In the late 1960s the owner and lessee of Grand Central Terminal in New York City applied for permission to build an office tower atop the existing structure. The terminal had been designated a "landmark" by the city, and the designated city agencies denied the tower applications because the plans were not "appropriate" on either historical or aesthetic grounds. The owner then filed an action in the New York courts alleging, among other things, that the city had "taken" the property by denying the permit. After a victory in the trial court, the plaintiff lost at both New York appellate courts. The United States Supreme Court granted certiorari, and the modern takings era began.

The principal importance of *Penn Central Transportation v. City of New York* n81 was that Justice Brennan's majority opinion affirming that no taking had occurred marked the first occasion in the Court's history when it attempted a systematic review and exposition of its views on the topic of regulatory takings. By discussing virtually every aspect of federal takings law, *Penn Central* offered a restatement of prior Court opinions and also set the agenda for every federal takings decision handed down since. Most relevant to this subsection, it laid the conceptual and semantic foundations for the modern, and current, test of when a regulation constitutes a taking.

Brennan's recap of previous decisions began by repeating the *Goldblatt* confession that the Court had failed "to develop any 'set formula' for determining when [a takings had occurred]" and the *Central Eureka* pronouncement that decisions turned largely "upon the particular circumstances [of the] case." n82 But there were, he stated, "several factors that have particular significance." n83 It was in identifying these factors that Brennan formed the basis of the modern takings test.

At least two factors were mentioned almost in passing. The interest invaded had, of course, to constitute "property" to fall within the protection of the Fifth and Fourteenth Amendments. n84 Also, government actions "characterized as acquisitions of resources to permit or facilitate uniquely public functions" were more susceptible to takings claims. n85

Clearly critical to the calculus were three other factors:

1) "The economic impact of the regulation on the claimant and, particularly, the extent to which the regulation has interfered with distinct investment- backed expectations;" n86

2) "the character of the government action;" n87 and

3) "instances in which a state tribunal reasonably concluded that 'the health, safety, morals, or general welfare' would be promoted by prohibiting particular contemplated uses of land." n88

The opinion recognized that there would be times when the factors were in opposition, and gave a strong boost to regulatory authority. Zoning laws were "the classic example" of when economic impact had to give way to the police power. More directly, the Court had decided a number of cases when "the challenged governmental actions prohibited a beneficial use to which individual parcels had previously been devoted and thus caused substantial individualized harm." n89

In retrospect, the most interesting aspect of this sweeping review was a single sentence that became, apparently unwittingly, the seed from which the modern test grew. In his last paragraph analyzing the cases upholding governmental authority to prohibit certain uses without regard to impact on the property owner, Brennan summarized:

> It is, of course, implicit in *Goldblatt* that a use restriction on real property may constitute a "taking" if not reasonably necessary to the effectuation of a substantial public purpose ... or, perhaps, if it has an unduly harsh impact upon the owner's use of the property. n90

This recapitulation became the officially adopted test two years later when the Court again held for the government in a takings challenge. In *Agins v. Tiburon* n91 the claimant argued that the failure of the city to rezone his tract to allow a more intense residential development "completely destroyed its value." The Court's unanimous opinion found no taking, and for the first time unequivocally set forth what it deemed the federal test -- a regulation "effects a taking if [it] does not substantially advance legitimate states interests ... or denies an owner economically viable use of his land ...." n92 So the combined test, first hinted at in *Goldblatt* and repeated in a conclusory way in *Penn Central*, had now become the official definition. It has remained so since, though as the next several subsections make clear there has been great disagreement within the Court on precisely how the test should be employed and what remedies follow from a finding that a regulation has violated one or the other part of the test.

COMPUTER-ASSISTED RESEARCH

LEXIS: taking w/5 substantial! w/2 advance! w/2 legitimate w/2 state!
w/2 interest deny or denies w/1 owner w/1 economically w/1
viable w/1 use w/1 land

FOOTNOTES:
(n1)Footnote 45. *99 U.S. 635, 642 (1878).*

(n2)Footnote 46. *Transportation Co. v. Chicago, 99 U.S. 635, 642 (1878).*

(n3)Footnote 47. *See* § 81.04(g), infra.

(n4)Footnote 48. *123 U.S. 623.*

(n5)Footnote 49. *Mugler, 123 U.S. at 668-669.*

(n6)Footnote 50. *Chicago, B. & Q. R.R., 166 U.S. at 252.*

(n7)Footnote 51. *New Orleans Gas Light Co. v. Drainage Comm'n, 197 U.S. 453, 462 (1905).*

(n8)Footnote 52. *See*, e.g., *Walls v. Midland Carbon, 254 U.S. 300, 311 (1920).*

(n9)Footnote 53. *Village of Euclid v. Ambler Realty Co., 272 U.S. 365 (1926).*

(n10)Footnote 54. *152 U.S. 133, 137 (1894).*

(n11)Footnote 55. *209 U.S. 349, 355 (1908).*

(n12)Footnote 56. *Chicago, B. & Q. R.R. v. Illinois ex rel. Drainage Comm'n, 200 U.S. 561 (1906).* For a full discussion of Harlan's views see Michael J. Davis & Robert L. Glicksman, To The Promised Land: A Century of Wandering and a Final Homeland for the Due Process and Taking Clauses, *68 Or. L. Rev. 408-09 (1990).*

(n13)Footnote 57. *Rideout v. Knox, 148 Mass. 368, 372 (1889).*

(n14)Footnote 58. *Block v. Hirsh, 256 U.S. 135, 156 (1921).*

(n15)Footnote 59. The Pennsylvania Supreme Court opinion is at *274 Pa. 489 (1922).* For an interesting and more complete rendition of the background of Pennsylvania Coal v. Mahon, see John Banta et al., The Taking Issue (1973).

(n16)Footnote 60. *260 U.S. 393 (1922).*

(n17)Footnote 61. "Our once level street are in humps and sags, our gas mains have broken, our water mains threaten to fail us in time of conflagration, our sewers spread their pestilential contents into the soil, our buildings have collapsed under their occupants or fallen into the streets, our people have been swallowed up in suddenly yawning chasms, blown up by gas explosions or asphyxiated in their sleep, our cemeteries have opened and the bodies of our dead have been torn from their caskets." *Brief on Behalf of the City of Scranton, Intervenor at 5, Pennsylvania Coal Co. v. Mahon (No. 549) 260 U.S. 393 (1922).*

(n18)Footnote 62. *Pennsylvania Coal, 260 U.S. at 414.*

(n19)Footnote 63. *Id. at 415.*

(n20)Footnote 64. *Id.*

(n21)Footnote 65. *Id.*

(n22)Footnote 66. *Id.*

(n23)Footnote 67. *Id. at 417.*

(n24)Footnote 68. *Id.*

(n25)Footnote 69. *Id. at 419.*

(n26)Footnote 70. *Id. at 422.*

(n27)Footnote 71. *Id.* The cases all involved legislation wiping out previously existing businesses without compensation. They included: *Pierce Oil Corp. v. City of Hope, 248 U.S. 498 (1919)* (oil tanks); *Hadacheck v. City of Los Angeles, 239 U.S. 394 (1915)* (brickyard); *Reinman v. City of Little Rock, 237 U.S. 171 (1915)* (livery stable); *Murphy v. California, 225 U.S. 623 (1912)* (billiard hall); *Powell v. Pennsylvania, 127 U.S. 678 (1888)* (oleomargarine factory); and *Mugler v. Kansas, 123 U.S. 623 (1887)* (brewery).

(n28)Footnote 72. *272 U.S. 365 (1926).*

(n29)Footnote 73. *Miller v. Schoene, 276 U.S. 272 (1928).*

(n30)Footnote 74. *Id. at 279-280.*

(n31)Footnote 75. *357 U.S. 155 (1958).*

(n32)Footnote 76. *Id. at 168.*

(n33)Footnote 77. *Id.* The cited cases were *United States v. Kansas City Ins. Co., 339 U.S. 799 (1950)* and *United States v. Causby, 328 U.S. 256 (1946).*

(n34)Footnote 78. *369 U.S. 590 (1962).*

(n35)Footnote 79. *Id. at 594.*

(n36)Footnote 80. *Id.*

(n37)Footnote 81. *438 U.S. 104 (1978).*

(n38)Footnote 82. *Id. at 124.*

(n39)Footnote 83. *Id.*

(n40)Footnote 84. *Id. at 124-125,* citing *United States v. Willow River Power Co., 324 U.S. 499 (1945). See* § 81.04(a), infra.

(n41)Footnote 85. *Id.* at 128, citing *United States v. Causby, 328 U.S. 256 (1946).*

(n42)Footnote 86. *Id.* at 124.

(n43)Footnote 87. *Id.*

(n44)Footnote 88. *Id.* at 125.

(n45)Footnote 89. *Id.* at 125-127. Brennan cited inter alia, *Miller v. Schoene, supra* note 84, and Goldblatt v. Hempstead, *supra* note 89.

(n46)Footnote 90. *Id.* at 127.

(n47)Footnote 91. *447 U.S. 255 (1980).*

(n48)Footnote 92. *Id. at 260.*

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CHAPTER 81 REGULATORY TAKINGS

9-81 Thompson on Real Property, Thomas Editions § 81.04

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§ 81.04 Specific Aspects of Federal Takings Law.

[Go To Supp]

Developing a test for adjudicating when a regulation can become a taking was a monumental task for the Court. It was almost a century from *Mugler* to *Agins*, and several models had suggested themselves in the interim. But choosing the combined substantive due process/economic impact test was less than half the battle. As federal judicial decisions since *Agins* have demonstrated, the more difficult problem is applying the test to a myriad of fact patterns. Critical to this application have been a great variety of subissues that plaintiffs have raised during takings litigation. Many come from unique fact patterns, though the roots of a surprising number can be found in *Pennsylvania Coal*, *Penn Central*, or both.

§ 81.04(a) What is "Property" Under the Fifth Amendment?

The Fifth and Fourteenth Amendments refer only to "property." Other valuable economic interests must look elsewhere for protection. Only a limited number of cases address the question of what interests are covered by the property rubric. They generally fall into two categories: those that consider the broad question of what interests are covered, and those that wrestle with how a particular property interest is viewed *vis-a-vis* the fee simple title.

COMPUTER-ASSISTED RESEARCH

LEXIS: property w/5 defin! w/15 fifth w/1 amendment

§ 81.04(a)(1) When is an Economic Interest "Property"?

While offering his comprehensive review of the previous Court takings decision in *Penn Central*, n93 Justice Brennan noted that "this Court has dismissed 'takings' challenges on the ground that, while the challenged government action caused economic harm, it did not interfere with interests that were sufficiently bound up with the reasonable expectations of the claimant to constitute 'property' for Fifth Amendment purposes." n94 The principal case he cited remains one of the leading analyses of when an economic interest rises to the level of "property."

In *United States v. Willow River Power Co.* n95 the claimant was awarded $25,000 by the Court of Claims as Fifth

Amendment compensation for the diminution of the operating head on its hydroelectric plant caused by a federally built dam on the navigable St. Croix River, which backed water up the unnavigable Willow River. The ordinary elevation on the Willow increased three feet, thus reducing the amount of electricity the claimant could generate.

The Court reversed the award because the United States' dominant public interest in navigable waters gave the government the right to override other economic interests without compensation. n96 The Court held that the claimant's interest in the preexisting water level (or, as it is more fun to think about, the previously empty three feet of space) did not amount to a "property right" under the Fifth Amendment. n97 Justice Jackson noted that the interest alleged was akin to that of a riparian landowner on a navigable waterway, and that such interests are held at the grace of the federal government. Jackson's attempt at defining what is and is not compensable was, alas, circular and unhelpful:

> [N]ot all economic interests are 'property rights'; only those economic advantages are 'rights' which have the law back of them, and only when they are so recognized may courts compel others ... to compensate for their invasion. n98

As Professor Berger plaintively asked: "Did [Willow River] lose because it had no property or did it have no property because it lost?" n99

A year later the Court decided *United States v. Causby,* n100 involving a claim by owners of a chicken farm that the glide path of fighter planes landing nearby was so low that it interfered with the use of the airspace above their property. The excessive noise and bright lights caused the claimants to suffer frequent loss of sleep and constant nervousness, and killed a number of their chickens.

This time the Court found a taking, stating that "[i]f the landowner is to have full enjoyment of the land, he must have exclusive control of the immediate reaches of the enveloping atmosphere." n101 It also provided considerably more help in determining how to identify protectible interests, holding that even in federal cases "local law" should be referred to in order to determine what matters of value are constitutionally protected. n102 Because North Carolina law provided that extremely low aircraft flights could be an unlawful interference with the use of real property, the Court concluded that the claimants were entitled to compensation for their losses.

The importance of state law in defining Fifth Amendment property interests was solidified in *Board of Regents of State Colleges v. Roth,* a Fourteenth Amendment claim involving the alleged intangible property right to continued employment. n103 The Court held that the claimant had no property right meriting the procedural due process protections of the Fourteenth Amendment. A property right, it noted, must be more than an abstract need or desire for a benefit. It must, rather, involve a legitimate claim of entitlement:

> Property interests are not created by the constitution but by existing rules or understandings that stem from an independent source such as state law. n104

Because here the expectation on which claimant relied could not be found in either state law or his own employment contract, it was not a constitutionally protected interest.

COMPUTER-ASSISTED RESEARCH

LEXIS: economic w/1 interest w/5 property w/15 fifth w/1 amendment

§ 81.04(a)(2) What Property Interest Can Be Taken Without Compensation?

A more frequent question than what interests are protected under the Fifth Amendment is what identifiable property interests can be interfered with or taken without compensation. A number of important takings cases have involved this

issue, including both *Pennsylvania Coal Co.* and *Penn Central*.

Pennsylvania Coal Co. turned in significant part on Holmes' statement that "[t]o make it commercially impracticable to mine certain coal has very nearly the same effect for constitutional purposes as appropriating or destroying it." n105 Brandeis' dissent challenged the statement, accusing the majority of increasing an owner's rights in property by dividing the title. If the same person owned the entire fee interest, he reasoned, the lost rights would be compared with those retained in an overall assessment of whether the government had exceeded its authority. "[T]he value of the coal kept in place by the restriction may be negligible as compared with the value of the whole property...." n106

A very similar issue arose in *Penn Central*. One of the claimant's arguments was that the air rights above the terminal constituted valuable, recognizable property that the city had taken by denying its application. Justice Rehnquist's dissent accepted the argument in modified form. n107 Justice Brennan's majority opinion did not:

> [T]he submission that appellants may establish a 'taking' simply by showing that they have been denied the ability to exploit a property interest that they heretofore had believed was available for development is quite simply untenable ... 'Taking' jurisprudence does not divide a single parcel into discrete segments and attempt to determine whether rights in a particular segment have been entirely abrogated ... [T]his court focuses rather ... on ... the interference with rights in the parcel as a whole ... n108

Subsequent jurisprudence followed the Brennan view. In *Andrus v. Allard* n109 the Court denied a claim by the owners of eagle parts that regulations forbidding the sale of such parts acquired before the effective date of the law constituted a taking. With Brennan again writing for the majority, it held that the regulations only prohibited one means of disposing of the artifacts and that "destruction of one 'strand' of the bundle [of property rights] is not a taking because the aggregate [of such rights] must be viewed in its entirety." n110 More ironically, in *Keystone*, the soft coal analog of *Pennsylvania Coal* itself, the Court denied the argument that the requirement of keeping fifty percent of coal in place constituted a taking *per se* because such coal did not "constitute a separate segment of property for takings law purposes." n111 The Court's latest pronouncement raises some questions about its ongoing allegiance to this "undivided fee" doctrine, but it remains the law of the land. n112

The "bundle of rights" that is property is generally considered to include three principal strands -- the right to use, the right to dispose, and the right to exclude. After *Penn Central*, *Andrus*, and *Keystone*, it was clear that interference with the rights of use or disposal did not automatically constitute a taking. But, as the following section demonstrates, not all rights in the bundle are equal, at least in takings jurisprudence.

COMPUTER-ASSISTED RESEARCH

LEXIS: property w/1 interest! w/5 taken w/5 without w/2 compensation

§ 81.04(b) Physical Invasions v. Physical Occupations.

As recently as *Penn Central*, the Court apparently considered physical intrusion merely a factor to be considered in determining whether a regulatory scheme had "gone too far" and had thus become a taking. In his restatement of prior holdings Brennan noted that "[a] 'taking' may more readily be found when the interference with property can be characterized as a physical invasion by government...." n113 But it soon became clear that the word "invasion" covered only some of government's intrusions onto private property. Two decisions and four years later, the Court distinguished physical "invasion" from physical "occupation," and in the process engendered the only hard and fast rule in the takings calculus.

The initial indication that the Court was moving toward an absolute rule came during the term after *Penn Central*, in

Kaiser Aetna v. United States. n114 In holding that the Corps of Engineers' assertion of the traditional public easement for navigation could constitute a takings in certain circumstances, Justice Rehnquist's opinion noted the importance of the right to exclude:

> In this case we hold that the 'right to exclude,' so universally held to be a fundamental element of the property right, falls within this category of interests that the Government cannot take without compensation. n115

Three years later this hint that some physical invasions would no longer be "weighed" with other factors became black letter law. In *Loretto v. Teleprompter Manhattan CATV Corp.,* n116 the Court held that all physical "occupations" are takings. For precedent the majority harkened back as far as *Pumpelly* and the other nineteenth century cases first establishing the inverse condemnation right. n117 For policy, the majority argued that "the power to exclude has traditionally been considered one of the most treasured strands in the owner's bundle of rights" because without that right the concomitant rights of use and disposal are worthless. n118 In a footnote the Court cautioned that not all invasions are occupations: "Not every *invasion* is a taking... [T]emporary limitations are subject to a more complex balancing process to determine whether they are a taking." n119 The Court gave no guidance on how to identify which invasions are occupations, though the degree of permanence was clearly the essential basis.

COMPUTER-ASSISTED RESEARCH

LEXIS: physical w/2 invasion! w/15 occupation!

§ 81.04(c) Creating Benefits and Preventing Harms.

One idea that grew out of the long stretch of Supreme Court inactivity between *Pennsylvania Coal* and *Penn Central* was that the essential distinction between regulatory schemes that constitute takings and those that do not concerned their natures -- schemes aimed at preventing public harms need not provide compensation to the regulated, those aimed at creating public benefits must. The concept arose from Brandeis' dissent in *Pennsylvania Coal* where he rejected Holmes' call for reciprocity of advantage by distinguishing between kinds of police power legislation:

> [W]here the police power is exercised not to confer benefits on property owners but to protect the public from detriment and danger, there is, in my opinion, no room for considering reciprocity of advantage. n120

The principal progenitor of the idea was Professor Allison Dunham, who relied on both Brandeis' dissent in *Pennsylvania Coal* and the majority in *Goldblatt* for his foundation. n121

To the extent it ever existed, the distinction seemed short lived. It was argued by the claimant in *Penn Central* as one basis for unconstitutionality of the historic preservation scheme, and was specifically rejected by Justice Brennan in an important footnote. n122 Brennan pointed out that many of the Court's takings precedents had upheld schemes banning uses that were lawful prior to institution of the challenged regulations. Those cases were constitutional not because they prohibited "noxious" uses but because they forwarded implementation of a policy of widespread public benefit. The footnote ended with a paragraph discussing the slippery semantic problems inherent in distinguishing regulations that created public benefits from those that prevented public harms.

The idea took an even more direct hit in *Lucas v. South Carolina Coastal Council*. n123 In rejecting the state's claim that the impact of its legislation on the claimant was irrelevant because it was preventing harm to the citizens of the State, the majority strongly rejected the notion that the police power had two sides. The opinion reiterated Brennan's arguments from the *Penn Central* footnote, then explained that the early emphasis on preventing public harms "was merely our early formulation of the police power justification necessary to sustain (without compensation) *any*

regulatory diminution in value." n124

The Court has thus at every opportunity rejected Brandeis' idea of distinguishing between preventing harm and creating benefits. Yet, as will be demonstrated later, the distinction still exists, now in the form of the so-called "nuisance exception." n125

COMPUTER-ASSISTED RESEARCH

LEXIS: prevent! w/2 harm! w/50 fifth w/1 amendment creat! w/2
benefit! w/50 fifth w/1 amendment

§ 81.04(d) Reciprocity of Advantage.

The idea of "reciprocity of advantage" as an important element in takings jurisprudence stems from its use by Justice Holmes in *Pennsylvania Coal* to distinguish a precedent on which the claimant had relied. Only a few years earlier, a unanimous Court that included Holmes had upheld another Pennsylvania state coal mining regulation, requiring each extractor to leave a coal pillar along its property line as part of a network of walls to prevent cave-ins. n126

The difference between that regulation and the Kohler Act, Holmes wrote in *Pennsylvania Coal,* was that the first scheme "secured an average reciprocity of advantage that has been recognized as a justification of various laws." n127 The statement was clearly dictum and not further explained. Yet the concept endured, and eventually became an important element in takings analysis.

But not immediately. Reciprocity of advantage was not mentioned in the handful of takings cases the Court decided in the fifty-six years between *Pennsylvania Coal* and *Penn Central,* when Justice Rehnquist made it a focal point of his dissent. Rehnquist had already written that denial of the approval for claimant to build its office towers had literally "taken" its property. n128 This taking could only be justified, he opined, if the regulatory action in issue either prevented a nuisance n129 or contained an "average reciprocity of advantage." n130 While never specifically defining the term, Rehnquist seemed to consider it a shorthand expression of an older idea -- that the Takings Clause exists to prevent the state "from forcing some people alone to bear public burdens which, in all fairness, should be borne by the public as a whole." n131

Justice Brennan's majority opinion in *Penn Central* neither accepted nor specifically responded to Rehnquist's analysis. It did, however, acknowledge that one of claimant's arguments was that they had been "singled out to endure financial hardship," n132 to which it offered a three part response: 1) the designation of claimant's property came as a result of a comprehensive planning process; 2) social welfare legislation often results in some persons bearing a greater burden than others; and 3) everyone in New York, including claimants, benefitted from historic preservation. n133 Reciprocity of advantage was not necessary, but it was there anyway.

This re-introduction of the concept of reciprocity of advantage into takings jurisprudence spawned increased attention by the Court to the balancing aspect of prohibitory regulation. Sometimes it invoked Holmes' specific words, sometimes not. In *Agins v. City of Tiburon,* for example, the majority opinion stated that one reason the zoning ordinance in question did not effect a taking was that:

> [t]here is no indication that the appellants' ... tract is the only property affected ... Appellants therefore share with other owners the benefits and burdens of the city's exercise of its police power. In assessing the fairness of the zoning ordinance, these benefits must be considered along with any diminution in market value that the appellants might suffer. n134

Similarly, though not identically, in *MacDonald, Sommer & Frates v. Yolo County* n135 the Court noted that "local

agencies charged with administering regulations governing property development are singularly flexible institutions; what they take with the one hand they may give back with the other." n136

The original phrase returned in *Keystone,* the mirror image of the case in which it was first written. One of the reasons the mining limitations at issue there were constitutional, wrote Justice Stevens, was because "reciprocity of advantage" showed "the [s]tate's interest in the regulation" was present. n137 Later the same term the Court noted in *Hodel v. Irving* that an otherwise unconstitutional scheme limiting the transferability of Indian property holdings was rendered more acceptable because "there is something of an 'average reciprocity of advantage' [citing *Pennsylvania Coal*] to the extent that [all tribe members indirectly benefitted from the statute.]" n138

Note there are at least three different ideas entering cases under the rubric of "reciprocity of advantage." The first, introduced in *Pennsylvania Coal* and picked up in Rehnquist's dissent in *Penn Central,* is that a regulation is unconstitutional if it places too heavy a public burden on a private owner. The second, hinted at in *Agins* and *Yolo County,* then specifically invoked in *Hodel v. Irving,* is that a regulation that otherwise "goes too far" can be saved if the claimant obtains sufficient benefits from the scheme of which the regulation is a part. The third, and most idiosyncratic, is Stevens' concept in *Keystone* that reciprocity of advantage is related to the state's valid interest in regulating in the first place. n139

COMPUTER-ASSISTED RESEARCH

LEXIS: reciprocity w/1 advantage

§ 81.04(e) Distinct (Reasonable) Investment-Backed Expectations.

Many of the factors "of particular significance" Justice Brennan identified in *Penn Central* in his attempted restatement of previous Court takings decisions were clearly recognizable from those prior opinions. Only one appeared as completely new. In discussing the importance of the impact of a regulation on the claimant, Brennan wrote that a particularly important aspect of impact was "the extent to which the regulation has interfered with distinct investment-backed expectations." n140 The opinion cited *Goldblatt* for this proposition, but a search of the referenced page reveals neither the words Brennan invoked nor any idea apparently related to the words. n141

The motivation for this innovation was revealed three pages later. For several paragraphs after the introduction of the term "distinct investment-backed expectations" Brennan discussed regulatory schemes that had been held constitutional despite very substantial impacts on the claimants because the schemes fell within the police power. One case, though, did not fit within the pattern, and was of such significance that it could not be ignored. So Brennan concluded his discussion of police power regulations by noting that:

> *Pennsylvania Coal Co. v. Mahon* ...is the leading case for the proposition that a state statute that substantially furthers important public policies may so frustrate distinct investment-backed expectations as to amount to a 'taking.' n142

The idea of distinct investment-backed expectations was thus born as either a nice or an artificial way of distinguishing an important case that looked, except in result, like many others before and after it.

Its surprise origin notwithstanding, the concept immediately became a frequently invoked dictum in takings opinions. The first hint of the Court's definition of the phrase came the following year in *Andrus v. Allard,* when Brennan indicated in a footnote that whether the claimants obtained their eagle artifacts before or after the restricting regulation might affect the substantive outcome of the case, because "[t]he timing of the acquisition ... is relevant to a takings analysis of [their] investment-backed expectations." n143 And while the term was mentioned only in passing that same term in *Kaiser Aetna,* n144 a year later the same author commented that "[t]he Government's attempt to create a public

right of access ... interfered with Kaiser Aetna's 'reasonable investment backed expectations.'" n145 No one seemed to notice, or care, that "distinct" expectations had turned to "reasonable" ones.

Because the term had been invented to distinguish *Pennsylvania Coal* from apparently similar cases in which takings were not found, it was inevitable that investment-backed expectations would be raised in *Keystone*. Justice Stevens' majority opinion did not quarrel with Brennan's earlier characterization of *Pennsylvania Coal* as turning on interference with investment-backed expectations. But the regulation in *Keystone* did not. The key distinction was the Court's finding in *Pennsylvania Coal* that the regulation prohibited the "profitable" mining of the hard coal. Because *Keystone* was a facial attack on the constitutionality of the regulatory scheme, and because only seventy-five percent of the soft coal could be mined "in any event," the Court concluded that "there is no showing that petitioners' reasonable investment-backed expectations have been materially affected ...." n146

A second case that term also invoked the concept. Section 81.04(h) *infra* sets out in full the facts and holding in *Nollan v. California Coastal Commission*. n147 But it may be briefly noted here that the Court held the commission could not condition claimants' building permit on their granting a public easement across their property. In his dissent Justice Brennan attempted to turn the investment-backed expectations concept on its head, arguing that the condition should have been constitutional because, as the structure claimants sought permission to build had not yet been built, the denial of a permit did *not* interfere with any such expectations. n148 The majority's willingness to ignore the backside impact of the concept in *Nollan* prompted at least one commentator to declare the "death-knell" of the idea. n149 That view received a boost in *Lucas,* n150 where the claimant bought beachfront property on a South Carolina barrier island for almost a million dollars, then saw its value plummet two years later when a coastal protection measure passed by the South Carolina legislature rendered it unimprovable. Despite both the substantial "investment" and almost immediate impact of the regulatory scheme, the majority opinion -- while generally favorable to the claimant -- mentioned the concept only in a footnote. n151 Neither dissent mentioned it either, and only Justice Kennedy's solo dissent seemed to believe the outcome should be affected in any way by the timing of the government's action. n152

Whether the idea of protecting investment-backed expectations remains viable or merely led a short life from 1978-1987 is currently in doubt. Lower courts have continued to use the doctrine after *Nollan,* n153 but it is as yet too early to evaluate the long range effect of the Court's failure to employ it in *Lucas,* a case where it seemed to fit so well. Until that is determined minor issues such as the precise definition and the difference between "distinct" and "reasonable" expectations will be on hold.

COMPUTER-ASSISTED RESEARCH

LEXIS: distinct or reasonable w/2 investment-backed w/2 expectation!

§ 81.04(f) Economic Impact.

The economic impact of a disputed regulation on the claimant has been highly relevant to the takings calculus since Holmes' famous "go too far" dictum in *Pennsylvania Coal*. In the now unanimously accepted, two-step test of constitutionality formulated in *Agins,* the degree of impact makes up half the inquiry. n154 In truth, because the substantive due process requirement that constitutes the first half of the takings equation will almost always be present, "impact" is often the only issue in a takings challenge.

Its importance notwithstanding, the Court has had great difficulty attempting to verbalize the precise *degree* of impact that converts an otherwise valid regulation into a takings. Indeed, the Court's continuous statement that it has adopted no "set formula" for takings questions refers more specifically to the impact aspect than to any other identified "factor." n155

The concept of investment-backed expectations, while an obviously related doctrine, is simply an aspect of the overall

"economic impact" inquiry. To the degree it is still of importance, n156 the "investment-backed expectation" concept emphasizes the timing and amount of the claimant's expenditure on the property. The more general inquiry of overall impact involves the total amount of diminution without regard to any timing or aggregate of the claimant's expenditure.

Holmes' only hint about when a measure might "go too far" was his remark that the Kohler Act had made mining the coal in question "commercially impracticable," n157 a condition he equated with "appropriating or destroying it." It appears, then, that what was important to Holmes was what the claimant lost. This idea received a further boost in *Goldblatt*, where the Court indicated that "a comparison of values before and after [the regulatory action] is relevant, [but] is by no means conclusive." n158

Brennan's attempt to restate federal takings law in *Penn Central* included not only the *Pennsylvania Coal* and *Goldblatt* aphorisms, but three additional descriptions that changed the focus of the diminution inquiry. At various points in the opinion Brennan mentioned an "unduly harsh impact," n159 a resultant use that produces no "reasonable return," n160 and a diminution that leaves no "economically viable use." n161 While this last formulation was in a footnote, it eventually became the second half of the takings test set out in *Agins*.

The importance of *Penn Central*, though, is less its exact verbal formulation of what "goes too far" than its shift in focus from what the claimant lost to what the claimant has left. That shift was underscored by Brennan when he found that the historic preservation regulation did not "go too far" because of the remaining uses, and value, of the claimant's property. n162

Justice Scalia's majority opinion in *Lucas* was the first to attempt to explain why the impact test had become an inquiry into whether the regulation in question left the claimant with an "economically viable use." First, regulations that fail to leave an economically viable use go beyond the normal adjustments one must expect in a democratic society, and secure no reciprocity of advantage. Second, the need to allow governments leeway to make such adjustments fades out when governmental action wipes out a private owner's property value. Third and finally, such regulations "carry ... a heightened risk that private property is being pressed into public service." n163

The principal question remaining from *Lucas* is whether the Court said that *only* regulations that leave no economically viable use go too far. A footnote indicated as much:

> [In applying the rule] it is true that ... in some cases the landowner with 95% loss will get nothing, while the land-owner with total loss will recover in full. But that occasional result is no more strange than the gross disparity between the landowner whose premises are taken for a highway (who recovers in full) and the landowner whose property is reduced to 5% of its former value by the highway (who recovers nothing). n164

COMPUTER-ASSISTED RESEARCH

LEXIS: economic w/2 impact w/50 fifth w/1 amendment

§ 81.04(g) Regulating Without Regard to Impact: The "Nuisance" Exception.

As demonstrated in § 81.03(a), *supra*, for many years the Court looked upon regulatory takings claims as nothing more than a subset of substantive due process claims. If police power legislation had a rational relationship to a legitimate public purpose, it was constitutional without regard to any impact on the property owner. Mugler's brewery, Reinman's livery stable and Hadcheck's brickyard were all closed down by regulation, and the substantiality of their losses was not a factor in determining the constitutionality of the regulation that effected the change. n165

Without doubt that view changed with Holmes' opinion in *Pennsylvania Coal Co*. n166 What remained at issue was

whether impact was now an issue in all, or only in some, takings cases. Brandeis' dissent in *Pennsylvania Coal* made clear his view that some kinds of legislation were constitutional without regard to impact. n167 But the issue was not addressed by the majority, and lay dormant through the following half-century of relative inattention the Court gave takings issues generally.

What was to become a principal debate in takings jurisprudence began with Brennan's restatement of the applicable law in *Penn Central*. After isolating several other "factors" that had influenced the outcome of prior regulatory takings claims, Brennan cited favorably:

> [I]nstances in which a state tribunal reasonably concluded that 'the health, safety, morals, or general welfare' would be promoted by prohibiting particular contemplated uses of land, this Court has upheld land-use regulations that destroyed or adversely affected recognized real property interests. n168

He then stated that such authority covered not only "contemplated," but also "existing" uses of land, citing, among other cases, *Mugler*, *Hadacheck*, and *Goldblatt*. He especially relied on *Miller v. Schoene*, n169 a post-*Pennsylvania Coal* case stating that:

> [T]he State had not exceeded its constitutional powers by deciding upon the destruction of one class of property [without compensation] to save another which, in the judgment of the legislature, is of greater value to the public. n170

This apparent relapse by the majority to the pre-*Pennsylvania Coal* view stirred Justice Rehnquist. In his dissent he argued that while the cases the majority cited did, indeed, ignore impact, they did so because the legislation in question outlawed particularly noxious uses. But this kind of legislation must be distinguished from the exercise of the police power generally:

> The nuisance exception to the taking guarantee is not conterminous with the police power itself. The question is whether the forbidden use is dangerous to the safety, health, or welfare of others. n171

The question, he indicated, was whether the use was a lawful one before the regulation. If not, no takings had occurred.

This debate on whether and to what degree regulations could be constitutional without regard to impact seemed to suffer a serious setback when the modern takings formula was developed in *Agins*. In holding that to pass constitutional muster in the face of a regulatory takings claim the law must pass both the substantive due process and impacts tests, the Court seemed to indicate that there was no zone of safety where impact could be ignored. n172

Yet, when the question next arose in *Keystone*, the *Penn Central* majority was back, still unwilling to concede that impact must always be judged. But Rehnquist's dissent in *Penn Central* had now set the agenda, and the majority view was far less frisky than it had been in *Penn Central* :

> The Court's hesitance to find a taking where the State merely restrains uses of property that are tantamount to public public nuisances is consistent with the notion of reciprocity of advantage ... n173

and later:

> [T]he public interest in preventing activities similar to public nuisances is a substantial one, which in many instances has not required compensation. n174

It is a long way from Brennan's reference in *Penn Central* to cases in which property values could be destroyed for "contemplated" or even "existing" uses when the police power was lawfully invoked, to Stevens timid assertion about "hesitancy" to find a takings when uses "tantamount" or "similar to" public nuisances were involved. But even this

fading luster of the classic approach to regulations aimed at eliminating harmful uses could not survive its next, and perhaps final, attack.

The principal position of the State in *Lucas* n175 was that its regulations were aimed at preventing barrier island erosion, and this harm-preventing purpose rendered the scheme constitutional without regard to its effect on the claimant. The South Carolina Supreme Court agreed:

> [T]he fact remains that the [U.S.] Supreme Court has time and again held that when a State merely regulates use, and acts to prevent a serious public *harm*, there is no 'taking' for which compensation is due. See *Mugler, Hadacheck, Miller* and *Goldblatt* ... n176

But the U.S. Supreme Court did not agree. Justice Scalia's response to the South Carolina Court's opinion conceded that "many of our prior opinions have suggested that 'harmful or noxious uses' of property may be proscribed ... without ... compensation." But he then divorced the Court from that position, asserting that the state court had been "too quick to conclude that that principle decides the present case." n177

The next several paragraphs marked the first, though probably not the last, time a majority opinion directly addressed the "nuisance exception." Scalia explained that all references in prior opinions to such a concept were merely restatements of the substantive due process requirement of a nexus to health, safety, welfare or morals. He reiterated the problem of distinguishing "harm" from "benefit" both generally and in the facts of the case before the Court. That meant, Scalia concluded, that the mere recitation by a legislature that its regulatory scheme was aimed at preventing serious harm could not be taken at face value, liberating the scheme from a determination of whether it had an unconstitutional impact on the claimant:

> The South Carolina Court's approach would essentially nullify *Mahon's* affirmation of limits to the noncompensable exercise of the police power. Our cases provide no support for this ... n178

There is, however, a "nuisance exception" of sorts, the Court decided. No impact analysis is necessary if "the proscribed use interests were not part of [the claimant's] title to begin with." First, some diminution in value is expected in a regulated society. More important, a total prohibition of uses can be imposed if it only prevents uses that would have been nuisances under the common law:

> [The regulation] ... must ... do no more than duplicate the result that could have been achieved in the courts ... under State's law of private nuisance, or ... under its complementary power to abate nuisances that affect the public generally, or otherwise. n179

Although the Court found it "unlikely that common-law principles would have prevented the erection of any habitable or productive improvements on petitioner's land," it remanded the matter as "a question of state law." n180

Justices Kennedy (concurring), Blackmun (dissenting) and Stevens (dissenting) each believed the majority had too narrowly drawn the limits of the exception, and they probably constitute enough opposition to signal a continuing struggle in cases ahead. But as of the summer of 1992 the Supreme Court had, for the first time, ruled that all takings analyses required an impact test, unless the interest prohibited was not "property" in the first place, because it was a common-law nuisance.

COMPUTER-ASSISTED RESEARCH

LEXIS: nuisance w/2 exception w/2 taking! w/2 guarantee!

§ 81.04(h) Substantive Due Process in the Modern Court: The *Nollan* Case.

While under the *Agins* test a regulation must both "substantially advance [a] legitimate state interest" and not "deny an owner economically viable use" of the property, without question most takings questions since *Pennsylvania Coal Co.* have involved the second, or impact, half of that formulation. The first half was generally thought merely to determine general applicability, and came into issue only when governments, like South Carolina in *Lucas*, attempted to say that the state interest was so strong that no impact analysis was necessary. n181

That view ended in 1987 when the Court decided *Nollan v. California Coastal Commission*. n182 The defendant commission granted the claimants permission to rebuild a home within its territorial jurisdiction, but conditioned approval on claimants' granting a walking easement between their seawall and the mean high tide line. The ultimate purpose was to allow the public to more easily traverse between public beaches in either direction from claimants' property.

The Court found the condition a taking, not because of any adverse impact -- there was none -- or, as might have been expected, because the condition authorized a permanent, public invasion. Rather the Court found that the condition failed the first half of the *Agins* test by not "substantially advanc[ing] a legitimate state interest."

The majority opinion, written by Justice Scalia, first indicated that the "substantially" adverb was critical, raising the inquiry in takings cases beyond what would be required in a usual, substantive due process inquiry. It then added that, even if the traditional substantive due process test was employed, the condition would fail, because there was absolutely no relationship between it and the public objective the commission purported to advance.

This unique analysis stirred three strong dissents, the most pointed from Justice Brennan, who accused the majority of returning constitutional jurisprudence to the *Lochner* days when it was in vogue for the Court to employ the Due Process Clause to second-guess state economic and social legislation. n183 None of the dissenters picked up the oddest aspect of the decision -- if an *ultra vires* act can be a taking, *Nollan* taken in conjunction with *First English*, means that a state or local government can be liable in damages simply for exceeding its power in enacting legislation, a unique remedy in American constitutional history. n184

Criticisms notwithstanding, *Nollan* makes clear that the Court will seriously consider takings claims based on either aspect of the *Agins* formulation, and is prepared to enter willingly into the kind of careful review of state and local regulatory schemes that most thought had been abandoned a half century ago.

COMPUTER-ASSISTED RESEARCH

LEXIS: substantially w/1 advanc! w/1 legitimate w/1 state w/1 interest

§ 81.04(i) The Current State of Federal Takings Law: A Summary.

An attempt to review and restate substantive federal takings law is more like describing a cluttered room than explaining the design of an integrated, well-ordered house. For over one hundred years the Court has piled federal takings decisions atop, beside and underneath its own precedents, with little apparent order in mind. No takings decision has ever been overruled, and each new opinion attempts to manipulate the past to justify the holding at hand. The predictable consequence is a very messy collage of strewn concepts and aphorisms that must pass for a rational jurisprudence. All articles are "in play"; any Justice can pick one up and wear it at any time. Almost all have.

That said, there are a few aspects of takings law that seem to evoke general agreement in the Court, at least until the next majority opinion is written. The most important of these is that the *Agins* test seems to be unanimously accepted as a shorthand requirement for constitutional regulation. n185 While there is widespread disagreement of how to interpret the formulation, the twin factors of the legitimacy of the governmental ends and means on the one hand, and the impact on the claimant on the other, seem well ensconced.

Another point of apparent agreement -- at least for now -- is that in determining whether a regulation has eliminated economic viability a court should assess the overall impact on the fee simple absolute rather than on a lesser, identifiable property right that is a component of the fee title. Here there is not unanimity, however, and the influence of the growing conservative view of takings generally could undermine what has been a majority view at least since *Penn Central Co.*. n186

Despite dissents at the time, there seems no backsliding on the absolute rule set out in *Loretto* that any permanent, physical invasion occasioned by regulation is a taking. n187 The only oddity came in *Nollan*, when Justice Scalia offered a *dictum* that the defendant governmental commission could have constitutionally required the claimants to allow the public a permanent viewing spot on their property. n188

The vagueness of Holmes' injunction against going "too far" long kept the Court from defining with any precision the degree of diminution required to violate that prohibition. Certainly it has been clear since *Pennsylvania Coal Co.* that a regulation which destroyed all value went "too far." Yet even after *Agins* spoke of denying "economically viable use" it was unclear whether going too far meant (1) only 100% diminutions, (2) all diminutions that made the property more costly to own than to give away, or (3) diminutions that eliminated a "reasonable return." That question may have been answered in *Lucas*, which seemed to hold that only 100% diminutions must be found to be takings. n189 Yet to say that all 100% diminutions *are* takings is not to say that all other diminutions *are not*, and it will take at least one more case for the Court to answer that most basic question.

One definite holding of *Lucas* was that there is no "nuisance exception" in the sense that a legislature can regulate without regard to impact based on its own determination that the proscribed use is a serious public harm to be terminated or prevented. The same analysis purported to bury the "prevent harm" versus "confer benefit" dichotomy. The narrow exception remaining for uses that could have been stopped by private or public nuisance action prior to regulation has no relationship to the *Agins* test, and is merely a derivative of the requirement that "property" must be lost before a takings claim can succeed. Yet the suddenness of the "no exception" holding in *Lucas*, taken in light of both a century of precedents to the contrary and three explicit statements of opposition by other Justices, reflects enough doubt within the Court to presage more discussion of the issue. And by turning back to common law nuisances, the Court, words notwithstanding, has returned again to a "prevent harm" standard.

The *Nollan* holding that violation of the first half of the *Agins* test can also be a taking is both unsurprising at one level and shocking at another. By welding the classic due process and impact tests in *Agins*, the Court obviously suggested that a regulation failing either side of the formulation should be found to be a taking. Yet the proscription against a deprivation of property without due process and the proscription against a taking without just compensation appear in different clauses of the Fifth Amendment, and only violations of the latter have ever produced damage remedies. This is a serious conceptual -- and perhaps economic -- problem for local governments, and the Court will either have to clear it up or treat *Nollan* as the odd duck it seems to have been.

Finally, there are a few concepts, notably "reasonable investment-backed expectations" and "reciprocity of advantage" that have popped up almost randomly in the past, the futures of which are completely unknown at the present. Reciprocity of advantage has been around since *Pennsylvania Coal*, but several important cases have been decided without mention of the concept. Likewise, investment-backed expectations appeared destined in *Penn Central* to become a major component of the jurisprudence, but its absence from the majority's analysis in *Lucas* indicates it has been downgraded in importance. There is no doubt it is helpful to a regulatory scheme to encompass reciprocity of advantage and hurtful to diminish reasonable investment-backed expectations, but how helpful or how hurtful is at present a considerable mystery.

FOOTNOTES:
(n1)Footnote 93. *See* § 81.03(d), *supra*.

(n2)Footnote 94. *438 U.S. at 124-125.*

(n3)Footnote 95. *324 U.S. 499 (1945).*

(n4)Footnote 96. *Willow, 324 U.S. at 502,* (Justice Jackson explaining, "We cannot start the process of decision by calling such a claim as we have here a 'property right'; whether it is a property right is really the question to be answered").

(n5)Footnote 97. *Id. at 503.*

(n6)Footnote 98. *Id. at 502.*

(n7)Footnote 99. Curtis J. Berger, Land Ownership and Use, at 11 (2d ed. 1975).

(n8)Footnote 100. *328 U.S. 256 (1946).*

(n9)Footnote 101. *Id. at 264.*

(n10)Footnote 102. *Id. at 266.*

(n11)Footnote 103. *408 U.S. 564 (1972).*

(n12)Footnote 104. *Id. Avenal v. United States, 33 Fed. Cl. 778 (1995)* (lessees of water bottoms used for oyster farming had compensable property interest in the salinity of the water, which was diminished by a federal freshwater diversion project).

(n13)Footnote 105. *See* note 79, *supra* and accompanying text.

(n14)Footnote 106. *Pennsylvania Coal Co., 260 U.S. at 419,* (Brandeis, J. dissenting).

(n15)Footnote 107. Rehnquist would have found the interference a taking because the denial was neither preventing a nuisance nor part of a scheme that offered the claimant reciprocity of advantage. *438 U.S. at 143-150.*

(n16)Footnote 108. *Id. at 130-31. Bauer v. Waste Mgt. of Conn., Inc., 662 A.2d 1179 (Conn. 1995)* (zoning regulation imposing height restriction on landfills was not an unconstitutional taking of the landfill owner's property).

(n17)Footnote 109. *444 U.S. 51 (1979).*

(n18)Footnote 110. *Id. at 65-66. Suitum v. Tahoe Reg'l Planning Agency, 117 S. Ct. 1659 (1997); Villas of Lake Jackson, Ltd. v. Leon County, 121 F.3d 610 (11th Cir. 1997).*

(n19)Footnote 111. *Keystone Bituminous Coal Ass'n v. DeBenedictis, 480 U.S. 470, 490 (1987).*

(n20)Footnote 112. *See* § 81.04(f), infra. *See also Bormann v. Board of Supervisors in & for Kossuth County, 584 N.W.2d 309 (Iowa 1998)* (an easement is a property interest which can be taken and must be compensated by the government; the actions of the board constituted a taking).

(n21)Footnote 113. *Penn Central, 438 U.S. at 124.*

(n22)Footnote 114. *444 U.S. 164 (1979).*

(n23)Footnote 115. *444 U.S. at 180.*

(n24)Footnote 116. *458 U.S. 419 (1982).*

(n25)Footnote 117. *See* § 81.03(c), *supra*.

(n26)Footnote 118. *458 U.S. at 435-36.*

(n27)Footnote 119. *458 U.S. at 435, n. 12. See also Landgate, Inc. v. California Coastal Comm'n, Supreme Court of California, 953 P.2d 1188 (Ca. 1998)* (a delay is not a taking; builder wanted to construct a house but delayed by review of his plans and debate about the creation of the parcels of land after road built through area).

(n28)Footnote 120. *Pennsylvania Coal, 260 U.S. at 422* (Brandeis dissenting).

(n29)Footnote 121. *See* Allison Dunham, A Legal and Economic Basis for City Planning, *48 Colum. L. Rev. 650 (1958);* Allison Dunham, From Rural Enclosure to Re-enclosure of Urban Land, *35 N.Y.U. L. Rev. 1238 (1960).*

(n30)Footnote 122. *438 U.S. 133, n.30.*

(n31)Footnote 123. *112 S. Ct. 2886 (1992).*

(n32)Footnote 124. *Lucas, 112 S. Ct. at 2898-99.*

(n33)Footnote 125. *See* § 81.04(g), infra. *Steel v. Cape Corp., 677 A.2d 634 (Md. App. 1996).*

(n34)Footnote 126. *Plymouth Coal Co. v. Pennsylvania, 232 U.S. 531 (1914).*

(n35)Footnote 127. *260 U.S. at 415.*

(n36)Footnote 128. *See* note 118, *supra* and accompanying text.

(n37)Footnote 129. *See* § 81.04(f), infra.

(n38)Footnote 130. *438 U.S. 147,* citing *Pennsylvania Coal, 260 U.S. at 415.*

(n39)Footnote 131. *438 U.S. at 148,* citing *Armstrong v. United States, 364 U.S. 40, 49 (1960).*

(n40)Footnote 132. *438 U.S. at 131.*

(n41)Footnote 133. *Id. at 132-34.*

(n42)Footnote 134. *447 U.S. 255, 262 (1980).*

(n43)Footnote 135. *477 U.S. 340 (1986).*

(n44)Footnote 136. *Agins, 477 U.S. at 350.*

(n45)Footnote 137. *Keystone, 480 U.S. at 488.*

(n46)Footnote 138. *Hodel v. Irving, 481 U.S. 704, 715 (1979).*

(n47)Footnote 139. For an evaluation of these ideas, see § 81.04(i), infra. For an interesting discussion of reciprocity of advantage in a lower federal court, see *Town of Indialantic v. McNulty, 400 So. 2d 1227 (Fla. 1981). Ehrlich v. City of Culver City, 50 Cal. Rptr. 2d 242 (1996)* (conditions imposed must be roughly proportional to impact caused by development).

(n48)Footnote 140. *438 U.S. 124.*

(n49)Footnote 141. *See 369 U.S. at 594.*

(n50)Footnote 142. *438 U.S. at 127.*

(n51)Footnote 143. *Andrus v. Allard, 444 U.S. 51, 65, n.21 (1979).*

(n52)Footnote 144. *Kaiser Aetna, 444 U.S. at 175.*

(n53)Footnote 145. *Pruneyard Shopping Center v. Robins, 447 U.S. 74, 84 (1980).* Justice Rehnquist was the somewhat disingenuous author of the two opinions.

(n54)Footnote 146. *Keystone, 480 U.S. at 499.*

(n55)Footnote 147. *483 U.S. 825 (1987).*

(n56)Footnote 148. *Nollan, 483 U.S. at 848.*

(n57)Footnote 149. Daniel R. Mandelker & Roger A. Cunningham, Planning & Control of Land Development, at 125 (3d ed. 1990).

(n58)Footnote 150. *Lucas v. South Carolina Coastal Council, 112 S. Ct. 2886 (1992).*

(n59)Footnote 151. *Lucas, 112 S. Ct. at 2895, n.8.*

(n60)Footnote 152. *Id. at 2903* (Kennedy, J. concurring).

(n61)Footnote 153. Compare *Loveladies Harbor Inc. v. United States, 15 Cl. Ct. 381 (1990)* with *Ciampitti v. United States, 22 Cl. Ct. 310 (1991).*

(n62)Footnote 154. *See* § 81.3(d), *supra* and accompanying text. *Applegate v. United States, 35 Fed. Cl. 406 (1996); Garrett v. City of Topeka, 916 P.2d 21 (Kan. 1996); K & K Constr., Inc. v. Department of Natural Resources, 551 N.W.2d 413 (Mich. App. 1996).*

(n63)Footnote 155. *Penn Central, 438 U.S. at 124* quoting *Goldblatt, 369 U.S. at 594; New Port Largo, Inc. v. Monroe County, 95 F.3d 1084 (11th Cir. 1996).*

(n64)Footnote 156. *See* § 81.04(e), *supra*.

(n65)Footnote 157. *Pennsylvania Coal Co., 260 U.S. at 414.*

(n66)Footnote 158. *Goldblatt, 369 U.S. at 594* (citation omitted); *Clajon Prod. Corp. v. Petera, 70 F.3d 1566 (10th Cir. 1995)* (licensing limits on the right to hunt surplus game on a rancher's property did not destroy all the beneficial use of the property and so was not a taking); *Volkema v. Department of Natural Resources, 542 N.W.2d 282 (Mich. App. 1996)* (no compensation was awarded for a portion of owner's property rendered useless by wetlands classification, because that classification caused only a diminution in the value of the property).

Dodd v. Hood River County, 136 F.3d 1219 (9th Cir. 1998) (couple bought forest land with intention of building a residence. Zoning forbids building any building not used for harvesting timber. Not a complete taking -- must use partial taking test - loss of economic use vs. public policy interests.); *K & K Constr., Inc. v. Department of Natural Resources, 575 N.W.2d 531 (Mich. 1998)* (Plaintiff's property to be considered as a whole when considering taking claims; land divided into four parcels -- two are developed but other two couldn't be developed because of wetland regulations).

(n67)Footnote 159. *Penn Central, 438 U.S. at 127.*

(n68)Footnote 160. *Id. at 129.*

(n69)Footnote 161. *Id. at 138, n.36.*

(n70)Footnote 162. *Id. at 136-138.*

(n71)Footnote 163. *Lucas, 112 S. Ct. at 2891.*

(n72)Footnote 164. *Id. at 2895, n.8; Zealy v. City of Waukesha, 548 N.W.2d 528 (Wis. 1996).*

(n73)Footnote 165. *See* respectively, *123 U.S. 623 (1887); 237 U.S. 171 (1915); 239 U.S. 394 (1915).*

(n74)Footnote 166. *See* § 81.06, *supra*.

(n75)Footnote 167. *Pennsylvania Coal Co., 260 U.S. at 422* (Brandeis, dissenting).

(n76)Footnote 168. *Penn Central, 438 U.S. at 125.*

(n77)Footnote 169. *276 U.S. 272 (1928);* see notes 85, 86, *supra* and accompanying text.

(n78)Footnote 170. *Penn Central, 438 U.S. at 126,* citing *276 U.S. at 279.*

(n79)Footnote 171. *Penn Central, 438 U.S. at 145* (Rehnquist, J. dissenting).

(n80)Footnote 172. *See* note 106 *supra* and accompanying text.

(n81)Footnote 173. *Keystone, 480 U.S. at 491.*

(n82)Footnote 174. *Id. at 492.*

(n83)Footnote 175. *See* note 134, *supra* and accompanying text.

(n84)Footnote 176. *Lucas v. South Carolina Coastal Council, 404 S.E.2d 895, 900 (S.C. 1991)* (emphasis in original).

(n85)Footnote 177. *Lucas, 112 S. Ct. at 2897.*

(n86)Footnote 178. *Id. at 2898.*

(n87)Footnote 179. *Id. at 2900.* The opinion also narrowly circumscribes the "or otherwise" by limiting it to actions taken to save some property from "grave threats" by destroying other property. *Id.* at n.16; *Zeman v. City of Minneapolis, 552 N.W.2d 548 (Minn. 1996).*

(n88)Footnote 180. *Id.* at 2901.

(n89)Footnote 181. *See* § 81.04(g), *supra*.

(n90)Footnote 182. *483 U.S. 825 (1987).*

(n91)Footnote 183. *Nollan, 483 U.S. at 843-845* (Brennan, dissenting). For a review of the substantive due process era see § 81.05, *supra*.

(n92)Footnote 184. For an extended analysis of the anomaly Nollan presents, see Michael I. Davis & Robert L. Glicksman, To The Promised Land: A Century of Wandering and a Final Homeland for the Due Process and Taking Clauses, *68 Or. L. Rev. 393 (1990).*

(n93)Footnote 185. *See* § 81.03(d), *supra*.

(n94)Footnote 186. *See* § 81.04(a)(2), *supra*. Chief Justice Rehnquist's opinions in both Penn Central and Keystone reflect a view contrary to the majority. It has been suggested that he and other members of the Court have been influenced by Professor Epstein's theory that would considerably expand the scope of the taking clause. *See* Richard A. Epstein, Takings: Private Property and The Power of Eminent Domain (1985).

(n95)Footnote 187. *See* § 81.04(b), *supra*.

(n96)Footnote 188. *Nollan, 483 U.S. at 836.*

(n97)Footnote 189. *See* § 81.04(f), *supra*.

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CHAPTER 81 REGULATORY TAKINGS

9-81 Thompson on Real Property, Thomas Editions § 81.05

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§ 81.05 The Takings Cause of Action.

[Go To Supp]

The overwhelming emphasis in regulatory takings jurisprudence has always been on the development of the substantive law that has been extensively reviewed in the preceding sections of this chapter. Yet there is a distinct cause of action involved in bringing a takings case, and that cause of action has itself been the object of considerable attention. Some of this scrutiny has concerned the application of general principles of federal procedural law to takings law. Issues of jurisdiction, abstention and immunity particularly fall into this set. Other issues generated by takings cases include ripeness, immunity and remedies. This section will review aspects of the federal takings cause of action in the general chronological order they might arise in an actual case.

COMPUTER-ASSISTED RESEARCH

LEXIS: cause w/1 action w/5 taking!

§ 81.05(a) Inverse Condemnation Under the Federal Constitution.

§ 81.05(a)(1) The Takings Cause of Action.

The initial issue a claimant confronts in bringing a lawsuit alleging regulatory takings by the government is setting forth the basis on which the plaintiff can claim access to the court for redress. While even the question may seem puzzling today, for much of the history of the Fifth and Fourteenth Amendments the answer was not obvious.

The Supreme Court has seldom addressed the issue of the source of the right for property owners to bring claims for inverse condemnation. While the Tucker Act, *28 U.S.C.A. § 1346* (1992 Supp.), waiving federal immunity in certain instances, has been law for more than a century, there has never been a federal statute specifically creating an inverse condemnation action against the federal government, much less against a government at any other level. n190 The question, then, has been whether such a right arises from the constitution itself.

The initial answer came in a case alleging a traditional, rather than a regulatory, takings against the United States. When

a circuit court ruled that the federal government need not pay interest on certain inverse condemnation claims against it under the Tucker Act because there was no statutory basis for such an award, the Court responded:

> This ruling cannot be sustained. The suits were based on the right to recover just compensation... That right was guaranteed by the Constitution... [T]hat condemnation proceedings were not instituted and that the right was asserted in suits by the owners did not change the essential nature of the claim... It rested upon the Fifth Amendment.

Statutory recognition was not necessary. n191

A much later suit against the United States confirmed that the modern Court would take a similar view. In holding that a certain statute did not authorize an inverse condemnation action, Justice Rehnquist differentiated between eminent domain and its claimant-initiated analog by offering the Court's view of the nature of inverse condemnation:

> The phrase "inverse condemnation" appears to be one that was coined simply as a shorthand description of the manner in which a landowner recovers just compensation for a taking of his property when condemnation proceedings have not been instituted... A landowner is entitled to bring such an action as a result of the "self-executing character of the constitutional provision with respect to compensation ...." n192

The applicability of the idea of a self-executing Fifth Amendment to regulatory takings claims against state or local governments depended on two extensions of the Court's view of actions against the United States. First and most important, the Court had to accept the argument that the remedy for a regulatory takings should be the same as that for a traditional taking. That was done in *First English Evangelical Lutheran Church v. County of Los Angeles*, n193 a case discussed in detail in § 81.05(c)(3), *infra*. Additionally, it had to determine that nothing in the federal system prevented imposition of the same standards against state and local governments as were imposed against the federal government.

This second extension occurred implicitly. Less than two years after the Rehnquist opinion accepting the "self-executing" nature of the Fifth Amendment against the federal government, the Court refused, on ripeness grounds, to hear a regulatory takings claim against a municipality. In what became a famous dissent, Justice Brennan disagreed on the ripeness issue, then stated his views that (1) inverse condemnation actions could be brought against all governments, and (2) that Rehnquist's earlier distinction between eminent domain and inverse condemnation notwithstanding, successful inverse condemnation actions against state and local governments must be treated just like condemnation suits:

> It should be noted that the Constitution does not embody any specific procedure or form of remedy that the States must adopt... The only constitutional requirement is that the landowner must be able meaningfully to challenge a regulation that allegedly effects a "taking" and recover just compensation if he does so. n194

While this broad view of the nature of the inverse condemnation right is but a decade old, it has never been challenged by a single member of the Court. By the time *First English* was decided in 1987 Rehnquist merely announced that the right to bring the claim under the Fifth and Fourteenth Amendments was self-executing, apparently feeling no need to mention that the defendant was neither a state nor the federal government, even though the Court had never formally held the self-executing right was good against an abusing government at any level. n195

COMPUTER-ASSISTED RESEARCH

LEXIS: inverse w/1 condemnation self-execut! w/5 fifth w/1
amendment

§ 81.05(a)(2) Jurisdiction.

Once the right to bring an action for inverse condemnation is established, a property owner faces little difficulty locating a jurisdictional base on which to ground a complaint. If the action is against the United States, the claim must be brought under the Tucker Act, which waives sovereign immunity under the terms set out in the statute. The relevant language of the statute grants jurisdiction over: "Any ... claim against the United States ... founded ... upon the Constitution ... in cases not sounding in tort ...." n196

The Act grants concurrent jurisdiction for claims up to $10,000 to the district courts and the United States Claims Court. Claims above that amount must be brought in the Claims Court.

If the action is brought against any other government in federal court, it must be filed under the *28 U.S.C.A. § 1343*, the general federal question jurisdiction statute. The critical language grants jurisdiction to the district courts to hear: "[A]ny civil action ... [t]o redress the deprivation, under color of any State law ... ordinance ... any right ... secured by the Constitution of the United State ...." n197 The language precisely covers takings claims against all governments except the United States, because all such actions must be grounded in an allegation of a deprivation of due process under the Fourteenth Amendment.

The takings cause of action against a government other than the United States may, and often must, n198 be filed in a state court of general jurisdiction, which has concurrent jurisdiction to hear complaints alleging a deprivation of a federal constitutional right. n199

COMPUTER-ASSISTED RESEARCH

LEXIS: jurisdiction w/15 inverse w/1 condemnation tucker w/1 act
w/15 inverse w/1 condemnation

§ 81.05(b) Restrictions on Bringing Takings Claims.

The previous section demonstrates that a claimant alleging a regulatory takings has a universally accepted cause of action operating through universally accepted jurisdictional bases. There remain, however, a number of possible impediments between filing the action and receiving a determination on the substantive merits of that action. At least one of these -- a statute of limitations defense -- can arise without regard to where the claimant files the action. Others arise exclusively or most frequently in the federal court system. This section reviews the principal nonsubstantive restrictions on takings actions, most of which involve merely the application of general principles to the regulatory takings field.

COMPUTER-ASSISTED RESEARCH

LEXIS: restrict! w/15 taking! w/2 claim!

§ 81.05(b)(1) Statute of Limitations.

Regardless of the forum in which an owner files a takings claim, there exists the possibility of a statute of limitations challenge to the action. If the claim is filed against the United States in an appropriate federal forum under the Tucker Act, the applicable limitation is clearly established. If, on the other hand, the complaint is lodged against a state or local government, there is a considerable diversity of view on the appropriate limitation to employ, regardless of whether the claim is brought in state or federal court.

As indicated, any action against the United States under the Tucker Act brings with it a well marked statutory road map.

The general statute of limitations for claims against the federal government requires such actions to be commenced within six years. n200 As indicated above, any action for more than $10,000 under the Tucker Act must be filed in Claims Court. A separate statute on actions filed in that forum establishes the same six-year limitation. n201

Claims against other governments are not so easily categorized. This uncertainty exists in both state and federal courts. Each of those forums applies state statutes of limitations to such actions, and a disagreement about the nature of the takings action has resulted in widely diverse treatment of the limitations question.

There is no federal statute for inverse condemnation actions arising directly under the Fifth and Fourteenth Amendments. To fill this void, federal courts have generally, though not exclusively, turned to state statutes as the most logical "borrowing" source for limitations, a determination explicitly grounded on analogous treatment of claims of deprivation of constitutional rights arising under § 1983. n202

This search for the proper state source has brought a variety of answers. Probably the most thoughtful federal court analysis of the problem to date has come from the Ninth Circuit in *Azul Pacifico Inc. v. City of Los Angeles*. n203 The regulation in question was a Los Angeles ordinance restricting rights of mobile home parks. After finding a regulatory taking and noting that compensation was owing under *First English*, the court turned to the limitation issue. It first determined that a parallel 1983 claim was barred by the one-year statute of limitations applicable under California law. Recognizing that the "self-executing" claim under the Fifth Amendment was a separate action, however, the court noted:

> Although the Constitution gives [claimant] a right of action, it does not provide a statute of limitations. In such situations, federal courts generally adopt the analogous state statute of limitations ... n204

It then determined that as an "inverse condemnation" action the claim was generally subject to that state's five-year statute of limitations. It also noted, however, that courts "will not adopt state limitations periods if doing so would contravene the governing federal policy," and discussed the six-year allowance under the Tucker Act. n205 The court then completed its analysis by declining to choose between state and federal law, because the complaint was filed timely in either instance.

Other federal courts have not considered the Tucker Act alternative, and have simply borrowed directly from the state of the alleged taking. A predictable mix of choices has resulted. n206

State courts have had more opportunities to apply their own statutes of limitations to takings actions, but the trend toward considerably varying outcomes is the same as in the federal courts.

The most recent and complete treatment by a state high court came from the Kansas Supreme Court on a certified inquiry from the United States District Court of Kansas. The formal inquiry was whether the state's three-year statute of limitations for "implied contracts" was applicable to an inverse condemnation action. In its search for a proper answer the Kansas court considered the statute in question, three alternative statutes, and even the possibility that there was no statute applicable at all. n207 The court rejected the implied contract statute suggested by the federal court, even though it had itself frequently referred to an inverse condemnation action as "akin to an action on implied contract." n208 The proper limitation statute, the court noted must recognize that "the basic right to compensation for property taken for public purposes is a constitutional one." n209 After determining that a statute should apply, then rejecting both the adverse possession and general catchall limitation statute, the court decided upon Kansas Statutes Annotated § 60-507:

> No action shall be maintained for the recovery of real property or for the determination of any adverse claim or interest therein ... after fifteen (15) years from the time the cause of action accrued. n210

This analysis, emphasizing the nature of the takings claim as the basis of determining the appropriate limitations statute, is a model other state courts have followed, though most assume rather than explain their choice. Some state courts have ultimately chosen a statute similar to that selected in Kansas, analogizing the action to an adverse possession claim. n211 At least one state chose the statute that Kansas rejected, that for actions in implied contract. n212 At least one state applied its general trespass limitation statute, n213 and another the catchall statute for unspecified wrongs. n214 Again, the diversity of outcomes has stemmed directly from the different characterizations of the takings action by the reviewing courts.

COMPUTER-ASSISTED RESEARCH

LEXIS: statute w/1 limitation! w/15 taking! w/2 claim!

§ 81.05(b)(2) Abstention.

The next subsection discusses the difficulties that will often prevent a claimant from filing a regulatory takings claim in federal court. But even if "ripeness" and all other justiciability requirements are met, the claimant may confront the "abstention" doctrine, which holds that in certain circumstances a federal court should not adjudicate a claim over which it has full authority, because a decision could be avoided through clarification of state law. The abstention doctrine has three principal subsets, each named for the Supreme Court decision that spawned it: 1) abstention to avoid federal constitutional rulings [*Pullman* abstention]; 2) abstention to avoid interference with complex state administrative processes [*Burford* abstention]; and 3) abstention to avoid interference with state court proceedings [*Younger* abstention]. Each of the first two kinds of abstention have been invoked in land use cases generally, and each can be or has been invoked in regulatory takings claims filed in federal court.

The purposes of the *Pullman* abstention, which requires deference to state court interpretations of state law, are to lessen friction between the federal and state governments, to reduce the possibility of error in interpreting state laws and regulations, and to avoid constitutional rulings. n215 Before it can abstain from a federal action the court must satisfy itself that the state law is substantially uncertain and that there is a reasonable possibility that a federal constitutional interpretation can be avoided. n216

An example of the application of *Pullman* to a regulatory takings claim came in *Rancho Palos Verdes Corp. v. City of Laguna Beach,* n217 where the Ninth Circuit approved a district court abstention from a broad scale attack on city policies regarding the claimant's large, recently-annexed tract. Abstention was proper because:

> The state is also struggling with the problem facing cities and counties in those cases where their zoning efforts to preserve open space ... may unwittingly have resulted in a seizure of property rights ... Federal courts must be wary of intervention that will stifle innovative state efforts to find solutions to complex social problems. n218

A more typical *Pullman* abstention came in the case examined in the previous subsection, in which the federal district court abstained so that the Kansas Supreme Court could determine the statute of limitations for a regulatory takings claim. n219 This same desire to avoid federal constitutional questions has motivated abstention by other lower federal courts as well. n220

The same policies that underlie *Pullman* abstention impel *Burford* abstention, which dictates deference when complex state administrative machinery exists that could be used to resolve a controversy. The *Burford* doctrine exists especially, though, to avoid mistakes in interpretation and to avoid friction with state entities. n221

The fundamentally local nature of land use control in this country almost eliminates any possibility that traditional land

planning regulations would be subject to *Burford* abstention. Indeed, several federal courts have refused to abstain on *Burford* grounds, while none has abstained solely on that basis. Yet *Burford* was used in conjunction with *Pullman* to provide abstention grounds in at least two cases. n222

More important, one can foresee the time when complex state-initiated and administered environmental controls such as those at issue in *Lucas* n223 could well fall directly within the reach of this doctrine.

It is clear that if abstention occurs under *Burford* the district court must dismiss the case. In a *Pullman* abstention, however, the federal court can retain jurisdiction until the state issues are decided. n224 The most satisfactory solution in *Pullman* cases is often to have the district court "certify" the state question to a state appeals court. While such a procedure can only be used if the state has a statute allowing it, a substantial majority now do. n225 The time and cost savings that certification brings in *Pullman* abstentions are obvious, and that is why the procedure has been specifically praised by the Supreme Court. n226

COMPUTER-ASSISTED RESEARCH

LEXIS: abstention w/15 taking! w/2 claim! or regulat!

§ 81.05(b)(3) Ripeness.

The chief obstacle to bringing a takings case in federal court is not abstention. It is ripeness, a doctrine that over the past fifteen years has been virtually custom made by the U.S. Supreme Court for the regulatory takings cause of action, and which has grown to become an almost insurmountable barrier to using the federal courts for litigating these claims. It has also grown to be a significant threat to bringing takings claims in state court.

To the very alert, the first hint that a major procedural problem might be developing came near the end of Brennan's analysis in *Penn Central Co.*, when he suggested that one reason the decision had not effected a taking was because the city had denied the claimant only two specific plans, leaving the possibility open for approval of a subsequent plan. n227 Two years later in *Agins* the tone became a bit more direct when the unanimous opinion noted that the claimants had "never ... sought approval for development of their land under the [applicable regulations]" and thus were "free to pursue their reasonable investment expectations by submitting a development plan to local officials." n228 The first claimant which was denied access to the federal courts under the still-nascent ripeness doctrine came the following year when the Court held that a regulatory takings claim arising under the Surface Mining Control and Reclamation Act of 1977 should not have been decided by the district court, because it was not "ripe." n229 The reason the claim was not ripe was that:

> There is no indication in the record that appellees have availed themselves of the opportunities provided by the Act to obtain administrative relief by requesting either a variance ... or a waiver ... n230

None of these decisions received a great deal of attention, at least for the developing idea of ripeness. Thus it still came as a major shock to most when the Court used the next possible opportunity to cite *Penn Central Co.*, *Agins*, and *Hodel* as bases for the development of a sweeping new restriction on takings actions generally and takings actions in the federal courts especially.

The issue in *Williamson County Planning Commission v. Hamilton Bank* n231 was whether the claimant was barred from bringing its regulatory takings action because it had failed to seek a variance from certain local regulations that otherwise prevented the development. The Court held that the claim was indeed premature, and for the first time tied the ripeness doctrine directly to the nature of the regulatory takings claim:

> [T]his Court consistently has indicated that among the factors of particular significance in the

> [regulatory taking] inquiry are the economic impact of the challenged action and the extent to which it interferes with reasonable investment-back expectations... Those factors simply cannot be evaluated until the administrative agency has arrived at a final, definitive position regarding how it will apply the regulations at issue to the particular land in question. n232

Nor was the Court through; it had yet another ripeness barrier to erect, this one especially designed for the federal courts:

> A second reason the taking claim is not yet ripe is that [claimant] did not seek compensation through the procedures the State has provided ... [I]f a State provides an adequate procedure for seeking just compensation, the [claimant] cannot claim a violation of the Just Compensation Clause until it has used the procedure and been denied just compensation. n233

The Court then noted that Tennessee law gave claimant an inverse condemnation action, thus rendering premature any claim in federal court.

A similar case a year later, in 1986, was again turned away, this time solely on the ground that the claimant had not attempted to use the procedures that could have affected the relevant agency's decision on its submission. n234

After 1986 the Court began to back off the ripeness issue, apparently for two reasons. First, most takings claims after *Williamson Bank* were filed in state courts, so the second half of the new standard was generally met. More important, much of the ripeness focus during its decade of development had been on the remedy question of whether successful claimants in regulatory takings actions were entitled to a money damage remedy. When that nagging issue was at last decided in *First English*, the momentum behind the ripeness surge died. Indeed, the turning point seemed to come in *First English* itself, when the Court found the remedy issue "ripe" in a procedural posture difficult to distinguish from *San Diego Gas & Electric* and *Agins*. n235 This trend to bypass ripeness and decide substance continued in *Lucas*, where the majority rendered a decision on the merits despite administrative changes in the South Carolina law that could have mooted the claimant's alleged unconstitutional deprivation. n236

Two aspects remain of the ripeness development. The first is that henceforth an overwhelming percentage of cases will be filed, like *Lucas*, in state rather than federal court. A more subtle but also more fundamental impact will be to make it far more difficult to file takings claims at any level based on owner-initiated regulatory decisions.

When the regulatory body has acted first, as it did in such cases as *Keystone*, *First English* or *Lucas*, it is quite easy for an inverse condemnation claimant to meet the *Williamson County* requirement that the defendant government must have reached a definitive position. But when a claim is based on a denial by the defendant of a proposal for change initiated by the landowner, as in *Agins*, *Penn Central*, or *Williamson Bank*, it is very difficult to establish that the regulatory body might not approve something of lesser intensity than that requested yet more than currently allowed. The Court may later change its position on this half of the ripeness requirement, but until that occurs it is hard to imagine circumstances under which owner-initiated claims can be heard on the merits.

COMPUTER-ASSISTED RESEARCH

LEXIS: ripeness w/15 taking! w/2 claim! or regulat!

§ 81.05(c) Remedies for Takings Claims.

Even after all procedural shoals have been avoided and a substantive takings case established, a claimant must battle for the desired remedy. Depending on the stage of the proceedings and the circumstances of the taking, that remedy might be declaratory relief, an equitable order requiring the defendant government to permit a particular use, or money

damages.

COMPUTER-ASSISTED RESEARCH

LEXIS: remed! w/15 taking! w/2 claim!

§ 81.05(c)(1) Declaratory Relief.

If a dispute between a landowner and a government is far enough along to pass the ripeness test, it would seem to fit comfortably within most state declaratory judgment acts. Indeed, the widely adopted Uniform Declaratory Judgment Act includes a provision seemingly made for such challenges:

> Any person ... whose rights ... are affected by a ... municipal ordinance ... may have determined any question of construction or validity arising under [the ordinance] ... and obtain a declaration of rights, status or other legal relations thereunder. n237

Declaratory judgments with accompanying injunctive relief have often been given to successful takings claimants, sometimes as the only alternative available to a successful claimant. n238

There are far fewer examples of declaratory judgment actions under the federal statute, n239 but the submission of a request for regulatory action that cannot be granted because of existing rules has been held to establish an "actual controversy" sufficient to invoke jurisdiction. n240

COMPUTER-ASSISTED RESEARCH

LEXIS: declaratory w/1 relief or judgement! w/15 taking! w/1 claim! or regulation!

§ 81.05(c)(2) Specific Equitable Relief.

The relatively recent imposition of tough ripeness standards on federal takings claims has considerably undercut the ability of landowners to establish regulatory takings when they are refused permission to bring a more intense use to their property. n241 In the instances when that remains possible, however, a successful claimant will sometimes seek the specific equitable relief of having the court order the defendant government to grant the use requested without further legislative consideration.

While there is little federal court precedent on the question of whether such orders can issue, states have varied in their responses to such specific prayers. A majority of courts have refused to order specific relief, holding that such a mandate would interfere too much with the legislative prerogatives of the local governing body. One court explained its choice in a zoning refusal case:

> The judiciary has no right or authority to substitute its judgment for that of the legislative branch ... Courts are not super zoning commissions and have no authority to classify property according to zones. n242

The outcome of a finding of unconstitutionality in such jurisdictions is either a remand to the legislative body for further consideration, or a simple invalidation that leaves the property unregulated until the local government acts again.

Other courts, unhappy with such cumbersome alternatives, have been willing to allow courts to grant such orders on the theory that the trial court has adjudicated the appropriateness of the claimant's desired use as well as the constitutionality of the defendant's position:

> In such cases the relief awarded may guarantee that the owner will be allowed to proceed with [the desired] use without further litigation and that he will not proceed with a different use. n243

A growing number of courts have tried to walk between these extremes by giving the legislative body another chance to review independently the reasonableness of the proposed use:

> [T]he trial court should give notice to the zoning authority that, within a reasonable time, it may, at its option, rezone the property. Further notice should be given that, if the property is not rezoned within such a period of time, the court will authorize the property owner to proceed with the proposed use if, on the basis of the evidence before it, the court determines the proposed use to be reasonable. n244

Such a position seems to fit neatly between the Scylla of starting over and Charybdis of a judicially-mandated regulation.

COMPUTER-ASSISTED RESEARCH

LEXIS: equitable w/1 relief w/15 taking! w/1 claim!

§ 81.05(c)(3) Damages.

By far the most attention in the remedies area has been focused on the question of damages. Interestingly, it was over a half century after *Pennsylvania Coal* when the question first arose whether a successful claimant in a regulatory takings case could receive interim or permanent damages. The plaintiff in *Pennsylvania Coal Co.* had sought only equitable relief, and for the next several decades it was assumed that invalidation or some equitable equivalent was the only relief available to successful regulatory takings litigants.

By the 1970s this assumption had been transformed into a question, drawn out in significant part by the pens of academia. n245 The real issue soon became apparent, which was whether Holmes' reference to a "takings" in *Pennsylvania Coal Co.* was equating overregulation with traditional invasion or merely a shorthand way of describing an *ultra vires* act that involved land use regulation.

The first answers came from prominent state high courts, both of which held that no damage remedy could be awarded for a regulatory takings. The New York Court of Appeals ruled out damages, holding that there was not only a jurisprudential difference between regulatory and traditional takings but that the regulatory variety were not takings at all. n246 Three years later the California Supreme Court agreed with New York's conclusion, but on the policy grounds that such a specter would greatly damage local land use planning and regulation. n247

This view flowed primarily from the perspective that Holmes had used the word takings metaphorically in *Pennsylvania Coal Co.*, and this was the view directly attacked by Brennan in his dissent in *San Diego Gas & Electric Co.*. The metaphor position, Brennan opined, "fails to recognize the essential similarity of regulatory taking and other 'takings'." A taking is a taking, and once one is found just compensation is required. The compensation need not be for the full market value of the property, for the government always has the opportunity to roll back the unconstitutional regulation. But even if the regulation is lifted, interim damages must be paid for the time during which the taking occurred. n248 The sudden popularity of the ripeness doctrine delayed by several years the Court's formal acceptance of Brennan's position. n249 That came finally in *First English*, in which the majority at last removed the quotation marks from regulatory "takings," equating them fully with their traditional brethren in requiring the award of just compensation on either an interim or permanent basis. n250

In the rare case where a government maintains a regulation that "goes too far" after a final adjudication of unconstitutionality, the claimant would be entitled to fair market value of the lost development rights as a permanent

taking. n251 The method of measuring the more usual interim damage is not so clear. State courts and lower federal courts have employed at least a half-dozen formulae for calculating temporary damages. Among the most popular have been:

> 1) Rate of return. This method calculates the fair return on the diminution in market value over the period of deprivation. n252
>
> 2) Fair rental value. This method is particularly useful when a preexisting use is denied. The rental allowed is usually at the highest and best use of the property for the period. n253
>
> 3) Before/after valuation. This method is often used in permanent takings, but cannot be used in temporary takings if appreciation has eliminated any recovery. n254
>
> 4) Option value. This method has been used by several state courts and is calculated on the basis of the cost of purchasing a one-year option on the property if it were unregulated. n255

There is little hint in *First English* of the evaluation method the Court would itself employ when a regulatory taking is found. Chief Justice Rehnquist's majority opinion did, however, compare temporary deprivations to leases, a signal that fair rental value might be preferred. The Court also indicated that the evaluation should be based on the owner's loss, not the government's gain. That viewpoint can be particularly useful for claimants in most regulatory takings cases, where it is far more difficult to determine the government's gain than the claimant's loss. n256 As a final consideration, the timing of the taking apparently begins when the regulation meets the ripeness test, usually the date on which the restriction was imposed. n257

COMPUTER-ASSISTED RESEARCH

LEXIS: damage! w/15 taking! w/1 claim!

§ 81.05(d) The § 1983 Alternative.

Any discussion of remedies for unconstitutional takings is incomplete without mention of an important, if little used, alternative to the inverse condemnation cause of action implied under the Fifth and Fourteenth Amendments. § 1983 of the Civil Rights Act of 1871 provides:

> Every person who, under color of any statute, ordinance, regulation ... subjects ... any[person] to the deprivation of any rights ...secured by the Constitution ... shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. n258

Not every land use decision is subject to challenge under § 1983, but there is no fundamental reason why an unconstitutional deprivation of a claimant's property under the Fifth and Fourteenth Amendment would not be. n259 But while a § 1983 action carries certain advantages of the traditional inverse condemnation action, there are also very significant barriers to its use.

The most important advantage the § 1983 cause of action carries over inverse condemnation is a broader choice of both defendants and remedies. The Court has likened a § 1983 action to a constitutional tort, opening the possibility of consequential damages not available under inverse condemnation. n260 While punitive damages are not available against local governments, they are available against local officials, even if the claimant can establish only nominal actual damages. n261 A successful claimant can also receive attorney's fees under *42 U.S.C. § 1988,* whether success is achieved through settlement or final judgment. n262

These advantages notwithstanding, most "takings" actions are not brought under § 1983, for the simple reason that the disadvantages inherent in that cause of action are even greater than the advantages. Because states are not considered "persons" under § 1983, there can be no money damage judgments against a state defendant under its provisions. That alone eliminates from the reach of the statute claims based on state regulatory schemes such as those in *Keystone* and Lucas. n263 Local governments and their individual members are "persons," subject to damage liability, but federal circuit courts have held they have absolute immunity for their legislative actions. n264 With that, cases such as *Agins* and *First English* disappear, where the action in question is legislative by state definition.

Local officials are also absolutely immune if the action in question is adjudicatory in nature. n265 Thus, the only actions local officials can be held accountable for under § 1983 are administrative acts, and even then the officials have a qualified immunity that renders them liable only if they have acted in derogation of a clearly established constitutional right, a circumstance very difficult to establish in the takings field. n266 Imagine the difficulty of proving that the officials in *Penn Central* or *Nollan* took their actions in knowing violation of the claimant's constitutional rights.

In sum, actions for takings under § 1983 at first seem tempting because of theoretical advantages this cause of action brings over the implied action under the Constitution. But those advantages fade quickly when held to the light of Court interpretations of § 1983 which, taken as a whole, eliminate almost all likely defendants from most cases in which damages are sought.

COMPUTER-ASSISTED RESEARCH

LEXIS: § 1983 w/15 taking! w/1 claim! § 1983 w/1 cause w/1 action

FOOTNOTES:
(n1)Footnote 190. *See* § 81.05(b), infra.

(n2)Footnote 191. *Jacobs v. United States, 290 U.S. 13, 16 (1933).*

(n3)Footnote 192. United States v. *Clarke, 445* U.S. 253, 257 (1980) [citing 6 Philip Nichols, Eminent Domain § 25.41 (3d rev. ed. 1972)].

(n4)Footnote 193. *482 U.S. 304 (1987).*

(n5)Footnote 194. *San Diego Gas & Elec. Co. v. City of San Diego, 450 U.S. 621, 661 (1981)* (Brennan dissenting).

(n6)Footnote 195. *See 482 U.S. at 315.*

(n7)Footnote 196. *28 U.S.C. § 1346*(a)(2) (1992 Supp.).

(n8)Footnote 197. *28 U.S.C. § 1343*(3).

(n9)Footnote 198. *See* § 18.05(b)(3), infra.

(n10)Footnote 199. Erwin Chemerinsky, Federal Jurisdiction § 5.1 (1989).

(n11)Footnote 200. *28 U.S.C. § 2401*(a) (1992 supp.). The provision also contains a disability waiver.

(n12)Footnote 201. *28 U.S.C. § 2501.*

(n13)Footnote 202. *Wilson v. Garcia, 471 U.S. 261 (1985). See* § 81.05(d), infra.

(n14)Footnote 203. *948 F.2d 575 (9th Cir. 1991).*

(n15)Footnote 204. *Azul Pacifico, 948 F.2d at 587.*

(n16)Footnote 205. *Id.*

(n17)Footnote 206. *Mississippi River Transmission Corp. v. Tabor, 757 F.2d 662 (5th Cir. 1985); Foster v. City of Detroit, 405 U.S. 138 (6th Cir. 1968); Lerman v. City of Portland, 675 F. Supp. 8 (D. Me. 1987); Barbaccia v. County of Santa Clara, 451 F. Supp. 260 (N.D. Cal. 1978).*

(n18)Footnote 207. *Hiji v. City of Garnett, 804 P.2d 950 (Kan. 1991).*

(n19)Footnote 208. *Id. at 957.*

(n20)Footnote 209. *Id.*

(n21)Footnote 210. *Id. at 958.*

(n22)Footnote 211. *Love v. Postal Telegraph-Cable Co., 20 S.E.2d 337 (N.C. 1942); Barker v. St. Louis County, 104 S.W.2d 371 (Mo. 1937).*

(n23)Footnote 212. *Prendergast v. Northern Va. Regional Park Auth., 313 S.E.2d 399 (Va. 1984).*

(n24)Footnote 213. *Dekalb County. v. Daniels, 329 S.E.2d 620 (Ga. 1985).*

(n25)Footnote 214. *Hart v. Detroit, 331 N.W.2d 438 (Mich. 1982).*

(n26)Footnote 215. *Railroad Comm'n of Texas v. Pullman Co., 312 U.S. 496 (1941). San Remo Hotel v. City & County of San Francisco, 145 F.3d 1095 (9th Cir. 1998)* (dispute over state regulations that prohibit changing residential rooms in hotels to tourist accommodations sent back to state court for determination because of the complexities of the case and the state law issues).

(n27)Footnote 216. Erwin Chemerinsky, Federal Jurisdiction at 599 (1989).

(n28)Footnote 217. *547 F.2d 1092 (9th Cir. 1976).*

(n29)Footnote 218. *Rancho Palos Verdes Corp. v. City of Laguna Beach, 547 F.2d at 1095.*

(n30)Footnote 219. *See Hiji v. City of Garnett, 804 P.2d 950 (Kan. 1991)* and § 18.05(b)(1), *supra*.

(n31)Footnote 220. *Rooke v. City of Scotts Valley, 664 F. Supp. 1342 (N.D. Cal. 1987).*

(n32)Footnote 221. *Front Royal & Warren County Indus. Park Corp. v. Town of Front Royal, Va., 135 F.3d 275 (4th Cir. 1998)* (people bought property which was then annexed to the town, but town refused to build sewer line to the property).

(n33)Footnote 222. *Corder v. City of Sherwood, 579 F. Supp. 1042 (E.D. Ark. 1984); Kent Island Joint Venture v. Smith, 452 F. Supp. 455 (D. Md. 1978).*

(n34)Footnote 223. *See* § 81.04(g), *supra*.

(n35)Footnote 224. *England v. Louisiana State Bd. of Med. Exmrs., 375 U.S. 411 (1964).*

(n36)Footnote 225. Erwin Chemerinsky, Federal Jurisdiction at 616, n.16 (1989).

(n37)Footnote 226. *Lehman Bros. v. Schein, 416 U.S. 386, 391 (1974).*

(n38)Footnote 227. *Penn Central Co., 438 U.S. at 138.*

(n39)Footnote 228. *Agins v. Tiburon, 447 U.S. at 262.*

(n40)Footnote 229. *Hodel v. Virginia Surface Mining & Reclamation Ass'n, 452 U.S. 264 (1981).*

(n41)Footnote 230. *Hodel, 452 U.S. at 297.*

(n42)Footnote 231. *473 U.S. 172 (1985).*

(n43)Footnote 232. *Williamson County, 473 U.S. at 191.*

(n44)Footnote 233. *Id. at 195.*

(n45)Footnote 234. *Cumberland Farms, Inc. v. Town of Groton, 719 A.2d 465 (Conn. 1998)* (cause ripe when final decision made by initial decision maker; gas station owner denied permit to add store to premises); *Babbitt v. Youpee, 519 U.S. 234, 1175 S. Ct. 727, 136 L. Ed.2d 696 (1997); Kruse v. Village of Chagrin Falls, Ohio, 74 F.3d 694 (6th Cir. 1996)* (landowners held not required to pursue any other state actions before maintaining this claim for compensation for taking of their land); *Timber Ridge Homes at Brookhaven, Inc. v. State, 637 N.Y.S.2d 179 (1996)* (relief for regulatory taking precluded by landowner's failure to seek an exemption from a moratorium). *Suitum v. Tahoi Reg'l Planning Agency, 80 F.3d 59 (9th Cir. 1996); Ventures Northwest Ltd. P'ship v. State, 914 P.2d 1180 (Wash. App. 1996); MacDonald, Sommer & Frates v. Yolo County, 477 U.S. 340 (1986).*

(n46)Footnote 235. *First English, 482 U.S. at 311-313.* In each of the previous two California cases a significant aspect of the appeal involved the California Supreme Court holding that damages were unavailable to successful regulatory takings applicants.

(n47)Footnote 236. *Lucas, 112 S. Ct. at 2890-92.* The Court's decision is particularly criticized in Justice Blackmun's dissent. *See 112 S. Ct. at 2916* (Blackmun, J. dissenting).

(n48)Footnote 237. Unif. Dec. Jgmt. Act § 2 (1922).

(n49)Footnote 238. *Agins v. Tiburon, 598 P.2d 25 (Cal. 1979), aff'd on other grounds 447 U.S. 255 (1980). See also* § 81.05(c)(3), infra.

(n50)Footnote 239. *28 U.S.C. § 2201.*

(n51)Footnote 240. *Steel Hill Dev., Inc. v. Town of Sanbornton, 335 F. Supp. 947 (D. N.H. 1971).*

(n52)Footnote 241. *See* § 81.05(b)(3), *supra*.

(n53)Footnote 242. *City of Conway v. Housing Auth., 584 S.W.2d 10, 13 (Ark. 1979).*

(n54)Footnote 243. *Sinclair Pipeline Co. v. Village of Richton Park, 167 N.E.2d 406, 411 (Ill. 1960).*

(n55)Footnote 244. *Union Oil Co. v. City of Worthington, 405 N.E.2d 277, 280 (Ohio 1980).*

(n56)Footnote 245. *See*, e.g., Costonis, 'Fair' Compensation and the Accommodation Power: Antidotes for the taking Impasse in Land Use Controversies, *75 Colum. L. Rev. 1021 (1975).*

(n57)Footnote 246. *Fred F. French Inv. Co. v. City of New York, 350 N.E.2d 381,* appeal dismissed *429 U.S. 990 (1976).*

(n58)Footnote 247. *Agins v. Tiburon, 598 P.2d 25 (Cal. 1979), aff'd 447 U.S. 255 (1980).*

(n59)Footnote 248. *450 U.S. 621, 651-661 (1981).*

(n60)Footnote 249. *See* § 81.05(b)(3), *supra*.

(n61)Footnote 250. *First English Evangelical Lutheran Church v. County of Los Angeles, 482 U.S. 304 (1987).*

(n62)Footnote 251. *Almota Farmers Elevator & Warehouse Co. v. United States, 409 U.S. 470 (1973).*

(n63)Footnote 252. *Wheeler v. City of Pleasant Grove, 833 F.2d 267 (11th Cir. 1987).*

(n64)Footnote 253. *Front Royal Indus. Park Corp. v. Front Royal, 749 F. Supp. 1439 (W.D. Va. 1990);* Douglas W. Kmiec, Regulatory Takings: The Supreme Court Runs Out of Gas in San Diego, *57 Ind. L. J. 45 (1982).*

(n65)Footnote 254. *Kimball Laundry Co. v. United States, 338 U.S. 1, 7 (1949).*

(n66)Footnote 255. *Anastaso v. Planning Bd. of West Orange, 484 A.2d 1358 (N.J. Super. 1984).*

(n67)Footnote 256. *First English, 482 U.S. at 319.*

(n68)Footnote 257. *Id. at 320,* note 10.

(n69)Footnote 258. *42 U.S.C. 1983.*

(n70)Footnote 259. Compare *Coniston Corp. v. Village of Hoffman Estates, 844 F.2d 461 (7th Cir. 1988) with Wheeler v. City of Pleasant Grove, 833 F.2d 267 (11th Cir. 1987). Kruse v. Village of Chagrin Falls, Ohio, 74 F.3d 694 (6th Cir. 1996)* (landowners held not required to pursue any other state actions before maintaining their § 1983 claim for compensation for taking of their land).

(n71)Footnote 260. *Carey v. Piphus, 435 U.S. 247 (1978).*

(n72)Footnote 261. *Smith v. Wade, 461 U.S. 30 (1983).*

(n73)Footnote 262. *Maher v. Gagne, 448 U.S. 112 (1980).*

(n74)Footnote 263. *Quern v. Jordan, 440 U.S. 332 (1980).*

(n75)Footnote 264. *Monell v. Department of Social Serv., 436 U.S. 658 (1978); Baytree of Inverrary Realty v. City of Lauderhill, 873 F.2d 1407 (11th Cir. 1989); Culebras Enter. Corp. v. Rivera Rios, 813 F.2d 506 (1st Cir. 1987); Gorman Towers, Inc. v. Bogoslavsky, 626 F.2d 607 (8th Cir. 1980).*

(n76)Footnote 265. *Butz v. Economou, 439 U.S. 478* (978).

(n77)Footnote 266. *Anderson v. Creighton, 483 U.S. 635 (1987).*

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CHAPTER 81 REGULATORY TAKINGS

9-81 Thompson on Real Property, Thomas Editions § 81.06

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§ 81.06 Takings Under State Law.

[Go To Supp]

While the federal courts, particularly the United States Supreme Court, were fashioning the substance and procedures of the federal regulatory takings cause of action, there were fifty parallel analyses of the problem being formed in state appellate courts. These parallel systems were often based on state constitutions and were seldom reviewed in the federal system. Not surprisingly, a crazy quilt pattern of treatments of the issue arose, some offering more protection to property owners than federal law offered, others less.

A general development, as well as a specific development have recently moved the state systems closer to the federal norm. Unquestionably, the more frequent and thoughtful attention given to the regulatory takings question by the U.S. Supreme Court has raised the visibility and attractiveness of its treatment of the issue. The predictable result has been more state courts using federal precedents as the basis for deciding their own cases. Additionally, the newly minted ripeness doctrine, coupled with *First English*'s requirement that a damage remedy always be available when a taking is found, have combined to pull state jurisprudence closer to the federal norm.

Yet traditional variances remain. Whether state appellate courts purport to apply federal substantive standards or to interpret their own constitutions, recurring examples of cases seem to have been decided differently than if they had been adjudicated in a federal court.

COMPUTER-ASSISTED RESEARCH

LEXIS: taking! w/15 state! w/15 law

§ 81.06(a) Historical Treatment of Regulatory Takings in State Courts.

The Fifth Amendment did not limit state conduct until 1897. n267 The U.S. Supreme Court did not recognize the regulatory takings cause of action until 1922. n268 For many years thereafter the Court took no further interest in the issue, n269 and it did not become actively involved in defining the substance and process of federal regulatory takings until the late 1970s. n270 Yet, the industrial revolution and the explosion of health, safety and welfare legislation it

spawned began after the Civil War. It is hardly shocking, then, that for over a century state appellate courts were the principal sources of regulatory takings law.

Nor is it surprising that the states developed highly diverse standards for adjudicating regulatory takings claims. Even after *Pennsylvania Coal Co.* there was no guidance from the U.S. Supreme Court on what degree of intrusion went "too far." Moreover, several states had constitutional provisions that differed from the text of the Fifth and Fourteenth Amendments by requiring just compensation whenever property was taken *or damaged*. n271 These factors added to the simple differences in philosophy among fifty appellate courts, yielding decisions that varied widely in the degree of freedom offered governmental entities in regulating real property use. Indeed, while all states had decisions that spanned part of the takings spectrum, some handed down decisions that still represent the absolute polar positions on how far is "too far." Examples from principal jurisdictions representing each pole are offered below.

§ 81.06(a)(1) New York: Protecting the Property Owner.

Few states have consistently rendered regulatory takings decisions more favorable to property owners than New York. Two of the famous state cases in takings history were handed down by its Court of Appeals. Though the opinions were written in different eras, each became a prime example of the extreme protection given private property rights under the Takings Clause.

The first decision came in 1938 when a property owner claimed a city ordinance restricting its rural Brooklyn lot to residential uses effected a taking under both the U.S. and New York Constitutions. The Court of Appeals reversed the Appellate Division, holding that no taking had occurred. Without saying which constitution had been violated, the high court held that the ordinance took the claimant's property because the tract could not be "profitably" used as a residence until some time in the future. n272 This apparent obligation to provide a "profitable" use is a considerably larger one than the obligation to leave an "economically viable" use, which is why *Arverne Bay* is a well-known example of a takings decision highly protective of private property rights.

An even more famous pro-claimant decision came in 1954 when the same court held that a rezoning of property from residential to "Designated Parking" effected a taking. n273 It reached this decision even though (1) the claimant had used the property as a parking lot for twenty-five years, (2) it had been a nonconforming use all that time, and (3) the parking lot use was a profitable one. In perhaps the most quoted sentence in claimants' appellate briefs since, the court said the taking occurred because the rezoning "will operate to destroy the greater part of the value of the property since ... it necessarily permanently precludes the use for which it is most readily adapted...." n274

The suggestion that any restriction is a taking that permanently "precludes the use for which [a tract] is most readily adapted marks the most extreme example of how short a distance "too far" can be.

§ 81.06(a)(2) California: Freedom to Regulate.

Across the country, the state destined to supplant New York as the nation's most populous was developing a contrary jurisprudence based on the principle of deference to state and regulatory decision making. Two of the California Supreme Court's many takings cases reflect a very different view of that issue than that espoused above by the New York Court of Appeals.

The more extraordinary case came first in California. For a number of years the City of Manhattan Beach had tried to purchase claimant's beachfront property. When the claimant at last determined to sell it to another private party, the city rezoned it from residential to "beach recreational," allowing only guard towers and signs. The claimant had paid thousands of dollars in taxes over ten years while trying to sell the property or have it upzoned. Finally, as a result of the rezoning, the claimant brought a takings action, which the California Supreme Court denied. n275 The court discussed the importance of the police power, then noted that the recreational classification gave "the owners the right to derive an

income" from the property. Of course there was no proof that the claimant could in fact derive such an income.

Another well-known case came eight years later. The claimant sought the right to extract rock, sand and gravel in an area of great value for that purpose. The area was zoned for residential and agricultural uses, but the trial court concluded it had "no appreciable economic value" as zoned and that any contrary conclusion was "preposterous." n276 Again the California Supreme Court found no taking, principally on the basis that the city's legislative judgment should be honored.

Together these decisions show a great willingness to defer to state and local regulatory actions without regard to impact on the owner. Both are difficult to reconcile with the modern takings test from *Agins*. *Manhattan Beach* almost certainly fails the first half of the test, and probably the second as well. And the *Consolidated Rock* decision is impossible to square with the requirement that a regulation leave the owner an "economically viable use."

§ 81.06(b) Modern State Takings Decisions.

The New York and California cases were not representative of state takings decisions generally. Most states vacillated across the takings spectrum, with the facts of the case and the prevailing philosophy of their high courts, creating what Professor Williams has termed "stomach jurisprudence." n277 A few even seemed to bounce from pole to pole without regard to the source of the constitutional restriction. n278

But that all seems truly history now. The merging of several forces has brought a new discipline and commonality to state regulatory takings decisions. Without doubt the most important of those forces is the intense attention the U.S. Supreme Court has devoted to the takings issue. That same Court's apparent determination to move more takings decisions to the states through the ripeness doctrine has also played an important part. The result is a new federalization of regulatory takings jurisprudence based on U.S. Supreme Court decisions. Yet, as might be expected, there are still a few holdouts among the states, reaching their own determinations either through idiosyncratic applications of federal standards or through interpretations of their own constitutions. n279

§ 81.06(b)(1) The Federalization of Takings Jurisprudence.

The point has been made elsewhere in this chapter that it was not until the *Penn Central Co.* case in 1978 that the U.S. Supreme Court began to treat the regulatory takings issue with anything approaching earnest resolve. n280 Once that began happening, however, there was an almost immediate reaction in the state appellate courts, with many adopting substantive federal standards as the Court revealed them over the next decade.

The movement toward federalization was predictable. Most state decisions handed down during the long period of U.S. Supreme Court inattention to the takings issue had been heavily fact-dependent, seemingly in wait for higher direction on how far was "too far." That was the prevailing posture regardless of whether the state in question had a constitutional provision similar to the Fifth Amendment or one that protected against both "takings" and "damage," as tribunals in the latter states generally held that the extra noun provided no extra protection in regulation cases. n281

This movement toward federal homogenization has been, and will continue to be, spurred by two of the U.S. Supreme Court's important decisions of the 1980s. As explained in § 81.05(b)(3), *supra*, the ripeness doctrine now funnels the preponderance of regulatory takings cases into the state courts. It is only natural for federal standards to follow. Also, the requirement of *First English* that all takings, temporary as well as permanent, be compensated, will apparently force all states to offer a full panoply of remedies in these cases. Again, federal standards will likely come along. n282

Most significant state land use and takings cases decided since the 1987 trilogy have reflected this trend toward federalization, n283 as have several decisions issued earlier in the decade. n284 All of these opinions purport to apply the *Agins* two-step test of constitutionality, and most use all principal federal precedents from *Pennsylvania Coal Co.* to

Keystone to resolve the substantive issue. While many do not differentiate between applying the federal constitutional amendments and their own constitutional provision, at least one tribunal acknowledged that federal standards were being used for both, even though it was a "takings or damages" state. n285

COMPUTER-ASSISTED RESEARCH

LEXIS: taking! w/15 federalization

§ 81.06(b)(2) Other Drummers: States Applying Their Own Standards.

While the homogenization described above is the clear trend, there remains a handful of states apparently intent on using their own set of standards to determine how far is "too far." These idiosyncratic positions have stemmed both from unique interpretations of the federal substantive standards and determined application of those states' own takings clauses. The great majority of these decisions have found takings when it was unlikely they would have been found in the federal system, though an occasional state court has found no taking when the intrusion seemed to have gone "too far" by federal standards. n286

A recent example of a state offering greater protection to a property owner through interpretation of federal standards was *Corrigan v. City of Scottsdale,* n287 where the court held that preventing development above an established elevation line effected a taking of claimant's property under the *Agins* test. It reached this conclusion despite the defendant's expert testimony that the regulation effected no diminution in value of the tract as a whole, and even the claimant's expert testimony that there was merely a diminution in total value from thirty-one million dollars to eighteen million dollars. It seems impossible for the court to have reached such a decision under the "no economically viable use" test, and the court itself admitted that the regulation was substantially related to a legitimate governmental interest.

The second way of giving additional protection to property owners has been to ignore the Fifth Amendment standards and utilize only the state constitution to adjudicate a regulatory takings claim. Using such a methodology both the Georgia and Pennsylvania Supreme Courts recently struck down amortization schemes -- the former for signs, the latter for adult bookstores -- as takings under their own constitutions. n288 Each of these decisions was rendered despite any evidence that the remaining uses were not "economically viable." The Minnesota Supreme Court also recently relied on its "taken, destroyed or damaged" constitutional standard to require compensation in a non-land use case, n289 and has handed down other recent decisions reflecting a similarly protective posture toward private rights in the land use context. n290

§ 81.06(c) Summary of State Takings Cases.

A full review of state regulatory takings cases leaves several lessons. First, for decades state appellate courts were the chief sources of takings decisions, and those decisions ranged over an extremely wide spectrum of philosophical and jurisprudential positions. Second, the great increase in United States Supreme Court opinions in takings cases over the past fifteen years has tended to unify takings jurisprudence around federal standards, a trend likely to continue as more cases are relegated to state court systems through the ripeness doctrine. And finally, while the federalization trend seems inevitable it is equally inevitable that state court systems will still occasionally offer decisions that reach a different result than strict application of federal standards would suggest.

FOOTNOTES:
(n1)Footnote 267. § 81.06, *supra*.

(n2)Footnote 268. *Id.*

(n3)Footnote 269. *See* § 81.03(c), *supra*.

(n4)Footnote 270. *See* § 81.03(d), *supra*.

(n5)Footnote 271. States that have "damage" provisions include Alabama, Arizona, Arkansas, California, Georgia, Illinois, Kentucky, Louisiana, Minnesota, Mississippi, Missouri, Montana, Nebraska, New Mexico, North Dakota, Oklahoma, Pennsylvania, South Dakota, Texas, Utah, Virginia, Washington, West Virginia, and Wyoming.

(n6)Footnote 272. *Arverne Bay Constr. Co. v. Thatcher, 15 N.E.2d 587 (N.Y. 1938).*

(n7)Footnote 273. *Vernon Park Realty, Inc. v. City of Mt. Vernon, 121 N.E.2d 517 (N.Y. 1954).*

(n8)Footnote 274. *Mount Vernon, 121 N.E.2d at 520.*

(n9)Footnote 275. *McCarthy v. City of Manhattan Beach, 264 P.2d 932 (Cal. 1953).*

(n10)Footnote 276. *Consolidated Rock Prod. Co. v. City of Los Angeles, 370 P.2d 342, 344 (Cal. 1962).*

(n11)Footnote 277. N. Williams, American Land Planning Law § 4.01 (1988 rev. ed.).

(n12)Footnote 278. Wisconsin is a prime example. Compare *Bino v. Hurley, 76 N.W.2d 571 (Wis. 1956)* with *Just v. Marinette Cty., 201 N.W.2d 761 (Wis. 1972).*

(n13)Footnote 279. *Kavanau v. Santa Monica Rent Control Bd., 941 P.2d 851 (Cal. 1997); Brunelle v. Town of South Kingstown, 700 A.2d 1075 (R.I. 1997). Daley v. Comm'r, Dept. of Marine Resources, Maine, 698 A.2d 1053 (Me. 1997); L.A. Ray Realty v. Town Council of Cumberland, 698 A.2d 202 (R.I. 1997); Sintra, Inc. v. City of Seattle, 935 P.2d 555 (Wash. 1997); Cottle Enter., Inc. v. Town of Farmington, 693 A.2d 330 (Me. 1997).*

(n14)Footnote 280. *See* §§ 81.03(b)-(d), *supra*.

(n15)Footnote 281. *See*, e.g., *Archer v. City of Los Angeles, 119 P.2d 1 (Cal. 1941).* In a few instances state courts have maintained that the "damaged" language broadens protection beyond that offered by the Fifth Amendment, but there is no evidence even that posture has affected regulatory takings decisions. *Grand Forks-Traill Water Users v. Hjelle, 413 N.W.2d 344 (N.D. 1987).*

(n16)Footnote 282. *Babbitt v. Youpee, 519 U.S. 234, 1175 S. Ct. 727, 136 L. Ed.2d 696 (1997);* Daddario v. Cape Cod Comm'n, - U.S. -, *118 S. Ct. 644, 139 L. Ed.2d 621 (1997);* Suitum v. Tahoe Reg'l Planning Agency, - U.S. -, *117 S. Ct. 1659, 137 L. Ed.2d 980 (1997); Bayou Des Familles Dev. Corp. v. California Coastal Comm'n, 130 F.3d 1034 (Fed. Cir. 1997).*

(n17)Footnote 283. *See Gardner v. Pinelands Comm'n, 593 A.2d 251 (N.J. 1991); Bevan v. Brandon Twp., 475 N.W.2d 37 (Mich. 1991); Finch v. City of Durham, 384 S.E.2d 8 (N.C. 1989); Birnbaum v. State, 541 N.E.2d 23 (N.Y. 1989); Richardson v. City of Honolulu, 124 F.3d 1150 (9th Cir. 1997).*

(n18)Footnote 284. *Board of Zoning Appeals v. Leisz, 702 N.E.2d 1026 (Ind. 1988)* (federal takings claim applies to state); *State v. Good Samaritan Hosp., 473 A.2d 892 (Md. 1984); Chronis v. State ex. rel. Rodriquez, 670 P.2d 953 (N.M. 1983); Seven Islands Land Co. v. Maine Land Use Reg. Comm'n, 450 A.2d 475 (Me. 1982).*

(n19)Footnote 285. *Stewart v. Rood, 796 P.2d 321 (Okla. 1990).*

(n20)Footnote 286. California decisions indicate it intends to retain its position as the most liberal of all states in deferring to local legislative discretion. *See Long Beach Equities v. Ventura Cty., 282 Cal. Rptr. 877 (Cal. App. 1991); Quirk v. Town of New Boston, 663 A.2d 1328 (N.H. 1995)* (requirement of a buffer zone around the landowner's campground was not a taking and did not interfere with the landowner's vested property rights); *Building Indus. Ass'n of Cleveland and Suburban Counties v. City of Westlake, 660 N.E.2d 501 (Ohio App. 1995)* (city park impact ordinance

that imposed a charge on new construction was held to be an unconstitutional tax on real property); *Sparks v. Douglas County, 904 P.2d 738 (Wash. 1995)* (conditioning plat approval on owner's dedicating rights of way for road improvements was not an unconstitutional taking).

(n21)Footnote 287. *720 P.2d 528 (Ariz. App. 1985), aff'd in part, vacated in (irrelevant) part, 720 P.2d 513 (Ariz. 1985), cert. denied, 479 U.S. 986 (1986).*

(n22)Footnote 288. *Lamar Adv. v. City of Albany, 389 S.E.2d 216 (Ga. 1990); PA Northwestern Distrib., Inc. v. Township of Moon, 584 A.2d 1372 (Pa. 1991).*

(n23)Footnote 289. *Segner v. Milwaukee Mut. Ins., 479 N.W.2d 38 (Minn. 1991).*

(n24)Footnote 290. *State by Powderly v. Erickson, 301 N.W.2d 324 (Minn. 1981); McShane v. City of Faribault, 292 N.W.2d 253 (Minn. 1980).*

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CHAPTER 81 REGULATORY TAKINGS

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Annotations

Annotation, *Conservation: Validity, Construction, and Application of Enactments Restricting Land Development by Dredging or Filling, 46 A.L.R. 3d 1422.*

Annotation, *Local Use Zoning of Wetlands or Flood Plain as Taking Without Compensation, 19 A.L.R. 4th 756.*

Annotation, *Pennsylvania Coal v. Mahon,* 28 A.L.R. 1321.

Annotation, *Seeking of Variance as Prerequisite for Ripeness of Challenge to Zoning Ordinance Under Due Process Clause of Federal Constitution's Fifth and Fourteenth Amendments' Post-Williamson Cases, 111 A.L.R. Fed. 483.*

Annotation, *Standing to Sue for Violation of State Environmental Regulatory Statute, 66 A.L.R. 4th 685.*

Annotation, *State Statutes of Limitations Applicable to Inverse Condemnation, 26 A.L.R. 4th 68.*

Annotation, *Supreme Court's Views as to What Constitutes "Taking" Within Meaning of Fifth Amendment's Prohibition Against Taking of Private Property for Public Use Without Just Compensation, 89 L. Ed. 2d 977.*

Annotation, *Validity and Construction of Law Regulating Conversion of Rental Housing to Condominiums, 21 A.L.R. 4th 1083.*

Annotation, *Validity and Construction of Statutes Regulating Strip Mining, 86 A.L.R. 3d 27.*

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Supp. To CHAPTER 81 REGULATORY TAKINGS

9-81 Thompson on Real Property, Thomas Editions Supp. to § 81.02

Supp. to § 81.02 Historical Developments of Takings Law.

[Go To Main]

§ 81.02(b) Foundations of Modern Taking Law, 1865-1922. [Go To Main]

§ 81.02(b)(1) The Police Power of the States.

Add:

but see Leisy v. Hardin, 135 U.S. 100 (1890) .

Add:

Francis v. Morial, 455 So. 2d 1168 (La. 1984) (There is no precise definition of the police power except in the context of a case-by-case analysis. However, in general terms, the police power allows states to govern persons and things within Constitutional limits, to protect the health, security, morals, and welfare of the general public).

§ 81.02(b)(2) Federal Courts Restraining the Police Power: Substantive Due Process.

Add:

but see Shaffer v. Heitner, 433 U.S. 186 (1977) .

Add:

Superseded by Constitutional Amendment, U.S. Const. Amend. XIII

§ 81.02(b)(3) From Title to Invasion: The Early Federal Appropriation Cases.

At the end of the last paragraph add new footnote: n36.1

Add:

overruled in part, United States v. Chicago, M., St. P. & P. R. Co., 312 U.S. 592 (1941) .

FOOTNOTES:
(n1)Footnote 36.1. *Kahuna Land Co. v. Spokane County, 974 P.2d 1249 (Wash. App. 1999)* (Even when a decision of the County is not a regulatory taking, it must still pass the reasonableness test of substantive due process.); *Daley v. Commissioner, Dep't of Marine Resources, 698 A.2d 1053 (Me. 1999)* (It would be surprising if a regulation complied with the due process clause but at the same time violated the regulatory takings analysis, but it is still necessary to treat the due process clause and the regulatory takings analysis as separate legal standards).

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Supp. to § 81.03 Development of Modern Takings Law.

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§ 81.03(d) Development of the Modern Takings Test. [Go To Main]

Add:

Parise v. Commonwealth, State Board of Funeral Directors, 415 A.2d 153 (Pa. Commw. Ct. 1980) (When the police power is properly exercised no taking can occur, regardless of the economic impact on the landowner).

Add:

Hamer v. School Bd. of City of Chesapeake, 393 S.E.2d 623 (Va. 1990) (Determination of what constitutes a public purpose is a judicial question. However, once a public purpose has been established, the expediency of the condemnor's project is a legislative question).

Add

Palm Beach Isles Assocs. v. United States, 58 Fed. Cl. 657 (Ct. Cl. 2003) (Army Corps of Engineers had a bona fide navigational purpose in denying a dredge and fill permit, which was a complete defense to a regulatory takings claim); *Chevron USA, Inc. v. Lingle, 363 F.3d 846 (9th Cir. 2004)* (Hawaii law prescribing maximum rent for oil company dealers did not advance a legitimate state interest and therefore constituted a regulatory taking); *Lingle v. Chevron U.S.A., Inc., 125 S. Ct. 2074* ; *161 L. Ed. 2d 876 (2005)* (the formula inquiring whether a government regulation "substantially advances" a legitimate state interest only prescribes the inquiry into the nature of due process, but is not the test for determining whether a taking has occurred).

Add new text and new footnote 92.1 at end of subsection:

The U.S. Supreme Court has recently announced two leading decisions, which have expanded prospects for inconsistency in takings decisions.[92.1]

Add:

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Supp. To CHAPTER 81 REGULATORY TAKINGS

9-81 Thompson on Real Property, Thomas Editions Supp. to § 81.04

Supp. to § 81.04 Specific Aspects of Federal Takings Law.

[Go To Main]

§ 81.04(a) What Is "Property" Under the Fifth Amendment? [Go To Main]

§ 81.04(a)(1) When Is An Economic Interest Property?

Add:

Anaheim Gardens v. United States, 444 F.3d 1309 (Fed. Cir. 2006) (Nos. 01-50ll, 01-5012, Fed. Cir., 2006) (low-income owners brought action to have restrictions on a right to prepay mortgages declared to be a regulatory taking); *Chiancola v. Board of Appeals of Rockport, 843 N.E.2d 108 (Mass. App. 2006)* (denial of a variance was not a regulatory taking); *Matter of Jamaica Recycling Corp. v. City of New York, 2006 NY Slip Op 26007 (N.Y. Misc. 2006)* (newly promulgated siting rules did not constitute a regulatory taking).

Theisen Vending Co., Inc. v. United States, 58 Fed. Cl. 194 (Ct. Cl. 2003) (adoption of regulations did not constitute a regulatory taking in the absence of enforcement); *Amaliksen v. United States, 55 Fed. Cl. 167 (Fed. Cl. 2003)* (takings claimant failed because unable to prove an ownership interest in the underlying land).

Add:

Lingle v. Chevron U.S.A. Inc., 125 S. Ct. 2074 (2005) (whether a property regulation advances a state interest is not the appropriate test for determining if a taking has occurred; *Agins* test is abrogated).

Champion Builders v. City of Terrell Hills, 70 S.W.3d 221 (Tex. App. 2001) (the passage of an ordinance increasing the minimum square footage requirement for single family apartments beyond what was contemplated for the project was

not a regulatory taking); *R.W. Docks & Slips, v. State, 617 N.W.2d 519 (Wis. App. 2000)* (refusal to grant a dredging permit did not constitute a regulatory taking); *Turntable Fishery & Moorage Corp. v. United States, 52 Fed. Cl. 256 (2002)* .

Add

Small Property Owners of San Francisco v. City and County of San Francisco, *47 Cal. Rptr. 3d 121 (2006)* (ordinance requiring landlords to pay above market-rate interest on security deposits was not a regulatory taking).

Add:

Benson v. State, 710 N.W.2d 131 (S.D. 2006) (a statute possibly diminishing the value of hunting servitudes did not constitute a regulatory taking).

Weatherford v. City of San Marcos, 157 S.W.3d 473 (Tex. App. 2005) (denial of rezoning requests did not amount to an unconstitutional regulatory taking); *Intermountain Sports, Inc. v. Department of Transportation, 103 P.3d 716 (Utah App. 2004)* (periodic closures of access roads during construction did not constitute a compensable taking).

§ 81.04(a)(2) What Property Interest Can Be Taken Without Compensation?

Add:

Walcek v. United States, 303 F.3d 1349 (Fed. Cir. 2002) (the relevant portion of the property for a takings analysis was the entire parcel, not just the portion designated as wetlands).

State *ex rel. Shelly Materials, Inc. v. Clark Cty. Bd. of Commrs., 875 N.E.2d 59* (Ohio, 2007) (a mineral estate may be the relevant parcel for a compensable taking claim, if the mineral estate has been severed from the other interests in the real property).

Add new text and footnotes at the end of the subsection:

In Lucas v. South Carolina Coastal Council n112.1, the U.S. Supreme Court was concerned with whether the plaintiff had, under state law, an established property right, the deprivation of which through land use regulation triggered a right to compensation. The existence of such an established property right held by the plaintiff was a question of state law to be determined on remand. Nearly twenty years later, in a similar case in Florida, the U.S. Supreme Court affirmed the Florida Supreme Court's determination that beachfront owners' shoreline rights were not established property rights. Therefore, regulation of those shoreline rights did not "take" an established right of private property so as to require

compensation. n112.2

Add:

San Remo Hotel v. City and County of San Francisco, 41 P.3d 87 (Cal. 2002) .

§ 81.04(b) Physical Invasions.

Add

McCarran Intern. Airport v. Sisolak, 137 P.3d 1110 (Nev. 2006) (a height restriction on use of property adjacent to an airport constituted a per se regulatory taking).

Hsu v. County of Clark, Nev., 173 P.3d 724 (Nev. 2007) (transition zone height restrictions, allowing aircraft to fly through the airspace at altitudes below 500 feet were a per se regulatory taking, relying on the *Sislak* holding).

§ 81.04(d) Reciprocity of Advantage. [Go To Main]

Add:

Karam v. State, Dep't of Environmental Protection, 705 A.2d 1221 (N.J. Super. Ct. App. Div. 1998) (Even if the land use regulation does cause some decrease in the value of the property, as long as the owner benefits from average reciprocity of advantage, there has been no taking.); *Creppel v. United States, 41 F.3d 627 (Fed. Cir. 1994)* (Reciprocity of advantage occurs when the property owner has received benefits from the very regulation the property owner is challenging. On the other hand, a partial taking occurs when a few property owners bear the burdens, while the benefit is spread throughout the community)

§ 81.04(e) Distinct (Reasonable) Investment-Backed Expectations. [Go To Main]

Add:

Resource Investments, Inc. v. United States, 85 Fed. Cl. 447 (Ct. Cl. 2009) (regulatory takings claim based on delaying and denying a permit to construct a landfill).

Add:

Lindsey Coal Min. Co. Liquidating Trust v. Shalala, 901 F. Supp. 959 (W.D. Pa. 1995) (A new regulation to preserve health benefits was not considered a taking even though to some degree it affected the reasonable investment-backed expectations by requiring payment of 60% of current income, and by reaching 40 years into the past and requiring the company to enforce a promise the company never actually made); *Palm Beach Isles Associates v. United States, 231 F.3d 1354 (Fed. Cir. 2000)* (reasonable investment-backed expectations were not a proper part of the *Fifth Amendment* takings analysis); *Rith Energy, Inc. v. United States, 270 F.3d 1347 (Fed. Cir. 2001)* ; *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency, 122 S. Ct. 1465 (2002)* .

§ 81.04(f) Economic Impact. [Go To Main]

Add:

Webster v. U.S., 90 Fed. Cl. 107 (9th Cir. 2009) (the city's mobile home rent control ordinance, which effected a nearly 90% transfer of the property value from the park owners to the tenants, constituted a regulatory taking).

After the citation K & K Constr., Inc. v. Department of Natural Resources add:

overruled, K & K Const., Inc. v. Department of Natural Resources, 575 N.W.2d 531 (Mich. 1998) ; *Coalition for Gov't Procurement v. Fed. Prison Indus., 154 F. Supp. 2d 1140 (W.D. Mich. 2001)* .

After the citation Volkema v. Department of Natural Resources add:

aff'd in part, Volkema v. Department of Natural Resources, 586 N.W.2d 231 (Mich. 1998) .

Add:

State Department of Environmental Protection v. Burgess, 772 So. 2d 540 (Fla. App. 2000) (permit denial did not deprive the owner of all economically viable use of the property); *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency, 216 F.3d 764 (9th Cir. 2000)* (a temporary moratorium on development did not amount to a categorical taking); *Metropolitan Development Commission of Marion County v. Schroeder, 727 N.E.2d 742 (Ind. App. 2000)* (a variance condition did not constitute a regulatory taking depriving the owner of all economically viable use of the property).

Add:

Resource Investments, Inc. v. United States, 85 Fed. Cl. 447 (Ct. Cl. 2009) (regulatory takings claim based on delaying

and denying a permit to construct a landfill); *Scofield v. State, Dept. of Natural Resources, 753 N.W.2d 345 (Neb. 2008)* (regulatory taking which did not deprive owners of all economic use of their property).

§ 81.04(f) Economic Impact. [Go To Main]

Add:

Davis v. Brown, 851 N.E.2d 1198 (Ill. 2006) (a statute authorizing the state to reserve rights of way for future highways did not create a regulatory taking).

Blue Ribbon Properties, Inc. v. Hardin County Fiscal Court, 50 Fed. Appx. 671 (6th Cir. 2002) (applicant not deprived of meaningful economic use of land).

§ 81.04(g) Regulating Without Regard to Impact: The Nuisance Exception. [Go To Main]

Add:

Parise v. Com., State Bd. of Funeral Directors, 415 A.2d 153 (Pa. Commw. Ct. 1980) (When the police power is properly exercised no taking can occur, regardless of the economic impact on the landowner).

Add:

Keshbro, Inc. v. City of Miami, 801 So. 2d 864 (Fla. 2001) .

FOOTNOTES:
(n5)Note 112.1. *505 U.S. 1003 (1992)* .

(n6)Note 112.2. *Stop the Beach Renourishment, Inc. v. Florida Dept. of Environmental Protection, 78 USLW 4578* (U.S. Sup. Ct. No. 08-1151, June 17, 2010).

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Supp. to § 81.05 The Takings Cause of Action.

[Go To Main]

§ 81.05(a) Missing [Go To Main]

§ 81.05(a)(1) The Takings Cause of Action.

Add:

Treasure Island v. Provident Management Corp., 718 So. 2d 738 (Fla. 1998) (Even an improperly issued injunction can be considered as a taking for which compensation is required).

Restrictions on Bringing Takings Claims. [Go To Main]

§ 81.05(b)(1) Statute of Limitations.

Add:

Nance v. U.S., 92 Fed. Cl. 41 (Ct. Cl. 2010) (regulatory taking claim time-barred under the Tucker Act); *Webster v. U.S., 90 Fed. Cl. 107 (9th Cir. 2009)* (regulatory takings claim time-barred).

Change the citation *Foster v. City of Detroit, 405 U.S. 138 (6th Cir. 1968)* to:

Foster v. Detroit, 405 F.2d 138 (6th Cir. 1968) .

Change the citation Lerman v. City of Portland to:

Lerman v. Portland, 675 F. Supp. 11 (D. Me. 1987) .

Add:

Kottschade v. City of Rochester, 760 N.W.2d 342 (Minn. App. 2009) (claim was ripe for review even though developer failed to renew a permit based upon conditional general development plan approval).

§ 81.05(b)(3) Ripeness.

At the end of the last sentence of the first paragraph in this section add new footnote: n226.1

Add:

Sandy Creek Investors, Ltd. v. City of Jonestown, Texas, 2003 U.S. App. LEXIS 5651 (No. 02-50402, Mar. 24, 2003, 5th Cir.) (takings claim not ripe because not all available administrative or state remedies had been exhausted); *Kottschade v. Cilty of Rochester, 319 F.3d 1038 (8th Cir. 2003)* (failure to prosecute state claim rendered federal claim unripe); Reddell v. Calilfornia Coastal Comm'n, *103 Cal. Rptr. 3d 383 (2010)* (regulatory takings case was not ripe because the government agency had not yet rendered a final decision on the use of the property); Ashe v. New Fairfield Conservation Comm'n 2001, Conn. Super. LEXIS 2882 (2002). *Hill-Grant Living Trust v. Kearsarge Lighting Precinct, 986 A.2d 662 (N.H. 2009)* (takings claim was not ripe because it was not futile for applicant to submit a new variance application).

At the end of the last paragraph of this section add new footnote followed by new paragraph below. n236.1

Yet another aspect of the ripeness doctrine has emerged in a U.S. Supreme Court opinion announced in June 2001. One who obtains land already burdened by regulation may still press a takings claim when proposed development is rejected, if prior owners have not previously produced a takings claim that is ripe for adjudication.[236.2]

Add:

St. Johns River Water Management Dist. v. Koontz, 5 So. 3d 8 (Fla. App. 2009) (court had jurisdiction to consider claim even though the owner failed to accede to the river management district's attempted exaction); *City of Sherman v. Wayne, 266 S.W.3d 34 (Tex. App. 2008)* (regulatory takings claim was ripe for review when the city reached a final decision regarding the use of the landowner's property).

Casey v. Mayor and City Council of Rockville, 929 A.2d 74 (Md. App. 2007) (historic designation regulatory claim was not ripe absent a final determination on a demolition permit); *Cormack v. Settle-Beshears, 474 F.3d 528 (8th Cir. 2007)* (federal regulatory takings claim barred by owner's failure to exhaust his inverse takings claim in state court).

§ 81.05(c)(3) Damages.

Add:

Forty Mill Realty v. State ex rel. Missouri Highway & Transp. Dept., 872 S.W.2d 528 (Mo. Ct. App. 1994) (Owners of a shopping center were not allowed to argue that the loss of visibility and traffic caused by the state rebuilding a highway constituted inverse condemnation. The court distinguished this case from a previous case where the court allowed evidence concerning the loss of visibility and traffic when considering consequential damages of a taking of 20,000 square feet of land).

After the citation Front Royal Indus. Park Corp. v. Front Royal add:

reversed, Front Royal Indus. Park Corp. v. Front Royal, 135 F.3d 275 (4th Cir. 1998) .

Add:

reversed, Anastasio v. Planning Bd., 507 A.2d 1194 (N.J. Super. App. Div. 1986) ; *Board of County Supervisors of Prince William County, Virginia v. United States, 276 F.3d 1359 (Fed. Cir. 2002)* (claimant entitled to recover what value the land would have commanded in the open market at the time of the taking); Portland Natural Gas Transmission System v. 19. 2 *Acres of Land, 195 F. Supp. 2d 314 (D. Mass. 2002)* (measure of damage is fair rental value plus negative value of taking on retained land); *Borough of Jewett City v. Slater Mill Associates, 2002 Conn. Super. LEXIS 569* (No. 121714, Feb. 20, 2002) (proper measure of damages was diminution of value after the taking).

§ 81.05(d) The § 1983 Alternative. [Go To Main]

Add:

but see Ngo v. Reno Hilton Resort Corp., 140 F.3d 1299 (9th Cir. 1998) .

Change the citation Butz v. Economou to:

Butz v. Economou, 466 F. Supp 1351 (S.D. N.Y. 1979) .

FOOTNOTES:
(n2)Footnote 226.1. *Eberle v. Dane County Bd. of Adjustment, 595 N.W.2d 730 (Wis. 1999)* (The Supreme Court uses the same analysis for ripeness regardless of whether the claim was brought under the *Fourteenth Amendment* or the *Fifth Amendment*); *see also Community Treatment Centers, Inc. v. Westland, 970 F. Supp. 1197 (E.D. Mich. 1997)* .

(n3)Footnote 236.1. *TJ's South, Inc. v. Town of Lowell, 895 F. Supp. 1116 (N.D. Ind. 1995)* (A tavern owner's substantive due process claim, seeking an exception to allow live entertainment at the tavern, effectively avoided the ripeness requirements because the claim was based on *first amendment* rights, not *fifth amendment* rights.)

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Supp. To CHAPTER 81 REGULATORY TAKINGS

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Supp. to § 81.06 Takings Under State Law.

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§ 81.06(b) Modern State Takings Decisions. [Go To Main]

Change the citation Daddario v. Cape Cod Comm to:

Daddario v. Cape Cod Comm'n, 522 U.S. 1036 (1997)

Change the citation Suitum v. Tahoe Reg'l Planning Agency to:

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§ 81.06(b)(2) Other Drummers: States Applying Their Own Standards.

Add:

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Supp. to § 81.07 Bibliography.

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CHAPTER 82 TRANSFERS BY DEED

9-82 Thompson on Real Property, Thomas Editions 82.syn

AUTHOR: Professor Ronald R. Volkmer School of Law Creighton University

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CHAPTER 82 TRANSFERS BY DEED

9-82 Thompson on Real Property, Thomas Editions § 82.01

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§ 82.01 Overview of the Law of Deeds.

Modern day American law recognizes a number of methods by which the title to real estate can be transferred. These methods of transfer have traditionally been classified according to differing criteria relating to both the method by which the transfer takes place and the time at which the transfer takes place. Thus, we find in the law traditional distinctions being drawn between: (1) transfer by voluntary act of an owner versus transfer by operation of law; (2) transfer during lifetime (inter vivos) versus transfer at death (testamentary); and (3) gratuitous transfer (gift) as opposed to bargained-for transfer (sale).

The term "conveyance" has traditionally been employed to encompass those methods of an inter vivos transfer of land by the voluntary act of the owner. While the common law of England recognized more than one form of conveyance, modern-day American law of conveyancing is more highly standardized and uniform. In American law, the law of deeds is the focal point of the law of "conveyancing." The law of deeds is concerned with inter vivos transfers of interests in real estate, bargained for or gratuitous. The touchstone for discussion is the written instrument: "the deed."

The law of deeds has origins going back to the common law of England. At the time Blackstone wrote on the topic of "Alienation by Deed," n1 the law of deeds was already moving from a common law basis to a statutory one. The shift toward a statutory basis for deed law accelerated in early American law, as the writings of Chancellor Kent illustrate. n2 In modern-day American law, the law of deeds is an amalgam of common law rules and statutory rules.

The logical starting point for a discussion of the law of deeds is the definition of the term "deed." While the common law meaning of the term is still relevant for many purposes, the definition of a deed in modern-day American law is more likely to be statutorily based. When we begin discussing the issue of what constitutes a "deed," we are confronted immediately with the formalities requirements for a deed. Formalities requirements for a deed are usually phrased in terms of the elements of "due execution." Although there may be varying interpretations of what elements are included in the phrase "due execution," there can be no dispute over the necessity of complying with the formalities requirements for "due execution" of a deed.

Formalities requirements go to the essential requisites for a deed. As a matter of custom and tradition, non-essential materials are typically included within the language of a deed. Of these non-essential materials, the most significant are

the so-called "covenants of title." These contractual undertakings, designed to provide a grantee with a measure of protection in regard to matters of title, have historically been considered a part of "deed law." These covenants have given rise to the familiar adjective "warranty," as applied to deeds.

In addition to the requirement of a validly executed deed, the law of conveyancing emphasizes the separateness of two other legal requirements: delivery and acceptance. A validly executed deed is insufficient, in and of itself, to transfer title; the validly executed deed must also be delivered and accepted by the grantee. Problems of delivery abound in the context of gratuitous transfers, particularly in situations where the intentions of the owner are unclear as to whether the transfer is to take place during the owner's lifetime or at the owner's death. Acceptance by the grantee is usually presumed, as is generally true in the law of gifts, and not in issue in the typical case.

A deed validly executed, delivered and accepted transfers title, but further questions may remain. The deed language may be unclear as to either what is being conveyed, who is doing the conveying, who is to receive title, under what conditions the grantee is to receive title, etc. In short, there may be ambiguity present, arising either from the face of the deed or from application of the deed language to the facts at hand. It is at this point where courts engage in the process of construction to clarify the meaning and legal effect of the instrument. In so doing, the courts have developed a number of well-settled constructional rules.

Although one specific section of this chapter deals exclusively with "Drafting Considerations," the entire chapter is, in a sense, devoted to drafting considerations; a deed, as the voluntary act of a grantor, is always the product of some person's draftsmanship. Problems of execution and construction are the end-result of faulty draftsmanship. The lawyer who fails to exercise due care in drafting a deed faces the potential of a malpractice lawsuit.

FOOTNOTES:

(n1)Footnote 1. 2 William Blackstone, Commentaries on the Law of England *ch. XIX (1765) (hereinafter cited as "Blackstone").

(n2)Footnote 2. IV James Kent, Commentaries on American Law Part VI -- Lecture LXVI (1830) (hereinafter cited as "Kent").

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CHAPTER 82 TRANSFERS BY DEED

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§ 82.02 Outline of the Chapter.

The substantive discussion of deeds begins with the definition of a deed and a comparison to other instruments, followed by a brief history of the law of deeds (§ 82.03). This is followed by a recitation of modern-day types and forms of deeds (§ 82.04).

Next is a review of selected issues affecting transfer by deed (§ 82.05), followed by a section focusing in on specific "formalities" requirements(§ 82.06). Succeeding sections address the following: parts of a deed (§ 82.07), essential elements of a deed (§ 82.08), and non-essential elements of a deed (§ 82.09). Covenants of title and estoppel by deed are the next topics considered (§ § 82.10, 82.11).

Section 82.12 addresses issues related to the consent of the grantor. Section 82.13 is devoted to one of the most important and least understood topics in the law of deed -- the process of construction and rules of construction. The concluding sections (§ § 82.14, 82.15) offer drafting considerations as well as a bibliography.

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CHAPTER 82 TRANSFERS BY DEED

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§ 82.03 Definition and History of Deed.

§ 82.03(a) Definition and Comparisons.

§ 82.03(a)(1) Definition.

As is true with other legal definitions, no all-encompassing definition of the term "deed" is universally agreed upon. One of the reasons for this lack of uniformity may be traced to the approaches taken; the "elements" approach or the "consequential" approach. The former emphasizes the legal requirements for a deed; the latter, the function of a deed.

Blackstone gave a common law definition for a deed, referring to it as a "writing sealed and delivered by the parties," n3 a definition similar to that of Chancellor Kent. n4 This definition stresses the legal requisites -- an elements approach. Modern definitions of the term "deed" are varied, although most of them include within the definition the "conveyance" function -- the transfer of an interest in real property from the grantor to the grantee. n5 This aspect of the definition is the consequential approach, indicating the function of a deed.

In modern-day law a comprehensive definition of the term "deed" will likely include both the consequential approach and the elements approach. n6 What is most significant for purposes of definition today are the state statutes. Many of these statutes incorporate the traditional definitions of a deed, while, at the same time, broadening the scope of what is included within the term. For example, a state statute which broadly defines "deed" to include any instrument which transfers an interest in real estate might incorporate leases or mortgages as well. n7 In the present discussion the term "deed" will be used in a more conventional, restricted sense. The following subsection will indicate the traditional dichotomies between deed law and other areas of law.

§ 82.03(a)(2) Other Instruments Compared.

The requirement of a written contract for the sale of real estate has produced a body of law generically referred to as the law of vendor/purchaser. Chronologically, the written contract precedes the actual conveyance, with the conveyance taking place on what has historically been referred to as "law day." The law of vendor/purchaser governs up to the moment of transfer on law day. Once the conveyance takes place on law day and the deed is delivered, the deed becomes the controlling instrument. Under the "merger doctrine," the deed supersedes the provisions of the contract of

sale n8 and takes the place of the contract as the controlling instrument. Although covenants may be contained within the deed, in its purest form the deed is a conveyance governed by property rules. Further discussion of the contractual aspects of a deed will be considered in various contexts.

Instruments transferring interests in real property for security purposes are governed by the law of mortgages, not the law of deeds. Historically speaking, the mortgage started out as a conveyance -- a conveyance of a fee simple upon a condition subsequent. In modern-day law, certain transfers for security purposes are accomplished through execution of so-called "deeds of trust." These, too, are governed by the law of mortgages, as well as by the law of trusts. It is axiomatic under the law of mortgages that a deed absolute on its face, can be shown to have been executed for security purposes. These instruments are governed by the law of mortgages as well.

Transfers of less than a freehold interest historically have been governed by the law of landlord/tenant. n9 The instrument of conveyance has customarily been referred to as a "lease," not a deed. Transfers of incorporeal interests, such as easements and profits, have been governed by property rules separate and apart from the law of deeds, n10 although the written instrument creating such interests is still today referred to as a deed. The same is true for instruments transferring mineral rights.

The most critical legal distinction for purposes of deed law is the distinction between a deed and a will, which will be considered in the succeeding chapter.

§ 82.03(b) History of Deeds.

As might be expected, the historical antecedents of the deed are traceable to conveyancing practices during the medieval period in England. The rich history of this period has been recounted in detail by other authors. n11 For present purposes it will suffice to recount the major developments and events that set the stage for the modern era of conveyancing. While English history explains much as to how the modern-day deed came about, the modern law of deeds has moved gradually from a common law basis to a statutory one. A brief review of common law conveyancing will be followed by discussion of the two acts of the English Parliament that greatly affected the development of the modern-day deed.

§ 82.03(b)(1) Common Law Conveyances.

The outstanding characteristic of English land law in the 11th through 13th centuries centered upon the concept of feudalism. n12 Out of this method of landholding developed the common law doctrine of estates. The doctrine of estates evolved into an elaborate system of present and future interests, and the concept of ownership, in a famous historian's phrase, "spread upon the plane of time." n13

Central to the development of this system of estates was the concept of alienability -- the right of an owner of an estate to freely transfer that interest to another person. The concept of free alienability was established in the landmark act of Parliament entitled *Quia Emptores* in 1290. n14 At the same time that the concept of free alienability was being established, the common law courts established some rather rigid, technical rules that effectively prohibited certain conveyances having certain characteristics. n15 The basis for these rules was the medieval concept of "seisin" and the rigid requirement that someone must always be "seised" of the land. In fashioning the concept of seisin, the common law courts created the concept of a freehold estate, the most important of which was the fee simple. n16

At common law, the exclusive method of transfer of a freehold estate was by livery of seisin. n17 In order to transfer a freehold estate, it was necessary for the transferor and transferee to actually go upon the land and perform the ceremonial rite of livery of seisin, during which the transferor, in the presence of witnesses, would hand over a clod or twig to the transferee. This ritual, known as feoffment, was necessarily a present operative act -- title to the subject property passed by feoffment at that time or not at all. Any attempt to pass seisin at a date subsequent to the actual

ceremony would be void. n18 Thus, conveyancing at common law did not necessarily involve a writing, for feoffment consisted of the physical actions of the parties to the transfer.

As custom developed, however, the parties at the time of the feoffment ceremony executed a charter of feoffment, a writing that would serve as evidence that the feoffment had actually taken place. The charter of feoffment was evidentiary in character, a written testimonial to *past* action. n19 The form and structure of the charter of feoffment greatly influenced the manner and form of what would later be called deeds. Thus, the charter of feoffment served as the historical antecedent to the modern deed.

In addition to the transfer of possessory freehold estates, the common law courts also permitted the transfers of non-possessory interests in land. These transfers were effectuated by grant. These "grants" were written documents under seal -- true instruments of conveyance. Interests that were transferable by grant included future interests as well as non-corporeal interests such as easements. n20

The status of the common law of conveyancing may be summed up in the famous common law maxim, "All lands lie in livery or in grant." n21 While influential in the development in the common law history of deeds, the concepts of livery and grant were not nearly as influential as the methods of transfer recognized in the courts of equity. The role of the equity courts in the enforcement of use estates was the next major development in the history of deeds. The recognition of the use estate ultimately produces one of the most famous English Parliamentary acts, the Statute of Uses. n22

§ 82.03(b)(2) Effect of the Statute of Uses.

The Statute of Uses, an act of Parliament of 1535, has been called the most influential statute in the history of English land law. n23 This is because of the powerful impact it had on two areas of real property law; future interests and conveyancing. The present focus is on the latter, particularly as it relates the development of the modern-day deed. In order to appreciate the significance of the Statute of Uses as it affected conveyancing, the concept of the use estate must be briefly explored.

The concept of the use estate developed shortly after the Norman Conquest of 1066, as part of the tenurial landholding system. The central concept of the use estate was that of a person holding fee simple title to real estate for the use and benefit of another person. Conceptually, it is the forerunner of the modern day trust. Property held in use estate gave rise to a form of bifurcated ownership; the person holding the legal title, the "feoffee to uses," was seised and regarded by the law courts as the owner of the property. According to the terms of the transfer, the feoffee to uses was obligated to hold the property conveyed for the use and benefit of some other person, the *cestui que* use. For the use concept to be successful, it was necessary for the *cestui que* use to have a right against the feoffee to uses. Recognition and legal protection of the *cestui que* use's interest came from the Chancellor and, ultimately, the courts of equity. Thus, it came to be that the *cestui que* use's interest in the property conveyed was recognized as an equitable interest. Because of the many advantages of holding property in use, most of the land in England after the Conquest was held in use estates. n24

The methods of creation of use estates are relevant to a discussion of the history of deeds. For some period after the Conquest, it appears that the most prevalent method of creating use estates was by a feoffment to uses, with livery of seisin being employed. However, other methods of creating use estates were recognized in equity, and these methods turned out to be far more significant in the law of conveyancing. The two other methods of "raising" a use, recognized in equity, were: (1) a bargain and sale transaction and (2) a covenant to stand seised. n25

The "bargain and sale" and the "covenant to stand seised" methods did not involve livery of seisin, instead, they utilized written documents. In the bargain and sale transaction, the transferor and transferee, by written instrument, would agree to the sale of the property for a consideration. n26 No livery of seisin would take place, and the law courts would therefore rule that no transfer had taken place. Courts of equity, however, looking to the substance of the transaction, would deem it unfair for the transferee to retain the consideration and the title. The equity courts exercised their powers

in holding that the transaction "raised a use" in the bargainee and left the bargainor holding legal title for the use and benefit of the bargainee. n27 While not transferring legal title, the writing, consideration, and parties' intent created an equitable interest in the bargainee.

A covenant to stand seised also involved a written instrument under seal. In this transaction, a person would covenant with another person to hold the property for that person's use and benefit. No livery of seisin would take place. So long as the parties to the covenant were related by blood, the equity courts would enforce the covenant despite lack of consideration. n28 Equity courts thus recognized a covenant to stand seised as a third method of "raising" a use.

The Statute of Uses did not abolish use estates. For those transactions to which the Statute applied, the use estate was "executed" and converted into the corresponding legal estate. In terms of conveyancing law, the bargain and sale transaction now became a legally recognized method of transferring a freehold estate without resorting to the cumbersome ritual of feoffment. In short, it became possible to transfer freehold estates by a written instrument. The bargain and sale contract became the instrument of transfer; the medieval deed. Likewise, covenants to stand seised were similarly effected: the covenant raised a use which the Statute of Uses executed. The result was the transfer of legal title from the covenantor to the covenantee. n29 The Statute of Uses, whether by design or chance, introduced into the common law the transfer of present freehold estate by written instrument. Thus, the stage was set for the modern era of conveyancing.

The common law history of conveyancing in England includes several other methods, such as the fine and common recovery, which, though now obsolete, played a significant role for centuries in medieval England. Some of the methods of conveyance mentioned by Blackstone n30 are still very much a part of modern-day law but are usually taken up in conjunction with other topics.

Contemporaneous with the Statute of Uses was Parliament's attempt to compel public recordation of transfers of fee interests. Parliament sought to do this through the Statute of Enrollments n31 by applying its requirement to the enrollment of bargains and sales of freehold interests. n32 The manner in which the Statute operated left a very large loophole, which was soon exploited by those interested in preserving secret transfers.

With only minor exceptions, the history of conveyancing in the United States does not include the concepts of tenure and livery of seisin. Some of the early American cases indicate that conveyances made by bargain and sale and covenant to stand seised would be recognized. n33 In those instances it was necessary for a court to hold that the Statute of Uses existed statutorily or as part of the common law of the state. No late 20th century lawyer will likely come into contact with a situation raising the question of "common law conveyances." As will be seen below, the modern-day basis for conveyancing in the United States is statutory; state statutes either prescribe formalities for a conveyance or authorize conveyances by written instruments meeting certain formalities requirements.

§ 82.03(b)(3) Effect of the Statute of Frauds.

As has been noted above, the common law required a deed for a valid transfer of an incorporeal interest. When Parliament enacted the Statute of Frauds in 1677, it left that requirement intact and required for the first time that the creation or transfer of a corporeal interest be evidenced by a writing. Section One of the Statute stated the creation of "leases, estates, interests of freeholds, or terms of years" must be by an instrument in writing. n34 Section Three of the Statute dealt with *transfers* of such interests:

> No leases, estates, ... shall be assigned, granted, or surrendered, unless it be by deed or note in writing signed by the party so assigning, granting or surrendering the same. n35

The deed referred to in this statute was the common law concept of a deed; an instrument under seal. The "note in writing" alternative permitted writings lacking a seal. For purposes of modern-day law it is not necessary to delve into

the fine points of interpretation of this landmark statute.

The effect of the Statute of Frauds upon modern-day conveyancing and the law of deeds has been profound. It was the Statute of Frauds that started modern-day conveyancing procedure by its requirement of a writing. It was the Statute of Frauds that initiated the modern-day requirement that deeds must be signed by the grantor. It was the Statute of Frauds that served as a prototype for similar statutes enacted by the various state legislatures in this country. n36

FOOTNOTES:
(n1)Footnote 3. Blackstone, *supra* note 1, at *295.

(n2)Footnote 4. Kent, *supra* note 2, at 444 (deed is "an instrument in writing, upon paper or parchment, between parties able to contract, and duly sealed and delivered").

(n3)Footnote 5. *See* Ballentine's Law Dictionary 318 (3d ed. 318) (deed defined as "a writing sealed and delivered by the parties"); Black's Law Dictionary 414 (6th ed. 1990) (deed defined as "a conveyance of realty") (hereinafter cited as "Black").

(n4)Footnote 6. Both of the law dictionaries cited in the previous note give more than one definition, illustrating both approaches.

(n5)Footnote 7. *E.g.*, NEB. REV. STAT. § 76-203 (deed definition "embraces every instrument in writing by which any real estate or interest therein is created, aliened, mortgaged or assigned ....")

(n6)Footnote 8. The merger doctrine is discussed in § 82.13 *infra*.

(n7)Footnote 9. *See* chs. 40-43 *supra*.

(n8)Footnote 10. *See* ch. 60 *supra*.

(n9)Footnote 11. Both Blackstone and Kent detail the common law history of conveyancing prior to the era of transfer by deed. There are numerous modern American works providing the rich detail of English history of common law conveyancing. A noteworthy example is the brief discussion contained in The Law of Property. *See* Roger A. Cunningham, William B. Stoebuck & Dale Whitman, The Law of Property § 1.6 (2d ed. 1993) (hereinafter cited as "Cunningham, Stoebuck & Whitman"). The textual discussion draws heavily upon on the classic works on the topic by the late Professor Moynihan. *See* Corneilius Moynihan, Introduction to the Law of Real Property (2d ed. 1988) (hereinafter "Moynihan").

For a literate and scholarly treatment of the law of estates, emphasizing English law, *see* A.W.B. Simpson, A History of the Land Law (2d ed. 1986).

(n10)Footnote 12. Moynihan, *supra* note 11, ch. 1.

(n11)Footnote 13. 2 Frederick Pollock & Frederic Maitland, History of English Law 10 (2d ed. reissued 1968).

(n12)Footnote 14. 18 Edw. I, c.1.

(n13)Footnote 15. Moynihan, *supra* note 11, ch. 7.

(n14)Footnote 16. *Id.*, ch. 2.

(n15)Footnote 17. Blackstone, *supra* note 1, at *315-316.

(n16)Footnote 18. Blackstone, *supra* note 1, at *311.

(n17)Footnote 19. Moynihan, *supra* note 11, at 162-163.

(n18)Footnote 20. *Id*. at 168-169.

(n19)Footnote 21. *Doe v. Cole, 7 B. & C. 243, 108 Eng. Rep. 714 (1827).*

(n20)Footnote 22. 27 Hen. VIII, c.10 (1536).

(n21)Footnote 23. Moynihan, *supra* note 11, at 178.

(n22)Footnote 24. Moynihan, *supra* note 11, ch. 8.

(n23)Footnote 25. *Id*.

(n24)Footnote 26. *Id*. at 176-177.

(n25)Footnote 27. *Id.*, ch. 9.

(n26)Footnote 28. *Id*. at 185-186.

(n27)Footnote 29. *Id*., ch. 9.

(n28)Footnote 30. For example, lease and partition. Blackstone, *supra* n.1, at *310.

(N29)Footnote 31. 27 Hen. VIII c.16 (1536).

(n30)Footnote 32. Moynihan, *supra* note 11, at 184.

(n31)Footnote 33. *E.g.*, *French v. French, 3 N.H. 234 (1825)* (covenant to stand seised).

(n32)Footnote 34. 29 Charles II, ch. 3, § 1 (1677).

(n33)Footnote 35. *Id.*, § 3.

(n34)Footnote 36. Cunningham, Stoebuck & Whitman, *supra* note 11, at 761.

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CHAPTER 82 TRANSFERS BY DEED

9-82 Thompson on Real Property, Thomas Editions § 82.04

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§ 82.04 Types and Forms of Deeds.

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The term "deed" is generic, used to describe a particular type and form of legal instrument, distinguished from other legal documents. Within the broad framework of the term "deed," there are distinctions that have been drawn between the various forms and types of deeds. Many of these distinctions are the products of history, evolving during the formative period of the law of deeds. They play no significant role in modern day law and will be examined only cursorily. The emphasis in this section will be on the modern day distinctions and developments.

§ 82.04(a) Historical Considerations and Modern Statutes.

§ 82.04(a)(1) Historical Considerations.

Both Blackstone n37 and Kent n38 wrote of the "several species" of conveyances at common law. These "species" were adverted to in the historical background above. Two of the "species," feoffment with livery of seisin and alienation "by fines and common recoveries," had ceased to have any significance in the United States by 1830. n39

The other methods of conveyance did play a significant role both in the manner in which deeds in this country were referred to and in the language of the instruments. These methods of conveyance, as listed by Kent, were: (1) grant, (2) covenant to stand seised to uses, (3) lease and release, and (4) bargain and sale. The methods were divided into two categories; "conveyances at common law, and conveyances which receive their efficacy from the statute of uses." n40 The grant fit into the first category; the others into the second.

The grant was the common law method of conveyancing incorporeal interests "which cannot passe without deed." n41 The operative words used, according to Blackstone, were "have given and granted." n42 Thus, from an historical standpoint, "grant deeds" were those conveying incorporeal interests using the "given and granted" language.

The covenant to stand seised was a method by which a use estate was raised. The primary limitation on this method was the requirement that "it must be founded on the consideration of blood or marriage." n43 As conveyances, covenants to stand seised owed "their efficacy to the statute of uses," n44 insofar, that is, as the Statute of Uses would "execute" the

use; the person formerly seised of the use of the land was "put at once into corporal possession of the land, without ever having seen it, a kind of parliamentary magic." n45

The conveyance by lease and release owed its efficacy to the Statute of Uses as well, but owed its popularity to the loophole in the Statute of Enrollments. n46 The lease and release was a two-step process requiring two instruments: (1) a one year term was "bargained and sold" to a tenant for a valuable consideration, raising a use; and (2) the owner of the freehold "one day later" released the reversion to the tenant. Thus, the tenant ended up with a fee simple estate with livery of seisin not having taken place and the transfer not subject to the Statute of Enrollments. n47 According to Blackstone, the common law release used the words "remised, released, and for-ever quitclaimed." n48

The bargain and sale conveyance was based in contract, or as Blackstone called it, "a kind of real contract." This "real contract" involved the following: "the bargainor for some pecuniary consideration bargains and sells, that is contracts to convey, the land to the bargainee; and becomes by such a bargain a trustee for, or seised of, the bargainee; and then the Statute of Uses completes the purchase." n49 Thus, the contract's "execution" under the Statute of Uses resulted in, as Chancellor Kent put it, a "complete transfer of title." n50 Although there were no "magic words" necessary for this type of conveyance, n51 the term "bargain and sale" came from the contract language that Blackstone described. n52

Blackstone also wrote of the distinction between a deed indenture and a deed poll, the former being a deed "made by more parties than one," n53 while the latter was a deed "made by one party only.'" n54 The deed "made by one party only" refers to a deed signed only by the grantor.

What of these "species" of conveyances in modern-day law? What about the modern-day statutes of deed poll and deed indenture? The next section deals with these questions.

§ 82.04(a)(2) Modern Statutes.

As to the "species" of conveyances, the distinction between conveyances operating "at common law" or "under the statute of uses" no longer obtains. What we have today are conveyances by deed operating by virtue of state statutes which (1) require a written instrument (deed) for the conveyance of any interest in land and (2) prescribe the formal requirements for the written instrument. Some traces of the common law methods of conveyancing are found in these statutes.

The first and foremost method of common law conveyancing was feoffment, with livery of seisin. Certain state statutes even today refer to "livery of seisin," primarily for the purpose of declaring that this method of transfer is no longer recognized. n55

The common law method of conveyance known as "grant" has been swallowed up in the modern-day statutes requiring the transfer of *any* interest in real estate by deed. Today, we occasionally find statutes which state that conveyances may be made by grant instead of livery of seisin. The primary legacy of this common law conveyance method in modern-day statutory law is the legal significance of the term "grant" when used as the operative word of conveyance in a deed; implied warranties of title may result. n56

Covenants to stand seised are rarely referred to today, but an occasional reference to them will be found in state statutes. n57 The same is true of the lease and release. n58 Both of these common law methods, operating under the "efficacy" of the Statute of Uses, have no statutory basis to support them, except as will be found occasionally in state law. The modern-day remnant of the lease and release is found in the modern-day quitclaim deed, discussed at § 82.04(b), *infra*.

The bargain and sale method of conveyance at common law depended upon the Statute of Uses. n59 Conveyancing under modern-day law does not operate under the Statute of Uses. Conveyances today operate under those statutes referred to above that require a deed and specify the legal requirements for a deed. One can find an occasional case

applying the common law bargain and sale theory as a basis for a conveyance, but that is rare. There are many modern-day deeds, some statutorily based, employing the terms "bargain and sale" as the operative words of conveyance in a deed. In that sense there are modern-day bargain and sale deeds -- deeds which bear that term as a heading. The only practical and significant factor involved in so-called bargain and sale deeds relates to the topic of implied warranties. Like the grant deed, the bargain and sale deed may trigger implied warranties of title. n60

Modern-day deeds are of the "deed poll" variety -- signed only by the grantor. The distinction between an "indenture" and a deed poll in modern-day law is obsolete. n61 As will be noted *infra*, n62 the requirement of the grantor's signature or its equivalent is a universal requirement for the validity of a deed. The fact that a deed is not signed by parties occupying the status of grantee is of no legal significance, despite the fact that the deed contains promises of the grantee. n63

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LEXIS: deed w/3 indenture w/5 distinction

§ 82.04(b) Modern Types of Deeds.

In modern-day law, deeds are usually categorized according to the presence or absence of warranties of title contained therein. n64 As will be shown below, a deed need *not* contain warranties in order to be a valid deed. In the United States, a deed containing no warranties of title has traditionally been referred to as a "quitclaim" deed. n65 The quitclaim deed is denominated a deed of release, conveying to the grantee whatever interest, if any, the grantor has in the property. n66 So long as the essential elements for a deed are present, the fact that the deed is quitclaim in nature does not in any way impair its validity as a deed. n67 At one time, the status of one purchasing under a quitclaim deed raised questions as to whether the grantee would have the status of a bona fide purchaser under the recording act. The modern-day view is that bona fide purchaser status is not imperiled by taking under a quitclaim deed. n68

COMPUTER-ASSISTED RESEARCH

LEXIS: quitclaim w/25 warrant! w/3 title
quitclaim w/5 convey w/5 interest w/5 grantor
quitclaim w/5 grantee w/5 acquir! w/5 same w/5 grantor
quitclaim w/5 good w/5 title
quitclaim w/5 convey! w/5 effective

Deeds containing the optional warranties of title are generically referred to as "warranty" deeds. The nature of warranties of title and their legal effect will be explored in § 82.10, *infra*. As a general proposition, warranty deeds are classified as general or special, depending upon the types of warranties contained therein. However, the binary distinctions between warranty deeds and quitclaim deeds and between general warranty deeds and special warranty deeds are not the same from state to state. Because of particular state statutes, the terminology of "warranty," "quitclaim," "general warranty," and "special warranty" deed is not always applied. n69

Deeds are sometimes identified by reference to the status of the grantor. Thus, a deed might be described as a "sheriff's deed," an "executor's deed," a "trustee's deed," a "guardian's deed," etc. In some states these deeds are referred to in statutes prescribing deed forms. n70 Regardless of the identity of the grantor, the substantive law of deeds requires that certain requirements be met before the instrument is legally effective as a deed.

Deeds are occasionally referenced by the subject matter of the conveyance. Thus, in the transfer of an easement, the deed employed is sometimes referred to as a "right-of-way" deed. n71 Another example is a so-called "timber deed." n72 The law of natural resources has produced its own set of deeds relating to transfers of oil and gas interests, mineral

interests, water rights, etc. n73 In these specialized areas of law, the person drafting a deed needs to take note of the peculiar problems inherent in drafting a deed conveying a particular type of real property interest.

§ 82.04(c) Statutory Short Form Deeds.

The drafting of deeds during the formative period of the English common law was marked by formalism. The common law conveyancers followed a rigid format -- a set pattern consisting of several parts. n74 The result was a prolix document; the typical deed was characterized by one critic as being "difficult to read, disgusting to touch and impossible to understand." n75

In the early days of the American republic, the conveyances followed the English format, with all of their redundancy and complexity. Chancellor Kent, writing in 1830, recognized that the language of a deed could be considerably simplified, n76 but acknowledged that the force of custom was great and that the "formality," "prolixity," and "usual redundancy of language" would likely continue. n77

The simplification desired by Chancellor Kent came about primarily because of the enactment, by state legislatures, of so-called "short form" statutes. These statutes set forth language for warranty, quitclaim and other forms of deeds that would fulfill the legal requirements for a deed and would be deemed sufficient under local law. By receiving statutory assurance of validity, conveyancers were being encouraged to simplify the forms of deeds, with a streamlined document being the end-product. The statutory forms, with their deed prototypes, encouraged a "fill in the blank" form of drafting.

Today, roughly three-fourths of the jurisdictions in this country have some form of a statutory short form deed. Categorization of the various state statutes is no simple task because of the variety of statutes and the interplay between two unrelated topics: (1) a statutory recitation of language sufficient to meet minimum requirements for a deed, and (2) creation of covenants of title by implication. This latter topic will be explored in a later section. n78

Below is a state-by-state listing of states having statutory short form deeds. The table includes pertinent statutory references as well as indications of the types of statutory form deeds in the jurisdiction. The final column refers to "short form" instruments that are either (1) particularized forms of warranty or quitclaims deeds or (2) specialized forms for mortgages, leases, etc. The process of drafting a deed in the individual circumstance might profitably begin by consulting this table.

Statutory Short Form DeedsState-By-State Table

State	*General Warranty*	*Special Warranty*	*Quitclaim*	*Other*
Alaska Alaska Stat.	§ 34.15.040		§ 34.15.040	
Arizona Ariz. Rev. Stat.	§ 33-402	§ 33-402	§ 33-402	§ 33-402 Mortgage.
California Cal. Civ. Code	§ 1092			
Colorado Colo. Rev. Stat. Ann.	§ 38-30-113	§ § 38-30-113, 38-30-115	§ § 38-30-113, 38-30-116	§ 38-30-115 Bargain and Sale Deed.
Connecticut Conn. Gen. Stat. Ann.	§ 47-36c		§ 47-36c	§ 47-36c Mortgage Deed, Conservator's Deed, Assignment of Mortgage, Testamentary Trustee's Deed, Executor's Deed, Ad-

				ministrator's Deed.
Delaware Del. Code Ann.	tit. 25 § 121	tit. 25 § 121		
District of Columbia D.C. Code Ann.			§ 45-501 Not specifically labeled a quitclaim deed, but a deed with no covenants of title express or implied.	§ 45-501 Deed by Husband and Wife, Deed of Life Estate, Deed of Trust to Secure Debts, Sureties, or Other Purposes, Trustee's Deed Under Decree, Executor's Deed, Mortgage, Lease.
Florida Fla. Stat. Ann.	§ 689.02			
Illinois Ill. Rev. Stat.	ch. 765 § 5/9		ch. 765 § 5/10	
Indiana Ind. Code Ann.	§ 32-1-2-12		§ 32-1-2-13	
Iowa Iowa Code Ann.	§ 558.19	§ 558.19	§ 558.19	§ 558.19 Mortgage.
Kansas Kan. Stat. Ann.	§ 58-2203		§ 58-2204	
Maine Me. Rev. Stat. Ann.	tit. 33 § 775	tit. 33 § 775	tit. 33 § 775 Includes quitclaim deeds with and without covenants, and municipal quitclaim deeds.	tit. 33 § 775 Deed of Executor, Administrator, Trustee, Guardian, Conservator, Receiver, or Commissioner, Deed of Distribution by Personal Representative, testate or intestate, Deed of Sale by Personal Representative, testate or intestate, Mortgage Deed, Partial Release of Mortgage, Assignment of Mortgage, Discharge of Mortgage, Deed from Individual to Himself and Another as Joint Tenants, Deed

				from Multiple Grantors to Joint Tenants.
Maryland Md. Real Prop.			§ 4-202 Not specifically labeled a quitclaim deed, but a deed with no covenants of title express or implied.	§ 4-202 Deed Granting Estate for Life, Deed of Trust to Secure Debts or for Other Purposes, Sheriff's or Other Officer's Deed, Trustee's Deed Under Decree, Deed of Commissioners to Make Partition of Land, Personal Representative's Deed, Mortgage, Lease.
Massachusetts MASS. GEN. LAWS ANN.	ch. 183 § 10	ch. 183 § 11 This form, while labeled a quitclaim deed, acts in effect as a special warranty deed. It implies a covenant on the part of the grantor that the property was free from all encumbrances made by the grantor, and that the grantor will warrant and defend the grantee's title against all persons claiming title through the grantor, but not any other person claiming title.		
Michigan Mich. Comp. Laws Ann.	§ 565.151		§ 565.152	
Montana Mont. Code Ann.	§ 70-20-103			
New Hampshire N.H. Rev. Stat. Ann.	§ 477:27	§ 477:28 Despite the label of quitclaim deed, this form acts as a spe-		

		cial warranty deed. It implies covenants on the part of the grantor of freedom from incumbrances, and that the grantor will warrant and defend the title of the grantee against anyone claiming through the grantor, but not any other person claiming title.		
New Jersey N.J. Rev. Stat. Ann.	§ § 46:4-1, 46:4-7	§ § 46:4-1, 46:4-8	§ 46:4-1 This form is not labeled a quitclaim deed, but serves the same purpose by transferring title without implying any covenants on the part of the grantor.	
New Mexico N.M. Stat. Ann.	§ 47-1-44	§ 47-1-44	§ 47-1-44	§ 47-1-44 Mortgage.
New York N.Y. Real Prop.	§ 258		§ 258	§ 258 Bargain and Sale Deed, with and without covenants against the grantor.
North Dakota N.D. Cent. Code			§ 47-10-06 This form is not labeled a quitclaim deed, but serves the same purpose by transferring title without implying any covenants on the part of the grantor.	
Ohio Ohio Rev. Code Ann.	§ 5302.05	§ 5302.07	§ 5302.11	
Oklahoma OKLA. STAT. ANN.	tit. 16 § 40		tit. 16 § § 40, 41	
Oregon Or. Rev. Stat.	§ 93.850	§ 93.855	§ 93.865	§ 93.860
Pennsylvania Pa.	ch. 21 § § 1, 5	ch. 21 § § 1, 6	ch. 21 § § 1, 7	

Stat. Ann.				
Rhode Island R.I. Gen. Laws	§ 34-11-12		§ 34-11-12	§ 34-11-12 Deed of Executor, Administrator, Trustee, Guardian, Conservator, Receiver, or Commissioner, Mortgage Deed, Partial Release of Mortgage.
South Carolina S.C. Code Ann.	§ 27-7-10			
South Dakota S.D. Codified Laws Ann.	§ 43-25-5		§ 43-25-7	
Tennessee Tenn. Code Ann.	§ 66-5-103	§ 66-5-103	§ 66-5-103	§ 66-5-103 Mortgage, Deed of Trust.
[17] Bargain and Sale Deed.				
Texas Tex. Prop. Code Ann.	§ § 5.022, 5.023			
Utah Utah Code Ann.	§ 57-1-12		§ 57-1-13	
Virginia Va. Code Ann.	§ § 55-48, 55-68	§ § 55-48, 55-69	§ § 55-48, 55-75	
Washington Wash. Rev. Code Ann.	§ 64.04.030		§ 64.04.050	§ 64.04.040 Bargain and Sale Deed.
West Virginia W. Va. Code	§ § 36-3-5, 36-4-2		§ § 36-3-5, 36-3-7	
Wisconsin Wis. Stat. Ann.	§ 706.10		§ 706.10	
Wyoming Wyo. Stat.	§ 34-2-102		§ 34-2-104	

FOOTNOTES:

(n1)Footnote 37. Blackstone, *supra* note 1, at *309-333.

(n2)Footnote 38. Kent, *supra* note 2, at 467-487 (1830).

(n3)Footnote 39. Kent, *supra* note 2, at 477, 487.

(n4)Footnote 40. Kent, *supra* note 2, at 467.

(n5)Footnote 41. 2 Edward Coke, Institutes of the Law of England; or A Commentary Upon on Littleton *172a (1st Am. ed., from the 19th London ed., Charles Butler ed. 1853) (hereinafter cited as "Coke").

(n6)Footnote 42. Blackstone, *supra* n.1, at *317.

(n7)Footnote 43. Kent, *supra* n.2, at 481.

(n8)Footnote 44. *Id*.

(n9)Footnote 45. Blackstone, *supra* n.1, at *338.

(n10)Footnote 46. Writing in 1830, Chancellor Kent called this the "usual mode of conveyance in England, because it does not require the trouble of enrolment." Kent, *supra* n.2, at 482. Kent noted that this mode of conveyance was particularly attractive for family settlements for "the secrecy which best accords with the feeling connected with family settlements."

(n11)Footnote 47. Blackstone, *supra* n.1, describes this process at *339.

(n12)Footnote 48. *Id*. at *324.

(n13)Footnote 49. *Id*. at *338.

(n14)Footnote 50. Kent, *supra* n.2, at 384.

(n15)Footnote 51. *Id*. at 484.

(n16)Footnote 52. Blackstone, *supra* n.1, at *338.

(n17)Footnote 53. *Id*. at 295.

(n18)Footnote 54. *Id.* at 296.

(n19)Footnote 55. Ala. Stat. § 35-4-31; Ariz. Code Ann. § 4-59-102; Colo. Rev. Stat. § 38-30-103; Ga. Code Ann. § 44-5-30; Ill. Comp. St. ch. 465, § 5/1, Ill. Comp. St. ch. 765, § 5/1; Mass. Ann. Laws ch. 183, § 4; Md. Real Prop. Law § 4-104; Mo. Ann. Stat. § 432.050; N.J. Stat. Ann.§ 25:1-1; N.Y. Real Prop. Law § 241; N.C. Gen. Stat. § 47-17; Or. Rev. Stat. § 93.010; 21 Pa. Stat. § 252, 33 Pa. Stat. § 1; Tenn. Code Ann. § 66-5-106; Va. Code Ann. § 55-17; W. Va. Code § 36-1-1.

(n20)Footnote 56. *See* § 82.10(e) *infra*.

(n21)Footnote 57. Ala. Code § 35-4-271; Ark. Stat. Ann. § 18-12-102; Cal. Civ. Code § 3304; Florida Stat. Ann. § 689.09; N.C. Gen. Stat. § 41-7; VA. CODE § 55-17; W. Va. Code § 36-3-4.

(n22)Footnote 58. Fla. Stat. Ann. § 689.09; N.Y. Real Prop. Law § 246; N.C. Gen. Stat. § 41-7; Va. Code § 55-17; W. Va. Code § 36-3-4.

(n23)Footnote 59. Moynihan, *supra* n.11, at 183-184.

(n24)Footnote 60. *See* § 82.10(e) *infra*.

(n25)Footnote 61. *Milner v. Bivens, 335 S.E.2d 288 (Ga. 1985).*

(n26)Footnote 62. *See* § 82.06(b) *infra*.

(n27)Footnote 63. *Langman v. Alumni Ass'n of the U. of Va., 442 S.E.2d 669 (Va. 1994)* (statute of frauds no bar to enforcement of mortgage assumption clause contained in deed not signed by grantee); *Brendonwood Common v. Franklin, 403 N.E.2d 1136 (Ind. App. 1980).*

(n28)Footnote 64. The topic of warranties of title will be discussed *infra*, at § 82.10. The terms "warranties of title"

and "covenants of title" are used interchangeably.

(n29)Footnote 65. *Ono v. Coos County, 792 P.2d 476 (Or. App. 1990).*

(n30)Footnote 66. *In re Kuether, 158 B.R. 151 (Bankr. N.D. 1993); Evans v. Waguespack, 638 So. 2d 1153 (La. App. 1994); Webster Oil Co., Inc. v. McLean Hotels, Inc., 878 S.W.2d 892 (Mo. App. 1994); Hawkeye Land Co. v. Iowa Power & Light Co., 497 N.W.2d 480 (Iowa App. 1993); Tuttle v. Burrows, 852 P.2d 1314 (Colo. App. 1992); Kamenar R.R. Salvage, Inc. v. Ohio Edison Co., 607 N.E.2d 1108 (Ohio App. 3d 1992).*

(n31)Footnote 67. *Reid v. Southeastern Materials, 396 So. 2d 667 (Ala. 1981); Teson v. Vasquez, 561 S.W.2d 119 (Mo. App. 1977).*

(n32)Footnote 68. Cunningham, Stoebuck & Whitman, *supra* n.11, at 843.

(n33)Footnote 69. *See* discussion *infra* pertaining to statutory short form deeds (§ 82.04(c)) and implied covenants of title (§ 82.10(e)).

(n34)Footnote 70. *See* § 82.04(c) *infra*.

(n35)Footnote 71. *See Fuller-Ahrens P'ship v. South Carolina Dep't of Hwys. & Pub. Transp., 427 S.E.2d 920 (S.C. 1993); Loper v. Odom, 619 So. 2d 1310 (Ala. 1993); State v. Union Pac. R.R., 490 N.W.2d 461 (Neb. 1992).*

(n36)Footnote 72. *See Howell v. Howell, 430 S.E.2d 235 (N.C. 1993); Greenlee v. Mitchell, 607 So. 2d 97 (Miss. 1992); Davenport v. Gruber, 826 P.2d 59 (Or. App. 1992).*

(n37)Footnote 73. *See Overholt v. Independent Sch. Dist. No. 2, 852 P.2d 823 (Okla. App. 1993); Anadarko Petr. Co. v. Venable, 850 S.W.2d 302 (Ark. 1993).*

(n38)Footnote 74. *See* § 82.07 *infra*.

(n39)Footnote 75. John Willock, Legal Facetiae 429 (1887).

(n40)Footnote 76. Kent, *supra* n.2, at 452.

(n41)Footnote 77. *Id*. at 453.

(n42)Footnote 78. *See* § 82.10(e) *infra*.

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CHAPTER 82 TRANSFERS BY DEED

9-82 Thompson on Real Property, Thomas Editions § 82.05

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§ 82.05 Issues Affecting Transfer by Deed.

A conveyance may fail for a variety of reasons. When examined more carefully, the failure is attributed to a violation of, or non-compliance with, a narrowly-defined legal rule. The applicable legal rule is typically considered part of the "law of deeds," and there is no great difficulty in applying the applicable rule from that general body of law. In the substantive law of deeds, there are various methods of categorization of the defects affecting the validity of the transfer. One method of approach is to consider intrinsic and extrinsic defects of deeds, which method will be employed in the succeeding discussion.

On the other hand, a conveyance may fail for reasons having nothing to do with the law of deeds, strictly speaking. The difficulty presented is the artificiality of distinctions that have evolved in land transfer law; there are no bright-line tests separating "the law of deeds" from other areas of law. What distinctions have been drawn are the result of custom and convention. While certain topics undoubtedly form the "core" of the law of deeds, there are related but peripheral topics that are worthy of note. As might be expected, these topics are not easily addressed in a work devoted to the law of deeds. In § 82.05(c), *infra*, some of the more pertinent of these peripheral issues will be briefly noted.

Regardless of the source of the legal rules involved and how they are categorized, one studying the law of deeds must take into account the types of rules involved. This matter will be briefly addressed in the concluding subsection.

§ 82.05(a) Intrinsic Defects -- Formalities Requirements.

The first and most basic reason for a failed conveyance is a defect in the "deed" itself; the instrument does not satisfy formalities requirements imposed by the common law or by statute.

Formalities requirements will be addressed *infra* under the heading of "Due Execution." Issues of due execution generically pertain to the form and the language of the instrument; what *must* be contained in a deed. When an instrument fails to contain what is legally required, the defect may be characterized as "intrinsic" to the instrument. The defect arises out of the form and language of the instrument itself.

§ 82.05(b) Extrinsic Defects.

A conveyance may fail for a variety of defects unrelated to issues of due execution. These defects are not apparent on the face of the instrument. Blackstone wrote of methods by which a deed may be "avoided, or rendered of no effect." n79 After listing defects of due execution, Blackstone proceeded to discuss facts and circumstances outside the instrument affecting the validity of the instrument. n80

Legal defects of this type includes such matters as legal competency of the grantor and grantee, consent of the grantor, delivery, and acceptance. In this work these issues will not be treated as issues of "due execution," but will be addressed separately. While there is some artificiality in this separation, it appears unavoidable. Issues of delivery and acceptance, arising primarily in the context of donative transfers, will be discussed in the succeeding chapter.

§ 82.05(c) Related Issues.

§ 82.05(c)(1) Interests Subject to Deed Requirement.

The assumption underlying the law of deeds is the unstated doctrine that the transfer in question is subject to the law of deeds. Exactly what types of transfer, however, are subject to the law of deeds? An analogous issue arises in the law of wills but, in that arena, it is easy to identify the law of wills as the Statute of Wills which regulates testamentary transfer via formalities requirements. Courts have developed a test for determining what transfers are "testamentary" for purposes of compliance with the Statute of Wills.

In the history of deed law, the inquiry begins with examination of Section Three of the English Statute of Frauds, which provided that "no leases, estates, or interests, either of freehold or terms of years ... shall be assigned, granted, or surrendered, unless it be by deed or note in writing ...." n81

There was no confusion about the scope of this statute or what it was designed to do; the first three sections of the statute "affect the creation and transfer of estates in *land*." The "deed or note in writing" requirement applied to the creation of transfers of interests *in land*. To the extent that a transferor was creating or transferring interests in personal property, this section of the statute was inapplicable. n82

COMPUTER-ASSISTED RESEARCH

LEXIS: deed w/10 not w/10 property w/2 personal w/5 real w/2 property

In the United States the "deed" requirement is governed by state statutory law. Some states have Statutes of Frauds that are similar to the English prototype, including Section Three. Other state statutes follow a different format, generally providing that a conveyance of an interest or of an estate in real property or land may be made by deed of conveyance. The terms "estate" and "interest" in land have a well-developed meaning, as evidenced by decades of case law. There can be little doubt, for instance, that an easement n83 or a future interest, such as a reversion, is subject to the formalities requirements of deed law. Not so clearly defined, however, are other interests which arise out of contract.

COMPUTER-ASSISTED RESEARCH

LEXIS: deed w/10 conveyance w/10 easement w/10 pass

Restrictive covenants and installment land contracts are but two examples in modern-day law. If one views the restrictive covenant as an equitable servitude, the interest is treated as tantamount to an easement, and thus, the formalities requirements of deed law would apply. Installment land contracts are even more difficult to categorize because of the equitable conversion doctrine. If the interest of the land contract vendor is treated as personal property under the legal fiction of equitable conversion, it would not be subject to the law of deeds. n84 The categorization of the respective interests of the land contract vendor and vendee is important not only for the law of conveyances, but also for

the law of security. Similarly, a question can arise pertaining to the characterization of contractual interests arising from ownership of mineral rights. n85

COMPUTER-ASSISTED RESEARCH

LEXIS: installment contract w/10 equitable conversion oil or gas w/5 inchoate w/5 interest

Whether an interest is considered real or personal property is the focal point of the law of fixtures. The property in question may become part of the soil and treated as an interest in real property for transfer purposes. n86 A partner's interest in a real estate partnership may raise a question as to the nature of the interest owned by a partner. n87

The law of deeds is the by-product of a legal system that has historically distinguished real property from personal property and conveyances from contracts. While modern law tends to discount and obliterate these distinctions, these fundamental distinctions underlie the structure of the law of deeds and may be outcome-determinative in particular cases.

§ 82.05(c)(2) Inalienable Interests.

Assuming that the interest in question is classified as "real property," and further assuming that the deed in question meets all statutory criteria, the conveyance may still fail. The failure could result from the fact that the interest is legally "inalienable" -- not capable of being transferred inter vivos. An "inalienable" property interest may result from a statutory or common law rule that makes certain interests, such as future interests, not transferable. n88 Transferors often impose restrictions on alienation in deeds or wills. Whether or not such restrictions are valid depends upon a body of law known as the restraints on alienation doctrine. n89 This doctrine has a long history and survives today in various forms. n90

One example of an inalienable interest at common law was the legal rule which developed in England that land in the hostile possession of another could not be transferred. n91 The legacy of that rule in this country are state statutes, some of which are still extant, which explicitly state that land in the hostile possession of another may be transferred by deed. n92 Although the precise status of the common law rule may theoretically be in doubt in certain states, it would be hard to imagine a modern-day court invoking a common law rule with nothing to commend it but history.

§ 82.05(d) Rules of Law and Rules of Construction.

The distinction between intrinsic and extrinsic defects goes to the issue of whether a valid conveyance has taken place. Thus posed, the issue is binary in form; the conveyance is either void or valid. Issues of this type are governed by the applicable rules of law, primarily statutory rules. Detailing the precise scope and nature of these rules is one of primary goals of this chapter. All of the legal rules pertaining to due execution are rules of law; these rules are standards to which the parties must conform. Rule compliance is paramount. At its most basic level, the law of deeds consists of the definition of these rules of law and application thereof to specific factual situations.

Assuming that a conveyance is valid, there might still exist a legal dispute over the interpretation of the deed. It is at this point that rules of construction enter in. Note that while the issue in deed construction cases is in binary form -- does this construction or that construction prevail? -- the issue presented is not one of validity but construction. As will be discussed in § 82.13, *infra*, courts have adopted rules to follow in the interpretive process, the so-called rules of construction.

Considered more generally, the law of deeds consists of rules governing validity (rules of law) and rules governing interpretation (rules of construction). The distinction between rules of law and rules of construction is basic to the law of property and must be constantly kept in mind in the analysis of all of the issues pertaining to deeds. This distinction

is important for both the lawyer-draftsman and the lawyer-litigator, but it is especially important to the former.

FOOTNOTES:

(n1)Footnote 79. Blackstone, *supra* n.1, at *308-309.

(n2)Footnote 80. *Id.* at *308-309.

(n3)Footnote 81. 29 Charles II ch. 3, § 3 (1677).

(n4)Footnote 82. *Smith v. Williams, 779 S.W.2d 479 (Tex. App. 1989); Warburton v. Virginia Beach Fed. Sav. & Loan Ass'n, 899 P.2d 779 (Utah App. 1995)* (agreement granting 'membership" insufficient to create an interest in real property); *Harlan v. Vetter, 732 S.W.2d 390 (Tex. App. 1987).*

(n5)Footnote 83. *Warburton v. Virginia Beach Fed. Sav. & Loan Ass'n, 899 P.2d 779 (Utah App. 1995)* (lot reservation agreement, allegedly creating easement, must satisfy Statute of Frauds); *Kesinger v. Logan, 779 P.2d 263 (Wash. 1989); Aebischer v. Zobrist, 371 N.E.2d 1003 (Ill. App. 3d 1977).*

(n6)Footnote 84. *Matter of Estate of Martinek, 488 N.E.2d 1332 (Ill. App. 3d 1986).*

(n7)Footnote 85. *Hansen v. Stichting Mayflower Recreation Funds, 898 F. Supp. 1503 (D. Utah 1995)* ("Release of Participating Interest" not a conveyance); *Mull Drilling Co. v. Medallion Petr., Inc., 809 P.2d 1124 (Colo. App. 1991); Berry Energy Consultants & Mgrs., Inc. v. Bennett, 331 S.E.2d 823 (W. Va. 1985); Arbaugh v. Raines, 184 S.E.2d 620 (W. Va. 1971).*

(n8)Footnote 86. *Hughes v. Young, 444 S.E.2d 248 (N.C. App. 1994)* (mobile home passes as real property); *McPeak v. Thorel, 499 N.E.2d 97 (Ill. App. 1986); National Blvd. Bank of Chicago v. Citizens Util. Co., 438 N.E.2d 471 (Ill. App. 3d 1982).*

(n9)Footnote 87. *Jones v. Shatina, 471 P.2d 110 (Wash. App. 1970).*

(n10)Footnote 88. *E.g.*, Neb. Rev. Stat. § 76-299 (possibilities of reverter and powers of termination inalienable). *See also Universal C.I.T. Credit Corp. v. Pritchett, 121 S.E.2d 17 (Ga. 1961); City of Daytona Beach v. Tuttle, 630 So. 2d 586 (Fla. App. 1993)* (city incapable of transferring riparian rights to private party).

(n11)Footnote 89. *See, e.g., Mull Drilling Co. v. Medallion Petr., Inc. 809 P.2d 1124 (Colo. App. 1991)* (right to grant executive rights to lease by holder of mineral interests).

(n12)Footnote 90. *See* ch. 29 *supra*.

(n13)Footnote 91. *See* discussion in Kent, *supra* n.2, at 439-442.

(n14)Footnote 92. *E.g.*, N.Y. Real Prop. Law § 260.

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CHAPTER 82 TRANSFERS BY DEED

9-82 Thompson on Real Property, Thomas Editions § 82.06

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§ 82.06 "Due Execution" -- Formalities Requirements.

[Go To Supp]

The phrase "due execution" of a deed does not appear in the writings of Coke or Blackstone. In 1830, Chancellor Kent employed the phrase "of the due execution of a deed" in his work. As to the meaning of the phrase "due execution," Kent stated that for a deed to be "duly executed," it "must be written on paper or parchment, and signed, sealed, delivered, and recorded." n93 Modern-day writers on the law of deeds, while not agreeing on all of the elements of "due execution," have regarded the elements of delivery and recordation as separate and distinct elements of deed law, not as components of "due execution." n94

§ 82.06(a) "In Writing."

Chancellor Kent's listing of the elements of due execution began with the writing requirement. This was most fitting since the first and most basic formalities requirement is that of a writing. As noted, n95 the English Statute of Frauds of 1677 introduced into law the requirement of a writing for the creation or transfer of corporeal interests in real estate. Blackstone noted that this statutory requirement was to abrogate the former practice of conveyances being made "by parol, or word of mouth." n96 The writing must be "upon paper or parchment" and may be "printed." n97

In the United States, the "in writing" requirement for deeds is a matter of state statutory law. State legislatures, using the English Statute of Frauds as a prototype, have enacted statutes requiring transfers of real estate to be made by "deed or note in writing." n98 Drafting and litigation have focused precisely on what this writing must contain, not on whether writing itself is required. n99 As noted *supra*, n100 the modern-day definition of deed invariably incorporates the writing requirement. Nothing is more basic to the very concept or definition of a deed than the "in writing" requirement.

COMPUTER-ASSISTED RESEARCH:

LEXIS: title w/5 real estate w/10 transfer! w/10 writ!

Where the law permits transfers of interests of real property without a writing, the law being applied is not the law of deeds. Wrongful possession of land may result in an original title through the doctrine of adverse possession. n101

Fraud and other forms of wrongdoing might result in a transfer through principles of restitution and the constructive trust remedy. n102 A purported oral gift of land cannot be given effect if the "in writing" requirement for deeds is taken seriously. n103 The doctrine of part performance, which equity courts recognized in the contracts section of the Statute of Frauds, has received some slight recognition in older cases involving oral gifts of real estate. n104

COMPUTER-ASSISTED RESEARCH:

LEXIS: part performance w/20 oral gift

§ 82.06(b) "Signed" by the Grantor.

The signature of the grantor is the second most basic and universal element encompassed in the phrase "due execution." Like the writing requirement, the necessity of the grantor's signature is traceable to the English Statute of Frauds. n105 Sir Edward Coke's discussion of the "incidents" of a deed, authored some fifty years before the Statute of Frauds, does not mention signing. Blackstone's treatise acknowledged the change wrought by the Statute of Frauds in stating that "signing now seems to be now as necessary as sealing." n106 Chancellor Kent, writing in 1830, in deference to the Statutes of Frauds provisions of the various states, declared that a deed must be signed. n107

In every American jurisdiction, a statute requires signing by the grantor, or, as stated in some states, the deed must be "subscribed" by the grantor. n108 Litigation over the signature requirement has arisen in a variety of contexts: what constitutes a "signature"; n109 placement of the signature; n110 whether signing by mark is sufficient; n111 whether a disabled grantor may be assisted in signing; n112 whether signing by an agent is allowed; n113 and the effect of an erroneous signature. n114 If the grantor is an entity and not a natural person, additional questions are presented with regard to statutory compliance. n115

COMPUTER-ASSISTED RESEARCH

LEXIS: grantor w/5 signs
w/5 mark w/10 witness!
signature w/10 hand w/25 aid
deed w/5 corporate seal

The not-so-obvious issue raised by the statutory requirement of the grantor's signature is the question of "who is the grantor?" The issue of whose signature is required arises most frequently in conjunction with grantors who own property in their individual names but are married at the time of the conveyance. The complicating factor is the inchoate interest of the spouse, which may be lawfully conveyed away only by deed signed by the spouse. n116 This issue of "spousal joinder" is a long-standing problem in the law pertaining to marketable title. n117 Technically, this issue is not one of "due execution" affecting the validity of the deed, but given the history and prevalence of this problem, it needs to be dealt with at the time of the transfer. n118

COMPUTER-ASSISTED RESEARCH

LEXIS: deed w/20 signature w/20 inchoate w/20 dower

What appears to be the signature of the grantor on the deed may turn out to be a forgery. n119 Obviously, if forgery is proved, the statutory requirement has not been met. The topic of forgery will be taken up in conjunction with "Consent Issues," § 82.12, *infra*.

COMPUTER-ASSISTED RESEARCH

LEXIS: forg! w/5 void

§ 82.06(c) Seal.

According to Chancellor Kent, "Deeds were originally called charters, and from the time of the Norman Conquest, the charter was authenticated by affixing to it a seal of wax, and it derived its validity from the seal." n120 The Statute of Frauds, Section Three, referred to a "deed or note in writing." n121 Blackstone and Kent interpreted this language to mean that the common law definition of "deed" as a sealed instrument remained after the passage of the Statute of Frauds. n122

Issues relating to the requirement of a seal are practically nonexistent in the modern-day law. Modern state statutes referring to a "deed" cannot rationally be construed as adopting the common law definition of a deed as an instrument under seal. n123 In the vast majority of states, there are statutes that have been adopted which either render a seal unnecessary or make its presence legally irrelevant. n124 Even in the rare jurisdiction which ostensibly requires a seal, n125 the courts appear to recognize various legal doctrines to satisfy this requirement. n126

COMPUTER-ASSISTED RESEARCH

LEXIS: deed w/5 seal

When the grantor is a corporation, the lack of a corporate seal may be legally significant. n127 To the extent that modern-day deeds bear evidence of "seals," it is more likely that the seal is that of the notary public, placed thereon in conjunction with the acknowledgment of the instrument. n128

COMPUTER-ASSISTED RESEARCH

LEXIS: deed w/5 corporate seal

§ 82.06(d) Attestation.

"Attestation" is, according to Blackstone, the "execution of [the deed] in the presence of witnesses." n129 Although initially described by Blackstone as a "requisite to the validity of a deed," the same author backtracks substantially in stating that attestation is necessary more "for preserving the evidence, than for constituting the essence of a deed." n130 Unlike the law of wills, which by statute incorporated "attestation" and "subscription" requirements as part of the execution process, n131 neither the common law nor the Statute of Frauds required attestation of deeds.

In the United States, there being no common law requirement of attestation, deed attestation became solely a matter of local statutory law. n132 Today, only the states of Florida and Ohio have statutes generally requiring attestation as an element of due execution. n133 State statutes typically require witnessing in conjunction with a statute that allows a grantor to sign by mark. n134 Attestation may also be a requisite to recording under local law. n135

§ 82.06(e) Acknowledgment.

Whereas the common law incorporated the requirement of a seal into the definition of a deed, that aspect of the common law of deeds has no modern-day vitality. n136 In the modern scheme of deed law, the requirement of an acknowledgment has, as a practical matter, been substituted as an element of due execution.

Acknowledgment of instruments is a modern-day statutory device designed to allow persons to rely upon the authenticity of the signatures appearing on deeds and other instruments. While the meaning and content of acknowledgment is subject to statutory definition from state to state, the general pattern of an acknowledgment

procedure involves two steps: (1) the person executing an instrument goes before an officer, signs the document and declares the action to be the voluntary act and deed of the person signing; (2) the officer then places a certificate of acknowledgment on this instrument, showing the name of the person making the acknowledgment, the date, the officer's authority and the officer's seal. n137

To what extent are deeds *required* to be acknowledged under modern-day law? Since acknowledgment was unknown at common law, there is no common law basis for requiring it as an element of due execution of a deed. As a purely statutory creation of the various jurisdictions, acknowledgment of a deed is required to the extent required by governing law, in this instance, state statutes. In examining these statutes, some basic distinctions need to be drawn.

In many jurisdictions, the courts have concluded that an unacknowledged instrument is valid as between the grantor and the grantee. n138 Courts taking this view do not regard the acknowledgment as an essential part of the deed nor as a part of the "due execution" formalities. n139 On the other hand, in these same jurisdictions, state statutory law might specifically require a valid acknowledgment for the transfer of an interest in a particular type of property, such as homestead. n140 As to such types of property, the acknowledgment of the deed is regarded as an execution formality, with non-compliance resulting in invalidity. n141 This is the rare case in which the type of property being conveyed affects the formalities requirements.

COMPUTER-ASSISTED RESEARCH

LEXIS: unacknowledged deed w/10 grantor w/10 grantee
instrument w/5 acknowledged w/15 grantor w/15 grantee
conveyance w/10 valid w/20 acknowledged w/20 homestead

Acknowledgment of a deed is typically required before the deed is entitled to be recorded. n142 Recordation is another area of law that is grounded in statutory law. As a general proposition, it is said that recordation is not a required formality for a deed; thus, the aphorism states that "title passes by deed and not by the registration." n143 As a practical matter and for good reason, the vast majority of deeds are recorded. Thus, whether acknowledgment is technically required or not becomes a moot point; the grantee in practically every instance imaginable will want to have the deed recorded promptly and to do so, the deed must be acknowledged. In this area of the law the practice is more important than the theory. Acknowledgment of a deed has become a de facto, if not a de jure, requirement.

COMPUTER-ASSISTED RESEARCH

LEXIS: deed w/2 recording w/5 essential w/5 validity
deed w/10 real estate w/10 delivery w/10 recording
deed w/5 not w/5 recorded w/10 effective

The issue of the validity of the acknowledgment might arise in varying contexts. Questions of this nature are governed by the law of acknowledgments, a body of law distinct from the law of deeds. Many of the issues pertaining to the validity of acknowledgments are strictly factual issues. Some purely legal questions do arise, but the number of recent cases involving alleged defective acknowledgments is relatively small. n144

In a lawsuit contesting the validity of a deed, the contestant would ordinarily be required to state specific grounds for invalidity. As to the matters discussed in this section, the contestant could make a challenge based upon alleged non-compliance with the signature requirement or the acknowledgment requirement. The burden of proof would be on the contestant in those cases in which a certificate of acknowledgment, regular in form, appears on the instrument. n145 Just as there are precautions that one should take in anticipation of a will contest, the person drafting a deed should always consider the advantages gained by having a deed properly acknowledged, even though the instrument does need to be acknowledged to be valid and will not be presented for recording.

FOOTNOTES:

(n1)Footnote 93. Kent, *supra* n.2, at 442.

(n2)Footnote 94. *E.g.*, Rufus Patton, *"Part 12: Deeds,"* in 3 American Law of Property § 12.57 (A.J. Casner ed. 1952); 8 George W. Thompson, The Modern Law of Real Property ch. 53 (delivery), ch. 55 (recording) (1963 repl. ed., John Grimes ed.) (hereinafter "Thompson").

(n3)Footnote 95. *See* § 82.03(b)(3) *supra*.

(n4)Footnote 96. Blackstone, *supra* n.1, at *240.

(n5)Footnote 97. *Id.*

(n6)Footnote 98. *E.g.*, Wash. Rev. Code Ann. § 64.04.010; N.D. Cent. Code § § 47-10-01, 47-10-06.

(n7)Footnote 99. *National Blvd. Bank of Chicago v. Citizens Util. Co., 438 N.E.2d 471 (Ill. App. 3d 1982).*

(n8)Footnote 100. *See* § 82.03(a)(1) *supra*.

(n9)Footnote 101. *See* ch. 87 *infra*.

(n10)Footnote 102. A recent case discussing the constructive trust remedy in the context of oral gift of real estate is *Erb v. Kohnke, 824 P.2d 903 (Idaho 1992). See also Quigley, Inc. v. Miller Family Farms, 629 A.2d 110 (N.J. Super. 1993)* (trial court's attempt to create easement based on equitable estoppel overturned based upon policy considerations of merger doctrine and Statute of Frauds).

(n11)Footnote 103. *Hill v. Bowen, 134 N.E.2d 769 (Ill. App. 2d 1956).*

(n12)Footnote 104. *See Lynch v. Lynch, 34 N.W.2d 485 (Iowa 1948); Hayes v. Hayes, 148 N.W. 125 (Minn. 1914); Barnwell v. Barnwell, 476 S.E.2d 492 (S.C. App. 1996)* ("part performance" doctrine applied to parol gift of land).

(n13)Footnote 105. 29 Chas. II, ch. 3, § 3 (1677).

(n14)Footnote 106. Blackstone, *supra* n.1, at *306.

(n15)Footnote 107. Kent, *supra* n.2, at 442.

(n16)Footnote 108. *See, e.g.*, Nev. Rev. Stat. § 111.205; N.Y. Gen. Oblig. Law § 5-703.

(n17)Footnote 109. 7 Thompson, *supra* n.94, § 3229 at 425.

(n18)Footnote 110. *Id*. at § 3230.

(n19)Footnote 111. *See Runge v. Moore, 196 N.W.2d 87 (N.D. 1972); In re Estate of Williams, 182 So. 2d 10 (Fla. 1965); Aberdeen Oil Co. v. Goucher, 362 S.W.2d 20 (Ark. 1962). See also* Thompson, *supra* n.94, at § 3231.

(n20)Footnote 112. *Watson v. Johnson, 411 P.2d 498 (Okla. 1965).*

(n21)Footnote 113. *Hildebrandt v. Hildebrandt, 683 P.2d 1288 (Kan. App. 2d 1984); Haffa v. Haffa, 253 N.E.2d 507 (Ill. App. 2d 1969); Herr v. Murphree, 402 S.W.2d 393 (Ark. 1966). See* the extensive discussion in the prior edition of Thompson relating to signing by one possessing a power of attorney. Thompson, *supra* n.94, § § 3234-3239.

(n22)Footnote 114. Thompson, *supra* n.94, § 3229 at 427.

(n23)Footnote 115. *See generally* the discussion in Thompson, *supra* n.94, at: § § 3221-3223 (partnerships); § 3224 (unincorporated associations); § 3225 (fiduciaries); § 3226 (corporations); § 3227 (governments). For a conveyance by a corporation, the lack of a corporate seal on the instrument may be fatal. *Catawba County Horsemen's Ass'n v. Deal, 419 S.E.2d 185 (N.C. App. 1992).*

(n24)Footnote 116. *See Morrison v. Brooke, 432 So. 2d 1227 (Ala. 1983); In re Estate of Mayer, 133 N.W.2d 322 (Wis. 1965).* Whether or not a spouse who signs a deed to release marital interests will be held liable on title covenants is an open question. *Compare Nordberg v. Green, 638 So. 2d 91 (Fla. App. 1994)* (spouse held liable on breach of warranty) *with Hughes v. Young, 444 S.E.2d 248 (N.C. App. 1994)* (spouse who joined in deed solely to release inchoate interest not liable on title covenants). The problem is an ancient one; in some states there are statutes which exonerate the joining spouse from liability on title covenants. *See, e.g.,* Mo. Rev. Stat. § 442.030; Va. Code Ann. § 55-42.

(n25)Footnote 117. The lack of the spouse's signature may create an unmarketable title in the grantee. *See Taylor v. Bailey, 271 S.E.2d 296 (N.C. App. 1980); Auen v. DiCesare, 404 A.2d 1324 (Pa. Super. 1979).*

(n26)Footnote 118. In addition to the foregoing 'signature' issues, the case of *Wachter Dev., L.L.C. v. Gomke, 544 N.W.2d 127 (N.D. 1996)* discusses another problematic signature issue: the signing by one grantor when not all grantors sign. According to the North Dakota court, although every signer of a deed conveys whatever interest that signer has, the exception to this general rule is if each signer intends the other grantors to sign, each signer's signature "is not effective as to any of the grantors unless all of them." Although the instant case involved a land sale contract and not a deed, the court referred to the "rule that applies to deeds." The issue thus presented is whether a deed may be "partially valid," binding only signing grantors, or void. This is a rare instance in the law of deeds where such choice is presented.

(n27)Footnote 119. *Southeast Bank N.A. v. Sapp, 554 So. 2d 1193 (Fla. App. 1989), review denied, 564 So. 2d 1087 (Fla. 1990); Lewis v. Barnett, 694 S.W.2d 743 (Mo. App. 1985); Bannerson v. Small, 842 F.2d 710 (3d Cir. 1988), cert. denied, 488 U.S. 845 (1988).*

(n28)Footnote 120. Kent, *supra* n.2, at 443.

(n29)Footnote 121. 29 Charles II, ch. 3, § 3 (1677).

(n30)Footnote 122. Blackstone, *supra* n.1, at *306; Kent, *supra* n.2, at 444.

(n31)Footnote 123. In the prior edition of this work the statement is made that "So a seal is essential to a conveyance of land, except in those states in which the use of a seal is dispensed with by statute." Thompson, *supra* n.94, § 3261 at 470. The underlying assumption in this statement is the notion that the common law definition of "deed" includes a seal, and it is the common law definition that modern-day statutes are adopting. While it is true that certain required elements of a deed are, even today, not statutorily based, it is hard to believe that modern-day legislators, in utilizing the term "deed," sought to resurrect 14th and 15th century concepts.

(n32)Footnote 124. *See* 3 A.L.P., *supra* n.94, § 12.58 at 304.

(n33)Footnote 125. As indicated in: *Garrison v. Blakeney, 246 S.E.2d 144 (N.C. App. 1978); Dunn v. Dunn, 87 S.E.2d 308 (N.C. 1955); Monroe Park v. Metropolitan Life Ins. Co., 457 A.2d 734 (Del. 1983)* (mortgage); *Filip v. Bogdan, 455 A.2d 1062 (N.H. 1983).*

(n34)Footnote 126. *See* Thompson, *supra* n.94, § 3263; 3 A.L.P., *supra* n.94, § 12.58 at 304.

(n35)Footnote 127. *Catawba County Horsemen's Ass'n v. Deal, 419 S.E.2d 185 (N.C. App. 1992).*

(n36)Footnote 128. *See* the discussion in § 82.06(e) *infra*, regarding the role and purpose of the acknowledgment function.

(n37)Footnote 129. Blackstone, *supra* n.1, at *307.

(n38)Footnote 130. *Id.*

(n39)Footnote 131. *See generally* Thomas Atkinson, The Law of Wills ch. 7 (1953) (hereinafter "Atkinson"). The American wills statutes, following English prototypes, typically require attestation and subscription by the witnesses. *See, e.g.*, Ala. Stat. § 48-8-131; Ill. Comp. Stat. ch. 755, § 5/4-3; N.Y. Estate Powers & Trusts Law § 3-2.1.

(n40)Footnote 132. *See* Thompson, *supra* n.94, § 3280.

(n41)Footnote 133. Fla. Stat. § 689.02; Ohio Rev. Code § § 5302.05, 5302.06. A state may require attestation in order to record a deed. *E.g.*, Ga. Code § § 44-5-30. Under Alabama law, the requirement of attestation may be satisfied by acknowledgment. Thus, under Alabama law, to be valid the deed must be either attested or acknowledged. *See In re Health Science Prods., Inc., 183 B.R. 903 (Bankr. N.D. Ala. 1995).*

(n42)Footnote 134. *See* 3 A.L.P., *supra* n.94, § 12.59 n.5. Under Alabama law two witnesses are required for signature by mark. Ala. Code § 35-4-20, *et seq*.

(n43)Footnote 135. *See* 3 A.L.P., *supra* n.94, § 12.59 n.6. In New York attestation by only one witness is required. N.Y. Real Prop. Law § 253. In Georgia and South Carolina, attestation by two witnesses is required. Ga. Code § 44-5-30 *et seq*; S.C. Code § 27-7-10.

(n44)Footnote 136. *See* § 82.06(c) *supra*.

(n45)Footnote 137. *See* 3 A.L.P., *supra* n.94, § 12.60 at 309.

(n46)Footnote 138. *See, e.g., Simmons v. Buchanan, 803 S.W.2d 950 (Ark. App. 1991); Lindquist v. Ball, 441 N.W.2d 590 (Neb. 1989); Jamieson v. Jamieson, 912 S.W.2d 602 (Mo. App. 1995)* (acknowledgment not a prerequisite to validity).

(n47)Footnote 139. *See* 1 American Jurisprudence 2d, *Acknowledgements* § 4 (hereinafter "Am. Jur. 2d"); 1A Corpus Juris Secundum, *Acknowledgements* § 7 (hereinafter "C.J.S.").

(n48)Footnote 140. *E.g., Lindquist v. Ball, 441 N.W.2d 590 (Neb. 1989).*

(n49)Footnote 141. The Nebraska case law (see previous note) on the requirement of acknowledgment in the transfer of a homestead is based on Neb. Rev. Stat. § 40-104. This statute operates as a rule of law in regard to the formalities of execution for a deed.

(n50)Footnote 142. *See generally* ch. 92 *infra* regarding recordation of deeds.

(n51)Footnote 143. The classic case on point is *Earle v. Fiske, 103 Mass. 491 (1870). See also Graham v. Lyons, 546 A.2d 1129 (Pa. Super. 1988); Blakely v. Kelstrup, 708 P.2d 253 (Mont. 1985).*

(n52)Footnote 144. *Associates Fin. Serv. Co. v. Bennett, 611 So. 2d 973 (Miss. 1992)* (defective acknowledgment has no effect on validity of deed between parties to deed); *Crotts Andrews v. All Heirs & Devisees of Bellis, 759 S.W.2d 532 (Ark. 1988)* (curative statute did not remedy defective acknowledgment).

(n53)Footnote 145. *See Mullins v. Ratliff, 515 So. 2d 1183 (Miss. 1987); Weaver v. Crommes, 167 N.E.2d 661 (Ohio App. 1959).*

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CHAPTER 82 TRANSFERS BY DEED

9-82 Thompson on Real Property, Thomas Editions § 82.07

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§ 82.07 Parts of a Deed.

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§ 82.07(a) History.

Sir Edward Coke, writing in the early 17th century, referred to a deed's "formall or orderly parts ... not of the essence of a deed of feoffment." n146 Thus, it appears that from the dawn of deed history, legal commentators have drawn the distinction between those parts of deed essential to its validity and those parts "not of the essence" of a deed. The succeeding sections discuss the essential and non-essential elements of a deed.

Blackstone emphasized that the "formal and orderly parts" of a deed, while "not absolutely necessary," should not be departed from "without good reason or urgent necessity." n147 Chancellor Kent noted that English and early American conveyancers conformed to Blackstone's admonition, not departing from the "formal and orderly parts of a deed, which have been well considered and settled." n148 The result of this adherence to formalism in the drafting of a deed was a lengthy and prolix document, described by one English judge as "difficult to read, disgusting to touch, and impossible to understand." n149

Following the pattern set forth by Coke, Blackstone listed the "formal and orderly" parts of a deed as: (1) premises; (2) habendum and tenendum; (3) reddendum; (4) conditions, if any; (5) clause of warranty; (6) covenants and; (7) conclusion. n150 The legal significance of these parts in the modern law of deeds will be briefly addressed.

§ 82.07(b) Current Significance.

A modern-day Chancellor Kent would likely conclude that there has been a wholesale departure from the form of deed espoused by Blackstone. Modern-day deeds are more simplified and concise than those of decades past; many of the "formal and orderly parts" are regarded today as neither legally necessary nor advisable. n151 The adoption of statutory short form deeds by state legislatures, previously discussed, n152 has played a significant role in the rather wholesale departure from the "formal and orderly part" format that prevailed into the 20th century. n153 An emphasis on simplification forces a re-examination of the traditional "set form" for deeds, and, in many instances, a re-examination reveals that certain of the "formal and orderly" parts are unnecessary. n154

The "premises," or introductory clause, covered such topics as the identity of the parties, recitals, and the consideration. n155 Each of these topics will be taken up in the succeeding sections. The "habendum and tenendum" clause, introduced by the familiar "to have and to hold" language, survived long after all reasons for its usage disappeared. n156 As to the habendum portion of the clause, Blackstone indicated that "the office of the habendum is to determine what estate or interest is granted in the deed, though this may be performed, and sometimes is performed, in the premises." n157 Issues arising out of the estate or interest conveyed are constructional problems and will considered in § 82.13(c)(2), *infra*. To the extent the habendum clause has any modern significance, it is in conjunction with deed construction. The habendum clause is not legally required, n158 and its inclusion in modern deed forms is explainable only by the force of habit and custom. n159

COMPUTER-ASSISTED RESEARCH

LEXIS: deed w/5 habendum clause w/5 not w/5 essential

By the reddendum clause, according to Blackstone, the grantor creates or reserves "some new thing to himself out of what he had before granted." n160 Under a system of tenure, the reddendum clause served to identity the services owed the feoffor by the feoffee. n161 In modern-day law, the reddendum survives in substance if not in form; the discussion of the "reservation," to be considered in § 82.09(c), *infra*, will show the modern-day legacy of the reddendum.

The "condition" part of a deed referred to is "a clause of contingency, on the happening of which the estate granted may be defeated." n162 The topic of estates upon a condition will be briefly discussed in § 82.09(d), *infra*.

Blackstone defined the "clause of warranty" as the language "whereby the grantor doth, for himself, and his heirs, warrant and secure to the grantee the estate so granted." n163 This topic in modern law is subsumed under the heading of "Covenants of Title" and will be considered in § 82.10, *infra*.

As to the part of a deed labelled "covenants," Blackstone wrote, these "are clauses of agreement contained in a deed, whereby either party may stipulate for the truth of certain facts, or may bind himself to perform, or give, something to the other." n164 In this passage there is a reference to three types of agreements very much a part of modern day law: (1) a grantor's covenant of a right to convey and of quiet enjoyment; n165 (2) a "covenant real," binding upon the heirs n166 and; (3) a grantee's covenant to pay rent and make repairs. n167

The contractual undertakings contained in a deed most often treated as a part of the substantive law of deeds are the grantor's title covenants, to be taken at § 82.10, *infra*. The topic of "real covenants," which is concerned primarily with the running of benefit and burden to successors in interest, is beyond the scope of this chapter. Oftentimes intertwined with the topic of "real covenants" are the rules pertaining to restrictive covenants and building restrictions. These topics as well are generally not considered as part of the substantive law of deeds. They will be briefly addressed in § 82.09(d), *infra*.

The conclusion of a deed has traditionally taken the form of a "testimonium clause" which recites the date of execution of the instrument. n168 The date of deed is not essential to the validity of the deed. This was true at common law n169 and is true today as well. n170

Blackstone recognized that in setting forth the "formal and orderly" parts of a deed he was describing matters of form and not of substance. In other words, there were no common law rules specifying that a deed, in order to be valid, had to take a certain form. In sum, Blackstone was lecturing on the virtues of good drafting, having previously addressed the "requisites" for a deed. n171 The various state legislatures, by design, simplified this topic considerably with the adoption of the statutory short form deeds. n172 Judicial decisions today explicitly reject the notion that technical forms and parts of a deed are required. n173

COMPUTER-ASSISTED RESEARCH

LEXIS: land w/2 interest w/5 technical w/5 language
deed w/2 valid w/50 notwithstanding w/50 technical
deed w/5 formal w/5 not w/5 necessary

In the modern era, about the only area of deed law in which the formal parts have played some significant role is in the area of deed construction. As will be shown later, n174 the significance of the parts of a deed is of diminishing significance in that area of deed law as well.

FOOTNOTES:
(n1)Footnote 146. Coke, *supra* n.41, at *243.

(n2)Footnote 147. Blackstone, *supra* n.1, at *298.

(n3)Footnote 148. Kent, *supra* n.2 at 453.

(n4)Footnote 149. John Willock, Legal Facetiae 420 (1887).

(n5)Footnote 150. Blackstone, *supra* n.1, at *298-304.

(n6)Footnote 151. *See Harlan v. Vetter, 732 S.W.2d 390 (Tex. App. 1987); Mehus v. Thompson, 266 N.W.2d 920 (N.D. 1978).*

(n7)Footnote 152. *See* § 82.04(c) *supra*.

(n8)Footnote 153. The emphasis in legal drafting on "plain language" has aided the cause of simplification. In at least one instance, the "plain language" philosophy has been enacted into statutory law. *See* N.J. Stat. Ann. § 56:12-1. Deed forms have been drafted conforming to this law. West's Legal Forms § § 32.220-32.220F (2d ed. 1986).

(n9)Footnote 154. Chancellor Kent, writing in 1830, was willing to depart from custom and simplify the form of a deed. *See* Kent, *supra* n.18, at 452.

(n10)Footnote 155. BLACKSTONE, *supra* n.1, at *298.

(n11)Footnote 156. The tenendum portion of the clause, by the time Blackstone wrote of it, had already lost all legal significance and was "kept in by custom." *Id*.

(n12)Footnote 157. *Id*.

(n13)Footnote 158. *Flynn v. Palmer, 70 N.W.2d 231 (Wis. 1955).*

(n14)Footnote 159. The few modern cases on the habendum deal with conflicts between it and the granting clause. Thus, it appears that inclusion of the habendum clause is not merely a "useless repetition," but a somewhat dangerous practice. *See* 3 A.L.P., *supra* n.94, § 12.47 at 293 ("the habendum is a useless repetition").

(n15)Footnote 160. Blackstone, *supra* n.1, at *299.

(n16)Footnote 161. Lord Coke felt that the proper place for discussion of reddendum belonged in his chapter on rents. Coke, *supra* n.41, at *6a.

(n17)Footnote 162. Blackstone, *supra* n.1, at *299.

(n18)Footnote 163. *Id*. at *242.

(n19)Footnote 164. *Id*. at *304.

(n20)Footnote 165. These topics will be taken in conjunction with "covenants for title," § 89.10 *infra*.

(n21)Footnote 166. The topic of "real covenants," that is, covenants running with the land, is discussed elsewhere in this treatise. *See* ch. 61 *supra*.

(n22)Footnote 167. These are standard covenants contained in leases. They considered elsewhere in this treatise. *See* chs. 40 and 41 *supra*.

(n23)Footnote 168. A.L.P., *supra* n.94, § 12.52.

(n24)Footnote 169. Blackstone, *supra* n.1, at *304.

(n25)Footnote 170. *Thompson, supra n.94,* § 3228. Questions sometimes arise with regard to the discrepancy between the date of the deed and the date of acknowledgment. The former date is usually controlling. *Id*.

(n26)Footnote 171. Blackstone, *supra* n.1, at *296-297.

(n27)Footnote 172. *See* § 82.04(c) *supra*.

(n28)Footnote 173. *See Harlan v. Vetter, 732 S.W.2d 390 (Tex. App. 1987); Veltmann v. Damon, 696 S.W.2d 241 (Tex. App. 1985); Butler v. Centerre Trust Co., 656 S.W.2d 831 (Mo. App. 1983).*

(n29)Footnote 174. *See* § 82.13(c)(2).

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CHAPTER 82 TRANSFERS BY DEED

9-82 Thompson on Real Property, Thomas Editions § 82.08

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§ 82.08 Essential Elements of a Deed.

1978 Bankruptcy Code

Given the diminished significance of the formal parts of a deed, modern commentators on the law of deeds have tended to focus on the distinction between the essential and non-essential elements of a deed. n175 Recent judicial decisions, in listing the requirements for a valid conveyance, likewise emphasize the essential elements of a deed. n176 Whereas the required elements of "due execution" are primarily statutorily based, n177 the essential elements discussed in this section are of common law origin.

§ 82.08(a) Parties -- Grantor and Grantee.

In listing the component parts of a deed, Chancellor Kent listed first "the names of the parties," n178 and then stated that "the parties must be competent to contract, and be truly and sufficiently described." n179 Kent's statements are epigrams of what the expositors of the common law, Coke n180 and Blackstone, n181 had listed as "incidents" and "requisites," respectively, of a deed. The common law requirement, as it pertains to parties, goes beyond the simple notion that there must be a grantor and a grantee. n182 The issues pertaining to "parties" to a deed, as the common law authorities noted, may be separated or subdivided into two categories: (1) the identification issue -- the "sufficiently described" requirement, and (2) the legal capacity issue -- the "competency to contract" requirement. Both of these topics will be separately addressed.

In the discussion of the identity and legal capacity issues, the underlying assumption is that the applicable rules are rules of law. Failure to comply with these rules results in, as the courts are wont to say, a "nullity." n183 The types of issues addressed in subsections (1) and (2) are the types of issues usually categorized as part of the substantive law of deeds. There are numerous identification and capacity issues that, while closely related the issues discussed in subsections (1) and (2), are customarily categorized in property law under different headings or topics. The inter-relationship of these issues will be briefly addressed in the concluding subsection.

§ 82.08(a)(1) Identities of Grantor and Grantee.

Blackstone stated that in every grant there must be a grantor and a grantee "expressed by sufficient names." n184 This is

true in modern-day law as well -- the deed must identify the grantor and grantee with sufficient certainty. n185

Many of the problems involving the identity of the grantor are related to the statutory requirement of the grantor's signature. n186 The inquiry focuses on the question of where on the deed the "identity" of the grantor must be disclosed. The general rule is that the identity of the grantor must be found in the "body" of the deed. n187 The courts are somewhat lenient in interpreting this requirement; the identity requirement is satisfied if a pronoun such as "I" or "we" is used and the pronoun can be linked to the signatures. n188 On the other hand, if the only identity of the grantor is from the signature, and the body of the deed makes no reference to the signer as grantor, courts applying the general rule find the deed void as to that signer's interest, but there are decisions to the contrary. n189

COMPUTER-ASSISTED RESEARCH

LEXIS: conveyance w/20 signer w/20 void

Conversely, if the deed recites the names of the grantors and not all grantors sign the deed, the deed is not void, and is effective to convey the signers' interests. n190

Some of the more nettlesome grantor identity problems are "variance" problems; the grantor's name in the body of the instrument is incomplete, incorrect or does not "match" the signature with precision. In these instances, the courts have been loath to invalidate a deed on these rather technical grounds. n191 The most vexing of the "variance" problems are those involving two instruments -- where the person named as grantee in an earlier deed is alleged to be the grantor of a later deed. Because of some variance in the names on the two instruments, title problems are raised. This matter will be considered in subsection (3), *infra*.

The starting point for discussion of identity of the grantee is the same as for that of the grantor; the law requires that the grantee be described with reasonable certainty. n192 Once again, courts are loath to invalidate a deed because the identity of the grantee is clouded because of misspellings, misdescriptions, variances, etc. n193 If the name of the grantee is omitted entirely from the body of the instrument, the violation of the general rule results in the invalidity of the deed. n194

The most problematic of the issues relating to the identity of the grantee is that of the "blank deed." What is the legal status of a deed in which the grantee's name is left blank, and someone is given authorization by the grantor to fill in the grantee's name at a later date? The prevailing view seems to be that the deed passes equitable title at the time it is handed over, and legal title passes when the name of the grantee is filled in. n195 There are troublesome issues in such cases complicated by such factors as the death of the grantor prior to the filling in of the deed, the parol authority of the agent, the precise time the instrument takes effect, and so forth, and the status of bona fide purchasers from the grantee. n196

COMPUTER-ASSISTED RESEARCH

LEXIS: conveyance w/20 name w/20 blank

§ 82.08(a)(2) Legal Capacity of Grantor and Grantee.

The modern statement of the rule pertaining to legal capacities of grantor and grantee is not the common law standard of "competency to contract." The modern rule is that the grantor and grantee must be legally recognized entities capable of holding legal title to the property conveyed. n197 This is the more precise and accurate interpretation of the requirement that every deed requires "a grantor and a grantee." n198 Presumably, the grantor and grantee must be separate and distinct legal entities, for, as the rule goes, a person cannot convey to oneself. n199

The identified grantor may be a natural person or an entity. External facts might reveal that the identified grantor either (1) never existed, or has ceased to exist, (2) is a legal entity that has *no* capacity to hold title to the subject real estate or, (3) is a legal entity that holds title to the subject property but whose ability to transfer is clouded by questions of legal disabilities, desire and intent. It is only in situations (1) and (2) that, for purposes of this discussion, involve legal capacity. In these two situations there is no legal entity holding title to the subject property and, hence, no grantor. The outstanding example of the nonexistent grantor is the purported conveyance by a dissolved corporation. n200 The death of a title holder will ordinarily terminate a power of attorney given by that person. A deed executed by the power holder after the death of the grantor is void. n201 Oddly enough, a person who assumes a fictitious name in receiving title to real estate has the power to convey using the fictitious name. n202

There are certain individuals or entities that are legally recognized for certain purposes but are either barred from owning real estate or limited in the amount or type of real estate that they may own. These bars or limitations arise from state constitutional or statutory provisions and, in the modern era, have been directed primarily at aliens and so-called "foreign" corporations. n203

There are a host of issues surrounding the legal ability of a grantor holding legal title to make a transfer. For purposes of this subsection, they are not considered "legal capacity" issues. Many of the topics under the heading of "ability to make a transfer" are primarily concerned with grantors who are natural persons affected by either minority status, marital status, mental competency, duress, or undue influence. Many of these topics will be discussed at § 82.12, *infra*. The rules pertaining to legal capacity go the validity of the conveyance, with the result that violation of the applicable rules results in an invalid conveyance. By contrast, the rules arising out of ability to transfer are treated quite differently, at least in theory: a defect or non-compliance with the rule results in a *voidable* transfer. n204

Grantors that are not natural persons, such as partnerships, corporations, and trusts, present specialized issues relating to ability to transfer. Restrictions or limitations on transfer by these entities are not within the scope of this chapter; neither are the issues relating to specialized formalities requirements applicable to the deeds in which these entities appear as grantors.

The legal capacity issue as it relates to grantees is relatively straightforward; as indicated above, the named grantee must be a legal entity capable of holding legal title. n205 The classic example of deed failure for want of a grantee is a purported conveyance to a "non-entity," wherein the court finds that the named grantee does not exist legally. n206 In the case of a named natural person, a nullity results if the court finds the named person to be "fictitious" n207 or deceased at the time of the transfer. n208 In the case of a named non-natural person as grantee which has no legal existence, such as a dissolved corporation, n209 the courts deem the deed void, sometimes utilizing the oxymoronic phrase "non-existing entity." n210

Two special problems of grantees under the heading of "non-existent" entity are worthy of note: (1) the estate of a deceased person as grantee, and (2) an "incipient corporation," i.e., an entity that arises after the date of the purported transfer. The traditional view of the status of a conveyance to an "estate" of a deceased person is to treat the deed as nullity. n211 There is, however, modern case law to the contrary. n212 The analogous situation has arisen in wills cases, with the courts generally recognizing the "estate" of a deceased person as a devisee. n213

The "incipient corporation" problem is that of a deed which names as grantee a corporation to be organized or in process of organization. To make a determination of validity in cases of this type, there must be, in theory, a determination of validity fixing upon a particular point in time. The effective date of a deed is usually stated to be the date of delivery, n214 and if at that date the corporation is "non-existent," the ordinary rule governs and the deed is treated as a nullity. n215 However, one recent decision allows the later-organized corporation to take and uphold the deed. n216 There seem to be two intersecting "date" problems in these cases: the date the deed is "effective" and the date the corporation acquires legal status. If the latter is later than the former, and the conveyance is effective, what we have is similar to what future interests scholars would call a "springing" future interest.

§ 82.08(a)(3) Issues Arising Out of Recordation.

Many of the issues relating to parties to a deed arise out of the system of public land recordation that exists in this country. Some of the more significant features of the land recordation system affecting parties to a deed are: (1) the marketable title concept; (2) the method of indexing and; (3) the concept of bona fide purchaser for value. n217

The marketable title concept, an extremely important aspect of vendor/purchaser law, is based on an inspection of the public land records and an assessment by a lawyer or title insurance company of the status of the title. This inspection involves a title search, with resort to the indexing system of the public land records and a compilation of the "chain of title." This is the stage where title problems are discovered; some of which are serious enough to render title unmarketable, others of which are inconsequential or remediable. Because most indices of public land records are based on surnames of the grantor and grantee, the importance of proper identification of grantor and grantee assumes critical importance. It is probably fair to state that most of the legal issues pertaining to identity of the grantor and the grantee arise in the context of a dispute over marketable title, as opposed to a lawsuit seeking to invalidate a conveyance. To the extent that the marketable title issues are litigated, the courts typically apply rules of construction in order to clear up discrepancies.

Recording statutes establish priorities between competing claimants to the same land. The most prominent concept introduced by these statutes is that of the bona fide purchaser for value, by which a later in time claimant may lawfully prevail over a prior in time claimant. In creating the law of bona fide purchaser, the courts have construed the recording statutes in such fashion as to distinguish between "void" and "voidable" transfers. A purchaser and the successors in interest to the purchaser receive no protection in taking under a void deed. The legal capacity defects, as defined in subsection (a)(2), *supra*, result in nullities, or void deeds. As noted as well in subsection (a)(2), certain defects relating to ability to transfer, result in a transfer that is voidable. Bona fide purchaser status is possible for those who take from one holding under a voidable deed.

COMPUTER-ASSISTED RESEARCH

LEXIS: bona fide purchase! w/20 void! Deed

§ 82.08(b) Words of Conveyance and the Intent to Convey.

Sir Edward Coke emphasized that for a deed to be valid at common law, it must "give land to another." n218 The modern day statement of this rule is that a deed must contain operative words of conveyance which indicate the grantor's intent to convey the property. n219 Two related questions arise out of this requirement: (1) Does the instrument contain the required "operative words?" and (2) Did the person executing the instrument intend to transfer the property by this instrument? Both of these questions go to the validity of the instrument, since no instrument will be valid as a deed unless the court finds that the requisite operative words are present and the grantor intended to transfer the subject property.

The issue of "operative words" consists of a search for a verb that meets the test. There is a lengthy history with regard to this issue. One of the criticisms of the deed forms of yesteryear was their prolixity, n220 resulting in part from the surplusage of the words of conveyance. There was no "magic words" requirement in the common law, although certain verbal formulas became almost mystical incantations: "gives, enfeoffs, grants, bargains and sells, leases and releases, surrenders, remises, yields up, alienates, confirms, assigns, covenants to stand seised, quitclaims and conveys." n221 One of the reasons for the enactment of legislation authorizing short form deeds n222 was to wean lawyers away from the litany of verbs long associated with proper deed drafting. The choice of the precise verb may be significant in modern law for a reason unrelated to validity. As will be discussed *infra*, n223 certain words of conveyance may carry with them, by virtue of state statutes, implied warranties of title.

In modern law, there are cases in which the words of conveyance requirement has not been satisfied. n224 In an occasional case, the court may exhibit great leniency in finding the requirement met. n225

The law of wills requires testamentary intent. n226 There is an analogous requirement for deeds, but there is no adjective to describe the intent. In deed cases, courts simply state that the purported grantor must have intended to convey the property. n227 The intent to transfer is typically evidenced by the form and heading of the document, as well as by the operative words of conveyance. The widespread use of deed forms tends to obviate questions of intent to transfer. On the other hand, there are informal documents, akin to holographic wills, sometimes hand-written and with varying headings, that are claimed to be deeds. In the wills cases, the courts do not admit to probate an instrument lacking testamentary intent. n228 Similarly, on the deeds side, the court does not uphold an instrument which the court finds to be unintended by the maker to be a deed. n229 The fact that an instrument is not captioned "deed" is not determinative. n230 Thus, instruments labelled "affidavit," n231 "joint venture agreement," n232 "contract," and "private annuity agreement" n233 have been held to be deeds. On the other hand, the fact that an instrument is in the form of a deed creates a presumption the instrument is a deed. n234

COMPUTER-ASSISTED RESEARCH

LEXIS: words of conveyance w/15 deed
intent w/15 to convey

§ 82.08(c) Legal Description.

Sir Edward Coke stated that one of the functions of the premises clause of a deed was to "comprehend the certainty of the land or tenements to be conveied...." n235 The phrase "certainty of the lands and tenements to be conveied" brings us to the topic of legal descriptions, an extremely important and broad topic. The topic of legal descriptions is not peculiar to the law of deeds; it is of critical importance in other areas of property law, both public and private. n236 Because legal descriptions of land play such an important role in real property law, every lawyer should have some basic familiarity with the systems of legal description in current use. For a general discussion of the topic of legal descriptions, refer to Chapter 39, *supra*, of this treatise.

This section focuses on the legal description as an essential element of a deed. The issues presented relate to the validity of the deed. The applicable rules are rules of law, which must be met before the instrument is deemed valid. In addition to the issues pertaining to validity, there are a host of issues pertaining to legal descriptions which focus on the meaning and the interpretation of the language of the legal description found in the instrument. The problems of an ambiguous legal description and rules of construction applicable to deeds will be discussed at § 82.13(c)(3), *infra*. The fine line separating validity issues from construction issues sometimes breaks down. If certain language is alleged to be so vague as to invalidate the instrument, a court may be asked to "construe" the language so as to validate the instrument. n237 Oftentimes, the focal point in such a case is the admission of extrinsic evidence which will, if admitted, clarify the ambiguous language and render the uncertain language certain. It is not surprising, therefore, that many of the cases pertaining to legal descriptions bring into play evidentiary considerations such as the "plain meaning rule" n238 and the "parol evidence rule." n239

As a general rule, it may be stated that any description in a deed is adequate if it affords the means of identification of the property. n240 The deed description will be considered adequate if it contains sufficient information to permit the identification of the property to the exclusion of all others. n241

COMPUTER-ASSISTED RESEARCH

LEXIS: property description w/10 sufficient w/5 identification

The deed "in blank" case, previously considered with respect to a grantee, n242 can also arise in the context of a legal description. The courts uniformly hold that an instrument which lacks a legal description entirely is void; n243 some courts specifically acknowledge that, while the grantor may authorize the filling in of the name of the grantee at some later date, there is no comparable authority that may be delegated by the grantor to fill in the legal description. n244

It is the vague or indefinite language of legal descriptions that most often runs afoul of the general rule requiring a sufficient means for identification of the property. While it is true that courts will not declare a deed void for uncertainty if, by any reasonable construction, it is possible to locate the land, n245 the language of the instrument may be so vague or indefinite that the courts are unable to identify, with certainty, the property to be conveyed. Under such circumstances, the faulty legal description results in invalidation. n246

COMPUTER-ASSISTED RESEARCH

LEXIS: description w/8 certain w/30 location w/5 sufficient w/15 location

One type of legal description contained in a deed is generic in nature, analogous to a residuary clause in a will. These descriptions, referred to as "Mother Hubbard" clauses, take the following form: "all of the grantor's property located in a certain county of a certain state." As between grantor and grantee, such descriptions are valid. n247 Such a clause is strictly construed, n248 however, and the recordation of the deed will not give notice to third parties. n249

COMPUTER-ASSISTED RESEARCH

LEXIS: mother hubbard clause w/50 notice w/15 subsequent purchasers

Coke had written of a description of property "which may by reference be reduced to a certainie." n250 The "Mother Hubbard" clause is one example of the "reduced to a certainie" theory in operation. A far more common example of this theory is a deed description which, by reference to another existing writing, furnishes the means or data by which particular land may be identified with reasonable certainty. n251

The existing writing requirement is consistent with the legal doctrine known as "incorporation by reference," a doctrine applied to contracts n252 and wills. n253 Incorporation by reference is used extensively in deed descriptions, and so long as the reference to the existing document is clearly set forth so as to connect the two documents, the courts will give effect to the incorporated legal description. n254 Another example of an incorporated document is the so-called "being" clause, wherein the property being transferred is referenced back to the next preceding recorded document by or through which the grantor claims title. n255 As might be expected, discrepancies and mistakes of various kinds may create problems in the incorporation by reference cases, but in most instances these problems may be remedied through the process of construction or a reformation action.

COMPUTER-ASSISTED RESEARCH

LEXIS: being clause w/5 deed

§ 82.08(d) Special Statutory Requirements.

For an instrument to be entitled to the status of "deed," the requirements of "formalities of execution" and essential elements must be met. The requirements discussed in the preceding sections are customarily and generally imposed by common law and state statutes. Because the validity of a deed is a jurisdiction specific inquiry, however, lawyers need to be sensitive to considerations other than the customary and general requirements. One of these considerations is the issue of the governing law; the other is the special or peculiar statutory requirements that might exist under the governing state's law.

§ 82.08(d)(1) Conflicts of Law Rule.

A lawyer preparing a deed to out-of-state property needs to be especially cautious, inasmuch as the validity of a deed is governed, under ordinary conflicts of law rules, by the law *in situs*, i.e., the law of the state where the property is located. n256 Some states recognize out-of-state deeds if they comply with the law of the state of execution. n257

§ 82.08(d)(2) Recordation Requirements and Validity.

Despite the literal language of various state statutes, n258 the recording of a deed is not essential to its validity; n259 in other words, the unrecorded deed is binding upon the parties. n260 Exceptions to the general rule are found in Maryland n261 and North Carolina. n262

Despite the fact that recording is not generally required for a deed to be valid, the fact is that the vast majority of deeds are promptly recorded. n263 Although some doubt may surround the topic of what instruments are recordable, n264 there can be no doubt that deeds are recordable documents. When presented for recordation, however, the law of recordation may impose additional requirements as to what the deed must contain in order for the deed to be entitled to be recorded. Each state's statutory law needs to be examined carefully as to what *additional* requirements are imposed for deed recordation. Given the reality that the vast majority of deeds are, in fact, recorded, these additional requirements, though technically not necessary for validity, become *de facto* required elements or formalities.

In recent years there has been a trend in state statutory law imposing additional requirements for recordation of a deed. This trend began with the acknowledgment requirement for deeds, which requirement does not, in the ordinary case, go to validity but to recordation. n265 As the acknowledgment requirement for recordation has become wide-spread, it has become, as a practical matter, just as much a part of the law of deeds as the signature requirement. n266

The state legislatures have imposed varying requirements in order for a deed to be recorded. Examples are the name and address of the grantor n267 and grantee, n268 the street address of the property conveyed, n269 the identity of the person who prepared the deed, n270 the amount of consideration, n271 and the filing of a confidential tax statement. n272 Each state's requirements are, of course, subject to change and must be reviewed yearly. n273 Some of the statutes referred to explicitly state that failure to comply does not affect the validity of the instrument. n274 It may be inferred that the statutes which do not contain this statement will be interpreted similarly. n275

§ 82.08(e) Curing Defects.

Deeds may be characterized as defective for a variety of reasons. In the preceding sections the emphasis has been on the formalities of due execution and essential elements of a deed. To the extent that a deed is defective for failure to meet common law and statutory requirements, it is a nullity. While defects arising out of the language of an instrument may be cured through a process of construction, n276 defects going to validity of the instrument are not easily cured. The methods by which defects of this type may be cured are varied.

§ 82.08(e)(1) Curative Statutes.

The topic of curative and marketable title acts is beyond the scope of the current discussion. The reader is referred to Chapter 91 of this work for more detailed discussion. n277 Of the topics previously discussed, the defective acknowledgment problem has been the subject of extensive statutory regulation. n278 While the statutes are helpful when applicable, n279 the problem is that the statutes do not address some of the more problematic acknowledgment defects. n280 The most helpful of the statutes are those which cure all problems of acknowledgment by virtue of the instrument being of record for a specified period of time. n281 Such statute types allow a subsequent purchaser to place complete confidence on the state of record title.

§ 82.08(e)(2) Action of the Parties.

The parties to a deed can take certain actions to remedy the defect. One method is for the parties to have a so-called corrective deed placed on record. Only certain defects may be remedied by the corrective deed. n282 An important limitation on the use of corrective deeds is that rights of third parties may not be impaired. n283 Another method that is recognized under modern statutes is the use of an affidavit, oftentimes authorized by marketable title legislation. n284

§ 82.08(e)(3) Judicial Proceedings.

To the extent that the defect in a deed is the result of a mutual mistake, a suit to reform the instrument would be available. n285 If, however, third party rights have intervened, the action would be unavailable. n286 A quiet title lawsuit could be employed to make an existing owner's title marketable. n287 When a vendor and a purchaser litigate the status of the vendor's title in a suit to determine marketability, the resultant lawsuit oftentimes results in a judgment eliminating any questions pertaining to defects in the vendor's title. n288

FOOTNOTES:
(n1)Footnote 175. *See* 3 A.L.P., *supra* n.94, part 12, ch. 2; Cunningham, Stoebuck & Whitman, *supra* n.11, § 11.1.

(n2)Footnote 176. *E.g., Boatmen's Nat'l Bank v. Dandy, 804 S.W.2d 783 (Mo. App. 1990)* (essential elements listed); *Curry v. Curry, 473 S.E.2d 760 (Ga. 1996)* (essential elements listed).

(n3)Footnote 177. *See generally* § 82.06 *supra*.

(n4)Footnote 178. Kent, *supra* n.2, at 451.

(n5)Footnote 179. *Id*. at 453.

(n6)Footnote 180. Coke, *supra* n.41, *35b.

(n7)Footnote 181. Blackstone, *supra* n.1, at *296.

(n8)Footnote 182. *Elk Park Ranch, Inc. v. Park County, 935 P.2d 1131 (Mont. 1997)* ("one party" deeds void); *Myers v. Francis, 548 So. 2d 833 (Fla. App. 1989); Milner v. Bivens, 335 S.E.2d 288 (Ga. 1985).*

(n9)Footnote 183. *Melni v. Custer, 781 P.2d 631 (Ariz. App. 1989); Temora Trading Co., Ltd. v. Perry, 645 P.2d 436 (Nev. 1982).*

(n10)Footnote 184. Blackstone, *supra* n.1, at *296. Along the same lines, Kent stated that one of the component parts of a deed consisted of the "names of the parties," which names must be "sufficiently described." Kent, *supra* n.2, at 451, 453.

(n11)Footnote 185. *Myers v. Francis, 548 So. 2d 833 (Fla. App. 1989); Milner v. Bivens, 335 S.E.2d 288 (Ga. 1985). See generally* A.L.P., *supra* n.94, § § 12.39, 12.40.

(n12)Footnote 186. *See* § 82.06(b) *supra*.

(n13)Footnote 187. *Christian v. Johnson, 556 S.W.2d 172 (Ky. App. 1977)* (corporate grantee). *See generally* A.L.P., *supra* n.94, § 12.40 n.23.

(n14)Footnote 188. *See generally Thompson, supra n.94,* § 3121 nn.50-50a.

(n15)Footnote 189. *Manning v. Wingo, 577 So. 2d 865 (Ala. 1991). See also Thompson, supra n.94,* § 3121; 3 A.L.P., *supra* n.94, § 12.40. The general rule may be altered by statute. *See, e.g.*, Iowa Code Ann. § 561.13 (homestead property). If the failure to designate the grantor in the body of the deed is a result of scrivener's error, the general rule

may not apply. *See Milstid v. Pennington, 268 F.2d 384 (5th Cir. 1959).*

(n16)Footnote 190. *Travis v. Travis, 399 So. 2d 243 (Ala. 1981).*

(n17)Footnote 191. *Lakeview Trust & Sav. Co. v. Estrada, 480 N.E.2d 1312 (Ill. App. 3d 1985); Kratzer v. Kratzer, 595 S.W.2d 453 (Mo. App. 1980)* (mistaken middle initial of grantee due to scrivener mistake). *See generally Thompson, supra n.94,* § 3121; 3 A.L.P., *supra* n.94, § 12.40.

(n18)Footnote 192. *Garraway v. Yonce, 549 So. 2d 1341 (Miss. 1989)* ("all our law requires is that the grantee be described in such terms that by reference to objective evidence other described, his identity may be ascertained with reasonable certainty").

(n19)Footnote 193. *Pruitt v. Ferguson, 297 S.E.2d 714 (Va. 1982); Haye v. United States, 461 F. Supp. 1168 (C.D. Cal. 1978). See generally* 3 A.L.P., *supra* n.94, § 12.40 nn.8-16. *Thompson, supra n.94,* § 3006. The use of the word "or" in a conveyance listing two grantees has been upheld. *Bostwick v. Jasin, 821 P.2d 282 (Ariz. App. 1991).* Under the statutory law of Nebraska, a conveyance to grantees "named in the disjunctive" is conclusively presumed to create a co-tenancy in the named grantees. Neb. Rev. Stat. § 76-275.07. *McCoy v. McCoy, 868 P.2d 527 (Idaho App. 1994)* (deed using disjunctive "or" ambiguous extrinsic evidence allowed to show grantor's true intent).

(n20)Footnote 194. *See* 3 A.L.P., *supra* n.94, § 12.40 n.2; *Thompson, supra n.94,* § 3306 n.57.

(n21)Footnote 195. *See* Cunningham, Stoebuck & Whitman, *supra* n.11, § 11.1 n.31. Until the name of the grantee is filled in, the deed is a nullity. *Karlen v. Karlen, 235 N.W.2d 269 (S.D. 1975).*

(n22)Footnote 196. *See generally* with regard to these issues: 3 A.L.P., *supra* n.94, § 12.41; *Thompson, supra n.94,* § 3006.

(n23)Footnote 197. *See* 3 A.L.P., *supra* n.94, § 12.40.

(n24)Footnote 198. Blackstone had stated that "in every grant there must be a grantor, a grantee." Blackstone, *supra* n.1, at *296.

(n25)Footnote 199. *See Thompson, supra n.94,* § 3007 n.68. Whether or not one can convey to oneself for the purpose of severing a joint tenancy is the usual factual background for the rule quoted. In recent cases and statutory law, there is an emerging trend allowing a person to convey to oneself for the purpose of severing a joint tenancy. *See Riddle v. Harmon, 162 Cal. Rptr. 530 (1980);* Cal. Civil Code § 683.2 (Supp. 1992); Neb. Rev. Stat. § 76-118(1) (1990). A grantor who conveys property, reserving a life estate and a power to revoke, can exercise the power of revocation by conveying back to the grantor. *Kalinoski v. Kalin, 829 S.W.2d 24 (Mo. App. 1992)* (no need to resort to "straw man" in order to exercise power of revocation).

(n26)Footnote 200. *Brend v. Dome Dev., Ltd., 418 N.W.2d 610 (N.D. 1988)* (conveyance by dissolved corporation a nullity). The issue of a "deceased grantor" (as well as a deceased grantee) arose in *Rhodes v. Hunt, 913 S.W.2d 894 (Mo. App. 1995)* (deed delivered after the death of one of the co-grantors who was also a co-grantee; dissent argued that the delivery failed "because the deed does not name grantors capable of conveying real estate at the time of delivery").

(n27)Footnote 201. *See generally* 3 A.L.P., *supra* n.94, § 18.55. *See also Jay v. Dollarhide, 84 Cal. Rptr. 538 (1970); Dickerson v. Murfield, 191 P.2d 380 (Or. 1948).*

(n28)Footnote 202. *See Thompson, supra n.94,* § 3121 n.70. A deed conveying land to a nonexistent or wholly fictitious grantee is treated differently that a conveyance to a person or business operating or using an "assumed name." In the former case, the deed is void (see text at note 206 *infra*); in the later case the requirement of having a "grantee" has been met. Or, as a recent case puts it, the assumed named "is sufficient." *Roeckl v. F.D.I.C., 885 P.2d 1067 (Alaska*

1994).

(n29)Footnote 203. *See Thompson, supra n.94,* § 3010 (alien land ownership), § 3014 (foreign corporations). State legislation imposing restrictions on foreign corporations in recent years has been directed primarily at the holding of agricultural land, *e.g.*, N.D. Cent. Code § 47-10.1-.02; S.D. Codified Laws § 47-9A-1.

(n30)Footnote 204. The outstanding exception to the rule is forgery, where the transfer is deemed void. Forgeries, however, can, and perhaps should, be considered violations of the signature requirement. *See* § 82.06(b) *supra*. As a practical matter, the void/voidable distinction comes into play most prominently in conjunction with successors in interests to the transferee and the claim of bona fide purchaser status.

(n31)Footnote 205. *Sharp v. Riekhof, 747 P.2d 1044 (Utah 1987).*

(n32)Footnote 206. *Haney's Chapel United Method. Church v. United Meth. Church, 716 So.2d 1156 (Ala. 1998)* ("The Community" not identifiable with reasonable certainty); *Jones v. Alpine Investors, 764 P.2d 513 (Okla. 1987)* (unincorporated association); *Daniels v. Berry, 513 So. 2d 250 (Fla. App. 1987).*

(n33)Footnote 207. *Melni v. Custer, 781 P.2d 631 (Ariz. App. 1989); Temora Trading Co., Ltd. v. Perry, 645 P.2d 436 (Nev. 1982).* A deed to a grantee using an assumed name is not treated as a "fictitious" grantee. *See* text at note 201 *supra.*

(n34)Footnote 208. *See* 3 A.L.P., *supra* n.94, § 12.40 n.3. *Julian v. Petersen, 966 P.2d 878 (Utah App. 1998).*

(n35)Footnote 209. *Piedmont and W. Corp. v. Carnes-Miller Gear Co., 384 S.E.2d 687 (N.C. App. 1989). But see Lighthouse Church of Cloverleaf v. Texas Bank, 889 S.W.2d 595 (Tex. App. 1994)* (deed to dissolved corporation, entitled to statutory reinstatement, not "void").

(n36)Footnote 210. *McLemore v. McLemore, 675 So. 2d 202 (Fla. App. 1996)* (deed to "trust" rather than the trustees of the trust; lower court ruled trust invalid); *Sharp v. Riekhof, 747 P.2d 1044 (Utah 1987); Daniels v. Berry, 513 So. 2d 250 (Fla. App. 1987). Sharp* involved a purported conveyance to a trust, with an apparent misdescription involved. The court indicated deed reformation might be possible. *Daniels* was a true "nonentity" case -- a 1922 deed to the "Colored Library and Civic Imp. Ass'n." The court stated that the attempts of certain individuals to assert their status as the association "will not create a legal entity any more than a genie can be rubbed from a bottle or a proverbial silk purse from a sow's ear." *513 So. 2d at 251.* The status of an unincorporated association as a grantee is not quite so simple that it can be summed up in the phrase "a nullity." *See Thompson, supra n.94,* § 3012 (conveyances to unincorporated associations validated through variety of techniques).

(n37)Footnote 211. *See Nilson v. Hamilton, 174 P. 624 (Utah 1913),* and cases cited at 3 A.L.P., *supra* n.94, § 12.40 n.4.

(n38)Footnote 212. *Estate of Stubbs, 776 F.2d 1472 (10th Cir. 1985); Haile v. Holtzclaw, 414 S.W.2d 916 (Tex. 1967).*

(n39)Footnote 213. The situations arising in the wills cases have involved a devise to "A or his estate," with A predeceasing the testator. *See* Olin L. Browder, Jr., *Trusts and the Doctrine of Estates, 72 Mich. L. Rev. 1509, 1520-1528 (1974).*

(n40)Footnote 214. *See* § 83.03(a) *supra*.

(n41)Footnote 215. *Thomas v. City of Columbus, 528 N.E.2d 1274 (Ohio App. 1987); Almon v. Gatschet, 437 S.W.2d 70 (Mo. 1969).*

(n42)Footnote 216. *John Davis & Co. v. Cedar Glen Four, Inc., 450 P.2d 166 (Wash. 1969). See also Zulver*

Realty Co. v. Snyder, 62 A.2d 276 (Md. 1948) (corporation nonexistent at time of deed signing and acknowledgment; existent at time of deed delivery). A more recent case discussing this issue is *Community Credit Union Servs. v. Federal Express Servs. Corp., 534 A.2d 331 (D.C. 1987). See generally Thompson, supra n.94,* § 3011.

(n43)Footnote 217. *See generally* ch. 92 *infra*.

(n44)Footnote 218. Coke, *supra* n.41, *7a.

(n45)Footnote 219. *White v. Zini, 838 S.W.2d 370 (Ark. App. 1992). New Hope Bldg. Supply Co. v. Nations, 131 S.E.2d 425 (N.C. 1963).*

(n46)Footnote 220. *See* text at n.148 *supra*.

(n47)Footnote 221. D. Barlow Burke, Jr., Real Estate Transactions 116-117 (1993). Burke gives a brief historical explanation of each of the verbs.

(n48)Footnote 222. *See* § 82.04(c) *infra*.

(n49)Footnote 223. *See* § 82.10(c).

(n50)Footnote 224. *Lim v. Choi, 501 S.E.2d 141 (Va. 1998)* (no words evidencing intent to convey); An extreme example of the extent to which courts will go to sustain an instrument "in the form of deed" as a deed is *Ex parte Rucker, 702 So.2d 456 (Ala. 1997)* (instrument labelled "Last Will and Testament" held to be a deed); *In re Gee, 166 B.R. 314 (Bankr. M.D. Tenn. 1993)* (words in a conveyance must express seller's intention to transfer); *Lilly v. Earl, 463 So. 2d 143 (Ala. 1984)* ("to have and to hold" insufficient); *White v. Zini, 838 S.W.2d 370 (Ark. App. 1992)* (agreement deemed insufficient to transfer easement).

(n51)Footnote 225. *Garden West Baseball Co. v. City of Anaheim, 31 Cal. Rptr. 2d 378 (Cal. App. 1994)* (easement may be created "by contract;" words of conveyance not required); *Veltmann v. Damon, 696 S.W.2d 241 (Tex. App. 1985); Harris v. Strawbridge, 330 S.W.2d 911 (Tex. App. 1959).*

(n52)Footnote 226. *See, e.g., Estate of Worthy, 252 Cal. Rptr. 462 (1988);* In the *Matter of Will of Smith, 528 A.2d 918 (N.J. 1987).*

(n53)Footnote 227. *Bonkowski v. Commissioner, 458 F.2d 709* (7th Cir.), *cert. denied, Kile v. United States, 409 U.S. 874 (1972).* The "intent to convey" requirement arises most frequently in the context of cases where the assent of the grantor is questioned. For further discussion of the "consent" issues, *see* § 82.12 *infra*.

(n54)Footnote 228. *See Succession of King, 595 So. 2d 805 (La. App. 1992); Matter of Estate of O'Donnell, 803 S.W.2d 530 (Ark. 1991); In re Estate of Wilson, 539 S.W.2d 99 (Tex. App. 1976).*

(n55)Footnote 229. *White v. Brookline Trust Co., 371 S.W.2d 597 (Tex. App. 1963).*

(n56)Footnote 230. *Matter of Estate of Severson, 459 N.W.2d 473 (Iowa 1990).*

(n57)Footnote 231. *See Harris v. Strawbridge, 330 S.W.2d 911 (Tex. App. 1959).*

(n58)Footnote 232. *Petersen v. Schaefer, 709 P.2d 813 (Wash. App. 1985).*

(n59)Footnote 233. *Hinchcliffe v. Fischer, 424 P.2d 581 (Kan. 1967).*

(n60)Footnote 234. *Dimond v. Kelly, 629 P.2d 533 (Alaska 1981).*

(n61)Footnote 235. Coke, *supra* n.41, *6a.

(n62)Footnote 236. Legal description issues can and do arise in the context of brokerage contracts, vendor/purchaser agreements, title insurance, and mortgages, to name a few outstanding examples. On the public law side, consider the role legal descriptions play in the herculean task faced by assessors who are charged with the responsibility of listing all parcels of real estate within a county for tax purposes. A further example of the pervasiveness of the problems of legal descriptions is illustrated by a recent decision invalidating a city ordinance establishing a taxing district. *Christensen v. City of Tekamah, 432 N.W.2d 798 (Neb. 1988)* (applicable statute required that ordinance "state the outer boundaries of the district"); The adequacy of the legal description might also be raised in a condemnation proceeding. *Lin v. Houston Comm. Coll. Sys., 948 S.W.2d 328 (Tex. App. 1997)* (legal description held adequate).

(n63)Footnote 237. The law of wills, in theory, involves a two-step process: (1) admission of the will to probate, involving compliance with applicable rules of law pertaining to formalities, and (2) once the "will" is admitted, an action to "construe" the will. Since there is nothing exactly comparable in the law of deeds as admission to probate, the two-step process does not, in theory, apply to deeds, yet, as we will see, there are lawsuits involving deeds which, if examined carefully, are "construe to validate" actions.

(n64)Footnote 238. *See* 3 A.L.P., *supra* n.94, § § 12.89 n.15; 11.91 n.10.

(n65)Footnote 239. *See Thompson, supra n.94,* § 3027.

(n66)Footnote 240. *Chicago Title Ins. Co. v. Wetherington, 490 S.E.2d 593 (N.C. App. 1997)* (adequate description); *McDonald v. Jones, 852 P.2d 588 (Mont. 1993)* (deed void for indefiniteness); *Wallace v. McKinzie, 869 S.W.2d 592 (Tex. App. 1993)* (easement described with sufficient certainty); *Wyatt v. McGregor, 855 S.W.2d 5 (Tex. App. 1993); Podlesak v. Wesley, 849 S.W.2d 728 (Mo. App. 1993).*

(n67)Footnote 241. *Mendelson v. Great Western Bank, 712 So.2d 1194 (Fla. App. 1998)* (divorce decree operated as deed; case remanded for consideration of extrinsic evidence);*Wilder v. Finnegan, 642 N.E.2d 496 (Ill. App. 1994)* ("part of" a certain tract challenged as too vague; court upheld the deed description); *Nationsbank Mtg. Corp. v. Cazier, 908 P.2d 572 (Idaho App. 1995)* (deed challenged on vagueness of legal description; court considered deed language ambiguous, construed it, and validated instrument). The specificity requirement is not as exacting in cases involving easements. *See Murdock v. Ward, 477 S.E.2d 835 (Ga. 1996); Adams v. City of Ila, 471 S.E.2d 310 (Ga. App. 1996); Hoelscher v. Simmerock, 921 S.W.2d 676 (Mo. App. 1996)* (easement location need not be specific); *McDonald v. Jones, 852 P.2d 588 (Mont. 1993); Bajrangi v. Magnethel Enters., 589 So. 2d 416 (Fla. App. 1991).*

(n68)Footnote 242. *See* § 82.08(a)(1), *supra*.

(n69)Footnote 243. *Rekis v. Lake Minnewaska Mtn. Homes, Inc., 573 N.Y.S.2d 331 (1991), appeal dismissed, 588 N.E.2d 99 (N.Y.2d 1992). See generally 11 A.L.R.2d 1365.*

(n70)Footnote 244. *West v. Witschner, 428 S.W.2d 538 (Mo. 1968); Mehus v. Thompson, 266 N.W.2d 920 (N.D. 1978).*

(n71)Footnote 245. *See Haney v. Molko, 844 P.2d 1382 (Idaho App. 1992); Citizens Nat'l Bank v. National Fire Ins. Co., 597 So. 2d 1130 (La. App. 1992); Bass Pro Outdoor World, L.P. v. Wilson, 965 S.W.2d 890 (Mo. App. 1998)* (construction rendering deed void for uncertainty "not favored").

(n72)Footnote 246. *Croft v. Tillman, 489 S.E.2d 852 (Ga. 1997)* (lack of described beginning point of description); In re Tennessee *Gas Transp., Inc., 169 B.R. 643 (Bankr. M.D. Tenn. 1994)* (deed is void since it failed to identify a particular tract of land). The "faulty legal description" may be the result of a clerical error in the legal description. A court may be inclined to "construe" or "reform" the deed to save it, a result that is likely to obtain in the usual case. *See, e.g., Saterlie v. Lineberry, 962 P.2d 863 (Wash. App. 1998)* (deed description reformed to match plat map); *Gwathmey v. State, 464 S.E.2d 674 (N.C. 1995)* (clerical error ("high" for "low") corrected by court). *But see Mull v. Mickey's*

Lumber & Supply Co., Inc., 461 S.E.2d 270 (Ga. App. 1995) (lot 20 mistakenly described as lot 21; mechanic's lien invalidated on basis of incorrect description); *Highway Props. v. Dollar Sav. Bank, 431 S.E.2d 95 (W. Va. 1993)* (alleged easement "from and to all parcels for ingress and egress from and to all other parcels" totally inadequate); *McDonald v. Jones, 852 P.2d 588 (Mont. 1993)* (even considering extrinsic evidence, "two acres" not identified); *Undernehr v. Sandelin, 827 S.W.2d 164 (Ark. App. 1992)* (metes and bounds did not "close").

(n73)Footnote 247. *Whitehead v. Johnson, 467 So. 2d 240 (Ala. 1985); Roeder Co. v. Burlington N., Inc., 716 P.2d 855 (Wash. 1986).*

(n74)Footnote 248. *Partnership Props. Co. v. Sun Oil Co., 552 So. 2d 246 (Fla. App. 1989)* ("Mother Hubbard" clause not controlling over specific description).

(n75)Footnote 249. *Luthi v. Evans, 576 P.2d 1064 (Kan. 1973).*

(n76)Footnote 250. Coke, *supra* n.41, *6a.

(n77)Footnote 251. *Kmiec v. Reagan, 556 S.W.2d 567 (Tex. 1977).*

(n78)Footnote 252. 17A C.J.S. *Contracts* § 299. *See also Childers & Venters, Inc. v. Sowards, 460 S.W.2d 343 (Ky. App. 1970); J.S. & H. Constr. Co. v. Richmond County Hosp. Auth., 473 F.2d 212 (5th Cir. 1973).*

(n79)Footnote 253. *See* Atkinson, *supra* n.130, § 80 (1953). *Auerbach v. County of Hanover, 478 S.E.2d 100 (Va. 1996)* (referenced plat referred to recorded deeds; these deeds become incorporated as well).

(n80)Footnote 254. *Podlesak v. Wesley, 849 S.W.2d 728 (Mo. App. 1993)* (maps, plats, surveys, assessor's plans may be incorporated); *Catelano v. Woodward, 617 A.2d 1363 (R.I. 1992)* (plat referred to in deed becomes part of deed for legal description purposes); *Triplett v. David H. Fulstone Co., 849 P.2d 334 (Nev. 1993)* (inadequate legal description remedied by reference to county assessment roll). The incorporation doctrine is properly applied to the "determination of physical bounds and quantity of land conveyed," not to the "quality and durational extent" of the estate conveyed. *Tattan v. Kurland, 588 N.E.2d 699 (Mass. App. 1992).*

(n81)Footnote 255. *See* West's Legal Forms § § 27.1, 27.3 (2nd ed. 1986). "Being" clauses are particularly recommended in Kentucky and Tennessee since in each of these jurisdictions, the deed is not entitled to recordation unless it refers to the next immediate source from which the grantor received title. Ky. Rev. Stat. § 382.110; Tenn. Code Ann. § 66-24-110.

(n82)Footnote 256. *Leasing Enters. v. Livingston, 363 S.E.2d 410 (S.C. 1987); Gabrielian v. Gabrielian, 473 A.2d 847 (D.C. 1984). See generally* Restatement (Second) of Conflict of Laws § 223 (1971). *Lex rei sitae* rule applies to grant from federal government. *Fontenelle v. Omaha Tribe, 298 F. Supp. 855 (D. Neb. 1969);* Estate of Lampert through Thurston v. Estate of Lampert through *Stauffer, 896 P.2d 214 (Alaska 1995); Sportsmen's Wildlife Defense Fund v. United States Dept. of Interior, 949 F. Supp. 1510 (D. Colo. 1996).*

(n83)Footnote 257. *E.g.*, Ind. Code Ann. § 32-1-2-4; Mich. Comp. Laws § § 554.44, 565.601; Neb. Rev. Stat. § 76-219; 16 Okla. Stat. Ann. § 376; Tenn. Code ann. § 66-23-105; Wyo. Stat. § 34-1-116.

(n84)Footnote 258. *E.g.*, neb. Rev. Stat. § 76-211 (Reissue 1990) (deeds of real estate *must* be signed by the grantor, acknowledged and "*recorded*").

(n85)Footnote 259. The classic statement is that of Judge Ames, in *Earle v. Fiske, 103 Mass. 491 (1870):* "Title passes by the deed, and not by the registration." *Gill v. Carborundum Corp., 238 A.D.2d 955, 661 N.Y.S.2d 165 (1997)* (title passes by delivery; recordation not required); *Crowther v. Mower, 876 P.2d 876 (Utah App. 1994)* (recordation immaterial in context of severance issue).

(n86)Footnote 260. *Blakely v. Kelstrup, 708 P.2d 253 (Mont. 1985).* The classic language of Judge Ames accurately summarizes the state of the law: "A deed duly signed, sealed and delivered is sufficient, as between the original parties to it, thought the instrument of conveyance may not have been acknowledged or recorded." *Earle v. Fiske, 103 Mass. 491 (1870).*

(n87)Footnote 261. Md. Real Prop. Code Ann. § 3-101 has been judicially construed such that under Maryland law, title does not pass until a deed is properly executed *and* recorded. *See Bourke v. Krick, 304 F.2d 501 (4th Cir. 1962)* (applying Maryland law, *citing Nickel v. Brown, 23 A. 736 (Md. 1892)).*

(n88)Footnote 262. N.C. GEN. STAT. § 47-26 (deed of gift void if not recorded within two years).

(n89)Footnote 263. Cunningham et al., *supra* note 11, at 826. The penalty for non-recordation, insofar as the grantee is concerned, is quite harsh: possible invalidation of the deed under which the grantee claims. The incentive for recordation is quite high as the penalty for non-recordation is so great. *Id.*

(n90)Footnote 264. *Id.* at 831-32.

(n91)Footnote 265. *See* § 83.06(e), *supra.*

(n92)Footnote 266. In a popular formbook, the topic of acknowledgments is placed in the same section with deeds. *See* West's Legal Forms, vol. 20, Part II, "Deeds and Acknowledgments" (2d ed. 1986).

(n93)Footnote 267. Ariz. Rev. Stat. § 42-1612.

(n94)Footnote 268. The requirement of providing the name and address of the grantee is somewhat common. Ariz. Rev. Stat. § 42-1612; Haw. Rev. Stat. § 502-34; 33 Me. Rev. Stat. Ann. § 457; Mass. Gen. Laws ch. 183, § 6 (residence and post office address); Mo. Rev. Stat. § 59.330(1); S.D. CODIFIED LAWS ANN. § 7-9-71.

(n95)Footnote 269. Colo. Rev. Stat. § 38-35-122; N.Y. REAL PROP. LAW § 333.

(n96)Footnote 270. DEL. CODE ANN. tit. 9, § 9605; Ind. Stat. § 36-2-11-16; Minn. Stat. Ann. § 507.091; Wis. Stat. Ann. § 59.513(1).

(n97)Footnote 271. Mass. Gen. Laws Ann. ch. 183, § 6; N.D. Cent. Code § 11-18-02.2.

(n98)Footnote 272. Neb. Rev. Stat. § 76-214.

(n99)Footnote 273. A general review of the individual state requirements are contained in Ch. 32, West's Legal Forms (2d ed. 1986).

(n100)Footnote 274. *E.g.,* Colo. Rev. Stat. § 38-35-123(2); Me. Rev. Stat. Ann. tit. 33, § 457; Mass. Gen. Laws Ann. ch. 183, § 6.

(n101)Footnote 275. *See, e.g., Bressel v. Jolicoeur, 609 N.E.2d 94 (Mass. App. 1993); Hahn v. Planning Board of Stoughton, 511 N.E.2d 20 (Mass. App. 1987)* (failure to state consideration as required by MAss. Gen. L. c. 183, § 6, does not invalidate deed). It remains to be seen whether the instrument not entitled to be recorded, which is, nonetheless entered into the records, will be treated as notice to subsequent purchasers. This problem is similar to that of a defective acknowledgment problem and notice. *See* 3 A.L.P. *supra* n.94, § 17.31 n.16.

(n102)Footnote 276. Construction issues will be considered in § 82.13, *infra.*

(n103)Footnote 277. *See also* Cunningham et al., *supra* note 11, § 11.12.

(n104)Footnote 278. The subject of defective acknowledgements has been addressed in all states. 1 C.J.S. Acknowledgments § 120.

(n105)Footnote 279. *Grabarz v. Waleski, 499 A.2d 433 (Conn. App. 1985).*

(n106)Footnote 280. *Greenlee v. Mitchell, 607 So. 2d 97 (Miss. 1992); Crotts Andrews v. All Heirs & Devisees of Bellis, 759 S.W.2d 532 (Ark. 1988); McWilliams v. Clem, 743 P.2d 577 (Mont. 1987).*

(n107)Footnote 281. *E.g.*, Neb. Rev. Stat. § 76-258 (all defects, irregularities, omissions cured after ten years).

(n108)Footnote 282. *Gilberto Sanchez v. Raymond Telles, 960 S.W.2d 762 (Tex. App. 1997)* (corrective deed cannot be used to supply missing signature); *Gonzales v. Gonzales, 867 P.2d 1220 (N.M. App. 1993)* (correction deed may be used to correct typographical errors in original deed or to negate prior conveyance); *Maltby v. Conner, 660 So. 2d 353 (Fla. App. 1995)* (petitioner, seeking judicial approval of corrective deed, failed to carry burden of proof); *Matter of Green River Forest, Inc., 200 B.R. 956 (M.D. Ga. 1996)* (corrected legal description); *McLemore v. McLemore, 675 So. 2d 202 (Fla. App. 1996)* (effect of corrective deed not decided); *Joe T. Garcia's Enters. v. Snadon, 751 S.W.2d 914 (Tex. App. 1988)* (corrective deed may be used to correct scrivener's error in description of property); *Robinette v. Myers, 510 So. 2d 1332 (La. App. 1987)* (purpose of correction deed is to admit mutual error and to change instrument to conform to parties' true intent).

(n109)Footnote 283. *Sartain v. Fidelity Fin. Servs., 775 P.2d 161 (Idaho App. 1989)* (corrective deed, if valid, relates back in time to original deed).

(n110)Footnote 284. *E.g.*, Neb. Rev. Stat. § 76-271; S.D. Codified Laws Ann. § 43-30-7.

(n111)Footnote 285. *See Doman v. Brogan, 592 A.2d 104 (Pa. Super. 1991); Mueller v. Marks, 576 So. 2d 1337 (Fla. App. 1991); Bourne v. Lajoie, 540 A.2d 359 (Vt. 1987).*

(n112)Footnote 286. *Gauker v. Eubanks, 199 S.E.2d 771 (Ga. 1973).*

(n113)Footnote 287. *See Johnson v. Estate of Shelton, 754 P.2d 828 (Mont. 1988); Heinze v. Hobson, 622 S.W.2d 17 (Mo. App. 1981).*

(n114)Footnote 288. *See Jack B. Parson Cos. v. Nield, 751 P.2d 1131 (Utah 1988); Schwenn v. Kaye, 202 Cal. Rptr. 374 (1984).*

Thompson on Real Property, Thomas Editions

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CHAPTER 82 TRANSFERS BY DEED

9-82 Thompson on Real Property, Thomas Editions § 82.09

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§ 82.09 Non-essential Elements of a Deed.

[Go To Supp]

The non-essential elements that will be included in this section and the succeeding section are those most prominent in the modern law of deeds. It is important to reiterate the fact that what is deemed essential or non-essential is a matter of state law, which is an amalgam of common law and statutory law.

The modern complexity of deeds results from the reality that deeds today are serving purposes beyond the basic purpose of conveying title to real estate. The rather simplistic conveyance of fee simple title from grantor to grantee can be accomplished under modern law by a streamlined instrument. n289 It is unlikely that the lawyer preparing a deed will face difficult challenges in ascertaining the minimal requirements for a conveyance. What the modern lawyer will more likely struggle with are those additions to a deed that make it more than a simple conveyance. Thus the non-essential elements become more problematic for persons drafting deeds. Many of these problems arise out of the law of contracts and are not, strictly speaking, part of the substantive law of deeds. The law of deeds has traditionally been intertwined with the law of contracts, as the first topic to be discussed illustrates. As the various sections will illustrate, the law of contracts and the law of property intersect in the modern law of deeds.

§ 82.09(a) Consideration.

Blackstone summarized the common law view of the consideration in stating that one of the requisites for a deed is that "the deed must be founded upon good and sufficient consideration." n290 Chancellor Kent succinctly explained how the element of consideration became a "requisite" for a deed:

> The necessity of consideration came from the courts of equity, where it was held requisite to raise a use; and when uses were introduced at law the courts of law adopted the same idea, and held, that a consideration was necessary to the validity of a deed of bargain and sale. n291

If the reason cited by Chancellor Kent is the only rationale for the requirement of consideration, the common law rule should not exist today. Modern deeds, even those labelled "bargain and sale," do not operate under the theory of an executed use. n292 If there is a modern reason for the requirement of consideration, the rationale must be founded in

contract law.

The modern definition of a deed as instrument of conveyance denotes that a deed is grounded in property law, not contract law. The universally accepted modern rule is that a conveyance may be gratuitous; consideration need not be present for a deed to be valid as between grantor and grantee. n293

COMPUTER-ASSISTED RESEARCH

LEXIS: deed w/5 valid w/5 invalidated w/10 failure w/2 consideration

While the deed between grantor and grantee may be valid without consideration, the law of creditors' rights may apply in allowing a creditor of the grantor to set aside the transfer. Under the fraudulent conveyance acts of the various states n294 and the Federal Bankruptcy Act, n295 a conveyance to hinder, delay or defraud creditors may be treated as voidable by the creditors of the grantor.

The next subsection discusses recital clauses in deeds. One of the traditional recitals contained in deeds related to consideration: the deed might simply recite the actual consideration paid, typically with an acknowledgment of receipt thereof, or it might recite a consideration of "one dollar and other valuable consideration." Since the receipt of consideration was not required to transfer title to the grantee, the natural question is: Why did the customary form of a deed contain a recital of consideration? What reasons, if any, justify this practice today?

It is sometimes stated that the recital of consideration is for the purpose of rebutting the presumption of a resulting trust. n296 The resulting trust doctrine applies only in cases where the consideration was paid for by someone other than the grantee. n297 To the extent that the recital falsely states that the consideration was paid for by the grantee, the recital in the deed does not preclude evidence of the true payor. n298

Persons entitled to the protection of the recording acts must, as a general rule, have the status of being bona fide purchasers. n299 Purchasers are those having given up something of value. n300 To the extent the recital in a deed indicates payment of money by the grantee to the grantor, it would be presumed that the grantee has "purchaser" status. n301 If the evidence revealed that the transfer was without consideration, the transferee would not have protection of the recording act as a bona fide purchaser. n302

Cases involving alleged "failure of consideration" for a conveyance can become quite complicated. A conveyance of land may be in exchange for money -- the ordinary purchase and sale -- or it may in exchange for other consideration. So long as the consideration is not illegal, n303 it may take any form.

The conveyance may be in satisfaction of a pre-existing debt. A question might arise as to whether such a grantee qualified as a purchaser under the recording acts, n304 but such cases do not present a "failure of consideration" argument. The conveyance may take place in the context of a contemporaneous exchange of consideration, n305 or the conveyance may be in exchange for future consideration. The future consideration may be the payment of money or the rendition of services.

Under what circumstances, however, might a "failure of consideration" argument be properly invoked as basis for canceling or invalidating a deed? n306 The general rule is that a deed otherwise valid will not be invalidated for total or partial failure of consideration. n307 One particular factual pattern in the case law has proved troublesome in the application of the general rule: promises to support a grantor for life in exchange for a conveyance of land. Some courts will invalidate the conveyance for failure of consideration, n308 while others relegate the non-breaching party to an action at law for damages n309 or other appropriate remedy. n310 A state statute may make conveyances based upon these types of promises voidable at the option of the grantor. n311 Recitals may play a significant role in these types of cases in proving the actual consideration. n312

COMPUTER-ASSISTED RESEARCH

LEXIS: deed & (failure w/3 consideration) & (support w/5 life)

§ 82.09(b) Recitals.

The first "formal and orderly" part of a deed, in Blackstone's listing, was named the "premises." According to Blackstone, this part of a deed states the number and names of the parties and the consideration. In addition, it may also "contain the recital, if any, of such deeds, agreements, or matters of fact as are necessary to explain the reasons upon which the present transaction is founded." n313 From Blackstone's time until the present day, recitals in deeds have been used for the purposes outlined by Blackstone and for other purposes as well.

Some of the reasons for recitals of consideration were discussed in the previous subsection. Statement of the actual amount of consideration is a statutory requirement for recordation in certain states. n314 Recall, as well, the prior discussion relating to other types of recitals required before a deed may be recorded. n315

The more traditional purposes of recitals, going back to Blackstone, is to identify the parties, with regard to their role, i.e., taking in their individual or representative capacities. In this regard the *descriptio personae* doctrine, which regards the description as simply describing the taker and not indicating representative capacity, is oftentimes employed. n316 In certain instances, the recital may create ambiguity with regard to that status of the party. n317 A deed by a fiduciary grantor should contain recitals showing the authority by which the fiduciary acts. n318 To alleviate some of the marketable title problems arising out of these types of conveyances, title standards in various states have been enacted to address questions of authority and status of the grantor. n319

Recitals are added to a deed to explain the reason, purpose or motivation for a conveyance. In some contexts, a court may find the recital legally insignificant. One illustration is from the law of estates; in determining whether a conveyance was made in the form of a defeasible estate, a court may find that a so-called "purpose clause," explaining the motivation for the transfer, does not convert the estate granted into a defeasible estate. n320 In other situations, the recitals may have legal significance in areas of law not even contemplated by the parties. Two examples are as follows: (1) An instrument appears, by its form, to be a quitclaim deed rendering the doctrine of estoppel by deed inapplicable. However, the recitals in the deed give rise to an estoppel, and the estoppel by deed doctrine is now applicable. n321 (2) A recorded deed recites that is it given to replace a "lost" deed. Persons claiming through this recorded deed claim bona fide purchaser status. A court finds that these claimants are on notice as to the "lost" deed. The rationale is that the recital in the recorded deed, in the chain of title, is "constructive notice" of all deeds referred to in the recorded deed. n322 Consider as well the "promise to support" cases referred to in the previous subsection. If the purpose of the conveyance is spelled out in the deed and that purpose is to provide support of the grantor for life, one important evidentiary issue has been satisfied. n323

The extent to which courts give effect to recitals depends in large measure on the type of recital involved. The general rule is that recitals are binding upon the grantor, the grantee and those in privity with them. n324 The grantor, the one likely responsible for the language of the recital and whose signature appears upon the instrument, is typically bound by the recital as courts invoke an estoppel theory. n325 Courts mention the estoppel theory in holding the grantee bound by the recital; n326 the more persuasive theory is that the acceptance by the grantee of a deed is the act binding the grantee. n327 On the other hand, courts have not given effect to the recital when it conflicts with other parts of a deed n328 or when it does not go to the essence of the contract. n329 Recitals relating to consideration are those most likely not to be given conclusive effect; at most, the recitals relating to consideration are given presumptive effect. n330

§ 82.09(c) Reservations and Exceptions.

Reservations and exceptions are very much a part of the modern law of deeds, even though they truly merit the label of a "non-essential" element of deeds. Reservations and exceptions began as common law concepts and continue today as such. This topic is one of the few subject areas of deed law where state statutes play no role. In the latter half of the 20th century, there have been some evolutionary, if not revolutionary, developments in the law pertaining to reservations and exceptions. A few words of explanation are in order.

§ 82.09(c)(1) Background and Theory.

The modern-day developments begin at the most basic of all levels: the matters of definition and distinction. Much of the law pertaining to reservations and exceptions has historically been premised on the separateness of the two concepts. Indeed, the distinction between the two concepts is the traditional starting point for discussion. The reason for carefully distinguishing between the two was based upon the assumption that different legal rules applied to them, yet, when applying these so-called "rules," the courts were, in most instances, simply construing language in instruments. What "law" there was existed primarily in the form of rules of construction applicable to reservations and exceptions. In the context of this section, these rules might more properly be discussed in the materials in § 82.13, *infra*, pertaining to specific rules of construction. n331

While there is much to be said for labelling the law of reservations and exceptions as a separate subset of problems in deed construction, that approach would not be entirely accurate either. To the extent that any rules of law exist in this area, the topic cannot simply be written off as a series of constructional rules, and, even assuming that the age-old distinction between reservations and exceptions is no longer viable, there remains the stubborn fact that whatever this deed language is called, it can significantly affect the legal rights of parties to the deed. Certainly from a drafting perspective, one needs to know the methods available to achieve certain desired results. Reservations and exceptions have been used, are used, and will continue to be used precisely because they are a permissible method of accomplishing a desired result. To say that care and caution should be exercised in drafting them is an understatement. As is true in most areas of deed law, there is very little in the law of reservations and exceptions standing in the way of what the parties to a deed want to accomplish. With this background in mind, we turn to some of the policy issues in the law of reservations and exceptions. To do so, we begin with the basics -- the definitions.

The traditional definition of "reservation" is that it is a clause in a deed by the which the grantor creates and reserves in the grantor some right or interest in the estate granted, which had no previous existence. n332 The concept has been called a "legal fiction" because it considers the grantor's "reserved" interest a result of an implied grant from the grantee back to the grantor. n333

The traditional definition of an "exception" is that it withdraws from operation of the deed part of thing granted which would otherwise pass to the grantee. n334 In this instance the grantor has never parted with the pre-existing interest. n335

As a matter of theory, it is hard to justify the distinction between the two because the difference appears to be a classic matter of form over substance; difference without distinction -- intellectual sleight-of-hand. The artificiality of the distinction has been revealed in numerous cases in which the terms were used interchangeably and indiscriminately.

In the more recent cases courts have recognized that the terms were being used interchangeably, and thus, the distinction between the two had become meaningless. n336

COMPUTER-ASSISTED RESEARCH

LEXIS: deeds & (reservation w/10 exception w/10 interchang!)

The new approach is to focus on the intent of the parties or to look to the character and effect of the provision itself.

n337 This new approach may be the courts' way of acknowledging that the substantive law of reservations and exceptions is practically non-existent and that almost all of the reservation/exception issues are constructional in nature. It also reveals the courts rebelling over the perceived form over substance mentality of the traditional distinction.

While it is true that the reservation/exception distinction reeks of artificiality, there is at least one way to look at the distinction which might cast it in a different light. If the concept of reservation is attached to the issue of what estate or interest is retained by the grantor n338 and if the concept of exception is linked to the legal description of the property conveyed, n339 the distinction between the two becomes manageable. It turns out, in fact, that a reservation is most often used in conjunction with the estate or interest retained by the grantor. Similarly, the exception is most often linked to the legal description of the property. So viewed, the traditional distinction, as it pertains to the actual practice, has some reality attached to it.

A final note regarding the modern trend as it relates to the utility and practicality of these two concepts: they allow grantors to accomplish what they desire by one deed rather than two. Consider the classic instances of reservation and exception: A grantor desires to convey Blackacre in fee simple and end up with an easement over the property and also desires not to transfer the north ten feet of Blackacre. The grantor could deed Blackacre to the grantee, who, in turn, could grant back an easement and the north ten feet of Blackacre. By use of the reservation and exception, however, the parties can accomplish all of the grantor's desires in a single instrument. The only possible objections to such procedure is that the stability of titles is somehow affected or that third party rights are in some way threatened. These concerns, if real, are legitimate. To the extent that the law of exceptions and reservations is simply a matter of effectuating expressed intent, the only basis for not giving effect to that intent is that rules of law or public policy stand in the way. In the succeeding subsection, we will turn to some of the modern issues pertaining to reservations and exceptions as exemplified by the case law.

§ 82.09(c)(2) Modern Issues.

This subsection will be addressing issues based on the assumption that courts will continue, as a general proposition, to make a distinction between a reservation and an exception on the terms outlined above. n340 As noted above, n341 there are courts which use the terms interchangeably; in these jurisdictions, the law we are examining would be referred to as the law of "reservation/ exception," for want of a better term.

Reservations are newly created interests, arising out of appropriate language of a deed. The fact that the interests being created are contained in a writing does homage to the Statute of Frauds and, to the extent the deed is recorded, gives notice to third parties of that created interest. An outstanding example of an interest created by a reservation is a reserved easement. With regard to the creation of easements, it might be noted that easements may be created by implication, without any writing. n342 When the easement arises by implication in favor of the grantor, the easement is known as "implied reservation." n343 Implied reservations are treated as part of the law of easements, not the law of deeds. n344

A wide variety of interests may be reserved by a grantor: profits, easements, life estates, water rights, mineral interests, oil and gas, timber rights, etc. This list further illustrates how reservations operate; the grantor conveys away an estate and receives back, in the classic metaphor of property law, one of the sticks in the bundle of ownership. What may be "excepted" by the grantor is any pre-existing interest. n345 The most problematic and hotly debated issue pertaining to the creation of reservations and exceptions involves not "what," but "in whom."

The traditional common law rule is that reservations and exceptions can only be created in favor of the grantor.

COMPUTER-ASSISTED RESEARCH

LEXIS: estate w/5 stranger w/5 deed w/5 reservation

An attempt to create a reservation or exception in favor a third party (someone other than the grantor or grantee) is void; a grantor cannot reserve title in a stranger to the grant. n346 The "stranger rule" has been the subject of vigorous criticism in that it is grounded in feudal notions and lacks any rational public policy basis. Within the past thirty years, courts have re-evaluated the "stranger rule," and some have rejected it. n347

Other courts have re-examined the rule and retained it. n348 A few states have statutes which effectively abolish the stranger rule. n349 One commentator, in critiquing the stranger rule, has noted that any rule that may be avoided by using two pieces of paper is inherently suspect. n350 Although the New York Court of Appeals has recognized the method by which the stranger rule may be frustrated, it felt that the stability of land titles depends upon settled and certain rules and that the stranger rule was a property rule entitled to respect for that reason. n351 That rationale suggests that there is reliance on the stranger rule by drafting attorneys and parties, an assumption which seems dubious, if not unbelievable. n352 The common law rule serves only as a penalty for faulty lawyering at the drafting stage, with the parties paying the price. n353 Unless some evidence from those states rejecting the stranger rule is forthcoming which shows that the abolition of the stranger rule creates title problems, there is no compelling policy reason for courts to adhere to the stranger rule.

The most prevalent construction issues pertaining to reservations and exceptions are (1) whether an exception or reservation was created by the language used and (2) whether the language of reservation or exception or similar language was intended to be a limitation on the grantor's title warranties.

With regard to the creation issues, at least two general rules can be identified: (1) The language of a deed must be sufficiently definite and clear in order to create a reservation or an exception. n354 (2) In accord with the general rule that deeds are to be strictly construed against the grantor, n355 exceptions and reservations are to be narrowly construed. n356 The obvious reason for the litigation over the creation issue is that the language used is not clear, the implication being that the language in question departs from the clear and customary language ordinarily used for creation of such interests. The analysis of this issue is not as simple as it may appear.

In examining form books pertaining to exceptions and reservations in deeds, one can appreciate some of the difficulties in the selection of the proper words. Some of the leading form books, in specifying the form for a reservation, use the phrase "excepting and reserving," or "except and reserve." n357 If the two concepts are interchangeable, this language is appropriate. However, if the two concepts are distinct, the phrase "except and reserve" is troublesome. Exceptions, ordinarily employed in conjunction with descriptions of land, are more likely to be introduced by the term "except." n358

Words or phases other than the classic language of "reserve" or "except" have been held to create valid reservations or exceptions. The ubiquitous "subject to" phrase has been held to constitute the granting of easement to someone other than the grantee. n359 A deed which states that it is "to become effective at the death of the grantor" has been construed as a reservation of a life estate in the grantor. n360 The word "less" has been construed as an exception. n361

Following the legal description in a deed, a grantor may add language such as "except," "subject to," or similar language. What follows thereafter may be a particularly described portion of the land conveyed or a more generic phrase reciting an interest held by a third party, such as an easement or a life estate. If the term is "except," followed by a particular legal description, the usual verbal formula for an exception is met. n362 On the other hand, if the word "except," or "subject to," is *preceded* by a legal description and followed by a description of a particular interest, such as a road or a railroad right of way, the construction to be given by the court is likely to change. Instead of finding that the "except" or "subject to" clause creates an exception, the courts construe the language of the "except" or "subject to" clause as simply indicative of the grantor's intent to: (1) put the grantee on notice of the third party interest, and (2) convey the property subject to the interest of the third party. n363 So construed, the grantor's entire interest passes. n364 The practical result of such construction is that the grantor does not end with "gores and strips," a policy consideration

that is explicitly recognized in one other area of deed construction. n365

Terms such as "except," n366 "reserve," "subject to," n367 "less," and similar language are oftentimes used in conjunction with the covenants for title contained in the deed. As will be shown later, the grantor may limit the covenants of title in the deed, in particular, the covenants of warranty and the covenant against encumbrances. If the grantor desires to limit the warranty under the covenant against encumbrances, the usual language of the covenant of encumbrances is followed by the term "except," followed by the interests specifically not warranted. In this context "except" is not being used in the technical sense of an exception as that term has been defined and used in this subsection.

Issues pertaining to the reservations and exceptions and their relationship to title warranties arise frequently in the context of the transfer of mineral interests and oil and gas interests. n368 The prototypical case is where the grantor, owning only a one-half interest in the oil, gas and other minerals, conveys by warranty deed "reserving" a one-half interest in the oil, gas and other minerals. There are two possible constructions: (1) "reserving" is construed in the technical sense of an exception, with the grantor retaining a one-fourth interest and the grantee receiving a one-fourth interest, or (2) "reserving" is construed as "except" simply to indicate the existence of the outstanding one-half interest. Under the former construction, the grantor may have violated one of the title covenants; under the latter construction, the grantee receives all of the grantor's interest (one-half), and there is no breach of any of the title covenants. n369 As should be obvious by now, the use of the words "except" or "reserve," in conjunction with the title covenants, is fraught with peril, and extreme care is called for in the drafting of the appropriate language in the deed.

§ 82.09(d) Covenants, Conditions and Restrictions.

Covenants and conditions, as formal parts of a deed, were briefly considered in their common law context in § 82.07, *supra*. The term "restrictions" is a modern term that, while in popular use, is more descriptive than definitional, more generic than specific. It will be the final topic discussed in this section.

Blackstone called covenants "clauses of agreement," n370 in other words, contracts between the grantor and the grantee. n371 The next section, "Covenants for Title," will consider the contractual undertaking of the grantors that, because of tradition and widespread use, are considered part of the law of deeds. To the extent that the covenants of the grantor and the grantee are in some way connected to the use of the land conveyed, the covenants start moving out of the law of contracts and into the substantive law of property. Questions of creation and enforceability of these covenants is a topic unto itself; the reader is referred to other portions of this treatise. n372

The modern day definition of "condition" is a slightly expanded version of Blackstone's definition. n373 "Condition" has been defined as a qualification or restriction attached to a conveyance whereby it is provided that in case a particular event occurs or does not occur, or if the grantee does or omits to do a particular act, the estate may commence, be enlarged, or be defeated. n374 The condition is attached, not so much to the conveyance or to the land, but to the estate conveyed. The doctrine of conditional estates in the law of property is a well-recognized body of law considered elsewhere in this treatise. n375

In the present discussion, the focus will be on the constructional issue of whether a covenant or a condition was created by the deed language. Courts faced with this issue employ a number of fairly predictable constructional rules in deciding cases of this type. While the case law is important in ascertaining the judicial attitude toward covenants and conditions, perhaps the more important point is that the deed contains ambiguous language -- a testament to the person who drafted the instrument.

In approaching the covenant or condition issue, the courts are quite explicit in taking an outcome-oriented approach. This is quite understandable in light of the drastic consequences of the court finding that the language created a condition, as opposed to a covenant. Breach of condition results in what the courts term a "forfeiture" of the estate; n376

other courts speak of the "destruction" of the estate. n377 By contrast, breach of a covenant does not involve the defeating or forfeiture of the estate; the typical remedies for breach of covenant are actions at law for damages or actions in equity for specific performance. n378

COMPUTER-ASSISTED RESEARCH

LEXIS: breach w/2 covenant w/10 damages w/10 specific
performance

Given the choice between covenant and condition, and considering the consequences of what follows, the judicial approach is quite predictable and understandable. The following are some of the rules of construction laid down by the courts in cases of this type: (1) conditions are disfavored in the law and are strictly construed, n379 (2) no provision will be interpreted as a condition if the language is susceptible of any other reasonable construction; and (3) condition will be found only if deed plainly and unequivocally admits of no other construction. n380 Given these guidelines, it is rare for a court to find that a condition has been created and even more rare to find that a forfeiture has occurred. n381 Whether a particular provision is a covenant or a condition may have significance beyond the issue of breach and forfeiture. n382

Unlike the terms "covenant" and "condition," the term "restrictions" is not found in the early writers' discussion of deeds. Only recently has the term "restrictions" begun to be recognized as a term of art in the law of property. n383 The term has been judicially construed on a limited number of occasions; the setting for the discussion is either the meaning of the term in a contract n384 or in a statute. n385 The term "restrictions" has been and continues to be associated with law of deeds. n386 In the current era, the question arises as to whether the term connotes a body of law independent of the traditional "covenant/condition" distinction. To answer the question, the term must be precisely defined.

"Restriction," for deed purposes, could be broadly defined to include restrictions on transfers by the grantee, n387 covenants, conditions, or outstanding third party interests such as easements. n388 However, the term "restriction" has come to have a narrower meaning: a limitation on the use of the property by the grantee. n389 This definition, while narrowing, is still problematic for the reason that the "use restriction" may take the form of a covenant or a condition. n390 The definition states that the grantee is restricted, but it does not indicate the consequence of violation of the restriction. The term as defined is generic; it is not an independent substantive legal concept apart from covenant and condition.

To gain further insight into the use and meaning of the term "restrictions," one can look to see how deed restrictions can be structured. The first is in the form of a conveyance upon a condition, with the appropriate language attached to the estate conveyed. The second is the form of a covenant, with the making of promises relating to the use of the land. The third form of restriction may be phrased in a variety of formats, unlike the traditional language of a condition or a restrictive covenant; the deed might simply state the grantee is restricted in the use of the land (a negative prohibition), or it might simply state that the land is to be used for a specified purpose only. In either case, the traditional language of condition and covenant is lacking. Will these negative prohibitions or declarations be found binding on the grantee, creating a valid restriction? Suppose the grantor states that the grantee is restricted in the type of building to be erected on the property. Will a building restriction be given effect? The conceptual difficulty with holding that restrictions of this type are binding on the grantee as covenants is the absence of language whereby the grantee expressly promises to do or not to do something.

Despite the conceptual difficulty, courts have enforced such restrictions as covenants. The theory, though often not expressed or expressed very clearly, is that the grantee's acceptance of the deed is tantamount to a promise to abide by the restriction. n391 When the deed contains the negative prohibition or declaratory language, there is no great difficulty in classifying the grantee's implied promise as a "restrictive covenant," the prototypical "restriction."

In the context of the modern residential subdivision, the declarations, restrictions, and covenants are usually separately recorded, prior to the conveyances of any lots in the subdivision. Subsequent deeds to the subdivision lots may or may not refer to the recorded declaration of covenants and restrictions. Once again the contractual basis for the restriction is not immediately apparent. In this situation as well, the courts have interpreted the grantee's acceptance of the deed with notice of the restrictions as tantamount to an agreement to abide by the restrictions. n392

COMPUTER-ASSISTED RESEARCH

LEXIS: restriction w/10 property w/15 notice w/2 restrictive
covenants

In the modern era of planned real estate subdivisions, the subdivision restrictions should be contained in the deed conveying the property to the grantee or placed of record prior to the grantee's purchase. n393 The form of the restriction can be either the traditional "covenant" form n394 or by negative prohibitions or declarations of the grantor. In the modern real estate subdivision development plan, the labels "covenants" and "restrictions" fit together because the grantee is to be bound to affirmative promises and to negative restrictions.

Deed restrictions in the form of conditions are still possible, although usually not advisable. Disputes over deed restrictions taking the form of conditions are most likely to involve public entities. While courts generally give effect to such conditions, so long as they are not unreasonable or contrary to public policy, n395 the judicial attitude toward construing the language as covenants is particularly evident in cases of this type. n396

FOOTNOTES:
(n1)Footnote 289. Chancello Kent recognized this in 1830 in describing a deed meeting minimal formalities and essentials requirements. Kent, *supra* n.2, at 452.

(n2)Footnote 290. Blackstone, *supra* n.1, at *296.

(n3)Footnote 291. Kent, *supra* n.2, at 465.

(n4)Footnote 292. *See* § 83.03(b)(2), *supra.*

(n5)Footnote 293. *Hav. Kohl, 902 S.W.2d 850 (Mo. App. 1995)* (lack of consideration insufficient reason to set aside deed). The issue of whether a grantor is bound on the covenants for title contained in a deed, absent consideration, appears to be an open question. *See Matter of Marriage of Wyly, 934 S.W.2d 175 (Tex. App. 1996); Walsh v. Bucalo, 620 A.2d 21 (Pa. Super. 1993); In re Estate of Ault, 609 N.E.2d 568 (Ohio App. 1992); Brown v. Peterson Dev. Co., 622 P.2d 1175 (Utah 1980); Taylor v. Godsey, 357 So. 2d 979 (Ala. 1978).*

(n6)Footnote 294. The Revised Uniform Fraudulent Conveyance Act is the source of many states' laws.

(n7)Footnote 295. *11 U.S.C § 548.*

(n8)Footnote 296. 3 American Law of Property, *supra* n.94, at § 12.43 n.12.

(n9)Footnote 297. Restatement (Second) of Trusts, § 440 (1959).

(n10)Footnote 298. William F. Fratcher, Scott on Trusts § 440 (2d ed. 1987).

(n11)Footnote 299. Cunningham et al., *supra* note 11, at § 11.10.

(n12)Footnote 300. *Id.*

(n13)Footnote 301. The question of nominal consideration is troublesome in this area; *see* 3 American Law of Property, *supra* n.94, § 17.10 n.9. To the extent that consideration is deemed to be required for the validity of a deed, a consideration of one dollar is deemed sufficient. *Saldana v. Saldana, 791 S.W.2d 316 (Tex. App. 1990).*

(n14)Footnote 302. *Glover v. Town of Union, 582 N.Y.S.2d 547 (1992).*

(n15)Footnote 303. *Groening v. Nowlen, 118 N.W.2d 998 (Mich. 1963).*

(n16)Footnote 304. *See Thompson, supra n.94,* § 3115.

(n17)Footnote 305. In the ordinary purchase and sale situation, "closing day" is the time when performance is called for. At that time there is contemporaneous exchange of consideration.

(n18)Footnote 306. Other remedies may be in the offing, such as an action for damages or specific performance, but the suit for cancellation is the focal point in this discussion since it involves the *post hoc* invalidation of the deed.

(n19)Footnote 307. *Quiring v. Quiring, 130 Idaho 560, 944 P.2d 695 (1997)* ("illegal" consideration rendered deed void); *Sintz v. Stone, 562 So. 2d 228 (Ala. 1990); Farrar v. Young, 216 S.E.2d 575 (W. Va. 1975).*

(n20)Footnote 308. Although the cases speak in terms of "failure of consideration," that does not accurately describe the legal theory actually being applied. As others have pointed out, the real issue is one of remedy, specifically, whether rescission and cancellation is an appropriate remedy in the particular case. In some cases, it appears, there is no breach in the contract sense, just the fact that the arrangement does not work out. For an enlightened discussion of this topic, *see* Dan Dobbs, The Law of Remedies § 12.12(2) (2d ed. 1993).

(n21)Footnote 309. *Vega v. Estate of Mullen, 583 So. 2d 1259 (Miss. 1991).*

(n22)Footnote 310. *Fritz v. Fritz, 377 N.W.2d 20 (Minn. App. 1985)* (support order).

(n23)Footnote 311. *E.g.,* Ala. Code § 8-9-12.

(n24)Footnote 312. *Tolver v. Tolver, 585 So. 2d 1 (Ala. 1991)* (recited consideration did not amount to promise to support).

(n25)Footnote 313. Blackstone, *supra* n.1, at *298.

(n26)Footnote 314. *See* n.270, *supra.*

(n27)Footnote 315. *See* § 83.08(d)(2), *supra.*

(n28)Footnote 316. 3 A.L.P., *supra* n.94, § 12.42.

(n29)Footnote 317. *Oken v. Hammer, 791 P.2d 9 (Colo. App. 1990)* (identification of grantor as "single person" ambiguous).

(n30)Footnote 318. *Thompson, supra n.94,* § 3110.

(n31)Footnote 319. *E.g.,* S.D. Codified Laws Title Standard 5.4 (Appendix to Ch. 43-30) § 343-30 (recital of status as single person); Ky. Rev. Stat. § 389A.015 (deed exercised by fiduciary shall recite in the source of title thereto the place where the order giving such authority may be found and a certified copy of the order granting the fiduciary power shall be recorded).

(n32)Footnote 320. *Walker. Lucas County Bd. of Comm'rs, 598 N.E.2d 101 (Ohio App. 1991); Wood v. Board of County Comm'rs, 759 P.2d 1250 (Wyo. 1988); Roberts v. Rhodes, 643 P.2d 116 (Kan. 1982).*

(n33)Footnote 321. *Hagensick v. Castor, 72 N.W. 932 (Neb. 1898), see also Zayka v. Giambro, 594 N.E.2d 894 (Mass. App. 1992)* (doctrine applied to transaction involving a quitclaim deed between family members, particularly where the claim against the title was made by persons with claim based on direct descent by blood from grantor); *McBride v. Hutson, 302 S.W.2d 456 (Tex. App. 1957); Sabine Prod. Co. v. Guaranty Bank & Trust Co., 432 So. 2d 1047 (La. App. 1983). But see Yaali, Ltd. v. Barnes & Noble, Inc., 506 S.E.2d 116 (Ga. 1998)* (recital cannot give rise to easement).

(n34)Footnote 322. *Harper v. Paradise, 210 S.E.2d 710 (Ga. 1974).*

(n35)Footnote 323. *See* n.308, *supra.*

(n36)Footnote 324. *Smith v. Sovran Bank Cent. South, 792 S.W.2d 928 (Tenn. App. 1990); Cook v. Cook, 171 S.E.2d 568 (Ga. 1969).*

(n37)Footnote 325. *Hubbard v. Schumaker, 402 N.E.2d 857 (Ill. App. 1980).*

(n38)Footnote 326. *Wiley v. Lamprecht, 81 N.E.2d 459 (Ill. 1948).*

(n39)Footnote 327. *Vettori v. Fay, 137 S.E.2d 810 (N.C. 1964).*

(n40)Footnote 328. *Elliot v. Cook, 397 S.E.2d 319 (N.C. App. 1990).*

(n41)Footnote 329. *Thompson v. Soles, 257 S.E.2d 59 (N.C. App. 1979).*

(n42)Footnote 330. *Posey v. Posey, 545 So. 2d 1329 (Ala. 1989); Foster v. Martin, 436 So. 2d 143 (Fla. App. 1983).*

(n43)Footnote 331. *See* § § 83.13(b)(1) and (b)(2), *infra.*

(n44)Footnote 332. *Bauer v. Lancaster County Sch. Dist., 501 N.W.2d 707 (Nev. 1993).*

(n45)Footnote 333. *Stevens Mineral Co. v. State, 418 N.W.2d 130 (Mich. App. 1987). See also Christman v. Emineth, 212 N.W.2d 543 (N.D. 1963)* (a reservation, is, in effect, a regrant).

(n46)Footnote 334. *Fairfax County Park Auth. v. Atkisson, 445 S.E.2d 101 (Va. 1994)* ("except" language followed warranty of title; court construed "except clause" as an "exception," not as a limitation on title warranties); *O'Brien v. Village Land Co., 794 P.2d 246 (Colo. 1990).*

(n47)Footnote 335. *Cottril v. Ranson, 220 W. Va. 691, 490 S.E.2d 778 (1997)* (statutory option to repurchase treated as exception); *Hartman v. Potter, 596 P.2d 653 (Utah 1979).*

(n48)Footnote 336. *Campbell v. Johnson, 622 N.E.2d 717 (Ohio App. 1993); Jolynne Corp. v. Michels, 446 S.E.2d 494 (W. Va. 1994); Matter of Marriage of Wade, 884 P.2d 736 (Kan. App. 1994)* (use of the term "excepting" rather than "reserving" only a "mere technical defect"); *Nature Conservancy v. Kolb, 853 S.W.2d 864 (Ark. 1993); Amerson v. Lancaster, 415 S.E.2d 93 (N.C. App. 1992); O'Brien v. Village Land Co., 794 P.2d 246 (Colo. 1990).*

(n49)Footnote 337. *Id.*

(n50)Footnote 338. *Lincoln Sav. & Loan Ass'n v. State, 768 P.2d 733 (Colo. App. 1988)* (reservation "reserves some one or more of the rights which would comprise a fee simple absolute").

(n51)Footnote 339. *Moore v. Davis, 117 S.W.2d 1033 (Ky. 1938).*

(n52)Footnote 340. *See* text at nn.331-34, *supra*.

(n53)Footnote 341. *See* text at n.335, *supra.*

(n54)Footnote 342. *See LeMay v. Anderson, 397 A.2d 984 (Me. 1979); Burns Mfg. Co. v. Boehm, 356 A.2d 763 (Pa. 1976).*

(n55)Footnote 343. *See Cheney v. Mueller, 485 P.2d 1218 (Or. 1971); Granite Props. Ltd. P'ship v. Manns, 487 N.E.2d 1230 (Ill. App. 1986).*

(n56)Footnote 344. *See Mitchell v. Castellaw, 246 S.W.2d 163 (Tex. 1952); Otero v. Pacheco, 612 P.2d 1335 (N.M. App. 1980).*

(n57)Footnote 345. *Lincoln Sav. & Loan Ass'n v. State, 768 P.2d 733 (Colo. App. 1988); Schaffert v. Hartman, 278 N.W.2d 343 (Neb. 1979).*

(n58)Footnote 346. *Leidig v. Hoopes, 288 P.2d 402 (Okla. 1955); Bauer v. Bauer, 141 N.W.2d 837 (Neb. 1966).*

(n59)Footnote 347. Perhaps the leading case rejecting the "stranger rule," is *Willard v. First Church of Christ, Scientist, Pacifica, 498 P.2d 987 (Cal. 1972)* (easement may be created in third party by reservation, but not by exception). *See also Azmus v. Nelson, 743 P.2d 377 (Alaska 1987); Malloy v. Boettcher, 334 N.W.2d 8 (N.D. 1983); Simpson v. Kistler Inv. Co., 713 P.2d 731 (Wyo. 1986); Katkish v. Pearce, 490 A.2d 626 (D.C. 1985); Garza v. Grayson, 467 P.2d 960 (Or. 1970); Townshend v. Cable, 378 S.W.2d 806 (Ky. 1964); Matter of Marriage of Wade, 884 P.2d 736 (Kan. App. 1994)* (stranger rule rejected; intention of grantor controlling). *See also Foster v. Foster, 652 N.E.2d 350 (Ill. App. 1995)* (stranger rule mentioned in context of ambiguous language of deed); *Nelson v. Parker, 687 N.E.2d 187 (Ind. 1997)* (stranger rule rejected; intention of grantor controlling).

(n60)Footnote 348. *In re Condemnation by County of Allegheny of Certain Coal, Oil, Gas, Limestone, Mineral Properties, 719 A.2d 1 (Pa. Cmwlth. 1998); Carillion Realty Corp. v. State, 602 N.Y.S.2d 76 (1993); Jolynne Corp. v. Michels, 446 S.E.2d 494 (W. Va. 1994); Estate of Thomson v. Wade, 509 N.E.2d 309 (N.Y. 1987); Pitman v. Sweeney, 661 P.2d 153 (Wash. App. 1983); Tallarico v. Brett, 400 A.2d 959 (Vt. 1979).*

(n61)Footnote 349. Mont. Code Ann. § 70-1-521; N.D. Cent. Code § 47-09-17; R.I. Gen. Laws Ann. § 34-11-10; S.D. Codified Laws Ann. § 43-4-19.

(n62)Footnote 350. Jesse Dukeminier, *Cleansing the Stables of Property: A River Found at Last, 65 Iowa L. Rev. 151, 174 (1979).*

(n63)Footnote 351. *Estate of Thomson v. Wade, 509 N.E.2d 309 (N.Y. 1987).*

(n64)Footnote 352. The California court in *Willard* rejected the argument relating to reliance, both by the affected parties and the title insurance company. *Willard v. First Church of Christ, Scientist, Pacifica, 498 P.2d 987, 991 (Cal. 1972).*

(n65)Footnote 353. Legal malpractice might be present, a point emphasized by Dukeminier. *See* Dukeminier, *supra* n.349, at 174.

(n66)Footnote 354. *Durden v. Reynolds, 440 S.E.2d 170 (Ga. 1994)* (reservations and exceptions fatally defective unless property can be located with reasonable certainty); *Highway Props. v. Dollar Sav. Bank, 431 S.E.2d 95 (W. Va. 1993)* (easement failed for lack of insufficient description); *Colucci v. Colucci, 596 A.2d 1099 (N.J. Super. 1991)* (exceptions must be specifically set forth); *Hancock v. Planned Dev. Corp., 791 P.2d 183 (Utah 1990)* ("subject to" language not intended as reservation); *Kauka Farms v. Scott, 352 S.E.2d 373 (Ga. 1987)* (extent of reserved life estate not too indefinite).

(n67)Footnote 355. *See* § 82.13(b)(2), *infra. Graham v. Kuzmich, 876 S.W.2d 446 (Tex. App. 1994)* (reservations

and exceptions strongly construed against grantor); *Carter v. Heitzman, 603 N.Y.S.2d 614 (N.Y. 1993).*

(n68)Footnote 356. *Stevens Mineral Co. v. State, 418 N.W.2d 130 (Mich. App. 1987). See also Norken Corp. v. McGahan, 823 P.2d 622 (Alaska 1991)* (rule of construction favoring grantees should be subordinate to polestar rule of giving effect to intent of the parties); *Notch Mountain Corp. v. Elliott, 898 P.2d 550 (Colo. 1995)* (reservations construed more strictly than grants); *In re Condemnation by County of Allegheny of Certain Coal, Oil, Gas, Limestone, Mineral Properties, 719 A.2d 1 (Pa. Cmwlth. 1998)* (rule of construction favoring grantee not applied "where the language is sufficiently clear to define the character and extent of the reservation or exception").

(n69)Footnote 357. West's Legal Forms, § § 31.11, 31.14. As the textual discussion illustrates, the "excepting and reserving" language is problematic. *See Townsend v. County of Allegany, 649 N.Y.S.2d 296 (App. Div. 1996)* ("reserving and excepting" construed as limitation on warranty); *Sheaffer v. Caruso, 676 A.2d 204 (Pa. 1996)* (by using excepting and reserving language, grantor "protected herself from liability under the general warranty deed and created in herself an estate in the oil and gas").

(n70)Footnote 358. *Id.,* § 31.3. *Fairfax County Park Auth. v. Atkisson, 445 S.E.2d 101 (Va. 1994)* ("except" language followed title warranty language; language construed as an exception); *Polizos v. Skoro, 877 P.2d 662 (Or. App. 1994)* ("excepting" language followed legal description).

(n71)Footnote 359. *Katkish v. Pearce, 490 A.2d 626 (D.C. 1985). Compare Davis v. Henning, 462 S.E.2d 106 (Va. 1995)* ("subject to" language of deed did not reserve easement in grantor) *with Camino Sin Pasada Neighborhood Ass'n v. Rockstroh, 889 P.2d 247 (N.M. App. 1994)* ("subject to" language held to have created an easement by reservation in grantor). The New Mexico court cited other recent cases on point and also discussed the issue of admissibility of extrinsic evidence.

(n72)Footnote 360. *Grimmett v. Estate of Beasley, 777 S.W.2d 588 (Ark. App. 1989).* This problem will be considered at § 83.03(c), *infra,* as well.

(n73)Footnote 361. *Lincoln Sav. & Loan Ass'n v. State, 768 P.2d 733 (Colo. App. 1988).*

(n74)Footnote 362. *See* text at note 333, *supra.*

(n75)Footnote 363. *Fairfax County Park Auth. v. Atkisson, 445 S.E.2d 101 (Va. 1994)* ("subject to" language reenforced intention of grantor previously expressed in "except" clause); *Carter v. Heitzman, 603 N.Y.S.2d 614 (N.Y. 1993)* ("excepting and reserving" clause, as applied to street, construed as consistent with passing of fee title to grantee; neither a "reservation" nor an "exception" was technically possible); *Walker v. Foss, 930 S.W.2d 701 (Tex. App. 1996)* ("subject to" used to protect grantor against claimed breach of warranty); *City and County of San Francisco v. Union Pac. R.R., 58 Cal. Rptr.2d 1 (Cal. App. 1996)* ("subject to" language typically connotes reservation of rights in grantor rather than limitation of estate conveyed); *Hancock v. Planned Dev. Corp., 791 P.2d 183 (Utah 1990); Lillich v. Lowery, 320 N.W.2d 463 (Neb. 1982); Pollnow v. State Dep't of Nat. Resources, 276 N.W.2d 738 (Wis. 1979).* The grantee may well be on constructive or inquiry notice of the third party interest. Lurking beneath the surface of cases of this type, and sometimes mentioned in passing, is the liability of the grantor on the title covenants. The term "less" was held to be exception in *Lincoln Sav. & Loan Ass'n v. State, 768 P.2d 733 (Colo. App. 1988).*

(n76)Footnote 364. There is in practically every state a presumption of the grantor's entire interest passing. *See* § 82.13(c)(2), *infra.*

(n77)Footnote 365. *See* § 82.13(c)(3), *infra*. The court in *Carter v. Heitzman, 603 N.Y.S.2d 614 (N.Y. 1993),* noted that it would be "illogical" to construe an "excepting and reserving" clause in a fashion that would result in the grantor's heirs retaining "ownership of the street but none of the surrounding property." This is a reference to the "strip and gore" doctrine in a context in which it is not normally found. As indicated in the discussion *infra,* at § 82.13(e), the public policy considerations which prompted the "strip and gore" doctrine are, on occasion, equally applicable in an

"exceptions and reservations" case. *Carter* is a rare case in which the court takes into account the policy behind the "strip and gore" doctrine in a factual setting not normally associated with it. Another example of a court taking into account the policies behind the "strip and gore" doctrine is *Ritz v. Indiana and Ohio R.R., 632 N.E.2d 769 (Ind. App. 1994).* In discussing the "fee v. easement" issue, the court in *Ritz* noted that the "public policy of this state does not favor the conveyance of strips of land by simple titles to a railroad for right-of-way purposes." As indicated in the text at § 82.13(c)(2), the prevailing approach in these types of cases is founded upon the "greatest estate" canon, a constructional rule, which results in a presumption of a fee simple.

(n78)Footnote 366. West's Legal Forms § 30.20 (2d ed. 1986).

(n79)Footnote 367. *Id.* at § 30.11.

(n80)Footnote 368. *See, e.g., O'Brien v. Village Land Co., 794 P.2d 246 (Colo. 1990); Ford v. Raab, 744 P.2d 956 (Okla. 1987); Cole v. Minor, 518 So. 2d 61 (Ala. 1987).*

(n81)Footnote 369. The Colorado court in *O'Brien* (*O'Brien v. Village Land Co., 794 P.2d 246 (Colo. 1990))* emphasized the distinction between the granting clause and the warranty clause; the Alabama court in *Cole* (*Cole v. Minor, 518 So. 2d 61 (Ala. 1987))* saw the issue as a conflict between the granting clause and the reservation. Both courts also discussed the question of whether the language was "unambiguous," thus barring any extrinsic evidence. Both courts ruled the deed language to be unambiguous, barred extrinsic evidence, and ruled that the "reserving" language was not a reservation in the technical sense, and thus the grantor's entire interest passed under the deed. *Peoples Bank and Trust Co. v. Nettleton Fox Hunting & Fishing Ass'n, 672 So. 2d 1235 (Miss. 1996)* (grantor conveyed mineral rights and did not reserve them; grantor "was merely trying to protect its warranty"). *See also Sheaffer v. Caruso, supra* at note 356).

(n82)Footnote 370. Blackstone, *supra* n.1, at *304.

(n83)Footnote 371. *Birnbaum v. Rollerama, Inc., 232 N.Y.S.2d 188 (1962).*

(n84)Footnote 372. The law of "real covenants" and "equitable servitude" is considered in chapters 61 and 62 of this treatise.

(n85)Footnote 373. *See* text at n.161, *supra.*

(n86)Footnote 374. *Hurd v. Becker, 165 So. 2d 420 (Fla. App. 1964); Birnbaum v. Rollerama, 232 N.Y.S.2d 188 (1962).*

(n87)Footnote 375. *See* Ch. 20, *supra*.

(n88)Footnote 376. *Sanders v. East Bay Mun. Util. Dist., 20 Cal. Rptr. 2d 1 (1993); Stratis v. Doyle, 575 N.Y.S.2d 400 (1991); Jelen & Son v. Kaiser Steel Corp., 807 P.2d 1241 (Colo. App. 1991); Feldman v. Urban Props., 165 A.2d 854 (N.J. Super. 1961).*

(n89)Footnote 377. *Taylor v. Martin, 585 So. 2d 849 (Ala. 1991); Wood v. Board of County Comm'rs, 759 P.2d 1250 (Wyo. 1988).*

(n90)Footnote 378. *Sanders v. East Bay Mun. Util. Dist., 20 Cal. Rptr. 2d 1 (1993); Inwood North Homeowners' Ass'n v. Harris, 707 S.W.2d 127 (Tex. App. 1986), rev'd, 736 S.W.2d 632 (Tex. 1987)* (foreclosure not available where no lien created); *Birnbaum v. Rollerama, Inc., 232 N.Y.S.2d 188 (1962).*

(n91)Footnote 379. *Loveland v. CSX Transp., Inc., 622 So. 2d 1120 (Fla. App. 1993)* (condition subsequent in deed); *Sanders v. East Bay Mun. Util. Dist., 20 Cal. Rptr. 2d 1 (1993); Suffolk Bus. Ctr., Inc. v. Applied Digital Data Sys., 581 N.E.2d 1320 (N.Y. 1991); Jelen & Son v. Kaiser Steel Corp., 807 P.2d 1241 (Colo. App. 1991); Taylor v.*

Martin, 585 So. 2d 849 (Ala. 1991).

(n92)Footnote 380. *Sanders v. East Bay Mun. Util. Dist., 20 Cal. Rptr. 2d 1 (1993); Jelen & Son v. Kaiser Steel Corp., 807 P.2d 1241 (Colo. App. 1991); Wood v. Board of County Comm'rs, 759 P.2d 1250 (Wyo. 1988); Malloy v. Newman, 649 S.W.2d 155 (Tex. App. 1983); Barnett v. County of Washoe, 476 P.2d 8 (Nev. 1970).*

(n93)Footnote 381. *E.g., Long v. Pompey Hills Vol. Fire Dep't, Inc., 539 N.Y.S.2d 1014 (1989), aff'd, 563 N.Y.S.2d 709 (1990).*

(n94)Footnote 382. *E.g.*, how a "repurchase option" contained in a deed is to be categorized. *See Suffolk Bus. Ctr., Inc. v. Applied Digital Data Sys., 581 N.E.2d 1320 (N.Y. 1991)* (repurchase option a covenant running with the land, not a condition); *Central Del. County Auth. v. Greyhound Corp., 588 A.2d 485 (Pa. 1991)* (repurchase option subject to rule against perpetuities, not to be construed as a conditional estate).

(n95)Footnote 383. Black's Law Dictionary, in the 5th edition of 1979, first began defining the term in its modern sense. *See* Black's Law Dictionary 1181 (5th ed. 1979).

(n96)Footnote 384. *Regency Highland Assocs. v. Sherwood, 388 So. 2d 271 (Fla. App. 1980)* (vendor/purchaser agreement); *Feldman v. Urban Commercial, Inc., 189 A.2d 467 (N.J. Super. 1963), aff'd, 209 A.2d 640 (N.J. Super. 1965); Bertrand v. Jones, 156 A.2d 161 (N.J. Super. 1960)* (vendor/purchaser agreement).

(n97)Footnote 385. *Myers v. Salin, 431 N.E.2d 233 (Mass. App. 1982); Breene v. Plaza Tower Ass'n, 310 N.W.2d 730 (N.D. 1981).*

(n98)Footnote 386. 26 C.J.S. *Deeds*, § § 141-71 ("Conditions and Restrictions").

(n99)Footnote 387. The body of law associated with restrictions on transfer is commonly referred to as the restraints on alienation doctrine. *See* Ch. 29, *supra*.

(n100)Footnote 388. *Bertrand v. Jones, 156 A.2d 161 (N.J. Super. 1960)* (sewer easement not a "restriction").

(n101)Footnote 389. Black, *supra* n.5, at 1990.

(n102)Footnote 390. *Malloy v. Newman, 649 S.W.2d 155 (Tex. App. 1983).*

(n103)Footnote 391. *Timberstone Homeowner's Assoc. v. Summerlin, 467 S.E.2d 330 (Ga. 1996)* ("affirmative acceptance" by grantee not required); *Heritage Heights Home Owners' Ass'n v. Esser, 565 P.2d 207 (Ariz. App. 1977).*

(n104)Footnote 392. Cunningham, Stoebuck & Whitman, *supra* n.11, at § 8.14 n.7; § 8.28. *See also Montana v. Blount, 504 S.E.2d 447 (Ga. App. 1998)* (*citing* Ga. Code Ann. § 44-5-39).

(n105)Footnote 393. *See generally* West's Legal Forms ch. 29 (1986) ("Restrictions"). It is theoretically possible for restrictions to be "implied" with no writing evidencing the restriction. As to the theory of implied restrictions, *see* Cunningham et al., *supra* n.11, at § 8.32.

(n106)Footnote 394. An affirmative promise to pay money to a homeowner's association is commonly found in such declarations.

(n107)Footnote 395. *Unknown Heirs, Devisees, Legatees & Assigns of Devou v. City of Covington, 815 S.W.2d 406 (Ky. App. 1991).*

(n108)Footnote 396. *Lacer v. Navajo County, 687 P.2d 404 (Ariz. App. 1983); Barnett v. Washoe County, 476 P.2d 8 (Nev. 1970).*

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CHAPTER 82 TRANSFERS BY DEED

9-82 Thompson on Real Property, Thomas Editions § 82.10

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§ 82.10 Covenants of Title.

[Go To Supp]

Although covenants of title are properly listed among the non-essential elements of a deed, the long-standing and widespread use of these covenants justifies their separate treatment in the law of deeds. The covenants of title are but one of a number of so-called title assurance devices, whereby the grantee of a deed receives some measure of protection against a grantor whose title is lacking or defective in some respect. There are many and varied issues relating to title defects. The reason for the continuing struggle over title issues can be traced, in large part, to the system of conveyancing generally employed in the United States. With few exceptions, n397 title in this country is based upon title instruments, such as deeds, and the recording of these instruments. The theory is that a real estate purchaser is entitled to rely upon the state of record title and receives protection through the recording acts, n398 but the validity of the instrument, even when recorded, may later be challenged. Deeds, wills, and other similar instruments are evidence of title, but they do not constitute conclusive evidence of title. The prudent purchaser should, of course, and ordinarily does, make a careful examination of the vendor's title prior to purchasing. Just as the landlord's careful screening of tenants is the best security, so a purchaser's careful examination of title prior to purchasing is the best protection against title problems. n399 The system, however, is not perfect, and even those who diligently check the title records may not receive protection against title failure or title flaws. n400 Title insurance is the more recent method of title protection in widespread use; the most ancient and more widely method used today is the deed containing title covenants.

Topics of importance in the modern law of covenants of title include types of covenants, scope of covenants, breach, remedy, and damages. All of these topics are essentially contract based doctrines. In addition to these standard topics, there are two other topics arising out of covenants of title that deserve special consideration: the topic of runnabilty of covenants and the doctrine of estoppel by deed. The latter topic will be discussed in the next section.

There are some inherent limitations on the scope of protection, as the following materials will indicate. There are also some limitations which naturally flow from the fact that the remedy for breach is typically an action for damages against an immediate or remote grantor. The defendant grantor may not exist, may not be amenable to service of process, or may be insolvent. In addition, the cause of action may be barred by a statute of limitations, which, in the case of a deceased grantor, may be a short statute of limitations. Finally, there is the question of damages. If what is

recovered are considered nominal damages, the lawsuit may be justifiable only for the purpose of establishing marketable title.

§ 82.10(a) Common Law Background.

In § 82.07(b), *supra,* it was noted that the clause of warranty in a deed was the medieval version of a title covenant. Coke's commentaries contain a lengthy chapter to the topic of warranties, n401 and the lengthiest discussion on parts of deeds by Blackstone is on the topic of the clause of warranty. n402 Chancellor Kent, writing in 1830, summarily reviewed the common law of warranties and concluded that the remedy by the ancient warranty had been superseded by "personal covenants." n403 Thus, by 1830 the common law of deed warranties had changed in two significant respects: the covenants were no longer to be implied, and they were no longer treated as binding upon successors in interest to the grantor. In addition, the remedy for breach had shifted from the ancient *warrantia chartae*, whereby the grantor might be required to "yield other lands" equal in value to the land warranted, to damages. n404

§ 82.10(b) Covenant Creation and the Statutory Law of Covenants.

The creation of covenants of title is the starting point for the law of covenants. The starting point for the creation of covenants of title is the language of the deed, for if title covenants are, as Kent said, "personal covenants," they are express contractual undertakings of the grantor. The ordinary method of creation of covenants for title is the language of the deed. In many jurisdictions, however, the creation of covenants is not just a matter of contract. There are a number of jurisdictions in which the use of certain language in a deed will be deemed to include certain covenants of title. These statutes vary considerably in their detail. In the concluding subsection there is a state-by-state listing of the various statutes pertaining to covenants of title. This listing includes the implied covenants of title arising from the use of certain language in a deed, as well as the statutes pertaining to runnability and estoppel by deed. The topics and scope of these statutes vary considerably. Given the extent of legislation in this area, the starting point for any research in the field should begin with a review of the state's statutory law to determine to what extent, if any, the common law rules pertaining to covenants for title have been abolished or modified.

§ 82.10(c) Types of Covenants.

There are six common law covenants of title: (1) seisin; (2) right to convey; (3) against encumbrances; (4) quiet enjoyment; (5) further assurances; and (6) warranty. n405 It is a matter of local custom and usage as to whether all six of these covenants are ordinarily included in the general warranty deed. n406

COMPUTER-ASSISTED RESEARCH

LEXIS: seisin w/5 convey w/5 encumbrances w/5 "quiet enjoyment"
w/5 warranty w/5 "further assurances"

Covenants of title have been divided into two categories -- present covenants and future covenants. Traditional common law classification places the covenants of seisin, right to convey, and against encumbrances in the first category and the covenants of quiet enjoyment, further assurances and warranty in the second category. n407 Covenants of warranty are classified as general or special. n408 The legal significance of these classifications will be considered below.

§ 82.10(c)(1) Covenant of Seisin.

The traditional language creating the covenant of seisin states, in simplified modern form, that the "[Grantor] covenants that [grantor] is lawfully seised of the said real estate" or that the grantor is "seised of an indefeasible estate in fee simple in said real estate." There is a technical difference between the formulations, going back over a century to the debate over the concept of "actual seizin."

Without benefit of a statute defining the covenant of seisin, the American courts early on struggled with the concept of actual seizin as complying with the covenant. The debate was whether the grantor's covenant of being "lawfully seised" was satisfied by delivering actual possession to the grantee, as some courts had held. n409 By 1860, the leading commentator on the topic stated that the weight of American authority was opposed to the doctrine of actual seizin as satisfying the covenant. n410 The controversy over actual seizin did not occur when the language of the covenant included the words "seized of an indefeasible estate." n411

What, then, is the modern definition and meaning of a covenant of seisin? In some states the definition of the covenant is statutorily defined. n412 In states where there is no statutory definition, the courts do not parse the language of the covenant itself or examine the technicalities of the medieval concept of seisin. The modern cases construe a covenant of seisin as a promise by the grantor that the grantor is the owner of the estate in the same quantity and quality which the grantor purports to convey. n413 The covenant of seisin, as thus construed, is truly a covenant of *title;* the focal point is the transfer of title, which, technically speaking, involves a conveyance of an *estate* in land. Thus defined, the covenant of "seisin" is a guaranty or warranty of the estate or interest conveyed, be it a fee simple, a life estate, an easement or mineral interests.

Some of the modern cases, however, state that the covenant of seisin is breached if the grantor has neither possession nor the right of possession. n414 This approach is the converse of the actual seizin doctrine of a century ago: lack of possession violates a warranty of title. n415 There is an analogy in the law of landlord/tenant regarding the landlord's duty to deliver actual possession to the tenant. Some courts hold that a landlord is under an *implied* covenant to deliver actual possession to the tenant. n416 If courts "construe" a covenant of seisin as requiring a delivery of actual possession, they are going beyond the notion traditionally expressed by the term "covenant of *title*."

The covenant of seisin is a "present" covenant, meaning that the covenant is breached, as Kent put it, "as soon as the deed is executed." n417 The statute of limitations begins running at that time. n418 The key to understanding what circumstances would give rise to a breach is the manner in which a court goes about defining the covenant. If a covenant of seisin is defined as a warranty by the grantor that the grantor is owner of the very estate the grantor is purporting to convey, the breach issue become clear. The alleged breach must relate to a failure of title; the mere existence of an encumbrance is not a breach. n419 The breach of a covenant of seisin has been found in cases where the grantor lacked title to the "appurtenance" conveyed n420 and the grantor did not own the mineral rights to the property conveyed. n421

COMPUTER-ASSISTED RESEARCH

LEXIS: seisin or seizin w/25 present covenant breach w/5 covenant
w/5 seisin or seizin w/20 failure w/5 title

As to the measure of damages for breach of a covenant of seisin, the courts continue to adhere to Chancellor Kent's statement of the law: "The buyer on the covenant of seisin, recovers back the consideration money and interest, and no mOr." n422 This restitutionary theory is supported by the traditional present-future covenant dichotomy. The cause of action for breach of a covenant of seisin accrues in the ordinary case at the time of the closing when the deed is delivered. At that time the grantee is "hurt" to the extent that the grantee has not received all the grantee has contracted for. A partial failure of title results in a *pro tanto* damage assessment. n423 The *pro tanto* rule has been applied in an exchange case as well as sale. n424

COMPUTER-ASSISTED RESEARCH

LEXIS: measure w/5 breach w/5 covenant w/5 seisin or seizin or
warranty

The extent to which the grantee can recover attorney fees and other costs of litigation in the suit for breach is very much dependent upon the facts of the individual case. A suit for attorney fees and costs resulting from the grantee's unsuccessful defense of title against a third party is distinct from a grantee's attempt to collect fees and costs in the direct suit against the grantor. Recovery of attorney fees and costs is granted in the first instance n425 and denied in the second. n426 In cases involving covenants of seisin, courts have awarded both attorney fees n427 and costs n428 against the breaching grantor.

COMPUTER-ASSISTED RESEARCH

LEXIS: "attorney fees" w/10 breach w/10 covenant w/10 seisin or
seizin or warranty

§ 82.10(c)(2) Covenant of Right to Convey.

The typical deed language creating a covenant of right to convey is: "Grantor hereby covenants with the grantee that [grantor] has good right, full power and lawful authority, to convey the said land ...." This covenant is said to be synonymous with the covenant of seisin n429 and thus redundant, but that may not always be true. If a deed executed by a fiduciary, such as personal representative or trustee, recites as its only covenant that the grantor has the legal power and lawful authority to convey, it may be construed strictly as a covenant which simply relates to the grantor's power to convey, not to title. Thus construed, the deed is more like a quitclaim deed than a warranty deed. n430

COMPUTER-ASSISTED RESEARCH

LEXIS: covenant w/10 "personal representative" w/10 authority
trustee w/5 power w/5 bind w/5 warranty

Issues of breach and of damages are treated the same under the covenant of right to convey as under the covenant of seisin. n431 Under the traditional view, the covenant of right to convey is a present covenant. n432

§ 82.10(c)(3) Covenant Against Encumbrances.

The typical deed language creating a covenant against encumbrances is short and direct: "Grantor hereby covenants that, at the time of execution hereof, the premises are free and clear of all encumbrances." The grantor can, and often does, limit this covenant so as to exclude existing encumbrances. This can be accomplished by a carefully drawn "subject to" clause: "subject to easements, covenants, or other encumbrances of record." n433 Using the word "except" to limit the covenant creates problems because of the concept, previously discussed, of an "exception" in a deed. n434

Many of the cases involving alleged breach of this covenant come down to the question of how the term "encumbrance" is defined. n435 The more recent cases define "encumbrance" as any right or interest in land subsisting in a third person, to the diminution of the value of the land, not inconsistent with the passing of fee simple title. n436 Examples can be found of definitions that are more expansive. n437

Because of the vague contours of the definition of encumbrance, there are numerous cases addressing the issue of whether the challenged interest or defect is violative of the covenant. Historically, liens and easements constituted the bulk of the case law raising the issue of breach. Liens are classic covenant violations; n438 easements are likewise violations, whether or not the grantee had knowledge of the easement. n439 In cases involving public easement, such as highways and railroad rights of way, knowledge of the grantee may be relevant. n440

Public land use restrictions and regulations are the focal points of many of the recent cases. In cases of this type, it is not the existence of the restriction or regulation that is at issue; the question is whether a violation of the public restriction

or regulation, existing at the time of the transfer, constitutes an encumbrance. n441 The courts have found no breach of the covenant in cases of violation of county zoning requirements, n442 county subdivision ordinance, n443 building code, n444 land use regulation, n445 or hazardous waste regulation. n446 There are some cases finding a breach when the violation pertains to zoning laws. n447

COMPUTER-ASSISTED RESEARCH

LEXIS: covenant or warranty w/25 breach w/25 zoning requirements
covenant or warranty w/25 breach w/25 subdivision ordinance
covenant or warranty w/25 breach w/25 building code covenant
or warranty w/25 breach w/25 land use regulation covenant or
warranty w/25 breach w/25 hazardous waste

Problems of location give rise to claims that an encumbrance exists. Encroachments can give rise to breaches of the covenant, n448 but the mere fact that a driveway, sewer line or septic tank is located on adjacent property may not be considered a breach. n449

COMPUTER-ASSISTED RESEARCH

LEXIS: covenant w/10 convey w/10 breach w/50 encroach!
covenant against encumbrances w/10 breach w/25 driveway or sewer line or septic tank

The traditional view is that a covenant against encumbrances is a present covenant, with any breach occurring at the time of the conveyance. n450 The damages for breach of the covenant are determined by the difference between the value of the property without the encumbrance and the value of the property with the encumbrance. n451 The cost of removing the encumbrance may, in appropriate cases, be the measure of damages. n452 However, this amount may not exceed the consideration paid. n453 In certain instances, the courts have awarded nominal damages for the breach. n454 Attorney fees are usually not awarded. n455

COMPUTER-ASSISTED RESEARCH

LEXIS: covenant w/5 encumbrances w/25 in praesenti covenant w/5 encumbrances w/25 in praesenti w/25 damag!

§ 82.10(c)(4) Covenant of Warranty.

In addition to the "covenant of warranty," there are closely related terms that come up in the discussion of covenants of title. These terms include: "warrant," "warranty of title," "warranty deed," "general warranty deeds," and "special warranty deeds." These terms may constitute the source of confusion if distinctions are not carefully made. This is particularly true as regards the peculiarities and vagaries of state statutory law pertaining to covenants of title. The reader is referred to subsection (e), *infra*, for more detailed information pertaining to the laws of the various jurisdictions.

In certain states the statutes provide that the term "warrant" implies all of the usual covenants of title. n456 In these jurisdictions the courts may use the term "warranty of title" as embracing all of the covenants n457 and the term "breach of warranty of title" to indicate that one of the usual covenants has been breached. n458 In other words, "warranty of title" is used generically in the sense of "covenants of title." "Warranty deed" is another term that is used generically to describe a deed containing the usual covenants of title. n459 The opposite of a warranty deed is "quitclaim deed," a deed containing no covenants of title. n460 One must be careful here as well, however, since in some states, what is ordinarily regarded as a special warranty deed is referred to as a "quitclaim deed." n461

COMPUTER-ASSISTED RESEARCH

LEXIS: lien or encumbrance w/15 warranty deed w/15 breach
warranty

Now we move to the covenant of warranty, one of the "usual covenants," according to Chancellor Kent. As Kent put it, this covenant states that "the grantor will warrant and defend the title against all lawful claims." n462 Kent's statement of the covenant of warranty is still accurate today. n463 In the language of some deeds, the grantor covenants to "warrant and defend the premises" against the claims of "all parties." It is the grantor's promise to warrant and defend the title against *all* claimants that makes the covenant of warranty a covenant of general warranty. n464 The grantor's covenant of warranty may be limited to warranting and defending the title against the claims of persons who claim by, through, or under the grantor. By limiting the warranty in this fashion, the grantor has given a covenant of special warranty. n465

COMPUTER-ASSISTED RESEARCH

LEXIS: fee simple title w/5 lawful claim general warranty deed w/15
grantee w/15 breach or broken

The terms "general warranty deed" and "special warranty deed" are terms of art used in conveyancing. Putting aside the statutorily-based meanings of these terms, the question arises whether the distinction is based solely upon the presence of a covenant of general or special warranty. At least one authority so states. n466 However, the case law discussing the definition of "special warranty deed" opens up the possibility of differing definitions of the term. A special warranty deed may be construed as a limitation on the grantor's covenants such that, as to all of the covenants, the warranties are limited against the grantor's own acts only. n467 As noted previously, n468 covenants of title are often limited by "subject to" or "except" language. To confuse matters even more, a court may refer to a deed containing this type of language as a "limited" warranty deed. n469 To repeat a basic point, the terminology varies from jurisdiction to jurisdiction, and thus, any "general discussion" is perilous, as is any attempt to generalize from the various cases from the several jurisdictions.

COMPUTER-ASSISTED RESEARCH

LEXIS: special warranty deed w/25 by through under limited warranty
w/15 convey!

Chancellor Kent stated that the covenant of warranty and the covenant of quiet enjoyment are "prospective, and an eviction is necessary to constitute a breach of them." n470 The prospective nature of these covenants causes them to be labelled "future" covenants in modern law. The modern cases continue to adhere to Kent's statement with regard to both the timing of the breach n471 and the necessity for an eviction, actual or constructive. n472 "Constructive eviction," a convenient legal fiction, has been utilized for over a century n473 and continues to be used today. n474

There are a variety of circumstances that might constitute the eviction, but the four main categories constituting an eviction are: (1) an eviction under paramount title existing at the time of conveyance, (2) a failure to obtain possession under deed because of possession in another with paramount title, (3) a surrender of possession after hostile assertion of paramount title, and (4) a purchase or extinction of such title by the purchaser. n475 The running of the statute of limitations commences when the breach occurs, which necessitates a finding of when the eviction took place. So long as the eviction is actual, a certain date is more likely to be easily calculable. When the eviction is constructive, the fact that the court is engaging in a legal fiction makes the accrual date more difficult to ascertain with precision. n476

COMPUTER-ASSISTED RESEARCH

LEXIS: eviction w/2 actual w/2 constructive w/50 warranty deed or
deed warranty failure w/10 obtain possession w/10
constructive eviction paramount title w/10 constructive
eviction surrender possession w/10 constructive eviction w/10
paramount purchase or extinction w/10 constructive eviction

The measure of damages issue for a breach of a covenant of warranty may be complicated by the status of the covenantee. In this discussion of damages, it is assumed that the covenantee is the immediate grantee. n477 In such case, the normal measure of damages is the purchase price with interest from date of the eviction. n478 There are older cases from New England which allow the covenantee to recover the value of the land at the time of eviction and the value of improvements. n479

COMPUTER-ASSISTED RESEARCH

LEXIS: eviction w/10 measure damages & breach warranty

The general rule is that a grantee who is involved in an unsuccessful defense of title is entitled to recover costs and attorneys' fees, n480 whereas a grantee who has successfully defended title is not so entitled. n481 Exactly when the grantee has successfully defended title and whether a lawsuit has drawn into question the grantee's title are not always easy to determine. n482

The general rules of the previous paragraph are subject to qualification and exception. n483 Even though a grantee's defense of title may be successful, recovery of costs may be allowed where the litigation was caused by grantor's negligence, n484 or where the wrongful act of the grantor thrusts the grantee into litigation with the third party. n485 In many jurisdictions the covenantee, in order to recover costs, must give the grantor notice of the pending litigation and, in some instances, request the grantor to appear and defend. n486 The general rule, along with its qualifications and exceptions, is being re-examined, and in at least one important recent case has resulted in a new test of liability of the grantor for the costs of a grantee's defense of an adverse claim. n487 This new test involves two factors: (1) the grantor's responsibility for the adverse claim or its actual or constructive knowledge of that claim, and (2) the grantee's demand of the grantor to defend the title. n488 Under this test the grantor might be held liable for the costs of the defense, regardless of whether the defense of the title is successful.

COMPUTER-ASSISTED RESEARCH

LEXIS: recovery costs w/10 successful defense w/10 grantor!
negligence wrongful act w/10 grantor w/10 litigation w/10
third persons

§ 82.10(c)(5) Covenant for Quiet Enjoyment.

Chancellor Kent stated that one of the usual covenants of a deed is a grantor's promise "that the grantee shall quietly enjoy." n489 The covenant for quiet enjoyment is generally regarded as identical in scope and in operation as a covenant of warranty. n490 Because the covenants of warranty and quiet enjoyment are, in truth, one and the same, there is no reason to attempt to state a separate set of rules applicable to the covenant for quiet enjoyment. The law applicable to the covenant of warranty becomes the law applicable to the covenant for quiet enjoyment. Typically, in referring to the combination warranty/quiet enjoyment covenant, the courts simply use the term "covenant of warranty." n491

COMPUTER-ASSISTED RESEARCH

LEXIS: quiet enjoyment w/10 identical or similar w/10 warranty

Occasionally, a court will give a nod to the covenant for quiet enjoyment in defining the covenant for warranty as a covenant against loss of possession. n492 There are few modern cases in which the covenant of quiet enjoyment is the covenant relied on exclusively by the grantee. n493

COMPUTER-ASSISTED RESEARCH

LEXIS: quiet enjoyment w/15 loss possession

§ 82.10(c)(6) Covenant for Further Assurance.

The covenant for further assurances is a promise by the grantor to do those acts reasonably required in the future to perfect the grantee's title. n494 While deed forms and statutes may continue to refer to this covenant, it is doubtful whether it plays any significant role in the modern law of deeds. It is also doubtful whether this covenant has ever played any significant role in American law: Chancellor Kent did not list this covenant as one of the "usual covenants" in a deed. n495

COMPUTER-ASSISTED RESEARCH

LEXIS: further assurances w/15 perfect w/15 title

§ 82.10(d) Enforcement by Remote Grantee -- "Real" Covenants.

Chancellor Kent did not use the terms "present" and "future" covenants in listing the covenants of title. The terms Kent used to distinguish the various covenants were "personal" and "real." According to Kent, the covenants of seisin, right to convey, and against encumbrances were the personal covenants -- "not running with the land, or passing to the assignee." In contrast, the covenants of warranty and for quiet enjoyment were "real" covenants -- "they run with the land conveyed and descend to heirs, and vest in assignees." n496 Kent's set of rules as to which covenants "run with the land" has routinely been accepted by the courts as an accurate statement of the law. n497 Today, in some jurisdictions, the "present" covenants are treated as "real" covenants and run with the land. This result came about either by judicial decision n498 or by state statute. n499

The fact that a covenant runs to the benefit of remote grantees creates some special problems relating to breach and enforcement. Issues may arise as to: (1) standing, (2) accrual of the cause of action for statute of limitations purposes, and (3) measure of damages.

With regard to the issue of standing, the remote grantee suing on the covenant must show a connection to the original covenantee, the so-called "vertical" privity requirement. n500 This requirement is satisfied by showing that the remote grantee has succeeded to the estate or interest of the covenantee. n501

For this purpose, the fact that intermediate conveyances contain no covenants is not significant. n502 The plaintiff may elect to sue the original covenantor, intermediate grantors who gave warranties, or all of them. n503

COMPUTER-ASSISTED RESEARCH

LEXIS: vertical privity w/25 grantee or covenant!

If a present covenant runs with the land, the date of the accrual of the cause of action, for statute of limitations purposes,

remains the same: the date of the conveyance. n504 As to the issue of damages, the long-standing issue is whether the remote grantee can sue for more than the consideration given by the remote grantee, in a case where that amount is less than the consideration received by the covenantor. There are no recent cases on point; the older cases are divided on this issue. n505

COMPUTER-ASSISTED RESEARCH

LEXIS: statute limitations w/100 covenant seisin or covenant seizin w/2 broken w/5 made

§ 82.10(e) State Statutes.

Statutory provisions relating to covenants of title may relate to a variety of topics. The focal point of the following state-by-state listing is the topic of "implied covenants." Implied covenants take a variety of forms and result in terminology differences that have the potential to create confusion in reviewing individual cases. Included within the listing are other topics relating to covenants for title: (1) statutes pertaining to runnability of covenants for title, constructive eviction, and covenant of seisin, and (2) estoppel by deed. While efforts have been made to make this list as complete and as up-to-date as possible, the reader is advised to check in great detail the statutes of the state the reader is investigating. The statutes may contain, in a section not pertaining to "deed" or "conveyances," a provision that could affect the legal rules pertaining to covenants for title. Finally, the reader is advised to review the case law of the individual jurisdiction to find out how the statutory language has been interpreted. As an example, the Alabama statute pertaining to implied covenants, cited below, n506 appears to create the typical "general warranty" covenants. As interpreted by the Alabama Supreme Court, however, the implied covenants of title are deemed "special," not general. n507

ALABAMA

1) IMPLIED COVENANTS

The words "grant," "bargain," or "sell" imply the following covenants by the grantor to the grantee, and the grantee's heirs and assigns, unless it is clear from express language of the document that the covenant does not exist:

- The grantor was seised of an indefeasible estate in fee simple;
- The property is free from encumbrances made by grantor, except rents and services reserved in the document;
- Quiet enjoyment of the property against the grantor, and the grantor's heirs and assigns.

These covenants may be acted upon as if they were expressly in the document. n508

ALASKA

1) IMPLIED COVENANTS

A deed substantially following the following form: "The grantor [name and residence of grantor] for and in consideration of [consideration] in hand paid, conveys and warrants to [name and residence of grantee] the following described real estate [description of property], located in the State of Alaska. Dated this [date] day of [month], [year]," implies the following covenants on the grantor to the grantee and the heirs and assigns of the grantee:

- At the time of delivery the grantor is lawfully seized of an indefeasible estate in fee simple;

- The grantor has the right and power to convey the premises;
- At the time of the delivery, the property is free from encumbrances;
- The grantor warrants quiet and peaceable possession of the property;
- The grantor will warrant and defend the title against all persons claiming the premises.

These covenants may be acted upon as if they were expressly in the document. n509

ARIZONA

1) IMPLIED COVENANTS

The words "grant" or "convey" imply the following covenants to the grantor and the grantor's heirs to the grantee and the grantee's heirs and assigns, and may be limited by express language in the document:

- Before the conveyance, the grantor has not conveyed the estate or any right, title or interest to any person other than the grantee;
- At the time of the conveyance, the property is free from encumbrances, which includes taxes, assessments, and all liens on real property;

These covenants may be acted upon as if they were expressly in the document. n510

ARKANSAS

1) IMPLIED COVENANTS

The words "grant, bargain and sell" act as express covenants that the grantor is seized of an indefeasible estate in fee simple; free from encumbrances made by the grantor other than the rents and services expressly reserved in the document; for quiet enjoyment against the grantor, and the grantor's heirs and assigns; unless expressly disclaimed in the document. These covenants may be acted upon as if they were expressly in the document. n511

2) ESTOPPEL BY DEED

If the grantor purports to sell the property without having legal or equitable title, and subsequently acquires such title, legal and equitable title immediately passes to the grantee. The grantee's title is as valid as if the grantor had full title at the time of the conveyance. n512

CALIFORNIA

1) IMPLIED COVENANTS

The word "grant" in a conveyance of a fee simple estate implies a covenant on the grantor and the grantor's heirs for the grantee, and the grantee's heirs and assigns, unless expressly disclaimed in the document:

- Before the conveyance, the grantor has not conveyed the estate or any right, title or interest to any person other than the grantee;

- At the time of the conveyance, the property is free from encumbrances made by the grantor or any person claiming under him;

These covenants may be acted upon as if they were expressly in the document. n513

2) ESTOPPEL BY DEED

When a person who purports to transfer title in real property with a proper instrument does not have title, then subsequently acquires title, the title passes by operation of law to the grantee or the grantee's successors. n514

3) RUNNABILITY OF COVENANTS

Covenants contained in grants of real property run with the land. n515

COLORADO

1) IMPLIED COVENANTS

The words "warrant(s) the title" in a warranty deed or a mortgage imply the following covenants for the grantor:

- At the time of the conveyance, the grantor was lawfully seized of an indefeasible estate in fee simple;

- The grantor has good right and full power to convey the estate;

- The property was free of encumbrances except those stated in the document;

- The grantor warrants the grantee and the grantee's heirs and assigns the quiet and peaceable possession of the property;

- The grantor will warrant and defend the title against all persons who lawfully claim it.

These covenants may be acted upon as if they were expressly in the document. n516

2) ESTOPPEL BY DEED

The words "and warrant the title to the same" will pass any after-acquired title of the grantor. n517

If the grantor acquires title after distribution of the property to the grantee, and subsequently acquires title, title immediately passes to the grantor and the grantor is deemed to hold the property in trust for the grantee. n518

3) RUNNABILITY OF COVENANTS

Covenants of seisin, peaceable possession, freedom from encumbrances, and warranty contained in any conveyance of real estate, or any interest therein, run with the premises and inure to the benefit of all subsequent purchasers and encumbrancers. n519

CONNECTICUT

1) IMPLIED COVENANTS

A deed substantively following the "Warranty Deed" statutory form implies the following covenants on the grantor for the grantee and the grantee's heirs, executors and administrators:

- At the time of delivery, the grantor was seized of an indefeasible estate in fee simple;
- The premises are free from all encumbrances except those in the document;
- The grantor has good right, full power and lawful authority to sell and convey the property to the grantee;
- The grantor, and the grantor's heirs, executors and administrators will warrant and defend the premises for the grantee and the grantee's assigns forever against the claims of all persons, except as laid out in the document. n520

The phrase "with warranty covenants" has the effect as if it read "The grantor covenants with the grantee that he is lawfully seized in fee simple of the granted premises; that the same are free from all encumbrances except as therein set forth, that he has good right, full power and lawful authority to sell and convey the same to the grantee and that the grantor shall, and his heirs, executors and administrators shall, warrant and defend the same to the grantee and his heirs and assigns forever against the claims and demands of all persons except as therein set forth." n521

The phrase "with mortgage covenants" has the effect as if it read: "The mortgagor covenants with the mortgagee that he is lawfully seized in fee simple of the mortgaged premises; that the same are free from all encumbrances except as therein set forth, that he has good right, full power and lawful authority to sell and convey the same to the mortgagee and that he, the mortgagor and his heirs and assigns, executors and administrators shall and will warrant and defend the same to the mortgagee and his heirs and assigns forever against the claims and demands of all persons except as therein set forth." n522

GEORGIA

1) RUNNABILITY OF COVENANTS

A purchaser of land obtains all rights the former owner had by virtue of any covenants of warranty of title, of quiet enjoyment, or of freedom of encumbrances contained in the conveyance from any former grantor unless the transmission of the covenants with the land is expressly prohibited in the covenant. n523

IDAHO

1) IMPLIED COVENANTS

The word "grant" implies the following covenants on the grantor and the grantor's heirs for the grantee, and the grantee's heirs and assigns unless expressly disclaimed in the document:

- Before the conveyance, the grantor has not conveyed the estate or any right, title or interest to any person other than the grantee;
- At the time of the conveyance, the property is free from encumbrances made by the grantor or any person claiming under him.

These covenants may be acted upon as if they were expressly in the document. n524

ILLINOIS

1) IMPLIED COVENANTS

The words "grant," "bargain," or "sell" in any conveyance of a fee simple estate acts as an express covenant to the grantee, the grantee's heirs and other legal representatives that the grantor was the owner of an indefeasible estate in fee simple; that the estate was free from encumbrances made by the grantor, except those rents and services reserved in the document; for the quiet enjoyment against the grantor, and the grantor's heirs and assigns unless expressly limited in the document. These covenants may be acted upon as if they were expressly in the document. n525

2) ESTOPPEL BY DEED

A quitclaim deed will not pass after-acquired title. n526

If a person purports to convey an estate in fee simple absolute who does not own of such an interest at the time of the conveyance, and subsequently acquires such an interest, the later acquired interest is held to be taken by the grantor in trust for the use of the grantee, and the conveyance will be valid as if the grantor had full title at the time of the conveyance. n527

INDIANA

1) IMPLIED COVENANTS

A conveyance which substantively follows the form: "A.B. conveys and warrants to C.D. [description of property] for the sum of [consideration]" and dated, signed, sealed, and acknowledged by the grantor will act as a covenant by the grantor, and the grantor's heirs and personal representatives that the grantor is lawfully seized of the property; has good right to convey the same; guarantees the quiet possession thereof; that the property was free from all encumbrances; and that the grantor will warrant and defend the title against all lawful claims. n528

IOWA

1) ESTOPPEL BY DEED

If a deed purports to transfer a greater interest than the grantor had at the time of the conveyance, any after-acquired interest of the grantor inures to the benefit of the grantee. This does not apply if the spouse joins in a conveyance for relinquishing dower or homestead only. n529

KANSAS

1) IMPLIED COVENANTS

Any conveyance which substantively follows the form: "A.B. conveys and warrants to C.D. [description of premises] for the sum of [consideration]" and dated, duly signed and acknowledged by the grantor implies a covenant from the grantor and the grantor's heirs and personal representatives that the grantor is lawfully seized of the property; has good right and convey the property; guarantees the quiet possession of the property; that the property is free from all encumbrances; and that the grantor will warrant and defend the property against all lawful claims. n530

2) ESTOPPEL BY DEED

When a grantor by the terms of the deed conveys to the grantee an indefeasible estate in fee simple and does not have such an estate at the time, and afterwards acquires it, the legal estate immediately passes to the grantee, and is as effective as if the grantor had full title at the time of conveyance to the grantee. n531

KENTUCKY

1) IMPLIED COVENANTS

The phrase "that he will warrant the property hereby conveyed" or words of like import, or the phrase "with warranty" or "with general warranty" act as if the grantor covenanted that the grantor, and the grantor's heirs and personal representatives would forever warrant and defend the property against the claims and demands of all persons for the grantee, and the grantee's heirs, personal representatives, and assigns. n532

The phrase "that he will warrant specially the property thereby conveyed" or words of like import, or the phrase "with special warranty" act as if the grantor covenanted that the grantor, and the grantor's heirs and personal representatives would forever warrant and defend the property against the claims and demands of all persons claiming under the grantor for the grantee, and the grantee's heirs, personal representatives, and assigns. n533

MAINE

1) IMPLIED COVENANTS

The phrase "warranty covenants" acts as if it read: "The grantor covenants with the said grantee, his heirs and assigns that he is lawfully seized in fee of the premises, that they are free of encumbrances, that he had good right to sell and convey the same to the said grantee to hold as aforesaid, and that he and his heirs shall and will warrant and defend the same to the said grantee, his heirs and assigns forever, against the lawful claims and demands of all persons." n534

The phrase "quitclaim covenants" acts as if it read: "The grantor covenants with the grantee, his heirs and assigns that he will warrant and forever defend the premises to the said grantee, his heirs and assigns forever, against the lawful claims and demands of all persons claiming by, through, and under him." n535

MARYLAND

1) IMPLIED COVENANTS

The phrase "that he will warrant generally the property hereby granted" implies a covenant that the grantor will warrant forever the property to the grantee against every lawful claim and demand of any person. n536

The phrase "that he will warrant specially the property hereby granted" implies a covenant that the grantor will warrant forever and defend the property to the grantee against any lawful claim and demand of the grantor and every person claiming or to claim by, through, or under him. n537

MASSACHUSETTS

1) IMPLIED COVENANTS

The phrase "warranty covenants" acts as if it reads: "The grantor, for himself, his heirs, executors, administrators and successors, covenants with the grantee, his heirs, successors and assigns, that he is lawfully seized in fee simple of the granted premises; that they are free from all encumbrances; that he has good right to sell and convey the same, and that

he will, and his heirs, executors, administrators and successors shall, warrant and defend the same to the grantee and his heirs, successors and assigns forever against the lawful claims and demands of all persons." n538

MICHIGAN

1) IMPLIED COVENANTS

No covenant is implied in any conveyance of real estate, except for oil and gas leases. n539

A conveyance which substantively follows the form: "A.B. conveys and warrants to C.D. [description of premises] for the sum of [consideration]" dated, duly signed, sealed and acknowledged by the grantor implies a covenant on the grantor, and the grantor's heirs and personal representatives to the grantee and the grantee's heirs and personal representatives that the grantor is lawfully seized of the premises, has good right to convey the same, that the property is free from all encumbrances, guarantees the quiet possession of the property, and will warrant and defend the title against all lawful claims. n540

MINNESOTA

1) ESTOPPEL BY DEED

A quitclaim deed will not pass after-acquired title. n541

MISSISSIPPI

1) IMPLIED COVENANTS

The word "warrant," without any limiting words, implies covenants of seizin, power to sell, freedom from incumbrance, quiet enjoyment, and warranty of title. n542

The words "warrant specially" in a conveyance implies a covenant that the grantor will warrant and defend the title of the property unto the grantee and the grantee's heirs against all persons claiming through the grantor. n543

The phrase "grant, bargain and sell" operates as an express covenant to the grantee, and the grantee's heirs and assigns that the grantor was seized of an estate free from incumbrance made by the grantor except reserved rents and services; for quiet enjoyment against the grantor, and the grantor's heirs and assigns unless expressly limited. These covenants may be acted upon as if they were expressly in the document. n544

2) ESTOPPEL BY DEED

A conveyance of quitclaim and release will estop the grantor and the grantor's heirs from asserting a subsequently acquired adverse title to the lands conveyed. n545

MISSOURI

1) IMPLIED COVENANTS

The phrase "grant, bargain and sell" implies the following covenants, unless expressly disclaimed in the document, which are binding on the grantor, and the grantor's heirs and assigns:

- Grantor was at the time of the conveyance seized of an indefeasible fee simple;

- The real estate was at the time of the conveyance free from encumbrances made by the grantor or anyone under whom the grantor claims;

- That further assurances of such real estate will be made by the grantor and the grantor's heirs to the grantee and the grantee's heirs and assigns.

These covenants may be acted upon as if they were expressly in the document. n546

2) ESTOPPEL BY DEED

When a grantor undertakes to convey an indefeasible estate in fee simple absolute as does not, at the time of the conveyance, have the legal title to the property, but afterwards acquires it, the legal estate immediately passes to the grantee, and the conveyance shall be as effective as if the grantor had full title at the time of the conveyance. n547

MONTANA

1) IMPLIED COVENANTS

The word "grant" implies the grantor has not conveyed the same estate or any right, title, or interest to anyone other than the grantee; and that at the time of conveyance the estate is free from encumbrances made by the grantor or anyone claiming under him. These covenants may be acted upon as if they were expressly in the document. n548

2) ESTOPPEL BY DEED

If the grantor purports to sell the property without having legal title, and subsequently acquires legal title, the title passes immediately to the grantee by operation of law. n549

3) RUNNABILITY OF COVENANTS

Every covenant contained in a grant of real property made for the direct benefit of the land or some part of it then in existence runs with the land. n550

NEBRASKA

1) IMPLIED COVENANTS

Unless expressly negated in the document, a covenant in a conveyance of real property that the grantor is seized, or lawfully seized, or words to that effect, shall be interpreted as a covenant that the grantor has good title to the very estate in quantity and quality that the grantor purports to convey. n551

2) RUNNABILITY OF COVENANTS

All covenants for title in a conveyance of real estate, including covenants of seizin, right to convey, freedom from encumbrances, quiet enjoyment, and warranty run with the land. n552

3) BREACH OF COVENANTS BY CONSTRUCTIVE EVICTION

Covenants of quiet enjoyment and of warranty may be breached by an eviction, actual or constructive. Constructive eviction occurs when the covenantee is kept out of possession by the paramount title holder; when the covenantee

surrenders possession to the paramount title holder; or when the covenantee in order to retain possession is forced to buy off the paramount title holder. n553

4) ESTOPPEL BY DEED

After-acquired title inures to benefit of grantee; however, after-acquired title does not inure if deed was either quitclaim or special warranty. Grantor not estopped from claiming title at judicial or tax sale. (Neb. Rev. Stat. § 76-209).

NEVADA

1) IMPLIED COVENANTS

The phrase "grant, bargain and sell," in all conveyances made after December 2, 1861, imply the following covenants, and no others, on the grantor and the grantor's heirs and assigns:

- The grantor has not transferred the property or any right, title, or interest in the property to anyone other than the grantee;

- At the time of the conveyance, the property is free from encumbrances made by the grantor or any person claiming under him.

These covenants may be acted upon as if they were expressly in the document. n554

2) ESTOPPEL BY DEED

If the grantor purports to sell the property without having legal title, and subsequently acquires legal title, the title immediately passes to the grantee. The grantee's title is as valid as if the grantor had full title to the property at the time of the conveyance. n555

NEW HAMPSHIRE

1) IMPLIED COVENANTS

No covenant will be implied from the use of the word "grant." n556

NEW JERSEY

1) IMPLIED COVENANTS

The phrase "that he will warrant generally the property hereby conveyed" implies a covenant that the grantor, and the grantor's heirs and personal representatives will warrant and defend the property for the grantee, and the grantee's heirs and personal representatives against all claims and demands. n557

The phrase "that he will warrant specially the property hereby conveyed" implies a covenant that the grantor, and the grantor's heirs and personal representatives will warrant and defend the property for the grantee, and the grantee's heirs and personal representatives against any claims or demands from the grantor or any person claiming by, through, or under the grantor. n558

NEW MEXICO

1) IMPLIED COVENANTS

The phrase "bargained and sold," or words to that effect, imply the following covenants unless expressly disclaimed in the document:

- At the time of the conveyance, the grantor had an irrevocable possession in fee simple of the property;

- At the time of the conveyance, the property is free from encumbrances made by the grantor or anyone claiming under him.

These covenants may be acted upon as if they were expressly in the document. n559

The phrase "warranty covenants" acts as if it read "the grantor for himself, his heirs, executors, administrators and successors, covenants with the grantee, his heirs, executors and successors and assigns, that he is lawfully seized in fee simple of the granted premises; that they are free from all former and other grants, bargains, sales, taxes, assessments, and encumbrances of what kind and nature soever; that he has good right to sell and convey the same; and that he, and his heirs, executors, administrators, and successors shall warrant and defend the same to the grantee and his heirs, successors and assigns forever against the lawful claims and demands of all persons." n560

The phrase "special warranty covenants" acts as if it read "the grantor for himself, his heirs, executors, administrators, and successors, covenants with the grantee, his heirs, successors and assigns that the granted premises are free from all encumbrances [encumbrances] made by the grantor, and that he will, and his heirs, executors, administrators, and successors shall warrant and defend the same to the grantee, and his heirs, successors and assigns forever against the lawful claims and demands of all persons claiming by, through, or under the grantor, but against none other." n561

NEW YORK

1) IMPLIED COVENANTS

No covenants are implied in any conveyance of real property. n562

NORTH DAKOTA

1) IMPLIED COVENANTS

The word "grant" implies the following covenants on the grantor, unless expressly disclaimed in the document:

- Before the time of the conveyance, the grantor has not conveyed the same estate, nor any right, title, or interest to any person other than the grantee;

- At the time of the conveyance, the property is free from encumbrances made by the grantee or any person claiming under him.

These covenants may be acted upon as if they were expressly in the document. n563

2) ESTOPPEL BY DEED

If the grantor purports to sell the property without having legal title, and subsequently acquires legal title, the title passes to the grantee by operation of law. n564

3) RUNNABILITY OF COVENANTS

All covenants contained in a grant of an estate in real property, made for the direct benefit of the property or some part of it then in existence, run with the land. Such covenants include covenants of warranty; for quiet enjoyment; for further assurance; and for the payment of rent, taxes, or assessments upon the land on the part of the grantee. n565

OHIO

1) IMPLIED COVENANTS

The phrase "general warranty covenants" acts as if it read "the grantor covenants with the grantee, his heirs, assigns, and successors, that he is lawfully seized in fee simple of the granted premises; that they are free from all encumbrances; that he has good right to sell and convey the same, and that he does warrant and will defend the same to the grantee and is heirs, assigns, and successors, forever, against the lawful claims and demands of all persons." n566

OKLAHOMA

1) IMPLIED COVENANTS

A deed made in substantial compliance with the warranty deed form implies the following covenants:

- At the time of the conveyance, the grantor was legally seized of an indefeasible estate in fee simple;
- The grantor has good right and full power to convey the estate;
- The estate is clear of all encumbrances and liens;
- The grantor warrants grantee, and the grantee's heirs and assigns quiet and peaceable possession of the property;
- The grantor will defend the title against all persons who make lawful claims.

These covenants may be acted upon as if they were expressly in the document. n567

2) ESTOPPEL BY DEED

All rights of a grantor in property subsequently accruing, and conveyed by the deed, accrue to the grantee. n568

OREGON

1) IMPLIED COVENANTS

A deed following the warranty deed form implies the following covenants:

- At the time of delivery, the grantor is seized of the estate the grantor purports to convey.
- At the time of delivery, the property is free from encumbrances except those expressly reserved in the deed.

- The grantor will warrant and defend the title against all persons who lawfully claim it. n569

A deed following the special warranty deed form implies the same warranties as the warranty deed form, except that the covenant of freedom from encumbrances is limited to only those encumbrances made by the grantor, and the grantor will only warrant and defend the title against all who lawfully claim by, through, or under the grantor. n570

2) ESTOPPEL BY DEED

A warranty deed passes all after-acquired title. n571

A bargain and sale deed will imply no covenants on the grantor, but will pass all after-acquired title. n572

PENNSYLVANIA

1) IMPLIED COVENANTS

The words "grant" or "convey" implied a covenant on the grantor to the grantee, and the grantee's heirs and assigns that the grantor is seized of an indefeasible estate in fee simple; that the property is free from incumbrances done by the grantor; for quiet enjoyment from the grantor, and the grantor's heirs, and assigns. These covenants may be expressly disclaimed in the document. n573

The phrase that the grantor or grantors "will warrant generally the property hereby conveyed" acts as if the grantor or grantors covenanted that the grantors and their heirs and personal representatives or successors will forever warrant and defend the property against the lawful claims of all persons for the grantee, and the grantee's heirs, personal representatives and assigns. n574

The phrase that the grantor or grantors "will warrant specially the property hereby conveyed" acts as if the grantor or grantors covenanted that they and their heirs and personal representatives or successors will forever warrant and defend the property for the grantee, the grantor's heirs, personal representatives and assigns against the lawful claims of all persons by the grantor or grantors and all persons claiming by, through, or under the grantor or grantors. n575

RHODE ISLAND

1) IMPLIED COVENANTS

The phrase "with warranty covenants" acts as if it reads: "The grantor, for himself and for his heirs, executors, and administrators, covenants with the grantee and his heirs and assigns, that he is lawfully seised in fee simple of the granted premises; that he has good right, full power and lawful authority to sell and covey the same to the grantee and his heirs and assigns; that the grantee and his heirs and assigns shall at all times hereafter peaceable and quietly have and enjoy the granted premises; and that the grantor will, and his heirs, executors and administrators shall, warrant and defend the same to the grantee and his heirs and assigns forever against the lawful claims and demands of all persons," n576

No covenants or warranties will be implied from the use of the words "grant," grantor," or "grantee." n577

SOUTH DAKOTA

1) IMPLIED COVENANTS

The word "grant" in a conveyance implies the following covenants on the grantor and the grantor's heirs and assigns

unless expressly disclaimed in the document:

- Before the conveyance, the grantor had not conveyed the estate or any right, title, or interest in the property to anyone other than the grantee;

- At the time of the conveyance, the property is free from encumbrances made by the grantor or any person claiming under him.

These covenants may be acted upon as if they were expressly in the document. n578

The words "remise," "release," or "quitclaim" imply the following covenants on the grantor, unless specifically disclaimed in the document:

- At the time of the conveyance, the property is free from encumbrances made by the grantor or any person claiming under him.

- At the time of the conveyance, the property is free from encumbrances made by the grantor. n579

2) ESTOPPEL BY DEED

A quitclaim deed will not pass after-acquired title. n580

3) RUNNABILITY OF COVENANTS

The only covenants contained in grants of estates run that with the land are those made for the direct benefit of the property or some part of it then in existence; covenants of warranty for quiet enjoyment or for further assurance on the part of the grantor; covenants for payment of rent or taxes or assessments upon the land, on the part of the grantee; and all covenants incidental to the above covenants. n581

TEXAS

1) IMPLIED COVENANTS

The words "grant" or "convey" implies a covenant on the grantor and the grantor's heirs to the grantee and the grantee's heirs that prior to the conveyance, the grantor had not conveyed the estate or any interest in the estate to any person other than the grantor; and that at the time of the conveyance, the property was free of encumbrances. These covenants may be acted upon as if they were expressly in the document. n582

UTAH

1) IMPLIED COVENANTS

A deed substantially following the following form: "[name], grantor, of [residence of grantor], hereby conveys and warrants to [name], grantee, of [residence], for the sum of [number] dollars, the following described tract of land in [county name] County, Utah, to wit: [description of premises]. Witness the hand of said grantor this [date] day of [month], [year]," implies the following covenants on the grantor, and the grantor's heirs and personal representatives for the grantee, and the grantee's heirs and representatives:

- The grantor is lawfully seized of the premises;

- The grantor has good right to convey the premises;

- The grantor guarantees the grantee quiet possession of the premises and that the premises is free from all encumbrances;

- The grantor will warrant and defend forever against all lawful claims.

These covenants may be acted upon as if they were expressly in the document. n583

2) ESTOPPEL BY DEED

If the grantor purports to sell the property without having legal title, and subsequently acquires legal title, the title immediately passes to the grantee. The grantee's title is as valid as if the grantor had full title to the property at the time of the conveyance. n584

VIRGINIA

1) IMPLIED COVENANTS

The phrase "that he will warrant generally the property hereby conveyed" acts as if the grantor covenanted that the grantor, and the grantor's heirs and personal representatives will forever warrant and defend the property for the grantee, and the grantee's heirs, personal representatives and assigns against the claims and demands of all persons. n585

The phrase "that he will warrant specially the property hereby conveyed" acts as if the grantor covenanted that the grantor, and the grantor's heirs and personal representatives will forever warrant and defend the property for the grantee, and the grantee's heirs, personal representatives and assigns against the claims and demands of all persons claiming by, through, or under the grantor. n586

The phrase "with general warranty" acts as if it was a covenant by the grantor "that he will warrant generally the property hereby conveyed." n587

The phrase "with special warranty" acts as if it was a covenant by the grantor "that he will warrant specially the property hereby conveyed." n588

The phrase "with English covenants of title" or words of similar import will imply covenants of the right to convey, of quiet possession and freedom from encumbrances, for further assurances, and of no act to encumber. n589

2) ESTOPPEL BY DEED

When a deed purports to convey property which the grantor does not own at the time of the conveyance but subsequently acquires title, the deed has the same effect as if the title was vested in the grantor at the time of the conveyance. n590

WASHINGTON

1) ESTOPPEL BY DEED

If the grantor purports to sell the property without having legal title, and subsequently acquires legal title, the title passes to the grantee. n591

A quitclaim deed will not pass after-acquired title. n592

WEST VIRGINIA

1) IMPLIED COVENANTS

The phrase "that he will warrant generally the property hereby conveyed," or a covenant of like import, or the phrase "will warrant generally," acts as if the grantor had covenanted that the grantor, and the grantor's heirs and personal representatives will forever warrant and defend the same property unto the grantee, and the grantee's heirs and personal representatives and assigns, against the claims of all persons. n593

A covenant by a grantor "that he will warrant specially the property hereby conveyed," or a covenant of like import, or the use of the words "special warranty," has the same effect as if the grantor had covenanted that the grantor, and the grantor's heirs and personal representatives will forever warrant and defend the said property unto the grantee, and the grantee's heirs, personal representatives and assigns, against the claims and demands of the grantor and all persons claiming by, through, or under him. n594

2) ESTOPPEL BY DEED

When a conveyance purports to convey a greater interest than the grantor owns, it shall operate as an alienation of such right or interest in such real property as such person might lawfully convey. n595

3) RUNNABILITY OF COVENANTS

Each of the covenants used in a conveyance delivered after January 1, 1931, shall be considered a covenant running with the land, unless contrary intent is apparent from the conveyance. n596

WYOMING

1) IMPLIED COVENANTS

The substantial following of the warranty deed statutory form implies the following covenants on the grantor, and the grantor's heirs and personal representatives:

- At the time of the conveyance, the grantor was lawfully seized of an indefeasible estate in fee simple;
- The grantor had good right and power to convey the same;
- The property was free from encumbrances;
- The grantor warrants to the grantee, his heirs and assigns, the quiet and peaceful possession of the property;
- The grantor will defend the title against all persons who lawfully claim the property.

These covenants may be acted upon as if they were expressly in the document. n597

2) ESTOPPEL BY DEED

A quitclaim deed will not pass after-acquired title. n598

FOOTNOTES:
(n1)Footnote 397. These exceptions would exist in locales utilizing the Torrens title, or title registration, system. *See* Cunningham et al., *supra* n.11, at § 11.15.

(n2)Footnote 398. *See generally* chapter 92, *infra.*

(n3)Footnote 399. As to the relationship between title covenants and marketable title, *see* Cunningham, Stoebuck & Whitman, *supra* n.11, at § 11.13 nn. 2-5.

(n4)Footnote 400. *See id.*, § 11.9, nn. 22-40, 44-48.

(n5)Footnote 401. Coke, *supra* note 41, at Ch. 13.

(n6)Footnote 402. *Blackstone, supra* note 1, at *300-03.

(n7)Footnote 403. Kent, *supra* note 2, at 458.

(n8)Footnote 404. *Id.*

(n9)Footnote 405. The classic work on covenants of title lists the six covenants. W. Rawle, A Practical Treatise on the Law of Covenants chapters 2-7 (3d ed. 1860) (hereinafter "Rawle"). The American Law of Property list of covenants omits the covenant for further assurance. *American Law of Property, supra* note 94, at § 12.126.

(n10)Footnote 406. As an example, in South Carolina the general warranty deed consists of five covenants, with the covenant of warranty not included in the list. *Martin v. Floyd, 317 S.E.2d 133 (S.C. App. 1984).* Chancellor Kent's listing of the "usual" covenants did not include the covenant of further assurances. Kent, *supra* note 2, at 459.

(n11)Footnote 407. Though not using the precise terms "present" and "future," Chancellor Kent drew this distinction, categorizing the covenants of warranty and quiet enjoyment as 'prospective." Kent, *supra* note 2, at 459.

(n12)Footnote 408. *American Law of Property, supra* note 94, at § 12.129.

(n13)Footnote 409. Rawle, *supra* note 405, at 16-48.

(n14)Footnote 410. *Id.* at 49.

(n15)Footnote 411. *Id.* at 22-23.

(n16)Footnote 412. *See* § 83.10(e), *infra.*

(n17)Footnote 413. *Seymour v. Evans, 608 So. 2d 1141 (Miss. 1992); Ives v. Real-Venture, Inc., 388 S.E.2d 573 (N.C. App. 1990), review denied, 388 S.E.2d 174 (N.C. 1990); Booker T. Washington Constr. & Design Co. v. Huntington Urban Renewal, 383 S.E.2d 41 (W. Va. 1989)* (construing W. Va. Code § 36-4-2); *Howard v. Clanton, 481 So. 2d 272 (Miss. 1985).*

(n18)Footnote 414. *Bosnick v. Hill, 731 S.W.2d 204 (Ark. 1987); Ethen v. Reed Masonry, Inc., 313 N.W.2d 19 (Minn. 1981).* Under this theory the presence of an adverse possessor constitutes a breach. *Double L Props., Inc. v. Crandall, 751 P.2d 1208 (Wash. App. 1988). See also* 21 C.J.S., *Deeds* § 43 nn.6-8.

(n19)Footnote 415. The "actual seizin" doctrine held that actual possession satisfies the "lawfully seized" requirement.

(n20)Footnote 416. *See* Cunningham et al., *supra* note 11, at § 6.21.

(n21)Footnote 417. Kent, *supra* note 2, at 459. Chancellor Kent's listing of the elements of due execution include delivery. *Id.* at 442. *Ethen v. Reed Masonry, Inc., 313 N.W.2d 19 (Minn. 1981)* (covenant of seisin breached "at time of execution of deed'). The modern authorities speak of the time of breach as the date of delivery. *See* 21 C.J.S., Covenants § 17 n.56. *See also Bosnick v. Hill, 731 S.W.2d 204 (Ark. 1987)* (covenant of seisin "broken as soon as made").

(n22)Footnote 418. *Riddle v. Nelson, 353 S.E.2d 866 (N.C. App. 1987); Brown v. Lober, 389 N.E.2d 1188 (Ill. 1979).*

(n23)Footnote 419. *Alexander v. Blackstone Realty Associates, 684 A.2d 60 (N.H. 1996)* (covenant of seisin not breached in transfer of leasehold); *Century 21 Deep South Props., Ltd. v. Corson, 612 So. 2d 359 (Miss. 1992); Riddle v. Nelson, 353 S.E.2d 866 (N.C. App. 1987)* (existence of public roadway). As we shall soon see, the definition of "encumbrance" is a bit problematic. If the jurisdiction construes the covenant of seisin as promise relating to possession, the breach issue changes as well. *See, e.g., Double L Props., Inc. v. Crandall, 751 P.2d 1208 (Wash. App. 1988)* (adverse possessor).

(n24)Footnote 420. *Ethen v. Reed Masonry, Inc., 313 N.W.2d 19 (Minn. 1981).*

(n25)Footnote 421. *Koelker v. Turnbull, 899 P.2d 972 (Idaho 1995)* (third parties holding ostensible claims to well and water on granted land of date of delivery). *Ralston v. Thacker, 932 S.W.2d 384 (Ky. App. 1996)* (breach of covenant of seisin in oil and gas lease; knowledge of grantor's defective title not a bar); *Ives v. Real-Venture, Inc., 388 S.E.2d 573 (N.C. App. 1990).*

(n26)Footnote 422. Kent, *supra* note 2, at 462. As to the current law on point, *see Woods v. Schmitt, 439 N.W.2d 855 (Iowa 1989); Sun Exploration & Prod. Co. v. Benton, 728 S.W.2d 35 (Tex. 1987); St. Paul Title Ins. Co. v. Owen, 452 So. 2d 482 (Ala. 1984).* So long as grantee is undisturbed in possession, the grantee is entitled only to nominal damages. *In re Health Science Prods., Inc., 183 B.R. 903 (N.D. Ala. 1995)* (dicta, applying Alabama law). *Schorsch v. Blader, 209 Wis.2d 401, 563 N.W.2d 538 (Wis. App. 1997)* (Wisconsin statute (706.10(5)), requiring rules of contract law to apply to warranties of title, did not change common law rule regarding measure of damages).

(n27)Footnote 423. *Wilson v. Downtown Orange Beach, Inc., 641 So. 2d 282 (Ala. App. 1993)* (apparent shortage in land conveyed; court appears to favor benefit of the bargain theory of damages as opposed to restitutionary theory); *Ralston v. Thacker, 932 S.W.2d 384 (Ky. App. 1996)* (pro tanto recovery); *Finucane v. Prichard, 811 S.W.2d 348 (Ky. App. 1991); Palazzo v. Atha, 242 So. 2d 417 (Miss. 1970).*

(n28)Footnote 424. *Maxwell v. Redd, 496 P.2d 1320 (Kan. 1972).*

(n29)Footnote 425. *Woods v. Schmitt, 439 N.W.2d 855 (Iowa 1989); but see Koelker v. Turnbull, 899 P.2d 972 (Idaho 1995)* (grantees successfully defended title; court nonetheless considered covenant breached, awarding attorney fees as "damages").

(n30)Footnote 426. *Barber v. Peringer, 877 P.2d 223 (Wash. App. 1994)* (unsuccessful attempt to invoke statutory warranty deed statute as basis for recovery of attorney fees incurred in direct suit against grantor); *Keilbach v. McCullough, 669 N.E.2d 1053 (Ind. App. 1996)* (grantor not liable for grantee's attorney fees when grantee successfully defended title); *Rauscher v. Albert, 495 N.E.2d 149 (Ill. App. 1986); Bridges v. Heimburger, 360 So. 2d 929 (Miss. 1978).*

(n31)Footnote 427. *Greenlee v. Mitchell, 607 So. 2d 97 (Miss. 1992); Howard v. Clanton, 481 So. 2d 272 (Miss. 1985).*

(n32)Footnote 428. *Doubl L. Props., Inc. v. Crandall, 751 P.2d 1208 (Wash. App. 1988); Bosnick v. Hill, 731*

S.W.2d 204 (Ark. 1987).

(n33)Footnote 429. *Seymour v. Evans, 608 So. 2d 1141 (Miss. 1992); Walker & Withrow, Inc. v. Haley, 653 P.2d 191 (Okla. 1982); Colonial Capital Corp. v. Smith, 367 So. 2d 490 (Ala. Civ. App. 1979).*

(n34)Footnote 430. *Ihde v. Kempkes, 422 N.W.2d 788 (Neb. 1988).* The underlying theory is that a person may have title, but not have the right to convey. Similarly, the fiduciary grantor may lack authority to execute a deed containing full warranties of title. *Moss v. Twiggs, 397 S.E.2d 707 (Ga. 1990).* In drafting a distinction is made between a "covenant for seisin by executors" and a "covenant by executors." West's Legal Forms, § § 30.15, 30.32 (2d ed. 1986).

(n35)Footnote 431. *Ethen v. Reed Masonry, Inc., 313 N.W.2d 19 (Minn. 1981).*

(n36)Footnote 432. *Howard v. Clanton, 481 So. 2d 272 (Miss. 1985).*

(n37)Footnote 433. The grantor may also limit liability on the covenant by creating a "special covenant against encumbrances" as opposed to a "general covenant against encumbrances." This distinction is most prominent in Maryland law due to two statutes in the Md. Real Prop. Code§ § 2-110 and -111. As to the status of the special covenant against encumbrances under Maryland law, *see Magraw v. Dillow, 671 A.2d 485 (Md. 1996)* (right of redemption created by tax sale was encumbrance).

A cotenant executing a warranty of deed may limit the liability of the granting cotenant by "words of severance" in the language of the deed. *See* Windell v. Miller, 687 N.E.2d (Ind. App. 1997) (one cotenant not liable for encumbrance of other cotenant due to "words of severance" contained in deed).

Hancock v. Planned Dev. Corp., 791 P.2d 183 (Utah 1990); Pruitt v. Meadows, 393 So. 2d 986 (Ala. 1981). See also Decatur v. Barnett, 398 S.E.2d 706 (Ga. App. 1990) ("subject to" language not acceptance of zoning violation), *rev'd, Barnett v. Decatur, 403 S.E.2d 46 (Ga. 1991).*

(n38)Footnote 434. *See* § 82.09(c)(2), *supra.*

(n39)Footnote 435. The concept of "encumbrance" is significant as well in definition of a marketable title, inasmuch as an encumbrance is the type of defect that might render a title unmarketable.

(n40)Footnote 436. *S. Utsunomiya Enters., Inc. v. Moomuku Country Club, 866 P.2d 951 (Haw. 1994); Analytical Measurements, Inc. v. Keuffel & Esser Co., 843 F. Supp. 920 (D.N.J. 1993)* (encumbrance generally means "an infringement on the title"); *Frimberger v. Anzellotti, 594 A.2d 1029 (Conn. App. 1991); Proffitt v. Isley, 683 S.W.2d 243 (Ark. App. 1985); Monti v. Tangora, 425 N.E.2d 597 (Ill. App. 1981).*

(n41)Footnote 437. For an extensive discussion of the meaning of the term "encumbrance," *see Magraw v. Dillow, 671 A.2d 485 (Md. 1996). See also: Webb v. Interstate Land Corp., 920 P.2d 1187 (Utah 1996)* (more than "mere contractual interest" required in order to qualify as an "encumbrance"); *Commonwealth Land Title Ins. Co. v. Stephenson, 399 S.E.2d 380 (N.C. App. 1991)* (encumbrance is "claim, lien, charge, or liability attached to and binding real property"); *Feit v. Donahue, 826 P.2d 407 (Colo. App. 1992)* (encumbrance includes third party interest which "interferes with free enjoyment" of land conveyed).

(n42)Footnote 438. *Hughes v. Young, 444 S.E.2d 248 (N.C. App. 1994)* (lien on a mobile home); *S. Utsunomiya Enters., Inc. v. Moomuku Country Club, 866 P.2d 951 (Haw. 1994)* (lis pendens an encumbrance; "equitable lien" until judicially recognized, not an encumbrance); *Margate Inv. Corp. v. Lupowitz, 638 So. 2d 143 (Fla. 1994)* (1980 real estate taxes, not assessed until 1985, did not breach 1981 covenant); *Century 21 Deep South Props., Ltd. v. Corson, 612 So. 2d 359 (Miss. 1992); Northside Title & Abstract Co. v. Simmons, 409 S.E.2d 885 (Ga. App. 1991)* (tax lien); *Northeast Petr. Corp. v. State, 466 A.2d 1164 (Vt. 1983)* (judgment lien a breach of "warranty"); *Weaks v. Gress, 474 S.W.2d 424 (Tenn. 1971)* (judgment lien). *See also Inland Real Estate Corp. v. Oak Park Trust & Sav. Bank, 469 N.E.2d*

204 (Ill. App. 1983) (claim for back taxes a breach). *Compare Colonial Capital Corp. v. Smith, 367 So. 2d 490 (Ala. App. 1979)* (paid mortgage, unsatisfied of record, not a breach).

(n43)Footnote 439. *Tammac Corp. v. Miller-Meehan, 643 A.2d 370 (Me. 1994)* (prior mortgage; knowledge of encumbrance no defense); *Seigle v. Jasper, 867 S.W.2d 476 (Ky. 1993)* (easement an encumbrance); *Stephenson v. First Missouri Corp., 861 S.W.2d 651 (Mo. 1993); Hughes v. Young, 444 S.E.2d 248 (N.C. App. 1994)* (knowledge of lien no defense). *Compare Roberts v. Malu Constr., Inc., 458 S.E.2d 146 (Ga. App. 1995)* (existence of drainage easement not considered breach; present nature of covenant apparently disregarded); *Bergstrom v. Moore, 677 P.2d 1123 (Utah 1984).* In the case of open and obvious prescriptive easements, some courts would find the covenant has not been violated. *See, e.g., Marathon Bldrs., Inc. v. Polinger, 283 A.2d 617 (Md. 1971); Tabet Lumber Co. v. Golightly, 457 P.2d 374 (N.M. 1969); Merchandising Corp. v. Marine Nat'l Exch. Bank, 106 N.W.2d 317 (Wis. 1961).* In other contexts, the courts have ruled that a grantee's knowledge of the encumbrance is not a defense. *See Baldin v. Dube, 751 P.2d 388 (Wyo. 1988). Lockhart v. Phenix City Inv. Co., 488 So. 2d 1353 (Ala. 1986). See also Juhan v. Cozart, 403 S.E.2d 589 (N.C. App. 1991)* (mere existence of sewer line, not established as easement, no violation).

(n44)Footnote 440. *See generally Jones v. Grow Inv. & Mtg. Co., 358 P.2d 909 (Utah 1961).* As to the visible and known easement exception, *see McKnight v. Cagle, 331 S.E.2d 707 (N.C. App. 1985); Hawks v. Brindle, 275 S.E.2d 277 (N.C. 1981)* (knowledge of grantee or obvious and notorious nature of the encumbrance results in no breach). This view is not always followed. *McClaskey v. Bumb & Muller Farms, Inc., 547 P.2d 302 (Ind. App. 1989)* (public highway easement a violation when deed language contained no exception for it); *Smith v. Tolbert, 438 S.E.2d 655 (Ga. App. 1993)* (purchasers aware of alley which was a public easement).

(n45)Footnote 441. Although the existence of publicly created restrictions does not constitute an encumbrance, the existence of a restrictive covenant may be deemed an encumbrance. *See Blissett v. Riley, 667 So. 2d 1335 (Ala. 1995)* (actual or constructive knowledge by grantee of restriction irrelevant); *Seymour v. Evans, 608 So. 2d 1141 (Miss. 1992).*

(n46)Footnote 442. *Barnett v. Decatur, 403 S.E.2d 46 (Ga. 1991).*

(n47)Footnote 443. *Seymour v. Evans, 608 So. 2d 1141 (Miss. 1992). Compare Hunter, Inc. v. City of Burlington, 670 A.2d 836 (Vt. 1995)* wherein the court held that a grantor who failed to obtain state subdivision approval breached the covenant against encumbrances.

(n48)Footnote 444. *Monti v. Tangora, 425 N.E.2d 597 (Ill. App. 1981).*

(n49)Footnote 445. *Frimberger v. Anzellotti, 594 A.2d 1029 (Conn. App. 1991)* ("latent" nature of violation stressed); *Fahmie v. Wulster, 408 A.2d 789 (N.J. 1979)* (culvert constructed by grantor in violation of requirement of governmental agency).

(n50)Footnote 446. *Analytical Measurements, Inc. v. Keuffel & Esser Co., 843 F. Supp. 920 (D.N.J. 1993); Cameron v. Martin Marietta Corp., 729 F. Supp. 1529 (E.D.N.C. 1990); United States v. Allied Chem. Corp., 587 F. Supp. 1205 (N.D. Cal. 1984).*

(n51)Footnote 447. *Bianchi v. Lorenz, 701 A.2d 1037 (Vt. 1997)* (certificate of occupancy lacking due to inadequate sewer system; encumbrance held to exist "at least when the seller can determine from municipal records" that violation of zoning ordinance exists); *Feit v. Donahue, 826 P.2d 407 (Colo. App. 1992); Wilcox v. Pioneer Homes, Inc., 254 S.E.2d 214 (N.C. App. 1979); Brunke v. Pharo, 89 N.W.2d 221 (Wis. 1958). See also First Am. Fed. Sav. & Loan Ass'n v. Royall, 334 S.E.2d 792 (N.C. App. 1985)* (failure to install water line, as promised to city council, a violation).

(n52)Footnote 448. *Bryant v. Moritz, 776 P.2d 1299 (Or. App. 1989); Campbell v. Karb, 740 P.2d 750 (Or. 1987).*

(n53)Footnote 449. *Polizos v. Skoro, 877 P.2d 662 (Or. App. 1994)* (adjacent street right-of-way); *Commonwealth*

Land Title Ins. Co. v. Stephenson, 399 S.E.2d 380 (N.C. App. 1991); Magun v. Bombaci, 492 A.2d 235 (Conn. Supp. 1985). Compare Eithen v. Reed Masonry, Inc., 313 N.W.2d 19 (Minn. 1981) ("appurtenance" concept basis for breach of covenant of seisin).

(n54)Footnote 450. *S. Utsunomiya Enters., Inc. v. Moomuku Country Club, 866 P.2d 951 (Haw. 1994); Blankenship v. Stovall, 862 S.W.2d 333 (Ky. App. 1993); Omega Chem. Co., Inc. v. Rogers, 524 N.W.2d 330 (Neb. 1994); Tammac Corp. v. Miller-Meehan, 643 A.2d 370 (Me. 1994). But see HSL Linda Gardens Properties, Ltd. v. Freeman, 859 P.2d 1339 (Ariz. App. 1993)* (statute of limitations does not begin to run until injury occurs, not upon breach). By statute in some states the covenant runs with the land, but in Vermont this result obtains by judicial decision. *See Hunter, Inc. v. City of Burlington, 670 A.2d 836 (Vt. 1995).* The rule in Maryland is that the covenant does not run "unless the parties have contracted otherwise." *Magraw v. Dillow, 671 A.2d 485 (Md. 1996); Frimberger v. Anzellotti, 594 A.2d 1029 (Conn. App. 1991); Lockhart v. Phenix City Inv. Co., 488 So. 2d 1353 (Ala. 1986).*

(n55)Footnote 451. *Clark v. Cypress Shores Dev. Co., 516 So. 2d 622 (Ala. 1987)* (depreciation in value of land due to encumbrance proper measure of damages; no recovery for improvements); *Yonkers City Post No. 1666, VFW v. Josanth Realty Corp., 494 N.E.2d 452 (N.Y. 1986).*

(n56)Footnote 452. *Campbell v. Karb, 740 P.2d 750 (Or. 1987)* (must be reasonable in amount and not exceed consideration paid).

(n57)Footnote 453. *Ticor Title Ins. Co. v. Graham, 576 N.E.2d 1332 (Ind. App. 1991); Forrer v. Sather, 595 P.2d 1306 (Utah 1979).*

(n58)Footnote 454. *In re Health Science Prods., Inc., 183 B.R. 903 (Bnkr. N.D. Ala. 1995)* (dicta, applying Alabama law); *Century 21 Deep South Props., Ltd. v. Corson, 612 So. 2d 359 (Miss. 1992); Proffitt v. Isley, 683 S.W.2d 243 (Ark. App. 1985); Fechtner v. Lake County Sav. & Loan Ass'n, 337 N.E.2d 193 (Ill. App. 1975).*

(n59)Footnote 455. *Stephenson v. First Missouri Corp., 861 S.W.2d 651 (Mo. App. 1993)* (attorney fees allowed for collateral litigation but not in direct suit against grantor). *But see S. Utsunomiya Enters., Inc. v. Moomuku Country Club, 879 P.2d 501 (Haw. 1994)* (action for breach of covenant against encumbrances is "in the nature of assumpsit," allowing for recovery of attorney fees under Haw. Rev. Stat. § 607-14). *Compare Hunter, Inc. v. City of Burlington, 670 A.2d 836 (Vt. 1995)* wherein the court held that a grantor who failed to obtain state subdivision approval breached the covenant against encumbrances and was liable for "consequential damages for attorney's fees." *Century 21 Deep South Props. Ltd. v. Corson, 612 So. 2d 359 (Miss. 1992); Campbell v. Karb, 740 P.2d 750 (Or. 1987); Forrer v. Sather, 595 P.2d 1306 (Utah 1979).*

(n60)Footnote 456. *See* § 83.10(e), *infra.*

(n61)Footnote 457. Another example of this phenomenon is the use of the phrase "covenant of general warranty" as including all of the usual covenants. *O'Brien v. Village Land Co., 794 P.2d 246 (Colo. 1990).*

(n62)Footnote 458. As an example, a court may use the term "breach of warranty" as method of indicating that a covenant against encumbrances was breached. *See Northeast Petr. Corp. v. State, 466 A.2d 1164 (Vt. 1983).*

(n63)Footnote 459. *Black, supra* note 5, at 1589.

(n64)Footnote 460. *Id.* at 1251.

(n65)Footnote 461. *See* subsection (e), *infra*.

(n66)Footnote 462. Kent, *supra* note 2, at 459.

(n67)Footnote 463. *Bloom v. Hendricks, 804 P.2d 1069 (N.M. 1991)* (typical warranty covenant provides that

grantor will warrant and defend the title conveyed "against any lawful claim that may be asserted against it in the future"); *Booker T. Washington Constr. & Design Co. v. Urban Renewal Auth., 383 S.E.2d 41 (W. Va. 1989)* (general warranty covenant is covenant "to warrant and defend the title against the claims of all persons whatsoever").

(n68)Footnote 464. *Black, supra* note 5, at 365.

(n69)Footnote 465. Black's Law Dictionary at 1398 (6th ed. 1990). For acknowledgment of the distinction between a general and special warranty of title, *see Booker T. Washington Const. & Design Co. v. Huntington Urban Renewal Auth., 383 S.E.2d 41 (W. Va. 1989).*

(n70)Footnote 466. See the definition of "special warranty deed" in Black's Law Dictionary. Black, *supra* note 5, at 1398. In this work there is no definition for "general warranty deed"; the definition of "warranty deed" is a bit vague but seems to indicate that a covenant of general warranty is included in a warranty deed. *Id.* at 1589.

(n71)Footnote 467. *Colorado Land & Resources, Inc. v. Credithrift of Am. Inc., 778 P.2d 320 (Colo. App. 1989); Harris v. Sklarew, 166 So. 2d 164 (Fla. App. 1964); Central Life Ins. Soc. v. Impelmans, 126 P.2d 757 (Wash. 2d 1942).* The manner in which courts construe the "implied covenants statutes in a particular jurisdiction needs to be checked very carefully." By way of example, the Alabama Supreme Court has construed its Implied Covenant Statute (Ala. Code § 35-4-71) as creating warranties limited to "acts of the grantor and those claiming under him." In short, the covenants implied are all "special" warranties. The court does not use the term "special warranty" in describing these warranties in a recent opinion. *St. Paul Title Ins. Co. v. Owen, 452 So. 2d 482 (Ala. 1984).* At the other extreme is a court's willingness to construe special warranty language as a general warranty. *See Galentine v. First Family Fin. Serv., 557 So. 2d 1164 (La. App. 1990).*

(n72)Footnote 468. *See* § 83.09(c)(2), *supra*.

(n73)Footnote 469. *Northside Title & Abstract Co. v. Simmons, 409 S.E.2d 885 (Ga. App. 1991).*

(n74)Footnote 470. Kent, *supra* note 2, at 459.

(n75)Footnote 471. *Washington Const. v. Urban Renewal Auth., 383 S.E.2d 41 (W. Va. 1989); St. Paul Title Ins. Co. v. Owen, 452 So. 2d 482 (Ala. 1984); Brown v. Lober, 389 N.E.2d 1188 (Ill. 1979).* The only apparent exception is when there is, at the time of conveyance, paramount title in one who is in possession. *Booker T. Washington Constr. & Design Co. v. Urban Renewal Auth., 383 S.E.2d 41, 44 n.8 (W. Va. 1989). See also Foley v. Smith, 539 P.2d 874 (Wash. App. 1975)* (breach occurs if eviction occurs under paramount title existing at time of conveyance).

(n76)Footnote 472. *Stevenson v. Ecklund, 865 P.2d 296 (Mont. 1993); Omega Chem. Co., Inc. v. Rogers, 524 N.W.2d 330 (Neb. 1994)* (citing Neb. Rev. Stat. § 76-207); *Roberts v. Malu Constr., Inc., 217 Ga. App. 551, 458 S.E.2d 146 (Ga. App. 1995)* (unrecorded drainage easement; no loss of possession shown); *Upton v. Griffitts, 831 P.2d 504 (Colo. App. 1992); Thompson v. Flack-Haney Timber Co., 567 So. 2d 345 (Ala. App. 1990); Shortt v. Chandler, 522 N.Y.S.2d 334 (1987); Self v. Petty, 469 So. 2d 568 (Ala. 1985).*

(n77)Footnote 473. *See* Rawle, *supra* note 404, at 251-311.

(n78)Footnote 474. *Booker T. Washington Constr. & Design Co. v. Urban Renewal Auth., 383 S.E.2d 41 (W. Va. 1989); King v. Anderson, 618 S.W.2d 478 (Tenn. App. 1980).* A state may have a statute which goes to the issue of breach and eviction. See the statutory listing in subsection (e), *infra.* As an example of a court's construction of such type of statute, *see Upton v. Griffitts, 831 P.2d 504 (Colo. App. 1992).*

(n79)Footnote 475. *White v. Long, 612 N.Y.S.2d 482 (1994)* (submerged leaking oil tank not a constructive eviction); *Omega Chem. Co., Inc. v. Rogers, 524 N.W.2d 330 (Neb. 1994)* (no hostile assertion by paramount title holder); *Stevenson v. Ecklund, 865 P.2d 296 (Mont. 1993)* (adjoining landowner dispute; no eviction shown); *Hull v.*

Federal Land Bank, 353 A.2d 577 (Vt. 1976). A recent example of the second category of case is *Upton v. Griffitts, 831 P.2d 504 (Colo. App. 1992);* an example of the fourth category of case is *Thompson v. Flack-Haney Timber Co., 567 So. 2d 345 (Ala. App. 1990).* The third category pertaining to surrender of possession after "hostile assertion" would include a final judgment or decree adverse to the covenantee's right of possession. *See St. Paul Title Ins. Co. v. Owen, 452 So. 2d 482 (Ala. 1984); Foley v. Smith, 539 P.2d 874 (Wash. App. 1975)* (no eviction or its equivalent where title defect was remedied). The presence of an outstanding title in a third party that could be asserted in a judicial proceeding is sometimes stated to be a constructive eviction. *See St. Paul Title Ins. Co. v. Owen, 452 So. 2d 482 (Ala. 1984); King v. Anderson, 618 S.W.2d 478 (Tenn. App. 1980)* (where title is in government, constructive eviction applicable). The "surrender of possession" after assertion of a hostile claim is exemplified by a settlement with the person asserting the hostile claim. Two recent decisions indicate that such a settlement, if entered into in good faith, is tantamount to an eviction (or as some courts, put it, an "ejectment"), thus giving rise to a breach of warranty to defend the title. *See Mastro v. Kumakichi Corp., 951 P.2d 817 (Wash. App. 1998); Garcia v. Herrera, 959 P.2d 533 (N.M. App. 1998).*

Compare Bridges v. Heimburger, 360 So. 2d 929 (Miss. 1978). The problematic nature of this theory in discussed in *Brown v. Lober, 389 N.E.2d 1188 (Ill. 1979)* (covenant of seisin applies where title is defective and no interference with possession).

According to another court, constructive eviction occurs if (1) the covenantee surrenders possession voluntarily or involuntarily to the holder of the paramount title; (2) avoids dispossession by buying that title; or (3) is unable to take possession. *Spiegle v. Seaman, 390 A.2d 639 (N.J. Super. 1978).*

(n80)Footnote 476. *See Pagosa Springs Inv. v. Sivers, 886 P.2d 307 (Colo. App. 1994)* (Colo. Rev. Stat. § 38-30-122 did not delay running of statute of limitations); *Upton v. Griffiths, 831 P.2d 504 (Colo. App. 1992)* (knowledge by landowners of hostile possession of third party started running of statute); *Hull v. Federal Land Bank, 353 A.2d 577 (Vt. 1976)* (neither grantor or grantee in actual possession at time of conveyance; statute began to run from date of deed). *See also St. Paul Title Ins. Co. v. Owen, 452 So. 2d 482 (Ala. 1984)* (date of trial court ruling adjudicating rights date of breach); *Foley v. Smith, 539 P.2d 874 (Wash. App. 1975)* (where rights under covenant are subject of pending litigation, statute does not begin to run until final decree against covenantee entered).

(n81)Footnote 477. As to damages issue when the remote grantee is suing, see subsection (d), *infra*.

(n82)Footnote 478. *St. Paul Title Ins. Co. v. Owen, 452 So. 2d 482 (Ala. 1984); Booker T. Washington Constr. & Design Co. v. Urban Renewal Auth., 383 S.E.2d 41 (W. Va. 1989); King v. Anderson, 618 S.W.2d 478 (Tenn. App. 1980).* This matter may be governed by state statute; *see* subsection (e) *infra.* A transfer by gift may result in no damages. *See Tarrant v. Schultz, 441 S.W.2d 868 (Tex. App. 1969).* The same result may obtain even if a state has a statute pertaining to damages. *See Smith v. Smith, 252 S.E.2d 484 (Ga. 1979)* (statute not applicable to ousted donee).

(n83)Footnote 479. 21 C.J.S. *Covenants*, § 58 n.35. The explanation for this, according to Kent, was that the value of the land "consisted chiefly in the improvements," and thus the covenant "would not have been of much benefit," if the damages were limited to the purchase price. Kent, *supra* n.2, at 463. Under the majority rule, improvements are not recoverable. *King v. Anderson, 618 S.W.2d 478 (Tenn. App. 1980).*

(n84)Footnote 480. *Rieddle v. Buckner, 629 N.E.2d 860 (Ind. App. 1994); Rauscher v. Albert, 495 N.E.2d 149 (Ill. App. 1986); Booker T. Washington Constr. & Design Co. v. Urban Renewal Auth., 383 S.E.2d 41 (W. Va. 1989).*

(n85)Footnote 481. *Cary v. Guirgossian, 508 S.E.2d 403 (Ga. 1998)* (attorney fees not awarded under statute relating to breach of warranty or under statute awarding fees in case of "bad faith"); *Omega Chem. Co., Inc. v. Rogers, 524 N.W.2d 330 (Neb. 1994); Stevenson v. Ecklund, 865 P.2d 296 (Mont. 1993); Seratt v. Liberty State Bank, 816 P.2d 584 (Okla. App. 1991); McDonald v. Delhi Sav. Bank, 440 N.W.2d 839 (Iowa 1989); Chaney v. Haeder, 752 P.2d 854 (Or. App. 1988).*

(n86)Footnote 482. *See St. Paul Title Ins. Co. v. Owen, 452 So. 2d 482 (Ala. 1984)* (grantee's suit must be with "the claimant of an outstanding superior right"); *Jablonski v. Buckeye Dev. Corp., 597 So. 2d 905 (Fla. App. 1992)* ("successful defense" by grantee on claim of voidable title; grantor still held liable for costs). *Jablonski* raises the issue of whether a "voidable title" (*see* § 82.12, *infra*) is a defective title in the context of covenants for title. This issue has arisen infrequently.

See also Mastro v. Kumakichi Corp., 951 P.2d 817 (Wash. App. 1998); Garcia v. Herrera, 959 P.2d 533 (N.M. App. 1998) (covenantee settled lawsuits with third parties; covenant of warranty breached).

(n87)Footnote 483. *Bloom v. Hendricks, 804 P.2d 1069 (N.M. 1991).*

(n88)Footnote 484. *McDonald v. Delhi Sav. Bank, 440 N.W.2d 839 (Iowa 1989).*

(n89)Footnote 485. *First Fid. Corp. v. Blanco, 276 N.W.2d 30 (Minn. 1979).*

(n90)Footnote 486. *See Thompson, supra* note 94, § 3203. *See also Mastro v. Kumakichi Corp., 951 P.2d 817 (Wash. App. 1998)* ("tender of defense" discussed).

(n91)Footnote 487. *Bloom v. Hendricks, 804 P.2d 1069 (N.M. 1991).*

(n92)Footnote 488. *Id.* at 255, 804 P.2d at 1074-75. The Bloom case arose out of a boundary line dispute, a perennial subject of litigation and a true "title" problem. Many grantors would have actual, if not constructive, knowledge of title defects of this type. If the "voidable" title problem is considered a title defect (*see* Jablonski, n.481, *supra*), the extent of the grantor's knowledge should be relevant since a grantor may have no way of knowing of this type of defect in a prior conveyance.

(n93)Footnote 489. Kent, *supra* note 2, at 459.

(n94)Footnote 490. *Brown v. Lober, 389 N.E.2d 1188 (Ill. 1979); Spiegle v. Seaman, 390 A.2d 639 (N.J. Super. 1978), Hull v. Federal Land Bank, 353 A.2d 577 (Vt. 1976).*

(n95)Footnote 491. One court has referred to the covenant of warranty as "the principal covenant of a deed," and then goes on to state that the covenant of warranty and covenant for quiet enjoyment "are substantially the same." *Foley v. Smith, 539 P.2d 874 (Wash. App. 1975).*

(n96)Footnote 492. *Knieper v. United States, 38 Fed. Cl. 128 (1997)* (covenant of quiet enjoyment does not cover physical condition of the property); *Wilder v. Wilhite, 376 P.2d 797 (Kan. 1962).*

(n97)Footnote 493. A recent example is *Callon Institutional Royalty Investors I. v. Dauphin Island Prop. Owners Ass'n, 569 So. 2d 343 (1990)* (grantor's action in asserting paramount title against assignee breached covenant of quiet enjoyment).

(n98)Footnote 494. *Martin v. Floyd, 317 S.E.2d 133 (S.C. App. 1984); Spiegle v. Seaman, 390 A.2d 639 (N.J. App. 1978).*

(n99)Footnote 495. Kent, *supra* note 2, at 471.

(n100)Footnote 496. Kent, *supra* note 2, at 459. The general topic of "real covenants," covenants running with the land, is considered in chapter 61 of this treatise.

(n101)Footnote 497. *See* 21 C.J.S., *Deeds* § 29; A.L.P., *supra* note 94, § § 12.124, 12.131.

(n102)Footnote 498. *See* cases cited in A.L.P.,*supra* note 94, § § 12.127 n.8, 12.128 nn.3-4; 12.131.16.

(n103)Footnote 499. *See* state-by-state listing in subsection (e) *infra*, which includes references to state statutes pertaining to running of covenants.

(n104)Footnote 500. *American Law of Property, supra* note 94, § 12.124 n.39.

(n105)Footnote 501. *Deason v. Findley, 40 So. 220 (Ala. 1906).* The "connection" is usually established by showing that the "chain of title" from the original covenantee to the plaintiff. The court in *Sandler v. New Jersey Realty Title Ins. Co., 178 A.2d 1, 8 (N.J. 1962)* stated that a real covenant is "operative on behalf of a grantee and each successive transferee thereafter." The requirement of privity between the grantor and grantee, so-called "horizontal privity," is not required under the modern day decisions and statutes. The classic case rejecting the "horizontal privity" requirement is *Wead v. Larkin, 54 Ill. 489 (1887).* As an example of a statute rejecting the "horizontal privity" requirement, *see* Neb. Rev. Stat. § 76-208.

(n106)Footnote 502. *St. Paul Title Ins. Co. v. Owen, 452 So. 2d 482 (Ala. 1984); Sandler v. New Jersey Realty Title Ins. Co., 178 A.2d 1 (N.J. 1962).*

(n107)Footnote 503. *Robertson v. Webster, 52 S.E.2d 511 (Ga. App. 1949).* By contrast, in a situation where the present covenants do not run, the grantee may sue only his immediate grantor on a breach of a present covenant. *Proffitt v. Isley, 683 S.W.2d 243 (Ark. App. 1985).*

(n108)Footnote 504. *Bernklau v. Stevens, 371 P.2d 765 (Colo. 1962).*

(n109)Footnote 505. *Compare Taylor v. Wallace, 37 P. 963 (Colo. 1894)* (remote grantee limited by amount paid to immediate grantor) with *Brooks v. Black, 8 So. 332 (Miss. 1890)* (remote grantee not so limited; may sue for amount of consideration received by remote grantor). The Brooks holding on measure of damages still obtains in *Mississippi. Bridges v. Heimburger, 360 So. 2d 929 (Miss. 1978).* The Brooks rule and its relationship to recovery of attorney fees, is discussed in *Howard v. Clanton, 481 So. 2d 272 (Miss. 1985).*

(n110)Footnote 506. Ala. Code § 35-4-271.

(n111)Footnote 507. *St. Paul Title Ins. Co. v. Owen, 452 So. 2d 482 (Ala. 1984).* The court does not use the term "special warranty," but the limitation the court reads into the statute (only those claiming by, through, or under the grantor) makes the deed a "special warranty deed" as that term is ordinarily used. *See* discussion at n.466, *supra*.

(n112)Footnote 508. Ala. Code § 35-4-271.

(n113)Footnote 509. Alaska Stat. § 34.15.030.

(n114)Footnote 510. Ariz. Rev. Stat. Ann. § 33-435.

(n115)Footnote 511. Ark. Code Ann. § 18-12-102.

(n116)Footnote 512. *Id.* at § 18-12- 601.

(n117)Footnote 513. Cal. Civ. Code § 1113.

(n118)Footnote 514. *Id.* at § 1106.

(n119)Footnote 515. *Id.* at § 1460.

(n120)Footnote 516. Colo. Rev. Stat. Ann. § 38-30-115.

(n121)Footnote 517. *Id.*

(n122)Footnote 518. Colo. Rev. Stat. Ann. § 38-30-104.

(n123)Footnote 519. *Id.* at § 38-30-121.

(n124)Footnote 520. Conn. Gen. Stat. § 47-36d.

(n125)Footnote 521. *Id.* at § 47-36e.

(n126)Footnote 522. *Id.* at § 47-36i.

(n127)Footnote 523. Ga. Code Ann. § 44-5-60.

(n128)Footnote 524. Idaho Code § 55-612.

(n129)Footnote 525. Ill. Rev. Stat. ch. 765 § 5/8.

(n130)Footnote 526. *Id.* at § 5/10.

(n131)Footnote 527. *Id.* at § 5/7.

(n132)Footnote 528. Ind. Code Ann. § 32-1-2-12.

(n133)Footnote 529. Iowa Code § 557.4.

(n134)Footnote 530. Kan. Stat. Ann. § 58-2203.

(n135)Footnote 531. *Id.* at § 58-2207.

(n136)Footnote 532. Ky. Rev. Stat. Ann. § 382.030.

(n137)Footnote 533. Ky. Rev. Stat. Ann. § 382.040.

(n138)Footnote 534. Me. Rev. Stat. Ann. tit. 33 § 764.

(n139)Footnote 535. *Id.* at § 766.

(n140)Footnote 536. Md. Real Prop. Code Ann. § 2-105.

(n141)Footnote 537. *Id.* at § 2-106.

(n142)Footnote 538. Mass. Gen. Laws Ann. ch. 183 § 16.

(n143)Footnote 539. Mich. Comp. Laws Ann. § 565.5.

(n144)Footnote 540. *Id.* at § 565.151.

(n145)Footnote 541. Minn. Stat. Ann. § 507.07.

(n146)Footnote 542. Miss. Code Ann. § 89-1-33.

(n147)Footnote 543. *Id.* at § 89-1-35.

(n148)Footnote 544. Miss. Code Ann. § 89-1-41.

(n149)Footnote 545. *Id.* at § 89-1-39.

(n150)Footnote 546. Mo. Rev. Stat. § 442.420.

(n151)Footnote 547. *Id.* at § 442.430.

(n152)Footnote 548. Mont. Code Ann. § 70-20-304.

(n153)Footnote 549. *Id.* at § 70-20-302.

(n154)Footnote 550. *Id.* at § 70-17-203.

(n155)Footnote 551. Neb. Rev. Stat. § 76-206.

(n156)Footnote 552. *Id.* at § 76-208.

(n157)Footnote 553. *Id.* at § 76-207.

(n158)Footnote 554. Nev. Rev. Stat. Ann. § 111.170.

(n159)Footnote 555. *Id.* at § 111.160.

(n160)Footnote 556. N.H. Rev. Stat. § 477:24.

(n161)Footnote 557. N.J. Rev. Stat. § 46:4-7.

(n162)Footnote 558. *Id.* at § 46:4-8.

(n163)Footnote 559. N.M. Stat. Ann. § 47-1-14.

(n164)Footnote 560. *Id.* at § 47-1-37.

(n165)Footnote 561. *Id.* at § 47-1-38.

(n166)Footnote 562. N.Y. Real Prop. Law § 251.

(n167)Footnote 563. N.D. Cent. Code § 47-10-19.

(n168)Footnote 564. *Id.* at § 47-10-15.

(n169)Footnote 565. *Id.* at § 47-04-26.

(n170)Footnote 566. Ohio Rev. Code Ann. § 5302.06.

(n171)Footnote 567. Okla. Stat. tit. 16 § 19.

(n172)Footnote 568. *Id.* at § 17.

(n173)Footnote 569. Or. Rev. Stat. § 93.850.

(n174)Footnote 570. *Id.* at § 93.855.

(n175)Footnote 571. *Id.* at § 93.850.

(n176)Footnote 572. *Id.* at § 93.860.

(n177)Footnote 573. Pa. Stat. Ann. ch. 21 § 4.

(n178)Footnote 574. *Id.* at § 5.

(n179)Footnote 575. *Id.* at § 6.

(n180)Footnote 576. R.I. Gen. Laws § 34-11-16.

(n181)Footnote 577. *Id.* at § 34-11-26.

(n182)Footnote 578. S.D. Codified Laws Ann. § 43-25-10.

(n183)Footnote 579. *Id.* at § 43-25-11.

(n184)Footnote 580. *Id.* at § 43-25-8.

(n185)Footnote 581. *Id.* at § 43-12-2.

(n186)Footnote 582. Tex. Prop. Code Ann. § 5.023.

(n187)Footnote 583. Utah Code Ann. § 57-1-12.

(n188)Footnote 584. *Id.* at § 57-1-10

(n189)Footnote 585. Va. Code Ann. § 55-68.

(n190)Footnote 586. Va. Code Ann § 55-69.

(n191)Footnote 587. Va. Code Ann. § 55-70.

(n192)Footnote 588. *Id.*

(n193)Footnote 589. Va. Code Ann. § § 55-70 -- 55-74.

(n194)Footnote 590. Va. Code Ann. § 55-52.

(n195)Footnote 591. Wash. Rev. Code § 64.04.070.

(n196)Footnote 592. Wash. Rev. Code § 64.04.050.

(n197)Footnote 593. W. Va. Code § 36-4-2.

(n198)Footnote 594. W. Va. Code § 36-4-3.

(n199)Footnote 595. *Id.* at § 36-1-10.

(n200)Footnote 596. *Id.* at § 36-4-16.

(n201)Footnote 597. Wyo. Stat. § 34-2-103.

(n202)Footnote 598. *Id.* at § 34-2-105.

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CHAPTER 82 TRANSFERS BY DEED

9-82 Thompson on Real Property, Thomas Editions § 82.11

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§ 82.11 Estoppel by Deed (After-acquired Title).

[Go To Supp]

Estoppel, as applied to real property, covers a variety of legal doctrines quite disparate in application and effect. At common law there were said to be three varieties of estoppel: (1) by deed, (2) by matter of record, and (3) by matter *in pais*. n599 In the present discussion the focus will be on the topic of "estoppel by deed" or, more accurately stated, one aspect of estoppel by deed.

COMPUTER-ASSISTED RESEARCH

LEXIS: (types or varieties or kinds) w/5 estoppel w/20 *in pais*

The various definitions of estoppel by deed are not uniform. n600 The broader definition of this term is that it is a bar precluding one party to a deed, and those in privity with that party, from asserting against the other party, and those in privity with that party, any right or title in derogation of the deed, or from denying the truth or any material facts asserted in the deed. n601 The latter half of this definition, which precludes both parties from denying matters asserted in the deed, is not restricted to matters of title. n602 What is commonly referred to as the estoppel by deed doctrine is, more precisely, the doctrine of after-acquired title, a form of estoppel by deed. n603 Although many courts use the term "doctrine of after-acquired title" or similar language, the term "estoppel by deed" continues to be used by some courts in describing the after-acquired title doctrine. In the current discussion, the term "after-acquired title doctrine" will be employed.

The after-acquired title doctrine states that title acquired by a grantor, who previously attempted to convey title to land which the grantor did not in fact own, inures automatically to the benefit of prior grantees. n604 Some cases, in defining this doctrine, add that the grantor's attempted conveyance must have been accompanied by a warranty of title. n605 This factor, as we will shall see, is one of the major issues in cases involving the doctrine.

There is widespread acceptance of the doctrine by the courts; in some jurisdictions there are statutes either codifying the doctrine or mentioning the doctrine. n606

COMPUTER-ASSISTED RESEARCH

LEXIS: title w/10 property w/10 afterwards acquired title

Courts have articulated various rationales and policy reasons in their statements of the basis for the doctrine: (1) the enforcement of the grantor's obligation to deliver a good title, n607 (2) to prevent the grantor from perpetrating a fraud on the grantee, n608 (3) to give the grantee all that was bargained for, and n609 (4) to protect an unwitting grantee who relies upon the good title of the grantor. n610

As mentioned previously, many courts refer to the doctrine of after-acquired title as "estoppel by deed." Not surprisingly, courts that refer to the after-acquired title doctrine as "estoppel by deed" explain the doctrine in a bit different terms. For these courts, the doctrine of estoppel by deed/after-acquired title is based upon the grantor's warranty of title in the deed. n611 Having warranted title, the grantor is later estopped to deny that an estate passed to the grantee. The doctrine, so explained, now has another rationale: avoiding circuity of actions. n612 The theory underlying the doctrine is of extreme practical importance, since it provides a basis for determining whether the doctrine applies in a particular case.

While courts generally agree on a definition of the doctrine of after-acquired title, there are still numerous legal issues that arise in attempting to apply the doctrine to the facts of a particular case. These disputes go to the details of the doctrine and, to some extent, the very basis for the doctrine. In some instances, the facts present a case where the doctrine of after-acquired title affects rights of third parties. This type of case presents a different analysis regarding the applicability of the doctrine.

The doctrine of after-acquired title has been found applicable in cases involving a deed of trust, n613 a mortgage, n614 mineral interests, n615 and an expectancy interest. n616 The doctrine has also been applied to vendor/purchaser agreements under limited circumstances. n617 The prototypical case applying the after-acquired title doctrine is where a grantor executes a deed purporting to convey land to which the grantor has no title or defective title. n618 Suppose that the interest under the deed does not pass due to invalidity of the deed, not because of lack of title in the vendor. A strict reading of the doctrine of after-acquired title, as traditionally defined, implies that the doctrine would not apply in such cases. n619

The application of the doctrine to quitclaim deeds, i.e., deeds without warranties, has been and continues to be, a topic of great interest and importance. In looking at the standard definition of the after-acquired title doctrine, there is nothing inherent in the statement of that doctrine which would prevent the application of the doctrine. A grantor who executes a quitclaim deed surely "purports" and "attempts" to convey title. If one looks to the various rationales given for the doctrine, the fact the instrument was a deed without warranties appears irrelevant. Thus many courts have found the doctrine can apply to a purported conveyance by quitclaim deed. n620

COMPUTER-ASSISTED RESEARCH

LEXIS: estoppel by deed w/10 quitclaim deed

Even if a court finds that a taker under a quitclaim deed is generally not entitled to the benefit of the doctrine, the courts have been resourceful in finding the general rule inapplicable. n621

The doctrine of after-acquired title is sometimes referred to as "estoppel by deed" and, as defined, may incorporate the requirement of a "warranty deed." n622 Some judicial decisions still refer to a warranty of title requirement for the doctrine to apply. n623

COMPUTER-ASSISTED RESEARCH

LEXIS: estoppel by deed w/50 warranty w/20 requir!

One limitation on the application of the after-acquired title doctrine relates to the estate or interest intended to be conveyed: the after-acquired title must be the same title or part of the title purportedly conveyed. n624 Generally speaking, there is nothing in the statement of the after-acquired title doctrine that makes any distinction as to the source of the title that the grantor acquires. Judicial decisions have engrafted an exception, however. If the title is acquired by the grantor from the earlier grantee, the doctrine does not apply. n625 This is an example of the after-acquired title doctrine being grounded in an estoppel principle. With modern courts speaking of the doctrine of after-acquired title applying "by operation of law," there would seem to be no room for subjective factors, such as motive, n626 knowledge, n627 intent, n628 or reliance. n629

The doctrine of after-acquired title is applicable only to the parties and those in privity with them. n630 The grantee asserting rights under the after-acquired title doctrine may find that the contesting party is claiming superior rights under the recording acts. In some cases, there is a direct clash between a person asserting after-acquired title and a person who claims bona fide purchaser status under the recording act. n631 As an example of the type of conflicts that might be encountered by the grantee, consider the status of a judgment lien creditor whose lien attaches the moment the grantor acquires the title. Is this a superior interest to that of the grantee who receives title via the after-acquired title doctrine? n632 Cases of this type will be decided on policies broader than the after-acquired title doctrine and necessitate a precise delineation of what property interest the grantee receives at the time of the conveyance. n633

COMPUTER-ASSISTED RESEARCH

LEXIS: estoppel by deed w/20 privity w/20 validity

FOOTNOTES:

(n1)Footnote 599. Black, *supra* note 5, at 551. The first two were called "legal estoppels," the third "equitable estoppels." *See also* 700 *Lake Ave. Realty v. Dolleman, 433 A.2d 1261 (N.H. 1981)* (four types of estoppel; estoppel "by recitals in instruments" the other listed type of estoppel).

(n2)Footnote 600. The confusion surrounding the definition of the term is illustrated by the two definitions given in Black's Law Dictionary for "Estoppel by deed" and "Deed, estoppel by." Black, *supra* n.5, at 551, 415. The latter definition is broader than the first.

(n3)Footnote 601. *Id.* at 551. This same idea has been expressed more simply: "Estoppel by deed in effect precludes the grantor from asserting against the grantee any right or title in derogation of the deed, or from denying the truth of any materials asserted in it." *McLaughlin v. Lambourn, 359 N.W.2d 370, 372 (N.D. 1985).*

(n4)Footnote 602. *See Cutright v. Wilson, 410 So. 2d 1274 (La. 1982)* (grantor precluded from attacking deed description); *Peoples Fed. Sav. & Loan Ass'n v. Myrtle Beach Golf & Yacht Club, 425 S.E.2d 764 (S.C. App. 1992)* (junior mortgagee estopped on issue of subordination); *Nodvin v. Plantation Pipe Line Co., 420 S.E.2d 322 (Ga. App. 1992)* (grantee estopped from denying validity of easement). *See also Buhecker v. R.B. Petersen & Sons Constr. Co., Inc., 929 P.2d 937 (Nev. 1996)* (grantors estopped to deny validity of conveyance); *Hilco Property Servs., Inc. v. United States, 929 F. Supp. 526 (D.N.H. 1996)* (grantors precluded from asserting that deed under which they received title was voidable); *Grennan v. Solomon, 472 S.E.2d 54 (Va. 1996)* (servient tenement owners estopped from asserting that dominant tenement owner had not actually owned dominant tenement).

(n5)Footnote 603. *Dominex, Inc. v. Key, 456 So. 2d 1047 (Ala. 1984); Hays v. King, 784 P.2d 21 (N.M. 1989)* (doctrine of after-acquired title "subcategory" of general doctrine of estoppel by deed).

(n6)Footnote 604. Black, *supra* n.5, at 61. *See Campbell v. Butler, 770 P.2d 7 (Okla. 1988); Dominex, Inc. v. Key, 456 So. 2d 1047 (Ala. 1984)* (doctrine of after-acquired title "a form of estoppel by deed"); *Franks Petr., Inc. v. Mayo, 438 So. 2d 696 (La. App. 1983); Kirby v. Holland, 316 N.W.2d 746 (Neb. 1982).*

(n7)Footnote 605. *Turner v. Lassiter, 484 So. 2d 378 (Ala. 1985); Daley v. Hornbaker, 472 A.2d 703 (Pa. Super. 1984); Pascoe v. Keuhnast, 642 S.W.2d 37 (Tex. App. 1982).*

(n8)Footnote 606. *See* the state-by-state statutory listing in § 82.10(e), *supra*. *Petition of Willmus, 568 N.W.2d 722 (Minn. App. 1997)* (doctrine of estoppel by deed does apply to registered land).

(n9)Footnote 607. *Hays v. King, 784 P.2d 21 (N.M. 1989).*

(n10)Footnote 608. *Id.*

(n11)Footnote 609. *Harkins & Co. v. Lewis, 535 So. 2d 104 (Ala. 1988).*

(n12)Footnote 610. *Schwenn v. Kaye, 202 Cal. Rptr. 374 (1984).*

(n13)Footnote 611. *Wood v. Sympson, 833 P.2d 1239 (Okla. 1992)* (purpose of doctrine is to assure grantor's "warranty" effectuated); *Daley v. Hornbaker, 472 A.2d 703 (Pa. Super. 1984)* (grantor who conveys "under warranty"); *Franks Petr., Inc. v. Mayo, 438 So. 2d 696 (La. App. 1983)* (doctrine generally limited to cases where grantor "warranted title"); *Pascoe v. Keuhnast, 642 S.W.2d 37 (Tex. App. 1982)* (doctrine dependent upon "covenant of warranty" in deed); *Sorensen v. Wright, 268 N.W.2d 203 (Iowa 1978)* (deed recites or affirms grantor is seized of a particular estate). In some of these states the court is referring to a statutory version of the doctrine, which, under the statute, is called the doctrine of "estoppel by deed."

(n14)Footnote 612. *McLaughlin v. Lambourn, 359 N.W.2d 370 (N.D. 1985).* The rationale of avoiding the circuity of actions emphasizes one aspect of the after-acquired title doctrine: the automatic "inurement" of title in the grantee. Older cases held that the grantee had the option of suing on the title covenants and was not "compelled" to accept the after-acquired title. *See* Thompson § 3207 note 80. Recent cases have not raised this issue; the courts using the term "after-acquired title doctrine" are clearly embracing the automatic inurement theory. The courts using the term "estoppel by deed," based on a warranty theory, also stress automatic inurement. *See, e.g., Wood v. Sympson, 833 P.2d 1239 (Okla. 1992)* (title passes to grantee "by operation of law"). *See also Miller-Long v. John Hanson Sav. & Loan, Inc., 676 F. Supp. 298 (D.D.C. 1987)* (after-acquired title inures "by operation of law").

(n15)Footnote 613. *Miller-Long v. John Hanson Sav. & Loan, Inc., 676 F. Supp. 298 (D.D.C. 1987).*

(n16)Footnote 614. *Harkins & Co. v. Lewis, 535 So. 2d 104 (Ala. 1988).*

(n17)Footnote 615. *Wood v. Sympson, 833 P.2d 1239 (Okla. 1992); Mau v. Schwan, 460 N.W.2d 131 (N.D. 1990); Turner v. Lassiter, 484 So. 2d 378 (Ala. 1985).*

(n18)Footnote 616. *Zayka v. Giambro, 594 N.E.2d 894 (Mass. App. 1992); Hipps v. Hipps, 343 S.E.2d 669 (S.C. 1986).*

(n19)Footnote 617. *Hardigan v. Kimball, 553 A.2d 1265 (Me. 1989); McLaughlin v. Lambourn, 359 N.W.2d 370 (N.D. 1985)* (contract for deed). But see *Kesinger v. Logan, 779 P.2d 263 (Wash. 1989)* (doctrine cannot apply unless there is a purported deed).

Hardigan was a routine vendor/purchaser case involving husband and wife, joint tenants as vendors. Only the wife signed the purchase agreement, the husband passing away prior to closing date. The wife, as surviving joint tenant, was required to complete the contract. The Maine court stated the "concepts of fairness and justice that support" application

of the after-acquired title doctrine when a grantor delivers a warranty deed "are equally applicable" to a purchase and sale agreement. *Compare Ianotti v. Ciccio, 591 A.2d 797 (Conn. 1991)* (quitclaim deed signed by one only joint tenant void; doctrine not applicable).

(n20)Footnote 618. *Hays v. King, 784 P.2d 21 (N.M. 1989).*

(n21)Footnote 619. *See Yaali, Ltd. v. Barnes & Noble, Inc., 506 S.E.2d 116 (Ga. 1998)* (doctrine cannot be used "to transfer title or to cure flaws in the legal requirements for the creation of a property interest"); *Dominex, Inc. v. Key, 456 So. 2d 1047 (Ala. 1984)* (application of doctrine "presuppose that the instrument relied on is valid). *Compare Houston First Am. Sav. v. Musick, 650 S.W.2d 764 (Tex. 1983)* (trust deed invalid; doctrine applied).

(n22)Footnote 620. *Zayka v. Giambro, 594 N.E.2d 894 (Mass. App. 1992)* ("If estoppel by deed is a sound principle, no compelling logic or binding precedent proscribes its application to a quitclaim deed."); *Hays v. King, 784 P.2d 21 (N.M. 1989); Tunnell v. Barry, 326 S.E.2d 288 (N.C. App. 1985)* (doctrine will apply "when the deed shows the grantor intended to convey and the grantee expected to acquire a particular estate").

(n23)Footnote 621. *Franks Petr., Inc. v. Mayo, 438 So. 2d 696 (La. App. 1983)* (deed in question not intended to be "mere quitclaim"). In certain instances, the "quitclaim" deed, by virtue of statute, contains implied warranties. *White v. Ford, 471 A.2d 1176 (N.H. 1984).* If the doctrine is statutory and the statute proscribes the doctrine when a quitclaim deed is used, a court may find the quitclaim deed in question is not a "quitclaim deed" within the meaning of the statute. *Walliker v. Escott, 608 P.2d 1272 (Wyo. 1980). Webster Oil Co., Inc. v. McLean Hotels, Inc., 878 S.W.2d 892 (Mo. App. 1994)* (estoppel by deed statute applicable only where grantor "undertakes to convey an indefeasible estate in fee simple"; conveyance by quitclaim did not satisfy statutory requirement).

(n24)Footnote 622. *See* Black, *supra* n.5, at 551 (estoppel by deed defined: "grantor under warranty deed...")

(n25)Footnote 623. *Turner v. Lassiter, 484 So. 2d 378 (Ala. 1985)* (title inures to benefit of grantee "under warranty deed"); *Pascoe v. Keuhnast, 642 S.W.2d 37 (Tex. App. 1982)* (doctrine dependant "upon the covenant of warranty"); *Sorenson v. Wright, 268 N.W.2d 203 (Iowa 1978)* (deed recites or affirms grantor is seized of a particular estate).

(n26)Footnote 624. *Lampley v. United States, 17 F. Supp.2d 609 (N.D. Miss. 1998)* (applying Mississippi law); *Rosewood Properties Inc. v. Community Credit Union, 944 S.W.2d 46 (Tex. App. 1997)* (estoppel does not apply to any after-acquired interest which was not purportedly granted); *Harkins & Co. v. Lewis, 535 So. 2d 104 (Ala. 1988)* (grantors only intended to convey three-fourths interest); *Jennings v. Wessley Energy Corp., 720 S.W.2d 811 (Tex. App. 1986)* (conveyance of "all our undivided interest" not applicable to after-acquired interest); *Kirby v. Holland, 316 N.W.2d 746 (Neb. 1982).*

(n27)Footnote 625. *Torgerson v. Rose, 339 N.W.2d 79 (N.D. 1983); Sorenson v. Wright, 268 N.W.2d 203 (Iowa 1978).* The only dissent from this doctrine appears to be *Lewicki v. Marszalkowski, 455 A.2d 307 (R.I. 1983)* (grantor estopped to invoke adverse possession).

(n28)Footnote 626. *Daley v. Hornbaker, 472 A.2d 703 (Pa. Super. 1984)* (doctrine applies whether grantor committed honest mistake or committed fraud).

(n29)Footnote 627. *McLaughlin v. Lambourn, 359 N.W.2d 370 (N.D. 1985)* (grantee's constructive or actual knowledge of lack of vendor's title no bar to application of doctrine).

(n30)Footnote 628. *Schwenn v. Kaye, 202 Cal. Rptr. 374 (1984)* (grantor's intent in reacquiring title irrelevant). Given the fact that the doctrine is remedial in nature and is supposed to carry out the parties' intention, the recent emphasis on intent is logical and overdue. *See Zayka v. Giambro, 594 N.E.2d 894 (Mass. App. 1992)* (doctrine turns on "obvious intention of the parties"). Perhaps what is emerging is the gradual shifting from the estoppel-based theory of

the doctrine to an expectation-based theory.

(n31)Footnote 629. So long as the doctrine of after-acquired title does not incorporate any "estoppel" theory, reliance should not, and is not, a factor under the standard definition of after-acquired title. On the other hand, when the doctrine is stated as "estoppel by deed," one can expect to find statements that the doctrine applies when the unwitting grantee takes a conveyance "in reliance" upon the grantor's good title. *See McLaughlin v. Lambourn, 359 N.W.2d 370 (N.D. 1985).*

(n32)Footnote 630. *State Street Bank & Trust Co. v. Heck's Inc., 963 S.W.2d 626 (Ky. 1998); Mayo v. Simon, 646 So. 2d 973 (La. App. 1994)* (grantee acquired title from third party); *Board of County Comm'rs v. Ogden, 870 P.2d 143 (N.M. App. 1994)* (grantor did not purport to convey lots in question); *Daley v. Hornbaker, 472 A.2d 703 (Pa. Super. 1984); Kraker v. Roll, 474 N.Y.S.2d 527 (1984).*

(n33)Footnote 631. The classic issues in these situations have to do with chain of title and the scope of search. *See* Ch. 92, *infra*. The courts' discussion in *Zayka v. Giambro, 594 N.E.2d 894 (Mass. App. 1992)* and *Schuman v. Roger Baker & Assocs., 319 S.E.2d 308 (N.C. App. 1984)* refer to these "chain of title" and "burden of search" considerations in their decisions.

(n34)Footnote 632. *See United Okla. Bank v. Moss, 793 P.2d 1359 (Okla. 1990)* (grantee prevails under first in time rule).

(n35)Footnote 633. If the deed conveys "nothing" to the grantee because the grantor had nothing to convey, the notion that the grantee receives an "equitable title" at that time is anomalous. See *United Okla. Bank v. Moss, 793 P.2d 1359 (Okla. 1990); Life Sav. & Loan Ass'n v. Bryant, 467 N.E.2d 277 (Ill. App. 1984).*

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CHAPTER 82 TRANSFERS BY DEED

9-82 Thompson on Real Property, Thomas Editions § 82.12

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§ 82.12 Consent Issues.

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After discussing the requisites for a deed and its formal and orderly parts, Blackstone next considered "how a deed may be avoided, or rendered of no effect." If a deed lacks any of the "requisites," he wrote, "it is a void deed *ab initio*." The requisites Blackstone listed included the "essentials" previously discussed, as well as the requirement of delivery, which will be taken up in the next chapter. Blackstone then considered how deeds "may also be avoided by matter ex post facto." The last of the five ex post facto methods is "By the judgment or decree of a court of judicature ... when it appears that the deed was obtained by fraud, force, or other foul practice; or is proved to be an absolute forgery." n634

The common law, it appears, has always made a distinction between deeds that are "void *ab initio*" and those which "may be avoided" by court decree. In modern law the courts refer to this as the difference between a deed that is "void" and one that is "voidable." n635 A deed that is void is a nullity; the grantor still owns the property since no title passes pursuant to the void instrument. n636 A deed that is voidable is quite different. The title passes to the grantee, subject to defeasance. The grantor, the grantor's successor in interest, or person acting on the grantor's behalf, must take affirmative action to revest title in the grantor. n637 Failure to do so may result in a running of the statute of limitations and thus the grantee's title becomes indefeasibly vested. n638

COMPUTER-ASSISTED RESEARCH

LEXIS: (deed w/10 void w/15 voidable) w/20 distinction

The void/voidable distinction plays a central role in the protection under the recording acts: a person otherwise qualifying as a bona fide purchaser under the recording act receives no protection under a "void" deed. n639 On the other hand, a person otherwise qualified as a bona fide purchaser for value does receive protection in purchasing from one whose title is merely "voidable." n640 Deeds which appear to be valid on their face, but turn out to be void, present insurmountable off-the-record risks for persons relying on the state of record title. It should not be surprising that practically all of the defects discussed in this section present instances of voidable title, not void. The two classic cases of "void" deeds are those involving lack of delivery and forgery. The latter topic will be taken up in the next chapter.

Forgery is treated differently under modern law than it was in Blackstone's treatise.

Blackstone listed "absolute forgery" as an example of a deed that may be avoided ex post facto. n641 This is not the treatment given forgery in the modern era. In § 82.06(b) *supra*, the signature of the grantor was listed as an essential element as a result of statutory enactments. A deed lacking the grantor's signature is a nullity. A forgery, by definition, is not the grantor's signature; thus, the conclusion is that the forged deed is void. n642 In terms of giving protection to third parties who rely on the state of record title, the courts could have drawn a distinction between a deed that contained no signature and one that has on it a forged signature of the grantor, with an acknowledgment. While the policy of protecting innocent purchasers is strong, the property owner's moral claim is superior. The stability of land titles is crucial in our society and a policy giving effect to forgeries would encourage unlawful behavior. The policy of protecting bona fide purchasers must yield to the greater good. There is no bona fide purchaser protection for one who takes under or through a forged deed. n643

COMPUTER-ASSISTED RESEARCH

LEXIS: forged deed w/10 void w/10 title purchaser w/10 bona fide purchaser w/15 forged deed

In the discussion which follows, the various topics all relate to the reality of the grantor's consent. The first topic, mental competency, looks solely to the grantor's status. The other three topics, duress, undue influence, and fraud, all focus on the conduct of the grantee or other persons as it relates to the voluntariness of the grantor's act. As to these three, there can be, and oftentimes are, overlapping elements.

The substantive law, as it relates to the topics discussed herein, is usually well-settled and fairly straightforward. The issues arising in the "consent" cases tend to be more factual than legal, more procedural than substantive. The more problematic of the issues are those relating to procedure, particularly as it relates to presumptions. There is a parallel body of law in the field of wills, with many of the same substantive concepts being applied in will contest cases. An action brought to set aside a deed of a deceased grantor is very similar to a will contest case, and is likely to involve many of the exact same issues.

The final topic of this section, error or mistake, is problematic in many ways. Issues of error or mistake often go to the question of consent, inasmuch as the error or mistake may give rise to the question of whether the grantor consented to a deed with the error or mistake contained therein. Some of the cases of this type may go to the question of validity; the more standard issue likely to be litigated is whether reformation of the deed is possible.

§ 82.12(a) Mental Competency.

An individual conveying property by deed must have the requisite mental capacity to understand the nature, effect, and legal significance of the act being performed. n644 The capacity of the grantor is determined as to the date of execution of the instrument. n645

COMPUTER-ASSISTED RESEARCH

LEXIS: (capacity or competence) w/5 determined w/5 (date or time) w/2 (execution or conveyance)

Courts do not agree whether the tests of mental capacity for executing a deed and a will are different n646 or the same. n647 In some discussions of the test for competency, the courts refer to the test employed in contract cases. n648 Those challenging the grantor's capacity have the burden of proof, as there is a rebuttable presumption that the grantor is competent. n649 A deed executed by a grantor who lacks mental competency is voidable, not void. n650

COMPUTER-ASSISTED RESEARCH

LEXIS: deed w/10 mental w/10 void w/5 voidable

§ 82.12(b) Duress.

Duress is a condition of mind produced by improper threats or coercion, destroying the free agency of the grantor and causing the grantor to do an act the grantor would not otherwise have done. n651 Threats of force and violence constitute duress. n652 A deed executed under duress is voidable, not void. n653 Once again, the difficult issues relate not to the substantive legal concept or definition, but to the proof of facts allegedly constituting duress. One of the purposes of acknowledgment in the law of deeds is to provide evidence on the face of the instrument that the deed was not executed under duress. n654

§ 82.12(c) Undue Influence.

Like duress, the concept of undue influence goes to the voluntariness of the grantor's act in executing the instrument. n655 Undue influence is generally defined as that influence which destroys the free agency of the grantor such that the instrument represents not the grantor's will, but the will of another. n656

COMPUTER-ASSISTED RESEARCH

LEXIS: undue influence w/10 destroy! w/5 free agency w/5 grantor

While a person alleging undue influence has the burden of proof, n657 that burden may be met and the burden shifted if a presumption of undue influence obtains. n658 There is considerable litigation over the circumstances under which a presumption of undue influence arises. The central concept in regard to the finding of a presumption is the existence of a confidential relationship between the grantor and the person allegedly exercising the undue influence. The predominant view is that a finding of a confidential relationship gives rise to a presumption of undue influence. n659 The fact that a confidential relationship does not exist does not mean that a presumption cannot arise, n660 or that undue influence cannot be proven. n661 On the other hand, the existence of a confidential relationship, in and of itself, is not grounds for voiding a conveyance. n662 The presence or absence of a confidential relationship, which plays a central role in determining whether a presumption of undue influence arises, depends upon what circumstances a court will find as giving rise to such relationship. In many undue influence cases, the issue of when a confidential relationship arises plays a crucial role in the outcome. The case law on this topic is fairly voluminous, and the rules vary from state to state. n663 A deed executed under undue influence is voidable. n664

COMPUTER-ASSISTED RESEARCH

LEXIS: deed w/5 undue influence w/10 voidable w/5 void

§ 82.12(d) Fraud.

While courts are in general agreement as to the definition and elements of fraud, there are complicating factors arising in deed cases alleging fraud because there are two types of fraud with differing legal consequences. The procedural issue most problematic in alleged fraud cases relates to pleading, not with the burden of proof and presumptions.

Fraud is grounded in tort law, and the standard tort law definition of fraud is utilized in deed cases. The standard definition of actual fraud encompasses nine elements: (1) a representation of an existing fact; (2) its materiality; (3) its falsity; (4) the speaker's knowledge of its falsity or ignorance of its truth; (5) the speaker's intent that it should be acted upon by the person to whom it is made; (6) ignorance of its falsity on the part of the person to whom it is made; (7) the latter's reliance on the truth of the representation; (8) the latter's right to rely upon it and (9) the latter's consequent

damage. n665 In the ordinary fraud case, the grantee sues for cancellation of a deed based on the misrepresentation by the grantor, and no mention is made of the two types of fraud. n666 If the court finds that the requisite elements have been met, the court will deem the transaction "voidable" and restore title to the grantor. n667

COMPUTER-ASSISTED RESEARCH

LEXIS: fraud w/2 inducement w/10 voidable w/5 void

This type of case, although not always so labelled, is the standard "fraud in the inducement" case. n668

In contrast with the "fraud in inducement" category of cases, there are cases in which the courts emphasize the distinction between "fraud in the inducement" and "fraud in the execution," or as it is sometimes called, "fraud *in factum*." n669 This distinction is legally relevant when rights of third parties are in question, for the deed which was procured by fraud in the execution is regarded as void, not voidable. As a result, the bona fide purchaser doctrine will not be applied in the case of the deed procured by fraud in the execution. n670 On the other hand, if the court finds that the fraud in question fits the category of "fraud in the inducement," the title of the grantee is voidable, and the bona fide purchaser doctrine can be asserted by a third party. n671 The courts have not been very successful in drawing clear lines between the two types of fraud. Other than stating that fraud in the execution is fraud that goes to the nature of the instrument itself, n672 the courts have given few definitional guidelines. n673

COMPUTER-ASSISTED RESEARCH

LEXIS: fraud w/2 execution w/10 void w/5 voidable

The usual pleading rule relating to pleading fraud with particularity applies in cases involving deeds. n674 There are few circumstances giving rise to a presumption of fraud. In some instances the courts have indicated that a confidential or familial relationship ordinarily may give rise to presumption of fraud, n675 but the ordinary rule is that the burden of proof is on the person alleging the fraud. n676 The only instance in which the courts routinely engage in a presumption of fraud is in the "promise to support" cases. In this type of case, for the promise to be fraudulent, the grantee must have made the promise with no intent to carry it out. n677 The fact that a grantee later fails to keep the promise may give rise to a presumption that the promise was fraudulent at its inception. n678

COMPUTER-ASSISTED RESEARCH

LEXIS: (confidential or familial) w/2 relationship w/10 presumption w/5 fraud

§ 82.12(e) Mistake.

There is limited case law recognizing the authority of a court to cancel a deed based upon mistake, but the grounds for so doing are narrowly circumscribed: the mistake must be mutual such that the deed does not express the true intent of the parties. n679 If the grantor fails to read the deed, the grantor's negligence in not doing so precludes relief based upon mistake. n680 The relief sought in mutual mistake cases is more likely to be reformation of the instrument. Relief will be granted if the mistake was mutual, n681 or if one party's mistake was accompanied by fraud or inequitable conduct on the other party. n682 Reformation will not be granted, however, against persons having the status of bona fide purchasers for value. n683

COMPUTER-ASSISTED RESEARCH

LEXIS: reform! w/15 bona fide purchasers w/10 mistake

FOOTNOTES:
(n1)Footnote 634. Blackstone, *supra* n.1 at *308-309.

(n2)Footnote 635. *See, e.g., State v. Bureau of Land Mgt., 876 F.2d 1419 (9th Cir. 1989); First Interstate Bank of Sheridan v. First Wyo. Bank, N.A. Sheridan, 762 P.2d 379 (Wyo. 1988); Nygaard v. Robinson, 341 N.W.2d 349 (N.D. 1983); Lighthouse Church of Cloverlead v. Texas Bank, 889 S.W.2d 595 (Tex. App. 1994)* (distinction between void and voidable deeds recognized).

(n3)Footnote 636. *Wutzke v. Bill Reid Painting Serv., 198 Cal. Rptr. 418 (1984); Cumberland Capital Corp. v. Robinette, 331 So. 2d 709 (Ala. App. 1976).*

(n4)Footnote 637. *Hill v. Watts, 801 S.W.2d 176 (Tex. App. 1990); Fallon v. Triangle Mgt., 215 Cal. Rptr. 748 (1985).*

(n5)Footnote 638. *Emanuel v. Emanuel, 338 S.E.2d 620 (N.C. App. 1986)* (statute of limitations barred action to set aside conveyance on mental incompetency grounds); *Dyer v. Dyer, 616 S.W.2d 663 (Tex. App. 1981)* (even if deed was voidable, statute of limitations barred action); *Goodwin v. City of Dallas, 496 S.W.2d 722 (Tex. App. 1973)* (action to set aside voidable deed barred by statute of limitations).

(n6)Footnote 639. The outstanding example is the forged deed case, which the courts treat as void. *In re Marriage of Jovel, 56 Cal. Rptr. 2d 740 (Cal. App. 1996)* (if deed is void, no bona fide purchaser doctrine applies).

(n7)Footnote 640. As will be shown *infra*, this is, in the main, how courts categorize the defects of mental incapacity, undue influence and duress. Fraud is bit more complicated. *See* § 82.12(d) *infra*.

(n8)Footnote 641. Blackstone, *supra* n.1, at *309.

(n9)Footnote 642. *Rosen v. Rosen, 663 N.Y.S.2d 228 (App. Div. 1997)* (forged deed a nullity); *Dyson Descendant Corp. v. Sonat Exploration Co., 861 S.W.2d 942 (Tex. App. 1993).* However, the fact that valid instrument incorporates by reference a forged instrument does render the incorporating document void. *Commonwealth Land Title Ins. Co. v. Nelson, 889 S.W.2d 312 (Tex. App. 1994); Greenlee v. Mitchell, 607 So. 2d 97 (Miss. 1992); Lewis v. Barnett, 694 S.W.2d 743 (Mo. App. 1985); Harding v. JaLaur Corp., 315 A.2d 132 (Md. App. 1974).*

(n10)Footnote 643. *Veigle v. United States, 888 F. Supp. 1135 (D. Fla. 1995)* (no bona fide purchaser protection under Florida law); *Bellaire Kirkpatrick Joint Venture v. Loots, 826 S.W.2d 205 (Tex. Civ. App. 1992); M.M. & G., Inc. v. Jackson, 612 A.2d 186 (D.C. 1992); Bennerson v. Small, 842 F.2d 710 (3d Cir. 1988).*

(n11)Footnote 644. *Gifford v. Geosling, 951 S.W.2d 641 (Mo. App. 1997)* (deed executed by one tenant by entirety who was incompetent would invalidate deed; acknowledgment by notary did not establish competency of grantor); *Hilco Property Servs., Inc. v. United States, 929 F. Supp. 526 (D.N.H. 1996)* (applying law of New Hampshire); *Thomas v. Neal, 600 So. 2d 1000 (Ala. 1992); Brown v. Resort Devs., 385 S.E.2d 575 (Va. 1989); Hansford v. Robinson, 340 S.E.2d 614 (Ga. 1986).*

(n12)Footnote 645. *O'Brien v. Belsma, 816 P.2d 665 (Or. App. 1991); Smith v. Smith, 574 So. 2d 644 (Miss. 1990); Smith v. Smith, 607 S.W.2d 617 (Tex. App. 1980).*

(n13)Footnote 646. *Bragdon v. Drew, 658 A.2d 666 (Me. 1995)* (incompetency alone insufficient to set aside a deed; contract rule for voidable contract cited and applied); *Ryan v. Colombo, 712 P.2d 139 (Or. App. 1985)* (greater competency required to execute deed than will); *Akerman v. Trosper, 420 N.E.2d 1148 (Ill. App. 1981)* (general rule is that greater mental capacity is required to execute deed than to execute will).

(n14)Footnote 647. *Whitworth v. Kines, 604 So. 2d 225 (Miss. 1992)* (same capacity required to execute a deed as

is required for making a will); *Rose v. Dunn, 679 S.W.2d 180 (Ark. 1984)* (law regarding mental capacity in execution of will also applicable to execution of deed). *See also Akerman v. Trosper, 420 N.E.2d 1148 (Ill. App. 1981)* (general rule requiring greater capacity for deed execution does not apply where the deed is in nature of voluntary settlement and grantor reserves life estate).

(n15)Footnote 648. *See Bach v. Hudson, 596 S.W.2d 673 (Tex. Civ. App. 1980)* (legal standards for determining mental capacity for purposes of executing a will or deed are substantially the same as mental capacity for executing a contract); *In re Estate of Herm, 284 N.W.2d 191 (Iowa 1979)* (higher degree of competency required "for transaction of ordinary business" than for a testamentary disposition). *Bowden v. Griffith, 675 A.2d 968 (Me. 1996)* (citing Restatement (Second) Contracts § 15).

(n16)Footnote 649. *Peters v. Nicotera, 669 N.Y.S.2d 1000 (1998); Abbott v. Rogers, 680 So. 2d 315 (Ala. App. 1996)* (proof of insanity before conveyance does not necessarily rebut presumption); *In re Estate of Cunningham, 565 N.E.2d 301 (Ill. App. 1990); Harper v. Rogers, 387 S.E.2d 547 (W. Va. 1989); Nichols v. Nichols, 427 A.2d 374 (Vt. 1981).*

(n17)Footnote 650. *First Interstate Bank of Sheridan v. First Wyo. Bank, N.A. Sheridan, 762 P.2d 379 (Wyo. 1988); Emanuel v. Emanuel, 338 S.E.2d 620 (N.C. App. 1986). Compare Keville v. McKeever, 675 N.E.2d 417 (Mass. App. 1997)* (in dicta the court declared that bona fide purchaser for value doctrine not applicable).

(n18)Footnote 651. *Wilson v. Wilson, 642 S.W.2d 132 (Mo. App. 1982); Lawler v. Speaker, 446 S.W.2d 888 (Tex. App. 1969).*

(n19)Footnote 652. *Gilley v. Gilley, 545 So. 2d 67 (Ala. App. 1989); Wilson v. Wilson, 642 S.W.2d 132 (Mo. App. 1982).*

(n20)Footnote 653. *Dyer v. Dyer, 616 S.W.2d 663 (Tex. Civ. App. 1981); Goodwin v. City of Dallas, 496 S.W.2d 722 (Tex. App. 1973).*

(n21)Footnote 654. *See* § 82.06(e), *supra*.

(n22)Footnote 655. *Greenlee v. Mitchell, 607 So. 2d 97 (Miss. 1992); Boshell v. Lay, 596 So. 2d 581 (Ala. 1992);* Curl by and through *Curl v. Key, 316 S.E.2d 272 (N.C. 1984). See also Martin v. Phillips, 369 S.E.2d 397 (Va. 1988)* (influence exerted must amount to coercion -- "practically duress").

(n23)Footnote 656. *Greenlee v. Mitchell, 607 So. 2d 97 (Miss. 1992); Boshell v. Lay, 596 So. 2d 581 (Ala. 1992); Harper v. Rogers, 387 S.E.2d 547 (W. Va. 1989);* Curl by and through *Curl v. Key, 316 S.E.2d 272 (N.C. 1984).*

(n24)Footnote 657. *Walsh v. Bucalo, 620 A.2d 21 (Pa. Super. 1993); Crawford v. Krebs, 352 N.E.2d 76 (Ill. App. 1976).*

(n25)Footnote 658. *Ballard v. Ballard, 549 So. 2d 1176 (Fla. App. 1989).*

(n26)Footnote 659. *Mulato v. Mulato, 705 So.2d 57 (Fla. App. 1997)* (presumption arose); *Mathis v. Hammond, 268 Ga. 158, 486 S.E.2d 356 (Ga. 1997)* (presumption arose); *Bradshaw v. McNeill, 228 Ga. App. 653, 492 S.E.2d 568 (Ga. App. 1997)* (presumption arose); *Eads v. Dearing, 874 P.2d 474 (Colo. App. 1994)* (fiduciary relationship creates presumption); *JML Investors Corp. v. Hilton, 647 N.Y.S.2d 244 (App. Div. 1996)* (presumption arose); *Griffin v. Armana, 1996 WL 444941 (Miss. 1996)* (presumption arose); *Greenlee v. Mitchell, 607 So. 2d 97 (Miss. 1992); Pedersen v. Bibioff, 828 P.2d 1113 (Wash. App. 1992); Haginas v. Haginas, 598 So. 2d 1334 (Ala. 1992); Middleton v. Suber, 388 S.E.2d 639 (S.C. 1990);* Curl by and through *Curl v. Key, 316 S.E.2d 272 (N.C. 1984).*

(n27)Footnote 660. *Smith v. Crites, 781 S.W.2d 189 (Mo. App. 1989); Martin v. Phillips, 369 S.E.2d 397 (Va.*

1988) (presumption of undue influence can arise where (1) grantor had "great weakness of mind"; (2) confidential relationship existed between grantor and grantee or (3) consideration was grossly inadequate and transaction occurred amid "circumstances of suspicion").

(n28)Footnote 661. *Bullard v. Crawley, 363 S.E.2d 897 (S.C. 1987); Perkins v. Rantz, 631 S.W.2d 907 (Mo. App. 1982).*

(n29)Footnote 662. *Brown v. Weik, 725 S.W.2d 938 (Tenn. App. 1983); Biggerstaff v. Ostrand, 261 N.W.2d 750 (Neb. 1978).*

(n30)Footnote 663. One of the most litigated issues in this area relates to transfers among family members. The typical issue is whether or not a presumption of confidential relationship exists when the grantor and grantee are related by blood or marriage. *See, e.g., Dixon v. Bradsher, 779 S.W.2d 727 (Mo. App. 1989)* (deed from parent to child not inherently a fiduciary relationship); *Seals v. Seals, 423 So. 2d 222 (Ala. 1982)* (deed from parent to child; relationship "confidential" in nature); *Wilson v. Wehunt, 631 So. 2d 991 (Ala. 1994)* (transfer from parent to child; no presumption "in absence of subservience on the part of the parent"); *Womack v. Womack, 622 N.E.2d 481 (Ind. 1993)* (law "no longer recognizes presumption of undue influence in a transaction between spouses"). *Avery v. Whatley, 670 A.2d 922 (Me. 1996)* (existence of confidential relationship must be established by a preponderance of the evidence); *Thorn v. Taylor, 679 So. 2d 1120 (Ala. App. 1996)* (lack of "dominance" led to finding of no undue influence).

(n31)Footnote 664. *First Interstate Bank of Sheridan v. First Wyo. Bank, N.A. Sheridan, 762 P.2d 379 (Wyo. 1988); Reynolds v. Molitor, 440 A.2d 192 (Conn. 1981); Reynolds v. Owen, 380 A.2d 543 (Conn. Super. 1977).*

(n32)Footnote 665. *Pedersen v. Bibioff, 828 P.2d 1113 (Wash. App. 1992); Wright v. Blevins, 705 P.2d 113 (Mont. 1985); Felonenko v. Siomka, 55 Or. App. 331, aff'd, 653 P.2d 1263 (Or. 1981); Troxell v. Troxell, 563 S.W.2d 135 (Mo. App. 1978). See also Spence v. Griffin, 372 S.E.2d 595 (Va. 1988)* (six elements listed); *Grohn v. Marquardt, 657 S.W.2d 851 (Tex. App. 1983)* (three elements listed).

(n33)Footnote 666. *E.g., Spence v. Griffin, 372 S.E.2d 595 (Va. 1988); Grohn v. Marquardt, 657 S.W.2d 851 (Tex. App. 1983).*

(n34)Footnote 667. *Hill v. Watts, 801 S.W.2d 176 (Tex. App. 1990)* (deed valid until successful suit to set aside deed accomplished).

(n35)Footnote 668. *Spence v. Griffin, 372 S.E.2d 595 (Va. 1988); Holland v. Hoffman, 443 So. 2d 931 (Ala. 1983).*

(n36)Footnote 669. *Akins v. Vermast, 150 Or. App. 236, 945 P.2d 640 (Or. App. 1997); Pedersen v. Bibioff, 828 P.2d 1113 (Wash. App. 1992); Bennion Ins. Co. v. 1st OK Corp., 571 P.2d 1339 (Utah 1977).*

(n37)Footnote 670. *Sheffield v. Andrews, 679 So. 2d 1053 (Ala. 1996)* (signature obtained by fraud); *Nygaard v. Robinson, 341 N.W.2d 349 (N.D. 1983); Bennion Ins. Co. v. 1st OK Corp., 571 P.2d 1339 (Utah 1977).*

(n38)Footnote 671. *Fallon v. Triangle Mgt., 215 Cal. Rptr. 748 (1985); McCoy v. Love, 382 So. 2d 647 (Fla. 1979).*

(n39)Footnote 672. *Pedersen v. Bibioff, 828 P.2d 1113 (Wash. App. 1992).*

(n40)Footnote 673. *Koo v. Robert Koo Wine & Liquor, Inc., 611 N.Y.S.2d 4 (1994)* (defendant signed plaintiff grantor's name without authorization; court characterized as "fraud in factum"); *McCoy v. Love, 382 So. 2d 647 (Fla. 1979)* (fraud in execution limited to "cases where there has been a complete failure of delivery"); *Bennion Ins. Co. v. 1st OK Corp., 571 P.2d 1339 (Utah 1977)* (fraud in execution limited to cases where forgery is involved or conduct "tantamount to forgery"). Lack of delivery and forgery are classic "void" deed cases; the inability of the courts to clearly

articulate the distinction between fraud in inducement and fraud in execution suggests the distinction may be more apparent than real.

(n41)Footnote 674. *Pedersen v. Bibioff, 828 P.2d 1113 (Wash. App. 1992); Nodland v. Plainsmen Petr., Inc., 265 N.W.2d 252 (1978).*

(n42)Footnote 675. *Hanson v. Harding, 429 S.E.2d 20 (Va. 1993)* (familial relationship may give rise to presumption where confidential relationship exists, consideration is grossly inadequate and grantor suffers from weakness of mind); *Pedersen v. Bibioff, 828 P.2d 1113 (Wash. App. 1992)* (confidential relationship).

(n43)Footnote 676. *Clay v. Clay, 501 S.E.2d 208 (Ga. 1998); Lipe v. Thomas, 600 S.W.2d 921 (Ark. App. 1980); Johnson v. Keener, 370 So. 2d 265 (Ala. 1979); Brecel v. Carlstedt, 381 N.E.2d 1174 (Ill. App. 1978).*

(n44)Footnote 677. *Popwell v. Greene, 465 So. 2d 384 (Ala. 1985).*

(n45)Footnote 678. *Royal v. Parado, 462 So. 2d 849 (Fla. App. 1985); Hayden v. Hayden, 378 N.E.2d 631 (Ill. App. 1978).* The special treatment given this type of case is not surprising in light of the manner in which courts treat such a type of case in the context of a "failure of consideration" claim. See discussion *supra* at § 82.09(a).

(n46)Footnote 679. *Schep v. Hess, 770 P.2d 34 (Okla. 1989); Davis v. Weatherington, 514 So. 2d 943 (Ala. 1987); Larsen v. Potter, 571 N.Y.S.2d 121 (1991)* (rescission granted based on mutual mistake concerning boundaries of property); *Greer v. Higgins, 338 So. 2d 1233 (Miss. 1976)* (mistake in inducement). *See also Bascetta v. Bascetta, 470 A.2d 1232 (Conn. App. 1984)* (unilateral mistake induced by other party sufficient for rescission).

(n47)Footnote 680. *See also Gold v. New York State Business Group Inc., 679 N.Y.S.2d 476 (App. Div. 1998)* (mistaken belief that deed was recorded not sufficient); *Jackson v. Reed, 438 So. 2d 750 (Ala. 1983); Miller v. Davis, 423 So. 2d 1354 (Ala. 1982).*

(n48)Footnote 681. *Fox v. Washburn, 451 S.E.2d 476 (Ga. 1994)* (reformation granted on basis of mutual mistake; strong dissent charges that majority holding will "nullify the statute of frauds and the parol evidence rule"); *Kishter v. Seven Courts Community Ass'n, 626 A.2d 993 (Md. App. 1993); Gunzinger v. C. & G. Estates, 610 A.2d 735 (Me. 1992); Bourne v. Lajoie, 540 A.2d 359 (Vt. 1987).*

(n49)Footnote 682. *Reasor v. Putnam County, 615 N.E.2d 131 (Ind. App. 1993), vacated, remanded, Estate of Reasor v. Putnam County, 635 N.E.2d 153 (Ind. 1994); McCoy v. McCoy, 611 So. 2d 957 (Miss. 1992).*

(n50)Footnote 683. *Department of Conserv. v. Nevois, 600 N.E.2d 91 (Ill. App. 1992); United States v. LaRosa, 765 F.2d 693 (7th Cir. 1985).*

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CHAPTER 82 TRANSFERS BY DEED

9-82 Thompson on Real Property, Thomas Editions § 82.13

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§ 82.13 Construction.

[Go To Supp]

§ 82.13(a) Introduction and Comparisons.

§ 82.13(a)(1) Introduction.

Judicial "construction" of instruments encompasses a wide variety of documents -- deeds, wills, contracts. Precisely what is meant by "construction" is the obvious starting point. *The Restatement of Property* defines "construction" as "the ascertainment, in accordance with judicial standards, of the meaning of the language of a will or deed." n684 The *Restatement* continues by identifying the ascertainment of the meaning of language as "this process of construction," and states that the product of this process is the "judicially ascertained intent" of the conveyor. n685 Thus, "construction" is a process of determining the conveyor's "judicially ascertained intent." How a court is to go about making this determination is the next task. According to the Restatement, the "judicially ascertained intent" is "normally determined by the language used in the conveyance, read as an entirety and in the light of the surrounding circumstances." n686 The *Restatement* definition is a useful starting point, in that it emphasizes the "process" oriented nature of the topic; it likewise raises the major issues to be encountered in the process. These will be discussed in greater detail below.

The underlying assumption in cases involving deed construction is that there is a valid deed, i.e., the instrument in question contains the essential elements, meets all formalities requirements, has been duly delivered, and is not subject to "avoidance" on grounds outlined in the previous section. In theory, at least, issues pertaining to validity are separate and apart from issues of construction. After all, if the instrument is not a "deed," there is nothing for the court to construe.

In light of the foregoing discussion, it is surprising to find an occasional reference to a rule of construction which states that a court should construe an instrument in such fashion so as to render the deed valid or operative. n687 When a court is asked to find that language in an instrument is sufficient so as to satisfy the requirements pertaining to words of conveyance n688 or adequate legal description, n689 the court is not "construing" a deed in the usual sense of the term. The court in such case is asked to construe language in order to make the instrument a valid deed. n690 The phenomenon of "construing to validate" occurs in will cases, as well as in deed cases. n691 Whether or not an

instrument is a deed depends upon compliance with rules of law; rules of construction are not designed or intended to deal with issues of validity.

§ 82.13(a)(2) Construction of Wills and Contracts Compared.

While commentators have examined the theories of construction that underlie the process of will and contract construction, the topic of deeds is usually obliquely referred to. In attempting to understand the theory of construction applicable to deeds, it may be helpful and useful to contrast the general theories of construction applicable to wills and contracts. n692

In the law of wills, courts refer to the so-called pole star rule of construction: It is the duty of the court to ascertain and give effect to the intention of the testator.

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LEXIS: constru! w/10 testator w/5 intent w/2 control!

As a unilateral instrument, a will represents the testator's intent; it is the testator's intent that is controlling. n693 Precisely what evidence should be taken into consideration by the court is dependent upon whether courts engage in "strict" or "liberal" theories of construction. The "strict" theory is embodied in the so-called "plain meaning" rule, whereby the court excludes extrinsic evidence on the theory that the language of the will is unambiguous and not subject to construction. The "liberal" theory emphasizes the search of the subjective meaning of the testator's language and looks to evidence outside the will, typically the "circumstances of its formulation." n694

A contract is the result of negotiation and is a bilateral agreement. Resort to the subjective intent of the parties is problematic, because the two parties are likely to have divergent intents. Given this dilemma, the prevailing contract interpretation theory is based on an "objective" theory of contracts. n695

A deed, if donative in nature, is similar to a will. As a conveyance, a deed might be regarded as the unilateral act of the grantor just as a will is regarded as the unilateral act of the testator. A deed may, and often does, contain numerous covenants. The contractual undertakings in a deed, supported by consideration, involve bilateral promises. This deed, like many leases, serves two functions -- as a conveyance and as a contract.

Construction of wills and construction of contracts are based upon different theories of interpretations. Deeds are susceptible of being fitted under either theory, as the *Restatement of Property* has recognized. According to the *Restatement*, to the extent that *any* instrument contains a "contractual aspect," an additional element affects the process of construing the instrument: "a conveyor is bound by the meaning which he reasonably should have anticipated that the conveyee would derive from the language used." n696 In short, the fact that there are "donative and non-donative conveyances," according to the Restatement, affects the process of construction.

The cases construing deeds do not reflect the "donative/non-donative" distinction, but do evidence some confusion as to whether a deed should be treated more like a will or more like a contract. This confusion begins with the most basic rule applicable to deeds -- the pole star rule.

§ 82.13(a)(3) The Pole Star Rule.

The pole star rule of construction in deed cases begins with the premise that a court should effectuate intent, but the question immediately arises as to *whose* intent the court should be effectuating. Viewing a deed as a conveyance by the grantor, the deed is similar to a will. From this perspective, it makes perfect sense for courts to enunciate a pole star rule of construction which emphasizes effectuating the *grantor's* intent. n697

COMPUTER-ASSISTED RESEARCH

LEXIS: object w/10 deed w/10 ascertain w/5 intent! w/5 grantor

On the other hand, a deed may be considered a bilateral transaction since two parties are always involved -- the grantor and the grantee. Then, too, many deeds contain covenants. By emphasizing the contractual and bilateral aspects of the deed, it makes perfect sense for most courts to say, as they do, that the role of a court in a deed construction case is to effectuate the intent of the *parties*. n698 Of course, the prototypical deed construction case presents a situation where the grantor's and the grantee's interpretations conflict; it is not possible to effectuate both parties' intent, given the fact that each party is proposing a method of interpretation based on that party's (supposed or real) intent.

COMPUTER-ASSISTED RESEARCH

LEXIS: object w/10 deed w/20 ascertain w/5 intent! w/5 parties

The critical issues in deed construction cases do not relate to the issue of whose intention is to be ascertained, but as to how the court will go about ascertaining that intent. More specifically, the critical issues are: (1) what evidence will the court consider; (2) what "rules of construction" exist; (3) why do they exist, and (4) when they will be applied.

To say that the deed will be construed according to the intent of the parties does not indicate the process to be used, nor does it indicate what evidence will be considered. The latter considerations constitute the real issues in deed construction cases. The pole star rule serves as little more than a ritual function in describing the judicial role in deed construction cases. To the extent that the pole star rule is meaningful, it is in conjunction with the distinction between rules of construction and rules of law. n699 Intent of the parties will be not effectuated where to do so would violate a rule of law. n700

§ 82.13(a)(4) The Language of the Instrument.

All courts agree that the starting point in the search for the parties' intent is the language of the deed. n701 In this process, the court examines all parts of the deed in the attempt to ascertain the meaning of the language used in the deed. n702

COMPUTER-ASSISTED RESEARCH

LEXIS: constru! w/2 deed w/10 intent w/8 language

After the court has carefully scrutinized the deed language and its meaning in light of the parties' contentions, the court will reach one of two possible conclusions: (1) the parties' intention "clearly appears" from the language of the deed and the court renders its decision or (2) the deed language is deemed "ambiguous" and the court must now turn to other evidence or rules of construction to cure the ambiguity.

Under the first conclusion, the court engages in the "plain meaning" theory of construction: Where the language and its meaning is adjudged definite and unambiguous, the court is required to give effect to such language, even though this meaning may not be, in fact, what the parties intended. n703 When a court finds that the parties' intent is revealed by the plain and unambiguous language of the instrument, technically the deed is not being construed, since there is no language requiring construction. n704 This methodology is sometimes called the "four corners" approach to deed construction, because the initial step in the process is "look to the four corners of the document." n705 In concluding that the deed language is clear and unambiguous, courts emphasize two points: (1) rules of construction are not applicable n706 and (2) the construction of a deed is a matter of law to be determined by the court. n707

COMPUTER-ASSISTED RESEARCH

LEXIS: constru! w/10 deed w/10 first w/10 four corners

The second conclusion, a finding of ambiguity, opens the door to the receipt of extrinsic evidence and the application of rules of construction. n708 Once this occurs, courts are more likely to characterize the issue as one of fact, rather than law. n709 Given the dramatic consequences flowing from the ambiguous/ unambiguous distinction, the process by which a court makes this determination is crucial. How a court goes about making this distinction and resolving it lies at the heart of the process of deed construction. While it may be difficult to explain the process, other than to say that a deed is ambiguous or unambiguous simply because a court says it is, there are some judicial statements about the process of determination that may shed some light on it.

The determination of whether a deed is ambiguous or unambiguous is a matter of law to be determined by the court. n710 The practical consequences flowing from this are truly significant: trial courts decide the critical issue rather than juries; appellate courts review the critical issue de novo. By confining the evidentiary search to the "four corners," and by giving appellate courts a rather free hand in their review, the appellate courts exert great control over the process of deed construction; whether that policy is the appropriate one probably depends upon how strongly one believes in the "plain meaning" theory of construction, and how disposed one is to freely admit extrinsic evidence.

The heart of the matter at hand is the concept of "ambiguity." When is a deed ambiguous? Courts have formulated various tests for ambiguity: (1) "when good arguments can be made for either of several contrary positions as to the meaning of a term"; n711 (2) "when language is of doubtful import, admits of being understood in more than one way, admits of two or more meanings, or refers to two to more things at the same time" n712 and (3) "only when the application of pertinent rules of construction leaves it genuinely uncertain which of two reasonable meanings is the proper one." n713 There are also judicial statements as to when a deed is not ambiguous: (1) "a deed which accurately and correctly describes the land and interest conveyed" n714 and (2) "if there is no reasonable doubt as to the meaning of the words." n715 Just because a dispute has arisen or parties disagree as to the meaning of the language, does not, in and of itself, render the deed ambiguous. n716

COMPUTER-ASSISTED RESEARCH

LEXIS: (two or several) w/10 meaning w/35 deed w/10 ambigu!

However stated, the tests are not helpful either in terms of explaining a process or articulating a policy. The conclusion that a deed is ambiguous appears, in most cases, as little more than an *ipse dixit* of the courts. If there is any theme to the approach of the courts, it is the heavy emphasis placed on the language of the instrument. There are policy reasons for this, but they are seldom discussed. At the conclusion of the discussion, this topic will be addressed. Next to be considered are the methods by which courts go about resolving ambiguities in deeds. This brings into play the role of extrinsic evidence and the rules of construction, general and specific.

§ 82.13(b) Resolving Ambiguities.

§ 82.13(b)(1) Extrinsic Evidence.

The modern day cases do not distinguish between "patent" and "latent" ambiguities when discussing the admissibility of extrinsic evidence. n717 This age-old distinction between ambiguities on the face of the instrument (patent), and those arising when the deed language is applied to extrinsic circumstances (latent), restricted the introduction of extrinsic evidence to cases involving so-called latent ambiguities. n718

Once a finding of ambiguity occurs, the door is opened to the admission of extrinsic evidence, namely the situation and circumstances of the parties at the time of execution. n719 The courts will generally look to subsequent acts of the parties as well, as these acts indicate how the parties themselves construed the deed. n720

COMPUTER-ASSISTED RESEARCH

LEXIS: deed w/20 ambigu! w/30 situation w/5 circumstances w/30 parties

A finding of ambiguity not only opens the door to the receipt of extrinsic evidence, it also allows a court to apply "rules of construction" in attempting to resolve the ambiguity. Surrounding circumstances and rules of construction, for most courts, are on equal footing. n721 Depending upon the type of case, a court may rely exclusively on the extrinsic evidence n722 or rules of construction. n723 Occasionally, a court will establish a hierarchy; either one favoring extrinsic evidence over rules of construction, n724 or rules of construction over extrinsic evidence. n725

There are numerous rules of construction applicable to deeds. The general rules seem to be little more than ritual incantations as courts mouth them along the way in their decision making process. The specific constructional rules tend to operate more in the fashion of "true rules of construction," i.e., as creating presumptions which greatly affect the outcomes of a case.

Practically all of the constructional rules are well established and non-controversial. All of these rules are subordinate to the pole star rule of construction: ascertaining the intention of the parties. n726 Although the rules are being applied in cases where the parties' intent is not clear, the basis for the various rules is *implied* intent. Based on what is regarded as the normal expectations of persons similarly situated, the courts believe the rules carry out the normal expectations of the parties. n727 When it comes to some of the more specific constructional rules, the rationales are based on public policy grounds that look less to the intent of the parties and more to societal interests.

COMPUTER-ASSISTED RESEARCH

LEXIS: purpose w/10 rules w/2 construction w/10 intent! w/5 parties

§ 82.13(b)(2) General Rules of Construction.

Blackstone listed "a few general rules and maxims" laid down by the courts for the construction and exposition of deeds and wills. n728 Most of these general rules survive to the present day. The general rules of construction, as articulated in modern day deed construction cases, are:

(1) The intent of parties must be ascertained from the whole instrument and not from isolated portions thereof. n729

(2) The court will attempt to harmonize all parts of a deed so that none of the provisions are rendered meaningless and none of the language is treated as surplusage. n730

(3) While the courts routinely state that in resolving an ambiguity, the deed will be construed against the grantor and in favor of the grantee, n731 this conclusion is based on the more precise rule that a deed will be construed against the party responsible for its preparation. n732

COMPUTER-ASSISTED RESEARCH

LEXIS: deed w/5 construed w/5 against w/5 grantor w/5 grantee

The first two rules appear as little more than guidelines for interpreting the language of the instrument. They furnish

starting points for analysis, but do not necessarily indicate which interpretation should be preferred. The third constructional rule has more potential effect on the process of construction, since it points in one direction or another with regard to the two possible constructions: If a court is to "strictly construe" a deed "against" a grantor, presumably that means that the grantor's interpretation is less favored than the grantee's.

§ 82.13(c) Other Issues of Ambiguity.

§ 82.13(c)(1) Specific Constructional Rules.

The constructional issues that arise out of ambiguous deed language are many and varied. Certain types of constructional issues have recurred with much greater frequency than others. In dealing with these recurring issues, the courts have fashioned fairly specific and well-developed rules of construction. The two most prominent issues which courts have addressed are those pertaining to: (1) the estate or interest conveyed by the deed and (2) the legal description, which, in the ordinary case, relates to the boundaries of the property conveyed. The rules of construction that courts employ in deciding issues of this kind will be considered separately.

§ 82.13(c)(2) Estate or Interest Conveyed.

Blackstone wrote that the function of the habendum clause of a deed was "to determine what estate or interest is granted by the deed." n733 However, Blackstone added, the habendum clause could not divest an estate created in the granting clause; the habendum language was deemed "repugnant" to the granting language and would be void. n734 By 1830, Chancellor Kent noted, the habendum clause had "degenerated into a mere useless form." n735 At the same time, however, Kent acknowledged that the deed forms continued to follow the "formal and orderly parts" format of the ancient writers, n736 which format included the habendum clause. Well into the 20th century, deed forms continued the traditional format, with the habendum clause as an integral part. A significant number of cases arose presenting conflicts between the granting clause of a deed and the habendum clause with regard to the estate or interest conveyed. The courts developed rules of construction pertaining to these conflicts. n737 The more recent cases construing inconsistent habendum and granting clauses rejected the notion of dividing deeds into formal parts, and simply adopted the more general rule of carrying out the intention of the parties. n738 Because the habendum clause is not currently widely utilized, there are few modern day cases discussing the habendum clause and the nature of the estate granted. n739

It is technically possible for a deed to contain a description of the estate conveyed that is so vague and indefinite as to result in the purported transfer being declared void. n740 This is another example of the "construe to validate" phenomenon, and is rarely encountered.

COMPUTER-ASSISTED RESEARCH

LEXIS: deed w/10 descri! w/15 vague w/15 void

The background for the present discussion is the common law doctrine of estates, which distinguishes between present possessory interests and future interests, and between possessory estates and non-possessory interests. The process of determining what estates or interests were created by the deed language is primarily one of classification. In the usual case, the court is called upon to determine whether the deed language, alleged to be ambiguous, creates one type of estate or another. If a court finds the deed language to be "unambiguous," the process of construction does not begin; the court simply pronounces judgment as to the estate or interest conveyed. In the present discussion the assumption is that the deed language is ambiguous, i.e., susceptible to two possible interpretations. Because of the ambiguity, the court turns to rules of construction to assist it in the process of construing the language.

There are two principal rules of construction that modern day courts apply in deed cases in determining the estate or

interest conveyed. The first rule is that the entire estate or interest of the grantor passes to the grantee, unless there is specific language to the contrary. n741 The second rule is that the deed language will be construed so as to pass the "greatest estate" that the grantor is capable of conveying. n742 Since grantors usually own an estate in fee simple, and the "greatest estate" in the law of estates is a fee simple, the combination of the rules have the effect of a presumption in favor of a fee simple estate passing to the grantee.

The constructional rule favoring a fee simple would be significant in cases in which the issue was whether the language created a fee simple or life estate, but in modern case law, the issue seldom arises. n743 In modern case law, the abandonment of railroad rights of way has led to a flurry of litigation over century-old deeds, and the nature of the estate or interest granted to the railroad companies. Although these cases are sometimes labelled as "fee v. easement" cases, that is technically inaccurate. The question arising in the cases is whether the deed language created a non-possessory interest in the nature of an easement or some type of possessory fee simple estate. The cases on point are legion, and the results vary from jurisdiction to jurisdiction as the cases are very fact-sensitive, heavily dependent upon the exact language of the grant. n744 As will be discussed below, the well-recognized presumption of a fee simple passing under the grant might be given lesser deference in these types of cases due to other public policy considerations.

There are a host of constructional issues common to deeds and wills relating to the doctrine of estates. These encompass a wide variety of topics which are beyond the scope of the present discussion. n745 The reader is referred to other chapters of this work for consideration of these topics. n746

The older deed forms, in the habendum clause, included a reference to "tenements, appurtenances and hereditaments" passing to the grantee along with the estate. Deed forms in current use are not likely to include a habendum, but may still contain references to "appurtenances," and occasionally, to "tenements" and "hereditaments." n747 The general rule is that even if these interests are not mentioned, they pass to grantee along with the land described. n748 An occasional case presents a constructional issue as to what constitutes an appurtenance in the context of deed language, n749 or what passes as an appurtenance. n750

§ 82.13(c)(3) Legal Descriptions.

A legal description may be so ambiguous so as to render the deed invalid, as previously noted. n751 The more common situation of faulty legal description does not involve validity, but construction: the deed's legal description creates doubt as to the precise dimensions of the property conveyed. Many of the cases of this type are the classic boundary line disputes, involving adjoining property owners. Specific constructional rules have been developed by the courts to deal with the recurrent description problems.

Ambiguities often arise in the context of a "metes and bounds" description. Metes and bounds descriptions typically employ natural or artificial monuments and course and distance designations, beginning from an identified starting point and ending with the last deed call that "closes," i.e., returns to the point of beginning. When the deed calls are located on the surface of the earth, conflicts between deed calls may arise, or the description may not "close." To resolve these ambiguities and conflicts, the courts have developed an order of preference governing inconsistent descriptions: Courts will look first to natural objects or landmarks, then to artificial monuments or established lines, then to boundary lines of adjacent owners, next to course and distance, and finally, to quantity. n752 The hierarchy just listed is well accepted and recognized. It should be emphasized, however, that the rules given are subsidiary rules of construction employed to carry out the intent of the parties. The priorities listed will not be given effect if to do so would produce results that are "absurd," or manifestly inconsistent with the parties' intention. n753 The great number of cases applying these rules is indicative of the necessity of drafting a metes and bounds description with great care.

COMPUTER-ASSISTED RESEARCH

LEXIS: natural objects w/20 monuments w/20 boundary lines

Property bordering upon a street, alley or highway presents a unique, but recurring, constructional issue. The grantor of the property oftentimes owns not only the property bordering on the street, alley, or highway, but also owns to the center of the street, alley, or highway. When the grantor conveys the land adjoining the street, alley or highway, the recurring question is whether the transfer of the property bordering on the street, alley or highway carries with it the grantor's interest in the street, alley or highway.

In dealing with cases of this type, the courts have developed and applied the following rule of construction: the conveyance of property bordering on a street, alley or highway carries with it the grantor's interest in the street, alley or highway, *unless* the instrument shows an intent not to convey such interest. n754 As will be discussed below, this rule is based upon strong public policy considerations. A similar treatment is given to property bordering upon a railroad right of way, n755 or a lake or stream. n756

COMPUTER-ASSISTED RESEARCH

LEXIS: grantor w/10 presum! w/15 convey! w/15 interest w/5 (street or alley or highway)

§ 82.13(d) Merger Doctrine.

In the typical real estate purchase, a contract of sale is entered into by the seller and purchaser, and, at closing, the sale is consummated by the seller conveying title by executing and delivering a deed to the purchaser. In determining the legal rights of the parties thereafter, the so-called merger doctrine becomes relevant: the contract provisions "merge" into the deed, and the rights of the parties are thereafter governed by the language of the deed. n757 The theory is that the acceptance of the deed is, prima facie, full performance of the contract to convey. n758 It is conclusively presumed that the deed represents the final agreement of the parties. n759 While the merger doctrine is universally accepted, it is only the starting point, inasmuch as the exceptions to the rule are at least as important as the rule itself.

COMPUTER-ASSISTED RESEARCH

LEXIS: contract w/20 closing w/20 merge w/10 deed

It is clear that the merger doctrine will not be applied if the court finds there is fraud or mistake involved. n760 This exception is relatively easy to apply. On the other hand, courts generally find that the merger doctrine will not apply if there are collateral or independent agreements that the parties intended to survive the delivery of the deed. n761 In other words, if the collateral agreement was not to be performed or satisfied by the execution of the deed, the agreement is "collateral" and is independent of the deed. n762 Given the fact that the main function of a deed is to convey title, collateral agreements are usually those matters not related to title. n763

COMPUTER-ASSISTED RESEARCH

LEXIS: deed w/50 doctrine w/5 merge! w/15 fraud w/20 mistake

The merger doctrine is sometimes referred to as a "rule of law"; n764 that characterization is apt if a court determines that the merger "rule" applies. However, the exceptions to the rule are almost co-extensive with the rule. These exceptions are very heavily dependent upon the intentions of the parties. n765 Thus, the applicability of the exceptions to the rule are treated as constructional issues, with an indication that the issue involved is one of fact, not of law. n766 Cases involving the merger doctrine and the exceptions to it are part vendor/purchaser law; part deed law. Given the fact that this area bridges contract law and property law, one should not be surprised to find courts struggling to find a coherent rationale for the rule and its exceptions.

COMPUTER-ASSISTED RESEARCH

LEXIS: deed w/50 doctrine w/3 merger w/5 exception

§ 82.13(e) Policy Considerations in Deed Construction.

The rules of law pertaining to the formalities of execution and essential elements of a deed form the basis for the substantive law of deeds. Those foundational rules are of utmost importance in the drafting stage, since these rules address the issue of validity of the instrument. Drafting considerations will be addressed in the succeeding subsection.

As important as the substantive rules are to the law of deeds, it appears in modern day law that the litigated appellate cases are more likely to address issues of construction rather than validity. n767 This is not surprising if one considers that the substantive rules of deed law pertaining to validity are mainly statutory, and that the requirements for a valid deed are fairly minimal. Legislation encouraging the use of statutory deed forms has assisted as well, in insuring that the requirements imposed by law have been met. The substantive law of deeds has become more simplified and less formalistic, easier to understand and to apply in practice.

By contrast, study and discussion of the theory and rules pertaining to deed construction have been neglected. The settled rules of deed construction are seldom questioned; even rarer is there an inquiry into the policy basis for the constructional rules that are being applied. The present discussion is intended to provide insights as to the process of deed construction and to raise questions regarding the policy bases for the rules of construction in current use.

The starting point in re-examination of this topic is what is meant by the process of construction. Viewed in the broad sense of that term, construction of a deed consists of three elements: (1) the idea in the minds of the parties to the deed; (2) the language of the deed and (3) the external object, person or legal consequences referred to by the words. Consideration of the meaning of the language of every deed necessarily involves the process by which the words are identified with the things to which they refer. This process of identification may be referred to as "construction." If one accepts the foregoing meaning, all deeds are subject to construction and, in every case, one must go outside the "four corners" of the instrument to make the identification.

Under the traditional manner in which courts go about construing deeds, the critical step is a finding of ambiguity, which opens the door to rules of construction and consideration of extrinsic evidence. Under the broader view of construction, the finding of ambiguity may not occur; the relevant inquiry is not initially limited to the deed language, inasmuch as the process of identification always involves relating the words of the deed to reality.

COMPUTER-ASSISTED RESEARCH

LEXIS: rules w/3 construction w/5 necess! w/10 ambigu!

The general rules of construction begin with the pole star rule -- the touchstone -- that of carrying out the intention of the parties. The comparable rule for will construction is carrying out the intention of the testator. This pole star rule is described by one author as a process that, in the main, turns out to be "purely fictitious," for the reason that the testator never had any intention with regard to the particular point in question. n768 In deed construction cases, when courts speak of effectuating the *parties'* intent, the problem is even more complicated: even assuming that one or both of the parties had something in mind using certain language, what does the court do when the intentions of the parties conflict? The reason the parties are before the court is precisely for the reason that they do not agree as to what was intended. To say that the starting point in deed construction cases is to effectuate the intention of the parties suggests that courts are engaging in a process more closely resembling the process of interpretation for contracts. n769 One of the other general rules of construction, identified above, illustrates the confusion as to whether deeds are to be construed more like contracts than wills. The rule that a deed will be "construed strictly" against its preparer indicates that a contract

analysis is being applied. Yet, many decisions simply assume that the grantor is responsible for preparation of the deed, and announce a rule of "strict construction" against the grantor.

Analysis of the rules of construction applicable to deeds tends to follow the comparable model of analysis applied to wills: the starting point is the pole star rule (giving effect to "intentions of the parties" or the "intention of the testator"). From this follow subsidiary rules of construction designed to assist the court in ascertaining the intention of the parties or the intention of the testator. In will construction cases, the underlying basis for a rule of construction can be based on what the court assumes the typical testator would desire in like circumstances. n770 This inquiry may be the safest guide in attempting to ascertain the subjective intention of the testator. Other commentators have questioned, however, whether the adoption of these subsidiary rules of construction are in fact more motivated by considerations of policy than the carrying out of the testator's subjective intent. n771

When it comes to the process of construing deeds, the inquiry as to the basis of the subsidiary rules of construction is more problematic. Whereas in will cases one can speak of subsidiary rules of construction as being based on what the average testator would have intended under like circumstances, n772 in deed cases it is more difficult to hypothesize the situation of the "typical grantor" and the "typical grantee." n773

Some of commentators who have examined the process of will construction, and the stated bases for the rules of will construction, conclude that it would be preferable for the courts to recognize openly the various policies behind the rules of construction. n774 The various rules of will construction, it is said, "necessarily contain something more than guides for finding subjective intent." n775 When it comes to deed construction, there is even more justification and basis for moving away from an analysis based on subjective intent, inasmuch as the fact that there are two parties makes the process of ascertaining and giving effect to subjective intent practically impossible. n776

With regard to the oft-repeated general rules of will construction, it is only the rule pertaining to "strict construction" that seems to have any genuine effect on the manner in which courts construe deeds. n777 When it comes to the most widely cited specific rules of construction, however, the policy considerations are often quite explicit and detailed.

The constructional rule which presumes that the grantor has conveyed the "greatest estate" possible is but one of many rules n778 which has as its goal the promotion of alienability, a policy deeply ingrained in the common law. n779 The constructional rules which courts have established pertaining to deed calls in ambiguous legal descriptions n780 are heavily fact dependent, as the court attempts to place itself into the position of the parties to the conveyance. In cases of this type, the type of dispute is such as to allow the court to utilize the rules of construction as aids to carrying out the parties' intentions.

The public policy considerations underlying a constructional rule are most evident in the cases in which property bordering upon a street, alley or highway is conveyed. As previously noted, n781 the presumption is that the grantor is conveying whatever interest the grantor owns in the street, alley or highway, along with the described property. This common law rule is based on the public policy of preventing "strips and gores," which policy is clearly and forcefully articulated in the case law. n782 This constructional rule is a "strong" rule of construction, in that there must be clear and explicit language to the contrary to prevent the rule from applying. n783

COMPUTER-ASSISTED RESEARCH

LEXIS: grantor w/10 presum! w/15 conve! w/15 interest w/5 (street or alley or highway)

Given the clearly articulated and strongly held views of the courts pertaining to the "strip and gore" doctrine, it is somewhat surprising to find that the courts have not applied this rationale in other deed construction cases. Recall that one of the more litigated deed construction issues in modern day law pertains to the nature of the estate granted to railroads for the construction and maintenance of a right of way. n784 The standard rules of deed construction are at

odds in cases of this type: the rule presuming the "greater estate" would point in favor of the language being construed as a possessory fee simple estate, rather than as an easement. On the other hand, the "strip and gore" doctrine would favor an easement construction. Given the fact that the two well-recognized and established rules of construction conflict, perhaps it is not surprising that the courts go back to the "intention of the parties" theory of construction, even though the instrument being construed may have been executed over 100 years ago. If the two rules of construction are deemed in conflict, the policies underlying the rules need to be examined and weighed in the context of the particular facts of the case. To decide the case upon the basis of the "intent of the parties" is subject to the criticism that the process engaged in is "entirely fictitious." Much of the same criticism may be directed at those cases in which the courts are construing language pertaining to "exceptions" and "reservations." n785 In these types of cases, the public policy considerations relating to alienability and "strips and gores" are present as well. The courts, however, once again, get mired in considerations of the "intentions of the parties," and fail to consider the relevant policy considerations.

The most vexing question pertaining to constructional issues goes back to the question of ambiguity and the admissibility of extrinsic evidence. n786 By subscribing to the "plain meaning" rule in the interpretation of deed language, the courts in deed construction cases have tended to emulate the approach they have taken in will construction cases. This approach is somewhat understandable, if one considers the fact that deed construction issues go back to the English common law at a time when the deed was being utilized primarily as a family settlement device.

In the present era, there is a growing recognition that in many respects the deed is more like a contract and should be construed by the rules governing contracts. The modern day deed is more likely the culmination of an arm-length business transaction than an inter-family gratuitous transfer. Viewed from a contract-based perspective, deed construction cases should mirror the process courts employ in the interpretation of contracts. In terms of legal theory, this would translate into a greater utilization of and resort to the parol evidence rule. There are an increasing number of cases where courts, faced with the allegation that a deed is ambiguous and needs construction, are resorting to the parol evidence rule to reject the proffered evidence. n787 Along these same lines, the number of recent cases raising issues pertaining to the "merger" rule continue to increase. As a result, courts are being forced to re-examine the underlying policy basis for the "merger" rule. It should not be surprising to find that, while some courts still refer to the "merger" rule in property terms, n788 more and more are the decisions pertaining to merger beginning to take on the appearance of a contracts case. n789

COMPUTER-ASSISTED RESEARCH

LEXIS: plain import w/40 parol w/2 evidence w/30 deed

The growing tendency to construe deeds as contracts should not be surprising, particularly in light of what has occurred in landlord/tenant law. Leases were traditionally regarded as conveyances and governed by property rules. There has been a marked trend in recent years to apply contract principles to leases. A fair number of the deed cases presenting construction issues arise out of the transfer of an easement. In most instances, the easement was bargained for and the deed transferring the easement constituted the performance called for by a contract. Given these circumstances, the tendency of the courts to look to contract principles of interpretation is a natural evolutionary development.

This is not to suggest, however, that the law of contract is the only pathway to follow in deed construction cases. Recall that some deeds are gratuitous transfers, the product of the unilateral act of a grantor. In deed construction cases involving transfers of this type, the contract analogy may be inappropriate.

The general rules of deed construction are generally not outcome-determinative and, therefore, are of limited effect. The more specific rules of deed construction, when examined carefully in terms of their rationales, are not based on "fictitious intent," but on factors that are generally regarded as evidencing sound public policy. While courts should be loathe to impose their own notions of public policy in construing a deed, there are certain circumstances where, it appears, the courts are explicit in articulating the public policy factors entering into the constructional process. So long

as the courts keep within proper limits, and the rationales are clearly articulated, the judicial role is properly served. It is doubtful that the legislature, which created the substantive rules for the validity of a deed, can come up with a set of constructional rules that would provide the necessary certainty and flexibility.

FOOTNOTES:

(n1)Footnote 684. 3 Restatement of Property § 241(1) (1940). Chapter 18 of the Restatement, entitled "General Rules of Construction," is part of Division III -- Future Interests. The general rules of Chapter 18, insofar as they describe the process of construction and indicate the role of extrinsic evidence, have applicability beyond the narrow topic of "future interests."

(n2)Footnote 685. *Id.*

(n3)Footnote 686. *Id.* at § 242.

(n4)Footnote 687. *See also Vigil v. Sandoval, 741 P.2d 836 (N.M. App. 1987); Jones v. Cox, 629 S.W.2d 511 (Mo. App. 1981).*

(n5)Footnote 688. *See* § 82.08(b), *supra*.

(n6)Footnote 689. *See* § 82.08(c), *supra*.

(n7)Footnote 690. Another example of "construing to validate" is the problem arising from language in the instrument which states that the instrument is to be effective from the date of the grantor's death. This matter will be explored in § 83.03(c), *infra*.

(n8)Footnote 691. In will cases, there is a two-step process: First the instrument is admitted to probate and becomes a "will." Secondly the will is "construed." This neat two-step process suffices in the ordinary will construction case. However, when an informal instrument is offered for probate and the question is whether the requirement of testamentary intent has been met, the courts are forced into the process of "construing" the language of the proffered instrument. If the court finds the requisite testamentary intent, the instrument has been "construed" into being a will. Usually in cases of this type the issue becomes one of admissibility of extrinsic evidence. *See, e.g., Kauffman's Will, 76 A.2d 414 (Pa. 1950).*

(n9)Footnote 692. There is a technical difference between "interpretation" and "construction" in will cases. *See* Atkinson, *supra* n.130, 809-814. In contract law, what is called "construction" in the Restatement of Property is referred to as "interpretation" in the Restatement of Contracts. Restatement of Property § 241, cmt. e.

(n10)Footnote 693. Lewis Simes & Allen Smith, The Law of Future Interests § 462 (2d ed. 1956).

(n11)Footnote 694. Atkinson, *supra* n.130, at 807-808; Restatement of Property § 242 (1940).

(n12)Footnote 695. The Restatement of Property states that in regard to "two-party commercial transactions," the conveyor is bound "by the meaning which he reasonably should have anticipated that the conveyee would derive from the language employed." Restatement of Property § 241, cmt. c (1940).

(n13)Footnote 696. Restatement of Property § 241, cmt. d (1940).

(n14)Footnote 697. *See, e.g., Lake View Acres Dev. Co. v. Tindal, 412 S.E.2d 457 (S.C. 1991); Seseney v. Jeffrey, 799 S.W.2d 636 (Mo. App. 1990); Skoog v. Fredell, 332 N.W.2d 333 (Iowa 1983).* Some language from the decisions indicates doubt as to whose intent the court should be looking to. *See, e.g., Hartman v. Potter, 596 P.2d 653 (Utah 1979)* (object of construction is to ascertain intention of the parties, "especially that of grantor"); *Saxon v. Johnson, 393 So. 2d 1007 (Ala. App. 1980)* (court is to ascertain intention of the parties, "especially the grantor"), *cert. denied, Ex*

parte Johnson, 393 So. 2d 1012 (Ala. 1981); Wilson v. Brown, 897 S.W.2d 546 (Ark. 1995) (construction of granted easement); *Williams v. Brown, 267 Ga. 215, 476 S.E.2d 741 (Ga. 1996)* (gratuitous transfer).

(n15)Footnote 698. *See, e.g., Nature Conservancy v. Clayton Kolb, 853 S.W.2d 864 (Ark. 1993); Milligan v. Milligan, 624 A.2d 474 (Me. 1993); Harris v. Ski Park Farms, Inc., 844 P.2d 1006 (Wash. 1993); Crum v. Butler, 601 So. 2d 834 (Miss. 1992); Glover v. Giraldo, 824 P.2d 552 (Wyo. 1992); Crockett v. McKenzie, 867 P.2d 463 (Okla. 1994); Sword v. Sword, 620 N.E.2d 199 (Ohio App. 1993); Foundation for Preservation of Historic Georgetown v. Arnold, 651 A.2d 794 (D.C. App. 1994)* (deeds, *like contracts*, to be construed according to intention of the parties). Recent cases interpreting deed language and the right to strip mine have both emphasized that is the intent of the *parties* that govern. *See Graham v. Drydock Coal Co., 667 N.E.2d 949 (Ohio 1996); Empire Coal Min. & Dev., Inc. v. Department of Envtl. Resources, 678 A.2d 1218 (Pa. Cmmw. 1996).*

(n16)Footnote 699. As to which, see § 82.05(d), *supra*.

(n17)Footnote 700. If one follows the technical distinction between "interpretation" and "construction," the process of determining the meaning of the language is "interpretation"; the process of determining the consequences of that meaning is "construction." *See* Atkinson, *supra* n.130, at 809-814. In deed cases that distinction has not been followed. As an example of a court construing an instrument and then determining its legal effect, one example in the perpetuities area will suffice: A deed, in addition to vesting in the grantee, purports to give the grantor "an option to repurchase" for a fixed price. If this option is unlimited in duration, it is violative of the common law rule against perpetuities. If, however, the court "construes" the deed as creating a right of repurchase that is personal to the grantor, the rule against perpetuities is not violated. The first step, determining whether the option is personal to the grantor, presents a classic deed "construction" issue. If the intent of the parties, as determined by the court, is that the option is not personal to the grantor, that intent cannot be given effect because to do so would violate a positive rule of law. The "intent of the parties" may be the "touchstone," as one court put it, but the authoritative construction may end up invalidating the instrument. Presumably this result is not ordinarily intended by the parties.

(n18)Footnote 701. *Smith v. Nugget Exploration, Inc., 857 P.2d 320 (Wyo. 1993); Smith v. Smith, 622 A.2d 642 (Del. Sup. 1993); Lake View Acres Dev. Co. v. Tindal, 412 S.E.2d 457 (S.C. 1991); Gilich v. Mississippi State Hwy. Comm'n, 574 So. 2d 8 (Miss. 1990); Sally-Mike Props. v. Yokum, 332 S.E.2d 597 (W. Va. 1985).*

(n19)Footnote 702. Many courts emphasize that in interpreting the language of a deed, the question is not what the parties may have *intended* to say, but the meaning of what they *did* say. *American Trading Real Estate Props., Inc. v. Town of Trumbull, 574 A.2d 796 (Conn. 1990); Withington v. Dick, 572 A.2d 912 (Vt. 1990). Smith v. Williams, 779 S.W.2d 479 (Tex. App. 1989), rev'd, 786 S.W.2d 665 (Tex. 1990); Modrzynski v. Wolfer, 651 N.Y.S.2d 782 (App. Div. 1996)* ("Intent" at issue is objective intent of the parties).

(n20)Footnote 703. *Concord Oil Co. v. Pennzoil Exploration & Prod. Co., 878 S.W.2d 191 (Tex. App. 1994)* (expressed intention of parties in deed "may not have been the parties' subjective intent"); *Vines v. McKenzie Methane Corp., 619 So. 2d 1305 (Ala. 1993); Isbrandtsen v. North Branch Corp., 556 A.2d 81 (Vt. 1988); Pocohontas Land Corp. v. Evans, 332 S.E.2d 604 (W. Va. 1985); Amos v. Coffey, 320 S.E.2d 335 (Va. 1984).*

(n21)Footnote 704. *McDonough Co. v. E.I. DuPont de Nemours & Co., 280 S.E.2d 246 (W. Va. 1981). See also Smith v. Smith, 622 A.2d 642 (Del. Super. Ct. 1992)* (if no reasonable doubt as to the meaning of the words of the deed, court's role is limited to application of the meaning of the words).

(n22)Footnote 705. *Gilich v. Mississippi State Hwy. Comm'n, 574 So. 2d 8 (Miss. 1990); Norken Corp. v. McGahan, 823 P.2d 622 (Alaska 1991).* This approach is particularly evident in the case law of Texas. *See, e.g., White v. White, 830 S.W.2d 767 (Tex. App. 1992); Temple-Inland Forest Prods. Corp. v. United States, 988 F.2d 1418 (5th Cir. 1993)* (applying Texas law of deed construction); *Hart v. United States, 945 F. Supp. 1009 (E.D. Tex. 1996)* (applying Texas' "four corners" rule).

In cases involving the scope of easements, there is increasing evidence that courts may be more willing to depart from a strict "four corners" approach. *See Lazy Dog Ranch v. Telluray Ranch Corp., 965 P.2d 1229 (Colo. 1998)* (court cites *Restatement (Third) of Property* and other judicial decisions favoring a "more flexible approach" as opposed to a "strict" four corners approach).

(n23)Footnote 706. *Norken Corp. v. McGahan, 823 P.2d 622 (Alaska 1991); Alabama Medicaid Agency v. Wade, 494 So. 2d 654 (Ala. App. 1986); Bennett v. Henderson, 663 S.W.2d 180 (Ark. 1984).*

(n24)Footnote 707. *Church of God Pentecostal, Inc. v. Freewill Pentecostal Church of God, Inc., 716 So.2d 200 (Miss. 1998); Sylvan Properties Co. v. State Planning Office, 711 A.2d 138 (Me. 1998)* (supreme court's review of deed language found it to be unambiguous, reversing lower court); *Ely v. Briley, 595 S.W.2d 723 (Tex. App. 1998); Iulucci v. James H. Maloy, Inc., 606 N.Y.S.2d 59 (1993); Smith v. Nugget Exploration, Inc., 856 P.2d 320 (Wyo. 1993); Pickens v. Kemper, 847 P.2d 648 (Colo. App. 1993); Phillips Indus. v. Firkins, 827 P.2d 706 (Idaho App. 1992); Vause v. Mikell by Solomonic, 348 S.E.2d 187 (S.C. App. 1986).*

(n25)Footnote 708. *Phillips Indus. v. Firkins, 827 P.2d 706 (Idaho 1992); Williams v. Hawthorne, 601 So. 2d 672 (La. App. 1992); First Hartford Corp. v. Kennebec Water Dist., 490 A.2d 1209 (Me. 1985); Sally-Mike Props. v. Yokum, 332 S.E.2d 597 (W. Va. 1985); Heyen v. Hartnett, 679 P.2d 1152 (Kan. 1984).* It is not always true that a finding of ambiguity opens the door to the receipt of extrinsic evidence. *See James v. Taylor, 969 S.W.2d 672 (Ark. App. 1998)* (statute pertaining to creation of joint tenancy required that evidence of intent to create joint tenancy appear from language of deed).

(n26)Footnote 709. *Phillips Indus. v. Firkins, 827 P.2d 706 (Idaho App. 1992); Russell v. Bryan, 797 S.W.2d 112 (Tex. App. 1990); Latham v. Garner, 673 P.2d 1048 (Idaho 1983); Gregory v. Sanders, 635 P.2d 795 (Wyo. 1981). See also American Trading Real Estate Props., Inc. v. Town of Trumbull, 574 A.2d 796 (Conn. 1990)* ("intent of parties" a question of fact).

(n27)Footnote 710. *Pennsylvania Elec. Co. v. Waltman, 670 A.2d 1165 (Pa. Super. 1995)* ("the court determines whether a written instrument is ambiguous"). *Compare Wintemberg v. Kowal, 1997 WL 35208 (App. Div. 1997)* (where evidence as to parties' actual intent is equivocal, fact question presented); *Phillips Indus. v. Firkins, 827 P.2d 706 (Idaho App. 1992); Whittington v. Whittington, 608 So. 2d 1274 (Miss. 1992); Chambers v. Huggins, 709 S.W.2d 219 (Tex. App. 1985); Knadler v. Adams, 661 P.2d 1052 (Wyo. 1983).*

(n28)Footnote 711. *Monson v. Dwyer, 378 N.W.2d 865 (N.D. 1985).*

(n29)Footnote 712. *Hoglund v. Omak Wood Prods., Inc., 914 P.2d 1197 (Wash. App. 1996)* (if statement is capable of two or more meanings, it is ambiguous); *Allen v. Green, 331 S.E.2d 472 (Va. 1985).*

(n30)Footnote 713. *Prairie Producing Co. v. Schlachter, 786 S.W.2d 409 (Tex. App. 1990).* This statement is not representative in that courts ordinarily do not apply rules of construction until *after* a determination of ambiguity has been made.

(n31)Footnote 714. *Pickens v. Kemper, 847 P.2d 648 (Colo. App. 1993).*

(n32)Footnote 715. *Smith v. Smith, 622 A.2d 642 (Del. Super. Ct. 1993).*

(n33)Footnote 716. Yaali, Ltd. v. Barnes & Noble, Inc., 506 S.E.2d (Ga. 1998); *Whittington v. Whittington, 608 So. 2d 1274 (Miss. 1992); Hudgeons v. Tenneco Oil Co., 796 P.2d 21 (Colo. App. 1991); Isbrandtsen v. North Branch Corp., 556 A.2d 81 (Vt. 1988).*

(n34)Footnote 717. Occasionally courts will refer to a "patent ambiguity" or a "latent ambiguity" but the

"patent-latent" distinction is not brought up. *See Doman v. Brogan, 592 A.2d 104 (Pa. Super. 1991)* (latent and patent); *Mason v. Superior Ct., 210 Cal. Rptr. 63 (1985)* (patent ambiguity); *Ouellette v. Butler, 480 A.2d 76 (N.H. 1984)* (latent ambiguity); *Flanagan v. Prudhomme, 644 A.2d 51 (N.H. 1994)* (patent and latent defects distinguished); *Dillingham v. Ryan, 651 A.2d 833 (Me. 1994); Slipp v. Stover, 651 A.2d 824 (Me. 1994).*

(n35)Footnote 718. *Carson v. Palmer, 190 So. 720 (Fla. 1939).*

(n36)Footnote 719. *Haney's Chapel United Meth. Church v. United Meth. Church, 716 So.2d 1156 (Ala. 1998)* (extrinsic circumstances considered); *Lawton v. Richmond, 690 A.2d 953 (Me. 1997)* (when latent ambiguity occurs, court determines intention of grantor from "contemporaneous circumstances and rules of construction"); *Flanagan v. Prudhomme, 644 A.2d 51 (N.H. 1994); Hare v. McClellan, 662 A.2d 1242 (Conn. 1995)* (circumstances surrounding execution considered); *Lakeview Assoc. v. Woodlake Master Cond. Assoc., 687 A2d 1270 (Conn. 1997)* (always "admissible to consider" situation of the parties and surrounding circumstances); *Phillips v. Fox, 458 S.E.2d 327 (W. Va. 1995)* (implied grant of right to surface mine); *Harris v. Ski Park Farms, Inc., 844 P.2d 1006 (Wash. 1993); Milligan v. Milligan, 624 A.2d 474 (Me. 1993); Norken Corp. v. McGahan, 823 P.2d 622 (Alaska 1991).*

(n37)Footnote 720. *Doman v. Brogan, 592 A.2d 104 (Pa. Super. 1991); Riverchase Homeowners Protective Ass'n v. City of Hoover, 531 So. 2d 645 (Ala. 1988); Heyen v. Hartnett, 679 P.2d 1152 (Kan. 1984); MacKay v. Breault, 427 A.2d 1099 (N.H. 1981).*

(n38)Footnote 721. *Milligan v. Milligan, 624 A.2d 474 (Me. 1993); Sally-Mike Props. v. Yokum, 332 S.E.2d 597 (W. Va. 1985); Heyen v. Hartnett, 679 P.2d 1152 (Kan. 1984).*

(n39)Footnote 722. *E.g., Riverchase Homeowners Protective Ass'n v. City of Hoover, 531 So. 2d 645 (Ala. 1988); Ouellette v. Butler, 480 A.2d 76 (N.H. 1984).*

(n40)Footnote 723. *E.g., Bernard v. Nantucket Boys' Club, 465 N.E.2d 236 (Mass. 1984).* When courts are construing deeds executed many years ago, the dearth of evidence as to surrounding circumstances makes resort to rules of construction a practical necessity.

(n41)Footnote 724. *Ashley v. Baker, 867 P.2d 792 (Alaska 1994); Foundation for Preservation of Historic Georgetown v. Arnold, 651 A.2d 794 (D.C. App. 1995)* (extrinsic evidence considered first, then, if necessary, court will resort to rules of construction); *Norken Corp. v. McGahan, 823 P.2d 622 (Alaska 1991).*

(n42)Footnote 725. *Pursue Energy Corp. v. Perkins, 558 So. 2d 349 (Miss. 1990)* (mineral deed).

(n43)Footnote 726. *Latchis v. John, 85 A.2d 575 (Vt. 1952); Swope v. Pageton Pocohontas Coal Co., 41 S.E.2d 691 (W. Va. 1947).*

(n44)Footnote 727. Purlo Corp. v. 3925 Woodward Ave., 67 N.W.2d 684 (Mich. 1954) (only purpose of rules of construction is to enable the court to reach probable intent of parties when it is not otherwise available).

(n45)Footnote 728. Blackstone, *supra* n.1, at *379-380.

(n46)Footnote 729. *Grill v. West Virginia R.R. Maint. Auth., 423 S.E.2d 893 (W. Va. 1992); Urbaitis v. Commonwealth Edison, 575 N.E.2d 548 (Ill. 1991); Gilich v. Mississippi State Hwy. Comm'n, 574 So. 2d 8 (Miss. 1990); Gasway v. Reiter, 736 P.2d 749 (Wyo. 1987); Chambers v. Huggins, 709 S.W.2d 219 (Tex. App. 1985); Heyen v. Hartnett, 679 P.2d 1152 (Kan. 1984).* This rule goes back to Blackstone's time. *See* W. Blackstone, *supra* n.1, at 379-380 ("the construction be placed on the entire deed, and not merely upon disjointed parts of it").

(n47)Footnote 730. *Loveland v. CSX Transp., Inc., 622 So. 2d 1120 (Fla. App. 1993); Carter v. Heitzman, 603 N.Y.S.2d 614 (N.Y. 1993); Luckel v. White, 819 S.W.2d 459 (Tex. 1991); Pursue Energy Corp. v. Perkins, 558 So. 2d*

349 (Miss. 1990); Bennett v. Henderson, 663 S.W.2d 180 (Ark. 1984); Goin v. Eater, 438 N.E.2d 234 (Ill. App. 1982). This rule as well is derived from Blackstone. *See* Blackstone, *supra* n.1, at *380 ("therefore every part of it be (if possible) made to take effect; and no word but what may operate in some shape or another").

(n48)Footnote 731. *E.g., Harris v. Ski Park Farms, Inc., 844 P.2d 1006 (Wash. 1993); D'Addario v. D'Addario, 603 A.2d 1199 (Conn. App. 1992); Heyen v. Hartnett, 679 P.2d 1152 (Kan. 1984); Loveland v. CSX Transp., Inc., 622 So. 2d 1120 (Fla. App. 1993)* (rule applied to deed "restriction"); *Notch Mountain Corp. v. Elliott, 898 P.2d 1081 (Colo. 1995)* (ambiguities in reservation construed against grantor).

(n49)Footnote 732. *Rath v. Haycock, 905 P.2d 854 (Or. App. 1995); Wilson v. Brown, 897 S.W.2d 546 (Ark. 1995); Messner v. Moorehead, 787 P.2d 1270 (Okla. 1990); Bennett v. Henderson, 663 S.W.2d 180 (Ark. 1984); Baker v. Gulf Transmission Co., 218 So. 2d 39 (Miss. 1969). See also Williams v. Phillips Petr. Co., 453 F. Supp. 967 (S.D. Ala. 1978).* Once again, this rule goes back to Blackstone, who had written that a deed "be taken most strongly against him that is the agent of the contractor, and in favour of the other party." Blackstone, *supra* n.1, at *380. However, Blackstone went on to distinguish between a deed indenture and a deed-poll, with the latter being construed "against the grantor," as the words of the deed "are the words of the grantor only." *Id.*

(n50)Footnote 733. Blackstone, *supra* n.1, at *298.

(n51)Footnote 734. *Id.*

(n52)Footnote 735. Kent, *supra* n.2, at 456.

(n53)Footnote 736. *Id.* at 453.

(n54)Footnote 737. *See* A.L.P., *supra* n.94, at § 12.47. The most prominent of these rules was the rule that the estate created by the granting clause could not be cut down or invalidated by the habendum or other language in the deed. This rule, dubbed the "repugnancy rule," has gradually faded into oblivion, although an occasional decision may refer to it and, in an isolated instance, apply it. *See* Cunningham, Stoebuck & Whitman, *supra* n.11, at 768 nn.60-62. *Smith v. Nugget Exploration, Inc., 857 P.2d 320 (Wyo. 1993)* (doctrine of repugnancy not recognized); *Grennan v. Solomon, 252 Va. 50, 472 S.E.2d 54 (Va. 1996)* (estate unequivocally granted in one part of instrument will not be diminished or destroyed by inconsistent language in another part of instrument).

(n55)Footnote 738. *E.g., Batesburg-Leesville Sch. Dist. No. 3 v. Tarrant, 361 S.E.2d 343 (S.C. App. 1987); Grayson v. Holloway, 313 S.W.2d 555 (Tenn. 1958). But see Goodson v. Capehart, 349 S.E.2d 130 (Va. 1986)* (granting clause always prevails over other parts of deed).

(n56)Footnote 739. *See, e.g., Knell v. Price, 569 A.2d 636 (Md. 1990)* (habendum clause prevailed over granting clause); *Anderson v. Jackson County Bd. of Educ., 333 S.E.2d 533 (N.C. App. 1985); Jolynne Corp. v. Michels, 446 S.E.2d 494 (W. Va. 1994)* (habendum clause in oil and gas lease known as "term" clause); *In re Laurel Run Corp., 166 B.R. 242 (Bankr. M.D. Pa. 1994)* (habendum clause cannot be used to expand grant); *Elton Schmidt & Sons Farm Co. v. Kneib, 507 N.W.2d 305 (Neb. App. 1993)* (granting clause prevails over habendum and description clauses).

(n57)Footnote 740. *E.g., Ellette v. Liedtke, 668 S.W.2d 880 (Tex. App. 1984)* (granting one half of "an undivided interest" in property held void); *Dahlberg v. Holden, 238 S.W.2d 699 (Tex. 1951)* (granting clause conveying "an undivided interest" legally insufficient).

(n58)Footnote 741. *State Dep't of Rds. v. Union Pac. R.R., 490 N.W.2d 461 (Neb. 1992); Harrell v. McMeans, 598 So. 2d 957 (Ala. App. 1992); Davies v. Radford, 433 N.W.2d 704 (Iowa 1988); Farmers Reservoir & Irrig. Co. v. Sun Prod. Co., 721 P.2d 1198 (Colo. App. 1986).* State statutes are often cited in the judicial opinions as providing the basis for the rule that a grantor's entire estate passes unless an intent to convey a lesser estate if effectively manifested.

(n59)Footnote 742. *Goodson v. Capehart, 349 S.E.2d 130 (Va. 1986); Mercer v. Bludwurth, 715 S.W.2d 693 (Tex. App. 1986); Stevens Mineral Co. v. State, 418 N.W.2d 130 (Mich. App. 1987).* This rule is sometimes stated in the context of another rule -- the deed will be "strictly construed" against the grantor. *Jolynne Corp. v. Michels, 446 S.E.2d 494 (W. Va. 1994). But see, Concord Oil Co. v. Pennzoil Exploration & Prod. Co., 878 S.W.2d 191 (Tex. App. 1994)* (greatest estate "canon" not appropriate in multi-grant case); *Ritz v. Indiana and Ohio R.R., 632 N.E.2d 769 (Ind. App. 1994)* (railroad right-of-way case; presumption against fee passing).

(n60)Footnote 743. Recent examples are: *Cole v. Thrasher, 272 S.E.2d 696 (Ga. 1980)* (life estate created); *Hacker v. Carlisle, 388 So. 2d 947 (Ala. 1980).*

(n61)Footnote 744. Cases holding that an easement was created: *CSX Transp., Inc. v. Rabold, 691 N.E.2d 1275 (Ind. App. 1998); Drazich v. Lasson, 964 P.2d 324 (Utah App. 1998); Crowell Land and Mineral Corp. v. Verneco, Inc., 610 So. 2d 1078 (La. App. 1993); City of Eunice v. Sunland Props., Inc., 597 So. 2d 1198 (La. App. 1992); Estate of Rockafellow v. Lihs, 494 N.W.2d 734 (Iowa App. 1992); Buhl v. U.S. Sprint Commun. Co., 840 S.W.2d 904 (Tenn. 1992); Notelzah v. Destival, 489 N.W.2d 744 (Iowa 1992); Crum v. Butler, 601 So. 2d 834 (Miss. 1992); Quarry Office Park Assocs. v. Philadelphia Elec. Co., 576 A.2d 358 (Pa. Super. 1990); City of Boyne City v. Crain, 446 N.W.2d 348 (Mich. App. 1989); Brewer and Taylor Co. v. Wall, 769 S.W.2d 753 (Ark. 1989); Lincoln Sav. & Loan Ass'n v. State, 768 P.2d 733 (Colo. App. 1988); Brown v. Penn Cent. Corp., 510 N.E.2d 641 (Ind. 1987); Roeder Co. v. Burlington N., Inc., 716 P.2d 855 (Wash. 1986).*

Cases holding that a fee simple was created: *Grill v. West Va. R.R. Maint. Auth., 423 S.E.2d 893 (W. Va. 1992); State Dep't of Rds. v. Union Pac. R.R., 490 N.W.2d 461 (Neb. 1992); Machado v. Southern Pac. Transp. Co., 284 Cal. Rptr. 560 (1991); Concord & Bay Land Co. v. City of Concord, 280 Cal. Rptr. 623 (1991); Maberry v. Gueths, 777 P.2d 1285 (Mont. 1989); Penn Cent. Corp. v. Commonwealth Edison Co., 512 N.E.2d 118 (Ill. App. 1987); Sowers v. Illinois Cent. Gulf R.R. Co., 503 N.E.2d 1082 (Ill. App. 1987). In re Laurel Run Corp., 166 B.R. 242 (Bankr. M.D. Pa. 1994); Bidstrup v. Brignac, 631 So. 2d 637 (La. App. 1994); Elton Schmidt & Sons Farm Co. v. Kneib, 507 N.W.2d 305 (Neb. App. 1993).* The Georgia Supreme Court noted that the railroad's interest in the right of way terminated upon abandonment regardless of whether the granted interest was an easement or a defeasible fee. *Giddens v. Barrantine, 448 S.E.2d 441 (Ga. 1994). Giddens* is an example of the type of case where the "fee v. easement" characterization does not accurately portray the actual issue.

Some of the cases involve the application of federal statutes or state eminent domain statutes. *Harris v. Ski Park Farms, Inc., 844 P.2d 1006 (Wash. 1993); Nature Conservancy v. Kolb, 853 S.W.2d 864 (Ark. 1993); City of Maroa v. Illinois Cent. R.R., 592 N.E.2d 660 (Ill. App. 1992); Estoril Producing Corp. v. Murdock, 822 P.2d 129 (Okla. App. 1991); Abrams v. Royse, 569 N.E.2d 1329 (Ill. App. 1991); Westman v. Kiell, 455 N.W.2d 45 (Mich. App. 1990).*

Conveyances of a "right of way" for a road or highway are usually found to be grants of easements. *See Greaves v. McGee, 492 So. 2d 307 (Ala. 1986); Chournos v. D'Agnillo, 642 P.2d 710 (Utah 1982)* (words "right of way" usually construed as grant of easement, citing cases); *Titeca v. State, 634 P.2d 1156 (Mont. 1981). But see American Trading Real Estate Props., Inc. v. Town of Trumbull, 574 A.2d 796 (Conn. 1990)* ("for purpose of a road or passage way" not indicative of easement; fee simple created).

The most recent cases favor the construction of fee passing to the railroad rather than an easement. *See Tazian v. Cline, 673 N.E.2d 485 (Ind. App. 1996)* (fee simple rather than easement), *aff'd, 686 N.E.2d 95 (Ind. 1997); Brown v. State, 924 P.2d 908 (Wash. 1996)* (statutory warranty deed form; fee simple created); *City of Manhattan Beach v. Superior Court, 52 Cal. Rptr. 2d 82 (Cal. 1996)* ("remise, release and quitclaim" language of fee simple preferred over "right of way" easement language); *Chevy Chase Land Co. v. United States, 37 Fed. Cl. 545 (Fed. Cl. 1997)* (fee simple absolute granted); *City and County of San Francisco v. Union Pac. R.R., 58 Cal. Rptr. 2d 1 (Cal. App. 1996)* (the preference for fee simple over easement has also been applied in a grant to a city for an aqueduct).

(n62)Footnote 745. In the law of estates, the following are examples of some of the standard rules of construction: (1) as between a fee simple determinable and a fee simple upon a condition subsequent, the latter is preferred; (2) language that might be construed as creating a defeasible fee simple will be construed to create a covenant, a trust, or an equitable charge, if the language permits of such construction; (3) there is a constructional preference for vested estates over contingent estates. Numerous constructional rules exist in the law of class gifts, most notably, the "rule of convenience" pertaining to maximum membership in a class (the class closing rules). Another well-recognized constructional rule from the law of concurrent estates is the preference for a tenancy in common over a joint tenancy.

(n63)Footnote 746. *See* Chs. 17-27; 31-32 *supra*.

(n64)Footnote 747. *See* West's Legal Forms, ch. 32 (2d ed. 1986).

(n65)Footnote 748. *See* A.L.P., *supra* n.94, at § 12.87. *See also Olmos v. Pecan Grove Mun. Util. Dist., 857 S.W.2d 734 (Tex. App. 1993)* (absent specific reservation in deed, building and other improvements constituting appurtenances pass as a matter of course).

(n66)Footnote 749. *McIlvaine v. Florida E. Coast Ry., 568 So. 2d 462 (Fla. App. 1990)* (restricted meaning given to "appurtenance" in context of deed to railroad).

(n67)Footnote 750. *Dimond v. Kelly, 629 P.2d 533 (Alaska 1981)* (conveyance of building carries with it undescribed land).

(n68)Footnote 751. *See* § 82.08(c), *supra*.

(n69)Footnote 752. *Milligan v. Milligan, 624 A.2d 474 (Me. 1993); Garrett v. Locke, 419 S.E.2d 842 (S.C. App. 1992); Morris v. Sigur, 584 So. 2d 729 (La. App. 1991); Spainhour v. B. Aubrey Huffman & Assocs., 377 S.E.2d 615 (Va. 1989); Thomas v. Brown, 535 N.Y.S.2d 836 (1988); D.D. & L., Inc. v. Burgess, 753 P.2d 561 (Wash. App. 1988); Franks v. Burks, 688 S.W.2d 435 (Tenn. App. 1984); Chao v. Richey, 455 A.2d 1008 (N.H. 1982). In re St. James Methodist Church of Hahnville, 666 So. 2d 1206 (La. App. 1995); Koennicke v. Maiorano, 682 A.2d 1046 (Conn. App. 1996)* (monuments over course and distance); *Snyder v. Haagen, 679 A.2d 510 (Me. 1996)* (hierarchy detailed in text described as the "familiar rule"). *Compare Modrzynski v. Wolfer, 651 N.Y.S.2d 782 (App. Div. 1996)* (discrepancy between measured distance and distances set forth in deed "does not create ambiguity in an otherwise unambiguous deed").

(n70)Footnote 753. *See Milligan v. Milligan, 624 A.2d 474 (Me. 1993)* (two dissenting judges regarded majority's application of rule as "mechanistic" and producing an "absurd" result). *Pennsylvania Elec. Co. v. Waltman, 670 A.2d 1165 (Pa. Super. 1995)* (course and distance given priority over natural monument).

(n71)Footnote 754. *Near v. Calkins, 946 P.2d 537 (Colo. App. 1997)* (highway rule applied); *Besneatte v. Gourdin, 21 Cal. Rptr. 2d 82 (1993); Christian v. Purdy, 808 P.2d 164 (Wash. App. 1991); Tidewater Area Charities, Inc. v. Harbour Gate Owners Ass'n, 396 S.E.2d 661 (Va. 1990); Belfast Water Dist. v. Larrabee, 570 A.2d 828 (Me. 1990); Town of Moorcroft v. Lang, 779 P.2d 1180 (Wyo. 1989).*

The usual rule may not apply if the grantor is a municipality. *See City of Albany v. State of N.Y., 270 N.E.2d 705 (N.Y. 1971). But see City of Webster v. City of Houston, 855 S.W.2d 176 (Tex. App. 1993).*

(n72)Footnote 755. *Descendants of Bulloch, Bussey & Co. v. Fowler, 475 S.E.2d 587 (Ga. 1996); Smith v. Smith, 622 A.2d 642 (Del. 1993); Roeder Co. v. Burlington N., Inc., 716 P.2d 855 (Wash. 1986).*

(n73)Footnote 756. *Burnham v. City of Farmington, 956 P.2d 1163 (N.M. App. 1998)* (river); *Stott v. Stevens, 873 P.2d 380 (Or. App. 1994)* (property bordering on ocean); *Glover v. Giraldo, 824 P.2d 552 (Wyo. 1992); Selkirk Island Corp. v. Standley, 683 S.W.2d 793 (Tex. App. 1984); Nilsson v. Latimer, 664 S.W.2d 447 (Ark. 1984).*

(n74)Footnote 757. *Estes v. Barry, 967 P.2d 284 (Idaho 1998)* (merger applied to bar evidence of purchaser's understanding of obligation to repay FHA "recapture" liability contained in warranty deed); 40 *North Corporation v. Morrell, 964 P.2d 423 (Wyo. 1998)* (subordination agreement contained in contract merged into deed); *Cleveland v. Tinaglia, 582 N.W.2d 720 (S.D. 1998)* (dispute over extent of easement; merger rule applied); *City of Memphis for Use & Benefit of State v. Moore, 818 S.W.2d 13 (Tenn. App. 1991); G.G.A., Inc. v. Leventis, 773 P.2d 841 (Utah App. 1989);* 37 *Robinswood Assocs. v. Health Indus., 547 N.E.2d 1019 (Ohio App. 1988); Reed v. Hassell, 340 A.2d 157 (Del. Super. 1975).*

Pennsylvania Elec. Co. v. Waltman, 670 A.2d 1165 (Pa. 1995) (option merged into deed); *Alexy v. Salvador, 630 N.Y.S.2d 133 (N.Y.A.D. 1995)* (contract providing for beach privileges merged into deed). If the parties stipulate in the contract that the purchase and sale agreement will be abrogated upon closing, it is likely the court will apply the merger doctrine. *See Schafir v. Harrigan, 879 P.2d 1384 (Utah App. 1994)* ("abrogation clause" in purchase agreement; merger applied); *Embassy Group v. Hatch, 865 P.2d 1366 (Utah 1993)* ("abrogation clause" present; merger applied). If the covenant in question relates to or is connected with "the title, possession, quantity or emblements" of the land, the merger doctrine will be applied. *See Urquart v. Teller, 958 P.2d 714 (Mont. 1998)* (merger rule applied; covenants relating to construction of improvements and transfer of property); *S. Utsunomiya Enters., Inc. v. Moomuku Country Club, 866 P.2d 951 (Haw. 1994)* (agreement to deliver property not subject to any liens; merger applied); *Analytical Measurements, Inc. v. Keuffel & Esser Co., 843 F. Supp. 920 (D.N.J. 1993)* (hazardous waste on property; merger language dicta since covenant against encumbrance was contained in deed); *Quigley, Inc. v. Miller Family Farms, 629 A.2d 110 (N.J. Super. 1993)* (claimed "right of access" in reality an easement; policy underlying merger doctrine undermined if "easement by estoppel" is upheld); *Village of Warsaw v. Gott, 649 N.Y.S.2d 605 (App. Div. 1996)* (contract of sale merged into deed); *Boser v. Boser, 239 A.D.2d 924, 654 N.Y.S.2d 509 (App. Div. 1997)* (separation agreement provision merged into deed); *Hunt v. Kojac, 666 N.Y.S.2d 330 (App. Div. 1997)* (contract provision relating to location of leach field and septic system merged into deed).

Reliance by a court upon the quoted language above relating to "title, possession, quantity or emblements" is both a test for determining when the merger doctrine applies and when the "collateral exception" applies. Note that under this approach merger is viewed primarily as a titles doctrine.

(n75)Footnote 758. *Barnhart v. Gold Run, Inc., 843 P.2d 545 (Wash. App. 1993); Dobrusky v. Isbell, 740 P.2d 1325 (Utah 1987).*

(n76)Footnote 759. *Haronian v. Quattrocchi, 653 A.2d 729 (R.I. 1995)* (option merged into deed); *Resolution Trust Co. v. Kahn, 501 N.W.2d 703 (Minn. App. 1993); Noufrios v. Murat, 598 N.Y.S.2d 82 (1993).*

(n77)Footnote 760. *Hill v. Spencer & Son, Inc., 973 S.W.2d 772 (Tex. App. 1998)* (merger doctrine not applicable to cases involving "accident, fraud, or mistake"); *GXG, Inc. v. Texacal Oil & Gas, 977 S.W.2d 403 (Tex. App. 1998)* (merger doctrine not applicable where deed was "ambiguous"); *Taylor v. Seaman, 932 S.W.2d 912 (Mo. App. 1996)* (merger not applicable where no evidence of deed's existence was lacking); *Roberts v. Roberts, 856 S.W.2d 28 (Ark. App. 1993); Embassy Group v. Hatch, 865 P.2d 1366 (Utah 1993)* (similarly, if grounds for reformation exist, the merger doctrine will not be applied); *Voss v. Brooks, 907 P.2d 465 (Alaska 1995).* Conversely, if grounds for reformation do not exist, merger will be applied. *Bryan v. Breyer, 665 A.2d 1020 (Me. 1995)* (if mistake is found, merger will not be a bar); *Groff v. Kohler, 922 P.2d 870 (Ala. 1996)* (grounds for reformation did not exist); *West v. Bowen, 898 P.2d 59 (Idaho 1995). See* also *Fitton v. Barrington Realty Co., 273 Ill. App. 3d 1017 (Ill. App. 1995)* (sale of real estate by acreage; no merger if misrepresentation or mistake present).

Compare Beal v. Schewe, 291 Ill. App. 3d 204, 683 N.E.2d 1019 (Ill. App. 1997) (sale in gross; merger doctrine applied). According to a Utah court, there are four exceptions to the merger doctrine: (1) mutual mistake in the drafting of the instrument; (2) ambiguity in the final documents; (3) existence of rights collateral to the contract of sale; and (4) fraud in the transaction. *Maynard v. Wharton, 912 P.2d 446 (Utah App. 1996); Winberg v. Cinfel, 532 N.W.2d 35 (Neb.*

1995) (merger not applicable unless the contract and the deed relate to the same lands); *Holec v. Heartland Bldrs., Inc., 600 N.E.2d 489 (Ill. App. 1992); Purbaugh v. Jurgensmeier, 483 N.W.2d 757 (Neb. 1992); Grahn v. Gregory, 800 P.2d 320 (Utah App. 1990); Hammerquist v. Warburton, 458 N.W.2d 773 (S.D. 1990).*

(n78)Footnote 761. *See generally* the discussion in *Knight v. McCain, 531 So. 2d 590 (Miss. 1988)* listing decisions from thirty-seven jurisdictions recognizing that collateral or independent agreements are not merged into the deed. With the decision in *Knight*, Mississippi became the thirty-eighth state; Nebraska became the thirty-ninth state in 1992. *See Purbaugh v. Jurgensmeier, 483 N.W.2d 757 (Neb. 1992). See also Bruggeman v. Jerry's Enterprises, Inc., 583 N.W.2d 299 (Minn. App. 1998)* (agreement to repurchase deemed both a "condition subsequent and "collateral"). The remaining states have not yet addressed the issue.

(n79)Footnote 762. *New Prospect Area Fire Dist. v. New Prospect Ruritan Club, 429 S.E.2d 791 (S.C. 1993)* (where deed constitutes only "part performance" of contract, other distinct and unperformed contract provisions are not merged); *Andreychak v. Lent, 607 A.2d 1346 (N.J. Super. 1992)* (contract covenants not necessarily satisfied by execution and delivery of deed are collateral and not merged).

(n80)Footnote 763. *Hammerquist v. Warburton, 458 N.W.2d 773 (S.D. 1990)* (test as whether agreement is collateral depends, in part, "on whether the collateral contract forms an integral part of the principal purpose of the deed, namely conveyance of title and quantity of land").

(n81)Footnote 764. *Maynard v. Wharton, 912 P.2d 446 (Utah App. 1996)* (merger doctrine "an admittedly harsh rule of law"); *Alvardo v. Bolton, 749 S.W.2d 47 (Tex. 1988)* (referring to the merger rule, "no rule of law is better settled") (Wallace, J., dissenting).

(n82)Footnote 765. Some courts are more forthright on this point than others. In determining whether an agreement will be characterized as collateral, many courts stress the parties' intent. *See, e.g., Andreychak v. Lent, 607 A.2d 1346 (N.J. Super. 1992); Hammerquist v. Warburton, 458 N.W.2d 773 (S.D. 1990); Reed v. Hassell, 340 A.2d 157 (Del. Super. Ct. 1975).* If a court is inclined to apply the "collateral agreement" exception, it is likely that the court will stress the parties' intent.

Hansen v. Stichting Mayflower Recreational Funds, 898 F. Supp. 1503 (D. Utah 1995) (parties' intent relevant only if "collateral" terms are involved, not matters of title). If the parties expressly stipulate that a particular covenant is to survive closing, some courts reject the merger doctrine on the basis that the parties did not intend to have the particular duty abrogated by a subsequent deed. *See Rubell v. Finkelstein, 679 So. 2d 889 (Fla. App. 1996)* (parties agreed that warranties would survive closing); *Carstensen v. Chrisland Corp., 442 S.E.2d 660 (Va. 1994)* (contract provision relating to future encumbrances by vendor stipulated that "this provision will survive settlement"; merger not applied); *H.R. Jay Realty v. Gross, 611 N.Y.S.2d 578 (1994)* (contract of sale contained one-year guarantee against defects which "guarantee was to survive closing"; merger not applied). If a court approaches the merger doctrine from the perspective of the parties' intent, there is no necessity that this intent be found in a writing. *See Roberts v. Roberts, 856 S.W.2d 28 (Ark. App. 1993)* (property settlement agreement rendered in divorce proceeding not merged because it "was not intended by the parties to be merged in the deed"). Under the rationales employed in the opinions cited in this paragraph, it is patently clear that the merger doctrine is not a rule of law, but a rule of construction. The same may be said of the cases relying upon an "abrogation clause." *See* note 756 *supra*.

If the contract calls for future performance by seller after closing, and that is expressly stipulated in the contract, the courts have little difficulty in concluding that the parties did not intend to merger the agreement into the contract. *See Lanterman v. Edwards, 689 N.E.2d 1221 (Ill. App. 1998)* (warranty in real estate sales contract not merged); *Davis v. Tazewell Place Assoc., 492 S.E.2d 162 (Va. 1997)* (express warranty contained in sale of townhouse not merged); *See Lasher v. Paxton, 956 P.2d 647 (Colo. App. 1998)* (attorney fee covenant not merged into deed); *Timothy Christian Schs. v. Village of Western Springs, 675 N.E.2d 168 (Ill. App. 1996)* (court order not merged in deed); *Wyatt v. Palmer, 683 A.2d 1353 (Vt. 1996)* (agreement to build house); *Olivier v. Alden, 634 N.E.2d 418 (Ill. App. 1994)* (two provisions

of contract merged into deed; third provision, relating to seller's obligation for six months after closing not merged); *Kelsey v. Nathey, 869 S.W.2d 213 (Mo. App. 1993)* (seller's promise to repair septic tank survived closing; deemed "collateral"). *Goldsmith v. Knapp, 637 N.Y.S.2d 343 (N.Y.A.D. 1996)* (post-closing maintenance duties); *Gaudet v. Starr, 451 S.E.2d 476 (Ga. App. 1994)* (agreement to make repair caused by termite infestation). *Compare Link v. Breen, 649 N.E.2d 126 (Ind. App. 1995)* (termite infestation clause in agreement not a warranty; merger applied). *See also Greco v. Vollmer, 890 S.W.2d 307 (Mo. App. 1994)* (contractual arrangements "to be performed at successive periods do not merge into the deed").

(n83)Footnote 766. *Sullivan v. Chesire, 380 S.E.2d 294 (Ga. App. 1989).*

(n84)Footnote 767. Many years ago Professor Atkinson observed that will construction issues accounted for "most" of the litigation in connection with decedents' estates. Atkinson, *supra* n.130, at 809.

(n85)Footnote 768. Atkinson, *supra* n.130, at 816.

(n86)Footnote 769. Professors Simes and Smith were sensitive to this point. In a footnote reference to deed construction, they observed that "deeds, like contracts, may be the result of a bilateral transaction involving the intentions of two or more persons." Simes & Smith, *supra* n.692, § 463, at 450 n.8. The Restatement of Property makes the same point in the context of donative and non-donative transfers. *See* Restatement of Property § 241, cmt. d (1940).

(n87)Footnote 770. Atkinson, *supra* n.130, at 815.

(n88)Footnote 771. Simes & Smith, *supra* n.692, § 465. Atkinson, *supra* n.130 at 816. Of course, the two bases are not mutually exclusive since the policy bases are, in the usual case, reflective of what the average testator intended.

(n89)Footnote 772. *See* William M. McGovern, *Facts and Rules in the Construction of Wills, 26 UCLA L. Rev. 285 (1978)* (hereinafter "McGovern"). Professor McGovern's article considers whether rules of construction in will cases provide "useful clues" to the testator's intent. He concludes that many of the rules of will construction do reflect "common sense assumptions concerning the normal testator's desires" and thus further the primary goal of will construction: effectuation of the testator's intent. At the same time, however, Professor McGovern maintains that in many situations the facts surrounding the will execution provide "more reliable guides than the words of the will." *Id. at 286.*

(n90)Footnote 773. Recall the distinction between donative and non-donative transfers, a distinction not mentioned in the case law, but noted by some of the authorities.

(n91)Footnote 774. Simes & Smith, *supra* n.692, § § 465, 468; Atkinson, *supra* n.130, at 816. Professor McGovern's article, *supra* n.771, lists policy bases for the various rules of construction in the law of estates.

(n92)Footnote 775. Simes & Smith, *supra* n.692, § 465 at 454.

(n93)Footnote 776. This approach is premised on the fact that a deed is a bilateral agreement, not the unilateral act of the grantor.

(n94)Footnote 777. *See* text at notes 730-731, *supra*. The rule construing an instrument strictly against the maker or preparer is prominent in contract law. Presumably the policy justifications for application of the rule in a contract setting apply with equal force in a deed setting.

(n95)Footnote 778. *See* McGovern, *supra* n.771, at 293-299. Professor McGovern's listing of constructional rules promoting alienability are not limited to interests created by will.

(n96)Footnote 779. *See* Restatement (Second) of Property (Donative Transfers) (Part II) 142-44 (Introductory Note) (1983).

(n97)Footnote 780. *See* § 82.13(c)(2) *supra*.

(n98)Footnote 781. *See text* at n.753 *infra*.

(n99)Footnote 782. One of the more explicit articulations of this doctrine is contained in *Bowers v. Atchison, T. & S.F. Ry., 237 P. 913 (Kan. 1925)* ("Experience revealed that separate ownership of long narrow strips of land distinct from the territory adjoining on each side, was prolific of private dispute and public disturbance, and public policy became an important factor in the interpretation.") The courts of Texas refer to this rule as the "strip and gore doctrine." *State v. Brazos River Harbor Nav. Dist., 831 S.W.2d 539 (Tex. App. 1992).* The Wyoming Supreme Court refers to this doctrine as the "presumed intent rule." *Town of Moorcroft v. Lang, 779 P.2d 1180 (Wyo. 1989).* In California the rule is referred to as the "doctrine of marginal streets." *Besneatte v. Gourdin, 21 Cal. Rptr. 2d 82 (1993).* California and Illinois have statutory rules of construction applicable to cases of this type. *See* Cal. Civil Code § 1112; Ill. Comp. Stat. ch. 765, § 5/7a.

(n100)Footnote 783. Professor Simes points to this distinction in regard to rules of construction in the context of future interests cases. *See* Lewis Simes, Handbook of the Law of Future Interests 183 (2d ed. 1966).

(n101)Footnote 784. *See* text at n.743 *supra*.

(n102)Footnote 785. *See* § 82.09(c)(2), *supra*. For recent examples of courts taking into account public policy considerations and departing from the more traditional approach of relying upon well-settled rules of construction, see the discussion at note 364 *supra*.

(n103)Footnote 786. The Simes and Smith analysis of "Theories of Construction" is one of the most carefully thought out reflections on the constructional process. These authors, however, finessed one of the most difficult issues when they stated the problem they were considering assumed "that all relevant evidence is before the court and there is still an ambiguity." Simes & Smith, *supra* n.692, § 465, at 452 n.10.

(n104)Footnote 787. *See, e.g., Wechsler v. New York State Dep't of Envtl. Conserv., 597 N.Y.S.2d 507 (App. Div. 1993); Schulz v. Miller, 837 P.2d 71 (Wyo. 1992).* The North Dakota Supreme Court has held that the North Dakota statutory parol evidence rule (N.D. Cent. Code § 9-06-07) applies to deeds. *Redspinner v. Charlesworth, 369 N.W.2d 109 (N.D. 1985).* The Supreme Court of Kansas, in refusing to admit extrinsic evidence to alter deed language it judged unambiguous, noted that the rule being applied was obvious, for "were it otherwise little protection would be afforded by the rule against modification of the terms of a written agreement by parol testimony." *Siegel v. Hackler, 310 P.2d 914 (Kan. 1957). Langman v. Alumni Ass'n of the U. of Va., 442 S.E.2d 669 (Va. 1994)* (parol evidence rule applies to deeds); *Abercrombie v. Hayden Corp., 883 P.2d 845 (Or. 1994)* ("Quitclaim deeds are within the parol evidence rule.") There is evidence that state appellate courts are beginning to resort to contract rules in the construction of deeds. *See Khamis Enters., Inc. v. Boone, 480 S.E.2d 364 (Ga. App. 1997)* (rules of contract law apply in interpreting easements); *United States v. Johansen, 93 F.3d 459 (8th Cir. 1996)* (under North Dakota law, "principles of contract law guide the inquiry"); *Crockett v. McKenzie, 867 P.2d 463 (Okla. 1994)* (ambiguous mineral deed; court cites and applies contract interpretation rules); *People ex rel. Dept. of Transp. v. Wilson, 31 Cal. Rptr. 2d 52 (Cal. App. 1994)* (deeds are to be construed "according to general principles of contract law"); *Homer v. Smith, 866 P.2d 622 (Utah App. 1993)* (deeds are to be construed "like contracts"); *Hansen v. Stichting Mayflower Recreational Funds, 898 F. Supp. 1503 (D. Utah 1995)* ("Deeds are construed according to ordinary rules of contract construction."); *Hare v. McClellan, 662 A.2d 1242 (Conn. 1995)* (parol evidence rule no bar to receipt of extrinsic evidence in construing ambiguous deed). *But see Ashley v. Baker, 867 P.2d 792 (Alaska 1994)* (contract and deed interpretation rules distinguished; "rigid" three-step approach to deed interpretation contrasted with more "fluid" approach to contract interpretation).

(n105)Footnote 788. Primarily by phrasing the merger rule as a "titles" doctrine.

(n106)Footnote 789. *See, e.g., City of Memphis for Use and Benefit of State v. Moore, 818 S.W.2d 13 (Tenn. App. 1991)* (parol evidence inadmissible to vary, alter, amend, modify or otherwise contradict an unambiguous instrument);

Reed v. Hassell, 340 A.2d 157 (Del. Super. Ct. 1975) (doctrine of merger can be explained as "sort of accord and satisfaction"). Many of the modern cases involve the exception to the merger rule, i.e., agreements that are "collateral or independent," to be performed subsequent to the conveyance. Discussion in these cases as to whether the agreements are "collateral or independent" bear similarity to the classic contract issue of "integration" and the parol evidence rule.

The influence of contract law principles is beginning to extend beyond deed construction issues. *See Bragdon v. Drew, 658 A.2d 666 (Me. 1995); Bowden v. Griffith, 675 A.2d 968 (Me. 1996)* (applying Bragdon test); (Restatement (Second) of Contracts rule cited as governing in case involving alleged incompetency of grantor). *Soursby v. Hawkins, 763 P.2d 725 (Or. 1988).*

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CHAPTER 82 TRANSFERS BY DEED

9-82 Thompson on Real Property, Thomas Editions § 82.14

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§ 82.14 Drafting Considerations.

Lawyers drafting deeds should be aware that a defectively drafted deed can constitute legal malpractice. n790 The lawyer's liability may extend, in certain cases, to non-clients. n791

In this area of law, the importance of skillful drafting cannot be overemphasized. The attorney's goal is threefold: (1) satisfy the common law and statutory requirements for a valid deed; (2) comply with local law requirements regarding the requirements for recordation and (3) utilize language that is clear and unambiguous with regard to: exceptions or reservations; covenants for title; the estate or interest conveyed and the property legally described.

Form-books published on a national or state level can be a useful starting point, as these works typically contain checklists and warnings regarding particular quirks of local law. While forms and checklists are helpful, there is no substitute for knowledge of the substantive rules of real property law, which encompasses a wide variety of topics such as the law of estates in land and future interests, the law of real covenants, the law of oil and gas, the law of solid minerals, the law of easements, etc. In many instances, it is not the law of deeds that presents the difficult problems; it is the substantive law in the other property-related fields that is the source of the difficulties.

The lawyer may do a first rate job in all of the areas mentioned above, but fail to do an adequate job of follow-up. The drafting lawyer needs to make sure that the documents are meticulously proofed by someone, to eliminate, so far as humanly possible, the inadvertent mistake. The "mistakes" discovered some time after execution and delivery of a deed may not be such as to invalidate the deed, but they may create serious marketability of title problems.

The initial step in deed drafting is the selection of the type of deed to be given: will the deed contain warranties and, if so, of what type? If the jurisdiction in question has a statutory short-form deed, will that form suffice in the individual case? If the grantor is an entity or a fiduciary, are there special considerations regarding the type of deed to be used? Is the "standard warranty deed" appropriate and suitable in the case at hand?

The common law and statutory requirements for validity of a deed are wholly a matter of state law. The formalities requirements and essential elements tend to be fairly minimal in modern-day law. The most basic of these requirements is that the deed be "in writing." That requirement does not present a drafting problem. The requirement of the grantor's

signature is straightforward enough and, barring any issue of forgery, easily met. However, when the grantor is not a natural person, the lawyer must take some care in deciding who it is that should sign the deed on behalf of the entity.

The grantor who is a fiduciary presents special problems as well, both with regard to describing the status of the grantor and the selection of the type of deed to be used.

The most common statutory and common law requirements for a valid deed are: identifiable grantor and grantee; legally sufficient words of conveyance; an adequate legal description and an indication of the precise estate or interest received by the grantee. Identification problems relating to the grantor and grantee may not be immediately apparent. As to the grantor, the lawyer needs to determine precisely how the grantor acquired title and what name appears in that instrument granting title to the grantor. A discrepancy in the two instruments, with regard to the grantor's identity, can occur quite easily when corporations are involved; leaving out a word of the corporate name can create marketable title problems. If the grantor is a fiduciary, that fact should also be made very clear in the deed. The grantee or grantees' names should be complete and accurate; once again, the correct corporate name is of special concern.

It is not likely that a lawyer-drafted instrument will fail to contain words of conveyance that render the conveyance invalid. What the drafting lawyer needs to recall is that, in certain states, the use of certain words will trigger statutorily implied warranties. While a deed must contain an adequate legal description and an indication of the estate being conveyed, it is a rare case in which a deed fails for having not met either one of these two requirements. The generic "Mother Hubbard" clause, describing the property conveyed as all of the grantor's property in a certain county, should be used only in emergency circumstances, when it is not possible to use the precise legal description. Faulty drafting of legal descriptions usually results in an ambiguous deed, not an invalid deed.

In certain circumstances, local law might require that a deed be witnessed or acknowledged in order for the deed to be valid. These requirements for validity are exceptions to the general rule but, if one is unfamiliar with local law, these matters need to be investigated. The fact that the property being conveyed is "homestead" property under state law oftentimes triggers an acknowledgment requirement.

As emphasized in prior discussion, since the usual procedure calls for recordation of a deed after its execution, local law must be consulted with regard to the requirements for recordation. The most common and traditional requirement for recordation is the requirement that the deed be acknowledged. Most lawyers are familiar with this requirement. In recent years, state legislatures have added to the list of special requirements for recordation of a deed. The time to address these special requirements is at the drafting stage. Whatever special or additional information that must appear on the deed, in order for it to be recorded, is one more factor the lawyer drafting the instrument needs to consider. Inasmuch as these special or additional requirements pertaining to recordation vary considerably from jurisdiction to jurisdiction, the drafting lawyer must be aware of particularities of local law.

In certain states, statutory deed forms include the pertinent language for the creation of covenants for title. In other states, particular words included in a deed have the effect of implying covenants for title. The effect of statutes on the creation of title covenants needs to be taken into account in the drafting process. The distinction between a covenant of general warranty and a covenant of special warranty is another distinction that arises in the drafting of "warranty" deed. Perhaps the most problematic issue in the drafting of title covenants is the use of language limiting the title covenants, particularly the covenant against encumbrances. The use of the phrases "subject to" or "except" must be approached with caution for the reason that the substantive law of "exceptions and reservations" might create ambiguities.

Exceptions and reservations are especially troublesome concepts for the drafting lawyer. The confusion surrounding these concepts is evidenced by the fact that the terms are sometimes used interchangeably; judicial decisions often consider the two concepts as indistinguishable. As has been pointed out in prior textual discussion, there is a technical distinction between the two. The two concepts, at least historically, had no connection with covenants for title. The classic example of a reservation, the easement reserved in favor of the *grantor*, presents no special drafting

considerations. An attempt to create an interest in someone other than the grantor, by way of an exception or reservation, is permitted only in certain jurisdictions. The "exception" is used most commonly in conjunction with the legal description; when so used no special drafting problems are encountered.

A grantor may limit the warranties under the title covenants, but the use of certain language and the placement of that language is critical. The phrase "subject to," when placed in the clause creating the covenant against encumbrances, indicates the intent of the grantor to exclude certain encumbrances from the warranty. When the phrase "subject to" is not connected to the title covenants, it may operate as a reservation, e.g., "subject to a life estate in the grantor." The phrase "except" should be used with extreme care. The reason is that the "except" clause can create ambiguities as to whether the "except" language creates a technical exception or whether it is merely a limitation on the title warranties.

The estate or interest conveyed, or the estate or interest retained, should be expressed in language which clearly delineates the precise estate granted or retained. In this area, the lawyer needs to be familiar with the law of estates and future interests, the law of easements, and the law of concurrent estates. Mineral estates and oil and gas interests are specialized topics in the law of estates, with their own special terminology. These specialized areas require knowledge and expertise beyond that of the average lawyer.

The area of deed drafting that is the most subject to error and mistake is the part of the deed which contains the legal description of the property conveyed. In many instances the lawyer simply relies on a description from another instrument. In some instances, the lawyer relies on a legal description furnished by a surveyor. While a few of the legal description problems are evident only upon a visual inspection or survey, some of the problems of legal description are evident from the face of the document. It is in this area that careful proofreading is required, in order to avoid the inadvertent mistake that may later create marketability problems. Property adjacent to a boundary having width, such as a street, highway, alley, or stream, can present unique drafting issues relating to the conveyance of the grantor's interest to the center of the adjoining street, alley, highway, or stream.

FOOTNOTES:

(n1)Footnote 790. *Santulli v. Englert, Reilly & McHugh, P.C., 586 N.E.2d 1014 (N.Y. 1992)* (failure to properly draw and record first mortgage); *Bourne v. Lajoie, 540 A.2d 359 (Vt. 1987)* (omission of two ten-acre lots from deed).

(n2)Footnote 791. *Collins v. Binkley, 750 S.W.2d 737 (Tenn. 1988)* (attorney liable to non-client purchasers of property where attorney knew purchasers would rely upon them).

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CHAPTER 82 TRANSFERS BY DEED

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Annotation, *Breach of Covenant Which Does Not Run with the Land as Affecting Right of Remote Grantee to Enforce Covenant of Warranty*, 45 A.L.R. (1926) 513.

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Annotation, *Construction and Effect of Marketable Record Title Statutes, 31 A.L.R.4th (1984) 11*.

Annotation, *Conveyance Subject to Restrictions Set Forth in a Recorded or Other Indicated Instrument as Imposing the Restrictions on the Land Conveyed, 84 A.L.R.2d (1962) 780.*

Annotation, *Deed as Conveying Fee or Easement*, 136 A.L.R. (1942) 379.

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Annotation, *Unfounded Outstanding Claims as Breach of Covenant for Quiet Enjoyment*, 5 A.L.R. (1920) 1087.

Annotation, *Validity and Effect of Deed Executed in Blank as to Name of Grantee*, 32 A.L.R. (1924) 737; 175 A.L.R. (1948) 1294.

Annotation, *Validity of Provision in Deed or Transfer to Assignee for Benefit of Creditors for Payment of Attorney's Fees, 79 A.L.R.2d (1961) 513.*

Annotation, *Water Systems or Other Apparatus Under Highway as Affecting Presumption that Description by Reference to Highway Carries Fee to Center Thereof*, 147 A.L.R. (1943) 667.

Annotation, *What Amounts to Constructive Eviction that will Support Action for Breach of Covenant of Warranty*, 172 A.L.R. (1948) 18.

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Supp. To CHAPTER 82 TRANSFERS BY DEED

9-82 Thompson on Real Property, Thomas Editions Supp. to § 82.04

Supp. to § 82.04 Types and Forms of Deeds.

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[Go To Main]

§ 82.04(a)(2) Modern Statutes.

Add:

Jeremiah 29:11, *Inc. v. Seifert, 136 P.3d 957 (Kan. App. 2006)* (grantee may be bound by covenants in deed though deed not signed by grantee). *Kindred v. City of Smithville, 292 S.W.3d 420 (Mo. App. 2009)* (a deed accepted by the grantee contractually bound the grantee).

§ 82.04(b) Types of Deeds. [Go To Main]

Add:

Crafts v. Pitts, 162 P.3d 382 (Wash. 2007) (quitclaim deed is effective as any deed in conveying title).

Add:

See also Ellingstad v. State Dept. of Nat. Res., 979 P.2d 1000 (Alaska 1999) (nature of "patent" deed and similarity to "quitclaim" deed discussed).

Geodyne Energy Income Prod. Partnership I-E v. Newton Corp., 161 S.W.3d 482 (Tex. 2005) (in deciding whether an instrument is a quitclaim deed, courts look to whether the language of the instrument, taken as a whole, conveyed property itself or merely the grantor's rights).

Add:

Enerlex, Inc. v. Amerada Hess, Inc., 302 S.W.3d 351 (Tex. App. 2009) (mineral deed as a quitclaim deed; no bona fide purchaser protection for grantee).

§ 82.05(c) Issues Affecting Transfer by Deed. [Go To Main]

§ 82.05(c)(1) Interest Subject to Deed Requirement.

See also: *Ford v. Summertree Lane Ltd. Liability Co., 56 P.3d 1206 (Colo. App. 2002)* (warranty deed did not transfer causes of action "lying in tort").

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Supp. To CHAPTER 82 TRANSFERS BY DEED

9-82 Thompson on Real Property, Thomas Editions Supp. to § 82.06

Supp. to § 82.06 "Due Execution"--Formalities Requirements.

[Go To Main]

§ 82.06(b) "Signed" by the Grantor. [Go To Main]

Add:

See also Griem v. Zabala, 744 So. 2d 1139 (Fla. App. 1999) (signature requirement not met).

Add:

Carrozza v. Carrozza, 944 A.2d 161 (R.I. 2008) (any mark will suffice as long as it is adopted as one's own).

Add:

See also: *Estate of Stephens, 28 Cal. 4th 665, 122 Cal. Rptr.2d 358, 49 P.3d 1093 (2002)* (discussing "amanuensis" rule--signing grantor's name with express authority of grantor to sign--but *not* as grantor's agent). *See also Treglia v. Zanesky, 788 A.2d 1263 (Conn. App. 2001)* (state statute allowed signature to be affixed "by a person with a power of attorney"; court interpreted statute as not requiring literal compliance).

See also Beck v. Beck, 90 S.W.3d 509 (Mo. App. 2002) (Missouri statute interpreted to require only signature of grantor(s) actually conveying an interest).

In re Estate of Bontkowski, 785 N.E.2d 126 (Ill. App. 2003) .

§ 82.06(d) Attestation. [Go To Main]

Add:

McCoy v. DeSilvio, 974 So. 2d 539 (Fla. App. 2008) (notary not considered witness; only one subscribing witness; deed invalid under Florida law); *Tunnage v. Green, 947 So. 2d 686 (Fla. App. 2007)* (equitable estoppel cannot be applied to remedy attestation defect).

See also American General Home Equity, Inc. v. Countryside Home Loans, Inc. 769 So. 2d 508 (Fla. App. 2000) (lack of witnesses rendered deed void). *Cazares v. Crosby, 65 P.3d 1184 (Utah 2003)* (history of Utah's "subscribing witness" statute (*Utah Code § 57-2-10*) reviewed).

Connecticut also has an attestation requirement (C.G.S.A. § 47-5). *See*: *Collard and Roe, P.C. v. Klein, 865 A.2d 500 (Conn. App. 2005)* .

§ 82.06(e) Acknowledgment. [Go To Main]

Add:

Estate of Jedrzejewski *ex rel. Severn v. Bierma, 197 P.3d 1254 (Wyo. 2008)* ; *Carrozza v. Carrozza, 944 A.2d 161 (R.I. 2008)* .

Estate of Dykes v. Estate of Williams, 864 So. 2d 926 (Miss. 2003) (strict compliance with acknowledgment format not required; deed held valid).

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Supp. To CHAPTER 82 TRANSFERS BY DEED

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Supp. to § 82.07 Parts of a Deed.

[Go To Main]

§ 82.07(b) Current Significance. [Go To Main]

Add:

Chebatoris v. Moyer, 757 N.W.2d 212 (Neb. 2008) (language of trust instrument satisfied requirements for a deed).

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Supp. To CHAPTER 82 TRANSFERS BY DEED

9-82 Thompson on Real Property, Thomas Editions Supp. to § 82.08

Supp. to § 82.08 Essential Elements of a Deed.

[Go To Main]

Add:

Gregg v. Georgacopoulos, 990 S.W.2d 120 (Mo. App. 1999) (emphasizing that a date is not a required element).

Add:

Celtic Corp. v. Tinnea, 254 S.W.3d 137 (Mo. App. 2008) (essential elements listed); *Chebatoris v. Moyer, 757 N.W.2d 212 (Neb. 2008)* (essential elements may exist in an instrument "not formally drafted as a deed").

§ 82.08(a) Missing [Go To Main]

§ 82.08(a)(1) Identities of Grantor and Grantee.

Add:

Tomika Investments, Inc. v. Macedonia True Vine Pentecostal Holiness Church of God, Inc., 524 S.E.2d 591 (N.C. App. 2000) (misnomer in need of corporate grantee does not render deed invalid).

§ 82.08(a)(2) Legal Capacity of Grantor and Grantee

See also Canterbury v. Kovacich, 74 P.3d 457 (Colo. App. 2003) (deed from one joint to himself did not result in severance).

In re County Treasurer of Cook County, 763 N.E.2d 900 (Ill. App. 2002) ("misnomer" did not affect validity of deeds); *Kelly v. Hard Money Funding, Inc., 87 P.3d 734 (Utah. App. 2004)* (insignificant variation in name of corporation did not affect validity of identity of grantee).

Journeay v. Berry, 953 So.2d 1145 (Miss. App. 2007) (misnomer did not invalidate restrictive covenants).

Gifford v. Linnell, 579 S.E.2d 440 (N.C. App. 530) (trust not yet created).

In re Estate of Savich, 671 N.W.2d 746 (Minn. App. 2003) .

Add:

Foster v. Foster, 682 S.E.2d 312 (S.C. App. 2009) (trust named as grantee not in existence; deed void).

See also In re Estate of Kiser, 72 P.3d 425 (Colo. App. 2003) (deed to co-trustees not naming beneficiaries, not complying with *Colo. Rev. Stat. § 38-30-103(b)*, not effective to transfer property to trust); *Hill v. Hill, 102 P.3d 1131 (Idaho 2004)* (trust as named grantee could be deemed "person" under Idaho statute).

Sullivan v. Buckhorn Ranch Partnership, 119 P.3d 192 (Okla. 2005) .

Stone v. Jetmar Properties, LLC, 733 N.W.2d 480 (Minn. App. 2007) (transfer to limited liability corporation void as entity was not in existence; court rejects application of "de facto corporation" doctrine).

Add:

Corporate Dissolution of Ocean Shores Park, Inc. v. Rawson Sweet, 134 P.3d 1188 (Wash. App. 2006) (deed made to corporation before its organization valid between the parties); *Heartland, L.L.C. v. McIntosh Racing Stable, L.L.C., 632 S.E.2d 296 (W. Va. 2006)* (deed to corporation to be formed valid, citing earlier edition of treatise); *Allen v. Scott, Hewitt and Mize, L.L.C., 186 S.W.3d 782 (Mo. App. 2006)* ("equitable rights" vest in entity to be formed in the future).

Sullivan v. Buckhorn Ranch Partnership, 119 P.3d 192 (Okla. 2005) (statutory estoppel under *16 O.S.2001 § 11* discussed).

Belcher Center LLC v. Belcher Center, Inc., 883 So. 2d 338 (Fla. App. 2004) (doctrines of estoppel by deed or equitable estoppel could be applied to cure problem of non-existent corporate entity).

§ 82.08(b) Words of Conveyance and Intent to Convey. [Go To Main]

Add:

Blazer v. Wall, 183 P.3d 84 (Mont. 2008) ("easement by reference" doctrine discussed in context of requirement of words of conveyance).

Johnson v. Ramsay, 67 S.W.3d 598 (Ark. App. 2002) (language "shall create" and "is hereby granted" sufficient, distinguishing *Zini* case).

Add:

City of Kellogg v. Mission Mountain Interests LTD., Co., 16 P.3d 915 (Idaho 2000) ("desires to sell" and "agrees to purchase" sufficient).

Add:

Mountain Properties, Inc. v. Tyler Hills Realty Corp., 767 A.2d 1096 (Pa. Super. 2001) (instrument denominated "Agreement" held to be a deed).

§ 82.08(c) Legal Description. [Go To Main]

Add:

Burlington Northern R.Co. v. Fail, 751 N.W.2d 188 (N. D. 2008) (reserved railroad easement did not fail for lack of particularity as to location; North Dakota statute required that easement be described "properly").

Payton v. Hadley, 819 N.E.2d 432 (Ind. App. 2004) ("errors in legal description do not render the deed void as a matter of law"); *Dixon v. Amoco Prod. Co., 150 S.W.3d 191 (Tex. App. 2004)* (land must be able to be identified with "reasonable certainty"); *Apex Financial Corp. v. Garza, 155 S.W.3d 230 (Tex. App. 2004)* (street address sufficient).

Add:

AIC Management v. Crews, 246 S.W.3d 640 (Tex. App. 2008) (property description is sufficient "if the writing furnishes within itself, or by reference to some other existing writing, the means or data by which the particular land to be conveyed may be identified with reasonable certainty").

Jablonowski v. Logan, 169 S.W.3d 128 (Mo. App. 2005) (deed's description is sufficient if it affords the means of identification of the property); *Adams v. Anderson, 127 P.3d 111 (Idaho 2005)* (property description is sufficient so long as the quantity, identity or boundaries of the property can be determined from the face of the document); *City of Kellogg v. Mission Mountain Interests LTD., Co., 16 P.3d 915 (Idaho 2000)* (map attached to agreement, though not

incorporated, helped clarify vague description); *Ratcliff v. Cyrus, 544 S.E.2d 93 (W. Va. 2001)* (description of easement held valid).

Cavazos v. Cavazos, 246 S.W.3d 175 (Tex. App. 2007) (description of land conveyed in 1976 presented issue of fact precluding summary judgment).

Add:

Braun v. Petty, 31 S.W.3d 521 (Mo. App. 2000) (invalidation will occur "only where relying upon oral proof or other evidence the ... property conveyed remains a matter of conjecture"); *Siegert v. Seneca Resources Corp., 28 S.W.3d 680 (Tex. App. 2000)* ("nucleus of description" test articulated).

Gaut v. Daniel, 293 S.W.3d 764 (Tex. App. 2009) ; *Lord v. Holland, 655 S.E.2d 602 (Ga. 2008)* (deed did not contain a "beginning point"; held invalid due to lack of means of identification of land to be conveyed).

Field v. Mednikow, 631 S.E.2d 395 (Ga. App. 2006) (inadequate legal description); *Smith v. Tolar, 636 S.E.2d 112 (Ga. App. 2006)* (easement void for lack of adequate legal description).

Strickland v. CMCR Investments, LLC, 610 S.E.2d 71 (Ga. 2005) (language in deed too vague and indefinite); *Harpagon Company, LLC v. Gelfond, 608 S.E.2d 597 (Ga. 2005)* (tax sale deed; "impossible to determine with certainty the parcel of property it purports to convey").

Pirkle v. Turner, 588 S.E.2d 733 (Ga. 2003) ; *Firma, Inc. v. Twillman, 126 S.W.3d 790 (Mo. App. 2004)* (tax collector deed did not meet "reasonable certainty" test).

Lord v. Holland, 655 S.E.2d 602 (Ga. 2007) (deed did not contain a "beginning point": held invalid due to lack of means of identification of land to be conveyed).

Dargan v. Tankersley, 671 S.E.2d 73 (S.C. 2008) ("catch--all" provision of deed valid).

But see Greer v. J. Hiram Moore, Ltd., 72 S.W.3d 436 (Tex. App. 2002) ("Mother Hubbard" clause not effective where evidence showed that grantor did not intend to convey).

J. Hiram Moore, Ltd. v. Greer, 172 S.W.3d 609 (Tex. 2005) (extensive discussion by divided Texas Supreme Court regarding "cover all" clauses in oil and gas leases).

Add:

Deljoo v. SunTrust Mortg., Inc, 668 S.E.2d 245 (Ga. 2008) (recorded deed in chain of title gives notice of documents incorporated by reference); *Blazer v. Wall, 183 P.3d 84 (Mont. 2008)* (reference to plat or survey may be properly incorporated by reference); *Burdette v. Brush Mountain Estates, LLC, 682 S.E.2d 549 (Va. 2009)* (plat).

Add:

Jones v. Bowen, 535 S.E.2d 501 (Ga. App. 2000) (deed incorporated plat by reference).

Add:

O'Brien v. Bocchino, 787 N.Y.S.2d 797 (App. Div. 2004) ("same premises" language in second deed, referencing prior deed, not sufficient to convey other noncontiguous land).

§ 82.08(d) Special Statutory Requirements. [Go To Main]

§ 82.08(d)(1) Conflicts of Law Rule.

Add:

Pellow v. Cade, 990 S.W.2d 307 (Tex. App. 1999) .

§ 82.08(d)(2) Recordation Requirements and Validity.

Add:

The converse of this proposition is that the recording of an "invalid deed" does not somehow convert it into a valid deed. *See, e.g., Special Property VI v. Woodruff, 730 N.W.2d 753 (Mich. App. 2007)* ("the recording of an instrument cannot, of itself, make an invalid grant valid"). *In re Thornton, 220 P.3d 395 (Mont. 2009)* ; *Borromeo v. DiFlorio, 976 A.2d 388 (N.J. Super. 2009)* . *See also Cavazos v. Cavazos, 246 S.W.3d 175 (Tex. App. 2007)* (deed effective upon delivery to grantee; delivery to County Clerk not necessary to effectuate delivery).

Marlanx Corp. v. Lage, 764 N.Y.S.2d 6 (A.D. 2003) .

Add:

Montgomery County v. Wildwood Medical Center, L.L.C., 934 A.2d 484 (Md. App. 2007) .

Add:

Fulcher v. Golden, 554 S.E.2d 410 (N.C. App. 2001) (recording of deed twenty years after making invalidated deed). Missouri law requires that so-called "beneficiary deeds" be recorded (*RSMo. § 465.021.1*). *See Estate of Dugger v. Dugger, 110 S.W.3d 423 (Mo. App. 2003)* .

Add:

City of Kellogg v. Mission Mountain Interests LTD., Co., 16 P.3d 915 (Idaho 2000) (municipality was grantee; statute requiring "address" of grantee satisfied by simply naming municipality).

Add:

KEB Enterprises, L.P. v. Smedley, 101 P.3d 690 (Idaho 2004) (grantee address on deed satisfied state statute requiring "complete address").

§ 82.08(e)(2) Action of the Parties

Grantor cannot use correction deed to unilaterally terminate or revoke interest conveyed by deed. *Gallups v. Kent, 953 So. 2d 393 (Ala. 2006)* . Similarly, an alteration of a deed, once delivered, cannot legally change the original deed. *See Z & Y Corp. v. Indore C. Stores, Inc., 638 S.E.2d 760 (Ga. App. 2006)* ; *McNertney v. Kahler, 710 N.W.2d 209 (Ia. 2006)* ; *Knapp v. Hughes, 808 N.Y.S.2d 791 (N.Y. A.D. 2006)* ; *Spence v. Spence, 628 S.E.2d 869 (S. C. 2006)* .

CenterPoint Energy Houston Elec., L.L.P. v. Old TJC Co., 177 S.W.3d 425 (Tex. App. 2005) (a correction deed can do more than simply correct a scrivener's error in the description of the property).

A correction deed can be used only in "limited circumstances." *Myrad Properties, Inc. v. LaSalle Bank Nat. Ass'n, 300 S.W.3d 746 (Tex. 2009)* . A "void" deed resulting from forgery may be "ratified" by the grantors. *Scott D. Erler, D.D.S. Profit Sharing Plan v. Creative Finance & Investments, L.L.C., 203 P.3d 744 (Mont. 2009)* . Material alteration of deed renders deed void. Lee v. Lee, *97 Cal. Rptr.3d 516 (Cal. App. 2009)* .

Arnold Industries, Inc. v. Love, 464 Utah Adv. Rep. 3 (2002) (corrective deed did not impact third parties).

In addition to the methods of curing defects noted, there is a possibility that a "voidable" deed may be "ratified" to make it valid. *See*: *Ockey v. Lehmer, 189 P.3d 51 (Utah 2008)* .

§ 82.08(e)(3) Judicial Proceedings.

Add:

Hughes v. Fisher, 129 P.3d 1223 (Idaho 2006) (easement).

Drake v. Hance, 673 S.E.2d 411 (N.C. App. 2009) (mutual mistake); *In re Estate of Munawar, 981 A.2d 584 (D.C. 2009)* (reformation denied).

Wynhoff v. Vogt, 608 N.W.2d 400 (Wisc. App. 2000) (emphasizing limited grounds (fraud and mistake) for reformation

of deed).

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Supp. To CHAPTER 82 TRANSFERS BY DEED

9-82 Thompson on Real Property, Thomas Editions Supp. to § 82.09

Supp. to § 82.09 Non-essential Elements of a Deed.

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§ 82.09(a) Consideration. [Go To Main]

Watson v. Tipton, 274 S.W.3d 791 (Tex. App. 2008) ; *Celtic Corp. v. Tinnea, 254 S.W.3d 137 (Mo. App. 2008)* (deed valid despite alleged lack of adequate consideration).

Estate of Dykes v. Estate of Williams, 864 So. 2d 926 (Miss. 2003) ; *Cox v. Cox, 71 P.3d 1028 (Idaho 2003)* . *Wayt v. Urbigkit, 152 P.3d 1057 (Wyo. 2007)* (as between the parties, a deed for conveyance of real property is good without consideration so long as there is no wrongful act, such as fraud or undue influence, on the part of the grantee).

Add:

In re Rudell Estate, 780 N.W.2d 884 (Mich. App. 2009) (recital of consideration may be rebutted).

Add:

Rebuild America, Inc. v. Milner, 7 So. 3d 972 (Miss. App. 2009) (tax deed set aside "due to lack of consideration").

Add:

West America Housing Corp. v. Pearson, 171 P.3d 539 (Wyo. 2007) (quitclaim deeds voided for "lack of consideration)."

Martin v. Martin, 998 So.2d 1081 (Ala. App. 2008) (deed set aside for lack of consideration).

See also Gilbert *ex rel. Roberts v. Rainey, 71 S.W.3d 66 (Ark. App. 2002)* (rescission granted).

Dixon v. Dixon, 608 S.E.2d 849 (S.C. 2005) (lifetime care agreement incorporated into deed; consideration "did not fail"); *Fischer-Marsh v. Fischer, 822 N.E.2d 1055 (Ind. App. 2005)* (alleged oral care agreement did not give rise to "condition subsequent"; rescission denied).

Add after statutory citation: Ex parte Alexander, -- So. 2d -- (Ala. 2001):

806 So. 2d 1222 (Ala. 2001) (construing *Ala. Code § 8-9-12*).

Add:

Alexander v. Wade, 806 So. 2d 1215 (Ala. App. 1999) (parol evidence admissible to establish promise to support).

§ 82.09(b) Recitals. [Go To Main]

Add:

Station Associates, Inc. v. Dare County, 513 S.E.2d 789 (N.C. 1999) (fee simple absolute passed; recitals expressed motive or purpose); *Swanberg v. City of Tybee Island, 518 S.E.2d 114 (Ga. 1999)* (recitals showed intent to create fee simple absolute).

§ 82.09(c) Reservations and Exceptions. [Go To Main]

§ 82.09(c)(1) Background and Theory.

Calvert Joint Venture #140 v. Snider, 816 A.2d 854 (Md. 2003) (pointing out distinction between exception and reservation).

Add:

Bright v. Johnson, 302 S.W.3d 483 (Tex. App. 2009) .

Add:

American Energy Corp. v. Datkuliak, 882 N.E.2d 463 (Ohio. App. 2007) (two terms used "interchangeably"; so-called "exception" was more in the nature of a "reservation").

Add:

Hinojos v. Lohmann, 182 P.3d 692 (Colo. App) (grantor's intention is determinative; use of the world "except" not dispositive); *Winegar v. Martin, 304 S.W.3d 661 (Tex. App. 2009)* (reservation of mineral interest).

§ 82.09(c)(2) Modern Issues.

Calvert Joint Venture #140 v. Snider, 816 A.2d 854 (Md. 2003) .

Add:

Barry Simon Development, Inc. v. Hale, 210 S.W.3d 312 (Mo. App. 2006) (Missouri courts have not adopted "stranger to the deed" doctrine).

Loomis v. Luraski, 36 P.3d 862 (Mont. 2001) (stranger rule rejected in apparent dictum).

Add:

Clearmount Property, LLC v. Eisner, 872 N.Y.S.2d 725 (App. Div. 2009) ; *Windham v. Riddle, 672 S.E.2d 578 (S.C. 2009)* ; *Midcoast Cohousing Land Acquisition, LLC v. Riverhouse Trust, 946 A.2d 421 (Me. 2008)* (stranger rule recognized but not applicable on facts stated).

Gilstrap v. June Eisele Warren Trust, 106 P.3d 858 (Wyo. 2005) (attempted reservation of mineral right in non-owning co-grantor).

U.S. Bank, N.A. v. Koenig, 650 N.W.2d 820 (N. D. 2002) (court construed inconsistent language (apparently the result of a mistake) to validate the reservation clearly spelled out in the deed).

Cundy v. Range Telephone Cooperative, Inc., 123 P.3d 901 (Wyo.2005) (reservations are to be narrowly and strictly construed against the grantor and in favor of grantee); *Kinney v. Keith, 128 P.3d 297 (Colo. App. 2005)* (reservations are construed more strictly than grants; any ambiguities in a reservation are construed against the grantor).

Springbob v. Farrar, 514 S.E.2d 135 (S.C. App. 1999) (dissenting opinion).

Shirley v. Shirley, 525 S.E.2d 274 (Va. 2000) .

Add:

City of Del Rio v. Clayton Sam Colt Hamilton Trust, 269 S.W.3d 613 (Tex. App. 2008) ("we view grants in deeds expansively and reservations restrictively"); *Rox Petroleum, L.L.C. v. New Dominion L.L.C., 184 P.3d 502 (Okla. 2008)* ("the intent to reserve or except a reversionary interest from a grant must be unambiguous and unequivocal").

In re Estate of Harding, 878 A.2d 201 (Vt. 2005) ("excepting and reserving" construed as exception; easement created in grantors).

Add:

Tri-County Metro. Transp. Dist. v. Portland Gen. Elec. Co., 985 P.2d 222 (Or. App. 1999) (language in deed "excepting" railroad right of way contained in deed description and warranty clause; construed as an exception); *Boswell Energy Corp. v. Arrowhead Homes, Inc., 976 P.2d 1113 (Okla. App. 1999)* ("less and except" in mineral deed created ambiguity precluding summary judgment).

Add:

Rennaker v. Gleason, 913 N.E.2d 723 (Ind. App. 2009) (easement created); *Blazer v. Wall, 183 P.3d 84 (Mont. 2008)* ("Subject to" wording is commonly used in a deed to refer to existing easements, liens, and real covenants that the grantor wishes to exclude from warranties of title.); *Smith v. Huston, 251 S.W.3d 808 (Tex. App. 2008)* ("subject to" language is language of limitation).

Reniere v. Gerlach, 752 A.2d 480 (R.I. 2000) ("Subject to" language created life estate person other than grantee). "Subject to" has been construed to mean "subordinate to," "subservient to," "limited by," or "charged with." *See Beattie v. State ex rel. Grand River Dam Auth., 2002 OK 3, 41 P.3d 377 (Okla. 2002)* ("subject to" limits the estate); *N.P., Inc./Jerald A. Turboff v. Turboff, 54 S.W.3d 886 (Tex. App. 2001)* ("subject to" a "limiting clause"); *Natural Gas Pipeline Co. of America v. Law, 65 S.W.3d 121 (Tex. App. 2001)* ("subject to" a "limiting clause"); *Thompson v. Chase Manhattan Mtg. Corp., 90 S.W.3d 194 (Mo. App. 2002)* .

Herr v. Herr, 957 A.2d 1280 (Pa. Super. 2008) ("save and except" language did not prevent grantor's interest from passing); *Hinojos v. Lohmann, 182 P.3d 692 (Colo. App. 2008)* ("except" did not prevent grantor's estate from passing).

Imerys Marble Co. v. J.M. Huber Corp., 577 S.E.2d 555 (Ga. 2003) (property conveyed subject to mineral leases). *Capstar Radio Operating Co. v. Lawrence, 152 P.3d 575 (Idaho 2007)* ("except" language construed as limitation on grantor's warranty).

Gilstrap v. June Eisele Warren Trust, 106 P.3d 858 (Wyo. 2005) (where the grantee is a co-tenant and owner of an outstanding interest, that interest must be subtracted from the interest purportedly warranted by the grantor).

Add (before "See also"):

Miller v. Kloeckner, 600 N.W.2d 881 (N.D. 1999) (reservation language in both granting and habendum clauses; construed as limitation on the warranty; the *"Duhig"* rule discussed and applied even though the deed was a "special warranty" deed); North Dakota has applied the "*Duhig"* rule in the context of an "overconveyance" of mineral interests. *Gawryluk v. Poynter, 654 N.W.2d 400 (N.D. 2002)* .

§ 82.09(d) Covenants, Conditions and Restrictions. [Go To Main]

Add:

Green Tree Servicing, LLC v. Williams, 659 S.E.2d 193 (S.C. App. 2008) (grantee "returned" property after breach).

St. Mary's Medical Center, Inc. v. McCarthy, 829 N.E.2d 1068 (Ind. App. 2005) (charitable devise; conditions subsequent are not favored and receive a strict construction).

Add:

Metcalf v. Black Dog Realty, LLC, 684 S.E.2d 709 (N.C. App. 2009) (no limitation or condition attached to fee simple in land deeded to County for courthouse).

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Supp. To CHAPTER 82 TRANSFERS BY DEED

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Supp. to § 82.10 Covenants of Title.

[Go To Main]

§ 82.10(c) Reservations and Exceptions. [Go To Main]

§ 82.10(c)(1) Covenant of Seisin.

Add:

Estate of Patterson v. Carroll, 646 S.E.2d 885 (S.C. App. 2007) (whether grantee had status of bona fide purchaser over outstanding claim not decisive in suit against grantor).

O'Connell v. O'Connell, 694 N.W.2d 429 (Wis. App. 2005) (right to claim reimbursement for improvements by co-tenant in partition action; no equitable lien existed). *Holmes Develop., LLC v. Cook, 48 P.3d 895 (Utah 2002)* (nominal damages only).

Bedard v. Martin, 100 P.3d 584 (Colo. App. 2004) (purchase price plus interest).

Add:

Bedard v. Martin, 100 P.3d 584 (Colo. App. 2004) (rule stated in text regarding recovery of attorney fees recognized).

§ 82.10(c)(3) Covenant Against Encumbrances.

Campbell v. Summit Plaza Associates, 192 P.3d 465 (Colo. App. 2008) (lack of access to real property not an encumbrance); *Foxley & Co. v. Ellis, 201 P.3d 425 (Wyo. 2008)* (profit is an encumbrance; status of federal grazing

rights discussed).

Holmes Develop., LLC v. Cook, 48 P.3d 895 (Utah 2002) (issue of *lis pendens* as an encumbrance mentioned, but not decided).

Kitchen v. Schmedeman, 71 P.3d 486 (Kan. App. 2003) (mortgage; escrow agent failed to pay at closing).

Kohlbrand v. Ranieri, 823 N.E.2d 76 (Ohio App. 2005) (pipeline easement; no duty to check records).

Add:

Webster v. Ragona, 836 N.Y.S.2d 381 (N.Y.A.D. 2007) (actual knowledge of easement no defense).

Arnell v. Salt Lake County Bd. of Adjustment, 112 P.3d 1214 (Utah App. 2005) (county slope ordinance).

§ 82.10(c)(4) Covenant of Warranty.

Add:

Juniata Valley Bank v. Martin Oil Co., 736 A.2d 650 (Pa. Super. 1999) (purchaser at foreclosure sale was suing for environmental degradation of property, not suing for breach for title).

Rich, Rich & Nance v. Carolina Const. Corp., 570 S.E.2d 212 (N.C. App. 2002) .

See also: *Wilkinson Homes, Inc. v. Stewart Title Guar. Co., 610 S.E.2d 187 (Ga. App. 2005)* ("breach of warranty" used to describe failure of title; breach of covenant of seisin not cited).

Add:

Lewis v. Jetz Service Co., Inc., 9 P.3d 1268 (Kan. App. 2000) (interpreting and applying *K.S.A. § 58-2203* which refers to *lawful* claims).

Add:

See also Mason v. Loveless, 24 P.3d 997 (Utah App. 2001) (emphasizing the distinction between special and general warranties of title).

Add:

House v. First American Title Co., 883 N.E.2d 197 (Ind. App. 2008) .

Add new paragraph:

In reading the language of the "special warranty" deed, the most recent cases have tended to construe the language of the "special warranty" *not* as a covenant of warranty (requiring eviction, actual or constructive) but as a more all-inclusive warranty of title and freedom from encumbrances. Illustrative of this trend are decisions of the supreme courts of Iowa and North Dakota. *See Egli v. Troy, 602 N.W.2d 329 (Iowa 1999)* (grantor breached special warranty deed by "acquiescing" in establishment of an encumbrance); *State Bank & Trust v. Brekke, 602 N.W.2d 681 (N.D. 1999)* (title arising by adverse possession breached special warranty); *Morello v. Land Reutil. Comm'n, 659 N.W.2d 310 (Neb. 2003)* (special warranty protected party against prior defect in title).

Bennett v. Investors Title Ins. Co., 635 S.E.2d 649 (S.C. App. 2006) (habendum clause limited special warranties contained in deed).

Add:

The case of *Solares v. Solares, 232 S.W.3d 873 (Tex. App. 2007)* , indicates that eviction (actual or constructive) may not be required "when the true owner is in possession at the time of the conveyance and the grantee is not, and at that time the grantee 'finds the premises already in the possession of one claiming under a paramount title, the covenant of warranty is breached, and the [grantee] may maintain an action ... .' " *Compare* the South Carolina Court of Appeals decision in *Estate of Patterson v. Carroll, 646 S.E.2d 885 (S.C. App. 2007)* (lower court found that covenant of quiet enjoyment had been breached by outstanding third party interest; appellate court ruled that covenant of seisin was violated).

Add (after Spiegle case):

Kramer v. Dunn, 749 A.2d 984 (Pa. Super. 2000) (constructive eviction occurred when grantees were forced to pay third party for land they originally believed had been conveyed to them by warranty deed).

Holmes Develop., LLC v. Cook, 48 P.3d 895 (Utah 2002) (no eviction proved); *Weiss v. Old Republic Nat. Title Ins. Co., 584 S.E.2d 710 (Ga. App. 2003)* ("yielding title to property to a paramount title amounts to an eviction and constitutes a breach of warranty").

Black v. Patel, 572 S.E.2d 295 (S.C. 2002) (successful defense of title); *Black v. Patel, 594 S.E.2d 162 (S.C. 2004)* .

Add:

Coco v. Jaskunas, 986 A.2d 531 (N.H. 2009) (failure of grantor to defend lawful claim; grantor liable for attorney fees and costs).

§ 82.10(e) State Statutes. [Go To Main]

See Kitchen v. Schmedeman, 71 P.3d 486 (Kan. App. 2003) .

Add:

Outback Properties, LLC v. Johnson, 201 P.3d 246 (Or. App. 2008) ("conveys" did not give rise to implied covenant).

Add:

Bitting v. Gray, 897 A.2d 25 (R.I. 2006) .

Add:

Winters v. County of Clatsop, 150 P.3d 1104 (Or. App. 2007) (bargain and sale deed contained no warranties).

Arnold Industries, Inc. v. Love, 464 Utah Adv. Rep. 3 (Utah 2002) (statute applied to creation of easement).

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Supp. To CHAPTER 82 TRANSFERS BY DEED

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Supp. to § 82.11 Estoppel by Deed (After-acquired Title).

[Go To Main]

Add:

Anderson v. Pease, 727 N.Y.S.2d 717 (App. Div. 2001) .

Add:

Gutierrez v. Rodriguez, 30 S.W.3d 558 (Tex. App. 2000) (doctrine applied to special warranty deeds).

Add:

But see Premier Bank v. Board of County Comm'rs, 214 P.3d 574 (Colo. App. 2009) .

Add:

Mack Oil Co. v. Garvin, 39 P.3d 775 (Okla. 2002) ; *Jones v. P.A.W.N. Enterprises, 988 S.W.2d 813 (Tex. App. 1999)*

(doctrine applied; grantees took with notice).

Add:

Smith v. Smith, 637 S.E.2d 662 (Ga. 2006) (doctrine inapplicable where deed was invalid due to lack of capacity).

Sullivan v. Buckhorn Ranch Partnership, 119 P.3d 192 (Okla. 2005) (grantor is not necessarily estopped from showing that the supposed legal entity did not exist).

King v. King, 760 So. 2d 830 (Miss. App. 2000) (estoppel by deed cannot be used "to effectuate a conveyance of real estate"); *Elrod v. Elrod, 272 Ga. 188, 526 S.E.2d 339 (Ga. 2000)* (citing OCGA § 24-4-24(b)(4), estoppel statute pertaining to "ancient deeds and other instruments more than 30 years old ..."); *Reece v. Smith, 577 S.E.2d 583 (Ga. 2003)* (doctrine of estoppel by deed "cannot be used to transfer title or cure flaws in the legal requirements for a property interest").

Add:

Conte v. Marine Lumber Co., Inc., 848 N.E.2d 1246 (Mass. App. 2006) (Zayka case distinguished; doctrine not applicable).

Add:

As to Wyoming law, see, in addition to *Walliker*, see: *Kennedy Oil v. Lance Oil & Gas Company, Inc., 126 P.3d 875 (Wyo. 2006)* . *West America Housing Corp. v. Pearson, 171 P.3d 539 (Wyo. 2007)* (doctrine not applicable to quitclaim deed (dicta)).

Add:

After acquired title doctrine does not apply if deed is a quitclaim deed. Johnson v. E-Z Ins. Brokerage, Inc., *95 Cal. Rptr.3d 782 (Cal. App. 2009)* ; *Premier Bank v. Board of County Comm'rs of County of Bent, 214 P.3d 574 (Colo. App. 2009)* (interpreting Colorado estoppel by deed statute).

Rendleman v. Heinley, 149 P.3d 1009 (N.M App. 2006) (successor to second purchaser from grantor estopped to challenge title of first purchaser); *Glover v. Union Pacific R. Co., 187 S.W.3d 201 (Tex. App. 2006)* (repudiation of deed may prevent application of doctrine).

Gilstrap v. June Eisele Warren Trust, 106 P.3d 858 (Wyo. 2005) (estoppel by deed cannot be used to confer upon the grantee a greater title than the deed would have conferred had it been effective.)

The doctrine could be barred by the doctrine of "issue preclusion." *See Hughes v. Insley, 845 A.2d 1 (Md. App. 2003)* .

The Oklahoma Supreme Court has likewise refused to adopt the rationale of the *Sorenson* case. *See Mack Oil Co. v. Garvin, 39 P.3d 775 (Okla. 2002)* .

Angell v. Bailey, 225 S.W.3d 834 (Tex. App. 2007) ("To determine whether the doctrine of estoppel by deed should apply, we must again focus on the intention of the parties to the instrument and ask whether the parties intended to bind themselves to the terms of the recital at issue").

Add after citation to Zayka case:

Bigelow v. Wiley Mt, Inc., 26 P.3d 162 (Or. App. 2001) (no intent of grantor demonstrated that after-acquired title should inure to the benefit of the grantee).

Arnold Industries, Inc. v. Love, 464 Utah Adv. Rep. 3 (Utah 2002) (reasonable reliance shown).

Add:

Ackerman v. Abbott, 978 A.2d 1250 (D.C. 2009) .

Freeman v. Stephens Production Co., 171 S.W.3d 651 (Tex..App. 2005) (no requirement for party invoking doctrine to be a party against whom estoppel is sought or a privy to such party).

See also Dalessio v. Baggia, 783 N.E.2d 890 (Mass. App. 2003) .

For another example of a situation where the estoppel by deed doctrine gets "trumped" by another legal doctrine, *see Rocket Oil and Gas Co. v. Donabar, 127 P.3d 625 (Okla. App. 2005)* (marketable record title act vested mineral rights in claimant despite claim made by adverse party asserting estoppel by deed).

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Supp. to § 82.12 Consent Issues.

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Add:

Ockey v. Lehmer, 189 P.3d 51 (Utah 2008) ("The distinction between void and voidable is important, although the terms are not always used precisely").

Chand v. Steuben Hill Management Corp., 798 N.Y.S.2d 521 (N.Y.A.D. 2005) (forged instrument rendered transfers void *in initio*).

Add:

Whether an altered deed should be treated as void or voidable in the context of a dispute over bona fide purchaser for value status is not clear. *See Spence v. Spence, 628 S.E.2d 869 (S.C. 2006)* .

Karan v. Hoskins, 803 N.Y.S.2d 666 (N.Y.A.D. 2005) (person cannot be a bona fide purchaser or encumbrancer for value through a forged deed, as such a deed is void and conveys no title).

Schiavon v. Arnaudo Brothers, 100 Cal. Rptr. 2d 801 (Cal. App. 2000) (void/voidable distinction emphasized).

Add:

Scott D. Erler, D.D.S. Profit Sharing Plan v. Creative Finance & Investments, L.L.C., 203 P.3d 744 (Mont. 2009) .

GMAC Mortg. Co. v. Chan, 867 N.Y.S.2d 204 (2008) ; Delsas *ex rel. Delsas v. Centex Home Equity Co., LLC, 186 P.3d 141 (Colo. App. 2008)* .

Beasley v. Burns, 7 S.W.3d 768 (Tex. App. 1999) Knowles v. Edwards, 967 So.2d 255 (Fla. App. 2007) ; *Wayt v. Urbigkit, 152 P.3d 1057 (Wyo. 2007)* ; *Cruz v. Cruz, 832 N.Y.S.2d 217 (N.Y.A.D. 2007)* .

Add at end of citations:

Burk v. Demaray, 646 N.W.2d 635 (Neb. 2002) (forged deed is "void").

Public Administrator of Kings County v. Samerson, 750 N.Y.S.2d 301 (N.Y. App. Div. 2002) ; *Wu v. Wu, 733 N.Y.S.2d 45 (App. Div. 2001)* ; *Wu v. Wu, 733 N.Y.S.2d 45 (App. Div. 2001)* . *Second Refuge Church of Our Lord Jesus Christ, Inc. v. Lollar, 653 S.E.2d 462 (Ga. 2007)* .

§ 82.12(a) Mental Competency. [Go To Main]

Add:

Street v. Street, 211 P.3d 495 (Wyo. 2009) (standard articulated; "post-execution memory" rejected as part of test).

Turner v. Hendon, 269 S.W.3d 243 (Tex. App. 2008) ; *McMahan v. Webb, 990 So.2d 825 (Miss. App. 2008)* .

In re Estate of Green, 755 So. 2d 1054 (Miss. 2000) (deed set aside; "clear and convincing evidence" standard satisfied). *In re Conservatorship of Moran, 821 So. 2d 903 (Miss. App. 2002)* .

Landers v. Sgouros, 224 S.W.3d 651 (Mo. App. 2007) ("the issue is whether the grantor had the mental capacity to understand the nature of the transaction, to know the extent of her property, and to recognize the objects of her bounty").

Add:

Lockridge v. Smith, 680 S.E.2d 501 (Ga. App. 2009) (court can consider evidence for a "reasonable period of time" before and after the deed is executed).

Cox v. Cox, 976 So.2d 869 (Miss. 2008) .

Lee v. Hiler, 141 S.W.3d 517 (Mo. App. 2004) .

Jolly v. Clarkson, 157 S.W.3d 290 (Mo. App. 2005) (differing standards for "gift deed" and "business deed").

Add:

Buckley v. Ritchie Knop, Inc., 838 N.Y.S.2d 84 (N.Y.A.D. 2007) .

Ex parte Chris Langley Timber & Management, Inc., 923 So. 2d 1100 (Ala. 2005) (insanity existing prior to conveyance; presumption of incapacity); *Jordan v. Clinton, 796 N.Y.S.2d 629 (N.Y.A.D. 2005)* (certified hospital records shifted burden of proof); *In re Estate of Johnson, 739 N.W.2d 493 (IA. 2007)* (incompetent grantor B deed "invalid").

Add:

Delsas *ex rel. Delsas v. Centex Home Equity Co., LLC, 186 P.3d 141 (Colo. App. 2008)* .

§ 82.12(c) Undue Influence. [Go To Main]

Add:

Gellert v. Eginton, 770 N.W.2d 190 (Minn. App. 2009) .

Chapman v. Varela, 213 P.3d 1109 (N.M. 2009) ("influence, improperly exerted, which acts to the injury of the person swayed by it, or to the injury of those persons whom [he or she] would have benefited")

Lasen v. Anderson, 187 P.3d 857 (Wyo. 2008) (elements stated).

McCormick v. Jeffers, 637 S.E.2d 666 (Ga. 2006) (undue influence is such "as amounts either to deception or to force and coercion which destroys free agency").

In re Conservatorship of Moran, 821 So. 2d 903 (Miss. App. 2002) (presumption did not arise);

Smith v. Ellison, 15 P.3d 67 (Or. App. 2000) (definition of undue influence quoted from *Restatement (Second) Contracts § 177(1)*); *Stephenson v. Warren, 525 S.E.2d 809 (N.C. App. 2000)* (seven "factors" listed as relevant in establishing whether undue influence has taken place).

Add:

Krueger v. Ary, 205 P.3d 1150 (Colo. 2009) (extensive discussion of the legal effect of the presumption as it relates to the burden of proof and the effect on evidence rebutting the presumption); *see also*: *Hill v. Harper, 18 So.3d 310 (Miss.*

App. 2009) (discussion of rebutting the presumption of undue influence).

Add:

Stevens v. Estate of Smith, 19 So.3d 764 (Miss. App. 2009) (factors listed for determining whether confidential relationship exists); *Krafczik v. Morris, 206 P.3d 372 (Wyo. 2009)* (factors listed for determining whether confidential relationship existed.);

In re Estate of Price, 273 S.W.3d 113 (Tenn. App. 2008) (no confidential relationship).

Supervised Estate of Allender v. Allender, 833 N.E.2d 529 (Ind. App. 2005) (fiduciary relationship gave rise to presumption).

Arnold v. Dubose, 740 So. 2d 979 (Miss. App. 1999) (presumption arose and was rebutted); *Holmes v. O'Bryant, 741 So. 2d 366* Miss. App. 1999) (confidential relationship not proved); *Lancaster v. Boyd, 803 So. 2d 1285 (Miss. App. 2002)* (presumption arose); *Wright v. Roberts, 797 So. 2d 992 (Miss. 2001)* (presumption arose); *Brooks v. Kay, 530 S.E.2d 120 (S.C. 2000)* (presumption arose). *See also Robertson v. Robertson, 15 S.W.3d 407 (Mo. App. 2000)* (confidential relationship "alone is not enough to raise a presumption of undue influence"); *In re Estate of Bontkowski, 785 N.E.2d 126 (Ill. App. 2003)* (lack of inadequate consideration and other factors led to finding of undue influence); *In re Conservatorship of Groves, 109 S.W.3d 317 (Tenn. App. 2003)* (presumption arose). *In re Estate of Hood, 955 So.2d 943 (Miss. App. 2007)* (presumption arose but was rebutted); *Spencer v. Hudspeth, 950 So.2d 238 (Miss. App. 2007)* (six factor test for determining whether confidential relationship existed).

Add:

Chesser v. Chesser, 643 S.E.2d 764 (Ga. App. 2007) (undue influence not established as a matter of law unless "the grantee of a gift of real property stands in a confidential relationship with the grantor of real property, *and* the grantor is of a weak mentality"); *Landers v. Sgouros, 224 S.W.3d 651 (Mo. App. 2007)* ("confidential relationship ... *alone* is not enough to raise a presumption of undue influence").

Add:

Duerbusch v. Karras, 267 S.W.3d 700 (Mo. App. 2008) ; *In re Estate of Summerlin, 989 So. 2d 466 (Miss. App. 2008)* (transfer from father to son; no presumption of undue influence); *Turner v. Hendon, 269 S.W.3d 243 (Tex. App. 2008)* (transfer from mother to daughter; no presumption); *Figgins v. Cochrane, 942 A.2d 736 (Md. 2008)* (transfer from father to daughter; confidential relationship arose).

In re Conservatorship of Cook, 937 So. 2d 467 (Miss. App. 2006) (presumption rebutted); *Meyer v. Wright, 854 N.E.2d 57 (Ind. App. 2006)* (presumption rebutted).

In re Estate of Reid, 825 So. 2d 1 (Miss. 2002) (presumption arose where undue influencer was adopted son); *Hayes v. Apperson, 826 So. 2d 798 (Ala. 2002)* (stepson held to have unduly influenced testatrix, reversing lower court finding); *Augenstein v. Augenstein, 737 N.E.2d 613 (Ohio. Com. Pl. 2000)* (deed from father to children sustained); *Long v. Waggoner, 558 S.E.2d 380 (Ga. 2002)* (grantor not of "weak mentality"; no presumption of undue influence). *Van*

Cleave v. Estate of Fairchild, 950 So.2d 1047 (Miss. App. 2007) (deed from parent to child a result of undue influence).

§ 82.12(d) Fraud. [Go To Main]

Add:

Petrol Props. v. Stewart Title Co., 225 S.W.3d 448 (Mo. App. 2007) .

Add:

Ford v. Exxon Mobil Chemical Co., 235 S.W.3d 615 (Tex. 2007) ; *Webb v. Kirkland, 899 So. 2d 344 (Fla. App. 2005)* (rescission ordered but grantee not required to quitclaim interest back to grantor).

Add:

Delsas *ex rel. Delsas v. Centex Home Equity Co., LLC, 186 P.3d 141 (Colo. App. 2008)* .

Svanidze v. Kirkendall, 169 P.3d 262 (Colo. App. 2007) (discussing "fraud in factum"and void deed).

Add:

Shappy v. Downcity Capital Partners, Ltd., 973 A.2d 40 (R.I. 2009) (negligence of grantor in signing documents discussed in context of void/voidable distinction).

In re Estate of Law, 852 So. 2d 33, 2002 Miss. App. LEXIS 327 (Miss. App. 2002) (deed to person who falsely represented herself to grantor as his wife not "fraudulent"), *reversed by In re Estate of Law, 869 So. 2d 1027* ; *2004 Miss. LEXIS 339* .

§ 82.12(e) Mistake. [Go To Main]

Add:

Johnson v. Conner, 260 S.W.3d 575 (Tex. App. 2008) (no mutual mistake of fact existed);

Estate of DeLoach v. DeLoach, 873 So. 2d 146 (Miss. App. 2004) (mutual mistake not sufficiently pleaded); *Jabour v. Calleja, 731 So. 2d 792 (Fla. App. 1999)* (unilateral mistake; rescission denied); *Syversen v. Hess, 665 N.W.2d 23 (N.D. 2003)* (mistake not proved; court emphasized parole evidence rule). *Ward v. Ward, 874 N.E.2d 433 (Mass. App. 2007)*

(unilateral mistake of grantor; rescission denied).

Smith v. Smith, 639 S.E.2d 711 (W.Va. 2006) (to justify the reformation of a clear and unambiguous deed for mistake, the mistake must be one of fact, not of law; the mistake must be mutual and common to both parties to the deed; the unambiguous deed must fail to express the obvious intention of the parties; and the mutual mistake must be proved by strong, clear and convincing evidence).

Brenco v. South Carolina Dept. of Transp., 609 S.E.2d 531 (S.C. App. 2005) (unilateral mistake); *Davis v. Smith, 922 So. 2d 814 (Miss. App. 2005)* (mutual mistake proved).

Hilterbrand v. Carter, 27 P.3d 1086 (Or. App. 2001) (no mutual mistake shown; relief denied).

Ottaco Acceptance, Inc. v. Larkin, 733 N.W.2d 539 (Neb. 2007) (cancellation or reformation appropriate remedies).

Add:

Myrad Properties, Inc. v. LaSalle Bank Nat. Ass'n., 300 S.W.3d 746 (Tex. 2009) (rescission based upon mutual mistake; refusal to grant relief would result in "unjust enrichment").

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Supp. to § 82.13 Construction.

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§ 82.13(a) Introduction and Comparisons. [Go To Main]

§ 82.13. (a)(3) The Pole Star Rule.

Add:

Windham v. Riddle, 672 S.E.2d 578 (S.C. 2008) (intention of the grantor must be ascertained and effectuated).

Main Street Landing, LLC v. Lake Street Ass'n, Inc., 892 A.2d 931 (Vt. 2006) ("master rule" is that the intent of the parties govern).

Patterson v. Paul, 863 N.E.2d 527 (Mass. 2007) (presumed intent of the *grantor*).

Add:

Estate of Smith v. Spinelli, 216 P.3d 524 (Alaska 2009) (intention of the parties governs; court goes on to describe the court's "three step approach" to deed interpretation); *Zimmerer v. Romano, 679 S.E.2d 601 (W. Va. 2009)* (intent of the parties).

Chebatoris v. Moyer, 757 N.W.2d 212 (Neb. 2008) (effectuate intent of the parties); *Porter v. Bassett, 195 P.3d 1212 (Idaho 2008)* (effectuate "real intention" of the parties): *Medicine Lodge Investments, L.L.C. v. EAR Inc., 197 P.3d 502 (Okla. App.2008)* (ascertain true intent of the parties); *Porter v. Morrill, 949 A.2d 526 (Conn. App. 2008)* (expressed intentions of the parties).

Second Refuge Church of Lord Jesus Christ, Inc. v. Lollar, 653 S.E.2d 462 (Ga. 2007 (ascertain and give effect to the intent of the *parties*); *Hoskins Heirs v. Bogg, 242 S.W.3d 320 (Ky. 2007)* (intention of the parties); *Ottaco Acceptance, Inc. v. Larkin, 733 N.W.2d 539 (Neb. 2007)* (intention of the parties); *Ecosystem Resources, L.C. v. Broadbent Land & Resources, L.L.C., 158 P.3d 685 (Wyo. 2007)* (intention of the parties).

Add:

K & A Acquisition Group v. Island Pointe, LLC, 682 S.E.2d 252 (S.C. 2009) .

§ 82.13(a)(4) The Language of the Instrument.

Add:

Ecosystem Resources, L.C. v. Broadbent Land & Resources, L.L.C., 158 P.3d 685 (Wyo. 2007) ; *North Sebago Shores, LLC v. Mazzaglia, 926 A.2d 728 (Me. 2007)* .

Add:

Connall v. Felton, 201 P.3d 219 (Or. App. 2009) (deed not ambiguous).

Add:

Bennett v. Tracy, 740 A.2d 571 (Me. 1999) (if the words of the deed, given "their general and ordinary meaning," create no ambiguity, the deed is "clear and unambiguous"); *Schwarm v. Mexia Holdings, L.P., 720 N.E.2d 330 (Ill. App. 1999)* (language of mineral deed contained "no ambiguity"; extrinsic evidence barred).

Add:

Cherokee Water Co. v. Freeman, 33 S.W.3d 349 (Tex. App. 2000) ("three tiered" process of deed construction articulated).

Windham Land Trust v. Jeffords, 967 A.2d 690 (Me. 2009) .

Silsby v. Belch, 952 A.2d 218 (Me. 2008)

Utsch v. Utsch, 581 S.E.2d 507 (Va. 2003)

Tanguay v. Biathrow, 937 A.2d 276 (N.H. 2007) .

Main Street Landing, LLC v. Lake Street Ass'n, Inc., 892 A.2d 931 ("if the court determines that the writing is ambiguous, interpretation of the parties' intent becomes a question of fact to be determined based on all of the evidence - not only the language of the written instrument, but also evidence concerning its subject matter, its purpose at the time it was executed, and the situations of the parties' "). *DeGraff v. Burnett, 939 A.2d 472 (Vt. 2007)* (court deemed language to be ambiguous).

Read v. Harvey, 112 P.3d 785 (Idaho 2005) (whether a conveyance instrument is ambiguous is a question of law; however, interpretation of an ambiguous deed is a question of fact to be settled by the language of the conveyance instrument and the facts and circumstances of the transaction).

Stefanoni v. Duncan, 923 A.2d 737 (Conn. 2007) ; *DeGraff v. Burnett, 939 A.2d 474 (Vt. 2007)* .

Gilbert v. Geiger, 747 N.W.2d 188 (Wis. App. 2008) ; *Marrujo v. Sanderson, 191 P.3d 588 (N.M. App. 2008)* .

Add:

Garrett v. O'Dowd, 775 N.W.2d 549 (Wis. App. 2009) . The Kansas Supreme Court has responded to the criticism that the usual method of approach--determining first whether a deed is "ambiguous"--is a proper method to be used in determining whether extrinsic evidence should be allowed. The Kansas court defended its traditional method of "ambiguity analysis," noting "The ambiguity analysis simply endeavors to give effect to what the parties actually said they meant at the time contracting." *See*: *Central Natural Resources, Inc. v. Davis Operating Co., 201 P.3d 680 (Kan. 2009)* .

Add:

Longoria v. Lasater, 292 S.W.3d 156 (Tex. App. 2009) .

§ 82.13(b)(1) Extrinsic Evidence.

Add:

Emerald Pointe, L.L.C. v. Jonak, 202 S.W.3d 652 (Mo. App. 2006) (patent latent distinction recognized).

Marshall v. Soffer, 756 A.2d 284 (Conn. App. 2000) (discusses circumstances giving rise to latent ambiguity).

Add:

Zimmerer v. Romano, 679 S.E.2d 601 (W. Va. 2009) .

If deed is ambiguous, ascertaining the parties' intentions is a question of fact. *Porter v. Bassett, 195 P.3d 1212 (Idaho 2008)* .

Baney v. Eoute, 784 A.2d 132 (Pa. Super. 2001) (extrinsic facts may be introduced to show that apparently "clear and unambiguous language is in fact latently ambiguous").

The Montana Supreme Court, in *Mary J. Baker Revocable Trust v. Cenex Harvest States, Cooperatives, Inc., 164 P.3d 851 (2007)* discusses a Montana statute (§ 1-4-101 MCA) allowing for the receipt of extrinsic evidence even when the instrument (deed) is "umambiguous on its face." The Supreme Court of Wyoming, in *Ecosystem Resources, L.C. v. Broadbent Land & Resources, L.L.C., 158 P.3d 685* , expressed a similar approach in analogizing the construction of deeds to contracts.

Thrasher v. Arida, 858 So. 2d 1173 (Fla. App. 2003) .

Add:

Central Healthcare Services, P.A. v. Citizens Bank of Philadelphia, 12 So. 3d 1159 (Miss. App. 2009) .

Cf LeBaron v. Wright, 938 A.2d 891 (N.H. 2007) (subsequent grantee's interpretation of language in a deed, however, has no bearing upon court's interpretation, which focuses upon the intention of the parties at the time of the conveyance).

Add:

Carpenter v. Luke, 689 S.E.2d 247 (W. Va. 2009) ; *Arnold v. Palmer, 686 S.E.2d 725 (W. Va. 2009)* ..

Add:

Central Natural Resources, Inc. v. Davis Operating Co., 201 P.3d 680 (Kan. 2009) ; *Range Resources Corp. v.*

Bradshaw, 266 S.W.3d 490 (Tex. App. 2008) ; *City of Del Rio v. Clayton Sam Colt Hamilton Trust, 269 S.W.3d 613 (Tex. App. 2008)* ; *City of Huntington Woods v. City of Detroit, 761 N.W.2d 127 (Mich. App. 2008)* .

DeGraff v. Burnett, 939 A.2d 472 (Vt. 2007) ; *Angell v. Bailey, 225 S.W.3d 834 (Tex. App. 2007)* .

Add:

Olde Severna Park Improvement Ass'n v. Barry, 982 A.2d 905 (Md. App. 2009) ; *Zimmerer v. Romano, 679 S.E.2d 601 (W. Va. 2009)* ; *City of Del Rio v. Clayton Sam Colt Hamilton Trust, 269 S.W.3d 613 (Tex. App. 2008)* ; *Bon Aventure, L.L.C. v. Craig Dyas L.L.C., 3 So.3d 859 (Ala. 2008)* .

American Energy Corp. V. Datkuliak,, 882 N.E.2d 463 (Ohio. App. 2007) ; *Hoskins Heirs v. Boggs, 242 S.W.3d 320 (Ky. 2007)* ; *Barnett v. Estate of Anderson, 966 So.2d 915 (Ala. 2007)* .

§ 82.13 (b) (2) General Rules of Construction

Add:

Carpenter v. Luke, 689 S.E.2d 247 (W. Va. 2009) ; *Arnold v. Palmer, 686 S.E.2d 725 (W. Va. 2009)* .

Add:

Central Natural Resources, Inc. v. Davis Operating Co., 201 P.3d 680 (Kan. 2009) .

Add:

Olde Severna Park Improvement Ass'n v. Barry, 982 A.2d 905 (Md. App. 2009) ; *Zimmerer v. Romano, 679 S.E.2d 601 (W. Va. 2009)* .

§ 82.13(c) Other Issues of Ambiguity. [Go To Main]

§ 82.13(c)(2) Estate or Interest Conveyed.

Add:

Metcalf v. Black Dog Realty, LLC, 684 S.E.2d 709 (N.C. App. 2009) (repugnancy rule stated and adopted); *Premier Bank v. Board of County Comm'rs of County of Bent, 214 P.3d 574 (Colo. App. 2009)* (granting clause prevails over habendum clause).

Other recent cases mentioning the "repugnancy rule" are: *Lucareli v. Lucareli, 614 N.W.2d 60 (Wis. App. 2000)* (power to appoint reserved to grantor conflicted with grant of fee simple); *Reniere v. Gerlach, 752 A.2d 480 (R.I. 2000)* (reservation of life estate not repugnant to granting of fee).

Add:

Kipp v. Estate of Chips, 732 A.2d 127 (Vt. 1999) (" ... the division of the deed into such parts as the premises, the habendum and the tenendum, was pretty much a matter of capitalization and punctuation, and our Court was never very much impressed with the idea that it is of vital importance in what part of a deed the intention is expressed so long as it finds somewhere clear and adequate expression").

Add:

Consol Pennsylvania Coal Co. v. Farmers Nat. Bank of Claysville, 960 A.2d 121 (Pa. Super. 2008) (purpose of habendum clause is to "determine what estate passes.").

See Bennett v. Investors Title Ins. Co, 635 S.E.2d 649, 660 (S.C. App. 2006) (court discusses habendum and granting clauses in context of limiting grantor's warranties).

Harlingen Irr. Dist. Cameron County No. 1 v. Caprock Commun. Corp., 49 S.W.3d 520 (Tex. App. 2001) (granting clause prevails over habendum); *Hunt v. Forestry Comm'n, 595 S.E.2d 846 (S.C. App. 2004)* (granting clause cannot be "cut down" by subsequent language; "forever" not required to grant a fee simple absolute).

Eastin v. Dial, 288 S.W.3d 491 (Tex. App. 2009) ; *Wiser v. Elliott, 209 P.3d 337 (Or. App. 2009)* .

Johnson v. Conner, 260 S.W.3d 575 (Tex. App. 2008) .

Cellco Partnership v. Shelby County, 172 S.W.3d 574 (Tenn. App. 2005) (grantor's entire estate passes under *Tenn. Code Ann. § 66-5-101*). *Estate of Haan v. Haan, 237 S.W.3d 231 (Mo. App. 2007)* .

Add:

Eastin v. Dial, 288 S.W.3d 491 (Tex. App. 2009) .

Tripp v. F & K Assam Family, LLC, 755 N.W.2d 106 (S.D. 2008) .

Tripp v. F & K Assam Family, LLC, 755 N.W.2d 106 (S.D. 2008) (fee title transferred). See also: *City of Huntington Woods v. City of Detroit, 761 N.W.2d 127 (Mich. App. 2008)* (golf course transferred to City with reverter clause).

Add to citation "Cases holding that an easement was created":

Timberlake, Inc. v. O'Brien, 902 N.E.2d 843 (Ind. App. 2009) .

After Line 3 of the text, add new paragraph:fp:

In a textbook case involving construction of railroad right of way deeds, the Supreme Court of South Dakota, in *Swaby v. Northern Hills Regional R.R. Authority, 769 N.W.2d 798 (2009)* , concluded that certain deeds created a fee simple determinable, certain deeds created a fee simple upon a condition subsequent and a third category of deeds created easements.

Kershaw Sunnyside Ranches, Inc. V. Yakima Interurban Lines Ass'n, 126 P.3d 16 (Wash. 2006) (grant to railroad created easement); *King Associates, LLP v. Bechtler Development Corp., 632 S.E.2d 243 (N.C. App. 2006)* (fee simple created in railroad).

Neider v. Shaw, 65 P.3d 525 (Idaho 2003) ; *Michigan Dept. of Natural Resources v. Carmody-Lahti Real Estate, Inc., 699 N.W.2d 272 (Mich. 2005)* (grant to railroad created easement); *Cornfield Point Ass'n v. Town of Old Saybrook, 882 A.2d 117 (Conn. App. 2005)* (conveyance to city for "highway purposes" created fee).

Add to second paragraph, beginning "Cases holding that a fee simple was created":

Moss v. Williams, 822 So. 2d 392 (Ala. 2001) ; *C & G, Inc. v. Rule, 25 P.3d 76 (Idaho 2001)* ; *Ray v. King County, 86 P.3d 183 (Wash. App. 2004)* .

Add to end of second paragraph ("fee simple was created"):

Louisville & Indiana R. Co. v. Indiana Gas Co., 792 N.E.2d 885 (Ind. App. 2003) .

Add to citations beginning with "Conveyances for a 'right of way' for a road":

Bird Peak Road Ass'n v. Bird Peak Corp., 771 A.2d 260 (Conn. App. 2001) (conflicting language of deed construed as an easement); *Gregg Neck Yacht Club, Inc. v. County Comm'rs of Kent County, 769 A.2d 982 (Md. App. 2001)* (deed created easement; "right of way" language deemed significant); *Realvest Corp. v. Lane County, 100 P.3d 1109 (Or. App. 2004)* (deed conveying 80 feet "right of way" conveyed fee).

Add at beginning of fifth paragraph ... The most recent cases ... .:

Chevy Chase Land Co. v. United States, 733 A.2d 1055 (Md. 1999) (easement); *Moore v Missouri Friends of Wabash Trace Nature Trail, Inc., 991 S.W.2d 681 (Mo. App. 1999)* (easement).

Roeder Co. v. K & E Moving & Storage Co., 4 P.3d 839 (Wash. App. 2000) (fee simple conveyed).

[Add at end of footnote:]

In the most recent Indiana case, the appellate court upheld a lower court ruling that classified some transfers to the railroad as easements and others as transfers of fee simple. *See Clark v. CSX Transp., Inc., 737 N.E.2d 752 (Ind. App. 2000)* .

Add to citations in second paragraph beginning "Cases holding that a fee simple was created":

Poznic v. Porter County Development Corp., 779 N.E.2d 1185 (Ind. App. 2002) ; *Severns v. Union Pacific Railroad Co., 125 Cal. Rptr. 2d 100 (Cal. App. 2002)* .

Add to citation in first sentence "Cases holidng that an easement was created":

Hanson Industries, Inc. v. County of Spokane, 58 P.3d 910 (Wash. App. 2002) ; *Mackall v. Fleegle, 801 A.2d 577 (Pa. Super. 2002)* ; *Faulkenberry v. Norfolk Southern Ry. Co., 563 S.E.2d 644 (S. C. 2002)* ; *Diaz v. Home Fed. Sav. & Loan Ass'n, 2002 Ill. App. LEXIS 921 (Ill. App. 2002)* .

Panetta v. Equity One, Inc., 875 A.2d 991 (N.J. Super. 2005) (deed conveyed riparian rights as an appurtenance; court

cited *N.J.S.A. 46:3-16* in support of decision).

§ 82.13(c)(3) Legal Descriptions.

Add:

Akers v. D.L. White Const., Inc., 127 P.3d 196 (Idaho 2005) (references to monuments control over conflicting calls for courses and distances if the monument is of a permanent nature and established with reasonable certainty).

Via v. Beckett, 617 S.E.2d 895 (W.Va. 2005) (specific call to line in both deeds was a monument establishing the property line).

Lisiewski v. Seidel, 806 A.2d 1121 (Conn. App. 2002) ; *Wallingford v. Kennedy, 753 A.2d 493 (Me. 2000)* ; *McGeechan v. Sherwood, 760 A.2d 1068 (Me. 2000)* ; *Eaton v. Town of Wells, 760 A.2d 232 (Me. 2000)* ; *Pion v. Bean, 833 A.2d 1248 (Vt. 2003)* ; *Khalsa v. Ward, 101 P.3d 843 (Utah App. 2004)* (fixed monuments prevail over course and distance); *Miller v. Callear, 91 P.3d 1117 (Idaho 2004)* (monuments prevail over course and distance).

Add:

Kitt v. Crosby, 672 S.E.2d 851 (Va. 2009) ("rule of preference" not "inflexible").

Kitt v. Crosby, 672 S.E.2d 851 (Va. 2008) (so called "rule of preference" not inflexible and will not be applied if to do so would frustrate the intent of the parties to the deed).

Add:

Warner v. Brown, 659 S.E.2d 885 (Ga. App. 2008) ; *Pomona Mobile Home Park, LLC v. Jett, 265 S.W.3d 396 (Mo. App. 2008)* .

Lovell v. Rea, 629 S.E.2d 459 (Ga. App. 2006) (moiety rule applied to road); *Bitting v. Gray, 897 A.2d 25 (R.I. 2006)* (limitation on moiety rule enunciated: "if a road is created wholly over the land of one person, the presumption of ownership to the centerline of a road is defeated and a conveyance of property bounded by such road conveys title only to the roadside"); *Hanson v. Cadwell Crossing, LLC, 848 N.E.2d 1240 (Mass. App. 2006)* (Massachusetts' "derelict fee statute [G.L. c. 183, § 58] codifies common law rule moiety rule); *Glover v. Union Pacific R. Co., 187 S.W.3d 201 (Tex. App. 2006)* (articulating elements of "strip and gore doctrine").

For an interesting case applying the "highway" rule when the bordering land was a railroad right of way (easement), *see*: *Diaz v. Home Fed. Sav. & Loan Ass'n, 2002 Ill. App. LEXIS 921* (Ill. App. No. 2-01-1165, Oct. 3, 2002); *Reagan v. Marathon Oil Co., 50 S.W.3d 70 (Tex. App. 2001)* (extensive discussion of "strip and gore" doctrine as applied by Texas courts); *Carney v. Heinson, 985 P.2d 1137 (Idaho 1999)* (vacated alley); *Ruddick v. Bryan, 989 S.W.2d 202 (Mo. App.*

1999) (vacated alley); *Kimberling North, Inc. v. Pope, 100 S.W.3d 863 (Mo. App. 2003)* ; *Watts v. Watts, 818 A.2d 1031 (Me. 2003)* ; 1845 *La Dawn Lane, LLC v. Bowman, 594 S.E.2d 373 (Ga. 2004)* (recognizing rule). *Minerva Partners, Ltd. v. First Passage, LLC, 731 N.W.2d 472 (Mich. App. 2007)* .

Add to citations in second paragraph:

A conveyance by the grantor after the vacation of the street or alley usually does not change the standard rule, but courts have differed on this point. *See Alexander v. McClellan, 39 P.3d 1265 (Colo. App. 2001)* ; *Moore v. Energy States, Inc., 71 S.W.3d 796 (Tex. App. 2002)* .

Add:

Coussens v. Stevens, 113 P.3d 952 (Or. App. 2005) (presumption is that when a grantor conveys "blocks and lots" that are separated by a roadway from a strip of waterfront property, the grantor intended to retain ownership of the waterfront strip unless there was also an express conveyance of that property)

Henry v. Malen, 692 N.Y.S.2d 841 (App. Div. 1999) (1867 deed "to the brook" rebutted presumption).

§ 82.13(d) Merger Doctrine. [Go To Main]

Add (at beginning):

Sentlowitz v. Cardinal Development, LLC, 882 N.Y.S.2d 267 (App. Div. 2009) (claims other than fraudulent concealment claim merged into deed); *Arnold v. Wilkins, 876 N.Y.S.2d 780 (App. Div. 2009)* (promise to convey a sewer system in good working order merged into deed);

Add new paragraph before last paragraph:

If the seller sues for payment of the purchase price or a contractor sues for "extra" work, the merger doctrine will likely be applied. *See CGM Const. Co. v. Miller, 693 N.Y.S.2d 763 (App. Div. 1999)* ; 527 *Smith Street Brooklyn Corp. v. Bayside Fuel Oil Depot Corp., 691 N.Y.S.2d 560 (App. Div. 1999)* . *See also Krajcir v. Egidi, 712 N.E.2d 917 (Ill. App. 1999)* (post closing action for balance of contract remanded for determination of whether parties' intention was for obligation to survive closing).

Bixler v. Oro Management, L.L.C., 86 P.3d 843 (Wyo. 2004) (it is "conclusively presumed that the deed represents the final agreement of the parties").

Add:

Sentlowitz v. Cardinal Development, LLC, 882 N.Y.S.2d 267 (App. Div. 2009) (fraudulent concealment claim did not merge); *JEM Acres, LLC v. Bruno, 764 N.W.2d 77 (Minn. App. 2009)* (alleged fraud by vendors relating to sewer system problems); *Sunset Beach Development, LLC v. AMEC, Inc., 675 S.E.2d 46 (N.C. App. 2009)* (alleged misrepresentation of vendor regarding violations of environmental laws).

Kagan v. Freedman, 866 N.Y.S.2d 216 (N.Y. App. Div. 2008) (merger doctrine precluded fraud and breach of contract claims); *Bickerstaff Real Estate Management, LLC v. Hanners, 665 S.E.2d 705 (Ga. App. 2008)* (merger doctrine precluded breach of warranty claim).

Cook v. Wilson, 845 N.E.2d 563 (Ohio App. 2006) (doctrine applied); *Ka Foon Lo v. Curis, 815 N.Y.S.2d 131 (N.Y. A.D. 2006)* (fraud claim rejected; doctrine applied); *Emerald Pointe, L.L.C. v. Jonak, 202 S.W.3d 652 (Mo. App. 2006)* (rule applied; no exceptions applied); *Bedrosian v. Guzy, 822 N.Y.S.2d 181 (N.Y. A.D. 2006)* (doctrine applied); *South Kitsap Family Worship Center v. Weir, 146 P.3d 935 (Wash. App. 2006)* (repurchase option did not survive closing).

Panos v. Olsen and Associates Const., Inc., 123 P.3d 816 (Utah App. 2005) (height restriction in deed "final, integrated agreement of the parties"; no exception to merger applied); *Sells v. Robinson, 118 P.3d 99 (Idaho 2005)* (merger applied; fact that deed was ambiguous would not preclude doctrine's application); *Harrodsburg Indus. Warehousing, Inc. v. MIGS, LLC, 182 S.W.3d 529 (Ky. App. 2005)* (purchase agreement merged into deed); *Chapman v. Anchor Lumber, 823 N.E.2d 594 (Ill. App. 2005)* (contract real estate tax provision merged into deed). *Unrau v. Kidron Bethel Retirement Services, Inc., 27 P.3d 1 (Kan. 2001)* (deed superseded residency agreement); *Lizotte v. Mitchell, 771 A.2d 884 (R.I. 2001)* (claims by purchasers of real estate contract barred by merger); *Mason v. Loveless, 24 P.3d 997 (Utah App. 2001)* (real estate purchase agreement superseded by deed); *In re Estate of Rosenbaum, 624 N.W.2d 821 (S.D. 2001)* (alleged oral agreement superseded by deed); *Dansie v. Hi-Country Estates Homeowners Ass'n, 987 P.2d 30 (Utah 1999)* (contract stipulating that purchasers take subject to covenants, conditions and restrictions merged into deed; covenants, conditions and restrictions "burden the title"); 1455 *Washington Ave. Assoc. v. Rose & Kiernan, Inc., 687 N.Y.S.2d 791 (App. Div. 1999)* (alleged promise by vendee to construct office building on transferred property; merger applied); *Kiec v. Sherrerd, 764 A.2d 39 (Pa. 2000)* (alleged non-compliance by seller with Sewage Facilities Act could not used as basis for rescission by purchaser who had accepted deed; court's long-standing commitment to merger doctrine emphasized); *Richardson v. Hardin, 5 P.3d 793 (Wyo. 2000)* (recovery of attorney's fee as required in purchase agreement barred by merger doctrine); *Dourountoudakis v. Alesi, 706 N.Y.S.2d 476 (App. Div. 2000)* (contract provision entitling purchaser to prepaid rents deemed merged); *DRT Const. Co., Inc. v. BH Associates, 702 N.Y.S.2d 738 (App. Div. 2000)* (obligation to deliver warranty deed did not survive closing); *Tripp v. C.L. Miller, 105 S.W.3d 804 (Ark. App. 2003)* ; *Rothstein v. Yaroscak, 750 N.Y.S.2d 625 (App. Div. 2002)* (breach of contract claims in vendor-purchaser agreemetn merged); *Warner v. Estate of Allen, 776 N.E.2d 422 (Ind. App. 2002)* (insurance claims under purchase agreement merged); *Andrew Lunsford Properties, LLC v. Davis, 572 S.E.2d 682 (Ga. 2002)* (alleged discrepancy in shortage of land barred by merger); *Taylor v. McConchie, 569 S.E.2d 35 (Va. 2002)* (rights to easement under contract merged); *Tungsten Holdings, Inc. v. Olson, 50 P.3d 1086 (Mont. 2002)* (road easement did not survive closing); *Estate of Fisher v. Fisher, 645 N.W.2d 841 (S.D. 2002)* ("first chance to buy" did not survive delivery of deed); *Richman v. Gehring Ranch Corp., 37 P.3d 732 (Mont. 2001)* (access rights merged); *Gloucester Landing Associates, Ltd. Partnership v. Gloucester Redevelopment Authority, 802 N.E.2d 1046 (Mass. App. 2004)* (merger clause contained in purchaser agreement). *Goodman v. Lothrop, 151 P.3d 818 (Idaho 2007)* (contract providing for life estate merged into deed); *Simone v. Homecheck Real Estate Services, Inc., 840 N.Y.S.2d 398 (N.Y.A.D. 2007)* (doctrine of merger barred contract claims); *Rivietz v. Wolohojian, 832 N.Y.S.2d 505 (N.Y.A.D. 2007)* (merger clause in contract precludes claim for breach of contract).

Add:

Illingworth v. Bean, 894 N.E.2d 958 (Ill. App. 2008) (rescission suit based upon misrepresentation not barred by merger doctrine); *Price v. Godby, 263 S.W.3d 598 (Ky. App. 2008)* (mistake).

Ross v. Ticor Title Ins. Co., 143 P.3d 885 (Wash. App.) (misrepresentation barred merger).

Geodyne Energy Income Production Partnership I-E v. Newton Corp., 161 S.W.3d 482 (Tex. 2005) (merger doctrine may not prevent proof of prior misrepresentations under the Deceptive Trade Practices-Consumer Protection Act); *Yeager v. McLellan, 177 S.W.3d 807 (Ky. 2005)* (fraud exception);

Brown v. Johnson, 34 P.3d 1233 (Wash. App. 2001) (action for misrepresentation; merger not applied); *Munawar v. Cadle Co., 2 S.W.3d 12 (Tex. App. 1999)* ; *Fehling v. Wicks, 687 N.Y.S.2d 868 (1999)* (merger rule not applied where latent defects discovered by purchaser after closing); *Greenfield v. Heckenbach, 797 A.2d 63 (Md. Spec. App. 2002)* .

Nunes v. Meadowbrook Develop. Co., 824 A.2d 421 (R.I. 2003) (doctrine not applied if there is proof of "fraud or mutual mistake"). *Ross v. Kirner, 172 P.3d 701 (Wash. 2007)* (negligent misrepresentation claim not merged; merger doctrine "does not bar actions based on fraud, misrepresentation, or mistake"); *Moore v. Smith, 158 P.3d 562 (Utah App. 2007)* (negligent misrepresentation claim not barred); *Czarobski v. Lata, 862 N.E.2d 1039 (Ill. App. 2007)* (mutual mistake regarding property tax assessment; merger not applied); All *Brands Fork Lift Corp. v Yetish, Inc., 840 N.Y.S.2d 685 (N.Y.Sup. 2007)* (pre-purchase agreement between co-purchasers of property not merged).

After the reference to the Bruggeman case, add:

Davencourt at Pilgrims Landing Homeowners Ass'n v. Davencourt at Pilgrims Landing, LLC, 221 P.3d 234 (Utah 2009) (implied warranty of workmanlike quality in sale of new home did not merge); *Golden v. Woodward, 15 So. 3d 664 (Fla. App.2009)* (duty of vendees to make payments survived closing); *Miller v. Hutson, 281 S.W.3d 791 (Ky. 2009)* (vendor's extension of liability agreement survived closing); *Shah v. Smith, 908 N.E.2d 983 (Ohio App. 2009)* (agreement to convey easement to purchases survived closing); *Brogden v. Durkee, 16 So.3d 113 (Ala. App. 2009)* (time for performance clause in purchase agreement did not merge).

Franklin Park Plaza, LLC v. V & J Nat. Enterprises, LLC, 870 N.Y.S.2d 193 (N.Y. App. Div. 2008) (merger doctrine rebutted by express intention of parties' intention); *Arnold v. Williams, 876 N.Y.S.2d 780 (N.Y. App. Div. 2008)* (parties intended obligation to survive closing); *Givens v. Ward, 272 S.W.3d 63 (Tex. App. 2008)* (merger doctrine does not bar reformation action); *Goodall v. Whispering Woods Center, L.L.C., 990 So.2d 695 (Fla. App. 2008)* (reformation action not barred by merger doctrine);

The Minnesota Supreme Court, in its review of the appellate court ruling, held that the "presumption of merger does not apply to a repurchase agreement, which cannot, by its very nature, be performed prior to closing." *See also* cases cited in note 765 *infra*.

Coe v. Crady Davis Corp., 60 P.3d 794 (Colo. App. 2002) (fee shifting provision did not merge; provision did not relate to "title, quality, possession or emblements of the land"); *Coughlin v. Gustafson, 772 N.E.2d 864 (Ill. App. 2002)* (warranties related to condition of dwelling deemed collateral); *Sainsbury Const. Co., Inc. v. Quinn, 47 P.3d 772 (Idaho App. 2002)* (no merger; covenants in contract were "collateral to and independent of the conveyance"); *Spears v. Warr, 44 P.3d 742 (Utah 2002)* (irrigation water agreements not merged; "collateral rights" exception applied); *Premier Title Co. v. Donahue, 765 N.E.2d 513 (Ill. App.2002)* (two exceptions to merger doctrine noted and both applied to facts of

case).

Neely Devel. Corp. v. Service First Investments, Inc., 582 S.E.2d 200 (Ga. App. 2003) (survival/nonmerger clause given effect).

Williams v. Younginer, 851 N.E.2d 351 (Ind. App. 2006) (implied warranties as to quality of improvements deemed collateral).

Add:

Novelty Crystal Corp. v. PSA Institutional Partners, L.P, 850 N.Y.S.2d 497 (N.Y. App. Div.) (agreement not deemed collateral)

Metro Group Const. Corp. v. Town of Hempstead, 808 N.Y.S.2d 393 (N.Y.A.D. 2005) (parties' undertakings were "collateral"; survival clause in contract as well); *NVR, Inc. v. Edwards, 801 N.Y.S.2d 878 (N.Y.A.D. 2005)* (employee discount agreement deemed collateral); *Bolen v. Bolen, 169 S.W.3d 59 (Ky. App. 2005)* (contract not executed before the deed);

Beck v. Smith, 538 S.E.2d 312 (Va. 2000) (provision in sales contract regarding impact of utility easements deemed collateral); *Neppl v. Murphy, 736 N.E.2d 1174 (Ill. App. 2000)* (warranty provision in sales contract relating to "operating condition at possession" deemed collateral); *Waterville Industries, Inc. v. Finance Authority of Maine, 758 A.2d 986 (Me. 2000)* (agreement to provides notices as to violations of rules and regulations deemed collateral); *Murphy v. Stowe Club Highlands, 761 A.2d 688 (Vt. 2000)* ("dirt work obligation" deemed collateral); *Bedard v. Martin, 100 P.3d 584 (Colo. App. 2004)* (fee-shifting provision not extinguished by merger); *Archambault v. Ogier, 95 P.3d 257 (Or. App. 2004)* ("collateral terms" not merged); *Wills v. Whitlock, 139 S.W.3d 643 (Mo. App. 2004)* ("collateral obligations" not merged); *Engle Homes, Inc. v. Jones, 870 So. 2d 908 (Fla. App. 2004)* (arbitration clause survived closing; language of purchase agreement negated merger). *West America Housing Corp. v. Pearson, 171 P.3d 539 (Wyo. 2007)* (a collateral obligation is one that is not "deed-related"; deed-related provisions are those concerning 'title, possession [and] quantities or emblements of the land ... .'); *Hastetter v. Fetter Properties, LLC, 873 N.E.2d 679 (Ind. App. 2007)* (doctrine of merger had no application to extinguish rights collateral and independent to the conveyance of title, such as those concerning the quality of improvements).

Add:

See also Juniata Valley Bank v. Martin Oil Co., 736 A.2d 650 (Pa. Super. 1999) (purchaser at foreclosure sale sued for damages under various theories due to discharge of fuel oil on property; merger not applied as "quality of title is not in issue"). *Bell v. Turner, 874 N.E.2d 820 (Ohio App. 2007)* (merger not applied as deed was never accepted thus no transfer of title occurred).

Panos v. Olsen and Associates Const., Inc., 123 P.3d 816 (Utah App. 2005) (merger doctrine is an "admittedly harsh rule of law").

Bixler v. Oro Management, L.L.C., 86 P.3d 843 (Wyo. 2004) (it is "conclusively presumed that the deed represents the final agreement of the parties").

Add [after Hansen v. Stichting Mayflower citation]:

See also Pavoni v. Nielsen, 999 P.2d 595 (Utah App. 2000) (abrogation clause limited; merger not applied). *Chapdelaine v. Sochocki, 635 N.W.2d 339 (Mich. App. 2001)* (easement reserved by agreement not capable of fulfillment until after deed was delivered; merger not applied). *But see Failes v. Lichten, 37 P.3d 301 (Wash. App. 2001)* (attorney fee provision not merger; contract contained "anti-merger" clause).

Blair Const., Inc. v. McBeth, 44 P.3d 1244 (Kan. 2002) ("whether merger occurs ultimately depends the intention of the parties"); *Albrecht v. Clifford, 767 N.E.2d 42 (Mass. 2002)* (warranties that did survive closing were only to last for one year per express agreement of the parties). *See also Crowley Marine Associates v. Nyconn Associates, Inc., 738 N.Y.S.2d 681 (App. Div. 2002)* (parties did not *intend* property tax provision to survive closing); *Kunker v. Isle Harbour Estates Inc., 738 N.Y.S.2d 740 (App. Div. 2002)* (merger doctrine does not apply "where there is a clear intent evidenced by the parties that a particular provision will survive closing or where there is a collateral undertaking").

Savage v. KGE Associates Ltd. Partnership, 580 S.E.2d 591 (Ga. App. 2003) (application of merger doctrine depends upon "intention of the parties"); *Home and Land Owners, Inc. v. Angel Fire Resort Operations, L.L.C., 69 P.3d 243 (N. M. App. 2003)* (merger doctrine discussed in "unique context of Chapter 11 bankruptcy proceedings").

Ladas Land & Development, Inc. v. Merritt and Walding Properties, L.L.P., 978 So.2d 55 (La. App. 2007) ("implicit consent" to the merger of the contract into the deed); *DiPrima v. Croce, 842 N.Y.S.2d 173 (N.Y. Sup. App. 2007)* (merger applied as the court found that "the parties did not *intend* the contract provision regarding the repair to the roof leak to survive delivery of the deed").

Deep Water Brewing, LLC v. Fairway Resources Ltd., 215 P.3d 990 (Wash. App. 2009) (intent of the parties controls; extrinsic evidence admissible); *Sunset Beach Development, LLC v. AMEC, Inc., 675 S.E.2d 46* (N.C. App.) .

Wade v. Huston, 877 A.2d 464 (Pa. Super. 2005) (parties did not intend merger of property settlement agreement arising out of divorce); *Schlup v. Bourdon, 105 P.3d 720 (Kan. App. 2005)* (merger is not absolute and whether merger occurs depends on the intention of the parties; parties did not intend merger and court so found).

§ 82.13(e) Policy Considerations in Deed Construction. [Go To Main]

Add:

The trend toward utilizing a "contracts" approach to deed construction appears to be accelerating. *See, e.g., Old Serverna Park Improvement Ass'n v. Barry, 982 A.2d 905 (Md. App. 2009)* ("In construing a deed, the basic principles of contract interpretation apply."); *Mattson v. Montana Power Co., 215 P.3d 675 (Mont. 2009)* ("The construction of a writing granting an interest in real property is governed by the rules of contract interpretation."); *Cassidy v. Pavlonnis, 205 P.3d 58 (Or. App. 2009)* ("A deed is subject to the ordinary rules of contract construction.").

But see Utsch v. Utsch, 565 S.E.2d 345 (Va. App. 2002) (parol evidence rule *not* applicable where issue is one of donative intent to make a gift).

Syversen v. Hess, 665 N.W.2d 23 (N.D. 2003) (parole evidence rule applied in context of alleged mistake). *See also Utsch v. Utsch, 581 S.E.2d 507 (Va. 2003)* (parol evidence rule applies where issue is one of donative intent to make a

gift).

Stonybrook Condominium Ass'n v. Jocelyn Properties, Inc., 862 A.2d 721 (Pa. Cm. 2004) (absent fraud, accident, mistake, parol evidence rule bars extrinsic evidence as to what parties to deed intended); *Caballo Coal Co. v. Fidelity Exploration & Production Co., 84 P.3d 311 (Wyo. 2004)* (construction of mineral rights reservation in deed; court referred to "*contracts*" conveying mineral interests in discussing constructional rules).

Department of Transp. v. Meadow Trace, Inc., 617 S.E.2d 246 (Ga. App. 2005) ("a deed is a contract").

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CHAPTER 83 DONATIVE TRANSFERS

9-83 Thompson on Real Property, Thomas Editions 83.syn

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§ 83.syn Synopsis to Chapter 83: DONATIVE TRANSFERS

§ 83.01 Overview of the Law of Donative Transfers.

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§ 83.03 Delivery.

§ 83.03(a) Introduction and Background.

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§ 83.07 Drafting Considerations.

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CHAPTER 83 DONATIVE TRANSFERS

9-83 Thompson on Real Property, Thomas Editions § 83.01

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§ 83.01 Overview of the Law of Donative Transfers.

Donative transfers of real property typically present different legal issues than sales of real property. Whether the transfer is by gift or sale, the instrument of transfer is the deed, the basic elements of which are examined in the preceding chapter.

Proof of delivery, essential to all transfers by deed, has proven troublesome in gift cases. Especially troublesome are those situations in which the grantor has attempted to retain some ownership interest until death. The dividing line between inter vivos and testamentary transfers looms large in these types of cases.

Conditional delivery issues have been problematic in gift cases. In the context of sales of real property, the conditional delivery issue is far less likely to arise.

Least problematic of all the requirement of acceptance. To the extent the issue arises at all, it arises in conjunction with gifts of real property.

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CHAPTER 83 DONATIVE TRANSFERS

9-83 Thompson on Real Property, Thomas Editions § 83.02

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§ 83.02 Outline of Chapter.

This chapter will focus on the concept of delivery and legal problems associated with delivery. These associated problems include deeds testamentary in nature, evidentiary issues and the issues pertaining to conditional delivery. The topic of acceptance will be the concluding topic.

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CHAPTER 83 DONATIVE TRANSFERS

9-83 Thompson on Real Property, Thomas Editions § 83.03

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§ 83.03 Delivery.

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§ 83.03(a) Introduction and Background.

The delivery requirement has been a part of the common law of deeds from the beginning. Sir William Blackstone, in stating that one of the requisites for a "good deed" is that "it be delivered," was simply reiterating the common law rule laid down by Coke. n1 In 1830 Chancellor Kent stated that delivery was "another incident essential to the due execution of a deed, for it takes effect only from the delivery." n2 There has never been a debate regarding the necessity of delivery; where the controversy arises is in regard to the legal test for delivery, which, otherwise stated, is a matter of definition -- giving substantive legal content to the term "delivery." Whether or not one considers "delivery" as an incident of "due execution," as Kent treated it, is, in the main, a semantical distinction that does not play a significant role in modern day case law. From a theory standpoint, however, the delivery requirement poses a fundamental questions as to how one defines the term "deed" and when an instrument becomes a "deed."

In order for an instrument to be a "deed," it must meet certain formalities requirements -- rules of law -- imposed by state statute or the common law. n3 If these requirements are met, the common understanding is that there is "deed," which, in order to be legally effective, must be delivered. The implicit understanding is that delivery can take place only *after* the execution of an instrument complying with common law and statutory formalities. n4 The deed, as instrument of conveyance which transfers legal title, is legally effective "upon delivery," which implies that delivery is the final step in making the transfer of title effective. n5 Otherwise stated, the question of delivery is not reached if the instrument in question is fatally defective for failing to meet statutory and common law requirements for what must be contained in a "deed." Once those requisites have been met, the second test must be satisfied, that of delivery of the "deed."

The conceptual difficulty of making "delivery" an element of due execution has an analogue in the law of wills: A person signs an instrument denominated as that person's will. If the person signing is purporting to execute an attested will, the instrument is not a "will" until the witnesses sign the instrument as witnesses. The "will" which the maker asks the witnesses to sign is not technically a "will" until the witnesses sign. Once the will is signed the instrument is referred to as a "will," even though the instrument does not take effect as a dispositive instrument until the testator dies. n6 There is a clearly defined time gap between the execution of the will and the date of the testator's death. Similarly a time gap

exists between the execution of a deed and delivery. The undelivered "deed" is analogous to the "will" of a living person. Both are potentially legally effective instruments of transfer.

Treating delivery as separate and distinct from the elements of due execution is further justified by careful examination of *when* a deed is deemed legally effective as a transfer. Chancellor Kent noted that a deed "takes effect *only from the delivery*." n7 This statement accurately reflects the law as it has always been understood n8 and as it exists today. n9 Some state statutes codify this rule. n10 If indeed a deed is effective as of "date of delivery" rather than date of execution, the distinction between execution of a deed and its delivery is more clearly brought into focus. There is some evidence that modern day courts are consciously separating the elements of execution and delivery; n11 if this trend would continue, there would be greater clarity in the case law discussing the delivery requirement.

§ 83.03(b) Definition -- The Legal Test.

The definition and meaning to be given to the term "delivery" determines whether, in a given instance, a deed is legally ineffective. In spite of the fact that literally hundreds of cases involve the issue of delivery, courts have generally either glossed over the definitional problem or have provided tests that are fundamentally inconsistent. The confusion surrounding the delivery issue is understandable in light of the primary meaning the law has given to the term "delivery."

The first and primary legal definition of "delivery" is an act by which the res or subject matter is placed within the actual or constructive possession or control of another. n12 Both Coke n13 and Blackstone, n14 in discussing delivery, used the term "tradition," a civil law term that emphasizes a transfer of possession. n15 The use of the term "tradition" implies that delivery of a deed connotes a change of possession with regard to the deed, which in the ordinary case, is a handing over of the deed by the grantor. Chancellor Kent's initial discussion of delivery likewise emphasizes the act of delivery as a handing over of the deed to the grantee or to a third party. n16 If "delivery" is indeed the common law equivalent of "tradition," the legal test for delivery will be formulated in terms of the grantor's physical relationship to, or power over, the written instrument. n17

A critical examination of the case law pertaining to the delivery of deeds reveals that the definition of delivery, as applied to deeds, is not the same as the "traditional" concept of delivery. The touchstone for delivery in deed cases is the intent of the grantor -- the intent to pass title immediately to the grantee. n18 As so formulated, the test for delivery involves a mental process, not a physical one. n19 The term "delivery," with its accompanying baggage of "tradition," the handing over of the thing, is ill-suited to describe the essence of what is involved -- the passage of legal title from the grantor to the grantee. n20 It is understandable that the law of delivery is muddled and confused, given the fact that the touchstone term (delivery) does not accurately describe what the law requires.

Whether or not the delivery requirement has been met is, in most cases, an extremely fact-sensitive issue. Oftentimes the evidence is conflicting as to what was the grantor's actual intent with regard to the passage of title. The evidentiary issues will be considered in the next subsection.

The two most recurrent delivery problems that arise in a modern day context are: (1) the significance of grantor's retained control over the deed and (2) the grantor's intention to have the deed take effect at the death of the grantor. A discussion of the former issue will follow; the next subsection will take up the latter issue.

There has been a great deal of unnecessary confusion as to the grantor's retained possession or control over the deed and the issue of delivery. If one goes back to the origins of the common law, an often-cited passage of Lord Coke reveals that the handing over of the deed is not required for delivery to be effective. Coke wrote that "as a deed may be delivered to a party without words, so may a deed be delivered by words without any act of delivery." n21 While a grantor's physical relationship to the deed may shed some light on the grantor's intention to pass title immediately, the legal test of delivery is *not* inextricably linked to the grantor's handing over of the deed or placing it beyond the

grantor's control. Blackstone's brief exposition of the delivery requirement equated "delivery" with "tradition," a term implying a handing over, a change of possession. n22 Chancellor Kent did not define "delivery"; his discussion of a deed being "delivered" to a grantee or a third party strongly suggests that delivery is accomplished by a handing over. n23 As these influential common law writers emphasized the physical relationship of the grantor to the deed, as opposed to the grantor's intention, it is not surprising that courts began to utilize a "tradition" approach in defining delivery. As an example of this approach, consider the following statement from a decision of the United States Supreme Court in 1865: "To constitute such delivery the grantor must part with the possession of the deed, or the right to retain it." n24 This statement glosses over the importance of ascertaining the grantor's intent and focuses upon the grantor's physical relationship to the deed. This statement, and many others like it, confuse the legal test for delivery with the evidence supporting the legal conclusion that the deed was delivered, i.e., that the grantor intended it to be presently operative.

Each jurisdiction formulates its own test of delivery; the variations existing in those formulations makes it difficult to make blanket pronouncements as to whether courts will require, as an element of delivery, that the grantor surrender physical possession or control over the deed. n25

As indicated above, modern day judicial decisions which have gone into some depth in discussing and determining the legal test for delivery tend to return to the original understanding of Lord Coke: delivery is a matter of the grantor's intent; manual transfer of the deed is not indispensable to delivery but is evidence of delivery. n26

This is not to say, however, that modern day judicial decisions emphasizing the importance of the grantor's intention as the critical inquiry in delivery case ignore manual tradition. Decisions are still being handed down which emphasize the importance of manual tradition, some of which can be read as imposing a requirement that a deed must be "handed over" in order to satisfy the delivery requirement. n27 It is submitted that the true significance of a deed being "handed over" lies not in the test for delivery, but the proof of delivery, a topic to be discussed in the next section.

§ 83.03(c) Deeds Testamentary in Nature.

As previously noted, the touchstone of delivery is the grantor's intention *to effectuate a present transfer*. Focusing upon the "present transfer" aspect of delivery highlights the well-recognized distinction the law has always made between transfers inter vivos and transfers testamentary. The former are transfers "among the living"; the passage of legal title occurs when the grantor effectively manifests that intention. The "words of conveyance" of a deed, the verbs which are necessary for a deed to be in proper form, n28 are usually written in the present tense. The operative words become effective when delivery occurs, but this must occur prior to the grantor's death. The reason for this requirement is that transfers of real estate at death must take place by will, not by deed. A transfer taking place at the death of the owner is said to be "testamentary." Testamentary transfers are governed by the statutes of wills, which impose differing formalities requirements than the law of deeds. Owners of real estate desiring to give away their property at death need to comply with the statute of wills. The law of deeds is concerned with conveyances, which, by definition, are transfers by the owner while alive. n29

In theory the inter vivos testamentary distinction is sharp and clear; in practice it is murky and blurred. In theory at least the courts have articulated a test for determining whether a purported transfer is inter vivos or testamentary: Was there a passing of an interest from the transferor to the transferee during the transferor's lifetime? If so, the transfer is not testamentary and not subject to the statute of wills. n30 Despite the apparent clarity of this test, difficulties have arisen in applying this test in the modern era. Whether the source of this difficulty is the law of future interests, the modern day phenomenon of non-probate transfers, or other factors, is hard to say. What the present inquiry is concerned with is how the law of delivery and the rules pertaining to testamentary transfers become entangled and how the courts have addressed such issues.

For a variety of reasons, hundreds of cases deal with the general topic of deeds testamentary in nature. n31 Owners of

property are not keenly aware of the sharp division between inter vivos and testamentary transfers. Grantors of deeds may have some notion that they want to convey the property, but may be extremely vague about when this transfer is to take place. Grantors may be desirous of revoking their transfers later on, if, for whatever reason, they change their minds. Grantors may have conflicting motives and desires, for one purpose intending a transfer now and, for other purposes, a transfer later. Grantors may perform some actions consistent with immediate passing of title, and others inconsistent with the passing of title. Grantors may say certain things indicative of immediate passage of title and later contradict these statements. Grantors may want to attach conditions to the transfer though not expressed in the deed. As it is generally true in cases involving a disputed delivery issue, the cases involving deeds testamentary in nature are extremely fact sensitive. As might be expected the judicial decisions are not models of consistency, even in the same jurisdiction. Given these caveats as to the legal morass now being entered, we proceed to analyze the state of the law pertaining to this topic.

In at least three identifiable types of cases it might be claimed that the grantor's purported conveyance fails for lack of delivery because the grantor was attempting to utilize a deed to effectuate a testamentary transfer:

> (1) The deed contains language which, by its terms, either states directly or implies that the grantor intends that the transfer take effect at the grantor's death;
>
> (2) The deed contains no language suggesting the title is to pass at the grantor's death, but the extrinsic facts and circumstances strongly imply this to be the grantor's true intention;
>
> (3) The deed, regular in form, is handed over to a third party with instructions that it be "delivered" to the grantee upon the grantor's death.

In the present discussion, the first type of case will be examined. The second category might be described as the "failure of delivery" cases, wherein the proof of delivery is lacking. Situations of this type will be discussed in the next section. The third category, the so-called "death escrow," will be taken up in § 83.05, *infra*.

Deed language that raises the issue of a purported testamentary transfer can take various forms. The most blatant example is a deed which states that "This deed is not to take effect until the death of the grantor" or equivalent language. This language can be taken literally: the grantor intends that title does not pass immediately, but only upon the grantor's death. So viewed the transfer is testamentary and subject to the statute of wills. As a *deed*, the instrument fails since there has been no interest presently transferred. n32 The trend in the more recent cases has been to sustain the validity of the deed in such type of case. n33

In so doing the courts have approached the problem as a constructional issue: the intent of the grantor is to be effectuated if at all possible. The legal test for finding the present transfer of an interest is the doctrine of estates. The courts construe the instrument as a transfer of a remainder to the grantee, with the grantor retaining a life estate. n34 By such construction, the deed is construed and validated all at once. n35

The case law reveals that there is other language contained in deeds which has engendered debate over whether the grantor is attempting a testamentary transfer. Some of the other types of provisions contained in deeds which have been challenged are: (1) the grantor reserves the power to revoke the deed; (2) the deed is effective only if the grantee survives the grantor; (3) the grantor reserves a power of sale. n36 Although there are conflicting decisions regarding the validity of each of these types of provisions, the modern trend in the case law is to sustain the validity of these provisions. n37 One court has interpreted a section of the Uniform Probate Code as effectively eliminating the delivery requirement in the case where the grantor intends to vest title at death. n38 The courts no doubt will continue to struggle with the concept of delivery in cases involving disguised testamentary transfers for the line between inter vivos and testamentary transfers is literally being assaulted in the light of the non-probate transfer "revolution." n39

COMPUTER-ASSISTED RESEARCH

LEXIS: donative w/1 transfer! w/30 testamentary w/15 deed! w/5 delivery or language

FOOTNOTES:
(n1)Footnote 1. William Blackstone, Commentaries upon the Law of England *306 (hereinafter Blackstone). Coke had written that "delivery" was one of the necessary incidents of a deed. Edward Coke, Commentaries Upon Littleton 35b (hereinafter Coke).

(n2)Footnote 2. 4 James Kent, Commentaries on American Law, 446 (1830) (hereinafter cited as Kent).

(n3)Footnote 3. *See* §§ 82.06, 82.08, *supra*.

(n4)Footnote 4. Chancellor Kent, though proclaiming that delivery was an element of "due execution," was aware of the anomaly of considering delivery an element of due execution. Kent wrote that "It [the deed] must be delivered." Kent, *supra* note 2, at 446.

(n5)Footnote 5. R.G. Patton, the author of the section on "Deeds" in the American Law of Property, recognized this chronology in stating that in order for there to be a transfer by deed, an instrument had to be drafted satisfying local requirements, followed by due execution, "following which there must be a proper and sufficient delivery of the instrument." R.G. Patton, *in* 3 American Law of Property § 12.64 (A.J. Casner ed. 1952).

(n6)Footnote 6. For certain purposes, primarily relating to revocation, the will upon execution is deemed to be presently legally operative.

(n7)Footnote 7. Kent, *supra* note 2, at 446.

(n8)Footnote 8. Blackstone, *supra* note 1, at *307.

(n9)Footnote 9. *Jacobs v. Hafen, 875 P.2d 559 (Utah App. 1994).* A further illustration of the distinction between execution and delivery is the presumption that a deed is delivered on the date of its execution. See text at note 63 *infra* and cases cited. The Georgia Court of Appeals has, however, applied the test of delivery to a "security deed." *See Jones v. Phillips, 227 Ga. App. 94, 488 S.E.2d 692 (1997). Fisher v. Poole, 453 A.2d 408 (Va. 1982); Hicks v. Loveless, 714 S.W.2d 30 (Tex. App. 1986); Boteilho v. Boteilho, 564 P.2d 144 (Haw. 1977).* Whether acceptance is necessary to complete the transfer will be considered in § 83.07, *infra*. Once delivery has taken place and title has vested in the grantee, subsequent alteration of the deed does affect the title of the grantee. *See Lindley v. Lindley, 991 P.2d 202 (Okla. 1998); Julian v. Petersen, 966 P.2d 878 (Utah App. 1998).*

(n10)Footnote 10. *See* N.D. Cent. Code § 47-09-06; N.Y. Real Property Law § 244; Ariz. Rev. Stat. § 33-401.

(n11)Footnote 11. An example is the following statement from the Wyoming court: "To effect a conveyance transferring title, a deed must be both executed and delivered." *Lenhart v. Desmond, 705 P.2d 338 (Wyo. 1985).*

(n12)Footnote 12. Black's Law Dictionary 428 (6th ed. 1990).

(n13)Footnote 13. Coke, *supra* note 1, at 35b.

(n14)Footnote 14. Blackstone, *supra* note 1, at *307.

(n15)Footnote 15. Black's Law Dictionary 1495 (6th ed. 1990).

(n16)Footnote 16. Kent, *supra* note 2, at 446.

(n17)Footnote 17. This approach would parallel the development in the law of gifts of personal property, with its "delivery" requirement that emphasizes a change of possession of the subject matter of the gift. *See* Ray Brown, Ch. VII *Gifts of Chattels in* The Law of Personal Property (Walter Rausenbush ed. 3d ed. 1975).

The law of delivery applicable to gifts sometimes sneaks into the law of delivery of deeds. One example is the notion of "constructive delivery," well recognized in gift law cases, but inappropriate for deed delivery cases. The reason is that the duly executed deed is a classic example of symbolic delivery, which under the circumstances, is the only method by which one can transfer an intangible. Title to real estate, which is what is being conveyed by deed, is certainly an intangible. (The only possible exception might be a so-called registered or Torrens title). Some judges, in deed delivery cases refer to "constructive" delivery in situations where the deed is not handed to the grantee. *See, e.g., Lenhart v. Desmond, 705 P.2d 338 (Wyo. 1985).* North Dakota statutory law provides for "constructive delivery" in deed delivery cases. *See* N.D. Cent. Code § 47-09-09.

Stranger still is the utilization of the term gift "causa mortis" in deed delivery cases. *See e.g., Dalia v. Lawrence, 627 A.2d 392 (Conn. 1993).* The standard definition of the term gift causa mortis restricts its applicability to personal property. *See* R. Brown, *supra*, § 7.15.

A bankruptcy court, applying Tennessee law, has applied the delivery test to a deed of trust. *In re Cohee, 178 B.R. 154 (M.D. Tenn. 1995).* There is no precedent, it would appear, for applying the delivery requirement to a security instrument.

(n18)Footnote 18. *Matter of Estate of Rohrer, 646 N.E.2d 17,* (Ill. App. 1995) (modern view is that question of delivery is one of the grantor's intentions, citing New York case law); *West v. West By & Through West, 620 So. 2d 640 (Ala. 1993); Estate of Blettell v. Snider, 834 P.2d 505 (Or. App. 1992); Estate of O'Brien v. Robinson, 749 P.2d 154 (Wash. 1988)* (referring to delivery requirement as "fictional"); *Yunghans v. O'Toole, 581 P.2d 393 (Kan. 1978). See also* Roger Cunningham et al., The Law of Property, § 11.3 (2d ed. 1993) (hereinafter Cunningham) ("Delivery is a question of the grantor's intent"); Olin Browder, *Giving or Leaving -- What is a Will? 75 Mich. L. Rev. 845 (1977)* ("Deliver" defined as "objective manifestation of the grantor's intention that the conveyancing transaction has been concluded") (hereinafter cited as Browder).

(n19)Footnote 19. *Halleck v. Halleck, 337 P.2d 330 (Or. 1959).*

(n20)Footnote 20. *B-T Ltd. v. Blakeman, 705 P.2d 307 (Wyo. 1985)* ("delivery" is a term of art); *Rothney v. Rothney, 107 P.2d 294 (Cal. App. 1940)* ("delivery" in legal contemplation involves more than the mere transfer of physical custody or possession of the deed).

(n21)Footnote 21. Coke, *supra* note 1, 36a.

(n22)Footnote 22. Black's Law Dictionary 1495 (6th ed. 1990).

(n23)Footnote 23. Kent, *supra* note 1, at 446.

(n24)Footnote 24. *Younge v. Guilbeau, 70 U.S. 636, 641 (1865).*

(n25)Footnote 25. The case of *Brtek v. Cihal, 515 N.W.2d 628 (Neb. 1994),* illustrates the confusion in this area. The court in two different places in its opinion emphasizes the importance of the grantor's parting with dominion over the instrument. However, in the court's syllabus to *Brtek* the court stated that "it is not necessary, to effectuate delivery, that a deed actually be handed over to the grantee" and that the intention of the grantor controls. It is one thing to have contradictory statements from the same court in two different cases; it is quite another to have contradictory statements in the same opinion. UnfortuNat'ly *Brtek* does not stand alone in this regard. *See also First Union Nat. Bank v. Shealy, 479 S.E.2d 846 (S.C. App. 1996)* (effective delivery contains two parts -- intention and stripping of control).

A 1963 annotation deals specifically with this topic. *See* Annotation, *Sufficiency of Delivery of Deed Where Grantor Retains, or Recovers, Physical Possession, 87 A.L.R.2d 787 (1963).* The following two statements appear in this annotation under the heading "Essential elements of legal delivery":

> All the cases in this annotation support the proposition that it is not essential to legal delivery of a deed that physical possession of the instrument be transferred from grantor to grantee, but there is sufficient (that is, legal) delivery where the grantor by his acts, or words, or both, expresses his intention to relinquish all dominion and control over the instrument and to have become presently effective as a transfer of title.

87 A.L.R.2d at 793 (citations omitted).

> In determining whether there was a sufficient legal delivery where the grantor has retained, or regained, physical possession of the deed, the courts expressly held in the following cases, and tacitly recognized in all others in this annotation, that it is essential that the grantor lose dominion and control over the instrument.

87 A.L.R.2d at 795.

> Similar contradictory statements may be found in the legal encyclopedias.

(n26)Footnote 26. In addition to the cases cited in notes 18 and 19 *supra, see Hanson v. Harding, 429 S.E.2d 20 (Va. 1993)* (manual transfer of deed not always conclusive; grantor's intent makes delivery operative); *Shroyer v. Shroyer, 425 S.W.2d 214 (Mo. 1968)* (not necessary for delivery that deed be actually handed over the grantee). An excellent discussion of the delivery issue and its relationship to manual transfer is contained in *McMahon v. Dorsey, 91 N.W.2d 893 (Mich. 1958)* ("The modern inquiry places but little emphasis on manual tradition.")

(n27)Footnote 27. *Poling v. Northrup, 652 A.2d 1114 (Me. 1995)* (conveyance of title to property requires "manual transfer of the deed"); *McCook v. Coutu, 626 A.2d 1321 (Conn. App. 1993)* (delivery of deed includes act by which grantor parts with possession of it); *Sims v. Sperry, 835 P.2d 565 (Colo. App. 1992)* (delivery requires proof that grantor parted with possession and control over the deed); *Crowder v. Crowder, 798 S.W.2d 425 (Ark. 1990)* (grantor must lose dominion over the deed); *Estate of Atkinson v. Allied Fence & Imp. Co., 746 S.W.2d 709 (Tenn. App. 1988)* (though manual delivery is not necessary, delivery complete where grantor loses power to recall or reclaim deed).

As noted above, Arkansas is a state which has traditionally emphasized the grantor's relinquishment of power and control over the deed as an element of delivery. The Arkansas Court of Appeals decision in *Grimmett v. Estate of Beasley, 777 S.W.2d 588 (Ark. App. 1989)* did not impose this requirement in a deed delivery case. This aspect of the case is criticized in Note, *44 Ark. L. Rev. 219 (1991).*

Texas is another state which has defined delivery in terms of the grantor's intent and control over the deed. A representative example is *Jones v. Young, 539 S.W.2d 901 (Tex. App. 1976)* ("In order to constitute delivery, a deed of conveyance must be placed in the hands of the grantee, or within his control."). The *Jones* case is the only case cited to in the definition of "Delivery -- Deed" in Black's Law Dictionary. *See* Black's Law Dictionary 429 (6th ed. 1990). This case, while representative of one view of delivery, tends to mislead inasmuch as this definition of delivery implies that handing over of the deed is essential.

(n28)Footnote 28. *See* § 82.08(b), *supra*.

(n29)Footnote 29. The present discussion draws heavily upon the analysis of Professor Browder, *see* Browder, *supra* note 18.

(n30)Footnote 30. *Id.* at 847-54.

(n31)Footnote 31. *See* the sixty-seven page annotation, Annotation, *Effect on Validity and Character of Instrument in Form of Deed of Provisions Therein Indicating an Intention to Postpone or Limit the Rights of Grantee Until After the Death of the Grantor, 31 A.L.R.2d 532 (1953),* covering the general topic of "Deed Postponing Rights at Death." This annotation covers only testamentary deed cases wherein the deed language raises the issue of a testamentary transfer.

(n32)Footnote 32. *Gardner v. Thames, 154 S.E.2d 926 (Ga. 1967); Wheeler v. Rines, 375 S.W.2d 48 (Mo. 1964); Coulter v. Coulter, 26 So. 2d 344 (Miss. 1946). See* cases cited in Annotation, *Effect on Validity and Character of Instrument in Form of Deed of Provisions Therein Indicating an Intention to Postpone or Limit the Rights of Grantee Until After the Death of the Grantor, 31 A.L.R.2d at 585-93.* The state of Missouri has a unique statute which validates the testamentary deed provided the deed is recorded. Mo. Rev. Stat. § 461.025, as modified by S.B. 701 (1994).

(n33)Footnote 33. *Grimmitt v. Estate of Beasley, 777 S.W.2d 588 (Ark. 1989); Vigil v. Sandoval, 741 P.2d 836 (N.M. App. 1987); Ford v. Hegwood, 485 So. 2d 1044 (Miss. 1986). See cases cited in* Annotation, *Effect on Validity and Character of Instrument in Form of Deed of Provisions Therein Indicating an Intention to Postpone or Limit the Rights of Grantee Until After the Death of the Grantor, 31 A.L.R.2d 556-570.*

(n34)Footnote 34. The retention of a life estate by the grantor is not inconsistent with the passage of legal title to a grantee. This is elementary in the law of future interests.

(n35)Footnote 35. Professor Browder appears to favor this approach, calling it "enlightened construction." Browder, *supra* note 18, at 860. Professor Atkinson called this a "reasonable interpretation." Thomas Atkinson, the Law of Wills 187 (1953).

Viewing this matter solely as an issue of construction brings up the "construe to validate" phenomenon. In the law of wills, construction of a will is not possible until a court has found the instrument in question is, indeed a will. For an instrument to be declared a will, it must meet certain formalities requirements. An instrument is offered for probate, then admitted to probate, and the instrument is truly and legally a "will." At this point, because of ambiguity *in the will*, construction may be necessary. With regard to deeds, there is nothing exactly comparable to admission to probate. A court is asked to "construe" a deed in order that it might find that the instrument is, in fact, a deed. Courts invalidating testamentary deeds do so on the basis of a violation of a rule of law -- what the grantor intends cannot be given effect because to do so would transgress a rule of law. There is something of a sleight-of-hand approach in "construing" a deed to validate it, "enlightened" or not.

(n36)Footnote 36. The Annotation, *Effect on Validity and Character of Instrument in Form of Deed of Provisions Therein Indicating an Intention to Postpone or Limit the Rights of Grantee Until After the Death of the Grantor, 31 A.L.R.2d 532* exhaustively lists the various types of challenged provisions and how courts have construed them. These issues are addressed as well in 1 William Page, The Law of Wills §§ 6.5., 6.6. 6.7. (W. Bowe-D. Parker rev. 1960).

(n37)Footnote 37. The power of sale and power to revoke issues have been more prominent in the modern case law that the other issues. For a discussion of the validity of the power to revoke, *see* John Garvey, *Revocable Gifts of Legal Interests in Land, 54 Ky. L.J. 19 (1965).* Two modern day cases involving the validity of the grantor's reserved power of sale are: *Harris v. Neeley, 359 S.E.2d 885 (Ga. 1987)* (power sustained); *Wright v. Husky, 592 S.W.2d 899 (Tenn. App. 1979)* (power rendered deed testamentary and void).

(n38)Footnote 38. *Estate of O'Brien v. Robinson, 749 P.2d 154 (Wash. 1988)* (construing R.C.W.A. 11.02.090, the Washington equivalent of § 6-201 of the Uniform Probate Code as it existed before the 1989 revision of Article VI).

The Washington court's interpretation had been rejected by the Supreme Court of North Dakota. *See First Nat'l Bank v. Bloom, 264 N.W.2d 208 (N.D. 1978).* The Joint Editorial Board of the Uniform Probate Code agrees with the interpretation of the North Dakota court. *See* Uniform Probate Code § 6-101 (Comment) (Official 1991 Text 10th ed).

(n39)Footnote 39. For the details of this "revolution," *see* John Langbein, *The Non-probate Revolution and the Future of the Law of Succession, 97 Harv. L. Rev. 1108 (1984).* The blurring of the line between inter vivos and testamentary transfer will force the courts to re-evaluate the concept of delivery and its purpose in the modern day world.

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CHAPTER 83 DONATIVE TRANSFERS

9-83 Thompson on Real Property, Thomas Editions § 83.04

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§ 83.04 Proof of Delivery: Presumptions.

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As indicated in the previous subsection, a deed may contain language which a court may conclude renders the deed "testamentary" and void for failure to comply with the statute of wills. Such a type of case is not the prototypical deed delivery case inasmuch as the determination is made without consideration of evidence extrinsic to the deed. The deed language is not the focal point in ascertaining whether the delivery requirement has been met. The touchstone for delivery in the grantor's intention, which is not revealed so much by what the deed says, but by the actions and words of the grantor. n40 The grantor's words and actions, n41 as well as the circumstances surrounding the execution of the deed, n42 are what the courts look to in ascertaining what the grantor intended. The overwhelming majority of cases state that the question of delivery is a factual issue. n43 Because the cases involving delivery are extremely fact-sensitive, precedent does not usually play a significant role in delivery cases.

The burden of proof in deed delivery cases is allocated by the courts in accord with the presumptions that courts apply in cases involving disputed delivery. Certain fact patterns give rise to a presumption of delivery. These presumptions, which might more accurately be referred to as inferences, shift the burden of going forward with the evidence. n44 The fact that a deed is acknowledged, does not, in and of itself, give rise to presumption of delivery. n45

The courts recognize and apply the following presumptions in deed delivery cases: (1) a presumption of non-delivery arising from the grantor's possession of the deed; (2) a presumption of delivery arising from the grantee's possession of the deed; and (3) a presumption of delivery arising from the recordation of the deed. n46 The presumption arising from possession is the most significant since it is arises in the vast majority of deed cases. Delivery to a third party for the benefit of a grantee, conditionally or unconditionally, occasionally occurs and will be addressed in § 83.05(b), *infra*. Recordation of deeds is the norm for commercial transactions; however, when it comes to gifts of real estate, the deed often goes unrecorded for some period of time.

With regard to all of the presumptions mentioned in this section, it is important to recognize that the presumptions are rebuttable, meaning that the parties against the presumptions operate to have the opportunity to present evidence to rebut the inference of delivery or non-delivery. As might be expected, in the vast majority of cases litigated, the

presumption is not rebutted. This fact simply points out the overriding significance of the role of presumption: the allocation of the burden of proof significantly affects the outcome of cases. n47

The significance of the grantor's retained possession of a deed was adverted to above in the discussion pertaining to the legal meaning of delivery. When an appellate court *defines* "delivery" in a fashion so as to imply a manual "tradition," the legal significance of such approach becomes obvious: The grantor's continued possession of a deed fails to fulfill the court's notion of the legal test for delivery. When a court emphasizes the grantor's intention as the touchstone, the court is more likely to then engage in the process of determining where the presumption lies, given the facts in the case relating to possession. The latter approach is more consistent with the historical and accepted meaning of "delivery," if not the popular meaning of the term. When courts emphasize the grantor's control over the deed as an element of delivery, they are mixing up the test for delivery with the proof of delivery.

An unrecorded deed, possession of which is retained by the grantor, raises a presumption of non-delivery. n48 This is the classic failure of delivery scenario, with the prototypical case being the deed found among the grantor's personal effects n49 or in the grantor's safety deposit box after death. n50 There are two circumstances where a court might not apply this presumption: (1) where the grantee had access to the deed, such as in a safety deposit box to which the grantee had access; n51 (2) where the grantor of the deed reserved a life estate. n52

A grantee's possession of the deed gives rise to presumption of delivery. n53 However, this presumption is rebuttable, by showing, for instance, that the deed was handed over for inspection, n54 or that possession of the deed was obtained without the grantor's consent. n55

A presumption of delivery arises from the fact that the deed is recorded, n56 but this presumption is rebuttable upon a showing of satisfactory evidence. n57 The fact that a deed is not recorded during the grantor's lifetime does not give rise to a presumption of non-delivery. n58 For this presumption to come into existence, the recording should have taken place during the grantor's lifetime, but this limitation is not always observed. n59 The fact that the grantee returns the deed to the possession of the grantor does not create a presumption of non-delivery. n60 When the grantee has possession of the deed and the deed has been recorded during the grantor's lifetime, the inference of delivery is exceptionally strong. n61

Delivery of a deed may be effectuated by handing the deed over to a third party for the benefit of the grantee. If the court is willing to consider the third party as the grantee's agent, there is no difference, legally speaking, between handing the deed over the grantee or the grantee's agent. n62

When a deed is dated, it presumed that the deed was delivered as of that date. n63 If the date of signing and date of acknowledgment are different, the courts are not in agreement as to which date should have priority. n64

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FOOTNOTES:
(n1)Footnote 40. *Hanns v. Hanns, 423 P.2d 499 (Or. 1967).*

(n2)Footnote 41. *Barker v. Nelson, 812 S.W.2d 477 (Ark. 1991)* (what was "said and done" by grantor and grantee); *Jorgensen v. Crow, 466 N.W.2d 120 (N.D. 1991)* ("some act or declaration"); *Walter v. Grover, 540 A.2d 120 (Me. 1988)* (determined by "words and actions").

(n3)Footnote 42. West v. West by & through *West, 620 So. 2d 640 (Ala. 1993)* (delivery to be ascertained "from all the surrounding circumstances"); *Estate of O'Brien v. Robinson, 749 P.2d 154 (Wash. 1998)* (look to "facts and

circumstances"); *Estate of Atkinson v. Allied Fence & Imp. Co., 746 S.W.2d 709 (Tenn. App. 1988)* (delivery may "inferred from the circumstances").

(n4)Footnote 43. *E.g., McCook v. Coutu, 626 A.2d 1321 (Conn. 1993); West v. West By & Through West, 620 So. 2d 640 (Ala. 1993); Estate of Dittus, 497 N.W.2d 415 (N.D. 1993); Brtek v. Cihal, 515 N.W.2d 628 (Neb. 1994)* (mixed question of law and fact); *UT Communs. Credit Corp. v. Resort Dev., 861 S.W.2d 699 (Mo. App. 1993)* (mixed question of law and fact). According to *Burgess v. Easley, 89 S.W.2d 87 (Tex. App. 1994), what* constitutes delivery is a "question of law," *whether* there has been delivery is a "question of fact." *Accord Markham v. Markham, 909 P.2d 602 (Haw. App. 1996)* (concurring and dissenting opinion).

(n5)Footnote 44. *See* 20*th Century Plumbing Co. v. Sfregola, 179 Cal. Rptr. 144 (1981)* (presumption arising from grantee's possession of deed is "prima facie" evidence of delivery; burden of proof shifted).

(n6)Footnote 45. *Matter of Estate of Shedrick, 462 N.E.2d 581 (Ill. App. 1984).*

(n7)Footnote 46. Annotation, *Sufficiency of Delivery of Deed Where Grantor Retains, or Recovers, Physical Possession, 87 A.L.R.2d 787, 792 (1963).*

(n8)Footnote 47. In some cases the courts seem to accord almost persuasive effect to the presumption raised. The fact that a court may say that a presumption "merely shifts the burden of proof onto the party questioning delivery," (*Energetic, Ltd. v. Whitmill, 497 N.W.2d 497, 505 (Mich. 1993)),* should not overshadow the reality of how presumptions operate: Allocating the burden of proof in deed delivery cases goes a long way in determining the outcome of the vast majority of deed delivery cases. This is not to say, however, that this judicial approach is illegitimate.

In many cases it is the lack of evidence what the grantor intended, or a bewildering mixture of facts as to what the grantor truly intended, that leaves a court guessing as to what the true intent of the grantor was. The rules pertaining to presumptions are common sense default rules which courts employ because the grantor's intent has not been clearly expressed. In an individual case the burden of proof is either on the grantee or the contestant challenging the deed. The presumptions are simply reflective of how the courts attempt to bring order to an oftentimes muddled situation, made more difficult by the fact that the person whose intent is in question, is oftentimes deceased at the time the controversy arises.

(n9)Footnote 48. Cunningham et al., *supra* note 18, § 11.3. The foregoing authority does not refer to this as a "strong" presumption, although this authority does state that a grantee's possession of a deed raises a "strong" presumption. When it comes to rebutting the presumption in either case, the cases are few and far between, especially when it comes to rebutting the presumption when the grantor retains possession of the deed. Authority for this statement may be found in cases *cited in* Annotation, *87 A.L.R.2d 796-818.* Things change dramatically, however, when the fact of recordation enter into the equation. As will be shown in note 58, *infra*, the presumption arising from recordation "trumps" the non-delivery presumption arising from the grantor's retained possession of the deed.

(n10)Footnote 49. *Brtek v. Cihal, 515 N.W.2d 628 (Neb. 1994)* (no satisfactory evidence that grantee had access to deed in grantor's dresser drawer; other testimony, including direct statement of grantee, indicated testamentary nature of transaction); *In re Estate of Darlington, 527 A.2d 159 (Pa. Super. 1987); Jones v. Jones, 470 So. 2d 1207 (Ala. 1985).*

(n11)Footnote 50. *First Nat'l Bank v. Bloom, 264 N.W.2d 208 (N.D. 1978). See also* cases *cited in* Annotation, *Sufficiency of Delivery of Deed Where Grantor Retains, or Recovers, Physical Possession, 87 A.L.R.2d 809-818 (1963).* If the grantor placed a deed in a safety deposit box to which the grantor had sole access, and there are no other facts supporting delivery, the purported deed could be said to fail for either (1) lack of delivery or (2) a purported testamentary transfer violative of the statute of wills. Delivery must occur during the grantor's lifetime, of course, so it could be argued that all "failure of delivery" cases are failed attempts at testamentary dispositions. That conclusion is

not justified by existing case law. Nor is it accurate to say that all testamentary deed cases are disguised failure of delivery cases. *See, e.g., Matter of Estate of Dittus, 497 N.W.2d 415 (N.D. 1993)* (court held deed in safety deposit box not legally effective because grantor intended testamentary transfer thus making it "unnecessary" for court to discuss delivery issue). *Chaney v. Waddell, 624 So. 2d 545 (Ala. 1993)* (eight deeds in grantor's safety deposit box post death; no delivery even though one grantee had access to box).

(n12)Footnote 51. The judicial decisions are conflicting in the situation where the deed was placed in a safety deposit box to which the grantee had access. *See* Cunningham et al., *supra* note 18, § 11.3 n.10. It is understandable that the results are varied: some courts might view the grantee "in possession" of the deed (with a resulting presumption of delivery) while courts might emphasize the fact that the grantor has not been stripped of dominion or control of the deed. Of course, other factors might enter, such as the statements of the grantor and others with regard to *when* the deed was to take effect (possible testamentary intent). *See Matter of Estate of Dittus, 497 N.W.2d 415 (N.D. 1993)* (grantee received key to safety deposit box; delivery failed because grantor intended a testamentary transfer). The surrounding circumstances might include other factors as well, such as control over the property, payment of taxes, etc. If the grantor is alive and able to testify, the person whose intent is in question can be asked directly what that intent was. *See Lenhart v. Desmond, 705 P.2d 338 (Wyo. 1985)* (grantor's testimony accepted).

(n13)Footnote 52. *Barker v. Nelson, 812 S.W.2d 477 (Ark. 1991); Grimmett v. Estate of Beasley, 777 S.W.2d 588 (Ark. App. 1989).* The same theory would apply to a deed naming the grantee as a joint tenant. *First Nat'l Bank & Trust Co. of Rogers v. Estate of Hummel, 758 S.W.2d 418 (Ark. App. 1988). See also Rhodes v. Hunt, 913 S.W.2d 894 (Mo. App. 1995)* (grantor's tenants by entirety reserved life estates to themselves); *Estate of Sabbs v. Cole, 57 Ark. App. 179, 944 S.W.2d 123 (Ark. App. 1997)* (reserved life estate; no requirement that deed pass beyond grantor's control).

(n14)Footnote 53. *Waxler v. Waxler, 699 A.2d 1161 (Me. 1997)* (transfer of physical possession of deed; presumption that title immediately passes); *Hanson v. Harding, 429 S.E.2d 20 (Va. 1993); Estate of Blettell v. Snider, 834 P.2d 505 (Or. App. 1992); Estate of Atkinson v. Allied Fence & Imp. Co., 746 S.W.2d 709 (Tenn. App. 1988); Matter of Estate of Williams, 496 N.E.2d 547 (Ill. App. 1986).*

(n15)Footnote 54. *Jorgensen v. Crow, 466 N.W.2d 120 (N.D. 1991); Walter v. Grover, 540 A.2d 120 (Me. 1988); Romero v. Romero, 611 P.2d 1119 (N.M. 1980).*

(n16)Footnote 55. *Lenhart v. Desmond, 705 P.2d 338 (Wyo. 1985). See also McCaslin v. Hamilton, 726 S.W.2d 713 (Ky. App. 1984)* (deed was conditioned upon entry of divorce decree, which never occurred).

(n17)Footnote 56. *Jacobs v. Hafen, 875 P.2d 559 (Utah App. 1994)* (citing Utah Code Ann. § 57-4a-4(1)(d)); *UT Communs. Credit v. Resort Dev., 861 S.W.2d 699 (Mo. App. 1993); Giefer v. Swenton, 928 P.2d 906 (Kan. App. 1996)* (recordation creates presumption); *Gross v. Gross, 781 P.2d 284 (Mont. 1989); Dinius v. Dinius, 448 N.W.2d 210 (N.D. 1989); Baker v. Pattee, 684 P.2d 632 (Utah 1984); Boteilho v. Boteilho, 564 P.2d 144 (Haw. 1977).*

(n18)Footnote 57. *In re Estate of Tucker, 881 S.W.2d 226 (Ark. App. 1994)* (presumption rebutted); *Johnson v. Ramsey, 817 S.W.2d 200 (Ark. 1991); Crowder v. Crowder, 798 S.W.2d 425 (Ark. 1990); Odom v. Forbes, 500 So. 2d 997 (Miss. 1987); Lenhart v. Desmond, 705 P.2d 338 (Wyo. 1985).*

(n19)Footnote 58. *Cantrell v. Henry, 696 S.W.2d 12 (Tenn. App. 1985).* What this means as a practical matter is that the presumption arising from the grantee's possession of the deed is not somehow "trumped" by the grantee's failure to record the deed.

(n20)Footnote 59. *Sargent v. Baxter, 673 So. 2d 979 (Fla. App. 1996)* (deed not recorded before grantor's death; no presumption of delivery obtained); *Jones v. Jones, 470 So. 2d 1207 (Ala. 1985)* (deed recorded six weeks after grantor's death; no presumption). *Compare Farrell v. Stinson, 11 N.W.2d 701 (Iowa 1943)* (deed recorded post-death gave rise to presumption of delivery). Delivery must take place during the grantor's lifetime. How can anything that occurs after the grantor's death prove the grantor's intent to make the conveyance presently operative? The *Farrell* holding regarding

post-death recording is not the only bizarre ruling in this area. In *Bulifant v. Slosjarik, 277 S.E.2d 151 (Va. 1981),* the court stated that a presumption would not arise from the "mere fact" of recordation where the deed was recorded for many years after its execution and "no satisfactory explanation accounts for its whereabouts during the intervening period."

(n21)Footnote 60. *Payne v. Carver, 534 So. 2d 566 (Ala. 1988); Meadows v. Brich, 606 S.W.2d 258 (Mo. App. 1980); Yunghans v. O'Toole, 581 P.2d 393 (Kan. 1978).*

(n22)Footnote 61. Despite the fact the grantor continues to live on the property, pay the taxes, and generally act as owner until death is not as significant as the "double" presumption obtaining from the grantee's possession of the deed and the recording of it during the grantor's lifetime. Even if the grantor made statements to the effect that the grantee was to receive the property at the grantor's death, the court may still find a delivery during the grantor's lifetime. *See, e.g., Dalia v. Lawrence, 627 A.2d 392 (Conn. 1993).* A court desirous of sustaining such arrangements might, in candor, simply state that the grantor intended to reserve a life estate and convey a remainder and that is how the deed will be construed despite the fact that the deed does not say that. As will be shown in § 83.05(b), *infra*, in so-called "death escrow" cases, the courts have had no difficulty in reaching that conclusion despite the fact that the deed language itself is not susceptible of that construction.

(n23)Footnote 62. *Buckley v. Chevron, U.S.A., Inc., 565 N.Y.S.2d 419 (1991); Vigil v. Sandoval, 741 P.2d 836 (N.M. 1987); Morelos v. Morelos, 631 P.2d 136 (Ariz. App. 1981); Arwe v. White, 381 A.2d 737 (N.H. 1977). Compare Poling v. Northrup, 652 A.2d 1114 (Me. 1995)* (no "per se rule" prohibiting delivery "to one's own agent." emphasizing intent of grantor as controlling criterion).

(n24)Footnote 63. *Braun v. Consolidated Rail Corp., 551 N.Y.S.2d 946 (1990); Hicks v. Loveless, 714 S.W.2d 30 (Tex. App. 1986).* This presumption is rebuttable. *D'Urso v. Scuotto, 489 N.Y.S.2d 294 (1985); Mackiewicz v. J.J. & Assocs., 514 N.W.2d 613 (Neb. 1994). Mizell v. Deal, 654 So. 2d 659 (Fla. App. 1995)* (presumption stated). *See also Graves v. Hutchinson, 659 N.E.2d 1212 (Mass. App. 1996)* (presumption rebutted); *Burgess v. Easley, 893 S.W.2d 87 (Tex. App. 1994)* (presumption rebutted); *Whalen v. Harvey, 1997 WL 17918 (App. Div. 1997).* Montana has a statutory presumption that the date of execution is the date of delivery. Mont. Code Ann. § 70-1-509.

(n25)Footnote 64. *See Keith v. Keith, 599 S.W.2d 214 (Mo. App.1980)* (deed presumed delivered on date of acknowledgment); *Watson v. Watson, 497 A.2d 794 (Md. 1985)* (statutory presumption of date of acknowledgment, citing Md. Code Ann., Real Prop., § 3-301). *Compare Fetzer v. Cities Serv. Oil Co., 572 F.2d 1250 (5th Cir. 1978)* (date of execution presumed delivery date even though later acknowledged). In the usual case the date of execution and acknowledgment are one and the same and that date is presumptively the date of delivery. *Matter of Laue's Estate, 589 P.2d 558 (Kan. 1979).* If the property involved is such that local law requires an acknowledgment for the deed to be valid, as in the case of homestead property, it would seem logical that in such case the date of acknowledgment should be governing.

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CHAPTER 83 DONATIVE TRANSFERS

9-83 Thompson on Real Property, Thomas Editions § 83.05

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§ 83.05 Conditional Delivery.

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Delivery upon a condition has been a part of the common law of deeds from its origins. In their writings on this topic, the common law authorities drew a distinction between a delivery to the grantee and a delivery to a "stranger," n65 i.e., someone other than the grantee. By and large, this distinction survives in modern day law.

§ 83.05(a) Between Grantor and Grantee.

The deed language may create a conditional estate in the grantee, but according to the common law, the grantor may not make delivery to the grantee upon a condition not expressed in the deed. n66 Otherwise stated, the rule is that the deed cannot be delivered in escrow to the grantee. Invalidating the oral condition leaves the grantee with title free of the condition expressed, in derogation of the grantor's intent. Since the expressed intention of the grantor is not being given effect, the rule being applied is a rule of law. Given the modern trend toward effectuation of the grantor's intent and away from rules of law that have feudal origins, n67 what modern day justification exists for the common law rule?

Viewed solely from the standpoint of the grantor and the grantee, the vitality of the common law rule depends upon how much one is concerned with evidentiary considerations. n68 When it comes to the policy of protecting the rights of innocent third parties, the common law rule makes good sense, inasmuch as the policies implicated here are the stability of land titles and the protection of bona fide purchasers under the recording acts. n69 There are a few cases in which the courts have enforced the oral condition, but it is difficult to determine whether this is an emerging trend. n70

§ 83.05(b) Third Party Delivery -- Death Escrow.

Blackstone wrote that delivery may be "to a third person, to hold till some conditions be performed on the part of the grantee, in which case it is not delivered as a deed, but as an escrow." n71 Thus the term "escrow" originally referred to the deed which was conditionally delivered. In modern day practice it is usually said that the deed is delivered "in escrow" to the third party, who is known as the escrow agent. This person is to hand the deed over to the grantee upon the happening of the stated event or condition. The modern day escrow is typically found in commercial real estate transactions, not donative transfers. n72

The prototypical conditional delivery case in the donative transfer area is the so-called "death escrow": the grantor handing over a deed to a third party with instructions to deliver the deed upon the grantor's death. n73 This transaction has overtones of a disguised testamentary transfer for it appears that the transfer of title from the grantor to the grantee takes place at the grantor's death without compliance with the statute of wills. In short the arrangement appears as intended as a substitute for a will. The same considerations that were present in the previous discussion n74 relating to "Deeds Testamentary in Character," are relevant to the death escrow. n75

The first difficulty with the death escrow is the nature of the condition: the death of the grantor. This is not a true condition; it is not a question whether the grantor will die, but when. If, however, there are other conditions which the grantor places on the transfer, such as survivorship by the grantee, a true condition is present, i.e., one over which the grantor has no control. Courts have generally refused to recognize the death escrow when these additional conditions are present, n76 but these decisions have been criticized on the grounds that the courts are laboring under a misconception as to the delivery requirement. n77

The validity of the death escrow will depend upon the finding the court makes with regard to the transfer to the third party: If the delivery to the third party is deemed irrevocable, with the grantor having no power of recall, the death escrow will be held valid. On the other hand, if the court finds that the grantor retained a power to recall the deed, the death escrow will fail. n78 Placing the emphasis on the grantor's ability to recall is consistent with: (1) the gift theory of the transaction, i.e., grantor has made an *irrevocable* transfer during lifetime; (2) the idea that delivery encompasses a manual transfer of the deed itself (the "tradition" theory of delivery). As might be expected death escrow cases are extremely fact sensitive in that the grantor and third party might have had different understandings with regard to the grantor's right to recall the deed. n79 From a policy standpoint, the question whether a court ought to sustain a death escrow even though the transfer to the third party is revocable is debatable. Given the fact that courts sustain *express* powers to revoke in deeds and given the proliferation and acceptance of non-probate devices, it might be argued that the death escrow should be sustained even if the grantor reserves a right of recall. It might be argued that the transaction bears essential similarity to a revocable inter vivos trust. On the other hand, the express right to revoke and the revocable inter vivos trust are memorialized by writings. Due respect for the wisdom of the policies underlying the Statute of Frauds and the parol evidence rule suggest that the law's traditional treatment of death escrows is justified and salutary, based on firm public policy bases. n80

If a court sustains a death escrow, subsidiary questions ensue: (1) when does the transfer of title take place?; (2) what estates are created in the grantor and grantee? As to the former issue, the common law authorities stressed the fact that the transfer of title actually takes place upon the "second delivery," i.e., from the escrow agent to the grantee. n81 On the other hand there is a well-established legal fiction to the effect that the transfer of title will "relate back" to the first delivery when, in the words of Kent, "justice requires a resort to fiction." n82 Predictability is hard to come by with such a guideline. On the other hand, resort to the fiction may become unnecessary in light of how courts have responded to the second issue. When sustaining the validity of the death escrow, some courts explicitly state that the effect of such transaction is to transfer a future interest to the grantee, with the grantor retaining a life estate. n83 This is, of course, not what the deed states but given the court's tendency to sustain the death escrow as another form of a "poor man's will," the result is not surprising. This construction conveniently explains the grantor's possession of the property until death, payment of taxes, receipt of income, etc. On the other hand, the life estate-remainder construction runs roughshod over the deed language, which is more than slightly problematic in view of the Statute of Frauds. Moreover, the deed is "construed" in a factual setting where the deed language is not ambiguous. There is a theoretical and conceptual difficulty with this as well. n84

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LEXIS: donative w/1 transfer! w/30 deliver! w/5 third w/1 part! or person w/15 escrow

FOOTNOTES:

(n1)Footnote 65. Coke, *supra* note 1, at 36a; Blackstone, *supra* note 1, at *307; Kent, *supra* note 2, at 446.

(n2)Footnote 66. *Southeast Timberlands, Inc. v. Haiseal Timber, Inc., 479 S.E.2d 443 (Ga. App. 1996)* (rule recognized); *Thomas v. Jim Walter Homes, Inc., 918 F. Supp. 1498 (M.D. Ala. 1996)* (applying Alabama law); *Buckley v. Chevron, U.S.A., Inc., 565 N.Y.S.2d 419 (1991); Raim v. Stancel, 339 N.W.2d 621 (Iowa App. 1983); State ex rel. Pai v. Thom, 563 P.2d 982 (Haw. 1977). See also* Cunningham et al., *supra* note 18, § 11.3 nn.15-16; American Law of Property, *supra* note 5, § 12.66 n.7.

There may be in a given jurisdiction a statutory rule prohibiting enforcement of the oral condition. *See:* Cal. Civil Code § 1056; Mont. Code Ann. § 70-1-510; N.D. Cent. Code § 47-09-07; S.D. Codified Laws § 43-4-8.

(n3)Footnote 67. An example in the law of deeds is the rule that a condition or reservation may not be created in a "stranger." *See* § 82.09(c)(2), *supra*.

(n4)Footnote 68. One authority states that there is "little to commend the majority approach." Cunningham et Al., *supra* note 18, § 11.3 at 784. Another authority concludes that "It still can be argued that the old rule is best." Browder, *supra* note 18, at 863. *See also* Carl W. Turner, *Conditional Delivery of a Deed to the Grantee*, Note, *44 Ky. L.J. 218 (1956)* (no "theoretical reason" not to enforce oral condition).

(n5)Footnote 69. The authority favoring abolition of the common law does not believe that any court would enforce the oral condition against a bona fide purchaser for value. Cunningham et al., *supra* note 18, § 11.3 at 784.

(n6)Footnote 70. The leading "minority view" case is *Chillemi v. Chillemi, 78 A.2d 750 (Md. 1951).* Other cases are cited in Cunningham et al., *supra* note 18, § 11.3, n.17. This work refers to these cases as the "growing minority view." The holdings of these cases are certainly in the minority; whether the label "growing" is appropriate is questionable.

(n7)Footnote 71. Blackstone, *supra* note 1, at 307.

(n8)Footnote 72. *See* § 94.06.

(n9)Footnote 73. The term "death escrow" is of recent vintage; it is an accurate and convenient term to describe the prototypical case. The term is becoming more widely utilized by writers. *See, e.g.*, Cunningham et al., *supra* note 18, § 11.4.

(n10)Footnote 74. *See* § 83.03(b), *supra*.

(n11)Footnote 75. Professor Atkinson discusses the validity of the death escrow in the section of his wills hornbook on deeds testamentary in character. *See* Thomas Atkinson, The Law of Wills, 183-90 (1953).

(n12)Footnote 76. See Cunningham et al., *supra* note 18, § 11.3, n.31 (citing the more recent cases); American Law of Property, *supra* note 5, § 12.67, n.18 (citing the older cases).

(n13)Footnote 77. Browder, *supra* note 18, at 861-62. The "misconception" is the notion that because there is one circumstance under which the grantor is entitled to the deed back, the grantor has not parted with control over the deed. As Browder points out, the condition in question (such as survivorship of the grantee) is one over which the grantor has no control; there is no retained "control" by the grantor over the deed.

(n14)Footnote 78. *First Union Nat. Bank v. Shealy, 479 S.E.2d 846 (S.C. App. 1996).; Herron v. Underwood, 503 N.E.2d 1111 (Ill. App. 1987), appeal denied, 511 N.E.2d 428 (Ill. 1987); Pipes v. Sevier, 694 S.W.2d 918 (Mo. App. 1985); Baird v. Lovell, 344 N.W.2d 574 (Iowa App. 1983); Pizel v. Pizel, 643 P.2d 1094 (Kan. 1982); Rosengrant v.*

Rosengrant, 629 P.2d 800 (Okla. App. 1981); Chandler v. Chandler, 409 So. 2d 780 (Ala. 1981). See also Cunningham et al., *supra* note 18, § 11.4, n.28; American Law of Property, *supra* note 5, § 12.67, n.11; Annotation, *Delivery of Deed to Third Person to be Delivered to Grantee After Grantor's Death*, 52 A.L.R. 1222 (1928).

(n15)Footnote 79. Custodian's testimony as to the understanding the custodian had with regard to the right of recall may be deemed irrelevant. *See* Cunningham et al., *supra* note 18, § 11.4, n.29. *See also Vasquez v. Vasquez, 973 S.W.2d 330 (Tex. App. 1998)* (attorney/custodian would have returned deed to grantor because of ethical duty; delivery sustained).

(n16)Footnote 80. Professor Browder's analysis of this point is somewhat equivocal. Browder, *supra* note 18, at 861-62 ("Respect for the nature and importance of the formal requirement of delivery, however, may fully justify regarding such further qualification of it as essentially subversive").

(n17)Footnote 81. Blackstone, *supra* note 1, at 307; Kent, *supra* note 2, at 446.

(n18)Footnote 82. Kent, *supra* note 2, at 446. The fiction of "relation back" is recognized in a recent death escrow case. *See: Pipes v. Sevier, 694 S.W.2d 918 (Mo. App. 1985).*

(n19)Footnote 83. *Davault v. Davault, 636 S.W.2d 422 (Mo. App. 1982). See* American Law of Property, *supra* note 5, § 12.67 n.3. *See also* Cunningham et al., *supra* note 18, § 11.4 n.33 (suggesting that the more proper interpretation, from a future interests standpoint, is a fee simple in the grantor'subject to a springing executory interest in the grantee).

(n20)Footnote 84. *See generally* the discussion at § 82.13, *supra*.

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CHAPTER 83 DONATIVE TRANSFERS

9-83 Thompson on Real Property, Thomas Editions § 83.06

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§ 83.06 Acceptance.

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There are semantical n85 and conceptual issues pertaining to acceptance by the grantee. Happily enough, these issues arise infrequently because the number of cases relating to acceptance by the grantee pale in comparison to the number of cases relating to deed delivery.

When the problem of delivery was first discussed the question arose as to whether "delivery" was to be regarded as a part of "due execution" of a deed. A similar issue arises as to whether "delivery" includes "acceptance." Recall from prior discussion relating to delivery the clearly accepted principle that a deed takes effect, or becomes operative, "upon delivery." In other words, passage of legal title takes place "upon delivery." If this is literally true, then acceptance by the grantee is not necessary to complete the transfer of legal title. The question now becomes: what is acceptance? Is the final act in the conveyancing process required before the conveyance is deemed legally effective? Is it simply a method by which a grantee is allowed to disclaim title to property previously vested in the grantee? These theoretical issues are seldom discussed in the case law; the prototypical deed acceptance case revolves around the question of whether the grantee accepted or not. n86 The traditional analysis pertaining to acceptance follows upon the same lines as the delivery issues: (1) how does one define the term, or otherwise stated, what is the legal test for acceptance? and (2) how does one go about proving acceptance? and (3) what presumptions exists in law pertaining to acceptance?

The rule in England was that delivery of the deed was sufficient for passage of legal title. The title passed to the grantee, with the right of the grantee to disclaim. n87 The American courts treat acceptance differently, however, stating as a general rule that in order for the title to be transferred to the grantee, acceptance by the grantee must be shown. n88 The basis for this general rule is the idea that the grantor cannot unilaterally "force title" upon the grantee. n89 When it comes to establishing proof of acceptance, the grantee's intention is paramount, for it is the intention of the grantee to take title that is controlling. n90 Proof of that intent is supplied by the acts, conduct or declaration of the grantee. n91 Any words or conduct of the grantee in acquiescing to the transfer are legally sufficient to prove acceptance. n92 Proof of delivery is aided greatly by the well-recognized presumption of acceptance: It is assumed that the grantee would accept a beneficial interest and thus acceptance will be presumed, absent a showing of contrary intention. n93 The presumption of acceptance is especially helpful when the grantee is capable of legally taking title, but can only act

through a fiduciary, such as cases involving minors and persons under a disability. n94 The grantee, in accepting the property may impose conditions to the acceptance. n95

The grantee's ability to refuse acceptance of a gift is comparable to the ability of a devisee or heir to refuse acceptance of a testamentary gift. This body of law has traditionally been subsumed under the title of "disclaimers" or "renunciation." The trend in recent years has been a statutory codification of this law, as well as an expansion of the applicability of disclaimers. One of the effects of this legislation is to clarify how one disclaims and the placing of time limits on the filing of disclaimers. The latest version of the Uniform Probate Code contains a provision setting forth rules for disclaimers of real property interests under a deed. n96 These provisions set forth specific rules for the procedure, the time limits and legal effects of the disclaimer. Enactment of legislation similar to the Uniform Probate Code provisions would greatly clarify the law pertaining to non-acceptance of gifts of personal property and inter vivos transfers of real estate.

It is likely that more and more donees of real estate will be extremely cautious in accepting gifts of real estate. There are a variety of reasons one might cite for refusing to take title in modern day law. These reasons include: (1) concern over liability issues relating to tort liability and potential environmental hazards, n97 (2) uncertainty over the legal effect of using a "deed in lieu of foreclosure," n98 and (3) taking title to a "white elephant." n99 Under existing law there is little guidance as to how one goes about refusing to accept a gift of real property and what time limitation governs.

When the grantee of a deed is a governmental entity, special considerations might apply. Local statutory law might require that the entity take formal action to accept a gift of real estate before such transfer is legally effective.

FOOTNOTES:

(n1)Footnote 85. One court, in discussing the differing theories of acceptance, referred to the debate as "mostly over semantics." *Arwe v. White, 381 A.2d 737 (N.H. 1977). See also* Cunningham et al., *supra* note 18, § 11.3, referring to the concept of acceptance as a "highly artificial one."

(n2)Footnote 86. The two relatively modern cases which go into some detail with regard to the theoretical issues are: *Halleck v. Halleck, 337 P.2d 330 (Or. 1959)* and *Arwe v. White, 381 A.2d 737 (N.H. 1977).* The issue of acceptance gets troublesome in cases involving transfers taking effect at the grantor's death -- the problem, once again, of deeds testamentary in character. If acceptance by the grantee takes place after the death of the grantor (the grantee being unaware of the deed), there is the very problematic issue of transfer of grantor's title post-death. It is not surprising that the two decisions cited, *supra* examine the problem of acceptance in the context of facts raising a testamentary transfer issue.

(n3)Footnote 87. American Law of Property, *supra* note 5, § 12.70 n.3. This approach has an analogue in trust law in this country -- title vests in the trustee subject to disclaimer. *Adams v. Adams, 88 U.S. 185 (1874).*

(n4)Footnote 88. *See generally* Cunningham et al., *supra* note 18, § 11.3, n.29; Annotation, *What Constitutes Acceptance by Grantee, 74 A.L.R.2d 992 (1963).* The Oregon Supreme Court adopted the English rule in *Halleck v. Halleck, 337 P.2d 330 (Or. 1959).*

(n5)Footnote 89. *County of Worth v. Jorgenson, 253 N.W.2d 575 (Iowa 1977).* This rationale might be dubbed the "looking a gift horse in the mouth" theory. Besides this very practical oriented rationale, the courts have probably been influenced, *sub silentio*, by the rule pertaining to gifts in personal property -- acceptance being treated as one of the three "elements" of a gift. *See, e.g., Gruen v. Gruen, 496 N.E.2d 869 (N.Y. 1986).*

(n6)Footnote 90. Annotation, *What Constitutes Acceptance by Grantee, 74 A.L.R.2d 992, 996 (1963).* The term "acceptance" has a legal meaning as distinct from its popular meaning. A jury instruction as to that legal meaning is required. *B-T Ltd. v. Blakeman, 705 P.2d 307 (Wyo. 1985); Langman v. Alumni Ass'n of the Univ. of Va., 442 S.E.2d 669 (Va. 1994)* (acceptance not determined by presence or absence of grantee's signature on deed but by factual

evidence of the grantee's actions tending to prove acceptance or renunciation).

(n7)Footnote 91. *Id.* at 996-998.

(n8)Footnote 92. *UT Communs. Credit Corp. v. Resort Dev., 861 S.W.2d 699 (Mo. App. 1993)* (subsequent actions of grantee in dealing with property showed acceptance); *Arwe v. White, 381 A.2d 737 (N.H. 1977).*

(n9)Footnote 93. *Langman v. Alumni Ass'n of the Univ. of Va., 442 S.E.2d 669 (Va. 1994); Collins v. Columbia Gas Trans. Corp., 425 S.E.2d 136 (W. Va. 1992);* Cunningham et al., *supra* note 18, § 11.3 n.30; American Law of Property § 12.70; Annotation, *What Constitutes Acceptance by Grantee, 74 A.L.R.2d 992 (1963).* If the grant is not beneficial to the grantee, the presumption does not obtain. *C.U.N.A. Mortg. v. Aafedt, 459 N.W.2d 801 (N.D. 1990).* This statement elaborates upon the idea that the presumption of acceptance is rebuttable and indicates under what circumstances the presumption might automatically disappear.

(n10)Footnote 94. In addition, the presumption might be applied in situations where the grantee was unaware of the deed. Cunningham et al., *supra* note 18, § 11.3, n.31.

(n11)Footnote 95. *Sun Exploration & Prod. Co. v. Benton, 728 S.W.2d 35 (Tex. 1987).*

(n12)Footnote 96. For further discussion, *see* § 82.07, *supra*.

(n13)Footnote 97. Federal and state legislation may impose personal liability on the title holder for clean-up of environmental hazards.

(n14)Footnote 98. *See C.U.N.A. Mortg. v. Aafedt, 459 N.W.2d 801 (N.D. 1990); Martin v. Uvalde Sav. & Loan Ass'n, 773 S.W.2d 808 (Tex. App. 1989).*

(n15)Footnote 99. *County of Worth v. Jorgenson, 253 N.W.2d 575 (Iowa 1977).*

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CHAPTER 83 DONATIVE TRANSFERS

9-83 Thompson on Real Property, Thomas Editions § 83.07

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§ 83.07 Drafting Considerations.

Because issues of donative transfers of real estate usually focus on the question of delivery, the problems associated with donative transfers do not generally raise drafting problems. Many of the delivery issues encountered in this Chapter are caused by the transferor's attempt to utilize a deed as a will substitute. In certain instances the language of the deed evidences that intent. The lawyer drafting a deed must determine whether the transferor is in fact attempting a disguised testamentary transfer. Language in a deed which states that title passes at the grantor's death is an invitation to litigation and should be avoided. If the grantor desires to convey and retain an interest at the same time, the drafting lawyer needs to be conversant with the law of future interests in order to accomplish what the grantor desires. While some courts may be willing to construe an instrument so as to imply a reserved life estate in the grantor, the drafting attorney should not assume that all courts will act in such fashion. From an estate planning standpoint, there may be advantages and disadvantages to a reserved life estate. If the grantor wants to simultaneously transfer an interest and retain an interest, the life estate-remainder option should be explored. If this option is selected, the language of the deed should make it clear that those estates are being created. If a lawyer discovers that what the client actually wants is a transfer taking place at the transferor's death, the lawyer should advise the client that a will is the appropriate instrument, not a deed. To the extent that a client desires to deed property and reserve a power of revocation or sale, the lawyer should ascertain whether, under local law, such provisions are valid.

Death escrow cases usually do not involve a writing. It is certainly advisable that in all escrow situations, death or commercial, that the escrow agreement be in writing. The escrow agreement should make it clear under what conditions the deed is to be handed over to the grantee. A well-drafted written escrow agreement is usually present in cases involving commercial escrows. Unfortunately, in death escrow cases, the typical scenario is a deed absolute in form being handed over to a third party for delivery upon death of the grantor. In most cases of this type, lawyers are not even involved. If lawyers are involved in the planning stage, the transferor would likely be advised to employ some other legal option.

Acceptance by the grantee does not ordinarily bring into play any special drafting considerations. From the standpoint of the grantor, it is ordinarily assumed that the grantee will accept the gift of real estate. This approach ignores, however, the possibility that a grantee may disclaim. Whether a grantee under a deed is permitted under local law to disclaim is governed by local law. Section 2-801 of the Uniform Probate Code n100 allows disclaimer by a person "to

whom an interest in or with respect to property or an interest therein devolves by whatever means." This language permits a grantee under a deed to disclaim. This section of the Uniform Probate Code goes on to state that the transferor may not defeat the right to disclaim. n101 However, the creating instrument can specify who takes in the event of disclaimer. n102 Thus a lawyer drafting a deed might consider the possibility of the grantee disclaiming and if this happens, who the alternative taker should be. The topic of disclaimer has traditionally been associated with devisees and trust beneficiaries, not grantees. However, the potential liability that might exist in becoming the legal titleholder of land might cause more and more grantees to consider refusing a gift of real estate. n103

FOOTNOTES:

(n1)Footnote 100. Uniform Probate Code § 2-801 (10th ed. 1991 text).

(n2)Footnote 101. *Id.* § 2-801(a).

(n3)Footnote 102. *Id.* § 2-801(d)(2).

(n4)Footnote 103. *See* discussion in § 83.06, *supra*.

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CHAPTER 83 DONATIVE TRANSFERS

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Annotation, *Deed: Effect of Uniform Probate Code § 6-201 providing that certain instruments attempting to pass property at death shall be nontestamentary, 81 A.L.R. 4th (1990) 1122.*

Annotation, *Delivery of Deed by One or More But Not All of the Grantors,* 162 A.L.R. (1946) 892.

Annotation, *Delivery of Deed to Third Person to be Delivered to Grantee After Grantor's Death,* 52 A.L.R. (1928) 1222.

Annotation, *Effect on Validity and Character of Instrument in Form of Deed of Provisions Therein Indicating an Intention to Postpone or Limit the Rights of Grantee Until After the Death of the Grantor, 31 A.L.R. 2d (1953) 532.*

Annotation, *Presumption of Delivery Where Deed is Given to Third Person or Comes into Possession of Grantee Through Third Person,* 124 A.L.R. (1940) 462.

Annotation, *Sufficiency of Delivery of Deed Where Grantor Retains, or Recovers, Physical Possession, 87 A.L.R. 2d (1963) 787.*

Annotation, *What Constitutes Acceptance by Grantee, 74 A.L.R. 2d (1963) 992.*

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§ 83.03(a) Introduction and Background. [Go To Main]

The Supreme Court of Mississippi has echoed the sentiments of Coke and Blackstone in stating that "*such instrument is not a deed until delivery*," presumably conveying the notion that "delivery" is a constitutive element of a "good deed." *In re Estate of Hardy, 910 So. 2d 1052 (Miss. 2005)* .

Add:

Watson v. Tipton, 274 S.W.3d 791 (Tex. App. 2008) (title vests upon execution of the deed and delivery); *Ligon v. City of Detroit, 739 N.W.2d 900 (Mich. App. 2007)* (deed takes effect from time of delivery); *Stone v. Jetmar Properties, LLC, 733 N.W.2d 480 (Minn. App. 2007)* (effective day of deed is usually stated to be date of delivery).

Whether a deed is effective as of the date of delivery has been the subject of recent court rulings pertaining to Medicaid eligibility and the so-called "look back" period. The discussion in these recent cases is whether the deed's effective date is the *date of recording*, rather than the date of delivery.

Compare H.K. v. State, Dept. of Human Services, Div. of Medical Assistance and Health Services, 877 A.2d 1218 (N.J. 2005) (delivery date was governing) *with Kinasz-Reagan v. Ohio Dept. of Job & Family Servs., 842 N.E.2d 1067 (Ohio App. 2005)* (date of recording was governing).

Walls v. Click, 550 S.E.2d 605 (W. Va. 2001) (deed takes effect "from its actual delivery or constructive delivery").

Add:

On the other hand, some modern day decisions continue to stress that "delivery" is a definition component of "deed." *See, e.g., In re Estate of Hardy, 805 So. 2d 515 (Miss. 2002)* ("such instrument is not a deed until delivery").

§ 83.03(b) Definition--The Legal Test. [Go To Main]

Add [at end of the Cohee case discussion]:

See also Defendant A v. Idaho State Bar, 978 P.2d 222 (Idaho 1999) (discussing delivery requirement in regard to a deed of trust).

Cook v. Hall, 778 N.W.2d 744 (Neb. App. 2009) .

Barmore v. Perrone, 179 P.3d 303 (Idaho 2008) (A deed "does not take effect as a deed until delivery with intent that it shall operate")

Orud v. Groth, 652 N.W.2d 447 (Iowa 2002) (delivery determined by grantor's "acts or words or both").

Add:

Ward v. Ward, 874 N.E.2d 433 (Mass. App. 2007) (manual delivery of the deed is not necessary to effectuate a transfer of title when the grantor has indicated his intention to deliver by executing and recording the deed).

Hogg v. Wolske, 130 P.3d 1087 (Idaho 2006) (delivery established even though grantor retained possession of deed).

Kerr v. Fernandez, 792 So. 2d 685 (Fla. App. 2001) (physical handing over of deed not required); *Schmidt v. Feikert, 631 N.W.2d 537 (Neb. App. 2001)* ("There is a vital distinction between the use of the word 'delivery' as simply designating the transfer of physical custody or possession of a deed, and the use of the term in its legal sense"). The Schmidt court's sensitivity to the use of the term "delivery" is all too rare in judicial decisions, as illustrated in the discussion in note 25. *See also In re Estate of Deschenes, 818 A.2d 1026 (Me. 2003)* (key to whether grantor delivered deed is whether grantor "intended to relinquish control *over the property*").

Add to the first paragraph:

In re Hardy, 805 So. 2d 515 (Miss. 2002) (citing rule from Am. Jur. 2d).

§ 83.03(c) Deeds Testamentary in Nature. [Go To Main]

Kansas likewise has a "TOD" deed statute. See: *In re Estate of Roloff, 143 P.3d 406 (Kan. App. 2006)* (construing *K.S.A. 59* 3501).

Add:

A reserved power to appoint has been held as inconsistent with the granting of the fee simple. *See Lucareli v. Lucareli, 614 N.W.2d 60 (Wis. App. 2000)* (repugnancy theory relied upon).

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Spielvogel v. City of Kansas City, 302 S.W.3d 108 (Mo. App. 2009) ; *Cook v. Hall, 778 N.W.2d 744 (Neb. App. 2009)* .

Riley v. W.R. Holdings, LLC, 138 P.3d 316 (Idaho 2006) ("[T]he real test of the delivery of a deed is this: Did the grantor by his acts or words, or both, intend to divest himself of title? If so, the deed is delivered").

Add:

But see Salter v. Hamiter, 887 So. 2d 230 (Ala. 2004) (grantor's retention of possession and control thirty-three years after handing over deeds did not negate delivery).

Add:

Barmore v. Perrone, 179 P.3d 303 (Idaho 2008) (parol evidence must necessarily be admitted when the question of delivery arises).

Add:

Deakle v. Childs, 939 So. 2d 936 (Ala. App. 2006) (delivery a "question of fact")

Walls v. Click, 550 S.E.2d 605 (W. Va. 2001) ("What constitutes a delivery of a deed is a question of law, but whether there has been a valid delivery generally presents a mixed question of law and fact").

But see: *Adams v. First Nat. Bank of Bells/Savoy, 154 S.W.3d 859 (Tex. App 2005)* (what constitutes a delivery is a question of law; whether there has been a delivery of a deed is a fact question).

Cavanaugh v. Richichi, 918 A.2d 290 (Conn. App. 2007) ("the delivery of a deed includes not only an act by which the grantor parts with the possession of it, but also a concurring intent on the part of the grantor that it shall vest the title in the grantee ... . Both elements involve questions of fact for the trier of fact").

Robinson v. Williams, 635 S.E.2d 120 (Ga. 2006) (deed in safety deposit box).

Add:

Cook v. Hall, 778 N.W.2d 744 (Neb. App. 2009) (grantor was also a cotenant grantee).

Johannes v. Idol, 181 P.3d 574 (Ks. App. 2008) (possession by co--grantees).

Morgan v. Lawrence, 909 So. 2d 99 (Miss. App. 2005) (deeds handed over to grantee).

Barmore v. Perrrone, 179 P.3d 303 (Idaho 2008) .

James v. Mabie, 819 So. 2d 795 (Fla. App. 2002) (grantee "merely holding the deed"; other evidence, including failure to record, showed failure of delivery).

Troxel v. Bishop, 201 S.W.3d 290 (Tex. App. 2006) (proof that a deed was filed of record establishes a prima facie case of delivery and the accompanying presumption that the grantor intended to convey the land according to the terms of the deed).

Hall v. Lofton, 563 S.E.2d 128 (Ga. 2002) (presumption not rebutted); *Williams v. Ross, 716 N.Y.S.2d 756 (App. Div. 2000)* ; *Rausch v. Devine, 80 P.3d 733 (Alaska 2003)* .

Ward v. Ward, 874 N.E.2d 433 (Mass. App. 2007) ; *Bank of New York v. Harvey, 928 A.2d 325 (Pa. Super. 2007)* .

Watson v. Tipton, 274 S.W.3d 791 (Tex. App. 2008) .

Greuter v. Wetekamp, 172 S.W.3d 822 (Mo. App. 2005) (presumption rebutted).

Burmeister v. Richman, 76 S.W.3d 912 (Ark. App. 2002) (presumption *not* rebutted even though plaintiff *grantor* was challenging the delivery of the deed).

Everett v. Everett, 912 So. 2d 151 (Miss. App. 2005) (post-death recording; no presumption arose).

Add:

Caruso v. Parkos, 637 N.W.2d 351 (Neb. 2002) (person to whom delivered deemed agent of grantees). If delivery is made to a third party and the right of recall is reserved by the grantor, no delivery has occurred. *Smith v. Smith, 820 So. 2d 64 (Ala. 2001)* ; *Estate of Gabbett v. Ray, 817 N.E.2d 924 (Ill. App. 2004)* (deed in possession of third party; no delivery during grantor's lifetime). *In re Padezanin, 937 A.2d 476 (Pa. Super. 2007)* (mere handing of the executed deed, without more, to a third person who is an agent of the grantee is ineffective; there must, furthermore, be "express and definite" instruction to the third party holder of the deed).

Add:

Martin v. Martin, 720 N.W.2d 732 (Ia. 2006) ("There is a longstanding presumption that delivery occurs on the date the deed is signed."); *Orud v. Groth, 708 N.W.2d 72,* (Ia. 2006) (presumption rebutted).

Lennar Northeast Partners Ltd. Partnership v. Gifaldi, 695 N.Y.S.2d 448 (App. Div. 1999) ; *Gold v. New York State Business Group, Inc., 724 N.Y.S.2d 102 (App. Div. 2001)* .

After See also add:

Healy v. Arp Cable, Inc., 687 N.Y.S.2d 101 (App. Div. 1999) (presumption rebutted).

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Supp. to § 83.05 Conditional Delivery

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Add:

Schmidt v. Feikert, 631 N.W.2d 537 (Neb. App. 2001) ; *Walls v. Click, 550 S.E.2d 605 (W. Va. 2001)* .

§ 83.05(a) Between Grantor and Grantee. [Go To Main]

Add:

Blancett v. Blancett, 102 P.3d 640 (N.M. 2004) (delivery to third party by grantor; presumption of delivery not irrebuttable) (*Chillemi* case cited). *Blancett* was an action by the grantor to "nullify" two deeds physically delivered; factually it is not a straightforward "oral condition" case as much as a rebutting the presumption of delivery case.

§ 83.05(c) Third Party Delivery--Death Escrow. [Go To Main]

Add:

In re Estate of Wittmond, 732 N.E.2d 659 (Ill. App. 2000) ; *Donnan v. Mariner, 529 S.E.2d 754 (S.C. App. 2000)* ; *Albrecht v. Brais, 754 N.E.2d 396 (Ill. App. 2001)* .

Add:

Lasen v. Anderson, 187 P.3d 857 (Wyo. 2008) (escrow agent never got deed; deed ended up in hands of grantee; transfer sustained).

Mollico v. Mollico, 628 N.W.2d 637 (Minn. App. 2001) (written instructions to escrow agent; parol evidence rule applied to bar evidence to show that right of recall existed). *Rothrock v. Rothrock, 104 S.W.3d 135 (Tex. App. 2003)*

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Supp. to § 83.06 Acceptance.

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Add:

People's Credit Union v. Berube, 989 A.2d 91 (R.I. 2009) (evidence supported finding that grantee refused to accept).

Add:

Jackson County v. State, Dept. of Natural Resources, 717 N.W.2d 713 (Wisc. 2006) (county, after having accepted tax deed, could not rescind).

See also: Janian v. Barnes, 727 N.Y.S.2d 182 (App. Div. 2001) (fact issue created; summary judgment not appropriate); *Panhandle Baptist Foundation, Inc. v. Clodfelter, 54 S.W.3d 66 (Tex. App. 2001)* (although recorded deed created presumption of acceptance, summary judgment improperly granted as to whether grantee accepted).

Add:

Jenkins v. Miller, 180 P.3d 925 (Wyo. 2008) (acceptance is primarily a matter of the grantee's intention).

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CHAPTER 84 THE IMPACT OF BANKRUPTCY LAW ON REAL PROPERTY INTERESTS

9-84 Thompson on Real Property, Thomas Editions 84.syn

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§ 84.syn Synopsis to Chapter 84: THE IMPACT OF BANKRUPTCY LAW ON REAL PROPERTY INTERESTS

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§ 84.04 Bibliography.

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CHAPTER 84 THE IMPACT OF BANKRUPTCY LAW ON REAL PROPERTY INTERESTS

9-84 Thompson on Real Property, Thomas Editions § 84.01

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§ 84.01 Introduction.

This brief chapter is intended to point out aspects of federal bankruptcy law that have particular impact on real property interests. Detailed and definitive treatises on American bankruptcy practice abound, and this chapter will not give a lengthy description of general bankruptcy law and procedure. However, a general overview is provided, followed by a discussion of aspects of bankruptcy law that particularly affect real property interests.

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CHAPTER 84 THE IMPACT OF BANKRUPTCY LAW ON REAL PROPERTY INTERESTS

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AUTHOR: Professor David A. Thomas J. Reuben Clark Law School Brigham Young University

§ 84.02 Overview of Current Bankruptcy Law.

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§ 84.02(a) The Code and the Rules.

The starting point for current bankruptcy law is the Bankruptcy Reform Act of 1978, n1 which became effective for all bankruptcy cases commenced on or after October 1, 1979. Any cases still pending that were commenced before that date are governed by the Bankruptcy Act of 1898.

Of the four titles constituting this Act, Title I is substantively the most important, as it contains all the provisions currently found in Title 11 of the United States Code, and which may be referred to as the Bankruptcy Code. Within this title or code are described four kinds of bankruptcy proceedings, designated by and usually referred to as chapter numbers. Chapter 7 proceedings are intended to accomplish the liquidation of debtor's estates, using available estate assets to provide at least partial payment to creditors, and discharging the unpaid portions of indebtedness. Chapter 9 proceedings are used to adjust indebtedness of municipalities. Chapter 11 proceedings enable business debtors to reorganize and then resume reduction of debts after reorganization. Under Chapter 13, debtors may obtain adjustments of their debt structure, which may enable them to pay off the debts. Other chapters in this first title of the Bankruptcy Act have procedural and other provisions that govern all of the individual proceedings just described. Individual debtors would usually proceed under Chapter 7 if they have little or no assets to apply to their debts and are essentially seeking a discharge of debts in order to make a fresh start. Other individual debtors may seek relief under Chapter 13, hoping that a relaxation of payment schedules and collection proceedings will enable them to reorganize their affairs and eventually pay the debts without relying on discharge.

The United States Supreme Court has also promulgated Rules of Practice and Procedure in Bankruptcy, many of which simply incorporate relevant provisions of the Federal Rules of Civil Procedure n2 and the Federal Rules of Evidence. n3

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LEXIS: bankruptcy reform act bankruptcy w/1 code rules w/1 practice w/1 procedure w/1 bankruptcy

§ 84.02(b) The Bankruptcy Courts.

The jurisdictional arrangements for adjudication of bankruptcy matters has given rise to controversy and uncertainty ever since the law was enacted in 1978. Presently, while the ultimate and residual local power to adjudicate bankruptcy matters rests in each district court, bankruptcy courts also exist in each district as units or appendages of the district court. These bankruptcy courts, however, exercise some powers that constitutionally should perhaps be exercised only by the district court. As a practical matter, even while that uncertainty persists, federal district courts immediately refer virtually all bankruptcy matters to the bankruptcy court. n4 District courts also may and do refer individual issues from pending district court cases to bankruptcy courts.

COMPUTER-ASSISTED RESEARCH

LEXIS: bankruptcy w/1 court!

§ 84.02(c) Typical Case Procedure.

§ 84.02(c)(1) Filing the Petition; Creating the Estate.

A case is commenced either by a debtor filing a voluntary petition n5 or by one or more creditors filing an involuntary petition for relief. n6 When a case is commenced, an estate is created, n7 which estate includes all of the debtor's legal and equitable interests in property at the time the petition was filed and any property interest acquired after filing. The estate will also include property acquired by the debtor within 180 days of filing the petition, if such property was acquired by bequest, devise or inheritance, property settlement in connection with a divorce, or benefits from a life insurance or death benefit plan. The estate also includes proceeds, products, offspring, rent, and profits from property of the estate, unless those items result from debtors' services performed after commencement of the case.

COMPUTER-ASSISTED RESEARCH

LEXIS: bankruptcy w/15 estate w/5 creat!

§ 84.02(c)(2) Appointment of the Trustee or Other Executive.

In a Chapter 7 case, a trustee is appointed automatically. n8 In Chapter 11 cases, a trustee may be appointed after notice and hearing; n9 otherwise, the debtor remains in possession of the estate and serves as the executive of the estate. The executive, whether trustee or debtor-in-possession, owes fiduciary duties to the creditors of the estate.

COMPUTER-ASSISTED RESEARCH

LEXIS: bankruptcy w/15 trustee w/5 appoint!

§ 84.02(c)(3) Gathering the Assets of the Estate.

The first duty of the executive is to gather the assets of the estate, and to that end a trustee has broad powers to compel turnover of property. This power extends to property in the hands of entities such as receivers, trustees, and assignees for the benefit of creditors. n10 Also, in some cases, even property held by a secured party must be turned over to the estate, especially if the secured party can be otherwise protected. If the security interest consists of a so-called "floating lien" that attaches, for example, to new merchandise as old merchandise is sold, the new merchandise may be brought into the estate, unless the new merchandise consists of proceeds, products, offspring, rents or profits of protected property. n11

The debtor is entitled to exempt certain property from being turned over to the estate, and also to redeem certain property. n12

COMPUTER-ASSISTED RESEARCH

LEXIS: bankruptcy w/30 gather! w/5 asset! w/2 estate

§ 84.02(c)(3)(i) Avoiding Preferences.

An important element of the trustee's power to gather assets into the estate is the power to negate certain transfers of the debtor's property that took place prior to the filing of the petition. If a transfer is deemed a preference, it may be "avoided" by the trustee. A "preference" is any transfer of the debtor's property to or for the benefit of a creditor, for or on account of an antecedent debt owed by the debtor before the transfer, made while the debtor was insolvent (under a rebuttable presumption of insolvency for a 90-day period preceding filing, made on or within 90 days of the filing or between 90 days and one year of the filing if the preferred creditor at the time of the transfer was an insider who had reasonable cause to believe the debtor was insolvent, or which transfer enables the creditor to receive more than the creditor would have received if the case were a liquidation case under Chapter 7, if the transfer had not been made, and if the creditor received payment of the debt to the extent provided by Title 11). n13

COMPUTER-ASSISTED RESEARCH

LEXIS: bankruptcy w/30 avoid! w/2 preference!

§ 84.02(c)(3)(ii) Avoiding Fraudulent Conveyances.

The trustee may also avoid pre-petition transfers deemed to be fraudulent conveyances. Such fraudulent conveyances are, in general, transfers made within one year before bankruptcy if made with actual intent to hinder, delay, or defraud creditors, or if the debtor received less than a reasonably equivalent value for the transfer under certain circumstances where the financial solvency of the debtor was impaired or the transfer was made to a general partner of a debtor partnership if the debtor was or was rendered insolvent thereby. n14

This avoidance power means, of course, that the transferee in most cases must turn the property or its value over to the trustee and seek recovery from the debtor's estate as a creditor in the bankruptcy proceeding.

COMPUTER-ASSISTED RESEARCH

LEXIS: bankruptcy w/30 avoid! w/2 fraudulent w/1 conveyance!

§ 84.02(c)(4) The Automatic Stay.

When the petition is filed, an automatic stay arises to suspend certain proceedings against the assets of the estate or against the debtor. n15 This effectively prohibits collection actions or proceedings to perfect or enforce liens or other claims against the debtor or against the property of the debtor's estate. The automatic stay provisions are extended to non-bankrupt co-debtors, either by statute for Chapter 12 and Chapter 13 proceedings, n16 or by court decision, for Chapter 11 proceedings. n17

COMPUTER-ASSISTED RESEARCH

LEXIS: bankruptcy w/30 automatic w/1 stay

§ 84.02(c)(5) Operation of the Debtor's Business.

The trustee may operate the debtor's business under a Chapter 11 proceeding, n18 but usually will not do so under

Chapter 7, which is intended to achieve liquidation. If the trustee does operate the business, the power of operating also includes the power to use, sell or lease the property, n19 obtain credit, n20 and accept or reject executory contracts and leases. n21

In a Chapter 11 proceeding to reorganize the business, the debtor in possession will be responsible for that reorganization, unless the creditors or other interested parties have had a trustee appointed to manage the estate.

COMPUTER-ASSISTED RESEARCH

LEXIS LEXIS: bankruptcy w/30 operat! w/5 debtor! w/2 business!

§ 84.02(c)(6) Filing a Plan.

The first step in the reorganization is to file a plan, n22 accompanied by a disclosure statement enabling interested parties to evaluate whether the plan is in their best interests. n23 The contents of the plan, both mandatory and optional, are prescribed by law, and the plan may call for sale of all or most of the estate assets. n24 Plans are subject to the approval vote of creditors, but if the plan does not impair the claim of a creditor, that creditor has no vote and is by law presumed to have approved of the plan. The Act defines under what circumstances a claim may be considered impaired. n25 Under certain circumstances where entire classes of claims -- usually unsecured -- are impaired, the plan will be accepted even over creditors' objections (known as the "cram down"). n26

When the plan is confirmed, the property vests in the debtor (subject to protection of various creditors' interests in the property as described in the plan), the automatic stay is lifted, and the plan should then be carried out. n27

COMPUTER-ASSISTED RESEARCH

LEXIS: bankruptcy w/30 fil! w/1 plan!

FOOTNOTES:
(n1)Footnote 1. *11 U.S.C. §§ 101*-1330.

(n2)Footnote 2. Bankruptcy Rules 7002-7071.

(n3)Footnote 3. Bankruptcy Rule 9017.

(n4)Footnote 4. *28 U.S.C. § 157.*

(n5)Footnote 5. *11 U.S.C. § 101*(12).

(n6)Footnote 6. *11 U.S.C. § 303*(b).

(n7)Footnote 7. *11 U.S.C. § 541; Martin v. United States, 159 F.3d 932 (5th Cir. 1998)* (the bankruptcy estate is a separate entity for tax purposes); *Hong Kong & Shanghai Banking Corp. v. Simon, 153 F.3d 991 (9th Cir. 1998)* (the bankruptcy estate is comprised of the debtor's legal and equitable interests in property wherever located and by whomever held).

(n8)Footnote 8. *11 U.S.C. § 701.*

(n9)Footnote 9. *11 U.S.C. § 1104.*

(n10)Footnote 10. *11 U.S.C. § 542. Financial Sec. Assur., Inc. v. Tollman-Hundley Dalton, L.P., 74 F.3d 1120 (11th Cir. 1996)* ("rents" is a term broad enough to include interest in hotel revenues); *Kennedy v. Lane Foods, Inc., 192*

B.R. 282 (M.D. Georgia, 1996) (a Ch. 11 debtor's real property included a restaurant building affixed to real property, but not the trade fixtures used in conducting the business).

(n11)Footnote 11. *11 U.S.C. § 552*(b).

(n12)Footnote 12. *11 U.S.C. § 522. Cochrane v. Vaquero Invs., 76 F.3d 200 (8th Cir. 1996)* (condominium tentatively held as not qualified for homestead exemption); *In re Bennett, 192 B.R. 584 (D. Maine 1996)* (plans to build a house on land do not satisfy state requirements for residence exemption).

(n13)Footnote 13. *11 U.S.C. § 547.*

(n14)Footnote 14. *11 U.S.C. § 548.*

(n15)Footnote 15. *11 U.S.C. § 362*(a). In the *Matter of Ross, 191 B.R. 615 (D.N.J. 1996)* (during the automatic stay, a Ch. 13 debtor may cure a default and reinstate a residential mortgage, following entry of foreclosure and conduct of the sheriff's sale, and before actual delivery of the sheriff's deed); *In re Zersen, 189 B.R. 732 (Bankr. W.D. Wis. 1995)* (co-obligor or co-debtor protected by automatic stay to the extent reorganization plan will satisfy debt; creditor may have relief from stay to the extent that the plan fails to satisfy debt).

(n16)Footnote 16. *11 U.S.C. §§ 1201,* 1301.

(n17)Footnote 17. *Otoe County Nat'l Bank v. W & P Trucking, Inc., 754 F.2d 881 (10th Cir. 1985).* However, when one defendant in a condemnation case filed a bankruptcy petition, the condemnor was not required to halt proceedings against other co-defendants. *Beutel v. Dallas County Flood Control Dist., No. 1, 916 S.W.2d 685 (Tex. App. 1996).*

(n18)Footnote 18. *11 U.S.C. § 1108.*

(n19)Footnote 19. *11 U.S.C. § 363.*

(n20)Footnote 20. *11 U.S.C. § 364.*

(n21)Footnote 21. *11 U.S.C. § 365.*

(n22)Footnote 22. *11 U.S.C. § 1121.*

(n23)Footnote 23. *11 U.S.C. § 1125.*

(n24)Footnote 24. *11 U.S.C. § 1123. In re Pinto, 191 B.R. 626 (D.N.J. 1996)* (a Ch. 13 plan must provide for payment of real property taxes and insurance for the residence); In re 611 Sixth Avenue Corp., 191 B.R. 295 (S.D.N.Y. 1996) (a Ch. 11 debtor was given an extension of time to decide to either assume or reject a nonresidential real estate lease).

(n25)Footnote 25. *11 U.S.C. § 1124. Troy Savings Bank v. Traveler's Motor Inn, Inc., 215 B.R. 485 (N.D. N.Y. 1997)* (objection to confirmation of a Ch. 11 plan in a single asset real estate case).

(n26)Footnote 26. *11 U.S.C. § 1129.*

(n27)Footnote 27. *11 U.S.C. §§ 1141,* 362.

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CHAPTER 84 THE IMPACT OF BANKRUPTCY LAW ON REAL PROPERTY INTERESTS

9-84 Thompson on Real Property, Thomas Editions § 84.03

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§ 84.03 Aspects of Bankruptcy Law and Procedure That Affect Real Property Interests.

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§ 84.03(a) Determining Property That is Exempt from the Estate.

Certain property of the debtor may be exempted from inclusion in the estate that will be distributed to the creditors, and those exemptions may be defined by state law. Some states have created a "homestead" exemption. Although the state courts may hold that the homestead exemption will not apply to property that became subject to a judicial lien predating the property's homestead status, the federal bankruptcy court may nevertheless eliminate the lien. n28

The debtor may not, however, eliminate or avoid the lien if the debtor did not possess an interest in the liened property before the lien attached. n29

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LEXIS: bankruptcy w/30 exempt! w/5 property

§ 84.03(b) Adjusting the Amount of Secured Claim Under a Mortgage.

When a debtor seeks adjustment of indebtedness under Chapter 13 through a flexible repayment plan, one device for achieving this adjustment is to reduce the amount of an allowed claim when it is secured by a lien on property worth less than the amount of the lien. The allowed claim is treated as secured by the lien up to the value of the property, but the balance is treated as an unsecured claim n30 and is therefore often worthless. This "mortgage stripping" may not occur, however, if the security interest or lien is in real property that is the debtor's principal residence. n31 Also, a federal court may order interest paid to a secured creditor, even if interest is not required by either the mortgage instruments or state law. n32

It has also been held that a mortgagor who obtains discharge from personal liability on the mortgage note in a Chapter 7 proceeding may nevertheless be subject to the mortgagee's *in rem* claim against the property. n33

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LEXIS: bankruptcy w/30 adjust! w/5 lien! w/5 property mortgage w/1 stripping

§ 84.03(c) Obtaining Adequate Protection for Secured Creditors.

Protection of property interests under the Fifth Amendment of the United States Constitution has prompted the principle that secured creditors must be afforded "adequate" protection in bankruptcy proceedings. n34

Because this protection extends only to the amount of the claim, an undersecured creditor obtains no special protection for the part of the claim not secured.

Under the Bankruptcy Act, secured creditors are protected up to the value of their claim, that is, of the benefit of their bargain, but different means of realizing that value may be substituted:

§ 361. Adequate protection

When adequate protection is required under section 362, 363, or 364 of this title of an interest of an entity in property, such adequate protection may be provided by --

(1) requiring the trustee to make a cash payment or periodic cash payments to such entity, to the extent that the stay under section 362 of this title, use, sale, or lease under section 363 of this title, or any grant of a lien under section 364 of this title results in a decrease in the value of such entity's interest in such property;

(2) providing to such entity an additional or replacement lien to the extent that such stay, use, sale, lease, or grant results in a decrease in the value of such entity's interest in such property; or

(3) granting such other relief, other than entitling such entity to compensation allowable under section 503(b)(1) of this title as an administrative expense, as will result in the realization by such entity of the indubitable equivalent of such entity's interest in such property. n35

One form of adequate protection is for periodic cash payments to be made to the secured creditor, with the payments being equal to the interest. In the case of real property, however, cash payments may not be ordered if the natural appreciation in the value of the realty is considered greater than the accruing interest and the appreciation alone is thus adequate protection. n36

Another form of adequate protection is a substituted or enhanced lien, such as a lien on additional real property or a lien on some other additional unencumbered collateral. In all such cases, the objective is to create a so-called "equity cushion" that in effect becomes the "indubitable equivalent" of the creditor's equity interest in the property held by the trustee. n37

This means that much litigation can be expected on what is an adequate "cushion" and on establishing the valuations of substitute property. The value of collateral is typically described as the amount that can be obtained from a judicial sale, and is not necessarily the same as the amount recoverable from a forced sale. The adequacy of the equity cushion is affected by factors such as accrual of interest indebtedness, appreciation of the property value, adequacy of insurance coverage, adequacy of property maintenance, current payments of taxes and assessments, and prospects for

rehabilitation. Larger equity cushions may be appropriate for unimproved land.

While a personal guarantee of a secured debt does not constitute adequate protection, n38 a guarantee that is properly secured can suffice. It has been held that mortgage insurance alone is not adequate protection for a secured creditor, n39 but in some courts VA and FHA mortgage insurance, standing alone, have been accepted as adequate protection. n40

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LEXIS: bankruptcy w/30 adequate w/2 protection w/15 secured w/1 creditor! w/50 property

§ 84.03(d) Relief from the Automatic Stay.

The automatic stay provisions are very broad, prohibiting all actions affecting the debtor or the estate as soon as the petition is filed. n41 The automatic stay provisions have specific impact on real property interests inasmuch as they prohibit enforcing pre-petition judgments, creditors' actions to obtain possession of property in the estate, and actions to enforce liens against the debtor or against property of the estate. n42 The automatic stay provisions do not apply to a limited range of property-related actions, such as perfection of a "relation back" lien after the petition, if the state law time for perfection has not expired, or to certain mortgage foreclosures by federal agencies.

The stay against litigation is very broad, but a few exceptions are in effect. The stay does not prohibit litigation on claims that arose after the petition was filed, nor litigation against a solvent and independent affiliate or subsidiary of the debtor, n43 nor -- in some circumstances -- against individual partners of a debtor partnership. The stay does prohibit actions to enforce a judgment (against the debtor) against debtor's assets held by a third party. A mortgage or trust deed foreclosure sale that takes place before the petition is filed will escape the effect of the stay, unless the debtor still had an equity of redemption or some other interest even after the sale. n44 Similarly, a pre-filing forfeiture of a real estate contract will escape the automatic stay, unless the debtor still had residual rights in the contract, such as a grace period in which to cure the default. This determination may be a matter of state law.

Actions undertaken in violation of the automatic stay are void, even if the violator is without notice of the stay. However, this voidness does not apply to good faith purchasers in certain situations, as explained in the following obtusely expressed provision:

(c) The trustee may not avoid under subsection (a) of this section a transfer of real property to a good faith purchaser without knowledge of the commencement of the case and for present fair equivalent value unless a copy or notice of the petition was filed, where a transfer of such real property may be recorded to perfect such transfer, before such transfer is so perfected that a bona fide purchaser of such property, against whom applicable law permits such transfer to be perfected, could not acquire an interest that is superior to the interest of such good faith purchaser. A good faith purchaser without knowledge of the commencement of the case and for less than present fair equivalent value has a lien on the property transferred to the extent of any present value given, unless a copy or notice of the petition was so filed before such transfer was so perfected. n45

If actions in violation of the automatic stay are undertaken knowingly and willingly, both the miscreant parties and their attorneys may suffer penalties based on contempt. n46 In addition to imposing fines and damages, the courts may also require creditors who violate the automatic stay provisions to have their claims subordinated to claims of other creditors. n47

Relief from the automatic stay may be sought "for cause including the lack of adequate protection." n48 Other causes that might justify relief include the desirability of completing an action in another tribunal, an averment that an action

would not interfere with the orderly progress of the bankruptcy case, failure to pay taxes, lapse of insurance, filing the bankruptcy petition in bad faith, and disobedience of court orders.

Relief from the automatic stay may also be granted with respect to actions or acts against property if the debtor does not have equity in the property and the property is not necessary to an effective reorganization. n49 Any automatic stay against property is automatically terminated once that property is no longer a part of the estate; property leaves the estate by being sold, or by being "abandoned" by the trustee, or by being determined to be exempt. In actions against the debtor rather than against the property, the automatic stay remains in effect until the case is terminated by closure, dismissal, or an order of discharge (of the debts). If a lien in existence at the time the petition was filed has not been discharged or avoided while the stay has been in effect, its enforcement may be pursued again after the stay has terminated. n50

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LEXIS: relief w/15 automatic w/1 stay w/30 property

§ 84.03(e) Use, Sale or Lease of the Property by the Trustee.

§ 84.03(e)(1) When Court Approval is Required.

The trustee, in carrying out the trustee obligations in Chapter 11 proceedings, is usually permitted to use, sell or lease the property in the debtor's estate without prior order of the court. n51 Court approval is required if the trustee's proposed use, sale, or lease of property in the state is not in the ordinary course of business or if the property to be used is "cash collateral":

> (a) In this section, "cash collateral" means cash, negotiable instruments, documents of title, securities, deposit accounts, or other cash equivalents whenever acquired in which the estate and an entity other than the estate have an interest and includes the proceeds, products, offspring, rents, or profits of property subject to a security interest as provided in section 552(b) of this title, whether existing before or after the commencement of a case under this title. n52

Because cash collateral is defined in terms of both the type of asset and who has an interest in it, cash that is unencumbered can be used by the trustee in the ordinary course of business without a prior court order.

A party whose interest in the estate may be affected by the trustee's use, sale or lease of property in the estate has the burden of raising the issue. n53 In response to such an objection, a court may condition the trustee's use, sale or lease of estate property on the providing of "adequate protection" to the objecting creditor.

If the trustee prefers to sell property of the estate, it can be sold free of encumbrances, claims, and lien interests if any one of five conditions are met:

> (1) applicable non-bankruptcy law permits sale of such property free and clear of such interest;
>
> (2) such entity consents;
>
> (3) such interest is a lien and the price at which such property is to be sold is greater than the aggregate value of all liens on such property;
>
> (4) such interest is in bona fide in dispute; or
>
> (5) such entity could be compelled, in a legal or equitable proceeding, to accept a money satisfaction

of such interest. n54

Such a sale by the trustee can also take place even if provisions in contracts or other documents related to the property would prohibit such a transaction. n55

The trustee may also sell estate property that is held concurrently by another party, but only if each of the following four conditions are fulfilled:

(1) partition in kind of such property among the estate and such co-owners is impracticable;

(2) sale of the estate's undivided interest in such property would realize significantly less for the estate than sale of such property free of the interests of such co-owners;

(3) the benefit to the estate of a sale of such property free of the interests of co-owners outweighs the detriment, if any, to such co-owners; and

(4) such property is not used in the production, transmission, or distribution, for sale, of electric energy or of natural or synthetic gas for heat, light, or power. n56

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LEXIS: bankruptcy w/50 property w/5 trustee! w/5 use! or sell! or lease!

§ 84.03(e)(2) The Trustee's "Abandonment" of Estate Property.

A trustee may voluntarily "abandon" property of the estate, without prior order of the court, if the property is determined to be "burdensome to the estate" or of "inconsequential value to the estate." n57 If property is listed on a debtor schedule required to be filed, n58 but then is not otherwise disposed of until the case is closed, it is considered automatically abandoned and left to the control of the debtor. To abandon property to control of a party other than the debtor requires that such party have a possessory interest in the property. Abandonment does not necessarily lift the automatic stay, unless the abandonment is directly to a creditor with a possessory interest. Under those circumstances it is common to submit a request for abandonment accompanied by a request for appropriate relief from the automatic stay with respect to that property.

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LEXIS: bankruptcy w/50 trustee! w/15 abandon! w/15 estate w/5 property

§ 84.03(e)(3) Obtaining Financing for the Trustee.

If the trustee seeks financial support for activities carried out on behalf of the estate, one source is the use of cash collateral, if any. Alternatively, the trustee may seek outside financing, and if obtaining such credit is in the ordinary course of business, no prior court order is necessary. n59

However, the trustee is severely limited in the kinds of collateral that can be made available to lenders. The trustee may promise a lender to repay the loan obligation as an expense of administration, although that commitment will be junior to secured debts. If this is unsuccessful, the trustee, after notice and hearing, may extend an administration expense that has priority over other administrative expenses; if this fails, the trustee may secure a loan by encumbering property in the estate. n60

These and other activities may seriously affect rights of unsecured creditors. If the trustee attempts to obtain financing

by encumbering estate assets that are already subject to claims of secured creditors, the trustee must show that adequate protection has been provided.

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LEXIS: bankruptcy w/50 financ! w/5 trustee! w/5 obtain! or support!

§ 84.03(f) Disposition of Executory Contracts and Unexpired Leases.

The trustee has discretion to accept or reject executory contracts and unexpired leases, but the consequences of those choices are set forth in the bankruptcy code. For purposes of the bankruptcy law, an executory contract is probably best defined as a contract that remains at least partially unperformed by both parties. n61

Examples would include earnest money agreements, recreational use permits, and time-share condominium contracts. Installment land contracts are probably executory contracts, but there is not complete agreement on that point.

If the executory contract or unexpired lease was terminated before the petition was filed, then it is not part of the estate. However, much controversy can arise over whether a valid pre-petition termination actually took place, and much judicial stretching has been exerted to find that a termination did not occur and that the contract or lease is property of the estate. n62

Some contracts may not be assumed and thus may not be brought into the debtor's estate. For instance, commitments for real estate financing may not be assumed by the trustee. n63

The trustee in a Chapter 7 proceeding usually has sixty days after the court grants an order of relief to accept or reject the executory contract or unexpired lease. n64 If the trustee does nothing within that time, the contract or lease is considered rejected. n65

In a Chapter 11 proceeding, the trustee may accept or reject a contract any time before the plan is confirmed, n66 unless a party to the contract or lease successfully requests that the trustee be compelled to make an earlier decision. n67

If the trustee accepts a contract or lease in default, the acceptance is conditioned on the trustee committing to cure the default, compensate for losses, and give assurance of future performance. n68

The trustee is permitted to assign such a contract or lease once it is assumed, but the assignee must give assurance of future performance. n69

A rejection of a contract or lease by the trustee is subject to court approval, and courts will sustain the rejection if the contract or lease would be burdensome to the estate, or, alternatively, if rejection would benefit the estate. If rejection results in compensable damage to the other party, that party usually has a corresponding unsecured claim against the estate. n70

If a lease is rejected and the other party is the lessee, the lessee may remain in possession for the balance of the term and even offset against the rent any repair expenses or other damages resulting from non-performance by the lessor/debtor. The vendee in possession under a rejected installment land sale contract is treated similarly. The vendee who is not in possession under a rejected land sale contract, or who elects to treat the contract as terminated, has only a lien against the debtor and the property for recovery of the part of the purchase price already paid by the vendee. n71

These decisions are often affected by whether the property interest is appreciating in value.

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LEXIS: bankruptcy w/50 trustee! w/15 executory w/2 contract! bankruptcy w/50 trustee! w/15 unexpired w/2 lease!

§ 84.03(g) The Trustee's Power to Avoid Previous Transactions.

The trustee has power to avoid certain pre-petition transactions which, if not avoided, would end or limit the interest of the estate in assets. n72

Avoidance proceedings must be commenced within two years of the time the trustee is appointed or the case is closed, whichever is earlier. The right to avoid is subject to any applicable law that permits security interests to be perfected effectively against entities that acquire rights in the property before the date of perfection. The prime real property example is a security interest that, upon perfection, relates back to a pre-petition time. With respect to real property, the trustee may in effect become a bona fide purchaser upon the commencement of the case, which defeats most unperfected liens.

The trustee is empowered to avoid any statutory lien to the extent the lien arises because of the debtor's insolvency or bankruptcy, or to the extent the lien is unperfected against a bona fide purchaser at the time the petition is filed, or to the extent the lien is for rent or distress for rent. n73

Certain post-petition transfers can be avoided if the petition was involuntary. An example would be a transfer of property outside the ordinary course of business, unless the transfer was for value or to a bona fide purchaser in a county other than where the case is pending. n74

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LEXIS: bankruptcy w/50 trustee! w/15 avoid! w/5 transaction! or lien! or transfer!

§ 84.03(h) Avoidance of Preferences.

Certain transfers by which the debtor has "preferred" one creditor over another can be avoided by the trustee. These transfers subject to avoidance are described in the bankruptcy code as follows:

(b) Except as provided in subsection (c) of this section, the trustee may avoid any transfer of an interest of the debtor in property --

(1) to or for the benefit of a creditor;

(2) for or on account of an antecedent debt owed by the debtor before such transfer was made;

(3) made while the debtor was insolvent;

(4) made --

(A) on or within 90 days before the date of the filing of the petition; or

(B) between ninety days and one year before the date of the filing of the petition, if such creditor at the time of such transfer was an insider; and

(5) that enables such creditor to receive more than such creditor would receive if --

(A) the case were a case under Chapter 7 of this title;

(B) the transfer had not been made; and

(C) such creditor received payment of such debt to the extent provided by the provisions of this title. n75

Some transfers, even if they meet all the above requirements to be avoided as preferences, are nevertheless protected from avoidance under the following provisions:

(c) The trustee may not avoid under this section a transfer --

(1) to the extent that such transfer was --

(A) intended by the debtor and the creditor to or for whose benefit such transfer was made to be a contemporaneous exchange for new value given to the debtor; and

(B) in fact a substantially contemporaneous exchange;

(2) to the extent that such transfer was --

(A) in payment of a debt incurred by the debtor in the ordinary course of business or financial affairs of the debtor and the transferee;

(B) made in the ordinary course of business or financial affairs of the debtor and the transferee; and

(C) made according to ordinary business terms;

(3) that creates a security interest in property acquired by the debtor --

(A) to the extent such security interest secures new value that was --

(i) given at or after the signing of a security agreement that contains a description of such property as collateral;

(ii) given by or on behalf of the secured party under such agreement;

(iii) given to enable the debtor to acquire such property; and

(iv) in fact used by the debtor to acquire such property; and

(B) that is perfected on or before 10 days after the debtor receives possession of such property;

(4) to or for the benefit of a creditor, to the extent that, after such transfer, such creditor gave new value to or for the benefit of the debtor --

(A) not secured by an otherwise unavoidable security interest; and

(B) on account of which new value the debtor did not make an otherwise unavoidable transfer to or for the benefit of such creditor;

(5) that creates a perfected security interest in inventory or a receivable or the proceeds of either, except to the extent that the aggregate of all such transfers to the transferee caused a reduction, as of the date of the filing of the petition and to the prejudice of other creditors holding unsecured claims, of any amount by which the debt secured by such security interest exceeded the value of all security interests for such debt on the later of --

(A)

(i) with respect to a transfer to which subsection (b)(4)(A) of this section applies, 90 days before the date of the filing of the petition; or

(ii) with respect to a transfer to which subsection (b)(4)(B) of this section applies, one year before the date of the filing of the petition; or

(B) the date on which new value was first given under the security agreement creating such security interest;

(6) that is the fixing of a statutory lien that is not avoidable under section 545 of this title; or

(7) if, in a case filed by an individual debtor whose debts are primarily consumer debts, the aggregate value of all property that constitutes or is affected by such transfer is less than $600. n76

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LEXIS: bankruptcy w/50 trustee! w/15 avoid! w/15 prefer!

§ 84.03(i) Avoidance of Fraudulent Conveyances.

The trustee may avoid certain conveyances deemed fraudulent. These fraudulent conveyances may consist of transfers of debtor's property made with actual intent to hinder, delay, or defraud creditors. Other fraudulent conveyances are defined as transfers for less than reasonably equivalent value made while the debtor was insolvent or which made the debtor insolvent, or which left the debtor unreasonably little capital, or which were intended to incur debts beyond the debtor's ability to pay. n77 The adequacy of the purchase price can be a fraud issue in foreclosure sale proceedings; this issue should be determined under applicable state law.

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LEXIS: bankruptcy w/50 trustee! w/15 avoid! w/15 fraudulent w/1 conveyance!

FOOTNOTES:

(n1)Footnote 28. *11 U.S.C. § 522*(f); *Owen v. Owen, 500 U.S. 305 (1991); Frameli v. Reed Oil Co., 155 B.R. 354 (Bankr. W.D. Pa. 1993)* (a judicial lien can be partially avoided and in determining whether the debtor may avoid the lien, bankruptcy court must first determine whether debtor would have been entitled to claim exemption in absence of judicial lien, and then determine extent to which available exemption is impaired by judicial lien); *In re Davis, 188 B.R. 544 (Bankr. N.D. Tex. 1995)* (state law governs which property may be exempted, but federal law governs the effect of liens upon state defined exempt property).

(n2)Footnote 29. *In re Mayer, 156 B.R. 54 (Bankr. S.D. Cal. 1993)* (under California's homestead law which attaches to the principal dwelling of each homeowner without any record being filed, the automatic homestead exemption does not operate against liens recorded before the debtor acquired his home. The debtor or the debtor's spouse must have actually resided in the home on the date the lien was recorded); *Farrey v. Sanderfoot, 500 U.S. 291 (1991).*

(n3)Footnote 30. *11 U.S.C. § 506*(a).

(n4)Footnote 31. *11 U.S.C. § 1322*(b)(2); *Nobelman v. American Sav. Bank, 113 S. Ct. 2106 (1993).*

(n5)Footnote 32. *Rake v. Wade, 113 S. Ct. 2187, 124 L. Ed. 2d 424 (1993).*

(n6)Footnote 33. *Johnson v. Home State Bank, 501 U.S. 7 (1991).*

(n7)Footnote 34. *In re Kids Creek Partners, L.P., 210 B.R. 547 (Bankr. N.D. Ill. 1997)* (a prepetition interest covering proceeds from sale of the debtor's personal property did not attach to postpetition proceeds of sale from debtor's real property); *Louisville Joint Stock Land Bank v. Radford, 295 U.S. 555 (1935).*

(n8)Footnote 35. *11 U.S.C. § 361.*

(n9)Footnote 36. *Heritage Sav. & Loan Ass'n v. Rogers Dev. Corp., 2 B.R. 679 (Bankr. E.D. Va. 1980).*

(n10)Footnote 37. *In re Duness Hotel Assocs., 188 B.R. 162 (Bankr. D.S.C. 19965)* (creditor's claim that accrual of interest "eroded" equity cushion fails to support a grant of relief from the stay).

(n11)Footnote 38. *In re Kenny Kar Leasing, Inc., 5 B.R. 304 (Bankr. C.D. Cal. 1980).*

(n12)Footnote 39. *Fidelity Bond & Mtg. Co. v. Caulk, 9 B.R. 242 (Bankr. E.D. Pa. 1981).*

(n13)Footnote 40. *See In re State Employees Ret. Fund v. Roane, 14 B.R. 542 (E.D. Pa. 1981).*

(n14)Footnote 41. *11 U.S.C. § 362.*

(n15)Footnote 42. *11 U.S.C. § 362*(a).

(n16)Footnote 43. *Feldman v. Trustees of Beck Indus., 479 F.2d 410 (2d Cir. 1973).*

(n17)Footnote 44. *Halloway v. Kleitz, 6 B.R 214 (Bankr. D. Nev. 1980); In re Butchman, 4 Bankr. 379 (Bankr. S.D.N.Y. 1980).*

(n18)Footnote 45. *11 U.S.C. § 549*(c).

(n19)Footnote 46. *Fidelity Mtg. Investors v. Camelia Bldrs., Inc., 550 F.2d 47 (2d Cir. 1976); Credithrift of Am., Inc. v. Bazan, 6 B.R. 937 (Bankr. N.D. Ill. 1980).*

(n20)Footnote 47. *In re Sayam's, Inc., 15 B.R. 229 (Bankr. N.D. Ga. 1981).*

(n21)Footnote 48. *11 U.S.C. § 362*(d). *Compass Bank for Savings v. Billingham, 212 B.R. 692* (lst Cir. 1997) (stipulation entitling mortgagee to relief from a stay was unenforceable after certain changes in circumstances); *In re LDN corp., 191 B.R. 320 (Bankr. E.D. Va 1996)* (failure of debtor to make payments to secured creditor for substantial length of time, together with substantially unsupported plan to satisfy secured debt after confirmation, may give rise to granting stay of relief for cause).

(n22)Footnote 49. *11 U.S.C. § 362*(d)(2).

(n23)Footnote 50. *Polk County Fed. Sav. & Loan Ass'n v. Weathers, 15 B.R. 945 (Bankr. D. Kan. 1981).*

(n24)Footnote 51. *11 U.S.C. § 363*(c).

(n25)Footnote 52. *11 U.S.C. § 363*(a).

(n26)Footnote 53. *11 U.S.C. § 363*(e).

(n27)Footnote 54. *11 U.S.C. § 363*(f).

(n28)Footnote 55. *11 U.S.C. § 363*(l).

(n29)Footnote 56. *11 U.S.C. § 363*(h).

(n30)Footnote 57. *11 U.S.C. § 554.* The 1984 amendment, Pub. L. 98-353, § 468(a), added "and benefit" after "value."

(n31)Footnote 58. *11 U.S.C. § 521.*

(n32)Footnote 59. *11 U.S.C. § 364.*

(n33)Footnote 60. *11 U.S.C. § 364.*

(n34)Footnote 61. *Clark v. Pure, 151 B.R. 75 (Bankr. E.D. Pa. 1993); Benevides v. Alexander, 670 F.2d 885 (9th Cir. 1982).*

(n35)Footnote 62. *See, e.g., In re Christopher Michaels Ristorante, 9 B.R. 149 (Bankr. S.D. Fla. 1981).*

(n36)Footnote 63. *11 U.S.C. § 365*(c)(2).

(n37)Footnote 64. *In re Prime Motor Inns, Inc., 166 B.R. 993 (Bankr. S.D. Fla. 1994)* (objective of *11 U.S.C. § 365*, the bankruptcy statute governing assumption of unexpired leases, is to protect the landlord, not to improve his position).

(n38)Footnote 65. *11 U.S.C. § 365*(d)(1). *Clark v. Pure, 151 B.R. 75 (Bankr. E.D. Pa. 1993).*

(n39)Footnote 66. *11 U.S.C. § 1123*(b)(2).

(n40)Footnote 67. *11 U.S.C. § 365*(d)(2).

(n41)Footnote 68. *11 U.S.C. § 365*(b)(1).

(n42)Footnote 69. *11 U.S.C. § 365*(f)(2).

(n43)Footnote 70. *11 U.S.C. § 365*(g).

(n44)Footnote 71. *11 U.S.C. § 365*(j).

(n45)Footnote 72. *11 U.S.C. §§ 544*-551.

(n46)Footnote 73. *11 U.S.C. § 545.*

(n47)Footnote 74. *11 U.S.C. § 549.*

(n48)Footnote 75. *11 U.S.C. § 547*(b). *In re Gutpelet, 137 F.3d 748 (3d Cir. 1998)* (avoidance of conveyances by which a husband conveyed real estate to his wife the debtor, and she reconveyed to herself and her husband as tenants in the entirety).

(n49)Footnote 76. *11 U.S.C. § 547*(c).

(n50)Footnote 77. *11 U.S.C. § 548. In re Gutpelet, 137 F.3d 748 (3d Cir. 1998)* (avoidance of conveyances by which a husband conveyed real estate to his wife the debtor, and she reconveyed to herself and her husband as tenants in the entirety); *Norman v. Balint, 215 B.R. 854 (N.D. Ohio 1997)* (neither "false pretenses" nor "maliciousness" established); *In re Ellinwood, 206 B.R. 300 (W.D. N.Y. 1997)* (debtor history of filing bankruptcy petitions to frustrate real estate foreclosure sales).

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Supp. To CHAPTER 84 THE IMPACT OF BANKRUPTCY LAW ON REAL PROPERTY INTERESTS

9-84 Thompson on Real Property, Thomas Editions Supp. to § 84.02

Supp. to § 84.02 Overview of Current Bankruptcy Law.

[Go To Main]

§ 84.02(c) Typical Case Procedure. [Go To Main]

§ 84.02(c)(1) Filing the Petition; Creating the Estate.

Change the text in the first sentence to read:

A case is commenced by a debtor filing a voluntary petition, a debtor and spouse filing a joint petition, or by one or more creditors filing an involuntary petition for relief.

Delete *11 U.S.C. § 101*(12) and add:

11 U.S.C. § 301

After the phrase "a debtor and spouse filing a joint petition." add new footnote:

5.1. *11 U.S.C. § 302.*

Add:

Jackson v. Novak (In re Jackson), 593 F.3d 171 (2d Cir. 2010) (interests include causes of actions possessed by the debtor at the time of filing, but do not typically include property the debtor neither owns nor becomes entitled to until after the filing); *Torch Liquidating Trust v. Stockstill, 561 F.3d 377 (5th Cir. 2009)* (cause of action is included regardless of whether or not the case was more likely to brought by another party).

Annas v. Allard, 272 B.R. 633 (E.D. Mich. 2002) (by including all legal interests of debtor without exception in the "property of the estate" Congress indicated its intention to include all legally recognizable interests even though they may be contingent and not subject to possession until some future time).

§ 84.02(c)(3) Gathering the Assets of the Estate.

Add:

Levey v. Sys. Div., Inc. (In re Teknek, LLC), 563 F.3d 639, 645 (7th Cir. 2009) (the trustee's duty is to gather the estate's assets, but this typically includes only "general claims" and not "personal claims"); *In re Smith, 2010 U.S. Dist. LEXIS 27658 (E.D.N.Y. 2010)* (trustees are to use reasonable diligence in fulfilling this duty and can be held personally liable for negligence in this duty).

Add:

In re Blackburn Bkrtcy., 385 B.R. 660 (N.D. Iowa 2008) (denial of discharge based on fraudulent concealment of assets).

Add:

In re Erickson, 406 B.R. 522 (Bankr. W.D. Mich. 2009) (tax refunds may be exempt, but they may be limited to the maximum exemption amount); *Swimelar v. Baker (In re Baker), 2010 U.S. App. LEXIS 9871 (2d Cir. 2010)* ; *In re Ferrante, 2009 Bankr. LEXIS 2862 (Bankr. D.N.J. 2009)* . Mitrani, Jacob. "Deepening Insolvency in Consumer Bankruptcy: A New Twist on a Once-Forgotten Theory," *28 ABI J. 48 (January 2010)* .

Turner v. Turner, 335 B.R. 755 (D. N.M. 2005) (debtor failed to disclose complex divestment scheme prior to filing for bankruptcy).

In re Karaus, 276 B.R. 227 (D. Neb. 2002) (most categories of exempt property were designed to enable debtor to hold, free from claims of creditors, property necessary to protect him and his family from impoverishment); *In re Alberto, 271 B.R. 223 (N.D. N.Y. 2001)* (once creditor had lawfully repossessed motor vehicle, debtor no longer had possessory right in the vehicle, but had right to redeem it before creditor disposed of it).

In re Lewandowski, 386 B.R. 643 (E.D. Mich. 2008) (trustee sale of land the debtors had claimed as exempt).

§ 84.02(c)(3)(i) Avoiding Preferences.

Add:

Englander v. Hekman Furniture Co. (In re Mastercraft Interiors, Ltd.), 2009 Bankr. LEXIS 4218 (Bankr. D. Md. 2009) (payments were not avoidable because they were made during the ordinary course of business between the parties); *Wells Fargo Home Mortg., Inc. v. Lindquist, 592 F.3d 838, 845 (8th Cir. 2010)* (the pre-petition transfer of the mortgage was deemed preferential); *Bank of Am., N.A. v. Mukamai (In re Egidi), 571 F.3d 1156 (11th Cir. 2009)* (use of cash advances and convenience checks to pay off a credit card company just before bankruptcy were deemed preferential transfers). *See generally* Tyson, John. "Automatic Stays and Administrative Expenses: Rights and Remedies Available to Landlords and Tenants in Bankruptcy Proceedings." *31 Campbell L. Rev. 413* (Spring, 2009).

In re Diagnostic Instrument Group, Inc., 276 B.R. 302 (M.D. Fla. 2002) (payments that Chapter 7 debtor had made during 90-day preference period on usurious short-term loan were not ordinary in the relevant industry, and could be avoided as preferential).

In re Lyon Bkrtcy., 360 B.R. 749 (E.D. N.C. 2007) (the look-back provision of the bankruptcy fraudulent transfer section is a substantive element, not a statute of limitations, and is not subject to tolling).

§ 84.02(c)(3)(ii) Avoiding Fraudulent Conveyances.

Add:

Goldstein v. Colombo Bank, F.S.B. (In re Md. Prop. Assocs.), 309 Fed. Appx. 737 (4th Cir. 2009) (badges of fraud may include the grantor's insolvency, the relationship between the grantor and the grantee, and departure from the normal course of business); *Stone v. Smile, 2009 Tenn. App. LEXIS 855 (Tenn. Ct. App. 2009)* (transfer deemed fraudulent because of several badges of fraud that existed: grantor was in a precarious financial condition, the grantor knew there was or soon would be a large judgment against it, and there was a lack of an innocent purpose for the transfer).

In re World Vision Entertainment, 275 B.R. 641 (M.D. Fla. 2002) (courts generally look at the totality of circumstances and the "badges of fraud" surrounding the transfers).

Snyder v. Zayler, 309 B.R. 272 (E.D. Tex. 2004) (Where debtor's purported transfer is a mere sham transaction, the transfer is null and void and does not affect the fee simple interest the debtor possessed in the property when the petition was filed.)

In re Lyon Bkrtcy., 360 B.R. 749 (E.D. N.C. 2007) (the look-back provision of the bankruptcy fraudulent transfer section is a substantive element, not a statute of limitations, and is not subject to tolling).

§ 84.02(c)(4) The Automatic Stay.

Add:

Barner v. Saxon Mortg. Servs. (In re Barner), 597 F.3d 651 (5th Cir. 2010) (the automatic stay does not disallow foreclosure proceedings where a previous bankruptcy order involved the same debtors, the same creditors and the same property); *Daimler Chrysler Fin. Servs. Am., LLC v. Jones (In re Jones), 591 F.3d 308 (4th Cir. 2010)* (if the debtor fails to state his intention to reaffirm the debt, the automatic stay is terminated and the creditor is free to take whatever action is necessary on the debt obligation); *Severo v. Comm'r, 586 F.3d 1213 (9th Cir. 2009)* (unless the IRS obtains relief from the automatic stay, the IRS may not collect tax claims against a debtor in bankruptcy); *Sternberg v. Johnston, 595 F.3d 937 (9th Cir. 2009)* (a debtor may recover emotional distress damages that arose from a violation of an automatic stayueven if the violation is not egregious).

Brown v. Chesnut (In re Chesnut), 422 F.3d 298 (5th Cir. 2005) (foreclosure on real property interest to which the debtor may have had a claim violated the automatic stay).

Fleet Business Credit, L.L.C. v. Wings Restaurants, Inc., 291 B.R. 550 (N.D. Okla. 2003) (automatic stay does not apply to disallow creditor with claims against both Chapter 7 debtor and non-debtor co-obligor from seeking appointment of receiver over co-obligor's property; receiver could be appointed even without any misconduct, in order to prevent dissipation of rents in which creditor had security interest); *Edwards v. Heartwood, 590 S.E.2d 734 (Ga. App. 2003)* (sale of real property during original owner's pending bankruptcy was void ab initio because it was in violation of the automatic stay, and purchaser therefore lacked standing to challenge the subsequent tax sale of the property).

Add:

Saleh v. Bank of Am., N.A. (In re Saleh), 2010 Bankr. LEXIS 908 (Bankr. S.D. Ohio 2010) (corporate co-debtors and business debts are not intended to receive the benefit of the co-debtor stay in a Chapter 13 bankruptcy); *In re Thongta, 401 B.R. 363 (E.D. Wis. 2009)* (co-debtor stay did not apply, because the debt was the debt of the debtor alone).

Add:

Cross-Appellees in 09-1432 v. BEPCO, LP (*In re* 15375 Mem'l Corp.), *589 F.3d 605 (3d Cir. 2009)* (the automatic stay protection is not per se valid justification for Chapter 11 filing, and courts typically demand more of Chapter 11 petitions to prove the filing is in good faith); *BEPCO, L.P. v. 15375 Mem'l Corp. (In re 15375 Mem'l Corp.), 400 B.R. 420 (D. Del. 2009)* (if the filing of a Chapter 11 petition is a litigation tactic, the petition will likely be dismissed as not being filed in good faith).

Arnold v. Garlock, Inc., 278 F.3d 426 (5th Cir. 2001) (bankruptcy court may invoke automatic stay provision to stay proceedings against nonbankrupt codefendant where such identity between the debtor and codefendant exists that a judgment against codefendant would in effect be a judgment or finding against the debtor); *Spears v. Boyd, 313 B.R. 212 (W.D. Mich. 2004)* (Chapter 7 petition by one spouse did not have the effect of severing a tenancy by the entirety held with the non-debtor spouse) (reversing *In re Spears, 308 B.R. 793* (Bankruptcy Ct., W.D. Mich. 2004) .

§ 84.02(c)(5) Operation of the Debtor's Business.

Add:

Taub v. Taub (In re Taub), 2010 Bankr. LEXIS 942 (Bankr. E.D.N.Y. 2010) (a trustee should operate the debtor's business in an objective and neutral manner)

§ 84.02(c)(6) Filing a Plan.

Add:

In re South Beach Secs., Inc., 2010 U.S. App. LEXIS 10175 (7th Cir. 2010) (the bankruptcy plan was rejected and not in the best interest of the affected parties, because the disclosure statement indicated the only purpose of the plan was to avoid taxes); *In re Casinos, Inc. v. President Casinos, Inc., 2010 U.S. Dist. LEXIS 12901 (E.D. Mo. 2010)* (case number 08CV1976 CDP) (the bankruptcy plan was accepted, even though some impaired creditors contested the elements of the disclosure statement).

U.S. v. Johnston, 267 B.R. 717 (N.D. Tex. 2001) (the interests of creditors are impaired when disclosure provided by debtors is incomplete).

Add:

Correct the citation for In re Pinto to read: *191 B.R. 610 (D. N.J. 1996)* and add the following to the end of the citation: abrogated on other grounds by *In re Mendez, 255 B.R. 143 (D. N.J. 2000)* .

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Supp. To CHAPTER 84 THE IMPACT OF BANKRUPTCY LAW ON REAL PROPERTY INTERESTS

9-84 Thompson on Real Property, Thomas Editions Supp. to § 84.03

Supp. to § 84.03 Aspects of Bankruptcy Law and Procedure That Affect Real Property Interest.

[Go To Main]

§ 84.03(a) Determining Property that Is Exempt from the Estate. [Go To Main]

Add:

In re Bernbaum, 404 B.R. 39 (Bankr. D. 2009) (a "cram down" interest may be permitted in a proposed Chapter 13 plan if the secured creditor would be likely to receive at least the present value amount if the claim were paid in full at confirmation). *See also Bank of New York Trust Co., NA v. Official Unsecured Creditors' Comm. (In re Pacific Lumber Co.), 584 F.3d 229 (5th Cir. 2009)* .

In re Sentry Operating Co. of Tex., Inc., 264 B.R. 8580 (S.D. Tex. 2001) (proposed Chapter 11 plan discriminated unfairly between classes of unsecured creditors for purposes of bankruptcy cram down provision, in that trade creditors were to receive 100 percent of their claims while others were to receive one percent).

Add:

see also In re Pederson, 230 B.R. 158 (B.A.P. 9th Cir 1999) .

Add:

Fehmel v. Union State Bank (In re Fehmel), 2010 U.S. App. LEXIS 7036 (5th Cir. 2010) (debtors' homestead exemption was limited because debtors failed to show their exemption for passively obtained equity was property); *In re Parton, 2009 Bankr. LEXIS 4175 (Bankr. E.D. Tenn. 2009)* (debtor could not claim the homestead exemption

because he was not residing on the property at the commencement of his bankruptcy); *Greene v. Savage (In re Greene), 583 F.3d 614 (9th Cir. 2009)* (a homestead exemption does not "run with the land" and is considered a classification, not a property interest).

Lanier v. Beaman, 394 B.R. 382 (E.D. N.C. 2008) (the exempt "residence" did not include the 9-acre lot adjacent to the 12-acre lot on which the debtor's residence was situated); *In re Raffone, 381 B.R. 30 (D. Conn. 2008)* (statute providing for exemption continuity applied only to a specific exemption interest, not to the entire fee simple property interest).

In re Procaccianti, 253 B.R. 590 (2000) .

Add to In re Davis cite:

aff'd in part and vacated in part by 170 F.3d 475 (5th Cir. 1999) .

Johnson v. Johnson, 288 B.R. 130 (8th Cir. 2003) (lien interest in divorced debtor's former marital residence qualified for inclusion within homestead exemption).

In re Wilson, 338 B.R. 315 (W.D. Ky. 2006) (state homestead exemption not applicable to property on which the debtors did not reside).

In re Harle, 422 B.R. 310 (Bankr. M.D. Fla. 2010) (the homestead exemption is subject to the judgment lien because the lien antedated the debtor's eligibility to claim the homestead exemption).

In re Johnson v. Johnson, 288 B.R. 130 (8th Cir. 2003) (debtor's lien interest in the former marital residence qualified as an "aggregate interest" in real property, under the homestead exemption provision of the Bankruptcy Code, and therefore debtor could exempt his aggregate interest in real property that debtor or dependant of debtor used as a residence).

Add to In re Mayer cite:

aff'd in part and vacated in part by 167 B.R. 186 (9th Cir. B.A.P. 1994) .

§ 84.03(b) Adjusting the Amount of Secured Claim Under a Mortgage. [Go To Main]

Add

In re Vondall, 364 B.R. 668 (8th Cir. 2007) (adversary proceeding by trustee to avoid mortgage lien).

Johnson v. Home State Bank cite should read:

501 U.S. 78 (1991) .

Add:

Johns-Manville Corp. v. Chubb Indemnity Ins. Co. (In re Johns-Manville Corp.), 600 F.3d 135 (2d Cir. 2010) (in rem authority for a bankruptcy court is restricted to the claims against the property in the bankruptcy estate).

See also In re Ehlen, 202 B.R. 742) (W.D. Wis. 1996) .

But see In re Witt, 199 B.R. 890 (W.D. Va. 1996) (stating that *Nobelman* had been overruled by Congress in *11 U.S.C. § 1322(c)(2)*).

Add:

but see In re Hatcher, 208 B.R. 959 (B.A.P. 10th Cir 1997) (stating that *Rake* had been overruled by Congress in *11 U.S.C. § 1322*)

Change citation to *Johnson v. Home State Bank, 498 U.S. 1066 (1991)* to:

Johnson v. Home State Bank, 501 U.S. 78 (1991) ; *Spears v. Boyd, 313 B.R. 212 (W.D. Mich. 2004)* (Chapter 7 petition by one spouse did not have the effect of severing a tenancy by the entirety held with the non-debtor spouse) (reversing *In re Spears, 308 B.R. 793* (Bankruptcy Ct., W.D. Mich. 2004) .

§ 84.03(c) Obtaining Adequate Protection for Secured Creditors. [Go To Main]

Add:

Thompson v. GMAC, LLC, 566 F.3d 699 (7th Cir. 2009) (a creditor must, after a debtor has filed for bankruptcy, return the asset to which the debtor has an interest and then seek adequate protection of its interests in bankruptcy court); *In re Warrington, 424 B.R. 186 (Bankr. E.D. Pa. 2010)* (although the creditor could not sell the vehicle to accomplish a transfer of title, the creditor was entitled to adequate protection).

In re Segovia, 387 B.R. 773 (N.D. Cal. 2008 (the lien of an attorney providing prepetition services to the debtor was not enforceable as a secured debt); *but see In re Yi, 219 B.R. 394 (E.D. Va. 1998)* (stating that Radford had been effectively *overruled* by *Wright v. Vinton Branch of Mountain Trust Bank, 300 U.S. 440, 8 Ohio Op. 301 (1937))* .

Add:

Contrarian Funds LLC v. Aretex LLC (In re WestPoint Stevens, Inc.), 600 F.3d 231 (2d Cir. 2010) (cash payments, a lien, or similar relief may constitute adequate protection for a creditor); *see also In re R & G Props., 2009 Bankr. LEXIS 2100 (Bankr. D. Vt. 2009)* ; *Bank of New York Trust Co., NA v. Official Unsecured Creditors' Comm. (In re Pacific Lumber Co.), 584 F.3d 229 (5th Cir. 2009)* .

In re Gaines, 243 B.R. 221 (1999) (court determined "cause" existed to lift automatic stay for mortgagee to exercise right in property because of debtor's erratic payment history and insufficient income); *In re Dupell, 235 B.R. 783 (1999)* ; *In re Goode, 235 B.R. 584 (1999)* ; *In re Q-C Grants Corp., 231 B.R. 506 (1999)* .

In re Duness Hotel should read:

In re Dunes Hotel

Add:

In re Jennings, 2010 BNH 10 (Bankr. D.N.H. 2010) (although the debtor proposed to provide adequate protection of an equity cushion from two properties and a lien on another property, the debtor still failed to prove that this adequate protection would provide the creditors with the indubitable equivalent of their interest in the properties); *In re YL West 87th Holdings I LLC, 423 B.R. 421 (Bankr. S.D.N.Y. 2010)* (equity cushion must be proven to show whether a senior lien is appropriate).

§ 84.03(d) Relief from the Automatic Stay. [Go To Main]

Add:

Titan Real Estate Ventures, LLC v. MJCC Realty Ltd. P'ship (In re Flanagan), 415 B.R. 29 (D. Conn. 2009) (automatic stay is given to protect creditors by avoiding the first-come first-served approach to the debtor's assets).

Add:

Ford v. Bd. of Managers of Cameo Townhouses, 2009 U.S. Dist. LEXIS 13124 (E.D.N.Y. 2009) (creditor could not name the debtor in a foreclosure action because the debtor had filed for bankruptcy before the foreclosure action was taken and consequently was protected by the automatic stay).

Add:

In re Johnson, 2010 Bankr. LEXIS 1393 (Bankr. D.S.C. 2010) (automatic stay did not apply to a truck that was not owned by the debtor, but by the debtor's employer and family).

Annotation, *Violation of Automatic Stay Provisions of 1978 Bankruptcy Code (11 U.S.C.A. sec. 362) as Contempt of Court, 57 A.L.R. Fed. 927 (1982)* .

In re Butchman cite should read:

4 B.R. 379 (Bankr. S.D. N.Y. 1980) .

Add:

Brooks v. Bank of N.Y. Mellon (In re Brooks), 2009 U.S. Dist. LEXIS 97824 (D. Md. 2009) (bank was granted relief from the automatic stay and could proceed with the foreclosure sale).

Add:

Lee v. Baca, 73 Cal. App. 4th 1116 (Cal. App. 1999) (A landlord obtained an unlawful detainer judgment against tenants and a writ of possession. The tenants filed for bankruptcy. The court held that the writ extinguished the tenant's rights to possession of the real property and since the tenants have no interest in the property, the landlord does not need to obtain relief from the automatic stay provision). *Walls v. Wells Fargo Bank, N.A., 276 F.3d 502 (9th Cir. 2002)* (compensatory civil contempt allows an aggrieved debtor to obtain compensatory damages, attorney fees, and the offending creditor's compliance with the discharge injunction).

But see In re Coletta, 336 Fed. Appx. 202 (3d Cir. 2009) (creditor was not liable when he inadvertently violated the automatic stay); *Eakin v. Goffe, Inc. (In re 110 Beaver St. P'ship), 355 Fed. Appx. 432 (1st Cir. 2009)* .

Add:

In re Biscayne Inv. Group, Ltd., 264 B.R. 765 (Bankr. S.D. Fla. 2001) (equitable subordination of claims required (1) that claimant has engaged in inequitable conduct, (2) misconduct resulted in injury to creditors or conferred unfair advantage on claimant, and (3) subordination is not inconsistent with provisions of Bankruptcy Code).

In parenthetical for In re LDN, last 5 words should read:

relief of stay for cause

Add:

In re Hickory Ridge, LLC, 2010 Bankr. LEXIS 1131 (Bankr. N.D. W. Va. 2010) (automatic stay terminated for lack of

adequate protection of the creditor's interests); *Barner v. Saxon Mortg. Servs. (In re Barner), 597 F.3d 651 (5th Cir. 2010)* (relief from an automatic stay is granted when the filing is a scheme to delay, hinder, and defraud creditors that are involved in several bankruptcy filings concerning the real property).

Add:

In re Pulcini, 261 B.R. 836 (Bankr. W.D. Pa. 2001) (cause existed for lifting stay to permit mortgagee that had purchased property at pre-petition foreclosure sale to bring eviction action against debtor-mortgagors who had at most bare legal title to property).

Add:

Capital One, N.A. v. Najafian (In re Najafian), 2010 Bankr. LEXIS 1508 (Bankr. E.D. Va. 2010) (debtor's automatic stay was terminated when she received her discharge and the creditor was able to continue with its motion to enforce the deed of trust).

Add:

Colarusso v. Ragosa, 280 B.R. 548 (D. Mass. 2002) (estoppel of claim to land by adverse possession).

Mousel Law Firm, P.C. v. Townhouse, Inc., 608 N.W.2d 571 (Neb. 2000) .

§ 84.03(e) Use, Sale or Lease of the Property by the Trustee. [Go To Main]

§ 84.03(e)(1) When Court Approval Is Required.

Add:

Stewart v. Shubert, 325 Fed. Appx. 82 (3d Cir. 2009) (affected party raised the issue concerning the bankruptcy estate and the trustee could not sell the land).

Add:

In re Canonigo, 276 B.R. 257 (Bankr. N.D. Cal. 2002) (lien which encumbered property that Chapter 13 debtor moved to sell did not constitute an "interest" therein within meaning of bankruptcy statute so long as lienholder could be compelled to accept money satisfaction of its interest).

Add:

Fitzpatrick v. Fredenberg (In re Wilson), 2010 Bankr. LEXIS 42 (Bankr. E.D. Tenn. 2010) (residential homes are not used for sale of electric energy or of natural gas for heat, light or power).

§ 84.03(e)(2) The Trustee's "Abandonment" of Estate Property.

Add:

A.T. Massey Coal Co. v. Jenkins, 2009 U.S. Dist. LEXIS 43516 (W.D. Va. 2009) (trustee abandoned all state tort claims because the claims were burdensome to the estate); *In re Hastings, 2009 U.S. Dist. LEXIS 16831 (D. N.J. 2009)* ; *In re Kent, 411 B.R. 743 (Bankr. M.D. Fla. 2009)* (abandonment of the asset is appropriate when there is no equity left in an asset and the unsecured creditors are unlikely to benefit).

In re Unidigital, 262 B.R. 283 (Bankr. D. Del. 2001) (although debtor may abandon property that is burdensome to estate, there is a limitation on this right where abandonment would pose a threat to public health).

§ 84.03(f) Disposition of Executory Contracts and Unexpired Leases. [Go To Main]

Add:

In re Reading Broad., Inc., 2009 Bankr. LEXIS 2593 (Bankr. E.D. Pa. 2009) (obtained financing to continue operating the television station); *but see In re Meehan 59 B.R. 380 (E.D. N.Y. 1986)* .

Add:

Olah v. Baird (In re Baird), 567 F.3d 1207 (10th Cir. 2009) (medical policy was not an executory contract, because the relevant policy period had expired and the doctor had already paid for the policy for that period); *Realnetworks, Inc. v. QSA Toolworks, LLC, 2009 U.S. Dist. LEXIS 71848 (W.D. Wash. 2009)* (trademark consent agreement deemed an executory agreement); *In re 72 Townsend, LLC, 2010 Bankr. LEXIS 1366 (Bankr. N.D. Cal. 2010)* (option agreement was not an executory agreement, because at the date of bankruptcy, the partnership had performed all its material obligations under the contract).

In re Ter Bush, 273 B.R. 625 (Bankr. S.D. Cal. 2002) (contract for purchase or sale of real property is no longer "executory" and may not be rejected by debtor once it has been reduced to judgment in specific performance action); *see also* Flaccus, Janet. "Domestic Relations Contempt Orders and the Bankruptcy Automatic Stay, Property of the Estate and Concurrent Jurisdiction." 2004 Ark. L. Notes 41 (2004).

Add:

Neal v. Eckersley, 2009 U.S. Dist. LEXIS 92734 (M.D. Pa. 2009) (contract was rejected because the debtor failed to accept or reject the executory contracts).

Add:

In re Sae Young Westmont-Chicago, L.L.C., 276 B.R. 888 (Bankr. N.D. Ill, May 2, 2002) (if debtor fails to respond within court-ordered deadline, he will be deemed to have rejected the contract or lease).

Add:

In re Valley Media, Inc., 290 B.R. 73 (D. Dela. 2003) (landlord of property included in the bankruptcy estate was entitled to immediate payment of real estate taxes).

In re Esmizadeh, 272 B.R. 377 (Bankr. E.D. N.Y. 2002) (trustee failed to assume lease in timely manner since he failed to make rent payments).

§ 84.03(g) The Trustee's Power to Avoid Previous Transactions. [Go To Main]

Add

Drake v. Franklin Equip. Co. (In re Franklin Equip. Co.), 418 B.R. 176 (Bankr. E.D. Va. 2009) (trustee has authority to avoid preferences and statutory liens to manage the bankruptcy estate); *Spicer v. United States, IRS (In re Motion Mktg. Solutions, Inc.), 403 B.R. 403 (Bankr. N.D. Tex. 2009)* (trustee unable to avoid a statutory lien from the IRS).

Gallups v. Kent, 953 So. 2d 393 (Ala. 2006) (8th Cir. BAP (Minn.)) (mortgage lien was avoided based on an erroneous legal description in the recorded mortgage).

Add:

40235 *Washington St. Corp. v. W.C. Lusarch, 177 F. Supp. 2d 1090 (S.D. Cal. 2001)* (purchase price for apartment complex was not close to fair market value for purposes of statute authorizing trustee to avoid certain unauthorized post-petition transfers of property of estate).

§ 84.03(h) Avoidance of Preferences. [Go To Main]

Add:

Menotte v. Oxyde Chemicals, Inc. (In re JSL Chem. Corp.), 424 B.R. 573 (Bankr. S.D. Fla. 2010) (payment was held to be an avoidable preference, and the creditor had to turn over the amount previously received); *Reding v. T.R. Motors, Inc. (In re Baker), 2009 Bankr. LEXIS 369 (Bankr. M.D. Ala. 2009)* (trustee was able to avoid the security interest as a preference because it was not timely effected). Deaton, David & Warren, Stephen. "Distressed Healthcare: Significant Considerations for Buyers, Sellers, and Lenders Arising from the Intersection of Healthcare and Bankruptcy Laws." 3 *J. Health & Life Sci. L.* 1 (January, 2010) (government overpayments will likely not be considered an avoidable preference if the healthcare provider files for bankruptcy).

Add:

In re Lakeside Community Hosp., Inc., 200 B.R. 853 (Bankr. N.D. Ill. 1996) (payment to county of outstanding real estate taxes as part of real estate closing did not fall within ordinary course of business exception to preference avoidance, where real estate closing included sale of all of the debtor's assets).

§ 84.03(i) Avoidance of Fraudulent Conveyances. [Go To Main]

Add:

Goldstein v. Colombo Bank, F.S.B. (In re Md. Prop. Assocs.), 309 Fed. Appx. 737 (4th Cir. 2009) (bank's constructive knowledge of the owner's fraudulent intent was sufficient for a trustee to avoid share-loan payments to bank); *Farinash v. Bensusan (In re Prebul Jeep, Inc.), 2009 Bankr. LEXIS 3927 (Bankr. E.D. Tenn. 2009)* ; *Campbell v. Dudley (In re Sobota), 2009 Bankr. LEXIS 1496 (Bankr. D. S.C. 2009)* (trustee failed to meet burden of proof for a fraudulent conveyance). See generally Klein, Sandra. "USTP Initiative Combats Bankruptcy-related Mortgage and Real Estate Fraud." *28 ABI J. 18* (July, 2009) .

In re French, 440 F.3d 145 (4th Cir. 2006) (the debtor's prepetition conveyance to her children as foreign real property was set aside as a fraudulent transfer).

In re Richardson, 268 B.R. 331 (Bankr. D. Conn. 2001) (Chapter 7 trustee failed to satisfy burden of proving that debtor's gratuitous transfer of homestead to wife more than 3 years prior to bankruptcy petition was effected with actual intent to hinder, delay, or defraud creditors).

Moore v. Moore, 277 B.R. 141 (M.D. Ga. 2002) (discharge of debt precluded by debtor's obtaining credit by false pretenses, false representation or actual fraud).

In re Balboa Street Beach Club, Inc., 319 B.R. 736 (S.D. Fla. 2005) (bankruptcy case was not dismissed for bad faith despite debtor's admission that the filing was motivated by a desire to reject an undesirable sales agreement); *United States v. Wagner, 382 F.3d 598 (6th Cir. 2004)* (fraudulent concealment of property from a bankruptcy trustee); *Eppers v. Eppers, 311 B.R. 826 (D. N.M. 2004)* (incomplete and inaccurate disclosure of nature of interest in real property on the bankruptcy schedules).

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Supp. To CHAPTER 84 THE IMPACT OF BANKRUPTCY LAW ON REAL PROPERTY INTERESTS

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Tyson, John. "Automatic Stays and Administrative Expenses: Rights and Remedies Available to Landlords and Tenants in Bankruptcy Proceedings." *31 Campbell L. Rev. 413* (Spring, 2009).

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Annotation, *Bifurcation and Avoidance, or "Stripping," of Liens, Security Interests, and Encumbrances Held by Undersecured Creditors by Rehabilitating and Liquidating Debtors in Bankruptcy, 158 A.L.R. Fed. 1 (1999)* .

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CHAPTER 85 OBTAINING LAND AND RIGHTS FOR DEVELOPMENT *

9-85 Thompson on Real Property, Thomas Editions 85.syn

AUTHOR: Professor George Lefcoe The Law Center University of Southern California

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CHAPTER 85 OBTAINING LAND AND RIGHTS FOR DEVELOPMENT *

9-85 Thompson on Real Property, Thomas Editions § 85.01

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§ 85.01 Financing and Contracting to Acquire Sites for Development: An Introduction.

This chapter is about the legal issues a land developer encounters in buying sites for residential development, financing the early stages of land acquisition and development, and obtaining development rights.

A developer who subdivides acreage into buildable lots for resale to homebuyers must: (1) locate and "tie up" suitable sites, (2) determine whether the soil conditions at the site are compatible with development, (3) design and engineer the site for roads and utilities, (4) obtain all the necessary approvals from governments entitling the developer to proceed with the project, and (5) construct the improvements. Sometimes the subdivider builds the individual houses. Sometimes the subdivider sells "improved" lots to homebuilders or individual buyers who build houses on their own.

In analyzing potential sites the developer tries to assess the most profitable use for the site -- what appraisers call the "highest and best use. n1 Land use patterns around the site are examined, taking into account natural boundaries which limit land supply (e.g., bodies of water, rough terrain), transportation networks, population trends, the economic base, and vacancy rates. The developer assesses the availability of utilities, roads, fire and police, hospitals, schools, employment, shopping and other support services. The developer reviews government regulations affecting land use n2 and examines the physical characteristics of the site, which are very important. Besides having the appearance that the ultimate consumers expect, a good site has soil that is able to physically support the planned structure without the need for substantial infrastructure and a slope that allows the in-flow of water and out-flow of sewage without elaborate pumping systems.

The developer feeds the market information from the location analysis into an estimate of projected revenues and costs. Revenues are based on the product of the total number of lots and the anticipated selling price per lot. An important factor in estimating revenues is the timing of lot sales, as measured by the "absorption rate." The absorption rate is the number of lots that are sold in a given market over a specified time. All else being equal, the higher the absorption rate, the greater the present value of the project.

A developer usually prepares more than one subdivision plan -- based on the existing zoning or how she thinks it could be changed. Often she compares plans with fewer units at higher prices against plans with a greater number of less expensive units. If the absorption rate for the cheaper product is higher, and the developer can pocket the revenue faster,

it may pay to accept a lower total revenue. The developer could go for the highest dollar yield, must also consider the time it will take to sell out. Expensive lots may sell much more slowly than "affordable" ones, offsetting a higher profit margin per unit. Estimated revenues are set against all of the costs of development. As with revenues, the timing of costs is important.

As for the actual development process, there is no simple guideline. In fact, the developer often engages in many activities simultaneously, such as meeting with real estate brokers to locate sites, reviewing plans with architects and engineers, assessing the interest of potential tenants or buyers, and discussing money availability with possible lenders and equity investors. Nevertheless, the development process may be broken down into distinct stages where activities in one stage will undoubtedly flow into the activities of another stage.

First, the land developer must conduct a market assessment of the area where the developer plans to build. This assessment would consider a wide range of factors, such as housing demand, housing supply, interest rates, demographic trends, economic growth, and regional development plans. Second, the land developer must identify appropriate sites by taking into account the relative infrastructure demands, local land development regulations, estimated land and housing development costs, and estimated profit levels. Third, the land developer must finalize the acquisition of the property by obtaining an option to purchase the property, preparing a site-specific development plan, submitting the plan to the local water, sewer and electrical departments for review and approval, submitting a formal finance proposal to lenders for approval, and exercising the option. Fourth, the land developer must prepare detailed engineering and architectural drawings for the infrastructure and buildings, begin construction, and develop a marketing plan. Last, the land developer must conduct continuous maintenance and management of the project. n3

FOOTNOTES:

(n1)Footnote 1. *See* C.F. Sirmans, Real Estate Finance 314-37 (2d ed. 1989).

(n2)Footnote 2. The complexities of government regulations affecting land use are outlined in §§ 85.08 -85.20, *infra*.

(n3)Footnote 3. For a more detailed description of the development process, *see* David E. Dowall, *Making Land Development Work: The Process and Critical Elements for Success*, 6 Real Est. Fin. 15, 16 (1989).

* Parts of this chapter have been adapted from George Lefcoe, Real Estate Transactions (Michie 1993).

Thompson on Real Property, Thomas Editions

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CHAPTER 85 OBTAINING LAND AND RIGHTS FOR DEVELOPMENT *

9-85 Thompson on Real Property, Thomas Editions § 85.02

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§ 85.02 Special Characteristics of the Land Developer's Purchase-and-Sale Agreement.

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Although the land developer's contract to buy land may be compared with a homebuyer's contract to buy a home, the land developer's list of contingencies is usually much longer. Whereas most homebuyers will learn whether they can arrange their acquisition loan in months, the land developer may need two or three years before even receiving a definitive answer regarding the necessary approvals from local government. Even then, in many states, the right to rely on local government approvals may not "vest" until the developer actually commences building in reliance on the approvals. n4

§ 85.02(a) Contingent Contract.

In many ways the land developer's contract to buy land is no different from the contract a homebuyer would sign. But in several respects it is quite different.

The homebuyer may want his contract subject to financing and inspections. The land developer has much more to worry about than the homebuyer, and a longer list of contingencies reflects this. The developer rarely knows before buying land whether the project to be built on the site is feasible. During the executory period the developer will spend thousands -- sometimes hundreds of thousands -- of dollars on soils and seismic tests and design and engineering studies. Are the soils stable enough for the project? Is the water table so high that it interferes with development? Will local government officials grant the necessary approvals to subdivide the property? At what price? Can the developer procure adequate financing for the early stages of development? The land developer will want to make her purchase obligation contingent on some or all of these items checking out to her satisfaction.

Not only is the developer's list longer than the homebuyer's, but the individual items often take more time to check out. In two months the homebuyer can expect a definitive answer from a lender. The land developer may need two or three years for a definitive answer from local government on whether approval to develop can be obtained.

The developer who contracts to buy a site for development may condition the obligation to buy on: (a) the recordation of a locally approved subdivision map dividing the site into a specific number of buildable lots; (b) the acquisition of

satisfactory A&D (acquisition and development) financing; (c) the return of good results from soil and hydrology tests; (d) the availability of sewer, water, utilities, and roads; and (e) the reassurance of positive marketing studies. Even if the developer has paid a team of experts to perform a detailed feasibility analysis, looking closely at everything from the local politics of subdivision approvals to storm drain costs, there are often unforeseen events that may turn a profitable project into a money loser.

However, the developer who signs a purchase-and-sale agreement hedged with such contingencies pays a premium. As one builder said, "We buy what we know can be developed. A contract contingent on zoning generally drives the price of land up." n5

The Legal Risks of a Contingent Contract for the Buyer/Developer. The developer entering a contingent contract carries certain legal risks inherent in the use of so many contingencies. First, the seller may try to force the unwilling developer to go through with the purchase claiming that all contract contingencies have been reasonably fulfilled -- even when the developer doesn't believe they have. Or, when the contingencies have clearly not been met, the seller may contend that the developer could have met the contingencies had the developer only made a good faith effort to do so.

Second, since many contingencies are typically worded to depend on the developer's satisfaction, the seller may seek to rescind the contract on the basis that it was illusory -- lacking in mutuality. The seller will be especially eager to do this after the developer has secured the requisite entitlements which cause the value of the land to rise above the promised contract price. By invalidating the contract, the seller hopes to cash in on the developer's hard work by building the project or by selling to another developer.

The seller's legal argument has some merit. In most land purchase-and-sale contracts with developers, the seller waives the right to specific performance. The last thing a developer wants is to be forced to buy a property which cannot be developed profitably. For this reason, the developer carefully limits the seller's remedies for the developer's breach to damages or liquidated damages. On the other hand, a developer will always insist on reserving specific performance to *force* the seller to sell. Since potential developer profits are usually deemed too speculative to reward as an element of damage, the developer believes that only the remedy of specific performance can give the developer the benefit of the bargain. It is precisely this lack of symmetry in the contract's remedies that invites a seller to challenge an unwanted land purchase agreement as lacking mutuality.

The developer's chances of enforcing a contract with asymmetrical remedies depends on two issues: (1) whether the state where enforcement is sought is one which requires mutuality of remedy or mutuality of obligation; and (2) whether the court will imply obligations on the part of the buyer to infuse a contract with some obligation on the buyer's part. Mutuality of remedy means that both parties are entitled to the identical remedy whereas mutuality of obligation means that both parties are entitled to some, not necessarily the same, remedy.

Comm'nly, the developer's land contract provides that if the contingencies fail and the developer cancels, the developer's only penalty is to pay all or half the escrow and title costs incurred to the date of cancellation. The seller is obligated to return the developer's down-payments. To save such contracts from being illusory or totally lacking in mutuality, developers may promise to use their best efforts to obtain entitlements. Where the developer has made no such promise, some courts will imply one. Other courts will not imply such a condition to save the contract. Where no such obligation is implied or expressed, and the seller really is given no remedy, absolutely none, under the contract in the event of the buyer's breach, not even the right to keep $100 of the buyer's down payment, mutuality of obligation is lacking. n6

Third, although the developer prefers to keep the contract open, the seller may want to rescind on grounds that the contingencies may take too long to satisfy. For example, one contract for 382 building lots was contingent on the availability of municipal water service. Upon entering the contract, the county sewer plant had excess capacity. Later, the county notified the parties that the local sewer plant was nearing capacity and that service hookups would only be

allocated on a "first come, first served" basis. The contract gave the buyer the right, if any contingency failed, to extend the closing date until sixty days after the contingency failed. The seller wanted to terminate because there was no telling how long it might take for the county to build a new plant and be in a position, once again, to guarantee service to all new lots.

The court understood the hardship to the seller and agreed it would be unfair to keep the seller waiting indefinitely for the county to increase its sewage plant capacity. But the seller had thoughtlessly contracted to extend the closing date until sixty days after all conditions were met, including the condition regarding a sewer hookup. The court did limit the contract to twenty-one years from the date it was signed -- to save the contract from violating the Rule Against Perpetuities. n7 Had the seller not given the buyer the option of extending the closing date until all contingencies were met, the seller could have rescinded. A reasonable time had passed for removal of the contingency and, ordinarily, an unforeseen delay that makes the promisor's performance materially more burdensome will discharge both parties' peformances. n8

The Zone Change Contingency: Determining Whether the Developer Has Tried Hard Enough. Sometimes, when the developer's obligation to buy is contingent on a zone change, and the change doesn't occur, the seller contends that the fault lies with the developer in not trying hard enough to get the change. How hard must the developer try to get a zone change in order to avoid liability?

In *Feinberg v. Berlewicz*, n9 the developer's obligation to buy a building was contingent on the developer obtaining a special zoning exception for manufacturing uses in the building. n10 The town of Barkhamstead required a special exception before the building could be used for manufacturing purposes; however, in order to file a successful use permit application, the applicant had to describe the actual intended use. Although the developer could have described a potential use, the developer was reluctant to do so without a committed tenant on the basis that if a tenant were ever found, that tenant might object to the agreed conditions. So, the developer tried valiantly to entice a tenant during the three-month executory period, but never found one and so never applied for the special exception permit. The sellers refused to extend the contract date and sued the developer for breach of contract, contending that the developer failed to make reasonable efforts to obtain the zoning permit. The contract had been conditioned on the buyer obtaining a special use permit; it had not been conditioned on the buyer being able to sign up a tenant. The developer countered by arguing that a complete application was out of the question since it was impossible to specify an actual intended use without a viable tenant. The court decided for the buyer, believing the buyer had behaved reasonably and used best efforts to obtain the special use permit.

Sometimes a developer whose obligation to buy is conditioned on a satisfactory zone change, comes to realize that potential opposition is so fierce it would be a total waste of time and money to go through the motion of filing a request. In *Riverfront Investors Group v. Chavese,* n11 the developer had contracted to buy a site for $1.7 million, hoping to use it as a surface parking lot. The obligation to purchase was "subject to Purchaser acquiring all appropriate permits and licenses...." Relying on the advice it had received that it would never get the permit, the developer never applied for the permit. In implying an obligation on the part of the developer to make a "good faith" effort to satisfy all contingencies, the court held that the developer could not use zoning problems as an excuse for its failure to go through with the purchase. n12 As a result, the developer forfeited $10,000 -- an amount equal to the earnest money -- plus interest.

Some courts draw a distinction between the obligation to use "good faith" and the obligation to use "best efforts." "Best efforts" implies a higher standard than "good faith." In *Krobath v. Brent* n13 the developers contract with the seller to use their "best efforts" to secure approval to subdivide a 216-acre tract. They submitted their survey and a proposed subdivision map to the Planning Board. Although the Planning Board denied the developers' application because the site was in a flood plain and wetlands, the board indicated that approval might be granted if obtained from the Department of Environmental Conservation. Since that process was expensive and could take over a year, the developers sought to rescind and get back their down-payment. The trial judge agreed with the buyer, apparently equating "best efforts" with "good faith." On appeal, the case was sent back to trial on grounds that "best efforts" requires more than "good faith."

which is an implied covenant in all contracts. "Best efforts" requires that developers pursue all reasonable methods for obtaining subdivision approval, and whether such obligation has been fulfilled will almost invariably, as here, involve a question of fact. n14

§ 85.02(b) The Option.

Contingent contracts invite disputes over whether the contingencies have been satisfied. By the use of options, such disputes may be avoided.

What is an Option? n15 Under an option, the developer has the right to compel specific performance and no obligation to purchase. The requirement for mutuality of obligation is satisfied by the seller receiving a fixed, non-refundable price for the option (which may or may not be credited towards the purchase price, depending on the particular option contract). For a cash investment (the option price), the developer enjoys a hold on the site. If the developer succeeds in her land planning efforts, the value of the site rises and the developer exercises the option to capture that value. Should the site prove unsuitable for any reason (e.g., geology, hydrology, planning or political difficulties, adverse market conditions, etc.), the developer may elect to withdraw painlessly, forfeiting only her option fee.

The difference between an option and a contract can be seen by analogy to put and call options in the stock market. Since a call option gives the purchaser the right to buy a security at a given price, known as the strike price, for a set period, the purchaser will exercise the option when it is "in the money" -- when the market price rises above the strike price. Accordingly, the purchaser will not exercise the option when the security is "out of the money" -- when the market price is below the strike price. In contrast, a put option gives the purchaser the right to sell a security as the strike price. So, by exercising the option when it is "in the money" -- when the market price is below the strike price, the purchaser is forcing the other party to purchase the security at a price higher than its actual market price.

The ordinary purchase-and-sale agreement contains both a call and a put option in that the buyer has a call option (the right to compel the seller to sell at the contract price) and the seller has a put option (the right to compel the buyer to buy at the contract price). However, in the typical real estate option, the purchaser has a call option and the seller relinquishes its put option in exchange for a price -- a non-refundable option fee.

In contrast, a purchase-and-sale agreement may be arranged where the seller has the call option and the buyer has the put option. n16 In one case, the seller reserved a call option presumably to be exercised if the development was successful and the buyer reserved a put option to be exercised if the development was unsuccessful.

Pricing the Option. In pricing the option, the seller may take into account the expenses it will incur during the option period, such as maintenance, taxes, insurance, and opportunity costs.

Statute of Frauds Applies. An option, like a contract, must satisfy the Statute of Frauds which requires as a condition to legal enforceability that contracts for the sale of real property be in writing. Case law holds that the writing must at least identify the parties to the agreement, state the price, describe the property, and contain all material conditions. n17 Alternately, the contract must prescribe a means by which the purchase price, the location of the property and the parties can be determined.

As is true of all real estate contracts, the death or subsequent insanity of the seller is not defense to performance; the seller's successors in title will be bound. If tender of the purchase price is made a condition precedent to the purchaser's exercise of the option, tender is necessary. Otherwise, it is not.

The Downside of Options. The option has three main drawbacks for the developer.

First, the developer who elects not to buy forfeits the option price. By contrast, a purchaser who backs out of a failed

contract contingency has a right to a full refund of the earnest money or down-payment. However, the line between an option and a contract blurs when the contract restricts the seller's remedies to the buyer's forfeiture of a pre-agreed, fixed sum -- usually the earnest money deposit. Further, if the seller agrees to waive the right to specific performance, the contract becomes more like an option.

Second, courts uniformly honor time-of-the-essence provisions in options. The time for performance is almost always specified in an option and when it is, it is strictly enforced. n18 Thus, the option is hazardous for the developer who makes a late payment because the late payment may be construed as a forfeiture of the option. In contrast, under purchase-and-sale agreements, courts often allow the buyer to pay late, to avoid forfeitures even over the vigorous objections of the seller.

Third, sellers are wary of options and seek compensation for the uncertainties of an option by hiking the selling price well above the price they would accept even under a contingent contract.

Options and the Single-Family Home Purchase Situation: The Lease-Option. Options are used less in the single-family home market than in the raw land market because people who are looking to buy or sell a home expect an immediate transfer of title, a change of possession, and an exchange of cash and holding cost obligations (mortgage, insurance, maintenance, etc.). However, in a soft housing market, sellers may agree to a lease-option.

With respect to buyers, the lease-option would be most helpful to those who recently moved, those who are starting new and uncertain careers, and those who are short on cash for down-payments. Through the use of a lease-option, the potential buyer can save on monthly payments (since monthly payments on a lease usually run about half the cost of owning the property), try out the neighborhood, and take the time to locate the best mortgage.

With respect to sellers, it might appear at first glance that the lease-option would only serve the interests of the buyer. However, the lease-option offers the seller many distinct advantages, such as: (1) a plentiful pool of prospective lease-option buyers; (2) little or no negotiation over the top-dollar option price; (3) higher than market rent to pay the owner's expenses such as mortgage payments; (4) top quality tenants who treat the home well since they usually expect to own it eventually; (5) option money which is not immediately taxable to seller until the exercise or expiration of the option; (6) the continued use of income tax deductions for the property; and (7) the continued maintenance of the house during the lease-option period since the seller usually pays for it. n19

Drafting the Option. An option exercised becomes a purchase-and-sale agreement. Developers realize that and draft their options carefully, but lessee-optionees seldom appreciate the need to write the option agreement as if it were a purchase-and-sale agreement because it becomes one at the buyer's command. The buyer may not require financing or inspection contingencies since, as a tenant, the buyer has time to learn the conditions of the premises and pre-qualify for a loan. But if the buyer desires warranties and representations from the seller about the property or title, or expects to retain furnishings or other items of personal property, the buyer needs to speak up early and get these promises from the seller in writing. This can be especially important if the option price turns out to be a bargain a year to two into the lease, because the buyer may not be able to obtain concessions from the seller at this point.

§ 85.02(c) The Right of First Refusal.

Definition. A species of contract akin to an option is the right of first refusal, also called a preemptive right and sometimes mislabelled as the "first right" of refusal. n20 Under a right of first refusal, the property owner isn't obligated to put the property up for sale. But if the owner does, the owner promises to give the holder of the right the chance to match the price she would accept or has contracted to accept from a third party. n21 The property owner may but doesn't have to set a price since the right-of-first-refusal price can be an offer the property owner receives from a third party that she would accept.

When Rights of First Refusal Are Used. Rights of first refusal are seldom used by developers to acquire sites precisely because the holder of the right has no guarantee either of the right to buy or of the right to buy at a fixed acquisition price. However, there are occasions when land developers might use rights of first refusal. If the seller holds more than one lot or parcel in the area, and is presently willing to sell only one, the developer may seek a right of first refusal should the seller later decide to sell the other contiguous parcels or lots. n22 Community builders, subdividing vast tracts into smaller, developable ones, usually temper the pace at which they release land to homebuilders so as not to overwhelm market demand -- thereby reducing their own land prices. They are often willing to grant successful homebuilders purchasing released parcels rights of first refusal on sites to be put on the market later. Although the developer might have preferred an option at a presently fixed price, a mutually acceptable price may not be easy for the buyer and seller to arrive at. With the right of first refusal, as least the developer has a foot in the door to bid on the additional acreage if and when it comes on the market.

The right of first refusal is also useful in leases, n23 partnerships, n24 co-ops, n25 condominiums, n26 and family settings. Interestingly, a few state and local legislators have conferred on apartment tenants a right to buy, when a landlord converts the apartments into condos or co-ops. n27

The Hidden Costs of a Right of First Refusal to the Grantor. We can detect five possible consequences to grantors conceding rights of first refusal. First, the right may have no effect on the ultimate price paid as the high bidder signs a purchase-and-sale agreement and the holder of the right decides either to match it or let the right expire unexercised. Second, the existence of a right of first refusal must be disclosed to potential buyers. The prospective homebuyer who offers too low a price will lose the deal, even if the owner accepts the offer, when the holder of the right matches the offer and buys the property. If the right holder elects not to match the bid, the high bidder will always wonder if she overpaid. For the length of the exercise period, the bidder's deal is in limbo. All of this may deter some potential buyers from bidding at all. Third, the existence of the right may encourage the bidder not to offer a price so low as to arouse the interest of the right holder. Like the right of statutory redemption, a right of first refusal may deter bidders from underbidding. Fourth, the right may nurture a bidding war between the high bidder and the holder of the right when the holder decides to match the high bidder's first contract offer. For the grantor/seller to benefit from a bidding war, the right of first refusal must be drafted to provide that the contract offeror shall have the opportunity of increasing its offer if the holder of the right elects to match the offer, and that each time the contract offer raises the bid, the holder of the right may elect to match or better it until one of the bidders ceases bidding. Few rights of first refusal are drafted this way. The grantor's interest would best be served if they all were. Fifth, the contract offeror may size up the situation, and decide to buy out the holder of the right of first refusal by purchasing a release of the person's interest under the right. How this affects the grantor's price depends, all too obviously, on what would have happened if the holder of the right had not agreed to sign a release.

Right of First Offer Distinguished From Right of First Refusal. Similar to the right of first refusal, but less objectionable to most sellers and seller's brokers, is a right of first offer. As with an option, the seller isn't obligated to sell under a right of first refusal or first offer. The holder of the right of first offer is entitled to be offered the property before the owner offers it to the general public. At what price? On what terms? The resolution of these issues is tricky. The idea is to give the holder of the right the first chance to buy at a price and on terms the owner would accept from a hypothetical third party. Naturally, since it is human nature for an owner to shoot high when first offering property for sale, the owner is tempted at the outset to set the right-of-first-offer price on the high side. One way of inducing the owner to set a realistic offer price and terms is to provide that the owner may only offer the property for sale to others at the same price and terms as those offered to the right holder. The right can be drafted to require that each time the owner reduces the asking price or relaxes the terms, the owner becomes obligated to give the right holder another chance.

An advantage to the seller of the right of first offer, compared to the right of first refusal, is that the seller need not have contracted with a broker and found a willing buyer before tendering the property to the holder of the right and learning whether the holder of the right wants to exercise it. Since sellers usually insist that the listing agreements contain an

exclusion denying the broker a commission if the holder of the right ultimately exercises it, brokers don't like to market property under a cloud of a right of first refusal. Under a right of first offer, if the owner decides to sell, the owner enjoys the option of holding back on any marketing effort until the holder relinquishes the right by accepting or rejecting the owner's offer price.

The right of first offer is better for the seller because, with a right of first refusal, the seller is put to the task of negotiating a complete and signed contract with a prospective buyer. The holder of the right of first refusal must be given the option of matching an actual contract. n28 Under a right of first offer, the owner doesn't begin negotiations until the holder of the right of first offer has rejected the deal. n29

Preemptive Rights Legal Issues

Price Specificity. Since rights of first refusal and first offer carry no fixed price, the holder of the right has the chance to match an offer the owner would accept. The failure to specify a price does not make these agreements unenforceable under the Statute of Frauds. Nor does it violate the principal that no contract for the purchase and sale of real property is specifically enforceable without a definite or ascertainable purchase price. As long as a means of reaching the price is stated, the agreements are enforceable.

Right of First Refusal or Right of First Offer? A well-drafted preemptive rights agreement should specify whether the optionor must place the property on the market and give the optionee the chance to match a third-party offer the optionor would accept (right of first refusal), or whether the optionor can simply declare an acceptable price and force the optionee to match it or forfeit the option before the optionor puts the property on the market (right of first offer). If the agreement is unclear as to which preemptive right is intended, some courts will not imply either and declare the option unenforceably vague or indefinite. n30

Preemptive Right Construed as a One Time Event. The agreement should also specify whether the optionee's right only extends to the seller's offer of listing price, or whether the optionee has the right to buy at the price ultimately negotiated between the seller and a third-party buyer. n31 As to whether which price or offer the optionee's right extends to, courts have limited the right to the seller's initial offer or list price. n32 So, if the optionee wants to have the right to keep bidding on the property, as the optionor's price expectations become more realistic, the agreement had better provide so.

Sale of Larger or Smaller Parcel Than That Reserved in the Option or Preemptive Right. Suppose the seller owns and wants to sell 1,000 acres but the optionee has only reserved the right to purchase 100 acres of it. Or the option is for 1,000 acres but the seller wants to sell only 100 acres? May the optionee insist that the seller match what the seller puts up for sale precisely with the amount reserved in the right? courts are divided.

After the seller has sold or contracted to sell the entire acreage to a third party, some courts allow the buyer to compel specific performance under either of these circumstances, others do not. Among those courts sympathetic to the holder of the preemptive right, courts have either set the sale aside, granted money damages, granted the holder of the 100-acre right the chance to buy the 1,000 acres, or compelled the seller to offer the 100 acres to the 1,000 acre-right holder at an appropriately reduced price. n33 Other courts simply deny the optionee any relief. n34

Should the default rule differ when the right of first refusal is conferred not by contract but by a state statute? In Iowa, mortgagors who lose their property through a foreclosure are given a statutory right of first refusal. The legislature has given foreclosed mortgagors the right to repurchase foreclosed property at the price the foreclosing mortgagee is later willing to accept when the mortgagee buys at its own foreclosure sale, and then resells. The lender, understandably, is looking for the highest net yield while the foreclosed debtor wants to redeem at the lowest possible price. When the lender believes that the highest price can be gained by offering the foreclosed property as part of a larger package, does the lender have to offer just the foreclosed piece to the foreclosed buyer? An Iowa court ruled that the mortgagee did not have to offer the property in separate tracts just because it was mortgaged or foreclosed that way. The mortgagee

satisfies its statutory obligation by giving the mortgagor the chance to buy the combined parcels. n35

Time for Exercise. Options usually specify a definite time for their exercise. If they do not, courts attempt first to discover how long the parties intended the preemptive right to last. "While an option for an indefinite term is void, a right of first refusal which does not specify a time limitation is not ordinarily void for indefiniteness...." n36

Rule Against Perpetuities, Rule Barring Restraints on Alienation. Options, rights of first refusal and rights of first offer are vulnerable to being declared unenforceable as unreasonable restraints on alienation or as violations of the Rule Against Perpetuities when they lack definite dates of termination consistent with the rule. The Rule Against Perpetuities consists of two parts, a prohibition against remoteness of vesting and a prohibition against suspending the power of alienation beyond the period of the rule. That period is "not later than twenty-one years, plus the period of gestation, after some life or lives in being at the time the of creation of the interest." n37 Most courts have held that options and other preemptive rights are subject to the time limitations of the Rule Against Perpetuities. n38 The drafting challenge: make sure the right must be exercised within the perpetuities period.

Exceptions and Exemptions to Perpetuities Rules. Some courts have saved preemptive rights from successful restraints or perpetuities challenges by implying the right must be exercised within the lifetimes of the optionor, the optionee, or both. n39 Of course, under such an implication, if the right hasn't been exercised before the optionee dies, the right terminates. n40 Other courts have characterized the interest under an option as a condition subsequent, so that title vests in the optionor unaffected by the preemptive right. n41 Some courts analyze preemptive rights by deciding whether they are "reasonable," looking to the optionee's reasons for wanting the right in the first place, n42 their duration, and how they affect the owner's practical ability to sell. Some courts save options by overlaying a 21-year time limit.

State legislatures have enacted statutes modifying perpetuities and restraint rules, or excepting specific interests. The most important of these is the Uniform Statutory Rule Against Perpetuities (USRAP) § 4(1), which precludes the rule from applying to "a non-vested property interest ... arising out of a non-donative transfer ...." Thus, the rule is effectively abolished for all commercial trans-actions. To date, twenty-four states have adopted some variation of the USRAP. n43

Further, in addition to exempting commercial transactions, some states such as New York n44 and Connecticut n45 have exempted governmental transactions as well. In this context, although the Rule Against Perpetuities is held to apply to the preemptive right at issue, the rule does not work against the governmental unit since it is perpetually in existence. n46

Release Provisions. Even if the holder of the right decides not to exercise it, unless the holder signs a recordable and recorded release to clear title, any sub-sequent purchaser with notice of that right risks taking title clouded by it. The agreement should require the right holder to sign a recorded release and specify damages for failure to do so.

FOOTNOTES:

(n1)Footnote 4. John J. Delaney & Emily J. Vaias, *Recognizing Vested Development Rights as Protected Property an Fifth Amendment Due Process and Takings Claims, 49 Wash. U. J. Urb. & Contemp. L. 27 (Summer 1996);* John J. Delaney, *Development Agreements Legislation: The Maryland Experience*, SB06 ALI-ABA 805 (Aug. 1996); Daniel R. Mandelker, *Protecting Vested Rights Through Legislation and Local Ordinances*, SB06 ALI-ABA 761(Aug. 1996); Annotation, *Activities In Preparation for Building as Establishing Valid Nonconforming Use or Vested Right to Engage in Construction for Intended Use, 38 A.L.R.5th 737 (1996).*

(n2)Footnote 5. Roy L. Dietz & William H. Lurz, *Advice from the Giants on Land & Politics*, 88 Prof. Bldr. 92 (July 1988).

(n3)Footnote 6. *See, e.g., Board of Educ., Gadsden Ind. Sch. Dist. No. 16 v. James Hamilton Constr. Co., 891 P.2d*

556 (N.M. App. 1994).

(n4)Footnote 7. *See Long Signature Homes, Inc. v. Fairfield Woods, Inc., 445 S.E.2d 489, 492 (Va. 1994).* The court could have compensated the seller for keeping the property off the market longer than the parties originally expected by awarding the seller interest on the purchase price measured from the date the parties expected the contract to close. *See Smith v. McKee, 859 P.2d 1061 (N.M. 1993); Kapson Const. Corp. v. ARA Plumbing & Heating Corp., 642 N.Y.S. 2d 701 (N.Y. App. Div. 1996)* (Even though developer obtained financing five years after construction contract was executed in cooperation with new business partners, contract's condition precedent requiring approval of developer's lender was satisfied, since clause mandated only that developer obtain construction financing, but did not provide for either time limitation or that financing be provided without developer seeking other business partners); *United States Postal Serv. v. Phelps Dodge Refining Corp., 950 F. Supp. 504 (E.D.N.Y. 1997)* (Vendor of real property, required to return purchase price following rescission of real estate contract due to mutual mistake as to vendor's ability to perform soil contamination remediation at site, would be assessed prejudgment interest from date that purchaser brought suit, rather than date that sale was completed; while vendor had been slow in attempting remediation, causing purchaser to have to wait for return of its money, vendor had "incurred significant cost").

(n5)Footnote 8. Restatement (Second) of Contracts § 269 (1981).

(n6)Footnote 9. *632 A.2d 709 (Conn. 1993).*

(n7)Footnote 10. *See, e.g., Boyd v. Haritidis, 657 N.Y.S. 2d 463 (N.Y. App. Div. 1997)* (Purchaser made diligent and good-faith efforts to qualify for financing, as required by contract, even though bank ultimately denied loan due to purchaser's limited income and irregular employment history; purchaser was not required to accept vendor's alleged verbal offer through third party to hold purchase money mortgage); *Feinberg v. Berlewicz, 632 A.2d 709 (Conn. 1993).*

(n8)Footnote 11. *644 So. 2d 247 (Ga. 1994).*

(n9)Footnote 12. *Id. at 251-52.*

(n10)Footnote 13. *625 N.Y.S. 2d 748 (1995).*

(n11)Footnote 14. *625 N.Y.S. 2d at 749. See also T.S.I. Holdings, Inc. v. Jenkins, 924 P.2d 1239, 1250 (Kan. 1996)* (Provision of contract for sale of control of corporation, calling for sellers to use their "best efforts" to secure return of shares pledged as collateral for bank loan, created standard of conduct on part of sellers above and beyond implied obligation of good faith); *First Nat'l Bank of Lake Park v. Gay, 694 So. 2d 784 (Fla. App. 1997)* (The contractual term "best efforts" imposes a legal duty of performance more demanding than mere competence, due diligence, or good faith. It requires the party owing the duty to take all action and do all things necessary to consummate the transaction contemplated by the agreement. "Best efforts" means maximizing the contractual benefits of the person to whom the duty is owed even if the benefits to the one owing the duty are reduced. If the duty of best efforts is owed, it must be performed even at a loss).

(n12)Footnote 15. *See* Ronald Benton Brown, *An Examination of Real Estate Purchase Options, 12 Nova L. Rev. 147 (1987). Casa El Sol-Acapulco, S.A. v. Fontenot, 919 S.W.2d 709 (Tex. App. 1996)* ("Option contract" has two components: underlying contract which is not binding until accepted; and covenant to hold open to optionee opportunity to accept); *Ingram v. Kasey's Assocs., 493 S.E.2d 856 (S.C. App. 1997)* (Contract to sell and purchase real estate mutually obligates both seller and buyer to complete transaction, while option to purchase only gives optionee right to purchase within limited time and without obligation to purchase); *HGS Homes, Inc. v. Kelly Residential Group, Inc., 948 S.W.2d 251 (Mo. App. 1997)* (A valid option to purchase land requires independent consideration separate and apart from the purchase price to be paid for the land; however, where the option is incorporated into a larger real estate contract or lease, the mutual considerations supporting the entire contract or lease support the option provision).

But see Brokaw v. Roe, 669 N.E.2d 1039 (Ind. App. 1996) (Option automatically expired when it was not exercised

before deadline, and owner was not required to take affirmative action to claim termination).

(n13)Footnote 16. *See Turboff v. Gertner, Aron & Ledet Invs., 840 S.W.2d 603 (Tex. App. 1992).*

(n14)Footnote 17. A 1989 update of the English Statute of Frauds seeks to avoid disputes over what conditions and terms are "material" by requiring the writing to incorporate "all terms which the parties have expressly agreed." *See also Lawrence v. Jones, 864 P.2d 194, 197 (Idaho App. 1993); Wolvos v. Meyer, 668 N.E.2d 671 (Ind. 1996)* (Agreement providing option to purchase property did not lack essential terms to render it unenforceable, though it required parties to enter formal purchase agreement, where parties agreed to adopt particular standard purchase agreement form used by brokers in county, and option agreement sufficiently identified essential terms, including parties, subject real estate, purchase price, and time frame in which closing was to be completed, as required to order specific performance).

But see Coulter & Smith, Ltd. v. Russell, 925 P.2d 1258 (Utah App. 1996) (purchaser's promise to vendor in written option agreement that he would proceed immediately to annex and develop tracts supplied consideration necessary to support option, but option agreement, which made completion of subdivision development precondition to transfer of real estate and stated that option expired two years after such completion, without specifying completion date, violated rule against perpetuities).

(n15)Footnote 18. 65 *Real Estate Sales*, Cal. Jur. § 153 (1979); *Bantam Four Cinemas, Inc. v. Zamias, 544 A.2d 487 (Pa. 1988); Western Sav. Fund, Etc. v. Southeastern, Etc., 427 A.2d 174 (Pa. 1981).* Once the optionee has by election converted the option into a bilateral contract, that same permissiveness towards timely performance returns. *Ingram v. Kasey's Assocs., 493 S.E.2d 856 (S.C. App. 1997)* (Option gives optionee a power of acceptance within time and manner specified in option, and such acceptance must objectively manifest Ass'nt in positive and unambiguous manner. When analyzing attempt to accept option, courts strictly construe in favor of optionor, the terms, conditions, and time limits of option); *HGS Homes, Inc. v. Kelly Residential Group, Inc., 948 S.W.2d 251 (Mo. App. 1997)* (When optionee accepts the offer in the prescribed manner, the option is deemed to have been exercised so as to create a binding bilateral contract, and the bilateral contract so created is specifically enforceable); *Beiger Heritage Corp. v. Estate of Kilbey, 667 N.E.2d 184 (Ind. App. 1996)* ("Option" is continuing offer whose duration and method of exercise is strictly controlled by agreement that created it; generally, exercise of option is effective if it strictly adheres to terms stipulated in contract).

(n16)Footnote 19. *See* Robert Bruss, *How Home Buyers, Sellers, Realty Agents, and Investors Can Profit from Lease Options*, available for $4 from Tribune Media Services, 64 E. Concord Street, Orlando, Florida 32801. Alan M. DiSciullo, *Renewals And Options*, 415 PLI/Real 273 (Nov. 1996).

(n17)Footnote 20. *See* 2 A.L.R. 701, 702 § 1(a) (1965).

(n18)Footnote 21. *See* 136 A.L.R. 138, 139 § II(a) (1942). Barbara Botein, *Office Leasing*, SB84 ALI-ABA 115, 137 (June 1997). *Greenfield Country Estates Tenants Ass'n v. Deep, 666 N.E.2d 988 (Mass. 1996)* (On notice of receipt of bona fide offer from third party, right of first refusal ripens into option to purchase according to its terms); *Beiger Heritage Corp. v. Estate of Kilbey, 667 N.E.2d 184 (Ind. App. 1996). But see Phipps v. CW Leasing, Inc., 923 P.2d 863 (Ariz. App. Div. 1 1996)* (The recorded document of the right of first refusal lacked a certificate of acknowledgment as required by Arizona statute. As a result, the recording did not provide constructive notice to a bona fide purchaser for value without actual or constructive notice).

(n19)Footnote 22. *See, e.g., Kellner v. Bartman, 620 N.E.2d 607 (Ill. 1993)* (B agreed to sell 28 acres to A. B also promised A, "In the event seller'shall decide to sell his remaining farmland ... he shall first offer the farmland to Buyer for the price and on the terms of the intended sale, by writing an instrument in writing... Buyer'shall have sixty (60) days from the date of such offer in which to accept or reject the same").

(n20)Footnote 23. *See, e.g., Estate of Pelzman, 863 P.2d 1019 (Mont. 1993).*

(n21)Footnote 24. "Insiders" can retain control of the partnership by matching the best offer a selling partner is offered by an outside bidder. *See, e.g.*, Annotation, *Valuation of Corporate Stock Under "Buy Out" or "First Option" Agreement Giving Option to or Requiring Corporation or Other Stock-holders to Purchase Stock of Deceased or Withdrawing Stockholders, 54 A.L.R. 3d 790 (1973).*

(n22)Footnote 25. A co-op board of owners reserving the right to approve buyers of any unit may couple that right with an option to purchase the unit at the price a buyer disapproved by the board had contracted to pay.

(n23)Footnote 26. *See, e.g.*, Annotation, *Validity, Construction, and Application of Statutes, or of Condominium Association By-Laws or Regulations, Restricting Sale, Transfer, or Lease of Condominium Units, 17 A.L.R.4th 1247, 1254 (1982);* 4B Powell on Real Property § 632.5[8]; Browder, *Restraints on Alienation on Condominium Units: The Right of First Refusal, 1970 U. Ill. L.F. 231 (1970).*

(n24)Footnote 27. *See, e.g.*, Fla. Stat. Ann. § 718.612.

(n25)Footnote 28. Ronald Benton Brown & Joseph M. Grohman, *Property Law: 1996 Survey Of Florida Law, 21 Nova L. Rev. 279, 283 (Fall 1996)* (A piece of land was subject to a right of first refusal when the broker contacted the owners with a possible buyer. However, the contract also provided that it would be void and that the broker would not receive a commission if the right of first refusal was exercised).

(n26)Footnote 29. *See Give Expansion Option, But Lessen Your Risks*, 1 Commercial Lease Law Insider (Feb. 1996).; Linda A. Striefsky, *Tenant Options and Rights of First Offer/Refusal -- Sample Provisions And Comm'nts*, SC11 ALI-ABA 77 (Aug. 13 1997); Barbara Botein, *Office Leasing*, SB84 ALI-ABA 115, 138 (June 1997); Marvin Garfinkel, *Excerpts from Declaration of Condominium for a Shopping Center*, SB50 ALI-ABA 599, 607 (Mar. 1997); Richard C. Mallory, *Options and First Refusals*, 415 PLI/Real 305 (Nov. 1996).

(n27)Footnote 30. Annotation, *Requisite Definiteness of Price to be Paid in Event of Exercise of Option for Purchase of Property, 2 A.L.R. 3d 701 (1965).*

(n28)Footnote 31. *See, e.g., Hare v. McClellan, 662 A.2d 1242 (Conn. 1995)* (since the agreement didn't specify whether the option was to purchase at $59,000, the seller's original asking price, or at $45,000, the ultimate price paid by the buyer, the issue would be left to the trier of fact).

(n29)Footnote 32. *See, e.g., Pratt v. Prentice, 151 N.Y.S. 259, aff'd, 117 N.E. 1082 (N.Y. App. Div. 1914); see also* Annotation, *Landlord and Tenant: Tenant's Rights Under Provision Giving Him Pre-emptive Right to Purchase on Terms Offered by Third Person, Where Third Person's Offer is Withdrawn Before Tenant Exercises Pre-emptive Right, 46 A.L.R.3d 1377 (1972).*

(n30)Footnote 33. *See* Note, *Rights of First Refusal and the Package Deal*, 22 Ford. Urb. L.J. 461 (1995).

(n31)Footnote 34. *See* Annotation, *Option to Purchase Real Property as Affected by Optionor's Receipt of Offer for, or Sale of, Larger Tract Which Includes the Optioned Parcel, 34 A.L.R.4th 1217 (1984).*

(n32)Footnote 35. *Hunter v. Union State Bank, 505 N.W.2d 172 (Iowa 1993); Dixon v. Farm Credit Bank of Texas, 689 So. 2d 135 (Ala. App. 1996)* (Finding that mortgagee did not improperly conduct foreclosure sale of 295-acre farm by selling it as single tract and not first offering it in parcels was supported by evidence that property was mortgaged as one parcel, that property consisted of one continuous rectangular area, that no natural boundaries divided the property, and that mortgagors offered only speculation as to how property should have been separated into parcels for sale, even though paved roads divided property into parcels of 220, 70, and five acres).

(n33)Footnote 36. *Kellner v. Bartman, 620 N.E.2d at 611.*

(n34)Footnote 37. *See, e.g., Village of Pinehurst v. Regional Invs. of Moore, 412 S.E.2d 645 (N.C. 1992)* (invalidating the city's right to buy private water and sewer systems from private developer). *See also* Note, *Village of Pinejurst v. Regional Investments of Moore: Perpetuating the Rules Against Perpetuities in the Realm of Preemptive Rights -- North Carolina Refuses to Accept an Exception to the Rule, 71 N.CL. REV. 2115 (1993).*

(n35)Footnote 38. *See* Annotation, *Pre-emptive Rights to Realty as Violation of Rule Against Perpetuities or Rule Concerning Restraints on Alienation, 40 A.L.R. 3d 920 (1971);* Danaya C. Wright, *Captive Gas and Condemned Trash: Highs and Lows of Indiana Property Law in 1996, 30 Ind. L. Rev. 1269, 1285 (1997);* Robert E. Parella, *Real Property, 47 Syracuse L. Rev. 681, 697 (1997)* (Perpetuities -- Options and Preemptive Rights).

Webb v. Reames, 485 S.E.2d 384 (S.C. App. 1997) (Reservation of perpetual right of first refusal in deed conveying lakeshore property violated rule against perpetuity in that right may not have vested within 21 years after life in being); *In re Bradlees Stores, Inc. 194 B.R. 555 (Bankr. S.D.N.Y. 1996)* (Damages may not be sought for refusal to perform option which is void under New York?s rule against perpetuities; to allow damages in that situation would tend to compel performance, which would contravene statute's purpose of invalidating unreasonably long restrictions on use or marketability of property); *Symphony Space, Inc. v. Pergola Properties, Inc., 669 N.E.2d 799 (N.Y. 1996)* (Vendor's option to buy back commercial property from purchaser was not "option appendant" or "option appurtenant" to lease under which vendor had leased back part of the property, and thus was not excepted from prohibition against remote vesting contained in statutory rule against perpetuities, where option encompassed all of property, including nonleased portion that vendor's assignees were not occupying; option was contained in agreement separate from lease; and duration of option exceeded term of lease).

(n36)Footnote 39. *See, e.g., Kellner v. Bartman, supra* (right had to be exercised within the seller's lifetime even though the contract specified that the right "shall extend to and be obligatory upon the heirs, executors, administrators and assigns of the respective parties."). *See also Silvicraft, Inc. v. Southwest Timber Co., 805 S.W.2d 84 (Ark. App. 1991); Fallschase Dev. Corp. v. Blakey, 696 So. 2d 833 (Fla. App. 1997)* (When agreement provides right of first refusal to named individual, right is personal to that individual, who is measuring life in being, and thus, since equitable interest would vest, if at all, within that individual's lifetime, rule against perpetuities does not apply. However in this case, right of first refusal in agreement for sale of real property violated rule against perpetuities, since agreement provided that right would not just be binding upon parties, but would be binding upon their heirs, successors, and assigns, and thus was of unlimited duration).

(n37)Footnote 40. *See Adler v. Simpson, 610 N.Y.S. 2d 355 (1994).*

(n38)Footnote 41. *See, e.g., Hinson v. Roberts, 349 S.E.2d 454 (Ga. 1986)* (holding that the preemptive right constitutes no impediment to a transfer of the property and so violates neither the policy of the Rule Against Perpetuities prohibiting remoteness of vesting nor the policy of the doctrine against restraints on alienation since the seller'stays in full control of the decision whether and when to sell and at what price). *See also Nickels v. Cohn, 764 S.W.2d 124 (Mo. App. 1989); Dennis v. Bird, 941 S.W.2d 486 (Ky. App. 1997)* (Where purchasers of farm conveyed tract of farm property to vendor and his daughter with option to repurchase tract for $400 should vendor or daughter cease to live there, transaction did not violate the rule against perpetuities; fee simple on condition subsequent was intended to be conveyed to vendor and daughter, with power of termination/right of reentry in purchaser and, thus, transaction did not involve remainder interest to which rule applied).

(n39)Footnote 42. *See Hare v. McClellan, supra* (in light of optionee's claim that they wanted to make sure development in the area was consistent with their uses of their own contiguous parcel, the court remanded the case for a factual determination as to the definition of contiguous); *Carroll v. Eno, 654 N.Y.S. 2d 368 (N.Y. App. Div. 1997)* (Agreement giving prospective buyer of cooperative apartment preemptive right to purchase apartment at price owner had purchased it for as insider in exchange for whatever right buyer had at that time to purchase apartment, was not unreasonable restraint on alienation, despite great disparity between insider price and present market value; parties had agreed upon price formula at time agreement was executed, transfer could have occurred at any time thereafter, and

plaintiff had benefit of tax advantages and income from subleases over years); *Donzella v. New York Tel. Co., 641 N.Y.S. 2d 423 (N.Y. App. Div. 1996)* (Purchase option in contract providing that option-holder could purchase property for $25,000 "at any time after expiration of ten year original term" did not violate common-law rule against unreasonable restraints on alienation of property, where commercial motivation existed for grant of purchase option and property owners acquired title to property as part of same financial scheme as brought option in to existence).

(n40)Footnote 43. The twenty-four states which have adopted the USRAP are Alaska, Arizona, California, Colorado, Connecticut, Florida, Georgia, Hawaii, Indiana, Kansas, Massachusetts, Michigan, Minnesota, Montana, Nebraska, Nevada, New Jersey, New Mexico, North Carolina, North Dakota, Oregon, South Carolina, Tennessee, and West Virginia. *See* Alaska Stat. §§ 34.27.050 - 34.27.090; Ariz. Rev. Stat. Ann. §§ 14-2901 - 14-2906; Cal. Prob. Code §§ 21200 - 21231; Colo. Rev. Stat. §§ 15-11-1101 - 15-11-1107; Conn. Gen. Stat. §§ 45a-490 - 45a-496; Fla. Stat. ch. 689.225; Ga. Code Ann. §§ 44-6-200 - 44-6-206; Haw. Rev. Stat. §§ 525-1 - 525-6; Ind. Code §§ 32-1-4.5.1 - 32-1-4.5.6; Kan. Stat. Ann. §§ 59-3401 - 59-3408; Mass. Gen. L. ch. 184A, §§ 1 - 11; Mich. Comp. Laws §§ 554.71 - 554.78; Minn. Stat. §§ 501A.01 - 501A.07; Mont. Code Ann. §§ 72-2-1001 - 72-2-1007; Neb. Rev. Stat. §§ 76-2001 - 76-2008; Nev. Rev. Stat. §§ 111.103 - 111.109; N.J. Rev. Stat. §§ 46:2F-1 - 46:2F-8; N.M. Stat. Ann. §§ 45-2-901 - 45-2-906; N.C. Gen. Stat. §§ 41-25 - 41-27; N.D. Cent. Code §§ 47-02-27.1 - 47-02-27.5; Or. Rev. Stat. §§ 105.950 - 105.975; S.C. Code Ann. §§ 27-6-10 - 27-6-80; Tenn. Code Ann. §§ 66-1-201 - 66-1-208; W. Va. Code §§ 36-1A-1 - 36-1A-8.

(n41)Footnote 44. *See Morrison v. Piper, 566 N.E.2d 643 (N.Y. 1990),* rev'g, *553 N.Y.S. 2d 548 (N.Y. A.D. 1990), appeal after remand, 567 N.Y.S. 2d 903; Metropolitan Transp. Auth. v. Bruken Realty, 492 N.E.2d 379 (N.Y. 1986). See generally* 5A Powell on Real Property § 792(7).

(n42)Footnote 45. *See Tolland Enters. v. Commissioner of Transp., 647 A.2d 1045* (Conn. App. 199) (permitting the state to exercise its repurchase right twenty-seven years later).

(n43)Footnote 46. *Id.* at 55, 647 A.2d at 1048.

* Parts of this chapter have been adapted from George Lefcoe, Real Estate Transactions (Michie 1993).

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CHAPTER 85 OBTAINING LAND AND RIGHTS FOR DEVELOPMENT *

9-85 Thompson on Real Property, Thomas Editions § 85.03

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§ 85.03 The Case Study.

To see how the financing and contracting issues are resolved in context we turn to an actual acquisition of a site by a subdivider-home builder, The Larwin Company, which has constructed tens of thousands of houses in California since World War II.

The Larwin Company builds single-family detached housing -- affordable, attractive houses at prices pitched to first-time buyers. To keep land prices reasonable the company purchases sites in outlying areas well ahead of development.

Larwin's land prices are low because outlying sites often lack road access and utility lines haven't been extended to the site. Someone has to finance the linkage of the remote site to the nearest public road, sewer, water, and power source. The likely candidates are local governments, utility companies, area-wide landowners through special tax assessment districts, or developers like Larwin. At the time sites are acquired, Larwin often does not know for sure what these infrastructure costs will be, and how much of them Larwin will have to shoulder.

The subject site is in the fast-growing northern part of Los Angeles County. This particular site was at least five to eight years from development when Larwin's president, Mr. Keston, began negotiating to buy it. For several decades it had been owned by a group of Los Angeles-based physicians who bought when the land was dirt cheap and had been shouldering the burdens of property taxes and insurance ever since.

Mr. Keston learned about the site from an acquaintance, a lawyer, who knew the physicians. Mr. Keston checked it out and discovered it was a desert parcel in the path of development but many miles from the nearest road and utility hookups -- absolutely undistinguishable from thousands of other acres but for one key fact. Most of the surrounding vacant desert land had been subdivided decades ago into smaller parcels and sold to individual investors as part of a failed land promotion scheme. This was one of the few large parcels still under single ownership. Size is important to Larwin because it needs to spread the high infrastructure costs over as many units as possible so as to obtain the economies of scale a large project in order to build its affordable product.

The physicians were in no position to become developers and had held the title for twenty years. Twenty years of taxes

and insurance with some offsetting income from farming leases gets to even the most patient investor. California's Proposition 13 n47 eased the burden somewhat by fixing property taxes at 1% of value in 1978 with a modest 2% inflation adjustment annually, unless land changes hands. Without Article 13 the sellers' property tax obligation would have grown each year as the fair market value of the site appreciated to account for increasing development potential. Still, the investing doctors were ready to be relieved from the costs of ownership and to reap a return on their initial investment, even if the site wasn't quite yet ready for building. That's why they agreed to negotiate a deal with Larwin. Better that Larwin "bank" the land for the next five years or so, as long as the owners were compensated adequately. Larwin had to decide what price to pay for the site.

FOOTNOTES:
(n1)Footnote 47. Cal. Const. art. 13A, § 1 *et seq.*

* Parts of this chapter have been adapted from George Lefcoe, Real Estate Transactions (Michie 1993).

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CHAPTER 85 OBTAINING LAND AND RIGHTS FOR DEVELOPMENT *

9-85 Thompson on Real Property, Thomas Editions § 85.04

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§ 85.04 Estimating Yields on Real Estate Investments.

What a developer is willing to pay for land depends on what the developer believes the land ultimately can be sold for. One needs to know whether one can turn a profit when all the costs are weighed against the eventual sales price. There are various ways to determine that.

§ 85.04(a) Current Yield.

The simplest measure of profit or loss is current yield. Current yield is used for income producing property, such as apartments, offices, hotels, and shopping centers. The investor or developer calculates the gross rents or sales price and subtracts the operating expenses and debt service. The result is called cash flow.

Gross rents or sale

-- Operating expense

-- Debt service

Cash flow

The cash flow is then measured against the investment cost:

Cash flow - investment/Investment = Current yield

Suppose Mr. Keston could buy land for $5,000,000 and sell it for $6,000,000 at the end of the year, incurring operating and sales expenses plus debt service costs of $500,000 during the year. His cash flow would be ($6,000,000 -$500,000) = $5,500,000. His profit would be $500,000. His current yield would be $500,000/$5,000,000, or 10%.

The current yield calculation works well enough in a very short-lived deal (one year or less). But the formula doesn't account for the time period of the investment, and therefore is inadequate for assessing multi-year investments. For

example, suppose Mr. Keston were putting his $5,000,000 up front in year one, but not selling subdivided lots until year five. Assuming his sales price and expenses remain unchanged, the current yield would be the same, but it would not reflect an annual percentage rate like we are used to dealing with. Instead, it would be 10% over the five-year investment period, or an average of 2% per year.

Five hundred thousand dollars received five years from now is worth less than the same amount received one year from now. This is because money has a time value. Wouldn't you grab a deal in which you got $100,000 now and repaid it at the end of the year? Of course you would -- for one simple reason. You would pocket the interest on $100,000 during the year.

In addition to the time value of money drawback, the current yield method is a "before tax" analysis and does not take into account changes in rents, expenses and property values over time. For these reasons, investors and lenders have used more sophisticated formulas to account for the time value of money -- formulas such as the Net Present Value method and the Internal Rate of Return.

§ 85.04(b) Net Present Value (NPV).

To demonstrate the time value of money, let's start by determining the present value of the right to receive $500,000 in sales proceeds five years from now. Assume that if you had the money now, you could earn 10% annually on it.

In effect, you are searching for the reciprocal of compound interest. Compound interest shows the future value of money you have now. Present value shows the value now of money you will receive in the future. The formula for present value is as follows:

Present value = Future Value/(1 + 1) [n]

i = interest rate

n = number of years from now

Our example is formulated as follows:

Present value = $500,000/(1 + .10) [5]

= $310,461

In other words, if you expected a 10% annual rate of return on your money, you would be indifferent to possessing $310,461 today or having the right to receive $500,000 five years from today.

Compare the following two investments. Each requires you to put out $100,000. Each will yield $120,000. The difference between the two deals is the timing of the expenditures and returns.

Investment I: you pay the entire $100,000 up front and get back $50,000 at the end of the first year and $70,000 at the end of the second year.

Investment II: you pay $20,000 a year for each of five years and get back $70,000 at the end of year five and $50,000 at the end of year six.

	Investment I		Investment II	
	Cost	Return	Cost	Return
Year 0	(100,000)		(20,000)	
Year 1		50,000	(20,000)	
Year 2		70,000	(20,000)	
Year 3			(20,000)	
Year 4			(20,000)	
Year 5				70,000
Year 6				50,000

Which investment is the better one?

If you are looking for a rate of return of at least 10%, would it pay to make Investment I? In order to answer this, you need to determine the NPV of Investment I.

The NPV is the present value of a stream of cash flows, less the present value of the costs of the investment discounted at your desired rate of return. Using the formula for present value presented earlier, you would calculate the NPV of Investment I as follows:

NPV	=	$50,000/(1 + .10) [1]	+	$70,000/(1 + .10) [2]	-	$100,000/(1 + .10) [0]
	=	$45,454	+	$57,851	-	$100,000
	=	$ 3,305				

What this means is that Investment I would yield $3,305 more, in today's dollars, than an investment that paid 10% annually. Therefore, Investment I is worth taking. Had the NPV been a negative number, this would have indicated that Investment I yielded less than 10% per annum, and you would invest your money elsewhere.

Now let's compute the NPV for Investment II, using the same minimum rate of return of 10%:

NPV	=	$70,000 (1.10)[5]	+	$50,000 (1.10)[6]	-	$20,000 (1.10)[0]	-	$20,000 (1.10)[1]	-	$20,000 (1.10)[2]
	-	$20,000 (1.10)[3]	-	$20,000 (1.10)[4]						
	=	-$11,709								

If you were seeking at least a 10% annual return on your investment, you would choose Investment I because of its positive NPV, and reject Investment II because of its negative NPV.

§ 85.04(c) Internal Rate of Return (IRR).

The NPV method starts with a targeted annual rate of return and arrives at a present value for the investment as measured against that target. If the NPV is positive, the investment yields more than the presumed rate of return. If the NPV is negative, the investment yields less. If the NPV is zero, then the investment yields are exactly equal the presumed or targeted rate of return.

This "zero point" is exactly what the IRR method tries to find. Therefore, the formula for IRR is simply the formula for NPV with the NPV set at zero. In other words, the IRR is the interest rate that causes the present value of all the cash flows the investor anticipates to equal exactly the present value of her investment.

Computers and financial calculators are commonly programmed to compute the IRR. However, if you want to determine the IRR of an investment by hand, you can use the "Trial and Error" method by inserting interest rates into the NPV formula until you find one that makes the equation equal to zero. n48 Your search may be facilitated by a technique called interpolation. The following is an example of how to determine the IRR of Investment I:

We have already determined that Investment I yields $3,305 more, in today's dollars, than a 10% rate of return. Our IRR must be higher than 10%, so let's insert 14% into the equation and see if that works.

	Future Value	Present Value at 10%	Present Value at 14%
Year One Cash Flow	$50,000	$45,454	$43,860
Year Two Cash Flow	70,000	+ 57,851/103,305	+53,865/97,825
Less: Initial Investment		- 100,000/3,305	- 100,000/- 2,175

Because the NPV at 14% is negative, whereas at 10% it was positive, the IRR must be somewhere between 10% and 14%. If we continued to insert interest rates, we would eventually arrive at 12.4%. But once we have done the calculations for 10% and 14%, we can stop guessing and use interpolation to nail down the correct IRR.

Interpolation:

NPV 10%	$3,305	NPV 10%	$3,305
Less NPV 14%	(2,175)	Desired NPV	0
Difference	5,480	Difference	3,305

Difference in rates 14 - 10 = 4%

3,305/5,480 = .60

.60 x 4% = 2.4%

10 + 2.4 = 12.4%

Through the same procedure you can determine that the IRR of Investment II is 5.4%. n49 With the IRR in hand, the investor may apply the IRR investment rule which states that one should accept the project if the IRR is greater than the discount rate and reject the project if the IRR is lower than the discount rate. n50

§ 85.04(d) Choosing Between NPV and IRR.

Some commentators prefer NPV to IRR because it yields a specific number, not a percentage. For equity investors, that dollar sum is "the bottom line." They would sometimes prefer to put more money in a deal for a larger set dollar yield than to invest a smaller sum at a higher rate of return -- if those were their only two choices.

One commentator offers this example of two competing investments. n51

	Initial Investment	Payoff (1 Year)	IRR	NPV (r = 10%)
Project A	$2,000	$2,500	25%	$273
Project B	$1,000	$1,300	30%	$182

Utilizing this example, the author reckons that project A is a better choice than B, because even though A has a lower IRR it yields more cash than B. "If project B were chosen on the basis of the IRR, the investor would not be maximizing his wealth. n52

Critics are quick to point out that the investor is seldom limited to such an odd choice -- either investing more money for a higher fixed dollar yield or investing a smaller sum for a lesser dollar yield but at a higher rate of return. Even in our example, the investor would have $1,000 left after investing in project B. Perhaps she could invest this money somewhere else, making up for the difference in NPV between projects A and B.

In the pages which follow, you will see Larwin's IRR calculations for the 880-acre project. Larwin used IRR because lenders prefer it -- probably, as Mr. Keston notes, "because it gives lenders a percentage against which they can compare their return on other projects against their cost of funds. The NPV yields a number which isn't a percentage and lenders deal in percentage."

§ 85.04(e) Analyzing the Larwin Numbers.

(i) The driving differences between Larwin's Exhibit A and Exhibit B, which follow, are the land price and the payout periods. Exhibit A assumes the land price to be $3,520,000, Exhibit B assumes it to be $4,576,000. Exhibit A has five annual repayments, each equal to 20% of the unpaid balance. B provides a steady stream of principal repayment. If Larwin had paid the greater sum, its rate of return would decline, as you can see, by 4.31% -- still well above Larwin's investment threshold.

Investment threshold is a function of risk. If Larwin viewed the risk as so high that a return in excess of 31.5% would be required for Larwin to take the risk, then paying even $3,520,000 would be too much.

(ii) Did the sellers leave over $1 million "on the table"? Larwin might have been able to absorb the cost if they were able to accept a lower IRR, but the highest price Larwin would have paid depended on the price other site owners would have accepted. Certainly, Larwin would not have paid $1 million -- or any amount -- more than owners of comparable sites in the immediate vicinity were asking. Still, sellers who can gain access to the buyer's projections may come to a clearer understanding of the buyer's "reservation price" -- the highest price the buyer will pay.

(iii) Timing matters greatly in NPV and IRR calculations. Huge expenses are incurred in real estate development well before the first homes are sold. If development takes longer than expected or sales are slower to close, IRR drops fast and hard. Conversely, it rises sharply if homes can be sold before completion or if completion and sales are ahead of schedule.

(iv) IRR calculations "incorporate both the magnitude and timing of the projected future benefits into a single number, so that you can compare projects having similar size and holding periods, yet dissimilar flows. n53

(v) Neither the NPV nor IRR methods assess very well the probabilities of their underlying assumptions. In Larwin's case, for instance, the land purchase price will be set once the land sale contract is entered. Government fees and exactions will remain indeterminate for several years; and estimates of market trends -- the strength of demand for housing -- are even less reliable since they purport to forecast sales perhaps 8-10 years in advance.

(vi) Even with these uncertainties, you can see why builders like seller financing. Based on Larwin's IRR calculations, Larwin can set an interest rate on seller financing that yields it strongly positive leverage. Sellers will compare their yield against other investment opportunities, what they could get on a CD, money market fund, or TD.

When Larwin first purchased the site, it was an unincorporated part of Los Angeles County, a jurisdiction which would have allowed 440 houses to be built there. Later, Larwin was able to persuade the county to de-annex and persuade an adjoining city to annex the site. The annexing city at the time was more friendly than the county planning regime to development. That city ultimately agreed to allow up to 2550 houses on the 880 acres, but wanted substantial off- and on-site "infrastructure" (road improvements, an 18-acre regional park, etc.). These numbers are based on the 440-unit project, before Larwin acquired the site.

These points are of special interest:

(1) Observe the relationship between the cost of the raw land, the cost of improving the land and the cost of constructing houses. In this example, the construction cost of building houses was about equal to the purchase price of the site plus land development costs. Raw land cost represented only about 15% of the "finished" lot cost.

(2) Larwin's expense meter starts running in the first four quarters, but only in the fifth quarter do sales proceeds start trickling in -- and this proved to be optimistic. Six years later, the site remains vacant due to adverse market conditions.

(3) Larwin assumed the project would be fully built and sold by the 21st quarter -- 53 years after buying the land. In fact, four years have gone by and the site is still vacant. Planning took longer as Larwin annexed the site and negotiated a development agreement. And the southern California housing market collapsed. So Larwin deferred development.

(4) The chart projects the costs and sales price of various house plans -- from 1,549 to 1,982 square feet. The finished lot cost is the same for each house. The base sales price per square foot is highest for the smallest house and smallest for the biggest house -- even though construction costs are assumed to be the same per square foot. The reason the bigger house seems to be a better buy is that a fixed land plus land development cost per unit is being spread across more square footage in the larger house. This is one way of seeing how land development costs (including fees paid to local governments) encourage the construction of larger houses. The fees become a smaller percentage of square foot cost as the number of square feet in a house increases. Big fees and infrastructure costs incline builders toward wanting to build bigger houses.

(5) Many developers run several sets of projections -- high, average and low -- for sales expectations and development costs, looking for the worst and best case scenarios. Larwin ran just one set of numbers as a rough, early stage guide. Later, after acquiring the site Larwin would refine its analysis.

(6) IRR calculations put numbers on one of the most difficult trade-offs developers must make: how much money should be spent up-front in hopes that by spending intelligently, the pace of sales will be accelerated? For instance, should the developer spend $150,000 or $2,000,000 constructing and outfitting the model homes and sales office? Cash spent years before the first sale lowers the IRR. But the earlier the sales, the higher the IRR. Just how much will attractive model homes and sales offices accelerate

sales? The IRR calculation does not answer that question. It only reports what happens if the developer's hunch to spend now is right -- or wrong. It does not indicate whether, in fact, the developer's decision will prove right or wrong in the marketplace.

Exhibit 1

Larwin Examines many sites before selecting the ones it will buy, and needs some way of comparing them. To assist, these calculations are run aimed at estimating Larwin's probable return from the site we have been reviewing.

Click here to view image.

FOOTNOTES:

(n1)Footnote 48. The basic formula for calculating the IRR is:

0 = CFo + CF1 + CF2 ... + Cfhp (1 + IRR)0 (1 + IRR)1 (1 + IRR)2 (1 + IRR)hp Note, "CF" stands for cash flow and "hp" stands for the holding period of the investment.

(n2)Footnote 49. *See* Jack Friedman & Peggy Pearson, Real Estate Finance and Investment Tables xix-xxiii (1983); C.F. Sirmans, Real Estate Finance 182-84 (2d ed. 1989).

(n3)Footnote 50. **See** Ross, Westerfield & Jaffe, Corporate Finance, 164 (1993). Ronald A. Shellan, *Negotiating Low-Income Housing Tax-Credit Venture Agreements: Beyond The Basics, 86 J. Tax'n 140 (March 1997)* (One cannot adequately negotiate the purchase price that the investor will pay to invest in a particular project without having at the partnership's disposal a computer spreadsheet that accurately calculates the internal rate of return (IRR) of the project's financial projections).

(n4)Footnote 51. The Mortgage and Real Estate Executive's Report 5-6 (June 1, 1989), *reprinted in* Michael Madison & Robert M. Zinman, Modern Real Estate Financing 30-32 (1991).

(n5)Footnote 52. *Id.* at 31.

(n6)Footnote 53. W. Tod McGrath, *"Developing" an Intuitive Understanding of the IRR*, 15 Real Est. Rev. 43 (Summer 1985).

* Parts of this chapter have been adapted from George Lefcoe, Real Estate Transactions (Michie 1993).

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CHAPTER 85 OBTAINING LAND AND RIGHTS FOR DEVELOPMENT *

9-85 Thompson on Real Property, Thomas Editions § 85.05

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§ 85.05 Three Types of Real Estate Development Financing.

[Go To Supp]

Like all subdividers, Larwin must somehow finance land acquisition and development. Land development financing is of three types:

(1) A&D (Acquisition and Development) Loans -- financing the land acquisition, the preparation of engineering and design plans, local government approvals, and site work (grading, utilities, roads, etc.). These are sometimes called land development loans.

(2) Construction Loans -- financing the construction of houses and other buildings in the project.

(3) Permanent Mortgage Loans -- financing the homebuyer's purchase.

A&D Financing. A&D financing is the most difficult and costly type of loan to arrange. Since many more projects are begun than are successfully completed, this form of financing carries a substantial risk premium -- a risk premium which is reflected in higher points, higher origination fees, higher nominal rates of interest, a share of the profits, and/or a measure of control over the developer's use of the investor's funds.

However, despite these measures, a lender may not necessarily profit from an A&D loan. For example, although a lender may contract for an 18% rate of interest, the lender will not turn a profit when it lends $1 million secured by a mortgage on property that later turns out to be worth only $600,000 on foreclosure. The $400,000 loss of principal will not be offset by the 18% interest rate over the two to five years of the A&D loan. In fact, many S&Ls failed precisely because their A&D loans proved riskier than anticipated. Their buoyant confidence in the 1980s that they could accurately price the risks of making loans secured by raw land was drowned in a flood of repossessed vacant sites, unbuilt and sometimes unbuildable. As a result, bank regulators discourage A&D lending by insisting that lenders hold greater sums aside as reserves when they make such loans. These requirements are called risk-related capital requirements. n54

Those institutional lenders who survived have gained new respect for the market and political uncertainties often overlooked by optimistic developers. Lenders also realize that a predeveloped site is just handfuls of dirt if repossession becomes necessary. That is why financing for the acquisition and development of vacant land is expensive. n55

Due to the newly appreciated risks associated with A&D financing, lenders have devised ways in which to minimize their exposure. First, some A&D lenders cap their loan-to-value ratios at 50-60%. Second, some insist on developers to invest funds personally in the project. Third, others expect developers to personally guarantee the loans. Fourth, some lenders include extension agreement whereby developers pay additional fees for extending the term of the loan. This addresses the significant timing uncertainties which are common in land development. Fifth, some lenders key fund disbursement to the developer's schedule of site improvement in attempt to assure satisfactory completion of the portion on schedule and within budget. Sixth, some lenders review important contracts for major site work components and insist that contractors be bonded to assure timely performance of their obligations. Seventh, some lenders take their profit shares as participating mortgagees.

However, with respect to A&D lenders who expect to be treated as participating mortgagees, the last thing in the world these secured lenders want is to have their security interest recharacterized as a joint venture. If characterized as joint venturers, these lenders risk tort and contract liability. In addition, they lose the ability to foreclose since only secured lenders, not co-venturers, have this right. n56 In order to avoid this situation, some lenders split their investment into two parts. One part is denominated as secured debt. The other part is explicitly labeled as an interest in a real estate joint venture. The typical real estate development joint venture is formed between an experienced developer and an institutional investor with the investor acting as the money partner and the developer as the managing partner. As to the forms of organization they might choose, they may select a partnership, limited partnership, limited liability company, or corporation.

Currently, the sources of A&D financing include commercial banks, investment banks and, in California, the California Public Employee Retirement System (C.A.L.P.E.R.S.) which started making A&D loans during California's real estate recession to jump-start the construction industry and promote entry level housing.

Construction Financing. This form of financing is somewhat easier for a developer to procure. By the time houses can be built, a lender has a fighting chance to figure out whether buyers are likely to bite in the six to twelve months it will take to build the house. Moreover, sales can be contracted from models. This gives a cautious construction lender the option of withholding construction financing until homebuyers enter into binding contracts for each house built with the lender's advances. Frequently, lenders package construction and A&D loans into one loan agreement with disbursements staged so that the developer covers a big share of the costs of each phase of construction.

Permanent Mortgage Loan. This form is the least expensive of all financing when secured by owner-occupied housing. A lender making this sort of loan takes a smaller credit risk than an A&D or construction loan financier. The home mortgage lender can appraise the house against comparable homes in the area whereas the A&D financier does not know if any income-generating use will ever be possible on the land. In addition, the home mortgage lender can run a credit check on the homebuyer without worrying, in the ordinary case, about the homebuyer simultaneously obligating himself to massive debt elsewhere -- as real estate developers are prone to do. Thus, where single A&D loans could run into the tens of millions, home mortgage loans come in bite-size portions.

Real estate financing sometimes resembles a house of cards with A&D financing resting precariously on the presumed availability of construction financing. The developer hopes to find a construction loan large enough to pay off the more expensive A&D loan. In turn, construction financing often depends on a permanent lender having made a commitment to finance the ultimate user's purchase once the project is built and sold. If construction and permanent loans are not available, the A&D lender could end up taking a very big hit.

Another hazard for lenders in every stage of development finance is the temptation for the developer to use loans from

one project to complete a previous project. This is all too common in the development business. When a developer has gone far enough on Project A to obtain construction funds, the developer may decide to divert some the funds to a new venture, Project B, or to finish work on the last project, Project C, for which funds ran dry. If the construction lender catches the developer, the lender may declare default on the Project A loan. Even if the construction lender does not figure out what is happening, chances are that the diverted construction loan proceeds were really needed to complete work on Project A, so the project will not be finished and ready for sale unless the developer can borrow more funds elsewhere -- maybe against Project D or Project E. With a downturn in the real estate market, all the developer's projects could go "sideways" -- even Project A which would have been fine but for the diversion of funds.

§ 85.05(a) Carryback Financing.

Land sellers can ease the developer's cash flow burden by taking back IOUs -- notes they can secure by retaining a security interest in the site.

There are three ways to structure the seller's security interest: (1) the land contract stays in place with the sellers continuing as legal title owners until the buyers pay the full purchase price; (2) sellers convey title and take back a note secured by a mortgage or deed of trust from buyers; (3) sellers lease the site to the developer along with an option to purchase.

In some states laws protecting secured debtors will be the same no matter what security device is chosen -- be it contract, mortgage, deed of trust, or ground lease, as long as courts are persuaded that the chosen instrument is in fact a security device. In other states the rights of the defaulting buyer depend significantly on the form of security investment used. In other states, the rights of a buyer under an installment sales contract are slimmer than under a mortgage or deed of trust. The contract seller may retain the buyer's down payment even if no deficiency judgment would have been owing under a mortgage, and the defaulting debtor has no right to redemption or a foreclosure sale. n57

In all cases, the buyer will want to put the world on notice of its interest by recording so as to prevent the seller from impairing or clouding the title. The informed seller appreciates that if the buyer's interest is recorded, the seller's ability to resell is impaired even if the buyer has defaulted. Until the buyer releases her claim of record, the seller's title will be unmarketable.

§ 85.05(b) Subordination Agreements.

Most construction lenders are required, whether by state law or their own lending policies, to acquire first liens when they make construction loans. n58 This could cause a problem if the seller of the land took back a purchase money deed of trust from the buyer, since purchase money deeds of trust are presumed to have priority over other liens created against the purchaser. n59 The solution is a subordination agreement.

The subordination agreement came into widespread use first in California development financing. Its use has spread to other states. n60

"Subordination" means simply that a security interest holder agrees that in the event of default, one who came later in time would have a superior position if foreclosure ensued and there wasn't enough money to satisfy both liens. n61

In other words, a subordination agreement reverses the lien priorities.

Subordination agreements are very risky for sellers, who can quickly end up with no land and no money. If the developer defaults on the loan they subordinated to, their security interest could be wiped out in foreclosure. Some sellers agree to subordinate because they don't know what they are doing or because they are being paid richly to take the risk (in the form of a higher purchase price and/or higher interest rate). Some subordinate because the only

developer/buyers they get offers from are short of cash, need third party money for construction, and explain to the seller that third party lenders demand first liens. In some cases the seller can obtain a share of profits as part of the subordination package in order to compensate for the risk.

A seller-protective subordination agreement strictly limits the amount, cost, timing and uses of borrowed funds. The goal is to make sure the value of the site is enhanced at least one dollar for every dollar to which the seller subordinates. Some limitations designed to minimize the seller's risk include: (1) restricting the uses to which development financing may be put; (2) limiting the type of lender to institutional ones; (3) "capping" the amount to be subordinated; and (4) requiring the holder of the senior debt to notify the subordinating seller of defaults and give the seller the opportunity to cure. n62

The Need for Consideration. To be legally enforceable, every contract must be supported by consideration. Thus, when there is an absolute lack of consideration, there can be no contract. For instance, in *Dugan v. First Nat'l Bank in Wichita*, n63 the court upheld one subordination agreement and invali-dated another subordination agreement on the basis of whether improvements were made to the property. In invalidating the second subordination agreement, the court noted that "[c]onsideration for the original [subordination agreement] is not consideration for a subsequent subordination agreement...." n64

However, the "prospect of ... enhanced property value is sufficient consideration to support an agreement to subordinate a security deed to a construction loan." n65 Further, conferring of benefit to a third party other than the subordinator is sufficient consideration for a subordination agreement. n66

Statute of Frauds Applies. A subordination agreement, much like a release from a mortgage obligation, must be in writing to be enforceable since a subordination agreement is essentially a surrender of an interest in land. n67 However, as with other agreements affecting an interest in land, courts may enforce subordination agreements which violate the Statute of Frauds on alternative grounds such as partial performance, n68 estoppel, n69 intent, n70 and passage of time. n71 Although the Statute of Frauds governs the enforcement of subordination agreements, the individual facts of a case may eventually dictate the outcome of the dispute.

Three Forms of Subordination. Subordination may take one of three forms: (1) automatic; (2) optional; and (3) recordation.

An automatic subordination clause obligates the seller to subordinate to the buyer's construction loan even though the precise terms are unknown at the time the purchase-and-sale agreement is signed. The buyer will nail down financing only after tying up the land with an option or purchase-and-sale agreement. Without the seller's subordination, the buyer probably would not be able to procure an acquisition and development loan. The purchase-and-sale contract will usually require the seller to execute documents the lender later requires affirming the automatic subordination.

An optional subordination occurs when the seller makes no promise to subordinate at the time the purchase-and-sale agreement is entered, or promises in the agreement only to subordinate to a construction loan satisfactory to the seller.

Subordination by recordation occurs when the seller specifically allows the construction lender to record the construction loan ahead of the security interest by which the buyer's promise to pay the balance due for the land.

The buyer would prefer an automatic subordination under which no further discretionary action by the seller is required. Automatic subordination agreements usually specify the seller's acceptable range for each crucial term of the new loan without limiting the buyer to loan terms that may be unavailable -- the amount of senior debt the buyer may incur, the uses to which those loan proceeds may be put, the way the construction funds are to be monitorred. n72

The optional subordination agreement gives the seller the opportunity to review the buyer's development proposal and

financing plans, and then decide whether it is willing to subordinate or not. Some sophisticated sellers of development land insist upon this format. If they do not like the developer's proposal, they refuse to subordinate. They refund the developer's down payment under the contract, and terminate the land sale contract. If they like what the developer proposes, they subordinate to the land acquisition and construction loan, and go forward with the contract.

Drafting Subordination Agreements to Protect the Senior Lienor. "Subordination is a term widely used in real estate law but is not generally defined and not always fully understood ... The paucity of case law, particularly in defining the term subordination, underscores the importance of spelling out in the documents, in more normal detail, what is intended by the parties." n73

A thoughtful lender, expecting the seller to subordinate its purchase money loan to the senior lienor's security interest, may desire certain rights and require certain actions on behalf of the junior lienor before default. With respect to rights, the senior lender would want the ability to: (1) amend, modify, blanket, split and extend the first mortgage without losing the benefit of subordination; (2) alter the project, grant easements, dedicate streets or agree to subdivision conditions without the consent of the junior lienor; (3) advance funds in the future and keep its senior lien priority for funds advances; (4) receive any insurance proceeds and condemnation awards payable to the junior lienor to reduce senior debt; (5) purchase, without obligation, the junior lien by paying it off in full; (6) send notices to the borrower without providing copies to the junior lienor; and (7) maintain a lien superior to the junior lienor's irrespective of the junior lienor's payment of taxes or insurance premiums on the borrower's behalf. n74 With respect to obligations of the junior lienor, the senior lender would require the junior lienor to:

(1) give the senior lender copies of any notices sent to the borrower;

(2) provide estoppel certificates and beneficiary statements indicating how much is owed on the junior debt;

(3) grant to the senior lienor a right of first refusal to purchase junior;

(4) not accept any prepayment of debt before the first mortgage is paid in full; and

(5) ensure that all future holders of its lien agree to maintain all the protections of the senior lienor which the seller has agreed to. n75 In the event of default, the senior lienor would want:

(1) a default on the junior lien to be regarded as a default on the senior lien; and

(2) an agreement whereby the junior lienor will not foreclose or exercise any other right on the borrower's default without first notifying the senior lienor. n76

Drafting Subordination Agreements to Protect the Seller. A pro-seller subordination agreement strictly limits the amount, cost, timing and uses of borrower funds. The goal is to make sure that the value of the site is enhanced at least one dollar for every dollar to which the seller subordinates. Ideally, the seller would want to:

(1) restrict the uses to which development financing may be put -- to construction of the project on the seller's site;

(2) limit its subordination to institutional lenders;

(3) cap the amount to be subordinated;

(4) require the holder of the senior lien to provide notice of defaults; and

(5) have the opportunity to cure defaults. n77

Limits on Buyer's Right to Enforce Seller's Automatic Subordination Promise. Some land sellers, after contracting to subordinate, get cold feet and refuse to execute the necessary documents implementing their promises to subordinate. When sellers go back on their word, they may provoke developers into suing for specific performance or the subordination agreement.

If the loan doesn't conform to the explicit terms of the subordination agreement, the seller wins. n78 But what if the subordination agreement doesn't specify any details about the construction loan to be obtained? A naive seller who signed a subordination agreement and fails to condition the subordination is begging to lose the security.

In sympathy, California courts have generally protected sellers from subordination agreements which were either vague in not specifying how much the buyer could borrow at what rate of interest, or failed to place enforceable limits on how the borrowed funds could be used (in order to make sure they went into improvements on the site and not into the borrower's pocket or her other projects). n79

In *Handy v. Gordon*, n80 the subordination agreement set the maximum allowable loan as an amount per lot. Since the developer could divide the land into however many lots he wanted, there was really no ceiling on the amount of loan allowed. The California Supreme Court noted that if the developer divided the property into one-acre lots, the construction loan could total $3,200,000, whereas if the developer chose 3-acre lots, the loan could total $12,000,000. Additionally, the agreement set no limits as to how the developer could use loan proceeds not needed for construction. Refusing to enforce the agreement, the court concluded that "the contract leaves [the seller] with nothing but [the buyer's] good faith and business judgment to insure them that they will ever receive anything for conveying their land. Such a contract is not as to them 'just and reasonable'...."

In *Troj v. Chesebro,* n81 a Connecticut court declared a subordination clause unenforceable for failing to meet the Statute of Frauds requirement of "plain and precise" language. The clause litigated in that case provided the purchase money mortgage "will be subordinate to land development and construction mortgage." n82 The subordination agreement provision was unenforceable because it was "silent with respect to the amount, terms, interest rate and date of maturity of the [subsequent loans]." n83 In fact, the plaintiff in *Troj* was denied any relief, legal or equitable, because the Statute of Frauds demands that "no action can be maintained for the direct enforcement of any agreements which is within the statute, and no damages can be recovered for its breach." n84

A similar result obtained in Florida under a "clear, definite and certain" test derived from contract law principles. In *Lasseter v. Dauer*, n85 a Florida court denied specific performance of a sales contract because, *inter alia*, the subordination clause of the contract stated that "Seller agrees to subordinate this mortgage to allow additional financing" n86 but the "nature or purpose of such financing, or the amount or limits thereof are not stated in the contract." n87

Some states are less protective of subordinating sellers than California. In Vermont, a subordination agreement was enforced by the buyer of an inn although the agreement didn't specify any details of the construction loan except that it would be used for capital improvements. The court held that since the seller intended the buyers to rely on the subordination agreement and they did, the seller was equitably estopped from denying or refusing to sign it. n88

A lender who doesn't want to take the chance that the court will protect the seller might prefer to avoid the subordination agreement format altogether. Instead, the parties could simply agree to record the construction lender's deed of trust before the seller's. Recording act principals give lien priority to the lender who "first duly records." However, in most states the lender only enjoys that priority who is a bona fide purchaser -- paid value for its position and had no notice of the earlier unrecorded claim. So the seller whose deed of trust is recorded second might still have a

lien superior to the lenders. If the lender knew about the seller's security interest, the lender would not qualify as a bona fide purchaser, and would not be entitled to protection under the recording acts. However, if there were a foreclosure of the acquisition and development loan, a third party purchaser at the lender's foreclosure sale might have an interest superior to the land sellers' under recording act cases in many states assuming the purchaser were truly a bona fide purchaser. Disregarding strict application of recording act principles, some courts treat the lender and the land seller in this situation as if the land seller *had* signed a subordination agreement. In doing so, they often scrutinize the subordination arrangement to see if it treats the subordinating land seller fairly. n89

Suppose the buyer defaults on his construction loan. The lender forecloses. In such a case the *seller*, who had signed a vague or unfair subordination agreement, might sue this time, seeking a declaration that the seller's lien has priority over the *lender*'s despite the subordination agreement, because the *buyer* couldn't have gotten specific performance of it. In this situation the courts are more likely to side with the lender:

> Relying on *Handy v. Gordon*, plaintiffs contend that the subordination agreement was unenforceable because it did not spell out the terms of the note and trust deed to which it was being subordinated. However, that case is of no help to plaintiffs here. *Handy* was a suit for specific performance, not a foreclosure. It denied specific performance because the Supreme Court held that, because of the uncertainty, *specific performance* was barred... That is not a holding that a subordination clause such as is herein involved is not enforceable by other means. n90

The *Schneider* case draws a distinction between the rights of a seller against the buyer with whom she entered a subordination agreement and her rights against the construction lender. The seller doesn't have to sell to a buyer who needs subordination. Once the seller signs a subordination agreement she can't invoke its vagueness or unfairness as a defense to the construction lender's foreclosure.

The rationale is equitable estoppel. The lender, advancing funds in good-faith reliance on a subordination agreement, is allowed to retain the lien priority the seller, from all appearances, granted. Sellers are estopped from denying their own subordination agreements in priority disputes with third-party lenders. n91 Unlike the buyer, the lender did not lure the seller into signing a "blank check" promise, and the lender advanced substantial funds relying on the seller's promise while most buyers using subordinated vendor financing have little cash at risk.

Even a vague subordination clause which would not, in all likelihood, be specifically enforceable by the buyer, was deemed sufficiently clear for the lender to obtain lien priority in foreclosure in *Hyatt v. Maryland Federal Savings and Loan Ass'n*. n92 The clause: "[t]his mortgage will be subordinated to bona fide ground development and construction loans."

Only in New Jersey, so far, are lenders disadvantaged in the same way as buyers for relying on a seller's vague subordination agreement. In *B.J.I. Corp. v. Larry W. Corp.* n93 a New Jersey court held that general, blanket subordination clauses are "ineffective to elevate the lender, whose advances were not used to benefit the property of the subordinator, to a position of priority, unless the clause was bargained for and its consequences fully understood by the subordinating party." n94

Lender is Bound By the Terms of the Subordination Agreement. Note, however, that the lender can only rely on the subordination agreement if it meets the agreement's terms. If the lender had disbursed funds contrary to the terms of the subordination agreement, it would lose its lien priority for those improper disbursements. n95 Furthermore, the lender is charged with inquiry notice of the exact terms of the subordination agreement by merely knowing that such an agreement exists whether the lender has a copy of the agreement or not, and whether or not the agreement was recorded. n96

Seller's Remedies Against the Lender for Improper Disbursement of Loan Proceeds. When the terms of the

subordination agreement are breached and the lender has disbursed funds improperly, courts wield three distinct remedies.

(1) The lender could have its lien priority subordinated to the seller's. There is some disagreement among courts whether this remedy is appropriate when the terms of the subordination agreement were implied in law (written in by courts after the fact). Some judges have thought the lien priority reversal should be used only in cases where the lender had actually agreed to the terms of the subordination (the terms weren't court imposed), and the lender ignored them. n97

Other judges have thought that institutional lenders could as reasonably be expected to request a copy of the subordination agreement when the agreement wasn't recorded as to ask a title company for a copy when it was. n98

(2) The lender could have its lien priority subordinated to the seller's lien but only to the extent of the sum disbursed improperly. Suppose the subordination required all funds in a $1 million loan to be used for construction on the seller's land. But the lender gave the buyer/borrower $100,000 for non-construction purposes. Under this remedy the lender would lose its lien priority for $100,000 but retain it for the $900,000 that was properly paid out. Under the first remedy the lender would lose its lien priority for the entire $1 million.

(3) The lender could retain its lien priority, and the subordinating seller could be given a claim for money damages up to the amount of the improperly disbursed funds. Thus, suppose the security property was worth $1,500,000 and the seller's subordinated loan was for $550,000. If the lender had a $1,000,000 secured loan to which the seller had subordinated, the lender would be able to foreclose and pocket the first $1,000,000 of foreclosure sale proceeds. Assuming the property yielded its full value at foreclosure of $1.5 million, this would leave $500,000 for the seller. The seller would be short $50,000. If the lender had disbursed $100,000 contrary to the terms of the subordination, the seller would be able to recover its actual loss up to $100,000. In this case, that would be $50,000. n99

Lenders, of course, who want first liens insist that sellers sign remedy waivers. Typical is this one: "Any application or use of Construction Loan funds, for purposes other than those provided for in the Construction Loan agreement, shall not defeat, alter or invalidate the lien of the Construction Trust Deed in whole or in part."

That was the language the lender used in *In re Sunset Bay Associates.* n100 The Ninth Circuit held that the disclaimer applied to diversions of funds. But it didn't specifically exonerate the lender from charging a loan fee of more than two points, another limitation in the subordination agreement. After this decision we can expect lenders' counsel to go back to their PCs and whip out a more inclusive disclaimer for future use.

Some lenders are protecting themselves another way against the risk that one of their loan disbursements might violate the terms of a subordination agreement. They subtract the subordinated seller's lien from the amount they lend. Then even if they make an improper disbursement, their desired loan-to-value ratio remains intact. For example, assume the senior lender were wanting to limit its loan-to-value ratio to 70%. The property is worth $2,000,000. The lender might loan up to $1,400,000. But if the sellers were taking back a subordinated purchase money loan for $300,000, the lender will only lend $1,100,000. Where lenders do this, subordinated financing is far less attractive to developers. The result of these seller-protective subordination cases is that California courts, trying to protect sellers from unfair subordinations, may have ended up removing the option of subordinated seller financing altogether. This works to the detriment of knowledgeable land sellers prepared to take the risks of subordination in exchange for a bigger purchase price.

Subordination by a Home or Condo Buyer to the Developer's Construction Loan. Just as the developer could

borrow from a land seller by deferring payment of the land purchase price, the developer can also borrow from home or condo buyers by using their down payments to build the project. The condo or home buyers will be asked to subordinate their purchase-and-sale agreements to the construction lender's mortgage.

Here is a subordination provision from the purchase-and-sale agreement for a condo not yet constructed:

> Seller may borrow money to construct the Condominium. Buyer agrees that any lender advancing funds to Seller for Seller's use in connection with the Condominium will have a prior mortgage on the Unit and the Condominium until closing. At that time, Seller may use all the proceeds of Buyer's purchase which are necessary to release the Unit from the then applicable mortgages for the purpose of obtaining those releases. Neither this agreement, nor Buyer's payments of their Deposits, will give Buyer any lien or claim against the Unit of the Condominium. Without limiting the generality of the foregoing, buyer's rights under this agreement will be subordinate to all mortgages (and all modifications made to those mortgages) that secure the advancement of construction funds, whether made or recorded before or after the date of this agreement.

§ 85.05(c) Partial Release Clauses.

Definition. A developer who finances the site acquisition with a loan secured by a mortgage or deed of trust on the entire project site will not be able to retail individual lots free of the lien unless she reserved a "partial release" right in her contract or loan agreement. No informed lot purchaser or homebuyer would pay $200,000 for a house subject to a mortgage or other lien of $3,250,000 which could be foreclosed at any time unless it is paid off. Yet that is the specter raised by land acquisition security interests. These are called "blanket" encumbrances because they cover the whole site. n101 The requisite release provisions are called partial releases because the parties contemplate the blanket being removed from individual lots as they are sold to individual lot or homebuyers, and the loan being partially repaid from lot sales proceeds. n102

What happens when a seller-financier provides no chance for partial payments? Here is a sad story from Miami Beach. In an old and worn-out hotel, there lived dozens of retirees, mostly on modest, fixed incomes. The hotel owners sold, taking back a big mortgage. Their buyers got the bright idea of selling long-term leases to individual rooms and scooping up whatever life savings the tenants could fork over for their cheap leases (all unrecorded, by the way). After selling a good number of these leases, the buyers of the hotel disappeared, and defaulted on the purchase money blanket mortgage. The creditors initiated foreclosure. The tenants had the choice of losing their residences, paying current market rents for them, or coming up with enough money to pay off the blanket encumbrance.

In agreeing to a partial release clause the seller doesn't want to be left with a landlocked parcel, one so small it can't be legally subdivided. Also, if the developer appreciates the riskiness of land development, the developer may be eager to recoup as much as possible of the unpaid purchase price from the first lot sales. At a minimum the developer expects to avoid a deterioration in the effective loan-to-value ratio, so must release individual sites only on payment of sums ample to compensate for the security being released. This is easy when each site in a subdivided tract is of equal value. A simple formula by which the vendor releases a site for 110-120% of its pro rata value will usually work satisfactorily for the seller. When the sites aren't of equal value, a schedule of release prices lot-by-lot or an agreement about the sequence of releases (the least valuable sites being released first), does the job.

Partial release clauses usually bar release if the mortgagor is in default, require the developer to pay the costs of effecting the release (loan escrow and recording fees), and assure payment concurrent with the release.

An institutional lender who holds a blanket encumbrance will usually condition partial releases with these requirements:

1. Survey of entire property encumbered by the deed of trust (or mortgage) showing the parcel to be

released ("Release Parcel") and the parcel to remain ("Remaining Parcel").

2. Opinion of counsel or other evidence, satisfactory in form, scope, and substance to Institution that the Remaining Parcel, without taking into account the Release Parcel, or any other property will (a) comply with and not be in violation of any zoning, subdivision, environmental, or other law, rule, or regulation of any authority having jurisdiction over the Remaining Parcel, and (b) be assessed as a separate tax parcel or lot with separate billing for the same.

3. Unless otherwise specifically approved by Institution, such easements, in form, scope, and substance satisfactory to Institution, as Institution determines to be necessary over, on, and across the Release Parcel to provide the same pedestrian and vehicular access and other uses to the Remaining parcel as existed prior to the release of the Release Parcel. Any such easements shall be included as appurtenances under the deed of trust (or mortgage).

4. An indorsement to Institution's title policy insuring its deed of trust (or mortgage) on the subject property which shall extend the effective date of the policy to the date of the recording of the partial reconveyance and any modification of deed of trust (or mortgage) instrument necessary to encumber such easements as may be required under item 3. No additional exceptions to the title policy unless the same are specifically approved by Institution. The indorsement must be in the form, scope, and substance satisfactory to Institution.

5. The borrower shall not be in default under the loan secured by the deed of trust (or mortgage) and shall provide Institution an estoppel certificate, in form, scope, and substance satisfactory to Institution, that the loan is current and the borrower has no claims or defenses to its obligation to pay the same.

6. The release price shall be applied first to all sums due under the deed of trust (or mortgage), then to accrued interest, and then to the unpaid principal balance of the loan.

7. The entire transaction shall be completed at no expense to Institution. n103

Developers would much prefer to reserve for themselves the right to determine the sequence of lot releases. They would also prefer the lender or seller to release free of charge land that the local government requires for public easements. Naturally, developers have no trouble sleeping comfortably when the most valuable sites are released first even if that means the lender's or seller's security interest has been dissipated. The lender and seller each must look out for themselves in structuring the sequence of releases.

The developer has one cogent argument for the seller to keep release prices "reasonable." The developer needs enough cash left over to meet the continuing obligation to complete the land improvements and market the project. A too-aggressive release payment schedule can leave the developer stranded with insufficient liquidity. That could lead to insolvency, which benefits neither seller nor developer.

§ 85.05(d) Land Development Loans.

It isn't easy to finance non-income producing activity, so a developer will be lucky to find a lender willing to advance even half the site and early development costs. Such loans usually have low loan-to-value ratios, 50% being typical. Lenders often expect developers to guarantee these loans personally in recognition that the site might not be readily saleable in foreclosure.

The land development loan won't be repaid until the site is subdivided and individual lots are sold. Timing uncertainties are so common in development that land development loans often contain extension agreements requiring the developer

to pay additional fees for extending the loan term. Fund disbursement is usually keyed to the developer's schedule of site improvements, and her satisfactory completion of each portion of the work on schedule and within budget. Land development lenders usually review the important contracts the developer enters for major site work components, and insist that significant contractors be bonded to assure timely performance of their obligations.

If the developer's estimates of revenue and costs are accurate, and the lender's release clause payment schedule is realistic, the land loan will be repaid as the lots are sold.

The following example is offered by the general counsel of an institutional lender of how a land loan repayment might work.

> A buys parcel Y from B for $1 million. A puts down $200,000 in cash, borrows $500,000 from Institution, and B takes back a $300,000 second mortgage. [A gives B all $500,000 of the Institution loan proceeds.] Under this scenario A would have to pay debt service on both loans. However, if A borrows $600,000 at 10% per annum from Institution, Institution will advance A $500,000 for the purchase and advance the remaining $100,000 as needed to enable A to pay the debt service on Institution's loan -- the $100,000 being the Institution's and A's estimate of the carrying cost of the loan assuming partial releases and paydowns. For example, if the loan provides for the land to be sold or developed in five parcels over a 3-year loan term, with each release A would pay Institution $100,000 to reduce the loan. n104

If A paid institution only $100,000 as she sold each of the five parcels, this would leave the developer owing B, the seller, $300,000, and Institutional lender $100,000 (assuming the developer borrowed the $100,000 to cover interest payments on the $500,000 Institutional loan). Why isn't this an advantageous release payment schedule for the institution? The seller?

§ 85.05(e) Joint Ventures.

Since acquisition and development loans are so risky, land sellers or lenders may prefer to be joint venturers or partners with the developer. If the seller or lender is taking the greater share of the risk, why not reserve a big share of the profits and exercise some control over the developer's use of the investor's funds?

The typical real estate development joint venture is formed between an experienced developer and an institutional investor with the investor acting as money partner, and the developer as managing partner. The precise forms of organization among which they might choose -- partnership, limited partnership, corporation -- are described in Chapter 16 of these materials.

Their agreement will specify who is to control major project decisions, how and when funds are to be disbursed, what expenditures may be funded from the money partner's contribution, how cost overruns are to be funded, whether the developer can be involved in competing projects, how profits and losses are to be shared, and limits on the sale or assignment of joint venture interests.

§ 85.05(f) When a Loan in Form Becomes a Joint Venture in Fact, and Vice Versa.

It isn't always easy to tell whether an agreement is a joint venture or a land acquisition loan. courts can sometimes be persuaded to disregard the form of documentation and instead analyze the reality of the relationship when the form and reality aren't the same.

The *Restatement (Second) of Agency* § 140 converts a lender into a partner who exercises "control of his debtor's business for the mutual benefit of himself and his debtor." One thoughtful commentator, Professor Dennis Hynes, argues that "control" should not be the only test of when a lender becomes liable as a principal. He urges that courts

should, and often do, take into account such factors as whether the lender shares profits, whether control is exercised mainly to impose financial responsibility in a poorly-run debtor company, whether the controlling lender made things better or worse for other creditors, and whether the lender could have realized that its decisions affecting management carried it outside its role as a lender. n105

The other tests to distinguish a joint venture from a loan aren't imbedded in concrete either.

> A joint venture is an association of two or more persons formed to carry out a single business enterprise for profit, through the combination of their property and services. A joint venture exists when an express or implied contract providing for (1) a community of interests, and (2) joint or mutual control, that is, an equal right to direct and govern the undertaking, binds the parties to such agreement. Neither criterion is dispositive of the point, however. The joint venture agreement must provide for sharing profits but it need not distribute them equally. Sharing of losses, if the losses involve only time and labor, need not specifically be in the joint agreement. Distribution of other losses and expenses may be implied from the manner in which profits are to be shared. Where it is the intent of the parties for all co-venturers to be subject to the risks of the business, a joint venture exists even though one co-venturer contributes capital and secures his condition with a note. Finally, a joint venture is similar to a partnership except a joint venture contemplates only a single business transaction. A partnership, on the other hand, is formed for general business of a particular kind. n106

A defaulting borrower may claim the lender exercised so much control over the business as to have become a joint venturer. If the borrower succeeds in this claim, the borrower will be able permanently to stay foreclosure (since the lender's "mortgage" will have become a partnership stake). The borrower may also succeed in pushing some of the venture's losses to the lender. n107 If the venture succeeds, the "lender" may claim joint venture or partnership status to share the profits.

A money "partner" would prefer to be a secured lender and not a co-owner when the partner wants bankruptcy priority over unsecured creditors. A secured lender whose interest is recast as that of a joint venturer becomes subordinated to the claims of unsecured creditors and liable jointly and severally along with the developer n108 for claims by homebuyers for construction defects. If the *developer's* sales agent lied to prospective purchasers to help close sales, the money partner would be jointly liable in fraud as a partner but free of liability as a lender.

The Statute of Frauds and the parol evidence rule would seem to bar these attempts to convert one sort of interest into another. Mortgages have to be in writing as they are interests in land. Oral statements can't be used in court to vary the terms of a written instrument. However, fraud and estoppel sometimes justify exceptions to the Statute of Frauds. So do other statutory and common law goals -- usury laws and redemption rights among them. And oral testimony may be admissible to explain ambiguities in a document or provisions collateral to it. Once these suits reduce to questions of fact, settlement may look inviting.

§ 85.05(g) Special Assessment Bond Financing.

Traditionally, local governments financed some improvements like streets, sidewalks, and street lights by forming taxing districts within the boundaries of the property to be benefited by the improvements and levying a special property tax against each lot in the district. In some states it is possible for a developer to initiate the formation of such a district with the approval of the county or city issuing bonds for improvements within the district. Under California law, for instance, a community facilities district may be formed to sell bonds secured by future property tax revenues to pay not only for streets and sidewalks but parks, schools, fire and police stations, jails, juvenile halls, ambulance and paramedic facilities and services, school sites, libraries, utility infrastructure, and other improvements. n109

When California developers acquire large vacant sites, they sometimes find this form of financing attractive. It enables

them to raise bond proceeds to pay for site improvements.

After a noticed public hearing and local government approval, a two-thirds vote of the qualified electors is necessary to approve the maximum tax rate to be applied in the district. If the site has fewer than twelve residents, the owners of property in the proposed district vote in proportion to their acreage.

The rate of tax is based on the amount of benefit each parcel will receive from the proposed improvements. The tax is collected by the county tax collector along with all other property taxes due. These bonds usually include a reserve fund to provide for debt service until the property in the district is improved, subdivided and sold to individual lot buyers. By scheduling the sale of bonds to mesh with the actual use of funds, and marketing the bonds to get the best rate, financing costs can be kept to a minimum. Good brokers are available to advise developers on these details. n110

Home or lot buyers in the district are expected to repay the debt in annual taxes. These special assessments can be quite steep -- and may be scheduled to rise over time. Under the laws of a few states, California among them, prospective buyers must be notified of this liability. n111

In the early years of this type of bond financing, few buyers seemed to appreciate the impact these assessments could have on their monthly housing cost.

As homebuyers became sensitive to the special property tax assessments they had to pay for infrastructure bonds, some developers who weren't using them began to advertise that fact. Apparently, homebuyers are catching on.

Some homebuyers might nonetheless prefer the special property tax assessment to the higher mortgage payments that would result if the costs of improvements weren't bonded but got passed to homebuyers as an increase to the house price. Interest rates on home mortgages are usually higher than on special assessment district bonds. Interest from such bonds is usually exempt from federal and state income taxes. So bonds bear lower interest rates than mortgages.

Special assessment bonds are quite risky for the investor -- the bond buyer -- because the local government doesn't pledge its "full faith and credit" to repayment. The investor depends entirely on property tax special assessments, hoping that the development project will succeed, houses will be built, and the new homeowners will pay their taxes. Should the project fall short of expectations, the bondholders will get stuck foreclosing on a partially developed site, the value of which may be insufficient to repay the sums they invested. n112

For example, consider the plight of Nevada County, California. In December of 1990, the county issued $9.7 million in Mello-Roos bonds to facilitate the development of a 384-unit project. As with other Mello-Roos bonds, the proceeds were to pay for the sewer, water and other utilities of the subdivision. Initially, all went well as Phase One construction on 103 lots was completed by 1991. However, the developer experienced financial difficulty in 1992 and failed to pay property taxes. The bonds fell into default in late 1992. After the county and the bank instituted foreclosure proceedings, the developer filed for bankruptcy. Eventually, the bankruptcy court permitted the bank to foreclose on the property and title was passed to the bank in December of 1993. To this day, the county and the bank are working together to sell the property and restructure the debt. In fact, one developer recently paid the county $751,000 for twenty-five lots with an option to acquire additional lots. With these proceeds, the county cured a two-year default on the bonds.

Tragically, the county's problems do not end merely with the default of the Mello-Roos bonds. In late 1994, the SEC contacted the county regarding possible violations of federal securities laws. In citing the failure of the county to disclose the structure and security of the bonds, SEC enforcement attorneys have notified the county of its intentions to recommend that the SEC file civil fraud charges. Although the SEC would have to prove either actual fraud or extreme recklessness to establish guilt, the mere possibility of such a penalty may chill further issuance of such bonds in the country. n113

Mello-Roos and Environmental Impact Statements. Local agencies are required to prepare environmental impact reports for projects which may have a significant impact on the environment. However, this requirement is limited to projects which are a necessary step in the chain of events which would culminate in a physical impact on the environment. As a result, the mere formation of a Mello-Roos district does not necessitate the preparation of environmental impact reports. n114

FOOTNOTES:

(n1)Footnote 54. As part of the Financial Institutions Reform, Recovery and Enforcement Act of 1989, Congress required all bank regulators to establish "uniform accounting standards for determining the capital ratios of all federally insured depository institutions." Acting within the scope of that authority, the Board of Governors of the Federal Reserve System adopted capital standards for banks. *56 Fed. Reg. 44,084.* Among them is an assignment "to the 100 percent risk weight category" for "real estate development and construction." *Id.* at 25.

(n2)Footnote 55. Usually, lenders foreclosing on undeveloped sites lose millions. *But see*, F. Anthony Orbe, *Lessons Learned the Hard Way: The Land Loan That Helped Shape Met Life's Strategy*, 6 Real Est. Fin. 29 (Summer 1989), where Met Life saved a $10 million loan by patiently developing the site itself and eventually making a bundle.

(n3)Footnote 56. *See* Hynes, *Lender Liability: The Dilemma of the Controlling Creditor, 58 Tenn. L. Rev. 635 (1991);* John C. Murray, *Recharacterization Issues In Real Estate Transactions*, 423 PLI/Real 223 (Nov. 1997); Billie J. Ellis, Jr. & Drew G. Alexandrou, *Negotiating And Documenting Real Estate Loan Transactions -- Comm'nly Negotiated Provisions (With Forms)*, 1 SB74 ALI-ABA 16 (May 15 1997) (Elements of Lender Control).

(n4)Footnote 57. For a state-by-state review of the remedies available under installment sales contracts, *see* Baxter Dunaway, The Law of Distressed Real Estate (Clark Boardman, 1985-1992). *Compare Burgess v. Shiplet, 750 P.2d 460 (1988)* (trial court prohibited from treating contract for deed as a mortgage and granting defaulting purchasers mortgage redemption right) *with Purcell v. Williams, 511 So. 2d 1080 (Fla. 1987)* (vendors denied damages against defaulting purchasers when court found that the sales contract was in fact a security transaction. Sellers were limited to remedies available to mortgages regarding deficiencies).

Compare In re Czel, 202 B.R. 778 (Bankr. D. N.M. 1996) (Forfeiture of real estate contract between vendors and debtor-purchaser and spouse did not shock bankruptcy court's conscience, so as to make forfeiture provision unenforceable under New Mexico law, and therefore transfer, falling within safe harbor for regularly conducted noncollusive forfeitures, was for reasonably equivalent value and was not avoidable as fraudulent transfer; although, under original contract, down payment was one-fifth of purchase price, time period for balloon payment was five years, property was raw land, there was no persuasive evidence of collusion between vendors and debtor and her spouse, vendors did not receive windfall due to equity in property at time of forfeiture, and appreciation of property alone was not enough to shock court's conscience) *with In re Heward Bros., 210 B.R. 475 (Bankr. D. Idaho 1997)* (Under Idaho law, if upon default by purchaser, equity subject to forfeiture under installment land contract exceeds vendor's reasonable damages suffered on account of purchaser's breach, contract must be foreclosed in same manner as mortgage through judicial sale); *Nelson v. Gurley, 673 N.E.2d 497 (Ind. App. 1996)* (purchaser's payment of 44.4% of land contract price was payment of "substantial amount," making forfeiture for breach of contract inappropriate).

(n5)Footnote 58. *See, e.g.*, Cal. Fin. Code § 1227 (for commercial banks); Cal. Fin. Code § 1560 (for trust companies).

(n6)Footnote 59. *See, e.g.*, Cal. Civ. Code § 2898; Idaho Code § 45- 112.

Atlantic Bank of N.Y. v. Forrest House Holding Co., 651 N.Y.S. 2d 607 (N.Y. App. Div. 1996) (if a lender fails to comply with the requirements of the Lien Law, its entire mortgage, including that part securing loan proceeds advanced for the purchase of the property, would become subordinate to any subsequently filed mechanics' liens).

(n7)Footnote 60. Hugh B. Lambe, *Enforceability of Subordination Agreements*, 19 Real Prop. Prob. & Trust J. 631, 632 (1984).

(n8)Footnote 61. *See* Harry D. Miller et al., *Subordination Agreements in California, 13 UCLA L. Rev. 1298 (1966);* Billie J. Ellis, Jr. & David P. Derber, *Senior Creditor/Subordinate Creditor Agreements*, SA80 ALI-ABA 359 (Mar. 1996).

Swiss Property Mgmt. Co., Inc. v. Southern Cal. IBEW-NECA Pension Plan, 70 Cal. Rptr. 2d 587 (Cal. App. 1998) (California Land Title Association (CLTA) form subordination agreements, signed by vendors without modification in conjunction with lender's deed of trust, superseded specific terms of subordination riders to vendors' deeds of trust, so that lender, not vendors, had first priority position; vendors' execution of CLTA agreements made clear that purchasers' loan depended upon execution of agreements, that agreements superseded prior agreements relating to subordination, and that lender would not supervise disbursement of loan proceeds).

(n9)Footnote 62. Patrick J. Rohan, *Real Estate Transactions*, 4 Real Estate Financing 3A-11, 3A-12 (1977).

Pawling Sav. Bank v. Jeff Hunt Properties, Inc., 639 N.Y.S. 2d 462 (N.Y. App. Div. 1996) (Mortgage that lender obtained to secure lump sum advance which it made to enable developer to pay off its land acquisition expenses did not qualify as "building loan mortgage," within meaning of subordination clause in prior mortgage indicating that this prior mortgage would be subordinate to any land site development or building loan mortgages on property).

(n10)Footnote 63. *606 P.2d 1009 (Kan. 1980).*

(n11)Footnote 64. *Id. at 1016-17.*

(n12)Footnote 65. *Cameron v. Churchill Mfg. Corp., 290 S.E.2d 474 476 (Ga. 1982).*

(n13)Footnote 66. *See Miller v. Wines, 554 N.E.2d 784, 788-89 (Ill. App. 1990).*

(n14)Footnote 67. *See Metrobank for Savings v. National Community Bank of N.J., 620 A.2d 433, 436-38 (N.J. Super. 1993); East Lansing State Bank v. Red Cedar Constr. Co., Inc. (In re Red Cedar Constr. Co., Inc.), 63 B.R. 228, 241 (Bankr. W.D. Mich. 1986)* (holding that the bank's letter to the debtor expressing its willingness to subordinate is insufficient to establish a contract to that effect). *But see North Ga. Sav. & Loan Ass'n v. Corbell, 339 S.E.2d 779 (Ga. App. 1986)* (holding that oral subordination agreements by the senior lienholder are not within the Statute of Frauds and may be either written or oral).

(n15)Footnote 68. *See Poyzer v. Amenia Seed & Grain Co., 409 N.W.2d 107 (N.D. 1987)* (holding that the oral subordination agreement was removed from the operation of the Statute of Frauds on grounds that there was evidence that the lender loaned the funds on the premise that they would have received a first mortgage on the property).

(n16)Footnote 69. *See Community Title Co. v. Crow, 728 S.W.2d 652 (Miss. App. 1987)* (holding that the subordinator had previously communicated his willingness to subordinate his interest and that the bank would have excepted such interest were it not for the subordination); *First Conn. Small Business Inv. Co. v. Arba, Inc., 365 A.2d 100 (Conn. 1976)* (holding that the alleged subordinator induced another party to believe certain facts and act in a manner it would not have otherwise were it not for those facts).

(n17)Footnote 70. *See Mihalko v. Continental Bank & Trust Co. (In re Mihalko), 87 B.R. 357 (Bankr. E.D. Pa. 1988)* (holding that the party's letter to its settlement clerk instructing the clerk to delay the recordation of its mortgage so as to allow another party to record first constituted an enforceable subordination agreement).

(n18)Footnote 71. *See Republic Nat'l Life Ins. Co. v. Lorraine Realty Corp., 279 N.W.2d 349 (Minn. 1979)* (holding enforceable a subordination agreement which lacked specificity on grounds that the agreement had been used

and relied upon by the parties for over fourteen years).

(n19)Footnote 72. Patrick J. Rohan, *Real Estate Transactions*, 4 Real Estate Financing 3A-11, 3A-12 (1977).

(n20)Footnote 73. Anthony B. Kuklin, *Counseling the Client on Subordination and Intercreditor Agreements*, 11 Prac. Real Est. Law 11-12 (November 1995). *Bissonenette v. Wylie, 693 A.2d 1050 (Vt. 1997)* (mortgagees' failure to obtain sureties' consent before discharging mortgage was breach of standard of reasonable care in preserving collateral).

(n21)Footnote 74. *Counseling the Client* at 14-16.

(n22)Footnote 75. *Id.* at 17-18.

(n23)Footnote 76. *Id.* at 16-17.

(n24)Footnote 77. Rohan, *Real Estate Transactions*, 4 Real Est. Fin. 3A-11, 3A-12 (1977).

(n25)Footnote 78. *Guarantee Bank v. Magness Constr. Co., 462 A.2d 405 (Del. Super. 1983); Riggs Nat'l Bank v. Wines, 474 A.2d 1360 (Md. App. 1984), cert. denied, 481 A.2d 802; Gluskin v. Atlantic Sav. & Loan, 108 Cal. Rptr. 318 (1973); Miller v. Citizens Sav. & Loan Ass'n, 56 Cal. Rptr. 844 (1967); Jones v. Sacramento Sav. & Loan, 56 Cal. Rptr. 741 (1967); Ruth v. Lytton Sav. & Loan, 108 Cal. Rptr. 318 (1973).*

(n26)Footnote 79. *422 P.2d 329 (Cal. 1967)* (court held that an enforceable subordination clause must contain terms that will define and minimize the risk that the subordination liens will impair or destroy the seller's security). *See also Stenehjem v. Kyn Jin Cho, 631 P.2d 482 (Alaska 1981); Middlebrook-Anderson Co. v. Southwest Sav. & Loan Ass'n, 96 Cal. Rptr. 338 (1971)* (court held that even where a subordination agreement does not contain any express limitation on the use of loan proceeds, there is an implied condition that the funds will only be used for construction).

(n27)Footnote 80. *422 P.2d 329 (Cal. 1967).*

(n28)Footnote 81. *296 A.2d 685 (Conn. Super. Ct. 1972).*

(n29)Footnote 82. *Id. at 685.*

(n30)Footnote 83. *Id. at 686. Smith v. Martin, 478 S.E.2d 228 (N.C. App. 1996)* (subordination agreements and clauses which subordinate loan obligations secured by deed of trust to future loans must, as minimum requirement to their enforceability, state the maximum amount of future loan and the maximum rate of interest permitted on loan).

(n31)Footnote 84. *Troj, 296 A.2d at 686.*

(n32)Footnote 85. *211 So. 2d 584 (Fla. 1968).*

(n33)Footnote 86. *Id. at 584.*

(n34)Footnote 87. *Id.*

(n35)Footnote 88. *Campbell Inns v. Banholzer, Turnure & Co., 527 A.2d 1142 (Vt. 1987).*

(n36)Footnote 89. *Middlebrook-Anderson Co. v. Southwest Sav. & Loan Ass'n, 18 Cal. App. 3d 1023, 96 Cal. Rptr. 338 (1971).*

(n37)Footnote 90. *Schneider v. Ampliflo Corp., 196 Cal. Rptr. 172 (1983).*

(n38)Footnote 91. *American Century Mtg. Investors v. Unionamerica Mtg. & Equity Trust, 355 A.2d 563 (D.C. 1976)* (Plaintiff sought to have its subordination agreements declared invalid because of lack of consideration. court

held that plaintiff was equitably estopped because of lender?s detrimental reliance); *Dreckshage v. Community Fed. Sav. & Loan Ass'n, 555 S.W.2d 314 (Mo. 1977)* (Holding that even if a conveyance or a subordination agreement may be voidable for fraud in the hands of a grantee, a lender who advances money in good faith, without notice of the fraud, and in reliance of the subordination, maintains priority. The loss must fall upon the grantor whose conduct brought about the circumstances resulting in loss.).

(n39)Footnote 92. *401 A.2d 118 (Md. 1979).*

(n40)Footnote 93. *443 A.2d 1096 (N.J. 1982).*

(n41)Footnote 94. *Id. at 1103.*

(n42)Footnote 95. *Middlebrook-Anderson v. Southwest Sav. & Loan Ass'n, 96 Cal. Rptr. 338 (1971)* ("...the lender is a third party beneficiary in the seller-buyer agreement, but only to the extent it abides by the conditions of subordination. If the lender does not comply with the seller's conditions it does not achieve priority."). *But see Provident Fed. Sav. & Loan Ass'n v. Idaho Land Developers, Inc., 757 P.2d 716 (Idaho 1988)* (Subordination clause was "for construction." Lender's lien priority for loan of unlimited amount was held not limited to money actually spent on improving the land.).

(n43)Footnote 96. *Ban-Co Inv. Co. v. Loveless, 587 P.2d 567 (Wash. App. 1978).*

(n44)Footnote 97. *Protective Equity Trust Co. No. 83 v. Bybee, 2 Cal. Rptr. 2d 864, 871 (1991).* The seller had sold property to the buyer for $210,000, $40,000 down and a $170,000 note secured by a purchase money deed of trust. The seller agreed to subordinate its purchase money deed of trust to the buyer's construction loan. The buyer's lender made him a loan of $95,000, but not for construction. The lender gave the buyer $40,000 to pay the down payment and the rest in cash. The buyer defaulted on both loans. The sellers foreclosed on their lien and brought suit to quiet title against the construction lender. A California appellate court ordered what the sellers sought. The seller had allowed the construction lender's deed of trust to be recorded before their deed of trust, but only because the sellers were relying on the terms of the subordination agreement. The buyer breached it with the construction lender's help. So the court reversed the priority and made the seller's trust deed senior to the lender's deed of trust. The lender lost its lien entirely since the sellers had already foreclosed theirs.

(n45)Footnote 98. *See* dissent by Judge Hall in *In re Sunset Bay Assocs., 944 F.2d 1503 (1991); Middlebrook-Anderson Co. v. Southwest Sav. & Loan Ass'n, 96 Cal. Rptr. 338 (1971).*

(n46)Footnote 99. *Schneider v. Ampliflo Corp., 196 Cal. Rptr. 172 (1983).*

(n47)Footnote 100. *944 F.2d 1503 (1991). Jack Erickson & Assocs. v. Hesselgesser, 50 Cal. App. 4th 182 (Cal. App. 1996)* (Purchaser waived protection of purchase money mortgage antideficiency statute when he induced vendor to subordinate purchase money trust deed to construction loan mortgage, though building remained single-family residence, where near-total reconstruction was predicted to nearly double property's value; purchaser should have borne risk of change in security's value, and vendor's subsequent reconveyance to purchaser left vendor without security, and so, not subject to statute).

(n48)Footnote 101. More specifically, § 11013 of the California Business and Professions Code defines a blanket encumbrance as "a trust deed or mortgage or any other lien or encumbrance, mechanics' lien or otherwise, securing or evidencing more than one lot or parcel of subdivided land, or an agreement affecting more than one such lot or parcel by which the owner or subdivider holds said subdivision under an option, contract to sell, or trust agreement." Cal. Bus. & Prof. Code § 11013.

(n49)Footnote 102. State statutes may require developers to escrow the purchase money from the buyer of individual lots until the lots sold are released from the blanket encumbrance. *See, e.g.,* Cal. Bus. & Prof. Code §

11013.2. A developer who deposits the buyer's check into a personal checking account before securing the release may go to prison for it. *See People v. Whitaker, 10 Cal. Rptr. 2d 719 (1992).*

(n50)Footnote 103. James L. Lipscomb, Structuring Complex Real Estate Transactions 8-149 (1988).

(n51)Footnote 104. *Id.* at 148.

(n52)Footnote 105. Hynes, *Lender Liability: The Dilemma of the Controlling Creditor, 58 Tenn. L. Rev. 635 (1991).*

(n53)Footnote 106. *Outrigger Const. Co., Inc. v. Bank Leumi Trust Co. of N.Y., 658 N.Y.S. 2d 394 (N.Y. App. Div. 1997)* (No joint venture relationship existed between property owner and financial institution providing construction loan, so as to allow breach of contract claim to be brought by construction contractor against institution; there was no indication that institution committed to absorb any portion of losses arising from construction projects); *Boyer v. First Nat'l Bank of Kokomo, 476 N.E.2d 895, 897 (Ind. App. 1985)* [citations omitted].

(n54)Footnote 107. *See Mantooth v. Federal Land Bank, 528 N.E.2d 1132 (Ind. App. 1988).*

(n55)Footnote 108. *Dunson v. Stockton, Whatley, Davin & Co., 346 So. 2d 603 (Fla. 1977), citing Connor v. Great W. Sav. & Loan Ass'n, 447 P.2d 609 (Cal. 1968)* (savings association held liable because of the "extent of control which the association exercised over the developer." Savings associations in California obtained legislation, following *Connor*, exonerating them from liability for construction defects no matter how much control they exercised ? as long as they were acting in their capacity as lenders. Cal. Civ. Code § 3434.

(n56)Footnote 109. The Mello-Roos Community Facilities Act of 1982, Cal. Gov't Code § 53311 et seq.

(n57)Footnote 110. Fitzgerald & Green, *Holding Down Infrastructure Financing Costs*, 8 Real Est. Fin. J. 61 (1991).

(n58)Footnote 111. Cal. Gov't Code § 53341.5 requires a subdivider to give any purchaser or lessee a notice about the district and the maximum annual amount of special tax which may be levied. Unnotified purchasers or lessees may rescind. They also may rescind within three days of receiving notice personally or within five days of receiving mailed notice.

> The notice must include, among other things, (i) a statement that the property being purchased or leased is subject to a special tax which is in addition to regular property taxes and any other applicable local tax or assessment, (ii) the maximum annual amount of the special tax, the number of years for which it will be levied, and the permitted amount of annual increases; (iii) the specific facilities or services which are being financed; (iv) a statement that the special tax is imposed on the property because it is a new development; (v) in the event of a sale, a statement that if the purchaser fails to pay this tax when due each year, the property may be foreclosed upon and sold; (vi) a statement that the tax is used to provide public facilities or services that are likely to particularly benefit the property; (vii) a statement that the purchaser or tenant should take this tax and the benefits from the facilities and services for which it pays into account in deciding whether to buy or lease the property; (viii) a statement that the authorized facilities may not yet have been constructed or acquired and that it is possible that some may never be constructed or acquired; (ix) an acknowledgment by the purchaser or tenant that he or she has read the notice and received a copy of the notice prior to entering into a contract to purchase or lease with respect to the property; and (x) a statement that the purchaser or tenant may terminate the contract or lease within three days of receiving the notice by person or within five days after it was deposited in the mail. Cox, Castle & Nicholson, Summary of Legal Development in 1993 Affecting the Real Estate, Construction and Financial Services Industries (1994) at 45-46.

(n59)Footnote 112. *See* Ben Weberman, *Shallow Bonds*, Forbes (Apr. 16, 1990). The author's advice to bondbuyers: "[T]read carefully... Investors who buy these instruments are entering a shadowy side of municipal finance. They are often left in the dark about credit quality."

In preventive anticipation, the California legislature in 1992 passed Senate Bill No. 1464, ch. 772, § 3 to add the following amendment to Section 53321(d) of the Mello-Roos Community Facilities Act:

> In the case of any special tax to pay for public facilities and to be levied against any parcel used for private residential purposes, (1) the maximum special tax shall be specified as a dollar amount ... which amount shall not be increased over time except that it may be increased by an amount not to exceed 2 percent per year, (2) the resolution shall specify a tax year after which no further special tax subject to this sentence shall be levied or collected, and (3) the resolution shall specify that under no circumstances will the special tax levied against any parcel subject to this sentence be increased as a consequence of delinquency or default by the owner of any other parcel or parcels within the district by more than 10 percent.

Subsections (1) and (2) clearly seek to protect the homebuyer by placing a cap on Mello-Roos tax increases and specifying a final maturity date after which the bond repayment is satisfied. Both these features protect the homebuyer from runaway tax increases and a predictable duration of repayment. However, since there are no further limitations, it is conceivable that the tax levied may increase 2% annually until the final tax year.

The 1992 amendment also limited the extent of cross-collateralization to avoid the disaster that occurred in a failed financing district in Colorado by adding subsection (3) to Section 53321(d). Specifically, it limits any increases due to a default or delinquency of other lots within the financing district to no more than 10%. This limitation allows for some cross-collateralization without the unbearable financial burden of a sudden doubling of special taxes.

(n60)Footnote 113. *See* Michael Utley, *Nevada County, Calif., Cures Mello-Roos Default Through Sales of Property*, Bond Buyer, February 7, 1996; James A. Curtis, *The SEC and Nevada County, Calif.: The County's Side of the Story*, Bond Buyer, January 23, 1996.

(n61)Footnote 114. *See Kaufman & Broad-South Bay, Inc. v. Morgan Hill Unified Sch. Dist., 11 Cal. Rptr. 2d 792 (Cal. App. 1992).*

* Parts of this chapter have been adapted from George Lefcoe, Real Estate Transactions (Michie 1993).

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CHAPTER 85 OBTAINING LAND AND RIGHTS FOR DEVELOPMENT *

9-85 Thompson on Real Property, Thomas Editions § 85.06

AUTHOR: Professor George Lefcoe The Law Center University of Southern California

§ 85.06 Larwin's Purchase-and-Sale Agreement.

Larwin submitted the enclosed letter of intent and option agreement to the physicians. Review it with the interests of the sellers in mind.

Exhibit 1

This is the letter of intent which the President of Larwin submitted for discussion with a committee representing the sellers. You will see that in the resulting contract Larwin got much but not all that it sought. Try spotting the key differences.

May 26, 1987
RE:Approximately 880 acres located between 90th and 110th Streets and G and H Avenues in the Lancaster area of the County of Los Angeles and more particularly described on the Preliminary Title Report ("PTR") attached hereto as Exhibit "A."
LETTER OF INTENT

Larwin ("Buyer") offers to purchase the above designated property from GH Ranch Properties, a Limited Partnership ("Seller"), for a purchase price of $4,000 per acre subject to the following general terms and conditions:

1. Purchase price to be payable as follows:

A. Twenty-five percent (25%) of the purchase price to be payable in cash at close of escrow.

B. The balance of seventy-five percent (75%) of the purchase price to be evidenced at

close of escrow by a Note secured by a first trust deed on the property. The Note shall bear interest at the rate of 72% per annum and five (5) equal principal payments (together with accrued interest) shall be due annually beginning one year after close of escrow. Appropriate release provisions at 110% with full credit for the down payment will be agreed upon prior to opening of escrow.

2. Within sixty-five (65) days of opening of escrow, Buyer will approve or disapprove the PTR, attached hereto as Exhibit "A." Seller will provide all underlying documents to the PTR within ten (10) days from opening of escrow.

3. Escrow to open at TMC Escrow Co., Encino, when a formal purchase and escrow agreement is signed by both Buyer and Seller. Escrow to close upon recordation of a final subdivision map for the property, but no later than thirty-six (36) months from opening of escrow.

4. During the escrow period, Buyer will process with the County of Los Angeles, the required zoning, EIR and Tentative Map approvals for the property and will pay all costs and fees necessary to obtain such approvals. Buyer to provide copies of all plans submitted to Los Angeles County to Seller for Seller's approval, such approval not to be unreasonably withheld.

5. Buyer shall be entitled to reasonable access to the property at any time prior to close of escrow for the purpose of making such engineering, survey, soils, geology and environmental studies and tests as Buyer may reasonably deem necessary, all of which shall be completed at no expense to Seller. Buyer agrees to indemnify and hold Seller and property free and clear of any liens, costs or liabilities in connection with such tests.

6. Buyer and Seller each acknowledges to the other that no broker was used in connection with this transaction.

7. Buyer to pay all real property taxes for the 880 acre parcels commencing twelve (12) months from opening of escrow.

8. Seller represents to Buyer that Seller has clear and marketable title to the property and full authority to convey the property at close of escrow.

If the above basic terms and conditions are satisfactory, please sign this letter below and return it to me on or before 5:00 PM, Thursday, June 4, 1987. Upon receipt of acknowledged Letter of Intent, a formal purchase and escrow agreement will be prepared by Buyer for the approval and signature of Buyer and Seller.

Very truly yours,

Agreed and accepted:

GH Ranch Properties,

Michael I. Keston

a Limited Partnership ("Seller")

/pp

By: _____

By: _____

Date _____

When Does a Letter of Intent Become a Binding Purchase-and-Sale Agreement? It is black-letter law that once parties agree to all material terms of a contract, a contract is formed. So, even though the parties may have agreed that the letter of intent shall become null and void if no agreement of purchase-and-sale is entered into within thirty days, courts may look past the letter's language and look to the intent of the parties. n115 In fact, express provisions of a written agreement may be waived either expressly or implicitly. n116 Thus, since the determination of intent and of waiver are both questions of fact, the party may not prevail upon a motion for summary judgment. n117

In order for a party to avoid the entanglements of a lawsuit and still use a letter of intent during negotiations, the party must include a release provision.

Exhibit 2

OPTION AGREEMENT

Purchase and Sale of Real Property and Escrow Instructions

Escrow No. _____

Date of Execution:
July _____, 1987

This Option Agreement, entered into between GH Ranch Properties, a California Limited Partnership ("Sellers"), and Larwin Construction Co., a California corporation, 16255 Ventura Boulevard, Suite 900, Encino, CA 91436 ("Buyer"), constitutes both an agreement to purchase and sell real property, and escrow instructions director to Escrow Consultants, Inc., 1901 Avenue of the Stars, Los Angeles, California 90067, Attention: Jean Selby ("Escrow Holder").

OPTION TERMS AND CONDITIONS

1. *Property*. Seller agrees to sell to Buyer and Buyer agrees to buy from Seller, upon timely execution of this Option, and on the terms and conditions hereinafter set forth, that certain real property (the "Property") consisting of approximately 880 acres in the unincorporated north of Avenue "H," south of Avenue "G," west of 90th Street, and east of 110th Street, and as more particularly described in that certain preliminary report of title issued by Chicago Title Insurance Company ("Title Company") Order No. 8754090-27, attached hereto as Exhibit "A," and made a part hereof.

2. *Purchase Price*. Seller agrees to sell the Property to Buyer for a total purchase price consisting of the sum of the Base Purchase Price, as set forth in Paragraph 2.1, and the Carry Adjustment, as set forth in Paragraph 2.2. The parties agree that the base purchase price and the Carry Adjustment are each stated with sufficient certainty, and a sufficient mechanism is provided for calculating said elements of the purchase price, that both parties waive any right to make a future assertion that the purchase price is not determinable with sufficient certainty on which to form the basis for this Agreement.

2.1. *Base Purchase Price*. The base purchase price of the Property ("Base Purchase Price") shall be $3,520,000.

2.2. *Carry Adjustment*. Buyer shall pay to Seller an amount ("Carry Adjustment") to compensate Seller for costs of retaining ownership of the Property until the closing of this transaction. The Carry Adjust shall be the product of (i) 0.01

(representing an escalation of one percent (1%) per month), multiplied by (ii) $3,520,000, multiplied by (iii) the number of the whole months elapsing between the date that is six months from the signing of this Agreement and the date of close of escrow.

As an example, if escrow closes on June 10, 1990, the Carry Adjustment would be (0.01) x $3,520,000 x (29 months) = $1,020,800.

3. *Exercise of Option and Terms of Payment*. The Purchase Price of the Property shall be payable as follows:

3.1. *Payment of Real Property Taxes*. In consideration of Buyers promise and agreement to pay all current, nondelinquent property taxes on the property commencing to accrue twelve (12) months from the date of this Option Agreement and the timely payment of the Option payments, as set forth below, Seller hereby grants to Buyer an Option to Purchase the property for a period as set forth in Paragraph 4.3 of this Option Agreement.

3.2. *Option Payments and Down Payment*. On or before six (6) months from signing of this Option Agreement, Buyer shall pay directly to Seller the amount of Twenty-Five Thousand Dollars ($25,000) ("First Option Payment"), which shall be applicable to the Purchase Price. The first Option Payment shall be refundable to Buyer only in the event of the failure or refusal of Seller to deliver the Property to Buyer at close of escrow in the condition required by this Option Agreement.

On or before eighteen (18) months from signing of this Option Agreement, Buyer shall pay directly to Seller the amount of Seventy-Five Thousand Dollars ($75,000) ("Second Option Payment") which shall also be applicable to the Purchase Price, and which Second Option Payment shall be refundable to Buyer only in the event of the failure or refusal of Seller to deliver the Property to Buyer at close of escrow in the condition required by this Agreement.

An additional amount, which, when combined with the First Option Payment and Second Option Payment aggregates twenty-five percent (25%) of the Purchase Price ("Down Payment") shall be paid by wire transfer or Cashiers Check drawn upon a California financial institution, to Escrow Holder, for Seller, at least one (1) day prior to the date set for close of escrow.

3.3. *Balance of Purchase Price*.

A. The balance of the Purchase Price shall be paid at Close of Escrow by Buyer's promissory note ("Note") in the form of Exhibit "B" attached hereto, bearing annual interest at ten percent (10%) per annum, which interest shall be paid annually by Buyer together with five (5) equal annual payments of principal. Such payments of principal and interest commencing on the first anniversary of the Close of Escrow.

(1) The Note shall be secured by a deed of trust ("Trust Deed") encumbering the property conveyed in the form of Exhibit "C" attached hereto.

(2) The Note shall be all due and payable on or before five (5) years after the Close of Escrow. All payments of principal shall release portions of the Property from the encumbrance of the Trust Deed as set forth herein.

B. The Trust Deed shall be the standard Chicago Title Insurance Company short form Deed of Trust in the form of Exhibit "C" attached hereto supplemented by a "Rider" satisfactory to Buyer and Seller. The Rider is attached to this Agreement as Exhibit "D" and made a part here by this reference.

4. *Escrow*.

4.1. *Escrow Holder*. Buyer shall perfect this Option Agreement by depositing a signed copy of this Option Agreement

with Escrow Holder not later than thirty-five (35) months from the date of this Option Agreement. The date of such deposit shall be referred to herein as the "Opening of Escrow" and the date escrow actually closes and the deed is recorded shall be referred to as "Close of Escrow." Escrow Holder is hereby authorized and instructed to act in accordance with the provisions of this Option Agreement, which Option Agreement, together with Escrow Holder's standard general escrow instructions. As between the parties, if there is a conflict between Escrow Holder's general instructions and this Option Agreement, this Option Agreement will control.

4.2. *Title Report and Underlying Documents*. Seller has caused Title Company to Provide Buyer with a preliminary title report (attached hereto as Exhibit "A") and all underlying documents covering the Property, such report showing all matters of record and all items which would be shown as exceptions on a CLTA policy of title insurance. On or before sixty (60) days from the date of this Option Agreement, Buyer shall give written notice of any items on such report or reports which Buyer disapproves, (with the exception of reserved mineral rights as herein described) and Seller shall, within ten (10) days following notice of Buyer's disapproval, notify Buyer of the items which Seller will cause to be removed or cured. As to the items which are to be removed or cured, Seller shall remove such items on or before close of escrow. If Seller elects not to cure or remove all of the disapproved items, and Buyer does not terminate under Section 5 below, Buyer shall be deemed to have waived its disapproval of such items. As to reserved mineral rights, Buyer shall have six (6) months from the date of this Option Agreement within which to notify Seller of its disapproval. The term "Reserved Mineral Rights," as used in this Agreement, shall mean any and all interest in the property, whatsoever, wherein any claim to ownership, royalty, or right to extract any mineral, water, or petroleum substance is made, referred to, or may be inferred.

4.3. *Close of Escrow*. Close of Escrow shall be the date upon which the Grant Deed conveying title to the Property to Buyer is recorded in the Official Records of the County of Los Angeles. Buyer shall designate by written notice the date for Close of Escrow, but in no event will Escrow close later than the sooner to occur of (i) thirty-six (36) months from the date of this Option Agreement or (ii) upon recordation of a final tract map upon any portion of the property. If this Escrow is not then in a condition to close, (as the same may have been extended by mutual agreement), because of the inability or refusal of Seller to deliver title in the condition provided for herein, Buyer may (in addition to any other remedies to which it may be entitled) in writing demand and receive the return of its money or documents. Should Seller not so default, and escrow not close through no fault of Seller, Seller may retain all option payments made.

4.4. *Required Conditions of Closing*. Escrow Holder is hereby authorized to record the documents and disburse the funds and documents called for, provided each of the following conditions has then been fulfilled:

(a) Chicago Title Insurance Company can issue a CLTA Owner's Policy of Title Insurance, (or, at Buyer's option and additional expense, an ALTA Owner's Policy of Title Insurance) with liability equal to the Purchase Price, showing title to the Property vested in Buyer, SUBJECT ONLY TO:

(i) Real Property taxes not then delinquent; and

(ii) All conditions and exceptions and other matters affecting title as shown in the preliminary title report to be delivered to Buyer pursuant to this Option Agreement, except for such exceptions and other matters which Buyer shall have disapproved (unless later waived) and which Seller prior to the Close of Escrow has agreed to remove.

(b) Buyer and Seller shall have deposited in Escrow funds and documents described in Paragraph 3.2, 3.3, and Section 8.

(c) Escrow Holder is authorized to record any instrument delivered through this Escrow if necessary or proper for issuance of the policy of title insurance referred to in this Paragraph 4.4.

4.5. *Prorations*. Ad valorem property taxes for the current fiscal year and the annual installments of (i) any bonded

indebtedness, (ii) any landscape and lighting maintenance assessments, and (iii) any other (maintenance and/or improvement) assessments imposed by a local government or public agency, shall be prorated as of the Close of Escrow.

Except for the foregoing assessments, all other assessments, deferred agricultural taxes, impositions or penalties (including Williamson Act exactions), and/or special taxes, including the full principal amount of any bonded indebtedness encumbering the Property, as well as supplemental taxes with respect to improvements completed by Seller as of the date of Close of Escrow, shall be paid by Seller. To the extent such amounts can be identified or reasonably estimated by Escrow Holder they shall be paid (or reserved for payment) from funds otherwise accruing to Seller at Close of Escrow, and if not so offset, Seller shall pay such amounts immediately upon demand by Buyer; provided, however, Seller shall not be responsible for any assessments resulting from Buyer's development of the Property.

5. *Review Period*. Buyer shall have until six (6) months from the date of this Option Agreement (the "Review Period") to examine and investigate all aspects of the Property, including without limitation, grading, soil composition and condition, easements, feasibility, governmental conditions, zoning, and traffic matters. Seller shall make available to Buyer all information in its possession regarding the Property during the Review Period.

At any time prior to the expiration of the Review Period, Buyer shall have the right in its sole discretion to terminate the Option Agreement for any reason whatsoever by giving written notice to Seller. In the event of such termination, all title charges shall be paid by Buyer. If not so terminated, the First Option Payment shall be paid by Buyer to Seller.

6. *Access/Dealing with Government*. Prior to Closing, and so long as this Agreement continues in effect, Seller shall

> (i) permit Buyer's representatives to have reasonable access to the Property to carry on any normal or customary investigatory or planning work with respect to development or improvement activities;
>
> (ii) facilitate Buyer's representatives in dealing as a contract purchaser of the Property with the County of Los Angeles and any other governmental and quasi-governmental authorities having jurisdiction over same in matters having to do with the planning, mapping, zoning and development of the Property; and in connection therewith.

7. *Delivery of Documents to Escrow Holder*. Seller hereby covenants and agrees to deliver to Escrow Holder on or prior to the Close of Escrow for disbursement to Buyer after Close of Escrow the following instruments and documents, the delivery of all such documents being a condition to the Closing of Escrow.

(a) *Grant Deed*. Grant Deed in a form reasonably acceptable to the Title Company and duly executed and acknowledged by Seller.

(b) *Tax Affidavit*. A declaration signed under penalty of perjury which provides Seller's employer identification number, which states that Seller is not a "foreign person" within the meaning of the Foreign Investment in Real Property Tax Act and which complies with any other applicable requirements in order to exempt Buyer from the withholding requirements of Section 1445 of the Internal Revenue Code as amended.

(c) *Proration Statement*. A proration statement to Paragraph 4.5 above.

8. *Delivery of Documents and Funds to Escrow Holder by Buyer*. Buyer hereby covenants and agrees to deliver to Escrow Holder on or prior to the Close of Escrow for disbursement as provided in this Option Agreement:

(a) Any documents which Buyer is obligated to countersign hereunder.

(b) Buyer's funds made payable to Escrow Holder in accordance with Section 3 above.

9. *Warranties of Seller*. Seller makes the following representations and warranties, each of which shall be true as of the Close of Escrow.

(a) The Property is free and clear of all leases and contracts of any kind or character which will bind the Property after the Close of Escrow.

(b) Seller is not now involved in or aware of any pending or threatened proceeding, or litigation which will affect the Property or Seller's ability to perform its obligations hereunder.

(c) The execution and delivery of, and the performance under this Option Agreement will not result in a violation, breach, or constitute a default under, any agreement or instrument of any nature to which Seller is a party or by which it or any of its properties may be bound.

(d) To the best of Seller's knowledge, there are no contracts (executory or otherwise) affecting the Property other than as disclosed in writing to Buyer.

(e) Seller has received no notice of and, to the best of knowledge of Seller, no violation exists or is claimed to exist, with respect to the Property for any use or improvements or their construction, of any statute, ordinance, regulation, or administrative or judicial order or holder, whether or not appearing in public records.

(f) During the period prior to Close of Escrow, Seller will execute no contract which will affect the Property after the Close of Escrow nor do any act to extend or modify any leasehold interest on the Property without prior written consent of Buyer, which consent shall not be unreasonably withheld.

(g) To the best of Seller's knowledge, Seller has complied, and the Property is in compliance, with all laws relating to the storage, use, and disposal of hazardous, toxic or radioactive matter including those materials identified in Sections 66680 through 66685 of Title 22 of the California Administrative Code, Division 4, Chapter 30, as they may be amended from time to time (collectively, "Toxic Materials"). If Seller has stored, used, or disposed of any Toxic Materials on the Property, during the period of Seller's ownership of the Property, Seller shall notify Buyer in writing within thirty (30) days after the signing of this Agreement as to the location of such activity. Buyer shall have the right to conduct appropriate tests of water and soil to ascertain the extent of any contamination in excess of permitted levels on the Property. Seller shall, respecting the period of Seller's ownership of the Property, be solely responsible for, and shall defend, indemnify and hold Buyer, its agents, and contractors harmless from and against, all claims, costs, and liabilities, including attorneys' fees and costs, arising out of or in connection with any removal, clean-up, and restoration work and materials required hereunder to return the Property to its condition existing prior to Seller's ownership. Seller's obligations hereunder shall survive the Close of Escrow. Seller agrees Buyer and/or its agents may, without liability so Seller, make all disclosures and file all reports which may be required by law with respect to discovery as a result of such investigations of any hazardous, toxic, or radioactive materials thereon.

Seller covenants to take no action prior to the Close of Escrow which would make any of the above representations and warranties untrue. All sellers warranties and representations are made for the benefit of Buyer and shall survive the Close of Escrow.

10. *Termination of Liquidated Damages*. IF BUYER TERMINATES THIS AGREEMENT PRIOR TO THE EXPIRATION OF THE REVIEW PERIOD OR BECAUSE OF SELLER'S INABILITY OR UNWILLINGNESS TO TRANSFER THE PROPERTY IN THE CONDITION REQUIRED HEREUNDER, ESCROW HOLDER SHALL RETURN ALL FUNDS HELD BY IT. HOWEVER, IF CLOSE OF ESCROW FAILS TO OCCUR AFTER THE

REVIEW PERIOD FOR ANY REASON OTHER THAN SELLER'S UNWILLINGNESS OR INABILITY TO TRANSFER THE PROPERTY IN THE CONDITION REQUIRED BY THIS AGREEMENT, ANY DEPOSIT(S) RELEASED TO SELLER SHALL BE RETAINED BY SELLER AS LIQUIDATED DAMAGES, AND SELLER'S SOLE REMEDY AND RIGHT TO DAMAGES. THE PARTIES AGREE THAT SELLER'S ACTUAL DAMAGES, IN THE EVENT OF SUCH DEFAULT BY BUYER, WOULD BE DIFFICULT OR IMPOSSIBLE TO DETERMINE. THEREFORE, THE SAID DEPOSIT HAS BEEN AGREED UPON, AFTER NEGOTIATION, AS THE PARTIES' BEST ESTIMATE OF SELLER'S DAMAGES.

Buyer and Seller each agree to indemnify and hold Escrow Holder harmless from any claim by the other arising out of any distributions made by Escrow Holder in accordance with and pursuant to the provisions of this section.

* * *

15. *Mutual Covenants*. In consideration of the mutual promises of the parties hereto, and of the execution of this Option Agreement by the parties, each party hereby agrees in good faith to utilize its best efforts in connection with the taking of any and all action necessary with respect to any investigation, review, or other procedure required to in order to enable such party to grant or withhold its consent or approval as provided for herein, it being the intention of each party that such covenant of good faith and utilization of best efforts shall be deemed sufficient and valid consideration for the promises of each party hereunder. Wherever any consent or approval of a party is required hereunder, such party shall not withhold such consent or approval unreasonably, it being understood that the standard of reasonableness shall be determined with reference to the standard of a reasonably prudent investor having experience and sophistication in the purchase of property of the type covered by the subject matter of this Option Agreement.

* * *

21. *Condemnation*. In the event that any eminent domain proceeding for the taking or condemnation of all or any part of the Property is instituted prior to the Close of Escrow, the following provisions shall apply:

(a) Seller shall promptly notify Buyer of such proceeding.

(b) If more than ten percent (10%) of the Property is subject to such proceeding, Buyer shall have the right to terminate this Agreement by giving notice of termination to Seller no later than fifteen (15) days after Seller has given Buyer notice of such proceeding.

(c) If Buyer elects not to terminate this Agreement, this Agreement and the parties' rights and obligations under this Agreement shall remain in full force and effect, and the full amount of any award attributable to the condemnation of all or part of any of the Property arising out of such proceeding shall be paid to Buyer and Seller shall be entitled to the full amount of the Purchase Price for the Property.

22. *Memorandum of Option*. A memorandum of this Option Agreement, in the form of Exhibit "E" attached, may be recorded by Buyer in Los Angeles County.

MEMORANDUM OF OPTION AGREEMENT

This Memorandum of Option Agreement is made this _____ day of _____, 1987, by and between Larwin Construction Co., 16255 Ventura Boulevard, Suite 900, Encino, CA 91436 ("Larwin"), and GH Ranch Properties,

1. GH and Larwin have entered into a certain Option Agreement and Escrow Instructions dated

_____, 1987, which Option Agreement provides for the sale of certain Property described in Exhibit "A" attached hereto to Larwin upon specified terms and conditions.

2. The parties have executed this Memorandum of Option Agreement in order that third parties may have notice of the existence of Larwin's right to purchase the Property upon the terms and conditions stated in the Option Agreement and Escrow Instructions.

IN WITNESS WHEREOF, the parties have executed this Memorandum of Option Agreement as of the date set forth above.

"LARWIN"

Larwin Construction Co., a

California corporation

By: _____

Stephen L. Rishoff, Vice President

By: _____

Charles L. Preston, Secretary

"GH"

GH Ranch Properties, a

California Limited Partnership

By: _____

By: _____

This is the document Larwin insisted on recording to protect its option.

Question 10.

What interest rate is the seller receiving in the form of the Carry Adjustment?

ANSWER 10.

The seller is receiving interest at one percent per month measured from a date six months after this contract is entered, to the close of escrow, in the form of a carry adjustment, 12% on an annual basis.

Question 11.

If the buyer decides within six months and before tendering the first payment not to buy, do sellers become automatically entitled to $25,000?

ANSWER 11.

No. Paragraph 3.2 governs the time for payment, not the obligation to pay. Paragraph 5 provides that the buyer can walk without paying anything in the first six months: "Buyer shall have six months from the date of this Option Agreement (the Review Period) to examine and investigate all aspects of the Property... At any time prior to the expiration of the Review Period, buyer shall have the right in its sole discretion to terminate the Option Agreement for any reason by giving written notice to the seller." If the buyer decided not to buy before the end of the six-month period, the buyer would only be obligated to pay title charges and property taxes under this provision.

Question 12.

(a) Suppose the real estate market in southern California collapses just after Larwin signs its agreement. So Larwin waits a few months and then sends a letter to the sellers indicating it has decided not to go forward. The sellers, through counsel, respond, more or less, like this:

We trusted you to see if our site could feasibly be developed. In conversation with us you said you were probably going to be spending $300,000-400,000 in staff time and independent engineering consulting studies, to evolve a politically and technically viable subdivision plan for the site. That is why we agreed to give you a six-month "free look" at the site. We fully expect you to perform those studies and let us know your results, or to compensate us for your not having done this work before walking away from this deal.

Is there anything in the agreement obliging Larwin to do the sort of work described in this letter? In the letter of intent? Which document governs on this point?

(b) In reality, Larwin planned to use their expertise to annex the site to the City of Lancaster which would allow 2,500 houses on the site -- not the 440 the county plans contemplated. The value of the site, once annexed by Larwin's efforts, could easily top $20,000 per acre, not the $4,000 the sellers were to receive.

On learning the news, suppose the sellers had written Larwin thusly:

Since you have yet to exercise your option to buy we are hereby terminating whatever rights you may have had under our alleged agreement. We call it "alleged" because you paid no consideration for it.

How could Larwin have reformulated the contract so as to have blocked this escape route to the seller?

ANSWER 12.

(a) Larwin makes no express promise in the option agreement to process its subdivision or to perform studies of any kind. But paragraph 5 implies Larwin will because they promise sellers copies of information in their possession concerning the property and there would be no information if Larwin did nothing. Larwin does make a promise to process the project's entitlements in paragraph 4 of the Letter of Intent. Usually the later document governs but perhaps paragraph 4 of the letter could be used to explain the meaning of paragraph 5 of the contract.

(b) Larwin could have made an explicit promise to do a certain amount of processing as consideration for the option, or could have paid money for the option even if it decided not to buy before the expiration of the sixth month. Larwin has, however, agreed to pay property taxes during the review period. This might be sufficient consideration for the option.

Question 13.

(a) How much must the buyer pay in cash to close the contract and take title?

(b) When can the sellers count on receiving the full purchase price -- at the latest -- following the buyer's election to buy?

ANSWER 13.

(a) Larwin must pay 25% of the purchase price ($880,000 of $3,250,000 + carry adjustment) in cash to close the contract and take title.

(b) The sellers can count on receiving the full purchase price "within five years from the date of close of escrow" which can take 36 months from the contract date--a total of eight years.

Question 14.

(a) Will the buyer receive title unencumbered by the seller's deed of trust to *any* portion of the property until paying the *full* purchase price?

(b) Representing the sellers what should the accompanying partial release provision specify to protect their security interest as the debt is partially paid and portions of the site are released from the blanket encumbrance?

(c) What is the "blanket encumbrance"?

ANSWER 14.

(a) Yes. The buyer will receive title unencumbered by the seller's deed of trust to the initial 200 acres upon payment of the down payment and then to any portion of the property upon which subsequent payments of principal have been made. There is a provision for partial releases.

(b) The sellers should make sure that each partial release leaves them at least as well secured as they were at the outset. The price paid for each released acre should preserve the original loan-to-value ratio. The sellers never want the value of the parcel released to exceed what is paid for its release. The sellers would not want the value of the remaining acreage ever to be lower than the balance due on the purchase price.

The sellers should also make sure they don't get stuck with any landlocked parcels or parcels so small as not to be legally subdivided.

(c) A blanket encumbrance is a trust deed on the entire property. In this case it is the deed of trust securing the unpaid balance of the purchase price which the buyer owes the seller for the land.

Question 15.

(a) How could an oil company's right to remove oil beneath the ground ever affect development activity at or near the surface?

(b) What modifications of a mineral right might a land developer need to renegotiate with its holder in order to develop without fear of later intrusion?

(c) Hazard a guess why the buyers need 6 months to "check out" mineral rights, but only 60 days to satisfy themselves about the other aspects of title?

ANSWER 15.

(a) An oil company's right to remove oil beneath the ground could affect the development at or near the surface if the company could drill from the surface, disrupting the surface land uses, houses, yards, streets, etc. Subsurface drilling could also cause soil subsidence.

(b) The developer would want to renegotiate the mineral rights with the holders of those rights to eliminate the possibility of physical entry. The developer will also seek to restrict the amount of oil recoverable to prevent subsidence or weakening of the foundations or structures on the surface. The developer will want surface entry relocated in a place that won't disturb the project or its residents.

(c) The developer may need time to negotiate with the holder of mineral rights concerning these modifications. Other aspects of title may not require protracted negotiation.

Question 16.

The Williamson Act, Calif. Govt. Code § 5120 et seq., is a state law allowing county government to designate areas as agricultural preserves for which subdivision activity is zoned out. Landowners in those areas may contract with the county, agreeing to keep their land for farming in exchange for the county's promise to assess the land at its agricultural value, not its potential value as a subdivision site. If the owners of lands want to sell to developers or subdivide themselves, they may petition to have their land withdrawn from the agricultural preserve program. Withdrawal must be "consistent with the purposes" of the Act or be proven "in the public interest."

In *Sierra Club v. City of Hayward*, the California Supreme Court found the administrative record inadequate to justify a city's agreeing to cancel. There had been evidence that the land was ripe for development, a fact predictable when the contract was entered. The city made no record to show whether other sites were available for housing in the area, whether there had been a change of conditions making land unprofitable for the agricultural use, or whether the public interest in additional housing was outweighed by the public interest in preserving agricultural land as open space.

If a landowner withdraws from the program, he may be assessed a penalty of 12.5% of the fair market value of the property.

(a) If such back taxes are levied, under this contract who pays them -- buyer or seller?

(b) What argument might the buyer have advanced to explain why the seller should pay them?

(c) Absent any provision or legal presumption regarding the date to which property taxes should be prorated, would the seller prefer the date to be when the obligation accrues, first becomes due and payable, or first becomes delinquent?

(d) Say property taxes are levied twice yearly, December 10 and April 10, becoming delinquent after those dates, but taxes accrue at six-month intervals, January 1 to June 30 and July 1 to December 31. V deeds to P on December 1. How could the December tax obligation be equitably divided between V and P, assuming prorations are figured as if all months had 30 days?

ANSWER 16.

(a) The answer isn't entirely clear. Paragraph 4 states the seller is to pay all deferred agricultural taxes (Williamson Act exactions). But the buyer is responsible for exactions if the assessment "results from buyer's development of the property."

(b) The buyer might argue that since the seller enjoyed the tax break and will now receive a "development value" purchase price for allowing the land to be put to non-agricultural uses, the seller should pay back taxes attributable to

the Williamson Act exemption.

(c) This depends on when the contract is to close. The seller would prefer the earliest date before the closing. Say the obligation accrues on July 1, becomes due and payable November 1, and delinquent December 10. If the closing were December 11, the seller would be responsible for some of the tax if the proration were based on the accrual date, a smaller liability if it were based on the due date, and no liability if it were based on the delinquency date. The accrual date is almost always used.

(d) 5/6 would be paid by V; 1/6 by P.

Question 17.

(a) By the terms of this contract does *seller* have a right to copies of the reports Larwin commissions during the review period if Larwin elects not to buy?

(b) If Larwin elects not to buy, how could these reports be of use to the sellers if they have no intention to develop but might want to sell to someone who does?

ANSWER 17.

(a) No. The sellers do not have a right to copies of the buyer's reports if the buyer elects not to buy. However, the sellers may have the right to see (and copy) reports and studies prepared by the buyer if the sellers' approval of zoning or subdivision applications is necessary.

(b) If Larwin decides not to buy the sellers might want to make Larwin's studies and reports available to future or prospective buyers.

Question 18.

(a) If buyer's agents or employees are injured in the course of their inspections could sellers be liable?

(b) What sort of provision would shift this risk to the buyer exclusively?

ANSWER 18.

(a) Yes. Sellers could be liable for injury to buyer's agents or employees on sellers' land. There is no provision in the contract to the contrary. The sellers still own the property and have given the buyer permission to conduct tests. So the sellers remain liable.

(b) The sellers need a clause making buyer liable for its inspectors' well-being, insuring for them, and naming sellers as additional insureds on the buyer's policy. This sort of language would be appropriate: "Buyer shall indemnify and hold Sellers harmless from all liability, claims, demands, damages or costs arising from the inspection of the property."

Question 19.

(a) Does the provision in paragraph 6 obligate the sellers to join with the buyer in requesting the site to be subdivided even if the sellers believe the subdivision layout would diminish the value of the site for most other potential developers active in the area?

(b) Does paragraph 6 obligate the sellers to sign documents subjecting the site to substantial development fees?

ANSWER 19.

(a) Paragraph 6 does not obligate the sellers to join with the buyer in requesting the site to be subdivided. The provision only requires the sellers to "facilitate" the buyer's representatives in dealing with the county regarding subdivision approval. A "reasonableness" standard might be implied in law. "Facilitate" doesn't necessarily mean "sign," "agree."

(b) Probably not. Paragraph 6 does not obligate the sellers to sign documents subjecting the site to substantial development fees. The sellers would be ill-advised to do so. The tax clause, paragraph 4, makes the buyer solely liable for development-related taxes. By analogy this clause could be read to imply that the developer and the developer alone should be liable for promised fees.

Question 20.

Does paragraph 9 protect Larwin against the sellers' contract warranties concerning the title from merging in the deed? How?

ANSWER 20.

Paragraph 9(g) explicitly protects the buyer against sellers' title warranties merging in the deed: "all sellers' warranties ... shall survive the Close of Escrow."

Question 21.

(a) Why does paragraph 10 have the effect of converting the contract into an option?

(b) Why is paragraph 10 important to the buyer?

(c) Under what circumstances might characterizing this agreement as an option disadvantage the buyer?

ANSWER 21.

(a) Paragraph 10 converts this contract into an option. The sellers' "sole remedy and right to damages" is the right to retain a specified sum as liquidated damage if buyer terminates. Paragraph 10 could be read as making liquidated damage the sellers only *damage* remedy. This would be consistent with the generally prevailing common law rule that liquidated damage clauses, absent contrary language, serve only to circumscribe the damage remedy and leave the equitable remedy for specific performance intact. If the paragraph is read as affirming this common law, the sellers could still sue for specific performance. The paragraph would be better drafted to protect the buyers if it expressly removed from the sellers the right to specific performance.

(b) Paragraph 10 is important to the buyer. The buyer wants freedom from any obligation to purchase the property or to pay actual damages for not buying it.

(c) Characterizing the agreement as an option could disadvantage the buyer if the buyer were late in performing. Time for performance provisions are strictly construed in options. Under ordinary purchase and sale agreements some courts give buyers a "reasonable" time to perform absent a compelling time of the essence provision.

Question 22.

Seller financing.

(a) Have the sellers agreed to finance part of the acquisition? How much of it?

(b) Have the sellers agreed to subordinate their security interest?

(c) Larwin will develop in stages. The day will come when an institutional lender will be prepared to extend credit for the improvements in phase one -- about 200 acres. How can that lender be assured a first lien, free of the seller's blanket encumbrance, according to the terms of this contract?

(d) Attached is the partial release clause Larwin and the sellers formulated. What assumption does it appear to embody about the value of each acre?

(e) Under the provision for partial releases, approximately how much of the site will still be subject to seller's blanket encumbrance released when the buyers have paid all the purchase price except one dollar?

(f) When the sellers are fully paid are they required to release the balance of the site?

ANSWER 22.

(a) Yes. The sellers have agreed to finance three-fourths (75%) of the purchase price.

(b) No. The sellers have agreed to no subordination provision.

(c) A future lender who wishes to extend credit for improvements in phase one can be assured a first lien free of the sellers' blanket encumbrance by the buyer invoking the rider to the trust deed and obtaining partial release of the 200 acres from the sellers' blanket encumbrance.

(d) The partial release clause embodies the assumption that each acre is worth the same value.

(e) Under the provision for partial release, 90% of the site will have been released at the time of the last payment to the sellers. The release price for each parcel is 110% of the purchase price.

(f) At the time of the last payment the entire site would have to have been released because "payment in full of the Note shall entitle Trustor to release all the property."

Exhibit 3

RIDER TO TRUST DEED

Portions of the land hereby encumbered shall be released from time to time as Trustor shall request, so long as Trustor is not in default on payments of the Note secured hereby and has paid accured interest on the amount of the release price principal. In consideration of the Down Payment, Trustor shall be entitled to an initial release, without payment of any further consideration, of up to 200 acres of the Property, which area shall be as designated by Trustor. Subsequent to this initial release, Trustor may release any other legal parcel, including such areas as become legal parcels as a result of "Release Maps" prepared by Trustor at its own cost. All subsequent releases shall be in any area of the Property designated by Trustor in its discretion, but contiguous in at least one point to area already released. The remaining area may be released from the lien of this Trust Deed by payment of an amount equal to (i) the number of acres sought to be released, multiplied by (ii) one hundred ten percent (110%), multiplied by (iii) the purchase price (as calculated in the Purchase and Sale Agreement), divided by 880 acres. As an example, if 50 acres are to be released, and the purchase price (base price plus carry adjustment) is $4,540,800 the release price would be (50 acres) x (110%) x ($4,540,800)) (880 acres) = $283,800. All property shall be reconveyed free of all encumbrances except such as are created by Trustor

or set forth in the policy of title insurance previously issued to Trustor for the Property. Payments for releases shall be applied to the principal amount due under the Note that this Trust Deed secures and payment in full of the Note shall entitle Trustor to release of all the Property.

Chicago Title Insurance Company, or its successor, as trustee under this Deed of Trust, is hereby appointed as attorney-in-fact and authorized to execute, as directed by the trustor, and without further instruction from beneficiary, subdivision applications, maps, grants of easements to public agencies and public utilities, applications to the Department of Real Estate, and letters to the Federal Housing Administration and Veterans Administration for the approval of proposed subdivisions of the Property, and to reconvey portions of the Property from the encumbrance hereof; said agency is a power coupled with an interest and shall be irrevocable so long as no uncured notice of default is filed of record. Seller shall execute and/or record any additional instruments reasonable necessary to effectuate the intent of this paragraph.

AGREED TO ON BEHALF OF BENEFICIARY,

ITS SUCCESSORS AND ASSIGNS:

_____

Exhibit 4

Among Larwin's earlier proposals was one for the subdivision of the site into 440 homesites of two acres each. Larwin then developed a proposal for a subdivision of 2,469 homesites on lots ranging from 7,000 square feet to one-half acre in size (concept B).

Click here to view image.

FOOTNOTES:

(n1)Footnote 115. *See James H. Moore & Assocs. Realty v. Arrowhead at Vail, 892 P.2d 367, 372 (Colo. App. 1994).*

(n2)Footnote 116. *Id. at 372.*

(n3)Footnote 117. *Id.*

* Parts of this chapter have been adapted from George Lefcoe, Real Estate Transactions (Michie 1993).

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CHAPTER 85 OBTAINING LAND AND RIGHTS FOR DEVELOPMENT *

9-85 Thompson on Real Property, Thomas Editions § 85.06.1

AUTHOR: Professor George Lefcoe The Law Center University of Southern California

§ 85.06.1 The Community Builder's Purchase-and-Sale Agreement with the Homebuilder.

The Difference Between Planned Communities and Ordinary Sub-divisions. Large-scale planned communities like Reston, Virginia; Columbia, Missouri; Irvine, Mission Viejo, and Valencia, California; or Aventura and Weston, Florida owe more in concept and aspiration to the garden suburbs built in the United States in the early decades of the 20th century than they do the post-World War II suburbs that have come to symbolize what the word "subdivision" means. Disney's 8,000 unit planned community in Orlando, Florida is described as "a pre-1940's sort of town ... garages behind homes, and everything within walking distance." n118

The post-war subdivisions provided basic, affordable housing on small lots by reducing overhead costs, adopting an assembly technique to the construction of houses. These projects seldom made provisions for public schools, recreation, shopping, or landscaping.

The garden suburbs of the 1910-1930 period and the planned communities of today are distinguished by such features as elaborate park and parkway systems, plazas, wide streets with sidewalks, golf courses, lakes, schools, lush landscaping, and convenient shopping. In fact, many are gated communities which enhance security and exclusivity. Further, house designs are sometimes controlled by design review and recorded deed restrictions.

Generally, when land subdividers aspire to create high quality communities, they start with large sites -- sites so vast that few developers could afford to build houses on all sites and fewer still are experienced in constructing and marketing the great variety of product types necessary to form a planned community. Community developers subdivide their holdings into separate projects or tracts, and then sell lots wholesale to homebuilders. They secure land use approvals for the concept, the project master plan, and often leave to the homebuilder the responsibility of filing the necessary subdivision map. Although the overall land developer makes sure there are sewer, water, and utilities hookups available for each tract, the homebuilder pays for most of the street improvements within each tract.

Special Provisions in a Purchase-and-Sale Contract Between a Planned Community Developer and a Homebuilder. Generally, the purchase-and-sale contract between a planned community developer and a homebuilder contains many provisions similar to those found in a homebuilder's contract to buy land from land investors. However, negotiations over price and payment terms for land in planned communities may be quite sophisticated since a

community developer will usually be more knowledgeable than the land speculator or amateur seller as to the number of units the builder may construct, the costs of development, and the time necessary to sell or rent the units. In this instance, the homebuilder's challenge in negotiating the price down is to convince the planned community developer that his or her numbers are wrong -- that the site cannot accommodate the proposed number of units, that the soil conditions are much worse than anticipated, and that the marketing success is far from certain. In addition, the developer will demand provisions unique to the sale of land in a planned community which are drafted to preserve the design integrity and development quality of the planned community.

First, the developer wants to see "lights, camera, action" style development where there is a steady buzz of construction activity, a carefully selected product mix, and a thoughtfully coordinated marketing plan. Second, the developer expects the homebuilder to swiftly landscape the purchased site, to install streets, sidewalks, utilities, and to maintain the site in a manner consistent with the overall community design and development standard. Third, the developer expects the homebuilder to extend cable television and telephone lines, sewer and water pipes, storm drains, electricity and gas to each house according to plans and specifications approved by the developer. Fourth, the developer wants the homebuilder to secure its promises with a letter of credit or performance bond. Fifth, since homebuilders usually purchase lots in stages, the developer wants the right to deny the homebuilder further lots if the houses are sub-par. Sixth, in the course of the homebuilder's procurement of local government subdivision map approvals, the developer expects the homebuilder to employ top-notch professionals. Seventh, since the developer has probably entered into agreements with local governments promising to pay certain fees for regional public improvements (roads, schools, parks, libraries, fire and police stations, etc.), the developer expects a pro-rata reimbursement of costs from the homebuilder. Eighth, the developer expects the homebuilder to seek its approval before reaching separate agreements with local governments regarding development standards and conditions. Ninth, the developer expects the homebuilder not to sell lots to another homebuilder. Tenth, in case the homebuilder borrows a construction loan or A&D loan secured by its interest in the land, the developer wants a right of first offer in the case of default to prevent the foreclosing lender from offering vacant lots at firesale prices. Eleventh, the developer expects reimbursement from the homebuilder in the event that its contractors damage adjoining streets or landscaping. Twelfth, the developer expects the homebuilder to carry ample public liability insurance and property damage insurance to cover claims arising out of accidents or damage caused by the homebuilder, or anyone directly or indirectly employed by the homebuilder, in the public rights-of-way or on the property retained by the land developer. Lastly, the developer expects a pledge of confidentiality from the homebuilder as to the terms and conditions of the contract.

FOOTNOTES:

(n1)Footnote 118. June Fletcher, *Dream-Builder Disney Offers Dream Houses*, Wall St. J., October 20, 1995, at B10.

* Parts of this chapter have been adapted from George Lefcoe, Real Estate Transactions (Michie 1993).

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CHAPTER 85 OBTAINING LAND AND RIGHTS FOR DEVELOPMENT *

9-85 Thompson on Real Property, Thomas Editions § 85.07

AUTHOR: Professor George Lefcoe The Law Center University of Southern California

§ 85.07 Allocating Liability for Hazardous and Toxic Waste.n119

[Go To Supp]

Under federal and some state laws the owner of land, or the operator of a business, may be liable for the cost of remediating contaminated property, and may not develop the property until it is "clean." The potential liability associated with such a clean-up poses a risk to real estate developers greater than the mere loss of a good opportunity. Once a developer acquires title, the developer may become liable for the cost of investigating whether a site contains hazardous or toxic substances, removing them, restoring natural resources and making health assessments. Business at the site may be interrupted. The value of the site may depreciate due to market reaction to adverse publicity about the site. The owner may also be liable to third parties for toxic torts, damage to adjacent properties and environmental claims litigation. n120 These costs can easily exceed by a large margin the value of the site.

Seller's Right to Rescind. If the seller during escrow came to realize for the first time that the site is polluted, the seller may have the right to rescind and may exercise that right in the realization of potential liability under federal law for hazardous and toxic clean-up costs even after closing and trusting the buyer to clean the site efficiently. In *Garb-Ko, Inc. v. Lansing-Lewis Services*, n121 the seller discovered, after contracting, that underground gasoline storage tanks were leaking. The seller sought and the Court granted rescission so that the seller could regain control of the site and avoid further clean-up costs and the third party claims that might have arisen had escrow closed and buyer failed to clean up the site satisfactorily.

Buyer Has No Right to Rescind; Title Is Marketable Despite Soil Contamination. A real estate developer or homebuilder discovering site contaminations during escrow may want to avoid closing and taking title because of the potentially crushing burden of owner liability for hazardous wastes.

Courts have consistently held that the presence of hazardous or toxic substances on a site does not render title unmarketable. n122 This means that the reluctant purchaser won't automatically be able to resist specific performance and get back a security deposit just because hazardous wastes are detected on the site -- unless the buyer contracted for that right specifically.

Litigating purchasers have argued that federal law does make title unmarketable since those laws can result in liens being placed on the property by the EPA for clean-up costs. They have contended that the threat of such liens and accompanying litigation should be enough to justify Courts treating contaminated sites as unmarketable. But Courts have held that until a lien is actually placed on the property, its title is unaffected -- even though such liens are real possibilities. Mere possibilities do not unmarketability make.

How Buyers Protect Themselves From Having To Buy Contaminated Sites. Purchasers can protect themselves in several ways by negotiating certain provisions in their contracts. First, the buyers can condition their obligation to buy on an environmental audit or their being personally satisfied the site is clean. They can reserve the right to rescind if they don't like what the audit reveals -- or to buy only the clean portions of the property, if clean portions are severable from the contaminated portions.

Second, buyers can insist on representations and warranties from the seller that the site is clean, and if it isn't, the seller will make it so. When the seller warrants against contamination, the liability for clean-up costs may be considerable. n123

Third, buyers can reserve the right to buy and clean up the site, with the seller paying all or part of the remediation cost, or agreeing to indemnify the buyer, perhaps with the indemnity secured by a letter of credit or third party guaranty, or covered by a price reduction equal to the clean-up cost. In this instance, the seller who agrees to a price abatement should seek from the buyer a release, indemnity, hold-harmless clause, or warranty promising the clean-up will be thorough and no further liability will come the seller's way afterwards. For example, the seller may seek a provision stating that the "Buyer shall not be entitled to the benefits of any insurance now or later existing for the benefit of any of the indemnified Parties and insuring against risks included within the scope of Buyer's obligations under this agreement." n124

No smart sellers want to sign a blank check for any amount of clean-up costs. Sellers often demand verification of whether a problem exists, a definition of the extent of the problem, a chance to review clean-up technologies, and maybe even a cost sharing arrangement with the buyer. n125 Sellers certainly don't expect to be liable for pollution attributable to activities occurring after the closing, or that result from the purchaser's intentional or willful conduct. They would prefer to limit their liability as to avoid "special, indirect, incidental or consequential damages." n126 Further, if sellers are to indemnify the buyer for clean-up costs, they would prefer to do so on an after-tax basis -- net of any tax benefits. In addition, sellers may prefer a decision-making panel comprised of representatives of the buyer and sellers to oversee the cleaning -- instead of the buyer making all of the clean-up decisions at the sellers' expense.

When Buyers Agree to Purchase Contaminated Sites. Developers-buyers prepared to clean-up sites are sometimes able to negotiate excellent terms from sellers. Those terms may include warranties, indemnifications, price abatements, or even an agreement under which the buyers act as the seller's agent during escrow as manager of the clean-up effort. For example, commercial developers purchase contaminated sites because the location and price are right. Abandoned industrial land is the easiest for which to secure planning approval from local governments. Since local public officials take no delight in presiding over industrial wastelands, they are eager to cooperate with developers who promise to transform rust zones into regional shopping malls, office towers, or even storage or warehouse facilities.

Unfortunately, compliance with federal law and state hazardous waste laws is seldom easy. Major clean-up requires years, bundles of money, abundant patience, and a good working relationship between buyer and seller. Experts may disagree on what needs to be done to clear the site, including experts inside the approving state or federal agencies. This is exacerbated when competing state agencies with different, potentially inconsistent, standards have jurisdiction over the same site. n127 Agency definitions of "hazardous" or "toxic" change as to the acceptable levels of contaminants, and what has to be done to secure compliance. In fact, government certification that the site is free of contaminants, where certification procedures exist, are sometimes applicable only to sites the state has already marked for treatment or to sites the state can be persuaded ought to be.

On the other hand, regulatory agencies direct their limited resources to the most polluted, visible, largest, most difficult sites. Generally, since most contaminated sites fall well below regulatory sight lines, the problem can be solved expeditiously and reasonably by hiring a competent remediation contractor.

§ 85.07(a) The Most Important Statute and Its Key Provisions: CERCLA.

In 1980 Congress passed the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), n128 commonly known as "Superfund," in response to public concern and outrage over the discovery of toxic waste dumps such as the Love Canal and the recognition of their dangers to the public health.

CERCLA established a system to identify sites where hazardous substances have been released into the environment or where this may occur in the future. The most seriously contaminated sites are generally placed on the National Priorities List (NPL), a compilation that now includes over twelve hundred sites across the nation. However, listing on the NPL is not required for CERCLA to apply. Any property where hazardous wastes have been deposited may fall under CERCLA's liability provisions.

Under this law the Environmental Protection Agency is given the mission of identifying and cleaning up polluted sites. A federal fund was created for this purpose, the Hazardous Substance Response Trust Fund, or Superfund. n129 If the owner of contaminated property refuses to clean up the site, the EPA may do so and has the statutory right to place a lien on the property in order to be reimbursed for the cleaning costs. n130

"The lien provision was designed to recover the enhanced value of the restored property and prevent the owner from realizing a windfall from Superfund cleanup and restoration activity...." n131 The lien is subordinate to prior recorded mortgages. It becomes effective when the government first spends public money cleaning up a site, and ends when the government's costs are repaid or the statute of limitation expires. Because the EPA can record the lien without giving the property owner notice and a hearing in advance, one federal circuit court of appeals has declared it a violation of the property owner's due process rights under the Fifth Amendment. n132 Under CERCLA, the Environmental Protection Agency is given the mission of identifying and overseeing the clean-up of polluted sites. A federal fund was created for this purpose: The Hazardous Substance Response Trust Fund, or Superfund. n133

EPA has never organized itself to conduct major public works projects. The EPA bureaucracy does preliminary assessments and site inspections and lets contracts for remedial investigations, feasibility studies, and some remedial designs. In the few cases where EPA initiates Fund-financed remedial action, however, it does so indirectly by entering an interagency agreement with the Army Corps of Engineers, which lets the contracts and supervises the remedial action projects. n134

Private owners may clean up their own sites and seek contribution from prior site owners and polluters.

CERCLA also establishes a framework for private parties to initiate site cleanups and then to pursue former site owners and polluters to share the costs of the privately initiated cleanup. n135

If the owner of contaminated property refuses to clean up the site, the EPA may do so and has the statutory right to sue the owner directly for reimbursement of cleanup costs, n136 and place a lien on the property for reimbursement. n137

The availability of private funds to clean up contaminated sites may be one reason CERCLA cleanups have gone so slowly. EPA hopes to stretch the limited federally-appropriated Superfund by adding the private dollars of landowners and polluters.

... Fund-financed cleanup is the exception rather than the rule within the Superfund program. Rare indeed is the site

where EPA willingly commits sufficient financial resources to implement a remedial action public works project. Special barriers to this commitment, for example, state assurances or the need for waiver of caps on federal spending, discourage the public works approach. n138

CERCLA was amended and expanded by the passage of the Superfund Amendments and Reauthorization Act of 1986 (S.A.R.A.). n139 These amendments introduced more stringent cleanup standards; created new, independent regulatory programs, such as the Emergency Planning and Community Right-to-Know Act; and generally increased the profile of environmental enforcement across the country.

CERCLA costs can and often do exceed the value of the site.

The EPA also has authority to sue the owner directly for reimbursement of clean-up costs. n140

Liability under CERCLA is based on the principle of strict liability and not negligence. n141 Even a contaminator who acted reasonably under the circumstances may be liable under the act. "Parties may have to bear the full costs of cleanup, for instance, even if they disposed of their wastes according to prevailing law and even if no evidence shows that their wastes, rather than someone else's, caused the contamination at the site." n142

For a defendant to be liable under CERCLA, it must be established that:

> 1. The contaminated site is a "facility." This is tautological since a facility is defined as any place hazardous substances "come to be located."
>
> 2. A release or threatened release of hazardous substances has occurred at the site. Release covers any spilling, dumping, pouring, emitting, leaching, leaking, escaping -- any way a substance could enter the environment.
>
> 3. The plaintiff has incurred response costs as a result of the release or threatened release. Response costs are those incurred in cleaning up the site, and not the costs of personal injuries or other economic harms caused by hazardous substances.
>
> 4. The defendant is included in one of the four statutory classes of liability, i.e., owner, former owner, transporter, or generator. n143

Once the foregoing have been established, the defendants are held strictly liable and can only raise the defenses set forth in the statute (as discussed below).

The statute poses the threat of retroactive liability. It has no exemption for releases of hazardous substances that were legal at the time they took place. Parties may be liable for past actions that were legal when they occurred.

In order to be vulnerable to a CERCLA action, a defendant must be a "potentially responsible party" (PRP) as defined by the statute. n144 The statute fingers present owners, owners at the time of the disposal of hazardous substances, anyone who arranges for disposal, treatment or transport of such materials, or anyone who accepts hazardous substances for transport. n145

The statute literally provides that the present "owner *and* operator" of the facility is liable. This prompted owners who had not actually contaminated the site to claim they were not owner-operators under the law, just owners. Courts have consistently rejected this as a "crabbed reading" of the statute. n146

Buyers of land have been socked with millions of dollars in clean-up costs even though the sites became contaminated long before they acquired title. n147

Liability under CERCLA is generally thought to be joint and several. n148 This means that each PRP is potentially exposed to bear the burden of other PRPs who cannot be found or are insolvent. However, the statute neither mandated nor rejected the common law of torts which reserves joint and several liability for situations where the cause of a harm is perceived as indivisible. But one of the bill's sponsors asserted that the intent to was to leave to common law the issue of joint and several liability. n149 Where more than one PRP is inculpated, Courts on a case-by-case basis determine the liability of each PRP -- and must also decide whether liability should be sole, joint, or joint and several.

The EPA is not bound to take any notice of the risk-sharing agreements of private parties. CERCLA specifically prohibits any private agreement from exonerating any person from liability under the statute. n150 Otherwise, what would stop owners from escaping all CERCLA liability by entering cost-shifting agreements with insolvent shell corporations? Note, in the absence of an "express statutory language evidencing a legislative intent to prohibit agreements in which private parties allocate the risk" of environmental cleanup liability under a state toxics control act between themselves, such private allocations have been held enforceable. n151

In determining contribution obligations (which is analogous to a comparative negligence proceeding where liability is divided among the responsible parties) the court is guided only by the vague instruction to examine "such equitable factors as the court determines are appropriate." n152 However, in an attempt to apportion liability, some Courts have relied upon a valuable, yet non-exhaustive, list of considerations known as the *Gore* factors. These factors include: (1) the ability of the parties to demonstrate that their contribution to a discharge, release or disposal of a hazardous waste can be distinguished; (2) the amount of hazardous waste involved; (3) the degree of toxicity of the hazardous waste involved; (4) the degree of involvement by the parties in the generation, transportation, treatment, storage, or disposal of the hazardous waste; (5) the degree of care exercised by the parties with respect to the hazardous waste concerned, taking into account the characteristics of such hazardous waste; and (6) the degree of cooperation by the parties with federal, state or local officials to prevent any harm to the public health or environment. n153

PRPs have a strong incentive to settle, especially if there is only one solvent PRP. Settlements in CERCLA actions are becoming much more common than litigation unless a party has a very strong defense to liability. Trial lawyers have written that the primary problem with CERCLA is "the legal wrangling relating to joint and several liability." n154 The complexity originates in the various conflicting common-law standards for determining when joint and several liability is appropriate. Under CERCLA as at common law, it is possible for a small but deep-pocketed waste contributor to become the major cleanup cost payor.

Much litigation has occurred concerning the breadth of the definition of "owner and operator" for purposes of CERCLA's strict liability. CERCLA § 101(2)(A) defines the term as "any person owning or operating such facility." As the case law has developed, some courts have expanded this definition to include a number of entities that, at least at first glance, would not normally be considered owners or operators.

One controversial area where CERCLA's definition of "owner or operator" has had a dramatic effect is upon banks and other lenders. A mortgage holder has limited protection under the so-called "secured creditor exception" found in CERCLA § 101(20)(A), which provides:

> Such term [owner] does not include a person who, without participating in the management of a ... facility, holds indicia of ownership primarily to protect his security interest in the facility.

Hence, merely holding title under a mortgage does not expose the creditor to liability. Lenders that became actively involved in managing the affairs of a financially distressed debtor -- as is frequently the case in "work outs," however --

found that some courts regarded them as owners or operators for purposes of CERCLA liability.

The Environmental Protection Agency has published its Final Rule Governing Lender Liability Under CERCLA. n155 Pre-foreclosure the lender is free of "owner or operator" liability for offering occasional or isolated advice, even about environmental compliance. "Workout" related efforts to cure, mitigate or prevent a default are also permissible without putting the lender in CERCLA harm's way. Post-foreclosure the lender can acquire title but must dispose of the foreclosed-on property expeditiously. n156 EPA's efforts at clarity were thwarted when a federal Court of appeals ruled that EPA lacked statutory authority to promulgate rules circumscribing lender liability under CERCLA n157 Presently, the scope of lender liability is uncertain, especially for lenders who take over the property upon default or foreclosure.

Lenders still have a powerful incentive to avoid lending on contaminated property since in a pinch they must look to the value of the security property for loan repayment. Contaminated property is seldom a safe bet.

Defenses to liability under the CERCLA are limited to (1) an act of God, (2) an act of war, or (3) an act or omission of a third party other than an employee of the defendant, or one in a direct or indirect contractual relationship with the defendant. n158

By its terms, the statute would seem to exclude from the defense all

subsequent purchasers of contaminated property, even remote purchasers, since sellers and remote purchasers have an indirect contractual relationship with each other. n159 However, an exception to the exception exists, known as the "innocent purchaser" defense.

SARA added the innocent purchaser defense to CERCLA's liability scheme. Under CERCLA § 107(b), it is no defense to CERCLA liability that the release of hazardous substances occurred by the actions of a third party if there was a contractual relationship with the third party. "Contractual relationship" is defined in § 101(35) to include "land contracts, deeds or other instruments transferring title or possession." However, SARA amended the definition of "contractual relationship" to exclude these transactions if the real property on which the facility is located was acquired by the defendant *after* the disposal or placement of the hazardous substance and the defendant did not know and had no reason to know that any hazardous substance was placed at the facility, or the defendant acquired the facility by inheritance or bequest or both.

Why shouldn't a purchaser be able to claim innocence even if the purchaser acquires title *before* the toxic substance gets to the site? A site owner is supposed to secure the property even against "accidental" spills.

To use this defense, a land purchaser must establish that the purchaser did not cause the environmental problems at the site and used all due care in attempting to discover the condition of the property before buying it. n160

To establish that the defendant had no reason to know of the

contamination, the defendant must have undertaken, at the time of acquisition, "all appropriate inquiry" into the previous ownership and uses of the property consistent with good commercial or customary practice.

Such an inquiry generally must take into account:

-- The previous uses of the facility;

-- The price;

-- All known or reasonably ascertainable information; and

-- The likelihood of the presence of hazardous substances or contaminated property.

To determine whether the appropriate inquiry has been made, a court will consider:

(1) any specialized knowledge or experience on the part of the owner or operator;

(2) the relationship of the purchase price to the property's value if uncontaminated;

(3) commonly known or reasonably ascertainable information about the property; and

(4) the ability to detect such contamination by appropriate inspection. n161

Environmental Audits. Buyers and lenders are demanding very rigorous inquiry into even seemingly benign transactions involving commercial and agricultural properties. n162 In 1989 and 1990, an informal real estate industry group gathered to promulgate an advisory, voluntary approach to defining "due diligence" for the innocent purchaser defense. The final Standard for Environmental Assessment for Commercial Real Estate was adopted in March, 1993. While carefully hedging, and indicating that different degrees of inquiry may be appropriate at different sites and "no implication is intended that a person must use [any one standard] in order to be deemed to have conducted inquiry in a commercially prudent or reasonable manner in any particular transaction," it recommended two separate but related practices. One, a "Phase I" Environmental Site Assessment Process and an "Environmental Site Assessment: Transaction Screen Process." The purpose of these is to identify obvious or likely signs of contamination. These practices include on-site visual inspection, research regarding the prior uses of the property, review of governmental data bases concerning neighboring hazardous waste facilities and hazardous substance users, search for environmental liens, interviews with past and present owners and operators and their employees, and review of facility and government records concerning the facility's operation. Among the historic records to be reviewed: aerial photographs, fire insurance maps, property tax files, recorded land title records, USGS 7.5-minute topographical maps, local street directories, building department records, and zoning/land-use records.

What, then, is a Phase I? It is a limited inquiry into the environmental condition of a property by an environmental consultant who opines on the existence or likelihood of contamination on the basis of non-intrusive data gathered from records, interviews and observation of the property. Yet, there is currently no uniform industry-wide agreement on what constitutes a Phase I. n163 If there is a reasonable suspicion to believe that site contamination may exist, an additional "Phase II" investigation may be conducted. This typically involves taking soil or groundwater samples to be analyzed for hazardous constituents.

Once it is determined that a "hazardous substance" exists or may exist, therefore, the property is subject to CERCLA, the first major task is the performance of the detailed technical study designed to determine the exact extent of contamination at the site. This study is referred to as a remedial investigation (RI). The RI is followed by an engineering analysis of the technologically available alternative methods that might be employed to clean up the contamination, which is known as a feasibility study (FS). The RI/FS process may take three years to complete, and cost over $1 million.

Once the RI/FS has been reviewed by the EPA, the Agency will issue a Record of Decision (ROD). The EPA evaluates the proposed remedies and in its decision recommends the remedial action required at the site. The final phase is the actual remedial action (RA) or clean-up of contamination. Techniques used include on-site incineration of contaminated soils or removal from the site to an appropriate facility. Groundwater contamination is a particular concern of the EPA. Restoring groundwater to drinking water quality is a long and costly process. Sometimes remedies take more than a

decade to implement.

Eventually, the work at the site is completed at substantial cost. The average cost of a Superfund site clean-up is in the range of $20 and $40 million, and the estimate for remediation of certain sites exceeds $500 million. Despite all the money spent in investigation, litigation, and actual remediation (an amount in the billions), no Superfund site has yet to be fully cleaned up and restored to its pre-contamination state; some of the more severely contaminated sites never will be. By mid-1994, only 56 of the 1,345 sites on EPA's National Priorities List have been cleaned up and removed from the list. n164

The parties to a contract may shift CERCLA liability between themselves through representations, warranties, indemnities, indemnifications, affidavits of environmental compliance, promises of remediation at seller's expense,

transfer of permits, and insurance coverage. These agreements may shift the costs of compliance among private parties but the EPA isn't bound by the risk-sharing agreements of private parties. CERCLA specifically prohibits any private agreement from exonerating any person from liability under the statute:

> No indemnification, hold harmless, or similar agreement or conveyance shall be effective to transfer from the owner or operator ... or from any person who may be liable for a release ... to any other person the liability imposed under this section. n165

Thus, the EPA can come at all Potentially Responsible Parties except those with a statutory defense. PRPs can invoke private agreements in a contribution proceeding or other action to enforce warranties, indemnities and the like. But those agreements aren't defenses to liability under CERCLA. If they were, what would stop owners from shifting liability to insolvent shell corporations?

Nuisance and Trespass. Among the most promising legal remedies available to the purchaser of a contaminated site against former owners are those in tort. Say, a former owner stored gasoline in underground tanks now leaking contaminants. CERCLA exempts petroleum products. But oil companies and gas station owners may be nonetheless liable for past spills that amounted to common-law nuisances. Those who placed leaking oil tanks in the ground or later neglected to maintain them properly may be liable for a continuing trespass as the tanks further contaminate the site.

While owners can't be held liable for nuisances and trespasses committed against themselves on their own property, they are potentially liable to successors -- unless they disclosed their previous activities so the costs of contamination cleanup could be figured into the purchase price. The successor must prove the elements of private nuisance as a precondition to recovery. It helps if the jurisdiction is one in which sellers are liable for innocent or negligent failures to disclose material adverse facts so the successor is relieved of the burden of having to prove fraud -- an intentional misrepresentation. n166

Warranties. Sometimes sellers warrant against soil contamination. When they do, their potential liability for cleanup costs may be considerable. Consider the case of *Mailman's Steam Carpet Cleaning Corp. v. Lizotte*. n167 A previous owner had operated a service station and fuel oil business on the site for 39 years and left 11 underground tanks behind. The next owner, Lizotte, in selling the property to Mailman, signed a warranty that the tanks were free of spillage and leaks, and would remain so for ten years. After closing, the buyer detected contamination, and sued for $225,000 to clean up the site. The purchase price had been $63,000. In upholding the recovery, the Court observed:

> [A] test of reasonableness may be imposed to determine if restoration of the property is a fair and reasonable remedy in the circumstances.
>
> ***

> Although these principles of tort damages are instructive, we are presented here with a breach of contract. "The established principle of law upon which damages for breach of contract may be assessed is that the injured party shall be placed in the same position he would have been in if the contract had been performed, so far as the loss may be ascertained to have followed as a natural consequence of the breach and to have been within the contemplation of the parties as reasonable men as a probable result of the breach." *Abrams v. Reynolds Metals Co., 166 N.E.2d 204 (1960).* The contamination of Mailman's property caused by leaks in the oil tanks was clearly the natural consequence of the breach of warranty. Lizotte could reasonably have contemplated that he would be liable to Mailman for all costs related to cleanup of the oil leakage as a probable result of the breach and that these costs would likely exceed the fair market value of the property. n168

Seller's Limited Warranties. No smart seller wants to sign a blank check for any amount of cleanup. Sellers want verification a problem exists, the extent of the problem, a chance to review cleanup technologies, and maybe even a cost-sharing arrangement with the buyer. n169 Sellers certainly don't expect to be liable for pollution attributable to activities occurring after the closing, or that result from the purchaser's intentional or willful conduct. They would prefer to limit their liability so as to avoid "special, indirect, incidental or consequential damages." n170 If the seller is to indemnify the buyer for cleanup costs, the seller will prefer indemnity based on an after-tax basis -- net of any tax benefits. The seller might prefer a decision-making panel to oversee the cleaning with representatives of buyer and seller, instead of the buyer making all the cleanup decisions at the seller's expense.

CERCLA's Inapposite Precedent. The huge costs, pervasive uncertainty and modest results under CERCLA have led to a vigorous attack on the statutory scheme. One author sees the problem with CERCLA in its having been modeled after an inappropriate precedent. CERCLA was modeled on Section 311 of the Clean Water Act as amended by the Federal Pollution Control Act Amendments of 1972. n171 That section seeks to compel the owners and operators of vessels to pay the "actual costs" of cleaning up oil and hazardous substance spills into navigable waters.

In the final analysis, the cleanup of contaminated groundwater and soil simply may be too unlike the oil spill situation for the Section 311 approach (upon which CERCLA is based) to work effectively. Like CERCLA, section 311 contemplates that the owner or operator of a vessel will clean up releases from that vessel or that the government will do so followed by the owner/operator's quick reimbursement of the Clean Water Act fund with which EPA or the Coast Guard finances response action. But the successful section 311 regime is different in several respects.

First, for all intents and purposes, the Clean Water Act's liability under Section 311, is prospective; its enactment preceded the spills which triggered its application. There is no attempt to cast liability back in time to past ship users or owners. Second, there are monetary caps on recoverable damages under the Clean Water Act. Third, and of particular relevance here, the Clean Water Act neither expressly nor implicitly creates a cost recovery cause of action on behalf of any entity other than the United States Government. n172

CERCLA's Perverse Land Use Incentives. Drafters of the Clean Water Act faced far simpler land use issues. They had only to worry about spills contaminating beaches and wetlands. CERCLA applies to vastly more terrain, much of it centered in the industrial heartland of big American cities. By forcing cleanup to pristine conditions of even these sites, many heavily contaminated for nearly a century, the costs of complying with CERCLA have been reported to "help drive employers away from cities, contributing to economic and social deterioration." An unintended consequence of CERCLA is that it encourages "the development of factories and buildings in uncontaminated forests, fields, and meadows." This contributes to "more urban sprawl and, ultimately, more air and water pollution as workers and their families move or drive to the new job sites." Often, "the levels of contamination found are tiny, and even after millions of dollars are spent on cleanups, particularly in urban areas, it is virtually impossible to measure whether anything improved." n173 Experimental efforts are underway to scale back the cleanup standards on "brown fields" (formerly industrial sites) so as not to thwart inner-city job creation and to slow down the flow of office and manufacturing

construction on what were previously green field sites.

Federal/State Turf Wars. The most disconcerting problem with CERCLA enforcement, however, has been the inability of the EPA and state governments to forge a cooperative relationship in order to provide a coordinated and effective cleanup response. It might be said that EPA's own use of the Superfund has simply limited the resources available to support state enforcement initiatives under CERCLA n174 Much of the problem though has been the result of controversy over the extent to which EPA is *required* under CERCLA to support state initiatives. There is a constant tension between EPA and state officials concerning, among other things, the appropriate role states should have in the cleanup of hazardous wastes.

The result is often a legal battle between the states and EPA where the focus is not on the problem of providing for an effective cleanup response, but on seemingly endless disputes over the rights and responsibilities of the parties involved... Despite the technical nature of hazardous waste cleanup, the entire process has become politically charged. Indeed, divergent political agendas on the state and federal level have spurred much of the conflict. n175

Almost every state has adopted some form of "mini-Superfund" legislation to deal with the hazardous waste problem... n176 Further, the states that have had the most success with hazardous waste cleanup programs have essentially administered the programs independent of CERCLA

While there might be powerful incentives for states to be content with a secondary role under CERCLA, many states are interested in taking more control of the cleanup response within their boundaries... Unfortunately, the prevailing attitude with EPA is that states are incapable of adequately cleaning up hazardous waste sites. One commentator has suggested that, while EPA may want states to assume a larger role in CERCLA enforcement, it seems to doubt that they will do an acceptable job. n177

§ 85.07(a)(1) The Technical Side of a CERCLA Remediation Action.

Once it is determined that a "hazardous substance" exists or may exist, and the property is subject to CERCLA, the first major task is the performance of the detailed technical study designed to determine the exact extent of contamination at the site. This study is referred to as a remedial investigation (RI). The RI is followed by an engineering analysis of the technologically available alternative methods that might be employed to clean up the contamination. This analysis is referred to as a feasibility study (FS). The RI/FS process may take three years to complete and cost over $1 million. n178 Once the RI/FS have been reviewed by the E.P.A., the agency will issue a Record of Decision (R.O.D.). In the R.O.D., the E.P.A. will evaluate the proposed remedies and recommend the remedial action required at the site. The final phase is the actual remediation action (RA) or clean-up of contamination. Techniques used include on-site incineration of contaminated soils or removal of such soils to an appropriate facility.

§ 85.07(b) The Common Law Relationship Between Buyer and Seller Pertaining to Hazardous Waste.

A real estate developer who discovers during escrow that a site is contaminated may want to avoid closing the deal and taking title because with the acquisition of title comes the potentially crushing burden of CERCLA.

Courts have consistently held that the presence of hazardous or toxic substances on a site does not render title unmarketable. n179 This means that the reluctant purchaser won't be able to resist specific performance and get back a security deposit even after consultants detect hazardous wastes on the site.

Litigating purchasers have argued that CERCLA does make titles unmarketable since it can result in liens being placed on the property by the EPA for cleanup costs. They have contended that the threat of such liens and accompanying litigation should be enough to justify courts treating contaminated sites as unmarketable. But courts have held that until a lien is actually placed on property, its title is unaffected -- even though CERCLA liens are real possibilities. Mere

possibilities do not unmarketability make.

Since purchasers get no protection at common law, they must be especially careful to include adequate protection in their contracts.

State Statutes Allocating the Costs of Site Cleanup Between Buyer and Seller. Some states have laws allowing the state to order that contaminated property be cleaned up before it is sold, so that property owners of industrial sites obtain a "negative declaration" that the property is free from contaminants before selling. Other states require disclosure before the owner transfers title of a hazardous waste site to the grantee, n180 or a state agency, n181 or approval of a state agency prior to transfer. n182 In New Jersey, before the property owner of a contaminated site can sell, the owner must prepare a remedial action plan for cleaning up the site. n183 The cleanup must take place in a timely manner just before or after the sale. Thus, the noses of the buyers and sellers are pushed right up against the unpleasant realities of cleanup. Elsewhere, buyers can ignore the risks. Or the parties may consciously allocate the costs of cleaning up a contaminated site between themselves through representations, warranties, indemnities, indemnifications, affidavits of environmental compliance, promises of remediation at seller's expense, transfer of permits, and insurance coverage. The EPA isn't bound to take any notice of the risk-sharing agreements of private parties. CERCLA specifically prohibits any private agreement from exonerating any person from liability under the statute:

> No indemnification, hold harmless, or similar agreement or conveyance shall be effective to transfer from the owner or operator ... or from any person who may be liable for a release ... to any other person the liability imposed under this section. n184

Thus, the E.P.A. seeks contribution from all Potentially Responsible Parties except those with a statutory defense. PRPs can invoke private agreements in a contribution proceeding or other action to enforce warranties, indemnities, and the like. But those agreements aren't defenses to liability under CERCLA. If they were, what would stop owners from shifting liability to insolvent shell corporations?

§ 85.07(c) State Title Transfer Requirements.

Some states have laws allowing the state to order that contaminated property be cleaned up before it is sold, or that property owners of industrial sites obtain a "negative declaration" that the property is free from contaminants before selling. Among them are New Jersey, n185 Illinois, n186 Connecticut, n187 Minnesota, n188 Pennsylvania, n189 and West Virginia. n190

§ 85.07(d) CERCLA Dispute Resolution Costs Are High.

If the statute's language and procedures were clear, there would be fewer disputes to resolve by litigation. However, this is not the case, and the financial stakes are high. In fact, the Office of Technology Assessment has estimated that 44% of the money allotted by Congress to the Superfund program is spent on negotiating and litigating the myriad issues that arise because of differing interpretations of CERCLA. n191

A Rand corporation study of four national insurance carriers (with 13,000 hazardous waste site claims) and five Fortune 100 industrial companies (with an average of 144 hazardous waste sites each) showed that considerable sums were spent on transactions costs -- mostly in litigation and negotiation. On average, 88% of the insurers' total expenditures went to transaction cost shares (ranging among insurers from 80% to 96% percent). More than half of this sum (42%) funded disputes over coverage. The rest (37%) was used to defend policyholders. The industrial firms spent more of their CERCLA related money on actual site clean up, averaging transactions costs of 21%. n192

A recent Rand study found average transaction costs for average PRPs to be one-third or 32% of the total cost incurred. n193

These transaction costs arise primarily out of disputes between potentially liable parties over their respective shares of the costs and between these parties and their insurers. Cong. Rec. S1079 (daily ed. Feb. 7, 1994) (summary of S. 1834). Rand researcher Lloyd Dixon, noted, however, that transaction costs tend to be front-loaded. Upon completion of cleanup, the ultimate proportion of transaction costs for PRPs would be from 19% to 27%. n194

Increasingly, transaction dollars may go to challenge EPA's recommended choice of cleanup methods when PRPs believe there are other less expensive options. For instance, removing contaminated soils to a remote toxic waste site is often quite costly compared to cleaning the soil in place. Insurers may incur legal and engineering costs persuading EPA or the courts to approve a new cleanup technology.

§ 85.07(e) Practical Factors to Consider in Drafting Hazardous Waste Warranty and Indemnity Clauses.

-- Developer-buyers prepared to clean up sites are sometimes able to negotiate excellent terms from sellers who appreciate the unlimited, strict liability they face under CERCLA even after selling. Those terms may include warranties, indemnifications, price abatements or even an agreement under which the buyer acts as the seller's agent during escrow as manager of the clean-up effort.

Commercial developers purchase contaminated sites because the location and the price are right. Abandoned industrial land is the easiest for which to secure planning approval from local governments. Local public officials take no delight in presiding over industrial wastelands. They are eager to cooperate with developers who promise to transform rust zones into regional shopping malls, office towers, or even storage or warehouse facilities.

-- CERCLA compliance is not easy. Major clean-up requires years, bundles of money, abundant patience, and a good working relationship between buyer and seller. Experts may disagree on what needs to be done to clear the site, including experts inside the approving state or federal agencies. Competing state agencies may have jurisdiction over the same site, and their standards may differ and even be inconsistent. There may be conflicts between a state environmental agency and the U.S. Environmental Protection Agency, as the states seek "substantial and meaningful involvement" in the cleanup process as guaranteed by federal law and the E.P.A. looks for expediated, superfund-financed cleanups. n195 Agency definitions of "hazardous" or "toxic" change as to the acceptable levels of contaminants, and what has to be done to secure compliance. Government certification that the site is free of contaminants, where certification procedures exist, are sometimes applicable only to sites the state has already marked for treatment or sites the state can be persuaded ought to be.

-- Sellers who reduce the purchase price substantially in exchange for the buyer agreeing to clean up the site might seek from the buyer releases, indemnities, hold harmless clauses or warranties, promising the clean-up will be thorough and no further liability will come the seller's way afterwards.

-- If the buyer is not obligated to clean up the site, a seller of property with known contaminants may also seek a restrictive covenant limiting

the future use of the land to nonresidential purposes so as to limit her exposure to future claims.

-- Indemnities may be limited by duration, dollar amount, and type of claim.

-- In many states a provision that the buyer takes "as is" will not suffice to shift the risks of hazardous substances to the buyer. Only specific mention of this risk would suffice in an "as is" clause. A release from unknown liabilities is invalid in California unless the assuming party expressly waives his rights to assert claims unknown at the time of the waiver. n196

-- A seller who releases a buyer from liability arising under CERCLA might later seek contribution from that buyer despite the release.

In one such case the U.S. Sixth Circuit Court of Appeals held for the seller, surprisingly, on the theory that Congress intended only indemnity contracts, and not releases, to be enforceable in CERCLA contribution cases. n197

The buyer might have won if the case had been heard in either of the two federal courts where release provisions have been held to protect buyers against suits by sellers for contribution. n198

-- A buyer might be willing to take title to a portion of the property, the uncontaminated part, or a buyer might be prepared to accept title to a site contaminated with some types of pollutants but not others, depending on the difficulty of cleaning them up and finding a disposal site for them.

-- Buyers and sellers might disagree about whether a site was contaminated or not. This can happen easily because environmental regulations are not always clear and change often. If the buyer has the right to rescind if the site is contaminated, who bears the burden of proving contamination?

-- If the sellers during escrow come to realize for the first time that the site is polluted, they may seek rescission on their own if they realize that under CERCLA they remain liable for hazardous and toxic clean-up costs even after the closing. In *Garb-Ko, Inc. v. Lansing-Lewis Services,* n199 the seller discovered, after contracting, that underground gasoline storage tanks were leaking. The seller sought rescission and the court granted it so that the seller could regain control of the site to avoid further clean-up costs and third party claims that might have arisen had escrow closed and buyer failed to clean up the site satisfactorily.

FOOTNOTES:

(n1)Footnote 119. Adam D. Duncan, Esq., Demetriou, Del Guercio, Springer & Moyer, Los Angeles, California, prepared the draft from which this section was derived (Oct. 1, 1992).

(n2)Footnote 120. Joseph Philip Forte, *Environmental Due Diligence: A Guide to Liability Risk Management in Commercial Real Estate Transactions, 5 Fordham Envtl. L.J. 349 (1994);* Comment, *Avoiding Liability: A Real Property Purchaser's Roadmap to the Dangers of Superfund Law, 15 U. Haw. L. Rev. 105 (1993);* David G. Mandelbaum, *Toward A Superfund Cost Allocation Principle, 3 Envtl. Law. 117 (Sept. 1996);* Barry S. Neuman, *Litigating And Managing The Multi-Party Superfund Cost Recovery Case,* SA85 ALI-ABA 485 (June 24 1996); William D. Evans, Jr., *The "Cape Fear" Features Of Superfund Contribution Litigation: The Available Remedies And Extent of Liability, 75 Mich. B.J. 1170 (Nov. 1996);* Andrew R. Klein, *Hazardous Waste Cleanup And Intermediate Landowners: Reexamining The Liability-Based Approach,* 21 Harv. Envt'l l. Rev. 337 (1997); William D. Evans, Jr., *The "Road Warrior" Quality of Superfund Contribution Litigation, 32 Tenn. B.J. 26* (July/Aug. 1996); Andrew Allen Lemmon, *The Developing Doctrine of Rylands V. Fletcher: Hazardous Waste Remediation Contractors Beware, 42 Loy. L. Rev. 287 (Summer 1996);* Annotation, *Indemnification or Release Agreement as Covering Liability Under § 107(A) of Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) (42 U.S.C.A. § 9607(A)), 139 A.L.R. Fed. 123 (1997);* Annotation, *Private Entity's Status as Owner or Operator Under §§ 107(A)(1, 2) Of Comprehensive Environmental Response, Compensation, and Liability Act (42 U.S.C.A. §§ 9607(A)(1, 2)) (CERCLA), 140 A.L.R. Fed. 181 (1997).*

(n3)Footnote 121. *423 N.W.2d 355 (Mich. App. 1988).*

(n4)Footnote 122. *See* Comment, *Toxic Clouds on Titles: Hazardous Waste and the Doctrine of Marketable Title, 19 B.C. Envtl. Aff. L. Rev. 355 (1992); United States v. Allied Chem. Corp., 587 F. Supp. 1205 (N.D. Cal. 1984);* Michael J. Maher & Sheila Horan, *Lessons In L. U. S. T.: The Complete Story of Liability for Leaking Underground Storage Tanks, 16 N. Ill. U.L. Rev. 581, 592 (Summer 1996)* (most courts have refused to expand the marketable title

doctrine to make the presence of hazardous wastes an encumbrance on title); Michael A. Nardolilli, *Title Insurance: Spotlight on Recent Lender's Policy Cases*, 50 Consumer Fin. L.Q. Rep. 466, 467 (Fall 1996) ("Unmarketability" of Title).

(n5)Footnote 123. Consider the case of *Mailman's Steam Carpet Cleaning Corp. v. Lizotte, 616 N.E.2d 85 (Mass. 1993).* A previous owner had operated a service station and fuel oil business on the site for thirty-nine years and had left eleven underground tanks behind. The next owner, Lizotte, in selling the property to Mailman, signed a warranty that the tanks were free of spillage and leaks, and would remain so for ten years. After closing, the buyer detected contamination, and sued for $225,000 to clean up the site. The purchase price had been only $63,000. In upholding the recovery, the Court observed:

> The contamination of Mailman's property caused by leaks in the oil tanks was clearly the natural consequence of the breach of warranty. Lizotte could reasonably have contemplated that he would be liable to Mailman for all costs related to cleanup of the oil leakage as a probable result of the breach and that these costs would likely exceed the fair market value of the property.

616 N.E.2d at 88.

Davis v. Sun Refining & Mktg. Co., 671 N.E.2d 1049 (Ohio App. 1996) (Purchasers brought action against vendor, alleging breach of contract and fraudulent concealment in connection with petroleum contamination of property resulting from failure of vendor, when removing underground storage tanks, to also remove piping. The remedy of specific performance of cleanup was granted against the vendor).

(n6)Footnote 124. John S. Hollyfield, *A Model Environmental Indemnity Agreement*, 11 Prac. Real Est. Law. 33, 39 (1995).

(n7)Footnote 125. *See* Elizabeth Glass Geltman, Modern Land Transactions 443, 447-51 (Michie Company 1994).

(n8)Footnote 126. *Id.* at 447.

(n9)Footnote 127. *See* Note, *The Adversarial Relationship Between the States and EPA: Conflict Over State Authority Under CERCLA, 3 Dick. J. Envtl L. & Pol'y 101 (1993).*

(n10)Footnote 128. *42 U.S.C. § 9601 et seq*. Gene A. Lucero & J. Drew Page, *CERCLA Rights And Liabilities*, SC18 ALI-ABA 1 (Sept. 25 1997).

(n11)Footnote 129. *26 U.S.C. § 9507.*

(n12)Footnote 130. *42 U.S.C. § 9607*(*l*)(1).

(n13)Footnote 131. Kimball, *Superfund Liens Held Unconstitutional*, 8 Real Est. Fin. J. 71, 72 (1992).

(n14)Footnote 132. *Reardon v. United States, 947 F.2d 1509 (1991). See* Note, *Environmental Law -- Due Process -- First Circuit Finds That CERCLA Lien Provision Violates Due Process, 105 Harv. L. Rev. 1420 (1992).* Michael P. Healy, *The Effectiveness and Fairness of Superfund's Judicial Review Preclusion Provision, 15 Va. Envt'l L.J. 271, 319* (Winter 1995-96) (Preclusion of Constitutional Claims Review Prior to CERCLA Enforcement); David J. Hayes & J. Drew Page, *CERCLA Rights and Liabilities*, SB18 ALI-ABA 1 (Oct. 10 1996); Brian A. Cahalane, Note, *CERCLA and the Fresh Start: Quelling the Eternal Conflict, 4 Am. Bankr. Inst. L. Rev. 265, 285 (Spring 1996)* (to grant the EPA a first priority lien over the property of an actual polluter raises constitutional questions); Annotation, *Liability of Generators Pursuant to 107(A)(3) of Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) (42 U.S.C.A. 9607(A)(3)), 126 A.L.R. Fed. 265 (1995).*

United States v. Rohm and Haas Co., 939 F. Supp. 1142 (D.N.J. 1996) (CERCLA and its retroactivity do not violate the due process, ex post facto, or bill of attainder provisions of the Constitution); *United States v. Cohen, 914 F. Supp. 252 (N.D. Ill. 1996)* (CERCLA's jurisdictional bar to preenforcement judicial review did not violate due process right of defendants seeking determination of their liability for response costs; where property rights are concerned, it is sufficient that at some stage there is opportunity for judicial review, and CERCLA permits judicial review when EPA files cost recovery action).

(n15)Footnote 133. *26 U.S.C. § 9507.*

(n16)Footnote 134. Alfred R. Light, *Superfund's Second Master: The Uneasy Fit of Private Cost Recovery Within CERCLA, 6 St. Thomas L. Rev. 97, 129 (1993).*

(n17)Footnote 135. *42 U.S.C. § 9607*(a)(4)(B) holds potentially responsible parties liable for "any other costs of response incurred by any other person consistent with the national contingency plan." For a critique of these parallel tracks ?-- CERCLA cleanups and private ones ?-- *see Light, supra.*

(n18)Footnote 136. *42 U.S.C. §§ 9607*(a), 9613(f)(1).

(n19)Footnote 137. *42 U.S.C. .§ 9607*(l)(1).

(n20)Footnote 138. Light at 129.

(n21)Footnote 139. Pub. L. No. 99-499.

(n22)Footnote 140. *42 U.S.C. §§ 9607*(a), 9613(f)(1).

(n23)Footnote 141. *See United States v. Monsanto Co., 858 F.2d 160, 161 (4th Cir. 1988), cert. denied, 490 U.S. 1106 (1989). State of California v. Montrose Chem. Corp. of Cal., 104 F.3d 1507 (9th Cir. 1997)* (Liability of owner, operator or other responsible party under CERCLA section imposing strict liability for response costs, damages for injury to natural resources and costs of any health assessments is joint and several, subject to statutory defenses); *United States. v. Cello-Foil Prods., Inc., 100 F.3d 1227 (6th Cir. 1996)* (Examining state of mind or ascertaining intent, at the contract, agreement, or other type of arrangement, stage to determine whether party is liable under CERCLA as party that otherwise arranged for disposal of hazardous substances, does not undermine strict liability nature of CERCLA as intent inquiry only determines whether the party is a potentially liable party; once party is determined to have requisite intent to be an arranger, strict liability takes effect); *United States v. Rohm and Haas Co., 939 F. Supp. 1142 (D.N.J. 1996)* (CERCLA includes no quantitative requirement in its definition of "hazardous substance" to incur liability because CERCLA imposes strict liability on those parties responsible for disposal of hazardous materials); *Pneumo Abex Corp. v. Bessemer and Lake Erie R.R., 921 F. Supp. 336 (E.D. Va. 1996).*

(n24)Footnote 142. Comments, *When Less is More: A Significant Risk Threshold for CERCLA Liability, 60 U. Chi. L. Rev. 697, 698 (1993).* The retroactive feature of the Superfund Act has been assailed as "antithetical to predictability" and "unnecessary cleanup and transition costs that further handicap American producers in world markets." George Clemon Freeman, Jr., *A Public Policy Essay: Superfund Retroactivity Revisited, 50 Bus. Law 663, 683 (1995).*

(n25)Footnote 143. CERCLA §§ 104(a), 107(a) (codified at 42 U.S.C. ?? §§ 9604(a), 9607(a)).

B.F. Goodrich v. Betkoski, 99 F.3d 505 (2d Cir. 1996) (Defendant who disposes of hazardous substances that are not independently releasable may still be held liable under CERCLA upon showing of threatened release, even though that defendant may not be required to pay damages during cost apportionment phase of litigation; requiring plaintiff to show more than release or threatened release would essentially require proof that specific defendant's hazardous substances

caused release of hazardous substance contrary to strict liability scheme under CERCLA). *See also Acushnet Co. v. Coaters Inc., 937 F. Supp. 988 (D. Mass. 1996)* (In order to prevail on claim for recovery of response costs under CERCLA, causal relationship between defendant's hazardous waste and incurrence of response costs must be proven; text of CERCLA limits liability to response costs that are caused by release or threatened release, and traditional principles of tort law under strict liability do not support interpretation allowing for liability in absence of causation).

(n26)Footnote 144. *41 U.S.C. § 9607*(a). Annotation, *Private Entity's Status as Owner or Operator Under ?§ 107(A)(1, 2) of Comprehensive Environmental Response, Compensation, and Liability Act (42 U.S.C.A. § 9607*(A)(1, 2)) (CERCLA), *140 A.L.R. Fed. 181 (1997);* Annotation, *What Constitutes "Disposal" for Purposes of Owner or Operator Liability Under § 107(A)(2) of Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) (42 U.S.C.A. § 9607(A)(2)), 136 A.L.R. Fed. 117 (1997).*

Millipore Corp. v. Travelers Indem. Co., 115 F.3d 21 (1st Cir. 1997) (CERCLA cost allocation scheme may operate retroactively making potentially responsible party (PRP) responsible for actions taken before CERCLA was enacted and before PRP was aware that its actions might lead to environmental liability); *Town of New Windsor v. Tesa Tuck, Inc., 935 F. Supp. 305 (S.D.N.Y. 1996)* (State thruway authority was not "responsible party" under Comprehensive Environmental Response, Compensation and Liability Act (CERCLA) as owner or operator of a facility where there was no evidence that hazardous substances were deposited, stored, disposed of, placed, or otherwise located on the authority's property); *Aluminum Co. of America v. Beazer East, Inc., 124 F.3d 551 (3d Cir. 1997)* (Corporation may be held liable under CERCLA as "operator" of facilities owned by another corporation only if "actual control" standard is satisfied).

(n27)Footnote 145. CERCLA § 107 (codified at *42 U.S.C. § 9607). Farm Bureau Mut. Ins. Co. of Michigan v. Porter & Heckman, Inc., 560 N.W.2d 367 (Mich. App. 1996)* (Subsection of Michigan's Environmental Response Act (MERA) stating that liability for incurrence of response activity shall attach to "owner or operator of the facility" applies to current owners and operators of facility); *United States v. CDMG Realty Co., 96 F.3d 706 (3d Cir. 1996)* (passive migration of contamination, that was dumped before prior owner's ownership, did not constitute disposal under CERCLA).

(n28)Footnote 146. *Tanglewood East Homeowners v. Charles-Thomas, Inc., 849 F.2d 1568 (5th Cir. 1988).*

(n29)Footnote 147. *N.L. Indus. v. Kaplan, 792 F.2d 896 (9th Cir. 1986); T & E Indus. v. Safety Light Corp., 680 F. Supp. 696 (D.N.J. 1988).*

(n30)Footnote 148. The government has argued often and successfully for a liberal application of joint and several liability. *See e.g., O'Reil v. Picillo, 883 F.2d 176 (1st Cir. 1989), cert. denied, 493 U.S. 1072 (1990); United States v. Chem-Dyne Corp., 572 F. Supp. 803 (S.D. Ohio 1983).* But there are cases which make proof apportionment -- and therefore a release from joint and several liability -- easier. *See EPA v. Segua Corp. (In re Bell Petroleum Servs., Inc.), 3 F.3d 889 (5th Cir. 1993); United States v. Alcan-Butler, 964 F.2d 252 (3d Cir. 1992); United States v. A&F Materials Co., 578 F. Supp. 1249 (S.D. Ill. 1984). See also* Note, *EPA v. Sequa Corporation (In re Bell Petroleum Services): The Fifth Circuit's Approach to Joint and Several v. Apportioned Liability Under CERCLA, 40 Loy. L.A. L. Rev. 165 (1994).*

Joint and several liability has been assailed because it discourages potential tortfeasors from reducing damages their acts cause. A rational firm would spend $100 to reduce pollution by $500 if it were fully liable for the $500 and had a 20% chance of being caught. But with joint tortfeasors, a rational firm figures its share of the total liability bill by dividing it into the total number of other solvent defendants. By that fraction, its incentive to prevent or mitigate damage is diminished. *See* Richard A. Epstein, *Two Fallacies in the Law of Joint Torts, 74 Geo. L.J. 1377, 1385.*861385-86 (1985). Song, *Application of Joint and Several Liability for Natural Resource Damages Under the CERCLA and Determining Who Can Recover for Natural Resource Damages 1997 Army Law. 49 (Nov. 1997).*

(n31)Footnote 149. *See* 126 Cong. Rec. S14964 (daily ed. Nov. 24, 1980). *United States v. Wallace, 961 F. Supp.*

969 (N.D. Tex. 1996) (Although CERCLA imposes strict liability on persons as listed in CERCLA as responsible, defendant may escape joint and several liability for response costs if it shows that its waste, when mixed with other hazardous wastes, did not contribute to release and cleanup costs incurred, or that, at most, it contributed to only divisible portion of harm).

But see United States v. Occidental Chem. Corp., 965 F. Supp. 408 (W.D.N.Y. 1997) (Covenant not to sue, which was contained in company's deed conveying property to city board of education and which was subsequently incorporated in board's deed to city, did not render city solely liable for costs of remediation of public nuisance; however, courts will enforce private contract allocating among parties any loss that parties might suffer by imposition of CERCLA liability where provisions show clear and unmistakable intent of parties).

(n32)Footnote 150. *142 U.S.C. § 9607*(e)(1) ("No indemnification, hold harmless, or similar agreement or conveyance shall be effective to transfer from the owner or operator ..... or from any person who may be liable for a release ..... to any other person the liability imposed under this section").

John M. Hyson, *"Fairness" and Joint and Several Liability in Government Cost Recovery Actions Under CERCLA, 21 Harv. Envt'l L. Rev. 137 (1997);* Eugene Martin-Leff, *The Common Law Ancestry of Superfund Liability: Blaming the Child for Its Inherited Traits, 8 Md. J. Contemp. Legal Issues 53* (Fall/Winter 1996-97).

(n33)Footnote 151. *Car Wash Enters., Inc. v. Kampanos, 874 P.2d 868, 873 (Wash. App. 1994);* Annotation, *Indemnification or Release Agreement as Covering Liability Under § 107(A) of Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) (42 U.S.C.A. 9607(A)), 139 A.L.R. Fed. 123 (1997).*

Paramount Communications Inc. v. Horsehead Indus., Inc., 660 N.Y.S.2d 718 (N.Y.A.D. 1997) (under CERCLA, party could not escape its liability to government but could arrange contractually for someone else to bear expense of those obligations); *North Shore Gas Co. v. Salomon, Inc., 963 F. Supp. 694 (N.D.Ill. 1997)* (While CERCLA permits parties to allocate liability among themselves by agreement, court may consider public policy in interpreting such agreements); *DRR, L.L.C. v. Sears, Roebuck & Co., 949 F. Supp. 1132 (D. Del. 1996)* (Under Delaware law, as predicted by a district court, private parties may contractually allocate their environmental liability under the Delaware Hazardous Substance Cleanup Act (DHSCA)); *Teleflex Inc. v. Collins & Aikman Prods. Co., Inc., 961 F. Supp. 368 (D. Conn. 1996)* (buyers were not entitled to recover cleanup costs under CERCLA, since parties clearly allocated risk of CERCLA liability to buyers under terms of purchase agreement); *Lion Oil Co., Inc. v. Tosco Corp., 90 F.3d 268 (8th Cir. 1996); SmithKline Beecham Corp. v. Rohm and Haas Co., 89 F.3d 154 (3d Cir. 1996);* United States v. Hardy, 916 F .Supp. 1385 (W.D. Ky. 1996).

(n34)Footnote 152. CERCLA § 113(f)(1) (codified at *41 U.S.C. § 9613*(f)(1)). J. Whitney Pesnell, *The Contribution Bar in CERCLA Settlements and Its Effect on the Liability of Nonsettlors, 58 La. L. Rev. 167 (Fall 1997).*

OHM Remediation Services v. Evans Cooperage Co., Inc., 116 F.3d 1574 (5th Cir. 1997) (recovery of response costs under CERCLA is not restricted to persons with "protectable interest" in cleanup site; CERCLA contribution actions are appropriate only to settle disputes among PRPs; contractor was PRP, and could thus maintain contribution claim, even though it denied its PRP status).

But see Foss v. Madison Twentieth Century Theaters, Inc., 551 N.W.2d 862 (Wis. App. 1996) (purchasers had no common-law rights of contribution or indemnification against vendors absent showing of any common liability of purchasers and vendor to any third party for clean up or that purchasers had been compelled to pay damages for which they had no liability).

See also New Castle County v. Halliburton NUS Corp., 111 F.3d 1116 (3d Cir. 1997) (a potentially responsible person may not bring a cost recovery claim against another potentially responsible person); *Branch Metal Processing,*

Inc. v. Boston Edison Co., 952 F. Supp. 893 (D.R.I. 1996) (Scrap metal dealer did not have valid claim for indemnification against electric utility pursuant to Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), in action for environmental cleanup cost contribution brought against dealer and utility, arising from alleged release of polychlorinated biphenyls (PCBs) from streetlight fixtures bought by dealer from utility and resold to metals processor; dealer had failed to show that utility agreed to indemnify dealer for any liabilities, including potential liability presented by instant action, and dealer's indemnification claims were disguised contribution claims and could not be maintained).

Moreover see Canadyne-Georgia Corp. v. NationsBank, N.A. (South), 982 F. Supp. 886 (M.D. Ga. 1997) (Georgia trust law prohibited imposition of owner liability under CERCLA and Georgia Hazardous Site Response Act (HSRA) against cotrustee for obligations of partnership, and (2) owner's cleanup efforts could not have conferred any benefit on cotrustee as required to support claims against cotrustee under Georgia law for contribution, indemnity, and restitution).

(n35)Footnote 153. *See Juniper Dev. Group v. Kahn (In re Hemingway Transport, Inc.), 993 F.2d 915, 921 n.4 (1st Cir. 1993); Environmental Transp. Sys., Inc. v. ENSCO, Inc., 969 F.2d 503, 508-09 (7th Cir. 1992); Gould, Inc. v. A&M Battery & Tire Serv., 954 F. Supp. 1014 (M.D. Pa. 1997); Acushnet Co. v. Coaters, Inc., 948 F. Supp. 128 (D. Mass. 1996)* (CERCLA provision authorizing court to allocate response costs in contribution actions using appropriate "equitable factors" authorized comparisons between plaintiffs and defendants by considering evidence to determine whether nature and extent of their respective ties to hazards to persons, property, and environment made it fair and reasonable to order defendant to reimburse plaintiffs for some share of contribution); *Farmland Indus., Inc. v. Colorado & Eastern R.R., 944 F. Supp. 1492 (D. Colo. 1996); United States v. Kramer, 953 F. Supp. 592 (D.N.J. 1997); Bethlehem Iron Works, Inc. v. Lewis Indus., Inc. 1996 U.S. Dist. LEXIS 14446 (E.D. Pa. 1996); Boeing Co. v. Cascade Corp., 920 F. Supp. 1121 (D. Or. 1996).*

(n36)Footnote 154. John E. Osborn & Steven N. Williams, *Reauthorizing Superfund: Problems and Prospects*, N.Y. L.J. March 29, 1994, at 1 (Mr. Osborn is a partner and Mr. Williams is an associate at a firm which concentrates in environmental and construction contract litigation). *See also* James T. Price, *Dividing the Costs of Hazardous Waste Site Cleanups Under Superfund: Is Joint and Several Liability Appropriate?*, 52 UMKC l. Rev. 339, 341, 347-8 (1984); B. Todd Wetzel, Note, *Divisibility of Harm Under CERCLA: Does an Indivisible Potential or Averted Harm Warrant the Imposition of Joint and Several Liability?, 81 Ky. L.J. 825, 843 (1993).*

(n37)Footnote 155. *56 Fed. Reg. 28,798.* Sander Alvarez, *Taming the Environmental Protection Agency: Lender Liability in The Aftermath Of Kelley V. EPA,* 3 Hastings W.-N.W. J. Envt'l L. & Pol'y 465 (Spring 1996); Molly O?O' Leary, Feature, C*ERCLA's Safe Harbor- Amendment Clears the Water,* 40 Advoc (Idaho) 12 (Sept. 1997); Joseph M. Macchione, Comment, *Lender Liability Under CERCLA in Light of the Asset Conservation, Lender Liability And Deposit Insurance Protection Act Of 1996: Does the Act Spell Lender Relief or Continued Heartburn?* 16 Temp. Envt'l l. & Tech. J. 81 (Spring 1997); John Charles Bell, *Lender Liability Under CERCLA: Options for Lenders Faced with Potential Liability, 4 Buff. Envt'l L.J. 131 (Fall 1996);* Jeffery M. Sharp, *Of Politics, Principles, and Money: How Environmental Lender Liability Changed the Leopards' Spots,* 25 Real Est. L.J. 56 (Summer 1996); Deborah A. Hottel & Michael R. Jeffcoat, *Caught in the Web: CERCLA Owner or Operator Liability Of Lenders, Shareholders, Parent Corporations, and Attorneys, 6 S.C. Envt'l L.J. 161 (Fall 1997);* Richard E. Slaney, *Lender Liability Under CERCLA: The Rise, Fall And Rebirth of The EPA Rule,101 Com. L.J. 389 (Winter 1996);* Margaret Murphy, *Brownfields Sites: Removing Lender Concerns as a Barrier to Redevelopment, 113 Banking L.J. 440 (May 1996);* Steven E. Friedman, Note, *UST Lender Liability, 2 Envt'l Law. 505 (Feb. 1996);* Richard A. Horsch, Paul K. Milmed & Kevin M. Plante, *Brownfield Redevelopment,* 11 Nat. Resources & envt'l 55 (Summer 1996); James W. Creenan & John Q. Lewis, Comment, *Pennsylvania's Land Recycling Program: Solving The Brownfields Problem with Remediation Standards and Limited Liability, 34 Duq. L. Rev. 661, 668 (Spring 1996);* Scott H. Reisch, *Reaping "Green" Harvests From "Brownfields": Avoiding Lender Liability at Contaminated Sites: Part II,* 26Colo. Law. 9 (Feb. 1997).

(n38)Footnote 156. Matthew L. Kimball, *The EPA's Final Rule: Updated Lender Guidance on Superfund Liability,* 9 Real Est. Fin. J. 39 (1992).

(n39)Footnote 157. *Kelly v. United States EPA, 14 F.3d 1100 (D.C. 1994).*

(n40)Footnote 158. CERCLA § 107 (codified at 42 U.S.C. ? § 9607(b)). *Town of New Windsor v. Tesa Tuck, Inc., 935 F. Supp. 317 (S.D.N.Y. 1996)* (CERCLA is a strict liability statute, with only a limited number of statutorily-defined defenses available. The defenses are that the release was caused solely by an act of God or war, or that the release was caused solely by a third party whose actions were not foreseeable by the defendant, who was exercising due care with respect to the hazardous substance).

(n41)Footnote 159. *See United States v. Hooker Chems. & Plastics Corp., 680 F. Supp. 546 (W.D.N.Y. 1988).*

(n42)Footnote 160. Note, *Liabilities of the Innocent Current Owner of Toxic Property Under CERCLA, 23 U. Rich. L. Rev. 403, 416-17 (1989):*

Few current owners to date have successfully avoided liability under the third-party defense. New York v. Shore Realty Corp. was one of the first cases in which a responsible party asserted the third-party defense. Shore claimed it was entitled to the third-party defense because the hazardous conditions were created by a prior tenant and Shore had exercised due care while it was in control of the property. The court held that the harm to Shore was not "caused solely" by a third party because Shore knew of the prior tenant's activities before purchasing the property, should have foreseen that such activities would continue, and did not take "precautions against" the tenant continuing the activities.

Among the few who have successfully invoked the "innocent purchaser" defense: the children and wife of a property shareholder were held exempt from liability for cleanup in a case in which they received their ownership shares by gift or devise after the contamination had occurred. *United States v. Pacific Hide & Fur Depot, Inc., 716 F. Supp. 1341 (D. Idaho 1989).*

Eva M. Fromm, Edward C. Lewis and Heather M. Corken, *Allocating Environmental Liabilities in Acquisitions, 22 J. Corp. L. 429, 451 (Spring 1997)* (The innocent landowner defense); Katherine Fairbanks, Comment, *The Industri-Plex Model: Beneficial Reuse of a Superfund Site, 23 B.C. Envt'l Aff. L. Rev. 851, 856 (Summer 1996);* Sarah W. Rubenstein, Comment, *CERCLA's Contribution to the Federal Brownfields Problem: A Proposal for Federal Reform, 4 U.Chi. L. Sch. Roundtable 149, 153* (1996-97) (Purchaser's liability); Judith S. Kavanaugh & William L. Earl, *CERCLA Investor Liability: "Don't Ask, Don't Tell" Won't Work, 71 Fla. B.J. 56* (July/Aug. 1997); Thomas G. Kessler, Comment, *The Land Recycling and Environmental Remediation Standards Act: Pennsylvania Tells CERCLA Enough Is Enough, 8 Vill. Envt'l L.J. 161 (1997);* Ram Sundar & Bea Grossman, *The Importance of Due Diligence in Commercial Transactions: Avoiding CERCLA Liability, 7 Fordham Envt'l L.J. 351 (Spring 1996);* Wm. Michael Thurmond, CLERCA's*"All Appropriate Inquiry": When Is Enough, Enough? 70 Fla. B.J. 34 (March 1996);* Annotation, *Arranger Liability of Nongenerators Pursuant to ?107(A)(3)§ 107(A)(3) Of Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) (42 U.S.C.A. § 9607(A)(3)), 132 A.L.R. Fed. 77 (1996).*

United States v. CDMG Realty Co., 96 F.3d 706 (3rd Cir. 1996) (Innocent owner defense required that plaintiff had to show that soil investigation was conducted negligently); *M & M Realty Co. v. Eberton Terminal Corp., 977 F. Supp. 683 (M.D. Pa. 1997)* (As general matter, CERCLA remedies for potential responsible parties (PRP) are limited to contribution actions; cost recovery actions are available only to innocent parties. Purchaser of contaminated property did not adequately plead status as innocent landowner, as required for CERCLA cost recovery action; complaint failed to clearly allege that purchaser had no actual knowledge of presence of hazardous substances on property, and did not allege that purchaser undertook all appropriate inquiry into previous ownership and uses of property consistent with good commercial or customary practice in effort to minimize liability).

(n43)Footnote 161. CERCLA § 101(35)(B) (codified at 42 U.S.C. ? § 9601(35)(B)). *See also Juniper Dev. Group v. Kahn (In re Hemingway Transport, Inc.), 993 F.2d 915, 932 (1st Cir. 1993); United States v. Shell Oil Co., 841 F. Supp. 962, 973 (C.D. Cal. 1993).*

(n44)Footnote 162. Jeff Civins, *Environmental Law Concern in Real Estate Transactions, 43 Sw. L. J. 819, 829 (1990).*

(n45)Footnote 163. Forte, *Environmental Due Diligence* at 380 (*supra* note 53.1).

(n46)Footnote 164. Catalina Camia, *Complexities Face Congress in 'Superfund' Overhaul*, C.Q. Feb. 5, 1994, at 239.

(n47)Footnote 165. *42 U.S.C. § 9607*(e)(1).

(n48)Footnote 166. *See, e.g., Newhall Land & Farming Co. v. Super. Court, 19 Cal. App. 4th 334 (1993).* A farming and development corporation, Newhall Land & Farming, purchased a site previously owned. Newhall filed against Mobil to recover damages from soil and groundwater contamination which occurred during Mobil's ownership. The Court of Appeals overruled a trial court's sustaining Mobil's demurrer.

(n49)Footnote 167. *616 N.E.2d 85 (Mass. 1993).*

(n50)Footnote 168. *Id. at 88.*

(n51)Footnote 169. *See* Elizabeth Glass Geltman, Modern Land Transactions 443, 447-51 (Michie Company 1994).

(n52)Footnote 170. *Id*. at 447.

(n53)Footnote 171. Pub. L. No. 92-500, *1986 Stat. 816 (1972).*

(n54)Footnote 172. Light at 133-34.

(n55)Footnote 173. Keith Schneider, *Rules Easing for Urban Toxic Cleanup*, New York Times, p. A8, 1/4/93.

(n56)Footnote 174. *See* Hubert H. Humphrey III & LeRoy C. Paddock, *The Federal and State Roles in Environmental Enforcement: A Proposal for a More Efficient Relationship, 14 Harv. Envt'l L. Rev. 7, 34 (1990);* Major Stuart W. Risch, *The National Environmental Committee: A Proposal to Relieve Regulatory Gridlock at Federal Facility Superfund Sites, 151 Mil. L. Rev. 1 (Winter 1996).*

(n57)Footnote 175. Note, *The Adversarial Relationship Between the States and EPA: Conflict Over State Authority Under CERCLA*, 3 Dickinson J. Of Envt'l L. & Pol'y. 101, 102 (Fall 1993).

(n58)Footnote 176. *Id., n.97 at 113:* Some of these state statutes are designed simply to pick up where CERCLA leaves off, but others are more comprehensive and require state agencies to take control of all cleanup response within a state, even, to the extent possible, response actions under CERCLA *See* James P. Young, Comment, *Expanding State Initiation and Enforcement Under Superfund, 57 U. Chi. L. Rev. 985, 994-5 (1990).* Efforts to further control the cleanup of hazardous wastes have resulted in several states resurrecting the use of old common-law theories of liability to obtain relief unavailable to them under CERCLA *See* Eric E. Nelson & Curt R. Fransen, *Playing With a Full Deck: State Use of Common-Law Theories to Complement Relief Available Through CERCLA, 25 Idaho L. Rev. 493* (1988-89).

(n59)Footnote 177. *Adversarial Relationship* at 113.

(n60)Footnote 178. For a more in-depth discussion, *see* Charles Dyer, Book Review, *Superfund: The Political Economy of Environmental Risk, 14 Stan. Envtl. L. J. 192 (1995).*

(n61)Footnote 179. Comment, *Toxic Clouds on Titles: Hazardous Waste and the Doctrine of Marketable Title, 19*

B.C. Envt'l Aff. L. Rev. 355 (1992); United States v. Allied Chem. Corp., 587 F. Supp. 1205 (N.D. Cal. 1984). Michael A. Nardolilli, *Title Insurance: Spotlight On Recent Lender's Policy Cases*, 50 Consumer Fin. L.Q. Rep. 466, 467 (Fall 1996) (Unmarketability of Title).

(n62)Footnote 180. Conn. Gen. Stat. Ann. § 22a-134; Ill. Ann. Stat. ch. 1111/2, paras. 1021 and 1039 (*see* now 415 ILCS 5/21 and 415 ILCS 5/39); Mass. Ann. Laws ch. 21C, § 7; Minn. Stat. Ann. § 115B.16; N.J. Stat. Ann. §§ 12:1k-32 - 13:1k-6; 35 Pa. Cons. Stat. Ann. § 6018.405 (1992); W. Va. Code § 20-5E20(a).

(n63)Footnote 181. N.Y. Envtl. Conserv. Law § 27-1317.

(n64)Footnote 182. Colo. Rev. Stat. Ann. § 25-15-206(1); Iowa Code Ann. § 455B.430(1)(2); Mo. Ann. Stat. § 260.465(1).

(n65)Footnote 183. N.J. Stat. Ann. § 13:1K .

(n66)Footnote 184. *42 U.S.C. § 9607*(4)(1).

(n67)Footnote 185. N.J. Stat. Ann. §§ 13:1k-6 to 13:1k-32.

(n68)Footnote 186. Ill. Ann. Stat. ch. 1112, paras. 1021 and 1039 (*see now* 415 ILCS 5/21 and 415 ILCS 5/39).

(n69)Footnote 187. Conn. Gen. Stat. Ann. § 22a-134.

(n70)Footnote 188. Minn. Stat. Ann. § 115B.16.

(n71)Footnote 189. 35 Pa. Const. Stat. Ann. § 6020.512(b).

(n72)Footnote 190. W. Va. Code § 20-5E-20 (1989).

(n73)Footnote 191. *See* Inside Epa Weekly Report (Nov. 2, 1989).

(n74)Footnote 192. *See* JAN PAUL ACTON & LLOYD S. DIXON, SUPERFUND AND TRANSACTION COSTS: THE EXPERIENCE OF INSURERS AND VERY LARGE INDUSTRIAL FIRMS (1991).

(n75)Footnote 193. John E. Osborn & Steven N. Williams, *Reauthorizing Superfund: Problems and Prospects*, N.Y. L.J. 1 (March 29, 1994) (citing Rand study, *Private-Sector Cleanup Expenditures and Transaction Costs at 18 Superfund Sites*, Lloyd S. Dixon, Deborah S. Drezner, James K. Hammit, 1993).

(n76)Footnote 194. Mark Hoffman, *Superfund not Working Well: Rand*, Bus. Ins. (Nov. 8, 1993), at 1; Anne M. LaPlace, *CERCLA's Current Report Card and The Efficacy of Proposed Amendments*, May 1994, p. 21 (paper on file with author).

(n77)Footnote 195. Note, *The Adversarial Relationship Between the States and E.P.A.: Conflict Over State Authority Under CERCLA*, 3 Dick. J. Envt'l L. & P. 101 (1993).

(n78)Footnote 196. Cal. Civ. Code § 1542.

(n79)Footnote 197. *AM Int'l, Inc. v. International Forging Equip., 743 F. Supp. 525 (N.D. Ohio 1990). See* Note, *21 Mem. St. U. L. Rev. 423 (1991).*

(n80)Footnote 198. *Mardan Corp. v. C.G.C. Music, Ltd., 804 F.2d 1454 (9th Cir. 1986); Chemical Waste Mgt. v. Armstrong World Indus., 669 F. Supp. 1285 (E.D. Pa. 1987).* Whether insurers must defend a PRP is not always clear. Note, *Whether Insurers Must Defend PRP Notifications: An Expensive Issue Complicated by Conflicting Court Decisions, 10 N. Ill. U. L. Rev. 579 (1991).*

(n81)Footnote 199. *423 N.W.2d 355 (Mich. App. 1988).*

* Parts of this chapter have been adapted from George Lefcoe, Real Estate Transactions (Michie 1993).

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CHAPTER 85 OBTAINING LAND AND RIGHTS FOR DEVELOPMENT *

9-85 Thompson on Real Property, Thomas Editions § 85.08

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§ 85.08 Laws Potentially Applicable to Securing Entitlement to Develop Land.

[Go To Supp]

In the preceding sections we saw how a company (Larwin) engaged in subdividing land and home-building might finance and contract for land. The following section describe most of the laws such an enterprise would have to satisfy in order to obtain the legal right to divide its 880 acres into smaller saleable parcels.

Many of these laws and regulations governing development are federal -- among them the Clean Air Act, the Clean Water Act, and the Endangered Species Act. Other applicable laws are state or local ones. Across the country, state governments and local communities differ in their attitudes towards growth. Even in the same community, attitudes towards development may change. In recessions, the case for development looks pretty good. When growth is abundant and outstrips infrastructure, the case for slowing growth may look better. n200 Developers going through the same technical steps may find themselves encouraged or impeded depending on the community's attitude towards new development, the competence of the local planning staff, and the efficiency of local bureaucratic practice.

A developer or lawyer in the entitlement business does well to start with a list of the applicable laws, regulations and rules. Such a checklist, however, can be daunting. For a southern California home builder it may look something like this:

> (1) *The Subdivision Map Act*. Before a home builder will be able to record a map showing how it proposes to divide its land into smaller lots, that map must be approved by local government. The local government's authority to control the subdivision of land is usually derived from state law. In some states, home rule cities derive their authority to regulate subdivisions from their charters. Subdivision regulation authority includes the right to restrict the number and size of lots, the width of streets, and their locations.
>
> (2) *Exactions, Dedications, and Fees*. A developer's right to subdivide will be conditioned on its dedicating land for streets, utility rights-of-way, and possibly sites for schools and parks. It may have to kick in money for regional public improvements located off its site such as highways, fire stations, and

libraries.

(3) *The Subdivided Lands Act*. Under state law in about 15 states, subdividers must provide lot buyers with detailed information about the project, its financing, the location of public facilities, and other important consumer information. These reports are analogous to the reporting requirements imposed on those who sell securities.

(4) *Zoning*. The land uses permitted on the site, the size of lots, and the portion of the site that can be utilized for building are the subject of local zoning ordinances.

(5) *General Plan*. Most states adopted the standard state zoning enabling act which requires that zoning be in accordance with a comprehensive plan. The zoning ordinance itself has been held to satisfy the requirement for a comprehensive plan in all but a few states. In California, Florida, Hawaii, Maine, Oregon, and Vermont the state legislatures have mandated -- independent of the local zoning ordinance -- an additional set of conditions for development approval.

(6) *Environmental Impact Statements*. Projects funded or subsidized by the federal government must meet requirements of the National Environmental Protection Act (NEPA). Many states have enacted laws modeled after NEPA requiring state and local decision-makers to consider the environmental impacts of government projects before approving them. Analyses and descriptions of the impacts, if they are potentially significant, are gathered in a document called an environmental impact report or an environmental impact statement (EIS or EIR) under NEPA.

(7) *CERCLA (The Comprehensive Environmental Response, Compensation and Liability Act)*. This federal law mandates that sites containing hazardous or toxic waste be cleaned up, preferably at the expense of past and present owners. Should a developer propose to subdivide and build houses on a site with contaminated soils, the developer will have to remove the contaminants as part of the approval process.

(8) *The Clean Air Act*. The Clean Air Act sets national air quality standards. The law requires states to prepare implementation plans showing how federal air quality standards are to be met locally. Under the implementation plans in cities that fall short of Clean Air Act standards, the developer may be subjected to the requirements of state, regional, or local air quality control boards. Requirements may include the necessity for new industry to "purchase" pollution from firms in the area who earned credits by reducing their emissions; by creating employee ride-sharing programs for major employers; through design changes in the layout of the project to encourage car-pooling and public transit use; and through a better balance of jobs and housing within the project area. Through the Clean Air Act, n201 Congress mandated air quality standards and authorized the E.P.A. to oversee the development of state implementation plans (S.I.P.s) to achieve those standards. Many localities failed to promulgate S.I.P.s and that has led to considerable litigation by environmental groups to compel the E.P.A.'s adoption of federal implementation plans and other sanctions against states that don't propose adequate S.I.P.s. n202

Under the implementation plans in cities that fall short of Clean Air Act standards, the developer may be subjected to the requirements of state, regional, or local air quality control boards. New industries may need to "purchase" the right to pollute from firms in the area. Marketable pollution credits may be awarded to firms in the area. Marketable pollution credits may be awarded to firms reducing their emissions. Employers may have to create employ ride-sharing programs. Land developers may have to design their projects to encourage car-pooling and public transit use. Local and regional land use regulators may need to use their authority to encourage a better balance of jobs and housing within the sub-areas of the region. However, Congress and the states have been hesitant to authorize air quality regulators to enact control over indirect sources of pollution such as parking garages and shopping centers. n203

Section 805 of the Clean Air Act Amendments declares that the law is not to be "an infringement on the existing authority of counties and cities to plan or control land use." But as one lawyer expert in air quality regulation observes: "restrictions applicable to stationary sources in the most severely polluted metropolitan areas will place bounds on local authority," and these can have "substantial impacts" on growth in such areas. n204

(9) *Wetlands*. The Clean Water Act protects wetlands against promiscuous dredging and filling. Developers are not allowed to dredge and fill without a special permit from the Army Corps of Engineers, and wetlands permits are not ordinarily issued for housing projects. Under § 404 of the Clean Water Act developers are not allowed to dredge and fill without a special permit from the Army Corps of Engineers. n205 Any activity that moves dirt around in a wetland counts as "dredge and fill." Placing dirt in a wetland to build a road or farming, can be "dredge and fill." An activity need not "pollute" to require a permit. n206 Getting a § 404 permit is by no means to be regarded as "routine, simple, cheap or pleasant." n207

No permit can be granted unless it is in the public interest. The Corps considers an enormous array of factors in its public interest review, everything from ecological conservation to the needs and welfare of people. n208 But the upshot of the public interest review is that anyone seeking to fill a wetlands will be required to create new wetlands from existing uplands at least equal in size and quality to the wetlands filled or dredged for development. The new wetlands must be at the site of the project or nearby. Many states have wetland protective legislation. n209 Wetlands permits are not ordinarily issued for housing projects.

Other agencies may become involved in wetlands permitting: the National Marine Fisheries Services, the Soil Conservation Service, state departments of fish and game, state and local water resources, and water quality control boards, to name some. Even the Secretary of the U.S. Department of Agriculture enters the wetlands scene through a program known as "Swampbusters." This program stops the Secretary from passing out agricultural subsidies to farmers who plant commodity crops in wetland basins. n210

(10) *The Endangered Species Act*. Congress has voted to protect endangered species. If the U.S. Department of Interior has declared a site to be the critical habitat of a species listed as endangered or threatened, developing the site may be an unlawful taking of that species. Under special circumstances (where the species can be saved by mitigation measures), a permit for development may be obtained. The Endangered Species Act n211 was designed so that the Secretary of the Interior first determines whether a species is "in danger of extinction" (endangered) or "likely to become endangered within the foreseeable future" (threatened). The process for making this determination is by *listing* endangered or threatened species. The Secretary publishes proposed listings, holds public hearings, and then publishes findings in the Federal Register.

The Secretary defined "harm" to include "significant habitat modification or degradation where it actually kills or endangers wildlife." If the U.S. Department of Interior has declared a site to be the critical habitat of a species listed as endangered or threatened, developing the site may be an unlawful taking of that species. n212 Under special circumstances (where the species can be saved by mitigation measures), a permit for development may be obtained, but a signi-ficant portion of the site may have to be set aside as open space under a *habitat conservation plan*. n213 Under a habitat conservation plan, a developer may end up losing the use of considerably more than half the project site so as to leave room in the critical habitat for the survival of an endangered or threatened species.

> (11) *Development Agreements*. In a few states, development agreements may be entered between the developer and local government. These agreements protect the developer against changes in local zoning or subdivision regulations enacted after beginning the project that might be applied retroactively. Developers enter these contracts with local governments so that future changes in land use laws won't prohibit or increase the costs of projects already approved.
>
> (12) *Referenda and Initiatives*. Many projects will require changes in zoning. In most states, even if the

developer secures a change favorable to the project, it is subject to repeal by the local voters. The voter repeal is called a *referendum*. In some states voters may also *initiate* zone changes.

(13) *Growth Caps*. Many communities have enacted absolute limits on the number of houses or the square footage of commercial space that can be built in the community within any given year. These are allocated to specific projects based on a competition (a "beauty contest" some call it) in which local officials assess the design qualities of competing projects, their neighborhood impacts, and the "goodies" the project offers the community. Some cities and counties have rigid urban growth boundaries beyond which no approvals will be granted for urban development. Some have voted to link new development to improvements in traffic or school capacity. A developer whose project falls askew of these requirements has an especially difficult task.

(14) *Annexation*. A developer will often consider the possibility of annexing her site from a growth-hostile jurisdiction to a more friendly local government if the site lies near the boundary of a welcoming community.

(15) *Coastal Zone Management Laws*. Projects lying in coastal zones may be subject to review by state or regional entities to assure compliance with plans that all coastal states have enacted to protect their coastlines from overdevelopment pursuant to the Federal Coastal Zone Management Act of 1972. n214 "Virtually all these state statutes utilize some type of permit system geared toward restricting development in fragile coastal regions. However, the different statutes vary considerably in stringency, focus, and clarity." n215 Louisiana requires a coastal use permit for any use that would "directly and significantly affect coastal waters." n216 California developers must obtain a coastal development permit, either from local governments or the state, before building any structure seaward of the nearest public road or less than 300 feet inland from the mean high tide. n217

Here is a partial list of agencies and groups a private developer dealt with in a coastal project in southern California on 900 acres of open space for a new city with 11,700 residential units, 4.9 million square feet of office, 720,000 square feet of residential area, and 2,400 hotel rooms: n218

CITY OF LOS ANGELES

Building and Safety Department

City Attorney's Office

Community Development Department

Fire Department

Housing Authority

Office of Housing Production and Preservation

Library Department

Planning Department

Police Department

Public Works Department
-- Bureau of Engineering

-- Bureau of Sanitation

-- Bureau of Street Lighting

-- Bureau of Street Maintenance

-- Street Tree Division

Department of Recreation and Parks

Department of Transportation

Department of Water and Power

COUNTY OF LOS ANGELES

Department of Beaches and Harbors

Fire Department

Los Angeles Flood Control District

Marina del Rey Design Control Board

Department of Health Services

Department of Recreation and Parks

Public Works

Sheriff

REGIONAL JURISDICTIONS

County Sanitation District

Los Angeles County Transportation Commission

Los Angeles Unified School District

South Coast Air Quality Management District

Southern California Association of Governments

STATE OF CALIFORNIA

California Coastal Commission

Department of Conservation Division of Oil and Gas Permits

Department of Fish and Game

Department of Health Services

Department of Real Estate

California Department of Transportation

Resources Agency

-- Department of Boating and Waterways

State Water Resources Control Board

-- Los Angeles Regional Water Quality Control Board

FEDERAL

Army Corps of Engineers

Environmental Protection Agency

Department of the Interior

-- U.S. Fish and Wildlife Service

Department of Commerce

-- National Marine Fisheries Service

National Oceanic and Atmospheric Administration

COMMUNITY GROUPS

The Friends of Ballona Wetlands

Kentwood Home Guardians

Villa Marina Council

Coalition of Concerned Communities

Coastal Area Support Team (COAST)

Venice Action Committee

Playa del Rey Network

Villa Marina East Homeowners Association

Marina Lessees

Del Rey Homeowners Association

Westchester Revitalization Corporation

West Beach Playa del Rey Association

Marina del Rey Lessees Association

Greater Westside Network

Ladera Civic Association

Playa del Rey Homeowners Association

Marina del Rey Chamber of Commerce

Westchester Chamber of Commerce

Venice Chamber of Commerce

Loyola Marymount University

Culver City Little League

Venice Town Council

Westchester Community Advisory Group

FOOTNOTES:

(n1)Footnote 200. *See, e.g.,* William A. Fischel, *Do Growth Controls Matter?,* Lincoln Inst. Of Land Policy 53 (1990) (concluding that "Growth controls and other aggressive extensions of land use regulations probably impose costs on society that are larger than the benefits they provide").provide."). *See also* Seymour I. Schwartz et al., *Research Design Issues and Pitfalls in Growth Control Studies,* 62 Land Economics 223 (1986).

(n2)Footnote 201. CAA of 1977, *42 U.S.C. §§ 7401*-7642; CAA of 1990, *42 U.S.C.A. §§ 7623,* 7624.

(n3)Footnote 202. *See* Baron, *Urban Air Quality: Litigation Under the Clean Air Act: Past, Present and Future*, 20 Envtl. L. Rptr. 10216 (1990). This article concludes: "Given the historic unwillingness of the states to adopt the serious measures needed to bring about attainment and E.P.A.'s reluctance to intervene, citizen suits will continue to play a pivotal role in the battle for clean air." Peter Hsiao, *New Developments and Trends in Clean Air Act Litigation and Enforcement*, SA85 ALI-ABA 403 (June 24, 1996).

(n4)Footnote 203. *See* Barry T. Woods, *Environmental Land Use, Indirect Source Controls and California's South Coast Plan: Is the Day of Attainment Coming?, 23 Envtl. L. 1273, 1295 (1993). See also* Hamilton et al., *Applying the*

Jobs/Housing Balance Concept, Urb. Land 15, 16 (Oct. 1991). Copyright 1991 by Urban Land Institute. Reprinted by permission.

(n5)Footnote 204. Kurman, *Clean Air and Urban Areas: Will the New Rules Clean Them Up or Out?*, Urb. Land 20 (Feb. 1992).

(n6)Footnote 205. Pub. L. No. 92-500, *86 Stat. 816, 33 U.S.C. § 1252 et seq.* (as further amended by Pub. L. No. 95-217, *91 Stat. 1566).*

(n7)Footnote 206. James S. Burling, *Property Rights, Endangered Species, Wetlands, and Other Critters -- Is It Against Nature to Pay for Takings? 27 Land & Water L. Rev. 309, 318 (1992).*

(n8)Footnote 207. *See* Johnine J. Brown, *Wading Through the Wetlands Regulations*, 10 Prac. Real Est. L. 13, 20-21 (Jan. 1994).

(n9)Footnote 208. 33 C.F.R. § 320.4(a)(1).

(n10)Footnote 209. *See, e.g.*, The Dam Safety and Encroachment Act, Pa. Stat. Ann. tit. 32, 693.1§§ 693.1 - 693.27, and the Clean Streams Law, Pa. Stat. Ann. tit. 35, ??691§§ 691 - 691.001. *See* Robert B. McKinistry, Jr., *Constraints Upon Development in Environmentally Sensitive Areas: Regulation of Wetlands and Floodplains in Pennsylvania*, 2 Vill. Env. L. J. 333, 354 (1991). A challenge to the application of one of those state wetlands protection acts, South Carolina's coastal zone management law, gave rise to the famous takings case, *Lucas v. South Carolina Coastal Council, 112 S. Ct. 2886 (1992).* Few developers will benefit directly from *Lucas* because most land use laws allow some economic use of land. Ordinances that ban all or nearly all uses usually do so to prevent nuisance-like conditions. However, local governments restricting development to secure open space or to protect farming where farming is no longer economically viable may have to compensate property owners. The *Lucas* case may have its greatest impact where developers are entirely prevented from using any of their land, because it is a wetlands, or provides a habitat for an endangered, or threatened species protected by the federal law.

State Courts differ dramatically in their responses to claims for compensation from property owners who are denied the right to develop based on state wetlands protection. At least four states hold that a buyer who purchases swampland has no reasonable expectations of being able to develop by filling the site. *Compare Just v. Marinette County, 201 N.W.2d 761 (1972) with State v. Johnson, 265 A.2d 711 (Me. 1970).* This is sometimes called the "buy a swamp, get a swamp" rule.

In two states, wetland owners have been held to enjoy the right to develop or be compensated. New York: *Berwick v. State (Berwick), 552 N.Y.S.2d 409 (N.Y.A.D. 1990);* Connecticut: *Gil v. Inland Wetlands & Watercourses Agency, 593 A.2d 1368 (Conn. 1991).* But in one of those, New York, the owner is only entitled to claim from the state damage caused by federal wetlands controls. For that the property owner must sue the Feds. Washington: *Orion Corp. v. State, 747 P.2d 1062 (Wash. 1987), cert. denied, 486 U.S. 1022 (1988);* Wisconsin: *Just v. Marinette County, 201 N.W.2d 761 (Wis. 1972);* New Hampshire: *Claridge v. New Hampshire Wetlands Bd., 485 A.2d 287 (N.H. 1984);* Florida: *Graham v. Estuary Props., Inc., 399 So. 2d 1374 (Fla. 1981).*

Basile v. Town of Southampton, 678 N.E.2d 489 (N.Y. 1997) (Valuation of property acquired by town in condemnation proceeding was required to reflect applicable wetlands restrictions, rather than its preregulatory property value; claimant took title to her property subject to wetlands regulations and encumbrances of covenants entered into by former owner in exchange for right to subdivide and develop).

(n11)Footnote 210. *16 U.S.C. §§ 3801* - 3845. *See* Turrini, *Swampbuster: A Report From the Front, 24 Ind. L. Rev. 1507 (1991).*

(n12)Footnote 211. Pub. L. No. 93-205, *8 Stat. 884.*

(n13)Footnote 212. The Secretary's definition of "harm" to include habitat modification was upheld in *Babbitt v. Sweet Home Chapter of Communities for a Great Oregon, 115 S. Ct. 2407 (1995).* Requiring the owner to forfeit the use of her site may also be a "taking" of private property for public use in the Fifth Amendment sense. *See, e.g.,* Oliver A. Houck, *Why Do We Protect Endangered Species and What Does That Say About Whether Restrictions on Private Property to Protect Them Constitute "Takings"?, 80 Iowa L. Rev. 297 (1995).*

Jeffrey A. Lockwood,*The Endangered Species Act And Private Property: The Intent and Implementation Of The ESA: A Matter Of Scale, 32 Land & Water L. Rev. 551 (1997);* Kimberly Rockwell, *The Fifth Amendment Implications of Including Habitat Modification in the Definition of Harm to Endangered Species (Babbitt V. Sweet Home Chapter Of Communities For A Great Oregon, 115 S. Ct. 2407 (1995)),* 11 J. Land Use & Envt'l L. 573 (Summer 1996); Michael Vivoli, Note, *"Harming Individual Liberty: Assessing The United States Supreme Court's Decision In Babbitt v. Sweet Home," 32 Cal. W. L. Rev. 275 (Spring 1996);* Richard A. Epstein, *Babbitt v Sweet Home Chapters of Oregon: The Law and Economics of Habitat Preservation,* 5 Sup. Ct. Econ. Rev. 1 (1997); Murray D. Feldman & Michael J. Brennan, *The Endangered Species Act and Private Property: Jucidial Application of the Endangered Species Act and the Implications for Takings of Protected Species and Private Property, 32 Land & Water L. Rev. 509 (1997).*

Good v. United States, 39 Fed. Cl. 81 (1997) (Environmental Species Act (ESA) did not require that property containing endangered species be maintained in its natural state and thus did not deprive property of all economic value so as to support federal takings claim for denial of federal permits for proposed residential development on property, in light of possibility that ESA exemptions could apply to allow taking of individual endangered rabbits and in light of fact that taking of individual rabbits on property would not legally require finding that continued existence of species would be jeopardized by development).

(n14)Footnote 213. Timothy Beatley, Habitat Conservation Planning: Endangered Species and Urban Growth (1994); Marsh, *Endangered Species Act: Reconciling Economic Development and Wild-life Conservation,* 1 Land Use F. 45, 47 (1991); Lindell L. Marsh, *Habitat Conservation at Fieldstone (Carlsbad),* Urban Land 52 (June 1995); Note, *Natural Communities Conservation Planning: An Ecosystem Approach to Protecting Endangered Species, 47 Stan. L. Rev. 319 (1995).*

(n15)Footnote 214. Pub. L. No. 92-583, *86 Stat. 1280* (codified as amended at *16 U.S.C. §§ 1451*-1464). For a list of the state statutes, *see* Zalkin, *Shifting Sand and Shifting Doctrines: The Supreme Court's Changing Takings Doctrine and Carolina's Coastal Zone Statute, 79 Cal. L. Rev. 207 n.46 (1991).* The South Carolina regulation prohibiting development or rebuilding seaward of certain setbacks was upheld by the U.S. Fourth Circuit Court of Appeals in Esposito v. The South Carolina Coastal Council (WL 11799, July 1991).

(n16)Footnote 215. Zalkin, *supra* note 93, at 217-18.

(n17)Footnote 216. La. Rev. Stat. Ann. § 49:214.30. *See also* Fla. Stat. Ann. § 380.23 (requirements must be coextensive with those of the Federal Coastal Zone Management Act of 1972). New Jersey prohibits construction of "facilities" in a coastal area without a permit from the State Commissioner of Environmental Protection. N.J. Stat. Ann. § 13:19-5.

(n18)Footnote 217. Cal. Pub. Res. Code §§ 30600 to 30613. The California State Coastal Commission must approve projects in coastal cities and counties which have yet to enact a local coastal plan approved by the state commission.

(n19)Footnote 218. Miller, *Playa Vista Update,* The Argonaut, Sept. 19, 1991, at 4.

* Parts of this chapter have been adapted from George Lefcoe, Real Estate Transactions (Michie 1993).

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CHAPTER 85 OBTAINING LAND AND RIGHTS FOR DEVELOPMENT *

9-85 Thompson on Real Property, Thomas Editions § 85.09

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§ 85.09 Checking Out the Politics of Planning.

To play the entitlement game, developers and their lawyers need to know who the decision-makers are. In most states they can be divided into four groups: elected local officials (mayor and councils for the cities; supervisors for the counties); planning commissions -- volunteer panels whose members, called planning commissioners, are appointed by elected officials; planning staff members; and staff members of other agencies, both within the jurisdiction and outside.

Unofficial players include the neighbors, journalists and newscasters who cover local news, and occasionally special interest groups, ranging from the Sierra Club to the Chamber of Commerce, who may become involved in a particular planning contest if the stakes are high enough.

(1) *Elected Officials*. The city council or county board of supervisors will have to give final approval to all "legislative" acts. These include zone changes, general plan amendments and the environmental documentation accompanying them, and, by special statute, development agreements.

In cities or counties whose representatives are elected by district, not at large, the representative of each district has a disproportionately important say in planning decisions arising on his or her turf. Fear of reciprocal intervention keeps others from more than the occasional attempt to second-guess the district supervisor or councilor in a planning case. Nonetheless, it sometimes happens that a project is approved over the objections of the district representative. The constituents of other council members may favor the project, or they may not care if their representative votes for it, and the representative may believe the project benefits the city as a whole, or may owe allegiance to the applicant or to established planning precedents.

A developer can anticipate the elected officials' preferences by:

(a) talking with earlier applicants about their cases;

(b) studying the transcripts and files of similar cases filed in the same area recently;

(c) sitting in on public hearings on planning and zoning matters to hear what peaks the interest of

councilors or supervisors;

(d) reading newspaper accounts from the local press on past planning controversies;

(e) reading the public conflict-of-interest disclosure form each elected official is required to file annually and which lists the official's residence, major investments, and gifts over $25; and

(f) meeting the official to discuss the application directly.

In larger jurisdictions, elected officials have staff who screen agendas. Among these may be a deputy who handles planning matters. That person is usually more accessible and often more candid than the elected official, an indispensable player for anyone hoping to develop or block a project.

As tempting as it is for the combatant in a land use contest to pick up the phone and call a powerful official who owes her a favor, be aware of legal limits to *ex parte* communications -- off-record conversations or information obtained in the absence of one or more of the parties to the dispute. In some places, any proven *ex parte* contact creating the "appearance of unfairness" taints the final decision and may result in sanctions. In some states, *ex parte* contacts are only barred for decisions of the quasi-judicial type but not legislative matters. n219 Elsewhere, sanctions apply to *ex parte* information only when the excluded party can show clear bias affecting the final decision. n220 Possible sanctions: the decision is set aside and next time around the tainted official is forbidden from participating, or the official is required to fully and truly disclose publicly the content of the communication in time for those who were excluded to have their say in rebuttal. n221 Sometimes Courts reverse decisions based on *ex parte* information. n222

Developers are the largest single contributors to state and local election campaigns. n223 What their donations purchase, they are quick to admit, is "access," the opportunity to discuss their problems privately with the official whose campaign they have helped finance. Developers who aren't regular contributors -- and many who are -- will often employ a political consultant, lawyer, engineer, architect, or planner who chews chicken at the right campaign fundraisers and thus has "paid dues" for access. One study showed, not surprisingly, that "lawyers with political connections to the leadership were more successful in obtaining re-zonings than lawyers without traceable connections." n224

Defenders of campaign funding by developers contend that, but for those contributions, the politics of planning would be dominated entirely in many places by the parochial interests of neighbors.

Smart developers watch the election calendar. They prefer to defer an unpopular proposal if a hotly contested local election is on the horizon. They don't want to jeopardize the political careers of their favorite elected officials.

(2) *Planning Commissioners*. These appointed officials serve as part-time volunteers, and usually enjoy some political clout. They have the first official say on all matters headed for the local legislature (zoning, plan amendments). In many communities, they also have the last word on administrative or quasi-judicial matters (subdivision approvals, variances, conditional use permits, planned unit developments) unless their decisions are appealed to the city council or board of supervisors.

"Good government" reforms established nonpartisan, appointed commissioners in hopes of removing planning and other "technical" decisions

from the clutches of political party bosses.

> ... the original reason for making planning commissions independent, outside of politics, still exists. There is still a need for a commission that will attract the services of leaders who are unable or unwilling

> to get into active politics, but who are interested in serving their city. There is still need for an official agency that any and all governments can approach with some assurance of an unbiased hearing. n225

This aspiration has been realized only partly.

Since planning commissioners are appointed by elected officials, they sometimes reflect the views of those who appointed them or, at a minimum, try to avoid head-on, politically embarrassing conflicts. Because they are not elected, they do sometimes enjoy an independence elected officials often forego. Elected officials can use planning commissions as convenient political buffers to insulate them from some controversial "no win" planning and zoning decisions.

(3) *Planning Staff*. The planning staff varies hugely from jurisdiction to jurisdiction in numbers and competence. In smaller towns they may be part-time supplemented by consultants. In larger jurisdictions the staff may be composed of several hundred souls. Being professionals, staffers often have well-formulated ideas about how things should be, and many of those ideas are forged from hard years of experience and perceptive observation of what works and what doesn't. Knowing the profession of the staffer assigned to a project can be helpful. Civil engineers, for instance, often see things differently than architects or social scientists.

A smart developer avoids antagonizing a staffer working on the application, no matter how incompetent or indifferent the staffer seems. Even after a final decision, many permits have conditions attached to them which prove ambiguous or technically unworkable. A staff member will be assigned by the department to decide what changes in the project are consistent with the approvals already granted, so that the project can proceed as modified, and what changes require a new approval. The assigned staff member will often be the same one who helped process the application in the first place.

(4) *Other Agency Staff*. Increasingly, planning is a multi-departmental and multi-jurisdictional affair. Developers or their engineers negotiate directly with many of these people. They include representatives of the local road or public works department, fire, police, school board, and water providers. If their projects require certification

from regional air and water quality control boards, state fish and game, or a wetlands permit from the U.S. Army Corps of Engineers, developers will want to know exactly which staff person is responsible for each of these.

(5) *Project Formulation and Expert Advice*. Good projects are easier to defend than bad ones. What counts as "good" is subjective, and depends hugely on who the neighbors are, what the regulators care about, and the technical standards and ground rules already in place. Surveying all these before the developer has locked a proposal into shape can save grief later.

Sophisticated developers are masters at offering the designs and "goodies" that will bring local cheers. It may be a school or park site. It could be low-income housing units (or a promise the project won't have any). Maybe it's hacienda or "Cape Cod" styling or a village-type clustering of houses, shops, and streets.

Savvy developers employ planning consultants to pave the way at city hall, lawyers to map and oversee the process required to obtain the necessary approvals, public relations firms to study what the neighbors really want and care about, traffic engineers to make sure congestion is alleviated, geologists to advise on how to prevent landslides, and environmental consultants to address all the ecological issues. Experienced developers don't get locked into a project design until they have consulted the local politicos and brainstormed with their experts.

FOOTNOTES:

(n1)Footnote 219. Generally, quasi-judicial decisions are those involving conditional use permits, variances, and subdivision map act approvals. Legislative acts are those involving zoning or the general plan. In some states, zoning decisions may be classified as quasi-judicial if the decision affects only one small parcel of land.

(n2)Footnote 220. See Jennie L. Petitt, *Ex parte Communication in Local Land Use Decisions, 15 B.C. Envtl. Aff. L. Rev. 181 (1988);* Richard Grosso, *Symposium: Growth Management: A Plan for Florida's Future. Florida's Future. Florida's Growth Management Act: How Far We Have Come, and How Far We Have Yet to Go, 20 Nova L. Rev. 589 (Winter 1996).*

(n3)Footnote 221. *See White v. Town of Hollis, 589 A.2d 46 (Me. 1991)* (denying property owners right to due process where board members failed to disclose *ex parte* information about the proposed project).

(n4)Footnote 222. *Jennings v. Dade Country, 589 So. 2d 1337 (Fla. App. 1991).*

Theodore C. Taub, *Preparing and Participating in the Public Hearing: Legislative or Quasi Judicial, Ex Parte Communications, and Bad Habits*, SC10 ALI-ABA 929 (August 14 1997).

But see Castaneda v. Brighton Corp., 950 P.2d 1262 (Idaho 1998) (Developer's alleged ex parte contact with city council when developer presented preliminary plat for approval at council meeting did not invalidate council's approval of subdivision, where there was no allegation of an economic interest by any of council, only bias suggested was that approving preliminary plat prior to annexation and rezoning allowed city to prejudge issue, there was no means for developer to apply for preliminary plat approval other than to appear before city and ask for such approval, and hearing at which preliminary plat was approved was open to the public and press).

(n5)Footnote 223. Campaign contributions are subject to exacting rules -- federal, state and local -- rules so complex that a specialized area of legal practice has evolved around them. If these rules are met, the contributions are deemed legitimate and not bribes. Developers who seek to influence local officials by, say, employing these officials or their family members or their business associates run the risk of prosecution for bribery. *See People v. Diedrich, 182 Cal. Rptr. 354 (1982),* in which a developer seeking removal of land from a Williamson Act agricultural preserve employed a county supervisor's associate for $142,000 as architect and planner on a project which a removal vote made possible. The jury found that the fee was intended to influence the supervisor's vote.

(n6)Footnote 224. Mark Gottdiener, Planned Sprawl: Private and Public Interests in Suburbia 79 (1977).

(n7)Footnote 225. Dennis O'Harrow in *ASPO Newsletter* (July 1961), *quoted in* Yokley's Law of Subdivisions 48 (2d ed. 1981).

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CHAPTER 85 OBTAINING LAND AND RIGHTS FOR DEVELOPMENT *

9-85 Thompson on Real Property, Thomas Editions § 85.10

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§ 85.10 Developer Strategies for Dealing with Neighbors.

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§ 85.10(a) Advance Meetings: Pros and Cons.

Some developers always like to present the projects for which they need local land use approvals to neighbors in advance of public hearings in order to win political support or at least acquiescence. By meeting with those who could be harmed by a new project, developers hope to head off opposition, perhaps by a redesign of the project or an offer of a compensating amenity to the neighborhood. Even if efforts at compromise fail, the developer gets some idea in these informal sessions with neighborhood groups what the neighbors are likely to say when the developer's case goes before the planning commission or city council. Planning officials, too, appreciate developer efforts to defuse potentially explosive planning decisions.

Some developers caution against such contacts, especially when opposition is certain to be strong and well organized. They say you are just giving the enemy advance information to use against you.

§ 85.10(b) Agreements with the Neighbors.

§ 85.10(b)(1) Generally.

A developer may actually contract with a neighborhood homeowners' association. The essence of the contract is the developer's promise to build a project of a certain quality and density in exchange for the association's political support. Sometimes the developer makes the neighbors happy by redesigning the project. The redesign can be costly. After the developer acquiesces in changing the project design, how can the developer be sure some of the neighbors won't fight the project anyway? How can the neighbors be sure, if they go along with the project and don't oppose it politically, that the developer will keep the bargain and build as agreed?

> (a) The neighbors and the developer can enter in a negotiated written contract embodying their respective promises. Illustrating a promise not to participate, here is a clause a major home builder, Kaufman & Broad, had all its buyers in one project sign as part of the developer's required disclosure statement: "Buyer agrees that it shall not oppose any action taken by Kaufman & Broad before the

County of Contra Costa or any other applicable municipal agency to reduce or increase the size of homes to be constructed in the community or to change the materials, plans, and specifications of such homes in the community." The developer's promises concerning development may be accompanied by deed restrictions recorded once the requested land use approval is granted -- or even prior to approval. The developer may agree to place restrictions on the future use of the site more exacting than those imposed by zoning. For example, the developer of a retail center, seeking to rezone a site from R-1 (single-family residential) to C-1 (light commercial) might agree not to use the site as a car wash even though a car wash is a permitted use in the C-1 zone. n226

(b) Some types of zoning involve a procedure by which specific conditions may be attached to the developer's rezoning. When conditions are imposed *ad hoc* -- with no prior enacted set procedures, regulations, or statutory guidelines, this is called contract or conditional zoning. In some jurisdictions, contract or conditional zoning is vulnerable to legal attack if the conditions seem out of line with the basic zoning scheme in the community. n227 The zoning ordinance itself may detail procedures for reviewing a developer's proposed plan and the attachment of specific conditions to it. This is a common feature of the Planned Unit Development, the Specific Plan, the Conditional Use Permit and the Special Exception Zoning.

(c) Local governments may enter development agreements either by authority of state statues or -- in the absence of explicit statutory authority -- through an aggressive use of their zoning powers. Development agreements link developer promises to the developer's entitlement to develop. n228

(d) Some cities delegate to homeowners' groups the right to act as planning vigilantes, and won't issue building permits until the developer "works something out" which the neighbors can approve. n229 Consultation is one thing. Veto is quite another. When cities delegate the final word to neighborhood groups without specific and appealable guidelines, and without reserving the ultimate decision to public officials, the delegation is unconstitutional and can even result in the city being liable in damages for unconscionable delays caused by intransigent neighborhood protectors. There is nothing wrong with city officials taking the neighbors' comments and suggestions into account in formulating permit conditions. What is impermissible is delegating the land use approval function to neighborhood groups.

Suppose the neighbors are naive. They don't know that there are many ways the developer's promise to them can be made a part of the developer's deal with the city. They take the developer's word about eliminating objectionable features of the original proposal. As their *quid pro quo*, they keep their promise to stay away from the public hearing, and not to oppose the project in any way. The developer's project is approved without the conditions promised the neighbors. Have they any recourse, then, if the developer begins breaching promises made to the neighbors?

Possibly so. In *Lacher v. Superior Court*, n230 a California appellate Court sanctioned a cause of action by neighbors alleging fraud against a developer for promising his project would not block their views. Relying on that promise, they stayed home from public hearings on the project. When the project was approved and construction commenced, the neighbors filed suit for damages on the houses if framing climbed above one story.

§ 85.10(b)(2) Homeowner Politics and the Limits of Delegation.

Homeowners' groups often succeed in exercising significant influence over what can be built in or near their spheres of political influence. The influence of neighbors has been so important that zoning has been likened to a pyramid with the single-family residence at the apex as the most protected use.

No individual property owner has a right to a particular zoning ordinance to control undeveloped land or prevent redevelopment. But homeowners appear to have a reliable political entitlement to the status quo in land use. The major difference between these public rights (zoning), and their closest private analog, private homeowners' associations, is

that the latter do not include any property owners who have not agreed to the rules in advance. Zoning is enacted by a local government, which usually has some involuntary members. The one-resident, one-vote rule and majority voting procedures open the possibility that public property rights might be expanded at the expense of politically effete members of the community. n231

The hegemony of neighboring owners over zoning is so great that one commentator has suggested formalizing homeowners' informal rights by giving owners the right to sell zoning entitlements to developers for a price. That way, when market conditions justified scrapping outdated zoning, there would be an orderly way of discarding it, by passing expensive and imperfect political detours.

The gravest deficiencies of zoning are caused by a separation of the possession of certain property rights from the right to receive payment for their transfer. By designing new and better forms of land tenure to replace zoning, the greatest failings of the metropolitan land market can for the most part be corrected without requiring that public decisions replace private ones. n232

Although, practically speaking, neighborhood associations are the most potent force in many city zoning fights, no recent case shows where the line must be drawn to limit the influence of neighborhood associations in land use decisions better than *Schulz v. Milne*. n233

The saga began in 1988 when Paul Schulz and Deborah Savage bought a dilapidated, unsafe, uninhabitable house in Bernal Heights, a San Francisco neighborhood, with the idea of refurbishing it. They drew plans to add a floor, alter the interior and basement and add twelve feet to the rear of the house. Everything they desired was permitted by local zoning codes. So they applied for a building permit.

"Not so fast," the building inspector told them. They first had to work out any renovation plans with the Bernal Heights Neighborhood Review Board, and Terry Milne, an officer of the Board. The Board is a private association of Bernal Heights residents.

Since the lawsuit they eventually filed was for damages based on the U.S. Civil Rights Acts, you can probably guess what happened in the three years from 1988 to 1991. Terry Milne wasn't easily satisfied. Paul and Deborah submitted thirteen revisions and ran up big architecture bills. Each time they submitted a revision, Milne found new objections -- none embodied in any city statute or regulation -- but all firmly entrenched in Terry Milne's mind.

At one brief moment in September, 1989, the city issued a permit, but withdrew it within a few weeks when "someone" lodged an objection with the building department. Finally, in November, 1991, the city issued Paul and Deborah a building permit. But it was too late. By that time, Paul and Deborah were broke. They had depleted their construction budget fighting Terry Milne for the building permit. They were living on the premises of a business they operated, and continued living there while they sought damages against the city, the Bernal Heights Board, and Terry Milne.

Were their civil rights violated? Absolutely, ruled the Court. Citing past U.S. Supreme Court cases, the Court concluded that a municipality is prohibited "from making a statutory or de facto delegation of power to private decision-makers if the municipality does not provide safeguards or standards to govern the use of private discretion." n234 Without such standards and safeguards, there is nothing to prevent "administrative decision-making" to deteriorate into "potentially selfish or arbitrary motivations or the whims of local taste." n235

The city contended that Paul and Deborah didn't have a "ripe" constitutional claim because they hadn't appealed to the city's Board of Appeals -- the final arbiter of building permit denials. But plaintiffs' claim was based on the excessive delay that robbed them of the means to refurbish their house, no less to take further administrative appeals. In the words of the Court:

> Under these circumstances, City's attempt to bar plaintiffs' takings claims for lack of ripeness here is troubling, to say the least. City claims that plaintiffs are barred ... until they first pursue their claim through all state Court and City channels. Yet, the reason plaintiffs are barred as a practical matter from seeking relief from the state Courts or the City is because the City siphoned away all of plaintiffs' money by excessively delaying plaintiff's application process... Because the heart of plaintiffs' takings claim is that plaintiffs were financially paralyzed from going forward with their remodelling plans ... those state remedies are "constitutionally deficient" with respect to plaintiffs. Thus, in the absence of a state remedy for delay alone, plaintiffs' takings claims against defendants for excessive delay are ripe. n236

Paul and Deborah didn't have it all their way in federal Court. They had pleaded a cause of action for "interference with prospective economic advantage." a tort claim. This theory the Court rejected. To establish such a claim there must be an economic relationship between the plaintiff and some third party. But when an applicant seeks a building permit, a zone change, or a municipal license, the relationship between the applicant and the city is not ordinarily regarded as an economic one because the city is exercising its police powers, not engaging in a purely economic transaction. Were the rule otherwise, any citizen who objected to any permit or zone change would be potentially at risk to a tort claim by the thwarted, disappointed applicant. This could chill all public participation -- legitimate and reckless alike.

§ 85.10(c) Lawsuits to Discourage Dissidents.

One way a developer might try to discourage homeowners from breaching their promise of support or urging others to breach it would be by filing a lawsuit based on the tort of intentional interference with economic advantage. To make out a case, the developer would have to show (1) an intentional disruption of a potential economic advantage or a disruption of a contract, (2) that the disruption caused a loss, and (3) the amount of damage. n237

Dissidents may have First Amendment and other defenses, especially if the developer's motive is to quell homeowner participation in political debate, or to retaliate against those who spoke against the project at zoning hearings. Litigation for such pernicious purposes is called a Strategic Lawsuit Against Public Participation (SLAPP). n238 The First Amendment prevents an award for intentional interference with prospective economic advantage if interference is "based on true statements." n239 States are enacting laws to make it easier for those who are being sued just to penalize them for exercising their right of petition or free speech to obtain dismissal. n240

A SLAPP suit is a tort action designed to intimidate defendants into silence. The target of a SLAPP potentially faces enormous damages and must bear substantial costs to defend against the SLAPP suit. The potential costs of litigation serve as a deterrent to the defendant and others privy to the lawsuit from further participation in the SLAPP related activity or other future related activities. Because the objective of a SLAPP suit is not to win, but rather to subject the defendant to the cost of litigation, traditional safeguards against meritless actions (suits for malicious prosecution and abuse of process, requests for sanctions) are inadequate to counter SLAPPs. n241 Some states have re-acted to the problem of SLAPP suits by enacting legislation designed to make it easier to dismiss SLAPP suits.

California, n242 Delaware, n243 Minnesota, n244 Nevada, n245 New York, n246 Rhode Island, n247 and Washington n248 have enacted Anti-SLAPP legislation. The legislation in these states provide procedural remedies or special defenses to dismiss lawsuits that are designed to chill and diminish a citizen's right to free expression and petition of government. n249 If the target of a SLAPP prevails, they are usually entitled to attorney's fees and costs. Furthermore, legislation in Delaware, n250 Minnesota, n251 New York n252 and Rhode Island n253 creates a cause of action for the prevailing target from which they can recover actual and punitive damages.

FOOTNOTES:

(n1)Footnote 226. *See, e.g., Zupancic v. Schimenz, 174 N.W.2d 533 (Wis. 1970)* (where the neighbors got no such promise and ended up with an unwanted car wash).

(n2)Footnote 227. *See, e.g.,* J. Patrick Green, *Giger v. City of Omaha: Of Contracts, Comprehensive Plans, and Master Plans in Nebraska Zoning, Questions With and Without Answers, 23 Creighton L. Rev. 289 (1990).*

(n3)Footnote 228. *See Giger v. City of Omaha, 442 N.W.2d 182 (Neb. 1989),* and discussion of development agreements, *infra* at § 85.06. *See also* City of New York v. Delafield, 246 Corp., 662 N.Y.S.2d 286 (N.Y.A.D. 1997) (the city did not waive its right to compel submission of restoration plans to the city planning commission under the terms of covenants agreed to by the original grantor and the initial grantee- developer). *But see Chung v. Sarasota County, 686 So. 2d 1358 (Fla. App. 1996)* (County's purported settlement agreement in zoning litigation, under which county agreed to rezone disputed property subject to numerous stipulations and conditions, constituted invalid contract zoning, though county commission had approved settlement at its regular meetings).

Almor Assocs. v. Town of Skaneateles, 647 N.Y.S.2d 316 (N.Y.A.D. 1996) (Town was not bound by terms of property owners' alleged conditional offer to terminate present litigation in exchange for rezoning of parcel to commercial and issuance of building permit for construction of shopping center on that parcel, despite town's rezoning of parcel to commercial, and, thus, town was not liable to owners for breach of contract, contract interference, and delay damages based on town's alleged failure to provide adequate sewer facilities; town could not contract away or limit or impair discretionary authority of future legislative bodies in area relating to governmental or legislative functions).

(n4)Footnote 229. *Schulz v. Milne, 849 F. Supp. 708 (N.D. Cal. 1994).*

(n5)Footnote 230. *281 Cal. Rptr. 640 (Cal. 1991).*

(n6)Footnote 231. William A. Fischel, The Economics of Zoning Laws 36-37 (1985).

(n7)Footnote 232. Robert A. Nelson, Zoning and Property Rights 234 (1977). *See also* George W. Liebman, *Devolution of Power to Community and Block Associations, 25 Urb. Law. 335 (1993).*

(n8)Footnote 233. *849 F. Supp. 708 (N.D. Cal. 1994).*

(n9)Footnote 234. *Id. at 712.*

(n10)Footnote 235. *Id.*

(n11)Footnote 236. *Id. at 714.*

(n12)Footnote 237. *See generally* William L. Prosser and Page Keeton et al., Prosser and Keeton on the Law of Torts §§ 129 to 130 (5th ed. 1984).

(n13)Footnote 238. *See* Thomas A.Waldman, *SLAPP Suits: Weaknesses in First Amendment Law and In the Courts' Responses to Frivolous Litigation, 39 UCLA L. Rev. 979 (1992);* Canan and Pring, *Strategic Lawsuits Against Political Participation,* 35 Soc. Probs. 506 (1988). Robert D. Sack, *Recent Developments in the Law of Defamation,* 498 PLI/Pat 7, 41 (Nov. 1997) (California anti-SLAPP statute); Susan D. Hargus, *Civil Practice Act: Prohibit A Civil Litigant from Interposing a Claim for an Improper Purpose Such as to Suppress a Person's Right of Free Speech or Right to Petition Government; Provide for a Motion to Strike or Dismiss that May Be Interposed by a Civil Defendant Whose Rights as Above Are Infringed by Such A Claim; Include Statements Made in Furtherance of the Right of Free Speech or Right to Petition Government in Connection With an Issue of Public Interest as Privileged Communications that May not Be Used as a Basis for a Libel or Slander Tort Claim, 13 Ga. St. U.L. Rev. 23 (November 1996);* Chad Baruch, *"If I Had A Hammer": Defending SLAPP Suits in Texas, 3 Tex. Wesleyan L. Rev. 55 (Fall 1996);* John Hershey, Casenote, *If You Can't Say Something Nice, Can You Say Anything at All? Moldea v. New York Times Co. and the Importance of Context in First Amendment Law, 67 U. Colo. L. Rev. 705 (Summer 1996);* Aaron R. Gary, *First Amendment Petition Clause Immunity from Tort Suits: In Search of a Consistent Doctrinal Framework, 33 Idaho L. Rev. 67, 128 (1996)* (consideration of SLAPP litigation in determining the scope of first amendment petition clause

immunity).

(n14)Footnote 239. *See, e.g., Paradise Hills Assocs. v. Procel, 1 Cal. Rptr. 2d 514 (1991).*

(n15)Footnote 240. *See* Cal. Civ. Proc. Code § 425.16, allowing such a person to prevail on a motion to strike unless the court determines that the plaintiff has established a probability it will prevail on its claim.

(n16)Footnote 241. *Wilcox v. Superior Court, 33 Cal. Rptr. 2d 466.*

(n17)Footnote 242. Cal. Civ. Proc. Code § 425.1.6.

(n18)Footnote 243. Del. Code Ann. tit. 10 §§ 8136 - 8138.

(n19)Footnote 244. Minn. Stat. Ann. § 554.

(n20)Footnote 245. Nev. Rev. Stat. Ann. §§ 41.640 - 41.670.

(n21)Footnote 246. N.Y. Civil Rights Law §§ 70-a, 76-a; N.Y. Civ. Prac. L. & R., Rules 3299(g) & 3212(h).

(n22)Footnote 247. R.I. Gen. Law §§ 9-33-1 - 9-33-4.

(n23)Footnote 248. Wash. Rev. Code §§ 4.24.500-4.24.520.

(n24)Footnote 249. *See, e.g., Dixon v. Superior Court, 36 Cal. Rptr. 2d 687.*

(n25)Footnote 250. Del. Code Ann. tit. 10 § 8138.

(n26)Footnote 251. Minn. Stat. Ann. § 554.

(n27)Footnote 252. N.Y. Civ. Rights law § 70-a.

(n28)Footnote 253. R.I. Gen. Law §§ 9-33-1 - 9-33-4.

* Parts of this chapter have been adapted from George Lefcoe, Real Estate Transactions (Michie 1993).

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CHAPTER 85 OBTAINING LAND AND RIGHTS FOR DEVELOPMENT *

9-85 Thompson on Real Property, Thomas Editions § 85.11

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§ 85.11 Controlling Subdivisions Through the Subdivision Map Act.

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§ 85.11(a) The Process.

It may come as a shock to those unaware of the pervasiveness of local land use controls, but in most states, a property owner has no right to sell land except in its present configuration. Say, you inherit 100 acres of undeveloped scrub outside a big city in the southwest. You might get the idea of selling it off in smaller parcels, hoping maybe to pocket enough from the sale of some of the acreage to pay for the construction of a house on the last 5, 10, or 20 acres. In most states, you will need a surveyor to delineate your boundaries, a licensed civil engineer to draw a subdivision map, and local government approval of the map before you can record it in the county land records and start selling lots. You can't just retail your 100 acres as you please. Attempting to do so without local government approval may be a criminal offense. The state laws which authorize this type of local government review are called Subdivision Map Acts.

The process of subdivision control is easier to describe than to endure for the proponents of most large-scale projects because the purposes and demands of subdivision regulation have been expanding rapidly in recent years. From insights into the marketplace, and a sense of what different layouts or site plans will cost to construct, the developer proposes a tentative map to the subdivision committee of the local government. "A tentative map is a precise drawing detailing the design of a project...." n254 Although the state map acts set the general procedural and substantive boundaries on what local governments may require, local governments get the first and usually the last word on the map configurations. They approve a tentative map with conditions that the developer must meet before the final map can be recorded, and lot sales begin.

In order to get approval of a tentative subdivision map, the developer's proposed map must be consistent with local zoning laws. For instance, if the zoning code calls for one-acre minimum lot sizes, the subdivider can't expect approval of a map subdividing the site into half-acre parcels.

Approval is conditioned on the developer doing certain things before recording a final map. Usually the conditions involve putting in roads, sewers and water connections. The developer can meet these conditions in kind or by financing them through a surety bond, a special assessment district bond, or a letter of credit. On recording the final subdivision map, the developer can sell individual lots.

The developer or the buyers can draw up plans to build on the lots. Those plans must meet local building codes. Armed with an approved building permit, the owner of a legally subdivided lot can commence construction. The work will be inspected for building code compliance during construction. On completion, the owner receives a certificate of use (in the case of commercial or industrial property) or occupancy (residential).

In some states the local government's elected officials are the arbiters of subdivision approvals, although planning staff and planning commissioners review proposed maps beforehand. In other jurisdictions the process is handled entirely by professional staff, with appeal rights only to the commission or elected officials. Elsewhere the process starts with the staff and ends with the planning commission, absent appeals.

Blue-penciling the developer's proposed maps had once been entirely a behind-closed-doors affair for experts -- the developer's engineer, representatives of local road, fire, police, and other public agencies. This is changing. Many states and cities now require neighbors to be notified of a pending subdivision proposal and to have an opportunity to be heard. n255

§ 85.11(b) Purposes.

When the public approval of subdivision maps began toward the end of the 19th century, the purpose of those early laws was to make a switch from the often confusing and inaccurate metes and bounds descriptions, which depended on distances, directions and monuments, to descriptions based on large, legible plat maps drawn with India ink, and filed with the county recorder for all to see. Those maps would divide the project area into blocks, and the blocks into individual lots. The developer would sell by referring to a lot and block number in her subdivision, as identified by her recorded plat map -- Lot 5, Block 18 in the Glorious Acres Subdivision on file in the County of Bliss at Book 1, Page 2.

On the plat map, the subdivider is obliged to show the width, direction, and length of streets. These are usually made to conform to the local master plan of streets which most states require as a condition to local governments' regulating subdivisions. Until recently this meant that a city or county would insist the streets inside the development connected to the city streets outside to form a contiguous network of roads linking the entire community.

This idea of a uniform, area-wide road system, often on a grid, has run into the safety and privacy worries on the minds of many homeowners. As a result, local road planners and fire departments must contend with increasing consumer demands for cul-de-sacs, speed bumps, and other traffic diverters that stop the flow of "through" traffic. A subtext is evolving on how far local governments can go in closing local roads to "through" traffic in order to shelter residents from outside motorists. n256

Landscape architects and planners see strengths and weaknesses in the traditional "grid" pattern:

> The traditional rectilinear "gridiron" street plan, despised by avant-garde planners of the 1930s, and used almost exclusively by American real estate developers up to that time, has, objectively speaking, many things to say for itself. It provides a strong visual order, clarity of orientation, flexibility of circulation (one-way streets) and spatial organization (green squares), and flexible density and land use. But the rectilinear plan does have its defects, particularly in residential areas: it conflicts with a hilly terrain; it has difficulty accepting diagonals; it encourages through traffic; provides excess street capacity at low density while creating too many conflict points at intersections; finally, it becomes monotonous if overly large and undifferentiated.
>
> As street networks began to approach their present size, and traffic its present volumes and speeds, planners began to look for a functional, not merely geometric, street system that would differentiate between different kinds of traffic, eliminate points of conflict and unnecessary street area, define

comprehensible, undisturbed areas for living, and fit the streets to natural topography. n257

The subdivision committee reviews the developer's plans for: (1) carrying water run-off from the site, (2) laying out water and sewer lines, (3) connecting the project to the nearest sewage treatment plant or constructing a sewage plant within the project, (4) tying the project into a municipal or local water company, or utilizing underground water through a system of wells for the project, and (5) providing easements and service for cable and TV, electricity, and gas.

Scrutiny of this infrastructure is a consumer protection measure. Lot purchasers rarely know whether their homes and neighborhood are protected from the 10-, 50- or 100-year flood, whether water pumping pressure is adequate to let them have the high velocity showers they crave, and whether the base and paving materials used to construct streets are durable.

The local government also protects itself in mandating these requirements, for it has the task of maintaining the streets, sidewalks, and storm drains. These should be designed so that maintenance is practical and efficient. Curbs and gutters make street-sweeping easier. Storm drains need access points so that maintenance crews can reach them. In high fire-risk areas, streets should be wide enough to accommodate fire trucks.

Major expenditures are at stake when infrastructure standards are set. These costs, like all the costs of new development, will affect the price of the finished lots and houses. Yet cost/quality trade-offs receive little public attention. Subdivision standards involve what appear to be technical choices. Planning commissioners or elected officials seldom overrule the recommendations of the local government's technical experts. So the developer and the local engineering technocracy battle it out until they reach an accord.

The subdivision map must conform to local zoning ordinances controlling the minimum size of lots, and lots must meet width and depth requirements where these are in place.

Often the subdivider will be asked to contribute to the solution of a regional school, park or traffic shortfall by constructing roads outside the subdivision to link it to the local street network. She may also be expected to contribute to school construction, park acquisition, or highway improvements.

Local governments have had a harder time sustaining mandatory off-site improvement requirements than sustaining on-site requirements. n258

It is easy to see how on-sites benefit the development project. The connection between a developer's project and off-sites needs to be proved.

Assessing subdividers for off-site public improvements raises important equity and efficiency issues, some of which have become the source of legal challenges to subdivision dedication and fee requirements.

(1) The subdivider may be asked to contribute money or dedicate land to remedy past shortfalls in road, school or park funding that have nothing to do with the burdens caused by her project.

(2) Once the local government is certain it can legally assess developers for "off-sites," local government officials may tend to prescribe bigger and more "off sites" than if local taxpayers had been picking up the tab, and may insist that these facilities be built by public employees at a price far greater than private firms would have charged for the same facilities.

(3) Landowners who don't change the use of their properties and don't subdivide don't have to pay subdivision exactions. This creates an incentive for maintaining the status quo even if the community would be better served by the landowner's changing the use of the site. n259

(4) Some types of development escape subdivision exactions entirely. Apartment developers, for instance, building on previously subdivided vacant lots, bring large numbers of people to the area but aren't engaged in the act of subdividing, and hence escape subdivision exactions and dedication requirements. (They could be liable, though, for impact fees levied when building permits are issued or utility hook-up fees are assessed to amortize the costs of capital facilities.)

(5) In states where converting an apartment house into a condominium is considered a "subdivision" for which local government approval is required, condo converters are caught in the web of subdivision fee and dedication requirements. Yet they are not necessarily bringing more people into the community than already reside there. In fact, if the buyers of condos are richer, and live at lower densities than the renters they displace, condo converters may actually be reducing the demand for schools, parks, and roads. Yet they may get socked for subdivision off-site contributions anyway.

(6) Some subdividers may actually benefit from dedicating land within their tracts for parks. People may pay more for houses near (but not necessarily adjoining) parks and schools. n260 Other subdividers may be required to provide or contribute to parks and schools whose projects are so far from these facilities they don't benefit at all from them. The buyers of homesites on large lots, in a planned private community with a country club and golf course, may not value a park as much as the buyers of a project built at very high densities in a project lacking open space amenities. Assessing both groups on a per lot or dwelling unit basis for a park may seem inequitable. Buyers in a retirement village may see no reason why they should subsidize schools (except in their capacity as taxpayers), or why they should pay a subdivision exaction for a regional high school.

(7) Exactions are often calculated on a per unit basis. Thus, they hit the buyers of cheaper houses harder than the buyers of big, expensive ones. An $8,000 exactions bill is 10% of an $80,000 house price, but only 1% of an $800,000 tag. (Exactions calibrated by the acre or by the square footage of the house help the buyers of smaller houses built at higher densities.)

(8) When communities first begin to fund a particular public facility through subdivision exactions, the buyers of new houses are required to pay for infrastructure or services that were paid by the community at large before then. This disadvantages the buyers and builders of new homes and benefits the owners of existing residences.

(9) Further, through their local property taxes, new homebuyers will be helping to retire the debt that was incurred to pay for the infrastructure built to service the existing residents.

(10) Subdivision fees and dedications are designed to charge the developer the costs a project may impose on the community. But the developer seldom receives a credit for benefits the project confers, such as construction employment, the location of housing near employment opportunities, and the provision of excess open space. n261

Most legal challenges to mandatory off-site contributions have fallen under one of three headings: (1) that the local government lacked authority under state statutes to impose the particular exaction; (2) that the subdivision exaction was unreasonable "because it is unrelated to the provision of an improvement needed by the subdivision itself "; n262 or (3) that requiring a cash payment involved an impermissible form of taxation under state law.

The payment could violate state tax laws in various ways. It might be characterized as violating state laws that taxes be uniform. It might be challenged because local governments weren't given the power to tax subdividers under state laws. n263 As a tax, the exaction might violate state spending, debt limit, or voter approval requirements. n264

Subdividers must also find ways of mitigating adverse environmental impacts, or risk disapprovals.

Arizona authorizes municipalities to:

> [d]etermine that certain lands may either not be subdivided, by reason of adverse topography, periodic inundation, adverse soils, subsidence of the earth's surface, high water table, lack of water or other natural or man-made hazard to life or property, or control the lot size, establish special grading and drainage requirements, and impose other regulations deemed reasonable and necessary for the public health, safety or general welfare on any lands to be subdivided affected by such characteristics. n265

California's subdivision map act instructs local governments to reject a subdivision if:

> (1) the proposed map is not consistent with applicable general and specific plans;
>
> (2) the design or improvement of the proposed subdivision is not consistent with applicable general and specific plans;
>
> (3) the site is not physically suitable for the type of development or proposed density;
>
> (4) the design or improvements are likely to cause substantial environmental damage or substantially and avoidably injure fish or wildlife or their habitat;
>
> (5) the design or improvement is likely to cause serious health problems; or
>
> (6) the design or improvements will conflict with public easements. n266

The developer's tentative subdivision map, if approved, will be conditioned on installing the required improvements before recording the final map, bonding for them, or securing a financial institution's letter of credit guaranteeing payment of the developer's obligations. n267 This saves taxpayers and homebuyers the surprise burden of paying for infrastructure in most cases. n268

Unless the developer plans an immediate build-out, the improvements will not usually be constructed all at once. Usually, the developer will bond or provide a letter of credit for them and furthermore, may decide to phase a large project into smaller, distinct subdivision maps, and only record in phases. This way the developer limits the financial obligation to each phase as the map is recorded.

§ 85.11(c) The Analogy to Special Assessment District Financing.

In many localities, the installation of sidewalks, curbs, gutters and street lights are supported by the formation of special assessment districts. Property owners within the area benefited by the improvement are assessed a special property tax in proportion to the benefit. For instance, sidewalks are assessed based on the owner's frontage.

> That the return to the property owner by way of benefit is, under our system of government, the basic foundation upon which this right [to levy special assessments] rests, becomes apparent from the consideration that if we are not able to say that the owner for the specific charge imposed is compensated by the increased value of the property, then most manifestly we have a special tax upon a minority of the property owners, which tax is for the benefit of the public and which tax is special, unequal, and un-uniform. n269

While the number of local governments has remained about the same over the past forty years (3,000 counties, 35,000 cities and townships), the number of special assessment districts has grown from 8,000 to 28,000.

§ 85.11(c)(1) How Special Assessment Financing Works.

Special assessment districts can be formed by a local general purpose government, a special purpose agency, residents petitioning for the formation of a district, and, in a few states, private developers.

In the Depression of the 1930s, many owners of subdivided vacant lots failed to pay the special assessments levied against them. The local government would then foreclose special assessment liens. Because local governments couldn't get much for these lots at foreclosure sales, however, the local taxpayers often got stuck having to pay for improvements in failed subdivisions. After that, special assessment bonds became harder to sell; bondholders took the risk of default seriously. Bond defaults also prompted many communities to begin requiring subdividers to install roads, streets, and drainage in their subdivisions, or fund the improvements before selling title to individual lots.

Traditionally, the use of special assessment financing was restricted in several ways. First, the benefit to the assessed owner had to exceed the cost of the funded improvement.

Second, the improvement had to be of a kind not generally of equal use to all members of the community but one that provided special utility to those whose property was assessed to fund it.

Third, the assessment had to be levied in proportion to benefit. That is why sidewalk assessments were based on frontage and highway improvements often funded on the basis of estimates of the trips generated by different types of land uses.

Nowhere have these traditional limitations been abrogated as much as in California. When cities in California came up against Proposition 13's two-thirds voter approval requirement for special taxes, they soon seized on the special assessment district as a way around it.

Local governments have expanded on the idea of a special assessment to fund regional public improvements as part of their growth control programs. The City of San Diego, for instance, created a special assessment district in a rapidly developing area called North University City. The assessment was designed to pay for nearly all the costs of water mains, utilities, sewers, drainage systems, streets and sidewalks, parks, transit and transportation, libraries, fire stations, school buildings, police stations, and other capital facilities the city felt necessary for the orderly development of North University City.

The city declared a fixed benefit area consisting of all those undeveloped parcels located within the boundaries of the district the city declared benefited by the assessment. Owners of parcels within this district were assessed. The fee was payable when a building permit was issued or when the capital improvement program called for a particular facility to be built, whichever event came first.

The fee was based on "the equivalent dwelling units" buildable on each parcel at its highest development potential under current zoning.

A California appellate court upheld this use of the special assessment district as "a valid exercise of San Diego's power to require undeveloped land to bear the costs of the public facilities necessary for the health and welfare of the future residents of North University City." n270

The court found that: "the main beneficiaries will be the residents in the immediate vicinity who will regularly use the facility and whose property value can only be enhanced by the property's proximity...." n271

These facilities are public and can be used by anyone in San Diego County, but the court presumed that use by the general public was incidental, not the primary goal of the capital improvement program.

These cases display a fairly relaxed special assessment standard, a marked departure from earlier California special assessment case law, not necessarily applied in all special assessment cases. In a landmark California case a grocery store, Safeway, had been included in a district to finance off-site parking, even though Safeway had its own 119-space parking lot. At peak use, never more than 71 of its spaces were filled. The court concluded: "We have searched the record in vain for an answer as to how Safeway was or could be benefited." n272

How far from precedents such as the Safeway case the California courts have come is the court's upholding the use of a benefit assessment which the City of Orland levied equally on all houses in the city to pay for the maintenance of city parks. n273 The fee had been derived by dividing the total annual maintenance cost by the number of houses in the city. n274 It is possible in Orland for Homeowner A to buy a house on a five-acre parcel in a project complete with swimming pool, tennis court, and country club membership. Orland Homeowner B buys a townhouse on a "postage stamp" lot across from a public park. Orland assesses A and B the same park maintenance fee, though B probably needs the park and A probably doesn't.

If it is right for Homeowner A to pay for a park he doesn't need, why didn't Safeway have to pay a share of an assessment for a municipal parking garage? Theoretically, some of Safeway's customers might use the municipal garage even when there was ample room for them on the Safeway lot. The municipal garage gives Safeway an option for future parking space which ought to be worth something. In future years Safeway could increase its customer base. Homeowner A is certainly going to have trouble seeing any distinction between his situation and Safeway's, and so are a good many property lawyers.

Here is the Orland Court's explanation:

> While renters, commercial and undeveloped property owners and persons residing outside the district are able to use the park facilities, and the community at large benefits by the presence of five parks in the area, the residential property owners are uniquely benefited by the proximity of these facilities to their properties. The record establishes no reason for doubting that the desirability of the assessed residential properties is enhanced by the presence of well-maintained public pools, playgrounds, picnic and barbecue areas, bicycle paths, baseball and softball fields, tennis and volleyball courts, and horseshoe pits in the area for the use and enjoyment of residents. Moreover, having a wide assortment of facilities such as a pool, a playground and a tennis court readily accessible in nearby public parks means that the assessed owners may enjoy the benefits of having such improvements available for use by their families and/or tenants while avoiding the expense of privately installing and maintaining such improvements on their own properties. Finally, in the absence of evidence to the contrary, we may presume that the presence of well-maintained open park land contributes to the attractiveness of the district and thereby also enhances the desirability of the properties therein. n275

Under reimbursement or "recapture agreements," developers who are required to install sewers or water lines, roads, parks and school sites larger than needed for their projects may contract for the right to be reimbursed by later developers who make use of these oversize facilities. Reimbursement agreements, typically, describe the project to be funded by the developer, promulgate a schedule coordinating the city's public works with the developer's improvements, allocate financial responsibility between city and developer, set a timetable for payments, define the "excess" costs for which the developer is entitled to reimbursement, identify the boundaries of the sites liable for reimbursement payments, and provide indemnity to the developer from liability arising from the city's construction of the public works at the developer's expense. Developers expect the city to assess other benefited owners as they come forward to develop their sites and if the city fails to levy and collect those payments, "itself to reimburse the Developer for reimbursable

costs."

If the city is to pay some of the cost, state rules for government contracts may apply. The city's reimbursement promise could cause the project to be within state competitive building statutes.

Off-site improvements a contractor was made to construct on public property were held subject to state competitive building rules in *Achen-Gardner, Inc. v. City of Chandler*. n276 The developer retained the right to hire someone other than the lower bidder or build the improvements himself on the understanding that the city's duty to reimburse the developer would be limited to the lowest bid received. That wasn't good enough in Arizona. Either the lower bidder gets the job, or the city pays nothing. Any agreement to the contrary is unenforceable. n277

The reimbursement obligation should be recorded in the county land records in the chain of title of the properties to be assessed later so purchasers subject to recapture payments will take title knowing about them. n278

Special assessment districts can be formed by a local general purpose government, a special purpose agency, residents petitioning for the formation of a district, and, in a few states, private developers. State statutes prescribe notice and hearing requirements, a chance to protest and sometimes require voter approval of special assessments.

Special assessments are levied against real property and are often collected along with the property tax. Special assessments may, but need not be, based on the fair value of the property being assessed, not exceeding the property's proportionate share of the cost of an improvement or service. The special assessment could be based on front footage, as in the case of sidewalks, lot area, as in a flood control system, or the size of buildings in a fire protection assessment. "Special assessments are traditionally used to finance the construction or repair of roads and sidewalks, and to finance the extension of sewer systems, both primarily residential uses." n279 Special assessments have also been used to fund parking garages, security patrols and street cleaning services in central business districts. They have been used to drain wetlands.

Special assessments aren't deductible as state and local taxes from federal income tax because the special assessment is not just another form of general taxation. n280 The special assessment entitles the assessed property owner to a proportionate offsetting benefit. Property taxes, on the other hand, are levied without regard to whether the taxpayer is well positioned to use the services or facilities funded. Property taxes may even be used to support welfare or other wealth distribution programs. Reimbursement agreements typically:

(1) describe the project to be funded by the developer,

(2) promulgate a schedule coordinating the city's public works with the developer's improvements,

(3) allocate financial responsibility between city and developer,

(4) set a timetable for payments,

(5) define the "excess" costs for which the developer is entitled to reimbursement,

(6) identify the boundaries of the sites liable for reimbursement payments,

(7) provide indemnity to the developer from liability arising from the city's construction of the public works at the developer's expense.

Developers expect the city to assess other benefited owners as they come forward to develop their sites. If the city fails to levy and collect those payments, it must "itself ... reimburse the Developer for reimbursable costs." n281

The reimbursement obligation should be recorded in the county land records in the chain of title of the properties to be assessed later so purchasers subject to recapture payments will take title knowing about them. n282

§ 85.11(c)(2) Legal Limits to Special Assessment Financing.

(a) Special Benefit. The assessed owner's property must demonstrably benefit specially from the improvement funded by the assessment. "Special" means the benefit must be different in kind and degree from the benefit the general public may derive from the improvement.

The benefit determination should be supported by expert evidence, inde-pendent research indicating the scope of the improvement and the precise impact of the improvement on the burdened property. The analysis must go further because the improvement "is not, per se, the special benefit. Instead, it is simply the mechanism from which the special benefit to the property is derived." n283

One way to prove special benefit is by an increase in property value attributable to the improvement. Alternately, a site might be more easily rented, more safely used, more quietly enjoyed, or more readily or intensively deve-loped. The improvement might result in lower fire, casualty, flood or other insurance premiums.

(b) Proportionality. The benefit must be proportionate to the special levy. This means that the cost must be apportioned among benefited property owners in a reasonable and fair way. Some owners cannot be arbitrarily assessed more than others whose benefits are identical.

One method of assessment is called front-footage. Each owner's assessment is the proportion of his property's front footage to that of all the properties being assessed. For this method to be lawfully applied, the assessed property must front on the improvement, and serve it. n284

(c) Kind. The improvement has to be of a *kind* not generally of equal use to all members of the community but one that provides special utility to those whose property is assessed to fund it.

With more traditional uses of special assessments, it is easy to identify the special benefit to the property assessed. For example, it is obvious that paving a street improves the value of abutting lots, and that building a storm drain or a sewer system has the same effect. n285

Courts have sometimes held that certain kinds of facilities can never properly be financed by special assessment. Libraries, fire stations, schools, water plants and police stations have all been on the list of improvements not fundable by special assessment in one place or another. n286 The judicial reasoning was that the benefits from these sorts of facilities are necessarily "general," and flow to the entire community. The benefits are not "special;" capable of being enjoyed by those property owners because of their living near the facility. n287

There is a second rationale for keeping some kinds of facilities off the special assessment candidates list. Some public facilities are seen as "merit" goods, public goods to which access should be denied to no one because they aren't property owners and which should not be located only where they could be funded by assessments based on property values. Schools are one example, hospitals and health clinics, another.

However, in many states, *any* public facility or service, potentially, may be funded by special assessment as long as the levying government can show that the benefits are special and proportional. The assessment has to be apportioned so that those who benefit more pay more.

§ 85.11(d) Applicability, Exemptions, Exceptions.

In most states only housing tract subdividers need comply with subdivision regulations. In all but a few states, industrial parks, shopping centers, and apartment complexes aren't subject to subdivision controls. n288

These types of developments may be subject to tight controls through zoning laws which mandate some form of site plan review, and even fee obligations. But they are controlled only when the owner actually wants to develop, not when she wants to subdivide her project and sell or lease pieces of it separately. n289

Some states exempt owners from subdivision controls who lease or finance individual lots and yet keep the property in common ownership. Because the owner retains common ownership, there is less need for the local government to fear development will take place on individual lots before the necessary infrastructure is in place or funded. But the financing exemption creates problems when a lender forecloses. Does the lender foreclosing on only part of a larger parcel have the right to convey title to a buildable, saleable parcel free of Subdivision Map Act requirements? If so, buyers at foreclosure will have little reason ever to comply with the subdivision law. On the other hand, if the purchaser at foreclosure takes only an undivided interest in the entire unsubdivided parcel, and the lender can't convey good title to the individual parcel on which the mortgage was placed, its security interest may not be worth much. A judicial decree to partition the co-tenancy probably won't be granted because it would violate the Subdivision Map Act. n290

The division of an existing apartment house into condominium units is exempted from subdivision laws in some states on the notion that conversion affects only the form of ownership and not the physical development of the property. n291 In California the state legislature has given local governments the right to control condo conversions through the subdivision process. n292

Condominiums are linked to subdivision approval because the developer must record an approved map dividing the "airspace" vertically into saleable units so that sales can take place by reference to that map, just as ordinary houses are sold according to a map which divides the tract horizontally.

Only the form of ownership changes when an apartment previously held for rental is converted into individually saleable units. So local government officials could sensibly be required to sign off on the recordation of a condo converter's map without a discretionary vote or the imposition of local fees and conditions. But if the option is open to them, local officials will be tempted to condition their approval of the converter's tentative tract map with fees for parks and maybe for schools, road widenings, off-street parking garages, art, and daycare centers. If the conversion results in affordable apartments being upgraded for sale to more affluent people, this may cause local officials to feel justified in disapproving the conversion altogether, or imposing conditions to help low income tenants buy their units. n293

Many subdivision map acts exempt subdivisions of fewer than five lots n294 and also exempt subdivisions of undeveloped acreage into very large parcels (e.g., 40 acres, or 20 acres if each parcel has direct access to an improved highway). The justification is that if not many parcels are involved or they are so large that they probably won't be developed at that size, the public won't be burdened with significant obligations for street, sewers, roads, sidewalks and other urban infrastructure.

§ 85.11(e) Sanctions for Illegally Subdividing.

The sanctions vary from state to state for noncompliance with subdivision laws:

(1) Typically, the subdivider can't begin selling lots using a plat map description until the map has been recorded. n295 The map won't be accepted for recordation until the local government certifies to the county recorder that the developer has met all the conditions it imposed on the tentative map.

(2) The purported transfer of a lot in an unrecorded map is often made void by statute, although the purchaser retains a right to damages from the subdivider. n296

(3) In most states, buyers of illegally subdivided or unsubdivided lots have the choice of going through with the sale, or rescinding contracts of sale or deeds and getting back their downpayments or purchase money. n297

(4) In a few states where the subdivision map act doesn't make conveyance of unrecorded lots void, and only provides penalties against the illegal subdivider, vendors have been allowed to enforce their contracts of illegally subdivided or unsubdivided lots. n298

(5) In some states, local governments may enjoin the sale of lots in an unapproved subdivision. n299

(6) Unless a lot abuts an approved street, no building permit may be issued for it in some places. n300

§ 85.11(f) Retroactive Application of Subdivision Standards to Lots Subdivided Before Those Standards Were Enacted.

A difficult legislative question arises when lots were subdivided before local governments began regulating subdivision activity as rigorously as they do now. A grantor may have met the standards in effect when she subdivided in 1935 or 1943. Today, however, the local government may insist, as a condition to issuing a building permit, that the applicant meet present-day standards by improving the street, contributing to a park fund, or buying an adjoining parcel where the applicant's lot size is short of current minimum lot size requirements.

These attempts to right past wrongs run into constitutional challenges as takings of private property when they result in the lot owner having no lawful use for the property. n301 Short of outright confiscation, new standards retroactively applied are balanced against the public interest -- what the "public health, safety and welfare" of the community require. n302

FOOTNOTES:
(n1)Footnote 254. *Del Monte Dunes v. City of Monterey, 290 F.2d 1496, 1499 (9th Cir. 1990).*

(n2)Footnote 255. *See, e.g.,* Minn. Stat. §§ 394.26(1a) and (2a) (requiring notice by publication for public hearings for subdivisions). The California Supreme Court ruled that neighbors whose property rights could be substantially affected by a neighboring subdivision were entitled to procedural due process -- a right to notice and a hearing. *Horn v. County of Ventura, 596 P.2d 1134 (Cal. 1979).* Following that case, the legislature enacted a state law requiring all property owners within 300 feet of a proposed subdivision to be given notice by mail or delivery and a right to be heard by the agency or person the city or county designated to approve subdivisions. Cal. Gov't Code § 66474.64. (This applies to General Law cities. Charter cities may go their own way on the specifics of notice-and-hearing requirements within the constitutional outlines of the *Horn* case.)

If the constitutional predicate of *Horn* is sound, anyone whose property interests could be substantially affected should receive notice -- even owners more than 300 feet from the proposed subdivision.

Shrewd subdividers sometimes try to limit potential opposition by obtaining development approvals for large sites in phases -- the first phase located well within a 300-foot radius of vacant property they already own. By the time the developer is ready to seek approval for the outer ring of her project, most of it will already have been approved without notice to neighboring owners. A statute in the State of Washington anticipated and closed this legal loophole. Wash. Rev. Code? § 58.17.090. That law requires notice to be sent to at least the 50 closest neighboring owners no matter how far away they are from the subject property.

(n3)Footnote 256. *See, e.g., Rumford v. City of Berkeley, 183 Cal. Rptr. 73 (1982).*

(n4)Footnote 257. Christopher Tunnard & Boris Pushkarev Man-Made America: Chaos or Control? 89-90 (1963). Copyright © 1963 by Yale University Press. Reprinted with permission.

(n5)Footnote 258. *Compare Ayers v. City Council, 207 P.2d 1 (Cal. 1949)* and *Hudson Oil Co. v. City of Wichita, 396 P.2d 271 (Kan. 1964)* (sustaining off-site requirements) with *Hylton Enters. v. Board of Supvrs., 258 S.E.2d 577 (Va. 1979)* and *Divan Bldrs., Inc. v. Planning Bd., 334 A.2d 30 (N.J. 1975)* (striking them down).

(n6)Footnote 259. *See* Stewart E. Sterk, *Nollan, Henry George, and Exactions, 88 Colum. L. Rev. 1731, 1734 (1988).*

(n7)Footnote 260. Having a park in the neighborhood can be good for house values. Being right next to a heavily used urban park, however, may lower a property's value. John C. Weicher & Robert H. Zerbst, *The Externalities of Neighborhood Parks: An Empirical Investigation,* 49 Land econ. 99 (1973).

(n8)Footnote 261. For a proposal that developers be compensated for the net benefit that subdivision dedication requirements confer, see Note, *Subdivision Land Dedication: Objectives and Objections, 27 Stan. L. Rev. 419 (1975).* Charles C. Mulcahy & Michelle J. Zimet, *Impact Fees For A Developing Wisconsin, 79 Marq. L. Rev. 759 (Spring 1996)* (Historical Development of Exactions).

(n9)Footnote 262. R. Marlin Smith, *From Subdivision Improvement Requirements to Community Benefit Assessments and Linkage Payments: A Brief History of Land Development Exactions,* 50 L. & Contemp. Probs. 5, 9 (1987).

(n10)Footnote 263. *Compare Home Builders Ass'n of Central Ariz., Inc. v. Riddel, 510 P.2d 376 (Ariz. 1973)* (construction tax on dwelling units for city parks held beyond Tempe's statutory taxing power since use of tax would not benefit taxpayers proportionately) with *Squires Gate, Inc. v. County of Monmouth, 588 A.2d 824 (N.J. 1991)* (developer escrowed fee for off-site road improvement to widen culverts held within the county's implied regulatory power because the costs of off-site road improvements were shared by all beneficiaries proportionately).

Compare Western/California, Ltd. v. Dry Creek Joint Elem. Sch. Dist., 50 Cal. App. 4th 1461 (Cal. App. 3 Dist. 1996) (Statute, providing no public agency could impose conditions on approval of project for purpose of providing school facilities that exceed amount authorized pursuant to this chapter, excluded Mello-Roos taxes and, consequently, developers were properly required to pay $1 per square-foot fee on residential development for school construction or reconstruction, even though that fee, together with existing Mello-Roos taxes, exceeded statutory cap on fees and other requirements); *Loyola Marymount Univ. v. Los Angeles Unified Sch. Dist., 45 Cal. App.4th 1256* (Cal. App. 2 Dist. 1996) (School facilities fees promulgated pursuant to statute governing levies against development projects for construction or reconstruction of school facilities are not ad valorem property tax); *Ehrlich v. City of Culver City, 911 P.2d 429 (Cal. 1996)* (requirement that developer provide art in area of project that is reasonably accessible to public was type of aesthetic control well within authority of city to impose).

With Country Joe, Inc. v. City of Eagan, 560 N.W.2d 681 (Minn. 1997) (Road unit connection charge imposed by city as condition of issuance of building permits was unlawful "tax," rather than regulatory or license fee authorized under city's general welfare powers); *Douglas County Contractors Ass'n v. Douglas County, 929 P.2d 253 (Nev. 1996)* ("Fair Share Cost" fee imposed by county and school district constituted an impact fee or tax and not merely regulatory measure, and thus was subject to constraints of impact fee statute and was improper because statute fails to include school site acquisition among list of permissible capital improvements; fee was designed to raise revenue and district intended to use funds anywhere in county according to the school improvements plan, rather than earmark them for use in subdivision from which they were exacted).

(n11)Footnote 264. Comment, *Financing Local Government in the Post-Proposition 13 Era: The Age and Effectiveness of Nontaxing Revenue Sources, 22 Pac. L.J. 1333 (1991).*

(n12)Footnote 265. Ariz. Rev. Stat. Ann. § 9-463.01(C)(4).

(n13)Footnote 266. Cal. Gov't Code § 66474.

(n14)Footnote 267. *Id.* § 66499(a)(1)(3).

(n15)Footnote 268. *Simac Design v. Alciati, 92 Cal. App. 3d 146, 157-58 (1979).*

(n16)Footnote 269. *Spring St. Co. v. City of Los Angeles, 148 P. 217, 219 (Cal. 1915).*

(n17)Footnote 270. *J.W. Jones Cos. v. City of San Diego, 203 Cal. Rptr. 580, 589 (1984).*

(n18)Footnote 271. *City of San Diego v. Holodnak, 203 Cal. Rptr. 797 (1984).*

(n19)Footnote 272. *Safeway Stores, Inc. v. City of Burlingame, 339 P.2d 933, 938 (Cal. 1959).*

(n20)Footnote 273. This permissive standard may be attributable to the court's discomfort with Proposition 13?s13's super majority voting requirement (two-thirds) for the enactment of a "special tax." A two-thirds vote isn't needed for a special assessment district levy, just a simple majority. *Knox v. City of Orland,* 92 Daily J. DAR 16569 (Dec. 14, 1992).

(n21)Footnote 274. A hybrid between a special assessment and a user fee is Orlando, Florida's transportation utility fee. To pay for the operation and maintenance of the city's roads, streets and transit system, each developed property is charged a share of expenditures based on the estimated trips generated. The base rate is calculated by dividing average costs by average daily trips. This is multiplied by a trip generation factor and unit demand. Unit demand is measured by the number of dwelling units, square feet or hotel rooms per parcel. Marie L. York, *Transportation Utility Fees: The Newest Revenue Enhancement,* Land Use L. 8 (Aug. 1991).

Smith v. Spokane County, 948 P.2d 1301 (Wash. App. 1997) (Individuals filed class action lawsuit against county and city challenging fees imposed on water and sewer customers within aquifer protection area (APA). The court held that APA charges did not constitute special assessments and that utility rates charged by municipality were reasonable); *Kentucky River Authority v. City of Danville, 932 S.W.2d 374 (Ky. App. 1996)* (Validity of special assessments and user fees depends on analysis of charge and benefit received).

(n22)Footnote 275. *Knox v. City of Orland, 14 Cal. Rptr. 2d 159, 170 (1992).*

(n23)Footnote 276. *Achen-Gardner, Inc. v. City of Chandler, 839 P.2d 1093 (Ariz. 1992).*

(n24)Footnote 277. *See Long Meadow Assocs. v. City of Glen Cove, 567 N.Y.S.2d 287 (N.Y. App. Div. 1991)* (city's requirement that adjacent landowners reimburse developer for their proportionate share of pumping quality cost-violated competitive bidding statute and so was void).

(n25)Footnote 278. *See* R. Marlin Smith, *From Subdivision Improvement Requirements to Community Benefit Assessments: A Brief History of Land Development Exactions,* 50 Law & Contemp. Probs. 6 (1975). *See, e.g.,* the Illinois statute, 65 ILCS 5/9-5-1 - 5/9-5-3.

(n26)Footnote 279. Marc N. Melnick, *New Avenues for Special Assessment Financing, 25 Urb. Law. 539 (1993).*

(n27)Footnote 280. "[T]axes and special assessments are distinguishable in that, while both are mandatory, there is no requirement that taxes provide any specific benefit to the property; instead [taxes] may be levied throughout the particular taxing unit for the general benefit of residents and property. On the other hand, special assessments must confer a specific benefit upon the land burdened by the assessment." *City of Boca Raton v. State, 595 So. 2d 25, 29 (Fla. 1992).*

(n28)Footnote 281. If the city is to pay some of the cost for the improvements, state rules for competitive bidding of government contracts may apply. *See Achen-Gardner, Inc. v. City of Chandler, 839 P.2d 1093 (Ariz. 1992)* (The developer retained the right to hire someone other than the low bidder or build the improvements himself on the understanding that the city's duty to reimburse the developer would be limited to the lowest bid received. That wasn't good enough in Arizona. Either the low bidder gets the job, or the city pays nothing. Any agreement to the contrary the Court declared unenforceable). *See also Long Meadow Assocs. v. City of Glen Cove, 567 N.Y.S.2d 287 (1991)* (city's requirement that adjacent landowners reimburse developer for their proportionate share of pumping quality cost violated competitive bidding statute, and so was void).

(n29)Footnote 282. *See* R. Marlin Smith, *From Subdivision Improvement Requirements to Community Benefit Assessments: A Brief History of Land Development Exactions,* 50 L. & Contemp. Probs. 6 (1975). *See, e.g.,* the Illinois statute, 65 ILCS 5/9-5-1 to 5/9-5-3.

(n30)Footnote 283. Henry Kenza van Assenderp and Andrew Ignatius Solis, *Dispelling the Myths: Florida's Non-Ad Valorem Special Assessment Law, 20 Fla. St. U.L. Rev. 823 (1993).*

(n31)Footnote 284. *See Kane v. City of New York, 273 N.Y.S.2d 559 (1966)* (no basis for special assessment levy where sewer abutted but did not serve assessed property).

(n32)Footnote 285. Brian S. Currey, *Financing Schools in the 90s, Examining the Options,* 2 Land Use & Envtl. Forum 289, 296 (1993).

(n33)Footnote 286. *See, e.g.,* 14 McQuillin, Municipal Corporations ?38.27§ 38.27 at 121 (3d ed. 1985).

Kari Swanson, *Municipal Finance, Special Assessment Water Oak Management Co. v. Lake County, 673 So. 2d 135 (Fla. 5th Dist. Ct. App. 1996), 26 Stetson L. Rev. 1053 (Spring 1997)* (A plan which consolidated all of a county's previously created fire control districts into a single unit and which authorized collection of special assessments was ruled invalid under the special benefit test); Kari Swanson, *Municipal Finance, Special Assessment Sarasota County v. Sarasota Church of Christ, Inc. 667 So. 2d 180 (Fla. 1996), 26 Stetson L. Rev. 1055 (Spring 1997)* (Florida's highest court resolved that storm water charges, as a matter of law, are not general or ad valorem taxes and held that under the present circumstances the storm water charges were a valid special assessment); Michael E. Beam, *Special Assessment, Rather Than Ad Valorem Tax, Is Proper Funding Method For Stormwater Management Program Created Under Florida Statutes, Chapter 403, 25 Stetson L. Rev. 973 (Spring 1996).*

(n34)Footnote 287. Ordinarily, levies to meet general expenses of the taxing entity and to construct facilities to serve the general public, such as fire stations, police stations, and schools, may not be transformed from general ad valorem taxes to special assessments by a mere change in name of the levy. *Solvang Mun. Improvement Dist. v. Board of Supvrs. of Santa Barbara County, 169 Cal. Rptr. 391 (1980).*

(n35)Footnote 288. *See, e.g.,* Ga. Code Ann. § 44-3-4.

(n36)Footnote 289. *Stateline Plaza, Inc. v. Lehrecke, 384 N.Y.S.2d 966 (1976).* California's law applies to any division of land for purposes of sale, leasing, or financing. Cal. Gov't Code § 64424. *Benny v. Alameda, 164 Cal. Rptr. 776 (1980).*

(n37)Footnote 290. For an artful but ultimately unsuccessful attempt to evade the "five or more" rule, *see Pratt v. Adams, 40 Cal. Rptr. 505 (1964)* (Twelve investors -- six couples -- conveyed 46,237 acres to themselves as joint tenants. They petitioned a court to divide the property into 12 individually owned parcels. Then the 12 owners could each divide his or her share into as many as four parcels for sale. By having the court divide the property, the group hoped to escape the costly requirements of the Subdivision Map Act. The court ruled that the partition process sanctioned by state law to protect cotenants could not be used to avoid the Subdivision Map Act.)

(n38)Footnote 291. Ala. Code § 35-8A-106: "(b) No zoning, subdivision or other real estate use law, ordinance, or regulation may prohibit the condominium form of ownership or impose any requirement upon a condominium which it would not impose upon a physically identical development under a different form of ownership."

(n39)Footnote 292. Cal. Gov't Code § 66426. *See Benny v. Alameda, 164 Cal. Rptr. 776 (1980).*

(n40)Footnote 293. *See* Daniel Lauber, *Condominium Conversions: A Reform in Need of Reform, in* Gersler and Popper, Land Reform American Style 273 (1984).

(n41)Footnote 294. In California, the subdivision of land into four lots or fewer is accomplished by filing what is called a "parcel" map. This filing carries somewhat less rigorous requirements than does filing a subdivision and final map. 9 Hagman & Volpert, California Real Estate Law & Practice §§ 290.20 to 290.24.

(n42)Footnote 295. Cal. Gov't Code § 66499.30.

(n43)Footnote 296. *See, e.g.,* Annotation, *Failure of Vendor to Comply With Statute or Ordinance Requiring Approval of Recording of Plat Prior to Conveyance of Property, As Rendering Sale Void or Voidable, 77 A.L.R.3d 1058 (1977). See also* Ky. Rev. Stat. Ann. § 5A:100.277(3).

(n44)Footnote 297. Wash. Rev. Code Ann. § 58.17.210. *See* Note, *Prevention of Subdivision Control Evasion in Indiana, 40 IND. L.J. 445 (1965); Ogan v. Ellison, 682 P.2d 760 (1984).*

(n45)Footnote 298. *See, e.g., Pangborn v. Westlake, 36 Iowa 546 (1873); Stauth v. Brown, 734 P.2d 1063 (Kan. 1987).*

(n46)Footnote 299. N.Y. Town Law § 268(2). *See also Lake County v. Truitt, 758 S.W.2d 529 (Tenn. App. 1988).*

(n47)Footnote 300. *Brous v. Smith, 106 N.E.2d 503 (N.Y. 1952).*

(n48)Footnote 301. *See, e.g., Board of Supvrs. v. Rowe, 216 Va. 128 (1975);* Va. Code Ann. ? § 19.1-466(f); *Associated Home Bldrs. Inc. v. Walnut Creek, 4 Cal. 3d 633 (1971).*

(n49)Footnote 302. "In general, retroactive subdivision and zoning laws will be upheld unless they are contrary to the health, safety, welfare, or morals of the community." *Johnston v. City of Geneva, 346 N.E.2d 444 (Ill. App. 1976).* "A municipality has a right to implement future community planning, balancing the need of the community with the property rights of the developer." *Wald Corp. v. Metropolitan Dade County, 338 So. 2d 863 (Fla. App. 1976). Southport Dev. Group, Inc. v. Township of Wall, 685 A.2d 84 (N.J. 1996)* (retroactive application of development fees ordinance to developers was permissible, particularly where developers had agreed to pay development fee under subsequently enacted ordinance in lieu of construction of affordable housing).

* Parts of this chapter have been adapted from George Lefcoe, Real Estate Transactions (Michie 1993).

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CHAPTER 85 OBTAINING LAND AND RIGHTS FOR DEVELOPMENT *

9-85 Thompson on Real Property, Thomas Editions § 85.12

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§ 85.12 Land Dedications, Exactions, in Lieu Fees, and Impact Fees.

[Go To Supp]

§ 85.12(a) From On-Site Dedications to Fees for Off-Site Impacts.

Early in the history of subdivision controls, local governments required subdividers to dedicate land within their tracts for roads, sidewalks, drainage courses, and utility easements. This practice continues. Many builders and developers are happy to comply because, in dedicating title of streets to the city, the developer escapes the obligation of maintaining them.

Theoretically, though, these dedications can be seen as

uncompensated takings of private land for public use without just compensation. n303

Dedications withstand the challenge and are upheld on the privilege theory, as the developer's quid pro quo for the local government agreeing to let the subdivider record a map. As Fred P. Bosselman and Nancy Stroud explain:

> At first blush, it might have seemed more logical to concede that the government was coercing the landowner into dedicating land to the government, and to justify such coercion on the grounds that the government would benefit the developer by perpetually maintaining the property dedicated. But because such sophisticated trade-offs are not permitted under the interpretation of the constitution's taking clause that requires that compensation be available to the landowner in cash, the courts were forced to resort to the legal fiction of a privilege in order to justify a bargain that seemed fair to both sides. n304

Eventually fees came to take the place of some types of land dedications. These are usually one-time cash payments earmarked for capital improvements serving the subdivision directly or indirectly. The fee is levied against the developer. It may fall due when a final subdivision map is recorded, building permits are issued, or when, upon completion, projects are given certification that occupancy is safe.

Governments prefer fees because:

(1) Land dedications "could not deal with facilities that should logically be located beyond the boundaries of the development...." n305

(2) Fees are the only sensible option when the subdivider doesn't actually own the site that the community wants for its school or park, or when the subdivider's tract is so small it would be inequitable to place the entire burden of providing the site on that developer alone.

(3) Land dedications only provide a site for a facility -- not the construction cost. The land may account for only a fraction of the total cost of a school or freeway ramp. With impact fees from builders or developers, local governments pay for the construction of school buildings, sewer mains, water treatment plants, flood control channels, arterial roads, freeway access ramps, and park improvements.

Developers would often rather dedicate land than pay fees. A dedicated site within a project for a park or school benefits buyers directly and obviously. Buyers might even pay a little more for it. The benefits of fees spent off-site are less apparent to buyers, especially if the public facilities funded by the fees are distant from the subdivision and open to others who contributed nothing to a sewer and water plant expansion, freeway on-ramp, flood control channel, library, or community center. n306

The developer's land dedication may be made on the understanding the local government will improve the site with a park or school within a certain time, and that if the local government doesn't make the improvement within the time, title to the dedicated site will revert to the developer. n307

Land dedications may not suffice when the local government is looking to the developer to fund the cost of constructing a public facility, when the subdivider doesn't own the site the community wants for its public facility, when the facility should logically be located beyond the boundaries of the development, or when the subdivider's tract is so small it would be inequitable to place the entire burden of paying for the site on just that one developer.

Impact fees are imposed usually by cities and counties, sometimes by special-purpose districts (school, sewer, or water districts), less frequently by state and federal agencies. In some places, several levels of government levy fees concurrently. n308 Fees are being imposed across the country, but are increasing especially rapidly in fast-growing states like Arizona, California, Colorado, Florida, Maryland, Nevada, Texas, Virginia and Washington. n309

Most exactions go for land or capital improvements; some pay for services or programs. Impact fees are in vogue because local governments, state highway departments, and school districts need money and are faced with cutbacks at all levels of government. n310

Fees are justified "to assure that new development pays its own way rather than imposing external costs on existing residents." n311 But fees can also be imposed as just another way of squeezing money from developers, and may actually subsidize the taxpayer. n312 "Cities often hire consultants and say, 'We need X amount of money, you develop an impact fee system that is legally defensible to get it.'" n313

§ 85.12(a)(1) Legal Challenges to Developer Exactions.

Most legal challenges to mandatory developer fees and land dedications have fallen under one of four headings:

(1) that the subdivision exaction was unreasonable "because it is unrelated to the provision of an improvement needed by the subdivision itself." n314

(2) that the local government lacked authority under state statutes to impose the particular exaction,

(3) that requiring the cash payment involved an impermissible form of taxation under state law, n315 or

(4) that the subdivision exaction exceeds the federal constitutional limits as to how far local governments may go in requiring subdividers to dedicate land or pay fees as conditions to the recordation of subdivision maps. These derive from the Fifth and Fourteenth Amendments prohibiting government from taking property without just compensation.

§ 85.12(b) Constitutional Limits: The *Nollan* Case.

Three different standards are used by state courts in determining the legitimacy of impact fees. n316

(1) "Reasonable Relationship." This standard is the least demanding of local government. Almost any connection between the exaction and the development will suffice, n317 as long as the impact fee bears a reasonable relationship to the exercise of the police power. n318

(2) "Specifically and Uniquely Attributable Test." Courts using this test want to be sure that the public facility would not have been needed but for this project. n319 They apply a standard much like that used by courts in determining whether a property has been properly included in a special assessment district: are the capital expenditures tied to a unique benefit directly conferred on homebuyers in the subdivision not enjoyed by taxpayers generally?

(3) "Rational Nexus." The "rational nexus" test has three parts: (a) Did the development to be assessed create a need for the service or facility it is being required to fund? n320 (b) Is the price the developer has to pay proportionate to the need attributable to the developer's project and to the cost of meeting that need? n321 (c) Is the fee earmarked?

This has become the dominant test in the state courts. n322 It became the federal constitutional standard as well. The U.S. Supreme Court, in *Nollan v. California Coastal Commission*, n323 required "a direct nexus between the condition imposed and some impact of the development."

The following excerpt describes the *Nollan* case, its origins and implications.

Property Rights, Endangered Species, Wetlands, and Other Critters -- Is It Against Nature To Pay for a Taking? n324

In California, there are few things more sacred than the beach. In 1972 the voters of California established a mechanism for sweeping protection of the California coast. The scheme ultimately resulted in the creation of the California Coastal Commission (Commission), which was given permit authority over all development activities on the coast. In a short while, the Commission embarked on an ambitious program of creating new public beaches, public access corridors to the beach, and easements across private property. The Commission, under the guise of its police power, chose not to pay for any of these improvements. Instead, it waited until a property owner sought a development permit -- and then simply told the owner that the permit was for sale -- at the price of giving up some land for a public beach, an access way, or whatever happened to be on the Commission's wish list.

When Marilyn and Patrick Nollan proposed replacing a ramshackle old beach bungalow with a two-story family home more in line with the neighborhood, they were not thrilled when the Coastal Commission demanded that they dedicate one-third of their property to the state to be the first segment in a new park. n325 After exhausting their administrative remedies, the Nollans sued. n326 Eventually, the Supreme Court rejected the Commission's imposition of the "exaction" requirement that the Nollans give up one-third of their property in exchange for the building permit. Such an exaction,

which would allow the public onto private property, would be a physical invasion and invoke the Takings Clause.

Writing for the Court, Justice Scalia explained the law of regulatory conditions. He indicated that it might be perfectly acceptable for a government agency to deny a development permit *if* the development were to have an adverse impact on the public "unless the denial would interfere so drastically with the Nollans' use of their property as to constitute a taking." In the situation where a permit can be denied, *and only in such a case*, the agency also has the option to approve the permit while imposing conditions on the permit when those conditions would directly ameliorate the same harms for which the permit could have been denied in the first place.

Under *Nollan*, it might be acceptable for an agency to require a builder to put in sewers in exchange for a permit to build a subdivision because without sewers, the development would be a health hazard. However, it would not be acceptable to require a builder to contribute to a fund to renovate city hall if the subdivision were not likely to adversely affect city hall. In the case of the Nollans, the replacement of a bungalow with a new home was *not* the sort of activity that was likely to create any need for a new lateral beach park. Therefore, the Commission could not condition *this* permit on the granting of a beach strip.

The Commission tried to justify the action by saying that the new home would obstruct the public's view of the beach. In the Commission's exact words, the home would prevent the public "psychologically ... from realizing a stretch of coastline exists nearby they have every right to visit." The Court noted, however, that even if the public's view of the beach were a legitimate governmental interest, a lateral beach park did nothing at all to ameliorate the loss of the view. There was no nexus between the view and the exaction of beachfront property.

The Nollans and their neighbors allow public access. The Coastal Commission required the Nollans to build the seawall, which the Nollans regard as a reasonable condition.

§ 85.12(c) What *Nollan* Means.

§ 85.12(c)(1) Generally.

The U.S. Supreme Court's opinion in *Nollan* repudiated the "reasonable relationship standard," which a California court had applied in *Grupe v. California Coastal Commission*. n327 In that case the property owner wanted to build a 5,000-square-foot house on a 15,200-square-foot beachfront lot. In exchange for the permit, the Commission wanted the owner to surrender between 8,000 and 10,000 square feet of land for a public access easement running along the beach the width of the property. The land was not accessible from anywhere but the shoreline; neighboring owners hadn't had to dedicate such easements; and the construction of one residence certainly didn't impact beach access enough to justify the easement.

The California appellate court upheld the Coastal Commission's requirement anyway:

> Although respondent's home alone has not created the need for access to the tidelands fronting his property, it is one small project among a myriad of others which together do severely limit public access to the tidelands and beaches of this state, and therefore collectively create a need for public access. n328

The *Nollan* case rejected this line of reasoning. The link between the exaction and the harm was too speculative, indirect, and remote. If Californians wanted to enjoy an afternoon sunbathing on the Nollans' beach, they would have to pay for it by acquiring the property outright. n329

Nollan sparked a nationwide controversy, including dozens of law review articles -- some heralding, some condemning the decision. The "nexus" debate is not about whether developers should ever have to pay fees. Almost everyone

accepts the possibility of some developer impact fees being appropriate under some circumstances. The issue is what the government should have to prove to justify the fees.

Courts sometimes have interpreted *Nollan* as requiring a detailed, provably close "nexus" between the developer's activity, the amount of the fee, and the use of the money. n330 Other courts have tolerated rather generalized studies showing far less than a compelling and proximate relationship between the development and the harm it is levied to address. n331

Most commentators assumed that the *Nollan* opinion would lead to courts striking down fees as disguised takings of property unless the fee was levied to compensate for a harm caused by the developer. n332

Others were not so sure how courts would interpret *Nollan*. n333

Those who don't think *Nollan* will make much of a difference in the legal standard cite this paragraph from the opinion:

> Thus, if the Commission attached to the permit some condition that would have protected the public's ability to see the beach notwithstanding construction of the new house -- for example, a height limitation, a width restriction, or a ban on fences -- so long as the Commission could have exercised its police power (as we have assumed it could) to forbid construction of the house altogether, imposition of the condition would also be constitutional. Moreover (and here we come closer to the facts of the present case), the condition would be constitutional even if it consisted of the requirement that the Nollans provide a viewing spot on their property for passersby with whose sighting of the ocean their new house would interfere... The evident constitutional propriety disappears, however, if the condition substituted for the prohibition utterly fails to further the end advanced as the justification for the prohibition... [T]he lack of nexus between the condition and the original purpose of the building restriction converts that purpose to something other than what it was. The purpose then becomes, quite simply, the obtaining of an easement to serve some valid governmental purpose, but without payment of compensation. Whatever may be the outer limits of "legitimate state interests" in the takings and land-use context, this is not one of them. n334

A few scholars and courts have insisted that *Nollan* only requires heightened scrutiny of government actions that result in the owner having to surrender physical possession of private property without just compensation or that impose other unconstitutional conditions. But they argue that it does not apply to most exactions, fees and land use regulations. n335

Presumably, *Nollan* supports or reenforces the position that the right to build a development that creates only a small amount of new traffic could not be conditioned on the developer funding the full cost of a new freeway through

town. n336 Nor could developers be legitimately assessed for all new fire hydrants and watermain replacements in a city -- just those installed to serve new development, not those replaced that were serving older buildings. n337

Whatever the "nexus" test requires, developers can seldom get a court to invoke the "nexus" test and set aside mitigation measures they have already agreed to provide in a development agreement or through a negotiated settlement with a local government. n338

> [a] contractual promise which operates to restrict a property owner's use of land cannot result in a "taking" because the promise is entered into voluntarily, in good faith and is supported by consideration. n339

Developers may not feel their promises and contracts with local governments were entered freely when they wouldn't have gotten planning permission otherwise. But they are not the best plaintiffs to be claiming that they didn't understand

the agreement signed, or that they were coerced into signing adhesive contracts with local governments. Most developers have the resources to challenge local authority even though they may decide going after the locals isn't a good way to use those resources.

Developers have also been estopped from protesting the legitimacy of a fee after they pay it, on the theory that the local government -- once it collects a fee -- will feel entitled to spend it. But no payment usually means no permit and a long delay while the developer's challenge works its way through court. Some states have created procedures for developers to pay under protest, and challenge fees or conditions later. n340

§ 85.12(c)(2) The Rough Proportionality Test.

Most commentators assumed that the *Nollan* opinion would lead to Courts striking down fees as disguised takings of property unless the fee was levied to compensate for a harm caused by the developer. n341 Others were not so sure how Courts would interpret *Nollan*. n342 Those who thought the Supreme Court didn't intend a continued, active scrutiny of local land-use decisions were startled by the next case the Court decided on this subject: *Dolan v. City of Tigard* n343 articulated a rough proportionality test for land dedication.

Florence Dolan wanted to expand an existing plumbing and electrical supply store in the city of Tigard, Oregon, on the main street of the central business district. Ms. Dolan's planned expansion was consistent with the city's applicable zoning scheme. Her idea was to double an existing 9,700-square-foot store and to pave a 39-space parking lot on existing gravel. Her parcel totalled 1.67 acres.

The state of Oregon has enacted a comprehensive land-use management program that requires cities and counties to adopt regulations and restrictions consistent with statewide planning goals. The city of Tigard had adopted such regulations codified in its Community Development Code (CDC).

The CDC's principal requirements of relevance to Ms. Dolan's planned expansion:

> (1) Lot owners in the Central Business District had to comply with a 15% open space and landscaping requirement. This meant only 85% of each CBD site, including Dolan's, could be developed.
>
> (2) Lot owners proposing development within or adjacent to the 100-year floodplain were required to dedicate land for "greenway" in that area. Fanno Creek flows through the southwestern corner and along the western boundary of Dolan's property. The Fanno Creek floodplain is designated in the city's comprehensive plan as part of the "greenway" system. Part of the Dolan property lies within the Fanno Creek floodplain.
>
> (3) The dedicated greenway was to include a pedestrian/bicycle pathway of 15 feet to encourage alternatives to automobile transportation. As applied to Dolan's property, these conditions -- the dedication of a portion of the site near the creek for floodplain management and a bike path -- required about 10% of Dolan's property, 7000 square feet, to be deeded to the city. Dolan would be permitted to rely on these dedications to meet the 15% open space requirement of the city law. Dolan requested variances from the CDC standards, but was denied by the Planning Commission. Dolan sued.

The Oregon Court of Appeals affirmed a Land Use Board of Appeals decision that a *Nollan* "reasonable relationship" existed between the proposed development and the requirement to dedicate land for the greenway and between alleviating the impacts of increased traffic flow caused by the development and facilitating the pathway as an alternative means of transportation. The Oregon Supreme Court also affirmed, reading *Nollan* to mean that an "exaction is reasonably related to an impact if the exaction serves the same purpose that a denial of the permit would serve." n344

The United States Supreme Court reversed and remanded in a 5-to-4 vote. The opinion begins by noting that had the

city simply required Dolan to dedicate the land for public use, a taking would have occurred without question. This would have deprived Dolan of the right to exclude others, "one of the most essential sticks in the bundle of rights that are commonly characterized as property." n345 On the other hand, however, the Court notes that the authority of state and local governments to engage in land-use planning has been sustained against constitutional challenge for almost 70 years.

In evaluating Dolan's claim, the Court laid out a *two-pronged analysis*. First, the Court must determine whether the *Nollan* "essential nexus" exists between the "legitimate state interest" and the permit condition exacted by the city. n346 If the Court finds that a nexus does exist, the Court must then decide the required degree of connection between the exactions and the projected impact of the proposed development. n347 The Court was not required to reach this second question in *Nollan*. The two prongs can be visualized like this: n348

case	element	test
Nollan	nature	"essential nexus"
Dolan	degree	"rough proportionality"

The Court noted that the permits imposed by the city of Tigard had none of the gimmicks attempted by the California Coastal Commission in *Nollan*. The Court found that the prevention of flooding and reduction of traffic congestion are the types of legitimate public purposes that the Court has upheld. The Court found it "obvious" that a nexus exists between preventing flooding and limiting development within the floodplain, noting the fact that Dolan would be doubling the size of the store and paving the parking lot, thus expanding the impervious surface on the property and increasing the amount of stormwater runoff. The Court also found a nexus between the city's attempt to limit traffic congestion by providing for alternative means of transportation through the construction of the pedestrian/bicycle pathway.

The Court then turned to the question of "whether the degree of the exactions demanded by the city's permit conditions bear the required relationship to the projected impact of petitioner's [Dolan's] proposed development." n349 The Court looked to how state Courts dealt with this question and found three general standards of review.

First, some state Courts use very generalized statements as to the necessary connection between the required dedication and the proposed development. n350 The Court found this standard too "lax" to adequately protect a property owner's right to just compensation if her property is taken for a public purpose.

Second, some state Courts use the "specific and uniquely attributable" test. n351 Under this standard, if the government cannot demonstrate that the exaction is directly proportional to the specifically created need, the exaction will be invalidated. The Court found this test to require such exacting scrutiny that was beyond the Federal Constitution.

Third, some state Courts take an intermediate position and require the local government to show a "reasonable relationship" between the required dedication and the impact of the proposed development. n352 Under this standard, the property owner need not dedicate property as a condition of obtaining a building permit unless the future public use is "occasioned by the construction sought to be permitted." n353 The Court found this "reasonable relationship" test to be closer to the constitutional norm than either of the other two tests. However, the Court refused to adopt it, because the term "reasonable relationship" is too confusingly similar to the term "rational basis," which describes the minimal level of scrutiny under the Equal Protection Clause of the Fourteenth Amendment. n354

One commentator analogized the Court's analysis to a "Goldilocks and the Three Bears" sort of critique: n355

> The first group of cases permitted government to exact land dedications with only "very generalized statements" of the connection between the project's impacts. This was found to be too soft.
>
> The second group of cases required a very precise fit between the impact of the project and the proposed solution. This was found to be too hard.
>
> The third group of cases adopted a "reasonable relationship," between the dedication and the project's expected impact. This was found to be just about right, but the Court didn't like the label. Instead of "reasonable relationship," the Court announced a standard of "rough proportionality."

The Court found that a term such as "rough proportionality" best portrays what it holds to be the requirement of the Fifth Amendment. The Court stated:

> No precise mathematical calculation is required, but the city must make some sort of individualized determination that the required dedication is related both in nature and extent to the impact of the proposed development. n356

Thus, the burden is on the government to meet the "rough proportionality" test before they can place conditions on a permit approval. The Court examined the facts of the case and determined that the rough proportionality test had not been met. The Court found that the city never said why a public greenway, as opposed to a private one, was required in the interest of flood control. The difference between a private and a public greenway is that Dolan loses her ability to exclude others, one of the "most essential" elements of property ownership. n357 The Court noted:

> It is difficult to see why recreational visitors trampling along petitioner's [Dolan's] floodplain easement are sufficiently related to the city's legitimate interest in reducing flooding problems along Fanno Creek, and the city has not attempted to make any individualized determination to support this part of its request. n358

With respect to the pedestrian/bicycle pathway the Court found that, although the city was correct in finding that the larger retail sales facility will increase traffic, the facts show:

> [T]he city has not met its burden of demonstrating that the additional number of vehicle and bicycle trips generated by the petitioner's [Dolan's] development reasonably relate to the city's requirement for a dedication of the pedestrian/bicycle pathway easement. The city simply found that the creation of the pathway "could offset some of the traffic demand ... and lessen the increase in traffic congestion." n359

The Court ended by noting the city's "laudable" goals of reducing flooding hazards and traffic congestion, but stated that there are limits to how this may be done. "A strong public desire to improve the public condition will not warrant achieving the desire by a shorter cut than the constitutional way of paying for the change." n360

> A critically important aspect of the *Dolan* decision is the Court's placement of the burden on the public entity to justify its exactions under the "rough proportionality" standard through "some sort of individualized deter-mination that the required dedication is related both in nature and extent to the impact of the proposed development."
>
> While it is not entirely clear from the majority opinion, as a practical matter, the Court's decision probably means that cities making adjudicatory permit decisions will have to make findings supported by substantial evidence that show a reasonably close fit between the particular development's projected

> impacts and any exactions or conditions required. This, in turn, means that cities will more often have to demonstrate (at administrative permit hearings or otherwise) through expert testimony and evidence -- such as traffic surveys, engineering studies and other expert evidence -- the nature and extent of the proposed project's likely impacts and the relationship of the exactions to these impacts. n361

Property rights activists have hailed the decision as a "dramatic victory." The Court finally recognized that "the ends can no longer justify the means in the regulation of land use." n362 Reactions by environmental groups and municipalities trying to develop a cohesive land-use plan have been mixed. Some have been bothered by the shift of the burden of proof to the municipality that could make land-use decisions more expensive and more time-consuming. n363 Others believe that the standard set by the Court was one municipalities could meet. n364 Clearly, *Dolan* offers developers a new talking point in their land-use entitlement negotiations. Cities may also be forced to do extensive research, on an individual basis, to justify certain exactions and dedications.

One commentator anticipates land use regulators to react to *Dolan* in a number of ways. n365 (1) Communities could abandon the use of dedications as a tool for offsetting the expected impacts of new development. *Dolan* doesn't explicitly apply to fees, just land dedications. (2) Communities may condemn and pay the owner for the land they would have formerly required to be dedicated. (3) Regulators could deny development applications they would previously have granted under conditions that might fail the "rough proportionality" test. (4) Regulators -- at the developer's expense -- might commission "property rights impact statements" much like developers now pay for environmental impact statements. (5) Governments could pay for land they would previously have sought by dedication with impact fees calibrated to have the required "essential nexus" and "rough proportionality" to the expected impacts of development. *Dolan* forecloses none of these possibilities.

"Roughly Proportionate" or "Rational or Essential Nexus." The language of the *Dolan* test is bound to lead to disagreements between subdividers and regulators about where the boundary line is which separates unconstitutional conditions from legitimate regulation.

Some situations are clear. It would be acceptable for a public agency to require a builder to put in sewers in exchange for a permit to build a subdivision since, without sewers, the development would be a health hazard. However, the right to develop a project that creates only a small amount of new traffic could not be conditioned on the developer funding the full cost of a new freeway through town. n366 Nor could developers be legitimately assessed for all new fire hydrants and watermain replacements in a city -- just those needed to serve new development, not those serving older buildings. n367 But how tailored, really, should the fit be of condition to harm?

No case shows that better than *Ehrlich v. City of Culver City*, n368 which the U.S. Supreme Court sent back to California's Second District Court of Appeals on the day it decided *Dolan*. The *Ehrlich* case began when developer Richard Ehrlich closed the failed Westside Sports Center at 4901 Overland Avenue in Culver City and applied to build a 30-unit townhouse project on his 2.4-acre parcel.

Before October 28, 1974, the property had been zoned C-2 (retail commercial) on Overland and R-1 (single-family), back from Overland. Ehrlich's predecessor sought a zone change in 1974, to C-3 (commercial) with a specific plan restricting the property to the development of a sports facility. Thus zoned, Ehrlich's predecessor sold the site to Ehrlich in 1975. Ehrlich spent $800,000 improving the property as a private tennis club. Besides five tennis Courts, the club featured a heated swimming pool, jacuzzi, sauna, three paddle tennis Courts, a jogging track, an aerobics area, and a building with lockers, a kitchen and other accessory uses.

Ehrlich was never able to make a financial success of the club. In 1981, Ehrlich sought a change to permit an office building on the site. The City denied the application, citing as justification that the tennis club provided the city with needed recreational facilities.

In 1988, the developer closed the sports facility, gave the equipment to the City and sought permission to build 30 townhouses on the site. This was a perfectly reasonable request viewed through the lens of traditional zoning. Adjoining the site to the south was a public library; to the west, a school and a large concrete play yard; to the south, three shops fronting on Overland; and further west, single-family residences. Across Overland to the east are two-story apartments built at densities exceeding Ehrlich's proposal. Indeed, a 30-unit townhouse could be expected to generate far less traffic and noise than the 1500-member sports club. Nonetheless, at first the City refused, again citing the need for recreational facilities. Ehrlich sued for a writ of mandate and damages and also sought city reconsideration offering to build four tennis Courts for the city elsewhere in exchange for permission for the townhouses.

The City reconsidered and approved the project subject to conditions:

> (1) a $280,000 mitigation fee -- the estimated cost of building four tennis Courts;
>
> (2) a $30,000 fee for the purchase of parklands, required of all Culver City developers under a state law called the Quimby Act;
>
> (3) a fee based on 1% of project cost -- $32,220 -- for art, unless the developer elected to sponsor an art project on-site, subject to City approval, or donated an art object to the City of equivalent value.

The developer entered an agreement with the City reserving his right to challenge the $280,000 mitigation fee and $32,220 art fee, as he is entitled to do under state law.

Ehrlich sued and at trial, Judge John Zebrowski agreed with him that the tennis Court mitigation fee was "simply an effort to shift the cost of providing a public benefit to one no more responsible for the need than any other taxpayer." The trial Court upheld the art fee and Ehrlich commissioned a sculpture to be built on the site -- an object the townhouse owners, association would like to get rid of. A California appellate Court overturned Zebrowski. n369 The U.S. Supreme Court vacated this opinion, and remanded the case for further consideration in light of *Dolan*. On remand, the same Court of Appeals, in an unpublished opinion, stood its ground, unmoved by *Nollan* and *Dolan*. On the nexus issue, while the Court conceded that the city could not prevent Ehrlich from going out of the sports club business and closing down under California law, that didn't mean the city had to give him a zone change. He bought the club knowing how the land was zoned. Nor does the fact he couldn't turn a profit mean the city's refusing to allow a change in use amounts to a denial of all economically viable use. For one thing, no one has a vested right to disregard otherwise legitimate zoning laws just to make a profit. And the fact that Ehrlich couldn't make a profit on the club doesn't mean no one could have. As for the rough proportionality test, $280,000 was about right as the cost of replacement tennis Courts. n370

Property rights advocates are disappointed. They had hoped for a victory on both counts: (1) no nexus because Ehrlich has no obligation to provide Culver City with tennis Courts just because he once ran a sports club that had them; (2) no proportionality because whatever recreational needs thirty townhouse units generated, $280,000 for four tennis Courts far exceeded them.

The appellate Court opinion may be appealed to the California Supreme Court. The "nexus" debate continues.

§ 85.12(c)(3) Reactions to *Dolan*.

The U.S. Supreme Court in *Dolan v. City of Tigard* n371 articulated a test for land dedication. The Court essentially adopted a three-part test: 1) The permit condition needs to promote a legitimate state interest, 2) the condition asked of the developer must be substantially related to the enunciated government purpose, and 3) the nature and extent of the condition needs to be "roughly proportional" to the projected impact of the proposed development. The Court stated:

> No precise mathematical calculation is required, but the city must make some sort of individualized determination that the required dedication is related both in nature and extent to the impact of the

proposed development. n372

Thus, the burden is on the government to meet the "rough proportionality" test before it can place conditions on a permit approval.

The majority opinion in *Dolan* does not clarify the type of findings that the public entity must make in order to satisfy its burden of making "some sort of individualized determination that the required dedication is related both in nature and extent to the impact of the proposed development." However, in the aftermath of *Dolan,* state and federal Courts have provided guidance on what constitutes adequate quantification necessary to satisfy the "rough proportionality" test. n373

§ 85.12(c)(4) Applicability of *Dolan* to Fees.

Some Courts have ruled that whether a development or impact fee is subject to the "rough proportionality" test depends on whether the exaction was imposed through a legislative enactment which sets standards so precise and uniform that the application of the standard becomes ministerial, much like the application of traditional land use regulations such as setbacks and design control. Courts have held that such fees are not subject to *Dolan* scrutiny because *Dolan* arose in an adjudicative proceeding that was site specific and discretionary. n374

§ 85.12(d) The "Nexus" Debate.

Should local governments be required to demonstrate that the development created a need for the fee, the fee is no greater than necessary to meet the need, and the fee will be used for its stated purpose and no other? Here is a catalog of the arguments on both sides. Hopefully, by scanning the arguments, the consequences of *Nollan* will be easier to appreciate.

Those favoring a strict "nexus" test have made these points in the debate:

1. Freed of strict constitutional limits, local governments, eager for revenue, might be tempted to approve environmentally destructive projects, just to siphon the developers' cash into the general fund. n375 By tying the use of subdivision exactions to public works projects necessitated by those subdivisions, the courts and legislatures have dulled the temptation to underregulate. n376 The temptation to underregulate isn't prevented entirely because developers may elect to forego their *Nollan* claims and pay higher-than-legal fees in exchange for development approval.

2. Unrestricted impact fees can be an invitation for communities to create pricey "entry fees" (like country club memberships) to bar the less affluent. A policy of charging excessive fees can be part of a "raise-the-drawbridge" mentality at work. n377 A strict nexus test can help restrain fee fever.

High fees and excessive exactions that rise above the direct public cost of providing services for new development put a severe strain on the tenability of an affordable housing market. Thus, policy makers must determine whether decreased housing opportunities for employees will deter business or industry from entering or expanding in a community. n378

3. The "nexus" test frees subdividers from having to pay school fees in districts with declining enrollments where the children of new homebuyers are filling the empty seats. n379

4. Developers forced to pay for schools, fire and police stations, and roads, have a great incentive to make sure public monies are well spent. Private builders are usually more efficient than government agencies. Once the costs of public facilities are assessed to private developers, they have an incentive to "blue pencil" the public design and construction process. The "nexus" test gives developers the legal

authority to hold local government accountable. n380 (One example: a major builder in southern California actually built a school, and discovered school districts spend 100-250% more than he did for the same product. Under a strict nexus test, he will now be able to challenge school fees greater than actually needed to build new schools).

5. Fees don't just take wealth from developers, land sellers, or homebuyers (experts are divided on who actually ends up paying these fees). They also drain tax funds from state and federal coffers because the developer will deduct the exaction from the gross income earned on the project. This revenue shifting may be subject to little political debate or public scrutiny since the impact fee is "off budget," and not evaluated against other public expenditures that the developer's exaction and taxes might have been allocated to cover. Through impact fees, special interests may be able to impose costs on developers for programs that taxpayers don't want to fund. n381 A strict "nexus" test puts a cap on the promiscuous use of fees. n382

6. Responsible developers favor some impact fees. They want the buyers of houses in their new subdivisions to enjoy quality schools, parks, playgrounds, and free-flowing traffic.

They might even have funded some of these improvements voluntarily. A nexus test means that all developers -- even less responsible ones -- share the burden proportionately, and no single developer is stuck having to pay more than a fair share.

7. If there were no limits on what local governments could charge developers, local officials might try to avoid seeking other revenue sources to fund needed capital improvements even when developer fees could never be sufficient to redress the problems at which local officials are aiming. Traffic congestion, for instance, is a result of vastly increased car ownership (the car population went up at twice the rate of the human population in the 1980s) and auto use (as more adult members of households took jobs outside the home in the 1980s). The needed transportation improvements could never be funded entirely out of development impact fees. If a state or local government attempted it they would eventually see that to fund a state highway improvement program out of impact fees would require fees so high as to cut down dramatically the number of houses built, causing a decline in net fee revenue. n383 By distinguishing early between fees legitimately assessed to mitigate the impacts of a particular project and fees levied in a hopeless effort to compensate for problems not truly related to new development, courts help focus the attention of local officials where it should be -- identifying additional and appropriate revenue sources.

8. Development impact fees are a volatile revenue source -- more volatile than other tax revenues -- since fee revenues fluctuate with the development cycle. In boom times, governments may be flooded with fee income. If they get used to putting this money towards anything but capital improvements necessitated by new development, they will have to deal with layoffs and program cutbacks in the inevitable downswings of the real estate cycle.

Those opposing a strict "nexus" test have made these points in the debate:

1. The strict nexus test can sometimes inhibit local government from levying sufficient fees to pay for needed public facilities. To avoid the strict and costly accountability of the nexus test localities may err on the safe side, and levy fees not nearly high enough to cover the full costs of new roads, parks, and schools. Developers are less likely to protest fees priced well below their fair share of the actual cost of new facilities. But taxpayers may rebel.

2. One consequence of underpricing is that local taxpayers may have to pay the difference. This can exacerbate calls for a politics of "no growth." A city whose impact fee is overturned in court may

propose larger lot sizes to reduce growth, or enact more stringent growth controls (annual building caps). n384 Underpricing impact fees can also result in public facilities not being built on time, provoking new residents and old to protest that government is failing them. Conversely, impact fees give a community an alternative to pricing entry into the community. The community doesn't have to depend on fiscally inspired exclusionary zoning. n385 Cities that use fees have higher growth rates than cities that don't. n386

3. Some local governments want janitors, secretaries, and paralegals to have the option of residing near their offices downtown, and for suburban police, nurses, firefighters, and schoolteachers to be able to find housing in the suburbs where they work. They may pass laws assessing office developers to pay "linkage fees" into a local affordable housing fund, and suburban housing developers to set aside units priced below cost so low- and moderate-income people can afford them. Strictly applied, the nexus test could result in these programs being declared invalid. n387

Opponents of "inclusionary" housing requirements and linkage fees say they would prefer courts to apply a strict version of the nexus test and strike down these programs. They argue that such programs are inefficient and illogical attempts to force developers whose projects may have indirectly increased the local demand for housing, and thus increased residential rents, to compensate by funding more housing. n388 If developers had to compensate for all the indirect price effects of their projects, there would be no limit to what they could be required to finance. Further, if they are forced to pay all the direct and indirect costs their projects impose, why not credit them with all the direct and indirect benefits of development? City growth benefits landowners by increasing property values, local businesses by increasing market potential, and existing residents by making new types of commerce, culture, and consumer goods feasible. n389 "... Not crediting developers for the benefits of growth effects a redistribution of wealth toward the existing residents." n390

4. Some scholars contend that a "strict" court-imposed nexus test isn't necessary because there is enough competition among cities for residents and new businesses to keep fees and taxes reasonable in relation to local services. The marketplace does a better job than courts of detecting and penalizing communities where fees are "out of line." Those communities won't attract firms and residents. n391

Other scholars have pointed out that, although some developers may elect to avoid communities that are overly restrictive or whose fees are out of line, this is small comfort to landowners in those communities who will lose the chance to sell to exiting developers. n392

Communities may want to exclude less affluent residents. Some cities may have unique attributes that allow them to exact excessive fees from developers. Hence "[c]ompetition alone will not prevent municipalities from imposing exactions that significantly exceed the external costs imposed by new development." n393

5. A strict "nexus" rule means simply that local governments will have to fund special studies to justify each new fee. This will nurture a "nexus study" industry and encourage litigation. But it won't reduce fees because local governments are strapped for funds. "Nexus" could even necessitate increased fees to pay for elaborate, detailed studies and court costs.

6. One economic argument for exactions is that they should reflect fully the cost of new facilities. They should be constructed as user charges and should exactly equal the actual costs of the capital facilities required to serve new development. The fees would become like prices in the private market, a cost that developers and homebuyers would pay only when the benefits of the development exceeded its true total costs, including those now shared among all taxpayers. n394

For this resource allocation ideal to be realized, a strict nexus test would have to be based on marginal cost instead of average cost pricing. To see the difference, consider the case of hookups to a regional water or sewer facility. In an average cost pricing system, every user would pay the same fee for a hookup. Marginal cost pricing would factor the distance to the facility and the density of the development when these affect the actual cost of the service. Density, distance, and location would be figured into the hookup fee. Lower density projects further removed from the sewage treatment plant would pay higher hookup fees than higher density projects located closer to it.

Developers and homebuyers should have their choice, but those who prefer the higher cost option shouldn't be able to push some of the sewage treatment and other real costs of their choice on those who settled for more efficient locations and densities.

Despite its theoretical elegance, marginal cost pricing is politically unpopular: it is difficult to administer, and it also results in some community members paying more than others for what seem to be the same services.

Where commercial and industrial fees are cross-subsidizing homeowner hookup charges, the use of marginal cost pricing would result in higher fees to housing and reduced fees for commercial and industrial users. But since voting is based on residence, a shift from average to marginal cost pricing could prove a political disaster. It might even ignite no-growth fires.

7. Developers are made to fund public improvements to compensate community residents for the inconvenience of growth. "*Nollan* disfavors ad hoc exactions [such as] those negotiated during a rezoning hearing, required as a condition of approval of a planned unit development, or added to normally administrative determined permits...." n395 Nexus requires that funds be put in special accounts and used only for designated purposes. Sometimes, however, residents might be willing to live with increased congestion levels for a price lower than the cost of the developer installing the public improvements to alleviate congestion.

When this is the case, the nexus requirement may inhibit the developer and the community reaching a settlement for the lower price. That lower price is the efficient one. The nexus study should only be the first step in unfettered bargaining between the developer and local government. If the total cost of mitigating negative impacts were the most the developer ever had to pay in exchange for planning permission, and payment of that sum delineated the outer boundary of the community's right to deny development, developers and local governments would be free to strike deals that optimized both their interests. n396 A strict nexus test discourages the search for less costly but equally satisfactory accommodation between developers and the existing community.

§ 85.12(e) Statutory "Nexus" Standards.

State courts have differed on whether the state enabling laws must explicitly authorize impact fees, or whether local authority to levy fees can be inferred either from the general power of charter cities, or implied from planning laws which make no mention specifically of the exaction power. n397

Several states have resolved this dispute by enacting statutes specifically giving localities the right to impose impact fees and dedication requirements. A few of these statutes simply authorize local governments to levy impact fees. n398 Many state legislatures have gone further and incorporated rather stringent "nexus" accountability standards into their state laws. n399 Commentators have recommended that all state legislatures do this. n400

These are among the requirements, which vary from state to state:

(1) Impact fees may be assessed only to fund capital improvements necessitated by and attributable to the new development being charged -- and only in proportion to the service demands the development generates. n401 There are often detailed requirements for calculating the maximum level for impact fees.

(2) Funds must be earmarked and spent only for the designated purpose. n402

(3) Funds not spent within a specified time must be refunded.

(4) Only certain types of public facilities may be funded by impact fees. Roads are the most popular. n403

(5) Municipalities enacting impact fee programs must first adopt a comprehensive plan with a capital investment component. Impact fees can only be spent according to a schedule consistent with the capital investment component of the comprehensive plan. n404

These laws are a call for communities to promulgate capital improvement plans and to study carefully the relationship between new development and the need for new public facilities. Under these laws, local governments set standards or levels of service for each facility. They are encouraged by some and required by others to monitor levels of service in developing areas and the city's progress in building promised facilities. Local governments become accountable for the timing of public improvements on penalty of having to refund fees to developers if facilities aren't provided within statutory time limits.

Developer attitudes about fees vary; they depend a great deal on the project, the amount of the fee, its predictability, how it is calculated, the means available for paying it, and how and when the money is collected and spent.

Developers are happy with the fees that enhance the value of their projects by funding new roads, parks, and schools that serve their projects directly and uniquely. n405 They don't like fees that go into the general funds of local governments. Developers prefer fees that give their projects a marketing advantage over those who built earlier and didn't have to pay.

Developers also prefer exactions that are predictable before they negotiate for the purchase of land, and before they estimate the costs and returns they expect from a project. They would like a chance to pass the fee backward to land sellers through a reduced land purchase price or forward to homebuyers through higher house prices. Developers may not be able to find landowners willing to cut their prices or buyers ready to pay more. But predictable exactions give developers the chance to avoid projects that "don't pencil." Communities that negotiate fees on a case-by-case basis aren't giving developers that chance.

Fees based on measured standards are more predictable than those based on vague performance standards. A school fee of $2.65 per gross square foot of housing is more readily calculated than a requirement of one new classroom per 30 bedrooms when neither the size or cost of the classroom is specified in advance and a "bedroom" isn't defined.

Developers also prefer to have the option of dedicating land, paying a fee, or building the required facility themselves.

Flexibility of financing sources also helps. Developers will be much more willing to agree to provide public improvements if alternative funding sources are available to use in place of the developer's expensive construction financing. The use of assessment districts, tax increment financing, and similar financing methods reduces developer's capital requirements and risk of exactions. n406

The developer's desire to have a public facility located in or near the project as a marketing advantage can conflict with the desire for a fee schedule that is predictable and that applies equally to all developers in the market area. A school

district might be empowered to demand particular sites marked out for schools on the district's master plan which the developer could be required to sell at a below-market price or dedicate free of charge. This would give the developer a marketing edge, especially if the school is located within walking distance of the project. Neighboring projects, however, might be free of any school financing obligation whatsoever. To create a level playing field, all developers region-wide should share the costs of new facilities by paying a fixed amount per dwelling unit or per square foot of assessable, conditioned or habitable space. Under this type of arrangement, developers won't necessarily obtain any marketing edge for their projects, but they don't have to fear being burdened disproportionately.

§ 85.12(f) Timing of Developer Contributions and Public Facilities.

§ 85.12(f)(1) Generally.

Nearly as important to the developer as the amount of the fee is the timing of its payment. Suppose it takes two years for a subdivider to obtain approval of a tentative tract map, another year to complete site improvements, and an additional six months to build houses. Must the subdivider pay the impact fee: (1) before recording the final map, (2) before applying for permits to construct houses, (3) just before seeking certificates of occupancy signifying that the houses are complete and meet local building code requirements, or (4) only when the houses are actually sold, the developer has the buyer's purchase price and the buyer is there, ready to use local public facilities?

From the developer's viewpoint, the later the better. Looking at the Internal Rate of Return calculations previously described in this chapter, you can see how timing affects the developer's ultimate returns. A developer whose IRR is 20% would be willing to pay approximately 44% more in fees if she could defer paying them for two years.

In a multi-phased development, can the developer be required to install improvements for all phases or throughout a very large tract before selling the first house?

At least one court held that only those improvements necessary for the health, welfare and safety of the occupants of the particular house could be required to be in place before the developer became legally entitled to the certificate of occupancy for that house. n407

Obviously, the timing of infrastructure is one of the issues a well considered set of conditions on a tentative tractmap will address. Most California jurisdictions won't allow a map to be recorded until all conditions have either been met on site, or financial means for their being met has been assured by a bonded guarantee or letter of credit. Developers building in phases obtain separate maps for each phase and only record when they are ready to improve and build a particular phase.

On the other hand, developers prefer off-site facilities to be in place by the time they begin marketing their houses. The local government can only do this without invading its general fund if the developer pays for the improvements up front or floats bonds or tax anticipation notes, repaid by developer contributions or tax assessments when the houses are completed.

Impact fees are usually levied when the developer applies for building permits, a compromise point between the recordation of the subdivision map and the day certificates of occupancy are issued or houses sold. n408 A proposed New Jersey impact fee statute splits them this way: 25% prior to final subdivision map approval, 25% prior to the issuance of a building permit, and the balance on application for an initial certificate of occupancy. n409

§ 85.12(f)(2) The Complexity of Nexus Testing.

The complexity of "nexus" testing is illustrated in *Shappell Industries v. Governing Board*. n410 A school district had imposed a fee for new facilities of $1.50 per square foot on residential and $0.25 per square foot on new commercial

and industrial development throughout the district. These state-authorized fees had to be supported by a showing of need.

To show need, the district relied on a consultant's report calculating school needs to the year 2000. First, the report projected student population, utilizing local general plan population projections. (Population projections are educated guesses extrapolated from past birth, death and migration rates.) Then the consultant calculated the number of school-aged children among the projected population. Making an assumption about the number of children in a classroom, the consultant estimated the number of new classrooms that would be needed in the year 2000. The consultant then figured the costs of constructing new schools. He divided these costs into the estimated square footage of all new housing expected to be built in the community to the year 2000.

The court perceived a fatal flaw: the city's consultant had failed to apportion the increased school population between new and existing housing. Some of the school population would be coming from older houses. After all, there is no preventing couples in older houses from childbearing. Another city-paid consultant had estimated that only 54.9% of the school enrollment would reside in new housing. So the court reduced Shappell's school fee accordingly. The reduction came to $0.15 per square foot. The reason for the modest reduction: developers weren't being assessed the full costs of the new schools. Schools were also being funded by subventions and local taxes.

Step back and consider how speculative the data really are that form the foundation for this careful "rough proportionality" or "nexus" exercise.

(1) Population projections, especially for local areas, are notoriously inaccurate. While birth and death rates are relatively reliable, migration patterns aren't as easy to predict, and migration matters a lot, especially in the south, southwest and west.

(2) The calculation assumes, crucially, a certain number of children per classroom. Pupil/teacher ratios vary greatly among the states. Should the present ratio be chosen, a ratio more in line with the national average, or a ratio preferred by school planners?

(3) There is data supporting the proposition that there are more school-aged children in houses with more bedrooms. A 1980 San Diego study demonstrated a link between the number of bedrooms and the number of children. It found that 27.4% of all the housing stock was three-bedroom units which accounted for 41.1% of all school-aged children. Two-bedroom houses were 32.7% of the stock and 17.2% of all school-aged students lived in them. Four-bedroom units were 11.3% of the stock and 30.7% of all students came from those houses.

But the school district fee challenged in *Shappell* hadn't been based on the number of bedrooms. It had been calculated on house size. There was no evidence that larger houses have more bedrooms, and more school-aged children living in them. We know that family size declines while dwelling space per person increases with wealth. Should the school district be required to show a positive connection between house size and school-aged children before utilizing a school fee based on house size?

The state legislature had previously mandated that school fees be assessed on the number of bedrooms. The legislature shifted to house size partly due to the difficulty of counting bedrooms (does a den count as a potential bedroom?), and in hopes that richer people would have to pay bigger school fees.

(4) For the commercial and industrial portion of the fee, the Milpitas school district -- the one sued by Shappell Industries -- had actually commissioned a study of the employees of different types of employment-generating land uses. They calculated the number of square feet used by each employee (e.g., retail: 631 square feet per employee; heavy industry: 63 square feet). This study also showed the ratio of school-aged students per employee (e.g., .43 students per research and development employee; .89 students per employee in warehouse space). From this data, the

city derived assessment amounts ranging from $1.35 per square foot for retail to $15.20 per heavy industry. The court saw no difficulty with the actual fee of $0.25 because it was such a small fraction of the need generated by each type of use.

(5) The employee study had neglected to estimate the percentage of employees in newly constructed facilities actually moving children into the district. Many people find work in newly built shops and factories who already reside in the community, and thus cause no net increase in the school-aged population. Again, because the $0.25/square foot fee was so small relative to likely need, the court wasn't troubled by the imprecise data used to support the commercial fee.

§ 85.12(g) Developers Who Voluntarily Contract with Local Governments or Pay Fees Without Protest Waive Their Rights to Challenge the Legality of the Fee.

Whatever the "nexus" test requires, developers can seldom get a court to invoke the "nexus" test and set aside mitigation measures they have already agreed to provide in a development agreement or through a negotiated settlement with a local government. n411

> [a] contractual promise which operates to restrict a property owner's use of land cannot result in a "taking" because the promise is entered into voluntarily, in good faith and is supported by consideration. n412

Developers may believe their promises and contracts with local governments were not entered into freely when, in fact, they wouldn't have gotten planning permission otherwise. However, developers are not the best plaintiffs to be claiming that they didn't understand the agreement signed, or that they were coerced into signing adhesive contracts with local governments. Most developers have the resources to challenge local authority even though they may decide that going after the locals isn't a good way to use those resources.

Developers have also been estopped from protesting the legitimacy of a fee after they pay it on the theory that the local government -- once it collects a fee -- will feel entitled to spend it; but no payment usually means no permit, and a long delay while the developer's challenge works its way through court. Some states have created procedures for developers to pay under protest and challenge fees or conditions later. n413

§ 85.12(h) The Attitudes of Planning Officials to Fees.

In 1987 and 1988, Raleigh, North Carolina (population 218,000; 76 square miles), instituted an ambitious impact fee program. n414 In 1985 the city had obtained state statutory authorization for its impact fee program through a local bill. n415 Since local bills require the unanimous consent of the entire delegation from the city, compromises had to be made:

(1) The city wanted the fee to cover six types of infrastructure (storm drainage, sewer, water, parks, roads, off-street parking downtown). The enabling power was granted only for drainage, roads, and parks.

(2) The city wanted 100% cost recovery. The state General Assembly limited it to 50% of any one project's cost.

(3) Park fees could only be spent on land acquisition, not park improvements.

(4) Fees could not be used to pay existing debt. This was meant to protect developers from having to contribute to the retirement of debt for infrastructure serving the older parts of the city. But it had the unintended effect of prohibiting the city from floating bonds to pay for new infrastructure, repayable from impact fees. The provision was later amended to allow borrowing secured by impact fees for new infrastructure in areas where the fees were raised. n416

Raleigh then adopted a "Facilities Fee Program" ordinance adding further restrictions:

(1) Fees were segregated into separate accounts for each of several defined large areas.

(2) Funds could only be spent for capital costs, not maintenance.

(3) Funds had to be spent in the order collected.

(4) Unspent funds would be refunded.

(5) A developer who provides "oversize" facilities to serve later development is entitled to reimbursement.

(6) The city council is to receive a report every two years showing who paid how much and where the money was spent. The money must be spent in the zone where it was collected. The periodic review gives the city government the chance to make sure that the money is being spent to benefit the specific projects within the zone from which it was collected. n417

How has the Raleigh system been working? "Very well," according to the facilities fee ordinance co-author, Deputy City Attorney Ira J. Botvinick. n418 Over three million dollars has been collected for roads, parks, and other infrastructure since 1987, despite the current recession.

Most of it is spent fairly quickly because the city actually schedules public improvements and implements voter-approved bond programs ahead of development. The impact fees go to retire improvement bonds.

The fee level is modest compared to the sums levied in many Florida and California communities -- less than $1,000 per dwelling unit, although fees may have to be adjusted upward soon. n419

Developers in Raleigh were among the main supporters of the fee program. They realized that if they didn't step forward to fund some portion of the cost of new infrastructure, voters might be reluctant to approve bonds for the balance. In fact, fees are calculated to pay only one-quarter to one-third of the actual projected cost of public facilities.

Developers perceived the impact fee system as more equitable than the special assessments and subdivision fees it replaced. Special assessments were based on criteria such as front footage. Mr. Botvinick gives the following example. Think of a rectangular project (shoe box-shaped). If the narrow end faced the road, the developer paid less than if the long side faced the road. Yet its trip-generating and park-use potential would be the same. Impact fees are based on national trip generation figures. Park fees are calculated per dwelling unit.

The fees are collected as part of the building permit process, and become due and payable at the time the permit is issued. Developers see this as more equitable than the earlier system, which relied on subdivision approvals, because not all projects required new subdivision maps. Lots subdivided before the ordinance was enacted would have been exempt. Expansions of existing buildings would also have escaped paying their fair share under subdivision exactions, but are assessed under this program because they require building permits even though they seldom require subdivision map approvals.

Have developers been successful in passing the fee back to land sellers? One reason the city decided to assess fees in fixed and determinable amounts rather than by negotiation, and to levy them at the building permit stage was to encourage developers to negotiate harder with landsellers. Locations are unique, however, and, as far as Mr. Botvinick has been able to tell, developers don't seem to have had much luck passing fees backward to landowners.

The easiest situation for developers to negotiate a land price adjustment is when part of the site is scheduled for a park

or road in the city's capital improvement program. That program specifies how much the city will voluntarily pay for sites required for public uses. The city needs to make its land acquisition price clear because land acquisition costs account for about one-third of total public facilities improvement expenses. If the city didn't know what it was going to pay for land, it wouldn't be able to estimate accurately the costs of public improvements and couldn't determine the appropriate fee levels to charge. Those who buy land in Raleigh can learn in advance what portion of the site the city expects to acquire and at what price. Yet, developers, chain stores particularly, often pay landowners many times more per square foot than the city reimburses when it buys the site. They could sue the city for "fair market value," but none have to date. An assistant city planning director, reflecting on the early Raleigh experience, observed that:

(1) Fees are an unstable source of funds, and depend on the rate of growth and mix of project types.

(2) They could put the community at a competitive disadvantage with other cities.

(3) Fees are a poor substitute for taxes because of their inherent inflexibility. They can only be spent for limited purposes in certain areas.

(4) Fee programs are time-consuming and costly to administer. n420

After examining the Raleigh formula, one observer concluded: "I hereby issue a health warning that Raleigh's enabling legislation and its Fee Ordinance are deceptively simple. Behind those two instruments lies an amazingly complex process of calculation...." n421

The nuances of local government finance are beyond the scope of this chapter except to note that in some states local governments have a way of avoiding the constitutional and statutory limits on impact fees. They can levy excise taxes on property development.

An excise tax is a general tax imposed on the privilege of developing property and benefiting from city services. Revenues from an excise tax go into the general fund. Impact fees revenues are marshalled for capital improvements only.

Whether a state statute that sets criteria for the imposition of development impact fees would bar local governments from adopting excise taxes free of those limitations is a question of state law. A recent California appellate court case upheld a city's excise tax on development of $3,000 per unit and 30 cents per square foot of non-residential development. The court observed that California's impact fee statute defined a fee as a "monetary exaction other than a tax." The city of Vallejo, having enacted a tax on development, and not a development impact fee, didn't have to concern itself with the impact fee limitations the statute imposed on local governments. n422

FOOTNOTES:

(n1)Footnote 303. Fred P. Bosselman & Nancy Stroud, *Legal Aspects of Development Exactions,* in Development Exactions 70, 71-72 (James E. Frank & Robert M. Rhodes eds., American Planning Ass'n 1987).

(n2)Footnote 304. *Id.* at 72. It might be just as well that courts didn't tag the upkeep obligation as a fair trade-off for the "taking," since many local governments are now requiring developers to provide for upkeep by funding endowments or transferring the title of streets, parks, and open space to homeowners' associations. The association becomes responsible for the maintenance of open space, and meets that burden by charging residents maintenance fees. The requirement that the subdivider convey open space to a homeowners' association has been upheld against constitutional challenge. *See, e.g., River Birch Assocs. v. City of Raleigh, 325 N.C. 100 (1990).*

(n3)Footnote 305. Louis F. Weschler et al., *Politics and Administration of Development Exactions,* in Development Exactions 15, 19 (James E. Frank & Robert M. Rhodes eds., American Planning Ass'n 1987).

(n4)Footnote 306. *See, e.g., Building Indus. v. City of Oxnard, 267 Cal. Rptr. 769 (1990).*

(n5)Footnote 307. *See, e.g., City of Lincoln v. Townhouser, Inc., 534 N.W.2d 756 (Neb. 1995)* (Developer wanted title to the dedicated park site returned, claiming that the city had not commenced development of the park within the promised seven years. The city claimed it had commenced development by erecting a fence and gate, surveying the site and drawing plans for park improvements. The agreement had not specified a precise list or schedule of improvements that the city was bound to commence within the seven years. The city prevailed.).

(n6)Footnote 308. *Cf.* McVey, *State Environmental Permit Fees Charged to Federal Facilities: Distinguishing Legal User Fees From Illegal Taxes, 29 Santa Clara L. Rev. 879 (1989)* (constitutional limits on the power of one level of government to tax another government's projects are often held inapplicable).

(n7)Footnote 309. Elizabeth D. Purdum & James E. Frank, *Community Use of Exactions: Results of a National Survey,* in Development Exactions 123, 143 (James E. Frank & Robert M. Rhodes eds., American Planning Ass'n 1987).

(n8)Footnote 310. Typical is Anne Arundel County, Maryland, which started its fee program when state capital funding for schools and federal and state funding for highways slowed down. Douglas R. Porter, *Impact Fees Come to Anne Arundel County* 34 (Urban Land Institute, July 1988).

(n9)Footnote 311. Stewart E. Sterk, *Completion Among Municipalities as a Constraint on Land Use Exactions, 45 Vand. L. Rev. 831, 832 (1992);* Steven B. Schwanke, *Local Governments and Impact Fees: Public Need, Property Rights, and Judicial Standards,* 4 J. Land Use & Envt'l L. 215 (1989).

(n10)Footnote 312. Ira S. Lowry & Bruce W. Ferguson, *Development Regulation and Housing Affordability* 128 (Urban Land Institute 1992).

(n11)Footnote 313. *Id.* at 137-38 (quoting an unnamed planning director). *See also,* James A. Nicholas et al., A Practitioner's Guide to Development Impact Fees 27-33 (Planners Press, 1991). The elaborate impact fees formulae in this book "were designed largely to satisfy the courts rather than with any confidence in the various assumptions that underlie them." John Delafons, Paying for Development 60 (1990) (based on author's interview with Professor Nicholas).

(n12)Footnote 314. R. Marlin Smith, *From Subdivision Improvement Requirements to Community Benefit Assessments and Linkage Payments: A Brief History of Land Development Exactions,* 50 L. & Contemp. Probs. 5, 9 (1987).

(n13)Footnote 315. The payment could violate state laws in various ways. It might be characterized as violating state laws that taxes be uniform. It might be challenged because local governments weren't given the power to tax subdividers under state laws. *Compare, Home Bldrs. Ass'n of Central Ariz., Inc. v. Riddel, 510 P.2d 376 (Ariz. 1973)* (construction tax on dwelling units for city parks held beyond Tempe's statutory taxing power since use of tax would not benefit taxpayers proportionately) *with Squires Gate, Inc. v. County of Monmouth, 588 A.2d 824 (N.J. 1991)* (developer escrowed fee for off-site road improvement to widen culverts held within the county's implied regulatory power because the costs of off-site road improvements were shared by all beneficiaries proportionately). As a tax, the exaction might violate state spending, debt limit, or voter approval requirements. Comment, *Financing Local Government in the Post-Proposition 13 Era: The Use and Effectiveness of Nontaxing Revenue Sources, 22 PAC. L. J. 1333 (1991).*

(n14)Footnote 316. *See* David L. Callies & Malcolm Grant, *Paying for Growth and Planning Gain: An Anglo-American Comparison of Development Conditions, Impact Fees and Development Agreements, 23 URB. LAW. 221, 232-35 (1991).*

(n15)Footnote 317. *Compare Bevan v. Brandon Twp., 475 N.W.2d 37 (Mich. 1991)* (court upheld a requirement of a 66-foot wide access road to intersecting highway for construction to accommodate emergency fire, police, and other vehicles, although court of appeals had determined that the existing 20-foot access was wide enough to accommodate emergency equipment for 2 single-family dwellings); with *Board of Supvrs. of W. Marlborough Twp. v. Fiechter, 129 Pa. Commw. 537 (1989).* Here, the court struck down a subdivision condition requiring the subdivider to increase the width of an existing 33-foot wide road by 82 feet (1/5 of an acre) because there was no evidence that a two-lot subdivision could possibly increase road usage enough to justify the dedication.

(n16)Footnote 318. *See, e.g., Weingarten v. Town of Lewisboro, 542 N.Y.S.2d 1012 (1989),* upholding $5,000 per lot fee for parklands as a condition for approving a subdivision. The fee was lower than the value of the land the subdivider could lawfully have been required to dedicate as parkland within the subdivision, and was "rationally related" to subdivision activity generally. *See Billings Props. Inc. v. Yellowstone County, 394 P.2d 182 (Mont. 1964). See also Blue Jeans Equities v. San Francisco, 4 Cal. Rptr. 2d 114 (1992),* upholding San Francisco's Transit Impact Development Fee ordinance applied to a project away from the traditional downtown area served by the transit system. This court sided with those commentators who have argued that *Nollan* only applies to unconstitutional conditions and possessory takings, not regulatory takings or fees.

(n17)Footnote 319. This language comes from *Pioneer Trust & Sav. Bank v. Village of Mt. Prospect, 176 N.E.2d 799, 802 (Ill. 1961).* Courts in New Hampshire, Ohio, New Jersey, and Rhode Island have invoked it on one or more occasions.

(n18)Footnote 320. *See, e.g., Rohn v. City of Visalia, 263 Cal. Rptr. 319 (1989)* (City could not require owner to dedicate 14% of its site to correct a long-existing street misalignment unrelated to the conversion of the site from residential to office use without paying for the land).

Seawall Associates v. City of N.Y., 542 N.E.2d 1059 (en banc), *cert. denied, 110 S. Ct. 500 (N.Y. 1989)* (moratorium on conversion, alteration, or demolition of single-room occupancy (SRO) housing was stricken because city failed to prove homelessness was significantly related to the supply of SRO units). Note, *Forced Tenancies as Takings of Property in Seawall Associates v. City of New York, Expanding on Loretto and Nollan, 40 DEPAUL L. REV. 245 (1990).*

(n19)Footnote 321. *See, e.g., Batch v. Town of Chapel Hill, 376 S.E.2d 22, 35 (N.C. App. 1989).* A subdivider of a 20-acre tract divided into 11 lots can't be required to make room for a parkway right-of-way through the property because the condition is "not proportionately related to the impact of the development, and there is no commensurate benefit to the subdivision...."

(n20)Footnote 322. The leading law review article arguing for a rational nexus test was written by Ira Michael Heyman & Thomas K. Gilhool, *The Constitutionality of Imposing Increased Community Costs on New Suburban Residents Through Subdivision Exactions, 73 YALE L.J. 1118 (1964).* It found almost immediate acceptance in the New York Court of Appeals and the Wisconsin Supreme Court. *See* Bosselman & Stroud at 74. *See also, Wald Corp. v. Metropolitan Dade Cty., 338 So. 2d 863, 868 (Fla. Dist. Ct. App. 1976).* Courts in Louisiana, Minnesota, Missouri, Nebraska, Texas, and Utah have also embraced it.

(n21)Footnote 323. *483 U.S. 825, 837 (1987).*

(n22)Footnote 324. James S. Burling, *27 LAND & WATER L. REV. 309, 332-33 (1992).* Copyright © 1993 by Pacific Legal Foundation. Reprinted with permission.

(n23)Footnote 325. The Nollans owned the land down to the mean high tide water mark. *Nollan v. California Coastal Comm'n, 483 U.S. 825 (1987)* (so did all their neighbors). What the Commission asked for was a lateral (*i.e.,* parallel to the shoreline) easement over the most seaward third of the Nollans' property. Because their adjacent

neighbors still owned *their* most seaward property, the general public would not have been able to reach the new Nollan park strip during high tide without trespassing on the neighbors' property. What the Commission was hoping for, obviously, was that the rest of Nollans' neighbors would ultimately request permits, and then would be required to give up their seaward property, thus creating, in time, one long thin beach park. *See 483 U.S. at 829;* telephone conference with Nollans' attorney Robert K. Best, Pacific Legal Foundation (April 6, 1987).

(n24)Footnote 326. By the time the case reached the United States Supreme Court the Nollans managed to build the house during a "window of opportunity" between two different state court appellate proceedings. *483 U.S. at 829.* Because the challenge was to a specific application of a regulation it was an "as applied" rather than a "facial" attack.

(n25)Footnote 327. *212 Cal. Rptr. 578 (1985).*

(n26)Footnote 328. *Id. 589-90.*

(n27)Footnote 329. Martin County, on the Atlantic coast in rapidly growing mid-peninsula Florida, has a beach access fee program. Residential developers contribute to a fund based on projected demand for beach access. The county uses the money to buy beach land. The formula is based on the county's estimate of a new resident's average expected frequency of usage and the standard linear footage used by each person at the beach. Combining the figures yields "beach land required per new resident." This leads to a "beach acquisition cost per person." Based on average household size per type of dwelling unit, the cost per person is converted into an impact fee per dwelling unit. *Impact Fees Protect Beach Access in Martin County, Florida,* SUCCESSFUL COMMUNITIES 1, #3 (Conservation Foundation 1989).

(n28)Footnote 330. *Seawall Assocs. v. City of N.Y., 544 N.Y.S.2d 542 (1989)* (striking down an exaction equal to the cost of constructing a replacement low-income unit for every SRO unit removed from the market because Arehabbers" didn't create the problem of homelessness in New York City).

Compare Banberry Dev. Corp. v. South Joran City, 631 P.2d 899 (Utah 1981) (requiring detailed assessment of the fairness of a water connection fee between new and old residents) with *J.W. Jones Cos. v. City of San Diego, 203 Cal. Rptr. 580 (1984)* (sustaining San Diego's facilities benefit assessment on undeveloped property in a growth area to raise funds for street and park improvements, exempting improved property in the area).

(n29)Footnote 331. *Commercial Bldrs. of N. Cal. v. City of Sacramento, 941 F.2d 872 (9th Cir. 1991), cert. denied, 112 S. Ct. 1997 (1992).* New office developers were to pay a fee based on a study that calculated the number of low income workers employed in a typical office building, and the subsidy that would be necessary to house the workers in a newly built Sacramento apartment house. The dissenting judge pointed out: "Even the study relied on by the city to support the ordinance states that its 'nexus analysis does not make the case that building construction is responsible for growth.' The ordinance is nothing more than a convenient way to fund a system of transfer payments."

See also Holmdel Bldrs. Ass'n v. Holmdel Twp. 556 A.2d 1236 (N.J. App. 1989), rev'd, 121 N.J. 550, 572, 583 A.2d 277, 288 (1990) (indicating that if the state mandated a housing linkage fee program and assessed homebuilders for it, New Jersey courts would apply a relaxed Aimpacts" or nexus standard).

See Note, *Commercial Builders Revisits Nollan, 13 Whittier L. Rev. 937 (1992).*

(n30)Footnote 332. *See, e.g.,* Peterson, *The Takings Clause: In Search of Underlying Principles, Part II C Takings as Intentional Deprivations of Property without Moral Justification,* 56, 99 (1990); Falik and Shimko, *The "Takings" Nexus C The Supreme Court Chooses a New Direction in Land Use Planning: A View From California, 39 Hastings L.J. 359 (1988)* (publicly imposed conditions must "directly mitigate those detrimental effects"); Sterk, Nollan and Henry George, *Exactions, 88 COLUM. L. REV. 1731 (1988)* (*Nollan* requires "a clear nexus between the size of the exaction and the externalities attributable to the landowner's use").landowner's use."). Noreen A. Murphy, Note, *The*

Viability Of Impact Fees After Nollan And Dolan, 31 NEW ENG. L. REV. 203 (Fall 1996); Jonathan M. Block, Note, *Limiting The Use Of Heightened Scrutiny To Land-Use Exactions, 71 N.Y.U. L. Rev. 1021 (1996);* Jan G. Laitos, *Takings And Causation, 5 Wm. & Mary Bill Rts. J. 359 (1997);* James S. Burling, *Development Fees And The Supreme Court's Takings Jurisprudence: A Close Fit?* SB14 ALI-ABA 99 (Oct. 17 1996).

(n31)Footnote 333. *See, e.g.*, Steven J. Lemon et al., *The First Applications of the Nollan Nexus Test: Observations and Comments, 13 Harv. Envtl. L. Rev. 585, 605 (1989)* ("Takings clause protection of private property rights could increase or decrease depending upon the prevalent local interpretation of *Nollan*").

(n32)Footnote 334. *483 U.S. at 836-37.*

(n33)Footnote 335. *See*, Manheim, *Tenant Eviction Protection and the Takings Clause, 1989 Wis. L. Rev. 925;* Lawrence, *Means, Motives, and Takings: The Nexus Test of Nollan v. California Coastal Comm'n, 12 Harv. Envt'l L. Rev. 231, 263 (1988).*

(n34)Footnote 336. *See, e.g., Liberty v. California Coastal Comm'n, 170 Cal. Rptr. 247 (1980)* (landowner who wants to build a restaurant can't be required to provide free public parking if the restaurant doesn't add to the existing public parking problem).

(n35)Footnote 337. *Bixel Assocs. v. City of Los Angeles, 265 Cal. Rptr. 347 (1989).*

(n36)Footnote 338. *But see Nunziato v. Borough of Edgewater, 225 N.J. Super. 124 (1988).* Here, the court was so incensed by a condominium developer having been induced to agree to pay $200,000 into an affordable housing trust fund, it set the fee aside.

(n37)Footnote 339. *Leroy Land Dev. v. Tahoe Reg'l Planning Agency, 939 F.2d 696, 698 (9th Cir. 1991).*

(n38)Footnote 340. *See, e.g.*, Cal. Gov't Code § 66020 (protester must pay and provide a written statement "informing the governing body of the factual elements of the dispute and the legal theory forming the basis for the protest"); 36 Ga. Code § 36-71-10 (freeing payor under protest from being estopped from exercising the right of appeal and the right to a refund); 67 Idaho Code § 67-8212 (protesting fee payor not estopped); Wash. Rev. Code Ann. § 82.02.070 (sanctioning payment of impact fees under protest).

(n39)Footnote 341. *See, e.g.*, Peterson, The Takings Clause: In Search of Underlying Principles, Part II -- Takings as Intentional Deprivations of Property Without Moral Justification, 56, 99 (1990); Falik & Shimko, *The "Takings" Nexus -- The Supreme Court Chooses a New Direction in Land Use Planning: A View From California, 39 Hastings L.J. 359 (1988)* (publicly imposed conditions must "directly mitigate those detrimental effects"); Sterk, Nollan & Henry George, *Exactions, 88 Colum. L. Rev. 1731 (1988)* (*Nollan* requires: "a clear nexus between the size of the exaction and the externalities attributable to the landowner's use.").

(n40)Footnote 342. *See, e.g.*, Steven J. Lemon, Sandy R. Feinland, Colin C. Diehl, *The First Applications of the Nollan Nexus Test: Observations and Comments, 13 Harv. Envtl. L. Rev. 585, 605 (1989)* ("Takings clause protection of private property rights could increase or decrease depending upon the prevalent local interpretation of *Nollan*.").

(n41)Footnote 343. *114 S. Ct. 2309 (1994).*

(n42)Footnote 344. *854 P.2d 437, 443.*

(n43)Footnote 345. *Dolan, 114 S. Ct. at 2316,* citing *Kaiser Aetna v. United States, 444 U.S. 164, 176 (1979).*

(n44)Footnote 346. *Dolan*, at 2316.

(n45)Footnote 347. *Id.*

(n46)Footnote 348. Dwight H. Merriam & R. Jeffrey Lyman, *Dolan v. Tigard: Study Materials*, C930 ALI-ABA 321, p. 326 (1994).

(n47)Footnote 349. *Dolan, 114 S. Ct. at 2318.*

(n48)Footnote 350. *See, e.g., Billings Properties, Inc. v. Yellowstone County, 394 P.2d 182 (1964).*

(n49)Footnote 351. *See, e.g., Pioneer Trust & Savings Bank v. Mount Prospect, 176 N.E.2d 799, 802 (1961).* This test was also adopted in New Hampshire, New Jersey, Ohio, and Rhode Island.

(n50)Footnote 352. *See, e.g., Simpson v. North Platte, 292 N.W.2d 297, 301 (1980).* Some form of the "reasonable relationship test" was also adopted in California, Minnesota, Texas, Utah and Wisconsin.

(n51)Footnote 353. *Id. at 302.*

(n52)Footnote 354. *Dolan, 114 S. Ct. at 2319.*

(n53)Footnote 355. Michael M. Berger, *Recent Takings and Eminent Domain Cases*, C930 ALI-ABA 221, p. 230 (1994).

(n54)Footnote 356. *Dolan, 114 S. Ct. at 2319-20.*

(n55)Footnote 357. *Id. at 2320.*

(n56)Footnote 358. *Id. at 2320-21.*

(n57)Footnote 359. *Id. at 2321-22.* As one commentator noted, it is not likely that people will buy bathtubs from Dolan's store and bring them home on a bicycle. Michael M. Berger, *Nollan Meets Dolan Rollin' Down the Bikepath*, 46 Land Use Law & Zoning Digest 3 (Feb. 1994).

(n58)Footnote 360. *Dolan* at 2322.

(n59)Footnote 361. Miller & Starr, Newsalert, 5-6 (Cal. Ed. Sept. 1994).

(n60)Footnote 362. Paula C. Murray, *Dolan v. City of Tigard: Another Wrinkle On The Takings Doctrine*, 23 Real Est. L.J. 275 (Winter 1995), quoting Greenhouse, *High Court, in a 5-4 Split, Limits Public Power on Private Property*, N.Y. Times, June 25, 1994, at p.1.

(n61)Footnote 363. Murray, quoting Richard J. Lazarus, law professor and counsel for the city, and John Echverria, general counsel for the Audubon Society.

(n62)Footnote 364. Murray, quoting Tim Searchinger, Environmental Defense Fund.

(n63)Footnote 365. Merriam & Lyman, C930 ALI-ABA 321 at 332.

(n64)Footnote 366. *See, e.g., Liberty v. California Coastal Comm'n, 170 Cal. Rptr. 247 (1980)* (landowner who wants to build a restaurant can't be required to provide free public parking if the restaurant doesn't add to the existing public parking problem).

(n65)Footnote 367. *Bixel Assocs. v. City of Los Angeles, 265 Cal. Rptr. 347 (1989).*

(n66)Footnote 368. *19 Cal. Rptr. 2d 468 (Cal. 1993).*

(n67)Footnote 369. Ehrlich v. City of Culver City, 19 Cal. Rptr. 2d (1993).

(n68)Footnote 370. Ehrlich v. City of Culver City, No. B055523, Dec. 27, 1994, unpublished, quoted in CP & DR LEGAL DIGEST, Jan. 1995, p. 5.

(n69)Footnote 371. *Dolan v. City of Tigard, 114 S. Ct. 2309 (1994).*

(n70)Footnote 372. *Dolan, 114 S. Ct. at 2319.*

(n71)Footnote 373. *See Dellinger v. City of Charlotte, 441 S.E.2d 626 (N.C. App. 1994)* (striking down road dedication requirement for failure to make written findings relating dedication to traffic from proposed subdivision); *J.C. Reeves Corp. v. Clackamas County, 887 P.2d 360 (Or. App. 1994)* (holding that the county's findings were inadequate because the county simply posited the relationship between subdivision-generated traffic and the need for subdivision frontage improvements which include surfacing, storm sewer, curb, and sidewalk); *Schultz v. City of Grant Pass, 884 P.2d 569 (Or. App. 1994)* (holding 20,000 sq. ft. right-of-way dedication as condition to develop 3.85 acres disproportional to an increase of 8 vehicle trips per day); *Christopher Lake Dev. Co. v. St. Louis County, 35 F.3d 1269 (8th Cir. 1994)* (holding property owner is entitled to recoup the portion of expenditures in excess of his pro rata share, where developer was required to install a drainage system in the entire 301-acre watershed in which developer's parcel comprised 12% of watershed); *Amoco Oil Company v. Village of Schaumburg, 661 N.E.2d 380 (Ill. App. 1995)* (holding that Schaumber's exaction of over 20% of Amoco's property on the basis of a *de minimis* increase in street traffic -- four-tenths of one percent -- does not satisfy the rough proportionality requirement).

See also Sparks v. Douglas County, 904 P.2d 738 (Wash. 1995) (finding "rough proportionality" where a property owners approval of four plat maps was conditioned on land dedications for each plat, and the County provided individualized evidence for each proposed dedication that the development would likely increase traffic on adjacent roads that were already inadequate for safe access).

(n72)Footnote 374. *See also* Ehrlich v. City of Culver City, 96 Daily Journal D.A.R. 2558 (1996) (art fee upheld because it was standardized and uniform, but recreational fee remanded to determine fair value in light of *Dolan* because the fee was site specific and discretionary); *Home Bldrs. Ass'n of Central Ariz. v. City of Scottsdale, 902 P.2d 1347 (Ariz. 1995).*

(n73)Footnote 375. "[S]elling land use regulations in order to have owners of private property provide public services subverts the rule of law because it lets elected officials avoid accountability for 'their' decisions." P. Tufo & B. Schreibman, *High court Limits Zoning Deals,* Legal Times, March 28, 1988, S26, S28. *See also,* Jerold S. Kayden, *Zoning for Dollars: New Rules for an Old Game: Comments on The Municipal Art Society and Nollan Cases, 39 Wash. U.J. Urb. & Contemp. L. 3 (1991); Nunziato v. Borough of Edgewater, 541 A.2d 1105 (N.J. App. 1988)* ("free-wheeling bidding ... is grossly inimical to the goals of sound land-use regulation").

(n74)Footnote 376. Author Kayden argues that "exchanging bonuses for unrelated amenities might offend good planning theory and practice," but should not be unconstitutional. Other and better remedies are available.

(n75)Footnote 377. *Id.*

(n76)Footnote 378. Gus Bauman & William H. Ethier, *Development Exactions and Impact Fees: A Survey of American Practices,* 50 LAW & CONTEMP. PROBS. 51, 53 (1975).

See also, Peter G. Sheridan, *Development Impact Fees in the 1990s,* Real Est. Fin. J. 30 (Fall 1992) (Impact fees have a devastating impact on the development of affordable housing, and they perpetuate homogeneous communities that lack socioeconomic diversification).

(n77)Footnote 379. The school impact fee raises a special question after *Nollan* because most state constitutions require "free and uniform" public schools. If *Nollan* requires that users, and only users, pay in proportion to their use, wouldn't impact fees for schools violate these state constitutional requirements that public schools be free? Not

necessarily, because those state constitutional provisions are interpreted to prohibit charging directly for attendance. An impact fee is not tuition, "a charge for school attendance," yet there is a nexus between new housing and the need for new schools even when each house averages only .44 schoolchildren because homebuyers enjoy the *option* of school access. *See St. Johns County, Florida v. Northeast Fla. Bldrs. Ass'n, 583 So. 2d 635 (Fla. 1991).*

See also Charles L. Siemon & Michelle J. Zimet, *School and Funding in the 1990s: Impact Fees or Bake Sales?,* LAND USE L. 3 (July 1992).

(n78)Footnote 380. *See, e.g.,* Cal. Gov't Code § 66005(a): "When a local agency imposes any fee or exaction as a condition of approval of a proposed development ... those fees or exactions shall not exceed the estimated *reasonable* cost of providing the service or facility for which the fee or exaction is imposed." [Emphasis added]

(n79)Footnote 381. *See* Michael H. Crew, *Development Agreements After Nollan v. California Coastal Comm'n, 22 URB. LAW. 23, 50 (1990).*

(n80)Footnote 382. "The politically attractive feature of regulation is not that it permits wealth transfers to be achieved that could not be achieved otherwise; but rather that it permits them to be achieved 'off budget,' with relative invisibility and thus relative immunity from normal democratic processes." *Pennell v. City of San Jose, 485 U.S. 1, 22 (1988)* (Scalia, J., concurring in part and dissenting in part).

(n81)Footnote 383. *See* Peter G. Sheridan, *Development Impact Fees in the 1990s,* 8 Real Est. Fin. J. 30, 31 (Fall 1992) (if developers can't pass fees to buyers, they eventually leave the market); Delaney & Smith, *Development Exactions: Winners and Losers,* 17 Real Est. L.J. 195 (1989).

(n82)Footnote 384. This is what happened in Guilderland, New York. *See* William A. Fischel, Do Growth Controls Matter? 40-41 (1989).

(n83)Footnote 385. Joseph Gyourko, *Impact Fees, Exclusionary Zoning, and the Density of New Development,* 30 J. Urb. Econ. 242 (1991).

(n84)Footnote 386. *Fees Finance Infrastructure Needs,* Urb. Land 27 (July 1988).

(n85)Footnote 387. It was just such a concern that led Boulder, Colorado, to replace its inclusionary zoning program with an excise tax on *all* new development to support affordable housing construction. Not all cities have state statutory authority to impose excise taxes. S. Mark White, *Using Fees and Taxes to Promote Affordable Housing,* Land Use Law 3 (1991).

Quinn, *Inclusionary Zoning and Linkage: Land Use Planning Techniques in an Age of Scarce Public Resources,* 1 U. FLA. J.L. & PUB. POL. 21 (1987); Theodore C. Taub, *Exactions, Linkages, and Regulatory Takings: The Developer's Perspective, 20 Urb. Law. 515, 547-48 (1988).*

Note, *Impact Fees and You: Perfect Together? 15 Seton Hall Legis. J. 401 (1991).*

Alterman, *Evaluating Linkage and Beyond: Letting the Windfall Recapture Genie Out of the Exactions Bottle, 34 Wash. U.J. Urb. & Contemp. L. 3 (1988);* Andrew & Merriam, *Defensible Linkage,* 54 J. Am. Plan. A. 199; Jerold S. Kayden & Robert Pollard, *Linkage Ordinances and Traditional Exactions Analysis: The Connection Between Office Development and Housing,* 50 Law & Contemp. Probs. 127 (1987).

(n86)Footnote 388. John A. Henning, Jr., *Mitigating Price Effects With a Housing Linkage Fee, 78 Cal. L. Rev. 721 (1990);* Robert C. Ellickson, *The Irony of "Inclusionary" Zoning, 54 So. Cal. L. Rev. 1167 (1981).*

(n87)Footnote 389. Andrejs Skaburskis, *The Design of Development Cost Charge Schedules,* 8 J. Prop. Res. 83, 93

(1991).

(n88)Footnote 390. *Id.*

(n89)Footnote 391. *See* Vicki Been, *"Exit" as a Constraint on Land Use Exactions: Rethinking the Unconstitutional Conditions Doctrine, 91 COLUM. L. REV. 473, 486-506 (1991).*

(n90)Footnote 392. *See* Richard A. Epstein, *Exit Rights Under Federalism,* 55 Law. & Contemp. Probs. 147, 155 (1992).

(n91)Footnote 393. Stewart E. Sterk, *Competition Among Municipalities as a Constraint on Land Use Exactions, 45 Vand. L. Rev. 831, 867 (1992).*

(n92)Footnote 394. Andrejs Skaburskis, *The Design of Development Cost Charge Schedules,* 8 J. Prop. Res. 83, 84 (1991) (pricing the services of their marginal cost insures that they are consumed by people who value the services by an amount that exceeds their cost).

(n93)Footnote 395. Robert H. Freilich, *Public Facility Financing and Land Use Regulation: Surviving the Nollan Decision,* Urb. Land 34, 35 (May 1988).

(n94)Footnote 396. William A. Fischel, *The Economic of Land Use Exactions: A Property Rights Analysis,* 50 Law & Contemp. Probs. 101 (1987). For a review of the arguments for and against "Zoning for Sale," *see* Note, *"Take My Beach, Please!": Nollan v. California Coastal Commission and a Rational-Nexus Constitutional Analysis of Development Exactions, 69 Bost. U. L. Rev. 823, 856-58 (1989).*

(n95)Footnote 397. Holding for implied power: *Mid-Continent Bldrs., Inc. v. Midwest City, 539 P.2d 1377 (Okla. 1975); Jordan v. Village of Menomonee Falls, 137 N.W.2d 442 (Wis. 1965), appeal dismissed, 385 U.S. 4 (1966).*

Holding for no implied authority: *City of Montgomery v. Crossroads Land Co., 355 So. 2d 363 (Ala. 1978); Eyde Constr. Co. v. Charter Twp., 386 N.W.2d 687 (Mich. App. 1986); West Park Ave. v. Ocean Twp., 224 A.2d 1 (N.J. 1966); Board of Supvrs. v. Fiechter, 566 A.2d 370 (Pa. Commw. 1989).*

(n96)Footnote 398. Ariz. Rev. Stat. Ann. § 9-463.05; Ill. Rev. Stat. ch. 121, par. 5-608.

(n97)Footnote 399. When local governments first started assessing developers for park and school site contributions, some courts held those requirements invalid as beyond the authority granted localities under the state subdivision Map Act. *See Kelber v. City of Upland, 318 P.2d 561 (Cal. App. 1957).* It was necessary for the state legislature specifically to enable local governments to levy fees for schools and parks. *See Associated Home Bldrs. Inc. v. Walnut Creek, 484 P.2d 606* (Cal.), *appeal dismissed, 404 U.S. 878 (1971).*

(n98)Footnote 400. *See* Michael G. Sterthous, *Accommodating Growth and Development after Guilderland: Is the New York Legislature About to (Re)Act on Impact Fees?, 8 Pace Envtl. L. Rev. 175 (1990).*

Mr. Sterthous suggests localities be compelled to enact guidelines in a comprehensive capital improvement plan, that localities differentiate the costs attributable to new development from those necessary to maintain or repair existing facilities, and that they be allowed to waive fees on "affordable" projects targeted to low-or moderate income families. *Id. at 233-34.*

(n99)Footnote 401. *See, e.g.,* Cal. Gov't Code § 66001. Fee as Condition of Approval; Agency Requirements.

(a) In any action establishing, increasing, or imposing a fee as a condition of approval of a development project by a local agency on or after January 1, 1989, the local agency shall do all of the following:

(1) Identify the purpose of the fee.

(2) Identify the use to which the fee is to be put.

(3) Determine how there is a reasonable relationship between the fee's use and the type of development project on which the fee is imposed.

(4) Determine how there is a reasonable relationship between the need for the public facility and the type of development project on which the fee is imposed [and] how there is a reasonable relationship between the amount of the fee and the cost of the public facility or portion of the public facility attributable to the development on which the fee is imposed.

(n100)Footnote 402. *See, e.g.,* Tex. Loc. Gov't Code § 395.012.

(n101)Footnote 403. In 1989 the Virginia General Assembly adopted a road impact fee provision. Va. Code Ann. §§ 15.1-498.1 - 15.1-498.1). A number of states have authorized impact fees for roads. N.J. Stat. Ann. § 27:1C-1; Ill. Rev. Stat. ch. 121, §§ 5:901 - 5:919; Wash. Rev. Code § 39.92.040; W. Va. Code § 72). In order to charge these fees, the locality must first designate the areas to be charged and estimate the cost of bringing the road network to a specified standard. "Then, fees for off-site road work can be imposed on developments on a pro-rata basis if the need for the off-site improvements are generated by the development itself." Woodrow W. Turner, Jr., *Planning, Zoning and Subdivision Law, 24 U. Rich. L. Rev. 691, 713 (1990).* Professor Turner attributes to the *Nollan* nexus test the reluctance of the Virginia General Assembly to add schools or parks to the list of permissible impact fee purposes. *Id.*

(n102)Footnote 404. The Maine Comprehensive Planning and Land Use Regulation Act, Me. Rev. Stat. Ann. tit. 30-A § 4354. In California, capital improvements can only be funded pursuant to plans indicating "the approximate location, size and time of availability, and estimates of costs." Cal. Gov't Code § 66002(a).

(n103)Footnote 405. An example of a fee program acceptable to the developers comes from south Orange County, California, a 2700-acre development called Foothill Ranch. There, the developer committed 800 acres for commercial and industrial development so that people living at the project and nearby could avoid long commutes to the vast majority of the county?s jobs, which lie miles to the north over very crowded roads. Some 12,000 to 18,000 jobs are expected to be drawn to the site. The developer pledged $40 million for a $240 million road project in south Orange County, and another $40 million on roads within the project. With smaller neighborhood parks taken into the measure, a total of 1,393 acres -- nearly half the site -- will be open space. Only 530 acres are being put to the developer's principal intended use -- housing for 3,900 units. The estimated value of the entire project on completion is $3 billion. John Charles Tighe, *Balancing Jobs, Parks, Homes in Orange County,* Los Angeles Times, Aug. 20, 1989 (Real Estate'section), at 1, col. 3.

A more controversial fee assessment program is the one in Riverside County, California. Homebuilders protested fees of $2,000-3,000 per housing unit. The developers' complaint was that the county had imposed developer fees as a way to cover deficits in its general fund, regardless of their relationship to new development. The Riverside County fees include contributions for expansion of space for courts, juvenile detention, the county general hospital, mental health clinics, the regional park system, wildlife preserves, sheriff stations and jails, roads, bridge, communications networks, and so on. Ordinance No. 659: Establishing a Redevelopment Mitigation Fee for Residential Development, County of Riverside (July 5, 1988).

By 1992, Riverside County development fees were $7,500 per home. The County Board of Supervisors froze them for 1993 to encourage growth in a time of recession, even though it may cause county planning staff layoffs. William Fulton, *Localities Rethink Policy on Fees,* 7 Cal. Plan. & Dev. Rep. 1, 9 (Sept. 1992).

(n104)Footnote 406. Douglas R. Porter, *Exactions and the Development Process*, 104, 119-120, *in* Development Exactions (James E. Frank & Robert M. Rhodes eds., American Planning Ass'n 1987).

(n105)Footnote 407. *J.D. Land Corp. v. Allen, 277 A.2d 404 (N.J. 1971).*

(n106)Footnote 408. Sarasota County, Florida, imposed its road and park fee (a special assessment) as a condition to issuing a certificate of occupancy. This charge was shifted to the buyer at closing. Its appearance on closing statements caused "surprise and hostility toward the local government" and complicated closings. James C. Nicholas, *Impact Exactions: Economic Theory, Practice, and Incidence*, 50 L. & Contemp. Probs. 84, 98 (1987).

(n107)Footnote 409. NJS 2037, 204th Leg. 1st Sess. § 7(f).

(n108)Footnote 410. *1 Cal. Rptr. 2d 818 (Cal. App. 1992).*

(n109)Footnote 411. *But see Nunziato v. Borough of Edgewater, 225 N.J. Super. 124 (App. Div. 1988).* Here, the court was so incensed by a condominium developer having been induced to agree to pay $200,000 into an affordable housing trust fund, the court set the agreement aside.

(n110)Footnote 412. *Leroy Land Dev. v. Tahoe Regional Planning Agency, 939 F.2d 696, 698 (9th Cir. 1991).*

(n111)Footnote 413. *See, e.g.*, Cal. Gov't Code § 66020 (protester must pay and provide a written statement "informing the governing body of the factual elements of the dispute and the legal theory forming the basis for the protest"); 36 Ga. Code § 36-71-10 (freeing payor under protest from being estopped from exercising the right of appeal and the right to a refund); 67 Idaho Code § 67-8212 (protesting fee payor not estopped); Wash. Rev. Code Ann. § 82.02.070 (sanctioning payment of impact fees under protest).

(n112)Footnote 414. *See* Thomas P. Snyder & Michael A. Stegman, Paying for Growth: Using Development Fees to Finance Infrastructure 103-123 (Urban Land Institute 1986).

(n113)Footnote 415. 1985 N.C. Session Law, ch. 498.

(n114)Footnote 416. 1987 N.C. Session Law, ch. 514.

(n115)Footnote 417. Raleigh City Code Ordinance part 10, ch. 8 *et seq.* (1987).

(n116)Footnote 418. Interview by author with Ira J. Botvinick, April 26, 1993.

(n117)Footnote 419. In 1987, fees in the San Francisco Bay area for a starter house averaged $9,110). *Trends*, Urban Land 32 (Oct. 1988).

(n118)Footnote 420. This information on Raleigh comes from an excellent study, John Delafons, *Paying for Development: A Report on Development Impact Fees and Other Methods of Allocating Infrastructure Costs in the USA (1990)* 83-94. The city planner whose views John Delafons summarized was William R. Breazeale.

(n119)Footnote 421. John Delafons, *Paying for Development: A Report on Development Impact Fees and Other Methods of Allocating Infrastructure Costs in the USA (1990)* at 92.

(n120)Footnote 422. Centex Real Estate Corp. v. City of Vallejo, 93 Daily Journal D.A.R. 13761 (1st App. Dist. 1993).

* Parts of this chapter have been adapted from George Lefcoe, Real Estate Transactions (Michie 1993).

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CHAPTER 85 OBTAINING LAND AND RIGHTS FOR DEVELOPMENT *

9-85 Thompson on Real Property, Thomas Editions § 85.13

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§ 85.13 Laws Concerning the Marketing of Subdivided Lots.

The marketing activities of subdividers are subject to various federal and state laws.

§ 85.13(a) The Interstate Land Sales Full Disclosure Act.

The federal laws applicable to the sale of subdivided lots are federal securities laws discussed in chapter sixteen and the Interstate Land Sales Full Disclosure Act (ILSFDA). n423

ILSFDA prohibits developers from using interstate commerce or the mails to sell any lot within a subdivision unless the developer has: (1) registered the development with the Secretary of the U.S. Department of Housing and Urban Development, (2) delivered an approved property report to the purchaser before sale, or (3) is exempted under the terms of the statute.

The purpose of the law is full disclosure, to "prevent unscrupulous developers from preying on the elderly and other less sophisticated members of the public." n424

"Interstate" is defined so broadly that most sales of subdivided lots would be swept into the statutory net. "Lot" includes "any portion, piece, division, unit or undivided interest in land located in any state or foreign country if the interest includes the right to the exclusive use of a specific portion of the land."

The statute applies no matter how the purchaser intends to use the property -- industrial, agricultural, residential, commercial. To be a subdivision under the terms of the law, the lots don't have to be contiguous as long as they are part of a "common promotional plan."

Developers may qualify for one of the exemptions. (1) Subdivisions with fewer than 25 lots are totally exempt. (2) Subdivisions with fewer than 100 lots don't have to register but are subject to the Act's anti-fraud provisions. (3) Lots are exempt if improved with a building or the seller is obligated to erect a building on the land within two years after the purchaser signs the contract. (4) Fully improved single-family residential lots are exempt if they are in subdivisions which meet all local codes and standards, the developer does not promote the subdivision through direct mail or by

telephone offering gifts, trips, dinners, or other promotional techniques to induce visits to the site. The lot must be zoned or restricted for residential use, situated on a paved street or highway, serviced with sewer, water and electricity at time of closing, conveyed by warranty or special warranty deed according to local custom, with a title insurance policy showing marketable title in the seller, and the purchaser must have personally visited the site. (5) Sales to purchasers in the building or land sales business.

The ILSFDA requires the property reports and statements made to prospective buyers to be meticulously honest. The law prohibits "any device, scheme, or artifice to defraud." n425

Examples in the regs of what the law doesn't allow: A property report that the property is "lakeside" and the lake is dry half the year. A brochure picturing amenities or improvements -- a golf course, a paved road, a country club -- that the promoter has not entered a binding contract to provide. n426

Remedies for breach of the ILSFDA available to purchasers include damages and rescission. The Act also establishes criminal penalties, and an action may be brought by the U.S. Department of Housing and Urban Development in any U.S. District court to enjoin acts or practices that violate the Act.

§ 85.13(b) State Subdivided Lands Acts.

Some states have laws regulating the disclosures subdividers must give their buyers, usually administered through a state corporation commission, just like state securities disclosure laws. n427 These laws restrict the marketing practices of land subdividers and typically require them to prepare an offering statement approved by a state which the subdivider agency must give to each prospective purchaser.

The exemptions in these laws aren't necessarily the same as those in the state Subdivision Map Acts.

Subdivided Lands Act are geared to protecting the innocent buyer from being pressured into an ill-advised sale. Under the New York law, for instance, the buyer not represented in the transaction by an attorney has ten days to cancel. n428 Subdivided Lands Acts often mandate that "advertising material and the general promotional pace" shall not be "false or misleading and comply with the standards prescribed" by a state commission. n429 New York requires a copy of all advertising for the sale of subdivided lands to be filed with a state agency first. n430

Under many of these laws, including the California law, no lot may be sold to an individual that is subject to a blanket encumbrance unless it contains a release clause. n431 A blanket encumbrance is any lien affecting more than the parcel being sold. n432 Larwin, for instance, couldn't have sold a lot to a homebuyer while the physicians still held an unpaid deed of trust secured by the entire project. For the sale to a homebuyer to close, Larwin would have needed a "partial release" clause. Then the subdivider could buy a release from the physicians, freeing the lot sold from the underlying deed of trust.

The California Subdivided Lands Act also requires that if a subdivider tries to pawn off a lot that has encumbrances or liens on it, he must make arrangements to satisfy these liens before pocketing the buyer's funds. Those arrangements may include: obtaining a bond, escrowing the purchase money, substituting a letter of credit for the funds, or another arrangement satisfactory to the commissioner.

A problem can arise when the subdivider promises to sell a house not yet built, or when the subdivider promises "community facilities" like a golf course or swimming pool, not in existence when the first sales take place. The commissioner can't allow sales to commence unless "reasonable arrangements have been made to assure completion of the subdivision and all off-site improvements included in the offering." n433

For all projects with common areas, including condos, the commission must satisfy itself that the projected costs of

maintaining the common areas are reasonable. The developer must also be committed to make "reasonable arrangements for delivery and control over the subdivision and all off-site land and improvements" to the buyers. n434

This is a particularly important requirement because it can be used to prevent the condo developer or tract subdivider from committing the buyers to "sweetheart" contracts with management or servicing companies affiliated with the developer. A bargain-priced condo won't be such a good deal if the condo buyer is stuck paying a small ransom each month for, say, pool maintenance -- provided by a company run by the developer. Nor will the buyers of units sold be happy to learn that they alone are paying the full tax and maintenance burden on unsold units because the developer controls the majority of votes on the condo board of directors. California's law gives the real estate commissioner the power to determine that the developer is capable of keeping all the key promises made to buyer n435 and prohibiting sharp practices. Legislators in states with fewer controls on subdivided land sales have had to deal with these grievances one-by-one, formulating statutes to correct each of them. California law tries to prevent a deceptive offering of a subdivision or condo from "hitting the street."

When a subdivision project passes this anti-fraud, anti-misrepresentation test, the subdivider prepares a public report under the instructions and rules of the real estate commission. That report must be presented to every buyer before closing. Among its prescribed contents are soil conditions, a description of every special tax assessment the homebuyers will have to pay in order to finance facilities serving the subdivision, a note on existing and proposed airports in the vicinity, a summary of arrangements for utilities to serve the tract, whether fill was used in constructing the project, and so on. n436 Sales can't commence until that report, called the white paper, has been approved by the commission.

FOOTNOTES:

(n1)Footnote 423. *15 U.S.C. § 1701 et seq.* Developers extending credit or arranging third-party credit must also satisfy the Truth in Lending Simplification and Reform Act, *15 U.S.C. § 1601 et seq.*; the Real Estate Settlement Procedures Act, *12 U.S.C. § 2601;* and the Equal Credit Opportunity Act, *15 U.S.C. § 1691 et seq.*

(n2)Footnote 424. Billie J. Ellis, *A Compliance Guide to Land Sales Marketing Regulation*, A.B.A. Sec. Real Prop., Prob. & Tr. law 4 (1992).

(n3)Footnote 425. 24 C.F.R. ch. X, § 1715.15(a).

(n4)Footnote 426. *Id.* § 1715.10(f).

(n5)Footnote 427. *See, e.g.*, Ariz. Rev. Stat. Ann. § 32-2181 *et seq.*; Cal. Bus. & Prof. Code 11000 *et seq.*; N.Y. Real Prop. Law § 337 *et seq.*; N.D. Cent. Code § 43-23.1-01 *et seq.*; Okla. Stat. Ann. tit. 71, § 601 *et seq. See generally Arizona Real Estate'sales Act: A Developer's View, 13 ARIZ. B.J. 42 (1977).*

(n6)Footnote 428. N.Y. Real Prop. Law § 337-c.

(n7)Footnote 429. N.D. Cent. Code § 43-23.1-08(3).

(n8)Footnote 430. N.Y. Real Prop. Law § 337-b(3).

(n9)Footnote 431. Cal. Bus. & Prof. Code § 11013.1.

(n10)Footnote 432. *Id.* § 11013.

(n11)Footnote 433. *Id.* § 11018.5. In Minnesota, the seller of improved subdivided lots is exempt from that state's registration procedures if the subdivider files a notice with the Commissioner of Commerce of intent to sell and deposits all down payments in escrow until the subdivider performs all obligations under the purchase-and-sale agreement. Minn. Stat. Ann. § 83.26, subd. 2i(1) and (2).

(n12)Footnote 434. Cal. Bus. & Prof. Code § 11018.5.

(n13)Footnote 435. Cal. Bus. & Prof. Code § 11018:

Investigation; Public Report; Grounds for Denial

...

The grounds for denial are:

(a) Failure to comply with any of the provisions in this chapter or the regulations of the commissioner pertaining thereto.

(b) The sale or lease would constitute misrepresentation to or deceit or fraud of the purchasers or lessees.

(c) Inability to deliver title or other interest contracted for.

(d) Inability to demonstrate that adequate financial arrangements have been made for all off-site improvements included in the offering.

(e) Inability to demonstrate that adequate financial arrangements have been made for any community, recreational or other facilities included in the offering.

(f) Failure to make a showing that the parcels can be used for the purposes for which they are offered; and in the case of a subdivision being offered for residential purposes failure to make a showing that vehicular access and a source of potable domestic water either is available or will be available.

(g) Failure to provide in the contract or other writing the use or uses for which the parcels are offered together with any covenants or conditions relative thereto.

(h) Agreements or bylaws to provide for management or other services pertaining to common facilities in the offering, which fail to comply with the regulations of the commissioner.

(i) Failure to demonstrate that adequate financial arrangements have been made for any guaranty or warranty included

in the offering.

(n14)Footnote 436. Cal. Bus. & Prof. Code § 1101.

* Parts of this chapter have been adapted from George Lefcoe, Real Estate Transactions (Michie 1993).

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CHAPTER 85 OBTAINING LAND AND RIGHTS FOR DEVELOPMENT *

9-85 Thompson on Real Property, Thomas Editions § 85.14

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§ 85.14 Zoning.

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§ 85.14(a) History and Legal Basis.

The workhorse of local land use controls is zoning which involves dividing the community into districts with different regulations in each. n437 "Despite its faults, zoning is still the most important and widely used tool for controlling development in the best interest of society." n438

All fifty states have laws enabling cities to zone. Some states specifically authorize counties to enact zoning laws as well.

Zoning ordinances -- written and enacted by local government officials -- prescribe the uses to which property can be put, and set the development standards for construction such as lot sizes, required off-street parking spaces, and building heights. They divide the community into discrete use zones with a text and accompanying maps. The text outlines different types of use zones such as residential (R), commercial (C), agricultural (A), manufacturing (M), and so on. While cities borrow one from the other, there are significant variations among these ordinances. There are as many zone categories as local whim, policy, and politics dictate. Some uses are allowed in each zone. Some uses may be specifically prohibited. Some uses may be allowed only if the applicant obtains a permit from a zoning administrator, planning commission or city council.

When zoning took hold in the early decades of this century in many big U.S. cities -- Boston, Los Angeles, New York n439 -- the idea was to improve on the law of nuisance. Nuisance law was often faulted for being reactive, unpredictable, random and limited. By the late 19th and early 20th centuries, the strict and literal application of the plaintiff-oriented maxim "*Sic utere tuo et alienum non laedas*" ("one should use his own property in such manner as not to injure that of another") had yielded to a more flexible standard of "reasonable use." courts considered the reasonableness of harm to the plaintiff and/or the reasonableness of the defendant's conduct. n440

Some courts denied offended neighbors relief until a noxious use had actually been built and was proved noxious. Injunctions of private nuisances were reserved for actual harms, not prospective ones. n441 Shops, warehouses, workshops and offices whose owners had the misfortune of building in areas where tract developers would eventually

subdivide, were sometimes sued by homeowners who arrived just in time to file nuisance petitions. The doctrine of "coming to the nuisance" didn't always prove a winner. For developers, especially of manufacturing facilities near residential areas, this meant surprise and, if they lost, enormous losses for buildings that they would never have built had their owners known in advance what awaited them in nuisance litigation. n442

Different courts reached different results on similar facts. There were no legislatively enacted standards of the sort it was hoped that zoning ordinances could supply. Because of its *ex post facto* application, courts were reluctant to classify minor disturbances as a nuisance, unless the remedies could be found short of forcing important industries to shut down. Zoning applied in advance of a project being built. Zoning proponents assumed zoning could embody more exacting standards than courts would have upheld in nuisance cases.

One 19th-century nuisance doctrine can be seen as the intellectual harbinger of zoning: the locality doctrine. In jurisdictions applying the locality rationale courts took into account whether the defendant's use was located in an area with similar or incompatible uses. A manufacturer locating in a predominantly residential district could be enjoined if it created "spillovers" substantially above those normally prevailing in the area. Once industry "took over" a neighborhood, those residents who remained were stuck with higher interference thresholds. As Professor Bone rightly concludes: "This version of the locality doctrine in effect worked a crude form of common law zoning." n443

Here is a California court's 1946 summary of the early safeguards courts, drawing significantly on the law of nuisance, imposed to protect property owners against too aggressive a use of the zoning power:

> Zoning Ordinances which have been held invalid fall roughly into four categories: 1. Where the zoning ordinance attempts to exclude and prohibit existing and established uses of business that are not nuisances. 2. Where restrictions create a monopoly. 3. Where the use of adjacent property renders the land entirely unsuited to or unusable for the only purpose permitted by the ordinances. 4. Where a small parcel is restricted and given less rights than surrounding property, as where a lot in the center of a business district is limited to use for residential purposes, thereby creating an "island" in the middle of a larger area devoted to other uses. n444

Support for zoning came from sources besides disaffection with nuisance law. Zoning in the U.S. also got a big boost nearly one hundred years ago from Chicago's World's Fair, an international exposition held in 1893 in Jackson Park, on the shore of Lake Michigan, to commemorate the discovery of the New World -- the Columbian Exposition. The image was of a gleaming city with monumental buildings arranged on a lake front, canals, and broad tree-lined, grand boulevards. The main structures were massive, symmetrical, classical Beaux Arts style buildings, with arcades, pavilions, domed ceilings, spires, arched windows -- the sort of architecture one sees in the public buildings of European capitals -- Paris or Vienna. The structures built to house the various national and state exhibits were sizeable mansions, the sort of houses multimillionaires of the day inhabited, carefully landscaped with ample side yards, setbacks and front yards. "Chicago's fabled 'White City' was an ideal to which every American city aspired. From the fair emerged the nationwide City Beautiful movement, a progenitor of modern city planning and the force behind such New York landmarks as Grand Central Terminal and the Public Library." n445

Inspired by the impressive mansions built for the state and national exhibits in the Chicago World's Fair, the Columbian Exposition, the earliest zoning ordinances legislated a minimal aesthetic that would capture the elements of classicism on a smaller scale: uniform side yards and setbacks, a uniformity of uses, landscaping requirements, and maximum building heights.

The separation of residences from commercial and industrial uses was a cornerstone of zoning. As early as 1908, the City of Los Angeles had established separate "Residence Districts" and "Industrial Districts." Real estate developers -- both residential and industrial -- could see advantages in separating incompatible land uses. Social reformers distressed by disease-ridden, crowded tenements hoped that by zoning more land for low-density residential use, and barring

apartments, the "conservation of the health of the people" n446 would result. They expected to curb slumlordism by making fewer sites available for high-density apartments. n447

While zoning ordinances prescribed the details for evolving suburbia, the unifying design vision of The City Beautiful was never realized. Major U.S. cities that evolved after the advent of zoning, the post-automobile cities, were places like Los Angeles, Houston and Miami. These are scarcely the prototype envisioned by The City Beautiful movement:

> Not that North American cities lack form, but their shape seems to be the result less of the resolution of an individual's will -- of a Peter the Great, a John Nash or a Baron Hausmann -- than of anonymous, pragmatic decisions to build railroads, highways, or factories. To understand the shape of the American city one has to appreciate the ripple effect of technologies like the commuter train, the automobile, steel frame construction and the elevator. n448

Engineers more than architects determined the shape of North American cities.

§ 85.14(b) The Economics of Use-Segregated Zoning.

Because zoning laws are usually enacted and enforced with the support of local residents, most of whom are already homeowners, it should not be surprising that some researchers have found that zoning raises the value of existing single-family dwellings. n449

Here is some of what researchers have found about the impacts of "use-segregating" zoning:

-- Non-residential uses adversely affect home values. The more land devoted to multi-family and industrial uses in a community, the lower are single-family home values there. n450

-- The presence of non-residential uses will *not* adversely impact the value of single-family residential zones, as long as the stores and factories are located together, not dispersed throughout residential areas. n451

-- Property subject to private deed restrictions limiting its use has about the same value as property subject to similarly restrictive zoning codes. But property that is neither zoned nor covenanted is less valuable than restricted property. n452 This suggests that property owners value the restrictions imposed by zoning laws and private deed covenants.

-- Apartments on the same or nearby blocks reduce home values in affluent areas. n453 Well-designed, carefully managed, small-scale publicly subsidized housing units scattered in low-density residential areas can raise home values in a neighborhood. n454 It is even possible to mix apartments with single-family houses in the same area without seriously impairing aggregate land values. But this requires careful site planning. n455

§ 85.14(c) Judicial Review Reenforces Single-Use Zoning.

When state courts were called upon to review zoning laws, many of them wanted to make sure that local officials didn't abuse their land use powers by discriminating in favor of some landowners, or by wielding their police powers so forcefully as to disrupt the investment-backed expectations of property owners.

Judges tested zoning ordinances for arbitrariness by looking to the existing and nearby uses to see if the zoning scheme codified those uses or disrupted them wholE.S.A.le. n456 They considered the impact on property values, and whether the property could be developed at all as zoned. Courts in most states were prepared to condone sizable private losses only when zoning was used to zone out "nuisance like" activity. n457

Local governments moved towards the promulgation of zoning maps that grouped comparable uses in monolithic zones.

This type of zoning was easy to justify in court because it appeared to treat landowners within a given zone alike, and offered a measure of predictability to developers and neighbors alike.

§ 85.14(d) The Impact of the Separation of Uses on Housing Affordability.

§ 85.14(d)(1) Keeping Apartments Out of Single-Family Zones.

If zoning was a blossom on the locality branch of nuisance law, it soon fell off the nuisance tree and sprouted a life of its own. Separating factories from houses could be justified as classic nuisance prevention. Many observers could not see justifying the separation of duplexes or apartments from single-family houses on the basis of classic nuisance law. Yet following the lead of the U.S. Supreme court's opinion in *Village of Euclid v. Ambler Realty*, n458 which declared that "apartment houses" in single-family areas "come very near to be nuisances," most courts readily sustained exclusive single-family zones. The rationalizations courts often gave (prevention of fire, increase in fresh air, and playing room for children) would have justified fire codes and limits on buildable density, but not the total exclusion of multi-family from single-family zones. Nonetheless, courts uniformly uphold the single-family zone, which bars duplexes, second units, or apartments. n459

Advocates of affordable housing contend that by keeping apartments out of single-family zones and allowing very little vacant land for new apartments, local zoning makes new housing more expensive than it needs to be.

"The biggest regulatory barriers to new lower cost housing are local zoning regulations that restrict the construction of medium-density, walk-up, multifamily housing units. It is much less expensive to build such apartments than any other type of housing." n460 As an example, a national advisory commission in 1991 cited Fairfax County, Virginia, where only 1% of 211,904 acres zoned for residential use are zoned for multi-family housing. n461 At one point, half of all building permits in Portland, Oregon, were for multi-family housing, but only 7% of all vacant land zoned residential allowed multi-family development. n462

§ 85.14(d)(2) Accessory Apartments in Single-Family Housing. n463

Critics of land use controls have also pointed out that by allowing people to rent a guest room or build a small second unit on their lot, the stock of affordable housing could be vastly increased. n464 About a third of all houses with more than five rooms are occupied by one- or two-person households. "Several million additional modest-rent housing units could be created across the nation very quickly, with almost no cost to the public sector. True, such units would serve mainly small households. But over one-half of all American households contain just one or two persons." n465

Many people do create second units in their houses in patent and knowing violation of zoning ordinances and building codes. "Over half a million accessory apartments were added to the nation's housing stock by conversion and remodeling between 1973 and 1980. This represents close to 21% of all private unsubsidized rental construction for that period...." n466

Accessory-unit housing has been promoted by local officials not enforcing single-family zoning laws even though an accessory unit converts a single-family residence into a duplex. Enforcement has been lax because it could result in "political repercussions." n467 Also, accessory-unit conversions are widely perceived as "victimless crimes," seldom causing noise or traffic problems when there aren't many of them on any block. Further, most conversions are difficult to detect.

Many owners of illegal conversions may not want them legalized anyway. By keeping notice of their conversions from public view, they are avoiding the property tax re-appraisals that usually follow new construction. They evade federal income tax by not reporting rental income. They wouldn't want to get caught because their conversions don't fully comply with provisions of the local building and housing codes. Owners seldom skimp on safety knowingly because

they continue residing in the house and have no interest in jeopardizing their own safety or security. But they often build in violation of code provisions they see as unnecessary or too costly.

Accessory units, kept illegal in single-family zones, may actually be more acceptable to the community when selective enforcement takes place by complaints from neighbors. The threat of enforcement disciplines owners of accessory units into behaving in a neighborly way, and gives the community the right to "clamp down whenever conversions begin causing traffic, parking, or other problems." n468

Suppose a local ordinance allowed accessory units either as a matter of right or subject to prescribed completion, and the owner complied. Neighbors would lose their tight grip over the conduct of the owner and the tenant. No law can mandate that people be good neighbors; land use controls don't reach aspects of personal conduct that can be more important to the neighbors than how many kitchens there are in a house. The owners and occupants of an illegal land use who persist in conduct annoying to their neighbors risk getting their illegal use shut down.

The downside of selective enforcement is unequal protection of the law, and possible health and safety problems for occupants and neighbors alike. n469 Legislation to legitimize and encourage these second units has been adopted by some states and cities. n470 Legislation forces officials to spin out "worst case" scenarios, and to build high legal walls against them. Rules written to prevent the worst case result in standards well in excess of those that would be perfectly acceptable in the usual situation. For instance, in most areas, there might be no parking problem for an accessory-unit occupant. But if a great many owners on the same block all decided to build accessory units, curb parking may no longer be available for visitors and deliveries, or cars may be parked curbside all the time, crowding the street. Solution: require one or more on-site parking spaces for each accessory unit.

Thus, in legalizing accessory units, local governments sometimes impose rigorous parking requirements, deep yard setbacks, design controls, higher-than-usual minimum lot sizes, minimum and/or maximum sizes for the accessory units, and occupancy restrictions. Occupancy restrictions are also common: owner occupancy or occupancy of the second unit only by those over a certain age (55 is a popular choice), or someone related to the owner. n471

Often, efforts to legalize accessory units outright are hotly opposed outright as an unwarranted intrusion into the single-family residence zone. n472 Opponents protest the legalization of secondary units because they want to avoid higher population densities and lot coverage ratios, traffic congestion, and competition for curb parking spaces. They don't like the idea of a neighborhood brimming with transients, and want to make sure if accessory units are to be legal, the neighborhood keeps its appearance as a single-family area. Appearance can best be achieved by requiring accessory-unit applicants to obtain conditional use permits, and by conditioning them so additions respect the single-family look. But requiring site plan and design review through a conditional use permit process raises the cost of accessory units and encourages illegal conversions or discourages conversions entirely.

§ 85.14(d)(3) Prohibiting Mobile Homes.

Factory-built houses, sometimes called mobile homes, are among the least expensive forms of new housing. Factories operate in bad weather when on-site construction might have to be suspended. Sometimes factory workers are paid less than on-site construction workers. Local governments have passed ordinances to exclude mobile home parks entirely, limit the number of mobile homes in any one park, or prohibit their construction in single-family zones. Again, legal challenges to these ordinances have yielded mixed results. n473 A few states have enacted laws preempting local governments from imposing their own interpretations of building and safety codes when the mobile homes meet nationally promulgated safety standards. They also mandate that local governments allow the construction of mobile homes on single-family zoned lots, provided the units meet the same development standards as are required for conventionally built houses in single-family zones, such as setbacks and sideyards. n474

§ 85.14(e) The Impact of the Separation of Uses on Traffic Patterns and Commuting.

"... [t]he social desirability of uniform neighborhoods characterized by a single land use is more controversial today...." n475 Outlawing all commercial uses in single-family zones means that even convenience grocery stores must be pushed out miles from where their consumers live, except when the store was there before zoning and got to stay in business as legal nonconforming uses. Many local planners have awakened to the fact that people can work at home without disturbing their neighbors -- and have encouraged cities to create a home occupation exception often conditioned on the home worker not generating much traffic and providing parking spaces for visitors and employees. But professional offices and research parks are still resisted close to residential areas. Pushing them out increases commuting distances, traffic congestion, air pollution, n476 and housing prices, n477 and diminishes housing choices. n478

> Mixed use zoning. When traditional Euclidean zoning is non-cumulative, it effectively separates residential from nonresidential uses. These uses were thought to be incompatible. Industrial factories, for example, were often dirty, smoky and smelly when Euclidean zoning was first adopted. This has changed. Industrial development now is often clean, and may even be located in large self-contained developments that may also include residential, retail and office uses.
>
> These trends have prompted a zoning innovation called mixed-use zoning. This type of zoning expressly permits the mixing of the traditional land-use categories in a single zoning district. The concept can be applied to large developments, but it also can be applied to what is known as "infill" development in transitional neighborhoods. These neighborhoods may be single-family residential neighborhoods that have become attractive to multifamily or commercial development or both. n479

Nonetheless, planners given the green light to drafting ordinances for mixed use zones would probably agree with a British observer: "It is almost impossible to draw up a zoning map that would result in the balance of activities and uses that has emerged in the villages and small towns on the east coast that predate strict separation of uses, or in the traditional neighborhoods of the larger cities." n480

§ 85.14(f) Bulk and Density Controls.

Zoning ordinances also usually include controls on building bulk and density. Big front yards are mandated by requiring minimum setbacks from the street. These persist even where people have little use for them where they are just a maintenance burden. Some land use planners and cost conscious developers champion the "zero lot line" -- an ordinance with no front yard setback, where the house abuts the sidewalk, and there are zero lot line residential zones in some states.

Lot widths are more apparent from the street than lot depths. Requiring that lots have a minimum street frontage is an aesthetic choice sometimes taken to create the appearance of house lots being bigger than they are.

Height limitations are common. These limit building bulk.

Site ratio. Some zoning ordinances limit the percentage of a lot that can be occupied by a building.

Floor area ratio. Some communities, especially in downtown office and multifamily districts, regulate building bulk through a floor area ratio (FAR). The FAR specifies a ratio between the square footage allowable in a building and the square footage of the building lot. A FAR of 2:1, for example, allows two square feet of building for each square foot of the lot. The FAR encourages innovative building design because the developer may utilize the FAR any way he wishes subject to height and other limitations on the site, such as setbacks. Under a FAR of 2:1, for example, the developer constructs a four-story building on half the lot if a building height of four stories was permitted. No case has considered the validity of floor area ratios. But see *Broadway, Laguna, Vallejo Ass'n v. Board of Permit Appeals, 427 P.2d 810 (Cal. 1967)* (stressing the importance of the FAR as a zoning control).

Minimum lot size requirements. The zoning ordinance usually requires a minimum size for building lots... The buildable area available on a lot also is limited by off-street parking requirements. The number of required spaces is based on the number of dwelling units in multifamily residential projects. For commercial, office, and industrial development the required number of spaces may be based on square footage or on the type of use. In the only case directly addressing the issue, the court held off-street parking requirements constitutional. *Stroud v. City of Aspen, 582 P.2d 720 (Colo. 1975)* ("cannot believe" ordinance unconstitutional in "these days of environmental concerns"). Because parking areas are paved, communities that want to ensure that part of the lot is left in its natural state may also include a usable open space requirement. This requirement specified a percentage of the lot that must be left in its natural condition. n481

Slope/Density Formulas. In hillside areas, buildable densities may depend on the steepness of the slope of the hillside. Here is the Los Angeles City slope density provision:

In Hillside Areas as defined in Chapter IX of the Los Angeles Municipal Code which are designated in the minimum density housing category by the applicable element of the General Plan adopted by the City Council, the dwelling unit density shall not exceed that allowed by the following formula:

$$D = 50 - S/35$$

Where D = the maximum number of dwelling units per gross acres allowable, and

S = the average natural slope of the land in percent.

Where the total allowable number of dwelling units per parcel map or tentative tract map calculated under the above formulas results in a number other than a whole number, it shall be rounded to the nearest whole number as follows: where the fractional portion of the total allowable number of dwelling units equals .5 or more, the total number of allowable dwelling units shall be rounded to the next larger whole number; where the fractional portion of the total allowable number of dwelling units equals less than .5, the total number of allowable dwelling units shall be rounded to the next smaller whole number. Average natural slope is slope prior to any grading. Where previous grading on a site makes it difficult to determine average natural slope using the above formula, the Director of Planning shall determine the average natural slope in a manner to carry out the purpose and intent of this subsection (La. Mun. Code § 17.05C).

Slope density is the ratio of height to length.

Click here to view image.

The greater the slope, the lower the density. These ordinances are designed to protect the steepest hillsides from being graded beyond recognition. In order to carve out level pads for houses and roads, hillside projects often need substantial grading. The more gentle the slope, the more likely the land can be developed without extensive cutting and filling of natural slopes.

Minimum Lot Sizes and Affordable Housing. n482 The bulk and density control that has been most challenged in court is the minimum lot size in single-family areas. Courts have almost always sustained these for a long list of reasons: the prevention of overcrowding, fire prevention, freedom from noise, to facilitate planning for roads, sewer, water, and other infrastructure, preservation of soil rainfall absorption, the use of on-site sewage treatment and underground water, agricultural preservation, regulation of the rate of suburban growth, green belt protection, property value enhancement. n483

The one situation where large minimum lot sizes are regularly stricken is where most of the area has already been developed with smaller lots and only a few unbuilt parcels remain. These owners of those few unbuilt lots are often able to have the "downzoning" set aside in court. n484

The critics of large lot zoning explain that large lots for some mean longer commutes n485 and higher land prices for everyone else in the region. Local minimum lot size controls also contribute to keeping out people with lower incomes. n486

> Thus what we see today, in city after city, and often at the state level, is a three-cornered political fight among the advocates of business and development, the poor and working class and their liberal advocates, and the environmentalists in alliance with no-growth people who are usually middle-class young or upper-middle class. This situation brings about strange alliances between, for instance, business groups and minority people, or ecologists and tax leagues. These same conflicts and contradictions are mirrored within many people who, traditional liberals, find themselves unable to reconcile their environmental interest with their concern for social equity. n487

courts in New Jersey and Pennsylvania have stricken local land use controls that had "exclusionary" effects, that made land prices prohibitive for low and moderate income housing. n488 "Affordable housing" legislation exists in California, Connecticut, Massachusetts, New Hampshire, New Jersey, Oregon and Rhode Island. n489 A feature of the California law is that local governments must grant a density bonus to developers who construct at least 20% of their dwellings for low and/or moderate income households, or 10% for very low income. n490

§ 85.14(g) Zoning to Achieve Economic Development Objectives.

The case of *Board of Supervisors of James City County v. Rowe, 216 S.E.2d 199 (Va. 1975)* depicts a complex local zoning ordinance enacted to promote economic development and planned commercial growth. The case shows that property owners sometimes object to aggressive planning efforts that depart significantly from the original "nuisance prevention" origins of zoning. The James City County ordinance, designed to nurture "quality" tourism imposed deep setbacks, making many parcels totally unusable unless combined with adjoining ones. It imposed exactions for the construction of ancillary roads to separate local from through traffic and it barred many highly profitable land uses such as fast food outlets. Ultimately, the Virginia Supreme court struck down all of these features of the ordinance.

Standard of Review. In nearly all states local land use laws must be rationally related to the public health, safety, or welfare, but carry with them a presumption of validity. n491 Despite the common rhetoric, the scope of state court review over local zoning laws differs markedly. In their 1981 land use casebook, Professors Ellickson and Tarlock found California and Illinois at opposite ends of the judicial review spectrum. "The California courts have long been exceedingly deferential to land-use controls. The Illinois courts are at the other pole; they actively conduct their own cost-benefit analysis of challenged land-use restrictions, and do not hesitate to invalidate restrictions that they regard as inefficient." n492 The Virginia Supreme court is closer to Illinois on this scale.

Zoning ordinances carry a presumption of constitutionality that is rebuttable. In California, however, "the presumption is close to conclusive." n493 One commentator, Richard Babcock, remarked: "What can one say about the California courts other than that one has to be a madman to challenge a government regulation in that bizarre jurisdiction." n494

Richard Babcock was writing about challenges by property owners turned down by local governments. California judges appointed in the administrations of Republican Governors Reagan, Deukmejian and Wilson may be moving California closer to the center of the judicial review spectrum. n495 At the same time, some Illinois judges, concerned about upholding sensible environmental standards, may be relaxing their tight grip on local governments' land use decisions. n496

Exhaustion of Remedies. Landowners wishing to vindicate their constitutional rights by challenging zoning ordinances that appear unduly restrictive must prove that their claims are "ripe" -- that the ordinance has actually been applied to the owner's property.

The U.S. Supreme court has created a series of tests, collectively known as the ripeness test, for when property owners' suits against local land use controls are appropriate. The owner must submit a development application, n497 request a variance, and exhaust state compensation procedures, n498 and perhaps reapply if her initial applications are denied. n499 "Where the plaintiff fails to meet these requirements, judicial action will be held in abatement." n500 A case isn't "ripe" for court decision until the local government has made its "final" decision. The challenger must also "exhaust administrative remedies," which means using all available administrative procedures to change the regulation or otherwise obtain relief before instituting litigation. "Even if a property owner can somehow chart this Kafkaesque maze of technical, expensive, and ultimately futile procedures, the game has only just begun. The property owner must now convince the court that a taking has occurred, which is another story in itself." n501

When a property owner challenges a law as unconstitutional on its face, rather than as applied to that owner's property, as the owners did in the Virginia case, they don't have to exhaust all administrative remedies before a court will hear their case. n502 Facial challenges can only be made to legislative enactments, not to administrative rules or decisions. Further, the enactment of a comprehensive plan without accompanying zoning or subdivision controls restricting an owner's use of property has also been held immune from a facial challenge. n503 Facial challenges are difficult to win. The law may be upheld if the court can imagine any circumstances in which the law might be valid. n504

More commonly, challenges are to the law or regulation as applied to the challenger's property. For "as applied" challenges: "The court's cases uniformly reflect an insistence on knowing the nature and extent of permitted development before adjudicating the constitutionality of the regulations that purport to limit it." n505 The "as applied" challenge has to start with the developer exhausting all conceivable administrative remedies. More takings cases have been lost or remanded for failure to exhaust than for any other cause. n506

Developers have three nonjudicial avenues to pursue before they can immunize their constitutional challenge from a "failure to exhaust administrative remedies" defense. First and most common, a variance from the board of adjustment, the staff, or the planning commission. n507 The owner may be able to persuade a court that applying for a variance would be futile, and should therefore not be required if the owner's property shares characteristics with adjacent property, similarly restricted, and a variance can't be granted under state law except for "special" or "unique" hardship. Second, if the application was for a conditional use permit or other site-specific approval, revise the application and try again. n508 Third and rare, request an amendment to the zoning ordinance or an amendment to the general plan. n509

Property owners, required to exhaust their administrative remedies first, may spend fortunes applying for local approvals -- doing engineering work, environmental studies and project design, all for naught. Local governments never tell owners what they can build. They don't render "advisory" opinions. They only tell the owner whether the application she has made happens to be one the locality will approve. So in a sense, an owner's land use remedies are potentially inexhaustible. n510 The developer can easily run out of money or patience pursuing them long before she exhausts all the possibilities.

The statute of limitations under the "exhaustion" doctrine is usually measured in days (30 to 90 depending on the action challenged), compared to the three to five years a plaintiff would ordinarily have in most states before a claim of inverse

condemnation would be barred by statute. If the developer needs to seek a variance, a conditional use permit, a rezoning, a tentative tract map approval, or a general plan amendment, and is denied one of these, the statute of limitations is the one that applies to the administrative or legislative action. n511 Ironically, developers have traditionally lobbied to reduce the time within which local government actions can be challenged. Until the time for challenge expires, no developer can safely rely on a permit. Now those short statutes of limitations are being applied against developers in "takings" challenges.

Another drawback of the "exhaustion" requirement is that the developer must usually bring the cause of action by requesting a writ of mandate. The challenger in an administrative mandamus action is usually not entitled to a new trial on the merits of the claim. The developer must present and rely on the administrative record developed by the agency reviewing the property owner's permit application.

The developer's problem is that the administrative record is usually made to persuade a local government to approve a particular project. Rarely will the developer consider the fact that the record has to be complete enough to support a takings claim if things go badly enough. To support a takings claim, the developer must show that there were no other options she could reasonably have chosen, and that the denial results in a total or near total diminution in value. It would try the patience of most local officials for the developer to introduce oral testimony on these points. The developer may be well advised to introduce written evidence. One way or another, the developer must figure out how to perfect the administrative record to support the takings claim under the exhaustion doctrine.

Exceptions to the exhaustion requirement exist. One is the "futility" doctrine, which exempts developers from pursuing "futile" administrative remedies. n512 The Virginia court, sensibly enough, excused a landowner from seeking a variance when the local government would have to gut or disregard the challenged ordinance entirely in order to grant the variance. Not all state courts would have waived the exhaustion of remedies requirement under these circumstances, especially in an "as applied" challenge. n513 Courts often dismiss cases for want of ripeness or exhaustion of remedies as a way to avoid reaching a decision on the merits of a claim. n514

Federal courts can also invoke the abstention doctrine and send a case back to a state court to decide state issues. Until state questions of law are decided, the federal court will postpone deciding federal issues. n515

Property owners like the ones in *James City County* sometimes avoid ripeness and exhaustion defenses by seeking declaratory judgments that local ordinances are unconstitutional. n516 While the U.S. Constitution limits federal courts to hearing "cases and controversies," most state courts are allowed to issue declaratory judgments concerning the legality of state or local laws before they are enforced.

Further, while challenges in federal court must be based on claimed violations of the U.S. Constitution or statutes, state court claims may include challenges based on state constitutions, state enabling legislation, or the construction of the language of the local ordinance or state statute, as well as on federal claims. *Dedication as a Condition to Zoning or Building Permit*. Dedications of land for streets, roads, and even parks and schools are commonly imposed on subdividers as a condition to their being allowed to subdivide their lots. Far less frequently are owner/builders required to dedicate land as a condition to receiving a building permit. The issuance of most building permits is regarded as a ministerial, not a discretionary act except for especially complicated projects. The owner who complies with all applicable zoning, subdivision, and building codes is presumed to have an absolute right to a building permit. Conditioning that right on a land dedication is therefore challengeable because it diminishes the owner's absolute entitlement to a building permit.

In areas that are already developed, local governments can't expect much future subdivision activity. So they won't be able to increase roadways through subdivision dedication requirements. Hence, many cities do condition the obtaining of a building permit on the applicant's dedicating land when the city's highway plan calls for a road widening abutting the applicant's site. This is the only way the city can get private funds to pay for the road widening, short of the

cumbersome and often politically contentious formation of a special assessment district.

In many states dedication requirements attached to building permits are permissible when the applicant's project itself generates the need for the extra road width. They have been stricken down when existing roads are already inadequate and the applicant's project isn't generating enough new traffic to justify the widening. n517

Architectural and Design Review. Typical zoning-for-aesthetic-purpose ordinances are those which restrict or prohibit billboards, regulate junkyards, create design review boards with the authority to prohibit private projects from being built without prior approval of the board. Currently, twelve states do not permit zoning based solely on aesthetics, while eleven states do. n518

States justify aesthetic zoning two ways: (1) protection of property values, and (2) under their police power to protect the health, safety, and *general welfare* of their citizens. n519 Most states which allow aesthetic zoning follow the seminal statement made by Justice Brennan in *Berman v. Parker*: "[t]he concept of public welfare is broad and inclusive. The values it represents are spiritual as well as physical, aesthetic as well as monetary. It is within the power of the legislature to determine that the community should be beautiful as well as healthy, spacious as well as clean, well-balanced as well as carefully patrolled." n520

A 1974 article in the *Urban Lawyer* reported that there were over 500 local governments with appearance or design review boards. n521 At least another 150 communities have historic district appearance controls. n522

Relatively few cases have reached the courts challenging design review probably because these laws affect mostly individuals wanting to build their own homes, and small businesses. They find compliance easier and cheaper than litigation even if they don't particularly like the changes design review boards impose. These laws may be vulnerable when the standard is "no excessive difference" or "compatibility" in neighborhoods with a great

variety of architectural styles. n523

Design review boards are labelled objectionable because:

> [They] exceed the proper role of government... Aesthetic zoning is based on subjective factors that defy attempts to find reasonable standards. A use of discretion and corruption are dangerous byproducts of such regulation. Finally, some courts have suggested that zoning based on aesthetics alone infringes on personal freedom. n524

The antagonists of aesthetic zoning also find billboard controls an infringement of free speech. n525

Opponents of aesthetic zoning also find the regulation of junkyards as eyesores to be arbitrary. The Arkansas Supreme court invalidated a junkyard regulation which prohibited five or more junk cars within one-half mile of a highway. n526

> By no stretch of the imagination could it be maintained that 5 such cars located one-half mile away from the highway, hidden behind a hill, a forest, a high fence, or in a building, could offend the aesthetic senses of a traveler along said highway, and certainly not his peace, health, or happiness. To that extent, then, it must be concluded that the Act is arbitrary and unreasonable, and bears no relation to the purpose intended to be achieved, which could only be to keep travelers from having to look at an unsightly junkyard. n527

Downzoning. Downzoning is any attempt to reduce the intensity or density of a landowner's entitlement. For example, the zoning ordinance might have allowed two units per acre, and could be amended so that the new minimum lot size is

increased to permit only one unit per acre. Or a site that was previously zoned for industrial purposes might be re-zoned for commercial or residential use only. Traditionally, downzonings carry a presumption of constitutionality with the burden of proof on the developer challenging its validity.

The Virginia courts have developed precise rules for judging the legitimacy of downzoning with two distinct standards, a permissive test if the downzoning is comprehensive, and a more restrictive test if the downzoning is piecemeal.

Comprehensive downzonings are sustained if evidence would lead reasonable persons to reach different conclusions, a "fairly debatable" standard. Piecemeal downzoning can be challenged by landowners making a prima facie case that there have been no changed circumstances to justify the zone change. Then the burden shifts to the local government which must prove that the original zoning was based on fraud or mistake or that circumstances have changed since the original ordinance was passed to justify the new one. n528

Other state courts have adopted strict guidelines for reviewing downzoning. Washington courts, for instance, have also made it more difficult to justify downzonings. In *Parkridge v. City of Seattle*, n529 the court held that downzonings were quasi-judicial actions, dropped the presumption of constitutionality, and placed the burden of proving the validity of the downzoning on the local government.

Developers dislike downzoning because it means fewer developable units. Legal challenges, seldom successful, are that the downzoning: (1) constitutes a "taking" of property; n530 (2) discriminates against a particular developer; n531 (3) constitutes exclusionary zoning; n532 (4) violates the developer's vested rights. n533

Involuntary Lot Mergers of Contiguous Parcels in Common Ownership. James City County contended that its building densities could be met by many owners who owned contiguous parcels if those parcels were merged. The Virginia Supreme court stated: "Since the restrictions are addressed to individual lots ... and since an owner of several lots (any of which he has a right to sell) cannot be deprived of the beneficial use of any individual lot, we fail to see how common ownership is constitutionally significant." n534

courts differ on whether the owner of two subdivided contiguous lots has a constitutional right to build one house on each of them when a zoning law increases the minimum lot size so that only one house could be constructed on the combined site. n535 Local officials may decide to "grandfather" them so that each remains a buildable parcel. Quite often, the language of the minimum lot size ordinance doesn't clearly address the question, and courts must construe the ordinance language. But if the local government enacts an ordinance clearly intending to "merge" contiguous lots in common ownership at the date of the new minimum lot size ordinance, is that merger constitutional? This question divides the courts. n536

§ 85.14(h) Flexible Zoning: Special Uses, Variances, Planned Unit Developments, and Zoning Amendments.

Early zoning advocates contemplated a once-and-for-all type of regulation that would have to be amended or varied only occasionally. They were completely mistaken. Zoning codes have had to be made flexible.

A provision is made in most zoning ordinances for variances to be granted in cases of unique and individual hardship. Variances were to be granted only when the application of uniform standards resulted in a particular owner suffering special losses so great, and unequal to what others experienced, as to justify a court labelling the application of the ordinance to that owner unconstitutional. n537 The applicant, under most variance provisions, must demonstrate that the ordinance causes unnecessary hardship, which can be relieved by a site-specific relaxation of standards in the ordinance.

The owner must demonstrate more than a small inconvenience, or even a substantial diminution in the value of the affected property. The owner's loss, if the ordinance is applied, must result in the owner not receiving a "reasonable return" on the property, or a loss of "all viable economic use," whichever standard the jurisdiction uses for measuring

whether a regulation is an unconstitutional taking of property.

The owner's hardship must be unique to the owner's site and cannot be the sort of problem that many owners in the neighborhood have with the ordinance. If the hardship is general, not unique, the remedy is to change the underlying ordinance, not to grant case-by-case exceptions through the variance procedure. For example, suppose the owner of a shop in a commercial zone can't comply with the on-site parking requirements economically because his site is so small it can't contain both a shop and even one off-site space. If all the properties in the area were subdivided into larger lots except this one, the owner may have a case for a variance. If the properties in the area are all too small to comply with the parking requirement, however, a variance would not be the appropriate remedy. A new and more realistic parking standard should be promulgated for the entire neighborhood.

The variance should not result in altering the "essential character of the locality." n538 If it did, the zoning board of adjustment, the planning commission, or the staff would be exercising their variance authority (which is administrative) to effect a major policy change only the elected legislative body should be making.

Studies of variance procedures throughout the country show that local boards of adjustment, planning commissions, and zoning administrators grant variances for applicants whose claims fall far short of constitutional legitimacy, as long as neighboring property owners don't object. Many legal scholars and some courts strongly disapprove the liberal granting of variances n539 because the procedure was designed to prevent unequal application of a uniform zoning law, and is often used to justify granting of special privilege to a property owner simply because the neighbors aren't vociferous. Other commentators, a distinct but articulate minority, point out that if no one objects to a variance perhaps granting it is in the public interest. n540 No harm, no foul.

Typically, a zoning ordinance lists the uses that would be allowed as of right in a zone. It might also list uses prohibited in each zone. A typical zoning ordinance has a third category of uses -- those which will be allowed only if the applicant obtains a special or conditional use permit. The applicant may have to spend several thousand dollars to process a conditional or special use permit application. The applicant will then have to meet the conditions the local government attaches to it.

The standard state zoning enabling act contemplated that there could be some land uses not necessarily but potentially incompatible in a given district if those uses weren't closely and specifically controlled.

(1) A hospital or church might be appropriate in a low-density residential zone, depending on how well it was buffered with landscaping, what the structure looked like, how loudly and often the sirens sounded or the church bells rang, how traffic was routed, and whether parking was adequate.

(2) Municipalities also use CUPs to regulate uses that, "although desirable in limited numbers, could have a detrimental effect on the community in large numbers." n541 Typical CUP-regulated uses of this type are: residential care facilities, private detention facilities, and large-scale daycare centers.

(3) The category of uses permitted only with special conditions has come to include many quite ordinary uses that could create "special" impacts. A fast food or convenience grocery store in a commercial zone might generate so much more traffic than other uses in that zone, as to justify requiring its promoters to obtain a conditional or special use permit. Through the CUP device, parking and access can be reviewed to be sure the heavy flow of traffic won't cause congestion or hardship for other business in the area. n542

(4) Sometimes, the special or conditional use technique is deployed to control ordinary developments in extraordinary places. A residential tract located in an ecologically sensitive area might be subject to a CUP requirement. Through site plan review the project developer might be restrained from developing those portions of the site that are of archeological significance or environmentally sensitive.

Gravel mining might be allowed in an agricultural zone if it can be done without disrupting farming. Mobile homes might be allowed in single-family residential zones if they meet comparable parking, open space, and design criteria.

All of these "conditional" uses, special exceptions, or special uses "require discretionary administrative approval ... pursuant to criteria specified in the zoning ordinance." n543 If the criteria in the ordinance are vague, CUPs issued under it may be unconstitutional.

Vagueness is especially troubling when the CUP process targets First Amendment protected uses like "adult" bookstores. The ordinance must specify precisely the harm which the decisionmakers expect to avoid in denying or conditioning CUPs that would regulate free speech. n544 Some CUP ordinances are written so as to require the board, commission, or staff to issue the permit on conditions assuring compatibility with adjoining uses. Sometimes the decisionmakers are given total discretion to approve, deny, or approve with conditions. The definition of vague phrases like "compatibility" and "adversely affect ... the existing neighborhood" are questions of law which courts, not local officials, get the last word in interpreting.

In one recent case a developer proposed to build four single-family houses in a hillside area considerably larger than the one-story bungalows in the neighborhood, with setbacks averaging 150 feet from the road where previously houses had been set back only 50 feet. The developer agreed to meet all the conditions the city planners had imposed to preserve sensitive plants, reduce fire hazards, avoid interference with neighbors' views, and prevent soil erosion. The planning commission approved the project. But the city council yielded to objecting neighbors and Sierra Club representatives who had argued the project was incompatible with the surrounding community and could damage rare plant species and wildlife habitat.

The appellate court set aside the city's denial by interpreting the phrase "adversely affected" in the city's ordinances as meaning: "to impact in a substantial, negative manner the economic value, habitability, or enjoyability of properties in the neighborhood."

> [T]he City essentially based its denial of the PIRD [planned infill residential development] permit upon the grounds the setbacks of the houses would be greater than is typical in the neighborhood and the houses would be arranged around a private road unlike most other houses in the neighborhood which are directly adjacent to 35th Street. Although such facts reveal Project differences from most of the existing neighborhood properties, they do not show the neighborhood or nearby properties would be "adversely affected."
>
> Nor does the record of the testimony and other evidence considered by the city council reveal any substantial evidence showing the Project would "adversely affect" the neighborhood or nearby properties. n545

A Texas city required a special use permit for group homes for the mentally retarded in R-3 (multiple family) zones. The U.S. Supreme court in *Cleburne v. Cleburne Living Center, Inc.*, n546 struck down this requirement as patently irrational. The city had denied the applicant a special use permit for a group home for 13 retarded men and women to be located in a multi-family zone. The house had four bedrooms and two baths. The group home complied with all state and federal regulations. The court saw no reason why this multi-family use had to be subjected to a discretionary land use review when other multi-family projects in the same zone did not -- except for the irrational fears of the neighbors about the mentally retarded.

The following excerpt from the court's opinion demonstrates a thorough "rationality" test being carried out. Originally, the promulgators of zoning thought that amendments to the ordinance would only take place in response to substantial

changes in political attitudes towards development. These could result from new demands for further growth or for greater environmental protection. In fact, many zoning amendments aren't initiated by public officials but by the owners of individual sites.

Zoning amendments can take two forms. An applicant may petition to rezone her site by amending the zoning map, changing the zone designation on the map of her site from, say, low-density residential to medium density residential.

Less commonly, but alternately, the applicant might petition for an amendment to the text of the zoning ordinance itself. Say the low-density category called R-1 allowed up to 1 unit per acre. A text amendment might provide thereafter in R-1 zones up to 2 units per acre would be allowed. By changing the text the applicant could double the allowable density of the site just as could be done by obtaining an amendment changing the zone applicable to the site from low- to medium-density residential, say from R-1 to R-2.

Under this type of ordinance the developer of a large tract may apply for a permit much like a conditional or special use permit, which allows greater flexibility in the way that permissible densities are distributed throughout the site. Suppose the land is in a zone which allows 2 units per acre. The site contains 400 acres. The developer may prefer some areas with "estate"-size parcels, two acres or larger, and others with four units per acre. As long as the total density for the tract doesn't exceed 800 units, the developer remains within the parameters set by the zoning ordinance. Most PUD ordinances allow this sort of density transfer from one portion of the site to another.

Some PUD ordinances will allow multi-family structures in otherwise single-family zones. Others do not. Some allow mixed use projects. Others don't.

Most PUD ordinances are available only to applicants whose tracts are greater than a prescribed minimum size, and many require that a certain substantial percentage of the site be dedicated as open space.

For developers contemplating a golf course, a lake, or the preservation of a steep hillside (as much to avoid the high costs of grading as for the aesthetics), a PUD ordinance is a welcome alternative to the use and density controls commonly found in standard zoning ordinances. They pay for this flexibility by undergoing a more complex process and sometimes risk even greater community opposition. They also must confront the possibility that even when their PUD is approved, the subdivision committee may later impose infrastructure conditions which make the project too expensive to build. For instance, the subdivision control administrators may not allow the developer to build smaller roads in the estate section of the tract than are permitted in the higher-density portions.

> Determining how much discretion should be allowed under PUD ordinances presents some difficult dilemmas. Open-ended review standards allow the reviewing agency an adequate scope of review to ensure good PUD design. Open-ended standards may also foreclose effective judicial review. If the basic zoning density is exclusionary, open-ended standards may also provide municipalities with an opportunity to use PUD review to exclude high-density development... Some commentators claim that PUD review is simply a pretext for municipal exclusion.
>
> Yet the adoption of precise PUD review standards may rigidly limit PUD design, and may be resisted by municipalities that want the greatest amount of discretion possible in the PUD review process. n547

California state law offers an alternative for rezoning a site to tailor its regulation to a particular development through the enactment of a specific plan. n548 A specific plan is a type of zoning ordinance which details the use, design, layout, and even the fees a developer must pay who builds within its boundaries. Ordinarily, such plans result from negotiations among the site owners, the developers, the local planners and elected officials, and the neighbors. Their

negotiated settlement becomes the basis for the language, maps, drawings, and other exhibits that constitute the specific plan. Of course, the plan may be amended. But its amendment is site-specific -- and won't change the zoning on sites that aren't part of the "deal."

A final aspect of zoning deserves mention, pre-zoning. If a city anticipates incorporating land previously outside city boundaries, it can adopt zoning laws ahead of annexation, so that the owners of the site to be annexed may have some assurance of the city's land use intentions for them. The developer through pre-zoning gets some assurance of how a community to which she might annex her site will zone it. Whether she can rely on the pre-zoning depends on the vesting rules discussed earlier.

§ 85.14(h)(1) Court Imposed Limits on Conditional Use Permits.

State courts have developed judicial limitations on the authority of local governments to condition CUPs. Here are some California court-imposed limits on authority of local governments to condition CUPs. n549

Conditional use permits run with the land. Hence, a city cannot condition a use permit on the requirement that it is nontransferable. Furthermore, A CUP does not expire automatically -- even when a permit condition provides for automatic termination. Notice and hearing are required, and the revocation must be reasonable. In addition, CUPs must be consistent with the general plan.

FOOTNOTES:

(n1)Footnote 437. The treatment of zoning in this chapter is skeletal compared with what you would see in a course dedicated entirely to land use controls. *See*, for instance, Daniel R. Mandelker & Roger A. Cunningham, Planning and Control of Land Development (3d ed. 1979).

(n2)Footnote 438. Hagman et al., California Zoning Practice xiii (CEB 1979).

(n3)Footnote 439. F.B. Williams, The Law of City Planning and Zoning 265 *et seq.* (McGrath, 1922, 1969 ed.).

(n4)Footnote 440. Jeff L. Levin, *Boomer and the American Law of Nuisance: Past, Present and Future, 54 Alb. L. Rev. 189, 189-200 (1990). Kucera v. Lizza, 59 Cal. App. 4th 1141* (Cal. App. 1 Dist. 1997) (Landowner cannot have obstructions enjoined as private nuisance, and may lack requisite special injury to achieve standing to abate such obstruction as public nuisance, as state law does not recognize doctrine of ancient lights or landowner's natural right to air, light or unobstructed view); *Liddle v. Corps of Engineers of United States Army, 981 F. Supp. 544 (M.D. Tenn. 1997)* (Residents living in proximity to lakeshore property did not suffer unique injury required for standing to raise claim that use of property by group camp operator would create public nuisance due to increased traffic flow, noise, and pollution effects, despite residents' claim that they suffered special injury because of their proximity to such traffic, noise, and pollution).

(n5)Footnote 441. *See, e.g., Koll-Irvine Center Property Owners Ass'n v. County of Orange, 29 Cal. Rptr. 2d 664 (1994); Jordan v. City of Santa Barbara, 46 Cal. App. 4th 1245 (Cal. App. 1996)* (Action for private nuisance cannot be maintained for interference with use and enjoyment of land caused solely by fear of future injury; damage or injury has long been considered essential element of cause of action for nuisance); *Fried v. Sungard Recovery Servs. Inc., 936 F. Supp. 310 (E.D. Pa. 1996)* (Asbestos plaintiff who failed to produce evidence supporting medical monitoring damage claim against contractor did not have standing to assert public nuisance cause of action).

(n6)Footnote 442. *But see Spur Industries, Inc. v. Del E. Webb Dev. Co., 494 P.2d 700 (1972)* (court granted home builder injunction against cattle feedlot, but required prevailing plaintiff to compensate defendant to pay for the relocation of the business whose business had been there first). *See* Osborne M. Reynolds, Jr., *Of Time and Feedlots: The Effect of Spur Industries on Nuisance Law, 41 Wash. U. J. Urb. & Contemp. L. 75 (1992).*

(n7)Footnote 443. Robert G. Bone, *Normative Theory and Legal Doctrine in American Nuisance Law: 1850 to 1920, 59 S. CAL. L. REV. 1104, 1151 (1986).* Today courts in nuisance cases look to zoning ordinances for guidance. Most of the time the zoning ordinance codifies the land uses which predominate in the area. *See, e.g., Bove v. Donner-Hanna Coke Corp., 258 N.Y.S. 229 (1932).*

To forestall conflicts between the land use preferences embodied in local ordinances and those that might prevail in individual nuisance litigation, California has passed a statute protecting any land use that is properly zoned from being subject to an injunction as a nuisance. However, the landowner or user still may be liable for nuisance damages who utilizes "unnecessary and injurious" methods. Cal. Civ. Proc. Code § 731(a). *See Wilson v. Interlake Steel Co., 649 P.2d 292 (Cal. 1982). See also* Note, *Remedies for Intangible Intrusions: The Distinction Between Trespass and Nuisance Actions Against Lawfully Zoned Businesses in California, 17 U.C. Davis L. Rev. 389 (1983).*

(n8)Footnote 444. *Wilkins v. City of San Bernardino, 175 P.2d 542 (1946).*

(n9)Footnote 445. Herbert Muschamp, *Architecture View: The Nina, the Pinta and the Fate of the "White City,"* N.Y. TIMES, Nov. 8, 1992, sec. 2, p. 32. *See also* William H. Wilson, The City Beautiful Movement (1989).

(n10)Footnote 446. march, Some Reflections, An Introduction to City Planning: Democracy's Challenge to the American City (1909).

(n11)Footnote 447. However, the City Beautiful movement displayed little interest in low-income housing. It was about ornate civic facilities -- theaters, libraries, city halls and museums. These were at the core of the master plans that evolved from the City Beautiful movement. As Professor Aoki writes, City Beautiful advocates "seemed to assume that placing impressive exteriors in a town would work to cure internal social problems." Keith Aoki, *Race, Space and Place: The Relation Between Architectural Modernism, Post-Modernism, Urban Planning and Gentrification, 20 Fordham Urb. L.J. 699, 711 (1993).*

(n12)Footnote 448. Witold Rybczynski, *"Edge Cities:" The People's Answer to Planners*, N.Y. Times, Nov. 17, 1991, sec. 2, p. 36, col. 1.

(n13)Footnote 449. *Compare* George E. Peterson, *The Influence of Zoning Regulations on Land and Housing Prices* (Urban Institute, 1974) (zoning affects house prices but different aspects of the zoning law impact house prices in different ways -- some positive, some negative) with Jonathan H. Mark & Michael A. Goldberg, *Land Use Controls: The Case of Zoning in Vancouver,* 9 Areuea J. 418 (1981) (zoning doesn't explain much about house prices).

(n14)Footnote 450. William J. Stull, *Community Environment, Zoning and the Market Value of Single-Family Homes, 17 J. LAW & ECON. 535 (1975).*

(n15)Footnote 451. Ronald R. Lafferty & H. E. Frech III, *Community Environment and the Market Value of Single Family Homes: The Effect of the Dispersion of Land Uses, 21 J.L. & Econ. 381 (1978).*

(n16)Footnote 452. Janet Furman Spreyer, *The Effect of Land Use Restrictions on the Market Value of Single Family Homes in Houston,* 2 J. Real Est. Fin. & Econ. 117 (1989).

(n17)Footnote 453. William A. Rabiega et al., *The Property Value Impacts on Public Housing Projects in Low and Moderate Density Residential Neighborhoods,* 60 Land Econ. 174 (1984).

(n18)Footnote 454. Jonathan H. Mark & Michael A. Goldberg, *Land Use Controls: The Case of Zoning in Vancouver,* 9 Areuea J. 418 (1981). A review of 15 studies on the effects of subsidized housing on property value counted 14 of them finding positive effects. *The Effects of Subsidized and Affordable Housing in Property Values: A Survey of Research, Department of Housing and Community Development,* State of California, Sacramento, 1990, at i. A list of those studies appears in Advisory Commission on Regulatory Barriers to Affordable housing, Not in My Back

Yard (1991) at 8-11.

(n19)Footnote 455. *See* T. M. Crone, *Elements of an Economic Justification for Municipal Zoning,* 14 J. Urb. Econ. 184 (1983) (describing a master-planned, privately built community which became Foster City, California).

(n20)Footnote 456. For an extreme version of these standards, which have generally been applied with some rigor by Illinois courts, *see LaSalle Nat' l Bank v. Cook Cty., 145 N.E.2d 65, 69 (Ill. 1957); Prescott v. Parish of Jefferson, 694 So. 2d 468 (La. App. 1997)* (On appeal, burden is on appellant or relator to affirmatively show zoning board abused its discretion or its decision was in excess of its jurisdiction or otherwise erroneous as matter of law); *Latrobe Speedway, Inc. v. Zoning Hearing Bd. of Unity Twp., 686 A.2d 888 (Pa. Commw. 1996)* (Zoning hearing board abuses its discretion when its findings are not supported by substantial evidence); *Moulton v. Board of Zoning Appeals for City of Lincoln, 555 N.W.2d 39* (Neb., 1996) (Zoning board of appeals is vested with discretion to dispose of matters within its province, but its acts are judicial in nature and are subject to review and reversal when they constitute abuse of discretion and are arbitrary).

(n21)Footnote 457. *See, e.g., Burrows v. City of Keene, 432 A.2d 15, 21 (N.H. 1981)* (zoning undeveloped woodland for conservation and barring "normal private development" held to be a taking of property entitling owner to compensation, since "normal development" is not a use of the land "sufficiently injurious to others" as to justify prohibition).

(n22)Footnote 458. *272 U.S. 365 (1926).*

(n23)Footnote 459. *See, e.g., Brett v. Building Comm'r, 145 N.E. 269 (Mass. 1924); Anderson v. County of Cook, 138 N.E.2d 485 (Ill. 1956); Krause v. City of Royal Oak, 160 N.W.2d 769 (Mich. App. 1968). But see Kisil v. City of Sandusky, 465 N.E.2d 848 (Ohio 1984)* (owner of single-family residence desiring to convert it into two-family dwelling petitioned for an area variance which the local government denied. The court reversed the denial.); *Countrywalk Condominiums, Inc. v. City of Orchard Lake Village, 561 N.W.2d 405 (Mich. App. 1997)* (Failure to provide for zoning of multi-family dwellings in small city did not violate equal protection or due process, given evidence that allowing multiple dwellings in area would further congest already overburdened roads and safety would be compromised and that ordinance bore real and substantial relation to public health and safety).

(n24)Footnote 460. Anthony Downs, *Regulatory Barriers to Affordable Housing,* 58 J.A.P.A. 419, 420 (1992). Mr. Downs believes savings of over 50% could be achieved if more land were zoned for multi-family use, and communities didn't require large lots, side yards, minimum floor areas and other such elements for multi-family and single-family uses. *See also* Advisory Commission on Regulatory Barriers to Affordable Housing, Not in My Backyard.

(n25)Footnote 461. Advisory Commission on Regulatory Barriers to Affordable Housing, Not in My Back Yard (1991), at 2-7.

(n26)Footnote 462. *Id.*

(n27)Footnote 463. Accessory units are sometimes called "grannie flats" -- a term derived from the state of New South Wales, Australia, where they were first allowed. This is something of a misnomer because accessory unit occupants are more likely to be rent-paying tenants than grannies or other relatives, and the homeowner creating such a unit is more likely to be a two-wage earner couple struggling to make big monthly mortgage payments than a widowed ?grannie? who bought her house decades ago, paid off her mortgage, lives on retirement funds, and has no urgent need for rental income.

(n28)Footnote 464. *See, e.g.,* Babcock, *The Egregious Invalidity of the Exclusive Single-Family Zone,* 35 Land Use L. & Zoning Dig. 4 (1983); Ziegler, *The Twilight of Single-Family Zoning,* 3 UCLA J. Envt'l L. & Policy 161 (1983) (hereafter Ziegler); Stephen C. Hall, *Case Comment, City Of Edmonds v. Oxford House, Inc.: A Comment On The Continuing Vitality Of Single-Family Zoning Restrictions, 71 Notre Dame L. Rev. 829 (1996).*

(n29)Footnote 465. Anthony Downs, *Regulatory Barriers to Affordable Housing,* 58 J.A.P.A. 419, 420 (1992).

(n30)Footnote 466. Martin Gellen, Accessory Apartments in Single-Family Housing viii (Rutgers 1985).

(n31)Footnote 467. Ziegler at 195-98.

(n32)Footnote 468. Gellen at 184.

(n33)Footnote 469. *Id.*

(n34)Footnote 470. Cal. Gov't Code § 65852.2. *See "Granny Flats" -- Easing the Housing Crunch for the Elderly,* 16 Futurist 51 (1982); Martin Gellen, Accessory Apartments in Single-Family Housing (Center for Urban Policy Research, 1985).

(n35)Footnote 471. Gellen at 188-91; P. Hare, *Accessory Apartments: Using Surplus Space in Single-Family Houses,* American Plan. Ass'n Advisory Serv. Rep. No. 365 (1981).

(n36)Footnote 472. Section 65852.2 of the Cal. Gov't Code authorized localities to adopt ordinances allowing "second units," or if they didn't, requiring them to grant conditional use permits for any second units meeting certain statutory standards. The legislature required the local government to grant permits even if parking were inadequate. In Wilson v. City of Laguna Beach, 92 Daily J. Dar 6398 (1992), the court ruled that state law required the city to validate illegally created Grannie flats:

> It is thus not surprising that cities, where finding a parking space can be the highlight of one's day, were less than enthusiastic about implementing the granny flat statute. This case arises out of the efforts of one such city, Laguna Beach, which, as the record shows, employed a number of artful bureaucratic devices to circumvent the statute in the time period before the adoption of its own (and, of course, somewhat stricter) ordinance -- the interval when, under the statute, they were required to grant the requested permits... But the fundamental value judgment at stake here -- a choice between housing and parking -- was made by the Legislature in favor of housing. It decided the benefits of the additional housing provided by second units outweigh the costs of exacerbating local parking problems. Accordingly, we must reverse and order the trial court to grant the writ.

(n37)Footnote 473. *See* Robin R. Wright & Morton Gitelman, Land Use 1014-26 (4th ed. 1991).

(n38)Footnote 474. *See, e.g.,* Cal. Gov't Code § 65852.3; 30A Maine Rev. Stat. Ann. § 4358.

(n39)Footnote 475. Fred P. Bosselman, *The Commodification of Nature's Metropolis, 12 N. Ill. U.L. Rev. 527, 585 (1992);* John Mixon, *Jane Jacobs & the Law: Zoning for Diversity Examined, 62 Nw. U. L. Rev. 314, 348-52 (1967).*

Zoning, when introduced into America, was in its essential form a German import from which, almost miraculously, all the beneficent features had been removed... German practice, for example, permitted duplex housing in even the most restricted residential zone, and still does... [t]his feature has all but disappeared from American ordinances. The German practice subjected commercial uses in residential zones to performance standards: they were prohibited only if they emitted objectionable odors or were otherwise noxious. In order to foster ease of administration, and out of perhaps justified mistrust of the integrity of zoning administration, commercial uses were almost totally prohibited in American residential zones, with malign consequences.

George W. Liebmann, *The Modernization of Zoning: Enabling Act Revision as a Means to Reform, 23 Urban Law. 1, 9-10 (1991).*

(n40)Footnote 476. This problem was recognized quite early in the history of zoning. *See* Jacob L. Crane, Jr., Progress in the Science of Zoning in Annals of the Amer. Acad. Pol. Sci. 195-96 (1931) (Lack of jobs/housing proximity makes transportation "more difficult, irksome and expensive.").

(n41)Footnote 477. Robert Cervero, *Jobs-Housing Balancing and Regional Mobility*, 55 J. Am. Plan. Assoc. 136 (1989) (higher housing costs in San Francisco Bay Area suburban employment centers induced many workers to live four miles or more from their workplaces).

(n42)Footnote 478. Jeffrey S. Zax, *Compensation for Commutes in Labor and Housing Markets*, 30 J. Urb. Econ. 203-04 (1991). Constrained housing choices make it difficult for households to shift the burden of commuting expenses to employers. A better set of jobs/housing location choices could result if employers who elected to locate farther from areas where employees could find affordable housing were forced to "internalize" some of those costs by paying employees who have to commute.

(n43)Footnote 479. Daniel R. Mandelker & Roger A. Cunningham, Planning and Control of Land Development 275 (3d ed. 1979).

(n44)Footnote 480. Richard Wakeford, American Development Control 262 (HMSO 1990).

(n45)Footnote 481. Mandelker & Cunningham, *supra* note 274 at 308-10.

(n46)Footnote 482. Annotation, *Validity of Zoning Laws Setting Minimum Lot Size Requirements, 1 A.L.R.5TH 622 (1992).* Even very large minimum lot sizes have been upheld -- 160 acres in *Wilson v. County of McHenry, 416 N.E.2d 426 (Ill. App. 1981).* The purpose there was to preserve prime farm land. *Johnson v. Town of Edgartown, 680 N.E.2d 37 (Mass. 1997)* (Island town's zoning regulation containing three-acre minimum area requirement for residential lots in residential/agricultural zoning district was valid, given proximity of restricted land to coastal great pond needing ecological protection, along with need to protect amenities and character of rural resort, such as the island, in order to assist its economic stability, including its shellfish industry and tourism); 1000 *Friends of Oregon v. Land Conservation & Dev. Comm'n, 934 P.2d 601 (Or. App. 1997)* (Land Conservation and Development Commission's (LCDC) acceptance of minimum lot sizes determined by county based on median lot in each subzone, without accepting that methodology itself, was consistent with agricultural planning goal and applicable rules; LCDC concluded that, in specific instances at issue, minimum sizes were adequate to maintain existing commercial agricultural uses, particularly given strict limitations on new farm dwellings).

(n47)Footnote 483. *Simon v. Town of Needham, 42 N.E.2d 516 (Mass. 1942).*

(n48)Footnote 484. *See, e.g., Morris v. Los Angeles, 254 P.2d 935 (Cal. App. 1953); Hamer v. Town of Ross, 382 P.2d 375, 335 (Cal. 1963); Dade County v. Beauchamp, 348 So. 2d 53 (Fla. 1977), cert. denied, 355 So. 2d 512 (Fla. 1978),* later proceeding, *48 Fla. Supp. 157 (1978), cert. denied, 369 So. 2d 996 (Fla. 1979); DuPage County v. Halkier, 115 N.E.2d 635 (Ill. 1953); Marquette Nat'l Bank v. County of Cook, 182 N.E.2d 147 (Ill. 1982); LaSalle Nat'l Bank v. Highland Park, 189 N.E.2d 302 (Ill. 1963).*

(n49)Footnote 485. In fact, lower density means further trips from suburb to suburb; but lower density also means shorter time on those commutes, assuming roads keep up with development. R. Cervero, Suburban Gridlock 31-34 (1986). Longer commutes result for two reasons. Work places are farther removed from housing as a result of large, low density subdivisions. And the lower density makes all forms of mass transit inefficient. Robert Cervero, Transportation and Urban Development: Perspectives for the Nineties 3-4 (1987).

(n50)Footnote 486. *Board of County Supvrs. of Fairfax County v. Carper, 200 Va. 653, 661 (1959).* Janai S. Nelson, Comment, *Residential Zoning Regulations and the Perpetuation of Apartheid, 43 UCLA L. REV. 1689, 1699 (1996)* (Zoning regulations increase housing costs, thereby pricing out economically disadvantaged groups that are disproportionately minority).

(n51)Footnote 487. William Alonso, *Urban Zero Population Growth*, 102 Daedalus 191, 197 (1973). *Urban Zero Population Growth* reprinted by permission of Daedalus, Journal of the American Academy of Arts and Sciences, from the issue entitled, "The No-Growth Society," Fall 1973, Volume 102, Number 4.

(n52)Footnote 488. *See* Hyson, *Pennsylvania Exclusionary Zoning Law: A Simple Alternative to Mount Laurel II?*, 36 LAND USE L. & ZON. DIG., No. 9, at 3 (1984); Martha Lamar, et al., *Mount Laurel at Work: Affordable Housing in New Jersey, 1983-1988, 41 Rutgers L. Rev. 1197 (1989);* J. Peter Byrne, *Are Suburbs Unconstitutional? 85 Geo. L.J. 2265 (1997).*

(n53)Footnote 489. Mandelker & Cunningham, *supra*, note 274, at 353-68; Michael J. Cacace & Tracy L. Soffaal, *Developments in Connecticut Zoning Case Law from 1992 Through 1995, 70 Conn. B.J. 37 (Feb. 1996).*

(n54)Footnote 490. Cal. Gov't Code §§ 65915 - 65915.5.

(n55)Footnote 491. Robert C. Ellickson & A. Dan Tarlock, Land-Use Controls 76 (3d ed. 1981).

(n56)Footnote 492. *Id. at 75.*

(n57)Footnote 493. *Id.*

(n58)Footnote 494. Richard F. Babcock, The Zoning Game Revisited 257 (1985).

(n59)Footnote 495. *See, e.g., Ross v. City of Yorba Linda, 2 Cal. Rptr. 2d 638 (1991).* The city denied a property owner the right to subdivide a 1.17-acre parcel into two lots because the area was in a zone requiring a minimum one-acre lot size. But only four of the 53 lots on the northern half of the block were an acre or larger. The court held that the denial of the property owner's request was arbitrary. The decision was based on a 1963 California Supreme court precedent.

(n60)Footnote 496. *See* Bosselman, 583-84 at n.132, describing *Beverly Bank v. Illinois Dep't of Transp., 579 N.E.2d 815 (Ill. 1991),* upholding restriction on construction in floodways. *But see Amoco Oil Co. v. Village of Schaumburg, 661 N.E.2d 380 (Ill. App. 1995)* (repeal of special use permit was not a reasonable exercise of village's legislative authority).

(n61)Footnote 497. *Agins v. City of Tiburon, 447 U.S. 255 (1980).*

(n62)Footnote 498. *Williamson County Regional Planning Comm'n v. Hamilton Bank, 473 U.S. 172 (1985); Citizens for Mount Vernon v. City of Mount Vernon, 947 P.2d 1208 (Wash. 1997)* (Objector's opposition to commercial development project before city council on grounds it was inconsistent with comprehensive plan, that proposal was not a neighborhood grocery store, and that proposal was inconsistent with residential zoning regulations surrounding site was sufficient to satisfy requirement of exhaustion of administrative remedies, despite objector's failure to specifically raise technical, legal argument of compatibility between R-2A zoning and commercial planned unit development (PUD); issue before council was not R-2A zoning, but city council's ability to approve commercial PUD in residential neighborhood and on property zoned residential); *Board of County Comm'rs of La Plata County v. Moga, 947 P.2d 1385 (Colo. 1997)* (property owner was required to exhaust remedies by appealing to county board of adjustments prior to the judicial review); *Tate Terrace Realty Investors, Inc. v. Currituck County, 488 S.E.2d 845 (N.C. App. 1997)* (property owner waived any right to object to competency of letter introduced at hearing on its application for permit, and the courts may not consider a matter not addressed by the county board); *Fehlhaber Corp. v. Village of Tequesta, 696 So. 2d 880 (Fla. App. 1997); Ward v. Board of County Comm'rs, Skagit County, 936 P.2d 42 (Wash. App. 1997); Macri v. King County, 110 F.3d 1496 (9th Cir. 1997); Drury Displays, Inc. v. City of Richmond Heights, 922 S.W.2d 793 (Mo. App. 1996); Martin v. Monroe County Plan Comm'n, 660 N.E.2d 1073 (Ind. App. 1996); Riley v. Boxa, 542 N.W.2d 519 (Iowa 1996)* (neither fee nor loss of rental income was sufficient to be considered irreparable injury justifying judicial intervention prior to property owner's exhaustion of administrative remedies).

But see Premium Standard Farms, Inc. v. Lincoln Twp. of Putnam County, 946 S.W.2d 234 (Mo. 1997) (Hog farming corporation challenging statutory authority of township to promulgate zoning regulations was not required to exhaust administrative remedies by pursuing appeal for variance permit to township board of zoning adjustment; issue presented was not dependent upon further development of record through administrative procedures, township had made clear that feed lots and lagoons such as corporation's fell within purview of its zoning regulations, and sole issue was whether statute prohibited township's regulations); *Smoke v. City of Seattle, 937 P.2d 186 (Wash. 1997)* (interpretation available under city land use code was not available administrative remedy for purposes of exhaustion requirement; owners had no duty to mitigate their injury through interpretation procedure); *Loulis v. Parrott, 695 A.2d 1040 (Conn. 1997)* (Exhaustion of administrative remedies doctrine does not preclude one party from bringing civil action to challenge alleged zoning violation by another party where that other party would be required to undertake, but has not yet undertaken, administrative proceedings concerning conduct underlying alleged violation); *Martin County v. Yusem, 690 So. 2d 1288 (Fla. 1997)* (Landowner was not required to exhaust administrative remedies prior to filing judicial action to challenge county's decision to deny requested amendments to comprehensive land use plan, which are legislative decisions that are subject to "fairly debatable" standard of review); *Reed v. City of Hoover, 695 So. 2d 34 (Ala. App. 1996)* (City filed complaint against owners of residential property, seeking injunction against construction and maintenance of fence on property; owners were not required to exhaust administrative remedies before counterclaiming against city).

(n63)Footnote 499. *McDonald, Sommer & Frates v. County of Yolo, 477 U.S. 340 (1986).*

(n64)Footnote 500. Terry D. Morgan, *Exhaustion of Administrative Remedies as a Municipal Defense to Inverse Condemnation Actions,* Proceedings of the Institute on Planning, Zoning & Eminent Domain, ch. 9 (Matthew Bender, 1985). Case Note, *Takings: Supreme court Holds Takings Claim Ripe Despite Failure to Sell TDRs*, 27 Real Est. L. Rep. 1 (Aug. 1997); Patrick W. Maraist, *The Ripeness Doctrine in Florida Land Use Law, 71 FLA. B.J. 58 (Feb. 1997);* Michael K. Whitman, *The Ripeness Doctrine in the Land-Use Context: The Municipality's Ally and the Landowner's Nemesis, 29 Urb. Law. 13 (Winter 1997);* David S. Mendel, Note, *Determining Ripeness of Substantive Due Process Claims Brought by Landowners Against Local Governments, 95 Mich. L. Rev. 492 (Nov. 1996).*

(n65)Footnote 501. Timothy v. Kassouni, *Ripeness Doctrine and the Judicial Relegation of Constitutionally Protected Property Rights,* 29 CAL. WES. L.R. 1, 51 (1992).

(n66)Footnote 502. Robert C. Ellickson & A. Dan Tarlock, Land-Use Controls 77 (3d ed. 1981). *Jott, Inc. v. Charter Twp. of Clinton, 569 N.W.2d 841 (Mich. App. 1997)* (Exhaustion of remedies requirement does not apply to facial challenge to zoning ordinance; facial challenge is one that attacks the very existence or enactment of ordinance and alleges that mere existence and threatened enforcement of ordinance adversely affects all property regulated in market as opposed to particular parcel. In this case, the challenged ordinance tried to regulate nudity at liquor-licensed establishments); *Buckeye Community Hope Found. v. City of Cuyahoga Falls, 970 F. Supp. 1289 (N.D. Ohio 1997)* (In case involving alleged unconstitutionality of giving effect to citizens' petition by withholding effectiveness of site plan ordinance pending referendum, equal protection claims were ripe without further exhaustion of administrative remedies because any further process down administrative road would have been "waste of time and money" where defeat of site plan ordinance was "inevitable conclusion"); *Cedarwood Land Planning v. Town of Schodack Through Schodack Planning Bd., 954 F. Supp. 513 (N.D.N.Y. 1997)* (developer's failure to seek variance rendered takings claim unripe for review; however, claim that new zoning law was unconstitutional on its face was ripe for review because facial challenge to constitutionality of law did not depend on extent to which developer was deprived of economic use of property or extent to which it had been compensated); *Vicary v. City of Corona, 935 F. Supp. 1083 (C.D. Cal. 1996)* (Nightclub owner would not be required to exhaust its administrative remedies by applying for conditional use permit (CUP) or submitting variance request prior to bringing challenge in court to constitutionality of zoning ordinance regulating live adult entertainment establishments, as evidence showed that city had already prejudged matter, such that variance request would have been futile, and without variance, CUP application would be denied).

(n67)Footnote 503. *Selby Realty Co. v. City of San Buenaventura, 514 P.2d 111 (Cal. 1973).*

(n68)Footnote 504. *See, e.g., Yee v. City of Escondido, 112 S. Ct. 1522 (1992).*

(n69)Footnote 505. *Sinclair Oil Corp. v. County of Santa Barbara, 96 F.3d 401 (9th Cir. 1996)* (Under California law, when opposing land use regulation as applied to particular parcel, landowner must first utilize available administrative procedures before seeking recourse in state courts); Lucas v. South Carolina Coastal Council, No. 91-543 (S. Ct. 1992), *citing MacDonald, Sommer & Frates v. County of Yolo, 447 U.S. 340, 351 (1986).*

(n70)Footnote 506. James S. Burling, *Local Control of Mining Activities on Federal Lands, 27 Land & Water L. Rev. 309, 346 (1992).*

(n71)Footnote 507. *See* Morgan, *Exhaustion of Administrative Remedies as a Municipal Defense to Inverse Condemnation Actions*, 9-20 to 9-23.

(n72)Footnote 508. In *Agins v. Tiburon, 447 U.S. 255 (1980)*, the U.S. Supreme court overruled the California Supreme court's holding that all a property owner could ever achieve through litigation was another chance to obtain local land use compensation.

Permitted: Kucera v. Lizza, 59 Cal. App. 4th 1141 (Cal. App. 1997) (State may legitimately exercise its police powers to advance aesthetic values; preservation of views and sunlight was legitimate purpose for exercise of municipality?s police power); *Wallace v. Brown County Area Plan Comm'n, 689 N.E.2d 491 (Ind. App. 1998)* (Town's ban of neon signs was no more extensive than necessary to further its interests in safety and aesthetics, and thus complied with First Amendment's restrictions on government regulation of commercial speech, given town's small geographic area and other alternatives available to restaurant owners challenging ban, including use of grounded light signs); *Lamar Adver. of Mobile, Inc. v. City of Lakeland, Fla., 980 F. Supp. 1455 (M.D.Fla. 1997)* (Municipality may regulate or prohibit signs or billboards for aesthetic purposes, and may distinguish and treat differently on-premises and off-premises signs); *Peterson Outdoor Adver. v. City of Myrtle Beach, 489 S.E.2d 630 (S.C. 1997)* (City validly exercised its authority in enacting ordinance to prevent unsightly and inharmonious development); *Blockbuster Video, Inc. v. City of Overland Park, 948 P.2d 179 (Kan. App. 1997)* (city properly denied revised final development plan using continuous awning after city had rejected such awning and tenant had accepted approved final development plan with segmented awning but then asked for revised plan to accommodate its after-the-fact changes to approved plan. There is aesthetic and cultural side of municipal development which can be fostered within reasonable limits, and it includes regulation of redevelopment or new development for aesthetic reasons); *City of Nichols Hills v. Richardson, 939 P.2d 17 (Okla. Crim. App. 1997)* (Ordinance which prohibited parking pickup truck in driveway of private residence, forward of front wall of main building, between 2:00 a.m. and 5:00 a.m., but allowing parking at such time and location of "private passenger vehicle," no matter how ugly, was unreasonable and overbroad and could not be upheld as promoting aesthetics); *Wilson v. City of Louisville, 957 F. Supp. 948 (W.D. Ky. 1997)* (Ordinance reducing maximum allowable size of "small free standing signs" did not violate equal protection rights under State Constitution; decision to amend ordinance, to promote aesthetic and safety interests, was rational).

Aesthetics concern not permitted: AT&T Wireless PCS, Inc. v. City Council of City of Virginia Beach, 979 F. Supp. 416 (E.D. Va. 1997) (Under Virginia law, zoning authority cannot limit or restrict use which person may make of property under guise of police power, where exercise of such power would be based solely on aesthetic considerations); *Damurjian v. Board of Adjustment of the Twp. of Colts Neck, 690 A.2d 655 (N.J. Super. A.D. 1997)* (Although creation of desirable visual environment is statutorily specified zoning purpose, and municipalities have ample opportunity under Municipal Land Use Law (MLUL) to work towards that purpose, municipalities must do so with reasonable precision and without blanket delegation); *Desert Outdoor Adver., Inc. v. City of Moreno Valley, 103 F.3d 814 (9th Cir. 1996)* (City billboard ordinance could not be justified on aesthetic or safety grounds where ordinance lacked any statement of purpose concerning those interests and city provided no evidence that the ordinance promoted those interests); *Westinghouse Elec. Corp. v. Council of Twp. of Hampton, 686 A.2d 905 (Pa. Cmmw. 1996)* (complaints by

residents as to existing poor aesthetics of site were insufficient to defeat conditional use applied for by company).

(n73)Footnote 509. Jan Z. Krasnowiecki, *Zoning Litigation and the New Pennsylvania Procedures, 120 U. PA. L. REV. 1029, 1048 (1972).*

See also Southern Pac. Transp. Co. v. City of Los Angeles, 922 F.2d 498 (9th Cir. 1980), cert. denied, 509 U.S. 943, 112 S. Ct. 382 (1992).

But see Tahoe-Sierra Preservation Council v. Tahoe Regional Planning Agency, 938 F.2d 153 (9th Cir. 1991).

(n74)Footnote 510. *See, e.g.,* Gus Bauman, *The Supreme court Inverse Condemnation and the Fifth Amendment: Justice Brennan Confronts the Inevitable in Land Use Controls, 15 RUTGERS L.J. 15 (1983).*

(n75)Footnote 511. *See, e.g., Scott v. City of Sioux City, 432 N.W.2d 144, 146 (Iowa 1988); Electro-Nucleonics v. WSSC, 554 A.2d 804 (Md. 1989).*

(n76)Footnote 512. Robert C. Ellickson & A. Dan Tarlock, Land-Use Controls 77 (3d ed. 1981).

(n77)Footnote 513. *Northwestern Univ. v. City of Evanston, 383 N.E.2d 964 (Ill. 1978).* The Illinois Supreme court refused to decide whether "a city zoning ordinance forbidding commercial activity, including professional sports, in the university district was unconstitutional because the university failed to exhaust local and administrative remedies."

(n78)Footnote 514. *See, e.g., Lake Nacimiento Ranch Co. v. County of San Louis Obispo, 830 F.2d 977 (9th Cir. 1987)* (owner required to seek general plan amendment and variance before challenging local land use law as allowing no economically viable use of property).

The application of rigorous ripeness tests to land use cases has been sharply criticized. *See* Michael M. Berger, *"Ripeness" Test for Land Use Cases Needs Reform: Reconciling Leading Ninth Circuit Decisions Is An Exercise in Futility,* 11 Zon. & Plan. L. Rep. 57 (1988); Daniel R. Mandelker & Brian W. Blaesser, *Applying the Ripeness Doctrine in Federal Land Use Litigation,* 11 Zon. & Plan. L. Rep. 49 (1988).

(n79)Footnote 515. *See* William E. Ryckman, *Land Use Litigation, Federal Jurisdiction, and the Abstention Doctrine, 69 Cal. L. Rev. 377 (1981); Pearl Inv. Co. v. City & County of San Francisco, 774 F.2d 1460 (9th Cir. 1985), cert. denied, 476 U.S. 1170 (1986).*

(n80)Footnote 516. Stewart Winstein & Diana E. Galanis, *Challenging the Constitutionality of a Zoning Ordinance in a Declaratory Judgment Action: An Effective Method of Relief of the Landowner Burdened by Land Use Restrictions,* S. Ill. U. L.J. 393 (1981).

(n81)Footnote 517. Woodrow W. Turner Jr., *Planning, Zoning and Subdivision Law, 24 U. Rich. L. Rev. 691, 713 (1990).*

(n82)Footnote 518. Kenneth Regan, *You Can't Build That Here: The Constitutionality of Aesthetic Zoning and Architectural Review, 58 Fordham L. Rev. 1013, 1014 nn.11, 12 (1990). See also* Samuel E. Poole III, *Architectural Review Regulations and the First Amendment: The Good, the Bad, and the Consensus Ugly, 19 URB. LAW. 287 (1987).*

(n83)Footnote 519. Regan, *supra*.

(n84)Footnote 520. *348 U.S. 26, 32 (1954).*

(n85)Footnote 521. Comment, *Arcitectural Controls: Aesthetic Regulations of the Urban Environment, 6 Urb. Law. 622 (1974).*

(n86)Footnote 522. Robert M. Anderson, *Architectural Controls, 12 Syracuse L. Rev. 26, 43 (1960).*

(n87)Footnote 523. Samuel E. Poole III, *Architectural Review Regulations and the First Amendment: The Good, the Bad, and the Consensus Ugly, 19 Urb. Law. 287 (1987).*

(n88)Footnote 524. Kenneth Regan, *You Can't Build That Here: The Constitutionality of Aesthetic Zoning and Architectural Review, 58 Fordham L. Rev. 1013, 1020 (1990).*

(n89)Footnote 525. *See Metromedia, Inc. v. City of San Diego, 453 U.S. 490 (1981)* (distinguishing commercial from noncommercial advertising, and striking down a city-wide ban of all billboards because it included a ban on all noncommercial signs: "To allow a government the choice of permissible subjects for public debate would be to allow that government control over the search for political truth.").

(n90)Footnote 526. *Bachman v. State, 359 S.W.2d 815 (Ark. 1962).*

(n91)Footnote 527. *Id. at 817.*

(n92)Footnote 528. *Board of Supvrs. v. Snell Corp., 202 S.E.2d 889 (Va. 1974). See* discussion of this case in Woodrow W. Turner Jr., *Planning, Zoning and Subdivision Law, 24 U. RICH. L. REV. 691, 695 (1990).*

(n93)Footnote 529. *573 P.2d 359 (Wash. 1978). See* discussion of this case in Turner, *supra* note 208.

(n94)Footnote 530. Downzoning ordinances will usually be upheld as long as a "reasonable economic use" remains. James A. Kushner, Subdivision Law and Growth Management 2-37 (1991).

(n95)Footnote 531. Where developer wins: *A.A. Profiles, Inc. v. City of Fort Lauderdale, 850 F.2d 1483 (11th Cir. 1988).* Where developer loses in a comprehensive downzoning case: *Norbeck Village Joint Venture v. Montgomery County Council, 254 A.2d 700 (Md. 1969).*

(n96)Footnote 532. *Burlington County N.A.A.C.P. v. Township of Mt. Laurel, 336 A.2d 713 (N.J. 1975), appeal dismissed, 423 U.S. 808 (1975). See* Kushner, *supra* note 325.

(n97)Footnote 533. *Stone v. City of Wilton, 331 N.W.2d 398 (Iowa 1983).*

(n98)Footnote 534. *Board of Supvrs. of James City County v. Rowe, 216 S.E.2d 199, 211 (Va. 1975).*

(n99)Footnote 535. *See* Deborah A. Foppert, *Merger Ordinances: An Unconstitutional Taking of Property?, 26 Suffolk Univ. L. Rev. 365 (1992).*

(n100)Footnote 536. Annotation, *Construction and Application of Zoning Laws Setting Minimum Lot Size Requirements, 2 A.L.R.5TH 553 (1992). James City Council* argues against "merger." *But see Cook v. Haynes, 406 N.Y.S.2d 173 (1978).*

The owner bought a lot on which a single-family house could have been built but the frontage requirements were later increased to a size the lot didn't satisfy. No house had been built on the site so it wasn't entitled to the status of a legal nonconforming use. The site was being put to the same uses as other acreage in the area -- agricultural.

A California court condoned an involuntary merger in *Hill v. Manhattan Beach, 491 P.2d 369 (Cal. 1971).* But the legislature has proscribed this practice. CAL. GOV'T CODE § 66499.20 *et seq.* authorizes local governments to accept lot mergers, but prohibits "automatic merger where contiguous parcels under common ownership exist." *See* 59 Cal. Opp. Att'y Gen. 239 (1976). Unless the local government has complied with the notice, hearing, and recordation-of-notice-of-merger provisions in state law, no merger occurs. *See Stell v. Jay Hales Dev. Co., 11 Cal. App. 4th 1214,* 92 Daily J. 17090 (2d Dist. 1992).

(n101)Footnote 537. Cases hold that the landowner's hardship can't be "self-inflicted." New York and Pennsylvania courts have repeatedly held that purchasing property with knowledge of the zoning restriction gives rise to self-inflicted hardship undeserving of a variance. Daniel R. Mandelker & Roger A. Cunningham, Planning and Control of Land Development 416 (3d ed. 1979).

By California statute, general law cities can only grant variances for modifications of development standards such as height, bulk, and parking. Changes in use can't be sanctioned by variance except in charter cities.

(n102)Footnote 538. Anderson, American Law of Zoning, § 18.09 (Bancroft-Whitney, 2d rev. ed., 1977).

(n103)Footnote 539. Arden H. Rathkopf & Charles A. Rathkopf, Rathkopf's Law of Zoning and Planning § 38.01(2), at 38-3 (4th ed. 1991).

(n104)Footnote 540. Bryden, The Impact of Variances: A Study of Statewide Zoning 769, 815 (1977).

(n105)Footnote 541. *Van Siclen v. Browne, 92 Cal. Rptr. 786, 788 (1981).*

(n106)Footnote 542. *See Board of Supvrs. of Fairfax County v. Southland Corp., 297 S.E.2d 718 (Va. 1982)* (Virginia court sustained the application of special use permit requirement to quick service food stores because traffic counts showed that peak hours of vehicle activity coincided with the morning rush hour. The local government showed that the trips generated by a 7-Eleven-type store were far greater than for most other commercial establishments allowed as a matter of right in the zone, and if quick service food stores were located on smaller parcels of land in the commercial zone necessitating "curb cuts" near intersections, this might lead to gridlock).

(n107)Footnote 543. *Smith v. County of Los Angeles, 259 Cal. Rptr. 231,* _____ (1989), citing Cal. Gov't Code § 65901.

(n108)Footnote 544. *City of Portland v. Tidyman, 759 P.2d 242 (Or. 1988).*

(n109)Footnote 545. *Martinez v. City of San Diego, 4 Cal. Rptr. 2d 753 (1992).*

(n110)Footnote 546. *College Area Renters and Landlord Ass'n v. City of San Diego, 43 Cal. App. 4th 677,* previously published at: *42 Cal. App. 4th 543,* (Cal. Rules of court, Rules 976, 977, 979) (Cal. App. 1996) (Distinction between nonowner- and owner-occupied residences in city zoning ordinance which regulated number of persons over age 18 who could live in nonowner-occupied residences in targeted areas was not rationally related to city's legitimate interest in alleviating overcrowding problems associated with excessive occupancy of detached homes in single-family residential zone, and therefore the zoning ordinance violated equal protection); *Cleburne v. Cleburne Living Center, Inc., 473 U.S. 432 (1985).*

(n111)Footnote 547. Daniel R. Mandelker & Roger A. Cunningham, Planning and Control of Land Development 593 (3d ed. 1979). Copyright © 1979 by The Michie Company. Reprinted with permission. "Model planned development legislation. Model legislation specifically authorizing the enactment of PUD ordinances was proposed in the mid-1960s. The model act is reproduced in Babcock et al., *The Model State statute, 114 PA. L. REV. 140 (1965)...* A few states adopted the act, usually with modifications. *See, e.g.,* PA. STAT. ANN. tit. 53 §§ 10701-17011, which was amended and reenacted in 1988. New Jersey, which originally adopted the act, later repealed it and redistributed its provisions to various sections of the planning law."

(n112)Footnote 548. Cal. Gov't Code § 65460 *et seq.*

(n113)Footnote 549. *See generally* Daniel J. Curtin, Jr., California Land Use and Planning Law (1994 ed.) 42-44.

* Parts of this chapter have been adapted from George Lefcoe, Real Estate Transactions (Michie 1993).

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CHAPTER 85 OBTAINING LAND AND RIGHTS FOR DEVELOPMENT *

9-85 Thompson on Real Property, Thomas Editions § 85.15

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§ 85.15 The Vested Rights Problem.

[Go To Supp]

Zoning may be our most common example of ex post facto laws ... it often appears that the only time a developer has a true "vested right" to develop is after he has literally established that right in concrete, the concrete of a building's foundation. n550

Developers are accustomed to checking out the land use entitlement situation before buying. But developers may not be able to rely on those rules. Local officials may change the rules and apply the new ones months later when the time comes to evaluate the developer's application. n551 They may apply further rule changes while the application is pending. Worse than that, even after the developer's application is approved and her subdivision map recorded, she could be subjected to additional changes. n552 The elusive point beyond which the owner's right to develop is no longer subject to new rules is called the "vesting" point.

May the developer rely on those rules being the ones that local officials will use in evaluating the application, n553 or be forced to submit to adverse changes in land use rules while the application is pending, or, worse, be subjected to changes enacted after the plan was approved and the subdivision map recorded? n554

Precedent can be found for every conceivable answer, sometimes within the same state. Even in California, there are decisions holding that the subdivider isn't protected from subsequent land use ordinance changes until a building permit is obtained and construction begins, n555 and cases holding that once the subdivider secures approval of a tentative map, the developer can proceed in reliance on it free of later-enacted ordinances or general plan amendments. n556

Why local legislators attempt to make retroactive changes in land use laws is readily understandable. Sometimes none or only a few of the neighbors of a development project will know when the developer has filed a request for a tentative subdivision map approval. Even those who receive notice of the subdivision hearing may not appreciate its significance. Neighbors may not become aroused until development is actually commenced at the site. By the time they see work at the site, the developer will probably have a "vested" right to proceed with the approved project. Even so, the developer may be vulnerable to political machinations at the behest of angry neighbors, forcing the developer to seek court relief

from retroactive laws.

The developer, on the other hand, would prefer to know for sure what she can do with the site before she commits herself to buying it. Admittedly, land use controls are complicated and demand vigilence. A developer must pay the price of constant vigilence or suffer the consequences. Why shouldn't the property owners seeking zoning protection do the same?

§ 85.15(a) Challenges to Retroactive Zoning: Estoppel and Vested Rights Theory.

The developer will challenge the application of new rules to her existing approved project on one or both of two legal theories: estoppel and vested rights.

Some commentators see these doctrines as quite distinct. Estoppel focuses on whether it would be inequitable to allow the government to repudiate its prior conduct; vested rights upon whether the owner acquired real property rights which are constitutionally protected and can't be taken away by governmental regulation without just compensation. n557

Some courts and commentators think the two doctrines are the same. n558 They see attempts to distinguish them as "predestined for failure ... hopelessly muddled by imprecise judicial application." n559 The vested rights claim is constitutionally based -- an assertion that the owner is protected by the U.S. or state constitutions. A claim based on the doctrine of estoppel is a petition for fair play.

Contrasting these two formulations of the anti-retroactivity rule, observe their ambiguities and the issues that must be addressed by the developer who invokes them.

§ 85.15(a)(1) Does Estoppel Apply to *Any* Act, Omission or Promise?

Must some local official have actually promised the developer freedom from later-enacted laws. Is an implied promise good enough? Usually, yes.

Suppose the local government is shrewdly attached as a statement to the tentative subdivision map approval: This approval is subject to such subsequent changes in fee schedules, dedication requirements, zoning and planning rules as the county or city enacts that are applicable to all properties similarly situated within the jurisdiction. Would this disclaimer be sufficient to rob the subdivider of the estoppel claim?

Must the official making the promise or doing the act be authorized to do it? Suppose an official issues a permit or renders an opinion contrary to existing law.

Once a project is built, the local governing body will issue a certificate of use or occupancy, signifying that the construction and use of the premises conform to local zoning. Occasionally a certificate will be issued illegally by a building department official who has misinterpreted or misapplied zoning, subdivision or planning rules. The error may be caught at once or may not become apparent for decades, when the error is finally established.

May the developer who relies on the illegal permit or erroneous opinion successfully claim estoppel? Generally, no. If estoppel "can too easily replace the legally established substantive and procedural requirements for obtaining permit," governments would be enabling private developers to operate "in violation of its own laws." n560 But every so often, not very often, the developer wins despite the fact that the underlying permit was invalid. n561

Local government officials may grant relief to property owners who were misled by public officials. Some city councils and courts will cut the property owner some slack if the error was not the owner's fault, and waiving the invalidity doesn't present an imminent threat to public health and safety. Publicity depicting the innocent owner's plight in having

relied on government-issued permits can help. Public sentiment usually works in the owner's favor to goad reluctant officials into making good on what the owner was told. At other times, the owner is just out of luck. n562

Suppose one government entity issues a valid permit or approves a subdivision map but another one passes an ordinance which drastically alters the conditions of development. Is agency or government B estopped by an implied promise made by agency or government A? When the agencies report to the same elected officials, usually yes. When different governments are involved, the answer is less clear. On estoppel grounds, strictly construed, B should not be bound by A's implied promise. On the "vested rights" theory, B might be bound by A's act once the developer's right to the project has vested.

§ 85.15(a)(2) Is Estoppel Based on "Reasonable Reliance" or on "Expenditure or Obligation So Substantial It Would Be Unjust Not to Enforce the Developer's Earlier Acquired Right Despite the Subsequent Change in Law"?

Just restating the second prong of the two formulations highlights the discrepancies in what courts might require. In some cases, developers lose their estoppel claims despite having invested tens or hundreds of thousands of dollars. Sometimes "reasonable reliance" isn't enough. A developer's reliance expenditures must be so substantial it would be conscience-shocking to allow local officials to apply a law retroactively against him.

Courts often disallow sums spent on "soft" costs (engineering studies, architectural fees, test borings), or on acquiring land before obtaining a permit. Other courts stamp these expenditures sufficient.

Suppose the developer knows that changes in local land use rules are being proposed. Is she lacking in good faith if she hurriedly begins construction while "red flags are flying," as one court put it, signaling imminent change? A tabulation of cases would show that the developer isn't required to stop in her tracks because local officials are considering rule changes. But a few decisions label the subdivider in bad faith who proceeds despite ordinance changes in the air.

§ 85.15(a)(3) The Public Interest and Nuisance Exceptions to Estoppel.

In several states estoppel isn't applied against the government if there is a substantial public health, safety, or welfare justification for applying a new rule retroactively. n563

Some judges would not apply the doctrine "'except in unusual cases where necessary to avoid grave or manifest unjustice' and with due consideration for any effect of an estoppel on the achievement of public policy goals." n564

Unlike estoppel, the claim to a "vested right" is essentially constitutional, based on the Fifth Amendment guarantee that private property may not be taken for public use without just compensation. This is why "nonconforming uses" are protected against later changes in zoning.

There is a public nuisance exception. The owner of a junkyard, gravel mining operation, or stockyard may have to yield to the interests of surrounding homeowners even when the "nuisance-like" use is zoned out retroactively.

§ 85.15(b) When Do "Vested" Rights "Vest"?

Clearly, a person who buys *half* an acre in an area *already zoned* with a *one*-acre minimum, can't legally obtain a building permit for a house. n565 Presumably, the person would have paid far less for the lot than if it had been large enough for entitlement to build a house on it. At best the person can hope to sell it to the owner of an adjoining parcel, or acquire enough additional land from a neighboring owner to meet the one-acre minimum. But if the person had built a house on a half-acre parcel when the zoning allowed it, the house can be kept in place even when the locality later enacts a minimum lot size of one acre. Single-family homes in residential zones aren't a public nuisance. The

homeowner's right to the house "vested" constitutionally -- and without regard to any promises or acts of local officials -- when it was built.

A "vested rights" dispute can arise if the property owner has a permit to build and hasn't yet begun construction. When, exactly, does the owner's right to build the house "vest" against the minimum lot size rule?

> [c]ourts have recognized that the law of vested rights must balance two conflicting interests: the public interest in lower construction costs that result from providing developers a fair degree of certainty about their investments; and the public interest in controlling pollution and congestion effectively. n566

Some states protect owners against subsequent changes in zoning or planning rules when they relied on and bought land on the advice of city planners that the project would be consistent with local land use objectives. n567 This is true only in a few states. In most places a prospective buyer who schmoozes with a planning director or city staffers gets no "vested rights" leverage out of it. It's just free advice. The schmoozing buyer is still at risk if the sources prove wrong.

In a few jurisdictions a property owner is protected from the time the owner obtains a favorable rezoning for the specific project. n568 Seldom is this enough. A rezoning is only a paper change. The developer who obtains it has spent, at most, "soft" costs -- legal, architectural, engineering fees -- no "hard" money in construction at the site.

Filing a building permit or subdivision map is sufficient for "vesting" in some states from the day the developer submits the completed subdivision application. n569 Several states, however, require a bit more than simply filing for a building permit, but less than actually getting one. These states, which include Florida, n570 Illinois n571 and New Hampshire, n572 require that the applicant have substantially changed his position in good faith reliance on the *probability* that the permit will be issued.

Getting a subdivision map approved is what it takes in other states. Recording the final approved map is the magic vesting moment in some places. Elsewhere, a developer isn't protected until she actually dedicates a street, sells a lot, or obtains a building permit pursuant to the approved map.

Finally, many states don't protect a developer against planning rule changes until the developer actually commences construction under a validly issued building permit. This is close to the "rule of irrevocable commitment" suggested by Cunningham and Kremer. n573 They would only protect owners who made an investment at the site that could not be recouped once the rules of the game were changed.

The property owner's vested right to develop isn't necessarily of infinite duration. A property owner who waits too long to utilize a vested right can find that the right has been divested. In one decided case, a developer was held entitled to rely on a special use permit but lost his right for failing to proceed "at a pace reasonably close to that contemplated at the time the project was approved." n574

§ 85.15(c) State Legislative Responses to the "Vested Rights" Problem.

Ten states now have specific legislation on vested rights authorizing development agreements as an option. n575 Here are examples of how several state legislatures have addressed the vested rights problem.

§ 85.15(c)(1) Colorado.

Colorado's "vested Property Rights" statute n576 allows a landowner to rely on the laws in effect at the time any "site specific development plan" is received. These include subdivision plat maps, planned unit developments, a conditional or special use plan, a development agreement, or other approval in which the type and intensity of use are specified.

The law protects the owner for three years from the date of.site-specific approval. Local governments can extend the time. By entering a development agreement, the developer can obtain a vested right under the agreement for more than three years.

The landowner isn't protected from retroactive laws if they are enacted to correct for hazards posing a serious threat to public health or safety and couldn't have been detected earlier, or if the laws are of general applicability like building codes.

§ 85.15(c)(2) California.

The California state legislature created two ways for developers to secure a right to rely on approved tentative maps free of subsequent adverse changes in the land use rules: vesting tentative maps and development agreements.

Under one California statute n577 the developer is entitled to label a map application as a "Vesting Tentative Map." The developer whose approved tentative subdivision map, whether a vesting one or not, must comply with the ordinances, policies and standards in effect when the developer *completes the application*. The subdivider is protected against later changes in land use rules.

From the time an application is completed, it can be months or years before it is finally approved. So it is quite significant that the day the *completed* application is filed becomes the "vesting" date under this statute. n578 Local officials may attempt to defer the completion date by insisting on additional information.

Other agencies like school districts aren't bound by the vesting rules that apply to the city or county granting the vesting tentative map. They can impose conditions based on rules or ordinances enacted after the completed tentative map was filed.

The local government may deny or condition a permit, approval, extension, or entitlement, regardless of the rules in effect on the filing date, "if a failure to do so would place the residents of the subdivision or the immediate community, or both, in a condition dangerous to their health or safety, or both." n579

If the subdivider gets a vesting tentative map, but needs other approvals or permits to effectuate the development, the local government agency may impose "reasonable conditions" on these, if those conditions were authorized by ordinances, policies and standards in place on the "vesting" date. n580

Also, the developer must meet state and federal rules in effect on the date her application is *approved* -- not the filing date.

The vesting tentative map may also be conditioned or denied "in order to comply with state or federal law." n581

The developer's right to rely on the rules in effect when she completes her application isn't perpetual: it is time-bound. She must meet the conditions of the tentative map act within prescribed time limits or lose her "vested" rights. n582

Some communities have tried to evade the certainty and notice purposes of the vesting tentative map statute by reserving the right to impose new and higher fees for capital facilities based on later additional studies. When the city of Modesto hiked its per-unit capital facilities fee from $2,654 to $4,890, a home builder challenged the city and won. The court reasoned that the statute was designed to give developers effective notice of the fees they could be expected to pay, and a "blank check" provision that didn't indicate the method of calculating increases clearly as to provide notice to developers frustrated by the statutory notice-and-certainty goals of the vesting tentative tract map act. n583

The difference between a vesting tentative map and a "plain vanilla" tentative map is the word "vesting" at the top of the

page. The developer decides whether to place that label on the map. It protects the developer against changes in the planning rules after the application has been submitted but before the developer has been able to obtain a valid building permit and spent substantial funds in good faith reliance on it.

Why doesn't every California developer take advantage of this statute and elect to inscribe "vesting" on every subdivision map she files? The statute makes processing a developer's vesting tentative map mandatory. But many local governments require far more detailed plans for "vesting tentative maps." They insist on seeing the precise locations of houses on lots, the heights, setbacks, and sometimes the elevations. All this detail is relevant because the local government won't be able to apply changes in its building and zoning standards retroactively. It will have to evaluate the detailed design of the project under its present rules and live with it. So cautious localities demand enough material from developers to evaluate just what those rules imply for the project the developer seeks to build.

If the developer later alters the configuration of lots or design of houses, the approved map will have to be amended. A developer who does that, may find that all but minor amendments occasion a new Environmental Impact Report (EIR) under the California Environmental Quality Act (CEQA) and the application of rules in effect at the time of the amendment. Hence, the vesting tentative map may not be useful to a developer whose project is large and who contemplates building it over a long time. Market fluctuations are more likely than not to push the developer into redesigns that invalidate the approved vesting tentative map.

"Lack of certainty," the California Legislature wisely declared, "can result in a waste of resources, escalate the cost of housing and other development to the consumer, and discourage investment." To protect developers against retroactive changes in zoning, subdivision, or building regulations, the California legislature was the first to authorize localities, at their discretion, to enter "development agreements" with developers, securing for developers the right to rely on the existing land use rules. n584 Ten states now have specific legislation on vested rights authorizing development agreements as an option. n585

A development agreement is a contract between the developer and the local government. The local government agrees to apply certain land use rules in exchange for the developer's promise to develop in a certain way. For developers, the main purpose of the development agreement is to protect against later changes in land use rules. n586

The development agreement has advantages to a developer besides the fact that she is protected against later changes in the locality's rules undermining hard-won entitlements. A developer can negotiate the right to have changes in the project judged by the rules in effect at the time the development agreement was first entered, and not by rules enacted later.

The developer can also obtain a longer time to complete the project with a development agreement than would have been available with a tentative subdivision map or a conditional use permit. Under California's Subdivision Map Act, approvals are good for two years with the possibility of a one-year extension. A development agreement may give the developer five, ten, even twenty years' protection against political mood changes. This is especially important in slow markets and for big multi-phased projects.

Local governments like development agreements because they can secure promises from the developer that they might not otherwise have the legal authority to demand. They can also exercise a great deal of site-specific control over the project. They are "relatively (legally) unrestricted" in what they can negotiate from the developer in the form of public facilities and amenities. n587 The local government can negotiate developer contributions for the maintenance of public parks or schools where only capital contributions could have been required, and then only to mitigate the impact of the developer's project on public facilities. The issues addressed in the various development agreement statutes provide guidance on matters that should be included in any development agreement, whether or not a particular matter is required under a specific statute. In general, the major issues addressed in development agreement statutes include: (1) the permitted parties to the agreement, (2) the process for approving or adopting the agreement, (3) the maximum

allowable duration of the agreement and any extensions, if allowed, (4) the items or issues which must be described or covered in the agreement, (5) the applicability of any changes in existing regulations, (6) a mechanism for periodic review of the development project and compliance with the agreed to conditions, (7) future amendment or cancellation of the terms of the agreement, and (8) mechanisms for enforcement of the agreement. The terms governing these issues in a development agreement should comply with any statutory requirements and establish a comprehensive and workable agreement between the local government, any relevant state agencies if permitted, and the developer. n588

Development agreements come with some risks and disadvantages. Lawyers disagree whether constitutionally the development agreement which one council or board signs can bind future elected officials to items generally classified as legislative (not administrative).

Legislative matters would include general ordinances imposing and changing development fees, zoning ordinances, and general plan categories and policies.

May a municipality agree not to enforce zoning, subdivision, and other police power regulations in the future? "On the one hand, government must keep its word [under the contracts clause]. On the other hand, a government cannot contract away the power to govern [reserved powers]. n589 Where do development agreements fall in the balancing of these two provisions?" n590

The agreement to "buy" certain amenities such as street improvements and recreation space from developers in exchange for development permits is analogous to the purchase of other goods and services. It would therefore be protected since the state may not "pass any ... law impairing the obligation of contract." This arguably prohibits the rescission of a development agreement because of an inconsistent new city ordinance, such as a zoning amendment. The possibly illegal consideration given for these purchases, however, might make the contract unenforceable. Under the reserved powers doctrine, a government may not agree to waive its police powers in the future.

Another rationale to counter the unlawful delegation agreement in states which have authorized localities to enter development agreements argument is that the state legislature has retained its own police power authority. The state has merely delegated some of its police power authority to cities and counties when they enter development agreements.

This position takes as its starting point such expressions as this one:

> The [state] legislature is possessed of the entire police power of the state, except as its power is limited by the provisions of the constitution'... The determination as to what portion, if any, of a state's police power shall be delegated to its lesser political entities is left to its people through constitutional processes or through their legislatures. n591

The snare for developers relying on this argument is that it implies that while a local government might be bound by the development agreement it enters with a developer, the state legislature might be able to renounce that agreement under a theory of retained powers.

Another self-contained limit in development agreements is obvious but nonetheless important. They only bind the government enacting them. Projects that require approval from several governmental agencies remain at risk. These include projects needing a wetland permit to dredge or fill from the U.S. Army Corps of Engineers, or a project affecting an endangered species. One answer here is a multi-party development agreement. n592

Many developers have rushed to friendly local governments when no-growth advocates were pushing anti-development initiatives to a vote. Developers hoping to conclude development agreements before the planning rules get tightened are often charged dearly in the form of fees and assessments for a range of public improvements from new freeway construction to daycare centers. n593 But they agree to pay the price in order to lock in local government approvals for

long-term development projects.

Developers may be able to collar the demands of local governments when they sit down to hammer out the terms of a development agreement by first securing an approved subdivision map or vesting tentative map. Then the developer already has a right to subdivide and sell. She has perfected an entitlement baseline below which she can't be asked to stoop.

Another disadvantage to development agreements is that they are time-consuming to negotiate. For the developer, this translates into legal fees. For the local government officials, it may involve the expenditure of political capital if they are accused of granting special privileges.

"The states of California, Hawaii, Nevada, and Florida have led in developing detailed legislation that authorized the use of development agreements...." n594 The Hawaii statute differs from the California statute in two key ways. First, Hawaiian development agreements are administrative acts, precluding repeal by referendum. n595 Second, subsequent Hawaiian laws may be applied if necessary to rectify a condition "perilous" to residents' health and safety. n596

Florida's statutory law is the most demanding of developers. The agreement must detail who will provide public facilities and when those facilities will be completed. n597 The statute details which subsequent government actions can unilaterally modify agreements. n598 Florida also limits the duration of a development agreement to five years. n599 Commentators in other states advise local governments to enter into development agreements, which may give the local governments greater powers in regulating private property rights than they would enjoy constitutionally. n600

The issues addressed in the various development agreement statutes provide guidance on matters that should be included in any development agreement, whether or not a particular matter is required under a specific statute. In general, the major issues addressed in development agreement statutes include: (1) the permitted parties to the agreement, (2) the process for approving or adopting the agreement, (3) the maximum allowable duration of the agreement and any extensions, if allowed, (4) the items or issues which must be described or covered in the agreement, (5) the applicability of any changes in existing regulations, (6) a mechanism for periodic review of the development project and compliance with the agreed to conditions, (7) future amendment or cancellation of the terms of the agreement, and (8) mechanisms for enforcement of the agreement. The terms governing these issues in a development agreement should comply with any statutory requirements and establish a comprehensive and workable agreement between the local government, any relevant state agencies, if permitted, and the developer. n601

FOOTNOTES:

(n1)Footnote 550. William A. Fischel, The Economics of Zoning Laws 23 (1985).

(n2)Footnote 551. Yes: *Youngblood v. Board of Supvrs., 586 P.2d 556,* (Cal. Rptr. 1978); No: *Boutet v. Planning Bd., 253 A.2d 53 (Me. 1969).*

(n3)Footnote 552. Yes: *In re McCormick Mgt. Co., 547 A.2d 1319 (Vt. 1988); Avco Community Devs., Inc. v. South Coast Regional Comm'n, 132 Cal. Rptr. 386 (1976);* No: *City of W. Hollywood v. Beverly Towers, 52 Cal. 3d 1184 (1991).*

(n4)Footnote 553. Yes: *Youngblood v. Board of Supervisors, 586 P.2d 556 (Cal. 1978);* No: *Boutet v. Planning Bd., 253 A.2d 53 (Me. 1969).*

(n5)Footnote 554. Yes: *In re McCormick Mgt. Co., 547 A.2d 1319 (Vt. 1988); Avco Community Devs., Inc. v. South Coast Regional Comm'n, 17 Cal. 3d 785, 132 Cal. Rptr. 386 (1976);* No: *City of W. Hollywood v. Beverly Towers, 52 Cal. 3d 1184 (1991).*

(n6)Footnote 555. *See, e.g., Santa Monica Pines, Ltd. v. Rent Control Bd., 679 P.2d, 201* Cal. Rptr. 593 (1984)

(approval of tentative subdivision map allowing condominium conversion held subject to later-enacted rent control law restricting removal of apartments from rental market); *Avco Community Devs., Inc. v. South Coast Regional Comm'n, 132 Cal. Rptr. 386 (1976)* (approval of entire project only "vested" as to phases on which work was actually begun).

(n7)Footnote 556. Cal. Gov't Code § 66474.2. *See Youngblood v. Board of Supvrs., 586 P.2d 556 (Cal. 1978)* (tentative subdivision map approved for 1-acre lots valid against later general plan amendment specifying 2-acre minimum lot size).

(n8)Footnote 557. John J. Delaney & Emily J. Vaias, *Recognizing Vested Development Rights as Protected Property in Fifth Amendment Due Process and Takings Claims, 49 Wash. U. J. Urb. & Contemp. L. 27 (Summer 1996);* Vivien J. Monaco, Comment, *The Harris Act: What Relief from Government Regulation Does It Provide for Private Property Owners? 26 Stetson L. Rev. 861 (Spring 1997);* Rowland Richards III, Note, *Promissory Estoppel and "Property" in the Due Process Clause: Toward a Consistent Rationale, 20 Vt. L. Rev. 847 (Spring 1996);* Theodore C. Taub, *Mitigating Taking and Due Process Claims: Florida's Private Property Rights Protection Act,* SC10 ALI-ABA 765 (Aug. 1997); Nancy E. Stroud & Thomas G. Wright, *Florida's Private Property Rights Act -- What Will It Mean for Florida's Future?, 20 Nova L. Rev. 683, 690 (Winter 1996);* Brenna Durden, David Layman & Sid Ansbacher, *Waiting for the Go: Concurrency, Takings, and the Property Rights Act, 20 NOVA L. REV. 661 (Winter 1996);* David G. Heeter, *Zoning, Estoppel: Application of the Principles of Equitable Estoppel and Vested Rights to Zoning Disputes,* 1971 URB. LAW ANN. 63, 64-65 (1971). Copyright © 1971 by Washington University School of Law. Reprinted with permission.

(n9)Footnote 558. "The vested rights doctrine is based on the theory of equitable estoppel ...." *City of West Hollywood v. Beverly Towers, Inc., 805 P.2d 329, 336, 382 (Cal. 1991)* (Broussard, J., dissenting).

(n10)Footnote 559. *See, e.g., Consaul v. City of San Diego, 282 Cal. Rptr. 214 (1991) reh'g granted, 8 Cal. Rptr. 2d 762 (Cal. App. 1992) rev. denied; Deffert Rentals, Inc. v. City of Burlington, 219 S.E.2d 223 (N.C. App. 1975). See also* James & Michen, *On Vested Rights to Land Use and Development, 46 VAND. L. REV. 373, 382-83 (1989).*

(n11)Footnote 560. 7004 *St. Charles Ave. Corp. v. City of New Orleans, 704 So. 2d 909 (La. App. 1997)* (A building permit issued erroneously, whether because of zoning, building code or other violations did not gain legal status simply because it was issued in the first instance; city director of safety and permits had authority to issue permit and to revoke it if erroneously issued); *Smith v. County of Santa Barbara, 9 Cal. Rptr. 2d 120 (1992)* (county board of supervisors was enjoined from waiving conditions in a conditional use permit just because the building department had issued a building permit which sanctioned a violation of the CUP); *S.B. Garage Corp. v. Murdock, 55 N.Y.S.2d 456 (1945)* ("A municipality may not be held equitably estopped by the original misfeasant or malfeasant act of its officers or agents in having issued a permit contrary to plain mandate of zoning provision.").

See Annotation, *Rights of Permittee Under Illegally Issued Building Permit, 6 A.L.R.2D 960, 961 (1949)* 6 A.L.R. Later Case Service 293 (1985): "As a general rule ... an invalid permit vests no rights or privileges in the person to whom the permit has been issued ... notwithstanding the resulting hardship to the permittee who had begun construction ... in reliance upon the permit."

(n12)Footnote 561. Cases granting relief to the owner are described in Annotation, *Rights of Permittee Under Illegally Issued Building Permit, 6 A.L.R.2D 960, 961 (1949)* 6 A.L.R. Later Case Service 293 (1985). *See also Hill v. Board of Adjustment, 299 A.2d 737 (N.J. 1972); Commonwealth Dep't of Envtl. Resources v. Flynn, 344 A.2d 720 (Pa. 1975).*

(n13)Footnote 562. *See, e.g., Marcus v. Village of Marmaroneck, 28 N.E.2d 856, 859 (N.Y. 1940).* One of my colleagues doing a house remodelling was given advice at a city planning department counter. He relied on it. Later, a building inspector made him demolish what he had built in reliance. When he protested to a lawyer in the city's planning department, she asked who had given the advice. He told her. "Oh," the lawyer replied, "there's nothing I can

do for you. That lost soul is so often wrong interpreting the codes that if we excused everyone who relied on her opinions, our zoning code would be nearly unenforceable."

(n14)Footnote 563. *Western Land Equities, Inc. v. City of Logan, 617 P.2d 388 (Utah 1980).* California is among these states.

(n15)Footnote 564. *See* the dissent in *City of W. Hollywood v. Beverly Towers, Inc., 805 P.2d 329 (Cal. 1991), quoting Hock Inv. Co. v. City & County of San Francisco, 221 Cal. App. 3d 1072 (1990).*

(n16)Footnote 565. *See, e.g., La Grange State Bank v. Glen Ellyn, 591 N.E.2d 480 (Ill. App. 1992).*

(n17)Footnote 566. *Lakeview Dev. v. South Lake Tahoe, 915 F.2d 1290, 1299 (9th Cir. 1990).*

(n18)Footnote 567. *Town of Largo v. Imperial Homes Corp., 309 So. 2d 571 (Fla. Dist. Ct. App. 1975)* (owner who consulted planning director before buying site was allowed to rely on director's analysis of site's development potential). *See also Benson v. City of De Soto, 510 P.2d 1281 (1973)* (Kansas Supreme court estopped city from enforcing new ordinances against property owner who had obtained rezoning and had immediately expended funds for final plans of the streets, sewers, etc.).

(n19)Footnote 568. Charles L. Siemon, Vested Rights: Balancing Public and Private Development Expectations 15, 16 (1982).

(n20)Footnote 569. *See, e.g.,* Vermont: *Smith v. Winhall Planning Comm'n, 436 A.2d 760 (1981).*

(n21)Footnote 570. *Good v. United States, 39 Fed Cl. 81 (Fed. Cl. 1997)* (Under Florida statutory and common law, developer may obtain vested right to pursue particular development plan where developer can show that he or she has substantially changed position, in good faith reliance, upon some act or omission of government, such that it would be highly inequitable to destroy acquired rights).

But see Stokes v. Board of Permit Appeals, 52 Cal. App. 4th 1348 (Cal. App. 1997) (Owner of abandoned bathhouse did not rely in good faith on building permits when he spent almost $400,000 in improvements to bathhouse, so as to give him vested right to complete construction, where owner misrepresented that property was currently being used as bathhouse when he applied for building permit, instead of disclosing it was vacant, and city was misled into issuing building permits based solely on that misrepresentation).

(n22)Footnote 571. In *Pioneer Trust & Sav. Bank v. County of Cook, 377 N.E.2d 21 (Ill. 1978),* the plaintiff was held to have a vested right in a retirement complex based on statements made to the plaintiff by the zoning administrator and zoning land planner. The plaintiff spent $65,000 for retirement prototype units which the county had given him permits to build, $7,000 for trips to view other retirement developments, at least $29,000 for an architect, $10,250 for a structural engineer, $10,000 for mechanical and electrical engineers, $2,300 for soil and water tests, and a $2,000 deposit for the building permit. The permit was never issued before the county downzoned the property to eight units per acre instead of the 17.4 which had been previously allowed. The Supreme court of Illinois ordered the county to issue the plaintiff a permit for his retirement project based on the above expenditures and advice the local planning staff had given him.

(n23)Footnote 572. The New Hampshire rule was applied in *Henry & Murphy, Inc. v. Town of Allenstown, 424 A.2d 1132 (N.H. 1980).* Subdividers had recorded a subdivision plan and sold 34 of 50 lots, each of which was 10,000 square feet, before the town downzoned the area by requiring a minimum lot size of 40,000 square feet.

The court held that the subdivider had a vested right to sell the remaining 16 lots. The value of the 16 10,000 sq. ft., each at $4000, was a total of $64,000, twice what the land would have been worth as four 40,000 sq. ft. lots (at $8,000 each) -- $32,00). Moreover, the larger lots might have been difficult to market since the subdivision contained homes of

modest size.

However, the court did allow that portion of the ordinance to apply "retroactively" to the still unimproved lots which restricted their use to one- and two-family dwellings. Previously, multiple-family dwellings would have been allowed.

A developer was held to have lacked a vested right in *Socha v. City of Manchester, 490 A.2d 794 (N.H. 1988).* When he bought his lot in Manchester, it was zoned to permit residential construction of unlimited height. On September 6, 1983, the city council passed a motion to begin proceedings to rezone the area to prohibit high-rise construction. Two days later plaintiff applied for a foundation permit to construct a high-rise apartment building. On the following day notice of public hearings of the proposed rezoning was published. The building commissioner notified plaintiff in writing that construction permits inconsistent with the proposed ordinance would not be issued.

The plaintiff never got a building permit for a superstructure. The court held that the plaintiff failed to demonstrate any detrimental reliance on the foundation permit, and therefore had no vested right in the proposed construction.

(n24)Footnote 573. Richard B. Cunningham & David H. Kremer, *Vested Rights, Estoppel, and the Land Development Process, 29 Hastings L.J. 623 (1978).*

(n25)Footnote 574. *Lakeview Dev. v. South Lake Tahoe, 915 F.2d 1290, 1299 (9th Cir. 1990).*

(n26)Footnote 575. Barry R. Knight & Susan P. Schoettle, *Current Issues Related to Vested Rights and Development Agreements, 25 URB. LAW. 779, 790 (1993).*

(n27)Footnote 576. Colo. Rev. Stat. Ann. § 24-68 *et seq. Villa at Greeley, Inc. v. Hopper, 917 P.2d 350 (Colo. App. 1996)* (Exception to protection of statutorily vested property rights to extent that affected landowner receives just compensation for certain costs incurred subsequent to receipt of plan approval from local government applied to vested right in site specific development (PUD) plan for preparole facility).

(n28)Footnote 577. Cal. Gov't Code § 66498.1 *et seq. Mola Dev. Corp. v. City of Seal Beach, 57 Cal. App. 4th 405 (Cal. App. 1997)* (City's prior approval of developer's vesting tentative map retained no force once such approval was judicially invalidated, and thus could not serve to create constitutionally protected property interest in such approval on behalf of developer).

Davidson v. County of San Diego, 49 Cal. App.4th 639 (Cal. App. 1996) (Vested rights doctrine in land use context is subject to qualification that such vested right, while immune from divestment through ordinary police power regulations, may be impaired or revoked if use authorized or conducted thereunder constitutes menace to public health and safety or public nuisance; public welfare demands may even require complete destruction of vested property right).

(n29)Footnote 578. The local government can apply rules enacted after the filing but before the map is approved if those rule changes were enacted as a result of proceedings begun before the application was filed. The proceedings could have been initiated by way of ordinance, resolution or motion, or hearings published noticing the prospective change. CAL. GOV'T CODE §§ 66474.2, 66498.1.

(n30)Footnote 579. Cal. Gov't Code § 66498.1(c)(1).

(n31)Footnote 580. *Id.* § 66498.1(e). The statutory language doesn?t specify that the ordinances have to be in place on the vesting date but that the conditions have to be authorized by ?ordinances, policies, and standards described in subdivision (b).? Subdivision (b) specifies the vesting date as the date of filing or, if that section of the government code is repealed, the date the vesting tentative map is approved or conditionally approved.

(n32)Footnote 581. Cal. Gov't Code § 66498.1(c)(2).

(n33)Footnote 582. *See, e.g.,* Cal. Gov't Code §§ 66452.6(g) and (h) (for a vesting map, not less than one nor more than two years unless applicant gets a building permit. Then it is the expiration of the permit.).

(n34)Footnote 583. *Kaufman & Broad Central Valley, Inc. v. City of Modesto, 25 Cal. App. 4th 1577 (1994).*

(n35)Footnote 584. Cal. Gov't Code §§ 65864 - 65865. The development agreement in California must conform to the general plan. It must be adopted by the elected local officials as an ordinance after they hold a public hearing on it. It is expressly made subject to referendum (that is, ballot box repeal). Cal. Gov't Code § 65867.5.

(n36)Footnote 585. Barry R. Knight and Susan P. Schoettle, *Current Issues Related to Vested Rights and Development Agreements, 25 Urb. Law. 779, 790 (1993).*

(n37)Footnote 586. *See, e.g.,* Eric Sigg, *California's Development Agreement Statute, 15 Sw. U. L. Rev. 695, 700 (1985).* Developers of large-scale, multi-phased planned unit development projects were especially vulnerable to political uncertainty because they often spend millions and work for decades before pulling building permits on the final phase of a big project.

(n38)Footnote 587. David L. Callies, *Paying for Growth and Planning Gain: An Anglo-American Comparison of Development Conditions, Impact Fees, and Development Agreements, 23 Urb. Law. 221, 248 (1991).*

(n39)Footnote 588. Knight and Schoettle at 790.

(n40)Footnote 589. *See, e.g., P.C.B. Partnership v. City of Largo, 549 So. 2d 738, 741 (Fla. App. 2d Dist. 1989).* A city allegedly repudiated a contract with a developer to make certain traffic improvements along with a sale to the developers of downtown land the city owned. The land sale was completed, but the city council changed its mind about making the traffic improvements. In a developer's suit for specific performance of the agreement, the court held for the city.

The agreement purports to restrict the City's ability to decide whether to build a road, install a traffic device and permit the development of a parking lot and a storm drain. The City does not have the authority to enter into such a contract, which effectively contracts away the exercise of its police powers.

The court did indicate, though, that the lender might have a cause of action for rescission or fraud if some of the purchase price for the lots was consideration for the traffic improvements.

See also Rockingham Square Shopping Center, Inc. v. Town of Madison, 262 S.E.2d 705 (N.C. 1980) (town agreed to construct access road as inducement for shopping center development; town reneged; developer sued and lost; town's promise held "ultra vires").

(n41)Footnote 590. Robert M. Kessler, *The Development Agreement and Its Use in Resolving Large Scale Multi-Party Development Problems: A Look at the Tool and Suggestions for Its Application,* 1 J. Land Use & Envtl. L. 451, 464-65 (1985). *See* Eric Sigg, *California's Development Agreement Statute, 15 Sw. L. Rev. 695 (1985).* "[T]o be viewed as a present exercise of the police power," the agreement must "contain specifics" -- site boundaries, the allowable densities and building sizes. (Sigg, at 716). The statute itself preserves the right of local governments to continuing enacting new rules, regulations and policies applicable to the development agreement site "which do not conflict" with the ones in effect when the agreement was concluded. *See also* Donald G. Hagman, *Development Agreements,* 3 Zon. & Plan. L. Rep. 65, 77 (1980).

(n42)Footnote 591. *City of Lafayette v. County of Contra Costa, 91 Cal. App. 3d 749, 754 (1979).*

(n43)Footnote 592. *See* Robert M. Kessler et al., National Institute: Managing Development Through Public/Private Negotiations (ULI/ABA 1985). For a comprehensive review of cases and doctrines limiting the authority

of local governments to "contract away" the policy power prerogative of succeeding regimes, *see* J.C. Griffiths, *Local Government Contracts: Escaping from the Governmental/Propriety Maze, 75 IOWA L. REV. 277 (1990).*

(n44)Footnote 593. *See generally* John J. Kirlin & Anne M. Kirlin, Public Choices-Private Resources 59-74 (Cal. Tax Found. 1985) (discussion of the increasing bargaining of responsibility for financing capital infrastructure).

(n45)Footnote 594. Judith Welch Wegner, *Moving Toward the Bargaining Table: Contract Zoning, Development Agreements, and the Theoretical Foundations of Government Land Use Deals,* 65 U.N.C. L. Rev. 957, 995 (1987).

(n46)Footnote 595. Act of April 30, 1985, Act 48, § 1, 1985 Haw. Sess. Laws 78, 78-79 (findings and purpose).

(n47)Footnote 596. *Id.* at 81 (enforceability and applicability).

(n48)Footnote 597. Fla. Stat. Ann. § 163.3221(3)(a)-(b).

(n49)Footnote 598. *Id.* at § 163.3229.

(n50)Footnote 599. Judith Welch Wegner, *Moving Toward the Bargaining Table: Contract Zoning, Development Agreements, and the Theoretical Foundations of Government Land Use Deals,* 65 U.N.C. L. REV. 957, 999 (1987).

(n51)Footnote 600. Wm. Terry Bray et al., *Once More The Trilogy, In Retrospect: An Essay On The Virtues Of Development Agreements In Texas, 32 S. Tex. L. Rev. 1 (1990).*

(n52)Footnote 601. Barry R. Knight & Susan P. Schoettle, *Current Issues Related to Vested Rights and Development Agreement, 25 Urb. Law. 779, 790 (1993).*

* Parts of this chapter have been adapted from George Lefcoe, Real Estate Transactions (Michie 1993).

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CHAPTER 85 OBTAINING LAND AND RIGHTS FOR DEVELOPMENT *

9-85 Thompson on Real Property, Thomas Editions § 85.16

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§ 85.16 The General or Comprehensive Plan.

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§ 85.16(a) Functions of the General or Comprehensive Plan.

The idea behind a general or comprehensive plan is that local governments should have some articulated reasons for saying yes or no to applications for development. Advocates of comprehensive planning don't believe a simple colored map, designating some areas for houses, some for shops, etc., is enough. The community ought to examine the impact of future growth on roads, schools, fire and police services. "If probable funding falls short of meeting identified needs, [the comprehensive plan should include] a discussion of how additional funding will be raised, or how land use assumptions will be reassessed to ensure that level of service standards will be met." n602

Planning ought to address issues of housing affordability, of making jobs and shops accessible to where people live, of open space for recreation and preservation, and of community design and appearance. The plan might also address the need to encourage economic development. Language in a general plan gives local residents a clue about what sorts of land uses could be expected in future years. It gives developers an idea of what proposals might be acceptable. It gives courts a standard for judging the fairness of individual planning outcomes. It offers a yardstick against which to measure individual planning decisions against alleged corruption or bribery.

Of course, certain things would have to be true for a general or comprehensive plan to accomplish all these objectives. First, each locality would have to be required or mandated to have such a plan possibly as a condition to its exercising zoning or subdivision controls.

Second, all elements of the planning documents would have to be internally consistent.

Third, the plans would have to be sufficiently specific so that individual applications could be measured against the plan's policies, objectives, and mapped land use designations. Cliches, vague promises, and contradictions would have to be avoided.

Fourth, the plan would have to apply both to public and private development projects to assure that standards for public facilities were observed no matter what kind of developer proposed to construct an office building, school, housing

project, or shopping mall.

Fifth, the plan would have to articulate all potentially relevant aspects of subsequent planning choices. There could be no "wild cards" pulled out by public officials at the last minute to justify individual zoning decisions that appeared contrary to stated planning goals.

Sixth, the plan would have to be adopted by the city council or board of supervisors, not just the planning commission or a staff committee, since it would be the reference point for future legislation.

Even if all these conditions can't be realized, comprehensive plans can be useful when they reflect a clear community consensus about where and how development ought to take place.

§ 85.16(b) Status of State Planning Requirements in the U.S.

All states have enabling legislation for planning. A few states have legislated specific standards for the plans of local governments. n603 Some state courts have indicated that they would show greater deference to local zoning decisions that were consistent with locally enacted plans. n604 But very few states have gone so far as to require that cities and counties adopt general or comprehensive plans. Most state courts faced with the issue have ruled that when state enabling laws refer to a comprehensive plan, the zoning ordinance itself may serve as that plan. No independent document is necessary.

The comprehensive plan "usually only represents a writer's or judge's assessment that the zoning is systematic and rational -- in other words, that the zoning itself, considered in its whole and in its parts, evidences a comprehensive plan. n605

Among the few states requiring a separate comprehensive or general plan as a condition to exercising zoning and subdivision controls are Arizona, n606 California, n607 Florida, n608 Georgia, n609 Hawaii, n610 Maine, n611 Oregon, n612 Rhode Island, n613 and Washington. n614 In these states a general plan serves as "a constitution for all future development." n615

A general plan must address the issues associated with a jurisdiction's physical development. Such issues concern the general locations, appropriate mixtures, timing and extent of land uses and supporting infrastructure. They pertain to the physical nature of a jurisdiction's environment. The broad scope of physical development issues ranges from appropriate areas for building factories to open space for preserving scenic vistas. n616

State laws list the elements of the plan that are required and others that are permitted. Almost always, the plan must delineate standards for land use, transportation and community facilities.

§ 85.16(c) Concurrency Requirements: Matching Development Approvals to Capital Improvements.

Florida's statute is unique in its insistence that "public facilities and services needed to support development shall be available concurrent with the impacts of such development." n617 That public facilities be in place "concurrent" with the impacts of new development gave Florida's state planning law its nickname, "concurrency." Florida is the first state to attempt integrating local capital improvements with local land development regulation. n618

Development orders and permits of local governments in Florida can only be issued in accordance with levels of service established by local governments, aided by state guidelines. These are spelled out in local facilities plans, part of a comprehensive plan each of Florida's 417 local governments must submit to the Florida Department of Community Affairs for review under Florida's Growth Management Act. The facilities for which acceptable levels of service need to be assured include roads and mass transit, sewers, solid waste, drainage, potable water, and parks. The most difficult of

these are transportation facilities.

> The construction of transportation facilities is costly and time-consuming, existing transportation deficiencies are substantial, and local governments cannot control the volume of traffic on roads that do not stop at jurisdictional boundary lines. Establishing appropriate levels of service for traffic is and has been a matter of great controversy, and the state and local governments have vigorously disagreed over whether the responsibility for setting those standards and funding transportation should be a state or local responsibility. n619

Critics point out that concurrency without transportation funding could mean "no growth." Business and development interests are apprehensive because state and local tax revenues aren't sufficient to meet public facilities needs. There is strong anti-tax sentiment, especially among Florida's retirees who moved there as much for the shelter against high state taxes as for the tropical climate. Critics predict massive job losses in construction, retail and wholE.S.A.le trade, finance, insurance and real estate as concurrency causes a substantial reduction in Florida homebuilding. n620

Tom Pelham, the first administrator of the law, explains the challenge: "The question is whether concurrency will be a mechanism for raising infrastructure funds or a vehicle for no-growth movements." n621

Under "conventional" growth management systems, developers only have to pay their fair share for services and facilities attributable to their development; they needn't worry about existing deficiencies in levels of service. Some Florida developers see denials based on these preexisting and pervasive shortcomings as a "takings." n622

An evaluation of the Florida law isn't yet feasible. The Florida law comes on line at a time when development has slowed. Many projects in the planning pipeline were exempted. Moreover, projects with regional impacts are subject to a special statewide approval process and are exempt from "concurrency." n623

§ 85.16(d) Consistency Requirements.

State law in Arizona, n624 California n625 and Florida n626 mandate that all local zoning and subdivision decisions be consistent with the locally adopted plans. n627

§ 85.16(e) What Consistency Means.

Both the City and the County of Los Angeles were required to "downzone" (reduce the allowable densities) in residential areas because their planned population projections exceeded by very large margins the amount of land they had zoned, potentially, for housing. This downzoning was expected to result in a significant reduction of land developable for affordable housing. n628

Suppose a city's present population is 70,000. Based on past growth rates and demographics (birth and death rates), its general plan projects a population of 100,000 for the city by the year 2000. But the city has zoned enough land residential to accommodate a population of 175,000. This city is vulnerable to a consistency lawsuit which would force the city to eliminate some of its potential residential capacity. n629

It isn't always clear, though, how far courts will go in making sure all land use decisions are consistent with the general plan. Say the land use element of a general plan marks a particular site for "low-density" residential and the land is zoned that way -- low-density residential. A developer seeks a zone change for a shopping center or high-density apartments. Such a change would be inconsistent with the general plan. Probably the city could be stopped from changing the zoning to an inconsistent use without also amending the general plan to cure the inconsistency.

But suppose a developer's site had been zoned for a shopping center long before the general plan marked out the site for

low-density residential. The developer sought and got a building permit for a shopping center. Building department officials saw that the zoning was right for a shopping center but neglected to observe the inconsistency between the general plan and the shopping center. Under similar circumstances a California court ruled that the developer could keep his building permit over the neighbors' vigorous protest. The court's decision was based on its interpretation of what situations the state legislature intended to reach by its consistency requirement. n630

Plan language expressing general goals and policies allows local governments considerable discretion. The general plan for the City of San Jose, for instance, called for city streets to operate at a Level of Service (LOS) during peak travel periods of D. LOS is a traffic engineer's qualitative measure of "the operating conditions within a traffic system and how these conditions are perceived by drivers and passengers." n631 Six levels of service have been established, with A the best and F the worst in terms of motorist satisfaction.

A property developer in San Jose sought to amend the general plan for his site from industrial-only to mixed use, to allow some shops and housing. The traffic engineers identified one intersection where the proposed change in land use would cause the LOS to drop from D to E. An objector argued the general plan amendment sought by the developer would contravene the traffic flow goals of the general plan. In upholding the plan amendment for the mixed use zone, a California appellate court wrote:

> This contention is patently unmeritorious on its face. [T]he ... provision is a goal and policy rather than a strict standard. It therefore does not follow that an amendment ... which does not strictly conform to that policy is invalid for that reason. n632

The court's work was made easier by the city planning staff. The staff had determined that certain road improvements at the crowded intersection would mitigate congestion. They had recommended: "restriping the north approach to have two left turn lanes, one through lane, and one shared through/right turn lane, and by adding an additional left turn lane at the south approach." The improvements would be funded by the developer as part of the construction project.

Occasionally, courts have even allowed cities in "consistency" states to approve rezonings with development standards that contradicted those in the specific general plan. The Arizona Supreme court upheld a rezoning in downtown Phoenix for a 500-foot-tall building even though the plan had set a 250-foot height limit.

This rezoning did deviate from the general plan in that it surpassed by a large margin the 250-foot height restriction. The plan, however, has other goals for that area. The plan does provide that gradient areas where this proposed building lies will have some concentrations of land use in sub cores. Also there is a provision for commercial development of the Central Avenue corridor. The building height restrictions are only stated in precatory language. Additionally, the plan provided for open space in the gradient, encouragement of landscaping, areas for people to enjoy and commercial development. The city council had before it evidence that this building would be commercially beneficial, would provide open spaces and recreational areas, landscaping, etc. The council also heard testimony that the developer could build two 20-story buildings which would leave less open space and less potential recreational areas. In viewing the above evidence, we cannot say the city council was wrong in finding the rezoning in basic harmony with the general plan. We do not need specific findings by the council to come to this conclusion since we have viewed the same evidence the council viewed. Certainly written findings would be preferable, but they are not mandatory. n633

In this case the developer got more than the plan promised. But can a property owner or developer always count on getting at least as great a density as was promised in the plan?

Judges aren't consistent in reviewing cases brought by property owners when local governments deny rezoning and development approvals seemingly promised in general plans. Suppose the general plan calls for a site to be developed high-density residential, but the zoning for the site only allows low-density residential. To make the two consistent the zoning could be amended to allow the greater density promised in the general plan; or the plan could be amended to

reduce the promised density. California courts have usually thought that zoning should be made to follow the general plan like the tail of a dog. n634

The Mira Development Corporation tried to obtain an increase in its zoning density consistent with the plan. But the San Diego city council refused, after neighbors vigorously objected at a public hearing before the city council, contending that their area already was overcrowded with too many apartments. In *Mira Development Corp. v. City of San Diego*, n635 a court sustained the city's refusal to rezone 11 acres from R1-10,000 (1 house on 10,000 square feet, 4 units per acre) to R-3,000 (15 units per acre), even though the general plan designated this area for high-density rental housing.

Another owner did much better when he was refused a subdivision map approval that he had submitted, which was consistent with the local plan. In *Herrington v. Sonoma County*, n636 the owner wanted to subdivide undeveloped agricultural acreage. He was awarded damages against the county when it denied him the right to develop a 32-unit subdivision where the general plan would have allowed up to 35 units.

§ 85.16(f) The Case Against Consistency Requirements.

Why is consistency or concurrency, and even mandated planning, so uncommon among the several states? Here are some possible answers:

(1) "If a master plan is vague, easily changeable, or packed with opportunities for the use of flexibility devices, then virtually any land use regulation can 'conform' to the plan." n637

(2) In the absence of concrete situations, and a particular proposal with identifiable impacts, plan designations don't receive the close attention a specific development proposal can attract. Elected officials, planning commissioners, and neighborhood associations aren't much interested in general goals. They awaken only when they think they can almost hear the bulldozer at work nearby. When the owner is ready to build according to a plan enacted years earlier, the shift in power between pro- and anti-growth factions may have changed. What was once politically acceptable may no longer be.

(3) There is no dominant ideology or philosophy behind land use planning to provide some "value" core for deciding individual cases. Also, there do not appear to be unique "correct ways of using, managing and regulating land use and development. Rather there is an extraordinary and rich range of approaches. Ideologues and technocrats will doubtless be very disappointed by this conclusion...." n638

(4) Remedies for noncompliance can be counterproductive. In California, for instance, a housing element is among the required elements of a general plan. n639 The state statutes call for each locality to plan housing affordable to all income groups. Many cities don't have housing elements. n640 Some have housing elements that don't meet state guidelines. n641 There is no state enforcement or penalty for noncompliance, so courts have created one. All development proposals are put "on hold" until the city adopts a housing element according to state standards. n642 This means that a "no growth"-motivated band of local officials can obtain their goal of no new development simply by not having a housing element.

(5) Comprehensive land use planning requires information about future populations, market demands, ecological linkages, funding for public facilities, usage patterns for those facilities, and a host of other variables that can't be forecast with an accuracy that would justify the cost and effort involved.

(6) "Consistency" planning actually increases the temptations for corruption and bribery by increasing the red tape developers must unwind in order to build.

(7) Some advocates of "consistency" planning believe it will remove discretion from inherently capricious local officials. However, at least one of those advocates, rethinking the matter, concluded that planning doesn't lead to consensus in advance of actual cases. It simply moves the negotiating stage forward in time. To the extent fewer players participate in this earlier stage when the general plan is evolved, and to the extent standards for making decisions at that stage are vague, opportunities for capriciousness are actually increased, not decreased, by planning consistency requirements. n643

(8) The owners of undeveloped property object. They say consistency requirements result in their sites being downzoned, thus reducing land values.

(9) Developers also object. They say downzonings reduce the number of sites potentially available for development, increasing the price of the remaining ones.

(10) Once enacted, these requirements are difficult to remove. There is a comforting ring to phrases like "consistency" and goals like "affordable housing" or "environmentally sound" land use decisions. Persuading people that these laws are counterproductive is difficult.

§ 85.16(g) The Consistency Bottom Line.

Whether you find the arguments for comprehensive planning persuasive, or the case against consistency compelling, one thing is certain for those who seek to develop in Florida, California, Oregon, Arizona, and other states that adopt planning consistency or planning concurrency: they must study with care all the provisions of the local general plan that could affect their project's approval. If they find aspects of the plan unfavorable to them, they will have to consider a plan amendment. This is not quick, cheap, or easy, but in many cases it is necessary.

FOOTNOTES:

(n1)Footnote 602. Wash. Rev. Code Ann. § 36.70A.070(b)(c)(iii) (the requirement in this section applies to transportation only).

(n2)Footnote 603. *See, e.g.,* Pa. Stat. Ann. tit. 53, § 10301(a); N.J. Stat. Ann. § 40:55D-38.

(n3)Footnote 604. *Udell v. Hass, 235 N.E.2d 897 (N.Y. 1968); Palatine Nat'l Bank v. Village of Barrington, 532 N.E.2d 955 (Ill. App. 1988).*

(n4)Footnote 605. Arden H. Rathkopf & Charles A. Rathkopf, 1 Rathkopf's The Law of Zoning and Planning § 12.01, at 12.2 (4th ed. 1991). *See also,* Charles M. Haar, *In Accordance with the General Plan, 68 Harv. L. Rev. 1154 (1955); Kozesnick v. Montgomery Twp. 131 A.2d 1 (N.J. 1957); Sasich v. City of Omaha, 347 N.W.2d 93 (Neb. 1984).*

(n5)Footnote 606. Ariz. Rev. Stat. Ann. §§ 9-461.04(A) - 9-462.01(E) (1991).

(n6)Footnote 607. Cal. Gov't Code §§ 65850 - 65860 (1992).

(n7)Footnote 608. Fla. Stat. Ann. § 163.3177(10)(h).

(n8)Footnote 609. Official Code of Georgia § 50-8-80 *et seq.* (metropolitan area planning and zoning law applies to areas of over 1 million, and requires each municipality's plan to be consistent with the area?s plan and development guide).

(n9)Footnote 610. Hawaiian Land Use Law, HAW. REV. STATS. ch. 205 (1961).

(n10)Footnote 611. 1989 Me. Legis. Serv. 377.

(n11)Footnote 612. *See Baker v. City of Milwaukee, 533 P.2d 772 (1975);* Or. Rev. Stat. §§ 197.175(2) - 215.054.

(n12)Footnote 613. R.I. Gen. Laws, ch. 45-11.2.

(n13)Footnote 614. Wash. Rev. Code Ann. § 36.70A.

(n14)Footnote 615. *O'Loane v. O'Rourke, 231 Cal. App. 2d 774, 782 (1965).*

(n15)Footnote 616. General Plan Guidelines, Governor's Office of Planning Research, State of California (1991).

(n16)Footnote 617. Fla. Stat. Ann. § 163.3177(10)(h).

(n17)Footnote 618. Thomas G. Pelham, *Adequate Public Facilities Requirements: Reflections on Florida's Concurrency System for Managing Growth, 19 Fla. St. U. L. Rev. 973 (1992).* Copyright © 1992 by Thomas Pelham. Reprinted with permission. In 1990, Washington became the second state to enact the concurrency requirements, but only for counties exceeding certain population and growth rates and cities within those counties, and only for transportation facilities. 1990 Wash. Legis. Serv. 1375.

Brenna Durden, David Layman & Sid Ansbacher, *Waiting for the Go: Concurrency, Takings, and the Property Rights Act, 20 Nova L. Rev. 661 (Winter 1996);* Craig A. Robertson, *Concurrency and its Relation to Growth Management, 20 Nova L. Rev. 891 (Winter 1996).*

(n18)Footnote 619. Thomas G. Pelham, *Adequate Public Facilities Requirements: Reflections on Florida's Concurrency System for Managing Growth, 19 Fla. St. U. L. Rev. 973, 1049 (1992).* Copyright © 1992 by Thomas Pelham. Reprinted with permission.

Stanley D. Abrams, *Managing and Avoiding Transportation Congestion,* SB06 ALI-ABA 517 (Aug. 15 1996).

(n19)Footnote 620. Florida Tax Watch and the Wefa Group, The Cost of Not Acting: The Economic Impact of Implementing Concurrency Without Funding Transportation 3.5, 3.6 (1989).

(n20)Footnote 621. Thomas H. Pelham, Florida's Concurrency Requirement, Regulation and Development Law Conference, Biltmore Hotel, Los Angeles, California (June 21, 1991).

(n21)Footnote 622. Robert Odland, *Growth Management: What California Can Learn From the Sunshine State, 24 Loy. L.A. L. Rev. 1109, 1119 (1991).*

(n22)Footnote 623. Fla. Stat. Ann. §§ 163.3177(9), 163.3177(10), 163.3184(1)(b), and 163.3184(8)(a).

(n23)Footnote 624. Ariz. Rev. Stat. Ann. § 9.463.01(E).

(n24)Footnote 625. Cal. Gov't Code § 65860(a). In California, the forty-odd charter cities are exempt, except for Los Angeles, which is subject to the consistency requirement by a special statute that cities with more than two million residents must comply. Even in the case of charter cities, courts look to the city's planning documents as a benchmark for judging the legitimacy of individual zoning and subdivision decisions. Cal. Gov't Code § 65860(d). *See City of Los Angeles v. State, 138 Cal. App. 3d 526 (1982).*

(n25)Footnote 626. Fla. Stat. Ann. § 163.3161. *See generally* Randall & Holcombe, Growth Management in Florida (James Madison Institute for Public Policy Studies 1990). Florida courts require "competent and substantial" evidence that development approvals and rezonings "conform strictly to the master plan, its elements, and objectives." *White v. Metropolitan Dade County, 563 So. 2d 117, 128 (Fla. Dist. Ct. App. 1990).*

(n26)Footnote 627. James Poradek, *Putting the Use Back in Metropolitan Land-Use Planning: Private*

Enforcement of Urban Sprawl Control Laws, 81 Minn. L. Rev. 1343 (May 1997) (Under Minnesota Metropolitan Land Planning Act, local planning must conform with Metropolitan plans). Edward J. Sullivan & Thomas G. Pelham, *Comprehensive Planning and Growth Management, 28 Urb. Law. 819 (Fall 1996)* (An overview of states' continuous efforts in their interpretation of the meaning of consistency or conformity with a comprehensive plan).

(n27)Footnote 628. Rabinovitz, *Rezoning Los Angeles: Readministration of Comprehensive Planning,* 49 Pub. Admin. Rev. 330 (1989).

(n28)Footnote 629. *See* Federation of Hillside & Canyon Ass'ns v. City of Los Angeles, Super. Ct. Case No. C326616, filed Dec. 13, 1984.

(n29)Footnote 630. *Elysian Heights Residents Ass'n v. City of Los Angeles, 227 Cal. Rptr. 226 (1986).* The appellate court found nothing in the state statutes to prohibit cities from issuing building permits under such circumstances. Nor could it find any sanctions for noncompliance with the consistency requirement in the statute. *See* Alperin, *AB283 --a Zoning Consistency Odyssey, 17 Sw. U. L. Rev. 1 (1987).*

S. Mark White, *State and Federal Planning Legislation and Manufactured Housing: New Opportunities for Affordable, Single-Family Shelter, 28 URB. LAW. 263 (Spring 1996)* (The comprehensive plan requirement has experienced a gradual evolution from its undefined status in the Standard Zoning Enabling Act to the elevation of the plan as the constitution for land-use regulations and land-use decisions. For purposes of analyzing the rise of the comprehensive plan as an antidote to exclusionary zoning, four major stages in the evolution of the plan should be examined: the recognition of the plan as a separate document, external consistency, the involvement of the state in the planning process, and internal consistency).

(n30)Footnote 631. Nicholas J. Garber & Lester A. Hoel, Traffic and Highway Engineering 247 (1988).

(n31)Footnote 632. *Schaeffer Land Trust v. San Jose City Council, 215 Cal. App. 3d 612, 263 Cal. Rptr. 813 (1989).*

(n32)Footnote 633. 21st *Century Dev. Co., LLC v. Watts, 958 S.W.2d 25 (Ky. App. 1997)* (the developer sought a change from a low density rural residential (RR) to a much higher density single family residential (RS) on a 21-acre parcel. The commission was limited to considering solely whether or not the proposal was in conformance with the comprehensive plan, which it was. The court ruled the planning commission erred in not considering the impact of the requested zoning change on traffic, drainage, and the like, and voided the ordinance adopting the zoning map amendment); *Richmarr Holly Hills, Inc. v. American PCS, L.P., 701 A.2d 879 (Md. App. 1997)* (Master plan recommendation may never be deemed more than guide in making ultimate decision whether to grant or deny individual or piecemeal petition for rezoning); *Haines v. City of Phoenix, 727 P.2d 339 (Ariz. 1986).*

(n33)Footnote 634. *Lesher Commun., Inc. v. City of Walnut Creek, 802 P.2d 317 (Cal. 1990). But see Daniels v. Van Voris, 660 N.Y.S.2d 758 (App. Div. 1997)* (When there is claimed violation of statute, requiring that zoning regulations conform to comprehensive plan, court must determine whether original comprehensive plan required amendment because of community's change and growth and whether amendment is calculated to benefit community as whole as opposed to benefiting individuals or group of individuals).

(n34)Footnote 635. *205 Cal. App. 3d 1201 (1988).*

(n35)Footnote 636. *834 F.2d 1488 (9th Cir. 1987).*

(n36)Footnote 637. Jerome G. Rose, *Planning and Dealing: Piecemeal Land Controls as a Problem of Local Legitimacy, 71 CAL. L. REV. 839, 880 (1973).*

(n37)Footnote 638. Elliott J. Feldman & Michael A. Goldberg, Land Rites and Wrongs: The Management,

Regulation, and Use of Land in Canada and the United States 279 (1987). Copyright © 1987 by Lincoln Institute of Land Policy. 113 Brattle Street, Cambridge, MA. 02138, 617-661-3016 or 800-LAND-USE ... Reprinted with permission.

(n38)Footnote 639. Cal. Gov't Code § 65580 *et seq.*

(n39)Footnote 640. Friends of "B" *Street v. City of Hayward, 142 Cal. Rptr. 50 (1977);* Newman, *Affordable Housing Still Suffers,* Cal. Plan. Dev. Rep. 1, 4 (1992).

(n40)Footnote 641. Newman, *supra* note 428.

(n41)Footnote 642. *See* Cal. Gov't Code § 65567; *Save El Toro Ass'n v. Days, 141 Cal. Rptr. 282 (1977);* George Lefcoe, *California's Land Planning Requirements: The Case for De-Regulation, 54 S. Cal. L. Rev. 447, 489 (1981).*

(n42)Footnote 643. Rider, *Planning as a Multicentric Process,* 57 Town Plan. Rev. 159, 161 (1986).

* Parts of this chapter have been adapted from George Lefcoe, Real Estate Transactions (Michie 1993).

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CHAPTER 85 OBTAINING LAND AND RIGHTS FOR DEVELOPMENT *

9-85 Thompson on Real Property, Thomas Editions § 85.17

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§ 85.17 Initiatives and Referenda.

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§ 85.17(a) Definitions; Variations.

The initiative process refers to the adoption of legislation by direct popular vote. The referendum is a process for rejecting, by direct vote, the ordinances a city council or statutes the state legislature had passed.

Some initiative laws give the legislative body first crack, and if it votes "yes," the initiative never gets to the ballot box. Some referenda are advisory only, others mandatory. The legislative body in some states may propose a referendum. An initiative may substitute for a referendum when the time for filing a referendum has passed or more signatures are required than for an initiative. If a legislative body approves a zone amendment some voters would like to reverse, they can mount an initiative campaign to repeal the amendment and restore the prior zoning.

§ 85.17(b) Purposes and Legality.

The dominant political forces behind initiatives and referenda shift over time. States at the turn of the century began adopting constitutional and statutory authorizations for initiative and referendum to "return government to the people," and to loosen the perceived domination of state legislatures by big business, special interest groups and their lobbyists. In California the Southern Pacific Railway was a target of populist reforms which included the initiative and referendum.

The tax revolt of the late 1970s got its start with an initiative -- California's Proposition 13. But its use a decade earlier bordered on the invidious. It was widely used to stop civil rights and fair housing legislation. Akron, Ohio passed a fair housing ordinance to bar racial discrimination in housing sales or rentals. When a citizen filed a lawsuit challenging the fair housing law, the council added a provision to its city charter requiring an advisory referendum on any future fair housing or anti-discrimination laws. The U.S. Supreme court struck down this charter provision because it embodied "an explicitly racial classification treating racial housing matters differently from other racial and housing matters." n644

Referenda with more subtle racist overtones darkened the legal landscape in the late 1960s-early 1970s but the U.S.

Supreme court, after *Hunter*, validated several because they touched on matters of race only tangentially. California voters added a provision to the state constitution requiring local voter approval of all public housing projects. Doubtless there were some voters who equated "public" housing with "minority" housing. That connection between racial or ethnic animus and the referendum wasn't close enough. The U.S. Supreme court in *James v. Valtierra* n645 upheld the public housing referendum requirement. The referendum applied to all low-rent public housing projects, not just ones occupied by a racial minority, and there was no support in the record for "any claim that a law seemingly neutral on its face is in fact aimed at a racial minority." n646

In later cases, litigants succeeded in setting aside local zoning decisions opposing subsidized housing projects as violations of the Fair Housing Act. n647 But civil rights activists lost in *City of Eastlake v. Forest City Enterprises, Inc.* n648 A developer sought to rezone eight acres from "light industrial" to multi-family housing for a subsidized housing project. As the rezoning application was moving from the planning commission, which voted yes, to the city council, the charter was amended by initiative to require 55% voter approval of all rezonings. The developer argued that delegating the zoning power to voters in this way violated procedural due process standards, since no standards existed to prevent the electorate from voting arbitrarily. The court decided against the developer:

> If respondent considers the referendum result itself to be unreasonable, the zoning restriction is open to challenge in state court, where the scope of the state remedy available to respondent would be determined as a matter of state law, as well as under Fourteenth Amendment standards. That being so, nothing more is required by the Constitution.
>
> * * *
>
> As a basic instrument of democratic government, the referendum process does not, in itself, violate the Due Process Clause of the Fourteenth Amendment when applied to a rezoning ordinance. n649

Starting in the early 1970s local initiatives and referenda were common weapons used by environmental advocates and neighborhood defenders in their battle against new development. There was little point in raising federal constitutional challenges after *Eastlake*, but numerous state law challenges succeeded. n650

"Perhaps the most conspicuous use of land-use initiatives in California has been to enact some form of local growth management." n651 Some of these measures took the form of prohibitions against new development until adequate public services or facilities were in place (usually transportation and traffic facilities).

These have run into judicial barriers when voters attempted to penalize developers for past shortfalls in public facilities instead of simply requiring developers to make a "fair share" contribution to prevent local traffic or school overcrowding from getting worse with new development. Some measures impose annual limits on new construction -- "caps" on the number of new houses or the volume of office space that could be built in any year in the locality. These have generally been upheld, although projects in the planning pipeline have sometimes won exemptions in court on "estoppel" grounds. Some initiatives require that no future general plan amendment, public works expenditures or development beyond a certain size or of a certain type (e.g., hotel) be allowed without a direct vote of the people. All of these have been or are being challenged in court. The initiative opponents have done best in court when they could find some basis for arguing that the state legislature had preempted voters from deciding the issue at stake, and had empowered only the local legislative body to enact laws on that subject. n652 The most important of these are the state's planning consistency rules.

Don Collin, general counsel of California's Building Industry Association, offers this analysis: "No growth" initiatives often fail because they are, in effect, zoning ordinances inconsistent with local general plans. Attempts to adopt general plans by initiative fail because the complexities imposed by state law on their enactment can't be met by an initiative process. The result is that while the *referendum* is very much alive in California land use law, the use of the *initiative* to

attain land use objectives is virtually preempted by state planning laws.

In many other states the zoning initiative and referendum are often held by courts to be subordinate and incompatible with the state's statutory processes for enacting land use laws.

> In *Kaiser Hawaii Kai Development Co. v. City and County of Honolulu [777 P. 2d 244 (Haw. 1989)],* the Hawaii Supreme court suggested that the deference modern California courts exhibit toward direct democracy might stem from the fact that the California State Constitution reserves the powers of initiative and referendum to the people. In Hawaii, by contrast, the powers of initiative and referendum, like the power to zone, are vested in the State. Proceeding on the notion that zoning and direct democracy are coequal powers, the *Kaiser* court held that the Zoning enabling Act was superior to the provision in Honolulu's Charter authorizing initiatives because "[z]oning by initiative is inconsistent with the goal of long-range comprehensive planning, and '[i]t seems unlikely that the Legislature intended the possible frustration of comprehensive zoning through the initiative process.'" n653

FOOTNOTES:

(n1)Footnote 644. *Hunter v. Erickson, 393 U.S. 385 (1969).*

(n2)Footnote 645. *402 U.S. 137 (1971).*

(n3)Footnote 646. *Id. at 141.*

(n4)Footnote 647. Daniel R. Mandelker & Roger A. Cunningham, Planning and Control of Land Development 496 (3d ed. 1979).

(n5)Footnote 648. *426 U.S. 668 (1976).*

(n6)Footnote 649. *Id. at 677.*

(n7)Footnote 650. *See, e.g., Township of Sparta v. Spillane, 312 A.2d 154 (N.J. 1973).*

(n8)Footnote 651. *See* Michael P. Durkee, Land Use Initiatives and Referenda in California 135 (1990).

(n9)Footnote 652. *L.I.F.E. Comm. v. City of Lodi, 262 Cal. Rptr. 166 (1989)* (moratorium on development of land adjacent to city preempted by state law governing procedures for annexation); *Patterson v. County of Telehama, 235 Cal. Rptr. 867 (1987)* (ordinance limiting county's use of zoning power conflicted with state requirements for a general plan); *Marblehead v. San Clemente, 226 Cal. App. 3d 1504 (1991)* (voters can't amend general plan and zoning by initiatives); *Lesher Communications v. Walnut Creek, 52 Cal. 3d 531 (1990)* (voter initiative linking development for traffic conditions held invalid as inconsistent with the city general plan).

(n10)Footnote 653. David G. Andersen, Comment, *Urban Blight Meets Municipal Manifest Destiny: Zoning at the Ballot Box, the Regional Welfare, and Transferable Development Rights, 85 Nw. U. L. Rev. 519, 530 (1991).*

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CHAPTER 85 OBTAINING LAND AND RIGHTS FOR DEVELOPMENT *

9-85 Thompson on Real Property, Thomas Editions § 85.18

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§ 85.18 Annexation.n654

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§ 85.18(a) The Competing Interests.

Cities are carved out of unincorporated areas called counties, towns, or townships, depending on the state. n655

In any annexation there are at least two and possibly three or four loci of interests. The annexing city always has a stake in the outcome. So does the area to be annexed, its residents and landowners. Landowner interests may conflict with resident interests since owners of undeveloped acreage prefer more growth while residents often prefer less growth. Sometimes another city nearby would prefer the annexed area to become part of its jurisdiction. Sometimes the county government would prefer the area to remain unincorporated, and continue under county rule. People in areas adjacent to the annexed area may have some interest in it because its moves may affect their options. For instance, the annexed territory may foreclose the feasibility of the entire area becoming one large new city. Or the adjacent neighbors may become isolated from existing county facilities as the unincorporated territory around it shrinks.

§ 85.18(b) Who Decides?

Annexation methods and statutes vary by state, and in some states home rules cities may have their own independent annexing authority. n656

The annexing city, the area to be annexed, or the county may be given the lead role or may share authority over annexation decisions. n657 Although voting is not a constitutional requirement, n658 by statute a voter approval may be required in the annexing city, n659 the area to be annexed, n660 both n661 or neither. n662 In a few states the state legislature itself by special act may effect annexations. n663 Most states offer more than one path to annexation, and in some the paths depend on how the annexing city is classified under state law, e.g., home rule, charter, or general law city.

The role of courts also varies by state. Judicial review and approval are required in Virginia n664 and Missouri. n665 Virginia's annexation system rests on final confirmation by an annexation court, empowered to oversee the process in order to serve "the best interests of the State in promoting strong and viable units of government." n666 This system

evolved because some wholE.S.A.le annexations were threatening the fiscal viability of county governments.

In other states judicial review is optional but available on petition. Courts in many states apply a "rule of reason" standard of review which is based on whether the annexed area is reasonable, necessary or convenient to the exercise of city government. Courts under this standard compare the benefits and detriments to both the municipality and the area to be annexed. n667

§ 85.18(c) Implications for Developers.

Since there isn't one agreed approach to land use regulation among jurisdictions, developers naturally consider forum shopping. They look for friendlier jurisdictions when they aren't happy with the one in which they find their undeveloped site.

Sometimes developer efforts are frustrated by the requirement that cities may only annex "contiguous" territory. n668 If the developer's site doesn't actually border on the city in which she would rather be, she may have to buy a strip of land that will connect to it or persuade the landowners separating her from contiguity to join her petition for annexation.

Litigation challenging development-motivated annexations usually, but not always, fails. As a Wisconsin court put it: "It cannot be doubted that a purpose to develop one's land is legitimate, and this court has stated that property owners may seek annexation in pursuit of their own perceived best interests." n669

The annexing city will almost always have its own reasons for wanting new development -- a need for new housing, industrial expansion, or an enlarged tax base. So courts will be able to cite both private and public interests in upholding development-oriented annexations.

In one of the few cases striking down such a move, a New York court observed that "the sole reason" for the annexation was to avoid the restrictive effect of the Town Zoning ordinance. n670 It is difficult to believe litigators defending an annexation would ever allow a record to be closed without their having shown reasons for the annexation other than the developer's desire to escape restrictive zoning.

§ 85.18(d) Annexation Agreements.

> *Annexation agreements*. Many annexations occur through annexation agreements between landowners and municipalities. They often are used when a developer wishes to develop land that requires city services or, as in the principal case, when the landowner needs a rezoning from the annexing municipality. The agreement usually provides that the developer will not protest annexation in return for the municipality's promise to provide necessary services and, if necessary to rezone the developer's land. The agreement may also provide for fees and site improvements to be provided by the developer. n671

These agreements raise the same constitutional issues posed by development agreements: can today's elected officials bind future elected officials to the zoning or other land use approvals promised in the annexation agreement? Suppose the Lancaster city council promises Larwin it will zone its site for 2,500 houses. But between the time of the agreement and Larwin's completed filing of a subdivision map, a newly elected council -- more skeptical of growth than their predecessors -- downzones Larwin's 880-acre site to 220 units. Must the new council honor the annexation agreement? Courts turn to the language of state-enabling statutes but state statutes seldom answer this question directly.

§ 85.18(e) Annexation Highlights Planning Anomalies: The Larwin Example.

Larwin succeeded in annexing its site from the County of Los Angeles to the City of Lancaster. The Lancaster general plan promised to accommodate significantly higher densities than did the county's. Los Angeles County's general plan

called for 2-acre minimum lot sizes. Larwin calculated it needed 3 units per acre, about 2,500 houses, to support its infrastructure costs (water supply, new roads, sewer services, parks, and schools).

Larwin wanted to spread the cost across a sufficiently large number of houses to keep final sales prices affordable to first-time buyers. Only the larger number of units could accomplish this. The higher density was acceptable to the City of Lancaster.

Recalling our earlier review of California's stringent "general plan consistency" rules, you may find this curious. How come the same site that in the general plan for Los Angeles county wasn't suitable for more than 440 homes could magically transform itself into a site well adapted for 2,500 houses -- just because of an annexation? The site didn't move, just some artificial planning boundaries?

The answer lies in a bit of local legal history. Los Angeles County had been careless in promulgating an earlier general plan. The open space element of that plan promised low density development. The county's zoning ordinances and subdivision rules facilitated development consistent with market demand. Yet the county's population projection figures were based on the relatively moderate growth rates the county experienced in the 1960s and 1970s. (The population projections of the county's 1980 plan proved totally wrong as the county experienced a population burst. Developers knew it from sales figures. County planners couldn't update their analyses fast enough because of the procedural constraints on the planning process and the millions a new plan costs.)

A "public interest" law firm successfully forced the county to downzone in order to bring its earlier planning projections into line with its zoning. A result of the downzoning was the two-acre minimum lot sizes Larwin encountered at its site. The "public interest" law firm collected a big legal fee for this lawsuit under state law for serving the vital public interest in sound planning.

Planning goals in California are measured jurisdiction by jurisdiction. Lancaster hadn't been sued for any lack of consistency among the various elements of its general plan. (A suit against Lancaster, a smallish city, wouldn't have been very profitable since the "public interest" varies proportionately with the size of the jurisdiction, the amount of lawyering effort involved, and the nature of the results obtained.) Anyway, Lancaster's growth rates were considerably higher than the county's. It started from a lower population base, and was located in the path of rapid growth. The county had to "average out" its projections in fast growing areas with slower growth parts of the county that had been fully built out years ago.

By annexing to the City of Lancaster, Larwin was able to overcome the slow growth bias which California's general plan consistency rules had foisted upon the County of Los Angeles.

FOOTNOTES:

(n1)Footnote 654. There is a secession movement springing up around the country as well. *See* Richard Briffaner, *Voting Rights, Home Rule, and Metropolitan Governance: The Secession of Staten Island as a Case Study in the Dilemmas of Local Self-Determination, 92 Colum. L. Rev. 775 (1992).*

(n2)Footnote 655. From 1980 to 1986, "municipalities with a population of 5,000 or more annexed 4,530 square miles with a population of 1,455,00). Illinois had the largest number of annexations, followed by California, Florida, and Texas." Daniel R. Mandelker et al., State and Local Government in a Federal System 45 (3d ed. 1990) (quoting Miller, *Municipal Annexation and Boundary Change,* The Municipal Year Book 1988, at 59, 60 (Int'l City Management Ass'n 1988)). *See also* A. Mushkatel, Citizen Response to Annexation 15, 16 (1975) (Ph.D. thesis on file at University of Oregon Library).

(n3)Footnote 656. *See* Acir, State and Local Roles in the Federal System 360-83 (1982).

(n4)Footnote 657. *Id.* at 370-83.

(n5)Footnote 658. *See, e.g., Lockport v. Citizens for Community Action, 430 U.S. 259 (1977)* (applying a "rational basis" test in upholding New York law prohibiting implementation of a county charter unless it was approved by a majority of both the city and non-city residents of a county). *See also* Board of Supvrs. v. Sacramento LAFCO, No. S023805, 92 Daily Journal DAR 15115 (Nov. 11, 1992) (upholding as rational California annexation law under which voters in the nearby incorporated area have no say in the annexation even though it deprives the unincorporated area of significant property and sales tax revenues).

(n6)Footnote 659. Iowa.

(n7)Footnote 660. Alabama, Alaska, California, Georgia, Louisiana, Minnesota, Montana, New Mexico, Oklahoma, Texas, Washington, and Wisconsin.

(n8)Footnote 661. Arkansas, Florida, Illinois, Michigan, New Jersey, Oregon, South Carolina, Tennessee, and West Virginia.

(n9)Footnote 662. Arizona, Colorado, Connecticut, Delaware, Hawaii, Idaho, Indiana, Kansas, Kentucky, Maine, Maryland, Massachusetts, Mississippi, Missouri, Nebraska, Nevada, New Hampshire, North Carolina, North Dakota, Pennsylvania, Rhode Island, South Dakota, Utah, Vermont, Virginia, and Wyoming.

(n10)Footnote 663. Connecticut, Delaware, Maine, Massachusetts, New Hampshire, Pennsylvania, Rhode Island, and Virginia.

(n11)Footnote 664. Va. Code Ann. § 15.1-1401.

(n12)Footnote 665. *McDonnell Aircraft Corp. v. City of Berkeley, Mo., 367 S.W.2d 498 (1963).*

(n13)Footnote 666. Va. Code Ann. § 15.1-1041(b).

(n14)Footnote 667. *Kansas City's Ry. v. City of Shreveport, 354 So. 2d 1362 (La. 1978).*

Every California annexation has to be ratified by a Local Area Formation Commission (LAFCO). LAFCO is an agency required by state law to be created in each county to oversee changes in jurisdiction boundaries within the county. CAL. GOV'T CODE § 56425 et seq.

See also Cal. Gov't Code §§ 57075, 57076, 1985 Cal. Stat. ch. 541-53, at 1990-91, *cited in L.I.F.E. Comm. v. City of Lodi, 213 Cal. App. 3d 1139 (1989).*

City of Lake Winnebago v. Gosewisch, 932 S.W.2d 840 (Mo. App. 1996) (Factors to be considered in determining whether annexation decision was reasonable include need for residential or industrial sites within proposed area, city's inability to meet needs without expansion, consideration only of reasonably foreseeable needs, past growth showing future necessity, extent that past growth has caused city to spill over into proposed area, beneficial effect of uniform application of municipal zoning ordinances in city and annexed area, need for or beneficial effect of uniform application and enforcement of municipal building, plumbing, and electrical codes, need for or beneficial effect of extending police protection to annexed area, need for or beneficial effect of uniform application of ordinances pertaining to health, need for and ability of city to extend essential municipal services into annexed area, enhancement in value by reason of adaptability of land proposed to be annexed for prospective city uses, and regularity of boundaries).

Matter of Enlargement and Extension of the Mun. Boundaries of the City of Jackson, 691 So. 2d 978 (Miss. 1997) (Twelve indicia of reasonableness of annexation are: (1) city's need to expand, (2) whether area sought to be annexed is reasonably within path of growth of city, (3) potential health hazards from sewage and waste disposal in annexed areas,

(4) city's financial ability to make improvements and furnish city services promised, (5) need for zoning and overall planning in areas, (6) need for city'services in areas sought to be annexed, (7) whether there are natural barriers between city and proposed annexation area, (8) past performance and time element involved in city's provision of services to its present residents, (9) economic or other impact of annexation upon those who live in or own property in proposed annexation area, (10) impact of annexation upon voting strength of protected minority groups, (11) whether property owners and other inhabitants of areas sought to be annexed have in past, and in foreseeable future unless annexed will, because of their reasonable proximity to corporate limits of city, enjoy economic and social benefits of city without paying their fair share of taxes, and (12) any other factors that may suggest reasonableness).

(n15)Footnote 668. *Missouri Rural Elec. Co-op. v. City of Hannibal, 938 S.W.2d 903 (Mo. 1997)* (annexation statute does not authorize annexation of land that is not contiguous to annexing authority); *Burton v. City of Belle Glade, 966 F. Supp. 1178 (S.D. Fla. 1997)* (Housing project that adjoined road which city had previously annexed but did not touch any other property within limits of city was not "contiguous" to city for purposes of Florida statute permitting municipalities to annex only contiguous property and prohibiting corridor annexations); *Town of Valdese v. Burke, Inc., 482 S.E.2d 24 (N.C. App. 1997)* (Contiguity requirement in statute allowing municipality to annex areas contiguous to its boundaries is violated in situations where an intervening right-of-way between municipality's boundary and property sought to be annexed has already been annexed into another municipality).

But see City of Fort Oglethorpe v. Boger, 480 S.E.2d 186 (Ga. 1997) (Statute which grants to municipalities the authority to annex contiguous property does not limit power of General Assembly to annex property which is not contiguous to a municipality).

(n16)Footnote 669. *Town of Pleasant Prairie v. City of Kenosha, 249 N.W.2d 581 (Wis. 1977).*

(n17)Footnote 670. *Matter of Enlargement and Extension of the Mun. Boundaries of the City of Jackson, 691 So. 2d 978 (Miss. 1997); Town of Sellersburg v. Proposed Annexation of Certain Property Located in Clark County, 677 N.E.2d 608 (Ind. App. 1997)* (town?s fiscal plan and annexation policy were not sufficiently specific to satisfy statutory requirements that town demonstrate that services provided to annexed areas would be equivalent to those provided to areas within town with similar topography, land use, and population density); *Town of Superior v. Midcities Co., 933 P.2d 596 (Colo. 1997)* (that town's annexation of landowner's property without annexation agreement or without first obtaining landowner's approval of annexation violated Annexation Act); *Village of Skaneateles v. Town of Skaneateles, 496 N.Y.S.2d 185 (1985).*

(n18)Footnote 671. Daniel R. Mandelker et al., State and Local Government in a Federal System 68 (3d ed. 1990). Copyright © 1990 by The Michie Company. Reprinted with permission.

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CHAPTER 85 OBTAINING LAND AND RIGHTS FOR DEVELOPMENT *

9-85 Thompson on Real Property, Thomas Editions § 85.19

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§ 85.19 State-Mandated Environmental Impact Reports for Local Land Use Decisions.

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§ 85.19(a) The Content of State Environmental Laws Affecting Approvals of Private Development Projects.

In a number of states, California and New York among them, burdens resulting from environmental assessment procedures are among the most significant that real estate developers are required to shoulder.

These state requirements resulted when states inspired by the National Environmental Quality Act began to enact "baby" NEPAs. The operative core of NEPA was the requirement that every federal agency, before taking any action that could significantly affect the environment, prepare a detailed environmental assessment and consider it before making any decision. n672 The assumption of NEPA, in the words of the U.S. Supreme court:

> Simply by focusing the agency's attention on the environmental consequences of a proposed project, NEPA ensures that important effects will not be overlooked or underestimated only to be discovered after resources have been committed... n673

Twenty-six states have adopted their own versions of NEPA. n674 Like NEPA, state environmental laws are also procedural in the sense that most of them require no more than that state and local government officials, before taking any action that could affect the environment significantly, prepare and consider a detailed written assessment of those impacts. n675

The state progeny of NEPA that affect local land use decisions the most are those that apply not just to state-sponsored or state-funded projects, but to all projects that require a permit from any state or local government. In these states any property owner who requests a general plan amendment, zone change, or subdivision map act approval may end up having to fund an extensive environmental assessment of her proposed project. n676 These laws apply to "discretionary" not "ministerial" acts, a distinction which invites litigation over whether such a government action as the granting of a building permit is "discretionary" or "ministerial." n677

Property developers are mercifully excluded from state versions of NEPA that define "actions" or projects as those actually built or funded by public agencies. n678

Some state laws define the relevant "environment" as the physical or natural one. Under these laws the boundaries of the environmental assessment are limited to impacts on air and water quality, noise, animals, flora and fauna, scenic and historic resources. n679 Other state laws define environment broadly to include socioeconomic factors: "existing patters of population concentration, distribution, or growth, and existing community or neighborhood character." n680 The distinction between laws which restrict the scope of environmental inquiry to the purely physical and those which authorize a holistic inquiry into all potential socioeconomic impacts is sometimes obscured by administrative regulation. For example, CEQA is supposed to be about "physical" impacts only. The California law, at first glance, seems clear on this point. "Significant effect on the environment" means an "adverse change in any of the physical conditions within the area affected by the project including land, air, water, minerals, flora, fauna, ambient noise, and objects of historic or aesthetic significance." But the statute bridges the physical and socioeconomic: "an economic or social change related to a physical change may be considered in determining whether the physical change is significant." n681 The CEQA guidelines include, in a long list of "physical" environmental impacts, projects which "displace a large number of people."

Thus, a developer seeking to demolish a 795-unit, rent-controlled apartment complex to clear the site for 706 market-rate condos and 144 new low-income rental units on the site, was required to describe the displacement effects on rent-controlled tenants, and mitigate those impacts, by offering replacement units on site or relocating the tenants to nearby "affordable" rent-controlled units. n682 This requirement was imposed even though California's environmental law is only supposed to apply to "physical" -- not "socioeconomic" impacts.

Under most state laws, if a "project," as defined by law, could significantly affect the environment, then the public decision-maker is required to order an environmental impact assessment before making its final decision on the project. The decision-maker cannot "waive" the environmental reporting requirement. Under North Carolina's law, the governing body has the discretion by ordinance to require detailed environmental statements. n683 One consequence is that a local government's decision in North Carolina to do without an EIR can't be successfully second-guessed in court.

Once an environmental assessment reveals that a project or action is bound to spew out negative impacts, does that mean the government decision-maker cannot approve the project? Not under NEPA. n684 And not under most of the state versions. n685 But some state laws prohibit the granting of permits "likely to cause pollution, impairment, or destruction of the air, water, land or other natural resources located within the state," despite economic considerations. n686

In California, local officials have three choices when confronted with a development project request that has potential adverse environmental impacts. They can vote "no" on the zoning, subdivision, or plan amendment because of the negative impacts. Indeed, the state subdivision map act requires that in order to approve a subdivision the local agency must find (and support its findings with facts) that the subdivision is not going to cause significant environmental damage or substantially injure fish and wildlife or their habitats.

A second choice is to impose all feasible conditions on the granting of the zone change, subdivision approval, or plan amendment in order to mitigate the environmental damage. For instance, scheduled road improvements might reduce traffic congestion below thresholds the local government set.

A third option is to approve the project despite its bad environmental results. To take this third route, public officials must find that "specific economic, social or other considerations made infeasible the mitigation measures or project alternatives identified in the environmental impact report." n687 These findings can't be conclusory. They must be supported with specific facts recited and proved in the public record.

Many cautious California land use lawyers advise their clients -- whether developers or local agencies -- always to adopt a finding of "overriding economic or social considerations" to insulate the agency's decision from attack on

grounds that the selected mitigation measures are inadequate to the task. Legally, this is a shrewd move. Politically, it is a big pill for elected officials to swallow since the "overriding considerations" resolution is a tacit admission that the local government had doubts about whether its mitigation measures are truly sufficient to avoid environmental degradation.

Generally, any affected citizen has the right under federal and state environmental quality laws to challenge the government's compliance. The plaintiff must demonstrate some type of injury (aesthetic would be sufficient) that could result from the construction of the project being challenged. n688 The Supreme court has recently held that unless a statute specifically allows broad regulations to be directly reviewed, litigants must be prepared to show that some concrete action will harm or threaten to harm the litigant directly at the site where the action will take place. n689

There are a few limits to the liberal standing rules under state environmental laws. For instance, one New York court dismissed the claim of an oil refinery owner who wanted to challenge a shopping center project nearby. The oil company was apprehensive that redeveloping the area for shopping center uses would later preclude oil refineries. This, ruled the court, was an economic concern, not an environmental one, for which the plaintiff lacked standing under New York's environmental laws. n690 But decisions denying standing under state environmental laws are rare even when business competitors sue. n691

The Supreme Judicial court of Massachusetts has interpreted that state's environmental law to preclude *all* private causes of action. n692 The court's policy justification: litigation delays resulting from environmental litigation are potentially unfair and impose great social and economic losses.

Environmental lawsuits can result in projects costing more or being relocated to areas where residents are less able to fight them. Neither of these results is necessarily benign environmentally. Even a losing environmental lawsuit eviscerates a project. But there have been times when slow growth advocates shot themselves in the foot by challenging and delaying projects. When property values and demand were on the rise in the mid-1980s many developers whose projects were temporarily stopped by environmental lawsuits eventually succeeded in procuring permits later at densities greater than those they had originally obtained. Most state court challenges to local land use decisions based on state environmental laws are procedural. The procedural emphasis is understandable and perhaps inevitable.

> [i]t would be inconsistent with NEPA's reliance on procedural mechanisms -- as opposed to substantive, resulting-based standards -- to demand the presence of a fully developed plan that will mitigate environmental harm before an agency can act. n693

Under most state environmental laws decision-makers are free to make whatever decision they wish, as long as they have had an opportunity to review a study detailing the environmental consequences of their actions.

Typically, suits are filed challenging the sufficiency of the data on which negative declarations are issued, or alleging the insufficiency of the environmental report itself, its failure to address all the important environmental factors, to consider alternative sites or alternatives to the project proposed. Since many large-scale projects are revised during development and construction, litigants sometimes object when supplemental environmental reports are not prepared and evaluated before local government officials approve changes in the original development.

The emphasis on procedure is easier for lawyers, business people and judges to comprehend since few of them are expert in the underlying disciplines that inform the content of good environmental reports -- such as biology, geology, chemistry, or transportation engineering. The procedural emphasis satisfies most litigants, too, since, as Professor Sterk observes, they "do not want more extensive consideration of environmental issues; what they want is a different decision." n694 Recognizing this, some courts have grown impatient with the procedural haggling which state environmental law seems to invite. Here is how California courts have put it:

> [t]he purpose of CEQA is not to generate paper, but to compel government at all levels to make decisions with environmental consequences in mind. CEQA does not, indeed cannot, guarantee that those decisions will always be those which favor environmental considerations. n695

The state of Michigan, uniquely, puts the environmental ball directly into play in court. n696 Outside Michigan the standard of judicial review is generally whether there is substantial evidence in the record to support the local agency's determination. Under the Michigan statute the court must decide whether a project threatens environmental harm based on the weight of the evidence. n697

The standard of review can make a big difference. The 1976 amendments to the California Environmental Quality Act (CEQA) require local agencies to impose all *feasible* mitigation. Feasible is defined by statute as "capable of being accomplished in a successful manner." n698 A student editor points out:

> Agencies committed to a development plan might make environmentally superior alternatives seem infeasible by carefully defining the goals of proposed projects in such a way that alternatives are incapable of successfully achieving those goals. n699

The reviewing court, under the substantial evidence test, would presumably be stuck with the agency's articulation of its goals. Using an "independent judgment" review like the one implicit in the Michigan statute, the court could decide whether the agency's formulation of its goals is persuasive.

§ 85.19(b) Environmental Assessment Procedures.

In most states the environmental review process for private developments begins when the applicant applies for a zone change or other public land use approval and the agency reviewing the application must define the project with the applicant's help.

The project description includes the precise location and boundaries shown on a map, a statement of the proponent's objectives, the technical, economic and environmental characteristics of the proposal, and the intended user of any environmental impact report -- namely, the government decision makers who need the information. A lead agency is designated to assess, at the earliest possible time in the planning process, whether the state environmental law applies to that project. Projects with impacts below some threshold are usually exempted by statute, regulation or administrative procedure.

The California Environmental Quality Act (CEQA), for instance, applies to "discretionary projects proposed to be carried out or approved by private agencies." n700 Any project that may have a significant environmental impact must proceed to the next step in the review process. In California, land use regulations often require case-by-case permitting of large-scale private development so that nearly every major private project is subject to CEQA.

While procedures and nomenclature vary from state to state, certain steps are common in the environmental impact assessment game.

> -- Below some threshold very small projects are usually exempted by statute, regulation or administrative procedure.
>
> -- The proponents of projects above that threshold need to fill out an environmental assessment form (the New York lingo) or an initial study (the California phrase). Here is an excerpt from one: n701

	Yes	May be	No
Air. Will the proposal result in:			

a. Substantial air emissions or deterioration of ambient air quality?	___	___	___
	___	___	___
	___	___	___
	___	___	___
	___	___	___
	___	___	___
	_	_	_
b. The creation of objectionable odors?	___	___	___
	___	___	___
	___	___	___
	___	___	___
	___	___	___
	___	___	___
	_	_	_
c. Alteration of air movement, moisture, or temperature, or any change in climate, either locally or regionally?	___	___	___
	___	___	___
	___	___	___
	___	___	___
	___	___	___
	___	___	___
	_	_	_
Land Use. Will the proposal result in a substantial alteration of the present or planned land use of an area?	___	___	___
	___	___	___
	___	___	___
	___	___	___
	___	___	___
	___	___	___
	_	_	_
Population. Will the proposal alter the location, distribution, density, or growth rate of the human population of an area?	___	___	___
	___	___	___
	___	___	___
	___	___	___
	___	___	___
	___	___	___
	_	_	_

-- If the form or study shows no significant impacts, the agency charged with tracking the process can issue a "negative declaration," a statement that the project threatens no significant environmental effects. The "neg dec" can sometimes be achieved by the developer agreeing to mitigation conditions which reduce the project's impacts below specified threshold levels. It is tempting for developers and local agencies eager to rush through a project to go for a "neg dec" even when there are big unmitigated impacts in hopes they will not get caught before the statute of limitations for challenge expires. But challenges to "neg decs" are among the most frequent and successful of environmental lawsuits.

An agency cannot support a decision to adopt a negative declaration by relying solely on a naked checklist that does not show the basis for disputed findings that a project will have no significant impacts. Argument, speculation, unsubstantiated opinion, and narrative evidence which is clearly inaccurate or erroneous does not constitute substantial evidence.

The requirement for substantial evidence was originated by courts and reflects the need for a reviewable record showing the factual basis for the agency's decision when a negative declaration is challenged. Some explanation needs to accompany the bare-bones checklist especially when an item checked "no" is counter-intuitive or likely to be disputed. Shortcomings in an initial study may be compensated by detailed findings adopted by the agency to accompany the "neg dec," as long as the record shows a factual basis (substantial evidence) for the agency's decision.

A "neg dec" can sometimes be achieved by the developer agreeing to mitigation conditions which reduce the project's impacts below specified threshold levels, to levels of insignificance. The mitigation measures must be clear, effective and realizable. About 40% of all "neg decs" in California are mitigated "neg decs."

One reason there is so much environmental litigation in California is that the state law requires more than substantial evidence. Substantial evidence is necessary but not sufficient to support a "neg dec." California law favors the preparation of full environmental studies by providing that an environmental impact report (EIR) is required "if there is a 'fair argument'" that there "may" be significant environmental impacts. The usual administrative law standard for judicial review of agency decisions is less rigorous. Under administrative law principles, agencies are upheld if a preponderance of the evidence supports their decision. But a "neg dec" decision is vulnerable in California if there is a "fair argument" the lead agency was wrong in issuing a "neg dec" -- no matter how much evidence the agency considered in reaching its "neg dec" decision. By contrast, in the state of Washington, projects and other major actions escape further environmental review unless the initial assessment shows "a *probable* significant, adverse environmental impact." n702

A 1990 survey of planners in California cities and counties showed that approximately three-quarters of all initial studies led to negative declarations or mitigated negative declarations. Only one initial study in four led to an E.I.R. n703

-- If the form or study shows significant impacts, the project developer and the public agency staff meet to scope out the issues that will require special attention in the environmental report. n704

-- Based on that scoping session, the firm or individual charged with preparing the report puts together a draft environmental impact statement (EIS in New York) or environmental report (EIR in California).

-- The public agency reviews that draft to see if it meets basic agency standards.

-- If the agency is satisfied, the draft EIR or EIS is circulated for public comment. It is also sent to all other public agencies including other federal or state authorities with potential environmental interests in the proposed project.

-- A public hearing may (but need not) be held so that government officials can take testimony on the draft report.

-- A final environmental report will be prepared which takes into account the public comments. Usually the final report is the draft plus each comment and the preparer or agency's response to it. The final EIR must address in detail each cogent objection.

-- The final report is circulated for a few days for last-minute comments and review.

-- The final EIR must be adopted by the government agency charged with making the discretionary decision *before* acting on the petition for which the EIR was prepared in the first place. The function of the report, after all, is to give decision-makers information about the environmental consequences of their actions. If they act before adopting the final EIR, they act without the benefit of the key document mandated by the environmental law.

§ 85.19(c) The Contents of the Environmental Report.

§ 85.19(c)(1) Generally.

One thing environmental reports almost always have in common is that they are bulky, filled with "boilerplate," the redundant and the obvious. n705 A typical Manhattan redevelopment project will detail the extent to which local area residents may be displaced, and may, reports Professor Sterk, include six pages outlining all of New York's rent regulations designed to keep existing residents in place despite "gentrification." These are laws any elected New York official knows all too well. In the years when this author was on the Los Angeles County planning commission, a typical Los Angeles county environmental report would start with a detailed analysis of the southern California climate ("Mediterranean," it was called).

Professor Sterk explains well that no one involved in the process of EIS preparation has any incentive for brevity. The lawyers and environmental consultants are earning fees usually based on the volume of their "input," not the usefulness of their work. The public bureaucrats overseeing the process are not paying for the report, the developer is, and public officials want to be sure every base is covered to avoid the embarrassment of having their decision remanded back to them by a reviewing court.

Many lawyers believe that hefty EISs are easier to defend in court than thin ones. They believe the bigger the report, the less likely the judge is to read it or conclude that the decision-makers did not have the material necessary to take into account all the potential environmental angles. n706

California by statute actually prescribes some of the headings that each EIR must address:

> (a) The significant environmental effects of the proposed project.
>
> (b) Any significant environmental effects which cannot be avoided if the project is implemented.
>
> (c) Mitigation measures proposed to minimize the significant environmental effects, including, but not limited to, measures to reduce wasteful, inefficient, and unnecessary consumption of energy.
>
> (d) Alternatives to the proposed project.
>
> (e) The relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity.
>
> (f) Any significant irreversible environmental changes that would be involved if the proposed project were not implemented.
>
> (g) The growth-inducing impact of the proposed project. The report shall also contain a statement briefly indicating the reasons for determining that various effects of a project are not significant and consequently have not been discussed in detail in the environmental impact report. For purposes of this section, any significant effect on the environment shall be limited to substantial, or potentially substantial, adverse changes in physical conditions which exist within the area. n707

§ 85.19(c)(2) Regional Impacts Must Be Evaluated.

State-mandated environmental reviews were quickly held by courts to require local governments to take a bigger view of the impacts of their land-use decisions. Local governments could no longer stop their analysis of impacts at their own boundaries. "Serious detrimental effects" on areas outside the locality had to be addressed. In one landmark case, the

Supreme court of the State of Washington declared a rezoning of farmland for a regional shopping center to be "arbitrary and capricious," despite the fact that a majority of voters in the city supported the proposal in an advisory ballot proposition. n708

The City of Bothell had entered a zoning agreement with the developer of a regional shopping center requiring mitigation of some impacts, but the agreement only required mitigation of impacts within the city. The Washington Supreme court cited the State Environmental Policy Act -- "that each person has a fundamental and inalienable right to a healthful environment" -- to justify protecting the welfare of all the people living in the area, not just those residing within Bothell. The court insisted that mitigation be as wide-reaching as the environmental impacts themselves. The court listed factors the city's impact statement had failed to address:

> First, agricultural and low density residential uses of land around the center could not be maintained. Pressures for secondary business growth would be severe. Not only would desirable agricultural land be lost, but intensified commercial uses would require substantial investments in highways, sewers, and other services and utilities. The economic and aesthetic values of the essentially rural character of the Valley would be lost. Second, highway construction requiring millions of dollars of local, state and federal funds would be necessary. Serious increased traffic congestion would create a potentially serious air pollution problem in the Valley. It would also, of course, add substantially to the aesthetic loss. Third, new alignment of the North creek to accommodate the shopping center, together with anticipated increases in runoff, might create a danger of flooding. Finally, the unstable peat soil on which the center is to be built may settle unevenly, with consequences which have not yet been investigated. n709

§ 85.19(d) Some Anomalies in Environmental Reporting.

NEPA and state environmental reports in New York and California are supposed to evidence a good faith search for options or alternatives less environmentally intrusive than the project proposed. n710 These usually include "no project," and sometimes the same project but at reduced densities. n711 Since the report is prepared after the proponent has selected a site and designed a project, the alternative analysis comes long after the developer has committed itself to its proposal.

In many situations, alternative sites must also be considered. "The private developer may own or control feasible alternative sites, may have the ability to purchase or lease such properties, or may otherwise have access to suitable alternatives." n712

Anticipating an "alternative site analysis," cautious developers, even as they look at sites before deciding which to buy, check out sites for environmental problems. By keeping a good record of the features of rejected sites, the developer can supply raw material which consultants may later be able to shape into an "alternate site analysis" in the EIR.

Professor Sterk points out how ludicrous this alternatives analysis can be. The developer is usually paying for the environmental report and has no incentive to broadcast better options than the one being proposed. "As a result, the pages devoted to consideration of alternative uses are often significant only for the waste of resources used in their production." n713

Since fewer environmental impacts are always presumed better, and smaller projects offer the promise of reduced traffic and air pollution, environmental reporting methodology favors lower density development. The environmental advantages are often illusory because most environmental analysis takes place case-by-case, not on a cumulative, regional basis.

One-acre home sites generate less traffic and pollution than quarter-acre sites only if you focus on a particular housing tract, not if you presume that all new housing throughout the region will be developed at one-acre minimum lot sizes.

n714 The California legislature has expressly disapproved the blanket use of lower densities in *housing* developments as an environmental quick fix. n715 There are two possible reasons. (1) Reductions of housing density -- larger minimum lot sizes -- tend to make housing more expensive, less affordable. (2) If all housing were developed at low densities, houses would probably end up farther away from job centers. This would lead to longer commuting to work and densities too low to support efficient public transit. n716

EIRs do not always deal with "second order" events because they are speculative, even if undeniable, possibilities. As sophisticated developers gain experience with environmental report methodologies they are beginning to insist that regional and not just local traffic and air quality impacts be the focus of their studies. New development may generate pollution at its site but could also result in net commuting benefits by bringing residents closer to shopping and job opportunities.

To some extent environmental reporting does mandate that secondary consequences be considered. Federal regulations, for instance, mandate consideration of "indirect effects," defined as those "caused by the action and are later in time or farther removed in distance, but are still reasonably foreseeable. Indirect effects may include *growth-inducing effects* and other effects related to *induced changes in the pattern of land use, population density, or growth rate*, and related effect on air and water and other natural systems, including ecosystems. 40 C.F.R. § 1508.08.

Agencies need not consider highly speculative or indefinite impacts. n717 The First Circuit offered some interpretive guidelines:

> Whether a particular set of impacts is definite enough to take into account, or too speculative to warrant consideration, reflects several different factors. With what confidence can one say that the impacts are likely to occur? Can one describe them "now" with sufficient specificity to make their consideration useful? If the decisionmaker does not take them into account "now," will the decisionmaker be able to take account of them before the agency is so firmly committed to the project that further environmental knowledge, as a practical matter, will prove irrelevant to the government's decision? n718

A developer building in phases would be required to assess not only the impacts on the environment of the first phase but the eventual build-out of all of its site. The EIR for the developer's project would also need to assess the cumulative effects of its growth-inducing impact on the entire area.

"Cumulative" analysis certainly means that the agency consider all the projects already planned and approved which are likely to be built in the area. Identifying past and current projects is normally easy enough by looking at local land use approvals and construction permit applications. But what about future projects?

Suppose a city receives applications for 2,000 new housing units in the same census tract from ten different developers. Must the EIR for each application take into account the possibility that all the other ones will be approved and built? Probably so. What about other "possible" future projects? Yes, if they are "reasonably foreseeable probable future projects." n719 Judicial pronouncements like these lead to calls for detailed administrative guidelines from the state agency overseeing CEQA compliance so that public agencies can "do the right thing" without excessive crystal ball gazing. n720

The issue of when and how to assess the "cumulative" impacts of projects has been far more complicated in the federal arena. Take the case of highways. n721 Should each link be subject to environmental review as it is funded and commenced, or should the entire network be considered in advance of the first phase being built? If there is substantial doubt about whether later phases will be funded, courts have sometimes upheld agency decisions not to assess the impacts of the entire network. Other federal courts have insisted that even though later phases may not come into being, their potential environmental impacts must be examined before phase one is commenced on an integrated program.

If a blanket programmatic assessment is made at the outset for an entire network of projects, must each project also be evaluated later for environmental impacts peculiar to it, or that may result because of changes in populations or traffic patterns which occurred after the initial environmental study was performed? Generally, if individual projects are interdependent their cumulative environmental impacts must be assessed at the outset. Distinct parts of an integrated network may later have to be subject to individual assessment as well, but only for their unique environmental impacts or to update the initial report with changes that could affect the conclusions reached earlier. n722

The anti-growth bias of environmental reporting is reinforced by the requirement that growth-inducing impacts be evaluated. n723 The accepted methodology focuses on negative secondary impact from building a project, and seldom the negative secondary impacts of not building it.

New housing might be halted in a rapidly developing area until more freeways are built. Environmental reports would show that if the housing is built ahead of the freeways, levels of service on existing roads will fall unacceptably. So state highway authorities obtain federal highway funds and propose a new freeway to service the anticipated growth. In reviewing the freeway proposal the Environmental Protection Agency under NEPA might well contend that building the freeway would induce growth. If the freeway were not built, the houses could not be built either. That makes the freeway growth-inducing, and contributes to congestion and air pollution.

This is ludicrous because stopping the construction of new houses or freeways is not a birth control device. It does not slow down immigration into a state or region except at the point that house prices are forced up by tightened planning controls. Yet environmental documents contain hundreds of pages of this sort of short-sighted analysis of growth-inducing impacts. n724

Most of the information elaborately displayed in costly EISs and EIRs is already available in the ordinary land use application process when a developer requests a change of zone, a subdivision map approval, a general plan amendment or a conditional use permit.

Local governments that want to facilitate development are able to combine their approval processes, conducting public hearings on zone change cases concurrently, for instance, with EIS or EIR approvals. Local governments hostile to development can stretch out the approval process even though the substantive material may be the same in a zone change case as in its underlying EIS or EIR.

Most environmental impact reports recommend mitigation measures which are later imposed on the developer as conditions of project approval. For example, mitigation for flooding would include storm drains and perhaps a pro rata contribution to a regional flood control facility. Mitigation for freeway access congestion might include contribution to a fund by all developers in the area, based on a study of their project's likely traffic impact, to widen the access way. To preserve endangered species developers might have to contribute to a fund for purchasing sites in the area that would become dedicated as wildlife preserves. n725

In California, those mitigation measures which are reasonably feasible to specify in the EIR must be specified. n726 But sometimes local officials can defer decisions on mitigation, approve a project in concept and wait until specific designs are drafted before imposing particular mitigation measures. n727

Many localities fail adequately to monitor the mitigation measures they impose. This failure undermines the efficacy of the process. California has specific statutory mitigation monitoring requirements. n728 One example of a city with well-considered guidelines for the monitoring of mitigation is San Luis Obispo. That city insists mitigation measures specify what should be done, who should do it, when the mitigation should be done, and how it should be done.

Professor Joseph Sax in 1973 observed that environmental reporting would reveal the fullest data only if data gatherers

had no incentive that would "bind them regularly to any particular client group." n729 In reality, it is difficult, if not impossible, to avoid bias of one sort or another among environmental preparers. They work for clients. If the client is the developer, the preparer knows it. This does not mean the preparer is dishonest. The developer needs to know the truth about the site and the neighborhood for optimal marketing, construction planning and to obtain political approval. But bad news can be cushioned, displayed in its best light, or on occasion discreetly avoided.

If the institution hiring the preparer is a slow- or no-growth motivated local government, the preparer knows that, too, and responds accordingly.

Local governments embrace different procedures for selecting the EIR or EIS preparer. In some, the planning staff does all the work, with the government reimbursed by developer fees. Some governments established a panel of approved independent consultants. When an EIR is required, the local planning staff selects one of them to do the job. Some localities have a list of approved preparers, and allow the developer to select among them. Some allow the developer to select her own EIR preparer. In all cases the local planning staff reviews drafts to determine if they are adequate and objective. After receiving public comments on the drafts and monitoring revisions and responses to these, the staff certifies completion of the final EIR.

Los Angeles County allows the developer to choose and hire an environmental consultant to prepare a draft EIR according to state and local planning guidelines. That procedure was challenged in *Friends of La Vina v. County of Los Angeles*. n730 The court upheld the county's practice of allowing developers to select their own preparers even though CEQA mandates that EIRs be "prepared directly by, or under contract to, a public agency." The court observed that CEQA guidelines and state practice "consistently teach that an agency may comply with CEQA by adopting EIR materials drafted by the applicant's consultant, so long as the agency independently reviews, evaluates, and exercises judgment over the documentation and the issues it addresses." n731

The dissenting judge would have put an end to the county practice of allowing the developer to hire the preparer of the draft EIR. "The stark and irreconcilable conflict of interest which exists if the developer's paid consultant prepares the EIR is manifest." The dissenting judge didn't believe consultants whose livelihoods depended on developers could achieve unbiased assessments of the dangers posed by their clients' projects.

One developer, hearing the result, applauded the majority opinion. His enthusiasm was based on these assumptions:

> [T]he developer should select the EIR preparer because he has the most to lose from a poorly drafted EIR. His project approval can be set aside because of it. "No growth" staffers if they prepared these reports might intentionally screw up, hoping to make sure the final approval was voidable. Anyway, local government planners aren't as competent or efficient as private consultants. If EIR work were done by governments "in house," planning bureaucracies would get larger, the work would take longer and it would cost more -- which developers would have to pay through higher application fees. As the majority says, local governments must approve the report, so all preparers must meet the same local standards for EIRs. Also, not allowing the developer to work with the preparer in advance of the initial draft would diminish the chance of the developer changing its project early to avoid negative environmental consequences.

The dissenting judge in *La Vina* wasn't convinced. The majority appears to have been.

§ 85.19(e) Supplemental Environmental Reports for Project Changes.

Developers change their plans. They expand or contract projects already approved, reducing or increasing the percentage of their sites they intend to use, the number or the size of the houses they want to build. They add or remove amenities -- golf courses, lakes, parks, guest parking facilities. When they seek to change an earlier approved project,

one that required and received an environmental assessment, will the change occasion an entirely new environmental review of the whole project, or just an assessment of the change?

This depends initially on whether their intended change requires a new discretionary decision by the local government. For instance, a developer who has subdivided the land into a configuration that is no longer deserved will probably need a new subdivision map. There may be a statutory procedure for very small changes, such as "lot line adjustments," just altering the boundaries among existing lots. But big changes in the way the subdivider wants to subdivide will require a new map, hence, a new environmental review.

Suppose, though, the subdivider just wants to build smaller houses because they will probably sell faster than larger, more expensive ones. Unless the developer has entered a development agreement specifying minimum dwelling sizes, a local ordinance requires them, or a map condition calling for the larger dwellings, or a design review, the developer won't need a new map or a new environmental review.

If the developer does need a new discretionary approval, two competing principles come into play in determining the scope of the environmental assessment. First, if construction has not started and the developer has no vested right to proceed with the earlier approval, local government officials "must consider all the facts and circumstances surrounding the proposed project...." n732 The developer is back to square one. Second, it would be "arbitrary and capricious for a Board to condition approval of the modification on the developer's compliance with remedial measures unless those remedial measures have some demonstrable connection with the environmental impact of the proposed modification." n733

In the case from which the above quotes were taken, the property owner in September 1982, obtained approval to remove a metal storage building, renovate a 12-unit motel building and construct two new motel buildings of 20 and 30 units respectively. This application was approved with certain conditions, but no environmental assessment was required.

A few months later, in January 1983, the applicant submitted a second proposal to modify the original site plan. This proposal only affected the front of the property along Old Montauk Highway and involved removing six cottages and constructing a new 28-unit motel (see Site Plan). For this second proposal, the town planning board issued a formal negative declaration under the New York environmental law.

Click here to view image.

Concerned citizens sued to prevent implementation of the modified plan and were granted a temporary injunction. A trial court determined that there was no likelihood the suit would succeed and allowed the petitioner to recommence construction. The entire project -- both parts -- was completed in June, 1983.

One month later, a New York trial court set aside the resolution of the Planning Board approving the modified plan, and directed the board to take a "hard look" at its potential environmental impacts.

The property owner appealed, and while the appeal was pending, resubmitted its second proposal to the Board. This time the Board, which had several new members on it, issued a positive declaration and insisted on an environmental report. They wanted an environmental study of the impact of the entire project, not just the modification (the second proposal). However, the statute of limitations for challenging the first proposal had long since lapsed. Meanwhile, the entire project -- the original and the modified portions -- had been fully constructed.

The Board wanted substantial improvements in traffic and fire vehicle access. To widen the turning radius and access road, the Board wanted the property owner to demolish some of the newly-built units, four in the project first approved,

four in the structure built as part of the second proposal.

On appeal, the property owner argued equitable estoppel. That argument, the New York court of Appeals found, was inappropriate. Granting estoppel when local government officials had violated state mandated planning and environmental laws could result in "large scale public fraud." Further, "the more fundamental reason why estoppel is not generally permitted against the government is that to do so may violate the doctrine of separation of powers... The State Legislature has granted municipalities the right to condition land development within their boundaries on approval of an acceptable site plan. This consideration is more than theoretical. The State has made protection of the environment one of its foremost policy concerns."

But this part of the court's opinion concerned the second proposal. The first proposal had not been assailed as violating the state's environmental laws within the applicable statute of limitations. It was perfectly legal when built. By virtue of the statute of limitations having run, the town board had lost jurisdiction over the impacts created by the already approved and built project.

The property owner argued that for the town planning board to review the environmental impacts of the first project as a condition to its review of the second application was arbitrary and capricious. The New York court of Appeals agreed. The court ordered the town building inspector to issue temporary certificates of occupancy for all units constructed under the site plan approved in September 1982.

The court also observed that as a result of this environmental litigation the property owner had been forced to hold its property vacant for five summer seasons, had lost profits estimated at $1,000,000 per year, and incurred carrying charges of $100,000 per month.

§ 85.19(e)(1) Power and Authority in the Land Use Approval Context.

Local officials may realize they cannot require as much as they would like of a property owner who submits a request for a minor amendment to an approved subdivision tract map, conditional use permit, or development agreement. But usually it will not be difficult for local officials to find plausible justifications for voting "no" on the request. For voting "yes," they may be able to squeeze more out of the property owner than the change itself would support legally. After the New York court of Appeals remanded *E.F.S. Ventures* back to the East Hampton Planning Board with an order for the Town Building Inspector to issue temporary certificates of occupancy for the units built under the September 1982 plan, the Town Planning Board resisted:

> After the court of Appeals decision, the client went back to the East Hampton Planning Board, which was not prepared simply to issue certificates of occupancy. There were negotiations. In order to eliminate another year or two or more of litigation, while the project sat dormant and eating up interest, a settlement agreement was entered into under which, I think four units, or perhaps six, were eliminated and the other objections that had been raised disposed of. After a relatively small amount of landscape work, the certificates of occupancy were issued about two or three months after the court of Appeals decision and in time for putting these units on the market. I think they were sold out rather quickly. n734

§ 85.19(e)(2) The Vested Rights Doctrine and the Supplemental EIR Requirement.

The *E.F.S. Ventures* case invites the question, for purposes of meeting the requirements of environmental reporting laws, when, if ever, do applicants' rights "vest"? Only when they actually construct their projects?

Suppose a developer conditions a land purchase agreement on land use approvals, and gets the approvals. The developer exercises the option to buy the land, and then petitions for changes in the already approved project. Would local officials be free to reevaluate what they had already approved, or would their inquiry be limited to evaluating the

environmental impacts of the changes?

The applicant's "vesting" claim would be based on the land acquisition, but not on any expenditures made to improve the site. In most states a property owner's right to rely on existing zoning does not vest at the point of land acquisition alone. But should the "vesting" rule for environmental review be more permissive?

§ 85.19(e)(3) The Nexus Test and the Permissible Scope of Environmental Reassessments When Owners Request Changes in Already Approved Projects.

Following the *Nollan* case described earlier in this chapter, property owners have another way to defend against local officials using the excuse of the owner's petition for a minor change to reevaluate the environmental impacts of the entire project. Local officials must be prepared to show that there is some logical connection, some rational nexus, between the proposed changes and the scope of the environmental review they are imposing upon the property owner. If the impacts of the proposed change fall below the environmental review threshold, local officials will not be able to demonstrate the existence of any such nexus -- even though the property owner has yet to begin building. n735

§ 85.19(e)(4) The Rules for California Supplemental EIRs.

By statute and regulation, California administrators and lawmakers protect applicants by requiring a subsequent or supplemental EIR in three circumstances.

(1) An Initial Study shows that the changes being proposed will bring about impacts not considered in the original EIR. Even if the change is substantial, if its impacts are no greater than those studied in the initial approval, no new EIR or supplemental EIR is required. n736

(2) Changes have occurred surrounding the project since the original EIR was prepared that will result in new significant impacts not previously discussed or anticipated.

(3) New information reveals (a) impacts overlooked earlier, (b) substantially more severe impacts than previously anticipated, (c) alternatives or mitigation not feasible before that have since become feasible.

FOOTNOTES:
(n1)Footnote 672. *42 U.S.C. §§ 4331* to 4335.

(n2)Footnote 673. *Robertson v. Methow Valley Citizens Council, 109 S. Ct. 1835, 1845 (1989).*

(n3)Footnote 674. Cooper H. Wayman et al., *The Adequacy of Environmental Impact Statements and the Development of State Law, 27 SW. L.J. 630, 659-67 (1973).*

Fifteen states enacted laws modeled after NEPA: California, Connecticut, Hawaii, Indiana, Maryland, Massachusetts, Minnesota, Montana, New York, North Carolina, Puerto Rico, South Dakota, Virginia, Washington, and Wisconsin.

Six states adopted similar procedures by executive order:

Arizona: Game and Fish Commission Policy of July 2, 1971, Policy Memo,

Requirements for Environmental Impact Statements (June 9, 1971); Michigan: Executive Directive 1974-4, issued by Governor (May 3, 1974); Nebraska: Dep't of Roads Action Plan (1973); New Jersey: N.J. Exec. Order No. 53 (Oct. 15, 1973) and Admin. Order No. 33 (Aug. 1, 1973); Texas: Policy for the Environment (adopted Jan. 1, 1973); Utah: Executive Order of the Governor (Aug. 27, 1974).

Five states enacted laws requiring environmental impact analysis in limited situations: Delaware, Mississippi, Georgia, Nevada, and North Dakota.

NEPA and ANILCA Requirements Concerning Supplemental Environmental Impact Statements And The Consideration Of Alternatives, 16 J. ENERGY NAT. RESOURCES & ENVT'L L. 147 (1996); William R. Mendelsohn, *In Camera Review Of Classified Environmental Impact Statements: A Threatened Opportunity? 23 B.C. ENVT'L AFF. L. REV. 679 (Spring 1996);* Jean M. Emery, *Environmental Impact Statements And Critical Habitat: Does NEPA Apply To The Designation Of Critical Habitat Under The Endangered Species Act? 28 ARIZ. ST. L.J. 973 (Fall 1996).*

(n4)Footnote 675. Note, *State Environmental Impact Statements, 15 Washburn L.J. 64 (1976).*

(n5)Footnote 676. N.Y. Envt'l Conserv. Law §§ 8-0105(3) to 8-0105(4); S.D. Codified Laws Ann. § 34A-9-2; Cal. Pub. Res. Code § 21100(g); Haw. Rev. Stat. § 343-2; Wash. Rev. Code Ann. § 43.21C.030.

(n6)Footnote 677. *Friends of Westwood v. City of Los Angeles, 235 Cal. Rptr. 788, 789 (1987).*

(n7)Footnote 678. *See, e.g.*, Conn. Gen. Stat. Ann. § 22a-1; Ind. Code Ann. § 13-1-10-3(2)(C); Va. Code Ann. § 1).1-1208.

(n8)Footnote 679. Minn. Stat. Ann. § 116B.02(4).

(n9)Footnote 680. N.Y. Envt'l Conserv. Law § 8-0105(6); S.D. Codified Laws Ann. 34A-9-1(4).

(n10)Footnote 681. Cal. Code of Regulations § 15382.

(n11)Footnote 682. *See Draft EIR, Lincoln Place Redevelopment Project*, April 1993, pp. 174-85. The Applicant contended that displacement at this scale was not a "physical" impact but addressed affordable housing and displacement issues anyway and were eventually required to relocate on-site any tenant who wanted on-site relocation before demolishing the structure in which that tenant resided.

(n12)Footnote 683. N.C. Gen. Stat. § 113A-8.

(n13)Footnote 684. Andrews, *Agency Responses to NEPA: A Comparison and Implications*, 16 Nat. Res. J. 301 (1976); *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc., 435 U.S. 519, 558 (1978).*

(n14)Footnote 685. N.Y. Envt'l Conserv. Law § 8-0109(8).

(n15)Footnote 686. Minn. Stat. Ann. § 116D.04(6).

(n16)Footnote 687. Cal. Pub. Res. Code § 21081(a). There is a debate among California land use lawyers whether "all feasible mitigation" has to be imposed in order for California local governments to elect this third option. Those who think not have this sort of case in mind: developer wants to subdivide into 40 lots. A grave environmental harm can be mitigated if he settles for 39 lots and dedicates one as open space. It is an archeological site. He would rather dedicate 100 acres of this property as open space than lose that 40th lot. The local government could refuse to allow the 40th lot on environmental grounds but has no basis for demanding the 100-acre dedication. They are willing to make the trade: Lot 40 for 100 acres. Whether they can do it involves parsing the language of California's Government and Health & Safety Codes.

The lawyers who think mitigation feasible would use the same example -- but without the 100-acre trade-off.

(n17)Footnote 688. *Knowles v. United States Coast Guard, 924 F. Supp. 593 (S.D.N.Y 1996)* (prospect of injury to party's aesthetic and recreational interest in historical sites on island was within "zone of interests" to be protected by

NEPA); *Sierra Club v. Morton, 405 U.S. 727 (1972).*

(n18)Footnote 689. *Lujan v. National Wildlife Fed'n, 497 U.S. 871 (1990).*

(n19)Footnote 690. *Empire State Restaurant & Tavern Ass'n, Inc. v. Rapoport, 658 N.Y.S.2d 687 (App. Div. 1997)* (To qualify for standing to raise State Environmental Quality Review Act (SEQRA) challenge, party must demonstrate that it will suffer injury that is environmental and not solely economic in nature); *Duval Ranching Co. v. Glickman, 965 F. Supp. 1427 (D. Nev. 1997)* (Economic interests asserted by ranchers and ranching companies were not within zone of interests protected by National Environmental Policy Act (NEPA), and thus, ranchers and ranching companies lacked standing to assert NEPA violation regarding Forest Service's alleged interference with water rights and rights of way); *City of Los Angeles v. United States Dep't of Agriculture, 950 F. Supp. 1005 (C.D. Cal. 1996)* (Electric utility that was direct competitor to proposed crude oil pipeline project and that could reap enormous economic benefits from alterations to final environmental impact statement (EIS) concluding that project was environmentally superior to alternatives did not have standing to bring NEPA action challenging adequacy of EIS; utility's economic interests in the dispute were of such magnitude as to render claims in conflict with general public interest in environment and to disqualify utility as reliable private Attorney General); *California Forestry Ass'n v. Thomas, 936 F. Supp. 13 (D. D.C. 1996)* (Timber companies, trade association, and county did not have standing to challenge Forest Service's decision to implement interim guidelines as part of program to protect spotted owl habitat based on procedural rights under NEPA's prudential zone of interest test; plaintiffs had economic interests that were fundamentally inconsistent with interests Congress had in mind when it enacted statute, despite asserted interest in forest health); *Mobil Oil Corp. v. Syracuse Indus. Dev. Agency, 559 N.E.2d 641 (N.Y. 1990).*

(n20)Footnote 691. *See, e.g., Har Enters. v. Town of Brookhaven, 548 N.E.2d 1289 (N.Y. 1989); City of Klamath Falls, Or. v. Babbitt, 947 F. Supp. 1 (D.D.C. 1996)* (City challenging designation of section of river as National Scenic River under National Wild and Scenic Rivers Act (WSRA) arguably fell within zone of interests of NEPA and WSRA and, thus, had standing to bring action, even though city's main goal was to derive economic benefit from proposed hydroelectric plant, which the designation precluded; city argued that it had interest as municipality in condition of river and basin, and argued that it believed hydroelectric plant could actually solve some of basin's ecological problems).

(n21)Footnote 692. *Cummings v. Secretary of Envt'l Affairs, 524 N.E.2d 836 (Mass. 1988).*

(n22)Footnote 693. *Robertson v. Methow Valley Citizens Council, 109 S. Ct. 1835, 1847 (1989). Compare City of Carmel-By-The-Sea v. United States Dep't of Transp., 123 F.3d 1142 (9th Cir. 1997)* (NEPA sets forth procedural mechanisms to ensure proper consideration of environmental concerns; it does not mandate particular substantive result. The court reviews an Environmental Impact Statement under the "rule of reason" to determine whether it contains "a reasonably thorough discussion of the significant aspects of the probable environmental consequences"); *Price Road Neighborhood Ass'n, Inc. v. United States Dep't of Transp., 113 F.3d 1505 (9th Cir. 1997)* (NEPA requirements were satisfied through use of reevaluation process rather than creation of supplemental EA, and fact that agencies did not hold additional meetings while conducting reevaluation of original EA did not violate public participation)

With Williamsburg Around the Bridge Block Ass'n v. Giuliani, 644 N.Y.S.2d 252 (App. Div. 1996) (City protocol regulating removal of lead paint from city-owned bridges was not equivalent of environmental impact statement (EIS), so as to satisfy State Environmental Quality Review Act (SEQRA) and city environmental quality review procedures (CEQR); there was no compliance with public comment mandates of SEQRA and CEQR, but rather, only limited public participation and scrutiny had been allowed).

(n23)Footnote 694. Stewart E. Sterk, *Environmental Review in the Land Use Process: New York's Experience with SEQRA, 13 Cardozo L. Rev. 2041, 2075 (1992).*

(n24)Footnote 695. *Citizens of Goleta Valley v. Board of Supvrs. of Santa Barbara County, 801 P.2d 1161, 1167 (Cal. 1990), quoting Bozung v. Local Agency Formation Comm., 529 P.2d 1017, 1030 (Cal. 1975).*

(n25)Footnote 696. Mich. Comp. Laws Ann. § 691.1203(1) provides: "When the plaintiff in the action has made a prima facie showing that the conduct of the defendant has, or is likely to pollute, impair or destroy the air, water or other natural resources or the public trust therein, the defendant may rebut the prima facie showing by the submission of evidence to the contrary. The defendant may also show, by way of an affirmative defense, that there is no feasible and prudent alternative to defendant's conduct and that such conduct is consistent with the promotion of the public health, safety and welfare in light of the state's paramount concern for the protection of its natural resources from pollution, impairment or destruction ...."

(n26)Footnote 697. 1970 Mich. Pub. Acts No. 127, §§ 1-7; Mich. Comp. Laws Ann. §§ 691.1201 - 691.1207.

(n27)Footnote 698. Cal. Pub. Res. Code § 21061.1.

(n28)Footnote 699. Note, *Substantive Enforcement of the California Environmental Quality Act,* Vol. 69, No. *1 Cal. L. Rev. 112-118 (1981).* Copyright © 1981 by California Law Review, Inc. Reprinted with permission.

(n29)Footnote 700. Cal. Pub. Resources Code § 21080(a).

(n30)Footnote 701. Dallas Holmes & Ron Van Blarcom, *Beware of the Naked Checklist!,* Western City (League of California Cities, Sept. 1988).

(n31)Footnote 702. Wash. Rev. Code Ann. § 43.21C.031.

(n32)Footnote 703. 2 Landis et al., Fixing CEQA (1995), Appendix B, p. 129.

(n33)Footnote 704. Hitting the right appropriate level of analysis in an environmental assessment is no simple task. "On the one hand, some compliance has reduced the EA analysis to a one-page form that is so cursory that it is questionable whether the underlying decision about whether to prepare an EIS is sound. On the other hand, an EA all too frequently takes on the look, feel, and form of an EIS, complete with the same qualitative contents and volume and weight." Thomas J. Shoenbaum & Ronald H. Rosenberg, Environmental Policy Law 74-75 (1991), *citing* Dinah Bear, *NEPA at 19: A Primer on an "Old" Law with Solutions to New Problems, 19 Envt'l. L. Rep. 10060 (1989).*

(n34)Footnote 705. The original Draft Environmental Impact Report for Larwin's Del Sur Ranch project (June 16, 1989) was two inches thick and weighed four pounds.

(n35)Footnote 706. Stewart E. Sterk, *Environmental Review in the Land Use Process: New York's Experience with SEQRA, 13 Cardozo L. Rev. 2041, 2081 (1992).*

(n36)Footnote 707. Cal. Pub. Res. Code § 2110).

(n37)Footnote 708. *SAVE v. City of Bothell, 576 P.2d 401 (Wash. 1989).*

(n38)Footnote 709. *Id., at 404-405.*

(n39)Footnote 710. NEPA's alternatives analysis requirement appears in 40 C.F.R. § 1502.14. California's is at CEQA Guidelines, § 15126(d)(4). NEPA does seem to require a more detailed analysis of alternatives. This is sensible for federal agencies with the power of eminent domain. *See* Tosta et al., *Environmental Review after Goleta, 21 SW. U.L. REV. 1079, 1101 (1992).*

(n40)Footnote 711. Larwin's Draft EIR, for instance, compared its 2500-unit project to no project, a development of 352 units on 2.5-acre lots, of 880 dwellings on 1-acre lots, but a project of 2500 units and similar density on a site closer to existing urbanization.

(n41)Footnote 712. *Citizens of Goleta Valley v. Board of Supvrs., 243 Cal. Rptr. 339 (1988). City of*

Carmel-By-The-Sea v. United States Dep't of Transp., 123 F.3d 1142 (9th Cir. 1997) (With regard to NEPA requirement that environmental impact statement (EIS) discuss reasonable alternatives to proposed action, "rule of reason" guides both choice of alternatives as well as extent to which EIS must discuss each alternative. Under California Environmental Quality Act, range of alternatives meriting consideration in environmental impact report is guided by doctrine of feasibility); *Sierra Club v. United States Army Corps of Eng'rs, 935 F. Supp. 1556 (S.D. Ala. 1996)* (Army Corps of Engineers did not violate Clean Water Act (CWA) or NEPA by failing to consider multi-tiered parking deck alternative in environmental assessment (EA) issued in connection with CWA wetlands fill permit for construction of conventional baseball stadium parking lot, given unrebutted evidence showing that alternative parking scheme was not practicable or reasonable; alternative would have more than doubled cost of construction project and posed substantial logistical problems for construction of stadium complex on donated land); *Airport Neighbors Alliance, Inc. v. United States, 90 F.3d 426 (10th Cir. 1996)* (Federal Aviation Administration (FAA) did not act arbitrarily by not considering alternatives to proposed runway upgrade under NEPA where implementing either alternative would be infeasible; alternative of parallel runway was precluded by terrain and existing military facilities and alternative of new airport would cost several billion dollars and would present environmental complications); *Mobil Oil Corp. v. City of Syracuse Indus. Dev. Agency, 646 N.Y.S.2d 741 (App. Div.. 1996)* (State Environmental Quality Review Act (SEQRA) review regarding proposed retail shopping plaza adequately considered environmental ramifications of project, and made appropriate analysis of reasonable alternatives; city industrial development agency responded in detail to comments directed at foreseeable potential environmental impacts not only from projects, but from other contemplated projects in redevelopment scenarios, and alternatives considered included multifamily housing, mixed use retail and office, cultural uses, alternate project sites, and no action alternative).

Compared with Organization to Preserve Agric. Lands v. Adams County, 913 P.2d 793 (Wash. 1996) (Proposed landfill project was properly characterized as "private," as it was primarily sponsored and initiated by private corporation and was not intended to fulfill solid waste responsibilities of county and, thus, environmental impact statement (EIS) did not have to include discussion of offsite alternatives; private corporation had no obligation to develop landfill for county, and was not currently involved in handling county's solid waste, nor was county involved in creating corporation, and corporation sought to build landfill to serve customers throughout region, including other states and Canada, and county had no governmental responsibility for solid wastes generated outside county).

(n42)Footnote 713. Stewart E. Sterk, *Environmental Review in the Land Use Process: New York's Experience with SEQRA, 13 Cardozo L. Rev. 2041, 2080-81 (1992).*

(n43)Footnote 714. For example, in the Larwin draft for Del Sur Ranch (June 16, 1989), the 352-unit alternative was anticipated to generate far fewer auto trips than the 2500-unit proposal. But, of course, no mention was made of where the other 2200 families would live if not at the Del Sur Ranch. Besides being too speculative, that data could also be embarrassing to local governments since it might prove that Larwin's higher density project was *not* the proximate cause of all the road congestion estimated in the EIR. Some of that traffic might occur anyway if the 2200 "surplus" families settled in the area at other projects. The "nexus" between Larwin's project and its off-site road contributions might be broken.

(n44)Footnote 715. This policy appears in two provisions: (1) Cal. Pub. Res. Code § 21083.3 calls for an EIR to mitigate only site-specific or project-specific impacts. This section only applies to the proposals for housing at densities that are permitted by zoning or a community plan. The underlying zoning or planning ordinance must have been approved with the benefit of a complete EIR that considered all significant environmental consequences; (2) Cal. Pub. Res. Code § 21085 cautions against the reduction in density of a housing project unless there is no other measure "that would provide a comparable level of mitigation."

(n45)Footnote 716. The same results are obtained under urban containment policies of the sort embodied in the United Kingdom's greenbelts and Oregon's statewide planning law. *See* Arthur C. Nelson, *An Empirical Note on How Regional Urban Containment Policy Influences an Interaction Between Greenbelt and Exurban Land Markets*, 54 Am. Plan. Ass'n J. 178-84 (Spring 1988).

(n46)Footnote 717. *Citizens' Utility Bd. v. Public Serv. Comm'n of Wis., 565 N.W.2d 554 (Wis. App. 1997)* (Wisconsin's Environmental Protection Act does not require administrative agency to engage in remote and speculative analysis, but it must take a hard look at environmental consequences of its proposed action); *Dubois v. United States Dep't of Agriculture, 102 F.3d 1273 (1st Cir. 1996)* (Environmental effect would be considered too speculative for inclusion in environmental impact statement (EIS) if it cannot be described at time EIS is drafted with sufficient specificity to make its consideration useful to reasonable decision maker, although reasonable forecasting is implicit in National Environmental Policy Act (NEPA) and agencies may not shirk their responsibilities by labeling all discussion of future environmental effects as "crystal ball inquiry."); *National Parks and Conservation Ass'n v. County of Riverside (Kaiser Steel Resources, Inc.), 42 Cal. App. 4th 1505 (Cal. App. 1996)* (EIR for proposed landfill project would not be required to analyze environmental effects of materials recovery facilities (MRF) from which landfill would accept processed wastes, because it (EIR) cannot currently provide meaningful information about speculative future projects); *Sierra Club v. Marsh, 769 F.2d 868 (1st Cir. 1985),* as edited in Shoenbaum & Rosenberg, Environmental Policy Law 89-90 (1991).

(n47)Footnote 718. Shoenbaum & Rosenberg, *supra* note 498, at 9).

(n48)Footnote 719. *See* Note, *The Cumulative Impact Assessment in CEQA: Is the Standard in San Franciscans for Reasonable Growth Attainable?, 12 WEST. ST. U. L. REV. 801 (1985);* Gail Kamaras, *Cumulative Impact Assessment: A Comparison of Federal and State Environmental Review Provisions, 67 ALB. L. REV. 113 (1993).*

(n49)Footnote 720. *San Franciscans for Reasonable Growth v. City & County of San Francisco, 198 Cal. Rptr. 634 (1984)* (City evaluated four different proposals for high-rise buildings within a few months of each other, but treated each as if the other three didn?t exist. City's EIRs were deemed deficient.). *See also NRDC v. Callaway, 524 F.2d 79 (2d Cir. 1975)* (agency failed to consider effect of dredging and filling operations it had recently authorized).

(n50)Footnote 721. *See Maryland Conserv. Council v. Gilchrist, 808 F.2d 1039 (1986).*

(n51)Footnote 722. *See* Frank P. Grad, Environmental Law 1091-1116 (3d ed. 1985).

(n52)Footnote 723. *Sierra Club v. Marsh, 769 F.2d 868 (1st Cir. 1985).*

(n53)Footnote 724. *See* letter to Ed Wood, Regional Administrator, Federal Highway Administration, San Francisco, from Daniel W. McGovern, Regional Administrator, United States Environmental Protection Agency, Ninth Region (Jan. 10, 1991), on Draft EIS for the San Joaquin Hills Transportation Corridor, Orange County, California.

(n54)Footnote 725. A maddening Catch-22 provision on mitigation appears in CAL. PUB. RES. CODE ? 21004. That section confines government to demanding only those mitigation measures which it has authority to impose simply by virtue of laws *other than* CEQA. However, § 21002 declares that projects should *not* be approved if there are feasible mitigation measures or alternatives which would "substantially lessen the significant environmental effects" of the project. Hence, a developer who refuses to accept unlawful mitigation requirements faces the possibility of project denial.

(n55)Footnote 726. *Los Angeles Unified Sch. Dist. v. City of Los Angeles, 58 Cal. App. 4th 1019 (Cal. App. 1997)* (Environmental impact report (EIR) was inadequate in failing to consider whether air conditioning and filtering at schools would be feasible method of mitigating impact of air pollution resulting from planned development; while EIR projected that levels of carbon monoxide around schools would be "slightly lower" in future, it did not characterize impact of air pollution on schools as "insignificant," and authors of EIR had sufficiently reliable data to permit preparation of meaningful and accurate report on its impact); *Citizens for Responsible Gov't v. City of Albany, 56 Cal. App. 4th 1199 (Cal. App. 1997)* (Article in gaming development agreement requiring developer to submit information addressing any potential adverse environmental impact of project and providing that all reasonably feasible mitigation measures would become conditions of city implementation approval did not suffice to bring agreement within terms of California Environmental Quality Act (CEQA), given language of section, which raised apparent conflicts with CEQA,

untimeliness of deferred CEQA review following approval of agreement and related measures, and city's limited discretion to adopt alternatives and mitigation measures that might be required for adequate CEQA review); *Sundstrom v. County of Mendocino, 248 Cal. Rptr. 352 (1988).*

(n56)Footnote 727. *Sacramento Old City Ass'n v. City Council of Sacramento, 280 Cal. Rptr. 478 (1991).*

(n57)Footnote 728. Cal. Pub. Res. Code § 21081.6.

(n58)Footnote 729. Joseph L. Sax, *The (Unhappy) Truth About NEPA, 26 Okla. L. Rev. 239, 248 (1973).*

(n59)Footnote 730. *284 Cal. Rptr. 171 (1991).*

(n60)Footnote 731. *Id. at 174.*

(n61)Footnote 732. *E.F.S. Ventures Corp. v. Foster, 520 N.E.2d 1345 (N.Y. 1988).*

(n62)Footnote 733. *Id.*

(n63)Footnote 734. Letter from Edward N. Costykian, Esq., Paul, Weiss, Rifkind, Wharton & Garrison, New York (June 30, 1992).

(n64)Footnote 735. *Town of Charleston v. Montgomery, Otsego, Schoharie Solid Waste Mgmt. Auth., 651 N.Y.S.2d 708 (App. Div. 1997)* (Solid waste management authority's decision to use particular road as access route to new landfill instead of more traveled state road did not require preparation of supplemental environmental impact statement (EIS), in light of fact that use of road chosen had been addressed in course of State Environmental Quality Review Act (SEQRA) review process); *Provo River Coalition v. Pena, 925 F. Supp. 1518 (D. Utah 1996)* (that preliminary injunction would not issue to halt construction of highway project on ground that supplemental environmental impact statement (SEIS) was needed).

But see Kiewit Const. Group Inc. v. Clark County, 920 P.2d 1207 (Wash. App. Div. 2 1996) (Order requiring supplemental environmental impact statement (SEIS) on traffic issues for proposed asphalt manufacturing plant was justified based on company's failure to disclose in environmental impact statement (EIS) the full effect of increased truck traffic on bicyclists and other users of planned bicycle trail, and on failure to discuss meaningfully the alternative of direct access ramps from plant onto freeway that would bypass bicycle trail and two-lane scenic highway); *Rohn v. City of Visalia, 263 Cal. Rptr. 319 (1989).*

(n65)Footnote 736. CEQA Guidelines § 15162. In *Fund for Envt'l Defense v. County of Orange, 252 Cal. Rptr. 79 (1988),* a developer was relieved from having to prepare a subsequent or supplemental EIR even though it proposed a thirty percent increase in project size, a change in building configuration and a change in the source of the project's water supply. The impacts of the change, despite its apparent magnitude, were deemed insubstantial.

* Parts of this chapter have been adapted from George Lefcoe, Real Estate Transactions (Michie 1993).

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CHAPTER 85 OBTAINING LAND AND RIGHTS FOR DEVELOPMENT *

9-85 Thompson on Real Property, Thomas Editions § 85.20

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§ 85.20 The Federal Dimension to Local Land Use Approvals.

[Go To Supp]

Congress decades ago rejected proposals for a national land use policy partly because land use has always been regarded as best regulated locally. n737 But local governments, whose officials depend only on the votes of local residents for their tenure, may find little political gain in sacrificing local interests for regional or national ones. So a growing volume of federal law directly limits what developers and landowners may do with their property even after they have secured local approvals. Federal laws regulate especially those industries whose by-products could pollute air, water, or land. n738

§ 85.20(a) Clean Water Act.

Anyone discharging pollutants into navigable water must comply with the Clean Water Act. n739 In some states, permitting authority has been delegated by the U.S. Environmental Protection Agency (EPA) to a state agency, such as the California Regional Water Quality Control Boards.

§ 85.20(b) RCRA.

Anyone handling hazardous wastes -- generating, treating, storing, transporting, or disposing -- is subject to the federal Resource Conservation and Recovery Act (RCRA). n740 Federal Rules require the generator to notify the EPA, obtain an identification number before sending wastes off-site, prepare manifests so the materials can be traced, train personnel, package properly and obtain permits, among other requirements. Again, the EPA has delegated its authority to agencies in some states by agreement.

§ 85.20(c) TSCA.

Similarly, the Toxic Substances Control Act (TSCA) n741 expanded EPA authority to require testing of new and old chemical substances and to regulate those as necessary, including a phase-out of polychlorinated biphenyls (PCB) manufacture.

§ 85.20(d) The Clean Air Act.

Through the Clean Air Act n742 Congress mandated air quality standards and authorized the EPA to oversee the development of state implementation plans (SIPs) to achieve those standards. Many localities failed to promulgate SIPs and that has led to considerable litigation by environmental groups to compel the EPA's adoption of federal implementation plans and other sanctions against states that don't propose adequate SIPs. n743

Many urban areas fail to meet health-based air quality standards due to high levels of ozone (the cause of urban smog) and carbon monoxide (CO). A Congressional deadline for the attainment of national ambient air quality standards was set in 1975. First the year 1982 was chosen, then 1987. By 1990, 96 metropolitan areas continued to have unhealthy ozone levels and 41 areas exceeded CO levels. Metropolitan areas were divided into categories based on the severity of their air pollution ranging from extreme to marginal. In 1990 Congress enacted and the President signed Clean Air Act Amendments providing time limits for the attainment of national air quality standards, varying from 3 years for marginal areas to 20 years for Los Angeles, the only extreme nonattainment area.

Many small firms previously unregulated by air quality authorities must now obtain permits.

"Major" stationary sources of pollution had been formerly defined as those spewing 100 tons per year (TPY) or more. The new air quality regulatory net will capture smaller polluters as "major" sources: 10 TPY generators in Los Angeles, 25 TPY in severely polluted areas, and 50 in seriously polluted areas.

Among the small businesses who will now have to pay the fees and obtain the permits that chemical manufacturers and oil refineries have long been subjected to are auto refinishing and undercoating plants, bakeries, dry cleaners, and printers. n744 Existing firms will have to retrofit by installing "reasonably available control technologies." New or modified sources must install technology to achieve the lowest achievable admissions rate. Both existing and new sources needing permits must monitor, keep records and report their pollution-generating activity to regulators.

Transportation controls will also become more stringent in severe nonattainment areas since automobiles (mobile sources in the air quality vernacular) are significant contributors to CO and other pollutants. Regulations could affect the siting of offices and shopping centers not served by mass or public transit as part of an effort to reduce vehicle miles traveled by discouraging single-occupant automobile trips to work. n745 Employers and developers may be required to create incentives for van pools, car pools, and the use of public transit.

Local governments may also seek to establish land use control incentives for a "jobs-housing" balance, policies that would bring jobs to bedroom suburbs and housing to office and industrial areas.

> The jobs/housing balance concept has initial surface appeal. If people work near where they live, they commute fewer miles between home and work, and produce less traffic and smog. n746
>
> Stripped to its essentials, a jobs/housing balance simply means a ratio between a measure of employment and a measure of housing within a given geographic area. n747

Air quality regulators tentatively concluded that it is "very difficult to produce real, permanent emission reductions" from a jobs/housing balance program "because people choose their housing, especially in two-worker households, for many reasons besides commuting distance to work." n748 Southern California planners are now working with air quality regulators to see if they can promulgate a set of specific jobs/housing balance land use rules that, if implemented, could noticeably reduce vehicle miles traveled.

Section 805 of the Clean Air Act Amendments declares that the law is not to be "an infringement on the existing authority of counties and cities to plan or control land use." But as one lawyer expert in air quality regulation observes:

"restrictions applicable to stationary sources in the most severely polluted metropolitan areas will place bounds on local authority," and these can have "substantial impacts" on growth in such areas. n749

§ 85.20(e) Wetlands Controls.

Environmental advocates are vigorous defenders of wetlands. It is easy to appreciate why.

> Wetlands may be swamps, bogs, marshes, tidal estuaries or potholes carved out of the earth by glaciers. They may sprawl over four million acres, like the Louisiana marshes and swamplands that constitute 40 percent of the nation's total coastal wetlands. They may cover a fraction of an acre, or thousands of acres, like the prairie potholes that provide nesting sites for 80 percent of North America's ducks.
>
> Wetlands are the cradle of life for wildlife and fish; almost all fish and shellfish spend time spawning or feeding in tidal estuaries. These swampy lands recycle nutrients and filter pollutants more efficiently than any state-of-the-art sewage treatment plant. They recharge aquifers, absorb storm waves and floodwater. They are also places of peace and incomparable beauty.
>
> Wetlands harbor one-third of America's endangered and threatened species. n750
>
> Wetlands are now valued for their intrinsic qualities as natural areas, for their recreational and educational uses, and for their ecological services, e.g., ground water recharge, floodpeak reduction, water quality improvement, wildlife habitat, food-chain support, and shoreline stabilization. n751

The federal law most directly affecting the right of property owners to develop wetlands is § 404 of the Clean Water Act, a complex statute over a hundred pages of which includes the 1972 Federal Water Pollution Control Act amendments, amended again in 1977. n752

Section 404 requires that anyone dredging or filling wetlands that could affect the waters of the United States must obtain a permit before doing so. Any activity that moves dirt around in a wetland counts as "dredge and fill." Placing dirt in a wetland to build a road or a house, digging a ditch when the spoil is tossed next to the ditch, even intensive farming, can be "dredge and fill." An activity need not "pollute" to require a permit. n753

"Dredge and fill" permits are issued by the United States Army Corps of Engineers. The Environmental Protection Agency oversees the law and can veto a permit.

Other agencies may become involved in wetlands permitting: the National Marine Fisheries Services, the Soil Conservation Service, state departments of fish and game, state and local water resources, and water quality control boards, to name some. Even the Secretary of the U.S. Department of Agriculture is in the wetlands act through a program known as "Swampbusters." This program stops the Secretary from passing out agricultural subsidies to farmers who plant commodity crops in wetland basins.[534]

The statute embodies a number of interlocking regulatory schemes including controls over the construction of waste treatment works, provisions setting federal effluent standards for conventional and toxic or other hazardous pollutants, the creation of a national water quality standard, and a permit scheme for anyone whose activities could affect the achievement of the Act's objectives.

The determination of whether a site is wetlands depends on its vegetation, the hydrology, and soils. n754 Generally, only if the Army Corps of Engineers finds indicators under each of these parameters will it declare a site wetlands, but there are exceptions. n755 Parameters under each of these headings are reviewed and changed from time to time by federal and state regulators, sometimes with Congressional oversight. n756

The statute itself isn't a complete wetlands protection law. Many activities affecting wetlands aren't regulated at all. Only dredging and filling come within the purview of the act. Among the activities that don't require permits: removing vegetation (without using equipment), draining, excavating, burning and flooding. n757

An underlying tension in the early administration of § 404 was that the Army Corps of Engineers saw § 404 as designed only to protect water quality. The EPA, the Fish and Wildlife Service, the National Marine Fisheries Services, and many environmental groups considered § 404 a legislative mandate to preserve wetlands as fish and wildlife habitats as well. n758

Under EPA guidelines the Corps' permits for dredging and filling are only available for water-dependent projects, like marinas, or where there is no practicable alternative to the proposed project. It is difficult to obtain a permit for housing, industrial or commercial construction in a filled wetland because these are not considered water-dependent in the sense that they can be constructed in areas that aren't wet. The housing applicant needs to show why the project can't be located elsewhere (even if the developer doesn't own other sites), why the project can't be reconfigured to avoid encroaching on wetlands, or why the site can't be used for some purpose that doesn't involve disturbing wetlands. n759

There are exemptions for certain farming and forestry activities but these aren't much help to real estate developers. n760

No permit can be granted unless it is in the public interest. The Corps considers an enormous array of factors in its public interest review, everything from ecological conservation to the needs and welfare of people. n761 But the upshot of the public interest review is that anyone seeking to fill a wetlands will be required to create new wetlands from existing uplands at least equal in size and quality to the wetlands lost to the project. The new wetlands must be at the site of the project or nearby.

Agencies acting to enforce the Clean Water Act assert jurisdiction over "waters of the United States." They take this to mean navigable waters, their tributaries, and wetlands adjacent to navigable waters and their tributaries.

The Army Corps of Engineers has also asserted jurisdiction over isolated wetlands (prairie potholes, vernal pools). "Every low-lying field and every wrinkle in a hillside is potentially subject to regulation by the Corps." n762

The jurisdictional basis for federal wetlands protection rests on the authority of the federal government to protect navigable waters, and its authority over interstate commerce. n763 These are independent predicates of authority with interstate commerce providing the broader constitutional base. If a person pollutes a non-navigable stream, that pollution could affect interstate commerce.

> Congress and the courts have become aware of the lethal effect pollution has on all organisms. Weakening any of the life support systems bodes disaster for the rest of the interrelated life forms. To recognize this and yet hold that pollution does not affect interstate commerce unless committed in navigable waters below the mean high water line would be contrary to reason. Congress is not limited by the "navigable waters" test in its authority to control pollution under the Commerce Clause. n764

Courts have interpreted the intent of Congress in the Clean Water Act to extend EPA jurisdiction to the limits of congressional power over interstate commerce.

A wetland could affect interstate commerce even though it is isolated -- unconnected to any significant body of water. That is what the Seventh Circuit court of Appeals ruled recently in *Hoffman v. EPA*. n765 A developer filled a 0.8-acre isolated wetland while constructing a 48-acre residential development. He hadn't obtained a permit under § 404 of the Clean Water Act. After the fact, he applied for one, and was denied. The Environmental Protection Agency (charged

with enforcing the Clean Water Act) fined him $50,000. The developer, Hoffman, appealed.

The EPA's interstate commerce argument was based on the flight patterns of migratory birds. n766 The court accepted the EPA's argument that migratory birds suffice to justify the regulation of isolated wetlands. The court had to swallow hard an observation it had made in its earlier opinion striking down the EPA's claim of authority, when "the EPA admitted that migratory birds would land and drink a puddle in the median of a highway." The court in defining interstate commerce as coterminous with the flight and landing patterns of migratory birds, sanctioned broad federal regulatory authority.

On the facts of the case the Seventh Circuit ruled that Hoffman's "puddle" wasn't subject to the wetlands permitting rules because there was no substantial evidence that the Hoffman property contained characteristics that would make it more attractive to birds than any other land.

> The migratory birds are better judges of what is suitable for their welfare than are we, the ALJ [the EPA Administrative Law Judge] or the CJO [the EPA's Chief Judicial Officer]. Having avoided Area A the migratory birds have thus spoken and submitted their own evidence. We see no need to argue with them. No justification whatsoever is seen from the evidence to interfere with private ownership based on what appears to be no more than a well intentioned effort in these particular factual circumstances to expand government control beyond reasonable or practical limits. After April showers not every temporary wet spot necessarily becomes subject to government control. n767

§ 85.20(f) Property Owners' Claims for Compensation Under "Takings Clause" When Regulations Become Confiscatory.

§ 85.20(f)(1) The Distinction Between Physical and Regulatory Takings.

§ 85.20(f)(1)(i) Generally.

HENDLER v. U.S.

952 F.2d 1364, 1371 (1991) **[citations and footnotes omitted]**

A man's home may be his castle, but that does not keep the Government from taking it. As an incident to its sovereignty, the Government has the authority to take private property for a public purpose. In England, when the King did so, payment for what was taken was, at least before Magna Carta, a sometimes thing, and largely at the discretion of the sovereign. In the United States, the Constitution does not leave that issue to the sovereign's good will. The ringing phrases of the Fifth Amendment conclude with the simple statement: "nor shall private property be taken for public use, without just compensation." U.S. Const. amend. V.

At the time of the writing of the Constitution and for many years thereafter a government taking meant exactly that -- the Government would physically occupy the land. If the Government needed a place for a military base, or for a building to house a government office or activity, that was a public purpose for which a government taking was authorized upon payment of just compensation. Much of the law of eminent domain -- both statutory and case -- developed for the purpose of providing the procedural structure for government takings; the main issue in the cases was what compensation was just.

As government activities expanded, situations arose in which government action resulted in an invasion of an owner's private property, but the government had not undertaken the procedural steps called for by statute to acquire the affected property interests. For example, the government's roadbuilding activity in A's land, the taking of which was authorized and paid for by the government, might cause permanent flooding on the nearby land of B. The suit by B, to require the government to pay just compensation for the taking of B's property as well, acquired the name of inverse condemnation.

Since the suit was based upon the constitutional provision protecting property rights, and the provision was considered to be self-executing with respect to compensation, it escaped the problems of sovereign immunity. Whether by planned acquisition through the exercise of eminent domain, or a payment after the fact through inverse condemnation, there was routinely present in these cases the fact of physical entry upon and occupation of private property by the government.

Occasionally an issue arose as to whether the government's activity was so short lived as to be more like the tort of trespass than a taking of property. The distinction between the government vehicle parked one day on O's land while the driver eats lunch, on the one hand, and the entry on O's land by the government for the purpose of establishing a long-term storage lot for vehicles and equipment, on the other, is clear enough. The fact that sovereign immunity might insulate the government from liability in the tort but not in the taking makes for interesting line-drawing in the close cases, and provides employment for lawyers.

Traditional takings doctrine, based as it is on the indicia of physical occupation of land, does not fit easily into the issues that arose with the emergence of the regulatory state._____

The U.S. Supreme court has drawn a fine, clear line between suits that arise when the government physically invades private property and suits arising from "mere" regulation. n768

> Where the government authorizes a physical occupation of property (or actually takes title), the Takings Clause generally requires compensation. *See, e.g., Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 426 (1982).* But where the government merely regulates the use of property, compensation is required only if considerations such as the purpose of the regulation or the extent to which it deprives the owner of the economic use of the property suggest that the regulation has unfairly singled out the property owner to bear a burden that should be borne by the public as a whole. *See, e.g., Penn Central Transp. Co. v. New York City, 438 U.S. 104, 123-25 (1978).* The first category of cases requires courts to apply a clear rule; the second necessarily entails complex factual assessments of the purposes and economic effects of government actions. n769

§ 85.20(f)(1)(ii) Requiring a Permit Isn't Taking.

Suppose a home builder obtains all the local approvals for a project, and commences filling a marshy area to make it buildable -- without having obtained a § 404 permit. Is the requirement of a permit itself a potential taking of private property without just compensation -- in violation of the U.S. Constitution, Fifth Amendment? The U.S. Supreme court answered this question in *United States v. Riverside Bayview Homes, Inc.* n770

> A requirement that a person obtain a permit before engaging in a certain use of his or her property does not itself "take" the property in any sense: after all, the very existence of a permit system implies that permission may be granted, leaving the landowner free to use the property as desired. Moreover, even if the permit is denied, there may be other viable uses available to the owner. Only when a permit is denied and the effect of the denial is to prevent "economically viable" use of the land in question can it be said that a taking has occurred. n771 This decision is not innocuous, because an applicant may need to spend considerable sums in order to complete an application and apply for a permit. But courts regard this as a constitutionally unobjectionable cost of doing business.

§ 85.20(f)(2) The Regulatory Takings Test As a Basis for Claiming Compensation Based on § 404 Permit Denials.

The most widely accepted test for determining whether a government action has become a regulatory "taking" comes from Justice Powell in *Agins v. Tiburon*. n772 The challenged law is a regulatory taking if it fails substantially to

advance a legitimate government interest *or* denies a property owner economically viable use of his land.

When the *federal* government effectively "takes" private property by regulating its use severely without paying for it, the owner may have a claim under the Tucker Act which may be filed in the U.S. Court of Claims. n773 Appeals from court of Claims rulings are decided by the U.S. Court of Appeals for the Federal Circuit. n774

A Tucker Act suit concedes the validity of the regulation and is a claim for compensation only. n775 If the litigant believes that the federal agency acted without authority, it must sue in federal district court. That is why Hoffman in the case didn't bring suit in the court of Claims under the Tucker Act.

In the early challenges under § 404, the court of Claims was unfriendly to developer suits. Typical of these was the court of Claims opinion in *Deltona Corp. v. United States*. n776 Deltona had bought a 10,000-acre parcel in 1964 for $7.5 million to develop in phases as a waterside residential community. Deltona subdivided its site into five parcels. It completed two phases by 1969. In 1973, after § 404 was added, Deltona sought a permit for the remaining three parcels. The Corps granted a permit for only one of the parcels. Deltona filed suit for compensation under the Tucker Act.

The court of Claims decided against Deltona. Of Deltona's total acreage the permit denial affected just 20%. While the value of the undevelopable acreage had diminished as a result of the denial, the court found that the partly submerged land had value for other purposes. Further, the court noted that these controls were imposed nationwide. Deltona had not been singled out for specially adverse treatment. The company knew that it would have to obtain various permits as a condition to developing, and bought knowing and assuming the risk that permit conditions would become more onerous over time.

Starting in the late 1980s, property owners began having better luck in the court of Claims as they challenged § 404 permit denials. Perhaps the case best illustrating this trend *is Loveladies Harbor, Inc. v. United States*. n777 The developer bought the site in 1958. By 1982, the developer had built on 199 acres of the holding, 250 acres, mostly before the enactment of the Clean Water Act in 1972.

The site was located on Long Beach Island, Ocean County, New Jersey. It abutted wetlands on the west, single-family homes on the east and southeast. The developer needed a permit from the New Jersey Department of Environmental Protection (N.J.D.E.P.) and the Corps to build out the remaining 51 acres. At first, N.J.D.E.P. denied the permit. The developer went to court to challenge the denial. Eventually the N.J.D.E.P. and the developer settled by agreeing that only 12.5 of 51 acres could be developed -- with 35 single-family homes. The other 38.5 acres were to be dedicated to the state in return for the N.J.D.E.P. permit. Nonetheless, the Corps denied the permit. The N.J.D.E.P. was delighted. It had labelled the developer's project a "'60's anachronism." The Corps' denial was held to be a taking because in denying the right to develop the last 12.5 acres, the developer suffered a deprivation of "all economically feasible use." n778 The trial court had found a value diminution of the 12.5-acre parcel from $2.6 million to $12,500, hence, a taking.

Crucial to this result was the court's willingness to separate the final 12.5 acres from the original 250-acre parcel of which it had once been a part. The calculation of a near-total loss was only possible because the court viewed the 12.5 acres separately. Weighed against all 250 acres, the owner's diminution in value would surely have fallen within the range of permissible regulation.

§ 85.20(f)(3) "Takings" Challenges to State Wetlands Laws.

Many states have wetland protective legislation. n779

> In most cases state wetlands regulation is undertaken in association with a state coastal zone management program, a comprehensive site planning regime for coastal areas undertaken under the standards of the Federal Coastal Zone Management Act, *61 U.S.C. § 1455*. n780

States don't face the "navigable water" or "interstate commerce" limitations imposed by the U.S. constitution on federal wetland protections. But they are still subject to the strictures of the Fifth Amendment via the Bill of Rights. State courts, though, differ dramatically in their responses to claims for compensation from property owners who are denied the right to develop based on state wetlands protections. n781

At least four states hold that a buyer who purchases swampland has no reasonable expectation of being able to develop by filling the site. n782 This is sometimes called the "buy a swamp, get a swamp" rule. In two states, wetland owners have been held to enjoy the right to develop or be compensated. n783 But in one of those, New York, the owner is only entitled to claim from the state compensation attributable to New York State's wetland rules. New York isn't liable for damage caused by federal wetlands controls. For that the property owner must sue the feds.

The U.S. Supreme court reviewed a property owner's "takings" challenge to South Carolina's coastal zone management law in *Lucas v. South Carolina Coastal Council*.

LUCAS v. SOUTH CAROLINA COASTAL COUNCIL

***112 S. Ct. 2886,* argued Mar. 2, 1992, decided June 29, 1992 [citations and footnotes omitted]**

JUSTICE SCALIA delivered the opinion of the court.

In 1986, petitioner David H. Lucas paid $975,000 for two residential lots on the Isle of Palms in Charleston County, South Carolina, on which he intended to build single family homes. In 1988, however, the South Carolina Legislature enacted the Beachfront Management Act, S.C. Code § 48-39-250 et seq. (Supp. 1990) (Act), which had the direct effect of barring petitioner from erecting any permanent habitable structures on his two parcels. See § 48-39289(A). A state trial court found that this prohibition rendered Lucas's parcels "valueless." App. to Pet. for Cert. 37. This case requires us to decide whether the Act's dramatic effect on the economic value of Lucas's lots accomplished a taking of private property under the Fifth and Fourteenth Amendments requiring the payment of "just compensation." U.S. Const., Amdt.

* * *

Prior to Justice Holmes' exposition in *Pennsylvania Coal Co. v. Mahon, 260 U.S. 393 (1922),* it was generally thought that the Takings Clause reached only a "direct appropriation" of property, *Legal Tender Cases, 12 Wall. 457, 551 (1871),* or the functional equivalent of a "practical ouster of [the owner's] possession." *Transportation Co. v. Chicago, 99 U.S. 635, 642 (1879).* Justice Holmes recognized in Mahon, however, that if the protection against physical appropriations of private property was to be meaningfully enforced, the government's power to redefine the range of interests included in the ownership of property was necessarily constrained by constitutional limits. *260 U.S. at 414-415.* If, instead, the uses of private property were subject to unbridled, uncompensated qualification under the police power, "the natural tendency of human nature [would be] to extend to qualification more and more until at last private property disappear[ed]." *Id., at 415.* These considerations gave birth in that case to the oft-cited maxim, that "while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking." *Ibid.*

Nevertheless, our decision in *Mahon* offered little insight into when, and under what circumstances, a given regulation would be seen as going "too far" for purposes of the Fifth Amendment. In 70-odd years of succeeding "regulatory takings" jurisprudence, we have generally eschewed any "'set formula'" for determining how far is too far, preferring to "engag[e] in ... essentially ad hoc, factual in inquiries," *Penn Central Transportation Co. v. New York City, 438 U.S. 104, 124 (1978)* (quoting *Goldblatt v. Hempstead, 369 U.S. 590, 594 (1962)).* See Epstein, Takings: Descent and Resurrection, *1987 Sup. Ct. Rev. 1, 4.*

* * *

As we have said on numerous occasions, the Fifth Amendment is violated when land-use regulation "does not substantially advance legitimate state interests or denies an owner economically viable use of his land." *Agins*, [447 U.S.], at 260 (emphasis added).

We have never set forth the justification for this rule. Perhaps it is simply, as Justice Brennan suggested, that total deprivation of beneficial use is, from the landowner's point of view, the equivalent of a physical appropriation. *See San Diego Gas & Electric Co. v. San Diego, 450 U.S., at 652* (Brennan, J., dissenting). "[F]or what is the land but the profits thereof[?]" 1 E. Coke, Institutes ch. 1, § 1 (1st Am. ed. 1812). Surely, at least, in the extraordinary circumstance when no productive or economically beneficial use of land is permitted, it is less realistic to indulge our usual assumption that the legislature is simply "adjusting the benefits and burdens of economic life," *Penn Central Transportation Co., 438 U.S., at 124,* in a manner that secures an "average reciprocity of advantage" to everyone concerned. *Pennsylvania Coal Co. v. Mahon, 260 U.S., at 415.* And the functional basis for permitting the government, by regulation, to affect property values without compensation -- that "Government hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in the general law," *id., at 413* -- does not apply to the relatively rare situations where the government has deprived a landowner of all economically beneficial uses.

On the other side of the balance, affirmatively supporting a compensation requirement, is the fact that regulations that leave the owner of land without economically beneficial or productive options for its use -- typically, as here, by requiring land to be left substantially in its natural state -- carry with them a heightened risk that private property is being pressed into some form of public service under the guise of mitigating serious public harm. As Justice Brennan explained: "From the government's point of view, the benefits flowing to the public from preservation of open space through regulation may be equally great as from creating a wildlife refuge through formal condemnation or increasing electricity production through a dam project that floods private property." *San Diego Gas & Electric Co., supra, at 652* (Brennan, J., dissenting). The many statutes on the books, both state and federal, that provide for the use of eminent domain to impose servitudes on private scenic lands preventing developmental uses, or to acquire such lands altogether, suggest the practical equivalence in this setting of negative regulation and appropriation.

We think, in short, that there are good reasons for our frequently expressed belief that when the owner of real property has been called upon to sacrifice all economically beneficial uses in the name of the common good, that is, to leave his property economically idle, he has suffered a taking.

The trial court found Lucas's two beachfront lots to have been rendered valueless by respondent's enforcement of the coastal-zone construction ban. Under Lucas's theory of the case, which rested upon our "no economically viable use" statements, that finding entitled him to compensation. Lucas believed it unnecessary to take issue with either the purposes behind the Beachfront Management Act, or the means chosen by the South Carolina Legislature to effectuate those purposes. The South Carolina Supreme court, however, thought otherwise. In its view, the Beachfront Management Act was no ordinary enactment, but involved an exercise of South Carolina's "police powers" to mitigate the harm to the public interest that petitioner's use of his land might occasion. *304 S.C., at 384, 404 S.E.2d, at 899.* By neglecting to dispute the findings enumerated in the Act or otherwise to challenge the legislature's purposes, petitioner "concede[d] that the beach/dune area of South Carolina's shores is an extremely valuable public resource; that the erection of new construction, inter alia, contributes to the erosion and destruction of this public resource; and that discouraging new construction in close proximity to the beach/dune area is necessary to prevent a great public harm." Id., at 382-383, 404 S.E.2d, at 898. In the court's view, these concessions brought petitioner's challenge within a long line of this court's cases sustaining against Due Process and Takings Clause challenges the State's use of its "police powers" to enjoin a property owner from activities akin to public nuisances.

It is correct that many of our prior opinions have suggested that "harmful or noxious use" of property may be proscribed by government regulation without the requirement of compensation. For a number of reasons, however, we think the South Carolina Supreme court was too quick to conclude that that principle decides the present case.

* * *

Where the State seeks to sustain regulation that deprives land of all economical beneficial use, we think it may resist compensation only if the logically antecedent inquiry into the nature of the owner's estate shows that the proscribed use interests were not part of his title to begin with. This accords, we think, with our "takings" jurisprudence, which has traditionally been guided by the understandings of our citizens regarding the content of, and the State's power over, the "bundle of rights" that they acquire when they obtain title to property. It seems to us that the property owner necessarily expects the uses of his property to be restricted, from time to time, by various measures newly enacted by the State in legitimate exercise of its police powers; "[a]s long recognized, some values are enjoyed under an implied limitation and must yield to the police power." *Pennsylvania Coal Co. v. Mahon, 260 U.S., at 413.* And in the case of personal property, by reason of the State's traditionally high degree of control over commercial dealings, he ought to be aware of the possibility that new regulation might even render his property economically worthless (at least if the property's only economically productive use is sale or manufacture for sale), *see Andrus v. Allard, 444 U.S. 51, 66-67 (1979)* (prohibition on sale of eagle feathers). In the case of land, however, we think the notion pressed by the Council that title is somehow held subject to the "implied limitation" that the State may subsequently eliminate all economically valuable use is inconsistent with the historical compact recorded in the Takings Clause that has become part of our constitutional culture.

Where "permanent physical occupation" of land is concerned, we have refused to allow the government to decree it anew (without compensation), no matter how weighty the asserted "public interests" involved, *Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S., at 426* -- though we assuredly would permit the government to assert a permanent easement that was a pre-existing limitation upon the landowner's title. We believe similar treatment must be accorded confiscatory regulations, i.e., regulations that prohibit all economically beneficial use of land: Any limitation so severe cannot be newly legislated or decreed (without compensation), but must inhere in the title itself, in the restrictions that background principles of the State's law of property and nuisance already place upon land ownership. A law or decree with such an effect must, in other words, do no more than duplicate the result that could have been achieved in the courts -- by adjacent landowners (or other uniquely affected persons) under the State's law of private nuisance, or by the State under its complementary power to abate nuisances that affect the public generally, or otherwise.

On this analysis, the owner of a lake bed, for example, would not be entitled to compensation when he is denied the requisite permit to engage in a landfilling operation that would have the effect of flooding others' land. Nor the corporate owner of a nuclear generating plant, when it is directed to remove all improvements from its land upon discovery that the plant sits astride an earthquake fault. Such regulatory action may well have the effect of eliminating the land's only economically productive use, but it does not proscribe a productive use that was previously permissible under relevant property and nuisance principles. The use of these properties for what are now expressly prohibited purposes was always unlawful, and (subject to other constitutional limitations) it was open to the State at any point to make the implication of those background principles of nuisance and property law explicit. See Michelman, "Property, Utility, and Fairness, Comments on the Ethical Foundations of 'Just Compensation' Law," *80 Harv. L. Rev. 1165, 1239-1241 (1967).* In light of our traditional resort to "existing rules or understandings that stem from an independent source such as state law" to define the range of interests that qualify for protection as "property" under the Fifth (and Fourteenth) Amendment(s), this recognition that the Takings Clause does not require compensation when an owner is barred from putting land to a use that is proscribed by those "existing rules or understandings" is surely unexceptional. When, however, a regulation that declares "off-limits" all economically productive or beneficial uses of land goes beyond what the relevant background principles would dictate, compensation must be paid to sustain it.

The "total taking" inquiry we require today will ordinarily entail (as the application of state nuisance law ordinarily entails) *analysis, of among other things, the degree of harm to public lands and resources, or adjacent private property, posed by the claimant's proposed activities* [emphasis added] see, e.g., Restatement (Second) of Torts §§ 826, 827, the social value of the claimant's activities and their suitability to the locality in question, see, e.g., id., §§ 828(a) and (b), 831, and the relative ease with which the alleged harm can be avoided through measures taken by the claimant and the government (or adjacent private landowners) alike, see, e.g., id., §§ 827(e), 828(c), 830. The fact that a particular use has long been engaged in by similarly situated owners ordinarily imports a lack of any common-law prohibition (though

changed circumstances or new knowledge may make what was previously permissible no longer so, see *Restatement (Second) of Torts, supra*, § 827, comment g. So also does the fact that other landowners, similarly situated, are permitted to continue the use denied to the claimant.

It seems unlikely that common-law principles would have prevented the erection of any habitable or productive improvements on petitioner's land; they rarely support prohibition of the "essential use" of land, *Curtin v. Benson, 222 U.S. 78, 86 (1911).* The question, however, is one of state law to be dealt with on remand. We emphasize that to win its case South Carolina must do more than proffer the legislature's declaration that the uses Lucas desires are inconsistent with the public interests, or the conclusory assertion that they violate a common-law maxim such as sic utere tuo ut alienum non laedas. As we have said, a "State, by ipse dixit, may not transform private property into public property without compensation...." *Webb's Fabulous Pharmacies, Inc. v. Beckwith, 449 U.S. 155, 164 (1980).* Instead, as it would be required to do if it sought to restrain Lucas in a common-law action for public nuisance, *South Carolina must identify background principles of nuisance and property law that prohibit the uses he now intends in the circumstances in which the property is presently found* [emphasis added]. Only on this showing can the State fairly claim that, in proscribing all such beneficial uses, the Beachfront Management Act is taking nothing.

The judgment is reversed and the cause remanded for proceedings not inconsistent with this opinion.

So ordered. n784

Lucas, a building contractor, bought two beachfront lots, the last of four lots in a subdivision on the Isle of Palms, a South Carolina Barrier Island, two years before South Carolina's Beachfront Management Act was applied to prohibit any construction on those two lots. Ironically, he had relied on the advice of the same consultants that two years later would help the state draw the imaginary line beyond which no one could build. They had told him the beachfront was stable and growing. Lucas reported, "when I bought the lots I was in total compliance with all rules and regulations." n785

Suppose Lucas sold those two lots after the law was passed. Would that subsequent purchaser have had as good a constitutional claim as Lucas did?

Justice Scalia writes that the state may resist compensation only if the logically antecedent inquiry into the nature of the owner's estate shows that the proscribed use interests weren't part of his title to begin with. Other U.S. Supreme court "takings" cases have invoked the phrase "distinct" or "reasonable" investment-backed expectation. Would a subsequent purchaser's case fail because she purchased with notice of the law, and maybe paid a discounted price because of it? What would her "reasonable" investment-backed expectation have been? Would awarding compensation to that buyer give her more than she bargained for?

Some courts consider inverse condemnation rights as personal and not as "running with the land." The seller will often have sold at a discount so that if the buyer got compensated, she would be getting a windfall. n786 In one Supreme court opinion discussing "investment-backed expectations," regulations, in order to become de facto "takings," had to be "so substantial and unforeseeable ... that justice and fairness require that they be borne by the public as a whole." n787

However, many courts allow the buyer to assert the seller's "takings" claim if that right was assigned by contract from seller to buyer. n788

Nollan, the homeowner the Supreme court rescued from the clutches of the California Coastal Commission, bought with clear notice of what the Coastal Commission would require. That didn't seem to make any difference to a majority of the justices. n789 Lucas himself had no vested right to develop and had invested nothing but the land purchase price.

In zoning cases some courts have taken the view that it is the property which is zoned, not the owner. If the zoning is

confiscatory or arbitrary, any owner should be able to challenge the law and have it set aside -- whether she bought before or after the law was enacted. What should matter is whether the law actually results in the property being reduced to worthlessness even though the owner's intended use of her property is exactly the same as all her neighbors.

South Carolina's coastal law establishes building setback lines according to the records of the shoreline over the past 40 years. The annual rate of erosion is multiplied by 40, setting a baseline, and the building setback is 20 feet behind the baseline. n790

Most owners of shoreline property in South Carolina are left with buildable lots. Lucas was not.

In 1990 the law was amended so that those very few owners with no buildable lot area could petition and obtain restricted building permits. n791 Applying for such a permit is one of the options now available to Lucas. Counsel to the South Carolina Coastal Council was quoted after the Supreme court issued its opinion: "I can't say with absolute certainty Mr. Lucas would obtain a permit but I can say the permitting committee would look favorably on an application."

Even if Mr. Lucas applied for a permit under the new hardship provisions and got one, he might still have a claim for the compensation based on a temporary taking.

If a government agency enacts a regulation which is later found to have been a "taking" of property, or the local government itself withdraws the unconstitutional regulation, the affected property owners cannot claim that their property was taken permanently. But they may have a claim for a temporary taking.

The U.S. Supreme court made this principal clear in *First English Evangelical Lutheran Church v. County of Los Angeles*. n792 By analogy the court cited situations in which the U.S. government used property during World War II which was returned to its rightful owners after the war, and cases in which governments had initiated condemnation actions to acquire private property and then abandoned their condemnation suits.

At one time some state courts thought that the only remedy available to a property owner in a "takings" case was the right to have the objectionable regulation stricken, usually by remanding the case back to the local government so it could reformulate its regulations. For developers this was not much of a remedy. The local government would be ordered to adopt new regulations or rules and give the aggrieved property owner a second chance to apply for a permit. Developers weren't sure they would be treated any better the second time, and expected to be socked with new fees and different requirements -- possibly forcing them to a second lawsuit, and a further remand back to the same hostile locals who had already rejected two proposals. *First English* declared the possibility of a damage remedy for a temporary taking. This remedy results in a developer being reimbursed for the time the developer lost and money he spent while the local government was trying to sort things out. The property owner, even the one who eventually obtained the right to build under the new rules, could collect damages for the temporary taking. The U.S. Supreme court in *First English* may have been reacting to a well established attitude of municipal officials that if a particular regulation were stricken down by a court decision under the Takings Clause, the municipality could always just amend the regulation and start all over again. n793

Before *First English*, local government officials didn't have to worry much about whether the land use controls they were enacting were confiscatory. If the local government's land use controls were stricken as unconstitutional, the most they faced was a long paperwork trail at the end of which the local government could enact new laws not all that different from the first set, and see if those would withstand constitutional challenge. After *First English*, a local government that enacted confiscatory regulations could be held liable by affected property owners for damages under the Fifth Amendment for the temporary taking even after withdrawing the offending regulations. n794

Compensation might be based on such measures as the fair rental value of the property, the value of an option for the

period the unconstitutional law was in effect, the owner's holding costs (mortgage interest, property taxes, insurance), the owner's opportunity costs (if the property could have been sold then but can't be sold when the regulation is lifted), or the before-after value of the property during the takings period. n795

The burden of proving a temporary taking is the same as proving a permanent one: (1) The value of the property must be reduced to zero, or nearly so; and (2) The challenged regulation must be found not to be advancing a legitimate state interest.

Neither test is easy to prove. The value reduction must be of "all economically viable use" or close to it. Just because property is greatly reduced in value, it hasn't necessarily been "taken" in the constitutional sense.

On remand, the appellate court found that the regulation in *First English* had not been a taking because the property owner had not been denied all economically viable use and the regulation substantially advanced a legitimate state interest. n796

The property owner, First English, was operating a camping facility. The county had denied it the right to reconstruct buildings -- bunkhouses and living quarters -- destroyed in a flood. The denial was pursuant to a temporary or interim ordinance. The interim ordinance was replaced by a permanent one restricting what could be built in the flood hazard area. Under both the interim and permanent ordinances, the camp facility could have been used to cook meals, play games, give lessons, pitch tents and for many other camping activities.

The appellate court ruled that neither the interim nor the permanent ordinance was an unconstitutional taking because both had been designed to protect human life, the highest goal in the hierarchy of police power objectives, through the control of what could be built in the flood hazard zone.

The lesson of *First English* on remand was that in order to establish a claim, even for a "temporary" taking, Mr. Lucas would still have to establish that the South Carolina law had been an unconstitutional taking. In November 1992, he succeeded in doing so. The state Supreme court rejected the Coast Council's claim that Lucas' building two houses on an erosion-prone beach would constitute a nuisance under South Carolina common law. The South Carolina Supreme court sent the case back to the circuit court to assess Lucas' damages "for his temporary deprivation of the use of his property" plus interest for his four-year court battle. n797

Some environmental lawyers are especially displeased with the South Carolina Supreme court's opinion. In South Carolina, as in most states, the right to rely on existing laws doesn't vest on mere site acquisition.

Further, the evidence at trial in *Lucas* showed "unusually frequent sales of, and rapidly escalating prices for, the two lots. One was bought for $96,000 in 1979 and sold for $187,000 in 1984 ... sold for $260,000 in 1985 ... and sold for $475,000 to Lucas in 1986 (an eighty-three percent increase in one year). The other lot had a similar history. Therefore, a lot escalated in value by more than 490 percent over twelve years ... and was alleged to have been worth $650,000 in 1991 ... only two years after Hurricane Hugo killed twenty-nine people and caused $6 billion in property damage along South Carolina's coast." n798

To avoid further litigation, the South Carolina Coastal Council paid Lucas $1.6 million for his two lots. Astonishingly, it expects to recoup some of that by selling the lots for development. n799 Rumor has it that when a neighboring owner offered the Commission a few hundred thousand dollars for one lot so it could be kept permanently as open space, the Commission rejected the offer. They preferred the higher price that development would bring.

Earlier, we mentioned *Deltona*, a court of Claims opinion which upheld a § 404 permit denial even though Deltona had been denied the right to develop 20% of its tract. n800 Deltona had subdivided its land into five parcels. It was denied the right to dredge and fill two of them. Suppose it had sold those two sites before seeking a § 404 permit. Would that

buyer have a claim better than Deltona's and as good as Lucas'?

Remember, Lucas' two beachfront lots weren't the only ones Lucas had ever developed. Could the South Carolina Supreme court determine the extent of Lucas' loss by considering the activities on the Island of the subdivider who sold Lucas the two lots? That doesn't seem fair, but if the court can't consider the situation of Lucas' seller, doesn't the *Lucas* case invite property owners to subdivide their sites by placing environmentally sensitive areas into separately owned parcels? Doesn't the case also invite Congress to immunize any environmental statute from a takings challenge by allowing some minimal development of affected sites?

Justice Scalia expressed awareness of these issues in footnote 7 in *Lucas* without resolving them:

> Regrettably, the rhetorical force of our "deprivation of all economically feasible use" rule is greater than its precision, since the rule does not make clear the "property interest" against which the loss of value is to be measured. When, for example, a regulation requires a developer to leave 90% of a rural tract in its natural state, it is unclear whether we would analyze the situation as one in which the owner has been deprived of all economically beneficial use of the burdened portion of the tract, or as one in which the owner has suffered a mere diminution in value of the tract as a whole. (For an extreme -- and, we think, unsupportable -- view of the relevant calculus, see *Penn Central Transportation Co. v. New York, 42 N.Y.2d 324, 333-334, 366 N.E.2d 1271, 1276-1277 (1977),* aff'd *438 U.S. 104 (1978),* where the state court examined the diminution in a particular parcel's value produced by a municipal ordinance in light of total value of the taking claimant's other holdings in the vicinity.) Unsurprisingly, this uncertainty regarding the composition of the denominator in our "deprivation" fraction has produced inconsistent pronouncements by the court. Compare *Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 414 (1922)* (law restricting subsurface extraction of coal held to effect a taking), with *Keystone Bituminous Coal Assn. v. DeBenedictis, 480 U.S. 470, 497-502 (1987)* (nearly identical law held not to effect a taking); see also *id., at 515-520* (REHNQUIST, C.J., dissenting); Rose, "*Mahon* Reconstructed: Why the Takings Issue is Still a Muddle," *57 S. Cal. L. Rev. 561, 566-569 (1984).* The answer to this difficult question may lie in how the owner's reasonable expectations have been shaped by the State's law of property -- i.e., whether and to what degree the State's law has accorded legal recognition and protection to the particular interest in land with respect to which the takings claimant alleges a diminution in (or elimination of) value. In any event, we avoid this difficulty in the present case, since the "interest in land" that Lucas has pleaded (a fee simple interest) is an estate with a rich tradition of protection at common law, and since the South Carolina court of Common Pleas found that the Beachfront Management Act left each of Lucas's beachfront lots without economic value.

Justice Stevens dissented in *Lucas* and elaborated on the complications the majority's opinion would engender:

> [b]ecause of the elastic nature of property rights, the court's new rule will also prove unsound in practice. In response to the rule, courts may define "property" broadly and only rarely find regulations to effect total takings. This is the approach the court itself adopts in its revisionist reading of venerable precedents... On the other hand, developers and investors may market specialized estates to take advantage of the court's new rule. The smaller the estate, the more likely that a regulatory change will effect a total taking. Thus, an investor may, for example, purchase the right to build a multi-family home on a specific lot, with the result that a zoning regulation that allows only single-family homes would render the investor's property interest "valueless." In short, the categorical rule will likely have one of two effects: Either courts will alter the definition of the "denominator" in the takings "fraction," rendering the court's categorical rule meaningless, or investors will manipulate the relevant property interests, giving the court's rule sweeping effect. To my mind, neither of these results is desirable or appropriate, and both are distortions of our takings jurisprudence.

Few developers will benefit directly from *Lucas* because most land use laws allow some economic use of land. Ordinances that ban all or nearly all uses usually do so to prevent nuisance-like conditions. However, local governments restricting development to secure open space or to protect farming where farming is no longer economically viable may have to compensate property owners.

The *Lucas* case may have its greatest impact where developers are prevented from using their land because it is a wetland or provides a habitat for an endangered or threatened species protected by the federal law described

later in this chapter.

The court's rule in the *Lucas* case is that an owner deprived of all economically viable uses of property is entitled to compensation unless the state's restriction of the use is compatible with the state's pre-taking nuisance law and the rights of property owners in the state before the challenged law was enacted. There will be no federal common law of nuisance. The standard is what property owners in the state could legitimately have expected to do with their property. This raises a particularly interesting question where state courts have held that wetlands owners have no right to fill and develop.

The law of nuisance is often unpredictable. The U.S. Supreme court cited the *Restatement (Second), Torts*, acknowledging the vagaries of nuisance law. The law of nuisance is also an evolving one, open to changed conditions. The court recognizes this when it offers the example of a nuclear plant on an earthquake fault that could be made to relocate.

The 11th Circuit court of Appeals, following *Lucas*, presented a trial court with a list of questions it should ask in deciding a property owner's challenge to the Lee County (Florida) Comprehensive Land Use Plan. Richard Reahard inherited 40 acres of waterfront land, once part of a 540-acre property his parents had developed for single-family houses. He wanted to do the same with the 40 acres as they had done with the 500 acres -- build houses. But under the county plan the site was put in a Resource Protection Area and he was limited to one single-family house or to uses of a "recreational, open space, or conservation nature."

Here is the list of questions the court of Appeals instructed the district court to ask on remand:

(1) The history of the property -- when was it purchased? How much land was purchased? Where was the land located? What was the nature of title? What was the composition of the land and how was it initially used?

(2) The history of development -- what was built on the property and by whom? How was it subdivided and to whom was it sold? What plats were filed? What roads were dedicated?

(3) The history of zoning and regulation -- how and when was the land classified? How was use proscribed? What changes in classifications occurred?

(4) How did development change when title passed?

(5) What is the present nature and extent of the property?

(6) What were the reasonable expectations of the landowner under the state common law?

(7) What were the reasonable expectations of the neighboring landowners under state common law? and

(8) Perhaps most importantly, what was the diminution in the investment-backed expectations of the landowner, if any, after passage of the regulation? n801

The process courts use in nuisance cases is quite different from the typical ones deployed by state legislatures or city councils in drafting land use and environmental controls. The testimony of witnesses, neighbors and environmental advocates is subject to discovery and cross-examination. Some local governments permit cross-examination in planning hearings, but it is seldom used and even more rarely effective because it antagonizes local officials, and few developers or their representatives are skilled interrogators. Litigation offers a more dispassionate forum for expert testimony, hard evidence of harm or lack of it and sometimes an analysis of alternatives that would be less damaging to the regulated owner. In sum, nuisance law is more protective of the private owner's property rights, making the *Lucas* court's opinion both significant and controversial.

In a separate concurring opinion, Justice Kennedy objected to the court drawing the takings line at the nuisance boundary:

> I agree with the court that nuisance prevention accords with the most common expectations of property owners who face regulations, but I do not believe this can be the sole source of state authority to impose severe restrictions. n802

Up to the *Lucas* decision, the U.S. Supreme court had sustained many restrictive and confiscatory land use controls on the grounds that they were proscribing "harmful or noxious" uses. Justice Kennedy's concurrence signals the possibility that there may be territory on which a majority of the court can find common ground for an exception to the "takings" rule somewhere between "nuisance" and "harmful use."

Justice Scalia's opinion in *Lucas* rejects Justice Blackmun's dissenting view that a local or state declaration should be presumed correct absent conflicting evidence in the record. Justice Scalia, writing for the majority, would give little credibility to these self-justificatory legislative declarations and findings. "Since such a justification can be formulated in practically every case, this amounts to a test of whether the legislature has a stupid staff. We think the Takings Clause requires courts to do more than insist upon artful harm-prevention characterizations." n803

At a minimum, state and local governments won't be able to satisfy the "nuisance" prong of the test by their own declaration of findings. They will have to show that their regulation was consistent with the state's nuisance law or was necessary to prevent an owner from harming others in ways universally understood as unacceptable.

There is a well established nuisance exception to the Fifth Amendment. Owners have no property right to commit nuisances. The court gives the example of an owner filling a lakebed that will result in neighboring lands being flooded, and a nuclear power plant built on an earthquake fault. These are extreme examples, indeed, of the nuisance exception to the takings doctrine. State courts and legislatures wanting to squeeze confiscatory police power regulations into the nuisance exception will have their hands full if these examples offer the only models. n804

The U.S. Supreme court now insists that local and state governments about to regulate a property owner's land to worthlessness must pay for their actions unless a court can actually find that the regulation is consistent with that state's nuisance or property law traditions. But what standard of review is appropriate for these findings? Is it enough that there is "substantial evidence" for them -- even if the court's conclusions are "fairly debatable"? n805

Must the "preponderance of evidence" point the state's way? n806 Or are these findings to be evaluated afresh and upheld only if "clear and convincing"? n807

Justice Scalia distinguishes personal from real property. "[I]n the case of personal property ... [the property owner] ought to be aware of the possibility that new regulation might even render his property economically worthless" while

real property is protected by the takings clause.

Does this mean that if Lucas had formed a corporation just to buy the two lots and the corporation had held title, he would have had no constitutional claim when his stock became worthless because it is personal property? The corporation would have had a takings claim, but not Lucas?

If there is a significant constitutional distinction to be drawn between real and personal property, recall the *Nollan* case, described earlier, concerning a property owner saved by the U.S. Supreme court from being "extorted" by the California Coastal Commission into giving up his sand beach in exchange for the right to replace his small old house with a larger new one. The case is widely cited as requiring a "nexus" between the fees local governments can charge developers and the rationale and uses of those fees. But Nollan was fighting to keep real property. The developers are fighting to keep money, personal property. Are they as much at risk as Allard when the Supreme court ruled in 1979 he could be stopped from selling eagle feathers without "just compensation"?

Perhaps it would be prudent not to take the sentence in *Lucas* distinguishing real from personal property too seriously. In upholding the right of a U.S. president to compensation against a Congressional attempt to "take" presidential papers, a federal appellate court applied the *Lucas* tests persuasively and definitively with no hint that personal property was somehow less entitled to Fifth Amendment protection than real property. *See Nixon v. United States*. n808

Perhaps the "personal property" sentence in Justice Scalia's *Lucas* opinion should be viewed as yet another attempt to brush eagle feathers under the precedential carpet. The "eagle feather" case is *Andrus v. Allard.* n809 In that case, the U.S. Supreme court upheld a prohibition against trading in the parts of endangered species challenged by a person who dealt in eagle feathers. Later, the U.S. Supreme court struck down a statute enacted to prevent land owned by Native Americans from being splintered into divided ownerships when the owner died intestate. The statute would have prohibited the devise or descent of undivided interests, and those interests would have escheated to the tribe. In the various opinions in *Hodel v. Irving*, n810 three justices (Brennan, Marshall and Blackmun) found nothing in the *Hodel* result to limit *Andrus v. Allard.* n811 Three justices (Scalia, Rehnquist and Powell) viewed *Hodel* as indistinguishable from *Andrus v. Allard*, and therefore saw *Andrus* as limited to its facts. n812 The language in *Lucas* regarding a personal property exception to regulatory takings law may be just another *Andrus* spillover.

§ 85.20(g) The Endangered Species Act.

A developer might have secured all local land use approvals and even be ready to bulldoze a site, when a federal marshal appears to stop the work because a species newly listed by the Secretary of Interior as endangered or threatened with extinction has been rumored to live there. The chance of development being halted this way is greatest in rapidly growing states like California, Florida, Texas, and Hawaii where native plants and animals are losing ground fast.

Some extinctions are natural, of course, and others man-induced. The magnitude of the problem, though widely perceived, is difficult to assess with any precision. Only 1.4 million species have been identified worldwide, but estimates of global species run to 100 million. With this much uncertainty it isn't easy even to guess what is happening to species globally, and what the future holds for them. Some researchers say 50,000 species are becoming extinct each year, and humans are "in imminent danger of precipitating a biological disaster to rival anything in evolutionary history." n813 Other scientists say the magnitude and rate of extinction is small, and probably exaggerated. n814

Throughout most of this century environmental advocates have sought to slow the rate worldwide of species extinction. "The collapse of biodiversity will be the whole world's loss, and those who live in relative ease cannot expect the most hard-pressed nations to bear the brunt of stemming it." n815

Here is one scholar's summary of the situation:

> (1) There is serious debate as to what actually constitutes a species;
>
> (2) Extinctions have been a part of the cycle of life since the first species evolved;
>
> (3) There have been from five to twelve mass extinction episodes on earth, relatively brief periods during which an unusually large number of species went out of existence;
>
> (4) There is significant scientific support for the proposition that we are currently in the midst of, or on the precipice of, another mass extinction equal to or greater than those of the past;
>
> (5) There is also great uncertainty as to the validity of the current mass extinction projections, amounting to orders of magnitude differences in the estimates; and
>
> (6) Most scientific authorities agree that it is at least probable that, whatever the margin of error in the extinction estimates, the actual number of species becoming extinct is large enough to be a matter of concern. n816

The first endangered species acts passed by Congress authorized the Secretary of the Interior to promulgate a list of species "threatened with worldwide extinction" and prohibited those species from being imported or exported." n817 The task of protecting such species from being harmed or "taken" was left to the states. n818 Federal agencies only had to avoid harming endangered species "to the extent practicable." n819

President Nixon signed a much strengthened revision of the Endangered Species Act in 1973 because the earlier 1969 Act "simply does not provide the kind of management tools needed to act early enough to save a vanishing species." n820

The purpose of the 1973 Act was to conserve the ecosystems upon which endangered or threatened species depended for their continued existence. n821

The Act was designed so that the Secretary of the Interior would first determine whether a species was "in danger of extinction" (endangered) or "likely to become endangered within the foreseeable future" (threatened). The process for making this determination is by *listing* endangered or threatened species. The Secretary publishes proposed listings, holds public hearings, and then publishes findings in the Federal Register.

Part of the listing process of special concern to property owners involves the Secretary delineating the "critical habitat" of the threatened or endangered species. Critical habitats are:

> [s]pecific areas within the geographical area occupied by the species, at the time it is listed ... on which are found those physical or biological features (i) essential to the conservation of the species and (ii) which may require special management considerations or protection; and ... specific areas outside the geographical area occupied by the species [if so determined by the Secretary]. n822

Once a species is identified ("listed") as threatened or endangered, the Act prohibits any person to "take" it. Taking may at first blush seem to prohibit only hunting and capturing, but the Act defines the term broadly to include any form of harm or harassment. n823 Developing the critical habitat of a listed species constitutes a "taking."

To grasp the implications of the "take" prohibition, consider the case of *Cristy v. Hodel*. n824 Grizzly bears were devouring Cristy's sheep. He complained to the U.S. Fish and Wildlife Service but they weren't able to do much about it. So Cristy shot a grizzly. He was fined $3,000 under the Endangered Species Act but took the offensive and sued the Secretary of the Interior to enjoin enforcement of the E.S.A. and recover just compensation under the Fifth Amendment. The Ninth Circuit affirmed a district court's entry of summary judgment in favor of the Secretary of the Interior. n825

Justice White put the issue this way:

> There can be little doubt that if a federal statute authorized park rangers to come around at night and take petitioner's livestock to feed the bears, such a governmental action would constitute a "taking"... If the Government decided ... to enact a law barring grocery store owners from "harassing, harming, pursuing" people who wish to take food off grocery shelves without paying for it, such a law might well be suspect under the Fifth Amendment. For similar reasons, the Endangered Species Act may be suspect as applied in petitioner's case... n826

Some commentators agree with Justice White, doubt the wisdom of the Ninth Circuit's opinion and believe that the grizzly's invasion of Cristy's land protected by federal law would justify the court ordering the feds to pay for the grizzly's dinners at Cristy's expense. n827 At common law a property owner had the right to capture or shoot a trespassing grizzly. By reversing the common law, the federal government leaves Cristy vulnerable to the property damage grizzlies inflict. The Ninth Circuit disagreed. It pointed out that the grizzly, not the government, had done the noshing.

The U.S. Supreme court has consistently interpreted the Act according to the "plain intent of Congress ... to halt and reverse the trend toward species extinction, whatever the cost." n828 Cost-benefit analysis is irrelevant. Listed species are to be protected regardless of the cost.

In the leading case, the court halted the construction of the $100 million Tellico dam project, when it was about 80% completed, because the dam threatened the critical habitat of a three-inch- long species of perch called the snail darter. At the time the case received a lot of publicity, much of it unfavorable.

Congress eventually exempted the dam from the E.S.A. by a rider to a public works appropriations bill. Not only was the dam built, the snail darter survived, too. New and apparently naturally occurring populations of snail darters were found elsewhere. n829 And the snail darter was successfully transplanted. n830

In the 1973 Act, Congress mandated that every federal agency had to consult with the Fish and Wildlife Service in the Department of the Interior to make sure its actions were not jeopardizing the continued existence of a listed species. The Department promulgated procedures for that consultation. n831 Consultations are required even if federal involvement is only the issuance of a permit or the funding of a private project.

The Secretary then determines if the actions proposed by the federal agency will jeopardize a listed species or disturb a critical habitat. If it will, and reasonably and prudent alternatives exist, the federal agency must take those alternatives. They include mitigation measures recommended to minimize the impacts. Any taking approved through the consultation process is an "incidental taking" and is exempted from the prohibitions of the Act. n832 This process occurs under § 7 of the Act.

In 1982 Congress made a similar process available to private parties who did not need a federal permit and so had not previously been entitled to a consultation process that could lead to a finding that a "taking" was "incidental" and thus exempt from the penalties of the Act. n833 The 1982 Amendment authorized the Fish and Wildlife Service to promulgate "habitat conservation plans" and issue "incidental" take permits to private persons under § 10A of the Act. n834

The habitat conservation process contemplates all interested parties -- environmental advocates, developers, local government officials -- reaching consensus on how to conserve critical habitat without completely rejecting development. Mitigation measures are part of the plan. These usually involve setting aside open space for endangered or threatened species.

The first habitat conservation plan (HCP) was in the San Bruno Mountains just south of San Francisco. It allowed the construction of houses on a site inhabited by the Mission Blue butterfly, a listed endangered species. The developer was able to preserve 87% of the butterfly habitat by donating and selling much of the site to the state and county, and building on only a small portion of it. Yet, counsel to the developer reports that "even though the project was redesigned, the developer did not lose a single unit of development as a result of the process. It did lose three years in completing the planning process and was subjected to the cost of the process." n835

In Riverside County, California, developers, environmental groups, and the county put together a plan for the preservation of the Stephens' Kangaroo Rat and perhaps as many as forty other species on the list or likely to get onto it by the creation of a vast regional park. n836 The cost of the regional park was estimated at $150-200 million.

The U.S. Fish and Wildlife Service issued an "incidental taking" permit for areas outside certain designated study areas. For every acre of species habitat "taken" for development, the county must set aside one acre as a permanent species habitat. The habitat lands are bought with proceeds from a development fee of $1,950 per acre. Ten million dollars was raised from development fees in each of the first two years of the program. n837 Habitat lands may only be used for purposes consistent with species preservation. For instance, horse riding trails are permissible; soccer playing fields are not.

Habitat conservation plans, like the one in Riverside County, increasingly remove vast amounts of land from development, much of the land privately owned and in the path of development. Property owners discover that hundreds, even thousands, of acres are "critical habitat."

> Wildlife biologists are urging local governments and developers to preserve entire habitats and broad swaths of land called wildlife corridors, as opposed to isolated patches of open space. Without these corridors linking large patches of habitat, predators, like coyotes and mountain lions, cannot travel between the "islands," and the ecological balance is disrupted leading to extinctions. n838

Understandably, the property owners whose sites fall within these wildlife corridors complain that the costs of conserving endangered species should not be paid by them alone. They believe all taxpayers should share the burden by compensating owners of lands that the law prohibits from being developed. A new aggressiveness on the part of landowners has been nurtured by cases like *Florida Rock Industries* and *Lucas*, reprinted earlier. n839

Environmental lawyers dispute the legitimacy of these Fifth Amendment takings claims, pointing out that property owners of critical habitat are in the same position as if a local ordinance prohibited development without a conditional use or other special permit. n840

§ 85.20(h) Evaluations of the Act.

There is a raging debate over whether the E.S.A. should be re-authorized and extended by Congress, substantially modified or junked altogether. Emotions run so high the issues are aired everywhere from controversial radio talk shows to the editorial pages of the Wall Street Journal. n841

Here is what the current Secretary of the Interior thinks about the E.S.A.'s accomplishments:

> The E.S.A. is undeniably the most innovative, wide-reaching, and successful environmental law which has been enacted in the last quarter century. In 1993, it is precisely twenty years old in its modern form. Case after case of resurgence and rebirth show that it has been remarkably successful: the American alligator has returned; the skies are now again graced by many bald eagles; the peregrine falcon is now moving from near extinction to the threshold of delisting. The exceptional stories include,

> not in the least, the forest plan that has now been worked out in the Cascade Forest ecosystem in the Pacific Northwest.
>
> The opponents of the E.S.A. understand those successes and those facts, so they attack it from a different direction. A collection of different groups has assembled, advocating a concept called the "takings" doctrine -- the notion that the E.S.A. is really about unconstitutional, uncompensated taking of private property. n842

On the other side of the debate, the case is put with equal conviction:

> Because of the rigid, burdensome strictures the E.S.A. attaches to the presence of listed species or critical habitat on a given piece of property, landowners are presented with perverse incentives. Rather than be severely restricted in the use they can make of their property, along with the attendant procedural requirements, some people have opted for the "3-S" alternative: shoot, shovel, and shut up. The E.S.A. actually has led to the preemptive slaughter of listed species in an effort to eliminate the perceived roadblock to business-as-usual. Similarly, in certain forests where there was the prospect of future critical habitat designation, greatly accelerated logging has been the self-help solution.
>
> Conversely, the E.S.A. either prohibits or strictly regulates activities that might help bring listed species off their deathbeds. Ownership, possession, and sale of listed species could provide positive incentives for people to protect and nurture them for reasons of their own financial self-interest. Yet the E.S.A. bans such activities. Individuals who might otherwise be interested in providing a sanctuary for listed species on their property find that if they set up birdhouses, nest boxes, or feeders, or harvest their trees on a longer cycle, or make any arrangements to attract and nurture such species, they become shackled by a host of restrictions as to the use of their land as soon as the first invitee arrives. Under such circumstances, few of even the most conservation-minded people will want to open their property to listed species.
>
> The E.S.A. restrictions have been analogized to requiring a person who finds a Rembrandt painting in her attic to keep it on the premises, ensure no matter how great the expense that it is not damaged or stolen, and give the federal government free, unlimited access to her home to monitor protection. Despite these burdens, the person would not be allowed to own, sell, trade, or display the painting for profit. Any delight the person might have felt of discovering this magnificent treasure on her property would probably be a fading memory by this point. She might even consider destroying the Rembrandt if she could do so undetected. Many people cherish living things as priceless works of art, but this natural affection is directly counteracted by the perverse incentives of the E.S.A. n843

FOOTNOTES:

(n1)Footnote 737. Hugh Hewitt, et al. California, Lecture at University of Southern California Law Center, Los Angeles, California (Oct. 28, 1992).

(n2)Footnote 738. CERCLA and SARA, federal laws concerning hazardous and toxic waste, are described in Chapter 74, *supra.*

(n3)Footnote 739. *33 U.S.C. § 1342.*

(n4)Footnote 740. *42 U.S.C. § 6901.*

(n5)Footnote 741. *15 U.S.C. § 2601.*

(n6)Footnote 742. CAAA of 1972, 55 U.S.C. LR 511; CAAA of 1990, Pub. L. No. 101-549.

(n7)Footnote 743. *See* David S. Baron, *Urban Air Quality: Litigation Under the Clean Air Act: Past, Present and Future*, 20 Envt'l L. Rptr. 10216 (1990). This article concludes: "Given the historic unwillingness of the states to adopt the serious measures needed to bring about attainment and EPA's reluctance to intervene, citizen suits will continue to play a pivotal role in the battle for clean air."

(n8)Footnote 744. Kurman, *Clean Air and Urban Areas: Will the New Rules Clean Them Up or Out?*, Urb. Land 16-17 (Feb. 1992).

(n9)Footnote 745. Acting under California's Clean Air Act, air quality regulators in the San Francisco Bay Area are considering a requirement that many large scale development projects obtain a separate permit from the regional air quality management district in addition to the permits already mandated by local land use controls. Elsewhere, air quality standards are imposed as part of the local land use environmental review process.

(n10)Footnote 746. Edward K. Hamilton, Francine F. Rabinovitz, John H. Alschuler, Jr. and Paul J. Silvern, October 1991. *Applying the Jobs/Housing Balance Concept*, Urb. Land 15 (Oct. 1991). Reprinted with permission from Urban Land, October 1991, ULI the Urban Land Institute, 625 Indiana Avenue, N.W., Washington, D.C. 20004-2930.

(n11)Footnote 747. *Id.* at 16. Reprinted with permission from Urban Land, October 1991, ULI the Urban Land Institute, 625 Indiana Avenue, N.W., Washington, D.C. 20004-2930.

(n12)Footnote 748. Pat Nemeth, South Coast Air Quality Management District, Symposium, Cal. Com. Council 2 (Spring 1991).

(n13)Footnote 749. Kurman, *supra* note 524, at 20.

(n14)Footnote 750. Anne Raver, *Let Us Now Praise Famous Swamps*, N.Y. Times, Aug. 18, 1991, § 6 (Magazine), at 21-22.

(n15)Footnote 751. David Ivester, Guide to Wetlands Regulation in California 1 (Jan. 1991) (unpublished manuscript on file with author).

(n16)Footnote 752. Pub. L. No. 92-500, *86 Stat. 816, 33 U.S.C. § 1252 et seq.* (as further amended by Pub. L. No. 95-217, *91 Stat. 1566 (1977)).*

(n17)Footnote 753. James S. Burling, *Local Control of Mining Activities on Federal Lands, 27 Land & Water L. Rev. 309, 318 (1992).*

(n18)Footnote 754. Wetlands are "those areas that are inundated or saturated by surface or ground water at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions. Wetlands generally include swamps, marshes, bogs, and similar areas." 33 C.F.R. § 328.3(b).

(n19)Footnote 755. *See generally* Federal Manual for Identifying and Delineating Jurisdictional Wetlands (1989). Proposed revisions were published in the Federal Register in 1991.

(n20)Footnote 756. Congress prohibited the use of the 1989 Manual that it perceived as overinclusive.

(n21)Footnote 757. David Ivester, Guide to Wetlands Regulation in California 3 (Jan. 1991) (unpublished manuscript on file with author).

(n22)Footnote 758. Office of Technology Assessment, Congressional Board of the 98th Congress, Wetlands: Their Use and Regulation 10 (1984).

(n23)Footnote 759. *But see Sylvester v. Army Corp., 871 F.2d 817 (9th Cir. 1989)* (upholding permit for a golf course in a filled wetland where no other feasible location could be found for the resort project of which the golf course was a part).

(n24)Footnote 760. *33 U.S.C. § 1344*(F) lists six of these, starting with "discharges incident to normal farming and ranching activities ...." The exemptions don't apply when there is a change of use.

(n25)Footnote 761. 33 C.F.R. § 320.4(a)(1).

(n26)Footnote 762. David Ivester, *Guide to Wetlands Regulation in California* 2 (Jan. 1991) (unpublished manuscript on file with author). A similar critique appears in Note, *Leslie Salt Co. v. United States: Keep the Birds Out of Your Birdbath, It May Be Considered the Jurisdiction of the Army Corps of Engineers as a "Water of the United States," 2 VILL. ENVT'L L.J. 463 (1991).*

(n27)Footnote 763. U.S. Const. art. I, § 8, cl. 3 grants Congress the right to "regulate commerce with foreign nations, and among the several States, and with the Indian Tribes."

(n28)Footnote 764. *United States v. Holland, 373 F. Supp. 665 (M.D. Fla. 1974)* (from **Grad, Environmental Law** 82-90 (3d ed. 1985), as further edited by your author).

(n29)Footnote 765. *Hoffman Homes, Inc. v. U.S.E.P.A., 999 F.2d 256 (7th Cir. 1993),* vacating the court's earlier opinion at *961 F.2d 1310 (1992). See also Leslie Salt Co. v. United States, 896 F.2d 354, 360 (9th Cir. 1990), cert. denied, 112 L. Ed. 2d 1194, 111 S. Ct. 1089 (1991)* (Ninth Circuit suggested waters which may provide habitat to migratory birds or endangered species could justify regulation under the Clean Water Act).

(n30)Footnote 766. This has become known as the "glancing duck" test of federal wetlands jurisdiction. *See* Burling, *Local Control of Mining Activities on Federal Lands, 27 LAND & WATER L. REV. 309, 317 n.36 (1992).*

(n31)Footnote 767. *Hoffman Homes, Inc. v. Administrator, U.S. E.P.A., 999 F.2d 256, 262 (7th Cir. 1993).*

(n32)Footnote 768. *Yee v. City of Escondido, 112 S. Ct. 1522 (1992).*

(n33)Footnote 769. *Id.*

(n34)Footnote 770. *United States v. Riverside Bayview Homes, Inc., 474 U.S. 121 (1985).*

(n35)Footnote 771. *Id*. at 459.

(n36)Footnote 772. *447 U.S. 255, 260 (1980).*

(n37)Footnote 773. *28 U.S.C. § 1491.*

(n38)Footnote 774. *Id.*

(n39)Footnote 775. *Id.*

(n40)Footnote 776. *657 F.2d 1184, 228 Ct. Cl. 476, cert. denied, 455 U.S. 1017 (1981).*

(n41)Footnote 777. *27 F.3d 1545 (Fed. Cir. 1994).*

(n42)Footnote 778. Loveladies v. United States, slip opinion at 22.

(n43)Footnote 779. *See, e.g.,* The Dam Safety and Encroachment Act, Pa. Stat. Ann. tit. 32, §§ 693.1 - 693.27, and the Clean Streams Law, Pa. Stat. Ann. tit. 35, §§ 691 - 691.1001. See Robert B. McKinistry, Jr., *Constraints Upon*

Development in Environmentally Sensitive Areas: Regulation of Wetlands and Floodplains in Pennsylvania, 2 VILL. ENVT'L L. REV. 333, 354 (1991).

(n44)Footnote 780. Ronald J. Shoenbaum & Thomas J. Rosenberg, Environmental Policy Law 253 (1991).

(n45)Footnote 781. *Compare Just v. Marinette County, 201 N.W.2d 761 (Wis. 1972)* with *State v. Johnson, 265 A.2d 711 (Me. 1970).*

(n46)Footnote 782. *Orion Corp. v. State, 747 P.2d 1062 (Wash. 1987), cert. denied, 486 U.S. 1022 (1988); Just v. Marinette County, 201 N.W.2d 761 (Wis. 1972); Claridge v. New Hampshire Wetlands Bd., 485 A.2d 287 (N.H. 1984); Graham v. Estuary Props., Inc., 399 So. 2d 1374 (Fla. 1981).*

(n47)Footnote 783. *Berwick v. State, 552 N.Y.S.2d 409 (1990); Gil v. Inland Wetlands & Watercourses Agency, 593 A.2d 1368 (Conn. 1991).*

(n48)Footnote 784. Justices Rehnquist, White, O'Connor and Thomas joined Justice Scalia in the majority opinion. Justice Kennedy concurred. Justices Blackmun and Stevens dissented in separate opinions. Justice Souter would have given the South Carolina Supreme court a chance to reconsider Mr. Lucas' claim in light of the law's new provisions for hardship exemptions.

(n49)Footnote 785. H. Jane Lehman, *Property Rights Drive Picks Up More Ground,* L.A. Times, Oct. 11, 1992, at K6.

(n50)Footnote 786. 2 Phillip Nichols, Nichols on Eminent Domain § 5.01(4) (1991).

(n51)Footnote 787. *Kirby Forest Industries v. United States, 467 U.S. 1, 14 (1984).*

(n52)Footnote 788. *Id.*

(n53)Footnote 789. It did to Justice Brennan, dissenting, who saw that fact as crucial in removing from Nollan any "reasonable expectation" of maintaining the beach. *483 U.S. at 858-60. See* Daniel R. Mandelker, *Waiving the Taking Clause: Conflicting Signals From the Supreme Court*, LAND USE L. & Zon. Dig. 3.5 (Nov. 1988).

(n54)Footnote 790. For a spirited justification for not allowing construction in areas like these, *see* Ian L. McHarg, Design with Nature (1971).

(n55)Footnote 791. Dean, *When a Shoreline Home May Be a Public Nuisance,* N.Y. Times, July 4, 1992, at 6.

(n56)Footnote 792. *482 U.S. 304 (1987).*

(n57)Footnote 793. *See San Diego Gas & Elec. Co. v. City of San Diego, 450 U.S. 621, 655-66 n.21 (1981)* (Brennan, J., dissenting, quoted a California city attorney speaking to the National Institution of Municipal Law Officers in 1974).

(n58)Footnote 794. Property greatly reduced in value isn't a good candidate for any kind of takings claim. The value reduction must be of "all economically viable use" or close to it. The weakness in the second prong can be seen in the result of *First English* on remand; the court found the county's ordinance a perfectly legitimate police power exercise.

(n59)Footnote 795. William E. Farrell, *The Corrigan Case: Litigating Money Damage for a Temporary Taking in a State court,* Institute on Planning, Zoning, and Eminent Domain, Proceedings of the Institute §§ 5.01, 5.03 (1987).

Damages for temporary takings are limited. The State of Florida destroyed 137,880 citrus trees belonging to a private

nursery to wipe out a citrus canker. Samples from the nursery's trees were "clean" and showed no evidence the trees were contaminated. The state was held liable for a temporary taking. But the nursery was denied damages for the lost production time caused by the decontamination process. *State Dep't of Agric. & Consumer Servs. v. Mid-Florida Growers, 541 So. 2d 1243 (Fla. App. 1989),* noted in *19 STETSON L. REV. 955 (1990).*

(n60)Footnote 796. *First English Evangelical Lutheran Church Glendale v. County of Los Angeles, 258 Cal. Rptr. 893 (1989).*

(n61)Footnote 797. *Lucas v. South Carolina Coastal Council, 424 S.E.2d 484 (1992).*

(n62)Footnote 798. Richard J. Grosso and David J. Russ, *Takings Law in Florida: Ramifications of Lucas and Reahard, 8 J. Land Use & Envt'l Law 431, 436* (1993 Summer Supp.)

(n63)Footnote 799. *See* Torf Fulton Assoc., 8 Cal. Plan. & Dev. Rep. 5 (Dec. 1992).

(n64)Footnote 800. To Florida Rock Industries, the court of Claims awarded $1 million for a permit denial affecting only 98 of 1560 acres. But they had asked for a permit for all the land and were forced to shrink their request.

(n65)Footnote 801. *Reahard v. Lee County, 968 F.2d 1131, 1136 (11th Cir. 1992).*

(n66)Footnote 802. *Lucas v. South Carolina Coastal Council, 112 S. Ct. 2886 (1992).*

(n67)Footnote 803. *Lucas, 60 U.S.L.W. 4848 n.12.*

(n68)Footnote 804. *See* John A. Humbach, *'Taking' the Imperial Judiciary Seriously: Segmenting Property Interests and Judicial Revision of Legislative Judgments, 41 Cath. U. L. Rev. 771 (1993),* criticizing the court on this point: "courts have to make value judgments too -- for example, when legislative direction is absent or when courts are applying some of the vaguer prescriptions of the constitution such as 'due process of law.' However, it would be a poor constitutional strategy to give the courts the job of making the same value judgments that an elected legislature has already made under *its* constitutional authority." *Id. at 809.*

(n69)Footnote 805. This was the standard in *Village of Euclid v. Ambler Realty Co., 272 U.S. 365 (1926)* (upholding zoning ordinances).

(n70)Footnote 806. "Preponderance of evidence" is the normal burden of proof in California civil actions. Cal. Evid. Code § 115.

(n71)Footnote 807. The *Nollan* case seemed to impose at least this great a burden on the California Coastal Commission.

These questions were suggested to the author by Kenneth B. Bley, Partner, Cox, Castle & Nicholson, Los Angeles (Oct. 24, 1992). He didn't offer answers.

(n72)Footnote 808. *Nixon v. United States, 978 F.2d 1269 (D.C. Cir. 1992).*

(n73)Footnote 809. *Andrus v. Allard, 444 U.S. 51 (1979).*

(n74)Footnote 810. *Hodel v. Irving, 107 S. Ct. 2076 (1987).*

(n75)Footnote 811. *108 S. Ct. at 2084.*

(n76)Footnote 812. *107 S. Ct. at 2085.*

(n77)Footnote 813. David Papineau, *In the Footsteps of the Dodo,* N.Y. Times Book Rev., Oct. 4, 1992, at 1, reviewing Edward D. Wilson, The Diversity of Life (Harv. Univ. Press 1992).

(n78)Footnote 814. *See* Stevens, *Species Loss: Crisis or False Alarm,* N.Y. Times, Aug. 20, 1991, at C1.

(n79)Footnote 815. David Papineau, *In the Footsteps of the Dodo,* N.Y. Times Book Rev., Oct. 4, 1992, at 1, 25, reviewing Edward D. Wilson, The Diversity of Life (Harv. Univ. Press 1992).

(n80)Footnote 816. John Charles Kunich, *The Fallacy of Deathbed Conservation Under the Endangered Species Act, 24 Envtl. L. 501, 521-22 (1994).*

(n81)Footnote 817. Pub. L. No. 91-135, *83 Stat. 275 (1969)* (repealed 1973).

(n82)Footnote 818. Michael J. Bean, The Evolution of National Wildlife Law 330 (1983).

(n83)Footnote 819. Daniel J. Rohlf, The Endangered Species act: A Guide to its Protection and Implementation 21 (1989).

(n84)Footnote 820. Steven Lewis Yaffee, Prohibitive Policy: Implementing the Federal Endangered Species Act 32-57 (1982).

(n85)Footnote 821. Pub. L. No. 93-205, *8 Stat. 884.*

(n86)Footnote 822. Hori, *The Future of the Endangered Species Act,* Land Use F. 39, 41 (1991), citing *16 U.S.C. § 1532*(5)(A).

(n87)Footnote 823. *16 U.S.C. § 1532*(19) ("The term 'take' means to harass, harm, pursue, hunt, shoot, wound, kill, trip, capture, or collect, or attempt to engage in any such conduct").

(n88)Footnote 824. *857 F.2d 1324 (9th Cir. 1988), cert. denied* as *Cristy v. Lujan, 490 U.S. 1114 (1989).*

(n89)Footnote 825. *Id.*

(n90)Footnote 826. *490 U.S. at 1115-16.*

(n91)Footnote 827. Geoffrey L. Harrison, Note, *The Endangered Species Act and Ursine Usurpations: A Grizzly Tale of Two Takings, 58 U. CHI. L. REV. 1101 (1991). See also* Note, *Does the Endangered Species Act Deprive an Owner of Fundamental Constitutional Rights: Cristy v. Hodel, 13 GEO. MASON L. REV. 421 (1990);* Lauri Alsup, Comment, *The Right to Protect Property, 21 ENVT'L L. 209 (1991).*

(n92)Footnote 828. Tennessee *Valley Auth. v. Hill, 437 U.S. 153, 184 (1978).*

(n93)Footnote 829. Michael J. Bean, The Evolution of National Wildlife Law 364-65 (1983).

(n94)Footnote 830. Webster, *Habitat Conservation Plans Under the Endangered Species Act, 24 San Diego L. Rev. 243, 246 n.22 (1987).*

(n95)Footnote 831. 50 C.F.R. § 402.01.

(n96)Footnote 832. *16 U.S.C. § 1536*(b)(4)(c)(i).

(n97)Footnote 833. *Id.* § 1539(a)(1)(B).

(n98)Footnote 834. *Id.* § 1539(a).

(n99)Footnote 835. Marsh, *Endangered Species Act: Reconciling Economic Development and Wildlife Conservation,* 1 LAND USE F. 45, 47 (1991).

(n100)Footnote 836. Interview by author with Paul T. Selzer, Esq., Best, Best & Krieger, Palm Springs office (Mar. 16, 1991).

(n101)Footnote 837. *Id.* Those who dreamed of a regional park were shaken by hard reality. In November 1990, voters turned thumbs down on a bond issue to add a special assessment on all property owners in the county to supplement developer contributions. Voters had been asked to approve a levy of $3 per parcel per month for it. Without some public funding for the regional park, the habitat conservation plan may fail if development fees aren't sufficient to fund it.

(n102)Footnote 838. David P. Berschauer, *Is the "Endangered Species Act" Endangered?, 21 Sw. U.L. Rev. 991, 1008 (1992).*

(n103)Footnote 839. Hewitt, *Endangered Species Act: Reauthorization or Reality?,* 1 Land Use F. 42 (1991).

(n104)Footnote 840. Silver, *Endangered Species Act: Views of an Environmental Lawyer,* 1 Land Use F. 48, 49 (1991). There is a provision in the Act which allows the President and Congress to invoke a Cabinet-level committee to override the Act. *16 U.S.C. § 1536*(e) to (h).

To approve harm to a listed species, the committee must find that there are no reasonable alternatives to the project, its benefits outweigh alternatives, it is in the public interest, of regional or national significance, and doesn't already involve an irreversible commitment of resources. To date, this provision has rarely been invoked.

(n105)Footnote 841. *See* Editorial, *Endangered Property Rights,* Wall St. J. (Sept. 12, 1994) at A14 ("If Washington decides it needs land to preserve the greater needs of the community, it should acquire it justly: by paying for it.").

(n106)Footnote 842. Bruce Babbitt, *The Endangered Species Act and "Takings": A Call for Innovation Within the Terms of the Act, 24 Envt'l L. 355, 356-57 (1994)* [footnotes omitted].

(n107)Footnote 843. Kunich, at 561-62 [footnotes omitted].

* Parts of this chapter have been adapted from George Lefcoe, Real Estate Transactions (Michie 1993).

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CHAPTER 85 OBTAINING LAND AND RIGHTS FOR DEVELOPMENT *

9-85 Thompson on Real Property, Thomas Editions § 85.21

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Annotations

Annotation, "Activities in Preparation for Building as Establishing Valid Nonconforming Use or Vested Right to Engage in Construction for Intended Use," *38 A.L.R.5TH 737.*

Annotation, "Broker's Liability for Fraud or Misrepresentation Concerning Development or Nondevelopment of Nearby Property," *71 A.L.R.4TH 511.*

Annotation, "Construction and Application of Zoning Laws Setting Minimum Lot Size Requirements," *2 A.L.R.5TH*

553.

Annotation, "Construction Mortgagee-Lender's Duty to Protect Interest of Subordinated Purchase-Money Mortgagee," *13 A.L.R.5TH 242 (1993).*

Annotation, "Construction of Provision of *15 U.S.C. § 1702*(A)(2) Exempting from Interstate Land Sales Full Disclosure Act Sale or Lease of Land Under Contract Obligating Sellor or Lessor to Erect Building Thereon Within Period of Two Years," *118 A.L.R. FED. 647.*

Annotation, "Enforceability, By Landowner, of Subdivision Developer's Oral Promise to Construct or Remove Roads," *41 A.L.R.4TH 573.*

Annotation, "Validity and Enforceability of Due-On-Sale Real-Estate Mortgage Provisions," *61 A.L.R.4TH 1070.*

Annotation, "Validity of Zoning Laws Setting Minimum Lot Size Requirements," *1 A.L.R.5TH 622.*

Annotation, "Zoning Authority as Estopped From Revoking Legally Issued Building Permit," *26 A.L.R.5TH 736.*

* Parts of this chapter have been adapted from George Lefcoe, Real Estate Transactions (Michie 1993).

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Supp. To CHAPTER 85 OBTAINING LAND AND RIGHTS FOR DEVELOPMENT

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Scope

Line beginning § 85.07(a)(1), change "Remediationin" to "Remediation in" Line beginning § 85.07(b), change "Comm'n" to "Common" Third line from bottom, change "Delgation" to "Delegation"

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Supp. to § 85.02 Special Characteristics of the Land Developer's Purchase-and-Sale Agreement.

Line beginning § 85.07(a)(1), change "Remediationin" to "Remediation in"

Line beginning § 85.07(b), change "Comm'n" to "Common"

Third line from bottom, change "Delgation" to "Delegation"
[Go To Main]

§ 85.02(a) The Contingent Contract. [Go To Main]

Add:

David Hartman, *Risky Business: Vested Real Property Development Rights--The Texas Experience and Proposals for the Texas Legislature to Improve Certainty in the Law, 30 Tex. Tech L. Rev. 297 (1999).*

Add:

Union Carbide Corp. v. Siemens Westinghouse Power Corp., 2001 U.S. Dist. LEXIS 874 , Slitz v. Pyramid Custom Home Corp., 1999 Conn. Super. LEXIS 1766 (Conn. Super. Ct., 1999) .

Add:

Mark Techs. Corp. v. Utah Res. Int'l, Inc., 147 P.3d 509 (Utah App. 2006) (The covenant of good faith and fair dealing is superimposed upon the express terms of the contract so that a party is in breach if he intentionally interferes with the other party's enjoyment of the benefits of her bargain.)

§ 85.02(b) The Option. [Go To Main]

Add:

Jakel v. Fountainhead Development Corp., Inc., 534 S.E.2d 199 (Ga. Ct. App. 2000) (option to purchase land not binding because it did not satisfy Statute of Frauds).

Add:

Peet v. Randolph, 33 S.W. 3d 614 (Mo. Ct. App. 2000) (right of first refusal clause in real estate sales contract was specific to enforce even though price and terms were not specific).

§ 85.02(c) The Right of First Refusal. [Go To Main]

Add:

Kalimian v. MTM Associates, 720 N.Y.S.2d 120, (2001) (the right to exercise right of refusal in purchase of property reverted to dormancy when grantee did not proceed with proposed sale).

Add:

Peet v. Randolph, 33 S.W. 3d 614 (Mo. Ct. App. 2000) (right of first refusal clause in real estate sales contract was specific to enforce even though price and terms were not specific).

Add:

Cole v. Peters, 3 S.W.3d 846 (Mo. Ct. App. 1999) (held preemptive right to buy was void under rule against perpetuities).

§ 85.04(d) Choosing Between NPV and IRR [Go To Main]

Add:

See also Colleen Vallen, *Corporate Law and Practice Course Handbook Series PLI Order No. 18409*: Basics of Accounting for Lawyers 2009: What Every Practicing Lawyer Needs to Know 356 (2009).

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Supp. to § 85.05 Financing Land Acquisitions.

Line beginning § 85.07(a)(1), change "Remediationin" to "Remediation in"

Line beginning § 85.07(b), change "Comm'n" to "Common"

Third line from bottom, change "Delgation" to "Delegation"
[Go To Main]

Add:

Lawrence J. Sheh, *Lender Liability and the Corporate Veil: An Analysis of Lenders as Shareholders under CERCLA, 25 B. C. Envtl. Aff. L. Rev. 687 (1998).*

§ 85.05(b) Subordination Agreements. [Go To Main]

Add:

Patrick E. Mears, *Who's on First? Negotiating Debt and Lien Subordination Agreements in Real Estate Transactions,*

13-Feb. Prob. & Prop. 19 (1999).

Add:

ALH Holding Co. v. Bank of Telluride, 18 P.3d 742 (Colo. 2000) .

§ 85.05(f) When a Loan in Form Becomes a Joint Venture in Fact, and Vice Versa. [Go To Main]

Add:

Douglass v. Stanger, 2 P.3d 998 (Wash. Ct. App. 2000) (held parties did not enter into a joint venture because there was no express or implied contract between them).

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Supp. to § 85.07 Allocating Liability for Hazardous and Toxic Waste.

Line beginning § 85.07(a)(1), change "Remediationin" to "Remediation in"

Line beginning § 85.07(b), change "Comm'n" to "Common"

Third line from bottom, change "Delgation" to "Delegation"
[Go To Main]

Add:

Leigh Ann K. Epperson, *Environmental Traps for Contractors*, *7 S.C Envtl. L.J. 135 (1998);* Lincoln L. Davies, *Working Toward a Common Goal? Three Case Studies of Brownfield Redevelopment in Environmental Justice Communities*, *18 Stan. Envtl. L.J. 285 (1999);* Mark Roberts and Andy Morgan, *Cleaning Up, Redeveloping, and Reusing Contaminated Properties*, *33 New Eng.L. Rev. 667 (1999);* Daniel C. Esty, *Toward Optimal Environmental Governance*, *74 N.Y.U. L. Rev. 1495 (1999);* Joel B. Eisen, *Brownfields Policies for Sustainable Cities*, *9 Duke Env L & Pol'y F 187 (1999)* .

Add:

McManus v. Rosewood Realty Trust, 719 A.2d 600 (N.H. 1998) ; *Country World Casinos, Inc. v. Tommyknocker Casino Corporation, 181 F.3d 1146 (10th Cir. 1999)* .

Add:

Black v. Coastal Oil New England Inc., 699 N.E.2d 353 (Mass. App. Ct. 1998) ; *Padgett v. Sanders, 719 N.E.2d 636 (Ohio App. 1998)* .

§ 85.07(a) The Most Important Statute and Its Key Provisions: CERCLA. [Go To Main]

Add:

John M. Hyson, *CERCLA Settlements, Contribution Protection and Fairness to Non-Settling Responsible Parties, 10 Vill. Envtl. L.J. 277 (1999);* Martin A. McCrory, *Who's on First: CERCLA Cost Recovery, Contribution, and Protection, 37 Am. Bus. L.J. 3 (1999);* Brock Elliot Czeschin, Note, *United States v. Navistar International Transportation Corp.: Seventh Circuit Bars Government's CERCLA Claim Based on Violation of the Statute of Limitations, 10 Vill. Envtl. L.J. 399 (1999); 1998 Salmon P. Chase College of Law National Environmental Moot Court Competition, 26 N. Ky. L. Rev. 437 (1999).*

Add:

Heather Edwards-Bohn, *Eleventh Circuit Reexamines the "Owner" or "Operator" Requirement of CERCLA and State Law, 8 S.C. Envtl. L. J. 255 (2000);* Robert J. Sutphin, Jr., *Environmental Law-Owners or Operators: Two Distinct Paths to Parent Corporation Liability under CERCLA-United States v. Bestfoods, 30 N.M. L. Rev. 109 (2000). Compare* Neil R. Burger, *Letting Frustrations get the Better of Us Second Circuit Allows a Lessee/Sublessor to Escape CERCLA Liability Commander Oil Corp. v. Barlo Equipment Corp., 215 F.3d 321 (2nd Cir. 2000) , 54 SMU L. REV. 433 (2001); See also* Layna Cook, *The Impact of United States v. Bestfoods on "Owner or Operator" Liability Under CERCLA,* 59 L.L. Rev. 1003 (1999).

Add:

Howard F. Chang & Hilary Sigman, *Incentive to Settle Under Joint and Several Liability: An Empirical Analysis of Superfund Litigation, 29 J. Legal Stud. 205 (2000).*

Add:

John M. Hyson, *The Plantiff's Burden in CERCLA Contribution Actions: Unscrambling the First Circuit's Acushnet Decision, 31 Envtl. L. Rep. 10180 (2001) . Axel Johnson, Inc. v. Carroll Carolina Oil Co., 191 F.3d 409 (4th Cir. 1999)* (party did not meet statutory defenses and was not an "innocent party," and entry of a consent decree resolving liability to the United States rendered contribution claims moot).

Add:

Charles H. Sarlo, *The Affirmative Defense of an Innocent Landowner Versus the Prima Facie Case of a Toxi Tort Plaintiff: Can CERCLA's Innocent Landowner Provision be Used as a Defense in a Toxic Tort Suit?, 16 Pace Envtl. L. Rev. 243 (1999).*

§ 85.07(b) The Common-Law Relationship Between Buyer and Seller Pertaining to Hazardous Waste. [Go To Main]

Add:

Union Station Associates, LLC v. Puget Sound Energy, Inc., 238 F. Supp. 2d 1218 (W.D. Wash. 2002) (developer, as a non-polluting potentially responsible party, was still limited to contribution actions against other such parties).

§ 85.07(e) Practical Factors to Consider in Drafting Hazardous Waste Warranty and Indemnity Clauses. [Go To Main]

Add:

Southdown v. Allen, 119 F. Supp 2d 1223 (N.D. Ala. 2000) (construing contracts releasing CERCLA contribution claims of owner against its customers under state law).

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Supp. to § 85.08 Law Potentially Applicable to Securing Entitlement to Develop Land.

Line beginning § 85.07(a)(1), change "Remediationin" to "Remediation in"

Line beginning § 85.07(b), change "Comm'n" to "Common"

Third line from bottom, change "Delgation" to "Delegation"
[Go To Main]

Add:

Joseph J. Kalo, *The Changing Face of the Shoreline: Public and Private Rights to the Natural and Nourished Dry Sand Beaches of North Carolina, 78 N.C. L. Rev. 1869 (2000);* Cory J. Albright, *Wake-up Call: Using the Washington Shoreline Management Act to Protect the Shorelines of Puget Sound from High-Speed-Vessel Wake Wash, 75 Wash. L. Rev. 519 (2000);* Kathryn W. Tate, *California's Anti-Slapp Legislation: A Summary of and Commentary on its Operation and Scope, 33 Loyola L. Rev. 801 (2000).*

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Supp. to § 85.10 Developer Strategies for Dealing with Neighbors.

Line beginning § 85.07(a)(1), change "Remediationin" to "Remediation in"

Line beginning § 85.07(b), change "Comm'n" to "Common"

Third line from bottom, change "Delgation" to "Delegation"
[Go To Main]

§ 85.10(c) Lawsuits to Discourage Dissidents. [Go To Main]

Add:

Donovan v. Gardner, 740 N.E.2d 639 (Mass. Ct. App. 2000) ; *Dowling v. Zimmerman, 103 Cal. Rptr. 2d 174 (Cal. Ct. App. 2001)* .

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9-85 Thompson on Real Property, Thomas Editions Supp. to § 85.11

Supp. to § 85.11 Controlling Subdivisions Through the Subdivision Map Act.

Line beginning § 85.07(a)(1), change "Remediationin" to "Remediation in"

Line beginning § 85.07(b), change "Comm'n" to "Common"

Third line from bottom, change "Delgation" to "Delegation"
[Go To Main]

§ 85.11(b) Obtaining Land nad Rights for Development [Go To Main]

Add:

Edward Rusky, *Real Estate Law and Practice Course Handbook Series:* Title Insurance in Commercial Real Estate Transactions 537 (2009).

§ 85.11(c) The Analogy to Special Assessment District Financing. [Go To Main]

Add:

Ajesh B. Patel, *Special Assessment--Assessments Imposed by Township on Commercial Properties in a Special Improvement District are Special Assessments Rather than Taxes, and Therefore, not subject to the State Constitution's Uniformity Clause. 2nd RocCJersey Associates v. Morristown, 158 N.J. 581, 731 A.2d 1 (1999) , 31 Rutgers L. J. 1600 (2000);* Heather Witfall, Municipal Finance: *Special Assessment Alachua County v. Dwight Adams, 702 So. 2d 1253 (Fla. 1997) , 28 Stetson L. Rev. 865 (1999).*

§ 85.11(f) Retroactive Application of Subdivision Standard to Lots Subdivided Before Those Standards Were Enacted. [Go To Main]

Add:

Henry County v. Tim Jones Properties, 539 S.E.2d 167 (Ga. 2000) ; *Kosalka v. Town of Georgetown, 752 A.2d 183 (Me. 2000)* ; *Montgomery Crossing Associates v. Township of Lower Gwynedd, 758 A.2d 285 (Pa. Ct. App. 2000)* ; *Rogers v. Town of Norfolk, 734 N.E.2d 1143 (Mass. 2000)* .

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Supp. To CHAPTER 85 OBTAINING LAND AND RIGHTS FOR DEVELOPMENT

9-85 Thompson on Real Property, Thomas Editions Supp. to § 85.12

Supp. to § 85.12 Land Dedications, Exactions, In Lieu Fees, and Impact Fees.

Line beginning § 85.07(a)(1), change "Remediationin" to "Remediation in"

Line beginning § 85.07(b), change "Comm'n" to "Common"

Third line from bottom, change "Delgation" to "Delegation"
[Go To Main]

§ 85.12(a) From On-Site Dedications to Fees for Off-Site Impacts. [Go To Main]

Add:

Alan Romero, *Two Constitutional Theories for Invalidating Extortionate Exactions, 78 Neb. L. Rev. 348 (1999). But see City of Annapolis v. Waterman, 2000 Md. LEXIS 1 (2000)* .

City Center Redevelopment Corporation v. Foxland, Inc., 180 S.W.3d 13 (Mo. App. 2005) (developer with private eminent domain rights to acquire property in blighted area is required to follow guidelines strictly).

Add:

Floyd B. Olsen, et al., *The Future of Impact Fees in Minnesota, 24 Wm. Mitchell L. Rev. 635 (1998).*

Add:

Benchmark Land Co. v. City of Battle Ground, 14 P.3d 172 (Wash. Ct. App. 2000) (held Nollan/Dolan proportionality test for determination of taking applied to the condition that developer expend sums for improvements as condition to issuance of permit); *Simeosen v. Town of Derry, 765 A.2d 1033 (N.H. 2000)* .

Add:

Compare Greater Franklin Developers Ass'n, Inc. v. Town of Franklin, 730 N.E.2d 900 (Mass. Ct. App. 2000) (held that school impact fee on real estate developers was impermissible tax); *Country Meadows West Partnership v. Village of Germantown, 614 N.W.2d 498 (Wis. Ct. App. 2000)* .

Add:

Benchmark Land Company v. City of Battle Ground, 49 P.3d 860 (Wash. 2002) (city requirement for developer to make improvements to a street adjoining the development was not upheld).

Add:

Isla Verde International Holdings, Inc. v. City of Camas, 49 P.3d 867 (Wash. 2002) (city not authorized to imposed open space condition).

Add new note 315.1 at the end of the page: n315.1

§ 85.12(b) Constitutional Limits: The Nollan Case. [Go To Main]

Add:

Richard Duane Faus, *Exactions, Impact Fees, and Dedications: Local Government Responses to Nollan/Dolan Takings Law Issues, 29 Stetson L. Rev. 675 (2000);* Shelley Ross Saxer, *Planning Gain, Exactions, and Impact Fees: A Comparative Study of Planning Law in England, Wales, and the United States, 32 Urb. Law. 21 (2000).*

Add:

Volusia County v. Aberdeen at Ormond Beach, L.P., 760 So. 2d 126 (Fla. 2000) .

Add:

Isla Verde Int'l Holdings v. City of Camas, 1999 Wash. App. LEXIS 2219 (Wash. Ct. App. 1999) ;

§ 85.12(c) What Nollan Means. [Go To Main]

§ 85.12(c)(1) Generally.

Add:

Brett Christopher Gerry, *Parity Revisited: An Empirical Comparison of State and Lower Federal Court Interpretations of* Nollan v. California, *23 Harv. J.L. & Pub. Pol'y 233 (1999); City of Annapolis v. Waterman, 2000 Md. LEXIS 1 (Md. Ct. App. 2000)* .

§ 85.12(d) The "Nexus" Debate [Go To Main]

Add:

"Report of the Task Force on Business Activity Taxes and Nexus of the ABA Section of Taxation State and Local Taxes Committee," 62 *Tax Law.* (Summer 2009).

§ 85.12(e) Statutory "Nexus" Standards. [Go To Main]

Add:

"Report of the Task Force on Business Activity Taxes and Nexus of the ABA Section of Taxation State and Local Taxes Committee," 62 *Tax Law.* (Summer 2009).

§ 85.12(f) Timing of Developer Contribution and Public Facilities. [Go To Main]

§ 85.12(f)(2) The Complexity of Nexus Testing.

Add:

Wilson v. Board of County Com'rs of County of Teton, 153 P.3d 917 (Who. 2007) (developers who did not challenge conditions until after the subdivision had been approved and most of the lots had been sold no longer had a right to challenge the conditions).

§ 85.13(a) The Interstate Land Sales Full Disclosure Act. [Go To Main]

Add:

Bodansky v. Fifth on the Park Condo LLC (S.D.N.Y. 2010); Romero v. Borden Estate River Realty LLC (E.D.N.Y. 2010). "Development: Condos Escape Disclosure Requirement," *Real Est. L. Rep.* (May 2010).

FOOTNOTES:
(n1)Footnote 315.1. *Homebuiders Association of Metropolitan Portland v. Tualitin Hills Park and Recreation District, 62 P.3d 404 (Ore. App. 2003)* (a municipal resolution creating a so-called system development charge was held to not violate the *Takings Clause*).

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Supp. to § 85.14 Zoning.

Line beginning § 85.07(a)(1), change "Remediationin" to "Remediation in"

Line beginning § 85.07(b), change "Comm'n" to "Common"

Third line from bottom, change "Delgation" to "Delegation"
[Go To Main]

§ 85.14(a) History and Legal Basis. [Go To Main]

Add:

Walsh v. Town of Stonington Water Pollution Control Authority, 736 A.2d 811 (Conn. 1999) ; *Sipriano v. Great Spring Waters of America, Inc., 1 S.W.3d 75 (Tex. 1999)* ; *Indiana Michigan Power Co. v. Runge, 717 N.E.2d 216 (Ind. App. 1999)* .

Add:

Powers v. State, 974 P.2d 716 (Ct. App. Ore. 1999) ; *Prescott v. Leaf River Forest Products., 740 So. 2d 301 (Miss.*

1999) ; *Fielder v. Rice Construction Co., 522 S.E.2d 13 (Ga. App. 1999)* .

Add:

Katia Brener, note, *Belle Terre and Single-Family Home Ordinances: Judicial Perceptions of Local Government and the Presumption of Validity, 74 N.Y.U. L. Rev. 447 (1999).*

§ 85.14(b) The Economics of Use-Segregated Zoning. [Go To Main]

Add:

Ronda Larson, note, *The End of an Era: Suburban Village Aversion in* Citizens for Mount Vernon v. City of Mount Vernon, *74 Wash. L. Rev. 367 (1999).*

§ 85.14(d) The Impact of the Separation of Uses on Housing Affordability. [Go To Main]

§ 85.14(d)(3) Prohibiting Mobile Homes.

Add:

T.W. Thom Constr., Inc. v. City of Jeffersonville, 721 N.E.2d 319 (Ind. App. 1999) ; *Boggs v. Madison County, 240 Ga. App. 849 (Ga. App. 1999)* ; *Sear v. Clayton County Zoning Bd. of Adjustment, 590 N.W.2d 512 (Iowa 1999)* ; *City of Marion v. Turner, 1999 Ohio App. LEXIS 1781 (Ohio App. 1999)* ; Michael J. Phillips, *The Slow Return of Economic Substantive Due Process, 49 Syracuse L. Rev. 917 (1999).*

Add:

Michigan Manufactured Hous. Ass'n v. Robinson Twp., 73 F. Supp. 2d 823 (W.D. Mich. 1999) .

§ 85.14(e) The Impact of the Separation of Uses on Traffic Patterns and Commuting. [Go To Main]

Add:

Ronda Larson, note, *The End of an Era: Suburban Village Aversion in Citizens for Mount Vernon v. City of Mount*

Vernon, 74 Wash. L. Rev. 367 (1999); Sunnyside Up Corp. v. City of Lancaster Zoning Hearing Bd., 739 A.2d 644 (Pa. Commw. Ct. 1999) .

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Supp. to § 85.15 The Vested Rights Problem.

Line beginning § 85.07(a)(1), change "Remediationin" to "Remediation in"

Line beginning § 85.07(b), change "Comm'n" to "Common"

Third line from bottom, change "Delgation" to "Delegation"
[Go To Main]

Add:

BBC Land & Development, Inc. v. Butts County, 640 S.E.2d 33 (Ga. 2007) (vested rights to develop in accordance with prior zoning are personal to the owner or developer, and may not be transferred with the land).

Add:

Yes: *West Main Associates v. City of Bellevue, 106 Wash. 2d 47, 720 P.2d 782 (1986)* .

Add:

1350 *Lake Shore Associates v. Healey, 861 N.E.2d 944 (Ill. 2006)* (an owner may develop according to vested rights even though the owner is aware of the probability that zoning amendments will be introduced).

Yes: *Browning-Ferris Industries v. Guilford County Bd. of Adj.,484 S.E.2d 411 (1997)* ; *Koontz v. Davidson County Board of Adjustment, 130 N.C. App. 479* ; *503 S.E.2d 108 (1998)* .

§ 85.15(a) Challenges to Retroactive Zoning: Estoppel and Vested Rights Theory. [Go To Main]

Add:

David Hartman, *Risky Business: Vested Real Property Development Rights--The Texas Experience and Proposals for the Texas Legislature to Improve Certainty in the Law, 30 Tex. Tech L. Rev. 297 (1999); Hitz v. Zoning Hearing Board of South Annville Township, 734 A.2d 60 (1998)* ; *City of Tuscon v. Whiteco Metrocom, Inc., 983 P.2d 759 (1999)* .

Add:

Toigo v. Town of Ross, 70 Cal. App. 4th 309, 82 Cal. Rptr. 2d 649 (1998) ; *Rayle v. Town of Cato Board, 743 N.Y.S.2d 784 (2002)* (rezoning based on comprehensive plan).

Add:

Rucci v. City of Eureka, 231 F.Supp. 2d 954 (E.D. Mo. 2002) (developer's rights under an option contract were protected by the *Takings Clause*).

§ 85.15(a)(1) Does Estoppel Apply to Any Act, Omission or Promise.

Add:

City of Oxford v. Day, 1998 Ohio App. LEXIS 1003 (1998) .

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Supp. to § 85.16 The General or Comprehensive Plan.

Line beginning § 85.07(a)(1), change "Remediationin" to "Remediation in"

Line beginning § 85.07(b), change "Comm'n" to "Common"

Third line from bottom, change "Delgation" to "Delegation"
[Go To Main]

§ 85.16(a) Functions of the General or Comprehensive Plan. [Go To Main]

Add:

PTL, LLC v. Chisago County Board of Commissioners, 656 N.W.2d 567 (Minn. App. 2003) (the comprehensive plan did not provide a basis for denying approval of preliminary plat); *Chenoweth v. City of Brighton, 655 N.W.2d 821 (Minn. App. 2003)* (city's establishment of a development plan did not constitute state action).

§ 85.16(e) What Consistency Means. [Go To Main]

Add:

Residents of Rosemont v. Metro, 21 P.3d 1108 (Or. App. 2001) (Metro erred in using growth projections that were not acknowledged in, or adopted to implement, regional plans);

After the first sentence, "...considerable discretion." add new footnote: n630.1

FOOTNOTES:
(n2)Footnote 630.1. *See Neighbors for Livability v. City of Beaverton, 35 P.3d 1122 (Or. App. 2001)* (city's interpretation of community service zone designation in its comprehensive plan was consistent with the text and context of the designation).

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Supp. to § 85.17 Initiatives and Referenda.

Line beginning § 85.07(a)(1), change "Remediationin" to "Remediation in"

Line beginning § 85.07(b), change "Comm'n" to "Common"

Third line from bottom, change "Delgation" to "Delegation"
[Go To Main]

§ 85.17(b) Purposes and Legality. [Go To Main]

Add:

Nordmarken v. City of Richfield, 641 N.W.2d 343 (Minn. App. 2002) (Municipal Planning Act (MPA) and the Metropolitan Land Planning Act (MLPA) preempted the right to petition for referendum, and through the MPA the legislature clearly intended to revoke the right to petition); *Save Palisade Fruitlands v. Todd, 279 F.3d 1204 (10th Cir. 2002)* (Colorado statute granting power of initiative to voters in counties classified as home rule, but not to voters in counties classified as statutory, was rationally related to legitimate government interests); but see *Humphrey v. Balli, 61 S.W.3d 519 (Tex. App. 2001)* (statute which prescribed procedures to be followed for sale of land by city did not clearly withdraw or exclude the ordinance from the initiative and referendum process).

After first paragraph, " ... enacting land use laws." add new footnote: n652.1

Add: n*

FOOTNOTES:
(n3)Footnote 652.1. *See Citizens for Jobs and the Economy v. County of Orange, 115 Cal. Rptr. 2d 90 (2002)* (initiative impermissibly interfered with county's essential government functions regarding land use planning and fiscal management).

(n4)Footnote *. *City of Marion v. Guaranty Loan and Real Est. Co., 58 S.W.3d 410 (Ark. App. 2001)* (the Missouri Court of Appeals has held that twelve factors are to be weighed when deciding whether a decision to annex was reasonable and necessary).

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Supp. To CHAPTER 85 OBTAINING LAND AND RIGHTS FOR DEVELOPMENT

9-85 Thompson on Real Property, Thomas Editions Supp. to § 85.18

Supp. to § 85.18 Annexation.

Line beginning § 85.07(a)(1), change "Remediationin" to "Remediation in"

Line beginning § 85.07(b), change "Comm'n" to "Common"

Third line from bottom, change "Delgation" to "Delegation"
[Go To Main]

§ 85.18(b) Who Decides? [Go To Main]

Add:

R. Perry Sentell, Jr., *Survey Article: Local Government Law, 51 Mercer L. Rev. 397 (1999).*

Add:

Town of Sugar Creek v. City of Elkhorn, 1999 Wisc. App. LEXIS 1257 (Wisc. App. 1999) ; *Town Council of New Harmony v. Parker, 707 N.E.2d 1002, 1007 n.2 (Ind. Ct. App. 1999)* ; Justice Deborah L. Cook, *Survey of Ohio Law: Preface, 25 Ohio N.U.L. Rev. 199 (1999); Survey of Ohio Law: Ohio Supreme Court Decisions, 25 Ohio N.U.L. Rev.*

219 (1999).

Add:

Village of Spring Valley v. Town of Ramapo, 694 N.Y.S.2d 712 (App. Div. 1999) .

§ 85.18(c) Implications for Developers. [Go To Main]

Add:

People of Charleston v. Witmer, 709 N.E.2d 998 (Ill. App. 1999) ; *City of Waukee v. City Development Board, 590 N.W.2d 712 (Iowa 1999)* . *But see City of Claremore v. Town of Verdigris, 2001 Okla. LEXIS 108* (Oct. 16, 2001) (fifty-foot wide boundary satisfied contiguity requirement for annexation, and two intervening strips of land between town's strip and annexed property could be ignored for purposes of determining contiguity).

After the third paragraph, " ... upholding development-oriented annexations." add new footnote: n669.1

§ 85.18(d) Annexation Agreements. [Go To Main]

In the indented paragraph at the top of the page " ... in return for the municipality's promise to provide necessary services" add new footnote: n670.1

Add:

Spring v. Bradley, 733 A.2d 1038 (Md. 1999) .

FOOTNOTES:
(n5)Footnote 669.1. *See Board of Trustees of the Village of Spring Valley v. Town of Clarkston, 738 N.Y.S.2d 699 (2002)* (court held that the proposed annexation was in the public interest).

(n6)Footnote 670.1. *See City of Springfield v. Judith Jones Dietsch Trust, 746 N.E.2d 1272 (Ill. App. 2001)* .

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Supp. To CHAPTER 85 OBTAINING LAND AND RIGHTS FOR DEVELOPMENT

9-85 Thompson on Real Property, Thomas Editions Supp. to § 85.19

Supp. to § 85.19 State-Mandated Environmental Impact Reports for Local Land Use Decisions.

Line beginning § 85.07(a)(1), change "Remediationin" to "Remediation in"

Line beginning § 85.07(b), change "Comm'n" to "Common"

Third line from bottom, change "Delgation" to "Delegation"
[Go To Main]

§ 85.19(a) The Content of State Environmental Laws Affecting Approvals of Private Development Projects.
[Go To Main]

Add:

See also Village of Tarrytown v. Planning Bd. of Village of Sleepy Hollow, 741 N.Y.S.2d 44 (2002) (planning board took requisite hard look at areas of environmental concern before issuing negative declaration under SEQRA).

In the second full paragraph, after " ... impacts on air and water quality," add new footnote: n678.1

§ 85.19(b) Environmental Assessment Procedures. [Go To Main]

In last paragraph, after " ... (EIR) is required if there is a fair argument that there may be significant environmental impacts." add new footnote: n701.1

§ 85.19(d) Some Anomalies in Environmental Reporting. [Go To Main]

After first full paragraph, following " ... growth-inducing impact on the entire area." add new footnote: n718.1

FOOTNOTES:
(n7)Footnote 678.1. *Napa Citizens for Honest Gov't v. Napa County Bd. of Supervisors, 110 Cal. Rptr. 2d 579 (2001)* (environment impact report was inadequate under California Environmental Quality Act in regard to its analysis of water and wastewater treatment resources).

(n8)Footnote 701.1. *City of Redlands v. County of San Bernardino, 117 Cal. Rptr. 2d 582 (2002)* .

(n9)Footnote 718.1. *But see Village of Tarrytown v. Planning Bd. of Village of Sleepy Hollow, 741 N.Y.S.2d 44 (2002)* (planning board was not required to engage in assessing cumulative environmental impacts of developing all of developer's properties).

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Supp. To CHAPTER 85 OBTAINING LAND AND RIGHTS FOR DEVELOPMENT

9-85 Thompson on Real Property, Thomas Editions Supp. to § 85.20

Supp. to § 85.20 The Federal Dimension to Local Land Use Approvals.

Line beginning § 85.07(a)(1), change "Remediationin" to "Remediation in"

Line beginning § 85.07(b), change "Comm'n" to "Common"

Third line from bottom, change "Delgation" to "Delegation"
[Go To Main]

§ 85.20(d) The Clean Air Act. [Go To Main]

Add:

Thomas O. McGarity, *Missing Milestones: A Critical Look at the Clean Air Act's VOC Emissions Reduction Program in Nonattainment Areas, 18 Va. Envtl. L.J. 41 (1999); Coalition for Clean Air, Inc. v. South Coast Air Quality Management District, 1999 U.S. Dist. LEXIS 16106 (1999)* .

§ 85.20(g) The Endangered Species Act. [Go To Main]

Add:

Diana Kirchheim, Comment, *The Endangered Species Act: Does "Endangered" Refer to Species, Private Property Rights, the Act Itself, or All of the Above?*, 22 Seattle Univ. L. Rev. 803 (1999); M. Neil Browne and Nancy K. Kubasek, *A Communitarian Green Space Between Market and Political Rhetoric about Environmental Law, 37 Am. Bus. L.J. 127 (1999);* Monica L. Mason, Comment, *Denial of Permission to "Take" an Endangered Species will Amount to a "Taking" under the [Go To Main] in Limited Situations, 21 U. Ark. Little Rock L. Rev. 519 (1999).*

Add:

Shannon Petersen, *Comment, Congress and Charismatic Megafauna: A Legislative History of the Endangered Species* Act, *29 Envtl. L. 463 (1999).*

Add:

Environmental Protection Info. Ctr., Inc. v. Pacific Lumber Co., 67 F. Supp. 2d 1113 (N.D. Cal. 1999) .

Add:

Monica L. Mason, Comment, *Denial of Permission to "Take" an Endangered Species will Amount to a "Taking" under the [Go To Main] in Limited Situations, 21 U. Ark. Little Rock L. Rev. 519 (1999); Earth Island Inst. v. Daley, 48 F. Supp. 2d 1064* (Ct. Int'l Trade 1999) .

Add:

Southwest Center for Biological Diversity v. Berg, 268 F.3d 810 (9th Cir. 2001) (environmental groups brought suit against city and various federal departments and officials alleging that city's comprehensive land management plan and species conservation program did not comply with requirements of Endangered Species Act (ESA)).

Add:

Environmental Protection Information Ctr., Inc. v. Pacific Lumber Co., 67 F. Supp. 2d 1113 (N.D. Cal. 1999) ; *San Bernardino Valley Audubon Soc'y v. Metropolitan Water Dist. of Southern California, 71 Cal. App. 4th 382 (1999)* ; *Environmental Protection Information Ctr., Inc. v. Simpson Timber Co, 1999 U.S. Dist. LEXIS 4234 (N.D. Cal. 1999)* ; *Boise Cascade Corp. v. State, 164 Or. App. 114 (1999)* .

Add:

Monica L. Mason, *Comment, Denial of Permission to "Take" an Endangered Species will Amount to a "Taking" under the [Go To Main] in Limited Situations, 21 U. Ark. Little Rock L. Rev. 519 (1999).*

Add:

Zeitz v. Village of Glenview, 304 Ill. App. 3d 586 (Ill. App. 1999) ; *Good v. United States, 189 F.3d 1355 (Fed. Cir. 1999)* .

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Supp. to § 85.21 Bibliography.

Line beginning § 85.07(a)(1), change "Remediationin" to "Remediation in"

Line beginning § 85.07(b), change "Comm'n" to "Common"

Third line from bottom, change "Delgation" to "Delegation"
[Go To Main]

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CHAPTER 86 POWERS

10-86 Thompson on Real Property, Thomas Editions 86.syn

AUTHOR: Professor Leonard Levin Villanova School of Law Villanova University

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CHAPTER 86 POWERS

10-86 Thompson on Real Property, Thomas Editions § 86.01

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§ 86.01 Powers of Appointment.

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§ 86.01(a) Introduction.

§ 86.01(a)(1) General Nature and Development.

The power of appointment is the power conferred by an owner of property to another person designating future ownership. n1 As applied to the law of wills, the power of appointment appears to be an anomaly in that one is allowed, in substance and effect, to permit someone else to make will provisions for one. n2 Historically, the power of appointment grew out of early attempts to control the disposition of land at death before a direct testamentary disposition of land was legally possible. A landowner who desired to retain land during the owner's lifetime and have a disposition which differed from the Canons of Descent n3 would make an inter vivos conveyance to a nominee. The nominee, in turn, agreed to hold it on inactive trust for the grantor during the grantor's lifetime and at death to such persons as the grantor might designate. These early "trusts" or "uses" became enforceable in the Chancery Court, thus permitting a landowner to bypass the rigid feudal rules of conveyancing as well as the prohibition of testamentary disposition of land. n4 One of the provisions of the Statute of Uses purported to prohibit the employment of a use to accomplish an indirect testamentary disposition of land. n5 However, the demand to dispose of land other than through intestacy remained strong. As a result, a few years after the Statute of Uses had purported to forbid the practice of employing a passive use to effectuate the purposes of a will, Parliament adopted the Statute of Wills and Devises which, for the first time, recognized the right of a landholder to make a direct testamentary disposition of landholding. n6 Although the employment of the inactive trust or use to accomplish a testamentary disposition was no longer possible or desirable, the power of appointment, nevertheless, developed from this practice. Thus, the ability to confer upon another a power to designate a future owner was seen simply as a logical development from the practice of employing the inactive trust or use as a means of effectuating testamentary land dispositions. n7 In theory, from the perspective of the law of estates, the power was viewed as creating a condition subsequent to the title of the creator of the power (who was usually denominated as the donor of the power). If the power were exercised appropriately, the condition was deemed to have occurred and the title of the donor or creator of the power was deemed divested in favor of the designee. n8 Similarly, if the donor designated a taker in default of the exercise of the power, the rights of such taker in default were deemed to be divested if the power was properly exercised. n9 On the other hand, if the power was not exercised, the property would pass to the donor or the donor's designee in default of an appointment. n10 In this sense, the person

designated to make the appointment (who was usually denominated as the donee of the power) was viewed as having no direct property interest but as being the instrumentality through whom the donor effectuated the gift. n11 Courts, however, have not been entirely consistent in this characterization. This problem is pursued further in subsequent sections.

§ 86.01(a)(2) Powers of Appointment as Distinguished from Other Relationships.

§ 86.01(a)(2)(i) Powers of Attorney.

A power of appointment is an irrevocable fractional interest in the property itself. This fractional right consists of the power to designate future owners of the property. As such, the power is unaffected by the death or subsequent incompetency of its creator. n12 Moreover, it resembles other property interests in that, once it is created, it can be revoked or modified only to the extent that the accompanying trust or other property interest could be revoked or modified. n13 On the other hand, the power of attorney constitutes a naked authority conferred on a person to act on another's behalf. n14 The power remains fully revocable and, in the absence of specific statutory changes, terminates on the principal's death or incompetency. n15 This is based on the fundamental agency concept that the principal can confer no greater power than the principal has individually. n16 By definition, a power of attorney is a document that creates an agency relationship. All such relationships are grounded on the principle that one can authorize another to do only what one can do personally. This has been expressed by the familiar Latin maxim, *"qui facit per alium facit per se*." n17

COMPUTER-ASSISTED RESEARCH

LEXIS: power! w/1 appointment w/50 power! w/1 attorney

§ 86.01(a)(2)(ii) Powers of Consumption.

Ordinarily, during the specified term for the trust to exist, beneficiaries are restricted to income. The corpus usually may be distributed only on the trust's termination. n18 This is true whether the trust provides income for one person during the income beneficiary's lifetime with corpus to another, or provides income for the beneficiary for a specific period, after which that beneficiary receives the corpus. n19 Hence, any right to corpus during the existence of the trust must be provided for by the trust. n20

Provisions for a beneficiary to receive corpus take two forms. The most common type of provision vests the discretionary power in the trustee to invade the corpus for the beneficiary's benefit. Such discretion may or may not be controlled by such standards as "maintenance, health or education." In any event, courts ordinarily will not interfere with the trustee in the exercise of this discretion. n21 It is, however, possible to confer on the beneficiary of the trust a power to demand distribution of corpus, or some portion, free of the trust. Strictly speaking, it is only the latter type of power which can properly be called a power of consumption. n22

For federal tax purposes, the power of a trustee to direct the corpus, and the power of a beneficiary to demand a portion of the corpus, are treated as powers of appointment subject to Internal Revenue Code § 2041. n23 Thus, if the beneficiary has a right to demand principal uncontrolled by ascertainable standards, and the right can be exercised either alone or without the joinder of the settlor or an adverse party, the trust assets, to the extent of such right, are a part of the estate of the beneficiary, regardless of whether the beneficiary exercises the right. n24 Moreover, failure to exercise such a power during the beneficiary's lifetime may itself be a reportable gift from such beneficiary. n25

For non-tax purposes, the construction problems of these types of powers bear little resemblance to the common law powers of appointment. Thus, for purposes of property law, a power of appointment refers only to the power to designate a future owner of property, but not to a power to demand or receive corpus of a trust. n26 Few property

lawyers would think of a power of consumption as a power of appointment. In this respect, the terminology employed by the property lawyer differs from that used by the tax lawyer.

COMPUTER-ASSISTED RESEARCH

LEXIS: power! w/1 appointment w/50 power! w/1 trustee!

§ 86.01(a)(2)(iii) Powers of Trustee.

Extensive powers may be granted to a trustee under the terms of a trust. These powers are, for many purposes, the equivalent of powers of appointment. Thus, a trust instrument may confer the power to allocate income to a class of beneficiaries with or without standards, thus giving rights to one beneficiary to the exclusion of others. n27 A similar power may be given with respect to corpus. n28

Traditionally, the ability to confer such a power on a trustee has been subject to an important limitation. When the trust is created for individuals, and no charitable purpose is involved, most courts have required the trust instrument to contain sufficient objective standards to enable a court to evaluate the trustee's exercise. An attempt to confer broad power on a trustee (or executor) to select beneficiaries without such standards is void on the theory that it attempts to create a trust for an insufficiently defined group of beneficiaries. n29 Many text writers have condemned this rule and have argued that if a trustee is willing to make the selection, public policy is not violated by permitting the trustee to do so, regardless of whether the trustee has a duty to make such a selection or not. n30

The *Restatement of Trusts* recommends a basic change in the law, so that when a settlor creates a trust for an indefinite class, purporting to vest the trustee with power to select from that class, the power should be viewed as a valid power of appointment in the trustee to create a trust, "so long as the class is not so indefinite that it cannot be ascertained whether any person falls within it." n31 Except for one English case n32 and possibly a California statute, n33 the recommendation has not found support. A settlor may avoid invalidity under this rule by expressly providing an objective standard which a court might evaluate. Thus, a settlor may confer discretion on the trustee to award to the "person or persons who most contributed to my health and comfort during my last illness." n34

He may also satisfy the requirement, even when no standards are provided for the trustee's discretion, when the class is sufficiently defined to enable a court to objectively determine the identity of the members of the class. Thus, a trustee may be given discretion to distribute among the settlor's children or other similar class of relatives. n35 As stated, the foregoing rules only apply to trusts for individual beneficiaries. If the trust is for charitable purposes, it is permissible to confer broad discretionary power on the trustee to select such purposes. This is because the Attorney General, as the representative of the state, has standing to make certain the trust is enforced. n36

Moreover, modern authorities have accepted the concept of the "honorary trust." Following the lead of the *Restatement of Trusts*, n37 these authorities permit a settlor to dedicate funds for a specific non-charitable purpose, and that will be recognized as long as the trustee is willing to carry out the purpose, and so long as the duration of the trust does not exceed the period of the Rule against Perpetuities. n38

It should be noted that something of an inconsistency appears in the willingness of some courts to recognize the so-called honorary trust and at the same time to deny to the settlor the ability to confer upon the trustee a power of appointment to make indefinite beneficiaries more specific.

Furthermore, even when the donee is not the trustee of an existing trust, if the power of appointment is for a limited, defined class it has some of the attributes of a trust, in that the potential appointees of the class have a recognizable interest in the appointive assets. As a result, some courts have spoken of a special power for such a class as a power held by the donee "in trust for the potential appointees." n39

COMPUTER-ASSISTED RESEARCH

LEXIS: power! w/1 appointment and power! w/1 trustee!

§ 86.01(a)(3) Parties and Classification of Powers.

§ 86.01(a)(3)(i) Necessary Parties.

A power of appointment is created either by the will or by the trust of the original property owner who is denominated as the donor of the power. n40 Much of the desirability of the power of appointment as a planning device arises out of its great flexibility. In creating the power, the donor may "cut the cloth" to fit known needs. Thus the donor may dictate how, when and under what circumstances the power may be exercised, and for whose benefit it may or may not be exercised. n41 There are no boundaries on the character of the limitations the donor may impose. Thus, regardless of the jurisdiction, the donor may make it more difficult for a donee to exercise a power inadvertently by requiring a specific reference to the power to effectuate its exercise. n42 Also, the donor can require the power to be exercised only by the donee's will, n43 or only after the lapse of a specific period of time. n44 Finally, the donor can limit the potential appointees to a limited class or can exclude one or more persons or classes from potential appointment. n45

Normally, a power designates another who, in fact, determines ownership within the limits established by the donor in the creation of the power. The person making such designation is called the donee of the power. n46 As previously indicated, when the donee stands in a fiduciary relationship with the appointive assets, such as a trustee or executor, a serious question of the validity of the transaction may arise, unless the class to whom appointment can be made is clearly defined. n47 The problem may be further complicated because some courts treat the donee of a power for an ascertained and limited class as holding such power "in trust" for members of the class. n48 Additionally, the donee may not have a further interest in the property. The donee may simply be a person in whom the donor vests particular confidence, and who has no other relationship to the appointive assets. n49 While it is common for a donee of a power to appoint a remainder interest to have a right to income during the donee's lifetime, this is not a prerequisite. n50 The person for whose benefit the power is exercised is called either the appointee or the beneficiary. n51 The power may or may not limit the persons to whom such appointment may be made. n52

Finally, it is wise for the donor in creating the power to designate an alternate taker in default in the event that the donee fails to exercise the power. n53

COMPUTER-ASSISTED RESEARCH

LEXIS: limit! w/1 power! w/1 appointment classif! w/5 power! w/1 appointment

§ 86.01(a)(3)(ii) Testamentary or Inter Vivos Powers.

One basis for classifying powers of appointment is according to the time they may be exercised. Although the donor has total power in describing when a power may be exercised, n54 the most common limitation is a requirement that the donee exercise the power only under the terms of the donee's will. Such a power is designated a testamentary power of appointment. n55 It is possible to confer upon a donee the right to exercise the power during the donee's lifetime, in which case the power is an inter vivos power. n56 An inter vivos power confers upon the donee virtually the same ability to transfer or convey full title as if the donee were a full owner. The inter vivos power's use, therefore, is primarily in instances in which a donor wishes to confer upon another the authority to act on the donee's behalf, virtually as an agent, without making the power terminable or destructible. n57 The testamentary power, on the other hand, is a common feature of a modern estate plan. It enables the donee to respond flexibly to changed conditions occurring after the donor's death and it permits the donor to tie up the property during the donee's lifetime since the

donee can only effectuate a transfer by exercising the power in the donee's will. n58

The limited extent to which a donee may effect the property which is subject to a testamentary power during the donee's lifetime is considered in a subsequent section. n59

COMPUTER-ASSISTED RESEARCH

LEXIS: testament! w/1 power! w/1 appointment w/50 estate or property
inter vivos 1/5 power! w/1 appointment w/50 estate or property

§ 86.01(a)(3)(iii) General, Special or Mixed Powers.

Powers may also be classified by how the potential class of appointees is described. If there is no limit upon the potential appointees, the power is denominated a general one. The donee under such a power has the same power to designate future owners as the original owner, the donor, has. n60 The donee may be thought of as having a type of ownership, limited only by the terms of the power. Thus, under the Internal Revenue Code, when a donee dies having such a general power of appointment, the appointive assets are taxable as part of the donee's estate to the same extent as property the donee fully owned. n61 Also, the donee's creditors may have a claim against the appointive assets if the donee is insolvent at the time of death and such donee purports to exercise the power by will. n62

A power containing a limitation on potential appointees is a non-general power. n63 It is possible for the donor to limit the potential appointees in one of two ways. First, the power may be limited to an ascertained class, in which case it is called a special power. Because the donee's power to make a further designation is so limited, the donee cannot be deemed the owner of the appointive assets. As a matter of fact, the donee's relationship to the class of potential appointees and to the appointive assets is analogous to a trustee's relationship to the trust beneficiaries and the trust assets. Thus, some of the courts have spoken of the donee as "holding the power in trust" under such circumstances. n64

Second, the donor may permit an appointment to anyone in the world except designated persons. n65 This is considered a mixed power. Thus, a donor who is angry at a relative, such as a brother, may permit the donee to exercise the power in favor of anyone except the brother. Limitations of this sort have become common, because under the terms of the Internal Revenue Code, the appointive assets are not included in the donee's estate at death, if the donee is prohibited from appointing to self, to creditors, to the donee's estate or creditors of the estate. n66 Thus, a donor may prevent inclusion of appointive assets in the donee's estate simply by excluding these classes from the potential group of appointees. n67

COMPUTER-ASSISTED RESEARCH

LEXIS: general w/2 power! w/1 appointment w/15 appointee!
special w/2 power! w/2 appointment w/50 appointee!
mixed w/2 power! w/1 appointment

§ 86.01(a)(3)(iv) Exclusive or Non-exclusive Powers.

Historically, special powers of appointment were further subdivided into two types. First, if the donee had the power to appoint to one or more members of the designated class and to exclude other members totally, the power was deemed an exclusive power. n68 The donee could make this perfectly clear by a simple statement that the donee could appoint "to one or more of the following...."

Second, if the donee could not exclude any member of the class, and this discretion was restricted simply to fixing the members' respective shares in the appointive property, the power was deemed a non-exclusive power. n69 A typical

example would be a power that simply conferred upon the donee the power to appoint "among" the members of a specified class. During the classic common law period, unless clearly specified to the contrary, powers were presumed to be non-exclusive. n70 Moreover, the donee could not evade the responsibility to make an appointment to all members of the class by making nominal appointments. Such an appointment was deemed illusory and void. n71 Thus, a significant share would have to be appointed to each member of the class. Courts had considerable difficulty under the common law rule in fixing the precise size the share should be to prevent being held void as illusory. n72

An estate planner could easily avoid the whole problem of illusory exercises of a power, if in the creation of the power, minimum and maximum amounts were fixed for each beneficiary. For example, a donor might specify that each member of the class shall receive an appointment of no less than 10% of the total appointive assets. If such a clause were included and the actual exercise was within the established guidelines, no tenable argument could be made to invalidate the exercise of the power.

The distinction, however, has little validity in most jurisdictions today. Many courts have reversed the common law presumption, declaring that unless an intention to the contrary is clearly expressed in the instrument, a power is presumed to be exclusive. n73 If the power is exclusive, the whole problem of illusory exercise of the power is avoided. Some jurisdictions have abolished the non-exclusive power altogether and have purported to make all powers exclusive. n74 Still other jurisdictions, while purporting to retain the distinction between exclusive and non-exclusive powers, have abolished the concept of illusory powers. n75 In such a jurisdiction, a donee with a non-exclusive power could appropriately exercise it by appointing a nominal amount to those members of the class whom the donee did not wish to benefit. n76

COMPUTER-ASSISTED RESEARCH

LEXIS: exclusive w/10 power! w/1 appointment
nonexclusive w/10 power! w/1 appointment

§ 86.01(a)(3)(v) Powers Collateral, Powers in Gross and Powers Appendant.

Finally, powers have been classified by the identity of the donee. In many modern estate plans, the donee has a personal interest in the property, in addition to having a right to designate an interest in the property. Thus, it is common for a settlor or testator to confer upon a spouse or a child a right to income during the spouse's or child's life, and then confer upon the spouse or child a testamentary power to designate the remainder interest with or without restriction upon the potential appointees. In this way, the donee received not only the enjoyment of income from the property, but also the power to designate future ownership. Such a power is called a power "in gross." n77 A power is "collateral," on the other hand, when the donee has no interest in the property other than the right to designate future owners. n78

The donee in such a case acted more or less as the alter ego for the donor, who would necessarily be dead if the power were testamentary, or who might no longer be available in the case of an inter vivos power. Historically, there existed a third type of power, in which a donee had the power to divest the donee's own prior interest. If a donee were given an inter vivos power to appoint away the donee's own rights in the property, this was said to be an appendant power. n79 Most modern courts no longer recognize such powers, since under modern law, such power would merge with the preexisting ownership of the donee. n80 Historically, such powers assumed some importance when, for example, a married woman was forbidden from devising her own property but could exercise a power of appointment. n81 Since the acceptance of full property interests for married women is universal, n82 there is no longer any need for recognition of such powers.

COMPUTER-ASSISTED RESEARCH

LEXIS: power! w/2 gross w/25 estate or property

power! w/2 collateral w/25 estate or property
power! w/2 appendant w/50 estate or property

§ 86.01(b) Problems of Characterization and the Doctrine of Relating Back.

§ 86.01(b)(1) General Powers.

§ 86.01(b)(1)(i) Statement of Problem.

As previously noted, in theory a power of appointment constitutes the creation of a condition subsequent to the donor's ownership. n83 The exercise of the power by the donee has the effect of divesting that ownership and vesting it in the appointee. The donee is thus seen as an instrument of the donor to effectuate the gift. The appointive assets remain the donor's until the exercise of the power. The ultimate giver is the original donor rather than the donee. This has led courts to bifurcate the process of determining the validity of the donee's will, so that it may be declared valid for purposes of disposing of the donee's own assets and yet ineffective to exercise a power of appointment. Thus, in *Hogarth-Swann v. Weed*, n84 an heir-at-law of the donor who would inherit if the power were not exercised was permitted to contest the donee's will in so far as it purported to exercise the power, even though the heir was not an heir of the donee and had no standing to challenge the donee's will for any other purpose. n85

Nevertheless, when the power is a general one in which the donee has an unlimited choice of appointees, realistically the donee, in making the designation, has in fact perfected the gift to such appointee. This is particularly so when the donee also has a life interest in the estate and the power is a testamentary one, so that there is a possibility of a substantial time lapse between the time the power was created and the time of its exercise. Thus, it is possible to argue that, even though the donee is not the owner of the appointive assets, the practical effect of the donee's exercise of the power is to confer upon the appointees the benefit of the donee's largess. In many cases it makes no difference whether one characterizes the giver as the donor or the donee, since title is vested in the appointee. In other cases, the outcome is entirely different, depending upon whether the giver is deemed the donee or donor. Most reported decisions appear to be made on a fairly pragmatic basis.

§ 86.01(b)(1)(ii) Choice of Law Problems.

When the donee and the donor of a testamentary power are domiciled in different jurisdictions, a problem may arise as to whether the appropriate choice of governing law should be the domicile of the donor or domicile of the donee. As long as the appointive assets are in the form of realty, little controversy has arisen with respect to choice of law. Regardless of where the donor or donee are domiciled, the law in effect at the situs of the land in question will be regarded as the law of the state with the most significant contact with the subject matter, and its rules govern. n86

On the other hand, a much more complex question arises in determining which state has the most significant contact with the subject matter when the appointive assets consist of personal property. Such a power of appointment would necessarily be in the form of a trust. Under orthodox conflicts of law principles, the state of the decedent's domicile is deemed to have the most significant contact with the subject matter, and its rules control unless a trust has been created which is being administered in another state. n87 However, if the established trust does not have a definitely defined situs and if the donor and donee reside in different jurisdictions and the power is a testamentary one, whose domicile should be regarded as controlling for this purpose?

Earlier cases, generally speaking, applied the law of the donor's domicile on the theory that the donee was merely the donor's instrumentality for effectuating the gift. n88 This view has been subject to criticism and it has been suggested that the choice of law should differ depending upon the character of the problem. When the problem relates to the validity of the power or the construction of the donor's will, the law of the donor's domicile should, in fact, control. n89 On the other hand, when the problem relates to the construction of the meaning and intention of the donee, the same choice of law should not necessarily be made. In fact, when courts have faced problems such as the question of whether

the donee's will should be construed as an exercise of an outstanding power, their decisions are in conflict. n90 Some have followed the traditional rules set forth above and have continued to apply the law of the donor's domicile. n91 Other jurisdictions, following the lead of the *Restatement (Second) of Conflicts*, n92 have held that in construing the meaning and effect of the donee's will, the law of the donee's domicile should control. n93

COMPUTER-ASSISTED RESEARCH

LEXIS: power! w/2 appointment w/50 conflict! w/2 law!

§ 86.01(b)(1)(iii) Lapse, Anti-Lapse and Similar Constructional Problems.

Generally speaking, when a court is called on to construe the meaning of the donee's will, it treats the problem in the same way when the disposition relates to appointive assets as when the disposition relates to the donee's own assets. The tendency of courts to look to the law of the donee's domicile rather than that of the donor has already been discussed. n94 Moreover, in construing the donee's will, courts must look at the facts at the time the power is exercised (the death of the donee, if the power is a testamentary one) n95 rather than from the creation of the power (i.e., the creation of the trust or the death of the donor). Thus, if during the period between the creation of the power and its purported exercise the appointee has died, the appointment is deemed to lapse, even though such appointee was alive when the power was created. n96 Moreover, in the leading case of *Thompson v. Pew*, n97 a provision in the Massachusetts Wills Act providing for an alternate gift to issue of a legatee who died before the testator (the so-called "anti-lapse" provision) was held applicable to permit the issue of an appointee under a power of appointment to take the appointment through the force of the statute; this was so even though the statute said nothing about the failure of a power of appointment as distinguished from the lapse of a personal gift of the donee. n98

A similar problem may arise with respect to other rules governing the construction of a donee's will in the light of changed circumstances. For instance, in *Shoch's Estate*, n99 the Pennsylvania Supreme Court was confronted with an afterborn child. The Pennsylvania Probate Code has long provided that if a decedent has a child born after the making of the will, then in the absence of a showing of contrary intention, such child receives the intestate share, and to the extent necessary to effectuate this purpose, the will is treated as inapplicable (the so-called Premittitur Heir Statute). The statute contains no provisions at all relating to powers of appointment or the disposition of appointive assets. Nevertheless, in *Shoch's Estate*, the court held that when the donee had a child during the time between the creation of the power and its attempted exercise, and such issue would have taken through the donor in the event the power was not exercised, the afterborn child took and the power would have to be deemed non-exercised. n100

From the foregoing, it may be fairly deduced that when the problem is one of construction of the donee's will, the law of the donee's domicile should control. This is on the basis that there should be little difference between what is meant for the purpose of disposing of the donee's own assets and what is meant for the purpose of disposing of the appointive assets.

COMPUTER-ASSISTED RESEARCH

LEXIS: construct! w/5 donee! w/5 will!
power! w/1 appointment! w/5 lapse!
power! w/1 appointment! w/50 anti-lapse

§ 86.01(b)(1)(iv) Rights of Creditors of Donee.

Unless the donee was also the original donor, n101 as long as the assets of the donee are sufficient to pay the debts, a creditor of the donee cannot regard the appointive assets as property of the donee for purposes of enforcing the obligation. n102 In the event of insolvency of the donee a somewhat different problem arises.

If the power of appointment is inter vivos, its exercise should be subject to the fraudulent conveyances statutes. In other words, if the donee of an inter vivos power exercises the power in favor of others than the creditors, and when the donee had the power to utilize such appointive assets to pay the creditors at time that the donee is insolvent, such exercise might be regarded as a voidable transfer in fraud of creditors and in violation of the statute. n103

If the power is testamentary in character, courts are not in agreement. The prevailing view is that, if the donee is insolvent at the time of death and purports to exercise the power of appointment, the appointive assets are sequestered in equity for the benefit of the donee's creditors. n104 This is on the theory that if the donee had the power to utilize these assets to satisfy creditors, equity will compel their use for this purpose rather than allowing such assets to pass to the donee's appointees. n105 But, under such prevailing view, if the donee fails to exercise the power at all, there is no basis for regarding such assets as a part of the donee's estate and the creditors have no rights. n106

Not all courts agree with the foregoing analysis. A respectable minority of jurisdictions take the position that, unless the donee appoints either to the creditors or to the donee's estate, the creditors cannot establish any rights, because the appointive assets remain assets of the donor and the donee's connection is only as a conduit of the donor's largess. n107 Under this theory, creditors might have a right to appointive assets if the donee's will contained a boilerplate provision directing the payment of debts and the jurisdiction was one in which general language in a donee's will was presumed to be an exercise of any outstanding powers of appointment. n108 So, too, if a donee blended personal and appointive assets in the donee's will it might be possible to infer an appointment to the donee's estate by necessary implication. n109 Actual decisions in which a creditor has been successful in establishing that an appointment has been made to the donee or to the donee's estate have been relatively rare.

The New York legislature some years ago adopted a provision that if a life tenant was also given an unlimited general power of appointment, as far as such life tenant's creditors were concerned the property could be considered as the life tenant's, regardless of whether the life tenant had exercised such power. n110 A few other jurisdictions have adopted similar legislation. n111

Finally, it should be noted that under the federal Bankruptcy Code, which supersedes any contrary state law, n112 if a donee with an inter vivos power of appointment which could be appointed in the donee's own favor becomes bankrupt, the trustee in bankruptcy as the representative of all the creditors may exercise such powers for the benefit of the donee's creditors. n113 Thus, even when the donee has not exercised the power, by force of the statute the trustee could do so on behalf of the creditors. The provisions of the Bankruptcy Code, however, have been held to be applicable solely to powers exercisable inter vivos. When the power is a testamentary one exercisable only by will, it cannot be exercised directly in favor of the donee and the provisions of the Bankruptcy Code do not apply. n114

COMPUTER-ASSISTED RESEARCH

LEXIS: right! w/15 creditor! w/15 donee! w/50 power! w/1 appointment
testament! w/5 power w/1 appointment w/15 creditor! w/15 rights
life w/1 tenant! w/15 general w/1 power w/1 appointment
trustee! w/5 bankruptcy w/50 power! w/1 appointment

§ 86.01(b)(1)(v) Rights of Spouse of Donee.

It is common for the surviving spouse to be given either a forced share in the deceased spouse's estate n115 or, in a community property state, a direct right of ownership in community property. n116 The question of whether the spouse may treat appointive assets held under a general testamentary power as part of the deceased's estate for this purpose largely turns on the statutory provisions of the jurisdiction in question. n117 In the majority of jurisdictions, such assets are only part of the decedent's estate when the deceased was not only the donee but when the property was originally the

deceased's, so that the deceased is both the donor as well as donee of the power. n118

Several jurisdictions have adopted the same test as that employed for federal tax purposes so that the appointive assets are included as long as the donee could exercise the power in favor of the donee, the creditors, the estate or creditors of the estate. n119 Others have denied the spouse any rights treating the property as that of the donor and not the donee. n120

It should be noted, however, that the spouse may also have accrued rights such as support or alimony, and to this extent may be treated as a creditor of the decedent. To the extent that the spouse has rights as a creditor, the rules applicable to creditors of the donee generally, which have been discussed previously, are fully applicable. n121

COMPUTER-ASSISTED RESEARCH

LEXIS: right! w/15 spouse! w/15 donee! w/50 appoint! w/2 asset!

§ 86.01(b)(1)(vi) Disposition in Absence of Valid Appointment.

When a testamentary power of appointment has not been properly executed, the appointive assets are ordinarily treated as never having been divested from the donor and are thus distributed as property of the donor. n122 The drafter for the donor should anticipate the circumstance that the power may not be exercised. This would ordinarily be done by creating an express gift to a nominee of the donor in the event that the donee has not made an effective disposition of the appointive assets. n123 If no such clause is included, the property is disposed of as if no power of appointment had ever been created. Thus, if the power were a part of a testamentary disposition, the appointive assets would be distributed either to the residuary legatees of the donor's will or, in the absence of an effective residuary clause, by intestacy. n124

All of the foregoing is, however, subject to one important qualification under the doctrine of capture. n125 Although the donee's attempted exercise might be ineffective, it might be possible to construe such ineffective exercise as, by necessary implication, an exercise of the power in favor of the donee's own estate. This is most likely in either of two situations. First, if the donee has attempted to exercise the power by creating a trust, the beneficial interests of which fail, the appointive assets pass as a part of the donee's estate. n126 This is simply an application of the familiar rule that when a beneficial interest in a trust fails, there is a resulting trust in favor of the settlor, who in this case is the donee. n127 Secondly, if, under the terms of the donee's will, the donee has blended the appointive assets with the donee's own, the donee will be deemed to have made such appointive assets a part of the estate even if the appointment is ineffective. It is not entirely clear how far a donee must go to achieve such blending. If the donee were to direct by a single clause that personal assets and those over which there was a power of appointment were to be distributed to the same people, this would probably be sufficient. n128 On the other hand, it has been held that no blending occurs when the donee in one paragraph of the will gives personal assets to designated beneficiaries and then in a separate paragraph exercises the power of appointment in favor of the same beneficiaries. n129 Although there is limited authority to the contrary, the prevailing view is that the doctrine of capture applies even when the donor has expressly provided for a gift in default of the exercise of the power. n130

Since most powers employed as a part of an estate plan are most likely testamentary, there has been little authority dealing with the consequences of an ineffective exercise of a power during the lifetime of the donee, when the terms of the power authorize such an exercise. In principle, it would seem that if the power was one which could be exercised inter vivos and it was not properly executed, a close question of construction would arise as to whether the donor contemplated only a single attempted exercise. If so, the ineffective exercise might terminate the power and the outcome would thus be similar to that involved when the power was testamentary. Otherwise, the donee might, while living, still make an effective exercise of the power.

COMPUTER-ASSISTED RESEARCH

LEXIS: invalid w/5 appointment w/50 testament! w/1 power! w/1 appointment
capture w/15 power! w/50 appointment

§ 86.01(b)(1)(vii) Taxability of Appointive Assets: The Federal Tax Structure.

Under the terms of the Internal Revenue Code, appointive assets may be taxed both to the donor and also to the donee so long as the power is a general one as that term is defined in the Code. n131

When a power of appointment is created by an inter vivos trust, its creation is subject to a gift tax so long as the trust is an irrevocable one and the power is created in favor of someone other than the donor. n132 So too, if a power is created by will, the appointive assets are treated as a part of the donor's estate for estate tax purposes. n133

The Code defines a general power as one in which the donee may appoint to the donee, to the donee's creditors, the estate or creditors of the estate. n134 If a power is general in this sense, the Internal Revenue Code directs that the appointive assets be treated as a part of the donee's estate. This is true regardless of whether the donee purports to exercise the power. n135 Furthermore, when any person makes a gift of property in which a life interest is retained, the property continues to be in the donee's estate for estate and gift tax purposes. n136 Thus, when a donee attempts a release of this power during the donee's lifetime, such release is ineffective for federal estate tax purposes if the donee also has a life income interest in the trust. n137 Additionally, any such release would ordinarily constitute a taxable gift as long as it was more than $5,000 or 5% of the corpus of the trust. n138

COMPUTER-ASSISTED RESEARCH

LEXIS: appointive w/1 asset! w/15 tax!
general w/1 power! w/1 appointment w/5 tax! w/2 federal

§ 86.01(b)(1)(viii) State Taxation.

The state inheritance or estate tax treatment of the general power of appointment differs considerably from one jurisdiction to another. In some jurisdictions the appointive assets are taxable as property of the donor only. The donee is viewed simply as the conduit for completing the transfer. n139 Thus, in Pennsylvania, where the tax rate varies depending upon the relationship of the recipient to the giver, it has been held that the rate is established by the relationship of the appointee to the donor rather than to the donee. n140 Furthermore, no additional tax is triggered by the exercise of the power. n141

In some jurisdictions, in addition to a tax upon the donor at the creation of the power, a tax is levied on the donee if, but only if, the donee exercises the power. n142 In other words, the question of the taxability of the appointive assets to the donee or the donee's estate is treated precisely the same as the question of whether the appointive assets are available to creditors of an insolvent donee's estate. n143

Still other jurisdictions have adopted as their model similar provisions to those in the Federal Tax Code previously discussed. n144 In other words, in addition to a tax upon the donor at the creation of the power, a tax is levied on the donee of a testamentary power at death regardless of whether the donee exercises the power. n145

In the notes are the statutory citations of some significant jurisdictions, along with the view to which these jurisdictions subscribe. n146

COMPUTER-ASSISTED RESEARCH

LEXIS: general w/1 power! w/1 appointment w/15 state w/2 tax!

§ 86.01(b)(2) Special and Mixed Powers.

§ 86.01(b)(2)(i) In General.

When the donee's power to designate beneficiaries is not absolute, there is little possibility of treating the appointive property as the donee's. Thus, most of the problems previously considered have no applicability to special powers.

If the power is a special power, i.e., it is limited to a class, the power of a donee to designate within the class is more closely analogous to the power of a trustee than to that of a full owner. As a matter of fact, some authorities have gone so far as to suggest that under these circumstances, the donee holds such power "in trust for the benefit of the intended appointees." n147

Until quite recently, the mixed power, in which the donee is not limited to a definite class but is simply excluded from making designations to those within a prohibited class, was an uncommon occurrence, so there is little theoretical authority on its nature. It would seem to be clear, however, that if, for example, creditors were an excluded class to whom an appointment could not be made, then the rules conferring rights on creditors if the donee was insolvent when purportedly exercising the power could have no application. n148 Moreover, under the express terms of the Internal Revenue Code, it is clear that if the donee, the creditors, the estate, and creditors of the estate are excluded classes, appointive assets are not subject to present estate tax on the donee's estate. n149 The present form of § 2041 of the Internal Revenue Code encourages the use of a power of attorney excluding these four classes of beneficiaries. Thus, more litigation on the nature of such powers seems likely in the future.

COMPUTER-ASSISTED RESEARCH

LEXIS: special w/2 power! w/1 appointment w/50 appointee

§ 86.01(b)(2)(ii) Disposition in Absence of Valid Appointment.

If the donee fails to make a valid appointment and the donee's estate is not within the class to whom an appointment could be made, the doctrine of capture previously discussed could have no application. n150 Since the doctrine is based upon the theory that the donee has, by implication, appointed in favor of the donee's own estate, this theory could not be invoked when the estate is not one to which a valid appointment can be made. Of course, if the donor has designated someone to take in default of a valid power of appointment, such designee does, in fact, take. n151 If on the other hand, no such designation is made, a distinction must be drawn between the special power for a limited class and the mixed power which simply excludes classes from being beneficiaries.

If the power is to appoint to a limited class and no alternate designation is made, the appointive assets do not return to the donor's estate. Instead they are distributed equally to all the members of the class. n152 This is true even though the power specifies that the donor may select one member of the class to the exclusion of others. n153 Two alternate theories for this outcome have been advanced. Some jurisdictions have justified the outcome on the theory that the donor should, by implication, be deemed to have intended a gift to the members of the class equally, in default of the exercise of the power. n154 Others have justified the outcome by analogy to the law of trusts. The theory is that the donee holds the power in trust for the beneficiaries, and when the donee fails to make the designation, the court itself will act by applying the maxim that a trust will not fail for want of a trustee, and thus will appoint equally to all eligible members of the class. n155 Occasionally courts have used both theories interchangeably as though they were the same; in most cases it makes little difference which is employed, since each produces the same outcome. However, in one fact situation it does make a difference. If a member of the class who survived the donor dies during the lifetime of the

donee, before any attempt is made to exercise the power, the estate of such intended appointee might share in the appointive assets, if a court were proceeding on the theory that there was an implied gift in default of the power. Presumably such an interest would be a vested one. The estate of the holder of the interest would take, even though such holder did not survive to the time of enjoyment. n156

On the other hand, if the court is considered to be exercising the power as a substitute trustee-donee, then the court, in exercising the power, could do no more than the donee could have done had the donee survived. As has already been noted, a donee cannot exercise a power in favor of an appointee who is already dead. n157 Thus, a court acting in place of the donee could not make such an appointment, either. n158

If, on the other hand, the power was a mixed one, the foregoing rules could have no application and it would seem that the appointive assets would have to remain in the donor's estate to be distributed with the other assets. n159

COMPUTER-ASSISTED RESEARCH

LEXIS: invalid w/15 appointment w/50 limited w/2 class!

§ 86.01(c) Creation of Power of Appointment.

§ 86.01(c)(1) In General.

A donor may create a power of appointment in the same ways that any other right can be created or transferred. Thus, it may be created as the result of the creation of a gift or trust during the donor's lifetime. n160 It may also be created under the terms of the will of the donor. n161 No magic words are required to create a power of appointment; n162 all that is required is a showing that the donor intended that another should have the ability to designate interests in the property in question. Nevertheless, care should be taken to employ language that does not cast doubt on the donor's intention. Moreover, the donor in the creation of the power may, and should, designate the manner in which it may be exercised, n163 and any limitations imposed upon the donee, either as to the persons to whom appointment may be made n164 or as to the time at which the appointment may be made. n165

COMPUTER-ASSISTED RESEARCH

LEXIS: creat! w/1 power! w/1 appointment

§ 86.01(c)(2) Special Caveats for the Drafter.

§ 86.01(c)(2)(i) Avoiding the Construction of the Indefinite Trust.

As previously noted, some courts have been unwilling to treat a direction to a fiduciary such as an executor or trustee to designate a beneficiary from an indefinite class as creating a valid power of appointment. n166 Although the *Restatement (Second) of Trusts* recommends such a position as creating a valid power of appointment to create a trust, n167 this recommendation has not been widely followed and many courts have traditionally ruled that the transaction constitutes a trust which is invalid and unenforceable for lack of beneficiaries. n168 These courts have distinguished such a relationship from a power because of the supposed obligation of the fiduciary to make the selection without any standards against which the court can evaluate its correctness. n169 Text writers have subjected this point of view to considerable criticism. n170 Irrespective of its correctness, it is a point of view that planners must take into consideration. When it is desired to select beneficiaries from an indefinite class, it is suggested that the donees specified be persons other than the executor or trustee. So, too, although magic language is usually unnecessary to create a power, the drafter in this context should be careful to explicitly label the right of designation as a power of appointment, so that a court might similarly treat it.

COMPUTER-ASSISTED RESEARCH

LEXIS: creat! w/1 power! w/1 appointment w/5 trust

§ 86.01(c)(2)(ii) Rule Against Perpetuities.

A power of appointment in theory creates a type of executory interest divesting the interest of the donor. n171 It is thus an interest whose creation must satisfy the criteria of the rule against perpetuities. n172 As noted elsewhere, many states no longer apply a common law rule against perpetuities in the sense that the barest of remote possibilities that an interest might vest beyond the permissible period will invalidate the interest. Generally speaking, modifications have taken either the form of judging the validity of the interest totally by hindsight to determine whether it had in fact vested, or permitting a court to modify the will or trust to bring it into conformity with the rule. n173 Regardless of whether the rule against perpetuities is construed as it was at common law or as it has been modified, the problem remains of determining whether a power is or is not remote. In most situations, if the power is one which the donee can presently exercise in favor of any person without restriction, it is the equivalent of full ownership and hence the rule against perpetuities is satisfied so long as it comes into existence within the period of the rule. n174

On the other hand, if the power were testamentary or there are limits on the class of potential appointees, the power must be such that the time of its exercise cannot be delayed beyond the permissive period. n175 Since the permissive period is a life or lives in being plus 21 years and since the power must be exercised by a donee within the donee's own lifetime, it follows that if a donor creates a power designating an existing person as a donee, the power is not too remote. A possible violation of the rule against perpetuities in this sense may arise if a donee exercises the power by creating new powers of appointment. n176 So, too, if, in conjunction with a class gift for a class capable of further increase, the donor purports to confer any powers of appointment upon members of the class, a perpetuities problem might arise. Thus, if a donee was identified as being a surviving member of class which remained open, such donee is of necessity a life in being. n177 A far more common possible violation of the rule against perpetuities may arise when the power at the time of its creation is admittedly valid under the foregoing rules, but it is argued that the donee in attempting to exercise the power has attempted to create interests which are too remote. This problem is discussed in a subsequent section. n178

COMPUTER-ASSISTED RESEARCH

LEXIS: power! w/1 appointment w/5 rule against perpetuities

§ 86.01(d) Exercise of Power.

§ 86.01(d)(1) Donor's Power to Designate.

As the creator of the power, the donor may determine what action the donee must take to exercise the power. How the power may be exercised may be set forth in the instrument creating the power. Theoretically, the donee would be bound to comply with the donor's directions, no matter how bizarre. n179 Thus, in theory, a donor could require that the donee could only exercise the power by "standing on his head." Many of the rules relating to the exercise of the power herein discussed are made applicable in the absence of contrary controlling provisions by the donor when creating the power. Thus, in some states it is presumed from a general bequest or a residuary clause that a donee intends to exercise the power. n180 Even in such a state, a donor who is anxious to prevent a donee from inadvertently exercising a power may specify that the power may be exercised only by specific reference to the terms of the power. n181 In the face of such a clause, no presumption would be made that the donee intended the exercise of the power; the clause would thus prevent the construction of the donee's will as an exercise of the power when the donee did not comply with the terms specified for such exercise. n182 Similarly, the donor may limit the means for exercising the power to the will of the donee (the testamentary power), or may designate the classes of persons to whom the power may or may not be exercised, or may

specify the nature of interests which the donee may create in the exercise of the power. n183

COMPUTER-ASSISTED RESEARCH

LEXIS: donor! w/5 power! w/5 designate w/15 power! w/1 appointment

§ 86.01(d)(2) Constructional Problems of Donee's Will.

§ 86.01(d)(2)(i) Determining Whether Donee Intended an Exercise.

One question litigated frequently is whether the donee of a testamentary power has intended to exercise the power under the terms of his will. Proper drafting of the donee's will may, of course, prevent the problem from arising. If the testator is the donee of a power of appointment, it can be specifically stated in the will whether the testator intends the terms of such will to be an exercise of the power of appointment. n184 Even a testator who is unaware of the power can frequently avoid a problem by including a "boilerplate" provision in the will purporting to exercise any powers of appointment. n185 In the alternative, the will could include a clause that states that no power conferred upon the testator shall be treated as having been exercised. n186

When the donee's will is silent on the subject, the courts are in conflict about what presumptions should apply. The classic common law view, which the *Restatement (Second) of Property* continues to recommend, n187 presumes that the donee's powers have not been exercised. Anyone asserting a contrary position has the burden of proof. n188 However, even when the donee's will fails to mention the power, the burden has been held to have been met when the donee purports to bequeath or dispose of appointive assets which are specifically described as if they were owned. n189 It has also been held that if a clause in the donee's will, such as a residuary clause, would be totally ineffective because removal of the appointive assets from the donee would leave no residue, the court may infer that the donee intended to exercise the power of appointment. n190 The rationale for such a determination is subject to some criticism, because a donee does not necessarily know what will be in the estate when death occurs. Thus, it is difficult to see why the intent to exercise the power should be inferred. Nevertheless, whether logical or not, this principle has become well-established.

Moreover, some authority proposes that if circumstantial evidence outside of the will can establish that the donee intended to exercise the power, such intent will be given effect. n191 Thus, the donee was deemed to have exercised a power conferred upon her under the will of her husband through a residuary clause in her will in favor of her only daughter. n192 There was evidence that the donee had a close relationship with her daughter. n193 The appointive assets were necessary to care for an invalid grandson. n194 There was no evidence that the donee would not have intended an exercise. n195 Finally, the out-of-state lawyer who drafted the will was confused about whether the power would be deemed exercised. n196

Other jurisdictions, either by statute or judicial decision, have presumed that general bequests and residuary clauses of a donee's will exercise any of the donee's testamentary powers of appointment unless the donee clearly indicated a contrary intent. n197 Indeed, it has been held that even the fact that the donor created the power after the donee executed the will exercising the power, would be insufficient to prevent the will of the donee from being construed as an exercise of the power under the foregoing rule. n198

COMPUTER-ASSISTED RESEARCH

LEXIS: donee! w/2 intent w/15 testament! w/1 power! w/1 appointment

§ 86.01(d)(2)(ii) Perpetuities and Appointive Interests.

In determining the validity of interests created by a donee in the exercise of a power of appointment, no special problem arises when the power is exercisable at any time and in favor of any person. Such a power is essentially the equivalent of ownership, and the validity of interests under the rule against perpetuities is determined as if the interest was the donee's own asset. In other words, for purposes of determining remoteness, time is deemed to be measured from the exercise of the power. n199 On the other hand, a potential trap exists for the estate planner preparing the will of the donee regarding the exercise of a non-general power in which there is a limitation on potential appointees. A serious possibility of an inadvertent violation of the rule against perpetuities exists, because for purposes of determining remoteness, measurement is not from the time of the exercise of the power, but from its creation. In other words, in determining the validity of an executory or contingent interest created through the exercise of a non-general power of appointment, the terms of the exercise must be read into the donor's will as though the donor had made the disposition. n200 Even if there is no limitation on the potential appointees (a general power), if the power is testamentary, most courts n201 determine the validity of the interests created by measuring from the creation of the power, rather than its exercise. n202 Since it is likely that the donor or creator of the power may be in an earlier generation than the donee, it is relatively easy to see how a violation may arise. For instance, if a person were to receive a testamentary power of appointment under the will of a parent, it could not ordinarily be exercised in favor of the donee's own grandchildren, since the determination of who would take could be delayed beyond the 21st birthday of the donee's children. n203

The traditional common law rule has been ameliorated to some degree. Although at common law the possibility rather than the reality of remoteness ordinarily controls, in the exercise of a power of appointment, the court is entitled to a "second look," such that actuality controls as to events transpiring between the creation and the exercise of the power. Thus, if a donee were to create an interest for grandchildren, such interest might be valid if it could be established that the donee's children were all alive when the power was created and no additional children were born to the donee. n204 A modern "wait and see" jurisdiction permitting actuality rather than possibility to control would reach a similar conclusion. n205

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LEXIS: appoint! w/1 interest! w/50 rule against perpetuities

§ 86.01(d)(2)(iii) Effect of Invalidity of Interest Created by Exercise of Power.

If a donee lawfully exercises a power of appointment but some or all of the interests purportedly created are ineffective, a number of legal consequences must be considered. If the power is a general one which the donee can exercise in favor of anyone, including the donee's estate, this ineffective appointment may be construed as an implied appointment to the estate under the doctrine of "capture." Such assets would be divested from the donor's estate and from the takers in default specified in the donor's will of trust, and instead would pass to the distributees of the donee's estate. n206

This construction is most likely to occur in two types of cases. First, if the donee exercises the power in favor of a trustee and attempts to create interests for beneficiaries, which interests fail because of lapse or a violation of the rule against perpetuities or other positive law, the power is deemed to have been exercised in favor of the donee. This is simply an illustration of the concept that if a beneficial interest in a trust fails, a resulting trust arises for the settlor or creator of the trust, in this case the donee. n207 Similarly, if the donee was to dispose of both appointive and non-appointive assets by the same clause, the donee might be said to have "blended the appointive assets" with those of the estate, and would be deemed to have appointed the assets to the donee's own estate. n208 These concepts are more fully developed elsewhere. n209

The second situation where appointed assets would pass to estate distributees arises if a donee purports to make a gift of the donee's own assets and of appointive assets for several purposes, and fails to earmark which assets are to be used for which purposes. This can occur if some of the purposes are inappropriate for the appointive assets. To give maximum effect to the donee's intention, a court might, under the doctrine of marshalling, earmark appointive assets only to those

purposes to which they could be lawfully applied, leaving the donee's own assets for the other purposes. n210 For example, suppose a donee had a special power of appointment limited to children. Donee left a will purporting to exercise the power and also to distribute his own assets, and the will provided for equal gifts to his wife and his children. A court applying marshalling might utilize appointive assets only to satisfy the gift for the children, leaving the donee's own assets, to the extent that they were sufficient, to make the gift for his wife who could not be an appointee. n211 The same concept might be invoked if an exercise, measured from the creation of the power of appointment, would violate the rule against perpetuities, while a similar gift of the donee's own assets would be valid, because it would be measured from the time the donee made the gift. n212

Finally, a donee of a special power might purport to appoint the power to several members of the class in question, or might make valid appointments to some members of the class and invalid appointments to other members (if, for example, some violate the rule against perpetuities). If the invalid appointments were simply voided and the normal rule applied (that the invalid appointment would be distributed equally among all members of the class) the result would be an unintended inequality, because the appointees of a valid exercise would receive not only their appointed share but a portion of the assets invalidly appointed. A donor might anticipate this problem by including a so-called "hodgepot" clause, under which any appointee who wishes to receive a portion of the unappointed assets must allow the validly appointed share to be included in the amount to be divided among the appointees, thereby assuring equality. n213 Even in the absence of such a clause, a court might reach a similar outcome by treating the appointments as not severable. Thus, invalidity of any portion of the appointment renders all appointments invalid. n214 In each case, a court, as a matter of construction, must ask whether the donee would have desired the valid appointments to stand if it had been known that the other appointments would be invalid. How a court will respond to this question is not always predictable.

COMPUTER-ASSISTED RESEARCH

LEXIS: invalid or ineffective w/2 interest w/50 power! w/1 appointment

§ 86.01(d)(2)(iv) Creation of New Powers in Appointee.

Two competing analyses are possible when a donee purports to exercise a power of appointment by attempting to create new powers in the appointee. One possibility is to consider the exercise as an attempt to delegate to another the power conferred by the donee. Since the donor would normally be deemed to rely personally on the selected donee, such a delegation would be considered unlawful under the familiar maxim that discretionary power vested in one person is personal and may not be delegated. A few decisions have taken this position. n215 The majority of jurisdictions, however, hold that the donee has authority to create any interest desired in the appointee. Thus, just as the power of appointment, prima facie, would include the power to designate a full interest and any partial interest, so, too, the new power of appointment might be deemed a new partial interest in the new donee. This is particularly so when the original power was a general power. n216 In accepting this reasoning, the Massachusetts court distinguished an earlier case on the basis that the creation of the new power had accompanied the creation of other interests for the appointee, so it could not be deemed a mere delegation. n217 It is uncertain whether this distinction is sound. The *Restatement of Property* has taken the position that, under these circumstances, the donee may exercise a power by creating new powers. n218

Even if the donee's power to select is unlimited (a general power), the donee's exercise must still comply with the rule against perpetuities. If the general power is testamentary, in most jurisdictions its validity under the rule against perpetuities is measured from the time the power was created, rather than from when it was exercised. n219 Since the new power must also be exercised within the permissive period, n220 it follows that the donee, in creating the new power, could do one of two things. The donee could designate a person who was alive when the donor originally created the power to assure that its exercise must occur within the permissive period. Alternatively, the donee could limit the time when the exercise of the new power could occur to a time period within the period of the rule. n221

On the other hand, if the donee of the original power is limited as to the persons to whom the donee can appoint, a problem then arises as to whether a new power created by the donee must similarly limit its appointments to those who could have been appointed under the terms of the original power. Most courts, when confronted with this problem, have limited such a donee to the creation of powers with the same limitations that existed in the original power. n222 This is also the position taken by the Restatement. n223

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LEXIS: creat! w/5 power! w/2 appointee
creat! w/5 interest! w/2 appointee
donee! w/2 creat! w/2 new w/1 power!

§ 86.01(e) Enforcement of Limitations on Exercise.

§ 86.01(e)(1) Testamentary Powers.

By definition, a donee can only exercise a testamentary power of appointment under the terms of the donee's will at death. n224 Hence, any attempt by the donee to exercise the power during the donee's lifetime is void. So too, a donee's attempt to contract to exercise the power in a specified way is unenforceable. If a donee breaches such a contract and exercises the power differently than had been contracted, the contract cannot be specifically enforced. n225 Moreover, such a donee cannot be held liable for damages, since that possibility would inhibit the donee in the free exercise of the power under the terms of the will as contemplated by the donor. n226

If the donee does not breach the contract, but exercises the power in the will consistent with the terms of his contract, the exercise is not tainted and the appointee may take in accordance with the terms of the exercise. n227 This is so even though the very existence of the contract might be thought of as inhibiting the donee in the free exercise of the power. The effect of such a contract must be distinguished from an agreement constituting a fraud on a special power, which invalidates the exercise of the power. n228 This question is more fully discussed elsewhere. n229

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LEXIS: donee! w/2 exercise! w/5 testament! w/1 power! w/1 appointment
donee! w/5 contract! w/5 power! w/1 appointment

§ 86.01(e)(2) Special Powers.

A donee may not fetter the discretion to exercise a testamentary power while living, but may agree to release the power while living. n230 This power, although illogical, has two sources. First, historically, the donee's ability to release a power of appointment *inter vivos* was considered analogous to the recognized power of a life tenant to extinguish the life estate. This device was employed at common law to enable the life tenant who also had the reversion to destroy any contingent remainders and thereby acquire a full fee simple. n231 Second, in 1942, when federal tax liability was imposed on the donee of a general testamentary power, a provision was made for the donee to avoid tax liability by disclaiming the power. n232 This reinforced the notion that such testamentary powers could be released.

Moreover, just as the donee may release the power, the donee may also enter into a valid contract with the takers in default not to exercise the power in such a way as to interfere with the rights of the taker in default. n233 For example, in one case a donee had a testamentary power to appoint among her six children, and agreed that one child would receive a minimum specified sum ($1000). The court construed the agreement as a contract by the donee to leave $6000 unappointed so each child would receive $1000. n234

COMPUTER-ASSISTED RESEARCH

LEXIS: donee! w/15 inter vivos w/15 release!
donee! w/15 contract! w/15 release!

§ 86.01(e)(2)(i) Benefitting Non-Objects Generally.

It is axiomatic that if a power of appointment restricts who may be potential appointees, such a restriction will be enforced. Thus, if the power is for a limited class, any attempt to appoint to anyone outside the described class will be utterly void. n235 Thus, when a power is created to appoint to the donor's nieces and nephews, an attempt to appoint to the issue of any niece or nephew who predeceased the donee was held to be void. n236 Similarly, if the power precludes appointment to a given class of persons, an appointment within the prohibited class will be deemed void. n237

Occasionally, however, a difficult constructional problem may arise in determining which appointment is the donor's intended appointee. Motives are frequently mixed, and an appointment may simultaneously confer a benefit upon an appropriate appointee under the power while also benefitting an inappropriate object. For example, if the donee appoints within the proper class of appointees in order to make a property settlement upon the donor's intended bride, is the appointment for the benefit of an appropriate object or for the benefit of the wife who is not an appropriate appointee? n238 Similarly, if the donee appoints to an appropriate appointee to enable the appointee to pay an overdue debt, should the appointment be construed as to the appointee, or is the appointee merely a conduit for the creditor who is not an appropriate object of the power? It is difficult to state any firm rule because the problem is frequently one of degree. However, the power is generally deemed to be exercised appropriately when it is exercised directly to an appropriate object, even if the donee knows that the gift will be used for immediate payment to a non-object of the power. n239 Only if it could be established that the appointee was under some legal or moral duty to transfer such specific funds to the non-object might the exercise of the power be attacked. n240

COMPUTER-ASSISTED RESEARCH

LEXIS: benefit! w/15 non-object! w/50 appointment

§ 86.01(e)(2)(ii) Application to Fraud on Power.

Even if an appointee is an appropriate object of the power, the appointment may be invalid if its primary purpose is to create a benefit for a non-object of the power. Such an appointment is called a "fraud on the power" and is therefore void. n241 The clearest application of this doctrine arises when the donee appoints to an appropriate object of the power solely in response to a contract to use all or part of the appointive assets for a non-object. n242 A similar outcome has been reached when no appointment, or a limited appointment, is given to an object in retaliation for the object's refusal to agree to dedicate the appointive assets to benefit a non-object. n243 An appointment to an object cannot be sustained if the appointee is under a mandatory duty to hold the proceeds as a trustee for a non-object. n244 Again, the donee ordinarily may not exact a benefit for the donee as the price for making an appointment. n245 Thus, it has been held that when a donee had the power to appoint among the donee's children, an appointment in favor of the children of an earlier marriage, as part of an overall property settlement with the previous first spouse, was void as an attempt to benefit personally. Since the donee was a non-object of the power, the appointment made to secure favorable terms from the previous spouse was held void. n246

COMPUTER-ASSISTED RESEARCH

LEXIS: fraud w/1 power! w/50 appointment

§ 86.01(f) Termination of Power.

§ 86.01(f)(1) Termination by Donor.

Once the donor creates a power of appointment, the donee has no greater power to withdraw or terminate it than with any other interest. Under the law of gifts, most inter vivos gifts are deemed irrevocable. n247 Similarly, the power of appointment is not terminable by the donor. If the power is part of an inter vivos trust, the donor may terminate it only if the trust is revocable. In most jurisdictions, the settlor has no power to revoke a trust unless such a right is specifically reserved. n248 So, if the trust confers a power of appointment, the power cannot be withdrawn, unless the donor expressly reserves the right to withdraw it.

On the other hand, if the donor purports to create a power of appointment by his will, the will has no effect until the donor dies. Hence, no power of appointment arises until the donor dies and the will is probated. Before that, the donor maintains the right to amend or revoke the will or any provision of it, including any attempted power of appointment. n249

COMPUTER-ASSISTED RESEARCH

LEXIS: donor! w/15 terminat! w/15 power!
w/1 appointment donor! w/15 withdraw!
w/15 power! w/1 appointment

§ 86.01(f)(2) Termination by Donee.

§ 86.01(f)(2)(i) Disclaimer or Release.

The transfer of property can never be forced upon anyone. Hence, any transferee of a property interest has always had the option to disclaim it. n250 In this sense, creation of the power of appointment is viewed as the creation of a property interest in the donee which the donee need not accept. Because under modern tax law a general power of appointment may have serious adverse tax consequences, the donee's ability to disclaim the power has been regulated by the tax code. n251 A disclaimer avoids the adverse tax consequences of an interest, and prevents it from being treated as a new gift to the taker in default, only if the disclaimer is "qualified" under federal law. To be qualified, a disclaimer must be made in writing within nine months of the creation of the interest. n252 The nine months runs from the donor's death if the donor created the interest by will, or from the creation of the trust if the donor created the interest in an inter vivos trust. Even if the disclaimer is not qualified because it is not made in time or with sufficient formality, it may nevertheless be effective as a release of the power. n253 If it does not qualify under the tax code, it operates as a further transfer of an interest by the donee. This leads to gift tax consequences. The appointive assets will also be included in the donee's estate, if the power is general and the donee has a life interest in the trust. n254

Even if the donee does not disclaim the power of appointment, the donee may always release rather than exercise it. Such a release presents no difficulty when the power is exercisable inter vivos. Even if the power is testamentary, the donee may release it during the donee's lifetime. The rule permitting such a release is a curious anomaly in the law. n255 Whether a release of a special power may be set aside because it is for purposes foreign to the power's creator, and therefore constitutes a fraud on the power, is more complicated. n256

COMPUTER-ASSISTED RESEARCH

LEXIS: donee! w/15 disclaim! w/15 power!
w/1 appointment donee! w/15 release!
w/10 power! w/1 appointment

§ 86.01(f)(2)(ii) Death of Donee.

A power of appointment is personal to the donee and cannot be exercised by another on the donee's behalf. In this sense all powers of appointment are nondelegable. Thus, if the donor purports to create a power of appointment in the donor's will for a donee who dies either before the donor does or simultaneously with the donor, the power is not deemed to be exercised even if the donee purports to make reference to it. No exercise is possible before the power comes into existence, and, in this example, the power cannot come into existence until the donor dies. Thus if the donee predeceases the donor, the power is deemed to lapse. n257

It may be possible, however, to read an attempt by a donee to make an appointment as the donor's own gift. Thus, if the donor was aware of the donee's will provisions, the gift might pass under the donor's will. The attempted exercise by the donee might be construed as an act of significance independent of the donor's own testamentary disposition, which the donor has adopted as a means of distributing the donor's own estate. n258

Even if the donee does survive the creation of the power, the donee normally does not have an inheritable interest. Thus, if the donee dies without having exercised the power while living or under the terms of the will, the power to exercise it will not ordinarily pass as a part of the donee's estate unless the terms of the power expressly so provide. The donee's power is normally deemed purely personal. n259

COMPUTER-ASSISTED RESEARCH

LEXIS: death w/5 donee w/5 power! w/1 appointment

§ 86.01(f)(3) Release by Prospective Donees.

If the exercise of the power is limited to an ascertained and closed class (a special power), it should be possible to terminate it, if all possible appointees join in an effective disclaimer of the power. n260 As already noted, no person can be compelled to accept any gift, n261 including one created through the exercise of a power of appointment. n262 Hence, in theory, if all persons to whom an appointment could be made manifest the intention that they will not accept an appointment, the power is effectively nullified. n263

COMPUTER-ASSISTED RESEARCH

LEXIS: appointee! w/10 disclaim! or terminat! w/15 power! w/1
appointment

§ 86.01(g) Estate Planning and Use of Power of Appointment.

§ 86.01(g)(1) Historic Use and Development.

Initially, the power of appointment grew out of medieval estate planners' employment of the medieval use. n264 The use was originally employed as a means of evading the rule prohibiting the testamentary disposition of land, and requiring that it descend to one's heir in accordance with the Canons of Descent. n265 Prior to the enactment of the Statute of Wills and Devises in 1540, a direct devise of land was not recognized. n266 Instead, if a landowner had not conveyed land during the owner's lifetime, it usually passed to the eldest son under the rules of primogeniture. n267 *Inter vivos* conveyances were, of course, recognized. It had become settled that the Chancellor would enforce the obligations assumed by one who took a conveyance for the use of another. n268 A landowner who wanted to dispose of property at death in a fashion other than that prescribed by the Canons of Descent could convey the property to a nominee to hold for the landowner's own use for life, and upon the landowner's death to hold for the use of such persons as the conveyancer might thereafter designate. n269 In enforcing such a use, the Chancellor would give effect to the conveyancer's will to fix the beneficiaries of the use upon the conveyancer's death. Although the Statute of Uses

specifically prohibited this practice, n270 Parliament almost immediately conferred a direct right upon a landowner to devise land. n271 However, by the time direct devises of land were recognized, the employment of a use for the benefit of the nominee of another had become well-established. The practice continued, even after direct devises of land were recognized.

COMPUTER-ASSISTED RESEARCH

LEXIS: estate planning w/15 power! w/1 appointment not w/30 tax

§ 86.01(g)(2) Non-Tax Planning.

The power of appointment is most commonly employed in estate plans to increase flexibility. A donee designated by the donor will be able to alter the estate plan in response to changing, and frequently unforeseeable, events. Often, the terms of a trust may indicate an intention that the trust will remain operative for decades after its creation. It is not uncommon for a trust to provide life income for the first generation, and for termination of the trust and distribution of corpus to the succeeding generation. n272 The trust thus may have to provide for circumstances arising decades after its creation. While a gift to a class provides limited flexibility, keeping the class open to receive additional qualifying members, n273 it cannot provide for differences within the class. Such differences can best be dealt with by conferring the power on a donee to provide for such differences when actual events establish a rational basis for making such provision. For example, a settlor might create a right to life income for a child and then confer upon the child the right to choose a successor interest among the child's children. It may be impossible for the settlor to make such a choice when the actual individual needs of the grandchildren are unknown and unknowable. Such power of appointment need not be limited to the life income beneficiary. The settlor, as a matter of fact, can confer a general or non-general power of appointment upon virtually any nominee, as a means of responding to changes in circumstances which the settlor cannot anticipate.

A donor may also employ the power of appointment to confer on an individual some, but not all, of the incidents of ownership. Thus, a settlor may wish to confer the property's ultimate disposition on a donee, but also to prevent the disposition during the donee's lifetime. Any attempt to give the property to the beneficiary while inhibiting the ability to transfer it during his lifetime would be ineffective. n274 The restriction on transfer would be void as a restraint on alienation, and could safely be disregarded. However, a settlor may accomplish the desired result by giving the beneficiary a life income and coupling it with a general testamentary power, exercisable only by donee's will. A testator may wish to give a surviving spouse an income interest in a trust, and then confer upon the spouse the power to select shares of any interest for their children. Without having full ownership, the spouse will have both the benefit of income from the property and the power to designate subsequent interests in the property.

In the above illustrations, the power of appointment relates only to a future interest in a trust following an income interest, at a point when the donor cannot anticipate changed circumstances. Although theoretically a power of appointment may be employed to create a present right or interest, n275 in most instances, such a power has little utility as a planning device. Possibly if a testator fears incompetency or illness at the time the will is drafted, it might be appropriate to delegate to another the power, in effect, to alter or amend the will on the basis of circumstances that change between the execution of the will and the testator's death. Thus, a testator may be able to employ the power of appointment as a device to prevent the testamentary plan from becoming frozen when, by reason of illness or incompetency, the testator is not in a position to respond to a changed and possibly unforeseeable circumstance. Situations in which the power is used in this fashion, however, are relatively rare.

§ 86.01(g)(3) Tax Planning.

§ 86.01(g)(3)(i) The Marital Deduction Trust.

Under the federal estate tax, all property passing to the surviving spouse is exempt from estate tax so long as the survivor's interest would be included in the estate of such surviving spouse, unless it were consumed or given away at death. n276 While it is possible to make an outright gift to a surviving spouse, many testators want to control the ultimate disposition while providing for management of the assets for the surviving spouse. Prior to the adoption of the present tax reform act, the best way to accomplish this was to create a trust in which the surviving spouse would receive the income during his or her lifetime. The surviving spouse would be given a general power of appointment which, under I.R.C. § 2041, would make the trust assets part of the surviving spouse's estate whether the spouse exercised the power or not. n277 The trust would provide a gift in default of the power's exercise. The testator could therefore assure the marital deduction for the assets, and if in fact the survivor never exercised the power of appointment, the original testator would maintain control over the ultimate disposition. n278

The tax reform act has created the qualified terminable interest (QTIP). Under the act, if the surviving spouse is given all of the income of the trust, the spouse may elect to treat the assets as a part of the survivor's estate, although under federal tax law they would not be included. n279 Hence, the general power of appointment is no longer essential to qualify an interest for the marital deduction. Even with a QTIP trust, the settlor will frequently want to retain flexibility in the estate plan and will thus limit the surviving spouse to a life income interest and confer on the surviving spouse a special power of appointment among class of beneficiaries selected by the settlor.

A unified credit is built into the estate and gift tax structure. Approximately the first $600,000 of assets passing by gift or inheritance is tax-exempt, no matter who is the beneficiary. n280 Often an estate planner will provide for the utilization of this credit as well as the marital deduction by creating two trusts. In the second trust, the surviving spouse's rights are limited so that trust assets are not included in the survivor's estate and the property can pass to the next generation completely tax free. n281 Since each spouse has the same unified credit, this means that $1,200,000 can pass tax free upon the death of the surviving spouse.

Since the tax reform act was adopted, the gift tax and estate tax have been coordinated. Thus the principles outlined above with respect to the testamentary estate plan also apply to a gift inter vivos. n282 In other words, so long as the donor spouse has made a gift which will be included in the donee spouse's estate (if not consumed or given away at the time of the donee's death) the gift is not subject to federal gift tax. Should a donor wish to create an inter vivos trust for the surviving spouse's benefit, he may prevent the imposition of a gift tax in the same way as that outlined in connection with a testamentary trust.

COMPUTER-ASSISTED RESEARCH

LEXIS: marital deduction trust! w/50 power! w/1 appointment

§ 86.01(g)(3)(ii) The Generation-Skipping Trust.

The present tax code has imposed a generation-skipping tax, which is levied at the highest available estate tax rate on all legacies, devises or gifts constituting a generation-skipping transaction. n283 There is, however, a generous $1,000,000 exemption before any generation-skipping tax is imposed. n284 Because of the high tax rate, planners should remember to avoid the tax whenever possible when large gifts are contemplated. The generation-skipping tax is imposed on any gift when there is more than a single generation between the giver and the receiver. n285 Thus, a generation-skipping tax might be imposed on a gift by a donor to his grandchildren, or on a gift by a donor to grandnieces and grandnephews. n286 Since no tax is exacted on the death of the donor's children or nieces and nephews, the added generation-skipping tax is imposed on the grandchildren or grandnieces and grandnephews. The tax is imposed regardless of whether the interest of the grandchildren or grandnieces and grandnephews is a direct gift or preceded by a life interest for their parents. As long as no tax was levied on their parents, the additional tax is imposed on the grandchildren. A generation-skipping tax can be avoided if the property is deliberately made taxable at what may be significantly lower rates on the death of the parents in question. Thus, a settlor confronted with a possible

generation-skipping tax might prefer the property to pass through the estate of the parent for tax purposes. Thus, the settlor can simply give such parent a right to life income with a general power of appointment. n287 Under the provisions of I.R.C. § 2041, such a power will trigger estate tax in the parent's estate. If the assets are taxable in the parents' estate, no generation-skipping tax will arise. The settlor may then provide for a gift to the grandchildren in default of the exercise of the power. So long as the parent does not exercise the power, the settlor's plan remains intact and no generation-skipping tax will be triggered. When the estate plan is for a married couple, the $1,000,000 exclusion that each is entitled to ought to be preserved. This can be done by combining a trust with a special power of appointment. Provisions comparable to the QTIP provisions previously discussed exist so that the spouse making the gift may utilize the personal $ l,000,000 exclusion and that of the spouse, as long as the spouse consents. n288

COMPUTER-ASSISTED RESEARCH

LEXIS: generation-skipping trust

FOOTNOTES:

(n1)Footnote 1. *See generally* Restatement (Second) of Property (Donative Transfers) § 11.1 (1984) (stating "[a] power of appointment is authority, other than as an incident of the beneficial ownership of property, to designate recipients of beneficial interests in property").

(n2)Footnote 2. *McCurdy's Estate, 240 P. 498 (Cal. 1925)* (codicil by aunt giving niece testamentary control over disposition of remainder interest of aunt's estate is valid); *McKallip's Estate, 188 A. 343 (Pa. 1936)*(recognizing ability to create and give effect to power of appointment where intention by testator is clear); *Estate of Steward, 473 A.2d 572, aff'd, 485 A.2d 391 (Pa. 1984)* (recognizing donee's general, presently exercisable power of appointment given by testator).

(n3)Footnote 3. Under the Canons of Descent, land descended to the eldest son and his issue to the exclusion of any other issue. In the absence of issue, it did not "ascend to parents" but instead was inherited by collaterals, those with a nearer common ancestor taking to the exclusion of those with a more remote common ancestor. For a complete explanation of the Canons of Descent, *see* Thomas E. Atchkinson, Law of Wills 36 at 37 (2d ed. 1953).

(n4)Footnote 4. Atchkinson, *supra* note 3, § 3 at 14.

(n5)Footnote 5. *Id.*, The Statute of Uses is commonly cited as *27 Hen. 8* ch. 10.

(n6)Footnote 6. *32 Hen. 8* ch. 1.

(n7)Footnote 7. Lewis F. Simes, Law of Future Interests § 55 at 122 (2d ed. 1956).

(n8)Footnote 8. *Id.*

(n9)Footnote 9. *Id.*

(n10)Footnote 10. *See also Osburn v. Murphy, 193 N.E.2d 669 (Ind. 1963)* (recognizing rule where no residuary clause exists and power of appointment fails property passes as intestate property to heirs of donor at date of death); *Dow v. Atwood, 260 A.2d 437 (Me. 1969)* (property distributed according to intestacy where appointee under testamentary power of appointment died prior to date of appointment); *O'Leary v. McCarty, 492 S.W.2d 124 (Mo. App. 1973); New England Trust Co. v. Faxon, 178 N.E.2d 488 (Mass. 1961); Ammco Ornamental Iron, Inc. v. Wing, 26 Cal. App. 4th 409 (1994)* (if trustee did not exercise his power of appointment, trust would pass to grantor's children).

(n11)Footnote 11. *See* Restatement (Second) of Property (Donative Transfer) § 11.1 cmt. b (1984).

(n12)Footnote 12. *Id.*, § 11.1 cmt. f. *In re Estate of Krokowsky, 883 P.2d 427 (Ariz. 1993)*(noting that power of

appointment, unlike power of attorney, does not cease upon death).

(n13)Footnote 13. *Id.*, § 15.1 cmt. b. *Estate of Krokowsky v. LaChance, 896 P.2d 247 (Ariz. 1995)* (appointment of testator's friend as power of attorney was not a general power of appointment).

(n14)Footnote 14. Restatement (Second) of Agency at 274 (1958).

(n15)Footnote 15. *See infra* § 86.02 (d)(1) *et seq*. for a discussion of common statutory changes. Although the actual authority of the agent will terminate on the death or incapacity of the principal, under some circumstances it might be possible for the agent to continue to have the power to bind the principal or the estate when the parties act in ignorance of the death or incapacity of the principal. This point is more fully developed *infra* § 86.02 (d) *et seq*. Additionally, many states have followed the lead of the Uniform Probate Code by allowing a power of attorney to be created which specifically survives the death or incapacity of the agent. *See* U.P.C. § 5-502 *et seq*.

(n16)Footnote 16. *Jefferson Std. Life Ins. Co. v. Guilford Co., 38 S.E.2d 519 (N.C. 1946); Clark v. Clark, 191 A.2d 417 (Pa. 1963); In re Peters Estate, 336 N.Y.S.2d 712 (1972).*

(n17)Footnote 17. Translated, this means, "he who acts through another acts by himself." *See Arkansas State Bd. of Architects v. Bank Bldg. & Equip. Corp. of Am., 286 S.W.2d 323 (Ark. 1956).*

(n18)Footnote 18. Restatement (Second) of Trusts § 233(b)(1987).

(n19)Footnote 19. *Id.*

(n20)Footnote 20. Occasionally, however, upon proof of hardship, a court may modify the terms of the trust to permit the trustee to invade corpus for an income beneficiary even when no such power is reserved. *See, e.g., In re Wolcott, 56 A.2d 641 (N.H. 1948).* Most courts have refused to make such distribution when it will affect the rights of other beneficiaries unless they have agreed to the distribution. This is because the court has no power to take property from one beneficiary and give it to another. *Springfield Safe Deposit & Trust Co. v. Friele, 23 N.E.2d 138 (Mass. 1939). See generally* Restatement (Second) of Trusts § 168 (1987).

A few states have specific provisions authorizing the probate court, at its discretion, to order a distribution which is inconsistent with the terms of the trust upon a finding that, given the circumstances, the settlor would have approved. *See, e.g.,* 20 Pa. Cons. Stat. Ann. § 6102.

(n21)Footnote 21. *Cf. Conlin v. Murdock, 43 A.2d 218 (N.J. 1945)*(court found that trustee who was also a beneficiary was guilty of abuse of discretion by providing equal payments to himself and to another beneficiary from trust providing for maintenance and support, because trustee was apparently well off and did not need funds and other beneficiary was destitute). Hartzell v. Commissioner of Internal Revenue, T.C.M. 1994-576 (finding that trustee acted within bounds of reasonable judgment in exercising its discretion in invading the trust); *In re Shurley, 171 Bankr. 769 (Bankr. W.D. Tex. 1994)*(upholding discretion of trustee to distribute corpus as trustee saw fit and to maintain accustomed manner of living of beneficiaries).

(n22)Footnote 22. *Montgomery v. Browder, 930 S.W.2d 772 (Tex. App. 1996)* (where a legal life tenant was given the power to appropriate from the corpus of decedent's estate such sums as required for maintenance and support with the power and authority to act as the owner thereof, this power was not absolute and unlimited and gave no right to make testamentary gifts).

(n23)Footnote 23. *See* Treas. Reg. § 20.2041-1(b)(1) (as amended 1961).

(n24)Footnote 24. *Id.* It should be noted, however, that this rule was created by a change in the Internal Revenue Code effective October 21, 1942. Any powers created before that date must be exercised to be brought into the estate of

the donee. *See* I.R.C. § 2041(a)(1). *Best v. United States, 902 F. Supp. 1023 (D. Neb. 1995)*(permitting invasion of the trust corpus for the beneficiary's comfort, support and maintenance did not create a general power of appointment under state law).

(n25)Footnote 25. *See* I.R.C. § 2514(e); Treas. Reg. §§ 20.2041-2(d), 25.2514-3(c)(4)(as amended 1986). It should be noted, however, that under the foregoing provisions, releases which do not exceed 5% of the trust corpus or $5000 are exempted.

(n26)Footnote 26. *See supra* § 86.01(a)(1).

(n27)Footnote 27. The power to distribute income this way is frequently called a "sprinkle trust." For the use of this form of trust, *see generally* Restatement (Second) of Trusts § 127 cmt. d (1987).

(n28)Footnote 28. *See* Restatement (Second) of Trusts § 120 cmt. c (1987).

(n29)Footnote 29. The rule apparently had its origin in *Morice v. Bishop of Durham, 9 Ves. 399, 10 Ves. 521 (1805)* and has been continued into relatively modern times. *See Clark v. Campbell, 133 A. 166 (N.H. 1926). Estate of Boyer v. Morrison, 868 P.2d 1299 (N.M. 1994)*(testamentary trust was invalid for failure to sufficiently identify beneficiaries).

(n30)Footnote 30. J.B. Ames, *The Failure of the Tilden Trust, 5 Harv. L. Rev. 389 (1892).*

(n31)Footnote 31. *See* Restatement (Second) of Trusts § 122 (1987). *See also* Restatement (Second) of Property (Donative Transfers) § 12.1 cmt. e (1984).

(n32)Footnote 32. McPhail v. Douton, [1971] App. Cas. 424 (1970).

(n33)Footnote 33. *See* Cal. Prob. Code § 15205(b)(1992).

(n34)Footnote 34. *See Moss v. Axford, 224 N.W. 425 (Mich. 1929).*

(n35)Footnote 35. *Goodale v. Mooney, 60 N.H. 528 (1881); In re Work Family Trust, 151 N.W.2d 490 (Iowa 1967); In re Dewey's Estate, 143 P. 124 (Utah 1914).* The rule has not been universally accepted, however. *See Gross v. Moore, 22 N.Y.S. 1019 (1893), aff'd, 36 N.E. 343 (N.Y. 1894); Wilce v. Van Amden, 94 N.E. 42 (Ill. 1911).*

(n36)Footnote 36. *Wilson v. Flowers, 277 A.2d 199 (N.J. 1971); In re Jordon's Estate, 197 A. 150 (Pa. 1938); In re Estate of Small, 58 N.W.2d 477 (Iowa 1953).*

(n37)Footnote 37. Restatement (Second) of Trusts § 124 cmt. c (1987).

(n38)Footnote 38. *See, e.g., Estate of Searight, 95 N.E.2d 779 (Ohio 1950)* (upholding trust providing for fixed payments in specified amount for care of pet dog). *See also In re Renner Estate, 57 A.2d 836 (Pa. 1948); Kositzky v. Monfore (In re Estate of Keenan), 519 N.W.2d 373 (Iowa 1994)* (portion of equitable interest in bequest in trust fund for payment of college scholarships to blood descendants that remained unvested at any time during period of rule against perpetuities was nonvested interest for purposes of rule against perpetuities).

(n39)Footnote 39. *See, e.g., Daniel v. Brown, 159 S.E. 209 (Va. 1931).* This analysis is not universally accepted. See *Bridgewater v. Turner, 29 S.W.2d 659 (Tenn. 1930);* Restatement (Second) of Property (Donative Transfers) § 24.2 cmt. b (1984).

(n40)Footnote 40. *See* Restatement (Second) of Property (Donative Transfers) § 11.2(1) (1984). *Estate of Govern v. C.I.R., 72 T.C.M. 725 (1996).*

(n41)Footnote 41. Restatement (Second) of Property (Donative Transfers) § 12.2 (1984).

(n42)Footnote 42. *In re Schede's Estate, 231 A.2d 135 (Pa. 1967);* Restatement (Second) of Property (Donative Transfers) § 12.2 cmt. c (1984).

(n43)Footnote 43. Restatement (Second) of Property (Donative Transfers) § 12.2 cmt. c (1984).

(n44)Footnote 44. *Id.*, § 12.2 cmt. b.

(n45)Footnote 45. *See infra* § 86.01(a)(3)(ii).

(n46)Footnote 46. Restatement (Second) of Property (Donative Transfers) § 11.2(2) (1984).

(n47)Footnote 47. *See supra* § 86.01(a)(2)(iii).

(n48)Footnote 48. *See infra* § 86.01(d)(1). *See also supra* § 86.01(a)(2)(iii).

(n49)Footnote 49. *Will of Brown, 466 N.Y.S.2d 988 (1983). Estate of Leighton, 638 A.2d 723 (Me. 1994)* (noting that donee was named because of donor's confidence in him).

(n50)Footnote 50. *Beck's Appeal, 9 A. 942 (Pa. 1887)* (recognizing an executor had power of appointment and distinguishing rule discussed, *supra* § 86.01(a)(2)(iii). *See also In re Park [1932] 1 Ch. 580.*

(n51)Footnote 51. Restatement (Second) of Property (Donative Transfers) § 11.2(4) (1984).

(n52)Footnote 52. As hereafter noted, powers are classified by how the potential beneficiaries are limited. If there is no limitation, they are denominated general powers. If they are limited to an ascertained class, they are denominated special powers. It is also possible to permit appointment to all but a limited class. Such powers were originally termed "mixed powers." Modern terminology, influenced by federal tax law, treats all powers as either general or non-general and does not distinguish between special and mixed powers. Restatement (Second) of Property (Donative Transfers) § 11.4 (1984).

(n53)Footnote 53. Restatement (Second) of Property (Donative Transfers) § 11.2(5) (1984). *See also infra* § 86.01(b)(2)(ii); *infra* § 86.01(b)(1)(vi) (discussing the disposition of appointive assets when donor provided no alternate disposition).

(n54)Footnote 54. Restatement (Second) of Property § 12.2 cmt. c (1984).

(n55)Footnote 55. Simes, *supra* note 7, § 12 at 124. *Continental Bank, N.A. v. State, 671 N.E.2d 806 (Ill. App. 1996).*

(n56)Footnote 56. Simes, *supra* note 7, § 12 at 124. *See also* Restatement (Second) of Property § 12.2 cmt. b (1984).

(n57)Footnote 57. *Beck's Appeal, 9 A. 942 (Pa. 1887); Gibbs v. Rumsey, 35 Eng. Rep. 331 (1813).*

(n58)Footnote 58. *See infra* § 86.01(a)(3)(ii); § 86.01(e)(i).

(n59)Footnote 59. *See infra* § 86.01(d).

(n60)Footnote 60. Restatement (Second) Property (Donative Transfers) § 11.4 (1984).

Estate of Bruner, 691 A.2d 530 (Pa. Super. 1997) (holding that a residuary gift to a person also nominated as executor, to be dispensed as agreed by the decedent and her nominee did not create either a general power of

appointment or absolute gift in the nominee, thus causing a partial intestacy). *See also Estate of Stewart, 473 A.2d 572 (Pa. Super. 1984)* (where testator authorized the person who took care of his business for four years to "handle my estate as she sees fit" and the court found an intention to create a general power of appointment).

(n61)Footnote 61. I.R.C. § 2041 (1988). *See infra* § 86.01(b)(1)(vii) for full discussion.

(n62)Footnote 62. *See Clapp v. Ingraham, 126 Mass. 200 (1879); National Shawmut Bank v. Joy, 53 N.E.2d 113, 122 (Mass. 1944). See infra* § 86.01(b)(1)(iv) for a full discussion of this problem.

(n63)Footnote 63. *See* Restatement (Second) of Property (Donative Transfers) § 11.4(2) (1984).

(n64)Footnote 64. *First Portland Nat'l Bank v. Rodrique, 172 A.2d 107 (Me. 1961); In re Rowland's Estate, 241 P.2d 781 (Ariz. 1952); Lyon v. Alexander, 156 A. 84 (Pa. 1931); Daniel v. Brown, 159 S.E. 209 (Va. 1931). Lilly v. Citizens Fid. Bank & Trust Co., 859 S.W.2d 666 (Ky. 1993)* (special powers of appointment may be exercised only for the benefit of a particular group or class which does not include the donee).

(n65)Footnote 65. *See, e.g.*, Restatement (Second) of Property (Donative Transfers) § 12.1 illustration 3 (1984).

(n66)Footnote 66. I.R.C. § 2041. *See infra* § 86.01(b)(1)(vii) for a full discussion.

(n67)Footnote 67. Restatement (Second) of Property (Donative Transfers) § 11.4 cmt. b (1984).

(n68)Footnote 68. *Ferrell-French v. Ferrell, 691 So. 2d 500 (Fla. App. 1997)* (where a testamentary power given by testatrix to her husband to divide trust assets "among my descendants in such manner and in such unequal proportions as he shall see fit" was held to be exclusive and the omission of one daughter from distribution of the proceeds was permissible); *Moore v. Emery, 18 A.2d 781 (Me. 1941).*

(n69)Footnote 69. *Binney v. Comm'r of Corps. & Taxation, 293 Mass. 96,* (1936).

(n70)Footnote 70. *Moore, 18 A.2d at 790.*

(n71)Footnote 71. *Id.*; *Hawthorn v. Ulrich, 69 N.E. 885 (Ill. 1904); Butcher v. Butcher, 9 Ves. Jr. 382 (1805); Will of Weinstein, 444 N.Y.S.2d 427 (1981).*

(n72)Footnote 72. *Moore, 18 A.2d at 789* ("It is impossible to have considered a case of this kind ... without wishing, that Judges in Equity had either never assumed control over the execution of discretionary powers; or had laid down rules, by which their successors might be guided ... To say, that under such a power an illusory share must not be given, or, that a substantial share must be given, is rather to raise a question than establish a rule." (quoting *Butcher, 9 Ves. Jr. 382)).*

(n73)Footnote 73. *Moore, 18 A.2d at 790. See also* Restatement (Second) of Property (Donative Transfers) § 21.1 (1984); *In re Estate of Stevenson, 327 N.Y.S.2d 768 (1971).*

(n74)Footnote 74. *Weinstein, 444 N.Y.S.2d at 430.*

(n75)Footnote 75. *Graeff v. DeTurk, 44 Pa. 527 (1863); Hawthorn v. Ulrich, 69 N.E. 885 (Ill. 1904).*

(n76)Footnote 76. *In re Sinnot's Estate, 165 A. 244 (Pa. 1933).*

(n77)Footnote 77. Restatement (Second) of Property (Donative Transfers) § 11.4 note c (1984). *See also McLaughlin v. Indus. Trust Co., 42 A.2d 12 (Del. 1945); Merrill v. Lynch, 13 N.Y.S.2d 514 (1939).*

(n78)Footnote 78. Restatement (Second) of Property (Donative Transfers) § 11.4 note c (1984). *See also Stewart's*

Estate v. Caldwell, 271 So. 2d 754 n.4 (Fla. 1972); Merrill v. Lynch, 13 N.Y.S.2d 514 (1939).

(n79)Footnote 79. Simes, *supra* note 7, § 56 at 125. *See also Merrill, 173 Misc. 2d at 39, 13 N.Y.S. at 514.*

(n80)Footnote 80. Simes, *supra* note 7, § 56 at 125; *Browning v. Bluegrass Hardware Co., 149 S.E. 497 (Va. 1929).*

(n81)Footnote 81. Simes, *supra* note 7, § 65; *Browning, 149 S.E. at 497; Young v. Sheldon, 36 So. 27 (Ala. 1903).*

(n82)Footnote 82. Atchkinson, *supra* note 3, § 50.

(n83)Footnote 83. *See supra* § 86.01(a)(1).

(n84)Footnote 84. *174 N.E. 314 (Mass. 1931).*

(n85)Footnote 85. *Id.*

(n86)Footnote 86. *Security Trust & Safe Dep. Co v. Ward, 93 A. 385 (Del. 1915); Russell v. Joys, 116 N.E. 549 (Mass. 1917); Estate of Lawrence, 20 A. 521 (Pa. 1890); Blunt v. Walker, 6 S.E. 558 (S.C. 1890), appeal dismissed, 134 U.S. 607 (1890).*

(n87)Footnote 87. Restatement (Second) of Conflicts § 260 et seq. (1971).

(n88)Footnote 88. *See, e.g., Hogarth-Swann v. Weed, 174 N.E. 314 (Mass. 1931); see also Beals v. State St. Bank & Trust Co., 326 N.E.2d 896 (Mass. 1975)* (criticizing the rule as applied to a question of whether or not the donee had, in fact, exercised the power but applying it in any event as a matter of stare decisis).

(n89)Footnote 89. *See* Restatement (Second) of Conflicts § 268 cmt. f (1971). *See also Fidelity Union Trust Co. v. Caldwell, 44 A.2d 842 (N.J. 1945).*

(n90)Footnote 90. *See infra* § 86.01(d)(2).

(n91)Footnote 91. *See In re Barton, 35 A.2d 266 (Pa. 1944); Bussing v. Hough, 21 N.W.2d 587 (Iowa 1946); Beals v. State St. Bank & Trust Co., 326 N.E. 896 (Mass. 1975).*

(n92)Footnote 92. *See* Restatement (Second) of Conflicts § 274 cmt. f (1971).

(n93)Footnote 93. *White v. United States, 680 F.2d 1156 (7th Cir. 1982); Toledo Trust Co. v. Santa Barbara Found., 512 N.E.2d 664 (Ohio 1987).*

(n94)Footnote 94. *See supra* § 86.01(b)(1)(ii).

(n95)Footnote 95. *See supra* § 86.01(a)(3)(ii).

(n96)Footnote 96. Restatement (Second) of Property (Donative Transfers) § 18.5 (1984). The rule has been accepted without dissent from the earliest times. *See, e.g., Oke v. Heath, 27 Eng. Rep. 9840 (Ch. 1748).* It has been accepted by modern American courts without dissent. *See, e.g., Dow v. Atwood, 260 A.2d 437 (Me. 1969); In re Sears' Estate, 215 N.Y.S.2d 859 (Sur. Ct. 1961).*

(n97)Footnote 97. *102 N.E. 122 (Mass. 1913).*

(n98)Footnote 98. *Id.*

(n99)Footnote 99. *114 A. 502 (Pa. 1921).*

(n100)Footnote 100. *Id.*

(n101)Footnote 101. *In re Mogridge's Estate, 20 A.2d 307 (Pa. 1941); Morton v. Morton, 147 A.2d 150 (Pa. 1959). See also* Restatement (Second) of Trusts § 156 cmt. c (1987).

(n102)Footnote 102. Restatement (Second) of Property (Donative Transfers) § 13.2 (1984).

(n103)Footnote 103. Restatement (Second) of Property (Donative Transfers) § 13.5 (1984). *See also Westminster Sav. Bank v. Sauble, 39 A.2d 862 (Md. 1944); Matthews v. Thompson, 71 N.E. 93 (Mass. 1904). In re Shurley, 171 Bankr. 769 (Bankr. W.D. Tex. 1994)* (if donee of inter vivos power of appointment exercised power in favor of others instead of creditors at time of insolvency, exercise would be void).

(n104)Footnote 104. The leading American case espousing this doctrine is *Clapp v. Ingraham, 126 Mass. 200 (1879).* Moreover, the doctrine has been held applicable even though the appointee was a creditor of the donee since the assets must be sequestered for the benefit of all creditors. *See Vinton v. Pratt, 117 N.E. 919 (Mass. 1917).*

(n105)Footnote 105. *Clapp v. Ingraham, 126 Mass. 200 (1879).*

(n106)Footnote 106. *Gilman v. Bell, 99 Ill. 144 (1881).*

(n107)Footnote 107. *Johnson v. Shriver, 216 P.2d 653 (1950); In re Stannert's Estate, 15 A.2d 360 (Pa. 1940). Cooley v. Cooley, 628 A.2d 608 (Conn. 1993)* (holding that donee's creditors have no claim to appointive assets because donee merely acts as a conduit and cannot derive personal benefit); *Lilly v. Citizens Fid. Bank & Trust Co., 859 S.W.2d 666 (Ky. 1993)* (donee is merely a conduit through which property passes, akin to an agency, which does not create an estate or right of property in the donee).

(n108)Footnote 108. *In re Pennsylvania Co., 107 A. 840 (Pa. 1919).*

(n109)Footnote 109. *See In re Stannert's Estate, 15 A.2d 360 (Pa. 1940).* Courts, however, have gone out of their way to avoid finding a blending of the appointive assets with donee's own assets. Thus, it is insufficient that the donee's will provides for the same disposition for both.

(n110)Footnote 110. N.Y. Est. Powers & Trusts Law § 10-7.2 (1992).

(n111)Footnote 111. *See, e.g.*, Minn. Stat. Ann. § 502.70 (West 1992).

(n112)Footnote 112. *Wright v. Union Cent. L. Ins. Co., 304 U.S. 502, reh'g denied, 305 U.S. 668 (1938).*

(n113)Footnote 113. *See 11 U.S.C. § 110* (West 1992).

(n114)Footnote 114. *Montague v. Silsbee, 105 N.E. 611 (Mass. 1914); Forbes v. Snow, 140 N.E. 418 (Mass. 1923); In re Peck's Estate, 32 N.W.2d 14 (Mich. 1948).*

(n115)Footnote 115. The most common type of protection is forced share legislation, much of which is patterned after the provisions of the Uniform Probate Code § 2-201. Typical of such statutes are: Idaho Code § 15-2-201; Minn. Stat. § 524.2-201; N.D. Cent. Code § 30.1-05-01.

(n116)Footnote 116.

Arizona: Ariz. Rev. Stat. Ann. § 25-211.

California: Cal. Civ. Code § 5110 (Deering).

Idaho: Idaho Code § 32-906.

Louisiana: La. Civ. Code Ann. art. 2335.

Nevada: Nev. Rev. Stat. Ann. § 123.220.

Mew Mexico: N.M. Stat. Ann. § 40-3-12.

Texas: Tex. Fam. Code ann. § 26.16.030.

Washington: Wash. Rev. Code § 26.16.030.

(n117)Footnote 117. *See* 20 Pa. Cons. Stat. Ann. § 2203(b)(4)(does not treat such assets as part of spouse's estate). Compare N.Y. Est. Powers & Trusts Law § 5-1.1 (mandates that they be considered).

(n118)Footnote 118. *See* 20 Pa. Cons. Stat. Ann. § 2203(b)(4).

(n119)Footnote 119. *See* Del. Code Ann. tit. 12, § 902 (1992).

(n120)Footnote 120. *See* Fla. Stat. § 732.206.

(n121)Footnote 121. *See supra* § 86.01(b)(1)(iv).

(n122)Footnote 122. *See supra* § 86.01(b)(1)(i). *See also Davis v. Kendell, 107 S.E. 751 (Va. 1921).*

(n123)Footnote 123. *See supra* § 86.01(a)(3)(ii). *See also, e.g., First Nat'l Bank of McMinn County v. Walker, 607 S.W.2d 469 (Tenn. 1980); Leidy Chem. Found., Inc. v. First Nat'l Bank of Md., 351 A.2d 129 (Md. 1975). Green v. Green, 986 F.2d 145 (6th Cir. 1993)* (holding that donee's exercise of power is confined to method of execution provided in power and must be kept strictly within these limitations of performance and duty, otherwise exercise will be ineffective against parties entitled to its benefit).

(n124)Footnote 124. *McKee v. Hedges, 297 S.W.2d 45 (Ky. 1956). Lilly v. Citizens Fid. Bank & Trust Co., 859 S.W.2d 666 (Ky. 1993)* (where power of appointment was not exercised, appointive assets passed to named beneficiaries of donor's will).

(n125)Footnote 125. *See infra* § 86.01(d)(2)(iii).

(n126)Footnote 126. *In re Estate of Krokowsky, 883 P.2d 427 (Ariz. 1993)* (if donee does not have capacity to make an effective appointment, the legal representative of donee can exercise donee's power); *Talbot v. Riggs, 191 N.E. 360 (Mass. 1934).*

(n127)Footnote 127. *Id.*

(n128)Footnote 128. *Old Colony Trust Co. v. Allen, 29 N.E.2d 310 (Mass. 1940). In re Estate of Block, 598 N.Y.S.2d 668 (1993)* (where intended class consisted of only two of three sons, court disposed of property in equal shares between the two named sons only).

(n129)Footnote 129. *In re Stannert's Estate, 15 A.2d 360 (Pa. 1940).*

(n130)Footnote 130. *Fiduciary Trust Co. v. Mishou, 75 N.E.2d 3 (Mass. 1947)* (repudiating earlier dictum to the contrary in *Bundy v. United States Trust Co., 153 N.E. 337 (Mass. 1920)).*

(n131)Footnote 131. Under I.R.C. § 2041, a power is defined as general whenever the donee has the right to make an appointment to the donee, to the donee's creditors, to the donee's estate, or to creditors of the estate. I.R.C. § 2041 (1988). *Powers v. U.S., 37 Fed. Cl. 709 (1997)* (holding that a power in testator's daughter to transfer a fraction of his residuary trust to such persons as she may have directed or appointed by her will created a general testamentary power of appointment taxable in her estate since she could have exercised it in favor of her estate); *Shawnut Bank N.A. v. Buckley, 665 N.E.2d 29 (Mass. 1996).*

(n132)Footnote 132. I.R.C. § 2514 (1988).

(n133)Footnote 133. I.R.C. § 2037 (1988).

(n134)Footnote 134. I.R.C. § 2041 (1988).

(n135)Footnote 135. *Id.* Under the express terms, however, a power is not deemed a general power for purposes of this section if: (1) it can only be exercised in conjunction with the settlor; (2) it can only be exercised in conjunction with a person with a substantial adverse interest to the donee; or (3) if it can only be exercised pursuant to an ascertainable standard relating to health, support, and education. *Id. See also* Treas. Reg. § 20.2041-1(c) (as amended in 1961); Treas. Reg. § 20.2041-3(c) (as amended in 1986).

(n136)Footnote 136. I.R.C. § 2036.

(n137)Footnote 137. Treas. Reg. § 20.2041-3 (as amended in 1991).

(n138)Footnote 138. I.R.C. § 2041(b)(2). *See also* Treas. Reg. § 20.2041-3(d) (as amended in 1986).

(n139)Footnote 139. *Estate of Kleinhans, 312 A.2d 366 (Pa. 1973); Conner v. O'Hara, 53 A.2d 33 (Md. App. Ct. 1947).*

(n140)Footnote 140. *Commonwealth v. Williams, 13 Pa. 29 (1850).*

(n141)Footnote 141. *In re Estate of Fleishman, 388 A.2d 1077* Pa. (1978).

(n142)Footnote 142. *In re Robinson, 255 N.W. 486 (Minn. 1934); In re Morgan's Will, 277 N.W. 650 (Wis. 1938).*

(n143)Footnote 143. *See generally Commonwealth v. Fidelity & Columbia Trust Co., 146 S.W.2d 3 (Ky. 1940)* (treating exercise of power as taxable event and regarding as irrelevant that jurisdiction had no inheritance tax when power was created).

(n144)Footnote 144. *See supra* § 86.01(b)(1)(vii). *See also Estate of Muchemore, 560 N.W.2d 477 (Neb. 1997)* (holding that a power to appoint by will given by testator to his surviving spouse in favor of any person or her estate was general, not special, and the property passing from his estate subject to the power qualified for the marital deduction and was exempt from Nebraska inheritance tax).

(n145)Footnote 145. *In re Weaver's Estate, 103 Cal. Rptr. 664 (1972).*

(n146)Footnote 146. Cal. Rev. & Tax code § 13696 (provisions similar to the federal tax law); Ill. Ann. Stat. ch. 120, para. 405A-3 (similar to federal tax law); Mass. Gen. L. ch. 65C, § 1 *et seq.* (tax levied if power is exercised); N.Y. Tax Law § 220 (tax levied if power is exercised); 72 Pa. Cons. Stat. Ann. § 9111(k) (donee is viewed as conduit, thus no tax is assessed); Tex. Tax Code Ann. § 211.051 (similar to federal tax law).

(n147)Footnote 147. *See, e.g., Daniel v. Brown, 159 S.E. 302 (Va. 1931); Brown v. Fidelity Union Trust, 9 A.2d 311 (N.J. 1939).*

(n148)Footnote 148. *Cf. State St. Trust Co. v. Kissel, 19 N.E.2d 25 (Mass. 1939)* (court construed power of appointment as general, holding provision prohibiting donee's creditors from reaching appointive assets was limitation on manner of exercise which was void as contrary to public policy). It is unlikely that Massachusetts courts would construe the provision as preventing the tailoring of a power to avoid a tax on the donee and thus put Massachusetts trusts in a less favorable tax planning basis than other states.

(n149)Footnote 149. I.R.C. § 2041.

(n150)Footnote 150. *See supra* § 86.01(b)(1)(vi) for a discussion of the doctrine of capture which is based on an appointment being construed as having been made by implication to the donee's estate. If the donee's estate is an impermissible appointee, this construction is invalid.

(n151)Footnote 151. *Waterman v. N.Y. Trust Co., 142 N.E. 668 (N.Y. 1923).*

(n152)Footnote 152. *Oglesby v. Springfield Marine Bank, 52 N.E.2d 1000 (Ill. 1944); Bridgewater v. Turner, 29 S.W. 659 (Tenn. 1930); Daniel v. Brown, 159 S.E. 209 (Va. 1931).*

(n153)Footnote 153. *Bridgewater v. Turner, 29 S.W.2d 659 (Tenn. 1930).*

(n154)Footnote 154. *Id.*

(n155)Footnote 155. *Daniel v. Brown, 159 S.E. 209 (Va. 1931).*

(n156)Footnote 156. *Bridgewater v. Turner, 29 S.W.2d 659 (Tenn. 1930).*

(n157)Footnote 157. *See supra* § 86.01(b)(1)(iii).

(n158)Footnote 158. *Daniel v. Brown, 159 S.E. 209 (Va. 1931).*

(n159)Footnote 159. *See supra* § 86.01(b)(1)(vi).

(n160)Footnote 160. *Will of Weinstein, 444 N.Y.S.2d 427 (1981).*

(n161)Footnote 161. *In re Lidston's Estate, 202 P.2d 259 (Wash. 1949).*

(n162)Footnote 162. *In re Lidston's Estate, 202 P.2d 259 (Wash. 1949); In re Clark, 274 A.D. 49 (N.Y. 1948); Monroe v. United States, 301 F. Supp. 762 (E.D. Wash. 1969). Estate of Leighton, 638 A.2d 723 (Minn. 1994)* (provision in will that executor could make such disposition of the estate as he deemed wise created power of appointment); *West v. Hines, 429 S.E.2d 1 (Va. 1993)* (power of appointment will be upheld when the will reflects with certainty donor's intent to create such power).

(n163)Footnote 163. The donor may specifically designate how the power may be exercised and such specification will control irrespective of what the law in the applicable jurisdiction might otherwise be. *See, e.g., Schede's Estate, 231 A.2d 135 (Pa. 1967)* (giving effect to donor stipulation that power could only be exercised by specific explicit reference to it).

(n164)Footnote 164. *See supra* § 86.01(a)(3)(iii). *Frazer v. Millington, 475 S.E.2d 811 (Va. 1996)* (holding that the creator of a special testamentary power of appointment did not impose upon the donee of the power a condition that she survive until the trust distribution date and that her exercise of the power was valid); *Estate of Carpenter v. Commissioner of the Internal Revenue, 52 F.3d 1266 (4th Cir. 1995)* (surviving wife's life estate did not include power to appoint the entire interest to herself or her estate).

(n165)Footnote 165. *See supra* § 86.01(a)(3)(ii).

(n166)Footnote 166. *See supra* § 86.01(a)(2)(iii).

(n167)Footnote 167. Restatement (Second) of Trusts § 122 (1987).

(n168)Footnote 168. *Clark v. Campbell, 133 A. 166 (N.H. 1926).* The position of the *Restatement* has been accepted by the English Court of Appeal. *See* McPhail v. Doulton, [1971] A.C. 424 (1970). *Estate of Boyer v. Morrison, 868 P.2d 1299 (N.M. 1994)* (testamentary trust held invalid for failure to sufficiently identify beneficiaries).

(n169)Footnote 169. *Estate of Boyer v. Morrison, 868 P.2d 1299 (N.M. 1994)* (testamentary trust held invalid for failure to sufficiently identify beneficiaries); *Clark v. Campbell, 133 A. 166 (N.H. 1926).*

(n170)Footnote 170. *See* Ames, *supra* note 29 at 389.

(n171)Footnote 171. *See supra* § 86.01(a)(1).

(n172)Footnote 172. Simes, *supra* note 7, § 135.

(n173)Footnote 173. *See supra* Ch. 28.

(n174)Footnote 174. *Id. Bray v. Bree, 2 Cl. & F. 453 (1834).*

(n175)Footnote 175. *American Trust Co. v. Williamson, 46 S.E.2d 104 (N.C. 1948); Bundy v. United States Trust Co., 153 N.E. 337 (Mass. 1926).*

(n176)Footnote 176. *Amerige v. Attorney General, 88 N.E.2d 126 (Mass. 1949); Minot v. Paine, 120 N.E. 167 (Mass. 1918).*

(n177)Footnote 177. *Burlington County Trust Co. v. DiCastelcicala, 189 A. 653 (N.Y. 1937).*

(n178)Footnote 178. *See infra* § 86.01(d)(2)(ii).

(n179)Footnote 179. *See generally* Restatement (Second) of Property (Donative Transfers) § 12.2 cmt. c (1984).

(n180)Footnote 180. *See, e.g.*, 20 Pa. Cons. Stat. Ann. § 2514(13); N.Y. Est. Powers & Trusts Law § 10-6.1. *See also infra* § 86.01(d)(2)(i).

(n181)Footnote 181. *In re Passmore, 416 A.2d 991 (Pa. 1980); In re Schede's Estate, 231 A.2d 135 (Pa. 1967); Holzback v. United Va. Bank, 219 S.E.2d 868 (Va. 1975). Estate of Hamilton v. Ricketson, 593 N.Y.S.2d 372 (1993)* (where there was no specific reference in will to power of appointment, power deemed not exercised).

(n182)Footnote 182. *Schede's Estate, 231 A.2d at 137.*

(n183)Footnote 183. The nature of these limitations, and how they are enforced by the court, are more fully explored *infra* § 86.01(f)(3), *et seq. Estate of Gerhard v. Cram, 455 S.E.2d 683 (S.C. 1995)* (estate tax liability was apportioned between trusts which the decedent funded during his lifetime and in which the decedent held a power of appointment).

(n184)Footnote 184. *See generally* Restatement (Second) of Property (Donative Transfers) § 17.1 (1984). *Estate of Rossi, 634 N.Y.S.2d 372 (1995)* (surviving spouse's specific bequests of the trust asset directly to several beneficiaries was a valid exercise of the general power to appoint the trust to her estate).

(n185)Footnote 185. *See Cross v. Cross, 559 S.W.2d 196 (Mo. App. 1977); Dollar Sav. & Trust Co. v. First Nat'l Bank of Boston, 285 N.E.2d 768 (Ohio 1972).*

(n186)Footnote 186. Id.

(n187)Footnote 187. Restatement (Second) of Property (Donative Transfers) § 17.3 (1984). On the other hand the Commissioners for Uniform Laws have approved a new version of the Uniform Probate Code. Under its terms, if the power is a general one whether the donee is presumed to have exercised it or not depends on whether the donor's will contains a gift in default of the exercise of the power. If it contains such a default gift the *Restatement* rule is retained. If no such gift in default exists the exercise of the power is presumed to prevent the property from returning to the donor's estate. *See* Uniform Probate Code § 2-608.

(n188)Footnote 188. *In re Proestler's Will, 5 N.W.2d 922 (Iowa 1942); Bank of N.Y. v. Black, 139 A.2d 393 (N.J. 1958). See* also Restatement (Second) of Property (Donative Transfers) § 17.3 (1984) (listing of jurisdictions adhering to the common law rule).

(n189)Footnote 189. *In re Estate of Krokowsky, 883 P.2d 427 (Ariz. 1993)* (donee's will bequeathing appointive assets is deemed to exercise power of appointment, even if will makes no reference to power); *In re Stork's Estate, 9 N.W.2d 273 (Iowa 1943)* (citing dictum of Supreme Court Justice Story in *Blagg v. Miles, 3 Fed. Cas. 559 (1842)).*

(n190)Footnote 190. **Id.**

(n191)Footnote 191. Restatement (Second) of Property (Donative Transfers) § 17.5 (1984). *Bank of N.Y. v. Black, 139 A.2d 393 (N.J. 1958).*

(n192)Footnote 192. *Bank of N.Y. v. Black, 139 A.2d 393 (N.J. 1958).*

(n193)Footnote 193. *Id.*

(n194)Footnote 194. *Id.*

(n195)Footnote 195. *Id.*

(n196)Footnote 196. *Id.*

(n197)Footnote 197. Restatement (Second) of Property (Donative Transfers) § 17.3 (1984) (statutory note at 216). The note lists states with statutes applicable to all powers of appointment and other states with statutes which, by their terms, are limited to general powers of appointment. Illustrative of the first class of statutes is N.Y. Est. Powers & Trusts Law § 10-6.1(a)(4). Illustrative of the second class of statutes is 20 Pa. Cons. Stat. § 2514(13).

In re Estate of Block, 598 N.Y.S.2d 668 (1993) (where donee's will left residual estate without reference to appointive assets, will was deemed as exercising appointee's power).

(n198)Footnote 198. *In re Davis, 59 N.Y.S.2d 607 (1946).*

(n199)Footnote 199. *Industrial Nat'l Bank v. Barrett, 220 A.2d 517 (R.I. 1966).*

(n200)Footnote 200. *Minot v. Paine, 120 N.E. 167 (Mass. 1918); Estate of Warren, 182 A. 396 (Pa. 1936); Arrowsmith v. Mercantile-Safe Dep. & Trust Co., 545 A.2d 674 (Md. 1988).*

(n201)Footnote 201. *Miller v. Douglass, 213 N.W.2d 320 (Wis. 1977); Rous v. Jackson, 29 Ch. D. 521 (1885).*

(n202)Footnote 202. *Industrial Nat'l Bank, 220 A.2d at 523; Minot v. Paine, 120 N.E. 167 (Mass. 1918); Estate of Warren, 182 A. 396 (Pa. 1936).*

(n203)Footnote 203. *Estate of Warren, 182 A. 396 (Pa. 1936).*

(n204)Footnote 204. *Id.*

(n205)Footnote 205. *See supra* Ch. 28.

(n206)Footnote 206. *See supra* § 86.01(a)(1).

(n207)Footnote 207. *See In re Van Hagan, 16 Ch. Div. 18 (1880); In re Hellinger's Estate, 83 N.Y.S.2d 10 (1948).*

(n208)Footnote 208. *See Stannert's Estate, 15 A.2d 309 (Pa. 1940)* (denying blending when testator provides for same disposition of appointive assets and personal assets, but does so by separate clauses in the will).

(n209)Footnote 209. *See supra* § 86.01(b)(1)(vi).

(n210)Footnote 210. *Minot v Paine, 120 N.E. 167 (Mass. 1918).*

(n211)Footnote 211. *Van Sychel's Estate, 21 Pa. C.C. 241, 9 Pa. D. 367 (1900); Stone v. Forbes, 75 N.E. 141 (Mass. 1905).*

(n212)Footnote 212. *Minot v. Paine, 120 N.E. 167 (Mass. 1918).*

(n213)Footnote 213. A hodgepodge clause might say: "Under any power of appointment, created by this will, no person to whom an appointment is made may share in the gift in default of appointment unless he contributes the property appointed to him to the fund to be distributed in default of appointment."

(n214)Footnote 214. *Parker v. MacBryde, 137 F.2d 932 (4th Cir. 1942) cert. denied, 318 U.S. 779 (1943); see also In re Buck Trust, 301 A.2d 328 (Del. Ch. 1973).*

(n215)Footnote 215. *See* Simes, supra note 7, § 264; *DeCharette v. De Charette, 94 S.W.2d 1018 (Ky. 1936); Boston Safe Dep. & Trust Co v. Prindle, 195 N.E. 793 (Mass. 1935); Opinion of the Justices to the House of Representatives 371 N.E.2d 1349, 1356 (Mass. 1978).*

(n216)Footnote 216. *Lehman v. Spicer, 108 Misc. 721 (N.Y. Sup. Ct. 1919) aff'd, 176 N.Y.S. 445 (1919); Garfield v. State St. Trust Co., 705 N.E.2d 705 (Mass. 1947).*

(n217)Footnote 217. *Garfield v. State St. Trust Co., 70 N.E.2d 705 (Mass. 1947)* (distinguishing *Boston Safe Dep. & Trust Co. v. Prindle, 195 N.E. 793 (Mass. 1935)).*

(n218)Footnote 218. Restatement (Second) of Property (Donative Transfers) § 19.2 (1984).

(n219)Footnote 219. *See supra* § 86.01(d)(2)(ii).

(n220)Footnote 220. The permissive period is generally a life in being plus 21 years. *See supra* § 86.01(d)(2)(ii).

(n221)Footnote 221. *See Minot v. Paine, 120 N.E. 167 (Mass. 1918).*

(n222)Footnote 222. *See National State Bank v. Morrison, 75 A.2d 916 (N.J. 1950); In re McClelland Estate, 70 A. 737 (Pa. 1908); Thayer v. Rivers, 60 N.E. 796 (Mass. 1901); Jennert v. Houser, 4 Ohio C.C. 353 (1890).*

(n223)Footnote 223. Restatement (Second) of Property (Donative Transfers) § 19.4 (1984).

(n224)Footnote 224. *See supra* § 86.01(a)(3)(ii).

(n225)Footnote 225. *Seidel v. Werner, 364 N.Y.S.2d 963 (1975); Estate of Brown, 351 N.Y.S.2d 655 (1973); Farmers' Loan & Trust Co. v. Mortimer, 114 N.E. 389 (N.Y. 1916).*

(n226)Footnote 226. *Seidel v. Werner, 364 N.Y.S.2d 963 (1975)* (promisee cannot obtain damages, but can receive restitution of value the promisee gave for promise); *Northern Trust Co. v. Porter, 13 N.E.2d 487 (Ill. 1938).*

(n227)Footnote 227. *In re Rogers' Estate, 6 N.Y.S.2d 255 (1938)* (if power is general, a contract to appoint does not invalidate appointment); *Benjamin v. Morgan Guar. Trust Co., 609 N.Y.S.2d 724 (1992)* (ulterior motives and agreements in exercise of general power do not invalidate appointment).

(n228)Footnote 228. *In re Rogers' Estate, 6 N.Y.S.2d 255 (1938).*

(n229)Footnote 229. *See infra* § 86.01(e)(2)(ii).

(n230)Footnote 230. Ronald C. Line, *Revised Provisions of Restatement of Property Provide Important Lessons for Estate Planners, 13 Est. Plan. 20 (1986);* Restatement (Second) of Property (Donative Transfers) § 14.3(3) and cmt. d (1984).

(n231)Footnote 231. Simes, *supra* note 7, § 15 *et seq.*

(n232)Footnote 232. I.R.C. § 2041 (1988).

(n233)Footnote 233. *In re Evert, [1910] 2 Ch. 147; Wood v. American Sec. & Trust Co., 253 F. Supp. 592 (D. D.C. 1966).*

(n234)Footnote 234. *In re Evert, [1910] 2 Ch. 147.*

(n235)Footnote 235. *Daniel v. Brown, 159 S.E. 209 (Va. 1931); In re Buck Trust, 301 A.2d 328 (Del. Ch. 1973).* Occasionally the question has arisen whether the donee of such a special power may release it for ulterior purposes. The few cases which have considered the question have conflicted. *See also Thomson's Ex'rs v. Norris, 20 N.J. Eq. 489 (1869).*

(n236)Footnote 236. *Daniel, 159 S.E. at 209.* Moreover, on the basis that a court would not permit to be done indirectly what could not be done directly, the court refused to apply the anti-lapse statute which provided for a substitute gift to the lineals of the first taker in the event that such taker's gift lapsed. *Id.*

(n237)Footnote 237. *Cf. State St. Trust Co v. Kissel, 19 N.E.2d 25 (Mass. 1939).* In *Kissel*, the donor created a power of attorney which was construed as a general power. He then added a provision which purported to prohibit creditors of the donee from ever acquiring any interest in the appointive assets. Donee, who was insolvent at the time of his death, purported to appoint to one of his creditors. The court ruled that the provision prohibiting creditors from sharing in the appointive assets of a general power was void as contrary to public policy. As a result, since the donee was insolvent, all of his creditors shared in the appointment in accordance with the mandate of *Clapp v. Ingraham, 126 Mass. 200 (1879).* It should be noted that the decision in *Kissel* was made before the Internal Revenue Code made it advantageous to have a power which could be exercised in favor of anyone other than the donee, his creditors, his estate, or creditors of his estate. I.R.C. § 2041. As a result, the decision has doubtful validity today.

(n238)Footnote 238. West v. Burney, 1 Russ. & My. 431 (1819).

(n239)Footnote 239. *Id.*

(n240)Footnote 240. *See* cases cited *infra* § 86.01(e)(2)(ii).

(n241)Footnote 241. *In re Carroll's Will, 8 N.E.2d 864 (N.Y. 1937); Horne v. Title Ins. & Trust Co., 79 F. Supp. 91,* (S. D. Cal. 1948); Restatement (Second) of Property (Donative Transfers) § 20.2 cmt. a, b (1984); *Hughes v. McDaniel, 98 A.2d 1 (Md. 1953).* In the *Matter of Tracy, 634 N.Y.S.2d 198 (1995)* (the exercise of a testamentary power of appointment of the remainder of a trust was challenged as resulting from undue influence).

(n242)Footnote 242. *Carroll's Will, 8 N.E.2d at 867.*

(n243)Footnote 243. *Horne, 79 F. Supp. at 94.*

(n244)Footnote 244. Restatement (Second) of Property (Donative Transfers) § 20.2 cmt. e (1984).

(n245)Footnote 245. Restatement (Second) of Property (Donative Transfers) § 20.2 cmt. a (1984).

(n246)Footnote 246. *Cochrane v. Cochrane, [1922] 2 Ch. 230; Pitman v. Pitman, 50 N.E.2d 69 (Mass. 1943).*

(n247)Footnote 247. *Morin v. Mapston, 705 P.2d 118 (Mont. 1985); Frederick v. Shorman, 147 N.W.2d 478 (Iowa 1966); Saunders v. Regeer, 50 Misc. 2d 850, 271 N.Y.S.2d 788 (1966).*

(n248)Footnote 248. In some jurisdictions, however, an *inter vivos* trust is deemed revocable unless the contrary is clearly indicated. *Kline v. Utah Dep't of Health, 776 P.2d 57 (Utah 1989). Curley v. Lynch, 92 N.E. 429 (Mass. 1910); In re Fowles' Will, 118 N.E. 611 (N.Y. 1918); Nowlin v. Frost Nat'l Bank, 908 S.W.2d 283 (Tex. App. 1995)* (the trust instrument unambiguously invalidated any exercise of the special power of appointment that required distribution within two years after the death of the last grantor).

(n249)Footnote 249. Moreover, if the donee dies before the donor, the donee's will cannot be construed as an exercise of the power since at the time of the donee's death such power was not yet in existence. *See Curley v. Lynch, 92 N.E. 429 (Mass. 1910); In re Fowles Will, 118 N.E. 611 (N.Y. 1918).*

(n250)Footnote 250. *Miller v. Herzfeld, 4 F.2d 355 (3d Cir. 1925); Estate of Soupcoff, 477 A.2d 1388 (Pa. 1984). Kinney v. Shinholser, 663 So. 2d 643 (Fla. App. 1995)* (holder of power of appointment not advised of ability to disclaim the power).

(n251)Footnote 251. I.R.C. § 2518 (1988).

(n252)Footnote 252. *Id.*

(n253)Footnote 253. *See infra* § 86.01(f)(3).

(n254)Footnote 254. I.R.C. §§ 2035-38, 2041, 2514 (1988).

(n255)Footnote 255. *See supra* § 86.01(e)(1)(ii) for the basis for this rule.

(n256)Footnote 256. *See supra* § 86.01(e)(2)(ii) for a discussion of this problem.

(n257)Footnote 257. *Curley v. Lynch, 92 N.E. 429 (Mass. 1910).*

(n258)Footnote 258. Restatement (Second) of Property (Donative Transfers) § 18.4 cmt. e (1984). *In re Fowles Will, 118 N.E. 611 (N.Y. 1918).*

(n259)Footnote 259. *In re Sutcliffe, 433 P.2d 389 (Kan. 1967).* The power of a donee under a power of appointment, however, should be distinguished from the discretionary power of a trustee, which may well pass to his successor in interest. *See, e.g., Duncan v. Elkins, 45 A.2d 297 (N.H. 1948).*

(n260)Footnote 260. Restatement (Second) of Property (Donative Transfers) § 14.6 (1984).

(n261)Footnote 261. *See supra* § 86.01(e)(1)(ii).

(n262)Footnote 262. *In re Lansing's Estate, 74 N.E. 882 (N.Y. 1905); Garfield v. White, 92 N.E. 2d 575 (Mass. 1950); Will of Heffner, 503 N.Y.S.2d 669 (1986).*

(n263)Footnote 263. Restatement (Second) of Property (Donative Transfers) § 14.6 (1984).

(n264)Footnote 264. Simes, *supra* note 7, § 55; Stephen W. DeVine, *Ecclesiastical Antecedents to Secular Jurisdiction over the Feoffment to the Uses to Be Declared in Testamentary Instructions, 30 Am. J. Legal Hist. 295 (1986).*

(n265)Footnote 265. Jane B. Baron, *Gifts, Bargains, and Form, 64 Ind. L. J. 155 (1989);* Mary Ellen Kazimer, *The Problem of the "Un-omitted" Spouse under Section 2-301 of the Uniform Probate Code, 52 U. Chi. L. Rev. 481, n.98 (1985).*

(n266)Footnote 266. Simes, *supra* note 7, § 5; Baron, *supra* note 265.

(n267)Footnote 267. 2 W. Blackstone, Commentaries, (1765) 20B *et seq. See also* 2 Frederick Pollock & Frederick William Maitland, The History of English Law Before The Time of Edward I, 262 *et seq.* (2d ed. 1918).

(n268)Footnote 268. Simes, *supra* note 7, § 5.

(n269)Footnote 269. *Id.*

(n270)Footnote 270. Statute of Uses 1535, 27 Hen. VIII ca. 10.

(n271)Footnote 271. Wills Act of 1540, 32 Hen. VIII ca. 1.

(n272)Footnote 272. *See infra* § 86.01(g)(3)(ii) for a discussion of the effect of a possible generation skipping tax and the use of the power of appointment in connection with the generation skipping tax.

(n273)Footnote 273. *See supra* Ch. 23.

(n274)Footnote 274. *Whitmore v. Starks, 161 N.E.2d 254 (Ill. 1959)* (restraints on alienation are void).

(n275)Footnote 275. *See, e.g., Dormer Estate, 35 A.2d 299 (Pa. 1944).*

(n276)Footnote 276. I.R.C. § 2056.

(n277)Footnote 277. I.R.C. Reg. § 2056(b)(5) *et seq.*

(n278)Footnote 278. A donor might avoid an accidental exercise of the power by requiring specific reference to the power. If such language were included, even a boiler plate reference to any powers of appointment would be inadequate to exercise the power. This is true even if the jurisdiction presumes an exercise of a power from general language in a will. *See, e.g., In re Schede's Estate, 231 A.2d 135 (Pa. 1967).*

(n279)Footnote 279. I.R.C. § 2056(b)(7). *Estate of Bennett v. Commissioner, 100 T.C. 42 (U.S. Tax Ct. 1993)* (surviving spouse did not qualify for marital deduction where spouse was not given all of the trust income).

(n280)Footnote 280. I.R.C. §§ 2010, 2505.

(n281)Footnote 281. C. Jean Stewart, *Federal Estate and Gift Tax Marital Deduction*, C733 ALI-ABA 71 (1992); Russell A. Willis, *QTIP Proposed Regulations Require Careful Drafting Approaches to Maximize Flexibility*, 13 Tax'n for Law 372 (1985).

(n282)Footnote 282. I.R.C. § 2523.

(n283)Footnote 283. I.R.C. § 2631(a). At present, the generation skipping tax rate is 55%.

(n284)Footnote 284. *Id.*

(n285)Footnote 285. I.R.C. §§ 2611(a), 2612, 2613(a)(1).

(n286)Footnote 286. I.R.C. § 2651. *E. Norman Peterson Marital Trust v. C.I.R., 78 F.3d 795 (2d Cir.1996).*

(n287)Footnote 287. I.R.C. § 2611(b)(2)(A) (any previously taxed assets excluded from Generation Skipping Tax).

(n288)Footnote 288. I.R.C. §§ 2631, 2632.

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CHAPTER 86 POWERS

10-86 Thompson on Real Property, Thomas Editions § 86.02

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§ 86.02 Powers of Attorney.

[Go To Supp]

§ 86.02(a) Theoretical Origin and Basis.

Unlike the power of appointment, the power of attorney is not predicated on property concepts. n289 Instead it constitutes a formal declaration that one person is to act as an agent on behalf of another. It is an essentially consensual relationship in which one person is vested with the power or authority to act on behalf of another. It is a familiar maxim of the law that ordinarily one may confer upon another the power to do any act that one could do personally. n290 No property is deemed to be involved in the creation of the relationship. Just as one may deal with one's own property on one's own behalf, one may authorize or empower another to do so on one's own behalf. It should be noted that this theoretical distinction creates very real differences in application as herein set forth. Thus, in the case of a power of appointment, the donor who has created it normally has no right to revoke the power unless the donor has retained the right. n291 Moreover, the fact that the donor who created the power has thereafter died or become incompetent is irrelevant. n292 On the other hand, since the agency relationship is predicated on consent, in the absence of an estoppel, the principal retains the right to withdraw consent and thus terminate the power. n293 Furthermore, if the principal dies or becomes incompetent, the power likewise terminates, since the power of the agent is predicated on the principal's continuing assent and the agent has no greater power than the principal would have with regard to the subject matter. n294

COMPUTER-ASSISTED RESEARCH

LEXIS: power! w/1 attorney w/50 power! w/1 appointment

§ 86.02(b) Construction and Scope of Power.

§ 86.02(b)(1) Express Authority.

In determining the scope or extent of power created through a power of attorney, the first step is a close reading of the provisions of the document constituting the power of attorney itself. In the first instance, what action the agent has the power to take affecting the property of the principal can only be determined by reading the language in the power itself.

n295 Generally speaking, courts have enunciated the principle that the document should be closely and narrowly construed. If the document has been carefully prepared and articulates with specificity what the agent can and cannot do on behalf of the principal, little difficulty should be anticipated in its interpretation. On the other hand, if this is not done, difficult and unpredictable problems of interpretation may arise. Thus, if the power of attorney relates to the power to sell property, it should specify whether the sale must be public, and, if it can be private, under what terms and conditions the sale may be made. n296 The same would be true of a power to lease, or any other power conferred by one person upon another to deal with property on the principal's behalf. n297

COMPUTER-ASSISTED RESEARCH

LEXIS: express w/1 authority w/10 power! w/1 attorney
scope w/2 power! w/1 attorney

§ 86.02(b)(2) Implied Authority.

When a power of attorney is not carefully drawn it may be possible for a court to cure the problem through the use of the doctrine of implied authority. It is a familiar doctrine of the law of agency that the power of an agent extends not only to acts which have been specifically authorized, but to other acts which are reasonably necessary to carry out the powers which have been expressly conferred. n298 This doctrine has been applied by some courts to the power of attorney. However, courts have only done so reluctantly and under circumstances when the power being implied is essential to carrying out the intention of and the purposes of the power itself. n299 Thus, it would seem that if a power of attorney conferred upon an agent a power to sell real estate of the principal, it might be inferred that the agent could employ a broker or an attorney to effectuate such a sale, even if the power is silent on that point. n300 Likewise, it would seem that if a power of attorney conferred upon an agent a power to lease such real estate, it might be inferred that an agent could employ the necessary assistance in procuring a tenant and in actually collecting the rent. While it is true that some courts have suggested in dictum that the powers created by a power of attorney should be strictly construed, n301 such limitation does not exclude the possibility of inferring additional power which is reasonably incidental to the power expressly conferred. The question of whether additional power should be inferred can only be determined on a case by case basis.

COMPUTER-ASSISTED RESEARCH

LEXIS: implied w/1 authority w/10 power! w/1 attorney

§ 86.02(b)(3) Apparent Authority.

It is possible for the doctrine of apparent authority to apply to an agent designated by a power of attorney. Under that doctrine, an agent may have powers not authorized either expressly or by implication on the basis of an estoppel. n302 Such a power arises from the relationship of the parties, independent of the power of attorney. If a principal places an agent in a position in which the agent reasonably appears to have the power to act, the principal may be bound by the agent's acts when a third person relies on appearances. n303 The application of this principle to a power of attorney should be relatively rare, since ordinarily the third person dealing with one who acts under a power of attorney might be expected to examine the power under which such person acts. n304 However, the doctrine of apparent authority on the basis of an estoppel might be invoked if outside of the power of attorney the principal has given to the agent oral instructions limiting the exercise of the power. Under those circumstances such third person would have no way of knowing of such limitations. n305 So, too, there may be circumstances in which, although the agent acts under a power of attorney, the agent would appear to have such power in any event. n306 Under these circumstances it might not be expected that the third person would examine the power. Thus, if a real estate broker leases property to another under a power of attorney authorizing such conduct, it seems unlikely that a tenant would anticipate that the broker was acting under a power of attorney; thus it seems unreasonable to impose a duty on such tenant to determine that the broker is

acting under a power of attorney in order to impose a duty to examine the precise limits of the power.

COMPUTER-ASSISTED RESEARCH

LEXIS: apparent w/1 authority w/10 power! w/1 attorney

§ 86.02(b)(4) Ratification.

The doctrine of power by ratification of an agent's unauthorized acts would appear to be fully applicable to the agent who has been appointed by a formal power of attorney. Under the doctrine of ratification, it is possible for a principal to be bound by an unauthorized act of the agent by ratifying the agent's act. If the agent purports to act on behalf of the principal and the principal then manifests assent to the act, such assent relates back and the transaction is treated as though originally authorized. n307 So too, if the principal, with knowledge of the agent's unauthorized act, accepts a benefit from such act, the principal may be deemed to have manifested assent to the act, thus ratifying it. n308 Although the application of the doctrine of ratification to the act of an agent acting under a power of attorney is relatively rare, it may in fact be invoked to bind the principal to an act which exceeds the authorization given by the power of attorney, even though none of the doctrines previously discussed would have conferred any such power upon the agent *ab initio*.

COMPUTER-ASSISTED RESEARCH

LEXIS: ratification w/10 power! w/1 attorney

§ 86.02(c) Application of Statute of Frauds.

By definition, a power of attorney implies an authority conferred upon an agent through a written document. There is, however, no direct statute of frauds dealing with the empowering of an agent to act on behalf of a principal. When the power involves the creation of an interest in land in which the interest itself must be evidenced by a signed writing, jurisdictions differ on the question of whether the agent's authority must also be contained in a writing to bind the interest of the principal in the land. n309 If the statute in question does not explicitly require it, the agent may execute the document on behalf of the principal and thus satisfy the statute of frauds, even if the agent's authority to so act is purely oral. n310 On the other hand, in several states the statute of frauds in question specifically requires that the agent cannot, by signature alone, bind the principal's interest in real estate, unless the agent's authority to act on behalf of the principal is itself evidenced by a writing duly signed by the principal. n311 In such a state, when the creation of an interest in real estate is at issue, the authority of the agent to act for the principal can be evidenced, for example, by a written power of attorney duly authorizing said agent to create the interest in question on behalf of the principal.

COMPUTER-ASSISTED RESEARCH

LEXIS: statute of frauds w/15 power! w/1 attorney

§ 86.02(d) Termination of Power.

§ 86.02(d)(1) Death or Disability of Principal.

Since the power of attorney is based on agency principles, its existence depends upon both the principal and agent remaining alive and competent. Thus, in the absence of any additional elements discussed herein, n312 if the principal dies or becomes incompetent the power of the agent to bind the principal also automatically terminates. n313 This is because one can only authorize an act to be done which one is personally capable of doing. Moreover, according to traditional authorities, the rule terminating such a relationship fully applies even when a third party dealing with the agent is unaware of the principal's death or incapacity. n314 Other jurisdictions disagree and hold that the agent has the power to bind the principal until the third party has reasonable notification of the principal's death or disability. n315

The latest revision of the Uniform Probate Code has recommended that the attorney-in-fact continues to have the power to bind the principal or the principal's estate when the attorney has acted in good faith without actual knowledge of the principal's death or incapacity. n316

If the agent dies or becomes incompetent, the agency terminates by operation of law in much the same way as when the principal dies or becomes incompetent. n317 Although the Uniform Probate Code specifically deals with death or incompetency of the principal, it contains no provision relating to the death or incompetency of the agent. From its very nature, the problem would seem to be a rare one. n318

COMPUTER-ASSISTED RESEARCH

LEXIS: terminat! w/2 power! w/1 attorney
death w/5 principal w/5 power! w/1 attorney
disability w/5 principal w/5 power! w/1 attorney

§ 86.02(d)(2) Revocation by Principal.

The principal who creates an authority in another to act on the principal's behalf always retains the right to terminate that authority by revocation. n319 It is recalled that a distinction must be drawn between the power of attorney, where the principal has a power to revoke, and the power of appointment, in which the donor has no such power unless it was expressly reserved. n320

In the case of the power of attorney, even if the actual authority is terminated, the agent continues to have the power to impose liability upon the principal to third parties who have not received notice of termination. n321 This limitation is based on estoppel principles. The principal who created the authority is deemed to make a continuing representation that the agent may bind the principal. Thus, even if the authority is terminated, the agent continues to have the apparent authority to bind the principal to those who have not been notified of the revocation and who act in reliance on the original power of attorney. n322

COMPUTER-ASSISTED RESEARCH

LEXIS: revoc! or revoke! w/5 principal w/5 power! w/1 attorney

§ 86.02(d)(3) Statutory Durable Power.

In states which have not fully adopted the Uniform Probate Code, a Uniform Durable Powers of Attorney Act contains similar provisions. n323 Not all powers of attorney come within the terms of the statute. In order to be durable, the power must clearly and expressly assert the intention of the principal that it is to endure during any subsequent incompetency of the principal. n324 Thus, a power of attorney containing a provision that "it shall not be affected by disability or incapacity of the principal" or that "it shall become effective on disability or incapacity of the principal" will come within the scope of the statute.

The durable power of attorney may be used in a number of ways by a modern estate planner. One who is fearful of becoming incompetent and wishes to avoid the expense and trouble involved in having a guardian or committee for the estate appointed, may, while competent, designate someone to act and deal with one's assets on one's own behalf, and provide that such designation shall remain unaffected by one's own incompetency. In this fashion, the durable power may function much as a revocable trust without the necessity of transferring a trust res to a trustee. n325

The durable power may also be used in conjunction with a trust. The property owner may execute an appropriate trust instrument but not wish to create a present trust. The owner therefore may not transfer any present trust res to the

designated trustee. The owner may, however, couple the instrument with a durable power of attorney authorizing and empowering the trustee or another to transfer designated property to the trust, should the owner become incompetent. This creates a res and makes the trust operative at that point. Such a device is frequently called a "standby trust." n326

Finally, the durable power may be employed with a "living will" to provide for the acceptance or rejection of medical care. n327 This has become particularly important when a person's quality of life has significantly deteriorated with no hope of recovery. Some states have not adopted living will legislation. In these states, it may be possible for a designee to act directly on the patient's behalf after the patient has become incompetent. Even in states with living will legislation, a durable power of attorney may be a useful way to create flexibility, by permitting a designee to act on then-existing circumstances which might have been difficult for the patient to anticipate when the living will was prepared. n328

COMPUTER-ASSISTED RESEARCH

LEXIS: durable w/1 power! w/1 attorney
durable w/1 power! w/1 attorney w/50 living will
durable w/1 power! w/1 attorney w/50 trust

FOOTNOTES:
(n1)Footnote 289. *Smith v. United States, 113 F. Supp. 702 (D. Haw. 1953). See generally supra* § 86.01(a)(2)(i).

(n2)Footnote 290. The phrase is frequently expressed in the Latin maxim *"qui facit per alium facit per se." See also supra* § 86.01(a)(2)(i).

(n3)Footnote 291. Restatement (Second) of Property (Donative Transfers) § 15.1 (1984); *Hope v. United States Trust Co., 117 N.Y.S.2d 540 (1952).*

(n4)Footnote 292. *See supra* § 86.01(a)(2)(i). *See also* Restatement (Second) of Property (Donative Transfers) § 11.1 cmt. b (1984).

(n5)Footnote 293. *See infra* § 86.02(d)(2).

(n6)Footnote 294. *See infra* § 86.02(d)(1).

(n7)Footnote 295. *Kunewa v. Joshua, 924 P.2d 559 (Haw. App. 1996)* a broad power to deal with real property as the attorney-in-fact might see fit did not give power to him to make gifts of the principal's property to himself); *Kim v. C.I.R., 71 T.C.M. 2530 (1996); Todd v. Superior Ct., 184 P. 684 (Cal. 1919); Campbell v. Foster Home Ass'n, 30 A. 222 (Pa. 1894).*

(n8)Footnote 296. Restatement (Second) of Agency § 60 (1958) (indicating private rather than public sale is presumed to be authorized).

(n9)Footnote 297. Restatement (Second) of Agency § 68 (1958). *New Jersey Hous. & Mtg. Fin. Agency v. Bedminster Hills Hous. Corp., 666 A.2d 1018 (N.J. Super. 1995)* (a corporation could use a power of attorney executed by mortgagors to assign to itself the mortgagors' right of redemption).

(n10)Footnote 298. *Baskin v. Dam, 249 A.2d 549 (Conn. 1967); Aimonett v. Rapid Gas, Inc., 126 N.W.2d 116 (S.D. 1964).*

(n11)Footnote 299. *Walch v. State of Nevada, 909 P.2d 1184 (Nev. 1996)* (one who is merely a party to joint accounts with another over whom the first has power of attorney does not give authority to the power's holder to use account assets for personal benefit); *Prior v. Hager, 440 S.W.2d 167 (Mo. App. 1969).*

(n12)Footnote 300. *Makousky, Inc. v. Stern, 172 N.W.2d 317 (Minn. 1969).*

(n13)Footnote 301. *Realty Growth Investors v. Council of Unit Owners, 453 A.2d 450 (Del. 1982); People v. Etzler, 290 N.W. 879 (Mich. 1940).*

(n14)Footnote 302. *See generally* Restatement (Second) of Agency § 159 *et seq.* (1958). *Pollas v. Hardware Wholesalers, 663 N.E.2d 1188 (Ind. Ct. App. 1996).*

(n15)Footnote 303. *See, e.g., Bush v. Atlas Auto. Fin Corp., 195 A. 757 (Pa. 1937).*

(n16)Footnote 304. Modern Globe v. 1425 Lake Drive Corp., 66 N.W.2d 92 (Mich. 1954).

(n17)Footnote 305. *Wittlin v. Giacalone, 171 F.2d 147 (D.C. Cir. 1948). See generally* Restatement (Second) of Agency § 160 (1958).

(n18)Footnote 306. *Lumbermen's Mut. Ins. Co. v. Slide Rule & Scale Eng'g Co., 177 F.2d 305 (7th Cir. 1949)* (citing Restatement (Second) of Agency § 161 (1958) with approval).

(n19)Footnote 307. Restatement (Second) of Agency § 82 *et seq.* (1958).

(n20)Footnote 308. *Martin v. Federal Life Ins. Co., 644 N.E.2d 42 (Ill. 1994)* (when party accepts benefits of agreement with knowledge of agreement, it ratifies agent's actions); *Benedictine Soc'y v. National City Bank, 109 F.2d 679 (3d Cir. 1940).*

(n21)Footnote 309. *See, e.g., Ashuelot Paper Co. v. Ryll, 259 A.2d 657 (N.H. 1969)* (requiring authorization in writing); *Charles v. Henry, 334 A.2d 289 (Pa. 1975)* (same); *Lipkowitz v. Freedman, 113 A. 152 (Conn. 1921)* (parol evidence of authorization is valid); *Monahan v. McElligott, 44 A.2d 30 (N.J. 1945)* (same).

(n22)Footnote 310. *See, e.g., Bliss v. Security-First Nat'l Bank, 183 P.2d 312 (Cal. 1947).*

(n23)Footnote 311. *See, e.g.*, 33 Pa. Cons. Stat. Ann. § 1.

(n24)Footnote 312. *See infra* § 86.02(d).

(n25)Footnote 313. Restatement (Second) of Agency §§ 120, 122 (1958); *Ferguson v. Pilling, 533 N.W.2d 662 (Iowa 1942)* (death of one of two co-principals); *Lewis v. Commissioner of Banks, 190 N.E. 790 (Mass. 1934). In re Guardianship of Mabry, 666 N.E.2d 16 (Ill. App. 1996).*

(n26)Footnote 314. *Long v. Thayer, 150 U.S. 520 (1893); Farmers Loan & Trust Co. v. Wilson, 34 N.E. 784 (N.Y. 1893).*

(n27)Footnote 315. *Carringer v. Whittington, 26 Mo. 311 (1858); Catlin v. Reed, 283 P. 549 (Okla. 1929);* Restatement (Second) of Agency § 122 (1958).

(n28)Footnote 316. Uniform Probate Code § 5-504 (1990).

(n29)Footnote 317. Restatement (Second) of Agency § 121 (1958) (agent's death terminates authority); Restatement (Second) of Agency § 122 (1958) (agent's loss of capacity terminates or suspends his authority); *Bowman v. Bowman, 210 N.E.2d 920 (Ohio 1965); Estate of Krempasky, 501 A.2d 681 (Pa. 1985).*

(n30)Footnote 318. *Cf. Friedman v. Irving Trust Co., 300 N.Y.S. 51 (1937)* (terminating authority of collecting bank when it became insolvent).

(n31)Footnote 319. *Matter of Wingate, 647 N.Y.S.2d 433* (N.Y. Sup. Ct., 1996) (the court revoked a durable power

of attorney executed by a principal who later became incapacitated and unable to make decisions concerning property management. Revocation was based upon breach of fiduciary obligation to sell the shares of a cooperative apartment so as to render the principal eligible for Medicaid); *Younggren v. Younggren, 556 N.W.2d 228 (Minn. App. 1996)* (holding that attorneys-in-fact were obligated to return to the principal funds withdrawn by them to pay debts of the principal not yet due despite their knowledge that the power of attorney had been revoked); *Behren v. Blunstein, 560 N.Y.S.2d 768 (1990); Levander v. Johnson, 193 N.W. 970 (Wis. 1923); McKellop v. Dewitz, 140 P. 1161 (Okla. 1914); Peterson v. Peterson, 700 P.2d 585 (Kan. App. 1985).*

(n32)Footnote 320. *See supra* §§ 86.01(a)(1), 86.01(a)(2).

(n33)Footnote 321. Restatement (Second) of Agency § 124A cmt. a (1958); *Perrine v. Jermyn, 30 A. 202 (Pa. 1894).*

(n34)Footnote 322. *Melchiorre v. California Canners & Growers, 394 F.2d 413 (4th Cir. 1968).*

(n35)Footnote 323. *See* Uniform Durable Powers of Attorney Act (U.L.A.) § 2. The Act has been adopted in 25 states and the District of Columbia. 8A Uniform Laws Annotated.

(n36)Footnote 324. *See* Uniform Probate Code § 5-502; Uniform Durable Power of Attorney Act (U.L.A.) § 1 et seq. at1

(n37)Footnote 325. Alexander M. Meiklejohn, *Incompetent Principals, Competent Third Parties, and the Law of Agency, 61 Ind. L. J. 115 (1986).*

(n38)Footnote 326. Emily Berendt & Laura Lynn Michaels, *Your HIV Positive Client: Easing the Burden on the Family Through Estate Planning, 24 J. Marshall L. Rev. 509 (1991);* Major Micheal N. Schmitt & Captain Steven A. Hatfield, The Durable Power of Attorney: Applications and Limitations, *132 MIL. L. REV. 203 (1991).*

(n39)Footnote 327. Ala. Code § 22-8A-2; Ariz. Rev. Stat. Ann. § 36-3202; Fla. Stat. § 765.04.

(n40)Footnote 328. *See* Patricia A. Wentworth, *Termination of Life-Prolonging Medical Treatment: An Analysis of Pennsylvania's Proposed Medical Treatment Decision Act, 92 Dick L. Rev. 839 (1988).*

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CHAPTER 86 POWERS

10-86 Thompson on Real Property, Thomas Editions § 86.03

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§ 86.03 Powers of Sale.

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§ 86.03(a) Relationships Giving Rise to Power of Sale.

§ 86.03(a)(1) Generally.

A power of sale may be conferred either expressly or by implication by a power of attorney, as discussed previously. n329 Moreover, a power of sale may arise from an unrestricted power of appointment. Thus, if a donor gives a donee an unrestricted power of appointment, the donee may exercise the power through a sale of the appointive assets. n330 Even in the absence of a formal agency relationship or a power of appointment, one person may have the power to sell property in which another has interest based on the person's status or relationship to the property or to its owner. Generally, such a power of sale exists in two types of cases. First, a fiduciary such as a trustee, executor, administrator, or guardian will have a right of sale of property in the fiduciary's charge; this is essential to the performance of the fiduciary's duties. n331 Secondly, a creditor or representative of creditors may have a right of sale of property which secures a debt that is in default, as a means of collecting on the indebtedness. n332 Although either relationship gives rise to a power of sale, in some instances the power may only be exercised after obtaining permission from the appropriate court. A more detailed discussion of the extent to which such a power of sale is recognized, and the extent to which court approval is a prerequisite of its exercise, are discussed below. n333

COMPUTER-ASSISTED RESEARCH

LEXIS: power w/1 sale w/50 relation!
power w/1 sale w/50 power w/1 appointment
power w/1 sale w/50 power w/1 attorney

§ 86.03(a)(2) Trustees and Executors.

Both the trustee and executor operate under written instruments created by the original donor. A trustee's powers are likely to be articulated in the instrument creating the trust. Similarly, the powers of an executor of a will are likely to appear in the will which appointed the executor. In both of these cases, the instrument in question should not only

expressly create a power in the executor or trustee to sell real estate or personal property, but should also contain details of how the sale is to be conducted, and may waive any obligation to obtain court approval or post security for the protection of the proceeds. n334

Absent provisions in the appointing instrument, the law has generally conferred on trustees and executors broad power to sell personal property without court approval during the administration of the estate. n335. Such a sale may be appropriate to secure funds for the payment of taxes or debts, to make distribution to beneficiaries, or, in the case of a trust, to procure funds for other lawful investments. n336

Historically, such broad power was not conferred with regard to real estate. When family wealth and position were related to holding land, sale was discouraged. The title to land was deemed to pass automatically to the heirs or devisees. It was only somewhat begrudgingly that land could be sold when sale was essential to the payment of debts, and then only with court approval. n337 Theoretically, a similar analysis could be applied to the trustee, even though the trustee had legal title to any real estate that was part of the res of the trust. n338 Most modern courts, confronted with the trustee's assertion of a right of sale of real estate during the administration of the trust estate, have implied, from the terms of the trust, a power to sell, even if not expressly provided. n339

Some states would require an executor, but not a trustee, to obtain the court's approval before conducting the sale of real property in the estate, when the terms of the will do not expressly confer power of sale. n340

Under the Uniform Probate Code, and in many modern jurisdictions, the problem does not exist. The statute gives both a trustee and an executor broad power of sale when necessary to the trust or estate's administration. n341 Thus, the historic distinction between realty and personalty is eliminated, since the trustee or executor's power of sale of realty is substantially similar to the common law treatment of personalty.

COMPUTER-ASSISTED RESEARCH

LEXIS: trustee! or executor! w/50 power w/1 sale or sell

§ 86.03(a)(3) Administrators and Guardians.

By definition, the administrator of an estate is a personal representative designated by a court when a decedent dies intestate or when the executor named in a will cannot or will not qualify. n342 Similarly, when the owner is a minor, or otherwise incompetent to exercise the powers of ownership, a court may designate a guardian of the minor's estate and vest the guardian with the power to act on the incompetent's behalf. The incompetent is called the guardian's ward. n343

By definition, there is no appointing instrument of an administrator or guardian. n344 Hence, the donor has no opportunity to specify what powers the administrator or guardian has, as the donor has when naming a trustee or executor. The scope and extent of the powers of administrators and guardians can only be determined by the local statutes and rules of court. Thus, an administrator or court-appointed guardian is more likely to require court approval to sell real estate, and the court may exercise substantial supervision over such a sale. n345

Nevertheless, in many modern jurisdictions the distinction between administrators and executors has begun to disappear. There is a tendency to vest administrators with the same broad power of sale over both personal and real property as that held by an executor. n346

COMPUTER-ASSISTED RESEARCH

LEXIS: administrator! or guardian! w/50 power w/1 sale or sell

§ 86.03(a)(4) Holders of Security Interests in Personal Property.

Generally speaking, the holder of a security interest in personal property has the power to sell the property constituting the security upon default by the debtor. It is common for the security agreement itself to provide for such sale. Under the express terms of the Uniform Commercial Code, however, the power is provided for, even if the power of sale is not expressly conferred under the terms of the security agreement. n347 Should the security agreement provide for the authority for such a sale, such authorization, unlike the normal agency relationship, is not terminable by either revocation or by subsequent death or incompetency of the property owner. n348

Liens in personal property may also arise by operation of law. For example, one who takes and retains possession of a chattel on which one has performed work or services to either preserve or enhance its value has what has been denominated an artisan's lien. n349 Other liens exist for innkeepers, n350 carriers n351 and public warehousemen. n352 At historic common law such liens did not include a right of sale but were viewed strictly as retaining liens. n353 In most modern jurisdictions, however, in the event of debtor's default, the power of sale is conferred on the lienholder just as in the case of security interests created through the express intention of the parties. n354 Some liens, such as those of carriers and public warehousemen, are governed by applicable provisions of the Uniform Commercial Code. n355

COMPUTER-ASSISTED RESEARCH

LEXIS: holder! w/2 security w/1 interest! w/15 personal
w/1 property w/50 power w/1 sale or sell
liens! w/15 power w/1 sale or sell

§ 86.03(a)(5) Mortgagees of Real Estate.

As more fully noted elsewhere, when a mortgage of real estate is in default, the most common means employed for a foreclosure is through public sale by an officer of the court. n356 Nevertheless, as an alternative, many jurisdictions permit the terms of the mortgage to confer upon the mortgagee an irrevocable power of sale in the event of a default in the mortgage. n357 The employment of such a power of sale is particularly common in the case of a corporate bond issue which has been secured by a mortgage of corporate real estate. In such a case, the mortgage agreement will commonly designate a trustee to whom an irrevocable power of sale is given on behalf of all of the holders of the corporate bond. n358

In any case in which a power of sale is conferred under the terms of a mortgage, like the power of sale created by any other security interest previously discussed, the power is treated as "coupled with an interest" and as such is not subject to revocation nor termination upon death or incompetency of either the principal or the agent. n359

COMPUTER-ASSISTED RESEARCH

LEXIS: power! w/1 sale w/50 mortgage! w/15 foreclos!

§ 86.03(b) Manner of Sale.

§ 86.03(b)(1) Notice to Interested Parties.

Whether notice to interested parties is required to effectuate the sale depends largely on the basis of the power. In those instances in which the power of sale can only be exercised with prior approval of a court, a part of the procedure for obtaining such approval involves notice of the fact that application is to be made to all parties in interest. n360 Thus, the administrator or guardian who obtains prior leave of court for the sale of real estate would have to notify all parties interested in the estate of the intent to apply to a court for leave of court to proceed with the sale. n361 On the other

hand, if the sale is not a public one (that is, one by auction) or is of personal property, the administrator or guardian's right to sell frequently does not depend on court permission. So too, if the sale is by an executor or trustee whose power of sale springs directly from the appointing instrument itself, there is less likelihood that the jurisdiction will impose such an obligation to notify interested parties. n362

If the sale, on the other hand, is by the holder of a security interest in personal property, notice to the debtor and to all other persons with an interest in the property being exposed to sale is an absolute requirement. n363 If the sale is by a mortgagee who is proceeding under a power of sale in lieu of foreclosure, notice to the mortgagor and other parties in interest is required. n364

Unless there is contrary statutory provision, a sale may be avoided by any party in interest who has failed to receive appropriate notice when such notice is required. n365 It is common, however, for there to be a statutory provision which protects the interest of a bona fide purchaser in the sale and relegates the injured party to remedies against the holder of the power of sale. Thus, if the transaction is a security interest within the terms of the Uniform Commercial Code, a sale by the secured party will pass valid title to a bona fide purchaser for value even if the notice requirements have not been met. n366 The Uniform Probate Code contains a similar provision with respect to an improper sale by a personal representative. n367

COMPUTER-ASSISTED RESEARCH

LEXIS: power w/1 sale w/15 notice or notify w/15 interested w/2 part!

§ 86.03(b)(2) Public or Private Sale.

A public sale is, by definition, an auction sale following advertised notice to the public. Frequently such sale is conducted on the theory that it is calculated to obtain the best available price for the property being sold. A private sale, on the other hand, is simply a sale by agreement between the seller and an individual buyer. n368

Jurisdictions differ as to when the sale must be a public one. More specifically, fiduciaries such as trustees, executors, administrators and guardians usually have very wide latitude in connection with the sale of personal property. It is rare that a duty will be imposed upon them to conduct a public sale with respect to such property. n369

On the other hand, in connection with the sale of real estate, a number of variables must be considered. In the first place, if the sale is one which requires court sanction or approval the court order authorizing the sale will undoubtedly specify whether the sale must be a public one. n370 Moreover, close attention must be paid to the sources of the fiduciary's power. Thus, in the case of a trustee or executor, close attention must be given to the will or trust making the appointment. Any direction given by the testator or settlor must be obeyed. As to all fiduciaries, including administrators and guardians, attention must be given to the statutory provisions relating to the power conferred on fiduciaries with respect to the sale of land. n371

As previously noted, the power of sale may also be related to the enforcement of mortgage in real estate or a lien or security interest in personal property. When a power of sale is conferred on a mortgagee, the terms of the mortgage must be carefully examined. The use of a public sale to enforce the mortgage is common because it most resembles enforcement by court process and because it fixes a reasonably reliable way of determining property valuation for purposes of satisfying the mortgagor's obligation. n372 With respect to liens on personal property, many of the statutes which authorize enforcement of the lien by sale mandate that the sale be a public one. n373 On the other hand, if the transaction is governed by the terms of the Uniform Commercial Code the sale may be private. n374 The only requirement is that the sale must be commercially reasonable in the sense that it must be reasonably calculated to produce the best available price. n375 Failure of the secured party to use appropriate care in effectuating such a sale is a basis for imposing liability upon the secured party, even though title in fact passes to the good faith purchaser. n376

In short, the trend of modern statutes and decisions is to provide for greater flexibility by permitting a private sale so long as the seller can establish that the price obtained is a fair and adequate one.

COMPUTER-ASSISTED RESEARCH

LEXIS: power w/1 sale w/15 public or private

§ 86.03(b)(3) Purchase by Seller.

If a sale is by a fiduciary such as a guardian, administrator, trustee or executor it is a settled rule that such a fiduciary cannot purchase the property on the fiduciary's own account. This is true even if a full and adequate price was paid. n377 Such prohibition is intended to prevent a fiduciary from engaging in self-dealing. n378 A few jurisdictions have relaxed this rule to the extent of permitting such fiduciary, after a full disclosure to the appropriate court, to make such a purchase with the court's approval. n379

If the sale is by a secured party or mortgagee the same considerations are not involved. If the sale is a public one by a mortgagee, the mortgagee will ordinarily participate in the competitive bidding either directly or through a nominee to be certain that the property is sold for an amount at least equal to the amount of the mortgagee's claim. Although there is little authority for a purchase of personal property by the secured party of personal property, on principle there would seem to be no objection to the secured party's participation. As a matter of fact, under the terms of the Uniform Commercial Code, the secured party, upon giving appropriate notice to the debtor may, in some cases, retain the secured property in satisfaction of the indebtedness without formally exposing it for sale at all. n380

COMPUTER-ASSISTED RESEARCH

LEXIS: power w/1 sale w/15 purchase! w/3 seller

FOOTNOTES:
(n1)Footnote 329. *See supra* § 86.02(b).

(n2)Footnote 330. *See infra* § 86.01(d)(1).

(n3)Footnote 331. *See infra* §§ 86.03(a)(2), 86.03(a)(3).

(n4)Footnote 332. *See infra* §§ 86.03(a)(4), 86.03(a)(5).

(n5)Footnote 333. *Id.*

(n6)Footnote 334. *Nagle v. Fleming, 154 A. 718 (Pa. 1931)* (permitting successor administrator to sell under power conferred on executor in will). *See also* 20 Pa. Cons. Stat. Ann. § 3354 (providing that a power of sale in an instrument should be broadly construed as permitting public or private sale without prior court approval).

(n7)Footnote 335.. *Woodward v. Jaster, 933 S.W.2d 777 (Tex. App. 1996); Williams v. Cobb, 242 U.S. 307 (1916); Flynn v. Chicago G.W.R.R., 141 N.W. 401 (Iowa 1913); Jones v. Atchinson T. & S.F.R.R., 23 N.E. 43 (Mass. 1889).*

(n8)Footnote 336. *Id.* Nevertheless, the right to make such a sale is not unlimited. Potential distributees may have the right to insist on a distribution in kind when there is no necessity for a sale for any purpose of the administration of the trust or estate. *See Appeal of Minichello, 84 A.2d 511 (Pa. 1952).*

(n9)Footnote 337. *See generally* Atchkinson, *supra* note 3, § 123129 at 668.

(n10)Footnote 338. Restatement, (Second) of Trusts § 190 comment a (1987) (indicating that under English law there is more of a residue of the old traditional rules than in American jurisdictions).

(n11)Footnote 339. *Penn v. Pennsylvania Co., 171 S.W.2d 437 (Ky. App. 1943); Sword v. Marquette Nat'l Bank, 91 N.W.2d 75 (Minn. 1958).*

(n12)Footnote 340. *See, e.g., Sigmon v. Simmon, 45 A 2d 495* (N.J. ch. 1946); *cf. In re Thompson's Estate, 63 A.2d 55 (Pa. 1949)* (dispensing with court approval because will authorized sale).

(n13)Footnote 341. Uniform Probate Code § 3-711. *See also* 20 Pa. Cons. Stat. Ann. § 3351.

(n14)Footnote 342. *Lichtenfels v. North Carolina Nat'l. Bank, 132 S.E.2d 360 (N.C. 1963); In re Minder's Estate, 270 P.2d 404 (Mont. 1954).* The Uniform Probate Code abandons any distinction between executor and administrator by defining the term "personal representative" as applicable to both. See Uniform Probate Code § 1-201(36).

(n15)Footnote 343. In some jurisdictions, other terms are employed instead of the term "guardian." The Uniform Probate Code employs the word "conservator," apparently to distinguish from one with custody of the person of the incompetent. *See* Uniform Probate Code § 1-202(8). In other jurisdictions the term "committee for the incompetent" is employed. See *Lockhart's Guardian v. Bailey Pond Creek Co., 30 S.W.2d 955 (Ky. 1930).*

(n16)Footnote 344. In some jurisdictions, the term "guardian" is broad enough to include a person designated by the terms of the will or gift of the donor. For example, the Pennsylvania Will Act confers on the testator power to designate a guardian for the estate of any minor beneficiary. See 20 Pa. Cons. Stat. Ann. §§ 2519(b), 5115. Such person, however, is for all practical purposes a trustee and is excluded from this discussion.

(n17)Footnote 345. *Withers v. Patterson, 27 Tex. 491 (1864); McIntosh v. Conn. Gen. Life Ins. Co., 366 S.W.2d 409 (Mo. 1963).* In Pennsylvania no sale of realty is possible by the guardian of either a minor or an incompetent without prior approval of court. *See* 20 Pa. Cons. Stat. Ann. §§ 5155(1), 5521. *Hardeman v. Judge, 931 S.W.2d 716 (Tex. App. 1996).*

(n18)Footnote 346. *See, e.g.,* Pa. Cons. Stat. Ann. § 3351 (drawing no distinction between executor and trustee). So too, the Uniform Probate Code utilizes the term "personal representative" to include both executors and administrators without distinction. See Uniform Probate Code § 1-201(36).

(n19)Footnote 347. U.C.C. § 9-504.

(n20)Footnote 348. The authority thus created has been denominated as a "power coupled with an interest," which is deemed to be irrevocable. *Boyer v. Nesbitt, 76 A. 103 (Pa. 1910).*

(n21)Footnote 349. *United States v. Toys of World Club, Inc., 288 F.2d 89 (2nd Cir. 1961); International Elecs. Co. v. N.S.T. Metal Prods. Co., 88 A.2d 40 (Pa. 1952). See generally* Restatement of Security § 61(a) and corresponding comments (1941).

(n22)Footnote 350. *See generally* Restatement of Security § 61(c) and corresponding comments (1941).

(n23)Footnote 351. *See generally* Restatement of Security § 61(b) and corresponding comments (1941).

(n24)Footnote 352. *See generally* Restatement of Security § 61(d) and corresponding comments (1941).

(n25)Footnote 353. Restatement of Security § 72, cmt. a (1941).

(n26)Footnote 354. *See, e.g.,* 6 Pa. Cons. Stat. Ann. § 11. *In re Newport Sav. & Loan Ass'n, 928 F.2d 472* (2d cir. 1996).

(n27)Footnote 355. U.C.C. § 7-210 (enforcement of warehouseman's lien), § 7-308 (enforcement of carrier's lien).

(n28)Footnote 356. *See generally infra*, Chapter 101.

(n29)Footnote 357. *Id. See also Garfinkle v. Superior Ct., 578 P.2d 925 (Cal. 1978); Spires v. Lawless, 493 S.W.2d 65 (Mo. Ct. App. 1973).*

(n30)Footnote 358. *See King v. Pelkofski, 266 N.Y.S.2d 61 (1978); Ames Family Sch. Ass'n v. Baker, 173 N.E. 437 (Mass. 1930).*

(n31)Footnote 359. *E.g., Ferguson v. Haygood, 225 P.2d 925 (Wyo. 1978); Pearch v. Stokes, 291 S.W.2d 309 (Tex. 1956).*

(n32)Footnote 360. *In re Bane's Estate, 305 A.2d 723 (Pa. 1973); Hemphill v. Pry, 38 A. 1020 (Pa. 1898).* It should be noted that particularly in some of the earlier cases it had been held that a general advertised notice is sufficient even if no specific personal notice is given to affected parties. *See, e.g., Wall's Appeal, 31 Pa. 62 (1857); In re Walker's Estate, 23 P. 930 (Utah 1890).*

(n33)Footnote 361. *Kline v. Shoup, 226 P. 729 (Idaho 1924).*

(n34)Footnote 362. *See* Uniform Probate Code § 3-711 (vesting broad powers on personal representative and implying they can be exercised without court approval and without notification to parties in interest). *See also* Restatement (Second) of Trusts § 190 (1987) (implying a similar power in trustees).

(n35)Footnote 363. Uniform Commercial Code § 9-504(3). A similar rule obtains with regard to a statutory right of sale created for possessory liens. *See, e.g.*, 6 Pa. Cons. Stat. Ann. § 11 (statutory provision relating to artisans' liens requiring 10 days notice to debtor before exposing property to sale).

(n36)Footnote 364. *Wison v. Armstrong, 236 S.W. 755 (Tex. Civ. App. 1921).*

(n37)Footnote 365. *Depositors Trust Co. v. Bruneau, 66 A.2d 86 (Me. 1949)* (requiring purchaser to assume risk that trustee sold pursuant to authority); *Gunnell v. Cockerill, 79 Ill. 79 (1875)* (purchaser is bound to know whether sale was made in manner required by trust instrument, if purchaser is aware of instrument conferring power of sale); *Huntt v. Townshend, 31 Md. 336 (1869).*

(n38)Footnote 366. U.C.C. § 9-504(4).

(n39)Footnote 367. Uniform Probate Code § 3-714.

(n40)Footnote 368. *E.g., Johnson Cotton Co. v. Cannon, 129 S.E.2d 750 (S.C. 1963); Union & Mercantile Trust Co. v. Harnwell, 250 S.W. 321 (Ark. 1923).*

(n41)Footnote 369. *See generally* Atchkinson, *supra* n.3, § 122; *Flynn v. Chicago Great W. R. Co., 141 N.W. 401 (Iowa 1913).*

(n42)Footnote 370. *See, e.g.*, 20 Pa. Cons. Stat. Ann. § 3353; N.Y. Surr. Ct. Proc. Act § 2107. As to sale of real estate generally, *see* Atchkinson, *supra* n.3, § 123.

(n43)Footnote 371. *See, e.g.*, 20 Pa. Cons. Stat. Ann. § 3351; N.Y. Est. Powers & Trusts Law § 11-1.1(b)(5)(B) (both statutes confer broad discretionary power on personal representative to sell real estate, but excluding realty specifically).

(n44)Footnote 372. *See In re Penrose Estate, 403 A.2d 982 (Pa. 1979)* (setting aside private sale and permitting

public sale by personal representative as more likely to fix reasonable price).

(n45)Footnote 373. *See, e.g.*, N.Y. Lien Law § 200 et. seq.; 6 Pa. Cons. Stat. Ann. § 11 et. seq. (both covering artisan's liens); 37 Pa. Cons. Stat. Ann. § 71 (covering innkeeper's liens).

(n46)Footnote 374. U.C.C. § 9-504(3).

(n47)Footnote 375. *Id.*

(n48)Footnote 376. U.C.C. § 9-504(4). *See also* U.C.C. § 9-507.

(n49)Footnote 377. *In re Bane's Estate, 305 A.2d 723 (Pa. 1973), aff'd, 336 A.2d 248 (Pa. 1975); Marshall v. Carson, 38 N.J. Eq. 250 (1884).*

(n50)Footnote 378. *Marshall v. Carson, 38 N.J. Eq. 250 (1884). See generally* Restatement (Second) of Trusts § 206, cmt. h (1987).

(n51)Footnote 379. *See, e.g.*, 20 Pa. Cons. Stat. Ann. § 3356; Uniform Probate Code § 3-712(2).

(n52)Footnote 380. U.C.C. § 9-505.

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CHAPTER 86 POWERS

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Annotation, *Constitutionality, Construction, Application, and Effect of Statute Invalidating Powers of Attorneys to Confess Judgment or Contracts Giving Such Power, 40 A.L.R. 3d 1158.*

Annotation, *Disposition of Property of Inter Vivos Trust Falling in After Death of Settlor, Who Left Will Making No Express Disposition of the Trust Property, 30 A.L.R. 2d 1318.*

Annotation, *Marriage of Testator or Birth of Testator's Child as Revoking Will Previously Made in Exercise of Power of Appointment, 92 A.L.R. 3d 1244.*

Annotation, *Power to Appoint Realty in Fee or Personalty Absolutely as Including Power to Appoint Lesser Estate or Interest, 94 A.L.R. 3d 895.*

Annotation, *Powers of Appointment: Revocation or Amendment of Exercise of Power to Appoint Future Interest, After Exercise by Inter Vivos Instrument, 60 A.L.R. 3d 143.*

Annotation, *Rights as Between Estate of Life Tenant and Remaindermen in Respect of Proceeds of Sale or Disposition Made in Exercise of Power Given Life Tenant, 47 A.L.R. 3d 1078.*

Annotation, *Sufficiency of Exercise of Power Specifying That It Can Be Exercised Only by Specific or Direct Reference Thereto, 15 A.L.R. 4th 810.*

Annotation, *Validity of Testamentary Exercise of Power of Appointment by Donee Sane When Will Was Executed But Insane Thereafter, 19 A.L.R. 4th 1002.*

Annotation, *Validity of Testamentary Provision Making Gift to Person or Persons Meeting Specified Qualification and Authorizing Another to Determine Who Qualifies, 74 A.L.R. 3d 1073.*

Annotation, *Wills: Gift Over to "Survivors" of Class or Group of Designated Beneficiaries as Restricted to Surviving Members of Class or Group, or as Passing to Heirs or Representatives of Deceased Beneficiaries, 54 A.L.R. 3d 280.*

Restatements

Restatement of Agency 2d § 32 *et seq*.

Restatement of Conflicts 2d §§ 274, 275, 281, 282.

Restatement of Property 2d (Donat Transaction) Volume 2 § 11.1 - § 24.4.

Restatement of Securities § 61.

Restatement of Trusts 2d § 112 *et seq*.

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Supp. To CHAPTER 86 POWERS

10-86 Thompson on Real Property, Thomas Editions Supp. to § 86.01

Supp. to § 86.01 Powers of Appointment.

[Go To Main]

§ 86.01(a) Introduction. [Go To Main]

§ 86.01(a)(2) Powers of Appointment as Distinguished from Other Relationships.

§ 86.01(a)(2)(iii) Powers of Trustee.

Add:

In *Martone ex rel. Martone v. Martone, 509 S.E.2d 302 (Va. 1999)* testator gave a similar power to his executor by authorizing him, in his sole discretion, to distribute income earned during the period of administration of the estate to one or more members of a class consisting of his wife and his issue, or accumulated and added to the residuary estate, or used to pay debts, funeral expenses, administration expenses or taxes owed by the estate.

Add:

Matter of Fouts, 677 N.Y.S.2d 699 (1998) . In a proceeding by a trustee to change the situs of an inter vivos honorary trust from New York to Washington, the court appointed an enforcer, not a guardian ad litem, to protect the interests of five chimpanzees who were the income and principal beneficiaries of the trust.

§ 86.01(a)(3) Parties and Classification of Powers.

§ 86.01(a)(3)(iii) General, Special or Mixed Powers.

Add:

Linehan v. Linehan, 904 N.E.2d 769 (Mass. 2009) (donee of power appointed the assets in trust for the benefit of his widow and son); *Brown v. Miller, 2 So. 3d 321 (Fla. App. 2009)* (language authorizing payments as donee should "from time to time request" did not prohibit withdrawal of the entire principal in a single transaction).

In re Chervitz Trust, 198 S.W.3d 658 (Mo. App. 2006) (a husband validly exercised his power of appointment when he appointed assets of his wife's trust to his trust).

Dickinson v. Wilmington Trust Co., 734 A.2d 605 , aff'd 734 A.2d 642 (Del. 1999) . The life income beneficiary of a trust who was given the power to appoint by will the principal and undistributed income to such persons as she should select held a general testamentary power of appointment with the ability to distribute to her creditors if she wished to do so. Existence of a spendthrift provision in the will was not logically inconsistent with the creation of a general power.

Add:

Pierce v. Doyle, 816 N.E.2d 1212 (Mass. 2004) (power of appointment granted by testator was reformed to make it consistent with testator's intent to grant a limited power).

§ 86.01(b) Problems of Characterization and the Doctrine of Relating Back. [Go To Main]

§ 86.01(b)(1) General Powers.

§ 86.01(b)(1)(iv) Rights of Creditors of Donee.

Add:

In re Gilroy, 235 B.R. 512 (Bkrtcy. D. Mass. 1999) . Debtor was the sole beneficiary of an Illinois subtrust created by her father with lottery winnings and valued at $230,000. This subtrust gave the beneficiary, either during life or at death, the right to appoint all or any part of the trust to any persons including herself. The spendthrift provision barring transfer of income and principal and exempting the trust assets from claims of creditors expressly permitted exercise of the general power of appointment. The Illinois rule barring a creditor from compelling the exercise of a general power of appointment was irrelevant. By filing the bankruptcy petition, the debtor made the general power an asset of the bankruptcy estate and no intervention of creditors was required.

§ 86.01(b)(2) Special and Mixed Powers

§ 86.01(b)(2)(i). In General.

Change Daniel v. Brown citation to read:

Daniel v. Brown, 159 S.E. 209 (Va. 1931) .

§ 86.01(b)(2)(ii). Disposition in Absence of Valid Appointment.

Change Bridgewater citation to read:

Bridgewater v. Turner, 29 S.W.2d 659 (Tenn. 1930) .

§ 86.01(d) Exercise of Power. [Go To Main]

§ 86.01(d)(1) Donor's Power to Designate.

In line 3, after "creating the power" add new footnote: n178.1

Add:

Giammarrusco v. Simon, *91 Cal. Rptr. 3d 50 (2009)* (a trustee's proposed argument that the court should reform the trust to correct a drafting mistake was not a contest in violation of the trust's no-contest rule); Townsend v. Townsend, *89 Cal. Rptr. 3d 760 (2009)* (a proposed challenge to a trust amendment did not violate the trust's no contest rule).

In re Meyer, 987 P.2d 822 (Ariz. App. 1999) . Settlor created two trusts, each giving her son a power to appoint in his will the balance of the trust to his wife, his issue or a named foundation subject to the condition that if, within three months after the son's death, the trustees have received no notice of the existence of the son's will, they may conclusively presume that he died intestate. The son died leaving a will which was not admitted to probate. The court found that its provisions were effective to transfer the trust assets to the foundation.

Add:

In re Allen A. Atwood Trust, 23 P.3d 309 (Okla. Civ. App. 2001) (where a trust created a limited testamentary power of appointment exercisable by express reference to the power. Under Virginia law, failure of the donee of the power to refer to the trust or the power precluded its exercise since the condition may not be disregarded).

Add:

In *Wetherill v. Basham, 3 P.3d 1118 (Ariz. App. 2000)* , the spouses as settlors of a revocable trust provided that the survivor, during life or upon death, had the right to appoint principal of the trust to or for the benefit of settlors' descendants "upon such conditions, and in amounts and at such times, as the Survivor may direct and appoint by written instrument delivered to the Trustee." Sixteen years later, the wife, individually and as guardian and conservator of her mentally incapacitated husband, executed a writing purporting to substitute herself for her husband as trustee and to replace her daughter with a granddaughter as sole remainder beneficiary. When the wife died shortly after her husband, her will left her residuary estate to the trust "as amended." The court found that the trust amendment was a proper exercise of the special power of appointment even though it was executed while both settlors were living. Proof of an intention to exercise the power of appointment was not required. *Edwards v. Urice, 99 P.3d 256 (Okla. App. 2004)* (power of appointment effectively exercised in a revocable trust).

§ 86.01(d)(2) Constructional Problems of Donee's Will.

§ 86.01(d)(2)(i) Determining Whether Donee Intended an Exercise.

Add:

Hargrove v. Rich, 604 S.E.2d 475 (Ga. 2004) (a specific reference to the power of appointment in the donee's will was sufficient to exercise the power).

Add:

First Union National Bank v. Ingold, 523 S.E.2d 725 (N.C. App. 1999) . The general power of appointment retained by the settlor was exercised in favor of his wife by the residuary clause of his will without reference to the power. Although not expressly referred to as a power of appointment, the language used specifically provided that he had the right to appoint the entire trust by will and contrary to the trust provisions.

§ 86.01(d)(2)(ii) Perpetuities and Appointive Interests.

Add;

In re Chappell, 883 N.Y.S.2d 857 (2009) (powers of appointment granted to the donee under trust instruments were "postponed" powers).

§ 86.01(d)(2)(iii) Effect of Invalidity of Interest Created by Exercise of Power.

Add:

Puzzanchera v. Loetel, 293 S.W.3d 51 (Mo. App. 2009) (exercise of power of appointment was invalid because such exercise had been specifically prohibited).

§ 86.01(e) Enforcement of Limitations on Exercise. [Go To Main]

§ 86.01(e)(1) Testamentary Powers.

Line 4, after "is unenforceable," add new footnote: n224.1

§ 86.01(g)(3)(i). The Marital Deduction Trust.

--second full paragraph

Strike:

The tax code has been updated and the tax-exempt amount has been raised to one million dollars for gifts given through 2010. This means that the total that spouses could pass would be two million dollars, one million each.

§ 86.01(g)(3)(ii). The Generation-Skipping Trust.

Strike:

Id.

Replace with:

I.R.C §§ 2010, 2631.

FOOTNOTES:
(n1)Footnote 178.1. *See e.g., Smith v. Brannan, 954 P.2d 1259 (Or. App. 1998)* . In 1978, H executed a will creating a marital trust for his wife which included the power to appoint the total fund by specific reference to the provision in her will. Contemporaneously, W made a will purporting to exercise the power through proper specific reference. In 1988, H executed a new will reducing his beneficiaries from six to two but retaining the trust and the power of appointment provisions in the same form. W had become incompetent and was unable to execute a new will. It was held that her will failed to satisfy the specific reference requirement.

(n2)Footnote 224.1. *Carmichael v. Heggie, 506 S.E.2d 308 (S.C. 1998)* . A life tenant with a general testamentary power of appointment over realty could not create a present interest in her son by deeding him her interest in the land, making a will purporting to exercise the power of appointment in his favor and contracting with him not to change the

will in return for his promise to care for her in her old age. The deed was effective to convey only the life estate.

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Supp. to § 86.02 Powers of Attorney.

[Go To Main]

§ 86.02(a) Theoretical Origin and Basis. [Go To Main]

Add:

Chase v. Northwest Airlines Corp., 49 F. Supp. 2d 553, 562 (E.D. Mich. 1999) quotes with approval 3 Am. Jur. 2d, Agency, § 23, p. 528 as follows: "A power of attorney is an instrument in writing by which one person, as principal, appoints another as his agent and confers upon him the authority to perform certain specified acts or kinds of acts on behalf of the principal."

Line 5, after "behalf of another," add new footnote: n289.1

Add:

In re Sechrest, 537 S.E.2d 511 (N.C. App. 2000) (where, in a proceeding to set aside a will, the execution of a power of attorney designating a health care agent with "full power and authority to make health care decisions" on her behalf created a fiduciary status only pertaining to matters within the scope of the agency).

In re Schlagel Trust, 51 P.3d 1094 (Colo. App. 2002) (the settlor's agent under a common law power of attorney had authority to revoke a trust although the instrument did not grant specific power to do so. It did give the agent broad powers in the execution of trust agreements and other estate planning documents. The trust agreement had been executed by the attorney-in-fact for the settlor).

Estate of Keatinge v. Biddle, 789 A.2d 1271 (Me. 2002) (held that under the usual rule retention of counsel by an attorney-in-fact under a durable power of attorney did not create an attorney-client relationship between the attorney and the principal. A separate agreement between the counsel and the grantor is required. Concern was expressed about the potential for conflicting loyalties being imposed on the counsel).

In re Estate of Romanowski, 771 N.E.2d 966 (Ill. App. 2002) (the attorney-in-fact under a statutory short form power of attorney exceeded her authority in naming herself and her daughter as contingent beneficiaries of a trust because such authority was not explicitly granted to her in the instrument).

In re Will of Kipke, 645 N.W.2d 727 (Minn. App. 2002) (a statutory short form power of attorney allowing the attorney-in-fact to change the beneficiary of a life insurance policy insuring the principal, except the attorney-in-fact cannot be a new beneficiary, does not apply to changes made by the principal).

§ 86.02(b) Construction and Scope of Power. [Go To Main]

§ 86.02(b)(1) Express Authority.

Add:

Cheloha v. Cheloha, 582 N.W.2d 291, 297 (Neb. 1998) (stating that "It is well settled that no gift may be made by an attorney in fact to himself or herself unless the power to make such a gift is expressly granted in the instrument itself and there is shown a clear intent on the part of the principal to make such a gift." Certificates of deposit owned by the principal were unlawfully converted by the attorney in fact to the extent they were used to pay the attorney in fact for personal services rendered to the principal when no oral contract for compensation was proved); *Elizondo v. Texas Nat. Resource Cons. Com., 974 S.W.2d 928 (Tex. App. 1998)* . An attorney-in-fact named by ten property owners could not bring suit in her representative capacity on behalf of her principals. Her agency status did not qualify her as a real party in interest permitting suit in her own name; *Schock v. Nash, 732 A.2d 217 (Del. Supr. 1999)* (An attorney-in-fact, under the duty of loyalty, always has the obligation to act in the best interest of the principal. Transfers made by the attorney-in-fact to herself or her family are voidable unless they were made with the consent of the principal after full disclosure); *Dayton Monetary Assoc. v. Becker, 710 N.E.2d 1151 (Ohio App. 1998)* (a partnership fictitious name statute requiring that certificates of registration be signed by the partners does not preclude use of a power of attorney broad enough to give such authority to the attorney-in-fact); *Ramos Irizarry v. Rivera Varela, 59 F. Supp.2d 358 (D. Puerto Rico 1999)* (A power of attorney granting authority to act on behalf of the principal in relation to her parent's estate did not include the right to sell the principal's share of a farm after title had been transferred to her and others as heirs).

In re Trust of Jameison, 8 P.3d 83 (Mont. 2000) (where a broad, general power of attorney to act in all matters affecting business or property did not authorize the attorney-in-fact to transfer the principal's property to herself as trustee and create a trust. Acceptance of trust benefits would not serve as a ratification since a writing was required).

In re Conservatorship of Anderson v. Lasen, 628 N.W.2d 233 (Neb. 2001) (where the attorneys-in-fact caused an unauthorized and unlawful dissipation of the principal(s estate by making gifts therefrom to themselves).

In re Estate of Roth, 724 N.Y.S.2d 476 (A.D. 2001) (where the attorney-in-fact and her son were obligated to repay alleged gifts made pursuant to a power of attorney because of insufficient evidence that the principal intended that the gifts were to be made).

Amcore Bank v. Hahnaman-Albrecht, Inc., 759 N.E.2d 174 (Ill. App. 2001) (a power of attorney authorizing the agent

"to perform for me every act of every kind and nature which may be deemed desirable or advisable to be performed for me" did not authorize an attorney-in-fact to sign a guaranty since such act was outside the powers specifically set forth. These specifically limited powers were not expanded by the broad "catch all" provision).

Add:

Salvation Army v. Ferrara, 775 N.Y.S.2d 470 (2004) (holder of power of attorney's transfer of property to himself was not presumptively invalid).

In re Estate of Wilson, 869 N.E.2d 824 (Ill. App. 2007) (agent under power of attorney for real estate not permitted to enjoin a temporary guardian).

In line 10, after "interpretation may arise" add new footnote: n295.1

Add at the end of the subsection:

Broad authority to sell real estate may carry ancillary statutory restrictions with respect to use of the proceeds.[297.1] Similarly, a general power of attorney broad enough to authorize the exercise of a power to revoke a trust may be required to recite specific authority and specific reference to the trust in order to be effective for that purpose.[297.2]

Add:

In re Estate of Kraus, *108 Cal. Rptr. 3d 760 (2010)* (alleged misappropriation of settlor's funds after defendant executed an invalid power of attorney).

§ 86.02(b)(2) Implied Authority.

Add:

In re Washington, 297 B.R. 662 (S.D. Fla. 2003) (holder of power of attorney acted improperly in forging purported debtor's signature on bankruptcy petition).

Add:

288 *St. Nick L.L.C. v. 288 Kiseki Realty, 728 N.Y.S.2d 20 (A.D. 2001)* (where the sole owner of defendant corporation executed a power of attorney authorizing his agent to engage in "business operating transactions." Sale of real property by the agency was barred because the power of attorney did not specifically include real estate transactions).

§ 86.02(b)(4) Ratification.

Add:

Township of North Fayette v. Guyaux, 992 A.2d 904 (Pa. Super. 2010) (power of attorney did not have retroactive effect).

§ 86.02(c). Application of Statute of Frauds. [Go To Main]

Add:

Estate of Rabinowitz v. Rabinowitz, *7 Cal. Rptr. 3d 722 (2004)* (the grantor of a power of attorney may orally acknowledge the power to witnesses).

Add:

HSBC Bank USA, N.A. v. Valentin, 900 N.Y.S.2d 350 (2010) (the power of attorney was not invalid because it had not been certified by an attorney).

§ 86.02(d) Termination of Power. [Go To Main]

§ 86.02(d)(1). Death or Disability of Principal.

Add:

Musquiz v. Marroquin, 124 S.W.3d 906 (Tex. App. 2004) (a power given to a daughter and a son was presumed to be a joint agency).

§ 86.02(d)(3) Statutory Durable Power.

Add:

Estate of Smith v. Southland Suites of Ormond Beach, LLC, 28 So. 3d 103 (Fla. App. 2010) (upholding durable power of attorney in connection with nursing home admission).

Add new footnote at end of first paragraph: n324.1

Add:

In re Guardianship of Shaffer, 711 N.E.2d 37 (Ind. App. 1999) (Attorneys-in-fact for an elderly Alzheimer's victim had the right to oppose the appointment of a guardian for the principal. The guardian, if appointed, would have no authority to revoke the power of attorney and no authority to act as to matters covered by the power); *In re Khoubesserian, 695 N.Y.S.2d 312 (A.D. 1999)* (A principal, in failing health, granted a durable power of attorney to her sister, who served for six years before her health also failed. An agreement made by the attorney-in-fact with an attorney to pursue an insurance claim on a contingent fee basis was valid as against a challenge interposed by a petitioner for appointment as guardian. The attorney acted pursuant to a power of attorney made by the original attorney-in-fact. Although the authority of the attorney ended at the death of his principal, compensation was awarded for services beneficial to the original principal made after the death of his principal).

In re Nellie G., 831 N.Y.S.2d 473 (2007) (trial court should have allowed person who held durable power of attorney to continue to manage property of incapacitated person).

Add:

Moffett v. Life Care Centers of America, 219 P.3d 1068 (Colo. 2009) (a person possessing the power of attorney could act on behalf of a person who became incapacitated after executing the power of attorney).

Add:

In re Guardianship of Muriel K., 640 N.W.2d 773 (Wis. 2002) (where the court held that agents under a power of attorney for health care and a durable power of attorney had authority to appeal from a lower court decision revoking their powers of attorney and replacing them with guardians to act for the principal).

Arrington v. Reynolds, 564 S.E.2d 870 (Ga. App. 2002) (landowners received sufficient notice of pending foreclosure

sale of their property where notice was published in the local newspaper, where timely notice was sent by certified mail to wife's post office box and where the postal service twice notified her of the letter's presence).

In re Keener, 268 B.R. 912 (Bkrtcy. Tex. 2001) (stating that a foreclosure sale is a harsh remedy under a deed of trust and must be done in strict compliance with the provisions of the deed of trust. The trustee must act with absolute impartiality to both parties when performing a foreclosure sale).

FOOTNOTES:
(n3)Footnote 289.1. Consent may be negated by showing that the principal was incompetent when he signed the power of attorney or by showing that the principal had been subjected to undue influence. *See Morris v. Jackson, 733 So. 2d 897 (Ala. Civ. App. 1999)* (where the attorney-in-fact was directed to return $7,000 and $2,700 improperly removed from the principal's bank accounts, plus interest); *Louros v. Cyr, 175 F. Supp. 2d 497 (S.D.N.Y. 2001)* (where powers of attorney executed by depositors creating individual accounts in a foreign bank did not cause a fiduciary relationship to exist with the attorney-in-fact who was a compensated contact of the foreign government charged with developing the private banking scheme. The attorney-in-fact was not acting as the mere agent of the depositors).

(n4)Footnote 295.1. *Estate of Smith v. U.S., 979 F. Supp. 279 (D. Vt. 1997)* . A power of attorney giving authority to "sell, purchase, lease, mortgage and convey any real property owned by me" was ambiguous in regard to creation of authority to make a charitable gift eligible for an estate tax deduction. Extrinsic evidence was appropriate and summary judgment was denied.

(n5)Footnote 324.1. *Miller v. Jackson Hospital and Clinic, 776 So. 2d 122 (Ala. 2000)* (where a durable power of attorney stated that it was to be unaffected by the subsequent incompetence of the donor. Although the donor had statutory power to delay the effectiveness of the power of attorney until his incompetence, he chose the form that created the authority immediately upon execution).

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Supp. to § 86.03 Powers of Sale.

[Go To Main]

§ 86.03(a) Relationships Giving Rise to Power of Sale. [Go To Main]

§ 86.03(a)(2) Trustees and Executors.

--Last sentence on Page, fourth word from the end. Correction:

"res" should be "rest."

Add:

Matter of Estate of Maxedon, 946 P.2d 104 (Kan. App. 1997) . The trustee had the power to sell a non-wasting asset to enhance income for distribution consistent with trust purposes. The trust instrument neither expressly permitted nor excluded such a sale.

Add:

Gershaw v. Gershfield, 751 N.E.2d 424 (Mass. App. Ct. 2001) (where trustees were expressly given broad direction to sell, convey and manage trust properly and the sale of an apartment building occupied by a beneficiary was a reasonable exercise of authority. Proceeds were to be used for maintenance of the beneficiary and the educational needs of his

children).

§ 86.03(a)(5) Mortgages of Real Estate.

Add:

6 *Angels, Inc. v. Stuart-Wright Mortgage, Inc., 102 Cal Rptr. 2d 711 (Cal. App. 2001)* (where, in a non-judicial foreclosure sale, the servicer of a loan on a deed of trust through clerical error understated to the trustee the amount of an acceptable opening bid. Sale of the understated amount was not set aside).

Rapps v. Cooke, 540 S.E.2d 241 (Ga. App. 2000) (where the court stated: "In exercising a power of sale, the foreclosing party is required only to advertise and sell the property in accordance with the terms of the instrument and to conduct the sale in good faith." Actual receipt of notice of default was not required by the security deed and the mortgagees did not act in bad faith by failing to provide the pay off amount of the accelerated debt).

Hicks v. E.T. Legg & Associates, 108 Cal Rptr. 2d 10 (Cal. App. 2001) (where in an action to set aside a non-judicial foreclosure sale, the court described the purposes of the legislative regulatory scheme as ((1) to provide the creditor/beneficiary with a quick, inexpensive and efficient remedy against a defaulting debtor/trustor; (2) to protect the debtor/trustor from a wrongful loss of the property; and (3) to ensure that a properly conducted sale is final between the parties and conclusive as to a bonafide purchaser).

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§ 86.03(b) Manner of Sale. [Go To Main]

§ 86.03(b)(1) Notice to Interested Parties.

Add:

Riley v. Robey, 25 Fed. App. 149 (4th Cir. 2002) (under Virginia law, specifying the street address in the notice of sale is not mandatory. Substantial compliance with the statutory requirement will validate the sale so long as the parties' rights are not affected in any material way).

Mills v. Haggard, 58 S.W.3d 164 (Tex. App. 2001) (a judgment of foreclosure sale was invalidated because holder failed to send notice of cure to debtor's address in file).

§ 86.03(b)(2) Public or Private Sale.

At end of last sentence in last paragraph, add new footnote: n376.1

§ 86.03(b)(3) Purchase by Seller.

Add:

Scurria v. Hodge, 720 So. 2d 460 (La. App. 1998) (An administrator has the fiduciary obligation to obtain the best price available. Sale of stock in a closely held corporation by a co-administrator to himself and another as original

shareholders of the corporation for less than market value creates a claim in the estate beneficiaries for the difference between the value of the shares and the amount received).

At end of second sentence in second paragraph, add new footnote 379.1: n379.1

FOOTNOTES:
(n6)Footnote 376.1. *See e.g. Blue Star Investments v. Johnson, 801 So. 2d 218 (Fla. App. 2001)* (a purchase price of 69.09% of the property's appraised value was not so grossly inadequate as to warrant setting aside the foreclosure sale). *Cf. In re Krohn, 52 P.3d 774 (Ariz. 2002)* (where the court adopted the rule of Restatement (Third) of Property: Mortgages § 8.3, a sale of real property under power of sale in a deed of trust may be set aside solely on the basis that the bid price was grossly inadequate. A bid of $10,000 for a property worth $57,000 was found to be grossly inadequate).

(n7)Footnote 379.1. *See e.g. Manion v. Chase Manhattan Mortgage Corp., 43 P.3d 576 (Wyo. 2002)* (where the first mortgagee was allowed to purchase at a foreclosure sale for the amount of its debt irrespective of the value of the premises in the absence of fraud or illegality).

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Add to Books

Davidowitz, Ronnie G. "Alternative Estate Planning Strategies--Using the General Power of Appointment." *Practicing Law Institute* PLI Order Number 6194 March 21- 22, 2005 .

Add to Articles

Acker, Alan S. "Using Testamentary Powers of Appointment to Maximize Estate Exemptions and Basis Step Up: Best Thing Since Sliced Bread?" 17 *Ohio Probate Law Journal* 106 (January/February 2006).

Barrows, Richard G. "Power of Attorney with Revokable Trusts." *13-FEB Nev. Law. 16* (2005).

Donaldson, Emily A. "Advanced Directives: What Direction Does Kansas Allow?" *75-MAR J. Kan. B.A. 19* (2006).

Conroy, Amy Jo. "Curbing the License to Steal: A Discussion of English Law and Possible Reforms for the Durable Power of Attorney," *44 Real Prop. Tr. & Est. L.J. 31* (Spring, 2009) .

Gallant, Keith Bradoc. "Durable Powers of Attorney for Property Management," SM061 *ALI-ABA* 217, Elder Law: Issues, Answers, and Opportunities (April 26-27, 2007).

Gans, Mitchell M. & Jonathan G. Blattmachr. "Making Spousal Estate Tax Exemptions Transferable." *19-DEC Prob. & Prop. 11* (2005).

Haddleton, Russell E. "The Durable Power of Attorney is on the Way," *Prob. & Prop.* 50 (May/June, 2010).

Holbrook, Dan W. "Don't Worry ... Be HIPAA! Or, Why Every Health Care Power of Attorney (and some Property Powers) May Need Revising." *39 Tenn. B.J. 15* (December, 2003).

Hook, Andrew H. "The Virginia Uniform Power of Attorney Act," *44 U. Rich. L. Rev. 107* (November, 2009).

Kabaker, Richard Z. "Powers of Appointment," *ALI-ABA Course of Study on Basic Estate and Gift Tax Planning*, SP005 ALI-ABA 63 (August 20-22, 2008).

Millard, Kevin D. "The Trustee's Duty to Inform and Report Under the Uniform Trust Code." *40 Real Prop. Prob. & Tr. J. 373 (2005).*

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Annotation, *Disposition of All or Residue of Testator's Property, Without Referring to Power of Appointment, as Constituting Sufficient Manifestation of Intention to Exercise power, in Absence of Statute, 15 A.L.R.3d 346* .

Annotation, "Election to take against will as extinguishing power of appointment," *38 A.L.R.2d 977* .

Annotation, "Partial exercise of power of appointment," *4 A.L.R.2d 919* .

Annotation, "Power to appoint as exercisable by creation of new power by donee," 169 A.L.R. 727 .

Annotation, "Power to appoint realty in fee or personalty absolutely as including power to appoint lesser estate or interest," *94 A.L.R.3d 895* .

Annotation, *Property Covered by Power of Appointment as Subject to Claims of Donee's Creditors,* 121 A.L.R. 803 .

Annotation, *Property Over Which Testator had Power of Appointment Which is Exercised by Residuary Clause, as Available for Payment of Pecuniary Legacies After Exhaustion of Testator's Own Property,* 104 A.L.R. 675 .

Annotation, "Validity of testamentary exercise of power of appointment by donee sane when will was executed by

insane thereafter," *19 A.L.R.4th 1002* .

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CHAPTER 87 ADVERSE POSSESSION

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AUTHOR: Professor Olan B. Lowrey School of Law Temple University Portion of this Chapter are based on Ch. 38 of George W. Thompson, Commentaries on the Law of Real Property (John S. Grimes, ed. reprinted 1979).

§ 87.syn Synopsis to Chapter 87: ADVERSE POSSESSION

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§ 87.19 Bibliography.

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FOOTNOTES:
(n1)Footnote *.
Portion of this Chapter are based on Ch. 38 of George W. Thompson, Commentaries on the Law of Real Property (John S. Grimes, ed. reprinted 1979).

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CHAPTER 87 ADVERSE POSSESSION

10-87 Thompson on Real Property, Thomas Editions § 87.01

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§ 87.01 Origin and Nature of the Doctrine of Adverse Possession.

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Much of the legislative and judicial confusion in the field of adverse possession of land is ascribable to the chain of causation of the doctrine's origin and growth. Its reason for existence may be explained by either or both of two different theories. It may be (as Blackstone n1 considered it) a limitation of action to recover possession, or it may be an actual transfer of title as a survival of feudal tenure. n2

The reason for the difficulty, but not its answer, lies in the mists of history. One must always read with caution the post-Elizabethan writers and perhaps even some of their hallowed predecessors. For the law of adverse possession has always been cultivated in the soil of political theory as it existed at the time and as it was fostered by the writer. Adverse possession is the law of the landless, the "have nots." It must be remembered that in the feudal scheme "seizin" took the place of our modern "title" to land. One who was "seized" held all of the legal rights that the law recognized as capable of being concentrated in an individual. Seizin was a sui generis legal concept whose basis was the only legal possession recognized by the law. n3 It combined the concept of possession n4 with "tenure." n5 The separation of possession and title was a later development in the law. n6 Early, no one had an interest in the land unless one was seized, i.e., unless one had possession. If one was disseised, if one lost possession, one lost the interest in the land. One no longer had title as we understand title today. n7 The early remedy -- at one time the sole remedy -- was to oust the "disseisor" by force. n8 If one did not do so promptly n9 one lost the right, after the law gave a legal remedy, to regain seisin by force. n10 The disseisin effected a change in the seisin and hence the legal title from the disseisee to the disseisor. n11 The disseisor had legal title albeit a defeasible one. n12 The disseisee had a mere right of entry -- something almost as nebulous as a chose in action, n13 so nebulous that it was not the subject of alienation, n14 nor even of descent n15 until the statute mort d'ancestor. n16 It is not certain whether there existed before the time of Henry II a writ to enable a disseisee to regain possession. n17 Glanvill, n18 however, mentions two assizes, novel disseisin and mort d'ancestor, whereby the disseisor or the disseisor's heirs could have the title tried and possession restored. Glanvill indicated that a plea of mort d'ancestor required a showing that the disseisin had occurred after the coronation of Henry II. n19 The writ of novel (or new) disseisin applied to disseisins occurring after Henry II's return from Normandy. n20 The statute of Merton n21 prevented the bringing of writs as to disseisin earlier than the death of Henry I. n22 Later the limitation was

fixed as of the coronation of Richard I. n23 Finally, by statute of Henry VIII n24 the limitation was changed to three score years before the bringing of the writ. n25 Littleton, however, treats these early acts as creating a title by prescription. n26 He points out that there was another source of such title to wit, possession beyond which the memory of man runneth not to the contrary. n27 Blackstone likewise states positively that sixty years possession in fee simple gives a title good as against the world. n28 Coke felt that the time of limitation had a two-fold result: to bar the writ and to make a title by the common law. n29 Preston has pointed out, however, that there were exceptions and, as in the case of persons under disabilities and life tenancies, the disseisor did not acquire title. n30

By statute of James I n31 writs of formedon in descender, in remainder and in reverter, were required to be sued out within 20 years. The purpose of this act as stated in the preamble was "For quieting of men's estates and avoiding of suits." With such historical confusion it is little wonder that there is lack of unanimity among the courts as to the exact nature of adverse possession. Although the statute of James I came some years after the settling of Jamestown (the usual date fixed as the crystalizing of the common law in America), n32 its fiat is generally accepted as the common law. Hence "adverse possession" for 20 years under the common law in this country passes title to the adverse possessor with certain stated qualifications. n33 In most states, however, there exist special statutes of limitations, actions affecting possession and title to land. Several questions present themselves. Do such statutes supplant or merely supplement the common law? Under such statutes of limitation, has the adverse possessor good title, with the statute merely affecting the required time for possession? Or does the statute merely bar certain remedies of the dispossessed person, leaving title to that person? n34 Does adverse possession give title as a bonus to the possessor, or does it take away title so that "possession" today becomes title if continued for a sufficient time? n35 This statute did more than bar possessory writs; it prevented the demandant from alleging seizin. n36 Some of the earlier statutes seem on their face merely to have barred possessory actions, leaving the writ of right available. n37

Adverse possession of real estate is a possession thereof inconsistent with the right of the true owner, and when such possession is accompanied by certain acts and circumstances, the title will vest in the possessor. The possession must be hostile, actual, visible, exclusive, notorious, continuous, and under a claim of title during the time necessary to create a bar under the statute of limitations. n38 The right to property thus acquired is not originated by consent, but against the will of the true owner, and generally rests on original trespass, which matures into a property right as the result of such owner permitting the adverse claimant or trespasser to continue the adverse use and possession uninterruptedly with a claim of right for the statutory period of limitation. n39 Such title is not based on a presumed grant, but is a new and independent title by operation of law and is not in privity with any former title. n40 "Adverse possession" means adverse occupation and use, since the word "possession" does not necessarily denote actual physical contact with the thing to be possessed, as where the holder of the legal title is, as a matter of law, possessed of the subject through constructive possession, and this can be ousted only by an actual physical entry and actual physical occupation thereafter. n41 Adverse use is such a use of property as the owner would personally exercise, disregarding the claims of others entirely, asking permission from no one, and using the property under a claim of right. n42

Adverse possession, to ripen into title, must be such as would have exposed the one in possession to an action because of what was done by the possessor, at any and all times during the prescriptive period that this possession continued. n43 Title by adverse possession rests upon the statutes limiting the time within which the owner must sue for the recovery of the land held adversely by another.

STATE ADVERSE POSSESSION LEGISLATION

State	Statute Of Limitations	General Time Limitation	Time Limitation Under Special Circumstances	Applicable Elements Listed By Statute
Alabama	Ala. Code § 6-2-33	**10 Years**	**10 Years** with color	Color of title, Notice,

			of Title § 6-5-200. **10 Years** where land has been sold under judgment of Court § 6-2-35. **3 Years** after disability ends § 6-2-8 **6 Months** extension of limitation after death of true owner § 6-2-14.	Pay Taxes § 6-5-200.
Alaska	Alaska Stat. § 09.01.030	**10 Years**	**7 Years** with color of title § 09.25.050.	None
Arizona	Ariz. Rev. Stat. § 12-526	**10 Years**	**5 Years** with duly recorded deed, use, taxes paid or for a city lot §§ 12-525, 528 **3 Years** under title or color of title § 12-528 **Suspended** during disability § 12-528	All Elements § 12-521 Possession § 12-526
Arkansas	Ark. Code Ann. § 18-61-101	**7 Years**	**5 Years** after judicial sale § 18-61-105.	Pay Taxes § 18-11-13 Possession

			2 Years Possession before action to recover land held under tax title § 18-61-106	§§ 18-11-102, 104 Entry § 18-61-102 Ejectment § 18-61-103
California	Cal. Civ. Proc. Code §§ 317-321	**5 Years**	**1 Year** after entry, **5 Year** years after right accrues § 320 **5 Years** after disability ends § 328	Exclusive, Claim of right, Continuous, Possession § 324 Possession §§ 321, 325, 326 Adverse § 323
Colorado	Col. Rev. Stat. § 38-41-10	**118 Years**	2 Years after disability ends § 38-41-112 7 Years with color of title and pay-ment of taxes §§ 38-41-108, 109 7 Years Under official and judicial conveyance or orders § 38-41-106	Entry §§ 38-41-109, 104 Claim of Right, Possession, Hostile § 38-41-103
Connecticut	Conn. Gen. Stat. Ann. § 52-575	**15 Years**	**5 Years** after disability ends § 52-575	Notice §§ 47-33f, 38, 40, 41 Easements § 47-37
Delaware	Del. Code Ann. Tit. 10	**20 Years**	**10 Years** after disa-	None

	§§ 7901, 7902		bility ends § 7903	
Florida	Fla. Stat. Ann. §§ 95.12, 14, 18	**7 Years**	**4 Years** from the date of tax sale deed § 95.191 **7 Years** if taxes are paid § 95.18 **7 Years** if under color of title § 95.16 **4 Years** under tax deed issued under § 197.231 assures title § 95.192 **3 Years** at sales made by executors § 95.21	Possession § 95.16 Tolling of Limitation § 95.051 Occupation is subordinate to legal title § 95.1
Georgia	O.C.G.A. § 44-5-163	**20 Years**	**7 Years** under written evidence of title, with notice § 44-5-164 **Full Statutory Period** required after disability §§ 44-5-170, 171	**All Elements** § 44-5-161 Possession §§ 44-5-165, 166, 168 Notice § 44-5-169 Prescription § 44-5-177 Tacking § 44-5-174
Hawaii	Haw. Rev. Stat. Ann. §§ 657-31, 31.5	**20 Years**	**5 Years** after death or after dis-	Time computation § 657-32

			ability ends, even if 20 years has expired §§ 657-34, 35, 36	Accrual § 657-33 Possession § 657-38
Idaho	Idaho Code Ann. § 5-203	**5 Years**	**5 Years** after disability ends § 5-213 **5 Years** under written claim of title § 5-202 **10 Years** for state property § 5-207	Constructive Possession § 5-206 Possession §§ 5-208, 209, 210
Illinois	Ill. Ann. Stat. Ch. 110 § 13-101	**20 Years**	**7 Years** with color of title and paid taxes 110 § 13-109 **7 Years** with possession and record title 110 § 13-107	83 § 6
Indiana	Ind. Code § 34-1-2-2	**10 Years**	**18 Months** extension of limitation period after death of true owner § 34-1-2-7 2 Years after disability is removed § 34-1-2-5 6 Years if sold by exe-	Taxes § 32-1-20-1

			cution § 34-1-2-2	
Iowa	Iowa Code Ann. § 614.31	**40 Years**	**10 Years** if record title is held § 614.17A **No Suspension** of the 40-year period granted for disability or lack of knowledge § 614.34	Possession § 614.23 Easement, Notice § 564.1 Notice § 564.4
Kansas	Kan. Stat. Ann. § 60-503	**15 Years**	**5 years** if sold by executors, administrators or conservators § 60-504, 505 **2 Years** after disability ends, but not exceeding 23 years § 60-508(a) **2 Years** after death of person under disability § 60-508(b)	Open, exclusive, continuous § 60-503
Kentucky	Ky. Rev. Stat. Ann. § 413.010	**15 Years**	**	**
Louisiana	La. Civ. Code Ann. Art. 3499	**30 Years**	**10 Years** if acquired in good faith and by just title 3478	None
Maine	Me. Rev. Stat. 14 § 801	**20 Years**	**5 Years** after death	Possession, Open, No-

			if a minister is dis-seized (or other sole corp.) 14 § 806 **10 Years** after remov-al of disab-ility or death 14 §§ 807, 808 **20 Years** for uncul-tivated land 14 § 816 **40 Years** possess-ion bars action for recovery of land 14 § 815	torious, Ex-clusive 14 § 810
Mary-land	Md. Cts. & Jud. Prac. Code. § 5-103	**20 Years**	**3 Years** or the applic-able period of limita-tions after disa-bility is removed, which ever is less. (Absence from state, imprison-ment, or marriage are not dis-abilities) § 5-201	None
Mas-sachusetts	Mass. Gen. Laws Ann. 260 § 21	**20 Years**	**None**	Possession, Open, No-torious 260 § 28
Michigan	Mich. Stat. Ann. § 600.5801(4)	**15 Years**	**5 Years** under fidu-ciary's deed or court	Possession, Open, Peaceable § 600.5868

			ordered sale § 600.5801(1) **10 Years** under tax deed § 600.5081(2) **15 Years** under will § 600.5081(3)	Possession, Claim of title § 600.5867
Min-nesota	Minn. Stat. § 541.02	**15 Years**	**None**	Possession § 541.02
Missis-sippi	Miss. Cod. Ann. §§ 15-1-7, 13	**10 Years**	**10 Years** after disab-ility, but not exceeding 31 years § 15-1-7 **3 Years** under tax title § 15-1-15	Possession § 15-2-13
Missouri	Mo. Stat. Ann. § 516.010	**10 Years**	**30 Years** where equitable title eman-ates from Govt. § 516.070 **3 Years** after death of true own-er § 516.050 **24 Years** after disab-ility is re-moved § 516.030	Possession § 516.040
Montana	Mon. Cod. Ann. §§ 70-19-401, 402, 403, 404, 407, 411	**5 Years**	**5 Years** after disab-ility ends § 70-19-413	Occupancy § 70-1-110 Possession § 70-1-404,

			10 Years if joinder of state § 70-19-303	408 Prescription § 70-19-405 Continuous, Exclusive § 70-19-407, 410
Nebraska	Neb. Rev. Stat. § 25-202	**10 Years**	**None**	None
Nevada	Nev. Rev. Stat. § 40.090	**15 Years**	**5 Years** under written instrument § 11.110 **10 Years** where dispute exists on title § 40.090	**All Elements** § 40.090 Continuous § 11.150 Possession §§ 11.100, 110, 120, 140, 070 Actual, Continuous, Claim of title, Exclusive § 11.130
New Hampshire	N.H. Rev. Stat. ch. 508 § 2	**20 Years**	**5 Years** after disability is removed 508 § 3	None
New Jersey	N.J. Stat. Ann. § 2A: 14-30	**30 Years**	**60 Years** for woodlands or uncultivated tracts § 2A: 14-30 **5 Years** after disability is removed if statutory limitation has expired	Continuous § 2A: 14-31 Entry § 2A:14-6

			§ 2A: 14-32	
New Mexico	N.M. Stat. Ann. § 37-1-22	**10 Years**	**1 Year** after disability ends § 37-1-21	Continuous, Possession, § 37-1-22
New York	N.Y.R.P.A.P. L. §§ 501-551	**10 Years**	**3 Years** after disability § 208	Possession §§ 501-551
North Carolina	N.C. Gen. Stat. § 1-40	**20 Years**	**7 Years** under color of title § 1-38 **30 Years** possession against the state or 21 years possession against the state with color of title § 1-35 **Suspended** with two or more disabilities § 1-12	None
North Dakota	N.D. Cen. Code Ann. § 28-01-08	**20 Years**	**10 Years** after disability ceases (or death), suspended during disability § 28-01-14 **10 Years** if actual, open, adverse, and paid taxes § 47-06-03	Possession §§ 28-01-09, 11 Possession, Claim of Right, Exclusive, Continuous, § 28-01-08 Actual, Open, Adverse § 47-06-03
Ohio	Ohio Rev. Code. Ann. § 2305.04	**21 Years**	**10 Years** after disability ends §	None

			2305.04	
Oklahoma	Okla. Stat. Ann. tit. 12 § 93	**15 Years**	**5 Years** from tax sale, Executioner's sale, partition, or other judicial sale 12 § 93 **2 Years** after disability is removed 12 § 94	Prescription 60 § 333
Oregon	Or. Rev. Stat. #xa7; 12.050	**10 Years**	**Suspended** up to 5 years during disability, but not longer than one year after disability ceases § 12.160	**All Elements** § 105.620
Pennsylvannia	42 Pa. Cons. Stat. Ann. § 5530	**21 Years**	**21 Years** after disability ceases 42 § 5531	None
Rhode Island	Gen. Laws R.I. § 34-7-1	**10 Years**	**10 Years** after disability ends § 34-7-2	**All Elements** § 34-16-7
South Carolina	Cd. of Law. S.C. §§ 15-67-210, 220, 260	**10 Years**	**10 Years** after termination of tenancy or failure to pay rent § 15-67-260	Possession §§ 15-67-210, 230, 250 Actual, Continuous, Claim of Right, Exclusive §§ 15-67-220, 240
South Dakota	S.D. Cod. Laws §§ 15-3-1, 2, 3,	**20 Years**	**40 Years** for state property §	Possession § 15-3-11

	7, 10		15-3-4 **10 Years** after disability is removed § 15-3-14 **15 Years** after termination of ten-ancy or failure to pay rent § 15-3-8 Exclusive, Claim of Right, Con-tin-uous, Adverse §§ 15-3-10, 12	
Tennessee	Tenn. Code Ann. § 28-2-102	**7 Years**	**7 Years** for State Conveyances or duly recorded for 30 years §§ 28-2-101, 105 **20 Years** payment of taxes assures title § 28-2-109 **Barred** if claiming land but did not pay any taxes for 20 years. (Exception: Disability) § 28-2-110	None
Texas	Tx. Cod. Ann. § 16.026	**10 Years**	**5 Years** if cultivated, paid taxes,	**All Elements** § 16.021

			with duly register-ed deed § 16.025 **3 Years** if under title or color of title § 16.024 **Suspended** under disab-ility § 16.022 **25 Years** maximum even with disability or good faith § 16.027, 028	Tacking § 16.023
Utah	Utah Code Ann. § 78-12-12	**7 Years**	**4 Years** if holder of tax title § 78-12-5.1	Possession, Claim of Right, Ex-clusive, Continuous §§ 78-12-8, 10 Possession §§ 78-12-9, 11 Continuous, Pay Taxes § 78-12-12
Vermont	Vt. Stat. Ann. tit. 12 § 501	**15 Years**	**None**	None
Virginia	Va. Code Ann. § 8.01-236	**15 Years**	**25 Years** possession assures title for a Church § 57-17	Possession § 8.01-145 Notice § 55-170.1
Washing-ton	Wash. Rev. Code Ann. § 4.16.020	**10 Years**	**7 Years** with con-nected title deductible	Open, No-torious §§ 7.28.050, 070

			of record or good faith, or color of title §§ 7.28.050, 070, 080 **Suspended** until 3 years after disability ceases § 7.28.090	
West Virginia	W. Va. Code § 55-2-1	**10 Years**	**5 Years** after disability ceases or death § 55-2-3 **20 Years** if under disability § 55-2-4	None
Wisconsin	Wis. Stat. Ann. § 893.25	**20 Years**	**7 Years** if founded on recorded title and payment of taxes § 893.27 **10 Years** if founded on written instrument § 893.26 **20 Years** for state property § 893.29	Exclusive, Actual, Tacking § 893.25 Possession §§ 893.31, 75.31
Wyoming	Wy. Stat. Ann. § 1-3-103	**10 Years**	**None**	None

By such adverse possession for the statutory period, the title of the lawful owner is lost by the failure to sue, and vests in the one in possession. n44

Statutes of limitation are sometimes termed statutes of repose, and, notwithstanding their drastic effect, are considered

as necessary and expedient for the general welfare. n45 The purpose of a statute providing that actions for the recovery of realty are barred in a specified number of years, is to render indefeasible the title of a limitation claimant whose claim satisfies the requirements of the statute. n46 In order to start the running of the statute, there must be a disseisin or ouster of the true owner, n47 and the possession of the disseisor must be such as will give such owner a right of action at any time during the period requisite to give title by adverse possession. n48 The one having title of record to the land is deemed in law to be in seisin and possession thereof and such seisin continues until ouster by the adverse possession of another. n49 It has been said perhaps incorrectly that the doctrine of adverse possession is based on the presumed acquiescence of the true owner, n50 since the law presumes, until the contrary appears, that those in possession are rightfully so. But acquiescence cannot be presumed unless such owner has or may be presumed to have notice of the possession. n51 It is presumed that possession is subordinate to the title of the true owner and adverse possession against such owner must be taken strictly and established by clear and positive proof. n52 Thus the possession of land by the grantor after the execution and delivery of a deed therefor is in trust for the grantee, and the statute of limitations does not begin to run until the grantor asserts an adverse holding by some unequivocal act brought to the knowledge of the grantee. n53 A claimant of title to land by adverse possession has the burden of showing that the possession on which the claim is based was for the length of time required by law. n54

Because of the close connection between "adverse possession" and "prescription," the terms are often used interchangeably. n55 "Adverse possession" may be distinguished from "prescription," in that it is a means of acquiring title to corporeal hereditaments only, and today is usually the direct result of the statute of limitations. "Prescription," on the other hand, is the outgrowth of common-law principles with but little aid from the statute, and involves the acquisition exclusively of incorporeal hereditaments. n56 Adverse possession differs from laches or permission and the owner can have no presumptions drawn against the owner because of laches. n57 It differs from dedication which contemplates a state of mind of the owner consenting to the gift. n58

Adverse possession denotes title acquired through the manner of possession. A prescriptive easement is a non-exclusive right acquired by manner of use. n59

So it is held that the acts of one claiming title by adverse possession must be strictly construed. n60 Other states, however, favor statutes of limitations and strictly construe exceptions thereto.

COMPUTER-ASSISTED RESEARCH

LEXIS: Adverse possession w/20 nature or origin

FOOTNOTES:
(n1)Footnote 1. 2 William Blackstone, Commentaries 197, 199.

(n2)Footnote 2. 1 John Britton, The Ancient Pleas of the Crown (French text with English translation, Nicholo, f. m. Oxford 1865) § 122 so indicates. *See* Cox, *History of the Adverse Possession Statute of Tennessee, 6 Mem. St. U. L. Rev. 673.*

(n3)Footnote 3. Digby, History of Real Property, ch. 2, § 9.

See Turner, *The Royal Court Treat Disseizin by the King: John and Henry III,* 1199-1240, *12 Am. J. Legal Hist. 1.*

(n4)Footnote 4. *See* 2 William Blackstone, Commentaries 200. Britton, ch. 32 to the effect that seisin is possession of the soil by the freeholder.

(n5)Footnote 5. *See* Percy Bardwell, *Disseisin and Adverse Possession, 33 Yale L. J. 1, 141, 285* (Termor could not be said to be himself in possession); 2 Christopher Saint German, Doctor and Student Dialogue 1531 (1870). *See also Atkins v. Horde, Doe ex dem Atkins v. Horde, 1 Burrows Reports 605, Brown's Cases in Parlament 247, 2 Cowper 689*

(1777).

(n6)Footnote 6. Laws, especially in early times "are not made, but grow." Digby, History of Real Property, ch. 2, § 2. *See also Dalo v. Laughlin, 636 S.W.2d 585 (Tex. 1982).*

(n7)Footnote 7. Williams felt that seisin and title were synonymous. If a person wrongfully gets possession of the land of another, he becomes wrongfully entitled to an estate in fee simple, and to no less estate in that land; thus, if one wrongfully encloses a bit of waste land and builds a hut on it and lives there, one acquires an estate in fee simple by one's own wrong in the land which one has enclosed. Williams on Seisin.

Maitland, however, distinguished between seisin and title:

> He who is seised, though he has no title to the seizin, can alienate the land; he can make a feoffment and he can make a will (for he who *has* land is enabled to devise it by statute), and his heir shall inherit from him, for he is a stock of descent; and there shall be dower and there shall be curtesy, and the lord shall have an escheat and the king a forfeiture, for such a one has land 'to give and to forfeit. ' This may make seisin look very much like ownership, and in truth our old law seems this (and has it ever been changed?) that seisin does give ownership good against all save those who have better because older title. Nevertheless we err if we begin to think of seisin as ownership or any modification of ownership; after all, it is but possession. A termor was not seised, but certainly he could make a feoffment in fee and his feoffee would be seised. This seems to have puzzled Lord Mansfield, and puzzling enough it is if we regard seisin itself as a proprietary right, for then the termor seems to convey to another a right that he never had. But when it is remembered that substantially seisin is possession, no more, no less, then the old law become explicable. My butler has not possession of my plate, he has but a charge or custody of it; fraudulently he sells it to a silversmith: the silversmith now has possession: so with the termor, who has no seisin, but who by a wrongful act enables another to acquire seisin.

12 Law Q. Rev. 488.

(n8)Footnote 8. 1 Britton, *supra* note 2 at § 115b.

(n9)Footnote 9. *Id.*

(n10)Footnote 10. As to what was the time limit on forfeiture regaining seisin, *see* 1 Britton, *supra* n. 2 at § 116.

(n11)Footnote 11. *See* 1 Britton, *supra* note 2, ch. 11, § 108b.

(n12)Footnote 12. Sir Geoffrey Gilbert, A Treatise of the Tenures in Two Parts (London, 1758) 21 felt, however, that the disseisor had only noticed possession against the disseisee and only a right of possession as against others. But the heir of the disseisor had possessions.

The disseisor could, however, alienate though the disseisee could not. Littleton, L. 3, c. 6, § 386 and when the disseisor died and his heir became seised the entry of the disseisee was tolled, Littleton, L. 3, c. 6, § 385, and he was put to his remedy at law.

See Hall, *"The Early History of Entry" Sur Disseisin, 42 Tul. L. Rev. 584.*

(n13)Footnote 13. Adverse possessor entitled to crops as against true owner. *Stockwell v. Phelps, 34 N.Y. 363 (1866); Brothers v. Hurdle, 32 N.C. 490 (1940); Hansen v. Sweet, 702 P.2d 823 (Idaho 1985).*

(n14)Footnote 14. *Kentucky W. Va. Gas Co. v. Woods, 110 F. 2d 94; McConnell v. Brown, 5 T. B. Mon. (Ky. 1827)*

478; Sohier v. Coffin, 101 Mass. 179 (1969). This rule has been changed by statute in many jurisdictions, 8 and 9 Vict., ch. 106, § 6. *See Ames, The Disseisin of Chattels, 3 Harv. L. Rev. 23.*

(n15)Footnote 15. Coke on Littleton, § 2.

Gilbert's Tenures 42 speaks of the pre-conquest law as giving a writ of entry available in the county courts.

The first adverse possession statute of limitations ran to beginning of the reign of Henry I (1100), the next to the reign of Henry II (1154), the Statute of Merton. The next was the reign of Richard I (1189), Statute of Westminster I; 3 Edw., ch. 39.

(n16)Footnote 16. *Hunter v. Hunter, 237 S.W.2d 100 (Mo. 1951).*

(n17)Footnote 17. 2 Frederick Pollock and Frederick William Maitland, The History of English Law Before the Time of Edward I, ch. 4, § 2.

Gilbert's Tenures 42 speaks of the pre-conquest law as giving a writ of entry available in the county courts. The first adverse possession statute of limitations ran to the beginning of the reign of Henry I (1100), the next to the reign of Henry II (1154), the Statute of Merton. The next was the reign of Richard I (1189), Statute of Westminster I; 3 Edw., ch. 39.

The first modern statute was 32 Henry 8, ch. 2 (1540) which made the period 30 years. 21 Jam., ch. 6 made the period 20 years.

(n18)Footnote 18. Book XIII. *See also* 2 Sir Edward Coke, Institutes of the Laws of England 24 (London 1794-1797). 2 Blackstone, *supra*.note 1 at 184, 185.

(n19)Footnote 19. 8 Ranulf de Glanvill, Tractatus de Legibus et Consuetudinibus Regni Angliae, Ch. 3 (London 1673). The date according to 2 Coke's Institutes, 94 was Act 20, 1154.

The initial date of statutes limiting disseisin action was December 1, 1135, death of Henry I. Then in 1236, it became December 19, 1154, coronation of Henry II. In 1275, it became September 3, 1189, coronation of Richard I. In 1540 the 60-year rule was made.

(n20)Footnote 20. Glanvill, *supra*, n. 19, Chs. 33, 37.

The date was A.D. 1184. This may have varied at the king's pleasure, LXIII, c. XXXII.

(n21)Footnote 21. 3 Blackstone, *supra* n. 1, at 196. *20 Hen. 3*, ch. 8.

The first statute of limitation required a showing of seisin of the death of Henry I. Bracton's Notebook, Hilary and Easter, A.D. 1228, A.R. 12, 280. Later this was shortened by the statute of Merton, BRACTON, f. 373.

(n22)Footnote 22. Westminster I, 3 Edw., ch. 39 (1275). Bracton f. 373 speaks as of a *tempo re regis Henrici senioris*.

The assize of mort d'ancestor was, by the statute of Merton, limited to the time after the return of John from Ireland. *See* Sir Matthew Hale, A History of the Common Law 124 (London 1794).

(n23)Footnote 23. Statute Westminster I, 3 Edw., ch. 8. *See* Hale, *supra*, n. 22 affecting the writ of right.

(n24)Footnote 24. *32 Hen. 8.*

(n25)Footnote 25. Coke on Littleton, *supra* n. 15, at § 115.

(n26)Footnote 26. *See also* Coke, *supra* n. 15, at § 114A.

(n27)Footnote 27. Littleton, L. 2, c. 10, § 170.

(n28)Footnote 28. 3 Blackstone, *supra* n. 1 at 196.

(n29)Footnote 29. Coke, *supra*, note 18 at 229. *See* William E. Walsh, Commentaries on the Law of Real Property, § 16 (Albany, N.Y. 1947).

(n30)Footnote 30. L. Press. Abstg. 1.

Exception in favor of those absent from the kingdom and those under disabilities were as old as the statute of Merton.

(n31)Footnote 31. 21 Jam., ch. 16.

(n32)Footnote 32. A.D. 1607, 4 Jam.

(n33)Footnote 33. Martin v. Burr, 171 S.W.1044 (Tex. Civ. App. 1914).

It is better that ancient wrongs go unrighted than ancient strife be renewed. *Tumlison v. Harville, 372 S.W.2d 385 (Ark. 1963).*

It has been said that Texas has the doctrine of "judicial possession" as a substitute for adverse possession. *State v. Sunray D. X. Oil Co., 503 S.W.2d 822 (Tex. Civ. App. 1973). See Annual Survey of Texas Law, 28 SW. L. J. 27.*

(n34)Footnote 34. *See* Percy Bordwell, *Disseisin and Adverse Possession, 31 Yale L. J. 1.*

See Stoebuck, *The Law of Adverse Possession in Washington, 35 Wash. L. Rev. 53;* Larson, *Texas Limitations: The Twenty-Five Year Statutes, 15 SW. L. J. 177;* Cox, *History of the Adverse Possession Statutes of Tennessee, 6 Mem. St. U. L. Rev. 673.*

(n35)Footnote 35. *See* Percy Bordwell, *Property in Chattels, 29 Harv. L. Rev. 374, 378.*

A similar problem arises in connection with adverse use of personalty. Does such use eventually pass title? *See Davis v. Mills, 194 U. S. 451 (1904);* Chapin v. Feeeland, 8 N.E.128 (Mass. 1886), merely bar the remedy. *See Miller v. Dell, 1 Q. B. 471 (1891).*

(n36)Footnote 36. 3 Blackstone, *supra* n. 1 at 196.

(n37)Footnote 37. Francis Hargreaves, notes on Land, Coke's First Institute 220 (London 1794).

(n38)Footnote 38. *Sparks v. Byrd, 562 So. 2d 211 (Ala. 1990); Strickland v. Markos, 556 So. 2d 229 (Ala. 1990); Cook v. Stevens, 77 P.2d 1100 (Ariz. 1938); Comstock v. Finn, 56 P.2d 957 (Cal. App. 1936); Gioscio v. Lautenschlager, 73 P.2d 1230 (Cal. App. 1937); Cluff v. Bonner County, 824 P.2d 115 (Idaho 1992); Mann v. LaSalle Nat'l Bank, 562 N.W.2d 1033 (Ill. App. 1990);* Brunotte v. de Witt, 196 N.E.489 (Ill. 1935); *Foote v. Chicago, 13 N.E.2d 965 (Ill. 1938); Loverkamp v. Loverkamp, 45 N.E.2d 871 (Ill. 1942); Marengo Cave Co. v. Ross, 10 N.E.2d 917 (Ind. 1937);* Philbin v. Carr, 129 N.E.19 (Ind. 1921); *Cooper v. Tarpley, 41 N.E.2d 640 (Ind. App. 1942); McCluskey v. Meraux, 188 So. 669 (La. App. 1908); Dorner v. Wishon, 809 S.W.2d 866 (Mo. App. 1991); Brown v. Chapman, 163 S.W.2d 920 (Mo. 1942); Sullivan v. Neel, 73 P.2d 206 (Mont. 1937); Thornburg v. Haecker, 502 N.W.2d 434 (Neb. 1993);* Conkey v. Knudsen, 284 N.W.737 (Neb. 1939); *Quarles v. Arcega, 841 P.2d 550 (N. M. App. 1992); Merrifield*

v. Buckner, 70 P.2d 896 (N. M. 1937); Markovich v. Chambers, 857 P.2d 906 (Or. App. 1993); Dry Gulch Ditch Co. v. Hutton, 133 P.2d 601 (Or. 1943); Tioga Coal Co. v. Supermarkets Gen. Corp., 546 A.2d 1 (Pa. 1988); Locke v. O'Brien, 610 A.2d 552 (R. I. 1992); Lien v. Beard, 478 N.W.2d 578 (S.D. 1991); Churchman v. Rumsey, 166 S.W.2d 960 (Tex. Civ. App. 1942); Peters v. Gillund, 186 S.W.2d 1019 (Tex. Civ. App. 1945); Grappo v. Blanks, 400 S.E.2d 168 (Va. 1991); Andrews v. Roseland Iron & Coal Co., S.E.252 (Va. 1892); *Selman v. Roberts, 404 S.E.2d 771 (W. Va. 1991).*

(n39)Footnote 39. *Hall v. Taylor, 67 P.2d 901 (Idaho 1937).*

(n40)Footnote 40. *Pearson v. Hasty, 137 P.2d 545 (Okla. 1934).*

(n41)Footnote 41. *Piney Oil & Gas Co. v. Scott, 79 S.W.2d 394 (Ky. 1934); Schlagel v. Lombardi, 486 A.2d 491 (Pa. Super. 1984).*

(n42)Footnote 42. Abel v. Love, 143 N.E.515 (Ind. App. 1924); *Smith v. Mathews, 662 S.W.2d 150 (Tex. 1983).*

(n43)Footnote 43. *Burlingame v. Marjerrison, 665 P.2d 1136 (Mont. 1983);* Seymour Water Co. v. Lebline, 144 N.E.30, 145 N.E.764 (Ind. 1924); *Niendorff v. Wood, 149 S.W.2d 161 (Tex. Civ. App. 1941).* A lost grant theory would support title where there had been "actual open adverse, exclusive and uninterrupted" possession for a long time. *Bull Run Dev. Corp. v. Jackson, 109 S.E.2d 400 (Va. 1959).*

(n44)Footnote 44. *Rudisail v. Allison, 424 S.E.2d 696 (N.C. App. 1993); Federal Sav. & Loan Co. v. Williams, 599 F. Supp. 1184 (D. Md. 1984); Gallea v. Hess Realty Corp., 515 N.Y.S.2d 683 (1987); Campbell v. Holt, 115 U. S. 620 (1885); Probst v. Presbyterian Church, 129 U. S. 182 (1889); Sharon v. Tucker, 114 U. S. 533 (1885); Perry v. Bassenger, 15 S.E.2d 365 (N.C. 1941);* Carneal v. Lynch, 20 S.E.959 (Va. 1895); *Hall v. Hall, 27 W. Va. 468 (1886); Mistric v. Kurtz, 610 So. 2d 226 (La. 1992).*

R. D. Cox, History of the Adverse Possession Statutes of Tennessee, *6 Mem. St. U. L. Rev. 673 (1976).*

As to Alabama viewpoint, see Shaford B. Smyer, Title by Adverse Possession, *14 Ala. Law. 352 (1953). See* Edward L. Montgomery, Adverse Possession of Land Titles in Utah, *3 UTAH L. REV. 294;* William B. Stoebuck, Law of Adverse Possession in Washington, *35 WASH. L. REV. 53 (1960).*

(n45)Footnote 45. *Federal Sav. & Loan Co. v. Williams, 599 F. Supp. 1184 (D. Md. 1984); Loughman v. Pitz, 36 F. Supp. 302 (E.D. N.Y. 1941); Desiron v. Peloza, 32 N.E.2d 316 (Ill. App. 1941); Gallea v. Hess Realty Corp., 515 N.Y.S.2d 683 (N.Y. A.D. 1987); Bank of United States v. Rosengarter, 24 N.Y.S.2d 647 (1941); Rudisail v. Allison, 424 S.E.2d 696 (N.C. App. 1993); School Bd. of City of Norfolk v. United States Gypsum Co., 360 S.E.2d 325 (Va. 1987).*

(n46)Footnote 46. *Rigby v. Liles, 505 So. 2d 598 (Fla. 1987); Free v. Owen, 113 S.W.2d 1221 (Tex. Com. App. 1938).*

(n47)Footnote 47. *Morken v. Morken, 375 N.W.2d 576 (Minn. App. 1985);* Glover v. Sage, 92 N.W.471 (Minn. 1902); *Monaghan v. Wagner, 487 So. 2d 815 (Miss. 1986); Mings v. Mings, 782 S.W.2d 165 (Mo. App. 1990);* Swope v. Ward, 84 S.W.895 (Mo. 1904); *Badge Lumber Co. v. St. Louis-San Francisco R. Co., 89 S.W.2d 954 (Mo. 1935); Casstevens v. Casstevens, 304 S.E.2d 623 (N.C. App. 1983);* Wade v. Crouch, 78 P.91 (Okla. 1904); *Hallmark v. Tidwell, 849 S.W.2d 787 (Tenn. App. 1992); Mercy v. Miller, 166 S.W.2d 68 (Tenn. App. 1942);* Johnson v. Ingram, 115 P.1073 (Wash. 1911).

(n48)Footnote 48. Sullivan v. Zeiner, 33 P.209 (Cal. 1893); *Craddock v. Berryman, 645 P.2d 399 (Mont. 1982); Hallmark v. Tidwell, 849 S.W.2d 787 (Tenn. App. 1992); Crites v. Koch, 741 P.2d 1005 (Wash. App. 1987);* Northern Pac. R. Co. v. Spokane, 88 P.135 (Wash. 1907); *Wilson v. Braden, 56 W. Va. 372, 49 S.E.J. 409, 107 Am. St. 927 (1904).*

(n49)Footnote 49. *Tobin v. Stevens, 241 Cal. Rptr. 223 (1987); Sleboda v. Heirs at Law of Harris, 508 A.2d 652 (R. I. 1986);* Houghton County v. Massie, 184 N.W.446 (Mich. 1921).

One cannot hold land adversely to oneself. Peavey v. Moran, 152 N.E.360 (Mass. 1926).

(n50)Footnote 50. *Badge Lumber Co. v. St. Louis-San Francisco R. R., 89 S.W.2d 954 (Mo. 1935).*

(n51)Footnote 51. *Id. Perpignani v. Wonasek, 408 N.W.2d 1 (Wis. 1987).*

(n52)Footnote 52. *Douglass v. Aldridge, 105 So. 145 (Fla. 1925); Clark v. Drska, 473 A.2d 325 (Conn. App. 1984).*

(n53)Footnote 53. Brooks v. Brooks, 180 N.W.41 (Neb. 1920) (grantor remaining in possession does not hold adversely until the hostility of the possession is made known to the grantee); *Vlachos v. Witherow, 118 A.2d 174 (Pa. 1957); James Harvey Ramsey Estate, Inc. v. Pace, 467 So. 2d 1202 (La. 1985).*

(n54)Footnote 54. *Yerbey v. Chandler, 21 S.E.2d 636 (Ga. 1942); Strickland v. Markos, 556 So. 2d 229 (Ala. 1990).*

(n55)Footnote 55. *Romans v. Nadler, 14 N.W.2d 482 (Minn. 1944); Newell Rod & Gun Club, Inc. v. Bauer, 597 A.2d 667 (Pa. Super. 1991).*

(n56)Footnote 56. *Getsinger v. Midlands Orthopedic Profit Sharing Plan, 489 S.E.2d 223 (S.C. App. 1997)* (common law recognizes 20 year "presumption of grant" for tacking by ancestors, heirs and parties in privity in addition to 10 year statute of limitations). *Romans v. Nadler, 14 N.W.2d 482 (Minn. 1944); Hester v. Sawyers, 71 P.2d 646 (N. M. 1937); Neyland v. Hunter, 668 S.W.2d 495 (Ark. 1987).*

The United States Supreme Court has relied upon the lost grant theory not merely in the field of incorporeal hereditaments but also as to realty so as to permit title to be maintained even as against the United States through long continued acts of ownership. *United States v. Fullard-Leo, 331 U. S. 256 (1947).*

(n57)Footnote 57. *Hans v. Hans, 482 So. 2d 1117 (Miss. 1986); Royal Elkhorn Coal Co. v. C. & O. R. R., 114 F. Supp. 341 (E.D. Ky. 1953); Brown v. Shafer, 88 So. 421 (Ala. 1921).*

(n58)Footnote 58. *Barstow v. State, 742 S.W.2d 495 (Tex. 1987);* Davis v. Bonaparte, 114 N.W.896 (Iowa 1908); Drimmel v. Kansas City, 168 N.W.280 (Mo. App. 1914).

(n59)Footnote 59. *Koontz v. Town of Superior, 746 P.2d 1264 (Wy. 1987); Glenville v. Strahl, 516 S.W.2d 781 (Mo. 1974).*

(n60)Footnote 60. *Dobrinsky v. Waddell, 599 N.E.2d 188 (Ill. App. 1992); Meyers v. Canutt, 46 N.W.2d 72 (Iowa 1951).*

Some states have statutes which bar claims to real estate dating prior to a fixed time unless such claims are filed or recorded within a fixed date after the enactment of the statute. Such statutes seem to do away with the common law requirements of adverse possession.

See R. D. Cox, History of the Adverse Possession Statutes of Tennessee, *6 MEM. ST. U. L. REV. 673 (1976).*

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CHAPTER 87 ADVERSE POSSESSION

10-87 Thompson on Real Property, Thomas Editions § 87.02

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§ 87.02 A Title by Lost Grant.

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Some states have recognized a doctrine of title based on the theory of a lost grant n61 somewhat similar to the doctrine of prescription in acquisition of easements. The doctrine has no basis in the English common law, although the concept of adverse possession based on parliamentary action held sway. n62 The Supreme Court of the United States has recognized that presumptions of lost grants can apply to corporeal as well as incorporeal rights in land. n63 In general the essentials of a title by lost grant are those of adverse possession. But there are material differences. Under the lost grant theory there is no initial disseisin and so no necessity of a showing of hostility. n64 A few states have by statute made lost grants the basis of adverse possession. n65 There is a practical distinction between the concepts of adverse possession and prescription as means of acquiring title to land: under the lost grant theory the title of an individual can be supported as against the sovereign, n66 and as against those under a disability, n67 or other causes suspending the running of the statute. n68 It is commonly invoked where the records are destroyed. Its requirements are generally those of adverse possession other than disseisin, except that the payment of taxes is often added. n69

In these states, however, there exists a doctrine either parallel with or in substitution for the rule of adverse possession that permits title to land to pass by prescription. n70

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LEXIS: Adverse possession w/20 lost grant 3 Am. Jur. 2d, Adverse Possession § 3

FOOTNOTES:
(n1)Footnote 61. *Kohala Corp. v. State, 732 P.2d 652 (Haw. 1987); Adams v. Slattery, 295 S.W.2d 859 (Tex. 1956).*

(n2)Footnote 62. *Ricard v. Williams, 20 U. S. (7 Wheat.) 59, 5 L. Ed. 398 (1822); Fletcher v. Fuller, 120 U. S. 534 (1887).*

But see William F. Walsh, Title by Adverse Possession, *16 N.Y. L. REV. 532,* pointing out that this theory arose out of

erroneous judicial concepts of adverse possession. For an example of this error as giving use to the doctrine see the discussion in *Lewis v. San Antonio, 7 Tex. 288 (1851),* which is the foundation of the Texas lost grant rule, and where the English doctrine of adverse possession was by the court confused with the Spanish law of prescription.

(n3)Footnote 63. The writers as late as Blackstone are silent, but see Parker v. *Baldwin, 11 East. 488, 103 Eng. Rep. 1092,* allowing a plea of a presumed grant by an individual against the crown. The court distinguished this rule from that of adverse possession where possession could not be held adversely to the crown. Co. Litt. § 277A. A crown grant was presumed from long continued occupancy.

(n4)Footnote 64. N.C. Gen. Stat. § 98-8, supports a seven-years possession as against all but the state where the official records have been destroyed by fire and also gives a presumed grant even as against the state after 30 years. The doctrine of presumed grant, § 1-35, is very old, going back to the Act of 1791 and is based on the statutes 21 Jam. ch. 2 and *9 Geo. 3.* Under the present statute, 30 years' possession is an absolute bar, not a mere presumed grant. *Price v. Jackson, 91 N.C. 11 (1884).*

Okla. Stat. Ann. tit. 60, § 322, creates a title by occupancy, which is valid except against those holding title by accession, transfer, will or succession, or against the state, or by "prescription." Section 333 provides that those who have occupied for a statutory time shall have a title by "prescription." The Oklahoma courts indicate, however, that this is not the lost grant theory, since such an occupancy does not run against the state. *Merritt Indep. Sch. Dist. No. 2 v. Jones, 249 P.2d 1007 (Okla. 1952),* nor against those under a disability. Thomas v. Morgan, 240 P.735 (Okla. 1925), and the courts treat it as a disseisin. Harjo v. Mathis, 41 P.92 (Okla. 1935), and it must be hostile. Taylor v. Harmon, 250 P.887 (Okla. 1926); Honeyman v. Andrew, 253 P.489 (Okla. 1926).

Pa. Stat., tit. 12, § 71 makes seven years' quiet possession based on an equitable right necessary, § 72 bars entrance after 21 years and § 79 makes 30 years' possession a presumption that the commonwealth has parted with title.

Wis. Stat. 1955, § 330.10, permits a title by prescription against the state after 40 years as distinguished from the usual 20 years. §§ 330.05-330. 10.

See Downing v. Bird, 100 So. 2d 57 (Fla. 1958) (the distinction between prescription and adverse possession).

(n5)Footnote 65. *Sleboda v. Heirs at Law of Harris, 508 A.2d 652 (R. I. 1986); Trustees of Schs. of TP.No. 8 v. Lilly, 26 N.E.2d 489 (Ill. 1940).*

Tennessee applies the theory prescription of a lost grant to a corporeal interest in land. *Eckhardt v. Eckhardt, 305 S.W.2d 346 (Tenn. App. 1957).* Note, Title by Adverse Possession in Tennessee, *5 VAND. L. REV. 621 (1952)* (Tennessee appears to be unique in the position).

Denying the theory of a lost grant presumption as an alternate to adverse possession. *Bull Run Dev. Corp. v. Jackson, 109 S.E.2d 400 (Va. 1959).*

(n6)Footnote 66. *Herbertson v. Iliff, 775 P.2d 754 (N. M. 1989); Caruth v. Gillespie, 68 So. 927 (Miss. 1915).* Note, The Doctrine of the Presumption of a Lost Grant as Applied Against the State, *29 HARV. L. REV. 88 (1916)* (burned records).

Where statute prevented adverse possession from running against the state, the possession could establish title as against the state upon the presumption of a lost grant. *United States v. Chavez, 175 U. S. 509 (1899); Trustees of Schs. of Twp. No. 8 v. Lilly, 26 N.E.2d 489 (Ill. 1940);* State v. Dickinson, 88 N.W.621 (Mich. 1901).

Prescriptive period will run so as to bar the state's title to the bed of a navigable lake. *Stave v. Cenac, 132 So. 2d 897 (La. App. 1961).*

(n7)Footnote 67. *Morgan v. Dillard, 456 S.W.2d 359 (Tenn. App. 1970).*

(n8)Footnote 68. *Jordan v. McClure Lumber Co., 54 So. 415 (Ala. 1910).*

(n9)Footnote 69. Walker v. Gore, 257 S.W.322 (Tex. Civ. App. 1923).

(n10)Footnote 70. In *Eckhardt v. Eckhardt, 305 S.W.2d 346 (Tenn. App. 1957)* (title passed by prescription under lost grant theory but not by adverse possession where no adverseness).

Title by prescription is equivalent to that acquired by formal grant. *Barry v. Thomas, 142 So. 2d 918 (Ala. 1962).*

In Louisiana acquisitive prescription requires corporeal possession for 30 years. *Menefee v. Arkansas La. Gas Co., 141 So. 2d 58 (La. App. 1962).*

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CHAPTER 87 ADVERSE POSSESSION

10-87 Thompson on Real Property, Thomas Editions § 87.03

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§ 87.03 Effect of Adverse Possession.

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Disseisin as before noted transferred title, as far as that concept was then known, to the disseisor. The disseisee had for time a right of re-entry. n71 After this time elapsed the disseisee had to resort to a writ of possession or right. n72 The disseisor might be said to have acquired, by the disseisin, something in the nature of a defeasible fee, n73 a fee upon condition subsequent, subject to being cut off by a writ of possession or of right. The statutes of limitations, by denying these writs to the disseisee, thus converted the defeasible fee into an absolute one. n74 When adverse possession does ripen into title it operates retrospectively. n75 Thus the owner cannot obtain damages for the interim possession. n76 Nor can the owner recover for profits that have been severed during such period. The common law permitted the disseisor and the adverse possessor to recover against a trespasser damages to the freehold as well as to the possessory interest. n77 Some states still follow this rule. n78 Others permit the trespasser to raise the question of title the *ius terti* as a defense to actions for damage to the freehold. n79 The older and apparently still majority rule gave the possessor title to the crops raised, leaving to the owner an action for damages. n80

The adverse possessor cannot, however prior to obtaining title, convey to a third party title to the profits, the timber, minerals, etc., as against the owner's claim. The owner can recover therefore even in the hands of an innocent purchaser. n81 But the adverse possessor is entitled to compensation in eminent domain and, if the adverse possessor has a wife, she can recover her dower. n82 The lapse of time limited by such statutes not only bars the remedy; it extinguishes the right, and vests the perfect title in the adverse holder. n83 A statute governing adverse possession is a statute of repose. n84

At common law the disseisor could defend possession against all comers, n85 even against the disseisee who, after the right of entry had been lost, attempted to reenter without a writ. n86 The disseisor acquired so much of the title or rights that the disseisee had no title to convey to another while out of possession, n87 nor could the disseisee devise the land. n88 The disseisor, however, could lease, convey and devise. n89 This limitation upon alienation by the disseisee was preserved for a late period in America. n90 Today the owner out of possession can convey and devise. n91 The adverse possessor can also do so by virtue of the possession though the time has not yet run. n92 Most jurisdictions now permit

peaceful, n93 but not forceful, re-entry n94 by the record owner.

The effect of completion of adverse possession under the American statutes is not so certain. The cases are in accord that when adverse possession is completed, title passes from the former owner to the adverse possessor. Title is acquired free from the claims of creditors of the former owner of the land and the administrator of a deceased former owner. n95 Such title so acquired by adverse possession is free and clear of all liens and encumbrances against the property held by private parties. n96

If the adverse possessor gives a mortgage before possession has ripened into title, the mortgage foreclosure, after the adverse possessor has acquired title, will pass as good title. n97

Title by adverse possession is subject to tax liens and assessments, n98 but is free from all easements, licenses and grants of profits by the former owner, n99 as well as all covenants and equitable servitudes. n100 When land is platted and lots are sold with reference to the plat, a lot owner claiming title to a lot through a common grantor cannot by adverse possession defeat another lot owner's private easement of ingress and egress over the alleys shown on the plat, even though the public rights in the alley have been relinquished. n101 Adverse possession for sufficient time to bar an action to recover real estate confers title against any title whatsoever as effectively as if the original owner n102 had made a formal conveyance to the possessor. It operates as complete investiture of title. n103 Adverse possession extinguishes the real owner's title n104 and passes an indefeasible title which is not lost by failure to promptly assert it. n105 A title acquired by adverse possession is as good as the best when established. n106 It is sometimes said the rule rests upon the theory that, when possession and use are long continued, they create a presumption of lawful origin. That is, they are founded upon such instruments and proceedings as in law would pass the right to the possession and use of the property. n107 It is more proper to say that when an adverse possession is shown there is no need to seek the aid of such presumption. The title is as full and complete as if the possessor had always held the undisputed title of record. n108 More properly, like disseisin, n109 when adverse possession ripens into title, it is taken as against all the world. n110 The adverse possessor forms a new stock of descent. n111 The adverse possessor is not subject to any former owner, and the title of the adverse possessor is not subject to any of the infirmities attaching to that of the former owner. n112 Title by adverse possession defeats a record title just as it defeats non-record title. n113

By the weight of authority, it is held that a purchaser may be compelled to take a title resting upon a hostile adverse and uninterrupted possession, under color of title which has continued for a length of time, sufficient to bar an action for the recovery of the property. n114 The agreement in favor of forcing a purchaser to take such a title is that the court has jurisdiction itself to try the title. n115 The contra rule relies upon the possibility that a third party claimant to the title is not bound by the decision of a court that has not obtained jurisdiction over him. n116

A title based on adverse possession is usually said to be a good but not a clear title. n117 The title thus acquired is respected in courts of equity as well as in courts of law. n118 Court action is not necessary to establish title by adverse possession, but the title is not marketable until there is a judicial etermination. n119 And the title is such as will support an action to remove a cloud therefrom; n120 or to maintain trespass against one claiming under a grant senior to the adverse claimant but without possession. n121 Some cases hold that title by adverse possession is effective for the removal of a cloud on the title by adverse possession is effective for the removal of a cloud on the title, n122 while other cases take a contrary view. n123 The effect of the possession of the adverse holder for the statutory period is not only to bar the remedy of the owner of the title paper or otherwise, but to divest the estate and vest it in the party holding adversely. n124 Such title is a legal title in fee simple; but where it must be proved by extrinsic evidence it is not a record title. n125 It is held that there is no superiority in a title derived from a grant to that acquired by possession under color of title for the period of limitations, although the latter title is derived by force of statute. n126 After title has been once acquired by adverse possession, the title so acquired is not lost by abandonment of possession, n127 nor by the mere recognition of the former owner's title and a promise to pay for the land. n128 After adverse possession has been established, the fact that the original owner later grants permission does not defeat the claim. n129 Where adverse possession has once actually ripened into title, the title is not lost through a parol disclaimer by the possessor or the

possessor's successors. n130 Such a parol statement may, however, be considered in evidence as bearing on the question of whether the possessor held the essential element of hostility. n131 A bona fide purchaser from the record owner of the property held adversely takes, subject to the possessor's rights, even though the statute provides that all deeds shall be void unless recorded. n132 This is true even though the adverse possessor's line has ceased to be visible on the surface. n133

If prior to the maturing of the adverse possession, the adverse possessor grants the surface and retains the minerals, the grantee's continued possession of the surface inures to the benefit of the grantor so as to ripen title as to the minerals. n134

The cases are divided as to whether working of part of a well-defined mineral estate is constructive possession of the whole. n135

The adverse possessor holds title not merely against the owner but also against the transferees; the latter are not protected by the recording acts. n136 When adverse possession ripens into title it relates back to the beginning of the possession so as to cut off the original owner's claim to interim rents, issues and profits, even if the original owner has already collected the rents. n137

The rule that a grantor retaining possession after the deed is presumed to be in with permission of the grantee is rebuttable by a showing of contrary intent. n138

Title of a person holding adverse possession of land for the requisite period extinguishes all other consistent titles and becomes the true title. n139

A title acquired by adverse possession is a fee simple absolute, while by prescription one acquires only a particular easement. n140

Where the time for adverse possession has been completed, title vests, and a formal admission by the adverse possessor of having held as the record owner's tenant will not disturb the title, unless the possession had not been adverse during the period. n141 This type of archaic phrasing means only that once title is in truth perfected, nothing said later by the successful claimant will divest title.

Absent a statute creating a means to record title by adverse possession, an adverse possessor's title does not need to be recorded. n142

It has been held that a strip of land acquired along a boundary by adverse possession does not pass under a deed from the adverse possessor unless the newly acquired land is described in the deed. n143

Adverse possession creates a new title -- not merely a defense against the prior title holder. n144

Court action is not necessary to establish title by adverse possession, but the title is not marketable until there is a judicial determination. n145

An adverse possessor who plants, cultivates and harvests crops has title thereto, even though the adverse possessor was a mere trespasser. n146

COMPUTER-ASSISTED RESEARCH

LEXIS: Adverse possession w/20 effect

FOOTNOTES:
(n1)Footnote 71. Digby, History of Real Property, ch. 2, § 9. Littleton, L. 3, c. 7, §§ 422 - 424.

If the disseisor, though the disseisee make continual claim, died more than a year and a day after the disseisin entry could not be made on his heir. Lacking a statute the continual claimant had a right of entry until the disseisor died. LITTLETON, L. 3, c. 7, § 427.

Entry by the disseisee destroyed the dower of the wife of the disseisor, even though entry was not made until after the disseisor's death. Littleton, L. 3, ch. 6, § 393.

The same rule applied as to defeasible fees but the courts divided as to whether there was dower and curtesy in a determinable fee after the estate determined. *See* 3 Richard Preston, An Essay in a Course of Lectures on Abstracts of Title 372 (New York, 1828); Evans v. Evans, 9 Bann. 190; Reed v. Morrison, 12 Serg. & Rawle 18 (Pa. 1824); *Beardslee v. Beardslee, 5 Barb. Ch. 324 (N.Y. 1849).*

(n2)Footnote 72. Even in the case of the crown, if the heir of the disseisor was in possession a writ of right, "Praecipe quod reddat nobis" was required to oust him. 1 Britton, § 22b.

(n3)Footnote 73. Digby, History of Real Property, ch. 2, § 9. Y. B. 11 & 12 Edw. II 202.

(n4)Footnote 74. *See* Hale, History Common Law, 122. Digby, History of Real Property, ch. 10, § 3(2).

(n5)Footnote 75. *Asher v. Whitlock, L. R., 1 Q. B. 1.*

(n6)Footnote 76. *Senn v. Western Mass. Elec. Co., 471 N.E.2d 131 (Mass. App. 1984); Counce v. Yount-Lee Oil Co., 87 F. 2d 572 (1937),* cert. denied, *302 U. S. 693 (1937).*

(n7)Footnote 77. *Hubbard v. Little, 9 Cush. 475 (Mass. 1852).*

(n8)Footnote 78. Carter v. Maryland & P.R. Co., 77 A.301 (Md. 1910).

(n9)Footnote 79. *See* Warren, The Plea of Ius Terti in Ejectment, *41 LAW. Q. REV. 139 (1925);* Francis S. Philbrick, Sign and Possession as the Basis of Legal Title, *24 IOWA L. REV. 268 (1939).*

Thompson v. McGrue, 119 N.E.2d 773 (Ill. 1954); Anderson v. Thunder Bay River Boom Co., 23 N.W.776 (Mich. 1885).

(n10)Footnote 80. *Page v. Fowler, 28 Cal. 605 (1865).*

Sometimes the theory is advanced that one out of possession has no title to the crops reaped but only an action for damages, upon the theory that title to realty cannot be tried in a transitory action.

(n11)Footnote 81. *E. E. Bolles Wooden-Ware Co. v. United States, 106 U. S. 432 (1882).*

(n12)Footnote 82. *Marino v. Smith, 454 So. 2d 1380 (Ala. 1984); Randolp v. Doss, 4 How. 205 (Miss. 1839).*

(n13)Footnote 83. *Davis v. Mills, 194 U. S. 451 (1904); Marshall v. Watkins, 18 N.E.2d 954 (Ind. 1939).*

(n14)Footnote 84. *Ruick v. Twarkins, 367 A.2d 1380 (Conn. 1976);* CONN. GEN. STAT. § 52-575.

(n15)Footnote 85. *Hubbard v. Little, 9 Cush. 475 (Mass. 1852).*

(n16)Footnote 86. Phillips v. Kent & Miller, 3 Zabrishie (23 N. J.) 155 (1851).

(n17)Footnote 87. Dever v. Hagerty, 62 N.E.586 (N.Y. 1902). *See* Costigan, The Conveyance of Lands by Disseisee, *19 Harv. L. Rev. 267;* Percy Bordwell, Seisin and Disseisin, *34 Harv. L. Rev. 717; McConnell v. Brown, 5 T. B. Mon. (Ky. 1827) 478,* no levy by creditors of disseisee.

(n18)Footnote 88. *See* Percy Bordwell, Seisin and Disseisin, *34 Harv. L. Rev. 717 (1921),* but see 2 Blackstone, *supra* n. 1 at 290.

(n19)Footnote 89. *Foxhill v. Columbia Lumber Co., 111 F. Supp. 603 (D. Alaska 1953).*

(n20)Footnote 90. *Kentucky W. Va. Gas Co. v. Woods, 110 F. 2d 94 (6th Cir. 1940).*

(n21)Footnote 91. *See* George P.Costigan, Jr., The Conveyance of Lands by Disseisee, *19 Harv. L. Rev. 267 (1905).*

(n22)Footnote 92. Keyser v. Brown, 138 N.E.514 (Ind. App. 1923).

(n23)Footnote 93. The statute of *5 Rich. 2,* c. 7 barred forceful reentries but permitted peaceful ones.

(n24)Footnote 94. *Pierce v. Austin, 651 S.W.2d 1380 (Ala. 1984); See* Percy Bordwell, Seisin and Disseisin, *34 Harv. L. Rev. 717 (1921),* and see M. T. Van Hecke, Zoning Ordinances and Restrictions on Deeds, *37 Yale L. J. 409 (1928).*

(n25)Footnote 95. *Shepherd v. Blue Diamond Coal Co., 706 S.W.2d 1 (Ky 1986); Estate of Mark v. H. H. Smith Co., 547 N.E.2d 796 (Ind. 1989);* Danielly v. Lowe, 130 S.E.687 (Ga. 1925); *McConnell v. Brown, 5 T. B. Mon. 478 (Ky. 1827).*

Adverse possession vests absolute title in the possessor. *Lewis v. Lyons, 389 N.Y.S.2d 674 (1976).*

(n26)Footnote 96. Johnson v. Fry, 143 S.E.857 (N.C. 1928), but the possession may be subject to certain liens. *See Pratt v. Pratt, 96 U. S. 704 (1877).*

(n27)Footnote 97. *Fleming v. Watson, 416 So. 2d 706 (Ala. 1982); Suplee v. Eckert, 152 A.2d 289 (Del. Ch. 1959).*

(n28)Footnote 98. *Grubb v. State, 433 N.W.2d 915 (Minn. 1989); Berry v. Bond, 206 P.2d 506 (Wash. 2d 1949),* but see *Virginia & W. Va. Coal Co. v. Charles, 254 F. 379 (4th Cir. 1918).*

(n29)Footnote 99. *Harrison v. State Hwys. & TransP.Comm'n, 732 S.W.2d 214 (Mo. 1987); Fullenwider v. Kitchens, 266 S.W.2d 281 (Ark. 1954),* even though the easement itself had been originally acquired by prescription; *Mumaw v. Robertson, 60 So. 2d 741 (Fla. 1952); Kurz v. Blume, 95 N.E.2d 338 (Ill. 1950).*

(n30)Footnote 100. *Lieber v. Hamel, 446 So. 2d 1240 (La. 1983).* Easements barred, Higgin v. Suburban ImP.Co., 151 S.E.824 (W. Va. 1930). Easements not barred, New England Home for Deaf Mutes v. Leader Filling Stations Corp., 177 N.E.97 (Mass. 1931).

(n31)Footnote 101. *Burkhard v. Bowen, 203 P.2d 361 (Wash. 1949); McCollum v. Reaves, 547 So. 2d 433 (Ala. 1989); Normant v. Eureka Co., 12 So. 454 (Ala. 1893); Vandegrift v. S. Mindral Land Co., 51 So. 983 (Ala. 1909); Vidmer v. Lloyd, 69 So. 480 (Ala. 1915); Sisson v. Swift, 9 So. 2d 891 (Ala. 1942); Rowe v. Bonneau-Jeter Hardware Co., 16 So. 2d 689 (Ala. 1943); Overson v. Cowley, 664 P.2d 210 (Ariz. App. 1992); Manor v. Stevens, 152 P.2d 133 (Ariz. 1944); Thompson v. Dypuik, 220 Cal. Rptr. 46 (Cal. App. 1985); San Francisco v. Fulde, 37 Cal. 349, 99 Am. Dec. 278 (1869);* Owsley v. Matson, 104 P.983 (Cal. 1909); *Marathon Petr. Co. v. Colonial Motel Props. Inc., 550 N.E.2d 778* (Ind. App. 1 Dist 1990); Collett v. Vanderburgh, 21 N.E.329 (Ind. 1889); Craven v. Craven, 103 N.E.333, 105 N.E.41 (Ind. 1914); *Odom v. Elliott, 452 So. 2d 315 (La. App. 1984); Schultze v. Frost-Johnson Lumber Co., 61 So. 404 (La. 1913); Johnson v. Black, 469 So. 2d 88 (Miss. 1985); Scottish-American Mtg. Co. v. Butler, 54 So. 666 (Miss.*

1911); Itawamba County v. Sheffield, 13 So. 2d 649 (Miss. 1943); Mings v. Mings, 782 S.W.2d 165 (Mo. 1990); Auldridge v. Spraggin, 162 S.W.2d 1042 (Mo. 1942); Lossing v. Shull, 173 S.W.2d 1 (Mo. 1943); Sickler v. Pope, 326 N.W.2d 86 (N.D. 1982); Kaminski Bros., Inc. v. Lussi, 454 A.2d 115 (Pa. Super. 1982); Jordan v. Chambers, 75 A.956 (Pa. 1910); *Sleboda v. Heirs at Law of Harris, 508 A.2d 652 (R. I. 1986); Spellbrink v. Bramberg, 14 N.W.2d 38 (Wis. 1944).*

Adverse possession not perfected until after grantee took, Kruvant v. 12-22 Woodland Ave. Corp., 350 A.2d 102 (N.J. Super. 1975), aff'd, *376 A.2d 188 (N.J. 1977).*

(n32)Footnote 102. *Roberts v. Mitchell, 437 So. 2d 512 (Ala. 1983);* Tennessee *Coal, Iron & R. Co. v. Linn, 26 So. 245 (Ala. 1899); Overson v. Cowley, 664 P.2d 210 (Ariz. 1982); Bride v. Walker, 176 S.W.2d 148 (Ark. 1943); Rice v. Hill City Stock Yards Co., 826 P.2d 1328 (Idaho App. 1990); Applebey v. Lenschow, 494 N.E.2d 524 (Ill. App. 1986); Williams v. Rogier, 611 N.E.2d 189 (Ind. App. 1993); Burlingame v. Marjerrison, 665 P.2d 1136 (Mont. 1983); Harlow v. Miller, 520 A.2d 95 (Vt. 1986).*

(n33)Footnote 103. *Jasperson v. Scharnikow, 150 F. 571 (C. C. A.9 1907); McAllister v. Norville, 514 So. 2d 1270 (Ala. 1987); Hubbard v. Curtiss, 684 P.2d 842 (Alaska 1984); Hart v. Sternberg, 171 S.W.2d 475 (Ark. 1943); Overson v. Cowley, 664 P.2d 210 (Ariz. 1982);* Strong v. *Baldwin, 97 P.178 (Cal. 1908); Applebey v. Lenschow, 494 N.E.2d 529 (Ill. App. 1986); Williams v. Rogier, 611 N.E.2d 189 (Ind. App. 1993); Marengo Cave Co. v. Ross, 10 N.E.2d 917 (Ind. 1937); School Dist. No. 4 v. Benson, 31 Me. 381 (1850); Bagley v. Moxley, 555 N.E.2d 229 (Mass. 1990); Nelson v. Brodhack, 44 Mo. 596 (1869); Hadley v. Ideus, 374 N.W.2d 231 (Neb. 1985); Sertic v. Roberts, 136 P.2d 248 (Or. 1943); Taylor v. Tripp, 330 N.W.2d 542 (S.D. 1983); Leonard v. Ramsey, 71 S.W.2d 606 (Tex. Civ. App. 1934); Catlett v. Whaley, 731 S.W.2d 544 (Tenn. App. 1987);* Weed v. Keenan, 13 A.804 (Vt. 1888); *Doenz v. Garber, 665 P.2d 932 (Wyo. 1983).*

(n34)Footnote 104. *Cassada v. Cassada, 404 S.E.2d 491 (N.C. App. 1991); Sevier v. Locher, 222 Cal. App. 3d 1082, 272 Cal. Rptr. 287 (1990); Lewis v. Village of Lyons, 389 N.Y.S.2d 679 (1976); Mustain v. Smith, 63 S.W.2d 537 (Ark. 1933).*

(n35)Footnote 105. *Deshon v. St. Joseph Country Club Village, 755 S.W.2d 265 (Mo. 1988); Slentz v. Cherokee Enters., 529 S.W.2d 495 (Mo. App. 1975).*

(n36)Footnote 106. Dail v. Etchison, 291 S.W.998 (Ark. 1927) (title as effective as if acquired by deed); *Osceola Fertilizer Co. v. Beville, 98 So. 354 (Fla. 1923)* (good as against either strangers or former owners); Ellis v. Smith, 37 S.E.739 (Ga. 1900); Stalcup v. Lingle, 131 N.E.852 (Ind. App. 1921) (fee-simple title acquired); Fordson Coal Co. v. Roark, 283 S.W.106 (Ky. 1926) (title once acquired can be divested only by conveyance, devise, or limitation); Fredericksen v. Henke, 209 N.W.257 (Minn. 1926) (title legal though not of record); *Lowi v. David, 98 So. 684 (Miss. 1924)* (after title once acquired, unnecessary to maintain fences or enclosures); Waddell v. Chapman, 238 S.W.481 (Mo. 1887) (independent title conferred); Manby v. Voorhees, 203 P.543 (N. M. 1921); Anderson v. Richards, 198 P.570 (Or. 1921) (perfect title acquired as against the world); Smith v. Vermont Marble Co., 133 A.355 (Vt. 1926) (after title acquired an admission does not divest it).

(n37)Footnote 107. *Fletcher v. Fuller, 120 U. S. 534 (1887); United States v. Chaves, 159 U. S. 452 (1895); Shahan v. Alabama G. S. R. Co., 22 So. 449 (Ala. 1897); Ziggy's Opportunities, Inc. v. I-10 Indus. Park Devs., 730 P.2d 281 (Ariz. 1986); Conger v. Weaver, 6 Cal. 548 (1856); Farrell v. Brown, 729 P.2d 1090 (Idaho App. 1986); Trustees of School TwP.No. 8 v. Lilly, 26 N.E.2d 489 (Ill. 1940); Marathon Petr. Co. v. Colonial Motel Props., Inc., 550 N.E.2d 778 (Ind. App. 1990);* Cadwalder v. Price, 73 A.273 (Md. 1909); Turner v. Hart, 38 N.W.890 (Mich. 1888); *Board of Trustees of Monroe County Bd. of Educ. v. Rye, 521 So. 2d 900 (Miss. 1988);* Brown v. Oldham, S.W.409 (Mo. 1894); *Castles v. Lawrence, 662 P.2d 589 (Mont. 1983); Price v. Western Life Ins. Co., 146 P.2d 165 (Mont. 1944); Devins v. Borough of Bogota, 592 A.2d 199 (N. J. 1991); Board of Educ. v. Nichol, 46 N.E.2d 872* (Ohio App.); *Locke v. O'Brien, 610 A.2d 552 (R. I. 1992); Cooke v. Smith, 721 S.W.2d 251 (Tenn. App. 1986);* Dunn v. Eaton, 23 S.W.163 (Tenn.

1942); *Jones v. Harrison, 773 S.W.2d 759 (Tex. App. 1989); Ivalis v. Curtis, 496 N.W.2d 690 (Wis. 1993); Perpignani v. Vonasek, 408 N.W.2d 1 (Wis. 1987).*

(n38)Footnote 108. *Evans v. Hogue, 681 P.2d 1133 (Or. 1984); Itawamba County v. Sheffield, 13 So. 2d 649 (Miss. 1943).*

(n39)Footnote 109. *Applebey v. Lenschow, 494 N.E.2d 529 (Ill. App. 1986). See* LESKE, LAW OF PROPERTY IN LAND 40.

(n40)Footnote 110. *Tapley v. Peterson, 489 N.E.2d 1170 (Ill. App. 1986);* McDuffee v. Sinnott, 10 N.E.385 (Ill. 1887); Way v. Hooton, 26 A.784 (Pa. 1902).

(n41)Footnote 111. *Armstrong v. Dailey, 514 So. 2d 993 (Ala. 1987)* (so free of claims of deceased record title holder); Danielly v. Lowe, 130 S.E.687 (Ga. 1893); *Pearson v. Hasty, 137 P.2d 545 (Okla. 1943).*

(n42)Footnote 112. Walker v. Converse, 36 N.E.202 (Ill. 1894); Dyer v. Eldridge, 36 N.E.522 (Ind. 1894); *Kinnison v. Wall, 46 So. 371 (La. App. 1890).*

(n43)Footnote 113. Rapp v. Harrold, 154 N.E.679 (Ind. App. 1926).

(n44)Footnote 114. *Cook v. Clark, 375 N.W.2d 181 (N.D. 1985);* Williams v. Porter, 21 S.W.643 (Ky. 1893); Lurman v. Hubner, 23 A.646 (Md. 1892); Simis v. McElroy, 54 N.E.674 (N.Y. 1899); Core v. Wigner, 9 S.E.36 (W. Va. 1889).

(n45)Footnote 115. *Steinfeldt v. Klusmire, 359 N.W.2d 81 (Neb. 1984);* Rehobeth Heights Dev. Co. Marshall, 137 A.83 (Del. Ch. 1927).

(n46)Footnote 116. *Hyland v. Kirkman, 498 A.2d 1278 (N. J. Super. 1985); Garner v. Union Trust Co., 45 A.2d 106 (Md. 1945);* Reformed Dutch Church v. Madison Ave. Bldg. Co., 108 N.E.444 (N.Y. 1915).

(n47)Footnote 117. *Evans v. Hogue, 663 P.2d 34 (Or. App. 1983); Cornell v. Andrews, 35 N. J. Eq. 7 (1882).*

(n48)Footnote 118. Depue v. Miller, 64 S.E.740 (W. Va. 1909).

(n49)Footnote 119. *Myerberg, Sawyer & Rue, P.A.v. Agee, 446 A.2d 69 (Md. 1982); Babo v. Bookbinder Fin. Corp., 551 P.2d 63 (Ariz. App. 1976).*

(n50)Footnote 120. *Clark v. Drska, 473 A.2d 325 (Conn. App. 1984);* Work v. United Glove Mines, 100 P.813 (Ariz. 1909); *Hardy v. Samuels, 122 S.W. 654 (Ark. 1909).*

(n51)Footnote 121. *Harris v. Walden, 333 S.E.2d 254 (N.C. 1985);* Charleroi Timber & Cannel Coal Co. v. Spaulding, 117 S.W.291 (Ky. 1909).

(n52)Footnote 122. The adverse possessor, after the term of the statute has run, is in every respect owner in fee so that he alone can maintain trespass or ejectment. McDuffee v. Sinnott, 10 N.E.385 (Ill. 1909); Barnes v. Light, 22 N.E.441 (N.Y. 1889); Baker v. Oakwood, 25 N.E.312 (N.Y. 1890); Way v. Hooton, 26 A.784 (Pa. 1910); *Hughes v. Graves, 39 Vt. 359 (1867).* The adverse possessor may maintain an action to quiet title, declaring the former title extinguished. Dean v. Goddard, 56 N.W.1060 (Minn. 1893). *See* case notes in *29 YALE L. J. 923; 79 U. PA. L. REV. 981,* criticizing decisions to the contrary.

(n53)Footnote 123. *See* note in 78 A.L. R. 110, 114.

(n54)Footnote 124. Owsley v. Matson, 104 P.983 (Cal. 1909); Tarver v. Djeppen, 65 S.E.177 (Ga. 1909); Hillman

Land & Iron Co. v. Marshall, 119 S.W.180 (Ky. 1909); Safe Deposit & Trust Co. v. Marburg, 72 A.839 (Md. 1909); Neal v. Davis, 99 P.69, 101 P.212 (Or. 1909); *Broad v. Warnecke, 144 S.W.2d 1005 (Tex. Civ. App. 1940); Stryker v. Rasch, 112 P.2d 570, 113 P.2d 963 (Wyo. 1941).*

(n55)Footnote 125. *Creel v. Hammans, 13 N.W.2d 305 (Iowa 1944).*

(n56)Footnote 126. Ellis v. Smith, 37 S.E.739 (Ga. 1900).

(n57)Footnote 127. *DeShon v. St. Joseph Country Club Village, 755 S.W.2d 265 (Mo. 1988);* Tarver v. Deppen, 65 S.E.177 (Ga. 1909); *School Dist. No. 4 v. Benson, 31 Me. 381 (1850);* Fredericksen v. Henke, 209 N.W.257 (Minn. 1926); *Manning v. Humble Oil & Ref. Co., 92 S.W.2d 577 (Tex. Civ. App. 1936).*

(n58)Footnote 128. *Crowden v. Grantland, 510 So. 2d 238 (Ala. 1987);* Blackburn v. Coffee, 218 S.W.836 (Ark. 1920).

The presumption of a grant to one not having record title can never fairly arise, where all the circumstances are perfectly consistent with the non-existence of the grant. *Dolbear v. Gulf Prod. Co., 286 F. 737 (1922). See* Thomas v. Morgan, 240 P.735 (Okla. 1925).

Adverse possession for the statutory period raises the presumption of a grant. Morgan v. Moseley, 266 S.W.876 (Ky. 1924) (presumption less readily invoked as against state than persons); Kentucky Block Fuel Co. v. Roberts, 268 S.W.802 (Ky. 1925) (grant from commonwealth presumed); Waddell v. Chapman, 238 S.W.481 (Mo. 1905) (presumption raised against everybody except government); Callison v. Wabash R. Co., 275 S.W.965 (Mo. App. 1925); Clary v. Bonnett, 103 S.E.779 (S.C. 1920); Lyles v. Fellers, 136 S.E.13 (S.C. 1926).

The doctrine of a presumed lost grant is distinct from that of limitation, but possession is absolutely essential to give rise to the presumption. Morgan v. Mosely, 266 S.W.876 (Ky. 1924).

The lost grant theory is a legal fiction. Bucella v. Agrippino, 154 N.E.79 (Mass. 1926).

(n59)Footnote 129. *Zuanich v. Quero, 376 A.2d 763 (Vt. 1977).*

(n60)Footnote 130. *Gilbert v. Green, 242 S.W.2d 879 (Tex. 1951).*

(n61)Footnote 131. *Van Valkenburgh v. Lutz, 106 N.E.2d 28 (N.Y. 1952).*

(n62)Footnote 132. *Mugaas v. Smith, 206 P.2d 332 (Wash. 2d 1949).*

(n63)Footnote 133. *Id.*

(n64)Footnote 134. *Houston Oil Co. of Texas v. Moss, 284 S.W.2d 131 (Tex. 1955).* Drilling and operation of oil well constituted adverse possession of the oil. *Pewitt v. ReN.W.ar, 261 S.W.2d 904 (Tex. Civ. App. 1953). See* McElroy, Adverse Possession of Mineral Estates, *11 BAYLOR L. REV. 253.*

(n65)Footnote 135. *Diederich v. Ware, 288 S.W.2d 643 (Ky. 1956).* Contra *Sanford v. Alabama Power Co., 54 S. 2d 562 (Ala. 1951).*

(n66)Footnote 136. *Strawberry Lane, Inc. v. Fraser, 129 A.D. 2d 874, 513 N.Y.S.2d 683 (1987); Palm Orange Groves, Inc. v. Yelvington, 41 S. 2d 883 (Fla. 1949).*

(n67)Footnote 137. *Counce v. Yount-Lee Oil Col, 87 F. 2d 572 (1937);* Steinberg v. Salzman, 120 N.W.1005 (Wis. 1909); Balantine, Title by Adverse Possession, *32 HARV. L. REV. 135.*

Jones v. Brown, 414 S.W.2d 618 (Ark. 1967); Rider v. Pottratz, 425 P.2d 766 (Or. 1967).

(n68)Footnote 138. *Perez v. Perez, 228 A.D. 2d 191 (N.Y. S. Ct. 1996)* (Error to fail to instruct jury to make finding of fact as to whether ouster of wife from former marital residence had occurred so that husband adversely possessed tenancy in common). *Gallea v. Hess Realty Corp., 128 A.D. 2d 274, 515 N.Y.S.2d 683 (1987); Barfield v. Vickers, 36 S.E.2d 766 (Ga. 1946).*

Adverse possession vests absolute title in the possessor. *Lewis v. Village of Lyons, 389 N.Y.S.2d 674 (1976).*

(n69)Footnote 139. *Hu Bel Air, Inc. v. Hirsch, 102 A.2d 550 (Md. 1954).* Adverse possession statute is statute of repose. *Rucik v. Twarkins, 367 A.2d 1380 (Conn. 1976).*

(n70)Footnote 140. *Wright v. Horse Creek Ranches, 697 P.2d 384 (Colo. 1985); Republic Nat'l Bank v. Stetson, 390 S.W.2d 257 (Tex. 1965).*

Title by prescription is good as against bona fide purchasers from original owner. *Pressley v. Jennings, 180 S.E.2d 896 (Ga. 1971).*

(n71)Footnote 141. *Combs v. Dubois, 662 P.2d 140 (Ariz. 1982); Yatczak v. Cloon, 22 N.W.2d 112 (Mich. 1946).*

(n72)Footnote 142. *McNeil v. Hadden, 76 So. 2d 160 (Ala. 1954)* (note that the strip held adversely will pass under added language describing the original boundaries if the deed is given while the period of adverse possession is still running and if the grantee goes into possession of the striP.But this is because the adverse claimant's possession had been destroyed).

(n73)Footnote 143. *Thomas v. Davis, 410 So. 2d 889 (Ala. 1982); Bridges v. Henson, 116 S.E.2d 570 (Ga. 1960).*

(n74)Footnote 144. *Babo v. Bookbinder Financial Corp., 551 P.2d 63 (Ariz. App. 1976).*

(n75)Footnote 145. *Id.*

(n76)Footnote 146. *Whitney v. Bails, 560 P.2d 1344 (Mont. 1977).*

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CHAPTER 87 ADVERSE POSSESSION

10-87 Thompson on Real Property, Thomas Editions § 87.04

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§ 87.04 "Possession."

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The essence of title by adverse possession is the legal concept of "possession," which is not always congruent with the lay understanding of the term. The legal concept of possession dates back to the time when possession and title were inseparable. Whenever one lost physical control, one lost title. In the formative stages of the common law, when one ceased to be in control of the land, one ceased to be the owner thereof. Land could be stolen just as cattle. Today this rule has receded only to the point that the thief must deny control to the title holder for a sufficient period for the thief to become the owner.

In order for the particular statute to be operative the claimant must have been in "possession" for the requisite period. What is this possession? It seems that the very early English statutes named real but not possessory actions. n147 The statute of James, however, did bar entry actions. n148 What is the sense of the modern statutes? Do they require seizin of the adverse possessor or do they merely require possession by him? n149 It is clear that an act which amounted to a disseisin at common law n150 is sufficient to constitute adverse possession. n151 Blackstone defines "disseisin" as a wrongful putting out of one who is seized of the freehold. n152 There is an actual disseisin when one wrongfully enters upon the land of another with intent to usurp, and, retaining the possession, actually turns the owner out, or at least keeps the owner out. n153 It is impossible to reconcile the American cases on the question of the extent to which the possession concept must be accompanied by a claim of right or title to pass title. The problem lies in the extent to which the jurisdiction likens adverse possession to disseisin. n154 Much authority states that possession must be accompanied by an intent to claim ownership. n155 This intent is not the secret purpose of the occupant, but is the purpose which the acts themselves manifest, and the acts done must be manifested to the person against whom the ouster is directed. n156 Possession must be sufficient to notify the owner of the assertion of the claim. Silent possession, accompanied by no act which can amount to an ouster, is insufficient upon which to found title by adverse possession. n157 Proof of acts of dominion over land by an occupant can be effective in establishing a title by adverse possession. n158 One of the most effective means of proving ouster is by showing the exercise of dominion over the land by the adverse claimant. n159 Actual possession is evidence of ouster. n160 Others distinguish between disseisin and adverse possession. n161

Proof of prior peaceful possession under color of title is not prima facie evidence of ownership and seisin. n162 Under this theory it is held that a wrongful intent to disseise the true owner is not a necessary element of adverse possession. n163 If a mere trespasser, without any claim or pretense of title, enters into land and holds the same adversely to the title of the owner, then ouster of the owner is effected. n164 The extent or degree of dominion of control necessary to establish adverse possession is largely determined by the nature of the property. Unquestionably under any theory there must be (a) an intent to take possession and (b) sufficient acts of dominion. n165 Possession alone is insufficient. The possessor must intend to hold despite and not subservient to the owner's title. A mere squatter does not have the intent to possess. n166 The mere fact that the legal concept of possession has been achieved and retained for the required period of time under the statute is not itself, however, enough to give the possessor title. There must be something more, something further even than actual disseisin. There must be a state of mind in the possessor claiming title to the property as against all the world including the true owner whomever the true owner be, and there must be sufficient publication of that fact to the world. n167

Some cases look upon adverse possession as analogous to common law disseisin. So a possession which does not amount to an ouster or disseisin is sufficient. n168 A true owner has the constructive possession, or seisin, and disseisin cannot be brought about without actual adverse possession, and, if there is no disseisin, the statute of limitations can have no operation. n169 To constitute adverse possession there must be an entry and ouster of the true owner, for until disseisin any possession of another is presumed to be subservient to the title. n170 It must appear that there has been a wrongful exclusion from possession of the party entitled to it. n171 In the case of a dispossession by a stranger, the fact that such stranger takes the actual and exclusive possession of the land is of itself a notice of the character of such possession, and of the intent with which it was done. None of these acts are essential where from the character of the land they are impossible. n172

Except when held under color of title, in order that title to land may be gained by adverse possession, the possession must be actual. n173 To determine the fact of actual possession in a particular case, all the circumstances must be taken into consideration. n174 In determining the question whether one has actual possession of property, the character and locality of the property and the uses for which it is naturally adapted are taken into consideration, for the possessory acts over an outlying and uncultivated piece of land may be proved by acts of ownership somewhat different from what would be required in regard to land under enclosure and in actual cultivation. n175 "Actual possession" is such possession as in general terms indicates an exclusive ownership of the property, and this is usually shown by a residence thereon, an enclosure of at least a portion of the land or the cultivation thereof, or such use of the land as is practicable and for the purpose for which lands of a similar character are ordinarily used. n176

Navigable waters may form part of the enclosure for adverse possession. n177

Mere casual acts of ownership do not constitute adverse possession, although there may be certain sorts of acts of possession which, if continued and uninterrupted, will be sufficient though the land is wild. n178

Actual possession is the same as pedis possessio or pedis positio, and these mean a foothold on the land, an actual entry, a possession in fact, a standing upon it, as a real demonstrative act done. It is the contrary of a possession in law, which follows in the wake of title, and is called constructive possession. n179

Some courts take the view that for a statute to operate against the owner out of possession, there must be an actual entry on the land by the disseisor that amounts to an ouster or disseisin of the owner. n180 In some cases the acts of dominion on the part of the disseisor must be done with the intention to disseise the owner; n181 and such intention must be made manifest by the disseisor's acts. n182 A mere intention to disseise unaccompanied by positive acts will not produce that effect, n183 nor will mere passive possession, without intention to claim the property, amount to an ouster or disseisin of the owner. n184 Mere occupation of land beyond boundary line is not possession, nor is fencing n185 of itself alone sufficient. n186 Residence on the land is not absolutely essential. n187 Cultivation of the tillable land and claiming the whole by virtue of color of title may be sufficient to constitute adverse possession. n188 Fencing is not necessary to

constitute either actual or adverse possession of land. n189 The possessor must exercise such acts of dominion over the property as will apprise the owner of the fact that a claim of ownership is being asserted. A test of adverse possession is whether the possessor has enjoyed the land as the average owner of similar property would. n190

As distinguished from prescription, adverse possession requires exclusive possession. n191 Where the property is vacant, the law attributes continual possession to the person having legal title, and in order to oust this constructive possession there must be actual possession for the necessary period. n192 A party occupying land must appropriate it for some purpose to which it is adapted to constitute adverse possession. n193 The mere fact that an action of trespass would lie is not sufficient possession to give rise to adverse possession. n194 One in possession of one tract cannot stretch the possession so as to include another by means of a claim of ownership without actual possession of such other tract. n195 Actual residence is not ordinarily required. n196 Statutes sometimes control the question of actual possession by requiring an actual residence on the land, n197 or by requiring the land to be enclosed or cultivated. n198 It is not essential that the owner have actual knowledge of the adverse possession if it was open, visible and notorious. n199

Where two deeds purport to convey the same land, thus resulting in an interlock, the senior deed supported by constructive possession of the land described will prevail over the junior deed, except to the extent that the latter proves adverse possession of some portion of the interlock. n200

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LEXIS: Adverse possession w/20 constitut! pre/4 possession

FOOTNOTES:
(n1)Footnote 147. Statute Westminster I., 3 Edw. ch. 39.

(n2)Footnote 148. 21 Jam. c. 16.

(n3)Footnote 149. Percy Bordwell, Disseisin and Adverse Possession, *33 YALE L. J. 141*.

(n4)Footnote 150. *Id.* at 285.

(n5)Footnote 151. Edward H. Warren, A Problem in *"Tacking," 88 U. PA. L. REV. 897 (1940).*

(n6)Footnote 152. 3 BiComm 169. *See* Mitchell v. Warner, 5 Commw. 497; *Varick v. Jackson, 2 Wend. 166 (N.Y. 1828); Hoey v. Furman, 1 Pa. 295 (1845).*

At common law, "occupation" was a word of art signifying a putting out of a man's freehold in time of war when the courts were closed. Coke on Littleton § 249b.

Littleton, L. 3, c. 6, § 412 indicated that there could be seisin by occupation. Coke felt, however, that usurpation in time of war did not amount to putting out of possession. § 249b.

(n7)Footnote 153. *Quirk v. Sanders, 673 S.W.2d 850 (Mo. 1984); Towle v. Ayer, 8 N. H. 57 (1835).*

Use in common with the servient estate is not adverse. *Sottiaux v. Bean, 95 N.E.2d 899 (Ill. 1950).*

(n8)Footnote 154. *See* Monthomery & Mullen Lumber Co. v. Quimby, 128 P.402 (Cal. 1912); Truman v. Raubuck, 56 A.944 (Pa. 1904); Clithero v. Fenner, 99 N.W.1027 (Wis. 1904).

A possessor's purchase or offer to purchase an outstanding title or interest does not necessarily admit the validity of

the outstanding claim or interest sought, nor does it necessarily amount to an acknowledgement that the possessor holds in subjection to the outstanding title or interest. Still less does the purchase or offer to purchase an outstanding interest necessarily negate the existence of the elements of adverse possession as to titles, claims or interests of third persons: *Brooks v. Bruin, 18 Ill. 539 (1857);* Bond v. O'Gara, 58 N.E.275 (Mass. 1900); Blackfoot Land & Dev. Co. v. Burks, 199 P.685 (Mont. 1921); Pease v. Whitney, 98 A.62 (N. H. 1916); Rock Springs v. Sturm, 273 P.908 (Wyo. 1929).

(n9)Footnote 155. *Petsch v. Widger, 335 N.W.2d 254 (Neb. 1983);* Knight v. Denman, 90 N.W.863 (Neb. 1902). The Roman law seemed to have deemed mere possession enough. Bond, Possession in the Roman Law, *6 Law Q. Rev. 239.* Coke on Littleton, § 153b.

(n10)Footnote 156. *Titcomb v. Anthony, 492 A.2d 1373 (N. H. 1985);* Oglesby v. Hollister, 18 P.146 (Cal. 1888); Winterburn v. Chambers, 27 P.658 (Cal. 1891).

Fencing and grazing held insufficient possession. *Mcdonald v. Weinacht, 465 S.W.2d 136 (Tex. 1971); Root v. Mecom, 542 S.W.2d 878 (Tex. Civ. App. 1976).*

(n11)Footnote 157. *Davis v. Clement, 468 So. 2d 58 (Miss. 1985);* Hahn v. Keith, 174 N.W.551 (Wis. 1919).

(n12)Footnote 158. *Bryab v. Atwater, 5 Day 181 (Conn. 1811); Kennebec Purchase v. Laboree, 2 Me. 275 (1823);* Baker v. Oakwood, 25 N.E.312 (N.Y. 1890).

(n13)Footnote 159. *Nome 2000 v. Fagerstrom, 399 P.2d 304 (Ala. 1990);* O'Banion v. Simpson, 191 P.1083 (Nev. 1920).

(n14)Footnote 160. *Allen v. Batchelder, 459 N.E.2d 375 (Mass. App. 1984);* Hahn v. Keith, 174 N.W.551 (Wis. 1919).

(n15)Footnote 161. *Nelson v. Christianson, 343 N.W.2d 375 (N.D. 1984);* Hahn v. Keith, 174 N.W.551 (Wis. 1919); Carpenter v. Coles, 77 N.W.424 (Minn. 1988).

> Disseisin was the wrongful taking away from the real owner of his actual seisin. "Disseusub was formerly a notorious act, when the disseisor put himself in the place of the disseisee as tenant of the freehold and performed the acts of the freeholder and appeared in that character in the lord's court." Lord Ellenborough, in William v. Thomas, 12 East 141, 155 (1810). Or, as Lord Mansfield put it: "Disseisin therefore must mean some way or other turning the tenant out of his tenure and usurping his place and feudal relation." *Taylor v. Horde, 1 Burr 60, 107 (1757).* How this was accomplished originally, unless the lord conspired with the disseisor, we do not know. It is sufficient for our purpose that disseisin was early possible, and that every wrongful taking of seisin from the real owner was not necessarily a disseisin. That only was disseisin where someone entered upon and ousted one who had taken actual possession under claim of freehold. Certainly this was true of actual disseisin, though there was a disseisin by election, where persons, to avail themselves of the remedy by assize, frequently were allowed to suppose or admit themselves to be disseised when they were not. Whatever may be true of the law of today, there was in the early common law a clear distinction between disseisin and other forms of adverse possession; for unless actual seisin was interfered with or could be regarded as interfered with for the purpose of the action, there was no disseisin, though there might perhaps be an abatement or some other form of adverse possession.

George P.Costigan, Jr., *19 Harv. L. Rev. 268 (1905).*

(n16)Footnote 162. *Cullman Wholesale, Inc. v. Simmons, 592 So. 2d 1031 (Ala. 1992); Bull Run Dev. Corp. v. Jackson, 109 S.E.2d 400 (Va. 1959).*

(n17)Footnote 163. Hagopian v. Saad, 199 A.433 (Conn. 1938).

(n18)Footnote 164. *Lee v. Mcdonald, 1990 W. L. 16891 (Tenn. App. 1990); Clarke v. Courtney, 30 U. S. (5 Pet.) 319 (1831).*

(n19)Footnote 165. *Lilly v. Palmer, 495 So. 2d 522 (Ala. 1986); Franks Petr. v. Babineaux, 446 So. 2d 862 (La. 1984);* Blackfoot Land Dev. Co. v. Burks, 199 P.685 (Mont. 1921).

A mere squatter does not have "possession." *Roby v. Hill, 11 Alaska 600 (1948).*

Nicola Riccio, a fisherman, lived for 32 years on Flat Rock Island which lies between Mill Creek and Long Island Sound near Rye, N.Y. He built a small house, and made his living fishing and clamming. The court said: "As to the appellant Riccio, he was a mere squatter on the island without color of title and acquired no permanent rights by his intrusion thereon. "*Briggs v. Peningo Land Co., 262 N.Y. S. 835 (1933),* aff'd, 195 N.E.361 (N.Y. 1935).

(n20)Footnote 166. *Carpenter v. Ruperto, 315 N.W.2d 782 (Iowa 1982);* see Content v. Dalton, 190 A.328 (N. J. Eq. 1937). Holding over for 43 years after mortgage foreclosure overcame presumption that former owner was a possessive tenant. *Tex-Wis Co. v. Johnson, 534 S.W.2d 895 (Tex. 1976).*

(n21)Footnote 167. *Cluff v. Bonner County, 824 P.2d 115 (Idaho 1992);* Philbin v. Carr, 129 N.E.19 (Ind. App. 1920) 706; *Mercy v. Miller, 166 S.W.2d 628 (Tenn. App. 1942).*

(n22)Footnote 168. *Peck v. Bigelow, 613 N.E.2d 134 (Mass. App. 1993); Simmonds v. Stanolind Oil & Gas Co., 114 S.W.2d 226 (Tex. 1938).* Constructive possession recognized. *Zeringue v. Blouin, 192 So. 2d 838 (La. 1966).*

(n23)Footnote 169. *Double L. Props., Inc. v. Crandall, 751 P.2d 1208 (Wash. App. 1988);* Coke on Littleton, § 181; 1 *Rolls Abridgement 659, pl. 5 Grube v. Wells, 34 Iowa 148 (1872);* Keller v. Harrison, 128 N.W.851, 131 N.W.53 (Iowa 1911). *Grandin v. Gardiner, 63 N.W.2d 128 (N.D. 1954)* (holding adverse color of title without possession is insufficient).

(n24)Footnote 170. *Gallea v. Hess Realty Corp., 515 N.Y.S.2d 683 (1987);* Coke on Littleton, § 229.

(n25)Footnote 171. *Fantasia v. Schmuck, 395 S.E.2d 784 (W. Va. 1990);* Murphy v. Doyle, 33 N.W.220 (Minn. 1887).

(n26)Footnote 172. *United States v. Chatham, 323 F. 2d 95 (1963)* (not merely technical); *Sparks v. Byrd, 562 So. 2d 211 (Ala. 1990); Smith v. Smith, 466 So. 2d 922 (Ala. 1985); Drennen Land & Timber Co. v. Angell, 475 So. 2d 1166 (Ala. 1985); Nome 2000 v. Fagerstrom, 399 P.2d 304 (Alaska 1990); Mesnick v. Caton, 228 Cal. Rptr. 779 (1986);* Yundt v. Davison, 197 S.E.248 (Ga. 1938); *Nelson v. Wagner, 700 P.2d 973 (Idaho 1985);* Pleasants v. Henry, 213 P.565 (Idaho 1923); *State v. Woods, 333 N.W.2d 490 (Iowa App. 1983);* Siegle v. Criss, 136 N.E.706 (Ill. 1922); Philbin v. Carr, 129 N.E.19 (Ind. App. 1920); Swanson v. New York Cent. R. R., 149 N.E.353 (Ind. App. 1925); *Humphrey v. Harrison, 646 S.W.2d 340 (Ky. 1982);* Childers v. York, 218 S.W.1027 (Ky. 1920) (junior grant held, actual possession necessary); Elliot v. Hensley, 222 S.W.507 (Ky. 1920) (actual possession of adjoining land necessary); Ahart v. Wilson, 277 S.W.1007 (Ky. 1925); Bie v. Ryssell, 281 S.W.1033 (Ky. 1926); *Whitley v. Texaco, Inc., 434 So. 2d 96 (La. App. 1982); O'Brien v. Alcus Lands P'ship Trust, 577 So. 2d 1094 (La. App. 1991); Bruton v. Braselton, 101 So. 873 (La. 1924); Bornio v. Berger, 105 So. 2d 11 (La. 1925)* (taking of actual possession under judgment held necessary); *Dupuy v. Joly, 200 So. 806 (La. 1941); Nixon v. English, 22 So. 2d 266 (La. 1945); Ellington v. Ellis & Dorsett, 2 La. App. 715 (1925); Brown v. Glass, 3 La. App. 38 (1848); Jackson v. Gordon, 186 So. 399 (La. App. 1939); McCluskey v. Merayx & Nunez, 188 So. 669 (La. App. 1939); Glover v. Graham, 459 A.2d 1080 (Me. 1983); Peters v. Staubitz, 498 A.2d 661 (Md. App. 1985);* Hines v. Symington, 112 A.814 (Md. 1921) (railroad company's acquisition of land by adverse possession); Bloodsworth v. Murray, 114 A.575 (Md. 1921); *Peck v. Bigelow, 613 N.E.2d 134 (Mass. App. Ct. 1993); Trotter v. Gaddis and McLaurin, Inc., 452 So. 2d 453 (Miss. 1984); Cranford v. Hilbun, 147 So. 2d 309 (Miss. 1962);*

Kline v. Groeschner, 219 S.W. 648 (Mo. 1920) (acquisitionof title to wild land); *Petsch v. Widger, 335 N.W.2d 254 (Neb. 1983); Scarcella v. Ascolese, 38 A.2d 194 (N. J. Eq. 1944);* Morgan v. Jenson, 181 N.W.89 (N.D. 1921); *Walls v. Grohman, 337 S.E.2d 556 (N.C. 1985); Tioga Coal Co. v. Supermarkets Gen. Corp., 546 A.2d 1 (Pa. 1988); Sioux City Boat Club v. Mulhall, 117 N.W.2d 92 (S.D. 1962); Humble Oil & Ref. Co. v. Parish, 146 S.W.2d 1045 (Tex. Civ. App. 1940); Yrscgek v. Garcuam, 164 S.W.2d 1 (Tex. Civ. App. 1942); Graves v. McClellan, 190 S.W.2d 154 (Tex. Civ. App. 1945); Jarvis v. Gillespie, 587 A.2d 981 (Vt. 1991); ITT Rayonier, Inc. v. Bell, 774 P.2d 6 (Wash. 1989); Perpignani v. Vonasek, 408 N.W.2d 1 (Wis. 1987).*

The claim of a grantee or one entering into possession of land is generally limited to the amount granted or the portion which the one taking possession actually encloses and does not extend to outlying and unenclosed land. Thompson v. Richardson, 221 S.W.952 (Tex. App. 1920) (burden on plaintiff to show possession extended to unenclosed land); *Houston Oil Co. v. Holland, 222 S.W. 546 (Tex. App. 1920).*

(n27)Footnote 173. *Doswell v. Dela Lanzo, 61 U. S. (20 How.) 29 (1857); Deputron v. Young, 134 U. S. 241 (1890); Ward v. Cochran, 150 U. S. 597 (1893); Roberts v. Mitchell, 437 So. 2d 512 (Ala. 1983); Hayes v. Cotter, 439 So. 2d 102 (Ala. 1983); Alexander City Union Warehouse & Storage Co. v. Central of Georgia R. Co., 62 So. 745 (Ala. 1913);* Kirker v. Daniels, 83 S.W.912 (Ark. 1904); *Thomson v. Dypvik, 226 Cal. Rptr. 46 (1985);* Nathan v. Dierssen, 79 P.739 (Cal. 1905); Fleming v. Howell, 125 P.551 (Colo. App. 1912); Dubuque v. Coman, 30 A.777 (Conn. 1894); *Bartholomew v. Edwards, 1 Houst. 17 (Del. 1855); Reid v. Anderson, 13 App. D. C. 30 (1898); Michigan Trust Co. v. Canada, 61 So. 123 (Fla. 1913);* Strong v. Powell, 20 S.E.6 (Ga. 1893); *Rice v. Hill City Stock Yards Co., 826 P.2d 1328 (Idaho 1990); Morrison v. Kelly, 22 Ill. 610 (1859);* Roby v. Calumet & C. Canal & Dock Co., 71 N.E.822 (Ill. 1904); Vandalia R. Co. v. Wheeler, 103 N.E.1069 (Ind. 1914); Willicuts v. Rollins, 52 N.W.199 (Iowa 1892); Anderson v. Burnham, 34 P.1056 (Kan. 1893); Tennis Coal Co. v. Sackett, 190 S.W.130 (Ky. 1916); Leader Realty Co. v. Lakeview Land Co., *63 S. 253 (La. 1913); Capo v. Blanchard, 1 La. App. 3 (1924);* Proctor v. Maine Cent. R. Co., 60 A.423 (Me. 1905); *Peters v. Staubitz, 498 A.2d 661 (Md. App. 1985);* Sadtler v. Peabody Heights Co., 10 A.599 (Md. 1886); *Morrison v. Chapin, 97 Mass. 72 (1867);* Whitaker v. Erie Shooting Club, 60 N.W.983 (Mich. 1894); Bazille v. Murray, 41 N.W.238 (Minn. 1899); *Cameron v. Lewis, 59 Miss. 134 (1881); Green v. Lange, 797 S.W.2d 765 (Mo. App. 1990); Linebarger v. Gomer, 766 S.W.2d 180 (Mo. App. 1989);* Brewster v. Laclede Land & ImP.Co., 152 S.W.302 (Mo. 1912); *Lossing v. Shull, 173 S.W.2d 1 (Mo. 1943);* Bush v. Stumpe, 222 S.W.1009 (Mo. 1920); Lockey v. Horsky, 2 P.19 (Mont. 1882); *Martin v. Kozuszek, 345 N.W.2d 26 (Neb. 1984);* Omaha & Florence Land & Trust Co. v. Parker, 51 N.W.139 (Neb. 1892); *Chollar-Potosi Min. Co. v. Kennedy, 3 Nev. 361 (1867);* Manchester v. Duggan, 70 A.1075 (N. H. 1908); *Foulke v. Bond, 41 N. J. L. 527 (1879);* Johnston v. Albuquerque, 72 P.9 (N. M. 1903); *G. O. S. Cattle Co. v. Bragaw, 28 P.2d 529 (N. M. 1933); Mastin v. Village of Lima, Livingston County, 448 N.Y.S.2d 274 (1982);* DeLancey v. Piepgras, 33 N.E.822 (N.Y. 1893); *Crisp v. Benfield, 307 S.E.2d 179 (N.C. App. 1983);* Locklear v. Savage, 74 S.E.347 (N.C. 1912); J. B. Streeter Jr. Co. v. Fredrickson, 91 N.W.692 (N.D. 1902); Thomas v. Spencer, 133 P.822 (Or. 1913); *Glenn v. Shuey, 595 A.2d 606 (Pa. Super. 1991); Arcadia Co. Inc. v. Peles, 576 A.2d 1114 (Pa. Super. 1990);* Baxter v. Girard Trust Co., 135 A.620 (Pa. 1927); *Steedman v. Hilliard, 3 Rich. (S.C.) 101;* Elliot v. Cumberland Coal & Coke Co., 71 S.W.749 (Tenn. 1902); Southern Coal & Iron Co. v. Schwoon, 239 S.W.398 (Tenn. 1921); Evans v. Tenpleton, 6 S.W.843 (Tex. 1887); Kirby Lumber Co. v. Conn, 263 S.W.902 (Tex. 1924); *Gibbs v. Lester, 41 S.W.2d 28 (Tex. Com. App. 1931);* Thompson v. Richardson, 221 S.W.952 (Tex. Com. App. 1920); Vergara v. Myers, 239 S.W.942 (Tex. Com. App. 1922); North Fort Worth Townsite Co. v. Taylor, 262 S.W.505 (Tex. Civ. App. 1924); Kelly v. Wilson, 283 S.W.696 (Tex. Civ. App. 1926); Oliver v. West Lumber Co., 287 S.W.100 (Tex. Civ. App. 1926); Dignan v. Nelson, 72 P.936 (Utah 1903); Wells v. Austin, 10 A.405 (Vt. 1887); Sulphur Mines Co. v. Thompson, 25 S.E.232 (Va. 1896); Chilton v. White, 78 S.E.1048 (W. Va. 1913); Kurz v. Miller, 62 N.W.182 (Wis. 1895). *See Bowles v. Whites, 57 S.E.2d 187 (Ga. 1950)* (denying betterment statute to one living with a relative).

Where a deed makes independent conveyance of separate and non-contiguous land, actual possession of one part does not include all. Morris v. Gibson, 134 S.E.796 (Ga. App. 1926).

A claimant under a junior grant which overlaps a senior grant is not in actual possession of any part of the junior grant

which is covered by the senior grant unless the claimant actually enters upon the land. Morgan v. Big Woods Lumber Co., 249 S.W.329 (Ky. 1923). *See* McQueen v. Graham, 111 S.E.890 (N.C. 1922) (junior grantee may, by actual adverse possession of a part of the lapped premises acquire title to the whole); Southern Coal & Iron Co. v. Schwoon, 239 S.W.398 (Tenn. 1921) (accidental encroachment on the land of another cannot be treated as an adverse possession of the entire tract belonging to such other person); Temple Lumber Co. v. Low, 272 S.W.769 (Tex. Com. App. 1925) (a tenant in possession of adjoining land can no more acquire title to more land than the tenant has in actual possession by encroachment through mistake or design than can an owner or claimant of adjoining land).

When land is held under a grant of title, possession is presumed to extend only to the land within the calls of the grant. Strunk v. Geary, 288 S.W.1053 (Ky. 1926); *Ellington v. Ellis & Dorsett, 2 La. App. 715 (1925); Holmes v. Hendricks, 4 La. App. 1 (1926).*

In the absence of color of title, the possession extends only to the limits of the visible actual occupancy. Fitschen Bros. Commercial Co. v. Noyes, 246 P.773 (Mont. 1926). *See* St. Petersburgh v. Meloche, *110 S. 341 (Fla. 1926);* Rock Run Iron Co. v. Heath, 116 S.E.590 (Ga. 1923); Baxter v. Girard Trust Co., 135 A.620 (Pa. 1927); Lyles v. Fellers, 136 S.E.13 (S.C. 1926). Possession of a portion of a tract while holding record title to the entire tract is deemed possession of the whole tract with the exception of such portions as may be actually occupied adversely by another. Davis v. Cox, 239 S.W.917 (Tex. Com. App. 1922); Kelly v. Wilson, 233 S.W.141 (Tex. Civ. App. 1922).

Where a tract of land is subdivided and sold to different parties, a subsequent purchaser of the whole tact entering under a deed conveying to him the whole tract cannot claim by limitation those subdivisions upon which he has never entered. His adverse possession of one subdivision will not extend to such other subdivisions as have not been invaded by his actual possession. Southwestern Lumber Co. v. Evans, 275 S.W.1078 (Tex. Civ. App. 1925).

The extent or degree of dominion of control necessary to establish adverse possession is largely determined by the nature of the property. *Wijas v. Clorfene, 262 N.E.2d 83 (Ill. App. 2d 1970).*

Actual possession is such occupancy or possession by a person as would put an ordinary prudent person on notice of that fact by observation of the premises involved. *Thomas v. Flynn, 100 N.W.2d 37 (Neb. 1951).*

(n28)Footnote 174. *Thomas v. Rogers, 53 So. 2d 736 (Ala. 1951); Combs v. Dubois, 662 P.2d 140 (Ariz. 1982); Klein v. Coswell, 199 P.2d 689 (Cal. App. 1948); Roche III v. Town of Fairfield, 442 A.2d 911 (Conn. 1982); Bakutis v. Schramm, 448 N.E.2d 982 (Ill. App. 1983); Chicago Title & Trust Co. v. Darley, 1 N.E.2d 846 (Ill. 1936); Snelling v. Adair, 199 So. 782 (La. 1940); Louisiana-Delta Hardwood Lumber Co. v. Johnson, 19 So. 2d 687 (La. App. 1944); Peters v. Staubitz, 498 A.2d 661 (Md. App. 1985); La Chance v. Rubashe, 17 N.E.2d 685 (Mass. 1938); Denton v. Ipock, 652 S.W.2d 290 (Mo. App. 1983); Frazier v. Shantz Real Estate & Inv. Co., 123 S.W.2d 124 (Mo. 1938); Saunders v. Rebuck, 496 N.W.2d 472 (Neb. 1993); Devins v. Borough of Bogota, 568 A.2d 903 (N. J. Super. 1989); Hightower v. Pendergrass, 662 S.W.2d 932 (Tenn. 1983); Jarvis v. Gillespie, 587 A.2d 981 (Vt. 1991); Blair v. Preece, 377 S.E.2d 493 (W. Va. 1988); Crites v. Koch, 741 P.2d 105 (Wash. App. 1987).*

Occasional acts of ownership or occasional trespasses are ordinarily insufficient to establish an adverse holding. Evans v. Joseph, 132 A.891 (Del. Ch. 1926) (use of water in pond held not to give prescriptive title to the bed of the pond); *Clark v. Cochran, 85 So. 250 (Fla. 1920)* (desultory logging operations on wild land); New York-Kentucky Oil & Gas Co. v. Miller, 220 S.W.535 (Ky. 1920) (grazing stock or permitting others to graze stock on land claimed to have been held adversely); *Industrial Lumber Co. v. Farque, 111 So. 166 (La. 1926)* (cutting and removing posts and logs from swamp lands held insufficient, but surveying the land and keeping a man in charge thereof is sufficient); Baxter v. Girard Trust Co., 135 A.620 (Pa. 1927) (leaning of party wall beyond boundary lines held not to establish title by adverse possession to ground covered by leaning wall). Compare, O'Banion v. Simpson, 191 P.1083 (Nev. 1920) (where land was suited only for grazing purposes, the grazing of cattle thereon under charge of a herder who was instructed to confine them to that particular tract constituted actual possession).

A parol gift of land must be perfected by adverse possession for the required statutory period. Lyles v. Fellers, 136 S.E.13 (S.C. 1926).

Physical residence is not always essential. Adverse use in a manner consistent with the nature of the property is sufficient. *Turnham v. Potter, 271 So. 2d 246 (Ala. 1972).*

Cutting of timber is not of itself adverse possession. *Cagle v. Valter, 170 N.E.2d 593 (Ill. 2d 1960); Conran v. Girvin, 341 S.W.2d 75 (Mo. 1960).*

Adverse possession is sufficient if land is used continuously for purposes for which it may by nature be adapted. *Shirk v. Schmunk, 218 N.W.2d 433 (Neb. 1974).*

Building of fence not conclusive as to adverse possession. *Payne v. Priddy, 371 S.W.2d 783 (Tex. Civ. App. 1963).*

Acts must be such as to give actual owner notice of claim by adverse possession. *Miller v. Fitzpatrick, 418 S.W.2d 884 (Tex. Civ. App. 1967). See 21 BAYLOR L. REV. 95.*

(n29)Footnote 175. *Harris v. Lynch, 940 S.W.2d 42 (Mo. App. 1997)* (Evidence not sufficient to establish adverse possession to strip of land) (manifestations of possession exhibited by claimant adequate to support possession in populous area differ from those which would support such a finding in a farming area); *Faulks v. Schrider, 114 F. 2d 587 (1940); United States v. Chatham, 323 F. 2d 95 (1963); Richterberg v. Wittich Mem. Church, 222 F. Supp. 324 (W. D. Okla. 1963); Bergen v. Dixon, 527 So. 2d 1274 (Ala. 1988); Thorman v. Cross, 541 N.E.2d 840 (Ill. App. 1989); Ranger Land Co. v. Story, 1 So. 2d 410 (La. App. 1941); Estate of Stone v. Hanson, 621 A.2d 852 (Me. 1993); Gadd v. Stone, 459 So. 2d 773 (Miss. 1984); Nennemann v. Rebuck, 496 N.W.2d 467 (Neb. 1993); Olson v. Fedde, 107 N.W.2d 663 (Neb. 1961); Patton v. North Jersey Dist. Water Supply Comm'n, 459 A.2d 1177 (N. J. 1983); Mullis v. Winchester, 118 S.E.2d 61 (S.C. 1961); Price v. Humble Oil & Ref. Co., 152 S.W.2d 804 (Tex. Civ. App. 1941)* (in determining what will amount to actual adverse possession, considerable importance must be attached to the nature and uses of the land, and that adverse possession is one thing in a populous country, another thing in a sparsely settled one, and still a different thing in a town or village); *Hart v. Rochelle, 170 S.W.2d 245 (Tex. Civ. App. 1943). See Kelso v. Caffery, 58 So. 2d 402 (La. 1952)* (acts of trapping held insufficient); *W. T. Carter & Bro. v. Ruth, 275 S.W.2d 126 (Tex. Civ. App. 1955)* (hunting and fishing held sufficient).

"Possessio pedis must correspond in a reasonable degree with the size of the tract, its condition and appropriate use, and must be such as usually accompany the ownership of land similarly situated. *Ewing v. Burnet, 36 U. S. (11 Pet.) 41 (1837); Brumagim v. Bradshaw, 39 Cal. 24 (1870).*

Where one is occupying enclosed premises, one does not have to build over the entire premises in order to make the holding adverse. It is sufficient if one occupies the land to which one has deed and not only claims the adjoining land, but actually enters thereon and regularly uses it in the way that land adjoining one's home is ordinary used. Davis v. Davis, 277 S.W.1025 (Ky. 1925) (town property). Cultivation is sufficient evidence of adverse holding. *Cambron v. Kirkland, 253 So. 2d 180 (Ala. 1971).*

Cultivation is evidence of possession as against a purchaser. *Humble Oil & Ref. Co. v. Laws, 272 So. 2d 841 (Fla. App. 1973).*

Pasturing, cropping, soil conservation and hay growing for more than 20 years established adverse possession. *Illinois Ry. Museum, Inc. v. Siegel, 266 N.E.2d 724 (Ill. App. 1971).*

Extent of possession depends upon the nature and character of the ground. *Authement v. Theriot, 292 So. 2d 319 (La.*

App. 1974); Derryberry v. Deford, 506 S.W.2d 152 (Tenn. App. 1973).

The nature of the land determines the type of use required to establish possession. *Succession of Kemp v. Robertson, 316 So. 2d 919 (La. App. 1975).*

Fencing and grazing cattle was sufficient possession. *Kimbell v. Allred, 317 So. 2d 487 (Ala. 1975).*

Partial fencing and use for pasture held sufficient possession. *William T. Burton Indus. v. Cook, 322 So. 2d 880 (La. App. 1975).*

Grazing of cattle in Louisiana may be sufficient possession. *Mustiful v. Galaspy, 340 So. 2d 659 (La. App. 1976).*

Mere mowing of grass not sufficient possession. *Wagley v. Cross, 347 So. 2d 859 (La. App. 1977).*

Mere maintenance of garden not sufficient possession. *Bailey v. Mahr, 255 N.W.2d 866 (Neb. 1977).*

Situation of parties, size and extent of land and purpose for which adopted controls adverse possession. *Sears v. State Dep't of Wildlife Conserv., 549 P.2d 1211 (Okla. 1976).*

Timbering, hunting, fishing and picnicking held insufficient possession. *Seven Springs Farms, Inc. v. King, 344 A.2d 641 (Pa. Super. 1975).*

Grazing or cultivation without enclosure held insufficient. *Gandy v. Culpepper, 528 S.W.2d 333 (Tex. Civ. App. 1975).* Grazing held sufficient occupation where land only adaptable and capable of being used for that purpose. *Doyle v. Ellis, 549 S.W.2d 62 (Tex. Civ. App. 1977).*

Where this was the sole use of which land was capable, grazing was sufficient to cite adverse possession. *Doyle v. Ellis, 549 S.W.2d 62 (Tex. Civ. App. 1977).*

Essential dominion is determined by the location, condition and reasonable use of the property. *Somon v. Murphy Fabrication & Erection Co., 232 S.E.2d 524 (W. Va. 1977).*

Occupation must be sufficient to place an ordinary, prudent person on notice. *Somon v. Murphy Fabrication & Erection Co., 232 S.E.2d 524 (W. Va. 1977). Whiteside v. Rottger, 913 S.W.2d 114,* (Mo. App. E.D., 1996)

(n30)Footnote 176. *Tampa Mtg. & Title Co. v. Smythe, 109 So. 2d 524 (Fla. 1958).*

(n31)Footnote 177. *Tensaw Land & Timber Co. v. Rivers, 15 So. 2d 411 (Ala. 1943); Monroe v. Rawlings, 49 N.W.2d 55 (Mich. 1951).* But see Murray v. Bousquet, 280 P.935 (Wash. 1929).

Mere cutting of posts and firewood did not establish possession. *Vick v. Berg, 473 S.W.2d 858 (Ark. 1971).*

Mere pasturing of livestock was not sufficient possession. *Cooper v. Cooper, 476 S.W.2d 223 (Ark. 1972).*

Acts of sporadic possession were insufficient. *Epps v. Freeman, 200 S.E.2d 235 (S.C. 1973).*

Merely grazing livestock on unfenced land was not possession. *Dingman v. Spengler, 371 S.W.2d 416 (Tex. Civ. App. 1963).*

Grazing as "possession" requires enclosure. *Dorbandt v. Jones, 492 S.W.2d 601 (Tex. Civ. App. 1973).*

Occasional cutting of timber is not such possession as to sustain adverse possession. *Sims v. Cage, 523 S.W.2d 486 (Tex. Civ. App. 1975).*

(n32)Footnote 178. *Bergen v. Dixon, 527 So. 2d 1274 (Ala. 1988); Harris v. Pinelog Props., Inc., 474 So. 2d 1113 (Ala. 1985); Stevenson v. Anderson, 6 So. 285 (Ala. 1889); Brumagim v. Bradshaw, 39 Cal. 24 (1870); Stowell v. Swift, 576 A.2d 204 (Me. 1990); Senn v. Western Mass. Elec. Co., 471 N.E.2d 131 (Mass. App. 1984); Board of Trustees of Monroe County Bd. of Educ. v. Rye, 521 So. 2d 900 (Miss. 1988); Gurwit v. Kannatzer, 788 S.W.2d 293 (Mo. App. 1990); Devins v. Borough of Bogota, 568 A.2d 903 (N. J. Super. 1989);* Pennsylvania R. Co. v. Breckenridge, 38 A.740 (N. J. L. 1897); Archibald v. New York Cent. & H. R. Co., 52 N.E.567 (N.Y. 1899); *Maynard v. Hibble, 418 S.E.2d 871 (Va. 1992).*

Under the Arkansas statute one not claiming under color of title must show "actual or pedal" possession of claimed boundaries. *Coons v. Lawler, 372 S.W.2d 826 (Ark. 1963).*

(n33)Footnote 179. *Richburg v. Golphin, 419 So. 2d 224 (Ala. Civ. App. 1982); Beasley v. Clark, 14 So. 744 (Ala. 1894); Clifton v. Liner, 552 So. 2d 407 (La. 1989); Whitley v. Texaco, Inc., 434 So. 2d 96 (La. 1983); Michel v. Stream, 19 So. 215 (La. Ann. 1896); Blankinship v. Payton, 605 So. 2d 817 (Miss. 1992); Heide v. Sheeks, 682 S.W.2d 877 (Mo. App. 1984); Hutton v. Townsend, 542 N.Y.S.2d 48 (1989); Casstevens v. Casstevens, 304 S.E.2d 623 (N.C. App. 1983); Arcadia Co. v. Peles, 576 A.2d 1114 (Pa. Super. 1990); Sleboda v. Heirs at Law of Harris, 508 A.2d 652 (R. I. 1986); Kirkland v. Gross, 332 S.E.2d 546 (S.C. 1985);* Liberman v. Clark, 85 S.W.258 (Tenn. 1905); *Garcia v. Palacios, 667 S.W.2d 225 (Tex. App. 1984); Perpignani v. Vonasek, 408 N.W.2d 1 (Wis. 1987).*

Encroachmen of building of long standing raised presumption of adverse possession. *Green v. Ayres, 535 P.2d 762 (Or. 1975).*

(n34)Footnote 180. *Gallea v. Hess Realty Corp., 515 N.Y.S.2d 683 (1987); Ewing v. Burnet, 36 U. S. (11 Pet.) 624 (1837);* Collett v. Vanderburgh, 21 N.E.329 (Ind. 1889); Colvin v. Republican Valley Land Ass'n, 36 N.W.361 (Neb. 1888).

Tenant's possession is that of the landlord. *El Cerrito, Inc v. Ryndak, 376 P.2d 528 (Wash. 1962).*

(n35)Footnote 181. DeFreize v. Quint, 30 P.1 (Cal. 1892). *See Pender v. Jackson, 260 P.2d 542 (Utah 1953)* (under statute).

(n36)Footnote 182. Slaven v. Dority, 134 S.W.1166 (Ky. 1911); *Lynde v. Williams, 68 Mo. 360 (1878);* Northern Pac. R. Co. v. Cash, 216 P.782 (Mo. 1923).

(n37)Footnote 183. Pioneer Inv. & Trust Co. v. Board of Educ., 99 P.150 (Utah 1909); *Eddy v. St. Mars, 53 Vt. 462 (1881).* And see Bettack v. Conachen, 294 N.W.57 (Wis. 1940).

(n38)Footnote 184. *Young v. Newbro, 200 P.2d 975 (Wash. 1948).* Adverse possession without color of title is limited to land occupied. *Alley v. Martin, 464 S.W.2d 591 (Ark. 1971).*

Building a barbed wire fence, pasturing stock and forming cultivatable area was "possession. " *Walter v. Jones, 154 N.E.2d 250 (Ill. 1958).*

Mere flooding of lands however long continued, is not such possession as will ripen into title by adverse possession. *Alen v. City of Gold Beach, 506 P.2d 507 (Or. App. 1973).*

Maintenance of a fence over record owner's objection held adverse though fencing alone is not possession. Smith v.

Southern Ry. -*Carolina Div., 118 S.E.2d 440 (S.C. 1961).*

Mere grazing is not possession. *McDonnold v. Weinacht, 465 S.W.2d 136 (Tex. 1971).* Contra *Niles v. Churchill, 482 P.2d 994 (Colo. App. 1971).*

Grazing of cattle up to a fence was sufficient possession. *Kimbell v. Allred, 317 So. 2d 487 (Ala. 1975).*

Cattle herding and living on property during trapping season held sufficient possession. *Liner v. Louisiana Land & Exploration Co., 319 So. 2d 766 (La. 1975).*

Pasturing and partial fencing held sufficient. *William T. Burton Indus. v. Cook, 332 So. 2d 880 (La. App. 1976).*

Fencing, hunting and picnicking held insufficient possession. *Seven Springs Farm, Inc. v. King, 344 A.2d 641 (Pa. Super. 1975).*

Cultivation of a part and grazing held not sufficient possession. *Gandy v. Culpepper, 558 S.W.2d 333 (Tex. Civ. App. 1977).*

Mere entry and possession without claim of right is mere trespass. *City of Houston v. Church, 554 S.W.2d 242 (Tex. Civ. App. 1977).*

(n39)Footnote 185. *Brumagim v. Bradshaw, 39 Cal. 24 (1870).*

(n40)Footnote 186. *Adair v. Bonninghausen, 9 N.W.2d 35 (Mich. 1943); Showalter v. Moist, 48 Lanc. Rev. 385 (Pa. 1943).*

Fencing, required where no color of title. *Brown v. Berman, 21 Cal. Rptr. 401 (1962).*

Clearing brush as possession. *Hibbard v. Robert G. Fromkin Woolen Corp., 165 A.2d 49 (Me. 1960); Kershaw v. Zecchini, 173 N.E.2d 624 (Mass. 1961).*

"Enclosure" no longer necessary in *Louisiana. Menefee v. Arkansas-Louisiana Gas Co., 141 So. 2d 58 (La. App. 1962).*

Cutting of timber is not sufficient possession. *Watkins v. Zwigler, 147 So. 2d 435 (La. App. 1962); Warren v. Swanzy, 361 S.W.2d 479 (Tex. Civ. App. 1962).*

(n41)Footnote 187. *Cockrell v. Kelley, 428 So. 2d 622 (Ala. 1983); Overson v. Cowley, 664 P.2d 210 (Ariz. 1982); Park v. Powers, 42 P.2d 75 (Cal. 1935); Rice v. Hill City Stock Yards Co., 826 P.2d 1328 (Idaho App. 1990); Tapley v. Peterson, 489 N.E.2d 1170 (Ill. App. 1986); Williams v. Rogier, 611 N.E.2d 189 (Ind. App. 1993);* Morris v. Thomas Forman Co., 266 S.W.873 (Ky. 1924); Jones v. Hargis, 150 S.W.928 (Ky. 1941); *Miceli v. Foley, 575 A.2d 1249 (Md. App. 1990); Gannon v. Bywaters, 669 S.W.2d 756 (Tex. App. 1984); Stewart v. McKee, 150 S.W.2d 245 (Tex. Civ. App. 1941); Klinefelter v. Dutch, 467 N.W.2d 192 (Wis. 1991). See* Fredericksen v. Henke, 209 N.W.257 (Minn. 1926); *Hardy v. Bumpstead, 41 S.W.2d 226 (Tex. Com. App. 1931); Ross v. Houston Oil Fields Ass'n, 88 S.W.2d 586 (Tex. Civ. App. 1935).*

After land has been abandoned as a public cemetery it may be acquired by adverse possession. *Hutchinson Land Co. v. Whitehead, 219 N.Y. S. 413 (1926).*

Clearing of brush and erection of a sign "was not possession." *National Prop. Owners Ass'n v. Hogue, 318 S.W.2d 151*

(Ark. 1958).

Cultivation is evidence of possession as against a purchaser. *Humble Oil & Ref. Co. v. Laws, 272 So. 2d 841 (Fla. App. 1973).*

(n42)Footnote 188. *Arcadia v. Peles, 576 A.2d 1114 (Pa. Super. 1990); Marion County v. Sparks, 112 S.W.2d 798 (Tex. Civ. App. 1938).*

Fence constituted exercise of dominion for adverse possession. *James v. Mizell, 265 So. 2d 866 (Ala. 1972).* But is not alone sufficient. *Cox v. Olivard, 482 S.W.2d 682 (Tex. Civ. App. 1972).*

Florida requires a substantial enclosure for adverse possession under color of title. *Kerrigan v. Thomas, 281 So. 2d 410 (Fla. App. 1973).*

Only by fencing or cultivation or improvement may possession be established necessary to set up adverse possession. *Swanson v. State, 358 P.2d 387 (Idaho 1960).*

Holding that a line of trees had not been sufficiently dense during the entire period of possession to constitute the enclosure required by statute, *Hemon v. Rowe Chevrolet Co., 226 A.2d 792 (N. H. 1967).*

Fence is an enclosure for purpose of possession though erected by adjoining landowner. *Seagle v. Montgomery, 88 S.E.2d 357 (S.C. 1955).*

Holding that fencing as an incident to grazing was insufficient possession for adverse possession. *McDonnold v. Weinacht, 465 S.W.2d 136 (Tex. 1976).*

Construction of fence and possession up to the fence line created adverse possession. *Vetick v. Kula, 247 N.W.2d 637 (Neb. 1976).*

(n43)Footnote 189. Anderson v. Burnham, 34 P.1056 (Kan. 1893); Whitaker v. Erie Shooting Club, 60 N.W.983 (Mich. 1894).

Possession is sufficient if the continued use of the land is for the purpose for which it is susceptible. *Kimble v. Willey, 204 F. 2d 238 (8th Cir. 1953).*

Jarboe v. Yopp, 283 S.W.2d 213 (Ky. 1955); Boudreaux v. Olin Indus., 94 So. 2d 417 (La. 1957) (cutting of timber and granting of mineral rights held acts of possession for prescription); *Hallmark v. Baca, 301 P.2d 527 (N. M. 1956)* (fencing on all accessible sides of tract held possession).

Holding that occupancy during the summer only constituted adverse possession. *Reymore v. Tharp, 553 P.2d 456 (Wash. App. 1976); Alaska Nat'l Bank v. Link, 559 P.2d 1049 (Alaska 1977).*

(n44)Footnote 190. *French v. Pearce, 21 Am. Dec. 680 (Conn. 1831); LaFrombois v. Jackson, 8 Cow. (N.Y.) 589 (1826);* Faull v. Cooke, 26 P.662 (Or. 1890); Algonquin Coal Co. v. Northern Coal & Iron Co., 29 A.402 (Pa. 1894).

(n45)Footnote 191. *Bauer v. Bush, 193 N.E.2d 529 (Ohio App. 1962);* Widdicomb Co. v. Card, 187 N.W.308 (Mich. 1922).

The requirement of exclusiveness in adverse possession does not mean that sporadic use by others defeats this, since it only need be the type of possession which would characterize an owner's use. *Somon v. Murphy Fabrication & Erection Co., 232 S.E.2d 524 (W. Va. 1977).*

(n46)Footnote 192. *Dargan v. Keystone Mills Co., 64 S.W.2d 1054 (Tex. Civ. App. 1933); Hart v. Rochelle, 170 S.W.2d 245 (Tex. Civ. App. 1943); Adams v. Lamicq, 221 P.2d 1037 (Utah 1950).*

Mere cutting of timber was not acquisitive prescription. *Poole v. Continental Can Co., 232 So. 2d 832 (La. App. 1970).*

Possession is sufficient if used for purpose for which land is adapted. *Hammerly v. County of Dodge, 185 N.W.2d 452 (Neb. 1971).*

Payment of taxes and picnicking on wild land held adverse possession. *Knecht v. Spake, 346 P.2d 98 (Or. 1959).*

Adverse possession must be of such a nature as to notify the true owner of the assertion of the hostile claim. *Roth v. Mechom, 542 S.W.2d 878 (Tex. Civ. App. 1976).*

(n47)Footnote 193. *Smith v. Pyles, 78 S.E.2d 5 (Ga. 1953); Flinn v. Blakeman, 71 S.W.2d 961 (Ky. 1934).*

Lacking color of title, adverse possession is limited to the land actually occupied. *Vick v. Berg, 473 S.W.2d 858 (Ark. 1971).*

(n48)Footnote 194. *Storey v. Patterson, 437 So. 2d 491 (Ala. 1983); Lewis v. Village of Lyons, 389 N.Y.S.2d 674 (1976).*

(n49)Footnote 195. *Adair v. Bonninghausen, 9 N.W.2d 35 (Mich. 1943); Showalter v. Moist, 48 Lanc. Rev. 385 (Pa. 1943).*

(n50)Footnote 196. *McDonnold v. Weinacht, 465 S.W.2d 136 (Tex. 1971)* (fencing as an incident to grazing was insufficient possession for adverse possession); *Stumpf v. Osterhage, 94 Ill. 115 (1879)* (possession and use of land that is not entirely enclosed by fences may be sufficient to establish adverse possession).

(n51)Footnote 197. *Nadler v. California Vets. Bd., 199 Cal. Rptr. 546 (1984); Baugher v. Boley, 58 So. 980 (Fla. 1912);* Brown v. Brown, 110 P.269 (Idaho 1910); Lockey v. Horsky, 2 P.19 (Mont. 1982); *Brown v. Evans, 182 S.W.2d 580 (Mo. 1844); In re Lent, 152 App. Div. 868, 137 N.Y. S. 1052 (1912); Moran v. Stanolind Oil & Gas Co., 127 S.W.2d 1012 (Tex. Civ. App. 1939); Klinefelter v. Dutch, 467 N.W.2d 192 (Wis. 2d 1991);* Funk v. Anderson, 61 P.1006 (Utah 1900).

Some states require that there be a substantial enclosure of the land before there can be possession as an alternative to color of title or cultivation. Cal. Civ. Proc. Code § 325; N.Y. REAL PROP. ACTIONS, art. 5, § 522. Enclosures are necessary where claim is under color of title. *J. H. Jenkins Contractors v. Farriel, 246 So. 2d 340 (La. App. 1971).*

(n52)Footnote 198. *Grayson Roper Ltd. Part. v. Finlinson, 782 P.2d 467 (Utah 1989); Chapman v. Sky L'Onda Mut. Water Co., 159 P.2d 988 (Cal. App. 1945).*

(n53)Footnote 199. *LaDue v. Currell, 110 S.E.2d 217 (Va. 1959).*

(n54)Footnote 200. *Id.*

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CHAPTER 87 ADVERSE POSSESSION

10-87 Thompson on Real Property, Thomas Editions § 87.05

AUTHOR: Professor Olan B. Lowrey School of Law Temple University Portion of this Chapter are based on Ch. 38 of George W. Thompson, Commentaries on the Law of Real Property (John S. Grimes, ed. reprinted 1979).

§ 87.05 Essential Elements of Adverse Possession.

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The unfolding of the bud of possession into the flower of title comes so close to the concept of a forfeiture obtained by equity that the law has developed certain elements essential to such perfection of title. Generally speaking, since there are no equities in favor of a person seeking to acquire property of another by adverse holding, the person's acts are to be strictly construed. n201 These elements become part of the common law doctrine of adverse possession even though under the rule of the particular state adverse possession is bottomed on a particular statute of limitations which is itself silent as to these requisites. Probably in no state is the statute of limitations self-sufficient. Always it is supplemented by these common-law rules. n202 In order for there to be "adverse possession" there must be first "possession" as that concept is developed under the law of the particular jurisdiction. n203 "Unless the adverse claimant is so in possession of the land that he may at any time be sued as trespasser the statute will not run in his favor; and although he may have taken actual possession, if he does not continue there sufficiently so that he may be sued at any time as a trespasser during the prescriptive bar, he cannot rely on the statute of limitations." n204 Second, the possession must be "adverse." n205 Again, the interpretation of this universally required doctrine of adversity has had a variety of treatment. Always, to be adverse, the "possession" must be open and notorious. n206 Notice required in adverse possession is not merely mere occupancy but that which opposes the owner's right and is defiant and inconsistent with the title. n207 It must be under a claim of right n208 or title, n209 continuous, n210 exclusive, n211 and it must be for the length of time required by statute. n212 In most jurisdictions the possession must be hostile. n213 The great weight of authority does not require color of title, n214 but many states do give certain benefits by statute or common law to adverse possessors who do claim under color of title. n215 In some states to claim the benefits, the possession must be in good faith. n216 The absence of any of these elements, or others required by statute, will prevent the acquisition of title by adverse possession. n217 In addition to these elements, some jurisdictions require, that the claimant pay taxes. n218 Where there are tax payment requirements, the courts have disagreed as to the necessity of paying taxes in adverse possession of boundary strips. n219 Payment of taxes is primarily evidence of a claim of right under common law standards. Some few states have short-term statutes where payment of taxes is a substantive element of adverse possession.

A statute requiring the payment of taxes as an element of adverse possession does not retroactively affect titles which

have been perfected by adverse possession prior to the passage of the statute. n220 Therefore, a tax-exempt organization which was in possession, but had failed to pay taxes on the property, did not obtain title by adverse possession. n221

If the statute required the payment of taxes during the period relied upon for adverse possession, failure to make such payments prevented the statute from running, although the statute was later repealed. n222 In the absence of a statute changing the rule, the fact that the owner of a legal title to land pays taxes from time to time does not prevent the running of the statute of limitations to defeat the title by adverse possession. n223 Under a statute requiring the adverse holder, predecessors, and grantors to pay all taxes levied and assessed against the property for the number of consecutive or successive years comprised in the statutory period, such payments are a condition precedent to the establishment of a title by adverse possession. Failure to pay the taxes for any one or more years of the statutory period is fatal, n224 regardless of whether or not the adverse claimant had color of title or other evidence of interest in the land involved. n225 Under a statute providing that possession under color of title and payment of taxes for seven years constitutes title by adverse possession, color of title must be acquired before payment of taxes relied upon; and the color of title, possession, and payment of taxes must exist concurrently without interruption and must continue throughout the same seven years. n226

Some courts have taken the position that there may be acts constituting "possession" without it being so open and notorious as to be "adverse." n227

COMPUTER-ASSISTED RESEARCH

LEXIS: Adverse possession w/20 essential elements

FOOTNOTES:

(n1)Footnote 201. *Bullock v. Andrews, 688 So. 2d 845 (Ala. App. 1997)* (evidence established exclusive, continuous and hostile possession for 30 years); *Mashburn v. Tucker, 705 So. 2d 400 (Ala. 1997)* (where adverse claim started in 1945 based upon an old fence which was maintained by landowners and since 1976 based upon a survey, and the adjoining landowners knew the fence to be on their land, adverse possession was established); *Drake v. Cornelius, 706 So.2d 1214 (Ala. App. 1997)* (fencing in of adjacent property did not constitute claim of right where the party claimed only property as set forth in the fencer's deed and had not occupied the fenced in land for requisite ten years); *Paul v. Mead, 11 N.W.2d 706 (Iowa 1943)* (entry into actual possession in good faith as owner under the title translative thereof); *Miller v. Transcontinental Gas Pipe Line Corp., 358 F. Supp. 1357 (W. D. La. 1973).* Hostile possession, claim of right, actual possession, open and notorious possession, exclusive possession and continuous possession are essential to constitute adverse possession. *Wilton Boat Club v. Hazell, 502 S.W.2d 273 (Mo. 1973). See* Williams, Title by Adverse Possession in Indiana, *6 VAL. U. L. REV. 26 (1972). Rice v. McGinnis, 653 So. 2d 950 (Ala. 1995)* (adverse possession established by occupation of land over ten years through possession that was actual, hostile, open, notorious, exclusive and continuous).

(n2)Footnote 202. *See Parker v. McGinnes, 842 S.W.2d 357 (1992); Kurz v. Blume, 95 N.E.2d 338 (Ill. 1950); Neters v. Canutt, 46 N.W.2d 72 (Iowa 1951).*

Possession includes the right to exclude others. *In re Opinion of the Justices, 313 N.E.2d 561 (Mass. 1974).*

(n3)Footnote 203. *See Davis v. Harnesberger, 87 S.E.2d 841 (Ga. 1955)* (possession by one holding instrument purporting to convey fee, plus claim of exclusive ownership, constitutes adverse possession); Knight v. Denman, 90 N.W.863 (Neb. 1902); Murray v. Bousquet, 280 P.935 (Wash. 1929); *Ewing v. Burnett, 36 U. S. (11 Pet.) 41 (1837).*

Henry W. Ballantine, Title by Adverse Possession, *32 HARV. L. REV. 135 (1918);* Percy Bordwell, Disseisin and Adverse Possession, *33 YALE L. J. 141 (1923).*

(n4)Footnote 204. *Colley v. Carpenter, 362 N.E.2d 163 (Ind. App. 1977)* (a period of time provided by statute for adverse possession is shortened by statute, the earlier statute governs if the possession was started during the time of earlier statute). *See also Core v. Faupel, 24 W. Va. 238 (1884).*

(n5)Footnote 205. *Miller v. Transcontinental Gas Pipe Line Corp., 358 F. Supp. 1357 (W. D. La. 1973)* (Louisiana requires an entry in good faith to acquire acquisitive prescription).

All-*State Credit Plan Natchitoches, Inc. v. Ratliff, 279 So. 2d 660 (La. 1972)* overruling *Trahan v. Broussard, 206 So. 2d 82 (La. 1968)* (in order to have a taking, the possession of the "ancestor in title" must be in good faith).

In Louisiana, immovable property under a plea of 30 years' acquisitive prescription cannot only be acquired where there has been corporeal possession for the required length of time, but there must also be positive intention to take possession as owner. *Thomas v. Congregation of St. Sauveur Roman Catholic Church, 308 So. 2d 337 (La. App. 1975),* overruling Caufield v. Clark, 21 P.443 (Or. 1889) (an offer to buy possessor's title is a recognition of the title, and thereafter, the offeror may not claim the property under the doctrine of prior possession); *Stringfellow v. Brown, 326 S.W.2d 1 (Tex. Civ. App. 1959).*

Hensz v. Linnstaedt, 501 S.W.2d 463 (Tex. Civ. App. 1973) (intention to hold adversely to true owner is an indispensable element of adverse possession).

See also Marina v. Smith, 454 So. 2d 1380 (Ala. 1984); Home Loan Co. v. Calhoun, 104 So. 797 (Ala. 1925); Nome 2000 v. Fagerstrom, 799 P.2d 304 (Alaska 1990); Patchett v. Webber, 245 P.422 (Cal. 1926); Sheehan v. All Persons, 252 P.337 (Cal. App. 1926); *Matter of Estate of Qualteri, 757 P.2d 1093 (Colo. App. 1988);* Haymaker v. Windsor Reservoir & Canal Co., 254 P.768 (Colo. 1927); *Cluff v. Bonner County, 824 P.2d 115 (Idaho 1992); Poole v. Corwin, 447 N.E.2d 1150 (Ind. App. 1983);* Abel v. Love, 143 N.E.515 (Ind. App. 1924); *Carpenter v. Ruperto, 315 N.W.2d 782 (Iowa 1982);* Prymek v. Washington County, 296 N.W.467 (Iowa 1941); *Sieck v. Anderson, 1 N.W.2d 647 (Iowa 1942); Lynch v. Lynch, 34 N.W.2d 485 (Iowa 1948); Connelly v. Buckingham, 357 N.W.2d 70 (Mich. App. 1984);* Distasio v. Gervasio, 208 N.W.440 (Mich. 1926); *Meyers v. Meyers, 368 N.W.2d 391 (Minn. App. 1985); Schaumburg v. Heafey, 650 S.W.2d 697 (Mo. App. 1983); Hilgert v. Werner, 145 S.W.2d 359 (Mo. 1940); State ex rel. Edie v. Shain, 152 S.W.2d 174 (Mo. 1941); Riebold v. Smith, 150 S.W.2d 599 (Mo. App. 1941); Shandaken Reformed Church of Mount Tremper v. Leone, 451 N.Y.S.2d 227 (1982);* Belotti v. Bickhardt, 127 N.E.239 (N.Y. 1920); *Corman v. Hewitt, 105 N.Y.S.2d 239 (1951); Schrenk v. Garvin, 709 P.2d 762 (Or. App. 1985); Dry Gulch Ditch Co. v. Hutton, 133 P.2d 601 (Or. 1943); Schlagel v. Lombardi, 486 A.2d 491 (Pa. Super. 1984);* Baxter v. Girard Trust Co., 135 A.620 (Pa. 1927); *Hershey v. Poorbaugh, 21 A.2d 434 (Pa. Super. 1941); Taylor v. Goodwin, 375 S.E.2d 346 (S.C. 1988);* Atlantic Coast Line R. Co. v. Searson, 135 S.E.558 (S.C. 1926); *Ham v. Flowers, 51 S.E.2d 753 (S.C. 1949); Wright v. Wallace, 700 S.W.2d 269 (Tex. App. 1985); Glecker v. Denton, 149 S.W.2d 213 (Tex. Civ. App. 1941);* Churchman v. Rumsy, 264 S.W.218 (Tex. Civ. App. 1924); Temple Lumber Co. v. McFarland, 264 S.W.298 (Tex. Civ. App. 1924); Southwestern Lumber Co. v. Evans, 275 S.W.1078 (Tex. Civ. App. 1925); Jones v. Adkins, 292 S.W.260 (Tex. Civ. App. 1927); *Beck v. Loveland, 222 P.2d 1066 (Wash. 2d 1950); Seeley v. LaRosa, 370 S.E.2d 132 (W. Va. 1988);* Bitonti v. Kauffeld Co., 120 S.E.908 (W. Va. 1923).

(n6)Footnote 206. *Weaver v. Helm, 941 S.W.2d 801 (Mo. App. 1997)* (mistake as to legal ownership of property established adverse possession and description of property by precise legal description was sufficient to establish boundary line). *Grube v. Wells, 34 Iowa 148 (1872).* Open, notorious, actual, visible, exclusive, continuous, hostile and under claim of ownership; *Richterberg v. Wittich Memorial Church, 222 F. Supp. 324 (W. D. Okla. 1963); Lilly v. Palmer, 495 So. 2d 522 (Ala. 1986); Beverly Trust Co. v. Dekowski, 576 N.E.2d 1049 (Ill. App. 1991); Triplett v. Triplett, 193 N.E.2d 66 (Ind. App. 1963); Appalachian Regional Healthcare, Inc. v. Royal Crown Bottling Co., 824 S.W.2d 878 (Ky. 1992); Bedingfield v. Watson, 147 So. 2d 458 (La. App. 1962); Emerson v. Maine Rural Missions Ass'n, Inc., 560 A.2d 1 (Me. 1989); Green v. Lange, 797 S.W.2d 765 (Mo. App. 1990); Pettis v. Lozier, 349 N.W.2d 372 (Neb. 1984); Maggio v. Pruzansky, 537 A.2d 756 (N. J. Super. 1988); Sioux City Boat Club v. Mulhall, 117 S.W.2d 92*

(S.D. 1962); Panter v. Miller, 698 S.W.2d 634 (Tenn. App. 1985); Chaplin v. Sanders, 676 P.2d 431 (Wash. 1984); Willis v. Holley, 925 P.2d 539 (Okla. 1996); Lloyd v. Montecucco, 924 P.2d 927 (Wash. App., 1996); *Calvert v. Belcher, 678 So. 2d 795 (Ala. Civ. App. 1996); Anthony v. Searle, 681 A.2d 892 (R. I. 1996); Clark v. Hargrave, 473 S.E.2d 474 (S.C. App. 1996); Kitterman v. Simrall, 924 S.W.2d 872 (Mo. App. W. D. 1996).*

(n7)Footnote 207. *Russell v. Russell, 540 S.W.2d 626 (Mo. App. 1976); Root v. Mecom, 542 S.W.2d 878 (Tex. Civ. App. 1976)* (adverse possession must be of such a nature as to notify the true owner of the assertion of the hostile claim).

(n8)Footnote 208. *Powell v. Hopkins, 262 So. 2d 289 (Ala. 1972)* (Alabama requires ten-year color of title, taxation for ten successive years, or deed or devise from predecessor); Highstone v. Burdette, 20 N.W.64 (Mich. 1884).

(n9)Footnote 209. *Brewster v. Herron, 267 P.2d 143 (Okla. 1952); Tindle v. Linville, 512 P.2d 176 (Okla. 1973)* (To secure adverse possession, there must be a repudiation of the true owner's claim); *Buckely v. Taggart, 62 Ind. 236 (1878).*

(n10)Footnote 210. *San Francisco v. Fulde, 37 Cal. 349 (1869).* To the effect that adverse possession, to be "continuous," must furnish a cause of action for every day of the claimed possession. *Noland v. Wise, 259 S.W.2d 46 (Ky. 1953).* But doctrine questioned. *Kentucky Women's Christian Temperance Union v. Thomas, 412 S.W.2d 869 (Ky. 1967).*

Actual, open, continuous, exclusive adverse use under claim of right for requisite time. *Baumrin v. Cournoyer, 414 F. Supp. 326 (D. Mass. 1976); Piel v. DeWitt, 351 N.E.2d 48 (Ind. App. 1976); Council Bluffs Sav. Bank v. Simmons, 243 N.W.2d 634 (Iowa 1976). Gonzalez v. Naman, 678 So. 2d 1152 (Ala. App. 1996). Kitterman v. Simrall, 924 S.W.2d 872 (Mo. App. W. D. 1996); Elder v. Smith, 474 S.E.2d 590 (W. Va. 1996).*

(n11)Footnote 211. *Brumagim v. Bradshaw, 39 Cal. 24 (1870); Meyer v. Canutt, 46 N.W.2d 72 (Iowa 1951); Harrelson v. Reaves 65 S.E.2d 478 (S.C. 1951);* see Annotation, 35 A.L. R. 134 (1925); *Beason v. Bowlin, 149 So. 2d 283 (Ala. 1962); Diem v. Diem, 372 P.2d 19 (Okla. 1962).* Requirement that use be "exclusive" means claim of right, not the use itself. *Zimmerman v. Summers, 330 A.2d 722 (Md. App. 1975).* Exclusive possession is essential. *Nihoa v. Chow, 552 P.2d 77 (Haw. 1976); Kitterman v. Simrall, 924 S.W.2d 872 (Mo. App. W. D. 1996); Elder v. Smith, 474 S.E.2d 590 (W. Va. 1996).*

(n12)Footnote 212. *See* William E. Taylor, Titles to Land by Adverse Possession, *20 Iowa L. Rev. 551.* Possession must be hostile. *McClellan v. King, 273 N.E.2d 696 (Ill. App. 2d 1971); Kitterman v. Simrall, 924 S.W.2d 872 (Mo. App. W. D. 1996); Elder v. Smith, 474 S.E.2d 590 (W. Va. 1996).*

(n13)Footnote 213. Preble v. Main Cent. R. Co., 27 A.149 (Me. 1893), 21 L. R. A.829; *Kitterman v. Simrall, 924 S.W.2d 872 (Mo. App. W. D. 1996); Elder v. Smith, 474 S.E.2d 590 (W. Va. 1996).*

(n14)Footnote 214. Color of title is not necessary for adverse possession. Tolley v. Thomas, 93 N.E.181 (Ind. App. 1910); Carpenter v. Coles, 77 N.W.424 (Minn. 1898).

(n15)Footnote 215. Swanson v. New York Cent. R. Co., 149 N.E.353 (Ind. App. 1925). *See* Jack T. Hutchinson, Requisites of Adverse Possession in Ohio, *22 U. Cin. L. Rev. 480 (1953).*

Open, notorious, uninterrupted and hostile. *Moore v. Anthony-Jones Lumber Co., 481 S.W.2d 707 (Ark. 1972); Grosvenor v. Olson, 199 N.W.2d 50 (Iowa 1972); Garris v. Butler, 189 S.E.2d 809 (N.C. App. 1972); Diel v. Beekman, 499 P.2d 37 (Wash. App. 1972).*

Holding no adverse possession in mining claims where the claimant knew he had no title and failed to comply with statutory requirements. *Nugget Props., Inc. v. Kittitas County, 431 P.2d 580 (Wash. 2d 1967).*

(n16)Footnote 216. *Hankins v. Pontoon Beach Amusement Park, Inc., 328 N.E.2d 714 (Ill. App. 3d 1975)* (hostile or adverse, actual, visible, notorious and exclusive, continuous possession and under claim of ownership is required); Missouri Lumber & Mining Co. v. Chronister, 259 S.W.1042 (Mo. 1924) (possession need not be under bona fide claim); Goulding v. Showquist, 141 N.W.24 (1913) (good faith required).

J. Rodney Lee, Notice as an Element of Adverse Possession, BAYLOR L. REV. 7, 234; John H. Merryman, Improving the Lot of the Trespassing Improver, *11 Stan. L. Rev. 456 (1959).*

(n17)Footnote 217. *Gunn v. Mickle, 501 So. 2d 466 (Ala. 1986); Lawrence v. Alabama State Land Co., 144 Ala. 524, 41 So. 612 (1906); Bentley Family Trust v. Lynx Enters., 658 P.2d 761 (Alaska 1983); Overson v. Cowley, 664 P.2d 210 (Ariz. 1982); Mooney v. Cooledge, 30 Ark. 640 (1875); Segelke v. Atkins, 357 P.2d 636 (Colo. 1960); Heacock v. Madsen, 696 P.2d 916 (Idaho 1985); Cagle v. Valter, 170 N.E.2d 593 (Ill. 2d 1960); Burlingame v. Marjerrison, 665 P.2d 1136 (Mont. 1983); Thornburg v. Haecker, 502 N.W.2d 434 (Neb. 1993);* Jenkins v. Maxwell Land Grant Co., 107 P.739 (N. M. 1910); *Cothran v. Akers Motor Lines, 127 S.E.2d 578 (N.C. 1962); Schlagel v. Lombardi, 486 A.2d 491 (Pa. Super. 1984); Panter v. Miller, 698 S.W.2d 634 (Tenn. App. 1985); Bywaters v. Gannon, 686 S.W.2d 593 (Tex. 1985);* Gillum v. Fuqua, 61 S.W.938 (Tex. Civ. App. 1901); *Broad v. Warnecke, 144 S.W.2d 1005 (Tex. Civ. App. 1940); Core v. Faupel, 24 W. Va. 238 (1884).*

First Nat'l Bank of Mattoon v. Spaniol, 318 N.E.2d 633 (Ill. App. 1974) (open, uninterrupted, continuous and exclusive use of property for more than 20 years where the origin of the way is not shown constitutes rebuttable presumption of an adverse right); *De Tenorio v. McGowan, 364 F. Supp. 1051 (1973); Ellingson v. Fuller, 513 P.2d 1339 (Ariz. App. 1973); Thomas v. State, 514 P.2d 572 (Haw. 1973)* (to be adverse, possession must be open, actual, hostile, notorious, continuous and exclusive for the statutory period).

(n18)Footnote 218. *Gue v. Olds, 799 P.2d 543 (Mont. 1990); Grubb v. State, 433 N.W.2d 915 (Minn. 1989); Holley v. May, 75 So. 2d 696 (Fla. 1954); Affleck v. Morgan, 364 P.2d 663 (Utah 2d 1961).*

People v. Ocean Shore R.R., 196 P.2d 570 (Cal. 1948) (payment of taxes alone is not adverse possession); *Bowden v. Heaton, 222 P.2d 247 (Cal. App. 1950).*

Moira Deirdre Ford, The Payment of Taxes Requirement in Adverse Possession Statutes, *37 Cal. L. Rev. 477 (1949);* Ind. Code Ann. § 3-1314.

Barnett v. Millis, 246 So. 2d 78 (Ala. 1971) (Statute requiring payments of taxes is not applicable to boundary encroachment); *Dillard v. Alexander, 168 So. 2d 233 (Ala. 1964)* (essential to have tax roll changed to name of adverse possessor); *Holley v. May, 75 So. 2d 696 (Fla. 1954)* (requirement of payment of taxes applied to property line disputes); *Ward Redwood Co., Inc. v. Fortain, 104 P.2d 813 (Cal. 1940)* (a statute requiring payment of taxes for adverse possession does not waive the common law requirements of adverse possession).

Contra, *Faulks v. Schrider, 114 F. 2d 587 (D. C. App. 1940) 21 B. U. L. Rev. 182* (statute avoided necessity of continuity of possession as long as taxes were paid); *Lower Yucaipa Water Co. v. Hill, 320 P.2d 877 (Cal. App. 2d 1958); Drew v. Mumford, 325 P.2d 240 (Cal. App. 2d 1958)* (where an agreed boundary line has been established, the tax requirement for adverse possession is satisfied).

Florida now requires payment of taxes unless holding under color of title. Fla. Stat. Ann. §§ 95.16-95.18. See James W. Day, Validation of Erroneously Located Boundaries by Adverse Possession and Related Documents, *10 U. Fla. L. Rev. 245.*

Palmer v. Greene, 31 So. 2d 70 (Fla. 1947); Balmer v. Pollak, 186 P.2d 217 (Idaho 1947); Malouf v. Fischer, 159 P.2d 881 (Utah 1945) (no adverse possession of boundary because taxes not paid).

Meyer v. Law, 287 So. 2d 37 (Fla. 1973) (in Florida one claiming possession with or without color of title must pay taxes for seven years); *Pellman v. Fleming, 253 So. 2d 497 (Fla. App. 1971)* (payment of taxes by possessor is essential); *Matter of Williams' Estate, 140 Cal. Rptr. 593 (1977)* (payment of taxes is essential); *Longabaugh v. Johnson, 321 N.E.2d 865 (Ind. App. 1975)* (adverse possession is established by actual, visible, notorious, exclusive and hostile possession and payment of taxes during the period) (tax payments are not required if none are assessed); *Stark v. Stanhope, 480 P.2d 72 (Kan. 1971)* (payment of taxes is not required); *Geoghegan v. Krauss, 87 So. 2d 461 (Miss. 1956)* (payment of taxes not essential to adverse possession but it is evidence in support thereof).

Helland v. Custer County, 256 P.2d 1085 (Mont. 1953) (a statutory requirement of payment of taxes as an element of adverse possession is not applicable where no taxes have ever been assessed).

Townsend v. Koukol, 416 P.2d 532 (Mont. 1966) (requirement of paying taxes for adverse possession).

Sceirine v. Densmore, 479 P.2d 779 (Nev. 1971) (payment of taxes is necessary in adverse possession); *Zubieta v. Tarner, 351 P.2d 982 (Nev. 1960)* (where the statute required payment of taxes as an integral part of adverse possession, adverse possession would still run for each person whose part of the tax attributable to an overlapping parcel had been paid); *Knecht v. Spake, 346 P.2d 98 (Or. 1959)* (holding that paying taxes and using land for picnicking and such other incidental uses as it is suited for was adverse possession).

See Averill Q. Mix, Payment of Taxes As a Condition of Title by Adverse Possession: A 19th Century Anachronism, *9 SANTA CLARA L. REV. 244 (1969).*

(n19)Footnote 219. *Parsons v. Anderson, 690 P.2d 535 (Utah 1984); Thomas v. Davis, 410 So. 2d 889 (Ala. 1982)* requiring payment. *Ernie v. Trinity Lutheran Church, 327 P.2d 145 (Cal. 1958),* rev'd, *336 P.2d 525 (Cal. 1959).*

(n20)Footnote 220. *Dictum. Lykes Bros., Inc. v. Brautcheck, 106 So. 2d 582 (Fla. 1958).*

(n21)Footnote 221. *Ernie v. Trinity Lutheran Church, 327 P.2d 145 (1958),* rev'd, *336 P.2d 525 (Cal. 1959).*

(n22)Footnote 222. *Indiana Rocks Beach South Shore, Inc. v. Ewell, 59 So. 2d 647 (Fla. 1952).* Payment of taxes required. *Holley v. May, 75 So. 2d 696 (Fla. 1954).*

Edwards v. Hardin Properties, Inc., 313 So. 2d 82 (Fla. App. 1975) (if adverse possession has run prior to adoption of statute requiring payment of taxes by adverse possessor, the adverse possessor's title is not disturbed); *Slatin's Props., Inc. v. Hassler, 291 N.E.2d 641 (Ill. 1972)* (mere payment of taxes without taking possession was not adverse).

(n23)Footnote 223. *Kellison v. McIsacc, 559 A.2d 834 (N. H. 1989); Superior Oil Co. v. Harsh, 39 F. Supp 467 (1941);* France v. Butcher, 264 S.W.931 (Ark. 1924); King v. Foster, 140 P.930 (Colo. App. 1914); Turner v. Ladd, 84 P.866 (Wash. 1906).

(n24)Footnote 224. *Straub v. Capps, 13 S.W.2d 294 (Ark. 1928);* Southern Land Co. v. McKenna, 280 P.144 (Cal. App. 1929); Miller v. Weldon, 140 P.930 (Colo. App. 1914); Citizens Right of Way Co. v. Pollard, 180 P.259 (Idaho 1919); Glos v. Holberg, 77 N.E.80 (Ill. 1906); Allison v. Baird Dev. Co., 292 S.W.956 (Tex. Civ. App. 1927); Huntsman v. Huntsman, 192 P.368 (Utah 1920); *Brownstein v. Brelle, 75 P.2d 613 (Wash. 1938).*

Nicholas v. Giles, 426 P.2d 398 (Ariz. 1967) (adverse possessor may comply with the rule by paying taxes even though owner has paid them); *Ernie v. Trinity Lutheran Church, 327 P.2d 145 (1958),* rev'd, *336 P.2d 525 (Cal. 1959)* (adverse possession requires payment of taxes, a tax-exempt organization cannot acquire title by adverse possession).

See Averill Q. Mix, Payment of Taxes as a Condition of Title by Adverse Possession: A 19th Century Anachronism, *9*

SANTA CLARA L. REV. 244 (1969).

(n25)Footnote 225. *Bonifay v. Garner, 445 So. 2d 597 (Fla. 1984);* France v. Butcher, 264 S.W.931 (Ark. 1924); King v. Foster, 140 P.930 (Colo. App. 1914); Turner v. Ladd, 84 P.866 (Wash. 1906); Cavanaugh v. Jackson, 34 P.509 (Cal. 1893); *Zubieta v. Tarner, 351 P.2d 982 (Nev. 1893)* (where there were overlapping deeds, the fact that each owner had paid taxes did not prevent one from acquiring title to the disputed strip even where the statute required payment of taxes as an element of adverse possession).

Cothran v. Akers Motor Lines, 127 S.E.2d 578 (N.C. 1962) (In North Carolina, color of title must be supported by open, notorious and adverse possession for seven years).

(n26)Footnote 226. *Smith v. Brown, 134 N.E.2d 823 (Ind. App. 1956)* (the requirement of payment of taxes added to the established requirements of the acquisition of title by adverse possession is supplementary to the statute as to disseisin and does not supersede the same); *Gochenour v. Logsdon, 30 N.E.2d 666 (Ill. 1940).*

(n27)Footnote 227. *Leake v. Richardson, 103 S.E.2d 227 (Va. 1958)* (fishing and excluding others from fishing in a pond was not "adverse").

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CHAPTER 87 ADVERSE POSSESSION

10-87 Thompson on Real Property, Thomas Editions § 87.06

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§ 87.06 Establishment of Adverse Possession.

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The burden of proving the elements which will constitute adverse possession is upon the party who asserts it, n228 by clear and positive evidence. n229 In proving possession, the facts should be shown which in law constitute possession. n230 The intention to claim adversely need not be manifested by words, but may be inferred from the claimant's acts. n231 All presumptions are in favor of the holder over the true owner. n232 There is no presumption of the rightfulness of the claimant's possession; the claimant prevails only because the true owner has not seasonably asserted the right of ejectment. n233 The presumption is that the true owner's possession is in accordance with the legal title, and it requires clear and unmistakable evidence to overcome this presumption. n234 It should be noted that the commonly used phrase "legal title" is not used to denote legal as opposed to equitable. Rather it refers to the title held by the true owner who may have acquired title by adverse possession. Mere conclusions of a witness as to who was in possession are inadmissible. n235 Mere inference is never sufficient to establish a title by adverse possession. n236 The possession in order to support a claim to title by adverse possession must be hostile to the true owner and not merely subordinate to him. n237

To support title by adverse possession, it is necessary to show that there were no circumstances during the alleged adverse possession period preventing the claimant against whom it is asserted from exercising his or her right of possession. n238 While every presumption is in favor of a possession in subordination to the rightful owner, and title by adverse possession must be established by clear and positive proof, where the evidence is conflicting the weight of the evidence still remains a question for the court or jury trying the issue. n239 Adverse possession may be shown in various ways. Among these are residence on the land; n240 the erection of buildings and other structures n241 on the premises; making use of the land by clearing and cultivating, n242 cutting timber, n243 or pasturing; n244 or by the actual inclosure of the land with a fence. n245 A fence built by agreement and held by the parties for the statutory period constituted a boundary by adverse possession. n246 The changing and improving of the land, the opening and grading of streets, the cutting and removal of timber for the use of and sale by the one in possession, protecting the water front by the construction of bulkheads and the leasing of land to others are acts sufficient to establish adverse possession. n247 The fact that the person who exercised control over the land did not live on it has been held not to

imply that the person was not in possession. n248 The erection of buildings and other improvements is insufficient unless accompanied by actual occupation or open use; n249 but an application for a permit to erect a building on land has been held of little value, if any, in proving adverse possession of the land on which the applicant proposed to erect the building. n250 The inclosure and use of lands by the claimant is sufficient to show actual possession. n251 Even though it be considered that the inclosure of the ground by a fence is unnecessary, nevertheless, the extent of the ground claimed must be indicated in some way and be of such character as to clearly show that such ground is claimed by the party asserting to the right thereto. There must be such marks as indicate that the land is under the actual control of the party claiming it. n252 Where the quantity of land involved is small, the rule as to the location of the line is exacting and possession to the line during all the statutory period must be definitely shown. n253 Also, adverse possession may be evidenced by such acts as conveying, n254 leasing, n255 mortgaging, n256 or paying the insurance n257 or taxes n258 on the property; but payment of taxes has been held insufficient of itself to establish adverse possession. n259 When the evidence tends to show that the possession has all the qualities of an adverse holding, the law presumes that such possession is adverse, absent evidence to the contrary. n260 Thus where land beneath the overhanging eaves and gutters of the plaintiffs' house was in actual possession of its owners, it was held that the plaintiff did not acquire any title to such land merely because eaves and gutters overhung it for the statutory period. n261 At most the plaintiff could acquire an easement by prescription.

COMPUTER-ASSISTED RESEARCH

LEXIS: Adverse possession w/20 burden pre/2 proof or proving

FOOTNOTES:

(n1)Footnote 228. *Gunn v. Mickel, 501 So. 2d 466 (Ala. 1986); Ratliff v. Giorlando, 343 So. 2d 506 (Ala. 1977); McLester Bldg. Co. v. Upchurch, 60 So. 173 (Ala. 1912); Gerner v. Sullivan, 768 P.2d 701 (Colo. 1989);* Evans v. Welch, 68 P.776 (Colo. 1902).

Clark v. Drska, 473 A.2d 325 (Conn. App. 1984); Catlin v. Decker, 38 Conn. 262 (1871); Matter of Keamo, 650 P.2d 1365 (Haw. App. 1982); Heacock v. Madsen, 696 P.2d 916 (Idaho 1985); Morris v. Humphrey, 496 N.E.2d 1209 (Ill. App. 1986); Rich v. Neffziger, 94 N.E.1 (Ill. 1911); *Eakins v. Sadler, 683 S.W.2d 303 (Mo. App. 1984);* Spicer v. Spicer, 155 S.W.832 (Mo. 1913); *Kruse v. Horlamus Indus., 387 N.W.2d 64 (Wis. 1986);* Baty v. Elrod, 92 N.W.1032, 97 N.W.343 (Neb. 1903); Conkey v. Knudsen, 284 N.W.737 (Neb. 1939); *Miller v. Leaird, 413 S.E.2d 841 (S.C. 1992); Panter v. Miller, 698 S.W.2d 634 (Tenn. App. 1985); Harlow v. Miller, 520 A.2d 995 (Vt. 1986).*

(n2)Footnote 229. Naporra v. Weckwerth, 226 N.W.569 (Minn. 1929); Pauls Valley Nat'l Bank v. Foss, 226 P.567 (Okla. 1924).

Nutting v. Herman Timber Co., 29 Cal. Rptr. 754 (1963); Sherman v. Goloskie, 188 A.2d 79 (R. I. 1963).

Clear and positive proof of adverse possession is needed. *Redfearn v. Kuhia, 494 P.2d 562 (Haw. 1972); Grant v. Strickland, 385 So. 2d 1123 (Fla. App. 1980); Tietzel v. Southwestern Const. Co., 154 P.2d 238 (N. M. 1944); Park Acres, Inc. v. New York, 36 N.Y.S.2d 458 (1942); Linn County v. Rozelle, 162 P.2d 150 (Or. 1945);* Baxter v. Girard Trust Co., 135 A.620 (Pa. 1927); *Buchanan v. Nixon, 43 S.W.2d 380 (Tenn. 1931);* Lecomte v. Toudouze, 17 S.W.1047 (Tex. 1891); *Churchman v. Rumsey, 166 S.W.2d 960 (Tex. Civ. App. 1942); Hart v. Rochelle, 170 S.W.2d 245 (Tex. Civ. App. 1943);* Lockin v. Johnson, 202 S.W.168 (Tex. Civ. App. 1918); Raleigh v. Wells, 81 P.908 (Utah 1905); Rock Springs v. Strum, 273 P.908 (Wyo. 1929).

Burden of proof is on one claiming adversely. Handy v. Handy, N.W.2d 245 (N.D. 1973).

Contra, the burden is on the holder of the record title as against the adverse possessor. *Pure Oil Co. v. Skinner, 294 So. 2d 797 (La. 1974).* Burden of proof of one seeking to establish adverse possession. *Horacek v. Hudson, 538 P.2d*

1019 (Mont. 1975).

(n3)Footnote 230. *Finocchiaro v. Francescone, 198 A.2d 37 (R. I. 1964); Horton v. Smith-Richardson Inv. Co., 87 So. 905 (Fla. 1921).*

Adverse possession may be kept up without a personal residence, where the disseisor gives leases to tenants, puts them in possession, and receives rent from them, claiming the land as the disseisor's own. *Abel v. Love, 143 N.E. 515 (Ind. App. 1924).*

Irrespective of the title, if any, conferred by a will, title may be acquired to the property by adverse possession where the party claiming under the will, and each of the successive grantees thereunder, entered into actual possession of the real estate conveyed under a claim of ownership in fee simple and held openly and adversely for the statutory period. Coil v. Schetter, 152 N.E.870 (Ind. App. 1926).

A parol gift of land is ineffectual to pass title, even where accompanied by possession unless such possession is adverse. Weyhmueller v. Hannebohm, 154 N.E.771 (Ind. App. 1927).

The mere holding of a tax deed and the subsequent payment of taxes assessed upon the land so held is not such adverse possession as starts the running of the statute of limitations. Widdicomb Co. v. Card, 187 N.W.308 (Mich. 1922).

(n4)Footnote 231. *Lilly v. Palmer, 495 So. 2d 522 (Ala. 1986);* Rock Springs v. Strum, 273 P.908 (Wyo. 1929). Destruction of a line fence constitutes notice of an adverse boundary claim. *Gomes v. Upchurch, 432 P.2d 890 (Haw. 1967).*

(n5)Footnote 232. *Esquibel v. Hallmark, 586 P.2d 1083 (N. M. 1978); Buchanan v. Nixon, 43 S.W.2d 380 (Tenn. 1931);* Rock Springs v. Strum, 273 P.908 (Wyo. 1929).

Burden of proof on claimant to establish adverse possession. *St. Louis-San Francisco R. Co. v. Walter, 305 F. 2d 90 (10th Cir. 1962); White v. Wilks, 357 S.W.2d 908 (Mo. 1962).* Preponderance of evidence necessary to establish adverse possession. *Burns v. Owen, 357 S.W.2d 520 (Ark. 1962).*

Burden on one claiming adverse possession held fulfilled by more than 30 years' acquiescence to established curb line. *Martin v. Arndt, 95 N.W.2d 858 (Mich. 1959).*

Possession for 57 years held insufficient to overcome burden of showing possession was adverse. *White v. Wilks, 357 S.W.2d 908 (Mo. 1968).*

(n6)Footnote 233. *Taffinder v. Thomas, 381 A.2d 519 (R. I. 1972); Superior Oil Co. v. Harsh, 126 F. 2d 572 (7th Cir. 1942).*

(n7)Footnote 234. Lambert v. Hemler, 91 N.E.435 (Ill. 1910); Folley v. Thomas, 93 N.E.181 (Ind. App. 1910).

Presumption that possession is not adverse. *Lawse v. Glaha, 114 N.W.2d 900 (Iowa 1962); Parrish v. Minturn, 382 P.2d 861 (Or. 1963).*

(n8)Footnote 235. Carnahan v. Cummings, 180 N.W.558 (Neb. 1920).

(n9)Footnote 236. Peyton v. Stephens, 60 S.E.562 (Ga. 1908); *Mercer v. Wayman, 137 N.E.2d 815 (Ill. 2d 1956);* Finn v. Alexander, 171 P.602 (Kan. 1918); *Schwartz v. Kuhn, 10 Me. 274 (1833);* Preble v. Maine Cent. R. Co., 27 A.149 (Me. 1893), 21 L. R. A.829; *Budd v. Brooke, 3 Gill 198 (Md. 1845), 43 Am. Dec. 321; Riley v. Jameson, 3 N. H.*

23 (1823); Austin v. Bailey, 37 Vt. 219 (1864); Schwallback v. Chicago, M. & St. P.R. Co., 34 N.W.128 (Wis. 1887).

(n10)Footnote 237. Tony v. Knapp, 106 N.W.552 (Mich. 1906); In re Auditor General, 274 N.W.745 (Mich. 1937); *Miller v. Warren, 87 N.Y. S. 1011 (1904);* Ayers v. Reidel, 54 N.W.588 (Wis. 1893).

One standing by and watching property being sold by the title holder is estopped from later asserting his equitable interest. *Leidel v. Ballbach, 75 N.W.2d 860 (Mich. 1956).*

(n11)Footnote 238. Breeden v. Moore, 64 S.E.604 (S.C. 1909).

Possessor's acknowledgment of record title owner's rights while the statute is running defeats adverse possession. *Wolgamot v. Corley, 523 S.W.2d 491 (Tex. Civ. App. 1975).*

(n12)Footnote 239. *May v. Campbell, 470 So. 2d 1188 (Ala. 1985); Harvey v. Thorpe, 28 Ala. 250 (1856); Woods v. Montevallo Coal & TransP.Co., 3 So. 475 (Ala. 1888); Normant v. Eureka Co., 12 So. 454 (Ala. 1893); Roberts v. Brooks, 649 P.2d 710 (Alaska 1982); Sevier v. Locher, 272 Cal. Rptr. 287 (1990); Sands Assocs. v. Rios, 503 A.2d 179 (Conn. App. 1986); Clark v. Drska, 473 A.2d 325 (Conn. App. 1984);* Twining v. Goodwin, 77 A.953 (Conn. 1910); *Marathon Petr. Co. v. Colonial Motel Props., Inc., 550 N.E.2d 778* (Ind. App. 1 Dist. 1990); *A.M. K. U. Trust v. Talley, 580 So. 2d 1116 (La. App. 4 Cir. 1991); McMullin v. Dowley 418 A.2d 1147 (Me. 1980); Peabody v. Hewett, 52 Me. 33,* (1861); *Hutchins v. Maloomian, 590 N.E.2d 1171 (Mass. App. 1992); Miller v. Leaird, 413 S.E.2d 841 (S.C. 1992); Bywaters v. Gannon, 686 S.W.2d 593 (Tex. 1985);* Lockin v. Johnson, 202 S.W.168 (Tex. Civ. App. 1918); *Crites v. Koch, 741 P.2d 1005 (Wash. 1987); Perpignani v. Vonasek, 408 N.W.2d 1 (Wis. 1987);* Illinois Steel Co. v. Bilot, 84 N.W.855 (Wis. 1901); *Grappo v. Blanks, 400 S.E.2d 168 (Va. 1991).* Burden of proof is on the one seeking to establish adverse possession. *Russell v. Russell, 540 S.W.2d 626 (Mo. App. 1979).* Dickerson Pond Sewage Works Corp. v. Valeria Associates, 647 N.Y.S.268 (N.Y. A.D. 2 Dep't 1996).

(n13)Footnote 240. *Bennett v. Kovarick, 51 N.Y. S. 752 (1898).* See *Evans v. Thomas, 106 S.W.2d 1006 (Ky. 1937).*

Acknowledgment of a tenancy stops running of the period. *Boles v. Red, 227 S.W.2d 310 (Tex. Civ. App. 1950).*

Hostility presumed by holding boundary line despite disavowal of interest to hold land of another. *Faubion v. Elder, 301 P.2d 153 (Wash. 1956).*

(n14)Footnote 241. *Kitzinger v. Gulf Power Co., 432 So. 2d 188 (Fla. App. 1983); Idaho Forest Indus. v. Haden Lake Watershed Imp. Dist., 733 P.2d 733 (Idaho 1987); Hubbard v. Kiddo, 87 Ill. 578 (1943); Whittington v. Cameron, 52 N.E.2d 134 (Ill. 1943); Williams v. Rogier, 611 N.E.2d 189 (Ind. 1993)* (laying sewer lines, grading, excavation was sufficient); *Pinewoods Assocs. v. W. R. Gibson Dev. Co., 837 S.W.2d 8 (Mo. App. 1992); Titcomb v. Anthony, 492 A.2d 1373 (N. H. 1985); Sinicropi v. Town of Indian Lake, 538 N.Y.S.2d 380 (1989);* 1540 *Columbus Corp. v. Cuyahoga County, 589 N.E.2d 467 (Ohio App. 3d 1990); James v. Union Graded Sch. Dist. No. 2, 207 P.2d 241 (Okla. 1943); Brown v. Clemens, 338 S.E.2d 338 (S.C. 1985); Alzo Advertising, Inc. v. Industrial Props. Corp., 722 S.W.2d 380 (Tex. App. 1986);* Pioneer Inv. & Trust Co. v. Board of Educ., 99 P.150 (Utah 1909); *Perpignani v. Vonasek, 408 N.W.2d 1 (Wis. 1987).*

Where the supporting beams intruded into plaintiff's wall although the defendant had not known this, the defendant obtained title by adverse possession. *Ottavia v. Savarese, 155 N.E.2d 432 (Mass. 1959).*

Clearing of land and installing septic tank held sufficient adverse possession. *Collins v. Cabral, 206 N.E.2d 84 (Mass. 1965); Tenala v. Fowler, 921 P.2d 1114* (Alaska, 1996).

(n15)Footnote 242. *Hayes v. Cotter, 439 So. 2d 102 (Ala. 1983); Royall v. Lisle, 15 Ga. 545 (1854);* Omaha & Florence Land & Trust Co. v. Parker, 51 N.W.139 (Neb. 1892); *Hardy v. Bumpstead, 41 S.W.2d 226 (Tex. Com. App.*

1931); Central Pac. R. Co. v. Tarpey, 168 P.554 (Utah 1917); Gross v. Robinson, 256 P.80 (Wyo. 1927).

Cropping of hay as possession. Illinois Cent. R. Co. v. HaseN.W.inkle, 83 N.E.815 (Ill. 1908); *Kennebeck Purchase v. Springer, 4 Mass. 416 (1808).*

(n16)Footnote 243. *Drennen Land and Timber Co. v. Angell, 475 So. 2d 1166 (Ala. 1985); Baldrich v. Barbour, 90 F. 2d 867 (1st Cir. 1937); Martel v. Hunt, 197 So. 402 (La. 1940); Little v. Barbe, 198 So. 368 (La. 1940); Haas v. Dezauche, 37 So. 2d 441 (La. 1948); Ranger Land Co. v. Story, 1 So. 2d 410 (La. App. 1941);* Bolland v. O'Neal, 83 N.W.471 (Minn. 1900); *Hoelmer v. Heiskill, 221 S.W.2d 142 (Mo. 1949). Lake Charles Harbor & Terminal District v. Erwin Heirs, Inc., 673 So. 2d 1351 (La. App. 3 Cir. 1996).*

(n17)Footnote 244. *Robertson v. Dombroski, 678 So. 2d 637 (Miss. 1996); State Nat'l Bank & Trust Co. v. Jacobsen, 358 N.W.2d 743 (Neb. 1984)* (claimant raised cattle and refused to remove fence enclosure); *Hoelmer v. Heiskill, 221 S.W.2d 142 (Mo. 1892);* Omaha & Florence Land & Trust Co. v. Parker, 51 N.W.139 (Neb. 1892). But see *Whitney v. United States, 167 U. S. 529 (1897); Bergere v. United States, 168 U. S. 66 (1897); Richey v. Miller, 177 S.W.2d 255 (Tex. 1944).*

Kelso v. Caffery, 58 So. 2d 402 (La. 1952); Blanchard v. Martel, 146 So. 2d 480 (La. App. 1933) (adverse possession may even be acquired by trapping if the nature of the ground and the exclusiveness and extent of the use justified the necessary possessory concept).

William L. Burton Indus., 322 So. 2d 880 (La. 1975) (partial fencing and use for pasture held sufficient possession); *Gandy v. Culpepper, 528 S.W.2d 333 (Tex. Civ. App. 1975)* (grazing or cultivation without enclosure held insufficient); *Monroe v. Rawlings, 49 N.W.2d 55 (Mich. 1951)* (hunting and building of a cabin was sufficient possession of which the land was capable).

(n18)Footnote 245. *Klinefelter v. Dutch, 467 N.W.2d 192 (Wis. 1991)* (fence partway across land, fence posts and section of telephone pole along fence line was "substantial enclosure"); *Normant v. Eureka Co., 12 So. 454, 39 Am. St. 45 (Ala. 1893);* Illinois Cent. R. R. v. Houghton, 18 N.E.301 (Ill. 1888); *Davies v. Wickstrom, 134 Am. St. 1100 (Wash. 1909);* Clithero v. Fenner, 99 N.W.1027 (Wis. 1904). *See* Sherrad v. Henry, 106 S.E.705 (W. Va. 1921) (actual enclosure not essential). Construction of fence and possession up to the fence line created adverse possession. *Vetick v. Kula, 247 N.W.2d 637 (Neb. 1976).* Timbering, hunting, fishing and picnicking held insufficient possession. *Seven Springs Farms, Inc. v. King, 344 A.2d 641 (Pa. 1975); Calvert v. Belcher, 678 So. 2d 795 (Ala. App. 1996); Palmer Ranch v. Suwansawasdi, 920 P.2d 870 (Colo. App. 1996); Abino Town and Country Estates Ass'n v. Carr, 920 P.2d 26 (Ariz. App. 1996). Robertson v. Dombroski, 678 So. 2d 637 (Miss. 1996).*

(n19)Footnote 246. *Vetick v. Kula, 247 N.W.2d 637 (Neb. 1976).*

(n20)Footnote 247. *Guaranty Title & Trust Corp. v. United States, 264 U. S. 200 (1924). See Horton v. Smith-Richardson Inv. Co., 87 So. 905 (Fla. 1921); Haywood v. Marker, 55 N.W.2d 143 (Mich. 1952).*

(n21)Footnote 248. *Chicago Title & Trust Co. v. Darley, 1 N.E.2d 846 (Ill. 1936).*

(n22)Footnote 249. *Hardy v. Bumpstead, 41 S.W.2d 226 (Tex. Com. App. 1930).*

(n23)Footnote 250. *New York v. Wilson & Co., 15 N.E.2d 408 (N.Y. 1938).*

(n24)Footnote 251. *Connasauga River Lumber Co. v. Shippen, 293 F. 579 (5th Cir. 1923). See* Dermott v. Stinson, 222 S.W.54 (Ark. 1920) (adverse possession of common by adjoining owners).

(n25)Footnote 252. Sherrard v. Henry, 106 S.E.705 (W. Va. 1921). Under a statute making natural obstructions which are sufficient to turn stock lawful fences, a river may be considered a lawful fence for the purpose of determining

whether the adverse claimant has enclosed the remaining boundaries of the land claimed. Seavey v. Williams, 191 P.779 (Or. 1920).

(n26)Footnote 253. Baxter v. Girard Trust Co., 135 A.620 (Pa. 1910).

(n27)Footnote 254. *Welder v. Wiggs, 790 S.W.2d 913 (Ark. App. 1990)* (claimant who took deed purporting to convey the entire fee from cotenants held land adversely to remaining cotenant); *Stiff v. Cobb, 28 So. 402 (Ala. 1900); Dikeman v. Parrish, 6 Pa. 210 (1900).*

(n28)Footnote 255. *Lake Charles Harbor & Terminal District v. Erwin Heirs, Inc., 673 So. 2d 1351 (La. App. 3 Cir. 1996); Dikeman v. Parrish, 6 Pa. 210 (1900).*

(n29)Footnote 256. *Stiff v. Cobb, 28 So. 402 (Ala. 1900).*

(n30)Footnote 257. *Bass v. Rounds, 811 S.W.2d 775 (Mo. 1991)* (paying insurance and taxes alone is insufficient); Frick v. Simon, 17 P.439 (Cal. 1888).

(n31)Footnote 258. *Graham v. Lambeth, 921 P.2d 850 (Kan. App. 1996); Lake Charles Harbor & Terminal District v. Erwin Heirs, Inc., 673 So. 2d 1351 (La. App. 3 Cir. 1996); Normant v. Eureka Co., 12 So. 454 (Ala. 1893); Hardie v. Bissell, 94 S.W. 611 (Ark. 1906);* Wren v. Parker, 18 A.790 (Conn. 1889); *Draper v. Shoot, 25 Mo. 197 (1857); Johnson v. Moore, 143 S.W.2d 254 (Mo. 1940);* Omaha & Florence Land & Trust Co. v. Parker, 51 N.W.139 (Neb. 1892); Rogers v. Miller, 42 P.525 (Wash. 1895).

(n32)Footnote 259. *Crowden v. Grantland, 510 So. 2d 238 (Ala. 1987); Chastang v. Chastang, 37 So. 799 (Ala. 1904); Cobb v. Nagele, 611 N.E.2d 599 (Ill. App. 1993);* Alsup v. Stewart, 62 N.E.795 (Ill. 1902); *B. W. & Leo Harris Co. v. Hastings, 59 N.W.2d 813 (Minn. 1953); Walker v. Easterling, 61 So. 2d 163 (Miss. 1952); Bass v. Rounds, 811 S.W.2d 775 (Mo. 1991)* (paying insurance and taxes alone is insufficient); Cashman v. Cashman, 27 S.W.549 (Mo. 1894); *Patton v. North Jersey Dist. Water Supply Comm'n, 459 A.2d 1177 (N. J. 1983); Sessions v. McDonald, 75 S.E.2d 904 (N.C. 1953); Rhodes v. Cahill, 802 S.W.2d 643 (Tex. 1990); Bone v. Loggins, 652 S.W.2d 758 (Tenn. App. 1982); Dillman v. Foster, 656 P.2d 974 (Utah 1982). Flournoy v. Perkins, 667 So. 2d 364 (Fla. App. 1995)* (payment of taxes is by itself insufficient to establish adverse possession; the alleged adverse possesser must also have been engaged in "ordinary use" of the property); *Martin v. Kearl, 917 P.2d 91 (Utah App. 1996).*

(n33)Footnote 260. *Badger Lumber Co. v. St. Louis-San Francisco R. Co., 89 S.W.2d 954 (Mo. 1933).*

(n34)Footnote 261. *Romans v. Nadler, 14 N.W.2d 482 (Minn. 1944).*

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CHAPTER 87 ADVERSE POSSESSION

10-87 Thompson on Real Property, Thomas Editions § 87.07

AUTHOR: Professor Olan B. Lowrey School of Law Temple University Portion of this Chapter are based on Ch. 38 of George W. Thompson, Commentaries on the Law of Real Property (John S. Grimes, ed. reprinted 1979).

§ 87.07 Constructive Possession.

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To the extent that the rule of transfer of title by adverse possession arises out of the common law theories of disseisin, and not out of statutes of limitations, reliance must be had upon actual disseisin, i.e., an actual taking of possession by the adverse possessor before the period can be said to begin running. n262 The common law does not seem to have recognized any such thing as constructive disseisin, n263 although the right heirs could make a constructive entry. n264

Initially the common law associated seizin with title, so that one who had no possession did not have title. As the concept of title ripened, however, it ceased to be identified with possession in the actual sense. Thus, title carried with it the element of possession until possession was voluntarily yielded by the owner or until the owner was actually ousted by another.

Generally, constructive possession still today follows title and can only be overcome or defeated by actual possession adverse thereto. n265 An adverse occupant who holds land without any color of title can obtain title by adverse possession only to so much of the land as is actually occupied; by the doctrine of constructive possession under color of title, however, the adverse possessor may acquire title to more land than actually occupied. The adverse possessor obtains title to the entire area defined or described by the instrument giving color of title. n266 When there is a claim only, however, and no color, the adverse possession is restricted to the land which the claimant enters and takes possession of with the intention to hold same, to the exclusion of all others. n267 Therefore, if one enters without color of title, that entry can give the disseisee no notice of adverse occupancy, except as to the land actually occupied. n268

When one enters upon land under color of title, however, that possession is not limited to the land actually occupied but, by construction, is extended to the entire tract included in the instrument under which possession is claimed. n269 Grantees taking actual possession under recorded deeds had constructive possession to the extent of the boundary described in the deeds. n270 Entry made under a patent or bare color of title is presumed in conformity thereto, and actual possession of the entrant will, by construction, be extended to the boundary described in such deed, patent, or color, provided another's possession is not invaded. n271

The rule that the older title takes precedence in the case where constructive possession between senior and junior patentees or grantees claiming title from a common source clashes, is held to have no application to one who claims under a senior grant but whose claim of title does not reach back to it. n272 By entry under color of title, the adverse claimant is presumed to be in possession of the whole of the claim. n273 In order to acquire adverse title by constructive possession, however, the owner of the land must have notice of the claim of title, either by actual knowledge or through notice implied by law. n274 Mere color of title, without more, is inoperative to give constructive possession. n275 Any land which is actually held by the owner cannot, of course, be acquired by another who bases the claim on constructive possession. n276 The main purpose of color of title under common law, as opposed to statutory law, is not to show an actual grant of land or any interest therein, but to designate the boundary of the possessor's claim thereto. n277

Where one asserts adverse possession under a claim of title without color of title, one's possession is limited to the area over which one has exercised actual dominion, whereas, under color of title, the limit is determined by the description contained in the title paper, as long as one is possessor and exercises some dominion over a portion of the property and other elements are satisfied. n278 If one possesses a good title to land, the possession of that land is not extended beyond its boundaries to cover any part of land covered by a void patent or void deed, and possession beyond such boundary is not of the character essential to a title by adverse possession. n279

As a foundation for the consideration of the extent of possession under color of title, the pertinent fundamental principles are: first, when land is unoccupied, the ownership is by construction of law in the true owner; n280 second, actual possession under color of title creates a constructive possession of all unoccupied land within the boundaries laid down in the instrument giving color of title; n281 third, there can be no constructive possession under color of title without actual possession of a part of the land conveyed by the instrument giving color of title; n282 fourth, it is presumed that the party entering under color of title holds to the boundaries defined by the instrument under which the party enters; n283 and fifth, the actual possession of a portion of the land by the rightful owner overcomes the constructive possession of a party holding under color of title as to that land actually held by the true owner. n284

These principles are general and apply whether the claim is to one lot; one lot divided into two parts by a natural feature which has the appearance of a boundary; several lots under one enclosure but conveyed separately; several contiguous lots amalgamated into one tract by the description in the instrument giving color of title; several lots held under one instrument but conveyed therein as separate parcels by distinct descriptions; several contiguous lots held by various instruments giving color of title; or several non-contiguous lots under one instrument. n285 Entry under colorable title to real estate is effective to ripen a good title only in accordance with the title purported to be conveyed by the instrument, and possession is deemed coextensive only with the limits thereof. n286

COMPUTER-ASSISTED RESEARCH

LEXIS: Adverse possession w/20 constructiv! pre/3 possession 3 Am. Jur. 2d, Adverse Possession § 16

FOOTNOTES:
(n1)Footnote 262. *See* Henry W. Ballentine, Title by Adverse Possession, *32 Harv. L. Rev. 135;* Percy Bordwell, Disseisin and Adverse Possession, *33 YALE L. J. 1, 141, 285 (1923).*

Possession of wild lands is constructive and follows title of original owner. *Tanner v. Case, 142 So. 2d 688 (Ala. 1962).*

Constructive adverse possession. *Freed v. Cloverlea Citizens Ass'n, 228 A.2d 421 (Md. 1967).*

(n2)Footnote 263. *See* Digby, History of Real Property, ch. 2, § 9; Coke on Littleton, § 58b.

(n3)Footnote 264. 1 Britton, § 121b.

(n4)Footnote 265. *Sturgis v. Hughes, 178 S.W.2d 236 (Ark. 1944).* Record title is constructive possession. *State ex rel. Gallion v. Graham, 143 So. 2d 810 (Ala. 1962).*

Constructive possession will not ripen into title if commenced subsequent to a record titleholder's own constructive possession. *Laird Props. New England Land Syndicate v. Mad River Corp., 305 A.2d 562 (Vt. 1973).*

(n5)Footnote 266. A void tax deed does not carry constructive possession sufficient for adverse possession. *National Prop. Owners Ass'n v. Hogue, 318 S.W.2d 151 (Ark. 1958). 14 ARK. L. REV. 181.*

Actual occupancy required where no color of title. *Daniels v. Alico Land Dev. Co., 189 So. 2d 540 (Fla. 1966).*

Constructive possession under color of title. *Arrien v. Levanger, 502 P.2d 573 (Or. 1972).*

Cumulate. Somon v. Murphy Fabrication & Erection Co., 232 S.E.2d 524 (W. Va. 1977); Alaska Nat'l Bank v. Lenck, 559 P.2d 1049 (Alaska 1977).

(n6)Footnote 267. *Lindgren v. Martin, 949 P.2d 1061 (Idaho 1997)* (disputed property substantially enclosed); *Schultz v. Dew, 564 N.W.2d 320 (S.D. 1997)* (line of trees constituted a "substantial inclosure"); *Marino v. Smith, 454 So. 2d 1380 (Ala. 1984); Crowder v. Doe ex dem. Tennessee Coal, Iron & R. R., 50 So. 230 (Ala. 1909); Lucas v. Scott, 24 So. 2d 540 (Ala. 1945); Vick v. Berg, 473 S.W.2d 858 (Ark. 1971)* (adverse possessor awarded only one quarter of one acre of a 54 acre tract where he built house and actually occupied property); *Miller v. Bell, 764 P.2d 389 (Colo. App. 1988); Poole v. Corwin, 447 N.E.2d 1150 (Ind. App. 1985);* Philbin v. Carr, 129 N.E.19 (Ind. App. 1920); *Cooper v. Tarpley, 41 N.E.2d 640 (Ind. App. 1942); Lechner v. Adelman, 369 N.W.2d 331 (Minn. App. 1985);* Swan v. Munch, 67 N.W.1022 (Minn. 1896); *Sinicropi v. Town of Indian Lake, 538 N.Y.S.2d 380 (1989); Woods v. Bivens, 354 S.E.2d 909 (S.C. 1987); Seeley v. LaRosa, 370 S.E.2d 132 (W. Va. 1988); McGuirk v. Ferran, 635 N.Y.S.2d 794 (1995)* (former owner who continued to live on the property after a tax sale to a new owner had hostile possession only of the residence); *Phillips v. Sollami, 632 N.Y.S.2d 859 (1995)* (adverse possession claim established with respect to a garage and the portion of a fence connected to the garage).

(n7)Footnote 268. Barber v. Robinson, 80 N.W.968 (Minn. 1899).

No constructive adverse possession without a claim founded on a written instrument. N.Y. Real Prop. Acts. Law § 251. *Corrington v. McNeil, 396 N.Y.S.2d 286 (1977).*

(n8)Footnote 269. *Hart v. Sternberg, 171 S.W.2d 475 (Ark. 1943);* Anderson v. Burnham, 34 P.1056 (Ark. 1893).

But see *Locklear v. Oxendine, 65 S.E.2d 673 (N.C. 1951); Moses v. Dautartas, 922 S.W.2d 345 (Ark. 1996). Fulkerson v. Van Buren, 961 S.W.2d 780 (Ark. App. 1998)* (church did not possess land adversely to landowner with required intent for seven years).

(n9)Footnote 270. *Stephenson Lumber Co. v. Hurst, 83 S.W.2d 48 (Ky. 1935). See also Marsh v. Gragg, 153 So. 219 (Ala. 1934); Johns v. Scobie, 86 P.2d 820 (Cal. 1939); Hammonds v. Jones, 122 S.W.2d 736 (Ky. 1938). Penn. Cent. TransP.Co. v. Martin, 353 N.E.2d 474 (Ind. App. 1976)* (payment of taxes required in adverse possession).

(n10)Footnote 271. *Holcomb v. Swift Coal & Timber Co., 65 S.W.2d 741 (Ky. 1933); Myrick v. Johnson, 160 S.W.2d 185 (Tenn. App. 1941).*

(n11)Footnote 272. Baldwin v. Mothena, 198 S.E.569 (Va. 1938).

(n12)Footnote 273. Kittel v. Steger, 117 S.W.500 (Tenn. 1909); *Caver v. Liverman, 185 S.W.2d 417 (Tex. 1945).*

(n13)Footnote 274. *Petsch v. Widger, 335 N.W.2d 254 (Neb. 1983); Ellicott v. Pearl, 35 U. S. (10 Pet.) 412 (1836); Little v. Downing, 37 N. H. 355 (1858).*

(n14)Footnote 275. *Smith v. Southern Kraft Corp., 159 S.W.2d 59 (Ark. 1942);* McBeth v. Wetnight, 106 N.E.407 (Ind. 1914); *Hicks v. Southwestern Settlement & Dev. Corp., 214 S.W.2d 315 (Tex. Civ. App. 1948).*

(n15)Footnote 276. *Giardina v. Williams, 512 So. 2d 1312 (Ala. 1987)* (holder of tax deed failed to establish adverse possession necessary to cut off record title owner's right to redeem); St. Louis, A.& T. H. R. R. v. Nugent, 39 N.E.263 (Ill. 1894).

(n16)Footnote 277. *West Virginia Pulp & Paper Co v. Natwick & Co., 21 S.E.2d 368 (W. Va. 1941).*

(n17)Footnote 278. *Somon v. Murphy Fabrication & Erection Co., 232 S.E.2d 524 (W. Va. 1941).*

(n18)Footnote 279. *Frazier v. Banks, 170 S.W.2d 900 (Ky. 1943).*

(n19)Footnote 280. *Hunnicutt v. Peyton, 102 U. S. 333 (1880);* Hominy Creek Land Co. v. Gauley Coal Land Co., 138 S.E.95 (W. Va. 1927).

(n20)Footnote 281. *Michigan v. Wisconsin, 270 U. S. 295 (1929);* Devlin v. Powell, 227 P.231 (Cal. App. 1924); *Daull v. Smith, 51 So. 2d 138 (La. 1951); Jacobson v. Aetna Cas. & Surety Co., 46 N.W.2d 868 (Minn. 1951).*

Where the adverse possession is alleged under a claim of right rather than color of title, the adverse possessor is entitled only to the land occupied. *Almond v. Anderegg, 555 P.2d 220 (Or. 1976).* The words "occupied" and "possession" are generally interchangeable but "occupied" tends to relate to actual occupancy by the claimant herself whereas "possession" tends to be somewhat broader and more logically applied to the use of an agent or constructive possession.

(n21)Footnote 282. *Henry v. Frohlichstein, 43 So. 126 (Ala. 1907).*

(n22)Footnote 283. Northern Pac. R. R. v. Cash, 216 P.782 (Mont. 1923).

(n23)Footnote 284. *Deputron v. Young, 134 U. S. 241 (1890);* Kentucky Union Co. v. Hevner, 275 S.W.513 (Ky. 1924); Howell v. Garlington, 270 S.W.269 (Tex. Civ. App. 1925).

(n24)Footnote 285. *See* in general: *Taylor v. Asher, 286 F. 721 (D. Ky. 1916);* Georgia Minerals Co. v. Cox, 115 S.E.770 (Ga. 1923); Rowan v. Newbern, 123 S.E.148 (Ga. App. 1924); LeMoyne v. Hays, 140 S.W.552 (Ky. 1911); Elliott v. Hensley, 222 S.W.507 (Ky. 1920); Elliott v. Cumberland Coal & Coke Co., 71 S.W.749 (Tenn. 1902); Appel v. Childress, 116 S.W.129 (Tex. Civ. App. 1908).

(n25)Footnote 286. Hagopian v. Saad, 199 A.433 (Conn. 1938); Dorman v. Goodman, 196 S.E.352 (N.C. 1938).

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CHAPTER 87 ADVERSE POSSESSION

10-87 Thompson on Real Property, Thomas Editions § 87.08

AUTHOR: Professor Olan B. Lowrey School of Law Temple University Portion of this Chapter are based on Ch. 38 of George W. Thompson, Commentaries on the Law of Real Property (John S. Grimes, ed. reprinted 1979).

§ 87.08 "Open and Notorious."

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For a possession to be adverse, the possessor must hold openly and notoriously to the world. A variety of reasons can be given for this requirement. Since title by adverse possession is valid as against the entire world and the adverse possessor does not come in by way of purchase through the record title holder, n287 the possession must be such that all other possible claimants can learn of it. If adverse possession is a reward to the possessor, the possession must be straightforward and not clandestine. Before possession can operate as notice, it must be clear and unequivocal. n288 Possession so open, visible, and notorious that it will raise the presumption of an adverse claim is the equivalent of actual knowledge; therefore, the adverse claimant need not show that the record owner had actual knowledge that the claimant was asserting an adverse claim. n289

It is necessary that adverse possession be open and notorious in order to constitute notice to the real owner of possession and claim of disseisin, and it is not mere occupancy or possession of the land which must be known to the true owner in order to prejudice the owner's rights; rather, it is its adverse character. n290 Knowledge by the true owner of actual claim of ownership is not essential in adverse possession. n291 The possession must be notorious and so conspicuous that it is generally known and talked of by the public, at least by the people in the vicinity of the premises. It must be manifest to the community. n292 Occupancy must be so notorious that the owner may be presumed to have knowledge that the occupancy is adverse. n293

The possession must be evidenced by such physical acts as will give the owner constant notice of the claimant's possession. n294 The notoriety as to claim of title and possession is for the purposes of showing that the original owner had notice of the claim and possession, and of its hostile character, and will therefore be presumed to have acquiesced in the claim of the possessor. n295 The cases indicate that where the original owner has actual knowledge of the adverse title, and of the hostile possession thereunder, notoriety becomes immaterial, for actual knowledge takes its place. n296

Under this line of reasoning, the word "notorious" means such elements of notoriety as the owner may be presumed to have notice of, and of its extent. n297 The claimant need not show actual notice to other persons claiming title to the

property. n298 It is doubted, however, that if a possession, known by the record owner alone to be adverse, possesses the notoriety sufficient to give the title *in rem*, good as against all the world that adverse possession purports to do.

Where possession is taken under the true owner, a claimant of title to land by adverse possession has the burden of clearly proving open and notorious use, hostile and adverse to the true owner's title. n299 Under one rule, a person who is in possession subservient to another must first surrender possession and then retake it before the person can claim to be holding adversely. n300 The weight of authority does not require actual surrender of possession, however. n301 The basic theory upon which adverse possession rests is that the owner of land who, having notice of the fact that it is occupied by another claiming dominion over it, nevertheless stands by during the entire statutory period and makes no effort to eject the claimant or otherwise protect the title, ought not to be permitted, for reasons of public policy, thereafter to maintain an action for that purpose. n302 Therefore, in order that the possession of the occupying claimant may constitute notice in law, it must be visible and open to the common observer so that the owner, or the owner's agent, on visiting the premises may readily see that the owner's rights are being invaded. In order to effect an ouster or disseisin of the true owner, possession must maintain such notoriety that the owner may be presumed to have notice of it and is therefore guilty of laches in failing to assert title during the statutory period against the claimant. n303 The possessor's claim of right must be in such tangible form that all those who are affected by it must be presumed to have acquiesced in it. n304 Encroachment upon land by concrete pier supporting building on adjoining land is a trespass of a permanent nature, and cause of action accrued when the trespass was first committed, at which time the statute of limitations began to run. n305

COMPUTER-ASSISTED RESEARCH

LEXIS: Adverse possession w/20 open notorious

FOOTNOTES:
(n1)Footnote 287. *Inhabitants of Sch. Dist. No. 4 v. Benson, 31 Me. 381 (Me. 1850).* The same principle of open claim would be applicable if the true owner did not have record title, i. e., a deed filed at record.

(n2)Footnote 288. *Falvo v. Pejepscot Industrial Park, Inc., 691 A.2d 1240 (Me. 1997)* (acts of claimant deemed insufficient to put record owner on notice of a hostile claim of right); *Armstrong v. Armstrong, 493 So. 2d 253 (La. App. 1986),* writ denied (where plaintiff's purpose was covert and not manifest to defendant, no actions were sufficient to call owner's attention to the adverse claim); *Shilts v. Young 567 P.2d 769 (Alaska 1977)* (flying over property in an airplane gives no notice of possession); In *Marengo Cave Co. v. Ross, 10 N.E.2d 917 (Ind. 1937)* (title by adverse possession was acquired to an entire cave, part of which was under another's land. The possessor occupied the entire cave, and the other party knew this. The fact that neither party knew part of the cave was under the other's land was held immaterial); *See also* Lewey v. H. C. Fricke Coke Co., 31 A.261 (Pa. 1895).

To support prescription there must be such external signs of possession as to clearly indicate the possessor holds control and dominion over the property. *Jacobs v. Southern Advance Bag & Paper Co., 82 So. 2d 765 (La. 1955).*

Occupation of surface is not adverse to severed minerals. *Gerhard v. Stephens, 442 P.2d 692 (Cal. 1968). Moore v. Dudley, 904 S.W.2d 496 (Mo. App. 1995).*

(n3)Footnote 289. *Mag Associates, Inc. v. SDR Realty, Inc., 669 N.Y.S.2d 314 (1998)* (triable fact issue existed as to whether adjacent landowner held the land under a claim of right); *Weinstein Enterprises v. Pesso, 647 N.Y.S.2d 260 (N.Y. A.D. 1996); Vanasdal v. Brinker, 500 N.E.2d 876 (Ohio App. 1985)* (maintenance of tract as a whole by planting flowers, trees and bushes sufficient to charge owner with notice); *Chapman v. Sky L'Onda Mut. Water Co., 159 P.2d 988 (Cal. App. 1945).* Open and notorious. *Slatin's Props., Inc. v. Hassler, 271 N.E.2d 665 (Ill. App. 1971).*

Possession must be of such notoriety that the true owner has actual knowledge or may be presumed to know of the

adverse claim. *Custis Fishing & Hunting Club, Inc. v. Johnson, 200 S.E.2d 542 (Va. 1973).*

(n4)Footnote 290. *Welder v. Wiggs 790 S.W.2d 913 (Ark. App. 1990); Anson v. Tietze, 190 S.W.2d 193 (Mo. 1945).* Notice of possession must be so open, visible, continuous and exclusive as to warn others that the possession is not held in subordination. *Sudheimer v. Cheatham, 443 P.2d 951 (Okla. 1968).*

(n5)Footnote 291. *Lewis v. Village of Lyons, 389 N.Y.S.2d 674 (1976).*

(n6)Footnote 292. *Fish v. Bannister, 759 S.W.2d 714 (Tex. App. 1988); Glenn v. Shuey, 595 A.2d 606 (Pa. Super. 1991);* Philbin v. Carr, 129 N.E.19, 706 (Ind. App. 1920).

Meaning of open and notorious possession, see further Crawford v. Davis, 227 S.W.5 (Ark. 1921) (continuous and notorious occupation and dominion over land must be shown); Meador v. Weathers, 267 S.W.787 (Ark. 1925) (possession must be so notoriously hostile as to constitute notice); Hibberd v. McCosker, 203 P.810 (Cal. App. 1921) (enclosure of land, necessity for, construction of California statute); Vallejo v. Burrill, 221 P.676 (Cal. App. 1923) (owner must have knowledge or a means of knowledge of the adverse occupation); Elrod v. Bagley, 115 S.E.3 (Ga. 1922); Crider v. Woodward, 135 S.E.95 (Ga. 1926) (tax receipt as evidence of notoriety of possession); Branch v. Central Trust Co., 151 N.E.284 (Ill. 1926) (fact that adverse claim was brought to the knowledge of the owner of the fee must be proved); Abel v. Love, 143 N.E.515 (Ind. App. 1924); Nelson v. Johnson, 226 S.W.94 (Ky. 1920) (acts of possession so open and notorious that they give notice generally of intention and purpose of occupant start the statute of limitations running in his favor); Combs v. Turner, 237 S.W.37 (Ky. 1922) (claim of occupants must be so notorious as to amount to constructive notice); Morgan v. Big Woods Lumber Co., 249 S.W.329 (Ky. 1923) (natural and artificial barriers as indicating purpose of occupant to exercise dominion over premises and give notice of possession); Ahart v. Wilson, 277 S.W.1007 (Ky. 1925) (acts must be so open and notorious as to put owner on notice); Elkhorn Coal Corp. v. Bradley, 288 S.W.326 (Ky. 1926) (actual possession of and residence on land sufficient notice); Ball v. Moss, 291 S.W.1042 (Ky. 1927) (clearing and enclosure of land not notice of claim beyond enclosure); *Loeb v. Fetzer, 99 So. 520 (La. 1924)* (actual possession or preservation of possession by external and public signs announcing the possession); *Carrere v. New Orleans, 111 So. 393 (1926)* (right of city to claim by adverse possession denied where it had no apparent title, the property was obscurely located, and was assessed for taxation against individuals); Webber v. Barker Lumber Co., 116 A.586 (Me. 1922) (purpose to hold dominion over land in hostility to owner must be openly evinced); Bloodsworth v. Murray, 114 A.575 (Md. 1921); Dow v. Dow, 137 N.E.746 (Mass. 1923) (acts must be sufficiently notorious to warrant jury in presuming that the owner had notice thereof); Northern Pac. R. R. v. Cash 216 P.782 (Mont. 1923) (possession may be open and notorious but not adverse); O'Banion v. Simpson, 191 P.1083 (Nev. 1920) (actual possession of land and exercise of usual acts of ownership, constructive notice); Folkman v. Myers, 115 A.615 (N. J. 1921) (possession not adverse when one occupies land by mistake and with no intention to occupy more land than he purchased); *Albany Garage Co. v. Munson, 218 N.Y. S. 78 (1926);* Berry v. Richmond Cedar Works, 113 S.E.772 (N.D. 1922) (posting land as adverse possession); *Munroe v. Mason, 83 Pa. Super. 411 (1924)* (act must amount to notice to world that adverse claim is being asserted); Leonard v. Cleburne Roller Mills Co., 239 S.W.605 (Tex. Com. App. 1922) (gift of house and lot by one partner to an employee, adverse possession perfecting title as against non-consenting partners); Krause v. Hardin, 222 S.W.310 (Tex. Civ. App. 1920) (actual possession and cultivation of land sufficient notice); Carter v. Richardson, 225 S.W.816 (Tex. Civ. App. 1920) (possession must be open, visible, and notorious for full period of time required); Gerhart v. Moore, 229 S.W.876 (Tex. Civ. App. 1921) (act of enjoyment must be such as to afford ground for action by real owner); Hopkins v. Waterstreet, 275 S.W.303 (Tex. Civ. App. 1925) (acts must be so open and notorious that knowledge thereof will be presumed); Madison v. Fleming, 283 S.W.589 (Tex. Civ. App. 1926) (actual and visible appropriation of land sufficient notice); Mandelbaum v. Looney Merc. Co., 293 S.W.203 (Tex. Civ. App. 1927) (registration, occupation, and use of property and payment of taxes generally sufficient as notice); Grays Harbor Commercial Co. v. McCulloch, 193 P.709 (Wash. 1920) (fishermen using land between highwater mark and inner harbor line).

Where the only use to which claimant put the land was to erect a sign, at or near the edge of the same, close to the

railroad and public highway for advertising purposes, this did not constitute adverse possession, since it is a matter of common knowledge that such signs are to be found upon and along railroads and public highways and at crossroads and advantageous points all over the country, both in town and in the rural section. Burton v. Holland, 278 S.W.252 (Tex. Civ. App. 1925).

Acts of dominion or making of improvements such as will indicate to persons residing in the immediate neighborhood who has exclusive management and control of the property are sufficient for adverse possession. *Wijas v. Clorfene, 262 N.E.2d 83 (Ill. App. 1970).*

To be notorious, possession must be so conspicuous as to be generally known and talked about by public or people in the neighborhood. *Commonwealth Dep't of Parks v. Stephens, 407 S.W.2d 711 (Ky. 1966).*

Use of property for hunting and fishing together with construction of a lean-to windbreak and a duck blind was not open and notorious. *Bramlett v. Harris & Eliza Kempner Fund, 462 S.W.2d 104 (Tex. Civ. App. 1970).* Essential dominion is determined by the location, condition and reasonable use of property. *Somon v. Murphy Fabrication & Erection Co., 232 S.E.2d 524 (W. Va. 1977).*

(n7)Footnote 293. *Witt v. Miller, 845 S.W.2d 665 (Mo. App. 1993); Taffender v. Thomas 381 A.2d 519 (R. I. 1977); People v. Hagaman, 215 S.W.2d 827 (Tenn. App. 1948).* The claimant must exercise such acts of ownership and occupancy as are sufficient to "hoist his flag" over the lands, so that all may observe it. McComb v. Saxe, 122 S.W.987 (Ark. 1909). *See* Pierce v. Barney, 58 A.152 (Pa. 1904).

Owner must be made aware of claim of adverse use. *Lawless v. Sears Roebuck & Co., 555 S.W.2d 79 (Mo. App. 1977).*

Payment of taxes by possessor is notice of prescription. *Adams v. Slattery, 295 S.W.2d 859 (Tex. 1956).*

(n8)Footnote 294. *Dunlap v. Larkin, 493 A.2d 750 (Pa. Super. 1985); Raby v. Hill, 11 Alaska 600 (1948); Newman v. Newman, 169 S.W.2d 667 (Ark. 1943); Federal Gas, Oil & Coal Co. v. Harmon, 71 S.W.2d 630 (Ky. 1934); Smith v. Anderson, 8 So. 2d 251 (Miss. 1942).*

Owner must be given notice of adverse possession claim. *Laney v. Monsanto Chem. Co., 348 S.W.2d 826 (Ark. 1961).*

Grantor remaining in possession after delivery of deed is not presumed to hold adversely. *Toscano v. Delgado, 506 S.W.2d 317 (Tex. Civ. App. 1974).*

(n9)Footnote 295. *Hindall v. Martinex, 591 N.E.2d 308 (Ohio 1990);* Lasley v. Kniskern, 115 N.W.971 (Mich. 1908); *Burns v. Foster, 81 N.W.2d 386 (Mich. 1957).*

(n10)Footnote 296. *Welder v. Wiggs 790 S.W.2d 913 (Ark. 1990);* Trotter v. Neal, 7 S.W.384 (Ark. 1957); *Green v. Lange, 797 S.W.2d 765 (Mo. 1990);* Dausch v. Crane, 19 S.W.61 (Mo. 1892); *Mann v. Mann, 183 S.W.2d 557 (Mo. 1944); Maggio v. Pruzansky, 537 A.2d 756 (N. J. 1988); Vanasdal v. Brinker, 500 N.E.2d 876 (Ohio App. 1986); Sinicropi v. Indian Lake, 538 N.Y.S.2d 380 (1989)* (in an action to require removal of a public bathhouse which encroached on plaintiff's property, town had adverse possession where bathhouse had been erected 10 years earlier, not withstanding plaintiff's contention until fact of encroachment became known).

(n11)Footnote 297. *Watrous v. Morrison, 14 So. 805 (Fla. 1894).*

Adverse possessor must have taken possession equally with others. *Wiggins v. Taylor, 228 S.E.2d 476 (N.C. 1976).*

(n12)Footnote 298. *Isaacks v. Clayton, 48 So. 2d 536 (Ala. 1950); Foote v. Chicago, 13 N.E.2d 965 (Ill. 1938).* But

knowledge of adverse possession by one co-tenant must be brought home to the co-tenant. *Harris v. Harris, 286 S.W.2d 849 (Ark. 1956).*

(n13)Footnote 299. The rule now is that where possession is originally taken, or held under the true owner, a clear, positive and continued disclaimer and disavowal of title and the assertion of an adverse right, to be brought home to the knowledge of the party, are indispensable before any foundation can be laid for the operation of the statute of limitations. The statute does not begin to operate until the possession, before in privity with the title of the true owner, becomes tortious and wrongful by the disloyal acts of the occupying tenant, which must be open, continued and notorious, so as to preclude every doubt as to the character of the holding or the fact of knowledge on the part of the owner. *Elliott v. Bertsch, 139 P.2d 332 (Cal. App. 1943).*

(n14)Footnote 300. Mortgage taking possession prior to foreclosure. *Ham v. Flowers, 51 S.E.2d 753 (S.C. 1949).*

A tenant must bring his claim home to the landlord to start adverse possession. *Baker v. Smith, 506 S.W.2d 842 (Ark. 1974).*

(n15)Footnote 301. So a grantor, by remaining in possession, may, by proper notice to the grantee, hold adversely to grantee. *Walker v. Easterling, 61 So. 2d 163 (Miss. 1952).*

(n16)Footnote 302. Philbin v. Carr, 129 N.E.19 (Ind. App. 1920); *Adair v. Bonninghausen, 9 N.W.2d 35 (Mich. 1943); Churchman v. Rumsey, 166 S.W.2d 960 (Tex. Civ. App. 1942).*

(n17)Footnote 303. *Iowa R. Land Co. v. Blumer, 206 U. S. 482 (1907); Gillis v. Curd, 117 F. 2d 705 (6th Cir. 1941); Mitchell v. Hammons, 792 S.W.2d 333 (Ark. App. 1990); Rucker v. Jackson, 60 So. 139 (Ala. 1912); Pflueger v. Hopple, 156 P.2d 316 (Idaho 1945);* Novak v. Orphans Home, 90 A.997 (Md. 1914); *Leggett v. Norman, 6 So. 2d 578 (Miss. 1942); Hilgert v. Werner, 145 S.W.2d 359 (1940); City Nat'l Bank v. Soderberg, 43 P.2d 495 (Okla. 1935); Reeves v. Porta, 144 P.2d 493 (Or. 1944);* Lagorio v. Dozier, 22 S.E.239 (Va. 1895); *Core v. Faupel, 24 W. Va. 238 (1884);* Bettack v. Conachen, 294 N.W.57 (Wis. 1940).

Owner must be made aware of claim of adverse use. *Lawless v. Sears Roebuck & Co., 555 S.W.2d 79 (Mo. App. 1977).*

It is not necessary that the true owner actually know of the presence of the adverse possessor but merely that the owner was charged with what a duly alert owner would have known. *Alaska Nat'l Bank v. Link, 559 P.2d 1049 (Alaska 1977).*

(n18)Footnote 304. *Wood v. Davidson, 145 P.2d 659 (Cal. App. 1944); Duke v. Houston Oil Co., 128 S.W.2d 480 (Tex. Civ. App. 1939).*

The claim of title by the occupant must be made in some tangible form, calculated to bring notice to those who are adversely affected thereby so as to create a presumption of acquiescence in such claim by the adverse parties. Philbin v. Carr, 129 N.E.19 (Ind. App. 1920). *See Simmonds v. Stanolind Oil & Gas Co., 114 S.W.2d 226 (Tex. 1938).* So a claim of adverse possession to a sewer was denied in *Kodzoff v. Paul, 108 F. Supp. 265 (D. Alaska 1952).*

Fencing as sufficient to "fly the flag." *Chicago Title & Trust Co. v. Drobnick, 169 N.E.2d 792 (Ill. So. 2d 1960); Gibson v. Berry, 124 So. 2d 195 (La. App. 1960); Grayson v. Robinson, 126 So. 2d 247 (Miss. 1961); Olson v. Fedde, 107 N.W.2d 663 (Neb. 1961).* But see *Loewenberg v. Wallace, 166 A.2d 150 (Conn. 1960).*

(n19)Footnote 305. *Overson v. Cowley, 664 P.2d 210 (Ariz. App. 1982); Bale v. Coffin, 479 P.2d 427 (Ariz. App. 1971)* (possession of a claimant must be exclusive). *Monte v. Montalbano, 145 So. 2d 197 (Ala. 1962); Bertram v. Orlando, 227 P.2d 894 (Cal. App. 2d 1951); Persyn v. Favreau, 804 P.2d 327 (Idaho App. 1990); Beard v. Henn, 190*

N.E.2d 345 (Ill. 2d 1963); Carroll v. Brown, 472 S.W.2d 825 (Tex. Civ. App. 1971). However, planting and cultivating a few trees on the property has been held insufficient to establish adverse possession. *Simpson v. Kao, 636 N.Y.S.2d 70 (1995).*

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CHAPTER 87 ADVERSE POSSESSION

10-87 Thompson on Real Property, Thomas Editions § 87.09

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§ 87.09 Exclusive Possession.

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One survival of the old concept of disseisin is the necessity that the possession must be exclusive in order to give use to a holding adverse to the owner. n306 Adverse possession does not rest primarily on oral claims, but on acts which evince a purpose to exercise exclusive dominion over the property. n307 A possession which is not exclusive, but is in participation with the owner or others, falls far short of that kind of adverse possession which deprives the true owner of the title. n308

It is necessary that the adverse claimant hold possession of the land for the claimant directly, and not for another. n309 A tenant cannot originate adverse possession in favor of the lessor; n310 two or more persons cannot hold one tract of land adversely to each other at the same time. It is essential that the possession of one who claims adversely must be of such an exclusive character that it will operate as an ouster of the owner of the legal title, since, in the absence of ouster, the legal title draws to itself the constructive possession of the land. n311 When two persons are in possession, the seisin follows the owner. n312 If either owns a better title than the other, the law will refer the joint occupancy to the right of such owner. n313

The rule that two persons claiming title may not be in constructive possession at the same time is inapplicable to actual possession. n314 There are cases which hold, moreover, that possession need not be exclusive of all persons holding, but only of the true owner. n315 Other cases have held that the claim of right must be exclusive in the possessor, so that no one individual can claim ownership where the acts of possession have been exercised in common with others. n316 In determining the exclusive character of the possession, the character and locality of the property and the uses and purposes for which it is naturally adopted are considered. Mere casual and occasional trespasses upon the land by a stranger are not generally considered to interrupt the continuity of adverse possession of land. n317 Thus, where an adjoining owner slightly encroached upon land held adversely but pulled back at the request of the adverse claimant under recognition of the latter's claim and title, it was held that the adverse claimant's possession was exclusive during the statutory period. n318 The claimant has the burden of proof upon the issue of exclusive and adverse possession, and such proof must be clear and satisfactory. n319

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LEXIS: Adverse possession w/2- exclusiv! pre/3 possess!

FOOTNOTES:

(n1)Footnote 306. *Thomas v. Davis, 410 So. 2d 889 (Ala. 1982); Swindall v. Ford, 63 So. 651 (Ala. 1913); Ford v. Beam, 2 So. 2d 411 (Ala. 1941); Overson v. Cowley, 664 P.2d 210 (Ariz. 1982); Morris v. Humphrey, 496 N.E.2d 1209 (Ill. App. 1986),* appeal denied (where owner removed fence of adverse claimant, destroyed his crops and put up his own fence, possession was not exclusive); Horn v. Metzger, 84 N.E.893 (Ill. 1908); Truth Lodge No. 213 v. Barton, 93 N.W.106 (Iowa 1903); Wilson v. Beck, 142 N.W.78 (Iowa 1913); *Paul v. Mead, 11 N.W.2d 706 (Iowa 1943); Meyers v. Canutt, 46 N.W.2d 72 (Iowa 1951);* Burke v. Traube, 126 S.W.125 (Ky. 1910); *Central Trust Co. v. Moffitt, 171 S.W.2d 21 (Ky. 1943);* Ribas v. Bennett, 5 Miller (La.) 271 (1833); *Little v. Barbe, 198 So. 368 (La. 1940); Warren v. Tom, 946 S.W.2d 754 (Mich. App. 1997)* (landowners could not exercise exclusive possession over disputed strip when they did not know where their claimed boundary lay); Cook v. Clinton, 31 N.W.317 (Mich. 1887); Carney v. Loveday, 256 N.W.577 (Mich. 1934); *Eady v. Eady, 362 So. 2d 830 (Miss. 1978)* (where title holder paid taxes, tore down buildings, sold timber and gave oil leases, adverse possession was not exclusive); *Louisville & N. R. Co. v. Gulf of Mexico Land & ImP.Co., 33 So. 845 (Miss. 1903);* Brown v. Hartford, 73 S.W.140 (Mo. 1903); Hanlon v. Union Pac. R. Co., 58 N.W.590 (Neb. 1894); Manchester v. Duggan, 70 A.1075 (N. H. 1908); Johnston v. Albuquerque, 72 P.9 (N. M. 1903); Kneller v. Lang, 33 N.E.555 (N.Y. 1893); Flesher v. Callahan, 122 P.489 (Okla. 1912); *Hughes v. Harden, 151 P.2d 425 (Okla. 1944);* Faull v. Cooke, 26 P.662 (Or. 1890); Sertic v. Roberts, 136 P.248 (Or. 1943); Healey v. Kelly, 54 A.588 (R. I. 1903); Cowan v. Hatcher, 59 S.W.689 (Tenn. 1900); *Bywaters v. Gannon, 686 S.W.2d 593 (Tex. 1985);* Bender v. Brooks, 127 S.W.168 (Tex. 1910); *W. T. Carter & Bro. v. Holmes, 113 S.W.2d 1225 (Tex. Comm. App. 1938); Patterson v. Peel, 149 S.W.2d 284 (Tex. Civ. App. 1941);* Turner v. Ladd, 84 P.866 (Wash. 1906); *Roesch v. Gerst, 138 P.2d 846 (Wash. 2d 1943);* Bryant v. Cadle, 104 P.23, 106 P.687 (Wyo. 1910). Exclusive possession is essential. *Nihoa v. Chow, 552 P.2d 77 (Haw. 1976).*

(n2)Footnote 307. *Cairo City Ferry Co. v. Cocke, 50 S.W.2d 508 (Ky. 1932).* Adverse possession disallowed because not "exclusive" where adjoining landowner's dam caused land to be overflowed once or twice in some years, but not in every year. *Dzuris v. Kucharik, 434 P.2d 414 (Colo. 1967).* Possession includes the right to exclude others. *Opinion of the Justices, 313 N.E.2d 561 (Mass. 1974).* Fencing off of river bed by riparian owner was not adverse to owner of the bed. *Heard v. State, 204 S.W.2d 344 (Tex. 1947).*

(n3)Footnote 308. *Ward v. Cochran, 150 U. S. 597,* (1893); *Drake v. Cornelius, 706 So. 2d 1214 (Ala. App. 1997)* (a landowner who fenced in a portion of the neighboring property and refused to move the fence did not acquire title to the fenced property by adverse possession); *Wallace v. Feibleman, 60 So. 290 (Ala. 1912);* Reed v. Smith, 58 P.139 (Cal. 1899); *Lowenberg v. Wallace, 197 A.2d 634 (Conn. 1964);* Quillen v. Betts, 39 A.595 (Del. 1897); Wright v. Stice, 51 N.E.71 (Ill. 1898); Bottz v. Colsch, 109 N.W.1106 (Iowa 1906); Ward v. Edge, 39 S.W.440 (Ky. 1897); *Duplessis v. Miller, 6 La. Ann. 683 (1851); Eaton v. Jacobs, 49 Me. 559 (1861); Bellis v. Bellis, 122 Mass. 414 (1877);* LeRoy v. Collins, 142 N.W.842 (Mich. 1913); *Louisville & N. R. Co. v. Gulf of Mexico Land & ImP.Co., 33 So. 845 (Miss. 1903);* Brown v. Chicago, B. & K. C. R. Co., 14 S.W.719 (Mo. 1890); Smith v. Mount, 56 N.W.793 (Neb. 1893); *Kenniston v. Hannaford, 55 N. H. 268 (1875); Culver v. Rhodes, 87 N.Y. 348 (1882); Haimeyer v. Tietig, 9 Ohio Dec. 438,* 13 Wkly. L. Bul. 540 (1899); McGowan v. Bailey, 36 A.325 (Pa. 1897); Lloyd v. Rawl, 41 S.E.312 (S.C. 1902); *Rick v. Grubbs, 214 S.W.2d 925 (Tex. 1948); Taylor v. Burnsides, 1 Gratt. 165 (Va. 1844).*

(n4)Footnote 309. *Eakins v. Sadler, 683 S.W.2d 303 (Mo. App. 1984)* (farming of disputed area by tenant of claimant did not create exclusive possession for claimant); *State Dep't of Hwys. v. Moity, 276 So. 2d 770 (La. App. 1973)* (lessee may not acquire title by acquisitive prescription); *Nihoa v. Chow, 552 P.2d 77 (Haw. 1976)* (exclusive possession is essential).

See also Kennebec Purchase v. Laboree, 2 Me. 275 (1823); O'Banion v. Simpson, 191 P.1083 (Nev. 1920); *Summer v. Murphy, 2 Hill (S.C. 1920) 488;* Pioneer Inv. & Trust Co. v. Board of Educ., 99 P.150 (Utah 1909).

(n5)Footnote 310. *Olsen v. Noble, 76 S.E.2d 775 (Ga. 1953).*

(n6)Footnote 311. *Stiff v. Cobb, 28 So. 402 (Ala. 1900); Hinton v. Farmer, 42 So. 563 (Ala. 1906);* Philbin v. Carr, 129 N.E.19, 706 (Ind. App. 1920).

(n7)Footnote 312. *Bellis v. Bellis, 122 Mass. 414 (1877). See Spradling v. May, 65 So. 2d 494 (Ala. 1953)* (acts of possession by both owner and claimant).

(n8)Footnote 313. *Gay v. Moffitt, 5 Ky. (2 Bibb) 506 (1901).*

(n9)Footnote 314. *Stephenson Lbr. Co. v. Hurst, 83 S.W.2d 48 (Ky. 1935).*

(n10)Footnote 315. Point Mountain Coal & Lumber Co. v. Holly Lumber Co., 75 S.E.197 (W. Va. 1912); Illinois Steel Co. v. Tamms, 141 N.W.1011 (Wis. 1913).

In *Almond v. Anderegg, 557 P.2d 220 (Or. 1976),* where the adverse possessor had built a roadway, the fact that he occasionally allowed the true owner to use the roadway did not bar adverse possession.

(n11)Footnote 316. *See* Davis v. Haines, 182 N.E.718 (Ill. 1932); Belotti v. Bickhardt, 127 N.E.239 (N.Y. 1920).

(n12)Footnote 317. Bloodsworth v. Murray, 114 A.575 (Md. 1921).

See also Joe Lee, Working Part of a Mineral Estate as Adverse Possession of the Whole, *46 KY. L. J. 67 (1957).*

(n13)Footnote 318. Rock Springs v. Strum, 273 P.908 (Wyo. 1929).

(n14)Footnote 319. *Urschel v. Garcia, 164 S.W.2d 804 (Tex. Civ. App. 1942)* (possession of surface alone is not adverse possession of minerals where mineral rights have already been severed); *Coleman v. Republic Steel Corp., 280 S.W.2d 171 (Ky. 1955)* (acts not sufficient to establish possession). *Jacobs v. Southern Advance Bag & Paper Co., 82 So. 2d 765 (La. 1955); Gregg v. Moore, 85 S.E.2d 279 (S.C. 1954).*

Thompson on Real Property, Thomas Editions

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CHAPTER 87 ADVERSE POSSESSION

10-87 Thompson on Real Property, Thomas Editions § 87.10

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§ 87.10 The Necessity of Hostility.

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Most of the courts and writers on the subject show a requirement that the adverse possession be "hostile" to the true owner. n320 In truth, no court has been found to repudiate the essentials of hostility. Possession itself is hostile when one holds property as one's own, whether by mistake or wilfully. n321 One taking under a parol gift may hold hostile to the giver. n322 "Hostile," in this sense, does not necessarily imply ill will toward the owner, or even that there may be a dispute, but means that an occupant holds as an owner against all other claims. n323

This hostility must be present at the inception of the adverse holding and continue throughout the entire period of limitation. n324 This does not mean that the original entry must be hostile but that the acts by which the possession becomes adverse must be hostile; in other words, whether the possession was originally hostile or not, it must have been hostile at the time the statute of limitation began to run, and it must have continued to be so during the full period. n325 Where possession or occupancy of land lacks hostility and adversity to the title of the true owner, the claim to title by the occupant fails. n326 The land must be held in direct opposition to the holder of the legal title and to all others, with the exception of the government. n327 It does not matter what the character of the possession was originally, but it must become hostile in order to be deemed adverse. n328

It is said that hostility is of the very essence of adverse possession. n329 Acts done by permission never ripen into title by adverse user. n330 If possession is permissive in the beginning, it can be changed to one of hostility only by the most unequivocal conduct on the part of the adverse claimant. n331 Permissive possession, even over a long period of time, does not confer title on the person in possession of the property. n332

The difference of opinion on hostility is based on the objective versus the subjective intent of the possessor. n333

Permissive possession by someone other than the true owner will not start the running of the statute of limitations. n334 One may, however, go into possession through permission and by later acts of hostility, cause the possession to become adverse from the time of such acts. n335 Thus, if the adverse claimant recognizes title in the owner, the period of

limitation will stop running. n336 If one enters with a supposition of a license or continues in possession with a mistaken belief in a license, the possession is not adverse, except at the option of the disseisee. n337 One may take possession under a void deed or by parol, however, and start the running of the statute. n338 A husband deserted his wife and later got a divorce. Twenty-five years after desertion, the husband sold to a bona fide purchaser. It was held that the wife did not hold adversely to her husband, since possession was permissive originally and there was no showing of any new hostile act. n339

The cases are divided as to whether a mistaken claim of right with no intent to hold hostile to the true owner is adverse. n340 Hostility is presumed in case of pure mistake. n341 In the case of line fences, the majority rule permits adverse possession even under a mistaken belief as to title where the adverse possessor had an intent to possess up to the claimed line, even though it was not the legal boundary. n342 Thus, while adverse possession of land beyond the true boundary may be obtained under a mistaken claim of right, n343 under the other rule in most jurisdictions it cannot be so obtained unless there is an intention to claim such land, whether or not it is the true boundary. n344

The minority view follows the subjective test of the adverse possessor. This test requires the possessor to intend to hold adversely, regardless of whether the holding was through a mistake as to the true line or through an intent to hold regardless of error. n345 The majority rule, on the other hand, holds that intention is immaterial. n346 The distinction appears to be essentially one of semantics. If a person claimed up to a fence line only if that line was consistent with the true survey line, then, in truth, there was no claim of right where the fence line was erroneous.

Before there can be hostility, notice must be bought home to the record owner. Mere possession, even if fenced, is not sufficient in itself. n347 The word "hostile" does not imply ill will or hostility, but an intent to hold title against the record title holder. n348 While a grantor's continuing possession is presumed permissive, n349 it can be adverse if inconsistent with the grantee's rights n350 and brought to the grantee's attention. n351

An attornment by a tenant of the adverse possessor to the record owner interrupts the running of the period only where the record owner is unaware of the adverse claim. If the record owner knows of the claim and the claimant does not know of the attornment, however, there is no interruption. n352 Where the tenant of the adverse possessor attorns to the true owner and the adverse possessor fails to remove the tenant, the adverse possession is broken. n353 Otherwise, the attornment by the tenant does not interfere with the running. n354

The presumption that a grantor who remains in possession does so in subordination to the grantee's title is overcome by a long continued possession. n355 When a trustee takes title initially hostile to the *cestui*, adverse possession begins to run from the date of acquisition of title; n356 otherwise, the running begins from the date of repudiation of the *cestui*'s right. n357 The running may be interrupted by recognition of *cestui*'s right. n358 A grantor remaining in possession after executing a deed is presumed to be a tenant at sufferance and not an adverse possessor. n359

The best that can be said of the word "hostility," as related to adverse possession, is that it is redundant at best and misleading at worst. What the cases require is a clear claim of right. A conclusion of hostility follows in virtually every case.

COMPUTER-ASSISTED RESEARCH

LEXIS: Adverse possession w/20 hostil! w/10 necess!

FOOTNOTES:
(n1)Footnote 320. *Dredge v. Forsyth, 67 U. S. (2 Black 563) (1862); Armstrong v. Morrill, 81 U. S. 120 (1871); Marino v. Smith, 454 So. 2d 1380 (Ala. 1984); Chastang v. Chastang, 37 So. 799 (Ala. 1904); Fulkerson v. Van Buren, 961 S.W.2d 780 (Ark. App. 1998)* (church congregation did not possess land adversely to landowner); *Stokes v. Kummer, 936 P.2d 4 (Wash. App. 1997)* (use of farmland without making lease payments is hostile possession); Hardin

v. Watson, 148 S.W.506 (Ark. 1912); DeFrieze v. Quint, 30 P.1 (Cal. 1892); *Miller v. Bell, 764 P.2d 389 (Colo. 1988); Stamper v. Griffin, 20 Ga. 312 (1856); McCrea v. Georgia Power Co., 1 S.E.2d 664 (Ga. 1939);* Schmidt v. Williams, 203 P.1075 (Idaho 1921); Meacham v. Bunting, 41 N.E.175 (Ill. 1895); *Worchester v. Lord, 56 Me. 265 (1868);* Putzel v. Drovers & Mechs. Nat'l Bank, 28 A.276 (Md. 1894); *Witt v. Miller, 845 S.W.2d 665 (Mo. App. 1993);* Mabary v. Dollarhide, 11 S.W.611 (Mo. 1889); *Riebold v. Smith, 150 S.W.2d 599 (Mo. App. 1941); Bebout v. Peffers, 1986 WL 9303 (Ohio App. 1986);* Long Island R. Co. v. Mulry, 105 N.E.806 (N.Y. 1914); Erck v. Church, 11 S.W.794 (Tenn. 1889); Evans v. Templeton, 6 S.W.843 (Tex. 1887); *Musgrove v. Foster Lumber Co., 89 S.W.2d 287 (Tex. Civ. App. 1935);* McNeill v. Chicago & N.W.R. Co., 240 N.W.377 (Wis. 1932).

(n2)Footnote 321. *Strickland v. Markos, 566 So. 2d 229 (Ala. 1990)* (claimant's customers parked on owner's land, left beer bottles and refused to stop parking on owner's land for 22 years, was sufficiently hostile); *Whitlow v. Moore, 21 So. 2d 253 (Ala. 1945).*

Ewald v. Horenberger, 345 N.E.2d 524 (Ill. App. 1976) (good faith mistake held sufficient hostility); *Heaver v. Helm, 941 S.W.2d 801 (Mo. App. 1997)* (mistake as to legal ownership establishes hostile possession); *Calfee v. Duke, 544 S.W.2d 640 (Tex. 1976)* (innocent belief in ownership is sufficient).

(n3)Footnote 322. *Humphrey v. Harrison, 646 S.W.2d 340 (Ky. 1983); Harrelson v. Reaves, 65 S.E.2d 478 (S.C. 1951).*

(n4)Footnote 323. Helm v. Wilson, 18 P.604 (Cal. 1888); Silvarer v. Hansen, 20 P.136 (Cal. 1888); Webb v. Rhodes, 61 N.E.735 (Ind. App. 1901); *Lebel v. Nelson, 560 N.E.2d 135 (Mass. App. Ct. 1990);* Ballard v. Hansen, 51 N.W.295 (Neb. 1892); Hoffine v. Ewing, 84 N.W.93 (Neb. 1900); *Vagnoni v. Gibbons, 598 A.2d 530 (N. J. Super. 1991); Brewer v. Brewer, 78 S.E.2d 719 (N.C. 1953);* Griffin v. Mulley, 31 A.664 (Pa. 1895); *Roesch v. Gerst, 138 P.2d 846 (Wash. 1943); Young v. Newbro, 222 P.2d 1066 (Wash. 2d 1950).* "Adverse" does not require evil intent. *Leon v. Byus, 565 P.2d 1312 (Ariz. 1977).* "Hostility" only requires a claim of right. *Barclay v. Tussey, 532 S.W.2d 193 (Ark. 1976).*

(n5)Footnote 324. Collins v. Bluff City Lumber Co., 110 S.W.806 (Ark. 1908); Illinois Cent. R.R.. v. Houghton, 18 N.E.301 (Ill. 1888); *Johnson v. Black, 469 So. 2d 88 (Miss. 1985); Crawford v. Aherns, 15 S.W. 341 (Mo. 1891); Curtis v. LaGrande Hydraulic Water Co., 23 P. 808, 25 P. 378 (Or. 1840);* Delacey v. Commercial Trust Co., 99 P.574 (Wash. 1909).

(n6)Footnote 325. *Machado v. Southern Pac. TransP.Co., 284 Cal. Rptr. 560 (1991); Mercer v. Selden, 42 U. S. 37 (1843); Superior Oil Co. v. Harsh, 126 F. 2d 572 (1942). See Jasperson v. Scharnikow, 150 F. 571 (9th Cir. 1907);* Keller v. Harrison, 128 N.W.851, 131 N.W.53 (Iowa 1911); *LaFrombois v. Jackson, 8 Cow. 589 (N.Y. 1834); Sumner v. Murphy, 2 Hill (S.C.) 488, 27 Am. Dec. 397.*

(n7)Footnote 326. *Brown v. Clemens, 338 S.E.2d 338 (S.C. 1985)* (encroaching chicken coop and garage were erected under mistaken belief as to location of boundary, no evidence of hostility); *Comstock v. Finn, 56 P.2d 957 (Cal. App. 2d 1936).* Continued possession by one who agreed to a judgment holding he had no interest in the realty was not adverse. *Sweeten v. Park, 276 S.W.2d 794 (Tex. 1955).*

(n8)Footnote 327. Philbin v. Carr, 129 N.E.19 (Ind. App. 1920); *Stephens v. Stephens, 94 So. 2d 366 (Fla. 1957); Vlachos v. Witherow, 118 A.2d 174 (Pa. 1955)* (if the possession of the grantor is not hostile, that of the grantee is not until the grantee commits an adverse act); *Metze v. Metze, 97 S.E.2d 514 (S.C. 1957).* Possession cannot be permissive. *Wiggins v. Lykes Bros. 97 So. 2d 273 (Fla. 1957).* The court held that a statute providing for a passing of timber title after 30 years' possession requires such possession to be adverse. Content v. Dalton, 190 A.328, aff'd, 194 A.286 (N. J. Eq. 1937). Hostility is not required; mistaken belief is sufficient. *Brand v. Prince, 349 N.Y.S.2d 222 (1973).* If the possession of the grantor is not hostile, that of the grantee is not until the grantee commits an adverse act. *Vlachos v. Witherow, 118 A.2d 174 (Pa. 1932).*

(n9)Footnote 328. *Stamper v. Griffin, 20 Ga. 312 (1931);* Clatskanie v. McDonald, 167 P.560 (Or. 1899); *Martin v. Jackson, 27 Pa. 504 (1901).*

It is questionable whether a possessor once claiming that his possession was permissive can later insist that it was adverse during the same period. *Van Valkenburgh v. Lutz, 106 N.E.2d 28 (N.Y. 1952).*

Where possession is originally by permission there must be a clear disclaimer of the owner's rights. *Coumas v. Transcontinental Garage, Inc., 230 P.2d 748 (Wyo. 1951).*

When one takes possession of a tract of land in belief that it was a gift, where in fact no gift was intended, he is a parol licensee and not a parol donee, therefore, the interest cannot ripen into title by adverse possession. *McKinnon v. Commerford, 88 So. 2d 753 (Fla. 1956).*

One entering by permission does not become adverse until one surrenders one's possession or, by some unequivocal act, notifies the owner that he no longer holds under the agreement made. *Jackson v. Eichenberger, 205 N.W.2d 349 (Neb. 1973).*

After a judgment divesting the possessor of title, his continued possession is not adverse until notice of his hostile claim is brought home to the other party. *Green v. Vance, 314 S.W.2d 794 (Tex. 1958).* An attempt to secure a deed from the record owner was not a denial of possessor's claim of right. *Ott v. Hoffmeier, 528 S.W.2d 166 (Mo. 1975).*

(n10)Footnote 329. Ruggles v. Dandison, 279 N.W.851 (Mich. 1938); *Hillery v. Jackson, 56 N.E.2d 921 (Ohio 1931).* Entry must be hostile. *Gregg v. Moore, 85 S.E.2d 279 (S.C. 1954).* Permission destroys adverse possession. *Dutile v. Aymond, 338 So. 2d 350 (La. App. 1976); John v. Turner, 542 S.W.2d 293 (Mo. App. 1976).* Acknowledgement of owner's title destroys adverse possession. *Dickson v. Davis, 230 S.E.2d 279 (Ga. 1976); Lewis v. Village of Lyons, 389 N.Y.S.2d 674 (1976); Root v. Meekem, 542 S.W.2d 878 (Tex. Civ. App. 1976).* Permission bars adverse possession. *Pendley v. Pendley, 338 So. 2d 405 (Ala. 1976).*

(n11)Footnote 330. *Smith v. Bentley, 27 S.E.2d 252 (Ga. App. 1943); McCoy v. Cover, 158 P.2d 380 (Kan. 1945); Reuter v. Reuter's Succession, 19 So. 2d 209 (La. 1944); Harris v. Mount Zion Baptist Church, 198 So. 780 (La. App. 1940);* Warne v. Noble, 282 N.W.855 (Mich. 1938); *Strubberg v. Roethemeyer, 941 S.W.2d 557 (Mo. App. 1997)* (neighboring landowners' possession of parcel was consensual); *Kelly v. Grainey, 129 P.2d 619 (Mont. 1942); Price v. Western Life Ins. Co., 146 P.2d 165 (Mont. 1944); Petsch v. Widger, 335 N.W.2d 254 (Neb. 1983); Laurance v. Tucker, 85 P.2d 374 (Or. 1938); First Church of Christ, Scientist v. Revell, 2 N.W.2d 674 (S.D. 1942); Adams v. Lamicq, 221 P.2d 1037 (Utah 1916); Northwest Cities Gas Co. v. Western Fuel Co., 123 P.2d 771 (Wash. 2d 1942).*

See John D. Holschuh Adverse Possession: Landlord and Tenant, *19 U. Cin. L. Rev. 248 (1950).*

See also Tex-Wis Co. v. Johnson, 534 S.W.2d 895 (Tex. 1976) (holding over for forty-three years after mortgage's foreclosure overcame presumption that former owner was merely a possessive tenant); *Robinson v. Myers, 244 A.2d 385 (Conn. 1968)* (positive proof necessary to establish adverse possession); *Ramey v. Ramey, 353 S.W.2d 191 (Ky. 1962)* (The mother made a parol gift of land to a son. The son's possession was held adverse as to the mother but the adverse possession was interrupted when the mother died and the other children were not aware of the gift); *Reid v. Reid, 348 P.2d 29 (Or. 1959)* (continued possession of grantor after deed presumed with permission of grantee).

(n12)Footnote 331. *Meyers v. Meyers, 368 N.W.2d 391 (Minn. 1985)* (violent argument between former husband and wife, support and property settlement negotiations and limited use of property by wife did not rise to level of declaration of hostile possession necessary); *Johnson v. Ocean Shore R. Co., 94 Cal. Rptr. 68 (1971)* (actual notice of adverse possession is necessary if entry was by permission); *Cox v. Godec, 108 P.2d 876, 109 P.2d 643 (Colo. 1940);* Ruggles v. Dandison, 279 N.W.851 (Mich. 1938); Lustmann v. Lustmann, 283 N.W.387 (Minn. 1938); Lindolkken v.

Paulson, 272 N.W.453 (Wis. 1937).

(n13)Footnote 332. *Hutchins v. Mason, 556 So. 2d 1002 (La. App. 1990); Aylesbury v. Lawrence, 199 P.2d 474 (Kan. 1948); Barron v. Federal Land Bank, 180 So. 74 (Miss. 1938); New Orleans & N.E.R. R. v. Morrison, 35 So. 2d 68 (Miss. 1948)* (right-of-way); *Pilgrim v. Neshoba County, 40 So. 2d 598 (Miss. 1949)* (ninety-nine year lease); *Tidwell v. Waldrup, 151 S.W.2d 1092 (Mo. 1941).*

Although the Maryland constitution refers to adverse possession, MD. CONST., Declaration of Rights, art. V, see Dene L. Lusby, Note, *17 MD. L. REV. 253 (1957),* the Maryland courts have repeatedly used the lost grant theory of prescription as the basis of acquisition of title. *Colvin v. Warford, 20 Md. 357 (1863);* Sollers v. Sollers, 26 A.188 (Md. 1893); *Sterling v. Sterling, 128 A.2d 277 (Md. 1957); Scott v. Lewis, 98 S.E.2d 294 (N.C. 1957)* (where a court decision had been rendered against the possessor's title his continued possession was not adverse thereafter without further notice of their intent to hold adversely); *Port of Portland v. Maxwell, 496 P.2d 23 (Or. App. 1972)* (use by permission is not adverse).

(n14)Footnote 333. Subjective intent. *Moss v. James, 411 S.W.2d 104 (Mo. 1967).* Objective intent. *French v. Pearce, 8 Conn. 439 (1831). Gates v. Roberts, 350 S.W.2d 729 (Mo. 1961). See* Allen L. Rays, South Carolina Law on Boundary Disputes, *12 S.C. L. REV. 418 (1959)* (objective intent).

(n15)Footnote 334. *Dial v. Armstrong, 113 S.W.2d 503 (Ark. 1938); Wright Estates Germain, 12 So. 2d 451 (Fla. 1943). DeTenorio v. McGowan, 364 F. Supp. 1051 (S.D. Miss. 1973)* (if one takes possession with permission, it is presumed that this permission continues and is not hostile).

(n16)Footnote 335. *Poole v. Corwin, 447 N.E.2d 1150 (Ind. App. 1983); Burham v. Van Zandt, 7 Barb. 91 (N.Y. 1849). Connot v. Bowden, 200 N.W.2d 126 (Neb. 1972)* (permissive use requires notice brought home to the owner before it becomes adverse); *Borens v. Krywoshyja, 184 A.2d 378 (Pa. Super. 1962)* (burden of showing use was under a license and not adverse); *In re Harlem River Drive, 121 N.E.2d 414 (N.Y. 1954)* (possession by a railroad holding a determinable easement becomes adverse when the railroad ceases to function).

(n17)Footnote 336. *Combs v. DuBois, 662 P.2d 140 (Ariz. 1983)* (offer to lease or buy the property from plaintiff's predecessor constituted recognition that defendant's claim was subordinate to true owner's claim); *Ott v. Hoffmeier, 528 S.W.2d 166 (Mo. 1975)* (an attempt to secure a deed from the record owner was not a denial of possessor's claim of right); *Foster v. Foster, 100 So. 2d 19 (Ala. 1958)* (an attempt by the possessor to obtain a deed from the record owner merely manifests knowledge that the possessor does not have a valid claim and does not defeat the adverse character of the possession); *Miller v. Roberson, 165 S.W.2d 469 (Tex. Civ. App. 1942).*

(n18)Footnote 337. *Coumas v. Transcontinental Garage, 230 P.2d 748 (Wyo. 1951); Lyons v. Andrews, 313 A.2d 313 (Pa. Super. 1973)* (possession is adverse, though under a mutual mistake of ownership); *Colley v. Carpenter, 362 N.E.2d 163 (Ind. App. 1977)* (possession held adverse through mistake); *Mumrow v. Riddle, 242 N.W.2d 487 (Mich. App. 1976)* ("hostile" does not imply ill will); *Somon v. Murphy Fabrication & Erection Co., 232 S.E.2d 524 (W. Va. 1977)* (entry by mistake is hostile); *Matter of Williams' Estate, 140 Cal. Rptr. 593 (1977)* ("hostility" does not require a dispute as to the title).

(n19)Footnote 338. *Harrelston v. Reaves, 65 S.E.2d 478 (S.C. 1951).*

(n20)Footnote 339. *Moser v. Granquist, 66 A.2d 267 (Pa. 1949).*

(n21)Footnote 340. *Gay Brothers Constr. Co. v. Florida Power & Light Co., 427 So. 2d 318 (Fla. App. 1983); Tartar v. Tucker, 280 S.W.2d 150 (Ky. 1955); Bishop v. Stackus, 112 A.2d 472 (Md. 1955); Barker v. Allen, 273 S.W.2d 191 (Mo. 1954); O'Brien v. Schultz, 278 P.2d 322 (Wash. 1954),* and see *Horton v. McLerkin, 275 S.W.2d 10 (Ark. 1954); Engquist v. Wirtjes, 68 N.W.2d 412 (Minn. 1955).*

Robertson v. Fincher, 348 So. 2d 466 (Ala. 1977) (mistaken intent sufficient); *Keyakuck Inv. Co. v. Doerhoff, 530 S.W.2d 507 (Mo. App. 1975)* (possession hostile and adverse since one intended to occupy as owner even though by mistake).

Mistaken belief sufficient, VT. STAT. ANN., § 501. *Zuanick v. Quera, 376 A.2d 763 (Vt. 1977);* Holmes, J. in Bond v. O'Gara, 58 N.E.275 (Mass. 1900):

> It is true, of course that a man's belief may be immaterial as such. Probably, although the courts have not been unanimous upon the point, he will not be the less a disseisor or be prevented from acquiring a title by lapse of time because his occupation of a strip of land is under the belief that it is embraced in his deed. His claim is not limited by his belief. Or, to put it in another way, the direction of the claim to an object identified by the senses as the thing claimed overrides the inconsistent attempt to direct it also in conformity to the deed, just as a similar identification when a pistol shot is fired or a conveyance is made overrides the inconsistent belief that the person aimed at or the grantee is some one else.

Hostility is required in adverse possession. *Ellingson v. Fuller, 513 P.2d 1339 (Ariz. App. 1973); Thomas v. State, 514 P.2d 572 (Haw. 1973); Thibodeaux v. Quelodeaux, 282 So. 2d 845 (La. App. 1973).*

Mistaken belief is sufficient regardless of whether claim would have been made if true line had been known. *Barnett v. Millis, 246 So. 2d 78 (Ala. 1971).*

Colorado, as respects hostility, merely requires the person occupying the property to believe that it is his own. *Brehm v. Johnson, 531 P.2d 991 (Colo. App. 1974)* (so adverse possession can be based on mutual mistake); *Meyer v. Law, 265 So. 2d 737 (Fla. App. 1972)* (possession by mistake is adverse); *Schuline v. Pelzer, 276 N.E.2d 832 (Ill. App. 1971)* (continued use by grantor of a strip erroneously included in a deed constituted adverse possession by the grantor); *Stark v. Stanhope, 480 P.2d 72 (Kan. 1971)* (an adverse possessor's continuity is not broken by casual entry on the land by use of the public on a roadway).

Adverseness of possession held adequate where land enclosed by a plainly visible fence, even though possessor believed disputed land was his and held and used it as his own for statutory period. Hostility of possession distinction is possessor's honest belief he owns land, and willing to defend supposed right. *Ridgely v. Lewis, 105 A.2d 212 (Md. 1954).*

Massachusetts has departed from its previous position and now holds that hostility only requires possessor to hold without intending to deprive any other of what is rightfully his. *Ottavia v. Savarese, 155 N.E.2d 432 (Mass. 1959).*

Ehle v. Prosser, 197 N.W.2d 458 (Minn. 1972) (subjective intent is not required in adverse possession); *Glenville v. Strahl, 516 S.W.2d 781 (Mo. App. 1970)* (hostility is not required); *Carfee v. Duke, 544 S.W.2d 640 (Tex. 1976)* (innocent belief in ownership is sufficient); *Ewald v. Horenberger, 345 N.E.2d 524 (Ill. App. 3d 1976)* (mistaken good faith is hostility).

(n22)Footnote 341. *Shults v. Geary, 660 N.Y.S.2d 497 (N.Y. A.D. 1997)* (claimant's acknowledgment of southern landowner's superior claim defeated hostility); *MAG Associates, Inc. v. SDR Realty, Inc., 669 N.Y.S.2d 314 (N.Y. A.D. 1998)* (claimant loses where prior to vesting of title it admits that title belongs to another; there is no hostility); *Almond v. Anderegg, 557 P.2d 220 (Or. 1976). Robarge v. Willett, 636 N.Y.S.2d 938 (1996)* (hostility presumed even though both parties were mistaken as to boundary); *Reynolds v. Arnold, 633 N.Y.S.2d 662 (1995)* (presumption of hostility not rebutted).

(n23)Footnote 342. *Morrow v. Dychess, 492 S.E.2d 420 (S.C. App. 1997)* (adjacent property owner failed to establish hostility to acquire easement by prescriptive right); *Knox v. Bogan, 472 S.E.2d 43 (S.C. App. 1996);*

Linebarger v. Gomer, 766 S.W.2d 180 (Mo. App. 1989); Hustace v. Jones, 629 P.2d 1151 (Haw. App. 1981); Alexander v. Hyland, 58 So. 2d 826 (Miss. 1952).

Only when the boundary up to which each has been in possession is found to be erroneous, and the true line ascertained, is the character of the possession of the intervening strip the subject of inquiry. It has long been the settled doctrine of this state that when this has been proven, and such possession is by mistake, and without intention to assert title thereto beyond the true boundary, if it should turn out to be a part of the adjoining owner's land the possession is not adverse; for in the absence of title, or color thereof, the essential element of adverse possession -- claim of right -- is lacking. *Grube v. Wells, 34 Iowa 148 (1872);* Fisher v. Muecke, 48 N.W.936 (Iowa 1891); Goldsborough v. Pidduck, 54 N.W.431 (Iowa 1893); Skinner v. Crawford, 6 N.W.144 (Iowa 1880); Wacha v. Brown, 42 N.W.269 (Iowa 1889); Jordan v. Ferree, 70 N.W.611 (Iowa 1897). If however, such possession, though taken by mistake, is with the intention to claim title to the division line, and thus, if necessary, acquire "title by prescription," it may ripen into title. Fullmer v. Beck, 518, 75 N.W.366 (Iowa 1898); Doolittle v. Bailey, 52 N.W.337 (Iowa 1892); Heinrichs v. Terrell, 21 N.W.171 (Iowa 1884). In other words, the possession of the strip of land beyond the true boundary, taken by mistake, may or may not be adverse. It is not the mistake, but the presence or absence of an intention to claim title, that fixes the character of the entry, and determines the disseisin. Preble v. Maine Cent. R. R., 27 A.149 (Me. 1893); Wilson v. Hunter, 28 S.W.419 (Ark. 1893); *Watrous v. Morrison, 14 So. 805 (Fla. 1894).* The necessity of such intent is questioned by many authorities, holding that the reasons which influence the entry are not material, provided it was under claim of ownership, and continued in the belief in its rightfulness. The cases are about equally divided, and will be found collected in a note to Finch v. Ullman, 16 S.W.863 (Mo. 1891); Miller v. Mills County, 82 N.W.1038 (Iowa 1900).

See also Percy Bordwell, Mistake and Adverse Possession, *7 IOWA L. REV. (1922) 129;* Lon L. Fuller, Mistake as to Boundary, *7 OR. L. REV. 329 (1928);* William Sternberg, The Element of Hostility in Adverse Possession, *6 Temp.L. Q. 207-220 (1932);* Stanley R. Darling, Adverse Possession in Boundary Cases, *19 Or. L. Rev. 117 (1940);* James M. Terry, *26 KY. L. J. 248 (1938).* Cases are collected in *33 L. R. A.(NS) 923,* Annotation, 97 A.L. R. 14 (1939).

Boundary disputes may be determined on the basis of acquiescence or oral agreement. *See* Joseph P.Loeb, The Establishment of Boundary Lines by Practical Location, *4 Cal. L. Rev. 179 (1916).*

Contra *Brunton v. Roberts, 97 S.W.2d 413 (Ky. 1936);* Preble v. Maine Cent. R. Co., 27 A.149 (Me. 1893), holding to the doctrine that even though the possessor holds to what is believed to be the true lease, but that title would not have been claimed title had the possessor known what the true was, there is no adverse possession. (This, of course, places a premium on bad faith.)

(n24)Footnote 343. *Vade v. Sickler, 195 P.2d 390 (Colo. 1948).* Possession under mistaken claim of right is sufficient if intent is to claim to the mistaken and not the true line. *Sanderson v. McManus, 252 S.W.2d 351 (Mo. 1952),* distinguishing *Courtner v. Putnam, 30 S.W.2d 126 (Mo. 1930),* where intent was to claim only to the true line.

(n25)Footnote 344. *Guy v. Lancaster, 34 So. 2d 10 (Ala. 1948); Pitts v. Pitts, 210 S.W.2d 502 (Ark. 1948); Wagner v. Thompson, 186 P.2d 278 (Kan. 1948);* Bettack v. Conachen, 294 N.W.57 (Wis. 1940).

Mistaken belief as to boundary line was not adverse. *Webb v. Curtis, 361 S.W.2d 87 (Ark. 1960).*

Holding under innocent mistake of boundaries is not adverse. *Ikola v. Goff, 107 Cal. Rptr. 663 (1973).*

In Kansas, the adverse possessor must have had the intent to claim even if aware of no title. Edwards v. Fleming, 112 P.836 (Kan. 1911); *Boese v. Crane, 324 P.2d 188 (Kan. 1958).*

In Massachusetts, one may acquire title by adverse possession under a mistaken claim of right. *Boutin v. Perreault, 178 N.E.2d 482 (Mass. 1961).*

Contra *Vlachos v. Witherow, 118 A.2d 174 (Pa. 1955)* (element of hostility is lacking); *Brand v. Prince, 349 N.Y.S.2d 222 (1973)* (hostility is not required; mistaken belief is sufficient).

(n26)Footnote 345. *Estate of Mark v. H. H. Smith Co., 547 N.E.2d 796 (Ind. 1989); Tobin v. Stevens, 251 Cal. Rptr. 587 (1988); Ouzts v. McKnight, 103 S.E.2d 561 (S.C. 1920);* see Allen L. Ray, South Carolina Law on Boundary Disputes, *12 S.C. L. REV. 418 (1959)* and *Metze v. Meetze, 97 S.E.2d 514 (S.C. 1957).*

(n27)Footnote 346. Good faith mistake held sufficient hostility. *Ewald v. Horenberger, 345 N.E.2d 524 (Ill. App. 1970).*

(n28)Footnote 347. *Williams v. Rogier, 611 N.E.2d 189 (Ind. 1993)* (permissive possession does not become hostile until a clear disclaimer is brought home to the owner).

(n29)Footnote 348. *Vlachos v. Witherow, 118 A.2d 174 (Pa. 1955).* Expressions of adverse intent not required for hostility. *Mumrow v. Riddle, 242 N.W.2d 489 (Mich. App. 1976).* Hostility requires a denial of owner's title but does not connote ill will. *Leon v. Byers, 565 P.2d 1312 (Ariz. 1977).*

(n30)Footnote 349. *Vlachos v. Witherow, 118 A.2d 174 (Pa. 1955).* Buyer holding possession after notice of rescission of sales contract holds adversely to owner. *Storck v. Pascoe, 72 N.W.2d 467 (Iowa 1955).* Continued possession by vendor is not adverse. *Kidd v. Young, 190 S.W.2d 65 (Tex. 1945),* nor by one in possession under a land-sales contract who continued to recognize the contract. *Bell v. Bell, 116 A.2d 921 (Me. 1955),* or a mortgagee in possession who recognized mortgagor's title. *Killian v. Everett, 79 So. 2d 17 (Ala. 1955),* nor one purchasing the rents, issues and profits at a tax sale for a term of years prior to the expiration of the term. *DeBow v. Hatfield, 114 A.2d 10 (N. J. Super. 1955).*

(n31)Footnote 350. *Board of Educ. v. Unknown Heirs, 128 N.E.2d 534 (Ohio 1954).*

(n32)Footnote 351. *Vlachos v. Witherow, 118 A.2d 174 (Pa. 1955).*

(n33)Footnote 352. *Kirby Lumber Corp. v. Laird, 231 F. 2d 812 (5th Cir. 1956).*

(n34)Footnote 353. *Id.*

(n35)Footnote 354. *Powell Lbr. Co. v. Nobles, 44 S.W.2d 774 (Tex. Civ. App. 1931).*

(n36)Footnote 355. *Haller v. Haller, 286 S.W.2d 331 (Ark. 1956).* Failure to pay ad valorem taxes indicated possession was not hostile. *Norman v. Smedley, 363 P.2d 839 (Okla. 1961).* A grantor or a judgment debtor holding over after sale is not in adverse possession against the grantee or purchaser unless actual notice is given of such adverse possession, the possessor being but a tenant at sufferance. *Green v. Vance, 314 S.W.2d 794 (Tex. 1958).*

(n37)Footnote 356. *Grant v. Grant, 340 S.E.2d 791 (S.C. 1986); Henslee v. Merritt, 82 So. 2d 212 (Ala. 1955).*

(n38)Footnote 357. *Woursell v. Woursell, 144 N.Y.S.2d 20 (1955).*

An oral agreement that the mortgagee was to have title in satisfaction of the debt, on the strength of which the mortgagee went into possession, was an adverse holding. *Knecht v. Spake, 346 P.2d 98 (Or. 1959).*

(n39)Footnote 358. *Henslee v. Merritt, 82 So. 2d 212 (Ala. 1955).*

The fact that the adverse possessor seeks to obtain a deed for the land from the record titleholder does not necessarily defeat his claim of right. *Foster v. Foster, 100 So. 2d 19 (Ala. 1956).*

(n40)Footnote 359. *Walker v. Coley, 88 So. 2d 868 (Ala. 1956)* (the presumption that the possession of the grantor continues subservient to the grantee does not run indefinitely).

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CHAPTER 87 ADVERSE POSSESSION

10-87 Thompson on Real Property, Thomas Editions § 87.11

AUTHOR: Professor Olan B. Lowrey School of Law Temple University Portion of this Chapter are based on Ch. 38 of George W. Thompson, Commentaries on the Law of Real Property (John S. Grimes, ed. reprinted 1979).

§ 87.11 Claim of Right or Title.

[Go To Supp]

It is probably a better rule that for the possession to be adverse, the possessor must have the intention of making a claim of right personally n360 and not through permission of another. n361

The Statute of Marlborough, n362 which set the date of 1230, the year Henry III voyaged to Brittany, n363 as the time for which seisin was necessary before a landlord's distress for services would lie, did not require proof of a written charter except in one instance. This was the beginning of the common law rule that an adverse possession need not be based on color of title, but only on a claim of right.

This claim of right must go beyond a mere right to possession. n364 It must relate to title or at least common law seisin. No matter how exclusive and hostile the possession may be in appearance, it cannot be adverse unless accompanied by an intent on the part of the occupant to make it so, and naked possession without any claim of right will never constitute a bar to the true owner's recovery of the land. n365 Possession, no matter how long continued, will not ripen into title unless the occupant asserts an exclusive ownership. n366 A mere squatter or trespasser is not an adverse possessor. n367 Mere naked possession or occupancy of realty must be deemed as being an occupancy for the benefit of the true owner. n368 Possession should be based on a claim of ownership or title in order to render it adverse. n369

The intention with which possession is taken or held is regarded as a controlling factor in determining whether or not it is adverse. There must be an intention to claim the title as owner, in derogation of the rights of the true owner. n370 Occupancy is not a mode of acquiring title to land, except when it is retained by the acquirer with the intention of keeping the property occupied as the acquirer's own. n371

This intention to claim as owner is said to be the very essence of title by adverse possession, n372 and to say that the possession must be hostile is equivalent to saying that it must be under a claim of right. n373 A claim may be of right even though the claimant knows that the true title is held by another. n374 A few courts have stated that the adverse claimant must have actual exclusive possession under claim of specific title, and not simply under a general assertion of

ownership. n375 However, the general rule is that one may claim and acquire title by adverse possession, independent of color of title. n376 To claim title by adverse possession, the claim of right must be as broad as the possession. n377 The claim of ownership must be open and not clandestine. n378 While reputation evidence of ownership is admissible to support a claim of title, it is not admissible to show actual ownership. n379

The courts and the legislatures are not, however, in step as to the extent to which such claim of right must be identical with a claim of fee simple absolute title. n380 The problem is understandable in light of the fact that the average layman does not know what fee simple absolute is. It is commonly said that the possession must be under claim of ownership, n381 but misapprehension has arisen from the use of such terms as "claim of right," "claim of title" and "claim of ownership." These terms, when used in connection with adverse possession, mean to some courts nothing more than the intention of the disseisor to appropriate and use the land as the disseisor's own, to the exclusion of all others. n382

There is a line of authority that holds to the doctrine that an adverse possessor must claim nothing less than a fee simple absolute that is the whole title. n383 Others permit the acquisition of a right-of-way by a railroad through adverse possession. n384 Still others permit one to obtain adverse possession of a right-of-way owned by a railroad where the possessor did not claim the entire fee, n385 and a mineral severance can be effected by adverse possession of the minerals separate from the land. n386 The cases have divided as to whether one claiming a homestead on what was mistakenly believed to be public lands could obtain title by adverse possession when the lands were ultimately shown to have been privately owned. n387

Some courts permit the adverse possessor to claim less than a fee simple absolute. n388 Under this rule, the claim of right by the adverse holder need be adverse only to the owner of the land. n389 The claim of right must be asserted publicly; it cannot exist merely in the mind of the possessor. n390 It need not, however, be based on any written instrument, n391 nor made in writing. n392 It has been held that it need not have any actual basis in fact. n393 It can arise through the acts and conduct of the possessor alone. n394 Care must be taken to distinguish between claim of right and color of title. n395 Claim of right is always required; color of title is not, except as required by statute. n396 Claim of title is where one enters and occupies land with the intent to hold it as one's own against the world, irrespective of any shadow or color of right or title as a foundation for his/her claim. Color of title is the semblance or appearance of title where the claimant does not in fact have title. They are distinct from, but supplementary to, each other. A parol gift of land gives sufficient claim of right in the grantee to permit the running of adverse possession. n397

COMPUTER-ASSISTED RESEARCH

LEXIS: Adverse possession w/20 claim w/3 (right or title not w/4 adverse)

FOOTNOTES:

(n1)Footnote 360. *Harvey v. Tyler, 69 U. S. 328 (1864);* Doe ex dem. Duval's Heirs v. McLoskey, 1 Judges 708 (Ala. 1840); *Turnipseed v. Moseley, 27 So. 2d 483 (Ala. 1946); Kurz v. Blume, 95 N.E.2d 338 (Ill. 1950); Meyers v. Canutt, 46 N.W.2d 72 (Iowa 1951); Hardison v. McCreary, 304 F. 2d 699 (5th Cir. 1962); Richterberg v. Wittich Memorial Church, 222 F. Supp. 324 (W. D. Okla. 1963).*

Claim of right is necessary. *Moran v. Roaring River Dev. Co., 461 S.W.2d 822 (Mo. 1970).*

Presumption of claim of right in adverse possession. *Dunnick v. Stockgrowers Bank of Marmouth, 215 N.W.2d 93 (Neb. 1974).*

(n2)Footnote 361. *Frazier v. Banks, 170 S.W.2d 900 (Ky. 1943); Holmes v. Johnson, 86 N.E.2d 924 (Mass. 1949);* Knight v. Denman, 90 N.W.863 (Neb. 1902). Adverse possession may be obtained while recognizing superior right in the government. *Abar v. Rogers, 100 Cal. Rptr. 344 (1972).* Adverse possession does not begin to run under a lease. *Arndt v. Ball, 70 N.W.2d 746 (Mich. 1955).*

Adverse possession cannot be predicated on possession of child against parent. *Watson v. Chilton, 187 S.E.2d 482 (N.C. App. 1972).*

Actual possession creates adverse possession regardless of possessor's intent to hold adversely. *Whytock v. Green, 383 P.2d 628 (Okla. 1963).*

(n3)Footnote 362. *52 Hen. 3 (1267).*

(n4)Footnote 363. This date had been first set by the *Statute of Merton, 20 Hen. 3* C8 (1235) as the date that novel assertion was only law when the plaintiff had been seized and disseized since that date.

(n5)Footnote 364. A mere possession of land of itself does not necessarily imply a claim of right. *School Dist. No. 4 v. Benson, 31 Me. 381 (1850);* Smeberg v. Cunningham, 56 N.W.73 (Mich. 1893); Buttz v. James, 156 N.W.547 (N.D. 1915).

(n6)Footnote 365. *Lucas v. Scott, 24 So. 2d 540 (Ala. 1945);* Arduino v. Detroit, 228 N.W.694 (Mich. 1930); *Mosley v. Gulf Prod. Co., 111 S.W.2d 726 (Tex. Civ. App. 1937).*

(n7)Footnote 366. *Jasperson v. Scharnikow, 150 F. 571 (9th Cir. 1907); Manhattan Land & Fruit Co. v. Buras, 43 F. Supp. 361 (E.D. La. 1942); Hess v. Rudder, 23 So. 136 (Ala. 1898);* Tennessee *Coal, Iron & R. Co. v. Linn, 26 So. 245 (Ala. 1899); Stiff v. Cobb, 28 So. 402 (Ala. 1900);* Meacham v. Bunting, 41 N.E.175 (Ill. 1895); *Cooper v. Tarpley, 41 N.E.2d 640 (Ind. App. 1942);* Baber v. Henderson, 57 S.W.719 (Mo. 1900); *Brown v. Chapman, 163 S.W.2d 920 (Mo. 1942);* Colvin v. Republican Valley Land Ass'n, 36 N.W.361 (Neb. 1888); *Van Valkenburgh v. Lutz, 106 N.E.2d 28 (N.Y. 1952);* Coquille Mill & Merc. Co. v. Johnson, 98 P.132 (Or. 1908); *Dry Gulch Ditch Co. v. Hutton, 133 P.2d 601 (Or. 1943); Babb v. Harrison, 66 S.E.2d 457 (S.C. 1951);* Pioneer Inv. & Trust Co. v. Board of Educ., 99 P.150 (Utah. 1909); *Roesch v. Gerst, 138 P.2d 846 (Wash. 1943).*

(n8)Footnote 367. *Roby v. Hill, 11 Alaska 600 (1948); Buckley v. Taggart, 62 Ind. 236 (1878).*

(n9)Footnote 368. *Morris v. Futischa, 148 P.2d 968 (Okla. 1944).*

(n10)Footnote 369. *Sharon v. Tucker, 144 U. S. 533 (1892); Snell v. Ruppert, 582 P.2d 916 (Wyo. 1978); Clark v. Hargrave, 473 S.E.2d 474 (S.C. App. 1996); Getsinger v. Midlands Orthopaedic Profit Sharing Plan, 327 S.C. 385 (S.C. App. 1997)* (hostility necessary against the whole world, not just against the true owner).

(n11)Footnote 370. *Payne v. Consolidated Coal, 607 F. Supp. 378 (W. D. Va. 1985); Sanders v. Baker, 231 S.W.2d 106 (Ark. 1950);* Bond v. O'Gara, 58 N.E.275 (Mass. 1900); Swope v. Ward, 84 S.W.895 (Mo. 1904).

This inattention may be inferred from the possessor's acts and the facts involved. *Hauer v. Van Straaten Chem. Co., 112 N.E.2d 623 (Ill. 1953); Tucker v. Hankey, 250 P.2d 784 (Kan. 1952).*

(n12)Footnote 371. *Wayne v. Roosevelt, 617 P.2d 17 (Ariz. 1980); Buckley v. Dumond, 156 So. 784 (La. App. 1934).*

(n13)Footnote 372. *F & J Enterprises, Inc. v. DeMontigny, 573 N.W.2d 153 (Neb. App. 1997)* (adjacent landowners occupied under claim of ownership); Altschul v. O'Neill, 58 P.95 (Or. 1899).

(n14)Footnote 373. Lathrop v. Levarn, 74 A.331 (Vt. 1909).

(n15)Footnote 374. *Dittmer v. Jacwin Farms, Inc., 637 N.Y.S.2d 785 (1996)* (possession not under claim of right); *Owens v. Bartruff, 687 P.2d 1072 (Or. 1984); McDaniel v. Sloss-Sheffield Steel & Iron Co., 44 So. 705 (Ala. 1907).*

(n16)Footnote 375. *Crary v. Goodman, 22 N.Y. 170 (1860); Dawley v. Brown, 79 N.Y. 390 (1880).*

(n17)Footnote 376. McVannel v. Pure Oil Co., 247 N.W.735 (Mich. 1933).

(n18)Footnote 377. Brewer v. Claypool, 275 N.W.34 (Iowa 1937).

(n19)Footnote 378. *James Harvey Ramsey Estate v. Pace, 467 So. 2d 1202 (La. App. 1985); Allen v. Sharp, 233 S.W.2d 485 (Tex. Civ. App. 1950).*

(n20)Footnote 379. *Bentley Family Trust v. Lynx Enters, 658 P.2d 761 (Alaska 1983)* (community reputation is evidence of notice); *Hart v. Rogers, 527 S.W.2d 230 (Tex. Civ. App. 1975).* This is partly a semantic distinction because sufficient reputation as to ownership may be so conclusive of claim of right as to result in title by adverse possession.

(n21)Footnote 380. For an example of the conflict of thinking as to the necessity of claim of freehold compare Percy Bordwell, Disseisin and Adverse Possession, *33 YALE L. J. 141 (1923),* and Edward H. Warren, A Problem in "Tacking," *88 U. PA. L. REV. 897 (1940).*

(n22)Footnote 381. Philbin v. Carr, 129 N.E.19 (Ind. App. 1920).

(n23)Footnote 382. *Guaranty Title & Trust Corp. v. United States, 264 U. S. 200 (1924); Van Valkenburgh v. Lutz, 106 N.E.2d 28 (N.Y. 1952)* (necessity of making claim of title in adverse possession). *See United States v. Certain Lands, 25 F. Supp. 52 (W. D. Ky. 1938).*

Some jurisdictions require a positive claim of right in adverse possession. *Evans v. Francis, 101 N.Y.S.2d 716 (1951);* Real Property -- Adverse Possession -- Necessity for a Claim of Right, *20 Fordham L. Rev. 345 (1951).*

(n24)Footnote 383. *Bedell v. Shaw, 59 N.Y. 46 (1874).*

(n25)Footnote 384. Branson v. Studebaker, 33 N.E.98 (Ind. 1892).

(n26)Footnote 385. Consumers Gas Trust Co. v. American Plate Glass Co., 68 N.E.1020 (Ind. 1903); Long Island R. Co. v. Mulry, 105 N.E.806 (N.Y. 1914).

(n27)Footnote 386. Catlin Coal Co. v. Lloyd, 52 N.E.144 (Ill. 1898).

Georgia now permits adverse possession against separated mineral rights by the fee simple owner of the property. *Nelson v. Bloodworth, 232 S.E.2d 547 (Ga. 1977).* GA. CODE ANN. § 85-407. 1.

Ownership or possession of surface after severance of minerals is not adverse to the owner of minerals. W.VA. CODE, § 55-2-1A.

(n28)Footnote 387. *Peters v. Smuggler-Durant Mining Corporation, 930 P.2d 575 (Colo. 1997)* (color of title under 7 year statute must concur in the time span with other elements of adverse possession statute, including possession and payment of taxes). Adverse possession obtained. Fear v. Barwise, 143 P.505 (Kan. 1914); Maas v. Burdetzke, 101 N.W.182 (Minn. 1904).

Contra *Hunnewell v. Burchett, 54 S.W. 487 (Mo. 1899).*

(n29)Footnote 388. *Kelly v. Wilson, 36 So. 2d 817 (Miss. 1948)* (fee simple determinable); *West v. Moore, 246 S.W.2d 74 (Tenn. 1952).*

(n30)Footnote 389. *Ellett v. Mitcham, 145 S.W.2d 917 (Tex. Civ. App. 1940).*

(n31)Footnote 390. Weber v. Detroit, 123 N.W.540 (Mich. 1909).

(n32)Footnote 391. Marion Inv. Co. v. Virginia Lincoln Furn. Corp., 198 S.E.508 (Va. 1938).

(n33)Footnote 392. Smith v. Feneley, 215 N.W.353 (Mich. 1927).

(n34)Footnote 393. Schmidt v. Brown, 80 N.E.1071 (Ill. 1907).

(n35)Footnote 394. Illinois Cent. R. Co. v. Houghton, 18 N.E.301 (Ill. 1888).

An attempt to secure a deed from the record owner was not a denial of possessor's claim of right. *Ott v. Hoffmeier, 528 S.W.2d 166 (Mo. App. 1975).*

(n36)Footnote 395. *Curtis v. Innerarity, 47 U. S. (6 How.) 146 (1948);* Philbin v. Carr, 129 N.E.19 (Ind. App. 1920); *Gibbs v. Lester, 41 S.W.2d 28 (Tex. Com. App. 1931).* Claim of ownership is essential. *Bailey v. Mahr, 552 S.W.2d 866 (Neb. 1977).*

(n37)Footnote 396. *Bonifay v. Garner, 445 So. 2d 597 (Fla. 1984);* see Annotation, *43 A.L. R. 2D 59 (1955);* and Annotation *32 A.L. R. 2D 1229 (1953).*

(n38)Footnote 397. *Humphrey v. Harrison, 646 S.W.2d 340 (Ky. 1983); Harrelson v. Reaves, 65 S.E.2d 478 (S.C. 1951).* Adverse possession originating in mistaken claim of right is sufficient. *Miles v. Blanton, 88 S.E.2d 273 (Ga. 1955).*

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CHAPTER 87 ADVERSE POSSESSION

10-87 Thompson on Real Property, Thomas Editions § 87.12

AUTHOR: Professor Olan B. Lowrey School of Law Temple University Portion of this Chapter are based on Ch. 38 of George W. Thompson, Commentaries on the Law of Real Property (John S. Grimes, ed. reprinted 1979).

§ 87.12 "Color of Title" as the Term Is Generally Used.

Cal. Prob. Code § 56.14

"Color of title" is something in writing which, at face value, professes to pass title but which does not do it, either from want of title in the person making it or from the defective mode of conveyance that is used. Such writing must not be so plainly and obviously defective, however, that a person of ordinary understanding would be misled by it. Where reference is made in a statute to "color of title," the term may have a much more limited meaning, referring to instruments which would pass good title but for certain stated defects. In most such cases, the defects will not be apparent on the face of the instrument, such as a deed, will, or certificate of inheritance. Under the statutes of some states, an unrecorded or unregistered deed cannot afford color of title. n398 A quitclaim deed does not constitute color of title. n399

While a forged deed is not in and of itself color of title, a grantee under a forged deed may, in turn, give a deed sufficient validity to be color of title for purpose of adverse possession. n400 Since color of title is defined as any writing which professes to pass title but which fails to do so, either from want of title in the person making it or from the defective mode of conveyance employed, n401 a forged deed, accepted by the grantee and subsequent grantees as genuine and regular in all respects, is a sufficient color of title. n402

The Federal "Color-of-Title" Act n403 requires good faith possession to ripen into title. n404 Color of title is not essential to adverse possession, n405 except where it is being relied upon pursuant to a statute. Title can be perfected by longer occupancy with all elements present.

A quitclaim deed to a right-of-way does not constitute color of title to the fee, n406 but a tax deed is ordinarily considered color of title, whether void or voidable. n407 To be effective as color of title, the property must be described with a degree of certainty, so that the boundaries may be ascertained. n408 A sales contract is color of title. n409 As to whether color of title must be in writing is a matter upon which the authorities are not agreed. Statutes in some states expressly require some writing, n410 and in some jurisdictions the courts hold that a writing is indispensable as a matter of law. n411 In other jurisdictions, however, it is held that color of title may exist without a writing. n412

In law, color of title is not title at all. It is a void paper having the semblance of a muniment of title, to which, for certain purposes, the law attributes certain qualities of title. Its chief office or purpose is to define the limits of the claim under it. Nevertheless, it must purport to pass title. n413 A deed to community property is color of title though one member of the community does not sign. n414 In some jurisdictions the doctrine of color of title is available only in cases where the instrument purporting to be a conveyance is accepted in good faith and in the honest belief that it invests the title in the claimant. n415 Other jurisdictions lay down the rule that, except in particular cases covered by statute, it is not a necessary element of color of title that the claimant thereunder should believe it to be valid. n416

The fact that the deed does not contain a covenant of warranty or is a mere quitclaim deed does not generally prevent adverse possession from running in favor of the grantee. n417 Where all the parties knew that the grantors named in a deed had no title, they could not rely on the deed as color of title. n418 An instrument conveying actual title is not color of title. n419

In problems involving adverse possession, care must be taken to distinguish between claim of right and color of title. Claim of right is an essential element of adverse possession. n420 In the absence of a statutory requirement to that effect, it is not necessary that the claim of title should be with color in order to constitute adverse possession. n421 Some courts have held it unnecessary and improper to inject the idea of color of title where the evidence is introduced for the sole purpose of showing that the possession has been adverse. n422 In a few jurisdictions, in particular, which make good faith a requirement of adverse possession, the requirement of color of title has been added to the common law claim of right as an element of adverse possession, though not necessarily. n423 Thus, some statutes provide that there must be color of title, either at the time of entry or subsequent thereto, before possession of land will ripen into a title by adverse possession. n424

Even in those states, however, it is not necessary that title of the disseisor be valid to constitute an adverse possession. The disseisor's title may be bad, or the original entry may have been by permission of the true owner. It is only necessary that the disseisor should have color of title and that the color of title should purport to give a freehold estate adverse to that of the original owner. The disseisor must have title, or color of title as distinguished from a mere claim of title. n425

On the other hand, at common law and under the majority rule in this country, the adverse claimant need not have a deed or other writing giving color of title or furnishing foundation for belief or claim of ownership or legal right to enter or take possession of land. n426 So under the rule in the majority of states, color of title is a necessary factor only when it is necessary to establish constructive possession, n427 to claim title to improvements as an occupying claimant n428 or as an aid to proving good faith when required, n429 or to benefit from a shorter statute of limitations. Color of title can dispense with the necessity of other proof that possession is hostile. n430

As the term is generally used, it is merely a sign or semblance of title, n431 written evidence of title n432 which, by reason of some defect not clearly appearing on its face, does not, in fact, amount to title. n433 It implies that a valid title has not passed to the claimant. n434 Consequently, an instrument which conveys title cannot be said to be color of title. n435 Color of title is merely the appearance of title without its reality, saving its possessor only from the imputation of being a naked trespasser; it contributes nothing to the fiber of title as affecting the adverse character of the possession. n436 Color of title may be given by deed not fully effective to pass title, n437 by will, by descent cast, by an execution sale, by a tax deed though invalid, n438 by a decree of court or invalid deed, n439 or by any instrument which serves to define the extent of the disseisor's claim and purports to convey title. n440 Some decisions hold that color of title or its equivalent may also be created by acts and circumstances which of themselves show the character and extent of the disseisor's entry and claim. n441 Basically, color of title is not essential to adverse possession, although it is a constructive possession. n442 As previously noted, however, some states shorten the requisite time if there is color of title. n443

COMPUTER-ASSISTED RESEARCH

LEXIS: Adverse possession w/20 index (color of title) or title (color of title)

FOOTNOTES:
(n1)Footnote 398. Eaton v. Doub, 128 S.E.494 (N.C. 1925); Rook v. Horton, 129 S.E.450 (N.C. 1925) (an unregistered deed not supported by consideration does not afford color of title against one claiming under a deed for value).

Color of title, where adverse possession under color of title requires a shorter period of time than otherwise by statute, requires a written instrument. *Karvonen v. Dyer, 261 F. 2d 671 (9th Cir. 1958).*

Color of title cannot arise from a deed in which the description is not sufficient to identify the premises so as to pass title thereto. *Hughes v. Heard, 109 S.E.2d 510 (Ga. 1959).*

A deed, which validly conveys title to part of a tract which it describes, is color of title to the balance. *Wachovia Bank & Trust Co. v. Miller, 89 S.E.2d 765 (N.C. 1955). Solomon's Rock Trust v. Davis, 675 A.2d 506 (Me. 1996).*

Georgia Power Company v. Irvin, 482 S.E.2d 362 (Ga. 1997) (adverse possession established by 20 years of adverse possession and 10 years under color of title.); *Harris v. Lynch, 940 S.W.2d 42 (Mo. App. 1997)* (possession must involve physical possession of entire area claimed if there is no color of title.); *Whipple v. Trail Properties, Inc., 652 N.Y.S.2d 657* (N.Y. App. Div. 3d Dep't 1997) (where deed did not indicate actual boundaries of contested parcel with certainty, summary judgment in favor of claimant was error where action was under color of written instrument.)

(n2)Footnote 399. A quitclaim deed would not support a short period of limitation. *Porter v. Wilson, 389 S.W.2d 650 (Tex. 1965);* Cal L. Donsky & William A.Kramer, Title to Land -- An Instrument Which Conveys only the Grantor's Right in the Land is a Quitclaim and Will Not Support the Five-Year Statute of Limitations, *43 Tex. L. Rev. 1129 (1965).*

(n3)Footnote 400. *Boudreaux v. Olin Industries, Inc., 94 So. 2d 417 (La. 1957).*

A deed by one co-tenant cannot be color of title as against the other co-tenants. John L. Roper Lumber Co. v. Richmond Cedar Works, 80 S.E.982 (N.C. 1914).

Johnson v. McLamb, 101 S.E.2d 311 (N.C. 1958) (tax foreclosure sale of one co-tenant's interest was color of title where sheriff's deed purported to convey entire interest).

(n4)Footnote 401. *Lewis v. Harding, 512 So. 2d 96 (Ala. 1987)* (any instrument purporting to convey title); Burns v. Stewart, 78 S.E.321 (N.C. 1913); *Cobb v. Spurlin, 327 S.E.2d 244 (N.C. App. 1985)* (does not convey title because of defect).

(n5)Footnote 402. *Bergesen v. Clauss, 155 N.E.2d 20 (Ill. 1958).*

(n6)Footnote 403. *43 U. S.C. § 1068.*

(n7)Footnote 404. Actual boundaries of patent, clearly marked, prevented title from ripening as to adjoining tract. *Day v. Hickel, 481 F. 2d 473 (9th Cir. 1973).*

(n8)Footnote 405. *Bonifay v. Garner, 445 So. 2d 597 (Fla. 1984); Ruick v. Twarkins, 367 A.2d 1380 (Conn. 1976).*

(n9)Footnote 406. Void tax deed is color of title. *Carney v. Anderson, 58 So. 2d 13 (Miss. 1952),* cert. denied, *344 U. S. 860 (1952). See La Caze v. Boycher, 80 So. 2d 583 (La. App. 1955);* and *Shepherd v. Mahannah, 220 F. 2d 737*

(5th Cir. 1955), to same effect.

Quitclaim deed executed after the grantor has conveyed away the property is not color of title. *Coons v. Baird, 265 N.E.2d 727 (Ind. App. 1970).*

(n10)Footnote 407. *Bradley v. Gordon, 200 So. 736 (Ala. 1941); Douglass v. Aldridge, 105 So. 145 (Fla. 1925); Gochenour v. Logsdon, 30 N.E.2d 666 (Ill. 1040);* Tibbetts v. Holway, 109 A.382 (Me. 1920); *Jones v. Gulf Ref. Co., 34 So. 2d 735 (Miss. 1948); Johnson v. Moore, 143 S.W.2d 254 (Mo. 1940); Barker v. Hayes, 147 S.W.2d 429 (Mo. 1940); Heron v. Garcia, 199 P.2d 1003 (N. M. 1948).*

See Calvary Baptist Church v. Saxton, 242 P.616 (Or. 1925); *Junction City Special Sch. Dist. v. Whiddon, 249 S.W.2d 990 (Ark. 1952)* (tax deed void for erroneous description was color of title); *King v. Fasching, 234 S.W.2d 549 (Mo. 1950)* (one in possession under an invalid deed may acquire title by adverse possession); *Turner Lumber Co. v. Beckham, 277 So. 2d 110 (Miss. 1972)* (tax deed is color of title).

(n11)Footnote 408. *Bryant v. Perry, 145 S.W.2d 1055 (Ky. 1940); Snelling v. Adair, 199 So. 782 (La. 1940); Armstrong Cork Co. v. Crook, 227 So. 2d 64 (Fla. App. 1969)* (to be color of title, the instrument must purport to convey the land); *Bruce v. Cheramie, 93 So. 2d 202 (La. 1956)* (a deed with a defective description is color of title for purposes of prescription).

(n12)Footnote 409. *First Nat'l Bank of Wray v. McGinnis, 819 P.2d 1080 (Colo. App. 1991); Rosenbaum v. Bohanon, 36 So. 2d 798 (Miss. 1948).*

(n13)Footnote 410. Wilson v. Atinson, 20 P.66 (Cal. 1888); Lower Latham Ditch Co. v. Louden Irrig. Canal Co., 60 P.629 (Colo. 1900); *Doyle v. Wade, 1 So. 516 (Fla. 1887); Mitchell v. Moore, 13 So. 2d 314 (Fla. 1943);* Sontag v. Bigelow, 31 N.E.674 (Ill. 1892); *Brooks-Scanlon Co. v. Childs, 74 So. 147 (Miss. 1917);* Power v. Kitching, 86 N.W.737 (N.D. 1901).

(n14)Footnote 411. Tennessee *Coal, Iron & R. Co. v. Linn, 26 So. 245 (Ala. 1899);* Barrett v. Brewer, 69 S.E.614 (N.C. 1910).

Deed lacking wife's signature held color of title. *Romero v. Garcia, 546 P.2d 66 (N.M. 1976).*

(n15)Footnote 412. *Taylor v. Buckner, 2 A.K. Marsh. (9 Ky.) 18 (1819); Green v. Kellum, 23 Pa. 254 (1854). See Walters v. Watson, 247 S.W.2d 368 (Ky. 1952); Baker v. Baker, 559 P.2d 415 (N.M. 1977)* (void deed may be color of title).

(n16)Footnote 413. *Roe v. Doe ex dem. Tennessee Coal, Iron & Ry. Co., 50 So. 230 (Ala. 1909);* Mehard v. Little, 196 P.536 (Okla. 1921); State v. King, 87 S.E.170 (W. Va. 1915).

(n17)Footnote 414. *Romero v. Garcia, 546 P.2d 66 (N. M. 1976).*

(n18)Footnote 415. Philbin v. Carr, 129 N.E.19 (Ind. App. 1920).

(n19)Footnote 416. Shutt v. Methodist Episcopal Church, 218 S.W.1020 (Ky. 1920).

(n20)Footnote 417. *Dupuy v. Joly, 200 So. 806 (La. 1941).*

(n21)Footnote 418. *Kuhn v. Chesapeake & O. R. Co., 118 F. 2d 400 (4th Cir. 1941).*

So where one in possession by permission took a quitclaim deed from a third party without notifying the record title owner of intent to hold adversely, there was no adverse possession. McNeill v. Sheboygan & M. R. Co., 240 N.W.377

(Wis. 1932). *See* William F. Walsh, Title by Adverse Possession, *16 N.Y. U. L. REV. 532 (1937-38), 17 N.Y. U. L. Rev. 44* (1938-39).

(n22)Footnote 419. So where a statute voided a deed, if not recorded within two years, the grantee could not claim by adverse possession under color of title of deed until the two years had elapsed. *Justice v. Mitchell, 78 S.E.2d 122 (N.C. 1953);* and see Barnesville v. Stafford, 131 S.E.487 (Ga. 1926).

(n23)Footnote 420. *Howard v. Berrien Springs, 19 N.W.2d 101 (Mich. 1945).*

(n24)Footnote 421. *Appalachian Regional Healthcare, Inc. v. Regal Crown Bottling Co., 824 S.W.2d 878 (Ky. 1992);* Anderson v. Burnham, 34 P.1056 (Kan. 1893); Carpenter v. Coles, 77 N.W.424 (Minn. 1898); Knight v. Denman, 90 N.W.863 (Neb. 1902), aff'd, 94 N.W.622 (Neb. 1903).

(n25)Footnote 422. Philbin v. Carr, 129 N.E.19 (Ind. App. 1920).

(n26)Footnote 423. *Jasperson v. Scharnikow, 150 F. 571 (9th Cir. 1907).*

(n27)Footnote 424. *Beaver v. Taylor, 68 U. S. (1 Wall.) 637; Dolton v. Cain, 81 U. S. (14 Wall 472) (1871); Beverly v. Burke, 9 Ga. 440 (1851); Royall v. Lisle, 15 Ga. 545 (1854);* Barrett v. Brewer, 69 S.E.614 (N.C. 1910); Ferguson v. Kennedy, Peck. (7 Tenn.) 321 (1824).

(n28)Footnote 425. *Dawley v. Brown, 79 N.Y. 390 (1880).* Deed lacking wife's signature held color of title. *Romero v. Garcia, 546 P.2d 66 (N. M. 1976).*

(n29)Footnote 426. *Guaranty Title & Trust Corp. v. United States, 264 U. S. 200 (1924); Leavitt v. Elkin, 49 N.E.2d 1020 (Mass. 1943).*

(n30)Footnote 427. Siegle v. Criss, 144 N.E.307 (Ill. 1924); Fear v. Barwise, 143 P.505 (Kan. 1914).

Constructive adverse possession under color of title. *Somin v. Murphy Fabrication & Erection Co., 232 S.E.2d 524 (W. Va. 1977); Alaska Nat'l Bank v. Linck, 559 P.2d 1049 (Alaska 1977).*

(n31)Footnote 428. *Nutting v. Herman Timber Co., 29 Cal. Rptr. 754 (1963).*

(n32)Footnote 429. *See* Tellferd v. Barney, 6 Western L. J. 385 (1848).

(n33)Footnote 430. *Stamper v. Griffin, 20 Ga. 312 (1856).*

(n34)Footnote 431. *Wright v. Mattison, 59 U. S. (18 How.) 50 (1855);* Finley v. Hogan, 30 S.W.1045 (Ark. 1895); Philbin v. Carr, 129 N.E.19 (Ind. App. 1920) (color of title is not to be confused with claim of title); *Barker v. Hayes, 147 S.W.2d 429 (Mo. 1940); West Virginia Pulp & Paper Co. v. J. Natwick & Co., 21 S.E.2d 368 (W. Va. 1941).*

Color of title is that which in appearance is title, but which in reality is no title. Seavey v. Williams, 191 P.779 (Or. 1920).

(n35)Footnote 432. *Fitzpatrick v. Massee-Felton Lumber Co., 3 S.E.2d 91 (Ga. 1939); Foote v. Chicago, 13 N.E.2d 965 (Ill. 1938).*

(n36)Footnote 433. Stoll v. Gottbreht, 176 N.W.932 (N.D. 1920); Knight v. Grim, 65 S.E.42 (Va. 1909).

(n37)Footnote 434. *Cobb v. Spurlin, 327 S.E.2d 244 (N.C. App. 1985);* Abels v. Pillman, 168 S.W.1180 (Mo. 1914); Morrison v. Linn, 147 P.166 (Mont. 1915); Stoll v. Gottbreht, 176 N.W.932 (N.D. 1920).

(n38)Footnote 435. *Shepherd v. Cox, 1 So. 2d 495,* error overruled, *4 So. 2d 217 (Miss. 1941).*

(n39)Footnote 436. *Dice v. Reese, 21 A.2d 89 (Pa. 1941).*

(n40)Footnote 437. Gathright Land Co. v. Begley, 255 S.W.837 (Ky. 1923); Frady v. Ivester, 125 S.E.134 (S.C. 1924); *Wallace v. McPherson, 214 S.W.2d 50 (Tenn. 1947).*

But a deed to "all my real estate," where the grantor owned no land, was not color of title. *Chambers v. Chambers, 72 S.E.2d 8 (N.C. 1952).*

(n41)Footnote 438. *Carney v. Anderson, 58 So. 2d 13 (Miss. 1952); Sailer v. Mercer County, 45 N.W.2d 206 (N.D. 1957).*

(n42)Footnote 439. *Gray Lumber Co. v. Pickard, 71 So. 2d 211 (Miss. 1954).*

(n43)Footnote 440. *Cook v. Norton, 43 Ill. 391 (1867);* Tibbetts v. Holway, 109 A.382 (Me. 1920); *Thompson v. Burhans, 79 N.Y. 93 (1879).*

(n44)Footnote 441. Kirby v. Kirby, 86 N.E.259 (Ill. 1908); *Hollinshead v. Nauman, 45 Pa. 140 (1863).* Color of title not required. *Penn. Cent. Transp. Co. v. Martin, 353 N.E.2d 474 (Ind. App. 1976).*

(n45)Footnote 442. Constructive adverse possession under color of title. *Somin v. Murphy Fabrication & Erection Co., 232 S.E.2d 524 (W. Va. 1977); Alaska Nat'l Bank v. Linck, 559 P.2d 1049 (Alaska 1977).*

(n46)Footnote 443. *Hope Land Mineral Corporation v. Christian, 570 N.W.2d 268 (Mich. App. 1997)* (shorter, five-year period applicable under color of sheriff's deed); *Henderson v. Tejada, 549 P.2d 242 (Ariz. App. 1976)* (possession under color of title for three years).

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CHAPTER 87 ADVERSE POSSESSION

10-87 Thompson on Real Property, Thomas Editions § 87.13

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§ 87.13 Requirement that Possession Be Continuous.

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As has been earlier discussed, the exact legal theory behind the origin of adverse possession is not clear. To the extent that disseisin gave a legal title, though defeasible, to the disseisor, no substantial term for possession was essential. n444 The disseisin itself gave title as against all the world. The disseisee could invoke the aid of the courts to regain seisin, provided the disseisin had not occurred before the date specified in the current statute. The later statutes n445 again limited the time within which the action for possession could be brought. They thus operated merely as a bar to the disseisee. There was no requirement of time of possession in the disseisor before the disseisor could defend possession against third parties, or even against the disseisee who re-entered. n446

There were, however, traces of a requirement of continued possession in the disseisee, n447 yet this was not true if another estate as of curtesy intervened between the death of the ancestor and the entry of the heir. n448 The statute of Henry VIII n449 barred entry against the heir only if the disseisor had five years possession after disseisin. The English Prescription Act n450 changed the theory of the previous statutes by barring the right of property, as well as the right of action, with others vesting the occupant with fee simple title. n451 Although this positive declaration of passage of title is missing from most of the American statutes, its force is universally recognized by the courts.

The courts are not in accord, however, as to the basic theory of adverse possession. Some treat it primarily as either an abandonment of possession or as a punishment to the owner for neglecting to re-enter. Under this reasoning, an owner out of possession for the statutory period loses title regardless of the privity of those in possession. n452 There is authority, however, to the effect that if title can be acquired by eminent domain it cannot be taken by adverse possession. n453 The great weight of authority, however, holds to the position that title draws possession to it, unless the possession is held adversely. n454 Therefore, when one abandons adverse possession, the possession reverts to the owner. n455 Thus, each adverse possessor must start anew, unless the possession is held in privity with the predecessor. n456 The effect of this change is evidenced further. Since the statute of limitations so confers a positive right on the possessor as well as creating a disability in the record owner, principles of equity demand that the possessor earn this right. Certainly, the possessor of today does not, as did the disseisor, acquire title by taking possession. Instead, today's

possessor gains title through long continued possession. Thus, not only must the owner be out of possession for the required period of time, but the possessor must also be in possession during this period. The holding may be interrupted by acts of the possessor indicating an admission of the record owner's title. n457

Continuity of possession may be established even if the land is used regularly for only a certain period each year; n458 intermittent and irregular use may be continuous if not interrupted by assertion of a paramount right. n459 Hence, to confer title by adverse possession, the possession must be shown to have been continuous for the full prescriptive period. n460 The possession must not only begin under claim of right adverse to the true owner, but it must continue so. n461 An intermittent occupancy will not satisfy the requirements of the law, for the moment the land becomes vacant, the law restores the possession to the holder of the legal title. n462 A perspective more consistent with general principles is that interim occupancy rarely meets the requirement that possession be continuous.

The cases are divided as to whether an adverse possessor of the surface terminates the adverse possession of the underlying minerals when the adverse possessor executes a mineral severance. n463

A party cannot get title by holding for part of the period and then surrendering the lands sought to another party. To give up the possession before the statutory period has run will wipe out all rights theretofore gained. n464 It must be continuous in the sense of not being abandoned by the claimant, n465 and in the sense as to afford a cause of action every day during the whole period. n466 When possession is effectively interrupted, the running of the statute is stopped, and a subsequent return to possession will not avail. The running of the statute will begin only from the date of the return. n467 Since occasional acts of dominion over the land will not constitute continuous possession, even if extended over the statutory period, the possession must be something more than temporary occupancy in order to be adverse. n468 Mere sporadic acts do not constitute adverse possession, n469 but it has been held that a temporary break or interruption, of not unreasonable duration, will not destroy the continuity of the adverse claimant's possession. n470 This rule is one of substance and not of absolute mathematical continuity, provided there is no break so as to sever two possessions. n471 It is not necessary that the occupant should be actually upon the premises continually. n472 If the land is occupied during the period of time it is capable of use, there is sufficient continuity. n473

Abandonment of the property by the adverse possessor prior to perfecting title puts an end to the possessory title, so that the adverse possessor cannot recover the property from a person entering subsequently without right. When the adverse possessor's possession ends, the adverse possessor is no longer subject to an action of ejectment by the owner, and, therefore, the statute can no longer run against that action. The adverse possessor becomes a complete stranger to the property. A subsequent entry gives rise to a new cause of action against which the statute starts to run anew. The question usually involved in the cases is whether the adverse possessor abandoned the premises without intent to return or merely left it temporarily intending to return and retain the possessory title. n474 Starting an action in ejectment or to quiet or register title by the owner and carrying through to a successful conclusion, not discontinued or otherwise disposed of not on the merits, is an interruption, causing the statute to start to run anew if the adverse possession is continued thereafter. n475 Based on the same requirements as the taking of possession by the adverse holder, open and notorious entry to regain the possession is an interruption, since a continued possession by the adverse possessor thereafter creates a new cause of action. n476 Some statutes fix a required period for interruption to be effective. n477 In the absence of evidence either of abandonment of possession or interruption thereof or of possession by another under a claim of title, possession of land by the grantee under a deed is presumed to continue as to the grantee and the grantee's successors in title. n478 The burden is on the claimant to show that a break in the continuity existed only for a reasonable period. n479 A break in possession after one has acquired title by adverse possession will have no effect on the rights one has thus acquired, at least against all except the owner. n480 The general principleis that once title is perfected it is like any other title as against everyone, including the former owner.

By taking possession, the adverse possessor acquires a legal right in the land that can be transferred to another. Thus, though possession must be continuous for the entire statutory period, such continuous possession need not be by one and the same person. One person may start the adverse possession to land, and another in privity with the person may

continue it for the statutory period. n481 The possession of successive occupants, if there is privity between them, may be tacked to make adverse possession for the requisite period. n482 Several successive periods of possession by different persons may be tacked or added to each other, provided the successive occupants are in privity of contract, estate, or blood, n483 and the combined period of such adverse holdings will be deemed as one continuous possession for the statutory period. n484

To tack, it is essential that there be privity, for different, unconnected entries only constitute a succession of trespasses, even though there may be no appreciable interval between the same. n485 It is generally held that "there must be privity of grant or descent, or some judicial or other proceedings which shall connect the possession so that the latter shall apparently hold by right of the former," n486 and that "the privity may be created in any way that will prevent a break in the adverse possession and refer the several possessions to the original entry, and it may be created by parol or otherwise from vendor to vendee." n487 Privity of estate exists between successive occupants when the earlier occupants' possession and claim passed or was transferred to the latter occupants by agreement, gift, devise, or inheritance. n488 It may be established by parol under the majority rule. n489 Privity necessary to enable possessory rights to be transferred is merely a succession of relationships to the same thing. n490 The English view has permitted tacking though there be no privity; it has been held that one disseisor in England can tack the possession of one whom the disseisor has disseised, though the latter be also a disseisor. n491

There is authority for the proposition that in the case of deeds, only the land actually conveyed is considered as being included, and the possession by the grantor of other lands not conveyed cannot be tacked by the grantee onto the period of the grantee's holding to make up the statutory period, even though such land may be adjacent to the property conveyed and used in connection therewith. n492 In such cases the deed does not establish privity between the two disseisors. n493 This is especially true if the grantee in possession has made no claim to title. n494 Where a person having title by deed to a lot or tract of land described in the deed also has enclosed with it -- and is in possession of -- adjoining land to which the person has no record title, and where the person conveys the land by the description in the deed and delivers with it the possession of the entire enclosure, the continuity of possession will not be broken, and the two possessions may be joined and considered as one continuous possession. n495

The point at issue is the intended and actual transfer of possession of the land held adversely. n496 A correction deed subsequently executed which includes the omitted tract makes proper the tacking of successive adverse possession of occupants. n497 It is the general rule that any conveyance, agreement, or understanding which will refer several adverse possessions to the original entry, and which is accompanied by a transfer of possession, will create such a privity as to permit a tacking for the purpose of establishing title by adverse possession. n498 For example, a husband's deed to his wife of the homestead was void because he did not sign and acknowledge it, and the wife conveyed the property to third person after her husband's death. No interval of time prior to the husband's death could be considered as adverse possession to support a claim of adverse possession asserted by the wife's grantee. n499

If a purchaser from an adverse possessor relies upon the seller's statement that the seller owns the land held adversely, there is sufficient privity to permit tacking though the deed does not describe the land. n500 On the question of boundary, the manner in which the privity is maintained is important, for if the deed description is strictly construed, the conveyance to an adverse claimant relied upon for tacking may not include within its bounds the land adversely held, and the tacking may therefore depend entirely upon an understanding. n501 Privity that will permit the tacking of possessions exists in the relationship of testator and devisee, n502 ancestor and heir, n503 landlord and tenant, n504 vendor and vendee, n505 and purchaser at a judicial sale and the occupant of the land. n506 To tack the tenant's occupation, however, the use must have been expressly or impliedly embraced within the terms of the tenancy. n507 Purchasers at administrators' sales of realty take in privity with the deceased adverse possessor. n508 An oral transfer will convey the adverse possessor's rights to the land but only until possession ripens into title, thereafter the Statute of Frauds applies. n509 It is essential that there be no gap between the holdings which are to be tacked, n510 although a brief vacancy resulting from a change of occupancy, as between landlord and tenant, does not prevent tacking in favor of the landlord. n511 Possession either through descent or by transfer of title or possession is considered to be in privity.

n512 A remainderman may tack the remainderman's possession to that of the life tenant for the purpose of creating adverse possession. n513 South Carolina permits tacking by descent, n514 but not by *inter vivos* transfer n515 or by will. n516

An adverse occupant cannot tack the possession of a prior occupant in order to perfect adverse title where such prior occupant did not or could not claim the land adversely. n517 Therefore, possession of land by the owner thereof in fee simple cannot be tacked upon subsequent possession of others to make out a prescriptive period. n518

COMPUTER-ASSISTED RESEARCH

LEXIS: Adverse possession w/20 continuous! pre/4 possess!

FOOTNOTES:
(n1)Footnote 444. *Hubbard v. Little, 9 Cush. 475 (Mass. 1852)* (so he could sue as against a new trespasser); Asher v. Whitlock, L. R. 1, Q. B. 7. *Price v. Lyon, 14 Conn. 279 (1841)* (ejectment). 3 Edw. ch. 39.

(n2)Footnote 445. *32 Hen. 8* ch. 32. The statute of 21 Jam., ch. 16 is the first modern method as to ejectment, but still held to the old rule as respects writ of right. 3 and 4 Will. 4, ch. 27 adopted the modern theory completely. Fifteen years adverse possession in *Connecticut, Robinson v. Myers, 244 A.2d 385 (Conn. 1968);* ten years in *Texas, Winchester v. Porretto, 432 S.W.2d 170 (Tex. Civ. App. 1968).*

(n3)Footnote 446. Descent cast upon the heir of the disseisor. Coke on Littleton, § 237 or alienation by the disseisor. 3 William Blackstone, Commentaries 176 barred reentry by the disseisee and left the disseisee to the remedy at law.

(n4)Footnote 447. Apparently because the lord had given a new title to the heir by recognizing the heir. Hale, reentry abolished by 3 and 4 WILL. 4, ch. 27, § 39.

(n5)Footnote 448. Littleton, § 394.

(n6)Footnote 449. *32 Hen. 8*, ch. 33. This did not affect feoffees of the disseisor.

(n7)Footnote 450. 3 and 4 Will. 4, ch. 27, § 34.

(n8)Footnote 451. Digby, History of Real Property, ch. 10, § 3 (Clarendon, 5th ed. 1987).

(n9)Footnote 452. *Smith v. Chapin, 31 Conn. 530 (1863); Davis v. McArthur, 78 N.C. 357 (1878); Scales v. Cockrill, 3 Head. (40 Tenn.) 432 (1859).*

(n10)Footnote 453. In re Condemnation of Certain Ground in *Prospect Park, 50 Del. Co. (Pa.) 212 (1962).*

(n11)Footnote 454. Wishart v. McKnight, 59 N.E.1028 (Mass. 1901); Sherin v. Brackett, 30 N.W.551 (Minn. 1886).

Nature of interruption necessary to defeat possessory actions. *Liner v. Louisiana Land & Exploration Co., 319 So. 2d 766 (La. 1975),* Note, Property -- Nature of Interruption Necessary to Defeat Possessing Action, *51 Tul. L. Rev. 168 (1976).*

(n12)Footnote 455. *Pistner Bros., Inc. v. Agheli, 518 A.2d 838 (Pa. Super. 1986)* (claimant's offer to purchase property from true owner broke continuity); *Kirby Lbr. Corp. v. Laird, 231 F. 2d 812 (5th Cir. 1956).*

One cannot tack a prior non-possessory period to a subsequent possessory period though the claimant held color of

title and paid taxes during the earlier period. *Vider v. Zavislan, 362 P.2d 163 (Colo. 1961).*

But dictum to the effect that title may be abandoned by long continued absence. *Commonwealth, Dep't of Parks v. Stephens, 407 S.W.2d 711 (Ky. 1966).*

(n13)Footnote 456. *Bennett v. Louisiana Pacific Corporation, 693 So. 2d 1319 (La. App. 1997)* (title acquired to disputed property through "acquisitive prescription" by 30 years of uninterrupted possession); *Martin v. Kearl, 917 P.2d 91 (Utah App. 1996); Meek v. Ralston, 918 S.W.2d 358 (Mo. App. W. D. 1996); Rathborne v. Hale, 667 So. 2d 1197 (La. App. 4th Cir. 1996); Matte v. Dan Beard, Inc., 546 A.2d 854 (Conn. App. 1988)* (no proof corporations were connected); *Doe ex dem. Harlan v. Brown, 4 Ind. 143 (1853); Spradling v. May, 65 So. 2d 494 (Ala. 1953); Ennis v. Stanley, 78 N.W.2d 114 (Mich. 1956)* (possession must be continuous).

(n14)Footnote 457. *Brinner v. Huckaba, 957 S.W.2d 491 (Mo. App. 1997)* (continuity not established); *Brown v. Whitcomb, 550 A.2d 1 (Vt. 1988)* (mere verbal protests without action to reassert dominion or control over disputed land does not interrupt the adverse possession); *Borne v. La Terre Co., 222 F. 2d 453 (5th Cir. 1955)* (a decree of ejectment against an adverse possessor interrupts the running of the period); *Thompson v. Morris, 237 S.W.2d 473 (Ark. 1951)* (one who uses land, not held by title but mistakenly thought to be included in land held by title, for the statutory period acquires that land by adverse possession, in spite of fact that the land was occupied only seasonally while adverse possessor was operating cotton gin on the title land); *Thompson v. Gonterman, 285 S.W.2d 157 (Ky. 1955)* (removal of fence by claimant after construction by him); *Thomas v. Young, 87 S.E.2d 127 (Va. 1955)* (running of adverse possession is not affected by a tax sale and redemption by the record owner where the state had a mere lien for taxes); *Sims v. Cage, 523 S.W.2d 486 (Tex. Civ. App. 1975)* (a judgment entered against adverse possessor in trespass to try title of suit interrupted the running of adverse possession).

(n15)Footnote 458. *Slater v. Ward, 460 N.Y.S.2d 150 (1983)* (seasonal use did not negate adverse possession); *Ewing v. Burnet, 36 U. S. (11 Pet.) 41 (1837).* But see *Thompson v. Morris, 237 S.W.2d 473 (Ark. 1951).*

Coslin v. Crossett Co., 342 S.W.2d 303 (Ark. 1961) (Weekend occupancy of a shack held not possession of wild land).

With respect to adverse possession, Texas distinguishes between "casual" or "incidental" enclosure in casual grazing and actual possession. *Mixon v. Clark, 518 S.W.2d 402 (Tex. Civ. App. 1974).*

Harvesting timber during times woodland timber could be cut was sufficient continuity. *Amey v. Hall, 181 A.2d 69 (Vt. 1962).*

Exclusive occupancy of a hunting cabin during hunting season held adverse possession. *Kraus v. Mueller, 107 N.W.2d 467 (Wis. 1961).*

See Comment, Seasonal Use of Land for Business Purposes as Regards Quality of Adverse Possession, *21 Baylor L. Rev. 217 (1969).*

Helton v. Cook, 219 S.E.2d 505 (N.C. App. 1975) (possessor's prison sentence was temporary, and did not interrupt running of possession).

(n16)Footnote 459. *Armstrong v. Armstrong, 493 So. 2d 253 (La. App. 1986); Williams v. Babcock, 368 A.2d 1166 (N. H. 1976).*

(n17)Footnote 460. *Ewing v. Burnet, 36 U. S. (11 Pet.) 41 (1837); Doswell v. De La Lanza, 61 U. S. (20 How.) 29 (1857); Armstrong v. Morrill, 81 U. S. (14 Wall.) 120 (1871); Hogan v. Kurtz, 94 U. S. 773 (1876); Deputron v. Young, 134 U. S. 241 (1890); United States v. Chaves, 159 U. S. 452 (1895); Iowa R. Land Co. v. Blumer, 206 U. S. 482 (1907); Jasperson v. Scharnikow, 150 F. 571 (9th Cir. 1907); Rucker v. Jackson, 60 So. 139 (Ala. 1912); Layton v.*

Hamilton, 107 So. 830 (Ala. 1926); Sanderson v. Thomas, 90 S.W.2d 965 (Ark. 1936); Horton v. Smith-Richardson Inv. Co., 87 So. 905 (Fla. 1921); Douglass v. Aldridge, 105 So. 145 (Fla. 1925); Blalock v. Redwine, 12 S.E.2d 639 (Ga. 1940); Patellis v. Tanner, 34 S.E.2d 84 (Ga. 1945); Meacham v. Bunting, 41 N.E.175 (La. 1895); *Stephenson v. Doe ex dem. Wait, 8 Blackf. (Ind.) 508 (1847);* McBeth v. Wetnight, 106 N.E.407 (Ind. App. 1914); *Gay v. Moffitt, 2 Bibb (5 Ky.) 506 (1812); Trotter v. Cassady, 3 A.K. Marsh. (10 Ky.) 365 (1821);* Asher v. Gibson, 248 S.W.862 (Ky. 1923) (subsequent adverse possession cannot be tacked onto a prior one where a period intervenes during which possession was interrupted); *Creech v. Jenkins, 123 S.W.2d 276 (Ky. 1938);* Ashcraft v. Courtney, 121 S.W.625 (Ky. 1909); *Frazier v. Banks, 170 S.W.2d 900 (Ky. 1943); Stephens v. Kidd, 181 S.W.2d 688 (Ky. 1944); Sanders De Hart v. Continental Land & Fur Co., 17 So. 2d 827 (La. 1944); Ranger Land Co. v. Story, 200 So. 649 (La. App. 1941),* modified, *1 So. 2d 410 (La. App. 1941); Henly v. Kask, 11 So. 2d 230 (La. App. 1942); Proprietors of Kennebec Purchase v. Laboree, 2 Me. 275 (1823);* Novak v. Orphans Home, 90 A.997 (Md. 1914); *Holyoke v. Haskins, 5 Pick. (22 Mass.) 20 (1827);* Hewitt v. Peterson, 148 N.E.450 (Mass. 1925); Cook v. Clinton, 31 N.W.317 (Mich. 1887); *Smeberg v. Cunningham, 56 N.W.73 (Mich. 1893), Ennis v. Stanley, 78 N.W.2d 114 (Mich. 1956);* Mabary v. Dollarhide, 11 S.W.611 (Mo. 1889); *Nichol v. Hettinger, 408 N.W.2d 302 (Neb. 1987);* Colvin v. Republican Valley Land Ass'n, 36 N.W.361 (Neb. 1888); *Christmas v. Cowden, 105 P.2d 484 (N. M. 1940); Michelsen v. Leskowitz, 55 N.Y.S.2d 831 (1945),* aff'd, *63 N.Y.S.2d 191 (1946);* McElhany v. Langston, 232 P.439 (Okla. 1924); *Fessler v. Thompson, 130 P.2d 513 (Okla. 1942);* Faull v. Cooke, 26 P.662 (Or. 1890); *Reeves v. Porta, 144 P.2d 493 (Or. 1944); Hershey v. Poorbaugh, 21 A.2d 434 (Pa. Super. 1941); McCullough v. Wall, 4 Rich. (S.C.) 68 (1850);* Walker v. Sorenson, 265 N.W.589 (S.D. 1936); Erck v. Church, 11 S.W.794 (Tenn. 1889); *Stockton v. Murray, 157 S.W.2d 859 (Tenn. App. 1941);* Evans v. Templeton, 6 S.W.843 (Tex. 1887); *Gibbs v. Lester, 41 S.W.2d 28, 80 (Tex. Com. App. 1931); Hardy v. Bumpstead, 41 S.W.2d 226 (Tex. Com. App. 1931); Pinchback v. Hockless, 158 S.W.2d 997 (Tex. Com. App. 1942); Hart v. Rochelle, 170 S.W.2d 245 (Tex. Civ. App. 1943);* Illinois Steel Co. v. Budzisz, 81 N.W.1027, reh'g denied, 82 N.W.534 (Wis. 1900).

One making a lease with the tenant of an adverse possessor is charged with notice that the lessee cannot repudiate the landlord's title, and this does not interrupt the running of the period. *Kimble v. Willey, 204 F. 2d 238 (8th Cir. 1953).*

Attornment by tenant to true owner with adverse possessor's knowledge interrupts running of the period. *Kirby Lumber Corp. v. Laird, 231 F. 2d 812 (5th Cir. 1956).*

Continuance of occupancy required. *United States v. Wilcox, 258 F. Supp. 944 (N.D. Iowa 1956). Ray v. Beacon Hudson Mountain Corp., 88 N.Y. 2d 154 (1996).*

(n18)Footnote 461. *Foscue v. Mitchell, 182 So. 740 (La. 1938).*

(n19)Footnote 462. *Bradley v. Gordon, 200 So. 736 (Ala. 1941); San Francisco v. Fulde, 37 Cal. 349 (1869);* McBeth v. Wetnight, 106 N.E.407 (Ind. App. 1914); Philbin v. Carr, 129 N.E.19 (Ind. App. 1920); *Trotter v. Cassady, 3 A.K. Marsh. (10 Ky.) 365 (1821);* Wilson v. Braden, 49 S.E.409 (W. Va. 1904); *See Douglass v. Aldridge, 105 So. 145 (Fla. 1925);* Bloodsworth v. Murray, 114 A.575 (Md. 1921); Baxter v. Girard Trust Co., 135 A.620 (Pa. 1927); Denying adverse possession because possession not continuous but questioning ruling of *Noland v. Wise, 259 S.W.2d 46 (Ky. 1953),* that possession to be adverse must constitute a cause of action every day. *Kentucky Women's Christian Temperance Union v. Thomas, 412 S.W.2d 869 (Ky. 1957).*

Acts of sporadic possession were insufficient. *Epps v. Freeman, 200 S.E.2d 235 (S.C. 1973).*

(n20)Footnote 463. *Burlington N., Inc. v. Hall, 322 N.W.2d 233 (N. Dak. 1982);* Continued possession of the surface by the grantor does not inure to the grantee's benefit. Northcut v. Church, 188 S.W.220 (Tenn. 1916).

Contra *Black Warrior Coal Co. v. West, 54 So. 200 (Ala. 1910);* Clements v. Texas Co., 273 S.W.993 (Tex. Civ. App. 1925).

(n21)Footnote 464. *Faulks v. Schrider, 114 F. 2d 587 (App. D. C. 1940); Warfield Nat. Gas Co. v. Ward, 149 S.W.2d 705 (Ky. 1940);* Bean v. Bean, 128 N.W.413 (Mich. 1910); *Shell Oil Co., Inc. v. Stone, 151 S.W.2d 872 (Tex. Civ. App. 1941).*

(n22)Footnote 465. *Heide v. Sheeks, 682 S.W.2d 877 (Mo. 1984); Simonds v. Stanolind Oil & Gas Co., 114 S.W.2d 226 (Tex. 1938);* Swan v. Young, 14 S.E.426 (W. Va. 1892).

Temporary absence does not break continuity of possession. *Feinstein v. McGuire, 297 S.W.2d 513 (Mo. 1957).*

Acts of sporadic possession were insufficient. *Epps v. Freeman, 200 S.E.2d 235 (S.C. 1973).*

Dictum that owner's survey of the land did not interrupt running of adverse possession. *Rosencrantz v. Shields, Inc., 346 A.2d 237 (Md. App. 1975).*

(n23)Footnote 466. White v. McNabb, 131 S.W.1021 (Ky. 1910); *Stephenson Lumber Co. v. Hurst, 83 S.W.2d 48 (Ky. 1935).*

Continuous possession for five years prior to the commencement of an action of ejectment, so as to justify the occupant's claim of title, need not be for the period immediately next preceding the action. *Comstock v. Finn, 56 P.2d 957 (Cal. App. 1936).*

It is held not necessary to the perfection of title based on thirty years' possession that corporeal possession once begun shall continue unbroken every day of the period. *Gibson v. Young, 163 So. 747 (La. App. 1935).*

Mere sporadic use of land is insufficient. *Inn Le'Daerda, Inc. v. Davis, 360 A.2d 209 (Pa. Super. 1976).*

(n24)Footnote 467. Strong v. *Baldwin, 97 P.178 (Cal. 1908);* Boltz v. Colsch, 109 N.W.1106 (Iowa 1906); Weisel v. Hobbs, 294 N.W.448 (Neb. 1940).

(n25)Footnote 468. *Elyton Land Co. v. Denny, 18 So. 561 (Ala. 1895). Goen v. Sansbury, 149 A.2d 17 (Md. 1959)* (claimant, who after platting the land and vainly trying to sell lots, abandoned his efforts for 13 years, did not hold adversely during the 13 years though he paid taxes).

(n26)Footnote 469. *McMullen v. Dauley, 418 A.2d 1147 (Me. 1980)* (sporadic cutting of wood insufficient in wooded area); *Shibley v. Hayes, 215 S.W.2d 141 (Ark. 1948); Thompson v. Morris, 237 S.W.2d 473 (Ark. 1951); Klein v. Caswell, 199 P.2d 689 (Cal. App. 1948); Floyd v. Bruce, 214 S.W.2d 402 (Ky. 1948).*

Utley v. Ruff, 502 S.W.2d 629 (Ark. 1973) (if there is a break in continuity of adverse possession, there can be no tacking); *Burns v. Crump, 95 S.E.2d 906 (N.C. 1957)* (there is no tacking if the deed does not describe the land adversely held).

(n27)Footnote 470. *Bruch v. Benedict, 165 P.2d 561 (Wyo. 1946).*

(n28)Footnote 471. *Anneberg v. Kurtz, 28 S.E.2d 769 (Ga. 1944).*

(n29)Footnote 472. *Barrell v. Renehan, 39 A.2d 330 (Vt. 1944).*

(n30)Footnote 473. *Adams v. Lamicq, 221 P.2d 1037 (Utah 1950).*

(n31)Footnote 474. Held no abandonment under the facts. *Beasley v. Howell, 22 So. 989 (Ala. 1898)* (vacancy caused by a tenant of claimant moving out, continuing for some time until another tenant moved in); Botsford v. Eyraud, 83 P.1008 (Cal. 1906) (grantee of possessor did not enter for a year; enclosure and keeping out of trespassers

during interval); Britt v. Houser, 188 S.W.628 (Ky. 1916); Bahneman v. Fritche, 180 N.W.215 (Minn. 1920); Hunter v. Pinnell, 91 S.W.472 (Mo. 1906); Pease v. Whitney, 98 A.62 (N. H. 1916) (failure to cultivate land, intent to retain land proved); Cathcart v. Matthews, 89 S.E.1021 (S.C. 1916) (temporary absence with intent to return); Chase v. Eddy, 92 A.99 (Vt. 1914) (after cutting for several years, marked lines of lot and made survey, no abandonment of possessory title).

Held abandonment. Meek v. Davis, 224 S.W.659 (Ky. 1920) (moved his family away a mile, returning after a full crop season); *Stephens v. Leach, 19 Pa. 262 (1852)* (intent to abandon sufficiently established by actual unequivocal abandonment in fact). Actual intent to return is not material if not established by conduct. A definite surrender of possession and dominion is sufficient. *Hoyle v. Mann, 41 So. 835 (Ala. 1906).*

(n32)Footnote 475. *General Iron Industries, Inc. v. A. Finkl & Sons Co., 686 N.E.2d 1 (Ill. App. 1997)* (adverse possession interrupted when title owner filed petition for bankruptcy reorganization); *Knoke v. Swan, 42 P.2d 1019 (Cal. 1935)* (action to quiet title); Baumgartner v. Doherty, 190 N.E.838 (Mass. 1934); Holmgren v. Isaackson, 116 N.W.205 (Minn. 1908) (dismissal by consent, no interruption); Butler v. Secrist, 138 N.W.749 (Neb. 1912); and Butler v. Smith, 120 N.W.1106 (Neb. 1909) (holding ejectment an interruption though action was changed to an action to redeem); Monnot v. Murphy, 100 N.E.742 (N.Y. 1913) (statute started to run anew when the possession was continued after the owner's judgment in ejectment); Barrell v. Title Guar. & Trust Co., 39 P.992 (Or. 1895). Dismissal without prejudice prevents an interruption by the suit. *Crawford v. Sasser, 38 S.W.2d 434 (Ky. 1931); Chastang v. Chastang, 37 So. 799 (Ala. 1904)* (entry ends the exclusive character of the wrongdoer's possession though he is not actually ousted); *Smith v. Southern Pac. R. Co., 34 P.2d 713 (Cal. 1934);* Nelson v. Johnson, 226 S.W.94 (Ky. 1920); *Bowen v. Guild, 130 Mass. 121 (1881);* Landon v. Townshend, 29 N.E.71 (N.Y. 1891); Zellmer v. Martin, 147 N.W.371 (Wis. 1914).

(n33)Footnote 476. Stealth not an interruption. *Burrows v. Gallup, 32 Conn. 493 (1865).* Must be more than a mere trespass, such as a contentious entry, to build a fence then torn down by possessor, Bugner v. Chicago Title & Trust Co., 117 N.E.711 (Ill. 1917); express notice is not necessary where entry and taking possession are open and notorious so that notice is implied. Batchelder v. Robbins, 45 A.837 (Me. 1900); *Ransom v. Lewis, 63 N.C. 43 (1868).*

(n34)Footnote 477. *See* William Edward Taylor, Titles to Land by Adverse Possession, *20 IOWA L. REV. 551 (1935).*

(n35)Footnote 478. *Wittig v. Carlucci, 537 A.2d 29 (Pa. Super. 1988); Sisson v. Swift, 9 So. 2d 891 (Ala. 1942).*

(n36)Footnote 479. *Ortmeyer v. Bruemmer, 680 S.W.2d 384 (Mo. 1984)* (flooding of land causing sporadic absense was sufficient proof); *Hardy v. Bumpstead, 41 S.W.2d 226 (Tex. Com. App. 1931).*

(n37)Footnote 480. *Munroe v. Eshe, 156 P.2d 700 (Colo. 1944).*

(n38)Footnote 481. *Christy v. Alford, 58 U. S. (17 How. 601) (1854); Doswell v. De La Lanza, 61 U. S. (20 How. 29) (1857); Meier v. Meier, 162 P.2d 950 (Cal. App. 1945);* Reynolds v. Smith, 199 S.E.137 (Ga. 1938); *Blalock v. Redwine, 12 S.E.2d 639 (Ga. 1940); Cliett v. Metropolitan Life Ins. Co., 24 S.E.2d 59 (Ga. 1943); Cooper v. Tarpley, 41 N.E.2d 640 (Ind. App. 1942); Shannon v. Kinney, 1 A.K. Marsh. (8 Ky.) 3 (1817); Weaver Bros. Realty Corp. v. Vines, 23 So. 2d 826 (La. App. 1945); Tate v. Cutrer, 53 So. 2d 285 (La. App. 1951); Casey v. Inloes, 1 Gill. (Md.) 430 (1844); Flewelling v. Roby, 82 A.2d 83 (N. H. 1951);* Morgan v. Jenson, 181 N.W.89 (N.D. 1921); *Glenn v. Shuey, 595 A.2d 606 (Pa. Super. 1991); Stark v. Lardin, 1 A.2d 784 (Pa. Super. 1938);* Erck v. Church, 11 S.W.794 (Tenn. 1889); *Home Owners' Loan Corp. v. Dudley, 141 P.2d 160 (Utah 1943);* Clithero v. Fenner, 99 N.W.1027 (Wis. 1904); *Menzner v. Tracy, 19 N.W.2d 257 (Wis. 1945). See* Comment, Tacking Adverse Possessions in Tennessee, *23 Tenn. L. Rev. 295 (1954).*

South Carolina has denied the principle of tacking in adverse possession. *Adams v. Adams, 66 S.E.2d 809 (S.C. 1951).*

(n39)Footnote 482. Fredericksen v. Henke, 209 N.W.257 (Minn. 1926) (privity is essential, possession lost by abandonment or lost by disseisin and possession taken when a prior occupant abandons or is disseised cannot be tacked); *O'Brien v. Bilow, 3 A.2d 641 (N. J. L. 1939);* Powers v. Malavazos, 158 N.E.654 (Ohio App. 1927).

(n40)Footnote 483. *Young v. Brush Mountain Sportsmen's Ass'n, 697 A.2d 984 (Pa. Super. Ct. 1997)* (continuous possession requires "privity" between successive occupants whether created by deed, other acts or operation of law. Deed does not create the required privity as to land not described in deed, even though occupied by grantor in connection with land described in the deed.)

San Francisco v. Fulde, 37 Cal. 349 (1869); Illinois Cent. R. Co. v. Hatter, 69 N.E.751 (Ill. 1904); *O'Connell v. Chicago Park Dist., 34 N.E.2d 836 (Ill. 1901); Innis v. Miller, 10 Mart. (La.) 289 (1821);* Melvin v. Locks & Canals on Merrimack River, 5 Met. (46 Mass.) 15 (1842); Wishart v. McKnight, 59 N.E.1028 (Mass. 1901); *Joplin Brewing Co. v. Payne, 94 S.W. 896 (Mo. 1906); Jackson ex dem. Colden v. Moore, 13 Johns. (N.Y.) 513 (1816); Nichols v. Reynolds, 1 R.I. 30 (1840);* Sutton v. Clark, 38 S.E.150 (S.C. 1901); Allis v. Field, 62 N.W.85 (Wis. 1895). *Brown v. Gobble, 474 S.E.2d 489 (W. Va. 1996); Enzor v. Minton, 472 S.E.2d 376 (N.C. App. 1996).*

Where a widow is not heir of her husband, she cannot tack his adverse possession. *Ray v. Fowler, 89 So. 2d 573 (Ala. 1956).*

Tacking by deed is permitted. *Zehner v. Fink, 311 A.2d 477 (Md. App. 1973); Brand v. Prince, 349 N.Y.S.2d 222 (1973),* aff'd, *324 N.E.2d 314 (N.Y. 1974).* Tacking possession of original tenant, his heir, tenant by curtesy of the heir and heirs of the heir. *International Paper Co. v. Jacobs, 128 S.E.2d 818 (N.C. 1963).* Permitting tacking. *Herrington v. Church of the Lord Jesus Christ, 150 S.E.2d 805 (Ga. 1966).* Tacking permitted if privity. *Caywood v. Dep't of Nat. Resources, 248 N.W.2d 253 (Mich. App. 1976); Alaska Nat'l Bank v. Linck, 559 P.2d 1049 (1977); Calhoun v. State, 367 A.2d 40 (Md. App. 1977).* Tacking permitted. *Colley v. Carpenter, 362 N.E.2d 163 (Ind. App. 1977). Tacking. Slentz v. Cherokee Enters., 529 S.W.2d 495 (Mo. App. 1975).*

(n41)Footnote 484. *McNeely v. Langan, 22 Ohio St. 32 (1871).* Taking of adverse possession through continued possession. *Noel v. Jumonville Pipe & Mach. Co., 158 So. 2d 179 (La. 1964),* Note, Immovables -- Thirty-Year Acquisitive Prescription -- Tacking, *38 TUL. L. REV. 575 (1964); International Paper Co. v. Jacobs, 128 S.E.2d 818 (N.C. 1963).* In Louisiana, for a landowner to maintain a possessory action, his possession must be uninterrupted for one year prior to dispossession. *Liner v. Louisiana Land & Exploration Co., 319 So. 2d 766 (La. 1975).*

(n42)Footnote 485. *Bonds v. Smith, 143 F. 2d 369 (App. D. C. 1944);* Davock v. Nealon, 32 A.675 (N. J. SuP.1895); *Gerhart v. Hilsenbeck, 63 A.2d 124 (Pa. Super. 1949).*

(n43)Footnote 486. Moore v. Helvy, 138 S.W.481 (Mo. 1911); *Wells v. Coursey, 15 S.E.2d 752 (S.C. 1941).*

In Louisiana, tacking is permitted without necessity of privity of estate or contract. *Finley v. Morgan, 80 So. 2d 196 (La. App. 1955).*

(n44)Footnote 487. *Santos v. Simon, 138 P.2d 896 (Ariz. 1943); Waller v. Dansby, 224 S.W. 615 (Ark. 1920); San Francisco v. Fulde, 37 Cal. 349 (1869).*

(n45)Footnote 488. *Wittig v. Carlucci, 537 A.2d 29 (Pa. Super. 1988); Hutto v. Cook, 164 S.W.2d 513 (Tex. 1942).*

The old South Carolina rule does not allow tacking between grantor and grantee or devisor and devisee but does between ancestor and heirs. *Burnett v. Crawford, 27 S.E. 645 (S.C. 1897).*

(n46)Footnote 489. *Evans v. Hogue, 681 P.2d 1133 (Or. 1984); Gregory v. Thorrez, 269 N.W. 142 (Mich. 1936).*

(n47)Footnote 490. *Menzner v. Tracy, 19 N.W.2d 257 (Wis. 1945).*

(n48)Footnote 491. J. B. Ames, The Nature of Ownership, in Lectures on Legal History, 204; J. B. Ames, The Disseisin of Chattels, *3 Harv. L. Rev. 313, 318 (1890); Wagner v. Moseley, 104 So. 2d 86 (Fla. App. 1958).*

(n49)Footnote 492. No sub silentio tacking permitted. *Mims v. Alabama Power Co., 77 So. 2d 648 (Ala. 1955); Von Neindorff v. Schallock, 68 P.2d 278 (Cal. App. 1937); Marvel v. Barley Mill Road Homes, Inc., 104 A.2d 908 (Del. Ch. 1954);* Maher v. Brown, 56 N.E.181 (Ill. 1899); *Finley v. Morgan, 80 So. 2d 196 (La. App. 1955);* Legge v. Peper, 129 A.292 (Md. 1925); *Louis Sachs & Sons v. Ward, 35 A.2d 161 (Md. 1943);* Hanlon v. Ten Hove, 209 N.W.169 (Mich. 1926); Gowdy v. Gordon, 215 N.W.702 (Mich. 1927); *Newkirk v. Porter, 74 S.E.2d 235 (N.C. 1953); Gerhart v. Hilsenbeck, 63 A.2d 124 (Pa. Super. 1949).*

(n50)Footnote 493. Duck Island Hunting & Fishing Club v. Whitnah, 137 N.E.840 (Ill. 1922).

(n51)Footnote 494. *Tait v. Pixley, 34 N.W.2d 775 (Wis. 1948).*

(n52)Footnote 495. *Lively v. Wick, 221 P.2d 374 (Colo. 1950);* Duck Island Hunting & Fishing Club v. Whitnah, 137 N.E.840 (Ill. 1922) (privity depends upon the possession and not the deed); Viking Refrigerator & Mfg. Co. v. Crawford, 114 P.240 (Kan. 1911); *Alukonis v. Kashulines, 70 A.2d 202 (N. H. 1950);* Belotti v. Bickhardt, 127 N.E.239 (N.Y. 1920). To same effect that in such cases tacking may be oral. *See Smith v. Crandell, 50 N.E.2d 718 (Mich. 1952).*

A grantee is in privity with the grantor though the deed does not describe the land adversely held. *Sinclair Ref. Co. v. Romohr, 117 N.E.2d 489 (Ohio App. 1953).*

(n53)Footnote 496. *Tartar v. Tucker, 280 S.W.2d 150 (Ky. 1955); Mary v. Mauer, 62 N.W.2d 455 (Mich. 1954); Miller v. Medley, 281 S.W.2d 797 (Mo. 1955); Sinclair Ref. Co. v. Romohr, 117 N.E.2d 489 (Ohio App. 1953). See Newkirk v. Porter, 74 S.E.2d 235 (N.C. 1953).*

(n54)Footnote 497. Saner v. Knight, 260 P.942 (Cal. App. 1927).

(n55)Footnote 498. *Santos v. Simon, 138 P.2d 896 (Ariz. 1943).*

(n56)Footnote 499. *Jahn v. Purvis, 199 So. 340 (Fla. 1940).*

In Alabama a widow is not in privity with her adverse possessor husband, not being his heir, and cannot tack to his possession. *Ray v. Fowler, 89 So. 2d 573 (Ala. 1956).*

(n57)Footnote 500. *Alukonis v. Kashulines, 70 A.2d 202 (N. H. 1950).* Privity is essential to tacking. *Cheatham v. Vanderwey, 499 P.2d 986 (Ariz. App. 1972).* The successive adverse possessors are not in privity unless the deeds describe the land held by adverse possession. *Burns v. Crump, 95 S.E.2d 906 (N.C. 1957).* "In Michigan the law is clear that where one seeks to tack the prior adverse possession of his grantor he must show an express reference to, or description of, the disputed property in the grantor's deed. " *Cutliff v. Densmore, 93 N.W.2d 307 (Mich. 1958).*

(n58)Footnote 501. Saner v. Knight, 260 P.942 (Cal. App. 1927); Gerbracht v. Lake County, 160 N.E.1 (Ill. 1927); Jeffries v. Sheehan, 218 N.W.703 (Mich. 1928); Arduino v. Detroit, 228 N.W.694 (Mich. 1930); Killmaster v. Zeidler, 257 N.W.721 (Mich. 1934); Gregory v. Thorrez, 269 N.W.142 (Mich. 1936); Kramper v. St. John's Church, 270 N.W.478 (Neb. 1936); *Alukonis v. Kashulines, 70 A.2d 202 (N. H. 1950);* Conaway v. Daly, 148 A.719 (N. J. Err. & App. 1930); Powers v. Malavazos, 158 N.E.654 (Ohio App. 1927); *Sinclair Ref. Co. v. Romohr, 117 N.E.2d 489 (Ohio App. 1953); Shuttles v. Butcher, 1 S.W.2d 661 (Tex. Civ. App. 1927); Abramson v. Sullivan, 103 S.W.2d 229 (Tex. Civ. App. 1937);* Bank of Eagle v. Pentland, 221 N.W.383 (Wis. 1928).

In Michigan the law is clear that where one seeks to tack the prior adverse possession of his grantor, one must show

on express reference to or description of the disputed property in the grantor's deed. *Cutliff v. Densmore, 93 N.W.2d 307 (Mich. 1958).*

See Day, Validation of Erroneously Located Boundaries by Adverse Possession and Related Doctrines, *10 U. FLA. L. REV. 245 (1957).*

(n59)Footnote 502. *Casstevens v. Casstevens, 304 S.E.2d 623 (N.C. App. 1983);* Keyser v. Brown, 138 N.E.514 (Ind. App. 1923); Sherin v. Brackett, 30 N.W.551 (Minn. 1886). *See* Coil v. Schetter, 152 N.E.870 (Ind. App. 1926).

(n60)Footnote 503. *Brown v. Wood, 451 So. 2d 569 (La. 1984);* Montague v. Marunda, 99 N.W.653 (Neb. 1904); *Riley v. Jameson, 3 N. H. 23 (1823).*

An heir is in privity with the ancestor. *Sinclair Ref. Co. v. Romohr, 117 N.E.2d 489 (Ohio App. 1953).*

Tacking permitted. *Mumrow v. Riddle, 242 N.W.2d 489 (Mich. App. 1976); Inn Le'Daerda, Inc. v. Davis, 360 A.2d 209 (Pa. Super. 1976).*

(n61)Footnote 504. *Reed v. Locks & Canals on Merrimack River, 49 U. S. (8 How. 274) (1850); Kimble v. Willey, 98 F. Supp. 730 (E.D. Ark. 1951),* rev'd, *198 F. 2d 812 (8th Cir. 1952),* aff'd, *204 F. 2d 238 (8th Cir. 1953);* Cox v. Daugherty, 36 S.W.184 (Ark. 1886); *Schneider v. Botsch, 90 Ill. 577 (1878);* Abel v. Love, 143 N.E.515 (Ind. App. 1924) (adverse possession may be kept up by disseisor giving leases to tenants, putting them in possession and receiving rent from them while claiming the land as his own); *Burgess v. Leverett & Assocs., 105 N.W.2d 703 (Iowa 1960);* Holmes v. Turners Falls Lumber Co., 23 N.E.305 (Mass. 1890); Ramsey v. Glenny, 48 N.W.322 (Minn. 1891); *Lindenmayer v. Gunst, 13 So. 252 (Miss. 1893);* Omaha & Florence Land & Trust Co. v. Parker, 51 N.W.139 (Neb. 1892); *Williams v. Robertson, 70 S.E.2d 692 (N.C. 1952);* Powers v. Malavazos, 158 N.E.654 (Ohio App. 1927); *Smith v. Pierce, 843 P.2d 391 (Okla. 1992)* (tacking where tenant used land that was not hers).

Possession by lessee inures to the benefit of the lessor. *Colley v. Carpenter, 362 N.E.2d 163 (Ind. App. 1977).*

Tenant purchasing property from landlord may tack the landlord's possession to the tenant's own. *Slentz v. Cherokee Enters., 529 S.W.2d 495 (Mo. App. 1975).*

Tenant's possession is that of landlord. *McShan v. Pitts, 554 S.W.2d 759 (Tex. Civ. App. 1977).*

(n62)Footnote 505. *Glenn v. Shuey, 595 A.2d 606 (Pa. Super. 1991)* (grantee cannot tack when land not conveyed to grantee); *Ringstad v. Grannis, 171 F. 2d 170 (9th Cir. 1948);* Merritt v. Westerman, 131 N.W.66 (Mich. 1911).

Where an adverse possessor retained the minerals and conveyed the surface, the grantee's possession of the surface could be tacked to the grantor's so as to perfect the grantor's title to minerals. *Houston Oil Co. of Texas v. Moss, 284 S.W.2d 131 (Tex. 1955).*

(n63)Footnote 506. *Kendrick v. Latham, 6 So. 871 (Fla. 1889).* In *Hentzy v. Mandan Loan & Inv. Co., 286 P.2d 325 (Mont. 1955),* the time the state had held possession under a tax sale was tacked to the possession of the buyer from the state.

(n64)Footnote 507. *Nennemann v. Rebuck, 496 N.W.2d 467 (Neb. 1993); Jerry Brown Farm Ass'n Inc. v. Kenyon, 375 A.2d 964 (R. I. 1977).*

(n65)Footnote 508. *Sinclair Ref. Co. v. Romohr, 117 N.E.2d 489 (Ohio App. 1953).*

(n66)Footnote 509. *Meyer v. Ellils, 411 P.2d 338 (Wyo. 1966).* Contra *Evans v. Hogue, 681 P.2d 1133 (Or. 1983).*

(n67)Footnote 510. *Matto v. Dan Beard, Inc., 546 A.2d 854 (Conn. App. 1988)* (no proof corporations were connected); *Louisville & N. R. Co. v. Philyaw, 6 So. 837 (Ala. 1889).*

(n68)Footnote 511. Thompson v. Kauffelt, 1 A.267 (Pa. 1885).

(n69)Footnote 512. *Pinewoods Assocs. v. W.R. Gibson Dev. Co., 837 S.W.2d 8 (Mo. App. 1992);* Fredericksen v. Henke, 209 N.W.257 (Minn. 1926).

(n70)Footnote 513. *Whittington v. Cameron, 52 N.E.2d 134 (Ill. 1943); Haynes v. Boardman, 119 Mass. 414 (1876).*

(n71)Footnote 514. *Terwilliger v. White, 72 S.E.2d 169 (S.C. 1952); Terwilliger v. Daniels, 72 S.E.2d 167 (S.C. 1952).*

(n72)Footnote 515. *Mazyck v. Wight, 2 Brev. (S.C.) 151 (1807); Garret v. Weinberg, 26 S.E.2d 3 (S.C. 1896); Adams v. Adams, 66 S.E.2d 809 (S.C. 1951).*

(n73)Footnote 516. Burnett v. Crawford, 27 S.E.645 (S.C. 1897).

(n74)Footnote 517. *Miller v. Stovall, 717 P.2d 798 (Wyo. 1986); St. Louis Union Trust Co. v. Smith, 182 S.W.2d 945 (Ark. 1944).* Cannot tack if previous holder does not claim title. *Murphee v. Swann, 342 So. 2d 329 (Ala. 1976).* One tenant in common cannot tack joint possession to that of the common grantor. *Bartlett v. Kloepping, 240 N.W.2d 592 (Neb. 1976).*

(n75)Footnote 518. *Troell v. Callaway, 147 S.W.2d 1111 (Tex. Civ. App. 1941).*

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CHAPTER 87 ADVERSE POSSESSION

10-87 Thompson on Real Property, Thomas Editions § 87.14

AUTHOR: Professor Olan B. Lowrey School of Law Temple University Portion of this Chapter are based on Ch. 38 of George W. Thompson, Commentaries on the Law of Real Property (John S. Grimes, ed. reprinted 1979).

§ 87.14 Duration and Interruption of Time of Possession.

[Go To Supp]

The English statute of limitations shifted from the ancient common law time beyond which the memory of man runneth not to the contrary through a succession of stated events to a period of sixty and finally twenty years. n519 The common law may be said to have finally come to rest on twenty years. n520 In America where by statute title by adverse possession has come to rest upon the various legislative enactments concerning limitation of actions, the required time of possession is governed by the statute and varies greatly between the jurisdictions. In a number of states, possession based upon some written instrument or judgment is protected against the entry or suit of the dispossessed owner after a much shorter period than that which bars the right against a possession not founded on an instrument or judgment. n521 And, just as at common law the entry required of certain persons such as heirs was "more tender" than that required of others, so the statutes sometimes vary the amount of time of possession required according to the nature of the claim of right of the possessor. So some states give shorter periods if the possessor has color of title. n522 No owner of land can be barred of title unless the owner has been put to an entry or action for the statutory period, and the statute begins to run at the time the possession of the claimant becomes adverse to that of the owner. As a rule, this is at the time of entry n523 but the possession of the claimant may not become adverse until some time after entry. n524 The statute does not begin to run until notice has been made of the adverse holding claim on the part of one seeking title by adverse possession and there has been an ouster. n525 An adverse possessor may be ejected one day before the expiration of the period. n526 The statute prescribing the period for the commencement of an action to recover real estate refers to adverse possession of real estate. n527 Where the premises are abandoned by the adverse claimant before the expiration of the statutory period of limitation, the adverse claimant forfeits all rights acquired by the adverse holding, and the constructive possession of the true owner reasserts itself. n528 The rule applies even where the abandonment is enforced by some occurrence over which the claimant has no control. n529 But a mere temporary absence from the premises by the adverse claimant not evincing any intention of abandonment, there being no interruption of the possession by entry of the true owner, or other disseisin, does not suspend the running of the statute against such owner. n530 There is no abandonment when a person leaves the land adversely occupied with the intention of returning. n531 When the occupancy is temporarily broken by a flood or fire, the possessor has a reasonable time to resume possession after such event without there being a discontinuance. n532

The question as to whether there has been such an abandonment of the possession as to break the continuity thereof depends upon whether the premises were vacant for such length of time and under such circumstances that the constructive possession of the owner can be said to have reasserted itself. n533 A break in the continuity of the possession stops the running of the statute and the adverse claimant can rely only upon a new possession taken after the break. n534

However, the fact that the premises were unoccupied on various occasions for a short period of time occasioned by one occupant moving out and another moving in, n535 or breaks of no greater duration than that reasonably required for a change of tenants, n536 does not interrupt the running of the statute. A temporary interruption not of unreasonable duration, does not destroy the adverse possession. n537 Where one holds possession adversely, an oral lease agreeing to hold under the true owner does not stop the running of the statute of limitations, because the true owner never lost the right to eject the adverse possessor. n538 A tenant cannot toll or interrupt the running of the adverse possession period by attorning to the holder of the record title. n539 The execution of a mineral lease by the adverse possessor, thereby severing the mineral from the surface estate, while operating as an estoppel as between severor and severee, does not stop the running of the statute so far as third persons are concerned. n540 The burden of proving adverse possession is on the one relying thereon; n541 but after the adverse possessor has made out a prima facie case, the burden of showing that the running of the statute was interrupted is on the party claiming title in opposition to the adverse possessor. n542

Possession by the adverse claimant must be uninterrupted for the full statutory period, for to break effectively the possession at any time before the period has fully expired will arrest the running of the statute. n543 The moment the running of the statute of limitations is interrupted the law restores the possession to the holder of the legal title, n544 and the claimant by adverse possession must begin de novo. n545 To disrupt the running of adverse possession, the owner must reassert a claim which would reinstate the owner in possession. n546 Upon interruption of the possession before completion of the statutory period, the possession of the true owner constructively intervenes, and should the claimant resume possession, the statute of limitations begins to run at the date of such resumption, and must run for the full statutory period thereafter in order to give the claimant title. n547 If the possession be interrupted, either by fraud or force, or by process of law, the statute begins to run only from the time of reentry. n548 So, a cessation of hostility for any length of time during the statutory period will interrupt the adverse character of the holding and stop the running of the statute. The possession of the claimant may be exclusive and continuous for the entire period, but if it ceases to be hostile at any time, the statute ceases to run, as hostility of possession cannot be assumed from exclusive and continuous possession. n549 A recognition or acknowledgment by the possessor of the true owner's title, prior to the running of the full statutory period, interrupts the running of the statute. n550 By a cessation of hostility, the claimant is deemed to recognize the title of the true owner, even though the claimant continues in possession for the whole period of limitation. n551 A tenant cannot interrupt the running of the adverse possession of the landlord by acknowledging the paramount title of a third person. n552 It would seem that, to have the effect to destroy the hostility of the possession, a recognition of the title of the rightful owner need not be communicated to such owner, but to some third person or persons. n553 Such acknowledgment is effective if made to a third person. n554 However, one holding property under claim of right may buy or attempt to buy peace without recognizing the title of the one from whom one attempts to purchase and without interrupting the statute of limitations. n555 The attempt to purchase the record title does not necessarily amount to a recognition of the superior title of the record owner, n556 but may be considered in determining whether the possession was actually adverse. n557 After title has been once acquired by adverse possession, the acknowledgment of the prior title of the prior owner does not divest the claimant of the title acquired by limitation. n558

The acquisition of a right of possession by deed or lease by the adverse possessor destroys the hostility of such possessor. n559 Any visible manifestation of ownership by the record owner at any time during the period of limitation will defeat adverse possession if the adverse possessor does not resist such acts of ownership. n560 The entry and building of a temporary structure by the true owner was held not in itself sufficient to interrupt the adverse claimant's adverse possession in the absence of evidence to show that the entry was connected with a right to enter. n561 The

weight of authority is that the effect to be given the act of purchase by an adverse claimant, either under color of title or as a trespasser, or an undivided interest in the subject matter of the claim, does not, as a matter of law, constitute a recognition of the true title to such extent as to change the character of the adverse claim as to others. n562 Also, it is held that the purchase of a tax title by the adverse occupant of the taxed premises, which were assessed in the name of other parties, does not operate to interrupt the continuity of the adverse possession of such occupant. n563

If a tenant of a person in adverse possession takes a written lease from the holder of the true title without the knowledge of the adverse possessor, the possession is interrupted only if the holder of true title does not know the facts as to the tenancy, or has no reason to suspect the adverse possession. n564 As a general rule, an entry upon or possession of the lands claimed by another, which, in the first instance, would suffice to effect a disseisin or ouster of the real owner, will break the continuity of the holder claiming by adverse possession. Such an entry upon or occupation of the land by the true owner for any portion of the period of adverse possession by the claimant will, as a general rule, break the continuity, and destroy the adverse possession. n565 Especially is this true where such entry is followed up by possession by the owner, although the adverse claimant continues in possession as before such entry. n566 To have this effect the entry need not be by the owner in person, but it may be by the owner's agent. n567 Entry by the agent or licensee of the record owner of the land may be sufficient to interrupt the running of the statute. n568 However, the reentry and consequent interruption of the possession must rise in dignity and character to that required to initiate an adverse possession. n569 It is not every entry, however, by the owner that will destroy the adverse possession, but to effect this, the owner must assert the claim to the land by acts of ownership. n570 Entry on land by a purchaser of timber rights from the real owner and the cutting and removal of timber from all parts of the land was held to constitute a reentry by the true owner and interrupted the limitation of claimant's exclusive possession. n571 The continuity of adverse possession is not broken by casual or occasional entries on the land by trespassers and wrongdoers. n572 Nor does a mortgage foreclosure of the record title interrupt the running of the period, n573 but a sale to the state for taxes does, since adverse possession ordinarily does not run against the state. n574 The redelivery of a deed by the grantee to the grantor for the purpose of re-investing the latter with the title is not effective for that purpose. Such delivery for the purpose of reinvesting the title in the grantor followed by a surrender of possession to the grantor makes the holding of the latter adverse. The running of the statute is not interrupted by the grantee's returning to and occupying the land at different intervals, if on such occasions the grantee occupied as tenant of the grantor and thereby recognized the superiority of the latter's claim to the land. n575 A conveyance by an adverse possessor to a corporation, whose stock the adverse possessor owned, without surrendering possession, followed by a reconveyance from the corporation to the adverse possessor, does not interrupt the running of the statutes. n576 An entry on land by a person disseised, merely for the purpose of seeing if there is any evidence of an adverse occupation, is not, as a matter of law, conclusive evidence of an interruption of the disseisor's possession. n577 A title once acquired by continuous adverse possession for the statutory period of limitation will not be forfeited by a subsequent interruption of the possession, or, it would seem, by a subsequent possession which was lacking in some of the characteristics essential to give title of itself. n578 Where the statute of limitations has commenced to run against the owner of real estate, the owner's subsequent death does not toll the statute. n579 A claim of title by adverse possession fails where possession is interrupted by the filing by the claimant of an action to quiet title before the statutory period has elapsed. n580 A decree quieting title to a given tract of land does not interrupt the running of the statute of limitations as to a strip in possession of an adjoining owner when no possession is taken under the decree. n581

The bringing of suit within the prescriptive period interrupts an adverse holding if followed by a judgment and recovery of possession thereunder by the plaintiff. n582 The interruption from this cause has been held to take place at the time the action is instituted. n583 So, a holding after the institution of an action to recover the land cannot be considered in making out this period of adverse possession. n584 Under some statutes, it is held that where an action for possession of land begins before the completion of the statutory period necessary to give title, and in which a judgment is subsequently returned, but not enforced by a writ of possession until after the expiration of the statutory period, such action for possession stops the running of the statute of limitations from the date of commencement of the action. n585 Where the action results unsuccessfully to the plaintiff, there is no interruption of the adverse holding. n586 The same result ensues where the statute has run so as to establish title by adverse possession long before the judgment in

ejectment was rendered. n587 While a trespass may be enjoined the relief from adverse possession is in ejectment and not by injunction. n588 However, the rule of interruption by entry of the owner has been modified or entirely abrogated by statute in many states. Some statutes require the entry by the owner to be followed by possession by the owner for a certain time, n589 while other statutes provide that in order that an entry by the owner may be sufficient to break the continuity of the adverse possession an action in ejectment must be brought within a certain time after such entry. n590 Still other statutes provide that an entry by the owner has no effect to break the running of the statute of limitations. n591 Reentry by permission of the party in adverse possession for a specific and limited purpose does not arrest the running of the statute or interrupt the possession of the adverse claimant, n592 at least as to such part of the land as is not entered upon nor covered by the agreement. n593 Although permissive entries are ineffective n594 and temporary intrusions are insufficient, n595 an interruption to be effective need not be for an extended period, but in other regards must satisfy remaining conditions necessary for acquiring title by adverse possession. It must be notorious, for mere denials of the owner or loose verbal claims of title in oneself, or any ineffectual protest short of a disturbance of the rights of the adverse claimant in a legal sense and -- short of an actual assertion of a right in oneself -- will not interrupt. n596 Forfeiture to the commonnwealth for nonpayment of taxes is not an interruption of possession where the state merely acquired a tax lien. n597 Where a grantee takes possession of adjoining lands not described in the grantee's deed in the belief that it is part of the granted land and conveys the land by deed description but delivers possession to the adjoining land also, the continuity of possession will not be broken and the two possessions will be considered as one possession for the purpose of acquiring adverse possession title. n598

If one is out of possession and must before obtaining possession have reformation of the instrument, the applicable statute of limitations is that which will mature the right to possession, not that applicable to recovery of possession. But if one in possession seeks reformation of the instrument under which one claims, the statute will not run against one's right until the other party goes into possession or asserts an adverse claim. n599

Where because of flooding or other reasons, the property cannot be continuously occupied, such possession as the land permits is sufficient. n600

The filing of a quiet title action by an adverse possessor does not interrupt the running of the possession. n601

The sale of land for taxes and its subsequent redemption by the owner of the legal title does not interrupt the running of adverse possession. n602 Possession taken under a contract of sale may be used in tacking. n603

Many states have short statutes of limitation for adverse possession under color of tax deed. n604 Tacking in adverse possession is allowed if the adverse possessor intended to and actually did turn over possession of undescribed land together with that described in the deed. n605

COMPUTER-ASSISTED RESEARCH

LEXIS: Adverse possession w/20 interrupt! w/5 possession not w/3 adverse

FOOTNOTES:

(n1)Footnote 519. The Roman Law followed the Greek Law in settling the period as to real estate at ten years. *Dalton v. Angus, 6 Ann. Cas. 740.*

(n2)Footnote 520. Jam., ch. 16 (adverse possession, 20 years).

For the number of years necessary to confer title by adverse possession in the different states, see the following statutes and decisions:

Ala. Code § 6-5-200; *Robinson v. Allison, 27 So. 461 (Ala. 1900)* (ten years).

Ten years' adverse possession required. *Cambron v. Kirkland, 253 So. 2d 180 (Ala. 1971).*

Alaska has a 7 and a 10-year statute of adverse possession. Alaska Stat. §§ 4. 10. 030, 9.25. 050.

Possession must be uninterrupted. *Shilts v. Young, 567 P.2d 769 (Alaska 1977).*

Three years, where possession is peaceable, adverse, and under color of title; five years where possession is peaceable, adverse, and where possessor pays taxes; ten years where there is merely an adverse holding. Ariz. Rev. Stat. Ann. §§ 12-523 to 12-526.

Seven years' adverse possession where taxes paid and with color of title Ark. Code Ann. § 18-11-102; fifteen years for wild and unimproved land. *Id.*, § 18-11-103. VanEtten v. Daugherty, 103 S.W.737 (Ark. 1907).

Seven years adverse possession required in *Arkansas. Pate v. Junkin, 489 S.W.2d 802 (Ark. 1973).*

Five years' adverse possession. Cal. Civ. Proc. Code § 325.

Eighteen years adverse possession. Colo. Rev. Stat. § 38-41-10; seven years' actual residence under a connected title deducible of record, § 38-41-106; seven years' possession under color of title taken in good faith, and paying of taxes, § 38-41-108; same for unoccupied lands. *Id.*

Fifteen years' adverse possession. 52 Conn. Gen. Stat. 575 (1993).

Seven years' adverse possession. Fla. Stat. Ann. §§ 95. 16 and 95. 18.

Twenty years' adverse possession, and seven years' adverse possession under color of title. Ga. Code Ann., §§ 85-406, 85-407.

Defective tax title plus seven years' adverse possession gave a fee simple absolute title. *Herrington v. LaCount, 167 S.E.2d 631 (Ga. 1969).*

Seven years' adverse possession under color of title. *Stevens v. Cogdell, 179 S.E.2d 45 (Ga. 1971).*

Seven years' adverse possession requires written evidence of title. *Seaboard Coast Line Ry. Co. v. Carter, 200 S.E.2d 113 (Ga. 1973).*

Five years' adverse possession. Idaho Code, § 5-207.

Twenty years' adverse possession. Ill. Ann. Stat. 110 para. 13-101; seven years with possession and record title from public officer, 110 para. 13-107; and seven years' payment of taxes with color of title and possession, 110 para. 13-109; same for vacant land. 110 para.13-110.

Seven years' adverse possession under color of title. Held adverse possession under facts: *Pyle v. Ferrell, 147 N.E.2d 341 (Ill. 1958).*

The court passed title by adverse use to a dwelling house under a theory similar to adverse possession but for a period of time governed by the statute of limitations in replevin actions. *Isham v. Cudlip, 179 N.E.2d 25 (Ill. App. 1962).*

Ten years' adverse possession. Ind. Stat. Ann. § 34-1-2-2.

Ten years' adverse possession after recording deed. Iowa Code Ann. § 614. 22; *Shires v. Niewoehner, 191 N.W.2d 633 (Iowa 1971).*

Fifteen years' adverse possession. Kan. Stat. Ann. § 60-503; Schrimpcher v. Stockton, 51 P.276 (Kan. 1897).

Possession must have been for more than fifteen years to claim title. *Wallace v. Magie, 522 P.2d 989 (Kan. 1974).*

Fifteen years' adverse possession. Ky. Rev. Stat. Ann. § 413. 010.

Ten years' continuous and uninterrupted possession in good faith. La. Civ. Code, art. 3473; *Moulierre v. Coco, 41 So. 113 (La. 1906);* and thirty years of such possession without regard to good faith. *LA. CIV. CODE, art. 3486, Mortimer v. Hodgson, 30 So. 104 (La. 1901).*

Ten years' possession is required in *Louisiana. Board of Comm'rs for Lafourche Basin Levee Dist. v. Elmer, 268 So. 2d 274 (La. App. 1972).*

Thirty-year acquisitive prescription is required in *Louisiana. Babin v. Montegut Ins. Agency, Inc., 271 So. 2d 642 (La. App. 1973).*

Twenty years' adverse possession. 14 Me. Rev. Stat. Ann. § 801.

Twenty years' uninterrupted adverse possession. Md. Code Ann., Cts. & Jud. Proc. § 5-103; University of Md. v. Calvary M. E. Church, South, 65 A.398 (Md. 1906).

Twenty years' adverse possession. Mass. Gen. Laws Ann. ch. 260 § 21.

Five years' adverse possession under color of title, and fifteen years' without regard to color of title. Mich. Comp.Laws Ann. § 600. 5801.

Fifteen years' adverse possession. Minn. Stat. Ann. § 541. 02.

Ten years' adverse possession. 5 Miss. Code Ann. § 15-1-13.

Ten years' adverse possession. 34 Mo. Ann. Stat. § 516. 010.

Five years' adverse possession with payment of taxes. 9 MONT. CODE ANN. §§ 70-19-404 and 70-19-411 (1991).

Ten years' adverse possession. 2 Neb. Rev. Stat. § 25-202; Flanagan v. Mathiesen, 97 N.W.287 (Neb. 1903).

Five years' adverse possession of property other than mining claims, Nev. Rev. Stat. Ann. § 11-070; two years' adverse possession of mining claims, § 11-060.

Twenty years' adverse possession. N. H. Rev. Stat. Ann. § 508:2.

Twenty years' adverse possession. 2A N. J. Stat. Ann. § 14-7; *Spiegle v. Borough of Beach Haven, 281 A.2d 377 (N. J. 1971).*

Ten years' adverse possession under color of title. N. M. STAT. ANN. § 37-1-22.

Ten years' adverse possession. N.Y. Real Prop. Act. Law. § 501; *Corrington v. McNeil, 58 A.D. 2d 719, 396 N.Y.S.2d 286 (1977).*

Seven years' adverse possession with color of title, N.C. Gen. Stat. § 1-38; and twenty years of such possession without color of title, § 1-40. *See also* Hawkins v. Richmond Cedar Works, 30 S.E.13 (N.C. 1898).

Ten years' adverse possession and payment of taxes. N.D. Cent. Code § 47-06-03.

Twenty-one years' adverse possession. Ohio Rev. Code Ann. § 2305. 04.

Fifteen years' adverse possession. 12 Okla. Stat. Ann. § 93; 60 Okla. Stat. Ann. § 333.

Seven-year limitation on land holding outside city limits. *State ex rel. Brett v. North Am. Life Ins. Co., 225 P.2d 796 (Okla. 1950); State ex rel. Combs v. Hopping Inv. Co., 269 P.2d 997 (Okla. 1954).*

Ten years' adverse possession. Or. Rev. Stat. § 105. 620 (1991).

Twenty-one years' adverse possession. 42 Pa. Const. Stat. Ann. § 5530.

Title to land by prescription results from possession in good faith and under a proper title for ten years as against persons present in Puerto Rico and for twenty years as against persons absent therefrom; 31 P.R. Laws Ann. § 5278 (1991); thirty years without color of title or good faith § 5280.

Ten years' adverse possession under claim of ownership in fee. R.I. Gen. Laws § 34-7-1.

Ten years' adverse possession. S.C. Code Ann. § 15-67-210; Mitchell v. Hamilton, 82 S.E.425 (S.C. 1914).

Twenty years' adverse possession. S.D. Codified Laws Ann. § 15-3-1.

Seven years' adverse possession. Tenn. Code Ann. § 28-2-161 et seq.

Three years' adverse possession with color of title. Tex. Code Ann., Civ. Prac. & Rem. § 16. 024; five years' adverse possession coupled with registered deed and payment of taxes, § 16. 025; ten years without color of title, § 16. 026. *See also Carroll v. Brown, 472 S.W.2d 825 (Tex. Civ. App. 1971).*

Seven years' adverse possession; four years with tax title coupled with payment of taxes. Utah Code Ann. §§ 78-12-7 and 78-12-7. 1. Fifteen years' adverse possession. 12 Vt. Stat. Ann. § 501; *Montgomery v. Branon, 278 A.2d 744 (Vt. 1971); Russell v. Pare, 321 A.2d 77 (Vt. 1974).*

Fifteen years' adverse possession. Va. Code § 8.01-236; *LaDue v. Currell, 100 S.E.2d 217 (1959); Peck v. Daniel, 184 S.E.2d 7 (Va. 1971).*

Seven years' adverse possession under color of title, Wash. Rev. Code Ann. § 7. 28. 050; ten years without, § 4.16. 020.

Ten years' adverse possession. W.Va. Code § 55-2-1; *Somon v. Murphy Fabrication & Erection Co., 232 S.E.2d 524 (W. Va. 1977).*

Ten years' adverse possession under color of title, Wis. Stat. Ann. § 893. 26; and twenty years' adverse possession without color of title, § 893. 25.

Ten years' adverse possession. Wyo. Stat. § 1-3-103.

North Dakota has adopted a statute barring claims to real estate by one not in possession within twenty years of bringing the action. N.D. Cent. Code § 28-01-04.

A somewhat similar statute in Iowa has been held to bar remainders. Lane v. Travelers Ins. Co., 299 N.W.553 (Iowa 1941). *See also* Ind. Code Ann. § 32-1-21-2, barring claims based on possibility of reverter or right of entry after thirty years from creation of such interest.

See Melvin D. Whitaker, Comment, The Twenty-five Year Statute of Limitations, *10 Baylor L. Rev. 196 (1958).* Purchaser at tax sale entitled to three-year statute of adverse possession. *Riley v. Depriest, 322 So. 2d 713 (Ala. 1975).*

Possession under color of title for three years. *Henderson v. Tejada, 549 P.2d 242 (Ariz. App. 1976).*

In Arkansas the period for wild and unimproved land is fifteen years. *Schuman v. Martin, 531 S.W.2d 26 (Ark. 1975).*

In Georgia the seven-year statute of adverse possession under color of title also applies to laches in ejectment. *Stone Mtn. Memorial Ass'n v. Bell, 223 S.E.2d 716 (Ga. 1976).*

Where possession was commenced while fifteen-year statute was in force, fifteen-year statute would apply over later ten-year statute. *Corrington v. McNeil, 396 N.Y.S.2d 286 (1948).*

(n3)Footnote 521. *Latta v. Clifford, 47 F. 614 (Colo. 1891); Stoltz v. Doering, 112 Ill. 234 (1885).*

(n4)Footnote 522. *See* William Edward Taylor, Titles to Land by Adverse Possession, *20 Iowa L. Rev. 551 (1935).* Where no color or muniment of title, the full period must run for prescription. *Pyron v. Colbert, 328 S.W.2d 825 (Tenn. App. 1959).*

(n5)Footnote 523. *Sheftel v. Lebel, 689 N.E.2d 500 (Mass. App. 1998)* (Declaratory judgment action to prevent nearby landowner from extending an express easement); *Lebel v. Nelson, 560 N.E.2d 135 (Mass. 1990);* Blumer v. Iowa R. R. Land Co., 105 N.W.342 (Iowa 1905), aff'd, *Iowa R. R. Land Co. v. Blumer, 206 U. S. 482 (1907); Jackson v. Andrews, 7 Wend. 152 (N.Y. 1831);* Munshower v. Patton, 10 Serg. & Rawle 334 (Pa. 1823); *Keaton v. Thomasson, 32 Tenn. (2 Swan) 138 (1852).*

(n6)Footnote 524. *Huebner v. Kuberski, 387 N.W.2d 144 (Iowa 1986)* (claimant did not assert rights over disputed land in beginning); Salt Lake Inv. Co. v. Fox, 90 P.564 (Utah 1907).

(n7)Footnote 525. *Monaghan v. Wagner, 487 So. 2d 815 (Miss. 1986); McKnight v. Basilides, 143 P.2d 307 (Wash. 1943); Harris v. Mandeville, 24 S.E.2d 23 (Ga. 1943).*

(n8)Footnote 526. *Singleton v. Terrel, 727 S.W.2d 688 (Tex. App. 1987).*

(n9)Footnote 527. *New York v. Coney Island Fire Dep't, 10 N.Y.S.2d 164 (1939),* aff'd, *18 N.Y.S.2d 923 (1940),* aff'd, *32 N.E.2d 827 (N.Y. 1941).*

After a decision against them determining that they were not owners of the land, and parties continued in possession, possession could not be considered adverse without further notice with their intention to hold adversely. *Scott v. Lewis, 98 S.E.2d 294 (N.C. 1957).*

(n10)Footnote 528. *Hoyle v. Mann, 41 So. 835 (Ala. 1906);* Driver v. Martin, 60 S.W.651 (Ark. 1901); Dubuque v.

Coman, 30 A.777 (Conn. 1894); Bennett v. Atlantic Coast Line R. R., 55 S.E.177 (Ga. 1906); Burns v. Edwards, 45 N.E.113 (Ill. 1895); Davenport v. Sebring, 3 N.W.403 (Iowa 1879); Kibbard v. Wilson, 32 S.W.1086 (Ky. 1895); *Moore v. Moore, 21 Me. 350 (1842);* Gifford v. Westport, 76 N.E.1042 (Mass. 1906); Pendill v. Marquette County Agrl. Soc'y, 55 N.W.384 (Mich. 1893); Blomberg v. Montgomery, 72 N.W.56 (Minn. 1897); *Nixon v. Porter, 38 Miss. 401 (1860);* Versteeg v. Wabash R. Co., 156 S.W.689 (Mo. 1913); Linen v. Maxwell, 40 A.184 (N.Y. 1893); *Ward v. Herrin, 49 N.C. 23 (1856);* Barrell v. Title Guar. & Trust Co., 39 P.992 (Or. 1895); Kirby v. Boaz, 131 S.W.533 (Tex. 1910); Whittlesey v. Hoppenyan, 39 N.W.355 (Wis. 1888); *Bruch v. Benedict, 165 P.2d 561 (Wyo. 1946).*

"The question is not, what did the out-going occupant intend, but, what did he do? Did he keep his flag flying, and present a hostile front of adverse pretensions? An adverse possession ought to be such as to challenge the right of all the world; but when an occupant evacuates the place and suffers it to go to wreck, he hauls down his colors, and his challenge is withdrawn. " *Stephens v. Leach, 19 Pa. 262 (1853).*

(n11)Footnote 529. Western v. Flanagan, 25 S.W.531 (Mo. 1894).

(n12)Footnote 530. Ovig v. Morrison, 125 N.W.449 (Wis. 1910). As to nature of interruption necessary to defeat possessory action, see *Liner v. Louisiana Land & Exploration Co., 319 So. 2d 766 (La. 1975).* Charles F. Thensted, Property -- Nature of Interruption Necessary to Defeat Possessory Action, *51 TUL. L. REV. 168 (1976).*

(n13)Footnote 531. *Reed v. Wolyniec, 471 A.2d 80 (Pa. Super. 1983)* (claimant's moving to another state and attempting to sell the disputed property did not break continuity); Goodrich v. Mortimer, 186 P.844 (Cal. App. 1919).

(n14)Footnote 532. Thomas v. Spencer, 133 P.822 (Or. 1913).

(n15)Footnote 533. *Jarvis v. Gillespie, 587 A.2d 981 (Vt. 1991); Montgomery v. Branon, 278 A.2d 744 (Vt. 1971)* (occupancy not necessarily continuous).

(n16)Footnote 534. *Ford v. Wilson, 35 Miss. 490 (1858);* Hornsby v. Davis, 36 S.W.159 (Tenn. Ch. App. 1895). Possession once taken continues until abandonment or disseisin. Smith v. Southern Ry. -*Carolina Div., 118 S.E.2d 440 (S.C. 1961);* Busby v. Maus, 128 N.E.564 (Ill. 1920) (decree of court breaking continuity of possession); Noe v. Russell, 218 S.W.1033 (Ky. 1926) (break of three years held sufficient to stop running of statute).

See Melvin D. Whitaker, Comment, Tolling Suspension of the Land Limitation Statutes, *9 BAYLOR L. REV. 389 (1957).*

Franklin v. House, 533 S.W.2d 243 (Mo. App. 1976) (owner's timbering operations interrupted running adverse possession).

(n17)Footnote 535. Morrison v. Bennett, 228 S.W.307 (Tex. Civ. App. 1921) (premises actually unoccupied for period of two months).

(n18)Footnote 536. Collins v. Megason, 228 S.W.583 (Tex. Civ. App. 1921).

(n19)Footnote 537. *Gillis v. Curd, 117 F. 2d 70 (6th Cir. 1941); Bruch v. Benedict, 165 P.2d 561 (Wyo. 1946).*

(n20)Footnote 538. *Manos v. Day Cleaners & Dyers, Inc., 108 N.E.2d 347 (Ohio App. 1952).*

(n21)Footnote 539. *Kimble v. Willey, 204 F. 2d 238 (8th Cir. 1953).* Contra *Kirby Lumber Corp. v. Laird, 231 F. 2d 812 (5th Cir. 1956).*

(n22)Footnote 540. *Mitchell v. Hammons, 792 S.W.2d 333 (Ark. App. 1990);* Clements v. Texas Co., 273 S.W.993 (Tex. Civ. App. 1955).

(n23)Footnote 541. Lyles v. Fellers, 136 S.E.13 (S.C. 1926).

(n24)Footnote 542. *Metropolitan St. Louis Sewer Dist. v. Holloran, 756 S.W.2d 604 (Mo. 1988); Vance v. Ellerbe, 90 So. 735 (La. 1922);* Howell v. Garlington, 270 S.W.269 (Tex. Civ. App. 1925).

(n25)Footnote 543. Collins v. Bluff City Lumber Co., 110 S.W.806 (Ark. 1908); Downing v. Mayes, 38 N.E.620 (Ill. 1894); *Creech v. Jenkins, 123 S.W.2d 267 (Ky. 1938); Frazier v. Banks, 170 S.W.2d 900 (Ky. 1943); Foscue v. Mitchell, 182 So. 740 (La. 1938);* Cohasset v. Moors, 90 N.E.978 (Mass. 1910); Crawford v. Ahrens, 15 S.W.341 (Mo. 1891); *Johnson v. Johnson, 77 P.2d 745 (Okla.1938);* Rushing v. Lanier, 132 S.W.528 (Tex. App. 1910); *Hart v. Rochelle, 170 S.W.2d 245 (Tex. App. 1943);* Stewart v. Stewart, 53 N.W.686 (Wis. 1892).

(n26)Footnote 544. Philbin v. Carr, 129 N.E.19 (Ind. App. 1920).

(n27)Footnote 545. Smith v. Vermont Marble Co., 133 A.355 (Vt. 1926).

Under the Georgia statute, a prescription does not run against an unrepresented estate until representation, provided the lapse does not exceed five years. If the estate remains unrepresented for more than five years, no deduction at all from the adverse possessor's term will be allowed in favor of the personal representative. Danielly v. Lowe, 130 S.E.687 (Ga. 1925).

Where two tracts of land were purchased by two vendees from a common grantor within a period less than the statutory period for the acquisition of title by adverse possession in an action in ejectment brought for a strip of ground claimed by both vendees, title by adverse possession could not be shown. Winslow v. Burge, 237 P.979 (Or. 1925).

(n28)Footnote 546. *Woycik v. Woycik, 537 A.2d 541 (Conn. App. 1988)* (a demand letter is not an act which would reinstate possession); *Bushey v. Seven Lakes Reservoir Co., 545 P.2d 158 (Colo. 1975).*

(n29)Footnote 547. *Armstrong v. Morrill, 81 U. S. (14 Wall.) 120 (1871); Daveis v. Collins, 43 F. 31 (C. C. Ill. 1890);* Brown v. Hanauer, 3 S.W.27 (Ark. 1887); Chicago & A.R. Co. v. Keegan, 56 N.E.1088 (Ill. 1900); *Steeple v. Downing, 60 Ind. 478 (1878);* Ashcraft v. Courtney, 121 S.W.625 (Ky. 1909); *Henly v. Kask, 11 So. 2d 230 (La. App. 1942); Bullen v. Arnold, 31 Me. 583 (1850); Casey's Lessee v. Inloes, 1 Gill. 430 (Md. 1844); Bowen v. Guild, 130 Mass. 121 (1881);* Johnston v. Fitz George, 14 A.762 (N. J. 1888); Thomas v. Spencer, 133 P.822 (Or. 1902); *Olwine v. Holman, 23 Pa. 279 (1854);* Wm. M. Rice Inst. v. Goolsbee, 134 S.W.397 (Tex. Civ. App. 1909); Reusens v. Lawson, 21 S.E.347 (Va. 1895); Wade v. McDougle, 52 S.E.1026 (W. Va. 1906); Illinois Steel Co. v. Budzisz, 90 N.W.1019 (Wis. 1902).

(n30)Footnote 548. *Townsend v. Edwards, 6 So. 212 (Fla. 1889).*

(n31)Footnote 549. *Russell v. Davis, 38 Conn. 562 (1871).*

Granting permission interrupts running of adverse possession. *Lundelius v. Thompson, 461 S.W.2d 153 (Tex. Civ. App. 1970).*

(n32)Footnote 550. Carter v. Thompson, 267 S.W.790 (Ark. 1925) (acceptance of deed with vendor's lien reserved for balance of purchase money); *Segelke v. Atkins, 357 P.2d 636 (Colo. 1960); Simms v. William Simms Hdw., 12 N.W.2d 783 (Minn. 1943);* Weisel v. Hobbs, 294 N.W.448 (Neb. 1940); Honeyman v. Andrew, 253 P.489 (Okla. 1926); *Livingston v. Turner, 152 S.W.2d 444 (Tex. Civ. App. 1941);* Collins v. Megason, 228 S.W.583 (Tex. Civ. App. 1921); Smith v. Vermont Marble Co., 133 A.355 (Vt. 1926).

(n33)Footnote 551. *Trufant v. White, 13 So. 83 (Ala. 1893);* Vittitow v. Burnett, 165 S.W.625 (Ark. 1914); *Lovell v. Frost, 44 Cal. 471 (1872);* McMahill v. Torrence, 45 N.E.269 (Ill. 1896); Litchfield v. Sewell, 66 N.W.104 (Iowa 1896); Pratt v. Ard, 65 P.255 (Kan. 1901); Warren v. Bowdran, 31 N.E.300 (Mass. 1892); *Heide v. Sheeks, 682 S.W.2d*

877 (Mo. 1984) (pasturing cattle or cutting timber in themselves do not establish adverse possession); *Stone v. Kansas City & W. B. R. R., 169 S.W. 88 (Mo. 1914);* Nebraska R. Co. v. Culver, 52 N.W.886 (Neb. 1892); *Williams v. Scott, 29 S.E. 877 (N.C. 1898).*

(n34)Footnote 552. *O'Neal v. Ellison, 587 S.W.2d 580 (Ark. 1979); Kimble v. Willey, 204 F. 2d 238 (1953).*

See Betty J. Wiest, Comment, Adverse Possession by Tenants in Texas, *38 TEX. L. REV. 320 (1959).*

(n35)Footnote 553. Chicago & A.R. R. v. Keegan, 56 N.E.1088 (Ill. 1900); Whitaker v. Thayer, 86 S.W.364 (Tex. App. 1905), aff'd, 108 S.W.1157 (Tex. 1908).

(n36)Footnote 554. Smith v. Vermont Marble Co., 133 A.355 (Vt. 1926).

(n37)Footnote 555. Munroe v. Pere Marquette R. R., 197 N.W.566 (Mich. 1924); *Dozier v. Krmpotich, 35 N.W.2d 696 (Minn. 1919); Hallowell v. Borchers, 34 N.W.2d 404 (Neb. 1948);* Chapman v. Dickerson, 223 S.W.318 (Tex. Civ. App. 1920). *See* Deck v. Wofford, 222 S.W.443 (Mo. 1920).

(n38)Footnote 556. Munroe v. Pere Marquette R. R., 197 N.W.566 (Mich. 1924); People v. Ladew, 143 N.E.238 (N.Y. 1924) (attempt to purchase possible outstanding title from the state not a recognition of title in the state).

(n39)Footnote 557. Robertson v. Chesapeake & O. R. R., 280 S.W.452 (Ky. 1925); Evans v. Houston Oil Co., 231 S.W.731 (Tex. Com. App. 1921).

An offer to purchase after the running of the prescriptive period is evidence that the possession was not adverse. Minto v. Salem Water, Light & Power Co., 250 P.722 (Or. 1926).

(n40)Footnote 558. *Munro v. Eshe, 156 P.2d 700 (Colo. 1944);* Hoskins v. Talley, 220 P.1007 (N. M. 1923).

(n41)Footnote 559. Patton v. Smith, 71 S.W.187 (Mo. 1902); Joy v. Palethorpe, 152 P.230 (Or. 1915).

(n42)Footnote 560. *Rick v. Grubbs, 214 S.W.2d 925 (Tex. 1948).*

Adverse possession of a summer cottage. *Nechtow v. Brown, 120 N.W.2d 251 (Mich. 1963); Laurin v. Wyroski, 121 N.W.2d 764 (Wis. 1963).*

(n43)Footnote 561. *Kendrick v. Klein, 150 P.2d 955 (Cal. App. 1944).*

(n44)Footnote 562. *Elder v. McClaskey, 70 F. 529 (6th Cir. 1895),* cert. denied, *163 U. S. 685 (1896);* Winterburn v. Chambers, 27 P.658 (Cal. 1891); Bryant v. Prewitt, 117 S.W.343 (Ky. 1909); Smith v. Feneley, 215 N.W.353 (Mich. 1927); Skala v. Lindbeck, 214 N.W.271 (Minn. 1927); Deck v. Wofford, 222 S.W.443 (Mo. 1920); Zweibel v. Myers, 95 N.W.597 (Neb. 1903); Alsworth v. Richmond Cedar Works, 89 S.E.1008 (N.C. 1916); *McCarthy v. Holt, 5 Tenn. App. 447 (1927); Meaders v. Moore, 132 S.W.2d 256 (Tex. Com. App. 1939);* Bitonti v. Kauffeld Co., 120 S.E.908 (W. Va. 1923).

In some states a tenant holding over is not in possession adverse to the landlord. *Johnstone v. Sanborn, 358 P.2d 399 (Mont. 1960)* (but holding the landlord had waived the statute).

(n45)Footnote 563. Merritt v. Westerman, 131 N.W.66 (Mich. 1911); Rupley v. Fraser, 156 N.W.350 (Minn. 1916); Monnot v. Murphy, 100 N.E.742 (N.Y. 1913); Silverstone v. Hanley, 104 P.767 (Wash. 1909).

A tax sale does not stop the running of adverse possession and adverse possessor takes despite sale to government. *Illinois Ry. Museum, Inc. v. Siegel, 266 N.E.2d 724 (Ill. App. 1971).*

(n46)Footnote 564. *Kimble v. Willey, 204 F. 2d 238 (8th Cir. 1953).*

(n47)Footnote 565. *Chastang v. Chastang, 37 So. 799 (Ala. 1904); Thompson v. Pioche, 44 Cal. 508 (1872);* Armstrong v. Payne, 206 P.638 (Cal. 1922); *Burrows v. Galup, 32 Conn. 493 (1865); Schenck v. White, 53 Ill. 358 (1870);* Brett v. Farr, 24 N.W.275 (Iowa 1885); Nelson v. Johnson, 226 S.W.94 (Ky. 1920); *Blakeley v. Pitman Coal Co., 44 S.W. 447 (Ky. 1898); Brewer v. Yazoo & M. V. R. Co., 54 So. 987 (La. 1911),* appeal dismissed, *Yazoo & M. V. R. v. Brewer, 231 U. S. 245 (1913);* Batchelder v. Robbins, 45 A.837 (Me. 1900); Wickes v. Wickes, 56 A.1017 (Md. 1904); *Bowen v. Guild, 130 Mass. 121 (1881);* Kipp v. Hagan, 122 N.W.317 (Minn. 1909); *Pierce v. Austin, 651 S.W.2d 161 (Mo. 1983)* (driving stakes into portion of defendant's driveway was a valid interruption); Hopkins v. Deering, 52 A.75 (N. H. 1902); Johnston v. Fitz George, 14 A.762 (N. J. 1888); Landon v. Townsend, 29 N.E.71 (N.Y. 1891); *Malloy v. Bruden, 86 N.C. 251 (1882);* Handley v. Barret, 35 A.133 (Pa. 1896); Chicago, R. I. & G. R. Co. v. Johnson, 156 S.W.253 (Tex. App. 1913); Howell v. Garlington, 270 S.W.269 (Tex. App. 1925) (removal of timber from land, statute interrupted as to part not actually enclosed or occupied by adverse claimant); *Earl v. Griffith, 52 Vt. 415 (1880); Barrell v. Renehan, 39 A.2d 330 (Vt. 1944);* Illinois Steel Co. v. Buszisz, 90 N.W.1019 (Wis. 1902); *Bruch v. Benedict, 165 P.2d 561 (Wyo. 1946).*

As between grantor and grantee, possession becomes adverse when a dispute arises between the parties as to the boundary. *Gauker v. Eubanks, 199 S.E.2d 771 (Ga. 1973).*

(n48)Footnote 566. *Kitzerow v. Reinhardt, 704 P.2d 132 (Or. 1985)* (record owner regularly going onto disputed land was sufficient); *Chastang v. Chastang, 37 So. 799 (Ala. 1904).*

Possessor's prison sentence was temporary and did not interrupt running of possession. *Helton v. Cook, 219 S.E.2d 505 (N.C. 1975).*

(n49)Footnote 567. *Matto v. Dan Beard, Inc., 546 A.2d 854 (Conn. 1988)* (letters from counsel constituted reentry); *Peabody v. Hewett, 52 Me. 33 (1861); Cambell v. Wallace, 12 N. H. 362 (1841);* Camp v. Camp, 92 A.12 (Vt. 1914); Illinois Steel Co. v. Budzisz, 90 N.W.1019 (Wis. 1902).

(n50)Footnote 568. *Webb v. Anderson, 40 So. 2d 189 (Miss. 1949);* Cook v. Easterling, 259 S.W.1089 (Tex. Civ. App. 1924), aff'd, 290 S.W.731 (Tex. Com. App. 1927).

(n51)Footnote 569. *Miceli v. Foley, 575 A.2d 1249 (Md. 1990)* (surveyor's entry onto property, and staking and walking of property were not sufficient to interrupt where surveyor never accosted adverse possessor nor made any direct or indirect attempt to oust); Armstrong v. Payne, 206 P.638 (Cal. 1922).

An entry is thus operative because, although at the moment there exists in fact a mixed possession, it is yet legally regarded as residing exclusively in the true owner, by virtue of his superior right. *Smith v. Steele, 17 Pa. 30 (1851).*

(n52)Footnote 570. *Otto v. Cornell, 349 N.W.2d 703 (Wis. 1984)* (allowing true owner's children to play on property and rake leaves was insufficient); *Kendrick v. Klein, 150 P.2d 955 (Cal. App. 1944);* Cowan v. Hatcher, 59 S.W.689 (Tenn. Ch. App. 1900).

(n53)Footnote 571. *Powell Lumber Co. v. Medley, 127 S.W.2d 520 (Tex. Civ. App. 1939).*

(n54)Footnote 572. Lucas v. Ferris, 112 A.165 (Conn. 1921); Bloodsworth v. Murray, 114 A.575 (Md. 1921); Hayes v. Williamson-Brown Land & Lumber Co., 104 S.E.527 (N.C. 1920); Sciraffa v. Flores, 274 S.W.260 (Tex. Civ. App. 1920).

(n55)Footnote 573. *Dozier v. Krmpotich, 35 N.W.2d 696 (Minn. 1949).*

(n56)Footnote 574. *Winstead v. Winstead, 38 So. 2d 118 (Miss. 1948).*

(n57)Footnote 575. Burnett v. Burnett, 240 S.W.75 (Ky. 1922).

(n58)Footnote 576. Clements v. Texas Co., 273 S.W.993 (Tex. Civ. App. 1925).

(n59)Footnote 577. *Bowen v. Guild, 130 Mass. 121 (1881).*

(n60)Footnote 578. *Sherman v. Kane, 86 N.Y. 57 (1881); Spofford v. Bennett, 55 Tex. 293 (1881).*

(n61)Footnote 579. Coshow v. Otey, 222 S.W.804 (Mo. 1920).

(n62)Footnote 580. *Matto v. Dan Beard, Inc., 546 A.2d 854 (Conn. App. 1988); Knoke v. Swan, 42 P.2d 1019 (Cal. 1935).*

(n63)Footnote 581. Rosenstihl v. Cherry, 151 N.E.642 (Ohio 1926).

Refusing to allow tacking of heirs to adverse possession of ancestor where administration had not been completed on the estate and heirship determined. *Currier v. Gonzales, 434 P.2d 66 (N. M. 1967).*

(n64)Footnote 582. *Moore v. Greene, 60 U. S. (19 How.) 69 (1856); Ernest M. Loeb Co. v. Avoyelles Drainage Dist. No. 8, 60 F. Supp. 296 (W. D. La. 1945); Bishop v. Truitt, 5 So. 154 (Ala. 1888);* Sibly v. England, 119 S.W.820 (Ark. 1909); McGrath v. Wallace, 24 P.793 (Cal. 1890); Breon v. Robrecht, 50 P.689, 51 P.33 (Cal. 1897); Hentig v. Redden, 26 P.701 (Kan. 1891); *Smith v. Hornback, 14 Ky. (4 Litt.) 232 (1823); Creech v. Jenkins, 123 S.W.2d 267 (Ky. 1938);* Barrell v. Title Guar. & Trust Co., 39 P.992 (Or. 1895); *Potts v. Wright, 82 Pa. 498 (1876); Spears v. Bankers' Mtg. Co., 191 S.W.2d 807 (Tex. Civ. App. 1945).*

An offer to purchase the record title terminates the adverse character of the possession. *Wilson v. Rogers, 343 S.W.2d 309 (Tex. Civ. App. 1961),* James M. York, Adverse Possession -- Effect of Adverse Claimant's Offer to Purchase from Record Owner.

(n65)Footnote 583. Breon v. Robrecht, 50 P.689, 51 P.33 (Cal. 1897); St. Paul, M. & M. R. R. v. Olson, 91 N.W.294 (Minn. 1902); *Portis v. Hill, 30 Tex. 629 (1868);* Stewart v. Stewart, 53 N.W.686 (Wis. 1892).

In order to have tacking, the predecessor in title must have claimed the land and in a proper manner transferred the claim. *Tankersley v. Randal, 361 S.W.2d 946 (Tex. Civ. App. 1962).*

(n66)Footnote 584. *Lindenmayer v. Gunst, 13 So. 252 (Miss. 1893).*

(n67)Footnote 585. Barrel v. Title Guar. & Trust Co., 39 P.992 (Or. 1895).

(n68)Footnote 586. *Langford v. Poppe, 56 Cal. 73 (1880),* appeal dismissed, *104 U. S. (14 Otto) 770 (1881);* Martin v. Hall, 153 S.W.997 (Ky. 1913); Snell v. Harrison, 32 S.W.37 (Mo. 1895); *Workman v. Guthrie, 29 Pa. 495 (1857);* Nelson v. Triplett, 39 S.E.150 (Va. 1901); *Michele v. Cordisco, 12 Bucks (Pa.) 37 (1961)* (must have privity to have tacking).

(n69)Footnote 587. *Auldridge v. Spraggin, 163 S.W.2d 1042 (Mo. 1942).*

(n70)Footnote 588. *Harrison v. Lee, 45 So. 2d 705 (Ala. 1950); Bush v. Gainesville, 56 S.E.2d 478 (Ga. 1949).*

(n71)Footnote 589. Place v. Place, 102 N.W.996 (Mich. 1905).

(n72)Footnote 590. *Ferguson v. Bartholomew, 67 Mo. 212 (1878);* Douglas v. Irvine, 17 A.802 (Pa. 1889).

(n73)Footnote 591. Cobb v. Robertson, 86 S.W.746, 87 S.W.1148 (Tex. 1905).

(n74)Footnote 592. Nelson v. Johnson, 226 S.W.94 (Ky. 1920) (possession for purpose of cultivating a single crop and cutting of timber); Mandlebaum v. Looney Merc. Co., 293 S.W.203 (Tex. Civ. App. 1927) (use of premises for purposes of storing property with occupant's permission does not break continuity of occupant's adverse use).

A deed by adverse possessor which did not include the adjoining strip held by adverse possession did not disallow tacking. *See Carpenter v. Huffman, 314 So. 2d 65 (Ala. 1975),* where the adverse possessor put the buyer in actual possession of the land. No tacking where the strip adversely held was not included in the deed. *Stutson v. McGee, 130 So. 2d 403 (La. 1961).* In order to tack, the land claimed must be included in the deed or be mistakenly omitted therefrom. *El Cerrito, Inc. v. Ryndak, 376 P.2d 528 (Wash. 1962).*

(n75)Footnote 593. Nelson v. Johnson, 226 S.W.94 (Ky. 1920).

(n76)Footnote 594. Jacob Tome Inst. v. Crothers, 40 A.261 (Md. 1898). As by creation of a tenancy in common. *Wilson v. Wilson, 74 S.E.2d 704 (N.C. 1953).*

(n77)Footnote 595. Bingham Livery & Transfer Co. v. McDonald, 110 P.56 (Utah 1910).

(n78)Footnote 596. *Lott v. Sebren, 48 So. 2d 626 (Miss. 1950);* Chavez v. Torlina, 99 P.690 (N. M. 1909); *Allen v. Sharp, 233 S.W.2d 485 (Tex. Civ. App. 1950).*

(n79)Footnote 597. *Stratos v. King, 319 S.E.2d 356 (S.C. 1984); Thomas v. Young, 87 S.E.2d 127 (Va. 1955).* But see *Pratt v. Parker, 255 P.2d 311 (N. M. 1953).* A tax sale does not stop the running of adverse possession and adverse possessor takes despite sale to government. *Illinois Ry. Museum, Inc. v. Siegel, 266 N.E.2d 724 (Ill. App. 1971).*

(n80)Footnote 598. *Marvel v. Barley Mill Road Homes, 104 A.2d 908 (Del. 1954),* Gerald Hornung, Real Property: Acquiescence in Lieu of Adverse Possession in Boundary Line Cases, *8 Okla. L. Rev. 486 (1955).* Tacking by successive grantees of adjoining land was permitted though land claimed by adverse possession was not included in deed. *Derryberry v. Ledford, 506 S.W.2d 152 (Tenn. App. 1973).*

(n81)Footnote 599. *Flowers v. Stanley, 316 P.2d 840 (Okla. 1957); Lumm v. Colliard, 317 P.2d 273 (Okla. 1957).*

(n82)Footnote 600. *Jarvis v. Gillespie, 587 A.2d 981 (Vt. 1991); Montgomery v. Branon, 278 A.2d 744 (Vt. 1971)* (occupancy not necessarily continuous).

(n83)Footnote 601. *Chapin v. Letcher, 93 N.W.2d 415 (N.D. 1958).*

(n84)Footnote 602. *Thomas v. Young, 87 S.E.2d 127 (Va. 1955).*

(n85)Footnote 603. *Zimmerman v. Summers, 330 A.2d 722 (Md. App. 1975).*

(n86)Footnote 604. *Tanner v. Case, 142 So. 2d 688 (Ala. 1962); Robertson v. Lemmon, 371 P.2d 175 (Kan. 1962),* cert. denied, *375 U. S. 5 (1963).*

(n87)Footnote 605. *Brand v. Prince, 324 N.E.2d 314 (N.Y. 1974).*

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CHAPTER 87 ADVERSE POSSESSION

10-87 Thompson on Real Property, Thomas Editions § 87.15

AUTHOR: Professor Olan B. Lowrey School of Law Temple University Portion of this Chapter are based on Ch. 38 of George W. Thompson, Commentaries on the Law of Real Property (John S. Grimes, ed. reprinted 1979).

§ 87.15 Necessity of Good Faith.

[Go To Supp]

There are two completely divergent views on the question of whether adverse possession must be taken and maintained under a claim of right made in good faith. n606 One line of cases requires a showing of good faith. n607 The other line (majority rule) does not require good faith where there has been actual possession, n608 but applies good faith only to constructive possession. n609 There is likewise a question as to whether good faith is an element of color of title. Some courts require that color of title be taken in good faith, n610 others do not. n611 Adverse possession may be acquired though possession is obtained through fraud. n612 Even where the possession is constructive, there are cases denying the necessity of good faith in the absence of a statute requiring it. n613 The weight of authority seems to be that, where the claimant actually occupies the land, good faith on the claimant's part is not required in order that the holding may ripen into a title. n614 Where required, "good faith" merely means that a person honestly believes to have acquired a good title regardless of knowledge and mental capacity, n615 and it exists wherever possession is taken in belief that such taking is rightful. n616 Knowledge on the part of the claimant that the title was defective, or even when one has knowledge of another claim under a different title, n617 will not impeach good faith, n618 for one will speculate in the purchase of land where one knows that there are imperfections and irregularities in the chain of title. If a claimant knows a title is worthless, then all trace of good faith is lacking and there is no color of title. n619 When one claims adversely, it is not necessary for one to show that one went into possession in good faith, but the burden of showing fraud is upon the opposite party. n620 If possession is commenced in good faith, subsequent knowledge of outstanding rights or subsequent possession, even if considered to be bad faith, does not prevent the establishment of title by adverse possession. n621 While, according to some adverse possession must not have arisen in fraud, direct evidence of bona fides is not required, and a presumption of good faith arises from adverse possession. n622 It has been held that an adverse possessor holding under "the expectancy of inheritance" did not have the "good faith" necessary to be holding under a claim of right n623 or for invoking a betterment statute so as to recover for improvements on ouster. n624

An occupying claimant is not liable for rent until after refusing a demand for rent. n625

COMPUTER-ASSISTED RESEARCH

LEXIS: Adverse possession w/20 good faith

FOOTNOTES:
(n1)Footnote 606. 3 AM. JUR. 2D, Adverse Possession, §§ 133-136 (1993).

(n2)Footnote 607. *Ochoa v. Hernandez y Morales, 230 U. S. 139 (1913); Jasperson v. Scharnikow, 150 F. 571 (9th Cir. 1907); Kelly v. Sinclair, 268 P.2d 1035 (Colo. 1954); Moore v. Worley, 24 Ind. 81 (1865); Carpenter v. Ruperto, 315 N.W.2d 782 (Iowa 1982); Armstrong v. Cities Serv. Gas Co., 502 P.2d 672 (Kan. 1972); Phillips v. Parker, 483 So. 2d 972 (La. 1986); Joseph Russell Realty Co. v. Kenneally, 605 P.2d 1107 (Mont. 1980); Mundy & Mundy, Inc. v. Adams, 602 P.2d 1021 (N. M. 1979).*

(n3)Footnote 608. *Nome 200 v. Fagerstrom, 799 P.2d 304 (Alaska 1990); Joiner v. Janssen, 421 N.E.2d 170 (Ill. 1981); Holmes v. Johnson, 86 N.E.2d 924 (Mass. 1949); Walker v. Bowen, 52 N.W.2d 574 (Mich. 1952);* Missouri Lumber & Mining Co. v. Chronister, 259 S.W.1042 (Mo. 1924); *Charlton v. Crocker, 665 S.W.2d 56 (Mo. App. 1984); Nagel v. Kiibler, 212 S.W.2d 1009 (Tex. Civ. App. 1948); I.T.T. Raynoier, Inc. v. Bell, 774 P.2d 6 (Wash. 1989); Blair v. Preece, 377 S.E.2d 493 (W. Va. 1989); Polanski v. Town of Eagle Point, 141 N.W.2d 281 (Wis. 1966); Bruch v. Benedict, 165 P.2d 561 (Wyo. 1946).*

(n4)Footnote 609. *Leo Sheep Co. v. United States, 440 U. S. 668 (1979); Spradling v. May, 65 So. 2d 494 (Ala. 1953); Ault v. State, 688 P.2d 951 (Alaska 1984); Birchfield v. Thiercof, 428 P.2d 148 (Ariz. 1967); Slatin's Props., Inc. v. Hassler, 291 N.E.2d 641 (Ill. 1972); Schlueter v. Ackerman, 137 A.2d 179 (Md. 1957);* Missouri Lumber & Mining Co. v. Chronister, 259 S.W.1042 (Mo. 1924); *Nyman v. City of Eugene, 593 P.2d 515 (Or. 1979);* WASH. REV. CODE ANN. § 7. 28. 070; *Peoples v. Port of Bellingham, 613 P.2d 1128 (Wash. 1980).*

(n5)Footnote 610. *Leo Sheep Co. v. United States, 440 U. S. 668 (1979); Van Meter v. Grice, 380 So. 2d 274 (Ala. 1980); Ault v. State, 688 P.2d 951 (Alaska 1984); Rinke v. Weedman, 341 S.W.2d 44 (Ark. 1960); O'Reilly v. Balkwill, 297 P.2d 263 (Colo. 1956); Joiner v. Janssen, 421 N.E.2d 170 (Ill. 1981); Counsel Bluffs Savings Bank v. Simmons, 243 N.W.2d 634 (Iowa 1976); Gore v. Hall, 112 A.2d 675 (Md. 1955);* Wilkerson v. Eilers, 21 S.W.514 (Mo. 1893); *Perusich v. Meier, 747 P.2d 857 (Mont. 1987); Braue v. Fleck, 127 A.2d 1 (N. J. 1956); Crary v. Goodman, 22 N.Y. 170 (1860); First Nat'l Bank of Eden v. Meyer, 476 N.W.2d 267 (S.D. 1991); Hussey v. Moser, 70 Tex. 42, 7* S.W.606 (1888); *Unsell v. Federal Land Bank of Houston, 138 S.W.2d 305 (Tex. Civ. App. 1940).*

(n6)Footnote 611. *McDonald v. Wimpy, 56 S.E.2d 524 (Ga. 1949).*

(n7)Footnote 612. *Ruick v. Twarkins, 367 A.2d 1380 (Conn. 1976);* Missouri Lumber & Mining Co. v. Chronister, 259 S.W.1042 (Mo. 1924); *Marky Inv., Inc. v. Arnezeder, 112 N.W.2d 211 (Wis. 1961).*

(n8)Footnote 613. *Oliver v. Pullam, 24 F. 127 (CC. N.C. 1885);* Dawson v. Falls City Boat Club, 99 N.W.17 (Mich. 1904); Berry v. Richmond Cedar Works, 113 S.E.772 (N.C. 1922); *Spellbrink v. Bramberg, 14 N.W.2d 38 (Wis. 1944).*

(n9)Footnote 614. May v. Dobbins, 77 N.E.353 (Ind. 1906); *Humbert v. Trinity Church, 24 Wend. 587 (N.Y. 1840).*

(n10)Footnote 615. *Armstrong v. Cities Serv. Gas Co., 502 P.2d 672 (Kan. 1972).*

(n11)Footnote 616. *Carpenter v. Ruperto, 315 N.W.2d 782 (Iowa 1982); Phillips v. Parker, 483 So. 2d 972 (La. 1986);* Seigneuret v. Fahey, 6 N.W.403 (Minn. 1880).

(n12)Footnote 617. *Rogers v. Manning, 38 S.E.2d 724 (Ga. 1946); Tontz v. Heath, 170 N.E.2d 153 (Ill. 1960);* Wright v. Tickenor, 3 N.E.853 (Ind. 1885); *Schlueter v. Ackerman, 137 A.2d 179 (Md. 1957); Palmer v. Denver & Rio*

Grande W. R. R., 410 P.2d 956 (N. M. 1966).

(n13)Footnote 618. Montgomery & Mullen Lumber Co. v. Quimby, 128 P.402 (Cal. 1912); *Armstrong v. Cities Serv. Gas Co., 502 P.2d 672 (Kan. 1972); Carpenter v. Ruperto, 315 N.W.2d 782 (Iowa 1982); Ryan v. Ribbeck, 83 So. 2d 650 (La. 1955); Witherspoon v. Brummett, 176 P.2d 187 (N. M. 1946).*

(n14)Footnote 619. *Carpenter v. Ruperto, 315 N.W.2d 782 (Iowa 1982).*

(n15)Footnote 620. *Tarver v. Taliafero, 423 S.W.2d 885 (Ark. 1968); Smith v. Powers, 69 S.E.2d 374 (Ga. 1952).*

(n16)Footnote 621. *Bel v. Manuel, 99 So. 2d 58 (La. 1958).*

(n17)Footnote 622. *Halpern v. Lacy Inv. Corp., 379 S.E.2d 519 (Ga. 1989).*

(n18)Footnote 623. *Epps v. Finehout, 189 S.W.2d 631 (Tex. Civ. App. 1945).*

(n19)Footnote 624. *Smith v. Hanna, 56 S.E.2d 339 (S.C. 1949); See also Epps v. Finehout, 189 S.W.2d 631 (Tex. Civ. App. 1945).*

(n20)Footnote 625. *Speller v. Mackereth, 334 So. 2d 859 (Ala. 1976).*

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CHAPTER 87 ADVERSE POSSESSION

10-87 Thompson on Real Property, Thomas Editions § 87.16

AUTHOR: Professor Olan B. Lowrey School of Law Temple University Portion of this Chapter are based on Ch. 38 of George W. Thompson, Commentaries on the Law of Real Property (John S. Grimes, ed. reprinted 1979).

§ 87.16 What Property Can Be Acquired by Adverse Possession.

[Go To Supp]

Adverse possession involves the acquisition of title to corporeal or possessory interest of land initially owned by another. Prescription concerns the acquisition of non-possessory interests and incorporeal hereditaments in another's land without affecting the title thereto. The origin, requisites and effects of adverse possession and prescription differ widely. The title to land may be obtained by adverse possession without regard to whether rights incidental to such title could be acquired independently by prescription or otherwise. n626 Land is subject to adverse possession regardless of how it was subdivided. n627 On the other hand, rights and interests in lands may be acquired by prescription without regard to the ownership of the fee to the land. n628 Thus easements, water rights, and the like, may be created or acquired by adverse use and enjoyment. n629 Easements may be lost by adverse possession. n630 An adverse claimant may establish a prescriptive right to use water intermittently and for part of the irrigation season only. If a right of this character is insisted upon and maintained without interruption, the prescriptive right arises. n631 The right to divert water from foreign watersheds may be acquired by adverse possession. n632 It is clear that wherever a portion of the surface or of the subsoil can be severed from the remainder, such portion is subject to adverse possession. n633 Where title to the shore is obtained by adverse possession, title is obtained to accretions though the accretions have existed only for a period of time short of the statutory period. n634

After the severance of the mineral estate from the surface estate, the owner of the mineral rights does not lose the same by any length of surface possession by non-user, that is the owner of the surface does not acquire title by the statute of limitations to the minerals by exclusive and continued occupancy and enjoyment of only the surface. n635 But where the mineral rights have not been severed from the surface rights, adverse possession of the surface will perfect valid title to both surface and mineral rights. n636 The title to the surface estate may be acquired by adverse possession where the original owner of the entire estate has conducted such mining operations thereon as amount to a severance of the minerals. n637 Title to minerals underlying the surface is gained by adverse possession of the surface n638 unless the title to the minerals has been severed from the surface. n639 And title to minerals alone may be obtained by adverse possession of the minerals themselves. n640 But where the possession is limited to the surface, title to the severed mineral estate does not pass by adverse possession. n641 It has been held, however, that severance after the start of

adverse possession will not stop the adverse possessor of the surface from gaining title to the minerals. n642 When title to minerals has been severed from the title to the surface an adverse possession of the surface arising after such severance does not affect title to the minerals. n643 However, where there has been a mineral severance, the owner of the surface can by working the minerals acquire title thereto through the doctrine of constructive possession. n644 If the possession commenced before the severance the weight of authority permits it to continue after severance even as against the minerals. n645 It is also held that title to a building may be acquired by adverse possession, although the title to the supporting land is in another. n646

There is a divergence of authority as to whether title by adverse possession can be obtained by encroachment such as overhanging structures. n647 But an easement may arise by such adverse use. n648

It has even been held that title to a burial lot with the rights in cemetery aisles or lanes may be acquired by adverse possession, and, conversely, may be lost by entry and continuous possession for the required statutory period; n649 but where bodies are buried in a cemetery lot through mistake as to the true boundary line, no adverse claim arises. n650

There is controversy as to whether the claim of right requisite to adverse possession can be less than a claim of a fee simple absolute. It has been held that title by adverse possession may be acquired to the lands of a married woman, n651 or to the right of dower of a widow, n652 and title to land intended to be used for church purposes can be acquired by adverse possession. n653 Under certain circumstances recordation of deed and possession of the property can give possessor title by adverse possession as against tenant in common. n654 Under some authorities title can be gained, as against a railroad, by adverse possession for the statutory period of limitation. n655 However, the adverse user of a railway right-of-way must be inconsistent with the use and enjoyment of the easement by the railway company. n656 In those states where no controlling statute intervenes, it is generally held that such parts of a railroad right-of-way as are acquired by private grant, purchase, gift, condemnation, or prescription, and are not enclosed or covered by the tracks of the railroad company and its structures, may be acquired against the railroad by adverse possession. n657 Other cases adhere to the rule that since a railroad right-of-way is devoted to a public use the title of the railroad company cannot be divested by adverse possession. n658

New York has firmly held that a private party can acquire title to the bed of a navigable stream by adverse possession against the state, subject to the state's right to regulate the use of the water for navigation, upon the theory that there was no interference with a public use. n659

Title by adverse possession may be acquired to lands held in trust, even where the adverse possessor conveyed the property to others in trust prior to adverse possession. n660 But at common law, as against the public, no right can be created by mere prescription or adverse possession. n661

There is a position that adverse possession will run in favor of the sovereign if a cause of action will be against it in favor of the owner. n662 The constitutional provision that prohibits taking property without paying just compensation does not bar the state from acquiring title by adverse possession. n663 A governmental subdivision may acquire title by adverse possession for the benefit of the public. n664

Where there is an adverse possession as to a trustee, and there is no fraud or concealment, and the *cestui que trust* is under no disability, the possession has been regarded as adverse both to the trustee and to the *cestui que trust*. n665 The same rule has been applied even where the *cestui que trust* is under a disability if the trustee holds title. n666

Adverse possession carries title to all of the land occupied, regardless of whether the titleholder had actual record title thereto. n667 Record title means only a title reflected in the public records, such as by deed, devise, certificate of heirship or court order. It is not necessarily the true title.

Adverse possession is not applicable to Indian lands held in trust by the state. n668 Adverse possession rules also apply

to personal property, n669 and are often at issue when owners seek to recover stolen artworks. n670

COMPUTER-ASSISTED RESEARCH

LEXIS: Adverse possession w/20 (affect! or effect!) w/3 [type of property]

FOOTNOTES:
(n1)Footnote 626. Golden v. Murphy, 103 P.394, 105 P.99 (Nev. 1909).

(n2)Footnote 627. Platted land is as much subject to adverse possession as unplatted land. *Roberts v. Duddles, 209 N.W.2d 720 (Mich. App. 1973).*

Acquisition of a river bank by adverse possession carried title to an island which was on the river bank's side of thread of stream. *Hanson v. Way Estate, 181 N.W.2d 537 (Mich. App. 1970).* Holding that there is no difference between the rights of riparian owner which were acquired by deed or those which were acquired by adverse possession.

(n3)Footnote 628. *Klein v. DeRosa, 79 A.2d 773 (Conn. 1951).*

(n4)Footnote 629. *Loudenslager v. Mosteller, 307 A.2d 286 (Pa. 1973); Mildenberger v. Galbraith, 815 P.2d 130 (Mont. 1991). SRBA v. Hagerman Water Rights Owners, Inc., 947 P.2d 409* ((*Id.* 1997) (Water rights may be acquired by adverse possession).

Cf. Under §§ 934 - 939 of title 43 of the United States Code, the third party cannot acquire title to a portion of a railroad right-of-way by adverse possession or by abandonment of land. *Allard Cattle Co. v. Colorado & So. Ry., 516 P.2d 123 (Colo. App. 1973),* aff'd, *530 P.2d 503 (Colo. 1974).*

(n5)Footnote 630. Easements arising from the platting of land may be lost by adverse possession. *Mumaw v. Robertson, 60 So. 2d 741 (Fla. 1952).*

(n6)Footnote 631. Armstrong v. Payne, 206 P.638 (Cal. 1922).

(n7)Footnote 632. *Bagwell v. V-Heart Ranch, Inc., 690 P.2d 1271 (Colo. 1984).*

(n8)Footnote 633. *Moffett v. International Paper Co., 138 So. 2d 492 (Miss. 1962).*

(n9)Footnote 634. *Peterson v. Harpst, 247 S.W.2d 663 (1952);* Doebbeling v. Hall, 274 S.W.1049 (Mo. 1925).

(n10)Footnote 635. *Chicago & N.W.Ry. v. Continental Oil Co., 253 F. 2d 468 (10th Cir. 1958); Magnolia Petroleum Co. v. Carter Oil Co., 218 F. 2d 1 (10th Cir. 1954),* cert. denied, *Oklahoma v. Magnolia Petr. Co., 349 U. S. 916 (1955); Schaneman v. Wright, 470 N.W.2d 566 (Neb. 1991); Nelson v. Christianson, 343 N.W.2d 375 (N.D. 1984). See* Howard R. Williams & Charles J. Meyers, Adverse Possession and Trespass in the Law of Oil and Gas, 29 R. Mt. L. Rev. 1 (1957).

(n11)Footnote 636. *Hurst v. Southwest Miss. Legal Services Corp., 610 So. 2d 374 (Miss. 1992).*

(n12)Footnote 637. Delaware & H. Canal Co. v. Hughes, 38 A.568 (Pa. 1897).

(n13)Footnote 638. *King v. Hester, 200 F. 2d 807 (5th Cir. 1952); Stowers v. Huntington Dev. & Gas Co., 72 F. 2d 969 (1934); Rio Bravo Oil Co. v. Staley Oil Co., 158 S.W.2d 293 (Tex. 1940); Glenrock v. Abadie, 259 P.2d 766 (Wyo. 1953). See Jones v. Brown, 199 S.W.2d 973 (Ark. 1947).*

Georgia permits adverse possession against separated mineral rights by the fee simple owner of the property. Ga.

Code Ann. § 85-407.1; *Milner v. Bivens, 335 S.E.2d 288 (Ga. 1985).*

(n14)Footnote 639. *Arnett v. Sinclair Prairie Oil Co., 88 F. Supp. 343 (W. D. Ky. 1948),* aff'd, *Delta Drilling Co. v. Arnett, 186 F. 2d 481 (6th Cir. 1950),* cert. denied, *340 U. S. 954 (1951),* reh'g denied, *341 U. S. 917 (1951); West v. Hapgood, 174 S.W.2d 963 (Tex. 1943);* State v. Estep, 175 S.E.350 (W. Va. 1934); *Bremhorst v. Phillips Coal Co., 211 N.W. 898 (Iowa 1926);* see Annotation, *35 A.L. R. 2D 158 (1954).*

Michigan Cent. R. R. v. Garfield Petr. Corp., 290 N.W.833 (Mich. 1940) (though railroad had acquired right-of-way by prescription it had not obtained title to minerals).

Herbert v. Forman, 181 P.2d 257 (Okla. 1947) (permissive use of surface did not extend to rights to minerals).

(n15)Footnote 640. *Epps v. Finehout, 189 S.W.2d 631 (Tex. Civ. App. 1945); Stephenson v. Wilson, 37 Wis. 482 (1875).*

(n16)Footnote 641. *Witt v. Graves, 787 S.W.2d 681 (Ark. 1990); Hassel v. Texaco, Inc., 372 P.2d 233 (Okla. 1962);* Michigan Cent. R. R. Co. v. Garfield Petr. Corp., 290 N.W.833 (Mich. 1940).

(n17)Footnote 642. *Hellier Coal & Coke Co., Inc. v. Bowling, 272 S.W.2d 651 (Ky. 1954); Hurst v. Southwest Miss. Legal Servs. Corp., 610 So. 2d 374 (Miss. 1992);* 3 AM. JUR. 2D, Mines & Minerals § 287 (1971 & Supp. 1993).

(n18)Footnote 643. Annotation, *35 A.L. R. 2D 154 (1954); West v. Hapgood, 174 S.W.2d 963 (Tex. 1943).*

(n19)Footnote 644. Thomas v. Young, 117 S.E.909 (W. Va. 1923); *Couch v. Armory Commission, 154 N.Y. S. 945 (1915).*

(n20)Footnote 645. *See* Howard R. Williams & Charles J. Meyers, Adverse Possession and Trespass in the Law of Oil and Gas, 29 R. Mt. L. Rev. 1 (1957).

(n21)Footnote 646. Fairbanks v. San Francisco & N. P.R. R., 47 P.450 (Cal. 1897).

(n22)Footnote 647. Adverse possession: *Walsh v. Cappuccio, 602 A.2d 927 (R. I. 1992); State ex rel. A.A.A.Investments v. City of Columbus, 478 N.E.2d 773 (Ohio 1985); Boese v. Crane, 324 P.2d 188 (Kan. 1958).*

Holding negative: *Valentine v. Ireland, 580 So. 2d 581 (Ala. 1991); Beaver v. Vandall, 547 N.E.2d 802 (Ind. 1989); Brown v. Clemens, 338 S.E.2d 338 (S.C. 1985).*

(n23)Footnote 648. *Ariola v. Nigro, 156 N.E.2d 536 (Ill. 1959); Romans v. Nadler, 14 N.W.2d 482 (Minn. 1944).*

(n24)Footnote 649. *Brunton v. Roberts, 97 S.W.2d 413 (Ky. 1936); Billings v. Paine, 319 S.W.2d 653 (Mo. 1959).*

(n25)Footnote 650. *Brunton v. Roberts, 97 S.W.2d 413 (Ky. 1936).*

(n26)Footnote 651. Trail v. Turner, 56 S.W.654, modified, 56 S.W.966 (Ky. 1900).

(n27)Footnote 652. Brown v. Morrisey, 32 S.E.687 (N.C. 1899).

(n28)Footnote 653. *Trevey v. Lindsey, 19 S.E.2d 613 (W. Va. 1924).*

(n29)Footnote 654. *Lindsey v. Lindsey, 294 S.E.2d 512 (Ga. 1982); Swafford v. Brasher, 22 So. 2d 24 (Ala. 1945);* John Forreter Hicks, Property -- Tenancy in Common -- Registration of Deed as Constructive Notice of Adverse Possession, *18 BAYLOR L. REV. 539 (1966).*

(n30)Footnote 655. Louisville & N. R. Co. v. Smith, 101 S.W.317 (Ky. 1907). Contra *Dyer v. Siano, 11 N.E.2d 451 (Mass. 1939).*

(n31)Footnote 656. Moran v. Chicago, B. & Q. R. R., 120 N.W.192 (Neb. 1909).

(n32)Footnote 657. *Seaboard Air Line R. R. v. Board of Bond Trustees of Special Road & Bridge Dist. No. 1, Alachua Co., 108 So. 689 (Fla. 1926)* (where the railroad acquires title to land by public grant it cannot be divested of its title by adverse possession). *See* the following cases: *Raton v. Pollard, 270 F. 5 (8th Cir. 1920); Penn. Central TransP.Co. v. Martin, 353 N.E.2d 474 (Ind. App. 1976); Mobile & O. R. Co. v. Strain, 88 So. 274 (Miss. 1921); Gulf, Colo. & S. F. Ry. Co. v. Candler, 61 S.W.2d 997 (Tex. App. 1933);* Netherlands American Mtg. Bank v. Eastern R. & Lumber Co., 252 P.916 (Wash. 1927).

(n33)Footnote 658. *People v. Lundy, 47 Cal. Rptr. 694 (1966); Miller v. St. Louis, Sw. Ry., 718 P.2d 610 (Kan. 1986);* Edholm v. Missouri Pac. R. Corp., 211 N.W.206 (Neb. 1926); St. Louis-San Francisco R. R. v. McBride, 231 P.284 (Okla. 1924) (adverse possession does not run against the public lands of the government nor does it run against the lands of Indian tribes); *A.D. Graham & Co. v. Pennsylvania Tpk. Comm'n, 33 A.2d 22 (Pa. 1943);* Atlantic Coast Line R. R. v. Pearson, 135 S.E.567 (S.C. 1926).

In some jurisdictions the statute expressly prohibits the divesting of a railroad company of its title by adverse possession. *Dyer v. Siano, 11 N.E.2d 451 (Mass. 1937);* 160 Mass. Gen. Laws Ann. § 88; Central Vermont R. R. v. R. C. Bowers Granite Co., 134 A.608 (Vt. 1926); 30 Vt. Stat. Ann. § 705.

A right-of-way acquired by congressional grant cannot be divested by adverse possession. St. Louis-San Francisco R. R. v. McBride, 231 P.284 (Okla. 1924).

Adverse possession will run against property which is the subject of an offered dedication if completed before the dedication is accepted, but not after dedication is completed by acceptance. *Steadman v. Town of Pinetops, 112 S.E.2d 102 (N.C. 1960).*

(n34)Footnote 659. *People v. System Properties, Inc., 141 N.E.2d 429 (N.Y. 1957).*

Contra, *Sterling v. Sterling, 128 A.2d 277 (Md. 1956).*

(n35)Footnote 660. Snyder v. Snover, 27 A.1013 (N. J. 1893).

(n36)Footnote 661. Charlotte v. Pembroke Iron Works, 19 A.902 (Me. 1890).

(n37)Footnote 662. *Commonwealth, Dep't of Parks v. Stephens, 407 S.W.2d 711 (Ky. 1966).*

(n38)Footnote 663. *Id.*

(n39)Footnote 664. *Dunnick v. Stockgrowers Bank of Marmouth, 215 N.W.2d 93 (Neb. 1974).*

(n40)Footnote 665. *Daley v. Daley, 14 N.E.2d 113 (Mass. 1938).*

(n41)Footnote 666. Reynolds v. Smith, 199 S.E.137 (Ga. 1938) (infancy); Collins v. McCarty, 3 S.W.730 (Tex. 1889) (coverture); *Broussard Trust v. Perryman, 134 S.W.2d 308 (Tex. Civ. App. 1939)* (insanity).

(n42)Footnote 667. Adverse possession includes accretions. *Schaake v. McGrew, 508 P.2d 930 (Kan. 1973).*

(n43)Footnote 668. *Schagticoke Tribe of Indians v. Kent Sch. Corp., 423 F. Supp. 780 (D. Conn. 1976).*

(n44)Footnote 669. *See* § 13. 04(d) in Vol. 2 of this work.

(n45)Footnote 670. *See* David A.Thomas, Adverse Possession: Acquiring Title to Stolen Personal Property, *10 Probate & Property 12* (March/April 1996); Naftzger v. American Numismatic Society (Los Angeles Superior Court No. BC 075918, Feb. 1, 1996); Society of California Pioneers v. Baker (San Francisco Superior Court No. A 066580, March 15, 1996); Richard A.Rothman & David B. Goldstein, A Tale of Two Innocents: Creating an Equitable Balance Between the Rights of Former Owners and Good Faith Purchasers of Stolen Art, *64 Fordham L. Rev. 49 (1995);* Steven A.Bibas, The Case Against Statutes of Limitations for Stolen Art, *103 YALE L. J. 2437 (1994);* Andrea E. Hayworth, Stolen Artwork: Deciding Ownership is No Pretty Picture, *43 Duke L. J. 337 (1993);* Alexandre A.Montague, Recent Cases on the Recovery of Stolen Art-The Tug of War Between Owners and Good Faith Purchasers Continues, 18 Columbia-Vla J. of Law & The Arts 75 (1993); Robin Morris Collin, The Law and Stolen Art, Artifacts, and Antiquities, *36 Howard L. J. 17 (1993);* Steven F. Grover, The Need for Civil-Law Nations to Adopt Discovery Rules in Art Replevin Actions: A Comparative Study, *70 Tex. L. Rev. 1431 (1992);* Elisa B. Pollack, Toward a New Standard In Art Recovery Cases: New York's Solomon R. Guggenheim Foundation v. Lubell and the Rejection of Due Diligence, 16 Columbia-Vla J. of Law & The Arts 361 (1992); Paige L. Margules, International Art Theft and the Illegal Import and Export of Cultural Property: A Study of Relevant Values, Legislation, and Solutions, 15 [Suffolk Transnational] L. J. 609 (1992); Texas State Bar Committee on Legal Aspects of the Arts, Acquiring Title to Stolen Art, *55 TEXAS BAR J. 237 (1992);* Charles D. Webb, Jr., Whose Art Is It Anyway? Title Disputes and Resolutions in Art Theft Cases, *79 KY. L. J. 883 (1991);* Leah E. Eisen, The Missing Piece: A Discussion of Theft, Statutes of Limitations, and Title Disputes in the Art World, 81 J. Of Criminal Law and Criminology 1067 (1991).

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CHAPTER 87 ADVERSE POSSESSION

10-87 Thompson on Real Property, Thomas Editions § 87.17

AUTHOR: Professor Olan B. Lowrey School of Law Temple University Portion of this Chapter are based on Ch. 38 of George W. Thompson, Commentaries on the Law of Real Property (John S. Grimes, ed. reprinted 1979).

§ 87.17 Who May Acquire Title by Adverse Possession.

[Go To Supp]

As a general rule, title by adverse possession may be acquired by every class and description of persons, natural or artificial, n671 who are otherwise legally capable of taking title to land. n672 Thus, title by adverse possession may be acquired by the nation, n673 state, n674 or municipality. n675 A private corporation may acquire title by adverse possession to the same extent as an individual. n676 One who has no capacity to take title by deed may or may not be able to acquire title by adverse possession. n677

In the context of border disputes, states may acquire title by prescription and acquiescence against another state. n678 But the state cannot acquire title by prescription as against the federal government. n679 Under one doctrine, any division or instrumentality of the sovereign can acquire title by adverse possession although it has the right of eminent domain. n680

Corporations having power to take under eminent domain have been held, in some cases, entitled to acquire real estate by adverse possession; n681 while in other cases this right has been denied. n682 Unincorporated associations such as religious groups n683 or graveyards n684 may mature title to realty by adverse possession. n685 But where an unincorporated association cannot hold by grant it cannot acquire by adverse possession. n686 Title by adverse possession may also be acquired by foreign corporations, n687 aliens, n688 non-residents, n689 infants, n690 and married women. n691 As between parties sustaining parental and filial relations, the possession of the land of the one by the other is presumed to be permissive and not adverse, and adverse possession cannot ordinarily be predicated on the possession of one as against the other in such cases. To make such possession adverse, there must be some open assertion of actual title, other than mere possession, and knowledge thereof brought home to the owner of the land. n692 Adverse possession may be asserted either defensively or aggressively. n693

A rule is sometimes laid down that to hold estates in land, the statute of limitations may be invoked defensively only by a defendant in actual possession of the land. n694 Possession under a title bond or a deed is not adverse. n695 Railroads can acquire fee title by adverse possession n696 but ordinary right-of-way use creates an easement by prescription only.

n697 A mortgagor in possession may begin adverse possession as against the purchaser at a foreclosure sale by hostile acts. n698 Possession by the grantee of a security deed holds subject to the rights of, and not adversely to, the debtor. n699 A mortgagee in possession after default may hold adversely. n700 But a mortgagee to claim adversely against a mortgagor must first distinctly disavow and repudiate the mortgage relationship and notice thereof must be brought home to the mortgagor. n701 Where the possessor made payments to the holder of the security deed, one did not have adverse possession against such a holder. n702 One who goes into possession under a parol gift of land, and who holds possession adversely, acquires title to the land. n703 Title by adverse possession may be acquired by a person through the adverse possession of another who receives and holds possession adversely in the name of the former and under the former's authority. n704 The mere passage of time abates the rule that a grantor who remains in possession is holding subservient to the grantee. n705 Where the possessor has sold property and remains in possession by the sufferance of the vendee such possession is not adverse unless the possessor can establish the fact that possession was held as owner. n706 A grantor remaining in possession after the deed may by notice of adverse claim to the grantee start the running of the period. n707 But generally the grantors continued possession is presumed permissive. n708 The cases are not in accord as to the extent to which religious groups can acquire title by adverse possession. Certainly they can do so if incorporated. n709 Some cases hold that they can do so generally. n710 Others deny the right of the trustees to acquire by adverse possession. n711

When possession is obtained in fiduciary capacity as agent, the unauthorized issuance of deed to the fiduciary by the principal's wife cannot transform the agent into an adverse possessor. n712

A *cestui que trust* in possession is a tenant at will of the trustee and until notice of hostility is brought home to the trustee such possession is not adverse to the trust. n713

A cotenant cannot hold adversely to the other cotenants unless the single cotenant brings home to the the others n714 or at least gives adequate constructive notice of the disclaimer of their interest. n715

Adverse possession of adjoining land by a cotenant in possession inures to the benefit of the other cotenants. n716 Nor can a cotenant's conveyance of a cotenancy give the grantee an adverse claim. n717 Where the tenant in common purports to deed the entire interest and the grantee does not record the deed but goes into possession, the cases are divided as to when adverse possession begins to run. n718

It is axiomatic that those with future interests are not subject to adverse possession against their future interests n719 until such persons have immediate right to possession. n720 Prior to such time, the owner of the future interest has no right to possession and, therefore, no cause of action. n721 However, if the period began to run before the future interest was created, it will continue to run, and thus the running of the period can bar the future interest before it becomes possessory. n722

COMPUTER-ASSISTED RESEARCH

LEXIS: Adverse possession w/20 against w/3 [type of person]

FOOTNOTES:

(n1)Footnote 671. *Bradstreet v. Huntington, 30 U. S. 402 (1831); A.A.A.Investments v. Columbus, 478 N.E.2d 773 (Ohio 1985); Parish of Jefferson v. Bonnebel Props., Inc., 612 So. 2d 300 (La. App. 1992),* cert. granted, *612 So. 2d 1247 (La. 1993).*

(n2)Footnote 672. *Stewart v. White, 30 So. 526 (Ala. 1900).*

(n3)Footnote 673. United States may acquire adverse possession against a state. *California v. United States, 132 F. Supp. 208 (1955).*

In North Carolina, the United States can acquire title by adverse possession. *United States v. Chatham, 208 F. Supp. 220 (W. D. N.C. 1962).*

A governmental subdivision may acquire title by adverse possession for the benefit of the public. *Dunnick v. Stockgrowers Bank of Marmouth, 215 N.W.2d 93 (Neb. 1974).*

(n4)Footnote 674. Attorney-General v. Ellis, 84 N.E.430 (Mass. 1908); Eldridge v. Binghamton, 24 N.E.462 (N.Y. 1890); *State v. Stockdale, 210 P.2d 686 (Wash. 1949); American Petrofina, Inc. v. Warren, 156 So. 2d 729 (Miss. 1963)* (county).

Acquisition of title to land by adverse possession by state or other governmental unit or agency, Annotation, Real Property -- Adverse Possession by State, *18 A.L. R. 3D 678* (1968 & Supp. 1993); *See also Commonwealth, Dep't of Parks v. Stephens, 407 S.W.2d 711 (Ky. 1966).*

(n5)Footnote 675. New York v. Carleton, 21 N.E.55 (N.Y. 1889).

Cf. *Tribble v. Mayor & Aldermen of Forsyth, 167 S.E.2d 142 (Ga. 1969)* (mere public use without upkeep and repair held insufficient for prescriptive title).

A town may acquire title by adverse possession if the disseisin is the act of the town. *Cerel v. Framingham, 171 N.E.2d 840 (Mass. 1961); State ex rel. Remy v. Agar, 559 P.2d 1235 (Okla. 1977).*

(n6)Footnote 676. *Todd v. Kitsap County, 676 P.2d 484 (Wash. 1984).*

(n7)Footnote 677. *Salem Church v. Numsen, 59 A.2d 757 (Md. 1947)* (may not); Hanlon v. Union Pac. R. Co., 58 N.W.590 (Neb. 1894) (may).

(n8)Footnote 678. *Georgia v. South Carolina, 497 U. S. 389 (1990); Rhode Island v. Massachusetts, 45 U. S. (4 How.) 591 (1846).*

(n9)Footnote 679. *Texas v. Louisiana, 410 U. S. 702 (1973).*

(n10)Footnote 680. The state may acquire title by adverse possession. *Commonwealth, Dep't of Parks v. Stephens, 407 S.W.2d 711 (Ky. 1966); Johnson v. State, 418 P.2d 509 (Or. 1967).*

Permitting adverse possession by the sovereign if the true owner could have maintained ejectment. *Commonwealth, Dep't of Parks v. Stephens, 407 S.W.2d 711 (Ky. 1966).*

See also Dunnick v. Stockgrowers Bank of Marmouth, 215 N.W.2d 93 (Neb. 1974).

(n11)Footnote 681. A railroad can claim title to the right-of-way by adverse possession only if the adverse possession dates from the time the railroad asserted a claim greater than the easement. *St. Louis-San Francisco R. R. v. Walter, 305 F. 2d 90 (1962).*

(n12)Footnote 682. Narron v. Wilmington & W. R. R., 29 S.W.356 (N.C. 1898).

(n13)Footnote 683. First Baptist Church v. Harper, 77 N.E.778 (Mass. 1906).

(n14)Footnote 684. *Gray Lumber Co. v. Pickard, 71 So. 2d 211 (Miss. 1954).*

(n15)Footnote 685. *Gribble v. Call, 123 S.W.2d 711 (Tex. Civ. App. 1938); See also Henderson v. Goodwin, 368*

S.W.2d 800 (Tex. Civ. App. 1963).

(n16)Footnote 686. *Salem Church of United Brethren v. Numsen, 59 A.2d 757 (Md. 1948); Stewart v. White, 30 So. 526 (Ala. 1901).*

(n17)Footnote 687. *Farha v. Signal Cos., 532 P.2d 1330* (Kan.), modified, *535 P.2d 463 (Kan. 1975).*

(n18)Footnote 688. *Scottish-American Mtg. Co. v. Butler, 54 So. 666 (Miss. 1910).*

(n19)Footnote 689. *Lindenmayer v. Gunst, 13 So. 252 (Miss. 1893).*

(n20)Footnote 690. Woodruff v. Roysden, 58 S.W.1066 (Tenn. 1900).

(n21)Footnote 691. *Clark v. Gilbert, 39 Conn. 94 (1872).*

(n22)Footnote 692. Chase v. Lavelle, 181 N.W.936 (Neb. 1921); *Petsch v. Widger, 335 N.W.2d 254 (Neb. 1983)* (presumption extended to grandparent-grandchild relationship and to cousins); *McIntosh v. Chincoteague Volunteer Fire Co., 260 S.E.2d 457 (Va. 1979).*

Possession of members of family of tenant is not adverse to landlord. *Jackson v. Genecov, 471 S.W.2d 589 (Tex. Civ. App. 1971).*

(n23)Footnote 693. *Morris v. Wells, 381 P.2d 882 (Okla. 1963); Beard v. Henn, 190 N.E.2d 345 (Ill. 1963); Worthen v. Rushing, 307 S.W.2d 890 (Ark. 1957); Levy v. Campbell, 28 So. 2d 224 (Miss. 1946). Moultrie v. Wright, 464 S.E.2d 194 (Ga. 1995)* (possession adverse to title of county); *Morrow v. Vinson, 666 So. 2d 802 (Miss. 1995)* (adverse possession statute applicable to 16th section school trust lands was inapplicable to the state). *Kiowa Creek Land & Cattle Co. v. Nazarian, 554 N.W.2d 175 (Neb. App. 1996); Palmer Ranch v. Suwansawasdi, 920 P.2d 870 (Colo. App. 1996).*

(n24)Footnote 694. *Greenlee v. Mitchell, 607 So. 2d 97 (Miss. 1992).*

(n25)Footnote 695. *Leo Egan Land Co., Inc. v. Heelan, 313 N.W.2d 682 (Neb. 1981);* Blair v. Meade, 234 S.W.433 (Ky. 1921).

(n26)Footnote 696. *Clayton v. Atlantic Richfield Co., 717 P.2d 558 (Mont. 1986); Coxe v. Lehigh Valley R. R., 158 A.2d 782 (Pa. 1960); Pierce v. Cherry Valley Farms, Inc., 66 N.E.2d 639 (Ohio 1946).*

(n27)Footnote 697. *Nature Conservancy v. Kolb, 853 S.W.2d 864 (Ark. 1993); Rio Bravo Oil Co. v. Hunt Petroleum Corp., 439 S.W.2d 853 (Tex. Civ. App. 1969); People v. Ocean Shore R., Inc., 196 P.2d 570 (Cal. 1948).*

(n28)Footnote 698. *Brewster v. Herron, 267 P.2d 143 (Okla. 1952); Picerne v. Sylvestre, 324 A.2d 617 (R. I. 1974).*

(n29)Footnote 699. *Boswell v. Underwood, 127 S.E.2d 870 (Ga. App. 1962); Tex-Wis Co. v. Johnson, 534 S.W.2d 895 (Tex. 1976).*

(n30)Footnote 700. *Killian v. Everett, 79 So. 2d 17 (Ala. 1955); Baldwin Co. v. Mason, 52 So. 2d 668 (Fla. 1951); Fogle v. Void, 74 S.E.2d 358 (S.C. 1953);* S.C. L.Q. 609.

(n31)Footnote 701. *Crumbaker v. Kelly, 601 P.2d 1199 (Nev. 1979); May v. Jeter, 141 S.E.2d 655 (S.C. 1965); Elliott v. Moffett, 74 A.2d 164 (Pa. 1950); Dunhan v. Davis, 91 S.E.2d 716 (S.C. 1956)* (payment by mortgagor engaged in farming the property to mortgagee in possession was consistent with obligation in mortgagor/mortgagee relationship, thus mortgagee's possession not adverse).

(n32)Footnote 702. *Woods v. Sanders, 25 So. 2d 141 (Ala. 1946).*

(n33)Footnote 703. *Walker v. Moore, 745 S.W.2d 292 (Tenn. 1988); Lewis v. Hardin, 512 So. 2d 96 (Ala. 1987).*

(n34)Footnote 704. *Gochenour v. Logsdon, 30 N.E.2d 666 (Ill. 1940); Bentley Family Trust, Bank of Cal. v. Lynx Enters., 658 P.2d 761 (Alaska 1983).*

(n35)Footnote 705. *Walker v. Coley, 88 So. 2d 868 (Ala. 1956).*

Cf. *McLaren v. Beard, 811 S.W.2d 564 (Tex. 1991)* (grantor does not hold adversely until repudiation of grantee's deed).

(n36)Footnote 706. *McLaren v. Beard, 811 S.W.2d 564 (Tex. 1991)* (presumed permissive); *Holley v. May, 75 So. 2d 696 (1954); Frost Lumber Indus. v. Harrison, 41 So. 2d 674 (La. 1949).*

A conditional vendor like a grantor cannot claim adverse possession unless he specifically disclaims the vendor/vendee relationship.*Perry v. Bedford, 238 Cal. App. 2d 6, 47 Cal. Rptr. 461 (1965).*

As between grantor and grantee, possession becomes adverse when a dispute arises between the parties as to the boundary. *Gauker v. Eubanks, 199 S.E.2d 771 (Ga. 1973).*

The grantor, who has clearly ousted the grantee, may occupy against the grantee in spite of a general warranty deed. *Carter v. Jones, 112 S.E.2d 705 (W. Va. 1968).*

(n37)Footnote 707. *Horton v. McLerkin, 275 S.W.2d 10 (Ark. 1955); Walker v. Easterling, 61 So. 2d 163 (Miss. 1952).*

The father grantor, continuing in possession after deeding to his son, did not hold adversely. *Corbett v. Corbett, 107 S.E.2d 165 (N.C. 1959).*

The grantor, who has clearly ousted the grantee, may occupy against the grantee in spite of a general warranty deed. *Carter v. Jones, 112 S.E.2d 705 (W. Va. 1969).*

(n38)Footnote 708. *McLaren v. Beard, 811 S.W.2d 564 (Tex. 1991).*

(n39)Footnote 709. *Presbyterian Church of James Island v. Pendarvis, 86 S.E.2d 740 (S.C. 1955).*

(n40)Footnote 710. *O. K. C. Corp. v. Allen, 574 S.W.2d 809 (Tex. Civ. App. 1978).*

(n41)Footnote 711. *Jackson v. Shaw, 69 A.2d 265 (Md. 1949).*

A trustee cannot hold adverse to the trust until he denudes himself of his trust and notifies the beneficiary. *Rolfe v. French, 491 S.W.2d 383 (Ark. 1973).*

(n42)Footnote 712. *Venator v. Quier, 589 P.2d 731 (Or. 1979); Stephens v. Stephens, 94 So. 2d 366 (Fla. 1957).*

(n43)Footnote 713. *Robertson v. Swayne, 378 P.2d 195 (Idaho 1963).*

(n44)Footnote 714. *Ruick v. Twarkins, 367 A.2d 1380 (Conn. 1976)* (ouster must be so open and hostile as to give notice); *Kneller v. Federal Land Bank of Wichita, 799 P.2d 485 (Kan. 1990)* (notice required); *Jordan v. Warran, 602 So. 2d 809 (Miss. 1992)* (actual notice required); *Bartlett v. Kloepping, 240 N.W.2d 592 (Neb. 1976)* (acts which would put person of ordinary prudence on guard); *Nelson v. Christianson, 343 N.W.2d 375 (N.D. 1984)* (constructive notice

insufficient); *Nedry v. Morgan, 584 P.2d 1381 (Or. 1978)* (actual notice required); *Sebesta v. Daniels, 812 S.W.2d 641 (Tex. Civ. App. 1991)* (notice must be brought home); *Sweeny Land Co. v. Kimball, 786 P.2d 760 (Utah 1990)* (actions to protect property presumed to be for benefit of all cotenants); *Estate of Neil, 565 A.2d 1309 (Vt. 1989)* (constructive notice insufficient); *Osborn v. Warner, 694 P.2d 730 (Wyo. 1985)* (same).

Grantee under a deed from a cotenant purporting to convey the entire interest held adversely. *Jordan v. Robinson, 194 S.E.2d 452 (Ga. 1972).*

Cotenant to claim adversely must make claim of absolute ownership.*Mack v. Linge, 119 N.W.2d 897 (Iowa 1963).*

Adverse possession of one cotenant inures to the benefit of other cotenants out of possession. *Big Run Coal & Clay Co. v. Helton, Ky., 323 S.W.2d 855 (Ky. 1959).*

Cotenant asserting adverse possession against the other cotenants must bring home to them the adverseness of his possession. *Burris v. Clark, Ky., 313 S.W.2d 857 (Ky. 1958)* (dictum); *Smith v. Tremaine, 350 P.2d 180 (Or. 1960)* (dictum); *Heiselt v. Heiselt, 349 P.2d 175 (Utah 1960)* (dictum).

Fiduciary relationship in tenancy in common negates adverse possession. *Quates v. Griffin, Miss., 239 So. 2d 803 (Miss. 1970).*

Recordation of a deed by one cotenant purporting to convey the entire fee is notice of adverse possession by grantee. *Quates v. Griffin, Miss., 239 So. 2d 803 (Miss. 1970).*

Married woman living separate from husband could acquire title by adverse possession. Potter v. Adams, 28 S.W.490 (Mo. 1894); *Ramsey v. Quillen, 73 Tenn. (5 Lea) 184 (Tenn. 1880);* Poindexter v. Rawlings, 59 S.W.76x6 (Tenn. 1900).

Tenancy in common not tenancy by entireties arises through adverse possession of husband and wife. *Preston v. Smith, 293 S.W.2d 51 (Tenn. App. 1955).*

(n45)Footnote 715. *Horne v. Ward, 585 So. 2d 877 (Ala. 1991)* (must repudiate cotenants' interests by act or declaration); *Hill v. Brown, 672 S.W.2d 330 (Ark. 1984)* (acts of possession must be so open and hostile as to presume knowledge of adverse claim); *Honolulu v. Bennett, 552 P.2d 1380 (Haw. 1976)* (constructive notice sufficient in certain circumstances); *Apodaca v. Tome Land & Improvement Co., 577 P.2d 1237 (N. M. 1978)* (conduct must clearly indicate change from permissive to adverse possession).

The conveyance of the cotenant to a stranger followed by an open taking of possession by the grantee was an ouster of the other cotenants. Parsons v. Sharpe, 145 S.W.537 (Ark. 1912). A family relationship between cotenants requires even stronger evidence of adverseness before adverse possession will arise. *McGuire v. Wallis, 330 S.W.2d 714 (Ark. 1960).*

Life tenant did not hold adversely. *Phelps v. Sledd, 479 S.W.2d 894 (Ky. App. 1972).*

Permitting a cotenant to obtain prescription interest where evidence indicates open public and unequivocal possession under a deed translative of title (even though the deed was invalid). *Continental Oil Co. v. Arceneaux, 183 So. 2d 399 (La. App. 1966).*

Where the adverse possessor enters into possession without a cotenancy relationship the fact that a subsequent inheritance makes a cotenancy does not interrupt the running of the statute. *Calfee v. Duke, 544 S.W.2d 640 (Tex. 1976).*

Grantee from tenant in common held adversely against other tenant in common. *Steele v. Mack, 341 So. 2d 1322 (Miss. 1977).*

One cotenant can hold adversely to the other. *Ruick v. Twarkins, 367 A.2d 1380 (Conn. 1976).*

Proof of ouster by one cotenant of another requires a high degree of evidence. *Steele v. Mack, 341 So. 2d 1322 (Miss. 1977); Silver Surprise, Inc. v. Sunshine Mining Co., 558 P.2d 186 (Wash. 1977).*

Joint owner acquiring title by adverse possession. *Burkhard v. Bowen, 203 P.2d 361 (Wash. 1949).*

(n46)Footnote 716. *Big Run Coal & Clay Co. v. Helton, 323 S.W.2d 855 (Ky. 1959).*

(n47)Footnote 717. *Cook v. Rochford, 60 So. 2d 531 (Fla. 1952).*

Cf. Vendee from one tenant in common holding a deed to the entire tract holds adversely to others. *Esterlin v. Williamson, 279 S.W.2d 907 (Tex. Civ. App. 1955).*

(n48)Footnote 718. *Thompson v. Odom, 184 So. 2d 120 (Ala. 1966)* (possession adverse where deed recorded); Gibbs v. Barkley, 242 S.W.462 (Tex. Com. App. 1922) (registration of deed sufficient for notice requirement).

Contra *Johnson v. McLamb, 101 S.E.2d 311 (N.C. 1958)* (grantee of purported entire interest does not hold adversely to cotenants).

Actual notice must be brought home to other tenants. Laing v. Gauley Coal Land Co., 153 S.E.57 (W. Va. 1930); *Leach v. Beattie, 33 Vt. 195 (1860)* (recordation is not sufficient for requirement of actual notice). Contra *Gardiner v. Hinton, 38 So. 779 (Miss. 1915)* (recordation not necessary).

(n49)Footnote 719. *Hinesley v. Davidson, 395 So. 2d 1 (Ala. 1981); Randall v. McKibbon, 191 N.W.2d 693 (Iowa 1971).*

(n50)Footnote 720. *Bradford v. Federal Land Bank of New Orleans, 338 So. 2d 388 (Miss. 1976); Haynes v. Strange, 337 S.W.2d 661 (Ark. 1960); Metropolitan Park Dist. of Tacoma v. Rigney, 399 P.2d 516 (Wash. 1965)* (possession by grantee of fee subject to condition subsequent not adverse to possessory estate of grantor until grantor declares forfeiture); *Rutledge v. Rutledge, 132 S.E.2d 469 (Va. 1963)* (after termination of the life estate, possession of grantee from life tenant holding under deed conveying the fee simple is adverse to remainderman).

(n51)Footnote 721. *McDonald v. Burke, 288 S.W.2d 363 (Ky. 1956).*

(n52)Footnote 722. *Blair v. Preece, 377 S.E.2d 493 (W. Va. 1989);* Lewis F. Simes, The Law of Future Interests, § 50 (West 1966).

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CHAPTER 87 ADVERSE POSSESSION

10-87 Thompson on Real Property, Thomas Editions § 87.18

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§ 87.18 Against Whom Adverse Possession Runs.

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As a rule adverse possession will run as against any person except those specifically exempted by statute. n723 There is a general principle of law that a statute of limitations does not begin to run against a person until a right of action accrues to the person. If, therefore, the doctrine of adverse possession is, in principle, a punishment to the owner for negligence, adverse possession should not begin to run against the holder of a future interest until those rights vest in possession as well as interest. At least it should not run until the law gives the future interest holder a right to protect it. If, however, in reliance upon the concept of disseisin n724 title passes as a bonus to the disseisor, n725 or as the early statutes indicate, n726 to put an end to stale claims as a matter of public policy, then emphasis should be on the length of possession not on the beginning of the right of action. The great weight of the decisions is, however, that a statute of limitations does not begin to run against any person until a right of action has accrued to that person. Hence, no disseisin on the part of anyone can affect a reversioner or remainderman until the termination of the intermediate estate. n727 The general rule is that adverse possession does not run against the holder of future interest until that holder has an immediate right of possession. n728

An owner cannot generally be barred while the owner has no right to possession or capacity to sue, or where for any other reason the owner is prevented by law from asserting the owner's rights, hence, the rule that the statute will not run against remaindermen during the existence of the precedent estate. n729 But where a life tenant is stranger to the deed under which another party claims, the rule that a life tenant cannot hold adversely to the remainderman is not applicable. n730 A life tenant does not hold adversely to the remainderman if the possession is consistent with the life interest. n731 The grantee of a life tenant does not ordinarily hold adversely to the remainderman. n732 There are some decisions holding that the adverse possessor holds adversely to the owner of the future interest n733 as well as the holder of the immediate estate particularly where the law gives the holder of the future interest a right of protection while the immediate estate is outstanding. n734 A few statutes purport to give absolute title by adverse possession as against the world. n735

There are generally two positions on the situation where the life tenant acquires an outstanding interest in or claim

against the property. One is that the life tenant holds the interest so acquired in trust for the remainderman but has a lien for the cost of acquisition. n736 The other is that the life tenant acquires title to the outstanding interest or lien but has a duty to afford the remainderman the right to acquire the interest by contribution. n737

An adverse possessor holds title as against a bona fide purchaser from the true title holder. n738

The holder of the immediate estate ordinarily does not hold adversely to the owner of the future interest. n739 The immediate holder may do so, however, by a proper claim of hostility coupled with adequate notice to the holder of the future interest. On the ground that possibilities of reverter and rights of reentry are mere expectancies and not vested interests, a statute terminating their existence after a stated period has been held constitutional. n740

Under what is known as the "holdover rule" the tenant holding over on a determinable fee does not hold adverse to the tenure of the possibility of reverter even after the fee determines, unless the tenancy has been repudiated and notice of such repudiation has been brought home to the true titleholder. n741

It has been held, however, that the holdover rule is not applicable with respect to easements. n742

The possession of the life tenant and of any person claiming under the life tenant ordinarily does not become adverse as against the remainderman until the cessation of the life estate. n743 A deed by a life tenant together with a recorded affidavit of fee simple title is not notice of claim of adverse possession to remainderman. n744 A widow who purchases property at a tax sale for taxes which accrued prior to the assignment to her of dower in the land claimed may acquire title by adverse possession to such land as against the remaindermen. n745 Where the life tenant and remainderman are respectively parent and child, the possession of the child as remainderman is not considered as adverse to the mother who is the owner of the life estate in the property. n746 A life tenant may, however, set up a claim hostile to the future interest and, if all the elements of adverse possession are accomplished, acquire a fee. n747

Possession of a life tenant becomes adverse to the remainderman when knowledge is conveyed that the possessor is claiming the entire title. n748 Adverse possession runs against a *cestui que* trust n749 and, unless barred by statute, against incompetents. n750 It does not appear that at common law the disability of a disseisee was taken into consideration so far as the exercise of the right of entry was concerned. n751 Nor did the common law writers mention any such exception to the early rule barring writs where possession had been held since the memory of man runneth not to the contrary. The first statute n752 and most of the succeeding ones barring writs of right and of possession contained certain exceptions in favor of those under stated disabilities, and this theory has found expression under the modern statutes. There is some authority that adverse possession will not run against any of the title holders if one of them is under disability. n753

It is commonly said that the statutes never run against a person under a disability. This is not accurate. Rather, title does not ripen against a person under a disability at the time the possession became adverse until after the disability is removed. n754 But it does run and ripen if the disability commences after the possession has become adverse. n755 Thus possession for the statutory period of limitation has been held to yield no title against infants where no one was charged with the duty of bringing action, even though such possession be under color of title. n756 There is authority for the point where the statute barring actions for the recovery of real property makes no exception in favor of persons under disability; the fact that the owner of the land was under disability at the time the adverse possession commenced does not suspend the running of the statute in the person's favor during the period of disability. n757 Some statutes contain specific exceptions in favor of stated disabilities. n758 Other states have reached the same result by judicial construction. n759 It has been said, perhaps inaccurately, that adverse possession presumes a grant and when no power to grant exists it follows that title by adverse possession cannot be acquired against persons under legal disability and unable to resist the alleged adverse claim if it is not well founded. This rule has been applied in the case of infants, insane persons, married women, and reversioners. n760 The exact disabilities which are favored by this exception vary from state to state. All favor infancy n761 and insanity. n762 But the approaches differ. Some treat disability in the case

of adverse possession as in the case of contracts and require action to be brought within a stated time after attaining the adult status. n763 Others do not start the period to run until after the infant becomes an adult. n764 The same variance is noted in the case of insanity. n765 There is also the problem of the retrospective effect of an adjudication of unsoundness of mind. n766 It has also been held in some states that, as against a married woman, title by adverse possession cannot be acquired. n767 A few states consider imprisonment n768 and military service to be a disability. n769 The courts are divided as to whether the running of adverse possession statutes are tolled by absence of the owner from the state. n770 Nor can disabilities be locked together n771 whether they exist in the same person n772 or in different title holders. The courts do recognize a fiduciary relationship, of a sort, between cotenants. If one cotenant acquires an outstanding interest in or claim against the property, the cotenant acquires it in the name of all. Hence adverse possession does not ordinarily operate in the case of cotenancies, as between cotenants. n773 Mere possession by one tenant in common for any period of time, however long, is not accepted as evidence of a release from the cotenants without additional evidence, giving to that possession a hostile character. n774 The possession of one joint owner or cotenant is regarded in law as the possession of all. n775 It is possible, however, for one cotenant to voluntarily break this fiduciary relationship and establish a possession adverse to the others. That cotenant must do so, however, by overt act and upon proper notice. n776 One cotenant can by a claim of exclusive ownership such as being a "sole heir" start the running of the period of adverse possession in favor of himself. n777

Strict proof is required as to the hostility of one cotenant's possession as against the others. n778

A grantee from a cotenant could acquire titles against other cotenants by adverse possession. n779 In order for one cotenant to acquire title to the common estate by exclusive possession of it, such possession must be held in known hostility to the cotenants and for the statutory period. n780 In order for the possession of the disseisor to be adverse to the cotenants they must have a knowledge of their rights and of the cotenant's assertion of adverse title. n781 In order to create an ouster as against the non-occupying cotenant or cotenants, the occupying cotenant must bring notice, in some form, to the other or others whom -- either by express notification, or from the notorious character of the occupancy -- before the possession will be adverse as against the other or others. n782

Cases are not in accord as to whether one cotenant who takes an outstanding title from a third party and records the deed thereby gives notice to the other cotenants of the claim of adverse possession of the property. n783

The cotenant against whom the adverse possession is asserted must have either actual notice of it or there must be such outward acts of exclusive ownership of an unequivocal character as to impart notice. n784 Acts of exclusive ownership by one cotenant, such as the open sale, conveyance, and delivery of possession thereunder of the whole estate, amount to a complete ouster of the other cotenant and unless the other cotenant or cotenants bring suit within the prescriptive period thereafter their right of recovery will be barred. n785 One cotenant's ouster must be so openly and notoriously hostile as to give notice to any other cotenants. n786 A quitclaim deed from a cotenant which described the entire property, and words to convey it, was sufficient to fulfill title requirement of adverse possession. n787

A quitclaim deed by one tenant in common, as to her interest, does not constitute color of title in the grantee as against the other tenant. n788 But a deed of a tenant in common purporting to convey the entire fee causes a claim of right on which to base adverse possession. n789 A mortgagee in possession after foreclosure of mortgage of one cotenant's interest does not hold adversely to the other cotenants. n790 Children may adversely possess against parents, and parents against children. n791

If credence is to be given to the theory enunciated by most of the common-law writers that the king acquired ultimate title to all the land of England, feudal principles would prevent the subject as tenant from holding adversely to the sovereign as the overlord. This principle was adhered to by the common law, whatever may have been its historical origin. In America the rule is universally followed that the statute of limitations does not operate against the United States acting in its public capacity. n792

The state statute of limitations cannot bar action by the federal government. This can only be done by act of Congress. n793

In the absence of a statute to the contrary the same is true in regard to the state, n794 and a subdivision thereof, n795 but a grant may sometimes be presumed from a state by reason of long continued possession. n796

It has been held that statutes of limitation for trespass apply to the state, n797 even if doctrine of adverse possession does not. n798 The state cannot lose by prescription that which it cannot constitutionally alienate. n799 Even where adverse possession cannot run against the state, the government may be estopped to deny the possessor's title. n800

Parties purchasing part of a platted area, in 1936 and 1939 described by metes and bounds in reference to a memo of the plat area, who enclosed property with a fence, acquired a right to street easements by adverse possession and the property purchasers cannot require that the fence be torn down and the street easements be reestablished. n801

In Texas, the doctrine of adverse possession is bottomed on the presumption of a lost grant. n802 A state may not generally acquire title from the United States by adverse possession. In any event, the period does not begin to run until after a patent is obtained from the government. n803 Title by adverse possession cannot be acquired against the governmental interests of the state, which it holds in trust for the public, but the rule may be otherwise where the state or a subdivision thereof holds in its proprietary character. n804 A statute may also make the state subject to the statute of limitations. n805 In some states, limitations run in favor of an adverse claimant against a municipality, n806 especially when the land in question is held by such municipality as private owner. n807

The public can acquire title by adverse possession. n808 Where the statutes are expressly made to apply to land held by the state, the usual construction is that they apply only to lands held in a private or proprietary manner, and not to those dedicated to a public use. n809 There is some conflict of authority, however, with reference to lands held by a municipality for a public purpose, some courts holding that such lands may be acquired by adverse possession; n810 but the weight of authority based either upon the common law or specific statutes holds that lands held by a municipality or quasi-municipal corporation as trustees of the public rights cannot be acquired by adverse possession. n811 In some states adverse possession will run against municipalities and school districts. n812 When property of the state or city is inalienable, title thereto cannot be obtained by adverse possession. n813 The United States and those claiming through it may claim adversely to a state, n814 and public lands may be acquired by adverse possession as against all persons except the government. n815

COMPUTER-ASSISTED RESEARCH

LEXIS: Adverse possession w/20 acquired by w/3 [type of person]

FOOTNOTES:

(n1)Footnote 723. *Blankenship v. Payton, 605 So. 2d 817 (Miss. 1992); Chaconas v. Meters, 465 A.2d 379 (D. C. 1983); Ruick v. Twarkins, 367 A.2d 1380 (Conn. 1976).*

A stranger may acquire adverse possession to land held in trust even though the beneficiary is in ignorance of his rights. *Cranford v. Hilbun, 147 So. 2d 309 (Miss. 1962).*

See Jeffrey Kravitz & Nancy K. Chiu, Adverse Possession of Abandoned Urban Housing, 7 LOYOLA U. L. A.L. REV. 30 (1974).

(n2)Footnote 724. *See* § 87.03 *supra*.

(n3)Footnote 725. *McGill v. Wahl, 839 P.2d 393 (Alaska 1992); Sparks v. Byrd, 562 So. 2d 211 (Ala. 1990);*

Beasley v. Konczal, 275 N.W.2d 634 (Wis. 1979); United States v. Stubbs, 776 F. 2d 1472 (10th Cir. 1985).

(n4)Footnote 726. *Statute of I Westminster, 3 Edw. ch. 39, 32 Hen. 8,* ch. 2.

(n5)Footnote 727. *Harkins & Co. v. Lewis, 535 So. 2d 104 (Ala. 1988); Busby v. Thompson, 684 S.W.2d 572 (Ark. 1985); Fambro v. Davis, 348 S.E.2d 882 (Ga. 1986); Field v. Lloyd, 453 S.W.2d 570 (Ky. 1970); Daley v. Daley, 14 N.E.2d 113 (Mass. 1938); Bentley v. Cam, 106 N.W.2d 528 (Mich. 1960); Klorner v. Nunn, 339 S.W.2d 838 (Mo. 1960); Braue v. Fleck, 127 A.2d 1 (N. J. 1956); Lotspeich v. Dean, 211 P.2d 979 (N. M. 1949); Heath v. Turner, 308 S.E.2d 244 (N.C. 1983); Miller v. Leaird, 413 S.E.2d 841 (S.C. 1992); Edwards v. Puckett, 268 S.W.2d 582 (Tenn. 1954);* cf. *West v. Moore, 246 S.W.2d 74 (Tenn. 1952)* (life tenant may hold adversely to devisor's remaindermen); *Rutledge v. Rutledge, 132 S.E.2d 469 (Va. 1963).* Contra *Mullan v. Bank of Pasco County, 133 So. 323 (Fla. 1931)* (possession adverse to remainderman where remainderman knew of such possession); *Cessna v. Carroll, 290 P.2d 803, 58 A.L. R. 2D 291 (Kan. 1956)* (life tenant may hold adversely to remainderman with notice); *Fleming v. Brunner, 166 A.2d 901 (Md. 1961)* (possession adverse to remainderman where remainderman knew of such possession); *Unick v. St. Joseph Loan & Trust Co., 21 N.W.2d 752 (Neb. 1946)* (life tenant may hold adversely to remainderman with notice); *Jones v. Bilderback, 290 S.W.2d 580 (Tex. Civ. App. 1956)* (same).

In the case of *Pooler v. Hyne, 213 F. 154 (7th Cir. 1949),* the court held that under the Indiana law, where a life tenant had conveyed by deed to a third party, adverse possession did not begin to run in favor of the third party until the life tenant's actions were brought home to the remaindermen. The court held in favor of the vendee, however, on the ground of laches of the remaindermen. But see *Meyers v. Kissner, 594 N.E.2d 336 (Ill. 1992)* (laches generally will not apply short of limitations period); *Chadek v. Alberhasky, 111 N.W.2d 297 (Iowa 1961)* (same).

Sale of property for unpaid taxes during life of life tenant does not start adverse possession running against remainderman in favor of the purchaser at the tax sale before the death of the life tenant. *Stamper v. Avant, 104 S.E.2d 565 (S.C. 1958).*

Possession by life estate is not adverse to remainderman. *Martin v. Walters, 490 P.2d 138 (Wash. 1971).*

(n6)Footnote 728. *Bradford v. Federal Land Bank of New Orleans, 338 So. 2d 388 (Miss. 1976); Haynes v. Strange, 337 S.W.2d 661 (Ark. 1960); Metropolitan Park Dist. of Tacoma v. Rigney, 399 P.2d 516 (Wash. 1965)* (possession by grantee of fee subject to condition subsequent not adverse to possessory estate of grantor until grantor declares forfeiture); *Rutledge v. Rutledge, 132 S.E.2d 469 (Va. 1963)* (after termination of the life estate, possession by grantee from life tenant holding under deed conveying the fee simple is adverse to remaindermen).

(n7)Footnote 729. *Willhite v. Berry, 83 N.E. 852 (Ill. 1908);* Gohlson v. Desha, 107 S.W.330 (Ky. 1908).

In *Superior Oil Corp. v. Alcorn, 47 S.W.2d 973 (Ky. 1931),* it was contended that the possession by the claimant had been adverse to the remainderman. In discussing a Kentucky statute, the court said:

> One ... might think it strange that the 30-year statute (section 2508) did not apply, as that statute expressly says it applies to all disabilities, but the answer to that is that being a remainderman is not a disability.

Disseisin at common law barred not only the tenant holding a fee upon condition subsequent, but also the right of reentry. LITTLETON, L. 3, ch. 6, § 392.

Sterling v. Sterling, 128 A.2d 277 (Md. 1957) (no adverse possession where state was powerless to grant land under navigable waters).

(n8)Footnote 730. *West v. Moore, 246 S.W.2d 74 (Tenn. 1952), Lewis v. Barnhart, 145 U. S. 56 (1892).*

(n9)Footnote 731. *Fambro v. Davis, 348 S.E.2d 882 (Ga. 1986)* (adverse possession does not run against remaindermen until interest is vested); *Beasley v. Beasley, 88 N.E.2d 435 (Ill. 1949).*

Abandonment of homestead by widow starts adverse possession against remainderman. *United States v. 165.51 Acres of Land, 205 F. Supp. 202 (E.D. Ark. 1962).*

Adverse possession does not begin to run against remainderman until the death of the life tenant. *Drake v. Barrs, 170 S.E.2d 684 (Ga. 1969).*

(n10)Footnote 732. *Beasley v. Beasley, 88 N.E.2d 435 (Ill. 1949).*

(n11)Footnote 733. *See* Henry W. Ballantine, Title by Adverse Possession, *32 HARV. L. REV. 135 (1918).*

If, after the adverse possession has started, the owner creates a life estate, followed by a remainder in the property, usually by will, the statute continues to run without interruption against the remainderman as well as against the life tenant so that both are barred when the required period has elapsed after such possession was started. *Blair v. Preece, 377 S.E.2d 493 (W. Va. 1989);* Hubbard v. Swofford Bros. Dry Goods Co., 108 S.W.15 (Mo. 1908); Sutton v. Clark, 38 S.E.150 (S.C. 1900).

(n12)Footnote 734. Some states permit the future interest to be protected by legal actions for damage as well as in equity. Nevelier v. Foster, 173 N.W.879 (Iowa 1919). *See also* Ralph E. Axley, Title to Real Property -- Thirty Years Limitation Statute, *1942 WIS. L. REV. 258 (1942).*

(n13)Footnote 735. Miss. Code Ann. § 15-1-13; N.D. Cent. Code § 47-06-03.

(n14)Footnote 736. *Thompson v. Watkins, 207 S.E.2d 740 (N.C. 1974).*

(n15)Footnote 737. Life tenant, as a quasi-fiduciary to the remainderman when purchasing at a foreclosure sale, must permit the remainderman to pay his proportionate share of the redemption price, but can take title if the remainderman refuses to contribute. *Thompson v. Watkins, 207 S.E.2d 740 (N.C. 1974).*

(n16)Footnote 738. *Golaher v. Hunting, 104 N.W.2d 765 (Mich. 1960).*

(n17)Footnote 739. Board v. Board, L. R. 9 Q. & Div. 48 (1873), but see *Superior Oil Corp. v. Alcorn, 47 S.W.2d 973 (Ky. 1931)* (adverse possession where future interest holder had notice of adverse intent).

Adverse possession does not run against possibility of reverter. *Byker v. Rice, 360 N.W.2d 572 (Iowa 1984).*

Adverse possession did not run against reversion. *Edwards v. Puckett, 268 S.W.2d 582 (Tenn. 1954).*

A tenant cannot hold adversely to the landlord. *Rockport Shrimp Co-op v. Jackson, 776 S.W.2d 758 (Tex. Civ. App. 1989).*

Possession under a fee simple determinable does not become adverse until the date of the occurrences of the event terminating the estate. *Mayor & City Council of Ocean City v. Tabor, 367 A.2d 1233 (Md. 1977).*

(n18)Footnote 740. *Trustees of Schools of TP.No. 1 v. Batdorf, 130 N.E.2d 111 (Ill. 1955)* (50 years).

(n19)Footnote 741. School Dist. TwP.of Richland v. Hanson, 173 N.W.873 (Iowa 1919); *City of New York v. Coney Island Fire Dep't, 32 N.E.2d 827 (N.Y. 1941).*

(n20)Footnote 742. *In re Harlem River Dr., City of New York, 121 N.E.2d 414 (N.Y. 1954)* (adverse possession began where holder of purported fee title ceased to use strip for purposes required in easement's reversion clause).

(n21)Footnote 743. *Sims v. Sims, 502 So. 2d 722 (Ala. 1987); Busby v. Thompson, 689 S.W.2d 572 (Ark. 1985); Fambro v. Davis, 348 S.E.2d 882 (Ga. 1986); Jones v. Hendricks, 431 N.E.2d 1361 (Ill. App. 1982); Randall's Estate v. McKibbon, 191 N.W.2d 693 (Iowa 1971); Berman v. Golden, 515 N.Y.S.2d 859 (1987); Heath v. Turner, 308 S.E.2d 244 (N.C. 1983); Miller v. Leaird, 413 S.E.2d 841 (S.C. 1992); Bradley v. Bradley, 540 S.W.2d 504 (Tex. Civ. App. 1976).*

(n22)Footnote 744. *Piel v. DeWitt, 351 N.E.2d 48 (Ind. 1976)* (actual notice required).

(n23)Footnote 745. Calvary Baptist Church v. Saxton, 242 P.616 (Or. 1925). Requirements for adverse possession are applicable to a claim to title by coterminous owner. *Carpenter v. Huffman, 314 So. 2d 65 (Ala. 1975).*

Where the life tenant was under a duty to pay taxes, her acquisition of a tax title was a redemption in favor of the remainderman, not a basis for adverse possession. *Wheeler v. Harris, 339 S.W.2d 99 (Ark. 1960).*

Adverse possession does not begin to run in favor of the purchaser at a tax sale against the remainderman until the life tenant dies. *Stamper v. Avant, 104 S.E.2d 565 (S.C. 1958); Taylor v. Jennings, 106 S.E.2d 391 (S.C. 1958).*

(n24)Footnote 746. Edmunds & Abernathy v. Pike, 118 S.E.91 (Va. 1923). Life tenant's parent's possession is not adverse to remainderman's son. *Bradley v. Bradley, 540 S.W.2d 504 (Tex. Civ. App. 1976).*

(n25)Footnote 747. *See* John H. Patten, Note, Real Property: Possession by Life Tenant or His Grantees as Adverse to Remaindermen, *4 Okla. L. Rev. 505 (1951).*

A widow holding under right of dower does not hold adverse to remainderman where there is no showing of repudiation or renunciation of dower in homestead. *Haynes v. Strange, 337 S.W.2d 661 (Ark. 1960).*

Life tenant may hold adversely to remainderman if claim is clear. *West v. Moore, 246 S.W.2d 74 (Tenn. 1952).*

Even where the life tenant purports to deed the entire estate, adverse possession in the grantee does not commence until the life tenant's death. *Griffin v. Reynolds, 107 S.W.2d 634 (Tex. Civ. App. 1937).*

The rule is otherwise where the life tenant had only a partial interest in the life estate and the remaindermen also have a partial life estate. *Strong v. Garrett, 224 S.W.2d 471 (Tex. 1949).*

Recording of affidavit by life tenant alleging fee simple title did not start adverse possession. *Piel v. DeWitt, 351 N.E.2d 48 (Ind. 1976).*

(n26)Footnote 748. *Cessna v. Carroll, 290 P.2d 803 (Kan. 1955).* Purchaser of life estate at an execution sale acquired title by adverse possession. *Wallace v. Magie, 522 P.2d 989 (Kan. 1974).*

(n27)Footnote 749. *Daley v. Daley, 14 N.E.2d 113 (Mass. 1938).* Administrator may not hold adversely unless the administrator clearly repudiates the trust, and this is brought home to the heirs. *Poka v. Holi, 357 P.2d 100 (Haw. 1960).*

Where a trustee has by words or deeds repudiated the trust, the trustee holds adversely to a beneficiary who has knowledge of the repudiation. *Presbyterian Church of James Island v. Pendarvis, 86 S.E.2d 740 (S.C. 1955).*

(n28)Footnote 750. Reynolds v. Smith, 199 S.E.137 (Ga. 1938) (infancy); Collins v. McCarty, 3 S.W.730 (Tex. 1887) (coverture); *Broussard Trust v. Perryman, 134 S.W.2d 308 (Tex. Civ. App. 1939)* (insanity).

The early law, however, permitted an heir of an insane person to reenter if the cause arose during the time the disseisee was non compos mentis. Littleton, L. 3, ch. 6, § 405. *Triplett v. Triplett, 193 N.E.2d 662 (Ind. App. 1963).*

(n29)Footnote 751. The statute terminating a right of entry after a year and a day from the disseisin contained no exceptions in favor of those under a disability.

(n30)Footnote 752. *See also Hen. 7, ch. 24 (1487) and 32 Hen. 8 (1540).*

(n31)Footnote 753. Lyles v. Fellers, 136 S.E.13 (S.C. 1926).

(n32)Footnote 754. *Bush v. Bradley, 4 Day (Conn.) 298 (1810).* One who takes a deed in fee simple from a life tenant holds under a common source with remaindermen or reversioners. *Brooks v. Williams, 178 S.E.2d 880 (Ga. 1970).* Indiana has taken the position that adverse possession can commence against one under a disability. *Triplett v. Triplett, 193 N.E.2d 662 (Ind. App. 1963).* In New Jersey a disability forms no part of the 20-year statute of limitations but only a five-year disability is permitted under the 30 and 60-year statutes. *Braue v. Fleck, 27 A.2d 1 (N. J. 1956).*

(n33)Footnote 755. Adverse possession does not commence to run during infancy but if running at time infant acquires title it continues to run. *Potter v. Quillen, 218 S.W.2d 60 (Ky. 1949). Ruick v. Twarkins, 367 A.2d 1380 (Conn. 1976).*

(n34)Footnote 756. Brown v. Hooks, 65 S.E.780 (Ga. 1909).

(n35)Footnote 757. De Hatre v. Edmonds, 98 S.W.744 (Mo. 1906); Steinberg v. Salzman, 120 N.W.1005 (Wis. 1909).

(n36)Footnote 758. Davis v. Union Meeting House Soc., 108 A.704 (Vt. 1920) (land held by trustees for religious purposes).

(n37)Footnote 759. Rehoboth Heights Dev. Co. v. Marshall, 137 A.83 (Del. 1927).

(n38)Footnote 760. Harris v. McCrary, 105 P.558 (Idaho 1909); Thomas v. Morgan, 240 P.735 (Okla. 1925); Lee v. Kirby, 277 S.W.225 (Tex. Civ. App. 1925).

(n39)Footnote 761. *United States v. Rose, 20 F. Supp. 350 (W. D. N.C. 1937);* St. Louis-S. F. R. Co. v. McBride, 231 P.284 (Okla. 1924). Contra by statute, *United States v. Algodones Land Co., 52 F. 2d 359 (10th Cir. 1931); Adams v. Adams, 66 S.E.2d 809 (S.C. 1951)* (adverse possession does not run against a minor). In Connecticut a parent may hold adverse possession against the minor child and the child may possess against the parent. *Ruick v. Twarkins, 367 A.2d 1380 (Conn. 1976).*

(n40)Footnote 762. United States v. 7,405. 3 *Acres of Land, 97 F. 2d 417 (4th Cir. 1938); Griswold v. Butler, 3 Conn. 227 (1820); White v. Clawson, 79 Ind. 188 (1881);* McLish v. White, 223 P.348 (Okla. 1924).

(n41)Footnote 763. Tenn. Code Ann. § 28-1-106.

(n42)Footnote 764. *See* Rehoboth Heights Dev. Co. v. Marshall, 137 A.83 (Del. 1927). Adverse possession runs against minors and others under disability but they have two years after removal of disability to bring action. *Richards v. Freeman, 247 P.2d 731 (Okla. 1952).*

(n43)Footnote 765. Tenn. Code Ann. § 28-1-106 (three years limitation after disability removed); Va. Code Ann. § 8. 01-229 (statute of limitations suspended until disability removed).

(n44)Footnote 766. *See* William Edwin Taylor, Titles to Land by Adverse Possession, *20 Iowa L. Rev. 738 (1935).*

(n45)Footnote 767. Whittaker v. Thayer, 123 S.W.1137 (Tex. Civ. App. 1909) (so by statute); *Collins v. Riley, 104 U. S. 322, 26 L. Ed. 752 (1881). See Gay v. J. Exum & Co., Inc., 67 S.E.2d 290 (N.C. 1951).*

(n46)Footnote 768. *See* generally *Livingston v. Meyers, 129 N.E.2d 12 (Ill. 1955).*

(n47)Footnote 769. Texas Civ. Prac. & Rem. Code Ann., § 16. 022. *Johnston v. Stinson, 215 S.W.2d 218 (Tex. Civ. App. 1948)* (tacking of minority and military service under Soldiers and Sailors Civil Relief Act permitted).

(n48)Footnote 770. *See Morrall v. Ingle, 23 Kan. 32 (1879)* (statute tolled, probably majority rule); *Herthel v. Barth, 81 P.2d 19 (Kan. 1938)* (statute not tolled).

(n49)Footnote 771. *Griswold v. Butler, 3 Conn. 227 (1819). See* Rehoboth Heights Dev. Co. v. Marshall, 137 A.83 (Del. 1927).

Disabilities may be tacked in *South Carolina. Massey v. Adams, 3 S.C. 254 (1871);* Garrett v. Weinbury, 26 S.E.3 (S.C. 1896).

Tacking of minority and military service under Soldiers and Sailors Civil Relief Act permitted. *Johnston v. Stinson, 215 S.W.2d 218 (Tex. Civ. App. 1948).*

(n50)Footnote 772. If the owner is under two or more disabilities when the cause of action arises, the disability period does not begin to run until all these disabilities are removed. *Jackson ex dem. Swartwout v. Johnson, 5 Cow. 74 (N.Y. 1825).* But the time is not extended because of disabilities arising after the cause of action has once accrued. *Currier v. Gale, 85 Mass. (3 Allen) 328 (1862); Oliver v. Williams, 50 So. 937 (Ala. 1909);* even if the subsequent disability arises before an effective disability is gone. *Demarest v. Wynkoop, 3 Johns. Ch. 129 (N.Y. 1817); Bunce v. Wolcott, 2 Conn. 27 (1816).*

(n51)Footnote 773. *Condra v. Grogan Mfg. Co., 233 S.W.2d 565 (Tex. 1950).*

Widow in possession as homestead must give notice of intent to occupy as a cotenant to obtain adverse possession. *Head v. Farnum, 425 S.W.2d 303 (Ark. 1968).*

One cotenant did not hold adversely where others were minors, even under a deed from their guardian. *Mercer v. Wayman, 137 N.E.2d 815 (Ill. 1956).*

Possession by one cotenant is not adverse so long as the other cotenants remain voluntarily out of possession, and are not kept out of possession by the acts of the possessor cotenant. *Moore v. Cole, 289 S.W.2d 695 (Tenn. 1956).*

See Gerald M. Adler, Joint Tenancy -- Agency by Estoppel -- Silence, *46 CAN. B. REV. 293 (1968).*

A cotenant does not hold adversely to other cotenants until they are actually ousted. *Jones v. Ball, 320 So. 2d 665 (Ala. 1975).*

(n52)Footnote 774. *Colburn v. Mason, 25 Me. 434,* (1845); *Brown v. Wood, 17 Mass. 68 (1820); German v. Machin, 6 Paige 288 (N.Y. Ch. 1837); Condra v. Grogan Mfg. Co., 233 S.W.2d 565 (Tex. 1950).*

Simon v. Richard, 8 So. 629 (La. 1890). One cotenant does not hold adversely with the other cotenants by merely being in sole occupancy of the premises. *Yin v. Midkiff, 481 P.2d 109 (Haw. 1971); Beck v. Beck, 481 S.E.2d 317 (N.C. App. 1997)* (adverse possession by cotenant).

See Louis S. Muldrow, Comment, Adverseness of Possession to Fractional Interests, *9 Baylor L. Rev. 168 (1957).*

(n53)Footnote 775. *Price v. Andrews, 10 N.E.2d 436 (Ind. App. 1937);* Mounce v. Hargis, 278 S.W.107 (Ky. 1925); Sowers v. Keedy, 109 A.143 (Md. 1919).

(n54)Footnote 776. *Beck v. Beck, 481 S.E.2d 317 (N.C. App. 1997)* (adverse possession by cotenant); *Morrison v. Byrd, 72 So. 2d 657 (Fla. 1954),* a deed by one cotenant purporting to convey the entire interest is sufficient color of title to make the possession of the grantee adverse to the other cotenants. *See Owen v. Miller, 76 S.E.2d 772 (Ga. 1953),* to effect that a grantee of a tenant in common purporting to convey the entire interest holds adversely to the other tenants in common.

Making of improvements is not ouster of cotenant. Allen v. Allen, 127 N.E.85 (Ill. 1920).

Must be an ouster of cotenant to start adverse possession. *Mercer v. Wayman, 137 N.E.2d 815 (Ill. 1956).*

(n55)Footnote 777. *Hunter v. Hunter, 237 S.W.2d 100 (Mo. 1951).*

One cotenant can acquire title by adverse possession as against others. *Bayless v. Alexander, 245 So. 2d 17 (Miss. 1971).*

Permitting prescription to run against other cotenants. *Eckhardt v. Eckhardt, 305 S.W.2d 346 (Tenn. App. 1957).*

(n56)Footnote 778. *Fritch v. Fritch, 335 P.2d 43 (Wash. 1959).*

(n57)Footnote 779. *Scramlin v. Warner, 416 P.2d 699 (Wash. 1966).*

(n58)Footnote 780. Tharpe v. Holcomb, 35 S.E.608 (N.C. 1900); *Condra v. Grogan Mfg. Co., 233 S.W.2d 565 (Tex. 1950).*

(n59)Footnote 781. *Inglis v. Webb, 23 So. 125 (Ala. 1898);* Morgan v. Mitchell, 30 S.E.792 (Ga. 1898); Boyd v. Boyd, 51 N.E.782 (Ill. 1898); Bader v. Dyer, 77 N.W.469 (Iowa 1898).

(n60)Footnote 782. Mounce v. Hargis, 278 S.W.107 (Ky. 1925); Smith v. Libby, 119 A.195 (Me. 1922) (husband and wife, divorced, acquisition of title to real estate); Sowers v. Keedy, 109 A.143 (Md. 1919); *Elsen v. Hughes, 94 N.E.2d 567 (Ohio App. 1949).*

So as to a transferee from a tenant in common. *Cook v. Rochford, 60 So. 2d 531 (Fla. 1952).*

In order to establish adverse possession by a cotenant, possession must be such that the other cotenant had actual knowledge of the adverse possession, not merely knowledge of circumstances putting them on notice. *Yin v. Midkiff, 481 P.2d 109 (Haw. 1971).*

Before adverse possession can take place, the cotenant must have notice or repudiation, and it must be of such unequivocal notoriety as to charge the cotenant with notice, and the cotenant must understand that the tenancy is being repudiated. *Walton v. Hardy, 401 S.W.2d 614 (Tex. Civ. App. 1966).*

Where tenancy by the entireties was severed by divorce, and the husband and wife became tenants in common, the fact that the husband continued to live on the land for twenty years did not constitute an ouster and give him title by adverse possession. *Hampton v. Manual, 405 S.W.2d 47 (Tenn. App. 1965).*

(n61)Footnote 783. Merely receiving a deed from a stranger and recording the same is not sufficient notice to other cotenants of a cotenant's claim of adverse possession. *Yin v. Midkiff, 481 P.2d 109 (Haw. 1971).*

(n62)Footnote 784. Casey v. Casey, 77 N.W.844 (Iowa 1899); Beniost v. Rothschild, 46 S.W.1081 (Mo. 1898);

Smith v. North Canyon Water Co., 52 P.283 (Utah 1898).

Ouster of one cotenant by another can be accomplished with acts so hostile that intention to dispossess is clear and unmistakable. *Heggen v. Marentette, 144 N.W.2d 218 (N.D. 1966).*

(n63)Footnote 785. *Davis v. Gulf Refining Co., 32 So. 2d 133, 34 So. 2d 731 (Miss. 1948); Ferguson v. Chancellor, 40 So. 2d 275 (Miss. 1949);* Talbott v. Woodford, 37 S.W.580 (W. Va. 1900).

See Charles B. Henley, Note, Adverse Possession of a Cotenant Against a Cotenant in Mississippi, *21 MISS. L. J. 147 (1949).*

(n64)Footnote 786. No adverse possession between cotenants until ouster. *Bartlett v. Kloepping, 240 N.W.2d 592 (Neb. 1976).*

(n65)Footnote 787. *Scramlin v. Warner, 416 P.2d 699 (Wash. 1966).*

(n66)Footnote 788. *Seveman v. Long Bell Lumber Co., 277 P.2d 510 (Cal. App. 1954); Cook v. Rochford, 60 So. 2d 531 (Fla. 1952); Lummis v. Brackin, 281 P.2d 928 (N. M. 1955); Morrison v. Hawksett, 64 N.W.2d 786 (N. Dak. 1954).*

(n67)Footnote 789. *Morrison v. Byrd, 72 So. 2d 657 (Fla. 1954); Broadwater v. Parker, 76 S.E.2d 402 (Ga. 1953); Westmoreland v. Curbello, 274 P.2d 143 (N. M. 1954); Beazley v. Beazley, 273 S.W.2d 938 (Tex. Civ. App. 1954).*

(n68)Footnote 790. *Frank v. Johnson, 75 So. 2d 153 (Ala. 1954). See also Nichols v. Gaddis & McLaurin, Inc., 75 So. 2d 625 (Miss. 1954).*

(n69)Footnote 791. *Ruick v. Twarkins, 367 A.2d 1380 (Conn. 1976).*

(n70)Footnote 792. *Stanley v. Schevalby, 147 U. S. 508,* (1893); *United States v. Dastervignes, 118 F. 199 (C. C. Cal. 1902),* aff'd, *122 F. 30 (9th Cir. 1903); Baldrich v. Barbour, 90 F. 2d 867 (1st Cir. 1937);* United States v. 7,405. 3 *Acres of Land, 97 F. 2d 417 (4th Cir. 1938); Grissom v. State for use of Alabama College, 48 So. 2d 197 (Ala. 1950);* Anderson v. Burnham, 34 P.1056 (Kan. 1893); Northern Pac. R. Co. v. Cash, 216 P.782 (Mont. 1923); *Christmas v. Cowden, 105 P.2d 484 (N. M. 1940); Hoffman v. Pittsburgh, 75 A.2d 649 (Pa. 1950).*

No adverse possession against the sovereign unless by statute. *Berkeley v. Gordon, 70 Cal. Rptr. 716 (1968); Application of Kelley, 445 P.2d 538 (Haw. 1968).* Adverse possession will not run against the sovereign, regardless of whether the property is held for proprietary or governmental purposes. *Grand Lodge of Ga., I. O. O. F. v. City of Thomasville, 172 S.E.2d 612 (Ga. 1970).* See Adverse Possession of Public Land: A Look at the Recommendations of the Public Land Law Review Commission, 1971 L. & SOC. ORDER 131. No loss of public right by adverse use. *Williams v. Babcock, 368 A.2d 1166 (N. H. 1976).* Lands held by municipality in a proprietary as distinguished from governmental capacity can be acquired by adverse possession. *Lewis v. Village of Lyons, 389 N.Y.S.2d 674 (1976).*

Bell v. State Dep't of Highways and Public Transp., 945 S.W.2d 292 (Tex. App. 1997) (State built highway on property claimed by claimant; claim denied because of sovereign immunity where the state claimed title by lost deed).

(n71)Footnote 793. *Rogers v. South Holding Corporation, 656 N.Y.S.2d 169 (1997)* (adverse possession can not be asserted against lake bottom below low water mark of navigable lake, because it belongs to the state); *Lysicki v. Montour School District, 701 A.2d 630 (Pa. Comm. 1997)* (no adverse possession against a school district); *Engel v. United States, 258 F. 2d 50 (6th Cir. 1958).*

(n72)Footnote 794. *Harvey v. Holles, 160 F. 531 (C. C. Iowa 1908); Lovell v. Dulac Cypress Co., Ltd., 117 F. 2d 1 (5th Cir. 1941),* cert. denied, *314 U. S. 672 (1941),* reh'g denied, *314 U. S. 713 (1941); Engle v. United States, 258 F. 2d*

50 (6th Cir. 1958); Grissom v. State for use of Ala. College, 48 So. 2d 197 (Ala. 1950); Pearce v. Cone, 2 So. 2d 360 (Fla. 1941); Elbe v. State ex rel. LeaveN.W.orth County Att'y, 93 P.803 (Kan. 1908); People v. *Baldwin, 188* N.Y.S. 542 (1921), aff'd, *135 N.E. 964 (N.Y. 1922); Hoffman v. Pittsburgh, 75 A.2d 649 (Pa. 1950); Brown v. Derway, 192 A. 16 (Vt. 1937); Virginia Hot Springs Co. v. Lowman, 101 S.E. 326 (Va. 1919); State v. Scott, 154 P. 165 (Wash. 1916).* Rule that no one can acquire title by adverse possession against the state does not apply to the *United States. California v. United States, 132 F. Supp. 208 (Ct. Cl. 1955); Wyatt v. Wycough, 341 S.W.2d 18 (Ark. 1960); Waterman v. Smith, 94 So. 2d 186 (Fla. 1957); Lovey v. Escambia County, 141 So. 2d 761 (Fla. App. 1962),* cert. denied, *147 So. 2d 530 (Fla. 1962); People v. Sys. Props., Inc., 141 N.E.2d 429 (N.Y. 1957); Frankfater v. State, 235 N.Y.S.2d 476 (1962); Corbin v. Cherokee Realty Co., 91 S.E.2d 542 (S.C. 1956); Commercial Waterway Dist. No. 1 v. Permanente Cement Co., 379 P.2d 178 (Wash. 1963).* In some states, by statute, the statute of limitations as to reconveyances of realty applies to the state but this does not apply to the federal government. *Engel v. United States, 258 F. 2d 50 (6th Cir. 1958).* Neither adverse possession nor estoppel runs against the *United States. United States v. Springer, 321 F. Supp 625 (C. D. Cal. 1970),* aff'd, *478 F. 2d 43 (9th Cir. 1972).*

(n73)Footnote 795. *Jackson v. Nacogdoches County, 188 S.W.2d 237 (Tex. Civ. App. 1945); Bowden-Gazzam Co. v. Kent, 154 P.2d 292 (Wash. 1944). Johnston v. New Orleans, 144 So. 2d 901 (La. App. 1962)* (once there has been a dedication, title to the property dedicated cannot be obtained by adverse possession); *Corbin v. Cherokee Realty Co., 91 S.E.2d 542 (S.C. 1956)* (adverse possession will not lie against a municipality); *Commercial Waterway Dist. No. 1 v. Permanente Cement Co., 379 P.2d 178 (Wash. 1963). See* Richard W. Miller, Real Property -- Nullum Tempus Occurrit Regi, 24 U. K. C. L. REV. 187 (1955). Property owned by municipality and reserved for public use is not subject to adverse possession. *Resnick v. Fort Madison, 145 N.W.2d 11 (Iowa 1966).* No adverse possession against the state. *Pretzer v. Lassen, 479 P.2d 430 (Ariz. App. 1971); State v. Zimring, 479 P.2d 202 (Haw. 1970); Moran v. Roaring River Dev. Co., 461 S.W.2d 822 (Mo. 1970).* No adverse possession against the state. *McBryde Sugar Co., Ltd. v. Robinson, 504 P.2d 1330 (Haw. 1973),* aff'd on reh'g, *517 P.2d 1330 (Haw. 1973),* cert. denied, *McBryde Sugar Co., Ltd. v. Hawaii, 417 U. S. 962 (1974),* and by *Robinson v. Hawaii, 417 U.S. 976 (1974),* and by *Albardo v. Hawaii, 417 U. S. 976 (1974).* No adverse possession as against sovereign. *Roe v. Newman, 509 P.2d 844 (Mont. 1973).* Holding that the state's fee ownership in tidelands cannot be lost through adverse possession or prescription. *O'Neill v. State Highway Dep't, 235 A.2d 1 (N. J. 1967).*

Adverse possession does not run against the state. *State v. Case, 356 N.Y.S.2d 717 (1974).* No adverse possession against the sovereign. *Romart Properties, Inc. v. City of New Rochelle, 324 N.Y.S. 2d 277 (1971),* aff'd, *338 N.Y.S.2d 247 (1972).* Limitation of actions does not run against the sovereign, nullum tempus occurrit regi. *State v. Berry, 220 N.E.2d 671 (Ohio App. 1966).* Adverse possession does not run against the government as to land taken for nonpayment of taxes. *Torch v. Constantino, 323 A.2d 278 (Pa. Super. 1974).* Holding that adverse possession plus other circumstances which would make it inequitable not to favor private rights over public rights will protect the private party. *City of Myrtle Beach v. Parker, 197 S.E.2d 290 (S.C. 1973).* Public right is not lost by adverse use. *Williams v. Babcock, 368 A.2d 1166 (N. H. 1976). See* Richard W. Miller, Real Property -- Nullum Tempus Occurrit Regi, 24 U. K. C. L. REV. 187 (1955).

(n74)Footnote 796. *Bullard v. Barksdale, 33 N.C. 461 (1850).* Title may not be acquired by adverse possession to a public road against the county. *Plischke v. Jameson, 146 N.W.2d 223,* modified, *152 N.W.2d 119 (Neb. 1967),* and modified, *153 N.W.2d 359 (Neb. 1967).*

(n75)Footnote 797. *Young v. Thendara, Inc., 43 N.W.2d 58 (Mich. 1950); Whitaker v. House, 372 S.W.2d 194 (Tenn. 1963).*

(n76)Footnote 798. *People ex rel. Eddy v. Clement, 96 N.W.2d 804 (Mich. 1959).*

(n77)Footnote 799. *Lewis v. State, 156 So. 2d 431 (La. 1963).*

(n78)Footnote 800. *Daniell v. Sherrill, 48 So. 2d 736 (Fla. 1950).*

(n79)Footnote 801. *Mumaw v. Roberson, 60 So. 2d 741 (Fla. 1952).*

(n80)Footnote 802. *Adams v. Slattery, 295 S.W.2d 859 (Tex. 1956).*

(n81)Footnote 803. *Lysicki v. Montour School District, 701 A.2d 630 (Pa. Comm. 1997)* (as an agent of the Commonwealth, a school district is immune from claims of adverse possession, even if property was never used for a public purpose); *Roby v. Hill, 11 Alaska 600 (1948).*

(n82)Footnote 804. *Finch, Pruyn & Co. v. State, 122 Misc. 404, 203 N.Y. S. 165 (1924).* Rights cannot be acquired by adverse possession in a navigable stream which would deprive the state of the power to improve such stream for navigation. *People v. New York & Ontario Power Co., 219 N.Y. S. 497 (1927).*

Property held for public use is not subject to adverse possession. *Town of Hornellsville v. City of Hornell, 328 N.Y.S.2d 941 (1972).*

No loss of public right by adverse use. *Williams v. Babcock, 368 A.2d 1166 (N. H. 1976).*

(n83)Footnote 805. *See* St. Paul & D. R. Co. v. Hinckley, 55 N.W.560 (Minn. 1893).

In Michigan, adverse possession does not run against the state, but the person in possession may seek any other equitable relief to determine title. Mich. Comp.Laws Ann. § 600.5821.

Adverse possession allowed against a county unless land is devoted to public use. *Torch v. Constantino, 323 A.2d 278 (Pa. Super. 1974).*

(n84)Footnote 806. Dermott v. Stinson, 222 S.W.54, (Ark. 1920); *Thurston v. Forest Park, 89 S.E.2d 509 (Ga. 1955);* Nall v. Conover, 122 S.W.1039 (Mo. 1909). *See* Ostrom v. San Antonio, 14 S.W.66 (Tex. 1890) (title to a street or a portion thereof may be acquired in this manner).

(n85)Footnote 807. Cass Farm Co. v. Detroit, 102 N.W.848 (Mich. 1905); Timpson v. Mayor, etc., of City of New York, 39 N.Y.S.248 (1896).

(n86)Footnote 808. *Crimmins v. Gould, 308 P.2d 786 (Cal. App. 1957).*

(n87)Footnote 809. People v. Banning Co., 140 P.587 (Cal. 1914). Land held by agency of sovereign in governmental capacity is not subject to adverse possession. *Finley v. Jordan, 508 P.2d 636 (Wash. 1973),* review denied, *82 Wash. 2d 1006 (1973).*

(n88)Footnote 810. *Goldman v. Quadrato, 114 A.2d 687 (Conn. 1955)* 549; Canton Co. v. Baltimore, 66 A.679, 67 A.274 (Md. 1907); Schneider v. Detroit, 98 N.W.258 (Mich. 1904); *Application of Smith, 283 P.2d 529 (Okla. 1955).*

Municipal property never devoted to a public use is subject to acquisition by adverse possession. *Siejack v. City of Baltimore, 313 A.2d 843 (Md. 1974).*

(n89)Footnote 811. Porter v. Stuttgart, 204 S.W.607 (1918); *Henry Cowell Lime & Cement Co. v. State, 114 P.2d 331 (Cal. 1941);* Larkey v. Los Angeles, 233 P.991 (Cal. App. 1925); *Fresno Irr. Dist. v. Smith, 136 P.2d 382 (Cal. App. 1943);* DeLand v. Dixon Power & Light Co., 80 N.E.125 (Ill. 1906); Princeton v. Hanna, 113 N.E.999 (Ind. 1916); Pine v. Reynolds, 174 N.W.257 (Iowa 1919); Attwill v. Boston & A.R. Co., 140 N.E.928 (Mass. 1923); La Barre v. Bent, 118 N.W.6 (Mich. 1908); Olsen v. Grand Beach, 276 N.W.481 (Mich. 1937); Marshall v. Springfield, 221 S.W.17 (Mo. 1920); *Windham v. Jubinville, 25 A.2d 415 (N. H. 1942); Mt. Pleasant v. New York, 191 N.Y. S. 741 (1921);* White v. Edenton, 91 S.E.601 (N.C. 1917); Grady v. Greenville, 123 S.E.494 (S.C. 1924); Laredo v. Demoreno, 183 S.W.827 (Tex. Civ. App. 1916); *Humble Oil & Refining Co. v. State, 162 S.W.2d 119 (Tex. Civ. App. 1942); Beckley v. George,*

13 S.E.2d 574 (W. Va. 1941); Klinkert v. Racine, 188 N.W.72 (Wis. 1922). *See* Davis v. Girard, 196 A.254 (R. I. 1938).

Adverse possession does not run against property held by the government for proprietary purposes. *Grand Lodge of Ga., I.O.O.F. v. City of Thomasville, 172 S.E.2d 612 (Ga. 1970).*

Adverse possession does not run against lands given, granted or appropriated to any public use. *Poplar Bluff v. Knox, 410 S.W.2d 100 (Mo. App. 1966).*

(n90)Footnote 812. *Thompson v. Morris, 237 S.W.2d 473 (Ark. 1951).* In Ohio, a private person can obtain title by adverse possession of land held in trust by a school board for school purposes. *Brown v. Board of Educ., 253 N.E.2d 767 (Ohio 1969).*

(n91)Footnote 813. *New York City v. Wilson & Co., 15 N.E.2d 408 (N.Y. 1938).*

(n92)Footnote 814. *See California v. United States, 132 F. Supp. 208 (Ct. Cl. 1955).*

(n93)Footnote 815. *Test v. Reichert, 14 N.W.2d 853 (Neb. 1944).*

Mistaken possession fulfills requirement of hostility. *West v. Tilley, 306 N.Y.S.2d 591,* appeal denied, *260 N.E.2d 874 (N.Y. 1970).*

See Elmer Mayse Million, Adverse Possession Against the United States -- A Treasure for Trespassers, *26 ARK. L. REV. 467 (1973).*

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CHAPTER 87 ADVERSE POSSESSION

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Coeur d'Alene, October 1994 Term, Upon remand by Idaho Supreme Court, *824 P.2d 115 (May 1995)* (Claimant must establish adverse possession against all potential claimants, including county);

Add:

Pace v. Towns, 756 So. 2d 680 (La. App. 2000) (dealing with the adverse possessor and his right to sue for restoration of boundaries allegedly acquired through adverse possession).

Add:

City-Wide Asphalt Paving, Inc. v. Alamance County, 513 S.E. 2d 335 (N.C. App. 1999)

Add:

Lee v. Lozier, 945 P.2d 214 (Wash. App. 1997) (An oral grant of land though void under the statute of frauds is nevertheless relevant to adverseness of claim);

Replace Tobin v. Stevens cite:

Tobin v. Stevens, 246 Cal. Rptr. 478 (Cal. App. 1988) (Rehearing was granted and decision cited at p.82 of text is "not citable");

Add:

Pace v. Towns, 756 So. 2d 680 (La. App. 2000) (using the term "acquisitive prescription" to denote the equivalent of adverse possession).

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Supp. to § 87.02 A Title by Lost Grant.

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Shelley v. Walnut Place Nursing Home, 1995 Tex. App. LEXIS 4069 (Tex. App. Feb. 23, 1995) ; *Johnson v. Rancho Guadalupe, Inc., 789 S.W.2d 596 (Tex. App. 1990)* .

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Change citation for Pierce v. Austin to:

651 S.W.2d 161 (Mo. App. 1983) .

Add:

Buckner v. Castro, 306 S.W.3d 655 (Missouri 2010) (prescriptive easement interest was extinguished by property owner's adverse possession of land)

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Snell & Wilmer, LLP v. Fegen, 3 P.3d 1172 (Ariz..App. 2000) .

Add:

Cook v. Robinson, 924 So. 2d 592 (Miss. App. 2006) (adverse possession acquired only over those lands upon which the claimant planted and cut timber); *Henson v. Tucker, 630 S.E.2d 64 (Ga. App. 2006)* (survey by claimant did not constitute adverse possession). However, a survey by the owner could interrupt adverse possession. *See* Annotation, Owner's surveying of land as entry thereon tolling running of statute of limitations for purposes of adverse possession, *76 A.L.R.3d 1202* .

Stump v. Whibco, 314 N.J. Super. 560, 715 A.2d 1006 (N.J. Super. 1998) (Where the facts show an open, obvious and continuous possession an ordinary person would be put on notice that the land is in possession of another and a presumption is created that the use is adverse. "The foundation of so-called title by adverse possession is the failure of the true owner to commence an action for the recovery of land within the period designated within the statute" where there is knowledge or a presumption of such owners' knowledge of the adverse possession).

Add:

Brinner v. Huckaba, 957 S.W.2d 491 (Mo. App. 1997) (Landowner did not establish continuity of adverse possession for 10-year period by tacking where previous occupants testified they had not claimed adverse possession); *Guenther v. Allen, 268 A.D.2d 934, 702 N.Y.S.2d 678 (2000)* (Thirty years of annual vacation on three hundred and sixty acres of deeded forest land from prior owner, erection of barrier to stop trespassers from using old logging roads, posting of property, attempt to repair old barn and payment of $23,000.00 in taxes established adequate possession to prevail by adverse possession against a holder of a tax deed one year earlier than claimants' deed. Nature of property is critical to issue of what constitutes adequate possession).

Add:

Devins v. Borough of Bogota, 592 A.2d 199 (N.J. 1991) (Judgment in lower court decision cite at page 103, note 178 reversed by above decision);

Add:

Opinion in Rice v. Hill City Stock Yards at the noted page and note was withdrawn and *Superseded on Denial of Rehearing by Rice v. Hill City Stock Yards Co., 826 P.2d 1288 (Idaho 1992)* ; *Ewald v. Hubbard, 737 So. 2d 858 (La. App. 1999)* ; *Opinion subject to revision.* (Possession established by growing corn and sugar cane, raising livestock, maintaining fence and pasturing horses and intent to possess is presumed where such possession is not in the name of another).

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Supp. to § 87.05 Essential Elements of Adverse Possession.

Replace the chapter synopsis with:
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Silas v. McGuire, 709 So. 2d 1272 (Ala. App. 1998) (Adverse possession began when claimants received deed to property, not when they became tenants under "unrecorded" lease-sale agreement);

Add:

Candler Holdings Ltd. I v. Watch Omega Holdings, L.P., 947 So. 2d 1231 (Fla. App. 2007) (without color of title, summary judgment affidavits are insufficient to establish possession).

Add:

Commander v. Winkler, 67 S.W.3d 265 (Tex. App. 2001) ; *Natural Gas Pipeline Co. of Am. v. Pool, 30 S.W.3d 639 (Tex. App. 2000)* .

Add:

Silipigno v. F.R. Smith & Sons, Inc., 896 N.Y.S.2d 261 (2010) (buried fuel tank did not establish open and notorious act of possession supporting adverse possession); *Wanha v. Olander, 255 Neb. 849, 587 N.W.2d 531 (Neb. 1998)* (Platting of disputed property gives notice but lack of notice by adverse claimant is not an element of adverse possession);

Add:

Teel v. Stading, 228 P.3d 1293 (Wash. 2010) (claimants had permissive use of disputed area, and therefore could not claim area through adverse possession);

Add:

Apperson v. White, 950 So. 2d 1113 (Miss. App. 2007) (good statement of all the elements required for adverse possession).

Add:

Luce v. Marble, 127 P.3d 167 (Idaho 2005) (tax payment requirement for oral claims of adverse possession); *Rocket Oil and Gas Company v. Donabar, 127 P.3d 625 (Okla. App. 2005)* (payment of ad valorem taxes on property did not constitute adverse possession, especially of the mineral interest).

Fraley v. Minger, 786 N.E.2d 288 (Ind. App. 2003) (adverse possession claimant never paid taxes and was thus precluded in establishing claim); Baumann v. Miles, Ca. 2002 (evidence showed that adverse possession claimant did not pay taxes on land claimed).

Hunter v. Robertson, 40 S.W.3d 337 (Ark. App. 2001) (payment of taxes requirement was not met when tax exempt status was granted to the landowner's predecessor in interest).

Fraley v. Minger, 786 N.E.2d 288 (Ind. App. 2003) (adverse claimants failed to prove that they had ever paid taxes on the parcel of land claimed); *Roark v. Bentley, 86 P.3d 507 (Idaho 2004)* (tax payment requirement satisfied under lot number exception).

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Supp. to § 87.06 Establishment of Adverse Possession.

Replace the chapter synopsis with:
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Mayerhoff v. Timenides, 2000 N.Y. App. Div. LEXIS 1199 (App. Div. 2000) (Claim of adverse possession rejected where four tenants of a third party lived at the property during the time adverse possession was claimed as part of the ten-year requisite period); *Pioneer Mill Co. v. Dow, 978 P.2d 727 (Haw. 1999)* .

Add:

Double "D" Bar "C" *Ranch v. Bell, 658 S.E.2d 635 (Ga. 2008)* (claimant failed to prove actual possession).

Add:

Dotson v. Former Shareholders of Abraham Lincoln Land and Cattle Company, Inc., 773 N.E.2d 792 (Ill. App. 2002) (erecting fence and placing sign on land was not sufficient to meet possession requirement).

Jutting v. Hendrix, 606 N.W.2d 140 (S.D. 2000) (maintaining a lawn and two trees on a disputed strip of land was enough to constitute possession).

Add:

Mastro v. Kumakichi Corporation, 951 P.2d 817 (Wash. App. 1998) (Grantor judicially estopped from asserting defense that suit would not lie for breach of title covenant until such time as an "adverse possessor" made lawful claim against the grantor's grantee); *Petrus v. The Nature Conservancy, 330 Ark. 722, 957 S.W.2d 688 (Ark. 1997)* (Court order not adequate where the land successfully claimed can not be identified from the court order); *Henderson v. Town and Country Grocers of Fredericktown, Missouri, Inc., 978 S.W.2d 850 (Mo. App. 1998)* (Cutting grass, weeds and removing snow from entire tract of land not sufficient to establish possession of entire tract, but claimant had actual possession of a portion of such tract for more than ten years, such possession was open and notorious and it was not necessary for claimant to "tack" her possession onto anyone else's to establish ownership); *Petrowsky v. Henkel, 583 N.W.2d 673 (Wis. App. 1998)* (Trial court's findings as to no interruption of possession, lack of exclusive possession, that the property was not enclosed and that the trial court improperly established the occupation line are sustained unless clearly erroneous); *Schwenker v. Mengert, 89 Wn. App. 1014 (Wash. Ct. App. 1998)* (Factual showing in support of prescriptive easement claim inadequate where both notes to the claimant and a lease reflected permissive use or just good neighborliness); *Mag Associates, Inc. v. SDR Realty, 247 A.D.2d 516, 669 N.Y.S.2d 314 (1998)* (Where under New York law a presumption of hostility had arisen because the elements of actual, open, notorious, exclusive and continuous evidence had been established by the evidence the claimant lost based on its introduction of maps raising a fact issue though the maps had not been prepared for the claimant's predecessor in interest where the title of such predecessor was relied upon); *Brennan v. Manchester Crossings, Inc., 708 A.2d 815 (Pa. 1998)* (Adverse possession established where record owners had not given permission and claimants had maintained disputed property as extension of their lawn); *Keene v. Jackson, 732 So. 2d 1138 (Fla. 1st DCA 1999)* (Establishment of adverse possession not accomplished as to any period of time).

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Supp. to § 87.07 Constructive Possession.

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cert. granted and "aff'd" by approval without using the word "*aff'd*," *Fulkerson v. Thompson, 974 S.W.2d 451 (Ark. 1998)* ; *Petrus v. The Nature Conservancy, 957 S.W.2d 688 (Ark. 1997)* (Claimant has adverse possession of property described in the deed even if not totally occupied if they have entered into possession of some portion);

Add:

Cornelius v. Moody Bible Institute of Chicago, 18 P.3d 1081 (Okla. App. 2001) (receipt of royalties from a mineral estate and payment of taxes was not enough to divest title from the record owner by adverse possession).

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Supp. to § 87.08 "Open and Notorious."

Replace the chapter synopsis with:
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Add:

O'Connell v. Graves, 894 N.Y.S.2d 678 (2010) (subterranean encroachment was not open and notorious)

Add:

Lind v. Webb, 1998 Tenn. App. LEXIS 170 (No. 03A01-9710-CH-00473, 1998) (Claimant did not carry burden as to "open and notorious" occupation for the requisite period of time).

A coterminous landowner attempting to establish title by adverse possession must prove open, notorious, hostile, continuous, and exclusive possession of the disputed property for a period of 10 years. *Ramsey v. O'Neal, 812 So. 2d 324 (Ala. 2001)* .

Add:

Zambrotto v. Superior Lumber Co., Inc., 4 P.3d 62 (Ore. App. 2000) (use of the disputed property for hiking and rattlesnake hunting was not sufficiently open and notorious); *Natural Gas Pipeline Company of America v. Pool, 30 S.W.3d 618 (Tex. App. 2000)* (that lessees become trespassers upon termination of the lease is not sufficient notice that the lessees have repudiated the lease).

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Supp. to § 87.09 Exclusive Possession.

Replace the chapter synopsis with:
[Go To Main]

Add:

Davis v. Chadwick, 55 P.3d 1267 (Wyo. 2002) (the town's use of property for public recreation did not defeat an adverse possessor's claim of continuous possession); *Warren v. Tom, 946 S.W.2d 754 (Mo. App. 1997)* (Landowners could not exercise exclusive possession over disputed strip when they did not know where their claimed boundary lay).

Add:

Ebenhoh v. Hodgman, 642 N.W.2d 104 (Minn. App. 2002) .

Add:

Conaway v. Fauller, 972 S.W.2d 442 (Mo. 1998) (Sporadic use of land in dispute by record owner did not defeat claimants' suit for title); *Madson v. TBT Ltd. Liability Co., 686 N.W.2d 85 (Neb. App. 2004)* (both parties used the

property for hunting and fishing so neighboring adverse claimant did not have exclusive use of the disputed property).

Add:

Gonzalez v. Gonzalez, 653 N.Y.S.2d 700 (1997) (Where entireties property for husband and first wife became tenancy in common property upon their divorce second wife could not establish hostility towards first wife after the husband's death and the first wife was granted partition); *Myers v. Bartholomew, 697 N.E.2d 160 (N.Y. 1998)* (Ten-year statute requiring ten years of exclusive occupancy to perfect title against a tenant in common requires a total of 20 years when there is no ouster);

Add:

Harrell v. Tilley, 119 P.3d 251 (Or. App. 2005) (trial court found mutual adverse possession between adjacent landowners claiming title to a strip of land between them; reversed on appeal).

Add:

Vaughn v. Stoenner, 581 S.E.2d 543 (Ga. 2003) (adverse possession failed when plaintiff failed to effect an actual ouster against defendant).

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Supp. To CHAPTER 87 ADVERSE POSSESSION

10-87 Thompson on Real Property, Thomas Editions Supp. to § 87.10

Supp. to § 87.10 Necessity of Hostility.

Replace the chapter synopsis with:
[Go To Main]

Add:

Maier v. Giske, 223 P.3d 1265 (Wash. App. 2010) (act of planting tree in wild area did not satisfy the notoriety and hostility elements required for adverse possession); *Sholl v. Anderson, 50 P.3d 1248 (Ore. App. 2002)* (adverse possession claimant did not establish hostility in claim for possession).

Add:

Sugarman v. Malone, 853 N.Y.S.2d 21 (2008) (adverse claimant of cooperative who offered to purchase the interest during the statutory period defeated the presumption of hostility).

Add:

McDaniel v. Kendrick, 688 S.E.2d 852 (S.C. 2009) (adverse possession failed for lack of hostility); *Mack v. Landry, 22*

S.W.3d 524 (Tex. App. 2000) ("Joint continuous use alone without an independent hostile act attempting to exclude all other persons, including the property owner, from using the roadway, is not sufficient to establish an easement by prescription"; *Vrazel v. Skrabanek, 725 S.W.2d 709, 711 (Tex. 1987)* (exclusivity not met when landowner and claimant both use the road)"); Estate of Seifert v. Seifert, *26 Cal. Rptr. 3d 560 (2005)* (continuous adverse possession did not occur while the adverse possession claimant owed a fiduciary to the property owner). *Jones v. Miles, 658 S.E.2d 23 (N.C. App. 2008)* (possession by adverse possession claimants was not hostile to interests of record owners).

Add:

Watkins v. Watkins, 2001 PA Super 128 (2001) (because of a familial relationship between the claimant and the record owner, the claimant's possession was not necessarily hostile); *Natural Gas Pipeline Company of America v. Pool, 30 S.W.3d 618 (Tex. App. 2000)* (lessees unable to establish adverse possession, even though they were trespassers); *Totman v. Malloy, 431 Mass. 143, 725 N.E.2d 1045 (Mass. 2000)* (no presumption exists that a close family relationship between the claimant and the record owner renders the claimant's possession permissive).

Add:

Walling v. Przybylo, 804 N.Y.S.2d 435 (2005) (adverse possessor could succeed despite knowledge that someone else held record title to the land); *Dombkowski v. Ferland, 2006 ME 24, 893 A.2d 599 (Maine 2006)* (intent is not a requirement of an adverse possession claim).

Conaway v. Fauller, 972 S.W.2d 442 (Mo. 1998) (Hostile possession established by claimants' occupation of area with intent to possess it as their own);

Add:

Greenberg v. Sutter, 257 A.D.2d 646 (N.Y. App. Div. 1999) (Requisite showing of hostility was made where there was invasion upon the owners' rights. Enmity need not be shown. Hostility can be found even if possession occurred inadvertently or by mistake);

Add:

But the mere existence of a benefit accruing to the district by virtue of the farmers' occupation was not sufficient to declare the use permissive. *White River Levee Dist. v. Reidhar, 61 S.W.3d 235 (Ark. App. 2001)* .

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10-87 Thompson on Real Property, Thomas Editions Supp. to § 87.11

Supp. to § 87.11 Claim of Right or Title.

Replace the chapter synopsis with:
[Go To Main]

Add:

White v. Pines Community Improvement Ass'n, 917 A.2d 1129 (Md. App. 2007) (permissive use cannot ripen into adverse possession).

Add:

Bockowski v. Malak, 280 A.D.2d 572, 720 N.Y.S.2d 557 (2001) (adjoining landowners who built a fence on land they did not know they owned did not possess that adjoining property under a claim of right); *Joseph v. Whitcombe, 719 N.Y.S.2d 44 (2001)* (no adverse possession in New York if possession is not under a claim of right).

Add:

Brennan v. Manchester Crossings, Inc., 708 A.2d 815 (Pa. 1998) (Trial court erred in holding that unusable fence

claimed as boundary indicated no claim of right);

Add:

Polen et al v. Gans et al, 1999 Ohio App. LEXIS 357 (Oh. App. 1999) (Governing body had no common law claim of right to a road as public where it had declined to chip the road in deference to being informed that it was a private road).

Birkholz v. Wells, 708 N.Y.S.2d 168 (2000) (a tacking claim was not defeated by failure to produce one of the predecessors in interest).

Add:

Watson v. Moore, 8 S.W.3d 909 (Mo. App. 2000) (Occupancy of land for the statutory period with the mistaken belief that the fence and survey reflected the border of her land constituted claim of right and hostility).

Add, after the Colorado citation:

aff'd, 930 P.2d 575 (Colo. 1997) .

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10-87 Thompson on Real Property, Thomas Editions Supp. to § 87.12

Supp. to § 87.12 "Color of Title" as the Term is Generally Used.

Replace the chapter synopsis with:
[Go To Main]

Add:

judgment affirmed, 930 P.2d 575 (Colo. 1997) .

Add:

Magma Trading Corp. v. Lintz, 727 So. 2d 377 (Fla. App. 1999) (Adverse possession established under color of title where deed acquired and property enclosed by chain link fence with locked gates); *De Chambeau v. Estate of Vernon K. Smith, 132 Idaho 568* ; *976 P.2d 922 (Idaho 1999)* (Quitclaim deed is sufficient to convey a written claim of title and constitutes color of title);

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Supp. To CHAPTER 87 ADVERSE POSSESSION

10-87 Thompson on Real Property, Thomas Editions Supp. to § 87.13

Supp. to § 87.13 Requirement That Possession Be Continuous

Replace the chapter synopsis with:
[Go To Main]

Add:

McNeil v. Ketchens, 397 Ill.App.3d 375 (2010) (temporary vacancy of home did not interrupt the couple's adverse possession)

Add:

McLendon v. Copiah Forest Products, Inc., 926 So. 2d 260 (Miss. App. 2006) (tacking permitted).

Add:

General Iron Industries v. Finkl & Sons Co., 686 N.E.2d 1 (Ill. App. 1997) (Interruption of possession requires starting over. Filing of petition for reorganization in bankruptcy estate creates constructive possession of the trustee so as to defeat claimant's rights because 20-year required possession was interrupted).

Add:

Gillett v. White, 153 P.3d 911 (Wyo. 2007) (tacking permitted to satisfy a 10-year requirement).

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Supp. To CHAPTER 87 ADVERSE POSSESSION

10-87 Thompson on Real Property, Thomas Editions Supp. to § 87.14

Supp. to § 87.14 Duration and Interruption of Time of Possession.

Replace the chapter synopsis with:
[Go To Main]

In entry for Alabama, add:

Wadkins v. Melton, 2002 Ala. Civ. App. LEXIS 708 (No. 2001144, Sept. 13, 2002) (ten years).

In entry for Missouri, add:

Casteel v. Yeary, 77 S.W.3d 127 (Mo. App. 2002) (ten years).

In entry for Ohio, add:

Krupp v. Leddick, 2002 Ohio App. LEXIS 6104 (No. 13-02-23, Nov. 20, 2002) (21 years).

Add:

Harwick v. Black, 580 N.W.2d 354 (Wis. App. 1998) (Twenty-year statute of limitations need not expire immediately before filing of a court action); *Pearson v. Virginia City Ranches Association, 993 P.2d 688 (Mont. 2000)* (period of adverse possession began when adjacent owner who erected a fence was asked to remove it and refused).

Add:

Manderscheid v. Dutton, 88 P.3d 281 (Or. App. 2004) (adverse possession obtained even though livestock were grazed only seasonally).

Add:

A grant of permission, and subsequent inaction, would have been sufficient to interrupt the running of the statutory period of adverse possession. *McKenzie v. Pope, 33 P.3d 1277 (Colo. App. 2001)* .

Add:

Jones v. Leagan, 681 S.E.2d 6 (S.C. 2009) (Conveyance did not interrupt period of adverse possession)

Add:

Witcher v. Bennett, 120 S.W.3d 922 (Tex. App. 2003) (tenant at sufferance failed to repudiate tenancy so as to begin the time period for adverse possession).

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10-87 Thompson on Real Property, Thomas Editions Supp. to § 87.15

Supp. to § 87.15 Necessity of Good Faith.

Replace the chapter synopsis with:
Conn. Gen. Stat. Ann. § 45a--447

Add:

Simmons v. Community Renewal and Redemption, LLC, 685 S.E.2d 75 (Ga 2009) (without good faith a claim of adverse possession could not be supported); *Spanjer v. Darlington, 1997 Wash. App. LEXIS 11* (No. 14231-1-II, Jan. 7, 1997) (Color of title taken in good faith to vacant land where taxes are paid by the legal owner); *Waggoner v. The Benton Beach Corporation, 1998 Conn. Super. LEXIS 956* (No. CV 9603914145, Apr. 3, 1998) (Among the factors that can be considered in adverse possession is good faith).

Add:

Chaplin v. Sanders, 676 P.2d 431 (Wash. App. 1984) .

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Supp. To CHAPTER 87 ADVERSE POSSESSION

10-87 Thompson on Real Property, Thomas Editions Supp. to § 87.16

Supp. to § 87.16 What Property Can Be Acquired By Adverse Possession.

Replace the chapter synopsis with:
Conn. Gen. Stat. Ann. § 45a--447

Add:

Louisa County Conservation Bd. v. Malone, 778 N.W.2d 204 (Iowa 2009) (county conservation board established that it had adverse possession of the abandoned railroad right-of-way)

Add:

Benson v. Hodgdon, 992 A.2d 1053 (Vt. 2010) (road could not be taken through adverse possession)

Add:

Inserra v. Violi, 2004 Neb. LEXIS 82 (No. S-03-469, May 14, 2004) (adverse possession claim failed because claimant could not provide exact description of the parcel claimed).

Titus v. Chapman, 687 N.W.2d 918 (S.D. 2004) (iron rebar markers denoting lot corners were not sufficient to constitute an enclosure for adverse possession purposes).

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10-87 Thompson on Real Property, Thomas Editions Supp. to § 87.17

Supp. to § 87.17 Who May Acquire Title by Adverse Possession.

Replace the chapter synopsis with:
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Change "S.W." to "S.E."

Add:

Washoe Tribe of Nev. & Cal. v. Brooks, 175 F. Supp. 2d 1255 (D. Nev. 2001) .

Add:

Board of Trustees of the Tecolote Land Grant v. Griego, 104 P.3d 554 (N.M. App. 2004) (no adverse possession found between cotenants).

Add:

Ninth Circuit noted that an express or implicit ouster of a cotenant by an unequivocal act of ownership starts the adverse possession statute of limitations running. *Johnson v. Berry, 171 F. Supp. 2d 985 (E.D. Mo. 2001)* .

Add:

New Covenant Worship Center v. Wright, 601 S.E.2d 245 (N.C. App. 2004) (occupant's possession was not hostile).

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10-87 Thompson on Real Property, Thomas Editions Supp. to § 87.18

Supp. to § 87.18 Against Whom Adverse Possession Runs.

Replace the chapter synopsis with:
[Go To Main]

Add:

Walsh v. St. Mary's Church, 670 N.Y.S.2d 220 (N.Y.A.D. 1998) (It is well settled that adverse possession runs against religious property).

Add:

Vezey v. Green, 171 P.3d 1125 (Alaska 2007) (claimant could not assert adverse possession of a long-standing public trail).

Add:

Cornfield Point Association v. Town of Old Saybrook, 882 A.2d 117 (Conn. App. 2005) (town immune from claims of adverse possession); *Adams Outdoor Advertising, Inc. v. Charter Township of Canton, 711 N.W.2d 391 (Mich. App.*

2006) (city property immune from claims of adverse possession).

Loavenbruck v. Rohrbach, 795 A.2d 90 (Maine 2002) (adverse possession claimants were not entitled to include within their possession period the years the two was the record owner of the parcel in dispute).

City of Marietta v. CSX Transportation, 533 S.E.2d 372 (Ga. 2000) (there can be no adverse possession or implied dedication of state property to the city).

Reisinger v. Terra Linda Development Co., Ltd., 2003 Cal. App. Unpub. LEXIS 3879 (No. A097086, Apr. 16, 2003) (homeowners could not claim adverse possession of open space that had been dedicated by private covenant to public use).

Add:

Nyman v. Anchor Development, LLC, 73 P.3d 357 (Utah 2003) (when a county acquired land for non-payment of taxes, this constituted a public purpose, precluding adverse possession actions relating to the land); *Albany Parking Services, Inc. v. City of Albany, 770 N.Y.S.2d 472 (2004)* (land held by the city in the city's proprietary capacity was subject to adverse possession).

Add:

Lawson v. City of Kankakee, Illinois, 81 F. Supp. 2d 930 (C.D.Ill. 2000) . (Terraces adjoining the sidewalk both dedicated to the City but maintained by the residents can not give title to residents by adverse possession against a government body even if all elements are present because possession does not run against the government where the property is dedicated to a public use).

Add new sections:

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Supp. To CHAPTER 87 ADVERSE POSSESSION

10-87 Thompson on Real Property, Thomas Editions Supp. to § 87.19

Supp. to § 87.19 Mutual Mistake.

Replace the chapter synopsis with:
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Ison v. Nefstead, et al, 594 N.W. 2d 420 (Wis. App., 1999) ("Mutual mistake is established by proving that both parties intended to make a different instrument than the one signed and both agreed on facts different from those set forth in the deed to be signed.")

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Supp. To CHAPTER 87 ADVERSE POSSESSION

10-87 Thompson on Real Property, Thomas Editions Supp. to § 87.20

Supp. to § 87.20 Boundaries by Acquiescence.

Replace the chapter synopsis with:
[Go To Main]

Lakeview Farm, Inc. v. Enman, 689 A.2d 1089 (Vt. 1997) (Where two generations of neighboring landowners established boundaries by accepting fence and blazing boundaries the boundary was established by acquiescence).

Kraft v. Mettenbrink, 559 N.W.2d 503 (Neb. App. 1997) (Both adverse possession and theory of mutual recognition and acquiescence may be raised under statute providing for court action to settle disputed corners although the two doctrines are separate).

Lilly v. Lynch, 945 P.2d 727 (Wash. App. 1997) (Mutual recognition acquiescence doctrine supplants adverse possession and exists where there has been a settlement as to boundaries in good faith by the relevant parties and who thereafter acquiesced therein for the statutory period of time and made improvements thereto. The lines so established are correct).

Jennings v. Burford, 958 S.W.2d 12 (Ark. App.1997) (Time required to establish boundary by acquiescence varies depending on facts of each case).

Arnold v. Robbins, 563 N.W.2d 178 (Wis. App. 1997) (Acquiescence by the true owner in another's possession for 21 years permits acquisition of title by adverse possession without the usual adverse intent).

Sorg v. Cunningham, 687 A.2d 846 (Pa. Super. 1997) (Proof of actual possession of an entire parcel of land as in adverse possession is not necessary to establish a boundary under the doctrine of consentable boundary).

Klein v. Mazar, 92 Wash. App. 1002 (1998) (Losing litigant raised the issue of mutual recognizance only at the appellate level. The trial court had ruled pursuant to a standard of proof calling for clear, cogent and convincing

evidence. The appellate court applied the lesser standard of preponderance of the evidence and affirmed).

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Supp. to § 87.21 Short Term Statute.

Replace the chapter synopsis with:
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Hope Land Mineral Corporation v. Christian, 570 N.W.2d 268 (Mich. App. 1997) (Claim to mineral rights pursuant to a facially valid sheriff's deed entitled to short term five year statute).

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10-87 Thompson on Real Property, Thomas Editions Supp. to § 87.22

Supp. to § 87.22 Prescriptive Rights.

Replace the chapter synopsis with:
[Go To Main]

Jacque v. Steenberg Homes, 563 N.W.2d 154 (Wis. 1997) (Prescriptive right can be gained by intentional trespass. Nominal damages for such trespass can support punitive damages, $100,000 not being excessive).

Green v. Mann, 237 A.D.2d 566, 655 N.Y.S.2d 627 (App. Div. 1997) (Easement established by 30 years of use with acquiescence of defendants).

Soderberg v. Weisel, 687 A.2d 839 (Pa. Super. Ct. 1997) (A prescriptive right differs from land acquired by adverse possession in that adverse possessor acquires land in fee whereas prescriptive easement holder is only entitled an easement-like use).

Songbyrd, Inc. v. Bearsville Records, Inc., 104 F.3d 773 (5th Cir. 1997) (Possessor of master recording did not give sufficient evidence to show owner actual notice of claim to possess recordings for the purpose of "acquisitive prescription" and action brought was not subject to "liberative prescription").

Parillo v. Salvador, 680 N.Y.S.2d 460 (App. Div. 1998) (Claimant, though having acquired fee by adverse possession to land underneath two docks built on adjacent landowners property, did not gain easement by laying electric line under water to the docks built by him).

Bingham v. Knipp, 1999 Tenn. App. LEXIS 117 (No. 02A01-9803-CH-00083, Feb.23, 1999) (No prescriptive easement in spite of a deed conveying a right of way, because there was no "clear and convincing evidence" of a continuous use).

Simpson v. Colonial Pipeline Co., 499 S.E.2d 634 (Ga. 1998) (Substantial evidence supported trial court finding that Pipeline Company had prescriptive title to right of way).

Donnelly et al v. Cowsill et al, 716 A.2d 742 (R.I. 1998) (Claimant with an implied easement through another property to a public street did not require access to a private way in order to reach a public street as required to obtain an easement in a private way).

A & M Properties, Inc. v. Norfolk Southern Corp., 506 S.E.2d 632 (W. Va. 1998) (A prescriptive right across active railroad track owned by railroad can not be established because the railroad is considered a "public highway").

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Supp. To CHAPTER 87 ADVERSE POSSESSION

10-87 Thompson on Real Property, Thomas Editions Supp. to § 87.23

Supp. to § 87.23 Fraud.

Replace the chapter synopsis with:
[Go To Main]

Maeberry v. Gayle, 955 S.W.2d 875 (Tex. App. 1997) (Adverse possession does not run against an owner based on a deed secured by fraud).

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10-87 Thompson on Real Property, Thomas Editions Supp. to § 87.24

Supp. to § 87.24 Taxes.

Replace the chapter synopsis with:
[Go To Main]

Trailwoods Homeowners' Ass'n v. Scott, 938 S.W.2d 669 (Mo. App. 1997) (Tax sale purchaser prevailed over homeowners' previous acquisition of title by adverse possession).

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Supp. To CHAPTER 87 ADVERSE POSSESSION

10-87 Thompson on Real Property, Thomas Editions Supp. to § 87.25

Supp. to § 87.25 Substantive Due Process.

Replace the chapter synopsis with:
[Go To Main]

Tarantini v. Russo Realty Corp., 684 N.Y.S.2d 890 (App. Div. 1999) (In adverse possession litigation a substantive count is insufficient as a matter of due porcess of law without identifying any government action that would involve those rights).

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10-87 Thompson on Real Property, Thomas Editions Supp. to § 87.26

Supp. to § 87.26 Tacking.

Replace the chapter synopsis with:
[Go To Main]

Jetton v. Maxfield, 1999 Ark. App. LEXIS 155 (No. CA 98-32, Mar. 3, 1999) (Tacking established adverse possession as to a portion of a disputed strip).

Thompson v. Hulse, 2000 Tenn. App. LEXIS (No. 03A01-9908-CV-00269, Jan. 26, 2000) (Tacking requires privity between two successive claimants to reach the twenty years of adverse use. The deed transferring ownership to the second party must "be described in the deed" to the second adverse claimants "or established through parol evidence").

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Supp. to § 87.27 Burden of Proof.

Replace the chapter synopsis with:
[Go To Main]

Brown v. Gobble, 474 S.E.2d 489 (W.Va. 1996) (Classifies the following states relative to the burden of proof in adverse possession case. Preponderance of the evidence as the minority position: W.Va., Mo., Neb., Ohio and Ark. Clear and convincing evidence as the minority position: N.Y., Or., Ala., Me., Ill., Mich., Ariz., Miss., R.I., Idaho, Va., N.M. and Minn.).

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10-87 Thompson on Real Property, Thomas Editions Supp. to § 87.28

Supp. to § 87.28 Attorney's Fees.

Replace the chapter synopsis with:
[Go To Main]

Cahill v. Lyda, 826 S.W.2d 932 (Tex. 1992) (Counsel appointed to represent defendant served by publication who did not answer is entitled to reasonable attorney's fees out of the shares of proceeds awarded to unknown heirs even though not successful).

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10-87 Thompson on Real Property, Thomas Editions Supp. to § 87.29

Supp. to § 87.29 Champertous Deed.

Replace the chapter synopsis with:
[Go To Main]

White v. Jones, 2000 Tenn. App. LEXIS 71 (Tenn. App. 2000) (Champertous deed can not by statute prevail where the deed to the claimant came from a source not in possession).

Change § 87.19 Bibliography to:

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10-87 Thompson on Real Property, Thomas Editions Supp. to § 87.30

Supp. to § 87.30 Bibliography.

Replace the chapter synopsis with:
[Go To Main]

Articles

Add:

Alspach, Christopher M. "Adverse Possession of Severed Mineral Interests and the Need for Statutory Guidance," *37 Tex. Tech. L. Rev. 1073* (Summer, 2005).

Bagley, Constance E., and Gavin Clarkson. "Adverse Possession for Intellectual Property: Adapting an Ancient Concept to Resolve Conflicts Between Antitrust and Intellectual Property Laws in the Information Age." *16 Harv. J.L. & Tech. 327* (Spring, 2003).

Fennell, Lee Anne. "Efficient Trespass: The Case for 'Bad Faith' Adverse Possession," *100 Nw. U. L. Rev. 1037 (Spring 2006).*

Foncello, Martin J. "Adverse Possession and Takings [Are] Seldom Compensation for Chance Happenings." *35 Seton Hall L. Rev. 667 (2005).*

Gardiner, Brian. "Squatters' Rights and Adverse Possession: A Search for Equitable Application of Property Laws." *Indiana Int'l and Comp. L. Rev.* (1997) 119.

Impert, Walter Quentin. "Whose Land Is It Anyway?: It's Time To Reconsider Sovereign Immunity From Adverse

Possession" *49 UCLA L. Rev. 447* (October, 2001).

Klass, Alexandra B. "Adverse Possession and Conservation: Expanding Traditional Notions of Use and Possession," *77 U. Colo. L. Rev. 283 (Spring 2006).*

Lester, Brian. "An Attempt to Quiet the Controversy: The Case for Automatically Equipping an Adverse Possessor with a Slander of Title Action," *37 New Eng. L. Rev. 249 (Winter 2003).*

Lukes, Timothy J. "Open and Notorious: Adverse Possession and Immigration Reform," *27 Wash U. J.L. & Pol'y 123 (2008).*

McCormack, John L. "Title to Property, Title to Marriage: The Social Foundation of Adverse Possession and Common Law Marriage," *42 Val. U. L. Rev. 461* (Winter, 2008).

O'Connor, Michael P. "Adverse Possession--Alive and Well in the 1990's." *N.Y. State Bar J.*, Jan. (1998) 14.

Raley, Shane P. "Color of Title and Payment of Taxes: The New Requirements Under Arkansas Adverse Possession Law." *Ark. L. Rev.* (1997) 489.

Saxe, Will. "When 'Comprehensive' Prescriptive Easements Overlap Adverse Possession: Shifting Theories of 'Use' and 'Possession," *33 B.C. Envtl. Aff. L. Rev. 175 (2006).*

Spitler, William Hayden. "Over a Century of Doubt and Confusion: Adverse Possession in Arkansas, Intent to Hold Adversely and Recognition of Superior Title in Fulkerson v., Van Buren," *53 Ark. L. Rev. 459 (2000).*

Stake, Jeffrey Evans. "The Uneasy Case for Adverse Possession," *89 Geo. L.J. 2419 (2001).*

Annotation, Act of trespasser as interrupting adverse possession, 22 A.L.R. 1458 .

Annotation, Adverse possession by stranger as against mortgagee, 136 A.L.R. 782 .

Annotation, Adverse possession: right of remainderman or reversioner to tack his possession to that of life tenant, 150 A.L.R. 557 .

Annotation, Cutting of timber as adverse possession, 170 A.L.R. 887 .

Annotation, One in adverse possession as within class of persons entitled to redeem from tax sale, 164 A.L.R. 1285 .

Annotation, Prescription or adverse possession against one under disability of infancy, coverture, or mental incompetency, 147 A.L.R. 236 .

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CHAPTER 88 TESTAMENTARY TRANSFERS OF REAL PROPERTY

10-88 Thompson on Real Property, Thomas Editions 88.syn

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CHAPTER 88 TESTAMENTARY TRANSFERS OF REAL PROPERTY

10-88 Thompson on Real Property, Thomas Editions § 88.01

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§ 88.01 Introduction and Overview of the Chapter.

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§ 88.01(a) General Notes.

This chapter will cover the law of testamentary transfers, or wills. The chapter begins with a summary of the history of wills. Then the execution ceremony and formalities of attested (witnessed) wills, and certain types of other wills are discussed in the next sections. Sections on will contracts, will construction (components and reformation doctrines) and will revocation follow. Post-mortem aspects of testamentary transfers are then presented, in sections discussing will contests; changes in persons (e.g., lapse) and changes in property (abatement, ademption, satisfaction, etc.); limits on dispositions under a will; probate and estate administration. Finally, sections on health-care planning devices, will substitutes, and malpractice issues in probate law conclude the chapter.

The chapter does not purport to cover the tax aspects of estate planning in great detail, although tax notes are sometimes included.

§ 88.01(b) Testamentary Freedom.

It is a virtually universal and ancient concept that property rights should transfer at death, from older family members to younger ones. n1 It is not as clear that the transfer of property by will (or by testator's instructions to be carried out at death) is fundamental in the same way. Yet the English common law and the law of the United States clearly and uniformly recognize the principle of testamentary freedom. Modern wills law imposes very few restrictions on testators. Most legal limits involve protection of family members and the prevention of unwarranted dead hand control on property from deceased grantors. n2 Authors have frequently attempted to justify the idea of testamentary freedom and control. Some explanations involve family relationships. First, it is assumed that the ability to provide for one's dependents at death serves a useful psychological function. If adequate provision can be made, and guardians selected for minor children, testators can be relieved of some anxiety about death. Second, the transfer of property at death to family members gives expression to, and reinforces the natural family ties. Third, the ability to transfer property at death helps to protect older, enfeebled testators. It gives them leverage over family members in soliciting care, or gives them the ability to reward faithful friends and servants for services rendered.

Other, largely psychological benefits may follow from the ability to make a will. The testator may wish to leave property to charity, to show benevolence. Also, the ability to leave gifts, charitable or otherwise, is a way to leave concrete evidence of worldly success after death. Another type of justification for the right to leave property by will is an economic one. People will have an incentive to produce, to invest and to accumulate property, and to do so in a creative manner, in order to have the psychological and material benefits of testamentary power. In the absence of the ability to make a will, testators might be more inclined to use up their resources during their lifetimes. The creative development and investment of resources benefits the economy in general, this argument maintains. n3

Testamentary freedom is also criticized. It is argued that the testator may have too much leverage over family members and may use the testamentary ability to control them. The power to effect testamentary transfers also tends to perpetuate wealth dynasties and to reward persons on the basis of accident of birth, rather than on a concept of merit. n4 Although the ability to make a will may not be a creature of natural law or a constitutionally protected right, the courts are relatively protective of the notion of testamentary freedom. Americans seem to value the ideal of transfer by will, although most people do not leave a will. n5

§ 88.01(c) Terms.

Many of the terms still used in wills and inheritance law come from the English common law. n6 At common law, if a person died without a will, the person was said to have died *intestate*. The personal property of an intestate individual passed by *distribution*, and was distributed to the *next of kin* of the decedent. Real property passed by *descent*, and it was *inherited* by the *heirs*. Modern intestacy statutes may be called statutes of *descent and distribution*, as a result of the common law terminology. At common law, property passed to the oldest son, under the system of primogeniture. American law never adopted the concept of primogeniture, and the intestacy law has attempted to benefit all similarly situated heirs equally regardless of age or gender.

Under modern intestacy law, a decedent's heirs are those who take under an intestacy statute. The specific terms of the statutes vary from state to state. n7 Which one will be applied depends largely on the domicile of the decedent at the time of death and the location of real property owned by the decedent.

If a person died with a will, the person died *testate*. A male person who left a will was known as a testator and a female person was known as a testatrix. Modern usage is testator, for either male or female decedents. A gift of real property was termed a *devise*, and the beneficiary was a devisee. A gift of money was called a *legacy*, and the recipient was a legatee. A gift of any other personal property was termed a *bequest*, and the testator was said to bequeath property to the beneficiary. In modern usage, the term "devise" will often be applied to all gifts under the will, and this is the Uniform Probate Code approach. n8 On the other hand, it is best for a will drafter to continue use of the terms in their technical senses, since in some jurisdictions the differences may still be recognized, and a "devise" of personal property could be found to be ambiguous.

Both intestate and testate estates have a personal representative. The personal representative collects the estate assets, pays claims, and carries out the distributions required by the statute (intestacy) or the will (testacy) A personal representative of an intestate estate is known as an *administrator*. (Former equivalent female term was administratrix, but this is generally not in modern usage). A personal representative for a testate estate is usually an *executor* (former female equivalent -- executrix). n9

§ 88.01(d) Uniform Probate Code.

The original version of the Uniform Probate Code (UPC) was adopted in 1969 by the National Conference of Commissioners on Uniform Laws. The Code was significant because it was the first comprehensive modern codification of the law of wills, probate, estates and trusts. Fifteen states have adopted the Uniform Probate Code. n10 The Code has been modified periodically and is subject to constant monitoring by the Joint Editorial Board for the

Uniform Probate Code (JEB-UPC) The JEB-UPC has nine members, three each from the National Conference, the American Bar Association and the American College of Trust and Estate Counsel. The board also has an Executive Director, a Chief Reporter, and three liasons, one for probate judges and two for law teachers. n11

In 1989, the JEB-UPC completed major changes to Article VI of the Uniform Probate Code, the sections on non-probate transfers at death. n12 In 1990, another, even more significant revision was adopted, that of Article II of the UPC. Article II contains most of the substantive provisions on the law of wills, intestacy and donative transfers.

In revising the terms of Article II, the drafters were concerned with three themes relevant to modern estates law. n13 The first is the transformation of the family and of family law in recent years. Most marriages entered into during the 1970s and most of the 1980s ended in divorce. Most people who divorce remarry. The concept of serial marriage changed the nature of family law in the past two decades and is now incorporated into various sections the Uniform Probate Code. Another family theme is the idea of marriage as a partnership between the parties. The notions of marital (rather than individual) property ownership, as well as the equitable distribution of property at death, were included in the Code revisions. n14 Equitable distribution has been recognized as a standard for the division of marital property at death for some time.

A second theme is the increased use of non-probate transfers to effectuate wealth transmission. More and more people are using life insurance, pension funds, joint accounts, inter-vivos trusts and other will substitutes to transfer assets at death. The revised version of the Uniform Probate Code attempts to bring the law of probate and non-probate transfers into greater unison. n15 Finally, the new Code provisions attempt to respond to the decline of formalism, in favor of rules attempting to honor the intent of the testator, or the presumed intent of an intestate decedent. For example, the areas of will execution, construction and revocation are sometimes plagued with technicalities that all too frequently operate to frustrate the clear intent of the testator. n16 The provisons of Article II have been incorporated into a new, free-standing uniform act, the Uniform Act on Intestacy, Wills, and Donative Transfers. Other free-standing uniform acts derived from the Uniform Probate Code 1990 revisions include the Uniform Testamentary Additions to Trusts Act (two acts, one based on the 1990 version of Uniform Probate Code § 2-511 and one based on the 1960 version); the Uniform Disclaimer of Property Interests Act (based on § 2-801 of the 1990 UPC). and the Uniform Disclaimer of Transfers by Will, Intestacy or Appointments Act (based on pre-1990 UPC § 2-801); the Uniform Statutory Rule Against Perpetuities (based on the 1990 UPC version of Part 9, Subpart 1 of Article II); and the Uniform International Wills Act (based on UPC Article II, Part 10, both pre- and post-1990 versions). n17 The reason for the adoption of free-standing statutes is to permit non-UPC states to adopt portions of the revised code without interfering with the state's existing probate scheme.

In this chapter, some emphasis will be placed on both the original and the 1990 versions of the Uniform Probate Code. The Code typically reflects the modern trend in wills law, and may also represent the "better view" in much of this area.

§ 88.01(e) Clients and Testamentary Transfers.

Some authors remind us that a probate practice, like some other areas of law, is an emotional one. When a client comes in for a will, the attorney should seek to determine the client's feelings about death, about property, and about disposition of that property. The feelings of the client are important in their own right, but the feelings are also themselves facts, as one author points out. Also, if the attorney understands the client's feelings and motivations, then the attorney will be better able to draft a will that is in fact in accord with the client's wishes. The post-mortem "client" will usually be in a process of mourning, and again it is useful for the attorney to strive to understand his or her feelings and emotions, in order to do a better job. n18

As one author argues, attorneys can help courts to understand that a will in probate is a story, told by the testator. Writing a will is an act of trust, the testator trusts the living survivors to carry out the testator's intentions after death. If we accept that trust, then we should respect the vulnerability of the deceased, and try to understand the entire story, even

if difficult or painful. n19

FOOTNOTES:
(n1)Footnote 1. *See* § 88.02 *infra* on the history of wills and sources cited therein. *See also* Social Meaning of Legal Concepts (No. 1): Inheritance of Property and the Power of Testation (Cahn ed. 1948); Louis B. Schwartz, *The Inheritance Law of the People's Republic of China, 28 Harv. Int'l L.J. 433 (1987);* Frances Foster-Simons, *The Development of Inheritance Law in the Soviet Union and the People's Republic of China*, 33 Am. J. Comp. Law 33 (1985); Comment, *Soviet Inheritance Law: Ideological Consistency or a Retreat to the West? 23 Gonz. L. Rev. 593 (1988).*

(n2)Footnote 2. *See* § 88.12, *infra*, on limits of dispositions under a will.

(n3)Footnote 3. *See generally* Thomas L. Shaffer & Carol Ann Moody, The Planning and Drafting of Wills and Trusts 1-24 (1991); Edward Halbach, *An Introduction to Death, Taxes, and Family Property* in Death, Taxes and Family Property 3-7 (E. Halbach ed. 1977); J. Bentham, The Theory of Legislation 177-86 (C. Ogden ed. 1950).

(n4)Footnote 4. *See generally* Ronald Chester, Inheritance, Wealth and Society (1982); John A. Brittain, Inheritance and the Inequality of Material Wealth (1978); Lester C. Thurow, Mechanisms of Distribution in the U.S. Economy (1975); Ascher, *Curtailing Inherited Wealth, 89 Mich. L. Rev. 69 (1990);* Buchanan, *Rent Seeking, Non-compensated Transfers, and Laws of Succession, 26 J. Law & Econ. 71 (1983);* Blum & Kalven, *The Uneasy Case for Progressive Taxation, 19 U. Chi. L. Rev. 417 (1952).* Also, *compare* Bruce Ackerman, Social Justice in the Liberal State 202-204 1980) *with* John Rawls, A Theory of Justice 289-91 (1971).

(n5)Footnote 5. The fact that Americans value their testamentary freedom was illustrated in a survey. *See* Mary Louise Fellows, Rita J. Simon & William Rau, *Public Attitudes About Property Distribution at Death and Intestate Succession Laws in the United States, 1978 Am. B. Found. Res. J. 319. See also Irving Trust v. Day, 314 U.S. 556 (1942)* (inheritance and testation rights not constitutionally required); *Hodel v. Irving, 481 U.S. 704 (1987)* (total abrogation of right to pass property at death may be unconstitutional, is a taking); Daniel J. Kornstein, *Inheritance: A Constitutional Right?*, 36 rutgers L. Rev. 741 (1984). Most Americans die intestate according to Allison Dunham, *The Method, Process and Frequency of Wealth Transmission at Death, 30 U. Chi. L. Rev. 241, 244 (1963)* (85% die intestate).

(n6)Footnote 6. *See generally* John Ritchie, Neill H. Alford, Jr., Richard W. Effland & Joel C. Dobris, Decedent's Estates and Trusts 5-8 (9th ed. 1993); Lawrence W. Waggoner, Richard V. Wellman, Grogory S. Alexander & Mary Louise Fellows, Family Property Law 2-3 (1991).

(n7)Footnote 7. For an example of a modern intestacy statute, *see* U.P.C. §§ 2-101 to 2-114.

(n8)Footnote 8. U.L.A. 73-86. For an older type of intestacy statute *see* Tex. Probate Code Ann. § 38.

(n9)Footnote 9. *See* U.P.C. § 1-201(10), 8 U.L.A. 9: "Devise," when used as a noun, means a testamentary disposition of real or personal property and, when used as a verb, means to dispose of real or personal property by will.

More discussion of probate and the role of the personal representative is found at § 88.13 *infra*.

(n10)Footnote 10. The states are: Alaska (Alaska Stat. §§ 13.06.005 to 13.36.100); Arizona (Ariz. Rev. Stat. Ann. §§ 14-110 to 14-7307); Colorado (Colo. Rev. Stat. §§ 15-10-101 to 15-17-101); Florida (Fla. Stat. Ann. §§ 731.005 to 735.302, 737.101 to 737.512); Hawaii (Hawaii Rev. Stat. §§ 560:1-101 to 560:8-102); Idaho (Idaho Code §§ 15-1-101 to 15-7-307); Maine (18-A Me. Rev. Stat. Ann. §§ 1-101 to 8-401); Michigan (Mich. Comp. Laws Ann. §§ 700.1 to 700.993); Minnesota (Minn. Stat. Ann. §§ 524.1-101 to 524.8-103); Montana (Mont. Code Ann. §§ 72-1-101 to 72-5-502); Nebraska (Neb. Rev. Stat. §§ 30-2201 to 30-2902); N.M. Stat. Ann. §§ 45-1-101 to 45-7-522); North Dakota N.D. Cent. Code §§ 30.1-01-01 to 30.1-35-01; S.C. Code Ann. §§ 62-1-100 to 62-7-604; and Utah Code Ann. 75-1-101

to 75-8-101.

(n11)Footnote 11. *See generally* Lawrence W. Waggoner, Richard V. Wellman, Gregory S. Alexander & Mary Louise Fellows, Family Property Law 63-64 (1991).

(n12)Footnote 12. *See* U.P.C., Art. VI, *Non-probate Transfers on Death,* §§ 6-101 to 6-311, 8 U.L.A. 303-326 (1993 Supp.). *See also* Richard V. Wellman, *Transfer-on-Death Securities Registration: A New Title Form, 21 Ga. L. Rev. 789 (1987).*

(n13)Footnote 13. For a discussion of the themes, *see* the Prefatory Note to Article II. U.P.C., Art. II, *Intestacy, Wills, and Donative Transfers,* 8 U.L.A. 72-73.

(n14)Footnote 14. This discussion is again reviewed in § 88.12, *infra.*

(n15)Footnote 15. *Id. See also* John Langbein, *The Nonprobate Revolution and the Future of the Law of Succession, 97 Harv. L. Rev. 1108 (1984),* John Langbein, *The Twentieth-Century Revolution in Family Wealth Transmission, 86 Mich. L. Rev. 722 (1988).*

(n16)Footnote 16. *See generally* § 88.03 Will Formalities and the Will Execution Ceremony, § 88.06 Will Construction -- Will Components, § 88.07 Will Construction and Reformation, § 88.07(d) Extrinsic Evidence, § 88.08 Will Contests, § 88.10 Will Revocation, *infra.*

(n17)Footnote 17. *See* the Table and Notes in 8 U.L.A. 1-4. The free standing acts can also be found as listed below:

Uniform Act on Wills, Intestacy, and Donative Transfers, 8A U.L.A. 154-270Uniform Testamentary Additions to Trusts Act, 8A U.L.A. 432-435Uniform Testamentary Additions to Trusts Act, 8A U.L.A. 426-431Uniform Disclaimer of Property Interests Act, 8A U.L.A. 64-67Uniform Disclaimer of Transfers by Will, Intestacy or Appointments Act, 8A U.L.A. 68-70Uniform Statutory Rule Against Perpetuities, 8A U.L.A. 348-389Uniform International Wills Act, 8 U.L.A. 181-201

(n18)Footnote 18. *See generally* Thomas L. Schaffer & carol ann mooney, the planning and drafting of wills and trusts 1-25 (1991) and sources cited at 24-25.

(n19)Footnote 19. *See* Jane B. Baron, *Intention, Interpretation and Stories, 42 Duke L.J. 630 (1992).*

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CHAPTER 88 TESTAMENTARY TRANSFERS OF REAL PROPERTY

10-88 Thompson on Real Property, Thomas Editions § 88.02

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§ 88.02 History of Wills.

It appears that the concept of testamentary disposition existed in ancient societies, as well as in pre-feudal England and Europe. References to testamentary dispositions are found in the Bible, as well as in Egyptian and Roman times. n20 The idea that a testamentary disposition might be necessary and useful may have originated with the problem of what to do with a person's property when the person died without a family to take the property. n21

When William the Conqueror defeated the English in the Battle of Hastings in 1066, he brought the feudal system of land tenure and ownership to England. n22 One of the key characteristics of feudalism was that freehold estates in real property (the most valuable estates) could only be transferred by livery of seisen. n23 This ceremonial transfer of real property was a public and open display with the present land owner passing a clod of earth or some twigs from the land to the new owner. n24 The necessity of livery of seisen made it impossible for individuals to leave their real property by will. n25 However, even in feudal times, it was considered good for the immortal soul to write a will disposing of one's personal property and the ecclesiastical courts had jurisdiction over such wills. Later, the English Statute of Distribution (1670) and the Statute of Frauds (1677) established the basis of modern succession to personal property. These and the Wills Act of 1837 were instrumental in the development of modern wills execution requirements in the United States. n26

The demand for the right to dispose of real property at death was very strong. This was at least partially due to the fact that feudalism also encompassed the doctrine of primogeniture, in which the eldest son would automatically inherit all of his father's interests in real property. This had the practical effect of disinheriting all of the landowner's other children. n27 The device of the "use" became popular in the 15th century, and enabled landholders to do many things with their real property that were previously impossible to accomplish. This included the disposal of property at death. n28

A use is a separation of the legal and equitable interests in real property. An owner of land (O) could convey Blackacre to the use of another person (X) The conveyance meant that X held the legal title and O held the equitable title in Blackacre. O could direct X's actions with regard to Blackacre, including what to do with it at O's death. While the courts of law refused to recognize the use, the courts of equity would give effect to the parties' intent. Thus, O could easily accomplish the goals of testamentary disposition. n29 The use ceased to exist, in a practical sense, after the

Statute of Uses took effect in 1536. The Statute "executed" the use by uniting legal and equitable title in the holder of the equitable title. n30 The ultimate purposes of the Statute of Uses were: (1) to make land transfers public again, and (2) to reinstate some of the feudal incidents (feudal form of taxation), which were due at the time of inheritance of land, to the overlords and to the king. n31 However, in 1540 the Statute of Wills was enacted, and it permitted individuals to freely dispose of their property by will. n32 This law became the foundation for the United States law of testamentary transfers and intestate succession.

In the United States, as in most of the world, pre-Industrial Revolution wealth tended to be concentrated in land and in family units. The family farm or family business was the key element of wealth for those families with any property at all. This property was passed at death, and tended to be passed to male heirs, rather than female. A female spouse would frequently have a legally mandated life interest in the property, but would not take the full fee simple estate. n33 The situation of a married woman began to change after 1840, when Married Womens Property Acts began to be adopted in the United States. By the turn of the century, married women could also freely direct the distribution of their property by will. n34 Much of current wills law is based on this type of society.

FOOTNOTES:

(n1)Footnote 20. *See generally* Thomas Edgar Atkinson, The Law of Wills §§ 2-3 (2d ed. 1953); 1 William H. Page, Page on Wills §§ 2.1-.18 (1960 ed.); Melville M. Bigelow, The Law of Wills 20-22 (1898) (Bigelow on Wills); Gardner on Wills, ch. 1, § 2 (2d ed. Walter T. Donmore, ed. 1916) (Gardner on Wills); Carole Shammas, Marylynn Salmon & Michel Dahlin, Inheritance in America From Colonial Times to the Present (1987); Marvin B. Sussman, Judith N. Cates & David T. Smith, The Family and Inheritance (1970); Gerry W. Beyer, *The Will Execution Ceremony -- History, Significance and Strategies, 29 S. Tex. L. Rev. 413, 415-419 (1988);* John Langbein, *The Twentieth-Century Revolution in Family Wealth Transmission, 86 Mich. L. Rev. 722 (1988).*

(n2)Footnote 21. Gardner on Wills, *supra* note 20.

(n3)Footnote 22. John E. Cribbet & Corwin W. Johnson, Principles of the Law of Property, ch. 3, § 1 (3d ed. 1989) (Cribbet & Johnson).

(n4)Footnote 23. Thomas F. Bergin & Paul G. Haskell, Preface to Estates in Land and Future Interests, ch. 1, § 7 (2d ed. 1984) (Bergin & Haskell).

(n5)Footnote 24. *Id.*

(n6)Footnote 25. Gardner on Wills, *supra* note 20.

(n7)Footnote 26. These statutes and the modern consequences are discussed in more detail in § 88.03 *infra*.

(n8)Footnote 27. Bigelow on Wills, *supra* note 20, at 18; Bergin & Haskell at ch. 1, § 5.

(n9)Footnote 28. Bergin & Haskell, *supra* note 23, at ch. 3, § 8. The use also enabled landowners to effectively transfer property without livery of seisen, to avoid the Rule in *Shelley's Case* and to permit a gift over to a third person after a vested remainder. *Id.* It also permitted interests to commence in the future: "to the use of A five years from now," or interests that might otherwise create a gap in the seisen: "to the use of A for life, then to the use of O for one day, then to the use of B;" as well as contingent interests following a term of years. *See* Cornelius J. Moynihan, Introduction to the Law of Real Property, ch. 8, § 2 (2d ed. 1988) (Moynihan).

(n10)Footnote 29. Bergin & Haskell, *supra* note 23 at 81-84.

(n11)Footnote 30. Bigelow on Wills, *supra* note 20, at 29-30.

(n12)Footnote 31. Moynihan, *supra* note 28, at ch. 8, § 5.

(n13)Footnote 32. Gardner on Wills, *supra* note 20, at 8.

(n14)Footnote 33. John H. Langbein, *The Twentieth Century Revolution in Family Wealth Transmission, 86 Mich. L. Rev. 722, 722-27.*

(n15)Footnote 34. *See* Sue S. Lebsock, the free women of petersburg: status and culture in a southern town, 1784-1860 (1984); Linda E. Speth, *More Than Her "Thirds": Wives and Widows in Colonial Virginia,* in Linda E. Speth & Alison Duncan Hirsch, Women, Family and Community in Colonial America: Two Perspectives (1983). *See also* Carole Shammas, Marylynn Salmon & Michel Dahlin, Inheritance in America from Colonial Times to the Present (1987).

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CHAPTER 88 TESTAMENTARY TRANSFERS OF REAL PROPERTY

10-88 Thompson on Real Property, Thomas Editions § 88.03

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§ 88.03 Will Formalities and the Execution Ceremony.

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§ 88.03(a) Introduction and History.

Most modern wills acts are modeled on one of two English statutes: the Statute of Frauds of 1677 n35 and the Wills Act of 1837. n36 Both acts require that a testamentary document be in writing, signed by the testator (or by a proxy at the testator's direction) and that the will be attested and subscribed by testator in the presence of witnesses. Other than the extra witnesses required by the Statute of Frauds (3 or 4), and the Wills Act actually increased the formalities required for will execution. Some differences among state wills statutes can be explained by referring to the two different English models.

Traditionally, the formalities of a will execution are said to fulfill three functions, n37 and a fourth function has more recently been suggested. The original purpose of the Statute of Frauds was to prevent fraud, and one of the functions of a modern wills act is to protect the testator from fraud after the testator's death; this is the *protective function*. If witnesses are present, it will be difficult for wrongdoers to forge the testator's signature or to produce a substitute will. Disinterested witnesses also reduce the posssibility of duress or undue influence. In a sense, the requirement of witnesses also protects the heirs of the testator, in that the competency of the testator can be evaluated by disinterested observers. If the testator is required to sign at the end of the will, then new or additional provisions cannot be inserted by a third party.

A second primary purpose of will formalities is to ensure that the will is the best possible evidence of the testator's intent; this is the *evidentiary function*. The requirement that the will be in writing establishes a permanent record of what the testator directed be done with the testator's property at death. The requirement of a signature (or proxy) establishes that the document is adopted by the testator as the testator's own will. Again, the presence of witnesses helps to establish the fact of execution and adoption of a testamentary document by the testator.

A third purpose of formal will execution is the *ritual* or *cautionary function*. All of the ceremony of a formal will execution is designed to ensure that the testator realizes that the making of a will is serious business. People will often make offhand comments about who should receive property when they die. Leaving property at death does not compel a testator to feel the "wrench of delivery" that is required in most inter-vivos transfers. Although wills are revocable and

do not take effect until death, a formal will execution helps to establish the significance of the event for the testator.

The fourth function of will formalities is to provide a "safe harbor" for testators; this is called the channeling function. If a will is executed in accordance with the statutory provisions, the testator can rest assured that its terms will be honored at the testator's death. The channeling function also has a societal benefit. If testators will standardize their testamentary dispositions as provided in the wills act, then the courts will have an easier time processing the documents throught the legal system and enforcing the provisions contained therein. n38

In theory, all of the functions of will formalities are as valid and as necessary as they were at the common law. At common law, strict compliance with the terms of the wills act was required. If the will execution did not meet all of the statutory formalities to the letter, the will was invalid. Both the common law theory and result are being questioned in the modern trend, and some recent developments are discussed below.

§ 88.03(b) Basic Formalities.

All wills acts, including the Uniform Probate Code, n39 require that wills be in writing and signed by the testator in some fashion. It is universally agreed that these two elements of a formal will are indispensable. n40 Some details of the requirements, particularly the signature, are discussed below.

§ 88.03(b)(1) Writing.

All states provide that wills must be in writing. A written will establishes a permanent record of the testator's stated desires about property disposition at death. To date, the law has limited the use of oral wills to a very narrow range of circumstances. n41 The law has also been reluctant to recognize a videotape or an audiotape as a "writing" for purpose of the wills statutes. n42

§ 88.03(b)(2) Signature.

Again, all states and the Uniform Probate Code n43 require that the will be signed by the testator. Although the Statute of Frauds of 1677 did not require the testator to sign in any particular location on the will, the Wills Act of 1837 did provide that the will should be signed at the end. This was intended to prevent the addition of later provisions, either by the testator, or by third parties. n44 Some state wills acts specifically provide that the will be signed at the end, n45 but the majority and the Uniform Probate Code do not specify location.

If no location is specified, the signature can appear anywhere, even in the body of the will, or in the introductory (exordium). clause. n46 If the signature is not at the end, the proponent of the will must show that the written name was intended as the signature of the testator. n47 If the will must be signed at the end, the issue arises as to the meaning of "end." If the term means the physical end of the will, then many wills might be held to be invalid on a technicality. The better view is to construe the term "end" to mean the "logical end" of the will. n48 Then, provisions such as the designation of the executor, or instructions for burial may be honored without serious problem.

Anything intended to be a signature by the testator will suffice as such. For example, if the testator writes a partial name, or a mark (such as an X), it will be a signature if the testator so intends. n49 Even at common law, a proxy could sign for the testator. A testator may not know how to write, or may be too weak to sign the will. A proxy signature must be made in the testator's presence and at testator's direction. The proxy may also need to add the proxy's own signature as well. n50 The concept of what is in the testator's "presence" arises most frequently in the context of witnesses, but can come up in this situation as well. The testator's presence may mean the testator's line of sight or line of vision, where the testator must actually be able to see the proxy sign the document. The "conscious presence" test is a more modern concept, and merely requires that the proxy sign in the vicinity of the testator, so that testator can keep track of what is going on. n51 The 1990 version of the Uniform Probate Code specifically provides that the proxy sign in the

conscious presence of the testator. n52

Someone may assist the testator with the testator's signature. Occasionally, it may be important to determine whether the signature is the testator's own, although written with assistance, or whether the signature is a proxy. This is because the proxy signature provision of a state statute may require that the testator specifically or expressly request or direct that the proxy sign the will. Sometimes testators merely indicate the need for the proxy or for assistance without express direction. A request for assistance can be indirect, and not run afoul of such a statute. n53 Normally it is assumed that the testator will sign the will first, and then the witnesses will sign. However, it is generally held that the exact order of signing is not important if the will execution and signatures take place during a continuous, single transaction. n54

§ 88.03(c) Formal Wills -- Attestation Requirements.

Even an informal or holographic will is required to be in writing and to be signed by the testator. However, the concept of a formal will includes witnesses and other aspects of attestation. These other formalities are discussed in this section.

§ 88.03(c)(1) Witnesses.

§ 88.03(c)(1)(i) Number.

The modern trend and the Uniform Probate Code require two witnesses, n55 as provided in the Wills Act of 1837. Some states however, do require more than two witnesses, in accord with the Statute of Frauds rule. n56

§ 88.03(c)(1)(ii) Competence.

Witnesses must be mentally competent, and able to observe the testator and understand the execution of the will. n57 In some states, a witness must be a minimum age (such as 18), in most, the witness must simply be able to observe and remember the events of the will execution, regardless of age. n58

The most important competency requirement is that a witness must be "credible," meaning disinterested. Witnesses must not be will beneficiaries. At common law, if an interested person was a witness to the will, the will was void. The modern trend avoids that harsh result by the use of "purging statutes." n59 A purging statute voids the interest of the interested witness under the will, but lets the rest of the provisions stand. Some statutes void only the "extra benefit" that the witness would receive under the will. n60 Consider, for example, a will leaving a $10,000 gift to A who is an heir of the testator. As an heir, A would be entitled to $5,000. The statute might void the entire gift to A, or simply void the extra $5,000 that A receives under the will. (A similar scenario could arise if a prior will gave A $5,000, but A was not a witness to that will. Testator executes a second will, leaving $10,000 to A, but this time A is a witness. The gift might be void *in toto*, or just to the extent of the extra benefit.).

Also, modern law tends to exempt the supernumerary witness from the purging statute. n61 For example, suppose the statute requires 2 witnesses, but the will is witnessed by three persons, A, B and C. Suppose that A and B are disinterested, but C is a will beneficiary. The gift to C may stand, because the statute only requires two disinterested witnesses, and that requirement is met under these facts. The supernumerary rule may also come into play if the testator executes a valid codicil to the will, with different, disinterested witnesses. The doctrine of republication by codicil may help to avoid the interested witness problem. n62 However, a witness cannot later disclaim an interest under the will and then serve as a disinterested witness. The witness must be competent and disinterested when the will is executed. n63 Courts are split as to whether the spouse of a will beneficiary is an interested witness. n64 Generally, the person named as the executor (if not also named as a beneficiary under the will) or the attorney for the executor will be considered to be disinterested witnesses. n65 A substantial minority of states follow the pre- and post-1990 Uniform Probate Code rule that the "interest" of a witness is irrelevant. n66 Witnesses are not required to be disinterested under this view. The Uniform Probate Code drafters reasoned that the interested witness prohibition operates as a trap for the layman, who may innocently use family members or friends as witnesses. The risk of fraud or undue influence is not

deemed to be substantially increased by the absence of the requirement that witnesses be disinterested. If a witness is the recipient of a large gift under the will, for example, the fact that witness was benefitted may be used in a suit to establish undue influence or fraud.

§ 88.03(c)(1)(iii) Witnessing Procedures.

As indicated above, it is usually presumed that the testator signs first, although the will is generally upheld if the parties sign as part of a continuous single transaction. The witnesses should sign within a reasonable time after the testator signs. n67 Usually statutes provide that the witnesses sign in the "presence" of the testator. It is said that the prevailing view is that the witnesses must sign in the testator's physical presence, or in the *line of sight* of the testator. n68 The testator does not have to watch the witnesses sign, but must be capable of watching. The modern trend is that the witnesses must only sign in the "conscious presence" of the testator. n69 Some statutes follow the terms of the Wills Act of 1837 and require that the witnesses sign in the presence of each other as well as the presence of the testator. n70 There is a difference of authority whether the witnesses must actually see the testator sign the will, or whether an acknowledgment of the signature is sufficient. That is, the testator would indicate that her signature on the document is authentic. The Wills Act required the witness of the signature, the Statute of Frauds required the witness of the will. The modern trend is to hold that witness of testator's acknowledgment of a signature is sufficient. n71

The 1990 Uniform Probate Code does not include a "presence" requirement at all, and permits witness of an acknowledgment of testator's signature on the will. The Code specifies that witnesses must witness either the testator's signature or the testator's acknowledgement of signature. n72 This "witnessing" would presumably involve some personal contact with the testator. This does not have to be done in the presence of other witnesses, and the testator does not need to be present when the witness signs the will.

In some states, the testator must request that the witnesses witness and sign the wills. The request may be expressed, or may be upheld as a proper request even if implied, by gestures or words. n73 Finally, the witnesses must intend to attest the will. The attestation is not proper if the witnesses think that they are witnessing or signing a contract, for example. n74

COMPUTER-ASSISTED RESEARCH

LEXIS: witness! w/15 sign! or attest! w/15 will! w/30 testator!

§ 88.03(c)(2) Publication.

A minority of some states require that the testator "publish" the will to the witnesses as the testator's last will and testament. The testator should state that the document that the witnesses are signing is the will of the testator, in order to meet this requirement. The testator must know that the document is a will, and what provisions are contained in the will. The witnesses, however, do not need to know the contents. n75

§ 88.03(d) Evidence of Attestation.

Two devices designed to insure that there is adequate evidence of proper attestation procedures are the attestation clause and the self-proving affidavit.

§ 88.03(d)(1) Attestation Clause.

While not required, the use of an attestation clause can be very useful in establishing the validity of a will. n76 The attestation clause details what happened during the will execution ceremony. For example, a typical attestation clause might provide:

The foregoing instrument (consisting of (number) pages including this one) was (date), signed and declared to be his [her] last will by (testator) in our joint presence; we, at his [her] request and in his [her] presence and in the presence of each other, subscribe our names as witnesses to the execution of this will, declaring our belief that he is of sound mind and memory and under no constraint or undue influence whatsoever.

_____ residing at _____

_____ residing at _____

_____ residing at _____

In some states, the attestation clause establishes a presumption that the will was executed in accord with its provisions. n77 This relieves the will proponent from needing to find witnesses who may or may not remember details of the will execution years after it takes place.

COMPUTER-ASSISTED RESEARCH

LEXIS: attestation clause w/15 will! w/30 presum! or valid!

§ 88.03(d)(2) Self-proving Affidavit.

The use of the self-proving affidavit is allowed in the majority of states. Under the Uniform Probate Code, n78 the affidavit establishes a conclusive presumption of all signature requirements and a rebuttable presumption of all other execution requirements. The 1990 version added new subsection (c), which provides that a signature attached to a self-proving affidavit would suffice as a signature affixed to the will, if necessary to prove the will's due execution. n79 Some states may even provide that the affidavit is conclusive evidence of all execution requirements. A sample affidavit is presented below:

The State of _____ County of _____ We, _____, _____, and _____, the testator and the witnesses, respectively, whose names are signed to the attached or foregoing instrument, being first duly sworn, do hereby declare to the undersigned authority that the testator signed and executed the instrument as his [her] last will and that he [she] signed willingly or directed another to sign for him [her], and that he [she] executed it as his [her] free and voluntary act for the purposes therein expressed; and that each of the witnesses, in the presence and hearing of the testator, signed the will as witness and that to the best of his [her] knowledge the testator was at that time 18 or more years of age, of sound mind and under no constraint or undue influence.

_____
Testator

_____
Witness

_____
Witness

Subscribed, sworn to and acknowledged before me by _____, the testator, and subscribed and sworn to before me by _____ and _____, witnesses, this _____ day of _____, _____.

(SEAL)

(Signed)_____
(*Official capacity of officer*)

The Uniform Probate Code also contains a form combining the attestation clause and the self-proving affidavit so that the testator and witnesses sign once rather than twice in § 2.504(a).

COMPUTER-ASSISTED RESEARCH

LEXIS: self-proving affidavit w/30 presum! w/15 will!

§ 88.03(e) Modern Developments.

At common law, strict compliance with will formalities was required. In the modern law, this approach seems unsatisfactory to many courts and commentators. n80 Will formalities are designed to prevent problems that arise with regard to transfers that are to take effect at death. However, the modern testator has a wide variety of will substitutes available for use. These will substitutes do not require execution formalities, and arguably create legal problems that are no worse than standard will problems. n81 Also, the modern philosophy of transfer of property at death has changed over time. Intestacy is disfavored in the modern law, whereas testacy was not favored at the common law. n82 Most importantly, the strict compliance requirement can operate to frustrate testator's clear and unambiguous intent, even if the testator has consulted a lawyer. Formalities may just be a trap for the layman, and discriminate against those individuals who are unable to afford an attorney. n83

One technique used to avoid the invalidation of an improperly executed will is the "substantial compliance doctrine." This is a type of harmless-error standard. If the will is in substantial, but not perfect compliance with the execution requirements of the wills act, it will nonetheless be admitted to probate. This approach can be adopted by courts, or by the legislature. n84

The new Uniform Probate Code (1990 version) incorporates an approach used in Australia, commonly called the "dispensing power." The dispensing power gives courts broad authority to excuse compliance with execution formalities. The UPC provisions provide that the will should be admitted to probate if the proponent can establish by clear and convincing evidence that the testator intended that the document be the testator's will. n85 Although no states have yet adopted this provision, it is probable that some states will move in this direction in the future. By its nature, the dispensing power is only available as a legislative alternative. It is a grant of power to the courts from the legislature.

One author has advocated the abolition of the attestation requirement for wills. In other words, the only essentials of will execution should be a writing and a signature. He argues that no useful purpose is served by the continued existence of elaborate will execution formalities whose main impact is the frustration of testator's intent. n86 Again, this approach has not been adopted in any state, and has not been incorporated into the Uniform Probate Code. This would have to be a legislative remedy, since it abolishes existing standards.

§ 88.03(f) Model Will Execution Ceremony.

In the modern trend, a will that is valid where executed will be valid everywhere. For choice of law purposes, the disposal of personal property will be governed by the law of the testator's domicile at the time of the testator's death. The disposition of real property will be governed by the law of the situs of the real property. As a result, it is wise for the practitioner to execute every will in accordance with the strictest formalities. Some suggestions are presented in this section. n87

**Before the will is drafted*, conferences with the client/testator should be conducted in private, without the presence of

persons who will be beneficiaries under the will. This will help to avoid accusations of fraud or undue influence after testator's death.

*When the will is drafted, it should be typed without strike-outs, erasures, or changes. If last minute changes are necessary, the client/testator and the witnesses should initial the changes. The pages of the will should be numbered, and fastened securely together. The number of pages should be included in the attestation clause. An attestation clause chould be included, as well as a self-proving affidavit.

**The location* of the will execution ceremony should be a room large enough to hold the testator, the lawyer, three witnesses, and a notary. All persons should be placed so that they can view the entire ceremony and observe each other.

**The witnesses* must be disinterested persons, ideally not even related to any will benficiaries. They must be mentally competent persons. They should be adults, and ideally reliable, stable, permanent residents of the place where the will is executed. Three witnesses will be sufficient for all states, and if only two are required, one can still serve as a supernumerary witness.

**At the time of the will execution ceremony*, all parties (witnesses, testator, notary, attorney) should go into the meeting room. No beneficiaries should be present. The parties should be introduced. The parties should be able to see each other, and to witness activity. The ceremony should take place without interruption and with all parties present at all times -- no one should leave or enter the room. The witnesses should have the opportunity to observe the testator and to assure themselves of testator's mental competence. The attorney should ask the testator to read the will carefully. The attorney may want to send the testator copies of drafts ahead of time, particularly if the will is long or complicated. If the will is short, the attorney may want to read the will (or key provisions of the will) to the testator out loud.

**The attorney should ask the testator the following questions*. The testator should answer "yes" to each question, and both the questions and the answers should be audible to the witnesses. The attorney should orally indicate that the testator is declaring the testator's answers to the questions in the presence of the witnesses, and should name the witnesses.

"Is this document your will?"

"Have you examined it, and do you understand its terms?"

"Does this will accurately express your wishes regarding the dispositon of your property at your death?"

"Do you request that (again attorney should name the witnesses individually) witness your will?"

**The testator should sign the will first*, and should also sign or initial each page in the will, in the margin. The attention of the witnesses should be directed to the testator's activity.

**One of the witnesses should read the attestation clause aloud* (indicating that the formalities have been met) The witnesses should agree, orally or in writing (after the signature of the witness on the will), that the statements made in the attestation clause are accurate. Then the witnesses should sign the will, and write their address next to or underneath their signature. The testator and the other witnesses should watch each witness sign. The attorney may also want to have the witnesses sign or initial each page of the will.

**The testator and the witnesses should then execute a self-proving affidavit*, which will be signed by the testator, witnesses, and a notary.

**The attorney may want to arrange for a videotaped record of the entire execution ceremony*, particularly if a will

contest is anticipated.

**A photographic copy* of the executed will should be made, and clearly marked as a copy. The safekeeping of the original will should be discussed with the client. Prior wills should probably be destroyed.

FOOTNOTES:
(n1)Footnote 35. Section I, Statute of Frauds, 29 Car. II., c. 3, § V (1677) states:

And be it further enacted by the authority aforesaid, That ... all devises and bequests of any lands or tenements, devisable either by force of the statute of wills, or by this statute, or by force of the custom of Kent, or the custom of any borough, or any other particular custom, shall be in writing, and signed by the party so devising the same, or by some other person in his presence and by his express directions, and shall be attested and subscribed in the presence of the said devisor by three or four credible witnesses, or else they shall be utterly void and of none effect...

(n2)Footnote 36. The Wills Act, 7 Will. IV & 1 Vict., c. 26, § IX (1837) states:

And be it further enacted, That no will shall be valid unless it shall be in Writing and Executed in manner hereinafter mentioned; (that is to say,) it shall be signed at the Foot or End thereof by the Testator, or by some other Person in his Presence and by his Direction; and such signature shall be made or acknowledged by the Testator in the Presence of Two or more Witnesses present at the same Time, and such Witnesses shall attest and shall subscribe the Will in the Presence of the Testator, but no Form of Attestation shall be necessary...

(n3)Footnote 37. The first three functions are presented in Gulliver & Tilson, *Classification of Gratuitous Transfers, 51 Yale L.J. 1 (1941).*

(n4)Footnote 38. John Langbein, *Substantial Compliance with the Wills Act, 88 Harv. L. Rev. 489 (1975);* Lon L. Fuller, *Consideration and Form, 41 Colum. L. Rev. 799 (1941). American Heart Association v. County of Greenville, 489 S.E.2d 921 (S.C. 1997)* (a probated will document is the property of the state, not of the legatee).

(n5)Footnote 39. *See* U.P.C. § 2-502(a)(1), 8 U.L.A. 112.

(n6)Footnote 40. *See* James Lindgren, *Abolishing the Attestation Requirement for Wills, 68 N.C. L. Rev. 641 (1990)* (advocating abolishing all requirements except writing and signature); John Langbein, *Excusing Harmless Errors in the Execution of Wills: A Report on Australia's Tranquil Revolution in Probate Law, 87 Colum. L. Rev. 1, 7 (1987).*

(n7)Footnote 41. *See* § 88.04(b) *infra.*

(n8)Footnote 42. *See* § 88.04(c) *infra.*

(n9)Footnote 43. *See* U.P.C. § 2-502(a)(2), 8 U.L.A. 112. *Bank One v. Inkard, 885 S.W.2d 183 (Tex. 1994).*

(n10)Footnote 44. *See* Thomas Edgar Atkinson, The Law of Wills 303 (2d ed. 1953); 2 William H. Page, Page on Wills § 19.57 (3d ed., Bowe-Parker ed. 1960).

(n11)Footnote 45. *See, e.g.,* Ark. Stat. § 28-25-103, Fla. Stat. Ann. § 732.502(1)(a)(1)(2); N.Y. Est. Powers & Trusts Law § 3-2.1(a)(1); 20 Pa. Cons. Stat. Ann. § 2502.

(n12)Footnote 46. *See Lemayne v. Stanley, 3 Lev. 1, 83 Eng. Rep. 545 (1681)* (signature in exordium clause permitted). *See also,* Philip Mechem, *The Rule in Lemayne v. Stanley, 29 Mich. L. Rev. 685 (1931);* Evans, *Incidents of Testamentary Execution, 16 Ky. L.J. 199 (1928). See generally* Annotation, *Wills: When is Will Signed at "End" or "Fort" as Required by Statute, 44 A.L.R. 3d 701 (1972).*

(n13)Footnote 47. *Matter of Fegley's Estate, 589 P.2d 80 (Colo. App. 1978); Potter v. Richardson, 230 S.W.2d 672 (Mo. 1950); McNair's Estate, 38 N.W.2d 449 (S.D. 1949); Thrift Trust Co. v. White, 167 N.E. 141 (Ind. App. 1929); Meads v. Earle, 91 N.E. 916 (Mass. 1910).*

(n14)Footnote 48. *See Clark v. Nat'l Bank of Commerce, 802 S.W.2d 452 (Ark. 1991); In re Powell's Will, 395 N.Y.S.2d 334 (1977); Wilson v. Polete, 218 So. 2d 843 (Miss. 1969); In re Stinson's Estate, 77 A. 807 (Pa. 1910).*

(n15)Footnote 49. *See generally* Annotation, *Fingerprints as Signature, 72 A.L.R. 2d 1267 (1960);* Annotation, *Validity of Will Signed by Testator's Mark, Stamp, or Symbol, or Partial or Abbreviated Signature, 98 A.L.R. 2d 841 (1964). See Mitchell v. Mitchell, 264 S.E.2d 222 (Ga. 1980)* ("X"); *Estate of Morris, 74 Cal. Rptr. 32 (Cal. App. 1969)* (initials); *Estate of Guinane, 213 N.E.2d 30 (Ill. App. 1965)* (nickname, family name); *In re Romaniw's Will, 296 N.Y.S. 925 (1937)* (fingerprint).

(n16)Footnote 50. *See* Restatement of Property 2d, Statutory Note to § 33.1.

(n17)Footnote 51. *See* more on the concept of "presence" in § 88.03(c)(1)(iii) *infra.*

(n18)Footnote 52. U.P.C. § 2-502(a)(2), 8 U.L.A. 112.

(n19)Footnote 53. *See generally In re Keke's Estate, 73 N.E.2d 437 (Ill. 1947); Ziegler v. Brown, 150 So. 608 (Fla. 1933); Brehony v. Brehony, 137 A. 260 (Pa. 1927); In re Mullin's Estate, 42 P. 645 (Cal. 1895);* Annotation, *Validity of Will Signed by Testator with the Assistance of Another, 98 A.L.R. 2d 824 (1964).*

(n20)Footnote 54. *See generally* Thomas Edgar Atkinson, The Law of Wills § 71 (2d ed. 1953); William H. Page, 2 Page on Wills § 19.139 (3d ed. Bowe-Parker, ed., 1960); Note, *The Order of Signing an Execution of Wills, 11 U. Cin. L. Rev. 390 (1937);* Annotation, *Validity of Will as Affected by Fact that Witnesses Signed Before Testator, 91 A.L.R. 2d 737 (1963).*

(n21)Footnote 55. U.P.C. § 2-502(a)(3), 8 U.L.A. 112.

(n22)Footnote 56. *See, e.g.,* N.H. Rev. Stat. § 551.2 (3 witnesses pre-1984 wills); Vt. Stat. Ann. tit. 14 § 5 (3 witnesses); La. Rev. Stat. Ann. § 9:2442, 9:2444 (2 witnesses and notary).

(n23)Footnote 57. The Uniform Probate Code simply provides that any "person generally competent to be a witness" may witness a will. U.P.C. § 2-505(a) (unchanged from pre-1990), 8 U.L.A. 117. *See generally* Verner F. Chaffin, *Execution, Revocation and Revalidation of Wills, 11 Ga. L. Rev. 297 (1977).*

(n24)Footnote 58. *See, e.g.,* Idaho Code § 15-2-505, Tex. Probate Code Ann. § 59 (14 years or older); Utah Code Ann. § 75-2-502. *But see Estate of Dejmal, 289 N.W.2d 813 (Wis. 1980)* (permitting minor to act as witness).

(n25)Footnote 59. England adopted a purging statute in 1752. *See generally* Alvin E. Evans, *The Competency of Testamentary Witnesses, 25 Mich. L. Rev. 238 (1927);* Edward B. Winn, *Interested Parties as Witnesses to Wills, 92 Trusts & Est. 786 (1953).*

(n26)Footnote 60. *See, e.g.,* D.C. Code Ann. § 18-104; IlL. Rev. Stat. ch. 110-1/2, § 4-6(a); Sparhawk v. Sparhawk, Mass (10 Allen) 155 (1865).

(n27)Footnote 61. *See, e.g.,* 1101/2 ILCS 4-3; N.Y. Est. Powers & Trusts Law § 3-3.2.

(n28)Footnote 62. *See King v. Smith, 302 A.2d 144 (N.J. Super. 1973). See infra* at § 88.06(c) for a discussion of republication by codicil.

(n29)Footnote 63. *See Estate of Parsons, 163 Cal. Rptr. 70 (1980). See also Vrooman v. Powers, 24 N.E. 267*

(Ohio St. 1890). See infra at § 88.13(f) for a discussion of disclaimers.

(n30)Footnote 64. *See generally Dorfman v. Allen, 434 N.E.2d 1012 (Mass. 1982)* (upholding constitutional challenge to beneficiary spouse disqualification as witness); *see also Rosenbloom v. Kokofski, 369 N.E.2d 1142 (Mass. 1977); Fearn v. Postlewaite, 88 N.E. 1057 (Ill. 1909); but see Estate of Harrison, 738 P.2d 964 (Okla. Ct. App. 1987); In re Flynn's Will, 329 N.Y.S.2d 249 (1972).*

(n31)Footnote 65. *See generally* Annotation, *Competency of Named Executor as Subscribing Witness to Will, 74 A.L.R. 2d 283 (1960).* Annotation, *Competency as Witness Attesting Will, of Attorney Named Therein as Executor's Attorney, 30 A.L.R. 3d 1361 (1970).*

(n32)Footnote 66. U.P.C. § 2-505(b); 8 U.L.A. 117. The code was the same pre-1990 and explicitly provides that "The signing of a will by an interested witness does not invalidate the will or any provision of it." *Id. See also* the comments to the section.

(n33)Footnote 67. *See* U.P.C. § 2-502(a)(3), 8 U.L.A. 112. The Code requires that the witnesses sign within a reasonable time, but this may be after the testator's death. *But see Estate of Peters, 526 A.2d 1005 (N.J. 1987)* (witnesses attestation improper when signature not done until after testator's death, more than 15 months after will executed). *See also* Note, *The Order of Signing in Execution of Wills, 11 U. Cin. L. Rev. 390 (1993);* Annotation, *Validity of Will as Affected by Fact that Witnesses Signed Before Testator, 91 A.L.R. 2d 737 (1963).*

(n34)Footnote 68. *See, e.g., In re Grant, 936 P.2d 1360 (Kan. 1997)* (will incorrectly executed because respondent photocopied the witnesses' and testator's signatures and superimposed them on the correct lines of the will); *In re McGurrin, 743 P.2d 994 (Idaho App. 1987)* (involving pre-1990 U.P.C. § 2-502). *See also Newton v. Palmour, 266 S.E.2d 208 (Ga. 1980); Estate of Jefferson, 349 S.2d 1032 (Miss. 1977).*

(n35)Footnote 69. *See* Thomas Edgar Atkinson, The Law of Wills § 72 (2d ed. 1953); William H. Page, Page 2 on Wills § 19.119-126 (3d ed., Bowe-Parker, ed. 1960); *see, e.g., Demaris' Estate, 110 P.2d 571 (Or. 1941).*

(n36)Footnote 70. *See, e.g.*, Fla. Stat. Ann. § 732.502(1)(c); Ind. Code Ann. § 29-1-5-3(2); Ky. Rev. Stat. § 394.040; Utah Code Ann. § 75-2-502.

(n37)Footnote 71. *See, e.g.*, 1101/2 ILCS 4-3; Tex. Prob. Code Ann. § 59; *Jackson v. Patton, 952 S.W.2d 404 (Tenn. 1997)* (will challenged on the ground that testatrix did not signify to the witnesses that the document they were signing was her will); *In re Salzman's Estate, 308 N.E.2d 83 (Ill. App. 3d 1974); Parkinson v. Artley, 455 P.2d 310 (Idaho 1969).*

(n38)Footnote 72. U.P.C. § 2-02(a)(3), 8 U.L.A. 112. *See also Estate of McGurrin, 743 P.2d 994 (Idaho Ct. App. 1987)* (telephone "witnessing" invalid); *In re Estate of Cunningham, 487 A.2d 777 (N.J. Super. 1984).*

(n39)Footnote 73. *See, e.g.*, Iowa Code Ann. § 633.279(1); N.Y. Estates, Powers & Trusts Law § 3-2.19a)(4); Rev. Code Wash. Ann. § 11.12.020. *See also Hanel v. Springle, 372 S.W.2d 822 (Ark. 1963); In re Albarino's Will, 256 N.Y.S.2d 762 (1964), aff'd, 256 N.Y.S.2d 784 (A.D. 1965); Howard v. Smith's Estate, 344 P.2d 260 (Okla. 1959); In re Davis' Will, 142 P.2d 143 (Or. 1943).*

(n40)Footnote 74. *See* John Ritchie, Neill H. Alford, Jr., Richard W. Effland & Joel C. Dobris, Decedents Estates and Trusts 281 n. 35 (8th ed. 1993).

(n41)Footnote 75. *See* William M. McGovern, Jr., Sheldon F. Kurtz & Jan Ellen Rein, Wills, Trusts and Estates § 4.3 (1988).

(n42)Footnote 76. *See* Chaffin, *Execution, Revocation and Revalidation of Wills: A Critique of Existing Statutory*

Formalities, 11 Ga. L. Rev. 297 (1977). Young v. Young, 313 N.E.2d 593 (Ill. App. 3d 1974).

(n43)Footnote 77. *See, e.g., Estate of Johnson, 780 P.2d 692 (Okla. 1989); Morris v. Estate of West, 602 S.W.2d 122 (Tex. Civ. App. 1980); In re Politowicz' Estate, 304 A.2d 569 (N.J. Super. 1973).*

(n44)Footnote 78. *See* U.P.C. § 2-504, 8 U.L.A. 115-116. *See also* U.P.C. §§ 3-405, 3-406, 8 U.L.A. 277-278 (on the presumptive effect of the affidavit).

(n45)Footnote 79. *See Estate of Ricketts, 773 P.2d 93 (Wash. App. 1989); Orrell v. Cochran, 685 S.W.2d 461, rev'd, 695 S.W.2d 552 (Tex. App. 1985);* Mann, *Self Proving Affidavits and Formalism in Wills Adjudication, 63 Wash. U. L.Q. 39 (1985). But see In re Alleged Will of Raney, 589 A.2d 1339 (N.J. 1991); Estate of Petty, 608 P.2d 987 (Kan. 1980); Estate of Charry, 359 S.2d 544 (Fla. Ct. App. 1978).*

(n46)Footnote 80. *See* Kossow, *The Uniform Probate Code: One for the Money ..., 61 Georgetown L.J. 1357 (1973);* John Langbein, *Substantial Compliance with the Wills Act, 88 Harv. L. Rev. 489 (1975);* Chaffin, *Execution, Revocation and Revalidation of Wills: A Critique of Existing Statutory Formalities, 11 Ga. L. Rev. 297 (1977);* Gaubatz, *Notes Toward a Truly Modern Wills Act, 31 U. Miami L. Rev. 497 (1977);* Nelson & Stark, *Formalities and Formalism, A Critical Look at the Execution of Wills, 6 Pepperdine L. Rev. 331 (1979);* Stein & Fuerstein, *The Demography of Probate Distribution, 15 U. Balt. L. Rev. 54 (1985);* Langbein, *Excusing Harmless Error in the Execution of Wills: A Report on Australia's Tranquil Revolution in Probate Law, 87 Colum. L. Rev. 1 (1987).*

(n47)Footnote 81. *See* the section on Will Substitutes, § 88.15, *infra.*

(n48)Footnote 82. *Id. See also* James Lindgren, *Abolishing the Attestation Requirement for Wills, 68 N.C. L. Rev. 541, 542-554 (1990).*

(n49)Footnote 83. *See, e.g., In re Mangeri's Estate, 127 Cal. Rptr. 438 (1976); Flagle v. Martinelli, 360 N.E.2d 1269 (Ind. App. 1977).*

(n50)Footnote 84. *See* John Langbein, *Substantial Compliance with the Wills Act, 88 Harv. L. Rev. 489 (1975).*

(n51)Footnote 85. Section 2-503 of the 1990 U.P.C. states:

Writings Intended as Wills, etc.

Although a document or writing added upon a document was not executed in compliance with Section 2-502, the document or writing is treated as if it had been executed in compliance with that section if the proponent of the document or writing establishes by clear and convincing evidence that the decedent intended the document or writing to constitute (i) the decedent's will, (ii) a partial or complete revocation of the will, (iii) an addition to or an alteration of the will, or (iv) a partial or complete revival of his [or her] formerly revoked will or of a formerly revoked portion of the will.

(n52)Footnote 86. *See* James Lindgren, *Abolishing the Attestation Requirement for Wills, 68 N.C. L. Rev. 541 (1990). See also* Lindgren, *The Fall of Formalism, 55 Albany L. Rev. 1009 (1992);* Nelson & Starck, *Formalities and Formalism: A Critical Look at the Execution of Wills, 6 Pepperdine L. Rev. 331 (1979).*

(n53)Footnote 87. These suggestions are drawn from several sources. *See, e.g.,* Gerry Beyer, *The Will Execution Ceremony -- History, Significance, and Strategies, 29 S. Tex. L. Rev. 413 (1988);* Restatement (Second) of Property (Donative Transfers), cmt. (1992); Barton Leach, Cases on Wills 44 (2d ed. 1949); William M. McGovern, Jr., Sheldon F. Kurtz & Jan Ellen Rein, Wills, Estates & Trusts § 4.4 (1988); John Ritchie, Neill H. Alford, Jr., Richard W. Effland & Joel C. Dobris, Decedents Estates and Trusts 230-234 (8th ed. 1993).

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CHAPTER 88 TESTAMENTARY TRANSFERS OF REAL PROPERTY

10-88 Thompson on Real Property, Thomas Editions § 88.04

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§ 88.04 Certain Types of Wills.

[Go To Supp]

§ 88.04(a) Holographic Wills.

§ 88.04(a)(1) Introduction.

Holographic wills, also known as "olographic" wills, are wills written entirely in the handwriting of the testator. The holographic will was recognized in Roman Law and came to the United States from the civil law tradition. Such wills need not be witnessed. n88 Normally witnesses are required in order to prevent forgery, to avoid undue influence or fraud on the testator, and to emphasize the formality and ceremony of a will execution. n89 Nonetheless, the Uniform Probate Code and a majority of jurisdictions in the United States do recognize holographic wills. n90 The policy seems to be that when the will is entirely in the handwriting of the testator, the functions of the witnesses are basically served. Also, many people support the proposition that one should be able to "do it yourself" when writing a will, without outside interference. n91 However, holographic wills can create problems, since they may have inherent ambiguities or may not be properly drafted. Holographic wills, by their very nature, are usually written by individuals without attorney advice.

§ 88.04(a)(2) Uniform Probate Code.

The Uniform Probate Code (UPC) expressly allows holographic wills if the signature and the material portions of the document are in the testator's handwriting. No other formal requirements for holographic wills are listed in the UPC. Thus, jurisdictions following the UPC approach do not require that the entire document be in the testator's handwriting. The testator may use a will form, for example, and simply fill in the material provisions disposing of the property. n92

§ 88.04(a)(3) State Statutes.

Slightly less than half the states do not recognize holographic wills. n93 Of the states that do recognize holographic wills, most adopt the Uniform Probate Code approach and require the signature and the material provisions to be in the handwriting of the testator. n94 Of the remaining jurisdictions, several adopt an older approach and require that the entire document be in the testator's own writing. n95 In these jurisdictions, a will containing some printed portions, such

as a will form, might not be admitted to probate. n96

Some states explicitly require a certain number of witnesses to testify that the handwriting is actually that of the testator. n97 Maryland and New York allow holographic wills only during service in the Armed Forces. n98 Some of the states that do not allow holographic wills nonetheless explicitly recognize the validity of a holographic will which is executed in a jurisdiction that does permit them. n99

§ 88.04(a)(4) Issues Involved with Holographic Wills.

§ 88.04(a)(4)(i) Date.

The Uniform Probate Code does not require holographic wills to be dated. Some states do require a date. n100 The issue arises when more than one will is found and there is a question about which is the most recent, or if there are questions about the decedent's capacity, during periods of the decedent's lifetime, to make a will.

§ 88.04(a)(4)(ii) Intent.

All wills must be made with testamentary intent, which is the intention to dispose of property at death. Many holographic will cases involve questions of intent, where would-be beneficiaries attempt to probate letters or notes. n101 Courts look to the context of the writing and the circumstances as a whole, in order to resolve the question of testamentary intent.

A related problem is the requirement of a signature. While holographic wills must be signed, they do not normally need to be subscribed; the signature can appear anywhere on the document, not just at the end. Courts have sometimes struggled with the issue of whether something is a signature; initials, a name in the body of a document, or a pet name. n102

Holographic wills have taken many colorful forms, such as writings on a wall, a handbag, or articles of clothing. n103

COMPUTER-ASSISTED RESEARCH

LEXIS: intent! or sign! w/30 holographic will!

§ 88.04(b) Nuncupative Wills.

A nuncupative will or testament is a will that is not in writing, and usually exists only when the testator, in a last illness, declares the will orally before witnesses. n104 Such a will is in a separate and distinct class and is subject to different requisites and conditions than written wills. n105

§ 88.04(b)(1) History.

Roman law permitted oral wills for soldiers. This may have been due to the difficulties of writing a will while on the eve of battle, or as a reward for military service, or as legal recognition of the fact that many soldiers could not write. n106 The English common law permitted oral wills for disposition of personal property. n107

In 1676 the English Statute of Frauds was passed requiring most wills to be in writing. The law was concerned with the risk of fraud or perjury in wills. However, the statute permitted oral wills under certain circumstances. A testator could make an oral will if: (1) the estate did not exceed 30 pounds; (2) three witnesses were present; (3) testator made clear that this was a will; and, (4) the testator was in a last illness. Also, the statute provided for a six month cut-off for proof of an oral will, except for such material as was committed to writing within six days of making the will. n108

Many United States jurisdictions as well as the Uniform Probate Code no longer permit nuncupative wills, or limit them to the "soldiers and sailors" situation. n109 Others (about 20) do permit oral wills, and the provisions often reflect the conditions of the English Statute of Frauds.

§ 88.04(b)(2) Modern Requirements.

The majority of United States jurisdictions, as well as the Uniform Probate Code, do not permit oral wills. In the states where they are permitted, such wills must meet certain requirements. These include: testator must be in the last illness, testator must show testamentary intent, a certain number of witnesses may be required, the will may be limited to personal property, the will may need to be reduced to writing within a certain period of time, and may be only admitted to probate for a limited period of time.

§ 88.04(b)(2)(i) Last Illness.

The general rule followed by most authorities is that an oral will can be made only when the testator is in the last illness. n110 The authorities have constructed the meaning of the term "last illness" in a couple of different ways. Under one view "last illness" means that the testator must be *in extremis*. n111 The privilege of leaving a nuncupative will must be exercised as a matter of necessity and not of choice. n112 Under this view, a nuncupative will is not valid where there was no immediate apprehension of death and no inability to reduce the will to writing. n113 For example, *Bellamy v. Peeler*, n114 a nuncupative will was held invalid where it appeared that the testator, after making the will, had the time, opportunity and means at hand to have reduced the will to writing, but failed to do so. A nuncupative will was denied probate where the testator for a long time suffered from pulmonary consumption and lived for 9 days after the alleged nuncupation. However, merely misjudging one's ability to recover, such as where the testator's condition deteriorates to the extent that it is physically impossible for the testator to make a written will, does not render a nuncupative will invalid. n115

Other authorities have not interpreted "last illness" to mean *in extremis*. n116 Under this view the requirement is that an oral will, to be valid, must be made in the last illness of the testator. This requirement is satisfied if the disease of which the testator dies has progressed to such a point that the testator expects death at any time, and because of the expected death and in preparation for death, a nuncupative will is made and death from this illness does, in fact, occur within a short time thereafter. n117 Under this view, a nuncupative will is not rendered invalid by the testator having sufficient time and opportunity, after making oral will, to make a written one.

State statutes that permit oral wills do require a last illness, *in extremis* or imminent peril of death. The statutory approaches vary as to how "imminent" death must be. n118 The English Statute of Frauds also required that the testator make the nuncupative will at home or wherever residence had been established for the previous 10 days or more, unless the testator was taken ill suddenly or by surprise. Some statutes also reflect this requirement. n119

§ 88.04(b)(2)(ii) Testamentary Intent.

Another requisite of nuncupative wills, and all wills in general, is testamentary intent. The general view is that, in order to support a nuncupative will, the testator must be shown to have not only testamentary intent but also intent to make an oral will. The requirements of a nuncupative will are not met, and cannot be established, where a testator dies while attempting to make a formal written will that has not yet been completed. n120 Mere verbal instructions and directions for drawing a written will do not constitute a nuncupative will, although spoken in the presence of witnesses requested to bear witness thereto, and reduced to writing. n121 State statutes usually require the testator to state that a will is being made. n122

§ 88.04(b)(2)(iii) Witnesses.

While the common law did not require a certain number of witnesses, the English Statute of Frauds required three

witnesses and state statutes sometimes incorporate this requirement. n123 Also, state statutes may specifically limit the use of the oral will to personal property, or to a maximum value, or both. n124

§ 88.04(b)(2)(iv) Reduction to Writing.

State statutes may also require that an oral will be reduced to writing by someone, usually a witness, within a certain period of time in order to be effective. The English Statute of Frauds required that this be done within 6 days. n125

§ 88.04(b)(2)(v) Proof.

A nuncupative will must be proved shortly after the testator's death. The rationale is that the longer the time between the testator's death and the proof of the oral will, the greater the probability that the words of the testator will escape the memories of the witnesses. In the English Statute of Frauds, as in most state statutes, this period is 6 months. n126

§ 88.04(b)(2)(vi) Miscellaneous.

A limitation in the use of oral wills exists in respect to the revocation of written wills. Under statutes providing that a will may be revoked by some other will or codicil in writing executed with due formalities, a nuncupative will, although sufficient when standing alone to dispose of an estate, cannot take effect as a revocation of a prior written will. n127 Some states do not permit an oral will to be admitted to probate unless the testator's spouse or other heirs are expressly notified and given the opportunity to contest the will. n128 Since nuncupative wills are not favored by the courts, because of the possibility of fraudulent practices and fabrication of wills, strict compliance with the prescribed requisites of oral wills is a must. n129 These requirements can be more onerous than those of a formal written will and they must be established to entitle the nuncupative will to probate.

COMPUTER-ASSISTED RESEARCH

LEXIS: Nuncupative Will!

Nuncupative Will! w/25 Require!

§ 88.04(c) Videotaped and Audiotaped Wills.

Several commentators have suggested and approved videotaping the execution ceremony of a written will. n130 Such use envisions the supplementing of a written will, not its complete replacement. At the present time, videotapes are used by some practitioners to record the will execution ceremony. Such recordings, however, only supplement the written instrument. A recorded visual and audio image presents a superb record of present reality, and the intent, capacity and state of mind of the testator. It is easy to understand the attraction of this medium and why its application to the probate process might expand. Of course, the problem of signatures of the testator and witnesses as well as other technical requirements of the Probate Code still remain to be resolved for a videotaped will to stand alone.

To date, Indiana is the only state to pass a statute specifically allowing the evidentiary use of a videotape of the execution ceremony, n131 although several states have considered bills dealing with videotapes and probate. n132 The 1989 amendment to the 1985 Indiana statute authorizes the use of videotapes to show the proper will execution, the intention of the testator, the mental state or capacity of the testator, the authenticity of the will, and other matters determined by a court to be relevant to the probate of a will. Although Ohio has not passed a statute dealing with videotaping of the will execution ceremony, the Board of Commissioners on Grievances and Discipline of the Supreme Court of Ohio has stated that the Ohio Code of Professional Responsibility does not prohibit the taping of such a ceremony. n133

Videotape may be used to prove the contents of a will if the testator declares that the provisions of the will reflect the

testator's desires. n134 A videotape of a testator reading the will has the potential to diminish the number of wills that are contested, thus reducing the number of such time-consuming, expensive and sometimes frivolous suits. n135 As one author states, a videotape of the will execution ceremony "is not subject to the vagaries of a witness' fading memory, and it presents a more comprehensive and accurate view of the testator and the testator's condition at the time of the will execution than does piecemeal evidence through witnesses' testimony." n136 Professor Beyer discusses four cases in which the judge looked at a videotaped will execution ceremony to establish capacity or undue influence. n137 Although it appears that there are no state statutes or cases allowing a videotaped will to substitute for a written will, our use of modern technology in all phases of the law continues to expand and the future will likely bring acceptance of the video will as a substitute for the written will. n138 There are two potential ways that a videotape could legally substitute for a written will: (1) expansion of the definition of "writing" to include videotapes, or (2) the finding that a videotape satisfies the main policy reasons behind the writing requirements, the avoidance of fraud and proof of the legitimacy of the document. n139

The California Rules of Evidence have expanded the definition of a writing to include, "handwriting, typewriting, printing, photostating, photographing, and every other means of recording upon any tangible thing any form of communication or representation, including letters, words, pictures, sounds, or symbols, or combinations thereof." n140 Under this expanded definition, the California courts have found a videotape to be a "writing." n141

On the policy side, a will must be in writing to prevent alteration, addition or deletion of the intent of the testator. As a practical matter, a videotape is more difficult to alter, and the visual image of the testator assists in establishing undue influence far more completely than a writing.

Another possible application of videotape technology is in the recording of a living will. Each state has its own requirements for a valid living will and all states require a living will to be in writing. No state statute currently allows a videotaped living will to substitute for a living will even though it may be particularly well adapted to this use in certain cases. n142

Videotape use will continue to expand in every area of the law. Because paratexts (electronically recorded words and images) can record present reality, we can expect prospective beneficiaries to introduce electronically recorded wills to support their challenges to written wills. n143 Courts may soon be dependent on electronically recorded testamentary instruments. n144

A few courts have considered the admissibility of an audiotape as a substitute for a holographic will. In the leading case, *Estate of Reed*, n145 the Wyoming Supreme Court refused to admit a tape recording to probate. The court held that a voice-print could not be considered to be a "writing." One author cites an incident where an audio recording was admitted to probate, but without opposition. n146

COMPUTER-ASSISTED RESEARCH

LEXIS: videotap! or audiotap! w/30 will!

videotap! or audiotap! w/30 will! w/15 eviden!

§ 88.04(d) Statutory Wills.

The term "statutory will" actually encompasses two distinct concepts: (1) a fill-in-the-blank form provided courtesy of the state legislature, and (2) the use of the "incorporation by reference" doctrine to incorporate standard language in a statute into the will. Both types of statutes are used in an effort to make it easier for testators to leave a will, and for will drafters to provide a quick, inexpensive, all-purpose will when necessary. n147

The California Statutory Will is the prototype for the "form will" type of statutory will. n148 The California model has also been adopted in Maine, Michigan, and Wisconsin. n149 The California version provides two will forms, one with a trust and one without. The standard will incorporates definitions and certain other provisions by reference and gives a testator a limited range of choices regarding the distribution of property at death, generally favoring spouses and descendants.

The alternative form of statutory will act is illustrated by the Uniform Statutory Will Act, which uses the doctrine of incorporation by reference to simplify will drafting. It can be used with a simple one-page will, basically incorporating all of the relevant statutory provisions by reference, or selected portions of the statutory will can be incorporated into a more complex scheme. n150 Again, the Uniform Statutory Wills Act contains definitions n151 and has provisions for trusts, n152 if desired. The drafters believe that the design of the Uniform Statutory Wills Act is both simpler and more flexible than the form will device of the California statute. n153 It has been adopted in Massachusetts and New Mexico. n154

Statutory will statutes have not yet been widely adopted. However, the concept is a fairly new one; the California version was adopted in 1983, and the Uniform Statutory Wills Act was approved in 1984. Also, the use of the statutory will still requires execution in accordance with appropriate formalities, such as signature, witnesses, date, etc. n155 Relaxation of execution formalities or the provision of alternative devices (will substitutes) might prove to be even more popular than statutory wills with both legislatures and would-be testators. n156

COMPUTER-ASSISTED RESEARCH

LEXIS: statutory will! or form will!

uniform statutory wills act

§ 88.04(e) Conditional Will/Sham Will.

Some wills are written without genuine intent that the will ever take effect, and others are written in a "just in case" state of mind. Conditional wills and sham wills are really issues of testamentary intent, and not unique types of wills. n157

A sham will is one that is written, but the testator did not mean for it to take effect. It might be written to procure a favor or as a joke. n158 Of course, issues involved in a sham will situation may overlap with issues of *quantum meruit*, agreements to make or not to revoke a will, n159 or testamentary capacity of the decedent. n160 A true sham will situation that would be litigated is relatively rare.

Conditional wills are more common. In some cases a testator may write a will before going into the hospital, before taking a trip, or during an illness. n161 There will be some language in the document indicating that the will is written just in case the testator does not return from the trip, or survive the operation or illness. Such wills are typically holographs written by the testator without legal advice. The testamentary intent aspect of a conditional will comes into play when the testator does not die of the anticipated cause or during the stated time, but dies much later or of a different cause.

Some states do allow conditional wills by statute. n162 If the will is clearly contingent on the happening of the specified event, it will usually not be held to be valid n163 in the absence of the occurrence of that event. However, most courts do admit conditional wills to probate under the delayed circumstances described above. Courts have a constructional preference in favor of validity. Also, there is a preference for testacy rather than intestacy. n164

COMPUTER-ASSISTED RESEARCH

LEXIS: conditional or sham w/2 will! w/30 intent! or valid!

§ 88.04(f) Superwills or Blockbuster Wills.

The debate over acceptance of the "Superwill" or "Blockbuster" will continues to rage. The use of a testamentary document to dispose of non-probate assets is not allowed under current law, although many commentators argue for its adoption. n165 In fact, the Uniform Probate Code specifically provides that a will may not change the beneficiary designation under a POD account or alter the survivorship rights in a multi-party bank account. n166 On the other hand, courts have occasionally given will provisions Superwill-type effects. For example, in *Estate of Lowry*, an Illinois appellate court upheld the testator's purported revocation of an inter-vivos trust in her will. n167 Similarly, a South Dakota court permitted a testamentary revocation of a joint bank account and jointly-held certificates of deposit. n168

Will substitutes, according to Black's Law Dictionary, are documents which accomplish what a will is supposed to accomplish, for example -- trusts, life insurance, joint ownership in real property. n169 Other will substitutes include partnership agreements, government bonds payable to a named person and upon the person's death to a named survivor, joint bank accounts, homestead rights and exemptions, promissory notes given for consideration payable after the maker's death, government savings bonds payable to alternative payees, gifts *causa mortis*, annuity contracts and retirement programs with survivorship provisions. n170

The owner of these will substitutes retains control over them during life and after the owner's death these assets are distributed outside of the probate process n171 without the need for a written will. Will substitutes, since outside the probate process, can be distributed promptly. Quick distribution is an appealing aspect of will substitutes. Also, will substitutes are cheaper and easier to use than most testamentary devices. Joint tenancies and life insurance are the "estate plans" of many people. These can be created, changed, and distributed without the need of an attorney or trips to the probate court.

A Superwill or Blockbuster will allows a testator to dispose of these non-probate assets through a written instrument. With a Superwill, a testator may dispose of testamentary and non-probate assets in one instrument, although such disposition of non-probate assets is not recognized under existing law. n172

Advocates of the Superwill argue that it is a logical progression in the estate planning area. n173 Just as will substitutes have evolved until fully recognized, so will Superwills develop from disfavor to recognition. n174 Second, the Superwill could better effectuate the testator's intent. n175 A testator would have the freedom to make a change in the beneficiaries of will substitutes in one testamentary instrument. For example, the testator could use a Superwill to change the beneficiary designation under an insurance policy or to change the joint tenant(s) of a bank account. The Superwill would be a statement of the testators most recent intent and consequently reflect the principle of the Uniform Probate Code that the testator's intent should always prevail. n176 Third, the Superwill would allow centralization of estate planning. The Superwill could allow the testator to unify all probate and non-probate dispositions in one dispositive source. n177 However, opponents of the use of a Blockbuster will device maintain that the current evolution of non-probate estate planning will cease. n178 The use of non-probate transfers would be made obsolete by the use of Superwills. n179 Some commentators believe use of the Superwill will diminish the popularity of the non-probate disposition of assets, along with the corresponding benefits of reduced expenses and ease of use. A Superwill would interfere with the quick disposition of non-probate assets by financial intermediaries. n180 Since a beneficiary of non-testamentary assets receives these without going through the probate process, they are distributed quickly. The Superwill would expose these assets to the probate process and the advantage of quick distribution would be eroded. With a Superwill, institutions would have to verify disposition of these assets, slowing down the process. Moreover, financial institutions would face potential liability if they distributed assets contrary to a Superwill.

A Superwill might encourage the distribution of assets without proper consideration of estate planning consequences. Finally, any attempt by legislators to allow limited use of the Superwill should address the problem of blind execution

and specificity. That is, a Superwill should only be executed after considering all the estate planning consequences of its provisions, with specific reference to particular probate and non-probate assets disposed of in the will. A Superwill could potentially expose the estate planning practitioner to more liability. Opponents of the Superwill see the added complexities of the Superwill as adding to the practitioner's risk of liability. n181

Before the Superwill can gain wide acceptance, these objections must be considered. For example, the concerns of financial institutions could be dealt with by holding them liable only for those Superwill designations that these institutions have actual notice of. Although requiring the testator to notify these institutions removes some of the testator's flexibility, placing the responsibility for notification on the testator would limit the use of the Superwill so as not to impede non-probate transfers. n182 In summary, although several commentators argue for the limited use of the Superwill, n183 no state statute currently allows the use. Those scholars that advocate some role for the Superwill recommend careful crafting of such statutes to minimize disruption to the probate process and to protect financial institutions, beneficiaries and bona fide purchasers.

COMPUTER-ASSISTED RESEARCH

LEXIS: Superwill! or Blockbuster Will!

FOOTNOTES:

(n1)Footnote 88. *See generally,* George E. Gardner on Wills § 17 (2d ed., Walter T. Dunmore, ed. 1916); William F. McGovern, Sheldon F. Kurtz & Jan Ellen Rein, Wills, Trusts and Estates § 4.5 (1988); Gail Boreman Bird, *Sleight of Handwriting: The Holographic Will in California, 32 Hastings L.J. 605 (1981);* John Langbein, *Substantial Compliance with the Wills Act, 88 Harv. L. Rev. 489 (1975).*

(n2)Footnote 89. These policies have been termed the evidentiary, protective, and ritual functions of will execution. *See* Ashbel G. Gulliver & Catherine J. Tilson, *Classification of Gratuitous Transfers, 51 Yale L.J. 1-10 (1941).*

(n3)Footnote 90. *See* U.P.C. § 2-502(b), 8 U.L.A. 112. The section provides:

A will that does not comply with subsection (a) is valid as a holographic will, whether or not witnessed, if the signature and the material portions of the document are in the testator's handwriting.

Bailey v. Estate of Kerns, 431 S.E.2d 312 (Va. 1993); In re Estate of Wells, 497 N.W.2d 683 (Neb. 1993).

(n4)Footnote 91. *See* Wellman, *Arkansas and the Uniform Probate Code, 2 U. Ark. Little Rock L.J. 1, 15 (1979).*

(n5)Footnote 92. The comments to the U.P.C. 2-502(b) make this point. *See* 8 U.L.A. 113.

(n6)Footnote 93. The states that do not appear to recognize holographic wills are: Alabama, Connecticut, Delaware, Florida, Georgia, Hawaii, Illinois, Indiana, Iowa, Kansas, Massachusetts, Minnesota, Missouri, New Hampshire, New Mexico, Ohio, Oregon, Rhode Island, South Carolina, Vermont, Virginia, Washington, and Wisconsin.

(n7)Footnote 94. States adopting the U.P.C. approach include: Alaska Stat. §§ 13.16.115, 13.16.125; Ariz. Rev. Stat. Ann. §§ 14-2502, 14-2503; Cal. Prob. Code § 6110; Colo. Rev. Stat. §§ 15-11-502, 15-11-503; Idaho Code §§ 15-2-502, 15-2-503; 18-A Me. Rev. Stat. Ann. § 2-503; Mont. Code Ann. § 72-2-303; N.J. Stat. Ann. § 3B-3-3; N.D. Cent. Code § 30.1-08-03; Utah Code Ann. § 75-2-503. Pennsylvania has a unique provision permitting *any* will, handwritten or printed, to be probated without witnesses. 20 Pa. Cons. Stat. Ann. § 2502.

(n8)Footnote 95. *See, e.g.,* Ark. Stat. Ann. § 28-25-104; Ky. Rev. Stat. Ann. § 394.040; La. Civ. Code Ann. art.

1588; Miss. Code Ann. § 91-5-1; Nev. Rev. Stat. § 133.090; 84 Okla. Stat. Ann. § 54; S.D. Code Laws § 29-2-8; Tenn. Code Ann. § 32-1-105; Tex. Prob. Code Ann. § 60; Wyo. Stat. Ann. § 2-6-113.

(n9)Footnote 96. *See, e.g., Matter of Estate of Dobson, 708 P.2d 422 (Wyo. 1985); In re Estate of Johnson, 630 P.2d 1044 (Ariz. 1981)* (refusing probate under U.P.C. provision). Many handwritten wills on will forms have been admitted to probate, however. *See In re Tubert's Estate, 298 S.E.2d 456 (W. Va. 1982); In re Mulkin's Estate, 496 P.2d 605 (Ariz. App. 1972). See generally,* Annotation, *Requirement that Holographic Will, or its Material Provisions, Be Entirely in Testator's Handwriting, as Affected by Appearance of Some Requirement that Holographic Will Be Entirely in Handwriting of Testator as Affected by Appearance of Printed Matter or Handwriting of Another, 37 A.L.R. 4th 528 (1985);* Annotation, *Printed or Written Matter Not in Testator's Handwriting, 89 A.L.R. 2d 1198 (1963).* Courts may ignore the printed parts of the will as "surplusage." *See, e.g., In re Will of Parsons, 128 S.E. 78 (N.C. 1935).*

(n10)Footnote 97. For example, *see* Ark. Stat. Ann. § 28-25-104 (three witnesses); N.C. Gen. Stat. § 31-34 (three witnesses); Tenn. Code Ann. § 32-1-105 (two witnesses).

(n11)Footnote 98. Md. Est. & Trusts Code Ann. § 4-103; N.Y. Est. Powers & Trusts Law § 3-2.2(a)(2).

(n12)Footnote 99. *See, e.g.,* Conn. Gen. Stat. Rev. § 45a-251; Fla. Stat. Ann. § 732.502(2); Iowa Code Ann. § 4-104; Wash. Rev. Code Ann. § 11.20.020(2); Wis. Stat. Ann. § 853-05.

(n13)Footnote 100. California law states that a holographic will without a date must fail against a prior inconsistent will unless it can be shown that the holograph was executed when the testator had testamentary capacity. Cal. Prob. Code § 6111(b)(1). Other statutes specifically mentioning the date include: La. Civ. Code Ann. art. 1588; Mich. Stat. Ann. § 27.5123; Nev. Rev. Stat. § 133.090; S.D. Codified Laws § 29-2-8.

(n14)Footnote 101. In *Blake's Estate v. Benza, 587 P.2d 271 (Ariz. App. 1978),* the court upheld a postscript to a letter as a will: "P.S. you can have my entire estate /s/ Henry J. Black (SAVE THIS)." However, what appear to be notes for a contemplated will are denied probate. *See In re Will of Smith, 528 A.2d 918 (N.J. 1987); Estate of Unruh, 665 P.2d 782 (Mont. 1983).* In North Carolina, the holographic will must be found among the testator's "valuable papers." N.C. Gen. Stat. § 31-3.4.

(n15)Footnote 102. *See Pounds v. Litaker, 71 S.E.2d 39 (N.C. 1952)* (monogram on letterhead not signature); *In re Estate of Fegley, 589 P.2d 80 (Colo. App. 1978)* (written name in beginning of document not a signature); *In re Estate of MacLeod, 254 Cal. Rptr. 156 (1988)* (written name in beginning of document is a signature). *See also* Annotation, *Validity of Will Signed by Testator's Mark, Stamp, or Symbol, or Partial or Abbreviated Signature, 98 A.L.R. 2d 841 (1964).*

(n16)Footnote 103. For example, *see* Million, *Wills: Witty Witless and Wicked, 7 Wayne L. Rev. 335 (1960);* Gest, *Some Jolly Testators, 8 Temple L.Q. 297 (1934);* Jesse Dukeminier & Stanley Johnson, Wills, Trusts and Estates 225 (4th ed. 1990).

(n17)Footnote 104. *See* Gardner on Wills, (2d ed., Walter T. Dunmore, ed. 1916) § 12 (Gardner on Wills).

(n18)Footnote 105. 79 Am. Jur. 2d at 724. Such conditions are discussed below.

(n19)Footnote 106. *See* William M. McGovern, Jr., Sheldon F. Kurtz & Jan Ellen Rein, Wills, Trusts and Estates (1988) § 4.5 (Wills, Trusts and Estates).

(n20)Footnote 107. Gardner on Wills, *supra* note 104, § 13.

(n21)Footnote 108. *Id.* at 45-46.

(n22)Footnote 109. *See, e.g.,* Alaska Stat. § 13.11.158; D.C. Code Ann. § 18-107; Mass. Gen. Laws Ann., ch. 191,

§ 6. The U.P.C. § 2-506, the choice of law section, only applies to written wills, *see* 8 U.L.A. 117.

(n23)Footnote 110. Gardner on Wills, *supra* note 104, § 13 at 47. *See generally,* Annotation, *What Amounts to "Last Sickness" or the Like Within Requirement that Nuncupative Will be Made During Last Sickness, 8 A.L.R. 3d 952 (1966).*

(n24)Footnote 111. "In extremis" would mean that death is thought to be imminent. *Id.*

(n25)Footnote 112. *See, e.g., Scaife v. Emmons, 10 S.E. 1097 (Ga. 1890).*

(n26)Footnote 113. *See, e.g., Jones v. Norton, 10 Tex. 120 (1883).*

(n27)Footnote 114. *23 S.E. 387 (Ga. 1895).*

(n28)Footnote 115. *In Re Wiley's Estate, 40 A. 980 (Pa. 1898).*

(n29)Footnote 116. *See, e.g., Harrington v. Stees, 82 Ill. 50 (1876); Baird v. Baird, 79 P. 163 (Kan. 1905).*

(n30)Footnote 117. *See, e.g.,* Johnston v. Glasscock (Ala. 1841).

(n31)Footnote 118. *See, e.g.,* Ga. Code Ann. § 53-2-47 (in extremis); Ind. Code Ann. § 29-1-5-4(a) (imminent peril of death); Kan. Stat. Ann. § 59-608 (last sickness); Miss. Code § 91-5-15 (last sickness); Mo. Ann. Stat. § 474.340.1 (imminent peril, and death must occur from the imminent peril); S.D. Codified Laws Ann. § 29-2-9(13) (limits nuncupative wills to those in military service in the field *or* on shipboard at sea *and* in actual contemplation fear or peril of death; or in expectation of immediate death from injuries received the same day) (emphasis added).

(n32)Footnote 119. *See* Gardner on Wills, *supra* note 104, § 13 at 45. *See also, e.g.,* Miss. Code Ann. § 91-5-15; Tex. Prob. Code § 65; N.H. Stat. Ann. § 551.16 (usual dwelling except where taken sick away from home and died before returning).

(n33)Footnote 120. Gardner on Wills, *supra* note 104, § 13.

(n34)Footnote 121. *Brown v. State, 151 P. 81 (Wash. 1915).*

(n35)Footnote 122. *See, e.g.,* Ind. Code Ann. § 29-1-5-4(a)(1) (declaration that this is a will); Kan. Stat. Ann. § 59-608 (call upon witnesses to bear testimony that this is a will); Nev. Rev. Stat. § 133.100.1(b) (bid someone present to bear witness that this is a will); N.C. Gen. Stat. § 31-3.5(2) (declaration that this is a will and call upon witnesses to bear witness); Tenn. Code Ann. § 3 2-1-106(a)(1) (declaration that this is a will).

(n36)Footnote 123. *See* Gardner on Wills, *supra* note 104, § 13 at 50. Most states that do specify only require 2 witnesses, *see, e.g.,* Kan. Stat. Ann. § 59-608; Miss. Code § 91-5-15; Nev. Rev. Stat. § 133.100.1(a); N.C. Gen. Stat. § 31-3.5(2); Ohio Rev. Code Ann. § 2107.60. However, at least two states require three witnesses. *See* N.H. Stat. Ann. § 551.16; Tex. Prob. Code § 65.

(n37)Footnote 124. At least two states limit the amount to $1,000 of personal property unless the testator is in active military service during war time, in which case the amount is $10,000. *See* Ind. Code Ann. § 29-1-5-4(b); Tenn. Code Ann. § 32-1-106(b). Other amounts vary: *see, e.g.,* Mo. Stat. Ann. § 474.340.2 (personal property -- $500); Nev. Rev. Stat. § 133.100.2 ($1,000); 84 Okla. Stat. Ann. § 46 ($1,000); Wash. Rev. Code Ann. § 11.12.025 ($1,000 -- personal property). A few states put a low dollar limit on the will unless it is reduced to writing or otherwise meets the statutory requirements. *See, e.g.,* Miss. Code Ann. § 91-5-15 ($100); Tex. Prob. Code § 65 ($30); 14 Vt. Stat. Ann. § 6 ($200).

(n38)Footnote 125. *See* Gardner on Wills, *supra* note 104, § 13. Usually the oral will must be reduced to writing

within 30 days under state statutes. *See, e.g.,* Ga. Code Ann. § 53-2-49; Ind. Code Ann. § 29-1-5-4(a)(2); Kan. Stat. Ann. § 59-608; Mo. Ann. Stat. § 474.340.1(2); S.D. Code Laws 30-6-33; Tenn. Code Ann. § 32-1-1-6. A few states have a much shorter period. *See, e.g.,* N.H. Rev. Stat. Ann. § 551.16 (6 days); N.C. Gen. Stat. § 31-18.3(a) (10 days); 14 Vt. Stat. Ann. § 6 (6 days).

(n39)Footnote 126. *See* Gardner on Wills, *supra* note 104, § 13. State statutes include: Ind. Code Ann. § 29-1-5-4(a)(3); Mo. Ann. Stat. § 474.340.1(3); N.H. Rev. Stat. Ann. § 551.16; Ohio Rev. Code Ann. § 2107.60; S.D. Codified Laws § 30-6-33; Tenn. Code Ann. § 32-1-106(a)(3); 14 Vt. Stat. Ann. § 6.

(n40)Footnote 127. The Statute of Frauds did not allow pure oral revocation. Gardner on Wills, *supra* note 104, § 13. *See also, e.g.,* Ind. Code Ann. § 29-1-5-4(c); Tenn. Code Ann. § 32-1-106(c).

(n41)Footnote 128. *See, e.g.,* Alaska Stat. § 13.11.158(c); N.C. Gen. Stat. § 31-18.3(b)(1); Wash. Rev. Code Ann. § 11.12.025.

(n42)Footnote 129. *See* Wills, Trusts and Estates, § 4.5.

(n43)Footnote 130. *See, e.g.,* Gerry W. Beyer & William R. Buckley, *Videotape and the Probate Process: The Nexus Grows, 42 Okla. L. Rev. 43 (1989);* John A Warnick, *The Ungrateful Living: An Estate Planner's Nightmare-The Trial Attorney's Dream, 24 Land & Water L. Rev. 401, 423-24 (1989);* William R. Buckley, *Indiana's New Videotaped Will Statute: Launching Probate into the 21st Century, 20 Val. U. L. Rev. 83 (1985);* Jodi Granite Nash, *A Videowill: Safe and Sure, 70 A.B.A.J. 87 (Oct. 1984);* Gerry W. Beyer, *Videotaping the Will Execution Ceremony -- Preventing Frustration of the Testator's Final Wishes, 15 St. Mary's L.J. 1 (1983)* (general discussion of videotaping the will execution ceremony).

(n44)Footnote 131. Ind. Code Ann. § 29-1-5 3(d) (amended in 1989, the 1985 version stated that subject to the Indiana Code of Procedure, a videotape may be admissible as evidence of the proper execution of a will).

(n45)Footnote 132. Gerry W. Beyer, *Drafting in Contemplation of Will Contests*, 38 No. *1 Prac. Law 61 (1992).*

(n46)Footnote 133. *Id.* (Requires the testator be told that the videotaping does not replace a written instrument).

(n47)Footnote 134. John A. Warnick, *The Ungrateful Living: An Estate Planner's Nightmare--The Trial Attorney's Dream, 24 Land & Water L. Rev. 401, 423 (1989)* (uses of a videotape in probating a will are limited by the rules of evidence and the imagination of the attorney).

(n48)Footnote 135. William R. Buckley, *Videotaped Wills: More Than a Testator's Curtain Call, 67 Mich. B.J. 266 (1988)* (sparing the beneficiaries the cost and strain of will contests, videotaped wills can be a public relations asset to the legal profession); Gerry W. Beyer, *Drafting in Contemplation of Will Contests,* 38 No. *1 Prac. Law 61 (1992)* (providing very strong evidence, the existence of a videotape may reduce litigation).

(n49)Footnote 136. Gerry W. Beyer, *Drafting in Contemplation of Will Contests*, 38 No. *1 Prac. Law 61, 32 (1992)* (listing the standards for admissibility of a videotape).

(n50)Footnote 137. The cases are: *In re Estate of Seegers, 733 P.2d 418, 421-22 (Okla. Ct. App. 1986)* (showing undue influence with videotape); *In re Will of Stotlar, 1987 WL 6091* (Del. Ch.) *aff'd without opinion, 542 A.2d 358 (Del. 1988)* (testatrix lacked capacity); *Trautwein v. O'Brien, 1989 WL 2149* (Ohio Ct. App.) (videotape was most compelling evidence of testator's incapacity); *In re Estate of Peterson, 439 N.W.2d 516 (Neb. 1989)* (finding testatrix had capacity).

(n51)Footnote 138. *See, e.g.,* William R. Buckley, *Videotaped Wills: More Than a Testator's Curtain Call, 67 Mich. B.J. 266 (1988)* (operating alone as testamentary instruments, videowills await the fashioning of statutes and case

law by lawyers, judges and legislatures, a likely future occurrence); Gerry W. Beyer, *Drafting in Contemplation of Will Contests,* 38 No. *1 Prac. Law. 61 (1992)* (suggesting that use of videotape can aid in fulfilling a person's testamentary intent).

(n52)Footnote 139. Gerry W. Beyer & William R. Buckley, *Videotape and the Probate Process: The Nexus Grows, 42 Okla. L. Rev. 43, 51-55 (1989)* (discussing the obstacles in the way of a videotape will standing alone).

(n53)Footnote 140. Cal. Evid. Code § 250.

(n54)Footnote 141. *See People v. Moran, 114 Cal. Rptr. 413 (Cal. App. 1974)* (interpreting a writing to include a videotape).

(n55)Footnote 142. William R. Buckley, *The Case For The Videotaped Living Will,* 2 Prop. and prob. 30 (1988) (urging that a videotaped living will provides a superior evidentiary supplement to a written living will by allowing terminally ill patients to directly describe their wishes).

(n56)Footnote 143. Ronald K. L. Collins & David N. Skover, *Paratexts, 44 Stan. L. Rev. 509 (1992)* (reviewing the use of electronically recorded sounds and images in the law).

(n57)Footnote 144. *Id.* (predicting Indiana may be the first state to allow videowills).

(n58)Footnote 145. *672 P.2d 829 (Wyo. 1983).* In *Reed,* it was clear that the decedent wanted the recording to be treated as a will. The tape was found in a sealed envelope with a notation that it was to be played only in the event of testator's death. The envelope was signed by the testator.

(n59)Footnote 146. *See* Eugene F. Scoles & Edward c. Halbach, decedents estates & trusts 150 (1993). The case was in 1981 in Alameda County, California.

(n60)Footnote 147. *See generally,* Gerry W. Beyer, *Statutory Will Methodologies -- Incorporated Forms v. Fill-in Forms: Rivalry or Peaceful Coexistence?, 94 Dick. L. Rev. 231 (1990);* Note, *The Statutory Will: A Simple Alternative to Intestacy, 35 Case W. Res. L. Rev. 307 (1984).* The doctrine of incorporation by reference is presented in § 88.06(b) *infra.*

(n61)Footnote 148. Cal. Prob. Code § 56-56.14.

(n62)Footnote 149. Me. Rev. Stat. Ann. tit. 18A, § 2-514; Mich. Comp. Laws Ann. § 700.123a-c; Wis. Stat. Ann. §§ 853.55-.62. Of these states, Maine has the simplest statute, a true fill-in-the-blank form.

(n63)Footnote 150. *See* Uniform Statutory Will Act, Prefatory Note, 8 U.L.A. 390.

(n64)Footnote 151. Uniform Statutory Will Act § 1, 8A U.L.A. 393-4.

(n65)Footnote 152. *Id.,* §§ 6, 8, 13, 8A U.L.A. 397-400, 403-405.

(n66)Footnote 153. *Id.,* Prefatory Note, 8A U.L.A. 390.

(n67)Footnote 154. Mass. Gen. Laws Ann. c. 191B §§ 1-15; N.M. Stat. Ann. §§ 45-2A-1 to 45-2A-17.

(n68)Footnote 155. *See* § 88.03, *supra.*

(n69)Footnote 156. *See* § 88.15, *infra.*

(n70)Footnote 157. *See* § 88.08, *infra,* concerning will contests, grounds, and testamentary intent.

(n71)Footnote 158. *See, e.g., Lister v. Smith, 3 S.W. & Tr. 282, 164 Eng. Rep. 1282 (P. Ct. 1863)* (codicil executed to induce family member to give up house); *Fleming v. Morrison, 72 N.E. 499 (Mass. 1904)* (will made to induce female beneficiary to have sexual relations with testator); *Vickery v. Vickery, 170 So. 745 (Fla. 1936)* (will made for purposes of ceremonial induction into Masonic lodge); Annotation, *Admissibility of extrinsic evidence upon issue of testamentary intent, 21 A.L.R. 2d 319 (1952).*

(n72)Footnote 159. *See* § 88.05, Will Contracts, *infra.*

(n73)Footnote 160. *See* § 88.08(d)(2), Will Contests -- Grounds Testamentary Capacity, *infra.*

(n74)Footnote 161. A classic case is *Eaton v. Brown, 193 U.S. 411 (1904).* Testator was going on a trip and wrote a will on August 31, 1901. She returned safely and died later, in December. *See also, Estate of Taybor, 259 P.2d 1014 (Cal. App. 2d 1953); Mason v. Mason, 268 S.E.2d 67 (W. Va. 1980);* Annotation, *Determination Whether Will is Absolute or Conditional, 1 A.L.R. 3d 1048 (1965).*

(n75)Footnote 162. *See, e.g.,* 84 Okla. Stat. Ann. § 53; S.D. Codified Laws § 30-6-32. "A will the validity of which is made by its own terms conditional, may be denied probate, according to the event with reference to the condition."

(n76)Footnote 163. *See, e.g., In re Pascal's Estate, 152 N.Y.S.2d 185 (1956); Walker v. Hibbard, 215 S.W. 800 (Ky. 1919).*

(n77)Footnote 164. *See generally,* William M. McGovern, Jr., Sheldon F. Kurtz & Jan Ellen Rein, Wills, Trusts & Estates § 7.1 (1988); Gardner on Wills § 18 (Walter T. Dunmore, ed., 2d ed. 1916).

(n78)Footnote 165. Roberta Rosenthal Kwall & Anthony J. Aiello, *The Superwill Debate: Opening the Pandora's Box?, 62 Temp. L. Rev. 277 (1989);* Mark L. Kaufman, *Should the Dead Hand Tighten Its Grasp: An Analysis of the Superwill, 1988 U. Ill. L. Rev. 1019 (1988);* Michael D. Carrico, *Uniform "Superwill" Legislation Project,* Winter 1986 Prob. & Prob. 45; Debra Lynch Dubovich, *The Blockbuster Will: Effectuating the Testator's Intent, 21 Val. U. L. Rev. 719 (1981). See also* Note, *The Blockbuster Will: Effectuating the Testator's Intent to Change Will Substitute Beneficiaries, 21 Val. U. L. Rev. 719 (1987).*

(n79)Footnote 166. U.P.C. § 6-213(b).

(n80)Footnote 167. *418 N.E.2d 10 (Ill. App. 3d 1981).*

(n81)Footnote 168. *In re Estate of Bol, 429 N.W.2d 467 (S.D. 1988). See also Burkett v. Mott, 733 P.2d 673 (Ariz. App. 1986); Connecticut Gen. Life Ins. Co. v. Peterson, 442 F. Supp. 533 (W.D. Mo. 1978)* (life insurance beneficiary changed in a will). *Contra Callk v. Equitable Life Ins. Soc., 428 N.E.2d 110 (Ind. App. 1981); In re Estate of Kovalyshyn, 33 A.2d 852 (N.J. Super. 1975); Stone v. Stephens, 99 N.E.2d 766 (Ohio St. 1951).*

(n82)Footnote 169. Black's Law Dictionary 1601 (6th ed. 1990).

(n83)Footnote 170. William Koseph Bowe & Douglas H. Parker, Page on The Law of Wills § 6.1 at 219 (1960).

(n84)Footnote 171. *See* Debra Lynch Dubovich, *The Blockbuster Will: Effectuating the Testator's Intent, 21 Val. U. L. Rev. 719, 721 (1981)* (detailed treatment of joint survivorship bank accounts and life insurance policies).

(n85)Footnote 172. Roberta Rosenthal Kwall & Anthony J. Aiello, *The Superwill Debate: Opening the Pandora's Box?, 62 Temp. L. Rev. 277 (1989);* Mark L. Kaufman, *Should the Dead Hand Tighten Its Grip: An Analysis of the Superwill, 1988 U. Ill. L. Rev. 1019 (1988).*

(n86)Footnote 173. *See* Michael D. Carrico, *Uniform "Superwill" Legislation Project,* Winter 1986 Prob. & Prob. 45; Mark L. Kaufman, *Should the Dead Hand Tighten Its Grasp: An Analysis of the Superwill, 1988 U. Ill. L. Rev. 1019*

(1988); Debra Lynch Dubovich, *The Blockbuster Will: Effectuating the Testator's Intent, 21 Val. U. L. Rev. 739 (1981).*

(n87)Footnote 174. *See* Debra Lynch Dubovich, *The Blockbuster Will: Effectuating the Testator's Intent, 21 Val. U. L. Rev. 735-738 (1981).*

(n88)Footnote 175. *See* Mark L. Kaufman, *Should the Dead Hand Tighten Its Grasp: An Analysis of the Superwill, 1988 U. Ill. L. Rev. 1019 (1988).*

(n89)Footnote 176. *See* Debra Lynch Dubovich, *The Blockbuster Will: Effectuating the Testator's Intent, 21 Val. U. L Rev. 739 (1981).*

(n90)Footnote 177. *See* Mark L. Kaufman, *Should the Dead Hand Tighten Its Grasp: An Analysis of the Superwill, 1988 U. Ill. L. Rev. 1026 (1988).*

(n91)Footnote 178. *See* Debra Lynch Dubovich, *The Blockbuster Will: Effectuating the Testator's Intent, 21 Val. U. L. Rev. 1027 (1981).*

(n92)Footnote 179. *Id.* at 743.

(n93)Footnote 180. *Id.* at 735.

(n94)Footnote 181. Mark L. Kaufman, *Should the Dead Hand Tighten Its Grasp: An Analysis of the Superwill, 1988 U. Ill. L. Rev. 1029-34 (1988).*

(n95)Footnote 182. *Id. at 1031.*

(n96)Footnote 183. *See, e.g.,* Roberta Rosenthal Kwall & Anthony J. Aiello, *The Superwill Debate: Opening the Pandora's Box?, 62 Temp. L. Rev. 277 (1989);* Mark L. Kaufman, *Should the Dead Hand Tighten Its Grasp: An Analysis of the Superwill, 1988 U. Ill. L. Rev. 1019 (1988);* Debra Lynch Dubovich, *The Blockbuster Will: Effectuating the Testator's Intent, 21 Val. U.L. Rev. 719 (1981).*

Thompson on Real Property, Thomas Editions

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CHAPTER 88 TESTAMENTARY TRANSFERS OF REAL PROPERTY

10-88 Thompson on Real Property, Thomas Editions § 88.05

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§ 88.05 Will Contracts.

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§ 88.05(a) Introductory Comments.

While "will contracts" have historically been permitted in the law, n184 the very notion raises some inherent problems. Wills are, by their nature, "ambulatory" documents. Wills are capable of being revoked and revised up until the time of death, since a will is not effective until the death of the testator. A contract, on the other hand, is not usually subject to unilateral modification and revocation. Also, contract remedies are separate and distinct from wills remedies. Finally, this section notes that, while contractual wills are sometimes used, the use is frequently criticized.

The law of contracts and the law of wills predictably and inevitably collide in cases involving contracts to make a will, joint and mutual wills, and contracts not to revoke a will. Judicial efforts to reconcile the conflicting principles "have provided both fascinating friction and instructive results." n185 Often the problem is manifested when a court attempts to achieve a just result by ignoring the principle of the revocability of wills in preference to that of contractual rights. A Missouri court expressly addressed this concern in *Owens v. Savage*. n186

"A miscegenation of the law of contracts and the law of wills occurs when courts state that wills are irrevocable." n187

"It is dealing with the 'hybrid' relationship resulting from combining the elements of contracts and wills, that confusion was created and remains." n188

Atkinson offers instruction in the doctrinal conflict: "Our law has no separate concept of 'will made in pursuance of contract'; we must treat the will part as a will and the contract part as a contract." Wills made pursuant to a contract, Atkinson continues, "are revocable although there has been an agreement not to revoke. The matter of the contractual aspect does not properly arise upon probate, but only when the agreement is sought to be established as a claim against the estate or in a proceeding against the successors of the decedent." n189 Another expert also provides a clear statement of the will/contract doctrinal problem: "A contract is never 'revocable' or subject to unilateral rescission, and in this respect a contract to make a joint will is no different from any other contract ... the wills are always revocable, and that the contract is never revocable but may be rescinded provided both, not just one, of the parties so agree." n190

§ 88.05(a)(1) Proof of Contract.

The immediate hurdle confronting litigants in contractual wills cases is proving the existence of a contract. Cases involving contracts to devise realty to elderly persons n191 and cases of joint and mutual wills usually require the strict "clear and convincing" standard of proof; n192 will contracts are not "favored children of the law." n193 Contracts to make a will often involve informal agreements between relatives or close friends; such relationships often lead the parties to discount the need for a writing evidencing their testamentary agreements. Courts, however, must work within the strictures of the law. The Statute of Frauds, for example, generally precludes courts from enforcing oral contracts involving conveyances of land, and many such statutes make *any* oral will contracts unenforceable. n194 This point is discussed below, in more detail. Another basic requirement that a plaintiff must establish to show the existence of a will contract is consideration. n195

§ 88.05(a)(2) Remedy.

While either legal or equitable relief is available in will contracts cases, most reported cases involved equitable remedies. n196 In cases involving a devise of real property, specific performance would seem to be an appropriate remedy due to the presumptive uniqueness of land. n197 However, because no will is irrevocable and the time for performance is at the death of the devisor, the prospective devisee could have to wait years for rights to be established in court. Such rules hobble courts attempting to fashion remedies in cases where the would-be testator breaches during her lifetime, and the contract rights of the promisee also are less clear in such cases. An additional obstruction to providing satisfactory relief to the injured party is presented when the potential devisor conveys to an innocent third party. In such cases, the non-breacher is unlikely to obtain adequate relief since courts will not enforce a will contract at the expense of "superior equities." n198 Another oft-utilized equitable remedy is the imposition of a constructive trust on the property in favor of the promisee. n199 Moreover, some courts have employed declaratory judgment to delineate the promisee's future rights to an action for damages or specific performance when the will-maker dies. Such declaratory relief presumably serves as notice to all would-be purchasers or donees of the land. n200 In cases where a contract to make a will cannot be proved, relief in quantum meruit for services rendered may be the appropriate remedy. n201

§ 88.05(a)(3) Critique.

Criticism of contractual wills, particularly joint and mutual wills, is widespread. n202 Heightened risk of litigation, and its accompanying delay and uncertainty in estate administration and distribution, is one criticism. Others include inflexibility of the testamentary plan and undesirable federal tax consequences. Will contracts are, of course, designed to reduce flexibility. However, as discussed herein, the use of such contracts is fraught with difficulties.

The tax disadvantages of joint and mutual wills can be disastrous. "Federal courts have repeatedly held that the contractual obligation imposed upon the surviving spouse converts what would otherwise have been a bequest or devise in fee simple to the surviving spouse into a mere life estate, a terminable interest which does not qualify for the marital deduction in the estate of the first spouse to die. One need not be too astute to recognize that because the federal estate tax has a graduated tax structure ranging from 3 to 77 percent, it is vitally important to preserve the marital deduction in the estate of the first spouse to die so as to avoid unnecessary tax liability." n203 In place of contractual wills, inter-vivos and testamentary trusts have received the endorsement of the authorities. "Professional management of the trust assets by a bank trust department to protect the surviving spouse from profligate spending and ingenuous unawareness of the predatory schemers can be gained, with the preservation of the marital deduction provision of the [Internal Revenue] Code." n204 Another source states: "It is hard to conceive of any objective of a [will] contract which could not be better accomplished by a trust." n205 The objectives include security, flexibility, and control.

§ 88.05(b) Contracts to Make a Will.

A contract to make a will might be more descriptively and instructively called an agreement to make a *provision* in one's will for a particular person. In practice, contracts to make a will frequently involve an agreement to devise or bequeath real and/or personal property in exchange for personal services, quite often in the context of elderly persons contracting to devise property in exchange for the services of caregivers. n206 Another frequent use of the contract to make a will is an agreement, often oral and informal, to leave property to a relative. Most common, however, are promises to benefit a third party, as where A promises B that she will leave property to B's relatives. n207

One issue that is frequently addressed in a contract to make a will is the Statute of Frauds problem. Some states require that all contracts to make a will be in writing. n208 On the other hand, the will itself may satisfy the writing requirement. n209

The Uniform Probate Code addresses the issue of proof of contractual wills, in § 2-514, which states:

A contract to make a will or devise, or not to revoke a will or devise, or to die intestate, if executed after the effective date of this Act, can be established only by (1) provisions of a will stating material portions of the contract; (2) an express reference in a will to a contract and extrinsic evidence proving the terms of the contract; or (3) a writing signed by the decedent evidencing the contract. The execution of a joint will or mutual wills does not create a presumption of a contract not to revoke the will or wills. n210

At least 24 states have passed statutes either exactly like or modeled after the Uniform Probate Code. n211 Thus, a strictly oral contract to make a will would not be enforceable under the Uniform Probate Code. On the other hand, the will itself may suffice as a writing.

Most courts will permit the doctrine of part performance to take a contract to make a will out of the Statute of Frauds. The elements of part performance are: (1) proof of the terms of the contract, (2) part performance by one party, and (3) *either* that the performance refer to the existence of the contract n212 *or* that the failure to enforce the contract would lead to unjust enrichment. n213 It is sometimes indicated in the cases that Uniform Probate Code provisions are also intended to "tighten up" this area of enforcement of will contracts as well. n214

COMPUTER-ASSISTED RESEARCH

LEXIS: contract! or agree! w/10 will! w/10 provi!

§ 88.05(c) Joint and Mutual Wills.

Although Lord Mansfield declared in 1775 that "there cannot be a joint will," n215 the term has nonetheless become a fixture in Anglo-American law and legal literature. This is not to say that Lord Mansfield's statement is incorrect: a will is by its nature a one-party instrument, and it is impossible for a will, even when jointly executed by two persons, to operate like a deed executed by joint grantors. n216 Despite this, however, the concept of joint and mutual wills has flourished, and the preponderance of modern authority is that joint and mutual wills are valid if properly drafted (although Louisiana, it must be noted, has declared joint wills void by statute). n217

"A 'joint will' is one where the same instrument is executed as the will of two or more persons and disposes of property owned by them, either jointly or separately." n218 The joint will is then the will of each person, and is probated at each person's death. Mutual wills are separate wills of two or more persons which are similar or reciprocal in their provisions. The mutual wills are two different wills, but the terms are identical, or mirror reflections in terms of disposition. Mutual wills are more common than true joint wills. n219 Joint and mutual will is a term used to describe wills with identical or similar terms as a contract to leave property as provided in the wills. n220

Joint and mutual wills typically are employed in coordinating the disposition of property by members of the same

family. Most often husband and wife, but also other relatives often ask their attorneys for wills that contain more or less reciprocal provisions. n221

In cases of joint and mutual wills, some courts apparently believe that the mere fact that testators have executed mutual wills with knowledge of the contents of each other's documents meets the requirements of a contract. Some courts even hold that joint wills, particularly if they are joint and mutual, were necessarily made pursuant to a contract. n222 The majority of American jurisdictions, however, hold that the mere execution of a joint will is insufficient to prove that a prior contract not to revoke exists. n223

On the other hand, a separate contract to make mutual wills would be upheld n224 or an irrevocability provision in a joint will could be sufficient to show the existence of a contract. n225

COMPUTER-ASSISTED RESEARCH

LEXIS: joint or mutual w/2 will!

§ 88.05(d) Contracts Not to Revoke.

The joint and mutual wills that engender litigation invariably involve a "contract" not to revoke the will. Usually such a contract is the alleged impetus for the execution of joint or mutual wills. The existence or non-existence of the contract not to revoke often is the crucial question in cases involving joint and mutual wills. As one commentator dryly stated, "[a]nalytical difficulties arise when a joint will or mutual wills are accompanied by a contract not to revoke." n226 A typical joint and mutual will, accompanied by a contract not to revoke, consists of reciprocal provisions for a gift over in fee or as a life estate to the survivor, and an agreement that the survivor dispose of the survivor's estate according to the contract.

Assuming the contract is enforceable, many other issues may arise. For example, may the surviving spouse under a joint and mutual will make gifts or sell property during the surviving spouse's lifetime? n227 Does the contract apply to property acquired after the death of one of the contracting parties? n228 Does the contract operate to defeat the forced heirship claims of a new spouse? n229 Does a beneficiary of a joint and mutual will contract have to survive both contracting parties in order to take under the will. n230 These and other questions evidence that joint and mutual wills are typically a bad idea.

COMPUTER-ASSISTED RESEARCH

LEXIS: joint or mutual w/2 will! w/30 contract! w/5 revoc! or revoke!

FOOTNOTES:

(n1)Footnote 184. *See* Bertel M. Sparks, Contracts to Make Wills 1-22 (1956); Gardner on Wills § 19 (2d ed., Walter T. Dunmore, ed. 1916).

(n2)Footnote 185. *See* Note, *Will Contracts for Personal Services and Real Property During the Lifetime of the Aging Devisor: Resolving the Continuing Dilemma,* 11 Prob. L.J. 57 (1992).

(n3)Footnote 186. *518 S.W.2d 192 (Mo. App. 1974).*

(n4)Footnote 187. *Id. at 200-01.*

(n5)Footnote 188. Mowrer, *Joint and Mutual Wills -- Effect of Contract Not to Revoke, 41 Mo. L. Rev. 127 (1976).*

(n6)Footnote 189. Thomas Edgar Atkinson, The Law of Wills, § 49 (2d ed. 1953).

(n7)Footnote 190. Bertel M. Sparks, *Operation of Joint Wills in Texas, 31 Tex. B.J. 277, 314 (1968).*

(n8)Footnote 191. Note, *Will Contracts for Personal Services and Real Property During the Lifetime of the Aging Devisor: Resolving the Continuing Dilemma,* 11 Prob. L.J. 57, 60 (1992).

(n9)Footnote 192. Note, *Contracts Not to Revoke Joint or Mutual Wills, 15 Wm. & Mary L. Rev. 144, 147 (1973);* William M. McGovern, Sheldon F. Kurtz & Jan Ellen Rein, Wills, Trusts and Estates § 9.5 (1988).

(n10)Footnote 193. Note, *Joint or Mutual Wills, 61 Harv. L. Rev. 675, 679 (1948).*

(n11)Footnote 194. Note, *Will Contracts for Personal Services and Real Property During the Lifetime of the Aging Devisor: Resolving the Continuing Dilemma,* 11 Prob. L.J. 57, 66 (1992).

(n12)Footnote 195. *See* William M. McGovern, Jr., Sheldon F. Kurtz & Jan Ellen Rein, Wills, Trusts and Estates § 9.5 (1988); Gardner on Wills § 19 (2d ed., Walter T. Dunsmore, ed. 1919).

(n13)Footnote 196. Note, *Joint and Mutual Wills--Effect of Contract Not to Revoke, 41 Mo. L. Rev. 127, 129 (1976).*

(n14)Footnote 197. John D. Calamari & joseph m. Perillo, the law of contracts 662-63 (3d ed. 1987).

(n15)Footnote 198. Note, *Will Contracts for Personal Services and Real Property During the Lifetime of the Aging Devisor: Resolving the Continuing Dilemma,* 11 Prob. L.J. 57, 58-61 (1992).

(n16)Footnote 199. Note, *Contracts Not to Revoke Joint or Mutual Wills, 15 Wm. & Mary L. Rev. 144, 171 (1973). See also* George P. Costigan, *Constructive Trusts Based on Promises Made to Secure Bequests, Devises or Intestate Succession, 28 Harv. L. Rev. 237 (1915).*

(n17)Footnote 200. Note, *Will Contracts for Personal Services and Real Property During the Lifetime of the Aging Devisor: Resolving the Continuing Dilemma,* 11 Prob. L.J. 57, 69-70 (1992).

(n18)Footnote 201. *See, e.g., Estate of Zent, 459 N.W.2d 795 (S.D. 1990); Green v. Richmond, 337 N.E.2d 691 (Mass. 1975).*

(n19)Footnote 202. *See, e.g.,* Comment, *The Contractual Will: Invitation to Litigation and Excess Taxation, 48 Tex. L. Rev. 909 (1970).* In fact, some authors indicate that a will should include a provision that it is not executed pursuant to a contract. *See, e.g.,* Thomas L. Shaffer & carol ann mooney, the planning and drafting of wills and trusts 220 (1991).

(n20)Footnote 203. Dewey, *Contractual Wills: Misplaced Marital Loyalties: Ensuing Litigation: Increased Federal Estate Taxes, 8 Akron L. Rev. 81 (1974).*

(n21)Footnote 204. *Id. at 96.*

(n22)Footnote 205. William M. McGovern, Jr., Sheldon F. Kurtz & Jan Ellen Rein, Wills, Trusts and Estates § 9.5 (1988).

(n23)Footnote 206. *See, e.g., Story v. Hargrave, 369 S.E.2d 669 (Va. 1988).*

(n24)Footnote 207. William M. McGovern, Sheldon F. Kurtz & Jan Ellen Rein, Wills, Trusts and Estates § 9.5 (1988). *Kretzer v. Brukaker, 660 N.E.2d 446 (Ohio 1996); Montgomery v. Browder, 930 S.W.2d 772 (Tex. App. 1996).*

(n25)Footnote 208. Also, wills involving the disposition of real estate may fall under the Statute of Frauds

provision requiring contracts for the sale of land to be in writing. *See* Bertram M. Sparks, Contracts to Make Wills 41-43 (1956). *See also,* Eugene F. Scoles & Edward C. Halbach, Decedent's Estates and Trusts 218-19 (5th ed. 1993). Of course, in cases where the contract is not enforceable, quantum meruit may be the appropriate remedy. *See, e.g., Hastoupis v. Gargao, 398 N.E.2d 745 (Mass. App. Ct. 1980).*

(n26)Footnote 209. *See, e.g., In re Buruk's Estate, 241 A.2d 755 (Pa. 1968); Olive v. Biggs, 173 S.E.2d 301 (N.C. 1970).*

(n27)Footnote 210. U.P.C. § 2-514, 8 U.L.A. 124 (The pre-1990 version was numbered § 2-701).

(n28)Footnote 211. For a list of Uniform Probate Code states, *see* § 88.01(d), n.10, *supra.*

(n29)Footnote 212. *See, e.g., Todd v. Cartwright, 684 S.W.2d 154 (Tex. 1984); In re Layton's Estate, 323 N.W.2d 817 (Neb. 1982); Musselman v. Mitchell, 611 P.2d 675 (Or. App. 1980).*

(n30)Footnote 213. *See, e.g., Crail v. Blakely, 106 Cal. Rptr. 187 (1973); Porporats v. Devincenzi, 68 Cal. Rptr. 210 (Cal. App. 1968).*

(n31)Footnote 214. *See, e.g., Rieck v. Rieck, 724 P.2d 674 (Colo. App. 1986); Matter of Estate of Moore, 669 P.2d 609 (Ariz. App. 1983). See also,* similar to U.P.C. provision, but pre-dates *U.P.C., Silianoff v. Silianoff, 339 So. 2d 462 (Fla. App. 1981). But see In re Estate of Robaugh, 380 N.W.2d 152 (Minn. App. 1986); Taylor v. Johnson, 677 S.W.2d 680 (Tex. App. 1984)* (both suggesting otherwise).

(n32)Footnote 215. *Darlington v. Pulteney, 1 Cowp. 260, 268, 98 Eng. Rep. 1075, 1079 (1775).*

(n33)Footnote 216. Bertel M. Sparks, *Operation of Joint and Mutual Wills in Texas, 31 Tex. B.J. 277 (1968).*

(n34)Footnote 217. La. Civ. Code Ann. art. 1572.

(n35)Footnote 218. Some examples of joint wills are found in: *Kitchen v. Estate of Blue, 498 N.E.2d 754 (Ind. App. 1986); Estate of Chayaka, 176 N.W.2d 561 (Wis. 2d 1970); Rubenstein v. Mueller, 278 N.Y.S.2d 845 (1967).*

(n36)Footnote 219. William M. McGovern, Jr., Sheldon F. Kurtz & Jan Ellen Rein, Wills Trusts and Estates § 9.5 (1988). Examples of mutual wills are found in *Junot v. Estate of Gilliam, 759 S.W.2d 654 (Tenn. 1988); Todd v. Cartwright, 684 S.W.2d 154 (Tex. App. 1984).*

(n37)Footnote 220. *See Rauch v. Rauch, 445 N.E.2d 77 (Ill. App. 1983)* (mutuality refers to contract aspect).

(n38)Footnote 221. *See* Eugene F. Scoles & Edward C. Halbach, Jr., Decedent's Estates and Trusts 221 (5th ed. 1993). The authors point out that husbands and wives usually use a joint and mutual will when they have no children and have agreed to leave their property to other relatives and when they both have children from previous marriages and want to protect their children's inheritance. On this subject, *see* Michael K. Davis, *Till Death Do Us Part: Antenuptial Agreements Concerning Wills and Estates,* 8 Prob. L.J. 301 (1988). *See also* John R. Price, Contemporary Estate Planning § 4.5 (1983).

(n39)Footnote 222. *See, e.g., Kitchen v. Estate of Blue, 498 N.E.2d 41 (Ind. App. 1986); In re Estate of Chayka, 162 N.W.2d 632 (Wis. 1968); Frazier v. Patterson, 90 N.E. 216 (Ill. 1909).*

(n40)Footnote 223. *See, e.g., Estate of Kester, 383 A.2d 914 (Pa. 1978); Estate of Randall v. McKebben, 191 N.W.2d 693 (Iowa 1971); Crain v. Mitchell, 479 S.W.2d 956 (Tex. Civ. App. 1972).* The Uniform Probate Code provides that a joint will does not give rise to a presumption not to revoke. *See* U.P.C. § 2-514, 8 U.L.A. 124.

(n41)Footnote 224. *McKinnon v. Baker, 370 N.W.2d 492 (Neb. 1985).*

(n42)Footnote 225. *In re Estate of Rowland, 504 So. 2d 543 (Fla. 1987).* As noted earlier, the litigation and tax risks associated with joint and mutual wills make their use inadvisable for most testators.

(n43)Footnote 226. Note, *Contracts Not to Revoke Joint or Mutual Wills, 15 Wm. & Mary L. Rev. 144 (1973).*

(n44)Footnote 227. *See, e.g., Quandee v. Shine, 321 N.W.2d 91 (N.D. 1982)* (gift); *Duran v. Komyatte, 490 N.E.2d 388 (Ind. App. 1986)* (transfer to joint tenancy); *Ray v. Rider, 650 F. Supp. 578 (ED. Tex. 1986)* (revocable trust) (all transfers were upheld). *But see, e.g., Schwatz v. Horn, 338 N.Y.S.2d 613 (1972); Flohr v. Walker, 520 P.2d 833 (Wyo. 1974);* Estate of Chayka, 176 N.W.3d 561 (Wis. 2d 1970).

(n45)Footnote 228. *See, e.g., In re Estate of Wiggins, 360 N.Y.S.2d 129 (1974), aff'd on opinion below, 385 N.Y.S.2d 287 (1976)* (surviving wife had tripled her inheritance from husband, but contract applied to all).

(n46)Footnote 229. *See Estate of Beerenk, 241 A.2d 755 (Pa. 1968); Rubenstein v. Mueller, 225 N.E.2d 540 (N.Y. 2d 1967)* (refusing to protect second spouse). *But see Shimp v. Huff, 556 A.2d 252 (Md. 1989); Patecky v. Friend, 350 P.2d 170 (Or. 1960).*

(n47)Footnote 230. This is a lapse problem, *see* the discussion of lapse, *infra* at § 88.11(a)(1). *See also Jones v. Jones, 692 S.W.2d 406 (Mo. App. 1986), Fiew v. Qualtrough, 624 S.W.2d 335 (Tex. Civ. App. 1981)* (beneficiary needs to survive one party); *In re Estate of Arends, 311 N.W.2d 686 (Iowa 1981)* (beneficiary only has rights when contract breached or all contracting parties are dead).

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CHAPTER 88 TESTAMENTARY TRANSFERS OF REAL PROPERTY

10-88 Thompson on Real Property, Thomas Editions § 88.06

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§ 88.06 Will Construction -- Will Components.

[Go To Supp]

The will is presumptively a conclusive document purporting to contain all necessary papers and information to legally express a testator's true intent. Realistically, this presumption is too simplistic as it may be necessary to understand and consider an array of external circumstances which may serve as interpretation tools when dissecting the will's construction and intent. Discussed below are four distinct will component doctrines: integration, republication by codicil, incorporation by reference, and acts of independent significance. Each doctrine serves a unique function within the law of wills. Each is a construction principle involving parts of wills.

§ 88.06(a) Integration of Wills.

The doctrine of integration contributes to will construction by allowing several sheets of paper to be compiled and executed together in composing a single will. The requisite necessities include: (1) the testator's intent that each sheet contribute to the will, and (2) each sheet must be present at the time of execution. n231 Papers added after execution may not be integrated into the will. Integration may be easily proven by physically attaching the individual sheets together or by a consistent flow of language from one page to the next. n232 The doctrine of integration is almost a simple, common sense rule. Unless there is a reason to think that there is a problem, the will should be admitted to probate. Although traditionally it was preferred that the testator sign each page of the will, the integration doctrine permits a single testator's signature appearing upon the last page of the document. n233

Recently, the doctrine of integration was examined by the Delaware Supreme Court while addressing the issue of a testator's integrated signature. In *Carter*, a lawyer prepared the testator's will consisting of four pages of substantive provisions and an additional fifth page serving as a self-proving affidavit. The five pages were stapled together and forwarded to the testator with instructions for proper execution. The testator mistakenly executed the will by signing only the affidavit in lieu of the will itself. The mistake was repeated on an additional codicil to the will. When admission of the will to probate was appealed, a question arose concerning the improperly executed self-proving affidavit. n234 The Delaware Supreme Court held that the doctrine of integration allowed separate writings to be merged together, thereby creating a single instrument. The court urged the importance of the existence of both writings at the time of execution and the testator's intent that each compose his will. Because the testator's affidavits contained

his signature and were attached to the actual will at all times, the Delaware statutory requirement insisting upon the testator's signature was met. The will and codicil were therefore held valid.

In contrast, an Indiana appellate court restricted the broad application of the integration doctrine to preprinted form wills. n235 In *Keener*, the testator's will consisted of four sheets of paper stapled together. The first two pages contained a preprinted form will and affidavit which were properly signed, witnessed and notarized. The final two pages contained the devisee list which was signed by the testator on the last page. The issue on appeal was whether the devisee list was properly integrated with the preprinted form will and affidavit. n236 The court explained that the integration doctrine allows the compilation of several extraneous documents to create a single will instrument. The appellant argued proper integration existed between the form will and devisee list because they were physically attached and contained a continuous flow of language. The court disagreed and held the will void. Integration failed to occur, and absent proper incorporation by reference, n237 the list was not honored as part of the will since the State of Indiana had not yet adopted the integration doctrine.

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LEXIS: integration w/15 will! w/5 execut!

§ 88.06(b) Doctrine of Incorporation by Reference.

The doctrine of incorporation by reference is somewhat related to the doctrine of integration, but serves a different function. Incorporation by reference enables an extraneous document to be incorporated into the will by reference, for a specified purpose, without requiring the presence of the document at will execution. At common law, four requirements must be met in order to validate the incorporation by reference in an effort to prevent fraud. First, the will itself must refer to the document to be incorporated; second, the will must contain a reasonable description of the document; third, the document must be in existence at the time the will is executed; and fourth, the testator must evidence an intent to incorporate the document into the will. n238 Proof that the referenced document was in existence at the time of will execution is required in an effort to mandate a testator's compliance with appropriate will statutes, thereby limiting the freedom to change one's will through future documents. If the will makes reference to an unprepared future document, the incorporation will be invalid. n239 In addition, a passing or ambiguous reference in the will does not meet the doctrinal requirements. n240

Although most states recognize the doctrine of incorporating by reference either by statute or case law, a few states reject the doctrine. n241

Many states, and the Uniform Probate Code, have statutory provisions codifying the doctrine of incorporation. Section 2-510 of the Uniform Probate Code states: "Any writing in existence when a will is executed may be incorporated by reference if the language of the will manifests this intent and describes the writing sufficiently to permit its identification." n242 Several states have adopted the Uniform Probate Code definition, or one similar to it, in their relevant state statutes. n243 Other states have added sections which further expand upon the Uniform Probate Code. n244

A related provision of the Uniform Probate Code is § 2-513. It provides:

Whether or not the provisions relating to holographic wills apply, a will may refer to a written statement or list to dispose of items of tangible personal property not otherwise specifically disposed of by the will, other than money. To be admissible under this section as evidence of the intended disposition, the writing must be signed by the testator and must describe the items and the devisees with reasonable certainty. The writing may be referred to as one to be in existence at the time of the testator's death; it may be prepared before or after the execution of the will; it may be altered by the testator after its preparation; and it may be writing that has no significance apart from its effect on the

dispositions made by the will. n245

This provision allows a testator to use a document outside of the will to dispose of personal property, other than money. The document may be prepared or revised *after* the will is executed; it need not be in existence at the time the will is executed. The document must be signed by the testator. The items listed must be described with reasonable certainty, but the comments indicate that phrases such as "all the tangible personal property other than money in my office" would suffice. That is, an inventory or itemized list is not required. n246 It is important to note that such a statement or list may only be used if the will refers to it. The list would be ineffective if the will did not address the issue. Additionally, the list or statement disposing of personal property, other than money, can only affect property not otherwise specifically disposed of in the will. However, the drafters' comments to § 2-513 provide the following sample will clause:

I might leave a written statement or list disposing of items of tangible personal property. If I do and if my written statement or list is found and is identified as such by my Personal Representative no later than 30 days after the probate of this will, then my written statement or list is to be given effect to the extent authorized by law and is to take precedence over any contrary devise or devises of the same item or items of property in this will.

Such a clause would effectively permit a testator to change a will disposition through an unattested list or written statement. The change of disposition is permissible since the will clause suggested above makes any gift in the will contingent on *not* being inconsistent with the written statement or list. If there is an inconsistency, the will does not dispose of the property.

It is important to note that the doctrine of incorporation by reference is often mentioned in connection with pour-over trusts. n247 If an existing inter vivos trust is in existence at the time of will execution, the testator may incorporate the trust terms into the will, thereby "pouring over" part of the estate into the trust at death. n248 Again, the doctrinal requirements must be met by properly identifying the trust within the will and expressly stating the intention to incorporate the existing trust into the will. This obviously works best with non-revokable and non-amendable trusts as the provisions contained therein at the time of will execution cannot be changed over time. Amendable trusts can present difficulties as revisions may be made after the trust was incorporated into the executed will. n249 Two additional legal questions involving the incorporation doctrine deserve mention. They are: (1) whether a holographic will can incorporate other documents that are not in the testator's own handwriting n250 and, (2) whether an improperly executed (and thus invalid) will may be incorporated by reference into a valid codicil.

On the holographic will issue, the cases appear to be split. n251 The difference may be somewhat theoretical. All cases involve the question of whether the incorporated materials become a physical part of the will. n252 In the case of a holographic will, if the addition is a physical part of the will, but is not handwritten, it should not be admitted to probate. Alternatively, if the incorporated material is simply made part of the "scheme of disposition," it should be a valid addition to probate. As to second issue, most courts do allow incorporation by the codicil. n253 One hornbook even calls republication by codicil a type of incorporation by reference. n254 Finally, it should be noted that the republication by codicil doctrine, discussed in the next section, does intersect with the incorporation by reference doctrine. For example, in *Simon v. Grayson*, n255 a leading incorporation by reference case, these two doctrines were combined in order to accomplish the testator's wishes. The testator executed a will dated March 25, 1932, and a codicil dated November 25, 1933. The testator died in 1935. The will referred the executors to a letter located in the testator's safety deposit box. The letter contained directions for the payment of money to certain persons. The letter was dated July 3, 1933, after the will but before the codicil. The California Supreme Court used both doctrines to permit the executors to follow the directions in the letter. The codicil republished the will on November 25, 1933 and thus the letter became a document in existence, referred to in the will, and intended by the testator to be incorporated into his will.

A Michigan appellate court addressed the issue of whether a codicil can serve as the effective will when the original

will has been misplaced. n256 The testator executed a will in October 1980, which granted petitioner one-half of the residual estate. A later codicil republished the will and expressly reconfirmed the October will with a minor modification. Upon testator's death, the original October will could not be located, but a copy was found along with the original codicil. Despite the traditional presumption that a lost will has been destroyed by the testator in an effort to revoke, the Michigan appellate court held that the codicil expressly incorporated by reference the provisions of the original October 1980 will, and thereby served as a valid and independent testamentary instrument. The court allowed admission of both the codicil and will copy to probate.

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LEXIS: Incorporat! w/2 reference w/15 will!

incorporat! w/15 holographic will!

incorporat! w/2 reference w/15 codicil

§ 88.06(c) Doctrine of Republication by Codicil.

The doctrine of republication by codicil allows a previous will to be revived or restated by the subsequent execution of a codicil. The codicil, which is a supplement to the will, updates the will and may even save a defectively executed will when combined with the incorporation by reference doctrine. n257 A codicil can revive a revoked will through operation of the republication doctrine. n258 If a testator revokes a will and then subsequently executes a codicil to that will, the will is republished. The doctrine can also be used to validate prior invalid codicils. n259 The doctrine of republication by codicil relies heavily upon the testator's intent to republish. This intention may be established by a reference within the codicil to a prior will and may be further endorsed by a physical attachment to the prior instrument. Additionally, when revalidating or modifying a prior will through republication by codicil, the date of the codicil becomes the effective date of the will, unless such is contrary to testator's intent. n260 Republication can come up in a variety of contexts. The Georgia Supreme Court decided a case involving the Georgia mortmain statute as it applied to charitable devises established within ninety days of a testator's death. n261 The will in question was originally executed more than ninety days before the testator's death. However, the will was republished by a later codicil granting the testator's widow a life estate with the remainder to a charitable trust. Interestingly, the republication occurred sixty-seven days before the testator's death. The codicil identified the will and stated the testator's intent to republish. The court held that a will republished by codicil becomes effective as of the codicil date, unless the testator intended otherwise. Therefore, the will in question fell well within the 90-day time limit of the mortmain statute.

Another important aspect of the doctrine of republication by codicil was examined in a Connecticut Supreme Court case which addressed the issue of intent. n262 In *Rosenfeld*, the testatrix's original will bequeathed a specific number of shares of stock in eight separate corporations to each of her eight grandchildren. After formal execution of the will, the corporate structures changed, thereby increasing the amount of stock owned by testatrix. The will was later republished by codicil in an effort to modify an unrelated provision, but otherwise made no mention of the additional shares of stock. The issue presented to the court was whether the grandchildren should receive the additional shares of stock, or receive the exact number bequeathed in the will. The court found no clear intention within the codicil to limit the grandchildrens' shares. By looking at the will, it was evident the testatrix intended each grandchild to obtain full ownership interest in one of the eight corporations, since each was granted all of the stock representing ownership in one corporation. Additionally, an anti-ademption clause specifically requested the grandchildren receive full value of any stock divested by the testator prior to her death, further indicating an intent that additional stock should pass to the grandchildren. n263

As an historical note, the doctrine of republication has its roots in the English common law. The Statute of Wills (1540), was construed so that real property acquired after the execution of the will did not pass under the will. n264 A codicil

could republish and update the will, and would permit land acquired after the original execution to pass under the will. The English law was subsequently revised to allow testators to dispose of all real and personal property owned at death. n265

COMPUTER-ASSISTED RESEARCH

LEXIS: republication or republish! w/2 codicial w/15 will!

§ 88.06(d) The Doctrine of Acts of Independent Significance.

This doctrine is also known as the "facts of independent significance" doctrine, or the "facts of non-testamentary significance" doctrine. The name is quite descriptive. Testators sometimes refer to people or to things in their wills in such a way that courts must go outside the will to determine who or what is intended. For example, a bequest "to those persons who work for me at the time of my death," n266 would be acceptable, or a gift of the contents of a desk or a drawer might be permitted. n267 Other typical examples include such things as "the automobile that I own at the time of my death," "my spouse, if I am married at the time of my death," or "all of the jewelry that I own at my death."

It is important that the acts have independent (non-testamentary) value and motive. The act or fact may be one affecting testator, beneficiary, third person, or any combination thereof, and may occur before or after execution of the will. For example, the testator may make reference within the will to the execution or revocation of a third person's will. n268 A third person's will, already in existence at the time of the testator's will execution, may also be incorporated by reference, assuming all incorporation requirements are met and this occurs within a jurisdiction recognizing the incorporation doctrine. n269

It should also be noted that reference to acts of independent significance may also be applicable to the pour-over trust in jurisdictions that fail to recognize the doctrine of incorporation by reference. The establishment of an inter-vivos trust is an act with independent significance as it is not usually intended to perform a testamentary purpose. n270

Section 2-512 of the Uniform Probate Code codifies the doctrine:

A will may dispose of property by reference to acts and events which have significance apart from their effect upon the dispositions made by the will, whether they occur before or after the execution of the will or before or after the testator's death. The execution or revocation of a will of another is such an event. n271

Several states, including Alabama, California, Colorado, Hawaii, Idaho, Maine, Montana, New Jersey, South Carolina, and Utah have directly incorporated the Uniform Probate Code provision into their relevant statutes. n272

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LEXIS: act! or fact! w/3 signigicance w/2 independent or non-testamentary w/30 will!

FOOTNOTES:

(n1)Footnote 231. *See, e.g., Cold v. Webb, 295 S.W. 1035 (Ky. 1927); Estate of Beale, 113 N.W.2d 380 (Wis. 2d 1962).*

(n2)Footnote 232. *See, e.g., Seiter's Estate, 108 A. 614 (Pa. 1919).*

(n3)Footnote 233. *See* Melville M. Bigelow, The Law of Wills 44 (1898).

(n4)Footnote 234. *See Matter of Will of Carter, 565 A.2d 933 (Del. 1989).*

(n5)Footnote 235. *See Keener v. Archibald, 533 N.E.2d 1268 (Ind. App. 1989).*

(n6)Footnote 236. *Id. at 1269.*

(n7)Footnote 237. *See* § 88.06(b), *infra.*

(n8)Footnote 238. *See, e.g., Wagner v. Clauson, 78 N.E.2d 203 (Ill. 1948). See generally,* Evans, *Nontestamentary Acts and Incorporation by Reference, 16 U. Chi. L.Rev. 635 (1949);* Annotation, *Validity of Will Written on Disconnected Sheets, 38 A.L.R. 2d 477 (1954).*

(n9)Footnote 239. Some courts take the "in existence" requirement quite literally. In *Kellom v. Beverstock, 126 A.2d 127 (N.H. 1956),* the court refused to incorporate a document, even though it was in existence when the will was executed, because the will did not refer to the document as being in existence.

(n10)Footnote 240. *See In re Young's Estate. 55 P. 1011, 1012 (Cal. 1899)* (description must be clear, explicit and unambiguous). *But see Clark v. Greenhalge, 528 N.E.2d 949 (Mass. 1991)* (notebook described only as a "memorandum" in a will was properly incorporated).

(n11)Footnote 241. For example, Connecticut rejected the doctrine in *Hathaway v. Smith, 65 A. 1058 (Conn. 1907). See also Bryan's Appeal, 58 A. 748 (Conn. 1904).* The doctrine is also rejected in New York and Louisiana.

(n12)Footnote 242. U.P.C. § 2-510, 8 U.L.A. 121.

(n13)Footnote 243. *See, e.g.,* Ala. Code § 43-8-139; Cal. Prob. Code § 6130; Colo. Rev. Stat. § 15-11-510; Haw. Rev. Stat. § 560:2-510; Idaho Code § 15-2-510; Me. Rev. Stat. Ann. tit. 18, § 2-510; Mont. Code Ann. § 72-2-311; N.J. Stat. Ann. § 3B:3-10; S.C. Code Ann. § 62-2-509; Utah Code Ann. § 75-2-510. *Lewis v. Suntrust Bank, 698 So. 2d 1276 (Fla. Dist. Ct. App. 1997)* (§ 732.512(1) of the Florida probate code mandates that the testator's intention to incorporate an existing document into a will be clearly manifested in the will).

(n14)Footnote 244. Arkansas added three sections including valid holographic references, admissible evidence of intended disposition, and characteristics of the incorporated writing. The latter includes writings prepared before or after the execution of the will and allows alterations. Ark. Code Ann. § 28-25-107. Florida also added a section permitting the disposition of property by referencing facts or events of independent significance. Fla. Stat. Ann. § 732.511. Washington merely added a simple sentence explaining that the will controls over any inconsistency between an incorporated writing and will. Wash. Rev. Code Ann. § 11.12.255. And lastly, Ohio has created an original definition which follows the general doctrinal requirements for incorporation, but speaks specifically of existing documents, books, records, or memorandum and their proper disposition and probate requirements. Ohio Rev. Code Ann. § 2107.05.

(n15)Footnote 245. U.P.C. § 2-513, 8 U.L.A. 123.

(n16)Footnote 246. U.P.C. § 2-513 cmts., 8 U.L.A. 123.

(n17)Footnote 247. *See* Robert J. Lynn, *Problems with Pour-Over Wills, 47 Ohio St. L.J. 47 (1986).*

(n18)Footnote 248. *See id. at 50.*

(n19)Footnote 249. *Id.* The subject of pour-over wills is discussed in more detail at § 88.15(e), *infra.*

(n20)Footnote 250. For a discussion of holographic wills, *see* § 88.04(a), *infra.*

(n21)Footnote 251. *See, e.g., Johnson v. Johnson, 279 P.2d 928 (Okla. 1954); In re Foxworth's Estate, 50 Cal. Rptr. 237 (1966); Estate of Plumel, 90 P.2d 192 (Cal. 1907)* (all allowing incorporation); *contra Hewes v. Hewes, 71 So. 4 (Miss. 1916).*

(n22)Footnote 252. *See* Eugene F. Scoles & Edward c. Halbach, Jr., Decedent's Estates and Trusts 164 (5th ed. 1993).

(n23)Footnote 253. *See Allen v. Maddock, 11 Moore P.C. 427, 14 Eng. Rep. 757 (1858).*

(n24)Footnote 254. William McGovern, Jr., Sheldon F. Kurtz & Jan Ellen Rein, Wills, Trusts and Estates § 6.3 (1988).

(n25)Footnote 255. *102 P.2d 1081 (Cal. 2d 1940).*

(n26)Footnote 256. *See In re Estate of Smith, 378 N.W.2d 555 (Mich. App. 1985).*

(n27)Footnote 257. Discussed at 88.06(b), *supra. In re Estate of Foxley, 568 N.W.2d 912 (Neb. Ct. App. 1997)* (a codicil refers to the original will. By placing the holographic entries on a photocopy of her will, the testatrix made an incorporation by reference).

(n28)Footnote 258. *See, e.g., Estate of Stormont, 517 N.E.2d 259 (Ohio App. 3d 1986);* Note, *Revival of Revoked Wills, 19 Wyo. L.J. 223 (1965).*

(n29)Footnote 259. However, the codicils must not be inconsistent and the republishing codicil must show intent to include the codicils as well as the will itself. *See, e.g., In re Johnson Trust, 225 A.2d 571 (Pa. 1969); Estate of Erbach, 164 N.W.2d 238 (Wis. 2d 1969).*

(n30)Footnote 260. *See Citizens & Southern Nat'l Bank v. Martin, 260 S.E.2d 901 (Ga. 1979).*

(n31)Footnote 261. *See* the discussion of mortmain statutes in § 88.12(d)(1), *infra.*

(n32)Footnote 262. *See Rosenfeld v. Frank, 546 A.2d 236 (Conn. 1988).*

(n33)Footnote 263. *See* the discussion of ademption at § 88.11(b)(1), *infra.*

(n34)Footnote 264. *See Brett v. Rigden, 1 Plow. 340, 75 Eng. Rep. 516 (1568);* 2 Frederick Pollock & Frederick William Maitland, History of English Law 315 (2d ed. 1898).

(n35)Footnote 265. *See* Gardner on Wills, §§ 90-92 (2d ed., Walter T. Dunmore, ed. West, 1916); Melville M. Bigelow, The Law of Wills 145 (1898).

(n36)Footnote 266. *See, e.g., Dennis v. Holsapple, 47 N.E. 631 (Ind. 1897); Reinheimer's Estate, 108 A. 412 (Pa. 1919).*

(n37)Footnote 267. *Creamer v. Harris, 106 N.E. 269 (Ohio St. 1906).*

(n38)Footnote 268. This was the case in *First Nat'l Bank v. Klein, 234 So. 2d 42 (Ala. 1970),* where the testator left part of the estate to the residuary legatees of testator's son under his will.

(n39)Footnote 269. *See* the discussion of the incorporation doctrine, § 88.06(b), *supra.*

(n40)Footnote 270. *See* the discussion of pour-over trusts, § 88.15(e), *infra.*

(n41)Footnote 271. U.P.C. § 2-512, 8 U.L.A. 123.

(n42)Footnote 272. Ala. Code § 43-8-141; Cal. Prob. Code § 6131; Colo. Rev. Stat. § 15-11-512; Haw. Rev. Stat. § 560:2-512; Idaho Code § 15-2-512; Me. Rev. Stat. Ann. tit. 18, § 3B:3-12; Mont. Code Ann. § 72-2-313; N.J. Stat. Ann. § 3B:3-12; S.C. Code Ann. § 62-2-511; Utah Code Ann. § 75-2-512.

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CHAPTER 88 TESTAMENTARY TRANSFERS OF REAL PROPERTY

10-88 Thompson on Real Property, Thomas Editions § 88.07

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§ 88.07 Will Construction and Reformation.

Va. Code 37.1-137.1

§ 88.07(a) Introduction.

One of the basic rules of will construction is that a will should be construed in such a manner that it gives effect to the intention of the testator. n273 In conjunction with this principle, it is generally held that the testamentary instrument should be construed in its entirety, and as a whole document. Some courts will also state the facts and circumstances of the testator's situation and the overall distributional plan should be considered as well. n274 The area of mistake creates a dilemma for the courts. The proposition that a will is subject to change, by a court, without the actual testimony of the testator is contrary to the philosophy of formal will execution. The formalities of a will execution ceremony are designed (at least in part) to protect the testator from later fraud, and to ensure that the testator is making a considered decision in the allocation of assets at death. n275 Also, second guessing testator decisions places a substantial burden on the court system. On the other hand, facts and circumstances sometimes clearly indicate that the testator's actual intent will be thwarted for some reason, if the literal language of the will document is given effect. The general rule is that courts will *not* rewrite a will to fix a testator's mistake, and that extrinsic evidence will *not* be admitted to establish testator's actual intent. Both rules are subject to some exceptions, discussed in the following sections.

The "no reformation" rule and the "no extrinsic evidence" rule have been under attack for many years. The no reformation rule is also referred to as the "plain meaning" rule. If the meaning of the will is plain on its face, no revision will be considered. The rules have been characterized as unrealistic and unnecessarily rigid. As Wigmore has noted, all language is subject to interpretation based on context and circumstances. The meaning of any document can only be some individual's meaning. n276 Other authorities have pointed to the law affecting inter-vivos transfers to criticize the rules. n277 Evidence of intent and surrounding circumstances are frequently admitted to aid in the construction or reformation of inter-vivos trusts or gifts.

§ 88.07(b) Mistake.

§ 88.07(b)(1) Mistaken Descriptions.

One of the most common errors alleged in an otherwise clear will is that the testator did not correctly identify a

beneficiary or items of property. For example, there are several cases regarding charitable bequests, where the designated benficiary is clearly identified in the will, but the circumstances tend to show that the testator intended another charity. n278 Sometimes a testator will leave property to a named individual, but there is evidence that the testator actually meant to name a different individual. n279

In these cases, courts will usually refuse to grant relief, even if the evidence shows that the mistake is the result of a scrivener's error or an attorney error. n280 One exception is the "personal usage" doctrine. In these cases, would-be beneficiaries are permitted to produce evidence that the testator habitually referred to them by an unusual, personal, or pet name. n281 For example, a husband might call his wife "mother," or family members might call a youngest child "baby." Another exception is the ambiguity rule, discussed below. In general, if the courts find that the description constitutes a latent ambiguity, then extrinsic evidence will be admitted to construe it.

§ 88.07(b)(2) Mistake of Fact -- Mistake in the Inducement.

Testators may be mistaken as to the legal effect of their use of words. For example, a gift to "heirs" was held to be a good gift to the testator's aunt as the legal heir, when the facts tended to show that the testator actually wanted the property to go to several cousins. n282 Another example of a mistake of fact is the testator's belief that a would-be beneficiary is dead, when in fact the person is still alive. n283 Again, courts will usually disregard the testator's mistaken belief. The usual problem for a court in a case like this is the uncertainty about what alternative disposition the testator would have made if the testator had known the truth. A limited exception may exist if the mistake of fact is recited on the face of the will, and the alternative disposition is described. n284 For example, a will might recite: "I leave property to my children in equal shares. One-half to Alice and one-half to Bob, since Charlie is dead." It might be implied that the shares should be distributed equally in thirds if Charlie is alive.

The mistaken belief about the death of a child is addressed in the Uniform Probate Code, and in some non-UPC states. The provision treats a child mistakenly believed to be dead as an omitted after-born child. The omitted child may share in the estate. n285 The protection of children from disinheritance is discussed elsewhere in this chapter.

Other than the omission situations discussed above, courts are generally unwilling to add gifts when a beneficiary appears to have been left out by accident, even if the omission is the result of an attorney error.

COMPUTER-ASSISTED RESEARCH

LEXIS: mistake! w/3 fact! w/15 will! w/15 construct! or reform!

§ 88.07(c) Ambiguity.

One major exception to the "no-reformation" rule and the "no extrinsic evidence" rule is the admissibility of extrinsic evidence to clear up an ambiguity in a will. Most jurisdictions draw a distinction between "latent" and "patent" ambiguities; evidence is admissible to construe a latent ambiguity, but a patent ambiguity just makes the gift void. n286 A latent ambiguity is said to be one that is not apparent from the instrument itself, it is not indicated on the face of the document. For example, a gift to nieces and nephews is a clear gift. However, if the testator had only one niece by blood, but several nieces and nephews by marriage, the question becomes whether the testator intended to include all of the nieces and nephews. n287 Sometimes latent ambiguities are found when the testator has devised property that the testator does not own, or when the name of the beneficiary is wrong. In the former case, the would-be beneficiary will have a stronger claim if the testator indicates that the property belongs to the testator. n288 For example, a gift of property located at 222 Center Street is ambiguous if the testator does not own property at that address. Perhaps the testator holds title to 333 Center Street. The named recipient of the Center Street property will have a stronger case if the will indicated that the testator thought that the Center Street property was the testator's property by making a gift of "my" property on Center Street, or "the property that I own" on Center Street.

A patent ambiguity is one that is obvious from a reading of the will. For example, testator might leave a blank: "$5000 to _____," or "_____ to Alice." Or, the will might make an incomplete disposition. Extrinsic evidence will not be admitted to clarify the testator's intent in the case of a patent ambiguity. n289 A minority of courts will admit extrinsic evidence to clear up an ambiguity when the disposition of testator's estate is incomplete, and will result in a partial intestacy if the gap is not filled. In general wills law, there is a constructional preference for testacy. n290 This type of problem in wills law is also sometimes described as an omission. n291

Courts may elect to construe a patent ambiguity without reference to extrinsic evidence, or may use extrinsic evidence to find that the ambiguity is latent, although it would appear to be patent. n292 In the modern trend, the distinction between latent and patent is criticized as an artificial distinction, which is easily manipulated. Some courts have abolished the distinction for puposes of will analysis. n293

COMPUTER-ASSISTED RESEARCH

LEXIS: patent or latent w/5 ambigu! w/15 will! w/15 construct! or reform!

§ 88.07(c)(1) Equivocation.

Another type of ambiguity is the *equivocation*. The words of the will might describe two persons (or, less often, things) with equal accuracy. For example, testator may leave property to "my nephew, John Jones." Testator has two nephews named John Jones. Extrinsic evidence is admissible to clear up this type of ambiguity. n294

COMPUTER-ASSISTED RESEARCH

LEXIS: equivocation w/15 will!

§ 88.07(d) Extrinsic Evidence.

As previously indicated, extrinsic evidence (evidence outside of the will document) will not be admitted to change the terms of testator's will on the grounds of mistake. n295 However, evidence is admissible to clarify an ambiguity. The reason for this rule is primarily the Statute of Wills and the policies behind it. The will itself is the best evidence of testator's intent, since the formalities of execution should help the testator to avoid fraud as well as inadvertent error. Also, the no extrinsic evidence rule is related to the parol evidence rule for contract construction. Oral evidence is generally not admissible to construe a written contract, since the contract itself is the best evidence of the agreement of the parties. n296 Courts are more willing to admit evidence of circumstances surrounding the testator, rather than direct declaration of intent purportedly made by testator. n297 Circumstances are more capable of objective proof than testator declaration, and are less susceptible to fraudulent misrepresentation. Circumstantial evidence is more reliable for purposes of will interpretation. Usually the standard of evidence required to make a change on the face of the will is fairly compelling. A clear and convincing evidence standard may be applied. n298

Other evidentiary rules may effect the admissibility of extrinsic evidence. The Dead Man's Act may prohibit testimony regarding conversations with the decedent if perceived to be contrary to decedent's interest. The hearsay rule might prohibit third party repetition of statements made by the testator after the execution of the will. (Pre-execution statements could fall under a state of mind exception.) Also, attorney-client privilege might bar an attorney from testifying about conversations with the client if the testimony could damage the clients interest, even after the client's death. n299

COMPUTER-ASSISTED RESEARCH

LEXIS: extrinsic evidence w/5 admi! w/15 will!

§ 88.07(e) Remedies.

It is generally held that courts will not re-write a testator's will. Courts will occasionally add terms under the guise of "construction." One variation of this technique is the willingness of courts to strike out erroneous portions of descriptions of persons or property. This doctrine is sometimes referred to by the Latin phrase, *falsa demonstratio non nocet* (meaning "mere erroneous description does not vitiate"). n300 For example, suppose a testator left property to "my cousins, Charles and Charlene." Evidence tended to show that the testator meant to include all cousins, and forgot to name Colin in the will. The court could accomplish the testator's wishes by striking the words "Charles and Charlene." All three cousins could take the property. The willingness of courts to delete, but not to add words has been criticized as rigid and artificial. n301 The effect of a deletion is often similar to that of an addition. Also, there does not seem to be a strong policy reason to change a will in one way (deletion) and not in another (addition)

Some courts have disregarded the no reformation rule and have actually changed the terms of a will. In a Hawaii case, the state supreme court changed the word "oldest" to "youngest," in order to correct a mistake in a will. n302 The New York Court of Appeals permitted a beneficiary name change in a will where the parties had executed mutual wills, but each executed the will of the other by mistake. n303 The California and Michigan Supreme Courts have also engaged in a substantive revision of testator's will. n304 New Jersey broke new ground in this area with the decision in *Engle v. Siegel*. n305 The New Jersey Supreme Court reformed a will to conform to testator's "probable intent." Although the will did not so provide, the court imputed an intent to the testator to benefit the families of husband (testator) and wife equally.

A constructive trust is also available as a remedy to a mistake in a will, if the mistake was induced by fraud. n306 For example, a constructive trust might be imposed if the benficiary told the testator that Alice was dead, knowing that Alice was alive and that the testator favored Alice. Or, the testator made a testamentary gift to Alex, upon the fraudulent representation that Alex would give the property to Betty. Before a constructive trust can be imposed, the facts must be proved by clear and convincing evidence.

Other will doctrines can be used to remedy "mistakes." For example, a court may remedy a failure to include an individual in a distribution scheme by finding that the testator was under an insane delusion about that individual. n307 The doctrine of dependent relative revocation is used to remedy a revocation made as the result of a mistake. n308

COMPUTER-ASSISTED RESEARCH

LEXIS: (re-write or strike out or change or reform! or remed!) w/15 will! w/15 mistake! or fraud!

§ 88.07(f) Attorney Liability for Malpractice.

Of course, an attorney is liable to the client if the attorney is guilty of negligent drafting. In testamentary transfer situations, the party injured as a result of the attorney's conduct is the disappointed beneficiary. In many cases, the doctrine of privity has operated as a bar to a malpractice claim. n309 Under this reasoning, the would-be beneficiary has no connection to the attorney-client relation with regard to the will, and so a tort suit is barred. Other courts have permitted the suits to proceed, although the damages may be difficult to prove. n310 Attorneys can take some steps to protect themselves. Descriptions of named persons can help to establish clear identity. For example, in a gift to "my sister Sue," add a description such as "now residing in Arizona." Check information such as property description and addresses, as well as the proper names of charities. The testator should carefully read the will, or the attorney may wish to read the will aloud to the testator if it is not too long and complicated. n311

§ 88.07(g) Reforms.

The area of mistake is one where the revised 1990 version of the Uniform Probate Code does not propose significant change. Scholars have some suggestions. Professor Mary Louise Fellows suggests that the courts remedy mistakes and ambiguities in a will by assuming that the testator would intend to do what a competent estate planner would do. n312 A preference for traditional family patterns of distribution, and of equal distribution among family members would be presumed. The law would help to protect testators who act without the benefit of competent legal advice. Professors John Langbein and Lawrence Waggoner suggest that a mistake or ambiguity should be corrected when it has affected the terms of the will, and when the mistake can be proved by clear and convincing evidence. n313

FOOTNOTES:

(n1)Footnote 273. *See, e.g., In re Carter's Estate, 257 A.2d 843 (Pa. 1969); see also* Henderson, *Mistake and Fraud in Wills, 47 B.U. L. Rev. 309 (1967).*

(n2)Footnote 274. *See* 3 Restatement of Property § 242, Comment C; 4 Page on Wills § 32.9 (Rowe-Parker, ed. 1961); *Landmark Trust Co. v. Aitken, 587 N.E.2d 1076 (Ill. App. 1992); In re Gulbenkian's Will, 173 N.E.2d 481 (N.Y.2d 1961).*

(n3)Footnote 275. *See* the discussion of will execution, and the functions of will formalities, § 88.03(a), *supra.*

(n4)Footnote 276. 9 John Henry Wigmore, A Treatise on the Anglo-American System of Evidence in Trials at the Common Law § 2462 (J. Chadbourne, rev. ed. 1981).

(n5)Footnote 277. *See* Joseph W. De Furia, Jr., *Mistakes in Wills Resulting from Scrivener's Errors: The Argument for Reformation, 40 Cath. U. L. Rev. 1 (1990);* Mary Louise Fellows, *In Search of Donative Intent, 73 Iowa L. Rev. 611 (1988);* John Langbein & Lawrence Waggoner, *Reformation of Wills on the Ground of Mistake: Change of Direction in American Law?, 130 U. Pa. L. Rev. 521 (1982). See also, Estate of Taff, 133 Cal. Rptr. 737 (1976); Engle v. Siegel, 377 A.2d 892 (N.J. 1977); In re Snide, 418 N.E.2d 656 (N.Y.2d 1981).*

(n6)Footnote 278. *See, e.g., Connecticut Junio Republic v. Sharon Hosp., 448 A.2d 190 (Conn. 1982). Badman v. Am. Cancer Soc'y, 615 P.2d 500 (Wash. App. 1980); Hays v. Illinois Indus. Home for the Blind, 147 N.E.2d 287 (Ill. 1958).*

(n7)Footnote 279. *See, e.g., Farrell v. Sullivan, 144 A. 155 (R.I. 1929)* (Arlene and Daniel named, testator meant Helene and William); *Siegley v. Simpson, 131 P. 479 (Wash. 1913)* (Richard H. Simpson in will, testator meant Hamilton Ross Simpson).

(n8)Footnote 280. *See generally* Joseph W. De Furia, Jr., *Mistakes in Wills Resulting from Scrivener's Errors: The Argument for Reformation, 40 Cath. U. L. Rev. 1 (1990);* and cases cited therein.

(n9)Footnote 281. *See, e.g., Mosely v. Goodman, 195 S.W. 590 (Tenn. 1917).*

(n10)Footnote 282. *Mahoney v. Grainger, 186 N.E. 86 (Mass. 1933).*

(n11)Footnote 283. *See, e.g., Carpenter v. Tinney, 420 S.W.2d 241 (Tex. Civ. App. 1967);* In *Matter Shumway's Will, 246 N.Y.S. 178 (1930); Gifford v. Dyer, 2 R.I. 99 (1852).*

(n12)Footnote 284. *See, e.g., In re Touseys Will, 69 N.Y.S. 846 (1901).*

(n13)Footnote 285. U.P.C. § 2-302, 8 U.L.A. 105.

(n14)Footnote 286. This rule apparently is derived from the maxims of Sir Francis Bacon. *See* Francis Bacon, Law Tracts 99 (1737); 7 F. Bacon's Work 385 (1870). *Trustees of Wheaton College v. Peters, 677 N.E.2d 25,* (Ill. App. Ct.

1997) (it was not an abuse of discretion to deny attorney fees in a will construction case which involved a latent ambiguity).

(n15)Footnote 287. *Estate of Anderson, 359 N.W.2d 479 (Iowa 1984). See also Clymer v. Mayo, 473 N.E.2d 1084 (Mass. 1985).*

(n16)Footnote 288. *See, e.g., Fenzel v. Floyd, 347 S.E.2d 105 (S.C. App. 1986)* ("lots I own on Suber Street" left in will, testator owned Suber property); *Kurtz v. Hibner, 8 Am. Rep. 665 (Ill. 1870)* (testator owned land in section 33, not "section 32"); *Patch v. White, 117 U.S. 210 (1886)* (testator owned lot 3 in square 406, not lot 6 in square 403). For an example of misidentified beneficiary, *see Breckheimer v. Kraft, 273 N.E.2d 468 (Ill. App. 1971); In re Estate of Gibbs, 111 N.W.2d 413 (Wis. 1961). See also* the cases and the discussion of *falsa demonstratio non nocet,* § 88.07(e), *infra.*

(n17)Footnote 289. *See, e.g., Farmers and Merchants Bank v. Farmers and Merchants Bank, 216 S.E.2d 769 (W.Va. 1972); Kell v. Charmer, 23 Beav. 195, 53 Eng. Rep. 76 (1856); Clayton v. Lord Nugent, 13 M. & W. 200, 153 Eng. Rep. 83 (1844);* Hunt v. Hart, 3 *Bro. Ch. Cas. 311, 29 Eng. Rep. 554 (1791).*

(n18)Footnote 290. *See, e.g., Weichert v. Weichert, 294 S.W. 721 (Mo. 1927). Estate of Akeley, 215 P.2d 921 (Cal. 1950).*

(n19)Footnote 291. *See Estate of Dorson, 196 N.Y.S.2d 344 (Sup. Ct. 1959); McCauley v. Alexander, 543 S.W.2d 699 (Tex. Civ. App. 1976); Wing v. Wachovia Bank & Trust, 272 S.E.2d 90 (N.C. 1980)* (both supplying omitted terms); *but see Estate of Calabi, 196 N.Y.S.2d 443 (Sup. Ct. 1959).*

(n20)Footnote 292. *See, e.g., Estate of Akeley, 215 P.2d 921 (Cal. 1950)* (testator only devised 75% of estate, although court held will be purported to devise all). *See also Stephenson v. Rowe, 338 S.E.2d 301 (N.C. 1986);* Annotation, *Proper Disposition Under Will Providing for Allocation of Express Percentages or Proportions Amounting to More or Less than Whole of Residuary Estate, 35 A.L.R. 4th 788 (1985).*

(n21)Footnote 293. *See, e.g., Matter of Kremick's Estate, 331 N.W.2d 228 (Mich. 1983); In re Gibson's Estate, 312 N.E.2d 1 (Ill. App. 1974).*

(n22)Footnote 294. *See, e.g., Estate of Bergau, 684 P.2d 734 (Wash. App. 1984); Nicholl v. Bergner, 63 N.E.2d 828 (Ohio App. 1945); In re Roots Estate, 40 A. 818 (Pa. 1898).*

(n23)Footnote 295. *See Mahoney v. Grainger, 186 N.E. 86 (Mass. 1933). In re Estate of Maxedon, 946 P.2d 104,* (Kan. App. 1997) (extrinsic evidence is not admissible to show the intention of the testator where there is no ambiguity in the language used, or to give the language of the will a meaning different from that which the law attributes to that language).

(n24)Footnote 296. *See generally* William M. McGovern, Jr., Sheldon F. Kurtz & Jan Ellen Rein, Wills, Estates & Trusts § 6.1 (1988).

(n25)Footnote 297. *See, e.g., Estate of Utterback, 521 A.2d 1184 (Me. 1987); Breckner v. Prestwood, 600 S.W.2d 52 (Mo. App. 1980); Estate of Russell, 444 P.2d 353 (Cal. 1968).*

(n26)Footnote 298. *See, e.g., Matter of Snide, 418 N.E.2d 656 (N.Y. 1981);* John Langbein & Lawrence Waggoner, *Reformation of Wills on the Ground of Mistake: Change of Direction in American Law?, 130 U. Pa. L. Rev. 521 (1982).*

(n27)Footnote 299. *See generally* Lawrence Waggoner, Richard Wellman, Grogory Alexander & Mary Louise Fellows, Family Property Law 553-54 (1993). *See also* Report, *Dead Man Statutes: Their Purposes, Effect and Future, 7 Real Prop. Prob. & Tr. J. 343 (1972).*

(n28)Footnote 300. *See, e.g., Patch v. White, 117 U.S. 210 (1886)* for a leading case on this point. *See also*

Breckheimber v. Kraft, 273 N.E.2d 468 (Ill. App. 1971); Arnheiter v. Arnheiter, 125 A.2d 914 (N.J. Super. 1956).

(n29)Footnote 301. *See* Warren, *Fraud, Undue Influence and Mistake in Wills, 41 Harv. L. Rev. 309 (1928); Schwackhamer v. Forman, 269 N.E.2d 48 (Ohio App. 1971).*

(n30)Footnote 302. *Matter of Ikuta's Estate, 639 P.2d 400 (Haw. 1981).*

(n31)Footnote 303. *Matter of Snide, 418 N.E.2d 656 (N.Y.2d 1981).*

(n32)Footnote 304. *Estate of Taff, 133 Cal. Rptr. 737 (1976); Estate of Kremlick, 331 N.W.2d 228 (Mich. 1983). See also Wilson v. First Florida Bank, 498 So. 2d 1289 (Fla. App. 1986).*

(n33)Footnote 305. *377 A.2d 892 (N.J. 1977).*

(n34)Footnote 306. *See, e.g., Latham v. Father Divine, 85 N.E.2d 168 (N.Y. 1949). See* the discussion of constructive trusts, *infra* § 88.08(d)(3)(iv)(A).

(n35)Footnote 307. *See* § 88.08(d)(2)(ii)(B), *infra.*

(n36)Footnote 308. *See* § 88.10(d), *infra.*

(n37)Footnote 309. *See generally* the section on malpractice, § 88.09, *infra*. *See also St. Mary's Church v. Tomek, 325 N.W.2d 164 (Neb. 1982); Ventura County Humane Soc'y v. Holloway, 115 Cal. Rptr. 464 (1974).*

(n38)Footnote 310. *See, e.g., Ogle v. Fuiten, 466 N.E.2d 224 (Ill. 1984); Simon v. Zipperstein, 512 N.E.2d 636 (Ohio St. 1987).*

(n39)Footnote 311. *See generally* Begleiter, *Attorney Malpractice in Estate Planning -- You've Got to Know When to Hold Up, Know When to Fold Up, 38 Kan. L. Rev. 193 (1990);* Johnston, *Legal Malpractice in Estate Planning -- Perilous Times Ahead for the Practitioner, 67 Iowa L. Rev. 629 (1982).*

(n40)Footnote 312. Mary Louise Fellows, *In Search of Donative Intent, 73 Iowa L. Rev. 611 (1988).*

(n41)Footnote 313. John Langbein & Lawrence Waggoner, *Reformation of Wills on the Ground of Mistake: Change of Direction in American Law, 130 U. Pa. L. Rev. 521 (1982).*

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CHAPTER 88 TESTAMENTARY TRANSFERS OF REAL PROPERTY

10-88 Thompson on Real Property, Thomas Editions § 88.08

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§ 88.08 Will Contests.

[Go To Supp]

§ 88.08(a) Introduction; Purpose.

Fundamental to the law of wills is the doctrine that the testator should be allowed free rein in disposing of the testator's property upon death. n314 Nevertheless, wills are creatures existing solely by virtue of statute, and, thus, the law may impose restrictions on the manner in which a person disposes of property. n315 These restrictions serve to ensure that the instrument enforced truly represents the testator's intentions and to promote important policy considerations. n316 In furtherance of the considerations underlying the will statutes, the courts have allowed a will to be invalidated in whole or part due to defects in the testamentary process. Statutory laws and court-created doctrines governing the making and acceptance of wills represent efforts to ensure that the primary goal of implementing the testator's wishes is served. Thus, when the formalities of will execution are not followed or when circumstances arise that call into question the intent of the testator, the will may be partially or wholly rejected, creating full or partial intestacy. Absent another will, disposition of the decedent's assets is then governed by a set of intestacy statutes designed to distribute property in a manner judged to be representative of the average, rational testator, taking into account general policy considerations. In such a case, the law concludes that these intestacy statutes are a better measure of the decedent's wishes than the defective will and offer greater assurance of effecting the decedent's intent while serving public policy.

In order to bring defects in the testamentary process before the court and provide a forum for potential beneficiaries of the estate to assert their rights, the law provides for will contests. The will contest is a procedure by which certain parties may challenge the will's validity by offering evidence of non-compliance with the formalities of execution, or that the will fails to reflect the testator's intent. As discussed below, the parties allowed to bring a contest are those who would benefit from its defeat. Thus, the law employs a natural incentive to encourage challenges. On the other hand, to discourage frivolous lawsuits and those which seek to defeat the testator's intent rather than affirm it, the law places a number of restrictions on will contests. Thus, a balance is struck between the need to ensure fulfillment of the underlying policy, to allow one to dispose of one's property as one pleases, and to accommodate the inherent uncertainties involved in assessing will execution and the deceased person's intent. This process ensures, as best as possible, that the will probated represents the testator's intentions. The effect of a successful contest is to divest devisees under the challenged will of their rights in decedent's property in favor of heirs taking under the intestacy statutes or devisees taking under another will. n317 Will contests are generally predicated on one or a combination of grounds

from three general areas of challenge: n318 (1) the instrument offered lacks testamentary "character," rendering it unsuitable for determining the decedent's intent and, thus, the intestacy statutes represent the best model for disposing of the decedent's property; (2) testator's expressed intent is not the product of an unimpaired will, but is the result of mental deficiency, an insane delusion, or mistake and, thus, does not accurately represent testator's rational intentions; or (3) an expression of intent is present, but circumstances suggest that the expression is that of a third party because of fraud, duress, or undue influence and, therefore, probate should be denied as not representative of the decedent's intent (interference by third parties with testator's intent).

An additional ground for contest may occur where the will admittedly meets the above standards, but has been purportedly revoked by a subsequent instrument or act. Thus, the instrument accurately reflects the testator's intent, but not at the legally determinative time, that is, at death. The law presumes, quite rationally, that the most recent, legally sufficient will provides the most accurate indication of the testator's desires at the moment of death. The law concerning revocation is discussed elsewhere in the text, n319 and this chapter will focus on contests based directly on the instrument challenged.

At the outset it should be noted that will contests constitute only a tiny portion of litigation in U.S. courts. A contributing reason for the lack of will contests is the limited pool of wills probated in the first instance. Several commentators, referring to various studies, have noted the small number of probated wills in this country. n320 According to those studies, only about 1 in 5 decedents, on average, have a will probated. n321 Even considering only probated wills, however, the percentage of contested wills remains low. One study, for example, found only 1% (of wills submitted for probate) were contested and only 38% of those went to trial. n322

§ 88.08(b) Relation to Probate.

Probate is admission to record of a particular instrument and proof of its validity as a will. n323 At heart, it is a formal declaration of the facts underlying the will's validity and perfects the will as a title instrument. Thus, probate of a will creates the circumstances whereby title to the property of the decedent may be transferred to the devisees. The admitted will then serves as evidence of the underlying facts, generally allowing transfers to third parties with assurance that title was properly vested in the transferor. n324

To have the will admitted to probate, the proponent generally files an application for probate which will be heard at a special proceeding, as opposed to an ordinary civil action. Usually the proponent must show the testamentary character of the instrument, testator's intent and capacity to execute the instrument as a will, the testator's knowledge of the contents of the will, and compliance with execution formalities. n325 While, as discussed elsewhere in this text, a number of procedures exist for admission of a will to probate, under usual circumstances the proponent's burden of showing the above conditions is met by showing due execution. n326 However, some jurisdictions may require an additional showing of some evidence of capacity, and, when questions as to undue influence, fraud, mistake, duress, forgery, or revocation arise, their absence must be shown by the proponent. n327

Validity, whether or not the instrument is the will of the decedent, is the only issue in the proceeding. n328 Questions regarding the right of the testator to dispose of particular property, the violation of contract obligations, or the property rights of heirs or devisees by construction of the will, for example, are settled in separate construction or distribution proceedings. The court will, however, look at alterations, such as interlineations or erasures, to determine whether they are part of the will. While the general rule is that courts will look at the instrument as a whole, invalidity of a portion usually will not invalidate the entire will. Substantial variation appears to exist among the jurisdictions regarding when and to what extent partial validity will be applied. n329

The will contest is an independent proceeding by which contestants attempt to thwart the evidentiary effect of probate, thereby denying beneficiaries under the will from taking title to the decedent's property. Because of standing restrictions, any distribution upon denial of probate will then favor the contestants. The contest may come prior to

probate or after. The timing of contest may depend a great deal on the form of probate followed in the jurisdiction of the challenged will. In states applying the "solemn" form of probate, notice to interested parties is given prior to probate allowing such parties an opportunity to contest at the hearing to admit the will to probate. In "common" form jurisdictions, the will is admitted to probate in an ex parte proceeding with notice given subsequently. Therefore, in the jurisdictions following this latter course, challenges are more likely to arise subsequent to probate. When a contest is instituted after common form probate, the action essentially becomes probate in solemn form. n330

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LEXIS: will! w/15 admi! w/15 probate w/30 valid! will! w/2 contest! w/30 probate

§ 88.08(c) Procedure.

§ 88.08(c)(1) Nature and Form.

A will contest is generally in rem n331 and considered to be an independent action, especially if brought after probate. It suspends estate matters, except for preservation and collection of debts, while the contest is pending. Questions of will validity are then tried *de novo.* If brought before probate, the form of the contest is generally by "caveat." When pursued after probate, as is usual, the form is generally by petition to revoke probate. Because the will contest is an independent action, the caveat or petition to revoke should not be considered a response to the application or petition for probate.

Whatever the form, the document asserting the will contest should state the specific reasons for objection or challenge and the interest of the contestant, discussed below. In addition, if the contestant's relationship to the decedent is collateral, some jurisdictions require the contestant to show the absence of persons more directly interested. n332

The Uniform Probate Code (along with most states) continues the distinction between informal and formal probate. n333 A will contest is a formal proceeding, under the Code. n334

The nature and form of a probate or will contest proceeding and their interaction vary considerably from jurisdiction to jurisdiction and often depend on the particular statutory wording. The practitioner is well advised to consult local law and practice to determine how to proceed.

§ 88.08(c)(2) Jurisdiction.

Will contests require statutory authority and courts of equity have no inherent jurisdiction to entertain such suits. Courts with jurisdiction over probate matters are variously named and include probate courts, surrogate courts, orphan's courts, register of wills, court of ordinary, and district, county, circuit, or common pleas courts acting as probate courts. Probate jurisdiction is normally predicated on the decedent's domicile at death, which is generally held to be synonymous with residence. The proof of the decedent's death is also a necessary element to the establishment of jurisdiction. The law of the situs of real property applies irrespective of domicile and the situs of personal property is determined at the time of death. Determination of both domicile and time of death are, therefore, important considerations for probate.

Some statutes allow courts to exercise probate jurisdiction over in-state assets of a non-resident. However, in the absence of such statutory authority, the courts are split as to whether jurisdiction may be exercised. n335

§ 88.08(c)(3) Standing.

§ 88.08(c)(3)(i) General.

Standing to contest a will is controlled by statute. n336 The contestant must generally show that she is an interested

party and this is the standard adopted by the Uniform Probate Code. n337 An interested party is one whose interest in the estate may be impaired or defeated by probate of the will or who will benefit by setting it aside. n338 This requirement has been applied even where the statute, read literally, would permit any person to contest. n339 The court may inquire as to standing *sua sponte* or on motion of a party. n340 The nature of the interest must be pecuniary or beneficial n341 and must be in the probate of the will, rather than the estate itself. In other words, even if the party seeking to contest takes under the will, such party will have no standing if they would take no more if the will were defeated. Thus, heirs or next of kin who take more under the will have no standing to contest. n342 As one court has put it: "The 'interest' of one who may contest is not the interest of every busybody or tomdicary who may not approve of the will. It must be a financial or property interest derived either from inheritance or under a will. The person so contesting must either gain or lose by virtue of the will in question." n343 According to the general rule, vested future interests are sufficient to establish standing and some jurisdictions allow contest when the future interest is contingent or conditional. n344 However, the pecuniary or beneficial interest requirement does not stretch so far as to include fees for serving as executor or trustee, a spouse's interest in administering the estate, or the prior right to be appointed as administrator. n345 Although the courts are stringent in the requirement of an interest in probate of the will, it is not necessary to prove the interest will in fact be impaired or the validity of the underlying claim by which the contestant would take. n346

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LEXIS: standing w/30 will! w/2 contest!

§ 88.08(c)(3)(ii) Specific Parties.

The common law and a number of statutes deny the killer of a testator the right to take by will, n347 or intestacy. n348 Most commonly applied to the murderer of the testator, some jurisdictions deny the right to inherit for manslaughter. n349 Generally speaking, no knowledge of the beneficial interest is required in order to invoke the rule. It is enough that the killer benefits from the wrongful act. n350 Although some states require a conviction, n351 a number of others do not n352 and a conviction is not necessary under the Uniform Probate Code. n353 When a killer of the testator is not able to take by law, no interest will arise by which the killer will have standing.

The right of a beneficiary to contest a will generally survives in the beneficiary's heirs or the administrator of the beneficiary's estate. n354 However, if the heir is still living and declines to contest, the heir's heirs cannot do so. n355

Pretermitted children generally cannot contest because their rights are independent of the will. n356 However, if the pretermitted child is the only heir, contest will render the will void and should be permitted. Where marriage and child come after execution of the will, the common law provided that the will was revoked. Some jurisdictions, therefore, allow contest in those circumstances. However, other jurisdictions deny such a right.

In general, children born out of wedlock will not have standing unless they have a right to inherit under state law or can establish some other recognized interest. n357

A beneficiary under a prior will generally may contest a later will. This is so even though a subsequent will, probated or not, had revoked the prior will. But, if the prior will was revoked by destruction, a contest will not be allowed. n358 A few cases have held that the beneficiary under a subsequent will has sufficient interest to contest a prior will. However, if the subsequent will has been denied probate, such parties will have no standing. In order to challenge a prior probated will, the beneficiary under a subsequent will must offer prima facie evidence of the validity of the subsequent will. n359

The courts are split concerning the right of an executor of a prior will to contest a subsequent will or codicil which revokes or modifies the prior will. Also, the jurisdictions are split as to whether an intestate administrator can contest a will. Further, the courts are split as to whether a public administrator can contest a will for the purpose of producing an

escheat in favor of the state. n360

The right to contest a will is generally considered transferable property, whether voluntary or involuntary. A few courts have denied the transferability of the bare right to contest, at least when the contest was filed after probate. n361 However, the general rule here must be applied in light of the rules concerning interest in the estate, such as estoppel, which may prevent the assignee from asserting a contest. n362

Purchasers of property from the testator's heir generally have an interest sufficient for contest where probate of the subsequent will would give property to someone other than the heir. However, some cases deny such a right when contest comes after probate. The creditors of an heir generally cannot contest, although some authority exists that a contest will be permitted in limited circumstances where the debtor's actions are designed to defeat the creditor's interests. A judgment or attachment creditor generally has a sufficient interest for standing, but some authorities disallow the contest under certain conditions. n363

§ 88.08(c)(4) Necessary Defendants.

Necessary defendants to be joined often include the executor named in the will, all parties named in the will as beneficiaries, and testamentary trustees, especially as representatives for unborn persons. n364 Some courts hold that there is no authority to proceed with a contest without joinder of all interested parties, even though the contest is a proceeding in rem and binding on all parties with notice, joined or not. n365 However, at least one court has held that it is not fundamental error to proceed to judgment, despite non-joinder of all necessary and indispensable parties, and the court was not deprived of jurisdiction to render a judgment by the failure to join. n366

§ 88.08(c)(5) Timing.

The timing of will contests are usually regulated by statutory limitation provisions. Unless contested within the limitation period following admission to probate, the order of probate becomes final and may not be challenged later. Since will contests are creatures of statute, extensions of the time period for disability generally requires an express statutory provision. Although the courts are split, there is some authority that the disability of one party to the action inures to the benefit of others. n367

Various approaches have been taken to the tolling of statutory limitations periods when fraud is involved. Some courts have allowed tolling for various types of fraud even where no express statutory provision exists, while others have required an express provision. The former courts have tolled the limitations period in particular cases of forgery and general cases of misrepresentation producing delay in contesting the will. Many courts limit tolling for fraud to extrinsic fraud only. n368

§ 88.08(c)(6) Estoppel.

Despite filing within the applicable rules concerning limitations, a contestant may, nonetheless, be prevented from maintaining the contest by virtue of estoppel or laches. n369 Particular conduct that may lead to estoppel includes express or implied consent to probate the will, participation in a previous suit for construction of the will, exercise of a spousal election, acquiescence to the will's provisions by conduct, acceptance of benefits under the will, n370 and failing to challenge the will until administration has been completed. In addition, courts will apply estoppel to a contestant who failed to assert the claimed rights in a previous contest, at least where the issues are the same. n371 Numerous other incidences of estoppel may be gleaned from the many cases in this area. Although the number of fact situations which will raise estoppel are numerous, potential contestants are helped by the rule that a person estopped may join with one who is not and participate in the will contest. n372

§ 88.08(c)(7) Burden of Proof.

A great deal of confusion exists within the body of law concerning burden of proof due to a lack of rigor in discussion and application. n373 Rigorously applied, burden of proof refers to the requirement that the party upon which it is placed will lose the case unless that party can persuade the fact finder that the evidence meets the standard of proof, usually a preponderance of evidence. This burden usually falls on the plaintiff. Meeting the preponderance of the evidence standard means producing evidence that demonstrates that the party's position on the issue, or interpretation of the facts, is more likely than not. Applied in this manner, the burden of proof may be referred to as the burden of persuasion. Thus, in the context of the preponderance of evidence standard, if the party with the burden of proof produces no evidence or the evidence is evenly split on an issue, that party has not sustained the burden of proof on the issue and the fact finder should rule for the opposing party. The location of the burden of persuasion is determined by the pleadings and the nature of the claims and does not change during the course of the trial.

In contrast to the burden of persuasion, the burden of production does change during trial. The burden of production refers to the requirement that a party present evidence on an issue or risk losing on that issue. Thus, at the beginning of the trial when neither party has put on evidence, the party with the burden of proof will lose, since the evidence is evenly split nothing versus nothing, unless that party presents evidence to the trier of fact. Therefore, at the start of trial, the burden of production is on the party with the burden of proof, or persuasion. Once that party has presented credible evidence n374 to the trier of fact, that party's position has become more likely than not because there is some evidence versus no evidence. This means that, absent any evidence to the contrary, the party with the burden of proof will sustain the burden and win on that issue. At this point the burden of production, or going forward with the evidence, switches to the opposing party, since that party will lose unless it produces evidence to counteract the evidence presented by the other side. To win on the issue, the opposing party must, at a minimum, demonstrate that the evidence is evenly split. If the opposing party does meet this burden and the evidence is evenly split or in favor of the opposing party, the burden of producing more evidence returns to the party with the burden of proof.

Thus, the burden of persuasion, which is the "rigorous" application of burden of proof, remains on the same party at all times during the trial and simply means that the party with the burden of proof, or persuasion, is at all times subject to the preponderance of the evidence standard. At the end of the presentation of evidence, regardless of who has produced evidence or in what amount, the weight of all the evidence in favor of the party with the burden of proof must be greater, even if only slightly, than that of the opposing party. Conversely, to remain consistent with the rigorous application of burden of proof, the opposing party can never be required to establish its position by more than equivalent evidence. Making the opposing party subject to a preponderance of the evidence standard in effect switches the burden of proof.

Many cases have not clearly distinguished between these two different burdens and write of the burden of proof "switching" during the course of a trial. This is not an appropriate application of the principles of burden of proof. Adding to the confusion, in the context of will contests, are the variety of positions among the jurisdictions as to which party should be subject to the burden of proof. In the sense that a will contest is an independent action, it would seem that the burden of proof should be placed on the contestant, especially if the action is brought after the will has been admitted to probate. However, due to the unique nature of the probate process, which is a special statutory proceeding in derogation to the common law rather than a traditional civil or common law action, many jurisdictions place the burden of proof on the proponent of the will in a contest proceeding. The Uniform Probate Code has adopted the position that the burden of persuasion should be on the contestant as to issues of testamentary incapacity or lack of intent, undue influence, fraud, mistake, duress or revocation. n375 Because of the wide variety of viewpoints concerning the various elements of the probate process, local law should be consulted to determine the interplay between burden of persuasion or production, the nature of probate proceedings and will contests, and the various presumptions for the particular jurisdiction.

COMPUTER-ASSISTED RESEARCH

LEXIS: burden w/2 proof w/30 will! w/2 contest!

§ 88.08(c)(8) Summary Judgment.

Summary judgment is available in both probate and will contest proceedings when no triable issues of fact exist. n376 The general rules for submission of evidence and the conclusive establishment of facts will apply, but the practitioner should be especially aware of the role of dead man's statutes, n377 the rules regarding admissibility of extrinsic evidence on the various issues, and special presumptions applied in will cases. A full discussion of the instances where summary judgment has been granted or denied, and the basis therefore, would be little more than a listing of cases. The practitioner should consult the annotations, digests, and other appropriate sources for particular applications in the jurisdiction.

§ 88.08(d) Grounds.

Although any circumstance which could ultimately affect the instrument offered as the decedent's will may be the subject of a contest, the usual grounds fall into three broad areas: the instrument itself; the nature of the decedent's acts as dependent upon the decedent's own condition; and interference with the decedent's acts by third parties. Because attacks on a will ultimately go to the question of testator's intent, the various grounds or general areas of contest may appear to overlap. Indeed, several grounds are often asserted in concert, particular lack of testamentary capacity and undue influence. Nevertheless, questions raised concerning non-compliance with the statutory requirements for will execution, or will formalities, lack of language of intent in the instrument itself, and extrinsic evidence that the expressed language of the instrument does not reflect the testator's intent, would all appear to fall under the broad category of attacks on the instrument itself. That the testator lacked testamentary capacity, or made a mistake regarding disposition or effect of the will, ultimately questions the testator himself rather than the instrument and these grounds are, thus, appropriately grouped together. Finally, issues of undue influence, fraud, forgery, or duress all involve a third party interfering, intentionally or not, indirectly or not, with the testator's actions.

§ 88.08(d)(1) Instrument Lacks Testamentary Character -- Attacks on the Instrument Itself.

§ 88.08(d)(1)(i) Execution.

The first area where problems can arise and offer fodder for challenges of the will is the instrument itself. That is, the contestant seeks to demonstrate that the instrument offered is not a will. As noted previously, to be a valid will the instrument must: be signed by the testator in the presence of two or more witnesses, attested, and signed by two or more witnesses in the presence of the testator, show intent to act as a will, be revocable, and take effect at the death of the testator. n378 Thus, the contestant argues the *contra* of these requirements by attacking the form or substance of the instrument offered as a will. The first three requirements are regarded as formalities of will execution and are extrinsic to the nature of the will. That is, these requirements may change from jurisdiction to jurisdiction in their particularity without changing the essential nature of what our legal system regards as a will. The last three requirements are intrinsic to the nature of the will as we know it.

In attacking the form, the contestant may raise issues concerning whether the particular formalities, the extrinsic requirements, have been complied with and whether the language used by the testator demonstrates sufficient testamentary intent for the court to find the instrument a will. Of course a clearly defective instrument, such as one that lacks the signature of the testator, will be denied probate by the probate official even in an ex-parte proceeding. The admission of a will to probate is dependent on the statutory requirements, not the interests of the proponent or the contestant. This is unlike the normal civil action where failure to assert rights concerning the issues often waives any defects in the process. n379 Defects in the required execution formalities are akin to jurisdictional issues and cannot be waived by either party. Although interested parties are allowed to litigate the issue, the will must stand or fold on its own merits with regard to execution formalities. Because such defects most often give rise to a *sua sponte* refusal of probate by the responsible officer, few challenges are mounted on the ground of failure to comply with will formalities.

§ 88.08(d)(1)(ii) Intent.

A second attack on the form concerns whether language of testamentary intent can be gleaned from the instrument. n380 A putative testator, for example, might execute an instrument conveying land immediately to a third party for consideration, signed by the grantor and two attesting witnesses. However, because the instrument is meant to take effect immediately, not upon the grantor's death, the instrument, although meeting the formal requirements of will execution does not represent testamentary intent. The instrument is simply a deed of real property and could not be probated as a will. The nature of such an instrument would likely be apparent on its face. Likewise, an ambiguity in an instrument giving property to another may be construed by the court as a failed attempt at an *inter vivos* gift, absent language indicating an intent for the disposition to take effect at death. As with other areas of the law, what a thing is called by the parties is not determinative; it is the legal effect of the act or instrument which gives proper title to the act or instrument. n381 After all, the decedent may not understand the legal significance of calling something a will and, therefore, intend something quite different from what the law recognizes as a will. A gift in anticipation of death does not amount to a will even though the testator may mistakenly believe so.

In determining the decedent's intent with regard to language used, the courts will generally not look at extrinsic evidence to supply testamentary intent to an instrument that lacks language of testamentary intent on its face. n382

COMPUTER-ASSISTED RESEARCH

LEXIS: intent! w/5 instrument w/15 will! or testament!

§ 88.08(d)(1)(iii) Substance.

The instrument may also be attacked on the basis of its substance. That is, all the formalities have been complied with, but the instrument, despite, testamentary intent on its face, lacks the substantive intent to act as a will. Contests based on substance can arise in three specific instances: conditional wills or provisions, specimen wills, and sham wills. n383 These types of attack are much harder to sustain because they rely on extrinsic evidence, which is generally disallowed, to contradict a will which is valid on its face. In addition, it is presumed that a properly executed will was done so with testamentary intent. n384 Conditional wills or provisions depend on the happening of a specific contingency in order to operate as a will. n385 A condition may relate to the will as a whole or to a particular provision of the will, but a condition relating to individual provisions only does not make the will conditional. Such wills may be predicated, for instance, on non-survival from a surgical procedure or failure to return from an extended visit abroad, and presumably involve some danger of death from disease or acts of violence. Courts will deny probate of such a will if the condition does not occur, n386 such as when testator dies from an unrelated cause. n387 Extrinsic evidence is generally not admissible to show a condition was intended, n388 but it is admissible to show that the will was intended to be absolute. Courts will often construe a condition as relating to the motive for making the will, rather than a condition intended to invalidate the will, and, thereby, uphold the will even when the condition is not met. For the court to find a conditional will, clear and definite language that a conditional will was intended must appear. n389 Revalidation may occur after a failure of condition and retention for a long period after such failure has been construed by some courts as republication of the will. n390

A specimen will is one intended as a guide for a will to be made in the future. n391 Sometimes the testator validly executes the will as a stopgap measure until the intended will is completed. Generally, extrinsic evidence is barred to show lack of testamentary intent if the will is clear on its face. Clearly, an instrument executed as a stop-gap measure should be given testamentary effect. Finally, even when extrinsic evidence has been permitted to show lack of testamentary intent, such evidence must be clear and convincing.

Sham wills are those executed without real intent to operate, but are executed for non-testamentary reasons, such as to keep peace in the family. n392 For example, in the case of *In re Kennedy's Will*, n393 the decedent had, on the basis of extrinsic evidence offered by the contestants, clearly executed the instrument in order to restrain relatives from pestering

concerning disposition of the decedent's property and not with any real testamentary intent. The court, however, noting that will formalities exist to keep doubt and uncertainty from attending the probate of a will, sustained the trial court's ruling disallowing the consideration of extrinsic evidence to prevent probate of the will. n394 Other courts, however, emphasizing the importance of effecting the testator's intent, have allowed extrinsic evidence admitted in order to show the will is a sham. n395 When extrinsic evidence is allowed to invalidate a properly executed will, clear and convincing evidence is usually required. Finally, some courts allow extrinsic evidence to show lack of testamentary intent when the will was executed as part of an organizational ceremony or initiation rite. n396

COMPUTER-ASSISTED RESEARCH

LEXIS: substance w/5 instrument w/15 will! or testament!

§ 88.08(d)(2) Mistake or Lack of Testamentary Capacity -- Attacks on the Testator.

Rather than attacking the will, the testator may be directly attacked through claims of incapacity or mistake. Here, the contestant asserts that the testator's state of mind is defective, not the acts of the testator. The first major area of attacks on the testator concerns lack of testamentary capacity. Two types of capacity are required for a testator to make a valid will, legal capacity and mental capacity.

§ 88.08(d)(2)(i) Legal Capacity -- Age.

Legal capacity, today, refers primarily to statutory age requirements. n397 Typically, the testator must be age 18 or older to make a valid will. n398 This is the standard set by the Uniform Probate Code. n399 This age requirement is measured chronologically and is not a function of mental age. n400 In addition, the age requirement may be superseded by marriage or military service. n401

COMPUTER-ASSISTED RESEARCH

LEXIS: age or legal capacity w/15 testator or will!

§ 88.08(d)(2)(ii) Mental Capacity.

The second type of capacity, mental capacity, has two branches, mental deficiency and insane delusion, both of which are measured at the time of execution of the will. The presence of sufficient mental deficiency or an insane delusion, operative as to the testator's testamentary intent, prevents the will, codicil, or devise from being effective. n402

Statutes providing for mental capacity are usually general in nature, merely providing, for example, that the testator be "of sound mind." n403 Thus, mental capacity is not clearly defined n404 and this ambiguity may be responsible for the large number of contests based on lack of testamentary capacity. n405 A general incapacity or mere eccentricity does not suffice to invalidate the will. n406 In fact, evidence on eccentricity is generally inadmissible, unless corroborative of other evidence of incapacity. The burden of the contestant is to show that the incapacity directly affected the testamentary disposition. n407 The contestant suffers an additional burden in that many jurisdictions presume sanity, and therefore testamentary capacity, either on proof of due execution or when the proponent produces some affirmative evidence of sanity. n408 Thus, testamentary capacity is a very low threshold test. n409 It is possible that the issue of mental capacity will become even more important in the future. With an aging population, the risk of a will being executed by a senile or incompetent testator may increase. n410 The problem of AIDS may also raise issues of testator competence. n411

§ 88.08(d)(2)(ii)(A) Mental Deficiency.

The test for the mental deficiency branch of incapacity requires that the testator comprehend (1) the nature and extent of

the estate, (2) the identity of beneficiaries and their relationship to the testator, n412 (3) the nature of the act which the testator is performing, that is, the distribution the testator is making, and (4) the relationship between the above elements in forming an orderly plan for disposition of the estate. n413 A general incapacity not involving the above elements cannot prevent a finding of testamentary capacity and the testator is not required to know every name or the value of each piece of property. That is, actual understanding is not required, but simply the mental capability of making the listed determinations and judgments. n414 Thus, although the testator may be generally incapacitated, only a "lucid interval" is required to effectuate testamentary intent. n415 If a mental deficiency is demonstrated, the usual course is to invalidate the will as a whole. n416 This serves, in part, as a contrast to insane delusions, discussed below, which generally invalidate the will partially rather than wholly.

§ 88.08(d)(2)(ii)(B) Insane Delusions.

An insane delusion (also known as mental derangement) is "an extravagant belief, adhered to against all reason; which is impossible under the circumstances; and which leads to an unnatural disposition." It is a belief in that which does not exist, which no rational mind would believe to exist, and which cannot be dispelled by reason. n417 While mental deficiency generally operates to negate entire will, insane delusions more often invalidate only those portions of the will directly resulting from the delusion. n418 However, if the delusion affects the will, generally, it will be invalidated *in toto*. n419 As with mental deficiency, an insane delusion must affect the disposition made by the testator in order for the will or devise to be invalidated. n420 Also, similar to mental deficiency, contestants are burdened with stiff hurdles to overcome in order to invalidate the will. Generally, courts will invalidate the will only when overwhelming evidence shows the disposition was caused by the delusion, n421 and will uphold the disposition if any rational basis exists for the testator's belief, n422 some courts even when the delusion goes to the testamentary act complained of. Although some courts apply this standard as an absolute, n423 the real test is whether evidence exists "from which a sane person in the testator's circumstances could rationally draw the same conclusion." n424 That is, mere mistake will not invalidate a will and will not serve as an insane delusion.

Because insane delusions concern rather ambiguous circumstances and standards, this area offers a usual ground for contests. n425 However, the insane delusion does not arise from mere eccentricity or prejudice, n426 and non-customary religious beliefs are insufficient alone. n427 Such factors are of evidentiary value, nonetheless, and cumulatively may sustain a claim of delusion. A mistake of fact is, also, not an insane delusion, n428 but the line between the two can often become confused and uncertain. The distinction between the two has been stated to be that mistake "arises from some external influence which is weighed by reason, however imperfectly; while a delusion arises from a morbid internal impulse, having no basis in reason." n429 Despite the occurrence of an insane delusion, either with respect to the entire will or a particular disposition, testamentary capacity can arise in a lucid interval just as with mental deficiency. n430

COMPUTER-ASSISTED RESEARCH

LEXIS: (mental w/2 capacity or deficiency) or insane delusion w/15 will!

§ 88.08(d)(2)(iii) Mistake. n431

Two areas of mistake may offer grounds for contest, mistake by the testator or mistake by the draftsperson. The common law rule, with respect to mistakes of the testator, is that only mistakes involving testamentary intent, such as testator executing the wrong instrument, will affect the validity of the will. n432 Thus, in cases where a husband and wife mistakenly sign each other's will, both wills are invalid. n433 Statutory avoidance for mistake must be one of ignorance, not error of judgment or willful failure to make a proper investigation. Generally, courts are without the power to reform a will for mistake, but may, in some circumstances, be allowed to strike a portion of the will or to correct mistakes incidental to construction of the will. Absent fraud or similar grounds, a mistake as to a relationship is not grounds to defeat the will. n434 Parol evidence is generally allowed, at least on mistakes involving intent, but where

the will unambiguously designates a beneficiary, parol evidence will not be admitted to contradict the will. n435 Partial invalidity may occur where avoidance for mistake is allowed. n436

Mistake of a draftsperson does not generally render all or any portion of the will invalid, unless it is shown that the will differs materially from what the testator believed it to contain and it affects the essential provisions of the will. If evidence is presented that the testator read the will, heard it read, or otherwise had reason to trust the result of drafting, any mistake by the draftsperson becomes immaterial. n437

§ 88.08(d)(3) Interference by Third Parties.

A third area that serves as a basis for will contests involves interference with the testamentary process by third parties. The major types of third party interference are undue influence, fraud, and duress.

§ 88.08(d)(3)(i) Undue Influence.

The term "undue influence" is difficult to define, but can be described as a form of substituted judgment. The influence wielded must be sufficient to overcome or destroy the free agency of the testator, such that the will is really the expression of the influencing beneficiary, rather than that of the testator. n438 Mere efforts to prejudice, persuade, or to gain leverage with the testator will not amount to undue influence. Generally, the motive or the character of the person attempting to influence the testator is immaterial. n439 Examples of cases where the courts have found undue influence include situations where the person attempting to influence the testator: made threats to abandon a helpless testator; n440 wrote letters or made statements in an effort to turn the testator against the natural objects of testator's affection; n441 threatened litigation or violence against testator; n442 or cases where a large disposition is made in favor of a non-relative caretaker. n443

The burden of proof of the existence of undue influence is on the contestant to the will. n444 Undue influence is usually exercised in private, and surreptitiously, so it is very difficult to prove. Circumstantial evidence may be used to show undue influence. n445 Undue influence may also be used to challenge the revocation of a prior will, where the undue influence led to the act of revocation. n446

In some situations, a presumption of undue influence arises, which shifts the burden of proof or of persuasion to the proponent of the challenged gift. n447 Again, the level of proof may vary, from preponderance of the evidence, to clear and convincing evidence. The presumption usually arises when the parties are in a fiduciary or confidential relationship. For example, priest-penitent, attorney-client, doctor-patient are all examples of fiduciary relationships. n448 Family members are not necessarily in a fiduciary relationship, but such a relationship may be found under certain circumstances. n449 Normally a husband and wife are not considered to be in a fiduciary relationship for purposes of an undue influence claim, since it is normal for a husband and wife to attempt to influence each other. n450

However, the same rule does not apply to parties in an unmarried sexual relationship. Courts have frequently found undue influence in cases where large gifts are made in favor of unmarried lovers, in both heterosexual and homosexual relationships. n451

The mere existence of the fiduciary relationship is not enough to establish the presumption. n452 Usually the contestant must also show that the testator was physically or mentally weak, and susceptible to undue influence. The beneficiary in question must have had a opportunity and motive to attempt to exercise undue influence, and must have actively participated in the drafting or execution or revocation of the will. The will should also show an unnatural disposition, disinheriting family members and close friends in favor of the person exercising undue influence. n453 If the beneficiary actually drafted the will, and is in a confidential relationship with the testator, then the presumption usually will arise. n454

§ 88.08(d)(3)(i)(A) Attorneys and Undue Influence.

Attorneys should exercise caution in drafting a will for a client that names the attorney as a beneficiary. The risk of a claim of undue influence may be high, and a disciplinary action may also result. Moreover, a will drafting by an attorney as beneficiary gives an appearance of impropriety. n455 Both the Model Code of Professional Responsibility and the Model Rules of Professional Conduct specifically address this issue.

EC 5-5 of the Model Code of Professional Responsibility reads:

EC 5-5 A lawyer should not suggest to his client that a gift be made to himself or for his benefit. If a lawyer accepts a gift from his client, he is peculiarly susceptible to the charge that he unduly influenced or over-reached the client. If a client voluntarily offers to make a gift to his lawyer, the lawyer may accept the gift, but before doing so, he should urge that his client secure disinterested advice from an independent, competent person who is cognizant of all the circumstances. Other than in exceptional circumstances, a lawyer should insist that an instrument in which his client desires to name him beneficially be prepared by another lawyer selected by the client.

The Model Rules of Professional Conduct, Rule 1.8(c) provide:

A lawyer shall not prepare an instrument giving the lawyer or a person related to the lawyer as parent, child, sibling, or spouse any substantial gift from a client, including a testamentary gift, except where the client is related to the donee.

The comment to this Rule states:

A lawyer may accept a gift from a client, if the transaction meets general standards of fairness. For example, a simple gift such as a present given at a holiday or as a token of appreciation is permitted. If effectuation of a substantial gift requires preparing a legal instrument such as a will or conveyance, however, the client should have the detached advice that another lawyer can provide. Paragraph (c) recognizes an exception where the client is a relative of the donee or the gift is not substantial.

The effect of a finding of undue influence is to invalidate the will. If the part of the will that is the result of undue influence can be severed without damage to the testator's general plan of distribution, partial invalidity will result. n456 If the will is executed pursuant to the exercise of undue influence, but the testator later executes a codicil free from undue influence, then the will is good. The codicil operates to ratify the will as originally written. n457

COMPUTER-ASSISTED RESEARCH

LEXIS: undue influence w/15 will! or testator!

§ 88.08(d)(3)(ii) Duress.

Duress is a doctrine related to undue influence. If a party attempts to influence the testator through the threat of unlawful action, then the action taken by testator to benefit that party is again invalid. For example, if a testator signs a will as a result of a threat against life, or a threat to kidnap the testator's child, then the will is invalid, at least to the extent of benefit to the threatening party. The action threatened must be unlawful, so a threat to file for divorce, or to stop seeing someone, or to tell a secret would probably not amount to duress. n458

COMPUTER-ASSISTED RESEARCH

LEXIS: duress w/15 will! or testator!

§ 88.08(d)(3)(iii) Fraud.

If a will is executed, is not executed, or is revoked because of fraud, then the testator's action will be invalid. Fraud is usually defined as a (1) misrepresentation made to the testator with (2) intent to deceive, with the (3) purpose of influencing the disposition of testator's property at death, and the misrepresentation does lead to (4) action on the testator's part as a (5) result of the misrepresentation. The misrepresentation must be material, must relate to the will itself, and must actually influence the testator's behavior. n459

As in other areas, fraud in will executions and revocations can occur in one of two ways. The most common form of fraud is *fraud in the inducement*. The testator is induced to take some action or to fail to take action as a result of the false statement. However, the testator is aware that the document in question is a will, and knows the contents of the will. n460 Fraud in the execution or fraud in the factum occurs when the testator is misinformed about the nature of the document or does not know the contents of the will. For example, if the testator is told that the document being signed is an insurance policy, but the testator is actually handed a will to sign, the will would be void, since it was obtained fraudulently. Or, if the testator dictates a will to a drafter, but the drafter wilfully and with intent to defraud does not write the terms indicated by the testator, and the testator unknowingly signs the will with the substituted terms, then the will is again invalid.

COMPUTER-ASSISTED RESEARCH

LEXIS: fraud w/15 will! or testator!

§ 88.08(d)(3)(iv) Remedies.

§ 88.08(d)(3)(iv)(A) Constructive Trust.

Probate may not provide an adequate remedy for a wrong due to fraud or undue influence. The court cannot write a will for the testator, and cannot substitute its judgment for that of the testator. The court may impose a constructive trust in equity if the legal remedies available to a complainant are adequate. Under a constructive trust, the wrongful beneficiary is treated as a trustee of the property received as a result of the wrongful conduct, for the benefit of the would-be beneficiary or heir. n461

§ 88.08(d)(3)(iv)(B) Tortious Interference with Inheritance.

A remedy outside of the probate system is an action for tortious interference with inheritance. If the defendant causes the decedent to divert the plaintiff's interest under gift, devise or intestacy through the use of undue influence, fraud, duress, or other tortious conduct, then the defendant may be liable for damages. This is not a will contest, and is not covered by *in terrorem* clauses.

§ 88.08(e) *In Terrorem* Clauses.

Testators frequently insert will clauses providing for forfeiture or reduction of will benefits for beneficiaries who contest the will. These clauses are generally referred to as *in terrorem* clauses. n462 The purpose of such clauses, from the standpoint of the testator, is clear: the will represents the testator's intent which the testator does not want frustrated by litigation, especially since the testator cannot participate.

Although courts generally hold such provisions valid, n463 they are highly unpopular and, therefore, strictly construed. n464 This hostile attitude reflects that old legal maxim: the law abhors a forfeiture. n465 The tension between upholding such clauses and striking them down also reflects the courts' difficulties with the conflicting policy considerations involved. Favoring the validity of *in terrorem* clauses is the state's interest in discouraging litigation, especially that which is unmeritorious. n466 The lack of any direct state interest in such proceedings adds weight to this

public policy factor. As one court has put it:

> But, in the case of an [*in terrorem* clause], the state has no interest whatever apart from the interest of the parties themselves. There is no duty, either perfect or imperfect, on the part of an heir to contest his ancestor's sanity. It matters not to the state whether the land is enjoyed by the heir or by the devisee; and we conceive, therefore, that the law leaves parties to make just what contracts and engagements they may think expedient as to raising or not raising questions of law or fact among themselves, the sole object of which is to give the enjoyment of the property to one claimant rather than to another. n467

On the other hand, in addition to the law's abhorrence of forfeitures, it is the duty of the law to safeguard the testator's intent from usurpation in making the will, to protect natural beneficiaries from defects in the testamentary process, and to hold the courts open for those with meritorious claims. n468

In order to address the conflicting policy considerations arising from non-contest clauses, a number of doctrines, generally divisible into two classes, have been developed. One class of doctrines involves avoidance of the conflict by finding that the party's action is not a contest. n469 A will contest is independent of construction or distribution actions and the courts will often find the action to be one to construe the will rather than to determine its validity. In addition, because of the strict construction rule, courts will frequently construe the clause as not applying to the specific challenge or party involved. Thus, in weighing the underlying policy considerations and the specific language of the clause, courts have held that the mere filing of a contest is insufficient to trigger a forfeiture. n470 Similarly, courts have held that testifying in a will contest does not subject a witness to forfeiture under the clause. n471

The second class of doctrines invokes exceptions to the general rule that such clauses are valid. The primary expression of exceptions to the rule's validity is usually given in terms of a "good faith" or "probable cause" exception which has been adopted by the Uniform Probate Code n472 and established by statute or court decision in a number of states. n473 Some testators have tried to get around the probable cause doctrine by inserting express language in the clause providing for forfeiture regardless of good faith or probable cause. n474 The effectiveness of these beefed-up *in terrorem* clauses is currently uncertain and must be resolved in light of the conflicting policy considerations at play.

Also falling into this second class are individual cases where courts have found the clause to be a violation of public policy under the specific circumstances of the case. n475 In addition, citing public policy, some courts hold the clause operable only as to adult beneficiaries, allowing a minor or the representative a minor to contest without forfeiting under the clause. n476 The split among the jurisdictions on the question of whether good faith or probable cause operates to invalidate the effects of an *in terrorem* provision reflects the delicate balancing of the policy considerations mentioned above. Several jurisdictions do not recognize the doctrine at all. n477 Some of the policy considerations, express or implied, in these decisions include avoidance of unmeritorious litigation, protection of the family's privacy, and the uncertainty of judicial determinations of an unavailable testator's intent. n478 Other authorities have limited the exception to contests based upon revocation by a later will or forgery. n479 This limitation is based on the contention that while the ambiguities of undue influence, testamentary capacity, and fraud may encourage unmeritorious, difficult litigation, n480 public policy favors, if not legally demands, the submission of wills, and the discovery of crime. n481 The better view, however, is that a probable cause exception strikes an appropriate balance between the competing policy considerations. Since the right to make a will exists solely by statute and court construction of these statutes is driven by the desire to effectuate the testator's intent, n482 it must be argued that public policy demands exposure of actions intended to thwart the statutory right to dispose of property at death. If this were not so, those who engage in undue influence, fraud, or coercion (imposition of duress) could do so with impunity in each case where a testator seeks to legitimately protect the testamentary intent with an *in terrorem* clause. The probable cause standard allows the court to weigh the motivation of the contestant and the merit of the action in determining applicability of the clause. The possibility that the contestant will engage in expensive litigation for nought should be sufficient discouragement of unmeritorious suits. On the other hand, the doctrine provides a means for preventing interference with the testator's desires concerning disposition of the property and assuring that the testator's natural wishes are unhampered by a failing

mental state.

COMPUTER-ASSISTED RESEARCH

LEXIS: in terrorem w/2 clause!

§ 88.08(f) Action for Malicious Prosecution of Will Contest.

Although the authorities are split, a majority of jurisdictions allow the proponent of the will to institute a tort action for malicious prosecution against an unsuccessful contestant who has pursued the will contest without probable cause. n483 It should further be noted that the courts have allowed a contestant to maintain a tort action for malicious prosecution when the will offered for probate was forged. n484 The elements of such an action are (1) that the will contest (or other action) was instituted or continued, (2) by or for n485 the defendant, (3) terminating in favor of the plaintiff and (4) damaging the plaintiff, and (5) that the defendant acted maliciously n486 (6) and without probable cause in initiating the suit. n487 The California Supreme Court has eloquently stated the rationale underlying the tort of malicious prosecution:

> The malicious commencement of a civil proceeding is actionable because it harms the individual against whom the claim is made, and also because it threatens the efficient administration of justice. The individual is harmed because he is compelled to defend against a fabricated claim which not only subjects him to the panoply of psychological pressures most civil defendants suffer, but also to the additional stress of attempting to resist a suit commenced out of spite or ill will, often magnified by slanderous allegations in the pleadings.
>
> The judicial process is adversely affected by a maliciously prosecuted cause not only by the clogging of already crowded dockets, but by the unscrupulous use of the courts by individuals "... as instruments with which to maliciously injure their fellow men."
>
> [The party who maliciously prosecutes a civil action uses] the judicial process as a vehicle for harassing or vexing his adversary or as a means of coercing the settlement of a collateral matter. The [wronged party] is compelled to expend attorney's fees in defending against the false charge and may suffer ... mental or emotional distress and possible loss of reputation and standing in the community. n488

Consistent with the above reasoning, at least one court, in allowing an action for malicious prosecution, has held that voluntary dismissal of a will contest constituted a favorable termination of the prior action. n489 Thus, the contestant is prevented from using the contest to coerce a settlement and then escape liability by voluntary dismissal of the suit.

§ 88.08(g) Ante-Mortem and Living Will Statutes.

Ante-Mortem (pre-death) probate is sometimes touted as a possible way to prevent will contests. The types of ante-mortem probate procedures to be followed are discussed in § 88.13(e) of this chapter.

FOOTNOTES:

(n1)Footnote 314. *See, e.g., In re Estate of Raney, 799 P.2d 986, 992 (Kan. 1990)* (person has power to dispose of property as he sees fit and court should not interfere if testator has mental capacity); *Daugherty v. Daugherty, 784 S.W.2d 650, 653 (Tenn. 1990)* (testator has absolute right to dispose of property as he chooses absent contravention of rule of law or public policy); *In re Estate of Sarabia, 270 Cal. Rptr. 560, 562 (1990)* (... without regard as to whether disposition is fair or appropriate); *In re Estate of Herr, 460 N.W.2d 407, 703 (N.D. 1990)* (... without regard to desires of prospective beneficiaries); *Matter of Burack, 541 N.Y.S.2d 444, 448 (1989)* (... so long as not illegal or against public policy); *Calhoun v. Campbell, 763 S.W.2d 744, 750 (Tenn. 1988)* (public policy favors extensive control of disposition

of property); *Harris v. Berry, 98 S.E.2d 251, 253 (S.C. 1957)* (sane testator has right to dispose of property as he chooses).

(n2)Footnote 315. *See Matter of Estate of Burk, 468 N.W.2d 407, 412 (S.D. 1991)* (testator has right to dispose of property as he chooses within limits and manner fixed by statute); *Shimp v. Huff, 556 A.2d 252, 263 (Md. 1989)* (purely statutory right which state may limit); *Kizer v. Hanna, 767 P.2d 679, 684 (Cal. 1989)* (testamentary disposition completely subject to legislative control); *Hall v. Vallandingham, 540 A.2d 1162, 1164 (Md. Ct. App. 1988)* (every state has power to regulate the manner by which property transmitted by will or inheritance and may deny or restrict its exercise).

(n3)Footnote 316. Such as the granting of an elective share to a surviving spouse, *see Shimp v. Huff, 556 A.2d 252, 263 (Md. 1989)* (discussing statutory restrictions providing for elective share), or provision for afterborn children, *see generally* §§ 88.12(c)(1), 88.12(c)(2), *infra.*

(n4)Footnote 317. *See* 79 Am. Jur. 2d *Wills* § 844 at 892 (purpose of will contest is to divest devisees of rights in estate and vest rights in heirs or devisees of another will).

(n5)Footnote 318. The usual grounds for contest are lack of testamentary capacity, fraud, undue influence, improper execution, forgery, or subsequent revocation. Annotation, *Validity and Enforceability of Provision of Will or Trust Instrument for Forfeiture or Reduction of Share of Contesting Beneficiary, 23 A.L.R. 4th 369, 373 (1983).* According to one study, lack of testamentary capacity and presence of undue influence constituted the bulk of claims. Jeffrey A. Schoenblum, *Will Contests -- An Empirical Study, 22 Real Prop. Prob. & Tr. J. 607, 647 (Winter 1987)* (noting approximately 44% of claims studied based on a combination of the two grounds and about 14% based on one or the other alone). The study also noted that less than 1% of the claims were based on the ground of failure to satisfy will formalities. *Id.*

(n6)Footnote 319. *See* § 88.10, *infra.*

(n7)Footnote 320. *See, e.g.,* Jeffrey A. Schoenblum, *Will Contests -- An Empirical Study, 22 Real Prop. Prob. & Tr. J. 607, 613 (Winter 1987);* Robert A. Stein & Ian G. Fierstein, *The Demography of Probate Administration, 15 U. Balt. L. Rev. 54 (1985).*

(n8)Footnote 321. *See generally* Jeffrey A. Schoenblum, *Will Contests -- An Empirical Study, 22 Real Prop. Prob. & Tr. J. 607 (Winter 1987);* Robert A. Stein & Ian G. Fierstein, *The Demography of Probate Administration, 15 U. Balt. L. Rev. 54 (1985).*

(n9)Footnote 322. Jeffrey A. Schoenblum, *Will Contests -- An Empirical Study, 22 Real Prop. Prob. & Tr. J. 607, 613, 619 (Winter 1987)* (study of Tennessee county, encompassing Nashville, over nine-year period).

(n10)Footnote 323. Probate and procedures are discussed in § 88.13, *infra.*

(n11)Footnote 324. Under the UPC, with some exceptions, probate in some form, either formal or informal, is required for the will to be effective as evidence of transfer of title. *See* U.P.C. §§ 3-201 & 3-1201, 8 U.L.A. 224-25 & 413. Some jurisdictions do not protect bona fide third party transferees upon modification or vacation of a probated will on the theory that probate is not final until the statutory period for appeal or contest has run. *See* Annotation, *Revocation of Probate of Will as Affecting Title of Purchasers from Beneficiaries under Will,* 26 A.L.R. 270 (1923).

(n12)Footnote 325. 80 Am. Jur. 2d *Wills* § 860 (1975 & Supp. 1993).

(n13)Footnote 326. The presence of an attestation clause reciting the formal requirements for due execution will raise a presumption of due execution. Several other presumptions, such as the presumption of sanity, reduce the proponents burden to proof of due execution in the absence of any evidence or charge of undue influence, mistake,

fraud, duress, and the like. *See* § 88.03, *supra*, regarding will execution.

(n14)Footnote 327. *See* § 88.08(d), *infra*.

(n15)Footnote 328. *See* 80 Am. Jur. 2d *Wills* § 863-864; 79 Am. Jur. 2d *Wills* § 839; 95 C.J.S. *Wills* § 317.

(n16)Footnote 329. *See* 80 Am. Jur. 2d *Wills* § 870 at 65; 95 C.J.S. Wills § 322 at 148.

(n17)Footnote 330. *See also* John Ritchie, Neill H. Alford, Jr., Richard W. Effland, Joel C. Dobris, Decedents Estates and Trusts at 17-18, 365-366 (8th ed. 1993). *Evans v. Waddell, 689 So. 2d 23 (Ala. 1997)* (the will contest is discussed).

(n18)Footnote 331. *See* 79 Am. Jur. 2d *Wills* § 845 (some aspects action in rem although statutes sometimes give character of inter partes action); 95 C.J.S. *Wills* §§ 318 and 322 (will contest is special proceeding in rem); 95 C.J.S. *Wills* § 308 (upon contest, a probate proceeding may take on the aspects of a proceeding inter partes rather than in rem). *McKay v. Kimble (In re Estate of Kimble), 871 P.2d 22 (N.M. 1994).*

(n19)Footnote 332. *See* 79 Am. Jur. 2d *Wills* §§ 847-848; 80 Am. Jur. 2d *Wills* §§ 937-938, 942-943; 95 C.J.S. *Wills* § 322.

(n20)Footnote 333. U.P.C. §§ 3-301 -- 3-311, 8 U.L.A. 245-255 (1983).

(n21)Footnote 334. U.P.C. § 3-401, 8 U.L.A. 270-271 (1983). *See also* the comments to this section, which do expressly refer to "solemn" and "common" forms of probate.

(n22)Footnote 335. 79 Am. Jur. 2d *Wills* §§ 851-854, 859. *Marr v. Hendrix, 952 S.W.2d 693 (Ky. 1997)* (will probated in Florida offered for ancillary probate in Kentucky).

(n23)Footnote 336. Some authority exists that a court in equity may have jurisdiction over will contests under its general equity jurisdiction. However, most authorities in the U.S. and England do not recognize jurisdiction for will contests independent of statute. *Selden v. Illinois Trust & Sav. Bank, 87 N.E. 860, 862 (Ill. 1909).*

(n24)Footnote 337. U.P.C. §§ 3-303(a)(3); 3-402(a)(2); 1-201(24); 8 U.L.A. 249, 272 (1983), 9.

(n25)Footnote 338. *See, e.g., In re Plaut's Estate, 164 P.2d 765, 766 (Cal. 1945).*

(n26)Footnote 339. *Thompson v. Turner, 89 N.E. 314, 314-15 (Ind. 1909). See* Annotation, *Standing of Legatee or Devisee Under Alleged Prior or Subsequent Will to Oppose Probate or Contest Will, 39 A.L.R. 3d 321, 325 (1971).*

(n27)Footnote 340. *See, e.g., In re Plaut's Estate, 164 P.2d 765, 766 (Cal. 1945)* (court may require proof of interest before proceeding).

(n28)Footnote 341. *See, e.g., In re Estate of Getty, 149 Cal. Rptr. 656 (1978).*

(n29)Footnote 342. *See, e.g., In re Power's Estate, 106 N.W.2d 833 (Mich. 1961).* Note, *15 Vand. L. Rev. 308 (1962). In re Lent, 59 A.2d 7 (N.J. Eq. 1948).*

(n30)Footnote 343. *Swinney v. Cummings, 581 S.W.2d 474, 477 (Mo. App. 1979).*

(n31)Footnote 344. 80 Am. Jur. 2d *Wills* § 893. Standing for contingent or conditional future interests often depends on the specific wording of the statute and may be limited in application.

(n32)Footnote 345. *See, e.g., In re Estate of Getty, 149 Cal. Rptr. 656 (1978)* (fact that codicil replaced on party as trustee and therefore revoked possibility of statutory fee for trust administration insufficient interest to confer standing

to contest). *In re O'Brien's Estate, 126 P.2d 47 (Wash. 1947)* (executor under prior will may not contest).

(n33)Footnote 346. *See In re Plaut's Estate, 164 P.2d 765, 766, 768 (Cal. 1945).*

(n34)Footnote 347. *See, e.g., Whitney v. Lott, 36 A.2d 888, 889-91 (N.J. Ch. 1944)* (common law denial of right to inheritance for murderer of testator by instrument of constructive trust in equity); *In re Estate of Kravitz, 211 A.2d 443 (Pa. 1965)* (by statutory provision); *In re Pollock, ch. 219, 222, 1 All E.R. 360, 362 (1941);* Fla. Stat. Ann. § 732.802; Ga. Code Ann. § 54-4-6. *See generally,* Annotation, *Homicide as Precluding Taking under Will or by Intestacy, 25 A.L.R. 4th 787;* John B. Rees, Jr., *American Will Statutes: II, 46 Va. L. Rev. 856, 888* (part I appears in *46 Va. L. Rev. 613 (1960)).* Slayer statutes are discussed in more detail in § 88.12(e), *infra.*

(n35)Footnote 348. *See, e.g.,* Conn. Gen. Stat. Ann. § 45a-477; Ga. Code Ann. § 54-4-6; U.P.C. § 2-803(b), 8 U.L.A. 161-63 (killer forfeits intestate share--killer's intestate share passes as if killer disclaimed; the pre-1990 version similarly provided for forfeiture of killer's intestate share).

(n36)Footnote 349. *See, e.g., Hamblin v. Marchant, 175 P. 678, aff'd on reh'g, 180 P. 811 (Kan. 1918)* (conviction of manslaughter in third degree sufficient). *But see* U.P.C. § 2-803 & cmt., 8 U.L.A. 163 (rule applies only to felonious and intentional killing but not to accidental manslaughter -- same as pre-1990 version); *In re Estate of Hoover, 682 P.2d 469 (Ariz. Ct. App. 1984)* (conviction of manslaughter requiring only recklessness under statute insufficient to satisfy forfeiture statute requirement that killing be intentional -- remanded to determine whether killing was intentional).

(n37)Footnote 350. The theories employed to transfer right in property to other beneficiaries are constructive trust in equity, equitable injunction, or non-passage of legal title. *See Whitney v. Lott, 36 A.2d 888, 890 (N.J. Ch. 1944).* The pre-1990 U.P.C. treats the disposition as if the murderer predeceased the testator. U.P.C. § 2-803, 8 U.L.A. 172-73. A 1990 amendment states that revocable benefits are considered as revoked and provides that the killer does not have to be convicted to fall within the rule. U.P.C. § 2-803 & cmt., 8 U.L.A. 161-63.

(n38)Footnote 351. *E.g.,* Conn. Gen. Stat. Ann. § 45a-477; Kan. Stat. Ann. § 59-513 (requiring conviction).

(n39)Footnote 352. *E.g.,* Ga. Code Ann. § 54-4-6. The trend appears to be not to require conviction. Since a 1960 article, *see* John B. Rees, Jr., *American Will Statutes: II, 46 Va. L. Rev. 856, 888-89* (part I is at *46 Va. L. Rev. 613 (1960)),* at least two states have amended their statutory provisions to omit any requirement of conviction. *See* Fla. Stat. Ann. § 732.802; 755 ILCS 5/2-6.

(n40)Footnote 353. U.P.C. § 2-803 & cmt., 8 U.L.A. 161-63 (pre-1990 version also did not require a conviction).

(n41)Footnote 354. 80 Am. Jur. 2d *Wills* § 926 at 99. *See generally* Annotation, *Modern Status: Inheritability of Descendability of Right to Contest Will, 11 A.L.R. 4th 907 (1982).*

(n42)Footnote 355. *See, e.g., In re Estate of Pearson, 319 N.W.2d 248 (Iowa 1982)* (daughter-in-law could not contest will even though would improve her husband's financial position and thus her divorce proceeding against him).

(n43)Footnote 356. *See* the section on pretermitted children, § 88.12(c), *infra.*

(n44)Footnote 357. *Moore v. Dague, 345 N.E.2d 449 (Ohio Ct. App. 1975)* (child born out of wedlock does not *per se* have pecuniary interest sufficient to maintain will contest since no constitutional or statutory right to inherit intestate exists). *Matter of Will of Tabler, 426 N.Y.S.2d 132, 134 (A.D.2d 1980)* (absent order of filiation, illegitimate child cannot be distributee and therefore has no right to file objection).

(n45)Footnote 358. *See* Annotation, *Standing of Legatee or Devisee Under Alleged Prior or Subsequent Will to Oppose Probate or Contest Will, 39 A.L.R. 3d 321, 337-38 & n.14 (1971).*

(n46)Footnote 359. Annotation, *Standing of Legatee or Devisee Under Alleged Prior or Subsequent Will to*

Oppose Probate or Contest Will, 39 A.L.R. 3d 321, 355 (1971).

(n47)Footnote 360. 80 Am. Jur. 2d *Wills* §§ 911-913.

(n48)Footnote 361. Annotation, *Right of Heir's Assignee to Contest Will, 39 A.L.R. 3d 696, 707 (1971); cf. Selden v. Illinois Trust & Savings Bank, 87 N.E. 860, 863-64 (1909)* (contest of will did not survive deceased heir in absence of statutory provision and, thus, was not "assignable" to personal representative).

(n49)Footnote 362. *See Trevino v. Turcotte, 564 S.W.2d 682 (Tex. 1978)* (assignees of remote heirs were estopped from contesting where as beneficiaries of their father's interest in will they were bound by his ratification and had enjoyed benefits of property taken by father under will).

(n50)Footnote 363. 80 Am. Jur. 2d *Wills* §§ 915-918 (1975 & Supp. 1993).

(n51)Footnote 364. *See also* U.P.C. § 3-403, 8 U.L.A. 274-5.

(n52)Footnote 365. 80 Am. Jur. 2d *Wills* §§ 922, 1037.

(n53)Footnote 366. *See Jones v. La Fargue, 758 S.W.2d 320, 324 (Tex. App. 1988).*

(n54)Footnote 367. Annotation, *Fraud as Extending Statutory Limitations Period for Contesting Will or its Probate, 48 A.L.R. 4th 1094 (1986).*

(n55)Footnote 368. *See* Annotation, *Fraud as Extending Statutory Limitations Period for Contesting Will or its Probate, 48 A.L.R. 4th 1094 (1986); see, e.g., Neill v. Yett, 746 S.W.2d 32 (Tex. Civ. App. 1988)* (statute tolling limitations period for contest contemplates extrinsic rather than intrinsic fraud).

(n56)Footnote 369. *See generally* Annotation, *Estoppel to Contest Will or Attack its Validity by Acceptance of Benefits Thereunder, 78 A.L.R. 4th 90 (1990).*

(n57)Footnote 370. Some courts will apply estoppel regardless of the contestant's knowledge of the legal effect of their actions. *See, e.g., Sheffield v. Scott, 662 S.W.2d 674 (Tex. Civ. App. 1983).*

(n58)Footnote 371. *Cf. In re Estate of Himmelfarb, 345 A.2d 477 (D.C. Ct. App. 1975)* (absence of prior adjudication of issues raised in second contest prevented application of res judicata and estoppel did not apply where notice given by contestant prior to any detrimental reliance).

(n59)Footnote 372. 80 Am. Jur. 2d *Wills* § 896.

(n60)Footnote 373. *See generally* Jan Ellen Rein-Francovich, *An Ounce of Prevention: Grounds for Upsetting Wills and Will Substitutes*, 20 Gonz. L.R. 1, 29-32 (1984-85) (Ms. Rein-Francovich provides what one might call a "lucid interval" regarding burden of proof. See her further explanation and cases cited). *See also* McCormick on Evidence §§ 336-339 (4th ed., John Strong ed. 1992).

(n61)Footnote 374. That is, the jury is likely to believe the truth of the evidence presented.

(n62)Footnote 375. U.P.C. § 3-407, 8 U.L.A. 279-80. The pertinent text of the section provides:

... Proponents of a will have the burden of establishing prima facie proof of due execution in all cases, and, if they are also petitioners, prima facie proof of death and venue. Contestants of a will have the burden of establishing lack of testamentary intent or capacity, undue influence, fraud, duress, mistake or revocation. Parties have the ultimate burden of persuasion as to matters with respect to which they have the initial burden of proof. If a will is opposed by the petition for probate of a later will revoking the former, it shall be determined first whether the later will is entitled to

probate, and if a will is opposed by a petition for a declaration of intestacy, it shall be determined first whether the will is entitled to probate.

(n63)Footnote 376. *See* Annotation, *Sufficiency of Evidence to Support Grant of Summary Judgment in Will Probate or Contest Proceedings, 54 A.L.R. 4th 561, 570 (1987).*

(n64)Footnote 377. A dead man's statute is "an evidential disqualification which renders inadmissible oral promises or declarations of a dead person when offered in support of their claims by those who bring claims against the estate of the dead person." Black's Law Dictionary 398 (6th ed. 1990). *See generally* Annotation, *Use of Evidence Excludible under Dead Man's Statute to Defeat or Support Summary Judgment, 67 A.L.R. 3d 970 (1975)* ("Dead man's statutes ... typically prevent an interested party from testifying against a decedent's representative as to transactions with the deceased, except on consent or implied waiver.").

(n65)Footnote 378. *See generally* 1 William H. Page, Page on Wills 99-101 (3d ed. 1941). Some jurisdictions add a publication requirement, meaning the testator must make the witnesses aware that the instrument being witnessed is a will. *See also* § 88.03, *supra,* on will execution.

(n66)Footnote 379. For example, the Statute of Frauds requirement for a signature of the party to be held liable under the contract may be waived by failure to plead non-compliance with the statutory requirement.

(n67)Footnote 380. An absence of language of testamentary intent in the instrument will result in a finding of no will in most cases. *See Hinson v. Hinson, 280 S.W.2d 731, 733 (Tex. 1955).* This is because extrinsic evidence generally cannot be used to supply testamentary intent to such an instrument. *See Huffman v. Huffman, 339 S.W.2d 885, 888 (Tex. 1960).*

(n68)Footnote 381. *See First Nat'l Bank v. Gardner, 376 S.W.2d 311, 314 (Ky. 1964).* The court colorfully stated that axiom of the law that the title or name given to a cause of action or document is not controlling in the following manner:

> A bear well painted and drawn to the life is yet the picture of a bear, although the painter may omit to write over it, 'this is the bear.' By parity of reasoning, the bear does not lose its basic characteristics if the artist dubs it a horse. (quoting former *Chief Justice Bibb, Prewitt v. Clayton, 21 Ky. (5 T.B. Mon.) 4, 5 (1827).*

(n69)Footnote 382. *See* Jan Ellen Rein-Francovich, *An Ounce of Prevention: Grounds for Upsetting Wills and Will Substitutes,* 20 Gonz. L.R. 1, 4 (1984-85), citing *Straw v. Owens, 746 S.W.2d 345, 346 (Tex. App. 1988)* (no writ), citing *Huffman v. Huffman, 339 S.W. 885, 888 (Tex. 1960),* (no amount of extrinsic evidence can supply absent testamentary intent and lack of expressed language evidencing testamentary intent renders instrument invalid as will); *Thomas v. Copenhaver, 365 S.E.2d 760, 762 (Va. 1988)* (extrinsic evidence not allowed to show testamentary intent which must appear on the face of the instrument).

(n70)Footnote 383. Presumably general challenges that language of intent in the instrument was not intended could also arise based on other occurrences. Wills executed in jest or with lack of serious intent also fall into this category. *See Nichols v. Nichols, 161 Eng. Rep. 1113 (1814)* (will executed in moment of levity); *Lister v. Smith, 164 Eng. Rep. 1282, 1284 (1863)* (wills executed in jest or boast, etc. are invalid as lacking testamentary intent). *See generally* § 88.04(e), Conditional Wills/Sham wills, *supra.*

(n71)Footnote 384. *See, e.g., In re Kennedy's Will, 124 N.W. 516, 518 (Mich. 1910); see also Recent Decisions, 16 N.Y.U. L.Q. 298, 323-25 (1939).*

(n72)Footnote 385. *See* Black's Law Dictionary 295 (6th ed. 1990). Non-validity of the will may also be

contingent, that is, the testator may provide that the will is not to take effect on the happening of a specified event. *See* William H. Page, Page on Wills 204-05 (3d ed. 1941).

(n73)Footnote 386. Jan Ellen Rein-Francovich, *An Ounce of Prevention: Grounds for Upsetting Wills and Will Substitutes,* 20 Gonz. L.R. 1, 12-13 (1984-85); 1 William H. Page, Page on Wills 205 (3d ed. 1941).

(n74)Footnote 387. *See In re Poonarian's Will, 137 N.E. 606 (N.Y. 1922)* (will condition related to death on trip not death several years subsequent to returning from trip).

(n75)Footnote 388. Jan Ellen Rein-Francovich, *An Ounce of Prevention: Grounds for Upsetting Wills and Will Substitutes,* 20 Gonz. L.R. 1, 12 (1984-85).

(n76)Footnote 389. Soldiers' and sailors' informal wills, for instance, receive favorable treatment by the courts due to the nature of their occupation. *See also*, § 88.04(a) Holographic Wills, and § 88.04(b) Nuncupative Wills, *supra*.

(n77)Footnote 390. Jan Ellen Rein-Francovich, *An Ounce of Prevention: Grounds for Upsetting Wills and Will Substitutes,* 20 Gonz. L.R. 1, 13 & n.41 (1984-85) (criticizing doctrine because intent formed after execution).

(n78)Footnote 391. Jan Ellen Rein-Francovich, *An Ounce of Prevention: Grounds for Upsetting Wills and Will Substitutes,* 20 Gonz. L.R. 1, 6 (1984-85).

(n79)Footnote 392. *See* Lowell Turrentine, wills and administration 158 n.2 (1962) for cases cited as to sham wills to induce pretended beneficiary to have immoral relations with the testator and to discourage annoying beneficiary.

(n80)Footnote 393. *124 N.W. 516 (Mich. 1910).*

(n81)Footnote 394. *In re Kennedy's Will, 124 N.W. 516, 519 (Mich. 1910)* (holding extrinsic evidence not permitted to contradict will valid on its face). *See generally* Jan Ellen Rein-Francovich, *An Ounce of Prevention: Grounds for Upsetting Wills and Will Substitutes,* 20 Gonz. L.R. 1, 5-6 (1984-85) (extrinsic evidence generally not allowed as interfering with policy behind formalities).

(n82)Footnote 395. *See Lister v. Smith, 164 Eng. Rep. 1282 (1863)* (extrinsic evidence permitted, if very cogent and conclusive, to show decedent executed will to convince woman to vacate a house); *Shiels v. Shiels, 109 S.W.2d 1112, 1113-15 (Tex. Civ. App. 1937)* (court may look at circumstances surrounding will execution to determine testamentary intent); Lowell Turrentine, Wills and Administration 158 n.2 (1962).

(n83)Footnote 396. *See* Lowell Turrentine, Wills and Administration 158 n.2 (1962); *Recent Decisions, 16 N.Y.U. L.Q. 298, 323-25 (1939); In re Sharp's Estate, 183 So. 470 (Fla. 1938)* (mere ceremonial execution of will as requirement to obtain degree in Masonry may be shown as lacking in proper testamentary intent). Such circumstances may raise an inference of invalidity with some courts who disfavor frivolous, hasty, or immature consideration attending will execution. Nevertheless, courts will validate such wills when circumstances indicate the presence of testamentary intent. *See In re Watkins' Estate, 198 P. 721 (Wash. 1921)* (that will executed as part of ritual insufficient ground alone for rejection for lack of testamentary intent); *Recent Decisions, 16 N.Y.U. L.Q. 298, 323-25 (1939).*

(n84)Footnote 397. *See* John T. Gaubatz, et al., Estates and Trusts: Cases, Problems and Materials 146 (1989) Incapacity due to coverture, alienage, and felony conviction has generally been dispensed with. Jan Ellen Rein-Francovich, *An Ounce of Prevention: Grounds for Upsetting Wills and Will Substitutes,* 20 Gonz. L.R. 1, 13 (1984-85). *See also Will of Elias Land v. Land, 611 N.Y.S.2d 833 (1994).*

(n85)Footnote 398. *See Restatement (Second) of Property,* Statutory Note to § 34.4 (1977); William M. McGovern, Jr., Sheldon F. Kurtz, Jan Ellen Rein, Wills, Trusts and Estates, § 7.2 (1988).

(n86)Footnote 399. U.P.C. § 2-501 (1990) 8 U.L.A. 102 (Supp. 1993).

(n87)Footnote 400. *In re Estate of Teel, 483 P.2d 603 (Ariz. 1971)* (upholding will of testator functioning at age level of 10-12 years old).

(n88)Footnote 401. *See, e.g.*, Iowa Code § 599.1; Kan. Stat. § 38-101, Or. Rev. Stat. 109.520, Tex. Prob. Code Ann. § 57 (providing for married persons or members of armed services).

(n89)Footnote 402. *See generally*, Meiklejohn, *Contractual and Donative Capacity, 39 Case W. Res. L. Rev. 307 (1989);* Jane Baron, *Empathy, Subjectivity and Testamentary Capacity, 24 San Diego L. Rev. 1043 (1987);* Epstein, *Testamentary Capacity, Reasonableness and Family Maintenance: A Proposal for Meaningful Reform, 35 Temp. L.Q. 231 (1962). See also Bishop v. Kenny, 466 S.E.2d 581 (Ga. 1996).*

(n90)Footnote 403. *See, e.g.*, U.P.C. § 2-501, 8 U.L.A. 102; Tex. Prob. Code Ann. § 57.

(n91)Footnote 404. *See* Milton D. Green, *Proof of Mental Incompetency and the Unexpressed Major Premise, 53 Yale L.J. 271, 273-74 & 310 (1944)* (discussing court standards for mental capacity).

(n92)Footnote 405. *See generally* Jeffrey A. Schoenblum, *Will Contests -- An Empirical Study, 22 Real Prop. Prob. & Tr. J. 607 (Winter 1987)* (noting number of contests based on lack of testamentary capacity and/or undue influence which is similarly ambiguous as to definition).

(n93)Footnote 406. *See* Jan Ellen Rein-Francovich, *An Ounce of Prevention: Grounds for Upsetting Wills and Will Substitutes*, 20 Gonz. L.R. 1, 23 (1984-85); Milton D. Green, *Proof of Mental Incompetency and the Unexpressed Major Premise, 53 Yale L.J. 271, 275 (1944); In re Estate of Roosa, 753 P.2d 1028 (Wyo. 1988).* Old age, physical weakness (including blindness, deafness, mutism), disease, lack of memory, or mistake as to property owned is not conclusive of testamentary incapacity. *Compare Akers v. Morton, 499 F.2d 44 (9th Cir. 1974), cert. denied, 423 U.S. 831 (1975)* (alcoholism did not prevent proper execution in lucid moment) *and Mangan v. Mangan, 554 S.W.2d 418 (Mo. App. 1977)* (physical incapacity did not prevent valid will execution in lucid moment) *with In re Estate of Erickson, 588 P.2d 125 (Or. 1978)* (physical incapacity, intoxication from narcotics, and lack of lucid interval showed testamentary incapacity in execution of codicil) *and Succession of Wright, 376 So. 2d 589 (La. App. 1979)* (physical incapacity, intoxication from narcotics, and lack of lucid interval showed testamentary incapacity in execution of will). *See generally* Jeffrey M. Alden, Note, *Testamentary Capacity in a Nutshell: A Psychiatric Reevaluation, 18 Stan. L. Rev. 1119 (1966);* Sharon Glisson Bradley, Note, *Testamentary Capacity: Is the Alcoholic Incapacitated, 46 Mont. L. Rev. 437 (1985).*

(n94)Footnote 407. *See* Milton D. Green, *Proof of Mental Incompetency and the Unexpressed Major Premise, 53 Yale L.J. 271, 275-76 (1944)* (in order to amount to testamentary incapacity, mental incompetency must destroy party's understanding of the questioned transaction specifically).

(n95)Footnote 408. *See Chambers v. Chambers, 542 S.W.2d 901, 907 (Tex. Civ. App. 1976)* (Texas does not presume sanity in probate matters).

If incapacity is established both prior to and subsequent to execution, the above presumption disappears and the proponent has the burden of proving a lucid interval. Jan Ellen Rein-Francovich, *An Ounce of Prevention: Grounds for Upsetting Wills and Will Substitutes*, 20 Gonz. L.R. 1, 21 (1984-85); John T. Gaubatz, et al., Estates and Trusts: Cases, Problems and Materials 153 (1989); *cf.* Milton D. Green, *Proof of Mental Incompetency and the Unexpressed Major Premise, 53 Yale L.J. 271, 274 n.17 (1944)* (proof of insanity of a permanent type shifts burden to proponent to show lucid interval).

(n96)Footnote 409. Several authorities have noted that juries are not as liberal at finding testamentary capacity as are the courts. *See* John T. Gaubatz, et al., Estates and Trusts: Cases, Problems and Materials 153 (1989); Jesse Dukeminier & Stanley M. Johanson, Wills, Trusts, and Estates 140-41 (4th ed. 1990); Jeffrey A. Schoenblum, *Will Contests -- An Empirical Study, 22 Real Prop. Prob. & Tr. J. 607, 626-27 (Winter 1987). See generally* Note, *Will*

Contests on Trial, 6 Stan. L. Rev. 91, 92 & n.5 (1953) (jury for contestant in 77% of cases involving undue influence and testamentary capacity).

(n97)Footnote 410. *See, e.g.,* Smith & Hagar, *The Senile Testator: Medicolegal Aspects of Competency*, 13 Cleveland-Mar. L. Rev. 397 (1964). For more information on the aging of the population, *see* § 88.14, *infra,* Health-Care Planning Devices.

(n98)Footnote 411. *See, e.g.,* Berendt and Michaels, *Your HIV Positive Client: Easing the Burden on the Family Through Estate Planning, 24 J. Marshall L. Rev. 509 (1991);* Rivera, *Lawyers, Clients, and AIDS: Some Notes From the Trenches, 49 Ohio St. L.J. 883 (1989);* Mock & Tobin, *Estate Planning for Clients with AIDS, 7 St. Louis U. Pub. L. Rev. 177 (1988).*

(n99)Footnote 412. Often referred to as knowing the natural objects of one's bounty.

(n100)Footnote 413. *See generally* Thomas Edgar Atkinson, Atkinson on Wills § 51 (2d ed. 1953). *See Estate of Wrigley, 433 N.E.2d 995 (Ill. App. 1982); Matter of Congdon's Estate, 309 N.W.2d 261 (Minn. 1981).*

(n101)Footnote 414. *See In re Estate of Weil, 518 P.2d 995 (Ariz. 1974)* (focus on capacity to know, not on whether in fact testator appreciated his moral obligations and duties towards particular persons in accordance with a standard fixed by society, the courts, or psychiatrists). *But see* Milton D. Green, *Proof of Mental Incompetency and the Unexpressed Major Premise, 53 Yale L.J. 271, 306 (1944)* (arguing that review of cases demonstrates that courts are ruling on abnormality of the transaction rather than the testators' ability to understand that transaction).

(n102)Footnote 415. *Compare Akers v. Morton, 499 F.2d 44 (9th Cir. 1974), cert. denied, 423 U.S. 831 (1975)* (alcoholism did not prevent proper execution in lucid moment) *and Mangan v. Mangan, 554 S.W.2d 418 (Mo. Ct. App. 1977)* (physical incapacity did not prevent valid will execution in lucid moment) *with In re Estate of Erickson, 588 P.2d 125 (Or. 1978)* (physical incapacity, intoxication from narcotics, and lack of lucid interval showed testamentary incapacity in execution of codicil) *and Succession of Wright, 376 So. 2d 589 (La. Ct. App. 1979)* (physical incapacity, intoxication from narcotics, and lack of lucid interval showed testamentary incapacity in execution of will).

(n103)Footnote 416. *See* 79 Am. Jur. 2d *Wills* § 86 (1975 & Supp. 1993). *Turja v. Turja, 118 F.3d 1006 (4th Cir. 1997)* (if the testator lacks mental capacity, the will is void; it cannot be valid in part and void in part).

(n104)Footnote 417. Black's Law Dictionary 794 (6th ed. 1990) ("... a conception of a disordered mind which imagines facts to exist of which there is no evidence and belief in which is adhered to against all evidence and argument to contrary, and which cannot be accounted for on any reasonable hypothesis."). *See also In re Nigro's Estate, 52 Cal. Rptr. 128 (1960); In re Honigman, 168 N.E.2d 676 (N.Y. 1960); Chafin Will Case, 32 Wis. 557 (1873); In re Will of Reimer, 85 N.W.2d 804 (Wis. 1957);* Modjecka, *Psychology and Law: An Examination of the Concept of Insane Delusion*, Wis. L. Rev. 54 (1960).

(n105)Footnote 418. *See, e.g., Kelley v. Reed, 580 S.W.2d 682 (Ark. 1979).*

(n106)Footnote 419. *See Spry v. Logansport Load & Trust, 133 N.E. 827, 828-29 (Ind. 1922)* (delusion which influences testator to make will but does not influence disposition does not destroy testamentary capacity).

(n107)Footnote 420. *See, e.g., Kingsdon v. Sylerant, 158 N.W.2d 863 (N.D. 1968); Pendarvis v. Gibb, 159 N.E. 353 (Ill. 1927).*

(n108)Footnote 421. *See, e.g., In re Estate of Raney, 799 P.2d 986, 994 (Kan. 1990)* (a delusion has to be patently absurd to reasonable people before it is considered a real delusion).

(n109)Footnote 422. Jan Ellen Rein-Francovich, *An Ounce of Prevention: Grounds for Upsetting Wills and Will*

Substitutes, 20 Gonz. L.R. 1, 27-28 (1984-85) (stating that Honigman, *infra,* dissent generally followed in other jurisdictions); *compare In re Honigman's Will, 168 N.E.2d 676 (N.Y. 1960)* (majority opinion invalidating will due to unreasonable belief in wife's infidelity -- dissent arguing that will should be upheld when other sound reasons exist for disposition) *with Matter of Estate of Bonjean, 413 N.E.2d 205, 207 (Ill. App. 1980)* (where testator has some actual grounds for belief, though regarded by others as wholly insufficient, the mere misapprehension of the facts or unreasonable and extravagant conclusions drawn therefrom do not establish a delusion that will invalidate will); *see, e.g., In re Estate of Raney, 799 P.2d 986, 994 (Kan. 1990)* (a delusion has to be patently absurd to reasonable people before it is considered a real delusion); *Matter of Estate of Bonjean, 413 N.E.2d 205, 207 (Ill. Ct. App. 1980)* (testamentary capacity not denied even if testator dislikes and disinherits family for bad reasons as long as bad reasons have rational foundation).

(n110)Footnote 423. *See, e.g., Matter of Estate of Yett, 606 P.2d 1174, 1176 (Or. Ct. App. 1980).*

(n111)Footnote 424. Jan Ellen Rein-Francovich, *An Ounce of Prevention: Grounds for Upsetting Wills and Will Substitutes, 20 Gonz. L. Rev. 1, 23* (1984-85) (hallmark is that will is product of deranged mind). *See, e.g., Matter of Stuhlfauth's Estate, 410 N.E.2d 1063 (Ill. 1980); In re Hargrove's Will, 28 N.Y.S.2d 571 (1941) aff'd, 42 N.E.2d 608 (A.D. N.Y. 1942).*

(n112)Footnote 425. *See generally* Jeffrey A. Schoenblum, *Will Contests -- An Empirical Study, 22 Real Prop. Prob. & Tr. J. 607 (Winter 1987)* (testamentary capacity common ground for contest probably because of ambiguity of definition).

(n113)Footnote 426. Jan Ellen Rein-Francovich, *An Ounce of Prevention: Grounds for Upsetting Wills and Will Substitutes,* 20 Gonz. L.R. 1, 23 (1984-85); Thomas L. Waterbury, Materials on Trusts & Estates (American Casebook Series) 340 (1986); *Matter of Estate of Bonjean, 413 N.E.2d 205, 207 (Ill. Ct. App. 1980)* (where testator has some actual grounds for belief, though regarded by others as wholly insufficient, the mere misapprehension of the facts or unreasonable and extravagant conclusions drawn therefrom do not establish a delusion that will invalidate will).

(n114)Footnote 427. Thomas L. Waterbury, Materials on Trusts & Estates 340 (1986); *see Owen v. Crumbaugh, 81 N.E. 1044 (Ill. 1907); Henderson v. Jackson, 111 N.W. 821, 822-23 (Iowa 1907)* (no insane delusion on basis of testator's belief in spirits or witchcraft); *Rice v. Henderson, 83 S.E.2d 762, 767 (W. Va. 1954)* (dictum: even belief in witchcraft, spirits, spooks, or supernatural things insufficient alone to establish insanity).

(n115)Footnote 428. Jan Ellen Rein-Francovich, *An Ounce of Prevention: Grounds for Upsetting Wills and Will Substitutes, 20 Gonz. L. Rev. 1, 24* (1984-85); *see In re Smith's Estate, 91 P.2d 254, 256 (Ariz. 1939)* (mistaken belief that relative well-off insufficient alone to establish insane delusion or invalidate will); *Blake v. Rhode Island Hosp. Trust Co., 163 A. 750, 750-51 (R.I. 1933)* (mistaken belief that half-sister illegitimate insufficient).

(n116)Footnote 429. *See In re Estate of Raney, 799 P.2d 986, 994 (Kan. 1990)* (quoting *Akins v. Akins, 199 P. 922 (1921)* (quoting *Taylor v. McClintock, 112 S.W. 405 (1908)).*

(n117)Footnote 430. Jan Ellen Rein-Francovich, *An Ounce of Prevention: Grounds for Upsetting Wills and Will Substitutes, 20 Gonz. L. Rev. 1, 26-27* (1984-85); *see, e.g., Tate v. Chumbley, 57 S.E.2d 151 (Va. 1950).*

(n118)Footnote 431. For a more detailed analysis of mistake, omission and ambiguity, *see* § 88.07, *infra*.

(n119)Footnote 432. *See Holcomb v. Holcomb, 803 S.W.2d 411, 415 (Tex. App. 1991)* (mistake of fact of law alone insufficient to defeat will, even thought testator would have made a different will but for mistake inducing the making of the will -- coupled with undue influence, it was sufficient); *Matter of Estate of Vick, 557 So. 2d 760, 766 (Miss. 1989)* (mistake of extrinsic fact causing different disposition not sufficient to avoid will).

(n120)Footnote 433. *See In re Estate of Pavlinko, 148 A.2d 528 (Pa. 1959)* (probate denied). *But see Matter of*

Estate of Snide, 439 N.Y.S.2d 690 (3d Dep't 1981) (identical wills but for names of spouses mistakenly signed by each other properly admitted to probate).

(n121)Footnote 434. 79 Am. Jur. 2d *Wills* §§ 415-17 (1975).

(n122)Footnote 435. *See In re Estate of Schroeder, 441 N.W.2d 527, 531-32 (Minn. App. 1989).*

(n123)Footnote 436. 79 Am. Jur. 2d *Wills* § 415 at 569 (1975).

(n124)Footnote 437. 79 Am. Jur. 2d *Wills* § 418 at 571 (1975).

(n125)Footnote 438. *See generally* Moller, *Undue Influence and the Norm of Reciprocity, 26 Idaho L. Rev. 275 (1990);* Green, *Fraud, Undue Influence, and Mental Incompetency, 43 Cal. L. Rev. 176 (1943);* Comment, *Wills, Undue Influence, 50 Mich. L. Rev. 748 (1952). See also McNeeley v. Hiatt, 909 P.2d 191 (Or. App. 1996).*

(n126)Footnote 439. *See also Ryan v. Colombo, 712 P.2d 139 (Or. App. 1985); Maurath v. Sickles, 586 S.W.2d 723 (Mo. App. 1979); Lipper v. Weslow, 369 S.W.2d 698 (Tex. Civ. App. 1963). See also Ginter v. Ginter, 101 P.2d 634 (Kan. 1909).*

(n127)Footnote 440. *In re Sickles Will, 50 A. 577 (N.J. 1901).*

(n128)Footnote 441. *Matter of Brown's Estate, 640 P.2d 1250 (Kan. 1982); Schmidt v. Schwear, 424 N.E.2d 401 (Ill. App. 1981); Cook v. Loftus, 414 N.E.2d 581 (Ind. App. 1981).*

(n129)Footnote 442. *Gay v. Gillilan, 5 S.W. 7 (Mo. 1887); In re Brunor, 47 N.Y.S. 681 (1897).*

(n130)Footnote 443. *Erb v. Lee, 430 N.E.2d 869 (Mass. App. Ct. 1982); Estate of Bulton, 328 A.2d 480 (Pa. 1974).*

(n131)Footnote 444. *See* William M. McGovern, Sheldon F. Kurtz & Jan Ellen Rein, Wills, Trusts and Estates § 7.3 (2d ed. 1988). *See also* U.P.C. § 3-407, 8 U.L.A. 278-79. For more discussion of burden of proof, *see* § 88.08(c)(7), *infra.*

(n132)Footnote 445. *Id., Estate of Kamesar, 259 N.W.2d 733 (Wis. 1977).*

(n133)Footnote 446. *See, e.g., Cook v. Loftus, 414 N.E.2d 581 (Ind. App. 1981); In re Reddaway's Estate, 329 P.2d 886 (Or. 1958). But see Florida Nat'l Bank v. Genova, 460 So. 2d 895 (Fla. 1984)* (not applicable to revocation of inter-vivos trust).

(n134)Footnote 447. *See generally* Whitman & Hooper, *The Confidential Relationship in Will Contests,* 122 Tr. & Est. 53 (1985).

(n135)Footnote 448. *See generally* William M. McGovern, Sheldon F. Kurtz & Jan Ellen Rein, Wills, Trusts and Estates § 7.3 (2d ed. 1988). *See also Habersack v. Rabaut, 287 N.W.2d 213 (Mich. App. 1979)* (attorney-client); *In re Buche's Estate, 132 P.2d 257 (Cal. App. 1942)* (doctor-patient); *McQueen v. Wilson, 31 So. 94 (Ala. 1901)* (priest-parishoner).

(n136)Footnote 449. *See, e.g., Costello v. Hall, 506 So. 2d 293 (Miss. 1987); Olson v. Harshman, 668 P.2d 147 (Kan. 1983).*

(n137)Footnote 450. *See, e.g., Matter of Estate of Robinson, 644 P.2d 420 (Kan. 1982); Gill v. Gill, 254 S.E.2d 122 (Va. 1979). But see McKee v. Stoddard, 780 P.2d 736 (Or. App. 1989); Hughes v. Hughes, 634 P.2d 1271 (N.M. 1981).*

(n138)Footnote 451. *See generally* Joseph W. deFuria, *Testamentary Gifts Resulting From Meretricious Relationships: Undue Influence or Natural Beneficence?, 64 Notre Dame L. Rev. 200 (1989);* Sherman, *Undue Influence and the Homosexual Testator, 42 U. Pitt. L. Rev. 225 (1981); In re Kaufmann's Will, 247 N.Y.S.2d 664 (1964), aff'd, 205 N.E.2d 864 (N.Y. 1965); In re Launius, 507 So. 2d 27 (Miss. 1987); In re Will of Moses, 227 So. 2d 829 (Miss. 1969); In re Kelly's Estate, 46 P.2d 84 (Or. 1935). See also* Annotation, *Existence of Illicit or Unlawful Relation Between Testator and Beneficiary as Evidence of Undue Influence, 76 A.L.R. 3d 743 (1977).*

(n139)Footnote 452. *See, e.g., Estate of Weickum, 317 N.W.2d 142 (S.D. 1982); Estate of Fritschi, 384 P.2d 656 (Cal. 1963). But see* In *Wood's Estate, 132 N.W.2d 35 (Mich. 1965).*

(n140)Footnote 453. *See, e.g., Burgess v. Bohle, 146 P.2d 242 (Cal. App. 1944); Will of Leisch, 267 N.W. 268 (Wis. 1936).*

(n141)Footnote 454. *See, e.g., Estate of Pedrick, 482 A.2d 215 (Pa. 1984); Franciscan Sisters Health Care Corp. v. Dean, 448 N.E.2d 872 (Ill. 1983); Blake's Will, 120 A.2d 745 (N.J. 1956); In re Arnold's Estate, 107 P.2d 25 (Cal. 1940).*

(n142)Footnote 455. *See generally* Joseph W. De Furia, *Testamentary Gifts from Client to Attorney-Draftsman: From Probate Presumption to Ethical Prohibition, 66 Neb. L. Rev. 695 (1987);* Johnston, *An Ethical Analysis of Common Estate Planning Practices -- Is Good Business Bad Ethics?, 45 Ohio St. L.J. 57 (1984). See also* Annotation, *Wills: Undue Influence in Gift to Testator's Attorney, 19 A.L.R. 3d 575 (1968).*

(n143)Footnote 456. *See, e.g., Williams v. Crickman, 405 N.E.2d 799 (Ill. 1980); Estate of Carothers, 150 A. 585 (Pa. 1930); contra In re O'Loughlin's Estate, 183 N.W.2d 133 (Wis. 1971); McCarthy v. Fidelity Nat'l Bank & Trust Co., 30 S.W.2d 19 (Mo. 1930).*

(n144)Footnote 457. *See generally* the doctrine of Republication by Codicil, discussed *infra* at § 88.06(c).

(n145)Footnote 458. *See generally* William M. McGovern, Jr., Sheldon F. Kurtz & Jan Ellen Rein, Wills, Estates and Trusts § 7.2 (2d ed. 1988).

(n146)Footnote 459. *See generally* Thomas Edgar Atkinson, The Law of Wills §§ 56-57 (2d ed. 1953); 1 William H. Page, Page on Wills §§ 14.2-14.8 (3d ed., Bowe-Parker ed. rev., 1960); Green, *Fraud, Undue Influence & Mental Incompetency, 43 Col. L. Rev. 176 (1973);* Henderson, *Mistake and Fraud in Wills -- Part I: A Comparative Analysis of Existing Law, 47 B.U. L. Rev. 303 (1967).*

(n147)Footnote 460. *See, e.g.,* In Estate of Carson, 194 P.5, 17 A.L.R. 239 (Cal. 1920).

(n148)Footnote 461. *See, e.g., Estate of Legeas, 258 Cal. Rptr. 858 (1989); Nemeth v. Banhalmi, 466 N.E.2d 977 (Ill. App. 1984); Bohannan v. Wachovia Bank & Trust Co., 188 S.E. 390 (N.C. 1936);* Restatement Second of Torts § 774B (1979).

(n149)Footnote 462. *See generally* Jack, *No Contest or* In Terrorem *Clauses in Wills -- Construction and Enforcements, 19 Sw. L.J. 722 (1965);* Leavitt, *Scope and Effectiveness of No-Contest Clauses in Last Wills and Testaments, 15 Hastings L.J. 45 (1963);* Kertz, *Contesting a Will in the Face of a Forfeiture Clause, 45 Georgetown L.J. 45 (1963).*

(n150)Footnote 463. Annotation, *Validity and Enforceability of Provision of Will or Trust Instrument for Forfeiture or Reduction of Share of Contesting Beneficiary, 23 A.L.R. 4th 369, 372 (1983).*

One state, Indiana, has expressly invalidated such clauses by statute. Ind. Code Ann. § 29-1-6-2 (Burns 1989) (providing that all such clauses are void). The annotation at *23 A.L.R. 4th 369* concerning validity and enforceability of

such clauses cites the Indiana case *Doyle v. Paul, 86 N.E.2d 98 (Ind. App. 1949)* (construing a prior codification of the above statute), as one upholding the validity of such clauses. This is a dubious reading of both the clause and the case. Under the will in question, the testator's sons were required to make certain payments in order to obtain a devise of land. The will stated that "dissatisfaction" with the conditions would render the gift void. The testator merely provided for a condition precedent to the sons taking under the will and an alternate disposition should they fail to comply. The forfeiture in this case simply reflects a failure or refusal to comply with the condition. The court held that the clause was not a no-contest clause and, therefore, was not subject to the statutory provision.

A Georgia statutory provision provides that an *in terrorem* clause is void unless an alternate disposition has been made. Ga. Code Ann. § 53-2-107.

Dunklin v. Ramsay, 944 S.W.2d 76 (Ark. 1997) (Arkansas Supreme Court has consistently held *in terrorem* clauses valid).

(n151)Footnote 464. *See, e.g., Estate of Wojtalewicz v. Woitel, 418 N.E.2d 418, 420 (Ill. App. 1981).* It has been asserted at times that some early English cases and some U.S. cases, usually in dictum, made a distinction between personalty and realty in applying such clauses. When personalty was involved and the will made no provision for disposition upon forfeiture, these authorities held the clause to be merely *in terrorem*, that is, precatory only, and, therefore, invalid. The better view is that, at least today, this distinction and application is illegitimate and a few cases have expressly repudiated the doctrine. *See* Annotation, *Validity and Enforceability of Provision of Will or Trust Instrument for Forfeiture or Reduction of Share of Contesting Beneficiary, 23 A.L.R. 4th 369, 372 (1983); Burtman v. Butman [sic], 85 A.2d 892, 894 (N.H. 1952); In re Hite's Estate, 101 P. 443, 447 (Cal. 1909).*

(n152)Footnote 465. *Estate of Wojtalewicz v. Woitel, 418 N.E.2d 418, 420 (Ill. App. 1981); Dulak v. Dulak, 496 S.W.2d 776, 782 (Tex. Civ. App. 1973), aff'd in part, rev'd in part, 513 S.W.2d 205 (Tex. 1974)* (clauses given strict construction to avoid forfeiture); *cf. Poag v. Winston, 241 Cal. Rptr. 330, 337 (1987)* (although California favors such clauses, because they may involve a forfeiture, strict construction is to be applied). *See generally* Annotation, *What Constitutes Contest or Attempt to Defeat Will Within Provision Thereof Forfeiting Share of Contesting Beneficiary, 49 A.L.R. 2d 198 (1956)* (strict construction of no-contest clauses consistent with law's abhorrence of forfeitures).

(n153)Footnote 466. *See In re Hite's Estate, 101 P. 443, 444 (Cal. 1909).*

(n154)Footnote 467. *In re Hite's Estate, 101 P. 443, 444 (Cal. 1909)* (quoting *In re Garcelon, 38 P. 414, 420 (Cal. 1894)* (quoting *Cooke v. Turner, 14 Sim. 493)).*

(n155)Footnote 468. Annotation, *What Constitutes Contest or Attempt to Defeat Will Within Provision Thereof Forfeiting Share of Contesting Beneficiary, 3 A.L.R. 5th 590, 611 (1992)* (although forfeiture clause to be strictly construed, the paramount consideration in construction of wills is the ascertainment and effectuation of testator's intent); *In re Hite's Estate, 101 P. 443, 444 (Cal. 1909)* (noting the balancing of policy considerations in ruling on validity of such clauses, including openness of the courts, but finding that policy favors no-contest clauses over open courts doctrine).

(n156)Footnote 469. *See generally* Annotation, *Validity and Enforceability of Provision of Will or Trust Instrument for Forfeiture or Reduction of Share of Contesting Beneficiary, 23 A.L.R. 4th 369, 373 (1983);* Annotation, *What Constitutes Contest or Attempt to Defeat Will Within Provision Thereof Forfeiting Share of Contesting Beneficiary, 3 A.L.R. 5th 590 (1992).*

(n157)Footnote 470. *Sheffield v. Scott, 662 S.W.2d 674, 677 (Tex. Civ. App. 1983)* (objections to will withdrawn before case scheduled to come to trial not conditioned upon property settlement is not a contest).

(n158)Footnote 471. *Hazen v. Cooper, 786 S.W.2d 519, 520 (Tex. App. 1990)* (testimony of witness subject to

will's no contest clause was insufficient under the circumstances to support summary judgment for proponents -- dictum: public policy *might* be violated by discouraging prospective witnesses asserted).

(n159)Footnote 472. U.P.C. § 3-905 (1990) 8 U.L.A. 383 (1983).

(n160)Footnote 473. *See generally* Annotation, *Validity and Enforceability of Provision of Will or Trust Instrument for Forfeiture or Reduction of Share of Contesting Beneficiary, 23 A.L.R. 4th 369 (1983).*

(n161)Footnote 474. *See Dulak v. Dulak, 496 S.W.2d 776, 781 (Tex. App. 1973), aff'd in part, rev'd in part, 513 S.W.2d 205 (Tex. 1974)* (court did not construe clause because it found no contest).

(n162)Footnote 475. *See, e.g., Estate of Wojtalewicz v. Woitel, 418 N.E.2d 418, 420-21 (Ill. App. 1981)* (holding clause violated public policy under specific circumstances where to uphold clause would allow waste to the estate); *Succession of Kern, 252 So. 2d 507, 510-11* (La. App.), *cert. denied, 254 So. 2d 462 (1971)* (holding clause violated public policy on specific facts). *See generally* Annotation, *Validity and Enforceability of Provision of Will or Trust Instrument for Forfeiture or Reduction of Share of Contesting Beneficiary, 23 A.L.R. 4th 369, 373 (1983).*

(n163)Footnote 476. *See* Annotation, *Validity and Enforceability of Provision of Will or Trust Instrument for Forfeiture or Reduction of Share of Contesting Beneficiary, 23 A.L.R. 4th 369, 373 (1983).*

(n164)Footnote 477. The Annotation at *23 A.L.R. 4th 369* cites California, Massachusetts, Missouri, and Ohio as rejecting a good faith/probable cause exception. *See, e.g., In re Howard's Estate, 155 P.2d 841, 842 (Cal. App. 1945)* (citing *In re Kitchen's Estate, 220 P. 301, 304 (Cal. 1923)* (action falling squarely within forfeiture clause invokes clause's effect regardless of good or bad faith)). Two other jurisdictions listed in the annotation, Michigan and New Jersey, have subsequently adopted U.P.C. § 3-905 which provides for a probable cause exception, thus statutorily overruling the prior cases. *See* Mich. Stat. Ann. § 27.5168; N.J. Stat. Ann. § 3B:3-47; U.P.C. § 3-905, 8 U.L.A. 383. *See also Estate of Vittorio, 546 N.W.2d 751 (Minn. App. 1996).*

(n165)Footnote 478. *See, e.g., In re Hite's Estate, 101 P. 443, 444-45 (Cal. 1909)* (citing private matters, unavailability of testator, and avoidance of litigation). *See generally* Annotation, *Validity and Enforceability of Provision of Will or Trust Instrument for Forfeiture or Reduction of Share of Contesting Beneficiary, 23 A.L.R. 4th 369, 373 (1983).*

(n166)Footnote 479. *See* Annotation, *Validity and Enforceability of Provision of Will or Trust Instrument for Forfeiture or Reduction of Share of Contesting Beneficiary, 23 A.L.R. 4th 369, 373 (1983).* Prior to adoption of the probable cause exception by statutory enactment of U.P.C. § 3-905, New Jersey recognized good faith or probable cause as applying in forgery and revocation cases only. *See Alper v. Alper, 65 A.2d 737, 740 (N.J. 1949).*

(n167)Footnote 480. *See* Jeffrey A. Schoenblum, *Will Contests -- An Empirical Study, 22 Real Prop. Prob. & Tr. J. 607, 649 (Winter 1987)* (noting the ill-defined concept of undue influence may encourage litigation). One commentator has noted that such clauses themselves may encourage litigation by suggesting the testator was worried about a contest and feared it would succeed. Thomas L. Waterbury, Materials on Trusts & Estates 345 (1986).

(n168)Footnote 481. *See Matter of Estate of Westfahl, 674 P.2d 21, 24-25 (Okla. 1983)* (holding that offer of subsequent will for probate, thereafter denied, did not invoke forfeiture clause in prior will and noting split of authority on good faith exception, but that consensus that probable cause based on forgery or subsequent revocation will not invoke clause -- noting also legal duty to offer will for probate). It is not clear whether Oklahoma limits good cause to forgery or revocation.

(n169)Footnote 482. *See* Annotation, *What Constitutes Contest or Attempt to Defeat Will Within Provision Thereof Forfeiting Share of Contesting Beneficiary, 3 A.L.R. 5th 590, 611 (1992)* (although forfeiture clause to be strictly construed, the paramount consideration in construction of wills is the ascertainment and effectuation of testator's intent).

(n170)Footnote 483. *See generally* Annotation, *Liability for Malicious Prosecution Based on Contest or Caveat to Will, 35 A.L.R. 3d 651 (1971).* The "English Rule" requires arrest of the person or seizure of the person's property or special injury. This rule is followed by some U.S. jurisdictions which disallow actions for malicious prosecution based upon a bad faith will contest. *Id. at 653-54.*

(n171)Footnote 484. *See Steiner v. Eikerling, 226 Cal. Rptr. 694 (1986).*

(n172)Footnote 485. *Id.,* (citing Restatement (Second) of Torts § 674: person who initiates civil proceedings is one who sets the machinery of law into motion whether acting in their own name, that of a third party, or whether the proceedings are to enforce his own or a third party's claim).

(n173)Footnote 486. Malice, in this context, has been defined as the intentional doing of a wrongful act without legal justification or excuse. *First Nat'l Bank v. Gardner, 376 S.W.2d 311, 316 (Ky. 1964).*

(n174)Footnote 487. *See* Annotation, *Liability for Malicious Prosecution Based on Contest or Caveat to Will, 35 A.L.R. 3d 651, 653 (1971); Bertero v. National Gen. Corp., 529 P.2d 608 (Cal. 1974).*

(n175)Footnote 488. *Bertero v. National Gen. Corp., 529 P.2d 608, 614 (Cal. 1974)* (citations omitted).

(n176)Footnote 489. *See MacDonald v. Joslyn, 79 Cal. Rptr. 707 (1969).*

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CHAPTER 88 TESTAMENTARY TRANSFERS OF REAL PROPERTY

10-88 Thompson on Real Property, Thomas Editions § 88.09

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§ 88.09 Attorney Malpractice in the Wills Context.n490

§ 88.09(a) History and Introduction.

The area of malpractice in the will drafting context has been characterized by two major trends in recent years. First, there has been a judicial movement away from the traditional concept of privity required for a malpractice suit. The Supreme Court adopted the English common law view of privity as early as 1879. n491 In this view, the attorney was not liable to the non-client, since the attorney only owed a duty to the client. This was the traditional view for many years. Beginning in the 1960s, however, there has been a movement away from the strict privity requirement, and many states have permitted the non-client (usually a would-be beneficiary) to sue.

The second significant trend is the general increase in the number of malpractice claims arising in the estate planning context, brought by clients as well as non-clients. n492 The abandonment of the strict privity requirement is a contributing factor to this increase. Also, the advancement of consumer interests in the 1960s and 1970s led to greater awareness of the "rights" of clients with regard to proper services in all areas. n493 Further, as one author points out, the legal profession is more willing to police itself than some other service professions, and is, of course, trained in advocacy and litigation techniques. n494 Third, the nature of the wills and estates practice can make attorneys peculiarly vulnerable to malpractice claims. This point is explored in more detail below.

§ 88.09(b) Privity.

Most authorities stress the change in the rules regarding privity as being critical to the change in malpractice claims in the estate planning area. The revolution began in California, in 1958, in *Biankanja v. Irving*. n495 In *Biankanja*, the defendant was a notary public, not an attorney, who negligently failed to ensure that the testator's will was properly attested. The California courts followed up on this decision in *Lucas v. Hamm*, n496 which did have an attorney-defendant. The courts developed a six-factor balancing test, to find a duty to the plaintiff. The factors used were: (1) the extent to which the transaction was intended to affect the plaintiff; (2) the foreseeability of harm to plaintiff; (3) the degree of certainty that the plaintiff suffered injury; (4) the closeness of the connection between the defendant's conduct and the injury suffered; (5) the moral blame attached to the defendant's conduct; (6) the policy of preventing future harm. n497 Other states have followed the California lead in adopting a balancing test in order to assess whether imposition of liability is appropriate. n498

Another approach, taken by the Illinois court in *Ogle v. Fuiten*, n499 is the third-party beneficiary theory. The court reasoned that the intent of the client testator was to benefit the plaintiff (third party), the interests of the client and the third party are virtually identical under those circumstances, so the attorney does owe a duty to the would-be beneficiary in these cases. Other states have gone along with this view. n500 Most courts that have considered the issue in recent years have held that the privity requirement should not apply to the would-be beneficiary non-client. n501 A few states have adhered to the strict privity view, however. n502

COMPUTER-ASSISTED RESEARCH

LEXIS: privity w/15 testator! or will! or estate planning

§ 88.09(c) Estate Planning Difficulties.

As indicated above, certain aspects of estate planning and will drafting leave the attorney particularly vulnerable to malpractice challenges.

§ 88.09(c)(1) Clear Errors.

Usually when a will is drafted improperly, or executed without requisite formalities, or fails to account for tax consequences, the fact of error is clear. Unlike some other areas of law, the establishment of a negligent mistake is relatively easy for the plaintiff. Also, since courts are reluctant to "fix" problems in wills, n503 or to ignore faulty executions, n504 the harm to the plaintiff is also easy to prove. As one author points out, a mistake in a will is often both indisputable and irreparable. n505 Thus when a court adopts a balancing of factors approach, as outlined above, or a third-party beneficiary theory, the plaintiff may easily establish the elements of a cause of action.

§ 88.09(c)(2) Inadequate Attention to Detail.

Many attorneys draft wills for their clients as a sideline. They do not charge much for the service, and may not put much time and effort into the process. n506 As a result, there may be a failure to collect appropriate information about the client, such as the family situation, the property owned by the client, and future plans of the client. The will that is ultimately drafted may not represent the true wishes of the client. n507 A related problem is the failure of the attorney to advise the client of changes in the law, or to encourage the client to review the will and the estate plan periodically as the situation of the client and the client's family may change. n508 Secondly, many attorneys are sloppy about supervision of the will execution ceremony. Improper attestation is one of the biggest problems in the wills malpractice area. n509 For example, the witnesses may be will beneficiaries, and their interests under the will "purged" as a result. n510 Or the will may not have enough witnesses. Or, more fundamental errors may occur, such as the situation where spouses each execute the will of the other. n511 This failure to supervise may be the result of the attorney's own negligence, or of improper delegation, either to an office staff member or to the client himself. n512 The attorney may have provided detailed instructions, yet the client may or may not follow the instructions to the letter.

Third, attorneys may be lax in understanding and advising the client about the estate administration process. The attorney may not be competent in this area (see below) or may just fail to keep the client advised of what procedures need to be followed, or fail to do so in a timely manner. n513

§ 88.09(c)(3) Competence Questions.

Another problem for attorneys who do will drafting and estate planning as a sideline is the question of competence. The attorney may have a surface understanding of the law of wills, estates and trusts, but not a good grasp of the tax considerations involved in estate planning, n514 or a thorough grounding in the law of future interests and the rule against perpetuities. n515 The level of understanding in the complexities of estate planning may also affect the ability of

the attorney to give effect to the client's desires.

COMPUTER-ASSISTED RESEARCH

LEXIS: competen! w/5 attorney! w/15 will! or estate!

§ 88.09(d) Reform.

As one author points out, the new revision of the Uniform Probate Code may help to alleviate some of the malpractice pressure. n516 For example, the dispensing power, as embodied in the new code, permits a court to disregard some technical attestation problems. n517 Or, the new code uses the self-proving affidavit, which again helps to avoid attestation difficulties. n518 Other, more aggressive reforms could also help, but are not underway at this time. The wise attorney will be aware of the pitfalls in this area. Many malpractice issues are easily avoided by careful drafting and execution of the will. If the estate is complicated or large, then the attorney should be careful to note the limits of the attorney's expertise, and seek out proper assistance.

FOOTNOTES:
(n1)Footnote 490. *See generally* The Lawyers' Guide to Legal Malpractice (A.B.A. Standing Committee on Lawyers' Professional Liability) (1992); Dennis J. Horan & George W. Spellmire, Jr., The Associate's Primer for the Prevention of Legal Malpractice (1989); Ronald E. Mallen & Jeffrey M. Smith, Legal Malpractice (3d ed. 1989); Characteristics of Legal Malpractice: Report of the National Legal Malpractice Data Center (Standing Committee on Lawyers' Professional Liability -- William H. Gates, Project Chairman, Sheree L. Swetin, Project Director) (1989); Forest J. Bowman, *Lawyer Liability to Non-Clients, 97 Dick. L. Rev. 267 (1993);* Martin D. Begleiter, *Article II of the Uniform Probate Code and the Malpractice Revolution, 59 Tenn. L. Rev. 101 (1991);* Gerald P. Johnston, *Legal Malpractice in Estate Planning and General Practice, 17 Mem. St. U.L. Rev. 521 (1987);* Gerald P. Johnston, *Legal Malpractice in Estate Planning -- Perilous Times Ahead for the Practitioner, 67 Iowa L. Rev. 629 (1982).*

Periodic references to attorney responsibility are found throughout the chapter, as well as in this section.*See also Winston v. Brogan, 844 F. Supp. 753 (S.D. Fla. 1994).*

(n2)Footnote 491. *National Sav. Bank of D.C. v. Ward, 100 U.S. 195 (1879).*

(n3)Footnote 492. *See generally* Martin D. Begleiter, *Attorney Malpractice in Estate Planning -- You've Got to Know When to Hold Up, Know When to Fold Up, 38 U. Kan. L. Rev. 193, 263-64 (1990);* Gerald P. Johnston, *Legal Malpractice in Estate Planning -- Perilous Times Ahead for the Practitioner, 67 Iowa L. Rev. 629, 630-631 (1982).*

(n4)Footnote 493. *See* Avery, *Significant Current Trends Affecting Malpractice Liability of Lawyers in the Fields of Real Property, Probate and Trust Law, 13 Real Prop. Prob. & Tr. J. 574 (1978);* Bridgman, *Legal Malpractice -- A Consideration of the Elements of a Strong Plaintiffs Case, 30 S.C. L. Rev. 213 (1979);* Comment, *Applicability of the Texas Deceptive Trade Practices Act to Attorneys, 30 Baylor L. Rev. 65 (1978).*

(n5)Footnote 494. *See* Gerald P. Johnston, *Legal Malpractice in Estate Planning -- Perilous Times Ahead for the Practitioner,* 67 Iowa L.J. 629, 632-35 (1982).

(n6)Footnote 495. *320 P.2d 16 (Cal. 1958).*

(n7)Footnote 496. *364 P.2d 685 (Cal. 1961), cert. denied, 368 U.S. 987 (1962).*

(n8)Footnote 497. *Lucas v. Hamm, 364 P.2d at 685 (Cal. 1961), cert. denied, 368 U.S. 987 (1962); Biankanja v. Irving, 320 P.2d 16, 65 A.L.R. 2d 1358 (Cal. 1958).*

(n9)Footnote 498. *See, e.g., Krawczyk v. Stingle, 543 A.2d 733 (Conn. 1988); Lecata v. Spector, 225 A.2d 28*

(Conn. 1966); Marker v. Greenberg, 313 N.W.2d 4 (Minn. 1981); Albright v. Burns, 503 A.2d 386 (N.J. Super. Ct. App. Div. 1986); Steward v. Ibarro, 362 A.2d 581 (N.J. Super. Ct. App. Div. 1976); Jenkins v. Wheeler, 316 S.E.2d 354 (N.C. Ct. App. 1984) rev. denied, 321 S.E.2d 136 (N.C. 1984); Auric v. Continental Cas. Co., 331 N.W.2d 325 (Wis. 1983). See generally Forest J. Bowman,*Lawyer Liability to Non-Clients, 97 Dick. L. Rev. 267 (1993).*

(n10)Footnote 499. *466 N.E.2d 224 (Ill. 1984).*

(n11)Footnote 500. *See, e.g., Schreiner v. Scoville, 410 N.W.2d 679 (Iowa 1987); Hale v. Groce, 744 P.2d 1289 (Or. 1987);* Guy v. Liederbach, 459 A.2d (Pa. 1983).

(n12)Footnote 501. *See* Martin D. Begleiter, *Article II of the Uniform Probate Code and the Malpractice Revolution, 59 Tenn. L. Rev. 101, 104 n.25 (1991);* Ronald E. Mallen & Jeffrey M. Smith, Legal Malpractice § 5.1 (3d ed. 1989).

(n13)Footnote 502. *See, e.g., Lilyhorn v. Drer, 335 N.W.2d 554 (Neb. 1983); Deeb v. Johnson, 344 N.Y.S.2d 688 (App. Div. 1991); Spivey v. Pulley, 526 N.Y.S.2d 145 (1988); Simon v. Zipperstein, 512 N.E.2d 636 (Ohio St. 1987); Dickey v. Jansen, 731 S.W.2d 581 (Tex. Civ. App. 1987); Copenhauer v. Rogers, 384 S.E.2d 593 (Va. 1989).*

(n14)Footnote 503. *See* § 88.07, *supra,* on Will Construction and Reformation.

(n15)Footnote 504. *See* § 88.03, *supra,* on Will Execution.

(n16)Footnote 505. *See* Gerald P. Johnston, *Legal Malpractice in Estate Planning and General Practice, 17 Mem. St. U. L. Rev. 521, 522 (1987).*

(n17)Footnote 506. *Id. at 527-530. See also* Gerald P. Johnston, *Legal Malpractice in Estate Planning -- Perilous Times Ahead for the Practitioner, 67 Iowa L. Rev. 629, 636-643 (1982).* Johnston calls the $50 will the "cornerstone of a malpractice claim." He also points out that books like Norman Dacey, How to Avoid Probate -- Updated! (2d ed. 1980) and Edward Siegel, How to Avoid Lawyers (1969) lead to a public misperception about the role of a lawyer in estate planning. *See also Lisenby v. Simms, 688 So. 2d 864 (Ala. Civ. App. 1997).*

(n18)Footnote 507. *Id.* at 652-659.

(n19)Footnote 508. *See, e.g., Heyer v. Glaig, 449 P.2d 161 (Cal. 1969)* (post-testamentary marriage); *McAbee v. Edwards, 340 So. 2d 1167 (Fla. Dist. Ct. App. 1976).*

(n20)Footnote 509. *See, e.g., Lecata v. Spector, 225 A.2d 28 (Conn. Supp. 1966); Guy v. Liederbach, 459 A.2d 744 (Pa. 1983); Auric v. Continental Cas. Co., 331 N.W.2d 325 (Wis. 1983).*

(n21)Footnote 510. *See* § 88.03(c)(1)(ii), *supra,* regarding interested witnesses.

(n22)Footnote 511. *See, e.g., In re Estate of Snide, 418 N.E.2d 656 (N.Y. 1981); In re Estate of Pavlinka, 148 A.2d 528 (Pa. 1959).*

(n23)Footnote 512. *See* Gerald P. Johnston, *Legal Malpractice in Estate Planning -- Perilous Times Ahead for the Practitioner, 67 Iowa L. Rev. 629, 650-651, n.74 (1982);* Gerald P. Johnston, *Legal Malpractice in Estate Planning and General Practice, 17 Mem. St. U. L. Rev. 521, 536-539 (1987).*

(n24)Footnote 513. *See, e.g., Linck v. Barohas & Martin, 667 P.2d 171 (Alaska 1983)* (failure to advise beneficiary to disclaim in order to save taxes); *Jenkens v. Wheeler, 316 S.E.2d 354 (N.C. App. 1984), rev. denied, 321 S.E.2d 136 (N.C. 1984)* (failure to deal with wrongful death claim); *Victor v. Goldman, 344 N.Y.S.2d 672 (1973), aff'd mem., 351 N.Y.S.2d 956 (App. Div. 1974)* (failure to draft will before client's death; court held no privity). *See generally* Barr, *General Practitioners Beware: The Duty to Steer an Estate Planning Client to a Specialist, 14 Cumb. L. Rev. 103*

(1984).

(n25)Footnote 514. *See, e.g., Horne v. Peckham, 158 Cal. Rptr. 714 (1979); Bucquet v. Livingston, 129 Cal. Rptr. 514 (1976).*

(n26)Footnote 515. *Compare Lucas v. Hamm, 364 P.2d 685 (Cal. 1961), cert. denied, 368 U.S. 987* (not malpractice to violate rule against perpetuities) *with Millwright v. Romer, 322 N.W.2d 30 (Iowa 1982)* (all Iowa residents presumed to know rule).

(n27)Footnote 516. Marvin D. Beglieter, *Article II of the Uniform Probate Code and the Malpractice Revolution, 59 Tenn. L. Rev. 101, 114-130 (1991).*

(n28)Footnote 517. U.P.C. § 2-503, 8 U.L.A. The dispensing power is discussed *infra* at § 88.03(e).

(n29)Footnote 518. U.P.C. § 2-504, 8 U.L.A. (1993 Supp.). The use of the self-proving affidavit is discussed *infra* at § 88.03. *See, e.g.,* John Langbein & Lawrence Waggoner, *Reformation of Wills on the Ground of Mistake: Change of Direction in American Law?, 130 U. Pa. L. Rev. 521 (1982);* Joseph W. De Furia, Jr., *Mistakes in Wills Resulting from Scrivener's Errors: The Argument for Reformation, 40 Cath. U. L. Rev. 1 (1990);* James Lindgren, *Abolishing the Attestation Requirement for Wills, 68 N.C. L. Rev. 1541 (1990);* Mary Louise Fellows, *In Search of Donative Intent, 73 Iowa L. Rev. 611 (1988).*

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CHAPTER 88 TESTAMENTARY TRANSFERS OF REAL PROPERTY

10-88 Thompson on Real Property, Thomas Editions § 88.10

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§ 88.10 Will Revocation.

[Go To Supp]

Wills are ambulatory documents, they do not go into effect until the death of the testator. As a result, wills can be changed and/or revoked during the lifetime of the testator. The ability to revoke a will existed in Roman law, and was recognized under the English common law. n519

§ 88.10(a) Revocation by Physical Act.

The English Statute of Frauds permitted revocation of a will by burning, canceling, tearing, or obliterating. n520 Modern statutes may include other methods, such as cutting, mutilating, or destroying. Most of these terms apply to some activity that affects the will as a whole, but the terms "cancel" and "obliterate" apply to the actual writing in the will. n521 All states permit revocation by physical act, and all Uniform Probate Code (UPC) n522 and non-UPC states have something similar to the original English version. Although most attorneys would not use these methods to revoke a will, physical acts are exactly what laypersons are likely to use in order to show revocation.

Revocation by physical act can be a trap for the unwary testator, since the terms of the statute must be followed exactly. For example, if the statute requires burning, tearing, or canceling, cutting the will with scissors may not suffice. Also, some case law indicates that cancellation of a will by physical act means marking on the actual written words of the will. n523 A notation in the margin that the will is cancelled or revoked may not be sufficient if it does not touch the written part of the will. (It may suffice as a revocation by subsequent instrument, however, as discussed in the next section.) The 1990 version of the Uniform Probate Code changes this result, and does not require that the cancellation notice touch the written portions. n524

If a will is in the custody of a testator and is found in a mutilated condition at testator's death, a rebuttable presumption arises that the testator intended to revoke. n525 However, if evidence shows that the will was mutilated by accident (the testator's dog chewed it up, for example), then the will would not be revoked. n526

At common law, partial revocations by physical act were not permitted, although the modern trend and Uniform Probate Code are contra. n527 If the partial revocations are not permitted, the will is probated as written. n528 This can present

a dilemma for courts when the partial revocations are illegible. For example, obliterations may be complete, or portions may be physically cut out of the will. In this situation there are two possibilities: the legible portions of the will can be probated (meaning that the partial revocations are successful) or the will can be denied probate altogether. n529

The connection between wills and codicils can sometimes create problems in the revocation situation. The common law rule is that a codicil is revoked by physical act only if an act is performed on the codicil itself. For example, if a will is marked "cancelled," but an attached codicil were unmarked, the codicil would stand. The modern view is to consider the degree of integration between the will and the codicil. If there is a high degree of interconnectedness, then the codicil will be deemed to be revoked with the will. However, if the codicil can stand alone, that will be permitted. n530

COMPUTER-ASSISTED RESEARCH

LEXIS: (burn! or cancel! or tear! or obliterat! or cut! or

mutilat! or destroy!) w/15 (revoke! or revoc!) w/5 will!

or

revoke! or revoc! w/5 will! w/30 physical act!

§ 88.10(b) Revocation by Subsequent Instrument.

§ 88.10(b)(1) Express Revocation.

All states permit express revocation by subsequent instrument. n531 This is the preferred method of revocation, used by attorneys. Standard language in wills drafted by attorneys includes a revocation clause, revoking all prior wills. The Uniform Probate Code and the modern trend also permits written revocation to consist solely of a revocation provision, with no new dispositions. n532 In other words, a testator can write a will, revoke the will, and let the property pass by intestacy.

Generally, a proper revocation by written instrument must be executed with the same formalities as those required for the execution of wills. If the state statute requires witnesses, publication, date, or other formalities for will execution, then the same formalities are used for will revocation. If the state recognized holographic wills, it is easier for a written expression of intent to revoke to operate as a proper revocation. For example, a letter or a marginal notation on the will might operate as the equivalent of a holographic will, and serve as a revocation. n533

COMPUTER-ASSISTED RESEARCH

LEXIS: express! w/2 revoc! or revoke! w/15 subsequent! w/2

instrument! w/30 will!

§ 88.10(b)(2) Implied Revocation -- Inconsistency.

A will may also be revoked by implication or by inconsistency with a subsequent written instrument. Although it is possible that a subsequent will revokes a prior will in its entirety, the general rule (in UPC and non-UPC states) is that the first will is revoked only to the extent that it is inconsistent with a subsequent document. n534 Of course, if the intent of the testator is clear regarding a complete revocation, the revocation will be honored.

Revocation by inconsistent document has interesting results at times. Suppose that testator devises a car to A, $10,000

to B, and $3000 to C in will number one. In will number two, testator devises $5000 to A, and $7000 to C. The two wills are not necessarily inconsistent, and if the estate has sufficient assets, A could receive the car and $5000, B and C could receive $10,000 each. If the wills do conflict, the later will is the valid one. If a court is unable to determine which will is the last one executed and the will provisions are inconsistent, then neither will is admitted to probate.

The 1990 version of the Uniform Probate Code makes a significant change in this area. The revised Code creates two presumptions, both rebuttable by clear and convincing evidence. If a new will completely disposes of testator's property, then it is presumed that the will completely revokes all previous wills. If the new will does not completely dispose of testator's property, then it is presumed that the prior wills stand as a supplement to the new will. n535 The presumptions are probably a more accurate assessment of what the average testator intends when writing a new will than the previous inconsistency test.

COMPUTER-ASSISTED RESEARCH

LEXIS: will! w/30 implicat! or inconsistent! w/2 revoke! or revoc!

§ 88.10(c) Revocation by Change of Circumstance.

The only events that may alter a will by operation of law are: the testator's divorce or annulment of a marriage, marriage of testator after execution of a will, birth of a child after execution of a will, or murder of the testator by a will beneficiary. The first circumstance is discussed in this section, the other are discussed are other points in this chapter. n536 The divorce rate has been steadily increasing since the late 1960s. The percentage of marriages ending in divorce was over 50% in the late 1970s and early 1980s. The rate appears to have leveled off or even decreased since that time, but the fact of marriage as a possibly temporary state is a fact for the modern testator. Also, most people who get divorced remarry, so the primary beneficiary of the testator's largess may change over time. n537

The majority of states and the Uniform Probate Code provide that a divorce or annulment revokes a will provisions in favor of an ex-spouse. n538 The statutes usually require that the divorce or annulment be completed at the time of the testator's death. Legal separation of the parties (divorce from bed and board, or divorce a mensa et thoro) is usually sufficient to work a revocation of gifts to a spouse. If the process is incomplete, the will stands as written. n539 In more than half of the states, the remarriage of the parties reinstates the will. If the divorce or annulment effects a partial revocation, usually the ex-spouse is treated as if he or she predeceased the testator. n540 Gifts to former in-laws or stepchildren are typically unaffected by a divorce or annulment, n541 but the Uniform Probate Code changes this result. n542

Proper drafting can avoid unintentional devises in the event of a divorce. Also, attorneys can encourage clients to review their wills periodically. The attorney needs to be careful to avoid the appearance of soliciting business, yet also has the obligation to advise clients in a timely and proper manner. n543

COMPUTER-ASSISTED RESEARCH

LEXIS: will! w/30 revoke! or revoc! w/15 change! w/2 circumstance!

§ 88.10(d) Revocation by a Third Party or Proxy.

Revocation by a third party is permitted under the Uniform Probate Code (pre- and post-1990 versions), as well as most court decisions. The revocation must be performed in the testator's presence and at testator's direction. As a practical matter, these revocations are by physical act. The requirement that the revocation be performed at the testator's direction is easy to meet, but the presence requirement is more frequently in issue. Some courts have held that a revocation performed in another room of the testator's home would be invalid because it was not in testator's presence. n544 The

1990 Uniform Probate Code adopts a more lenient "conscious presence" test. A revocation under this standard (by a third party) does not have to be done in the line of vision of the testator, or in the same room with the testator present. n545 If the third party does not actually revoke the will as directed, or merely pretends to revoke the will, the revocation is improper and does not stand. n546 The will must be admitted to probate. However, if the third party defrauded the testator and receives a benefit under the will, courts may impose a constructive trust. The constructive trust serves as a remedy and will prevent the wrongdoer from gaining profit as a result of the fraud. n547

COMPUTER-ASSISTED RESEARCH

LEXIS: will! w/30 revoke! or revoc! w/15 proxy or third part!

§ 88.10(e) Lost Wills.

At common law, if it was known that the decedent had executed a will, the decedent had possession of the will, and the will was not found at the death of the decedent, it was presumed that the will had been revoked by the testator. n548 This is still the rule in modern law.

Testators sometimes execute duplicate original wills. The testator may retain possession of all copies; or an attorney or other third party may retain one copy, and the testator have another. Only one of the duplicate originals may be found at the testator's death, and the question arises: Should the law imply that the testator has revoked the will? If the testator retained only one of the duplicate originals, but one is not found in testator's possession at death, the decisions are split about whether a revocation should be implied. For example, if T executes two duplicate wills, and T retains one, but T's attorney has the other, then the failure to find a will in T's possession at T's death is somewhat ambiguous. n549 If both (or more) duplicate originals are in testator's possession, the majority view is that the will should be treated as revoked if all copies are not found. The execution of duplicate wills is not a recommended practice, at least partially because of the problem of proper and unambiguous revocation. n550

Most statutory law focuses on the opposite problem, the admission of a copy or of the contents of a "lost" will to probate. The Uniform Probate Code permits admission to probate if the contents and the execution of the lost will can be established by clear and convincing evidence. n551 Lost wills are subject to formal probate procedures and supervision. Some states also require the testimony of two witnesses to establish the contents of the will and possibly the execution of the will. Normally, a copy of the will can substitute for one witness. n552 The two-witness rule prevented the probate of a purported Howard Hughes will. n553 Still other states have a very strict standard for admission of a lost will to probate: the will must be in existence at the testator's death (an almost impossible requirement for a "lost" will, if taken literally), or the will must have been destroyed as the result of fraudulent conduct or representations. n554 The second requirement is not usually a problem; if a will is destroyed by fraud, it is not revoked, and can be admitted to probate. Most courts construe the first requirement of the will's existence at the time of death to mean a legal existence. A will exists in the legal sense if it is not revoked.

COMPUTER-ASSISTED RESEARCH

LEXIS: will! w/5 (lost or lose! or found) w/30 revoke! or revoc!

§ 88.10(f) Dependent Relative Revocation.

§ 88.10(f)(1) Introduction.

Mary executes a will, but later decides to revoke the instrument and execute a new one. She does so, but the second will lacks proper attestation and thus is ineffective.

Desiring to be more generous in a particular bequest in her will, Alice draws a line through the original amount in her will and writes in a larger figure.

Betty hears an erroneous report that one of the beneficiaries of her will has been killed; she therefore crosses out the beneficiary's name and pencils in the name of a substitute beneficiary.

Intestacy, or partial intestacy, could result from the facts in all the above hypotheticals. Courts, however, employing the doctrine of dependent relative revocation, may choose to avoid such a result and probate the original will in each case. n555 The courts are attempting to correct the testator's "mistake," in accord with the testator's probable intent. Other courts use a fictional "conditional" revocation analysis; the testator only meant to revoke the will if the testator's assumptions were correct. While this is laudable, it has been said that the doctrine of dependent relative revocation is a fall-back position, or the "doctrine of second best." n556

§ 88.10(f)(2) History and Definition.

The doctrine of dependent relative revocation was originally based on a theory of giving the testator relief from the testator's "mistake." n557 However, some modern courts use a "conditional revocation" analysis; the revocation of the earlier document is conditional on the validity of the later testamentary instrument. n558 The "mistake" theory probably more accurately reflects the reality of the typical dependent relative revocation situation. n559

The term dependent relative revocation, "while not entirely devoid of inherent sense," n560 nonetheless has caused considerable confusion in its meaning, scope and application. Definitions of the term run from concise (a) to near nonsensical (b):

> (a) Under the doctrine of dependent relative revocation, a revocation does not take effect where a testator revokes a will with a present intention to make a new disposition as a substitute and the new disposition is not made or is ineffective. n561
>
> (b) The doctrine which regards as mutually dependent the acts of one destroying a will and thereupon substituting another instrument for distribution of the estate, when both acts are the result of one plan, so that, if the second act, through incompleteness or other defect, fails to accomplish its intended purpose, and it thereby becomes evident that the testator was misled when he destroyed his will, the act of destruction is regarded as bereft of intent of revocation and the way for probate of the destroyed will is opened. n562

"The revoking act is the dependent act, and the proposed new disposition is the relative act," n563 and the attempt to revoke in whole or in part "will be treated as relative and dependent upon the efficacy of the new disposition intended to be substituted." n564 In other words, when circumstances indicate that the testator would not have revoked a will if the testator had known certain pertinent information (e.g., a new will is ineffective), then the court will ignore the revocation and treat the revoked will as a valid testamentary document. It is critical that the court have evidence of testator's purported intent. Also, courts will typically only apply the doctrine if there is an alternative scheme of disposition (different from the revoked will) that fails for some reason.

§ 88.10(f)(3) Intent.

The doctrine of dependent relative revocation is grounded on the assumption that, had the testator known the new disposition would be ineffective, the testator would have foregone the new will in favor of the disposition provided in the original will. n565 The doctrine presumes that the testator would prefer the old will to intestacy, and on the strength of this presumption the old will is admitted to probate. n566 Moreover, revocation by destruction of the will by the testator is effective only if the act is performed with "the intent and for the purpose of revoking" the instrument. n567 Under standard revocation rules, the intention to revoke must be unconditional; revocation subject to an unfulfilled

condition is not effective. n568 A doctrine, sometimes referred to as "provisional" or "conditional" revocation, n569 has been applied to avoid intestacy "where a will has once been duly executed and the acts of a testator in relation to its revocation seem conditional or equivocal." n570

"The doctrine is functionally a rule of interpretation of intention," n571 and analysis sometimes begins with the rebuttable presumption n572 that if a testator has duly executed a will the testator does not intend to die intestate. n573 This is in substance an extension of the basic rule of wills that the intention of the testator governs. n574 The vital question is whether the testator intended the revocation to be absolute or conditional upon the efficacy of a new will. n575 A revocation independent of any condition must be construed as absolute; n576 "being merely a rule of presumed intention, the doctrine ... cannot be carried so far as to defeat the real intention of the testator." n577 Ordinarily, the doctrine is applied when the testator's known dispositive intent cannot be honored. If the revocation goes to the entire will, the court is presented with the dilemma of giving effect to the dispositions in that will or letting the law of intestacy determine the division of the decendent's property. Neither course will carry out precisely the testator's intent, but one will come closer than the other. Dependent relative revocation should be applied and the will ruled unrevoked when the plan of testamentary disposition is close to the later will; if intestacy is closer (to the later plan), the court should refuse to apply the doctrine. n578

COMPUTER-ASSISTED RESEARCH

LEXIS: dependent relative revocation w/30 intent!

§ 88.10(f)(4) Application.

Unsuccessful attempts to revoke a will may be by subsequent instrument such as a later will with an express revocation clause, or by physical acts to the document, such as interlineations n579 or mutilation of all or part of the document. n580 Courts will apply the doctrine of dependent relative revocation to attempts to revoke all or part of a will. n581 Although some courts refuse to apply the doctrine when a will is expressly revoked by a subsequent instrument, the modern trend is to allow the doctrine to be used. n582 The reasoning in cases that refuse to apply the doctrine where there is express written revocation is that such revocation is inherently *unambiguous*. On the other hand, physical destruction, interlineation, or mutilation of a document is inherently *ambiguous*. As a result, the courts reason that it is easier to prove that a testator's revocation was "conditional" in the latter examples. On the other hand, most courts no longer are concerned about the distinction.

Courts also frequently give relief in situations involving a mistake in an underlying assumption. In cases of a mistake, courts most often will admit parol evidence, "but not for mistakes in the execution of a will unless the will itself shows the mistaken belief. Protection against unreliable evidence is preserved ... by requiring that the proof of a mistake be clear and convincing. The extrinsic evidence usually consists of a duly executed will and the scrivener's testimony of what happened, or even the oral declarations of the testator." n583

§ 88.10(g) Revival.

§ 88.10(g)(1) Introduction.

At common law, if a testator executed two wills and later revoked the second will, the first will was thereby revived. n584 The English common law notion of a "will" would recognize the testamentary document in effect at the time of the testator's death. A subsequent will simply "covered" an earlier one. If the covering will was removed, the earlier one was reinstated. Revival is theoretically similar in some respects to the doctrine of dependent relative revocation, n585 and in fact the doctrines sometimes are confused. n586

Accurately ascertaining the true intention of the testator has long occupied and confounded the courts and probably

obscured the real intentions of the testator in the process. The actions of testators are often bewildering to those left behind, but perhaps no situation has produced the variety of interpretations, now entombed as legal doctrines, as the case of a testator who makes a will, then makes another will that expressly or impliedly revokes the first, and then destroys this second will. If the testator intended to die intestate, it is puzzling that he or she left the first will. On the other hand, the testator may have intended the first will to control the devolution of his or her property. If this is the situation, it is equally puzzling that the first will has been revoked. This latter incongruity may be explained, however, by assuming that the act of revoking the second instrument was intended to 'revive' the first instrument. n587

§ 88.10(g)(2) History of Revival.

Development of the doctrine of revival in England, and later the United States was marked by confusion, probably as a result of the division of jurisdiction between the common law courts, which controlled devises of real property, and the ecclesiastical courts, which administered succession to personalty. Because the Statute of Frauds did not address the question of revival, the common law and ecclesiastical courts were left on their own to resolve the issue. n588

At common law, as stated above, revocation or destruction of a subsequent will automatically revived the first will. This was considered logical, on the theory that a will is ambulatory until the testator's death: "A will has no operation until the death of the testator," and thus the "second will never operated," leaving in force the first will. n589 A revoked will, this reasoning continued, could itself have no power to revoke. n590

Conversely, the ecclesiastical courts treated the subsequent will as immediately revoking the first will as of the date of the execution of the subsequent will; should the testator later destroy the subsequent will, the ecclesiastical courts would hear evidence concerning testator's intent in determining whether to revive the initial will. n591

The Wills Act of 1837, brought a halt to these conflicting directions of the law by answering the revival question in the context of formulating a unified treatment of the law of wills and testaments. n592 Under the Wills Act, oral declarations of the testator are inadmissible to determine intent to revive. English courts applying the statute hold that execution of a subsequent will immediately revokes the effectiveness of the first will. n593

§ 88.10(g)(3) Common Law Views in U.S. Jurisdictions.

About ten states do not have statutes on the subject of revival. n594 In these jurisdictions, some states seem to follow the ecclesiastical courts' view that a subsequent will revokes the prior will, and that the prior will is revived only upon evidence of the testator's intent. n595 Some cases hold that a presumption in favor of revival arises from the acts of the testator who destroys a subsequent will while retaining the prior will. n596 The presumption, however, is not conclusive and may be rebutted by evidence that the testator intended otherwise. Determining the intention of the testator is a question of fact, and parol evidence is admissible in making such determination. n597

Other American cases have followed the common law rule handed down in the early English decisions: revocation of the later will automatically revives the first will. n598 Courts sometimes split on whether this view is followed when the subsequent will revokes the first by implication only, n599 or even where the subsequent will expressly revokes the former. n600

Other authorities take the opposite view: revocation of the subsequent will does not revive the former will. On the rationale that a revocatory clause operates immediately, courts have held that an express revocation clause in a subsequent will irreversibly ends the effectiveness of the prior will so that it cannot be revived despite the later destruction or cancellation of the subsequent will. This view is advanced despite the fact that the subsequent will does not "speak" until the death of the testator. Courts following this view require that, in order for the initial will to again take effect after revocation of the subsequent will, there must be a republication, reexamination, or a duly executed codicil expressing the intention that the initial will again be given effect. n601

COMPUTER-ASSISTED RESEARCH

LEXIS: reviv! w/5 will! w/30 automatic! or presum! or intent!

§ 88.10(g)(4) Statutory Rules in U.S. Jurisdictions.

As stated previously, the common law rule that revocation of a subsequent will revives the first will was abrogated by the Wills Act of 1837, which provided that no revoked will could be revived other than by reexecution of the revoked will or by a duly executed codicil showing an intention to revive. n602 No doubt motivated by confusion and conflict concerning the doctrine of revival in the courts, the majority of American states have attempted to settle the question by statute.

The pre- and post-Uniform Probate Code adopts a limited revival doctrine, providing that the initial will can be given effect after revocation of a subsequent will if the testator's intent to do so can be established. There is a presumption against revival, but it can be overcome with evidence of the testator's intent. The testator's statements to that effect, at the time of revocation of the subsequent will or later, can be admitted in evidence to prove such intent. n603 The Uniform Probate Code provision dealing with revival of a revoked will is as follows:

(a) If a subsequent will that wholly revoked a previous will is thereafter revoked by a revocatory act under Section 2-507(a)(2), the previous will remains revoked unless it is revived. The previous will is revived if it is evident from the circumstances of the revocation of the subsequent will, or from the testator's contemporary or subsequent declarations, that the testator intended the previous will to take effect as executed.

(b) If a subsequent will that partly revoked a previous will is thereafter revoked by a revocatory act under Section 2-507(a)(2), a revoked part of the previous will is revived unless it is evident from the circumstances of the revocation of the subsequent will, or from the testator's contemporary or subsequent declarations, that the testator did not intend the revoked part to take effect as executed.

(c) If a subsequent will that revoked a previous will in whole or in part is thereafter revoked by another, later, will, the previous will remains revoked in whole or in part, unless it or its revoked part is revived. The previous will or its revoked part is revived to the extent it appears from the terms of the later will that the testator intended the previous will to take effect. n604

The 1990 version of the Uniform Probate Code § 2-509 made two changes to the 1969 version. n605 The first change is reflected in the comments. The comments criticize the technique used by the Minnesota Supreme Court in *Estate of Boysen*. n606 In *Boysen*, the court was asked to look at all of the circumstances of the revocation to determine if the decedent intended to revive a prior will when he revoked a subsequent instrument. The Minnesota court came up with a neat three-part test in order to determine intent. n607 The comments to the 1990 Uniform Probate Code § 2-509 specifically state that "the open-ended statutory language [of the statute] is not to be undermined by translating it into discrete subsidiary elements, all of which must be met, as the court did in *Estate of Boysen*." n608 The second change in the 1990 Uniform Probate Code revival provision deals with partial revocations. The 1990 provision maintains the rebuttable presumption against revival for wholly revoked wills. However, § 2-509(b) does change the prior rule for partially revoked wills. It creates a rebuttable presumption in favor of revival for previously revoked sections of a will. For example, testator leaves $5000 to Alice, and all other property to Bob. Later testator executed a codicil revoking the

gift to Alice. Still later, testator revokes the codicil. In this context, it does make sense to assume that the testator intended for the original provision to be reinstated. n609 There is criticism of the Uniform Probate Code's admission of parol evidence to prove the intention of the testator. "Arguably, admitting parol evidence to ascertain the testator's intent 'is contrary to the whole spirit and policy of the statute of wills.'" n610 The Code's drafters, however, were cognizant of the dangers accompanying extrinsic evidence to prove intent to revive, but they believed the rule justified for the following reasons:

> 1) Such evidence is admissible in any case involving revocation by act in order to prove that the act itself is intended as a revocation;
>
> 2) in many states the same evidence could be used to establish dependent relative revocation and thus allow probate of the second will as unrevoked; and
>
> 3) there is general understanding among non-lawyers that an earlier will, still intact, is good if the revoking instrument is destroyed. n611

Further, the testator dies intestate if there is no evidence of intent, because the Code presumes against an intent to revive. n612 Several states have patterned their revival statutes either exactly or closely after the Uniform Probate Code. n613 Alabama's revival statute is like the Uniform Probate Code, but the testator declarations must be written. n614

Several other states follow the view that reexecution is a prerequisite to revival (most of these states provide an alternative to reexecution -- see footnote). n615 Other states determine the question of revival by intent (which must be expressed in writing) as embodied in the terms of the subsequent wills or revocation, or by republication of the original will. n616 New Mexico provides that there is no revival "unless the validity of the prior will is acknowledged in writing." n617 The New York statute allows revival in three instances: (1) a codicil that incorporates by reference the prior will, (2) an executed and attested writing declaring the revival of the prior will, (3) or a republication requiring re-execution and re-attestation of the prior will. n618 Two other states, South Carolina and Wisconsin, determine the issue of revival purely on the basis of the testator's intent. South Carolina requires "clear, cogent, and convincing evidence;" Wisconsin requires "clear and convincing evidence." n619 Georgia and Maryland provide for revival only by republication. In Georgia, the republication may be proved by parol evidence; in Maryland, the prior will must still be in existence. n620 In Florida, there is no revival, even where the original will is in existence; n621 in Washington, also, there is no revival. n622

COMPUTER-ASSISTED RESEARCH

LEXIS: reviv! w/5 will! w/50 (wills act w/1 11837) or uniform

probate code

FOOTNOTES:

(n1)Footnote 519. *See* Robert Whitman, *Revocation and Revival: An Analysis of the 1990 Revision of the Uniform Probate Code and Suggestions for the Future, 55 Albany L. Rev. 1035, 1037 (1992). See generally* William M. Mcgover, Jr., Sheldon f. Kurtz & Jan Ellen Rein § 5.1 n.1 (1988); Chaffin, *Execution, Revocation and Revalidation of Wills: A Critique of Existing Statutory Formalities, 11 Ga. L. Rev. 297 (1977);* Comment, *American Revocation Statutes: The Need for Change and Uniformity, 8 Cumb. L. Rev. 175 (1977).*

(n2)Footnote 520. Statute of Frauds, 1677, 29 Car. 2, ch. 3 § 6. *See also* Wills Act of 1837, 7 Will & 1 Vict. ch. 26, *reprinted in* Allison Reppy & Leslie J. Tomkins, Historical and Statutory Background of The Law of Wills 195-197 (1928).

(n3)Footnote 521. *See, e.g., Kronayge v. Stoecklein, 293 N.E.2d 320 (Ohio App. 1972); Thompson v. Toyall, 175*

S.E. 748 (Va. 1934).

(n4)Footnote 522. U.P.C. § 2-507(a)(2), 8 U.L.A. 118 (allows burning, tearing, canceling, obliterating or destroying).

(n5)Footnote 523. *See, e.g.,* cases in note 521, *supra. Contra Warner v. Warner's Estate, 37 Vt. 356 (1864).*

(n6)Footnote 524. U.P.C. § 2-507(a)(2), 8 U.L.A. 118. The section specifically provides that a revocation by burning, tearing or canceling need not touch the words on the will.

(n7)Footnote 525. *See, e.g., Estate of May, 220 N.W.2d 388 (S.D. 1974).*

(n8)Footnote 526. *See, e.g., McKenzie v. Francis, 197 S.E.2d 221 (Va. 1973).*

(n9)Footnote 527. *See* U.P.C. § 2-507, 8 U.L.A. 117 (permits revocation of a will or "any part" thereof). *See generally* Lawrence Waggoner, Richard Wellman, Gregory Alexander & Mary Louise Fellows, Family Property Law 275-76 (1991).

(n10)Footnote 528. *See, e.g., Dodson v. Walton, 597 S.W.2d 814 (Ark. 1980); In re Newell's Estate, 256 N.E.2d 53 (Ill. App. 1970).*

(n11)Footnote 529. *See, e.g., Matter of Brune's Estate, 606 P.2d 647 (Or. App. 1980); Estate of Johannes, 227 P.2d 148 (Kan. 1951).*

(n12)Footnote 530. *See generally* Annotation, *Sufficiency of Evidence of Non-Revocation of Lost Will Where Codicil Survives, 84 A.L.R. 4th 531 (1991). See also In re Francis' Will, 132 N.Y.S. 695 (Sup. Ct. 1911).*

(n13)Footnote 531. *See, e.g.,* U.P.C. § 507(a)(1), 8 U.L.A. 118.

(n14)Footnote 532. *See* U.P.C. § 1-201 (56), 8 U.L.A. 11 (defines will to include an instrument that revokes or revises another will). *See also* Annotation, *Revocation of Will by Writing Not Testamentary in Character*, 14 A.L.R. 1018 (1920); Annotation, *Revocation of Will By Non-testamentary Writing, 22 A.L.R. 3d 1346 (1968).*

(n15)Footnote 533. *See* Annotation, Revocation of Witnessed Will by Holographic Will or Codicil, Where Statute Requires Revocation by Instrument of Equal Formality as Will, 49 A.L.R. 1223 (1973).

(n16)Footnote 534. *See Gilbert v. Gilbert, 652 S.W.2d 663 (Ky. Ct. App. 1983).* The pre-1990 Uniform Probate Code merely provided that a will was revoked to the extent that it was inconsistent with a new will. See U.P.C. § 2-507, 8 U.L.A. 117. The 1990 code adds some presumptions discussed infra, n.17. See also Restatement (Second) of Property (Donative Transfers § 33.2) and cmt. b. Other cases include: *In re Estate of Francoeur, 290 N.E.2d 396 (Ill. App. 1972); In re Estate of Johnson, 154 Cal. Rptr. 586 (1979); Lane v. Sherrill, 614 S.W.2d 619 (Tex. Civ. App. 1981); In re Estate of LaGreca, 297 N.J. Super. 67 (N.J. Super. Ct. App. Div. 1997)* (the court concluded that the execution of the codicil revoked the inconsistent will provisions, and those provisions were not revived by the destruction of the codicil because the decedent did not observe the formalities required by New Jersey statute).

(n17)Footnote 535. U.P.C. § 2-507(b), (c), (d) and cmts., 8 U.L.A. 118. The subsections provide:

(b) If a subsequent will does not expressly revoke a previous will, the execution of the subsequent will wholly revokes the previous will by inconsistency if the testator intended the subsequent will to replace rather than supplement the previous will.

(c) The testator is presumed to have intended a subsequent will to replace rather than supplement a previous will if the subsequent will makes a complete disposition of the testator's estate. If this presumption arises and is not rebutted by clear and convincing evidence, the previous will is revoked; only the subsequent will is operative on the testator's death.

(d) The testator is presumed to have intended a subsequent will to supplement rather than replace a previous will if the subsequent will does not make a complete disposition of the testator's estate. If this presumption arises and is not rebutted by clear and convincing evidence, the subsequent will revokes the previous will only to the extent the subsequent will is inconsistent with the previous will; each will is fully operative on the testator's death to the extent they are not inconsistent.

(n18)Footnote 536. *See* § 88.12, Limits on Dispositions Under a Will, infra (sections on spouse, omitted children and slayer statutes).

(n19)Footnote 537. The section on protection of a spouse, § 88.12(b), infra, discusses the divorce revolution and remarriage phenomenon.

(n20)Footnote 538. *See, e.g.*, U.P.C. § 2-508, 8 U.L.A. 122; U.P.C. §§ 2-508, 2-804, 8 U.L.A. 120, 164-165. The new U.P.C. attempts to cover both probate and non-probate assets. The section also revokes gifts to relatives of former spouses (who are not related to testator) in subsection (d).

(n21)Footnote 539. *See, e.g., Matter of Estate of Maruccia's, 429 N.E.2d 751 (N.Y. 1981).* But see § 2-204(d) of the U.P.C., 8 U.L.A. 100 (providing that a property settlement agreement prior to divorce or pursuant to separation presumably waives all rights to ex-spouse's estate). The comments to 24, § 2-204 point out that this should help avoid problems that arise when one of the parties dies while a divorce is pending.

(n22)Footnote 540. *See* U.P.C. § 2-804(d), 8 U.L.A. 165. Effect is to assume former spouse died immediately prior to divorce or annulment.

(n23)Footnote 541. *See, e.g., Clymer v. Mayo, 473 N.E.2d 1084 (Mass. 1985); Estate of Caffed, 387 N.E.2d 1209 (N.Y. 1979).*

(n24)Footnote 542. U.P.C. § 2-804(d), 8 U.L.A. 16.

(n25)Footnote 543. On this subject, see Johnston, Estate Planning Practices -- Is Good Business Bad Ethics?, *45 Ohio St. L.J. 57, 124-33 (1984);* Committee Report, Developments Regarding the Professional Responsibility of the Estate Planning Lawyer: The Effect of the Model Rules of Professional Conduct, *22 Real Prop. Prob. & Tr. J. 1, 28 (1987).*

(n26)Footnote 544. *See, e.g., Estate of Bancker's, 232 So. 2d 431 (Fla. App. 1970); In re Haugh's Estate, 280 N.W.2d 684 (Wis. 1979).*

(n27)Footnote 545. *See* U.P.C. § 2-507, 8 U.L.A. 117 (1983), 8 U.L.A. 118.

(n28)Footnote 546. *See, e.g., Morris v. Morris, 642 S.W.2d 448 (Tex. 1982)* (wife purported to destroy husband's will, at his request, but did not actually destroy it); *Estate of Silva, 145 P. 1015 (Cal. 1915)* (same facts).

(n29)Footnote 547. Id. See also *White v. Mulvania, 575 S.W.2d 184 (1978).*

(n30)Footnote 548. *See generally* Annotation, Sufficiency of Evidence of Non-revocation of Lost Will Not Shown

to Have Been Non-accessible to Testator -- Modern Cases, *70 A.L.R. 4th 323 (1989);* Annotation, Proof of Non-revocation, in Proceeding to Establish Lost Will, *3 A.L.R. 2d 949 (1949).*

(n31)Footnote 549. *See, e.g., In re Robinson's Will, 13 N.Y.S.2d 324 (1939); Jones v. Mason, 324 La. 116, 99 So. 2d 46 (A.D. 1958)* (will revoked); contra *Stiles v. Brown, 380 So. 2d 792 (Ala. 1980); Estate of Shaw, 572 P.2d 229 (Okla. 1977).* See also Annotation, Destruction or Cancellation of One Copy of Will Executed in Duplicate, as Revocation of Other Copy, *17 A.L.R. 2d 805 (1951).*

(n32)Footnote 550. Id. See also John R. Price, Contemporary Estate Planning 212 (1983); Evans, Testaments Revocation by Act to the Document and Dependent Relative Revocation, *23 Ky. L.J. 559, 568-70 (1935).*

(n33)Footnote 551. *See* U.P.C. § 3-303 cmt., 8 U.L.A. 249-50, indicating that lost or destroyed will must be established in formal proceedings, under § 3-401, 8 U.L.A. 270. See also *White v. Brennan's Adm'r, 212 S.W.2d 299 (Ky. 1948)* (will was proved); *Estate of Shaughnessy, 648 P.2d 427 (Wash. 1982)* (will not proved).

(n34)Footnote 552. *See, e.g.,* Ark. Stat. Ann. § 60-304; Fla. Stat. § 733.207.

(n35)Footnote 553. *Howard Hughes Med. Inst. v. Gavin, 621 P.2d 489 (Nev. 1980).*

(n36)Footnote 554. *See, e.g., Edir's Estate, 29 P.2d 631 (Colo. 1934); Estate of Wheadon, 579 P.2d 930 (Utah 1978); Estate of Irvine v. Doyle, 710 P.2d 1366 (Nev. 1985); Matter of Fox, 174 N.E.2d 499 (N.Y. 1961);* but see *Kerckhof's Estate, 125 P.2d 284 (Wash. 1942).*

(n37)Footnote 555. The use of the doctrine may also depend on whether the jurisdiction recognizes the doctrine of revival, or whether it allows holographic wills. Revival is discussed infra, at § 88.10(g) and holographic wills are discussed in § 88.04(a), infra.

(n38)Footnote 556. *See* Lawrence W. Waggoner, Richard v. Wellman, Gregory S. Alexander & Mary Louise Fellows, Family Property Law 291 (Foundation Press 1991). The authors point out that the Uniform Probate Code's relaxed revival rules, U.P.C. § 2-509, 8 U.L.A. 120, or the dispensing power, U.P.C. § 2-503, 8 U.L.A. 114, would probably make most uses of dependent relative revocation unnecessary.

(n39)Footnote 557. *Onions v. Tyrer, 2 Vern. 742, 23 Eng. Rep. 1085, 1 P. Wms. 343, 24 Eng. Rep. 418 (1717).* See generally Palmer, Dependent Relative Revocation and Its Relation to Relief for Mistake, *69 Mich. L. Rev. 989 (1971).*

(n40)Footnote 558. *See, e.g., In re Estate of Callahan, 29 N.W.2d 352 (Wis. 1947); In re Kaufmann's Estate, 155 P.2d 831 (Cal. 1945).* See also Gardner on Wills, §§ 82, 86 (2d ed., Walter T. Dunmore ed. 1916).

(n41)Footnote 559. *See* John Langbein & Lawrence Waggoner, Reformation of Wills on the Ground of Mistake: Change of Direction in American Law?, *130 U. Pa. L. Rev. 521 (1982).*

(n42)Footnote 560. Warren, Dependent Relative Revocation, *33 Harv. L. Rev. 337, 338 (1920).*

(n43)Footnote 561. 95 C.J.S., Wills § 267 (1957).

(n44)Footnote 562. Black's Law Dictionary 437. 5th Ed. (West 1990).

(n45)Footnote 563. Evans, Testamentary Revocation by Act to the Document and Dependent Relative Revocation, *23 Ky. L.J. 559, 578 (1935).*

(n46)Footnote 564. Annotation, Effect of Testator's AttemptedPhysical Alteration of Will After Execution, 62 A.L.R. 1367, 1401 (1929).

(n47)Footnote 565. *Id. In re Estate of Laura, 690 A.2d 1011 (N.H. 1997)* (a testator can revoke a will by (1) properly executing a separate will, codicil, or other writing, or (2) performing a physical act of destruction. Either act must be accompanied by an intent to revoke).

(n48)Footnote 566. 79 Am. Jur. 2d 675, Wills § 563 (1975).

(n49)Footnote 567. William M. McGovern, Sheldon F. Kurtz, Jan Ellen Rein, Wills, Trusts and Estates § 5.3.

(n50)Footnote 568. *Stewart v. Johnson, 194 So. 869 (Fla. 1940).*

(n51)Footnote 569. *In re Roeder's Estate, 106 P.2d 847 (N.M. 1940).*

(n52)Footnote 570. Annotation, Effect of Testator's Attempted Physical Alteration of Will After Execution, 62 A.L.R. 1401 (1929).

(n53)Footnote 571. Id.

(n54)Footnote 572. *Ruel v. Hardy, 6 A.2d 753 (N.H. 1939)* ("Rule of dependent relative revocation ... raises only a rebuttable, and not a conclusive, presumption ... and does not apply where there is some actual evidence on question of testator's intention.")

(n55)Footnote 573. Joseph W. deFuria, Mistakes in Wills Resulting From Scriveners' Errors: The Argument for Reformation, *40 Cath. U. L. Rev. 1, 23 (1990).*

(n56)Footnote 574. *LaCroix v. Senecal, 99 A.2d 115 (Conn. 1953); Carpenter v. Wynn, 67 S.W.2d 688 (Ky. 1934)* ("The controlling factor so far as these cases ... are concerned is the actual intent of the testator in each case.").

(n57)Footnote 575. 79 Am. Jur. 2d 676, Wills § 564 (1975).

(n58)Footnote 576. *In re Dougan's Estate, 53 P.2d 511 (Or. 1936).*

(n59)Footnote 577. 79 Am. Jur. 2d 676, Wills § 564 (1975).

(n60)Footnote 578. Palmer, Dependent Relative Revocation and its Relation to Relief for Mistake, *68 Mich. L. Rev. 989, 998 (1971).* See, e.g., *Carter v. First United Methodist Church, 271 S.E.2d 493 (Ga. 1980).*

(n61)Footnote 579. *Walter v. Walter, 17 N.E.2d 199 (Mass. 1938).*

(n62)Footnote 580. Palmer at 991, 992.

(n63)Footnote 581. *See, e.g., In re Estate of Uhl's, 81 Cal. Rptr. 436 (1969); Schneider v. Harrington, 71 N.E.2d 242 (Mass. 1947); In re Appleton's Estate, 2 P.2d 71 (Wash. 1931); Wolf v. Bollinger, 62 Ill. 368 (1872).* But see *Ruel v. Hardy, 6 A.2d 753 (N.H. 1939).*

(n64)Footnote 582. Cases following the majority rule include: *In re Estate of Casselman, 364 N.W.2d 27 (Neb. 1985); LaCroix v. Senecal, 99 A.2d 115 (Conn. 1953); In re Kaufman's Estate, 155 P.2d 831 (Cal. 1945).* See contra, *In re Estate of Lopes, 199 Cal. Rptr. 425 (1984); Crosby v. Alton Ochoner Med. Fed'n, 276 S.E.2d 661 (Miss. 1973); In re Estate of Barker, 448 So. 2d 28 (Fla. App. 1984).*

(n65)Footnote 583. Joseph W. deFuria, Mistakes in Wills Resulting From Scriveners' Errors: The Argument for Reformation, *40 Cath. U. L. Rev. 1, 24 (1990).* See generally Henderson, Mistake and Fraud in Wills, *47 B.U. L. Rev. 304 (1967).*

(n66)Footnote 584. Melville Madison Digelow on Wills 131 (1898).

(n67)Footnote 585. William M. McGovern, Jr., Sheldon F. Kurtz & Jan Ellen Rein, Wills, Trusts and Estates § 5.3 (West 1988).

(n68)Footnote 586. *See, e.g., Larrick v. Larrick, 607 S.W.2d 92 (Ark. 1980)* (Arkansas Supreme Court refused to allow probate of will where testator dies soon after destroying will, the court basing its refusal to apply dependent relative revocation on anti-revival statute. A concurring judge disagreed with this reasoning, noting that the anti-revival statute "only comes into effect if there has been a revocation. It is to determine precisely that question, i.e., whether there has been a revocation, that the doctrine [dependent relative revocation] is applied.").

(n69)Footnote 587. Gail Boreman Bird, Revocation of a Revoking Codicil: The Renaissance of Revival in California, *33 Hast. L.J. 357 (1981).*

(n70)Footnote 588. *Id. at 358.*

(n71)Footnote 589. *Goodright v. Glazier, 4 Burr. 2512, 98 Eng. Rep. 317 (1770).*

(n72)Footnote 590. *Stetson v. Stetson, 66 N.E. 262 (Ill. 1903).*

(n73)Footnote 591. *Usticke v. Bawden, 162 Eng. Rep. 238 (1824); Williams v. Miles, 94 N.W. 705 (Neb. 1903).*

(n74)Footnote 592. 7 Will, 4 & 1 Vict. ch. 26, § XXII (1837) (there can be no revival of a will revoked by a subsequent will absent re-execution or properly executed codicil showing intent to revive).

(n75)Footnote 593. Gail Boreman Bird, Revocation of a Revoking Codicil: The Renaissance of Revival in California, *33 Hast. L.J. 357, 360 (1981).*

(n76)Footnote 594. Restatement 2d of Property, Statutory Note § 33.2.

(n77)Footnote 595. *See, e.g.*, Pickens v. Davis (Mass. 1883); *McClure v. McClure, 6 S.W. 44 (Tex. 1887); Hawes v. Nicholas, 10 S.W. 558 (Tex. 1889).*

(n78)Footnote 596. *See, e.g., McClure v. McClure, 6 S.W. 44 (Tex. 1887).*

(n79)Footnote 597. *See generally* 79 Am. Jur. 2d, Wills §§ 691-692.

(n80)Footnote 598. *Succession of Dambly, 186 So. 7 (La. 1938); Whitehill v. Halbing, 118 A. 454 (Conn. 1922).*

(n81)Footnote 599. *Rabe v. McAllister, 8 A.2d 922 (Md. 1939); May v. Estate of McCormick, 769 P.2d 395 (Wyo. 1989).*

(n82)Footnote 600. *Whitehill v. Halbing, 118 A. 454 (Conn. 1922).*

(n83)Footnote 601. *See generally* 79 Am. Jur. 2d, WIlls § 690.

(n84)Footnote 602. 7 Will, 4 & 1 Vict., ch. 26, § XXII (1837).

(n85)Footnote 603. U.P.C. § 2-509, cmt., 8 U.L.A. 120.

(n86)Footnote 604. U.P.C. § 2-509 [Revival of Revoked Will], 8 U.L.A. 120.

(n87)Footnote 605. *See generally* Robert Whitman, Revocation and Revival -- An Analysis of the 1990 Revision of the Uniform Probate Code and Suggestions for the Future, *55 Albany L. Rev. 1035, 1055-1061 (1992).*

(n88)Footnote 606. *209 N.W.2d 45 (Minn. 1981).*

(n89)Footnote 607. *Id. at 47.* The court asked three questions: 1) did the testator know if the earlier will still existed; 2) did he know of the nature and extent of his property and the disposition thereof in the prior document, and 3) did the testator disclose an intention to make a disposition in accord with the previous document. It is this sort of "test" that the Uniform Probate Code drafters found objectionable.

(n90)Footnote 608. U.P.C. § 2-509, cmt., 8 U.L.A. 120.

(n91)Footnote 609. Id.; Robert Whitman, Revocation and Revival: An Analysis of the 1990 Revision of the Uniform Probate code and Suggestions for the Future, *55 Albany L. Rev. 1035, 1061 (1992).*

(n92)Footnote 610. William M. McGovern, Jr., Sheldon F. Kurtz, Jan Ellen Rein, Wills, Trusts and Estates § 5.3 (West 1988).

(n93)Footnote 611. National Conference of Commissioners on Uniform State Laws, Unif. Prob. Code § 2-508, Comment at 97 (3d Working Draft 1967).

(n94)Footnote 612. William M. McGovern, Jr., Sheldon F. Kurtz & Jan Ellen Rein, Wills, Trusts and Estates § 5.3 (West 1988).

(n95)Footnote 613. *See, e.g.,* Alaska Stat. § 13.11.190; Ariz. Rev. Stat. Ann. § 14-2509; Cal. Code § 6123; Colo. Rev. Stat. § 15-11-509; Idaho Code § 15-2-509; Me. Rev. Stat. Ann. § 2-509; Mich. Comp. Laws Ann. § 700.125; Minn. Stat. Ann. § 524.2-509; Mo. Ann. Stat. § 474.410; Mont. Code Ann. § 72-2-323; Neb. Rev. Stat. § 30-2334; N.D. Cent. Code § 30.1-08-09; Utah Code Ann. § 75-2-509.

(n96)Footnote 614. Ala. Code § 43-8-138.

(n97)Footnote 615. Ark. Stat. Ann. § 28-25-110 (reexecution, or, incorporation by reference in another will); Haw. Rev. Stat. § 560:2-509; 755 ILCS5/4-7 (reexecution of duly executed instrument declaring revival); Iowa Code Ann. § 633.284 (reexecution of will or codicil incorporating by reference original will); Ky. Rev. Ann. Stat. § 394.100 (reexecution or codicil); Nev. Rev. Stat. § 133.130 (intent in revocation or reexecution); N.J. Stat. Ann. § 3B:3-15 (reexecution or codicil); N.C. Gen. Stat. § 31-5.8 (reexecution or another will incorporating first will by reference); Or. Rev. Stat. § 112.295 (reexecution or another will incorporating by reference original will; Va. Code Ann. § 64.1-60 (reexecution or codicil); W. Va. Code § 41-1-8 (reexecution or codicil).

(n98)Footnote 616. Ind. Code Ann. § 29-1-5-6; Kan. Stat. Ann. § 59-612; Ohio Rev. Code Ann. § 2107.38; Okla. Stat. Ann. tit. 84 § 106; S.D. Codified Laws Ann. § 29-3-6.

(n99)Footnote 617. N.M. Stat. Ann. § 45-2-509.

(n100)Footnote 618. N.Y. Estates & Trusts Law § 3-4.6.

(n101)Footnote 619. S.C. Code Ann. § 62-2-508; Wis. Stat. Ann. § 853.11(6).

(n102)Footnote 620. Ga. Code Ann. § 53-2-73; Md. Ann. Code § 4-106.

(n103)Footnote 621. Fla. Stat. Ann. § 732.508.

(n104)Footnote 622. Wash. Rev. Code § 11.12.080.

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CHAPTER 88 TESTAMENTARY TRANSFERS OF REAL PROPERTY

10-88 Thompson on Real Property, Thomas Editions § 88.11

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§ 88.11 Changes After Will Execution.

[Go To Supp]

§ 88.11(a) Changes in Persons.

§ 88.11(a)(1) Lapse. n623

One of the most common will-drafting oversights is the failure to anticipate the death of will beneficiaries prior to the death of the testator. At common law, a gift to a deceased beneficiary fails, or it lapses. n624 The doctrine of lapse applies automatically in the absence of statute or contrary intent expressed by the testator. The rule of law is that the will does not take effect until the death of the testator, and that the will can only pass property to living persons.

§ 88.11(a)(1)(i) Void Gifts.

Lapsed gifts should be distinguished from void gifts. A testamentary gift is void, rather than lapsed, when the beneficiary is dead at the time the will is executed. Void gifts also fail, at common law. It should also be noted that gifts may lapse or become void for reasons other than the death of the beneficiary, such as a disclaimer, a bequest to an animal, a bequest in violation of public policy, or a beneficiary who is a witness to the will. n625

§ 88.11(a)(1)(ii) Lapse into the Residue.

In general, the common law provides that a specific or general gift will lapse into the residue. n626 A lapse in the residue will pass by intestacy to the testator's heirs. A testator may leave the residue of the estate to more than one beneficiary. The death of one or more of the residue holders can result in a partial lapse. The traditional rule would provide that the lapsed portion of the residue would pass as an intestate share. The modern trend, by case law or statute, is to pass the lapsed gift to the other residue holders. n627 For example, if Testator leaves the residue of his estate to A and B, but A predeceases Testator, the common law would dictate that one-half of the residuary estate should pass to Testator's intestate heirs. The modern trend would give the entire residue to B.

COMPUTER-ASSISTED RESEARCH

LEXIS: lapse! w/2 residue w/015 gift! w/30 testator! or testament!

§ 88.11(a)(1)(iii) When Lapse Not Applied -- Common Law.

The doctrine of lapse was designed to give effect to the presumed intent of the testator, but modern statutes will frequently change the common law result. n628 Even at common law, however, lapse would not apply if the testator indicated a contrary intent. There are several cases holding that a gift embellished with language beyond that of an outright gift may give inheritance rights to the heirs, issue, or estate of the will beneficiary. n629 For example, a gift to "X and his heirs" is an outright gift and will be subject to the lapse statute. A gift to "Y and her heirs, forever, absolutely, in fee simple" might be construed as making a gift to Y that might reach beyond Y's death. There is a split of authority on this issue, however.

The doctrine of lapse also did not apply to real property, but only to personal property, under very early common law. Lapsed gifts of real property would pass to the beneficiary's heirs, rather than to the residue or to the testator's heirs. A few states preserve this distinction in their statutes. n630

COMPUTER-ASSISTED RESEARCH

LEXIS: lapse! w/30 (contrary w/2 intent!) or real property

§ 88.11(a)(2) Antilapse Statutes.

Virtually all states have some form of antilapse statute. In a way, "antilapse" is a misnomer, since the gift will still lapse if the beneficiary predeceases the testator. The statute provides a *substitute* gift, which is believed to be more in line with the testator's probable intent. n631 A typical antilapse statute is embodied in pre-1990 Uniform Probate Code § 2-605: n632

If a devisee who is a grandparent or a lineal descendant of a grandparent of the testator is dead at the time of execution of the will, fails to survive the testator, or is treated as if he predeceased the testator, the issue of the deceased devisee who survive the testator by 120 hours take in place of the deceased devisee and if they are all of the same degree of kinship to the devisee they take equally, but if of unequal degree than those of more remote degree take by representation. One who would have been a devisee under a class gift if he had survived the testator is treated as a devisee for purposes of this section whether his death occurred before or after the execution of the will.

Key provisions of this statute include a survivorship requirement (120 hours), limited application regarding beneficiaries, and a substitute gift to beneficiary's issue or rather than to the beneficiary's estate.

Many statutes include a survivorship requirement, such as the one in the Uniform Probate Code requiring the devisee to survive the testator by 120 hours. The common law merely required that the beneficiary survive, for an instant, in order to take under the will. n633 Almost all statutes limit the applicability of the antilapse statutes to close blood relatives of the decedent. The Uniform Probate Code draws the line at the testator's grandparent or lineal decedents thereof. This classification would include testator's siblings, parents, aunts and uncles, cousins, as well as children. Some statutes are broader (any devisee) and others narrower (lineal descendants only). n634 If a beneficiary is not covered under the antilapse statute and yet predeceases the testator, then the gift will lapse under the common law doctrine.

The impact of the antilapse statute is to provide a substitute gift, usually to the issue of the beneficiary, although some states will pass the property to the beneficiary's heirs. n635

Antilapse statutes, like lapse itself, can be defeated by the clearly expressed intent of the testator. Traditionally, simple survivorship language would suffice. For example, a gift of "my house to A, if he survives me," would normally be held

to defeat the application of the antilapse statute. n636

COMPUTER-ASSISTED RESEARCH

LEXIS: antilapse w/2 statute! w/30 testator!

§ 88.11(a)(2)(i) Application of Antilapse Statutes to Class Gifts.

A gift to members of a class is a gift to a group of persons. For example, devises to my "children," "cousins," "brothers and sisters," or "nieces and nephews" are all class gifts. The nature of a class gift is that it is a group gift, and the individual shares awarded to the members of the class may vary over time. Class members may be added and the class size increased (usually by the birth of new members) and class members may drop out and class size decreased (usually by the death of existing members). n637 In the modern trend, courts apply the antilapse statutes to class gifts, even if the statute itself is silent on the issue. The Uniform Probate Code makes the statute expressly applicable to class gifts. (The 1990 version also extends application to void class gifts -- gifts made without any members of the class in existence when the will was executed and at the death of the testator.) n638 The practical effect of application can be illustrated by an example. Testator leaves property to "my children." At the time of the execution of the will, T has two children, A and B. Later C, another child, is born. Child A predeceases T, leaving issue. If the antilapse statute does not apply, the share of A (deceased) would go to the other members of the class, B and C. If the statute is applied, then the share of A (deceased) would go to A's issue. This is again presumed to be the likely intent of the testator, particularly in the event of multi-generational gifts (i.e. a gift to grandchildren) at least in the absence of contrary instructions. n639

A court will occasionally need to address the issue of whether the gift is a true class gift, or a gift to named individual members of a class. One test is whether the testator is "group-minded." For example, a gift to "Abby and Bob, my children," would not normally be considered a class gift, since Abby and Bob are named persons.

COMPUTER-ASSISTED RESEARCH

LEXIS: class w/2 gift! w/30 antilapse w/2 statute!

§ 88.11(a)(2)(ii) 1990 Uniform Probate Code Antilapse Provisions.

The revised Uniform Probate Code section on antilapse incorporates some significant changes from prior law. Some important sections are included here:

Section 2-601. Antilapse; Deceased Devisee; Class Gifts

(a) [Definitions.] In this section:

(1) "Alternative devise" means a devise that is expressly created by the will and, under the terms of the will, can take effect instead of another devise on the happening of one or more events, including survival of the testator or failure to survive the testator, whether an event is expressed in condition-precedent, condition-subsequent, or any other form. A residuary clause constitutes an alternative devise with respect to a non-residuary devise only if the will specifically provides that, upon lapse or failure, the non-residuary devise, or non-residuary devises in general, pass under the residuary clause.

(2) "Class member" includes an individual who fails to survive the testator but who would have taken under a devise

in the form of a class gift had he [or she] survived the testator.

(3) "Devise" includes an alternative devise, a devise in the form of a class gift, and an exercise of a power of appointment.

(4) "Devisee" includes (i) a class member if the devise is in the form of a class gift, (ii) an individual or class member who was deceased at the time the testator executed his [or her] will as well as an individual or class member who was then living but who failed to survive the testator, and (iii) an appointee under a power of appointment exercised by the testator's will.

(5) "Stepchild" means a child of the surviving, deceased, or former spouse of the testator or of the donor of a power of appointment, and not of the testator or donor.

(6) "Surviving devisee" or "surviving descendant" means a devisee or a descendant who neither predeceased the testator nor is deemed to have predeceased the testator under § 2-702.

(7) "Testator" includes the donee of a power of appointment if the power is exercised in the testator's will.

(b) [Substitute Gift.] If a devisee fails to survive the testator and is a grandparent, a descendant of a grandparent, or a stepchild of either the testator or the donor of a power of appointment exercised by the testator's will, the following apply:

(1) Except as provided in paragraph (4), if the devise is not in the form of a class gift and the deceased devisee leaves surviving descendants, a substitute gift is created in the devisee's surviving descendants. They take by representation the property to which the devisee would have been entitled had the devisee survived the testator.

(2) Except as provided in paragraph (4), if the devise is in the form of a class gift, other than a devise to "issue," "descendants," "heirs of the body," "heirs," "next of kin," "relative," or "family," or a class described by language of similar import, a substitute gift is created in the deceased devisee or devisee's surviving descendants. The property to which the devisees would have been entitled had all of them survived the testator passes to the surviving devisees and the surviving descendants of the deceased devisees. Each surviving devisee takes the share to which he [or she] would have been entitled had the deceased devisees survived the testator. Each deceased devisee's surviving descendants who are substituted for the deceased devisee take by representation the share to which the deceased devisee would have been entitled had the deceased devisee survived the testator. For the purposes of this paragraph, "deceased devisee" means a class member who failed to survive the testator and left one or more surviving descendants.

(3) For the purposes of § 2-601, words of survivorship, such as in a devise to an individual "if he survives me," or in a devise to "my surviving children," are not, in the absence of additional evidence, a sufficient indication of an intent contrary to the application of this section.

(4) If the will creates an alternative devise with respect to a devise for which a substitute gift is created by paragraph (1) or (2), the substitute gift is superseded by the alternative devise only if an expressly designated devisee of the alternative devise is entitled to take under the will.

(5) Unless the language creating a power of appointment expressly excluded the substitution of the descendants of an appointee for the appointee, a surviving descendant of a deceased appointee of a power of appointment can be substituted for the appointee under this section, whether or not the descendant is an object of the power.

The section preserves the 120-hour survivorship requirement, the limitation of antilapse protection to grandparents and their lineal descendants, as well as the application of the statute to class gifts. The section extends protection to the testator's own stepchildren, but not to the descendants of the stepchildren.

The new section covers void, as well as lapsed gifts. The new version extends the coverage of the statute to the exercise of powers of appointment, as well as bequests and devises. For example, suppose the testator exercises a testamentary power of appointment in favor of a child, Chad. Chad predeceases the testator, leaving issue. The 1990 Uniform Probate antilapse section would allow Chad's children to take their father's share under the exercise of the power. The antilapse provision of the 1990 Uniform Probate Code is limited to wills, but other sections extend antilapse coverage to non-probate instruments, such as insurance policies, pension plans, pay-on-death (POD) accounts, or future interests created under the terms of a trust.

In a controversial move, the 1990 UPC provides that mere survivorship language does not defeat the application of the antilapse provision. For example, if testator leaves property to "X, provided that he survives me," and X does not survive testator, the antilapse statute would still apply (if X were in the protected relative category of grandparent or lineal descendant) The comments to the revised section discuss this issue in detail. The drafters believe that the simple requirement of survivorship does not reveal anything about testator intent with regard to lapse. The provision is easily avoided with proper drafting. For example, the testator could leave property to "X, and not to X's descendants," or to provide that the residue include all lapsed failed devises. Another way to avoid the antilapse statute is to provide an alternative gift beneficiary in the will. For example, the testator could leave property to "A, if A survives me, and if A does not survive me, to B." If A predeceases the testator, the antilapse statute would not apply (even if A is in a protected class of relatives) and the property would go to B. As the comments note, if both A and B predeceased testator, then the antilapse statute would apply.

§ 88.11(a)(3) Simultaneous Death.

As illustrated by the doctrine of lapse, discussed in the previous sections, a person can only inherit from or take under the will of another if the person survives the decedent. Sometimes relatives die in common disasters or accidents, such as a plane crash or automobile accident.

At common law, if two persons died in a common disaster, the law did not provide a presumption as to survivorship. n640 The surviving relatives or other heirs and devisees were forced to provide proof of the order of death. In the

absence of such proof, the presumption was that each person's property would pass as if the other person never existed.

§ 88.11(a)(3)(i) 1940 Uniform Simultaneous Death Act.

In 1940, the Uniform Simultaneous Death Act was first promulgated, and was later amended in 1953. n641 The Act was adopted in every state and the District of Columbia. The Act changed the common law rule. It provides that if there is no evidence of the order of death, then each person's property is distributed as if the person survived the other. n642 Thus, if there is no evidence that a husband survived his wife, then his property is distributed to his relatives, heirs or devisees, because it is assumed that he did survive. This provision has two advantages. First, it saves the time and money of two estate administrations. Second, this disposition is more likely to be in line with testator's intent. In the husband-wife example above, the husband's property would pass to his relatives and the wife's property would pass to hers. This avoids dual administration of husband's property (passing through his estate to her, then through her estate) and it would give his property to his relatives, heirs or devisees, not those of his wife.

Despite the popularity of the Uniform Simultaneous Death Act, it did not prevent disputes in cases where the parties did not die at exactly the same time, but very close in time, perhaps a few hours or even a few minutes apart. The comment to the 1991 version of the Uniform Simultaneous Death Act refers to "unfortunate litigation in which the representative of one of the individuals attempts, through the use of gruesome medical evidence, to prove that the one he or she represents survived the other by an instant or two." n643 One of the best-known examples is *Janus v. Tarasewicz*. n644 In *Janus*, the newly-wed husband and wife returned from their honeymoon, and learned of the death of the husband's brother. The brother had swallowed cyanide-laced Tylenol capsules. Before the cause of death had been determined, both the husband and wife took some capsules. The husband was pronounced dead at the hospital, but the wife remained on life support systems, and was not officially pronounced dead until 2 days later. The families of the couple fought over the proceeds of the husband's life insurance policy, and the court held that the wife's family would be permitted to take since the wife did survive.

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LEXIS: 1940 w/5 uniform simultaneous death act or usda

§ 88.11(a)(3)(ii) 1991 Uniform Simultaneous Death Act.

The new 1991 version attempts to deal with this problem by creating a presumption that an heir or devisee who fails to survive the decedent by 120 hours is deemed to have predeceased the decedent. n645 The Uniform Simultaneous Death Act (USDA) is derived from some requirements in the pre-1990 and 1990 versions of the Uniform Probate Code. In the 1969 version of the Uniform Probate Code, §§ 2-104 and 2-601 provided for a 120-hour survival requirement for intestate and testate succession. n646 The provisions were not widely adopted however, since they were inconsistent with the 1940 and 1953 USDA. In the 1990 Uniform Probate Code, § 2-702 extended the 120-hour requirement to all forms of governing instruments, including insurance policies, and joint tenancies and tenancies by the entirety. n647 Another change in the 1990 Uniform Probate Code and the new USDA is the requirement of clear and convincing evidence to show survival of 120 hours. n648 This would help to "reduce litigation and to resolve close cases in favor of non-survival," according to the comment to the 1991 Uniform Simultaneous Death Act. n649 A death certificate serves as prima facia evidence of date and time of death, and in the absence of evidence disputing time of death, such a certificate suffices as clear and convincing evidence. n650

In 1991, the Uniform Simultaneous Death Act was amended to provide that evidence of death was to be determined in accord with the Uniform Determination of Death Act (UDDA) The UDDA was promulgated in 1980 and has been adopted in the majority of states. n651 The definition of death is either (1) irreversible cessation of circulatory and respiratory functions or (2) irreversible cessation of all functions in the entire brain, including the brain stem. The determination must be in accord with accepted medical standards. n652

As a matter of will drafting, it is easy to insert a survivorship clause into the will, with a gift over in the event of a failure to survive. A typical provision would state "For the purposes of this will, a beneficiary will not be deemed to have survived me if the beneficiary dies within (5, 30, 60, 90) days of my death." This language can also be incorporated into a trust document. It is unwise to use phrases such as "if we die simultaneously" or if we die in a "common accident," since litigation and evidentiary issues about survival, as described above, can arise.

§ 88.11(b) Changes in Property.

This section presents some legal doctrines to be used when property owned by the testator at the time of the execution of the will is different, in quality or quantity, than property owned by the testator at death.

§ 88.11(b)(1) Ademption by Extinction.

Generally, the doctrine of ademption by extinction is applied when property owned by the testator and purportedly devised to a beneficiary in a will is no longer in the estate at the time of testator's death. n653 For example, if the testator leaves "my mother's diamond ring" to her daughter in her will, but later sells the ring before death, the gift to the daughter is adeemed. The theory of ademption by extinction is that there is nothing left with which to satisfy the bequest, and this is treated as a revocation of the gift. n654 Ademption by extinction should be distinguished from ademption by satisfaction, which is discussed in the next section.

§ 88.11(b)(1)(i) Classification of Gifts.

Ademption by extinction applies only to *specific* bequests. All gifts in a will can be classified into one of four categories: general, specific, demonstrative, or residuary. n655 A general bequest is one that is satisfied out of any assets of the estate. A typical example would be a monetary gift, such as "$1,000 to each of my nieces and nephews." A specific legacy is a gift of a particular item of real or personal property. Examples are: "my house at 123 Main Street to my son, Sam," or "my stamp collection to my friend, Fred." A demonstrative bequest is a hybrid of the general and specific classifications; it is a gift to be paid out of particular estate assets. Again, the typical example is a monetary gift, but to be paid out of a particular source: "$1,000 each to Alice and Bob, to be paid from my account at the First National Bank." Finally, a residuary gift is the bequest or devise of the remainder of testator's estate, or the "remainder" (or the residue) "of my estate to my husband, Hank."

Only specific gifts are subject to ademption by extinction. It is inherent in the nature of these gifts that they are unavailable for distribution if they are sold, destroyed, condemned or otherwise transferred or transformed.

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LEXIS: Gift! w/15 classif! w/15 general or specific or demonstrative or w/15 testator!

§ 88.11(b)(1)(ii) Identity Theory.

The most generally accepted common law view of ademption is that it applies without regard to testator's probable intent. This is called the identity theory because it limits the inquiry to whether the item given in the specific bequest or devise is found in the estate. If the particular item of property is not in the testator's estate at the time of death, it is adeemed. The identity theory was first formulated by Lord Thurlow in 1786. n656 Since that time courts have found that gifts were adeemed even when testator's intent seemed fairly clear that the gift should be given in an alternate form. The identity rule may be illustrated hypothetically; suppose father (F) devises, by properly executed will, his home, Brownstone, to his daughter (D1), leaving the residue of his estate to another daughter (D2) Five years after the will is executed, F sells Brownstone and purchases Whitestone. D1 lives with and lovingly cares for F through extended years of failing health until his death. F, by his every word and deed throughout his lifetime, evinced unequivocally his desire

that his home would go to D1 upon his death. Yet, in jurisdictions strictly following the identity rule of Lord Thurlow, D2, not D1, will take Whitestone under the will's residuary clause. D1 would be left with nothing. Or the testator might sell the property given in a specific devise, but put the proceeds in a bank account. n657 Or, the transfer may be involuntary, such as where the property is condemned by the government using eminent domain power. n658 Or, the property may be subject to an executory contract. n659 Despite this unhappy result, and despite "the cardinal rule for the interpretation of wills ... that they shall be construed so as to give effect to the intention of the testator," n660 there is logic behind Lord Thurlow's seemingly cold, harsh rule. Thurlow himself explained his rule this way:

> If a testator had given a particular horse to A.B., if that horse died during the testator's lifetime, or was disposed of by him, then there is nothing on which the bequest can operate. And I do not think that the question in these cases turns on the intention of the testator... And I believe it will be a safer and clearer way to adhere to the plain rule which I before mentioned, which is to inquire whether the specific thing given remains or not. For where a testator gives by his will a particular sum of money, and he afterwards receives and spends it, I see no end to the confusion arising from the following any other line. n661

The rationale advanced in support of the identity doctrine, and its apparent disregard for testator intent, is that admission of evidence extrinsic to the will would violate formal will requirements by inconsistency with testator intent as expressed in the written instrument. That is, it would shatter the inviolability of the will itself. Under this rationale, then, testator intent is taken into account, but only intent as expressed in the will, while at the same time studiously avoiding any consideration of supervening circumstances or events indicating a contrary intent on the testator's part.

The pro-identity rationale, however, fails to recognize that many if not most ademption problems involve situations wherein the testator fails to foresee events that can and do arise, and consequently remains testamentarily silent concerning the testator's wishes concerning such events. Or, perhaps in ignorance as to its effect on the estate, a testator may voluntarily sell bequeathed real or personal property with no intention that the gift adeem. But the identity doctrine ignores these factors.

On the other hand, some courts have rejected application of the identity theory, and do try to consider testator's intent. n662 However, the court may still require that the beneficiary trace the property and find an appropriate replacement for the (otherwise) adeemed items. n663

One key area of ademption and intent to adeem involves the consequences of the actions of a third party. If a guardian, conservator, or some other person actually sells, transfers, or otherwise disposes of the property specifically devised in the will, the court may hold that the gift is not adeemed. n664 This is particularly true if the principal (testator) is incapacitated and thus incapable of forming the requisite intent to adeem. However, if a competent principal seems to approve the agent's action, the courts will treat the action as ratified and adeem the gift. n665

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LEXIS: identity theory w/30 ademption w/15 testator!

§ 88.11(b)(1)(iii) Construction Techniques to Avoid Ademption.

Sometimes courts will attempt to avoid the somewhat harsh results of ademption by extinction. One technique is to construe the bequest as general rather than specific. A Wisconsin court did this in *In re Will of Blomdahl*, n666 where the will contained two bequests of 100 shares of the ABC Co. stock. Testator owned 200 shares which were sold before death. The court held that the bequest was general. The executor might be required to purchase the stock for the beneficiary in this situation. However, if the testator uses the word "my" in the bequest, such as by stating, "I bequest my 100 shares of XYZ stock to Sally," it is more difficult for the court to find that it is anything but a specific bequest.

n667 Occasionally, a court may find that a gift is demonstrative, rather than specific. n668 A second constructional device is to find that the property subject to a specific bequest is changed only in form. A leading case is *Goode v. Reynolds*, n669 where the testator left shares of bank stock to the beneficiary. The bank consolidated with another bank and new shares were issued. The court found that this was a change in form, not substance.

A third technique is to hold that the terms of the will refer to the time of death, rather than the time of will execution. For example, "my automobile" or "my house" could mean either the automobile or house owned when the will was executed (and now gone), or the automobile or house owned at the time of death. n670 This construction device could also be extended to include additions to or increases in the value of the property. n671

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LEXIS: avoid! w/5 ademption w/15 technique!

§ 88.11(b)(1)(iv) Statutory Reforms.

The 1990 Uniform Probate Code provision on ademption made substantial changes to the pre-1990 version. The section is reproduced below:

§ 2-606. Nonademption of Specific Devises; Unpaid Proceeds of Sale, Condemnation, or Insurance; Sale by Conservator or Agent.

(a) A specific devisee has a right to the specifically devised property in the testator's estate at death and:

(1) any balance of the purchase price, together with any security agreement, owing from a purchaser to the testator at death by reason of sale of the property;

(2) any amount of a condemnation award for the taking of the property unpaid at death;

(3) any proceeds unpaid at death on fire or casualty insurance on or other recovery for injury to the property;

(4) property owned by the testator at death and acquired as a result of foreclosure, or obtained in lieu of foreclosure, of the security interest for a specifically devised obligation;

(5) real or tangible personal property owned by the testator at death which the testator acquired as a replacement for specifically devised real or tangible personal property; and

(6) unless the facts and circumstances indicate that ademption of the devise was intended by the testator or ademption of the devise is consistent with the testator's manifested plan of distribution, the value of the specifically devised

property to the extent the specifically devised property is not in the testator's estate at death and its value or its replacement is not covered by paragraphs (1) through (5).

(b) If specifically devised property is sold or mortgaged by a conservator or by an agent acting within the authority of a durable power of attorney for an incapacitated principal, or if a condemnation award, insurance proceeds, or recovery for injury to the property are paid to a conservator or to an agent acting within the authority of a durable power of attorney for an incapacitated principal, the specific devisee has the right to a general pecuniary devise equal to the net sale price, the amount of the unpaid loan, the condemnation award, the insurance proceeds, or the recovery.

(c) The right of a specific devisee under subsection (b) is reduced by any right the devisee has under subsection (a).

(d) For the purposes of the references in subsection (b) to a conservator, subsection (b) does not apply if after the sale, mortgage, condemnation, casualty, or recovery, it was adjudicated that the testator's incapacity ceased and the testator survived the adjudication by one year.

(e) For the purposes of the references in subsection (b) to an agent acting within the authority of a durable power of attorney for an incapacitated principal, (i) "incapacitated principal" means a principal who is an incapacitated person, (ii) no adjudication of incapacity before death is necessary, and (iii) the acts of an agent within the authority of a durable power of attorney are presumed to be for an incapacitated principal. n672

The 1990 Uniform Probate Code version is meant to avoid the identity theory of ademption and to adopt the intent theory. It even goes further, creating a presumption against ademption by extinction, by putting the burden of showing that an ademption was intended on the party claiming the ademption. It also specifically provides that the actions of a conservator or an agent acting under a durable power of attorney of an incapacitated person will not affect a specific devise. However, if the testator recovers capacity and survives for one year, this protection is lost.

The pre-1990 Uniform Probate Code §§ 2-607 and 2-608 provided some relief from the rigid identity theory of ademption. Specific legatees of stock, for instance, received any additional securities of the same entity or "securities of another entity owned by the testator as a result of a merger ... or similar action initiated by the entity." n673 But under the pre-1990 Code, the specific legatee of stock does not receive a cash distribution even when initiated by the entity. In cases in which the testator sold a specifically bequeathed asset, the Uniform Probate Code would award the legatee any part of the proceeds still unpaid at the testator's death. n674 Similarly, cases in which specifically devised real property is taken by eminent domain or lost in a fire or other calamity, or in the event of a foreclosure, proceeds should go to the devisee if paid after testator's death. Should a conservator of a legally impaired testator sell the specifically bequeathed property, the Uniform Probate Code would provide the legatee "a general pecuniary devise equal to the net sale price." n675 Some non-Uniform Probate Code statutes have also adopted provisions that advance the intent theory of ademption. n676

§ 88.11(b)(2) Ademption by Satisfaction.

The doctrine of satisfaction comes into operation when the testator, during her lifetime, gives or transfers to the legatee money or property specifically bequeathed by will, thus extinguishing the legacy. Similarly, a testator may satisfy a bequest earmarked for a specific purpose by himself achieving that purpose during the testator's lifetime. n677 The

effect of such gift, transfer, or accomplishment of purpose is tantamount to the testator giving (or transferring) the bequeathed property to a third person, as in the case of ademption by extinction. n678 Satisfaction, therefore, is similar to ademption. Indeed, a sizable number of authorities, if not most, consider satisfaction to be a form of ademption by extinction in that the subject matter of the bequest is not present in the testator's estate at the testator's death. The doctrine of satisfaction is also similar to the doctrine of advancement in an intestate estate. n679 In fact, the doctrine of ademption by satisfaction is difficult to apply to specific devises. If the testator gives a specific item to the beneficiary, it is adeemed by extinction, not satisfaction.

However, satisfaction, as opposed to the strict doctrine of ademption by extinction, may operate not only on specific devises but also on general, demonstrative or residual devises. The doctrine also differs from ademption by extinction in that the legatee's gift does not in fact disappear from the estate in such cases, but rather moves into the legatee's possession during the testator's lifetime.

The general rule is that testator's intention determines whether the doctrine of satisfaction comes into play. For example, the transfer of mere money to a legatee who would take under a general bequest does not in and of itself indicate that the testator wishes the transfer to satisfy the bequest. If the testator intended for the transfer to satisfy the legacy, it will do so, but if the testator intended the inter vivos transfer as a gift in addition to the bequest, the law will give effect to such intention. Similarly, if the testator intended the transfer to be a partial satisfaction of the bequest, the law will give pro tanto recognition to such intention. Most courts put the burden of disproving testator intent on the party challenging such intent. n680 This critical factor of ascertaining testator intent also distinguishes satisfaction cases from the strict ademption by extinction doctrine. n681

The doctrine of satisfaction is not applied to gifts made before the execution of the will, but it is applied to post-execution gifts if the testator intended such effect. Moreover, satisfaction may apply even when unlike gifts are intended by the testator to fulfill a legacy; a gift of land may even satisfy a bequest of personal property if the testator so intended. n682 Conversely, however, without proof of such testator intent, the legacy will not be satisfied. Courts in many states allow oral evidence to prove testator intent, but the Uniform Probate Code does not apply the doctrine unless the will or some other writing evinces such intent.

At least seventeen states have by statute adopted the doctrine of satisfaction. Other states deal with the doctrine under ademption statutes or through operation of the common law. The states that have adopted the doctrine of satisfaction almost without exception mirror the Uniform Probate Code treatment of the doctrine. The Uniform Probate Code provides that an inter vivos gift of property is treated as satisfaction only if: (1) the will provides for deduction of the gift, (2) the testator declares in a contemporaneous writing that the gift is to be deducted from the devise or is in satisfaction of the devise, or (3) the devisee acknowledges in writing that the gift is in satisfaction of the legacy. n683

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LEXIS: ademption w/15 satisfaction w/30 testator!

§ 88.11(b)(3) Abatement.

When a testator's estate is insufficient to meet all debts, estate administration costs and legacies, the legacies are reduced, and in some cases, even destroyed. Testamentary gifts may only be paid out of that portion of the estate remaining after all debts of the testator and charges against the estate are paid. Abatement is the legal mechanism whereby the remaining assets, if any, are apportioned among the beneficiaries named in the will.

In general, gifts abate in a certain order, based on their classification as general, specific, or residuary. The classification system was discussed in the section on ademption. n684 Usually, intestate property, if any, will abate first. A testator would normally leave property intestate only if there were no residuary clause in the will, or if the residuary clause fails

for some reason. Otherwise, residuary gifts abate first, then general gifts, then specific and demonstrative gifts. n685 This is in accord with the presumed intent of the testator, although the residue taker is frequently the testator's primary concern. Gifts of the same type generally abate pro rata. For example, if the estate contains $10,000, but the testator made gifts of $10,000 to Alice, $6,000 to Bob and $4,000 to Connie, then Alice should receive $5,000, Bob gets $3,000, and Connie is left with $2,000.

§ 88.11(b)(3)(i) Intent.

The intention of the testator, if discernable, will receive paramount consideration in questions of abatement. n686 The general rule in abatement cases is that the loss must be borne by those upon whom the testator places it. Courts will presume that the testator intended an equal abatement of all general pecuniary legacies in the absence of a contrary showing. A legacy will be accorded a preference only when such is shown to be the testator's intent; "equality is the rule and preference the exception" in abatement cases. Of course, the testator may have intended a preference, and such intent will be honored. n687 However, the burden of proof falls upon the party seeking the preference. n688 Where the will is ambiguous as to testator's intent to prefer one legacy to another, no preference will be given. An important factor in determining whether a preference exists is whether the will shows the testator foresaw and provided for the possibility of a deficiency in the estate assets.

A provision for time of payment, as indicated by the terms of the will, does not afford a preference to those legacies which are to be paid first. Similarly, no intent to create a preference is to be inferred from such terms as "in the first place," "in the second place," and the like in cases in which the testator obviously expected the estate would be adequate to fully pay all legacies. A testator may, however, expressly direct that legacies assume priority in the order in which they are listed in the will. In brief, intent to prefer a legacy may be shown expressly by the terms of the will, by evidence existing outside the will, or by such extraneous circumstances as the relationship of the beneficiary to the testator, but where the will speaks clearly on the matter, the document will be controlling. n689

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LEXIS: intent! w/5 testator! w/15 abate!

§ 88.11(b)(3)(ii) History and Common Law.

Historically, personal property was decimated before real estate in payment of legacies. n690 The general rule, traditionally and historically, has been that in the absence of a statute providing otherwise, a shortfall of the personalty to pay legacies in full will cause them to abate, and they are not payable out of the realty, unless of course the testator expressly provides otherwise in the will.

This preference for abatement of personalty comes from the common law rule that real property passed directly to the will beneficiary at testator's death. Personal property passed to the executor of the estate. As a result, only personal property was available to pay estate debts, expenses, legacies and bequests. Real property could not be reached unless the creditor had a lien on the property. n691 Modern probate law no longer draws this title distinction. However, some states retain vestiges of the realty-over-personalty preference. n692

§ 88.11(b)(3)(iii) Uniform Probate Code and Modern Trend.

In the modern trend, the Uniform Probate Code does not distinguish between personal and real property testamentary gifts. n693 Also, several states have by statute expressly abolished the preference for realty over personalty in abatement matters. n694 A majority of modern courts have ruled that in view of the fact that a testator may expressly charge her realty with payment of estate debts, there is no sound reason, where a testator bequeaths both real and personal property, to presume that the testator intended to favor one class of property at the expense of another, n695

and logic would indicate that the classes abate pro rata.

The Uniform Probate Code sets out an order of abatement similar to that of the common law and most of the state statutes; "shares of distributees shall abate ... in the following order: (1) property not disposed of by will; (2) residuary devises; (3) general devises; (4) specific devises." n696 Within each classification, abatement is pro rata, according to the Uniform Probate Code. The text of Uniform Probate Code § 3-902 is:

(a) Except as provided in subsection (b) and except as provided in connection with the share of the surviving spouse who elects to take an elective share, shares of distributees abate, without any preference or priority as between real and personal property, in the following order: (1) property not disposed of by the will; (2) residuary devises; (3) general devises; (4) specific devises. For purposes of abatement, a general devise charged on any specific property or fund is a specific devise to the extent of the value of the property on which it is charged, and upon the failure or insufficiency of the property on which it is charged, a general devise to the extent of the failure or insufficiency. Abatement within each classification is in proportion to the amounts of property each of the beneficiaries would have received if full distribution of the property had been made in accordance with the terms of the will.

(b) If the will expresses an order of abatement, or if the testamentary plan or the express or implied purpose of the devise would be defeated by the order of abatement stated in subsection (a), the shares of the distributees abate as may be found necessary to give effect to the intention of the testator.

(c) If the subject of a preferred devise is sold or used incident to administration, abatement shall be achieved by appropriate adjustments in, or contribution from, other interests in the remaining assets.

By statute or case law, a minority of states favor spouses and relatives in matters of abatement. An Iowa court, for example, held that bequests to the testator's spouse abate last, even if they are residuary bequests. n697 Although the Uniform Probate Code affords no similar preference, the comment to § 3-902 indicates that, "it is commonly held, even in the absence of a statute, that general legacies to a wife, or to persons with respect to which the testator is in loco parentis, are to be preferred to other legacies in the same class because this accords with the probable purpose of the legacies." n698 To the contrary, however, it has been held that general legacies to a testator's brother and sister abated pro rata and with no priority when the estate was insufficient to meet all charges and legacies in full. The fact that the brother and sister of the testator were the nearest relatives, and the only relatives among the general legatees, did not entitle them to a preference in order of payment. n699

It should also be noted that the issue of ademption can arise in conjunction with the surviving spouse's elective share, where a spouse may decide to take a statutory forced share in lieu of the gift under the will, or with the claims of a pretermitted child, born after execution of the will. n700 An older view might require that all of the elective share be paid out of the residue, but the modern trend would apportion the spouse's forced share among all beneficiaries. n701 This is similar to the trend in estate tax apportionment, discussed below.

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LEXIS: uniform probate code w/30 abate!

§ 88.11(b)(3)(iv) Estate Tax Note.

Non-probate property, such as property held in joint tenancy or revocable inter vivos trusts, may be included in the federal taxable estate. n702 Or, the estate may not contain non-probate assets, but federal estate tax may still be due. Older cases followed a "burden on the residue" rule, making the residue holder primarily liable for the estate taxes. n703 A modern trend in this area is to apportion the tax among all recipients of property (probate and non-probate) The Uniform Estate Tax Apportionment Act takes this approach. The Uniform Probate Code incorporates the Uniform Estate Tax Apportionment Act in § 3-916. n704

§ 88.11(b)(4) Other Changes.

§ 88.11(b)(4)(i) Exoneration of Liens.

At common law, the courts assumed that the testator intended that liens upon devised land and specific gifts were to be discharged out of the general personal estate. n705 The beneficiary of the property subject to the lien would take free of the lien. For example, suppose testator left Blackacre to A and the rest of the probate property to B. Blackacre is subject to a mortgage. The mortgage would be paid from B's share of the estate, and A would take Blackacre free and clear. The common law presumption was based on the notion that the personal estate was benefitted by the assumption of the lien in the first place. The personal estate would be less if the testator had paid the debt during the testator's lifetime.

The modern trend, as exemplified by the Uniform Probate Code, reverses the presumption. The debt is not exonerated unless the will specifically so provides. n706

§ 88.11(b)(4)(ii) Corporate Stock.

In general, an increase in value of any asset left under a will goes to the beneficiary. Traditionally, courts draw a line between specific and general devises. If a gift is specific, it passes all interest and benefits attached to the item of property. If the gift is general, only the actual items pass. n707

This general/specific distinction was carried over into the area of stock splits. A stock split occurs when a corporation decides to issue more shares of stock, but still maintain the pro rata ownership levels. For example, A owns 1,000 shares of stock, representing 1% of the ownership interest in the company. If the stock splits three-for-one, A will own 3,000 shares, still representing 1% of the total. Also, if the 1,000 shares originally had a total value of $3,000 ($3 apiece) they would still be worth $3,000 ($1 apiece), after the stock split. The former rule was that if testator made a specific devise of stock to a beneficiary, then the beneficiary would receive all the stock. If the bequest was general, the beneficiary was limited to the precise number of shares disclosed in the will. n708 As for dividends, courts have held that cash dividends are not available to the stock devisee, they go to the residue holder. Stock dividends also traditionally were not given to the stock beneficiary.

The Uniform Probate Code treats stock dividends and stock splits in the same manner. However, the pre-1990 Uniform Probate Code still relied on the general/specific distinction. n709 The 1990 version provides that all stock splits *and* stock dividends should go to the stock beneficiary. n710 The 1990 version maintains the exception for cash dividends. It should be noted, however, that the abolition of the specific/general distinction is not yet widely adopted. Section 2-605 of the 1990 Uniform Probate Code provides:

(a) If a testator executes a will that devises securities and the testator then owned securities that meet the description in the will, the devise includes additional securities owned by the testator at the death to the extent the additional securities were acquired by the testator after the will was executed as a result of the testator's ownership of the described securities and are securities of any of the following types:

(1) securities of the same organization acquired by reason of action initiated by the organization or any successor, related, or acquiring organization, excluding any acquired by exercise of purchase options;

(2) securities of another organization acquired as a result of a merger, consolidation, reorganization, or other distribution by the organization or any successor, related, or acquiring organization; or

(3) securities of the same organization acquired as a result of a plan of reinvestment.

(b) Distributions in cash before death with respect to a described security are not part of the devise. n711

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LEXIS: specific or general w/2 devise! w/15 stock w/30 uniform probate code

FOOTNOTES:

(n1)Footnote 623. *See generally* John L. Garvey, Drafting Wills and Trusts: Anticipating the Birth and Death of Possible Beneficiaries, *71 Or. L. Rev. 47 (1992);* Edward C. Halbach & Lawrence W. Waggoner, The UPC's New Survivorship and Antilapse Provisions, *5 Albany L. Rev. 1019 (1992);* Leonard Levin, Lapse and the Vesting of Interest Revisited, 3 Hofstra Prop. L.J. 155 (1990); Patricia J. Roberts, Lapse Statutes: Recurring Construction Problems, *37 Emory L J. 323 (1988);* Addison E. Dewey, Testators Who Die Intestate, 7 Prob. L.J. 221 (1987); Susan F. French, Antilapse Statutes are Blunt Instruments: A Blueprint for Reform, *37 Hastings L.J. 335 (1985).* See also Mark L. Ascher, The 1990 Uniform Probate Code: Older and Better, or More Like the Internal Revenue Code?, *77 Minn. L. Rev. 639, 649-657 (1993);* Mary Louise Fellows, Traveling the Road to Probate Reform: Finding the Way to Your Will (Response to Professor Ascher), *77 Minn. L. Rev. 659, 674-680 (1993).*

(n2)Footnote 624. *See* William M. McGovern, Jr., Sheldon F. Kurtz & Jan Ellen Rein, Wills, Trusts and Estates § 10.4 (1988).

(n3)Footnote 625. Id. See, e.g., *In re Estate of Russell, 444 P.2d 353 (Cal. 1968)* (gift to dog). See also supra, § 88.03(c)(1)(ii) (purging statutes regarding interested witnesses/beneficiaries under will); § 88.10(c) (will revoked by divorce or annulment with respect to ex-spouse); §§ 88.12(d)(1) and (e) (mortmain statutes and slayer statutes limit dispositions under wills); and § 88.13(f) (disclaimers).

(n4)Footnote 626. At common law, devises of land did not fall into the residue, but passed by intestacy. This rule is virtually extinct today. See 5 Amer. L. Of prop. § 21.30. *In re Estate of Homburg, 697 So. 2d 1154 (Miss. 1997)* (the chancellor refused to give effect to the provision in the will, finding that the gift in trust to one party had lapsed and would devolve to residue).

(n5)Footnote 627. *See, e.g.*, U.P.C. § 2-606, 8 U.L.A. 146, 134. See also *Estate of Jackson, 471 P.2d 278 (Ariz. 1970); Nieman v. Zacharias, 176 N.W.2d 671 (Neb. 1970); Commerce Nat'l Bank v. Browning, 107 N.E.2d 120 (Ohio St. 1952);* contra, *Estate of Levy, 415 P.2d 1006 (Okla. 1966); Swearingen v. Giles, 565 S.W.2d 574 (Tex. Civ. App. 1978).*

(n6)Footnote 628. *See* "Antilapse Statutes" discussed infra.

(n7)Footnote 629. *See, e.g., Estate of Griffen, 543 P.2d 245 (Wash. 1975)* (unto herself and her heirs forever); *Estate of Mangel, 186 N.W.2d 276 (Wis. 1971)* (and to her heirs and assigns forever); *Richland Trust Co. v. Bicvar, 339 N.E.2d 830 (Ohio St. 1975)* (per stirpes).

(n8)Footnote 630. *See contra, Estate of Walters, 519 N.E.2d 1270 (Ind. Ct. App. 1988); Forester v. Marler, 228 S.E.2d 646 (N.C. App. 1976); Nieman v. Zacharias, 176 N.W.2d 671 (Neb. 1970).*

(n9)Footnote 631. *See* U.P.C. § 2-603, cmt., 8 U.L.A. 129.

(n10)Footnote 632. U.P.C. § 2-605, 8 U.L.A. 144.

(n11)Footnote 633. *See* more discussion regarding survivorship infra at § 88.11(a)(3), Simultaneous Death.

(n12)Footnote 634. *See, e.g.*, 110-1/2 ILCS 4-11; Tex. Prob. Code Ann. § 68 (lineal descendants only); Ohio Rev. Code § 2107.52 (any relative); Ga. Code Ann. § 53-2-103; Ky. Rev. Stat. 394.400 (all devisees).

(n13)Footnote 635. *See, e.g.*, Iowa Code § 633.273.

(n14)Footnote 636. *See, e.g., Estate of Stroble, 636 P.2d 236 (Kan. App. 1981); Matter of Estate of Burruss, 394 N.W.2d 466 (Mich. App. 1986); In re Evan's Estate, 227 N.W.2d 603 (Neb. 1975);* but see *Estate of Ulrikson, 290 N.W.2d 757 (Minn. 1980); Estate of Kehler, 411 A.2d 749 (Pa. 1980).*

(n15)Footnote 637. *See generally* Thomas F. Bergin & Paul G. Haskell, Preface to Estates in Land and Future Interests, 136-141 (2d ed. 1984).

(n16)Footnote 638. U.P.C. § 2-605 and cmt., 8 U.L.A. 144.

(n17)Footnote 639. *See* the discussion in *Hoverstad v. First Nat'l Bank & Trust Co., 74 N.W.2d 48 (S.D. 1955);* Annotation, Applicability of Antilapse Statutes to Class Gifts, *56 A.L.R. 2d 948 (1957).*

(n18)Footnote 640. *See* Unif. Simultaneous Death act, Prefatory Note, 8 U.L.A. 557, 558 (1983); *Sherman v. Roe, 262 S.W.2d 393 (Tex. 1953); In re Conover's Estate, 259 N.Y.S.2d 618 (1965).*

(n19)Footnote 641. *See* Unif. Simultaneous Death Act, Table of Adopting Jurisdictions, 8A U.L.A. 557.

(n20)Footnote 642. Unif. Simultaneous Death Act, § 1, 8A U.L.A. 561. See generally William H. DeParcq, Presumptions, Simultaneous Death, *40 Minn. L. Rev. 69 (1956);* John T. McNaughton, Burden of Proof and Presumptions, *35 B.U. L. Rev. 481 (1955);* Frederic Sammond, Simultaneous Death Act as It Pertains to the Marital Deduction, *38 Marquette L. Rev. 16 (1954).*

(n21)Footnote 643. Unif. Simultaneous Death Act Prefatory; Note, 8A U.L.A. 321.

(n22)Footnote 644. *482 N.E.2d 418 (Ill. App. 1985).*

(n23)Footnote 645. *See* Unif. Simultaneous Death Act §§ 2, 3, 4, 8A U.L.A. 323-324 (sections cover probate code issues such as dissolution of property, right to exempt property, homestead, family allowance, donative provisions of governing instruments and co-owners with right of survivorship).

(n24)Footnote 646. *See* U.P.C. §§ 2-104, 2-601, 8 U.L.A. 64, 128.

(n25)Footnote 647. *See* U.P.C. § 702, 8 U.L.A. 182-184. The section applies this rule to "co-owners with right of survivorship," a term which includes "joint tenants, tenants by the entireties," and other co-owners entitled to the whole of the property upon the death of the other or others.

See also Edward Halbach & Lawrence Waggoner, The UPC's New Survivorship and Antilapse Provisions, *55 Albany L. Rev. 1091 (1992).*

(n26)Footnote 648. *See* Unif. Simultaneous Death Act §§ 2, 3, 4, 8A U.L.A. 323-24; U.P.C. § 2-702.

(n27)Footnote 649. *See* Unif. Simultaneous Death Act, Prefatory Note, 8A U.L.A. 321.

(n28)Footnote 650. *See* Unif. Simultaneous Death Act § 5(2), 8A U.L.A. 324.

(n29)Footnote 651. *See* Unif. Determination of Death Act, U.L.A.

(n30)Footnote 652. *See* Unif. Determination of Death Act § 1 U.L.A.; Unif. Simultaneous Death Act § 5.

(n31)Footnote 653. *See generally* William M. McGovern, Jr., Sheldon F. Kurtz, & Jan Ellen Rein, Wills, Trusts & Estates § 10.1 (West 1988). Paulus, Ademption by Extinction: Smiting Lord Thurlow's Ghost, 2 Texas Tech L. Rev. 195 (1971); Note, Ademption and Testator's Intent, *74 Harv. L. Rev. 741 (1961);* Annotations, Ademption of Bequest of Proceeds of Property, *45 A.L.R. 3d 10 (1972);* Ademption of Legacy of Business or Interest Therein, *65 A.L.R. 3d 541 (1975);* Ademption or Revocation of Specific Devise or Bequest By Guardian, Conservator, or Trustee of Mentally or Physically Incompetent Testator, *84 A.L.R. 4th 462 (1991).*

(n32)Footnote 654. *See, e.g.*, Black's Law Dictionary 39 (5th ed. West 1990) ("The extinction or withdrawal of a legacy by testator's act equivalent to revocation or indicating an intention to revoke."); *Rogers v. Carte, 385 S.W.2d 563 (Tex. App. 1965)* ("Ademption used to describe acts by which specific legacy becomes inoperative because of the disappearance of its subject matter from testator's estate in his lifetime.").

(n33)Footnote 655. *See* Thomas Edgar Atkinson, The Law of Wills § 132 (2d ed. 1953); Gardner on Wills §§ 145-150 (2d ed. Walter T. Dunmore ed. 1916).

(n34)Footnote 656. The identity theory comes from Ashburner v. MacGuire, 2 *Bro. C.C. 108, 29 Eng. Rep. 62 (Ch. 1786).*

(n35)Footnote 657. *See, e.g., In re Dugans Estate, 73 A.2d 778 (Del. Ch. 1950).*

(n36)Footnote 658. *Ametrono v. Downs, 63 N.E. 340 (N.Y. 1902).* See also, *In re Wrights Will, 165 N.E.2d 561 (N.Y.2d 1960)* (gift of diamond ring adeemed even though insurance company paid testator value).

(n37)Footnote 659. *Matter of Estate of Hills, 564 P.2d 462 (Kan. 1977).*

(n38)Footnote 660. *Gorham v. Chadwick, 200 A. 500, 502 (Me. 1928).*

(n39)Footnote 661. *Stanley v. Potter, 30 Eng. Rep. 3 (1789).*

(n40)Footnote 662. *See, Hoben v. O'Donnell, 451 N.W.2d 30 (Ill. App. 1983); Newbury v. McCammant, 182 N.W.2d 147 (Iowa 1970); White v. White, 257 A.2d 470 (N.J. Super. 1969).*

(n41)Footnote 663. *See In re Mason's Estate, 397 P.2d 1005 (Cal. 1965).*

(n42)Footnote 664. *See, e.g., Morse v. Converse, 113 A. 214 (N.H. 1921); In re Mason's Estate, 397 P.2d 1005 (Cal. 1965); In re Estate of Swoyer, 439 N.W.2d 823 (S.D. 1989).* Annotations, *84 A.L.R. 4th 462 (1991); 51 A.L.R. 2d 770 (1957).*

(n43)Footnote 665. *See, e.g., McGee v. McGee, 413 A.2d 72 (R.I. 1980).*

(n44)Footnote 666. *257 N.W. 152 (Wis. 1935).*

(n45)Footnote 667. *First Nat'l Bank v. Perkins Inst. for the Blind, 176 N.E. 532 (Mass. 1931); Matter of Estate of Wales, 727 P.2d 536 (Mont. 1986).* More information on stock transformations is found in § 88.11(b)(4), infra.

(n46)Footnote 668. *See, e.g., Smith v. Estate of Peters, 741 P.2d 1172 (Alaska 1987); Lavender v. Cooper, 285 S.E.2d 528 (Ga. 1982); Leaver v. McBride, 506 S.W.2d 141 (Tenn. 1974).*

(n47)Footnote 669. *271 S.W. 600 (Ky. 1925).*

(n48)Footnote 670. *See, e.g., Stenkamp v. Stenkamp, 723 P.2d 336 (Or. App. 1986); Milton v. Milton, 10 S.2d 175 (Miss. 1942); Lusk's Estate, 9 A.2d 363 (Pa. 1939).*

(n49)Footnote 671. *See, e.g., Estate of Russell, 521 A.2d 677 (Me. 1987).*

(n50)Footnote 672. *See* U.P.C. § 2-606 and comments, 8 U.L.A. 136. See also Richard W. Effland, Will Construction Under the Uniform Probate Code, *63 Or. L. Rev. 337 (1984)* (pre-1990 Code); Gregory S. Alexander, Ademption and the Domain of Formality in Wills Law, *55 Albany L. Rev. 1067 (1992)* (1990 revision).

(n51)Footnote 673. U.P.C. § 2-607, 8 U.L.A. 147-148.

(n52)Footnote 674. U.P.C. § 2-608(a), 8 U.L.A. 148.

(n53)Footnote 675. U.P.C. § 2-608(b), 8 U.L.A. 148-149.

(n54)Footnote 676. *See, e.g.,* Fla. Stat. Ann. §§ 732.605, .606; Ky. Rev. Stat. § 394.360; N.J. Stat. Ann. §§ 3B: 3-42 to -44; N.Y. Est. Powers & Trusts Law § 34.5; 20 Pa. Stat. Ann. § 2541(16.1).

(n55)Footnote 677. *See, e.g., Austin v. Austin, 22 N.W.2d 560 (Neb. 1946)* (legacies for grandchildren's education satisfied by grandfather's providing such education during his lifetime); *Trustees of Baker Univ. v. Trustees of Endowment Ass'n, 564 P.2d 472 (Kan. 1977)* (scholarship fund endowed).

(n56)Footnote 678. *See* § 88.11(b)(1), supra.

(n57)Footnote 679. *See, e.g., American Trust & Banking Co. v. Balfour, 198 S.W. 70, 71 (Tenn. 1917)* ("ademption of specific legacy is extinction, alienation, withdrawal or satisfaction of legacy by act of testator by which the intention to revoke is indicated.")

(n58)Footnote 680. *See In re Estate of Wantz, 289 N.W. 363, 366 (Neb. 1939)* ("when the evidence shows such an intention on the part of the testator to adeem or satisfy a legacy subsequent to the execution of the will, such intention is controlling, and the burden of disproving such intention is on the party denying it."). But see *In re Estate of Hall, 446 N.W.2d 661 (Mich. App. 1989)* (certificate of deposit transferred to son prior to testator's death could not be treated as being in partial satisfaction of will's devise to son, where will contained no provision for satisfaction through inter vivos gifts).

(n59)Footnote 681. *Stanley v. Potter, 30 Eng. Rep. 83, 84 (1789)* ("I do not think that the question in these [ademption] cases turns on the intention of the testator.").

(n60)Footnote 682. *See Carmichael v. Lathrop, 66 N.W. 350 (Mich. 1896).*

(n61)Footnote 683. *See* U.P.C. § 2-609, 8 U.L.A. 138-139; pre-1990 version is § 2.612, 8 U.L.A. 153 (1983).

(n62)Footnote 684. *See* § 88.11(b)(1), supra.

(n63)Footnote 685. *See, e.g.*, U.P.C. § 3-902(a), 8 U.L.A. 379-380.

(n64)Footnote 686. *See, e.g., Osborn v. Osborn, 334 S.W.2d 48 (Mo. 1960)* (testator's intent to take advantage of full marital deduction under tax laws prevailed over normal abatement rules).

(n65)Footnote 687. *See, e.g., In re McDonald's Estate, 41 N.E.2d 128 (Ill. App. 1942)* (priority may be given a legatee of a general legacy if the intention of the testator to give such preference appears beyond dispute by terms of will); *In re Van Wechel's Estate, 41 N.W.2d 694 (Iowa 1950)* (testator may indicate his intent that gifts be paid in a certain order of priority, and where such intent appears, full effect will be given thereto).

(n66)Footnote 688. *See In re Weed's Will, 252 N.W. 294 (Wis. 1934).*

(n67)Footnote 689. Gardner on Wills § 151 (2d ed., Walter T. Dunmore ed. 1916).

(n68)Footnote 690. *See, e.g., Lenzen v. Miller, 37 N.E.2d 833 (Ill. 1941)* (debts and pecuniary legacies must be paid from personalty, and, where there is a deficiency of personalty for that purpose, legacies must abate unless testator charges his realty with their payment); *In re Hill's Estate, 260 N.W.2d 711 (Iowa 1966)* (where will gave all testator's realty to two hospitals and all his personalty to an individual, the personalty should be first used to pay debts, and pro rata abatement between realty and personalty was not required).

(n69)Footnote 691. *See generally* the discussion of the history of wills, § 88.02, infra.

(n70)Footnote 692. *See, e.g.*, Edmund's Administrator v. Scott (Va. 1884).

(n71)Footnote 693. U.P.C. § 3-902, 8 U.L.A. 379-380.

(n72)Footnote 694. *See, e.g.*, Ill. Rev. Stat. ch. 110-1/2, § 24.3(b); N.Y. Est. Powers & Trust Law. § 13-1.3(b).

(n73)Footnote 695. *See, e.g., O'Day v. O'Day, 91 S.W. 921 (Mo. 1906); May v. Burns, 131 So. 232 (Ala. 1930).*

(n74)Footnote 696. U.P.C. § 3-902(a), 8 U.L.A. 379-380.

(n75)Footnote 697. *Nolte v. Nolte, 76 N.W.2d 881 (Iowa 1956);* Iowa Code § 633.436. See also 20 Pa. Cons. Stat. Ann. § 3541.

(n76)Footnote 698. U.P.C. § 3-902, cmt., 8 U.L.A. 380.

(n77)Footnote 699. *In re Van Wechel's Estate, 41 N.W.2d 694 (Iowa 1950).*

(n78)Footnote 700. *See* the discussion of the spouses forced or elective share at § 88.12(a), infra; and the rights of issue at § 88.12(b), infra.

(n79)Footnote 701. The Uniform Probate Code adopts this view. See U.P.C. § 2-301(b), § 2-302(d), 8 U.L.A. 104, 105. See also, Ala. Code § 43-8-75; Md. Est. & Trusts Code § 3-208; *In re Byrne's Estate, 267 N.Y.S. 627 (1933).*

(n80)Footnote 702. The Internal Revenue Code provides that insurance proceeds and property subject to a power of appointment bear the share of estate taxes attributable.

(n81)Footnote 703. *See, e.g., Habert v. Monroe County, 142 Ill. App. 3d 152 (1986); Matter of Estate of Hawes, 683 P.2d 1252 (Kan. 1984).* See generally, Featheringil, Estate Tax Apportionment and Nonprobate Assets: Picking the Right Pocket, *21 Cumb. L. Rev. 1 (1990);* Fleming, Apportionment of Federal Estate Taxes, *43 Ill. L. Rev. 153 (1948).*

(n82)Footnote 704. The pertinent sections provide:

Section 3-916. [Apportionment of Estate Taxes.]

(b) Except as provided in subsection (i) and, unless the will otherwise provides, the tax shall be apportioned among all persons interested in the estate. The apportionment is to be made in the proportion that the value of the interest of each person interested in the estate bears to the total value of the interests of all persons interested in the estate. The values used in determining the tax are to be used for that purpose. If the decedent's will directs a method of apportionment of tax different from the method described in this Code, the method described in the will controls.

...

(i) If the liabilities of persons interested in the estate as prescribed by this act differ from those which result under the Federal Estate tax law, the liabilities imposed by the federal law will control and the balance of this Section shall apply as if the resulting liabilities had been prescribed herein.

See U.P.C. § 3-916, 8 U.L.A. 393-396.

(n83)Footnote 705. Thomas Edgar Atkinson on wills § 137 (2d ed. 1953); Paulus, Exoneration of Specific Devises: Legislation v. The Common Law, *6 Willamette L. Rev. 53 (1970).*

(n84)Footnote 706. U.P.C. § 2-607, 8 U.L.A. 137. See also, N.Y. Est. Powers & Trust Law § 3-3.6(a).

(n85)Footnote 707. *See, e.g., Ogden v. Pattee, 21 N.E. 227 (Mass. 1889); Fleming v. Carr, 22 A. 197 (N.J. Eq. 1891).*

(N86)Footnote 708. *See, e.g., In re Mandelle's Estate, 233 N.W. 230 (Mich. 1930); Fitch's Will, 118 N.Y.S.2d 234 (A.D. 1952).* But see *Bostwick v. Hurstel, 304 N.E.2d 186 (Mass. 1973)* (abandoning distinction). See generally, Paulus, Special and General Legacies of Securities -- Whither Testator's Intent, *43 Iowa L. Rev. 467 (1958);* Note, Rights to Stock Accretions Which Occur Prior to Testator's Death, *36 Alb. L. Rev. 182 (1971);* Annotations, Right of General Legatee of Stocks, Bonds or Other Securities Where Testator Owns at Time of Death None Such as are Described in Will or Less than Bequeathed, *22 A.L.R. 2d 457 (1952);* Change in Stock or Corporate Structure, or Split or Substitution of Stock of Corporation, as Affecting Bequest of Stock, *46 A.L.R. 3d 7 (1972);* Wills: Effect of Gift of Specified Percentage or Share of Estate (or Residuary Estate) to Include Specific Property Found to be of Greater Value than Share Bequeathed, *63 A.L.R. 4th 1186 (1988).*

(n87)Footnote 709. U.P.C. § 2-607(a), 8 U.L.A. 14-148.

(n88)Footnote 710. U.P.C. § 2-605, 8 U.L.A. 135.

(n89)Footnote 711. U.P.C. § 2-605(c), 8 U.L.A. 135.

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CHAPTER 88 TESTAMENTARY TRANSFERS OF REAL PROPERTY

10-88 Thompson on Real Property, Thomas Editions § 88.12

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§ 88.12 Limits on Dispositions Under a Will.

[Go To Supp]

§ 88.12(a) General.

While the general policy of American law favors testamentary freedom, there are some statutory and common law limits, usually protecting family members. There is a strong policy in favor of protecting families from poverty and a state interest in keeping families off of the welfare rolls. On the other hand, testamentary freedom arguably gives the testator the incentive to work hard in order to acquire property, it gives family members the incentive to treat the testator well, and it gives more leeway for thoughtful estate planning and fair distribution. For example, it is very common for a testator to help one child during testator's lifetime, when the child needs help, but to leave other children a greater share of the estate at death. n712 All states have some sort of statutory protection for the family of the decedent. Such protection is usually in the form of a homestead provision, a support allowance (at least for spouses) and an exemption of a certain amount of personal property from estate creditors. United States systems of family protection tend to be fairly rigid, leading some authorities to advocate for a more flexible scheme, giving courts authority to vary from the terms of a will under circumstances where equity requires. n713 The English law establishes such broad powers in the court, and permits the court to provide not only for family members but for any persons maintained by the decedent prior to death. The law would protect former spouses who have not remarried, stepchildren, elderly parents, or even live-in companions. This attitude has not gained popularity in American law. One fear is that such flexibility might promote litigation.

Distribution of property under the homestead and family allowance provisions may well deplete a small estate, making the will irrelevant. Under the 1990 version of the Uniform Probate Code (UPC), the homestead exemption, family allowance, and exempt property allowances total $43,000. n714 The Uniform Probate Code provisions are typical, although states may vary the dollar amounts. The UPC section on homestead is somewhat unusual in that it grants a monetary right in lieu of a right of occupancy. This is meant to protect families of renters, as well as those of homeowners. The UPC also clarifies the point that family allowances and exemptions are not charged against devises under the will or against the elective share of a spouse (discussed below). n715

COMPUTER-ASSISTED RESEARCH

LEXIS: will! or testament! w/15 limit! or protect!

§ 88.12(b) Protection of a Spouse.

§ 88.12(b)(1) History.

The history of spousal protection can be traced to the English common law doctrines of dower and curtesy. Dower provided a widow with a one-third lifetime interest in the real property of her deceased husband. Curtesy gave the husband a life estate in all of the wife's real and personal property, provided that a child was born during the marriage. n716 At common law, a spouse was not an heir of the decedent. In the United States, the law has moved away from the concepts of dower and curtesy. A spouse is an heir, if the decedent is intestate. In all non-community property states except Georgia, the spouse has a right to take a share of the estate even if there is a will disinheriting him or her. n717 The community property states are discussed separately below. The spouse's right to property was traditionally known as a "forced" share, but a more modern, and more descriptive term is the "elective" share. A surviving spouse may elect to take against the terms of the will. Usually the decision must be made within a limited period of time. The Uniform Probate Code, for example, require that the election be made within 9 months after death, or six months after probate of the will, whichever is later. n718

§ 88.12(b)(2) Theory.

The modern theory of spousal protection is based on the notion of a marriage as an economic partnership. Both spouses contribute, directly or indirectly, to the wealth accumulated during the marriage, and should share the property at death. n719 This idea of marriage has been incorporated into divorce law, in the movement to equitable distribution of property between the spouses at divorce. n720 Historically, spouses were protected on the basis of a concept of need, that society would not want surviving spouses to live in poverty. While both theories are still legitimate, changes in the family and in demographic patterns have created some problems with spousal protection presumptions. n721 Many, if not most, marriages end in divorce, and most of these people remarry. Or, marriages may end by the death of one of the parties, and then a remarriage occurs late in life. In either case, the parties may want to protect children or other dependents from the earlier marriage, even at the expense of the inheritance rights of the new, later spouse. Many of the cases in this area involve this type of situation. The new Uniform Probate Code provisions on spousal elective shares attempt to deal with this issue in a creative way.

§ 88.12(b)(3) Alteration of Rights by Pre- or Post-Nuptial Agreement.

One solution to the second marriage problem is the use of a contract, either before or during the marriage, to alter the inheritance rights of the spouses. This is permitted under both the Uniform Premarital Agreement Act (adopted in 15 states), n722 as well as the Uniform Probate Code. In general, pre- and post-nuptial agreements are governed by general contract law principles. However, since the parties are in a fiduciary relationship, the courts, and the UPAA and the UPC all require that the agreement be fair, and that the financial situation of both parties be fully disclosed. This also parallels the modern trend in divorce settlements. n723

COMPUTER-ASSISTED RESEARCH

LEXIS: pre-nuptial or post-nuptial w/2 agreement! w/30 inherit! or uniform probate code

§ 88.12(b)(4) The Spousal Election.

§ 88.12(b)(4)(i) Election Is Personal.

As indicated above, the surviving spouse will have a limited period of time after decedent's death to elect to take a spousal elective share. The election is typically held to be personal to the spouse, exercisable *only* by him or her, even if

the surviving spouse is incompetent. n724 The Uniform Probate Code provides for an exception if the election is used for the economic benefit of the spouse (but not the spouse's heirs or devisees). n725 While the exception is consistent with the "need" theory of spousal elective shares, as discussed above, the requirement that the election is personal is generally inconsistent with the broader and more modern theory of spousal protection, the partnership theory. n726

§ 88.12(b)(4)(ii) Amount of Property Received.

The extent of the property that the spouse may receive upon election varies from state to state. The typical provision for a surviving spouse in an intestate estate might be one-half of the decedent's estate. Some states would allow a similar percentage in a forced share situation, but other states would allow a lesser amount for an elective share, typically one-third. n727 The Uniform Probate Code provisions are discussed below.

§ 88.12(b)(4)(iii) Where Elective Share Is Paid From.

If no statute is in effect, the common law rule determines that the statutory share be paid out of the estate according to the normal order of abatement (residue, general, demonstrative, and specific). n728 Of course, this raises a traditional abatement issue, that the testator normally leaves the residue to the person who is the primary object of the testator's beneficence. The Uniform Probate Code, in both the pre- and post-1990 versions, assign the responsibility for the elective share pro-rata among all of the beneficiaries. n729

§ 88.12(b)(4)(iv) Does Surviving Spouse Acquire the Elective Share *Plus* Bequest or Inter Vivos Transfers?

Another question is what happens if the decedent leaves the surviving spouse a bequest in the will, and the survivor elects to take against the will. Does the survivor take the bequest *and* the elective share, or just the elective share? In most jurisdictions, the survivor who elects a forced share is treated as if the survivor predeceased the testator for purposes of the will. The surviving spouse must choose between the will and the election. n730 The Uniform Probate Code goes a step further and reduces the elective share by the value of assets left to the surviving spouse under the will. n731 A related issue involves non-probate property. If the surviving spouse is the beneficiary of a trust, or the survivor in a joint tenancy, or the recipient of a lifetime gift from the decedent spouse, is the non-probate asset included in determining the statutory share? Most statutes would disregard the inter vivos n732 transfer, but the Uniform Probate Code includes all of this property in calculating the augmented estate, n733 discussed below in § 88.12(b)(7)(i).

COMPUTER-ASSISTED RESEARCH

LEXIS: surviv! w/5 spouse! w/30 elective share w/15 bequest or (inter vivos w/2 transfer).

§ 88.12(b)(5) Omitted Spouse.

In contrast to the disinherited spouse, the situation may arise when the will, written before the marriage of the parties, omits a spouse. Some states will provide protection for an omitted spouse, with a provision similar to the Uniform Probate Code § 2-301. n734 This section provides that a surviving spouse who married the testator after the execution of the will is entitled to at least an intestate share of the decedent's estate. The 1990 UPC limits the spouse's share to that property which is not given to a previously-born child of the decedent or that child's descendants. A few states have marriage revocation statutes, which provide that a premarital will is revoked after marriage. n735 The marital revocation statutes are derived from the English Wills Act of 1837. n736

COMPUTER-ASSISTED RESEARCH

LEXIS: omit! w/5 spouse! w/30 will!

§ 88.12(b)(6) Attempts to Avoid the Spousal Share.

Early statutes indicated that the statutory share of a survivor was calculated on the value of the probate estate. However, the probate estate does not include some will substitutes, such as insurance, pre-death gifts, inter-vivos revocable trusts, joint tenancies, etc. Some states have attempted to prevent or alleviate this "fraud on the spouse's share" by specifically including certain non-probate items in the elective share. n737

The common law also attempted to thwart the fraud on the spouse's share. Courts developed two tests to include property in an elective share calculation, even if not included in the probate estate. First, some cases treat transfers as "illusory," and include them in the elective share. n738 For example, a revocable trust might be considered to be illusory, because the grantor retains so much control over the assets in the trust. A second, but less common theory is the fraudulent motive/intent test. n739 In these cases, if the decedent attempted to transfer property with the intent to defraud the decedent's spouse of a fair share, then the transfer will be disregarded for purposes of calculating the forced share.

COMPUTER-ASSISTED RESEARCH

LEXIS: avoid! w/15 spous! w/5 share! w/30 will! or insurance or gift! or
trust! or joint tenanc!

§ 88.12(b)(7) Uniform Probate Code.

§ 88.12(b)(7)(i) Augmented Estate. n740

The Uniform Probate Code (both pre- and post-1990) included a provision for a reclaimable estate. n741 The 1990 UPC uses a very broad augmented estate concept to determine the surviving spouse's share. The augmented estate included the decedent's probate estate and reclaimable estate (gifts, life insurance, etc.) It also includes all property that the surviving spouse succeeds to by virtue of decedent's death (other than homestead, family allowance, testate and intestate succession) such as life insurance, retirement plan or other death benefits. n742 Finally, the value of the assets of the surviving spouse (up to an "applicable percentage") are included in the augmented estate, plus any of the survivor's reclaimables (property that would have been reclaimed if the survivor had predeceased the decedent) The applicable percentage is twice the value of the sliding scale percentage for the elective share, based on the length of the marriage. n743 This incremental percentage system is described below. The total augmented estate is then used to determine what the elective share should be.

§ 88.12(b)(7)(i)(A) Supplemental Elective Share.

The new (1990) Uniform Probate Code also includes two other significant changes to the former elective share statute. First, the elective share includes a "supplemental elective share" of $50,000. n744 The survivor's assets must total at least $50,000, when combined with the supplemental elective share making up the difference if the assets do not reach that figure. The comments point out that this provision implements the "support" or "need" aspect of the elective share. The $50,000 amount is computed by totalling the survivor's assets, not including family allowances and exemptions, nor the survivor's Social Security benefits.

§ 88.12(b)(7)(i)(B) Incremental Percentage for Elective Share.

Second, in an effort to make the UPC system similar to a community property system, the drafters included a sliding scale for calculating the elective share, depending on the length of the marriage. This is also called an "accrual" method of calculating the elective share. n745 For example, if the parties were married 18 months, the survivor would be entitled to 3% of the augmented estate, after five years the share would be 15%, after ten years the share would be 30% and after fifteen years the full 50% would be available. This scheme was proposed by Professors Langbein and Waggoner in 1987, in an effort to deal with problems associated with short-term marriages, or later-in-life marriages.

n746 The UPC system differs from a community property scheme in two important ways: the spouse must survive in order to take the statutory share, and the elective share includes all of the decedent's property, including property acquired before marriage and property acquired through inheritance or devise. n747 The new UPC provisions are somewhat complicated to apply in individual situations. The comment to Part 2 of Article II contains several detailed examples which help to explain how the new elective share works. n748

§ 88.12(b)(8) Community Property.

§ 88.12(b)(8)(i) Generally.

The subject of community property is treated extensively elsewhere in this treatise, n749 but the community property concept is important in the area of spousal election. The community property system comes from the civil law (French and Spanish), rather than the common law (English) tradition. Under the common law, each spouse owns what is in his or her name. n750 Modern divorce law has changed this somewhat with the concept of equitable distribution, but the technical rule remains in place. Eight states have a community property system, n751 and Wisconsin has adopted the Uniform Marital Property Act, n752 which has a similar impact on the property of married couples. In a community property system, all property earned or acquired during the marriage belongs to both spouses, in equal shares. Property owned before the marriage is not community property and property received by gift, bequest or inheritance is also not included.

Community property states typically do not have a forced share provision for estates. It is thought that such a share for a surviving spouse is not necessary, since the spouse already owns his or her share of the property acquired during the marriage. While this is consistent with the partnership theory of marriage, it can be deficient for support, particularly in a marriage of short duration. n753 Community property law requires that property be classified either as separate property or as community or marital property. Many of the legal issues involved with community property law involve these classification questions. For example, if separate property is combined with marital property to purchase an asset, is the asset community property, separate property, or a fractional share of each? n754 Also, state law may vary on how these issues are resolved.

COMPUTER-ASSISTED RESEARCH

LEXIS: community property w/30 surviv! w/5 spous! w/5 share

§ 88.12(b)(8)(ii) Conflicts Issues.

Migratory couples can have unique problems when they move from a common law state to a community property state, or the reverse. In general, the law of the state where the couple was domiciled when they acquired the assets controls the classification of ownership of the assets. On the other hand, the law of the domicile at the time of death controls the disposition of the decedent's probate estate. n755 For example, if a couple resides in a community property state, such as Texas, for many years, all property acquired during that time is community property and is owned in equal undivided share by the husband and the wife. If the couple later moves to a common law state, a surviving spouse may have the protection of both ownership of former community assets as well as the forced share provisions of a probate statute. n756 The Uniform Disposition of Community Property Rights at Death Act, n757 adopted in 13 states, attempts to deal with this possible double benefit. The property acquired during the marriage while living in a community property state is presumed to be marital property subject to the terms of the Act. At death, one-half the property belongs to the survivor outright, and is not subject to disposition under the decedent's will or subject to distribution in an intestate estate. It is also not included in the survivor's elective share.

If a couple resides in a common law state for most of their married life, and then moves to a community property state, a surviving spouse might lose the protection of the elective share, and yet not have ownership rights to any of the

property acquired during the marriage. n758 Some community property states recognize a "quasi-community property" concept. n759 Quasi-community property is property that would have been community property, except it was acquired when the couple lived in a common law state. This is a type of deferred community property, since it does not take on the quality of community property until the death of one of the spouses. At least two of the community property states recognize "quasi-community property" at divorce, but not at death. n760

COMPUTER-ASSISTED RESEARCH

LEXIS: uniform disposition w/1 community property rights w/1 death act

§ 88.12(b)(9) Tax Notes. n761

The federal estate tax marital deduction applies to all property that is left to the surviving spouse in an absolute ownership interest. The elective share is an absolute ownership interest, so the deduction would cover this property. The tax laws also permit qualified terminable interest property (QTIP) to be subject to the marital deduction. n762 A QTIP trust, for example, would give the surviving spouse a life interest, but would not permit the survivor to dictate distribution of the remainder at the survivor's death. In non-UPC states, the tax laws give a surviving spouse some incentive to take the elective share (over a QTIP interest in a will) as an absolute ownership interest, particularly if the survivor has children from a previous marriage whom the survivor would like to benefit.

The question also arises whether the elective share should be calculated on the value of the estate before or after estate taxes are deducted. The majority and the Uniform Probate Code adopt the view that the amount of the elective share is calculated before estate taxes are deducted. n763 The UPC incorporates the Uniform Estate Tax Apportionment Act, which provides that a tax deduction that is allowed because of a relationship to the decedent (such as a surviving spouse) should work to the benefit of the person in the relationship (the surviving spouse) Thus, the spouse should get the estate tax benefit. n764

COMPUTER-ASSISTED RESEARCH

LEXIS: estate tax! w/30 elective share! or (surviv! w/5 spouse!)

§ 88.12(c) Protection for Children.

§ 88.12(c)(1) Forced Succession -- Legitime.

The European civil law tradition protected children from being disinherited by their parents, through a device known as the legitime. The only United States jurisdiction to follow this tradition is Louisiana. n765 The Louisiana code does permit disinheritance under certain circumstances, listed in the statute, but the reasons must be proved before the disinheritance will be allowed. In all other states, a parent may intentionally disinherit a child. This policy is criticized, particularly in view of the fact that many people now have multiple marriages and multiple families. n766 Divorce settlements or decrees may expressly provide for will bequests for children. These are will contracts, and are discussed in § 88.05 of this chapter. In Wisconsin, the probate court is given the unique authority to provide support for minor children (until age 18) out of a decedent's estate. n767

§ 88.12(c)(2) Drafting Hints -- Testamentary Libel.

Although a parent has the ability to disinherit children, the actual practice is risky, and invites the possibility of a will contest. As a general matter, probate attorneys may try to discourage clients from excluding their children. If a client is determined to disinherit the client's children, the attorney should determine the reason. In drafting the will, specificity is desirable, the child(ren) should be named, issue and descendants of the disinherited child should also be mentioned, if appropriate. The reasons for the exclusion may be set out in the will or included in some other written document, to be

read along with the will. However, the testator will want to avoid any possibility of testamentary libel and the possibility that the disappointed heir would recover through a tort suit. n768

COMPUTER-ASSISTED RESEARCH

LEXIS: draft! w/15 testament! or will! w/30 libel!

§ 88.12(c)(3) Negative Will.

A testator may not disinherit any or all children by decree, in the majority view. This is termed a "negative will," and is not recognized in the common law or in most statutes. n769 The testator must designate who is to receive property under the will, or it will pass by intestate succession. Usually children would be heirs under an intestacy statute. The testator must leave all of the testator's property to someone or something through the provisions of the will. The new Uniform Probate Code does allow a "negative will." n770 The testator may preclude or limit any heir from taking under intestate succession. The property passes as though the excluded person had disclaimed his or her share.

COMPUTER-ASSISTED RESEARCH

LEXIS: negative will!

§ 88.12(c)(4) Pretermitted Heirs.

The law had no difficulty with the intentional disinheritance of children, but most states will offer protection against accidental exclusion. Virtually all states have some statutory provision on this point, and they are usually called pretermitted heir statutes. Statutes fall into two categories: those that protect after-born or after-adopted children only (born or adopted after the execution of the will) n771 and those that will protect any child that is accidently excluded, usually by the use of class gift language in the disinheriting clause. n772 The majority view and the Uniform Probate Code n773 protect only the after-born or adopted child. It is assumed that the testator would only accidently exclude a child that is not yet born or adopted. Most of the cases involved with the second type of statute involve a will that does not specifically name the excluded child. For example, the testator may have an illegitimate child, and may not want to indicate the existence of the child in the will. Phrases indicating that the testator "has no children," or "wishes to exclude any children," may not be sufficient to establish that the disinheritance is intentional. n774 The typical pretermitted heir statute permits the omitted child to take an intestate share. However, this can lead to unfair results. For example, Hank marries Wilma, writes a will leaving everything to Wilma, and then they have a child, Connie. Under some statutes, Connie could take an intestate share, and actually receive more money and property than Wilma. Or, the testator could leave small gifts to each living child, exclude an after-born child, and leave the rest to charity. The excluded child could possibly gain a much greater share than the siblings, probably contrary to the testator's intent. n775 The Uniform Probate Code attempts to deal with these issues. An after-born child may receive an intestate share, but not if the testator left all (or substantially all) property to the other parent of the child, and the will was executed when the testator had no living children. n776 The drafters reasoned that the testator would assume that the other parent would take care of the child. If the testator leaves property to other children, who were living at the time the will was executed, then the Code provides that the omitted child may receive a pro-rata share of the property given to the other children. n777 For example: if testator leaves $30,000 to child A and $30,000 to child B. Child C is born after the will is executed. C may take $20,000 of the $60,000 total bequest. C's share is derived from one third of A's share ($10,000) and one-third of B's share ($10,000) If testator left child A $45,000 and child B $15,000, C would still receive $20,000, but the derivation would be different: one-third of A's share ($15,000), and one-third of B's share ($5000). n778

One frequently litigated issue is whether grandchildren (descendants) of an excluded, but deceased, child may inherit from the testator. The courts have split on this issue, but may allow the succession if the testator has not specifically excluded them. n779 Exclusion provisions should expressly address this issue.

COMPUTER-ASSISTED RESEARCH

LEXIS: pretermitted heir!

§ 88.12(d) Mortmain Legislation and Other Restrictions on Dead Hand Control.

§ 88.12(d)(1) Mortmain Statutes. n780

Only three states retain mortmain legislation, n781 so the interest in these statutes is largely historical. The term mortmain (meaning dead hand) comes from a feudal statute, passed in 1279. Feudal tenants would sometimes give their interest in real property to a monk, priest, or other member of a religious order. As a result, the feudal overlords would lose their ability to claim some of the valuable incidents of feudal ownership. The Statute of Mortmain was passed to prevent these transfers. A later English statute, passed in 1736, was intended to prevent deathbed gifts, via will, to charities. The statute imposed a 12-month waiting period for such bequests. The will had to be executed 12 months before the testator's death in order for the transfer to be effective. n782

The modern mortmain legislation is rooted in the English law. Statutes, when in effect, would regulate the length of time that must pass before a testamentary gift to charity could be effective. A typical period could be ninety days or six months. The statutes might also regulate or limit the value that could be left to a charity under testator's will, such as the 50% cap in the New York statute discussed in *In re Rothko*. n783 The statute has since been repealed. A third type of statute would regulate both the size of the charitable gift and the time of the execution of the will. n784 For example, a statute might limit a gift to charity to no more than one-third of the estate, and the will must be executed no less than 90 days prior to testator's death. Most statutes only applied to charitable gifts, but the Idaho statute, for example, also regulates gifts to employees or owners of nursing homes.

The purpose of mortmain legislation is to protect family members. Therefore, usually, only certain relatives of the testator will have standing to challenge the charitable gift. Some states may limit standing to children of the decedent, or to spouses and children of the decedent. Others may permit any heir to move to set aside the gift. n785

Standing is one reason why the statutes are not frequently in use. The statute can easily be avoided by drafting. For example, if the will specifically disinherits the testator's children, the court may hold that no one has standing to challenge a bequest in violation of a mortmain statute. These statutes can also be avoided through the use of a will substitute. If a testator makes an outright gift to a charity shortly before death, it will be difficult to set the gift aside. n786 Mortmain statutes were often struck down or repealed in the few states that did have them in the 1970's.

COMPUTER-ASSISTED RESEARCH

LEXIS: mortmain w/5 statute! or legislation!

§ 88.12(d)(2) The Rule Against Perpetuities.

A significant limit on dead hand control is embodied in the Rule Against Perpetuities. The rule prohibits restrictions on property that will continue too long after the death of the testator. The complexities of the rule are beyond the scope of this chapter, and are treated elsewhere in this treatise. n787 A classic statement of the rule is Gray's: No interest is good, unless it must vest, if at all, not more than twenty-one years after some life in being at the creation of the interest. n788 The rule applies to the creation of future interests in third parties: contingent remainders, class gifts, and executory interests. The rule can be avoided by careful drafting. Modern case law and statutory reforms are also in place to attempt to avoid making the rule a "trap for the unwary." A Uniform Statutory Rule Against Perpetuities has been approved by the National Conference of Commissioners on Uniform Laws and is incorporated into the Uniform Probate

Code. n789 The statutory act provides that interests subject to the rule should be valid for 90 years from creation, and struck down after 90 years only if the interests have not vested after that time. The Uniform Rule has been criticized for combining some of the worst aspects of the common law rule and modern reforms, n790 but it has been adopted in several states.

§ 88.12(d)(3) Testator Post-mortem Attempts to Influence Donee Behavior.

Testators may put conditions on their bequests in a will, but under certain circumstances, courts will refuse to honor some restrictions. Examples include unreasonable restraints on marriage; attempts to encourage divorce, separation or to foster family fights; or efforts to influence the practice of religion. n791

COMPUTER-ASSISTED RESEARCH

LEXIS: testator! w/15 bequest! w/5 condition! or restrict! or restrain!

§ 88.12(d)(4) Devises to Animals or Otherwise Contrary to Public Policy.

An outright bequest to an animal or pet will not be honored. An honorary trust for the care of a pet is allowed. n792

§ 88.12(e) Slayer Statutes.

Most states have enacted statutes or have common law rules that prohibit a person who has committed homicide from receiving any property rights or insurance proceeds from the decedent victim's estate. The statutory and common law provisions apply to both intestate inheritance rights and testamentary gifts. The slayer rule evolved from equity principles that "no one shall be permitted to profit by his own fraud, to take advantage of his own wrong, to found any claim upon his own iniquity, or to acquire property by his own crime." n793

The moral justification for denying slayers the right to succeed to their victims' property is indisputable in those cases in which greed motivates the killings. When the killer intends to interfere with the succession law it is fair to deny the killer the benefit of that law. Additionally, denying succession rights to slayers reinforces criminal punishments because the denial serves a deterrence function. n794 The killing of a decedent by an heir or a beneficiary is also disruptive of the system of property distribution at death. These types of killings potentially disrupt the normal disposition of property; the victims lose personal enjoyment of their property, the victims are denied the opportunity to change their existing estate plans, and the killings interfere with the order of death of the victims and the slayers, placing property transfers conditioned on survivorship in jeopardy of being controlled by surviving slayers. n795 One court indicated that the slayer rule is an appendage to the property law transfer system. n796 The *Riggs* court held that the New York slayer statute should not be considered penal in nature but should protect the integrity of the property transfer law in light of the felonious and intentional or reckless killing. Case law on the subject of slayer statutes can be divided into three categories.

First, the killer may still take from decedent. The courts reason that the denial of the inheritance to the slayer because of a crime would impose an additional punishment not provided for by the penal statute. n797 In the second group, the legal title will not pass to the slayer because of the equitable principle that no one should be permitted to profit by one's own fraud, or take advantage and profit as a result of one's own wrong or crime. n798 Finally, under the third rule the legal title passes to the slayer but equity holds the slayer to be a constructive trustee for the heirs or next of kin of the decedent. Because of the unconscionable mode by which the property is acquired by the slayer, equity treats the slayer as a constructive trustee and compels the slayer to convey the property to the heirs or next of kin of the deceased. n799

Virtually all states have some sort of slayer statute. n800 The cases and statutes usually deny the slayer the right to take under a will or by intestacy and may also extend to joint tenancies (right of survivorship), inter-vivos trusts, insurance

benefits or family protection benefits, such as homestead. n801 The Uniform Probate Code adopts this approach, for the most part. n802 However, the joint tenancy provision simply provides for severance, not for complete loss of all property by the killer. n803 The cases and statutes are in conflict, however, when the "killer" is acquitted in a criminal case, or is convicted of involuntary manslaughter, or pleads "no contest" to the murder charge. n804 Normally, a person who acted in self-defense or who was insane at the time of the killing would not be treated as a slayer. n805 The Uniform Probate Code requires either a criminal conviction of a felonious and intentional killing of the decedent, or a probate court determination established by a preponderance of the evidence that the requisite criminal accountability would be found. n806 Some states, however, will deny rights to the slayer even in the absence of an intentional killing as discussed above.

COMPUTER-ASSISTED RESEARCH

LEXIS: slayer w/2 rule! or statute! w/30 succession or will! or distribut!

FOOTNOTES:

(n1)Footnote 712. *See generally* William M. McGovern, Jr., Sheldon F. Kurtz & Jan Ellen Rein, Wills, Trusts and Estates § 3.1 (1988). *See also Gonzalez v. Sarutegui, 870 P.2d 1188 (Ariz. 1993).*

(n2)Footnote 713. *See, e.g.*, Jan Ellen Rein, A More Rational System for the Protection of Family Members from Disinheritance, *15 Gonz. L. Rev. 11 (1979);* Gaubatz, Notes Towards a Truly Modern Wills Act, 31 U. of Miami L. Rev. 497 (1977); Paul Haskell, The Power of Disinheritance: Proposal for Reform, *52 Georgetown L.J. 499 (1964);* Laufer, Flexible Restraints on Testamentary Freedom, *69 Harv. L. Rev. 277 (1955);* Cahn, Restraints on Disinheritance, 85 U. of Pa. L. Rev. 139 (1936). But see Mary Ann Glendon, Fixed Rules and Discretion in Contemporary Family Law and Succession Law, *60 Tul. L. Rev. 1165 (1986);* John Langbein & Lawrence Waggoner, Redesigning the Spouse's Forced Share, *22 Real Prop. Prob. & Tr. J. 303 (1987).*

(n3)Footnote 714. U.P.C. § 2-402 (homestead), 2-403 (exempt property), 2-404 (family allowance), 2-405 (source determination and documentation) (1990 version), 8 U.L.A. 108-111 (1993 Supp.). The homestead allowance is $15,000, the exempt property allowance is $10,000 and the family allowance may be up to $18,000.

(n4)Footnote 715. Sections 2-402 to 2-405 are reproduced here:

§ 2-402A Constitutional Homestead.

The value of any constitutional right of homestead in the family home received by a surviving spouse or child must be charged against the spouse or child's homestead allowance to the extent the family home is part of the decedent's estate or would have been but for the homestead provision of the constitution.

§ 2-403 Exempt Property.

In addition to the homestead allowance, the decedent's surviving spouse is entitled from the estate to a value, not exceeding $10,000 in excess of any security interests therein, in household furniture, automobiles, furnishings, appliances, and personal effects. If there is no surviving spouse, the decedent's children are entitled jointly to the same value. If encumbered chattels are selected, and the value in excess of security interests, plus that of other exempt property, is less than $10,000, or if there is not $10,000 worth of exempt property in the estate, the spouse or children are entitled to other assets of the estate, if any, to the extent necessary to make up the $10,000 value. Rights to exempt property and assets needed to make up a deficiency of exempt property have priority over all claims against the estate, but the right to any assets to make up a deficiency of exempt property abates as necessary to permit earlier payment of homestead allowance and family allowance. These rights are in addition to any benefit or share passing to the surviving spouse or children by the decedent's will, unless otherwise provided, by intestate succession, or by way of elective

share.

§ 2-404 Family Allowance.

(a) In addition to the right to homestead allowance and exempt property, the decedent's surviving spouse and minor children whom the decedent was obligated to support and children who were in fact being supported by the decedent are entitled to a reasonable allowance in money out of the estate for their maintenance during the period of administration, which allowance may not continue for longer than one year if the estate is inadequate to discharge allowed claims. The allowance may be paid as a lump sum or in periodic installments. It is payable to the surviving spouse, if living, for the use of the surviving spouse and minor and dependent children; otherwise to the children, or persons having their care and custody. If a minor child or dependent child is not living with the surviving spouse, the allowance may be made partially to the child or his [or her] guardian or other person having the child's care and custody, and partially to the spouse, as their needs may appear. The family allowance is exempt from and has priority over all claims except the homestead allowance.

(b) The family allowance is not chargeable against any benefit or share passing to the surviving spouse or children by the will of the decedent, unless otherwise provided, by intestate succession, or by way of elective share. The death of any person entitled to family allowance terminates the right to allowances not yet paid.

§ 2-405 Source, Determination, and Documentation.

(a) If the estate is otherwise sufficient, property specifically devised may not be used to satisfy rights to homestead allowance or exempt property. Subject to this restriction, the surviving spouse, guardians of minor children, or children who are adults may select property of the estate as homestead allowance and exempt property. The personal representative may make those selections if the surviving spouse, the children, or the guardians of the minor children are unable or fail to do so within a reasonable time or there is no guardian of a minor child. The personal representative may execute an instrument or deed of distribution to establish the ownership of property taken as homestead allowance or exempt property. The personal representative may determine the family allowance in a lump sum not exceeding $18,000 or periodic installments not exceeding $1,500 per month for one year, and may disburse funds of the estate in payment of the family allowance and any part of the homestead allowance payable in cash. The personal representative or an interested person aggrieved by any selection, determination, payment, proposed payment, or failure to act under this section may petition the court for appropriate relief, which may include a family allowance other than that which the personal representative determined or could have determined.

(b) If the right to an elective share is exercised on behalf of a surviving spouse who is an incapacitated person, the personal representative may add any unexpended portions payable under the homestead allowance, exempt property, and family allowance to the trust established under Section 2-204(b).

(n5)Footnote 716. *See generally* H. Hartog, Marital Exits and Marital Expectations in Nineteenth Century America, *80 Georgetown L.J. 95 (1991);* R. Chused, Married Women's Property Law, 1800-1850, *71 Georgetown L.J. 1359 (1983);* Committee Report, Spouse's Elective Share, 12 Real Prop. Prob. & Trust J. 323 (1977).

(n6)Footnote 717. *See* Chaffin, A Reappraisal of the Wealth Transmission Process: The Surviving Spouse, Year's Support and Intestate Succession, *10 Ga. L. Rev. 447 (1976);* Plager, The Spouse's Nonbarrable Share: A Solution in Search of a Problem, *33 U. Chi. L. Rev. 681 (1966);* Note, Preventing Spousal Disinheritance in Georgia, *19 Ga. L. Rev. 427 (1985).*

(n7)Footnote 718. U.P.C. § 2-205(a)(b), 8 U.L.A. 100.

(n8)Footnote 719. *See generally* U.P.C. comment to Elective Share of Surviving Spouse, 8 U.L.A. 86-88.

(n9)Footnote 720. *See, e.g., Painter v. Painter, 320 A.2d 484 (N.J. 1974); O'Brien v. O'Brien, 49 N.E.2d 712 (N.Y.2d 1985). See also* Divorce Reform at the Crossroads (S. Sugarman & H. Kay, eds. 1990); Lenore Weitzman, The Divorce Revolution (1985); Smith, The Partnership Theory of Marriage: A Borrowed Solution Fails, *68 Tex. L. Rev. 689 (1990);* Reynolds, The Relationship of Property Division and Alimony: The Division of Property to Address Need, *56 Fordham L. Rev. 827 (1988). See generally* the Unif. Marriage and Divorce Act, 9A U.L.A. 147; Unif. Marital Prop. Act, 9A U.L.A. 97 (1987).

(n10)Footnote 721. *See generally* Mary Ann Glendon, The Transformation of Family Law (1989); Lawrence Waggoner, Spousal Rights in Our Multiple-Marriage Society: The Revised Uniform Probate Code, *26 Real Prop. Prob. & Tr. J. 683 (1992);* Lawrence Waggoner, The Multiple Marriage Society and Spousal Rights Under the Revised Uniform Probate Code, *76 Iowa L. Rev. 223 (1991);* Zaritsky & Zaritsky, Problems of the Elective Share (How to Balance the Rights of the Survivor on the Deceased Spouse's Estate and the Testator's Desire to Insulate His Estate from Claims), 129 Tr. & Est. 23 (1990); Lovas, When Is a Family Not a Family: Inheritance and the Taxation of Inheritance Within the Nontraditional Family, *24 Idaho L. Rev. 353 (1988).*

(n11)Footnote 722. Unif. Premarital Agreement Act § 6, 9B U.L.A. 369; U.P.C. § 2-204, 8 U.L.A. 99-100. Section 2-204 is reproduced herein:

§ 2-204 Waiver of Right to Elect and of Other Rights.

(a) The right of election of a surviving spouse and the rights of the surviving spouse to homestead allowance, exempt property, and family allowance, or any of them, may be waived, wholly or partially, before or after marriage, by a written contract, agreement, or waiver signed by the surviving spouse.

(b) A surviving spouse's waiver is not enforceable if the surviving spouse proves that:

(1) he [or she] did not execute the waiver voluntarily; or

(2) the waiver was unconscionable when it was executed and, before execution of the waiver, he [or she]:

(i) was not provided a fair and reasonable disclosure of the property or financial obligations of the decedent;

(ii) did not voluntarily and expressly waive, in writing, any right to disclosure of the property or financial obligations of the decedent beyond the disclosure provided; and

(iii) did not have, or reasonably could not have had, an adequate knowledge of the property or financial obligations

of the decedent.

(c) An issue of unconscionability of a waiver is for decision by the court as a matter of law.

(d) Unless it provides to the contrary, a waiver of "all rights," or equivalent language, in the property or estate of a present or prospective spouse or a complete property settlement entered into after or in anticipation of separation or divorce is a waiver of all rights of elective share, homestead allowance, exempt property, and family allowance by each spouse in the property of the other and a renunciation by each of all benefits that would otherwise pass to him [or her] from the other by intestate succession or by virtue of any will executed before the waiver or property settlement.

(n12)Footnote 723. *See generally* Rena Seplowitz, Transfers Prior to Marriage and the Uniform Probate Code Redesigned Elective Share -- Why the Partnership is Not Yet Complete, 25 Ind. L. Rev. (1991); Paul Haskell, The Premarital Estate Contract and Social Policy, *57 N.C. L. Rev. 415 (1979);* Clark, Antenuptial Contracts, *50 U. Colo. L. Rev. 141 (1979). See also Osborne v. Osborne, 428 N.E.2d 810 (Mass. 1981); Posner v. Posner, 233 So. 2d 381 (Fla. 1970).*

(n13)Footnote 724. *See, e.g., Kennett v. Hood, 185 N.E.2d 888 (Ill. 2d 1962). See also* Barnabeo, The Incompetent Spouse's Election: A Pecuniary Approach, 8 U. of Mich. J. L. Rev. 106 (1985); Annotation, Time Within Which Election Must be Made for Incompetent to Take Under or Against Will, *3 A.L.R. 3d 119 (1968).*

(n14)Footnote 725. U.P.C. § 2-203, 8 U.L.A. 97-98.

(n15)Footnote 726. *See* the Analysis in Lawrence Waggoner, Richard Wellman, Gregory Alexander & Mary Louise Fellows, Family Property Law 473-476 (1991).

(n16)Footnote 727. *See generally* William M. McGovern, Jr., Sheldon F. Kurtz & Jan Ellen Rein, Wills, Trusts and Estates § 3.8 (1988); John Langbein and Lawrence Waggoner, Redesigning the Spouse's Forced Share, *22 Real Prop. Prob. & Tr. J. 303 (1983);* Chaffin, A Reappraisal of the Wealth Transmission Process: The Surviving Spouse, Year's Support and Intestate Succession, *10 Ga. L. Rev. 42 91985);* Stevenson, Does Dower Still Lurk in Elections to Take Under the Will, *30 U. Cin. L. Rev. 172 (1962).*

In re Estate of DeFilippis, 683 N.E.2d 453 (Ill. App. 1997) (surviving spouse sought to recover two condominium units the testator had transferred during his lifetime to several adult children); *Pezza v. Pezza, 690 A.2d 345 (R.I. 1997)* (surviving spouse sought declaration of rights in parcels of land the deceased husband had transferred into trust prior to death).

(n17)Footnote 728. *See* § 88.11(b), supra.

(n18)Footnote 729. *See* U.P.C. § 2-207(b)(c), 8 U.L.A. 86-87.

(n19)Footnote 730. The common law permitted a spouse to take both dower and property left by will. *See Brown v. Parry, Dickens 485, 21 Eng. Rep. 438 (1787).* Modern statutes reverse the presumption, *see, e.g.*, Ill. Rev. Stat. ch. 1102, § 2-8(a); Ohio Rev. Code § 2107.42. *See also Montgomery v. Estate of Montgomery, 677 N.E.2d 571 (Ind. App. 1997); Rockler v. Sevareid, 691 A.2d 97 (D.C. 1997)* (D.C. Code § § 19-303 and 313 (a) and (e) explained).

(n20)Footnote 731. *See* U.P.C. § 2-207(a), 8 U.L.A. 102.

(n21)Footnote 732. *See generally* William M. McGovern, Jr., Sheldon F. Kurtz & Jan Ellen Rein, Wills, Trusts

and Estates § 3.8 (1988).

(n22)Footnote 733. *See* the discussion of the Uniform Probate Code provisions, § 88.12(b)(7), infra.

(n23)Footnote 734. U.P.C. § 2-301, 8 U.L.A. 103-4. The text is reproduced herein:

§ 2-301 Entitlement of Spouse; Premarital Will.

(a) If a testator's surviving spouse married the testator after the testator executed his [or her] will, the surviving spouse is entitled to receive, as an intestate share, no less than the value of the share of the estate he [or she] would have received if the testator had dies intestate as to that portion of the testator's estate, if any, that is neither devised to a child of the testator who was born before the testator married the surviving spouse and who is not a child of the surviving spouse nor devised or passes under Sections 2-603 or 2-604 to a descendant of such a child, unless:

(1) it appears from the will or other evidence that the will was made in contemplation of the testator's marriage to the surviving spouse;

(2) the will expresses the intention that it is to be effective notwithstanding any subsequent marriage; or

(3) the testator provided for the spouse by transfer outside the will and the intent that the transfer be in lieu of a testamentary provision is shown by the testator's statements or is reasonably inferred from the amount of the transfer or other evidence.

(b) In satisfying the share provided by this section, devises made by the will to the testator's surviving spouse, if any, are applied first, and other devises, other than a devise to a child of the testator who was born before the testator married the surviving spouse and who is not a child of the surviving spouse or a devise or substitute gift under Sections 2-603 or 2-604 to a descendant of such a child, abate as provided in Section 3-902.

(n24)Footnote 735. *See, e.g.*, Ga. Code Ann. § 53-2-76; Ky. Rev. Stat. § 294.090; Mass. Gen. L. Ann. ch. 191 § 9; Nev. Rev. Stat. Ann. § 133.110; Wis. Stat. Ann. § 853.11(2). *See generally* Annotation, Sufficiency of Provision for or Reference to Spouse to Avoid Lapse of Will by Subsequent Marriage, *97 A.L.R. 2d 1026 (1964);* Annotation, Sufficiency of Provision for, or Reference to Prospective Spouse to Avoid Lapse or Revocation of Will by Subsequent Marriage, *38 A.L.R. 4th 117 (1985).*

(n25)Footnote 736. Wm. IV & 1 Vict., c. 26 § XVIII (1837).

(n26)Footnote 737. *See generally* William Dickson McDonald, Fraud on the Widows Share (1960); Kwestl Seplowitz, Testamentary Substitutes: Retained Interests, Custodial Accounts and Contractual Transactions -- A New Approach, *38 Am. U. L. Rev. 1 (1988);* Falender, Protective Provisions for Surviving Spouses in Indiana: Considerations for a Legislative Response to Leazenby, *11 Ind. L. Rev. 755 (1978);* Kulzer, Law and the Housewife: Property, Divorce and Death, *28 U. Fla. L. Rev. 1 (1975);* Clark, The Recapture of Testamentary Substitutes to Preserve the Spouse's Elective Share: An Appraisal of Recent Statutory Reforms, *2 Conn. L. Rev. 513 (1970);* Comment, Spousal Disinheritance and the New York Solution -- A Critique of Forced Share Legislation, *7 W. New Eng. L. Rev. 881 (1985);* Note, Estate Planning: Validity of Inter-Vivos Transfers Which Reduce or Defeat the Surviving Spouses

Statutory Share in Decedent's Estate, *32 Okla. L. Rev. 837 (1979).*

(n27)Footnote 738. *See, e.g., Newman v. Dore, 9 N.E.2d 966 (N.Y. 1937); Montgomery v. Michaels, 301 N.E.2d 465 (Ill. 1973). See also* John Langbein, The Nonprobate Revolution and the Future of the Law of Succession, *97 Harv. L. Rev. 1108 (1984);* Richard Effland, Rights of Creditors in Nonprobate Assets, *48 Mo. L. Rev. 431 (1983).* Annotation, Determination of, and Charges Against, "Augmented Estate" Upon Which Share of Spouse Electing Against Will is Determined Under Uniform Probate Code § 2-202, *63 A.L.R. 4th 1173 (1988);* Annotation, Gift or Other Voluntary Transfer by Husband as Fraud on Wife, *49 A.L.R. 2d 521 (1956).*

(n28)Footnote 739. *See, e.g., Estate of Bernskoetter, 693 S.W.2d 249 (Mo. App. 1985); Russell v. Walz, 458 N.E.2d 1172 (Ind. App. 1984); Hanke v. Hanke, 459 A.2d 246 (N.H. 1983).*

(n29)Footnote 740. *See generally* Fisher & Curnette, Reforming the Law of Intestate Succession and Elective Shares: New Solutions to Age-Old Problems, *93 W. Va. L. Rev. 61 (1990);* Waggoner, The Multiple-Marriage Society and Spousal Rights Under the Revised Uniform Probate Code, *76 Iowa L. Rev. 223 (1990);* Sheldon F. Kurtz, The Augmented Estate Concept Under the Uniform Probate Code, *62 Iowa L. Rev. 981 (1977).*

(n30)Footnote 741. *See* U.P.C. § 2-202, 8 U.L.A. 75-76 (1983), 93-94.

(n31)Footnote 742. *See* U.P.C. §§ 2-202(b)(4), 2-207(a)(4) (1990 version), 8 U.L.A. 94, 102.

(n32)Footnote 743. *See* U.P.C. § 2-202(b), 8 U.L.A. 94.

(n33)Footnote 744. *See* U.P.C. § 2-201(b) and comment, 8 U.L.A. 92-93.

(n34)Footnote 745. *See* U.P.C. § 2-201(a), 8 U.L.A. 92. The schedule is reproduced below:

If the decedent and the spouse were married to each other for:	The elective-share percentage is:
Less than 1 year	Supplemental Amount Only.
1 year but less than 2 years	3% of the augmented estate.
2 years but less than 3 years	6% of the augmented estate.
3 years but less than 4 years	9% of the augmented estate.
4 years but less than 5 years	12% of the augmented estate.
5 years but less than 6 years	15% of the augmented estate.
6 years but less than 7 years	18% of the augmented estate.
7 years but less than 8 years	21% of the augmented estate.
8 years but less than 9 years	24% of the augmented estate.
9 years but less than 10 years	27% of the augmented estate.

10 years but less than 11 years	30% of the augmented estate.
11 years but less than 12 years	34% of the augmented estate.
12 years but less than 13 years	38% of the augmented estate.
13 years but less than 14 years	42% of the augmented estate.
14 years but less than 15 years	46% of the augmented estate.
15 years or more	50% of the augmented estate.

(n35)Footnote 746. John Langbein & Lawrence Waggoner, Redesigning the Spouse's Forced Share, *22 Real Prop. Prob. & Tr. J. 303 (1987).*

(n36)Footnote 747. *See* Oldham, Should the Surviving Spouse's Forced Share Be Retained?, *38 Case W. Res. L. Rev. 223 (1988). See also* Unif. Probate Code §§ 2-202(b), 2-203(a) (1990 version), 8 U.L.A. 93-97 (1993 Supp.).

(n37)Footnote 748. *See* comment to Article II, Part 2, Elective Share of Surviving Spouse (1990 version), 8 U.L.A. 86-92.

(n38)Footnote 749. *See* Chapter 37, *supra*,.

(n39)Footnote 750. *See, e.g., Wirth v. Wirth, 326 N.Y.S. 308 (1971).*

(n40)Footnote 751. The states are: Arizona, California, Idaho, Louisiana, Nevada, New Mexico, Texas, and Washington. *See generally* William M. McGovern, Jr., Sheldon F. Kurtz & Jan Ellen Rein, Wills, Trusts and Estates § 3.10 91988); Younger, Marital Regimes, *67 Cornell L. Rev. 45 (1981);* Greene, Comparison of the Property Aspects of the Community and Common Law Systems, *13 Creighton L. Rev. 71 (1979).*

(n41)Footnote 752. *See* Unif. Marital Prop. Act, 9 U.L.A. 97; Wis. Stat. Ann. §§ 766.001-766.978. *See also* Symposium, The Continuing Evolution of American Community Property Law, *1990 Wis. L. Rev. 583.*

(n42)Footnote 753. *See generally* Lenore Weitzman, the Divorce Revolution (1985); Smith, The Partnership Theory of Marriage: A Borrowed Solution Fails, *68 Tex. L. Rev. 689 (1990);* Reynolds, The Relationship of Property Division and Alimony: The Division of Property to Address Need, *56 Fordham L. Rev. 827 (1988).*

(n43)Footnote 754. This is called a "tracing" problem. For a discussion of classification issues, see William A. Rieppy & Cynthia A. Samuel, Community Property in the United States 51-164 (2d ed. 1982). The Uniform Probate Code augmented estate can also create tracing issues. *See, e.g.*, Annotation, Determination of, and Charges Against, "Augmented Estate" Upon Which Share of Spouse Electing to Take Against Will is Determined Under Uniform Probate Code § 2-202, *63 A.L.R. 4th 1173 (1988).*

(n44)Footnote 755. *See* Juenger, Marital Property and the Conflict of Laws, *81 Colum. L. Rev. 1061 (1981);* Clausnitzer, Property Rights of Surviving Spouses and the Conflict of Laws, *18 J. Fam. L. 471 (1980);* Jan Ellen Rein, A More Rational System for the Protection of Family Members Against Disinheritance, *15 Gonz. L. Rev. 11 (1979).*

(n45)Footnote 756. *See, e.g., Devine v. Devine, 711 P.2d 1034 (Wash. App. 1985).*

(n46)Footnote 757. 8A U.L.A. 121 (1983); 73 (1993 Supp.) The states are: Alaska, Arkansas, Colorado, Connecticut, Florida, Hawaii, Kentucky, Michigan, Montana, New York, Oregon, Virginia, and Wyoming. *See also* Stanley Johanson, The Migrating Client: Estate Planning for the Couple from a Community Property State, 9 Inst. On Est. Plan ch. 8 (1975); Note, Community Property in a Common Law Jurisdiction: A Seriously Neglected Area of the Law, *16 Washburn L.J. 77 (1976).*

(n47)Footnote 758. *See, e.g., Brenholdt v. Brenholdt, 612 P.2d 1300 (N.M. 1980).*

(n48)Footnote 759. *See* Cal. Prob. Code § 66.101; Idaho Code §§ 15-2-101, -102, -202; Wash. Rev. Code §§ 26.15.220-.250.

(n49)Footnote 760. *See* Ariz. Rev. Stat. § 25-318; Tex. Fam. Code Ann.

§ 363(b). *See also Estate of Hanau v. Hanau, 730 S.W.2d 663 (Tex. 1987).*

(n50)Footnote 761. *See generally* Norvie L. Lay, Tax and Estate Planning for Community Property and the Migratory Client (1970); Randall, Of Visigoths, Community Property, Death and Income Tax Basis, *25 Gonz. L. Rev. 737 (1990);* Kahn, The Federal Estate Tax Burden Borne by a Dissenting Widow, *64 Mich L. Rev. 1499 (1966). See also* John R. Price, Contemporary Estate Planning (1983); Harold Weinstock, Planning an Estate (2d ed. 1982); Jeffrey A. Schoenblum, Multistate and Multinational Estate Planning (1982); Jesse Dukeminier & Stanley Johanson, Family Wealth Transactions (2d ed. 1978).

(n51)Footnote 762. Internal Rev. Code § 2056. This change to allow "QTIPs" occurred when the Economic Recovery Tax Act of 1981 took effect.

Commissioner of Internal Revenue v. Hubert, 117 S. Ct. 1124 (1997) (the marital deduction statute allows an estate to deduct for federal estate tax purposes an amount equal to the value of any interest in property which passes or has passed from the decedent to the surviving spouse, but only to the extent that such interest is included in determining the value of the gross estate).

(n52)Footnote 763. *See* U.P.C. § 3-916, 8 U.L.A. 393-396; Unif. Estate Tax Apportionment Act, 8A U.L.A. 287-316. *See also Wolf's Estate, 121 N.E.2d 224 (N.Y. 1954); Rosenfeld's Estate, 101 A.2d 684 (Pa. 1954). See also* Annotation, Surviving Spouse Taking Elective Share as Chargeable with Estate or Inheritance Tax, *67 A.L.R. 3d 199 (1973).*

(n53)Footnote 764. U.P.C. § 3-916(e)(2), 8 U.L.A. 394-395.

(n54)Footnote 765. *See* La. Civ. Code, art. 1493. Louisiana recently limited the application of this statute to children under age 23 or to those children with a mental or physical handicap. For additional comment on the Louisiana scheme, see Spaht et al., The New Forced Heirship Legislation: A Regrettable "Revolution", *50 La. L. Rev. 409 (1990);* Nathan, An Assault on the Citadel: A Rejection of Forced Heirship, *52 Tul. L. Rev. 5 (1977);* Lehman, In Defense of Forced Heirship, *52 Tul. L. Rev. 20 (1977);* LeVan, Alternatives to Forced Heirship, *52 Tul. L. Rev. 29 (1977). See generally* Evans, Should Pretermitted Children be Entitled to Inherit?, *31 Cal. L. Rev. 263 (1943);* Matthews, Pretermitted Heirs: An Analysis of the Statutes, *29 Colum. L. Rev. 748 (1929).*

(n55)Footnote 766. *See, e.g.*, Batts, I Didn't Ask to Be Born: The American Law of Disinheritance and a Proposal for Change to a System of Protected Disinheritance, *41 Hastings L.J. 1197 (1990);* Buchanan, Rent-Seeking, Noncompensated Transfers and the Laws of Succession, *26 J.L. & Econ. 71 (1983).*

(n56)Footnote 767. Wis. Stat. Ann. § 861.35.

(n57)Footnote 768. *See, e.g.*, Gerry Beyer, Drafting in Contemplation of Will Contests, 38 NO. *1 Prac. Law 61*

(1993); John Warnick, The Ungrateful Living: An Estate Planner's Nightmare -- The Trial Attorney's Dream, *24 Land & Water L. Rev. 401 (1989);* Pyle, How to Beat the Pretermitted Heir Statute, *18 Hastings L.J. 333 (1967). See also* Hudnak, The Sleeping Tort: Testamentary Libel, *27 Mercer L. Rev. 1147 (1976);* Reynolds, Defamation from the Grave: Testamentary Libel, *7 Cal. W. L. Rev. 91 (1971);* Annotation, Libel by Will, *21 A.L.R. 3d 754 (1968).*

(n58)Footnote 769. *See, e.g., In re Estate of Jetter, 570 N.W.2d 26 (S.D. 1997)* (South Dakota statute authorizes negative wills); *In re Estate of Cancik, 476 N.E.2d 738 (Ill. 1985); In re Martz' Estate, 28 N.W.2d 108 (Mich. 1947). See also* Note, The Intestate Claims of Heirs Excluded by Will: Should "Negative Wills" Be Enforced?, *52 U. Chi. L. Rev. 177 (1985).*

(n59)Footnote 770. U.P.C. § 2-101(b), 8 U.L.A. 75. Text is reproduced herein:

(b) A decedent by will may expressly exclude or limit the right of an individual or class to succeed to property of the decedent passing by intestate succession. If that individual or a member of that class survives the decedent, the share of the decedent's intestate estate to which that individual or class would have succeeded passes as if that individual or each member of that class had disclaimed his [or her] intestate share.

See also N.Y. Est. Powers & Trusts Law § 1-2.18; *Estate of Jetter, 570 N.W.2d 26 (S.D. 1997)* (the statute allowing a negative will is interpreted as permitting disinheritance of a testator's heirs only if there are other heirs who can take).

(n60)Footnote 771. *See, e.g.*, 110-1/2 ILCS 4-10; N.Y. Est. Powers & Trusts Law § 5-32; Tex. Prob. Code Ann. § 67. *In re Estate of Laura, 690 A.2d 1011 (N.H. 1997)* (a testator's heirs are protected against unintentional omission from the testator's will).

(n61)Footnote 772. *See, e.g.*, Mass. Gen. Laws ch. 191, § 20.

(n62)Footnote 773. U.P.C. § 2-302, 8 U.L.A. 90-91, 105.

(n63)Footnote 774. *See, e.g., In re Estate of Padilla, 641 P.2d 539 (N.M. App. 1982); Estate of Peterson, 442 P.2d 980 (Wash. 1968); Goff v. Goff, 179 S.W.2d 707 (Mo. 1944)* (all permitting child to take); but see *Hauptman v. Conant, 400 N.E.2d 272 (Mass. App. 1980); Bridgeford v. Estate of Chamberlin, 573 P.2d 694 (Okla. 1977).*

(n64)Footnote 775. *See* William M. McGovern, Jr., Sheldon F. Kurtz & Jan Ellen Rein, Wills, Trusts and Estates § 3.6 (1988).

(n65)Footnote 776. U.P.C. § 2-302(1), 8 U.L.A. 105. Section 2-302 is reproduced here:

§ 2-302 Omitted Children.

(a) Except as provided in subsection (b), if a testator fails to provide in his [or her] will for any of his [or her] children born or adopted after the execution of the will, the omitted after-born or after-adopted child receives a share in the estate as follows:

(1) If the testator had no child living when he [or she] executed the will, an omitted after-born or after-adopted child receives a share in the estate equal in value to that which the child would have received had the testator dies intestate, unless the will devised all or substantially all the estate to the other parent of the omitted child and that other parent survives the testator and is entitled to take under the will.

(2) If the testator had one or more children living when he [or she] executed the will, and the will devised property or an interest in property to one or more of the then-living children, an omitted after-born or after-adopted child is entitled to share in the testator's estate as follows:

(i) The portion of the testator's estate in which the omitted after-born or after-adopted child is entitled to share is limited to devises made to the testator's then-living children under the will.

(ii) The omitted after-born or after-adopted child is entitled to receive the share of the testator's estate, as limited in subparagraph (i), that the child would have received had the testator included all omitted after-born and after-adopted children with the children to whom devises were made under the will and had given an equal share of the estate to each child.

(iii) To the extent feasible, the interest granted an omitted after-born or after-adopted child under this section must be of the same character, whether equitable or legal, present or future, as that devised to the testator's then-living children under the will.

(iv) In satisfying a share provided by this paragraph, devises to the testator's children who were living when the will was executed abate ratably. In abating the devises of the then-living children, the court shall preserve to the maximum extent possible the character of the testamentary plan adopted by the testator.

(b) Neither subsection (a)(1), subsection (a)(2), nor subsection (c) applies if:

(1) it appears from the will that the omission was intentional; or

(2) the testator provided for the omitted after-born or after-adopted child by transfer outside the will and the intent that the transfer be in lieu of a testamentary provision is shown by the testator's statements or is reasonably inferred from the amount of the transfer or other evidence.

(c) Except as provided in subsection (b), if at the time of execution of the will the testator fails to provide in his [or her] will for a living child solely because he [or she] believes the child to be dead, the child is entitled to share in the estate as if the child were an omitted after-born or after-adopted child.

(d) In satisfying a share provided by subsection (a)(1), devises made by the will abate under Section 3-902.

(n66)Footnote 777. Id., subsection (2).

(n67)Footnote 778. *See generally* Note, Premarital Wills and Pretermitted Children: West Virginia Law v. Revised Uniform Probate Code, *93 W. Va. L. Rev. 197 (1990);* Annotation, Pretermitted Heir Statutes: What Constitutes Sufficient Testamentary Reference to, or Evidence of Contemplation of, Heir to Render Statute Inapplicable, *83 A.L.R. 4th 779 (1991).*

(n68)Footnote 779. *See generally* Jan Ellen Rein, A More Rational System for the Protection of Family Members Against Disinheritance, *15 Gonz. L. Rev. 11 (1979). See, e.g., Estate of Hilton's, 649 P.2d 488 (N.M. App. 1982),* cert. denied, *649 P.2d 1391 (N.M. 1982); Crump's Estate v. Freeman, 614 P.2d 1096 (Okla. 1980); In re Horst, 190 N.E. 475 (N.Y. 1934). See also,* e.g., Mass. Gen. Law ch. 191, § 20; Tex. Prob. Code Ann. § 67(c).

(n69)Footnote 780. John R. Cunningham, Mortmain Statutes: The Dead Hand Still Survives, *27 Idaho L. Rev. 49* (1990/1991); Annotation, Modern Statutes: Validity and Effect of Mortmain Statutes, *6 A.L.R. 4th 603 (1981). See also* Jesse Dukeminier, Cleansing the Stables of Property, *65 Iowa L. Rev. 151 (1979);* Committee Report, Restrictions on Charitable Testamentary Gifts, *6 Real Prop. Prob. & Tr. J. 290 (1970).*

(n70)Footnote 781. Ga. Code § 113-117; Idaho Code § 15-2-615; Miss. Code § 91-5-31. Two states have held that the state's mortmain statute was unconstitutional, see *Martin v. Martin, 687 So. 2d 903 (Fla. Dist. Ct. App. 1997)* (Florida's mortmain statute referred to wills, and not to trusts); *Shriner's Hosp. for Crippled Children v. Zrillic, 563 So. 2d 64 (Fla. 1990); Shriner's Hosp for Crippled Children v. Hester, 492 N.E.2d 153 (Ohio St. 1986); Estate of Cavill, 329 A.2d 503 (Pa. 1974).* Other states have repealed their statutes.

(n71)Footnote 782. *See generally* William M. McGovern, Jr., Sheldon F. Kurtz & Jan Ellen Rein, Wills, Trusts and Estates § 3.11 (1988).

(n72)Footnote 783. *335 N.Y.S.2d 666 (1972),* aff'd, *351 N.Y.S.2d 940 (1974).*

(n73)Footnote 784. The Georgia and Mississippi statutes take this approach.

(n74)Footnote 785. *See* William M. McGovern, Jr., Sheldon F. Kurtz & Jan Ellen Rein, Wills, Trusts and Estates § 3.11 (1988).

(n75)Footnote 786. Id.

(n76)Footnote 787. *See* Volume 3, ch. 28.

(n77)Footnote 788. John Chipman Gray originally formulated this statement of the rule in 1886. *See generally* Lewis M. Simes, Future Interests § 127 (2d ed., 1966); Barton Leach, Perpetuities in a Nutshell, *51 Harv. L. Rev. 638 (1938);* Barton Leach, The Nutshell Revisited *78 Harv. L. Rev. 973 (1965).*

(n78)Footnote 789. *See* Unif. Stat. Rule Against Perpetuities, 8A U.L.A. 348. Twenty states have adopted the rule since its adoption in 1986. *See also* Unif. Prob. Code §§ 2-901 to 2-906, 8 U.L.A. 168-179.

(n79)Footnote 790. For comment and critique of Uniform Statute Rule Against Perpetuities, see Robert J. Lynn, Perpetuities Literacy for the 21st Century, *50 Ohio St. L.J. 219 (1989);* Paul Haskell, A Proposal for a Simple and Socially Effective Rule Against Perpetuities, *66 N.C. L. Rev. 545 (1988);* Lawrence Waggoner, The Uniform Statutory Rule Against Perpetuities: The Rationale of the 90-Year Waiting Period, *73 Cornell L. Rev. 157 (1988);* Mark Bloom, Perpetuities Refinement: There is an Alternative, *62 Wash. L. Rev. 23 (1987);* Jesse Dukeminier, The Uniform Statutory Rule Against Perpetuities: Ninety Years in Limbo, *34 U.C.L.A. L. Rev. 1023 (1987).*

(n80)Footnote 791. *See, e.g., Shapiro v. Union Nat'l Bank, 315 N.E.2d 825 (Ohio 1974)* (condition that son marry Jewish girl whose parents were both Jewish upheld); *Holmes v. Connecticut Trust & Safe Dep. Co., 103 A. 640 (Conn. 1918)* (restriction against use of tobacco and alcohol upheld for testator's daughters, but not for their husbands); *Girard Trust Co. v. Schmitz, 20 A.2d 21 (N.J. Eq. 1941)* (condition that beneficiaries, testator's siblings, not communicate with brother and sister disliked by testator struck as contrary to public policy). *See also Keating v. Keating, 165 N.W. 74 (Iowa 1917);* Restatement (Second) of Property, Donative Transfers § 6.2 (1983); Browder, Conditions and Limitations in Restraint of Marriage, *39 Mich. L. Rev. 1288 (1941).*

(n81)Footnote 792. *See, e.g., In re Estate of Russell, 444 P.2d 353 (Cal. 1968). See also* Schwartz, Estate Planning for Animals, 113 Tr. & Est. 376 (1974). The Uniform Probate Code, in the Uniform Statutory Rule Against Perpetuities section, has a provision regarding honorary trusts and trusts for pets. *See* Unif. Prob. Code § 2-907, 8 U.L.A. 180-181.

(n82)Footnote 793. *See, e.g.*, Schifanelli v. Wallace, 188 (Md. 1974); *Misenheimer v. Misenheimer, 303 S.E.2d 415 (N.C. App. 1983),* aff'd, *325 S.E.2d 195 (N.C. 1985); In re Estate of Van Der Veen, 935 P.2d 1042 (Kan. 1997)* (Kansas slayer statute explained).

(n83)Footnote 794. *See* Mary Louise Fellows, The Slayer Rule: Not Solely a Matter of Equity, *71 Iowa L. Rev. 489 (1986).*

(n84)Footnote 795. *Id. at 493.*

(n85)Footnote 796. *Riggs v. Palmer, 22 N.E. 188 (N.Y. 1889).*

(n86)Footnote 797. *See, e.g., Bird v. Plunkett, 95 A.2d 71 (Conn. 1953); In re Duncan's Estate, 246 P.2d 445 (Wash. 2d 1952).*

(n87)Footnote 798. *See, e.g., Riggs v. Palmer, 22 N.E. 188 (N.Y. 1889).*

(n88)Footnote 799. *See, e.g., Pritchett v. Henry, 287 S.W.2d 546 (Tex. Civ. App. 1955).*

(n89)Footnote 800. *See* Mary Louise Fellows, The Slayer Rule: Not Solely a Matter of Equity, *71 Iowa L. Rev. 489, 505 n.55 (1986)* (indicating all states except Delaware, Maryland, Massachusetts, Missouri, New Hampshire, and New York have some form of slayer statute).

(n90)Footnote 801. *Id. at 506. See, e.g.,* Fla. Stat. § 732.802(4) (homestead); Tex. Prob. Code Ann. § 41(d) (insurance); Va. Code § 55.410(B) (inter-vivos trust); Wis. Stat. § 700.17(b)(2) (joint tenancy).

(n91)Footnote 802. U.P.C. § 2-803(b) and (c). The provisions state that:

(b) [Forfeiture of Statutory Benefits.] An individual who feloniously and intentionally kills the decedent forfeits all benefits under this Article with respect to the decedent's estate, including an intestate share, an elective share, an omitted spouse's or child's share, a homestead allowance, exempt property, and a family allowance. If the decedent died intestate, the decedent's intestate estate passes as if the killer disclaimed his [or her] intestate share.

(c) [Revocation of Benefits Under Governing Instruments.] The felonious and intentional killing of the decedent:

(1) revokes any revocable (i) disposition or appointment of property made by the decedent to the killer in a governing

instrument, (ii) provision in a governing instrument conferring a general or nongeneral power of appointment on the killer, and (iii) nomination of the killer in a governing instrument, nominating or appointing the killer to serve in any fiduciary or representative capacity, including a personal representative, executor, trustee, or agent; and

(2) severs the interest of the decedent and killer in property held by them at the time of the killing as joint tenants with the right of survivorship [or as community property with the right of survivorship], transforming the interests of the decedent and killer into tenancies in common.

(n92)Footnote 803. Accord, but against the majority, see *In re Estate of Foster, 320 P.2d 855 (Kan. 1958); Kempaner v. Thompson, 394 So. 2d 918 (Ala. 1981).*

(n93)Footnote 804. *See, e.g., Estate of Kramme, 143 Cal. Rptr. 542 (1978)* (involuntary manslaughter, husband took as heir); *Stickland v. Wysowatcky, 250 P.2d 199 (Colo. 1952)* (same); *In re Tarlo's Estate, 172 A. 139 (Pa. 1934)* (conviction may be required). But see N.C. Gen. Stat. § 31A-3(3) (plea of nolo contendere prevents inheritance by slayer).

(n94)Footnote 805. *Turner v. Estate of Turner, 454 N.E.2d 1247, 1252 (Ind. Ct. App. 1983); Minnesota Mut. Life Ins. Co. v. James, 202 F. Supp. 243, 246 (W.D. Mo. 1962).*

(n95)Footnote 806. Unif. Prob. Code § 2-803(g):

(g) [Felonious and Intentional Killing; How Determined.] After all right to appeal has been exhausted, a judgment of conviction establishing criminal accountability for the felonious and intentional killing of the decedent conclusively establishes the convicted individual as the decedent's killer for purposes of this section. In the absence of a conviction, the court, upon the petition of an interested person, must determine whether, under the preponderance of evidence standard, the individual would be found criminally accountable for the felonious and intentional killing of the decedent. If the court determines that, under that standard, the individual would be found criminally accountable for the felonious and intentional killing of the decedent, the determination conclusively establishes that individual as the decedent's killer for purposes of this section.

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CHAPTER 88 TESTAMENTARY TRANSFERS OF REAL PROPERTY

10-88 Thompson on Real Property, Thomas Editions § 88.13

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§ 88.13 The Personal Representative, Probate and Administration.

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§ 88.13(a) Overview.

Modern probate law offers many options for the administration of estates. These administration options range along a scale of formality, reflecting the differing complexities of individual estates. As the complexity of issues involving estate assets increases, so does the need for consolidated oversight of the estate's administration. On the other hand, when the complexity of the estate is slight and the value low, the inherent costs and delay of formal administration outweigh its advantages, and an informal method of estate administration is desirable. A large percentage of today's estates, due to their simple nature and small amount of assets, pass to the decedent's heirs or will beneficiaries without any administration at all. n807 This absence of administration resembles the disbursement of estates under the Roman civil law system and its successors. n808 According to the civil law tradition, heirs take title to the decedent's property directly as tenants in common, but are personally liable to estate creditors, even if the creditors' claims exceed estate assets. Thus, citizens in civil law jurisdictions may avoid most of the burdensome features found in common law formal administration, cost, delay, and loss of privacy, but risk subjecting their personal assets to liability for the decedent's debts. n809 This process of direct descent without administration is termed "universal succession" and has been adopted in the United States as an option in the Uniform Probate Code and to a limited extent in California. n810

Under the common law, probate and administration were formal. n811 Real property passed directly to heirs or devisees, but personal property passed to an estate administrator. n812 This reflected the common law concern for the protection of creditors and the fact that real property was, in any event, generally beyond the reach of creditors. n813 Personalty was consolidated in a single source, the administrator, in order to expedite satisfaction of creditors' claims. n814 Only after creditors had been satisfied would distribution of any remaining assets to the heirs or devisees occur. Creditors in civil law jurisdictions, on the other hand, are less favored since they are required to trace the assets and either negotiate with or sue individual heirs or devisees to collect on their claims. n815 Thus, universal succession encouraged bargaining among those entitled to the estate's assets as a method of distributing the estate. n816

Modern civil law and common law jurisdictions have moderated the traditional procedures to a great extent in order to effect a better compromise between the twin goals of reducing cost, delay, and disclosure of private matters and the protection of creditors. n817 Today, many of the distinctions between these two systems have faded. n818 The

discussion below will demonstrate how statutory and case law changes in common law jurisdictions have broadened probate and administration options and increased the efficiency with which the goals of administration are served. Although the term "administration" is presented with some ambiguity in the literature, n819 traditionally, administration of an estate has referred to the activities of a person appointed to administer an estate, n820 and that is how the term will be used in this text.

§ 88.13(b) The Uniform Probate Code.

The Uniform Probate Code (the "Code") has set the backdrop for probate reform in this country since 1969. As will be seen below, the current version of the Code provides an array of options, allowing adopting jurisdictions to tailor probate and administration to the needs of particular estates. The Code has greatly expanded the authority of persons who administer estates where necessary and appropriate, while providing stringent mechanisms to address traditional concerns for creditors' rights. Currently, fifteen states have adopted the Code in full, with some amendments. n821 Most other states have either adopted portions of the Code, patterned their statutes after code provisions, or followed the underlying policy considerations involved in the evolution of the Code since adoption. n822

§ 88.13(c) The Personal Representative.

Although not important in the abstract, since duties and liabilities essentially remain the same, an understanding of the various designations for persons appointed to administer estates is useful and necessary and, additionally, helpful when consulting cases and commentaries on this subject. Although the Uniform Probate Code draws all administrators of estates, including executors, under the appellation, "personal representative" n823 two fundamental designations for personal representatives remain alive and well. A personal representative named in a will is titled an executor; executrix is often used when a woman serves, though this practice may be fading. n824 A person appointed who was not named in a will is referred to as an administrator, or administratrix. Thus, if a person dies intestate (without a will), or the appointment of an executor fails because of a failure to specify the executor, refusal of the appointment, death, lack of capacity or other impairment, the probate court will appoint a personal representative who will be called an administrator. Any difference between an executor and administrator arises primarily from the personal representative's source of power and duties. An executor's power and duties are generally enlarged or diminished by the testator's will. The administrator, a creature of statute, is generally empowered or restrained by statutory provisions.

Administrators, and in some instances executors, can be divided further according to the basis upon which they were appointed and their duties. Where the will provides for an executor but does not name who is to fill the position, or if the named person fails to qualify, the administrator appointed is an *administrator with will annexed*, or *administrator c.t.a.* (*cum testamento annexo*) An administrator appointed to complete an administration when the original personal representative has not done so is an *administrator of goods not administered*, or *administrator d.b.n.* (*de bonis non*) These two terms are combined when an administrator d.b.n. takes over from an administrator c.t.a., or an executor if the executor can no longer serve and the will did not name a successor executor, thus becoming an *administrator d.b.n.c.t.a.* (quite a mouthful!) Another type of administrator is the public administrator who is a permanent official appointed when no other suitable person can be found to serve. The *temporary administrator*, or *administrator pendente lite*, is one who serves temporarily during the interim between death and appointment of the general administrator. A *special administrator* may be appointed to deal with specific property as when an executor or named administrator has a conflict of interest with regard to estate property; for example, where an executor is also a beneficiary under the will. Finally, if the decedent owned property located in another state, an ancillary administrator, or ancillary executor, as opposed to the domiciliary administrator or executor, n825 may be necessary due to residency requirements of the situs state. An administrator or executor generally has authority only as to property located within the jurisdiction where she is appointed. n826

The personal representative, unknown to the civil law tradition where property passed directly to the heirs, n827 exists to protect the rights of estate creditors, heirs or devisees, and debtors by providing for the orderly distribution of the

decedent's estate. n828 Thus, discussion of the personal representative focuses on the nature, powers, and responsibilities of the office as related to the realization of the above goals. The reader should analyze the cited cases, statutes, and doctrines in light of these goals. As the discussion progresses, the reader should also keep in mind the historical policy debate shaping the development of modern probate and administration; the traditional common law support for creditors' rights versus the desire of heirs or devisees to expeditious receipt of their benefits. The methods adopted in response to this debate reflect attempts to effect a compromise between the prolonged, high cost process of formal administration, which tends to give greatest protection to creditors, and less formal procedures which lessen delay and, by lowering costs, provide greater distributions to heirs and devisees. Although an important component in the debate, the changing role of the personal representative is only one of several procedural innovations being implemented to address the above concerns.

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LEXIS: personal representative! w/15 administrat! or execut! w/30 will!

§ 88.13(c)(1) Competency to Serve, Right of Appointment, and Renunciation.

To be competent to serve as a personal representative, a person must meet three qualifications: capacity, suitability, and residence. n829 These requirements are generally controlled by statutes, but some jurisdictions allow the probate court discretion to supplement the statutory requisites. Capacity requirements are minimal and generally a person capable of making a will is competent to serve. Age may be a factor. Under the Uniform Probate Code, no person under the age of 21 may serve as personal representative. n830 Additionally, a statutory suitability standard for serving is often applied. n831 The Uniform Probate Code, for example, provides that a person is disqualified if found unsuitable by the court in formal proceedings. n832 Factors to consider are character, integrity, soundness of judgment, and any criminal convictions. n833 A final hurdle to appointment may be a residency requirement. n834 When real property of the decedent is located in another jurisdiction, the failure to meet this qualification often requires the appointment of an ancillary personal representative. The ancillary personal representative must, of course, meet the competency requirements of the situs jurisdiction.

A person named as executor in a will or petitioning the probate court to serve as administrator should be appointed if the above qualifications are satisfied. n835 Absent a named executor, the court will appoint a personal representative with preference given to a statutory prioritized list of persons. n836 Preference is normally given to a surviving spouse first, followed by children, parents, siblings, and creditors. n837 Although appointment under these priority systems is often said to be of right, in reality such systems merely create a presumption that the preferred party should be appointed, which may be rebutted by evidence that the above qualifications for service as personal representative are not met. The court's discretion in rejecting a preferred party is generally limited to rulings on these qualifications and choices within a preferred class of entitled persons. n838 The court must appoint according to the statute if the preferred party meets those qualifications. In other words, an entitled person who is suitable may not be passed by in favor of a person with less priority simply because such a person is better suited for the position.

Service as a personal representative is a voluntary action and a party so nominated is given a reasonable time to refuse or renounce. n839 However, if a party wishes to refuse or renounce an attempted appointment, the party should do so immediately in order to avoid incurring any personal liability. As will be seen below in the discussion on duties, a personal representative is required to preserve and protect estate assets. Should any loss of value occur during a period when the personal representative had authority and opportunity to act, the personal representative may well be personally liable for the resulting loss. n840

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LEXIS: (competen! w/2 serve!) or (right w/1 appointment) or renunciat!

w/50 uniform probate code

§ 88.13(c)(2) Authority.

Whether nominated by the testator in a will or selected by the probate court, the personal representative is appointed by the court and is subject to the court's authority and supervision. n841 The nature of the personal representative's authority and the extent of supervision will vary with the form of administration employed.

Once appointed by the probate court, the authority of the personal representative to act is demonstrated by letters testamentary, in the case of an executor, or letters of administration issued by the court. Endorsements on these letters of authority will show the extent of that authority, that is, whether the personal representative is required to obtain court approval for the personal representative's actions. n842 This allows the personal representative to deal with third parties who are in possession of estate assets or who are creditors or debtors of the estate, making collections or paying claims and releasing such parties from further liability. n843 Because the estate is not a legal entity, n844 this also provides a method by which suits may be brought on behalf of the estate. n845 The personal representative, standing in the shoes of the decedent, may sue or be sued with regard, for example, to contracts of the deceased or torts committed or suffered by the deceased. n846 Depending on the particular statute of the jurisdiction, the authority to sue may extend to wrongful death actions. n847

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LEXIS: authority w/15 personal representative! w/30 testament!

§ 88.13(c)(3) Duties.

The personal representative may be responsible for the following general duties, depending on when and where the personal representative enters the administration proceedings: (1) offer the will, if any, for probate, (2) collect, inventory, and appraise the assets of the decedent, (3) manage those assets during administration, (4) file tax returns with the appropriate tax authorities, (5) receive and pay claims of creditors, including tax authorities, and (6) distribute any remaining assets to those entitled to receive them, whether by intestacy statutes or will. Ultimately, these general duties serve the underlying purpose of administration to liquidate the decedent's assets and wind up the decedent's affairs. n848 In addition, regardless of the designation or manner in which a personal representative is appointed, once the office is accepted, the personal representative has fiduciary responsibilities similar to those of a trustee, which govern the manner in which the general duties are carried out. n849

§ 88.13(c)(3)(i) General Duties.

The first chore for the personal representative upon appointment and probating the will is to inventory, collect, and appraise the assets and determine the liabilities of the deceased. Armed with letters testamentary or letters of administration, the personal representative should claim and take possession or control over all property subject to administration. Recall that once appointment has been accepted, fiduciary duties attach and the personal representative will be personally liable for losses due to improper retention or control of estate property by other parties. Although title to both personal and real property may pass directly to heirs or beneficiaries, the assets are still subject to administration needs. n850 Thus, the personal representative must quickly determine the extent of the estate's assets and liabilities and take command of property needed for proper administration.

Some assets often overlooked are those items associated with the decedent's person, e.g., watches, rings, contents of wallet/purse, etc.; safe deposit boxes; home lock boxes; bank accounts; stocks and bonds; uncashed checks or accruals from sources such as trusts, social security, pensions, wages, or rents; land situated in other jurisdictions; contents of the home or office; causes of action; insurance; contracts; joint ownership property; invalid inter vivos gifts; monies owed

by debtors of the deceased; and debtor's business interest. n851 Because many of these items may require prompt attention in order to preserve their value, time is of the essence in cataloging the deceased's property. For example, statutes of limitation may require that the personal representative take immediate action with respect to certain causes of action. The personal representative must also be aware of the possibility of misappropriation or misplacement of assets.

Once timely inventory and collection of the assets is made, the personal representative must turn attention to appraising and managing those assets. Appraisal is required to determine the extent, priority, and chronology of liquidation in order to pay funeral expenses, administration expenses, and estate creditors. Along these lines, the personal representative is required in many instances to identify creditors and give them notice of the estate proceedings. For unknown creditors, notice by publication will be sufficient, but for known or reasonably ascertainable creditors, personal notice may be required. n852 In addition, notification to heirs and beneficiaries may be required to provide them an opportunity to challenge probate procedures or administration actions, and generally oversee their interests, if any, in the estate's assets.

After a determination of the value of the estate's assets and the nature and extent of claims against the estate, the personal representative has a duty to manage the estate in order to accomplish administration's ultimate goal of winding up the decedent's affairs, that is, liquidating the estate and satisfying claims against the estate from tax authorities, creditors and beneficiaries. Once again, delays in proper management of the decedent's assets can result in lost value and personal liability to the personal representative. The personal representative's management is subject to the concept of waste: avoidable depreciation of value or loss of potential value. Therefore, the personal representative should take care to ensure that property is appropriately insured even if the decedent had not done so. Protection against waste may also include avoidance of environmental liability under CERCLA and making appropriate tax elections.

The personal representative is also responsible for filling out and filing the decedent's last federal and state income tax returns, any estate income tax returns required during the period of administration, and the final estate tax return, and for payment of any amount due. n853 Other state tax duties may arise for the personal representative. n854 In filing the federal income tax return for the estate, the personal representative may elect to use either a calendar or fiscal year, a choice that may have important consequences to management of the estate. n855 Federal estate tax is submitted by filing form 706 with the IRS within nine months after decedent's death. n856 In addition, if the decedent owned a life insurance policy, form 712, supplied by the insurer, and a certified copy of the will must be filed along with form 706.

During this period, the personal representative may be required to submit reports and accounts to the court or beneficiaries. n857 All personal representatives, regardless of the level of court supervision, are generally required to submit an initial report containing an inventory and appraisal of assets and a list of claims against the estate. n858 Interim reports are sometimes required and a final report and accounting will be required to close out the administration. n859 Finally, after funeral expenses, administration expenses, tax liabilities, and creditors have been paid, any remaining assets are distributed to those persons entitled to receive them. n860 This is generally accomplished by an order of distribution issued by the probate court and based on the administrator's final report. n861 Once the final report has been accepted and the distribution approved, the personal representative is relieved of further responsibility or power to manage estate assets. n862 After closing, the personal representative is not subject to liability for losses except for liability for actions taken during administration of the estate. Such issues cannot be raised under the estate administration, but must then be raised in a separate action.

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LEXIS: personal representative! w/30 dut! or responsibilit! w/50 estate or testament!

§ 88.13(c)(3)(ii) Fiduciary Duties.

As mentioned previously, all personal representatives are subject to fiduciary duties with respect to the estate's beneficiaries and creditors. n863 These fiduciary duties mirror those of a trustee with the caveat that the personal representative, rather than investing and looking to the future of the assets, is responsible for winding up the estate and liquidating assets to pay claims. n864 Thus, the personal representative's investment powers and duties are sharply restricted compared to those of the trustee, and are to be implemented only to the extent necessary to preserve the estate's assets for the short time needed to wind up the estate's affairs. n865 This is true even when the period of winding up is inordinately long; the personal representative, unlike the trustee who may have a duty to manage the assets with an eye to profit, is confined to preserving the value of the estate and has been found to be in breach of that duty where the sole purpose of a management action is to obtain a profit on an estate asset. n866 Keeping in mind this fundamental difference, a personal representative has the fiduciary duties of confidentiality, loyalty, care, recordkeeping, and management. These basic fiduciary duties cannot be removed by the testator, but are required regardless of the amount of discretion provided for in managing the estate's administration. n867 After all, the personal representative is fiduciary to the creditors and beneficiaries, not the testator; the testator cannot waive the rights of these other parties.

The personal representative owes a duty of confidentiality with respect to the estate's affairs. The personal representative should, therefore, never disclose information concerning the estate, except to the extent required for proper administration. n868 A duty of loyalty is required of the personal representative. The duty of loyalty, also referred to as the duty of faithfulness, requires the personal representative to avoid conflicts of interest and self-dealing with the estate. The executor or administrator cannot favor personal interests, but must serve the interests of the creditors and beneficiaries only. Therefore, the personal representative cannot profit or obtain an advantage in dealing with the estate. n869 As mentioned above, a special administrator may be required to oversee transactions between the estate's primary personal representative and the estate, its creditors, or beneficiaries, or whenever a conflict of interest arises between the personal representative's own affairs and the administration of the estate. The personal representative must also avoid commingling of estate assets. If assets are commingled, the burden of showing the portion attributable to the estate is on her. Any increases in the value of commingled property will be attributed solely to the estate assets, since the personal representative cannot personally profit in dealing with estate assets.

Subsumed under the duty of loyalty is the duty of impartiality. Pursuant to this duty, the personal representative cannot favor one, or a set of beneficiaries, over another. n870 The duty is owed equally to all beneficiaries. n871 The duty of impartiality may arise when tax liabilities must be spread among beneficiaries. n872 Impartiality and self-dealing are implicated concurrently when the executor or administrator is also a creditor or beneficiary of the estate.

The personal representative also has a duty to administer and manage the estate and must do so even in the absence of compensation. The duty to employ reasonable care, skill, prudence, and diligence is the fiduciary duty that accompanies and governs the personal representative's management of estate assets. The personal representative should act in managing the estate as a prudent person would act in the management of their own affairs. This duty, paralleling that of the trustee, forbids speculative investments. Additionally, the personal representative is constrained by the duty to liquidate, rather than continue an investment for profit. n873 Mere error in judgment, however, is insufficient to constitute a breach of duty. The personal representative's actions are to be judged in light of the circumstances at the time of the action, not in light of the actual outcome of that action. Thus, if a reasonably prudent person would make a certain disposition of assets, the personal representative will not be personally liable simply because that action ultimately resulted in a loss of value. As mentioned above, the personal representative, in applying these management concepts in protecting and preserving the estate, may be required to insure uninsured assets, provide that previously insured assets remain insured through transfer of title and reissuance of policies, or employ other methods of asset preservation.

In employing reasonable care and skill, the personal representative is under a duty not to delegate discretionary tasks. The duty not to delegate requires that the personal representative fulfill her duty to personally manage the estate. n874 Administrative or ministerial tasks may be delegated, but the personal representative remains responsible for the actions

of such delegates under a duty to properly select, or retain, and supervise. n875 The ability to delegate administrative or ministerial tasks allows the personal representative to hire appraisers, accountants, or attorneys as required to evaluate or give expert advice. n876 The ultimate decisions and responsibility for those decisions, although based on information acquired through such agents, must rest with the personal representative, who may not employ such help when a reasonable lay investigation would produce the required information or determine the appropriate action. n877 In evaluating whether the personal representative has exercised reasonable care and skill, reliance on professional evaluations or advice is a factor to be weighed, but is not determinative of the personal representative's liability. Finally, in the case of co-executors or co-administrators, the personal representative cannot simply sit idle while other fiduciaries manage the estate. n878 The personal representative's duty is personal and affirmative, not passive, and the duty is to remain aware of actions taken with respect to the estate and to object to any unauthorized or inappropriate actions, in order to protect the personal representative against personal liability. n879 Accurate records must be maintained by the fiduciary in order to track assets and assure the court and the beneficiaries that the personal representative has fulfilled all obligations. n880 Should a question arise as to the value or disposition of an asset, the personal representative will be liable to the extent of any uncertainty. The personal representative carries the burden of showing proper management and disbursement, and any doubt will be resolved in favor of the beneficiaries.

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LEXIS: personal representative! w/30 fiduciary w/2 dut! or responsibilit!
w/50 estate or testament!

§ 88.13(c)(4) Powers.

The scope of the personal representative's powers is highly dependent on the form of administration. In a formal administration, where court supervision is at its highest level, the personal representative will have few, if any, real powers to manage or dispose of estate assets. n881 Court approval is required for nearly every transaction, either prior to the transaction, after the transaction, or both. n882 On the other hand, personal representatives in independent administrations, similar to outright title owners, have far-reaching powers and can dispose of assets without prior court approval and subject only to a subsequent court challenge by a beneficiary or creditor. n883 Potential sources in determining what powers the personal representative is to have and how they will be exercised are traditional statutory sources, the Uniform Probate Code, and the will itself. n884

Traditional statutory powers of the personal representative facilitate the duties to collect, pay, and distribute. These powers allow the personal representative to take possession of personal property of the decedent, collect debts, and enforce claims of the estate. The specific powers may vary among the jurisdictions. With respect to realty, some statutes direct the personal representative to take realty and subject it to management as with personalty, some statutes pass realty directly to heirs or devisees, and some give discretion to the personal representative to take and retain realty when needed to satisfy estate debts. Nearly all states allow the personal representative to sell land to pay debts on a showing of necessity and a court order. Finally, it should be noted that some rights associated with real property are in the nature of personalty and pass to the personal representative for administration. These personalty rights in real property include situations where decedent was a lessee for a term of years, a vendor in a contract for the sale of land, a lessor with rentals due, or party to a cause of action with respect to land arising inter vivos.

Under the Uniform Probate Code, which provides for unsupervised administration, the powers of the personal representative may be dramatically increased. n885 Although title to both real and personal property passes directly to heirs or beneficiaries under the Uniform Probate Code, all such property is subject to prior claims and administration. n886 The unsupervised administrator has all the powers of an absolute owner, subject to the fiduciary duties as mentioned above. n887 No notice, hearing, or court order is required for the unsupervised administrator to act with respect to estate property. n888 On the other end of the spectrum, the supervised administrator may have little power to act without court approval. n889 Endorsements on the letters of administration show the nature and extent of the

administrator's power.

A final source of powers for the personal representative may be found in the deceased's will, if any. Although the ability of the testator to confer administrative powers on the personal representative is broad, the testator may not authorize actions which are illegal, contrary to public policy, or inconsistent with the personal representative's statutory duties. n890 The testator may, for example, authorize the sale of estate lands without judicial approval or supervision, or the selection of certain tax elections and adjustments. As noted above, however, the testator cannot relieve the personal representative of basic fiduciary duties.

The personal representative must be aware of the extent of the personal representative's powers. Actions in excess of granted, legal powers (ultra vires acts) that result in loss are chargeable to the personal representative regardless of care, diligence, prudence, or good faith. n891

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LEXIS: personal representative! w/15 power! w/50 testator!

§ 88.13(c)(5) Remedies for Breach of Duty or Unauthorized Acts.

Various remedies are available to the beneficiaries should the personal representative breach a fiduciary duty or act beyond the scope of the powers. The primary vehicle for holding the personal representative answerable for such a breach is for the beneficiary to make a complaint of maladministration and an objection to the personal representative's account. If the personal representative is found to have caused a loss to the estate, through mismanagement or ultra vires acts, an assessment may be made against the personal representative, which is called a surcharge. The surcharge is collectible from the personal assets or bond of the personal representative. Mere errors in judgment will not constitute mismanagement; mismanagement occurs only when the personal representative acted unreasonably. On the other hand, the personal representative is completely liable for ultra vires acts without regard to care, diligence, prudence, or good faith.

Should the personal representative engage in self-dealing, the beneficiaries are entitled to either avoid or ratify the act. Any profits made from self-dealing ratified by the beneficiaries will belong to the estate: the personal representative will not be allowed to profit from self-dealing no matter how fair the transaction.

Finally, a personal representative may be removed or denied compensation for breach of a fiduciary duty. n892

COMPUTER-ASSISTED RESEARCH

LEXIS: personal representative! w/15 breach! w/30 remed! w/15
beneficiar!

§ 88.13(c)(6) Resignation, Removal, and Replacement.

Absent statutory authority or will provision, a personal representative may not resign without leave of court, n893 although some jurisdictions allow an agreement to resign between interested parties and the personal representative. Such an agreement to resign is, in effect, a removal. Removal, otherwise, is usually governed by statute, although some jurisdictions give the probate court discretion to go beyond statutory grounds for removal. n894 Among the grounds for removal are: subsequently arising incapacity, such as illness or a declaration of mental incompetence; failure to file an inventory or accounting as required; default on a requirement to post bond, and interests hostile or adverse to the estate beneficiaries. n895 In addition, removal can occur for misconduct by the personal representative in exercising her fiduciary duties: mismanagement, waste, unfaithfulness, maladministration, etc. The probate court may also "remove" a

personal representative by revoking letters of administration or letters testamentary improperly issued. n896 Unless the will provides for a substitute executor, the probate court will replace a personal representative, who dies or is removed, according to the same procedures for the initial appointment discussed above. n897

COMPUTER-ASSISTED RESEARCH

LEXIS: personal representative! w/15 resign! or remov! or replace! w/50
testament!

§ 88.13(c)(7) Compensation.

Fees for serving as personal representative are governed by the will or by statute. If a fee is set by the will, the personal representative may renounce the fee, before qualifying, and take a reasonable fee set by statute. n898 For personal representatives subject to a statutory fee structure, the standard measure for compensation generally falls within one of four categories: (1) a true commission, that is, a fixed percentage of the estate's value, (2) a reasonable fee determined by the court on the basis of services rendered, (3) a fixed fee, or (4) the personal representative determines the personal representative's own fee and pays himself or herself subject to court review for reasonableness. n899 Such fees are deductible for federal estate tax purposes. n900 An attorney acting as personal representative is entitled to fees for both positions under the majority view, but a minority of jurisdictions consider this self-dealing. n901 A personal representative may waive the fee in whole or part, but issues are raised in that instance about whether waiver constitutes a gift to the estate subject to a gift tax, and whether the personal representative incurs income tax liability. n902 Therefore, any waiver of fees should occur before services are rendered. If the executor is a beneficiary under the will, devise in lieu of the fee will be income, unless the executor is not required to perform in order to take the devise. n903

COMPUTER-ASSISTED RESEARCH

LEXIS: personal representative! w/30 fee! or compensat! or commission!

§ 88.13(d) Probate and Administration Options.

Probate and administration are two independent proceedings, with probate applying only when a will is in issue. If the decedent died intestate, that is without a will, proceedings or actions to administer the estate can begin immediately. However, if the decedent left a will, the first issue is probate of the will.

§ 88.13(d)(1) Probate.

As mentioned above, a party named in the will to administer the estate has the duty to offer the will for probate if the party is aware that the will names the party as executor. n904 This may require the named executor, when aware of the existence of the will and the nomination, to locate the will, file it with the probate court, and submit a petition to admit the will to probate. n905 Generally, a party in possession of the will of a deceased person has an obligation to file the will with the appropriate court. n906 Even though the will has been located and filed by another, the personal representative must petition the court for its admission to probate if the filing party has not done so. A failure or delay in doing so, without a renunciation of the appointment, could lead to personal liability for waste to estate assets during the delay.

Two basic methods for probate, solemn form and common form, occur among the various jurisdictions and a third method, informal probate, is found in some jurisdictions as an additional procedure. Probate in solemn form requires notice to interested parties, who may then challenge or object to the will's validity at a contested hearing to determine whether the will is to be admitted to probate. n907 Once the decree admitting the will to probate issues, parties with notice of the contested proceeding are barred from further challenges. Probate in common form, on the other hand,

allows the will to be probated in an *ex parte* proceeding where the petitioner provides *prima facie* evidence of the will's validity. Once the will is admitted to probate, notice is given to interested parties who then have a statutorily limited time period for contesting the will and challenging probate. After the period of limitations has passed, parties who had notice of probate are barred from further challenges. In either situation, of course, if the will is successfully challenged and no other will is probated, the decedent becomes intestate and proceedings advance to the administration stage.

The third method of probate, informal probate, has been adopted in several jurisdictions and allows an uncontested will to be probated on a verified petition or affidavit presented to the appropriate officer, generally a registrar or judge. n908 Similar to the foregoing, at least one jurisdiction allows the probate of a will solely as a muniment of title. n909

§ 88.13(d)(2) Administration.

§ 88.13(d)(2)(i) Avoiding Formal Administration.

Once the will has been probated or intestacy determined, proceedings to administer the estate may begin. The common law presumed that formal administration was necessary. However, because formal probate proceedings are costly and time-consuming, both the common law and the various states, by statute, now provide alternatives where appropriate. Since the primary purpose of administration is the protection of creditors, these alternatives revolve around whether the estate is solvent, the value of assets available, and the existence of creditors. When creditors are non-existent or have worked out a settlement with the estate beneficiaries, no administration should be necessary. Likewise, if the estate is insolvent, or is of so little value that no assets will remain for creditors once homestead, family allowances, or exemptions are applied, administration would be futile and further erode the funds available to the beneficiaries.

The first and most obvious method of avoiding formal administration is to avoid leaving anything to administer. This doesn't mean trying to die broke! What is meant here are methods of non-probate transfer. Many statutory mechanisms exist for disposing of property in a non-probate fashion. Such mechanisms include "payable on death" beneficiary designations on life insurance policies, creation of joint survivorship property, revocable inter vivos trusts, especially those with pour over provisions, and inter vivos gifts, to name a few. n910 The second of these avoidance mechanisms is to employ a non-administrative method. One non-administrative method is the family settlement, which is generally favored among the jurisdictions. n911 This option is available in some states even to the extent of an agreement not to probate a will. n912 This allows estates with no creditors, or where the family members have already informally satisfied any creditors' claims, to be distributed according to an agreement among family members, rather than by intestacy statutes or the will.

In addition, under some statutes, certain types of property may be collected upon affidavit, stating that the claimant is entitled to the property and that there are no creditors or that the claimant has paid such creditors as exist, will pay creditors from the property received, or will otherwise be liable to subsequently arising creditors. n913 Such simplified procedural mechanisms permit the claimant to collect the property and release the obligor from further liability without court proceedings. n914 These statutes generally apply to small bank accounts, automobile certificates of title, wage claims, or specific sums of money, to name a few examples. n915

A third mechanism for removing an estate from formal administration is the small estate or summary administration procedures found in all jurisdictions. These generally cover the situation where the estate is insolvent or consists only of exempt property. n916 Such statutes generally provide that estates valued at less than a statutorily set amount may be administered according to more streamlined, less elaborate procedures, such as collection by affidavit. n917 Because the primary purpose of administration is the protection of creditors, it has been argued that summary administration should be available for any estate where creditors are non-existent, regardless of the amount of the estate. Since these statutes generally exclude non-probate assets, and in some instances homestead, exempt personal property, and family allowance, even relatively large estates may fall within the purview of small estate statutes. n918 Generally, the procedure begins with a petition specifying that a statutorily specified number of days has passed since death, that no

formal administration has begun, that the estate's value is less than the statutory amount, and that the petitioners are beneficiaries under the will or intestacy statutes. In some jurisdictions, a registrar issues an affidavit demonstrating the authority of the petitioner to collect property of the deceased. In other states, a court order or decree of distribution serves the same function. If real property is involved, such an order or affidavit may be filed as a muniment of title in order to establish a marketable chain of title for the heir or beneficiary.

§ 88.13(d)(2)(ii) Administration with a Personal Representative.

None of the above mechanisms require a personal representative and may be implemented, indeed must be implemented in some instances, by the beneficiary. However, some situations call for consolidation of assets in a single source of authority and, in these cases, a personal representative will become necessary. The need for a personal representative, administration, and court involvement may arise in the following situations: (1) family members are in dispute over distribution, (2) third parties refuse to recognize title to estate property in heirs or devisees, (3) creditors' claims exist, (4) tax responsibilities are complicated, (5) suit must be brought to collect from estate debtors. n919

Once a person is appointed as personal representative, the person is generally required to make an oath n920 and post bond. n921 Although an oath is required, a failure to take such an oath does not relieve the personal representative from future liability. n922 For executors, the bond requirement ordinarily may be waived by the testator in the will. On the other hand, administrators, or executors where the will does not expressly waive the bond requirement, commonly are required to post bond, except in the case of a corporate representative who may be excluded from the bond requirement by statute. n923 The Uniform Probate Code ("UPC") changes the common law bond requirements by providing that no bond is required in informal administrations unless the will so requires, an interested person petitions for bond, or a special administrator has been appointed. For formal administration, the Uniform Probate Code makes the bond discretionary unless waived by the will. n924

In an effort to balance the two competing policies underlying distribution of the decedent's estate, some jurisdictions provide for informal, unsupervised, or independent administration. n925 This method of fulfilling administration requirements has long existed in Texas and Washington and is now incorporated, as an option, into the Uniform Probate Code. n926 In Texas, for example, the testator may expressly provide that the executor named is to be independent of court supervision. n927 If the will does not so provide, the executor will administer the estate supervised by the probate court. In addition, an independent administrator may be appointed by the court if all beneficiaries under the will agree. Under independent administration, the independent administrator or executor has the widest ranging powers over the broadest range of assets of any administration process. n928 The independent administrator or executor generally has all the powers of true ownership, subject only to the fiduciary duties. n929 This allows the independent personal representative to proceed without court supervision or approval in most instances, thus lessening the costs and delays inherent in such supervision, while providing protection for creditors by virtue of the fiduciary duties attached to the office. n930 Addressing the criticism that independent administration can be too independent at times, the Uniform Probate Code provides authority for the personal administrator to petition the court for determination of specific issues when necessary, while leaving the bulk of estate administration unsupervised. n931

When circumstances arise which require a more formal administration of the decedent's estate, court involvement becomes necessary and a supervised or dependent administration is undertaken. Under dependent administration, the personal representative, executor or administrator has very limited power, if any, to deal with estate assets without prior court approval, subsequent court approval, or both. n932 As an example, under Texas law n933 a dependent administrator, or her attorney, in order to sell real property must:

(1) file an application for sale which describes the property or interest therein to be sold, the condition of the estate and the amount of claims against it, the property on hand liable for payment of those claims, and any facts tending to show the necessity or advisability of the sale;

(2) set and appear at a hearing, with prior notice to interested parties, to obtain a court order specifying the terms of the sale;

(3) sell the property and report the sale to the court within 30 days; (4) set and appear at a second hearing for court approval of the sale; and

(5) convey the deed to the purchaser. n934

The above example amply demonstrates the attendant costs and delays of formal administration and the widespread frustration and criticism of probate in America. It is likely, therefore, that efforts to modify probate codes to be more efficient and cost-effective will continue, while still addressing the need for assurance of creditor payment.

COMPUTER-ASSISTED RESEARCH

LEXIS: administrat! or implement! w/15 personal representative!

§ 88.13(e) Ante-Mortem Probate.

Ante-mortem probate, or living probate, is a method of probating a will that permits the will to be validated during the testator's lifetime. Forms of ante-mortem probate date back to biblical times, and the European civil law tradition provides for an authenticated will prior to death. n935 Although it is a relatively recent development in United States wills law, Michigan had a form of ante-mortem probate statute as early as 1833, n936 and there was a resurgence of interest in the 1930s. n937

The primary purpose of allowing probate during the lifetime of the testator is to discourage frivolous will contests by disgruntled would-be heirs and devisees. Also, a form of living probate helps to ensure that the testator's intent is clear, and that the testator's wishes are honored, since if ambiguities arise, the testator is available to clarify the issues. In the absence of ante-mortem probate, testators traditionally use will substitutes (joint tenancy, gifts) or *in terrorem* clauses to avoid will contests and to make their wishes clear. n938 In the modern law, three basic forms of ante-mortem probate have been proposed, although only one, the contest model, has been adopted in any state. All three forms were originally proposed in the mid- to late-1970s.

The contest model was proposed by Professor Howard Fink. n939 This is an adversarial model. The testator submits the will to the court for a declaratory judgment. All would-be heirs, as well as the will beneficiaries, are given standing to contest the will. If the will is declared valid, it is filed with the court. In order to revoke the will, the testator must go back to court. A version of this model has been adopted in Arkansas, North Dakota, and Ohio. n940 One problem with this system is that the contents of the will become "public" knowledge, at least to the family. If the testator anticipates problems with family members, the discussion of the will during the testator's lifetime may lead to strained family relationships. Or, in the alternative, legitimate complaints about the will may not be raised because family members are reluctant to rock the boat. The other two methods avoid this problem, to a certain extent.

The conservatorship model was proposed by Professor John Langbein. n941 This is also a declaratory judgment procedure, except that the prospective heirs and beneficiaries are represented by a conservator who litigates their claims. The model is still somewhat adversarial and the will is still not private, but this model interposes a "screen" between the parties.

Finally, the administrative model takes this a step further and has an administrative law judge review the will *in camera*. The administrative system was proposed by Professors Gregory Alexander and Albert Pearson. n942 This is an *ex parte* proceeding in which the prospective heirs and beneficiaries are still represented, through a guardian ad litem. The guardian does not represent specific persons, but is more in the role of "a court-appointed special master." n943 The

contents of the will are not disclosed unless it is determined to be necessary. The right to contest a will approved by ante-mortem probate procedures would be sharply limited. The authors believe that the previously discussed two models are merely "accelerated will contests," and that this system would be more attractive to potential testators. n944

All three versions have some common problems. First, any sort of will contest (pre- or post-death) can be expensive. It is also more difficult for a testator to change a disposition, since revisions must go through the entire process again. Also, questions have been raised about notice and standing; exactly which heirs are we talking about, since a living person has no heirs, because one's heirs are not determined until the time of death. n945 The class of heirs may undergo substantial change between the time the will is executed and the time of death. Moreover, if actual notice to heirs is required, the search and mailing costs can be high. On the other hand, if interest in ante-mortem probate continues, and particularly if a Uniform Act is approved, n946 then the availability of living probate is likely to increase.

COMPUTER-ASSISTED RESEARCH

LEXIS: ante-mortem or living w/2 probat!

§ 88.13(f) Disclaimers.

A disclaimer, also known as a renunciation, is a refusal to accept a gift under a will, or to accept an inheritance in the case of intestacy. At common law, an heir could not renounce, on the theory that the transfer of property in intestacy occurred automatically, by operation of law. n947 Even at common law, a will beneficiary could renounce.

Today, most states have some sort of disclaimer statute. Usually the effect of the disclaimer is to treat the disclaiming beneficiary or heir as if he or she predeceased the decedent. n948 The effect of the disclaimer should be limited to the interest disclaimed, not to the estate as a whole. The right to disclaim is personal to the party disclaiming, and cannot be exercised on behalf of a deceased beneficiary. However, the Uniform Probate Code does permit the right to disclaim to be exercised by the personal representative of a deceased party. n949

The National Conference of Commissioners on Uniform State Laws approved three different disclaimer acts: the Uniform Disclaimer of Property Interests Act, n950 the Uniform Disclaimer of Transfers by Will, Intestacy or Appointment Act, n951 and the Uniform Disclaimer of Transfers Under Nontestamentary Instruments Act. n952 The 1990 version of the Uniform Probate Code incorporates the Uniform Disclaimer of Property Interests Act, n953 and the pre-1990 Code incorporated the Uniform Disclaimer of Transfers by Will, Intestacy or Appointment Act. n954 The new section is broader, in accord with the 1990 Code revisions making its provisions applicable to nonprobate transfers. n955 Disclaimers are particularly important today as a form of post-mortem estate or estate-tax planning. n956 A proper disclaimer under the Internal Revenue Code n957 can benefit the estate or the beneficiary, by taking advantage of the marital deduction for estate tax purposes, or to qualify a charitable remainder for deduction, or to reduce estate or income taxes for the renouncing beneficiary or heir.

In order to be a qualified disclaimer under the tax laws, the disclaimer must be in writing. It must be made within nine months after the creation of the interest, or within nine months after the disclaimant reaches age 21. The person disclaiming cannot accept the property disclaimed or any benefits of the property. Finally, the disclaimant cannot disclaim in favor of any particular charity or other individual. n958

§ 88.13(g) Non-claim Statutes.

Most states have a statute barring claims of creditors against an estate, unless the claim is filed within a certain period of time after notice is given to the creditor. n959 Usually the non-claim period is fairly short. For example, the Uniform Probate Code allows creditors four months to present their claims. n960 The short period is designed to facilitate settlement of the estate in a timely manner.

The notice should be given directly to known creditors, and notice by publication is sufficient for unascertainable creditors. n961

A non-claim statute should be distinguished from a statute of limitations. Non-claim statutes run separately from the non-claim provisions. For example, a claim might be timely under a non-claim statute, but be barred under an applicable statute of limitations, or conversely, a claim might be barred with regard to the estate under a non-claim statute, but still be allowable under the normal statute of limitations. The Uniform Probate Code provides a one-year statute of limitations for claims arising before the death of the decedent. n962 The statute starts to run at the decedent's death. The Code also tolls any other relevant statute of limitations for four months after the death of the decedent. n963

FOOTNOTES:

(n1)Footnote 807. *See* Jesse Dukeminier & Stanley M. Johanson, Wills, Trusts, and Estates 35 (4th ed. 1990) A five-state study showed a high of 34% of estates administered in Massachusetts. Stein & Fierstein, Demography of Probate Administration, *15 U. Balt. L. Rev. 54, 61 (1985).*

(n2)Footnote 808. *See* Eugene F. Scoles, Succession Without Administration: Past and Future, *48 Mo. L. Rev. 371, 372-73 (1983);* Basye, Dispensing with Administration, *44 Mich. L. Rev. 329, 331 (1945)* (both describing the civil law and common law probate traditions).

(n3)Footnote 809. *See* Eugene F. Scoles, Succession Without Administration: Past and Future, *48 Mo. L. Rev. 371, 372-73 (1983)* (discussing contrast between civil law and common law traditions); Jesse Dukeminier & Stanley M. Johanson, Wills, Trusts, and Estates 48 (4th ed. Little Brown 1990) (stating neither fiduciary nor lawyer generally needed in universal succession and that such a system can have enormous advantages). Heirs and beneficiaries can avoid personal liability under the civil law by renouncing their interest in the estate or by accepting with benefit of inventory. This latter method allows the heir to separate inherited assets from his own and thus avoid liability except to the extent of the inherited estate.

(n4)Footnote 810. Jesse Dukeminier & Stanley M. Johanson, Wills, Trusts, and Estates 48-49 (4th ed. Little Brown 1990) (describing the Roman civil law tradition, its desirability, and its limited adoption in California); see U.P.C. §§ 3-312 to 3-322, 8 U.L.A. 256-69 (laying out the U.P.C. provisions regarding succession without administration, a.k.a. universal succession); Cal. Prob. Code §§ 13500, 13540 & 13550 (providing that surviving spouse may reject administration for property passing to the spouse and take title subject to personal liability for decedent's debts chargeable against the property). The National Conference of Commissioners on Uniform State Laws approved a free-standing version of U.P.C. §§ 3-312 to 3-322 in 1983 titled Uniform Succession Without Administration Act., 8 U.L.A. 3 & 256.

(n5)Footnote 811. *See* Max Rheinstein, The Model Probate Code: A Critique, *48 Colum. L. Rev. 534, 539 (1948)* (stating administration by courts has been rule in states).

(n6)Footnote 812. Eugene F. Scoles & Edward C. Halbach, Jr., Decedents' Estates and Trusts 623 (3d ed., Little Brown 1981); John Ritchie, et al., Decedents' Estates and Trusts 1175-76 (6th ed. Foundation Press 1982).

(n7)Footnote 813. *See* Eugene F. Scoles, Succession Without Administration: Past and Future, *48 Mo. L. Rev. 371, 371 & 373 (Spring 1983)* (stating common laws concern for creditors and land passing directly to heirs and generally not reachable by creditors); John Ritchie, et al., Decedents' Estates and Trusts 1175 (6th ed., 1982) (noting real property at common law not reachable by unsecured creditors); see also Max Rheinstein, The Model Probate Code: A Critique, *48 Colum. L. Rev. 534, 547 (1948)* (stating protection of creditors "raison d'etre" for administration); L. Neville Brown, Winding Up Decedents' Estates in French and English Law, *33 Tul. L. Rev. 631, 633 & 642 (1959)* (office of personal representative reflects English concern for assuring payment of creditors).

(n8)Footnote 814. *See* Max Rheinstein, The Model Probate Code: A Critique, *48 Colum. L. Rev. 534, 547 (1948)* (stating protection of creditors "raison d'etre" for administration); L. Neville Brown, Winding Up Decedents' Estates in French and English Law, *33 Tul. L. Rev. 631, 633 & 642 (1959)* (office of personal representative reflects English concern for assuring payment of creditors).

(n9)Footnote 815. *See* L. Neville Brown, Winding Up Decedents' Estates in French and English Law, *33 Tul. L. Rev. 631, 633 & 641-42 (1959)* (stating heirs or legatees sued severally for proportion of decedent's debts and discussing methods by which creditors obtain satisfaction in French civil law).

(n10)Footnote 816. Cf. John H. Martin, Justice and Efficiency Under a Model of Estate Settlement, *66 Va. L. Rev. 727, 758-60 (1980)* (discussing settlement without administration as bargaining); *Id. at 771-72* (noting Louisiana civil law system of acceptance without administration facilitates bargaining as means of settlement).

(n11)Footnote 817. *See* Eugene F. Scoles, Succession Without Administration: Past and Future, *48 Mo. L. Rev. 371, 373 (1983);* L. Neville Brown, Winding Up Decedents' Estates in French and English Law, *33 Tul. L. Rev. 631, 631 (1959).*

(n12)Footnote 818. Eugene F. Scoles, Succession Without Administration: Past and Future, *48 Mo. L. Rev. 371, 373 (1983).*

(n13)Footnote 819. *See, e.g.*, Jesse Dukeminier, Jr. & Stanley M. Johanson, Family Wealth Transactions: Wills, Trusts, Future Interests, and Estate Planning 89 (1972) (using the terminology "informal administration by family settlement"). Consider that the UPC incorporates a provision for "succession without administration" that parallels in scope and procedure "informal administration by family settlement" (emphasis added in both). Compare U.P.C. § 3-312 to 3-322, 8 U.L.A. 256-69 with Jesse Dukeminier, Jr. & Stanley M. Johanson, Family Wealth Transactions: Wills, Trusts, Future Interests, and Estate Planning 89 (1972).

(n14)Footnote 820. *See* Thomas L. Waterbury, Materials on Trusts & Estates (American Casebook Series) 475 (1986) (citing Eustace W. Tomlinson, Administration of Decedents' Estates 35 § 1.10 (2d ed. 1978) (asserting administration is personal representative's activities). But see Jesse Dukeminier, Jr. & Stanley M. Johanson, Family Wealth Transactions: Wills, Trusts, Future Interests, and Estate Planning 89 (1972) (asserting inappropriate to say no administration in family settlement situation); Basye, Dispensing with Administration, *44 Mich. L. Rev. 329, 331 (1945)* (noting activities of heirs in universal succession might be regarded as administration). Indeed, the terms "universal succession" and "succession without administration" would have no particular meaning or significance if administration referred to the activities beyond those of the personal representative. It is the personal representative that gives meaning to the historical distinctions, even if waning, between the civil and common law systems. The personal representative represents the essence of the common law concept of administration.

(n15)Footnote 821. The fifteen states are, with date of adoption: Alaska (1972), Arizona (1973), Colorado (1973), Florida (1974), Hawaii (1976), Idaho (1971), Maine (1979), Michigan (1978), Minnesota (1974), Montana (1974), Nebraska (1974), New Mexico (1975), North Dakota (1973), South Carolina (1986), and Utah (1975). 8 U.L.A. 1 (Supp. 1993); see also Lawrence H. Averill, An Eclectic History and Analysis of the 1990 Uniform Probate Code, *55 Alb. L. Rev. 891, 900 (1992).*

(n16)Footnote 822. *See* Lawrence H. Averill, An Eclectic History and Analysis of the 1990 Uniform Probate Code, *55 Alb. L. Rev. 891, 900 (1992)* (noting nearly all other states have incorporated U.P.C. piecemeal); see also Wellman, Recent Developments in the Struggle for Probate Reform, *79 Mich. L. Rev. 501, 501-02 (1981).*

(n17)Footnote 823. U.P.C. § 1-201(36), 8 U.L.A. 10. A "general personal representative" excludes special administrator. Id. For convenience and clarity, the term "personal representative" from the U.P.C. will be used to refer to both administrators and executors in the text. Any distinctions between the two will be noted separately, as necessary.

(n18)Footnote 824. *See* Jesse Dukeminier & Stanley M. Johanson, Wills, Trusts, and Estates 32-33 (4th ed., Little Brown 1990).

(n19)Footnote 825. The domiciliary administrator is sometimes referred to as the general, domestic, or primary administrator. A foreign administrator is "one appointed or qualified under the laws of a foreign state or country, where the decedent was domiciled." Black's Law Dictionary 43 (5th ed. 1979). Black's lists 13 different designations for administrations of estates. Id. at 41-42.

(n20)Footnote 826. A personal representative generally cannot maintain derivative actions, that is, those of the decedent, outside the jurisdiction of her appointment. She can, however, maintain her own actions as personal representative -- for example, a suit to secure damages for misappropriated estate property.

(n21)Footnote 827. Basye, Dispensing with Administration, *44 Mich. L. Rev. 329, 331 (1945)* (asserting personal representative unknown to civil law tradition); see also Jesse Dukeminier & Stanley M. Johanson, Wills, Trusts, and Estates 48 (4th ed. 1990) (stating no personal representative in civil law universal succession).

(n22)Footnote 828. Eugene F. Scoles, Succession Without Administration: Past and Future, *48 Mo. L. Rev. 371, 372-73 (1983).*

(n23)Footnote 829. Thomas L. Waterbury, Materials on Trusts & Estates (American Casebook Series) 548 (1986).

(n24)Footnote 830. U.P.C. § 3-203(f)(1), 8 U.L.A. 241. However, the U.P.C. also provides that a person 18 or over, qualified under the priority of appointment section, except for the age requirement, may nominate a qualified person to act as personal representative. U.P.C. § 3-203(c) (1991), 8 U.L.A. 240.

(n25)Footnote 831. Thomas L. Waterbury, Materials on Trusts & Estates (American Casebook Series) 548 (1986).

(n26)Footnote 832. U.P.C. § 3-203(f)(2), 8 U.L.A. 241.

(n27)Footnote 833. 33 C.J.S. Executors & Administrators § 28 at 911.

(n28)Footnote 834. Eugene F. Scoles & Edward C. Halbach, Jr., Decedents' Estates and Trusts 577 (3d ed. Little Brown 1981); Thomas L. Waterbury, Materials on Trusts & Estates (American Casebook Series) 548 (1986).

(n29)Footnote 835. Persons named in wills are especially favored and disqualification provisions are narrowly construed. Thomas L. Waterbury, Materials on Trusts & Estates (American Casebook Series) 548 (1986) (noting qualifications for executors may be less stringent than for administrators); Eugene F. Scoles & Edward C. Halbach, Jr., Decedents' Estates and Trusts 577 (3d ed. Little Brown 1981); see *In re Svacina's Estate, 1 N.W.2d 780, 782-83 (Wis. 1942)* (construing statutory provision regarding qualification of named executor).

(n30)Footnote 836. *See also* U.P.C. § 3-203, 8 U.L.A. 239-40 (providing prioritized list for persons seeking appointment as personal representative). Interest in the estate and relationship to the decedent are the primary considerations in establishing the list. Eugene F. Scoles & Edward C. Halbach, Jr., Decedents' Estates and Trusts 577 (3d ed. Little Brown 1981). Gender preference in the probate court's selection of an administrator is constitutionally impermissible as a violation of the equal protection clause of the *Fourteenth Amendment. Reed v. Reed, 404 U.S. 71, 77 (1971)* (striking down an Idaho statute affording a preference to males in appointment of administrators).

(n31)Footnote 837. Cf. U.P.C. § 3-203(a)(2)-(6), 8 U.L.A. 239-40 (providing prioritized list for persons seeking appointment as personal representative).

(n32)Footnote 838. 33 C.J.S. Executors & Administrators § 34 at 924 & § 46 at 946 (1942 & Supp. 1993). The probate court has significant discretion in choosing between applicants with the same priority. 33 C.J.S. Executors & Administrators § 36 at 932-34 & § 41 at 938-39 (1942 & Supp. 1993).

(n33)Footnote 839. 33 C.J.S. Executors & Administrators § 29 at 917 (1942 & Supp. 1993) (concerning executors); 31 Am. Jur. 2d Executors & Administrators § 225 (1989 & Supp. April 1993); cf. 33 C.J.S. Executors & Administrators § 47 at 953 (1942 & Supp. 1993) (concerning administrators). A person who has priority for appointment as administrator may waive the precedent right. Id. at § 47.

(n34)Footnote 840. *See* U.P.C. § 3-712, 8 U.L.A. 329 (providing that personal representative is liable for breach of fiduciary duty to same extent as trustee of express trust).

(n35)Footnote 841. *See* Jesse Dukeminier, Jr. & Stanley M. Johanson, Family Wealth Transactions: Wills, Trusts, Future Interests, and Estate Planning 80 (1972); Thomas L. Waterbury, Materials on Trusts & Estates (American Casebook Series) 475 (1986).

(n36)Footnote 842. Thomas L. Waterbury, Materials on Trusts & Estates (American Casebook Series) 546 (1986).

(n37)Footnote 843. Jesse Dukeminier, Jr. & Stanley M. Johanson, Family Wealth Transactions: Wills, Trusts, Future Interests, and Estate Planning 81-82 (1972).

(n38)Footnote 844. Eustace W. Tomlinson, Administration of Decedents' Estates 7 (1972).

(n39)Footnote 845. Jesse Dukeminier, Jr. & Stanley M. Johanson, Family Wealth Transactions: Wills, Trusts, Future Interests, and Estate Planning 82 (1972).

(n40)Footnote 846. *See* Thomas L. Waterbury, Materials on Trusts & Estates (American Casebook Series) 518 (1986); see also U.P.C. § 3-703, 8 U.L.A. 317 (providing for personal representative's standing to sue). Heirs are often unable to collect debts owed the estate because debtors fear additional liability to a personal representative appointed later. In addition, heirs often have no standing to sue to collect debts owed the estate, necessitating the appointment of a personal representative. This occurs because the absence of creditors entitled to the assets is often considered determinable only in a court proceeding and because the heir lacks title interest in the property. Eugene F. Scoles, Succession Without Administration: Past and Future, *48 Mo. L. Rev. 371, 377 (1983). See also* John Ritchie et al., Decedents' Estates and Trusts 1176 (6th ed. Foundation Press 1982); John T. Gaubatz et al., Estates and Trusts: Cases, Problems and Materials 601 (1989).

Giuliani v. Guiler, 951 S.W.2d 318 (Ky. 1997) (the personal representative had sole authority to bring the action, and the damages belonged to the estate of the deceased, to be distributed in accordance with the last will and testament, or, if none, in accordance with the laws of descent and distribution).

(n41)Footnote 847. Jesse Dukeminier, Jr. & Stanley M. Johanson, Family Wealth Transactions: Wills, Trusts, Future Interests, and Estate Planning 82 (1972).

(n42)Footnote 848. Eugene F. Scoles & Edward C. Halbach, Jr., Decedents' Estates and Trusts 591 (3d ed. Little Brown 1981).

(n43)Footnote 849. Thomas L. Waterbury, Materials on Trusts & Estates (American Casebook Series) 475 (1986).

(n44)Footnote 850. *See* U.P.C. § 3-101, 8 U.L.A. 221. *Hutchinson v. Spink, 126 F.3d 895 (7th Cir. 1997)* (court order granted to a special administrator of the decedent's estate the same powers that a personal representative would have).

(n45)Footnote 851. *See* J. Brooke Spotswood, Laying Claim to Decedent's Unclaimed Property, 7, No. 1, Prob. & Prop. 46, 46 (Jan./Feb. 1993).

(n46)Footnote 852. *Tulsa Prof. Servs. v. Pope, 485 U.S. 478 (1988)* (holding actual notice required for known or

readily ascertainable creditors). *See also* the discussion of claim statutes, § 88.13(f) infra.

(n47)Footnote 853. Thomas L. Waterbury, Materials on Trusts & Estates (American Casebook Series) 447 & 473 (1986); A. James Casner & Jeffrey N. Pennell, Estate Planning 138-41 (5th ed. 1988 & Supp. 1992).

(n48)Footnote 854. *See* Thomas L. Waterbury, Materials on Trusts & Estates (American Casebook Series) 473-74 & 528-29 (1986).

(n49)Footnote 855. *Id. at 510-15.*

(n50)Footnote 856. Id. at 447 & 528; A. James Casner & Jeffrey N. Pennell, Estate Planning 139 (5th ed. 1988 & Supp. 1992).

(n51)Footnote 857. Thomas L. Waterbury, Materials on Trusts & Estates (American Casebook Series) 521 (1986); even an independent executor is not entitled to forego his duty to account and keep records. 31 Am. Jur. 2d **Executors & Administrators** § 32.

(n52)Footnote 858. *See, e.g.*, Thomas L. Waterbury, Materials on Trusts & Estates (American Casebook Series) 521 (1986); see Tex. Prob. Code Ann. § 145 (requiring independent administrators to submit inventory, appraisal, and list of claims).

(n53)Footnote 859. Thomas L. Waterbury, Materials on Trusts & Estates (American Casebook Series) 521 (1986); see, e.g., Tex. Prob. Code Ann. § 151 (providing for closing of estate by affidavit).

(n54)Footnote 860. Thomas L. Waterbury, Materials on Trusts & Estates (American Casebook Series) 523-24 (1986).

(n55)Footnote 861. Id. As to realty, the decree in some jurisdictions directly assigns the property to the distributee and may be recorded as record title. Under the U.P.C., the personal representative conveys by deed according to the order.

(n56)Footnote 862. *See, e.g.*, U.P.C. § 3-608, 8 U.L.A. 304.

(n57)Footnote 863. Eugene F. Scoles & Edward C. Halbach, Jr., Decedents' Estates and Trusts 591 (3d ed. Little Brown 1981).

(n58)Footnote 864. Id.; Jesse Dukeminier, Jr. & Stanley M. Johanson, Family Wealth Transactions: Wills, Trusts, Future Interests, and Estate Planning 82 (1972); Thomas L. Waterbury, Materials on Trusts & Estates (American Casebook Series) 535 (1986).

(n59)Footnote 865. Jesse Dukeminier, Jr. & Stanley M. Johanson, Family Wealth Transactions: Wills, Trusts, Future Interests, and Estate Planning 82 (1972); Thomas L. Waterbury, Materials on Trusts & Estates (American Casebook Series) 535 (1986).

(n60)Footnote 866. However, investment may be required to the extent necessary to preserve the value of the estate assets. EUGENE F. SCOLES & EDWARD C. HALBACH, JR., DECEDENTS' ESTATES AND TRUSTS 591-92 (3d ed. Little Brown 1981).

(n61)Footnote 867. Cf. *Wood v. Honeyman, 169 P.2d 131 (Or. 1946)* (holding cannot relieve fiduciary of duty to account even if no duty to keep formal records).

(n62)Footnote 868. Stephen R. Leimberg & Charles K. Plotnick, A Sample Letter to Clients on Their Duties as Executors and Trustees, 32, No. 6, Prac. Law. 23, 24 (Sept. 1986).

(n63)Footnote 869. Eugene F. Scoles & Edward C. Halbach, Jr., Decedents' Estates and Trusts 591, 593-94 (3d ed. Little Brown 1981) (noting the inflexibility of the duty of loyalty). *See also* Cooter & Freedman, The Fiduciary Relationship: Its Economic Character and Legal Consequences, *66 N.Y. L. Rev. 1045 (1991); Matter of Estate of Rothko, 401 N.Y.S.2d 449 (1977).*

(n64)Footnote 870. Thomas L. Waterbury, Materials on Trusts & Estates (American Casebook Series) 542 (1986).

(n65)Footnote 871. Id., see, e.g., *McCarter v. McGregor, 64 A.2d 449 (N.J. 1949).*

(n66)Footnote 872. *See* Dobris, Equitable Adjustments in Postmortem Income Tax Planning: An Unremitting Diet of Worms, *65 Iowa L. Rev. 103 (1979).*

(n67)Footnote 873. Eugene F. Scoles & Edward C. Halbach, Jr., Decedents' Estates and Trusts 591 (3d ed. Little Brown 1981); Thomas L. Waterbury, Materials on Trusts & Estates (American Casebook Series) 535 (1986).

(n68)Footnote 874. Thomas L. Waterbury, Materials on Trusts & Estates (American Casebook Series) 532-33 (1986).

(n69)Footnote 875. Eugene F. Scoles & Edward C. Halbach, Jr., Decedents' Estates and Trusts 640 (3d ed. Little Brown 1981).

(n70)Footnote 876. *See* U.P.C. §§ 3-707 (providing for employment of appraisers) & 3-715(21) (providing for employment of attorneys, auditors, investment advisors, and other agents) 8 U.L.A. 325 & 335-36.

(n71)Footnote 877. *See* Thomas L. Waterbury, Materials on Trusts & Estates (American Casebook Series) 532 (1986).

(n72)Footnote 878. Eugene F. Scoles & Edward C. Halbach, JR., Decedents' Estates and Trusts 640-41 (3d ed., Little Brown 1981); Thomas L. Waterbury, Materials on Trusts & Estates (American Casebook Series) 542-43 (1986).

(n73)Footnote 879. Eugene F. Scoles & Edward C. Halbach, Jr., Decedents' Estates and Trusts 640-41 (3d ed. Little Brown 1981); see Thomas L. Waterbury, Materials on Trusts & Estates (American Casebook Series) 542-43 (1986).

(n74)Footnote 880. Eugene F. Scoles & Edward C. Halbach, Jr., Decedents' Estates and Trusts 591 (3d ed., Little Brown 1981).

(n75)Footnote 881. Jesse Dukeminier, Jr. & Stanley M. Johanson, Family Wealth Transactions: Wills, Trusts, Future Interests, and Estate Planning 82 (1972). The UPC provides for broad powers for supervised administration, except for distributions, which must be approved by the court, and any restrictions endorsed on the letters of the personal representative by the court. Unif. Prob. Code § 3-504, 8 U.L.A. 295. *Schmidt v. Schmidt, 560 N.W.2d 886 (N.D. 1997)* (sets forth the powers of personal representatives generally in North Dakota).

(n76)Footnote 882. Jesse Dukeminier, Jr. & Stanley M. Johanson, Family Wealth Transactions: Wills, Trusts, Future Interests, and Estate Planning 82 (1972).

(n77)Footnote 883. *See* U.P.C. §§ 3-307, 3-704 and 3-711 (concerning power of unsupervised personal representative); § 3-607 (providing for order restraining personal representative); § 3-712 (providing for liability of personal representative for breach of duties), 8 U.L.A. 253, 321, 328, 303 & 329.

(n78)Footnote 884. Thomas L. Waterbury, Materials on Trusts & Estates (American Casebook Series) 544-545 (1986).

(n79)Footnote 885. Id. at 546. The full panoply of powers may be found at Unif. Prob. Code § 3-715(1)-(27), 8 U.L.A. 333.

(n80)Footnote 886. U.P.C. § 3-101, 8 U.L.A. 221.

(n81)Footnote 887. U.P.C. §§ 3-711 & 3-712, 8 U.L.A. 328 & 329.

(n82)Footnote 888. U.P.C. §§ 3-307, 3-704 & 3-711, 8 U.L.A. 253, 321 & 328.

(n83)Footnote 889. Thomas L. Waterbury, Materials on Trusts & Estates (American Casebook Series) 546 (1986); Jesse Dukeminier, Jr. & Stanley M. Johanson, Family Wealth Transactions: Wills, Trusts, Future Interests, and Estate Planning 82 (1972).

(n84)Footnote 890. Thomas L. Waterbury, Materials on Trusts & Estates (American Casebook Series) 547 (1986).

(n85)Footnote 891. Eugene F. Scoles & Edward C. Halbach, Jr., Decedents' Estates and Trusts 629-631 (3d ed., Little Brown 1981).

(n86)Footnote 892. 33 C.J.S. Executors & Administrators § 876 at 1046 (1942 & Supp. 1993) (stating compensation may be denied for misconduct).

(n87)Footnote 893. Thomas L. Waterbury, Materials on Trusts & Estates (American Casebook Series) 549 (1986). The right to resign is generally not absolute, but discretionary with the court. The personal representative may resign under the U.P.C. if a replacement is found and assets are delivered to the replacement. An accounting is required. U.P.C. § 3-610, 8 U.L.A. 306.

(n88)Footnote 894. 33 C.J.S. Executors & Administrators § 90 at 1031-32 (1942 & Supp. 1993); 31 Am. Jur. 2d Executors & Administrators § 277 (1989 & Supp. April 1993). *Schenebeck v. Schenebeck, 947 S.W.2d 367 (Ark. 1997)* (removal of personal representative allowed when estate is mismanaged or where a duty remains unperformed).

(n89)Footnote 895. Thomas L. Waterbury, Materials on Trusts & Estates (American Casebook Series) 549 (1986); see also U.P.C. § 3-611, 8 U.L.A. 306.

(n90)Footnote 896. 33 C.J.S. Executors & Administrators § 84 at 1016-17 (1942 & Supp. 1993); 31 Am. Jur. 2d Executors & Administrators § 283 (1989 & Supp. April 1993).

(n91)Footnote 897. Thomas L. Waterbury, Materials on Trusts & Estates (American Casebook Series) 549 (1986). The successor personal representative is often in a more precarious position than the original. In addition to the normal duties, the successor must inquire into the previous administrator's performance and compel redress for any breach of duty. A failure to seek redress or a negligent failure to detect a breach by the prior personal representative may lead to liability for the successor. Thus, a personal representative who replaces another should demand an accounting. Eugene F. Scoles & Edward C. Halbach, Jr., Decedents' Estates and Trusts 641 (3d ed., Little Brown 1981). Under the U.P.C., the personal representative of the deceased representative becomes a temporary administrator for the estate the deceased was administering and has a duty to preserve and protect, account for, and deliver that estate to the successor representative. U.P.C. § 3-609, 8 U.L.A. 305.

(n92)Footnote 898. U.P.C. § 3-719, 8 U.L.A. 341. The personal representative is, also, entitled to reimbursement for litigation expenses incurred on behalf of the estate. U.P.C. § 3-720, 8 U.L.A. 343.

(n93)Footnote 899. Thomas L. Waterbury, Materials on Trusts & Estates (American Casebook Series) 548 (1986); see also A. James Casner & Jeffrey N. Pennell, Estate Planning 147 (5th ed. 1988 & Supp. 1992). The U.P.C. provides that the personal representative pays him- or herself, subject to review by the court on petition of an interested party. U.P.C. § 3-719 & 3-721, 8 U.L.A. 341 & 349.

(n94)Footnote 900. A. James Casner & Jeffrey N. Pennell, Estate Planning 151 & n.27 (5th ed. 1988 & Supp. 1992).

(n95)Footnote 901. Jesse Dukeminier & Stanley M. Johanson, Wills, Trusts, and Estates 34 (4th ed., Little Brown 1990); *see also* A. James Casner & Jeffrey N. Pennell, Estate Planning 85-90 of Supp. (5th ed. 1988 & Supp. 1992).

(n96)Footnote 902. *See* A. James Casner & Jeffrey N. Pennell, Estate Planning 147-51 & n.26 (5th ed. 1988 & Supp. 1992) (discussing issues raised by waiver of fee).

(n97)Footnote 903. *United States v. Merriam, 263 U.S. 179 (1923); see also* A. James Casner & Jeffrey N. Pennell, Estate Planning 151 & n.28 (5th ed. 1988 & Supp. 1992).

(n98)Footnote 904. *See* 95 C.J.S. *Wills* § 311 at 112-13 & 116-17 (1957 & Supp. 1993).

(n99)Footnote 905. *See* 95 C.J.S. *Wills* § 95 at 116-17 (1957 & Supp. 1993).

(n100)Footnote 906. *See* 95 C.J.S. *Wills* § 95 at 117 (1957 & Supp. 1993).

(n101)Footnote 907. John H. Martin, *Justice and Efficiency Under a Model of Estate Settlement, 66 Va. L. Rev. 727, 731-32 (1980).*

(n102)Footnote 908. U.P.C. § 3-301, 8 U.L.A. 245 (informal probate by registrar).

(n103)Footnote 909. *See* Tex. Prob. Code Ann. § 89; *cf.* Unif. Prob. Code § 3-901, 8 U.L.A. 379. A muniment of title simply means documentary evidence of title. Therefore, a certified copy of the will and the order admitting it to probate will serve as record title when filed in the land records of the situs county. A statutory heirship proceeding has the same effect in intestate estates and a certified copy of the court decree serves as a muniment of title. *See* Tex. Prob. Code Ann. §§ 48 & 55.

(n104)Footnote 910. Jesse Dukeminier & Stanley M. Johanson, Wills, Trusts, and Estates 34 & chs. 4 & 7 (4th ed. Little Brown 1990). *See infra*, § 88.15, Will Substitutes.

(n105)Footnote 911. 31 Am. Jur. 2d *Executors & Administrators* § 52 (1989 & Supp. April 1993).

(n106)Footnote 912. Eugene F. Scoles, *Succession Without Administration: Past and Future, 48 Mo. L. Rev. 371, 374-379 (1983);* see also *Robbins v. Simmons' Estate, 252 S.W.2d 970, 971-72 (Tex. Civ. App. 1952).*

(n107)Footnote 913. Eugene F. Scoles, *Succession Without Administration: Past and Future, 48 Mo. L. Rev. 371, 382 (1983).* See, e.g., Ariz. Rev. Stat. § 14-3971B; Cal. Prob. Code §§ 13100-13101; Colo. Rev. Stat. § 15-12-1201; Utah Code Ann. § 75-3-1201.

(n108)Footnote 914. *See* Jesse Dukeminier, Jr. & Stanley M. Johanson, Family Wealth Transactions: Wills, Trusts, Future Interests, and Estate Planning 90 (1972).

(n109)Footnote 915. *See* Eugene F. Scoles, *Succession Without Administration: Past and Future, 48 Mo. L. Rev. 371, 382-83 (1983);* Jesse Dukeminier, Jr. & Stanley M. Johanson, Family Wealth Transactions: Wills, Trusts, Future Interests, and Estate Planning 89-90 (1972); *see also* N. Y. Surr. Ct. Proc. Act §§ 1305-1306 (regarding small bank accounts); N. Y. Surr. Ct. Proc. Act §§ 1310 (regarding debts of $10,000 or less); Mich. Stat. Ann. § 9.1938 (regarding automobile certificate of title); Iowa Code Ann. § 321.47 (regarding automobile certificate of title).

(n110)Footnote 916. Thomas L. Waterbury, Materials on Trusts & Estates (American Casebook Series) 531 (1986).

(n111)Footnote 917. *See* Jesse Dukeminier, Jr. & Stanley M. Johanson, Family Wealth Transactions: Wills, Trusts, Future Interests, and Estate Planning 90 (1972); *see also* U.P.C. § 3-1201, 8 U.L.A. 413.

(n112)Footnote 918. Jesse Dukeminier, Jr. & Stanley M. Johanson, Family Wealth Transactions: Wills, Trusts, Future Interests, and Estate Planning 90 (1972).

(n113)Footnote 919. *See* John Ritchie, et al., Decedents' Estates and Trusts 1175-76 (6th ed. Foundation Press 1982); *see also* John T. Gaubatz, et al., Estates and Trusts: Cases, Problems and Materials 600 (1989) (discussing relationship between administration and clear title).

(n114)Footnote 920. 33 C.J.S. *Executors & Administrators* § 66 at 980 (1942 & Supp. 1993).

(n115)Footnote 921. Jesse Dukeminier, Jr. & Stanley M. Johanson, Family Wealth Transactions: Wills, Trusts, Future Interests, and Estate Planning 81 (1972).

(n116)Footnote 922. 33 C.J.S. *Executors & Administrators* § 66 at 980 (1942 & Supp. 1993).

(n117)Footnote 923. *See* Jesse Dukeminier, Jr. & Stanley M. Johanson, Family Wealth Transactions: Wills, Trusts, Future Interests, and Estate Planning 81 (1972); *see also* Tex. Prob. Code Ann. § 195(b) (exempting corporate fiduciary from bond requirement).

(n118)Footnote 924. U.P.C. § 3-603, 8 U.L.A. 299. An interested party may request bond in a formal administration, but the court has discretion to deny the request. *See id*.

(n119)Footnote 925. See also U.P.C. §§ 3-307 & 3-704, 8 U.L.A. 253 & 321.

(n120)Footnote 926. See U.P.C. §§ 3-307 & 3-704, 8 U.L.A. 253 & 321; Thomas L. Waterbury, Materials on Trusts & Estates (American Casebook Series) 477 (1986) (discussing the Texas and Washington systems); John H. Martin, *Justice and Efficiency Under a Model of Estate Settlement, 66 Va. L. Rev. 727, 767-71 (1980)* (discussing the Texas and Washington systems).

(n121)Footnote 927. Tex. Prob. Code Ann. § 145.

(n122)Footnote 928. John H. Martin, *Justice and Efficiency Under a Model of Estate Settlement, 66 Va. L. Rev. 727, 761-62 (1980).*

(n123)Footnote 929. *See, e.g.*, U.P.C. § 3-711, 8 U.L.A. 328.

(n124)Footnote 930. John H. Martin, *Justice and Efficiency Under a Model of Estate Settlement, 66 Va. L. Rev. 727, 761-62 (1980).*

(n125)Footnote 931. *See* U.P.C. §§ 3-307 & 3-704, 8 U.L.A. 253 & 321; John H. Martin, *Justice and Efficiency Under a Model of Estate Settlement, 66 Va. L. Rev. 727, 767-71 (1980)* (noting lack of adequate procedures for discretionary judicial involvement in Texas and Washington).

(n126)Footnote 932. Jesse Dukeminier, Jr. & Stanley M. Johanson, Family Wealth Transactions: Wills, Trusts, Future Interests, and Estate Planning 82 (1972).

(n127)Footnote 933. Tex. Prob. Code. Ann. §§ 331, 340-346, 348-357. A personal representative who does not follow the required procedures is liable for use of the estate, damages resulting from neglect of his duty, and may be removed from his office. Tex. Prob. Code. Ann. § 358.

(n128)Footnote 934. This procedure requires four trips to the courthouse and six documents!

(n129)Footnote 935. *See generally* Aloysius A. Leopold & Gerry W. Beyer, *Ante-Mortem Probate: A Viable Alternative, 43 Ark. L. Rev. 131, 148-152 (1990).*

(n130)Footnote 936. 1883 Mich. Pub. Stat. 17, found in Howard Fink, *Ante-Mortem Probate Revisited: Can An Idea Have Life After Death?, 37 Ohio L.J. 264, 268 n.8 (1976).*

(n131)Footnote 937. *See, e.g.*, David F. Gavers, Ante-Mortem Probate: An Essay in Preventive Law, 1 Univ. Chic. L. Rev. 440 (1934).

(n132)Footnote 938. *See infra* §§ 88.15 (will substitutes), 88.09(b) (*In Terrorem clauses*). *See also Young v. Snell, 948 P.2d 1291 (Wash. 1997)* (probate law incorporates applicable statutes of limitations).

(n133)Footnote 939. Howard Fink, *Ante-Mortem Probate Revisited: Can An Idea Have Life After Death?, 37 Ohio St. L.J. 264 (1976).*

(n134)Footnote 940. Ark. Code Ann. §§ 28-40-201 to 203; Ohio Rev. Code Ann. §§ 2107.081-.085; N.D. Cent. Code §§ 30.1-08.1-01 to -04.

(n135)Footnote 941. John Langbein, *Living Probate: The Conservatorship Model, 77 Mich. L. Rev. 63 (1978).*

(n136)Footnote 942. Gregory S. Alexander & Albert M. Pearson, *Alternative models of Ante-Mortem Probate and Procedural Due Process Limitations on Succession, 78 Mich. L. Rev. 89 (1979).*

(n137)Footnote 943. *Id. at 113.*

(n138)Footnote 944. *Id. at 112*, quoting Langbein, *Living Probate: The Conservatorship Model, 77 Mich. L. Rev. 63, 74 (1978).*

(n139)Footnote 945. *See* Thomas F. Bergin & Paul G. Haskell, Preface to Estates in Land and Future Interests 230-232 (2d ed. Foundation Press 1984); Mary Louise Fellows, *The Case Against Living Probate, 78 Mich. L. Rev. 1066 (1980).*

(n140)Footnote 946. *See* the Uniform Act draft in the Appendix to Aloysius A. Leopold & Gerry W. Beyer, *Ante-Mortem Probate: A Viable Alternative, 43 Ark. L. Rev. 131, 197-199 (1990).*

(n141)Footnote 947. *See generally*, John E. Howe, *Renunciation by the Heir, Devisee or Legatee*, 42 Ky. L. Rev. 605 (1953); Christian Marius, Lauritzen, II, Only God Can Make an Heir, *48 Nw. U. L. Rev. 568 (1953).*

(n142)Footnote 948. *See generally*, William M. McGovern, Jr., Sheldon F. Kurtz & Jan Ellen Rein, Wills, Trusts and Estates § 2.5 (1988); Adam J. Hirsch, *The Problem of the Insolvent Heir, 74 Cornell L. Rev. 587 (1989). See, e.g.*, U.P.C. § 2-801(d) (1990 version), 8 U.L.A. 158 (1993 Supp.).

(n143)Footnote 949. *Id.*, § 2-801(a).

(n144)Footnote 950. 8A U.L.A. 85-91 (1983). The act was approved in 1978.

(n145)Footnote 951. 8A U.L.A. 93-109 (1983). The act was approved in 1978.

(n146)Footnote 952. 8A U.L.A. 111-119 (1983). This act was approved in 1978.

(n147)Footnote 953. U.P.C. § 2-801 (1990 version), 8 U.L.A. 157-159 (1993 Supp.).

(n148)Footnote 954. U.P.C. § 2-801 (pre-1990 version), 8 U.L.A. 160-170 (1983).

(n149)Footnote 955. *See generally*, S. Alan Medlin, *An Examination of Disclaimers Under UPC Section 2-801, 55 Alb. L. Rev. 1233 (1992).*

(n150)Footnote 956. *See generally*, John H. Martin, *Perspectives on Federal Disclaimer Legislation, 46 U. Chi. L. Rev. 316 (1979);* John J. Roche & Christopher T. Carlson, *The Dynamic Disclaimer, 14 New Eng. L. Rev. 399 (1979).* For disclaimers of future interests, *see* George M. Schain, *The Effective Disclaimer, 34 Cath. U. L. Rev. 19 (1984);* Lawrence Newman & Albert Kalter, *Disclaimers of Future Interests: Continuing Problems and Suggested Solutions, 49 Notre Dame L. Rev. 827 (1974).*

(n151)Footnote 957. I.R.C. § 2518 (1986).

(n152)Footnote 958. *Id. See also* William M. McGovern, Jr., Sheldon F. Kurtz & Jan Ellen Rein, Wills, Trusts and Estates § 16.16 (1988).

(n153)Footnote 959. *See generally*, William M. McGovern, Jr., Sheldon F. Kurtz & Jan Ellen Rein, Wills, Trusts and Estates § 14.9 (1988); Thomas Waterbury, *Notice to Decedent's Creditors, 73 Minn. L. Rev. 763 (1989);* Debra Falender, *Notice to Creditors in Estate Proceedings, 63 N.C. L. Rev. 659 (1985). But see, e.g.*, Tex. Prob. Code Ann. §§ 298, 327 (claims are not barred, but are paid later).

(n154)Footnote 960. U.P.C. § 3-801(a) (1989 revision), 8 U.L.A. 243 (1993 Supp.).

(n155)Footnote 961. *See Tulsa Professional Collection Servs. v. Pope, 485 U.S. 478 (1988).*

(n156)Footnote 962. U.P.C. § 3-803(a)(1) (1989 revision), 8 U.L.A. 246 (1993 Supp.).

(n157)Footnote 963. U.P.C. § 3-802 (1989 revision), 8 U.L.A. 244 (1993 Supp.).

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CHAPTER 88 TESTAMENTARY TRANSFERS OF REAL PROPERTY

10-88 Thompson on Real Property, Thomas Editions § 88.14

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§ 88.14 Health Care Planning Devices.

[Go To Supp]

This section will discuss living will statutes, durable powers of attorney, and the disposition of body parts after death. There are also sample living will and durable health care power of attorney forms, as well as key provisions of the Uniform Anatomical Gifts Act, the Uniform Durable Powers of Attorney Act, and the Uniform Rights of the Terminally Ill Act in an appendix to this section.

§ 88.14(a) Living Wills.

The rather inaptly named "living will" is of course not a will at all, but a directive to health care providers about medical treatment during a terminal illness. These documents are to be executed when one is competent and able to make decisions, and usually provide that extraordinary measures to prolong life not be taken.

Most states have adopted some form of living will statute since California adopted the first such act in 1977. n964 States without living will statutes have sometimes allowed the use of a living will by court decision. n965 The Conference of Commissioners on Uniform State Laws has proposed the Uniform Rights of the Terminally Ill Act. n966 The perceived necessity for living wills comes from several sources: the aging of the population, n967 advances in medical technology, and the publicity surrounding such cases as *Cruzan v. Missouri Department of Health*. n968

In *Cruzan*, a young woman (Nancy) was in a persistent vegetative state for eight years following an automobile accident. Her parents sought to terminate artificial nutrition and hydration, but the hospital refused, and the Missouri Supreme Court found that clear and convincing evidence of Nancy's preference on this issue was not shown. n969 The United States Supreme Court affirmed, holding that the state could require clear and convincing evidence of the patient's preference in the absence of a living will. The case is particularly interesting since it does not *require* states to adhere to a standard of clear and convincing proof, and would seem to allow a state to honor the wishes of family members in the absence of a living will. It also appears that the Court's concept of a terminally ill patient's rights would include honoring the provisions of a living will.

§ 88.14(a)(1) Limits to Effectiveness.

Living will statutes normally require the patient's condition to be terminal and the patient be unable to make decisions about personal health care before the living will can take effect. n970 This seriously limits the effectiveness of the living will statutes. All of the statutes provide for "passive" euthanasia only, and for the majority of states, active euthanasia is expressly prohibited. n971 Active euthanasia, for example, would include administering drugs designed to shorten one's life. Passive euthanasia, however, involves only the withdrawal or removal of existing treatment, or the withholding of potential treatment. Passive techniques would normally exclude the withholding of nutrition and hydration. This, of course, can create a dilemma for health care providers when nutrition and hydration also prolong the pain and misery of the patient.

Most living will statutes require that the declarant be an adult and be competent at the time of the execution of the living will. There is also typically a requirement that the execution be witnessed by two persons. Witnesses may not be family members or the attending physicians, in most states. n972 The requirements are very similar to those for a standard will execution.

§ 88.14(a)(2) Living Wills -- Minors and Pregnant Women.

Two problem areas in the use of living wills concern the ability to make health care decisions for minors or incompetents, and the applicability of a living will when a woman is pregnant.

A few states have provisions regarding decision-making for terminally ill incompetent adults or terminally ill minors (who have not executed a living will) Usually the minor's spouse, if the spouse is an adult, or the minor's parents may make the decision under these acts. n973 Some states may require the court to appoint a guardian ad litem to represent the terminally ill patient's interest. Of course, these cases can also be treated like any other situation where the patient has failed to execute a living will. A court may decide to permit the substituted judgment of relatives or close friends to prevail. In these cases, there typically seems to be an effort to determine what the terminally ill person would have wanted, if possible. n974

A minority of states have incorporated a "pregnancy clause" into their living will statutes, n975 making the provisions of a living will inapplicable when the patient is a pregnant woman. Such clauses directly pit the rights of the individual patient against the possibility of saving the life of the unborn fetus, particularly in light of the constitutional right to privacy embodied by the line of decisions following *Roe v. Wade*. n976

While the living will does arguably preserve an individual's right to bodily integrity, privacy, and to "die with dignity," it also raises serious concerns about the dangers, the advisability, and the encouragement of euthanasia, "mercy" killings, or "assisted" suicides. Moreover, it is possible that an individual might make the decision about life-prolonging health care one way when all is well, and might make a completely different decision when faced with an actual terminal illness.

While the living will is well-known to most lay people, many professionals advocate the use of a durable power of attorney as an alternative, or an addition to the use of the living will. The durable power of attorney is discussed below.

COMPUTER-ASSISTED RESEARCH

LEXIS: living will! w/30 health care or medical w/15 minor! living will!

w/30 preganant wom*n!

§ 88.14(b) Durable Powers of Attorney.

A power of attorney creates an agency relationship, where the agent may act for the principal under certain circumstances or for a certain length of time. However, under traditional agency doctrine, the agent's authority terminates when the principal becomes incapacitated. n977 The durable power is unique in that it expressly continues the agent's authority through incapacity until the agent has actual knowledge of the principal's death. n978 Virtually all of the states have some sort of durable power of attorney statute in place and the Uniform Probate Code includes a section authorizing durable powers of attorney. n979 The durable health care power is particularly useful since the person executing the power can designate a trusted relative or friend to make health care decisions for them in the event of incapacity. These are not limited to situations where the patient is terminally ill. Thus, in a case like Nancy Cruzan's (non-terminal persistent vegetative state) the agent could take steps to terminate life support. Durable powers are more flexible than living wills, in that they can give the agent great leeway, or narrow the scope of the agent's authority, to see that all medical means are used to keep the principal alive or that no medical means are used. The agent may be granted the authority to deal with the situation at the time that decisions need to be made, and the principal may retain full authority to direct health care decisions until the principal becomes incompetent to act. n980

Some states specifically authorize durable health care powers of attorney, but it is believed that the general durable power statutes would authorize use in the health care situation as well. n981 Of course the durable powers raise some of the same ethical issues involved in the previous section. Will the use of such devises lead unscrupulous or over-eager family members to "pull the plug" too soon?

COMPUTER-ASSISTED RESEARCH

LEXIS: durable w/5 power! w/2 attorney w/30 health care or medical

§ 88.14(c) Donation/Disposition of Body Parts.

At common law, a decedent had no real control over the disposition of his or her body. Nor did the common law recognize property rights in the corpse of a deceased person. In more recent times, the courts have sometimes permitted individuals to direct the disposal of their remains, even over the objections of family members, or even if the request was an unusual one. n982 The medical field became particularly interested in this area as organ transplants became more and more possible and more and more successful during the 1960s, '70s, and '80s. Accordingly, there is a great demand for body parts for transplant today, a demand that far exceeds the supply. n983

California was the first state to enact a decedent organ donation statute in 1947, and the Uniform Anatomical Gifts Act was promulgated during the 1960s and adopted in some form in every state. n984 The original act requires either a will or a signature on a card with two witnesses. n985 The witnesses must sign in the presence of each other and in the presence of the donor. The act permits a donor to donate his or her body to various medical establishments for research or transplantation. A new act was promulgated in 1987 and has been adopted in several jurisdictions. It simply requires a signature on a card, without witnesses. Of course, the donor may still donate by will, or the next of kin may make the donation. n986 In some states, the donation card may be on the donor's driver's license. The 1987 Uniform Anatomical Gifts Act permits donation for education, therapy, research, or transplantation. It expressly prohibits *sale* of body parts for transplantation. n987

Despite the ease of organ donation, the shortage of available organs for transplants persists. Perhaps people are unwilling to contemplate their own death in such direct fashion, or some people may have religious, moral or aesthetic reasons to decline to execute a donation card. Or, there may be fear that over-eager doctors will hasten death or fail to take appropriate steps to preserve the donor's life in an effort to proceed with a transplant. n988

Other efforts to increase the number of organs available for transplant continue to be considered. Some have proposed a free market in body parts. Not surprisingly, the concept of a market economy in body parts created a public outcry, particularly when the scheme might involve payments to living donors. The concern with living donors is that the poor

would be taken advantage of, in order to benefit the rich. At least partially in response to such proposals, Congress enacted the National Organ Transplant Act (the "Act") in 1984. n989 The Act prohibits the commercial sale of organs in the private market. The Act also established an organ matching network to facilitate the transplantation process. However, this program has been ineffective in increasing the availability of organs for transplants.

Another suggestion is for hospitals or physicians to make regular requests to family members for organ donation at the time of death of potential donors. The federal government incorporated this concept into its regulatory scheme. n990 However, it has been criticized as imposing on grief-stricken families at a particularly vulnerable time. (It is also unlikely that families would be eager to consent at these times, since the most desirable donor would be a young person who is killed in an accident. The family is usually in shock and unable to cope with such possibly upsetting requests.).

A third suggestion is to create a rebuttable presumption of consent to organ transplant in the law. If a person does NOT want to be considered as an organ donor, the person would execute a document revoking the implied permission. Again, this proposal can be criticized on a variety of religious, moral, and aesthetic grounds. However, such routine organ salvaging is not uncommon in Europe. n991

COMPUTER-ASSISTED RESEARCH

LEXIS: donat! or disposit! w/15 body w/2 organ! or part! w/30 decedent

§ 88.14(d) Appendix.

§ 88.14(d)(1) Uniform Anatomical Gift Act -- Key Provisions -- 1987 Act.

All states and the District of Columbia have either the 1987 or the 1968 version of the Uniform Anatomical Gift Act.

§ 1 Definitions.

As used in this [Act]:

(1) "Anatomical gift" means a donation of all or part of a human body to take effect upon or after death.

(2) "Decedent" means a deceased individual and includes a stillborn infant or fetus.

(3) "Document of gift" means a card, a statement attached to or imprinted on a motor vehicle operator's or chauffeur's license, a will, or other writing used to make an anatomical gift.

(4) "Donor" means an individual who makes an anatomical gift of all or part of the individual's body.

(5) "Enucleator" means an individual who is [licensed] [certified] by the [State Board of Medical Examiners] to remove or process eyes or parts of eyes.

(6) "Hospital" means a facility licensed, accredited, or approved as a hospital under the law of any state or a facility operated as a hospital by the United States government, a state, or a subdivision of a state.

(7) "Part" means an organ, tissue, eye, bone, artery, blood, fluid, or other portion of a human body.

(8) "Person" means an individual, corporation, business trust, estate, trust, partnership, joint venture, association, government, governmental subdivision or agency, or any other legal or commercial entity.

(9) "Physician" or "surgeon" means an individual licensed or otherwise authorized to practice medicine and surgery or osteopathy and surgery under the laws of any state.

(10) "Procurement organization" means a person licensed, accredited, or approved under the laws of any state for procurement, distribution, or storage of human bodies or parts.

(11) "State" means a state, territory, or possession of the United States, the District of Columbia, or the Commonwealth of Puerto Rico.

(12) "Technician" means an individual who is [licensed] [certified] by the [State Board of Medical Examiners] to remove or process a part.

§ 2 Making, Amending, Revoking, and Refusing to Make Anatomical Gifts by Individual.

(a) An individual who is at least [18] years of age may (i) make an anatomical gift for any of the purposes stated in § 6(a), (ii) limit an anatomical gift to one or more of those purposes, or (iii) refuse to make an anatomical gift.

(b) An anatomical gift may be made only by a document of gift signed by the donor. If the donor cannot sign, the document of gift must be signed by another individual and by two witnesses, all of whom have signed at the direction and in the presence of the donor and of each other, and state that it has been so signed.

(c) If a document of gift is attached to or imprinted on a donor's motor vehicle operator's or chauffeur's license, the document of gift must comply with subsection 9(b) Revocation, suspension, expiration, or cancellation of the license does not invalidate the anatomical gift.

(d) A document of gift may designate a particular physician or surgeon to carry out the appropriate procedures. In the absence of a designation or if the designee is not available, the donee or other person authorized to accept the anatomical gift may employ or authorize any physician, surgeon, technician, or enucleator to carry out the appropriate procedures.

(e) An anatomical gift by will takes effect upon death of the testator, whether or not the will is probated. If, after death, the will is declared invalid for testamentary purposes, the validity of the anatomical gift is unaffected.

(f) A donor may amend or revoke an anatomical gift, not made by will, only by:

(1) a signed statement;

(2) an oral statement made in the presence of two individuals;

(3) any form of communication during a terminal illness or injury addressed to a physician or surgeon; or

(4) the delivery of a signed statement to a specified donee to whom a document of gift had been delivered.

(g) The donor of an anatomical gift made by will may amend or revoke the gift in the manner provided for amendment or revocation of wills, or as provided in subsection 9(f).

(h) An anatomical gift that is not revoked by the donor before death is irrevocable and does not require the consent or concurrence of any person after the donor's death.

(i) An individual may refuse to make an anatomical gift of the individual's body or part by (i) a writing signed in the same manner as a document of gift, (ii) a statement attached to or imprinted on a donor's motor vehicle operator's or chauffeur's license, or (iii) any other writing used to identify the individual as refusing to make an anatomical gift. During a terminal illness or injury, the refusal may be an oral statement or other form of communication.

(j) In the absence of contrary indications by the donor, an anatomical gift of a part is neither a refusal to give other parts nor a limitation on an anatomical gift under Section 3 or on a removal or release of other parts under Section 4.

(k) In the absence of contrary indications by the donor, a revocation or amendment of an anatomical gift is not a refusal to make another anatomical gift. If the donor intends a revocation to be a refusal to make an anatomical gift, the donor shall make the refusal pursuant to subsection (i).

§ 3 Making, Revoking, and Objecting to Anatomical Gifts, by Others.

(a) Any member of the following classes of persons, in the order of priority listed, may make an anatomical gift of all or a part of the decedent's body for an authorized purpose, unless the decedent, at the time of death, has made an unrevoked refusal to make that anatomical gift;

(1) the spouse of the decedent;

(2) an adult son or daughter of the decedent;

(3) either parent of the decedent;

(4) an adult brother or sister of the decedent;

(5) a grandparent of the decedent; and

(6) a guardian of the person of the decedent at the time of death.

(b) An anatomical gift may not be made by a person listed in subsection (a) if:

(1) a person in a prior class is available at the time of death to make an anatomical gift;

(2) the person proposing to make an anatomical gift knows of a refusal or contrary indications by the decedent; or

(3) the person proposing to make an anatomical gift knows of an objection to making an anatomical gift by a member of the person's class or a prior class.

(c) An anatomical gift by a person authorized under subsection (a) must be made by (i) a document of gift signed by the person or (ii) the person's telegraphic, recorded telephonic, or other recorded message, or other form of communication from the person that is contemporaneously reduced to writing and signed by the recipient.

(d) An anatomical gift by a person authorized under subsection (a) may be revoked by any member of the same or a prior class if, before procedures have begun for the removal of a part from the body of the decedent, the physician, surgeon, technician, or enucleator removing the part knows of the revocation.

(e) A failure to make an anatomical gift under subsection (a) is not an objection to the making of an anatomical gift.

§ 4 Authorization by [Coroner] [Medical Examiner] OR [Local Public Health Official].

(a) The [coroner] [medical examiner] may release and permit the removal of a part from a body within that official's custody, for transplantation or therapy, if:

(1) the official has received a request for the part from a hospital, physician, surgeon, or procurement organization;

(2) the official has made a reasonable effort, taking into account the useful life of the part, to locate and examine the decedent's medical records and inform persons listed in Section 3(a) of their option to make, or object to making, an anatomical gift;

(3) the official does not know of a refusal or contrary indication by the decedent or objection by a person having priority to act as listed in Section 3(a);

(4) the removal will be by a physician, surgeon, or technician; but in the case of eyes, by one of them or by an enucleator;

(5) the removal will not interfere with any autopsy or investigation;

(6) the removal will be in accordance with accepted medical standards; and

(7) cosmetic restoration will be done, if appropriate.

(b) If the body is not within the custody of the [coroner] [medical examiner], the [local public health officer] may release and permit the removal of any part from a body in the [local public health officer's] custody for transplantation or therapy if the requirements of subsection (a) are met.

(c) An official releasing and permitting the removal of a part shall maintain a permanent record of the name of the decedent, the person making the request, the date and purpose of the request, the part requested, and the person to whom it was released.

§ 5 Routine Inquiry and Required Request; Search and Notification.

(a) On or before admission to a hospital, or as soon as possible thereafter, a person designated by the hospital shall ask each patient who is at least [18] years of age: "Are you an organ or tissue donor?" If the answer is affirmative the person shall request a copy of the document of gift. If the answer is negative or there is no answer and the attending physician consents, the person designated shall discuss with the patient the option to make or refuse to make an anatomical gift. The answer to the question, an available copy of any document of gift or refusal to make an anatomical gift, and any other relevant information, must be placed in the patient's medical record.

(b) If, at or near the time of death of a patient, there is no medical record that the patient has made or refused to make an anatomical gift, the hospital [administrator] or a representative designated by the [administrator] shall discuss the option to make or refuse to make an anatomical gift and request the making of an anatomical gift pursuant to Section 3(a) The request must be made with reasonable discretion and sensitivity to the circumstances of the family. A request is not required if the gift is not suitable, based upon accepted medical standards, for a purpose specified in Section 6. An entry must be made in the medical record of the patient, stating the name and affiliation of the individual making the request, and of the name, response, and relationship to the patient of the person to whom the request was made. The [Commissioner of Health] shall [establish guidelines] [adopt regulations] to implement this subsection.

(c) The following persons shall make a reasonable search for a document of gift or other information identifying the bearer as a donor or as an individual who has refused to make an anatomical gift:

(1) a law enforcement officer, fireman, paramedic or other emergency rescuer finding an individual who the searcher believes is dead or near death; and

(2) a hospital, upon the admission of an individual at or near the time of death, if there is not immediately available any other source of that information.

(d) If a document of gift or evidence of refusal to make an anatomical gift is located by the search required by subsection (c)(1), and the individual of body to whom it relates is taken to a hospital, the hospital must be notified of the

contents and the document or other evidence must be sent to the hospital.

(e) If, at or near the time of death of a patient, a hospital knows that an anatomical gift has been made pursuant to Section 3(a) or a release and removal of a part has been permitted pursuant to Section 4, or that a patient or an individual identified as in transit to the hospital is a donor, the hospital shall notify the donee if one is named and known to the hospital; if not, it shall notify an appropriate procurement organization. The hospital shall cooperate in the implementation of the anatomical gift or release and removal of a part.

(f) A person who fails to discharge the duties imposed by this section is not subject to criminal or civil liability but is subject to appropriate administrative sanctions.

§ 6 Persons Who May Become Donees; Purposes for Which Anatomical Gifts may be Made.

(a) The following persons may become donees of anatomical gifts for the purposes stated:

(1) a hospital, physician, surgeon, or procurement organization, for transplantation, therapy, medical or dental education, research, or advancement of medical or dental science;

(2) an accredited medical or dental school, college, or university for education, research, advancement of medical or dental science; or

(3) a designated individual for transplantation or therapy needed by that individual.

(b) An anatomical gift may be made to a designated donee or without designating a donee. If a donee is not designated or if the donee is not available or rejects the anatomical gift, the anatomical gift may be accepted by any hospital.

(c) If the donee knows of the decedent's refusal or contrary indications to make an anatomical gift or that an anatomical gift by a member of a class having priority to act is opposed by a member of the same class under Section 3(a), the donee may not accept the anatomical gift.

§ 7 Delivery of Document of Gift.

(a) Delivery of a document of gift during the donor's lifetime is required for the validity of an anatomical gift.

(b) If an anatomical gift is made to a designated donee, the document of gift, or a copy, may be delivered to the donee to

expedite the appropriate procedure after death. The document of gift, or a copy, may be deposited in any hospital, procurement organization, or registry office that accepts it for safekeeping or for facilitation of procedures after death. On request of an interested person, upon or after the donor's death, the person in possession shall allow the interested person to examine or copy the document of gift.

§ 8 Rights and Duties at Death.

(a) Rights of a donee created by an anatomical gift are superior to rights of others except with respect to autopsies under Section 11(b) A donee may accept or reject an anatomical gift. If a donee accepts an anatomical gift of an entire body, the donee, subject to the terms of the gift, may allow embalming and use of the body in funeral services. If the gift is of a part of a body, the donee, upon the death of the donor and before embalming, shall cause the part to be removed without unnecessary mutilation. After removal of the part, custody of the remainder of the body vests in the person under obligation to dispose of the body.

(b) The time of death must be determined by a physician or surgeon who attends the donor at death or, if none, the physician or surgeon who certifies the death. Neither the physician or surgeon who attends the donor at death nor the physician or surgeon who determines the time of death may participate in the procedures for removing or transplanting a part unless the document of gift designates a particular physician or surgeon pursuant to Section 2(d).

(c) If there has been an anatomical gift, a technician may remove any donated parts and an enucleator may remove any donated eyes or parts of eyes, after determination of death by a physician or surgeon.

§ 9 Coordination of Procurement and Use.

Each hospital in this State, after consultation with other hospitals and procurement organizations, shall establish agreements or affiliations for coordination of procurement and use of human bodies and parts.

§ 10 Sale or Purchase of Parts Prohibited.

(a) A person may not knowingly, for valuable consideration, purchase or sell a part for transplantation or therapy, if removal of the part is intended to occur after the death of the decedent.

(b) Valuable consideration does not include reasonable payment for the removal, processing, disposal, preservation, quality control, storage, transportation, or implantation of a part.

(c) A person who violates this section is guilty of a [felony] and upon conviction is subject to a fine not exceeding [$50,000] or imprisonment not exceeding [five] years, or both.

§ 11 Examination, Autopsy, Liability.

(a) An anatomical gift authorizes any reasonable examination necessary to assure medical acceptability of the gift for the purposes intended.

(b) The provisions of this [Act] are subject to the laws of this State governing autopsies.

(c) A hospital, physician, surgeon, [coroner], [medical examiner], [local public health officer], enucleator, technician, or other person, who acts in accordance with this [Act] or with the applicable anatomical gift law of another state [or foreign country] or attempts in good faith to do so is not liable for that act in a civil action or criminal proceeding.

(d) An individual who makes an anatomical gift pursuant to Section 2 or 3 and the individual's estate are not liable for any injury or damage that may result from the making or the use of the anatomical gift.

§ 12 Transitional Provisions.

This [Act] applies to a document of gift, revocation, or refusal to make an anatomical gift signed by the donor or a person authorized to make or object to making an anatomical gift before, on, or after the effective date of this [Act].

§ 13 Uniformity of Application and Construction.

This [Act] shall be applied and construed to effectuate its general purpose to make uniform the law with respect to the subject of this [Act] among states enacting it.

§ 88.14(d)(2) Uniform Rights of the Terminally Ill Act -- Key Provisions -- 1989.

The 1989 version of this Act has been adopted in seven states. Six other states have the 1985 Act. Also, 31 other states and the District of Columbia have some form of a Living Will Statute or Natural Death Act. A list is found in 9b U.L.A. 109 (1993 Supp.).

§ 1 Definitions.

As used in this [Act], unless the context otherwise requires:

(1) "Attending physician" means the physician who has primary responsibility for the treatment and care of the patient.

(2) "Declaration" means a writing executed in accordance with the requirements of Section 2(a).

(3) "Health-care provider" means a person who is licensed, certified, or otherwise authorized by the law of this State to administer health care in the ordinary course of business or practice of a profession.

(4) "Life-sustaining treatment" means any medical procedure or intervention that, when administered to a qualified patient, will serve only to prolong the process of dying.

(5) "Person" means an individual, corporation, business trust, estate, trust, partnership, association, joint venture, government, governmental subdivision or agency, or any other legal or commercial entity.

(6) "Physician" means an individual [licensed to practice medicine in this State].

(7) "Qualified patient" means a patient [18] or more years of age who has executed a declaration and who has been determined by the attending physician to be in a terminal condition.

(8) "State" means a State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, or a territory or insular possession subject to the jurisdiction of the United States.

(9) "Terminal condition" means an incurable and irreversible condition that, without the administration of life-sustaining treatment, will, in the opinion of the attending physician, result in death within a relatively short time.

§ 2 Declaration Relating to Use of Life-Sustaining Treatment.

(a) An individual of sound mind and [18] or more years of age may execute at any time a declaration governing the withholding or withdrawal of life-sustaining treatment. The declarant may designate another individual of sound mind and [18] or more years of age to make decisions governing the withholding or withdrawal of life-sustaining treatment. The declaration must be signed by the declarant, or another at the declarant's direction, and witnessed by two individuals.

(b) A declaration directing a physician to withhold or withdraw life-sustaining treatment may, but need not, be in the following form:

DECLARATION

If I should have an incurable and irreversible condition that, without the administration of life-sustaining treatment, will, in the opinion of my attending physician, cause my death within a relatively short time, and I am no longer able to make decisions regarding my medical treatment, I direct my attending physician, pursuant to the Uniform Rights of the Terminally Ill Act of this State, to withhold or withdraw treatment that only prolongs the process of dying and is not necessary for my comfort or to alleviate pain.

Signed this _____ day of _____, _____.

Signature:_____
Address:_____

The declarant voluntarily signed this writing in my presence.

Witness _____
Address _____
Witness _____
Address _____

(c) A declaration that designates another individual to make decisions governing the withholding or withdrawal of life-sustaining treatment may, but need not, be in the following form:

DECLARATION

If I should have an incurable and irreversible condition that, without the administrations of life-sustaining treatment, will, in the opinion of my attending physician, cause my death within a relatively short time, and I am no longer able to make decisions regarding my medical treatment, I appoint _____ or, if he or she is not reasonably available or is unwilling to serve, _____, to make decisions on my behalf regarding withholding or withdrawal of treatment that only prolongs the process of dying and is not necessary for my comfort or to alleviate pain, pursuant to the Uniform Rights of the Terminally Ill Act of this State.

[If the individual(s) I have so appointed is not reasonably available or is unwilling to serve, I direct my attending physician, pursuant to the Uniform Rights of the Terminally Ill Act of this State, to withhold or withdraw treatment that only prolongs the process of dying and is not necessary for my comfort or to alleviate pain.]

Strike out bracketed language if you do not desire it.

Signed this _____ day of _____, _____.

Signature _____
Address _____

The declarant voluntarily signed this writing in my presence.

Witness _____
Address _____
Witness _____
Address _____

Name and address of designee.

Name _____
Address _____

(d) The designation of an attorney-in-fact [pursuant to the Uniform Durable Power of Attorney Act or the Model Health-Care Consent Act], or the judicial appointment of an individual [guardian], who is authorized to make decisions regarding the withholding or withdrawal of life-sustaining treatment, constitutes for purposes of this [Act] a declaration designating another individual to act for the declarant pursuant to subsection (a).

(e) A physician or other health-care provider who is furnished a copy of the declaration shall make it a part of the declarant's medical record and, if unwilling to comply with the declaration, promptly so advise the declarant and any individual designated to act for the declarant.

§ 3 When Declaration Operative.

A declaration becomes operative when (i) it is communicated to the attending physician and (ii) the declarant is determined by the attending physician to be in a terminal condition and no longer able to make decisions regarding administration of life-sustaining treatment. When the declaration becomes operative, the attending physician and other health-care providers shall act in accordance with its provisions and with the instructions of a designees under Section 2(a) or comply with the transfer requirements of Section 8.

§ 4 Revocation of Declaration.

(a) A declarant may revoke a declaration at any time and in any manner, without regard to the declarant's mental or physical condition. A revocation is effective upon its communication to the attending physician or other health-care provider by the declarant or a witness to the revocation.

(b) The attending physician or other health-care provider shall make the revocation a part of the declarant's medical record.

§ 5 Recording Determination of Terminal Condition and Declaration.

Upon determining that a declarant is in a terminal condition, the attending physician who knows of a declaration shall record the determination and the terms of the declaration in the declarant's medical record.

§ 6 Treatment of Qualified Patients.

(a) A qualified patient may make decisions regarding life-sustaining treatment so long as the patient is able to do so.

(b) This [Act] does not affect the responsibility of the attending physician or other health-care provider to provide treatment, including nutrition and hydration, for a patient's comfort, care or alleviation of pain.

(c) Life-sustaining treatment must not be withheld or withdrawn pursuant to a declaration from an individual known to the attending physician to be pregnant so long as it is probable that the fetus will develop to the point of live birth with continued application of life-sustaining treatment.

§ 7 Consent By Others to Withdrawal or Withholding of Treatment.

(a) If written consent to the withholding or withdrawal of the treatment, witnessed by two individuals, is given to the attending physician, the attending physician may withhold or withdraw life-sustaining treatment from an individual who:

(1) has been determined by the attending physician to be in a terminal condition and no longer able to make decisions regarding administration of life-sustaining treatment; and

(2) has no effective declaration.

(b) The authority to consent or to withhold consent under subsection (a) may be exercised by the following individuals, in order of priority:

(1) the spouse of the individual;

(2) an adult child of the individual or, if there is more than one adult child, a majority of the adult children who are reasonably available for consultation;

(3) the parents of the individuals;

(4) an adult sibling of the individual or, if there is more than one adult sibling, a majority of the adult siblings who are reasonably available for consultation; or

(5) the nearest other adult relative of the individual by blood or adoption who is reasonably available for consultation.

(c) If a class entitled to decide whether to consent is not reasonably available for consultation and competent to decide, or declines to decide, the next class is authorized to decide, but an equal division in a class does not authorize the next class to decide.

(d) A decision to grant or withhold consent must be made in good faith. A consent is not valid if it conflicts with the expressed intention of the individual.

(e) A decision of the attending physician acting in good faith that a consent is valid or invalid is conclusive.

(f) Life-sustaining treatment must not be withheld or withdrawn pursuant to this section from an individual known to the attending physician to be pregnant so long as it is probable that the fetus will develop to the point of live birth with continued application of life-sustaining treatment.

§ 8 Transfer of Patients.

An attending physician or other health-care provider who is unwilling to comply with this [Act] shall take all reasonable steps as promptly as practicable to transfer care of the declarant to another physician or health-care provider who is willing to do so.

§ 9 Immunities.

(a) A physician or other health-care provider is not subject to civil or criminal liability, or discipline for unprofessional conduct, for giving effect to a declaration or the direction of an individual designated pursuant to Section 2(a) in the absence of knowledge of the revocation of a declaration, or for giving effect to a written consent under Section 7.

(b) A physician or other health-care provider, whose action under this [Act] is in accord with reasonable medical standards, is not subject to criminal or civil liability, or discipline for unprofessional conduct, with respect to that action.

(c) A physician or other health-care provider, whose decision about the validity of consent under Section 7 is made in good faith, is not subject to criminal or civil liability, or discipline for unprofessional conduct, with respect to that decision.

(d) An individual designated pursuant to Section 2(a) or an individual authorized to consent pursuant to Section 7, whose decision is made or consent is given in good faith pursuant to this [Act], is not subject to criminal or civil liability, or discipline for unprofessional conduct, with respect to that decision.

§ 10 Penalties.

(a) A physician or other health-care provider who willfully fails to transfer the care of a patient in accordance with Section 8 is guilty of [a class _____ misdemeanor].

(b) A physician who willfully fails to record a determination of terminal condition or the terms of a declaration in accordance with Section 5 is guilty of [a class _____ misdemeanor].

(c) An individual who willfully conceals, cancels, defaces, or obliterates the declaration of another individual without the declarant's consent or who falsifies or forges a revocation of the declaration of another individual is guilty of [a class _____ misdemeanor].

(d) An individual who falsifies or forges the declaration of another individual, or willfully conceals or withholds personal knowledge of a revocation under Section 4, is guilty of [a class _____ misdemeanor].

(e) A person who requires or prohibits the execution of a declaration as a condition for being insured for, or receiving, health-care services is guilty of [a class _____ misdemeanor].

(f) A person who coerces or fraudulently induces an individual to execute a declaration is guilty of [a class _____ misdemeanor].

(g) The penalties provided in this section do not displace any sanction applicable under other law.

§ 11 Miscellaneous Provisions.

(a) Death resulting from the withholding or withdrawal of life-sustaining treatment in accordance with this [Act] does not constitute, for any purpose, a suicide or homicide.

(b) The making of a declaration pursuant to Section 2 does not affect the sale, procurement, or issuance of a policy of life insurance or annuity, nor does it affect, impair, or modify the terms of an existing policy of life insurance or annuity. A policy of life insurance or annuity is not legally impaired or invalidated by the withholding or withdrawal of life-sustaining treatment from an insured, notwithstanding any term to the contrary.

(c) A person may not prohibit or require the execution of a declaration as a condition for being insured for, or receiving, health-care services.

(d) This [Act] creates no presumption concerning the intention of an individual who has revoked or has not executed a declaration with respect to the use, withholding, or withdrawal of life-sustaining treatment in the event of a terminal condition.

(e) This [Act] does not affect the right of a patient to make decisions regarding use of life-sustaining treatment, so long as the patient is able to do so, or impair or supersede a right or responsibility that a person has to effect the withholding or withdrawal of medical care.

(f) This [Act] does not require a physician or other health-care provider to take action contrary to reasonable medical standards.

(g) This [Act] does not condone, authorize, or approve mercy-killing or euthanasia.

§ 12 When Health-Care Provider May Presume Validity of Declaration.

In the absence of knowledge to the contrary, a physician or other health-care provider may assume that a declaration complies with this [Act] and is valid.

§ 13 Recognition of Declaration Executed in Another State.

A declaration executed in another state in compliance with the law of that state or of this State is valid for purposes of this [Act].

§ 14 Effect of Previous Declaration.

An instrument executed anywhere before the effective date of this [Act] which substantially complies with Section 2(a) is effective under this [Act].

§ 88.14(d)(3) Uniform Probate Code -- Durable Power of Attorney.

This Act has been adopted in 5 states. It is an alternative to Part 5 of Article V of the Uniform Probate Code.

§ 5-501 Definition.

A durable power of attorney is a power of attorney by which a principal designates another his attorney in fact in writing and the writing contains the words "This power of attorney shall not be affected by subsequent disability or incapacity of the principal, or lapse of time," or "This power of attorney shall become effective upon the disability or incapacity of the principal," or similar words showing the intent of the principal that the authority conferred shall be exercisable notwithstanding the principal's subsequent disability or incapacity, and unless it states a time of termination, notwithstanding the lapse of time since the execution of the instrument.

§ 5-502 Durable Power of Attorney Not Affected by Lapse of Time, Disability or Incapacity.

All acts done by an attorney in fact pursuant to a durable power of attorney during any period of disability or incapacity of the principal have the same effect and inure to the benefit of and bind the principal and his successors in interest as if the principal were competent and not disabled. Unless the instrument states a time of termination, the power is exercisable notwithstanding the lapse of time since the execution of the instrument.

§ 5-503 Relation of Attorney in Fact to Court-Appointed Fiduciary.

(a) If, following execution of a durable power of attorney, a court of the principal's domicile appoints a conservator, guardian of the estate, or other fiduciary charged with the management of all of the principal's property or all of his property except specified exclusions, the attorney in fact is accountable to the fiduciary as well as to the principal. The fiduciary has the same power to revoke or amend the power of attorney that the principal would have had if he were not

disabled or incapacitated.

(b) A principal may nominate, by a durable power of attorney, the conservator, guardian of his estate, or guardian of his person for consideration by the court if protective proceedings for the principal's person or estate are thereafter commenced. The court shall make its appointment in accordance with the principal's most recent nomination in a durable power of attorney except for good cause or disqualification.

§ 5-504 Power of Attorney Not Revoked Until Notice.

(a) The death of a principal who has executed a written power of attorney, durable or otherwise, does not revoke or terminate the agency as to the attorney in fact or other person, who, without actual knowledge of the death of the principal, acts in good faith under the power. Any action so taken, unless otherwise invalid or unenforceable, binds successors in interest of the principal.

(b) The disability or incapacity of a principal who has previously executed a written power of attorney that is not a durable power does not revoke or terminate the agency as to the attorney in fact or other person, who, without actual knowledge of the disability or incapacity of the principal, acts in good faith under the power. Any action so taken, unless otherwise invalid or unenforceable, binds the principal and his successors in interest.

§ 5-505 Proof of Continuance of Durable and Other Powers of Attorney by Affidavit.

As to acts undertaken in good faith reliance thereon, an affidavit executed by the attorney in fact under a power of attorney, durable or otherwise, stating that he did not have at the time of exercise of the power actual knowledge of the termination of the power by revocation or of the principal's death, disability, or incapacity is conclusive proof of the non-revocation or non-termination of the power at that time. If the exercise of the power of attorney requires execution and delivery of any instrument that is recordable, the affidavit when authenticated for record is likewise recordable. This section does not affect any provision in a power of attorney for its termination by expiration of time or occurrence of an event other than express revocation or a change in the principal's capacity.

FOOTNOTES:

(n1)Footnote 964. California Natural Death Act, Cal. Health & Safety Code §§ 7185-7195. *See generally*, Gregory Gelfand, *Living Will Statutes: The First Decade, 1987 Wis. L. Rev. 737, 739 n. 3* (listing 39 statutes). The California statute may have been at least partially the result of the Karen Ann Quinlan case. A comatose, permanently injured young woman was on a respirator for several months, and her parents petitioned the courts for permission to disconnect the respirator. Eventually they succeeded. *See In re Quinlan, 355 A.2d 647, cert. denied, 429 U.S. 922 (N.J. 1976).*

(n2)Footnote 965. *See, e.g., In re Storar, 438 N.Y.S.2d 64 (1982); John F. Kennedy Mem. Hosp. v. Bludworth, 452 So. 2d 921 (Fla. 1984); In re Conroy, 486 A.2d 1209 (N.J. 1985).*

(n3)Footnote 966. *See* Uniform Rights of the Terminally Ill Act, *infra* § 88.14(d)(2).

(n4)Footnote 967. *See generally*, Jan Ellen Rein, *Preserving Dignity and Self-Determination of the Elderly in the Face of Competing Interests and Grim Alternatives: A Proposal for Statutory Refocus and Reform, 60 Geo. Wash. L. Rev. 1818 (1992). See also* Paul Kennedy, Preparing for the Twenty-First Century 36-38 (Random House 1993) (pointing out that a greater proportion of the population is over 65 in the wealthier or more developed nations).

(n5)Footnote 968. *297 U.S. 261 (1990).*

(n6)Footnote 969. *Cruzan v. Harmon, 760 S.W.2d 408* (Mo. *en banc* 1988).

(n7)Footnote 970. *See* Gregory Gelfand, *Living Will Statutes: The First Decade, 1987 Wis. L. Rev. 737, 740-747;* Leslie P. Francis, *The Evanescence of Living Wills*, 14 J. Contemp. Law 27, 35-38.

(n8)Footnote 971. *Id. at 747-750.* Gelfand criticizes this attitude, saying that it implies that it is "somehow better" to let someone die by inaction than to take steps to actively help someone die. *Id. at 749.*

(n9)Footnote 972. *See generally*, Comment, *Comparison of the Living Will Statutes of the Fifty States*, 14 J. of Contemp. L. 105 (1988) (chart in appendix contains comparative checklist of state laws).

(n10)Footnote 973. *See, e.g.*, 1987 Ark. Acts 713 § 14; N.M. Stat. Ann. § 24-7-4, § 24-7-8.1; Tex. Rev. Civ. Stat. Ann. art. 4590h, §§ 4C, 4D.

(n11)Footnote 974. *See, e.g., Superintendent of Belchertown State Sch. v. Saikewicz, 370 N.E.2d 417 (Mass. 1977); In re Conroy, 486 A.2d 1209 (N.J. 1985).*

(n12)Footnote 975. *See* Gregory Gelfand, *Living Will Statutes: The First Decade, 1987 Wis. L. Rev. 737, 778-780.*

(n13)Footnote 976. *410 U.S. 113 (1973).* Goldberg, *Medical Choices During Pregnancy: Whose Decision Is It Anyway?, 41 Rutgers L. Rev. 591 (1989);* Gallagher, *Prenatal Invasions & Interventions: What's Wrong with Fetal Rights?, 10 Harv. Women's L.J. 9 (1987);* Johnsen, *The Creation of Fetal Rights: Conflicts With Women's Constitutional Rights to Liberty, Privacy, and Equal Protection, 95 Yale L.J. 599 (1986);* Note, *Rethinking (M)otherhood: Feminist Theory and State Regulation of Pregnancy, 103 Harv. L. Rev. 1325 (1990);* Related cases include: *Fosmire v. Nicoleau, 551 N.E.2d 77 (N.Y. 1990); In re A.C. 573 A.2d 1235 (D.C. App. 1990). See also A Matter of Life and Death* in Newsweek, Nov. 16, 1992, p. 55. German doctors kept brain-dead 18-year old woman who was 14 weeks pregnant on life support for several weeks in the hope of saving the child.

(n14)Footnote 977. *See Restatement (Second) of Agency* §§ 120, 122.

(n15)Footnote 978. The incidence of durable power of attorney statutes increased during the 1970s, and was aided by the introduction of the durable power section into the Uniform Probate Code in 1969, *See* Uniform Prob. Code Part 5, Durable Power of Attorney, Prefatory Note. *See* Note, *Appointing an Agent to Make Medical Treatment Choices, 84 Colum. L. Rev. 985, 1012 n.175 (1984)* (listing statutes).

(n16)Footnote 979. U.P.C. §§ 5-501 - 5-505 (reproduced in the Appendix *infra*).

(n17)Footnote 980. *See generally*, Susan R. Martyn & Lynn Balshone Jacobs, *Legislating Advance Directives for the Terminally Ill: The Living Will and Durable Power of Attorney, 63 Neb. L. Rev. 779 (1984);* Note, *Appointing An Agent to Make Medical Treatment Choices, 84 Colum. L. Rev. 985 (1984).*

Vacco. v. Quill, 117 S. Ct. 2293 (1997) (nearly all states expressly disapprove of suicide and assisted suicide either in statutes dealing with durable powers of attorney in health-care situations, or in "living will" statutes).

(n18)Footnote 981. Examples of specific authorization statutes include: Del. Code Ann. tit. 16 § 2502(b); Cal. Civ. Code § 2431(a); Tex. Rev. Civ. Stat. Ann. art. 4590h-l; Va. Code § 54-3258:1 (the Virginia statute requires a terminal illness). One issue involved in the use of general durable power statutes to designate an agent for health care decisions is whether a health care decision is too "personal" to be delegated (like voting, marrying, or making a will)? *See* Moses & Pope, *Estate Planning, Disability and the Durable Power of Attorney, 30 S.C. L. Rev. 511, 530 (1979).*

(n19)Footnote 982. *See, e.g.*, Ellmer M. Melleon, *Wills: Witty, Witless, and Wicked, 7 Wayne L. Rev. 335, 347-48 (1960);* Note, *Some Jolly Testators, 8 Temp. L.Q. 297, 303-307 (1934);* Annotation, *Enforcement of Preference*

Expressed by Decedent as to Disposition of his Body After Death, 54 A.L.R. 3d 1037 (1974) for humorous (and other) examples of testamentary requests.

(n20)Footnote 983. *See generally* Comment, *Body Parts and Property Rights, A New Commodity for the 1990s, 22 Sw. U. L. Rev. 399 (1993);* Lloyd R. Cohen, *Increasing the Supply of Transplant Organs: The Virtues of a Futures Market, 58 Geo. Wash. L. Rev. 1 (1989);* Note, *Regulating the Sale of Human Organs, 71 Va. L. Rev. 1015 (1985).*

(n21)Footnote 984. The 1987 version of the Uniform Act, § 88.14(d)(1), *infra. See also Comment, Body Parts and Property Rights: A New Commodity for the 1990s, 22 Sw. U. L. Rev. 399, 409 n.65 (1993)* (statutory listing).

(n22)Footnote 985. Uniform Anatomical Gifts Act § 4a (1968 version).

(n23)Footnote 986. Uniform Anatomical Gifts Act §§ 2, 3 (1987 version).

(n24)Footnote 987. Uniform Anatomical Gifts Act § 10(a) (1987 version).

(n25)Footnote 988. *See* Comment, *Body Parts and Property Rights: A New Commodity for the 1990s, 22 Sw. U. L. Rev. 399, 414-419 (1993);* Lloyd R. Cohen, *Increasing the Supply of Transplant Organs: The Virtues of a Futures Market, 58 Geo. Wash. L. Rev. 1, 2-9 (1989).*

(n26)Footnote 989. National Organ Transplant Act, Pub. L. No. 98-5-7, *98 Stat. 233,* codified as *42 U.S.C.A. 273*-274(e). For market advocates, *see* Comment, *Body Parts and Property Rights: A New Commodity for the 1990s, 22 Sw. U. L. Rev. 399 (1993);* Lloyd R. Cohen, *Increasing the Supply of Transplant Organs: The Virtues of A Futures Market, 58 Geo. Wash. L. Rev. 1, 2-9 (1989).*

(n27)Footnote 990. *See generally* Quay, *Utilizing the Bodies of the Dead, 28 St. Louis U. L.J. 889 (1984);* Cotton & Sandler, *The Regulation of Organ Procurement and Transplantation in the United States, 7 J. Legal Med. 55 (1986).*

(n28)Footnote 991. *See generally* Jesse Dukeminier, *Supplying Organs for Transplantation, 68 Mich. L. Rev. 811 (1970);* Note, *Refining the Law of Organ Donation: Lessons from the French Law of Presumed Consent*, 19 N.Y.Y. L.J. Int'l L. & Pol. 1013 (1987). *See also* Silver, *The Case for a Post-Mortem Organ Draft and Proposed Model Organ Draft Act, 68 B.U. L. Rev. 681 (1988)* (requiring organ donation -- a "draft").

Thompson on Real Property, Thomas Editions

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CHAPTER 88 TESTAMENTARY TRANSFERS OF REAL PROPERTY

10-88 Thompson on Real Property, Thomas Editions § 88.15

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§ 88.15 Will Substitutes.

[Go To Supp]

§ 88.15(a) Introduction.

Will substitutes are frequently used in lieu of transfer by will. n992 Will substitutes are non-testamentary transfers, but do effect a present transfer of the grantor's interest. n993 The use of will substitutes has been called a "revolution" by at least one author, n994 and the increase in use of gifts, joint accounts, life insurance and pension beneficiary designation and other devices has indeed taken over the transfer of wealth at death for most decedents.

The use of will substitutes is at least in part a demonstration of testator attempts to avoid probate. Use of the probate system can be expensive and time-consuming for most testators, and some of the former functions of probate (to clear title and to pay debts). may not be as essential today as they were in the past. The use of will substitutes may also be advantageous for grantors since the devices are usually asset-specific, and transfers do not need to comply with the statute of wills formalities. n995 Although the formalities help to protect testators, and to serve ritual, evidentiary and possibly "safe harbor" functions, the technicalities are frequently at odds with testator's actual intent, and may simply be perceived as roadblocks to the accomplishment of testator objectives. n996

§ 88.15(b) Gifts.

Gifts are probably not one of the most frequently used will substitutes, but may be important after decedent's death, particularly for tax purposes and as causa mortis gifts.

§ 88.15(b)(1) Elements.

Both inter-vivos and causa mortis gifts require that four elements be met. n997 The donor must be of sound mind (this is usually presumed, in the absence of evidence to the contrary), the donor must have present intent to make a gift, the donor must deliver the gift, and the donee must accept the gift. It is also presumed that the donee accepts the gift, in the absence of evidence to the contrary.

Delivery is probably the most frequently litigated issue in the law of gifts. n998 The issue of intent is sometimes closely

linked to the issue of delivery. It is important that the intent to make a gift be a present intent, not an intent or a promise to make a future gift. n999 Actual delivery can help to strengthen the proof of intent, since the donor will feel the "wrench of delivery" in handing over the item to the donee. n1000 The courts normally like to see physical delivery of an item of tangible personal property. However, constructive delivery (delivery of the means of acquiring the item of personal property) or delivery by a written instrument of gift is frequently allowed. n1001 Mere "symbolic" delivery is not allowed. n1002 A gift of real property is delivered by delivery of the deed.

§ 88.15(b)(2) Causa Mortis Gifts.

The typical gift is an *inter vivos* gift, or a gift from one living person to another. Such gifts are irrevocable. A *causa mortis* gift is a gift made in contemplation of death. The donor, believing that he or she is dying, makes a gift of an item to a donee, usually from a deathbed. These gifts are revocable. The essential elements are still the same, including delivery. In many cases, the courts struggle with the issue of whether the delivery was adequate, particularly in light of the limitations involved in the situation of a bedridden donor. n1003

COMPUTER-ASSISTED RESEARCH

LEXIS: causa mortis w/2 gift!

gift! w/5 contemplat! w/2 death or die! or dying

§ 88.15(b)(3) Tax Note.

Gifts (particularly causa mortis gifts) do not create substantial tax savings. Generally gifts made within three years of the decedent's death will be included in the decedent's gross estate. However, certain exclusions apply, and the donor may make tax-exempt gifts during the donor's lifetime, up to $10,000 per donee. n1004

§ 88.15(c) Bank Accounts.

§ 88.15(c)(1) Pay-on-Death Accounts.

The term "pay-on-death" account is quite descriptive. When using a P.O.D. account, the donor deposits funds in a bank account during the donor's lifetime, and designates that the proceeds of the account are to be paid to a certain person at the death of the donor/depositor. Most courts find such accounts to be testamentary in character, and in the absence of statute, the designation of the beneficiary will not be honored. n1005

COMPUTER-ASSISTED RESEARCH

LEXIS: pay on death or pod w/2 account!

§ 88.15(c)(2) Totten Trusts.

A device similar to the P.O.D. account is the Totten trust. n1006 In a Totten trust arrangement, the donor deposits funds into an account, and names him- or herself as trustee of the account for the benefit of another. During the donor's lifetime, the donor has full control of the account and may freely make deposits and withdrawals. The trust is revocable. Many states recognize the Totten trust, either by case law or statute. n1007

COMPUTER-ASSISTED RESEARCH

LEXIS: totten trust!

§ 88.15(c)(3) Multi-Party Accounts.

Joint bank accounts are a popular device to avoid probate transfer at death. However, it is not foolproof, and courts will look beyond the form of the joint account to the substance and the intent of the arrangement between the parties.

If it was the intention of the donor/depositor to transfer a present interest to the other joint tenant(s), then the proceeds of the account will pass automatically to the survivor(s) at the death of one joint tenant. However, if the account was opened merely for the convenience of the donor/depositor, or for the establishment of survivorship rights, then the courts may hold that the account proceeds should not pass to the surviving joint tenants, because it is testamentary in nature. n1008

COMPUTER-ASSISTED RESEARCH

LEXIS: multi-party account! w/50 probate or death or testament!

§ 88.15(d) Life Insurance.

Life insurance can be one of the largest non-probate transfers at death for many individuals and is another popular will substitute device. During the lifetime of the insured, the insured can change the beneficiary designation or revoke the policy altogether. The proceeds of life insurance are universally held not to be testamentary in nature in the case law. Also, unlike most other forms of will substitutes, life insurance proceeds are not susceptible to the claims of decedent's creditors through the estate. A related, widely-used will substitute is the pension fund beneficiary designation. n1009

COMPUTER-ASSISTED RESEARCH

LEXIS: life insurance w/30 probate or testament!

§ 88.15(e) Revocable Inter Vivos Trusts.

The revocable inter vivos trust has become an extremely popular device for avoiding probate ever since the publication of "How to Avoid Probate," by Norman Dacey, in 1960. The book was a bestseller, and an updated version was published in 1988. A fill-in-the-blank form of irrevocable trust, with settlor as trustee, is sometimes known as the "Dacey" trust. Most courts and the Restatement hold that an inter vivos revocable trust is not testamentary in nature, even if the donor/settlor retains a lifetime beneficial interest, and the power to control the trust. n1010 However, the use of the "Dacey" trust is criticized. n1011 The inter-vivos trust may also be used in conjunction with a "pour-over" provision in a will. A "pour-over" provision operates when a will transfers or "pours over" certain assets from the estate into an existing trust. In a similar manner, a pour-over provision in a existing trust document can transfer trust assets into the estate at the death of the donor/settlor. n1012

COMPUTER-ASSISTED RESEARCH

LEXIS: revocable w/2 inter vivos w/2 trust! w/30 probate

§ 88.15(f) Uniform Probate Code.

The Revised Uniform Probate Code attempts to unify the treatment of probate and non-probate transfers. In general, the Code validates will substitutes, making it irrelevant or impossible to say that the transfers are testamentary and therefore invalid. n1013

The Code provisions specifically cover multiple-party bank accounts. n1014 In general the provisions attempt to clarify

some of the difficulties found with bank accounts after the death of a donor/depositor. The Code specifically allows Totten trusts, P.O.D. accounts, and joint tenancy accounts to be effective, unless the intent of the parties is otherwise.

A new section of the Uniform Probate Code creates a new form of ownership for securities, the Transfer-on-Death or T.O.D. registration. n1015 The securities are transferred at death in much the same way as the P.O.D. account proceeds are passed to the designated beneficiary.

The Uniform Probate Code sections on will substitutes are also promulgated as a free-standing Uniform Act, the Uniform Non-probate Transfers on Death Act. The provisions of the Act have been adopted in whole or in part by six states. n1016

FOOTNOTES:

(n1)Footnote 992. On the issue of will substitutes generally, see Olin L. Browder, Giving or Leaving -- What is a Will?, *75 Mich. L. Rev. 845 (1977);* William M. McGovern, Jr., The Payable on Death Account and Other Will Substitutes, *67 Nw. U. L. Rev. 7 (1972);* John Ritchie, What is a Will?, *49 Va. L. Rev. 759 (1963);* Ashbel G. Gulliver & Catherine J. Tilson, Classification of Gratuitous Transfers, *51 Yale L.J. 1 (1941).*

(n2)Footnote 993. *See*, e.g., *Farkas v. Williams, 125 N.E.2d 600 (Ill. 1955).*

(n3)Footnote 994. *See* John H. Langbein, The Nonprobate Revolution and the Future of the Law of Succession, *97 Harv. L. Rev. 1108 (1984). See also* Grayson M.P. McCouch, Will Substitutes Under the Revised Uniform Probate Code, *58 Brook. L. Rev. 1123 (1993).*

(n4)Footnote 995. *See* John H. Langbein, The Nonprobate Revolution and the Future of the Law of Succession, *97 Harv. L. Rev. 1108 (1984).*

(n5)Footnote 996. For a discussion of will formalities and their functions, see § 88.03 and the discussion *supra*.

(n6)Footnote 997. *See* generally John E. Cribbet & Corwin W. Johnson, Principles of the Law of Property 152-158 (1989); Brown on Personal Property 76-188 (3d ed., Raushenbush ed. 1975).

(n7)Footnote 998. *See* Mecham, The Requirement of Delivery in Gifts of Chattels, *21 Ill. L. Rev. 341 (1926).*

(n8)Footnote 999. *See* generally Eisenberg, Donative Promises, *47 U. Chi. L. Rev. 1 (1979).* For an interesting case about present intent to make a future gift, see *Gruen v. Gruen, 496 N.E.2d 869 (N.Y. 1986).*

(n9)Footnote 1000. *See* Mecham, The Requirement of Delivery in Gifts of Chattels, *21 Ill. L. Rev. 341, 348 (1926).*

(n10)Footnote 1001. *See*, e.g., *In re Cohn, 176 N.Y.S. 225 (1919).*

(n11)Footnote 1002. *See*, e.g., *Newman v. Bost, 29 S.E. 848 (N.C. 1898).*

(n12)Footnote 1003. *See*, e.g., *Wheeler v. United States, 116 F.3d 749 (5th Cir. 1997)* (with the possible exception of gifts causa mortis, the present transfer tax scheme eschews subjective intent determinations in favor of the objective requirements set forth in the statutes); *Scherer v. Highland, 380 A.2d 698 (N.J. 1977); Foster v. Reiss, 112 A.2d 553 (N.J. 1955). See also Ferrell v. Stinson, 11 N.W.2d 701 (Iowa 1953).*

(n13)Footnote 1004. *See* I.R.C. §§ 2001(b), 2503; Jerome Manning, Estate Planning 202-207 (1988).

(n14)Footnote 1005. *See* generally William M. McGovern, Jr., The Payable on Death Account and Other Will Substitutes, *67 Nw. U. L. Rev. 7 (1972). See*, e.g., *Truax v. Southwestern College, 522 P.2d 412 (Kan. 1974); Compton v. Compton, 435 S.W.2d 76 (Ky. 1968); Methodist v. First Nat'l Bank, 211 A.2d 168 (Vt. 1965).*

(n15)Footnote 1006. The term "Totten trust" comes from a New York case approving the use of the device, *Matter of Totten, 71 N.E. 748 (N.Y. 1904).*

(n16)Footnote 1007. *See*, e.g., *Brucks v. Home Fed. Sav. & Loan Ass'n, 228 P.2d 545 (Cal. 1951); Estate of Petralia, 204 N.E.2d 1 (Ill. 1965);* but see, e.g., *Hoffman's Estate, 195 N.E.2d 106 (Ohio St. 1963);* Fleck v. *Baldwin, 172* S.W.2d 975 (Tex. 1943).

(n17)Footnote 1008. *See* generally Richard v. Wellman, The Joint and Survivorship Account in Michigan -- Progress Through Confusion, *63 Mich. L. Rev. 629 (1965);* Donald Kepner, Five More Years of the Joint Bank Account Muddle, *26 U. Chi. L. Rev. 376 (1959);* Donald Kepner, The Joint and Survivorship Bank Account -- A Concept Without a Name, *41 Cal. L. Rev. 596 (1953). See also* Hines, Personal Property Joint Tenancies, *54 Minn. L. Rev. 509 (1970).*

(n18)Footnote 1009. *See*, e.g., *Davis v. Wark, 217 Cal. Rptr. 734 (Cal. Ct. App. 1985); Buehler v. Buehler, 323 S.W.2d 67 (Tex. Civ. App. 1959); Gurnett v. Mutual Life Ins. Co., 191 N.E. 250 (Ill. 1934). See also* 4 George J. Couch & Ronald A. Anderson, Cyclopedia of Insurance Law §§ 27:57-:64 (2d ed. rev. Mark S. Rhodes, 1984).

Whalen v. Wyman-Gordon Co., 976 F. Supp. 95 (D. Mass. 1997) (Probate Court determines to whom a decedent's life insurance and 401(k) proceeds shall be paid).

(n19)Footnote 1010. *See*, e.g., *Bucholtz v. Belshe, 114 F.3d 923 (9th Cir. 1997)* (the State of California was not entitled to recover certain Medi-Cal payments from the successors of deceased Medi-Cal recipients, when the successors received the property through revocable inter vivos trusts); *Exchange Nat'l Bank v. Sparkman, 554 P.2d 1090 (Colo. 1976); Westerfield v. Huckaby, 474 S.W.2d 189 (Tex. 1971); Farkas v. Williams, 125 N.E.2d 600 (Ill. 1955); Smith v. Deshaw, 78 A.2d 479 (Vt. 1951);* but see *Ambrosius v. Ambrosius, 239 F. 473 (2d Cir. 1917). See also* Restatement (second) of Trusts § 57 (1959); Gerry W. Beyer, Simplification of Inter-Vivos Trust Instruments -- From Incorporation by Reference to the Uniform Custodial Trust Act and Beyond, 32 So. Tex. L. Rev. 203, 238-248 (1991).

(n20)Footnote 1011. *See*, e.g., Johanson, Revocable Trusts and Community Property, *47 Tex. L. Rev. 537, 538 (1969).*

(n21)Footnote 1012. *See* generally W.S. McClanahan, The Pour Over Device Comes of Age, *39 S. Cal. L. Rev. 163 (1966);* W.S. McClanahan, Bequests to An Existing Trust -- Problems and Suggested Remedies, *47 Cal. L. Rev. 267 (1959);* Annotation, Wills -- "Pour-Over" Provision, *12 A.L.R. 3d 56 (1969). See also* § 88.06(b) Incorporation By Reference, *supra*.

(n22)Footnote 1013. *See* Grayson M. P. Couch, Will Substitutes Under the Revised Uniform Probate Code, *58 Brook. L. Rev. 1123, 1131-1133 (1993);* William M. McGovern, Jr., Nonprobate Transfers Under the Revised Uniform Probate Code, *55 Alb. L. Rev. 759 (1992). See also* U.P.C. § 6-101, 8 U.L.A. 306.

(n23)Footnote 1014. U.P.C. §§ 6-201 to 6-226, 8 U.L.A. 307-319.

(n24)Footnote 1015. U.P.C. §§ 6-301 to 6-311, 8 U.L.A. 319-326; see generally Richard v. Wellman, Transfer-On-Death Securities Registration: A New Title Form, *21 Ga. L. Rev. 789 (1987);* Note, Uniform Probate Code Section 6-201: A Proposal to Include Stocks and Mutual Funds, *72 Cornell L. Rev. 397 (1987).*

(n25)Footnote 1016. *See* Unif. Nonprobate Transfers on Death Act (1991), 8A U.L.A. 288-319. Adopting states include Colorado, New Mexico, and North Dakota, Minnesota and Oregon have adopted only the Uniform Transfer-On-Death Security Registration Act, and Wisconsin adopted the Uniform Multiple-Person Accounts Act.

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CHAPTER 88 TESTAMENTARY TRANSFERS OF REAL PROPERTY

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AUTHOR: Professor Victoria Mikesell Mather School of Law St. Mary's University of San Antonio

§ 88.16 International Wills Act.

The Uniform Probate Code also contains a provision on international wills. n1017 The purpose of the act was to provide a form for wills that would be recognized in other countries. The provisions go only to the validity of the form of the will, and not to the substantive law of testamentary transfers for each nation. Eight states have adopted the International Wills Act, either standing alone or in conjunction with the Uniform Probate Code. n1018

FOOTNOTES:
(n1)Footnote 1017. U.P.C. §§ 2-1001 to 2-1010, 8 U.L.A. 181-201.

(n2)Footnote 1018. Non-U.P.C. adopting states include California, Connecticut, Illinois, and Oregon. Adopting U.P.C. states include Colorado, Minnesota, Montana and North Dakota.

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CHAPTER 88 TESTAMENTARY TRANSFERS OF REAL PROPERTY

10-88 Thompson on Real Property, Thomas Editions § 88.17

AUTHOR: Professor Victoria Mikesell Mather School of Law St. Mary's University of San Antonio

§ 88.17 Bibliography.

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Annotation, *Liability for Administration Expenses of Spouse Electing Against Will, 89 A.L.R. 3d 315.*

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Annotation, *Term 'Money' or 'Moneys' in Will as Including Real Property, 76 A.L.R.3d 1254.*

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Supp. To CHAPTER 88 Testamentary Transfers of Real Property

10-88 Thompson on Real Property, Thomas Editions Supp. to § 88.01

Supp. to § 88.01 Introduction and Overview of the Chapter

[Go To Main]

§ 88.01(d) Uniform Probate Code. [Go To Main]

Change text of third sentence from top of page from, "Fifteen states ... " to read:

Sixteen states...

Add:

Other states have added various provisions of the UPC in a more piecemeal fashion.

At note 10 after the citation "Mich. Comp. Laws Ann ... " add:

"*S.C. Code Ann. §§ 62-1-100 to 62-7-604*; South Dakota (adopted articles I, II, III, V, and VIII in 1995; http://www.sdbar.org/pamphlets/probate.htm) and Kentucky (in part, KY Revised Statutes).

At note 10 after the citation "Hawaii Rev. Stat. ... " add:

Repealed and superseded by: 1996 Haw. Sess. Laws, Act 288

Note 10 after the citation "Mich. Comp. Laws Ann ... " add:

§§ 700.1- 700 .35 *repealed* (effective Apr. 1 2000).

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Supp. To CHAPTER 88 Testamentary Transfers of Real Property

10-88 Thompson on Real Property, Thomas Editions Supp. to § 88.03

Supp. to § 88.03 Will Formalities and the Execution Ceremony.

[Go To Main]

§ 88.03(c) Formal Wills--Attestation Requirements. [Go To Main]

§ 88.03(c)(1) Witnesses.

§ 88.03(c)(1)(i) Number.

After the citation "La. Rev. Stat. Ann ... " add:

§§ *repealed* (effective 1999).

§ 88.03(c)(1)(ii) Competence.

Add:

The witnesses must be aware that they are witnessing the execution of a will. *See Estate of Griffith v. Griffith, 30 So. 3d 1190 (Miss. 2010)* .

§ 88.03(c)(1)(iii) Witnessing Procedures.

After "more than 15 months after will executed," add:

See also Matter of Estate of Royal, 826 P.2d 1236 (Colo. 1992) (holding that signing of will by witness after testator's death is not allowed regardless of circumstances).

Add:

In *Chester v. Smith, 677 S.E.2d 128 (Ga. 2009)* , the testatrix was unable to see the witnesses sign the will and thus the will was not validly executed. *Brudz v. Brudz, 1998 Conn. Super. LEXIS 3161 (Conn. 1998)* .

Note 68 change the citation of "Estate of Jefferson ... " to read:

In re Jefferson's Will, 349 So. 2d 1032 (Miss. 1977) .

Add:

In re Will of Young, 1998 Del. Ch. LEXIS 123 (Del. 1998) .

After the citation "In re Davis' Will ... " add:

overruled in part, In re Lappy's Estate 277 P.2d 781 (Or. 1954) .

§ 88.03(c)(2) Publications.

In the sentence beginning "A minority of some states require ... " omit: "some"

§ 88.03(d) Evidence of Attestation. [Go To Main]

§ 88.03(d)(1) Attestation Clause.

Add:

In re Wafer, 715 So. 2d 672 (La. Ct. App. 1998) .

Add:

Parker v. Melican, 684 S.E.2d 654, 657 (Ga. 2009) (holding that despite the presence of an attestation clause, the presumption of proper execution was rebutted by clear proof).

After "(N.J. Super. 1973)," Add:

Koble v. Alfaro (In re Estate of Alfaro), 703 N.E. 2d 620 (Ill. App. 1998) (holding that a notary's signature could serve both as an attestation and a notarial certificate at once).

Add:

Hampton Roads Seventh-Day Adventist Church v. Stevens, 657 S.E.2d 80 (Va. 2008) (holding that the witnesses' signatures on the self-proving affidavit satisfied the requirement that the will be signed in the presence of two witnesses).

§ 88.03(d)(2) Self-proving Affidavit.

Add:

1 A.L.R.5th 965

Note 79 change the citation of "Estate of Charry ... " to read:

359 So. 2d 544 (Fla. Ct. App. 1978) .

§ 88.03(e) Modern Developments. [Go To Main]

Add:

John V. Orth, "Wills Act Formalities: How Much Compliance is Enough?" *43 Real Prop. Tr. & Est. L.J. 73* (Spring, 2008) .

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Supp. To CHAPTER 88 Testamentary Transfers of Real Property

10-88 Thompson on Real Property, Thomas Editions Supp. to § 88.04

Supp. to § 88.04 Certain Types of Wills.

[Go To Main]

§ 88.04(a) Holographic Wills. [Go To Main]

§ 88.04(a)(1) Introduction.

Add:

For a general discussion of holographic wills see Stephen Clowney, "In their Own Hands: An Analysis of Holographic Wills and Homemade Willmaking," *43 Real Prop. Tr. & Est. L.J. 27 (Spring 2008)* .

Add:

After "(1975)" add:

See also Cason v. Taylor, 51 S.W. 3d 397 (Tex. App. 2001) (holding that testimony of content of a lost holographic will was sufficient to set aside earlier formal will.)

Add:

In re Foxley, 575 N.W.2d 150 (Neb. 1998) .

§ 88.04(a)(3) State Statutes.

Note 94 change the citation of the Alaska statute to read:

Alaska Stat. § 13.12.502;

After the citation "Mont. Code Ann § 72-2-503 ... " add:

repealed (1993).

After the citation "N.D. Cent. Code § 30.1-08-03" add:

repealed (1993).

Delete the words:

Pennsylvania has a unique provision permitting *any* will, handwritten or printed, to be probated without witnesses.

Change the citation of "La. Civ. Code Ann ... " to read:

La. Civ. Code Ann. art. 1575

After the citation "S.D. Code Laws § 29-2-8 ... " add:

repealed (1995) (In 1995 South Dakota repealed all previously enacted laws regarding succession and wills and

replaced them with the Uniform Probate Code).

Move the citation "Tenn. Code Ann. § 32-1-105" to footnote 94 since this law supports the position in footnote 94 better than it supports the position in footnote 95.

Change the citation of "In re Will of Parsons ... " to read:

178 S.E. 78 (N.C. 1935) .

Change the citation of the "N.C. Gen Stat." to read:

N.C. Gen. Stat. § 31-18.2

§ 88.04(a)(4)(i) Date.

Change the citation of "La. Civ. Code Ann ... " to read:

La. Civ. Code Ann. art. 1575.

Change the citation of the "Mich. Stat. Ann ... " to read:

Mich. Stat. Ann. § 700.2502

After the citation "S.D. Code Laws § 29-2-8 ... " add:

repealed (1995) (In 1995 South Dakota repealed all previously enacted laws regarding succession and wills and replaced them with the Uniform Probate Code).

After the word capacity, Add new Note 100.1: n100.1

§ 88.04(b)(1). History.

Add:

In re Estate of Cote, 848 A.2d 264 (Vt. 2004) (state nuncupative will statute permits a decedent under such a will to dispose of not more than $200 worth of personal property).

§ 88.04(b)(2)(i) Last Illness.

Following "(1966)," Add:

Some states also allow oral wills to be made by soldiers and sailors if certain circumstances are met. Joseph M. Mentrek, "Estate Planning in a Digital World," 19 *Ohio Prob. L.J.* 195 (2009). *See also 32 McGeorge L. Rev. 681;* Torounian, Vartuhi Review of Selected 2000 California Legislation: Estates and Trusts Chapter 17: An Attempt to Improve the Existing Probate Law (discussion of oral wills).

After the citation "S.D. Code Laws § 29-2-9 ... " add:

repealed (1995) (In 1995 South Dakota repealed all previously enacted laws regarding succession and wills and replaced them with the Uniform Probate Code).

§ 88.04(b)(2)(ii) Testamentary Intent.

Change the citation "Nev. Rev. Stat. § 133.100.1(b)" to read:

Nev. Rev. Stat. § 133.100 (Nevada no longer accepts nuncupative wills).

§ 88.04(b)(2)(iii) Witnesses.

Change the citation "Nev. Rev. Stat. § 133.100.1(a)" to read:

Nev. Rev. Stat. § 133.100 (Nevada no longer accepts nuncupative wills).

Change the citation "Nev. Rev. Stat. § 133.100.2" to read:

Nev. Rev. Stat. § 133.100 (Nevada no longer accepts nuncupative wills).

§ 88.04(b)(2)(iv) Reduction to Writing.

After the citation "S.D. Code Laws § 30-6-33 ... " add:

repealed (1995) (In 1995 South Dakota repealed all previously enacted laws regarding succession, wills and probate and replaced them with the Uniform Probate Code).

Change the citation of "Tenn. Code Ann ... " to read:

Tenn. Code Ann. § 32-1-106.

§ 88.04(b)(2)(vi) Miscellaneous.

After the citation "Alaska Stat. § 13.11.158(c)" add:

repealed (1996).

§ 88.04(c) Videotaped and Audiotaped Wills. [Go To Main]

Add:

Joseph K. Grant, "Shattering and Moving Beyond the Gutenberg Paradigm: The Dawn of the Electronic Will," *42 U. Mich. J.L. Reform 105 (Fall 2008).*

§ 88.04(d) Statutory Wills. [Go To Main]

Change the citation of "Cal. Prob. Code § 56-56.14" to read:

Cal. Prob. Code § 56.14 repealed (1985).

After the citation "Mich. Comp. Laws Ann. § 700.123a-c" add:

repealed (2000).

§ 88.04(e) Conditional Will/Sham Will. [Go To Main]

After the citation "S.D. Code Laws § 30-6-32 ... " add:

repealed (1995) (In 1995 South Dakota repealed all previously enacted laws regarding succession, wills and probate and replaced them with the Uniform Probate Code).

After the first sentence, Add new Note 164.1: n164.1

§ 88.04(f) Superwills or Blockbuster Wills. [Go To Main]

Add:

but see In re Estate of Sanders, 929 P.2d 153 (Kan. 1996) .

FOOTNOTES:
(n1)Footnote 100.1. *Estate of Lightfield, 213 P.3d 468 (Mont. 2009)* , (the) testator had executed two different wills, and was held to have lacked testamentary capacity when he signed the second, holographic, will).

(n2)Footnote 164.1. For a discussion on both superwills and blockbuster wills see John H. Martin, "Reconfiguring Estate Settlement," *94 Minn. L. Rev. 42 (November 2009).*

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Supp. To CHAPTER 88 Testamentary Transfers of Real Property

10-88 Thompson on Real Property, Thomas Editions Supp. to § 88.05

Supp. to § 88.05 Will Contracts.

[Go To Main]

§ 88.05(a). Introductory Comments. [Go To Main]

Add:

In the *Estate of Friesenhahn, 185 S.W.3d 16 (Tex. App. 2005)* (a testamentary devise was upheld when the will was held to be not a contractual will).

§ 88.05(a)(2) Remedy.

After the case "Green v. Richmond ... " add:

but see Wilcox v. Trautz, 693 N.E.2d 141 (Mass. 1998) .

§ 88.05(b) Contracts to Make a Will. [Go To Main]

Add:

Aubuchon v. Howort, 1998 Mass. Super. LEXIS 313 (Mass. 1998) .

Add:

Estate of Draper v. Bank of America, N.A., 205 P.3d 698 (Kan. 2009) (wife violated duty of good faith in prenuptial agreement to leave assets to her husband's sons by removing huge sums from her estate).

Add:

In *Ray v. McMaster, 296 S.W.3d 344 (Tex. App. 2009)* , the court explained that the following factors are illustrative of a contractual will: "(1) a statement about the consideration for making the agreement; (2) a statement that the agreement cannot be changed or varied without the consent in writing of each person making the will; (3) a reference to the section of the Probate Code addressing the requirements for contractual wills; and (4) a specific description of what the contract requires in the event of the death of the first person making the contractual will."

Change the citation of "Silianoff v. Silianoff ... " to read:

399 So. 2d 462 (Fla. Ct. App. 1982) .

Add:

In *Mangels v. Cornell, 189 P.3d 573 (Kan. App. 2008)* , the court explained that the existence of the following terms demonstrate an intent to be contractually bound by a joint and mutual will: "(1) A provision in the will for a distribution of property on the death of the survivor; (2) a carefully drawn provision for the disposition of any share in case of a lapsed residuary bequest; (3) the use of plural pronouns; (4) joinder and consent language; (5) the identical distribution of property upon the death of the survivor; (6) joint revocation of former wills; and (7) consideration, such as mutual promises."

§ 88.05(c) Joint and Mutual Wills. [Go To Main]

Change the citation of "Kitchen v. Estate of Blue ... " to read:

498 N.E.2d 41 (Ind. Ct. App. 1986) .

After the citation "Crain v. Mitchell ... " add:

disapproved, Jones v. Jones, 718 S.W.2d 416 (Tex. Ct. App. 1986) .

§ 88.05(d) Contracts Not to Revoke. [Go To Main]

Change the citation of "Ray v. Rider" to read:

650 F. Supp. 518 (E.D. Tex. 1986)

Change the citation of "Estate of Chayka ... " to read:

76 N.W.2d 560 (Wis. 1970) .

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Supp. To CHAPTER 88 Testamentary Transfers of Real Property

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Supp. to § 88.06 Will Construction--Will Components.

[Go To Main]

§ 88.06(b) Doctrine of Incorporation by Reference. [Go To Main]

Add:

In *In re* Estate of Herold, *76 Cal. Rptr. 3d 546 (2008)* , the court explained that provisions from wills should not be incorporated into decrees of trust distributions because such decrees are intended to be final and to supersede the will.

Change the citation "Clark v. Greenhalge ... " to read:

582 N.E.2d 949 (Mass. 1991) .

Change the citation "Mont. Code Ann ... " to read:

Mont. Code Ann. § 72-2-530.

Change the citation of "Fla. Stat. Ann ... " to read:

Fla. Stat. Ann. § 732.512.

Add:

In re Pozarny, 677 N.Y.S.2d 714 (N.Y. 1998) , but see, In re Wickwire, 270 A.D.2d 659 (N.Y.A.D. 2000) (noting the effect of New York statutes on the issue).

§ 88.06(c) Doctrine of Republication by Codicil. [Go To Main]

After the citation "In re Estate of Foxley ... " add:

rev'd, 575 N.W.2d 150 (Neb. 1998) .

Supplements to a will made by codicil must still comply with some of the formalities subject to wills. *See Parker v. Melican, 684 S.E.2d 654 (Ga. 2009)* (holding that a testator's failure to sign a codicil in the presence of witnesses rendered the codicil improper).

Change the citation of "In re Johnson Trust ... " to read:

255 A.2d 571 (Pa. 1969) .

§ 88.06(d) The Doctrine of Acts of Independent Significance. [Go To Main]

Add:

Van Moorleghan v. Taylor, 10 S.W.3d 244 (Tenn. Ct. App. 1998) .

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10-88 Thompson on Real Property, Thomas Editions Supp. to § 88.07

Supp. to § 88.07 Will Construction and Reformation.

[Go To Main]

§ 88.07(a) Introduction. [Go To Main]

Add:

American Finance & Inv. Co. v. Herrera, 20 S.W.3d 829 (Tex. Ct. App. 2000) (Real Estate described in codicil as "property located on the west side of [city] with house on it" was sufficiently clear that there was no controversy surrounding the intent of the testator).

Change the citation of "In re Gulbenkian's will..." to read:

174 N.E.2d 481 (N.Y. 1961) .

Smith v. Buckley, 753 N.Y.S.2d 581 (2003) (will bequeathed land on condition that a private road be kept open for use by specified landowners); *Dyer v. Dyer, 566 S.E.2d 665 (Ga. 2002)* (will construed so that provisions were not irreconcilable).

At the end of first paragraph, Add new Note 275.1: n275.1

§ 88.07(b)(1) Mistaken Descriptions.

After the citation "Connecticut Junio Republic v. Sharon Hosp..." add:

rev'd, Erickson v. Erickson, 716 A.2d 92 (Conn. 1998) .

After "estator meant Hamilton Ross Simpson)" add:

Restatement (Third) of Property (Don. Trans.) s 12.1, Reforming Donative Documents To Correct Mistakes (1995).

Add:

But see Jeffrey A. Cooper, "Empty Promises: Settlor's Intent, The Uniform Trust Code and the Future of Trust Investment Law," *88 B.U. L. Rev. 1165 (December 2008)* (arguing that the modern trend is to avoid technical obstacles in order to effectuate the testator's intent).

§ 88.07(b)(2) Mistake in Fact--Mistake in Inducement.

Add:

Kale v. Wilson, 668 S.E.2d 729 (Ga. 2008) (the court was required to interpret the will so that language proclaiming the niece as "honor bound to distribute items I have designated to my loved ones" did not result in a condition precedent to the vesting of the estate).

§ 88.07(c). Ambiguity. [Go To Main]

After first sentence, Add new Note 285.1: n285.1

Add:

In re Estate of Vincent, 98 S.W.3d 146 (Tenn. 2003) (general language in the will directing payment of all "just debts" was not sufficiently clear to justify exoneration of the mortgage).

§ 88.07(c)(1) Equivocation.

After the citation "Estate of Bergau..." add:

rev'd, 693 P.2d 703 (Wash. 1985) .

§ 88.07(d) Extrinsic Evidence. [Go To Main]

Add:

In re Estate of Cole, 621 N.W.2d 816 (Minn. Ct. App. 2001) .

After parenthetical ending with "... language)" add:

See also Hershman, Jay N.; 15 Quinnipiac Prob. L.J. 143 (2000).

Add:

San Antonio Area Foundation v. Lang, 35 S.W.3d 636 (Tex. 2000) (stating that the term "real property" did not require extrinsic evidence to understand).

Add:

Garrett v. Read, 102 P.3d 436 (Kan. 2004) (testimony from the will's scrivener about an asset distribution agreement between the testator and his spouse was admitted) *overruled in part by, Nelson v. Nelson, 288 Kan. 570, 205 P.3d 715.*

Add:

In re Robinson, 720 So. 2d 540 (Fla. App. 1998) .

Add:

In re Estate of Cole, 621 N.W.2d 816 (Minn. Ct. App. 2001) .

Add:

Succession of Delcambre, 893 So. 2d 167 (La. App. 2005) (extrinsic evidence excluded because the terms of the bequest were clear and unambiguous).

§ 88.07(f) Attorney Liability for Malpractice. [Go To Main]

Add:

See Rydde v. Morris, 675 S.E.2d 431 (S.C. 2009) (holding that an attorney owed no duty to prospective beneficiaries when the attorney failed to prepare a will for execution prior to the decedent's death).

FOOTNOTES:
(n3)Footnote 275.1. *See Handelsman v. Handelsman, 852 N.E.2d 862 (Ill. App. 2006)* (holding that extrinsic evidence could not be used in reforming a testamentary trust to reflect the settlor's alleged actual intent).

(n4)Footnote 285.1. *See*, e.g., *Dyess v. Brewton, 669 S.E.2d 145 (Ga. 2008)* (holding that parol evidence was permissible to explain an ambiguity in a codicil which referenced a will).

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Supp. to § 88.08 Will Contests.

[Go To Main]

§ 88.08(a) Introduction; Purpose. [Go To Main]

Change the citation of "In re Estate of Herr..." to read:

60 N.W.2d 699, 703 (N.D. 1990) .

§ 88.08(c) Procedure. [Go To Main]

§ 88.08(c)(1) Nature and Form.

Add:

Estate of Smith, 71 Cal. Rptr. 2d 424 (Cal. App. 1998) .

§ 88.08(c)(3) Standing.

§ 88.08(c)(3)(i) General.

Add:

Barrera v. Vanpelt, 965 S.W.2d 780 (Ark. 1998) .

Add:

See, e.g., *In Re Estate of Eguia, 917 N.E.2d 166 (Ind. App. 2009)* (holding that a personal representative lacked standing to contest a will because he was not a beneficiary).

§ 88.08(c)(3)(ii) Specific Parties.

Change the citation of the "Conn. Gen. Stat. Ann..." to read:

Conn. Gen. Stat. Ann. § 45a--447

Change the citation of the "Conn. Gen. Stat. Ann..." to read:

Conn. Gen. Stat. Ann. § 45a--447

§ 88.08(d) Grounds. [Go To Main]

§ 88.08(d)(1) Instrument Lacks Testamentary Character--Attacks on the Instrument Itself.

§ 88.08(d)(1)(ii) Intent.

Add:

Estate of Smith, 71 Cal. Rptr. 2d 424 (Cal. App. 1998) .

See In re Estate of Pruitt, 249 S.W.3d 654 (Tex. App. 2008) (holding that there was a genuine issue of material fact whether or not the testator and the witnesses signed the will at the same time).

Add:

An issue regarding the intent of the testator also arises as to whether the testator intended to revoke a will prior to his death. See, e.g., *Brown v. Brown, 21 So.3d 1 (Ala. Civ. App. 2009)* ; *In re Estate of Turner, 265 S.W.3d 709 (Tex. App. 2008)* .

Change the citation of "Huffman v. Huffman ..." to read:

339 S.W.2d 885, 888 (Tex. 1960) .

§ 88.08(d)(2) Mistake or Lack of Testamentary Capacity--Attacks on the Testator.

§ 88.08(d)(2)(ii) Mental Capacity.

Add:

Succession of Wiggins, 984 So. 2d 948 (La.App. 3 Cir. 2008) (decedent could not be shown as unable to read and write in a manner necessary to possess testamentary capacity).

Add:

See In re Succession of Furlow, 17 So.3d 475 (La. App. 2009) (holding that the plaintiffs failed to meet their burden of proving that testator lacked testamentary capacity).

§ 88.08(d)(2)(ii)(B) Insane Delusion.

Add:

Shook v. Pendley, 1998 Ark. App. LEXIS 869 (Ark. App. 1998) .

§ 88.08(d)(3) Interference by Third Parties.

§ 88.08(d)(3)(i) Undue Influence.

Add:

Lakes v. Ryan, 2003 Ohio App. LEXIS 501 (No. CA2002-05-118, Feb. 3, 2003) (held that the testator was not under undue influence at the time he executed the will)

Change the citation of "Ginter v. Ginter..." to read:

101 P. 634 (Kan. 1909) .

Add:

See In re Estate of Henry, 250 S.W.3d 518 (Tex. App. 2008) (holding that a will was not the product of undue influence); *Harris v. Jourdan, 180 P.3d 119 (Or. App. 2008)* (holding that a will was the product of undue influence).

Add:

See In re Last Will and Testament of Kistler, 22 So.3d 1209 (Miss. App. 2009) (holding that the evidence was sufficient to overcome a presumption of undue influence).

After the citation "In Wood's Estate..." add:

overruled, Widmayer v. Leonard, 373 N.W.2d 538 (Mich. 1985) , overruling recognized, State Farm Mut. Auto. Ins. Co. v. Allen, 477 N.W.2d 445 (Mich. Ct. App. 1991) .

After the citation "Estate of Pedrick..." add:

see also Estate of Younger, 508 A.2d 327 (Pa. Super. Ct. 1986) .

§ 88.08(d)(3)(i)(A) Attorneys and Undue Influence.

After the citation "McCarthy v. Fidelity Nat'l Bank & Trust Co..." add:

but see, Mundwiller v. Mundwiller, 822 S.W.2d 863 (Mo. Ct. App. 1991) (stating that *McCarthy* has been overruled by *Mo. Rev. Stat. § 473.081* (1986)) called into doubt by statute as stated in *Burke v. Kehr, 826 S.W.2d 855 (Mo. App. 1992)* .

§ 88.08(d)(3)(iii) Fraud.

Add:

Bohlen v. Spears, 509 S.E.2d 628 (Ga. 1998) . Influencing disposition of testator's property can take numerous forms; *see, e.g., Dietter v. Dietter, 737 A.2d 926 (Conn. App. 1999)* (fraudulent transfer of assets from testamentary trust to inter vivos trust).

§ 88.08(d)(3)(iv) Remedies.

§ 88.08(d)(3)(iv)(B) Tortious Interference with Inheritance.

At end of subsection, add new footnote: n461.1

§ 88.08(e) *In Terrorem* Clauses. [Go To Main]

Add:

Sinclair v. Sinclair, 670 S.E.2d 59 (Ga. 2008) ("Because in terrorem clauses result in forfeitures, they must be strictly construed. Moreover, conditions in terrorem that are impossible, illegal, or against public policy shall be void").

Add:

In re Ellis, 683 N.Y.S.2d 113 (N.Y.A.D. 1998) .

Add:

See Peter G. Billings, "Infants and In Terrorem Clauses: Rethinking *New York Estate Powers and Trusts Law Section 3-3.5*," 22 *Quinnipiac Prob. L.J.* 397 (2009) (arguing that a New York statute which exempts minors from in terrorem clauses is against public policy).

Change the citation of "Mich Stat. Ann... ." to read:

Mich. Stat. Ann. § 700.2518

§ 88.09(b) Privity. [Go To Main]

After the citation "Auric v. Continental Cas. Co..." add:

see also, Beauchamp v. Kemmeter, 629 N.W.2d 785 (Wis. App. 2000) .

After the citation "Hale v. Groce..." add:

but see, Mieras v. DeBona, 550 N.W.2d 202 (Mich. 1996) disagreed with by *Blair v. Ing, 21 P.3d 452 (Hawaii 2001)* .

Change the citation of "Guy v. Liederbach..." to read:

459 A.2d 744 (Pa. 1983) .

Add:

Blair v. Ing, 21 P.3d 452 (Hawaii 2001) .

Add:

See, e.g., Rydde v. Morris, 675 S.E.2d 431 (S.C. 2009) (holding that prospective beneficiaries could not prevail in a legal malpractice claim against the decedent's attorney because the attorney did not owe the prospective beneficiaries fiduciary duties).

§ 88.09(c)(2) Inadequate Attention to Detail.

After the citation "Heyer v. Glaig..." add:

but see, Laird v. Blacker, 279 Cal.Rptr. 700 (Cal. Ct. App. 1991) (stating that *Heyer* has been superseded by statute); however, the Laird v. Blacker case may not be cited, *see* Cal. Rules of Court 976, 977, and 979.

After the citation "Guy v. Liederbach..." add:

but see, Blair v. Ing, 21 P.3d 452 (Hawaii 2001) .

After the citation "Auric v. Continental Cas. Co..." add:

see also, Beauchamp v. Kemmeter, 629 N.W.2d 785 (Wis. App. 2000) .

§ 88.09(c)(3) Competence Questions.

After the citation "Horne v. Peckham ... " add:

but see, ITT Small Business Finance Corp. v. Niles, 885 P.2d 965 (Cal. 1994) overruled, Jordache Enterprises, Inc. v. Brobeck, Phleger & Harrison, 958 P.2d 1062 (Cal. 1998) (discussing the time at which the statute of limitations begins to run in attorney malpractice cases).

FOOTNOTES:
(n5)Footnote 461.1. *See, e.g., Rienhardt v. Kelly, 164 F.3d 1296 (10th Cir. 1999)* (action on tortious interference with expected inheritance).

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Supp. to § 88.10 Will Revocation.

[Go To Main]

§ 88.10(a) Revocation by Physical Act. [Go To Main]

Add:

In *Morrison v. Morrison, 655 S.E.2d 571(Ga. 2008)* , the court held that a testator could not revoke his will by obliterating a copy of his will.

Add:

In *Gushwa v. Hunt, 197 P.3d 1(N.M. 2008)* , the court held that the testator could not revoke his will by writing "revoked" on a photocopy of his will.

After ".. The Law of Will 195-197 (1928)," Add:

Board of Trustees v. Calhoun 514 So. 2d 895 (Ala. 1987) (holding that an entire will is invalid where the will had been in control of the testator and the signature page had been removed.)

Add:

Hansel v. Head, 706 So. 2d 1142 (Ala. 1997) .

§ 88.10(e) Lost Wills. [Go To Main]

Add:

In re Estate of Wilson, 252 S.W.3d 708 (Tex. App. 2008) ; *Mincey v. Deckle, 662 S.E.2d 126 (Ga. 2008)* .

After the citation "Estate of Shaw ... " add:.

see also, In re Estate of Goodwin, 18 P.3d 373 (Okla. App. 2000) .

change the citation of "Ark. Stat. Ann..." to read:

Ark. Stat. Ann. § 28-40-302

§ 88.10(f)(3) Intent.

Add:

In re Estate of Oliva, 880 N.E.2d 1223 (Ind. App. 2008) (holding that the doctrine of dependent relative revocation applied where the testator destroyed his prior will only after he or she had created and signed a new one).

Add:

In re Estate of Sharp, 889 N.Y.S.2d 323 (2009) ("The doctrine of relative revocation ... is usually applied where the testator cancels a will with a present intention to make a new testamentary disposition and the new disposition is not made, or if made, fails of effect for some reason ... ").

After the citation "Carter v. First United Methodist Church ... " add:

but see Havird v. Schlachter, 470 S.E.2d 657 (Ga. 1996) .

§ 88.10(f)(4) Application.

Change the citation of "Crosby v. Alton Ochoner Med. Fed'n ... " to read:

276 So. 2d 661 (Miss. 1973) .

§ 88.10(g)(4) Statutory Rules in U.S. Jurisdictions.

Add:

In re Estate of Creech, 989 A.2d 185 (D.C. 2010) ("[A] prior will may not be revived unless it has been re-executed or a codicil is executed in accordance with other statutory provisions.").

Change the citation of "Estate of Boysen ... " to read:

309 N.W.2d 45 (Minn. 1981) .

Change the citation of "Alaska Stat ... " to read:

§ 13.12.509

Change the citation of "Cal. Code ... " to read:

Cal. Prob. Code § 6123.

Change the citation of "Me. Rev. Stat. Ann ... " to read:

18-A Me. Rev. Stat. Ann. § 2-509

After the citation "Mich. Comp. Laws. Ann ... " add:

repealed, (effective Apr. 1 2000).

Change the citation of "Mont Code Ann ... " to read:

Mont. Code Ann. § 72-2-529

After the citation "S.D. Codified Laws Ann § 29-3-6" add:

repealed (1995) (In 1995 South Dakota repealed all previously enacted laws regarding succession, wills and probate and replaced them with the Uniform Probate Code).

Change the citation "MD. Ann. Code ... " to read:

Md. Estate & Trust Code § 4-106

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Supp. to § 88.11 Changes After Will Execution.

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§ 88.11(a) Changes in Persons. [Go To Main]

§ 88.11(a)(1) Missing

§ 88.11(a)(1)(iii) When Lapse not Applied--Common Law.

After the citation "Richland Trust Co. v. Bicvar ... " add:

but see Matter of Estate of Winslow, 934 P.2d 1001 (Kan. Ct. App. 1997) .

§ 88.11(a)(2) Antilapse Statutes.

Add:

Makepeace v. Mosser, 591 S.E.2d 191 (W. Va. 2003) (when testator intended real property to pass to his sister or her heirs, the anti-lapse statute authorized the property to pass to the sister's heirs).

Add:

Iowa Code § 633.273 (revised to read "issue" and not "heirs").

Add:

Jacobsen v. Flathe, 1997 Tenn. App. LEXIS 635 (Tenn. App. 1997) .

Change the citation "Estate of Kehler ... " to read:

411 A.2d 748 (Pa. 1980) .

§ 88.11(a)(2)(i) Application of Antilapse Statutes to Class Gifts.

Add:

In Re Estate of Lensch, *99 Cal. Rptr. 3d 246 (2009)* (holding that an anti-lapse statute caused the gift to pass to the diseased legatee's children).

§ 88.11(a)(3) Simultaneous Death.

§ 88.11(a)(3)(ii) 1991 Uniform Simultaneous Death Act.

Add:

See Waldman v. Maini, 195 P.3d 850 (Nev. 2008) .

§ 88.11(b) Changes in Property. [Go To Main]

§ 88.11(b)(1). Ademption by Extinction.

Add:

In re Estate of Frank, 189 P.3d 834 (Wash. App. 2008) (action over whether real property devised to a foundation was adeemed).

Bolte v. Robertson, 2006 Ala. LEXIS 88 (Ala. 2006) (devisee of property sold before testator's death was not entitled to payments made on the property purchase price before testator's death).

Mattlage v. Mattlage, 243 S.W.3d 763 (Tex. App. 2007) (devise in will adeemed by contract for the sale of the land).

For a discussion on the development of the law of ademption by extinction see Joshua Mullen, "Property: Administration of Wills: Common Law Ademption by Extinction and the Applicability of the *Tennessee Code Annotated Section 32-3-111*." *75 Tenn. L. Rev. 577 (2008).*

Add:

Estate of Pickett v. Johnson, 2004 Miss. App. LEXIS 67 (No. 2002-CA-01748-COA, Feb. 3, 2004) (a sales contract not cancelled by the vendor's death resulted in ademption of the devise for that land).

§ 88.11(b)(1)(ii) Identity Theory.

Change the citation of "In re Dugan's Estate ... " to read:

In re Dungan's Estate, 73 A.2d 776 (Del. Ch. 1950) .

Change the citation of "Hoben v. O'Donnell ... " to read:

Hobin v. O'Donnell, 451 N.E.2d 30 (Ill. Ct. App. 1983) .

Change the citation of "White v. White ... " to read:

251 A.2d 470 (N.J. Super. 1969) .

§ 88.11(b)(1)(iii) Construction Techniques to Avoid Ademption.

Change the citation of "Milton v. Milton ... " to read:

10 So. 2d 175 (Miss. 1942) .

§ 88.11(b)(1)(iv) Statutory Reforms.

Change the citation of "N.Y. Est. Powers & Trusts Law ... " to read:

§ 3-4.5

Change the citation of "Pa. Sta. Ann ... " to read:

20 Pa. Stat. Ann. § 2514(16.1).

§ 88.11(b)(2) Ademption by Satisfaction.

After the citation "Austin v. Austin ... " add:

but see, In re Estate of McFayden, 454 N.W.2d 676 (Neb. 1990) (stating that the use of parol evidence in matters of ademption as discussed in *Austin* had been superceded by statute).

After the citation "In re Estate of Wantz ... " add:

but see, In re Estate of McFayden, 454 N.W.2d 676 (Neb. 1990) (stating that *Wantz* has been superceded by statute).

§ 88.11(b)(3) Abatement.

§ 88.11(b)(3)(i) Intent.

Add:

In re Estate of Oberstar, 709 N.E.2d 872 (Ohio Ct. App. 1998) .

§ 88.11(b)(3)(iv) Estate Tax Note.

Change the citation of "Habert v. Monroe County ... " to read:

Haberl v. Monroe County, 491 N.E.2d 909 (Ill. Ct. App. 1986) .

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Supp. to § 88.12 Limits on Dispositions Under a Will.

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§ 88.12(a). General. [Go To Main]

Add:

Bernard v. Foley, 139 P.3d 1196 (Cal. 2006) (care custodians presumptively disqualified from receiving testamentary transfers).

Henry v. Henry, 670 N.W.2d 431 (Iowa App. 2003) (gifts to a son were not advancements of amounts he would have received under his parents' wills).

§ 88.12(b) Protection of Spouse. [Go To Main]

§ 88.12(b)(2) Theory.

Add:

However, the decedent's spouse's legal right to her elective share can be forfeited through improper conduct such as fraud or undue influence. See *Campbell v. Thomas, 897 N.Y.S.2d 460 (2010)* (holding that although the wife had known the decedent for 25 years she forfeited her elective share by inducing the decedent into marriage through undue influence).

After the citation "Painter v. Painter ... " add:

but see, Landwehr v. Landwehr, 545 A.2d 738 (N.J. 1988) (Pointing out that subsequent statutes have altered the original rationale in the *Painter* case).

Change the citation of the case "O'Brien v. O'Brien ... " to read:

489 N.E.2d 712 (N.Y. 1985) .

After the citation "O'Brien v. O'Brien ... " add:

but see, Hoak v. Hoak, 370 S.E.2d 473 (W.Va. 1988) .

§ 88.12(b)(3) Alteration of Rights by Pre or Post-Nuptial Agreement.

After the first sentence, Add new Note 721.1: n721.1

After the citation "Osborne v. Osborne ... " add:

Robbat v. Robbat, 643 So. 2d 1153 (Fla. Ct. App. 1994) .

§ 88.12(b)(4) The Spousal Election.

§ 88.12(b)(4)(iv) Does Surviving Spouse Acquire the Elective Share *Plus* Bequest or Inter Vivos Transfers?

Add:

In re Estate of Erwin W. Peterson, 576 N.W.2d 767 (Neb. 1998) .

After the citation "Ohio Rev. Code § 2107.42" add:

repealed.

Change the citation of "Ill. Rev. Stat ... " to read:

755 Ill. Rev. Stat. 5/2-8.

§ 88.12(b)(5) Omitted Spouse.

Change the citation of "Ky. Rev. Stat ... " to read:

but see, Ky. Rev. Stat. § 394.090

§ 88.12(b)(8)(i) Generally.

Change the citation of "Wirth v. Wirth ... " to read:

Wirth v. Wirth, 326 N.Y.S.2d 308 (N.Y. App. Div. 1971) .

For a discussion of how protection differs for spouses in community and marital property states see Benjamin Erlick, "Varying Levels of Protection Afforded: Disinherited Spouses in the Marital Property and Community Property States," *1 Phoenix L. Rev. 501 (2008)* .

§ 88.12(b)(8)(ii) Conflicts Issues.

Change the citation of "Cal. Prob. Code ... " to read:

Cal. Prob. Code § 66.

Change the citation of "Idaho Code ... " to read:

Idaho Code § 15-2-201.

Change the citation of "Wash. Rev. Code ... " to read:

Wash. Rev. Code § 26.16.220 - 26.16.250

After the citation "Tex. Fam. Code Ann. § 363(b) ... " add:

repealed.

§ 88.12(c)(2) Drafting Hints--Testamentary Libel.

Add:

See Adam Dayan, "The Kids Aren't Alright: An Examination of some of the Flaws in American Law Regarding Child Disinheritance, the Reasons that Children should be Protected, and a Recommendation for the United States to Learn from the Australian Model that Protects Children Against Disinheritance." *17 Cardozo J. Int'l & Comp. L. 375 (2009).*

§ 88.12(c)(4) Pretermitted Heirs.

Change the citation of "110 1/2 ILCS 4-10 ... " to read:

755 I.L.C.S. 5/4-10

§ 88.12(d)(1) Mortmain Statutes.

Change the citation of "Ga. Code 113-117" to read:

Ga. Code Ann. § 53-2-9, 53-2-10.

After the citation "Idaho Code § 15-2-615" add:

repealed (1994).

After the citation "Miss Code § 91-5-31" add:

repealed (1993).

§ 88.12(d)(2). The Rule Against Perpetuities.

Add:

Griffith v. Kirsch, 886 A.2d 249 (Pa. 2005) (language in will did not constitute an unreasonable restraint on alienation).

§ 88.12(e) Slayer Statutes. [Go To Main]

Change the citation of "Schifanelli v. Wallace ... " to read:

315 A.2d 513 (Md. 1974) .

Add:

In re Estate of Morris P. Van Der Veen, 935 P.2d 1042 (Kan. 1998) .

Add:

In re Estate of Kissinger, 206 P.3d 665 (Wash. 2009) (holding that a slayer statute could not apply to a killer who was found not guilty of murder by reason of insanity).

Add:

In *Levenson v. Word, 686 S.E.2d 236 (Ga. 2009)* , the Georgia Supreme Court held that the administrator of a husband's estate could not succeed in a conversion claim when the wife used estate property to procure legal representation to defend a murder prosecution against her.

FOOTNOTES:
(n6)Footnote 721.1. *See e.g., Foster v. Estate of Gomes, 27 So.3d 145 (Fla. App. 2010)* ; *Taylor v. Taylor, 1 So.3d 348 (Fla. App. 2009)* .

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Supp. To CHAPTER 88 Testamentary Transfers of Real Property

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Supp. to § 88.13 The Personal Representative, Probate and Administration.

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§ 88.13(b) The Uniform Probate Code. [Go To Main]

Change text of sentence from fifteen states to sixteen states.

Add:

South Dakota (1995).

§ 88.13(c) The Personal Representative. [Go To Main]

Add:

Karen J. Sneddon, "Beyond the Personal Representative: The Potential of Succession Without Administration," *50 S. Tex. L. Rev. 449* (Examining methods of succession with limited judicial interference).

§ 88.13(c)(1) Competency to Serve, Right of Appointment, and Renunciation.

Add:

See Wright v. Centerpoint Energy Resources Corp., 276 S.W.3d 253 (Ark. 2008) (holding that venue was proper in the county in which the decedent resided and not the county in which the personal representative resided).

§ 88.13(c)(2) Authority.

add:

See Estate of Dale v. Robinson, 760 N.W.2d 557 (Mich. App. 2008) (holding that the statute of limitations began to run from the point of time that the personal representative was issued letters of authority).

After the citation "Giuliani v. Guiler ... " add:

but see Clements v. Moore, 55 S.W.3d 838 (Ky. App. 2000) .

Attorney fees are recoverable for breach of fiduciary duty in the testamentary context. *Schneidman v. Tollman, 691 N.Y.S.2d 58 (1999)* (dictum).

Add:

See e.g., In re Estate of Bates, 948 A.2d 518 (D.C. 2008) (holding that a personal representative did not violate his fiduciary duties by selling a parcel of real estate); *Weekley v. Prostrollo 778 N.W.2d 823 (S.D. 2010)* (holding that a personal representative breached his fiduciary duty by failing to take possession of construction equipment).

Add:

See e.g., Stegemeier v. Magness, 728 A.2d 557 (Del. 1999) .

§ 88.13(c)(4) Powers.

Add:

See In re Estate of Olson, 744 N.W.2d 555 (S.D. 2008) (holding that a personal representative lacked the power to sell land where the will did not provide for the power and it was not necessary to the sell the land to pay off estate debts).

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§ 88.13(d)(2) Administration.

After the third sentence, Add new Note 909.1: n909.1

§ 88.13(f) Disclaimers. [Go To Main]

Add:

However the testator can provide that any property which is disclaimed shall go to a particular charity or individual. *See* Estate of Christiansen v. CI.R., 130 T.C. No.1 (U.S. Tax Ct., 2008) .

FOOTNOTES:
(n7)Footnote 909.1. For a discussion on how and why people avoid probate and possible alterations to the probate code see John H. Martin, "Reconfiguring Estate Settlement," *94 Minn. L. Rev. 42 (2009).*

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Supp. to § 88.14 Health Care Planning Devices.

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§ 88.14(a) Living Wills. [Go To Main]

After the citation "In re Quinlan ... " add:

but see, Matter of Conroy, 486 A.2d 1209 (N.J. 1985) , distinguished by, *In re Hughes, 611 A.2d 1148 (N.J. Super. 1992)* .

Change the citation of "Cruzan v. Missouri Dept. of Health ... " to read:

497 U.S. 261 (1990) .

§ 88.14(a)(1) Limits to Effectiveness.

Add:

See Sarah E. Heck and Mary J. Hoeller, "Physician Orders for Life-Sustaining Treatment: The New Living Will?" 53 *Res Gestae* 40 (April, 2010) (arguing that living wills are rarely enforced and that they do little to affect patient care).

Add:

Additionally, in *Sheible v. Joseph L. Morse Geriatric Center Inc., 988 So.2d 1130 (Fla. App. 2008)* , the court held that there was no cause of action against a nursing home for resuscitating a patient contrary to her living will).

§ 88.14(a)(2) Living Wills--Minors and Pregnant Women.

After the citation "N.M. Stat Ann. § 24-7-4" add:

repealed (1997).

After the citation "Tex. Rev. Civ. Stat. Ann. art. 4590h ... " add:

repealed (1989).

After the citation "In re Conroy ... " add:

but see Matter of Hughes, 611 A.2d 1148 (N.J. 1992) (distinguishing *Conroy* because in this instance the intent of the patient was unclear and the medical procedure could save a healthy woman's life, as opposed to merely prolonging a painful and imminent death).

§ 88.14(b) Durable Powers of Attorney. [Go To Main]

Change the citation "Vacco v. Quill" to read:

521 U.S. 793 (1997) .

After the citation "Cal. Civ. Code § 2431 ... " add:

repealed (1994).

After the citation "Tex. Rev. Civ. Stat. Ann. art. 4590h ... " add:

repealed (1989).

Change the citation of "Va. Code § 54.3258:1" to read:

Va. Code 37.1-137.1

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Supp. to § 88.15 Will Substitutes.

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§ 88.15(b) Gifts. [Go To Main]

§ 88.15(b)(2) Causa Mortis Gifts.

After the first sentence, Add new Note 1002.1: n1002.1

§ 88.15(c) Bank Accounts. [Go To Main]

§ 88.15(c)(1) Pay-on-Death Accounts.

After the citation "Truax v. Southwestern College ... " add:

but see In re Estate of Morton, 740 P.2d 571 (Kan. 1987) (stating that *Truax* has been overruled by statute).

§ 88.15(c)(2) Totten Trusts.

Add:

Cianciulli v. Smyth, 678 N.Y.S.2d 881 (N.Y.A.D. 1998) .

After the citation "Fleck v. Baldwin ... " add:

but see Land v. Marshall, 426 S.W.2d 841 (Tex. 1968) (stating that the holding in *Fleck* cannot be entirely correct since it directly opposes to a Texas Statute.)

FOOTNOTES:
(n8)Footnote 1002.1. Courts view causa mortis gifts with skepticism, because such gifts carry with them a high danger of fraud and perjury. Adam J. Macleod, "A Gift Worth Dying For?: Debating the Volitional Nature of Suicide in the Law of Personal Property," *45 Idaho L. Rev. 93, 97- 98 (2008)* .

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"No Step-Up in Basis under Sec. 1041 for Real Property Held in a Testamentary Trust on Death of Income Beneficiary, Who Held Only a Limited Power of Appointment, Except for Amount Covered Under Five and Five Power," *116 Banking L. J. 201 (February 1999).*

Sherman, Jeffrey G., "Posthumous Meddling: An Instrumentalist Theory of Testamentary Restraints on Conjugal and Religious Choices," *99 U. Ill. L. Rev. 1273 (1999).*

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Annotation, Conflict of laws as to construction and effect of will devising real property, 79 A.L.R. 91 .

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Annotation, Option created by will to purchase real estate, *44 A.L.R.2d 1214* .

Annotation, Power of those who accept executorship or trusteeship to exercise right to sell real property conferred by will on several named as executors and trustees, some of whom fail or refuse to accept, 36 A.L.R. 826 .

Annotation, Remedies in event of executor's or testamentary trustee's delay in exercise of power to sell real estate conferred by will, 132 A.L.R. 1473 .

Annotation, *Rights as Between Specific Devisees and Residuary Devisees in Respect of Blanket Mortgage or Other Lien on the Real Estate Covered by Those Devises,* 168 A.L.R. 701 .

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CHAPTER 89 INTESTATE SUCCESSION

10-89 Thompson on Real Property, Thomas Editions 89.syn

AUTHOR: Professor Buddy O.H. Herring Wake Forest University School of Law

§ 89.syn Synopsis to Chapter 89: INTESTATE SUCCESSION

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CHAPTER 89 INTESTATE SUCCESSION

10-89 Thompson on Real Property, Thomas Editions § 89.01

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§ 89.01 Introduction.

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The laws of intestate succession affect the lives of millions of people each year. While a growing number of people are taking the time to draft and execute last wills and testaments, a significant number of people owning property die each year without a will, in other words they die intestate. When that happens, the laws of the state will determine how their property is distributed. Also, the laws of intestacy will apply if a person dies and leaves a will that does not fully dispose of their property. Finally, the laws of intestate succession will apply to certain assets regardless of whether or not the deceased has a will. An example would be wrongful death judgment proceeds. In some states, these funds are to be distributed according to the laws of intestate succession and not under the residuary clause of a will. n1

The laws of intestate succession apply to any property which the decedent owned at death not properly disposed of by a valid last will and testament or not controlled by contract. They apply to present as well as future interests in property. Theoretically, these laws will distribute the intestate's property the way an average, reasonable and prudent person would dispose of his or her property. This may or may not be the way the actual intestate would have distributed property and cannot take into account special circumstances that only pertain to this family. Also, since there are 50 different legislatures fashioning the intestate laws of each state, there may be at least 50 different ideas as to what a reasonable and prudent person would do with his or her property in a given set of circumstances.

This chapter will summarize the transformation of intestate succession laws in the United States from colonial times to the present, pointing how the early English common law influence has been supplanted by statutes in each of the states. The chapter will describe the principal state legislative approaches toward distributing an intestate's real and personal property.

FOOTNOTES:
(n1)Footnote 1. *Matter of Estate of Richardson, 695 So.2d 587 (Miss. 1997)* (illegitimate children may recover as heirs in a wrongful death suit despite the residuary clause of the decedent's will); *Estate of J. W. Hessenflow v. Hessenflow, 909 P.2d 662 (Kan. App. 1995)* (election by decedent's widow to take by intestate succession); *Estate of Chong v. Chong, 906 P.2d 710 (Nev. 1995)* (two bank accounts not disposed of by will were distributed according to intestate

succession); *In re Estate of Marguerite Hunt, 908 S.W.2d 483 (Tex. App. 1995)* (remainder interest not disposed of by will passed by intestacy); *In re Will of Moore v. Eckliln, 428 S.E.2d 855 (N.C. App. 1993); McKinney v. Mosteller, 365 S.E.2d 612 (N.C. 1988).*

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CHAPTER 89 INTESTATE SUCCESSION

10-89 Thompson on Real Property, Thomas Editions § 89.02

AUTHOR: Professor Buddy O.H. Herring Wake Forest University School of Law

§ 89.02 Historical Background.

With the development of individual property rights came the question as to what happened to these rights upon the owner's death. The development of succession rules and the right to make a will can be traced back at least to Roman society. If a person died without making a will, he was said to die intestate and most post-Roman societies have developed a scheme to deal with a deceased person's property. This scheme is referred to as intestate succession. The development of most modern intestate succession laws can be traced back to feudal England and the Norman Conquest of 1540.

The Norman Conquest brought two important features into English law that impacted greatly on the law of intestate succession. These were the Norman brand of feudalism with its hallmark concept of primogeniture and the separation by William the Conqueror of the lay, or royal courts and the ecclesiastical courts. As a result of this division of courts, the laws regarding descent of land were determined by the more legalistic royal law courts and the rules regarding succession to personal property or chattels were developed by the more liberal ecclesiastical courts.

Thus, two sets of rules were developed by two different courts which applied to two different kinds of property. If one wanted to know what happened to a person's real property one looked to the rules of feudalism, as defined by the royal law courts. If one wanted to know what was to be done with a decedent's personal property, one had to examine the rules established by the ecclesiastical courts. This distinction between succession to real property and to personal property continued well into the 20th century in the United States.

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CHAPTER 89 INTESTATE SUCCESSION

10-89 Thompson on Real Property, Thomas Editions § 89.03

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§ 89.03 Descent of Real Property -- England.

After the Norman Conquest, descent of real property in England was governed by principles of feudalism. The hallmark of the feudal system, as far as descent of land was concerned, was the concept of primogeniture. Primogeniture provided that the eldest son had the right to inherit real property to the exclusion of his sisters and his younger brothers. The major rules concerning descent of real property were established by 1272, but it was not until Sir Matthew Hale wrote his *History of the Common Law* in 1713 that the principles were articulated in one place. n2

Perhaps the most famous statement of the rules concerning descent of real property in England was set forth by Blackstone in his *Commentaries*. n3

These Canons of Descent were as follows:

1. Inheritances shall lineally descend to the issue of the person who last dies actually seised in infinitum; but shall never lineally ascend.

2. The male issue shall be admitted before the female.

3. Where there are two or more males in equal degree, the eldest only shall inherit; but the females all together.

4. The lineal descendants in infinitum of any person deceased shall represent their ancestor; that is shall stand in the same place as the person himself would have done, had he been living. n4

5. On failure of lineal descendants or issue of the person last seised, the inheritance shall descend to his collateral relatives being of the blood of the first purchaser; subject to the three preceding rules.

6. The collateral heirs of the person last seised must be his next collateral kinsman of the whole blood.

7. In collateral inheritance the male stock shall be preferred to the female, unless the lands have in fact descended from a female.

Under these rules, the eldest son of the intestate would inherit all of the real property of the intestate. If the eldest son predeceased the intestate and left issue, those issue would take to the exclusion of the other children of the intestate. If the eldest son predeceased the intestate and left no issue, then the next eldest son or his issue, if he predeceased the intestate, would take all of the estate. Only if there were no sons or lineal descendants of sons would a daughter take the intestate's real property. If that situation arose, all daughters would share equally in the real property of the intestate.

One of the most striking features of the ancient system of intestate succession was the fact that the spouse was never included in the inheritance of real property and that under no circumstances would the parents or grandparents of the intestate take a share of the real property. If there were no children or lineal descendants of children, the real property would go to the intestate's brothers or sisters or their issue -- again preferring the eldest male over all others. If the land was obtained by purchase, the entire paternal line would have to be exhausted before even a much closer collateral on the maternal line would take the real property. This system placed a high premium on being male, being born first and having lineal descendants as quickly as possible.

Spouses were never allowed to inherit real property under the Canons of Descent. Spouses did have the protection of the rights granted by dower and curtesy, but would never inherit, in fee simple, any of the lands of a spouse.

Children born out of wedlock were not included under the term child and could not inherit from anyone. Also, the collateral relatives could not inherit from the illegitimate person. When the illegitimate person died intestate, the real property could descend to the children or other lineal descendants, but not to the collateral relatives. The personal property could pass to the spouse and children.

The Canons of Descent remained in force in England until the passage of the Inheritance Act of 1833. n5 This act made some sweeping changes in the system and abolished such things as non-inheritance by parents. However the system of primogeniture remained in force until 1925. n6

The Canons of Descent had a profound influence on the intestate succession laws of the United States. While most of the states governed intestate succession by statute, many of the principles contained in the Canons were incorporated in the new intestate succession statutes. However, the states generally rejected the concept of primogeniture, the prohibition on spouses inheriting, and the prohibition on inheritance by lineal ancestors.

FOOTNOTES:

(n1)Footnote 2. Matthew Hale, The History of the Common Law, 4th Ed. Dublin, Printed for J. Moore, 1792.

(n2)Footnote 3. William Blackstone, Commentaries, Bk. 2 c. 14.

(n3)Footnote 4. This rule established the parentela system. So long as an ancestor of the closest common ancestor was alive they would inherit before an ancestor claiming through a more remote ancestor. Thus, a great-great grandchild would inherit before an aunt or uncle. The closest common ancestor's line would be exhausted before moving to a more remote common ancestor's line.

(n4)Footnote 5. 3 & 4 Wm. IV, c. 106.

(n5)Footnote 6. Administration of Estates Act, 1925; 15 Geo. V, c. 23.

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CHAPTER 89 INTESTATE SUCCESSION

10-89 Thompson on Real Property, Thomas Editions § 89.04

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§ 89.04 Distribution of Real Property -- England.

While the descent of real property was controlled by the Canons of Descent and the law courts, the distribution of personal property was controlled by the ecclesiastical courts. Before 1670, there was much uncertainty about the distribution of personal property of a deceased and often the battle was between the deceased's family members and the church itself. This confusion threatened the ecclesiastical court's jurisdiction. In 1670, the Church sponsored the Statute of Distribution n7 to bring some order to the distribution of personal property.

The main difference between the Statute of Distribution and the Canons of Descent was the recognition in the Statute of the right of the spouse to a share of the deceased's estate. There was also no prohibition against the parents taking a share and, of course, primogeniture was not a feature of the Statute of Distribution.

§ 89.04(a) Widow's Share.

The first thing that one had to do in distributing the personal property was to ascertain the widow's n8 share of the estate. It was only after her share was computed that the share of children and other relatives could be determined. Under the Statute, if there were any children or surviving heirs of children, the widow was entitled to one-third of her deceased husband's personal property. If there were no children and no surviving heirs of predeceased children, the widow got one-half of her husband's personal property. The share not taken by the surviving spouse was then distributed as described in the next two subsections.

§ 89.04(b) Children's Share.

Once the widow's share was determined, the remainder of the personal property could be divided. Where both a widow and children survived, the children would divide equally that share of the estate not allocated to the widow. In other words, the children would divide equally two-thirds of the deceased's personal property. If there was a single child, that child would take the entire two-thirds. n9

Grandchildren took nothing so long as their parents were alive. If, however, a child predeceased the intestate, leaving issue, those issue would take their parent's share. For example, suppose that X died leaving three children (A, B, and C) and a widow (W), A had two children (C-1 and C-2) and B had one child (C-3) and C had no children. Under the

Statute of Distribution, W would be entitled to 1/3 of the personal property and A, B and C would divide the remaining 2/3 of the personal property equally. Each would get 2/9 of the personal property. Now suppose that A predeceased X. Again W gets 1/3 of the personal property and the remaining 2/3 is now divided between X's children or their representatives. In this case, B would get 2/9 and C would get 2/9 and A's share of 2/9 would be divided equally between C-1 and C-2. They would each get 1/9. Notice that C-3 got nothing because his parent was still alive. Now suppose that both A and B predecease X. W will still get her 1/3 of the personal property. Since one of the children is still alive, we divide the remaining 2/3 by the number of children alive, plus those who died leaving issue, in this case 3. So C still gets her 2/9 of the personal property. The remaining 4/9 of the property is to be divided between C-1, C-2, and C-3. The question is how is it to be divided. If it was divided as was done under the Canons of Descent, we would used the concept of representation and C-1 and C-2 would divide their parent's 2/9th share. C-3 would then take her parent's 2/9ths share. If the theory of representation was used C-1 and C-2 would each get 1/9th and C-3 would get 2/9ths. This would be a *per stirpes* distribution. If, on the other hand, a *per capita* distribution was made, then C-1, C-2 and C-3 would divide the 4/9ths share of their parents equally. Arguments can be made for either scheme and in 1741 the Lord Chancellor expressed the opinion that a *per stirpes* distribution would be proper. n10 It was later decided that a *per stirpes* distribution would be proper in such cases. n11

If the deceased left no widow, but had surviving children or heirs of children, the children or their heirs took the whole estate. If there was a single child, that child took all the personal property. So long as there were children or heirs of children, the parents and collateral relatives would take none of the personal property.

§ 89.04(c) Next of Kin.

If the deceased left a widow and no children and no representatives of predeceased children, the widow took one-half of the personal property. The remaining one-half went to the next of kin to be divided equally by those in the nearest degree of kinship. If the deceased left no widow and no children or representatives of predeceased children, then the next of kin took all the personal property.

The rules for determining next of kin were quite different than the rules for determining heirs under the Canons of Descent. The principles of primogeniture and the preference for males over females were not followed. Also, the rule against property lineally ascending was not followed. Thus, if X died intestate and left no widow and no children or heirs of predeceased children, but was survived by father and mother (F and M) and a brother and a sister (B and S), the real property would all go to B, but the personal property would be divided equally between F and M. If X's parents had predeceased X, then the personal property would be divided equally between B and S.

The ecclesiastical courts did not follow the Canons of Descent in computing degree of kinship. Under the Canons of Descent the nearest collateral line would be exhausted before moving to the next parentela. (The first parentela are the descendants of the intestate's parents. The second parentela would be descendants of the intestate's grandparents.) Thus, if X died leaving no widow, no children, no parents, the land would then descend to X's brother or the brother's heirs, no matter how remote those heirs might be. An heir of the brother, even if three or four times removed from the brother, would take the land, by representation, to the exclusion of an uncle. The closest stock was exhausted before the land would pass to a more remote stock. n12

In determining degree of kinship, the ecclesiastical courts adopted the civil law method of counting. Under this method, one first counted the steps from the deceased to a common ancestor and then the steps from the ancestor to the claimant. The sum of the two numbers represented the degree of kinship of the claimant to the deceased. Thus, a nephew was in the third degree of kinship. It was one step from the deceased to the parents and then one step to the decedent's brother and then one step to the brother's child. An uncle would be in the third degree also. There would be one step to the deceased's parents, one step to the grandparents (the common ancestor), and then one step to the uncle. Absent a widow and children or representatives of children, those in the closest degree of kinship would share equally in the personal property of the deceased.

In the example above, if the intestate left no widow, no children, no representatives of children, and no parents, but did leave a nephew and a grandfather, the grandfather would take all the personal property since he was in the second degree of kinship and the nephew was in the third degree. However, the nephew would take all the real property.

Generally representation was not allowed. The one exception was in the case where there were brothers or sisters and children of predeceased brothers and sisters. In this case, alone, the Statute allowed the children of a predeceased brother or sister to move up and share in the estate with the surviving brothers and sisters. The children would share equally in their parent's share. If there were no surviving brothers and sisters, but there were nephews and nieces, they would share equally with aunts and uncles who were also in the third degree.

§ 89.04(d) Miscellaneous.

Unlike the rules under the Canons of Descent, the source of the deceased's title was irrelevant in the passing of personal property. No preference was given to the maternal or paternal side of the family. Also, relatives of the half-blood would inherit equally with relatives of the whole blood.

However, just as in the case of descent of land, illegitimate children would take none of their parent's personalty.

FOOTNOTES:
(n1)Footnote 7. 22 & 23 Car. II, ch. 10.

(n2)Footnote 8. The Statute did not contemplate the situation of a woman dying intestate since her husband would be entitled to all her personal property upon marriage.

(n3)Footnote 9. *Brown v. Farndell, Carth. 51, 90 Eng. Rep. 634 (1689).*

(n4)Footnote 10. *Lockyer v. Vade, 27 Eng. Rep. 713 (1741).*

(n5)Footnote 11. *In re Ross's Trusts, 13 L.R.-Eq. 286 (1871).*

(n6)Footnote 12. W. D. Rollison, Principles of the Law of Succession to Intestate Property *11 Notre Dame Lawyer 14, 121 (1935).*

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CHAPTER 89 INTESTATE SUCCESSION

10-89 Thompson on Real Property, Thomas Editions § 89.05

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§ 89.05 Intestacy -- United States.

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§ 89.05(a) Introduction.

The English law of intestacy has had a great influence on the law of intestacy in the United States. While all of the American states have rejected the concepts of primogeniture and the preference of males over females and most reject the distinctions England drew between real and personal property, many of the patterns and concepts developed in England have served as the basis for American intestate succession laws.

Since the colonies did not have bishops and a strongly developed state church, no ecclesiastical courts developed. Since there were not two courts vying for power in the area of intestate succession, most of the states decided to treat real and personal property alike. There were some exceptions concerning the share of the surviving spouse and even today some state statutes make reference to a different share of the real property and the personal property of the intestate. n13

Generally, the legislatures decided to follow the scheme set forth in the English Statute of Distribution, 1670. The concepts of dower and curtesy were abolished and the surviving spouse was entitled to share in the estate of the deceased. Also, the Canons of Descent's prohibition on property lineally ascending never became a part of the laws of most states. Finally, most states decided to follow the civil law method of determining next of kin.

While the English law served as a model for most states, there is no universal law of intestate succession in the United States today, n14 each state has developed its own laws of intestate succession. Also, while there is no universal intestate succession law in this country, there are certain areas of agreement among the states and the various jurisdictions can be placed in groups depending on how they deal with certain areas, such as the share of the surviving spouse. n15

§ 89.05(b) The Surviving Spouse.

In England, under the common law, the surviving spouse was not entitled, outright, to any of the decedent spouse's real property. The common law provided that the surviving spouse would get a life interest in the lands of the deceased spouse under the principles of dower or curtesy. This right could not be defeated by will. Under the Statute of

Distribution, 1670, the widow took either a third or a half of the personal property, depending on whether or not there were descendants of the deceased. This share could be defeated by will.

This situation has been greatly changed in the United States. Dower and curtesy have largely been abolished or greatly changed. Generally speaking, the surviving spouse is given a share of the realty and personalty of the deceased spouse. In many jurisdictions there is no distinction. The surviving spouse is given a fixed share of the intestate's estate, regardless of what comprises the estate. n16

There is, however, a wide variance as to what is the surviving spouse's share and exactly what comprises that share. Since the surviving spouse is considered a special case, different legislatures have adopted different means to deal with the surviving spouse. Also, many states reduce the share of the surviving spouse if he or she is a second or successive spouse and there are children by a previous marriage. n17 There is, however, one area of agreement and that is that the surviving spouse's share is to be allocated before any other relative receives any of the estate of the deceased.

Thus, the first thing the administrator must do in distributing an intestate estate is determine what is the share of the surviving spouse.

§ 89.05(b)(1) Share of the Surviving Spouse -- Uniform Probate Code.

The Uniform Probate Code n18 contains a basic pattern of intestate succession. This pattern, presumably, reflects how most people would dispose of their property if they were to die without a will. The Code has been adopted in sixteen states. n19

The share of the surviving spouse varies according to a number of factors. The intestate share of a decedent's estate is:

(1) the entire estate if:

(i) no descendant or parent of the decedent survives the decedent; n20 or

(ii) all of the decedent's surviving descendants are also descendants of the surviving spouse and there is no other descendant of the surviving spouse who survives the decedent; n21

(2) the first [$200,000], plus three-fourths of any balance of the intestate estate, if no descendant of the decedent survives the decedent, but a parent of the decedent survives the decedent;

(3) the first [$150,000], plus one-half of any balance of the intestate estate, if all of the decedent's surviving descendants are also descendants of the surviving spouse and the surviving spouse has one or more surviving descendants who are not descendants of the decedent;

(4) the first [$100,000], plus one-half of any balance of the intestate estate, if one or more of the decedent's surviving descendants are not descendants of the surviving spouse. n22

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LEXIS: intestate succession w/30 surviving w/1 spouse! w/5 share

§ 89.05(b)(2) Share of the Surviving Spouse -- Issue and Parents.

Even if a jurisdiction has not adopted the Uniform Probate Code, one of the most important factors in determining the intestate share of the surviving spouse is whether or not the intestate left issue or descendants of issue surviving. In many states, the surviving spouse's share is reduced if there are issue. n23 The Alabama Code n24 now requires that if

there is no surviving issue or parent of the decedent, the entire estate goes to the surviving spouse. If there is no surviving issue, but the decedent is survived by a parent or parents, the surviving spouse receives the first $100,000 in value, plus one-half of the balance of the intestate estate. If there are surviving issue all of whom are also issue of the surviving spouse, the surviving spouse receives the first $50,000 in value, plus one-half of the balance of the intestate estate. If there are surviving issue one or more of whom are not issue of the surviving spouse, one-half of the intestate estate goes to the surviving spouse. Similar provisions are found in Alaska, n25 Connecticut, n26 Nebraska, n27 New Hampshire, n28 New Jersey, n29 North Dakota n30 and Pennsylvania. n31 In some of these states the share is reduced if there are issue which are not issue of the surviving spouse. n32

Some states give the surviving spouse the entire estate if there are no issue of the intestate regardless of what other relatives survive. n33 In other states, the spouse's share is determined not only by whether or not there are issue, but whether or not parents survive the intestate. n34 For example, in Indiana, n35 the spouse's share is one-third of the estate if there are two children, one-half if there is one child, three-quarters if there is a parent, and the entire estate if there are no issue or parents. n36

If the intestate left issue that are not the issue of the surviving spouse, the surviving spouse's share is most often reduced. The most general reduction is 50%. In other words, where the surviving spouse was to get the entire estate, if there were surviving issue, but if those issue are not issue of the surviving spouse, he or she would get only 50% of the estate. n37

A few states provide that the surviving spouse shall receive the entire estate even if there are issue and parents. n38 In Arizona, n39 the surviving spouse receives the entire estate, including the intestate's interest in community property, if there are no issue or if all the surviving issue of the intestate are also issue of the surviving spouse. n40 Iowa also gives the surviving spouse all of the estate if all the issue are issue of the surviving spouse. n41

One state, Arkansas, provides the surviving spouse no intestate share if children of the intestate survive. However, where there are no issue, the spouse receives all of the estate if the parties have been married at least three years. If they have not been married three years, the surviving spouse receives one-half of the estate. n42

In the great majority of the states, if the intestate is not survived by any issue or by any parents, the surviving spouse takes the entire estate. n43

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LEXIS: intestate succession w/30 issue or parent!

§ 89.05(c) Descendants.

If the law of a particular jurisdiction does not give the entire estate to the surviving spouse, the next group of people who usually take part of the intestate estate are the lineal descendants. The share allocated to lineal descendants by statute is markedly different from that allocated at the common law. Whereas the eldest son was the preferred beneficiary of land and the children took the largest share of the intestate's personal property, today in most states the surviving spouse is the prime beneficiary. n44

The share that the lineal descendants take is specified by statute. Lineal descendants include posthumously born children n45 and in most states adopted children, though reference to the specific adoption statute must be made to determine if a child inherits through his adopted parents.

Generally speaking, after the allocation of the share for the surviving spouse, the remainder of the intestate's estate goes to his or her lineal descendants in equal shares. n46

The situation becomes more difficult when the intestate is survived by living children, plus descendants of predeceased children. Here the question is what share do the descendants of the predeceased child take? Do they take equally or do they take their parent's share by representation? On this question there is universal agreement among the states. Where there is a living child or children and heirs of a predeceased child, the shares are determined by counting the number of living children plus those who died leaving issue. n47 For example, if an intestate died leaving three living children and a fourth predeceased child who had two children (grandchildren of the intestate), each of the living children would receive one-fourth of the estate and the two grandchildren would divide their parent's one-fourth. However some states have modified this rule when there are two or more predeceased children leaving issue. n48

The distribution becomes more complicated when all of the children have died and have left issue. The question then is whether or not these descendants take *per stirpes* or *per capita*. For example, suppose that the intestate had three children (A, B, and C) and when he died all of his children had predeceased him. Suppose that A had one child (C-1); that B had two children (C-2 and C-3) and that C had three children (C-4, C-5, and C-6). The question is whether these grandchildren take their parent's share or take equally as grandchildren. If they take on a *per stirpes* bases, C-1 gets one-third, C-2 and C-3 each get one-sixth, and C-4, C-5 and C-6 each get one-ninth. If they take on a *per capita* basis, then each child would take one-sixth of the estate. At the common law, the division was *per stirpes*. n49 A growing number of states have abandoned this division and will now allow all the surviving grandchildren to take equally. n50

However, in all states a grandchild will take nothing so long as his or her parent is alive. Also, there is no preference given between males and females.

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LEXIS: intestate succession w/30 descendant!

§ 89.05(d) Lineal Ascendants.

At the common law, real property could never lineally ascend. n51 Thus, parents could never take any of the intestate's real property, but they could share in the intestate's personal property. Today, no state follows the common law rules concerning real property. As a matter of fact, in many states, if the intestate does not leave lineal descendants, the parents will share in the estate with the surviving spouse. n52 Some states do exclude lineal ascendants if there are no lineal descendants, but there is a surviving spouse. n53 In all cases, the lineal ascendants will not take any of the property if there are any lineal descendants.

In almost all jurisdictions, parents are the preferred beneficiaries when there are no lineal descendants and no spouse. n54 However, in a few jurisdictions, the parents will divide the share of the estate not going to the surviving spouse with surviving brothers and sisters of the intestate. n55

Under certain circumstances, the majority of jurisdictions provide for ascendants even beyond parents. n56

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LEXIS: intestate succession w/30 lineal w/2 ascendant!

§ 89.05(e) Collateral Succession.

If there are no lineal descendants, no spouse, and no parents, most statutes provide for the intestate's estate to go equally to brothers and sisters. n57 Again, there is no distinction made between males and females. If there are surviving brothers and sisters as well as issue of predeceased brothers and sisters, most states provide that the surviving nephew

and nieces will take their parent's share on a *per stirpes* basis. n58 However, a growing number of states are taking the position that the division is made at the brother and sister level and the shares not taken by living brothers and sisters are lumped together and taken on a *per capita* basis by the surviving nephews and nieces. n59 When there are no surviving brothers and sisters, most states will make a *per capita* division among nephew and nieces. n60

Most states allow descendants of brothers and sisters to represent predeceased brothers and sisters to the exclusion of grandparents and descendants of grandparents. n61 The effect of this position is to exhaust the first parentela, before moving up to the grandparents and the second parentela.

If there are no brothers and sisters or descendants of brothers and sisters, most states will divide the estate among surviving grandparents, usually with one-half the estate going to the maternal side of the family and one-half going to the paternal side of the family. n62 The surviving maternal grandparents would share equally in the one-half share, but if only one of the maternal grandparents were alive, the survivor would take the entire one-half share, the same rule applying on the paternal side of the family. If neither paternal grandparent survived the intestate, then the one-half share allocated to the paternal side of the family would go to the descendants of the paternal grandparents by representation. If there are no paternal relatives, that share would then go to maternal side of the family. On each side of the family, the states will usually allow representation. n63

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LEXIS: intestate succession w/30 collateral w/2 succession.

§ 89.05(f) Half-Bloods.

In dealing with collateral relatives of the half blood, the states have completely rejected the common law Canons of Descent prohibition against half-bloods taking a share of the intestate's real property. Almost all of the states have abolished the different treatment of collateral relatives of the half and whole bloods. n64

However, some states have special rules when it comes to half-bloods. Connecticut allows half-bloods to take only when there are no collateral relatives of the whole blood in the same degree. n65 Mississippi has a similar statute. n66 A number of states only give half-bloods one-half the amount that a whole blood in the same degree would take. n67

§ 89.05(g) Illegitimates.

At the English common law, an illegitimate child was a *filius nullius*, a child of no one. Such children could not inherit from either mother or father and the parents could not inherit from the child. The only heirs that the illegitimate child would have would be the child's own children. The illegitimate person would have no lineal ascendants, nor any collateral relatives, n68 but instead would establish a new family.

This harsh rule has been modified in all states. The most common rule is that the illegitimate child can inherit from the mother and she can inherit from the child. The child is placed in her bloodline as a child. n69

In most states, an illegitimate child cannot inherit from his or her father unless the child has been legitimated by a subsequent marriage or some other formal acknowledgement has been given by the father, usually during his lifetime. n70 In some states that acknowledgment must be in writing. n71 Another method accepted by most states is if the father is declared in a judicial proceeding to be the father of the child. n72

Some states are less strict and will allow succession between an illegitimate child and the father when the father has openly and notoriously acknowledged his paternity. n73

Oregon allows the child to inherit from its father regardless of the marital status of the parents. n74

Once a state allows the illegitimate to inherit from a parent, the general rule is that the parent can inherit from the child and that the child can also inherit through the parent. In other words, if the child is allowed to inherit from his or her mother, then the child is treated the same as a legitimate child. The same is true once the state has declared that the child can inherit from his or her father. n75

There are a few exceptions; California, for example, limits the rights of relatives of illegitimate children unless they also acknowledge the relationship and help support the child. n76 In New Hampshire and Vermont, the relatives of an illegitimate child have no rights of succession. n77

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LEXIS: intestate succession w/30 illegitima!

§ 89.05(h) Adoption.

Adoption was unknown at the common law and has become an area almost completely controlled by statutes in this country. One of the main problems in dealing with adopted children in an intestate situation is that many of the rules governing the adoptee's status are found in statutes located outside the Intestate Succession Act. n78 One must be sure to examine the adoption statutes of a particular jurisdiction before deciding what share the adopted child is entitled to or how to divide an adopted child's estate.

Three areas must be examined in dealing with an adopted child in an intestate situation: (1) whether the child can inherit from the natural parents, or the adoptive parents, or both; (2) whether the adoptive parents, or the natural parents, or both, can inherit from the adopted child; (3) and from whose kin can the adopted child inherit?

There is almost universal agreement on the first issue. The general rule is that the adopted child will inherit from the adoptive parents. n79 A few states do allow the adoption decree to restrict the broader inheritance rights granted by the statute. n80 A few states still allow the adopted child to inherit from the natural parents. n81 But, clearly, the general scheme is to place the adopted child into the bloodstream of the adoptive family and to treat the adopted child as a natural born child and to remove the adopted child from his or her natural family.

In following the idea of placing the adopted child into the bloodstream of his adoptive family, most states provide that only the adoptive parents can inherit from the adopted child. n82 Even states which allow the adopted child to inherit from the natural parents n83 do not allow the natural parents to inherit from the adopted child, unless very special circumstances exist. The most common situation where a natural parent is permitted to inherit from the adopted child is when one of natural parents and one of the adoptive parents marry. n84

Generally speaking, the adopted child will inherit from his adoptive parents' kin and not from the natural parents' kin. Also, the adoptive kin and not the natural kin will take the adopted child's property on intestacy. There are a few exceptions, especially in dealing with natural grandparents, n85 but generally the adopted child is placed into the family of the adopting parents for inheritance purposes.

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LEXIS: intestate succession w/30 adopt!

FOOTNOTES:
(n1)Footnote 13. *See, e.g.,* N.C. Gen. Stat. Ann. § 29-14.

(n2)Footnote 14. U.P.C. § 1-101.

(n3)Footnote 15. *Outwater v. Secretary of Health & Human Servs., 894 F. Supp. 1114 (E.D. Mich. 1995)* (state court determination that illegitimate child could inherit property under intestate succession did not determine child's entitlement to Social Security survivor benefits).

(n4)Footnote 16. A few states still give the surviving spouse an intestate share of the personalty of the decedent plus a share of the real property. *See, e.g.,* Del. Code Ann. tit. 12, § 502; Ky. Rev. Stat. Ann. §§ 392.010, 392.020.

(n5)Footnote 17. *See* note 22, *infra*.

(n6)Footnote 18. Uniform Probate Code (u.L.A.) § 2-101 (hereinafter, "U.P.C.")

(n7)Footnote 19. Alaska, Arizona, Colorado, Florida, Hawaii, Idaho, Maine, Michigan, Minnesota, Montana, Nebraska, New Mexico, North Dakota, South Carolina, South Dakota and Utah.

(n8)Footnote 20. U.P.C. § 2-102(1).

(n9)Footnote 21. U.P.C. §§ 2-102(2) - 2-102(3).

(n10)Footnote 22. U.P.C. § 2-102(4).

(n11)Footnote 23. *See, e.g.,* S.C. Code Ann. § 62-2-102.

(n12)Footnote 24. Ala. Code § 43-8-41.

(n13)Footnote 25. Alaska Stat. § 13.11.010.

(n14)Footnote 26. Conn. Gen. Stat. Ann. § 45a-436.

(n15)Footnote 27. Neb. Rev. Stat. § 30-2302.

(n16)Footnote 28. N.H. Rev. Stat. Ann. § 561:1.

(n17)Footnote 29. N.J. Rev. Stat. § 3B:5-3 (1982).

(n18)Footnote 30. N.D. Cent. Code § 30.1-04-02. The North Dakota statute now provides that the share of the surviving spouse is $200,000 plus one-half the balance if either parent survives.

(n19)Footnote 31. 20 Pa. Cons. Stat. § 2102. Here the spouse's share is reduced to $30,000.

(n20)Footnote 32. *See, e.g.,* Ala. Code § 43-8-41. The amounts are reduced by 50%; Ariz. Rev. Stat. Ann. § 14-2102. The amount is reduced 50%.

(n21)Footnote 33. *See, e.g.,* Ariz. Rev. Stat. Ann. § 14-2102; Colo. Rev. Stat. § 15-11-102; Fla. Stat. Ann. § 732.102; Ga. Code ann. §§ 53-4-2 - 53-4-3; Spouse takes all in Mississippi if there are no children, but divides equally if there are children. Miss. Code Ann. § 91-1-7; Spouse gets entire estate in New Mexico if there are no children, but only one-fourth if there are children. N.M. Stat. Ann. § 45-2-102. The same is true in Tennessee. Tenn. Code Ann. § 31-2-104. Annotation, *Adopted child as within term "issue" in statute relating to decedents' estates,* 98 a.L.R. 191.

(n22)Footnote 34. N.Y. Est. Powers & Trusts Law § 4-1.1; N.C. Gen. Stat. § 29-14; Wash. Rev. Code § 11.04.015. *See also Burk v. Burk, 903 P.2d 914 (Or. App. 1995)* (surviving spouse held entitled to one half of estate residue under the California intestate succession statute).

(n23)Footnote 35. Ind. Code Ann. § 29-1-2-1. The Indiana statute now provides that the spouse's share is one-half if there is at least one child, three-quarters if one or both parents are still surviving, and the entire estate if there are no issue or parents.

(n24)Footnote 36. S.D. Codified Laws Ann. §§ 29-1-5 - 29-1-6. South Dakota has now adopted the Uniform Probate Code.

(n25)Footnote 37. See, e.g., Mont. Code Ann. § 72-2-112; Or. Rev. Stat. § 112.025; Iowa gives the second or successive spouse the greater of $50,000 or half of the estate if there are issue not issue of the surviving spouse. Iowa Code §§ 633.211 - 633.212. In Oklahoma the second or successive spouse only gets one-half of the property acquired by joint effort during the marriage. Okla. Stat. tit. 84, § 213B1. In Virginia the share is reduced to one-third. Va. Code Ann. § 64.1-11.

(n26)Footnote 38. Or. Rev. Stat. §§ 112.025, 112.035. If there are surviving issue of the decedent, one or more of whom are not issue of the surviving spouse, the share of the surviving spouse is one-half of the net intestate estate.

(n27)Footnote 39. Ariz. Rev. Stat. Ann. § 14-2102.

(n28)Footnote 40. If some of the surviving issue are not issue of the surviving spouse, he or she receives one-half the estate. Ariz. Rev. Stat. Ann. § 14-2102.

(n29)Footnote 41. Iowa Code §§ 633.211 - 633.212. *See also* Va. Code Ann. § 64.1-11.

(n30)Footnote 42. Ark. Rev. Stat. Ann. § 28-9-214.

(n31)Footnote 43. *But cf.*, D.C. Code Ann. § 19-304; Ky. Rev. Stat. Ann. §§ 392.010, 392.020, 392.030; La. Civ. Code Ann. art. 2434; Mass. Gen. Laws Ann. ch. 190, § 1; Mo. Rev. Stat. § 474.010. *See also Tarlton v. Stidham, 469 S.E.2d 38 (N.C. App. 1996).*

(n32)Footnote 44. *See* § 89-05(b), supra.

(n33)Footnote 45. *See, e.g., West v. King, 262 S.W.2d 897;* Ga. Stat. Ann. § 53-4-2(4).

(n34)Footnote 46. *See, e.g.*, U.P.C. § 2-103(1); Ala. Code § 43-8-42(1); Ariz. Rev. Stat. Ann. § 14-2103(1); Conn. Gen. Stat. Ann. § 45-274(a); Ind. Code ann. § 29-1-2-1(d); Fla. Stat. Ann. § 732.103(1); N.J. Rev. Stat. § 3B:5-4(a); N.M. Stat. Ann. § 45-2-103(A).

(n35)Footnote 47. Annotation, *Descent and distribution to nieces and nephews as per stirpes or per capita, 19 A.L.R. 2d 191, 194 (1951).*

(n36)Footnote 48. *See, e.g.*, N.C. Gen. Stat. § 29-16. Here the grandchildren of the pre-deceased children will divide their parent's total share per capita. For example, if two of the children had pre-deceased the intestate, one leaving one child and the other leaving two children, the living child would take one-third and the three grandchildren would equally divide the remaining two-thirds.

(n37)Footnote 49. William H. Page, *Descent Per Stirpes and Per Capita*, Wis. L. Rev. 3.

(n38)Footnote 50. *See, e.g.*, N.J. Rev. Stat. § 3B:5-4(a); N.C. Gen. Stat. § 29-16(2); N.D. Cent. Code § 30.1-04-03(2-103)(1); Or. Rev. Stat. § 112.045(1).

(n39)Footnote 51. *See* § 89.03.

(n40)Footnote 52. *See*, e.g., N.C. Gen. Stat. § 29-15(3); S.C. Code Ann. § 62-2-103.

(n41)Footnote 53. *See, e.g.*, Colo. Rev. Stat. § 15-11-102(1)(a); Fla. Stat. Ann. § 732.102(1)(a); Miss. Code Ann. § 91-1-7; Va. Code Ann. § 64.1-11.

(n42)Footnote 54. *See, e.g.*, Ala. Code § 43-8-42; Ariz. Rev. Stat. Ann. § 14-2103; Cal. Prob. Code § 6402; N.C. Gen. Stat. § 29-15(3).

(n43)Footnote 55. *See, e.g.*, Ga. Stat. Ann. § 53-4-2; 755 Ill. Stat. Ann. 5/2-1; Miss. Code Ann. § 91-1-3.

(n44)Footnote 56. *See, e.g.*, Ark. Stat. Ann. § 28-9-214; Cal. Prob. Code §§ 6402 - 6414; Me. Rev. Stat. tit. 18-A, § 2-103; N.C. Gen. Stat. § 29-15.

(n45)Footnote 57. *See, e.g.*, Ariz. Rev. Stat. Ann. § 14-2103(3); Fla. Stat. Ann. § 732.103(3); N.M. Stat. Ann. § 45-2-103.

(n46)Footnote 58. *See, e.g.*, N.M. Stat. Ann. § 45-2-103(C); Va. Code Ann. § 64.1-3.

(n47)Footnote 59. *See, e.g.*, N.C. Gen. Stat. Ann. § 29-16(1)(2). For example, if the intestate left surviving him two sisters and also two pre-deceased sisters with issue, the estate would be divided into four parts. The two surviving sisters would each get a fourth of the estate. The remaining one-half would be divided equally among the issue of the pre-deceased sisters. See also U.P.C. § 2-103.

(n48)Footnote 60. U.P.C. § 2-103. *But cf.* Fla. Stat. Ann. § 732.104; Ky. Rev. Stat. Ann. § 391.040.

(n49)Footnote 61. *See, e.g.*, Fla. Stat. Ann. § 732.103; N.C. Gen. Stat. § 29-16(b) allowing representation through the fifth degree of kinship.

(n50)Footnote 62. U.P.C. § 2-103.

(n51)Footnote 63. *Id.*

(n52)Footnote 64. *See, e.g.*, Ala. Code § 43-8-46; Del. Code Ann. tit. 12, § 506; Ind. Code Ann. § 29-1-2-5; Mich. Comp. Laws Ann. § 700.109; N.C. Gen. Stat. § 29-3; Utah Code Ann. § 75-2-107.

(n53)Footnote 65. Conn. Gen. Stat. Ann. § 45A-439. Connecticut law now draws no distinction between half-bloods and relatives of the whole blood.

(n54)Footnote 66. Miss. Code Ann. § 91-1-5.

(n55)Footnote 67. *See, e.g.*, Fla. Stat. Ann. § 732.105; Ky. Rev. Stat. Ann. § 391.050; Va. Code Ann. § 64.1-2. The Florida statute allows collateral kindred of the half-blood to inherit whole parts if all the kindred are of the half-blood.

(n56)Footnote 68. Chester G. Vernier & Edwin P. Churchill, *Inheritance By and From Bastards, 20 Iowa L. Rev. 216.*

(n57)Footnote 69. *See, e.g.*, Idaho code § 15-2-109; Mich. Stat. Ann. § 700.111; N.C. Gen. Stat. Ann. §§ 29-19-29-22; Ohio Rev. Code Ann. § 2105.17; Va. Code Ann. §§ 64.1-5.1-64.1-5.2. *See also Estate of Hicks, 675 N.E.2d 89 (Ill. 1996)* (statute declared unconstitutional because of gender discrimination).

(n58)Footnote 70. *See* Del. Code Ann. tit 13, §§ 1301-1304; N.C. Gen. Stat. Ann. §§ 29-19(b)(1) - 29-19(b)(2). *See also Haas v. Chater, 79 F.3d 559 (7th Cir. 1996);* In the *Matter of the Estate of Morris, 472 S.E.2d 786 (N.C. App. 1996); Bilbrey v. Smithers, 937 S.W.2d 803 (Tenn. 1996).*

(n59)Footnote 71. N.C. Gen. Stat. § 29-19(2). The acknowledgement must be in writing and executed during the

father's lifetime. It is also permissible for a father to acknowledge a child in his last will. If this method is used then the child is considered a child for all purposes under the will.

(n60)Footnote 72. *See, e.g.*, Ark. Stat. Ann. § 28-9-209; Ky. Rev. Stat. Ann. § 391; N.C. Gen. Stat. Ann. § 29-19(b)(1). *See also* In the *Matter of Nocita, 914 S.W.2d 358 (Mo. 1996)* (claims of paternity asserted during probate are governed by Probate Code limitations provision, rather than by limitations provision in Parentage Act).

(n61)Footnote 73. 20 Pa. Const. Stat. Ann. §§ 2107, 2514(8). *See also Brookbank v. Gray, 658 N.E.2d 724 (Ohio 1996)* (unacknowledged illegitimate was not barred from recovering for the wrongful death of the putative father).

(n62)Footnote 74. Or. Rev. Stat. § 109.060.

(n63)Footnote 75. *See, e.g.*, Mass. Gen. Laws Ann. ch. 190, § 5; N.H. Rev. Stat. Ann. § 561.4; N.C. Gen. Stat. § 29-19.

(n64)Footnote 76. Cal. Prob. Code § 6452.

(n65)Footnote 77. N.H. Rev. Stat. Ann. § 561.4; Vt. Stat. Ann. tit. 14, §§ 553, 554.

(n66)Footnote 78. Fred L. Kuhlman, *Intestate Succession by and from the Adopted Child, 28 Wash. U. L.Q. 221 (1943);* Francis H. Fairley, *Inheritance Rights Consequent to Adoptions, 29 N.C. L. Rev. 227 (1951).*

(n67)Footnote 79. *See, e.g.*, Conn. Gen. Stat. Ann. § 45A-731; Fla. Stat. Ann. § 732.108; Mich. Comp. Laws § 700.110; N.C. Gen. Stat. Ann. § 29-17; Utah Code Ann. § 75-2-109. *See also Estate of Ryan v. Ryan, 928 P.2d 735 (Ariz. App. 1996); In re Estate of Brittin, 664 N.E.2d 687 (Ill. App. 1996).*

(n68)Footnote 80. Alaska Stat. §§ 13.11.045, 25.23.130; Colo. Rev. Stat. § 15-11-109.

(n69)Footnote 81. Tex. Prob. Code Ann. § 40; Vt. Stat. Ann. tit. 15 § 448.

(n70)Footnote 82. *See* statutes cited in note 3, *supra*.

(n71)Footnote 83. *See* note 4, *supra*.

(n72)Footnote 84. *See, e.g.*, Ariz. Rev. Stat. Ann. § 8-117; N.Y. Dom. Rel. L. § 117; Okla. Stat. tit. 10, § 7505-6.5; Wash. Rev. Code § 26.33.260.

(n73)Footnote 85. N.Y. Dom. Rel. L. § 117.

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CHAPTER 89 INTESTATE SUCCESSION

10-89 Thompson on Real Property, Thomas Editions § 89.06

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§ 89.06 Advancements.

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Intestate succession laws are premised on the idea that a reasonable and prudent person would want to treat children equally. Thus, if, while alive, the intestate made a substantial transfer of property to one child it was probably in anticipation of that child's inheritance. The doctrine of advancements is based on these two ideas. The doctrine will force a child, or other beneficiary, to account for the early distribution in the final distribution of the intestate's estate. Generally speaking, the advance will have to account for so much of the advancement that does not exceed the advance's share of the estate. If an advance received in excess of what would be the advance's share of the estate, the excess will not have to be refunded. n86

One must look at the specific state statute to determine who must account for advancements. At English common law, the doctrine was limited to children of the intestate. n87 A few jurisdictions follow the English common law. n88 However, most have expanded the class of those who must account for an advancement to include grandchildren and other lineal heirs. A few states apply the doctrine to all heirs. n89 Since the foundation of the doctrine of advancements is the presumed equal treatment of children, to extend the doctrine beyond lineal heirs seems somewhat arbitrary.

If a recipient is in a class of people covered by the statute, the first problem is to determine if the payment or transfer of property was an advancement. Not all transfers of property or gifts of money even between parent and child are intended to be an advancement. There are other possibilities. For example, a parent could make a gift or loan to a child. Neither of these would be advancements. Clearly, the intent of the intestate is the controlling factor in determining whether or not an advancement had taken place. The intent at the time of the transaction is the pertinent factor. n90

Determining the intent of a deceased person is often very difficult. Courts are usually quite liberal in admitting evidence to establish that intent. n91 However, a number of states have addressed this problem by enacting statutes which either create a presumption of gift n92 or require that an advancement be in writing. n93 Absent a statute, a number of states have created a presumption that any substantial inter vivos transfer of property between an intestate and a person covered by the advancement statute is an advancement. n94 This presumption is rebuttable and the burden is on the heir to show that an advancement was not intended. n95

Once the intent of the intestate at the time of the transfer is established, it is not fixed for all time. The intestate may have a change of mind and turn the transfer into something more favorable to the donee. For example, a transfer that was intended to be an advancement can be altered by the intestate to an inter vivos gift. However, something that was a gift at the time of transfer cannot be changed to an advancement. n96

Once the facts establish that an advancement was the intent of the intestate, the question is then how must the advance account for the advancement? The advance must bring the advancement into "hotchpot" before sharing any further in the estate of the intestate. n97 What this means is that the value of the advancement, usually determined as of when the advance came into possession of the advancement, n98 will be added to the value of the intestate's estate and then the required division made among the persons enumerated in the statute. For example, suppose the intestate died leaving three children and no spouse. Suppose further that the intestate succession statute required the estate to be divided equally among the children and that the value of the estate was $90,000. Now suppose that the decedent made an advancement to one child in the amount of $30,000. The law of advancements would require adding the advancement to the net estate (bringing it into "hotchpot"). This would create an estate of $120,000. Each child would be entitled to one-third of the $120,000 or $40,000 each. The two children who had not received advancements would each get $40,000 and the child who had received the $30,000 advancement would get $10,000, thus distributing the $90,000 estate. If the advancement had been $50,000, the child who received it would now be precluded from any share of the $90,000 and the remaining children would split the $90,000 equally. n99

What if the child who had received the advancement died before the intestate, leaving two children, would the children have to account for the advancement? Most states, either by statute, n100 or case law n101 require the grandchildren to account as long as at least one of them survives.

COMPUTER-ASSISTED RESEARCH

LEXIS: intestate succession w/30 advancement!

FOOTNOTES:

(n1)Footnote 86. *See, e.g.*, N.C. Gen. Stat. § 29-25; Mass. Gen. Laws Ann. ch. 196, § 3.

(n2)Footnote 87. 22 & 23 Char. II, ch. 10, cls. IV, V (1670).

(n3)Footnote 88. Ga. Stat. Ann. § 53-4-50.

(n4)Footnote 89. *See, e.g.*, N.C. Gen. Stat. § 29-23; Tex. Prob. Code § 44.

(n5)Footnote 90. *Nobles v. Davenport, 111 S.E. 180 (1922).* Annotation, *Intent as a Factor in Determining Whether There is an Advancement*, 26 A.L.R. 1086.

(n6)Footnote 91. *Page v. Elwell, 253 P. 1059 (1927).*

(n7)Footnote 92. N.C. Gen. Stat. § 29-24.

(n8)Footnote 93. Cal. Prob. Code § 6409; N.Y. Est. Powers & Trusts Law, § 2-1.5.

(n9)Footnote 94. *See, e.g., Watt v. Lee, 191 So. 628 (1939); In re Wiese's Estate, 270 N.W. 380 (1936).*

(n10)Footnote 95. *In re Plummer's Estate, 190 N.W. 30 (1922).* Annotation, *Presumption and burden of proof with respect to advancements to children*, 26 A.L.R. 1097 (1923). *But cf., Johnson v. Belden, 20 Conn. 322 (1850); Rutherford v. Deaver, 235 S.W. 853 (Tex. Com. App. 1921).*

(n11)Footnote 96. *Elliot v. Western Coal & Mining Co., 90 M.E. 1104 (1910).*

(n12)Footnote 97. Va. Code Ann. § 64.1-17.

(n13)Footnote 98. N.C. Gen. Stat. § 29-26.

(n14)Footnote 99. N.C. Gen. Stat. § 29-23.

(n15)Footnote 100. *See, e.g.*, Minn. Stat. Ann. § 524.2-110; N.C. Gen. Stat. § 29-27; Ind. Code § 29-1-2-10. Minn. Stat. Ann § 524.2-109(c) provides that grandchildren do not have to account unless so required in the decedent's contemporaneous writing.

(n16)Footnote 101. *Douglas v. Hammel, 285 S.W. 433 (1926); Mow v. Baker, 24 S.W.2d 1 (Tex. Com. App. 1930).*

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CHAPTER 89 INTESTATE SUCCESSION

10-89 Thompson on Real Property, Thomas Editions § 89.07

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§ 89.07 Unworthy Heirs.

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There are a variety of situations where the conduct of a person entitled to a share of the intestate's estate under the intestate succession acts may be barred from taking. For example, a spouse who abandons his or her spouse my lose the right to intestate succession. n102 Likewise a parent who abandons his or her child will be barred from taking by intestate succession. n103

At the common law, a murderer could inherit from his or her victim. While this result may be shocking, it was also the law in many states. Today, however, all states, either by statute or decision have abrogated the common law rule. n104

If one intentionally kills another, he or she will not be allowed to take from the estate of the deceased. Most states will treat the slayer as having predeceased the intestate victim. n105 Whatever share the slayer would have taken will then go to the heirs.

The statutes only cover intentional killings. Thus, if one accidently kills a decedent, the killer would still be entitled to take. n106 Also, a slayer who did not know the nature and extent of the acts will be permitted to take. n107

Under most statutes, criminal charges are not required in order to bar the slayer. For example, a person who committed suicide before charges could be filed could still be barred from taking. n108 The burden would be on the slayer's estate to show that the slayer should not be excluded under the statute. n109

COMPUTER-ASSISTED RESEARCH

LEXIS: intestate succession w/30 heir! w/15 entitle! or bar! or los!

FOOTNOTES:
(n1)Footnote 102. N.C. Gen. Stat. § 31A-1.

(n2)Footnote 103. N.C. Gen. Stat. § 31A-2.

(n3)Footnote 104. *See, e.g.*, U.P.C. § 2-803; *Misenheimer v. Misenheimer, 303 S.E.2d 415 (1983);* J. David Walsh, Note, *Decedents' Estates -- Forfeitures of Property Rights by Slayers, 12 Wake Forest L. Rev. 448 (1976).*

(n4)Footnote 105. N.C. Gen. Stat. § 31A-4.

(n5)Footnote 106. *Matter of Wells, 350 N.Y.S.2d 114 (1973).*

(n6)Footnote 107. *Matter of Eckhart, 54 N.Y.S.2d 484 (1945).*

(n7)Footnote 108. *Matter of Jacobs, 154 N.Y.S.2d 536 (1956).*

(n8)Footnote 109. *Matter of Bobula, 227 N.E.2d 49 (1967).*

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CHAPTER 89 INTESTATE SUCCESSION

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§ 89.08 Escheats.

It is generally provided that if there is no one to take under the intestate succession statutes, the intestate's property will escheat to the state. n110 These escheat funds are often used for some public purpose. n111

However, with the expansion of those entitled to take under modern intestacy laws, the number of escheats has been on the decline. The question each legislature must ask before limiting intestate succession is whether it is better for the state to take the property or a "laughing heir." North Carolina is an example of a state which has limited collateral succession to persons who are within five degrees of kinship to the intestate, but will allow unlimited collateral succession to avoid escheats. n112

COMPUTER-ASSISTED RESEARCH

LEXIS: intestate succession w/30 property w/5 escheat!

FOOTNOTES:
(n1)Footnote 110. *See, e.g.*, N.C. Gen. Stat. § 29-12.

(n2)Footnote 111. In North Carolina, the funds are used for scholarships at the University of North Carolina. The same is true in Nevada. Nev. Rev. Stat. Ann. § 134.120 (1949).

(n3)Footnote 112. N.C. Gen. Stat. § 29-7. But the statute will not allow inheritance by persons claiming through a common ancestor not mentioned in the statute, even if that means the property will escheat. *Newlin v. Gill, 237 S.E.2d 819 (1977).*

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CHAPTER 89 INTESTATE SUCCESSION

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§ 89.09 Bibliography.

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Annotation, *Brothers and Sisters of Deceased as Beneficiaries within State Wrongful Death Statute, 31 A.L.R. 3d 373.*

Annotation, *Disposition of Property of Inter Vivos Trust Falling in After Death of Settlor, Who Left Will Making No Express Disposition of the Trust Property, 30 A.L.R. 3d 1318.*

Annotation, *Estoppel or Laches Precluding Lawful Spouse from Asserting Rights in Decedent's Estate as Against Putative Spouse, 81 A.L.R. 3d 110.*

Annotation, *Eligibility of Illegitimate Child for Survivor's Benefits Under Social Security Act, Pursuant to § 216(h)(2)(A) of Act (42 USCS § 416(h)(2)(A)), Where State Intestacy Law Denying Inheritance Right, or Application of that State Law to § 216(h)(2)(A), May Violate Child's Right to Equal Protection of Laws, 116 A.L.R Fed. 121.*

Annotation, *Family Settlement of Intestate Estate, 29 A.L.R.3d 174.*

Annotation, *Inheritance by Illegitimate from or through Mother's Ancestors or Collateral Kindred, 99 A.L.R. 2d 1101.*

Annotation, *Lack of Final Settlement of Intestate's Estate as Affecting Heir's Right to Partition of Realty, 92 A.L.R. 3d 473.*

Annotation, *Partial Invalidity of Will: May Parts of Will be Upheld Notwithstanding Failure of Other Parts for Lack of Testamentary Mental Capacity or Undue Influence, 64 A.L.R. 3d 261.*

Annotation, *Renunciation of Inheritance, Devise, or Legacy as Affecting State Inheritance, Estate, or Succession Tax, 27 A.L.R.3d 1354.*

Annotation, *Right of Adopted Child to Inherit from Intestate Natural Grandparent, 60 A.L.R. 3d 631.*

Annotation, *Right of Heir's Assignee to Contest Will, 39 A.L.R. 3d 696.*

Annotation, *Right to Probate Subsequently Discovered Will as Affected by Completed Prior Proceedings in Intestate Administration, 2 A.L.R.4th 1315.*

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Supp. To CHAPTER 89 INTESTATE SUCCESSION

10-89 Thompson on Real Property, Thomas Editions Supp. to § 89.01

Supp. to § 89.01 Introduction.

[Go To Main]

Add:

Mayo v. White, 224 Cal. Rptr. 373 (Cal. App. 1986) (holding that a cause of action for wrongful death is not an interest that a beneficiary would be entitled to take by intestate succession and thus cause of action can not be distributed to heirs); *Tolbert v. Maner, 504 S.E.2d 772 (La. App. 1998)* ("descendant of child who predeceased parent was entitled to *per stirpes* distribution of proceeds of wrongful death action, brought by surviving children of deceased parent"), *rev'd by, Tolbert v. Maner, 518 S.E.2d 423 (Ga. 1999)* .

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Supp. To CHAPTER 89 INTESTATE SUCCESSION

10-89 Thompson on Real Property, Thomas Editions Supp. to § 89.05

Supp. to § 89.05 Intestacy--United States.

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§ 89.05(a) Introduction. [Go To Main]

Change U.P.C. § 1-101 to:

U.P.C. § 1-102

Add:

In re Estate of Prestie, 138 P.3d 520 (Nev. 2006) (decedent's will revoked under a statute providing for revocation of will by marriage; decedent's widow obtained one-half of the estate by intestate succession).

In re Estate of Bonde, 694 N.W.2d 74 (Minn. App. 2005) (in Minnesota, a homestead under debtor-creditor law is classified as other real estate for purposes of intestate succession).

Estate of Crenshaw, 100 P.3d 568 (Colo. App. 2004) (the testimony of a purported common law wife was barred by the state's dead man's statute).

§ 89.05(b) The Surviving Spouse. [Go To Main]

Add:

Gillette v. Wurst, 869 A.2d 488 (Pa. 2005) (a widow was allowed to disclaim her interest in a wrongful death settlement and the proposed intestate distribution of settlement funds).

Change to:

See note 20, *infra.*

§ 89.05(b)(1) Share of the Surviving Spouse--Uniform Probate Code.

Add to list of states that have adopted the U.P.C.:

Kentucky (in part).

Change to:

U.P.C. § 2-102(1).

Change to:

U.P.C. § 2-102(2)-(4).

§ 89.05(b)(2) Share of the Surviving Spouse--Issue and Parents.

Add:

In re Estate of Hinderliter, 882 P.2d 1001 (Kan. App. 1994) (dealing with intestacy statute where decedent leaves spouse and children).

Add:

Dial v. Dial, 38 N.E. 2d 43 (Ill.1941) (dealing with intestate succession when parents and surviving spouse exist); *Lane v. Scarborough, 200 S.E.2d 622 (N.C. 1973)* (dealing with the disposal of an estate where spouse impliedly released her

share with the estate passing to the deceased's parents).

delete note 36.

Change Okla. Stat. to:

tit. 84, § 213(B)(1) nsert 3

Add:

Anderson v. Greenleaf, 165 A. 730 (N.J. Sup. 1933) (holding that in the absence of issue, surviving spouse takes the estate); *In re Dumas' Estate, 413 So. 2d 58 (Fla. App. 1982)* ("pretermitted spouse receives entire estate when no lineal descendant survives decedent"); *Lowe v. Fulford, 442 So. 2d 29 (Ala. 1983)* (holding that in the absence of issue, surviving spouse takes the estate).

§ 89.05(c) Descendants. [Go To Main]

Add:

Estate of Calden, 712 A.2d 522 (Me. 1998) (holding that the wife of devisee was entitled to her intestate share of her deceased husband's inheritance from his step-mother's will).

Add:

Vogel v. Mercantile Trust Co. Nat. Ass'n., 511 S.W.2d 784 (Mo. 1974) (holding that statute providing for posthumous child does not indefinitely postpone the vesting of estates); *Wolyniec's Estate v. Moe, 226 A.2d 743 (N.J. Super. 1996)* (holding that posthumous grandchild qualified to take under statute).

See also Woodward v. Commissioner of Social Security, 760 N.E.2d 257 (Mass. 2002) (holding that under limited circumstances posthumously conceived children may have inheritance rights of issue).

Add:

Bahl v. Lambert Farms, Inc., 819 A.2d 534 (Pa. 2003) (heirs seeking to partition real estate that passed under intestacy were not entitled to inherit under the doctrine of maternity by estoppel).

Morris v. William L. Dawson Nursing Center, Inc., 719 N.E.2d 715, (Ill. 1999) (grandchildren, not siblings considered "next of kin" for entitlement of proceeds.

Craig v. Carrigo, 121 S.W.3d 154 (Ark. 2003) (in probate proceeding, pretermitted children were allowed to inherit as if testator had died intestate).

Add:

In re Estate of Kendall, 968 P.2d 364 (Okla. Civ. App. 1998) (holding that where deceased "was not survived by issue, spouse, parent, grandparent or sibling, all nieces and nephews" took *per capita* succession).

Cook v. Grierson, 845 A.2d 1231 (Md. App. 2004) (grandchildren are not issue under the state's intestate succession statute).

Add:

In re Estate of Fosler, 13 P.3d 686 (Wyo. 2000) (describing distribution of property among lineal descendants).

§ 89.05(d) Lineal Ascendants. [Go To Main]

After entire note, add:

Hess v. Hess, 758 So. 2d 1203 (Fla. App. 2000) (holding that even though the mother was divorced from the father and was 100% responsible for the death of her daughter because of negligent driving, settlement proceeds from the suit on behalf of the daughter must be evenly divided between estranged parents).

Add:

Bray v. Taylor, 36 N.J.L. 415 (N.J. Err.& App. 1872) (holding that an estate can not lineally ascend to grandparents).

Add:

In re Estate of Swartz, 870 P.2d 179 (Okla. Civ. App. 1994) (dealing with grandparents as lineal descendants).

§ 89.05(f) Half-Bloods. [Go To Main]

Add:

In re Estate of Thiemann, 992 S.W.2d 255 (Mo.App. 1999) (holding that half-bloods receive half share of whole bloods, but a whole share where all "collaterals are of half-blood").

§ 89.05(g) Illegitimates. [Go To Main]

Add:

Trimble v. Gordon, 430 U.S. 762, 4 Ohio Op. 3d 296 (1977) (provision of state probate code permitting intestate succession by illegitimates only through mothers but not fathers denied equal protection); *Turner v. Perry County Coal Corp., 242 S.W.3d 658 (Ky. App. 2008) cert. denied, 129 S. Ct. 80, 172 L. Ed. 2d 29* (*Trimble* decision did not apply retroactively so as to invalidate succession statute in effect at time of landowner's death).

Add:

In re Estate of Williams, 891 N.Y.S.2d 268 (2009) (a posthumous non-marital child was entitled to DNA testing to establish his right to inherit).

Add:

Baugh v. Baugh, ex rel, 973 P.2d 202 (Kan. App. 1999) (holding that no parentage action need be brought for illegitimate child to take by succession).

Estate of Morningstar, 794 N.Y.S.2d 205 (2005) (results of DNA testing could be used to satisfy the burden of establishing paternity).

Jenkins v. Johnson, 128 S. Ct. 920 (2008) (illegitimate daughters were not required to comply with proof of paternity provisions of the estate settlement statute in order to assert their rights as legal heirs to the real property owned by the decedent).

In paragraph 4, last sentence, remove the phrase "and Vermont."

Add:

Bahl v. Lambert Farms, Inc., 819 A.2d 534 (Pa. 2003) (in an action by heirs of the decedents' putative son to partition and obtain intestate shares of decedents' farm sold to a purchaser, the court held that the heirs were not entitled to inherit under the doctrine of maternity by estoppel).

Change N.H. Rev. Stat. Ann. § 561.4 to:

§ 561:4 and remove the Vermont statute reference.

§ 89.05(h) Adoption. [Go To Main]

Remove reference to Utah Code.

Add:

Rist v. Taylor, 955 P.2d 436 (Wyo. 1998) (holding that second adoption terminated the parent-child relationship of the previous adoption for inheritance purposes).

Barnum-Smith v. Joseph, 949 P.2d 472 (Cal. 1998) (dealing with foster parents and foster child as adoptive parents and child).

Remove Alaska Stat. § 13.11.045 and remove Colo Rev. Stat. § 15-11-109.

Add at the end of the first paragraph:

Additionally, many states recognize a virtual or implied adoption, in which a non-adopted child is treated as an adopted child for purposes of the intestate succession laws.[81.1]

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Supp. to § 89.06 Advancements.

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Add:

Tankesley v. Thompson, 469 S.E. 2d 853 (Ga. App. 1996) (holding that "inter-vivos transfer of money from parent to child" is an advancement).

Change Minn. Stat. Ann. § 524.2-110 to:

§ 524.2-109

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Supp. to § 89.07 Unworthy Heirs.

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Change "my" to "may"

Add:

Hixson v. Krebs, 523 S.E. 2d 684 (N.C. App. 1999) (defining "abandonment" of child by parent).

Add:

Crain v. Crain, 754 So. 2d 261 (La. App. 1999) (holding that where an heir murdered parents, the children of an unworthy heir could not inherit where the unworthy heir had siblings).

See Annotation, "Felonious killing of ancestor as affecting intestate succession," *39 A.L.R.2d 477* .

LoCascio v. Sharpe, 23 So. 3d 1209 (Fla. App. 2010) (slayer statute applied to cause the victim's intestate estate to pass as if the killer had predeceased her).

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CHAPTER 90 LAND DESCRIPTIONS, BOUNDARIES AND SURVEYS *

10-90 Thompson on Real Property, Thomas Editions 90.syn

AUTHOR: Professor David A. Thomas J. Reuben Clark Law School Brigham Young University

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CHAPTER 90 LAND DESCRIPTIONS, BOUNDARIES AND SURVEYS *

10-90 Thompson on Real Property, Thomas Editions § 90.01

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§ 90.01 Introduction to the Chapter.

This chapter treats the legal rules applicable to land descriptions, boundaries dividing described parcels of land, and the surveys by which such descriptions are derived. These legal rules arise largely from the process of common law, produced by individual judicial decisions in unconnected cases. Some of the rules have been codified, especially in attempts to make consistent the land regulation activities of state and local governments, but even in codified form the statutory rules generally reflect the common law rules.

* This chapter is drawn in part from chapter 45 of George W. Thompson, Commentaries on the Modern Law of Real Property (John S. Grimes ed. 1979), which made a significant contribution to preserving the American common law governing land descriptions and boundaries.

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CHAPTER 90 LAND DESCRIPTIONS, BOUNDARIES AND SURVEYS *

10-90 Thompson on Real Property, Thomas Editions § 90.02

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§ 90.02 Land Descriptions.

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§ 90.02(a) The Purpose of a Description in a Conveyance of Land.

A proper and sufficient description is an essential element of a conveyance of land. The description must either identify the land or furnish the key or means by which the description can be obtained from other sources. n1 Some cases impose no heavier burden on the description than to require only that something in the description suggest the possibility of locating the land by competent explanatory evidence. n2 Thus, in one case, a reference to the described land as being "the interest in two shares, adjoining lands" of persons named, belonging to the vendor, was held sufficient to support explanatory evidence that there was a tract of land which fitted the rest of the description, in which it was known that the vendor claimed two shares, and that the land had been more particularly described in a partition proceeding. n3

The particular function of the description is to identify n4 or furnish the means of identifying the property conveyed. n5 Some courts have even stated that the purpose of a description is *not* to identify the land, but merely to *furnish the means* of identifying the land. n6 The language of description in a conveyance of land furnishes the means of locating the land conveyed, but the actual locating of that land is a separate and independent activity. n7

A description is sufficient if it furnishes the means or key to identifying the land. n8 A description is sufficiently certain when it enables the land to be identified n9 either by a person who is familiar with the area n10 or by means of an actual survey. n11 A description is not insufficient merely because the land cannot be identified without the aid of extrinsic facts. n12 However, a description is insufficient for uncertainty if it cannot be applied to any definite land even with the aid of extrinsic evidence. n13

A description is sufficient if, by any reasonable construction and with the aid of extrinsic evidence, it enables one to determine the land intended to be conveyed; n14 of course, if the land cannot be located even under those circumstances, the description and the conveyance are void for uncertainty. Likewise, if the starting point of a described boundary cannot be identified, the conveyance is void; n15 and if the description omits one or more boundaries, so the quantity of land is undetermined, the conveyance is void. n16

A description will be liberally construed to afford the basis of a valid grant that will carry out the intent of the parties. n17 However, a description consisting only of the words, "a piece or parcel of land near [a topographical feature]" is too vague and indefinite to create a right of property in any particular parcel of land. n18 Ordinarily, the description need not be by boundaries, corners, distances, or monuments, if with the aid of parol evidence location of the land is possible. n19

COMPUTER-ASSISTED RESEARCH

LEXIS: Description w/10 (land or real) and purpose

§ 90.02(b) The Requirement of Certainty in a Description.

A valid description must designate with reasonable certainty the land intended to be conveyed. n20 Deeds purporting to convey land, but which do not describe or designate the land, are invalid for uncertainty; n21 however, a general description of all lands belonging to the grantor is sufficient to pass title to all lands belonging to the grantor. n22

No standard rule defines the sufficiency of a description. n23 Rules which prefer one form of description over another are merely rules of construction used to discover the real intent of the parties, n24 if the description contains a latent ambiguity. n25

A description must identify the land with reasonable certainty, but the degree of certainty required is qualified by the rule that that is certain which can be made certain. n26 A description is sufficiently certain if it can be rendered certain with the aid of extrinsic evidence relative to the surrounding circumstances. n27 Only if an ambiguity is patent and appears on the face of the description will the description be void for uncertainty. n28

In a deed, the description of the land follows immediately after the operative words, and should contain all the particulars necessary to identify the land clearly and accurately, such as its situation in a town and county named, its boundaries, their measurements, and the total area. A house in a town is usually described as part of subdivision, or as situated in a particular street or road, and the dimensions of the lot of land are usually given in linear feet. The street number of the house is a useful particular. Land in the country is usually described by reference to government surveys, or to the private surveys of the particular property.

Boundaries are sometimes identified by reference to the land of adjoining owners, or are sometimes determined by reference to fixed monuments, or by their distance from streets or natural or permanent objects. A reference to the occupancy of the property by a former occupant can be useful. The description need not be by government survey, lots and blocks, or metes and bounds, if it still is sufficient to permit the property to be located definitely. n29 The description may be general and need not be by boundaries, corners, distances, or monuments if, with the aid of parol evidence, location of the land is possible. n30 A description is sufficient if it enables one pursuing an inquiry upon information given in the deed to identify the land to the exclusion of all other land. n31

A description is not void for uncertainty if it is possible, by any reasonable rules of construction, to ascertain from the description, aided by extrinsic evidence, what land it was intended to convey. n32

The law will not declare the instrument void for uncertainty until it has been examined with all the light which contemporaneous facts may furnish. If these render the intention clear and the words of the instrument are, by fair rendering, susceptible of a construction to uphold such intention, then they will be so construed and the instrument enforced. n33

It is only when it remains a matter of conjecture what property was intended to be conveyed, after resorting to such extrinsic evidence as is admissible, that a deed will be held void for uncertainty in the description of land. n34 Resort

may be had to other parts of a deed to aid in determining what property the deed was intended to convey. If the description in a deed was sufficient when the deed was executed, no subsequent change in conditions can render such description insufficient. n35

If there is a mistake in the deed as to the general location of the land, even though the description is perfect, parol evidence is admissible to identify the land, and the erroneous general location may be rejected as surplusage. n36 A deed void for uncertain description cannot be saved by resorting to extrinsic proof as to the secret and undisclosed intention of the maker; n37 however, a deed will not be held void for uncertainty in the description of property if by the aid of extrinsic evidence it can be made certain and the property located, and in such case the intention of the grantor is controlling. n38

If the description in the deed is clear, but contains an exception that is unclear, the grantee takes the entire tract without respect to the purported exception. n39

The description must identify the interest conveyed as well as the area. n40

COMPUTER-ASSISTED RESEARCH

LEXIS: Description w/10 (land or real) and certain!

§ 90.02(c) Rules of Construction for Land Descriptions.

A description is not invalid for uncertainty so long as by reasonable construction it can be ascertained what the parties intended to be embraced in the description. n41 Any form of agreement to convey may be used to assist in explaining an ambiguity in the deed description related to such agreement; even though the parties' negotiations are merged in the deed and may not control the deed, they may explain an ambiguity or indicated an error. n42

If a valid description is ambiguous on its face, two sources of information may be used to help resolve the ambiguity, the facts and circumstances pertinent to the conveyance, and the intentions of the parties as manifested before, at, or after the creation of the description. n43 Thus, in determining the sufficiency of a description, resort may be had not only to the words used but also to the other facts and circumstances suggested by the description. A description should be construed with reference to the actual state of the land at the time the description was created or the deed containing it was executed. A court construing a description in a deed should as nearly as possible assume the position of the parties to the deed, and consider the circumstances of the transaction between them, and then read and interpret the words used in light of these circumstances. n44 A court construing an ambiguous description will put itself in the position of the parties at the time the deed containing the description was executed and determine the parties' intent in the light of the surrounding circumstances. n45

Possession may render certain what otherwise would be an uncertain description. n46

Regardless of the parties' intent, a deed passes title to only that property actually described in the deed. n47 A deed cannot extend possession or title to lands not described in the deed, n48 nor can a specific description be extended to include property not within its terms. n49 Where the description is too indefinite to afford means of identifying the land, no title or color of title is given. n50 Even though parol evidence is often admissible to ascertain what lands are embraced in the description, such evidence cannot make the deed operative over lands not embraced in the descriptive words. n51 Thus a deed is void for uncertainty where it contains no definite or ascertainable description of the property intended to be conveyed. n52

The interplay between specific and general descriptive language is illustrated by the case in which a deed described the land conveyed as beginning at a certain rock, and running thence one mile east, one mile north, one mile west, and one

mile south, to the place of beginning, and also stated that it was the land set off to a certain Indian under a treaty with the government. The Indian had previously selected land as "a tract one mile square, the exact boundaries of which may be defined when the surveys are made." After the deed was given, the Indian's land was located and patented on land that was not within square boundaries and did not lie within the boundaries named in the deed at issue. In construing the deed's description, the court held that, because the deed was for a specific tract of land, it could not be construed to convey the grantor's interest in the land actually patented to the Indian. n53

If a deed describes a parcel or some portion of the land to be conveyed with insufficient certainty, other portions of the description that are adequate are not thereby invalidated. n54

Extrinsic evidence used to interpret a deed description may not be used to contradict or otherwise control the language of the description. n55 A deed describing land merely as lying on Flat River, including a house and lot named, adjoining lands of persons named, is void for uncertainty, because no quantity of land is given, or any means pointed out by which the land about the house and lot named could be laid off. n56 Parol evidence will not be received to show that a marked tree is the boundary line in a case where the line was described in a deed by courses and distances and the marked tree was not mentioned in the deed. n57 Because ascertaining the intent of the parties frequently depends not only upon the language used in the deed description but also upon all the circumstances of the transaction, it is usually a question of fact. However, if the intent of the parties is to be determined from the description alone, then the rule prevails that the construction of a written instrument is for the court. n58

Another prevailing rule of construction is that, if possible, a deed description should be construed so that no part needs to be rejected. n59 Similarly, a deed description should be so construed that some effect will be given to it. n60 A deed description should not be voided for uncertainty if any reasonable construction can confer upon it the requisite certainty. n61 In making such construction of a description, the words used need not be construed literally or strictly, because greater regard is accorded to the intention of the parties as manifested in the entire document than to any particular word or expression. n62 Courts are usually liberal in upholding a description and giving effect to the evident intention of the parties. n63

In this regard, two basic rules of construction sometimes conflict. On the one hand, the deed and description as a whole are available to determine what property the parties intended to convey; n64 when several descriptions appear in a deed and all of them are general, the deed as a whole governs. n65 One part of a description is usually not permitted to control absolutely other parts. n66 The whole description of a deed that is inartfully drawn will be considered without giving special prominence to any one expression. n67

This rule of construing the deed description as a whole, however, is not permitted to avoid an even more basic rule, which is that nothing will pass by a description, except what is actually in or indicated by the description, whatever the intention of the parties may have been. n68 The description as it stands in the deed is presumed to be as the parties intended it, until it is clearly made to appear that a mistake exists. Every word is to have effect and to be harmonized with the rest of the description, if this is possible. Where a deed contains a valid general description followed by an inconsistent second or cumulative description, the latter will be rejected. n69 The punctuation within a description is generally not considered in construing the description. n70

If the deed description gives rise to doubt or uncertainty, the court may place itself in the position of the grantee, read the description in light of the circumstances under which it was executed, and consider the condition of the property, state of the title, boundaries, or other material matters in interpreting the deed. n71 A description that may be rendered certain by averment is not void for uncertainty. n72

§ 90.02(c)(1) Presumption that Course or Line is Straight.

A course or line stated in a deed description is presumed to be a straight line, but the presumption does not apply if

anything in the description indicates that the course is to be determined by a fixed monument, such as a wall. Even a line extending beyond the line of such a wall or monument may be deflected from a straight line in order to conform to the distance given for the next boundary line. n73 A call in the description of a survey for the marked "line" of another survey between designated points which is not a straight line, but consists of several lines and marked corners, is sufficient. n74 A line should be construed, if possible, to mean a continuous and straight line, and should not be deflected except to conform to the parties' intentions. n75

A "meander line," whether state or national, is not considered a boundary line, but is used only for determining the acreage when title is transferred to private parties, or for convenience. n76 A meander line is not a boundary, but the water of the body which is meandered is the true boundary, whether or not the meander line coincides with the shore line. n77 A boundary line presumably runs straight across between known corners. n78

COMPUTER-ASSISTED RESEARCH

LEXIS: Description w/10 (land or real) and (course or line) w/10 straight

§ 90.02(c)(2) Meaning of Particular Words Used in Descriptions.

The word "half," when used in describing land, should be construed as meaning "half in quantity," unless the context or surrounding facts and circumstances show a contrary intention. It was so held in a case where two tenants in common of a parcel of land, which could not be easily divided by a north and south line drawn equidistant from its east and west lines, conveyed to each other the "east half" and "west half," respectively, of the parcel, containing an equal number of acres and without reference to the government survey. n79

In government surveys of public lands the terms "east half" and "west half" are used, not with reference to quantity, but to a line equidistant from the boundary lines of the parcel subdivided, and those terms have the same signification in patents issued by the government, as provided by statute. A deed of the "east half" of a parcel of land "according to the United States survey" is definite, and excludes the idea of two equal quantities, and fixes the dividing line equidistant from the boundary lines of the parcel. n80 If a section or tract of land has been divided into designated subdivisions, a subsequent deed describing the land to be conveyed as "one-half" of the section or tract will pass the area contained in the designated subdivision, regardless of whether it is more or less than the corresponding one-half subdivision. n81

In a description of land under government surveys, if part of a section or of a quarter section is described as the "north side" or the "north end," the words may be taken to mean the north half of the section or quarter section. n82 The word "part" may be so used as to show that it means "half"; n83 but it may be so used that it is uncertain what meaning is attached to it, and in that case the description will be insufficient. n84 Thus a description in a deed as "part of the southwest east quarter, containing 31 1/4 acres," was held void for uncertainty. n85

As a general rule, where a deed describes the land conveyed by metes and bounds, or as containing a specific quantity, qualified by the words "more or less," the qualifying words will relieve the grantor or grantee, as the case may be, from the obligation to make compensation for any excess or deficiency, absent fraud or bad faith, if there is a reasonable approximation to the quantity specified in the deed. n86 The use of such words does not affect the positive character of the representations as to acreage. Their use does not bar an inquiry into a fraud or misrepresentation as to quantity on the part of the grantor, and a very material misrepresentation in quantity is itself some evidence of such fraud or misrepresentation. n87

The purchaser's previous knowledge of the land or its boundaries does not preclude the purchaser from recovering for fraudulent misrepresentation of quantity if, without fault of the purchaser, the purchaser was actually deceived and defrauded by the misrepresentation, if the deficiency is more than can be fairly covered by the phrase "more or less." n88

The words "more or less" and the word "about," used in connection with quantity or distances, are words of safety and precaution. They are intended merely to cover some slight or unimportant inaccuracy, and, while enabling an adjustment to the rigidity of fixed monuments, they do not weaken or destroy the statements of distance and quantity when no other guides are furnished. n89 These words do not imply that the purchaser takes the risk of the quantity. If the variation is slight, the purchaser has no remedy; if the variation is large or materials, the purchaser may be relieved from paying for the deficient quantity. n90

The words "more or less" are not descriptive of the boundaries, and they become important only where the description is by metes and bounds or other definite description of a particular tract of land, as qualifying an estimate of the quantity contained in the described tract. n91

The words "more or less," when used in deed descriptions following the quantity of land named, ordinarily mean "about." n92 If the land is described as so many acres "more or less," the sale will be treated as a sale by the acre unless from the whole deed it plainly appears that a sale in gross was intended. n93 If the land was described by metes and bounds, the words "containing by estimate" a certain number of acres were held equivalent to the words "more or less." n94 If the description is by acreage and courses and distances, and "more or less" is used in both calls and area, the description is void for indefiniteness. n95 Usually such words are added to an estimate of the quantity of the land following a particular description, and although they contribute little or nothing to identifying the land, they are taken as prima facie evidence that the parties intended to risk a reasonable gain or loss in the estimated quantity. n96

If the description by metes and bounds is unambiguous, the added clause "being the same" cannot be taken to create an ambiguity in an antecedent unambiguous description, even though the clause itself is of doubtful meaning as embracing either "part of the same" or "all the same." n97

A conveyance described by metes and bounds is limited to an undivided interest by the addition of words such as "being an undivided half thereof." The plain meaning of the language used determines the interest conveyed. n98 However, where a deed described the property conveyed as "the north one-half of the southwest undivided quarter," and it appeared that the quarter, as divided by the government lines, would consist of two unequal fractions, the court held that the word "undivided" was used with reference to a division of the quantity of land, so as to give the grantee but one-half of the quantity. n99 A deed conveying a number of tracts described by government numbers and "also the undivided half of the N. E. 4 of section 30; and the S. W. 4 of the S. W. 4 of section 31," was held to pass the whole of the S. W. 1/4 of the S. W. 1/4 of section 31. n100

The word "adjoining" in a description means next to, or in contact with, and excludes the idea of any intervening space. n101 The word "adjoining" implies a closer relation than "adjacent." If "adjacent" is uncontrolled by context or subject matter, it is not inconsistent with the idea of something intervening. The description of premises "adjoining the Atlantic Ocean," with the additional words "bounded on the ocean," carries title to the line of ordinary high water, with all the incidents of riparian ownership upon tidal waters. n102 Land is adjacent to other land when it lies near or close to it, even though it is not in actual contact to the other land. n103

The word "contiguous" means in actual contact or touching, and therefore a deed conveying certain saltworks, and "land contiguous thereto," does not embrace a parcel of land three-quarters of a mile from such works, and separated therefrom by the lands of other persons. n104 It has been held that two quarter sections of land which only touch at the corner, no other parts or sides being common, do not constitute contiguous bodies of land. n105 However, in Georgia, "tracts of land which corner with one another are contiguous." n106 The line of an adjacent tract, if known and established, may be a call in a deed or a natural object. n107

The terms "north," "south," "east," and "west," or "northerly," "southerly," "easterly," and "westerly," when not controlled by definite courses, monuments or other definite descriptions, mean due north, south, east, or west. n108 A

court may hold that true north is intended when the word "north" or "northerly" is used without qualification. n109

The word "northerly" in a deed description must be taken to mean due north, if there is no object to direct its course. However, if monuments apply to the description, the course may incline either way any distance, as long as it tends toward the north. n110 Where a conveyance described the property by metes and bounds, but incidentally mentioned that the northerly and southerly lines ran through a party wall, the description by metes and bounds controlled. n111 The term "south" in a description was held to mean a southwardly course, not due south. n112

§ 90.02(c)(3) Rules of Contruction for Descriptions Generally.

A deed is not held void for uncertainty in its description so long as it can be reasonably ascertained what both parties understood to be included in the description. n113 The negotiations of the parties that led to the making of the deed are merged in the deed and cannot control a deed that is otherwise clear on its face, such negotiations may serve to explain an ambiguity or error in the deed. n114

If a deed description is ambiguous on its face, two sources of information may be used to resolve the ambiguity: the circumstances within which the deed description was created, and the intention of the parties, expressed at or after creating the description. n115

A court trying to determine the sufficiency of a deed description may refer to the words used in the description itself or to facts and circumstances suggested in the description. n116 A deed description is construed with reference to the circumstances that existed at the time the description was created; the court assumes as much as possible the position of the parties to interpret the description in light of their understanding. n117 If possession under an ambiguous description has already taken place, that possession may be taken into account in assessing the intention of the parties. n118

Interpretation of a deed description by means of assessing the parties' intent cannot cause the deed to convey land not actually included within the description. n119 Thus, even though parol evidence is often admissible to ascertain what lands are embraced in the description, such evidence cannot make the deed operative upon lands not included within the descriptive words. n120 A deed description that is specific cannot be extended by generalization to lands not included within the terms of the description. n121 If the description is too indefinite to enable identification of the land, no title or color of title is given. n122 If one parcel in a deed description is described with insufficient clarity, that does not nullify the deed with respect to other parcels that are sufficiently described. n123

The language of a deed description cannot be controlled or contradicted by use of extrinsic evidence. n124 A grant will be held void for uncertainty when, after resort to oral proof, the identification of the parcel is still uncertain and the parties' intent is conjectural. n125 In such cases, the deed is wholly ineffective to pass any title. n126

A deed describing land as simply lying near a certain topographical feature, including a house and lot named, adjoining the land of named persons, is void for uncertainty because no quantity of land is given or any means given by which the land around the house and lot could be laid out. n127 Similarly, parol evidence cannot be used to invoke use of a marked tree as a boundary marker when the tree was not mentioned in the deed. n128

Ascertaining the intent of the parties from the circumstances of the transaction is usually a question of fact; but ascertaining intent only from construction of the deed is usually a matter of law for the court. n129

A deed description should, if possible, be so construed so that all parts of the deed can be upheld as valid n130 or that at least some effect will be given to the deed. n131 In other words, a deed description will not be held void for uncertainty if by any reasonable construction the deed can be made valid. n132 Words need not be construed literally or strictly, since greater regard is accorded to the real intention of the parties as manifested in the entire deed than to any particular word or arrangement in its expression. n133 This rule is rather liberally invoked. n134

What property the parties intended the deed to convey is determined by a consideration of the deed as whole, n135 particularly when several descriptions appear in the deed and all of them are general, n136 and especially by a consideration of all parts of the description without arbitrarily permitting any one part to control absolutely. n137 The whole description of a deed will be read without giving special prominence to any one expression. n138 The description as it stands in the deed is presumed to be as the parties intended it, until it is clearly made to appear that a mistake exists. Every word is to have effect and to be harmonized with the rest of the description, if possible. If a deed contains a general description followed by an inconsistent second description, the latter description will be disregarded. n139

Traditionally, the punctuation of a deed description is not to be regarded in construing the description. n140

A description that may be rendered certain by averment is not void for uncertainty. n141

COMPUTER-ASSISTED RESEARCH

LEXIS: Description w/10 (land or real) and constru!

§ 90.02(c)(4) Rules of Construction for "Mother Hubbard" Descrip-tions.

The so-called "Mother Hubbard" descriptions purport to convey all of the grantor's land or all the grantor's land situated in a certain area. Despite the problems caused by such descriptions they traditionally have been upheld. n142 The apparent vagueness or uncertainty of such a description may be clarified by proving what lands the grantor owned within that description at the time the conveyance was executed. n143 Therefore, a description by which the grantor conveys "all in my possession" will stand when aided by extrinsic evidence. n144

When land is conveyed by such words without description, only the land to which the grantor holds legal title is passed. Likewise, a conveyance describing "all lands the grantor holds on the Dry Fork of Otter Creek" is not void for uncertainty. n145 A conveyance is sufficient which describes land as situated in a named county, containing a certain number of acres, and being the land on which the grantor now resides. n146 Descriptions of all the grantor's land in a certain town, county, or state, or wherever situated, are sufficient. n147

A deed that described the land as being "a lot ninety by four hundred and fifty feet on the northwesterly corner" of a named street, in a specified city, county and state was not void for uncertainty where the evidence showed that the grantor owned a lot of land at that corner, the lot was 90 feet by 450 feet, and the grantor owned no other land in that neighborhood. n148

A deed conveying the portion of a designated tract of land that had not been included in a previous conveyance by the grantor to a third person is insufficient of itself to show title to any of such lands in the grantee, although the deed may be made effectual by showing what part of the tract had not been conveyed to the third person. n149 A deed may convey title to such lands as the grantor actually owns within the limits of the whole tract described. n150 A deed conveying certain described lands, "not including any lands now sold off to other parties who hold deeds" therefore, is not void for uncertainty of description. n151 Thus, if land is described as part of a larger tract, and as the remainder of that tract not already sold by the grantor, sufficient data exists for determining the land to be conveyed. n152

Some states do not uphold a description that specifies land to be conveyed and then adds to the conveyance a more general reference to all the grantor's land in a particular locality; that is, the more general portion of the description is subordinated to the specific part, if the general wording conveys more than the specific wording. n153 A "Mother Hubbard" clause that is too general is not recognized in some states. n154

COMPUTER-ASSISTED RESEARCH

LEXIS: Description w/10 (land or real) and ("Mother Hubbard")

§ 90.02(c)(5) Rules of Construction for Descriptions Incorporated by Reference to Other Instruments.

Generally, descriptions in other instruments may be incorporated by reference into deeds. n155 If the reference in the deed is to a public record in which the property to be conveyed is sufficiently described, then the reference is a sufficient description. n156 Such a description referring to a recording office record, however, has been held insufficient where it omitted the number of the book of deeds and the page where the description was to be found. n157 If the reference to be incorporated is to other deeds or title documents, then such a reference will be an adequate description if the description information in both the referencing and the referenced documents is sufficient; n158 the full descriptions in such referenced documents are incorporated n159 and competent evidence may be admitted to locate the land described. n160

If a reference is made to another deed for the purpose of obtaining a more detailed description, the referencing document is considered a general description, and the referenced document is a more particular description which controls the general description. n161

A reference to other deeds or title instruments must be specific. A general reference to the land records of the county is ineffective as a description. n162 A deed which is fulled identified in a reference need not be recorded in order to provide the needed description information. n163 A deed that incorporates a description in land patent is effective even if the patent is not actually issued to the grantor until after the referencing deed is executed. n164

Although a general description in a referencing deed incorporates a more specific description in a referenced document, n165 if the description in the referencing document is already clear and complete, the description in the referenced document will not restrict the other description. n166

A deed may so refer to all instruments in the chain of title as to incorporate them by reference. n167 If a recorded deed refers to an unrecorded deed for a description, and the description is sufficient to identify the property, the unrecorded deed is considered incorporated and admissible with the recorded deed, even though the unrecorded deed was improperly executed and not entitled to be recorded. n168

A deed which plainly refers to the legal proceeding by which a parcel of land was designated may also contain a sufficient description by reference. Thus, a deed which described land only by the number of acres in the parcel, and as lying on the north and east side of a specified lot, but subject to the dower of a named widow, "which [dower right] has been laid off and assigned to her for life in said lot of land," is not void for uncertainty, for there is a plain reference to the proceedings by which dower was assigned to the widow, and the import of the deed is to convey the reversion to the identical parcel embraced in the assignment of dower. n169

A deed referring accurately to another deed made to the grantor and conveying all the parcels of land described in the other deed and not already disposed of, sufficiently describes the land to be conveyed. n170

A deed describing land as "all that certain interest in the landed estates of H, deceased, to which we are or may be entitled by gift, devise, or descent, or otherwise," describes the property conveyed with sufficient certainty; n171 but a deed of land described as "inherited" from a certain person is not sufficient to embrace land which the grantor received by devise under the will of such person. n172

If a deed is blank as to description, but refers to another deed or instrument which does contain a sufficient description, the latter instrument becomes part of the deed and the description is sufficient. n173

If a deed refers to an authentic plat of land, the plat becomes a part of the deed as if incorporated into the deed. However, where a deed referred to two tracts of land and a subsequent deed gave a more particular description which included only one of the tracts of land and declared that the subsequent deed conveyed the same land as conveyed by the original deed, the more specific description prevailed over the more general reference and the tract referred to but not described was not included in the conveyance. n174

A map may be made part of a deed description if the reference to it is definite and certain. n175 To incorporate a plat into a deed description, the words of reference usually simply connect the deed with the plat. n176 A plat that was referred to in a deed description as being annexed to the deed, but was in fact not so annexed and not recorded with the deed, was not valid evidence to aid in description of the property. n177

A deed description that refers to a description in another deed prevails over a metes and bounds description that is inaccurate and does not reflect the parties' intentions. n178 However, if the metes and bounds description is accurate, a reference to a description in another deed does not control it. n179 If a deed refers to land deeded to the grantor by named persons but the referenced deed mentions no date or recording information, the referenced deed is not competent evidence to identify the land described. n180 In a case of inconsistency between the descriptions in the referencing and referenced deeds, the court will simply try to ascertain the intentions of the parties. n181

COMPUTER-ASSISTED RESEARCH

LEXIS: Description w/10 (land or real) and (reference or incorporat!)

§ 90.02(c)(6) Grant of Structure as Passing Land Under It.

The grant of a house, store, wharf, mill or other structure passes the fee in the land occupied and improved for that structure at the time of the grant for the use or purpose designated. n182 This is because the grant of such a structure necessarily includes the entire continuous and permanent beneficial occupation and enjoyment of the land itself, and not construed as embracing a public burial ground included within the described boundaries, even though the description does not exclude the burial ground. n183 Reservation of a barn in a description includes a sheepshed, a fenced barnyard and the land covered by these buildings and used with the barn. The term "barn" should be construed to include whatever is connected with the barn and is essential to its use and enjoyment as a barn. n184

COMPUTER-ASSISTED RESEARCH

LEXIS: Description w/10 (land or real) and (structure or building)

§ 90.02(c)(7) Exclusion of the Highway from the Description.

§ 90.02(c)(7)(i) Generally.

In most jurisdictions, a grantee of a "lot" in a recorded plat takes title to the center of an adjoining street subject to the public easement, even though the land may be described only by lot number, n185 or by metes and bounds extending to the line of the highway or street without express reference to the center line. n186 However, if the grantor conveys lots according to such a plat, and bounds the lots on the plats expressly on the exterior lines of the streets, the grantee does not acquire the fee to any part of the street. n187 In California, generally, the word "lot" does not include a portion of the street bounding the road. n188

The fact that the measurements and coloring of a plan referred to in a description exclude the streets is not sufficient to overcome the presumption that the deed passes the fee to the center of the streets. n189 Accordingly, the fact that a deed to land abutting on a highway, which highway was subsequently abandoned with the title reverting to the owners of the

fee, contained after the description a diagram of the lands but excluding half of the highway, did not show an intention to retain a reversionary interest in the highway. n190

Of course, if statute or ordinance requires that streets shown on recorded plats are vested in the city, town or county, land conveyed by reference to such plats necessarily excludes the streets. n191 If a starting point is given as the side of a street and thence along the street, the description did not run to the center; n192 but if the starting point were merely a stake at the edge of the street, so that it would be impractical for the boundary marker to be in the center of the street, the line has been held to run to the center of the street. n193

If the road is referred to at a point where one normally enters the road ("*terminus a quo*"), more uncertainty exists over whether the boundary is at the center of road; if the road is referred at a point where the roadway ends ("*terminus ad quem*"), the boundary line is more likely to be in the center of the road. This is because in some jurisdictions or localities it is common to measure from the side of the road instead of the center, giving rise to a rebuttable presumption that the measurement was indeed from the side. n194 Also, it is possible that a deed of a platted lot conveying the measurement from a corner of the lot at the street may convey the land according to the measurement from the border of the street, rather than from the center of the street, even though the plat gives measurements to the center of the street. n195

The general rule of measuring boundaries from the center of the street does not apply if the grantor does not own the fee of the street, as there is no presumption that a grantor intended to convey what the grantor did not own. n196 For instance, if land taken for a canal has been acquired in fee from adjoining owners, a conveyance by such owners of land bounded by the canal is a conveyance only to the exterior line of the canal. n197

Where one conveys land bounded expressly on the exterior lines of existing or proposed streets, the grantee obtains no fee interest in the land underlying any part of the street. n198 Nor does the grantee obtain the fee interest in land underlying a highway through a conveyance whose description -- regarding the highway -- is couched in such phrases as "by the side of," "by the margin of," or "by the line of." n199 Description phrases such as "from," "to," "alongside of," or "by" may extend the boundary line only to the street's center line, but on even slight evidence for such intent, the boundary will be extended only to the side of the street. n200 A boundary line which runs across a road, and thence by the side of the road, is by the margin of the road and not by its center. n201

If a boundary is described as running between fixed monuments on the side of a street, the parcel described does not include the fee of the street to the center line of the street. n202 Thus, where one end of a boundary line is fixed on the side of a highway, no rule of construction will result in the other end of the boundary line being located in the center of the street; only express words would accomplish such a result. n203 As stated above, if a starting point is given as the side of a street and thence along the street, the description did not run to the center; n204 but if the starting point were merely a stake at the edge of the street, so that it would be impractical for the boundary marker to be in the center of the street, the line has been held to run to the center of the street. n205

In some states, the presumption or intention that the highway is completely excluded from the description may be inferred from words used in any part of the description or deed. In these states, if a boundary commences at a point or monument on the side of a road and thence runs along the road, the boundary is set as by the margin of the road and not by its center line. n206 The rule is the same even if the deed states that the road was laid out to accommodate purchasers of lots bounding on the road, with the locations of lots and road shown on a plat. n207 The presumption may be rebutted by evidence of differing intentions. n208 A deed conveying land lying on the east side of a road, describing the land as "beginn-ing in the east line of the road," thence running around the lot to the east, "thence southerly by the sea to a road or passway," and "thence northerly in the east line of said road to the place of beginning," was held to exclude the road. n209

COMPUTER-ASSISTED RESEARCH

LEXIS: Description w/10 (land or real) and highway w/10 exclusi!

§ 90.02(c)(7)(ii) Non-Exclusion of Underlying Fee.

According to the general rule, excepting a highway from a conveyance does not except the fee, unless the intention to except the fee clearly appears; without such intention, what is excepted is the public easement to use the highway. n210 Accordingly, the grant of a way or the privilege of a highway carries an easement only. n211 If a grantor reserves a road through land conveyed, to provide access for other land owned by the grantor, the reservation is presumed to be merely of the use of the road and not the fee in the road. n212 An exception of a highway from a conveyance does not constitute a dedication. n213

COMPUTER-ASSISTED RESEARCH

LEXIS: Description w/10 (land or real) and highway w/10 exclusi! w/10 fee

§ 90.02(c)(7)(iii) The Rule When the Highway is Not Yet Opened.

A street which is only proposed, or which does not yet exist, may be used as a monument in a description. If a street extends up to an unplatted and unsurveyed tract of land but not yet into the tract, and a lot is sold with boundaries fixed by the street as if it had been extended into the tract, and the location of the future extension is clear, use of the street as a boundary will control the courses and distances of the description. n214 If a deed purports to convey land up to one side of a designated but still unopened street, the deed is construed as conveying only up to that point, even though the courses, distances and statement of amount conveyed would carry the grant to the other side of the road. n215 Even though an abutting way is used as a boundary, if it has not been dedicated, it gives rise to no easement. n216

As a majority rule, where the outside line of a proposed street is given as the boundary, an easement arises in the course of the street; n217 however, contrary authority exists. n218

Where a boundary is fixed by the location of a street that is installed after execution of the deed, when the street is accepted it is presumptively the street referred to in the deed. n219 If a lot is bounded upon a street that is projected but not yet installed, and the street is laid out and opened on the grantor's land some distance in front of the lot, according to the measurements and plat referred to, the land between the lot as described and the street as laid out passes by the deed. n220

Where land was conveyed to a railroad company by a deed that described the land by reference to the line of the company's railroad as then located but not built, the boundary line was not affected by a later change in the location of the road. n221

The fact that land conveyed is described in the deed as situated on a certain street is not an implied covenant that such a street exists, where there is no reference to any plan or to the street except in the description of the land. n222

In sales by plats an implied covenant arises that the abutting streets or ways are or will be laid out as described, are of the width represented, and that the grantor will do nothing to defeat or impair the right-of-way conveyed to the grantee. n223 If a grantor conveys land as fronting on or bounded by a certain space designated in the deed as a street or way, which the grantor also owns, the grantors covenants that such land is indeed a street or way and that the grantor will not thereafter deny it as against the grantee or the grantee's successors; it is immaterial whether such a description carries the fee to the center of the designated street or way or only to the side line. n224

If a street has not yet been accepted as a public street, one who purchases a lot according to a plat showing the street

immediately adjoining, even if the fee of the street to the center line is conveyed, acquires only an easement in the street, and may not take possession of any part of the street so as to exclude the vendor. n225

A deed designating a private lane or road as one of the boundaries of the land conveyed, passes title to the the middle line of the lane or road. n226 Where a plat of land is recorded and land appears thereon bounded by lines clearly intended to represent the lines of a street, and lots are sold as being bounded on such street, the land shown for the street is dedicated for a public street even though not so named on the plat. n227 As to the grantee in such a case, the way shown on the plat is a street, whether it has been opened or not. n228 This also applies to land sold by an attorney-in-fact, even if the power of attorney did not include the power to dedicate streets to the public. n229

According to the general rule, a grant of land bounded on a highway, street or alley carries with it the fee to the center line of the street, subject to the public easement, provided that the grantor owned thereto and signified no contrary intent, even if the street is not yet accepted or opened. n230 Other authorities, however, favor the rule that carrying the fee conveyed to the center line of a street or highway does not apply to mere paper or proposed streets, but applies only to actual streets. n231 Certainly the rule of conveyance to the center line does not apply when the grantor lays out the street after the conveyance, and the conveyance did not refer to the street. n232 If one side of a street has been described as the boundary of land conveyed, but the street is not yet laid out as of the date of the deed, the street side is considered the intended boundary if the street is shortly thereafter laid out. n233

A grant of land bounded upon a public street will be referred to the street as actually built and used rather than to the street as shown on a recorded plat or map or by survey, especially when these lines nearly coincide. n234 A road or highway mentioned as a boundary means the existing road or highway and not that which may exist of record or may be determined by a survey; as all monuments, it means a monument existing in fact. n235 If the road has not been actually opened by the date of the conveyance, but there was a recorded plat of it, the location of the road must be determined by the plat, as the description in the deed must necessarily refer to that. n236

Where land is bounded on the west by a street according to a map referred to, the western boundary is eventually determined by wherever the eastern boundary of the street is laid out or actually surveyed. n237 A deed describing land as beginning at a point "ranging" with the south line of a street refers to the street as extended to the property on a recorded plat, and not as it actually exists some distance away. n238

Some authorities limit the doctrine carrying the fee to the center line of a street to actual highways and is not to be applied to mere paper streets. n239 Thus one who buys lots according to a plat and the streets are unopened acquires only an easement therein and cannot take actual possession of any part of the land designated for the street, n240 unless the conveyance expressly grants to the center line. n241 If a grant is bounded by a way or lane and coupled with the privilege of using it, such an easement may show that no fee was granted over any part of the way or lane. n242 If the granted premises are bounded by a passageway, the grantee has only a right of way over the passageway. n243

If a deed describes one of the boundaries as a street of a certain width "but not yet opened," reserves the exclusive right to represent the land in all proceedings pertaining to the opening of the street, and the city repeals the ordinance locating the street, the grantee takes no interest in the street nor in the land within the lines of the street. n244

In a grant of land upon a highway, the grantor does not convey to the grantee a right of way, for this already exists and is to be kept in repair at the public expense; if the grantor has expressly or implicitly assured the right of way to the grantee, then the grantor retains the fee to make good the assurance of the easement. n245

A deed describing the land as extending "to a driveway, thence easterly on said driveway" a certain distance, and reserving all existing rights of way over the driveway, and declaring that the driveway shall remain open and common to all parties having a right therein, conveys title in fee to its center, subject to such easements, and with a corresponding easement over the other half. n246

Where a private driveway or alley was carved from the lots on one side thereof only and not from the other lots abutting on the opposite side, and no special reservation appeared in the deeds conveying the lots, the rights of the grantees extended to the whole of the driveway or alley and not to the middle line only. n247

COMPUTER-ASSISTED RESEARCH

LEXIS: Description w/10 (land or real) and highway w/10 open!

§ 90.02(c)(7)(iv) The Effect of Abandoning the Highway.

A grantee who holds no fee interest in any part of a street may, however, have a perpetual easement of way, to be kept open even if the street is no longer used as a public highway. Thus, if a grantor has bounded land by a street in such a way as to retain title to the soil of the entire street, and the street is later abandoned as a public highway, the grantee still retains an implied grant of a private easement in the street. n248 In such a case, the grantee has the right to have the ground over which the street was laid left open forever as a way to be used for every ordinary purpose accommodating use of the grantee's adjoining land. n249

If a deed conveys land without reference to a street which had formerly abutted the land but which had been vacated, the grantee acquires no interest in the street. n250 As a rule, when a street or way is discontinued, the owners of land adjacent to it as a rule are entitled to the full possession and use of the land which was already theirs in fee. The public easement expires, and adjacent owners take possession under their respective titles. n251

When a street is vacated, the land within the boundaries of the street attaches itself in the nature of an accretion to the adjacent land in proportion to frontage, and becomes the private property of the owners of such adjacent land. n252 These changes are regulated by statutes in some states. In some states the absolute title to land covered by an abandoned highway reverts to the owner of the fee even if the owner's land is not abutting the highway. n253 Owners with abutting land and who obtain title to the soil covered by an abandoned highway need not take actual possession to establish their rights when the highway is abandoned. n254 Where a conveyance limits the grant to the side lines of the street, no fee interest in the street has passed to the grantees holding abutting lots, and they acquire no interest in the soil of the street when the street is abandoned and its land relieved of the public easement. n255 Similarly, if the original grantor restricts the conveyance by words so as to reserve title to the land within the street in the grantor, upon abandonment of the street the fee reverts to the grantor free of the easement's burden. n256

COMPUTER-ASSISTED RESEARCH

LEXIS: Description w/10 (land or real) and highway w/10 abandon!

§ 90.02(c)(8) Sale of Land by Plat as Dedicating Streets.

If land is sold by a plat on which are indicated streets, such streets are not necessarily dedicated to the public for use as highways. n257 Some jurisdictions hold that sales with references to plats on which streets are indicated constitute only offers to dedicate, and the offers may be withdrawn if not accepted by the public within a reasonable time. n258 Other cases hold that such a sale constitutes a dedication of streets and alleys only as between the grantors and purchasers, n259 and if the claims of the purchasers are extinguished, revocation is possible if the public has not yet acquired affirmative rights by adopting the property designated for streets by official acts of the municipality or user. n260 A few cases hold, however, that land sold with reference to a plat on which streets are indicated perfects a dedication without any affirmative or official act on the part of the public. n261 The owner's acts and declarations may evidence an intent, either for the present or future, to dedicate the streets to public use, but they are not of themselves a conclusive surrender of the land for such dedication.

If the plat contains a statement reserving all rights and privileges not expressly granted, and providing that nothing should be taken by implication to be granted, no implication of a dedication of streets or land reserved for parks to the use of the public may be drawn from the plat. This limitation persists even if the grantor, before executing the deed, made representations that land marked upon the plat for use as streets or parks should be dedicated to the public; acceptance of the deed waives the benefit of such representations and affirms the restrictions of the statements on the plat. n262

If the deed description calls for a street as one of the boundaries of the land, that is not sufficient to establish a dedication of the street to public use, if at the date of the deed no such street existed in fact or on paper or had ever been dedicated, accepted or used by the public or by public authority. By comparison, a deed describing the conveyed land as bordering on a designated street may constitute a dedication by the grantor of such street, n263 or at least indicate an intention to dedicate the street to the public. n264

A reference in a deed to a point in the middle of a proposed street about to be laid out, and which point is to be used as a monument fixing one corner of the land conveyed, is too indefinite to be either a present dedication or a reservation of the land included in the proposed street for future dedication. An owner may subdivide a tract of land so as to establish over it only private rights of way for the sole benefit of purchasers of lots in the tract, ways in which the public will have no interest or control. n265

COMPUTER-ASSISTED RESEARCH

LEXIS: Description w/10 (land or real) and dedicat! w/10 street!

§ 90.02(c)(9) Distribution of Variances in Distance.

If the survey of a line reveals a length that is less than the length called for in a description, it is not presumed that the survey of any portion of the line is defective, but that the entire measurement of the line is imperfect. If the line is subdivided, such as for lots, the deficiency is distributed proportionately along the whole line, n266 except as to those parts of the boundary already fixed by possession. n267 Thus if land is subdivided in lots shown on a recorded subdivision plat, with a deficiency between the actual frontage and that shown on the plat, the deficiency must be divided among the lots in proportion to their respective frontages as indicated on the plat. n268

This same principle of distributing deficiencies applies also to excesses, n269 subject to exceptions related to the particular cause of the error. n270 Where in a platted block the lots are marked as having the same frontage, except one with specific dimensions, and a survey shows excess frontage, the excess is distributed to all lots, not just to the lot that differs from the others. n271 Averages in a block should be divided between lot owners according to the percentage of frontage held by each. n272

If a disputed boundary line is to be established by proportional measurement, a proved surplus or shortage must be shown. n273 If all the lots except one in a block have specified frontages, any deficiency is taken out of the lot with the unspecified frontage, so that its frontage is the length of the block less the stated frontages of all the other lots. n274

Where title to adjoining lots comes from the same grantor, and there is a shortage, the first innocent grantee of one of the lots need not contribute to make up the shortage. n275

§ 90.02(c)(10) Construction of Description Against the Grantor.

According to a common rule of construction for private conveyances, ambiguous description language is construed in favor of the grantee, because it is assumed that the language was provided by the grantor. n276 Applying this rule of

construction, however, does not extend the description to include land the deed does not convey. n277

If a conveyance is defined by two inconsistent descriptions, one general and one specific, the grantee may adopt the most favorable. n278 This privilege, however, is subject to the rule that, if one of two inconsistent descriptions is more certain than the other, the more certain description must govern, even if that one is less beneficial to the grantee. n279

The common rule of construction for conveyances from a public grantor is just the opposite of the rule applied to private grants. n280 The description for a conveyance of land from the state is construed most strongly against the grantee. n281

If the description creates a mistake in the quantity of land conveyed, and the parties have dealt at arm's length, the burden of the mistake falls on the grantor. n282

COMPUTER-ASSISTED RESEARCH

LEXIS: Description w/10 (land or real) and construc! w/10 grantor

§ 90.02(c)(11) Identifying and Resolving Latent and Patent Ambiguities in Descriptions.

§ 90.02(c)(11)(i) Latent Ambiguities.

A latent ambiguity occurs when the deed or other instrument appears sufficiently certain and free from ambiguity, but the ambiguity is produced by something extrinsic, or some collateral matter out of the instrument. Where a description is apparently clear and complete, yet when it is applied to the land it appears that the words are applicable to different things, and there is nothing in the deed to show which is meant, extrinsic evidence is admissible to show the true meaning of the words used. n283

Parol evidence may be admissible to resolve latent ambiguities in a deed, but not to resolve patent ambiguities. n284 The general rule is that if the deed description is so ambiguous as to leave doubt as to what the parties intended, extrinsic evidence may be resorted to as an aid in its construction. n285 Such extrinsic evidence is always admissible to explain any uncertainty or latent ambiguity in the deed description, so as to make it apply to the parcel of land intended to be conveyed and give effect to the deed. n286 Thus, where a right of way over certain lots was described as laid out by a named civil engineer, in accordance with a map attached to the deed, but the map did not identify the location apart from the survey on the ground, explanatory evidence was admissible to show that the map was made from an actual survey and to show the location of the right of way as surveyed upon the ground. n287 Where the calls in a deed are conflicting or ambiguous, or when an effort to apply the description to the ground gives rise to ambiguity, parol evidence is admissible to show where a survey or a line of survey was actually made on the ground. n288

A description that could apply equally to two or more parcels contains a latent ambiguity which may be explained by parol evidence. n289 Where land conveyed is described as a lot bearing a designated number in a certain tract, and in such tract can be found more than one lot with such number, the description may be cured by evidence that only one of the thus numbered lots was owned by the grantor. n290

The function of extrinsic evidence as applied to a deed description is to explain the latent ambiguity or to identify on the ground the property described. Such evidence must not contradict the deed or make a description of other land than that described in the deed. n291 It cannot be used to make the deed convey land not embraced in the words used to describe the subject matter of the deed, but only to ascertain the intention of the parties as expressed by such words. n292

Parol evidence may be used not only in cases of conflict or interpretation, but also for purposes of explanation. It is always permissible to give evidence of existing circumstances, such as the actual condition and situation of the land,

buildings, passages, watercourses, and local objects in order to give definite meaning to the language used in a deed and to show the sense in which particular words were used by the parties. n293 Admissibility of extrinsic evidence turns on whether the evidence tends to explain some descriptive word or expression of doubtful meaning, so that the description language, aided by such evidence, identifies the land conveyed. n294 Thus, where no testimony shows that the surveyor actually marked the line from a given point to the bank of a river and where there is no call in the description for the line and objects testified to, parol evidence is admissible to established the boundary line from such given point to the river bank. n295

Where a deed description reserves or excepts one acre of land from the southwest corner of the land described, "together with the buildings thereon," and grantor remained in possession of all the buildings, the grantor was permitted to show that one square acre in the southwest corner of the land would not include the buildings reserved by the grantor, and that it was intended to reserve an acre of such shape as would include the buildings not so reserved. n296

Where parol evidence is admitted to remove a latent ambiguity, the identity of the land is a mixed question of law and fact. n297

COMPUTER-ASSISTED RESEARCH

LEXIS: Description w/10 (land or real) and ambiguit! w/10 latent

§ 90.02(c)(11)(ii) Patent Ambiguities.

A deed contains a patent ambiguity if the description describes the acreage in part of a tract, but the tract cannot be located. n298 Similarly, if a deed conveys a part of tract without describing what part of the tract is intended to be conveyed, a patent ambiguity exists which parol evidence cannot aid. n299 A deed for a tract of land in a named county, described as adjoining land held by two other named owners, is void if the tract is part of a larger tract held by the grantor, because the part intended to be conveyed cannot be known; if the land intended to be conveyed is not part of a larger tract held by the grantor, and the quantity is given in the description, the ambiguity is not patent and may be located by parol evidence. n300 A description of the land as simply (part of) a tract, without further identification in the deed, is void for indefiniteness. n301

If the description is so inaccurate that the land cannot be identified, the deed is void n302 and parol evidence may not be admitted in aid of the description. n303 A deed description equally applicable to more than one tract of land is void for indefiniteness. n304

A description in a tax deed as "Home lot in lot 6, block 4, ward 1" contains an ambiguity patent on the face of the deed, and parol evidence is not admissible to explain the description. n305 A deed description as "northwest quarter of section 7, north of Castor River, where there are several sections 7 north of Castor River in the county, and no range or township is mentioned, a patent ambiguity exists and the deed is void. n306 Added for land "except such portion as has been laid out in town lots, and sold prior to the execution of the mortgage," and which does not show which lots have been so sold, is patently ambiguous, void for uncertainty, and unable to be aided by parol evidence. n307

COMPUTER-ASSISTED RESEARCH

LEXIS: Description w/10 (land or real) and ambiguit! w/10 patent

§ 90.02(c)(11)(iii) Statements of Intention of the Parties.

A clause in a deed describing the parties' intention as to the property conveyed may be given a controlling effect upon all prior phrases used in the deed's general description. n308 And if elements of the description are in conflict, the

parties' intentions will be given effect. n309 Language in the description apparently used to clear up indefiniteness or ambiguity in the description will be given effect according to that purpose. n310

A conveyance describing land by lots, blocks, or government subdivisions and adding, at the end of the description, "also together with all other lands that may not have been heretofore described belonging to said" grantor, passes title to a lot not expressly mentioned. n311

In cases of conflicting elements in a description, the element with respect to which there is the least likelihood of error should control, because it is the most likely to effectuate the parties' intentions. n312 Determining the grantor's intention is the primary purpose for which rules determining boundaries exist, and all such rules yield to such intention when discovered. n313

COMPUTER-ASSISTED RESEARCH

LEXIS: Description w/10 (land or real) and ambiguit! w/20 (part! or intent!)

§ 90.02(c)(11)(iv) The Parol Evidence Rule as Applied to Descriptions.

A deed, in so far as it is contractual, is subject to the parol evidence rule. n314 According to this rule, parol evidence is not admissible to contradict or vary a description which is definite and certain, n315 or to control the legal effect of the words used, but if susceptible to different meanings, a construction must be put upon the terms used. n316

Parol evidence is not admissible to prove that the parties intended something different from that which the written language expresses or which may be the legal inference and conclusion to be drawn from it. n317 Thus, where a description was clear and exact in giving metes and bounds but, as applied to the land, conveyed a lot adjoining the land of the grantor, it was held that parol evidence could not be introduced to show that the grantor intended to convey his own lot, even though his deed referred to the deed by which he acquired title, which deed correctly described the land intended to be conveyed. This result was reached because there was no ambiguity in the metes and bounds description, and the clause referring to the prior deed did not create any ambiguity in the prior description, but was repugnant to it. n318 If, on inspection of the deed, the identity of the land is altogether uncertain, the court should pronounce the deed void. n319 Thus a deed which on its face contains two inconsistent descriptions, either of which will identify a different piece of property, is void for uncertainty. n320

If the description in the deed is ambiguous, the parol evidence rule is much relaxed. Boundaries may be proved by hearsay. n321 Evidence may be introduced to prove boundaries that is admissible to prove any other fact. n322 Indeed, in boundary disputes, the rules of evidence are more liberal than those governing other actions, especially where the surveyor's marks have disappeared. n323 Lost boundaries may be established by the best evidence available under the circumstances, n324 so parol evidence is admissible to prove boundaries. n325 Traditionary evidence is not inadmissible hearsay. n326

The *identity* of a monument in a deed is always recognizable by parol evidence. n327 By the weight of authority, parol evidence as to monuments to prove practical *location* is not admissible unless the monuments were erected prior to or contemporaneous with the deed. n328 Parol evidence is admissible to show the position of the monuments and boundary marks mentioned in a deed n329 or fixed by the parties at the time of or soon afterwards. Where the land has been actually surveyed and stakes set at the corners, parol evidence is competent to prove their location, and, if lost or destroyed, the places where they were set. n330 If such corners and monuments can be determined by the field notes of the government survey of the land, they are not so unknown or uncertain as to allow the admission of parol evidence to locate them. n331 If the means are at hand to establish the line, and a competent surveyor could locate it, it is not uncertain in a legal sense. n332 Resort must often be had to the existing circumstances, and to the construction put upon the description by the parties, to ascertain where on the face of the earth the monuments and lines described really are.

n333

In determining whether disputed land was included in a conveyance, where the description in the deed was not ambiguous, but conflicts and ambiguities arise in applying the description to the ground, parol evidence as to how the land was actually surveyed on the ground and as to the original surveyor's footsteps, is admissible to show where the line is established. n334 The lines and courses mentioned in a deed may be established upon the land by showing the survey actually made at the instance of the parties to the deed with a view to its execution. n335

Although the calls for courses and distances cannot be limited to reference to objects found on the ground, as indicating the footsteps of the surveyor, but not mentioned in the field notes, evidence of such objects may be introduced to aid a call found in the field notes by removing an ambiguity and to determine which one of conflicting calls shall prevail. n336 When the description is by survey, however full and precise the survey may be, resort must be had to extrinsic evidence to identify the survey on the ground. If by such evidence the land described can be found and identified with reasonable certainty, the description is sufficient. n337

Where the boundaries are actually located may be proved by any kind of evidence which is admissible to prove any fact. As evidence which may tend to establish this fact, the jury may consider, among other things, actual occupation, ancient reputation, the admission of a party against the party's interest, and the agreement of the parties as to the actual location of the boundary. n338 Reference may also be had to prior deeds conveying the same land. n339

Because a deed conveys only what is described in it, regardless of the grantor's intent, n340 proof of the grantor's intent is inadmissible to explain a deed which is on its face void for uncertainty, n341 or to enlarge or change the meaning of the words used in the deed. n342 Parol evidence cannot make a deed convey land that it does not purport to convey, nor prevent it from conveying that which it does clearly purport to convey. n343

When the parties have reduced their contract to writing in the form of a deed, this is taken to be the final expression of their intention, and extrinsic evidence cannot be employed to show that their intention was different from what is expressed on the face of the deed. n344 Where the description in field notes or in the deed is unambiguous on its face and in its application to the ground, parol evidence is not admissible to show that the surveyor actually ran a line of the survey at a different place from that described in the deed. n345 If the land intended to be conveyed can be ascertained from the deed itself by rejecting a part of the description as manifestly false, resort should not be had to extrinsic evidence. n346

A grantor is not allowed to contradict the deed or to vary the description of the land thereby conveyed. n347 Where the description of property intended to be conveyed by deed is ambiguous, its identity must be gathered from the intention of the parties as shown by the instrument itself and accompanying circumstances. n348 If the intention of the parties can be ascertained from the language of the deed with due consideration to the situation in which they were when the writing was made, parol or extraneous evidence is not admissible; but if in attempting to apply the language to the subject matter two situations should be presented, either of which would answer the terms of the writing with equal certainty, parol evidence is admissible to prove which of the two situations the parties had in mind. n349

Parol evidence is admissible to apply the description to the parcel intended to be conveyed, when the terms used in the deed leave it uncertain what property was intended to be embraced in it. n350 Such evidence cannot be used to enlarge the scope of the descriptive words, but only to fit them to the land intended to be described. n351 The deed must itself point to the source from which evidence from any other source (sometimes referred to as evidence "aliunde") to make the description complete is to be sought. n352 This may sometimes be done by the use of a single word, as for instance where the language used is "my" farm, or "my" homestead. n353 A description of land as lying in a designated county on a named creek, "in the _____ district of said county and known as the south half of lot 30 in a survey of said district and containing 101 1/4 acres," is not void for uncertainty, since it may be shown by parol evidence that there is only one lot 30 and the county mentioned on the creek specified. n354

The question of the application of a description to its property subject matter is for the jury, who may have the aid of all competent extrinsic evidence. n355 The question of the identity of the location is always a question of fact for the jury. n356 The construction of the terms used in a deed, aside from extraneous evidence, is for the court. n357 It is, however, the province of the jury to determine the boundaries in controversy from all the evidence, including the description in the deed. n358

The particular terms used to describe the property may be defined by parol evidence. The term "messuage" properly includes a dwelling house and the land usually held with it. Therefore, where land is described as a "messuage" in the occupation of a person named, oral evidence is admissible to show that a garden adjoining had always been occupied with the messuage and passed by deed. A "farm" may be defined by parol evidence showing what lands, house, and buildings have been used and known as "constituting the farm." Land described as "my residence," "my homestead," "my place," or "my lot" may be identified by parol evidence if necessary. n359 Thus, it is held that a deed for "one half of my lot," accompanied by proof that the grantor owned at the time but one lot in the place, was not void for uncertainty in the description. n360 A description of the property conveyed as "my house and lot" or "one-half of my lot" may be made sufficient by extrinsic evidence. n361 If the land is described as the land inherited by the grantor from the grantor's parents or from others named, evidence to identify the land so inherited is admissible. n362 Parol evidence is admissible to identify land described by a name applied by the parties to the property, though not so known by the entire neighborhood. n363

If the property is described as a house and lot in a named street, evidence is admissible that the vendor or grantor had only one house and lot on that street, and that the parties had been in negotiations for the purchase and sale of such house and lot. n364 Such evidence identifies the property and applies the description to the property intended.

In a deed the words of description are, of course, intended to relate to an estate owned by the grantor. And, in our opinion, this is also the presumption in construing a contract for a future conveyance. If the party who enters into the agreement in fact owns a parcel answering to the description, and only one such, that must be regarded as the one to which the description refers. With the aid of this presumption, the words "a house and lot," on a street where the party who uses the language owns only one estate, are as definite and precise as the words "my house and lot" would be a description the sufficiency of which has been placed beyond all doubt by very numerous authorities. n365

A description of a town lot by its length and breadth, and also by the improvements upon it, is sufficient when it is shown that no other lot in the town has improvements of a like character. n366 The omission from the description of the name of the township, range, county, and state will not render the deed void if the description given can, without alteration, be applied to a particular tract, so that the court can, from extrinsic evidence, say that the minds of the parties met and agreed upon the identity of the distinct parcel intended to be conveyed. n367 Evidence from other sources (sometimes referred to as evidence "aliunde") is pointed to by a reference to another deed for the description, or some part of the description, n368 or by a description of the land as being the same inherited by the grantor from or devised to the grantor by some other person, or as called by a distinct name, or described as known by that name. n369 Parol evidence cannot be adduced to identify land insufficiently described in a contract of sale. n370

COMPUTER-ASSISTED RESEARCH

LEXIS: Description w/10 (land or real) and ambiguit! w/20 parol

§ 90.02(d) Types of Descriptions.

§ 90.02(d)(1) General and Particular Descriptions.

The rule that the intention of the parties to a deed is the test by which to determine its legal effect applies to the

description as well as other parts of the deed. n371 The general description is usually followed by another description which gives further details regarding the property and usually cites some characteristic that distinguishes the land from other land. This is known as the particular description, and as found in practice may be so mathematically defined that the engineer can stake out the bounds without reference to other documents or plats, or it may be so broad that from the engineer's standpoint it is general. n372 The most common form of description is the combined general and particular. The general often serves as a means of identification and the particular for purpose of definition. The two should be in perfect accord and together express the intention of the parties.

A particular description is not necessarily limited by the general words of intention, nor does such language restrict the grantor's covenants to the grantor's title and interest, when the land itself is the subject matter of the conveyance. n373 This rule applies to cases where the particular description is unambiguous; n374 but if the general description harmonizes with the manifest intention of the parties as disclosed by any proper evidence, including the terms of the instrument, and the particular description does not, the ordinary rule of preference does not apply, and the general description prevails. n375

If a deed contains both a specific and a general description that are in conflict with or repugment to each other, the specific description controls. n376 This preference for the specific or particular description is one of the strongest of the construction rules. n377 This presumption favoring the specific description will prevail unless it appears that the parties intended otherwise n378 or the specific or particular description is incomplete or defective. n379 Also, a specific description cannot be varied or enlarged by a more general and less definite description. n380

The words "meaning to convey lot known as the Seal Cove lot" following a particular description by metes and bounds, do not enlarge the grant unless the contrary intent appears. n381 Where the calls of the description are definite and clearly expressed, they should not be extended to conform to an intent which might be discovered from other parts of the description. n382 However, the intent to restrict the conveyance as made in the particular description may be made so clear that effect must be given to the general expression of intent. Thus, where three parcels of land were described as if the grantor were conveying the full and absolute interest in the parcels, but the grantor added, "meaning to convey all the land I purchased," of three persons named, "referring to their deeds for particulars," and again saying, "meaning to convey all the land set forth in said deed, and no more," and it appeared that the land acquired by the deeds referred to was only an undivided one-half interest in the land described, it was held that the deed conveyed only the undivided half interest. n383

If a particular or specific description makes a general reference to a description in a prior deed made for another purpose, the specific description prevails over the general reference. n384 This is because if a description in a deed is clear and complete, a reference to another deed cannot restrict the description. n385 If the reference to an earlier deed is "for a more particular description," but the earlier deed conveyed only part of the land conveyed by the later deed, which later deed clearly describes the property, the whole of the land so described will pass to the grantee. n386 If a grantor refers to a prior deed and declares the intention "to convey the same and identical real estate conveyed by such deed," the grant is still not necessarily controlled by such a reference. n387 When land is described as the same conveyed to the grantor under a deed referred to for a particular description, the title to a lot excepted from the deed referred to does not pass, even though the grantor owned the lot at the time. n388 A reference to a description in a prior deed becomes of importance when the particular description is imperfect or doubtful, and the particular description is in such case aided rather than controlled by the reference. n389

A particular description by metes and bounds prevails over the insertion of a general description, especially if the general description was inserted to reveal the grantor's source or chain of title, n390 or to further identify the land, n391 or give emphasis or clarification to the description. n392 If a general description is followed by a more particular description, the more particular description controls unless other provisions of the instrument or the surrounding circumstances clearly indicate a different intention. n393 If a general description is inserted merely to fortify the particular description or to show chain of title rather than fix boundaries, the particular description prevails. n394 A

general description of a farm described by name, or as that farm on which the grantor lives, may control a reference to a deed by which the grantor holds title, so that if the deed referred to describes more or less land than the farm contains as described, the parcel that passes is the farm described by the more general description of name or occupancy. n395

Where a deed contains a general description, definite and certain in itself, and is followed by a particular description, such particular description will not limit or restrict the grant which is clear and unambiguous by the general description. n396 A general description may be limited, restrained or controlled by a particular description, but as a rule a particular description is not limited, restrained or controlled by a general description. A description of land as "60 acres off of the south end of the west half of the southwest quarter" of a certain section is no less certain and definite than a conflicting metes and bounds description in the same instrument, but the metes and bounds description controls. n397

A particular description prevails over a general reference to the premises as being in possession of the grantor, or of some other person named, n398 or as belonging to a person named, n399 or as "being the land set off" by a certain Indian treaty to a person named. n400

After a definite description by metes and bounds, the grant cannot be enlarged by adding the words, "together with the buildings thereon standing," if the buildings project beyond the boundaries of the land. n401 Where the parcel described was of a specified farm, but a schedule and plan referred to did not include a close which was proved to have been held and treated as part of the farm, it was held that this close did not pass.

The rule that when particular words of description are following by general terms, the latter will be regarded as referring to things of a like class applies mostly where the general words follow the particular, and not where the particular words follow the general. n402

If the general description is definite and certain, and is proved to be correct by reference to the land itself, or in any other way, or if in any way the intention of the parties appears to have been to convey the land thus generally described, the general description will prevail as against a description by course and distances, so far as these descriptions differ. n403 Where a deed contains conflicting calls, and the first call is followed by a general description which manifestly was intended to be a summing up of the intention of the parties as to the premises conveyed, the general description controls all prior words or phrases used, if sufficient to identify with certainty the property conveyed. n404 Where fixed boundaries are clearly and certainly established, they prevail over courses and distances. n405 Where a conflict exists between the calls of a deed for courses and distances and its calls for the lines in a prior deed of the grantor to another, the latter controls, n406 especially because it is recognized that mistakes often occur in descriptions by courses and distances. n407

COMPUTER-ASSISTED RESEARCH

LEXIS: Description w/10 (land or real) and (general or particular)

§ 90.02(d)(2) Maps and Plats as Descriptions.

A description in a deed may be sufficient if it describes land by reference to a map or plat, n408 if the reference is definite and certain in connecting the deed with the map or plat. n409 A description containing numbered lots without reference to a particular map or plat will not suffice. n410

As a general rule, a distinct and definite reference in a deed to a plan, map or plat has the effect of incorporating such plan, map or plat in the deed, n411 especially if the instrument referred to is recorded n412 or is annexed to the deed. n413 When sufficient reference is made to a map or plat, the courses and distances and other details which appear on the map or plat are considered true and correct, and as adopted by the grantor through the reference. n414

A plat becomes a monument when made part of a patent by reference, n415 but, even if property conveyed may be described by reference to a map, the deed and the map, when construed together, must furnish a description having the same degree of certainty as would be required of a description appearing only in the deed itself. n416 A recorded plat that is referred to in a deed for a description of property conveyed, and which, thus, becomes a part of the description thereof, is subject to the same kind of construction as to errors as governs the remainder of the description. Inconsistencies in the plat will be harmonized by eliminating the features of lower evidentiary rank and giving effect to those of higher rank. n417

A reference to a survey, whether or not noted on a plat, makes the survey part of the deed, and both must be construed together. n418 Both the survey and plat referred to are as much a part of the deed as if they were actually included within the deed. n419 Therefore, the boundaries, monuments, courses, and distances laid down on a map referred to are as much to be regarded as the true descriptions of the land as if they were expressly recited in the deed. n420 A conveyance of land according to a plat or by governmental subdivisions carries all the land lying within the lines so run and platted. n421 If a plat or survey enables a surveyor to locate the boundary lines with certainty, a reference to this is in itself a sufficient description. n422 A reference to the field notes of a survey for a description of the land renders such notes admissible in evidence to show the location of the land. n423 A description in a deed is valid if it refers to recorded or official maps or plats. n424

When lands are granted according to an official plat of a survey, the plat itself, with all its notes, lines, descriptions and landmarks, becomes as much a part of the grant or deed by which the lands are conveyed, and controls so far as limits are concerned, as if such descriptive features were written out upon the face of the deed or the grant itself. n425 Where the deed contains particular words of description and also refers to a plat, which is more definite than the particular words of description and is not inconsistent therewith, the description by plat controls in ascertaining the property conveyed. n426 Some courts, however, have held that the description by words prevails over the description by reference to a plat or map. n427

Where the deed describes the land by reference to a plat or map, the grantee takes title in accordance with the boundary so identified. n428 Where the plat or map is referred to only for the purpose of boundary, the fact that the plat or map has been illegally laid out and platted into lots and streets does not affect the validity of the deed or reference. n429 Even if the deed does not expressly refer to a recorded plat of the land and make it a part of the description, if the only way of making out the description and identifying the land is by means of the plat, it is presumed that the parties contracted with reference to the plat, and the plat may be viewed as part of the description. n430 Where one granted two lots, each sixty feet wide, in a certain block owned and laid out by the grantor, a plat of which the grantor filed in the county clerk's office, according to which the block contained a large number of lots, all of which were twenty-six feet wide, it was held that the words describing the width of the lot must be rejected as erroneous description; therefore, in the absence of competent proof to the contrary, the parties must be presumed to have contracted with reference to the real condition of the property. n431 Where lots were sold according to an unrecorded plat and the later recorded plat contained a mistake in that the lots were numbered in the opposite order, it was held that the original plat governed. n432

A plat of land made for the grantor, but not shown to the grantee before or at the time of the conveyance, and not referred to in the deed, is inadmissible to control the boundaries as described in the deed. n433 However, if a grantor who conveyed a house with land was familiar with a village atlas showing the lot on which the house stood, it may be presumed that the deed was intended to convey the lot shown by the atlas. n434

To be of weight in locating particular lines or objects, a map need not be based on a survey accurately made or absolutely correct, but need only have a degree of certainty that is reasonable and practical under the circumstances; n435 however, an erroneous map n436 or plat n437 cannot have controlling effect in applying the description of the property conveyed. If a recorded plat erroneously gives acreage, the shortage will be taken out of the lot or lots included in the plat that do not have definite frontage. n438

If a plat referred to for description of land is imperfect or incomplete, the description is still valid to pass title if the parcels intended to be conveyed are known to the parties and are susceptible of identification according to the actual survey on the ground. n439 A description of land as a numbered lot or block on a certain plat is sufficiently definite, even though the plat on its face furnished no data for locating the lot or block, but with the aid of parol evidence the land can be identified. n440 If a plat is referred to as recorded when in fact it is not, the conveyance is not therefor invalidated, and the unrecorded plat or other parol evidence may be used to identify the parcel. n441 The statement in the description that the plat is recorded is simply rejected as erroneous description.

Evidence that the recorded plat referred to in a deed differs from the original plat should not be received; such a mistake in the reference should instead be redressed by an attempt to reform the deed. n442

Where a description refers to a map and to monuments at the corners of the lot, parol testimony is admissible to show that the map is inaccurate, and was compiled from other maps without an actual survey, and that the land which the parties intended to convey was the land that was staked off and located by the survey. n443 In such a case, the survey governs the plan in determining the location of the boundary lines of lots in a subdivision. n444 Also, where a survey was not made according to law, the survey was held not to be evidence as to the boundary between two quarter sections severed by the survey. n445 It has also been held that even though a plat is so defective as not to be entitled to record, if it had been recognized as valid for sixty years and used as the foundation of deeds, it is admissible in evidence to how the description and location of a given lot. n446

An unrecorded plan or map that is referred to in a deed may be identified by parol evidence; n447 and as against the grantor and those in privity with the grantor, it is a sufficient identification to show that the grantor exhibited the plan or map as the plat referred to. n448 A deed to land described by reference to a map prepared by the grantor implies a representation to the grantee as an inducement to purchase that a street shown by the map and furnishing the only outlet has been dedicated, even though the map is not recorded and the street line is not indicated thereon. n449

Where a conveyance of lots is made with reference to a map, it is immaterial who made the map or whether it is recorded or whether a copy can be produced, if the location can be proved with reference to streets by any method which the law recognizes. n450 Where a private survey showing a boundary line was admissible, a map showing that survey and identified by witnesses who made it is likewise admissible. n451 Maps, survey, monuments, pedigree and even reputation evidence are admissible to establish boundaries. n452

When a description reference is made to a plat, the plat may be used to identify the lands referred to, even if the plat does not conform to a statute and is not duly certified. n453 When a plat is so defective as not to be entitled to record, but according to which deeds have been executed for years, it is admissible as an instrument referred to. n454

Although a map or plat may be identified by parol evidence n455 it is preferable for the map or plat to be annexed to or endorsed upon the deed, if the deed is not already recorded. Plans made at the time of a conveyance are usually recorded with it, and the deed should then refer to the plan and state that it is to be recorded contemporaneously with the deed.

In case of ambiguity as to which one of two plats is referred to in a description, the courts will take into consideration the circumstances attending the transaction, the situation of the parties, and the state of the thing granted, and it will be presumed that a purchase according to a plat refers to a plat legally existing at the time of the deed. n456

A map or diagram drawn on a deed, in such relation or connection with the descriptive words of the deed as to indicate to any reasonable person that the grantor intended it to be taken as a part of the description, is admissible in evidence as a part of the deed when that is admitted in evidence, although not referred to in the deed itself. "When the map is on the deed itself, the court of necessity must examine it, and from it, taken together with the words of description, determine what the deed conveys." n457

To make a map or plat a part of a conveyance there must be a definite reference therein to the map or plat showing the land intended to be conveyed. n458 A deed including the descriptive elements in the body of the instrument, as well as those in a plat referred to as an additional description of the land, should be construed as a whole, and effect given to every part thereof if practicable. n459 If a plat has not been properly filed, a description by the congressional survey may be valid. n460

A plat referred to as annexed to a deed but which has become separated from the deed may be identified as the plat annexed, and it is then admissible in evidence. n461 A reference in a deed to a plat is evidence as against the grantor of the existence of such a plat; and evidence tending to show a survey of the town prior to the conveyance, and that the grantor produced the plat in question some years afterwards as such plat, is sufficient to identify the survey as that mentioned in the deed. n462 A map or plan referred to in a deed is a material and essential part of the conveyance, and is to be so construed when attempted to be controlled by the general language of the deed calling for natural monuments and boundaries. n463

It is not necessary that a plan incorporated in a deed by reference be recorded, if its existence and veracity are proved otherwise. n464 The fact that the plat referred to is invalid because it was not made and filed in accordance with statutory provisions, does not affect the deed making the reference. A reference to a void deed, or a void plat, for a description is just as effectual as a reference to a valid deed or valid plat, if the description is correct and the deed or plat referred to is accessible. n465

Maps or plans that have been in use many years and which agree with the original surveys are not to be held erroneous because they do not agree with resurveys made long afterwards, and based upon information furnished by persons living. n466 When there is a conflict between a map or plat and an actual survey the latter controls, and the reference to the map may be rejected as surplusage, n467 assuming that the corners and lines established by the survey can be identified. n468 This is true even though the map is the official map of a town. Where no monuments are shown contradicting the measurements given on a recorded plan, and no substantial reasons shown to establish their inaccuracy, the plat must control. n469 Where a deed contains words of description such as that the land conveyed is bounded by the lands of named parties, and also refers to a plat which contains definite boundaries as to courses, distances and monuments, the description by plat controls. n470 Parol evidence is admissible to show that there is a conflict between the survey in the field from which the map was made and the map itself, in order to determine the correct boundary of a parcel. n471 A call in a deed for a natural boundary, such as a lake, controls the grant as against a plat annexed and referred to upon which the lake does not appear. n472

The lines of a survey marked on the ground constitute the actual survey and control courses. n473 They control a general description of a boundary, such as "up the bayou." n474 If a discrepancy exists between the plat and the field notes of the original survey of public lands, the former must control, since it represents the lines and corners as fixed by the surveyor-general, and by which the land was sold. n475 A description in a deed following the description in a patent which contained a mistake as to one of the calls must yield to the actual facts, if shown by the plat filed with the registrar of the land office. n476

In construing a deed describing land by the government survey, the court must ascertain the corners of the survey as actually established, and not as they ought to have been established. The presumption is that the deed was intended to convey according to the established corners. This presumption may be rebutted by evidence that the parties were mistaken as to the location of the government line and intended to convey a definite tract, but it is by no means conclusive. And, while parol evidence will not be admitted to dispute the written contract, it may be admitted to explain it and to show the understanding of the parties. n477

Where a plat delineates an actual survey, the survey rather than the plat fixes the location and the boundaries of the land. The plat is a picture and the survey is the substance. In a conveyance referring to a plat, the lot bounded by the lines

actually run upon the ground is the lot intended to be conveyed. The plat may be all wrong, but that does not matter if the actual survey can be shown. n478 If there is a dispute as to the boundary line between a street and the abutting lots, the original survey will control the recorded plat. Where a surveyor of the land marks the division lines on the ground by monuments, such lines control calls and distances indicated on the surveyor's map. n479 A boundary by a street which has been surveyed and marked by visible monuments prevails as against a plat that varies the location of the street. The line of the street is determined by the survey rather than by the recorded plat. The courses and distances of a survey are always regarded as more or less uncertain and always yield, in cases of doubt or discrepancy, to known monuments and boundaries referred to as identifying the land, whether such monuments be natural or artificial objects, such as rivers, streams, springs, lakes, marked trees, fences, or buildings. n480 The lines of a survey marked upon the ground, if they can be located, govern plans made from such a survey. n481

A reference in a deed to a patent of the United States of the same land makes the patent and the survey upon which the patent was issued a part of the deed. n482

If an experienced surveyor familiar with the land testifies as to having surveyed the land many years ago and found it to correspond with certain maps then in existence, and further testifies by the aid of those maps that the line was straight in contradiction to testimony of a job, the surveyor's testimony is admissible even though the maps are shown to be not authentic. n483

The loss of a plat referred to in a deed does not invalidate the deed if the land can be laid out upon the ground in substantial accordance with the plan. n484 A description by reference to a map, field notes or plats governs over statements of quality. n485 Reference to a plat in a deed estops the seller from denying rights obtained by the purchaser in the streets and alleys designated in the plat. n486

COMPUTER-ASSISTED RESEARCH

LEXIS: Description w/10 (land or real) and (map! or plat!)

§ 90.02(d)(3) Description by Name of Tract.

If a tract of land bears a name of such common repute that its boundaries can be identified through use of the name alone, such use of name is a valid and sufficient description in a deed. n487 Traditional evidence may be resorted to in order to establish a boundary line under such circumstances. n488 Deed language that gives the boundary of the land on all sides and describes the land and gives the land's name as generally known has been held a sufficient description to convey the land. n489 If more than one tract of land is known by the same name, that name will not suffice as a description of the land conveyed. n490

A description of a tract of land by name only points to outside evidence showing the existence of a tract of land generally known by that name, and such evidence is admissible to apply the name to the land intended. n491 A grant of land by name passes the title to the entire tract of land known by that name. n492 Where a mortgage conveyed "the following described tract or parcel of land, to wit, the property known as 'K's Grist and Saw Mill and Gin,' together with all the privileges and appurtenances belonging thereto," parol evidence was admitted to show that two acres of land on which the mill and gin were situated had always been used in connection therewith, and were necessary to the enjoyment of the same. n493

A general description giving the name by which the estate is commonly known is controlled by a subsequent particular description. n494 However, in order for a general grant to be limited by a subsequent particular description, such an intention must definitely appear from the terms of the particular description. n495 An exception in a deed which reads, "except the dower of fifty acres, as fully described in the deed given to C. B. Co.," is not void, although the boundaries of the excepted land are not defined in any way, because reference may be had to the deed to the C. B. Co. to ascertain

them. n496

COMPUTER-ASSISTED RESEARCH

LEXIS: Description w/10 (land or real) and (name w/5 tract or lot or parcel)

§ 90.02(d)(4) Prevalence of Description by Name Over Other Forms of Description.

A description of property by a name well known and usually applied to it prevails over a description by measurement. n497 When the subject matter of a conveyance is completely identified by its name, the addition of another particular which is inconsistent will be rejected as surplusage. "When property has a descriptive name, it may be conveyed by that name, and defects in other parts of the description may be disregarded." n498

A description of a lot by name or number, upon a plat or map referred to, ordinarily prevails over a description by courses and distances, and over calls for monuments, or other particulars used in a description, because the lot itself, with the name or number by which it is known, is the prominent thing. Therefore, there is less likelihood of uncertainty in regard to it than in regard to the particulars of the description, which are employed to identify more particularly the principal thing, the lot itself. n499 Thus, where a lot was conveyed by number upon a recorded plat, and was also described as being 60 feet wide and 120 feet deep, but the lot on the plat was only 26 feet wide, it was held that, although the grantor owned the adjoining land, his deed conveyed only the lot described by the plat, and that the word in the deed describing the width of the lot must be rejected as an erroneous description. n500 Where there is a variance between a plat and the field notes of an original survey of public lands, the plat must control. n501 The area of a lot conveyed by number has been held not reduced by the words "being the property purchased by me from" a named person, although the grantor, at the time of her receiving a quitclaim deed to such lot from the person named, held a part of the lot by adverse possession. n502

If there is indicated an intention that the description by monuments or measurements shall prevail over the general description by lot, this intention will be enforced. n503 If there appears to be an error in the number of a lot, a description by definite boundaries will prevail. This was the case where "beach and water property" was conveyed by definite exterior boundaries and was further described as blocks numbered one to thirty-two inclusive on a map referred to, but one block within such boundaries was numbered thirty-three; it was held that the description by boundaries controlled. n504

A description of land by lot numbers is not void though the recorded plat shows no division into lots, but merely into blocks, if it be shown that the owner had always treated it as divided into lots, and it appears that the property had been conveyed and generally known by lot numbers. n505

COMPUTER-ASSISTED RESEARCH

LEXIS: Description w/10 (land or real) and name

§ 90.02(d)(5) Description by Statements of Quantity.

A statement of quantity ordinarily adds nothing to the particular description, except where the grantor has unequivocally expressed an intention to pass only a certain quantity of land; such a description prevails over a specific metes and bounds description. n506

The quantity of land named in a deed is ordinarily one of the descriptive elements that is lowest on the scale of importance. n507 Quantity is usually less certain than any other element of the description n508 and, as a general rule, a call for quantity is not conclusive. A call for quantity yields to calls for monuments and course and distances, n509

unless it appears that the parties intended otherwise, n510 or other calls are doubtful, n511 or the result is unconscionable. n512 A statement of the quantity, in the absence of an express covenant that the land conveyed contains that quantity, has very little weight when the deed contains an accurate description by permanent boundaries capable of being ascertained. n513 Quantity is ordinarily not controlling unless the deed contains no calls for monuments or for courses and distances. n514

The method of identifying boundary by acreage is generally considered the weakest method and yields to every other method, n515 especially where the words "more or less" are added. n516 The quantity of land is not a factor in establishing boundaries, unless the more particular description expressed is indefinite and uncertain. n517 Quantity does become important where the location or boundary is doubtful, and in doubtful cases quantity may have weight in aid of the description, even controlling effect in some cases. n518 Thus a deed containing an indefinite description was applied, by the use of the survey's measurements of the disputed distances for clarification, so as to embrace the acreage indicated in the deed. n519

Parol evidence is usually not admissible to determine whether the words relating to quantity are merely descriptive or are used as a warranty of quantity. The meaning of the words used must be sought only in the deed itself. n520 A description of land in a deed by metes and bounds and natural landmarks, pointing out the boundaries by metes and bounds, is held controlling over a statement in the deed as to the quantity of land there described. n521 Where a grantee accepted a deed containing a metes and bounds description, it was held that the grantee could claim only to the boundaries fixed by the lines and corners called for and could not extend the tract over onto other lands in order to claim the quantity called for in the deed. n522

While quantity is a circumstance of slight or no weight in a question of title, it may have a marked effect on the question of boundary, and in some cases be controlling, n523 especially if there is uncertainty in the specific description of the deed. n524

A call for quantity usually yields to a more definite description by metes and bounds. n525 However, while the reference to quantity usually has no effect beyond assistance to the description, in some cases where the grantor unequivocally expressed an intention to pass only a certain quantity of land, quantity prevails over a specific description by metes and bounds. n526 The deed may make quantity the controlling element, as where a deed, after describing the land by courses and distances, declared that "said tract shall contain just one acre, and the distances shall be so construed." n527

In the construction of a deed, the quantity of the land is comparatively unimportant, distances are of less weight than courses, and monuments are usually given more weight than either. n528 When the boundaries of a parcel are definite, a statement of the quantity of the land does not generally have any effect. Such a statement is considered merely as descriptive, and, as the quantity is the least reliable part of the description, quantity must yield to the boundaries or other definite elements of the description, such as name, number, map or survey. n529 The most material and particular part of the description controls that which is less natural and certain. It is only in the absence of monuments, courses and distances that the quantity of land named in the deed will govern. n530

A description by metes and bounds controls a statement of the quantity, unless a contrary intention appears in the deed. n531 Where a description is by government survey, recitals of acreage are unimportant. n532 Quantity will prevail in the absence of monuments and courses and distances. n533 The call for quantity may be resorted to for the purpose of making that certain which otherwise would be uncertain, and especially is this the case when the lands are described by sectional subdivisions. n534 It is only where all other elements of the description are ambiguous that the quantity of land called for will be considered. n535 In doubtful cases, the quantity of land called for may have weight as a circumstance in aid of the description, and in the absence of other definite descriptions, it may have a controlling effect. n536 Quantity will control when the superior calls are not set forth in the deed, n537 or when the superior calls leave the boundary doubtful. n538 The call for quantity may serve to show that the courses and distances are right, and that a

further description by visible monuments is wrong. Thus, when it is apparent upon the face of a deed that the intention was to convey a specific quantity of lands, and the courses and distances given that precise quantity, but the description by fixed monuments would embrace more or less than that quantity, it is clear that the description by courses and distances should be followed. n539

Juries must be instructed as to the materiality of a call for quantity. When one of the boundaries is uncertain, upon an issue as to the location of one of the lines the jury should be instructed to take into consideration the quantity of land granted; and they should not be instructed that the quantity is immaterial if the boundaries can be fixed in harmony with the calls of the survey. n540

A call for quantity may be considered and, under some circumstances, may have controlling weight on the question of the parties' intentions. n541 Such a call is part of the description and must be so considered in identifying the land conveyed. n542 Thus, where a deed conveys a given quantity of land, and describes it as bounded by a stream on one side, starting from a point named, and containing a certain number of acres in a square form, all the boundaries may be determined by the quantity given and the location on the stream. n543 Where there is uncertainty in the specific description of a tract of land, the quantity named in the deed may be of decisive weight, especially so if the intention to convey only so much and no more is plain. n544 Where a mathematical calculation disclosed that the lines as given in the deed did not embrace the quantity of land mentioned, it was held that the line necessary to include the quantity will be supplied where the intention of the grantor was clear. n545 Where the general boundaries given may either exclude or include a tract of land and are to that extent ambiguous, the number of acres which the parties have fixed may be looked to in defining the boundary. n546

Quantity has been given controlling effect in numerous cases. Each case has been decided upon its own merits, with the only general rule being that, if possible, effect shall be given to the intention of the parties, if this can be ascertained. n547 Quantity will control when it is made the essence of the contract, n548 or there is an express or implied covenant in the deed to convey a definite quantity. n549 A grant of a mine with one thousand acres of land "around, circumjacent, and adjoining said mine," the grantor owning a larger tract, may according to the California decisions be located in a square form around the mine, taking the mine as the center of the location. n550

A deed to a specified number of acres out of a larger tract with the right in the grantees to select the location of the acreage will be valid provided the grantee actually makes a selection. n551 No title passes until the selection is made, and the deed gives only the right to make a selection and to enforce a conveyance of the land that is chosen in the manner provided by the deed. n552 Until a selection is made, the grantee's continuing right to select will pass to subsequent grantees. n553 A right given to the vendee to select a definite number of acres of land out of a larger tract affords the means of rendering the description certain. n554

The general rule is that a deed must contain such description of the land as will enable the land to identified, and this applies to deeds executed in blank as to the description, with respect to which the grantor has authorized another person to fill in the blank. n555 A deed with a blank description is void, of course, but the grantor may authorize an agent to select the land and fill in the description; if this selection is not made during the lifetime of the grantor, then the deed is void. If the grantee enters into possession under such a deed, this may be used as evidence of the land selected. n556 A deed of land located by a general description, with a direction that a certain quantity of land is to be surveyed by a surveyor designated and the field notes attached to the deed, is not void for indefiniteness if the survey is made and the field notes attached as directed. n557 The grantor cannot by parol, after delivery of the deed, authorize the grantee to fill in the description. n558 Greater strictness is required in a tax deed that conveys a part of a larger tract, than in the case of a voluntary conveyance, as the description must correspond substantially with that employed in the prior proceedings. n559

A description that excepts acreage that is not located is void for ambiguity. n560 Land may not be described by quantity alone, or by a quantity to be taken out of a larger tract without indicating out of what part it is to be taken, n561 unless it

is for a specified undivided interest, n562 or one party, such as the purchaser, is given the right to select the tract. n563 A grant of the south part of a subdivision of a government section of land containing a certain number of acres is sufficiently certain, inasmuch as the quantity of land specified may be laid off in a strip of equal depth on the southern boundary of the named subdivision. n564 If the land conveyed be a certain number of acres in a certain corner in a named section, enough land may be selected in such corner, in a square bounded by four equal sides, to satisfy the call for quantity. n565

Where the description of land conveyed is by government section numbers, the land conveyed, without more, is that which is situated within the designated sections as surveyed and platted by the government. n566 Where a tract of land is subdivided and thereafter is found to contain either more or less than the aggregate amount called for in the surveys of the tract within it, the proper method is to apportion the excess or deficiency among the several tracts. n567

A description as "the southeast part of a quarter section containing thirty-two acres" is insufficient, because it is impossible to determine whether the form of the parcel should be a square or some other shape. n568 However, numerous courts have held that such a description is sufficient, because the land is to be laid off in such case in the form of a square. n569 A deed describing the land as "ten acres off the south end of the northeast quarter of section 35, township 19 north, in range 7 east, except four acres off of the west side of said ten-acre tract, heretofore conveyed to Cassana McGill," was held to properly describe the land. n570 A grant of "sixteen feet of the north end" of a lot described is not so uncertain as to render the grant void. n571

Where land is purportedly conveyed out of a larger tract and no attempt is made to located the land conveyed, some courts have given the grantee an undivided interest in the larger tract. n572 Others have treated the deed as void for ambiguity. n573 A third view permits the parties to informally agree after execution of the deed as to the tract conveyed. n574 A conveyance of a definite quantity of land out of a larger tract well described, but without locating the land thus conveyed, is construed as conveying a proportionate undivided interest in the larger tract, provided the deed does not purport specifically to describe the smaller tract so conveyed, nor attempt to do so with any certainty. n575 The legal effect is the same as though the interest were directly expressed as an undivided fractional part; n576 but if the deed attempts to describe a specific part of the larger tract, but fails to give sufficient description to convey that part, the deed does not convey any undivided interest in the whole tract, even though the quantity intended to be conveyed is given. n577 Where a deed conveying a tract of land, consisting of a specified number of acres out of a larger tract, describes the tract so faultily that the tract cannot be located and it is apparent that the intention was to convey in severalty, rather than an undivided interest, the conveyance will fail for want of a description and will not be upheld as a conveyance of an undivided interest in the larger tract. n578 A deed describing the premises conveyed as being all of a designated tract not conveyed by the grantor to a third party named is sufficient of itself, and without proof as to what part of the tract had not been conveyed to the third party, to show title to any part of such lands in the grantee. n579 Such a deed, however, is rendered certain in its description by showing what part of the whole tract has been conveyed, and the deed is sufficient to convey any remaining land as against a subsequent purchaser for value without notice. n580

A deed that conveys a certain number of acres on the north side of a lot, described by its number, the lot being a square, is sufficiently certain to embrace such a parallelogram as would result from drawing a line across the lot, parallel with its northern boundary, so as to cut off the required quantity. n581

A description of a half acre "where the graveyard is not situate" was sufficient identification and could be laid off with the old graveyard as the center of the tract. n582 A deed conveying 20 acres in a square in the northeast corner of the east half of the northwest quarter of a named section, was held valid, since a "square" is a figure having four sides of equal length. n583

COMPUTER-ASSISTED RESEARCH

LEXIS: Description w/10 (land or real) and quantit!

§ 90.02(d)(6) Description by Designation of the Area in Which the Description is Located.

A misnomer of the city, town, or county in which the land is located does not invalidate the deed if the description is sufficient to identify the land. n584 Thus, if the land is described as being in a certain city, but because of a change in city limits the land is actually in another town, and the grantor owns the land when the conveyance is made, and the land can be identified by the description in the deed, the deed is valid. n585

A deed that fails to designate the state, county or quarter section in which the property is located is ineffective, unless the property can still be sufficiently identified. n586 When land is described according to the federal public lands survey system, the description is sufficient even if the name of the county and state or territory in which the land is located is not given, because judicial notice is taken of such surveys. n587 If the county or school district in which the land is located is named, with a particular description by metes and bounds, even if the section and township information is omitted, the land can be identified. n588 However, if the township, range or county information is omitted, and the land is described only by the number and subdivisions of a section, the description is void on its face. n589 A deed may be valid, even though it fails to specify the state and county in which the land is located, if the description given corresponds to that of the grantor's land in the county in which the deed is acknowledged and recorded. n590 A presumption prevails that, in the absence of anything in the instrument to the contrary, the land is in the state in which the parties reside and in which they execute the deed. n591 This presumption is one of fact and may be rebutted by oral evidence. n592 If, in a description by section, township and range, the state and county are omitted, parol evidence is admissible to complete the description and identify the property. n593 However, where the property intended to be conveyed was described as "lot No. 3, containing two acres more or less, bounded as follows: North by land of G; east by street running north and south; south by A, railroad company; west by lands of L. Sr.," and the names of the town, county and state were omitted, the description was too uncertain to pass title. n594 Title also does not pass if the deed fails to show the meridian to which the range should be referred, whether the township is north or south, and to mention the state and county. n595

COMPUTER-ASSISTED RESEARCH

LEXIS: Description w/10 (land or real) and (area or locat!)

§ 90.02(d)(7) Description by Abbuttals.

If the land is described or a call for description is given by reference to abutting land or monuments, the description is good if the abutting lines can be accurately determined. The line of an adjacent tract of land is a monument of well established. n596 It may be a sufficient description of the land conveyed to state that it is bounded by or adjoins lands belonging to named persons. n597 When one accepts a deed for land bounded by another's land, the land referred to becomes a monument; n598 "in this connection a boundary line of a named adjoiner is a fixed natural object." n599

A parcel of land described as adjoining the lands of persons named and as containing a specified number of acres, is sufficiently described to admit parol evidence as to the land intended to be conveyed. n600 If the quantity of land is given, and the land is described as situated in a certain county adjoining the lands of other named persons, the question left open for explanation by outside evidence is whether the grantor had a tract of land of the quantity specified in that county, and so bounded by the lands of the named persons so as to separate it from other tracts, and to indicate its boundaries with reasonable certainty. n601 Where land was described as "a certain tract or parcel of land in the county aforesaid fronting the farm of C.W.T., adjoining the farm of T.H.R. and others, and known as the B.H.T. place, being 150 acres more or less," it was held that the description was sufficiently certain to permit the reception of parol evidence to fit the description of the property. n602

When the boundary given is the land of a named person, the description of this particular boundary will be sufficient even if the title of the named person is defective, if it is shown that the grantor recognized the person as the owner and

as claiming the land and the boundary line of the adjacent tract is established by extrinsic evidence. n603 If the land is described as bounded on one side by the land of a named person, the true boundary line of the person's land must be taken as the boundary line, and not the boundary line as it was understood and agreed to exist at the time the deed was executed, if there is a difference between the two lines. n604 An abutting line is not a valid call unless it is definitely fixed. n605 Land described as 100 acres, more or less, bounded on the north by the lands of a specified person, on the east by the lands of another specified person, on the south by the lands of a third specified person, and on the west by the lands of the grantor, was held too indefinite to pass title. n606

COMPUTER-ASSISTED RESEARCH

LEXIS: Description w/10 (land or real) and abuttal!

§ 90.02(d)(8) Weighing the Importance of Different Modes of Description.

The calls of a land description may be either natural or artificial and are further divided into descriptive (or directive) calls and special locative calls. The special locative calls are more precise and particular and thus prevail over the descriptive calls in case of conflict. n607 However, whether one mode of description prevails over another also depends on the accuracy of each call. A clear and definite description by boundary will prevail over any additional but inconsistent and inaccurate description by occupancy. n608 In a deed containing two descriptions, the more certain one governs. n609 A mistake made in one version of the description discredits that part of the description, so that another part of the description, ordinarily not so important, becomes controlling. For instance, a description by occupancy is ordinarily a minor and unimportant form of description; but this form of description may through inaccuracy or ambiguity in a more important form of description, or from failure to employ a more important form, become an essential part of the description and control the rest of it. A specific reference to the land of another person for a boundary controls a general reference to the boundary as land formerly conveyed to the grantor by a person named.

If the deed contains two descriptions, one of which describes the land with reasonable certainty, and the other giving some additional particular is incorrect, the incorrect particular or circumstance of description will be rejected as surplusage. n610 If the parties go upon the land and make a physical survey, giving a boundary that is actually run and marked, intending to convey the land surveyed, such land will pass as between the parties, even though a different and erroneous description appears in the deed. n611

§ 90.02(e) Defective Descriptions.

§ 90.02(e)(1) Conflicting Descriptions.

If the deed description is erroneous, that which is intended to be conveyed, rather than that which is described, is conveyed. n612 Also, a subsequent erroneous addition to the description will not be permitted to limit or impair what has been described with certainty in the deed. n613 If land is described by two equally explicit and unambiguous descriptions, that description controls which best expresses the intentions of the parties, and was manifested by the entire instrument. n614 If a deed contains two descriptions, one general and the other particular, the particular will prevail in case of any conflict or inconsistency between the descriptions. n615 Where a general description is followed by a more particular description, the latter controls, unless other provisions of the instrument and the surrounding circumstances clearly indicate a different intention. n616

If an accurate description is followed by an inaccurate description, the inaccurate description is merely cumulative and will be disregarded. n617 If land is sufficiently described for the purpose of identification after eliminating an incorrect part of the description, the deed is read as if such description were eliminated and effect is given to the remaining part of the description. n618 If the land is described by a name which is applicable to the entire parcel intended to be conveyed, a subsequent description, which appears to be merely a second description, and in fact covers only a part of the land first

described, does not affect the general description, and will be rejected. n619 However, if the further descriptive phrase restricts or qualifies the general terms of the description, effect must be given to the words of restriction or qualification. n620 Where a description applicable to land to which the grantor had title is followed by a description of land to which the grantor had no title, the former will be taken as the true description and the latter will be rejected. n621

An erroneous statement of a monument does not invalidate a deed when the remaining description is sufficiently certain to locate the land. n622 When, by omitting one part of a description which is false or impossible, a perfect description remains, the false part should be rejected and the deed held as effectual to carry out the intention of the parties. n623

An incorrect description will not be allowed to invalidate the deed n624 and thus defeat the parties' manifest intentions, n625 provided the deed contains in addition a description which will permit the parties' intentions to be given effect; n626 the incorrect description will be treated as surplusage n627 and will be disregarded. n628 With the incorrect part disregarded, the deed is read as if such description were eliminated and effect is given only to the remaining part of the description. n629 A call for a wrong county when the record is in the right county, when the description is otherwise certain, is sufficient. n630 Where there is inconsistency between different parts of the description, the part which exhibits the greatest certainty or best expresses the intention of the parties will prevail. n631

To justify the suppression of a part of a description, this must not only be out of harmony with the other parts of the description, but it must be undeniably so, in some important respect, after putting a reasonable construction upon the rest of the description. Words of general description will not always prevail over an enumeration of particulars, because, in cases where there is an enumeration of particulars which on their face purport to be designed as qualifications or restrictions of a preceding general description, the general description must yield to the particular description. n632

Where a description commenced on the "westerly" line of a designated street, but a consideration of the remainder of the description disclosed that "westerly" should be read "easterly," the court property so treated the description. n633 Where a general description is followed by a more particular description, the latter controls, unless other provisions of the instrument and the surrounding circumstances clearly indicate a different intention. n634

Traditionally it has been held that first calls prevail over later conflicting calls in deeds. n635 Accordingly, a rule of construction developed that the first description in a deed is presumed to express the true intention of the parties. n636 However, "a specific description, whether it comes before or after a general designation, must prevail, upon the underlying principle that the law will always demand the production of the highest evidence, and, as between two descriptions, will prefer that which is most certain." n637 Thus, there is in fact no rule that, if clauses in a description of land are repugnant, the first necessarily prevails over the last. n638

Where property is sufficiently described as a whole, the description is not invalidated or restricted by a further general reference or statement which is inconsistent with the description as a whole. Thus, a description of property as the grantor's farm or homestead on which he resides, or on which some other person lives, is sufficient to pass the farm or homestead so occupied, although some particular circumstance be added which is inconsistent with such description, as for instance a reference for boundaries to a deed which embraced only a part of the farm or homestead; n639 or a statement of quantity which is much less that the whole farm; n640 or even a particular description by courses and distances which does not include the whole farm. n641

Where a description is sufficient within itself, any additional indefinite term will be rejected as surplusage. n642 Where one made a deed of land situate in a town named, and containing 230 acres, more or less, being "all the lands which I own in said town, the butts and bounds to be found in the county records," and an examination of the records shown that the grantor owned by purchase 235 acres of land in that town, but it appearing that he had acquired title to possession to another tract of about 50 acres, it was held that the latter tract as well as those of which he had record title passed by his deed. n643 A grant of all the grantor's real estate situation in a town named conveys all the grantor's land there situated. n644 Likewise, a particular description by metes and bounds prevails over a general description of the lands as being

"all" of a certain tract, even though the particular description does not cover all the lands in the tract named. n645 A sufficient general description will not be limited by a subsequent particular description, unless an intention definitely appears from the terms of the particular description to limit the general description. n646

Where a general description is followed by a more particular description, the latter controls, unless other provisions of the instrument and the surrounding circumstances clearly indicate a different intention. n647 Several lots were described by numbers, with the further description, "being all of block 25" The lots so numbered were not in that block, but in another. It appearing to be the grantor's intention to convey the block in which he resided, and that he resided in the block passed by the deed, it was accordingly held that that block passed by the deed. n648 Thus, where a lot was described as bounding on a street named, and the remainder of the description was by metes and bounds, but this further description was added, "intending to include only the land on which said buildings are situated, and the yard inclosed within the fence now built," it was held that the latter description was incorrect because it would leave a narrow strip of land between the fence and the street, and it could not have been the intention of the parties to do this. n649

In determining the intention of the parties to a deed as to the boundaries, the actual condition and situation of the land, ways, and other local objects must be considered. n650 Where one of two descriptions in a deed is consistent with a reasonable hypothesis and the evident intention of the parties, and the other renders the instrument absolutely inoperative, the false or incorrect call will be rejected, and the description applied in light of fact existing at the time. n651 A general description controls when the particular description is uncertain or impossible. n652 Parts of the particular description found to be in harmony with the general description may be used in defining the limits of the grant. n653

COMPUTER-ASSISTED RESEARCH

LEXIS: Description w/10 (land or real) and conflict!

§ 90.02(e)(2) Correcting Descriptions.

A description is considered certain if it can be rendered certain. n654 Mistakes in deed descriptions may arise from human or instrument error, n655 and such mistakes may be corrected if no injustice will be done. n656 The mistake, however, must be a material one, n657 and it must be corrected before rights have been acquired by presumption. n658 Thus, where a division fence between lands of adjoining owners had been standing more than twenty-one years, it constitutes the boundary line between them, although it is crooked and the deeds of both parties call for a straight line between acknowledged landmarks. n659 Where the grantee under a defective description takes possession of the land actually intended to be conveyed, a court of equity may, as against the grantor, correct the description. n660

A deed cannot be reformed for mutual mistake where rights of bona fide purchasers for value have intervened. n661 The parol evidence rule is not applicable to actions for reform of instruments where the reason for the action is mutual mistake. n662

COMPUTER-ASSISTED RESEARCH

LEXIS: Description w/10 (land or real) and correct!

§ 90.02(e)(3) Acts of Parties to Cure Defective Descriptions.

A description which does not in itself identify the land may be cured by the acts of the parties. n663 Thus, where a grantor conveyed 300 acres out of a much larger tract, directing that it be laid off in a convenient form, and the grantee entered into possession of that quantity of land out of the larger tract, and continued in possession for many years, and then conveyed the land so occupied by metes and bounds, the last grantee cannot object that the deed to his grantor was

void because it did not sufficiently identify the land. n664 The parties' treatment of the description in the deed must be treated as a weighty circumstance in ascertaining their intention, where the words used in the description do not definitely identify the land. n665

An ambiguous description may be cured by the parties' practical construction thereof. n666 A conveyance of a certain number of acres of land to be selected out of a larger tract by the grantee is not void for uncertainty, n667 but no title to any specific land passes until the selection is made; and, if the selection be not made within twenty years, the grantee's right is barred. n668 If the parties to a deed which does not describe the property with certainty, either before or after the date of the same, mark out or identify and appropriate certain land as the exact and identical parcel conveyed or to be conveyed by such deed, it will be held to be effective to convey such land. Their declarations and acts at the time of the conveyance may be proved to determine the intent of the parties. n669 Thus, where a grantor conveys a wharf property by clear and definite description, and then adds to the description the following, words, "Also one-half of an acre of land near the wharf, or at the wharf," the deed will be regarded as effective to convey a particular half-acre near the wharf which the parties to the deed, near the time of its execution, surveyed or otherwise marked out and appropriated. n670 However, a description in a deed cannot be contradicted by the declarations of the grantor, made at the time of the deed, that it erroneously embraced a certain strip of land. n671

The practical construction to be given to a doubtful description by the subsequent acts of the parties may be proved by parol evidence; n672 but a description that is clear and unambiguous cannot be set aside and a different one substituted in its place by parol proof of the acts of the parties, either before or after the execution of the deed. n673 On the other hand, if it appears that certain land was not claimed by the grantee as being embraced in the grant, that the grantee then conveyed all the land definitely granted, but did not attempt to convey the land in question, and that the grantor, the commonwealth of Massachusetts, did subsequently authorize a location on such land, these contemporaneous and subsequent acts of the parties are sufficient evidence that such land was not included in the grant. n674 Where a grantee establishes a right to the recovery of a certain number of acres of land that had been conveyed to the grantors with the right to select the tract from a larger tract, the grantee will be confined to the land occupied and claimed by the grantors. n675

The doctrine of estoppel does not extend to mere descriptive matter or statements or recitals that are immaterial and not contractual or essential to the purpose of the instrument. n676 An immaterial recital does not estop the parties from denying its truth. Thus, in the description of lands excepted from a conveyance, a recital that such lands had been conveyed to another does not estop the grantor, nor anyone to whom the grantor may convey the excepted lands, from alleging that no such conveyance had in fact occurred. n677 This is on the ground that a recital is conclusive of the facts stated, only in an action of which the deed itself is the foundation or defense. n678 Descriptive language cannot be inserted after the deed is executed. n679

COMPUTER-ASSISTED RESEARCH

LEXIS: Description w/10 (land or real) and defect! w/20 cur!

§ 90.02(e)(4) Judicial Acts in Correcting Descriptions.

Absent statutory command to the contrary, the settlement of boundary disputes is a matter of law rather than equity in those jurisdictions and cases where the distinction is material. n680 Equity may be invoked in appropriate cases, especially if the legal remedy is inadequate. n681 Equity has no place unless the parties are adjoining landowners n682 or one of the parties has no equity against the party in possession. n683 In some states actions of this type are statutory. n684

As a general rule what constitutes boundaries are questions of law, n685 and where the boundaries are actually located on the ground are questions of fact. n686 If the description in a deed is clear and unambiguous, the terms used are to be

construed by the court; n687 but if the terms themselves are unambiguous, or their presumptive meaning is rebutted by other evidence, the question of the deed's meaning may be for the jury in some jurisdictions. n688 Even though the construction of a deed is for the court, whether certain land is within the description in a deed may be a question of fact for the jury, n689 or reserved. n690 However, if the facts are not in dispute and the only question involved is the correct application of well-known principles of law to the facts, the location of a boundary is a question of law for the court. n691 Whether a latent ambiguity in the description renders the deed void, if the land can be identified by extrinsic evidence has been held to be a mixed question of law and fact. n692

Where there is no want of certainty or definiteness in the clauses of a survey as disclosed by the deed, their meaning must be determined by the court. n693 Where a government corner between adjoining landowners has been obliterated, the exact location of the corner may be determined by the jury from the evidence. n694 Where the monuments called for by a survey have disappeared, but there is evidence of their existence and location, it is a question for the jury whether the line was indicated by monuments. n695

Where the true location of a government corner is in doubt, evidence is admissible to show where the original marks of such corner were years before, when they were very plain and distinct, and were generally regarded and recognized as indicating the original government corner; and to that end it may be shown that permanent improvements, such as lines of trees, roads, public and private improvements, were, when such indications were plain and visible, located with reference thereto as the true government corner by persons who had no other interest than to locate them correctly. n696

A court of law can correct a description only by way of a construction of the language used, and with a view to carry out the manifest intention of the grantor. One part of a description cannot be rejected merely because it is inconsistent with another part. If the ambiguity is patent, the deed is void; but if from the whole deed it appears that the intention of the grantor can evidently be carried out by the rejection of a repugnant clause or word, this can be done by construction in a court acting as a court of law; otherwise, the parties must seek a remedy of equity, by which alone a deed can be reformed. n697 If an ambiguity in the description is patent and thus incapable of being removed by extrinsic evidence, a suit in equity to reform the deed is the proper remedy. n698 Where a deed as written was meaningless, but the through the correction of an error, a reasonable layout of the land was obtained, the court was held justified in treating the error as a clerical error. n699

A mistake in naming the owner of the land, when the real owner actually conveys it, is immaterial. Thus, a deed by a married woman, properly describing land which she had inherited from her father, is not invalidated by her describing it as land which her husband had inherited from her father. n700 If a grantor through mistake makes a deed of gift for more land than was intended, the deed may be reformed, even though the grantee was unaware of the execution and delivery of the deed. n701

COMPUTER-ASSISTED RESEARCH

LEXIS: Description w/10 (land or real) and correct! w/10 (court or judicia!)

FOOTNOTES:
(n1)Footnote 1. *Lee v. Wal-Mart Stores, Inc., 34 F.3d 285 (5th. Cir. 1994)* (insofar as the description of the property to be conveyed is concerned, the writing must furnish within itself the means or data by which that particular land may be identified with reasonable certainty); *Howard v. Rivers, 465 S.E.2d 666 (Ga. 1996)* (description of easement is sufficient if it provides key so that land where easement is located can be identified); *Atlanta v. Atlanta Trailer City Trailer Park, Inc., 102 S.E.2d 23 (Ga. 1958); Haney v. Molko, 844 P.2d 1382 (Idaho App. 1992)* (a deed is void when it does not provide an adequate description to identify the land it purports to convey, using means either directly from its language or by something extrinsic to which it refers); *Hoelscher v. Simmerock, 921 S.W.2d 676 (Mo. App. 1996)* (in general, any description in conveyance of interest in real property is sufficient if it affords means of identifying property); *Eland Energy, Inc. v. Rowden Oil & Gas, Inc., 914 S.W.2d 179 (Tex. App. 1995)* (for description of land in

contract to comply with statute of frauds, writing must furnish within itself, or by reference to some other existing writing, means or data by which land to be assigned may be identified with reasonable certainty); *Warner Communications, Inc. v. Keller, 888 S.W.2d 586 (Tex. App. 1994)* (generally, any description is sufficient by which the identity of the premises can be established, or which furnishes the means of identification); *Skinner v. Francisco, 88 N.E.2d 867 (Ill. 1949); State v. Rosenquist, 51 N.W.2d 767 (N.D. 1952)* (description is adequate if it can be made certain by extraneous evidence of physical conditions referred to in the deed).

(n2)Footnote 2. *Mull v. Mickey's Lumber & Supply Co., Inc., 461 S.E.2d 270 (Ga. App. 1995)* (to be valid, real property description in deed must identify land, or must contain key by use of which description may be applied by extrinsic evidence); *Harry Bourg Corp. v. Punch, 653 So. 2d 1322 (La. App. 1995)* (one must be able to identify and locate the property from description in deed itself or from other evidence which appears in public records); *O'Brien v. Alcus Lands Partnership Trust, 577 So. 2d 1094 (La. App. 1991)* (one must be able to identify and locate property from description in deed itself or from other evidence appearing in public records); *Quarles v. Arcega, 841 P.2d 550 (N.M. App. 1992)* (but where the description in the deed, aided by extrinsic evidence, is insufficient to identify the property, the deed cannot serve as color of title); *Deaver v. Jones, 19 S.E. 637 (N.C. 1894); Cathey v. Buchanan Lbr. Co., 66 S.E. 580 (N.C. 1909); Masterson v. Todd, 24 S.W. 682 (Tex. App. 1894); Dixon v. Bremerton, 171 P.2d 243 (Wash. 1946)* (reasonable certainty alone is required by deed); *Jones v. Mabry, 225 S.W.2d 561 (Tenn. App. 1949); Broaddus v. Grout, 258 S.W.2d 308 (Tex. 1953); Highway Properties v. Dollar Sav. Bank, 431 S.E.2d 95 (W. Va. 1993)* (deed granting to railroad land for its right-of-way must contain on its face description of land in itself certain so as to be identified or, if not in itself so certain, must give such description as, with aid of evidence outside deed and not contradicting it, will identify and locate land; otherwise, deed is void for uncertainty).

(n3)Footnote 3. *Farmer v. Batts, 83 N.C. 387 (1894). See McGlawhorn v. Worthington, 3 S.E. 633 (N.C. 1887); Edwards v. Bowden, 5 S.E. 283 (N.C. 1888).*

(n4)Footnote 4. *Bissette v. Strickland, 131 S.E. 655 (N.C. 1926); Powers v. Rawles, 112 S.E. 78 (S.C. 1922).*

(n5)Footnote 5. *Kyle v. Jordan, 65 So. 522 (Ala 1914); Robinson v. Allison, 19 So. 837 (Ala. 1896); Gould v. Gould 21 S.E.2d 64 (Ga. 1942); Smith v. Federal Land Bank, 181 S.E. 149 (Ga. 1935); Swint v. Swint, 94 S.E. 571 (Ga. 1917); Davis v. Harden, 84 S.E. 426 (Ga. 1915); Andrews v. Murphy, 12 Ga. 431 (1853); Collins v. Dressler, 32 N.E. 883 (Ind. 1892); Lingeman v. Shirk 43 N.E. 33 (Ind. App. 1896); De Long v. Starkey, 92 N.E.2d 228 (Ind. App. 1950); Stack v. Commercial Towel & Uniform Service, 91 N.E.2d 790 (Ind. App. 1950); Crawford v. Crawford, 271 P.2d 240 (Kan. 1954); Cupples v. Harris 11 So. 2d 609 (La. 1942); Lewis v. Kinnaird, 65 A. 365 (Md. 1906); Armijo v. New Mexico Town Co., 5 P. 709 (N.M. 1885); Cherry v. Roanoke Tobacco Warehouse Co., 75 S.E.2d 124 (N.C. 1953); Norwood v. Totten, 82 S.E. 951 (N.C. 1914); Bachelor v. Norris, 82 S.E. 839 (N.C. 1914); Hinton v. Moore 51 S.E. 787 (N.C. 1905); Euliss v. McAdams, 13 S.E. 162 (N.C. 1891); Allen v. Sallinger, 12 S.E. 986 (N.C. 1891); Felty v. Calhoun, 21 A. 19 (Pa. 1891); Peart v. Brice, 25 A. 537 (Pa. 1893); Chaney v. Maupin 153 S.W.2d 187 (Tex. App. 1941); McElroy v. Danciger, 241 S.W. 1098 (Tex. App. 1922); Diffie v. White 184 S.W. 1065 (Tex. App. 1916); Gresham v. Chambers 16 S.W. 326 (Tex. 1891); Smith v. Bailey 127 S.E. 89 (Va. 1925); Pilkerton v. Roberson 65 S.E. 835 (Va. 1909); Sulphur Mines Co. v. Thompson 25 S.E. 232 (Va. 1896); Barth v. Barth, 143 P.2d 542 (Wash. 1943); Goff v. Goff 89 S.E. 9 (W. Va. 1916);* "All real estate in my name" was a sufficient description to permit parol identification. *Thorn v. Phares, 14 S.E. 399 (W. Va. 1891). Lavendar v. Ball 100 So. 2d 331 (Ala. 1958).* Description is sufficient if it can be identified by extrinsic evidence admissible under evidence rules, *Magnolia Petroleum Co. v. Marks, 74 So. 2d 36 (La. 1984);* provided it refers to one and only one tract, *Skinner v. Noland, 277 S.W.2d 812 (Tex. App. 1955).*

(n6)Footnote 6. *Dimond v. Kelly, 629 P.2d 533 (Alaska 1981)* (the purpose of a deed description is not to identify the land, but to furnish the means of identification); *Sanders v. Baker 231 S.W.2d 106 (Ark. 1950); Anderson-Cottonwood Irr. Dist. v. Zinzer, 125 P.2d 106 (Cal. App. 1942); Gould v. Gould 21 S.E.2d 64 (Ga. 1942); Haney v. Molko, 844 P.2d 1382 (Idaho App. 1992)* (the purpose of a deed description is not to identify the land, but to furnish the means of identification); *Taylor v. Taylor, 93 N.E. 9 (Ind. 1910); Burrow v. Terre Haute & L. R.R., 8 N.E.*

167 (Ind. 1886); Rucker v. Steelman, 73 Ind. 396 (1881); Gilbert v. Lusk, 106 N.E.2d 404 (Ind. App. 1952); Koons v. Burkhart, 119 N.E. 820 (Ind. App. 1918); Daigle v. Calcasieu Nat'l Bank, 9 So. 2d 394 (La. 1942); North Mankato v. Carlstrom, 2 N.W.2d 130 (Minn. 1942); Mitchell v. Nicholson, 3 N.W.2d 83 (N. D. 1942); Wyatt v. McGregor, 855 S.W.2d 5 (Tex. App. 1993) (the purpose of the deed description is to furnish the means of identification of the land, not to identify the land); *Mitchell v. Robinson, 136 S.W. 501 (Tex. App. 1911); Meadow River Lbr. Co. v. Smith, 30 S.E.2d 392 (W. Va. 1944); Holley v. Curry, 51 S.E. 135 (W. Va. 1905); Thorn v. Phares, 14 S.E. 399 (W. Va. 1891). Gullett v. Burton, 345 S.E.2d 323 (W. Va. 1986)* (main object of description of land sold or conveyed, in deed of conveyance or in contract of sale, is not in and of itself to identify land sold, but rather to furnish means of identification, and when this is done it is sufficient). A description or designation in itself may be deemed sufficient on its being made to appear by proper allegations and proof that at the place indicated the vendor owned premises answering its terms and owned at that place no other such property. *Beverage v. Canton Placer Min. Co., 278 P.2d 694 (Cal. 1955).* A description is considered sufficiently certain which can be made certain. A description in a deed will be deemed sufficient if a person of ordinary prudence, acting in good faith and making inquiries suggested by the description given in such deed, would be enabled to identify the property. *Ford v. Ford, 124 N.W. 1108 (S. Dak. 1910).*

(n7)Footnote 7. *Yaist v. U.S., 17 Cl. Ct. 246 (Cl. Ct. 1989)* (although the location of land conveyed through a deed is typically determined by the deed description, the interpretation of a written instrument is a question of law, which is to be determined by the court). *Parkman v. Ludlum, 69 So. 2d 434 (Ala. 1953).*

(n8)Footnote 8. *Bryant v. Chicago Mill & Lbr. Co., 120 F. Supp. 463 (E.D. Ark. 1854); Mullinax v. Galen-Marshall, Inc., 642 So. 2d 431 (Ala. 1994)* (the instrument must at least furnish the means of identification or key to the identification, the applicable principle being that that is certain which can be made certain); *Alabama Processing Co., Inc. v. Utilities Bd. of Town of Citronelle, 527 So. 2d 690 (Ala. 1988)* (the test for sufficiency is, "does the writing furnish the means of identification, or provide the key to the identification," the applicable principle being that that is certain which can be made certain); *Sanders v. Gaker, 231 S.W.2d 106 (Ark. 1950); Brasher v. Tanner, 353 S.E.2d 478 (Ga. 1987)* (those descriptions are valid which, while not sufficient to independently identify the land, provide a key which will unlock the mystery to the location of the real estate conveyed); *Gainsville Midland R.R. v. Tyner, 50 S.E.2d 108 (Ga. 1948); Rogers v. Manning, 48 S.E.2d 527 (Ga. 1948); Gilbert v. Lusk, 106 N.E.2d 404 (Ind. App. 1952); Rodgers v. Baughman, 342 N.W.2d 801 (Iowa 1983)* (the land must be so described that it can be identified with reasonable certainty; the writing must disclose a description which is itself definite and certain or it must furnish the means or key by which the description may be made certain and identified with its location on the ground).

(n9)Footnote 9. *Tolle v. Curley, 251 S.W. 377 (Ark. 1923); Mull v. Mickey's Lumber & Supply Co., Inc., 461 S.E.2d 270 (Ga. App. 1995)* (test for sufficiency of description in materialman's lien document is whether description makes possible identification of real property described); *State ex rel. Taraloca Land Co. v. Fawley, 639 N.E.2d 98 (Ohio 1994)* (in every voluntary instrument used to transfer a part of land conveyed by a certificate of title, an accurate description of such part enabling it to be definitely located and platted shall be given); *Harlan v. Vetter, 732 S.W.2d 390 (Tex. App. 1987)* (if the instrument containing the reference has enough information to enable one, by pursuing an inquiry based upon the information contained therein, to identify the particular property to the exclusion of all others, the reference and description are sufficient). *Contrast Fuller v. Mountain Sculpture, Inc., 314 P.2d 842 (Utah 1957)* (holding a description valid if a reasonably intelligent person could locate it on the ground) with *Robinson v. Laffon, 311 P.2d 768 (Mont. 1957)* (defaulting a mining claim for insufficiency of description in posted and recorded notices).

(n10)Footnote 10. *Westside Galvanizing Services, Inc. v. Georgia-Pacific Corp., 724 F. Supp. 644 (W.D. Ark. 1989)* (the established test in Arkansas is that the property description be sufficient to enable any one familiar with the locality to identify the premises intended to be described with reasonable certainty, to the exclusion of others); *In re Koski, 149 B.R. 170 (Bankr. D. Idaho 1992)* (so long as the description contains information sufficient to enable a party familiar with the locality to identify the premises intended to be described with reasonable certainty, to the exclusion of others, the description is sufficient); *McCarron's Bldg. Center, Inc. v. Einertson, 482 N.W.2d 529 (Minn. App.1992)* (if there appears enough in the description to enable a party familiar with the locality to identify the premises intended to be described with reasonable certainty, to the exclusion of other premises, it will be sufficient); *Breckenridge Material*

Co. v. Byrnesville Const. Co., Inc., 842 S.W.2d 551 (Mo. App. 1992) (description of property need not be letter perfect; rather, when rights of third parties are not involved, description need only be sufficient to enable one familiar with locality to identify the premises intended to be covered by lien); *Allied Pools, Inc. v. Sowash, 735 S.W.2d 421 (Mo. App. 1987)* (the description is sufficient where enough appears in the statement to enable one familiar with the locality to identify the intended premises); *Brown v. Hurley, 90 S.E.2d 324 (N.C. 1955); Easterling v. Simmons, 293 S.W. 690 (Tex. App. 1927).*

(n11)Footnote 11. *City of Birmingham v. Smith, 507 So. 2d 1312 (Ala. 1987)* (an ambiguity in the property description will not void the description if a surveyor can locate the property on the ground); *Thompson v. Southern Cal. Motor Road Co., 23 P. 130 (Cal. 1890); Wagnor v. Blume 161 P.2d 1001 (Cal. App.1945); Howard v. Howard, 226 P. 984 (Cal. App. 1924); Kester v. Bostwick, 15 So. 2d 208 (Fla. 1943); Bank of South Jacksonville v. Cammar, 103 So. 827 (Fla. 1925); Ansley v. Graham, 74 So. 505 (Fla. 1917); Walker v. Lee, 40 So. 881 (Fla. 1906); Campbell v. Carruth, 13 So. 432 (Fla. 1893); O'Berry v. Gray, 510 So. 2d 1135 (Fla. App. 1987)* (a land description is legally sufficient if it will enable a surveyor to ascertain, identify, and locate the land intended to be described); *Farrell v. Brown, 729 P.2d 1090 (Idaho App. 1986)* (a description is sufficient if from the description given a competent surveyor can locate the land on the ground with or without the aid of extrinsic evidence); *Brunotte v. DeWitt, 196 N.E. 489 (Ill. 1935); Brenneman v. Dillon, 129 N.E. 564 (Ill. 1920); Kane v. McDermott, 547 N.E.2d 708 (Ill. App. 1989)* (description of property is sufficiently definite if it will enable a surveyor, by aid of extrinsic evidence, to locate the property); *Reid v. Mitchell, 95 Ind. 397 (1884); Pennington v. Flock, 93 Ind. 378 (1884); Meikel v. Greene, 94 Ind. 344 (1883); Brown v. Anderson, 90 Ind. 93 (1883); Guy v. Barnes, 29 Ind. 103 (1867); Drake v. City of Fort Wayne, 543 N.E.2d 1145 (Ind. App. 1989)* (legal description of annexed territory contained in annexation ordinance was sufficient, where qualified land surveyor testified that he could identify territory covered solely by reference to ordinance and to recorded documents referred to therein); *Downing v. Thompson, 92 S.W. 290 (Ky. 1906); Goodbar v. Dunn, 61 Miss. 618 (1884); Podlesak v. Wesley, 849 S.W.2d 728 (Mo. App. 1993)* (otherwise put, a description of a particular parcel is sufficient if a competent surveyor can locate the land on the ground); *First Sec. Bank, Underwood, N.D. v. Enyart, 439 N.W.2d 801 (N.D. 1989)* (a liberal rule of construction will be applied, and if a surveyor with the deed can, with the aid of extrinsic evidence if necessary, locate the land and establish its boundaries, the description therein is sufficient); *Throckmorton v. Moon, 10 Ohio 42 (1840); Hardy v. California Trojan Powder Co., 219 P. 197 (Or. 1925); Reeder v. Reeder, 135 P. 176, 137 P. 191 (Or. 1913); Brogard v. Barhan, 96 P. 673,* (Or. 1908); *Marks v. Ligionier Borough, 82 A. 477 (Pa. 1912); Aquila Southwest Pipeline Corp. v. Gupton, 886 S.W.2d 497 (Tex. App. 1994)* (description of property in petition for condemnation is sufficient for purposes of trial court's jurisdiction over subject matter in condemnation proceeding if it is such that surveyor, or other person skilled in such matters, could take such description and definitely locate same on ground); *Harris v. Iglehart, 113 S.W. 170 (Tex. App. 1908).*

(n12)Footnote 12. *Copeland v. Carpenter, 59 S.E.2d 245 (Ga. 1950); White v. Spahr, 59 S.E.2d 916 (Ga. 1907); Mull v. Mickey's Lumber & Supply Co., Inc., 461 S.E.2d 270 (Ga. App. 1995)* (to be valid, a real property description in deed, contract for sale of land, or materialman's lien document must identify the land, or must contain the key by use of which a description may be applied by extrinsic evidence); *Hayes v. O'Brien, 37 N.E. 73 (Ill. 1894); De Long v. Starkey, 92 N.E.2d 228 (Ind. App. 1950); McRoberts v. McArthur, 64 N.W. 903 (Minn. 1895); Podlesak v. Wesley, 849 S.W.2d 728 (Mo. App. 1993)* (the conclusion that no one could locate the real estate based on the description alone is not solely determinative here; however, it is not required that a deed contain a sufficient description so that, based on it alone, the property can be located; extrinsic facts pointed out in the description may be resorted to in order to ascertain the land conveyed, and the property may be identified by extrinsic evidence); *Connell v. Galligher, 55 N.W. 229 (Neb. 1893); Foreman v. Sholl, 439 S.E.2d 169 (N.C. App. 1994)* (a description, though indefinite, is sufficient if court can, with the aid of extrinsic evidence which does not add to, enlarge, or in any way change the description, fit it to the property conveyed by the deed); *Flanagan v. Prudhomme, 644 A.2d 51 (N.H. 1994)* (extrinsic evidence of parties' intentions and circumstances surrounding conveyance may be used to clarify terms of ambiguous deed; deed is patently ambiguous, and extrinsic evidence can be used to clarify its terms, when language in deed does not provide sufficient information to adequately describe conveyance without reference to extrinsic evidence); *Wall v. Carrell 894 S.W.2d 788 (Tex. App. 1994)* (extrinsic evidence is admissible to identify land from sources other than the deed itself); *Wyatt v. McGregor, 855*

S.W.2d 5 (Tex. App. 1993) (a deed is not void for uncertainty unless the description cannot be made to apply to any definite piece of land even with the aid of extrinsic evidence).

(n13)Footnote 13. *Mull v. Mickey's Lumber & Supply Co., Inc., 461 S.E.2d 270 (Ga. App. 1995)* (if descriptive words, when aided by extrinsic evidence, fail to locate and identify a certain tract of land, the description fails and the instrument is void); *Hoelscher v. Simmerock, 921 S.W.2d 676 (Mo. App. 1996)* (a description of interest in real property is sufficient unless, after resorting to oral proof or after relying upon other extrinsic or external proof or evidence, that which was intended by instrument remains a mere matter of conjecture); *Haith v. Roper, 88 S.E.2d 142 (N.C. 1955); Wiggins v. Short, 469 S.E.2d 571 (N.C. App. 1996)* (an easement is void when there is such an uncertainty appearing on the face of the instrument itself that the court -- reading the language in the light of all the facts and circumstances referred to in the instrument -- is yet unable to derive therefrom the intention of the parties as to what land was to be conveyed); *Sanderson v. Sanderson, 82 S.W.2d 1008 (Tex. App. 1935).*

(n14)Footnote 14. *Brunotte v. DeWitt, 196 N.E. 489 (Ill. 1935)* (any description in a deed is sufficient if it contains a means of identification); *Crawford v. Crawford, 271 P.2d 240 (Kan. 1954); Smith v. Wedgewood Builders Corp., 590 A.2d 186 (N.H. 1991)* (a deed generally will be held sufficiently definite if it is possible by any reasonable rules of construction to ascertain from the description, aided by extrinsic evidence, what property is intended to be conveyed); *Hill v. U.S. Life Title Ins. Co. of New York, 731 S.W.2d 910 (Tenn. App. 1986); In re Gatlinburg Motel Enterprises, Ltd., 119 B.R. 955 (Bankr. E.D. Tenn. 1990)* (it is said to be a broad general principle that a deed will not be declared void for uncertainty in a description if it is possible by any reasonable rules of construction to ascertain from the description, aided by extrinsic evidence, what property is intended to be conveyed); *Meyer v. Kesterson, 1997 WL 749478 (Or. App. 1997)* (description of land in contract is sufficient if surveyor is able to ascertain by extrinsic evidence what property was intended to be conveyed).

(n15)Footnote 15. *Brasher v. Tanner, 353 S.E.2d 478 (Ga. 1987)* (if a party attacking a deed can show a recited boundary does not exist or that the point of beginning of a courses and distances description does not exist, the deed fails unless it is saved by additional words in the description); *Stephenson v. Rowe, 338 S.E.2d 301 (N.C. 1986)* (the will furnished no means by which the twenty-five acres could be identified and set apart, nor did the will refer to anything extrinsic by which the twenty-five acres could be located; the will fixed no beginning point or boundary; it was too vague and indefinite to admit of parol evidence to support it); *Deaver v. Jones, 19 S.E. 637 (N.C. 1894); Archibald v. Davis, 50 N.C. 322 (1858); Mann v. Taylor, 49 N.C. 272 (1857); Foreman v. Sholl, 439 S.E.2d 169 (N.C. App. 1994)* (valid metes and bounds description must contain a certain starting point and the direction and length of each boundary line); *Town of Cary v. Franklin-Sloan V.F.W. Post 7383, 443 S.E.2d 791 (N.C. App. 1994)* (a drawing which does not have any ascertainable monuments, does not indicate the size of the tracts of land shown, does not indicate any courses and very few distances, and has no ascertainable beginning point is not a sufficient description); *Sullivan v. Fant, 160 S.W. 612 (Tex. App. 1914).*

(n16)Footnote 16. *Hanners v. Woodruff, 354 S.E.2d 826 (Ga. 1987)* (where the description in a land sale Contract specifies the exact quantity of the parcel to be conveyed, it is not void for lack of definiteness if the shape can be determined from the intention of parties and lines fixed mathematically so as to encompass the exact quantity conveyed); *Haney v. Molko, 844 P.2d 1382 (Idaho App. 1992)* (the description contained in the deed will be sufficient so long as the quantity, identity or boundaries of the property can be determined from the face of the instrument or by reference to extrinsic evidence); *Island Coal Co. v. Streitlemier, 37 N.E. 340 (Ind. 1894).*

(n17)Footnote 17. *Nolen v. Henry, 67 So. 500 (Ala. 1914); Bajrangi v. Magnethel Enterprises, Inc., 589 So. 2d 416 (Fla. App. 1991)* (the modern tendency is to allow a liberal interpretation of the description of land and to uphold the validity of such description if there is any way possible to arrive at the intention of the parties thereto); *Calton v. Lewis, 21 N.E. 475 (Ind. 1889); Hannon v. Hilliard, 101 Ind. 310 (1885); McDonald v. Jones, 852 P.2d 588 (Mont. 1993)* (when interpreting validity of deeds, a deed will be liberally construed to give it effect, rather than to render it a nullity); *Peterson v. Taylor, 735 P.2d 1120 (Mont. 1987)* (the general rule is that a deed will be liberally construed so as to give it effect, rather than to render it a nullity); *Gernt v. Floyd, 174 S.W. 267 (Tenn. 1915); Wyatt v. Mcgregor, 855 S.W.2d 5*

(Tex. App. 1993) (the high court held that courts should liberally construe a deed's descriptive words in order to uphold the conveyance); *Palomita, Inc. v. Medley, 747 S.W.2d 575 (Tex. App. 1988)* (the general requirement for a sufficient legal description of property is: the descriptive words in an instrument should be given a liberal construction, in order that the writing may be upheld); *Chambers v. Huggins, 709 S.W.2D 219 (Tex. App. 1985)* (grants in deeds are liberally construed); In re King County for Foreclosure of Liens for Delinquent Real Property Taxes for Years 1985 through 1988, *811 P.2d 945 (Wash.1991)* (to determine if a property description is sufficient, the description should be liberally construed).

(n18)Footnote 18. *George v. Bates, 20 S.E. 828 (Va. 1894); See* the following cases: *Ketchum v. Cook, 247 S.W.2d 1002 (Ark. 1952)* (description as "a part of" is void for indefiniteness); *Capps v. Holt, 58 N.C. 153 (1859); Munnink v. Jung, 22 S.W. 293 (Tex. App. 1893); Westfall v. Cottrills, 24 W. Va. 763 (1884).*

(n19)Footnote 19. *Chidester v. Newark, 58 F. Supp. 787 (D.N.J. 1945).*

(n20)Footnote 20. *Lee v. Wal-Mart Stores, Inc., 34 F.3d 285 (5th Cir. 1994)* (in order for writing to satisfy statute of frauds requirement that lease of real property for more than one year be in writing, there must be description of property to be conveyed sufficient that particular land may be identified with reasonable certainty); *Thompson v. Abbott, 229 S.W.2d 660 (Ark. 1950); Haney v. Molko, 844 P.2d 1382 (Idaho App. 1992)* (to be sufficient, a property description must designate the land intended to be conveyed with reasonable certainty); *McHale v. Treworgy, 90 N.E.2d 908 (Mass. 1950); Podlesak v. Wesley, 849 S.W.2d 728 (Mo. App.1993)* (no sale or conveyance of land for taxes shall be valid if the description is so imperfect as to fail to describe the land or lot with reasonable certainty); *Phoenix Mut. Life Ins. Co. v. Kingston Bank & Trust Co., 112 S.W.2d 381 (Tenn. 1938); Boyert v. Tauber, 834 S.W.2d 60 (Tex. 1992)* (insofar as the description of the property to be conveyed is concerned, the writing must furnish within itself the means or data by which that particular land may be identified with reasonable certainty); *Walchshauser v. Hyde, 890 S.W.2d 171 (Tex. App. 1994)* (an instrument conveying real estate is void under the statute of frauds unless the real estate's description is so definite and certain upon the face of the instrument itself, or in some other writing referred to, that the land can be identified with reasonable certainty); *Wallace v. McKinzie, 869 S.W.2d 592 (Tex. App. 1993)* (description of land must be so definite and certain upon face of conveying instrument itself, or in some other writing referred to, that land can be identified with reasonable certainty); *Wyatt v. McGregor, 855 S.W.2d 5 (Tex. App. 1993)* (the description in the writing memorializing the transfer of ownership must furnish within itself, or by reference to some other existing writing, the means or data by which that particular land may be identified with reasonable certainty); *Sovran Bank, N.A. v. Creative Industries, Inc., 425 S.E.2d 504 (Va. 1993)* (a deed conveying land must give such a description of the property intended to be conveyed as will be sufficient to identify it with reasonable certainty); *Meadow River Lbr. Co. v. Smith, 30 S.W.2d 392 (W. Va. 1944);* (when the location is made later, even by parol, the title is valid); *Schenk v. Evoy, 24 Cal. 104 (1864); Simpson v. Blaisdell, 27 A. 101 (Maine 1892).* A deed delivered without a written description has been held to be void, and not to be validated by the grantee's filling in the description later. *Boyd Lbr. Co. V. Mills, 92 S.E. 534 (Ga. 1917); Hulburt v. Walker, 179 N.E. 34 (N.Y. 1931).* A description in a deed of "100 acres more or less in the south side of lot No. 69" was void for indefiniteness. *Bennett v. Rewis, 96 S.E.2d 257 (Ga. 1957).* A description, "50 acres east and 50 acres west," of a stated house held void for indefiniteness as not indicating a shape. *Williams v. Manchester Bldg. Supply Co., 97 S.E.2d 129 (Ga. 1957).* A description so indefinite that no parcel is described cannot be aided by parol. *Harris v. Woodard, 41 S.E. 790 (N.C. 1902).* In *Turner v. Hunt, 116 S.W.2d 688 (Tex. 1938),* when a specific plot in the rear was conveyed, the deed also called for one acre along the road for a house site, the plot to be surveyed and set off later. The court held that the grantee received no fractional interest as tenant in common, but acquired a mere equitable interest which could be lost by abandonment or laches.

(n21)Footnote 21. *Saulsberry v. Saulsberry, 121 F.2d 318 (6th Cir. 1941); Chicago, Wilmington & Franklin Coal Co. v. Menhall, 42 F. Supp. 81 (E.D. Ill. 1941); Price v. Price, 182 S.W.2d 879 (Ark. 1944); Killian v. Lincoln Nat. Life Ins. Co., 148 S.W.2d 1085 (Ark. 1941); Blume v. MacGregor, 148 P.2d 656 (Cal. App. 1944); Florida Bank & Trust Co. v. Ocean & Lake Realty Co., 160 So. 1 (Fla. 1935); Oglesby v. Volunteer State Life Ins. Co. of Tennessee, 23 S.E.2d 404 (Ga. 1942); Gould v. Gould, 21 S.E.2d 64 (Ga. 1942); Callaway v. Beauchamp, 92 S.E. 538 (Ga. 1917); Haney v. Molko, 844 P.2d 1382 (Idaho App. 1992)* (a deed must describe with reasonable certainty property it purports to

convey; a deed is void when it does not provide an adequate description to identify the land it purports to convey); *Wilson v. Johnson, 43 N.E. 930 (Ind. 1896); Wilson v. Johnson, 38 N.E. 38 (Ind. 1894); Shoemaker v. McMonigle, 86 Ind. 241 (1882); Buchanan v. Whitman, 36 Ind. 257 (1871); Wilfert v. Duson, 58 So. 1019 (La. 1912); Castera v. New Orleans Land Co., 51 So. 1021 (La. 1910); Schroeder v. Turpin, 161 S.W. 716 (Mo. 1913); Blumenthal v. Blumenthal, 158 S.W. 648 (Mo. 1913); Barber Asphalt Paving Co. v. Field, 161 S.W. 364 (Mo. App. 1913); Baldwin v. Hinton, 90 S.E.2d 316 (N.C. 1955)* (void for ambiguity in description); *Peel v. Calais, 31 S.E.2d 440 (N.C. 1944); Patton v. Sluder, 83 S.E. 818 (N.C. 1914); Speed v. Perry, 83 S.E. 176 (N.C. 1914); Baylor v. Soska, 658 A.2d 743 (Pa. 1995)* (deed did not convey adverse possessor's claim to land on which garage was located, where deed did not even minimally describe disputed land); In re Tennessee *Gas Transport, Inc., 169 B.R. 643 (Bankr. M.D. Tenn. 1994)* (to be valid, a deed must designate the land intended to be conveyed with reasonable certainty); *Holden v. Dahlberg, 228 S.W.2d 889 (Tex. App. 1950)* ("an undivided interest" held void for uncertainty); *Blankenship v. Mott 104 S.W.2d 607 (Tex. App. 1937); Farmers Royalty Holding Co. v. Jeffus, 94 S.W.2d 255 (Tex. App. 1936); Standefer v. Miller, 182 S.W. 1149 (Tex. App. 1916); Meadow River Lbr. Co. v. Smith, 30 S.E.2d 392 (W. Va. 1944); Holley's Ex'r v. Curry, 51 S.E. 135 (W. Va. 1905).*

(n22)Footnote 22. *Chidester v. Newark, 58 F. Supp. 787 (D.N.J. 1945); G. R. Holcomb Estate Co. v. Burke, 48 P.2d 669 (Cal. 1935); In re Estate of Marsh, 513 N.W.2d 35 (Neb. App. 1994)* (in Nebraska, the general long standing rule is that an otherwise effective conveyance of property transfers the entire interest which the conveyor has and has the power to convey, unless an intent to transfer a lesser interest is effectively manifested); *Roeder Co. v. Burlington Northern, Inc., 716 P.2d 855 (Wash. 1986)* (a quitclaim deed containing catchall clause, or "Mother Hubbard" description, purporting to convey all property owned by grantor in a certain locality is valid and transfers all property in such locality to which grantor holds record title at time of conveyance). A conveyance of land through which a railroad right-of-way runs carries the fee to the right-of-way, although it is not mentioned in the deed; *Eureka Real Estate & Inv. Co. v. Southern Real Estate & Financial Co., 200 S.W.2d 328 (Mo. 1947).* In *Seguin v. Maloney-Chambers Lbr. Co., 253 P.2d 252 (Or. 1953),* a deed conveying a stated amount of timber on a stated tract was not void for uncertainty for failure to specify the exact location of the timber.

(n23)Footnote 23. *First Sav. Bank & Trust Co. v. Elgin, 225 P. 582 (N.M. 1924).*

(n24)Footnote 24. *United States v. 0.08246 Acres of Land, 888 F. Supp. 693 (E.D. Pa. 1995)* (the preference of monuments over courses and distances is a rule of construction and is merely an aid in determining intention); *Wisconsin Realty Co. v. Lull, 187 N.W. 978 (Wis. 1922).*

(n25)Footnote 25. *Munro v. Esche, 156 P.2d 700 (Colo. 1944); Hardee v. Horton, 108 So. 189 (Fla. 1925); Tanner v. Williamson, 33 S.E.2d 694 (Ga. 1945); Kelekolio v. Onomea Sugar Co., 29 Haw. 130 (1926); Brenneman v. Dillon, 129 N.E. 564 (Ill. 1920); Daigle v. Calcasieu Nat'l Bank, 9 So. 2d 394 (La. 1942); Nattin v. Glassell, 100 So. 609 (La. 1924); North Mankat v. Carlstrom, 2 N.W.2d 130 (Minn. 1942); People v. Call, 223 N.Y.S. 257 (1927); Duckett v. Lyda, 26 S.E.2d 918 (N.C. 1943); Dill-Cramer-Truitt Corp. v. Jacksonville Lbr. Co., 112 S.E. 740 (N.C. 1922);* Myers v. Hatler, 254 P.355 (Or. 1927); *Kinard v. Eubank, 292 S.W. 633 (Tex. App. 1927); Sanborn v. Miski, 209 N.W. 759 (Wis. 1926).*

(n26)Footnote 26. *United States v. King, 44 U.S. 773, 11* L. Ed.842 (1845); *Winnipisiogee Paper Co. v. New Hampshire Land Co., 59 F. 542 (C.C.N.H. 1893); Mullinax v. Galen-Marshall, Inc., 642 So. 2d 431 (Ala. 1994)* (the instrument must at least furnish the means of identification, or, as some cases have it, provide the key to the identification, the applicable principle being that that is certain which can be made certain); *Thompson v. Southern California Motor Road Co., 23 P. 130 (Cal. 1890); Bajrangi v. Magnethel Enterprises, Inc., 589 So. 2d 416 (Fla. App. 1991)* (the modern view is that the description is sufficient if the reference to the property in the deed is such that the court, by pursuing an inquiry based upon the words of reference, is able to identify the particular property to the exclusion of all other property; the maxim applicable is that is certain which can be made certain); *Abercrombie v. Simmons, 81 P. 208 (Kan. 1905); Jones v. Hargis, 150 S.W.2d 928 (Ky. 1941); Snelling v. Adair, 199 So. 782 (La. 1940); Austin v. Dolbee, 59 N.W. 608 (Mich. 1894); Kyle v. Rhodes, 15 So. 40 (Miss. 1894); Nixon v. Porter, 34 Miss.*

697 (1858); Ollison v. Village of Climax Springs, 916 S.W.2d 198 (Mo. 1996) (while it is true that a deed must describe land so that it can be identified, yet that is certain which by outside evidence can be made certain); *McCulloh v. Price, 36 P. 194 (Mont. 1894); Smith v. Wedgewood Builders Corp., 590 A.2d 186 (N.H. 1991)* (in respect to land conveyance, that is certain which can be made certain); *Smith v. Furbish, 44 A. 398 (N.H. 1894); Duckett v. Lyda, 26 S.E.2d 918 (N.C. 1943). Peart v. Brice, 25 A. 537 (Pa. 1893); Lieberman v. Clark, 85 S.W. 258 (Tenn. 1905); Bowles v. Brice, 2 S.W. 729 (Tex. 1886); Davis v. First Nat'l Bank, 145 S.W.2d 707 (Tex. App. 1940); Adams v. Grogan-Cochran Lbr. Co., 181 S.W.2d 582 (Tex. App. 1944); Holley's Ex'r v. Curry, 51 S.E. 135 (W. Va. 1905).*

(n27)Footnote 27. *Bryant v. Chicago Mill & Lbr. Co., 120 F. Supp. 463 (E.D. Ark. 1954); Aiken v. McMillan, 106 So. 150 (Ala. 1925); Lemon v. Tanner, 292 S.W. 668 (Ark. 1927); Howard v. Howard, 226 P. 984 (Cal. 1924); Thompson v. Southern California Motor Road Co., 23 P. 130 (Cal. 1890); Andrews v. Moss, 129 S.E. 62 (Ga. 1925); Haney v. Molko, 844 P.2d 1382 (Idaho App. 1992)* (while it is indisputable that deed must describe with reasonable certainty property it purports to convey, description contained in deed will be sufficient so long as quantity, identity, or boundaries of property can be determined from face of instrument or by reference to extrinsic evidence); *Patterson v. McClenathan, 129 N.E. 62 (Ill. 1920); Abercrombie v. Simmons, 81 P. 208 (Kan. 1905); Tircuit v. Burton-Swartz Cypress Co., 110 So. 489 (La. 1926); Brooks v. Hackney, 404 S.E.2d 854 (N.C. 1991)* (if the description is sufficiently definite for the court, with the aid of extrinsic evidence, to apply the description to the exact property intended to be sold, it is enough); *Foreman v. Sholl, 439 S.E.2d 169 (N.C. App. 1994)* (a description, though indefinite, is sufficient if court can, with aid of extrinsic evidence which does not add to, enlarge, or in any way change the description, fit it to the property conveyed by the deed); *Smith v. Wedgewood Builders Corp., 590 A.2d 186 (N.H. 1991)* (a deed generally will be held sufficiently definite if it is possible by any reasonable rules of construction to ascertain from the description, aided by extrinsic evidence, what property is intended to be conveyed); *Peart v. Brice, 25 A. 537 (Pa. 1893); In re Barnacle, 623 A.2d 445 (R.I. 1993)* (where the description used furnishes a key whereby a person, aided by extrinsic evidence, can ascertain what property is covered, such description is sufficient); *Battle v. Wolfe, 283 S.W. 1073 (Tex. App. 1926); Blair v. Rorer, 116 S.E. 767 (Va. 1923);* In re King County for Foreclosure of Liens for Delinquent Real Property Taxes for Years 1985 through 1988, *811 P.2d 945 (Wash. 1991)* (to determine if a property description is sufficient, the description should be liberally construed and extrinsic evidence may be consulted). Description is sufficient if it will enable a surveyor to locate the property. *Anderson v. Anderson-Tully Co., 196 F.2d 684 (5th Cir. 1952); Ken-Tex Exploration Co. v. Conner, 251 S.W.2d 280 (Ky. 1952); Gubser v. Town, 273 P.2d 430 (Or. 1954); Dixon v. Bremerton, 171 P.2d 243 (Wash. 1946).* Deed must furnish the key to identification. *Turner v. Boyd, 91 S.E.2d 502 (Ga. 1956); White v. Spahr, 59 S.E.2d 916 (Ga. 1950).*

(n28)Footnote 28. *Bajrangi v. Magnethel Enterprises, Inc., 589 So. 2d 416 (Fla. App. 1991)* (a patent ambiguity in a description could not be cured by parol evidence because to do so would be the insertion of new language into the instrument); *Ashauer v. Peer, 147 S.W.2d 144 (Mo. App. 1941); Brooks v. Hackney, 404 S.E.2d 854 (N.C.1991)* (parol evidence may not be introduced to remove a patent ambiguity since to do so would not be a use of such evidence to fit the description to the land but a use of such evidence to create a description by adding to the words of the instrument); *Foreman v. Sholl, 439 S.E.2d 169 (N.C. App. 1994)* (parol evidence may not be introduced to remove a patent ambiguity since to do so would not be a use of such evidence to fit the description to the land but a use of such evidence to create a description by adding to the words of the instrument); *Amerson v. Lancaster, 415 S.E.2d 93 (N.C. App. 1992)* (if description of property in conveying instrument is so vague and indefinite that court would have to insert new language into instrument in order to make instrument effective, ambiguity in deed is patent and parol evidence is inadmissible so that attempted reservation will be void for uncertainty); *Frizeen v. Swanton, 34 P.2d 939 (Or. 1934); Davis v. Kirby Lbr. Corp., 158 S.W.2d 888 (Tex. App. 1942).* Parol evidence was admitted to explain patent ambiguity in deed. *Sharpe v. Savannah River Lbr. Corp., 87 S.E.2d 398 (Ga. 1955),* similar as to latent ambiguity; *Richardson v. Register, 87 S.E.2d 40 (S.C. 1955); Gates v. Asher, 280 S.W.2d 247 (Tex. 1955).*

(n29)Footnote 29. *Brenneman v. Dillon, 129 N.E. 564 (Ill. 1920); Hamm v. Town of Medway, 644 A.2d 1388 (Me. 1994)* (the Town's reference to the assessor's tax maps by name was a legally sufficient description to withstand a facial attack); *Bell Hardware of Medford, Inc. v. Ed Szoyka Woodworking Co., 879 P.2d 208 (Or. App. 1994)* (real property

shall be described for recordation by giving the subdivision according to the United States survey, or by lots, blocks or by giving the boundaries thereof by metes and bounds, or in such other manner as to cause the description to be capable of being made certain); *Fairfax County Park Authority v. Atkisson, 445 S.E.2d 101 (Va. 1994)* (although partition decree which preserved portion of land for family cemetery did not contain metes and bounds description of cemetery, chancellor made factual finding that portion of cemetery was located on parcel). *But see Zelnik Realty, Inc. v. York, 566 N.Y.S.2d 752 (N.Y. App. Div. 1991)* (natural landmarks and artificial monuments take precedence over mere metes and bounds descriptions); *Dovin Const. Co., Inc. v. 7MDR of Queens, Inc., 566 N.Y.S.2d 994 (N.Y. Sup. Ct. 1991).*

(n30)Footnote 30. *Mullinax v. Galen-Marshall, Inc., 642 So. 2d 431 (Ala. 1994)* (the statute of frauds does not invalidate a contract merely because it contains a general uncertain description, where that description can be made specific and certain by parol evidence of concurrent facts and circumstances sufficient to that end); *Bajrangi v. Magnethel Entrp., 589 So. 2d 416 (Fla. App. 1991)* (where the description shows that a particular tract as distinguished from other lands is meant, then parol evidence can be resorted to to apply the description, or identify or locate the land, though the description be somewhat general); *Conyers v. West, 78 S.E.2d 422 (Ga. 1953); Long v. Martin, 234 S.W. 91 (Tex. App. 1921).*

(n31)Footnote 31. *In re Horton Vaults, Inc., 109 B.R. 356 (Bankr. E.D. Ark. 1989)* (the property must be described with sufficient definiteness to enable a party familiar with the locality to identify the premises with reasonable certainty, to the exclusion of others); *Rye v. Baumann, 329 S.W.2d 161 (Ark. 1959)* (if the descriptive words furnish a key for identifying the land there is a valid description); *Bajrangi v. Magnethel Enterprises, Inc., 589 So. 2d 416 (Fla. App. 1991)* (description is sufficient if reference to property in the deed is such that the court, by pursuing an inquiry based on the words of reference, is able to identify the particular property to the exclusion of all other property); *Jordan v. Boisvert, 632 So. 2d 254 (Fla. App. 1994)* (the modern view is to find the description sufficient if the reference to the property in the deed is such that the court is able to identify the particular property to the exclusion of all other property, by pursuing an inquiry based upon the words of reference); *In re Koski, 149 B.R. 170 (Bankr. D. Idaho 1992)* (so long as the description contains information sufficient to enable a party familiar with the locality to identify the premises intended to be described with reasonable certainty, to the exclusion of others, the description is sufficient); *McCarron's Bldg. Center, Inc. v. Einertson, 482 N.W.2d 529 (Minn. App. 1992)* (if there appears enough in the description to enable a party familiar with the locality to identify the premises intended to be described with reasonable certainty, to the exclusion of other premises, it will be sufficient); *First Sec. Bank, Underwood, N.D. v. Enyart, 439 N.W.2d 801 (N.D. 1989)* (in the context of a description in a deed, the description is sufficient if the reference to the property in the deed is such that the court, by pursuing an inquiry based upon the words of reference, is able to identify the particular property to the exclusion of all other property); *Harlan v. Vetter, 732 S.W.2d 390 (Tex. App. 1987)* (if there appears in the instrument enough to enable one by pursuing an inquiry based upon the information contained in the deed to identify the particular property to the exclusion of others, the description will be held sufficient); *Wyatt v. Mcgregor, 855 S.W.2d 5 (Tex. App. 1993)* (the description need not be mathematically certain, but only reasonably certain so as to enable a party familiar with the locality to identify the premises to the exclusion of others); *Abercrombie v. Bright, 271 S.W.2d 734 (Tex. App. 1954).*

(n32)Footnote 32. *Los Angeles v. Hannon, 112 P. 878 (Cal. 1910); Benedict v. Gaylord, 11 Conn. 332 (1836);* Works v. State, 22 N.E.127 (Ind. 1889); *Calton v. Lewis, 21 N.E. 475 (Ind. 1889); Pursley v. Hayes, 22 Iowa 11 (1967); Smith v. Furbish, 44 A. 398 (N.H. 1894); Adams v. Grogan-Cochran Lbr. Co., 181 S.W.2d 582 (Tex. App. 1944). Holley's Ex'r v. Curry, 51 S.E. 135 (W. Va. 1905).*

(n33)Footnote 33. *Stanley v. Green, 12 Cal. 148 (1859).*

(n34)Footnote 34. *Phillips v. Porter, 3 Ark. 18 (1840); People v. Klumpke, 41 Cal. 263 (1871); Los Angeles v. Hannon, 112 P. 878 (Cal. 1910); Tryon v. Huntoon, 7 P. 741 (Cal. 1885); Calton v. Lewis, 21 N.E. 475 (Ind. 1889); Roehl v. Haumesser, 15 N.E. 345 (Ind. 1888); Pursley v. Hayes, 22 Iowa 11 (1867); Edwards v. Bowden, 5 S.E. 283 (N.C. 1888); Harkness, v. Devine, 11 S.W. 872 (Tex. 1889); Williams v. Western Union R.R., 5 N.W. 482 (Wis. 1880).*

(n35)Footnote 35. *Blair v. Rorer, 116 S.E. 767 (Va. 1923).*

(n36)Footnote 36. *Lochte v. Austin, 13 So. 838 (Miss. 1891).*

(n37)Footnote 37. *Oglesby v. Volunteer State Life Ins. Co. of Tennessee, 23 S.E.2d 404 (Ga. 1942).*

(n38)Footnote 38. *Smith v. Wilkinson, 67 S.E.2d 698 (Ga. 1951)* (a deed is sufficient to pass title, and will not be declared void for uncertainty of description, if descriptive averments are certain, or if they afford a key by which land can be definitely located by aid of extrinsic evidence); *Lewis v. Bowen, 75 S.E.2d 422 (Ga. 1953)* (a deed is sufficient to pass title and will not be declared void for uncertainty of description, if descriptive averments contained therein are certain, or if they afford a key by which the realty conveyed thereby can be definitely located by the aid of extrinsic evidence); *Mcdilda v. Lankford, 102 S.E.2d 41 (Ga. 1958)* (a deed is sufficient to pass title and will not be declared void for uncertainty of description, if descriptive averments contained therein are certain, or if they afford a key by which the realty conveyed thereby can be definitely located by the aid of extrinsic evidence); *Wallace v. Adamson, 201 S.E.2d 479 (Ga. App. 1973)* (a deed is sufficient to pass title, and will not be declared void for uncertainty of description, if the descriptive averments contained therein are certain, or if they afford a key by which the land can be definitely located by the aid of extrinsic evidence); *Suttle v. Northside Realty Associates, Inc., 321 S.E.2d 424 (Ga. App. 1984)* (a deed is sufficient to pass title, and will not be declared void for uncertainty of description, if the descriptive averments are certain, or if they afford a key by which the land can be definitely located by the aid of extrinsic evidence); *Chauvin v. Leblanc, 148 So. 2d 182 (La. App. 1962)* (deed will not be declared void for uncertainty in description if it is possible by reasonable rules of construction to ascertain from description, aided by extrinsic evidence, what property is intended to be conveyed; it is sufficient if description furnishes means of identification of land or by which property can be located); *Mitchell v. Nicholson, 3 N.W.2d 83 (N.D. 1942); Kuklies v. Reinert, 256 S.W.2d 435 (Tex. App. 1953)* (a deed will not be declared void for uncertainty of description if it is possible by any rules of construction to ascertain from description, aided by extrinsic evidence, what property it is intended to convey, and it is sufficient if description points out and indicates the premises so that by applying description to land involved it can be found and identified); *American Spiritualist Association v. City of Dallas, 366 S.W.2d 97 (Tex. App.1963)* (deed is not void for uncertainty unless description cannot be made to apply to any definite piece of land even with aid of extrinsic evidence, and a description that does not fully define land but when aided by extrinsic testimony enables land to be identified with certainty, is sufficient); *Colman v. Butkovich, 556 P.2d 503 (Utah 1976)* (problem lies in ascertaining intent with which deed was executed and it should be resolved, if possible, by looking to terms of instrument itself and any reasonable inferences to be drawn therefrom, and if there then remains any uncertainty or ambiguity, it can be aided by extrinsic evidence; accordingly, if from that process property can be identified with reasonable certainty, deed is not invalid for uncertainty); *Consolidation Coal Co. v. Mineral Coal Co., 126 S.E.2d 194 (W. Va. 1962)* (when the description of the land conveyed in a deed is general, the deed will not be held void for uncertainty, if by the aid of extrinsic evidence it can be located and its boundaries ascertained).

(n39)Footnote 39. *Moss v. Crabtree, 18 So. 2d 467 (Ala. 1944); Rye v. Baumann, 329 S.W.2d 161 (Ark. 1959)* (land embraced in an exception in a deed must be described with the same certainty that is required when describing the property conveyed and failure to do so will render the exception void and the grantee takes the whole tract, including that part which was intended to be excepted); *Glasscock v. Mallory, 213 S.W. 8 (Ark. 1919); Blevins v. Manufacturers Record Publishing Co., 105 So. 2d 392 (La. 1957); Day v. Pounders, 94 So. 2d 620 (Miss. 1957); Beasley v. Beasley, 171 So. 680 (Miss. 1937); Contra Farrell v. Bowker, 123 A. 305 (Pa. 1924).*

(n40)Footnote 40. *Bailey v. Martin, 237 S.W.2d 16 (Ark. 1951); Dahlberg v. Holden, 238 S.W.2d 699 (Tex1951).*

(n41)Footnote 41. Descriptions do not identify of themselves; they only furnish the means of identification. They give us certain marks or characteristics -- perhaps historical data or incidents -- by the aid of which we may single out the thing intended from all others; not by the description alone but by that explained and applied. Even lands are not identified by description until we place ourselves in the position of the parties by whom the description has been prepared, and read it with the knowledge of the subject matter which they had at the time.

Jackson v. Woods, 876 P.2d 116 (Colo. App. 1994) (in case of repugnant or contradictory descriptive calls in a deed, court may reject or disregard the one which is false or mistaken); *In re Gatlinburg Motel Enterprises, Ltd., 119 B.R. 955 (Bankr. E.D. Tenn. 1990)* (a deed will not be declared void for uncertainty in description if it is possible by any reasonable rules of construction to ascertain from the description, aided by extrinsic evidence, what property is intended to be conveyed); *Hill v. U.S. Life Title Ins. Co. of New York, 731 S.W.2d 910 (Tenn. App. 1986)* (it is said to be a broad general principle "that a deed will not be declared void for uncertainty in description if it is possible by any reasonable rules of construction to ascertain from the description, aided by extrinsic evidence, what property is intended to be conveyed); *Teledyne Isotopes, Inc. v. Bravenec, 640 S.W.2d 387 (Tex. App. 1982)* (deed should not be declared void for uncertainty if it is possible, by any reasonable rules of construction, to ascertain from description, aided by extrinsic evidence, what property parties intended to convey); *Henderson v. Coombs, 453 S.E.2d 415 (W. Va. 1994)* (no part of a deed should be declared void for uncertainty if it is possible, by any reasonable rule of construction, to ascertain from the description, aided by extrinsic evidence, the property intended to be affected); *Sally-Mike Properties v. Yokum, 332 S.E.2d 597 (W. Va. 1985)* (no part of a deed should be declared void for uncertainty if it is possible, by any reasonable rule of construction, to ascertain from the description, aided by extrinsic evidence, the property intended to be affected); *McCullough v. Waterfront Park Ass'n, Inc., 630 A.2d 1372 (Conn. App. 1993)* (when determining boundary line in deed, if description in deed is clear and unambiguous, it must be given effect; in such case, inquiry is not intent of parties but intent that is expressed in deed). *Lewis v. Saucer, 653 So. 2d 1254 (La. App. 1995)* (in determining true boundary line, even if calls in deed are erroneous, good faith purchaser who buys in accordance with fixed boundaries stated on deed is entitled to land within those fixed boundaries); *Hoffman v. Port Huron, 60 N.W. 831 (Mich. 1894); Willey v. Snyder, 34 Mich. 60 (1876); United States v. 0.08246 Acres of Land, 888 F. Supp. 693 (E.D. Pa. 1995)* (under Pennsylvania law, primary function of trial court in resolving boundary dispute is to ascertain intent of the parties at time of original subdivision of the tract). *Pennsylvania Elec. Co. v. Waltman, 670 A.2d 1165 (Pa. App. 1995)* (primary function of a court faced with a boundary dispute is to ascertain and effectuate intentions of parties at time of original subdivision). *Wall v. Carrell, 894 S.W.2d 788 (Tex. App. 1994)* (when location for boundary line of land is uncertain, primary focus is to ascertain the intention of the parties and apply all rules of construction designed to carry out that intention). *Booten v. Peterson, 209 P.2d 349 (Wash. 1949)* (the purpose of a description is not to identify but to furnish a means of identification).

(n42)Footnote 42. *Moran v. Lezotte, 19 N.W. 757 (Mich. 1884).* A mill site was described in a course as "commencing at a point 50 links east of the bank of the slough." There were no objects which would satisfy the remainder of the description whether such starting point was taken to be fifty links east of the east bank or east of the west bank of the slough, but, under the circumstances, the latter construction was held to be the correct one. *Mack v. Bensley, 23 N.W. 97 (Wis. 1885).*

(n43)Footnote 43. *Arab Corp. v. Bruce, 142 F.2d 604 (5th Cir. 1944); Hare v. McClellan, 662 A.2d 1242 (Conn. 1995)* (in arriving at intent expressed in language used in deed or other conveyance, it is always admissible to consider situation of the parties and circumstances connected with transaction, and every part of writing should be considered with help of that evidence). *Nationsbanc Mortg. Corp. of New York v. Cazier, 908 P.2d 572 (Idaho App. 1995)* (in interpreting and construing deeds, uncertainties should be treated as ambiguities subject to be cleared up by resort to intention of the parties as gathered from the deed, circumstances attending and leading up to its execution, subject matter, and situation of the parties at that time); *McCoy v. McCoy, 868 P.2d 527 (Idaho App. 1994)* (where deed's language is ambiguous, parol or extrinsic evidence describing surrounding facts and circumstances is admissible to prove parties' intent; in such case, interpretation of intent is question of fact to be determined by trier of fact, not only from instrument itself but from extrinsic evidence as well); *Foster v. Foster, 652 N.E.2d 350 (Ill. App. 1995)* (to resolve ambiguity in deed, parties' intentions may be determined by examining language of deed, circumstances surrounding its execution, and parties' subsequent conduct); *Flanagan v. Prudhomme, 644 A.2d 51 (N.H. 1994)* (Supreme Court's interpretation of disputed deeds is based on parties' intentions gleaned from construing language of deed from as nearly as possible the position of parties at time of conveyance and in light of surrounding circumstances; extrinsic evidence of parties' intentions and circumstances surrounding conveyance may be used to clarify terms of ambiguous deed);

Crockett v. McKenzie, 867 P.2d 463 (Okla. 1994) (when court determines that deed is ambiguous, it has duty to resolve ambiguity by considering parol and extrinsic evidence, including parties' admissions and other circumstances; in interpreting conveyance, court must give effect to intent of parties); *Sheaffer v. Caruso, 676 A.2d 204 (Pa. 1996); Davis v. Henning, 462 S.E.2d 106 (Va. 1995)* (in construing deeds, it is duty of court to ascertain intention of parties, gathered from language used, and general purpose and scope of instrument in light of surrounding circumstances).

(n44)Footnote 44. *Scott v. Dunkle Box & Lbr. Co., 152 S.W. 1025 (Ark. 1912); Thompson v. Southern California Motor Road Co., 23 P. 130 (Cal. 1890); Truett v. Adams, 5 P. 96 (Cal. 1884); Hare v. McClellan, 662 A.2d 1242 (Conn. 1995)* (in arriving at intent expressed in language used in deed or other conveyance, it is always admissible to consider situation of the parties and circumstances connected with transaction, and every part of writing should be considered with help of that evidence); *Nationsbanc Mortg. Corp. of New York v. Cazier, 908 P.2d 572 (Idaho App. 1995)* (in interpreting and construing deeds, uncertainties should be treated as ambiguities subject to be cleared up by resort to intention of the parties as gathered from the deed, circumstances attending and leading up to its execution, subject matter, and situation of the parties at that time); *Foster v. Foster, 652 N.E.2d 350 (Ill. App. 1995)* (to resolve ambiguity in deed, parties' intentions may be determined by examining language of deed, circumstances surrounding its execution, and parties' subsequent conduct); *Cilley v. Childs, 73 Me. 130 (1882); Jones v. Pashby, 29 N.W. 374 (Mich. 1886); Hubbard v. Whitehead, 121 S.W. 69 (Mo. 1909); Wolf v. Dyer, 8 S.W. 551 (Mo. 1888); Boland v. Byrne, 145 S.W.2d 755 (Mo. App. 1940); Elliott v. Gilchrist, 9 A. 382 (N.H. 1887); Flanagan v. Prudhomme, 644 A.2d 51 (N.H. 1994)* (Supreme Court's determination of disputed deeds is based on parties' intentions gleaned from construing language of deed from as nearly as possible the position of parties at time of conveyance and in light of surrounding circumstances); *Darling v. Alexander, 114 N.Y.S. 334 (N.Y. App. Div. 1909); Gernt v. Floyd, 174 S.W. 267 (Tenn. 1915); Davis v. Henning, 462 S.E.2d 106 (Va.1995)* (in construing deeds, it is duty of court to ascertain intention of parties, gathered from language used, and general purpose and scope of instrument in light of surrounding circumstances); *Phillips v. Fox, 458 S.E.2d 327 (W. Va. 1995)* (in clarifying ambiguities in deed, it is court's duty to place itself in situation of parties, as near as may be, to determine meaning and intent of language employed in deed); *Whitney v. Robinson, 10 N.W. 512 (Wis. 1881); Messer v. Destreich, 10 N.W. 6 (Wis. 1881).*

(n45)Footnote 45. *Schweitzer v. Crandell, 291 S.W. 68 (Ark. 1927); Devlin v. Powell, 227 P. 231 (Cal. App. 1924); Flanagan v. Prudhomme, 644 A.2d 51 (N.H. 1994)* (Supreme Court's determination of disputed deeds is based on parties' intentions gleaned from construing language of deed from as nearly as possible the position of parties at time of conveyance and in light of surrounding circumstances); *First Sav. Bank & Trust Co. v. Elgin, 225 P. 582 (N.M. 1924); People v. Call, 223 N.Y.S. 257 (N.Y. App. Div. 1927); Blair v. Rorer, 116 S.E. 767 (Va. 1923); Sanborn v. Miski, 209 N.W. 759 (Wis 1926).*

(n46)Footnote 46. *Cardin v. Outdoor East, 468 S.E.2d 31 (Ga. App. 1996)* (even if lease description of the leased property were insufficient for uncertainty or vagueness, taking of actual possession by lessee would have cured deficiency); *Richards v. Snider, 3 P. 177 (Or. 1884).*

(n47)Footnote 47. *Alford v. Rodgers, 6 So. 2d 409 (Ala. 1942); Price v. Price, 182 S.W.2d 879 (Ark. 1944); Andreau v. Watkins, 7 So. 876 (Fla. 1890); Oglesby v. Volunteer State Life Ins. Co., of Tennessee, 23 S.E.2d 404 (Ga. 1942); Caddell v. Eagle Coal Co., 138 S.W. 304 (Ky. 1911); Cupples v. Harris, 11 So. 2d 609 (La. 1942); Beugnot v. New Orleans Land Co., 71 So. 947 (La. 1916); Schroeder v. Turpin, 161 S.W. 716 (Mo. 1913); Blumenthal v. Blumenthal, 158 S.W. 648 (Mo. 1913); Webster Oil Co., Inc. v. McLean Hotels, Inc., 878 S.W.2d 892 (Mo. App. 1994)* (deed conveying real estate passes title to land described in the instrument); *Foreman v. Sholl, 439 S.E.2d 169 (N.C. App. 1994)* (description of land that must be contained in all conveyances, including deeds, purporting to be color of title must be either certain in itself or capable of being reduced to certainty by something extrinsic to which deed refers; description, though indefinite, is sufficient if court can, with aid of extrinsic evidence which does not add to, enlarge, or in any way change the description, fit it to the property conveyed by the deed); *Jones v. Smith 73 N.Y. 205 (1878); Coleman v. Manhattan Beach Imp. Co., 94 N.Y. 229 (1883); Thayer v. Finton, 15 N.E. 615 (N.Y. 1888); Lockwood v. Hall, 44 N.Y.S.2d 345 (N.Y. App. Div. 1944); Lott v. Dashiell, 233 S.W. 1103 (Tex. App. 1921); Minor v. Powers, 26 S.W. 1071 (Tex. App. 1893); Meadow River Lbr. Co. v. Smith, 30 S.E.2d 392 (W. Va. 1944).*

(n48)Footnote 48. *Brown v. Powers, 52 So. 647 (Ala. 1910); Foreman v. Sholl, 439 S.E.2d 169 (N.C. App. 1994)* (all conveyances purporting to be color of title, including deeds, must contain, as essential element of conveyance, description of identifying land; if conveyance does not contain such description, it is void); *Baylor v. Soska, 658 A.2d 743 (Pa. 1995)* (the only method by which adverse possessor may convey title asserted by adverse possession is to describe in the instrument of conveyance by means minimally acceptable for conveyancing of realty that which is intended to be conveyed).

(n49)Footnote 49. *Beugnot v. New Orleans Land Co., 71 So. 947 (La. 1916); Thayer v. Finton, 15 N.E. 615 (N.Y. 1888); Robbins v. HNG Oil Co., 878 S.W.2d 351 (Tex. App. 1994)* (recitation in deed that it conveyed all property inherited through decedent could not operate to enlarge specific description given in deed of property conveyed) (where a recitation was made to another deed or another record for the purpose of showing from what source the real property had been derived and as a help in tracing the title, then such a reference or referral will not and could not operate to enlarge the specific description given in the deed which contained the reference); *Hansen v. Stichting Mayflower Recreational Fonds, 898 F.Supp. 1503 (D. Utah 1995)* (under Utah law, complete and unambiguous absence of any description of parcel of mined property in deeds conveying interests in surrounding properties was conclusive evidence of parties' intent not to convey unmentioned parcel).

(n50)Footnote 50. *Youmans v. Moore, 87 S.E. 273 (Ga. 1915); Foreman v. Sholl, 439 S.E.2d 169 (N.C. App. 1994)* (description of land that must be contained in all conveyances, including deeds, purporting to be color of title must be either certain in itself or capable of being reduced to certainty by recurrence to something extrinsic to which deed refers; description, though indefinite, is sufficient if court can, with aid of extrinsic evidence which does not add to, enlarge, or in any way change the description, fit it to the property conveyed by the deed).

(n51)Footnote 51. *Durden v. Reynolds, 440 S.E.2d 170 (Ga. 1994)* (parol evidence may not add to, enlarge or any way change description of property contained in deed); *Coleman v. Manhattan Beach Imp. Co., 94 N.Y. 229 (1883); Dodge v. Lavin, 83 A. 1009 (R.I. 1912); Minor v. Powers, 26 S.W. 1071 (Tex. App. 1893); Ward v. Nelson, 131 S.W. 310 (Tex. App. 1910).*

(n52)Footnote 52. *Sepulveda v. Apablasa, 77 P.2d 526 (Cal. App. 1938); Foreman v. Sholl, 439 S.E.2d 169 (N.C. App. 1994)* (all conveyances purporting to be color of title, including deeds, must contain, as an essential element of the conveyance, "a description identifying the land;" if the conveyance does not contain such a description, it is void; the description must be "either certain in itself or capable of being reduced to a certainty by a recurrence to something extrinsic to which the deed refers."); *Byars v. Johnson 213 S.W.2d 294 (Tex. App. 1948); Walchshauser v. Hyde, 890 S.W.2d 171 (Tex. App. 1994)* (the principle that an instrument conveying real estate is void under the Statute of Frauds unless the real estate's description is so definite and certain upon the face of the instrument itself, or in some other writing referred to, that the land can be identified with reasonable certainty); *City of Parkville v. Northern Farms, 950 S.W.2d 882 (Mo. App. 1997)* (city petitioned for declaratory judgment authorizing it to annex contiguous farmland).

(n53)Footnote 53. *Prentice v. Stearns, 113 U.S. 435,* (1885); *Prentice v. Duluth Storage & Forwarding Co., 58 F. 437 (8th Cir. 1893); Prentice v. Northern Pac. R.R., 43 F. 270 (C.C. Minn. 1890).*

(n54)Footnote 54. *Tatum v. Tatum, 1 So. 195 (Ala. 1887); Grimes v. Jordan, 260 S.W.2d 220 (Tex. App. 1953); Greenan v. Solomon 472 S.E.2d 54 (Va. 1996)* (if an estate is conveyed in one part of an instrument, by clear, unambiguous, and explicit words, such estate of interest or benefit is not diminished nor destroyed by words in another part of instrument, unless terms that diminish or destroy estate before given be as clear and decisive as terms by which it was created).

(n55)Footnote 55. *Hansen v. Stichting Mayflower Recreational Fonds, 898 F.Supp. 1503 (D. Utah 1995)* (under Utah law, parol evidence may not Contradict, vary, or add to deeds); *Bliss v. Bliss, 898 P.2d 1081 (Idaho 1995)* (evidence regarding intent and conversations when deed was executed was inadmissible to contradict deed); *Robbins v. HNG Oil Co., 878 S.W.2d 351,* (Tex. App. 1994) (the deed was unambiguous on its face so that extrinsic evidence could

not be admitted to contradict the deed or to create ambiguities); *Jasper State Bank v. Goodrick, 107 S.W.2d 600 (Tex. App. 1937).*

(n56)Footnote 56. *Foreman v. Sholl, 439 S.E.2d 169 (N.C. App. 1994)* (description of land that must be contained in all conveyances, including deeds, purporting to be color of title must be either certain in itself or capable of being reduced to certainty by something extrinsic to which deed refers).

(n57)Footnote 57. *Schweitzer v. Heppner, 622 N.Y.S.2d 142 (N.Y. App. Div. 1995)* (parol evidence may not be used to vary a boundary description or call set forth in a deed).

(n58)Footnote 58. *Hansen v. Stichting Mayflower Recreational Fonds, 898 F.Supp. 1503 (D. Utah 1995)* (when construing deeds in the absence of ambiguity, the construction of deeds is a question of law for the court, and the main object in construing a deed is to ascertain the intention of the parties, especially that of the grantor, from the language used; the description of the property in a deed is prima facie an expression of the intention of the grantor); *Morse v. Kelley, 26 N.E.2d 326 (Mass. 1940).*

(n59)Footnote 59. *Maier v. Continental Oil Co., 120 F.2d 237 (7th Cir. 1941); Fletcher v. Lyon, 123 S.W. 801 (Ark. 1909); More v. Massini, 37 Cal. 432 (Cal. 1869); Blume v. MacGregor, 148 P.2d 656 (Cal. App. 1944); Law v. Hempstead, 10 Conn. 23 (1833); Black v. Skinner Mfg. Co., 43 So. 919 (Fla. 1907); Harris v. Hull, 70 Ga. 831 (1883); Henry v. Metz, 46 N.E.2d 945 (Ill. 1942); Case v. Owen, 38 N.E. 395 (Ind. 1894); Patton Park, Inc. v. Pollack, 55 N.E.2d 328 (Ind. App. 1944); Consolidated Rail Corp., Inc. v. Lewellen, 666 N.E.2d 958 (Ind. App. 1996)* (a deed to a railroad is to be construed in its entirety and the parts are to be construed together so that no part is rejected); *Hess v. Kernen Bros., 149 N.W. 847 (Iowa 1914); Smyth v. Fogle, 129 N.W. 735 (Iowa 1911); Wendtlandt v. National Coop. Refinery Ass'n, 215 P.2d 209 (Kan. 1950); Runyon v. Hatfield, 157 S.W. 17 (Ky. 1913); Coombs v. Frey, 133 S.W. 758 (Ky. 1911); Williams v. Grimm 112 S.W. 839 (Ky. 1908); Funkhouser v. Porter, 107 S.W. 202 (Ky. 1908); Pierce v. Hunter, 13 So. 2d 259 (La. 1943); Simpson v. Blaisdell, 27 A. 101 (Me. 1892); Cilley v. Childs, 73 Maine 130 (1882); Herrick v. Hopkins, 23 Maine 217 (1843); Moore v. Griffin, 22 Maine 350 (1843); Bright v. Lake Linganore Ass'n, Inc., 656 A.2d 377 (Md. App. 1995)* (generally, all circumstances surrounding the execution of a deed and all parts of the deed may be utilized in order "that every word of it may take effect and none be rejected"); *Logsdon v. Brailer Mining Co., 123 A. 113 (Md. 1923). Brackett v. Pitcher, 5 N.E.2d 552 (Mass. 1936); Thatcher v. St. Andrews Church, 37 Mich. 264 (1877); Jones v. Pashby, 29 N.W. 374 (Mich. 1886); Moran v. Lezotte, 19 N.W. 757 (Mich. 1884); De Paige v. Douglas, 136 S.W. 345 (Mo. 1911); Stoepler v. Silverberg, 119 S.W. 418 (Mo. 1909); Wolfe v. Dyer, 8 S.W. 551 (Mo. 1888); Lyford v. Laconia, 72 A. 1085 (N.H. 1909); Wharton v. Brick, 8 A. 529 (N.J. Sup. 1887); Buffalo, N.Y. & E.R.R. v. Stigeler, 61 N.Y. 348 (1874); Shaffer v. Hahn, 15 S.E. 1033 (N.C. 1892); Brown v. Brown, 84 S.E. 25 (N.C. 1915); Troy & North Carolina Gold Min. Co. v. Snow Co., 87 S.E. 40 (N.C. 1915); In re Wyatt's Claim, 141 N.E.2d 308 (Ohio App. 1955); Franklin Drilling Co. v. Jackson, 217 P.2d 816 (Okla. 1950); Brier Hill Collieries v. Gernt, 175 S.W. 560 (Tenn. 1915); Harris v. Windsor, 294 S.W.2d 798 (Tex. 1956); Benge v. Scharbauer, 259 S.W.2d 166 (Tex. 1953); Aelvoet v. Schultz, 181 S.W.2d 1011 (Tex. App. 1944); Burgess v. McCommas, 129 S.W. 382 (Tex. App. 1910); Cleveland v. Sims, 6 S.W. 634 (Tex. 1887); Carpenter v. Camp. Mfg. Co., 71 S.E. 559 (Va. 1911); Young v. Camp Mfg. Co., 66 S.E. 843 (Va. 1910); Skamania Boom Co. v. Youmans, 116 P. 645 (Wash. 1911); McDougal v. Musgrave, 33 S.E. 281 (W. Va. 1899); Parkinson v. McQuaid, 11 N.W. 682 (Wis. 1882).*

(n60)Footnote 60. *Drayson v. Wolff, 661 N.E.2d 486 (Ill. App. 1996)* (every word in deed shall be gathered and, if possible, given effect); *Urbaitis v. Commonwealth Edison, 575 N.E.2d 548 (Ill. 1991); Timmons v. Timmons, 96 N.E. 622 (Ind. App. 1911); Maxwell v. McCall, 124 N.W. 760 (Iowa 1910); Brungardt v. Smith, 290 P.2d 1039 (Kan. 1955); Bright v. Lake Linganore Association Inc., 656 A.2d 377 (Md. App. 1995); Maxwell v. Harper, 98 P. 756 (Wash. 1909).*

(n61)Footnote 61. *McLendon v. Ravesies, 173 So. 303 (Miss. 1937); Jasper State Bank v. Goodrich, 107 S.W.2d 600 (Tex. App. 1937); State v. City of Murfreesboro, 1994 WL 585678 (Tenn. App. 1994)* (it is "a broad general principle that a deed will not be declared void for uncertainty in description if it is possible by any reasonable rules of construction to ascertain from the description, aided by extrinsic evidence, what property is intended to be conveyed").

(n62)Footnote 62. *Department of Conservation ex rel. People v. Fairless, 653 N.E.2d 446 (Ill. App. 1995)* (the fundamental purpose of the construction of a deed is to ascertain the intention of the parties, which is to be determined from the language used in the instrument as a whole); *Magnolia Petroleum Co. v. West, 30 N.E.2d 24 (Ill. 1940); Schweitzer v. Heppner, 622 N.Y.S.2d 142 (N.Y. App. Div. 1995)* (Real Property Law § 240(3) provides that: "Every instrument creating, transferring ... real property must be construed according to the intent of the parties, so far as such intent can be gathered from the whole instrument, and is consistent with the rules of law").

(n63)Footnote 63. *Mitchell v. Moore, 13 So. 2d 314 (Fla. 1943); Wolfson v. Succession of Lisso, 6 So. 2d 231 (La. App. 1942); Gates v. Asher, 280 S.W.2d 247 (Tex. 1995)* (words of description in deed are given liberal construction in order that conveyance may be upheld, and parol evidence is admitted to explain the descriptive words and to identify the land, where the instrument contains the "nucleus" of description).

(n64)Footnote 64. *Skerritt Inv. Co. v. Englewood, 248 P. 6 (Colo. 1926); Department of Conservation ex rel. People v. Fairless, 653 N.E.2d 446 (Ill. App. 1995)* (the fundamental purpose of the construction of a deed is to ascertain the intention of the parties, which is to be determined from the language used in the instrument as a whole); *Weaver v. Ellis, 469 N.E.2d 251 (Ill. 1984); Mitchell v. Mays, 268 S.W. 806 (Ky. 1925); Dill-Cramer-Truitt Corp. v. Jacksonville Lbr. Co., 112 S.E. 740 (N.C. 1922); Moore v. Gilchrist, 273 S.W. 308 (Tex. App. 1925); Sanborn v. Miski, 209 N.W. 759 (Wis. 1926).*

(n65)Footnote 65. *Keith v. Woodruff, 34 So. 911 (Ala. 1902); Hall v. Bartlett, 112 P. 176 (Cal. 1910); Davis v. Randall, 99 P. 322 (Colo. 1909); Cannon v. Emmans, 46 N.W. 356 (Minn. 1890); Schweitzer v. Heppner, 622 N.Y.S.2d 142 (N.Y. App. Div. 1995)* (where the language used in a deed is susceptible of more than one interpretation, the courts will look beyond the written instrument to the surrounding circumstances).

(n66)Footnote 66. *Powers v. Rawles, 112 S.E. 78 (S.C. 1922)* (in determining the location of the beginning corner of the land conveyed, the court must look to the entire description contained in the deed). *Battle v. Wolfe, 283 S.W. 1073 (Tex. App. 1926).*

(n67)Footnote 67. *Bentley v. Murray, 177 S.W. 180 (Ky. 1909).*

(n68)Footnote 68. *Thayer v. Finton, 15 N.E. 615 (N.Y. 1888); Hoffman v. Chapman, 170 S.W.2d 496 (Tex. App. 1942).*

(n69)Footnote 69. *Haley v. Murray, 177 S.W.2d 333 (Tex. App. 1944).*

(n70)Footnote 70. *United States v. 12,918.28 Acres of Land in Webster Parish, La., 61 F. Supp. 545 (W.D. La. 1945).*

(n71)Footnote 71. *Thompson v. Southern California Motor Road Co., 23 P. 130 (Cal. 1890); Walsh v. Hill, 38 Cal. 481 (Cal. 1869); Department of Conservation ex rel. People v. Fairless, 653 N.E.2d 446 (Ill. App. 1994)* (where an uncertainty as to a description of land exists, extrinsic evidence of the facts and circumstances attending the transaction merit consideration in construing the deed. "[W]here there is an ambiguity or question in construing a deed, it should be construed most favorably on behalf of the grantee"); *Denver, M. & R.R. v. Lockwood, 38 P. 794 (Kan. 1895); Seaton v. Hixon, 12 P. 22 (Kan. 1886); Haynes v. Heller, 12 Kan. 381 (1874); Cannon v. Emmans, 46 N.W. 356 (Minn. 1890); Witt v. St. Paul & N. P. Ry., 35 N.W. 862 (Minn. 1888).*

(n72)Footnote 72. *Mettaart v. Allen, 39 N.E. 239 (Ind. 1894); Pence v. Armstrong, 95 Ind. 191 (1883).*

(n73)Footnote 73. *Ladies Seamens Friends Soc. v. Halstead, 19 A. 658 (Conn. 1889); Seneca Nation v. Hugaboom, 30 N.E. 983 (N.Y. 1892); Dickson v. Wilson, 82 N.C. 487 (1880); Gover v. Queen, 189 S.W.2d 672 (Ky. 1945)* (presumption is that a boundary line running from point to point is a straight line); *Siler v. Cannon, 130 S.W.2d 742 (Ky. 1939)* (this is rebuttable by a showing of actual markings of boundary lines on the ground).

(n74)Footnote 74. *Bell v. Powers, 121 S.W. 991 (Ky. 1909).*

(n75)Footnote 75. *Grand County v. Larimer County, 11 P. 193 (Colo. 1886); Gallatin Tpk. Co. v. State, 84 Tenn. 36 (1885); Jackson v. Welsh Land Ass'n, 41 S.E. 920 (W. Va. 1902).*

(n76)Footnote 76. *McLeod v. Reyes, 40 P.2d 839 (Cal. App. 1935); Strayhorn v. Jones, 284 S.W.2d 331 (Ky. 1955).*

(n77)Footnote 77. *Schaller v. Florence, 259 N.W. 529 (Minn. 1935).* Meander lines are not per se boundary lines, their purpose being to fix limits for determining quantity of land to be paid for and they are not a limitation on title. *State v. Brace, 36 N.W.2d 330 (N.D. 1949).*

(n78)Footnote 78. *Hallaian v. Collins, 242 P.2d 58 (Cal. App. 1952); Edwards v. Williamson, 211 S.W.2d 862 (Ky. 1948).*

(n79)Footnote 79. *Gunn v. Brower, 105 P. 702 (Kan. 1909); Jones v. Pashby, 29 N.W. 374 (Mich. 1886); Dart v. Barbour, 32 Mich. 267 (1875); Cogan v. Cook, 22 Minn. 137 (1875); Farley v. Deslonde, 6 S.W. 786 (Tex. 1888); Owen v. Henderson, 47 P. 215 (Wash. 1896).* But "half" may be used by the parties to convey a particular tract, not merely a half in quantity. *Brewer v. Schammerhorn, 332 P.2d 526 (Kan. 1958).*

(n80)Footnote 80. *Jones v. Pashby, 12 N.W. 884 (Mich. 1882), 29 N.W. 374 (Mich. 1886).*

(n81)Footnote 81. *Sun Oil Co. v. Smith, 113 S.W.2d 683 (Tex. App. 1938).*

(n82)Footnote 82. A deed purporting to reconvey one-half of a tract of land which was previously conveyed by the grantee to the grantor containing one hundred acres, and stating that, "This deed is intended to convey fifty acres of land," was held ineffective as a conveyance, where it furnished no means of identifying the fifty acres or the one-half of the one hundred acres attempted to be conveyed; *Lampier v. Ley, 113 S.W.2d 955 (Tex. App. 1938).* "The term 'eastern one-half,' in a deed conveying one-half of a tract of land, in the absence of admissible parol evidence disclosing a different intention, would mean the eastern half, formed by a line to be run due north and south through the tract; but if it appears that before the deed was executed a division in two parts, supposedly equal in area, had been made by a line, having a different bearing actually marked on the ground by stakes and fences, according to which possession had been held for a number of years, and the parties have since held possession according to such line, the words must be taken to mean the eastern one-half as so laid off and held in severalty." *Bank v. Catzen, 60 S.E. 499 (W. Va. 1908).*

(n83)Footnote 83. *Soukup v. Union Inv. Co., 51 N.W. 167 (Iowa 1892).*

(n84)Footnote 84. *Collins v. Storm, 39 N.W. 161 (Iowa 1888); Roberts v. Deeds, 10 N.W. 740 (Iowa 1881).*

(n85)Footnote 85. *W.C. Early & Co. v. Long, 42 So. 348 (Miss. 1906); Parrow v. Proulx, 15 A.2d 835 (Vt. 1940).*

(n86)Footnote 86. *Hughes v. Fifer, 31 N.E.2d 634 (Ind. 1941); Kitzman v. Carl, 110 N.W. 587 (Iowa 1907); Frey v. Etzel, 151 N.W. 807 (Wis. 1915). See Eastland v. Robinson, 25 S.W.2d 1028 (Ky. 1930).* "More or less" means that each party runs risk of gain or loss but they will abide by their bargain. *Spires v. Nix, 57 So. 2d 89 (Ala. 1952).*

(n87)Footnote 87. *Estes v. Odom, 18 S.E. 355 (Ga. 1893).*

(n88)Footnote 88. *Id.*

(n89)Footnote 89. *Harrell v. Hill, 19 Ark. 102 (1957); Russo v. Corideo, 129 A. 849 (Conn. 1925); Mahrt v. Mann, 210 N.W. 566 (Iowa 1926); Kitzman v. Carl, 110 N.W. 587 (Iowa 1907); Eastland v. Robinson, 25 S.W.2d 1028 (Ky. 1930); Brewer v. Schammerhorn, 332 P.2d 526 (Kan. 1958); Pierce v. Lefort, 200 So. 801 (La. 1941); Oakes v. De Lancey, 30 N.E. 974 (N.Y. 1892); Frey v. Etzel, 151 N.W. 807 (Wis. 1915).* "More or less" is merely a waiver of quantity

and means that the parties take the risk as to quantity; *Salyer v. Poulos, 122 S.W.2d 996 (Ky. 1938).* They are words of precaution and do not destroy statements of distance and quantity if there are no other guides; *Parrow v. Proulx, 15 A.2d 835 (Vt. 1940).* A description, 24 acres more or less off the north end takes 24 acres off the north end the words more or less being disregarded. *Lovejoy v. McKibben, 74 So. 281 (Miss. 1917).*

(n90)Footnote 90. *Estes v. Odom, 18 S.E. 355 (Ga. 1893); Hosleton v. Dickinson, 1 N.W. 550 (Iowa 1879); Armstrong v. Brownfield, 4 P. 185 (Kan. 1884); Boggs v. Bush, 122 S.W. 220 (Ky. 1909); Clark v. Scammon, 62 Me. 47 (1873); Williamson v. Hall, 62 Mo. 405 (1876); Baker v. Light, 16 S.W. 330 (Tex. 1891); Frost Lbr. Industries, Inc. v. Brantley, 109 S.W.2d 999 (Tex. App. 1937); Pickens v. Pickens, 77 S.E. 365 (W. Va. 1913).*

(n91)Footnote 91. *Zeppa v. Houston Oil Co., 113 S.W.2d 612 (Tex. App. 1938).*

(n92)Footnote 92. *Carling v. Wilson, 58 So. 417 (Ala. 1912); Wightman v. Campbell, 146 N.Y.S. 666 (N.Y. App. Div. 1914), aff'd* by *Wightman v. Campbell, 112 N.E. 184 (N.Y. 1916).*

(n93)Footnote 93. *Pack v. Whitaker, 65 S.E. 496 (Va. 1909). Contra Slagle v. Clark, 237 S.W.2d 430 (Tex. App. 1951).*

(n94)Footnote 94. *Myer v. Wooten, 102 S.W. 423 (Tex. App. 1907).*

(n95)Footnote 95. *Rogers v. Manning, 48 S.E.2d 527 (Ga. 1948). See Malone v. Klaer, 46 S.E.2d 495 (Ga. 1948).*

(n96)Footnote 96. *Wooten v. State, 177 S.W.2d 56 (Tex. 1944).*

(n97)Footnote 97. *Finlay v. Stevens, 36 A.2d 767 (N.H. 1944).*

(n98)Footnote 98. *Maxwell v. Hosmer, 138 Mass. 207 (1885).*

(n99)Footnote 99. *Kinsey v. Satterthwaite, 88 Ind. 342 (Ind. 1882).*

(n100)Footnote 100. *Vandegrift v. Shortridge, 61 So. 897 (Ala. 1913).*

(n101)Footnote 101. *Yard v. Ocean Beach Ass'n, 24 A. 729* (N.J. Err. & App. 1892); *State v. Franco-American Securities, 172 S.W.2d 731 (Tex. App. 1943).* In *Blow v. Vaughan, 10 S.E. 891 (N.C. 1890),* a distinction was made between the words "adjoining" and "bounded," but this was repudiated in the later case of *Perry v. Scott, 14 S.E. 294 (N.C. 1891).*

(n102)Footnote 102. *Yard v. Ocean Beach Ass'n, 24 A. 729* (N.J. Err. & App. 1892); *Morris Canal & Ganking Co. v. Brown, 27 N.J.L. 13 (N.J. Supp. 1858), rev'd* by *Brown v. Morris Canal & Banking Co., 27 N.J.L. 648* (N.J. Err. & App. 1858).

(n103)Footnote 103. *Yuba v. Kate Hayes Min. Co., 74 P. 1049 (Cal. 1903).*

(n104)Footnote 104. *Holston Salt & Plaster Co. v. Campbell, 16 S.E. 274 (Va. 1892).*

(n105)Footnote 105. *Linn County Bank v. Hopkins, 28 P. 606 (Kan. 1892); Kresin v. Jau, 15 Minn. 116 (1870); Bulger v. Robertson, 50 Mo. App. 490 (1892); Griffin v. Denison Land Co., 119 N.W. 1041 (N.D. 1908); Holston Salt & Plaster Co. v. Campbell, 16 S.E. 274 (Va. 1892).*

(n106)Footnote 106. *Morris v. Gibson, 134 S.E. 796 (Ga. App. 1926).*

(n107)Footnote 107. *Wood v. Hildebrand, 42 A.2d 919 (Md. 1945).*

(n108)Footnote 108. *Currier v. Nelson, 31 P. 531 (Cal. 1892); Martin v. Lloyd, 29 P. 491 (Cal. 1892); Irwin v.*

Towne, 42 Cal. 326 (1871); Faris v. Phelan, 39 Cal. 612 (1870); Fratt v. Woodward, 32 Cal. 219 (1867); Bosworth v. Danzien, 25 Cal. 296 (1864); Plaquemines Oil & Dev. Co. v. State, 23 So. 2d 171 (La. 1945); Livingston Oil & Gas. Co. v. Shasta Oil Co., 114 S.W.2d 378 (Tex. App. 1938); Roanoke v. Blair, 60 S.E. 75 (Va. 1907); Reed v. Tacoma Bldg. & Sav. Ass'n, 26 P. 252 (Wash. 1891). "Due north" has a legal meaning of survey on an astronomical basis. *Richfield Oil Corp. v. Crawford, 249 P.2d 600 (Cal. 1952).* The words "southerly" or "westerly" are not necessarily due compass calls. *Brown v. McCaffrey, 60 A.2d 792 (Me. 1948). Fosburgh v. Sando, 166 P.2d 850 (Wash. 1946).*

(n109)Footnote 109. *Green v. Palmer, 229 P. 876 (Cal. App. 1924).*

(n110)Footnote 110. *Foster v. Foss, 77 Me. 279 (1885); Segar v. Babcock, 26 A. 257 (R.I. 1893).*

(n111)Footnote 111. *Meadows v. Michel, 120 N.Y.S. 319 (N.Y. App. Div. 1909).*

(n112)Footnote 112. *Martt v. McBrayer, 166 S.W.2d 823 (Ky. 1942).*

(n113)Footnote 113. Descriptions do not identify of themselves; they only furnish the means of identification. They give us certain marks or characteristics -- perhaps historical data or incidents -- by the aid of which we may single out the thing intended from all others, not by the description alone but by that explained and applied. Even lands are not identified by description until we place ourselves in the position of the parties by whom the description has been prepared, and read it with the knowledge of the subject matter which they had at the time. *See Hoffman v. Port Huron, 60 N.W. 831 (Mich. 1894).* The purpose of a description is not to identify but to furnish a means of identification; *Booten v. Peterson, 209 P.2d 349, 384 (Wash. 1949).*

(n114)Footnote 114. *Moran v. Lezotte, 19 N.W. 757 (Mich. 1884); Alexy v. Salvador, 630 N.Y.S.2d 133 (N.Y. App. Div. 1995)* (prior negotiations and agreements regarding sale of land merge into and are extinguished by deed of conveyance and any inconsistencies between contract and deed are presumed to be explained and governed solely by the latter except where there is clear intent evidenced by parties that particular provision shall survive delivery of deed or where there exists collateral undertaking that is not connected with title, possession or quantity of land).

A mill site was described in a course as "commencing at a point 50 links east of the bank of the slough." There were no objects which would satisfy the remainder of the description whether such starting point was taken to be fifty links east of the east bank or east of the west bank of the slough, but, under the circumstances, the latter construction was held to be the correct one. *Mack v. Bensley, 23 N.W. 97 (Wis. 1885).*

(n115)Footnote 115. *Arab Corp. v. Bruce, 142 F.2d 604 (5th Cir. 1994); Department of Conservation v. Fairless, 653 N.E.2d 446 (Ill. App. 1995)* (the fundamental purpose of the construction of a deed is to ascertain the intention of the parties; where, however, an uncertainty as to a description of land exists, extrinsic evidence of the facts and circumstances attending the transaction merit consideration in construing the deed); *Schweitzer v. Heppner, 622 N.Y.S.2d 142 (N.Y. App. Div. 1995); Foreman v. Sholl, 439 S.E.2d 169 (N. C. App. 1994)* (a patent ambiguity is such an uncertainty appearing on the face of the instrument that the court, reading the language in the light of all the facts and circumstances referred to in the instrument, is unable to derive therefrom the intention of the parties as to what land was to be conveyed); *Rath v. Haycock, 905 P.2d 854 (Or. App. 1995); Doman v. Brogan, 592 A.2d 104 (Pa. Super. Ct. 1991)* (where calls in deed conflict to present latent ambiguity, before issue of true location of boundary line is submitted to jury, court must first ask whether conflicting boundary descriptions admit of more than one reasonable division; in making this determination, court should consider all evidence of parties' intentions, extrinsic or otherwise, offered in support of conflicting boundary descriptions, including consideration of instrument as whole, its subject matter and circumstances attending its execution).

(n116)Footnote 116. *Saulsberry v. Saulsberry, 121 F.2d 318 (6th Cir. 1941); Ezikovich v. Linden, 618 A.2d 570 (Conn. App. 1993)* (to determine the nature of an easement created by deed, we must discern the intention of the parties to the deed by considering the language of the deed, the situation of the property and the surrounding circumstances);

Arab Corp. v. Bruce, 50 F. Supp. 350 (E.D. La. 1943); Magnolia Petroleum Co. v. West, 30 N.E.2d 24 (Ill. 1940); Bryant v. Fordyce, 78 P. 32 (Kan. 1938); Sermersheim v. Ackerman, 144 S.W.2d 804 (Ky. 1940); Bice v. Holmes, 14 N.W.2d 800 (Mich. 1944); Western Auto Supply Co. v. Komiz Tire Co., 48 N.Y.S.2d 256 (N.Y. App. Div. 1944); Monk v. Kornegay, 29 S.E.2d 754 (N.C. 1944); North Shore, Inc. v. Wakefield, 530 N.W.2d 297 (N.D. 1995) (the language of the deed, if clear and explicit, governs its interpretation; the parties' mutual intentions must be ascertained from the four corners of the deed, if possible, although a court may look to the circumstances under which a deed was made to explain ambiguous language); *Crockett v. McKenzie, 867 P.2d 463 (Okla. 1994)* (when court determines that deed is ambiguous, it has duty to resolve ambiguity by considering parol and extrinsic evidence, including parties' admissions and construction and other circumstances); *Sides v. Cleland, 648 A.2d 793 (Pa. Super. Ct. 1994)* (in ascertaining the scope of an easement created by express grant, the intention of the parties to the grant must be advanced); *Wiegand v. Wiegand, 37 A.2d 492 (Pa. 1944); Green v. Kunkel, 183 S.W.2d 585 (Tex. App. 1944); Davis v. Henning, 462 S.E.2d 106 (Va. 1995)* (in construing deeds, it is the duty of the court to ascertain the intention of the parties, gathered from the language used, and the general purpose and scope of the instrument in the light of surrounding circumstances); *Phillips v. Fox, 458 S.E.2d 327 (W. Va. 1995)* (as a general principle, ambiguities in a deed are to be clarified by resort to the intention of the parties ascertained from the deed itself, the circumstances surrounding its execution, as well as the subject matter and the parties' situation at that time).

(n117)Footnote 117. *Scott v. Dunkle Box & Lbr. Co., 152 S.W. 1025 (Ark. 1912); Schweitzer v. Crandell, 291 S.W. 68 (Ark. 1927); Thompson v. Southern California Motor Road Co., 23 P. 130 (Cal. 1890); Truett v. Adams, 5 P. 96 (Cal. 1884); Devlin v. Powell, 227 P. 231 (Cal. App. 1924); Matter of Marriage of Wade, 884 P.2d 736 (Kan. App. 1994)* (the court puts itself as nearly as possible in the situation of the grantors when they made the deed and, from a consideration of that situation and from the language used in each part of the deed, determine as best it can the purpose of the grantors and the intentions they endeavored to convey); *Cilley v. Childs, 73 Me. 130 (1882); Jones v. Pashby, 29 N.W. 374 (Mich. 1886); Hubbard v. Whitehead, 121 S.W. 69 (Mo. 1909); Wolfe v. Dyer, 8 S.W. 551 (Mo. 1888); Boland v. Byrne, 145 S.W.2d 755 (Mo. App. 1940); Flanagan v. Prudhomme, 644 A.2d 51 (N.H. 1994)* (Supreme Court's determination of disputed deeds is based on parties' intentions gleaned from construing language of deed from as nearly as possible the position of parties at time of conveyance and in light of surrounding circumstances); *Elliott v. Gilchrist, 9 A. 382 (N.H. 1887); First Sav. Bank & Trust Co. v. Elgin, 225 P. 582 (N.M. 1924); People v. Call, 223 N.Y.S. 257 (N.Y. App. Div. 1927); Darling v. Alexander, 114 N.Y.S. 334 (N.Y. App. Div. 1909); Gernt v. Floyd, 174 S.W. 267 (Tenn. 1915); Blair v. Rorer, 116 S.E. 767 (Va. 1923); Sanborn v. Miski, 209 N.W. 759 (Wis. 1926); Whitney v. Robinson, 10 N.W. 512 (Wis. 1881); Messer v. Oestreich, 10 N.W. 6 (Wis. 1881).*

(n118)Footnote 118. *Prieto v. St. Tammany Homesites, Inc., 602 So. 2d 1111 (La. App. 1992)* (physical occupancy of any part of tract specifically described in deed, with intent to possess the whole, will constitute possession of all the property included therein, for purposes of maintaining possessory action); *Richards v. Snider, 3 P. 177 (Or. 1884).*

(n119)Footnote 119. *Alford v. Rodgers, 6 So. 2d 409 (Ala. 1942); Brown v. Powers, 52 So. 647 (Ala. 1910); Price v. Price, 182 S.W.2d 879 (Ark. 1944); Maltby v. Conner, 660 So. 2d 353 (Fla. App. 1995)* (desire to reduce litigation costs and possibly estate taxes following death of elderly grantor could not justify order directing that corrective deed be issued to convey out parcel which was not included in metes and bounds descriptions in prior deeds conveying property to revocable trust); *Andreu v. Watkins, 7 So. 876 (Fla. 1890); Oglesby v. Volunteer State Life Ins. Co. of Tennessee, 23 S.E.2d 404 (Ga. 1942); Houston v. Pritchett, 287 S.W. 936 (Ky. 1942); Caddell v. Eagle Coal Co., 138 S.W. 304 (Ky. 1911); Bryan v. Breyer, 665 A.2d 1020 (Me. 1995)* (purchasers were not entitled to reformation of purchase-and-sale agreement and accompanying deed to include lot that was excluded from legal description of land conveyed, even though parties all assumed when they entered into agreement that lot was included); *Schroeder v. Turpin, 161 S.W. 716 (Mo. 1913); Blumenthal v. Blumenthal, 158 S.W. 648 (Mo. 1913); Jones v. Smith 73 N.Y. 205 (1878); Thayer v. Finton, 15 N.E. 615 (N.Y. 1888); Lockwood v. Hall, 44 N.Y.S.2d 345 (N.Y. App. Div. 1943); Minor v. Powers, 26 S.W. 1071 (Tex. 1894); 233 S.W. 1103 (Tex. App. 1921); Meadow River Lbr. Co. v. Smith, 30 S.E.2d 392 (W. Va. 1944).*

(n120)Footnote 120. *Durden v. Reynolds, 440 S.E.2d 170 (Ga. 1994)* (parol evidence may not add to, enlarge or in any way change description of property contained in deed); *Chappell v. Donnelly, 439 S.E.2d 802 (N.C. App. 1994)*

(parol evidence cannot enlarge the scope of the descriptive words because "[t]he purpose of parol evidence is to fit the description to the property, not to create a description"); *Carll v. Little Miami R.R., 32 Ohio C.C. 667 (1911); Dodge v. Lavin, 83 A. 1009 (R.I. 1912); Minor v. Powers, 26 S.W. 1071 (Tex. 1894); Ward v. Nelson, 131 S.W. 310 (Tex. App. 1910).*

(n121)Footnote 121. *Jayore v. Hall, 624 So. 2d 522 (Ala. 1993)* (his deed to include a 23-acre parcel that had been omitted from deeds and that most specific description of 4.79-acre parcel in sister's deed prevailed over general description of same parcel in brother's); *Maltby v. Conner, 660 So. 2d 353 (Fla. App. 1995)* (where a specific description is given in clear, explicit language completely identifying the land being conveyed, it may not be varied by a more general statement of intent concerning the extent of the conveyance); *Beugnot v. New Orleans Land Co., 71 So. 947 (La. 1916); Hoffman v. Kaplan, 875 S.W.2d 948 (Mo. App. 1994)* (although specific description contained in deed generally prevails over general description, whenever possible, real intent is to be gathered from the whole description as well as the particular); *Thayer v. Finton, 15 N.E. 615 (N.Y. 1888); Vicars v. First Virginia Bank-Mountain Empire, 458 S.E.2d 293 (Va. 1995)* (general language in a deed was not sufficient to convey mineral interests in a tract of land which was not specifically identified in the deed).

(n122)Footnote 122. *McCone v. Butts, 616 So. 2d 535 (Fla. App. 1993)* (to establish adverse possession by color of title based upon instruments of conveyance, instrument must contain description of property legally sufficient to identify land with degree of certainty essential to ascertain boundaries and identity of the land); *Youmans v. Moore, 87 S.E. 273 (Ga. 1915); Foreman v. Sholl, 439 S.E.2d 169 (N.C. App. 1994)* (all conveyances purporting to be color of title, including deeds, must contain, as essential element of conveyance, description of identifying land; if conveyance does not contain such description, it is void).

(n123)Footnote 123. *Tatum v. Tatum, 1 So. 195 (Ala. 1887); Grimes v. Jordan, 260 S.W.2d 220 (Tex. App. 1953).*

(n124)Footnote 124. *Michael J. Uhes, Ph.D., P.C., Profit Sharing Plan & Trust v. Blake, 892 P.2d 439 (Colo. App. 1995)* (extrinsic evidence should not be considered in construing deed if intent of parties is discernible from deed itself); *Terry v. Salazar, 892 P.2d 391 (Colo. App. 1994)* (if deed is unambiguous, extrinsic evidence is inadmissible and must be ignored, even if received without objection); *Bidstrup v. Brignac, 631 So. 2d 637 (La. App. 1994)* (meaning and intent of parties to deed must be sought within four corners of instrument and cannot be explained or contradicted by extrinsic evidence when words of deed are clear, explicit, and lead to no absurd consequences); *Pennsylvania Elec. Co. v. Waltman 670 A.2d 1165 (Pa. Super. Ct. 1995)* (where deed is uncertain because of vague or ambiguous language, extrinsic evidence may be used to explain, but not vary, the writing in the deed); *Doman v. Brogan, 592 A.2d 104 (Pa. Super. Ct. 1991)* (where there exists an uncertainty due to use of vague or ambiguous language in the deed, resort may be had to extrinsic or parol evidence to explain, but not vary, written word of deed); In re Tennessee *Gas Transp., Inc., 169 B.R. 643 (Tenn. Bkrtcy. Ct. 1994)* (because the description fails to identify a particular tract of land, extrinsic evidence is not admissible to supply the location of the land in question); *Robbins v. HNG Oil Co., 878 S.W.2D 351 (Tex. App. 1994)* (under Texas law, parol evidence will not be received or admitted to create ambiguity or to give contract or deed meaning different from that which its language imparts); *Johnson v. Dale, 835 S.W.2d 216 (Tex. App. 1992)* (extrinsic evidence was inadmissible to prove location of easement at variance with unambiguous description in deed); *Jasper State Bank v. Goodrich, 107 S.W.2d 600 (Tex. App. 1937).*

(n125)Footnote 125. *Bernstein v. Humes, 71 Ala. 260 (Ala. 1881); Mason v. Merrill, 21 N.E. 799 (Ill. 1889); Williams v. Miller, 35 S.E.2d 127 (Va. 1945).*

(n126)Footnote 126. *McCormick v. Monroe, 46 N.C. 13 (N.C. 1853); Blow v. Vaughan, 10 S.E.2d 891 (N.C. 1890).*

(n127)Footnote 127. *Allen v. Chambers, 39 N.C. 125 (1845).* For other descriptions held void for indefiniteness, *Blow v. Vaughn, 10 S.E. 891 (N.C. 1890).*

(n128)Footnote 128. *Wynne v. Alexander, 29 N.C. 237 (N.C. 1847).*

(n129)Footnote 129. *Mt. Maumee Partnership v. Peet, 673 A.2d 127 (Conn. App. 1996)* (the construction of a deed in order to ascertain the intent expressed in the deed presents a question of law); *Morse v. Kelley, 26 N.E.2d 326 (Mass. 1940); Luckel v. White, 819 S.W.2d 459 (Tex. 1991)* (construction of unambiguous deed is question of law for court, and primary duty of court when construing such deed is to ascertain intent of parties from all of the language in deed by fundamental rule of construction known as "four corners rule"); *French v. Chevron USA, Inc., 871 S.W.2d 276 (Tex. App. 1994)* (construction of unambiguous deed was question of law for court whose primary duty in interpreting deed was to ascertain intent of the parties, as expressed within four corners of instrument); *Hansen v. Stichting Mayflower Recreational Fonds, 898 F. Supp. 1503 (D.Utah 1995)* (under Utah law, in absence of ambiguity, construction of deeds is question of law for court, and main object in construing deed is to ascertain intention of parties, especially that of grantor, from language used).

(n130)Footnote 130. *Maier v. Continental Oil Co., 120 F.2d 237 (7th Cir. 1941); Fletcher v. Lyon, 123 S.W. 801 (Ark. 1909); More v. Massini, 37 Cal. 432 (1869); Blume v. Mac Gregor, 148 P.2d 656 (Cal. App. 1943); Law v. Hempstead, 10 Conn. 23 (1833); Black v. Skinner Mfg. Co., 43 So. 919 (Fla. 1907); Matter of Lumpkin Sand and Gravel, Inc., 104 B.R. 529 (Bkrtcy. Ct. M.D. Ga. 1989)* (deeds are to be construed in accordance with the intentions of the parties and effect must be given to every part of the description where practicable); *Harris v. Hull, 70 Ga. 831 (1883); Henry v. Metz, 46 N.E.2d 945 (Ill. 1942); Case v. Owen, 38 N.E. 395 (Ind. 1894); Consolidated Rail Corp., Inc. v. Lewellen, 666 N.E.2d 958 (Ind. App. 1996)* (deed to railroad is to be construed in its entirety and parts are to be construed together so that no part is rejected); *Patton Park, Inc. v. Pollak, 55 N.E.2d 328 (Ind. App. 1944); Hess v. Kernen Bros., 149 N.W. 847 (Iowa 1914); Smyth v. Fogle, 129 N.W. 735 (Iowa 1911); Wendtlandt v. National Coop. Refinery Ass'n, 215 P.2d 209 (Kan. 1950); Runyon v. Hatfield, 157 S.W. 17 (Ky. 1913); Coomes v. Frey, 133 S.W. 758 (Ky. 1911); Williams v. Grimm, 112 S.W. 839 (Ky. 1908); Funkhouser v. Porter, 107 S.W. 202 (Ky. 1908); Pierce v. Hunter, 13 So. 2d 259 (La. 1943); Simpson v. Blaisdell, 27 A. 101 (Me. 1892); Cilley v. Childs, 73 Me. 130 (1882); Herrick v. Hopkins, 23 Me. 217 (1843); Moore v. Griffin, 22 Me. 350 (1843); Brackett v. Pitcher, 5 N.E.2d 552 (Mass. 1936); Jones v. Pashby, 29 N.W. 374 (Mich. 1886); Moran v. Lezotte, 19 N.W. 757 (Mich. 1884); Thatcher v. St. Andrews Church, 37 Mich. 264 (1877); De Paige v. Doughlas, 136 S.W. 345 (Mo. 1911); Stoepler v. Silverberg, 119 S.W. 418 (Mo. 1909); Wolfe v. Dyer, 8 S.W. 55 (Mo. 1888); Lyford v. Laconia, 72 A. 1085 (N.H. 1909); Wharton v. Brick, 8 A. 529 (N.J. Supp. Ct. 1887); Gregory v. Floyd, 435 S.E.2d 808 (N.C. App. 1993)* (deeds are construed as a whole and meaning is given to every part without reference to formal divisions of the deed); *Shultz v. Young, 25 N.C. 385 (1843); Troy & North Carolina Gold Min. Co. v. Snow Lbr. Co., 87 S.E. 40 (N.C. 1915); Brown v. Brown, 84 S.E. 25 (N.C. 1915); Shaffer v. Hahn, 15 S.E. 1033 (N.C. 1892); In re Wyatt's Claim, 141 N.E.2d 308 (Ohio App. 1955); Handley v. Santa Fe Minerals, Inc., 849 P.2d 433 (Okla. App. 1992)* (intention of parties to oil or gas leases or royalty deeds must be deduced from entire agreement, and every provision must be construed so as to be consistent with each other and that construction adopted, if possible, which gives effect to every part of the contract); *Franklin Drilling Co. v. Jackson, 217 P.2d 816 (Okla. 1950); In re Laurel Run Corp., 166 B.R. 242 (Bkrtcy. Ct. M.D. Pa. 1994)* (effect must be given to all the language of the instrument and no part shall be rejected if it can be given a meaning); *Lake View Acres Development Co. v. Tindal, 412 S.E.2d 457 (S.C. App. 1991)* (in the construction of this deed, the court is guided by two settled rules of law: first, the intention of the grantor; ... secondly, in ascertaining such intention the deed must be construed as a whole, and effect given to every part thereof, if such can be done consistently with law); *Brier Hill Collieries v. Gernt, 175 S.W. 560 (Tenn. 1915); Garrett v. Dils Co., 299 S.W.2d 904 (Tex. 1957); Harris v. Windsor, 294 S.W.2d 798 (Tex. 1956); Benge v. Scharbauer, 259 S.W.2d 166 (Tex. 1953); Cleveland v. Sims, 6 S.W. 634 (Tex. 1887); White v. White, 830 S.W.2d 767 (Tex. App. 1992)* (in seeking to ascertain intention of parties, court must attempt to harmonize all parts of deed); *Aelvoet v. Schutz, 181 S.W.2d 1011 (Tex. Ct. App 1944); Burgess v. McCommas, 129 S.W. 382 (Tex. App. 1910); Carpenter v. Camp Mfg. Co., 71 S.E. 559 (Va. 1911); Young v. Camp Mfg. Co., 66 S.E. 843 (Va. 1910); Skamania Boom Co. v. Youmans, 116 P. 645 (Wash. 1911); McDougal v. Musgrave, 33 S.E. 281 (W. Va. 1899); Parkinson v. McQuaid, 11 N.W. 682 (Wis. 1882).*

(n131)Footnote 131. *Timmons v. Timmons, 96 N.E. 622 (Ind. App. 1911); Maxwell v. McCall, 124 N.W. 760 (Iowa*

1910); Brungardt v. Smith, 290 P.2d 1039 (Kan. 1955); Maxwell v. Harper, 98 P. 756 (Wash. 1909).

(n132)Footnote 132. *McLendon v. Ravesies, 173 So. 303 (Miss. 1937); Jasper State Bank v. Goodrich, 107 S.W.2d 600 (Tex. App. 1937); Henderson v. Coombs, 453 S.E.2d 415 (W. Va. 1994)* (no part of a deed should be declared void for uncertainty if it is possible, by any reasonable rule of construction, to ascertain from the description, aided by extrinsic evidence, the property intended to be affected).

(n133)Footnote 133. *City of Manhattan Beach v. Superior Court, 914 P.2d 160 (Cal. 1996)* (deeds are to be construed like any other contract and the intent of parties arrived at by a consideration of the whole instrument and not of detached clauses); *Magnolia Petroleum Co. v. West, 30 N.E.2d 24 (Ill. 1940); Bidstrup v. Brignac, 631 So. 2d 637 (La. App. 1994)* (cardinal rule to be followed in construing deeds, uncertain because of ambiguity, is to ascertain intention of parties from entire language of deed); *Peoples Bank and Trust Co. v. Nettleton Fox Hunting & Fishing Ass'n, 672 So. 2d 1235 (Miss. 1996)* (under "four corners doctrine," instrument is considered as a whole, to ascertain intention of parties; particular words should not control but, rather, entire instrument should be examined); *Crum v. Butler, 601 So. 2d 834 (Miss. 1992)* (deed must be construed as whole without separating it from its formal parts and intent of parties may be gathered from instrument; intent of parties as expressed in deed's language must govern); *Peterson v. Beck, 537 N.W.2d 375 (S.D. 1995)* (the paramount rule of construction is that the intention of the parties, and the grantor in particular, is to be ascertained by a fair consideration of the entire instrument and the language therein, without undue emphasis on any particular part or provision of the document); *Bank One v. Alexander, 910 S.W.2d 530 (Tex. App. 1995)* (in construing deed, Court of Appeals must ascertain intent of parties by looking to four corners of deed; that is to say, intention of parties must be gathered from entire instrument, and not from some isolated clause or paragraph); *Grill v. West Virginia R.R. Maintenance Authority, 423 S.E.2d 893 (W. Va. 1992)* (in construing a deed, it is duty of court to construe it as whole, taking and considering all parts together, and giving effect to intention of parties whenever that is reasonably clear and free from doubt, unless to do so will violate some principle of law inconsistent therewith).

(n134)Footnote 134. *Mitchell v. Moore, 13 So. 2d 314 (Fla. 1943); Wolfson, v. Succession of Lisso, 6 So. 2d 231 (La. App. 1942).*

(n135)Footnote 135. *Skerritt Inv. Co. Englewood, 248 P. 6 (Colo. 1926).* Not only should the entire description be considered in determining the identity of the land conveyed but the entire deed itself is to be considered. *Mitchell v. Mays, 268 S.W. 806 (Ky. 1925); Dill-Cramer-Truitt Corp. v. Jacksonville Lbr. Co., 112 S.E. 740 (N.C. 1922); Batesburg-Leesville School Dist. No. 3 v. Tarrant, 361 S.E.2d 343 (S.C. App.1987)* (estate conveyed by deed must be determined from the whole deed); *Moore v. Gilchrist, 273 S.W. 308 (Tex. App. 1925); Sanborn v. Miski, 209 N.W. 759 (Wis. 1926).*

(n136)Footnote 136. *James River & Kanawha Power Co. v. Old Dominion Iron & Steel Corp., 122 S.E. 344 (Va. 1924).*

(n137)Footnote 137. *Gregory v. Floyd, 435 S.E.2d 808 (N.C. App.1993); Powers v. Rawles, 112 S.E. 78 (S.C. 1922).* In determining the location of the beginning corner of the land conveyed, the court must look to the entire description contained in the deed; *Battle v. Wolfe, 283 S.W. 1073 (Tex. App. 1926); Smith v. Nugget Exploration, Inc., 857 P.2d 320 (Wyo. 1993)* (in interpreting written instrument, all parts and every word should be given effect, if possible, though no one clause, phrase or sentence should be determinative of intent; intention of parties, as expressed in a deed, is to be determined from entire instrument without undue preference given to any part).

(n138)Footnote 138. *Bentley v. Napier, 122 S.W. 180 (Ky. 1909).*

(n139)Footnote 139. *Mt. Maumee Partnership v. Peet, 673 A.2d 127 (Conn. App. 1996)* (when deed contains multiple descriptions that appear to be inconsistent and irreconcilable, description containing less certainty must yield to that with greater certainty); *Haley v. Murray, 177 S.W.2d 333 (Tex. App. 1944). But see Glover v. Giraldo, 824 P.2d*

552 (Wyo. 1992) (where a deed contains references of both a general and particular nature, the particular description is preferred and will control over or limit a more general description).

(n140)Footnote 140. *Thatcher v. St. Andrews Church, 37 Mich. 264 (Mich. 1877); see United States v. 12,918.28 Acres of Land in Webster Parish, La., 61 F. Supp. 545 (W.D. La. 1945).*

(n141)Footnote 141. *Pence v. Armstrong, 95 Ind. 191 (1883); Mettart v. Allen, 39 N.E. 239 (Ind. 1894).*

(n142)Footnote 142. *Borchard v. Eastwood, 65 P. 1047 (Cal. 1901); Patterson v. McClenathan, 129 N.E. 767 (Ill. 1921); Roberts v. Medlock 148 So. 474 (La. App. 1933);* Peacock v. Schroeder; *846 S.W.2d 905 (Tex. App. 1993).* "All of my land wherever situate" conveys all of land owned at time of deed. *Pettigrew v. Dobbelaar, 63 Cal. 396 (1883).* Option to purchase "my farm" valid where only one farm owned, *Cramer v. Ballard, 24 N.W.2d 80 (Mich. 1946),* but optionee was in possession. A description by reference to the grantor's ownership is sufficient. *Crockett v. Housing Auth. of City of Dallas, 274 S.W.2d 187 (Tex. App. 1954).* A deed conveying that part of a tract owned by the grantor is valid since the portion owned can be proved by parol evidence. *Heirs & Unknown Heirs of Barrow v. Champion Paper & Fibre Co., 327 S.W.2d 338 (Tex. App. 1959).*

(n143)Footnote 143. U.S. v. 9.41 Acres Located in Sebastian County; *725 F. Supp. 421 (W.D. Ark. 1989); Ketchum v. Cook, 247 S.W.2d 1002 (Ark. 1952); Pettigrew v. Dobbelaar, 63 Cal. 396 (1883); Blair v. Bruns, 8 P. 569 (Colo. 1885); Clifton Heights Land Co. v. Randell, 47 N.W. 905 (Iowa 1891); Ison v. Wolf, 156 S.W. 129 (Ky. 1913); Maker v. Lazell, 22 A. 474 (Me. 1891); Fitzgerald v. Libby, 7 N.E. 917 (Mass. 1886); Harmon v. James, 15 Miss. 111 (1846); Bank of Missouri v. Bates, 17 Mo. 583 (1853); Brown v. Warren, 16 Nev. 228 (1881); Baird v. Campbell, 73 N.Y.S. 617 (1901); Pate v. Sampson Lumber Co., 81 S.E. 132 (N. C. 1914); Stambaugh v. Smith, 23 Ohio St. 584 (1873); Smith v. Westall, 13 S.W. 540 (Tex. 1890); Falls Land & Cattle Co. v. Chisholm, 9 S.W. 479 (Tex. 1888); Hervey v. Edens, 6 S.W. 306 (Tex. 1887); Witt v. Harlan, 2 S.W. 41 (Tex. 1886).*

Contra Waterman v. Tidewater Associated Oil Co., 35 So. 2d 225 (La. 1947). "All the land of the grantor adjoining" a specifically described tract was a valid description. *Union Cent. Life Ins. Co. v. Smith, 190 S.E. 651 (Ga. 1937).* Description of all land situate in a particular county is valid if county identified. *Crocker v. Smith, 9 N.E.2d 309 (Ill. 1937).* In *Hoover v. Roberts, 74 P.2d 152 (Kan. 1937),* the grantor conveyed "the undivided eighth interest of the grantor, being all of the interest of the grantor as heir-at-law and devisee under the last will, etc." The grantor was one of eight children, of whom three had died. Under the construction of the will the grantor received a one-fifth interest. A Kansas statute provided that a grantor presumably conveyed all of the interest the grantor had unless his intent was clearly expressed to convey less. The court held that the grantee received a one-fifth share. "All the land I own in _____ Parish" was a valid desciption. *Willimas v. Bowie Lbr. Co., 38 So. 2d 729 (La. 1948).* All grantor's property in a given locality is a valid description. *Smith v. Westall, 13 S.W. 540 (Tex. 1890).* A "Mother Hubbard" clause, whereby the grantor purports to convey the land described and any other land owned by the grantor in the same described area, is ambiguous and parol evidence was admissible; *Smith v. Allison, 301 S.W.2d 608 (Tex. 1956).* Deed of all oil and gas rights owned by the grantor in the United States held valid. *Texas Consol. Oils v. Bartels, 270 S.W.2d 708 (Tex. App. 1954).* All land owned in named county is sufficient; *Patterson v. Twaddell, 301 S.W.2d 680 (Tex. App. 1957).* Identification made by notary's notation. *Holley v. Curry 51 S.E. 135 (W. Va. 1905).*

(n144)Footnote 144. *Brusseau v. Hill, 256 P. 419 (Cal. 1927); see Hightower v. Blakely Hard Wood Lbr. Co., 137 S.E. 22 (Ga. 1927); Patterson v. McClenathan, 129 N.E. 767 (Ill. 1921); Jones v. Colle, 727 S.W.2d 262 (Tex. 1987).* Deed of all of grantor's property or all in a certain location was sufficient. *Wilson v. Boyce, 92 U.S. 320, 23 L. Ed. 608 (1875); Wright v. Louisville & N.R.R., 82 So. 132 (Ala. 1919); Snyder v. Bridewell, 267 S.W. 561 (Ark. 1924); Davis v. Horne, 45 So. 476 (Fla. 1907); Lewis v. Kinnaird, 65 A. 365 (Md. 1906); Drew v. Carroll, 28 N.E. 148 (Mass. 1891); Brown v. Warren, 16 Nev. 228 (1881); Merrill v. Bradley, 119 S.W. 297 (Tex. 1909).* The mortgage of all the property of the mortgagor without further describing it is insufficient. *Herman v. Deming, 44 Conn. 124 (1876).* Deed of all of land owned by the grantor in a certain stream was held valid. *Albertson v. Prewitt, 49 S.W. 196 (Ky. 1899).*

(n145)Footnote 145. *Albertson v. Prewitt, 49 S.W. 196 (Ky. 1899).* "All of the swamp river land" in a described tract was a valid description only if the line of demarcation could be accurately made, not being void as a matter of law. *Sharpe v. Savannah River Lbr. Corp., 87 S.E.2d 303 (Ga. 1957); Roeder Co. v. Burlington N. Inc., 716 P.2d 855 (Wash. 1986).*

(n146)Footnote 146. *Durden v. Reynolds, 440 S.E.2d 170 (Ga. 1994); Swiney v. Swiney, 82 Tenn. 316 (1884).*

(n147)Footnote 147. *Afflick v. Pekin Wood Products Co., 131 F. Supp. 910 (E.D. Ark. 1955); Frey v. Clifford, 44 Cal. 335 (1872); Blair v. Bruns, 8 P. 569 (Colo. 1885); Brown v. Warren, 16 Nev. 228 (1881); Texas Consol. Oils v. Bartels, 270 S.W.2d 708 (Tex. App. 1954); Amos v. Coffey, 320 S.E.2d 335 (Va. 1984).* A deed conveying any interest in an improperly described tract is subject to correction if it can be shown by parol evidence that the grantor owns only one tract answering the description. *Pickett v. Bishop, 223 S.W.2d 222 (Tex. 1949).*

(n148)Footnote 148. *Pettigrew v. Dobelaar, 63 Cal. 396 (1883).*

(n149)Footnote 149. *Maier v. Joslin, 48 N.W. 909 (Minn. 1891); Rosenbaum v. McCaskey, 386 So. 2d 387 (Miss. 1980).*

(n150)Footnote 150. *Baker v. Clay, 14 S.W. 734 (Mo. 1890).*

(n151)Footnote 151. *Turk v. Turk, 89 So. 457 (Ala. 1921).*

(n152)Footnote 152. *Whitehead v. Johnston, 467 So. 2d 240 (Ala. 1985).*

(n153)Footnote 153. Holding that general clause must be subordinated to a particular description: *Gaylord v. McCoy, 74 S.E. 321 (N.C. 1912); Lake View Acres' Dev. Co. v. Tindal, 412 S.E.2d 457 (S.C. App. 1990); West v. Hermann, 104 S.W. 428 (Tex. App. 1907); Cummings v. Black, 25 A. 906 (Vt. 1892). Contra Costello v. Graham, 80 P. 336 (Ariz. 1905); Clifton Heights Land Co. v. Randall, 47 N.W. 905 (Iowa 1891); Marr v. Hobson, 22 Maine 321 (1843); Lauchheimer v. Saunders, 65 S.W. 500 (Tex. App. 1901).*

(n154)Footnote 154. Deed of whatever land grantor owned was too vague as a description. *Turrentine v. Thompson, 99 S.W.2d 585 (Ark. 1936); Hansen v. Stichting Mayflower Rec. Fonds, 898 F. Supp. 1503 (D. Utah 1995).*

(n155)Footnote 155. *Fancher v. Prock, 88 S.W.2d 179 (Mo. 1935); Realty Purchase Corp. v. Fisher, 4 S.E.2d 518 (N.C. 1939); Tate v. Sartain, 793 S.W.2d 45 (Tex. App. 1990).*

(n156)Footnote 156. *Partnerships Properties Co. v. Sun Oil Co., 552 So. 2d 246 (Fla. 1989); Bryant v. Fordyce, 78 P.2d 541 (Kan. 1938).*

(n157)Footnote 157. *Conner v. Helvik, 73 P.2d 541 (Mont. 1937).*

(n158)Footnote 158. *M.C. Dixon Lumber Co. v. Mathiason, 266 So. 2d 841 (Ala. 1992); Redemeyer v. Cunningham, 215 P. 83 (Cal. App. 1923); Abercrombie v. Bright, 271 S.W.2d 734 (Tex. App. 1954).*

(n159)Footnote 159. *Mt. Maumee Partnership v. Peet, 673 A.2d 127 (Conn. App. 1996); Kalivoda v. Pugh, 226 P.2d 857 (Kan. 1951); Bland v. Kentucky Coal Corp., 206 S.W.2d 62 (Ky. 1947); Mexico Refractories Co. v. Roberts, 167 S.W.2d 660 (Mo. App. 1942); Crim v. O'Brien, 73 S.E. 271 (W. Va. 1911).*

(n160)Footnote 160. *Kuhn v. Chesapeake & O. Ry., 118 F.2d 400 (4th Cir. 1941); Powers v. Jackson, 50 Cal. 429 (1875); Caldwell v. Center, 30 Cal. 539 (1866); White v. Spahr, 59 S.E.2d 916 (Ga. 1950); Kauffman v. Deese, 55 S.E.2d 358 (Ga. 1949); Miller v. Topeka Land Co., 24 P. 420 (Kan. 1890); Elliott v. Green, 172 S.W.2d 442 (Ky. 1943); Perry v. Buswell, 94 A. 483 (Me. 1915); Hoffman v. City of Port Huron, 60 N.W. 831 (Mich. 1884); Sansing v. Thomas, 52 So. 2d 478 (Miss. 1951); Kyle v. Rhodes, 15 So. 40 (Miss. 1894); Hays v. Perkins, 18 S.W. 1127 (Mo. 1892);*

Clamorgan v. Hornsby, 6 S.W. 651 (Mo. 1888); Clamorgan v. Baden & St. L. R.R., 72 Mo. 139 (1880); Dolde v. Vodicka, 49 Mo. 98 (1871); Nelson v. Brodhack, 44 Mo. 596 (1869); Mexico Refractories Co. v. Roberts, 167 S.W.2d 660 (Mo. App. 1942); Rupert v. Penner, 53 N.W. 598 (Neb. 1892); Ipock v. Gaskins, 77 S.E. 843 (N.C. 1913); Roper Lbr. Co. v. Swain, 77 S.E. 700 (N.C. 1913); Gudger v. White, 54 S.E. 386 (N.C. 1906); Walker v. Moses, 18 S.E. 339 (N.C. 1893); Everitt v. Thomas, 23 N.C. 252 (1840); Gaddes v. Pawtucket Institution for Savings, 80 A. 415 (R.I. 1911); Waterman v. Andrews, 14 R.I. 589 (1884); In re Gatlinburg Motel Enterprises v. Herskowitz, 119 B.R. 955 (Bankr. E.D. Tenn. 1990); Byrd v. Phillips, 111 S.W. 1109 (Tenn. 1908); Winters v. Stover, 251 S.W.2d 726 (Tex. 1952); Henry v. Whitaker, 17 S.W. 509 (Tex. 1891); Gresham v. Chambers, 16 S.W. 326 (Tex. 1891); Catlett v. Starr, 7 S.W. 844 (Tex. 1888); Cleveland v. Sims, 6 S.W. 634 (Tex. 1887); Coffee v. Manly, 166 S.W.2d 377 (Tex. App. 1937); Bratton v. Adams, 26 S.W. 1108 (Tex. App. 1894); Basso v. Veysey, 110 A.2d 706 (Vt. 1954); Walker v. County of Green Lake, 69 N.W.2d 252 (Wis. 1955); Newman v. Tymeson, 13 Wis. 172 (1860).

(n161)Footnote 161. *Coffee v. Manly, 166 S.W.2d 377 (Tex. App. 1942); Glover v. Giraldo, 824 P.2d 552 (Wyo. 1992).*

(n162)Footnote 162. *Brown v. Chambers, 63 Tex. 131 (1885).*

(n163)Footnote 163. *Saunders v. Schmaelzle, 49 Cal. 59 (1874).*

(n164)Footnote 164. *Ames v. Irvine Co., 55 Cal. Rptr. 180 (1966); Norton v. Connor, 14 S.W. 193 (Tex. 1890).* A description of land by reference to "the title of possession as given by George A. Nixon, especial commissioner for Joseph Vehelin's colony, of which the said Mardes was a colonist," is sufficient. *Mardes v. Meyers, 28 S.W. 693 (Tex. App. 1894); see Gresham v. Chambers, 16 S.W. 326 (Tex. 1891); Bitner v. New York & Texas Land Co., 3 S.W. 301 (Tex. 1887).*

(n165)Footnote 165. *Kalivoda v. Pugh, 226 P.2d 857 (Kan. 1951); Bland v. Kentucky Coal Corp., 206 S.W.2d 62 (Ky. 1947); Mexico Refractories Co. v. Roberts, 167 S.W.2d 660 (Mo. App. 1942); Crim v. O'Brien, 73 S.E. 271 (W. Va. 1911).*

(n166)Footnote 166. *Jones v. Webster Woolen Co., 27 A. 105 (Me. 1892); Barksdale v. Barksdale, 45 So. 615 (Miss. 1908); Lewis v. Furr, 44 S.E.2d 604 (N.C. 1947); Burks v. Louisville Title Ins. Co., 121 N.E.2d 94 (Ohio 1953); Gaddes v. Pawtucket Inst., 80 A. 415 (R.I. 1911); Huntley v. Houghton, 81 A. 452 (Vt. 1911); Green Bay & M. Canal Co. v. Hewitt, 12 N.W. 382 (Wis. 1882).*

(n167)Footnote 167. *Cadorette v. Levesque, 69 A.2d 692 (N.H. 1949); E. I. DuPont De Nemours & Co. v. Moore, 291 S.E.2d 174 (N.C. App. 1982); Harris v. Windsor, 279 S.W.2d 648 (Tex. App. 1955).*

(n168)Footnote 168. *Deaton v. Swanson, 28 S.E.2d 126 (Ga. 1943).*

(n169)Footnote 169. *Parler v. Johnson, 7 S.E. 317 (Ga. 1888).*

(n170)Footnote 170. *Falls Land & Cattle Co. v. Chisholm, 9 S.W. 479 (Tex. 1888); Bitner v. New York & Texas Land Co., 3 S.W. 301 (Tex. 1887); Robbins v. Hng Oil Co., 878 S.W.2d 351 (Tex. App. 1994); see Combs v. Virginia Iron, Coal & Coke Co., 106 S.W. 815 (Ky. 1908); Ball v. Loughridge, 100 S.W. 275 (Ky. 1907).*

(n171)Footnote 171. *Harris v. Broiles, 22 S.W. 421 (Tex. App. 1893); see Austin v. Dolbee, 59 N.W. 608 (Mich. 1894).*

(n172)Footnote 172. *Emeric v. Alvarado, 27 P. 356 (Cal. 1891); Clarke v. Caldwell, 521 N.Y.S.2d 851 (1987).*

(n173)Footnote 173. *Odom v. Hull, 658 So. 2d 442 (Ala. 1995); see Detroit, G. H. & M. Ry. v. Howland, 224 N.W. 366 (Mich. 1929); Wilson v. Meredith, Clegg & Hunt, 268 S.W.2d 511 (Tex. App. 1954).*

(n174)Footnote 174. *Finlay v. Stevens, 36 A.2d 767 (N.H. 1944); Hall v. Nascimento, 594 A.2d 874 (R.I. 1991).*

(n175)Footnote 175. *Calhoun v. Ryals, 124 S.E. 867 (Ga. 1942); Rouyer v. Harrison, 58 So. 2d 753 (La. 1952); Withington v. Derrick, 572 A.2d 912 (Vt. 1990).*

(n176)Footnote 176. *Bouligny v. Delatte, 550 So. 2d 929 (La. App. 1989); McElwee v. Mahlman, 104 A. 705 (Me. 1918).*

(n177)Footnote 177. *Shirras v. Caig, 11 U.S. 34, 3 L.E. 260 (1812).*

(n178)Footnote 178. *See Plummer v. Gould, 52 N.W. 146 (Mich. 1892); Witt v. St. Paul & N. P. Ry., 35 N.W. 862 (Minn. 1888); Quelch v. Futch, 90 S.E. 259 (N.C. 1916); Withington v. Derrick, 572 A.2d 912 (Vt. 1990).*

(n179)Footnote 179. *Perry v. Buswell, 94 A. 483 (Me. 1915); Cochrane v. Harris, 84 A. 499 (Md. 1912); Muto v. Smith, 55 N.E. 1041 (Mass. 1900); In re Lawrence Ave., 163 N.Y.S. 598 (1917).*

(n180)Footnote 180. *Widney v. Southern Pac. Co., 7 P. 2d 1046 (Cal. App. 1932).*

(n181)Footnote 181. *John L. Roper Lbr. Co. v. Hinton, 260 F. 996 (E.D. N.C. 1919); Knight v. Knight, 96 A. 32 (Del. 1915); Nodvin v. Plantation Pine Line Co., 420 S.E.2d 322 (Ga. App. 1992); Sandford v. Sandford, 20 S.W.2d 83 (Ky. 1929); Milligan v. Milligan, 624 A.2d 474 (Me. 1993); Pierce v. Adams, 18 A.2d 792 (Me. 1941); Quelch v. Futch, 90 S.E. 259 (N.C. 1916); James River & Kanawha Power Co. v. Old Dominion Iron & Steel Corp., 122 S.E. 344 (Va. 1924).*

(n182)Footnote 182. *Pottkamp v. Buss, 31 P. 1121 (Cal. 1892); Hatch v. Brier, 71 Me. 542 (1880); Cunningham v. Webb, 69 Me. 92 (1879); Moulton v. Trafton, 64 Me. 218 (1874);*

(n183)Footnote 183. *Southampton v. Post, 4 N.Y.S. 75 (1889).*

(n184)Footnote 184. *Cunningham v. Webb, 69 Me. 92 (1879); Hilton v. Gilman, 17 Me. 263 (1840).*

(n185)Footnote 185. *Dickinson v. Arkansas City Imp. Co., 92 S.W. 21 (Ark. 1906); Shaw v. Johnston, 107 P. 399 (Idaho 1910); Lackner v. Bybee, 159 S.W.2d 215 (Tex. App. 1942). Contra Merrill v. Newton, 58 N.W. 70 (Mich. 1894).*

(n186)Footnote 186. *Wegge v. Madler, 109 N.W. 223 (Wis. 1906).*

(n187)Footnote 187. *Trowbridge v. Ehrich, 84 N.E. 297 (N.Y. 1908).*

(n188)Footnote 188. *Pierson v. Bradfield, 111 P.2d 460 (Cal. App. 1941).*

(n189)Footnote 189. *Jacob v. Woolfolk, 14 S.W. 415 (Ky. 1890); Gould v. Eastern R.R., 7 N.E. 543 (Mass. 1886); Home Owners Loan Corp. v. Dudly, 141 P.2d 160 (Utah 1943); Wegge v. Madler, 109 N.W. 223 (Wis. 1906).*

(n190)Footnote 190. *Bird v. New York, 125 N.Y.S. 1028 (N.Y. App. Div. 1910).* Deed to lot bounding vacated street passes title only to the lot line, not under the street. *Welsh v. Monson, 79 N.W.2d 155 (N.D. 1956).*

(n191)Footnote 191. *Burbach v. Schweinler, 14 N.W. 449 (Wis. 1882).*

(n192)Footnote 192. *In re Parkway, 103 N.E. 508 (N.Y. 1913); but see Low v. Tibbetts, 72 Me. 92 (1881).* But deed bounding "by" or "on" a way carries no title to the center if the description was by or on the side line of the way. *Casella v. Sneirson, 89 N.E.2d 8 (Mass. 1949); Lido Colony Ass'n v. Shelbourne-Grand Hotel Co., 135 N.Y.S.2d 799 (N.Y. App. Div. 1954); Abraham v. Dougherty, 51 A.2d 133 (Vt. 1947).*

(n193)Footnote 193. *VanWinkle v. VanWinkle, 89 N.Y.S. 26 (N.Y. App. Div. 1904).*

(n194)Footnote 194. *Dodd v. Witt, 29 N.E. 475 (Mass. 1885).*

(n195)Footnote 195. *Montgomery v. Hinds, 33 N.E. 1100 (Ind. 1893).*

(n196)Footnote 196. *Overland Machinery Co. v. Alpenfels, 69 P. 574 (Colo. 1902); Watrous v. Southworth, 5 Conn. 305 (1824); Cole v. Hadley, 39 N.E. 279 (Mass. 1895); In re Robbins, 24 N.W. 356 (Minn. 1885); Brown v. Oregon Short Line R.R., 102 P. 740 (Utah 1909); Church v. Stiles, 10 A. 674 (Vt. 1887); Burbach v. Schweinler, 14 N.W. 449 (Wis. 1882). Contra Ayres v. Pennsylvania R.R., 3 A. 885 (N.J. Supp. 1886).*

(n197)Footnote 197. *Hunt v. Raplee, 7 N.Y. St. 783 (1887).*

(n198)Footnote 198. *Trowbridge v. Ehrich, 84 N.E. 297 (N.Y. 1906).*

(n199)Footnote 199. *MacNicol v. East Coalinga Oil Fields Corp., 140 P.2d 793 (Cal. 1943); Alameda Macadamizing Co. v. Williams, 12 P. 530 (Cal. 1886); Severy v. Central Pac. R.R., 51 Cal. 194 (1875); Moody v. Palmer, 50 Cal. 31 (1875); Oxton v. Groves, 68 Me. 371 (1878); Cottle v. Young, 59 Me. 105 (1871); Baltimore & O. R.R. v. Gould, 8 A. 754 (Md. 1887); Peabody Heights Co. v. Sadtler, 63 Md. 533 (1885); Hamlin v. Attorney General, 81 N.E. 275 (Mass. 1907); Holmes v. Turners Falls Co., 8 N.E. 646 (Mass. 1886); Hamlin v. Pairpoint Mfg. Co., 6 N.E. 531 (Mass. 1886); Grand Rapids & I. R.R. v. Heisel, 38 Mich. 62 (1878); Dexter v. Riverside & Oswego Mills, 15 N.Y.S. 374 (1891); Clark v. Rochester City & B. R.R., 2 N.Y.S. 563 (1888); In re New York, 103 N.E. 508 (N.Y. 1913); Holloway v. Southmayd, 34 N.E. 1047 (N.Y. 1893); Holloway v. Delano, 34 N.E. 1052 (N.Y. 1893).* If the starting point is on the exterior line of the street the deed does not extend to the center. *Lough v. Machlin, 40 Ohio St. 332 (1883); Anthony v. Providence, 28 A. 766 (R.I. 1894); Hughes v. Providence & W. R.R., 2 R.I. 508 (1853); Kneeland v. Van Valkenburgh, 1 N.W. 63 (Wis. 1879).*

(n200)Footnote 200. *Palmer v. Mann, 201 N.Y.S. 525 (1923).*

(n201)Footnote 201. *Holmes v. Turners Falls Co., 8 N.E. 646 (Mass. 1886).*

(n202)Footnote 202. *Peabody Heights Co. v. Sadtler, 63 Md. 533 (1885); Hunt v. Brown, 23 A. 1029 (Md. 1892).*

(n203)Footnote 203. *Rieman v. Baltimore Belt R.R., 31 A. 444 (Md. 1895).*

(n204)Footnote 204. *In re Parkway, 103 N.E. 508 (N.Y. 1913); but see Low v. Tibbetts, 72 Me. 92 (1881).*

(n205)Footnote 205. *VanWinkle v. VanWinkle, 89 N.Y.S. 26 (N.Y. App. Div. 1904).*

(n206)Footnote 206. *Betcher v. Chicago, M. & St. P. R.R., 124 N.W. 1096 (Minn. 1910); In re Tremont Ave., 130 N.Y.S. 510 (1911); Morison v. New York Elev. R.R., 26 N.Y.S. 641 (1893); Dexter v. Riverside & Oswego Mills, 15 N.Y.S. 374 (1891); Trowbridge v. Ehrich, 84 N.E. 297 (N.Y. 1908); Holloway v. Southmayd, 34 N.E. 1047 (N.Y. 1893); Blackman v. Riley, 34 N.E. 214 (N.Y. 1893).*

(n207)Footnote 207. *Holloway v. Southmayd, 34 N.E. 1047 (N.Y. 1893).*

(n208)Footnote 208. *Dunham v. Williams, 37 N.Y. 251 (1867).*

(n209)Footnote 209. *Hamlin v. Attorney General, 81 N.E. 275 (Mass. 1907).*

(n210)Footnote 210. *McCue v. Berge, 52 N.E.2d 789 (Ill. 1944); Zimmerman v. Kirchner, 131 N.W. 756 (Iowa 1911); Hall v. Hall, 76 A. 705 (Me. 1910); Bolio v. Marvin, 89 N.W. 563 (Mich. 1902); Elliot v. Small, 29 N.W. 158 (Minn. 1886); Richardson v. Palmer, 38 N.H. 212 (1859).*

(n211)Footnote 211. *Jamaica Pond Aqueduct Corp. v. Chandler, 91 Mass. 159 (1864).*

(n212)Footnote 212. *Webb v. Jones, 50 So. 887 (Ala. 1909); The Redemptorist v. Wenig, 29 A. 667 (Md. 1894).*

(n213)Footnote 213. *Carman v. Hewitt, 105 N.Y.S.2d 239 (1951).*

(n214)Footnote 214. *Cunn v. Cambron, 109 So. 2d 705 (Ala. 1959)* (road could be a monument though not a public road); *Johnson v. Arnold, 18 S.E. 370 (Ga. 1893); Potts v. Canton Cotton Compress & Warehouse Co., 12 So. 147 (Miss. 1892).*

(n215)Footnote 215. *Sandretto v. Wahlsten, 144 N.W. 1089 (Minn. 1914).*

(n216)Footnote 216. *State v. Clements, 32 Me. 279 (1850); Bushman v. Gibson, 20 N.W. 106 (Neb. 1884); Miliken v. Denny, 47 S.E. 132 (N.C. 1904).*

(n217)Footnote 217. *Petitpierre v. Maguire, 100 P. 690 (Cal. 1909); Betley v. Gordy ConstR.R., 115 A.2d 475 (Del. 1855); Casella v. Sneirson, 89 N.E.2d 8 (Mass. 1949); Smith v. Lock, 18 Mich. 56 (1869); Hughes v. Lippencott, 245 P.2d 390 (N.M. 1952); Kenyon v. Hookway, 41 N.Y.S. 230 (1896); Philadelphia Storage Battery Co. v. City of Philadelphia, 186 A. 103 (Pa. 1936).*

(n218)Footnote 218. *Wood v. Culhane, 164 N.E. 622 (Mass. 1929); In re Brook Avenue, 58 N.Y.S. 163, aff'd 55 N.E. 1093 (N.Y.A. 1899); Lankin v. Terwilliger, 29 P. 268 (Or. 1892).*

(n219)Footnote 219. *Payne v. English, 35 P. 348 (Cal. 1894); see Orena v. City of Santa Barbara, 28 P. 268 (Cal. 1891).*

(n220)Footnote 220. *Draper v. Monroe, 28 A. 340 (R.I. 1893).*

(n221)Footnote 221. *King v. Norfolk & W. R.R., 17 S.E. 868 (Va. 1893).*

(n222)Footnote 222. *Cole v. Hadley, 39 N.E. 279 (Mass. 1895).*

(n223)Footnote 223. *Banks v. Ogden, 69 U.S. 57, 17 L. Ed. 818 (1864); Malone v. Jones, 100 So. 831 (Ala. 1924); Kittle v. Pfeiffer, 22 Cal. 484 (1863); Guthrie v. New Haven, 31 Conn. 308 (1863); Winter v. Payne, 15 So. 211 (Fla. 1894); Cox v. Louisville, N. A. & C. R.R., 48 Ind. 178 (1874); Molitor v. Sheldon, 15 P. 231 (Kans. 1887); Baltimore & O. R.R. v. Gould, 8 A. 754 (Md. 1887); Hall v. City of Baltimore, 56 Md. 187 (1881); Gould v. Eastern R.R., 7 N.E. 543 (Mass. 1886); Merrill v. Newton, 58 N.W. 69 (Mich. 1894); Capen v. Stevens, 29 Mich. 496 (1874); Zinn v. Sidler, 187 S.W. 1172 (Mo. 1916); Snoddy v. Bolen, 24 S.W. 142 (Mo. 1893); Hennessy v. Murdock, 33 N.E. 330 (N.Y. 1893); Fidelity-Philadelphia Trust Co. v. Forster, 29 A.2d 496 (Pa. 1943); In re Ferguson, 11 A. 885 (Pa. 1888); Jarstad v. Morgan, 4 N.W. 27 (Wis. 1880), 86 Am Dec. 743 (Wis. 1864).*

(n224)Footnote 224. *Petitpierre v. Maguire, 100 P. 690 (Cal. 1909).*

(n225)Footnote 225. *Merrill v. Newton, 58 N.W. 69 (Mich. 1894)*

(n226)Footnote 226. *See Gulf Sulphur Co. v. Ryman, 221 S.W. 310* (Tex. App., 1920).

(n227)Footnote 227. *San Francisco v. Burr, 36 P. 771 (Cal. 1894).*

(n228)Footnote 228. *Rudolph v. Elyton, 50 So. 80 (Ala. 1909); Dobson v. Hohenadel, 23 A. 1128 (Pa. 1892); Anthony v. Providence, 28 A. 766 (R.I. 1894).*

(n229)Footnote 229. *Anthony v. Providence, 28 A. 766 (R.I. 1894).*

(n230)Footnote 230. *See Loud v. Brooks, 217 N.W. 34 (Mich. 1928),* and cases cited therein; *but see Rucker v.*

Gregory, 62 S.E.2d 221 (Va. 1950).

(n231)Footnote 231. *Plumer v. Johnston, 29 N.W. 687 (Mich. 1886); Saccone v. West End Trust Co., 73 A. 971 (Pa. 1909).*

(n232)Footnote 232. *Knott v. Jefferson St. Ferry Co., 9 Or. 530 (1881); Valley Pulp & Paper Co. v. West, 17 N.W. 554 (Wis. 1883).*

(n233)Footnote 233. *Manchester v. Hodge, 69 A. 527 (N.H. 1908).*

(n234)Footnote 234. *MacNicol v. East Coalinga Oil Fields Corp., 140 P.2d 793 (Cal. 1943); Orena v. Santa Barbara, 28 P. 268 (Cal. 1891); Bristol Mfg. Co. v. Barnes, 5 A. 593 (Conn. 1886); Falls Village Water Power Co. v. Tibbetts, 31 Conn. 165 (1862); Winter v. Payne, 15 So. 211 (Fla. 1894); Johnston v. Palmetto, 77 S.E. 807 (Ga. 1913); Fisher v. Bennehoff, 13 N.E. 150 (Ill. 1887); Cleveland v. Obenchain, 8 N.E. 624 (Ind. 1886); Bradstreet v. Dunham, 21 N.W. 592 (Iowa 1884); Brown v. Heard, 27 A. 182 (Me. 1893); Tebbetts v. Estes, 52 Me. 566 (1864); Foley v. McCarthy, 32 N.E. 669 (Mass 1892); O'Brien v. King, 7 A. 34 (N.J. Supp. 1886); Blackman v. Riley, 34 N.E. 314 (N.Y. 1893); Draper v. Monroe, 28 A. 340 (R.I. 1893); Aldrich v. Billings, 14 R.I. 233 (1883).* plot owner has the right of access to roadways shown on the plat; *Romadka v. Schroff, 130 N.E.2d 277 (Ill. 1955)* (one adjoining landowner cannot block common driveway.) *Lizzo v. Drukas, 129 N.E.2d 892 (Mass. 1955); Benedict v. Lynch, 81 So. 2d 91 (La. App. 1955)* (as to protection of right of access).

(n235)Footnote 235. *Bristol Mfg. Co. v. Barnes, 5 A. 593 (Conn. 1886); Falls Village Water Power Co. v. Tibbetts, 31 Conn. 165 (1862); Brown v. Hearnd, 27 A. 182 (Me. 1893); Racine v. Emerson, 55 N.W. 177 (Wis. 1893).*

(n236)Footnote 236. *Atwood v. Canrike, 48 N.W. 950 (Mich. 1891).*

(n237)Footnote 237. *Harriman v. Whitney, 82 N.E. 671 (Mass. 1907).*

(n238)Footnote 238. *Reid v. Klein, 37 N.E. 967 (Ind. 1894).*

(n239)Footnote 239. *Plumer v. Johnston, 29 N.W. 687 (Mich. 1886); Saccone v. West End Trust Co., 73 A. 971 (Pa. 1909).*

(n240)Footnote 240. *Merrill v. Newton, 58 N.W. 70 (Mich. 1894).*

(n241)Footnote 241. *Clymer v. Roberts, 69 A. 548 (Pa. 1908).*

(n242)Footnote 242. *Hobson v. Philadelphia, 24 A. 1048 (Pa. 1892); Petitpierre v. Maguire, 100 P. 609 (Cal. 1909); Smith v. Duncan, 99 P. 673 (Utah 1909).*

(n243)Footnote 243. *Flagg v. Phillips, 87 N.E. 598 (Mass. 1909).*

(n244)Footnote 244. *Daughters of American Revolution v. Pennsylvania R.R., 79 A. 127 (Pa. 1911).*

(n245)Footnote 245. *Ames v. Hilton, 70 Me. 36 (1879); Bangor House Proprietary v. Brown, 33 Me. 309 (1851).*

(n246)Footnote 246. *Boland v. St. Johns Schools, 39 N.E. 1035 (Mass. 1895);*

(n247)Footnote 247. *Shore v. Friedman, 16 A.2d 727 (Pa. Supp. 1940).*

(n248)Footnote 248. *Highbarger v. Milford, 80 P. 633 (Kan. 1905); Holloway v. Delano, 34 N.E. 1052 (N.Y. 1893); Holloway v. Southmayd, 34 N.E. 1047 (N.Y. 1892); Taylor v. Cox, 63 S.E.2d 470 (S.C. 1951); Hague v. Juab Country Mill & Elev. Co., 107 P. 249 (Utah 1910).*

(n249)Footnote 249. *See Baltimore & O. R.R. v. Gould, 8 A. 754 (Md. 1887); Holloway v. Southmayd, 34 N.E. 1047 (N.Y. 1893).*

(n250)Footnote 250. *National Bank v. Johnson, 241 P. 458 (Wash. 1926). Contra, Greenberg v. L. I. Snodgrass Co., 119 N.E.2d 292 (Ohio App. 1953)* (a conveyance by lot number also carries the area of a previously vacated abutting street even though the street was also mentioned in the description as an abuttal).

(n251)Footnote 251. *Moddy v. Palmer, 50 Cal. 31 (1875); Ott v. Kreiter, 1 A. 724 (Pa. 1885); Healey v. Babbitt, 14 R.I. 533 (1884); Kimball v. Kenosha, 4 Wis. 321 (1855).*

(n252)Footnote 252. *Neff v. Ernst, 311 P.2d 849 (Cal. 1956); Bullen v. Arkansas Valley & W. R.R., 95 P. 476 (Okla. 1908).*

(n253)Footnote 253. *Steenerson v. Fontaine, 119 N.W. 400 (Minn. 1908).*

(n254)Footnote 254. *Deering v. Reilly, 60 N.E. 447 (N.Y. 1901).*

(n255)Footnote 255. *Groff v. Philadelphia, 24 A. 1048 (Pa. 1892).*

(n256)Footnote 256. *Harris v. Elliott, 35 U.S. 25, 9 L. Ed. 333 (1836).*

(n257)Footnote 257. *Baker v. Mott, 28 N.Y.S. 968 (1894); People v. Kellogg, 22 N.Y.S. 490 (1893); Ward v. Rice, 239 S.W. 2d 823 (Tex. App. 1951).*

(n258)Footnote 258. Mebane v. Wynne, 192 S.W.221 (Ark. 1917); *Inyo County v. Given, 191 P. 688 (Cal. 1920); Center v. Collier, 144 P. 1123 (Colo. App. 1914); Miami v. Florida East Coast R.R., 84 So. 726 (Fla. 1920); Rose v. Elizabethtown, 114 N.E. 14 (Ill. 1916); Beale v. Tacoma Park, 100 A. 379 (Md. 1917); Weihe v. Macatawa Resort Co., 164 N.W. 510 (Mich. 1917); Diamond Match Co. v. Ontonagon, 40 N.W. 448 (Mich. 1888); Stillman v. Olean, 127 N.E. 267 (N.Y. 1920); Norfolk v. Nottingham, 30 S.E. 444 (Va. 1898).*

(n259)Footnote 259. *Smith v. King County, 141 P. 695 (Wash. 1914).*

(n260)Footnote 260. *Beale v. Tacoma Park, 100 A. 379 (Md. 1917).*

(n261)Footnote 261. *Broocks v. Muirhead, 25 S.E.2d 889 (N.C. 1943); Thomas v. Farrier, 65 P.2d 526 (Okla. 1937).*

(n262)Footnote 262. *Kelly v. West Seattle Land & Imp. Co., 29 P. 1054 (Wash. 1892).*

(n263)Footnote 263. *Tweddell v. South Orange, 112 A. 511 (N.J. Supp. 1921).*

(n264)Footnote 264. *St. Louis v. Clegg, 233 S.W. 1 (Mo. 1921).*

(n265)Footnote 265. *People ex rel. Schimpff v. Norvell, 13 N.E.2d 960 (Ill. 1938).*

(n266)Footnote 266. *Eshleman v. Malter, 35 P. 860 (Cal. 1894); Hillside Cotton Mills v. Bartley, 119 S.E. 404 (Ga. 1923); Nilson Bros. v. Kahn, 145 N.E. 340 (Ill. 1924); Caylor v. Luzadder, 36 N.E. 909 (Ind. 1894); Miller v. Topeka Land Co., 24 P. 420 (Kan. 1890); State v. Aucoin, 20 So. 2d 136 (La. 1944)* (governmental surveyors have authority to make fractional sections where a navigable body of water or obstruction prevents the making of a regular section); *James v. Drew, 9 So. 293 (Miss. 1891); Brewster v. Bulow, 296 S.W. 372 (Mo. 1927); Stahlman v. Riordan, 227 S.W. 726 (Tex. App. 1921); Pereles v. Magoon, 46 N.W. 1047 (Wis. 1890); Westphal v. Schultz, 4 N.W. 136 (Wis. 1880).*

(n267)Footnote 267. *Hillside Cotton Mills v. Bartley, 119 S.E. 404 (Ga. 1923); Brewster v. Bulow, 296 S.W. 372 (Mo. 1927).*

(n268)Footnote 268. *Galbraith v. Parker, 153 P. 283 (Ariz. 1915); Newcomb v. Lewis, 31 Iowa 488 (1871); Moreland v. Page, 2 Iowa 139 (1855); Miller v. Topeka Land Co., 24 P. 420 (Kan. 1890); McAlpine v. Reicheneker, 27 Kan. 257 (1882); Susi v. Davis, 177 A. 610 (Me. 1935); Reimers v. Quinnin, 13 N.W. 813 (Mich. 1882); Mechler v. Dehn, 191 N.Y.S. 650 (1922), rev'd, 196 N.Y.S. 460 (N.Y. A.D. 1922), aff'd, 142 N.E. 288 (N.Y. 1923); Westphal v. Schultz, 4 N.W. 136 (Wis. 1880); O'Brien v. McGrane, 27 N.W. 446 (Wis. 1871); Jones v. Kimble, 19 Wis. 429 (Wis. 1865).*

(n269)Footnote 269. *Miller v. Topeka Land Co., 24 P. 420 (Kan. 1890); McAlpine v. Reicheneker, 27 Kan. 257 (1882); Witham v. Cutts, 4 Me. 31 (1826); Wolfe v. Scarborough, 2 Ohio St. 361 (1853).*

(n270)Footnote 270. *City of Jacksonville v. Broward, 163 So. 229 (Fla. 1935).*

(n271)Footnote 271. *Pereles v. Magoon, 46 N.W. 1047 (Wis. 1890).*

(n272)Footnote 272. *Van Deven v. Harvey, 100 N.W.2d 587 (Wis. 1960).*

(n273)Footnote 273. *Chandler v. Hibberd, 332 P.2d 133 (Cal.. App. 1958).*

(n274)Footnote 274. *Routh v. Williams, 193 So. 71 (Fla. 1940).*

(n275)Footnote 275. *Parizek v. Klein, 68 N.W.2d 299 (Iowa 1955).*

(n276)Footnote 276. *United States v. 12,918.28 Acres of Land in Webster Parish, La., 61 F. Supp. 545 (W.D. La. 1945); Pima Farms Co. v. McDonald, 244 P. 1022 (Ariz. 1926); Forest Preserve Dist. of Cook County v. Lehmann Estate, 58 N.E.2d 538 (Ill. 1944); Connor v. Anderson, 8 N.E.2d 422 (Ind. App. 1937); Quade v. Pillard, 112 N.W. 646 (Iowa 1907); Brewer v. Schammerhorn, 332 P.2d 526 (Kan. 1958); Esty v. Baker, 50 Me. 325 (1862); Sweeney v. Landers, 69 A. 566 (Conn. 1908); Irwin v. Hoffman, 179 A. 41 (Pa. 1935); Coleman v. Goskins, 163 S.E. 790 (S.C. 1932); South & W. R.R. v. Mann, 62 S.E. 354 (Va. 1908).*

(n277)Footnote 277. *Ferguson v. Champion Fibre Co., 110 S.E. 220 (N.C. 1921).*

(n278)Footnote 278. *Brown v. Cranberry Iron & Coal Co., 59 Fed. 434 (C.C.W.D. N.C. 1894); Hager v. Spect, 52 Cal. 579 (1878); Vance v. Fore, 24 Cal. 435 (1864); Winter v. White, 17 A. 84 (Md. 1889);* Buchanan v. Stewart, *3 H. & J. 112 (Md. 1813);* Hall v. Gittings, *2 H. & J. 112 (Md. 1807).*

(n279)Footnote 279. *See Ohlson v. Batterton, 230 S.W. 110 (Mo. 1921).* "The expressed description in a deed to realty will not be extended beyond its terms because of a belief by the holder under it that it covered land not embraced in that description, nor because of any unexpressed intention in the mind of the grantor that it should cover land not described in the deed itself, there being no suggestion of mistake in the drawing of it." *Harper v. Hesterlee, 109 S.E. 902 (Ga. 1921).*

(n280)Footnote 280. *Proprietors of Charles River Bridge v. Warren Bridge, 36 U.S. 420, 9 L. Ed. 773 (1837); Martin v. Waddell, 41 U.S. 367, 10 L. Ed. 997 (1842); Central Transp. Co. v. Pullman's Palace Car Co., 139 U.S. 24, 11 S. Ct 478, 35 L. Ed. 55 (1891); Bowlby v. Shively, 30 P. 154 (Or. 1892).*

(n281)Footnote 281. *Younger v. Moore, 103 P. 221 (Cal. 1909); Orena v. Newlove, 94 P. 628 (Cal. 1908).*

(n282)Footnote 282. *Bridges v. Thomas, 118 So. 2d 549* (Fla. 2 Dist. App. 1960).

(n283)Footnote 283. *Patch v. White, 117 U.S. 210, 6 S. Ct. 617, 29 L. Ed. 860 (1886); Thornell v. Brockton, 6 N.E.*

74 (Mass. 1886); Holcomb v. Mooney, 11 P. 274 (Or. 1886); Masterson v. Todd, 24 S.W. 682 (Tex. App. 1894). See also Dorr v. School Dist., 40 Ark. 237 (1882); Thacker v. Howell, 26 S.W. 719 (Ky. 1894); Greeley v. Weaver, 13 A. 575 (Me. 1888); Coe v. Ritter, 86 Mo. 277 (1885).

In *Gentile v. Crossan, 38 P. 247 (N.M. 1894),* a deed described a boundary as follows: "Y del camino a las lomas;" meaning, "And from the road to [las lomas] the hills." There was strong evidence that "las lomas" signified, in that vicinity, a certain kind of hills. It was held that the use of the term constituted a latent ambiguity which could be explained by parol evidence.

In *Minor v. Powers, 24 S.W. 710 (Tex. App. 1893),rev'd, 26 S.W. 1071 (Tex. 1894),* Fisher, C. J., said: "The instrument itself may not disclose any uncertainty or doubt, and may upon its face give a perfect description; but in an attempt to apply it, when it is found that the description will apply to two or more objects or subjects, or is a misdescription of the object or subject intended by the conveyance, a latent ambiguity results, and evidence is admissible to explain and remove it." A boundary line was described as drawn from a house named, and reference was made to a map for a more particular description. On the map referred to the line appeared to be drawn from the northeast corner of the house. It appeared in evidence that the position of the house was incorrectly represented on the map. It was held, however, that the trial judge was bound to look to the map as forming part of the deed, and to tell the jury that the line was to be drawn as marked on the map. *Warren v. Tom, 946 S.W.2d 754 (Mo. App. 1997)* (vendors of parcel brought action against purchasers to determine boundary line; parol evidence admissible to explain ambiguity).

(n284)Footnote 284. *Higinbotham v. Blair, 139 N.E. 909 (Ill. 1923); Temple v. Benson, 100 N.E. 63 (Mass. 1912)* (parol evidence as to the intent of the parties is admissible to reform a deed which contains a latent ambiguity); *Detroit G. N. & M. Ry. v. Howland, 224 N.W. 366 (Mich. 1929); Sargent v. Gagne, 147 A.2d 892 (Vt. 1958)* (a latent ambiguity arises when a description is equally applicable to two or more persons or objects).

(n285)Footnote 285. *Hudson v. McGuire, 223 S.W. 1101 (Ky. 1920); Pearson v. Leigh, 278 P. 989 (Or. 1929).*

(n286)Footnote 286. *Guilmartin v. Wood, 76 Ala. 204 (1884); Dorr v. School Dist., 40 Ark. 237 (1882); Vejar v. Mound City Land & Water Ass'n, 32 P. 713 (Cal. 1893); Thompson v. Southern Cal. Motor Road Co., 23 P. 130 (Cal. 1890); Reamer v. Nesmith, 34 Cal. 624 (1868); Murray v. Hobson, 13 P. 921 (Colo. 1887); Blair v. Bruns, 8 P. 569 (Colo. 1885); Benedict v. Gaylord, 11 Conn. 332 (1836); Shore v. Miller, 4 S.E. 561 (Ga. 1887); Bradish v. Yocum, 23 N.E. 114 (Ill. 1889); Mason v. Merrill, 21 N.E. 799 (Ill. 1889); Trentman v. Neff, 24 N.E. 895 (Ind. 1890); Shelby v. Teris, 14 S.W. 501 (Ky. 1890); Tyler v. Fickett, 73 Me. 410 (1882); Reynolds v. Boston Rubber Co., 35 N.E. 677 (Mass. 1893); Macdonald v. Morrill, 28 N.E. 259 (Mass. 1891); Hooten v. Comerford, 26 N.E. 407 (Mass. 1891); Dodd v. Witt, 29 N.E. 475 (Mass. 1885); Hefelman v. Otsego Water-Power Co., 43 N.W. 1096 (Mich. 1889), aff'd, 44 N.W. 1151 (1890); Price v. Ferguson, 6 So. 210 (Miss. 1889); Brown v. Guice, 46 Miss. 299 (1872); Wolfe v. Dyer, 8 S.W. 551 (Mo. 1888); Charles v. Patch, 87 Mo. 450 (1885); Hanlon v. Union Pac. R.R., 58 N.W. 590 (Neb. 1894); Scott v. Yard, 18 A. 359 (N.J. Ch. 1889); Gentile v. Crossan, 38 P. 247 (N.M. 1894); Thayer v. Finton, 15 N.E. 615 (N.Y. 1888); Case v. Dexter, 13 N.E. 449 (N.Y. 1887); Allen v. Sallinger, 12 S.E. 896 (N.C. 1891); Kanne v. Otty, 36 P. 537 (Or. 1894); Hicklin v. McClear, 24 P. 992 (Or. 1890); Palmer v. Farrell, 18 A. 761 (Pa. 1889); Linney v. Wood, 17 S.W. 244 (Tex. 1886); Coffey v. Hendricks, 2 S.W. 47 (Tex. 1886); Dwyre v. Speer, 27 S.W. 585 (Tex. App. 1894); Clark v. Gregory, 26 S.W. 244 (Tex. App. 1894); Rugg v. Ward, 23 A. 726 (Vt. 1892).*

(n287)Footnote 287. *Thompson v. Southern Cal. Motor Road Co., 23 P. 130 (1890).*

(n288)Footnote 288. *Blake v. Pure Oil Co., 100 S.W.2d 1009 (Tex. Com. App. 1934).*

(n289)Footnote 289. *Clark v. Powers, 45 Ill. 283 (1867).*

(n290)Footnote 290. *Head v. Lane, 112 S.E. 892 (Ga. 1922).*

(n291)Footnote 291. *Garrow v. Toxey, 66 So. 443 (Ala. 1914); Colonial & United States Mtg. Co. v. Lee, 129 S.W. 84* (Ark., 1910); *Fratt v. Woodward, 32 Cal. 219 (1867); Rohde v. Gallat, 70 So. 471 (Fla. 1915); Glover v. Newsome, 65 S.E. 64 (Ga. 1909); Spongberg v. First Nat'l Bank, 99 P. 712 (Idaho 1909); Hannon v. Hilliard, 101 Ind. 310 (1885); Wolfson v. Succession of Lisso, 6 So. 2d 231 (La. Ap. 1942); North Mankato v. Carlstrom, 2 N.W.2d 130 (Minn. 1942); Jennings v. Brizeadine, 44 Mo. 332 (1860); Carson v. Ray, 52 N.C. 609 (1860); Frost v. Erath Cattle Co., 17 S.W. 52 (Tex. 1891).*

(n292)Footnote 292. *Coleman v. Manhattan Beach Imp. Co., 94 N.Y. 229 (1883).*

(n293)Footnote 293. *Chattahoochie & G. R.R. v. Pilcher, 51 So. 11 (Ala. 1909).*

(n294)Footnote 294. *Reamer v. Nesmith, 34 Cal. 624 (1868); Blow v. Vaughan, 10 S.E. 891 (N.C. 1890); McCormick v. Monroe, 46 N.C. 13 (1853); Massey v. Belisle, 24 N.C. 170 (1841); D. T. Carroll Corp. v. Carroll, 256 S.W.2d 429 (Tex. App. 1953);*

(n295)Footnote 295. *Stover v. Gilbert, 247 S.W. 841 (Tex. Com. App. 1923).*

(n296)Footnote 296. *Lego v. Medley, 48 N.W. 375 (Wis. 1891).*

(n297)Footnote 297. *Young v. Gharis, 170 S.W. 796 (Tex. App. 1914).*

(n298)Footnote 298. *McClelland v. McClelland, 241 S.W.2d 264 (Ark. 1957); Edwards v. Santa Paula, 292 P.2d 31* (Cal. 2 Dist. App. 1956); *DeMartinez v. DeVidaurri, 219 S.W.2d 823 (Tex. App. 1949).*

(n299)Footnote 299. *Campbell v. Johnson, 44 Mo. 247 (1869); Katz v. Daughtrey, 151 S.E. 879 (N.C. 1930)* (a description of a designated amount of land out of a larger tract is void where the shape is not designated).

(n300)Footnote 300. *Sharpe v. Savannah River Lbr. Corp., 87 S.E.2d 298 (Ga. 1955); Perry v. Scott, 14 S.E. 294 (N.C. 1891); Edwards v. Bowden, 5 S.E. 283 (N.C. 1888); McGlawhorn v. Worthington, 3 S.E. 633 (N.C. 1887); Richardson v. Register, 87 S.E.2d 40 (S.C. 1955); Gates v. Asher, 280 S.W.2d 247 (Tex. 1955)* (similar as to latent ambiguity).

(n301)Footnote 301. *Ketchum v. Cook, 247 S.W.2d 1002 (Ark. 1952);* Murry v. Ward, Case No. CA 95-827 (Ark. App. 1996) (in a quiet title action the deed void where "Pt." or "Part of" is used to describe a section of a tract).

(n302)Footnote 302. *Holloman v. Davis, 78 S.E.2d 143 (N.C. 1953); Strother v. Hamilton, 268 S.W. 529 (Tex. App. 1925).*

(n303)Footnote 303. *Cox v. Hart, 145 U.S. 376, 12 S. Ct. 962, 36 L. Ed. 741 (1892); Boardman v. Reed, 31 U.S. 328, 8 L. Ed. 415 (1832); Wilson v. Carling, 66 So. 188 (Ala. 1914); Chambers v. Ringstaff, 69 Ala. 140 (1881); Scott v. Dunkle Box & Lbr. Co., 152 S.W. 1025 (Ark. 1912); Fuller v. Fellows, 30 Ark. 657 (1875); Brandon v. Leddy, 7 P. 33 (Cal. 1885); Mesick v. Sunderland, 6 Cal. 297 (1856); Hoodless v. Jernigan, 35 So. 656 (Fla. 1903); Youmans v. Moore, 87 S.E. 273 (Ga. 1915); Boyd v. Ellis, 11 Iowa 97 (1860); McBride v. Steinweden, 83 P. 822 (Kan. 1906); Caddell v. Eagle Coal Co., 138 S.W. 304 (Ky. 1911); Dowdell v. Orphans Home Soc., 38 So. 16 (La. 1905); Brown v. Guice, 46 Miss. 299 (1872); Meinhardt v. White, 107 S.W.2d 1061 (Mo. 1937); King v. Fink, 51 Mo. 209 (1873); Jennings v. Brizeadine, 44 Mo. 332 (1869); Campbell v. Johnson, 44 Mo. 247 (1869); Hardy v. Matthews, 38 Mo. 121 (1866); Curdy v. Stafford, 27 S.W. 823 (Tex. App. 1894); Giddings v. Day, 19 S.W. 682 (Tex. 1892); Johnson v. Ashland Lbr. Co., 9 N.W. 464 (Wis. 1881).*

(n304)Footnote 304. *Edwards v. Santa Paula, 292 P.2d 31* (Cal. 2 Dist. App. 1956).

(n305)Footnote 305. *Smith v. Brothers, 38 So. 353 (Miss. 1905).*

(n306)Footnote 306. *Martin v. Kitchen, 93 S.W. 780 (Mo. 1906).*

(n307)Footnote 307. *Bowen v. Wickersham, 24 N.E. 983 (Ind. 1890).*

(n308)Footnote 308. *Barney v. Miller, 18 Iowa 460 (1865); Bates v. Foster, 59 Me. 157 (1871); Plummer v. Gould, 52 N.W. 146 (Mich. 1892); Jones v. Pashby, 29 N.W. 374 (Mich. 1886); Moran v. Lezotte, 19 N.W. 757 (Mich. 1884); Chapman v. Crooks, 2 N.W. 924 (Mich. 1879); Witt v. St. Paul & N. P. Ry., 35 N.W. 862 (Minn. 1888); Klapman v. Hook, 32 S.E.2d 882 (S.C. 1945).*

(n309)Footnote 309. *Hubbard v. Whitehead, 121 S.W. 69 (Mo. 1909); Ashauer v. Peer, 147 S.W.2d 144 (Mo. App. 1941).*

(n310)Footnote 310. *Hunt v. Evans, 233 S.W. 854 (Tex. App. 1921).*

(n311)Footnote 311. *Clifton Heights Land Co. v. Randell, 47 N.W. 905 (Iowa 1891).*

(n312)Footnote 312. *Moran v. Lezotte, 19 N.W. 757 (Mich. 1884); Connor v. Johnson, 37 S.E. 240 (S.C. 1900).*

(n313)Footnote 313. *Pierce v. Freitas, 280 P.2d 67* (Cal. 1 Dist. App. 1955); *Staff v. Hawkins, 64 A.2d 176 (Conn. 1949); Wiggs v. Warren Realty Co., 84 So. 2d 737 (La. App. 1956); Cordova v. Atrisco, 201 P.2d 996 (N.M. 1949); Wheeler v. Stanolind Oil & Gas Co., 252 S.W.2d 149 (Tex. 1952); Losee v. Jones, 235 P.2d 132 (Utah 1951).*

(n314)Footnote 314. *In re Weitzel's Estate, 280 N.W. 270 (Neb. 1938).*

(n315)Footnote 315. *Spencer v. Pierce, 287 S.W. 1019 (Ark. 1926); Peavey v. Moran, 152 N.E. 360 (Mass. 1926); Prickett v. Frum, 132 S.E. 501 (W. Va. 1026).*

(n316)Footnote 316. *Brown v. Powers, 52 So. 647 (Ala. 1910); Foster v. Carlisle, 48 So. 665 (Ala. 1909); Guilmartin v. Wood, 76 Ala. 204 (1884); Riley v. North Star Min. Co., 93 P. 194 (Cal. 1907); Hogins. v. Boggs, 34 P. 653 (Cal. 1893); Benedict v. Gaylord, 11 Conn. 332 (1836); Andreu v. Watkins, 7 So. 876 (Fla. 1890); Bradish v. Yocum, 23 N.E. 114 (Ill. 1889); Ratliff v. Sowards, 153 S.W. 25 (Ky. 1913); McCreary v. Skidmore, 99 S.W. 219 (Ky. 1907); Auxier v. Herald, 96 S.W. 915 (Ky. 1906); Ames v. Hilton, 70 Me. 36 (1876); Pollard v. Ketterer, 108 N.E. 1086 (Mass. 1915); Beardsley v. Crane, 54 N.W. 740 (Minn. 1893); Northrip v. Burge, 164 S.W. 584 (Mo. 1914); Jennings v. Brizeadine, 44 Mo. 332 (1869); Herbert v. Steele, 68 A. 411 (N.H. 1896); Gleason v. Shuart, 127 N.Y.S. 101 (N.Y.A.D. 1911); Harris v. Oakley, 28 N.E. 530 (N.Y. 1891); Partridge v. Russell, 2 N.Y.S. 529 (1888); Meier v. Kelly, 25 P. 73 (Or. 1890); Holcomb v. Mooney, 11 P. 274 (Or. 1886); Segar v. Babcock, 26 A. 257 (R.I. 1893); Davis v. George, 134 S.W. 326 (Tex. 1911); Williams v. Winslow, 19 S.W. 513 (Tex. 1892); Farley v. Deslonde, 6 S.W. 786 (Tex. 1888); Yarbrough v. Clarkson, 155 S.W. 954 (Tex. App. 1913); Mosteller v. Astin, 129 S.W. 1136 (Tex. App. 1910); Openshaw v. Rickmeyer, 102 S.W. 467 (Tex. App. 1907); Hartz v. Owen, 27 S.W. 42 (Tex. App. 1894); Norfolk Trust Co. v. Foster, 78 Va. 413 (1884); Cook v. Hensler, 107 P. 178 (Wash. 1910); Hartmyer v. Eyerly, 79 S.E. 1093 (W. Va. 1913); Kirch v. Davies, 11 N.W. 689 (Wis. 1882).*

(n317)Footnote 317. *Chattahoochie & G. R.R. v. Pilcher, 51 So. 11 (Ala. 1909).* To the same effect, *see* the following cases: *Mejer v. Kelly, 25 P. 73 (Or. 1890); Rugg v. Ward, 23 A. 726 (Vt. 1892); Holston Salt & Plaster Co. v. Campbell, 16 S.E. 274 (Va. 1892); Town v. Greer, 102 P. 239 (Wash. 1909).*

(n318)Footnote 318. *Cassidy v. Charleston Five Cents Sav. Bank, 21 N.E. 372 (Mass. 1889).*

(n319)Footnote 319. *Cox v. Hart, 145 U.S. 376 12 S. Ct. 962, 56 L. Ed. 741 (1892).*

(n320)Footnote 320. *Hall v. Bartlett, 112 P. 176 (Cal. 1910).*

(n321)Footnote 321. *Lankford v. Pope, 57 S.E.2d 538 (Ga. 1950).*

(n322)Footnote 322. *Joffe v. Gliksman, 51 A.2d 467 (N.J. Ch. 1947).*

(n323)Footnote 323. *Reynolds v. Bradford, 233 S.W.2d 464 (Tex. App. 1950).*

(n324)Footnote 324. *Ghione v. State, 175 P.2d 955 (Wash. 1946).*

(n325)Footnote 325. *Lankford v. Pope, 57 S.E.2d 538 (Ga. 1950); Ledford v. Hill, 60 S.E.2d 555 (Ga. App. 1950); Bringardner Lbr. Co. v. Bingham, 251 S.W.2d 273 (Ky. 1952); Selfe v. Travis, 29 So. 2d 786 (La. App. 1947); Minneapolis & St. L. R.R. v. Ellsworth, 54 N.W.2d 800 (Minn. 1952); Gardner v. Claverack, 22 N.Y.S.2d 265 (1940); Richardson v. Register, 87 S.E.2d 40 (S.C. 1955); State v. Gulf Oil Corp., 264 S.W.2d 743 (Tex. App. 1954).*

(n326)Footnote 326. *Hostetter v. Commonwealth, 80 A.2d 719 (Pa. 1951); Hamill v. Bahr, 271 S.W.2d 319 (Tex. App. 1954).*

(n327)Footnote 327. *Claremont v. Carlton, 2 N.H. 369 (1821).*

(n328)Footnote 328. *Watford v. Pierce, 124 S.E. 838 (N.C. 1924).*

(n329)Footnote 329. *Noonan v. Lee, 67 U.S. 499, 17* L. Ed.278 (1862); *Anderson v. Richardson, 28 P. 679 (Cal. 1892); Benton v. Horsley, 71 Ga. 619 (1883); Tyler v. Fickett, 73 Me. 410 (1882); Linscott v. Fernald, 5 Me. 496 (1829); Borer v. Lange, 46 N.W. 358 (Minn. 1890); Allison v. Kenion, 79 S.E. 1110 (N.C. 1913); Minor v. Kirkland, 20 S.W. 932 (Tex. App. 1892); Vanover v. Hollyfield, 134 S.E. 548 (Va. 1926).*

(n330)Footnote 330. *Hooten v. Comerford, 26 N.E. 407 (Mass. 1891); Borer v. Lange, 46 N.W. 358 (Minn. 1890); Turnbull v. Schroeder, 11 N.W. 147 (Minn. 1882).*

(n331)Footnote 331. *Pickett v. Nelson, 47 N.W. 936 (Wis. 1891).*

(n332)Footnote 332. *Hartung v. Witte, 18 N.W. 175 (Wis. 1884).*

(n333)Footnote 333. *Walsh v. Hill, 38 Cal. 481 (1869); Tyler v. Fickett, 73 Me. 410 (1882); Wing v. Burgis, 13 Me. 111 (1836); Wills v. Leverich, 25 P. 398 (Or. 1890).*

(n334)Footnote 334. *Blake v. Pure Oil Co., 100 S.W.2d 1009 (Tex. Com. App. 1937).*

(n335)Footnote 335. *Kronenberger v. Hoffner, 44 Mo. 185 (1869); Euliss v. McAdams, 13 S.E. 162 (N.C. 1891); Roberts v. Preston, 6 S.E. 574 (N.C. 1888).*

(n336)Footnote 336. *West Lbr. Co. v. Goodrich, 223 S.W. 183 (Tex. 1920); Ken-Tex Exploration Co., Inc. v. Conner, 251 S.W.2d 280 (Ky. 1952)* (a description is sufficient if a surveyor can with the aid of extrinsic evidence locate the boundaries).

(n337)Footnote 337. *Douthit v. Robinson, 55 Tex. 69 (1881); Scaling v. Beggs, 334 S.W.2d 209 (Tex. App. 1960)* (testimony of surveyor admitted to show that call had been omitted from deed and by running first call and reversing remaining calls, three sides of the tract could be established and the parallelogram formed).

(n338)Footnote 338. *Mulford v. Le Franc, 26 Cal. 88 (1864); Jones v. Pashby, 29 N.W. 374 (Mich. 1886).* Traditionary evidence admissible to prove boundaries: *Rickert v. Thompson, 8 Alaska 398 (1933); Deaton v. Swanson, 28 S.E.2d 126 (Ga. 1943); Gardner v. Claverarck, 22 N.Y.S.2d 265 (1940), aff'd, 22 N.Y.S.2d 200 (N.Y. A.D. 1940); West Virginia Pulp & Paper Co. v. J. Natwick & Co., 21 S.E.2d 368 (W. Va. 1941).*

(n339)Footnote 339. *McAfee v. Arline, 10 S.E. 441 (Ga. 1889); Fahey v. Marsh, 40 Mich. 236 (1879); Cronin v. Gore, 38 Mich. 381 (1878); Cannon v. Emmans, 46 N.W. 356 (Minn. 1890); Weeks v. Martin, 10 N.Y.S. 656 (1890).*

(n340)Footnote 340. *Ellison v. Humble Oil & Ref. Co., 106 S.W.2d 1083 (Tex. App. 1937), rev'd, 132 S.W.2d 395 (Tex. Com. App. 1939).*

(n341)Footnote 341. *Thrasher v. Royster, 65 So. 796 (Ala. 1914); Elliott v. Coleman, 54 So. 491 (Ala. 1911); Reynolds v. Lawrence, 40 So. 576 (Ala. 1906); Gaston v. Weir, 4 So. 258 (Ala. 1888); Meyer Bros. v. Mitchell, 75 Ala. 475 (1883); Driggers v. Cassady, 71 Ala. 529 (1882); Chambers v. Ringstaff, 69 Ala. 284 (1881); Clements v. Pearce, 63 Ala. 284 (1879); Bloker v. Foley, 193 S.W. 561 (Mo. 1917); Jennings v. Brizeadine, 44 Mo. 332 (1869); Muldoon v. Deline, 31 N.E. 1091 (N.Y. 1892); Masterson IrR.R. v. Foote, 163 S.W. 642 (Tex. App. 1913); Post v. Rutland R.R., 69 A. 156 (Vt. 1908).*

(n342)Footnote 342. *Segar v. Babcock, 26 A. 257 (R.I. 1893); West v. Hermann, 104 S.W. 428 (Tex. App. 1907); Holston Salt & Plaster Co. v. Campbell, 16 S.E. 274 (Va. 1892).*

(n343)Footnote 343. *Frost Lbr. Industries, Inc. v. Brantley, 109 S.W.2d 999 (Tex. App. 1937).*

A boundary deed ran from a point thence "west with the highway to a stake." The question was whether this meant the survey of the original highway or the road as it existed at the time the deed was executed. It was held that parol evidence would not be admitted to show the line of the original survey where no road had actually been constructed according to the survey. *Brown v. Hodges, 61 S.E.2d 603 (N.C. 1950).*

(n344)Footnote 344. *McMillan v. Aikin, 66 So. 624 (Ala. 1914); J.F. Hall-Martin Co. v. Hughes, 123 P. 617* (Cal. 2 Dist. App. 1912); *Tyrrell v. Comstock, 18 Conn. 210 (1846); Benedict v. Gaylord, 11 Conn. 332 (1836); Kennedy v. Kennedy, 188 S.E. 722 (Ga. 1936); Mendel v. Leader, 71 S.E. 753 (Ga. 1911); Blakely Oil & Fertilizer Co. v. Proctor & Gamble Co., 67 S.E. 389 (Ga. 1910); Gordon v. Trimmier, 18 S.E. 404 (Ga. 1893); Cal Hirsch & Sons Iron & R.R. v. Peru Steel Casting Co., 96 N.E. 807 (Ind. App. 1911); Edens v. Miller, 46 N.E. 526 (Ind. 1897); Thompson v. Smith, 55 N.W. 886 (Mich. 1893); Case v. Green, 19 N.W. 554 (Mich. 1884); White v. Smith, 37 Mich. 291 (1877); Shotwell v. Harrison, 22 Mich. 410 (1871); Weissenfels v. Cable, 106 S.W. 1028 (Mo. 1907); Cooperative Bldg. Bank v. Hawkins, 73 A. 617 (R.I. 1909); Holston Salt & Plaster Co. v. Campbell, 16 S.E. 274 (Va. 1892).*

(n345)Footnote 345. *Blake v. Pure Oil Co., 100 S.W.2d 1009 (Tex. Com. App. 1937).*

(n346)Footnote 346. *Benedict v. Gaylord, 11 Conn. 332 (1836); Case v. Dexter, 13 N.E. 449 (N.Y. 1887); Masten v. Olcott, 4 N.E. 274 (N.Y. 1886); Schoenewald v. Rosenstein, 5 N.Y.S. 766 (N.Y. City Ct. 1889); Coffey v. Hendricks, 2 S.W. 47 (Tex. 1886).*

(n347)Footnote 347. *Harding v. Wright, 24 S.W. 211 (Mo. 1893); Jones v. Shepley, 2 S.W. 400 (Mo. 1886); Jennings v. Brizeadine, 44 Mo. 332 (1869).*

(n348)Footnote 348. *Smith v. Chappell, 148 So. 242 (La. 1933); Miller v. Southland Life Ins. Co., 68 S.W.2d 558 (Tex. App. 1934).*

(n349)Footnote 349. *Saunders v. Publishers Paper Co. 208 F. 441 (D.C. N.H. 1913); Cordua v. Guggenheim, 8 N.E.2d 274 (N.Y. 1937).*

(n350)Footnote 350. *Cox v. Hart, 145 U.S. 376, 12 S. Ct. 962, 56 L. Ed. 741 (1892); Thompson v. Southern California Motor Road Co., 23 P. 130 (Cal. 1890); Reamer v. Nesmith, 34 Cal. 624 (1868); Murray v. Hobson, 13 P. 921 (Colo. 1887); Andreu v. Watkins, 7 So. 876 (Fla. 1890); Gress Lbr. Co. v. Coody, 21 S.E. 217 (Ga. 1894); Judd v. Anderson, 1 N.W. 677 (Iowa 1879); Turnbull v. Schroeder, 11 N.W. 147 (Minn. 1882); Lochte v. Austin, 13 So. 838 (Miss. 1841); Bray v. Adams, 21 S.W. 853 (Mo. 1893); Skinker v. Haagsma, 12 S.W. 659 (Mo. 1889); Charles v. Patch, 87 Mo. 450 (1885); Grimes v. Bryan, 63 S.E. 106 (N.C. 1908); Walker v. Moses, 18 S.E. 339 (N.C. 1893); Robbins v. Harris, 2 S.E. 70 (N.C. 1887); Meier v. Kelly, 25 P. 73 (Or. 1890); Raymond v. Coffey, 5 Or. 132 (1873); Peart v. Brice, 24 A. 537 (Pa. 1893); Giddings v. Day, 19 S.W. 682 (Tex. 1892); Cook v. Olive, 19 S.W. 161 (Tex. 1892);*

Overand v. Menczer, 18 S.W. 301 (Tex. 1892); Gresham v. Chambers, 16 S.W. 326 (Tex. 1891); Watson v. Baker, 9 S.W. 867 (Tex. 1888); Koepsel v. Allen, 4 S.W. 856 (Tex. 1887); Cox v. Rust, 29 S.W. 807 (Tex. App. 1895); Whirter v. Allen, 20 S.W. 1007 (Tex. App. 1892); Wead v. St. Johnsbury & L. C. R.R., 24 A. 361 (Vt. 1892); Hunter v. Hume, 13 S.E. 305 (Va. 1891).

(n351)Footnote 351. *Blow v. Vaughan, 10 S.E. 891 (N.C. 1890); Stiles v. Estabrooks, 29 A. 961 (Vt. 1894).*

(n352)Footnote 352. *Black v. Pratt Coal & Coke Co., 5 So. 89 (Ala. 1888); Gaston v. Weir, 4 So. 258 (Ala. 1888); Colonial & United States Mtg. Co. v. Lee, 129 S.W. 84 (Ark. 1910); Blow v. Vaughan, 10 S.E. 891 (N.C. 1890).*

(n353)Footnote 353. *Blow v. Vaughan, 10 S.E. 891 (N.C. 1890).*

(n354)Footnote 354. *Moore v. McAfee, 106 S.E. 274 (Ga. 1921).*

(n355)Footnote 355. *Curtis v. Aaronson, 7 A. 886 (N.J. Supp. 1887); Steigleder v. Marshall, 28 A. 240 (Pa. 1893).*

(n356)Footnote 356. *Oliver v. Brown, 15 A. 599 (Me. 1888); Steigleder v. Marshall, 28 A. 240 (Pa. 1893); Keizer v. Beemer, 13 A. 909 (Pa. 1888).*

(n357)Footnote 357. *Cox v. Hart, 145 U.S. 376, 12 S. Ct. 962, 56 L. Ed. 741 (1892); Curtis v. Aaronson, 7 A. 886 (N.J. Supp. 1887); Robinson v. Jones, 22 S.W. 15 (Tex. App. 1893).*

(n358)Footnote 358. *Cochran v. Smith, 26 N.Y.S. 103 (N.Y. Supp. 1893).*

(n359)Footnote 359. *Lick v. O'Donnell, 3 Cal. 59 (1853); Hodges v. Kowing, 18 A. 979 (Conn. 1889); Lente v. Clark, 1 So. 149 (Fla. 1886); McAfee v. Airline, 10 S.E. 441 (Ga. 1889); Andrews v. Pearson, 68 Me. 19 (1875); Campbell v. Morgan, 22 N.Y.S. 1001 (1893); Euliss v. McAdams, 13 S.E. 162 (N.C. 1891); McGlawhorn v. Worthington, 3 S.E. 633 (N.C. 1887); Carson v. Ray, 52 N.C. 609 (1860); Murdock v. Anderson, 57 N.C. 77 (1858).*

(n360)Footnote 360. *Lick v. O'Donnell, 3 Cal. 59 (1853).*

(n361)Footnote 361. *Brenneman v. Dillon, 129 N.E. 564 (Ill. 1920).*

(n362)Footnote 362. *Smith v. Westall, 13 S.W. 540 (Tex. 1890).*

(n363)Footnote 363. *Euliss v. McAdams, 13 S.E. 162 (N.C. 1891).*

(n364)Footnote 364. *Mead v. Parker, 115 Mass. 413 (1874); Hurley v. Brown, 98 Mass. 545 (1868).*

(n365)Footnote 365. *McAfee v. Arline, 10 S.E. 441 (Ga. 1889); Hurley v. Brown, 98 Mass. 545 (1868).*

(n366)Footnote 366. *Harkey v. Cain, 6 S.W. 637 (Tex. 1887).*

(n367)Footnote 367. *See McCullough v. Olds, 41 P. 420 (Cal. 1895); Garden City Sand Co. v. Miller, 41 N.E. 753 (Ill. 1895); Lloyd v. Bunce, 41 Iowa 660 (1875); Burns v. Witter, 108 P. 129 (Or. 1910).*

(n368)Footnote 368. *Cleveland v. Sims, 6 S.W. 634 (Tex. 1887); Gilder v. Brenham, 3 S.W. 309 (Tex. 1887).* Evidence that corner location had been recognized for 50 years held to establish corner. *Geraghty v. Gray, 313 P.2d 102 (Cal. App. 1957).*

(n369)Footnote 369. *Murray v. Tulare IrR.R., 49 P. 563 (Cal. 1897), reh'g denied, 52 P. 586 (Cal. 1898); Fuller v. Wood, 72 S.E. 504 (Ga. 1911); Casey v. Luken, 88 N.E. 347 (Ind. App. 1909); Vaughan v. Swayzie, 56 Miss. 704 (1879); Case v. Dexter, 13 N.E. 449 (N.Y. 1887); St. Dennis v. Harras, 105 P. 246 (Or. 1909), reh'g denied, 106 P. 789 (Or. 1910); Arthur v. Ridge, 89 S.W. 15 (Tex. App. 1905).*

(n370)Footnote 370. *Hall v. Cotton, 180 S.W. 779 (Ky. 1915).*

(n371)Footnote 371. *Groeneveld v. Camano Blue Point Oyster Co., 81 P.2d 826 (Wash. 1938).*

(n372)Footnote 372. *See Moore v. Fowle, 51 S.E. 796 (N.C. 1905).*

(n373)Footnote 373. *Hobbs v. Payson, 27 A. 519 (Me. 1893);* Brunswick Sav. Inst. v. Crossman, 76 Me. (1885); *Cummings v. Black, 25 A. 906 (Vt. 1892); Clement v. Bank of Rutland, 17 A. 717 (Vt. 1889).*

(n374)Footnote 374. *Haskell v. Friend, 81 N.E. 962 (Mass. 1907).*

(n375)Footnote 375. *Gilbert v. McCreary, 104 S.E. 273 (W. Va. 1920).*

(n376)Footnote 376. *Guilmartin v. Wood, 76 Ala. 204 (1884); Sikes v. Shows, 74 Ala. 382 (1883); Doe ex dem. Phillips v. Porter, 3 Ark. 18 (1840); Benedict v. Gaylord, 11 Conn. 332 (1836); Harlan v. Ellis, 32 S.E.2d 389 (Ga. 1944); Jacqua v. Heston, 142 N.E. 874 (Ind. App. 1904); Waldin v. Smith, 39 N.W. 82 (Iowa 1888); Metropolitan Life Ins. Co. v. Hoskins, 117 S.W.2d 180 (Ky. 1937); Pendergrass v. Butcher, 164 S.W. 949 (Ky. 1914); Herrick v. Hopkins, 23 Me. 217 (1843); Moore v. Griffin, 22 Me. 350 (1843); Thorndike v. Richards, 13 Me. 430 (1836); Morse v. Kelley, 26 N.E.2d 326 (Mass. 1940); Jones v. Pashby, 29 N.W. 374 (Mich. 1886); Boxley v. Easter, 319 S.W.2d 628 (Mo. 1959); Grandy v. Casey, 6 S.W. 376 (Mo. 1887); Hannibal & St. J. R.R. v. Green, 68 Mo. 169 (1878); Wharton v. Brick, 8 A. 529 (N.J. Supp. 1887); Clarke v. New York, 151 N.Y.S. 714 (1915); Case v. Dexter, 13 N.E. 449 (N.Y. 1887); Herff v. Richardson, 135 S.E. 533 (N.C. 1926); Johnston v. Case, 42 S.E. 957 (N.C. 1902);* Cox v. McGowan, 21 S.E.108 (N.C. 1895); *Carter v. White, 7 S.E. 473 (N.C. 1888); Everitt v. Thomas, 23 N.C. 252 (1840); Raymond v. Coffey, 5 Or. 132 (1873); Cullers v. Platt, 16 S.W. 1003 (Tex. 1891); Whaley v. Lemmon, 281 S.W. 321 (Tex. App. 1926); Tate v. Betts, 97 S.W. 707 (Tex. App. 1906); McDonough v. Hanger, 111 A. 452 (Vt. 1920); Cummings v. Black, 25 A. 906 (Vt. 1892).*

(n377)Footnote 377. *Perry v. Buswell, 94 A. 483 (Me. 1915).* The rule is unquestioned where the purpose of general description was to show the grantor's source or chain of title, *Prentice v. Northern Pac. R.R., 154 U.S. 163, 14 S. Ct. 997, 38 L. Ed. 947 (1894); Lovejoy v. Lovett, 124 Mass. 270 (1878); Von Herff v. Richardson, 135 S.E. 533 (N.C. 1926); Baltimore Bldg. & Loan Ass'n v. Bethel, 27 S.E. 29 (N.C. 1897)* (or to reiterate or redescribe for emphasis or clarification); *Carter v. White, 7 S.E. 473 (N.C. 1888)* (or to further identify the land). A specific description in a deed repugnant to a general description or in conflict therewith controls. *Everitt v. Thomas, 23 N.C. 252 (1840).*

(n378)Footnote 378. *Hatcher v. Virginia Min. Co., 282 S.W. 1102 (Ky. 1926); Snelling v. Adair, 199 So. 782 (La. 1940); Gilbert v. McCreary, 104 S.E. 273 (W. Va. 1920).* Description of "78 acres known as the Malone Place and being" followed by a description which did not embrace all of the tract, the particular description did not limit the general tract. *Sithers v. Burton, 106 So. 2d 876 (Ala. 1958).*

(n379)Footnote 379. *Cornett v. Creech, 100 S.W. 1188 (Ky. 1907); Haley v. Murray, 177 S.W.2d 333 (Tex. App. 1944).*

(n380)Footnote 380. *Sugg v. Greenville, 86 S.E. 695 (N.C. 1915).* A just and reasonable rule which the courts have long followed in harmonizing conflicting calls in a deed or survey is to ascertain which calls are locative, and which are merely directory, and conform the lines to the locative calls. Directory calls are those which merely direct the neighborhood wherein the different calls may be found; whereas locative calls are those which serve to fix the boundaries. Therefore locative calls control in case of conflict. It is less likely that the surveyor or the parties to the instrument under interpretation would make a mistake in describing the exact boundaries than when merely calling attention to the neighborhood where they should be found; *Cates v. Reynolds, 228 S.W. 695 (Tenn. 1921).*

(n381)Footnote 381. *Sinford v. Watts, 122 A. 573 (Me. 1923).*

(n382)Footnote 382. *Cooperative Bldg. Bank v. Hawkins, 73 A. 617 (R.I. 1909).*

(n383)Footnote 383. *Flagg v. Bean, 25 N.H. 49 (1852); Woodman v. Lane, 7 N.H. 241 (1834); Barnard v. Martin, 5 N.H. 536 (1831); Ousby v. Jones, 73 N.Y. 621 (1878).*

(n384)Footnote 384. *Sherwood v. Whiting, 8 A. 80 (Conn. 1887); Perry v. Buswell, 94 A. 483 (Me. 1915); Peasley v. Drisko, 65 A. 24 (Me. 1906); Hobbs v. Payson, 27 A. 519 (Me. 1893); Brown v. Heard, 27 A. 182 (Me. 1893); Jones v. Webster Woolen Co., 27 A. 105 (Me. 1892); Brunswick Sav. Inst. v. Crossman, 76 Me. 577 (1885); Hathorn v. Hinds, 69 Me. 326 (1879); Crosby v. Bradbury, 20 Me. 61 (1841); Child v. Ficket, 4 Me. 471 (1827); Willard v. Multon, 4 Me. 14 (1826); Cassidy v. Charlestown Five Cents Sav. Bank, 21 N.E. 372 (Mass. 1889); Dow v. Whitney, 16 N.E. 372 (Mass. 1888); Zink v. McManus, 3 N.Y.S. 487 (1888), aff'd 24 N.E. 467 (N.Y. 1890); Gaddes v. Pawtucket Inst. for Sav., 80 A. 415 (R. I. 1911); Sanger v. Roberts, 48 S.W. 1 (Tex. 1898); Wilder v. Davenport, 5 A. 753 (Vt. 1886).*

(n385)Footnote 385. *Campbell v. United Fuel Gas Co., 130 S.E. 666 (W. Va. 1925).*

(n386)Footnote 386. *Peasley v. Drisko, 65 A. 24 (Me. 1906); Crosby v. Bradbury, 20 Me. 61 (1841).*

(n387)Footnote 387. *Brunswick Sav. Inst. v. Crossman, 76 Me. 577 (1885).*

(n388)Footnote 388. *Getchell v. Whittemore, 72 Me. 393 (1881).*

(n389)Footnote 389. *Hathorn v. Hinds, 69 Me. 326 (1879).*

(n390)Footnote 390. *Prentice v. Northern Pac. R.R., 154 U.S. 163, 14 S. Ct. 997, 38 L. Ed. 947 (1894); Lovejoy v. Lovett, 124 Mass. 270 (1878); von Herff v. Richardson, 135 S.E. 533 (N.C. 1926).*

(n391)Footnote 391. *Midgett v. Twiford, 26 S.E. 626 (N.C. 1897); Carter v. White, 7 S.E. 473* (N.C. 188).

(n392)Footnote 392. *Baltimore Bldg. & Loan Ass'n v. Bethel, 27 S.E. 29 (N.C. 1897).*

(n393)Footnote 393. *Curran v. Maple Island Resort Assn, 14 N.W.2d 655 (Mich. 1944).*

(n394)Footnote 394. *Prentice v. Northern Pac. R.R., 154 U.S. 163, 14 S. Ct. 997, 38 L. Ed. 947 (1894)* (words "and being" held equivalent to "which is"); *Smith v. Sweat, 38 A. 554 (Me. 1897); Dow v. Whitney, 16 N.E. 722 (Mass. 1888); Cullers v. Platt, 16 S.W. 1003 (Tex. 1891).*

(n395)Footnote 395. *Madden v. Tucker, 46 Me. 367 (1860); Deacons of Auburn Congregational Church v. Walker, 124 Mass. 69 (1878); Hastings v. Hastings, 110 Mass. 280 (1872); Melvin v. Locks and Canals on Merrimack River, 46 Mass. 15 (1842); Ela v. Card, 2 N.H. 175 (1820); Green Bay & Mississippi Canal Co. v. Hewitt, 12 N.W. 382 (Wis. 1882).*

(n396)Footnote 396. *Barney v. Miller, 18 Iowa 460 (1865); Bott v. Burnell, 11 Mass. 163 (1814); Middleton v. Wharton, 43 N.W. 4 (Minn. 1889); Johnson v. Simpson, 36 N.H. 91 (1858).*

(n397)Footnote 397. *Honret v. Dumbeck, 78 N.E. 691 (Ind. 1906).*

(n398)Footnote 398. *Hobbs v. Payson, 27 A. 519 (Me. 1893); Maker v. Lazell, 22 A. 474 (Me. 1891); Thayer v. Finton, 15 N.E. 615 (N.Y. 1888).*

(n399)Footnote 399. *Hawthorn v. Hinds, 69 Me. 326 (1879).*

(n400)Footnote 400. *Prentice v. Northern Pac. R.R., 154 U.S. 163, 14 S. Ct. 997, 38 L. Ed. 947 (1894).*

(n401)Footnote 401. *Carville v. Hutchins, 73 Me. 227 (1882); Tyler v. Hammond, 11 Pick. (28 Mass.) 193 (1830).*

(n402)Footnote 402. *Stephen Putney Shoe Co. v. Richmond, F. & P. R.R., 81 S.E. 93 (Va. 1914).*

(n403)Footnote 403. *Wade v. Deray, 50 Cal. 376 (1875); Barney v. Miller, 18 Iowa 460 (1865); Rayburn v. Winant, 18 P. 588 (Or. 1888); Arambula v. Sullivan, 16 S.W. 436 (Tex. 1891); Harkey v. Cain, 6 S.W. 637 (Tex. 1887); Adams v. Alkire, 20 W. Va. 480 (1882).* Recitation in deed that it conveyed some tracts of land that grantor inherited prevailed over particular description. *Gregory v. First State Bank, 305 S.W.2d 538 (Ky. 1957).*

(n404)Footnote 404. *Williams v. James, 178 So. 384 (La. 1938).*

(n405)Footnote 405. *Page v. Whatley, 50 So. 116 (Ala. 1909).*

(n406)Footnote 406. *Ewell v. Hauser, 131 S.W. 186 (Ky. 1910).*

(n407)Footnote 407. *Houser v. Belton, 32 N.C. 358 (1849).*

(n408)Footnote 408. *Jones v. Johnston, 59 U.S. 150, 15 L. Ed. 320 (1855); Crooke v. Property Management Services, Inc., 110 S.E.2d 677 (Ga. 1959); Whittington v. Mann, 126 A.2d 617 (Md. 1956); Linder v. Horne, 74 S.E.2d 227 (N.C. 1953)* (provided the plat is recorded); *Krzewinski v. Eaton Homes Inc., 161 N.E.2d 88 (Ohio App. 1958).*

(n409)Footnote 409. *Spencer v. Wiegert, 117 So. 2d 221 (Fla. App. 1959); Calhoun v. Ryals, 124 S.E. 867 (Ga. 1924); McElwee v. Mahlman, 104 A. 705 (Me. 1918); Dillon v. Davis, 112 S.E.2d 137 (Va. 1960).*

(n410)Footnote 410. *Thrasher v. Royster, 65 So. 796 (Ala. 1914).*

(n411)Footnote 411. *Jefferis v. East Omaha Land Co., 134 U.S. 178, 10 S. Ct. 518, 33 L. Ed. 872 (1890); Deery v. Cray, 77 U.S. 263, 19 L. Ed. 887 (1869); Noonan v. Lee, 67 U.S. 499, 17 L. Ed. 278 (1862); Howenstein Realty Corp. v. Richardson, 135 F.2d 803 (D.C. Cir. 1943); Seminole Fruit & Land Co. v. Pyles, 13 F.2d 878 (D.C. Cir. 1926); Smith v. Harbaugh, 112 So. 914 (Ala. 1927); Thrasher v. Royster, 65 So. 796 (Ala. 1914); Spaulding v. Bradley, 22 P. 47 (Cal. 1889); Chapman v. Polack, 11 P. 764 (Cal. 1884); Penry v. Richards, 52 Cal. 496 (1877); Hudson v. Irwin, 50 Cal. 450 (1875); Powers v. Jackson, 50 Cal. 429 (1875); Vance v. Fore, 24 Cal. 435 (1864); Wahrendorff v. Moore, 93 So. 2d 720 (Fla. 1957); Bank of South Jacksonville v. Cammar, 103 So. 827 (Fla. 1925); East Coast Lbr. Co. v. Ellis-Young Co., 45 So. 826 (Fla. 1908); Andreu v. Watkins, 7 So. 876 (Fla. 1890); Westbrook v. Comer, 29 S.E.2d 574 (Ga. 1944); Holder v. Jordan Realty Co., 136 S.E. 907 (Ga. 1927); King v. Sears, 18 S.E. 830 (Ga. 1893); Boise City v. Hon, 94 P. 167 (Idaho 1908); Read v. Bartlett, 99 N.E. 345 (Ill. 1912); Peoria Gas & Elec. Co. v. Dunbar, 85 N.E. 229 (Ill. 1908); Brophy v. Richeson, 36 N.E. 424 (Ind. 1894); Miller v. Topeka Land Co., 24 P. 420 (Kan. 1890); Hensley v. Burt & Brabb Lbr. Co., 116 S.W. 316 (Ky. 1909); Perkins v. Jacobs, 129 A. 4 (Me. 1925); Erskine v. Moulton, 66 Me. 276 (Me. 1877); Lincoln v. Wilder, 29 Me. 169 (Me. 1848); Thomas v. Patten, 13 Me. 329 (Me. 1836); Kennebec Purchase v. Tiffany, 1 Me. 219 (Me. 1821); Goldstein v. Beal, 59 N.E.2d 712 (Mass. 1945); Carroll v. Hinchley, 56 N.E.2d 608 (Mass. 1944); Suburban Land Co. v. Billerica, 49 N.E.2d 1012 (Mass. 1943); Dubinsky v. Cama, 158 N.E. 321 (Mass. 1927); Nichols v. New England Furn. Co., 59 N.W. 155 (Mich. 1894); Heffelman v. Otsego Water-Power Co., 43 N.W. 1096 (Mich. 1889), 44 N.W. 1151 (Mich. 1890); Quinnin v. Reimers, 10 N.W. 35 (Mich. 1881); Wiley v. Lovely, 8 N.W. 716 (Mich. 1881); Dittrich v. Ubl, 13 N.W.2d 384 (Minn. 1944); Borer v. Lange, 46 N.W. 358 (Minn. 1890); Sanborn v. Mueller, 35 N.W. 666 (Minn. 1887); Nicolin v. Schneiderhan, 33 N.W. 33 (Minn. 1887); Coles v. Yorks, 31 N.W. 353 (Minn. 1887); Reed v. Lammel, 9 N.W. 858 (Minn. 1881); Lindsay v. Smith, 166 S.W. 820 (Mo. App. 1914); St. Louis v. Missouri Pac. R.R., 21 S.W. 202 (Mo. 1893); Whitehead v. Ragan, 17 S.W. 307 (Mo. 1891); Dolde v. Vodicka, 49 Mo. 98 (Mo. 1871); Shelton v. Maupin, 16 Mo. 124 (Mo. 1852); Billings v. Pierce Packing Co., 161 P.2d 636 (Mont. 1945); Vaught v. McClymond, 155 P.2d 612 (Mont. 1945); Lehigh & H. R. R.R. v. Antalics, 80 A. 469 (N.J. 1911); Lantz v. Howell, 107 S.E. 437 (N.C. 1921); Davidson v. Arledge, 2 S.E. 378 (N.C. 1887); Corbin v. Cherokee Realty Co., 91 S.E.2d 542 (S.C. 1956)* (where the plat showed an area as a sidewalk, the city could also use it as a street); *Houston Oil Co. v. Kimball, 122 S.W. 533 (Tex. 1909); Hunt v. Evans, 233 S.W. 854 (Tex. App. 1921); Clement v. Paris, 154 S.W. 624 (Tex. App. 1913); Mathews v. Gillespie, 120 S.E. 324 (Va. 1923); Schwalm v. Beardsley, 56 S.E. 135 (Va. 1907); Cook v. Hensler, 107 P. 178 (Wash. 1910); Zuleger v. Zeh, 150 N.W. 406 (Wis. 1915); Burbach v.*

Schweinler, 14 N.W. 449 (Wis. 1882); Shufeldt v. Spaulding, 37 Wis. 662 (Wis. 1875).

(n412)Footnote 412. *Mahaffey v. Miller, 105 So. 731 (La. 1925); McDaniel v. Leuer, 230 S.W. 633 (Mo. 1921); Lawver v. Anderson, 118 A. 761 (Pa. 1922). See Wisconsin Realty Co. v. Lull, 187 N.W. 978 (Wis. 1922).*

(n413)Footnote 413. *Werk v. Leland University, 99 So. 716 (La. 1924).*

(n414)Footnote 414. *Mexico Beach Corp. v. St. Joe Paper Co., 97 So. 2d 708 (Fla. App. 1957)* (reference to a plat incorporates in the deed the courses and distances of the plat); *Spencer v. Levy, 173 S.W. 550 (Tex. App. 1914).*

(n415)Footnote 415. *United States v. State Inv. Co., 285 F. 128 (8th Cir. 1922); Smith v. Fowler, 333 P.2d 1034 (Colo. 1959)* (map or plat becomes part of the deed when referred to therein).

(n416)Footnote 416. *Redemeyer v. Cunningham, 215 P. 83 (Cal. App. 1923).*

(n417)Footnote 417. *Mahaffey v. Miller, 105 So. 731 (La. 1925).*

(n418)Footnote 418. *Black v. Sprague, 54 Cal. 266 (1880); Hudson v. Irwin, 50 Cal. 450 (1875); Serrano v. Rawson, 47 Cal. 52 (1873); Hensley v. Burt & Brabb Lbr. Co., 116 S.W. 316 (Ky. 1909); Heffelman v. Otsego Water-Power Co., 43 N.W. 1096 (Mich. 1889), 44 N.W. 1151 (Mich. 1890).*

(n419)Footnote 419. *James v. Hitchcock, 309 S.W.2d 909 (Tex. App. 1958)* (survey prevails over map); *Edmunds v. Barrow, 71 S.E. 544 (Va. 1911).*

(n420)Footnote 420. *Erskine v. Moulton, 66 Me. 276 (1877); Cunningham v. Boston & A. R.R., 27 N.E. 660 (Mass. 1891); Gibson v. Carroll, 180 S.W. 630 (Tex. App. 1915).*

(n421)Footnote 421. *Gary Land Co. Griesel, 100 N.E. 835 (Wis. 1904).*

(n422)Footnote 422. *St. Louis v. Wiggins Ferry Co., 15 Mo. App. 227 (1884). See Houston Oil Co. v. Kimball, 122 S.W. 533 (Tex. 1909).*

(n423)Footnote 423. *Irvin v. Bevil, 16 S.W. 21 (Tex. 1891); Norton v. Conner, 14 S.W. 193 (Tex. 1890); Nye v. Moody, 8 S.W. 606 (Tex. 1888). See Sullivan v. Solis, 114 S.W. 456 (Tex. App. 1908).*

(n424)Footnote 424. *Sanders v. Baker, 231 S.W.2d 106 (Ark. 1950); Hocking v. Title Ins. & Trust Co., 226 P.2d 24 (Cal. App. 1951),* subsequent opinion, *234 P.2d 625 (Cal. 1951); Linder v. Horne, 74 S.E.2d 227 (N.C. 1953).*

(n425)Footnote 425. *Jefferis v. East Omaha Land Co., 134 U.S. 178 (1890); Cragin v. Powell, 128 U.S. 691, 9 S. Ct. 203, 32 L. Ed. 566 (1888); Sanders v. Baker, 231 S.W.2d 106 (Ark. 1950); Woods v. West, 58 N.W. 938 (Neb. 1894); Withney v. Detroit Lbr. Co., 47 N.W. 425 (Wis. 1890). See Read v. Bartlett, 99 N.E. 345 (Ill. 1921).*

(n426)Footnote 426. *Wilson v. Chicago Lbr. & Timber Co., 143 F. 705 (8th Cir. 1906); Beardsley v. Nashville, 41 S.W. 853 (Ark. 1897); Hasbrouck v. Cavill, 200 P. 979 (Cal. App. 1921); Barri v. Schwarz Bros. Co., 107 A. 3 (Conn. 1919); Alden v. Pinney, 12 Fla. 348 (1868); Warsaw Turpentine Co. v. Ft. Barrington Club, 195 S.E. 755 (Ga. 1937); Patrick v. Sheppard, 187 S.E. 379 (Ga. 1936); Casso v. Ascension Realty Co., 196 So. 1 (La. 1940); Erskine v. Moulton, 66 Me. 276 (1877); Moore v. Minneapolis & St. P. S. R. R.R., 152 N.W. 405 (Minn. 1915); People v. Chateaugay Ore & Iron Co., 189 N.Y.S. 754 (N.Y. App. Div. 1921); Hayden v. Hayden, 100 S.E. 515 (N.C. 1919); Goldsmith v. Means, 158 A. 596 (Pa. Super 1932); Beck v. Gulf Production Co., 113 S.W.2d 258 (Tex. App. 1938); Cook v. Hensler, 107 P. 178 (Wash. 1910).*

(n427)Footnote 427. *Swarzwald v. Cooley, 103 P.2d 580 (Cal. App. 1940); Fisk v. Ley, 56 A. 559 (Conn. 1903); Wooten v. Solomon, 77 S.E. 375 (Ga. 1913); Hale v. Swift, 63 S.W. 288 (Ky. 1901); Futrell v. Holloway, 149 So. 167*

(La. App. 1933); Burke v. Henderson, 66 N.Y.S. 468 (N.Y. App. Div. 1900).

(n428)Footnote 428. *Roetzel v. Rusch, 45 P. 2d 518 (Okla. 1935).*

(n429)Footnote 429. *Noonan v. Lee, 67 U.S. 499, 17 L. Ed. 278 (1862).*

(n430)Footnote 430. *Sanders v. Baker, 231 S.W.2d 106 (Ark. 1950); Hanlon v. Union Pac. R.R., 58 N.W. 590 (Neb. 1894); Redmond v. Mullenax, 18 S.E. 708 (N.C. 1893); Arambula v. Sullivan, 16 S.W. 436 (Tex. 1891); Sheppard v. Wilmott, 47 N.W. 1054 (Wis. 1891); Burbach v. Schweinler, 14 N.W. 449 (Wis. 1882).*

(n431)Footnote 431. *Arambula v. Sullivan, 16 S.W. 436 (Tex. 1891). See Haley v. Amestoy, 44 Cal. 132 (1872).*

(n432)Footnote 432. *Mason v. Gates, 102 S.W. 190 (Ark. 1907).*

(n433)Footnote 433. *Hall v. Eaton, 29 N.E. 660 (Mass. 1885).*

(n434)Footnote 434. *Webber v. Mixter, 121 A. 677 (Me. 1923).*

(n435)Footnote 435. *Arkansas v. Tennessee, 269 U.S. 152, 7 L. Ed. 813 (1925).*

(n436)Footnote 436. *Hardee v. Horton, 108 So. 189 (Fla. 1925).*

(n437)Footnote 437. *Kentucky Union Co. v. Shepherd, 234 S.W. 10 (Ky. 1921).*

(n438)Footnote 438. *Tyner v. McDonald, 63 So. 2d 504 (Fla. 1953).*

(n439)Footnote 439. *Noonan v. Lee, 67 U.S. 499, 17 L. Ed. 278 (1862); Wiley v. Loveley, 8 N.W. 716 (Mich. 1881); Borer v. Lange, 46 N.W. 358 (Minn. 1890).*

(n440)Footnote 440. *Redd v. Murry, 24 P. 841 (Cal. 1890), 30 P. 132 (Cal. 1892).*

(n441)Footnote 441. *Wiley v. Loveley, 8 N.W. 716 (Mich. 1881); Johnstone v. Scott, 11 Mich. 232 (1863).*

(n442)Footnote 442. *Jones v. Johnston, 59 U.S. 150, 15 L. Ed. 320 (1855).*

(n443)Footnote 443. *Cleveland v. Choate, 18 P. 875 (Cal. 1888); Neill v. Hake, 93 N.W.2d 821 (Minn. 1958)* (measurements in plat incorporated by reference yield to intent of the parties).

(n444)Footnote 444. *Susi v. Davis, 177 A. 610 (Me. 1935).*

(n445)Footnote 445. *Phillips v. Hink, 114 N.W. 699 (S.D. 1908).*

(n446)Footnote 446. *Pere Marquette R.R. v. Graham, 114 N.W. 58 (Mich. 1907).*

(n447)Footnote 447. *Penry v. Richards, 52 Cal. 496 (1877); Strasser v. Stabeck, 127 N.W. 384 (Minn. 1910); Borer v. Lange, 46 N.W. 358 (Minn. 1890); Hicklin v. McClear, 22 P. 1057 (Or. 1889); Snooks v. Wingfield, 44 S.E. 277 (W. Va. 1903).*

(n448)Footnote 448. *Redd v. Murry, 24 P. 841 (Cal. 189), 30 P. 132 (Cal. 1892).*

(n449)Footnote 449. *Kuck v. Wakefield, 115 P. 427 (Or. 1911).*

(n450)Footnote 450. *Spencer v. Levy, 173 S.W. 550 (Tex. App. 1914).*

(n451)Footnote 451. *Reeves v. Jackson, 184 S.W.2d 256 (Ark. 1944).*

(n452)Footnote 452. *Hostetter v. Commonwealth, 80 A.2d 719 (Pa. 1951); Searcy v. Logan, 39 S.E.2d 593 (Tex. App. 1931)* (map or plat not made under order of court is not admissible but may be used by the surveyor witness to elucidate the surveyor's testimony); *Reynolds v. Bradford, 233 S.W.2d 464 (Tex. App. 1950)* (ancient maps which have had long public recognition may be admitted in evidence to prove surveys).

(n453)Footnote 453. *Sanborn v. Mueller, 35 N.W. 666 (Minn. 1887); Whitlow v. Moore, 21 So. 2d 253 (Ala. 1945)* (an original airplane map was admissible).

(n454)Footnote 454. *Pere Marquette R.R. Graham, 114 N.W. 58 (Mich. 1907).*

(n455)Footnote 455. *Penry v. Richards, 52 Cal. 496 (1877); Redd v. Murry, 24 P. 841 (Cal. 1890).*

(n456)Footnote 456. *Cook v. Hensler, 107 P. 178 (Wash. 1910).*

(n457)Footnote 457. *Murray v. Klinzing, 29 A. 244 (Conn. 1894).*

(n458)Footnote 458. *Thrasher v. Royster, 65 So. 796 (Ala. 1914).*

(n459)Footnote 459. *Aiken v. Wallace, 68 S.E. 937 (Ga. 1910).*

(n460)Footnote 460. *Kalivoda v. Pugh, 226 P.2d 857 (Kan. 1951).*

(n461)Footnote 461. *McCullough v. Wall, 4 S.C. 68 (1850).*

(n462)Footnote 462. *Redd v. Murry, 24 P. 841 (Cal. 1890), 30 P. 132 (Cal. 1892).*

(n463)Footnote 463. *Slauson v. Goodrich Transp. Co., 74 N.W. 574 (Wis. 1898).*

(n464)Footnote 464. *Perkins v. Jacobs, 129 A. 4 (Me. 1925); Golden v. Rollins, 98 So. 2d 409 (Ala. 1957)* (a map is inadmissible where drawn by a surveyor who is living but who did not testify).

(n465)Footnote 465. *Young v. Cosgrove, 49 N.W. 1040 (Iowa 1891); Nichols v. New England Furn. Co., 59 N.W. 155 (Mich. 1894); Brewington v. Jenkins, 85 Mo. 57 (Mo. 1884); Cottingham v. Seward, 25 S.W. 797 (Tex. App. 1894).*

(n466)Footnote 466. *McCombs v. Sheldon, 26 S.W. 1114 (Tex. App. 1894).*

(n467)Footnote 467. *Whiting v. Gardner, 22 P. 71 (Cal. 1889); Cleveland v. Choate, 18 P. 875 (Cal. 1888); Penry v. Richards, 52 Cal. 496 (1877); O'Farrel v. Harney, 51 Cal. 125 (1875); Andrews v. Wheeler, 103 P. 144 (Cal. App. 1908); Lillis v. Urrutia, 99 P. 992 (Cal. App. 1908); Root v. Cincinnati, 54 N.W. 206 (Iowa 1893); Bradstreet v. Dunham, 21 N.W. 592 (Iowa 1884); Hall v. Pratt, 134 S.W. 900 (Ky. 1911); Bell v. Powers, 121 S.W. 991 (Ky. 1900); Hale v. Swift, 63 S.W. 288 (Ky. 1901); Neeley v. Maurer, 195 P.2d 628 (Wash. 1948)* (even where blocks and streets are laid out with reference to government surveys, they still must yield to the staking and locating of the blocks where parties have bought with reference to the stakes); *Koenings v. Jung, 40 N.W. 801 (Minn. 1888); Racine v. J. I. Case Plow Co., 14 N.W. 599 (Wis. 1883); Marsh v. Mitchell, 25 Wis. 706 (1868); Isacks v. Deutsch, 114 So. 2d 746 (La. App. 1959)* (if the deed refers to a plat of a subdivision, the plat takes precedence over contrary descriptions in the deed).

(n468)Footnote 468. *O'Farrel v. Harney, 51 Cal. 125 (1875).*

(n469)Footnote 469. *Zuleger v. Zeh, 150 N.W. 406 (Wis. 1915).*

(n470)Footnote 470. *Warsaw Turpentine Co. v. Fort Barrington Club, 195 S.E. 755 (Ga. 1937).*

(n471)Footnote 471. *O'Farrel v. Harney, 51 Cal. 125 (1875).*

(n472)Footnote 472. *Literary Fund v. Clark, 31 N.C. 58 (N.C. 1848).*

(n473)Footnote 473. *Bean v. Bachelder, 3 A. 279 (Me. 1886); Heaton v. Hodges, 14 Me. 66 (1836).*

(n474)Footnote 474. *Lutcher & Moore Lbr. Co. v. Hart, 26 S.W. 94 (Tex. App. 1894),* referred to and distinguished from *Bland v. Smith, 26 S.W. 773 (Tex. App. 1894).*

(n475)Footnote 475. *Chapman v. Polack, 11 P. 764 (Cal. 1886); Delaware Securities Corp v. Kahn, 175 So. 779 (Fla. 1937); Beaty v. Robertson, 30 N.E. 706 (Ind. 1892); Cornett v. Dixon, 11 S.W. 660 (Ky. 1889).* In *Vance v. Fore, 24 Cal. 435 (1864),* it was said: "The map may be regarded as a daguerreotype of the land which the grantor intended to convey."

(n476)Footnote 476. *Taylor v. Stacey, 131 S.W. 491 (Ky. 1910).*

(n477)Footnote 477. *Squire v. Greer, 26 P. 222 (Wash. 1891).*

(n478)Footnote 478. *Penry v. Richards, 52 Cal. 496 (1877); O'Farrel v. Harney, 51 Cal. 125 (1875); Root v. Cincinnati, 54 N.W. 206 (Iowa 1893); Bradstreet v. Dunham, 21 N.W. 592 (Iowa 1884); Bean v. Bachelder, 3 A. 279 (Me. 1886); Williams, v. Spaulding, 29 Me. 112 (Me. 1848); Esmond v. Tarbox, 7 Me. 61 (Me. 1830); Pike v. Dyke, 2 Me. 213 (Me. 1823); Whitehead v. Ragan, 17 S.W. 307 (Mo. 1891); Dolde v. Vodicka, 49 Mo. 98 (Mo. 1871); Kronenberger v. Hoffner, 44 Mo. 185 (Mo. 1869); Graham v. Dewees, 20 S.W. 127 (Tex. 1892); Smith v. Boone, 19 S.W. 702 (Tex. 1892); State v. Flick, 180 S.W.2d 371 (Tex. App. 1943); Marsh v. Mitchell, 25 Wis. 706 (Wis. 1868).*

(n479)Footnote 479. *Andrews v. Wheeler, 103 P. 144 (Cal. App. 1908).*

(n480)Footnote 480. *Higueras v. United States, 72 U.S. 827, 18* L. Ed.469 (1864); *United States v. Sutter, 62 U.S. 170, 16 L. Ed. 119 (1858); Wolfe v. Scarborough, 2 Ohio St. 361 (1853); Grier v. Pennsylvania Coal Co., 18 A. 480 (Pa. 1889); Bland v. Smith, 26 S.W. 773 (Tex. App. 1894).*

(n481)Footnote 481. *Stetson v. Adams, 39 A. 575 (Me. 1898).*

(n482)Footnote 482. *Powers v. Jackson, 50 Cal. 429 (1875); Miller v. Topeka Land Co., 24 P. 420 (Kan. 1890); Tarpenning v. Cannon, 28 Kans. 665 (1882).*

(n483)Footnote 483. *Wineman v. Grummond, 51 N.W. 509 (Mich. 1892). See Burdell v. Taylor, 26 P. 1094 (Cal. 1891).*

(n484)Footnote 484. *New Hampshire Land Co. v. Tilton, 19 F. 73 (N.H. Cir. 1884).* In *Hicklin v. McClear, 22 P. 1057 (Or. 1889),* it was held that in an action involving the title to certain town lots, the facts relating to platting of the town site by the proprietors, their dedication of the streets and alleys by conveying lots therein, the existence of the two plats, and their similitude in fact, were admissible in evidence to identify the property then in controversy. Where the plat of a town site has been lost, a deed of one who, at the time it was executed, owned property within and without the tract alleged to have been covered by the plat, and which conveyed land outside the tract, describing the land by bounding by a portion of the town-site tract, is admissible to show the location of the land covered by the plat, in order to defeat the title of one claiming under such former owner. *Sperry v. Wesco, 38 P. 623 (Or. 1894).*

(n485)Footnote 485. *Askins v. British American Oil Producing Co., 203 P.2d 877 (Okla 1949).*

(n486)Footnote 486. *Finlaw v. Hunter, 96 N.E.2d 319 (Ohio App. 1949).*

(n487)Footnote 487. *Caraker v. Brown, 111 S.E. 51 (Ga. 1922); Moore v. McAfee, 106 S.E. 274 (Ga. 1921)* ("Old Grant Mill Place"); *Meir-Nandorf v. Milner, 201 P. 720 (Idaho 1921)* ("Bear Island"); *Courvelle v. Eckart, 50 So. 2d 325 (La. App. 1951); Floyd v. Cook, 49 So. 2d 365 (La. App. 1950); Dill-Cramer-Truitt Corp. v. Jacksonville Lbr. Co.,*

112 S.E. 740 (N.C. 1922) ("Town Point Plantation"); *Merchant v. Marshfield Trading Co., 188 P. 174 (Or. 1920).*

(n488)Footnote 488. *Rickert v. Thompson, 8 Alaska 398 (1933); Ledford v. Hill, 60 S.E.2d 555 (Ga. App. 1950); Richardson v. Register, 87 S.E.2d 40 (S.C. 1955); Cockrell v. Work, 94 S.W.2d 784 (Tex. App. 1936).*

(n489)Footnote 489. *White v. Spahr, 59 S.E.2d 916 (Ga. 1950); Floyd v. Cook, 49 So. 2d 365 (La. App. 1950); Beasley v. Beasley, 171 So. 680 (Miss. 1937).*

(n490)Footnote 490. *Case v. Brier Hill Collieries, 235 S.W. 57 (Tenn. 1921).*

(n491)Footnote 491. *Murray v. Tulare IrR.R., 49 P. 563 (Cal. 1897), 52 P. 586 (Cal. 1898); McAffee v. Arline, 10 S.E. 441 (Ga. 1889); Trentman v. Neff, 24 N.E. 895 (Ind. 1890); Porter v. Porter, 123 S.W. 302 (Ky. 1909); Andrews v. Pearson, 68 Me. 19 (1875); Garvey v. Parkhurst, 86 N.W. 802 (Mich. 1901); Dochterman v. Marshall, 46 So. 542 (Miss. 1908); Marvin v. Elliot, 12 S.W. 899 (Mo. 1890); Euliss v. McAdams, 13 S.E. 162 (N.C. 1891); McGlawhorn v. Worthington, 3 S.E. 633 (N.C. 1887); Smith v. Low, 24 N.C. 457 (N.C. 1842).*

(n492)Footnote 492. *Truett v. Adams, 5 P. 96 (Cal. 1884); Haley v. Amestoy, 44 Cal. 132 (Cal. 1872); Stanley v. Green, 12 Cal. 148 (1859); Huddleson v. Reynolds, 8 Gill. 332 (Md. 1849).*

(n493)Footnote 493. *Kimbrell v. Rogers, 7 So. 241 (Ala. 1890).* "While, ordinarily, land cannot be said to pass as appurtenant to land, if the land expressly granted does not admit of reasonable enjoyment without certain adjacent land, which has been constantly used with the land granted, it will also pass." *Woodman v. Smith, 53 Me. 79 (Me. 1865).*

(n494)Footnote 494. *Dochterman v. Marshall, 46 So. 542 (Miss. 1908).*

(n495)Footnote 495. *Barksdale v. Barksdale, 45 So. 615 (Miss. 1908).*

(n496)Footnote 496. *McAfee v. Arline, 10 S.E. 441 (Ga. 1889).*

(n497)Footnote 497. *Vejar v. Mound City Land & Water Ass'n, 32 P. 713 (Cal. 1893); Martin v. Lloyd, 29 P. 491 (Cal. 1892); Hayley v. Amestoy, 44 Cal. 132 (1872); Cadwalader v. Price, 73 A. 273 (Md. 1909); Paroni v. Ellison, 14 Nev. 60 (1879); Freeman v. Ramsey, 128 S.E. 404 (N.C. 1925); Harkey v. Cain, 6 S.W. 637 (Tex. 1887).*

(n498)Footnote 498. *Murray v. Tulare IrR.R., 49 P. 563 (Cal. 1897), 52 P. 586 (Cal. 1898).*

(n499)Footnote 499. *Masterson v. Munro, 38 P. 1106 (Cal. 1895); McAfee v. Arline, 10 S.E. 441 (Ga. 1889); Colstad v. Levine, 67 N.W.2d 648 (Minn. 1954)* (where the memo describes the real estate by street address, it is an adequate description to avoid application of statute of frauds); *Moore v. Minneapolis & St. P. S. R.R., 152 N.W. 405 (Minn. 1915); Ambs v. Chicago, St. P., M. & O. R.R., 46 N.W. 321 (Minn. 1890); O'Herrin v. Brooks, 6 So. 844 (Miss. 1889); Rutherford v. Tracy, 48 Mo. 325 (1871); Union R. & T. Co. v. Skinner, 9 Mo. App. 189 (Mo. App. 1880); Johnson v. Watson, 272 P.2d 580 (Nev. 1954)* (a description by street, number, town and state of real estate set out in a memo is sufficient to support an oral agreement to sell).

(n500)Footnote 500. *Arambula v. Sullivan, 16 S.W. 436 (Tex. 1891).*

(n501)Footnote 501. *Deleware Securities Corp. v. Kahn, 175 So. 779 (Fla. 1937).*

(n502)Footnote 502. *Trott v. Joslyn, 192 N.W. 536 (Mich. 1923).*

(n503)Footnote 503. *Arambula v. Sullivan, 16 S.W. 436 (Tex. 1891),* explaining *Sikes v. Shows, 74 Ala. 382 (1883).*

(n504)Footnote 504. *Friedman v. Nelson, 53 Cal. 589 (1879).*

(n505)Footnote 505. *Marvin v. Elliott, 12 S.W. 899 (Mo. 1890).*

(n506)Footnote 506. *Sanders v. Godding, 45 Iowa 463 (Iowa 1877); Tompkins v. Thomas, 118 S.W. 581 (Tex. App. 1909).*

(n507)Footnote 507. *Klapman v. Hook, 32 S.E.2d 882 (S.C. 1945).*

(n508)Footnote 508. *Ewell v. Weagley, 13 F.2d 712 (4th Cir. 1926); Metropolitan Life Ins. Co. v. Hoskins, 117 S.W.2d 180 (Ky. 1937).*

(n509)Footnote 509. *Ewell v. Weagley, 13 F.2d 712 (4th Cir. 1926); Snodgrass v. Snodgrass, 101 So. 837 (Ala. 1924); Cates v. Cates, 247 S.W. 780 (Ark. 1923); Gragg v. Culp, 246 P. 43 (Cal. 1926); McConnell v. White, 85 S.E.2d 75 (Ga. App. 1954); Blaylock v. Hackel, 138 S.E. 333 (Ga. 1927); Gesaman v. Minton, 132 N.E. 654 (Ind. App. 1921); Strunk v. Geary, 288 S.W. 1053 (Ky. 1926); Tulane Educ. Fund v. Stair, 86 So. 595 (La. 1920); People v. Call, 223 N.Y.S. 257 (N.Y. App. Div. 1927); Hutchinson v. Little Four Oil & Gas Co., 119 A. 534 (Pa. 1923); Easterling v. Simmons, 293 S.W. 690 (Tex. App. 1927); Brunswick Land Corp. v. Perkinson, 132 S.E. 853 (Va. 1926); United Fuel Gas Co. v. Snyder, 135 S.E. 164 (W. Va. 1926); Fehrman v. Bissell Lbr. Co., 204 N.W. 582 (Wis. 1925), 205 N.W. 905 (Wis. 1925).*

(n510)Footnote 510. *Ewell v. Weagley, 13 F.2d 712 (4th Cir. 1926); Kelekolio v. Onomea Sugar Co., 29 Haw. 130 (1926); Cotton v. Cotton, 112 A. 245 (N.H. 1920); Wisconsin Realty Co. v. Lull, 187 N.W. 978 (Wis. 1922).*

(n511)Footnote 511. *People v. Call, 223 N.Y.S. 257 (N.Y. App. Div. 1927); Post v. Wilkes-Barre Connecting R.R., 133 A. 377 (Pa. 1926). See McQueen v. Graham, 111 S.E. 860 (N.C. 1922).*

(n512)Footnote 512. *Land v. Dunn, 241 S.W. 580 (Tex. App. 1922).*

(n513)Footnote 513. *Beal v. Schewe, 683 N.E.2d 1019 (Ill. App. 1997)* (purchaser brought action against vendors after discovering that farmland contained only 948 acres, although purchaser believed that he had purchased 980 acres); *Veve y Diaz v. Sanchez, 226 U.S. 234, 33 S. Ct. 36, 57 L. Ed. 201 (1912); Spreckels v. Brown, 212 U.S. 208, 29 S. Ct. 256, 53 L. Ed. 476 (1909); Ayers v. Watson, 113 U.S. 594, 5 S. Ct. 641, 28 L. Ed. 1093 (1885); Busbee v. Thomas, 57 So. 587 (Ala. 1912); Hess v. Cheney, 3 So. 791 (Ala. 1888); Rogers v. Peebles, 72 Ala. 529 (Ala. 1882); Wright v. Wright, 34 Ala. 194 (1859); Doe ex dem. Phillips v. Porter, 3 Ark. 18 (1840); Winans v. Cheney, 55 Cal. 567 (1880); Stanley v. Green, 12 Cal. 148 (1859); Nichols v. Turney, 15 Conn. 101 (1842); Belden v. Seymour, 8 Conn. 19 (1830); Snow v. Chapman, 1 Conn. 528 (Super. 1793); Dale v. Smith, 1 Del. Ch. 1 (1814); Andreu v. Watkins, 7 So. 876 (Fla. 1890); Benton v. Horsley, 71 Ga. 619 (Ga. 1883); Harris v. Hull, 70 Ga. 831 (1883); Ufford v. Wilkins, 33 Iowa 110 (1871); Armstrong v. Brownfield, 4 P. 185 (Kan. 1884); Clark v. Scammon, 62 Me. 47 (1873); Chandler v. McCard, 38 Me. 564 (1854); Allen v. Allen, 14 Me. 387 (1837); Morse v. Kelley, 26 N.E.2d 326 (Mass. 1940); Turnbull v. Schroeder, 11 N.W. 147 (Minn. 1882); Baker v. Clay, 14 S.W. 734 (Mo. 1890); Ware v. Johnson, 66 Mo. 662 (Mo. 1877); Campbell v. Johnson, 44 Mo. 247 (1869); Thayer v. Finton, 15 N.E. 615 (N.Y. 1888); Case v. Dexter, 13 N.E. 449 (N.Y. 1887); Raymond v. Coffey, 5 Or. 132 (1873); Doyle v. Mellen, 8 A. 709 (R.I. 1887); Miller v. Bentley, 37 Tenn. 671 (Tenn. 1858); Rand v. Cartwright, 18 S.W. 794 (Tex. 1891); Granberry v. Storey, 127 S.W. 1122 (Tex. App. 1910); McDonald v. McCrabb, 105 S.W. 238 (Tex. App. 1907); South Penn Oil Co. v. Knox, 69 S.E. 1020 (W. Va. 1910); Rioux v. Cormier, 44 N.W. 654 (Wis. 1890).*

(n514)Footnote 514. *Wood v. Hildebrand, 42 A.2d 919* (Md. 1945; *Blevins v. Manufacturers Record Publishing Co., 105 So. 2d 392 (La. 1957)* (acreage designations do not enlarge metes and bounds description).

(n515)Footnote 515. *Motichek v. Perriloux, 93 So. 2d 190 (La. 1957); W.B. Thompson & Co. v. McNair, 7 So. 2d 184 (La. 1942); Texas Pacific Coal & Oil Co. v. Masterson, 334 S.W.2d 436 (Tex. 1960); Beasley v. Beasley, 171 So. 680 (Miss. 1937)* (when an accurate fractional designation is employed followed by an erroneous recital to acreage, the latter is disregarded).

(n516)Footnote 516. *Kennedy v. Boykin, 14 S.E. 809 (S.C. 1892).* As far back as 1818, Nott, J., said, in *Peay v. Briggs, 9 S.C. 98 (1818),* recognized in the more recent case of *Bratton v. Clawson, 34 S.C. 127 (1848),* "that where a person purchases land by metes and bounds, represented to contain a certain number of acres, 'more or less,' he [or she] is entitled to recover all the lands within the prescribed limits, whatever the number of acres may be. It must be apparent from the words 'more or less' that the metes and bounds are to govern, and not the number of acres."

(n517)Footnote 517. *Montana Min. Co. v. St. Louis Min. & Milling Co., 183 F. 51 (9th Cir. 1910); Wheatley v. San Pedro, L. A. & S. L. R.R., 147 P. 135 (Cal. 1915); Shrrod v. Battle, 70 S.E. 834 (N.C. 1911); Holden v. Cantrell, 84 S.E. 826 (S.C. 1915).*

(n518)Footnote 518. *Wilson Lbr. & Milling Co. v. Hutton, 68 S.E. 2 (N.C. 1910); Mitchell v. Nicholson, 3 N.W.2d 83 (N.D. 1942); McDowell v. Carothers, 146 P. 800 (Or. 1915); Sansing v. Bricka, 159 S.W.2d 142 (Tex. App. 1941); Turner v. Creech, 108 P. 108 (Wash. 1910).*

(n519)Footnote 519. *Snyder v. Rhinehart, 118 S.W.2d 543 (Ky. 1938).*

(n520)Footnote 520. *Hess v. Cheney, 3 So. 791 (Ala. 1888); Winston v. Browning, 61 Ala. 80 (1878).*

(n521)Footnote 521. *Carswell v. Sanders, 185 S.E. 282 (Ga. 1936).*

(n522)Footnote 522. *Mosley v. Edds, 80 S.W.2d 401 (Tex. App. 1935).*

(n523)Footnote 523. *Wisconsin Realty Co. v. Lull, 187 N.W. 978 (Wis. 1922).*

(n524)Footnote 524. *Montana Min. Co. v. St. Louis Min. & Milling Co., 183 F. 51 (9th Cir. 1910).*

(n525)Footnote 525. *Dierks Lbr. & Coal Co. v. Tedford, 146 S.W.2d 918 (Ark. 1941).*

(n526)Footnote 526. *Sanders v. Godding, 45 Iowa 463 (1877); Tompkins v. Thomas, 118 S.W. 581 (Tex. App. 1909).*

(n527)Footnote 527. *Sanders v. Godding, 45 Iowa 463 (1877).*

(n528)Footnote 528. *Raymond v. Jackson, 9 N.E.2d 409 (Mass. 1937).*

(n529)Footnote 529. *Hess v. Cheney, 3 So. 791 (Ala. 1888); Rogers v. Peebles, 72 Ala. 529 (1882); Richwine v. Jones, 39 N.E. 460 (Ind. 1895); Silver Creek Cement Corp. v. Union Lime & Cement Co., 35 N.E. 125 (Ind. 1893), 37 N.E. 721 (Ind. 1894); Finley v. Meadows, 119 S.W. 216 (Ky. 1909); Motichek v. Perriloux, 93 So. 2d 190 (La. 1957); Qucoin v. Marcel, 38 So. 2d 81 (La. App. 1948)* (a sale of land from one fixed boundary to the other is a sale per aversionem and the purchaser takes all of the land though the acreage is greater than that called for in his deed); *Andrews v. Pearson, 68 Me. 19 (Me. 1875); Morse v. Kelley, 26 N.E.2d 326 (Mass. 1940); Sansing v. Thomas, 52 So. 2d 478 (Miss. 1951); Ayers v. Harris, 13 S.W. 768 (Tex. 1890); Hunter v. Hume, 13 S.E. 305 (Va. 1891); Gwynn v. Schwarz, 9 S.E. 880 (W. Va. 1889); Borkenhagen v. Vianden, 52 N.W. 260 (Wis. 1892); Doctor v. Furch, 44 N.W. 648 (Wis. 1890).*

In *Baker v. Light, 16 S.W. 330 (Tex. 1891),* the deed was of "400 acres, more or less, out of the southeast corner" of a certain survey, and described that the tract conveyed did not reach to the east line of the survey. It was proved that, when the tract conveyed was surveyed, the east line of the survey could not be found, and that the surveyor only established the west corners of the tract. The position of these corners was not disputed. Although there were 400 acres within the courses and distances named in the deed, the deed passed title to all the land between the west corners of the tract and the east line of the survey.

(n530)Footnote 530. *Silver Creek Cement Corp. v. Union Lime & Cement Corp., 35 N.E. 125 (Ind. 1893), 37 N.E.*

721 (Ind. 1894); Allen v. Kersey, 3 N.E. 557 (Ind. 1885).

(n531)Footnote 531. *Steele v. Williams, 15 S.W. 49 (Ky. 1891).*

(n532)Footnote 532. *Van Eaton v. Dennis, 242 S.W.2d 21 (Mo. 1951).*

(n533)Footnote 533. *Gesaman v. Minton, 132 N.E. 654 (Ind. App. 1921); Meyer v. Comegrys, 86 So. 307 (La. 1920); Brauer v. Adams, 101 S.E.2d 558 (Va. 1958).*

(n534)Footnote 534. *Withe v. Luing, 93 U.S. 514, 23 L. Ed. 938 (1876); Dorr v. School Dist. No. 26, 40 Ark. 237 (1882); Hall v. Shotwell, 5 P. 683 (Cal. 1885); Winans v. Cheney, 55 Cal. 567 (1880); Hicks v. Coleman, 25 Cal. 122 (1864); Campbell v. Carruth, 13 So. 432 (Fla. 1893); Andrews v. Murphy, 12 Ga. 431 (1859); Pennington v. Flock, 93 Ind. 378 (Ind. 1884); Jones v. Motley, 13 S.W. 432 (Ky. 1890); Snyder v. Rhinehart, 118 S.W.2d 543 (Ky. 1938); Hoffman v. Port Huron, 60 N.W. 831 (Mich. 1894); Moran v. Lezotte, 19 N.W. 757 (Mich. 1884); Enochs v. Miller, 60 Miss. 19 (1882); Davis v. Hess, 15 S.W. 324 (Mo. 1891); Wolfe v. Dyer, 8 S.W. 551 (Mo. 1888); Prior v. Scott, 87 Mo. 303 (Mo. 1885); Burnett v. McCluey, 78 Mo. 676 (1883); Wilson Lbr. & Milling Co. v. Hutton, 68 S.E. 2 (N.C. 1910); Hale v. Cottle, 28 P. 901 (Or. 1892).*

(n535)Footnote 535. *Lovett v. West Virginia Cent. Gas Co., 79 S.E. 1007 (W. Va. 1913).*

(n536)Footnote 536. *Currie v. Gilchrist, 61 S.E. 581 (N.C. 1908). See Succession of Bryant, 53 So. 2d 517 (La. App. 1951).*

(n537)Footnote 537. *O'Brien v. Clark, 64 A. 53 (Md. 1906).*

(n538)Footnote 538. *Ainsa v. United States, 161 U.S. 208, 16 S. Ct. 544, 40 L. Ed. 673 (1896); People v. Call, 223 N.Y.S. 257 (1927).*

(n539)Footnote 539. *McDonald v. McCrabb, 105 S.W. 238 (Tex. App. 1907); Turner v. Creech, 108 P. 1084 (1910).*

(n540)Footnote 540. *Scott v. Pettigrew, 12 S.W. 161 (Tex. 1888).*

(n541)Footnote 541. *Wisconsin Realty Co. v. Lull, 187 N.W. 978 (Wis. 1922).*

(n542)Footnote 542. *Korneman v. Davis, 219 S.W. 904 (Mo. 1920).*

(n543)Footnote 543. *Hall v. Shotwell, 5 P. 683 (Cal. 1885); Hicks v. Coleman, 25 Cal. 122 (1864); State v. Hicks, 85 S.E. 665 (W. Va. 1915).*

(n544)Footnote 544. *Ainsa v. United States, 161 U.S. 208, 16 S. Ct. 544, 40 L. Ed. 673 (1896).*

(n545)Footnote 545. *Tompkins v. Thomas, 118 S.W. 581 (Tex. App. 1896).*

(n546)Footnote 546. *Carnegie Natural Gas Co. v. Carter Oil Co., 81 S.E. 840 (W. Va. 1914).*

(n547)Footnote 547. *Moran v. Lezotte, 19 N.W. 757 (Mich. 1884); Lipscomb v. Underwood, 27 S.W. 155 (Tex. App. 1894); Slack v. Dawes, 22 S.W. 1053 (1893); Rioux v. Cormier, 44 N.W. 654 (Wis. 1890).*

(n548)Footnote 548. *Sanders v. Godding, 45 Iowa 463 (1877).*

(n549)Footnote 549. *Doyle v. Mellen, 8 A. 709 (R.I. 1887).*

(n550)Footnote 550. *Santa Clara Min. Ass'n v. Quicksilver Min. Co., 17 F. 657 (C.C. Cal. 1882).*

(n551)Footnote 551. *Dohoney v. Womack, 19 S.W. 883 (Tex. 1892), 20 S.W. 950 (Tex. App. 1892); Penny v. Booth, 220 S.W. 430 (Tex. App. 1920).*

(n552)Footnote 552. *Dull v. Blum, 4 S.W. 489 (Tex. 1887).*

(n553)Footnote 553. *Ransome v. Watson, 134 S.E. 707 (Va. 1926).*

(n554)Footnote 554. *Dohoney v. Womack, 19 S.W. 883 (Tex. 1892), 20 S.W. 950 (Tex. App. 1892); Nye v. Moody, 8 S.W. 606 (Tex. 1888).*

(n555)Footnote 555. *Louisville & N. R.R. v. Boykin, 76 Ala. 560 (1884).*

(n556)Footnote 556. *Tarrant v. McLemore, 8 S.W. 94 (Tex. 1888).*

(n557)Footnote 557. *Nye v. Moody, 8 S.W. 606 (Tex. 1888).*

(n558)Footnote 558. *Boyd Lbr. Co. v. Mills, 92 S.E. 534 (Ga. 1917).*

(n559)Footnote 559. *Hornor v. Jarrett, 137 S.W. 820 (Ark. 1911); Alleman v. Hammond, 70 N.E. 661 (Ill. 1904); Sullenger v. Baecher, 101 N.E. 517 (Ind. App. 1913); Kelley v. Jones, 86 A. 252 (Me. 1913); People v. Golding, 106 N.Y.S. 821 (N.Y. Supp. 1907); Keller v. Chournos, 133 P.2d 318 (Utah 1943); Moon v. Salt Lake, 76 P. 222 (Utah 1904); Miller v. Daniels, 92 P. 268 (Wash. 1907).*

(n560)Footnote 560. *Sellards v. Malheur County, 272 P.2d 975 (Or. 1954); Bennett v. Rewis, 96 S.E.2d 257 (Ga. 1957)* (deed conveying specified number of acres more or less of the north side was void for indefiniteness though the east and west boundaries were given); *Lipton v. Bruce, 154 N.Y.S.2d 951 (N.Y. 1956)* (the court shaped a tract described as "one acre out of a larger tract other than a square" so as to give access to water on a point); *McDonald v. Denson, 199 S.W.2d 707 (Tex. App. 1947)* (a deed was valid which specified a definite number of acres to be located either on one side or out of one corner of a larger tract).

(n561)Footnote 561. *Templeton v. Dreiss, 961 S.W.2d 645 (Tex. App. 1998)* (deed purporting to convey land, which describes it only by quantity and as being part of a larger tract, with nothing to identify what specific portion of the larger tract is intended to be conveyed, is void for uncertainty of description); *McClelland v. McClelland, 241 S.W.2d 264 (Ark. 1951); Graysonia-Nashville Lbr. Co. v. Wright, 175 S.W. 405 (Ark. 1915); Rhodes v. Covington, 63 S.W. 799 (Ark. 1901); Cooper v. Lee, 27 S.W. 970 (Ark. 1894); Adams v. Edgerton, 3 S.W. 628 (Ark. 1887); Mutual Bldg. & Loan Ass'n v. Wyeth, 17 So. 45 (Ala. 1895); Wilkinson v. Roper, 74 Ala. 140 (1883); Edwards v. Santa Paula, 292 P.2d 31 (Cal. App. 1956); Hall v. Bartlett, 112 P. 176 (Cal. 1910); Grace v. Grace, 89 S.E.2d 813 (Ga. App. 1955); James v. Hamil, 78 S.E. 721 (Ga. 1913); Armstrong v. Hufty, 55 N.E. 443 (Ind. 1899), 60 N.E. 1080 (Ind. 1901); Collins v. Storm, 39 N.W. 161 (Iowa 1888); Roberts v. Deeds, 10 N.W. 740 (Iowa 1881); Tircuit v. Burton-Swarz Cypress Co., 110 So. 489 (La. 1926);Powers v. Sawyer, 62 A. 349 (Me. 1905); Moulton v. Egery, 75 Me. 485 (1883); Plenny v. Ferrill, 11 So. 6 (Miss. 1892); Tierney v. Brown, 5 So. 104 (Miss. 1888); Goodbar & Co. v. Dunn, 61 Miss. 618 (1884);Dingey v. Paxton, 60 Miss. 1038 (1883); Cogburn v. Hunt, 54 Miss. 675 (1877); Campbell v. Johnson, 44 Mo. 247 (Mo. 1869); Higdon v. Howell, 83 S.E. 807 (N.C. 1914); Cathey v. Buchanan Lbr. Co., 66 S.E. 580 (N.C. 1909); Mizell v. Ruffin, 18 S.E. 72 (N.C. 1893); Blow v. Vaughan, 10 S.E. 891 (N.C. 1890); McGlawhorn v. Worthington, 3 S.E. 633 (N.C. 1887); Jory v. Palace Dry-Goods & Shoe Co., 46 P. 786 (Or. 1896); Overand v. Menczer, 18 S.W. 301 (Tex. 1892); Tram Lbr. Co. v. Hancock, 7 S.W. 724 (Tex. 1888); Miller v. Daniels, 92 P. 268 (Wash. 1907); Morse v. Stockman, 40 N.W. 679 (Wis. 1888).*

(n562)Footnote 562. *Harlowe v. Harlowe, 129 S.E. 98 (Ga. 1925).*

(n563)Footnote 563. *Dohoney v. Womack, 19 S.W. 883 (Tex. 1892), 20 S.W. 950 (Tex. App. 1892); Penney v. Booth, 220 S.W. 430 (Tex. App. 1920).*

(n564)Footnote 564. *Watson v. Crutcher, 19 S.W. 98 (Ark. 1892); Cox v. Hayes, 27 P. 785 (Cal. 1883); Gress Lbr. Co. v. Coody, 21 S.E. 217 (Ga. 1894); Soukup v. Union Inv. Co., 51 N.W. 167 (Iowa 1892); Tierney v. Brown, 5 So. 104 (Miss. 1888); Goodbar & Co. v. Dunn, 61 Miss. 618 (1884); Enochs v. Miller, 60 Miss. 19 (1882); McCready v. Lansdale, 58 Miss. 877 (1881); Jones v. Mabry, 225 S.W.2d 561 (Tenn. App. 1949); Mendota Club v. Anderson, 78 N.W. 185 (Wis. 1899); Scott v. Washburn, 324 S.W.2d 957 (Tex. App. 1959)* (description calling for a definite quantity of land out of a corner of another tract or where two sides are known presents a parallelogram); *Fowler v. Tarbet, 274 P.2d 341 (Wash. 1954)* ("two acres in width east and west" held a valid description).

(n565)Footnote 565. *Wilkinson v. Roper, 74 Ala. 140 (1883); McCartney v. Dennison, 35 P. 766 (Cal. 1894); Richey v. Sinclair, 47 N.E. 364 (Ill. 1897); W.C. Early & Co. v. Long, 42 So. 348 (Miss. 1906); Goodbar & Co. v. Dunn, 61 Miss. 618 (1884); Smith v. Nelson, 19 S.W. 734 (Mo. 1892); Mitchell v. Nicholson, 3 N.W.2d 83 (N.D. 1942); Walsh v. Ringer, 2 Ohio 327 (1926); Dull v. Blum, 4 S.W. 489 (Tex. 1887). See McDonald v. Denson, 199 S.W.2d 707 (Tex. App. 1947); Lego v. Medley, 48 N.W. 375 (Wis. 1891); Caudill v. McNeil, 106 S.E.2d 467 (N.C. 1959)* (a call dividing land in half meant half as to area).

(n566)Footnote 566. *Anderson-Tully Co. v. Campbell, 10 So. 2d 445 (Miss. 1942).*

(n567)Footnote 567. *Humble Oil & Ref. Co. v. Manziel, 187 S.W.2d 149 (Tex. App. 1945).*

(n568)Footnote 568. *McClelland v. McClelland, 241 S.W.2d 264 (Ark. 1951); Shoemaker v. McMonigle, 86 Ind. 421 (Ind. 1882); White v. Hyatt, 40 Ind. 385 (1872); Buchanan v. Whitham, 36 Ind. 257 (1871). See Schattler v. Cassinelli, 19 S.W. 746 (Ark. 1892); Stewart v. Aten, 5 Ohio St. 257 (1855).*

(n569)Footnote 569. *Wilkinson v. Roper, 74 Ala. 140 (1883); McCartney v. Dennison, 35 P. 766 (Cal. 1894); Soukup v. Union Inv. Co., 51 N.W. 167 (Iowa 1892); Lovejoy v. Gaskill, 14 N.W. 583 (Minn. 1883); Smith v. Nelson, 19 S.W. 734 (Mo. 1892); Walsh v. Ringer, 2 Ohio 327 (1826); Blackert v. Dugosh, 145 N.E.2d 606 (1957)* (one-half acre on the east side construed as being drawn by parallel lines); *Day v. Pounders, 94 So. 2d 620 (Miss. 1957)* (exception of "10 acres off S.E. corner" was valid);. *Walsh v. Ringer, 2 Ohio 327 (1826)* ("70 acres in the southwest corner" was held valid).

(n570)Footnote 570. *Barton v. Cridge, 44 N.E. 541 (Ind. 1896).*

(n571)Footnote 571. *Vaughn v. Schmalsle, 25 P. 102 (Mont. 1890).*

(n572)Footnote 572. *Cullen v. Sprigg, 23 P. 222 (Cal. 1890); Pipkin v. Allen, 29 Mo. 229 (1859); Morehead v. Hall, 35 S.E. 428 (N.C. 1900); Seguin v. Maloney-Chambers Lbr. Co., 253 P.2d 252 (Or. 1953), 256 P.2d 514 (Or. 1953); Morris v. Baird, 78 S.E. 371 (W. Va. 1913); W.T. Carter & Bro. v. Ewers, 131 S.W.2d 86 (Tex. App. 1939)* ("An undivided interest in" a described tract held insufficient as contrasted with "my undivided interest").

(n573)Footnote 573. *Tircuit v. Burton-Swartz Cypress Co., 110 So. 489 (La. 1926); Smith v. Sorelle, 87 S.W.2d 703 (Tex. App. 1932).*

(n574)Footnote 574. *Jones v. Mabry, 225 S.W.2d 561 (Tenn. App. 1949).*

(n575)Footnote 575. *Cullen v. Sprigg, 23 P. 222 (Cal. 1890); Wallace v. Miller, 52 Cal. 655 (1878); Grogan v. Vache, 45 Cal. 610 (1873); Lawrence v. Ballou, 37 Cal. 518 (1869); Schenk v. Evoy, 24 Cal. 104 (1864); Lick v. O'Donnell, 3 Cal. 59 (1853); McAfee v. Arline, 10 S.E. 441 (Ga. 1889); Pipkin v. Allen, 29 Mo. 229 (1859); Dohoney v. Womack, 19 S.W. 883 (Tex. 1892); Eldredge v. Godwin, 263 S.W.2d 598 (Tex. App. 1953); Linnartz v. McCulloch, 27 S.W. 279 (Tex. App. 1893); Slack v. Dawes, 22 S.W. 1053 (Tex. App. 1892). See* the following cases: *Tribble v. Wood, 65 So. 73 (Ala. 1914); Osteen v. Wynn, 62 S.E. 37 (Ga. 1905); Phillips v. Collinsville Granite Co., 51 S.E. 666 (Ga. 1905); Sabatier v. Bowie Lbr. Co., 56 So. 628 (La. 1911); Kirkpatrick v. Schaal, 110 N.W. 730 (Neb. 1906); Morris v. Short, 151 S.W. 633 (Tex. App. 1912); Wing v. Red, 145 S.W. 301 (Tex. App. 1912); Morris v. Baird, 78 S.E. 371 (W.*

Va. 1913).

(n576)Footnote 576. *Grider v. Wood, 178 F. 908 (8th Cir. 1910).*

(n577)Footnote 577. *Grogan v. Vache, 45 Cal. 610 (Cal. 1873); Roth v. Gabbert, 27 S.W. 528 (Mo. 1894); Dwyre v. Speer, 27 S.W. 585 (Tex. App. 1894).*

(n578)Footnote 578. *Lawrence v. Barrow, 117 S.W.2d 116 (Tex. App. 1938).*

(n579)Footnote 579. *Maier v. Joslin, 48 N.W. 909 (Minn. 1891).*

(n580)Footnote 580. *Baker v. Clay, 14 S.W. 734 (Mo. 1890).*

(n581)Footnote 581. *Gress Lbr. Co. v. Coody, 21 S.E. 217 (Ga. 1894); Cobb v. Taylor, 32 N.E. 822 (Ind. 1892), 33 N.E. 615 (Ind. 1893).*

(n582)Footnote 582. *Honey v. Gambriel, 135 N.E. 25 (Ill. 1922); Hodge v. Blanton, 38 Tenn. 560 (1858).* In the case of *McDonough v. Roland Park Co., 57 A.2d 279 (Md. 1948),* a reservation of a graveyard 50 feet square used as a burial place by the grantor and his heirs was held to be void where it could not be proven that a graveyard had ever existed and there was nothing in the deed to locate the area. For a similar case, *see Mooney v. Cooledge, 30 Ark. 640 (1875).*

(n583)Footnote 583. *Dinwiddie v. Cox, 9 So. 2d 68 (La. App. 1942).*

(n584)Footnote 584. *Perry v. Clark, 32 N.E. 226 (Mass. 1892).*

(n585)Footnote 585. *Id.*

(n586)Footnote 586. *Sanders v. Alford Bros. Co., 111 So. 278 (Fla. 1926); Hertel v. Woodard, 191 P.2d 400 (Or. 1948)* (description of property by street and number is insufficient to decree specific performance since parol evidence cannot be introduced to show other description); *Broaddus v. Grout, 258 S.W.2d 308 (Tex. 1953)* (added parcel containing a metes and bounds description but giving the wrong tract number was void); *Wilkinson v. Webb, 23 So. 180 (Miss. 1898);* (description of county unimportant where town is shown);.

(n587)Footnote 587. *Hawkins v. Hudson, 45 Ala. 482 (1871); Stephens v. Ledgerwood, 226 S.W.2d 587 (Ark. 1950); McCullough v. Olds, 41 P. 420 (Cal. 1895); Wilder v. Aurora, DeKalb & R. Elec. Trac. Co., 75 N.E. 194 (Ill. 1905); Garden City Sand Co. v. Miller, 41 N.E. 753 (Ill. 1895); Calton v. Lewis, 21 N.E. 475 (Ind. 1884); Beal v. Blair, 33 Iowa 318 (1872); Mee v. Benedict, 57 N.E. 175,* (Mich. 1893); *Russell v. Sweezey, 22 Mich. 235 (1871); Hanna v. Renfro, 32 Miss. 125* (Miss. Err. & App. 1856); *Howe v. Williams, 51 Mo. 252 (Mo. 1873); Carson v. Railsback, 13 P. 618 (Wash. 1887); Crotty v. Effler, 54 S.E. 345 (W. Va. 1906).*

(n588)Footnote 588. *Fuller v. Fellows, 30 Ark. 657 (1875); Brenneman v. Dillon, 129 N.E. 564 (Ill. 1920); Gordon v. Goodman, 98 Ind. 269 (1884).*

(n589)Footnote 589. *Dorr v. School District, 40 Ark. 237 (1882); Connelly v. Smith, 97 So. 2d 865 (Fla. App. 1957); Haughton v. Sartor, 15 So. 71 (Miss. 1894),* overruling *Foute v. Fairman, 48 Miss. 536 (Miss. 1873).*

(n590)Footnote 590. *Stephens v. Ledgerwood, 226 S.W.2d 587 (Ark. 1950); Sanders v. Alford Bros. Co., 111 So. 278 (Fla. 1926); Jones v. Mabry, 225 S.W.2d 561 (Tenn. App. 1949); Easterling v. Simmons, 293 S.W. 690 (Tex. App. 1927).*

(n591)Footnote 591. *Homan v. Stewart, 16 So. 35 (Ala. 1894); Dutch v. Boyd, 81 Ind. 146 (1881).* "The real estate in controversy is described in the deed as being in Scottsburg, but the deed is silent as to the county and state in which it

is situated. The deed, however, was made and acknowledged in Scott County, Indiana, and the parties thereto are described as being residents of that county. The cause was tried in Scott County, Indiana, in a court of general jurisdiction, without objection, and the witnesses spoke of the property as being situated in Scottsburg. Under this state of facts we will presume that the land in controversy is in Scott County, Indiana." *Warmoth v. Dryden, 25 N.E. 433 (Ind. 1890).*

(n592)Footnote 592. *Mead v. Parker, 115 Mass. 413 (1874).*

(n593)Footnote 593. *Webb v. Elyton Land Co., 18 So. 178 (Ala. 1895); Tewksbury v. Howard, 37 N.E. 355 (Ind. 1894); Flynn v. Holman, 94 N.W. 447 (Iowa 1903); Ladnier v. Ladnier, 23 So. 430 (Miss. 1848).*

(n594)Footnote 594. *Glover v. Newsome, 65 S.E. 64 (Ga. 1909).*

(n595)Footnote 595. *Hartigan v. Hoffman, 47 P. 217 (Wash. 1896).*

(n596)Footnote 596. *Thrash v. Wood, 112 S.E.2d 578 (Ga. 1960); Hofer v. Carino, 72 A.2d 335* (N.J. 19500; *Wachovia Bank & Trust Co. v. Miller, 89 S.E.2d 765 (N.C. 1955).*

(n597)Footnote 597. *Porter v. Paschal, 125 S.E. 846 (Ga. 1924); Brenneman v. Dillon, 129 N.E. 564 (Ill. 1920); Fidelity Realty Co. v. Flahaven Land Co., 236 S.W. 260 (Ky. 1922); Bayard v. Baldwin Lbr. Co., 103 So. 290 (La. 1925); Humes v. Krauss, 72 So. 2d 737 (Miss. 1954); Austrian American Ben. Cemetery Ass'n v. Desrochers, 214 P. 3 (Wash 1923), 216 P. 891 (Wash. 1923); Campbell v. United Fuel Gas Co., 130 S.E. 666 (W. Va. 1925); Livingston v. Livingston, 82 S.E.2d 1 (Ga. 1954)* (description as adjoining tract of another held void where shape of tract to be conveyed was not specified).

(n598)Footnote 598. *Bryant v. Maine Cent. R.R., 9 A. 736 (Me. 1887).*

(n599)Footnote 599. *Deaton v. Swanson, 28 S.E.2d 126 (Ga. 1943); Fidelity Realty Co. v. Flahaven Land Co., 236 S.W. 260 (Ky. 1922); Gary v. Bullock, 19 So. 2d 120 (La. 1944).*

(n600)Footnote 600. *Morris v. Beckum, 89 S.E. 704 (Ga. 1916); O'Farrell v. Vondereau, 68 S.E. 485 (Ga. 1910); Simpson v. Blaisdell, 27 A. 101 (Me. 1892); Dundalk Holding Co. v. Easter, 73 A.2d 877 (Md. 1950); Whitwell v. Spiker, 142 S.W. 248 (Mo. 1911); Johnson v. Branning Mfg. Co., 80 S.E. 980 (N.C. 1914); Perry v. Scott, 14 S.E. 294 (N.C. 1891); Edwards v. Bowden, 5 S.E. 283 (N.C. 1888); McGlawhorn v. Worthington, 3 S.E. 633 (N.C. 1887); McCollum v. Buckners Orphans Home, 117 S.W. 886 (Tex. App. 1909).*

(n601)Footnote 601. *Blow v. Vaughan, 10 S.E. 891 (N.C. 1890).*

(n602)Footnote 602. *Grimes v. Bryan, 63 S.E. 106 (N.C. 1908).*

(n603)Footnote 603. *O'Farrell v. Vondreau, 68 S.E. 485 (Ga. 1910).*

(n604)Footnote 604. *Bell v. Redd, 65 S.E. 90 (Ga. 1909). See Brown v. Rickard, 12 S.E. 570 (N.C. 1890).*

(n605)Footnote 605. *Staff v. Hawkins, 64 A.2d 176 (Conn. 1949).*

(n606)Footnote 606. *Oglesby v. Volunteer State Life Ins. Co., 23 S.E.2d 404 (Ga. 1942).*

(n607)Footnote 607. *Thomas Jordan Inc. v. Skelly Oil Co., 296 S.W.2d 279 (Tex. App. 1956); Hollars v. Stephenson, 99 N.E.2d 258 (Ind. App. 1951)* (controlling factors in order of priority are: natural objects, artificial monuments, adjacent boundaries, courses and distances and lastly, quantity).

(n608)Footnote 608. *Lutcher & Moore Lbr. Co. v. Hart, 26 S.W. 94 (Tex. App. 1894).*

(n609)Footnote 609. *Ohlson v. Batterton, 230 S.W. 110 (Mo. 1921).*

(n610)Footnote 610. *Cumberledge v. Brooks, 85 N.E. 197 (Ill. 1908).*

(n611)Footnote 611. *Yopp v. Aman, 193 S.E. 822 (N.C. 1937).*

(n612)Footnote 612. *United States v. Big Band Transit Co., 42 F. Supp. 459 (E.D. Wash. 1941).*

(n613)Footnote 613. *Bruni v. Viduarri, 166 S.W.2d 81 (Tex. 1942).*

(n614)Footnote 614. *Harris v. Hull, 70 Ga. 831 (1883); Barney v. Miller, 18 Iowa 460 (1865); Driscoll v. Green, 59 N.H. 101 (1879); Lane v. Thompson, 43 N.H. 320 (1861); Richardson v. Palmer, 38 N.H. 212 (1859); White v. Gay, 9 N.H. 126 (1827);* Wilson Lbr. & Milling Co. v. Hutton, 68 S.E. 2d (N.C. 1910); *Mullaly v. Noyes, 26 S.W. 145 (Tex. App. 1894); Smith v. Bailey, 127 S.E. 89 (Va. 1925).*

(n615)Footnote 615. *Harlin v. Ellis, 32 S.E.2d 389 (Ga. 1944).*

(n616)Footnote 616. *Curran v. Maple Island Resort Ass'n, 14 N.W.2d 655 (Mich. 1944); Carrere v. Johnson, 115 So. 196 (Miss. 1928); Gilbert v. McCreary, 104 S.E. 273 (W. Va. 1920). In re Ballantine's Appeal, 67 Pa. 178 (1870). See Hoover v. Roberts, 74 P.2d 152 (Kan. 1937).*

(n617)Footnote 617. *Vaughn v. Continental Royalty Co., 116 F.2d 72 (5th Cir. 1940), cert. denied, 313 U.S. 580 (1941); Hanlon v. Western Loan & Bldg. Co., 46 116 P.2d 465 (Cal. App 1944); Cumberledge v. Brooks, 85 N.E. 197 (Ill. 1908); Cassidy v. Charlestown Five Cents Sav. Bank, 21 N.E. 372 (Mass. 1889); Mizell v. Osmon, 189 S.W.2d 306 (Mo. 1945); Reserve Petroleum Co. v. Harp, 226 S.W.2d 839 (Tex. 1950); Grimes v. Jorday, 260 S.W.2d 220 (Tex. App. 1953).*

(n618)Footnote 618. *Farrell & Co. v. Arkansas Fuel Oil Co., 84 F.2d 887 (5th Cir. 1936); Edwards v. Santa Paula, 292 P.2d 31* (Cal. 2 Dist. App. 1956); *Frank Towers Corp. v. Labiana, 97 A.2d 567 (Conn. 1953); Copeland v. Carpenter, 59 S.E.2d 245 (Ga. 1950); De Long v. Starkey, 92 N.E.2d 228 (Ind. App. 1950).*

(n619)Footnote 619. *Pendrey v. Godwin, 66 So. 43 (Ala. 1914); Martin v. Urquhart, 82 S.W. 835 (Ark. 1904); Ratliff v. Sowards, 153 S.W. 25 (Ky. 1913); Crosby v. Bradbury, 20 Me. 61 (1841); Gittings v. Hall, 1 Md. 1 (1851); Drew v. Drew, 28 N.H. 489 (1854); Ela v. Card, 2 N.H. 175 (1820); Griscom v. Evens, 40 N.J.L. 402 (1978).*

(n620)Footnote 620. *In re Orwig, 167 N.W. 654 (Iowa 1918).*

(n621)Footnote 621. *Decker v. Stansberry, 94 N.E. 940 (Ill. 1911); Bray v. Adams, 21 S.W. 853 (Mo. 1893).*

(n622)Footnote 622. *Benton v. McIntire, 15 A. 413 (N.H. 1888); New York State Natural Gas Corp. v. Roeder, 120 A.2d 170 (Pa. 1956).*

(n623)Footnote 623. *Wise v. Watts, 239 F. 207 (9th Cir. 1917); Wilcoxson v. Sprague, 51 Cal. 640 (1877); Derham v. Hill, 142 P. 181 (Colo. 1914); Shoemaker v. Chappell, 14 D.C. 413 (D.C. Supp. 1886); Copeland v. Carpenter, 59 S.E.2d 245 (Ga. 1950); Holston v. Needles, 5 N.E. 530 (Ill. 1886); Gano v. Aldridge, 27 Ind. 294 (1865); De Long v. Starkey, 92 N.E.2d 228 (Ind. App. 1950); In re Orwig, 167 N.W. 654 (Iowa 1918); Thurman v. Leach, 116 S.W. 300 (Ky. 1909); Suthon v. Viguerie, 53 So. 855 (La. 1910); Chandler v. Green, 69 Me. 350 (1879); Worthington v. Hylyer, 4 Mass. 196 (1808); Tuthill v. Katz, 128 N.W. 757 (Mich. 1910); Johnson v. Bowlware, 51 S.W. 109 (Mo. 1899); Johnson v. Simpson, 36 N.H. 91 (1858); Heller v. Cohen, 48 N.E. 527 (N.Y. 1897); Miller v. Johnston, 91 S.E. 593 (N.C. 1917); Hayden v. Brown, 53 P. 490 (Or. 1898); State v. Franco-American Securities, 172 S.W.2d 731 (Tex. App. 1943); Clark v. Hutzler, 30 S.E. 469 (Va. 1898); Gibney v. Fitzsimmons, 32 S.E. 189 (W. Va. 1898); Heinselman v. Hunsicker, 79 N.W. 23 (Wis. 1899).*

(n624)Footnote 624. *Baird v. Harris, 290 S.W. 80 (Mo. App. 1927).*

(n625)Footnote 625. *Kelekolio v. Onomea Sugar Co., 29 Haw. 130 (1926); Mitchell v. Heckstall, 139 S.E. 438 (N.C. 1927).*

(n626)Footnote 626. *Cates v. Cates, 247 S.W. 780 (Ark. 1923); Stockton Sav. & Loan Soc. v. Purvis, 44 P. 561 (Cal. 1895); Blume v. MacGregor, 148 P.2d 656* (Cal. 1 Dist. App. 1943); *Harmon v. First Nat'l Bank, 176 S.E. 833 (Ga. App. 1934); Burson v. Shields, 129 S.E. 22 (Ga. 1925); Kelekolio v. Onomea Sugar Co., 29 Haw. 130 (1926); Meir-Nandorf v. Milner, 201 P. 720 (Idaho 1921); Brenneman v. Dillon, 129 N.E. 564 (Ill. 1920); Fidelity Realty Co. v. Flahaven Land Co., 236 S.W. 260 (Ky. 1922); McManus v. Wilson, 102 So. 543 (Miss. 1924); Dill-Cramer-Truitt Corp. v. Jacksonville Lbr. Co., 112 S.E. 740 (N.C. 1922); Myers v. Hatler, 254 P. 355 (Or. 1927);* Gabriel v. Wilson, 36 Luz. L. Reg. Rep. 311 (Pa. Com. Pl.); *Reserve Petroleum Co. v. Harp, 226 S.W.2d 839 (Tex. 1950); State v. Franco-American Securities, 172 S.W.2d 731 (Tex. App. 1943); Easterling v. Simmons, 293 S.W. 690 (Tex. App. 1927); Matthews v. Gillespie, 120 S.E. 324 (Va. 1923).*

(n627)Footnote 627. *Ladnier v. Cuevas, 103 So. 217 (Miss. 1925). See McCormick-Hannah v. Magruder, 163 So. 407 (Fla. 1935).*

(n628)Footnote 628. *Ewell v. Weagley, 13 F.2d 712 (4th Cir. 1926); Brenneman v. Dillon, 129 N.E. 564 (Ill. 1920); Ladnier v. Cuevas, 103 So. 217 (Miss. 1925); Myers v. Hatler, 254 P. 355 (Or. 1927); Polk v. Carey, 247 S.W. 568 (Tex. App. 1922); Mathews v. Gillespie, 120 S.E. 324 (Va. 1923).*

(n629)Footnote 629. *Prentice v. Stearns, 113 U.S. 435, 5 S. Ct. 547, 28 L. Ed. 1059 (1885); Bartlett Land & Lbr. Co. v. Saunders, 103 U.S. 316, 26 L. Ed. 546 (1880); Lodge v. Lee, 10 U.S. 237, 3 L. Ed. 210 (1810); Farrell & Co. v. Arkansas Fuel Co., 84 F.2d 887 (5th Cir. 1936); Wise v. Watts, 239 F. 207 (9th Cir. 1917), cert. denied, 244 U.S. 661, 37 S. Ct. 746, 61 L. Ed. 1377 (1917); Winnipisiogee Paper Co. v. New Hampshire Land Co., 59 F. 542 (C.C. N.H. 1893); Hamm v. San Francisco, 17 F. 119 (C.C. Cal. 1883); Jackson v. Sprague, 13 F. Cas. 253 (C.C. N.Y. 1825); Pendrey v. Godwin, 66 So. 43 (Ala. 1914); Garner v. Morris, 65 So. 1000 (Ala. 1914); Sumner v. Hill, 47 So. 565 (Ala. 1908); Chadwick v. Carson, 78 Ala. 116 (1884); Clements v. Pearce, 63 Ala. 284 (1879); Cecil v. Gray, 148 P. 935 (Cal. 1915); Irving v. Cunningham, 4 P. 766 (Cal. 1884); Wilcoxson v. Sprague, 51 Cal. 640 (1877); Wade v. Deray, 50 Cal. 376 (1875); Reamer v. Nesmith, 34 Cal. 624 (1868); Reed v. Spicer, 27 Cal. 57 (1864); King v. Samuel, 93 P. 391 (Cal. App. 1907); Derham v. Hill, 142 P. 181 (Colo. 1914); Murray v. Hobson, 13 P. 921 (Colo. 1887); Sherwood v. Whiting, 8 A. 80 (Conn. 1887); Shoemaker v. Chappell, 15 D.C. 413 (D.C. Supp. 1886); Holston v. Needles, 5 N.E. 530 (Ill. 1886); Bowen v. Allen, 113 Ill. 53 (1885); Stevens v. Wait, 112 Ill. 544 (1884); Kruse v. Wilson, 79 Ill. 233 (1875); White v. Hermann, 51 Ill. 243 (1869); Myers v. Ladd, 26 Ill. 415 (1861); Kinsey v. Satterwaite, 88 Ind. 342 (1882); Gano v. Aldridge, 27 Ind. 294 (1866); Thurman v. Leach, 116 S.W. 300 (Ky. 1909); Bender v. Chew, 56 So. 1023 (La. 1911); Suthon v. Viguerie, 53 So. 855 (La. 1910); Bryan v. Wisner, 11 So. 290 (La. 1892); Hobbs v. Payson, 27 A. 519 (Me. 1893); Maker v. Lazell, 22 A. 474 (Me. 1891); Getchell v. Whittemore, 72 Me. 393 (1881); Chandler v. Green, 69 Me. 350 (1879); Andrews v. Pearson, 68 Me. 19 (1875); Jones v. Buck, 54 Me. 301 (1866); Abbott v. Abbott, 53 Me. 356 (1864); Keith v. Reynolds, 3 Me. 356 (1825); Cate v. Thayer, 3 Me. 71 (1824); Vose v. Handy, 2 Me. 322 (1823); Bay v. Posner, 29 A. 11 (Md. 1894); Pollard v. Ketterer, 108 N.E. 1086 (Mass. 1915); Cassidy v. Charlestown Five Cents Sav. Bank, 21 N.E. 372 (Mass. 1889); Tuthill v. Katz, 128 N.W. 757 (Mich. 1910); Wiley v. Loveley, 8 N.W. 716 (Mich. 1881); Wilt v. Cutler, 38 Mich. 189 (1878); Barksdale v. Barksdale, 45 So. 615 (Miss. 1908); Lochte v. Austin, 13 So. 838 (Miss. 1891); Union R. & Transit Co. v. Skinner, 9 Mo. App. 189 (1880); West v. Bretell, 22 S.W. 705 (Mo. 1893); Bray v. Adams, 21 S.W. 854 (Mo. 1893); Shewalter v. Pirner, 55 Mo. 218 (1874); Cooley v. Warren, 53 Mo. 166 (1873); Rutherford v. Tracy, 48 Mo. 194 (1871); Jamison v. Fopiano, 48 Mo. 194 (1871); Evans v. Greene, 21 Mo. 170 (1855); Finlay v. Stevens, 36 A.2d 767 (N.H. 1944); Benton v. McIntire, 15 A. 413 (N.H. 1888); Heller v. Cohen, 48 N.E. 527 (N.Y. 1897); Muldoon v. Deline, 31 N.E. 1091 (N.Y. 1892); Case v. Dexter, 13 N.E. 449 (N.Y. 1887); Schoenwald v. Rosenstein, 5 N.Y.S. 766 (N.Y. City. Ct. 1889); Miller v. Johnson, 91 S.E. 593 (N.C. 1917); British & American Mtg. Co. v. Long, 18 S.E. 165 (N.C. 1893); Shaffer v. Hahn, 15 S.E. 1033 (N.C. 1893); Simpson v. King, 36 N.C. 11 (1840); Proctor v. Pool, 15 N.C. 370 (1833); Merrick v. Merrick, 37 Ohio St. 126 (1881); McDowell v.*

Carothers, 146 P. 800 (Or. 1915); Raymond v. Coffey, 5 Or. 132 (1873); Duncan v. Madera, 106 Pa. 562 (1884); Arambula v. Sullivan, 16 S.W. 436 (Tex. 1891); Coffey v. Hendricks, 2 S.W. 47 (Tex. 1886); Haley v. Murray, 177 S.W.2d 333 (Tex. App. 1944); Birdseye v. Rogers, 26 S.W. 841 (Tex. App. 1894); Minor v. Powers, 24 S.W. 710 (Tex. App. 1893), rev'd, 26 S.W. 1071 (Tex. 1894); Peterson v. Ward, 23 S.W. 637 (Tex. App. 1893); Flanary v. Kane, 46 S.E. 312, 681 (Va. 1904); Barbour, Stedman & Herod v. Tompkins, 52 S.E. 707 (W. Va. 1906); Green Bay & M. Canal Co. v. Hewitt, 12 N.W. 382 (Wis. 1882); Thompson v. Jones, 4 Wis. 106 (1855).

(n630)Footnote 630. *Metcalf v. Prescott, 25 P. 1037 (Mont. 1891).*

(n631)Footnote 631. *Ewell v. Weagley, 13 F.2d 712 (4th Cir. 1926); Tolle v. Curley, 251 S.W. 377 (Ark. 1923); Wade v. Deray, 50 Cal. 376 (1875); More v. Massini, 37 Cal. 432 (1869); Benedict v. Gaylord, 11 Conn. 332 (1836); Hardee v. Horton, 108 So. 189 (Fla. 1925), cert. denied, 273 U.S. 714, 47 S. Ct. 107, 71 L. Ed. 854 (1926); Higinbotham v. Blair, 139 N.E. 909 (Ill. 1923); Bond v. Fay, 90 Mass. 212 (1864), 94 Mass. 86 (1866); Allen v. Holton, 37 Mass. 459 (1837); Driscoll v. Green, 59 N.H. 101 (1879); Lane v. Thompson, 43 N.H. 320 (1861); White v. Gay, 9 N.H. 126 (1837); Raymond v. Coffey, 5 Or. 132 (Or. 1873).*

(n632)Footnote 632. *Prentice v. Northern Pac. R.R., 154 U.S. 163, 14 S. Ct. 997, 38 L. Ed. 947 (1894); Pettit v. Bigson, 77 So. 703 (Ala. 1917); Castro v. Tennent, 44 Cal. 253 (1872); Benedict v. Gaylord, 11 Conn. 332 (1836); Black v. Skinner Mfg. Co., 43 So. 919 (Fla. 1907); McCaskill v. Stearns, 74 S.E. 1032 (Ga. 1912); St. Louis Bridge Co. v. Curtis, 103 Ill. 410 (1882); Pendergrass v. Butcher, 164 S.W. 949 (Ky. 1914); Bender v. Chew, 56 So. 1023 (La. 1911); Perry v. Buswell, 94 A. 483 (Me. 1915); Chochrane v. Harris, 84 A. 499 (Md. 1912); DePaige v. Douglas, 136 S.W. 345 (Mo. 1911); Coppermines Co. v. Comins, 148 P. 349 (Nev. 1915); Lord v. Wentworth, 36 A. 17 (N.H. 1896); Kanouse v. Slockbower, 21 A. 197 (N.J. Ch. 1891), rev'd on other grounds, 26 A. 333* (N.J. Err. & App. 1893); *Clarke v. New York, 151 N.Y.S. 714 (N.Y. A.D. 1915); Potter v. Bonner, 93 S.E. 370 (N.C. 1917);* Chambers v. Forsythe, 1 *C.D. 155 (Ohio Cir. 1885); Johnson v. Conger, 166 S.W. 405 (Tex. App. 1914); Huntley v. Houghton, 81 A. 452 (Vt. 1911); Wiseman v. Crislip, 78 S.E. 107 (W. Va. 1913).*

(n633)Footnote 633. *Blume v. MacGregor, 148 P.2d 656* (Cal. 1 Dist. App. 1944).

(n634)Footnote 634. *Curran v. Maple Island Resort Ass'n, 14 N.W.2d 655 (Mich. 1944); Carrere v. Johnson, 115 So. 196 (Miss. 1928); Gilbert v. McCreary, 104 S.E. 273 (W. Va. 1920); In re Ballantine's Appeal, 67 Pa. 178 (1870)* (general language will not enlarge an interest specifically conveyed). *See* 115 A.L.R. 192, for cases decided therein. *Hoover v. Roberts, 74 P.2d 152 (Kan. 1937).*

(n635)Footnote 635. *Flanagan v. Elder, 90 So. 2d 540* (La. 2 Cir. App. 1956).

(n636)Footnote 636. *Vance v. Fore, 24 Cal. 435 (1864).*

(n637)Footnote 637. *Cox v. McGowan, 21 S.E. 108 (N.C. 1895),* per Avery, J., in substantially his words. In *Carter v. White, 7 S.E. 473 (N.C. 1888),* the court held that the first description, "known as Walker's Island," must yield to a more specific one, by metes and bounds, which did not include the whole island.

(n638)Footnote 638. *Rathbun v. Geer, 30 A. 60 (Conn. 1894).*

(n639)Footnote 639. *Sherwood v. Whiting, 8 A. 80 (Conn. 1887); Green Bay & M. Canal Co. v. Hewett, 12 N.W. 382 (Wis. 1882).*

(n640)Footnote 640. *Busbee v. Thomas, 57 So. 587 (Ala. 1912); Chapman & Dewey Lbr. Co. v. Board of Directors of St. Francis Levee Dist., 139 S.W. 625 (Ark. 1911); Cecil v. Gray, 148 P. 935 (Cal. 1915); Andrews v. Pearson, 68 Me. 19 (1875); Rutherford v. Tracy, 48 Mo. 325 (1871); Granberry v. Storey, 127 S.W. 1122 (Tex. App. 1910).*

(n641)Footnote 641. *Lodge v. Lee, 10 U.S. 237, 3 L. Ed. 210 (1810); Pendrey v. Godwin, 66 So. 43 (Ala. 1914);*

Haley v. Amestoy, 44 Cal. 132 (1872); Haley v. Ray, 82 S.E. 1058 (Ga. 1914); Keith v. Reynolds, 3 Me. 393 (1825); Cate v. Thayer, 3 Me. 71 (1824); Union R. & Transit Co. v. Skinner, 9 Mo. App. 189 (1880).

(n642)Footnote 642. *Tolle v. Curley, 251 S.W. 377 (Ark. 1923); Ladnier v. Cuevas, 103 So. 217 (Miss. 1925).*

(n643)Footnote 643. *Field v. Hustson, 21 Me. 69 (1842).*

(n644)Footnote 644. *Hobbs v. Payson, 27 A. 519 (Me. 1893).*

(n645)Footnote 645. *Cummings v. Black, 25 A. 906 (Vt. 1892). See Dochterman v. Marshall, 46 So. 542 (Miss. 1908); Coppermines Co. v. Comins, 148 P. 349 (Nev. 1915).*

(n646)Footnote 646. *Barksdale v. Barksdale, 45 So. 615 (Miss. 1908).*

(n647)Footnote 647. *Curran v. Maple Island Resort Ass'n, 14 N.W.2d 655 (Mich. 1944); Carrere v. Johnson, 115 So. 196 (Miss. 1928); Gilbert v. McCreary, 104 S.E. 273 (W. Va. 1920); In re Ballantine's Appeal, 67 Pa. 178 (1870)* (general language will not enlarge an interest specifically conveyed). *See* 115 A. L. R. 192, for cases decided therein. *Hoover v. Roberts, 74 P.2d 152 (Kan. 1937).*

(n648)Footnote 648. *Sharp v. Thompson, 100 Ill. 447 (1881).*

(n649)Footnote 649. *Driscoll v. Green, 59 N.H. 101 (1879).*

(n650)Footnote 650. *Hill v. Taylor, 4 N.E.2d 1008 (Mass. 1936).*

(n651)Footnote 651. *Hubbard v. Whitehead, 121 S.W. 69 (Mo. 1909).*

(n652)Footnote 652. *Sawyer v. Kendall, 64 Mass. 241 (1852).* Otherwise, if particular description is complete: *Moore v. Whitley, 66 S.E.2d 785 (N.C. 1951); Whiteheart v. Grubbs, 60 S.E.2d 101 (N.C. 1950).*

(n653)Footnote 653. *See Gilbert v. McCreary, 104 S.E. 273 (W. Va. 1920).*

(n654)Footnote 654. *Warsaw v. Swearngin, 295 S.W.2d 174 (Mo. 1956)* (that description is certain which by evidence aliunde can be made certain); *Lobit v. Crouch, 293 S.W.2d 110 (Tex. App. 1956); Teutsch v. Hvistendahl, 29 N.W.2d 389 (S.D. 1947)* (where the land owned by the defendant actually was lot 7 and part of lot 8, the court declined to reform the deed which was for lot 7 alone since the contract only spoke of 7 and there was no meeting of the minds of the parties).

(n655)Footnote 655. *Rye v. Baumann, 329 S.W.2d 161 (Ark. 1959)* ("running east on section line 3/4 of an acre" meant 156 ft. 6 inches that being one side of a square and the description was sufficient.); *Floyd v. Carswell, 83 S.E.2d 586 (Ga. 1954)* (a metes and bounds description must have a definite starting point.); *Terrell v. Prestel, 68 Ind. 86 (1879)* (deed was reformed where lot described as No. 78 was intended to be No. 75); *Haith v. Roper, 88 S.E.2d 142 (N.C. 1955)* (it is not essential that the calls close if the corners can be determined by reference to other corners referred to in the deed); *Arbogast v. Pilot Rock Lbr. Co., 336 P.2d 329 (Or. 1959)* (omission of the word "quarter" is not fatal where the meaning of the phraseology is rendered certain through common knowledge and experience, and where the missing words are obviously understood). *See Combs v. Virginia Iron, Coal & Coke Co., 106 S.W. 815 (Ky. 1908); Gates v. Asher, 280 S.W.2d 247 (Tex. 1955)* (reasonable certainty only is required of a description. Identification beyond reasonable doubt is not essential).

(n656)Footnote 656. *Roy v. Dannehr, 144 N.W. 758 (Minn. 1914); Foard v. McAnnelly, 114 S.W. 990 (Mo. 1908); Schad v. Sharp, 8 S.W. 549 (Mo. 1888); Lemmon v. Hartsook, 80 Mo. 13 (1883); Menkens v. Blumenthal, 27 Mo. 198 (1858); Talbot v. W. K. Smith Security Sav. & Trust Co., 107 P. 480 (Or. 1910),reh'g denied, 108 P. 125 (Or. 1910).*

(n657)Footnote 657. *Cunningham v. Roberson, 31 Tenn. 137 (1851).*

(n658)Footnote 658. *Hoffman v. White, 7 So. 816 (Ala. 1890); Dyer v. Eldridge, 36 N.E. 522 (Ind. 1894).*

(n659)Footnote 659. *McCoy v. Hance, 28 Pa. 149 (1857).*

(n660)Footnote 660. *Dwight v. Tyler, 14 N.W. 567 (Mich. 1883). See Eastland v. Robinson, 25 S.W.2d 1028 (Ky. 1930).*

(n661)Footnote 661. *Holley v. May, 75 So. 2d 696 (Fla. 1954).*

(n662)Footnote 662. *Smalley v. Rogers, 100 So. 2d 118 (Miss. 1958).*

(n663)Footnote 663. *Hamm v. San Francisco, 17 F. 119 (C.C. Cal. 1883); Hyatt v. Ogletree, 12 So. 2d 397 (Ala. App. 1942), cert. denied, 12 So. 2d 400 (Ala. 1943); Grant v. Bannister, 118 P. 253 (Cal. 1911); Vejar v. Mound City Land & Water Ass'n, 32 P. 713 (Cal. 1893); Mulford v. Le Franc, 26 Cal. 88 (1864); Munro v. Eshe, 156 P.2d 700 (Colo. 1944); Carney v. Hennessy, 60 A. 129 (Conn. 1905); Glos v. Holmes, 81 N.E. 1064 (Ill. 1907); Mettart v. Allen, 39 N.E. 239 (Ind. 1894); Quade v. Pillard, 112 N.W. 646* (Iowa, 1907); *McKinney v. Raydure, 203 S.W. 1084 (Ky. 1918); Abadie v. Lee Lbr. Co., 55 So. 658 (La. 1911); Getchell v. Atherton, 71 A. 767 (Me. 1908); Morrison v. Holder, 101 N.E. 1067 (Mass. 1913); Monfort v. Stevens, 35 N.W. 827 (Mich. 1888); Sandretto v. Wahlsten, 144 N.W. 1089 (Minn. 1914); Blumenthal v. Blumenthal, 158 S.W. 648 (Mo. 1913); Wolfe v. Dyer, 8 S.W. 551 (Mo. 1888); Barker v. Publishers Paper Co., 97 A. 749 (N.H. 1916); Sugg v. Greenville, 86 S.E. 695 (N.C. 1915); Richards v. Snider, 3 P. 1777 (Or. 1884); Stephens v. Long, 75 S.E. 530 (S.C. 1912); Reserve Petroleum Co. v. Hodge, 213 S.W.2d 456 (Tex. 1948); McLennan v. Fisher, 130 S.W. 598 (Tex. App. 1910); Smith v. Mullen, 75 S.E. 130 (Va. 1912); Davies v. Wickstrom, 105 P. 454 (Wash. 1909); Polebitzke v. John Week Lbr. Co., 158 N.W. 62 (Wis. 1916). Contra Dahlberg v. Johnson's Estate, 211 P.2d 764 (Idaho 1949).*

(n664)Footnote 664. *Smith v. Bradley, 11 S.W. 370 (Ky. 1889).*

(n665)Footnote 665. *Davis v. Jones, 116 S.W.2d 461 (Tex. App. 1938).*

(n666)Footnote 666. *Gotee v. Felspausch, 294 S.W. 813 (Ky. 1927); Fidelity Realty Co. v. Flahaven Land Co., 236 S.W. 260 (Ky. 1922); McKinney v. Raydure, 203 S.W. 1084 (Ky. 1918); Mathews v. O'Donnell, 233 S.W. 451 (Mo. 1921).*

(n667)Footnote 667. *Pond v. Minnesota Iron Co., 58 F. 448 (C.C. Minn. 1893); Waters v. Bew, 29 A. 590 (N.J. Ch. 1894); Dohoney v. Womack, 19 S.W. 883 (Tex. 1892), aff'd on reh'g, 20 S.W. 950 (Tex. App. 1892); Nye v. Moody, 8 S.W. 606 (Tex. 1884).*

(n668)Footnote 668. *Dull v. Blum, 4 S.W. 489 (Tex. 1887).*

(n669)Footnote 669. *Harris v. Oakley, 28 N.E. 530 (N.Y. 1891).*

(n670)Footnote 670. In *Smipson v. Blaisdell, 27 A. 101 (Me. 1892)*, Chief Justice Peter, delivering the decision upon the point whether the land had been defined, said:

> It can be defined by the parties going down with the surveyor and surveying it off and putting down marks. It can be defined in other ways, perhaps. It need not be done necessarily by both parties being upon the ground at the time. If George Hinman went upon the land himself, and began to use a half acre, -- a well-defined half acre, -- marked it out by piling paving all over a well-defined half acre, or in any other way, so as to make it clear and distinct that he was appropriating a certain specific half acre under his deed, and the grantor knew it and saw it, and acquiesced therein for a number of years, -- that would be evidence from which the jury might infer that it had been in that way marked out and appropriated,

but it would not be conclusive.

Farrar v. Cooper, 34 Me. 394 (1852).

(n671)Footnote 671. *Foster v. Carlisle, 48 So. 665 (Ala. 1909).*

(n672)Footnote 672. *Lovejoy v. Lovett, 124 Mass. 270 (1878); Stone v. Clark, 42 Mass. 378 (1840).*

(n673)Footnote 673. *Ames v. Hilton, 70 Me. 36 (1879). See Holden v. Alexander, 62 S.E. 1108 (S.C. 1908), reh'g denied, 64 S.E. 400 (1909).*

(n674)Footnote 674. *Roberts v. Richards, 24 A. 425 (Me. 1891).*

(n675)Footnote 675. *Hermann v. Thomas, 141 S.W. 574 (Tex. App. 1911).*

(n676)Footnote 676. *Turner v. Germany, 94 S.W.2d 1177 (Tex. App. 1936), rev'd, 123 S.W.2d 874 (Tex. Com. App. 1939).*

(n677)Footnote 677. *St. Louis & S. F. R.R. v. Budd, 165 S.W. 265 (Ark. 1914); Ingersoll v. Truebody, 40 Cal. 603 (1871); Osborne v. Endicott, 6 Cal. 149 (1856); Baldwin v. Thompson, 15 Iowa 504 (1864); Ambs v. Chicago, St. P., M. & O. R.R., 46 N.W. 321 (Minn. 1890); Berger v. Kirby, 153 S.W. 1130 (Tex. 1913).*

(n678)Footnote 678. *Devries v. Hiss, 20 A. 131 (Md. 1890).* Affirmative representation as to boundary line estopped claim of other line where improvements had been made in reliance on representations; *Dunn v. Fletcher, 96 So. 2d 257 (Ala. 1957).*

(n679)Footnote 679. *Dahlberg v. Johnson's Estate, 211 P.2d 764 (Idaho 1949).*

(n680)Footnote 680. *Stark v. Marshall, 67 So. 2d 235 (Fla. 1953)* (ejectment is the remedy ordinarily invoked); *Warner v. Noble, 282 N.W. 855 (Mich. 1938); Chaney v. Williams, 94 So. 2d 922 (Miss. 1957); Albi v. Reed, 281 S.W.2d 882 (Mo. 1955)* (ejectment is the remedy ordinarily invoked); *Murray Hotel Co. v. Golding, 216 P.2d 364 (N.M. 1950)* (ejectment is the remedy ordinarily invoked); *Curtis v. O'Brien, 84 A.2d 584 (Vt. 1951); Barrell v. Renehan, 39 A.2d 330 (Vt. 1944).*

(n681)Footnote 681. *Irwin Fishing & Hunting Club v. Cobb, 179 So. 183 (Ala. 1938)* (equity has jurisdiction to settle disputed boundary line); *Payne v. Terhune, 91 S.E.2d 348 (Ga. 1956); Sweeney v. Sweeney, 25 N.E.2d 273 (Ind. App. 1940)* (equity has jurisdiction if some equity has arisen from the conduct or relation of the parties); *McGowan v. Neimann, 298 N.W. 411 (Neb. 1941)* (equity court given jurisdiction by statute); *Knotts v. Knotts, 1 S.E.2d 809 (S.C. 1939)* (court of equity has jurisdiction where at sometime there has been a definite location of the disputed boundary line); *Little v. Little, 75 S.E.2d 871 (S.C. 1953).*

(n682)Footnote 682. *Walls v. Bennett, 110 So. 2d 277 (Ala. 1959);* McNeil v. hadden, *76 So. 2d 160 (Ala. 1954).*

(n683)Footnote 683. *Kertesz v. Falgiano, 84 S.E.2d 744 (W. Va. 1954).*

(n684)Footnote 684. *Drewry v. Cowart, 34 So. 2d 687 (Ala. 1948); Magee v. Booty, 47 So. 2d 828 (La. App. 1950); Hodson v. Hammer, 39 N.W.2d 601 (Minn. 1949); Sypolt v. Shaffer, 43 S.E.2d 235 (W. Va. 1947).*

(n685)Footnote 685. *Murray v. Munsey, 113 A. 36 (Me. 1921); Geddie v. Williams, 127 S.E. 423 (N.C. 1925); Von Herff v. Richardson, 135 S.E. 533 (N.C. 1926).*

(n686)Footnote 686. *United States v. State Inv. Co., 264 U.S. 206, 44 S. Ct. 289, 68 L. Ed. 639 (1924); Beach*

Front Hotel Co. v. Sooy, 197 F. 881 (*C.C.A. 3 N.J. 1912); Chattahoochie & G.R.R. v. Pilcher, 51 So. 11 (Ala. 1909); Andreu v. Watkins, 7 So. 876 (Fla. 1890); Kelekolio v. Onomea Sugar Co., 29 Haw. 130 (1926); Kandlik v. Hudek, 6 N.E.2d 196 (Ill. 1936); Brown v. Chadwell, 117 S.W.2d 901 (Ky. 1938); Murray v. Munsey, 113 A. 36 (Me. 1921); Abbott v. Abbott, 51 Me. 575 (1863); Strong v. Neidermeier, 202 N.W. 938 (Mich. 1925); Gee v. Sherman, 293 S.W. 789 (Mo. App. 1927); Scott v. Yard, 18 A. 359 (N.J. Ch. 1889); Bonaparte v. Carter, 11 S.E. 262 (N.C. 1890); Geddie v. Williams, 127 S.E. 423 (N.C. 1925); Von Herff v. Richardson, 135 S.E. 533 (N.C. 1925); Fulton v. Kuck, 79 P.2d 647 (Or. 1938); Pearson v. Brewer, 281 S.W. 876 (Tex. App. 1926); Viall v. Hurley, 11 A. 395 (Vt. 1920); Baker v. Sherman, 46 A. 57 (Vt. 1899); Brunswick Land Corp. v. Perkinson, 132 S.E. 853 (Va. 1926); Asberry v. Mitchell, 93 S.E. 638 (Va. 1917); Zirkle v. Three Forks Coal Co., 138 S.E. 371 (W. Va. 1927); Halls v. McKearn, 212 N.W. 257 (Wis. 1927).*

(n687)Footnote 687. *Meir-Nandorf v. Milner, 201 P. 720 (Idaho 1921). See Viall v. Hurley, 111 A. 395 (Vt. 1920); Prickett v. Frum, 132 S.E. 501 (W. Va. 1926).*

(n688)Footnote 688. *Meeks v. Willard, 29 A. 318 (N.J. Supp. 1894).* Cf. *Burroughs v. Southern Colonization Co., 173 N.E. 716 (Ind. App. 1930).*

(n689)Footnote 689. *Zaban v. Coleman, 108 S.E. 555 (Ga. App. 1921); Laidley v. Rowe, 119 A. 474 (Pa. 1923). See Leverett v. Bullard, 49 S.E. 591 (Ga. 1904); McCasland v. Aetna Life Ins. Co., 9 N.E. 119 (Ind. 1886); Goyette v. Keenan, 82 N.E. 427 (Mass. 1907); Den ex dem. Becton v. Chestnut, 20 N.C. 479 (1839); Stephens v. Long, 75 S.E. 530 (S.C. 1912).*

(n690)Footnote 690. *Burnett v. Roman, 68 So. 353 (Ala. 1915); Gillespie v. Powell, 64 S.E. 80 (Ga. 1909); Little v. Greek, 82 A. 955 (Pa. 1912).*

(n691)Footnote 691. *State v. Franks, 113 S.W.2d 589 (Tex. App. 1937).*

(n692)Footnote 692. *Strother v. Hamilton, 268 S.W. 529 (Tex. App. 1925).*

(n693)Footnote 693. *Bartlett v. Boyd, 175 S.W. 947 (Mo. 1915).*

(n694)Footnote 694. *McKey v. Hyde Park, 134 U.S. 84, 10 S. Ct. 512, 33 L. Ed. 860 (1890); Kittell v. Jenssen, 56 N.W. 487 (Neb. 1893); Bushey v. South Mountain Min. & Iron Co., 20 A. 549 (Pa. 1890).*

(n695)Footnote 695. *Seneca Nation v. Hugaboom, 9 N.Y.S. 699 (1890), aff'd, 30 N.E. 983 (N.Y. 1892).*

(n696)Footnote 696. *Baker v. McArthur, 19 N.W. 923 (Mich. 1884); Major v. Watson, 73 Mo. 661 (1881); Jacobs v. Moseley, 4 S.W. 135 (Mo. 1887); Town of Liberty v. Burns, 19 S.W. 1107 (Mo. 1892), aff'd, 21 S.W. 728 (1893); Coy v. Miller, 47 N.W. 1046 (Neb. 1891); Anreson v. Spawn, 49 N.W. 1066 (S.D. 1891).*

(n697)Footnote 697. *Boardman v. Reed, 31 U.S. 328, 8 L. Ed. 415 (1832); Mexico Refractories Co. v. Roberts, 167 S.W.2d 660 (Mo. App. 1942); Ford v. Unity Church Soc., 25 S.W. 394 (Mo. 1894); West v. Bretell, 22 S.W. 705 (Mo. 1893); Shewalter v. Pirner, 55 Mo. 218 (1874); King v. Fink, 51 Mo. 209 (1873); Rutherford v. Tracy, 48 Mo. 325 (1871); Jennings v. Brizeadine, 44 Mo. 332 (1869); Campbell v. Johnson, 44 Mo. 247 (1869); Gibson v. Borgy, 28 Mo. 478 (1857); Evans v. Greene, 21 Mo. 170 (1855); Winnipiseogee Paper Co. v. Eaton, 9 A. 221 (N.H. 1887); Sellards v. Malheur County, 272 P.2d 975 (Or. 1954); Knowlton v. Campbell, 37 S.E. 581 (W. Va. 1900).* A court will reform a deed description to include property omitted if there is clear and convincing evidence of the scrivener's mistake. *Whitt v. Proctor, 204 S.W.2d 582 (Ky. 1947); Monks v. Grady, 8 S.W. 617 (Tex. 1888).*

(n698)Footnote 698. *Campbell v. Johnson, 44 Mo. 247 (1869).*

(n699)Footnote 699. *Connecticut Light & Power Co. v. Fleetwood, 200 A. 334 (Conn. 1938). Losee v. Jones, 235*

P.2d 132 (Utah 1951) (where a metes and bounds description was intended to close, the court corrected the east call to permit closing).

(n700)Footnote 700. *Grant v. Armstrong, 16 S.W. 531 (Ky. 1891).*

(n701)Footnote 701. *Jonas v. Meyers, 101 N.E.2d 509 (Ill. 1951). Crookston Imp. Co. v. Marshall, 59 N.W. 294 (Minn. 1894)* (if the vendor intended to sell more than that described, a mutual mistake of fact occurs that can be reformed in equity).

* This chapter is drawn in part from chapter 45 of George W. Thompson, Commentaries on the Modern Law of Real Property (John S. Grimes ed. 1979), which made a significant contribution to preserving the American common law governing land descriptions and boundaries.

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CHAPTER 90 LAND DESCRIPTIONS, BOUNDARIES AND SURVEYS *

10-90 Thompson on Real Property, Thomas Editions § 90.03

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§ 90.03 Land Boundaries.

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§ 90.03(a) Establishing Boundary Lines.

§ 90.03(a)(1) Methods of Establishing Boundary Lines.

Sometimes when adjoining landowners attempt to agree on a boundary different from the record boundary, their effort is hindered by requirements of the statute of frauds. Moreover, some states may require words of grant to transfer an interest in realty. In this situation, therefore, adjoining landowners wishing to adjust their boundary line must either execute an appropriate instrument n702 or shift title by adverse possession.

The two requirements of an instrument in writing and words of grant have caused courts to render inconsistent decisions about whether and how adjoining landowners can agree upon a line. Some courts rely on the doctrine practical location, n703 others refer to acquiescence, others to estoppel, others depend on the statute of limitations n704 and still others on adverse possession n705 or prescription. Thus, establishing boundaries by agreement may be described in courts by such terms as "practical location," "acquiescence," "implied agreement," "estoppel," "prescription," "adverse possession" and "statute of limitations," n706 and the evidence necessary to prove the boundary may vary greatly depending on which theory is employed in the jurisdiction. In the absence of estoppel or adverse possession, there must be a controversy or uncertainty about the boundary before the location can be established by agreement.

The evidence for adverse possession theory boundary cases requires a showing of continuous adverse possession for the statutory period, sometimes with payment of taxes. In many states a form of "hostility" is required. Thus, in a boundary line case the adverse possessor must know the line is different and must intend to hold to the wrong line. Agreement between the parties ends the adverse possession.

By contrast, establishing practical location of a boundary by the method of acquiescence requires the parties' knowledge of the real boundary as described in the deed, so that a claim of different location rests upon the principle of estoppel. n707 In some states title will pass by prescription. Under prescription, the requirements of hostility and taxes are not present, but the duration of time requirement is; there must be no agreement by the parties, but there must be intent on one side and passive acquiescence on the other side to promote the lost grant theory. Most states do not permit title but

only an easement to pass by prescription. Protest by one party terminates the prescription.

Use of a boundary agreement requires proof of an actual contract between the adjoining landowners, written evidence to avoid the statute of frauds and, in many states, words to grant to transfer title and consent of spouses to release inchoate rights. By comparison to acquiescence, practical location requirements include a disputed or doubtful boundary, an agreement as to the line between the adjoining landowners, a taking of possession by each up to the agreed upon line, and holding that possession for a long period of time. In boundary disputes the rules of evidence are more liberal than in other forms of actions, especially where the original surveyor's marks have disappeared. n708 The problem of practical location is often intertwined with that of the requirement of hostile intent that pertains to adverse possession. n709

§ 90.03(a)(2) Practical Location of Boundaries.

In many jurisdictions, landowners may agree with one another as to their boundaries in disregard of their deeds, and in a way that binds themselves and their successors. This is called "practical location." n710 Practical location is limited by the general rule that an oral agreement is not effective to establish an arbitrary but already marked line for an unascertained or disputed boundary, n711 nor to change a known boundary line. n712 A boundary line established by adverse possession prior to the agreement is not uncertain and may not be established by oral agreement. n713 The rationale of these restrictive rules is that any oral agreement to establish a line other than the true or marked line constitutes a conveyance of land in violation of the statute of frauds. n714 Also, a definite boundary whose location is known cannot be changed by a parol agreement n715 in the absence of subsequent adverse possession in accordance with the new line. n716 A parol agreement between the owners of adjacent land, which has been partitioned between them, that they will disregard the boundary fixed by the partition and establish another line, violates the statute of frauds when unaided by adverse possession. n717

Courts generally favor boundary line agreements, n718 and therefore a few courts will enforce otherwise invalid oral agreements, n719 but most, because of the statute of frauds, will deny enforcement of an oral boundary agreement if the true boundary is known. n720 Practical location in some states consists of an agreement followed by taking possession. n721 In many states, where a dispute or uncertainty exists as to the true line, the agreement need not be evidenced by execution of formal instruments. n722 The agreement to settle a disputed line will be upheld n723 even if a line has in fact been established by acquiescence and is no longer actively disputed. n724 Under proper circumstances, there may be a practical location n725 of a doubtful boundary line by an agreement between the adjoining owners, followed by acquiescence in the location made and by occupancy in accordance with the location, and this will be binding on the owners and their successors. n726

Practical location is simply an actual designation by the parties of the monuments and bounds called for by their deeds, n727 and one owner cannot make a practical location with the other. n728 The mere fact that one owner knew of a survey and saw the actual setting of the stakes is insufficient to establish a practical location in the absence of proof that the owner agreed to the line or that improvements were made according to the survey. n729 Thus a boundary line may be established by agreement after controversy before the limitations period has run. n730 In other jurisdictions, however, practical location is recognized only where the parties have held to the agreed line for a sufficient time for prescription to run. n731

Practical locations do not act as a transfer of title, because this would violate the statute of frauds. n732 Instead, they are treated as fixing by agreement where the true line, as set out in the respective title claims, really is. n733 Hence the necessity that the line be in controversy or doubt. n734

The mutual promises of the parties are sufficient consideration to sustain an agreement to locate an uncertain boundary line. n735 The basis of a practical location is the intent of the parties to settle a questionable line. n736

Where there has been a bona fide dispute as to the true line and the parties have made, n737 acted upon and acquiesced

in a peaceful settlement, a legal line is established. n738 The agreement may be expressed or implied. n739 Adjacent landowners can only agree in writing for consideration on a boundary known not to be the true one. n740 If the agreement is based on an honest mistake, it is not binding upon the parties. n741 An agreement or acquiescence in a wrong boundary when the deed gave the true lines or they were known is treated as a mistake and is not binding upon the parties. n742 The location of a common boundary by a grantor is binding upon the grantees. n743

Practical location requires that there be a dispute or uncertainty in regard to the boundary line. That there is a question between adjoining landowners in regard to the boundary line is not enough to serve as the foundation of a valid and conclusive agreement between them. Thus, where a question arose as to the boundary line, and one of the parties expressed themselves as satisfied with the line of the survey, and a partition wall was placed upon the line, it was found that the line was not drawn and fixed as a compromise of any dispute between the parties, and that the true line was susceptible to demonstration by a survey correctly made. The agreed line was not, therefore, binding upon either party. The only effect of the agreement was that the parties were to accept and abide by the line established by the survey if it was the true line, and not otherwise. When it was shown that this was not the true line, either party was free to repudiate the erroneous line. n744

The rule that a parol agreement between owners of adjacent tracts of land that a certain line is the true dividing line is binding if accompanied by possession to the agreed line, or otherwise duly executed, and if the boundary is indefinite, unascertained or disputed, is in applicable where, at the time of the parol agreement, there is no line in dispute. n745 It is only where the true line is unknown or is difficult to ascertain, and the parties by agreement establish the line to settle a disputed and vexatious question as to the boundary line between them, that the parties are bound. n746

If the beginning point is definite, neither the intention nor the belief of grantors can change it. n747 Some courts have required that there be facts present sufficient to constitute an estoppel before a boundary "agreement" is considered effective. n748 Other courts require only that facts show that a contract was entered into by the parties. n749 An agreement may be presumed from long acquiescence. n750

There need be no actual dispute between the parties as a basis for an agreed line if the true boundary lines are in fact uncertain, and can be determined only by judicial inquiry. n751 Where one adjoining owner, in the absence of the neighbor, causes the position of a fence to be changed, the fact that the neighbor does not seek to put the fence back, but merely disputes it with the owner who made the change, does not estop the neighbor from demanding such restoration. n752 The owners of adjoining lands are not bound by an erroneous survey made at their request, without knowledge of the error. n753 Thus, to establish an agreed boundary line, it is necessary to show that there was an uncertainty or belief of uncertainty in the location of the line, that there was an agreement express or implied in fixing the line and that there was an actual designation of the line upon the ground and occupation in accordance with that line. n754 The dispute or uncertainty as to the true line is sufficient consideration for the making of an agreed boundary. n755

Silence during the making of a survey does not constitute an agreement to make the survey a boundary. n756 In order for an agreement to settle a disputed boundary line to be binding, there must be (a) a line sufficiently definite to be traced and (b) a definite agreement that this is to be the line. n757 The agreed upon boundary line must be definite, certain and clearly marked and must result from an uncertain boundary. n758

A line between adjoining lands marked by a fence and mutually acquiesced in by the adjoining landowners for ten years as the division line between their properties becomes the true line. n759 Where the location of a boundary line has not been established, or is otherwise doubtful, and the adjoining landowners orally agree to a survey and to be bound by the result, they are concluded by the line run by the survey. n760

There is a marked distinction between an undertaking to settle a dispute boundary, on the one hand, and, on the other hand, the mere consent of the parties to adopt a dividing line, in regard to which line no doubt or dispute has arisen and where both parties are mistaken as to the true line. The acquiescence or admission of the owner of land, made under a

mistake as to rights, should neither estop nor prejudice the owner from subsequently enlarging possession to the limits of the true title, provided no actual adversary possession has intervened to defeat the title. This has long been the settled rule. n761

Where adjoining owner deliberately erect monuments, fences or improve-ments on a line between their lands with the understanding that it is the true line, it amounts to a practical location n762 but the mere fact that an owner sets a fence within the owner's boundary does not give the adjoining owner the right to the land fenced out. n763 It must first be considered if the fence is merely temporary and erected without the intention of marking the boundary, so that it cannot be regarded as a boundary fence; also, it cannot be so regarded if its location is the result of fraud or mistake. Nevertheless, a practical loction may be along a wrong line, and either of the parties so making the location may be estopped to claiming the true line, n764 when the parties have acquiesced in the location over a long period of years. n765 While a landowner is not compelled to build a fence, where an owner builds a fence on a line laid out by surveyors, it is in a sense a monument which is held out as the true line and which will estop the builders from denying the right of innocent purchasers obtaining land to regard it as such after its establishment for many years. n766

It has been held that where a barn and a fence built on the rear line of a lot encroached on the adjoiner, and upon tearing down the barn a fence was built on the same line, a practical location was made by acquiescence and the adjoiner was estopped to claim to true line. n767 If one owner merely permits an adjoining owner to construct a fence on an asserted boundary line, the owner is not estopped thereby from questioning the correctness of such line. n768 If an owner of land repudiates a boundary which has long been observed, and insists on a survey to determine the line as fixed by the government, that owner cannot afterward insist on the location by acquiescence. n769 When a practical location is not induced by fraud or mistake, it concludes the parties and those in privity with them. n770 It has been so held where, after long acquiescence, a location was found to vary from the course called for in the deeds and grants under which the parties claimed before agreeing to the line. n771 However, an irregular pasture fence running from tree to tree on or near the line, and which was in a sense a practical location based on an error and acquiesced in, was held to not preclude either party from asserting the ownership of the land beyond the true line. A practical location made by a mutual grantor is binding on the grantees, n772 for it is presumed to be the line mentioned in the deeds. n773

An agreement that settled a disputed boundary is a finality and cannot be disturbed, even though the parties afterwards learn that the true line could have been found, or the parties were mistaken as to the true line. n774 The fact that a boundary line established by agreement of the parties is not the true boundary line, that the agreement does not correctly locate the boundary line, and that the parties to the agreement were mistaken as to its correct location, does not affect the validity of the oral agreement establishing the boundary line, and the parties will be held to the line agreed on. n775 A boundary line fixed by agreement of the adjoining landowners constitutes an "agreed boundary," in contradistinction to the "geographical" or "surveyed boundary." n776

After a disputed boundary has been established by agreement, a subsequent by the parties to the agreement and their privies, by the same description as that under which the title was acquired and possession held prior to the agreement, will pass the title according to the agreed boundary. n777 If the agreed line is marked by monuments, subsequent purchasers would be bound to take notice of them for this reason; n778 but, if the agreement is susceptible of clear proof, it is undoubtedly binding upon subsequent purchasers, even though there are no visible monuments of the agreed line. n779 An agreement between adjoining landowners, fixing their boundary, executed either by a marked line or by actual adverse possession, carries notice to all the world of the fact. n780 An oral agreement as to boundaries was binding on a subsequent owner acquiring title through tax deed. n781

The parties to an effectual agreement establishing a boundary line must be owners in fee of the lands contiguous to the disputed or uncertain boundary. n782 Only owners abutting on a disputed line may make agreement fixing its location, n783 and it has been held that a municipality as well as any other owner may by agreement determine the boundary line of its property. n784 While a mortgagor may make such an agreement, the agreement will not be binding on the mortgagee or those claiming under the mortgagee. n785

Location of boundaries by parties at or before the time of purchase is competent. n786 The fact that a purchaser of land has not yet paid the consideration for the purchase does not invalidate a parol agreement made by the purchaser with the adjoining owners fixing the boundary line between their lands. n787 An agreement between a vendor and a proposed purchaser fixing the boundary line between the part to be purchased and the part retained by the vendor, followed by the completion of the sale, taking possession, and making improvements in reliance on the agreement is conclusive upon the parties. n788

An agreement between a grantor and the grantee's husband fixing the division line between the land conveyed and that retained by the grantor at a line different from the one stated in the deed, in consequence of which the grantor extended improvements up to the new line, is not binding on the grantee when the agreement and the improvements were made without her knowledge. n789 The agreement or acquiescence of one heir does not bind the other heirs, who are all tenants in common of the property. n790 The location of a boundary line by an agent of the owner will not necessarily bind the owner in a subsequent controversy between the owner and an adjoining owner. n791

A mere intruder is not allowed to question the boundaries defined in a deed, and assert the title to a portion of the land to be in an adjoining owner, especially when it appears that the grantee by the deed has had long-continued possession of the land in accordance with the boundaries described in the deed. n792

Parol evidence cannot be admitted to establish an act as a practical location of boundaries. n793 It must be shown that boundary monuments were erected prior to or contemporaneously with the execution of the deed before such parol is admissible. n794 Where it can be proved that the grantor and the grantee went upon the land and made a physical survey of the land, giving a boundary that was actually run and marked, and a corner was made, the party claiming under the deed will hold according to the agreed line, notwithstanding a varying description. n795

A stranger to the chain of title cannot take advantage of a boundary agree-ment. n796 A common grantor may establish a line that is binding on the grantees and their successors. n797 Such a boundary line agreement may be implied as well as express. n798 A section line cannot be relocated by agreement. n799 A practical location is binding upon all successors in interest and privities to the parties, n800 but it does not affect adjoining landowners who are not parties to the agreement. n801

COMPUTER-ASSISTED RESEARCH

LEXIS: Boundar! w/10 locat! w/5 practical

§ 90.03(a)(3) Fences as Boundaries.

Whether a fence line has been established as a boundary depends on the intent of the parties at the time the fence is constructed and on the parties' subsequent conduct with respect to the fence. A fence does not establish a line in the absence of an agreement to that effect. n802

A permanent division fence may have the effect of establishing conclusively the boundary line between adjoining owners. n803 Where a permanent fence was erected to mark the boundary line between adjoining owners, and for more than ten years had been regarded by the parties as being upon the true line, it was held to mark the true boundary between them. n804 A permanent fence built upon a portion of the line between adjoining owners does not entitle either of them to hold by adverse possession upon another part of the same line, when a temporary fence has been kept up varying from the line of the permanent fence. n805 A division line between lands of adjoining owners which is agreed on and thereafter recognized and treated as the true division line for fifteen years will be regarded by the court to be so located. n806 The fixing of lines by common consent and the recognition by adjoining owners involves an element of estoppel and mere acquiescence is not sufficient. n807

To become an established line, the fence must have been accepted as an agreed boundary and not merely as a barrier. n808 When parties agree upon a line, neither of them knowing the true line, but each intending to fix upon it, and each acting on the best information available, and not relying wholly upon the other, and each makes a mistake in locating the line, neither of them is estopped from asserting claim to the true line when this is afterwards ascertained. n809 Where one of two adjoining owners constructs a fence on what by mistake was supposed to be the boundary line between them, that owner is not precluded from afterwards claiming land outside the fence, in the absence of adverse occupancy thereof by the other owner for the prescriptive period under a claim of title. n810

The owner of a city lot, upon part of which a neighbor has constructed a building, is not estopped from asserting title to such part by the fact that the building construction proceeded without objection, where it appears that the lot owner honestly believed that the neighbor knew the correct location of the boundary line between their lots. n811

Even though one of two adjoining owners has been led to establish or acquiesce in the establishment of a line as the true boundary between the lots by the misrepresentation of the other, still the line is binding when purchasers from the misrepresenter make improvements relying on the supposed boundary. However, notice to such purchasers that the line is not recognized is sufficient to save the other owner's rights and the other owner need not take steps to prevent their trespass. n812 Acquiescence does not presume an agreement, either express or implied, but an agreement may be inferred from acquiescence. n813 One adjoining owner who is unwilling for a neighboring owner to construct a fence on an asserted boundary line, but who does not block such construction, is not estopped thereby from questioning the correctness of that line. n814

A tenant in common who, on partition, makes the allotment, fixes the amount of owelty, points out to the cotenant a boundary that is wrong, and permits the cotenant to make the election and pay the owelty without disclosing to the cotenant where the true boundary is, will be estopped to deny that the line pointed out is the true boundary, regardless of any fraudulent intent. n815

Where neighboring owners establish a line by mistake, believing it is the true line and not in settlement of a controversy, the mistake may be corrected. n816 Although there may be a mistake as to the location of the true boundary line, occupancy by one of the neighboring owners beyond such line and up to the line which is actually recognized as the boundary will give title up to the purported boundary when such occupancy has all the requisites of adverse possession. n817 However, if adjoining owners hold to a division fence or line under the mistaken belief that it is the true line, such occupancy, though continuous and uninterrupted, is not adverse. Such occupancy without the intent of claiming beyond the true line is no evidence of an agreement between such owners establishing the line of occupation as the division line between them. Possession in accordance with a division fence, built for convenience and not to establish a line, is not bar to a claim of title according to the true line. n818

An owner who does not know of the exact location of the boundary line is not deprived of title unless the opposing claimant has actually acquired title by adverse possession. n819 A court may infer from adjoining landowners' long-standing acceptance of a fence as the boundary between their lands that they agreed that such fence should be the boundary in case of uncertainty as to the true boundary line. n820

An ancient fence may be competent evidence of the location of a boundary line, n821 particularly where corners have been obliterated n822 or original monuments cannot be found. n823 The position of old fences may be considered in ascertaining disputed boundaries, n824 and the conduct of the parties with reference to old fences may be such as to justify the conclusion that the fences were established by agreement of the parties, or have been recognized by them for such a length of time as to determine the line of ownership between the parties. Fences built by adjoining landowners on the line of the street, according to stakes set by the surveyors soon after the original survey was made, and maintained for forty-five years, are better evidence of the location of such line than a new survey, made forty years after the original survey, which changes such line. n825 Ancient fences built on what were supposed to be boundary lines of the tract of

land in dispute and maintained for at least thirty years are held to fix the correct boundaries, as against modern surveys conflicting therewith and with each other. n826 But the weight accorded to ancient fences of the true line between tracts of land is not so great where such line was not at any time marked by original monuments. n827 Evidence that a fence was built according to stakes set by a surveyor who made the original plat and that the fence has been maintained on substantially the same line for more than forty years, was held to warrant the holding that the fence was built on the true line. n828 Evidence that there was a very ancient fence between the lots of adjoining owners, and that the fence has been maintained as it now stands for more than forty years, and that during such time the owners have openly and continuously held possession under a claim of right up to the line of such fence, warrants a finding that the fence was constructed by agreement of the parties; and a slight variation from the position of the boundary line as described in a deed made sixty years ago, when the land was of little value, does not affect the conclusiveness of the evidence. n829

A division fence maintained only for convenience is not evidence of the establishment of a boundary line, either by agreement, n830 acquiescence, n831 or adverse possession. n832 Thus, a brush fence maintained near the line between adjoining owners, and continued for forty years, but not at all times in the same place, does not bind either party to the line usually occupied by such fence. n833 Neither are the parties in such case bound for the reason that they have cut wood, or pastured their cattle, or mowed the grass, up to such fence, each on the party's own side, and never on the other side. n834

A fence between adjoining owners, placed by mistake on a line different from the true boundary line, does not estop the owner upon whose land the fence stands from claiming up to the true line; and the owner's grantee, under a deed conveying the land "bounded by the lands of" the adjoining owner, may claim title according to the true boundary line, and is not restricted to the line of the grantor's occupancy as shown by the fence. n835

A fence built by an adjoining owner nearly on the true line is not notice to the other adjoining owner that any portion of the other's land is enclosed. The other owner is justified in assuming that the neighbor is enclosing only the neighbor's own land, and the other is not estopped to claim to the true line. n836 Possession held under a mistaken impression of the location of the true line is not adverse, unless the party holds the property up to the line under claim of ownership. n837 If one takes possession of the land and holds it by mistake, with no intention of taking what the possessor does not own, that would not destroy the adverse character of the possession, if it was the possessor's intention to hold all that was possessed, believing it to be owned, n838 and therefore, the question of color of title does not apply in boundary disputes. n839 Hence where improvements have stood for over twenty-one years, title to the land covered by them is determined by adverse possession, and the excess or deficiency in the block cannot disturb the lines of possession so fixed; but if adverse possession is claimed by occupancy during a shorter statutory period, and the statute requires color of title, then the absence of such is fatal, and the shortage or surplus is to be apportioned. n840 Where a division fence is constructed under an agreement that in case a survey should determine that the fence line is not the true line, the fence line should be changed to the true line, possession of both adjoining landowners is permissive possession and will not ripen into a title by adverse possession. n841 In the absence of direct evidence, an uncertainty in the location of a boundary line and an agreement fixing the line may be deduced from the circumstances and inferred from the conduct of the parties, particularly from long acquiescence, but acquiescence must be in regard to a fence or monument as a boundary line, and not merely as to its existence as a barrier. n842

COMPUTER-ASSISTED RESEARCH

LEXIS: Boundar! w/10 fence

§ 90.03(a)(4) Center of Way as Dividing Line.

In most jurisdictions the state has only an easement or right-of-way on land used for highway purposes. The owner of the abutting land owns the underlying fee. Where land on each side of the highway is owned by different persons the title of each runs to the center, unless the highway was originally carved out of one tract alone. n843

It is an established rule that a conveyance of land bounded by or along an existing way, whether public or private, carries the title to the center of the way, subject, of course, to the public use of it as a highway, unless there be something showing an intent to the contrary. n844 Chief Justice Chase said, "It is a familiar principle of that law [referring to the statute law of Illinois regarding dedication], that a grant of land bordering on a road or river, carries title to the center of the river or road, unless the terms or circumstances of the grant indicate a limitation of its extent by the exterior lines." n845 The intent is to be gathered from the description, in connection with other parts of the grant, and by reference to the situation of the land, and the relation of the parties to the land conveyed and to other adjacent lands; and, if an intent to exclude the highway appears by the terms of the grant as interpreted by the surrounding circumstances, the title does not pass. n846 The intent to convey to the middle line of the highway arises from the presumption that the adjoining owners originally furnished the land for a right-of-way in equal proportions, and from the further presumption that such owner, in selling land bounded upon the highway, intended to sell to the center line of the street, and not to retain a narrow strip which could hardly be of use or value except to the owner of the adjoining land. n847 The public policy of discouraging separate ownership of narrow strips of land is the basis for the rule. n848 It is against public policy to allow hostile owners to own small strips of land that were created upon abandonment of a highway. n849

Generally, the rule that a conveyance carries to the center of a right-of-way unless the right-of-way is expressly reserved in a deed is a rule of conveyance, and not mere presumption rebuttable by parol evidence of the grantor's intent. n850 It is applicable even if the conveyance is by the state. n851 But it is sometimes spoken of as a presumption. n852 By public policy, description runs to center. n853 Various reasons are given for the rule, such as that "the way was taken out of the party that hath other lands adjoining," n854 and that the owner of the land laid out in lots and streets gets compensation for the streets in the increased value of the lots, n855 and so purchasers, one after another, pay for the street in paying for the lots. n856 Other reasons for the rule are the absence of practical use to the grantor of relatively small, odd-shaped parcels of land which would otherwise remain in the grantor's possession; n857 the greater value to the grantee who has acquired adjacent land, and who has an immediate interest in the properties adjoining; n858 the public convenience, which is best served by having control of highways and streets in the owners of adjacent properties, rather than in distant owners, who have no incentive to keep them up; n859 the concern of the state and other political units as to who shall determine and pay for improvements; n860 prevention of disputes regarding precise boundaries; n861 and the embarrassment and confusion which would prevail if a different rule existed. n862 The rule is the same whether applied to the streets of a city or to the highways in the country. n863

A grant of land bounded by a highway or river carries to the center if the grantor owns that far, in the absence of contrary language. n864 The reasons for the rule are variously assigned as public policy to prevent disputes and litigation over narrow tracts of land, n865 that a highway being a monument, the call should run to the center, n866 or that the small strip is of little value to the grantor as compared with the grantee. n867

The presumption that a deed carries to the center of an abutting road applies to private as well as public roads. n868 It also applies to railroad rights-of-way. n869

Where the fee to the roadway is in an abutting owner, the title is not a contingent interest or mere expectancy, but is a present ownership of the fee with full dominion. The owner has full dominion and control over land and all rights of the absolute owner of soil, subject only to easements and servitudes in favor of public. The owner may use land for purposes in any way not inconsistent with public easement. n870 A servient estate in a strip of land set apart for railroad right-of-way, highway, or other comparable public purpose passes with a conveyance of the fee to an abutting legal subdivision or tract out of which a right-of-way or other strip was carved, even though no express provision to that effect is contained in conveyance, and on abandonment of the strip for the purpose for which it was set apart, the dominant estate becomes extinguished and the entire title and estate vest in the owner of such abutting legal subdivision or tract. n871

This rule is generally applied equally to boundaries by public and by private ways and alleys. n872 Thus, in case land is laid out in blocks and lots as represented on a map or plat, and lots are sold bounded upon the projected streets, the deed passes the fee to the center of the street adjoining such land. n873 The grantor in such case is regarded as dedicating the ways to use as streets or ways, so far as the grantees are concerned, and the grantor is not allowed afterwards to say they are not streets or ways. The grantor's deed thus operates not only to create a street, but also, through the presumption arising from the fact that there is a street, to extend the grant to its center. n874 The rule of ownership to the center of a public highway does not apply to a public common, n875 nor to an abandoned railroad right-of-way bordered by two streets. n876

An intent to exclude an abutting highway will never be presumed, but must appear from the terms of the deed and be interpreted in the light of the surrounding circumstances. n877 The rule of construction is not uniform, for in some states strong language indicative of the intention to exclude a grant of the fee of the street is required to rebut the presumption of intent to grant the way. Thus, in several states the rule seems to be that nothing short of direct expression of intention to exclude the soil of the highway will have the effect of excluding it. n878 In these states the mere mention of the side of the road, or of a monument on the side of a road, as the place of beginning or end of a line, is not sufficient to exclude the road from the grant. n879 The fact that the monument at one end of the street boundary is stated to be in the line of the street does not necessarily require a construction that the fee did not extend to the center of the street. n880 Even a boundary by the south line of a street has been held to pass the title to the center line of it. n881 If, however, in addition to such words, there are other words or metes and bounds showing an intention to exclude the highway, such intention must prevail. n882 Thus, if two points on the side line of a street are fixed as the beginning and end of the course, the boundary will be the side line of the street. As respects a statutory presumption that the owner of land bounded by a road or street is presumed to own to the center of the way, where all contracts and deeds show the grantor's intention to reserve title to the way, title thereto remains in the grantor, and the grantor will be held to own all the road or street subject to easements granted. n883

The intention as regards conveying to the middle of the street is to be found not only in the terms used in the deed, but in the circumstances attending the transaction. Each case is to be decided in large part according to its own circumstances; n884 and intent to exclude the highway will never be presumed, but must appear from the terms of the deed as read and interpreted in the light of surrounding circumstances. n885 Thus, if a deed calls for a monument at the side of the street and thence "along the street," or "by the street," the conveyance carries the fee to the center line of the street, even though the distances may reach only to the side line. n886 It is to be remembered, however, that this presumption is a rule of construction and is to be applied to ascertain the intention of the parties n887 as determined by the consideration of the language used and such circumstances as may be properly considered, such as reference to the situation of the lands and the relation of the parties to them. n888 The presumption yields to language showing a contrary intention. n889 Thus, a description commencing at the intersection of the northerly side of a street with a creek, shows an intention to exclude the fee of the street. n890 A manifest intention not to grant the fee to the center of the street was shown in a case where a town granted to the owner of land bordering on a highway, the fee of which was in the town, a strip of land from the highway, and discontinued such strip as a part of the highway. n891 Where the deed clearly shows, in conjunction with the surrounding circumstances, that the grantor of land bordering on a street the fee of which the grantor owns, intends to reserve the fee in the street, such intent will be given effect. n892 The mere fact that the land is not described as abutting or bounding on a highway, and that the highway is not mentioned, does not prevent the application of the rule if in fact the land borders on it. n893 Thus, where the property conveyed was described as a store building, and the land on which it stood in fact bounded upon the highway, the mere fact that the highway is not mentioned does not vary the general rule that a conveyance by a highway carries the fee to the center of it. n894

When a conveyance is made of lands abutting upon a public highway, and the deed contains no words of exception or reservation, or any language expressing a contrary intention, the presumption arises that the fee to the center of the highway passes to the grantee as a part of the grant. n895 Where the grantor owns the fee of the entire street, a presumption arises that, upon a sale of land bounded upon the street, the grantor intended to convey the fee in the street

to the opposite boundary, if the grantor owns no land on the opposite side of the street, and did not intend to retain an interest in any portion of the street fronting the land so conveyed. n896 If a highway be laid off entirely upon the land of the grantor, running along the margin of the grantor's tract, the fee in the whole of the soil of the highway vests in the grantee. n897 Thus, a conveyance of a lot abutting on a street adjacent to a river bank carries title to the stream rather than to the center of the street, if such is the grantor's intention. n898 If there is no property susceptible of private ownership beyond a public street, a conveyance of lots fronting on such street passes the fee to the entire street, unless the terms of the grant of the circumstances limit the grant to the center of the street. n899 Of course, if there is any reason for supposing the grantor did not intend to convey the fee of the entire width of the street, such as where the grantor has an interest such as riparian rights in the land on the other side of the street, then the ordinary presumption will apply, and the grantee will take the fee only to the middle of the street. n900 The rule that the grant of a lot in an original plat of a village bounded on a street is presumptive evidence of an intention to convey title to the full width of the street, and to the shore of a lake opposite the street, has been held not to apply to a conveyance made after the street had been vacated. n901 A deed conveying the blocks on each side of a street passes the title to the fee of the street to the grantee. n902

Whether a deed passes the fee in a road which runs across the land conveyed is a question of intention and in determining such question the court may look beyond the words of description contained in the deed and consider the location of the land, the purpose of the deed, and the circumstances under which it was made. n903 Where a grantor laid out a street through the land and divided into lots all of such land abutting on the south side of such street and the deeds to such lots described them, in each instance, as lying on the south side of the street, the title to the bed of the street remained in the grantor. n904

A deed merely describing land as situated on the side of a street passes the title to the center of the street, n905 and so a deed describing land as "beginning on the southerly side" of a road, at the corner of land belonging to a third personal named, and thence running on said road, conveys the title to the middle of the road. n906 In these cases no fixed monument, such as a stake and stones at the edge of the road, is referred to, and there is nothing to prevent the application of the general rule. In case a stake and stones referred to are not to be found, it seems the title to the center line of the road would pass. n907

On the other hand, some of the cases go even to the extent of holding that the point of intersection of two streets taken as a starting point may indicate an intention to exclude a grant of the fee of a street. The point thus established is regarded as controlling the other parts of the description, and lines running thence along the streets are confined to the exterior lines of the streets, and the soil of the street is not included. n908 So, it is held that if the deed clearly expresses that the side line of a street restricts the conveyance, the presumption is clearly overcome, and the street is excluded. n909

The fact that the measurements of the side line reach only to the outer line of a highway is not sufficient to control the presumption of an intention to convey the fee to the center of the highway. n910 Thus, proof that the distance stated in the description of a deed conveying land bounded on a way do not extend to the center of the way is not enough to exclude the operation of the rule that a deed conveying land as bounded on a way conveys title to the center thereof. n911 The use of the words "thence along said road" in the boundary description of land conveyed has been held to mean "thence along the center of said road." n912 If it is clearly expressed that the side line of a street restricts the conveyance, the presumption is clearly overcome, and the street is excluded; n913 and where a deed describes land as "beginning at a certain point" and running "to the road" and thence in "line of road" the measurements being exact and reaching only to the side of the road, it has been held that the title does not include the highway. n914 A grantee under a deed describing the land by metes and bounds without reference to a highway, but intended to convey to the highway, acquires title to the fee under the highway. n915 Where the description carried the parcel so many feet to a street named, "thence along the northerly side of said street," it was held that the fee of the street to the center passed by the deed. n916 Where a description by metes and bounds beings "at a point" on the exterior line of a highway, and returns thereto, it has been held to evince an intention that the grantee shall take to the side line of the highway only. n917 The

presumption of a conveyance to the center of the street is not rebutted in case of a boundary by a road "to a stone wall," and thence by the wall, by the fact that the wall terminated at the side of the street. In such case the boundary is by the center of the road to the line of the wall extended. n918 A boundary by "other land of the grantor on a passageway," when in fact there is no passageway and the only reference to it is in this description, includes no part of any passageway. The boundary is controlled by the measurements. n919

A deed of land by a plat showing a street or alley as a boundary conveys the title to the center of the street or alley, provided the grantor's title extends to the center. n920 So it is generally held that a conveyance of land bounded on a highway, street, or alley carries with it the fee to the center thereof, subject to the public easement, provided that the grantor at the time of the conveyance owned thereto and there are no words in the deed showing a contrary intent, regardless of whether or not the highway, street, or alley has been accepted or opened. n921 Even if the grantor retains the fee of the streets, the grantee acquires a right-of-way over them as an easement appurtenant to the land conveyed. n922 There is no presumption that a conveyance carries the title to the center of a street after the street has been vacated. n923

Where the city had issued a permit to an abutting property owner to connect water, the city was liable for a person injured in an excavation between the sidewalk and the curb. n924

In two or three states this rule does not apply, where the plat is made out and recorded in conformity with the statutes of such states upon that subject; but this is because the courts of those states hold that the statutes vest the entire title, beneficial and otherwise, in the city, town, or county, so that the dedicator has no interest left in the land which is the subject of grant. n925 Under such a statute the fee in the streets is held in trust for street purposes, and for no other use of purpose. Every other beneficial use is in the lot owners, and this interest of the lot owners will pass by a conveyance of the lot. n926 The conveyance of a lot facing on a street set apart in the plat for the use of the owners of the lots abutting thereon conveys only an easement in the street. n927 Adjacent landowners do not own to center of a public common. n928

Where owners of a tract of land create a railroad right-of-way and later dedicate a street adjoining the right-of-way, a subsequent grantee of the land abutting on the other side of the street takes to the center of the street but not to the middle of the right-of-way. n929

The rule that a conveyance of land on an alley carries with it ownership of a fee to the center thereof if the grantor owned to the center and there are no other words in the deed showing a contrary intent applies whether or not the alley has been open or the dedication accepted. n930 The cases are divided as to whether the line runs to the center of an alley platted but vacated before the date of the conveyance. n931

A deed carries to the center of a projected road, even though the road was never opened or was abandoned. n932 If the highway is laid off entirely on the grantor's land so that the grantor owns the underlying fee, the later conveyance of the adjoining land carries title under the entire highway right-of-way. n933 It is the weight of authority that regardless of whether the way referred to actually exists as such, where a way is called for as the boundary in the conveyance of land and the grantor owns the fee which is covered by the way, the grantee acquires an easement in the way named and the grantor is estopped to deny that the way exists. n934 However, the deeds of conveyance may be such as to deny the grantee an easement in the abutting way. n935

COMPUTER-ASSISTED RESEARCH

LEXIS: Boundar! w/10 (way w/5 center)

§ 90.03(a)(5) Court Determination of Boundaries.

In some states special statutory proceedings are used to establish disputed boundaries. n936 In these proceedings the function of the statutory officials may be to find ancient boundaries rather than to determine and fix new lines. n937

Generally a court of equity has no jurisdiction to fix boundaries merely because they are disputed or uncertain. To give such jurisdiction there must be some equity interjected by the acts of the parties or their situation or relation. n938 A court of equity has no jurisdiction to determine disputed questions of boundary, except as incidental to the granting of some equitable relief. n939 It has been held, nevertheless, that equity has jurisdiction to determine disputed boundary lines, n940 notwithstanding acts of ownership that may have been done by the respective parties, or that the suit may be a substitute for an action at law to settle the ownership of a strip of land. n941 A demurrer for lack of equity to a bill to correct a boundary line was held properly overruled, since, though the controversy might have been settled in an ejectment suit, equity had jurisdiction to settle it. n942

A suit in equity to determine controverted boundaries of adjacent parcels of land may be maintained where the confusion results from the defendant's fraud or misconduct, or the defendant breaches a duty to preserve a marking line, or where the settlement of a boundary cannot be had at law without a multiplicity of actions. n943 Equity has jurisdiction to establish boundaries which have once been defined and established but have become lost or obliterated, where the owners of the adjacent premises are responsible for the loss or obliteration of the boundary, and to prevent a multiplicity of suits. n944

Even in case there has been a mistake as to the boundary line, and one owner has placed a building a little over the line upon land of the adjoining owner, a court of equity will not order the removal of the building, but will leave the party to the remedy at law. The court may, however, enter a decree that, if the plaintiff will release the strip of land so built upon within a certain time, judgment shall be entered for the value of the land as found by a referee, and costs. The court will not aid the plaintiff in obtaining an exorbitant price for land which is comparatively valueless except for purposes of litigation. n945 Where adjacent landowners have a dispute over the location of their boundary line, the remedy is either ejectment or an action to establish the boundary. n946 Under some statues, however, equity has jurisdiction to determine a disputed boundary, though the title to the land is incidental thereto. n947 A court of law will declare the meaning of a description in a deed when the real intent of the parties can be gathered from the whole description in a deed by a reasonable construction of the instrument. n948

Boundary questions may be adjudicated in a suit brought in the statutory form of trespass to try title. n949 Some statutes permit courts to direct the running of lines to determine boundaries. n950

An agreement to submit to arbitration a question of boundary is valid, n951 the decision of the arbitrators being binding upon the parties concerned, even though there is no written agreement, n952 and the award made thereunder will be subject to impeachment only as in other arbitration cases. n953 The award is regarded as an adjudication by a tribunal of the parties' own choice, n954 and is not to be set aside for errors of judgment; n955 if it conforms to the submission, it may be impeached only for fraud, partiality, misconduct, or gross mistake on the part of the arbitrators to the evident injury of the party claiming it, n956 and it cannot be impeached for irregularities not objected to at the time. n957 The decision may be impeached upon the grounds that the arbitrators exceeded their authority and that the award was not within the submission, or that they acted under a miscomprehension based on erroneous interpretation of the intention of the parties to the agreement. n958 Neither a conveyance nor an order for a conveyance is essential to the validity of the award, which acts as an estoppel and precludes the losing party and those claiming under that party from denying the superior title of the successful party. n959

A division line between adjoining owners established by the award of referees, under a written agreement entered into by them for the purpose, is binding upon them where possession of the land is taken and held by them respectively under the award. n960

An award on an oral submission as to the division line between adjoining pro-prietors is not conclusive between them

unless followed by an acquiescence for a time sufficient to give title by prescription. n961 Fence-viewers have no official authority to establish a disputed boundary line, so their establishment of one is merely an award on an oral submission, or a parol contract between the parties. n962

A written agreement merely providing for a survey at joint expense does not bind the parties thereto to the boundary established, and if one party adopts the line so run and builds in conformity with it, the other party is not thereby estopped from claiming that it is not the true line, if it does not appear that the claiming party knew the other was incurring expense upon the faith of a supposed agreement in regard to the line so run as the true one. n963

A boundary line fixed by a surveyor employed by various property owners is not binding upon an owner who was not a party to the surveying and who never acquiesced in the line fixed by the surveyor. n964 Where two adjoining owners agreed that two surveyors, one selected by each, should run a boundary line between their lands, and the line was run in the presence of both landowners, neither of whom objected, the running of such line was an award conclusive upon both. n965 Where adjoining owners agree to have a disputed boundary located by a surveyor and to abide by the location made, they will be bound by such location if it appears that some definite survey was made approximating the proper method, or that the parties acquiesced in and recognized the line located. n966

COMPUTER-ASSISTED RESEARCH

LEXIS: Boundar! w/10 (court or judicia!)

§ 90.03(a)(6) Admissibility of Evidence to Establish Boundaries.

The destruction of a monument does not affect its identity if its previous site is capable of location. n967 Ancient boundaries and landmarks may be established by traditional evidence. n968

The declarations of deceased persons made when they were in possession of land and in the act of pointing out their boundaries are admissible in evidence as to those boundaries when nothing appears to show an interest to deceive or misrepresent. n969 Statements made by persons when pointing out boundaries are admissible when those persons are not available as witnesses. n970 The declarations as to boundaries made by a deceased person while living are admissible where the person is shown to have had an actual knowledge on the subject, and there was no inducement for the person to misrepresent, n971 regardless of whether the person owned the land or adjacent land at the time the declarations were made, n972 and there is no reasonable probability, because of lapse of time, that testimony could be obtained from persons having actual knowledge thereof. n973 It need not appear affirmatively that the declarations were against the interest of the person making them, n974 but they must be so in fact, n975 or it must at least appear that such person had no interest to make false representations; n976 and it must appear that the declarations were made by a former owner in possession of the land at the time, n977 in the act of pointing out the boundaries. n978 The declarations must be those of a person who has since deceased. n979 The declarations derive their force from the fact that they accompany the act of pointing out the boundaries, and are thus a part of the act. n980

The declarations of a surveyor, subsequently deceased, made on the spot while running or pointing out a line are admissible to identify the monuments of a survey. n981 Thus the declarations of a surveyor while making a survey have been admitted to identify a monument pointed out by him as a corner of the same survey, established in making the original survey many years before, in which he had participated before he died.

The decisions in South Carolina and Texas have gone so far as to admit not only evidence of the declarations of a surveyor made while surveying the land, and since deceased, but also those of a chain bearer who had pointed out to the witness the place of a corner, and subsequently died. n982 The acts and declarations of a surveyor while surveying an adjacent lot, upon the question of boundary, are admissible, the surveyor being now deceased, and having no interest to misrepresent at the time of such survey. What the surveyor did and said at the time the surveyor found the corner of the

land in question may be regarded as something more decisive than the expression of a mere opinion. n983

In some states the declarations of a surveyor or other disinterested person, since deceased, are admissible in a controversy about a survey line, if the person was in a position to know the boundary line, corner, or monument, and the declarations were made before the controversy commenced, n984 provided the declarations were made while the declarant was pointing out or marking the boundaries, or discharging some related duty. n985 More generally, however, and upon sound principles, the rule is restricted to the admission of declarations only when made by persons owning the land and being at the time in possession of it, n986 and even then the declarations must be either a part of the matter at issue, n987 or be made against the interest of the owner. Thus the declarations of the owner, while standing on the land, in the owner's own favor, are not competent evidence in favor of one claiming under the owner, to prove right-of-way over adjacent land of another person. n988

The declarations of a surveyor made while engaged in making the survey are held admissible as a part of the matter at issue, and it is not necessary to prove the surveyor's subsequent death. n989 Surveys by the same surveyor made at about the same time as a survey in dispute, and locating the same lines, are admissible as declarations of the surveyor, who is dead; n990 but declarations of a surveyor, since deceased, who was not present at or connected with the original survey, are inadmissible though the surveyor took part in a subdivision of the survey. n991 A surveyor cannot testify to a boundary unless the surveyor produces the data of the survey. n992

In establishing a boundary years after the survey, a court may admit any evidence tending to establish the place where the original surveyor ran the line, which is the best evidence of which the case is susceptible. n993

The opinion of a witness as to the location of a disputed division line is incompetent testimony, though the witness had long been intimately acquainted with the premises. n994 The opinion of surveyors to the effect that, when the land was originally surveyed, only one line of the survey was actually run, is inadmissible. It is the province of the jury to conclude from the facts proved whether the lines were actually run or whether the survey was merely an office survey. n995 The rule that monuments which are not called for in the filed notes cannot be considered for the purpose of locating the footsteps of the surveyor does not apply where a witness who accompanied the surveyor testifies that such monuments indicate the line marked by the surveyor. n996

Traditional evidence is now generally admissible to prove boundaries. n997 Evidence of common reputation and understanding, so far as it definitely exists, is admissible to prove the location of private boundaries. n998 In some states, ancient boundaries in dispute, whether public or private, may be proved by the common reputation and understanding of the neighborhood where the land lies. Such reputation or understanding, to be admissible, must be shown to be general and concurrent, and it must have been in existence before the controversy commenced in which it is used as evidence. n999 Such proof must also show the boundary with reasonable certainty. n1000

Where the location of a private boundary depends upon showing the original section line, this may be shown by proof of general reputation. n1001 Common reputation of the location of boundaries is received, provided it had its origin at a time comparatively remote, and attached to some monument or natural object, or is fortified by evidence of occupation and acquiescence giving the land a definite location. n1002

If the field notes of a survey are inconsistent or uncertain, the true location of the survey may be shown by the testimony of the surveyor who made it. n1003 A plat made by that surveyor may be admitted in evidence to explain and illustrate the surveyor's testimony in regard to the lines and measurements the surveyor has made. n1004 The surveyor may use such map in explaining the surveyor's testimony, which would not be clearly intelligible without it, though the plat is not shown to be correct or official. n1005

If it is apparent on the face of the field notes that there is a mistake in them, it is not competent for a witness to state that there is such a mistake. n1006 This must be determined from the paper itself. Where natural or artificial objects are

called for in the field notes of official surveyors, the presumption is that such objects actually existed n1007 at the places indicated by the field notes. n1008 If, however, the survey was a mere chamber or office survey, the calls for such objects afford but slight evidence of their existence. n1009

In establishing a boundary years after a survey, the court may resort to any evidence tending to establish the place where the original surveyor ran a line, which is the best evidence of which the case is susceptible. n1010 An ancient survey qualifying as a public document is admissible. n1011 The testimony of persons who saw monuments now lost is admissible to locate those monuments. n1012

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LEXIS: Boundar! w/10 (eviden! w/20 admissi!)

§ 90.03(a)(7) Acquiescence in Establishing Boundaries.

A substantial line of authority relies upon the doctrine of acquiescence by adjoining landowners for a long period of time as being sufficient to establish a boundary line, even though it does not correspond with the original true line. n1013 Acquiescence differs from practical location in that no agreement is present. Instead one party lays out the line and the other does not dispute it. It may or may not require dispute or doubt as to the true line and may or may not require a holding for the full period of adverse possession. Estoppel requires either of the three elements of an estoppel in pais, i.e., equitable estoppel: (a) a holding out, (b) a reliance thereon, and (c) injury, or estoppel by document. n1014

The essence of the doctrine of fixing a boundary by acquiescence is the implied agreement by the parties that the fence or other boundary is the true line. The failure of the parties to object is essential and the doctrine is a mixture of implied agreement and estoppel. n1015 The adoption of a division line by acquiescence is distinguished from adverse possession and rests upon a different factual situation. n1016

The doctrine of acquiescence rests on a public policy that seeks to avoid litigation over boundary lines. n1017 While the interests of society demand that title shall not be transferred for slight cause and except as required by law yet the same interests favor stability of boundaries. n1018

Sometimes acquiescence is considered a type of estoppel. n1019 In other states acquiescence is an independent doctrine. n1020 Mere acquiescence in a boundary line is not of itself sufficient to constitute it the true line or to prevent the owners from disputing it unless the acquiescence results from an agreement based on a doubt or dispute between the parties. n1021

As in practical location, the cases are divided as to whether acquiescence can be established short of the period of the statute of limitations. n1022 There is also dispute as to whether possession up to the line is required. n1023 The cases further lack accord as to whether acquiescence is a legal conclusion or merely evidence of establishment of a line. n1024 Under some cases acquiescence is actually evidence of an agreement to establish a line.

Some cases decline to recognize acquiescence as a method of establishing a boundary line and require either a boundary agreement n1025 or elements of estoppel. n1026 Acquiescence is a question of fact, n1027 and each case must furnish its own holding, to be deduced from its own facts and circumstances. n1028 Acquiescence, under circumstances not amounting to an estoppel, is a mere fact to be considered by the jury in determining the true location of a boundary line. n1029

Where there was a dispute as to the division line, and one of the adjoining owners occupied the disputed land, and the other, because misled by the adverse claim and by advice received in reference to it, acquiesced for less than twenty years in such occupation, the adjoining owner was not estopped from asserting title. n1030 If an owner ignorant of his

true boundaries by mistake acquiesces in a line as a boundary, the owners and grantees are not thereby precluded from afterwards claiming to the true line, n1031 and it has been held that one who has no knowledge that the adjoining owner has encroached upon the land cannot be held to have lost his rights by acquiescence in such occupancy no matter how long continued, for one cannot waive or acquiesce in a wrong while ignorant that it has been committed, n1032 especially where each party has equal means of ascertaining the correct line. n1033

Acquiescence requires the consent of both landowners. n1034 A line established by acquiescence is binding on successors in interest if sufficient time has elapsed. n1035 The line established by acquiescence must be definite and certain and not speculative. n1036

Some of the cases confound acquiescence and practical location and require a dispute as to the true line before acquiescence is applicable. n1037 Others merely require that the line be uncertain. n1038 Others do not insist that either dispute or doubt be present in all cases. n1039 Boundaries by acquiescence are established only after the parties become aware of a dispute. n1040

An agreement or acquiescence in a wrong boundary line where the true boundary is known or can be ascertained from the deed is treated as a mistake and does not establish title. n1041 So where the true line is known the principles of adverse possession must apply to transfer the title. n1042

A division line established by the admission of one of the parties, and acted upon by the other, may estop the former from denying that it is not. Thus, where one of two adjoining landowners, for the purpose of enabling the other to locate a division fence, pointed out a line as the true dividing line between them, and the latter, relying upon this information, built the fence and cultivated the land and made improvements up to this line, it was held that, as against the latter, the former proprietor and grantees were estopped to claim that a mistake had been made, and the line established was not the true line. n1043 Where a landowner surveys a boundary line for his land, which is publicly marked, and sells land with reference thereto, that other is estopped from denying the correctness of its location as against one purchasing with reference thereto. n1044 An agreed location may be inferred from long standing acceptance by the parties as to the line. n1045

Many cases hold that acquiescence in a boundary line for a shorter period than that fixed by the statute of limitations is not conclusive on the owners of abutting land. n1046

A boundary line between a public highway and an abutting owner cannot be fixed by acquiescence, for no one representing the public is authorized to acquiesce in any particular location. n1047 When the statement of the boundaries is indefinite, much weight is to be given to the construction put upon the deed by the parties themselves through their acts and admissions. n1048

Ratification or equitable estoppel is the basis of the doctrine of acquiescence, n1049 and such doctrine may apply even though the adjoining owners, actually thus locating a different line, did not intend any line other than that fixed by their deeds or patents. n1050 Where, however, a boundary line has been definitely established, mere passive acquiescence will not establish a different line on the principle of practical location. n1051 The boundary line between a highway and land abutting thereon cannot, as against the public, be fixed by acquiescence. n1052

A boundary agreed to by adjoining landowners' predecessors, where the agreement did not remain unchallenged for a period equal to the statute of limitations and it was not inequitable to disregard the agreement, is no defense to an action to quiet title. n1053 The doctrine of acquiescence is not applicable where only evidenced by actions or words prior to knowledge of encroachment. n1054 In other states, however, a boundary may be established by acquiescence over a period of time shorter than that required for adverse possession. n1055

The rule of acquiescence appears to have been adopted as a rule of repose, for the purpose of quieting titles, and

preventing the uncertainty, confusion and consequent litigation which would be likely to result from the disturbance of boundary lines so long established. n1056 Where a corner, or a line, supposed to have been established by the government in the surveys of public lands, has been acquiesced in by adjoining owners of such lands for many years, and improvements made, and the land broken up to the line thus established, there is a presumption in favor of such corner being the true one, which can only be overcome by clear proof that it was not established by the government. n1057 In other states, however, acquiescence does not establish a legal line where there is no other evidence than the acquiescence of an agreement fixing the line and the acquiescence was the result of mistake. n1058

Where the exact location of a boundary line is not definitely known, a dispute involving the boundary line must be determined by looking to the conduct of the parties with reference thereto. n1059 Thus, long acquiescence by the owners of adjoining lands in the location of the dividing line between their lands may, in effect, establish such line, if the acquiescence be for a period of effect, establish such line, if the acquiescence be for a period of time equal to that fixed by the statute of limitations. n1060 When there is honest mistake as to boundaries, adverse possession runs. n1061 While some courts permit the fixing of boundary lines by parol, n1062 others by reason of the statute of frauds decline to so do where there is knowledge of the true boundary. n1063 Under the one theory title may be acquired to a boundary line by acquiescence short of the statutory period of limitations. n1064

In the absence of direct evidence, an uncertainty in the location of a boundary line and an agreement fixing the line may be deduced from the circumstances and inferred from the conduct of the parties, particularly from long acquiescence, but the acquiescence must be in regard to a fence or monument as a boundary line, and not merely as to its existence as a barrier. n1065 In general, acquiescence depends on the words, declarations, or silence of the parties or inferences and presumptions of their conduct. Acquiescence exists where a one who knows of being entitled to impeach a transaction or enforce a right neglects to do so for such a length of time that, under the circumstances of the case, the other party may fairly infer that the first has waived or abandoned the right. n1066 Where it was shown by uncontradicted evidence that the parties and their predecessors in title acquiesced in the dividing line for several years, such acquiescence operated to establish the line. n1067 It has been said that a supposed boundary line, long acquiesced in, is better evidence of the true location of the line than any survey made after the original monuments have disappeared. n1068

The distinction should be kept in mind that acquiescence in a boundary line without any agreement is not conclusive, unless it is continued under circumstances of adverse occupation long enough to give title by adverse possession; while acquiescence in a boundary line which, by reason of uncertainty or dispute, the parties have established by agreement, need not be continued for any definite time. n1069 Acquiescence in a wrong boundary line will not establish it as the true line, but such acquiescence for a long period of time is evidence that such line is the true line. n1070 It has been held that a boundary may be established by acquiescence for a period of twenty, n1071 fifteen, n1072 ten, n1073 and seven years. n1074 The acquiescence is, then, of importance only as showing the agreement. n1075 A survey of lands intended to locate a boundary between adjoining lands, followed by acquiescence and possession by both adjoining owner to the line thus located, is evidence of the verity of such line, without regard to limitations. n1076

Where an assumed or agreed boundary is located through mistake and there is no intent to treat it as an agreed line, it is not binding upon the parties. n1077 The establishment of a boundary line by adjoining owners may be without binding effect, if such owners were mistaken as to the actual location of the true line. n1078 The acquiescence of the owners of adjoining lands to a line created by a fence is only evidence of an "agreed boundary line," but not conclusive. n1079 Acquiescence in a boundary line may be implied by reason of use over a period of time shorter than that required for adverse possession. n1080 An agreement or acquiescence in a wrong boundary when the true boundary is known, or can be ascertained from the deed, is treated both in law and equity as a mistake, and neither party is estopped from claiming the true line. n1081 Accordingly, where adjoining landowners employ a surveyor to run the boundary line between the lands, not because they have a dispute about it, but merely because they are ignorant of its exact location, the line so run, if incorrectly located, is not conclusive on the parties, even though they acquiesce in it, believing it to be correct. n1082 Where both parties acquiesce, the line becomes the legal boundary, though both parties were acting under an honest mistake and there was no intent to hold adversely. n1083

Where the owner of land, desiring to break it, calls upon the owner of adjoining land to point out the boundary between them, and the latter indicates what is supposed to be the line, no estoppel is created against such adjoining owner to claim the true line if different from the one pointed out. n1084 It is universally recognized that acquiescence necessitates a knowledge of facts which will enable a party to take effectual action, n1085 and, therefore, on these grounds it is rightly held that where a landowner in good faith points out to the owner of adjoining land an incorrect boundary line, both parties being ignorant of the true line, the first owner is not estopped from denying such line as the true boundary. n1086

There is disagreement among the courts as to whether acquiescence itself establishes a line or whether it is merely evidence of an existing boundary line n1087 not based on mistake. n1088 When the line has been established by acquiescence, all land included within it passes with a conveyance of the property to which it has become attached. n1089 The United States government is not subject to the doctrine of acquiescence, n1090 nor are the state governments affected by the doctrine.

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LEXIS: Boundar! w/10 acquiesc!

§ 90.03(a)(8) Estoppel to Deny Boundary Lines.

A number of the courts uphold parol boundary agreements upon the theory of estoppel. n1091 In some instances this is the case where the three elements of an estoppel in pais are present, a holding out, a reliance thereon and injury. n1092 Other cases speak of estoppel without anything being present except the agreement. So the parties to a verbal agreement establishing a boundary, where its correct location is in dispute, are bound by the agreement and each is estopped to deny the location of the line. n1093 If a boundary line is in dispute the parties may agree upon a boundary. If there is no bona fide controversy then adverse possession must be completed to pass title. n1094

In these states, even though title to real estate cannot be transferred by a verbal agreement, yet, where a boundary between contiguous lands is uncertain or disputed, the respective owners of such lands may verbally agree on a certain line as the permanent boundary line. n1095 An oral agreement fixing a dividing line between adjoining owners is not within the statute of frauds, if the dividing line had been in doubt or dispute; and the agreement may be enforced both in equity at law. n1096 Such agreement is not regarded as passing the title to any real estate, but merely as defining the line between such owners, n1097 Abecause that can only be done by deed properly executed; but such settlement determines the location of the existing estate of each, and, when followed by possession and occupancy, binds then, not by way of passing title, but as determining the true location of the boundary line between their lands." n1098

Where the location of a boundary line is uncertain or in dispute, an oral agreement determining the question will not be invalid under the statute of frauds, at least when possession is subsequently maintained with reference to the agreed line. n1099

Where adjoining owners have established a dividing line by a parol agreement, and have executed the agreement by taking actual possession of the parts allotted to them, respectively, up to the agreed line, and have for a long time recognized that line as a true dividing line, there is an estoppel to claim otherwise. n1100 If the parties have carried the agreement into execution, and entered into possession in accordance with it, the courts will not disturb it, even if both parties were mistaken as to the true location of the line. n1101

The courts actually encourage such private settlements as a means of suppressing litigation. n1102 To make the agreement effective, however, by way of estoppel, it is necessary that the line established by agreement should be followed by possession according to that line. n1103 It is not necessary that possession under the agreed line should be

had for the statutory period of limitation to give validity to the agreement, even though the agreement derives additional weight by long acquiescence. n1104 Where disputed boundary lines have been established by express agreement, and the parties have recognized them and expended large sums of money under the agreement, they will be upheld, although title by adverse possession has not be acquired. The application of the doctrine of estoppel as to a voluntary adjustment between contiguous lands is not within the statute of frauds, n1105 because no estate is created. n1106

Parol evidence is admissible to show the location of a boundary line established by agreement between the adjoining landowners. n1107 In case one of the parties at once repudiated the line as fixed, and retained possession of the land in controversy, and there has been no possession acquired or taken by the other according to the line claimed to have been established by the agreement of the parties, it is clear that there has been no practical location of the line by which the parties are estopped. n1108

A party may, by acts and conduct, be estopped from questioning a boundary line acted upon by another even though such line is not the true boundary line. n1109 Where the defendants in 1932 witnessed the rebuilding of a fence on the line adopted by their predecessors in interest as the correct boundary and acquiesced in that line for eight years, they were estopped to asset that the fence was not on the true boundary line. n1110 A boundary agreement which did not set out true boundary is binding on one who came into title through a tax deed (which did not vitiate the boundary agreement) and succeeding mesne conveyances. n1111

An estoppel does not arise from an agreement to deviate from a known boundary, since this is treated by the courts as a mistake. n1112

Construction of improvements alone is not sufficient to establish a boundary line in the absence of an agreement. n1113

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LEXIS: Boundar! w/10 estoppe!

§ 90.03(b) Boundaries Related to Water.

§ 90.03(b)(1) Title to Bed of Body of Water Determined by Question of Navigability.

Where a flowing or stationary body of water is given as a boundary in deeds, the great weight of authority distinguishes between navigable and nonnavigable water. Distinction is also made between fresh and tidal waters. A call to such a body of water creates five possibilities as to the boundary: high watermark, low watermark, the meander line, the center line, the trend of the stream or the thread of the stream.

The question of what are navigable waters depends on their capacity for navigation, not their actual usage. n1114 High watermark is the line which the water ordinarily covers for periods of time sufficient to destroy vegetation. n1115

The question of whether a description in a deed carries title underneath the surface of abutting fresh waters depends to a considerable extent on whether such waters are navigable or nonnavigable. Basically, if the waters are navigable or are "public" the state or the federal government owns the bed while the title is in private ownership if the water is nonnavigable or nonpublic.

The great weight of authority does not stop the line at the water's edge if the body of water is nonnavigable but carries it to the middle of the stream. "Navigability" is actually used in two senses, one to determine rights to the bed of the body of water, the other governing the problem of whether or not the state or federal government can control right of commerce, flowage and other riparian rights. So a federal finding as to navigability does not disturb title to the bed but does affect riparian and public rights and places limitations on the state's control over the use of water. n1116 Once a

body of water has been declared navigable it always remains as such. But a declaration of navigability by state or federal act cannot control title to the bed without the riparian owner being compensated by eminent domain for the taking of title to the property.

At common law the term "navigable river" was confined to rivers or arms of the sea in which the tide ebbed and flowed. n1117 The reason for this rule was that the limit of the tide in all the waters of England was the limit of practical navigation and was, as a consequence, made the test for determining navigable capacity of the stream. n1118 This test is totally inapplicable in the United States. Fresh water is navigable in the American common law sense, if it is, in fact, in its natural condition, reasonably capable of valuable use as a public way. n1119 Consequently, the English common law rule regarding navigable lakes and rivers has been changed, and in its place the civil law rule has been adopted, which recognizes as navigable all streams and lakes which are really so, though they are not tidewater rivers. n1120 This is the prevailing doctrine in this country. The earliest judicial statement of it is found in a case before the Supreme Court of Pennsylvania in 1807, in which Chief Justice Tilghman, after observing that the rule of the common law upon the subject had not been adopted in Pennsylvania, said:

> The common-law principle is, in fact, that the owners of the banks have no right to the water of navigable rivers. Now, the Susquehanna is a navigable river, and therefore the owners of its banks have no such right. It is said, however, that some of the cases assert that by navigable rivers are meant rivers in which there is not flow or reflow of the tide. This definition may be very proper in England, where there is no river of considerable importance, as to navigation, which has not a flow of the tide; but it would be highly unreasonable when applied to our large rivers, such as the Ohio, Allegheny, Delaware, Schuylkill, or Susquehanna and its branches. n1121

Congress, by earlier legislation with regard to the survey of public lands, recognized the same rule, declaring that navigable rivers shall be public highways. n1122 By the common law, even such rivers as the Mississippi, the Missouri, the Ohio, the Hudson, and the Connecticut and other great rivers, above the point where the tide ebbs and flows, would not be navigable rivers, though they are navigable in fact; and therefore, where such a river formed the boundary of land the grantee became a riparian owner, and the grant extended to the center of the river. n1123 The courts have greatly varied their tests as to what constitutes navigability. If the water by its depth, width, and location is rendered available for commerce, it is navigable whether it is actually so used or not. n1124 So it has been held that a river is navigable if it may support any form of commerce. Thus, it has been held that a river is navigable if the tide ebbs and flows therein, or if it is in fact navigable during some seasons of the year for the floatages of boats, lighters, rafts, logs, and the like, n1125 and it is not necessary that the waters be navigable in all their parts, n1126 or that the navigable portion be open to use all of the year. n1127 The criterion for determining whether or not a stream is navigable is its capability of use for transportation, and this is a question of fact. n1128 In view of this legislation the Federal courts, in construing grants of the United States, hold that the common law rules of riparian ownership do not apply to navigable streams, even in those states in which this rule has been adopted. n1129 The question of whether a riparian owner holds the fee to the middle thread of the stream or the river's bank, is governed by the law of the states. It depends upon the laws of each state to what extent the prerogative of the state to lands under water shall extend; and, therefore, it happens that the Mississippi River, by that settled policy of the state of Iowa, is regarded as a navigable river, and the title of a riparian owner on the banks of this river extends only to ordinary high watermark, and that the shore between high and low watermark, as well as the bed of the river, belongs to the state; while on the other side of the same great river, in the states of Illinois and Mississippi, the common law doctrine prevails, and in those states the title of the riparian proprietor extends to the middle of the current. n1130

Navigability, when claimed as the basis of a right asserted "under the Constitution of the United States, is necessarily a question of Federal law to be determined according to the general rule recognized and applied in the Federal courts," and "the rule long since approved [by the Supreme Court of the United States] ... in applying the Constitution and laws of the United States is that streams or lakes which are navigable in fact must be regarded as navigable in law; that they are navigable in fact when they are used, or are susceptible of being used, in their natural and ordinary condition as

highways for commerce, over which trade and travel are or may be conducted in the customary modes of trade and travel on water; and further that navigability does not depend on the particular mode in which such use is or may be had, -- whether by steamboats, sailing vessels or flatboats, -- nor on an absence of occasional difficulties in navigation, but on the fact, if it be a fact, that the stream in its natural and ordinary condition affords a channel for useful commerce." n1131 It is capacity for navigation, not usage, that determines question of navigability. n1132

COMPUTER-ASSISTED RESEARCH

LEXIS: Boundar! w/10 (bed w/10 body w/3 water) Boundar! w/10 navigab!

§ 90.03(b)(2) Title to Bed of Nonnavigable Streams.

The rule is almost universal that if the stream or river is not navigable as navigability is determined in the particular jurisdiction for purposes of determination of title, but not necessarily riparian rights, the title to the bed of the stream is in private hands.

Where the body of water is a nonnavigable stream the weight of authority makes the boundary line the thread of the stream, not the meander line. n1133 The meander line is merely drawn to determine acreage above water usually for the purpose of sale in the case of government owned lands.

Where the boundary line is not that of the stream, the cases are divided as to whether the tract expands or contracts as the stream adjoining the boundary moves. n1134 Even though the street or stream is not mentioned as the boundary, if the call was to such a monument it will run to the center. n1135

The land covered by fresh-water streams not navigable is prima facie the property of the riparian proprietors, "usque ad filum aquae" (as far as the thread of the water or stream). n1136 If the same person owns the land on both sides of the stream, that person owns the entire river bed so far as the owned lands extend. n1137 One who owns the bank on one side of the stream only, owns the bed of the stream "ad medium filum aquae" (to the center of the thread of the water or stream). A conveyance of land on a fresh-water river, which contains a call to Athe river," makes the river the boundary, and conveys the land to the center of the stream. n1138

By the "thread of the stream," strictly speaking, is meant the center of the main channel of the stream. n1139 The thread of a stream is the middle line between its shores at its lowest flow, not at the time of normal water. n1140 Ordinarily, the middle line between the shores is regarded as the thread of the stream, taking it in the natural and ordinary stage of the water, irrespective of the depth of the channel. n1141 Moreover, it is the middle line of the stream for the time being that is the boundary. The boundary line may change from time to time by the gradual wearing away of the bank upon one side of the stream and the depositing of the soil upon the opposite side, and the land before covered by water belongs to the riparian proprietor, n1142 although, if the bed of the stream be suddenly changed by a freshet (sudden overflow from a heavy storm or accumulation of water), the boundary is not changed; the ownership remains according to former bounds. n1143 The thread of the stream must be the line which would give the owners on each side access to the water whatever its stage might be, and particularly at its lowest flow. n1144

If one owning land on both sides of a river grants the land on the westerly side of it, bounding it by the river, the grant includes an island lying between the westerly bank and the middle of the main channel of the river. n1145 If such owner in making a grant excepts an island, the grantor makes the thread of the channel between the island and the mainland the boundary. n1146 If an island gradually forms in the bed of a river wholly on one side of the thread of the stream, it is the property of the riparian owner on that side; n1147 but if the island is so situated that it is partly on one side and partly on the other of the thread of the river, it belongs in severalty to the proprietors on each side, the division line being the thread of the old river before the formation of the island. n1148 So, of course, if a point of land on one side is cut off, making an island, this belongs to the original owner.

If the old bed of the river, being gradually deserted by the current, fills up and new land is formed, this belongs to the riparian proprietors on each side, the division line being the thread of the old river; n1149 but if the bed of the river, as it existed at the time of the grant, cannot be found or traced, the courses and distances of a survey giving the meander line of the river may be resorted to. n1150

The right of the riparian proprietor to alluvion, or accretions to the land through the gradual action of the water, is everywhere admitted. The rule applies to lands bounding on tidewaters and to lands bounding on fresh waters. It applies to the state equally and to private persons; and it is independent of the law governing the title in the soil covered by the water. n1151 The thread of the stream is the true boundary of lands conveyed by a municipal judge by a deed naming a nonnavigable river as the boundary. n1152

The exact boundary line of a navigable stream is the point midway between the level of water which exactly reaches the cut bank and the higher level of water which does not overtop the bank. n1153

Among two or more channels, the middle line of the channel having the greater depth of water, and being the one generally used for the purposes of navigation, is regarded as the thread of the stream, even though the greater quantity of water may flow in the other channel. n1154 If there is a main channel through which the water flows at all times, and an auxiliary channel which furnishes a passage for surplus water in times of freshet, the center of the main channel is the thread of the stream. n1155 A change in the course of a stream caused by a freshet (sudden overflow from a heavy storm or accumulation of water) so as to cut off a point of the property of a landowner and leave it beyond the thread of the stream does not effect a change of ownership. n1156 A sudden variation or abandonment of the old channel and the formation of a new one (avulsion) does not change the boundary from the thread of the old to the thread of the new channel; n1157 but where the change in the course of a stream constituting a boundary is gradual and made little by little (accretion), the boundary follows the thread of the stream. n1158

A "meander line" is a line run by the government for the purpose of designing the sinuosities of the shore or bank of a body of water and as a means of ascertaining the quantity of land in adjoining fractional areas subject to sale by the government and, as a general rule, it is not necessarily such line but rather the watercourse itself, which constitutes the boundary of land bordering thereon. n1159 It is recognized, however, that the intention of the parties governs. n1160 In cases of fraud or mistake in running the meander line it has been held that the meander line was a boundary line. n1161 If there is a strip of land between the meander line and bank of the stream, lake or bayou, the question of intention, fraud or error in the survey becomes of controlling importance in determining whether the meander line forms the boundary. n1162 A "meander corner" is a marker for courses but, unlike section and quarter corners, it is not a fixed point for measurements. n1163 It was held in a Minnesota case that where a government lot abuts on a lake, the shifting water line, as the lake recedes, and not the meander line, is the boundary of the lot. n1164

In ascertaining the measurement from one point to another on navigable water, the measurement is by its meanders and not in a direct line. n1165 In determining the division line between adjoining owners on navigable water the measurement is by the general trend of the water line. n1166 Measurement in a straight line is sometimes adopted in the case of streams not navigable. n1167 A government meander line is not the boundary line, but the lake water line is. n1168 A river boundary is not meander line, but the thread of the river is. n1169

While ordinarily the high watermark and not the meander line is the boundary, the parties may extend the meander line; occasionally the discrepancies between the meander line and high watermark may be so great as to indicate a mistake. n1170 A meander line may be the boundary if the parties so intended or where the public officials making the sale have made it so. In such a case accretion is not applicable. n1171

The boundary along the "bank" or "shore" of a stream is the boundary of land; n1172 the boundary line is a thread of the stream, and not the bank, unless the contrary intention appears. n1173 In a number of states in the absence of any call in

the deed to the contrary, it is presumed that a grant of land on a navigable freshwater river is carried to the thread of the stream, n1174 but the question of the title and boundary of a riparian owner is purely one of local law. n1175

In Maryland, if the owner of the bed of a nonnavigable stream conveys land bordering thereon, title to the middle of the stream passes to the grantee even though the deed does not expressly so provide. n1176 In New Jersey, a deed to land bordering a stream above tidewater carries title to the center of the stream, provided the grantor's title extends that far. n1177 In New York where the deed of a grantor who owns to the center of a nontidal stream describes the land conveyed as bounded by such stream or with reference to a map showing it to be thus bounded, the grantee will take to the thread of the stream unless the deed clearly indicates that the grantor's intent was to the contrary. n1178

The effect of the deed depends upon its terms and the presumptions arising therefrom, unless the terms used are uncertain or ambiguous, so that parol evidence is admissible to explain them. Thus, a deed which describes a line along a nontidal river as running "with" or "along" the stream, or as running "by" or "on" the stream or "up" or "down" the stream, carries the title to the center of the stream, unless a contrary intention appears. n1179

In certain jurisdictions a boundary by a navigable stream takes to high water, n1180 while in others it takes to low water. n1181 Where a grant is bounded on a river, the presumption that the grantor intends the boundary should extend to the stream is rebuttable. n1182

When the starting point is a monument on the bank of a river, and the line runs thence along the river or by it or on it, the boundary is still but the thread of the stream, unless by other terms used in the deed it appears that it was intended to limit the boundary to the bank of the stream. n1183 Where a deed contains a call "to the river," the river is the boundary, and the land conveyed extends to the center of the stream. n1184 The same rule applies when a boundary line runs to a terminus on the bank of a river, and thence by or along the river to another terminus. n1185 A boundary line running from a post on the north bank of a creek, "thence down the same and along the several meanders thereof to the place of beginning," which was also on the bank, includes the bed of the stream to the center. n1186 A survey running to a point on a river, and "thence down said river, and binding thereon," to another point, includes a sand bar on the same side of the river, between the two points. n1187

The "right bank" of a stream as used in a land description is the bank on the right hand as one faces downstream. n1188 If, however, the course of a river is changed by digging an artificial channel, a deed of land bounded by the river may mean the river as it ran it its old channel. Thus, where, before the making of a deed of land on the north side of a river, the owners of the land on the south side had dug a channel through a part of the grantor's land, and the river changed its course to the artificial channel, so that it ran in a straight line, the old channel being a bow, leaving a strip of land belonging to the grantor lying between the old channel and the new channel, the grantor's deed bounding upon the river was held to convey the land to the old river bed, and to include the strip in question. n1189 A change by artificial means in the boundaries of a stream, so as to form a millpond, does not have the effect of changing the boundary of lands from the thread of the original stream, and a deed of land described as "along the bank of said millpond," carried the title to the center of the original stream. n1190 Where a pond formed by changing the boundaries of a stream has existed until it has become a well-known landmark, and is considered a permanent body of water with well-defined banks, the rule regarding boundaries as applied to natural lakes will be applied to such artificial pond. n1191

While, as already noted, in many states a boundary starting at a monument on the bank of a stream, and thence running along the stream, includes the stream to the middle of the channel, yet there are decisions to the effect that in such case the stream is wholly or partly excluded. n1192 Thus, where the starting point was a hickory tree standing on the bank of the Ohio River, thence after several courses to a corner ironwood tree on the bank of the river, and thence by the river to the starting point, the boundary was held to be by the river. n1193 A grant of land bordering the Potomac River and described as beginning at a certain tree and extending "down" the river's various courses to another tree has been held not to purport to convey land in the river proper. n1194 In California, a deed which carries to the bank of a stream the side lines of the land conveyed, without describing the line connecting such side lines, will pass title to the center of the

stream. n1195 In Texas, a deed calling for the bank of a river, thence with the meanderings of the bank to a stake, has been held to convey to the water's edge, Athe bank" meaning the land adjacent to the water. n1196 In New York, it has been held that a boundary line which runs "from," "to," "alongside of," or "by" a stream will run, as a general rule, only to the center line thereof and that the stream will be excluded altogether by only slight evidence of an intention to that effect. n1197 In the same state, it has been held that, if a grant of land "near or adjoining unto Harlem River" meant "along" such river, such grant passed title only to high watermark. n1198 In Oregon, however, it has been held that deeds conveying land "to the river" assumed to convey to low watermark. n1199

The fact that the quantity of land called for in a deed is satisfied without including the bed of a stream which constitutes the boundary does not limit the title to the bank of the stream. n1200 In the purchase of land bounded upon a river at a stipulated price per acre, it would seem that the purchaser would be required to pay for land to the line of ordinary low water only, though the title might extend to the thread of the stream. n1201

On the other hand, if the quantity of land and measurements require the inclusion of the shore, or land covered by the water between high and low watermark, this affords a reason for extending a boundary to meet this requirement. Thus, in a deed of land on Long Island Sound, the first course, starting from a point accurately fixed, ran a certain distance to a point on the Sound, thence along the shore to the intersection of the center line of a certain street, and thence by said street a certain distance to the point of beginning. It appeared by a survey that the first and last courses, if run in obedience to the distance given, would extend to low watermark, and that, to give the quantity the deed purported to convey, the land to low watermark must be included. It was accordingly held that the boundary line was along the low watermark. n1202 Where a tract of land appears to have as one of its boundaries a body of water, such body of water will constitute the boundary however distant or variant from the position indicated for it by the meander line, and will control as a call of the survey over the quantity of land designated. n1203

Even if the monument is some distance from the river, the boundary thence by the river will be by the thread of the stream, if there is nothing further in the deed to show an intention to limit the boundary to the bank. n1204 A boundary marker on the bank of a nonnavigable stream has been held not to indicate the end of the boundary line, but only the point where the line strikes the water. n1205 A corner tree or other monument is not always to be had near a river, and, therefore, one may be taken at some distance from it, but if the course is by a river, this is regarded as the boundary. n1206 The stream is a natural boundary, and controls a call for a monument on the bank; and it is not to be presumed that the grantor retains a strip of land between the line indicated by the monuments and the line of low water. n1207 This presumption does not apply when the boundary is a millrace owned and retained by the grantor, for in such case there is an obvious reason why the grantor should wish to retain such a narrow strip between the top of the bank of the millrace and the water-edge of the millrace at low watermark. n1208 There are many reasons why the usual presumption is reversed in the case of an artificial waterway, and a grant that clearly limits the boundary to a line upon or beyond its bank passes no fee to the soil in the artificial channel. n1209 If the meander line is the boundary, accretion does not apply. n1210

Where land is described as lying on a river named, the meander line of the river as surveyed does not constitute the boundary of the land, but the grantee is a riparian owner, and has title to the land lying between such meander line and the river in case the boundary line is governed by the commonlaw rule. n1211

Under one line of authority, where the boundary was determined definitely by the shoreline as it existed at the time of the land grant or the old boundary is otherwise definitely known, the question of definitely known boundaries is disregarded and the shoreline proprietor may consider the shore the boundary which through general gradual changes the proprietor may follow across definite boundaries of others. n1212 The other line of authority does not apply the rule of succession of property by accretion where there was a definite boundary but only where the boundaries were determined by the shoreline. n1213

In apportionment for pertinent riparian rights areas in a river or river bed as between several riparian tracts fronting on

one bank, the course of the divisional lines extending from the shore out to or toward the thread of the river is not controlled by the course or direction of the respective upland side lines dividing the respective riparian tracts. The direction in which upland division lines run between the riparian tracts to the bank or shore of the river does not control the direction of the division line to be projected into the river. n1214

A call in a description for a boundary line ending at a creek must be extended to such a creek, although the stated length thereof may not reach the creek. n1215

A boundary marker on the bank of a nonnavigable stream did not indicate the end of the boundary line, but only the point where the line strikes the water. n1216

COMPUTER-ASSISTED RESEARCH

LEXIS: Boundar! w/10 nonnavigab!

§ 90.03(b)(3) Title to Bed of Navigable or Public Streams.

As the converse of nonnavigable or nonpublic bodies of water, title to the bed or navigable or public water is in the state n1217 or the federal government. In the case of navigable water, however, there is disagreement as to whether high watermark, low watermark or the meander line marks the boundary. n1218

The "shore" or navigable water is the land which lies between high and low watermarks, n1219 and as a general rule a grant extending thereto extends only to high watermark. n1220 The high watermark is the line where the water stands sufficiently long to destroy vegetation below it; it is not to be determined by mathematical calculation but is a physical fact to be determined by inspection of the river bank. n1221 The space between high and low watermark is variously denominated "the shore," "the beach," "the flats," "the strand," "the sand," and is also designated by several other less familiar terms. The proprietor of land on the shore or bank is presumed to own to high watermark only. If the proprietor claims ownership below this line, the proprietor must establish the claim. n1222 "Ordinary" high watermark, as used in this connection, is not the limit of the monthly spring tides, but the limit reached by the neap tides (the tide that occurs when the difference between high tide and low tide is the smallest). n1223 It has also been defined as the line "limited by the outflow of the medium high tide between the spring and neap tides." n1224 It has generally been used in the sense of average. n1225 The general rule is, that a boundary on the sea, a bay, navigable or tidewater river is a boundary at the ordinary high watermark. n1226 This rule is not applicable to a case where, by the cutting of a canal between a fresh-water pond and some body of salt water, the water of the former becomes salt, and the tide ebbs and flows therein; n1227 but it is held that a deed conveying a parcel of land and rocks situated by a harbor bounded by the ledgy shore passed the title to low watermark. n1228 It is a general rule that a boundary by the beach, the shore, the strand, or the space between high and low watermark, whatever name may be given to it, excludes such space unless there is something else in the deed to indicate an intention to pass the title to low watermark. n1229 Where, however, there is a tract of land conveyed by metes and bounds, and within the tract thus exactly defined there is a portion of tidewater, then the grant carries the land under water, subject to the right of navigation over it, and the continuance of the water's conditions there prevailing. n1230

In Massachusetts, it is held that the ownership of land between high and low watermarks is ownership of a substantial nature rendering the land subject to taxation unless otherwise exempted, notwithstanding the use of the land is restricted by state and federal regulations to protect the public right therein. n1231 In Pennsylvania it is held that title to land bordering on a navigable stream extends to low watermark subject to the rights of the public to navigation and fishery between high and low water. n1232 The call of a deed runs to the thread of a navigable fresh-water stream in Wisconsin. n1233

COMPUTER-ASSISTED RESEARCH

LEXIS: Boundar! w/10 (navigab! w/10 bed)

§ 90.03(b)(4) Title to Tide Lands.

The question of whether the state or the federal government had title to the tidelands was finally resolved by the Supreme Court of the United States in favor of the latter. However, this title was partially relinquished by act of Congress following the Supreme Court decision. n1234 Save for that act, the United States holds title to all coastal waters and the resources of the soil thereunder, despite state acts attempting to enlarge boundaries. n1235

Before that decision of the Supreme Court, in a number of cases decisions had been rendered as to the rights to the tidelands. It was held under these cases the new states admitted into the Union have the same rights as the original states in the tidewaters and in the lands below the high watermark, within their respective jurisdictions. Thus, upon the admission of Alabama into the Union, the title in the lands below high watermark of navigable waters passed to the state, and could not afterwards be granted away by the Congress of the United States. n1236 The same doctrine is applicable to California, which was acquired from Mexico by the 1848 treaty of Guadalupe Hidalgo. n1237 Other states having the ownership and control of all navigable waters and of the beds thereof are Florida, n1238 Maine, n1239 Massachusetts, n1240 Oregon n1241, and Washington n1242. The question of the applicability of these cases to the present law remains to be determined.

In Washington a sale of tidelands by the state is subject to the paramount right of the public in navigable waters thereof and confers no right to obstruct navigation therein. n1243

This summary "shows that there is no universal and uniform law upon the subject, but that each state has dealt with the lands under the tidewaters within its borders according to its own views of justice and policy. Great caution, therefore, is necessary in applying precedents in one state to cases arising in another."

As a general rule, a state may, in conveying tidelands, either grant or completely withhold rights in the adjoining water areas as it chooses. n1244 A grant from the sovereign of land bounded by the sea, or by any navigable tidewater, does not pass any title below high watermark, unless either the language of the grant, or long usage under it, clearly indicates that such was the intention. n1245 Thus it was held that a grant from the Mexican government, confirmed by a decree of a court of the United States under authority of Congress, of land bounded "by the bay" of San Francisco, did not include land below the ordinary high watermark of the bay. n1246 It was also held that a person afterwards acquiring the title of the city in a lot and wharf below high watermark had no right to complain of work constructed by a commissioner of the state, under authority of the legislature, for the protection of the harbor and the convenience of shipping, in front of the wharf, and preventing the approach of vessels to it. n1247 "Whether a conveyance made by the state of land abutting upon navigable water does confer upon the grantee any right or interest in those waters or in the land under the same is a matter wholly of local law"; n1248 however, "the dominion over navigable waters and property in the soil under them, are so identified with the exercise of the sovereign powers of government that a presumption against their separation from sovereignty must be indulged, in construing all grants by the sovereign, of lands to be held in private ownership... Such grants are peculiarly subject to the rule, applicable generally, that all grants by or to a sovereign government as distinguished from private grants, must be construed so as to diminish the public rights of the sovereign only so far as is made necessary by an unavoidable construction." n1249 By direct statutory provision in some states, lands covered by navigable waters, though vacant and unappropriated, are not the subject of grant. n1250

COMPUTER-ASSISTED RESEARCH

LEXIS: Boundar! w/10 (tide w/5 land!)

§ 90.03(b)(5) Ownership of the Seashore.

Problems involving ownership of land under the ocean bed are fourfold: ownership as between nations, ownership as between the federal government and the states, ownership as between the states of the federal government and individuals and ownership as between individual persons. The situation is complicated by the questions of what constitutes the foreshore, the tidelands, the bed of bays and inlets and the bed of the ocean itself.

The rule formulated by Grotius gave each nation title to its coastal waters three miles from shore, the effective limit of cannon fire in the seventeenth century. This arbitrary measurement, long since outmoded in practice, was seriously questioned by the United States during Prohibition, when an effort was made to extend it to twelve miles and numerous and large extensions have been implemented since by most nations.

The basic principle of ownership of land subject to the ebb and flow of the tide is that title is in the sovereign. Under the common law the seaward boundary of the land was the mean high tide of the sea waters. n1251

Land by the sea, between high and low watermark, and by rivers where the tide ebbs and flows, is vested in the state. The rule of law in regard to public and private ownership of the shore is exhaustively stated in a decision of the Supreme Court of the United States rendered by Mr. Justice Gray: n1252

> By the common law, both the title and the dominion of the sea, and of rivers and arms of the sea, where the tide ebbs and flows, and of all the lands below high watermark, within the jurisdiction of the crown of England, are in the king. Such waters, and lands which they cover, either at all times, or at least when the tide is in, are incapable of ordinary and private occupation, cultivation, and improvement; and their natural and primary uses are public in their nature for highways of navigation and commerce, domestic and foreign, and for the purpose of fishing by all the king's subjects. Therefore the title, jus privatum, in such lands, as of waste and unoccupied lands, belongs to the king, as the sovereign, and the dominion thereof, jus publicum, is vested in him, as the representative of the nation and for the public benefit... In England, from the time of Lord Hale, it has been treated as settled, that the title in the soil of the sea, or of arms of the sea, below ordinary high watermark, is in the king except so far as an individual or a corporation has acquired rights in it by express grant, or by prescription or usage, and that this title, jus privatum, whether in the king or in a subject, is held subject to the public right, jus publicum, of navigation and fishing. The same law has been declared by the House of Lords to prevail in Scotland...
>
> The common law of England upon this subject, at the time of the emigration of our ancestors, is the law of this country, except so far as it has been modified by the charters, constitutions, statutes, or usages of the several colonies and States, or by the Constitution and laws of the United States. The English possessions in America were claimed by right of discovery. Having been discovered by subjects of the king of England, and taken possession of in his name, by his authority or with his assent, they were held by the king as the representative of, and in trust for, the nation, and all vacant lands, and exclusive power to grant them, were vested in him. The various charters granted by different monarchs of the Stuart dynasty for large tracts of territory on the Atlantic coast conveyed to the grantees both the territory described and the powers of government, including the property and the dominion of lands under tidewaters; and upon the American Revolution all the rights of the crown and of Parliament vested in the several States, subject to the rights surrendered to the national government by the Constitution of the United States.
>
> In Connecticut, also, the title in the land below high watermark is in the state. But by ancient usage, without any early legislation, the proprietor of the upland has the sole right, in the nature of a franchise, to wharf out and occupy the flats, even below low watermark, provided he does not interfere with navigation; and this right may be conveyed separately from the upland, and the fee in flats so reclaimed vests in him.

The title to the soil under navigable waters, except so far as private rights in such soil have been acquired by express grant or by prescription, is in the sovereign. "The rule is applied both to the territory of the United States ... and to land within the confines of the states, whether they are original states ... or states admitted into the Union since the adoption of the Constitution." n1253 The law is settled "that lands underlying navigable waters within a state belong to the state in its sovereign capacity and may be used and disposed of as it may elect, subject to the paramount power of Congress to control such waters for the purposes of navigation in commerce among the states and with foreign nations, and subject to the qualification that where the United States, after acquiring the territory and before the creation of the state, has granted rights in such lands by way of performing international obligations, or effecting the use or improvement of the lands for the purposes of commerce among the states and with foreign nations, or carrying out other public purposes appropriate to the objects for which the territory was held, such rights are not cut off by the subsequent creation of the state, but remain unimpaired, and the rights which otherwise would pass to the state in virtue of its admission into the Union are restricted or qualified accordingly... But, as was pointed out in *Shively v. Bowlby*, n1254 "... the United States early adopted and constantly has adhered to the policy of regarding lands under navigable waters in acquired territory, while under its sole dominion, as held for the ultimate benefit of future states and so has refrained from making any disposal thereof, save in exceptional instances when impelled to particular disposals by some international duty or public exigency. It follows from this that disposals by the United States during the territorial period are not lightly to be inferred, and should not be regarded as intended unless the intention was definitely declared or otherwise made very plain." n1255 In Maine, the owners of land adjoining tidewater are prima facie owners of the shore. n1256 At common law the title to that part of the beach below high watermark is in the state, n1257 and consequently where land is bounded by the ocean, sea, or bay, or along the shore line of tidal water, the line of ordinary high water marks the limit of a grant; n1258 but if the body of water is distinctly called for in the deed, the water proper and not the shore is the boundary of the land conveyed. n1259

The statute of Washington, providing that any accretions that may be added to any tract of tideland heretofore sold or that may hereafter be sold by the state, is held to apply only to instances where the accretion occurs after the state has divested itself of title. n1260

Subject to the constitutional power of Congress to regulate commerce, it is state rather than federal law that determines the rights of adjoining owners in navigable waters and the lands lying thereunder. n1261 "Although presumptively title to the soil under navigable waters within the state is in the state ... the nature and extent of the rights of the state and of riparian owners in navigable waters within the state and to the soil beneath are matters of state law to be determined by the statutes and judicial decisions of the state." n1262 Where there is no Acontrolling local law otherwise limiting the rights of a riparian owner upon a navigable river, ... he has, in addition to the rights common to the public, a property right incident to his ownership of the bank, of access from the front of his land to the navigable part of the stream, and when not forbidden by public law may construct landings, wharves or piers for this purpose ... This right of a riparian owner, it is true, is subordinate to the public right of navigation, and subject to the general rules and regulations imposed for the protection of such public right. And it is of no avail against the exercise of the absolute power of Congress over the improvement of navigable rivers, but must suffer the consequences of the improvement of navigation, if Congress determines that its continuance is detrimental to the public interest in the navigation of the river." n1263 Cases declaring the law of various of the states concerning rights in navigable waters as between the state and adjoining owners are cited below. n1264

The law of the several states bordering on the sea, in regard to the private ownership of the shore, is stated in detail by Mr. Justice Gray in *Shirley v. Bowlby*. n1265 Passing by the New England states for the present, because an exceptional rule prevails there, the following is a summary of the law of the other original states: In New York it was long considered as settled law that the state succeeded to all the rights of the crown and Parliament of England in lands under tidewaters, and that the owner of land bounded by a navigable river within the ebb and flow of the tide had no private title or right in the shore below high watermark, and was entitled to no compensation for the construction, under a grant from the legislature of the state, of a railroad along the shore between high and low watermark, cutting off all access

from his land to the river, except across the railroad. n1266 The owner of the upland has no right to wharf out without legislative authority; and titles granted in lands under tidewater are subject to the right of the state to establish harbor lines. n1267 In New York a patent from the crown of lands bounded by navigable tidewater has been held to convey no title to land below high water, but merely jurisdiction over the same which is to be upheld and administered for the crown, n1268 and a similar grant to the city of New York was held to convey the land between high and low water to the city in trust for the public; so that a later conveyance by the city to a private person describing the land as bounded by the Hudson River was limited to the line of high water. n1269 The law of that state, as formerly understood, has been so far modified as to hold that the owner of land bounded by tidewater may maintain an action against a railroad corporation constructing its road, by authority of the legislature, so as to cut off his access to the water. n1270

In New Jersey it is the settled rule that the lands under water, including the shore on the tidewaters of New Jersey, belong absolutely to the state, which has the power to grant them to anyone, free from any right of the riparian owner in them. n1271

In Pennsylvania likewise, upon the Revolution, the state succeeded to the rights, both of the crown and of the proprietors, in the navigable waters and the soil under them; n1272 but, by the established law of the state, the owner of lands bounded by navigable water has the title in the soil between high and low watermark, subject to the public right of navigation and to the authority of the legislature to make public improvements upon it, and to regulate the owner's use of it. n1273

In Delaware, all navigable rivers within the state belong to the state, not merely in right of eminent domain, but in actual propriety. n1274

In Maryland, the owner of land bounded by tidewater is authorized, according to various statutes beginning in 1745, to build wharves or other improvements upon the flats in front of the land, and to acquire a right in the land so improved. n1275

In Virginia, by virtue of statutes beginning in 1679, the owner of land bounded by tidewaters has the title to ordinary low watermark, and the right to build wharves, provided they do not obstruct navigation. n1276

In North Carolina, when not otherwise provided by statute, the private ownership of land bounded by navigable waters stops at high watermark, and the land between high and low watermark belongs to the state, and may be granted by it. n1277 The statutes of that state, at different periods, have either limited grants of land bounded on navigable waters to high watermark, or have permitted owners of the shore to make entries of the land in front, as far as deep water, for the purpose of a wharf; and any owner on the shore appears to have the right to wharf out, subject to such regulations as the legislature may prescribe for the protection of the public rights of navigation and fishery. n1278

In South Carolina the rules of common law, by which the title in the land under tidewaters is in the state, and a grant of land bounded by such waters passes no title below high watermark, appear to be still in force. n1279

In Georgia, also, the rules of the common law would seem to be in force as to tidewaters, except as affected by statutes of the state providing that the right of the owner of lands adjacent to navigable streams extends to low watermark in the bed of the stream. n1280

In the New England states the rule of private ownership of the shore was established by the Massachusetts Colonial Ordinance of 1641-1647, and by usage founded thereon. This ordinance, which remains in force to this day, related to land adjoining creeks, coves, and other places about and upon salt water, where the sea ebbs and flows. It establishes that the proprietor of such land Ashall have propriety to the low watermark, where the sea doth not ebb above a hundred rods, and not more wheresoever it ebbs further." By low watermark is meant the lowest line made by the receding tide with the land; not the lowest line which a stream of fresh water emptying into the sea, or a cove or a tidal river, makes

with the land. It has nothing to do with a fresh-water stream, or with a tidal channel through which only fresh water flows at low tide. Nothing in the ordinance indicates an intention to preserve the freshwater stream or channel as a boundary below ordinary high watermark. And the cases cited show it has not been done in applying it. The channel would not be the boundary even above high watermark. The rules of proprietorship on a fresh-water stream may furnish in a given case the best analogy for the division of interjacent flats on a stream below a point where the tide ebbs and flows, but beyond that they have no force. n1281 The rule or principle of the Massachusetts ordinance has been adopted and practiced in Plymouth, Maine, Nantucket, and Martha's Vineyard since their union with the Massachusetts colony under the Massachusetts province charter of 1692. n1282 And a conveyance of upland bounded by such waters passes the grantor's title to the same extent. n1283

This ordinance or custom does not apply to streams above the point where they are affected by the ebb and flow of the tide; but it applies wherever the tide ebbs and flows, though the water be fresh and is merely thrown back by the influx of the sea. n1284 In the New England states, a boundary by the sea or seashore, or beach or tidewater, prima facie includes the land between high and low watermark to the extent of the grantor's title. n1285 A deed with such a boundary passes the flats adjoining the upland conveyed, though the description, regarding both the quantity of the land conveyed and the length of the lines, would be satisfied by applying it to the upland alone. n1286 A boundary by a tidal creek, the bed of which is bare at low water, prima facie conveys the title to the center of the channel of the creek. n1287 The grant of a wharf will carry with it the grantor's flats in front of the wharf to low watermark, unless there are words in the deed that restrict its operation in respect to the land covered by the water. n1288

The title to an island situated within one hundred rods from the opposite upland, there being no channel between the island and the mainland at low water, does not extend, as between the island and the mainland, unless by special grant, to any flats circling the island, except such as lie on the sea side of the island, between the island and the receded sea. n1289

"In New Hampshire a right in the shore has been recognized to belong to the owner of the adjoining upland, either by reason of its having once been under the jurisdiction of Massachusetts, or by early and continued usage." n1290

"In Rhode Island the owners of land on tidewater have no title below high watermark, but by long usage, apparently sanctioned by a colonial statute of 1707, they have been accorded the right to build wharves or other structures upon the flats in front of their lands, provided they do not impede navigation, and have not been prohibited by the legislature; and they may recover damages against one who, without authority from the legislature, fills up such flats so as to impair that right." n1291 Under this ordinance, the ownership of upland adjoining tidewater prima facie extends to low watermark, not exceeding one hundred rods and subject to public rights of passage by boat. n1292

"In Connecticut the public whose representative is the state, is the owner of the soil between high and low watermarks upon a navigable river in which the tide ebbs and flows. The owner of the adjoining upland has the exclusive privilege of wharfing and erecting stores and piers over and upon such soil and of using it for any purpose which does not interfere with navigation, and he may convey this privilege separately from the adjoining uplands. Over such soil he has the exclusive right of access to the water, the right to accretion and generally to reclamation... The owner of the fee to the high waterline has such riparian rights below the high waterline, unless such rights have been legally separated from the upland either by some owner of it by alienation, by deed or by exception of reservation in a conveyance of the upland or otherwise." n1293

The common-law rule that the title to the shore is in the state does not exclude the possibility of private title derived from the sovereign or obtained by prescription. Thus in New York, where the common-law rule generally prevails, there may be private title to land under bays and harbors, as well as to beaches and the shore, to low watermark, derived from early colonial grants, or grants from the English sovereign. n1294 The state of New York is authorized, subject to the limitations of the Federal Constitution, to grant lands under water and rights therein. n1295 The city of New York holds title by grant from the king of England to a strip of land extending beyond low watermark a distance of four hundred

feet and entirely around the island. n1296 The patent of 1685 to the town of Hempstead, which describes one boundary as running around the points of the necks along the sound, conveyed the land under the water of Manhassett Bay. n1297 "The shore," said Lord Hale, "doth prima facie and of common right belong to the king, both in the shore of the sea and the shore of the arms of the sea... Yet they may belong to the subject in point of propriety, not only by charter or grant, whereof there can be but little doubt, but also by prescription or usage."

At the time when the kings of England were required at their coronation to grant their individual rights in waste land to their subjects at large, they could have granted, not only the shore of the sea to a subject, but also the bed of the sea itself; but since the Magna Charta, land covered by the sea will not pass by general words in a grant of upland.

Some later New York cases take the view that the title of the sovereign to the seacoast and the shores of tidal rivers is different from the fee simple which a person holds to an estate in lands. They assert that it is not a proprietary, but a sovereign right, and it has been frequently said that a trust is engrafted upon this title for the benefit of the public, of which the state is powerless to divest itself. n1298 In Florida, it is held that the title to marshlands, subject to tidal overflow, and to the shoal waters of bays is in the state and under its control subject to the control of the federal government for purposes of navigation. n1299

But where title in the foreshore is in the state in trust for its citizens and not in a proprietary sense it is questionable whether the state can relinquish this title.

Accretions along the shores of the Gulf of Mexico which have been added by artificial means do not belong to the upland owners, but remain the property of the state. n1300

There is a presumption that the grantor conveys the title to land covered by water so far as the grantor's own title extends, whether the conveyance is bounded by the sea, a tidal river, or a fresh-water stream, unless the grantor expressly reserves the land under the water, or the terms of the deed indicate an intention to reserve it. n1301 The presumption is similar to that already mentioned which pertains to a conveyance bounded by a highway, street, or private way. It is also a presumption founded upon a similar reason; and that reason is, that the land adjacent to the bank of a stream, or to the shore of the sea or other tidal waters, is necessary or valuable to the adjoining proprietor, but ordinarily is of no use to one who has conveyed land bounded upon the water.

This presumption may always be overcome by language in the deed showing an intention not to convey any title to the land covered by water. n1302 The grantee's title will be limited to the shore land in case the grantee purchases by a plat which shows that the land in front of the granted land is platted into blocks which have been sold or reserved for sale; and the grantee acquires no riparian rights in the unplatted land between the water blocks and navigable water; for the plat contemplates on its face that the exterior line of the outermost blocks is to be treated as the shore line, and that the rights usually appurtenant to riparian land attach to these blocks. n1303

In Connecticut, there is a rebuttable presumption that riparian rights attached to upland bordering on a navigable tidal river pass with a conveyance of such upland. n1304

In Virginia, by virtue of the operation of a statute extending the rights of individuals to low watermark, riparian rights, including the right to the soil between ordinary high and low watermark, as incident or appurtenant to the adjacent land, pass to the grantee, although the conveyance is in terms made to "high watermark," unless the deed manifests a clear intention to control the operation of the statute. n1305

A gradual encroachment by the sea or navigable river carries the title underneath the eroded land to the state. n1306 If the water subsequently rebuilds the land there is a conflict as to whether the original owner takes by accretion n1307 or by the original title. n1308 The United States, however, reserves title to the continental shelf.

COMPUTER-ASSISTED RESEARCH

LEXIS: Boundar! w/10 seashore

§ 90.03(b)(6) Rule as to Lakes Forming State Boundaries.

Where stationary bodies of water form the boundary line between states the problem arises as to whether the bed is owned by the United States or the adjacent states and where the division line lies. Naturally there is a vast difference between a large lake and a small lake as to the rights of the riparian owners. The various jurisdictions do not agree as to the extent of the rights of such owners. Should a lake lie between two states or nations the boundary line between them would be the center line of the lake, and each would have title to such center line. n1309 The rule relative to the boundary between states and nations may be changed by treaty, by prior discovery and possession, and by cession of the sovereign power, and the "three mile" limit is not usually applicable to such lakes. n1310

The rule of ownership ad filum aquae (to the thread or center of the stream) is not applicable to the great fresh-water lakes which form the boundary between the United States and Canada, or to lakes which form the boundary between states, such as Lake Champlain, for example. These are regarded as inland seas, and the title of their beds is in the adjoining states, and not in the individual owners of the adjoining land. The matter of title to the beds of such lakes is wholly unprovided for by the common law of England. n1311 In this country the rule has been adopted that such lakes are not private property but public. There may be a reason for this exception to the rule, not depending upon the size of the lake as regards those lakes which form the natural boundaries between this country and a foreign nation, or those that form the boundaries between states, but the reason for the exception may also be founded upon the size and navigable character of such lakes. n1312

The title and the dominion of the beds of the Great Lakes belong to the state adjacent to which the same is located. n1313 The same rule is applied to beds of Great Lakes as is as applied at common law to the beds of tidewaters. n1314 The state is the owner of the fee of all lands under the navigable waters of the Great Lakes, but in trust for the use of the public. n1315 This rule applies to navigable bodies of water other than the Great Lakes. n1316 The sovereignty of the state of Wisconsin extends to the center of Lake Michigan, and its laws, so far as they do not conflict with the laws of the United States, are operative within such limits. n1317 "The title to such lands being in the states, they are subject to state regulation and control, under the condition, however, of not interfering with the regulations which may be made by Congress with regard to public navigation and commerce, ... state control and ownership therein being supreme, subject only to the paramount authority of Congress in making regulations of commerce, and subjecting the lands to the necessities and uses of commerce." n1318 "We are quite ready to assume, as a general proposition, that the title to all the lake beds in the state, especially those of navigable lakes, is in the state, and that the general government never had any control or ownership thereof." n1319 To what extent a state may exercise its prerogative over the land covered by the waters of these lakes depends upon the law of each state, just as it does in the case of the great navigable rivers. The states may, if they so determine, resign to the riparian proprietor rights which properly belong to them in their sovereign capacity. n1320 Thus it is held that it is within the power of a state legislature to authorize the extension of a boulevard and driveway over and upon the bed of Lake Michigan, and to sell and convey submerged lands which might be reclaimed by such extension. n1321

In Michigan, it has been held that "a grant to the shore of Lake Erie means to the water's edge at its lowest mark." n1322

Title to the bed of other large lakes like Lake Champlain is in the states in trust for the people. n1323 There are, however, a few early Connecticut grants in the "fire lands" of the Western Reserve which go under the bed of Lake Erie. n1324 Michigan alone of all of the states takes the position that the meander lines along the Great Lakes fix the boundary line of the riparian owners. Therefore under the Michigan rule, although riparian owners may exercise the ordinary riparian rights along the Great Lakes, they acquire no title by accretion or reliction. n1325 Michigan does not hold to this meander line rule, however, in the case of streams. n1326 It has been suggested that the Michigan rule

comes from an early misinterpretation of the Swamp Lands Act.

COMPUTER-ASSISTED RESEARCH

LEXIS: Boundar! w/10 (lake! w/20 state)

§ 90.03(b)(7) Nonnavigable Lakes and Ponds.

If the body of water does not have an appreciable flowage current and is nonnavigable -- that is, if it is a small lake or pond and is natural in its origin -- then the adjacent or littoral owners hold title to the center of the body of water under ordinary conditions. The federal government, when it created states out of areas where title to the land was basically in the United States, surrendered to the state so created title to the beds of all navigable bodies of water. Title to the beds of nonnavigable bodies of water passed to the riparian owners to whom the federal government sold the adjoining land.

The problem is therefore presented as to the construction of a description in a deed that carries to the shore of such a quiet nonnavigable body of water. Riparian rights are incident to the ownership of land bordering on water and pass with the transfer of such property, although not designated as such in the deed. In general terms they connote the rights and profits to the owner of the upland arising from its connection with the water, such as the easement of passage and use, subject, however, to governmental regulation for the improvement of navigation. n1327 A boundary by the shore of a lake conveys all the riparian rights of the grantor in the lake, in front of the land conveyed, and as against the grantor, any land made by filling in the lake at the shore. n1328 It is never presumed that the grantor reserves any proprietary rights in front of the land conveyed. The intention to do so must clearly appear from the conveyance; and the mere fact that the boundary of the lot conveyed is indicated by a line on the plat will not limit the grant to the line on the plat, or operate to reserve to the grantor proprietary rights in front of the lot. n1329

A street, one side of which is by a navigable lake or river, extends to low watermark, and the dedication of it to public use is held to have been intended to enable the public to get to the water for the better enjoyment of the public right of navigation. n1330 A purchaser of a lot fronting on such street acquires the fee, subject to the public easement to the entire street and shore to low watermark, including all riparian rights. n1331 Where the grantor conveys the entire estate up to the line of a public road or street bordering on a navigable lake, the grantor conveys to the grantee the fee to the entire road or street and the grantor retains no riparian rights. n1332 Ordinarily, a conveyance of land abutting upon the shore carries with it to the grantee therein all rights incident to the shore land; but, when the deed shows an intention on the part of the grantor to reserve the riparian rights, they will not pass to the grantee. n1333

The common-law rule is that a deed of land bordering on a small lake not navigable is presumed to convey title to the center of the lake, unless it appears that there was an intention otherwise, for the riparian owner has title to the land under such lake or pond extending to the center. n1334 A boundary on a natural pond or lake carries title to the center thereof, n1335 unless the deed makes it plain that the grantor's intent was to the contrary. n1336 The fee owner of all of the land which borders on a lake owns also the land under the lake. n1337 In a few jurisdictions the contrary is held, and the fee is limited to the shore or low watermark. n1338 The owner of a fractional subdivision of a section bordering on a small inland lake owns the land under the lake embraced within the extended lines of the subdivision of which the owner has title. n1339 The rule is otherwise in Massachusetts, because of the Colonial Law or ordinance adopted in 1641, and amended in 1647, declaring great ponds, which were defined as those containing more than ten acres, to be public property, and since that time such ponds have not been subject to private ownership. n1340 In New York, and other states having no similar statute, the land under small lakes and ponds is the subject of private ownership, and a boundary thereon, in a conveyance by the owner of the adjoining lands, passes the owner's title to the center line of such lake or pond. n1341

The presumption of a boundary by the center of a pond or lake may be excluded by any description which indicates an intention to limit the grant by the shore or edge of the lake. Thus, if the boundary is described to be "at low-water

mark," n1342 or "meandering along the water's edge," n1343 by the "margin" of the lake, n1344 "on the edge of the pond," n1345 or "to the edge of my millpond," n1346 a boundary by the center of the lake is excluded.

The land covered by a lake or millpond which is the subject of private ownership may be conveyed separate and apart from the land surrounding the lake or pond, such as when such owner conveys a mill and mill privilege "embracing as far as high watermark." n1347

Land conveyed by a deed which bounds it by the high watermark of a tideless lake, into which only a small stream runs, does not extend to the lake's center. n1348

One line of authority treats a description running to the edge of a pond and thence along the pond as indicating an intention to exclude the pond. n1349 The general rule of private ownership of lakes applies to natural lakes of considerable size, n1350 such as a lake about seven miles long and half a mile wide, n1351 a lake three miles in length and one mile in width, n1352 or a lake four or five miles long and eight hundred feet wide. n1353

A conveyance of land on a natural navigable lake passes title only to the water's edge. n1354 In case government surveys have been extended over small lakes, just as though the whole was dry land, and titles have been conveyed with reference to such surveys, the boundaries of lands under such surveys may be confined to the terms of the patents and deeds. n1355 Nonnavigable lakes and ponds are subject to the doctrine of "reliction" so that as the lake recedes the shifting water line is the boundary. n1356

COMPUTER-ASSISTED RESEARCH

LEXIS: Boundar! w/10 (nonnavigab! w/5 lake! or pond!)

§ 90.03(b)(8) Boundaries by Large Lakes and Ponds.

Where a stationary body of water is navigable or has by statute or custom a similar characteristic, title of the littoral owners -- like that of riparian owners of a navigable stream -- does not carry to the bed. The boundary line upon a large natural lake or great pond is the low waterline at which the water usually stands when free from disturbing causes. n1357 The line will extend to the height of the water at ordinary stages of low water, and not to the lowest stage of the water in seasons of great drought. n1358 If the water be raised to an artificial height in the winter, but in the summer is allowed to remain at its natural level, a boundary by the lake or pond conveys the land to the low watermark of the lake or pond in its natural state, and it is immaterial that the conveyance was executed in the winter, when the water was high. n1359 In case a natural pond has been permanently enlarged and raised by means of a dam at its outlet, a boundary upon the pond carries the title to the low watermark of the pond in its enlarged state. n1360 Of course, the general rule that the boundary by a natural lake is a boundary by low watermark gives way to any clearly expressed intent to the contrary. n1361

The grant of an island in a swamp or a natural lake carries the title to low watermark; but if the swamp or lake is afterwards drained by artificial means, the grantee's title does not extend to and include the land laid bare by such drainage, but remains at the line of low water, as it was when the grant was made, and evidence to determine where such line was is admissible. n1362 If there is a stream running through the swamp, a boundary by the swamp is by the middle of the stream. n1363 A boundary by a slough or arm of a navigable river is by the middle of the slough; n1364 but where the calls of a deed are to points on the margin or banks of a swamp and thence with the swamp, the title extends only to the banks of the swamp. n1365

Where land bordering upon a large lake, such as the Winnipesaukee or any navigable lake, is conveyed, the right of the purchaser to erect a wharf or building in the lake below the low watermark, as against everybody but the state, passes as an appurtenance to the land. n1366

COMPUTER-ASSISTED RESEARCH

LEXIS: Boundar! w/10 (lake! or pond!)

§ 90.03(b)(9) Public and Nonpublic Waters.

Some cases extend and assert public rights as against private ownership in lakes and rivers, without much regard to any test of definition of navigability. This is well illustrated in an important decision of the Supreme Court of Minnesota, in which Mr. Justice Mitchell said:

> In this country, while still retaining the common-law classification of navigable and nonnavigable, we have, in view of our changed conditions, rejected its test of navigability, and adopted in its place that of navigability in fact; and, while still adhering to navigability as the criterion whether waters are public or private, yet we have extended the meaning of that term so as to declare all waters public highways which afford a channel for any useful commerce, including small streams, merely floatable for logs at certain seasons of the year. Most of the definitions of 'navigability' in the decided cases while perhaps conceding that the size of the boats or vessels is not important, and, indeed, that it is not necessary that navigation should be by boats at all, yet seem to convey the idea that the water must be capable of some commerce of pecuniary value, as distinguished from boating for mere pleasure. But if, under present conditions of society, bodies of water are used for public uses other than mere commercial navigation in its ordinary sense, we fail to see why they ought not to be held to be public waters, or navigable waters, if the old nomenclature is preferred. Certainly, we do not see why boating or sailing for pleasure should not be considered navigation, as well as boating for mere pecuniary profit... If the term 'navigable' is not capable of a sufficiently extended meaning to preserve and protect the rights of the people to all beneficial public uses of these inland lakes to which they are capable of being put, we are not prepared to say that it would not be justifiable, within the principles of the common law, to discard the old nomenclature and adopt the classification of public waters and private waters. But, however that may be, we are satisfied that, so long as these lakes are capable of use for boating, even for pleasure, they are navigable within the reason and spirit of the common-law rule. When the waters of any of them have so far receded or dried up as to be no longer capable of any beneficial use by the public, they are no longer public waters, and their former beds, under the principles already announced, would become the private property of the riparian owners." n1367

In some cases, it is held that public waters are those where the tide ebbs and flows, and the ownership of which is in the state. n1368 It would seem that any body of water that is capable of being generally and commonly useful for some purpose of trade and the transportation of property may be properly designated as public water. n1369 In one case it was held that a natural fresh-water pond containing fifteen or more acres, though situated in the midst of and entirely surrounded by the land of a private owner, is public water, and the title of such owner extended only to the water's edge or at high watermark. n1370

A boundary upon a public navigable river or lake is a boundary by the edge of the water at ordinary low watermark, that is, the deed with such boundary passes to the grantee the title to the land between such stage of the water and high watermark. n1371

In accordance with this rule, where a navigable river is one of the boundaries of a municipality, the low waterline, and not the thread of the stream, is the boundary, in the absence of express language to the contrary in the act of incorporation. n1372

But, under the older rule, it is held that navigability and nonnavigability mark the distinction between public waters and

private waters. n1373 A riparian owner of both sides of a stream may in Virginia enjoin trespassing for fishing since the colonial grants gave title to the waters and fishing rights. n1374

COMPUTER-ASSISTED RESEARCH

LEXIS: Boundar! w/10 (public or nonpublic w/5 water!)

§ 90.03(b)(10) Boundary by Artificial Body of Water.

The rules governing title to the bed of artificial bodies of water do not necessarily coincide with those applicable to natural bodies of water. n1375 A boundary by a ditch or canal ordinarily extends the grant to the center line of the ditch, if the grantor's title extends so far and not farther. n1376 If the ditch is wholly upon the grantor's land, the deed bounding the grantor's land upon the ditch would carry the title to the whole of the ditch, because it would not be presumed that the grantor would retain a strip of land occupied by half of the ditch, which would be useless without the land adjoining. However, this rule does not apply in case of a boundary upon an artificial watercourse, like a millrace, flume, or ditch, in which the grantor still has an interest as owner of a mill, or of other land for the beneficial use of which such watercourse is necessary, or in case the flume or ditch is owned by another. n1377 A grant that clearly limits the boundary to a line upon or beyond its bank passes no fee to the soil in the artificial channel. n1378 The rule in Pennsylvania is that when a deed calls for a canal as a boundary, unless a contrary intention clearly appears, the grantee takes title, as against the grantor, to the middle of the canal, but nothing more, and this whether the grantor owns the fee in the entire canal, and nothing upon the other side, or whether the grantor owns land extending beyond the other side of the canal. n1379

A boundary by an artificial pond, formed by erecting a dam across a stream, passes the land to the thread of the original stream, n1380 unless qualified to the contrary, but when such a pond has existed for a long period of years, and has become regarded as a permanent feature of the topography, it may acquire the properties of a natural lake, and the rule applicable to such may fix the boundary. n1381 A deed bounding the land conveyed by the Ahigh watermark" of a pond contemplates the pond's high watermark at the time the deed is given. n1382 Where the thread of a stream has always been apparent through a pond formed by an artificial dam, a deed of land bounded by the pond passes the land to the thread of the stream, even though the deed purports to convey a strip of land extending along the stream for some distance above and below the dam. n1383 Where an artificial pond was created by damming a stream, it is held that the same rule applies to a pond as to the steam before the dam was built. n1384 The rule that the boundary upon an artificial pond does not extend to the thread of the stream, where the pond has been so long kept up as to have become permanent and to have acquired another well-defined boundary, does not apply in the case of a purely artificial pond temporarily maintained, the margin and banks of which had not been long established and clearly marked. n1385 A boundary line given as commencing at "a stake near the highwater mark" of a pond, thence running "along the high watermark" is fixed at the high watermark, and that mark is a permanent one, and does not follow the changes in the high watermark of the pond. n1386 Parol evidence is admissible to show that it was intended to limit the grant to the margin of the water as it overflowed the land in the spring. n1387

COMPUTER-ASSISTED RESEARCH

LEXIS: Boundar! w/10 (water w/20 artificial)

§ 90.03(b)(11) Sale of the Bed Separate from the Shore.

It is possible for one who owns the bed of a body of nonnavigable or nonpublic water to convey title to the bed or even to reserve title separate from the area not covered by water. n1388 The owner may sell or reserve the title to the soil in the bed of the river, separate from the upland, or the upland without the bed of the river. n1389 It is only necessary to use such terms in describing the land that the ordinary presumption shall not apply. The owner may convey the land

bounding it by a river at high watermark or at low watermark. n1390 A boundary on or along the "bank of" a stream, or "the shore" of a stream instead of "on" or "along" the stream, is generally held to restrict the title to the water's edge, at low watermark. n1391 Where the description in a deed began on a river, and the last two calls were "to" the river, and "thence up said river with its meanders to the beginning," it was held that the title conveyed extended to the thread of the main channel of the river, so as to include an island between the bank and such channel, though the distance given in the call to the river fell short of the channel. n1392 Where a line is described as running across a brook to a monument placed on its farther bank, and the boundary is thence down said brook to a stake and stones on said bank, the boundary is along the bank of the brook, and not by the center line of the stream. n1393

Where the language of a deed shows a manifest intention to stop at the water's edge, it will prevail over the general presumption. The intention of the party is the real object sought. If the meaning is not clear, resort is had to rules of construction. n1394

As bearing upon the construction of the deed in this respect, other instruments may be considered, if they are executed between the same parties at the same time and respecting the same subject matter. n1395 However, such instruments are not to be considered for this purpose unless they are between the same parties, or, if they are between different parties, unless they relate to the same transaction and are, in effect, parts of one transaction. n1396 Thus, if one advertises and sells land bounded on a stream, and on the same day, and as part of the same sale, sells the bed of the stream to another person, the deeds being executed the same day and containing the same recitals, the intention thus shown to separate the ownership of the bed of the stream from the ownership of the lot overcomes the presumption that the deed of the lot carries the title to the bed of the stream to its center. n1397

A conveyance describing the land conveyed as being bounded by the west bank of a river was held to convey riparian land in the absence of language showing an intention of the grantor to reserve the land lying between the bank and the thread of the stream. n1398

Accretion lands may be severed by grant. When this is done they do not pass by a conveyance of the upland to a bona fide purchaser. n1399 There is a presumption that the parties intended accretions to pass with the sale of the upland without being specifically described therein. n1400 But the accretion may be severed from the upland and conveyed separately, n1401 and a purchaser of the upland is not protected by the recording acts from a previous unrecorded conveyance of the accretion. n1402

§ 90.03(b)(12) Determining Title to an Irregular Shore Line.

Descriptions are often delightfully ambiguous in purporting to convey title to an irregular shore line. A similar problem arises where the record line has been changed by accretion or reliction. There is basic disagreement between the courts as to whether the extent of shore frontage or the area of the upland should govern. If the shore line is concave, converging lines are run from the divisional shore line to the line of navigability. If convex, the lines are run divergent to the line of navigability. n1403

One rule to determine the division line between adjoining holdings in the shallow waters of the ocean, or of a navigable river or lake, of owners of land bordering thereon, and located on a curved or irregular shore, is: First, to measure the whole extent of the shore line, and compute how many rods, yards, or feet each riparian proprietor owns thereon; second, to divide the navigable water line into as many equal parts as such shore line contains rods, yards, or feet of the shore line; and third, to draw a line from the point of division on the shore line to the point thus determined as the point of division on the navigable water line. This general rule was early adopted in Massachusetts, and has since been adhered to there, and adopted by the United States courts, and the courts of New York, Michigan and Wisconsin. n1404

The rights of the owners of adjoining lands bordering on navigable or tidewaters are not fixed by extending the boundary line into the waters in the direction of its last course but by a line perpendicular to the shore line or, if the

shore line is circular, perpendicular to a tangent drawn on the circle at the point of intersection. n1405

In a Michigan case it was said that the rule was well settled that the boundary line between two adjoining riparian owners, as to the land covered by water, was not in any way dependent upon the direction of the lines on the land, but that the lines from the shore should run, as near as may be, perpendicular to the course of the stream. n1406

It will be seen by an examination of the cases that the courts have applied a different rule for the division of the rights of riparian owners to the shores of lakes and rivers. Much of the apparent confusion of the authorities can be traced to the fact that a river has a "thread of the stream," while no such term is applied to a lake, the sea, or a large pond. n1407

Another rule of measurement is given as follows: (1) measure the shoreline, (2) divide the navigable waterline into as many parts as each shore line contains feet and give to each proprietor as many parts as the proprietor has feet of shoreline, (3) draw line from the shore boundary to the applicable point of division of the water. n1408

The court should so divide the river bed between two tracts fronting the same bank that each tract will have an extended frontage in the river based on and proportionate to the length of each tract's frontage on the shore. n1409 It is the frontage on the river bank or shore rather than the tract's depth area, or configuration or the direction in which its upland sides run, which governs. n1410 The lines must be run so as not to deprive the riparian tract of its proportionate frontage rights on the outer river line. n1411

Different methods are applicable to division of a lake bed. If the lake is circular, division lines form a triangle with the shore the base and the lake center the vertex. n1412 If lake is oblong, the lines are drawn perpendicular to a median center. n1413 If neither of the other two are practical, the lake bed is divided in proportion to the shore line owned. n1414

COMPUTER-ASSISTED RESEARCH

LEXIS: Boundar! w/10 (shore w/10 irregular)

§ 90.03(b)(13) Private Deeds to the Foreshore.

Where ownership of the foreshore is in private hands, as in the case of tidal waters pursuant to act of Congress or to the bed of bays and inlets, there arises a problem of such ownership of the ocean bed as between owners of the upland. Various suggestions are offered to measure the area of each upland owner in inlets and bays.

Of course, the owner in any sale may sever the upland from the flats, selling either without the other at his pleasure. n1415 The owner may convey the interest in the land below high watermark separately from the upland. n1416 Thus a deed calling for a line running to the shore or bank of a tide river and thence along the bank or shore, or for a line running on the beach or shore of the sea, excludes the shore or flats, which is the term applied to the ground between high and low watermark. n1417 The bank or shore becomes a monument limiting the land thereto when the deed clearly shows this to be the intention of the grantor; but when the land is described as bounded by a monument standing on the bank of a tidal stream, or on the shore of the sea and thence by the stream or sea, the monument does not generally restrict the boundary to the bank or shore. n1418 Moreover, while a boundary by the shore is ordinarily a boundary by high watermark, yet it may appear from the whole instrument and from monuments referred to that the term was used as importing low watermark. The word may always be controlled by other expressions used in the conveyance. n1419 A deed conveying a parcel of land bounded by the shore of the sea at high watermark, "including all the privileges of the shore to low watermark,"was held to pass the fee in the land to low watermark. n1420 Deeds conveying all the tidelands in front of the lots mentioned therein extended the title thereunder to low watermark wherever that might be, then or afterwards. n1421

Under a statute giving the owner of land on tidewater the title to low watermark, a conveyance by metes and bounds which are substantially coincident with high watermark carries all the rights of the grantor to the strip lying between high and low watermark. n1422

If land be described as running "to a cove and thence along the margin of the cove," the grant excludes adjoining flats. n1423 The same effect follows when the call is "on the west bank of the creek;" n1424 also where the words are "by the bank of the stream." n1425 A grantor may so definitely and specifically bound the conveyance by the bank of a stream that the grantor will retain title to the land from the bank to the bed. n1426

A conveyance of the upland possesses all accretions, though not described in the deed, unless there has been a severance. But a deed of severance need not be recorded as against a purchaser of the upland where the upland deed does not describe the accretions. n1427

A boundary marker on the bank of a nonnavigable stream was held not to indicate the end of the boundary line, but only the point where the line strikes the water. n1428

COMPUTER-ASSISTED RESEARCH

LEXIS: Boundar! w/10 (deed! w/5 foreshore)

FOOTNOTES:
(n1)Footnote 702. *Bercot v. Velkoff, 41 N.E.2d 686 (Ind. App. 1942).*

(n2)Footnote 703. *Simms v. William Simms Hdw., 12 N.W.2d 783 (Minn. 1943)* (practical location rests on estoppel); *Marathon Oil Co. v. Gulf Oil Corp., 130 S.W.2d 365 (Tex. App. 1939)* (some element of estoppel required to make practical location enforceable); *Trip v. Bagley, 276 P. 912 (Utah 1928).*

(n3)Footnote 704. *Nedham v. Collamer, 211 P.2d 308 (Cal. App. 1949)* (time must be at least equal to statute of limitations or improvements must be made to create estoppel); *Essex v. Lukas, 159 A.2d 612 (R.I. 1960)* (boundary recognized as such for length of statute of limitations precluded denial of line as being true one).

(n4)Footnote 705. *Trevillian v. Rais, 9 P.2d 402 (Ariz. 1932); Bemis v. Bradley, 139 A. 593 (Me. 1927)* (requiring that possession be held up to agreed line for the period of adverse possession to transfer title).

(n5)Footnote 706. *Issacks v. Clayton, 48 So. 2d 536 (Ala. 1950)* (practical location); *Trevillian v. Rais, 9 P.2d 402 (Ariz. 1932)* (depending on adverse possession); *Bernier v. Preckel, 236 N.W. 243 (N.D. 1931); Bichler v. Ternes, 248 N.W. 185 (N.D. 1933).* In Georgia, the line may be established by an oral agreement plus actual possession to the agreed line, or by an executed agreement or by acquiescence. *Bradley v. Shelton, 7 S.E.2d 261 (Ga. 1940).*

(n6)Footnote 707. *Simms v. William Simms Hdw., 12 N.W.2d 783 (Minn. 1943).*

(n7)Footnote 708. *Reynolds v. Bradford, 233 S.W.2d 464 (Tex. App. 1950).*

(n8)Footnote 709. *Carstensen v. Brown, 236 P. 517 (Wyo. 1925)* (hostile intent is unnecessary if possession is held for the statutory time under honest mistake).

(n9)Footnote 710. *Schlender v. Maretoli, 37 P.2d 993 (Kan. 1934); Engquist v. Wirtjes, 68 N.W.2d 412 (Minn. 1955).* In Georgia, practical location is not dependent upon the statutes regarding prescription or adverse possession. *Bennett v. Perry, 61 S.E.2d 501 (Ga. 1950)* (requiring only seven years' acquiescence or possession). *Downing v. Boehringer, 349 P.2d 306 (Idaho 1960)* (evidence of practical location of boundary could not be established without a showing that the location was either uncertain or unknown to the parties establishing it). In North Carolina the practical

location rule is an exception to the doctrine that calls for monuments have first priority. *Yopp v. Aman, 193 S.E. 822 (N.C. 1937).*

(n10)Footnote 711. *Cagle v. Brady, 24 S.E.2d 865 (Ga. App. 1943).*

(n11)Footnote 712. *Horn v. Thompson, 58 N.E.2d 896 (Ill. 1945); Bercot v. Velkoff, 41 N.E.2d 686 (Ind. App. 1942); Wallace v. Mounts, 164 S.W.2d 541 (Ky. 1942); May v. Abernathy, 130 S.W.2d 135 (Tenn. App. 1939).*

(n12)Footnote 713. *Adkins v. Willis, 230 S.W.2d 32 (Ark. 1950); Hardison v. Jordan, 44 A.2d 892 (Me. 1945)* (refusing to recognize practical location in absence of disseisin). Dispute or uncertainty required. *Farmer v. Kornfuehrer, 271 S.W.2d 501 (Tex. App. 1954); Brown v. Milliner, 232 P.2d 202 (Utah 1951).*

(n13)Footnote 714. *Schraeder Min. & Mfg. Co. v. Packer, 129 U.S. 688, 9 S. Ct. 385, 32 L. Ed. 760 (1889); Alexander v. Wheeler, 69 Ala. 332 (Ala. 1881); Lewis v. Ogram, 87 P. 60 (Cal. 1906); Connecticut Light & Power Co. v. Fleetwood, 200 A. 334 (Conn. 1938); Watrous v. Morrison, 14 So. 805 (Fla. 1894); Shahn v. Watkins, 21 S.E.2d 58 (Ga. 1942); Cagle v. Brady, 24 S.E.2d 865 (Ga. App. 1943); Horn v. Thompson, 58 N.E.2d 896 (Ill. 1945); Wright v. Hendricks, 58 N.E.2d 453 (Ill. 1944); Bercot v. Velkoff, 41 N.E.2d 686 (Ind. App. 1942); Wallace v. Mounts, 164 S.W.2d 541 (Ky. 1942); White v. Hapeman, 5 N.W. 313 (Mich. 1880); Trussell v. Lewis, 14 N.W. 155 (Neb. 1882); Sanford v. McDonald, 6 N.Y.S. 613 (1889); Buckner v. Anderson, 16 S.E. 424 (N.C. 1892); Shaffer v. Hahn, 15 S.E. 1033 (N.C. 1892); Caraway v. Chancy, 51 N.C. 361 (N.C. 1859); Bobo v. Richmond, 25 Ohio St. 115 (1874); Coughran v. Alderete, 26 S.W. 109 (Tex. App. 1894); Windsor v. Bourcier, 150 P.2d 717 (Wash. 1944); Pickett v. Nelson, 37 N.W. 836 (Wis. 1888); Hartung v. Witte, 18 N.W. 175 (Wis. 1884).*

(n14)Footnote 715. *See Shaw v. Williams, 50 So. 2d 125 (Fla. 1950); Jones v. Scott, 145 N.E. 378 (Ill. 1924); Duff v. Turner, 256 S.W. 1105 (Ky. 1923); Adams v. Warner, 204 N.Y.S. 613 (N.Y.A.D. 1924).*

(n15)Footnote 716. *Crawford v. Roloson, 152 N.E. 319 (Mass. 1926); Hale v. Arms, 119 S.E. 94 (Va. 1923), reh'g denied, 121 S.E. 269 (1923).*

(n16)Footnote 717. *Nathan v. Dierssen, 66 P. 485 (Cal. 1901).*

(n17)Footnote 718. *Crook v. Leinenweaver, 224 P.2d 891* (Cal. 4 Dist. App. 1950).

(n18)Footnote 719. *Winborn v. Alexander, 279 S.W.2d 718 (Tenn. App. 1954).*

(n19)Footnote 720. *Jensen v. Bartlett, 286 P.2d 804 (Utah 1955)* (finding, however, that there was sufficient uncertainty to justify agreement).

(n20)Footnote 721. *Williams v. Pichard, 7 So. 2d 468 (Fla. 1942)* (agreement as to line followed by erection of fence created boundary); *Kilgore v. Leary, 180 So. 35 (Fla. 1938); Robertson v. Abernathy, 16 S.E.2d 584 (Ga. 1941).*

(n21)Footnote 722. *Mello v. Weaver, 224 P.2d 691 (Cal. 1950); Martin v. Lopes, 164 P.2d 321 (Cal. App. 1945); McGinty v. Interstate Land & Imp. Co., 90 S.E.2d 42 (Ga. App. 1955); Roberts v. Brae, 54 P.2d 698 (Cal. 1936)* (essential elements are uncertainty or belief as to uncertainty of the line, an express or implied agreement fixing it, actual designation of the line and occupation thereunder).

(n22)Footnote 723. *Thaxter v. Inglis, 54 P. 86 (Cal. 1898); York v. Horn, 315 P.2d 912 (Cal. App. 1957); Crook v. Leinenweaver, 224 P.2d 891 (Cal. App. 1950); Farr v. Woodfolk, 45 S.E. 230 (Ga. 1903); Carstarphen v. Holt, 23 S.E. 904 (Ga. 1895); Miller v. McGlaun, 63 Ga. 435 (1879); Hollingsworth v. Barrett, 89 S.W. 107 (Ky. 1905); Ennis v. Stanley, 78 N.W.2d 114 (Mich. 1956); Beardsley v. Crane, 54 N.W. 740 (Minn. 1893); Ernsting v. Gleason, 39 S.W. 70 (Mo. 1897); Schroeder v. Engroff, 144 A.2d 808 (N.J. Super. L. 1958), rev'd, 155 A.2d 15 (N.J. Super. A.D. 1959), certification granted, 157 A.2d 363 (N.J. 1960), rev'd, 162 A.2d 845 (N.J. 1960); Hinds v. Parmley, 315 S.W.2d 159*

(Tex. App. 1958); Davis v. Miers, 308 S.W.2d 277 (Tex. App. 1957) (prior dispute necessary); *Pickett v. Nelson, 47 N.W. 936 (Wis. 1891); Hass v. Plantz, 14 N.W. 65 (Wis. 1882); Spear v. Smith, 327 P.2d 36 (Cal. App. 1958)* (actual dispute or controversy is not necessary in California to the establishment of boundaries by implied agreement); *White v. Saling, 89 P.2d 754 (Okla. 1939)* (line established through pure mistake and ignorance is not a practical location).

(n23)Footnote 724. *Helm v. Wilson, 18 P. 604 (Cal. 1888); Sloan v. Ayres, 189 S.W.2d 653 (Ark. 1945)* (line established through pure mistake and ignorance is not a practical location).

"There must be an uncertainty as to the true line, and some question, dispute, or controversy about it, which can be settled by such an agreement or acquiescence; in other words, that is certain which can be made certain, and, if the true line cannot be made certain by the deed and a survey, or by the calls and monuments mentioned in the deed, then, only, it may be made certain by an agreement or acquiescence of the parties." *Hartung v. Witte, 18 N.W. 175 (Wis. 1884). See Johnson v. Squires, 75 N.W.2d 45 (Mich. 1956)* (dictum).

(n24)Footnote 725. *Henderson v. Walker, 122 S.E. 613 (Ga. 1924); Doherty v. Egan Waste Co., 111 A. 499 (N.J. Ch. 1920); Adams v. Warner, 204 N.Y.S. 613 (N.Y.A.D. 1924).* Boundary lines established by acquiescence; *McGinty v. Interstate Land & Imp. Co., 90 S.E.2d 42 (Ga. App. 1955); Railey v. Heath, 88 S.E.2d 194 (Ga. App. 1955).*

(n25)Footnote 726. On the subject of the location of boundary lines by agreement, *See generally Weeks v. Walls, 180 So. 544 (Ala. 1938); Krutz v. Faught, 166 S.W.2d 655 (Ark. 1942); Mello v. Weaver, 224 P.2d 691 (Cal. 1950); Hannah v. Pogue, 147 P.2d 572 (Cal. 1944); Nusbickel v. Stevens Ranch Co., 200 P. 651 (Cal. 1921); Raney v. Merritt, 238 P. 767 (Cal. App. 1925); Howatt v. Humboldt Milling Co., 214 P. 1009 (Cal. App. 1923); Kilgore v. Leary, 180 So. 35 (Fla. 1938); Veal v. Barber, 30 S.E.2d 252 (Ga. 1944); McGill v. Dowman, 24 S.E.2d 195 (Ga. 1943); Shirley v. Byrd, 134 S.E. 316 (Ga. 1926); Henderson v. Walker, 122 S.E. 613 (Ga. 1924); Hart v. Carter, 103 S.E. 457 (Ga. 1920); Loverkamp v. Loverkamp, 45 N.E.2d 871 (Ill. 1942); Bercot v. Velkoff, 41 N.E.2d 686 (Ind. App. 1942); Baker v. Johnson, 138 N.E. 780 (Ind. App. 1923); Seaver v. Vonderahe, 127 N.E. 206 (Ind. App. 1920); Lynch v. Northwestern Laundry, 189 N.W. 748 (Iowa 1922); Blanford v. Biven, 254 P. 1030 (Kan. 1927); Long v. Myers, 211 P. 109 (Kan. 1922); Shafer v. Leigh, 209 P. 830 (Kan. 1922); Fordson Coal Co. v. Howard, 168 S.W.2d 588 (Ky. 1943); Turner v. Spicer, 249 S.W. 1038 (Ky. 1923); Driskill v. Atwood, 237 S.W. 388 (Ky. 1922); Holbrooks v. Wright, 220 S.W. 524 (Ky. 1919); Harper v. Learned, 6 So. 2d 326 (La. 1942); Borneman v. Milliken, 124 A. 200 (Me. 1924); Matthews v. McLouth, 205 N.W. 580 (Mich. 1925); Martin v. Hays, 228 S.W. 741 (Mo. 1921); La Rue v. Bungenstock, 249 S.W. 402 (Mo. 1923); Union Tp. v. Cotton Hill Tp., 243 S.W. 333 (Mo. 1922); Ashauer v. Peer, 147 S.W.2d 144 (Mo. App. 1941); Doherty v. Egan Waste Co., 111 A. 499 (N.J. Ch. 1920); Barcus v. Blanchard, 39 A.2d 499 (N.J. Ch. 1944), aff'd, 42 A.2d 271* (N.J. Err. & App. 1945); *Magnolia ConstR.R. v. McQuillan, 121 A. 734* (N.J. Err. & App. 1923); *Adams v. Warner, 204 N.Y.S. 613 (N.Y.A.D. 1924); Watford v. Pierce, 124 S.E. 838 (N.C. 1924); Rocher v. Williams, 80 P.2d 649 (Okla. 1938); Colley v. Henderson, 228 P. 923 (Or. 1924); Reisland v. Schick, 224 P. 827 (Or. 1924); Aldrich v. Brownell, 120 A. 582 (R.I. 1923); Home Owners' Loan Corp. v. Dudley, 141 P.2d 160 (Utah 1943); Carstensen v. Brown, 236 P. 517 (Wyo. 1925). Cf. Marshall v. Jameson, 134 S.E. 573 (Va. 1926).*

(n26)Footnote 727. *Wells v. Jackson Iron Mfg. Co., 47 N.H. 235 (1866).*

(n27)Footnote 728. *Crook County Comm'rs v. Sheridan County Comm'rs, 100 P. 659 (Wyo. 1909).*

(n28)Footnote 729. *Dye v. Ebersole, 234 S.W.2d 376 (Ark. 1950); Hruby v. Lonseth, 116 P. 26 (Wash. 1911).*

(n29)Footnote 730. *Walters v. Meador, 201 S.W.2d 24 (Ark. 1947); Sloan v. Ayres, 189 S.W.2d 653 (Ark. 1945); Furlow v. Dunn, 144 S.W.2d 31 (Ark. 1940); Scales v. Wood, 112 S.E.2d 670 (Ga. App. 1959); Downing v. Boehringer, 349 P.2d 306 (Idaho 1960); Nitterauer v. Pulley, 82 N.E.2d 643 (Ill. 1948); Loverkamp v. Loverkamp, 45 N.E.2d 871 (Ill. 1942)* (disputed line may be established by parol agreement and possession); *Turner v. McCarty, 124 S.W.2d 753 (Ky. 1939); Hotze v. Ring, 115 S.W.2d 311 (Ky. 1938)* (agreed line may ripen into title without consideration or oral agreement); *Cochrane v. Milligan, 101 N.W.2d 292 (Mich. 1960); Lake for Use & Benefit of Benton v. Crosser, 216*

P.2d 583 (Okla. 1950).

(n30)Footnote 731. *Collins v. Burchfield, 110 S.E.2d 368 (Ga. 1959)* (a disputed boundary may be fixed by oral agreement accompanied by taking possession or by acquiescence for the statutory period); *Hardison v. Jordan, 44 A.2d 892 (Me. 1945)* (Maine does not recognize a practical location that does not amount to a disseisin); *Neill v. Hake, 93 N.W.2d 821 (Minn. 1958); Simms v. William Simms Hdw., 12 N.W.2d 783 (Minn. 1943); Dunkel v. Roth, 300 N.W. 610 (Minn. 1941)* (Minnesota will not recognize practical location except where coupled with the statute of limitations, an express agreement or estoppel); *Holt v. Hutcheson, 333 P.2d 530 (Okla. 1958); Nagel v. Philopsen, 90 N.W.2d 151 (Wis. 1958).*

(n31)Footnote 732. *Bordes v. Leece, 208 N.W. 780 (Ky. 1919).*

(n32)Footnote 733. *Wood v. Bapp, 169 N.W. 518 (S.D. 1918); Wade v. McDougle, 52 S.E. 1026 (W. Va. 1906).*

(n33)Footnote 734. *Myrick v. Peet, 180 P. 574 (Mont. 1919); Kingsley v. Jacobs, 149 P.2d 950 (Or. 1944).*

(n34)Footnote 735. *Guy v. Lancaster, 34 So. 2d 10 (Ala. 1948).*

(n35)Footnote 736. *Davis v. Wright, 249 S.W.2d 979 (Ark. 1952); Talmadge v. Moore, 220 P.2d 588* (Cal. 4 Dist. App. 1950).

(n36)Footnote 737. *Taylor v. Trustees of Glenlock Public School, 194 S.E. 169 (Ga. 1937); Kunkle v. Clinkingbeard, 162 P.2d 892 (Idaho 1945); Bercot v. Velkoff, 41 N.E.2d 686 (Ind. App. 1942); Kingsley v. Jacobs, 149 P.2d 950 (Or. 1944).*

(n37)Footnote 738. *Warner v. Noble, 282 N.W. 855 (Mich. 1938).*

(n38)Footnote 739. *Peake v. Azusa Valley Sav. Bank, 99 P.2d 382* (Cal. 3 Dist. App. 1940).

(n39)Footnote 740. *Andrews v. Andrews, 113 S.E.2d 47 (N.C. 1960).*

(n40)Footnote 741. Practical location not influenced by fraud or mistake will establish a line. *Lake for Use & Benefit of Benton v. Crosser, 216 P.2d 583 (Okla. 1950); Thompson v. Bain, 183 P.2d 785 (Wash. 1947).*

(n41)Footnote 742. *Rast v. Fischer, 236 P.2d 393 (Cal. App. 1951); Nitterauer v. Pulley, 82 N.E.2d 643 (Ill. 1948),* requiring a dispute before the neighbors can agree upon a true line.

(n42)Footnote 743. *Angell v. Hadley, 207 P.2d 191 (Wash. 1949).*

(n43)Footnote 744. *Sanford v. McDonald, 6 N.Y.S. 613 (1889).*

(n44)Footnote 745. *Taylor v. Trustees of Glenlock Public School, 194 S.E. 169 (Ga. 1937).*

(n45)Footnote 746. *Randleman v. Taylor, 127 S.W. 723 (Ark. 1910); Kandlik v. Hudek, 6 N.E.2d 196 (Ill. 1936). McNeil v. Hadden, 76 So. 2d 160 (Ala. 1954)* (a section line cannot be changed by parol or by adverse possession).

(n46)Footnote 747. *Denson v. Kuehne, 215 S.W.2d 429 (Tex. App. 1948), rev'd, 219 S.W.2d 1006 (Tex. 1949).*

(n47)Footnote 748. *Meyers v. Johnson, 15 Ind. 261 (1860); Ernie v. Trinity Lutheran Church, 336 P.2d 525 (Cal. 1959)* (practical location requires an uncertainty of a boundary, agreement fixing the line and acquiescence for period of statute of limitations or change in position amounting to estoppel).

(n48)Footnote 749. *See* Jack Young, *Parol Agreements Relating To Land Boundaries, 11 ARK. L. REV. 431 (1957).*

(n49)Footnote 750. *Seidenstricker v. Holtzendorff, 217 S.W.2d 836 (Ark. 1949).*

(n50)Footnote 751. *Silvarer v. Hansen, 20 P. 136 (Cal. 1888).*

(n51)Footnote 752. *Russell v. Producers Oil Co., 70 So. 92 (La. 1915).*

(n52)Footnote 753. *Wesley v. Sargent, 38 Me. 315 (1854).*

(n53)Footnote 754. *Roberts v. Brae, 54 P.2d 698 (Cal. 1936); Schneider v. Pascoe, 118 P.2d 860 (Cal. App. 1941)* (the required dispute consists of uncertainty of mind of the parties as to the location of the boundary line); *Johnston v. McFerren, 3 N.W.2d 136 (Iowa 1942)* (oral agreement followed by possession and improvement conclusively settled line); *White v. Saling, 89 P.2d 754 (Okla. 1939)* (if the line was located through ignorance and mistake, it is not a practical location); *Marathon Oil Co. v. Gulf Oil Co., 130 S.W.2d 365 (Tex. App. 1939), modified, 152 S.W.2d 711 (Tex. 1941)* (a parol agreement based on a mutual mistake of fact is not enforceable in the absence of estoppel elements making disregard of it inequitable).

(n54)Footnote 755. *Hotze v. Ring, 115 S.W.2d 311 (Ky. 1938).*

(n55)Footnote 756. *Bunch v. Bunch, 276 S.W.2d 705 (Ark. 1955); Horn v. Hays, 243 S.W.2d 3 (Ark. 1951).*

(n56)Footnote 757. *Dye v. Ebersole, 243 S.W.2d 376 (Ark. 1951); Reel v. Walter, 309 P.2d 1027 (Mont. 1957)* (burden of proof is on one seeking to show agreed location of boundary).

(n57)Footnote 758. *Walters v. Meador, 201 S.W.2d 24 (Ark. 1947); Steele v. University of Kentucky, 174 S.W.2d 129 (Ky. 1943)* (lines must be established on the ground and possession taken).

(n58)Footnote 759. *Mullahey v. Serra, 264 N.W. 63 (Iowa 1935). See Thompson v. Schappert, 294 N.W. 580 (Iowa 1940); Fishman v. Nielson, 53 N.W.2d 553 (Minn. 1952)* (adjoining landowners may establish boundary line by acquiescence).

(n59)Footnote 760. *Gulf Oil Corp. v. Timms, 116 S.W.2d 940 (Tex. App. 1938); Farmer v. Kornfuehrer, 271 S.W.2d 501 (Tex. App. 1954)* (the boundary must be in dispute and the agreement must fix a certain boundary).

(n60)Footnote 761. Mr. Justice Lamar said: "The decisions in the other States generally support the rule that owners of adjacent tracts of land are not bound by consent to a boundary which has been defined under a mistaken apprehension that it is the true line, each claiming only the true line, wherever it may be found, and that in such case neither party is precluded or estopped from claiming his [or her] own rights under the true one when it is discovered." *Schraeder Min. & Mfg. Co. v. Packer, 129 U.S. 688, 9 S. Ct. 385, 32 L. Ed. 760 (1889). See* the following cases: *Jenkins v. Trager, 40 F. 726 (C.C.S.D. Miss. 1889); Perich v. Maurer, 155 P. 471 (Cal. App. 1915); Honaker v. Heatly, 131 P. 759 (Cal. 1913); Redman v. Redman, 240 S.W.2d 553 (Ky. 1951); Buchanan v. Ashdown, 24 N.Y.S. 1122 (1893); Harn v. Smith, 15 S.W. 240 (Tex. 1891); Smith v. Davis, 45 Va. 50 (1847); Hatfield v. Workman, 14 S.E. 153 (W. Va. 1891); White v. Ward, 14 S.E. 22 (W. Va. 1891); Hass v. Plantz, 14 N.W. 65 (Wis. 1882).*

(n61)Footnote 762. *Perich v. Maurer, 155 P. 471 (Cal. App. 1915); Brunswick Pulp & Paper Co. v. Wilson, 89 S.E.2d 476 (Ga. 1955).*

(n62)Footnote 763. *Sheldon v. Michigan Cent. R.R., 126 N.W. 1056 (Mich. 1910); McNeil v. Hadden, 76 So. 2d 160 (Ala. 1954)* (where two persons agree on a boundary line, but title is not taken by adverse possession, a deed running only to the survey line and not to the agreed line does not pass title to land lying between the survey line and the agreed line).

(n63)Footnote 764. *Lane v. Jacobs, 152 N.Y.S. 605 (N.Y.A.D. 1915).*

(n64)Footnote 765. *Granada v. D'Allesandro, 160 N.Y.S. 602 (1916).*

(n65)Footnote 766. *Rippey v. Harrison, 119 P. 178 (Wash. 1911).*

(n66)Footnote 767. *Lane v. Jacobs, 152 N.Y.S. 605 (N.Y.A.D. 1915).*

(n67)Footnote 768. *Fuelling v. Fuesse, 87 N.E. 700 (Ind. App. 1909).* Mere acquiescence in occupancy does not constitute a boundary line agreement; *Drew v. Mumford, 324 P.2d 240 (Cal. App. 1958).*

(n68)Footnote 769. *Michael v. Megan, 115 N.W. 483 (Iowa 1908).*

(n69)Footnote 770. *Goltermann v. Schiermeyer, 28 S.W. 616 (Mo. 1894).*

(n70)Footnote 771. *Laughlin v. Francis, 105 N.W. 360 (Iowa 1905).*

(n71)Footnote 772. *Turner v. Creech, 108 P. 1084 (Wash. 1910).*

(n72)Footnote 773. *Herse v. Mazza, 91 N.Y.S. 778 (N.Y.A.D. 1904).*

(n73)Footnote 774. *Peebles v. McDonald, 188 S.W.2d 289 (Ark. 1945); E.O. Barnett Bros. v. Gentry, 173 S.W. 424 (Ark. 1915); Taylor v. Rudy, 137 S.W. 574 (Ark. 1911); Payne v. McBride, 131 S.W. 463 (Ark. 1910); Young v. Blakeman, 95 P. 888 (Cal. 1908); Silvarer v. Hansen, 20 P. 136 (Cal. 1888); White v. Spreckels, 17 P. 715 (Cal. 1888); Truett v. Adams, 66 Cal. 218 (1884); Cavanaugh v. Jackson, 27 P. 931 (Cal. 1891); Sneed v. Osborn, 25 Cal. 619 (1864); Carr v. Schomberg, 232 P.2d 597 (Cal. App. 1951); McGill v. Dowman, 24 S.E.2d 195 (Ga. 1943); Idaho Land Co. v. Parsons, 31 P. 791 (Idaho 1892); Wright v. Hendricks, 58 N.E.2d 453 (Ill. 1944); Fisher v. Bennehoff, 13 N.E. 150 (Ill. 1887); Rosenmeier v. Mahrenholtz, 101 N.E. 721 (Ind. 1913); Horton v. Brown, 29 N.E. 414 (Ind. 1891); Cleveland v. Obenchain, 8 N.E. 624 (Ind. 1886); Pitcher v. Dove, 99 Ind. 175 (1884); Welborn v. Kimmerling, 89 N.E. 517 (Ind. App. 1909). Seberg v. Iowa Trust & Sav. Bank, 119 N.W. 378 (Iowa 1909); Leifheit v. Neylong, 117 N.W. 4 (Iowa 1908); Central Trust Co. v. Moffitt, 171 S.W.2d 21 (Ky. 1943); Hocker v. Keeton, 115 S.W. 784 (Ky. 1909); Hughes Lbr. Co. v. Valentine, 106 S.W. 839 (Ky. 1908); Grigsby v. Combs, 21 S.W. 37 (Ky. 1893); Breakey v. Woolsey, 112 N.W. 719 (Mich. 1907); Jones v. Pashby, 35 N.W. 152 (Mich. 1887); Smith v. Hamilton, 20 Mich. 433 (1870); Houston County v. Burns, 148 N.W. 115 (Minn. 1914); Foard v. McAnnelly, 114 S.W. 990 (Mo. 1908); Atchison v. Pease, 10 S.W. 159 (Mo. 1888); Schad v. Sharp, 8 S.W. 549 (Mo. 1888); Majors v. Rice, 57 Mo. 384 (1874); Hills v. Ludwig, 24 N.E. 596 (Ohio 1889); Bobo v. Richmond, 25 Ohio St. 115 (1874); Walker v. Devlin, 2 Ohio St. 593 (1853); Joy v. Palethorpe, 152 P. 230 (Or. 1915); Ungaro v. Mete, 27 A.2d 826 (R.I. 1942); Levy v. Maddox, 16 S.W. 877 (Tex. 1891); Harrell v. Houston, 17 S.W. 731 (Tex. 1886); Linney v. Wood, 17 S.W. 244 (Tex. 1886); Provident Nat'l Bank v. Webb, 128 S.W. 426 (Tex. App. 1910); Voight v. Raby, 20 S.E. 824 (Va. 1894); Gwynn v. Schwartz, 9 S.E. 880 (W. Va. 1889).*

(n74)Footnote 775. *Shelor v. Humble Oil & Ref. Co., 103 S.W.2d 207 (Tex. App. 1937).*

(n75)Footnote 776. *Peebles v. McDonald, 188 S.W.2d 289 (Ark. 1945).*

(n76)Footnote 777. *Smith v. Catlin Land & Imp. Co., 22 S.W. 1083 (Mo. 1893); Smith v. McCorkle, 16 S.W. 602 (Mo. 1891); Louisiana & Texas Lbr. Co. Dupuy, 113 S.W. 973 (Tex. App. 1908); Brown v. Milliner, 232 P.2d 202 (Utah 1951).*

(n77)Footnote 778. *Boyd v. Graves, 17 U.S. 513, 4 L. Ed. 628 (1819); Ingram v. Tucker, 152 S.W. 957 (Ky. 1913).*

(n78)Footnote 779. *Dudley v. Elkins, 39 N.H. 78 (1859).*

(n79)Footnote 780. *Warden v. Addington, 115 S.W. 241 (Ky. 1909).*

(n80)Footnote 781. *Euse v. Gibbs, 49 So. 2d 843 (Fla. 1951).*

(n81)Footnote 782. *See Sneed v. Osborn, 25 Cal. 619 (1864).*

(n82)Footnote 783. *Krutz v. Faught, 166 S.W.2d 655 (Ark. 1942)* (law favors boundary settlements); *Hunter v. Malone, 108 S.W. 709 (Tex. App. 1908).*

(n83)Footnote 784. *Muchenberger v. Santa Monica, 275 P. 803 (Cal. 1929).*

(n84)Footnote 785. *Orr v. Hadley, 36 N.H. 575 (1858).*

(n85)Footnote 786. *In re Freeman, 128 S.E. 404 (N.C. 1925).*

(n86)Footnote 787. *Cavanaugh v. Jackson, 27 P. 931 (Cal. 1891).*

(n87)Footnote 788. *See Seberg v. Iowa Trust & Sav. Bank, 119 N.W. 378 (Iowa 1909).*

(n88)Footnote 789. *Mitchell v. Brawley, 39 N.E. 497 (Ind. 1895). See Matthews v. French, 92 S.W. 634 (Mo. 1906).*

(n89)Footnote 790. *Lagow v. Glover, 14 S.W. 141 (Tex. 1890).*

(n90)Footnote 791. *O'Hara v. O'Brien, 40 P. 423 (Cal. 1895).*

(n91)Footnote 792. *Stembridge v. Britschu, 20 S.W. 278 (Ky. 1892); Brown v. Hodges, 65 S.E.2d 144 (N.C. 1951)* (holding that parol evidence could not be admitted to show that the adjoining landowners had agreed upon a line other than that set forth in the deeds).

(n92)Footnote 793. *Brown v. Hodges, 65 S.E.2d 144 (N.C. 1951).*

(n93)Footnote 794. *Yopp v. Aman, 193 S.E. 822 (N.C. 1937).*

(n94)Footnote 795. *Dudley v. Jeffress, 100 S.E. 253 (N.C. 1919).*

(n95)Footnote 796. *Draper v. Griffin, 142 P.2d 772 (Cal. App. 1943); Kunkle v. Clinkingbeard, 162 P.2d 892 (Idaho 1945)* (a tenant cannot bind his landlord to a practical location).

(n96)Footnote 797. *Martin v. Hobbs, 270 P.2d 1067 (Wash. 1954); Beck v. Loveland, 222 P.2d 1066 (Wash. 1950).*

(n97)Footnote 798. *McGinty v. Interstate Land & Imp. Co., 90 S.E.2d 42 (Ga. App. 1955).*

(n98)Footnote 799. *Alford v. Rodgers, 6 So. 2d 409 (Ala. 1942).*

(n99)Footnote 800. *Needham v. Collamer, 211 So. 2d 409 (Ala. 1942); McRae Land & Timber Co. v. Ziegler, 65 So. 2d 876 (Fla. 1953); Smith v. Lanier, 42 S.E.2d 495 (Ga. 1947); Bringardner Lbr. Co. v. Bingham, 251 S.W.2d 273 (Ky. 1952); Ekberg v. Bates, 239 P.2d 205 (Utah 1951); Scales v. Wood, 112 S.E.2d 670 (Ga. App. 1959)* (a parol agreement as to a boundary line is void). *Contra Clements v. Cox, 327 S.W.2d 83 (Ark. 1959)* (parol agreement may fix line).

(n100)Footnote 801. *Martin v. Lopes, 170 P.2d 881 (Cal. 1946).*

(n101)Footnote 802. *Thomas v. Harlan, 178 P.2d 965 (Wash. 1947); Home Owners Loan Corp. v. Dudley, 141 P.2d 160 (Utah 1943)* (a fence erected by the owner of both tracts is not a boundary line); *Johnson v. Szumowicz, 179*

P.2d 1012 (Wyo. 1947) (a fence built at a variance from the true line purely for convenience does not establish a new line).

(n102)Footnote 803. *Deery v. Cray, 77 U.S. 263, 19 L. Ed. 887 (1869); Parkman v. Ludlum, 69 So. 2d 434 (Ala. 1953)* (brick foundation and line of rotted fence posts marked boundary line); *Chambless v. Jones, 71 So. 987 (Ala. 1916); Shelton v. Malette, 301 P.2d 18* (Cal. 4 Dist. App. 1956) (fences may be considered monuments and may constitute an agreed line); *Stalcup v. Lingle, 131 N.E. 852 (Ind. App. 1921); McBeth v. White, 253 P. 212 (Kan. 1927); Warsaw v. Swearngen, 295 S.W.2d 174 (Mo. 1956)* (so also houses); *Martin v. Hays, 228 S.W. 741 (Mo. 1921); Borgeson v. Tubb, 172 P. 326 (Mont. 1918); Glenn v. Yoder, 339 P.2d 108 (Okla. 1959); Midland Valley R.R. v. Imler, 262 P. 1967 (Okla. 1927); Davis v. Lynham, 247 P. 294 (Utah 1926); Warren v. Mazzuchi, 148 P. 360 (Utah 1915); Windsor v. Sarsfield, 119 P. 1112 (Wash. 1912). Johnson v. Whelan, 98 P.2d 1103 (Okla. 1940),* overruling *Reynolds v. Wall, 72 P.2d 505 (Okla. 1937)* (in Oklahoma a holding by adjoining landowners for 15 years to a fence recognized by each as a boundary but not erected by either precluded each from denying this to be the true line).

(n103)Footnote 804. Scanlon v. Miller, No. C8-97-806 (Minn. App. 1997) (fence which had been in place without objection for 30 years held to be the boundary); *Salter v. Cobb, 88 So. 2d 845 (Ala. 1956); Bradley v. Burkhart, 115 N.W. 597 (Iowa 1908).*

(n104)Footnote 805. *Smith v. Hosmer, 7 N.H. 436 (1835).*

(n105)Footnote 806. *Lewallen v. Mays, 95 S.W.2d 1125 (Ky. 1936); York v. Horn, 315 P.2d 912 (Cal. App. 1957)* (fence maintained for 57 years implied a practical location); *Williams v. Pichard, 7 So. 2d 468 (Fla. 1942)* (fence erected on agreed boundary settles the line); *Hall v. Gayheart, 235 S.W.2d 1020 (Ky. 1951)* (mutual erection of a fence established the line); *Miskotten v. Drenten, 29 N.W.2d 91 (Mich. 1947).*

(n106)Footnote 807. *Caswell v. Faulk, 97 S.W.2d 341 (Tex. App. 1936); McPherson v. Blair, 273 S.W.2d 852 (Ark. 1934)* (use of division fence for more than 25 years' acquiescence established line in absence of contrary evidence); *Tull v. Ashcraft, 333 S.W.2d 490 (Ark. 1960)* (fence became boundary by acquiescence through many years);. *Dragos v. Russell, 237 P.2d 831 (Utah 1951)* (mutual erection of adjoining fence and holding to line for more than 30 years established boundary by acquiescence).

(n107)Footnote 808. *Copley v. Eade, 184 P.2d 698 (Cal. App. 1947); Eggers v. Mitchem, 34 N.W.2d 603 (Iowa 1948); O'Dell v. Hanson, 42 N.W.2d 86 (Iowa 1950).* Mere existence of a fence does not establish a boundary of itself; *Brown Paper Mill Co. v. Warnix, 259 S.W.2d 495 (Ark. 1953).* Fencing of a strip does not give color of title; *Blackburn v. Florida West Coast Land & Dev. Co., 109 So. 2d 413 (Fla. App. 1959), cert. denied, 114 So. 2d 3 (Fla. 1959).*

(n108)Footnote 809. *Cheeney v. Nebraska & C. Stone Co., 41 F. 740 (C.C. Colo. 1890); Evans v. Miller, 58 Miss. 120 (1880); Golterman v. Schiermeier, 28 S.W. 616 (Mo. 1894); Lemmon v. Hartsook, 80 Mo. 13 (1883).*

(n109)Footnote 810. *Talbot v. W.K. Smith Secur. Sav. & Trust Co., 107 P. 480 (Or. 1910).*

(n110)Footnote 811. *Mullaney v. Duffy, 33 N.E. 750 (Ill. 1893),* per Shope, J.: "Where the estoppel is sought to be established from the silence of a party who in equity and good conscience should have spoken, as it is here, if there be any ground of estoppel, it is essential that the party should have had knowledge of the facts, and the other party have been ignorant of the truth, and have been misled into doing that which he would not have done but for such silence."

(n111)Footnote 812. *Hefner v. Downing, 57 Tex. 576 (1882).*

(n112)Footnote 813. *Keller v. Harrison, 116 N.W. 327 (Iowa 1908).*

(n113)Footnote 814. *Fuelling v. Fuesse, 87 N.E. 700 (Ind. App. 1909).*

(n114)Footnote 815. *Snodgrass v. Snodgrass, 101 So. 837 (Ala. 1924).*

(n115)Footnote 816. *Hensley v. Lewis, 128 S.W.2d 917 (Ky. 1939); Duval County Ranch Co. v. Foster, 318 S.W.2d 25 (Tex. App. 1958).* But the parties may settle a disputed or uncertain line by agreement, *Webb v. Harris, 315 S.W.2d 274 (Tenn. App. 1958).*

(n116)Footnote 817. *Goodloe v. Gusmus, 97 So. 821 (Ala. 1923); Blackburn v. Coffee, 218 S.W. 836 (Ark. 1920); Waxelbaum v. Gunn, 104 S.E. 216 (Ga. 1920); Cassidy v. Lenahan, 128 N.E. 544 (Ill. 1920); Poleske v. Jones, 185 N.W. 917 (Iowa 1921); Fuller v. Stone, 226 P. 778 (Kan. 1924); Brookshire v. Hughes, 261 S.W. 1109 (Ky. 1924); Bradstreet v. Winter, 109 A. 482 (Me. 1920); Railsback v. Bowers, 257 S.W. 119 (Mo. 1923); Northern Pac. R.R. v. Cash, 216 P. 782 (Mont. 1923); Dawson v. Abbott, 114 S.E. 15 (N.C. 1922); Anderson v. Richards, 198 P. 570 (Or. 1921); Hutchinson v. Little Four Oil & Gas Co., 119 A. 534 (Pa. 1923); Gulf Oil Corp. v. Amazon Petroleum Corp., 152 S.W.2d 902 (Tex. App. 1941); Bowles v. Watson, 245 S.W. 120 (Tex. App. 1922); Bettack v. Conachen, 294 N.W. 57 (Wis. 1940); Wilson v. Stork, 177 N.W. 878 (Wis. 1920).*

(n117)Footnote 818. *Taylor v. Fomby, 22 So. 910 (Ala. 1897); Drew v. Mumford, 325 P.2d 240 (Cal. App. 1958)* (mere acquiescence in existence of a fence does not of itself amount to an agreement as to a boundary line); *Silver Creek Cement Corp. v. Union Lime & Cement Co., 35 N.E. 125 (Ind. 1893); Webster v. Shrine Temple Co., 117 N.W. 665 (Iowa 1908); Goldsborough v. Pidduck, 54 N.W. 431 (Iowa 1893); Mills v. Penny, 37 N.W. 135 (Iowa 1888); Skinner v. Crawford, 6 N.W. 144 (Iowa 1880); Grube v. Wells, 34 Iowa 148 (1872); Crawford v. Hebrew, 96 P. 348 (Kan. 1908); Preble v. Maine Cent. R.R., 27 A. 149 (Me. 1893); Foard v. McAnnelly, 114 S.W. 990 (Mo. 1908); Golterman v. Schiermeier, 28 S.W. 616 (Mo. 1894); Finch v. Ullman, 16 S.W. 863 (Mo. 1891); Skinker v. Haagsma, 12 S.W. 659 (Mo. 1889); Krider v. Milner, 12 S.W. 461 (Mo. 1889); Atchison v. Pease, 10 S.W. 159 (Mo. 1888); Schad v. Sharp, 8 S.W. 549 (Mo. 1888); Jacobs v. Moseley, 4 S.W. 135 (Mo. 1887); Acton v. Dooley, 74 Mo. 63 (1881); Walbrunn v. Ballen, 68 Mo. 164 (1878); Houx v. Batteen, 68 Mo. 84 (1878); Tamm v. Kellogg, 449 Mo. 118 (1871); Kincaid v. Dormey, 47 Mo. 337 (1871); Thomas v. Babb, 45 Mo. 384 (1870); St. Louis University v. McCune, 28 Mo. 481 (1859); Kimes v. Libby, 126 N.W. 869 (Neb. 1910); Bobo v. Richmond, 25 Ohio St. 115 (1874); McAfferty v. Conover, 7 Ohio St. 99 (1857); King v. Brigham, 31 P. 601 (Or. 1892); Malouf v. Fischer, 159 P.2d 881 (Utah 1945); Schaubuch v. Dillemuth, 60 S.W. 745 (Va. 1908); Lake Geneva Beach Ass'n v. Anderson, 18 N.W.2d 493 (Wis. 1945).*

(n118)Footnote 819. *Central Trust Co. of Wensboro v. Moffitt, 171 S.W.2d 21 (Ky. 1943).*

(n119)Footnote 820. *Hannah v. Pogue, 147 P.2d 572 (Cal. 1944).*

(n120)Footnote 821. *Starr v. Suckert, 209 N.W. 171 (Mich. 1926); Henderson v. Nelson, 284 S.W. 318 (Tex. App. 1926); Dragos v. Russell, 237 P.2d 831 (Utah 1951)* (recognition of fence as boundary for 30 years established a boundary by acquiescence).

(n121)Footnote 822. *Case v. Ericson, 258 P. 536 (Idaho 1927).*

(n122)Footnote 823. *Hanlon v. Ten Hove, 209 N.W. 169 (Mich. 1926).*

(n123)Footnote 824. *Hoffman v. Port Huron, 60 N.W. 831 (Mich. 1894); Mothershead v. Milfeld, 236 S.W.2d 343 (Mo. 1951).* Fence must be recognized as the boundary; *Tillman v. Hutcherson, 154 S.W.2d 104 (Mo. 1941); Home Owners Loan Corp. v. Dudley, 141 P.2d 160 (Utah 1943).*

(n124)Footnote 825. *Bradford v. Hume, 38 A. 143 (Me. 1897); Carpenter v. Monks, 45 N.W. 477 (Mich. 1890); Racine v. Emerson, 55 N.W. 177 (Wis. 1893).*

(n125)Footnote 826. *Wunnicke v. Dederich, 152 N.W. 139 (Wis. 1915).*

(n126)Footnote 827. *Wollman v. Ruehle, 80 N.W. 919 (Wis. 1899).*

(n127)Footnote 828. *Racine v. Emerson, 55 N.W. 177 (Wis. 1893).*

(n128)Footnote 829. *Bayhouse v. Urquides, 105 P. 1966 (Idaho 1909); Fylre v. Hartness, 229 P.2d 751 (Kan. 1951); Beckman v. Davidson, 39 N.E. 38 (Mass. 1894); Wolf Brick Co. v. Lonyo, 93 N.W. 251 (Mich. 1903); Borgeson v. Tubb, 172 P. 326 (Mont. 1918); Trussell v. Lewis, 14 N.W. 155 (Neb. 1882). But see Welch v. Haley, 64 S.E.2d 364 (Ga. App. 1951).*

(n129)Footnote 830. *Long v. Myers, 198 P. 934 (Kan. 1921); Ackerman v. Ryder, 271 S.W. 743 (Mo. 1925); Rieske v. Hoover, 177 P. 228 (Utah 1918).*

(n130)Footnote 831. *Ackerman v. Ryder, 271 S.W. 743 (Mo. 1925); Carstensen v. Brown, 236 P. 517 (Wyo. 1925).*

(n131)Footnote 832. *Alexander v. Wheeler, 78 Ala. 167 (1884); Brown v. Cockerell, 33 Ala. 38 (1858); Schmidt v. Williams, 203 P. 1975 (Idaho 1921); Carroll v. Rabberman, 88 N.E. 995 (Ill. 1909); Williams v. Bernstein, 25 So. 411 (La. 1899); Weber v. Detroit, 123 N.W. 540 (Mich. 1909); Krider v. Milner, 12 S.W. 461 (Mo. 1889); Jacobs v. Moseley, 4 S.W. 135 (Mo. 1887); Walbrunn v. Ballen, 68 Mo. 164 (1878); Kincaid v. Dormey, 47 Mo. 337 (1871); Ohme v. Thomas, 279 N.W. 480 (Neb. 1938); Hickey v. Daniel, 195 P. 812 (Or. 1921); Rieske v. Hoover, 177 P. 228 (Utah 1918); Hass v. Plantz, 14 N.W. 65 (Wis. 1882).*

(n132)Footnote 833. *Smith v. Hosmer, 7 N.H. 436 (1835).*

(n133)Footnote 834. *Smith v. Hosmer, 7 N.H. 436 (1835).*

(n134)Footnote 835. *Cleaveland v. Flagg, 58 Mass. 76 (1849).*

(n135)Footnote 836. *Hockmoth v. Des Grand Champs, 39 N.W. 737 (Mich. 1888). Pedersen v. Reynolds, 87 P.2d 51 (Cal. App. 1939)* (fence built to take advantage of natural contour does not create a boundary line).

(n136)Footnote 837. *Barret v. Kelley, 30 So. 824 (Ala. 1901); Goldsborough v. Pidduck, 54 N.W. 431 (Iowa 1893); Miller v. Mills County, 82 N.W. 1038 (Iowa 1900); Shotwell v. Gordon, 26 S.W. 341 (Mo. 1894); Brummell v. Harris, 50 S.W. 93 (Mo. 1899); Patton v. Smith, 71 S.W. 187 (Mo. 1902); Peters v. Reichenbach, 90 N.W. 184 (Wis. 1902).*

(n137)Footnote 838. *Chostner v. Schrock, 252 S.W. 381 (Mo. 1923).*

(n138)Footnote 839. *Gloyd v. Franck, 154 S.W. 744 (Mo. 1912).*

(n139)Footnote 840. *Nilson Bros. v. Kahn, 145 N.E. 340 (Ill. 1924).*

(n140)Footnote 841. *Pugh v. Schlindler, 86 N.W. 515 (Mich. 1901).*

(n141)Footnote 842. *Roberts v. Brae, 54 P.2d 698 (Cal. 1936); Rodgers v. Roseville Gold Dredging Co., 286 P.2d 536 (Cal. App. 1955)* (fences may be treated as monuments).

(n142)Footnote 843. *Florida State Tpk. Authority v. Anhoco Corp., 107 So. 2d 51 (Fla. App. 1958); Blalock v. Atwood, 157 S.W. 694 (Ky. 1913)* (conveyance bounded by way carries to the center unless a contrary intention appears from the deed or from the circumstances); *City Motel, Inc. v. State, 336 P.2d 375 (Nev. 1959)* (title was to center of railroad right-of-way); *Fleck v. Universal-Cyclops Steel Corp., 156 A.2d 832 (Pa. 1959)* (railroad is a "highway" under the rule that a description carries to the center of the highway); *Rio Bravo Oil Co. v. Weed, 50 S.W.2d 1080 (Tex. 1932), cert. denied, 288 U.S. 603, 53 S. Ct. 386, 77 L. Ed. 978 (1933)* (a description "to" the right-of-way line and "with" the right-of-way line carried to the center of the railroad right-of-way though it enlarged the quantity of land given, lengthened the side boundaries and required disregarding the plat).

(n143)Footnote 844. *Banks v. Ogden, 69 U.S. 57, 17 L. Ed. 818 (1864); Wilburton v. Swafford, 253 F.2d 479 (10th Cir. Okla. 1958); Herbert v. Rainey, 54 F. 248 (C.C.W.D. Pa. 1892); Brewer v. Avinger, 94 So. 590 (Ala. 1922); South & N. A. R.R. v. Davis, 64 So. 606 (Ala. 1914); Moore v. Johnston, 6 So. 50 (Ala. 1889); Columbus & W. R.R. v. Witherow, 3 So. 23 (Ala. 1887); McGee v. Swearengen, 109 S.W.2d 444 (Ark. 1937); Taylor v. Armstrong, 24 Ark. 102 (1863); MacNicol v. East Coalinga Oil Fields Corp., 140 P.2d 793 (Cal. 1943); Machado v. Title Guarantee & Trust Co., 99 P.2d 245 (Cal. 1940); Allan v. San Francisco, 61 P.2d 1175 (Cal. 1936); Jones v. Baumbach, 226 P. 400 (Cal. 1924); Fraser v. Ott, 30 P. 793 (Cal. 1892); Watkins v. Lynch, 11 P. 808 (Cal. 1886); Webber v. California & O. R.R., 51 Cal. 425 (1876); Pinsky v. Sloat, 279 P.2d 584 (Cal. App. 1955); Severo v. Pacheco, 170 P.2d 40 (Cal. App. 1946); Griest v. Amrhyn, 68 A. 521 (Conn. 1907); Gear v. Barnum, 37 Conn. 229 (1870); Champlin v. Pendleton, 13 Conn. 23 (1838); Chatham v. Brainerd, 11 Conn. 60 (1835); Watrous v. Southworth, 5 Conn. 305 (1824); Peck v. Smith, 1 Conn. 103 (1814); Brooks v. West Miami, 41 So. 2d 556 (Fla. 1949); New Fort Pierce Hotel Co. ex rel. Carlton v. Phoenix Tax Title Corp., 171 So. 525 (Fla. 1936); Smith v. Horn, 70 So. 435 (Fla. 1915); Jacksonville, T. & K. W. R.R. v. Lockwood, 15 So. 327 (Fla. 1894); Feig v. Graves, 100 So. 2d 192 (Fla. App. 1958); Silvey v. McCool, 12 S.E. 175 (Ga. 1890); Cicero v. Chicago, B. & Q. R.R., 110 N.E. 811 (Ill. 1915); La Salle Varnish Co. v. Glos, 98 N.E. 538 (Ill. 1912); Sullivan v. Atchison, T. & S. F. R.R., 95 N.E. 1081 (Ill. 1911); Henderson v. Hatterman, 34 N.E. 1041 (Ill. 1893); Montgomery v. Hinds, 33 N.E. 1100 (Ind. 1893); Hamilton County Comm'rs v. Indianapolis Natural Gas Co., 33 N.E. 972 (Ind. 1893); Warbritton v. Demorett, 27 N.E. 730 (Ind. 1891); Terre Haute & S. E. R.R. v. Rodel, 89 Ind. 128 (1883); Terre Haute & I. R.R. v. Scott, 74 Ind. 29 (1881); Cox v. Louisville, N. A. & C. R.R., 48 Ind. 178 (1881); Woolverton v. Miller, 148 N.E. 621 (Ind. App. 1925); Irvin v. Crammond, 108 N.E. 539 (Ind. App. 1915); Chicago, I. & L. R.R. v. Johnson, 162, 90 N.E. 507 (Ind. App. 1910); Bergan v. Cooperative Ice & Fuel Co., 84 N.E. 833 (Ind. App. 1908); Haslett v. New Albany, Belt & Terminal R.R., 34 N.E. 845 (Ind. App. 1893); Bowers v. Atchison, T. & S. F. R.R., 237 P. 913 (Kan. 1925); Henkenberns v. Hauck, 236 S.W.2d 703 (Ky. 1951); Matthews v. Hudson, 213 S.W.2d 424 (Ky. 1948); Henry v. Board of Trustees of Diocese, 270 S.W. 476 (Ky. 1925); Blalock v. Atwood, 157 S.W. 694 (Ky. 1913); Williams v. Johnson, 149 S.W. 821 (Ky. 1912); Jacob v. Woolfolk, 14 S.W. 415 (Ky. 1890); Hardison v. Jordan, 50 A.2d 447 (Me. 1946); Low v. Tibbetts, 72 Me. 92 (1881); Oxton v. Groves, 68 Me. 371 (1878); Cottle v. Young, 59 Me. 105 (1871); Sutherland v. Jackson, 32 Me. 80 (1850); Johnson v. Anderson, 18 Me. 76 (1841); Bucknam v. Bucknam, 12 Me. 463 (1835); Corey v. Carback, 94 A.2d 629 (Md. 1953); Callahan v. Clemens, 41 A.2d 473 (Md. 1945); Foreman v. Presbyterian Ass'n, 30 A. 1114 (Md. 1894); Rieman v. Baltimore, Belt R.R., 31 A. 444 (Md. 1895); Gump v. Sibley, 28 A. 977 (Md. 1894); Hunt v. Brown, 23 A. 912 (Md. 1890); Baltimore & O. R.R. v. Gould, 8 A. 754 (Md. 1887); Peabody Heights Co. v. Sadtler, 63 Md. 533 (1885); Suburban Land Co. v. Billerica, 49 N.E.2d 1012 (Mass. 1943); New York, N. H. & H. R.R. v. Cohasset Water Co., 103 N.E. 829 (Mass. 1914); Gould v. Eastern R.R., 7 N.E. 543 (Mass. 1886); Dodd v. Witt, 29 N.E. 45 (Mass. 1885); Pratt v. Quirk, 138 N.W. 38 (Minn. 1912); Gilbert v. Emerson, 61 N.W. 820 (Minn. 1895); Lamm v. Chicago St. P. M. & O. R.R., 47 N.W. 455 (Minn. 1890); Ellsworth v. Lord, 42 N.W. 389 (Minn. 1889); Rich v. Minneapolis, 35 N.W. 2 (Minn. 1887); In re Robbins, 24 N.W. 356 (Minn. 1885); Skrmetta v. Moore, 30 So. 2d 53 (Miss. 1947); Springfield ex rel. Koch v. Eisenmayer, 297 S.W. 460 (Mo. App. 1927); Snoddy v. Bolen, 24 S.W. 142 (Mo. 1893), on reh'g, 25 S.W. 932 (Mo. 1894); McPherson v. Monegan, 187 P.2d 542 (Mont. 1947)* (even though the deed described the land as following the south side of the road it did not overcome the presumption that the grantee owned to the center of the road); *Laconia v. Morin, 30 A.2d 479 (N.H. 1943); Wolff v. Veterans of Foreign Wars, 74 A.2d 253 (N.J. 1950)* (deed by city of lot owned by it carried to the center of the abutting street); *Wiedmer v. West Jersey & S. R.R., 119 A. 776 (N.J. Supp. 1923); Ayres v. Pennsylvania R.R., 20 A. 54 (N.J. Err. App. 1890); Dodge v. Pennsylvania R.R., 11 A. 751 (N.J. Ch. 1888), aff'd, 10 A. 622 (N.J. Err. App. 1889); Cordova v. Atrisco, 201 P.2d 996 (N.M. 1949); Nemet v. Edgemere Garage & Sales Co., 73 N.Y.S.2d 921 (1947); Curden v. Rochester Ro. Co., 25 N.Y.S. 114 (1893), aff'd, 28 N.Y.S. 1135 (1894); Bird v. New York, 125 N.Y.S. 1028 (N.Y.A.D. 1910); Holloway v. Southmayd, 34 N.E. 1047 (N.Y. 1893); Hennessy v. Murdock, 33 N.E. 330 (N.Y. 1893); In re Ladue, 23 N.E. 465 (N.Y. 1890); Cochran v. Smith, 26 N.Y.S. 103 (1893); Harris v. Carter, 127 S.E. 1 (N.C. 1925); Greenberg v. L.I. Snodgrass Co., 119 N.E.2d 292 (Ohio 1954); Finlaw v. Hunter, 96 N.E.2d 319 (Ohio App. 1949); Donough v. Mansfield Tel. Co., 32 N.E.2d 480 (Ohio App. 1937); Oklahoma City v. Local Federal Sav. & Loan Ass'n, 134 P.2d 565 (Okla. 1943); Cross v. Talbot, 254 P. 827 (Or. 1927); Rahn v. Hess, 106 A.2d 461 (Pa. 1954); Orginger v. Minnotte Bros. Co., 42 A.2d 413 (Pa. 1945); Clymer v. Roberts, 69 A. 548 (Pa. 1908); Firmstone v. Spaeter, 25 A. 41 (Pa. 1892); Kohler v. Kleppinger, 5 A. 750 (Pa. 1886); Dodson v. Hohenadel, 23 A. 1128 (Pa. 1892); Ott v. Kreiter, 1 A. 724 (Pa. 1885); Anthony v.*

Providence, 28 A. 766 (R.I. 1894); Healey v. Babbitt, 14 R.I. 533 (1884); Rushing v. Sellers, 81 S.E.2d 281 (S.C. 1954); Nashville v. Lawrence, 284 S.W. 882 (Tenn. 1926); Manziel v. Railroad Comm'n, 197 S.W.2d 490 (Tex. App. 1946); Lackner v. Bybee, 159 S.W.2d 215 (Tex. App. 1942); Cantley v. Gulf Production Co., 118 S.W.2d 448 (Tex. App. 1938); Texas Bitulithic Co. v. Warwick, 293 S.W. 160 (Tex. Comm'n App. 1927); *Williams v. Miller, 35 S.E.2d 127 (Va. 1945); Turner v. Davisson, 287 P.2d 726 (Wash. 1955); National Bank v. Johnson, 241 P. 458 (Wash. 1926); Andrews v. Youmans, 47 N.W. 304 (Wis. 1890); Jarstad v. Morgan, 4 N.W. 27 (Wis. 1880); Gove v. White, 20 Wis. 425 (1866); Milwaukee v. Milwaukee & B. R.R., 7 Wis. 85 (1859); Kimball v. Kenosha, 4 Wis. 321 (1855); Coumas v. Tanscontinental Garage, 230 P.2d 748 (Wyo. 1951). See Boston Five Cents Sav. Bank v. Massachusetts General Hosp., 152 N.E. 40 (Mass. 1926); Hunter v. Van Keuren, 224 N.Y.S. 153 (N.Y. Supp. 1927).* Deed in Maryland formerly did not carry to center of alley abutting on lot; *Arcadia Inv. Corp. v. Crown Cork & Seal Co., 57 A.2d 285 (Md. 1948).* Grant of a tract of land bordering on an easement carries with it all of the grantor's fee interest under the easement; *Cantley v. Gulf Production Co., 143 S.W.2d 912 (Tex. 1940). Contra, Haines v. McLean, 276 S.W.2d 777 (Tex. 1955)* (on basis of intent).

(n144)Footnote 845. *Banks v. Ogden, 69 U.S. 57, 17 L. Ed. 818 (1864).* Likewise where a private right-of-way is a boundary, a deed passes title to the center of the right-of-way; *Daviau v. Betourney, 88 N.E.2d 541 (Mass. 1949).*

(n145)Footnote 846. *Baltimore & O. R.R. v. Gould, 8 A. 754 (Md. 1887); Dexter v. Riverside & Oswego Mills, 15 N.Y.S. 274 (1891),* per Martin, J.; *In re Parkway, 103 N.E. 508 (N.Y. 1913).*

(n146)Footnote 847. *Gardner v. Amerada Petroleum Corp., 91 F. Supp. 134 (S.D. Tex. 1950)* (oil and gas lease went to center of the street); *Neff v. Ernst, 311 P.2d 849 (Cal. 1957)* (carries to center of highway unless clear countrary intent is manifest); *Seery v. Waterbury, 74 A. 908 (Conn. 1909); Henderson v. Hatterman, 34 N.E. 1041 (Ill. 1893); In re Robbins, 24 N.W. 356 (Minn. 1885); In re Ladue, 23 N.E. 465 (N.Y. 1890).*

(n147)Footnote 848. *State v. Armin, 173 S.W.2d 503 (Tex. App. 1943).*

(n148)Footnote 849. *Fordyce v. Hampton, 17 S.W.2d 869 (Ark. 1929); Bowers v. Atchison, T. & S. F. R.R., 237 P. 913 (Kan. 1925); Schneider v. Jacob, 5 S.W. 350 (Ky. 1887); Campeggi v. Wakefield, 145 A. 546 (Md. 1929); Loud v. Brooks, 217 N.W. 34 (Mich. 1928); Hunter v. Van Keuren, 224 N.Y.S. 153 (1927); Vanderbilt University v. Williams, 280 S.W. 689 (Tenn. 1926).*

(n149)Footnote 850. *Kassner v. Alexander Drug Co., 147 P.2d 979 (Okla. 1943). See American Steel & Wire Co. v. St. Louis, 190 S.W.2d 919 (Mo. 1945). Contra* intent must appear in the deed not from parol evidence, *Gee v. Swearengen, 109 S.W.2d 444 (Ark. 1937); Sawtelle v. Astor, 126 S.W.2d 367 (Tenn. App. 1938).* Treated, however, as a rule of intention, *Hensley v. Lewis, 128 S.W.2d 917 (Ky. 1939); Richard v. New Orleans, 197 So. 594 (La. 1940); Davis v. Girard, 196 A. 795 (R.I. 1938).*

(n150)Footnote 851. *Joslin v. State, 146 S.W.2d 208 (Tex. App. 1940).*

(n151)Footnote 852. *Machado v. Title Guarantee & Trust Co., 99 P.2d 245 (Cal. 1940); Suburban Land Co. v. Billerica, 49 N.E.2d 1012 (Mass. 1943).*

(n152)Footnote 853. *United States v. 5.324 Acres of Land, 79 F. Supp. 748 (S.D. Cal. 1948); Lindel Realty Co. v. Miller, 62 A.2d 817* (N.J. Super. Ch., 1948).

(n153)Footnote 854. *See Church v. Meeker, 34 Conn. 421 (1867); Jacksonville, T. & K. W. R.R. v. Lockwood, 15 So. 327 (Fla. 1897); Healey v. Babbitt, 14 R.I. 533 (1884).*

(n154)Footnote 855. *Paul v. Carver, 26 Pa. 223 (1856).*

(n155)Footnote 856. *Anthony v. Providence, 28 A. 766 (R.I. 1894).*

(n156)Footnote 857. *Johnson v. Grenell, 98 N.Y.S. 629 (N.Y A.D. 1906), aff'd, 81 N.E. 161 (N.Y. 1907).*

(n157)Footnote 858. *Henry v. Board of Trustees of Diocese, 270 S.W. 476 (Ky. 1925); White v. Jefferson, 124 N.W. 373 (Minn. 1910), aff'd, 125 N.W. 262 (Minn. 1910).*

(n158)Footnote 859. *Durbin v. Roanoke Bldg. Co., 60 S.E. 86 (Va. 1908).*

(n159)Footnote 860. *Kimball v. Kenosha, 4 Wis. 321 (1855).*

(n160)Footnote 861. *Durbin v. Roanoke Bldg. Co., 60 S.E. 86 (Va. 1908).*

(n161)Footnote 862. *Paul v. Carver, 26 Pa. 223 (1856).*

(n162)Footnote 863. *Taylor v. Armstrong, 24 Ark. 102 (1863).*

(n163)Footnote 864. *Nashville v. Lawrence, 284 S.W. 882 (Tenn. 1926).*

(n164)Footnote 865. *Bowers v. Atchison, T. & S. F. R.R., 237 P. 913 (Kan. 1925); Reynolds v. Refuge Planting Co., 97 So. 2d 101 (Miss. 1957)* (conveyance runs to center of stream, street or highway).

(n165)Footnote 866. *Helmer v. Castle, 109 Ill. 664 (1884).*

(n166)Footnote 867. *Mott v. Mott, 68 N.Y. 246 (1877).*

(n167)Footnote 868. *Wambeck v. Lovetri, 107 A.2d 395 (Conn. 1954)* (if owned by grantor). *Contra Seery v. Waterbury, 74 A. 908 (Conn. 1909); Callahan v. Clemens, 41 A.2d 473 (Md. 1945); Daviau v. Betourney, 88 N.E.2d 541 (Mass. 1949); Oklahoma City v. Local Federal Sav. & Loan Ass'n, 134 P.2d 565 (Okla. 1943); Walker v. Tanner, 275 S.W.2d 958 (Tenn. App. 1954). See Vanderbilt University v. Williams, 280 S.W. 689 (Tenn. 1926)* (express grant of easement as rebutting presumption); *Talbot v. Massachusetts Mut. Life Ins. Co., 14 S.E.2d 335 (Va. 1941).* In Pennsylvania, if the street is not a public one, the grantee takes title only to the edge with an easement over the bed, title to the bed remaining in the grantor, *Rahn v. Hess, 106 A.2d 461 (Pa. 1954).*

(n168)Footnote 869. *Federal Crude Oil Co. v. Yount-Lee Oil Co., 103 F.2d 171 (5th Cir. 1939), cert. denied, 308 U.S. 579, 60 S. Ct. 98, 84 L. Ed. 485 (1939); Afflick v. Pekin Wood Products Co., 131 F. Supp. 910 (E.D. Ark. 1955), aff'd, 228 F.2d 816 (8th Cir. 1956); Pyron v. Blanscet, 238 S.W.2d 636 (Ark. 1951)* (but not if intent of deed was to run only to the outer edge of an abandoned right-of-way); *New Orleans & N. E. R. v. Morrison, 35 So. 2d 68 (Miss. 1948); Hennick v. Kansas City So. R.R., 269 S.W.2d 646 (Mo. 1954); Eureka Real Estate & Inv. Co. v. Southern Real Estate & Financial Co., 200 S.W.2d 328 (Mo. 1947); Putnam v. Oklahoma City, 224 P.2d 270 (Okla. 1950); Oklahoma City v. Dobbins, 117 P.2d 132 (Okla. 1941); Cuneo v. Champlin Ref. Co., 62 P.2d 82 (Okla. 1936); Rio Bravo Oil Co. v. Weed, 50 S.W.2d 1080 (Tex. 1932), cert. denied, 288 U.S. 603, 53 S. Ct. 386, 77 L. Ed. 978 (1933); Boothe v. McLean, 267 S.W.2d 158 (Tex. App. 1954), rev'd, 276 S.W.2d 777 (Tex. 1955); Joslin v. State, 146 S.W.2d 208 (Tex. App. 1940). Contra, Stuart v. Fox, 152 A. 413 (Me. 1930), cert. denied, 284 U.S. 572, 52 S. Ct. 14, 76 L. Ed. 497 (1931).*

(n169)Footnote 870. *State v. Williams, 145 N.E.2d 373 (Ohio Com. Pl. 1957).*

(n170)Footnote 871. *Chickasha Cotton Oil Co. v. Mayaville, 249 F.2d 542 (10th Cir. Okla. 1957).*

(n171)Footnote 872. *Moore v. Johnston, 6 So. 50 (Ala. 1889); Gear v. Barnum, 37 Conn. 229 (1870); Cincinnati & G. R.R. v. Mims, 71 Ga. 240 (1884); Jacob v. Woolfolk, 14 S.W. 415 (Ky. 1890); Schneider v. Jacob, 5 S.W. 350 (Ky. 1887); Callahan v. Clemens, 41 A.2d 473 (Md. 1945); Albert v. Thomas, 20 A. 912 (Md. 1890); Boland v. St. Johns Schools, 39 N.E. 1035 (Mass. 1895); Gould v. Eastern R.R., 7 N.E. 543 (Mass. 1886); Hennessy v. Murdock, 33 N.E. 330 (N.Y. 1893); In re Ladue, 23 N.E. 465 (N.Y. 1890); Anthony v. Providence, 28 A. 766 (R.I. 1894).* That the rule does not apply to private streets. *See Sutherland v. Jackson, 32 Me. 80 (1850); Maryland Tel. & T. Co. v. Ruth, 68 A. 358*

(Md. 1907); Kaatz v. Curtis, 102 N.E. 424 (Mass. 1913); Wellington v. Cambridge, 100 N.E. 1096 (Mass. 1913); Gray v. Kelley, 80 N.E. 651 (Mass. 1907); Walker v. Walker, 33 A.2d 455 (Pa. Super. 1943); Saccone v. West End Trust Co., 73 A. 971 (Pa. 1909); Richmond v. Thompson, 81 S.E. 105 (Va. 1914).

(n172)Footnote 873. *Rogers v. Bollinger, 26 S.W. 12 (Ark. 1894); Kittle v. Pfeiffer, 22 Cal. 484 (1863); Guthrie v. New Haven, 31 Conn. 308 (1863); Winter v. Payne, 15 So. 211 (Fla. 1894); Garstang v. Davenport, 57 N.W. 876 (Iowa 1894); Pinkerton v. Randolph, 85 N.E. 892 (Mass. 1908); Trowbridge v. Ehrich, 84 N.E. 297 (N.Y. 1908); Snyder v. Monroe County, 153 N.Y.S.2d 479 (1956), aff'd, 175 N.Y.S.2d 1008 (N.Y.A.D. 1958); Durbin v. Roanoke Bldg. Co., 60 S.E. 86 (Va. 1908); Jarstad v. Morgan, 4 N.W. 27 (Wis. 1880). See Oklahoma City v. Local Federal Sav. & Loan Ass'n, 134 P.2d 565 (Okla. 1943).*

(n173)Footnote 874. *Banks v. Ogden, 69 U.S. 57, 17 L. Ed. 818 (1864); Herbert v. Rainey, 54 F. 248 (C.C.W.D. Pa. 1892), aff'd, 55 F. 443 (3d Cir. 1893); Currier v. Howes, 37 P. 521 (Cal. 1894); Archer v. Salinas City, 28 P. 839 (Cal. 1892); People v. Reed, 22 P. 474 (Cal. 1889); Stone v. Brooks, 35 Cal. 489 (1868); Plumer v. Johnson, 29 N.W. 687 (Mich. 1886); Hurley v. Mississippi Rum River Boom Co., 24 N.W. 917 (Minn. 1885); Stewart v. Perkins, 19 S.W. 989 (Mo. 1892); Faulkner v. Rocket, 80 A. 380* (R.I. 380). The principle of these cases is also recognized and applied in *McShane v. Moberly, 79 Mo. 41 (1883); Dill v. Board of Education, 20 A. 739 (N.J. Ch. 1890); Palmer v. East River Gas Co., 101 N.Y.S. 347 (N.Y.A.D. 1906); In re Ladue, 23 N.E. 465 (N.Y. 1890); Hicklin v. McClear, 22 P. 1057 (Or. 1889); Meier v. Portland Cable R.R., 19 P. 610 (Or. 1888); In re Ferguson's Appeal, 11 A. 885 (Pa. 1888).*

Vice-Chancellor Van Fleet stated it to be established that, where land was conveyed as abutting on a proposed street, before a public highway in fact existed there, and a way over such proposed street was essential to the beneficial enjoyment of the land granted, or even a desirable accessory to it, the implication was that, until the proposed street became an actual highway, the grantee had the use of it as a means of passage to and from his [or her] land; *Dodge v. Pennsylvania R.R., 11 A. 751 (N.J. Ch. 1888), aff'd, 19 A. 622* (N.J. Err. & App. 1889).

See White v. Tide-Water Oil Co., 25 A. 199 (N.J. Ch. 1892); Booraem v. North Hudson County R.R., 5 A. 106 (N.J. Err. & App. 1885); *Attorney General ex rel. Stickle v. Morris & E. R.R., 19 N.J. Eq. 386 (N.J. Ch. 1869), rev'd, 19 N.J. Eq. 575* (N.J. Err. & App. 1869), *rev'd, 20 N.J. Eq. 530 (1869).*

No one but the absolute owner of the land can dedicate land to a public use so as to pass the fee, and the dedication of land upon which there is a deed of trust is subject to be avoided by a sale under the deed. *McShane v. Moberly, 79 Mo. 41 (1883).* A conveyance describing land as bounded by the street corner extends to the center of the street; *Coumas v. Transcontinental Garage, 230 P.2d 748 (Wyo. 1951).*

(n174)Footnote 875. *Roach v. Tuscumbia, 52 So. 2d 141 (Ala. 1950).*

(n175)Footnote 876. *Pyron v. Blanscet, 238 S.W.2d 636 (Ark. 1951); Turner v. Davisson, 287 P.2d 726 (Wash. 1955)* (a deed does not carry title to the center of a vacated street).

(n176)Footnote 877. *Gyr v. Hagemann, 163 N.E.2d 620 (Ind. App. 1960)* (title runs to the center of the highway except where the conveyance manifests a contrary intention); *Gosstol Realty Corp. v. Gillman, 229 N.Y.S. 201 (N.Y.A.D. 1928).*

(n177)Footnote 878. *Brewer v. Avinger, 94 So. 590 (Ala. 1922); Seery v. Waterbury, 74 A. 908 (Conn. 1909); Gear v. Barnum, 37 Conn. 229 (1870); Peck v. Smith, 1 Conn. 103 (1814); Chicago & E. I. R.R. v. Willard, 92 N.E. 271 (Ill. 1910); Woolverton v. Miller, 148 N.E. 621 (Ind. App. 1925); Foreman v. Presbyterian Ass'n, 30 A. 1114 (Md. 1894); Baltimore & O. R.R. v. Gould, 8 A. 754 (Md. 1887); Peabody Heights Co. v. Sadtler, 63 Md. 533 (1885); Grant v. Moon, 30 S.W. 328 (Mo. 1895); Snoddy v. Bolen, 24 S.W. 142 (Mo. 1893); Oliver v. Ormsby, 73 A. 973 (Pa. 1909); Saccone v. West End Trust Co., 73 A. 971 (Pa. 1909); Anthony v. Providence, 28 A. 766 (R.I. 1894); Norcross v. Griffiths, 27 N.W. 606 (Wis. 1886).*

(n178)Footnote 879. *Champlin v. Pendleton, 13 Conn. 23 (1838); Thompson v. Maloney, 65 N.E. 236 (Ill. 1902); Jacob v. Woolfolk, 14 S.W. 415 (Ky. 1890); Low v. Tibbetts, 72 Me. 92 (1881); Cottle v. Young, 59 Me. 105 (1871); Palmer v. Dougherty, 33 Me. 502 (1851); Johnson v. Anderson, 18 Me. 76 (1841); Iron Mountain R.R. v. Bingham, 11 S.W. 705 (Tenn. 1889).*

(n179)Footnote 880. *Pinkerton v. Randolph, 85 N.E. 892 (Mass. 1908).*

(n180)Footnote 881. *Kneeland v. Van Valkenburgh, 1 N.W. 63 (Wis. 1879).*

(n181)Footnote 882. *Hoboken Land & Imp. Co. v. Kerrigan, 31 N.J.L. 13 (1864).*

(n182)Footnote 883. *Joy v. Kizziar, 38 P.2d 493 (Okla. 1934).*

(n183)Footnote 884. *Miller v. Rackley, 34 S.E.2d 438 (Ga. 1945); Rounds v. Ham, 88 A. 892 (Me. 1913); Gaylord v. King, 8 N.E. 596 (Mass. 1886); Hamlin v. Pairpoint Mfg. Co., 6 N.E. 531 (Mass. 1886); Riverside & Oswego Mills, 15 N.Y.S. 374 (1891), aff'd, 31 N.E. 627 (N.Y. 1892); In re Ladue, 23 N.E. 465 (N.Y. 1890); Obringer v. Minnotte Bros. Co., 42 A.2d 413 (Pa. 1945); Hughes v. Providence & W. R.R., 2 R.I. 508 (1853); Williams v. Miller, 35 S.E.2d 127 (Va. 1945).*

(n184)Footnote 885. *Banks v. Ogden, 69 U.S. 57, 17 L. Ed. 818 (1864); Smith v. Horn, 70 So. 435 (Fla. 1915); Thompson v. Maloney, 65 N.E. 236 (Ill. 1902); Henderson v. Hatterman, 34 N.E. 1041 (Ill. 1893); Jacob v. Woolfolk, 14 S.W. 415 (Ky. 1890); Warren v. Blake, 54 Me. 276 (1866); Palmer v. Dougherty, 33 Me. 502 (1851); Thomas v. Hunt, 35 S.W. 581 (Mo. 1896); Gosstol Realty Corp. v. Gillman, 229 N.Y.S. 201 (N.Y.A.D. 1928); Woolf v. Pierce, 103 N.E. 508 (N.Y. 1913); Iron Mountain R.R. v. Bingham, 11 S.W. 705 (Tenn. 1889); Schutze v. Dabney, 204 S.W. 342 (Tex. App. 1918), rev'd, 228 S.W. 176 (Tex. Com. App. 1921).*

(n185)Footnote 886. *Dean v. Lowell, 135 Mass. 55 (1883); Joslin v. State, 146 S.W.2d 208 (Tex. App. 1940); Brown v. Hodges, 61 S.E.2d 603 (N.C. 1950), reh. den., 65 S.E.2d 144 (1951)* (parol evidence will not lie to show that a highway described as a boundary has been changed since the time of the original description).

(n186)Footnote 887. *Gray v. Kelley, 80 N.E. 651 (Mass. 1907).*

(n187)Footnote 888. *Graham v. Stern, 61 N.E. 891 (N.Y. 1901).*

(n188)Footnote 889. *Seery v. Waterbury, 74 A. 908 (Conn. 1909); White v. Jefferson, 124 N.W. 373 (Minn. 1910), 125 N.W. 262 (Minn. 1910); In re Parkway, 103 N.E. 508 (N.Y. 1913); Norcross v. Griffiths, 27 N.W. 606 (Wis. 1886).*

(n189)Footnote 890. *In re Tremont Ave., 130 N.Y.S. 510 (1911).*

(n190)Footnote 891. *Gaylord v. King, 8 N.E. 596 (Mass. 1886); Graham v. Stern, 61 N.E. 891 (N.Y. 1901).*

(n191)Footnote 892. *Nashville v. Lawrence, 284 S.W. 882 (Tenn. 1926).*

(n192)Footnote 893. *Gear v. Barnum, 37 Conn. 229 (1870); Champlin v. Pendleton, 13 Conn. 23 (1838).*

(n193)Footnote 894. *Dickinson v. Arkansas City Imp. Co., 92 S.W. 21 (Ark. 1906); Gear v. Barnum, 37 Conn. 229 (1870); Henderson v. Hatterman, 34 N.E. 1041 (Ill. 1893).*

(n194)Footnote 895. *Suburban Land Co. v. Billerica, 49 N.E.2d 1012 (Mass. 1943); Bradley v. Spokane & I. E. R.R., 140 P. 688 (Wash. 1914). See Neil v. Independent Realty Co., 298 S.W. 363 (Mo. 1927).*

(n195)Footnote 896. *Taylor v. Armstrong, 24 Ark. 102 (1863); Wait v. May, 51 N.W. 471 (Minn. 1892); In re Robbins, 24 N.W. 356 (Minn. 1885); Thomas v. Hunt, 35 S.W. 581 (Mo. 1896); Snoddy v. Bolen, 24 S.W. 142 (Mo.*

1893); Smith v. Furbish, 44 A. 398 (N.H. 1894); Johnson v. Grenell, 81 N.E. 161 (N.Y. 1907); Haberman v. Baker, 28 N.E. 370 (N.Y. 1891); Healey v. Babbitt, 14 R.I. 533 (1884); Norcross v. Griffiths, 27 N.W. 606 (Wis. 1886).

(n196)Footnote 897. *Taylor v. Armstrong, 24 Ark. 102 (1863); Gifford v. Horton, 103 P. 988 (Wash. 1909).*

(n197)Footnote 898. *Irvin v. Crammond, 108 N.E. 539 (Ind. App. 1915).*

(n198)Footnote 899. *Delachaise v. Maginnis, 11 So. 715 (La. 1892); Gifford v. Horton, 103 P. 988 (Wash. 1909).*

(n199)Footnote 900. *Brisbine v. St. Paul & S. C. R.R., 23 Minn. 114 (1876).*

(n200)Footnote 901. *Empenger v. Fairley, 137 N.W. 1110 (Minn. 1912).*

(n201)Footnote 902. *Cocke v. Texas & N. O. R.R., 103 S.W. 407 (Tex. App. 1907).*

(n202)Footnote 903. *Auburn & S. R.R. v. Hoadley, 195 N.Y.S. 517 (1922), aff'd, 198 N.Y.S. 899* (N.Y.A.D. 4 Dept. 1923).

(n203)Footnote 904. *United States Fidelity & Guaranty Co. v. Dempster, 133 A. 723 (Md. 1926); Gerbig v. Zumpano, 177 N.Y.S.2d 969 (1958), aff'd, 182 N.Y.S.2d 1016 (N.Y.A.D. 1959), rev'd, 165 N.E.2d 178 (N.Y. 1960); Hill v. Cunningham, 329 P.2d 1034 (Okla. 1958)* (where the grantor owned land on both sides of the railroad right-of-way and she conveyed the portion west of the right-of-way she did not convey the fee under the right-of-way west of the center line).

(n204)Footnote 905. *Kneeland v. Van Valkenburgh, 1 N.W. 63 (Wis. 1879).*

(n205)Footnote 906. *Chadwick v. Davis, 8 N.E. 601 (Mass. 1886); Broadsword v. Kauer, 120 N.E.2d 111 (Ohio 1954)* (where one owns a corner formed by two intersecting highways, one's boundary is determined by a line drawn parallel with the center of the highways at a distance of one-half the known width of the highways).

(n206)Footnote 907. *Chadwick v. Davis, 8 N.E. 601 (Mass. 1886).*

(n207)Footnote 908. *Rieman v. Baltimore Belt R.R., 31 A. 444 (Md. 1895); Kehres v. New York, 147 N.Y.S. 825* (N.Y.A.D. 2 Dept. 1914); *Tietjen v. Palmer, 105 N.Y.S. 790* (N.Y.A.D. 2 Dept. 1907). *See Holloway v. Delano, 18 N.Y.S. 704 (1892), aff'd, 34 N.E. 1052 (1893); Cochran v. Smith, 26 N.Y.S. 103 (1893); Wegge v. Madler, 109 N.W. 223 (Wis. 1906).*

(n208)Footnote 909. *Baltimore & O. R.R. v. Gould, 8 A. 754 (Md. 1887).*

(n209)Footnote 910. *Moody v. Palmer, 50 Cal 31 (1875); Gear v. Barnum, 37 Conn. 229 (1870); Peck v. Smith, 1 Conn. 103 (1814); Long v. Faulkner, 108 S.E. 370 (Ga. 1921); Henderson v. Hatterman, 34 N.E. 1041 (Ill. 1893); Irvin v. Crammond, 108 N.E. 539 (Ind. App. 1915); Georgetown v. Lynn, 178 S.W. 1085 (Ky. 1915); Warren v. Thomaston, 75 Me. 329 (1883); Oxton v. Groves, 68 Me. 371 (1878); Cottle v. Young, 59 Me. 105 (1871); Hunt v. Rich, 38 Me. 195 (1854); Johnson v. Anderson, 18 Me. 76 (1841); Pinkerton v. Randolph, 85 N.E. 892 (Mass. 1908); Gould v. Wagner, 82 N.E. 10 (Mass. 1907); Gould v. Eastern R.R., 7 N.E. 543 (Mass. 1886); Laconia v. Morin, 30 A.2d 479 (N.H. 1943); Obringer v. Minnotte Bros Co., 42 A.2d 413 (Pa. 1945); State v. Arnim, 173 S.W.2d 503 (Tex. App. 1943); Lackner v. Bybee, 159 S.W.2d 215 (Tex. App. 1942); Cogito v. Dart, 33 S.E.2d 759 (Va. 1945); Durbin v. Roanoke Bldg. Co., 60 S.E. 86 (Va. 1908). See Wiedmer v. West Jersey & S. R.R., 119 A. 776 (N.J. Supp. 1923).*

(n210)Footnote 911. *Gould v. Wagner, 82 N.E. 10 (Mass. 1907); State v. Williams, 335 S.W.2d 834 (Tex. 1960)* (where description ran along a highway, title ran to the center absent any language retaining an interest in the highway in the grantor); *Chicago & E. I. R.R. v. Willard, 92 N.E. 271 (Ill. 1910)* (a description in a right-of-way deed 50 feet on each side of a survey line, which included 4 feet of a highway, did not run to the center of the highway since it was

"subject to the public road as it now runs").

(n211)Footnote 912. *Prall v. Burckhartt, 132 N.E. 280 (Ill. 1921); State v. Williams, 335 S.W.2d 834 (Tex. 1960)* (the fact that the metes and bounds run only to the external boundary of the highway does not prevent the deed running to the center); *Berton v. All Persons, 170 P. 151 (Cal. 1917)* ("to and along Frank's Place" did not run to the center of the street). *Contra, Salter v. Jonas, 39 N.J.L. 469 (1877)* (as running to the center).

(n212)Footnote 913. *Baltimore & O. R.R. v. Gould, 8 A. 754 (Md. 1887).*

(n213)Footnote 914. *De Baun v. Pardee, 139 N.Y.S. 1077 (1913), aff'd, 153 N.Y.S. 1111 (N.Y.A.D. 1915).*

(n214)Footnote 915. *Merchant v. Grant, 147 P. 484 (Cal. App. 1915); Norcross v. Griffiths, 27 N.W. 606 (Wis. 1886).*

(n215)Footnote 916. *Low v. Tibbetts, 72 Me. 92 (1881); Foreman v. Presbyterian Ass'n, 30 A. 1114 (Md. 1894).*

(n216)Footnote 917. In re Parkeway in the *City of New York, 103 N.E. 508 (N.Y. 1913).*

(n217)Footnote 918. *Dean v. Lowell, 135 Mass. 55 (1883).*

(n218)Footnote 919. *Treat v. Joslyn, 29 N.E. 653 (Mass. 1885).*

(n219)Footnote 920. *Alameda Macadamizing Co. v. Williams, 12 P. 530 (Cal. 1886); Gould v. Howe, 23 N.E. 602 (Ill. 1890); Jacob v. Woolfolk, 14 S.W. 415 (Ky. 1890); Schneider v. Jacob, 5 S.W. 350 (Ky. 1887); Brown v. Oregon Short Line R.R., 102 P. 740 (Utah 1909).*

(n220)Footnote 921. *Paine v. Consumers Forwarding & Storage Co., 71 F. 626 (6th Cir. 1895); Johnson v. Arnold, 18 S.E. 370 (Ga. 1893); Hamilton v. Chicago, B. & O. R. R.R., 15 N.E. 854 (Ill. 1888); Loud v. Brooks, 217 N.W. 34 (Mich. 1928).*

(n221)Footnote 922. *Baker v. Mott, 28 N.Y.S. 968 (1894), aff'd, 46 N.E. 1144 (N.Y. 1897).*

(n222)Footnote 923. *In re Schmeidel's Estate, 137 N.W. 110 (Minn. 1912); Felin v. Philadelphia, 88 A. 421 (Pa. 1913).*

(n223)Footnote 924. *Ledbetter v. Great Falls, 213 P.2d 246 (Mont. 1949).*

(n224)Footnote 925. *Union Coal Co. v. La Salle, 26 N.E. 506 (Ill. 1891); Des Moines v. Hall, 24 Iowa 234 (1868). See People ex rel. Hoffmaster v. La Duc, 46 N.W.2d 442 (Mich. 1951).* It may be observed that an entirely different construction has been given to the statutes of Wisconsin and Minnesota concerning town plats, which statutes are said to be the same as that of *Illinois. Schurmeier v. St. Paul & P. R.R., 10 Minn. 82 (1865), aff'd, 74 U.S. 272, 19 L. Ed. 74 (1868); Kimball v. Kenosha, 4 Wis. 321 (1855). See Snoddy v. Bolen, 24 S.W. 142 (Mo. 1893), reh'g, 25 S.W. 932 (1894); Milwaukee v. Milwaukee & B. R.R., 7 Wis. 85 (1859).*

(n225)Footnote 926. *Ferrenbach v. Turner, 86 Mo. 416 (1871); Price v. Thompson, 48 Mo. 361 (1894).*

(n226)Footnote 927. *Tatum v. St. Louis, 28 S.W. 1002 (Mo. 1894).*

(n227)Footnote 928. *Roach v. Tuscumbia, 52 So. 2d 141 (Ala. 1950).*

(n228)Footnote 929. *Afflick v. Pekin Wood Products Co., 131 F. Supp. 910 (E.D. Ark. 1955), aff'd, 228 F.2d 816 (8th Cir. Ark. 1956).*

(n229)Footnote 930. *Johnson v. Arnold, 18 S.E. 370 (Ga. 1893); Jacob v. Woolfolk, 14 S.W. 415 (Ky. 1890);*

Anthony v. Providence, 28 A. 766 (R.I. 1894). Contra McGee v. Swearengen, 109 S.W.2d 444 (Ark. 1937) (rule is applicable only to streets and alleys existing at the time of conveyance); *Elliott v. McIntosh, 183 P. 692 (Cal. App. 1919)* (way is only a protected one); *Southerland v. Jackson, 30 Me. 462 (1849).*

(n230)Footnote 931. *Paine v. Consumers F. & S. Co., 71 F. 626 (6th Cir. 1895)* (holding the line runs to the center). *Contra White v. Jefferson, 124 N.W. 373 (Minn. 1910), reargument denied, 125 N.W. 262 (Minn. 1910).*

(n231)Footnote 932. *Cantley v. Gulf Production Co., 118 S.W.2d 448 (Tex. App. 1938), aff'd, 143 S.W.2d 912 (Tex. 1940).* If the street has never been opened up the deed runs only to the exterior line since the owner of the land may desire to convert it to other uses. *Elliott v. McIntosh, 183 P. 692 (Cal. App. 1919); Bangor House Proprietary v. Brown, 33 Me. 309 (1851); Hawkes v. Philadelphia, 107 A. 747 (Pa. 1919).*

(n232)Footnote 933. *Cantley v. Gulf Production Co., 118 S.W.2d 448 (Tex. App. 1938), aff'd, 143 S.W.2d 912 (Tex. 1940).*

(n233)Footnote 934. *Malone v. Jones, 100 So. 831 (Ala. 1924); Crute v. Hyatt, 249 S.W.2d 116 (Ark. 1952); Roger v. Struven, 186 P. 817 (Cal. App. 1919); Buckley v. Maxson, 181 A. 922 (Conn. 1935); Betley v. Bordy ConstR.R., 115 A.2d 475 (Del. Ch. 1955); Gibson v. Gross, 84 S.E. 373 (Ga. 1915); Talbert v. Mason, 113 N.W. 918 (Iowa 1907); Riley v. Stein, 32 P. 947 (Kan. 1893); Walling v. Eggers, 78 S.W. 428 (Ky. 1904). But see* following cases: *Young v. Braman, 75 A. 120 (Me. 1909); State v. Clements, 32 Me. 279 (1850); Moale v. Baltimore, 5 Md. 314 (1854); Casella v. Sneirson, 89 N.E.2d 8 (Mass. 1949); Karrer v. Berry, 6 N.W. 853 (Mich. 1880); Long v. Fewer, 54 N.W. 1071 (Minn. 1893); McPherson v. Monegan, 187 P.2d 542 (Mont. 1947); National Silk Dyeing Co. v. Grobart, 175 A. 91 (N.J. Ch. 1934); Hughes v. Lippincott, 245 P.2d 390 (N.M. 1952); In re Brook Avenue, 58 N.Y.S. 163* (N.Y.A.D. 1 Dept. 1899), *aff'd, 55 N.E. 1093 (N.Y. 1899); In re 31st Patterson Ave., 273 N.Y.S. 757 (1934); Hawkes v. Philadelphia, 107 A.2d 747 (Pa. Super. 1954); Wolf v. Brass, 12 S.W. 159 (Tex. 1888); Gish v. Roanoke, 89 S.E. 970 (Va. 1916).*

(n234)Footnote 935. *Ralph v. Clifford, 112 N.E. 482 (Mass. 1916); Green v. Barbee, 76 S.E.2d 307 (N.C. 1953).*

(n235)Footnote 936. *Harris v. Harris, 177 So. 330 (Ala. 1937); Turner v. Howser, 60 S.E.2d 505 (Ga. App. 1950); Shireman v. Null, 212 S.W.2d 277 (Ky. 1948); Jackson v. Davis, 43 So. 2d 494 (La. App. 1949); Smith v. Benson, 40 S.E.2d 451 (N.C. 1946).*

(n236)Footnote 937. *Milligan v. Hale, 76 S.E.2d 29 (Ga. App. 1953).*

(n237)Footnote 938. *West Virginia Pulp & Paper Co. v. Dodrill, 221 F. 780 (N.D. W. Va. 1915); Boone v. Robinson, 152 S.W. 753 (Ky. 1913); Cullen v. Ksiaszkiewiez, 118 N.W. 496 (Mich. 1908); Dolan v. Smith, 110 N.W. 932 (Mich. 1907); Wilson v. Hart, 12 S.W. 249 (Mo. 1889); Andrews v. Brown, 108 P. 184 (Or. 1910); Deane v. Turner, 74 S.E. 165 (Va. 1912); Struntz v. Hood, 107 P. 253 (Wash. 1910). See* in general: *Muck v. Weyerhaeuser Timber Co., 273 F. 469 (9th Cir. 1921), cert. denied, 257 U.S. 645, 42 S. Ct. 55, 66 L. Ed. 414 (1921); Camp v. Dunnavent, 109 So. 362 (Ala. 1926); Maull v. Lindsley, 84 So. 92 (Fla. 1920); Georgia Peruvian Ochre Co. v. Cherokee Ochre Co., 108 S.E. 609 (Ga. 1921); Warner v. Noble, 282 N.W. 855 (Mich. 1938); Middleton v. Howell, 90 So. 725 (Miss. 1922); Uxbridge Co. v. Poppenheim, 133 S.E. 461 (S.C. 1926); Viall v. Hurley, 11 A. 395 (Vt. 1920); Duty v. Honaker Lbr. Co., 108 S.E. 863 (Va. 1921); Mylius v. Arnold, 128 S.E. 737 (W. Va. 1925).*

(n238)Footnote 939. *West Virginia Pulp & Paper Co. v. Dodrill, 221 F. 780 (N.D. W. Va. 1915); Darst v. Lang, 10 N.E.2d 659 (Ill. 1937); Dolan v. Smith, 110 N.W. 932 (Mich. 1907); McGinty v. Interstate Land & Imp. Co., 90 S.E.2d 42 (Ga. App. 1955)* (in Georgia processioners may not establish new lines but must trace and mark anew old lines).

(n239)Footnote 940. *Wood v. Foster, 157 So. 863 (Ala. 1934).*

(n240)Footnote 941. *Irwin Fishing & Hunting Club v. Cobb, 179 So. 183 (Ala. 1938).*

(n241)Footnote 942. *Holder v. Taylor, 172 So. 761 (Ala. 1937).*

(n242)Footnote 943. *Susi v. Davis, 177 A. 610 (Me. 1935). Wareham Sav. Bank v. Partridge, 56 N.E.2d 867 (Mass. 1944); Goode v. Riley, 28 N.E. 228 (Mass. 1891)* (in Massachusetts the description in a deed may be reformed to include less land but may not in the absence of additional factors be reformed to include more land); *Andrews v. Charon, 193 N.E. 737 (Mass. 1935)* (the statute of frauds will be avoided, however, and the deed reformed if there has been sufficient change in the plaintiff's position).

(n243)Footnote 944. *Erie Basin Imp. Co. v. Smith, 120 N.Y.S. 323 (N.Y.A.D. 1909).*

(n244)Footnote 945. *Hunter v. Carroll, 15 A. 17 (N.H. 1988).*

(n245)Footnote 946. *Struntz v. Hood, 107 P. 352 (Wash. 1910).*

(n246)Footnote 947. *Calhoun v. Edwards, 42 S.E.2d 426 (Ga. 1947); Elasser v. Szymanski, 77 N.W.2d 815 (Neb. 1956); McDowell v. Carothers, 146 P. 800 (Or. 1915); Columbia City Land Co. v. Ruhl, 134 P. 1035 (Or. 1913), 141 P. 208 (1914).*

(n247)Footnote 948. *Fancher v. Prock, 88 S.W.2d 179 (Mo. 1935).*

(n248)Footnote 949. *Long v. Chapman, 151 So. 2d 879 (Tex. App. 1941).*

(n249)Footnote 950. *Whitlow v. Moore, 21 So. 2d 253 (Ala. 1945); Vance v. Pritchard, 10 S.E.2d 725 (N.C. 1940); Overton v. Chadwick, 7 S.E.2d 632 (S.C. 1940).*

(n250)Footnote 951. *Turner v. Spicer, 249 S.W. 1038 (Ky. 1923); Bell v. Casey, 108 S.W. 261 (Ky. 1908); Robbs v. Woolfolk, 224 S.W. 232 (Tex. App. 1920). See Rottman v. Toft, 204 N.W. 585 (Wis. 1925).*

(n251)Footnote 952. *Hill v. Walker, 140 S.W. 1159 (Tex. App. 1911).*

(n252)Footnote 953. *Robbs v. Woolfolk, 224 S.W. 232 (Tex. App. 1920).*

(n253)Footnote 954. *Hopper v. Hickam, 69 S.W. 297 (Mo. 1902).*

(n254)Footnote 955. *Goodridge v. Dustin, 46 Mass. 363 (1842).*

(n255)Footnote 956. *Robbs v. Woolfolk, 224 S.W. 232 (Tex. App. 1920).*

(n256)Footnote 957. *Allen v. Hickam, 56 S.W. 309 (Mo. 1900).*

(n257)Footnote 958. *Scrivner v. Johnson, 265 S.W. 647 (Ark. 1924).*

(n258)Footnote 959. *Turner v. Spicer, 249 S.W. 1038 (Ky. 1923); Clare v. Drexler, 110 S.E. 176 (Ga. 1921)* (order made by agreement of adjoining owners, appointing surveyor to run boundary line, held not to have submitted case to him as arbiter or umpire, so as to make line run by him conclusive).

(n259)Footnote 960. *Thayer v. Bacon, 85 Mass. 163 (1861).*

(n260)Footnote 961. *Watrous v. Morrison, 14 So. 805 (Fla. 1894).*

(n261)Footnote 962. *Camp v. Camp, 10 A. 748 (Vt. 1887).*

(n262)Footnote 963. *Thayer v. Bacon, 85 Mass. 163 (1861).*

(n263)Footnote 964. *Kampmann v. Heintz, 24 S.W. 329 (Tex. App. 1893).*

(n264)Footnote 965. *McNeil v. Hadden, 76 So. 2d 160 (Ala. 1954); Stark v. Frayer, 67 So. 2d 237 (Fla. 1953); Brooks v. Michos, 35 N.W.2d 153 (Mich. 1948); Hill v. Walker, 140 S.W. 1159 (Tex. App. 1911); Curtis v. O'Brien, 84 A.2d 584 (Vt. 1951); Kertesz v. Falgiano, 84 S.E.2d 744 (W. Va. 1954). See Krutz v. Faught, 166 S.W.2d 655 (Ark. 1942); Cliett v. Metropolitan Life Ins. Co., 24 S.E.2d 59 (Ga. 1943).*

(n265)Footnote 966. *Anderson v. Huebel, 113 N.W. 975 (Wis. 1907).*

(n266)Footnote 967. *Warsaw v. Swearngin, 295 S.W.2d 174 (Mo. 1956); McWhorter v. Ballou, 221 S.W.2d 667 (Ky. 1949)* (records of former suits are admissible in evidence in action covering disputed corner); *Marvel v. Regienus, 108 N.E.2d 545 (Mass. 1952); Engquist v. Wirtjes, 68 N.W.2d 412 (Minn. 1955); Angelina County Lbr. Co. v. McKnight, 265 S.W.2d 246 (Tex. App. 1954)* (parol evidence is admissible to locate monument or corner); *Boehreinger v. Creighton, 10 Or. 42 (1881)* (parol evidence permitted to show location of beginning stakes).

(n267)Footnote 968. *Deaton v. Swanson, 28 S.E.2d 126 (Ga. 1943).* Extrinsic evidence is admissible to explain boundary calls; *Warsaw v. Swearngin, 295 S.W.2d 174 (Mo. 1956).*

(n268)Footnote 969. *Clement v. Packer, 125 U.S. 309, 8 S. Ct. 907, 31 L. Ed. 721 (1888); Hunnicutt v. Peyton, 102 U.S. 333, 26 L. Ed. 113 (1880); Boardman v. Reed, 31 U.S. 328 (1832); Betts v. Gahagan, 212 F. 120 (4th Cir. 1914); England v. Scott, 166 S.W.2d 1014 (Ark. 1942); Sharp v. Blankenship, 21 P. 842 (Cal. 1889); McLeod v. Swain, 13 S.E. 315 (Ga. 1891); Towner v. Thompson, 9 S.E. 672 (Ga. 1889); Scott v. Means & Russell Iron Co., 18 S.W. 1012 (Ky. 1892), 19 S.W. 189 (Ky. 1892); Simpson v. Blaisdell, 27 A. 101 (Me. 1892); Royal v. Chandler, 21 A. 842 (Me. 1891); Tuftonboro v. Willard, 197 A. 404 (N.H. 1938); Lawrence v. Tennant, 15 A. 543 (N.H. 1888); Partridge v. Russell, 2 N.Y.S. 529 (1888); Broadwell v. Morgan, 55 S.E. 340 (N.C. 1906); Roberts v. Preston, 6 S.E. 574 (N.C. 1888); Boyd v. Ducktown Chem. & Iron Co., 89 S.W.2d 360 (Tenn. App. 1935); Windus v. James, 19 S.W. 873 (Tex. 1892); Johnson v. Archibald, 14 S.W. 266 (Tex. 1890); Whitman v. Haywood, 14 S.W. 166 (Tex. 1890).*

(n269)Footnote 970. *Cockrell v. Work, 94 S.W.2d 784 (Tex. App. 1936).*

(n270)Footnote 971. *Resseau v. Bland, 491 S.E.2d 809 (Ga. 1997)* (witness's testimony about rock formation on disputed property based on what she was told by decedent was admissible); *Cadwalader v. Price, 73 A. 273 (Md. 1909); Table Rock Lbr. Co. v. Branch, 63 S.E. 948 (N.C. 1909); Turner Falls Lbr. Co. v. Burns, 45 A. 896 (Vt. 1899).*

(n271)Footnote 972. *Cadwalader v. Price, 73 A. 273 (Md. 1909); Keefe v. Sullivan County R.R., 71 A. 379 (N.H. 1908).*

(n272)Footnote 973. *Turner Falls Lbr. Co. v. Burns, 45 A. 896 (Vt. 1899).*

(n273)Footnote 974. *Daggett v. Shaw, 46 Mass. 223 (1842); Wood v. Foster, 90 Mass. 24 (1864).*

(n274)Footnote 975. *Chrisco v. Yow, 69 S.E. 422 (N.C. 1910); Corbleys v. Ripley, 22 W. Va. 154 (1883).*

(n275)Footnote 976. *Turgeon v. Woodward, 78 A. 577 (Conn. 1910); Peters v. Tilghman, 73 A. 726 (Md. 1909); Corbleys v. Ripley, 22 W. Va. 154 (1883).*

(n276)Footnote 977. *Chapman v. Twitchell, 37 Me. 39 (1854); Partridge v. Russell, 2 N.Y.S. 529 (1888); Taylor v. Glenn, 7 S.E. 483 (S.C. 1888).*

(n277)Footnote 978. *Hunnicutt v. Peyton, 102 U.S. 333, 26 L. Ed. 113 (1880); Lemmon v. Hartsook, 80 Mo. 13 (1883); Curtis v. Aaronson, 7 A. 886 (N.J. Supp. 1887).*

(n278)Footnote 979. *Wilson Wood & Lbr. Co. v. Hinton, 86 S.E. 494 (N.C. 1915).*

(n279)Footnote 980. *Hunnicutt v. Peyton, 102 U.S. 333, 26 L. Ed. 113 (1880).*

(n280)Footnote 981. *Ayers v. Watson, 137 U.S. 584, 11 S. Ct. 201, 34 L. Ed. 803 (1891); Hunnicutt v. Peyton, 102 U.S. 333, 26 L. Ed. 113 (1880); Boardman v. Reed, 31 U.S. 328, 8 L. Ed. 415 (1832); Kentucky Coal & Timber Dev. Co. v. Kentucky Union Co., 214 F. 590 (E.D. Ky. 1914); Cherry v. Body, 16 Ky. 7 (1800); Tyrone Min. & Mfg. Co. v. Cross, 18 A. 519 (Pa. 1889); Blythe v. Sutherland, 3 S.E. 258 (S.C. 1825); Simpson v. De Ramirez, 110 S.W. 149 (Tex. App. 1908).*

(n281)Footnote 982. *Southern Realty & Inv. Co. v. Keenan, 83 S.E. 39 (S.C. 1914); Blythe v. Sutherland, 3 S.E. 258 (S.C. 1825); Speer v. Coate, 3 S.C. 227 (1825).*

(n282)Footnote 983. *Van Deusen v. Turner, 29 Mass. 532 (1832); Adams v. Blodgett, 47 N.H. 219 (1866).*

(n283)Footnote 984. *Hunnicutt v. Peyton, 102 U.S. 333, 26 L. Ed. 113 (1880); Boardman v. Reed, 31 U.S. 328, 8 L. Ed. 415 (1832); Kentucky Coal & Timber Dev. Co. v. Kentucky Union Co., 214 F. 590 (E.D. Ky. 1914); Martin v. Atkinson, 7 Ga. 228 (1849); Whalen v. Nisbet, 26 S.W. 188 (Ky. 1894); Cadwalader v. Price, 73 A. 273 (Md. 1909); Tuftonboro v. Willard, 197 A. 404 (N.H. 1938); Keefe v. Sullivan County R.R., 71 A. 379 (N.H. 1908); Lawrence v. Tennant, 15 A. 543 (N.H. 1888); Sasser v. Herring, 14 N.C. 340 (1832); Southern Realty & Inv. Co. v. Keenan, 83 S.E. 39 (S.C. 1914); Simpson v. De Ramirez, 110 S.W. 149 (Tex. App. 1908); Tucker v. Smith, 3 S.W. 671 (Tex. 1887); Harriman v. Brown, 35 Va. 697 (1837); Hill v. Proctor, 10 W. Va. 59 (1877).* The contents of the field book of a deceased surveyor are admissible; *Cockrell v. Work, 94 S.W.2d 784 (Tex. App. 1936).*

(n284)Footnote 985. *Hunnicutt v. Peyton, 102 U.S. 333, 26 L. Ed. 113 (1880); Ellicott v. Pearl, 35 U.S. 412, 9 L. Ed. 475 (1836); Clay County Land & Cattle Co. v. Montague, 28 S.W. 704 (Tex. App. 1894).*

(n285)Footnote 986. *Hunnicutt v. Peyton, 102 U.S. 333, 26 L. Ed. 113 (1880); Chapman v. Twitchell, 37 Me. 59 (1853); Curtis v. Aaronson, 7 A. 886 (N.H. Supp. 1887).*

(n286)Footnote 987. *Deming v. Carrington, 12 Conn. 1 (1837). See Abbott v. Walker, 90 N.E. 405 (Mass. 1910).*

(n287)Footnote 988. *See Turgeon v. Woodward, 78 A. 577 (Conn. 1910); Gilmartin v. Buchanan, 119 N.Y.S. 489 (N.Y. App. Div. 1909).*

(n288)Footnote 989. *Clement v. Packer, 125 U.S. 309, 8 S. Ct. 907 (1888); Boardman v. Reed, 31 U.S. 328, 8 L. Ed. 415 (1832); Montgomery v. Lipscomb, 58 S.W. 306 (Tenn. 1900); Ellicott v. Pearl, 35 U.S. 412, 9 L. Ed. 475 (1836)* (a survey by a public surveyor is evidence of what he does officially but other matters performed by him not within the scope of his functions cannot be put in evidence); *Vaught v. McClymond, 155 P.2d 612 (Mont. 1945)* (a surveyor cannot testify except in connection with the data from which he surveys); *Crump v. Humble Oil & Ref. Co., 164 S.W.2d 786 (Tex. App. 1942)* (certified copy of the record of surveyor's lost field notes, as shown in the land commissioner's office, were admissible).

(n289)Footnote 990. *Cottingham v. Seward, 25 S.W. 797 (Tex. App. 1894).*

(n290)Footnote 991. *Angle v. Young, 25 S.W. 798 (Tex. App. 1894).*

(n291)Footnote 992. *Kelley v. Absher, 210 S.W.2d 531 (Mo. App. 1948).*

(n292)Footnote 993. *Leone Plantation Inc. v. Roach, 187 S.W.2d 674 (Tex. App. 1945). Simpson v. Goering, 170 P.2d 831 (Kan. 1946)* (evidence of private survey was held admissible); *Williamette Falls Canal & Lock Co. v. Gordon, 6 Or. 175 (1876)* (parol evidence was admissible to show location of natural boundaries used in deed description); *Hayden v. Brown, 53 P. 490 (Or. 1898)* (where deed made reference to "points," testimony of surveyor was permitted to show that reference had been made to the points of a mariner's compass); *Humble Oil & Ref. Co. v. State, 162 S.W.2d*

119 (Tex. App. 1942) (recitals and calls in junior survey are not admissible to create ambiguity in calls of senior surveys, or to change location of senior surveys, but are admissible as declarations of deceased survey as to what they actually found on the ground); *Southern Pine Lbr. Co. v. Hart, 329 S.W.2d 511 (Tex. App. 1959)* (surveyor was permitted to testify that his field notes in his opinion described the same land as in a previous deed).

(n293)Footnote 994. *Beecher v. Galvin, 39 N.W. 469 (Mich. 1888); Titterington v. Trees, 14 S.W. 692 (Tex. 1890).*

(n294)Footnote 995. *Reast v. Donald, 19 S.W. 795 (Tex. 1892); Randall v. Gill, 14 S.W. 134 (Tex. 1890).* Testimony of unofficial survey is admissible where there is preliminary proof of its accuracy; *Gannon v. Pearl, 311 S.W.2d 184 (Ky. 1958).*

(n295)Footnote 996. *Bearden v. Schenecker, 240 S.W. 996 (Tex. App. 1922).*

(n296)Footnote 997. *Amos v. Gunn, 94 So. 615 (Fla. 1922).*

(n297)Footnote 998. *Ellicott v. Pearl, 35 U.S. 412, 9 L. Ed. 475 (1836); Moore v. McAfee, 106 S.E. 274 (Ga. 1921); Case v. Ericson, 258 P. 536 (Idaho 1927); Kentucky Union Co. v. Shepherd, 234 S.W. 10 (Ky. 1921); Thurman v. Leach, 116 S.W. 300 (Ky. 1909); Phillips v. Stewart, 97 S.W. 6 (Ky. 1906); Thoen v. Roche, 58 N.W. 686 (Minn. 1894); People v. Call, 223 N.Y.S. 257 (1927); Corbett v. Hawes, 122 S.E. 478 (N.C. 1924); Corpenning v. Westall, 83 S.E. 753 (N.C. 1914); Sullivan v. Blout, 80 S.E. 892 (N.C. 1914); Temple Lbr. Co. v. Felts, 260 S.W. 228 (Tex. App. 1924); Thacker v. Wilson, 122 S.W. 938 (Tex. App. 1909).*

(n298)Footnote 999. *Kinney v. Farnsworth, 17 Conn. 355 (1845); Wooster v. Butler, 13 Conn. 309 (1839); Stetson v. Freeman, 11 P. 431 (Kan. 1886); Jones v. Dean, 5 S.W. 470 (Ky. 1887); Thoen v. Roche, 58 N.W. 686 (Minn. 1894); Nixon v. Porter, 34 Miss. 697 (1858); Goddard v. Parker, 10 Or. 102 (1882); Sexton v. Hollis, 1 S.E. 893 (S.C. 1887); Aldrich v. Griffith, 29 A. 376 (Vt. 1893); Nys v. Biemeret, 44 Wis. 104 (1878).*

(n299)Footnote 1000. *Nixon v. Porter, 34 Miss. 697 (1858).*

(n300)Footnote 1001. *Mullaney v. Duffy, 33 N.E. 750 (Ill. 1893).*

(n301)Footnote 1002. *Barrett v. Dodd, 59 S.E.2d 395 (Ga. 1950)* (monuments govern over courses and distances in deeds); *Locklear v. Paul, 79 S.E. 617 (N.C. 1913); Douglas Land Co. v. T. W. Thayer Co., 58 S.E. 1101 (Va. 1907).*

(n302)Footnote 1003. *Ellicott v. Pearl, 35 U.S. 412, 9 L. Ed. 475 (1836); Ford v. Bradford, 103 So. 549 (Ala. 1925); Gunn v. Harris, 14 S.E. 593 (Ga. 1892); Schoen v. Harris, 143 N.W. 1108 (Iowa 1913); Phillips v. Stewart, 97 S.W. 6 (Ky. 1906); Ellis v. Wingate, 155 N.E.2d 783 (Mass. 1959)* (the knowledge a surveyor has of relevant conveyances goes to weight rather than competence of testimony; *Morrison v. Holder, 101 N.E. 1067 (Mass. 1913); Mabry v. Winding, 90 So. 2d 175 (Miss. 1956)* (testimony and survey of qualified surveyor is admissible in evidence); *Moses v. Weaver, 49 So. 2d 235 (Miss. 1950); Grimes v. Armstrong, 304 S.W.2d 793 (Mo. 1957)* (surveyor may testify that survey was made from government corner established by field notes); *Falone v. Gochee, 189 N.Y.S.2d 363 (N.Y. App. Div. 1959); Lobdell v. Northville, 136 N.Y.S. 113 (N.Y. App. Div. 1912); Sommer v. Compton, 96 P. 124, 1065 (Or. 1908); Brinton v. Pennsylvania R.R., 79 A. 671 (Pa. 1911); Holden v. Cantrell, 84 S.E. 826 (S.C. 1915); Kardell v. Crouch, 326 S.W.2d 869 (Tex. App. 1959); Lear v. Graeber, 178 S.W.2d 124 (Tex. App. 1943)* (a surveyor's certificate on field that surveys were made on the ground creates a presumption that surveys were made on the ground); *Schley v. Blum, 22 S.W. 264 (Tex. App. 1893).*

(n303)Footnote 1004. *Goldsborough v. Pidduck, 54 N.W. 431 (Iowa 1893). See Ashville Land Co. v. Lang, 59 S.E. 703 (N.C. 1907).*

(n304)Footnote 1005. *Gunn v. Harris, 14 S.E. 593 (Ga. 1892); Griffith v. Rife, 12 S.W. 168 (Tex. 1888).*

(n305)Footnote 1006. *Coleman v. Smith, 55 Tex. 254 (1881).*

(n306)Footnote 1007. *Morgan v. Renfro, 124 Ky. 314 (1907); Kuechler v. Wilson, 18 S.W. 317 (Tex. 1891).*

(n307)Footnote 1008. *Cadeau v. Elliott, 34 P. 916 (Wash. 1893).*

(n308)Footnote 1009. *Pruner v. Brisbin, 98 Pa. 202 (1881).*

(n309)Footnote 1010. *Leone v. Plantation, Inc. v. Roach, 187 S.W.2d 674 (Tex. App. 1945).*

(n310)Footnote 1011. *Worm v. Crowell, 87 N.W.2d 384 (Neb. 1958).* Former surveys may be introduced in evidence; *Lee v. Gidley, 40 So. 2d 80 (Ala. 1949).* Surveys of official origin may be introduced in evidence. Surveys which do not meet statutory requirements may be admitted for what they may be worth; *Durden v. Kerby, 41 S.E.2d 131 (Ga. 1947).* A private survey is admissible in evidence in a controversy between the parties who had the survey made but not as to third parties; *Robinson v. Peterson, 104 S.E.2d 788 (Va. 1958).*

(n311)Footnote 1012. *Sells v. Hurley, 191 S.W.2d 212 (Ky. 1945).*

(n312)Footnote 1013. *Bates v. Harlow, 221 S.W.2d 17 (Ark. 1949)* (inferred from long continued occupation); *Caballero v. Balamotis, 300 P.2d 363 (Cal. App. 1956); Euse v. Gibbs, 49 So. 2d 843 (Fla. 1951); Warwick v. Ocean Pond Fishing Club, 58 S.E.2d 383 (Ga. 1950); Mothershead v. Milfeld, 236 S.W.2d 343 (Mo. 1951);* "Where the parties, with the view of making a deed, go upon the land and make a physical survey of the same, giving it a boundary which is actually run and marked, and the deed is thereupon made, intending to convey the land which they have surveyed, though a different and erroneous description may appear upon the face of the deed, the land thus ascertained and intended will pass between the parties or voluntary claimants who hold in privity, this being an exception to the general rule that parol evidence may not vary or contradict the written instrument." *Clarke v. Aldridge, 78 S.E. 216 (N.C. 1913); Hakanson v. Manders, 63 N.W.2d 436 (Neb. 1954)* (one cannot by his own acquiescence bind the adjoining landowner to a boundary line created by himself); *Johnson v. Whelan, 98 P.2d 1103 (Okla. 1940),* overruling *Reynolds v. Wall, 72 P.2d 505 (Okla. 1937)* (if adjoining owners possess up to and acquiesce in a boundary line fence for 15 years, though not erected by either of them, it becomes the true line.); Di Santo v. De Bellis, 182 A.488 (R.I. 1935); *Cox v. Dallas Levee Imp. Dist., 258 S.W.2d 851 (Tex. App. 1953); Willie v. Local Realty Co., 175 P.2d 718 (Utah 1946); Grell v. Ganser, 39 N.W.2d 397 (Wis. 1949).*

(n313)Footnote 1014. *Arizona ex. rel. Gaines v. Copper Queen Consol. Min. Co., 233 U.S. 87, 34 S. Ct. 546, 58 L. Ed. 863 (1914).*

(n314)Footnote 1015. *Copley v. Eade, 184 P.2d 698 (Cal. App. 1947); Downing v. Boehringer, 349 P.2d 306 (Idaho 1960)* (one standing by while his [or her] neighbor makes valuable improvements in belief as to true line is estopped from denying the line); *Kennedy v. Oleson, 100 N.W.2d 894 (Iowa 1960).*

(n315)Footnote 1016. *Salter v. Cobb, 88 So. 2d 845 (Ala. 1956)* (statute relating to the requirements for adverse possession does not apply to boundaries by acquiescence); *Copley v. Eade, 184 P.2d 698 (Cal. App. 1947)* (acquiescence is a mixture of implied agreement and estoppel); *Watts v. Pettigrew, 63 S.E.2d 897 (Ga. 1951)* (doctrine of prescription not present in acquiescence); *Spies v. DeMayo, 72 N.E.2d 316 (Ill. 1947)* (acquiescence may be implied from acts of parties); *Nichols v. Kirchner, 40 N.W.2d 13 (Iowa 1949); Patrick v. Cheney, 285 N.W. 184 (Iowa 1939)* (acquiescence exists where one who knows that one is entitled to impeach a transaction neglects to do so for such a length of time that under the circumstances other parties may fairly infer that one has waived or abandoned one's right); *Hakanson v. Manders, 63 N.W.2d 436 (Neb. 1954).*

(n316)Footnote 1017. *Ekberg v. Bates, 239 P.2d 205 (Utah 1951).*

(n317)Footnote 1018. *Euse v. Gibbs, 49 So. 2d 843 (Fla. 1951); Winborn v. Alexander, 279 S.W.2d 718 (Tenn.*

App. 1954); Ekberg v. Bates, 239 P.2d 205 (Utah 1951); Brown v. Milliner, 232 P.2d 202 (Utah 1951).

(n318)Footnote 1019. *Roberts v. Chadwick, 158 F.2d 374 (5th Cir. 1946)* (referring to a common boundary line established by agreement of owners of continuous estate estopped the grantor and his privities derived from the estate from denying the existence of the line); *Hakanson v. Manders, 63 N.W.2d 436 (Neb. 1954); People v. Livingston, 220 N.Y.S. 82 (1926)* (acquiescence rests on ratification or equitable estoppel).

(n319)Footnote 1020. *Grell v. Ganser, 39 N.W.2d 397 (Wis. 1949).*

(n320)Footnote 1021. *Shaw v. Williams, 50 So. 2d 125 (Fla. 1950); Warwick v. Ocean Pond Fishing Club, 58 S.E.2d 383 (Ga. 1950)* (deed which fixed the line as 100 feet from highwater line was sufficiently uncertain to be the basis of acquiescence); *Hanlon v. Ten Hove, 209 N.W. 169 (Mich. 1926); Richey v. Miller, 177 S.W.2d 255 (Tex. 1944); Glenn v. Whitney, 209 P.2d 257 (Utah 1949).*

(n321)Footnote 1022. *Hein v. Nutt, 184 P.2d 656 (Ariz. 1947)* (statutory period essential for acquiescence); *Jennings v. Burford, 958 S.W.2d 12 (Ark. App. 1997)* (establishment of boundary by acquiescence does not require any set amount of time but must be lengthy); *Davis v. Wright, 249 S.W.2d 979 (Ark. 1952)* (line determined by parol though short of statutory time); Tietjen v. Dobson, 152 S.E.222 (Ga. 1930) (acquiescence for statutory period establishes a boundary line. Actual possession is evidence of but not indispensable to show such acquiescence); *Mulder v. Stands, 225 P.2d 463 (Idaho 1950); Trimpl v. Meyer, 71 N.W.2d 437 (Iowa 1955)* (same period for acquiescence as for adverse possession); *Langle v. Brauch, 185 N.W. 28 (Iowa 1921); Escher v. Bender, 61 N.W.2d 143 (Mich. 1953)* (acquiescence may establish boundary line short of statutory period); *Three Way Land Co. v. Wells, 185 S.W.2d 795 (Mo. 1945)* (acquiescence must run for period of statute unless there is an element of estoppel); *Wilp v. Magnus, 230 P.2d 733 (Okla. 1951)* (statutory period essential for acquiescence); *Barrell v. Renehan, 39 A.2d 330 (Vt. 1944)* (acquiescence must run for period of adverse possession); *Scott v. Slater, 255 P.2d 377 (Wash. 1953)* (same period for acquiescence as for adverse possession).

(n322)Footnote 1023. Actual possession up to the agreed line is required; *Euse v. Gibbs, 49 So. 2d 843 (Fla. 1951); Skinner v. Francisco, 88 N.E.2d 867 (Ill. 1949); Wagers v. Wagers, 238 S.W.2d 125 (Ky. 1951).* Acquiescence or possession required; *Dye v. Dotson, 39 S.E.2d 8 (Ga. 1946).* Either possession must be taken or the agreement executed; *Callaway v. Armour, 60 S.E.2d 367 (Ga. 1950).*

(n323)Footnote 1024. Acquiescence as to survey is prima facie evidence of line without regard to statute of limitations; *McKay v. Lunsford, 174 So. 620 (Ala. 1937).* Acquiescence treated as a presumption as to true line; *Mothershead v. Milfeld, 236 S.W.2d 343 (Mo. 1951); Woodburn v. Grimes, 275 P.2d 850 (N.M. 1954); Erie R.R. v. Kaplowitz, 137 N.Y.S.2d 261 (1954).*

(n324)Footnote 1025. Acquiescence is but evidence of the true boundary; *Thompson v. Allen, 111 S.W.2d 791 (Tex. App. 1937); Brown v. Derway, 192 A. 16 (Vt. 1937).*

(n325)Footnote 1026. *Kandlik v. Hudek, 6 N.E.2d 196 (Ill. 1936)* (estoppel after acquiescence for statutory period); *Eubanks v. Buckley, 132 P.2d 353 (Wash. 1942)* (acquiescence for eight years created an "estoppel").

(n326)Footnote 1027. *Parkinson v. Sears, 290 S.W. 556 (Tex. App. 1926).*

(n327)Footnote 1028. *Kandlik v. Hudek, 6 N.E.2d 196 (Ill. 1936); Lourance v. Goodwin, 48 N.E. 903 (Ill. 1897); Beecher v. Galvin, 39 N.W. 469 (Mich. 1888); Koenigheim v. Sherwood, 16 S.W. 23 (Tex. 1891).*

(n328)Footnote 1029. *Bundick v. Moore-Cortes Canal Co., 177 S.W. 1030 (Tex. App. 1915).*

(n329)Footnote 1030. *Hinkley v. Crouse, 26 N.E. 452 (N.Y. 1891).*

(n330)Footnote 1031. *Ulman v. Clark, 100 F. 180 (C.C. W. Va. 1900); Myrick v. Peet, 180 P. 574 (Mont. 1919).*

(n331)Footnote 1032. *Connell v. Clifford, 88 P. 850 (Colo. 1907).*

(n332)Footnote 1033. *Daugherty v. Manning, 221 S.W. 983 (Tex. App. 1920).*

(n333)Footnote 1034. *Hakanson v. Manders, 63 N.W.2d 436 (Neb. 1954).*

(n334)Footnote 1035. *Dye v. Dotson, 39 S.E.2d 8 (Ga. 1946); Beneficial Life Ins. Co. v. Wakamatsu, 270 P.2d 830 (Idaho 1954); Richardson v. Register, 87 S.E.2d 40 (S.C. 1955); Willie v. Local Realty Co., 175 P.2d 718 (Utah 1946).*

(n335)Footnote 1036. *Williams v. Barnett, 287 P.2d 789 (Cal. App. 1955).*

(n336)Footnote 1037. *Williams v. Barnett, 287 P.2d 789 (Cal App. 1955); Fredricks v. Sorensen, 248 P.2d 949 (Cal. App. 1955)* (must have an actual controversy); *Holley v. May, 75 So. 2d 696 (Fla. 1954); Shaw v. Williams, 50 So. 2d 125 (Fla. 1950); Hickox v. Griffin, 55 S.E.2d 351 (Ga. 1949); Dye v. Dotson, 39 S.E.2d 8 (Ga. 1946);*

(n337)Footnote 1038. *Johnson v. Smith, 219 S.W.2d 926 (Ark. 1949); Mello v. Weaver, 224 P.2d 691 (Cal. 1950); Morris v. Vossler, 243 P.2d 43 (Cal. App. 1952); Warwick v. Ocean Pond Fishing Club, 58 S.E.2d 383 (Ga. 1950); Glenn v. Whitney, 209 P.2d 257 (Utah 1949).*

(n338)Footnote 1039. *Woodburn v. Grimes, 275 P.2d 850 (N.M. 1954).*

(n339)Footnote 1040. A "dispute" is an uncertainty of minds of the parties as to the true line; *Schneider v. Pascoe, 118 P.2d 860 (Cal. App. 1941).*

(n340)Footnote 1041. *Williams v. Barnett, 287 P.2d 789 (Cal. App. 1955); Rast v. Rischer, 236 P.2d 393 (Cal. App. 1951).*

(n341)Footnote 1042. *Hakanson v. Manders, 63 N.W.2d 436 (Neb. 1954).*

(n342)Footnote 1043. *Idaho Land Co. v. Parsons, 31 P. 791 (Idaho 1892); Sherman v. Hastings, 46 N.W. 1084 (Iowa 1890); Proctor v. Libby, 85 A. 298 (Me. 1912); Lemmon v. Hartsook, 80 Mo. 13 (1883); Coughran v. Alderete, 26 S.W. 109 (Tex. App. 1894).*

(n343)Footnote 1044. *Briscoe v. Puckett, 12 S.W. 978 (Tex. 1889); Anderson v. Jackson, 6 S.W. 575 (Tex. 1887), 13 S.W. 30 (Tex. 1889); New York & T. Land Co. v. Gardner, 25 S.W. 737 (Tex. App. 1894).*

(n344)Footnote 1045. *Barham v. Gattuso, 227 S.W.2d 151 (Ark. 1950); Harris v. E. B. Mooney Inc., 199 S.W.2d 319 (Ark. 1947); Ernie v. Trinity Lutheran Church, 336 P.2d 525 (Cal. 1959); Mello v. Weaver, 224 P.2d 691 (Cal. 1950); Crook v. Leinenweaver, 224 P.2d 891 (Cal. App. 1950)* (acquiescence is merely an evidentiary factor in determining the existence of a boundary line agreement); *Stone v. Jernigan, 104 S.E.2d 101 (Ga. 1958); Spies v. DeMayo, 72 N.E.2d 316 (Ill. 1947)* (even though no uncertainty or dispute); *Mothershead v. Milfeld, 236 S.W.2d 343 (Mo. 1951); Woodburn v. Grimes, 275 P.2d 850 (N.M. 1954); Jensen v. Bartlett, 286 P.2d 804 (Utah 1955); Scott v. Slater, 255 P.2d 377 (Wash. 1953).*

(n345)Footnote 1046. *Hein v. Nutt, 184 P.2d 656 (Ariz. 1947); Shaw v. Williams, 50 So. 2d 125 (Fla. 1950); Palm Orange Groves, Inc. v. Yelvington, 41 So. 2d 883 (Fla. 1949); Pope v. Beasley, 38 S.E.2d 300 (Ga. 1946); Smith v. Lanier, 34 S.E.2d 91 (Ga. 1945)* (7 years); *Mulder v. Stands, 225 P.2d 463 (Idaho 1950); Woodland v. Hodson, 152 P. 205 (Idaho 1915); Trimpl v. Meyer, 71 N.W.2d 437 (Iowa 1955); Mullahey v. Serra, 264 N.W. 63 (Iowa 1915); Phillips Petroleum Co. v. Selnes, 27 N.W.2d 553 (Minn. 1947); Three Way Land Co. v. Wells, 185 S.W.2d 795 (Mo. 1945); Hakanson v. Manders, 63 N.W.2d 436 (Neb. 1954); Kennedy v. Gottschalk, 295 N.W. 813 (Neb. 1941); Wilp v. Magnus, 230 P.2d 733 (Okla. 1951); Allison v. Oligher, 14 A.2d 569 (Pa. Super. 1940); Cox v. Dallas Levee Imp. Dist., 258*

S.W.2d 851 (Tex. App. 1953); Barrell v. Renehan, 39 A.2d 330 (Vt. 1944) (15 years); *Scott v. Slater, 255 P.2d 377 (Wash. 1953).*

(n346)Footnote 1047. *Quinn v. Baage, 114 N.W. 205 (Iowa 1907).*

(n347)Footnote 1048. *Deery v. Cray, 77 U.S. 263, 19 L. Ed. 887 (1869); Hamm v. San Francisco, 17 F. 119 (C.C. Cal. 1883); Truett v. Adams, 5 P. 96 (Cal. 1884); Hastings v. Stark, 36 Cal. 122 (1868).*

(n348)Footnote 1049. *People v. Livingston, 220 N.Y.S. 82 (1926).*

(n349)Footnote 1050. *Carestensen v. Brown, 236 P. 517 (Wyo. 1925). See Nusbickel v. Stevens Ranch Co., 200 P. 651 (Cal. 1921).*

(n350)Footnote 1051. *People v. Livingston, 220 N.Y.S. 82 (1926).* Passive acquiescence with knowledge of the adverse parties' claim will forfeit a right to dispute a boundary; *Shaw v. Williams, 50 So. 2d 125 (Fla. 1950).* An agreement fixing a boundary line under the belief that it is the true line, when in fact it is not, is not binding, and may be set aside by either party when the mistake is discovered, unless some principle of estoppel prevents it, as where the rights of innocent third parties have intervened. The mere making of declarations and admissions as to position of boundary lines, when made in good faith and by mistake, and in ignorance of the true location of the line, does not work an estoppel; *Brewer v. Boston & W. R. Corp., 46 Mass. 478 (1843).* The weight of authority is that, where the intention was to establish the line according to the true boundary, and by mistake the parties agreed upon a line which does not conform to such a boundary, the line so agreed on is not conclusive, and the agreement may be set aside by either party; *Bemis v. Bradley, 139 A. 593 (Me. 1927).*

(n351)Footnote 1052. *Langle v. Brauch, 185 N.W. 28 (Iowa 1921).*

(n352)Footnote 1053. *Draper v. Griffin, 142 P.2d 772 (Cal. App. 1943).*

(n353)Footnote 1054. *Holley v. May, 75 So. 2d 696 (Fla. 1954).*

(n354)Footnote 1055. *Appeal of Moore, 252 P.2d 875 (Kan. 1953); Escher v. Bender, 61 N.W.2d 143 (Mich. 1953); Cornelison v. Flanagan, 180 P.2d 823 (Okla. 1947)* (dictum).

(n355)Footnote 1056. *O'Donnell v. Penney, 20 A. 305 (R.I. 1890); Baldwin v. Brown, 16 N.Y. 359 (1857);* (the court denies the soundness of the theory that a parol agreement, either actual or supposed, lies at the foundation of the rule, and holds that the supposition of such an agreement, in cases of long acquiescence, is entirely superfluous).

(n356)Footnote 1057. *Diehl v. Zanger, 39 Mich. 601 (1878); Hoffman v. Port Huron, 60 N.W. 831 (Mich. 1894); Carpenter v. Monks, 45 N.W. 477 (Mich. 1890); Beaubien v. Kellogg, 37 N.W. 691 (Mich. 1888); Coy v. Miller, 47 N.W. 1046 (Neb. 1891).*

(n357)Footnote 1058. *Kingelin v. Rogers, 259 S.W.2d 245 (Tex. App. 1953).*

(n358)Footnote 1059. *Hotze v. Ring, 115 S.W.2d 311 (Ky. 1938).*

(n359)Footnote 1060. *High Gravity Oil Co. v. Southwestern Petroleum Co., 290 F. 370 (6th Cir. 1923); Brantley v. Helton, 139 So. 283 (Ala. 1932); Lewis v. Johnson, 89 So. 447 (Ala. 1921); Hoffman v. White, 7 So. 816 (Ala. 1890); Trevillian v. Rais, 9 P.2d 402 (Ariz. 1932); Wheatley v. San Pedro, L. A. & S. L. R.R., 147 P. 135 (Cal. 1915); Helm v. Wilson, 18 P. 604 (Cal. 1888); Burris v. Fitch, 18 P. 864 (Cal. 1888); White v. Spreckels, 17 P. 715 (Cal. 1888); Cooper v. Vierra, 59 Cal. 282 (1881); Columbet v. Pacheco, 48 Cal. 395 (1874); Sneed v. Osborn, 25 Cal. 619 (1864); Raney v. Merritt, 238 P. 767 (Cal. App. 1925); Perich v. Maurer, 155 P. 471 (Cal. App. 1915); Prieshof v. Baum, 29 P.2d 1032 (Colo. 1934); Rathbun v. Geer, 30 A. 60 (Conn. 1894); Euse v. Gibbs, 49 So. 2d 843 (Fla. 1951); Acosta v. Gingles, 69 So. 717 (Fla. 1915); Liddon v. Hodnett, 22 Fla. 442 (1886); Hickox v. Griffin, 55 S.E.2d 351 (Ga. 1949);*

Smith v. Lanier, 34 S.E.2d 91 (Ga. 1945); Robertson v. Abernathy, 25 S.E.2d 424 (Ga. 1943); Collins v. Rebb, 162 S.E. 676 (Ga. 1932); McGinty v. Interstate Land & Imp. Co., 90 S.E.2d 42 (Ga. App. 1955); Railey v. Heath, 88 S.E.2d 194 (Ga. App. 1955); Cagle v. Brady, 24 S.E.2d 865 (Ga. App. 1943); Southern Timber v. Bland, 124 S.E. 359 (Ga. App. 1924); Kanklik v. Hudek, 6 N.E.2d 196 (Ill. 1936); Fisher v. Bennehoff, 13 N.E. 150 (Ill. 1887); Darst v. Enlow, 6 N.E. 215 (Ill. 1886); Leeka v. Chambers, 6 N.W.2d 837 (Iowa 1942); Brewer v. Claypool, 275 N.W. 34 (Iowa 1937); Norton v. Ferguson, 211 N.W. 417 (Iowa 1926); Klay v. Kurvink, 134 N.W. 633 (Iowa 1912); Chicago, M. & St. P. R.R. v. Hanken, 118 N.W. 527 (Iowa 1908); Bradley v. Brukhart, 115 N.W. 597 (Iowa 1908); Doolittle v. Bailey, 52 N.W. 337 (Iowa 1892); Wilson v. Gunning, 45 N.W. 920 (Iowa 1890); Sheldon v. Atkinson, 16 P. 68 (Kan. 1887); Crutchlow v. Beatty, 23 S.W. 960 (Ky. 1893); Howard v. Howard, 113 S.W.2d 434 (Ky. 1938); Lewallen v. Mays, 95 S.W.2d 1125 (Ky. 1936); Farley v. Borderland Coal Co., 292 S.W. 303 (Ky. 1927); Belknap v. Louisville, 20 S.W. 309 (Ky. 1892); Schieble v. Hart, 12 S.W. 628 (Ky. 1889); Hammond v. Williams, 9 S.W. 711 (Ky. 1888); Walker v. Simpson, 13 A. 580 (Me. 1888); Faught v. Holway, 50 Me. 24 (1861); Hanlon v. Ten Hove, 209 N.W. 169 (Mich. 1926); LeCompte v. Lueders, 51 N.W. 542 (Mich. 1892); Flynn v. Glenny, 17 N.W. 65 (Mich. 1883); Dupont v. Starring, 4 N.W. 190 (Mich. 1880); Simms v. Fagan, 12 N.W.2d 783 (Minn. 1943) (doctrine of adverse possession does not apply); *Beardsley v. Crane, 54 N.W. 740 (Minn. 1893); Three Way Land Co. v. Wells, 185 S.W.2d 795 (Mo. 1945); Battner v. Baker, 18 S.W. 911 (Mo. 1892); Jacobs v. Moseley, 4 S.W. 135 (Mo. 1887); Turner v. Baker, 64 Mo. 218 (1876); Lindell v. McLaughlin, 30 Mo. 28 (1860); Borgeson v. Tubb, 172 P. 326 (Mont. 1918); Romine v. West, 278 N.W. 490 (Neb. 1938); Runkle v. Welty, 126 N.W. 139 (Neb. 1910); Benson v. Daly, 56 N.W. 788 (Neb. 1893); Obernalte v. Edgar, 44 N.W. 82 (Neb. 1889); Levy v. Yerga, 41 N.W. 773 (Neb. 1889); Trussell v. Lewis, 14 N.W. 155 (Neb. 1882); People v. Livingston, 220 N.Y.S. 82 (1926); Nichol v. Flynn, 153 N.Y.S. 308 (N.Y. App. Div. 1915); Dale v. Jackson, 8 N.Y.S. 480 715 (1890); Hill v. Edie, 1 N.Y.S. 480 (1888); Ausable Co. v. Hargraves, 1 N.Y.S. 42 (1888), aff'd, 24 N.E. 1099 (N.Y. 1890); Clark v. Davis, 19 N.Y.S. 191 (1892); Norcom v. Leary, 25 N.C. 49 (1842); Bichler v. Ternes, 248 N.W. 185 (N.D. 1933); Rocher v. Williams, 80 P.2d 649 (Okla. 1938); Richards v. Snider, 3 P. 177 (Or. 1884); Kuhns v. Fennell, 15 A. 920 (Pa. 1888); In re West Chester & P. R.R., 13 A. 214 (Pa. 1888); Culbertson v. Duncan, 13 A. 966 (Pa. 1888); O'Donnell v. Penney, 20 A. 305 (R.I. 1890); Galbraith v. Lunsford, 9 S.W. 365 (Tenn. 1888); Gilchrist v. McGee, 17 Tenn. 455 (1836); Humble Oil & Ref. Co. v. Davis, 287 S.W. 104 (Tex. App. 1926); King v. Mitchell, 21 S.W. 50 (Tex. App. 1892); Home Owners Loan Corp. v. Dudley, 141 P.2d 160 (Utah 1943); Nelson v. Da Rouch, 50 P.2d 273 (Utah 1935); Barrell v. Renehan, 39 A.2d 330 (Vt. 1944); Neill v. Ward, 153 A. 219 (Vt. 1930); Teass v. St. Albans, 17 S.E. 400 (W. Va. 1893); Gwynn v. Schwartz, 9 S.E. 880 (W. Va. 1889); Wunnickle v. Dederich, 152 N.W. 139 (Wis. 1915); Eiden v. Eiden, 45 N.W. 322 (Wis. 1890); Pickett v. Nelson, 37 N.W. 836 (Wis. 1888); Carstensen v. Brown, 236 P. 517 (Wyo. 1925).* Even though a common driveway is constructed by mutual consent, each party holds adversely to the other from the moment of construction, such use being under a claim of right; *Shanks v. Floom, 124 N.E.2d 416 (Ohio 1955)* (holding adverse possession had run, the use being under a revocable license).

(n360)Footnote 1061. *Bridges v. Brackett, 54 S.E.2d 642 (Ga. 1949).* Acquiescence through mutual mistake does not establish a boundary line through estoppel; *Irelan v. Hall, 295 P.2d 775 (Okla. 1956).*

(n361)Footnote 1062. *Winborn v. Alexander, 279 S.W.2d 718 (Tenn. App. 1954).*

(n362)Footnote 1063. *Jensen v. Bartlett, 286 P.2d 804 (Utah 1955)* (finding, however, that there was sufficient uncertainty to justify agreement).

(n363)Footnote 1064. *Johnson v. Squires, 75 N.W.2d 45 (Mich. 1956); McClintic v. Davis, 90 S.E.2d 364 (S.C. 1955). But see Short v. Mauldin, 296 S.W.2d 197 (Ark. 1956).*

(n364)Footnote 1065. *Roberts v. Brae, 54 P.2d 698 (Cal. 1936); McGinty v. Interstate Land & Imp. Co., 90 S.E.2d 42 (Ga. App. 1955)* (acquiescence of fence); *Railey v. Heath, 88 S.E.2d 194 (Ga. App. 1955)* (cutting of weeds and timber up to line held establishment of boundary by acquiescence).

(n365)Footnote 1066. *Garrett v. Cook, 200 P.2d 21 (Cal. App. 1948); Eggers v. Mitchem, 34 N.W.2d 603 (Iowa 1948); Dwight v. Des Moines, 156 N.W. 336 (Iowa 1916).*

(n366)Footnote 1067. *Sikes v. Mutual Ben. Life Ins. Co., 187 S.E. 61 (Ga. 1936).*

(n367)Footnote 1068. *Tarpenning v. Cannon, 28 Kans. 665 (1882). See Garrett v. Cook, 200 P.2d 21 (Cal. App. 1948); Crawford v. Cook, 51 S.E.2d 422 (Ga. 1949); Browne v. Johnson, 51 S.E.2d 416 (Ga. 1949); Eggers v. Michem, 34 N.W.2d 603 (Iowa 1948).* The earlier cases in this state were decided upon the ground that acquiescence was evidence of an agreement between the parties; Jackson ex dem. Nellis v. Dysling, 2 Caines 198 (1804).

(n368)Footnote 1069. *Malone v. Mobbs, 145 S.W. 193 (Ark. 1912),* modified by, *146 S.W. 143 (Ark. 1912); Payne v. McBride, 131 S.W. 463 (Ark. 1910); Jordan v. Deaton, 23 Ark. 704 (1861); Cavanaugh v. Jackson, 27 P. 931 (Cal. 1891); Silvarer v. Hansen, 20 P. 136 (Cal. 1888); Johnson v. Brown, 63 Cal. 391 (1883); Cooper v. Vierra, 59 Cal. 282 (1881); Biggins v. Champlin, 59 Cal. 113 (1881); Shaw v. Williams, 50 So. 2d 125 (Fla. 1950); Osteen v. Wynn, 62 S.E. 37 (Ga. 1908); Quick v. Nitschelm, 28 N.E. 926 (Ill. 1891); Sheets v. Sweeney, 26 N.E. 648 (Ill. 1891); Bloomington v. Bloomington Cemetery Ass'n, 18 N.E. 298 (Ill. 1888); Davis v. Waggoner, 83 N.E. 381 (Ind. App. 1908), 84 N.E. 1105 (Ind. App. 1908); Griffith v. Murray, 147 N.W. 855 (Iowa 1914); Quinn v. Baage, 114 N.W. 205 (Iowa 1907); McBride v. Bair, 112 N.W. 169 (Iowa 1907); Andrews v. Meredith, 109 N.W. 287 (Iowa 1906); Cline v. Blackburn, 168 S.W.2d 15 (Ky. 1943); Hay v. Pierce, 139 S.W. 941 (Ky. 1911); Pack v. Stepp, 110 S.W. 887 (Ky. 1908); Fields v. Sizemore, 105 S.W. 438 (Ky. 1907); Sebastian v. Keeton, 29 S.W. 23 (Ky. 1895); Byersdorfer v. Schultz, 2 S.W. 492 (Ky. 1887); Manistee Mfg. Co. v. Cogswell, 61 N.W. 884 (Mich. 1895); Jones v. Pashyby, 35 N.W. 152 (Mich. 1887); Bird v. Stark, 33 N.W. 754 (Mich. 1887),* "it is undoubtedly true, under our decisions, that, to make an arrangement less than fifteen years old binding, it must have been made with the understanding that it should be so regarded;" *Dupont v. Starring, 4 N.W. 190 (Mich. 1880); Cronin v. Gore, 38 Mich. 381 (1878); Stewart v. Carleton, 31 Mich. 270 91875); Turner v. Baker, 64 Mo. 218 (1876); Adams v. Child, 88 P. 1087 (Nev. 1905); French v. Wray, 139 N.Y.S. 339 (N.Y. App. Div. 1912); Chadwell v. Chadwell, 23 S.W. 793 (Tenn. 1893); Alliance Milling Co. v. Eaton, 25 S.W. 614 (Tex. 1894); Lecomte v. Toudouze, 17 S.W. 1047 (Tex. 1891); Levy v. Maddox, 16 S.W. 877 (Tex. 1891); Harn v. Smith, 15 S.W. 240 (Tex. 1891); Blassingame v. Davis, 5 S.W. 402 (Tex. 1887); Switzgable v. Worseldine, 15 P. 144 (Utah 1887)* (recognizing the general principle, which was held not applicable to the case). *See* in general: *Turner v. De Priest, 87 So. 370 (Ala. 1921)* (30 years or more); *Booker v. Booker, 138 S.E. 251 (Ga. App. 1927)* (7 years); *Jackson v. Snyder, 208 N.W. 321 (Iowa 1926); Holliday v. Tennis Coal Co., 286 S.W. 773 (Ky. 1926); Hanlon v. Ten Hove, 209 N.W. 169 (Mich. 1926); Martin v. Hays, 228 S.W. 741 (Mo. 1921); Rocher v. Williams, 80 P.2d 649 (Okla. 1938); Bearden v. Schenecker, 240 S.W. 996 (Tex. App. 1922)* (more than 30 years); *Egleski v. Strozyk, 209 P. 708 (Wash. 1922)* (15 years).

(n369)Footnote 1070. *Brown v. Derway, 192 A. 16 (Vt. 1937); Thiel v. Damrau, 66 N.W.2d 747 (Wis. 1954)* (50-year acquiescence to establish line was sufficient).

(n370)Footnote 1071. *Riley v. Griffin, 16 Ga. 141 (1854).*

(n371)Footnote 1072. *Beecher v. Parmele, 9 Vt. 352 (1837).*

(n372)Footnote 1073. *Kitchen v. Chantland, 105 N.W. 367 (Iowa 1905); Romine v. West, 278 N.W. 490 (Neb. 1938).*

(n373)Footnote 1074. *Ivey v. Cowart, 52 S.E. 436 (Ga. 1905).*

(n374)Footnote 1075. *Mulder v. Stands, 225 P.2d 463 (Idaho 1950); Thompson v. Allen, 111 S.W.2d 791 (Tex. App. 1937); Mosley v. Gulf Production Co., 111 S.W.2d 726 (Tex. App. 1937).*

(n375)Footnote 1076. *McKay v. Lunsford, 174 So. 620 (Ala. 1937).*

(n376)Footnote 1077. *Brown v. Milliner, 232 P.2d 202 (Utah 1951).*

(n377)Footnote 1078. *Kinne v. Waggoner, 197 P. 195 (Kan. 1921); Ackerman v. Ryder, 271 S.W. 743 (Mo. 1925);*

Schmuck v. Beck, 234 P. 477 (Mont. 1925). See Huddart v. McGirk, 199 P. 494 (Cal. 1921).

(n378)Footnote 1079. *Mosley v. Gulf Production Co., 111 S.W.2d 726 (Tex. App. 1937).*

(n379)Footnote 1080. *Atkins v. Reagan, 60 N.W.2d 790 (Iowa 1953); Escher v. Bender, 61 N.W.2d 143 (Mich. 1953).*

(n380)Footnote 1081. *See Schrader Min. & Mfg. Co. v. Packer, 129 U.S. 688, 9 S. Ct. 385, 32 L. Ed. 760 (1889); Jackson ex dem. Bradstreet v. Huntington, 30 U.S. 402, 8 L. Ed. 170 (1831); Ricard v. Williams, 20 U.S. 59, 5 L. Ed. 398 (1822); Schieble v. Hart, 12 S.W. 628 (Ky. 1889); Golterman v. Schiermayer, 28 S.W. 616 (Mo. 1894); Knowlton v. Smith, 36 Mo. 507 (1865); Sanford v. McDonald, 6 N.Y.S. 913 (1889); Shaffer v. Hahn, 15 S.E. 1033 (N.C. 1892); Bohny v. Petty, 17 S.W. 80 (Tex. 1891); Hatfield v. Workman, 14 S.E. 153 (W. Va. 1891); Hartung v. Witte, 18 N.W. 175 (Wis. 1884); Hass v. Plantz, 14 N.W. 65 (Wis. 1882).*

(n381)Footnote 1082. *Pickett v. Nelson, 47 N.W. 936 (Wis. 1891).* In *Hartung v. Witte, 18 N.W. 175 (Wis. 1884),* Orton, J., said:

> There must be an uncertainty as to the true line, and some question, dispute, or controversy about it which can be settled by such an agreement or acquiescence. In other words, that is certain which can be made certain; and if the true line cannot be made certain by the deed and a survey, or by the calls and monuments mentioned in the deed, then only it may be made certain by an agreement or acquiescence of the parties. There must be such uncertainty as to cause a dispute of controversy of the parties before resort can be had to such evidence. In this deed there is no uncertainty as to the true west line of the premises, and there is no evidence of any question or dispute of the parties concerning it, and both parties know or can ascertain where the true line is... When the true line can be ascertained by a correct survey, it is considered certain;

Coats v. Taft, 12 Wis. 388 (1860).

(n382)Footnote 1083. *Vander Zyl v. Muilenberg, 29 N.W.2d 412 (Iowa 1947).*

(n383)Footnote 1084. *Heinz v. Cramer, 51 N.W. 173 (Iowa 1892).*

(n384)Footnote 1085. *Pence v. Langdon, 99 U.S. 578, 25 L. Ed. 420 (1878).*

(n385)Footnote 1086. *Cheeney v. Nebraska & C. Stone Co., 41 F. 740 (C.C. Colo. 1890).*

(n386)Footnote 1087. Line by acquiescence must be a boundary not a barrier; *Copley v. Eade, 184 P.2d 698 (Cal. App. 1947); Eggers v. Mitchem, 34 N.W.2d 603 (Iowa 1948).* Acquiescence is merely evidence of an agreement; *Foster v. Duval County Ranch Co., 260 S.W.2d 103 (Tex. App. 1953).*

(n387)Footnote 1088. Mere acquiescence will not establish a line where based on a mutual mistake as to the true line; *Williams v. Barnett, 287 P.2d 789 (Cal. App. 1955); Kingelin v. Rogers, 259 S.W.2d 245 (Tex. App. 1953); Brown v. Milliner, 232 P.2d 202 (Utah 1951).* Long established line by acquiescence acted upon and improvements will transfer title though line was not correct; *Scott v. Slater, 255 P.2d 377 (Wash. 1953),* or was located in error; *Seidenstricker v. Holtzendorff, 217 S.W.2d 836 (Ark. 1949); Walters v. Union Nat'l Bank, 23 N.W.2d 184 (Mich. 1946).*

(n388)Footnote 1089. *Escher v. Bender, 61 N.W.2d 143 (Mich. 1953).*

(n389)Footnote 1090. *United States v. Stewart, 121 F.2d 705 (9th Cir. 1941), rev'g, 29 F. Supp. 59 (N.D. Cal. 1939), rev'd, 316 U.S. 354, 62 S. Ct. 1154, 86 L. Ed. 1529 (1942).*

(n390)Footnote 1091. *Roberts v. Chadwick, 158 F.2d 374 (5th Cir. 1946)* (establishment of an agreed line creates an estoppel); *Harrison v. Manvel Oil Co., 179 S.W.2d 413 (Tex. App. 1943), rev'd, 180 S.W.2d 909 (Tex. 1944).*

(n391)Footnote 1092. *Hein v. Nutt, 184 P.2d 656 (Ariz. 1947)* (reliance is essential); *Lawson v. Chamblee, 183 S.W.2d 290 (Ark. 1944)* (reliance necessary); *Draper v. Griffin, 142 P.2d 772* (Cal. 4 Dist. App. 1943) (calf or pig pen was not a valuable improvement creating an estoppel); *O'Dell v. Hanson, 42 N.W.2d 86 (Iowa 1950)* (a holding out is essential); *Taylor v. Zepp, 14 Mo. 482 (1851); Keel v. Covey, 241 P.2d 954 (Okla. 1952); Great Plains Oil & Gas Co. v. Foundation Oil Co., 153 S.W.2d 452 (Tex. 1941)* (must prove injury); *Light v. McHugh, 183 P.2d 470 (Wash. 1947); Thomas v. Harlan, 178 P.2d 965 (Wash. 1947)* (there must be reliance on the adjoining property owner's statements to create an estoppel); *Tyree v. Gosa, 119 P.2d 926 (Wash. 1941)* (must have a positive holding out).

(n392)Footnote 1093. *Roberts v. Chadwick, 158 F.2d 374 (5th Cir. 1946); Fordson Coal Co. v. Howard, 168 S.W.2d 588 (Ky. 1943); Liederbach v. Pickett, 273 N.W. 77 (Minn. 1937)* (one cotenant can also estop the other); *Harrison v. Manvel Oil Co., 179 S.W.2d 413 (Tex. App. 1943), rev'd, 180 S.W.2d 909 (Tex. 1944).* No estoppel arises from the making of improvements unless the other party was aware thereof; *Birmingham v. Reid, 195 So. 432 (Ala. 1940).* Knowingly permitting another to make improvements without objection on what the other honestly believes to be the true line creates an estoppel; *Trimpl v. Meyer, 71 N.W.2d 437 (Iowa 1955); Faulkner v. Lloyd, 253 S.W.2d 972 (Ky. 1952).* But mere failure to object to erection of improvements is not an estoppel; *Kinkade v. Simpson, 197 P.2d 968 (Okla. 1948).* Where one induced another to purchase adjoining land by representing a line to be true without knowing it was not and improvements were made thereon, he was estopped from denying the line but was entitled to damages fro the land taken; *Lavelle v. Jaccard, 27 N.Y.S.2d 671 (1941).*

(n393)Footnote 1094. *Johnson v. Squires, 75 N.W.2d 45 (Mich. 1956).*

(n394)Footnote 1095. *Kilgore v. Leary, 180 So. 35 (Fla. 1938); Richardson v. Register, 87 S.W.2d 40 (S.C. 1955)* (dictum). *See*, Jack Young, AParol Agreements Relating to Land Boundaries," *11 Ark. L. Rev. 431 (1957).*

(n395)Footnote 1096. *Wakefield v. Ross, 28 F. Cas. 1346 (C.C. R.I. 1827); Hannah v. Pogue, 147 P.2d 572 (Cal. 1944); White v. Spreckels, 17 P. 715 (Cal. 1888); Drew v. Mumford, 325 P.2d 240* (Cal. 2 Dist. App. 1958); *Smith v. Lanier, 34 S.E.2d 91 (Ga. 1945); Robertson v. Abernathy, 25 S.E.2d 424 (Ga. 1943); Sheets v. Sweeney, 26 N.E. 648 (Ill. 1891); Fisher v. Bennehoff, 13 N.E. 150 (Ill. 1887); Schoonmaker v. Doolittle, 8 N.E. 839 (Ill. 1886); Fuelling v. Fuesse, 87 N.E. 700 (Ind. App. 1909); Spencer v. Supernois, 268 P.2d 946 (Kan. 1954); Howard v. Howard, 113 S.W.2d 434 (Ky. 1938); Walker v. Cornett, 122 S.W. 841 (Ky. 1909); Warden v. Addington, 115 S.W. 241 (Ky. 1909); Ferguson v. Crick, 23 S.W. 668 (Ky. 1893); Grigsby v. Combs, 21 S.W. 37 (Ky. 1893); Archer v. Helm, 11 So. 3 (Miss. 1893); Natchez v. Vandervelde, 31 Miss. 706 (1856); Smith v. McCorkle, 16 S.W. 602 (Mo. 1891); Krider v. Milner, 12 S.W. 461 (Mo. 1889); Atchison v. Pease, 10 S.W. 159 (Mo. 1888); Schad v. Sharp, 8 S.W. 549 (Mo. 1888); Jacobs v. Moseley, 4 S.W. 135 (Mo. 1887); Acton v. Dooley, 74 Mo. 63 (1881); Turner v. Baker, 64 Mo. 218 (1876); Blair v. Smith, 16 Mo. 273 (1852); Taylor v. Zepp, 14 Mo. 482 (1851); Rocher v. Williams, 80 P.2d 649 (Okla. 1938).*

(n396)Footnote 1097. *Boyd v. Graves, 17 U.S. 513, 4 L. Ed. 628 (1819); Lindsay v. Springer, 4 Del. 547 (Super. 1847); Watrous v. Morrison, 14 So. 805 (Fla. 1894); Horn v. Thompson, 58 N.E.2d 896 (Ill. 1945); Berghoefer v. Frazier, 37 N.E. 914 (Ill. 1894); Burns v. Martin, 7 N.W. 219 (Mich. 1880); Smith v. Hamilton, 20 Mich. 433 (1870); Acton v. Dooley, 74 Mo. 63 (1881); Turner v. Baker, 64 Mo. 218 (1876); Blair v. Smith, 16 Mo. 273 (1852); O'Donnel v. Penney, 20 A. 305 (R.I. 1890); Gwynn v. Schwartz, 9 S.E. 880 (W. Va. 1889).*

(n397)Footnote 1098. *Berghoefer v. Frazier, 37 N.E. 914 (Ill. 1894).*

(n398)Footnote 1099. *High Gravity Oil Co. v. Southwestern Petroleum Co., 290 F. 370 (6th Cir. 1923); Sherrin v. Coffman, 219 S.W. 348 (Ark. 1920); Cosgrave v. Donovan, 199 P. 808* (Cal. 3 Dist. App. 1921); *Gee v. McDowell, 71 S.E.2d 532 (Ga. 1952); McGill v. Dowman, 24 S.E.2d 195 (Ga. 1943); Childers v. Dedman, 122 S.E. 45 (Ga. 1924); Loverkamp v. Loverkamp, 45 N.E.2d 871 (Ill. 1942); Jones v. Scott, 145 N.E. 378 (Ill. 1924); Carver v. Turner, 219*

S.W.2d 409 (Ky. 1949); Wallace v. Lackey, 250 S.W. 843 (Ky. 1923); Conlay v. Grillette, 70 So. 2d 139 (La. App. 1954); Wilhelm v. Herron, 178 N.W. 769 (Mich. 1920); Box Elder Livestock Co. v. Glynn, 193 P. 117 (Mont. 1920); Reynolds v. Bradford, 233 S.W.2d 464 (Tex. App. 1950); Kennard v. Maxwell, 287 S.W. 60 (Tex. App. 1926); Ekberg v. Bates, 239 P.2d 205 (Utah 1951); Brown v. Milliner, 232 P.2d 202 (Utah 1951); Fehrman v. Bissell Lbr. Co., 204 N.W. 582 (Wis. 1925); error dismissed, 274 U.S. 720, 47 S. Ct. 590, 71 L. Ed. 1324 (1927); Carstensen v. Brown, 236 P. 517 (Wyo. 1925). See Smithson v. Handley, 91 So. 447 (Ala. 1921); "The fact that more real estate is described in a deed than is owned by the grantor will not destroy its operative effect as to the described land that is owned by the grantor," *Miller v. Miller, 38 N.E.2d 343 (Ind. App. 1942).*

(n399)Footnote 1100. *Howard v. Howard, 113 S.W.2d 434 (Ky. 1938); McClintic v. Davis, 90 S.E.2d 364 (S.C. 1955)* (acquiescence in boundary line creates estoppel even short of period for adverse possession); *Winborn v. Alexander, 279 S.W.2d 718 (Tenn. App. 1954). See Kandlik v. Hudek, 6 N.E.2d 196 (Ill. 1936).* Building of fence and referring to it as a boundary line in deeds created an estoppel; *Roberts v. Chadwick, 158 F.2d 374 (5th Cir. 1946).* A calf or pig pen was held not sufficient of a valuable improvement as to raise an estoppel; *Draper v. Griffin, 142 P.2d 772* (Cal. 4 Dist. App. 1943). Standing by while another erected a fence amounted to an estoppel; *Hall v. Gayheart, 235 S.W.2d 1020 (Ky. 1951).*

(n400)Footnote 1101. *Iowa v. Carr, 191 F. 257* (*C.C.A. 8 Iowa 1911); Price v. De Reyes, 119 P. 893 (Cal. 1911); Cavanaugh v. Jackson, 27 P. 931 (Cal. 1891); Silvarer v. Hansen, 20 P. 136 (Cal. 1888); Helm v. Wilson, 18 P. 604 (Cal. 1888); White v. Spreckels, 17 P. 715 (Cal. 1888); Sneed v. Osborn, 25 Cal. 619 (1864); Lindsay v. Springer, 4 Del. 547 (1847); McGill v. Dowman, 24 S.E.2d 195 (Ga. 1943); Idaho Land Co. v. Parsons, 31 P. 791 (Idaho 1892); Mullaney v. Duffy, 33 N.E. 750 (Ill. 1893); Quick v. Nitschelm, 28 N.E. 926 (Ill. 1891); Bloomington v. Bloomington Cemetery Ass'n, 18 N.E. 298 (Ill. 1888); Fisher v. Bennehoff, 13 N.E. 150 (Ill. 1887); Adams v. Betz, 78 N.E. 649 (Ind. 1906); Main v. Killinger, 90 Ind. 165 (1883); Kinsey v. Satterthwaite, 88 Ind. 342 (1882); Griffin v. Brown, 149 N.W. 833 (Iowa 1914); Fordson Coal Co. v. Howard, 168 S.W.2d 588 (Ky. 1943); Young v. Woolett, 29 S.W. 879 (Ky. 1895); Harper v. Learned, 6 So. 2d 326 (La. 1942); Pritchard v. Young, 74 Me. 419 (1883); Hills v. Ludwig, 24 N.E. 596 (Ohio 1889); Ungaro v. Mete, 27 A.2d 826 (R.I. 1942); Harrison v. Manvel Oil Co., 180 S.W.2d 909 (Tex. 1944); Levy v. Maddox, 16 S.W. 877 (Tex. 1891); Harn v. Smith, 15 S.W. 240 (Tex. 1891); Harrell v. Houston, 17 S.W. 731 (Tex. 1886); Eddie v. Tinnin, 26 S.W. 732 (Tex. App. 1894); Eubanks v. Buckley, 132 P.2d 353 (Wash. 1942); George v. Collins, 77 S.E. 356 (W. Va. 1913); Teass v. St. Albans, 17 S.E. 400 (W. Va. 1893); Gwynn v. Schwartz, 9 S.E. 880 (W. Va. 1889).* Having agreed upon the line, or agreed upon a mode by which it shall be determined, and having accepted and acquiesced in it by the unequivocal act of taking possession according to the line, they and their privies are estopped from afterwards disputing it. The estoppel arises from the act of the parties in taking possession, and occupying their respective tracts to the line thus agreed upon and determined; *Berghoefer v. Frazier, 37 N.E. 914 (Ill. 1894); Stutsman v. State, 275 N.W. 387 (N.D. 1937).*

(n401)Footnote 1102. *Fisher v. Bennehoff, 13 N.E. 150 (Ill. 1887); Houston v. Matthews, 9 Tenn. 116 (1826).*

(n402)Footnote 1103. *Berghoefer v. Frazier, 37 N.E. 914 (Ill. 1894); Bloomington v. Bloomington Cemetery Ass'n, 18 N.E. 298 (Ill. 1888); Fisher v. Bennehoff, 13 N.E. 150 (Ill. 1887).*

(n403)*Footnote 1104. v. Wynn, 62 S.E. 37 (Ga. 1908).*

(n404)Footnote 1105. *Pittsburgh & L. A. Iron Co. v. Lake Superior Iron Co., 76 N.W. 395 (Mich. 1898), error dismissed, 178 U.S. 270, 20 S. Ct. 931, 44 L. Ed. 1065 (1900).*

(n405)Footnote 1106. *Osteen v. Wynn, 62 S.E 37 (Ga. 1908); Jones v. Pashby, 35 N.W. 152 (Mich. 1887).*

(n406)Footnote 1107. *Sheets v. Sweeney, 26 N.E. 648 (Ill. 1891); Combs v. Combs, 240 S.W.2d 558 (Ky. 1951).*

(n407)Footnote 1108. *Berghoefer v. Frazier, 37 N.E. 914 (Ill. 1894). See Miller v. Richey, 173 S.W.2d 490 (Tex. App. 1943), aff'd, 177 S.W.2d 255 (Tex. 1944).*

(n408)Footnote 1109. *Harrison v. Manvel Oil Co., 179 S.W.2d 413 (Tex. App. 1943), rev'd, 180 S.W.2d 909 (Tex. 1944).*

(n409)Footnote 1110. *Eubanks v. Buckley, 132 P.2d 353 (Wash. 1942).*

(n410)Footnote 1111. *Euse v. Gibbs, 49 So. 2d 843 (Fla. 1951).*

(n411)Footnote 1112. *Rast v. Fisher, 236 P.2d 393* (Cal. 2 Dist. App. 1951).

(n412)Footnote 1113. *Pilibos v. Gramas, 231 P.2d 502* (Cal. 4 Dist. App. 1951).

(n413)Footnote 1114. *McDowell v. Internal Imp. Fund, 90 So. 2d 715 (Fla. 1956).*

(n414)Footnote 1115. *Driesbach v. Lynch, 234 P.2d 446 (Idaho 1951).*

(n415)Footnote 1116. *Coleman v. Schaeffer, 126 N.E.2d 444 (Ohio 1955).*

(n416)Footnote 1117. *Concord Mfg. Co. v. Robertson, 25 A. 718 (N.H. 1890); Fulton Light, Heat & Power Co. v. State, 94 N.E. 199 (N.Y. 1911), reh'g. den., 95 N.E. 1129 (N.Y. 1911).*

(n417)Footnote 1118. *Hine v. Trevor, 71 U.S. 555, 18 L. Ed. 451 (1866); Concord Mfg. Co. v. Robertson, 25 A. 718 (N.H. 1890).* A deed does not carry any land beneath nonnavigable sound but only to high watermark as of the time the titles were acquired; *Kelly v. King, 36 S.E.2d 229 (N.C. 1945). See* Comment, "Effect of Common and Civil Law on Tidal Boundaries," *9 Baylor L. Rev. 40 (1957).*

(n418)Footnote 1119. *United States v. Appalachian Electric Power Co., 311 U.S. 377, 61 S. Ct. 291, 85 L. Ed. 243 (1940); Concord Mfg. Co. v. Robertson, 25 A. 718 (N.H. 1890); Ewell v. Lambert, 13 S.E.2d 333 (Va. 1941).*

(n419)Footnote 1120. *United States v. Rio Grande Dam & IrR.R., 174 U.S. 690, 19 S. Ct. 770, 43 L. Ed. 1136 (1899); Packer v. Bird, 137 U.S. 661, 11 S. Ct. 210, 34 L. Ed. 819 (1891); Barney v. Keokuk, 94 U.S. 324, 24 L. Ed. 224 (1876); Daniel Ball v. United States, 77 U.S. 557, 19 L. Ed. 99* (187); *Wisconsin Public Service Corp. v. Federal Power Comm'n, 147 F.2d 743 (7th Cir. 1945); Chamberlain v. Board of City Comm'rs, 11 So. 2d 724 (Ala. 1943); Bayzer v. McMillan Mill Co., 16 So. 923 (Ala. 1895); Hess v. Cheney, 3 So. 791 (Ala. 1888); Williams v. Glover, 66 Ala. 189 (1880); Bullock v. Wilson, 2 Ala. 436 (1945); McGahhey v. McCollum, 179 S.W.2d 661 (Ark. 1944); St. Louis, I. M. & S. R.R. v. Ramsey, 13 S.W. 931 (Ark. 1890); Little Rock, M. R. & T. R.R. v. Brooks, 39 Ark. 403 (1882); Lux v. Haggin, 10 P. 674 (Cal. 1886); Johnson v. Johnson, 95 P. 499 (Idaho 1908); Schulte v. Warren, 75 N.E. 783 (Ill. 1905); Martin v. Evansville, 32 Ind. 85 (1869); Wood v. Chicago, R. I. & P. R.R., 15 N.W. 284 (Iowa 1883); Tomlin v. Dubuque, B. & M. R.R., 32 Iowa 106 (1871); Haight v. Keokuk, 4 Iowa 199 (1857); McManus v. Carmichael, 3 Iowa 1 (1856); Wood v. Fowler, 26 Kan. 682 (1882); State v. Aucoin, 20 So. 2d 136 (La. 1944); Smart v. Aroostook Lbr. Co., 68 A. 527 (Me. 1907); Brooks v. Cedar Brook & S. C. R. Imp. Co., 19 A. 87 (Me. 1889); Rushton ex rel. Hoffmaster v. Taggart, 11 N.W.2d 193 (Mich. 1943); Lorman v. Benson, 8 Mich. 18 (1860); State v. Korrer, 148 N.W. 617 (Minn. 1914); Lamprey v. State, 53 N.W. 1139 (Minn. 1893); Homochitto River Comm'rs v. Withers, 29 Miss. 21 (1855); Benson v. Morrow, 61 Mo. 345 (1875); Meyers v. St. Louis, 8 Mo. App. 266 (1880); Kinkead v. Turgeon, 104 N.W. 1061 (Neb. 1905); Connecticut River Lbr. Co. v. Olcott Falls Co., 21 A. 1090 (N.H. 1890); People v. Jones, 20 N.E. 577 (N.Y. 1889); People ex rel. Erie R.R. v. State Tax Comm'n, 43 N.Y.S.2d 189 (N.Y. App. Div. 1943), aff'd, 60 N.E.2d 31 (N.Y. 1944); Powell v. Rochester, 157 N.Y.S. 109 (1915); State v. Eaton, 19 S.E. 88 (N.C. 1894); State v. Narrows Island Club, 5 S.E. 411 (N.C. 1888); Fagan v. Armistead, 33 N.C. 433 (1850); Collins v. Benbury, 25 N.C. 277 (1842); State v. Cleveland & P. R.R., 113 N.E. 677 (Ohio 1916); Hume v. Rogue River Packing Co., 83 P. 391 (Or. 1905); Fulmer v. Williams, 15 A. 726 (Pa. 1888); Cates v. Wadlington, 1 S.C. 580 (1822); State ex rel. Cates v. West Tennessee Land Co., 158 S.W. 746 (Tenn. 1913); Miller v. State, 137 S.W. 760 (Tenn. 1911); Elder v. Burrus, 25 Tenn. 358 (1845); Boutwell v. Champlain Realty Co., 94 A. 108 (Vt. 1915); Strand v. State, 132 P.2d 1011 (Wash. 1943); Griffith v. Holman, 63 P. 239 (Wash. 1900); Brown Oil Co. v. Caldwell, 13 S.E. 42 (W. Va. 1891); Gaston v. Mace, 10 S.E. 60 (W. Va. 1889);*

Willow River Club v. Wade, 76 N.W. 273 (Wis. 1898).

(n420)Footnote 1121. *Carson v. Blazer, 2 Pa. 475 (1810).*

(n421)Footnote 1122. Act May 18, 1796, ch. 29, § 9, 1 Stat. L. 468 *43 U.S.C. § 931).*

(n422)Footnote 1123. *Hardin v. Jordan, 140 U.S. 371, 11 S. Ct. 838, 35 L. Ed. 428 (Ill. 1891); St. Louis v. Rutz, 138 U.S. 226, 11 S. Ct. 337, 34 L. Ed. 941 (1891); Jones v. Soulard, 65 U.S. 41 (1860); United States v. Elliott, 131 F. 2d 720 (10th Cir. 1942); Birmingham v. Lake, 10 So. 2d 24 (Ala. 1942); Gill v. Hedgecock, 184 S.W.2d 262 (Ark. 1944); Ford v. Butte County, 145 P.2d 640 (Cal. App. 1944); Hanlon v. Hobson, 51 P. 433 (Colo. 1897); Welles v. Bailey, 10 A. 565 (Conn. 1887); Adams v. Pease, 2 Conn. 481 (1818); Boardman v. Scott, 30 S.E. 982 (Ga. 1897); Lattig v. Scott, 107 P. 47 (Idaho 1910); Kinsella v. Stephenson, 106 N.E. 950 (Ill. 1914); Fuller v. Dauphin, 16 N.E. 917 (Ill. 1888); Buttenuth v. St. Louis Bridge Co., 17 N.E. 439 (Ill. 1888); Trustees v. Schroll, 12 N.E. 243 (Ill. 1887); Holmes v. Haines, 1 N.W.2d 746 (Iowa 1942); Princeton v. Martin, 170 S.W.2d 660 (Ky. 1943); Brown v. Chadbourne, 31 Me. 9 (1849); Browne v. Kennedy, 5 Md. 195 (1821); Hall v. Alford, 72 N.W. 137 (Mich. 1897); Webber v. Pere Marquette Boom Co., 30 N.W. 469 (Mich. 1886); Backus v. Detroit, 13 N.W. 380 (Mich. 1882); Ryan v. Brown, 18 Mich. 196 (1869); Lorman v. Benson, 8 Mich. 18 (1860); The Magnolia v. Marshall, 39 Miss. 109 (1860); Hardt v. Orr, 6 N.W.2d 589 (Neb. 1942); Attorney General v. Delaware & B. B. R.R., 27 N.J. Eq. 631 (1876); Kanouse v. Slockbower, 21 A. 197* (N.J. Err. & App. 1876); *Tagliaferri v. Grande, 120 P. 730 (N.M. 1911); Bond v. Wool, 12 S.E. 281 (N.C. 1890); State v. Glen, 52 N.C. 321 (1859); Williams v. Buchanan, 23 N.C. 535 (1841); Lembeck v. Nye, 24 N.E. 686 (Ohio 1890); June v. Purcell, 36 Ohio St. 396 (1881); Walker v. Public Works, 16 Ohio 540 (1847); Blanchard v. Porter, 11 Ohio 138 (1841); Gavit v. Chambers, 3 Ohio 495 (1828); Phillips Petroleum Co. v. Davis, 147 P.2d 135 (Okla. 1942); Kingsley v. Jacobs, 149 P.2d 950 (Or. 1949); Moore v. Willamette Transp. & Lock Co., 7 Or. 355 (1879); Matthews v. Bagnik, 41 A.2d 875 (Pa. Super. 1945); State v. Columbia, 3 S.E. 55 (S.C. 1887); McCullough v. Wall, 3 S.C.L. (4 Rich.) 68 (1850); Richmond v. Thompson, 81 S.E. 105 (Va. 1914); State ex rel. Davis v. Superior Court for Cowlitz County, 146 P. 609 (Wash. 1915); Norcross v. Griffiths, 27 N.W. 606 (Wis. 1886); Jones v. Pettibone, 2 Wis. 308 (1853).*

(n423)Footnote 1124. *State v. Aucoin, 20 So. 2d 136 (La. 1944).*

(n424)Footnote 1125. *In re Delaware River, 115 N.Y.S. 745 (N.Y. App. Div. 1909).* Navigable if it will float saw logs; *Wisconsin v. Federal Power Comm'n, 214 F.2d 334 (7th Cir. 1954)* (dictum), cert. den. *348 U.S. 883, 75 S. Ct. 124, 99 L. Ed. 694 (1954).* But not navigable if floats logs only three days in a year; *Bingenheimer v. Diamond Iron Min. Co., 54 N.W.2d 912 (Minn. 1952).* In Florida waters are navigable if they will float logs in commerce; *Bucki v. Cone, 6 So. 160 (Fla. 1889).*

(n425)Footnote 1126. *St. Anthony Falls Water Power Co. v. St. Paul Water Comm'rs, 168 U.S. 349, 18 S. Ct. 157, 42 L. Ed. 497 (1897); Schulte v. Warren, 75 N.E. 783 (Ill. 1905); Danes v. State, 113 N.E. 786 (N.Y. 1916).*

(n426)Footnote 1127. *McKinney v. Northcutt, 89 S.W. 351 (Mo. App. 1905).*

(n427)Footnote 1128. *Healy v. Joliet & C. R.R., 116 U.S. 191, 6 S. Ct. 352, 29 L. Ed. 607 (1886); Smart v. Aroostook Lbr. Co., 68 A. 527 (Me. 1907); Missouri ex rel. Missouri Water Co. v. Bostian, 272 S.W.2d 857 (Mo. App. 1954)* (dictum).

(n428)Footnote 1129. *Packer v. Bird, 137 U.S. 661, 11 S. Ct. 210, 34 L. Ed. 819 (1891); St. Paul & Pac. R.R. v. Schurmeirer, 74 U.S. 272, 19 L. Ed. 74 (1868).*

(n429)Footnote 1130. *Hardin v. Jordan, 140 U.S. 371, 11 S. Ct. 808, 35 L. Ed. 428 (1891); St. Louis v. Rutz, 138 U.S. 226, 11 S. Ct. 337, 34 L. Ed. 941 (1891); Packer v. Bird, 137 U.S. 661, 11 S. Ct. 210, 34 L. Ed. 819 (1891); St. Louis v. Myers, 113 U.S. 566, 5 S. Ct. 640, 28 L. Ed. 1131 (1885); Barney v. Keokuk, 94 U.S. 324, 24 L. Ed. 224 (1876). See Johnson v. Johnson, 95 P. 499 (Idaho 1908),* as applying the common-law rule.

(n430)Footnote 1131. *United States v. Holt State Bank, 270 U.S. 49, 46 S. Ct. 197, 70 L. Ed. 465 (1926); Strand v. State, 132 P.2d 1011 (Wash. 1943). See* Kenneth Roberts, "Title and Boundary Problems Relating to the Riverbeds," *36 Tex. L. Rev. 299 (1958).*

(n431)Footnote 1132. *Broward v. Mabry, 50 So. 826 (Fla. 1909).*

(n432)Footnote 1133. *Heje v. Wirth, 334 S.W.2d 498 (Tex. App. 1960), rev'd, 343 S.W.2d 226 (Tex. 1961); Schultz v. Winther, 101 N.W.2d 631 (Wis. 1960)* (but the circumstances may indicate otherwise).

(n433)Footnote 1134. Since the original boundary is ascertainable the line does not move; *Stratbucker v. Junge, 46 N.W.2d 486 (Neb. 1951); Erickson v. Horlyk, 205 N.W. 613 (S.D. 1925); Allard v. Curran, 168 N.W. 761 (S.D. 1918). Contra*, upon theory that once the stream touches the boundary the land becomes riparian; *Welles v. Bailey, 10 A. 565 (Conn. 1887); Widdecombe v. Chiles, 73 S.W. 444 (Mo. 1903).*

(n434)Footnote 1135. *McAdam v. Smith, 350 P.2d 689 (Or. 1960); Kirby Lbr. Co. v. Campbell, 331 S.W.2d 388 (Tex. App. 1960)* (river calls are of the highest order and take precedence over courses and distances and area recitals).

(n435)Footnote 1136. *Hardin v. Jordan, 140 U.S. 371, 11 S. Ct. 838, 35 L. Ed. 428 (1891); Bernot v. Morrison, 143 P. 104 (Wash. 1914).* "The rule of the common law on this point appears to have been followed in all the original states, -- except in Pennsylvania, Virginia, and North Carolina, and except as to great rivers, such as the Hudson, the Mohawk, and the St. Lawrence in New York,--as well as in Ohio, Illinois, Michigan, and Wisconsin. But it has been wholly rejected as to rivers navigable in fact, in Pennsylvania, Virginia, and North Carolina, and in most of the new states," *Shively v. Bowlby, 152 U.S. 1, 14 S. Ct. 548, 38 L. Ed. 331 (1894).*

(n436)Footnote 1137. *Packer v. Bird, 137 U.S. 661, 11 S. Ct. 210, 34 L. Ed. 814 (U.S. Cal. 1891); People ex rel. Burnham v. Jones, 20 N.E. 577 (N.Y. 1889); Benner v. Platter, 6 Ohio 504 (1834); Gavit v. Chambers, 3 Ohio 495 (1828); Delaplaine v. Chicago & N. W. R.R., 42 Wis. 214 (1877).*

(n437)Footnote 1138. *Paterson v. East Jersey Water Co., 70 A. 472 (N.J. Ch. 1908), aff'd, 78 A. 1134* (N.J. Err. & App. 1910).

(n438)Footnote 1139. *Cessill v. State, 40 Ark. 501 (1883).* Grant carries to the thread of a nonnavigable stream unless the terms of the grant and attendant circumstances indicate to the contrary; *Choctaw & Chicksaw Nations v. Seay, 235 F.2d 30 (10th Cir. 1956), cert. denied, 352 U.S. 917, 77 S. Ct. 26, 1 L. Ed. 2d 123 (1956).*

(n439)Footnote 1140. *Bishel v. Faria, 347 P.2d 289 (Cal. 1959).*

(n440)Footnote 1141. *Rowe v. Smith, 51 Conn. 266 (1883); Holmes v. Haines, 1 N.W.2d 746 (Iowa 1942); Spurrier v. Hodges, 90 S.W. 559 (Ky. 1906); State v. Burton, 31 So. 291 (La. 1902); Warren v. Thomaston, 75 Me. 329 (1883); Hardt v. Orr, 6 N.W.2d 589 (Neb. 1942); McCullough v. Wall, 4 S.C. 68 (1850); State v. Muncie Pulp Co., 104 S.W. 437 (Tenn. 1907); Coumas v. Transcontinental Garage, 230 P.2d 748 (Wyo. 1951).*

(n441)Footnote 1142. *Nebraska v. Iowa, 143 U.S. 359, 12 S. Ct. 396, 36 L. Ed. 186 (1892); St. Louis v. Rutz, 138 U.S. 226, 11 S. Ct. 337, 34 L. Ed. 941 (1891); Jefferis v. East Omaha Land Co., 134 U.S. 178, 10 S. Ct. 518, 33 L. Ed. 872 (1890); St. Clair v. Lovingston, 90 U.S. 46, 23 L. Ed. 594 (1874); Saulet v. Shepherd, 71 U.S. 502, 18 L. Ed. 442 (1866); Banks v. Ogden, 69 U.S. 57, 17 L. Ed. 818 (1864); Jones v. Soulard, 65 U.S. 41, 16 L. Ed. 604 (1860); New Orleans v. United States, 35 U.S. 662, 9 L. Ed. 573 (1836); Hagan v. Campbell, 8 Ala. 9 (1838); Warren v. Chambers, 25 Ark. 120 (1867); Welles v. Bailey, 10 A. 565 (Conn. 1887); Bellefontaine Imp. Co. v. Niedringhaus, 55 N.E. 184 (Ill. 1899); Buttenuth v. St. Louis Bridge Co., 17 N.E. 439 (Ill. 1888); Steele v. Sanchez, 33 N.W. 366 (Iowa 1887); Kraut v. Crawford, 18 Iowa 549 (1865); Fowler v. Wood, 85 P. 763 (Kan. 1906); Frank v. Goddin, 91 S.W. 1057 (Mo. 1906); Primm v. Walker, 38 Mo. 94 (1866); Gill v. Lydick, 59 N.W. 104 (Neb. 1894); Lammers v. Nissen, 4 Neb. 245 (1876); Willhelm v. Burleyson, 11 S.E. 590 (N.C. 1890); Murry v. Sermon, 8 N.C. 56 (1820); Niehaus v. Shepherd, 26 Ohio St.*

40 (1875); Lamb v. Ricketts, 11 Ohio 311 (1842); Walker v. Shepardson, 4 Wis. 486 (1855); Jones v. Pettibone, 2 Wis. 308 (1853). See Arnd v. Harrington, 287 N.W. 292 (Iowa 1939); Conkey v. Kundsen, 284 N.W. 737 (Neb. 1939). The presumption is in favor of present boundary lines, and party alleging that location of the line has been changed by forces of nature has the burden of proof; *Shapleigh v. United Farms Co., 100 F.2d 287 (5th Cir. Tex. 1938).*

(n442)Footnote 1143. *Nebraska v. Iowa, 143 U.S. 359, 12 S. Ct. 396, 36 L. Ed. 186 (1892); St. Louis v. Rutz, 138 U.S. 226, 11 S. Ct. 337, 34 L. Ed. 941 (1891); Bellefontaine Imp. Co. v. Neidringhaus, 55 N.E. 184 (Ill. 1899); Chicago v. Ward, 48 N.E. 927 (Ill. 1897); Buttenuth v. St. Louis Bridge Co., 17 N.E. 439 (Ill. 1888); Fowler v. Wood, 85 P. 763 (Kan. 1906); Degman v. Elliott, 8 S.W. 10 (Ky. 1888); Wiggenhorn v. Kountz, 37 N.W. 603 (Neb. 1888); Holbrook v. Moore, 4 Neb. 437 (1876); Henning v. Bennett, 18 N.Y.S. 645 (1892). See Arnd v. Harrington, 287 N.W. 292 (Iowa 1939).*

(n443)Footnote 1144. *Hardt v. Orr, 6 N.W.2d 589 (Neb. 1942).*

(n444)Footnote 1145. *Walker v. Board of Public Works, 16 Ohio 540 (1847); Branham v. Bledsoe Creek Tpk. Co., 69 Tenn. 704 (1878).* So in case of a navigable river, *Missouri v. Kentucky, 78 U.S. 395, 20 L. Ed. 116 (1870).* Dividing line is center or thread of nonnavigable stream; *Brown v. Wilson, 155 S.W.2d 176 (Mo. 1941); Hardt v. Orr, 6 N.W.2d 589 (Neb. 1942); Higgins v. Adelson, 270 N.W. 502 (Neb. 1936); Mix v. Tice, 298 N.Y.S. 441 (1937); Rose v. Franklin, 4 S.E.2d 876 (N.C. 1939); Kingsley v. Jacobs, 149 P.2d 950 (Or. 1944); Matthews v. Bagnik, 41 A.2d 875 (Pa. Super. 1945); Ewell v. Lambert, 13 S.E.2d 333 (Va. 1941).*

(n445)Footnote 1146. *Stolp v. Hoyt, 44 Ill. 219 (1867).*

(n446)Footnote 1147. *Jones v. Soulard, 65 U.S. 41, 16 L. Ed. 604 (1860).*

(n447)Footnote 1148. *St. Louis v. Rutz, 138 U.S. 226, 11 S. Ct. 337, 34 L. Ed. 941 (1891); McCullough v. Wall, 4 Rich. (S.C.) 68 (1850).*

(n448)Footnote 1149. *Warren v. Chambers, 25 Ark. 120 (1867); St. Louis v. Missouri P. R.R., 21 S.W. 202 (Mo. 1893); Buse v. Russell, 86 Mo. 209 (1885); St. Louis Public Schools v. Risley, 40 Mo. 356 (1867); Victoria v. Schott, 29 S.W. 681 (Tex. App. 1895).*

(n449)Footnote 1150. *Martin v. Cooper, 25 P. 262 (Cal. 1890).*

(n450)Footnote 1151. *Shively v. Bowlby, 152 U.S. 1, 14 S. Ct. 548, 38 L. Ed. 331 (1894); Handly v. Anthony, 18 U.S. 374, 5 L. Ed. 113 (1820); Jefferis v. East Omaha Land Co., 134 U.S. 178, 10 S. Ct. 518, 33 L. Ed. 872 (1890); Minto v. Delaney, 7 Or. 337 (1879). See Stratbucker v. Junge, 46 N.W.2d 486 (Neb. 1957).*

(n451)Footnote 1152. *Hanlon v. Hobson, 51 P. 433 (Colo. 1897).*

(n452)Footnote 1153. *Oklahoma v. Texas, 261 U.S. 340, 43 S. Ct. 376 (1923); Heard v. State, 204 S.W.2d 344 (Tex. 1947).*

(n453)Footnote 1154. *Iowa v. Illinois, 147 U.S. 1, 13 S. Ct. 239, 37 L. Ed. 55 (1893); St. Louis Public Schools v. Risley, 77 U.S. 91, 19 L. Ed. 850 (1869); Jones v. Soulard, 65 U.S. 41, 16 L. Ed. 604 (1869); Keokuk & H. Bridge Co. v. People, 34 N.E. 482 (Ill. 1893); Buttenuth v. St. Louis Bridge Co., 17 N.E. 439 (Ill. 1888); Chicago & N. W. R.R. v. Clinton, 55 N.W. 462 (Iowa 1893); Dunleith & Dubuque Bridge Co. v. Dubuque, 8 N.W. 443 (Iowa 1881); Graves v. Fisher, 5 Me. 69 (1827); Benner v. Platter, 6 Ohio 504 (1834); Branham v. Bledsoe Creek Tpk. Co., 69 Tenn. 704 (1878).*

(n454)Footnote 1155. *Missouri v. Kentucky, 78 U.S. 395, 20 L. Ed. 116 (1870); Cessill v. State, 40 Ark. 501 (1883); Hardt v. Orr, 6 N.W.2d 589 (Neb. 1942); Pike v. Hood, 27 A. 139 (N.H. 1892).*

(n455)Footnote 1156. *Sweatman v. Holbrook, 38 S.W. 691 (Ky. 1897).*

(n456)Footnote 1157. *Rober v. Michelsen, 116 N.W. 949 (Neb. 1908).*

(n457)Footnote 1158. *Pack v. Stepp, 110 S.W. 887 (Ky. 1908).*

(n458)Footnote 1159. *Whitaker v. McBride, 197 U.S. 510, 25 S. Ct. 530, 49 L. Ed. 857 (1905); Horne v. Smith, 159 U.S. 40, 15 S. Ct. 988, 40 L. Ed. 68 (1895); Mitchell v. Smale, 140 U.S. 406, 11 S. Ct. 819, 35 L. Ed. 442 (1891); Hardin v. Jordan, 140 U.S. 371, 11 S. Ct. 838, 35 L. Ed. 428 (1891); Cragin v. Powell, 128 U.S. 691, 9 S. Ct. 203, 32 L. Ed. 566 (1888); St. Paul & P. R.R. v. Schurmeier, 74 U.S. 272, 19 L. Ed. 74 (1868); Banks v. Ogden, 69 U.S. 57, 17 L. Ed. 818 (1864); Bridge Co. v. Miller, 12 F.2d 41 (8th Cir. 1926), cert. denied, 273 U.S. 723, 47 S. Ct. 113, 71 L. Ed. 859 (1926); Forsyth v. Smale, 9 F. Cas. 471 (C.C. Ind. 1876); Ford v. Butte County, 145 P.2d 640 (Cal. App. 1944); Los Angeles v. San Pedro, L. A. & S. L. R.R., 189 P. 449 (Cal. 1920), cert. denied, 254 U.S. 636, 41 S. Ct. 9, 65 L. Ed. 450 (1920); South Florida Farms Co. v. Goodno, 94 So. 672 (Fla. 1922); Burgin v. Pickron, 47 S.E.2d 195 (Ga. App. 1948); Fuller v. Dauphin, 16 N.E. 917 (Ill. 1888); Stoner v. Rice, 22 N.E. 968 (Ind. 1889); Sphung v. Moore, 22 N.E. 319 (Ind. 1889); Ridgway v. Ludlow, 58 Ind. 248 (1877); Cedar Rapids v. Marshall, 203 N.W. 932 (Iowa 1925); Kraut v. Crawford, 18 Iowa 549 (1865); Cushenbery v. Waite-Phillips Co., 240 P. 400 (Kan. 1925); Clute v. Fisher, 31 N.W. 614 (Mich. 1887); Palmer v. Dodd, 31 N.W. 209 (Mich. 1887); Pere Marquette Boom Co. v. Adams, 6 N.W. 857 (Mich. 1880);*

(n459)Footnote 1160. *United States v. Hayes, 20 F.2d 873 (8th Cir. Okla. 1927), cert. denied, 275 U.S. 552, 555, 48 S. Ct. 115, 72 L. Ed. 421 (1927).*

(n460)Footnote 1161. *Security Land & Exploration Co. v. Burns, 91 N.W. 304 (Minn. 1902), aff'd, 193 U.S. 167, 24 S. Ct. 425, 48 L. Ed. 662 (1904).*

(n461)Footnote 1162. *Niles v. Cedar Point Club, 175 U.S. 300, 20 S. Ct. 124, 44 L. Ed. 171 (1899); Glenn v. Jeffrey, 39 N.W. 160 (Iowa 1888); Harrison v. Stipes, 51 N.W. 976 (Neb. 1892); Bissell v. Fletcher, 28 N.W. 303 (Neb. 1886); Lammars v. Nissen, 4 Neb. 245 (1876), aff'd, 154 U.S. 650, 14 S. Ct. 1189, 25 L. Ed. 562 (1879).*

(n462)Footnote 1163. *Thunder Lake Lbr. Co. v. Carpenter, 200 N.W. 302 (Wis. 1924).*

(n463)Footnote 1164. *Sherwin v. Blitzer, 106 N.W. 1046 (Minn. 1906).*

(n464)Footnote 1165. *People v. Henderson, 40 Cal. 29 (1870); Fuller v. Dauphin, 16 N.E. 197 (Ill. 1888); Rayburn v. Winant, 18 P. 588 (Or. 1888).*

(n465)Footnote 1166. *State v. Arnim, 173 S.W.2d 503 (Tex. App. 1943); Northern Pine Land Co. v. Bigelow, 54 N.W. 496 (Wis. 1893).*

(n466)Footnote 1167. *People v. Henderson, 40 Cal. 29 (1870); Hicks v. Coleman, 25 Cal. 122 (1864).*

(n467)Footnote 1168. *Wisconsin Realty Co. v. Lull, 187 N.W. 978 (Wis. 1922); Northern Pine Land Co. v. Bigelow, 54 N.W. 496 (Wis. 1893); Lally v. Rossman, 51 N.W. 1132 (Wis. 1892).*

(n468)Footnote 1169. *Menasha Wooden Ware Co. v. Lawson, 36 N.W. 412 (Wis. 1888).*

(n469)Footnote 1170. *Lopez v. Smith, 109 So. 2d 176 (Fla. App. 1959); Cutliff v. Densmore, 93 N.W.2d 307 (Mich. 1958)* (meander line is boundary of property abutting shore line, regardless of advancement or recession of shore line).

(n470)Footnote 1171. *Smith v. Fowler, 333 P.2d 1034 (Colo. 1959).*

(n471)Footnote 1172. *Chandos v. Mack, 46 N.W. 803 (Wis. 1890); Greene v. Nunnemacher, 36 Wis. 50 (1874).*

Where the line was "10 feet east of the river" it did not shift with erosion of the bank; *Hart v. T. L. Wright Lbr. Co., 196 S.W.2d 272 (Mo. 1946).*

(n472)Footnote 1173. *Oklahoma v. Texas, 258 U.S. 574, 42 S. Ct. 406, 66 L. Ed. 771 (1922), modification denied, 260 U.S. 711, 143 S. Ct. 251, 67 L. Ed. 476 (1923); United States v. Certain Lands, 52 F. Supp. 540 (S.D. N.Y. 1943); United States v. Elliott, 131 F.2d 720 (10th Cir. 1942); Ne-Bo Shone Ass'n v. Hogarth, 81 F.2d 70 (6th Cir. 1936); Hood v. Murphy, 165 So. 219 (Ala. 1936); Goforth v. Wilson, 184 S.W.2d 814 (Ark. 1945); Gill v. Hedgecock, 184 S.W.2d 262 (Ark. 1944); Kilgo v. Cook, 295 S.W. 355 (Ark. 1927); Barboro v. Boyle, 178 S.W. 378 (Ark. 1915); Ford v. Butte County, 145 P.2d 640 (Cal. App. 1944); Spivey v. Barwick, 122 S.E. 594 (Ga. 1924); Earhart v. Rosenwinkel, 25 N.E.2d 268 (Ind. App. 1940); State v. Tuesberg Land Co., 109 N.E. 530 (Ind. App. 1915); Irvin v. Crammond, 108 N.E. 539 (Ind. App. 1916); Webb v. Board of Neosho County Comm'rs, 257 P. 966 (Kan. 1927); Hough v. Ohio River Sand Co., 288 S.W.2d 655 (Ky. 1956); Princeton v. Martin, 170 S.W.2d 660 (Ky. 1956); Begnaud v. Grubb, 25 So. 2d 606 (La. 1946); Hilt v. Weber, 233 N.W. 159 (Mich. 1930); Wineman v. Withers, 108 So. 708 (Miss. 1926); Missoula Bakke, 198 P.2d 769 (Mont. 1948); Ohm v. Clear Creek Drainage Dist., 45 N.W.2d 117 (Neb. 1950); Mingus v. Bell, 29 N.W.2d 332 (Neb. 1947); Hardt v. Orr, 6 N.W.2d 589 (Neb. 1942); In re Application of Central Nebraska Public Power & Irr. Dist., 295 N.W. 386 (Neb. 1940); Haney v. Hewitt, 181 N.W. 861 (Neb. 1921); Whitney v. Dudley, 40 N.Y.S.2d 838 (1943), aff'd, 45 N.Y.S.2d 725 (N.Y.A.D. 1943); Philips Petroleum Co. v. Davis, 147 P.2d 135 (Okla. 1942); Kingsley v. Jacobs, 149 P.2d 950 (Or. 1944); Leaf v. Pennsylvania Co., 112 A. 243 (Pa. 1920); Matthews v. Bagnik, 41 A.2d 875 (Pa. Super. 1945); Lee v. Grupe, 223 S.W.2d 548 (Tex. App. 1949); Boerner v. McCallister, 89 S.E.2d 23 (Va. 1955); James River & Kanawha Power Co. v. Old Dominion Iron & Steel Corp., 122 S.E. 344 (Va. 1924); Harper v. Holston, 205 P. 1062 (Wash. 1922); State ex rel. Davis v. Superior Court for Cowlitz County, 146 P. 609 (Wash. 1915). See Nattin v. Glassell, 100 So. 609 (La. 1924).*

(n473)Footnote 1174. *Tempel v. United States, 248 U.S. 121, 39 S. Ct. 56, 63 L. Ed. 162 (1918); Shively v. Bowlby, 152 U.S. 1, 14 S. Ct. 548, 38 L. Ed. 331 (1894); Hardin v. Jordan, 140 U.S. 371, 11 S. Ct. 808, 35 L. Ed. 428 (1891); Indiana v. Milk, 11 F. 389 (C.C. Ind. 1882); Thomas v. Hatch, 23 F. Cas. 946 (C.C. Me. 1838); Gill v. Hedgecock, 184 S.W.2d 262 (Ark. 1944); Ford v. Butte County, 145 P.2d 640* (Cal. 1 Dist. App. 1944); *Denver v. Pearce, 22 P. 774 (Colo. 1889); Welles v. Bailey, 10 A. 565 (Conn. 1887); Warner v. Southworth, 6 Conn. 471 (1827); Adams v. Pease, 2 Conn. 481 (1818); Johnson v. Johnson, 95 P. 499 (Idaho 1908); Sikes v. Moline Consumers Co., 127 N.E. 342 (Ill. 1920); People v. Madison, 17 N.E. 147 (Ill. 1888); Trustees of Schools v. Schroo, 12 N.E. 243 (Ill. 1887); Sizor v. Logansport, 50 N.E. 377 (Ind. 1898); Brophy v. Richeson, 36 N.E. 424 (Ind. 1894); Edwards v. Ogle, 76 Ind. 302 (1881); Ridgway v. Ludlow, 58 Ind. 248 (1877); Ross v. Faust, 54 Ind. 471 (1876); Noyes v. Collins, 61 N.W. 250 (Iowa 1894); Wilson v. Watson, 138 S.W. 283 (Ky. 1911); Williamsburg Boom Co. v. Smith, 1 S.W. 765 (Ky. 1886); Warren v. Thomaston, 75 Me. 329 (1883); Granger v. Avery, 64 Me. 292 (1874); Pike v. Monroe, 36 Me. 309 (1853); Nickerson v. Crawford, 16 Me. 245 (1839); Hathorn v. Stinson, 10 Me. 224 (1833); Laphish v. Bangor Bank, 8 Me. 85 (1831); Morrison v. Keen, 3 Me. 474 (1825); Sewers v. Hacklander, 188 N.W. 547 (Mich. 1922); Johnson v. Burghorn, 179 N.W. 225 (Mich. 1920); Twogood v. Hoyt, 4 N.W. 445 (Mich. 1880); Lamprey v. State, 53 N.W. 1139 (Minn. 1893); Paterson v. East Jersey Water Co., 70 A. 472 (N.J. Ch. 1908); People v. ex rel. Burnham v. Jones, 20 N.E. 577 (N.Y. 1889); Waterford Elec. Light, Heat & Power Co. v. State, 203 N.Y.S. 858 (N.Y.A.D. 1924), aff'd, 147 N.E. 225 (N.Y. 1925); Niehaus v. Shepherd, 26 Ohio St. 40 (1875); Hopkins v. Kent, 9 Ohio 13 (1839); Gavit v. Chambers, 3 Ohio 495 (1828); Hughes v. Providence & W. R.R., 2 R.I. 508 (1853); McCullough v. Wall, 4 S.C. 68 (1850); Martin v. Nance, 40 Tenn. 649 (1859); Crenshaw v. Slate River Co., 27 Va. 245 (1828); Hayes v. Bowman, 1 Va. 417 (1794); Carter v. Chesapeake & O. R.R., 26 W. Va. 644 (1885); Camden v. Creel, 4 W. Va. 365 (1870); Farris v. Bentley, 124 N.W. 1003 (Wis. 1910); Chandos v. Mack, 46 N.W. 803 (Wis. 1890); Norcross v. Griffiths, 27 N.W. 606 (Wis. 1886); Arnold v. Elmore, 16 Wis. 509 (1863).* Banks and not meanders of navigable river is boundary line; *O'Connor v. Rumiano Bros. Co., 321 P.2d 122* (Cal. 3 Dist. App. 1958).

(n474)Footnote 1175. *Oklahoma v. Texas, 258 U.S. 574, 42 S. Ct. 406, 66 L. Ed. 771 (1922); Walker v. Felmont Oil Corp., 240 F.2d 912 (6th Cir. 1957)* (Kentucky owned originally to the low watermark of the north bank of the Ohio River and can lease the minerals underneath the bed).

(n475)Footnote 1176. *Linthicum v. Shipley, 116 A. 871 (Md. 1922).*

(n476)Footnote 1177. *Western Elec. Co. v. Jersey Shore Realty Co., 117 A. 398 (N.J. Ch. 1922).*

(n477)Footnote 1178. *Stewart v. Turney, 142 N.W. 437 (N.Y. 1923). See United States v. Certain Tracts of Land in Brazoria County, Texas, 93 F. Supp. 182 (S.D. Tex. 1950)* (for title to stream beds under Austin's First Colony Grants and "Small Bill," 1929).

(n478)Footnote 1179. *Charles C. Wilson & Son v. Harrisburg, 77 A. 787 (Me. 1910); Stubblefield v. Osborn, 31 N.W.2d 547 (Neb. 1948); Coumas v. Transcontinental Garage, 230 P.2d 748 (Wyo. 1951).*

(n479)Footnote 1180. *Barney v. Keokuk, 94 U.S. 324, 24 L. Ed. 224 (1876); Wallace v. Driver, 33 S.W. 641 (Ark. 1896); Chapman v. Kimball, 9 Conn. 38 (1831); Watt v. Robbins, 142 N.W. 387 (Iowa 1913); Wood v. Fowler, 26 Kan. 682 (1882); Wilson v. Forbes, 13 N.C. 30 (1828); State v. Nolegs, 139 P. 943 (Okla. 1914); Armstrong v. Pincus, 158 P. 662 (Or. 1916); Harper v. Holston, 205 P. 1062 (Wash. 1922).*

(n480)Footnote 1181. *Widdicombe v. Rosemiller, 118 F. 295 (C.C. M.D. Mo. 1902); Webb v. Demopolis, 13 So. 289 (Ala. 1892); Irvin v. Crammond, 108 N.E. 539 (Ind. App. 1915); Wemple v. Eastham, 90 So. 637 (La. 1922); State v. Korrer, 148 N.W. 617 (Minn. 1914); Gibson v. Kelly, 39 P. 517 (Mont. 1895); Roberts v. Taylor, 181 N.W. 622 (N.D. 1921); Leaf v. Pennsylvania Co., 112 A. 243 (Pa. 1920); Hillebrand v. Knapp, 274 N.W. 821 (S.D. 1937); Brown Oil Co. v. Caldwell, 13 S.E. 42 (W. Va. 1891).*

(n481)Footnote 1182. *Cole v. Pittsburgh & L. E. R.R., 162 A. 712 (Pa. Super. 1932).* Deed to Alow watermark" carries to thread of stream; *Hough v. Ohio River Sand Co., 288 S.W.2d 655 (Ky. 1956). Contra* bed of stream; *Allen v. Weber, 50 N.W. 514 (Wis. 1891).*

(n482)Footnote 1183. *St. Clair v. Lovingston, 90 U.S. 46, 23 L. Ed. 59 (1874); St. Paul & P. R.R. v. Schurmeier, 74 U.S. 272, 19 L. Ed. 74 (1868); Leary v. Jersey City, 189 F. 419 (C.C. N.J. 1911); Whitehurst v. McDonald, 52 F. 633 (4th Cir. 1892); Sizor v. Logansport, 50 N.E. 377 (Ind. 1898); Hough v. Ohio River Sand Co., 288 S.W.2d 655 (Ky. 1956); Low v. Tibbetts, 72 Me. 92 (1881); Robinson v. White, 42 Me. 209 (1856); Lowell v. Robinson, 16 Me. 357 (1839); Kent v. Taylor, 13 A. 419 (N.H. 1888); Paterson v. East Jersey Water Co., 70 A. 472 (N.J. Ch. 1908), aff'd, 78 A. 1134* (N.J. Err. & App. 1910); *People ex rel. Burnham v. Jones, 20 N.E. 577 (N.Y. 1889); Gouverneur v. National Ice Co., 11 N.Y.S. 87 (N.Y. Supp. 1890), rev'd, 31 N.E. 865 (N.Y. 1892); McCullock v. Aten, 2 Ohio 307 (1826); Turner v. Parker, 12 P. 495 (Or. 1886); Mead v. Haynes, 3 Va. 33 (1824); Hayes v. Bowman, 1 Va. 417 (1794); Brown Oil Co. v. Caldwell, 13 S.E. 42 (W. Va. 1891); Camden v. Creel, 4 W. Va. 365 (1870).*

(n483)Footnote 1184. *Paterson v. East Jersey Water Co., 70 A. 472 (N.J. Ch. 1908); White v. Woodard, 42 S.E.2d 94 (N.C. 1947).*

(n484)Footnote 1185. *Gouverneur v. National Ice Co., 31 N.E. 865 (N.Y. 1892).*

(n485)Footnote 1186. *Seneca Nation v. Knight, 23 N.Y. 498 (1861).*

(n486)Footnote 1187. Asher Lbr. Co. v. Lunsford, 30 So. S.W. 968 (Ky. 1895). Property held to extend to stream where the lines were run by courses without monuments that conformed to meanders of the stream; *Ball Creek Coal Co. v. Napier, 202 S.W.2d 728 (Ky. 1947).*

(n487)Footnote 1188. *Kingsley v. Jacobs, 149 P.2d 950 (Or. 1944).*

(n488)Footnote 1189. *Macdonald v. Morrill, 28 N.E. 259 (Mass. 1891). See Bischoff v. Wethered, 76 U.S. 812, 19 L. Ed. 829 (1869); Emery v. Webster, 42 Me. 204 (1856).*

(n489)Footnote 1190. *Hartz v. Detroit, P. & N. R.R., 116 N.W. 1084 (Mich. 1908).*

(n490)Footnote 1191. *Patapsco Guano Co. v. Bowers-White Lbr. Co., 59 S.E. 538 (N.C. 1907).*

(n491)Footnote 1192. *Dunlap v. Stetson, 8 F. Cas. 75 (C.C. Me. 1827); Axline v. Shaw, 17 So. 411 (Fla. 1895); Murphy v. Copeland, 1 N.W. 691 (Iowa 1879); Bradford v. Cressey, 45 Me. 9 (1858); Fulton Light, Heat & Power Co. v. State, 94 N.E. 199 (N.Y. 1911); Gouverneur v. National Ice Co., 31 N.E. 865 (N.Y. 1892); Lamb v. Rickets, 11 Ohio 311 (1842).*

(n492)Footnote 1193. *Wood v. Appal, 63 Pa. 210 (1869).*

(n493)Footnote 1194. *Marine R. & Coal Co. v. United States, 265 F. 437 (App. D.C. 1920), aff'd, 257 U.S. 47, 42 S. Ct. 32, 66 L. Ed. 124 (1921).*

(n494)Footnote 1195. *Hutton v. Yolo Orchard Co., 258 P. 96* (Cal. 3 Dist. App. 1927), *aff'd, 265 P. 933 (Cal. 1928).*

(n495)Footnote 1196. *Graham v. Knight, 240 S.W. 981 (Tex. App. 1922).*

(n496)Footnote 1197. *Palmer v. Mann, 201 N.Y.S. 525 (N.Y.A.D. 1923).*

(n497)Footnote 1198. *In re New York, 217 N.Y.S. 544 (1926).* A colonial patent which described the land granted as running "to Hudson's river, then down the stream of said river as it runs" to the boundary of the next tract did not thereby pass title to the thread of the river, the common-law presumption that a grant bounded by a river above the ebb and flow of the tide extends to the middle of the stream not applying in the case of a grant on the Hudson river; *Finch, Pruyn & Co. v. State, 203 N.Y.S. 165 (N.Y. Ct. Cl. 1924).*

(n498)Footnote 1199. *Richards v. Page Inv. Co., 228 P. 937 (Or. 1924).*

(n499)Footnote 1200. *Kent v. Taylor, 13 A. 419 (N.H. 1888); Gouverneur v. National Ice Co., 31 N.E. 865 (N.Y. 1892).*

(n500)Footnote 1201. *Holbert v. Edens, 73 Tenn. 204 (1880).*

(n501)Footnote 1202. *Oakes v. De Lancey, 30 N.E. 974 (N.Y. 1892).*

(n502)Footnote 1203. *Brown v. Dunn, 115 N.W. 1097 (Wis. 1908).*

(n503)Footnote 1204. *Budd v. Brooke, 3 Md. 198 (1845).*

(n504)Footnote 1205. *Whitney v. Dudley, 40 N.Y.S.2d 838 (1943), aff'd, 45 N.Y.S.2d 725 (N.Y.A.D. 1943).*

(n505)Footnote 1206. *Bradley v. Rice, 13 Me. 198 (1836).*

(n506)Footnote 1207. *Smith v. Furbish, 44 A. 398 (N.H. 1894); Carter v. Chesapeake & O. R.R., 26 W. Va. 644 (1885).*

(n507)Footnote 1208. *Carter v. Chesapeake & O. R.R., 26 W. Va. 644 (1885).*

(n508)Footnote 1209. *Nichols v. New England Furn. Co., 59 N.W. 155 (Mich. 1894).*

(n509)Footnote 1210. *Smith v. Fowler, 333 P.2d 1034 (Colo. 1959).*

(n510)Footnote 1211. *Hardin v. Jordan, 140 U.S. 371, 11 S. Ct. 838, 35 L. Ed. 428 (1891); St. Paul & P. R.R. v. Schurmeier, 74 U.S. 272, 19 L. Ed. 74 (1868); People v. Henderson, 40 Cal. 29 (1870); Hicks v. Coleman, 25 Cal. 122 (1864); Lattig v. Scott, 107 P. 47 (Idaho 1910), rev'd, 227 U.S. 229, 33 S. Ct. 242, 57 L. Ed. 490 (1913); Sphung v.*

Moore, 22 N.E. 319 (Ind. 1889); State v. Portsmouth Sav. Bank, 7 N.E. 379 (Ind. 1886); Edwards v. Ogle, 76 Ind. 302 (1881); Ridgway v. Ludlow, 58 Ind. 248 (1876); Ross v. Faust, 54 Ind. 471 (1876); Ladd v. Osborne, 44 N.W. 235 (Iowa 1890); Kraut v. Crawford, 18 Iowa 549 (1865); Reno Brew. Co. v. Packard, 103 P. 415 (Neb. 1909); Minto v. Delaney, 7 Or. 337 (1879); Menasha Wooden Ware Co. v. Lawson, 36 N.W. 412 (Wis. 1888). Meander line is not boundary but merely to establish acreage; *Smith v. Long, 281 P.2d 483 (Idaho 1955); Ozark-Mahoning Co. v. State, 37 N.W.2d 488 (N.D. 1949); McCombs v. McKaughan, 195 S.W.2d 194 (Tex. App. 1946); Ghione v. State, 175 P.2d 955 (Wash. 1946).*

(n511)Footnote 1212. *Welles v. Bailey, 10 A. 565 (Conn. 1887); Peuker v. Canter, 63 P. 617 (Kan. 1901); Widdecombe v. Chiles, 73 S.W. 444 (Mo. 1903).*

(n512)Footnote 1213. *Gilbert v. Eldridge, 49 N.W. 679 (Minn. 1891); Ocean City Ass'n v. Shriver, 46 A. 690* (N.J. Err. & App. 1900); *Erickson v. Horlyk, 205 N.W. 613 (S.D. 1925); Allard v. Curran, 168 N.W. 761 (S.D. 1918).* In Florida the rule is to observe the rights of the upland owner over the area as near as practicable in the direction of the channel so as to distribute equitably the submerged lands between the upland and the channel giving due consideration to the lay of the upland shoreline, the direction of the channel and the correlative rights of adjoining upland owners; *Hayes v. Bowman, 91 So. 2d 795 (Fla. 1957).*

(n513)Footnote 1214. *Emerson v. Taylor, 9 Me. 42,* (1832); *A. M. Campau Realty Co. v. Detroit, 127 N.W. 365 (Mich. 1910); Manufactures Land & Imp. Co. v. Board of Commerce & Nav., 121 A. 337 (N.J. Supp. 1923); O'Neal v. Rollinson, 192 S.E. 688 (N.C. 1937); Montgomery v. Shaver, 66 P. 923 (Or. 1901); J. S. Thornton & Co. v. Smith, Grant & Co., 10 R.I. 477 (1873); Cordovana v. Vipond, 94 S.E.2d 295 (Va. 1956); Groner v. Foster, 27 S.E. 493 (Va. 1897); Farris v. Bentley, 124 N.W. 1003 (Wis. 1910). Contra, Bond v. Wool, 12 S.W. 281 (N.C. 1890),* dividing the frontage areas in the river by prolonging division lines of the respective adjacent riparian tracts into the same courses out into the river. *See Rector v. United States, 20 F.2d 845 (8th Cir. Okla. 1927).* Also *contra* by acquiescence or estoppel, *Treat v. Chipman, 35 Me. 34 (1852); Brown v. Goddard, 13 R.I. 76 (1880).*

(n514)Footnote 1215. *Pierce v. Alexander, 189 S.W.2d 16 (Tex. App. 1945).*

(n515)Footnote 1216. *Whitney v. Dudley, 40 N.Y.S.2d 838 1943).*

(n516)Footnote 1217. In Florida title to land under navigable lake is held by the state in trust for the public; *McDowell v. Internal Imp. Fund, 90 So. 2d 715 (Fla. 1956).*

(n517)Footnote 1218. Riparian owner owns to high watermark; *Barney v. Keokuk, 94 U.S. 324, 24 L. Ed. 224 (1876).* So title to the foreshore is in the public with an easement of access to navigable water in the riparian or littoral owner; *San Francisco Sav. Union v. R. G. R. Petroleum & Min. Co., 77 P. 823 (Cal. 1904); Brookhaven v. Smith, 80 N.E. 665 (N.Y. 1907); Allen v. Allen, 32 A. 166 (R.I. 1895).* The line between the riparian owner and the state's navigable bed is the line to which the river rises in time of ordinary high water; *Siler v. Dreyer, 327 P.2d 1031 (Kan. 1958).* Riparian owner owns to low watermark; *State v. Korrer, 148 N.W. 617 (Minn. 1914); Freeland v. Pennsylvania R.R., 47 A. 745 (Pa. 1901),* and thus owns the foreshore subject to public rights of navigation, fishing and bathing; *Citizens Elec. Co. v. Susquehanna Boom Co., 113 A. 559 (Pa. 1921).* In Oregon the line of the navigable water is ordinary high water; *Montomery v. Shaver, 66 P. 923 (Or. 1901).* In Virginia the line is the low watermark; *Cordovana v. Vipond, 94 S.E.2d 295 (Va. 1956); Groner v. Foster, 27 S.E. 493 (Va. 1897).*

(n518)Footnote 1219. *Massachusetts v. New York, 271 U.S. 65, 46 S. Ct. 357, 70 L. Ed. 838 (1926); People v. Fortuna, 279 F. 500 (1st Cir. 1922); Apalachicola Land & Dev. Co. v. McRae, 98 So. 505 (Fla. 1923); Sinford v. Watts, 122 A. 573 (Me. 1923); Wood v. Hildebrand, 42 A.2d 919 (Md. 1945). See La Porte v. Menacon, 190 N.W. 655 (Mich. 1922).* What consititutes Abed" of navigable stream, *See Apalachicola Land & Dev. Co. v. McRae, 98 So. 505 (Fla. 1923); Wemple v. Eastham, 90 So. 637 (La. 1922).* Land between high and low watermarks of navigable stream as "bank."

(n519)Footnote 1220. *Massachusetts v. New York, 271 U.S. 65, 46 S. Ct. 357, 70 L. Ed. 838 (1926); People v. Fortuna, 279 F. 500 (1st Cir. 1922); New York City v. Wilson & Co., 15 N.E.2d 408 (N.Y. 1938); Darling v. Christensen, 109 P.2d 585 (Or. 1941).*

(n520)Footnote 1221. *Union Sand & Gravel Co. v. Northcott, 135 S.E. 589 (W. Va. 1926).*

(n521)Footnote 1222. *Shively v. Bowlby, 152 U.S. 1, 14 S. Ct. 548, 38 L. Ed. 331 (1894); Barney v. Keokuk, 94 U.S. 324, 24 L. Ed. 224 (1876); United States v. Pacheco, 69 U.S. 587, 17 L. Ed. 865 (1864); Oblenis v. Creeth, 67 F. 303 (C.C. S.D. N.Y. 1895); Jones v. Martin, 35 F. 348 (C.C. S.D. Cal. 1888); Boulo v. New Orleans M. & T. R.R., 55 Ala. 480 (Ala. 1876); Martin v. O'Brien, 34 Miss. 21* (Miss. Err. & App. 1857); *De Lancey v. Peipgras, 17 N.Y.S. 681 (1892); Bowden-Gazzam Co. v. Kent, 154 P.2d 292 (Wash. 1944).*

(n522)Footnote 1223. *Forgeus v. Santa Cruz, 140 P. 1092 (Cal. App. 1914).*

(n523)Footnote 1224. *New Jersey Zinc & Iron Co. v. Morris Canal & Banking Co., 15 A. 227 (N.J. Ch. 1888).*

(n524)Footnote 1225. *See East Boston Co. v. Commonwealth, 89 N.E. 236 (Mass. 1909),* and cases cited.

(n525)Footnote 1226. *Valentine v. Sloss, 37 P. 326, 410 (Cal. 1894); Long Beach Land & Water Co. v. Richardson, 11 P. 695 (Cal. 1886); More v. Massini, 37 Cal. 432 (Cal. 1869); Ladies' Seamens' Friend Soc. v. Halstead, 19 A. 658 (Conn. 1889); Mather v. Chapman, 40 Conn. 382 (1873); Lockwood v. New York & N. H. R.R., 37 Conn. 387 (1870); Nichols v. Lewis, 15 Conn. 137 (1842); Chapman v. Kimball, 9 Conn. 38 (1831); East Haven v. Hemingway, 7 Conn. 186 (1828); Adams v. Pease, 2 Conn. 481 (1818); Martin v. O'Brien, 34 Miss. 21 (1857); Yard v. Ocean Beach Ass'n, 24 A. 729* (N.J. Err. & App. 1892); *Oakes v. De Lancey, 14 N.Y.S. 294 (1891), aff'd, 15 N.Y.S. 561 (1891),* which was *aff'd, 30 N.E. 974 (N.Y. 1892); De Lancey v. Piepgras, 17 N.Y.S. 681 (1892); De Meritt v. Robinson, 116 S.W. 796 (Tex. 1909).*

(n526)Footnote 1227. *Wheeler v. Spinola, 54 N.Y. 377 (1873).*

(n527)Footnote 1228. *Burnham v. Hoyt, 104 N.E. 62 (Mass. 1914).*

(n528)Footnote 1229. *Oblenis v. Creeth, 67 F. 303 (C.C. S.D. N.Y. 1895); People ex rel. Burnham v. Jones, 20 N.E. 577 (N.Y. 1889).*

(n529)Footnote 1230. *Lowndes v. Huntington, 153 U.S. 1, 14 S. Ct. 758, 38 L. Ed. 615 (1894); Knight v. United Land Ass'n, 142 U.S. 16 (1891); Oblenis v. Creeth, 67 F. 303 (C.C. S.D. N.Y. 1895).*

(n530)Footnote 1231. *Boston v. Boston Port Dev. Co., 30 N.E.2d 896 (Mass. 1941).*

(n531)Footnote 1232. *Black v. American International Corp., 107 A. 737 (Pa. 1919).*

(n532)Footnote 1233. *Arnold v. Elmore, 16 Wis. 509 (1865); Chandos v. Mack, 46 N.W. 803 (Wis. 1890).* Deed carries title to high watermark of navigable body of water where valid contrary intent does not appear; *Broward v. Mabry, 50 So. 826 (Fla. 1909).* Upland owners in Florida whose lands are bounded by high watermark own to the edge of the channel if they bulkhead and fill in from the shore to the edge of the channel; *Holland v. Fort Pierce Financing & ConstR.R., 27 So. 2d 76 (Fla. 1946).*

(n533)Footnote 1234. Rights of the States.-- (a) It is hereby determined and declared to be the public interest that (1) title to and ownership of the lands beneath navigable waters within the boundaries of the respective States, and the natural resources within such lands and waters, and (2) the right and power to manage, administer, lease, develop, and use the said lands and natural resources all in accordance with applicable State law be, and they are hereby, subject to the provisions hereof, recognized, confirmed, established, and vested in and assigned to the respective States or the persons who were on June 5, 1950, entitled thereto under the law of the respective States in which the land is located,

and the respective grantees, lessees, or successors in interest thereof; (b) (1) The United States hereby releases and relinquishes unto said States and persons aforesaid, except as otherwise reserved herein, all right, title, and interest of the United States, if any it has, in and to all said lands, improvements, and natural resources; *43 U.S.C. § 1311*.

(n534)Footnote 1235. *United States v. Texas, 339 U.S. 707, 70 S. Ct. 918, 94 L. Ed. 1221 (1950), reh'g denied, 340 U.S. 907, 71 S. Ct. 274, 95 L. Ed. 656 (1950); United States v. Louisiana, 339 U.S. 699, 70 S. Ct. 914, 94 L. Ed. 1216 (1950); United States v. California, 332 U.S. 19, 67 S. Ct. 1658, 91 L. Ed. 1889 (1947).*

(n535)Footnote 1236. *Shively v. Bowlby, 152 U.S. 1, 14 S. Ct. 548, 38 L. Ed. 331 (1894); Pollard v. Hagan, 44 U.S. 212, 11 L. Ed. 565 (1845); Cain v. Simonson, 39 So. 571 (Ala. 1905); Mobile v. Eslava, 9 Ala. 577 (1839), aff'd, 41 U.S. 234, 10 L. Ed. 948 (1842).*

(n536)Footnote 1237. *Knight v. United Land Ass'n, 142 U.S. 161, 12 S. Ct. 258, 35 L. Ed. 974 (1891); San Francisco v. Le Roy, 138 U.S. 656, 11 S. Ct. 364, 34 L. Ed. 1096 (1891); Packer v. Bird, 137 U.S. 661, 11 S. Ct. 210, 34 L. Ed. 819 (1891); Weber v. Board of State Harbor Comm'rs, 85 U.S. 57, 21 L. Ed. 798 (1873); Mumford v. Wardwell, 73 U.S. 423, 18 L. Ed. 756 (1867); United States v. Pacheco, 69 U.S. 587, 17 L. Ed. 865 (1864); San Francisco Sav. Union v. R. G. R. Petroleum & Min. Co., 77 P. 823 (Cal. 1904); Coburn v. Ames, 52 Cal. 385 (1877).*

(n537)Footnote 1238. *Clement v. Watson, 58 So. 25 (Fla. 1912); State v. Gerbing, 47 So. 353 (Fla. 1908); State v. Black River Phosphate Co., 13 So. 640 (Fla. 1893).*

(n538)Footnote 1239. *State v. Leavitt, 72 A. 875 (Me. 1909); Low v. Knowlton, 26 Me. 128 (1846).*

(n539)Footnote 1240. *Home for Aged Women v. Commonwealth, 89 N.E. 124 (Mass. 1909).*

(n540)Footnote 1241. *Hume v. Rogue River Packing Co., 83 P. 391 (Or. 1905); Lewis v. Portland, 35 P. 256 (Or. 1893).*

(n541)Footnote 1242. *Eisenbeis v. Wakeman, 28 P. 923 (Wash. 1892).*

(n542)Footnote 1243. *Landis v. Sea Isle City, 18 A.2d 841 (N.J. Ch. 1941); Judson v. Tide Water Lbr. Co., 98 P. 377 (Wash. 1908).*

(n543)Footnote 1244. *Seattle v. Oregon & W. R.R., 255 U.S. 56, 41 S. Ct. 237, 65 L. Ed. 500 (1921). See* the following cases: *Fox River Paper Co. v. Railroad Comm'n, 274 U.S. 651, 47 S. Ct. 669, 71 L. Ed. 1279 (1927); Appleby v. New York, 271 U.S. 362, 46 S. Ct. 513, 70 L. Ed. 986 (1926); Ord Land Co. v. Alamitos Land Co., 249 P. 178 (Cal. 1926); State v. Tampa, 102 So. 336 (Fla. 1924); Linthicum v. Shipley, 116 A. 871 (Md. 1922); Nedtweg v. Wallace, 208 N.W. 51 (Mich. 1926), aff'd, 211 N.W. 647 (Mich. 1927); In re Inwood Hill Park, 220 N.Y.S. 198* (N.Y. A.D. 1 Dept. 1927); *Tiffany v. Oyster Bay, 136 N.E. 224 (N.Y. 1922); People v. Hudson River Connecting R. Corp., 126 N.E. 801 (N.Y. 1920), cert. denied, 254 U.S. 631, 41 S. Ct. 7, 65 L. Ed. 447 (1920); James River & Kanawha Power Co. v. Old Dominion Iron & Steel Corp., 122 S.E. 344 (Va. 1923); Boyer v. State, 142 P.2d 250 (Wash. 1943).*

(n544)Footnote 1245. *Shively v. Bowlby, 152 U.S. 1, 14 S. Ct. 548, 38 L. Ed. 331 (1894); Barney v. Keokuk, 94 U.S. 324, 24 L. Ed. 224 (1876); Weber v. Board of Harbor Comm'rs, 85 U.S. 57, 21 L. Ed. 798 (1873); United States v. Pacheco, 69 U.S. 587, 17 L. Ed. 865 (1864).*

(n545)Footnote 1246. *United States v. Pacheco, 69 U.S. 587, 17 L. Ed. 865 (1864).*

(n546)Footnote 1247. *Weber v. Board of Harbor Comm'rs, 85 U.S. 57, 21 L. Ed. 798 (1873). See Knight v. United States Land Ass'n, 142 U.S. 161, 12 S. Ct. 258, 35 L. Ed. 974 (1891).*

(n547)Footnote 1248. *Seattle v. Oregon & W. R.R., 255 U.S. 56, 41 S. Ct. 237, 65 L. Ed. 500 (1921).*

(n548)Footnote 1249. *Massachusetts v. New York, 271 U.S. 65, 46 S. Ct. 357, 70 L. Ed. 838 (1926). See People v. New York & Ontario Power Co., 219 N.Y.S. 497 (N.Y. A.D. 1927).*

(n549)Footnote 1250. *Bell v. Smith, 87 S.E. 987 (N.C. 1916).*

(n550)Footnote 1251. *Rudder v. Ponder, 293 S.W.2d 736 (Tex. 1956).*

(n551)Footnote 1252. *Shively v. Bowlby, 152 U.S. 1, 14 S. Ct. 548, 38 L. Ed. 331 (1894); Watson v. Holland, 20 So. 2d 388 (Fla. 1944).* "Tide land" is land which is alternately covered and uncovered by the flow and ebb of tides; *Apalachicola Land & Dev. Co. v. McRae, 98 So. 505 (Fla. 1923); Hardy v. California Trojan Powder Co., 219 P. 197 (Or. 1923).*

(n552)Footnote 1253. *Massachusetts v. New York, 271 U.S. 65, 46 S. Ct. 357, 70 L. Ed. 838 (1926).*

(n553)Footnote 1254. *Shively v. Bowlby, 152 U.S. 1, 14 S. Ct. 548, 38 L. Ed. 331 (1894).*

(n554)Footnote 1255. *United States v. Holt State Bank, 270 U.S. 49, 46 S. Ct. 197, 70 L. Ed. 465 (1926).*

(n555)Footnote 1256. *McLellan v. McFadden, 95 A. 1025 (Me. 1915).*

(n556)Footnote 1257. *Brower v. Wakeman, 89 A. 913 (Conn. 1914).*

(n557)Footnote 1258. *United States v. Pacheco, 69 U.S. 587, 17 L. Ed. 865 (1860); People of Porto Rico v. Fortuna Estates, 279 F. 500 (1st Cir. 1922); Plainfield-Union Water Co. v. Plainfield, 87 A. 448* (N.J. Err. & App. 1913); *Yard v. Ocean Beach Ass'n, 24 A. 729* (N.J. Err. & App. 1892); *Tiffany v. Oyster Bay, 102 N.E. 585 (N.Y. 1913).*

(n558)Footnote 1259. *Tiffany v. Oyster Bay, 102 N.E. 585 (N.Y. 1913).*

(n559)Footnote 1260. *Strand v. State, 132 P.2d 1011 (Wash. 1943).*

(n560)Footnote 1261. *United States v. Chicago, M., St. P. & P. R.R., 312 U.S. 592, 61 S. Ct. 772, 85 L. Ed. 1064 (1941); United States v. Pennsylvania Salt Mfg. Co., 16 F.2d 476 (D. Pa. 1926); Sioux City Bridge Co. v. Miller, 12 F.2d 41 (8th Cir. 1926); The M. L. C. No. 10, 10 F.2d 699 (2nd Cir. 1926); Chamberlain v. Board of City Comm'rs, 11 So. 2d 724 (Ala. 1943); State v. Tampa, 102 So. 336 (Fla. 1924); Lower Tp. v. Wildwood, 28 A.2d 74 (N.J. Sup. 1942); People v. New York & Ontario Power Co., 219 N.Y.S. 497 (N.Y.A.D. 1927); Waterford Elec. Light, Heat & Power Co. v. State, 203 N.Y.S. 858 (N.Y.A.D. 1924); Luscher v. Reynolds, 56 P.2d 1158 (Or. 1936)* (grant from federal government is governed by state law as to water boundaries, and at common law a riparian owner is held to the center of the lake if not affected by tide); *Armour & Co. v. Newport, 110 A. 645 (R.I. 1920); State v. Black Bros., 297 S.W. 213 (Tex. 1927); Lorino v. Crawford Packing Co., 169 S.W.2d 235 (Tex. App. 1943); Strand v. State, 132 P.2d 1011 (Wash. 1943).*

(n561)Footnote 1262. *Fox River Paper Co. v. Railroad Comm'n, 274 U.S. 651, 47 S. Ct. 669, 71 L. Ed. 1279 (1927).*

(n562)Footnote 1263. *United States v. River Rouge Imp. Co., 269 U.S. 411, 46 S. Ct. 144, 70 L. Ed. 339 (1926).*

(n563)Footnote 1264. *United States v. Chicago, M., St. P. & P. R.R., 312 U.S. 592, 61 S. Ct. 772, 85 L. Ed. 106 (1941); United States v. Appalachian Elec. Power Co., 311 U.S. 377, 161 S. Ct. 291, 85 L. Ed. 243 (1940); Seattle v. Oregon & W. R.R., 255 U.S. 56, 41 S. Ct. 237, 65 L. Ed. 500 (1921); United States v. 25.4 Acres of Land, 52 F. Supp. 75 (E.D. N.Y. 1943); United States v. Pennsylvania Salt Mfg. Co., 16 F.2d 476 (D. Pa. 1926)* (law of Pennsylvania); *Sioux City Bridge Co. v. Miller, 12 F.2d 41 (8th Cir. 1926)* (law of Nebraska), *cert. denied, 273 U.S. 723 (1926); Winford v. Griffen, 1 F.2d 224 (8th Cir. 1924); Strong v. Gilmore, 6 Alaska 384 (1921); Ord Land Co. v. Alamitos Land Co., 249 P. 178 (Cal. 1926); Carpenter v. Santa Monica, 147 P.2d 964 (Cal. App. 1944); Freed v. Miami Beach Pier Corp., 112 So. 841 (Fla. 1927); Martin v. Busch, 112 So. 274 (Fla. 1927); Miller v. Lewiston-Clarkston Canning Co.,*

209 P. 194 (Idaho 1922); Bedford-Nugent Co. v. Herndon, 244 S.W. 908 (Ky. 1922); Smith v. Dixie Oil Co., 101 So. 24 (La. 1924); Sinford v. Watts, 122 A. 573 (Me. 1923); Smoot Sand & Gravel Corp. v. Columbia Granite & Dredging Corp., 126 A. 91 (Md. 1924); Collins v. Gerhardt, 211 N.W. 115 (Mich. 1926); State v. District Court, 178 N.W. 595 (Minn. 1920); Herrin v. Sutherland, 241 P. 328 (Mont. 1925); Hinkley v. State, 195 N.Y.S. 914 (N.Y.A.D. 1922), aff'd, 137 N.E. 599 (N.Y. 1922); New York v. Dyckman Market Terminal Corp., 224 N.Y.S. 207 (1927); Hunter v. Van Keuren, 224 N.Y.S. 153 (1927); Roberts v. Taylor, 181 N.W. 622 (N.D. 1921); Keeter v. State, 196 P. 970 (Okla. Crim. App. 1921); Richards v. Page Inv. Co., 228 P. 937 (Or. 1924); Citizens Elec. Co. v. Susquehanna Boom Co., 113 A. 559 (Pa. 1921); Armour & Co. v. Newport, 110 A. 645 (R.I. 1920); Lorino v. Crawford Packing Co., 175 S.W.2d 410 (Tex. 1943); Anderson v. Polk, 291 S.W. 1112 (Tex. App. 1927), aff'd, 297 S.W. 219 (Tex. 1927); Harper v. Holston, 205 P. 1062 (Wash. 1922); Union Sand & Gravel Co. v. Northcott, 135 S.E. 589 (W. Va. 1926).

(n564)Footnote 1265. *Shively v. Bowlby, 152 U.S. 1, 14 S. Ct. 548, 38 L. Ed. 331 (1894).*

(n565)Footnote 1266. *People v. Steeplechase Park Co., 113 N.E. 521 (N.Y. 1916); Sage v. New York, 47 N.E. 1096 (N.Y. 1897); Hedges v. West Shore R.R., 44 N.E. 691 (N.Y. 1896); In re Staten Island Rapid Transit Co., 8 N.E. 548 (N.Y. 1886).* Littoral owner was held entitled to right of access to sea as against municipality which owned the foreshore; *Tiffany v. Oyster Bay, 136 N.E. 224 (N.Y. 1922).*

(n566)Footnote 1267. *People v. Vanderbilt, 28 N.Y. 396 (1863); People v. New York & S. I. Ferry Co., 68 N.Y. 71 (1877).*

(n567)Footnote 1268. *De Lancey v. Piepgras, 33 N.E. 822 (N.Y. 1893).*

(n568)Footnote 1269. *In re Mayor of New York, 75 N.E. 156 (N.Y. 1905).*

(n569)Footnote 1270. *Rumsey v. New York & N. E. R.R., 30 N.E. 654 (N.Y. 1892);, 32 N.E. 979 (N.Y. 1893); Kane v. New York E. R.R., 26 N.E. 278 (N.Y. 1891); Williams v. New York, 11 N.E. 829 (N.Y. 1887).*

(n570)Footnote 1271. *Philadelphia Brew Co. v. McOwen, 73 A. 518* (N.J. Err. & App. 1909); *Marcus Sayre Co. v. Newark, 45 A. 985* (N.J. Err. & App). Deed extends only to high watermark of seashore or navigable rivers; *Bailey v. Driscoll, 117 A.2d 265 (N.J. 1955); In re Site for Hunts Point Sewage Treatment Works, 119 N.Y.S.2d 391 (N.Y.A.D. 1953).*

(n571)Footnote 1272. *Gilman v. Philadelphia, 70 U.S. 713, 18 L. Ed. 96 (1865); Rundle v. Delaware & R. Canal Co., 55 U.S. 80, 14 L. Ed. 335 (1852).*

(n572)Footnote 1273. *Wall v. Pittsburgh Harbor Co., 25 A. 647 (Pa. 1893).*

(n573)Footnote 1274. *Bailey v. Philadelphia, W. & B. R.R., 4 Del. 389* (Del. Err. & App. 1846). *See Willson v. Black Bird Creek Marsh Co., 27 U.S. 245, 17 L. Ed. 412 (1829).*

(n574)Footnote 1275. *Horner v. Pleasants, 7 A. 691 (Md. 1887); Garitee v. Baltimore, 53 Md. 422 (1880); Goodsell v. Lawson, 42 Md. 348 (1875); Baltimore v. McKim, 3 Md. 453 (Ch. 1831); Casey v. Inloes, 1 Md. 430 (1894). See Smith v. Maryland, 59 U.S. 71, 15 L. Ed. 269 (1855).*

(n575)Footnote 1276. *Taylor v. Commonwealth, 47 S.E. 875 (Va. 1904); Garrison v. Hall, 75 Va. 150 (1881); Norfolk v. Cooke, 64 Va. 25 (1873); French v. Bankhead, 52 Va. 136 (1854). See McDonald v. Whitehurst, 47 F. 757 (C.C.E.D. Va. 1891).*

(n576)Footnote 1277. *Shepards Point Land Co. v. Atlantic Hotel, 4 S.E 39 (N.C. 1903); Ward v. Willis, 51 N.C. 183 (1858); Collins v. Benbury, 27 N.C. 118 (1884); Lewis v. Keeling, 46 N.C. 299 (1854); Hatfield v. Grimstead, 29 N.C. 139 (1846).*

(n577)Footnote 1278. *Bond v. Wool, 12 S.E. 281 (N.C. 1890); State v. Narrows Island Club, 5 S.E. 411 (N.C. 1888); Gregory v. Forbes, 1 S.E. 541 (N.C. 1887); Collins v. Benbury, 25 N.C. 277 (1842); Wilson v. Forbes, 13 N.C. 30 (1828).*

(n578)Footnote 1279. *State v. Pinckney, 22 S.C. 484 (1885); State v. Pacific Guano Co., 22 S.C. 50 (1884).*

(n579)Footnote 1280. *Alabama v. Georgia, 64 U.S. 505, 16 L. Ed. 556 (1859); Howard v. Ingersoll, 54 U.S. 381, 14 L. Ed. 189 (1851); Young v. Harrison, 6 Ga. 130 (1849); Savannah v. State, 4 Ga. 26 (1848).* In Florida, except as to Dade and Palm Beach Counties, title to all tidewater bottoms made by dredging is in the Trustees of the Internal Improvement Fund; *Duval Engineering & Cont. R.R. v. Sales, 77 So. 2d 431 (Fla. 1954).*

(n580)Footnote 1281. *Tappan v. Boston Water-Power Co., 31 N.E. 703 (Mass. 1892). See Litchfield v. Scituate, 136 Mass. 39 (1883).*

(n581)Footnote 1282. *Shively v. Bowlby, 152 U.S. 1, 14 S. Ct. 548, 38 L. Ed. 331 (1894).*

(n582)Footnote 1283. *Snow v. Mt. Desert Island Real Estate Co., 24 A. 429 (Me. 1891); Parsons v. Clark, 76 Me. 476 (1884); Barrows v. McDermott, 73 Me. 441 (1882); Clancey v. Houdlette, 39 Me. 451 (1855); Moulton v. Libbey, 37 Me. 472 (1854); Low v. Knowlton, 26 Me. 128 (1846).* There may be private ownership between high and low watermark, and use for any purpose that does not interfere with public interest; *Ladies' Seamens' Friend Soc. v. Halstead, 19 A. 658 (Conn. 1889); Nichols v. Lewis, 15 Conn. 137 (1842); East Haven v. Hemingway, 7 Conn. 186 (1828).* The owner's title extend to extreme low watermark; *Sewall & Day Dordage Co. v. Boston Water-Power Co., 16 N.E. 782 (Mass. 1888).*

(n583)Footnote 1284. *Lapish v. Bangor Bank, 8 Me. 85 (1831).*

(n584)Footnote 1285. *Snow v. Mt. Desert Island Real Estate Co., 24 A. 429 (Me. 1891); Babson v. Tainter, 10 A. 63 (Me. 1887); Stevens v. King, 76 Me. 197 (1884); King v. Young, 76 Me. 76 (1884); Montgomery v. Reed, 69 Me. 510 (1879); Erskine v. Moulton, 66 Me. 276 (1877); Pike v. Monroe, 36 Me. 309 (1853); Winslow v. Patten, 34 Me. 25 (1852); Moore v. Griffen, 22 Me. 350 (1843); Litchfield v. Ferguson, 6 N.E. 721 (Mass. 1886).*

(n585)Footnote 1286. *King v. Young, 76 Me. 76 (1884); New Haven Steamboat Co. v. Sargent & Co., 50 Conn. 199 (1882).*

(n586)Footnote 1287. *King v. Young, 76 Me. 76 (1884).*

(n587)Footnote 1288. *Ammidown v. Granite Bank, 90 Mass. 285 (1864); Central Wharf & Wet Dock Corp. v. India Wharf, 123 Mass. 561,* per Gray, C. J. (1861); *Commonwealth v. Alger, 61 Mass. 53 (1851); Wheeler v. Stone, 55 Mass. 313 (1848); Ashby v. Eastern R.R., 46 Mass. 368 (1842).*

(n588)Footnote 1289. *Babson v. Tainter, 10 A. 63 (Me. 1887); Call v. Carroll, 40 Me. 31 (1855); Treat v. Chipman, 35 Me. 34 (1852); Emerson v. Taylor, 9 Me. 42 (1832).*

(n589)Footnote 1290. *Concord Mfg. Co. v. Robertson, 25 A. 718 (N.H. 1890).*

(n590)Footnote 1291. *Folsom v. Freeborn, 13 R.I. 200 (1881).* It would seem, however, that the owner of the upland has no right of action against any one filling up the flats by authority of the state for any public purpose; *Clark v. Providence, 15 A. 763 (R.I. 1888); Gerhard v. Seekonk River Bridge Comm'rs, 5 A. 199 (R.I. 1886).*

(n591)Footnote 1292. *Sinford v. Watts, 122 A. 573 (Me. 1923). See Jubilee Yacht Club v. Gulf Ref. Co., 140 N.E. 280 (Mass. 1923).*

(n592)Footnote 1293. *Walz v. Bennett, 111 A. 834 (Conn. 1920). See Orange v. Resnick, 109 A. 864 (Conn. 1920).*

(n593)Footnote 1294. *Del Balso Holding Corp. v. McKenzie, 3 N.E.2d 438 (N.Y. 1936); Oakes v. De Lancey, 24 N.Y.S. 539 (1893), aff'd, 39 N.E. 21 (N.Y. 1894),* prior litigation, same parties, *See 14 N.Y.S. 294 (N.Y.Super. 1891), aff'd, 15 N.Y.S. 561 (N.Y. Super. 1891), aff'd, 30 N.E. 974 (N.Y. 1892).*

(n594)Footnote 1295. *People v. Delaware & Hudson Co., 107 N.E. 506 (N.Y. 1914).*

(n595)Footnote 1296. *See Sage v. New York, 47 N.E. 1096 (N.Y. 1897); Roe v. Strong, 14 N.E. 294 (N.Y. 1887).*

(n596)Footnote 1297. *Grace v. North Hempstead, 152 N.Y.S. 122 (N.Y.A.D 1915).*

(n597)Footnote 1298. *See* the following cases: *Watson v. Holland, 20 So. 2d 388 (Fla. 1944); McCauley v. Salmon, 14 N.W.2d 715 (Iowa 1944); Nelson v. DeLong, 7 N.W.2d 342 (Minn. 1942); Coxe v. State, 39 N.E. 400 (N.Y. 1895); Saunders v. New York, C. & H. R.R., 38 N.E. 992 (N.Y. 1894); Lorino v. Crawford Packing Co., 175 S.W.2d 410 (Tex. 1943).*

(n598)Footnote 1299. *State v. Tampa, 102 So. 336 (Fla. 1924).*

(n599)Footnote 1300. *Lorino v. Crawford Packing Co., 175 S.W.2d 410 (Tex. 1943).*

(n600)Footnote 1301. *Cobb v. Lavalle, 89 Ill. 331 (1878); Houck v. Yates, 82 Ill. 179 (1876).*

(n601)Footnote 1302. *People ex rel. Highways Comm'rs v. Madison County Board of Suprs., 17 N.E. 147 (Ill. 1888); Morrison v. Keen, 3 Me. 474 (1825).*

(n602)Footnote 1303. *Gilbert v. Emerson, 56 N.W. 818 (Minn. 1893),* Mitchell, J., said: "The platting of these waterblocks, and conveying them with reference to the plat, manifestly contemplated reclaiming them and filling them in, or otherwise improving them for use; and we cannot see what difference it makes whether this had been done before the grantor conveyed, or was only in contemplation."

(n603)Footnote 1304. *Walz v. Bennett, 111 A. 834 (Conn. 1920).*

(n604)Footnote 1305. *Waverly Water-Front & Imp. Co. v. White, 33 S.E. 534 (Va. 1899).*

(n605)Footnote 1306. *Wilson v. Shiveley, 4 P. 324 (Or. 1884).*

(n606)Footnote 1307. *Welles v. Bailey, 10 A. 565 (Conn. 1887); Naylor v. Cox, 21 S.W. 589 (Mo. 1892).*

(n607)Footnote 1308. *Mulry v. Norton, 3 N.E. 581 (N.Y. 1885).*

(n608)Footnote 1309. *Thorson v. Peterson, 9 F. 517 (N.D. Ill. 1881), Sultana v. Chapman, 5 Wis. 454 (1856).*

(n609)Footnote 1310. *Illinois Cent. R.R. v. Illinois, 146 U.S. 387, 13 S. Ct. 110, 36 L. Ed. 1018 (1892), aff'd, 154 U.S. 225, 14 S. Ct. 1015, 38 L. Ed. 971 (1894).*

(n610)Footnote 1311. *Hardin v. Jordan, 140 U.S. 371, 11 S. Ct. 838, 35 L. Ed. 428 (1891); People ex rel. Burnham v. Jones, 20 N.E. 577 (N.Y. 1889).*

(n611)Footnote 1312. *Indiana v. Milk, 11 F. 389 (C.C. Ind. 1882); Hathorn v. Stinson, 10 Me. 224 (1833); Dilingham v. Smith, 30 Me. 370 (1849).*

(n612)Footnote 1313. *People v. Kirk, 45 N.E. 830 (Ill. 1896); State v. Venice of American Land Co., 125 N.W. 770 (Mich. 1910).*

(n613)Footnote 1314. *Chicago Transit Co. v. Campbell, 110 Ill. App. 366 (1903).*

(n614)Footnote 1315. *Hardin v. Jordan, 140 U.S. 371, 11 S. Ct. 808, 35 L. Ed. 428 (1891); Illinois Cent. R.R. v. Illinois, 146 U.S. 387, 13 S. Ct. 110, 36 L. Ed. 1018 (1892), aff'd, 154 U.S. 225, 14 S. Ct. 1015, 38 L. Ed. 971 (1894); Revell v. People, 52 N.E. 1052 (Ill. 1899); Illinois Cent. R.R. v. Chicago, 50 N.E. 1104 (Ill. 1898), aff'd, 176 U.S. 646, 20 S. Ct. 509, 44 L. Ed. 622 (1900); Winnepesaukee Camp-Meeting Ass'n v. Gordon, 29 A. 412 (N.H. 1892); Concord Mfg. Co. v. Robertson, 25 A. 718 (N.H. 1890); Hicks v. Smith, 85 N.W. 512 (Wis. 1901); Illinois Steel Co. v. Bilot, 84 N.W. 855 (Wis. 1901); McLennan v. Prentice, 55 N.W. 764 (Wis. 1893); Stevens Point Boom Co. v. Reilly, 44 Wis. 295 (1878); Diedrich v. Northwestern Union R.R., 42 Wis. 248 (1877).*

(n615)Footnote 1316. *Hillebrand v. Knapp, 274 N.W. 821 (S.D. 1937); Pewaukee v. Savoy, 79 N.W. 436 (Wis. 1899).*

(n616)Footnote 1317. *Bigelow v. Nickerson, 70 F. 113 (7th Cir. 1895).*

(n617)Footnote 1318. *Hardin v. Jordan, 140 U.S. 371, 11 S. Ct. 808, 35 L. Ed. 428 (1891).*

(n618)Footnote 1319. *Rood v. Wallace, 79 N.W. 449 (Iowa 1899), error dismissed, 187 U.S. 87, 23 S. Ct. 49, 47 L. Ed. 86 (1902).*

(n619)Footnote 1320. *Illinois Cent. R.R. v. Illinois, 146 U.S. 387,* (1892), *aff'd, 154 U.S. 225, 14 S. Ct. 1015, 38 L. Ed. 971 (1894); Hardin v. Jordan, 140 U.S. 371,* (1891); *Barney v. Keokuk, 94 U.S. 324,* (1876).

(n620)Footnote 1321. *People v. Kirk, 45 N.E. 830 (Ill. 1896).*

(n621)Footnote 1322. *LaPorte v. Manacon, 190 N.W. 655 (Mich. 1922).*

(n622)Footnote 1323. *Champlain & St. L. R.R. v. Valentine, 19 N.Y. 484 (1853).*

(n623)Footnote 1324. *East Harbor Sportsman's Club v. Kelting, 49 N.W. 1109 (Ohio 1897); Hogg v. Beerman, 41 Ohio St. 81 (Ohio 1884).*

(n624)Footnote 1325. *Kavanaugh v. Baird, 217 N.W. 2 (Mich. 1928), rev'd, 235 N.W. 871 (Mich. 1931); Kavanaugh v. Rabior, 192 N.W. 623 (Mich. 1923).*

(n625)Footnote 1326. *See St. Paul & P. R.R. v. Schurmeier, 74 U.S. 272, 19 L. Ed. 74 (1868).*

(n626)Footnote 1327. *In re West 205th Street, 147 N.E. 361 (N.Y. 1925).*

(n627)Footnote 1328. *Castle v. Elder, 59 N.W. 197 (Minn. 1894).*

(n628)Footnote 1329. *Gilbert v. Emerson, 56 N.W. 818 (Minn. 1893).*

(n629)Footnote 1330. *Wayzata v. Great Northern R.R., 52 N.W. 913 (Minn. 1892). See Banks v. Ogden, 69 U.S. 57, 17 L. Ed. 818 (1864).*

(n630)Footnote 1331. *Wait v. May, 51 N.W. 471 (Minn. 1892). See Codman v. Winslow, 10 Mass. 146 (1813).*

(n631)Footnote 1332. *Gifford v. Horton, 103 P. 988 (Wash. 1909).*

(n632)Footnote 1333. *Grant v. Oregon R. & Nav. Co., 90 P. 178 (Or. 1907), modified, 90 P. 1099 (Or. 1907).*

(n633)Footnote 1334. *Hardin v. Jordan, 140 U.S. 371, 11 S. Ct. 808, 35 L. Ed. 428 (1891); Person v. Johnson, 235 S.W.2d 876 (Ark. 1950)* (a call running "to the north bank" of a lake ran to the center of the lake); *Johnson v. Smith, 219 S.W.2d 926 (Ark. 1949); Stoner v. Rice, 22 N.E. 968 (Ind. 1889); Ridgway v. Ludlow, 58 Ind. 248 (1877); Earhart v. Rosenwinkel, 25 N.E.2d 268 (Ind. App. 1940); Ottowa Shores Home Owners Ass'n v. Lechlak, 73 N.W.2d 840 (Mich.*

1955); Burt v. Munger, 23 N.W.2d 117 (Mich. 1946); Clute v. Fisher, 31 N.W. 614 (Mich. 1887); Tucker v. Mortenson, 148 N.W. 60 (Minn. 1914); Kirkpatrick v. Yates Ice Co., 45 Mo. App. 335 (1891); Barcus v. Blanchard, 39 A.2d 499 (N.J. Ch. 1944), aff'd, 42 A.2d 271 (N.J. Err. & App. 1945); *Kanouse v. Stockbower, 21 A. 197 (N.J. Ch. 1891), rev'd, 26 A. 333* (N.J. Err. & App. 1893); *Gouverneur v. National Ice. Co., 31 N.E. 865 (N.Y. 1892); Lewis v. Clark, 133 N.Y.S.2d 880 (1954); Waters of White Lake, Inc. v. Fricke, 123 N.Y.S.2d 400* (N.Y.A.D. 3 Dept. 1953), *aff'd, 126 N.E.2d 568 (N.Y. 1955); Hammel v. Camp Ranger, 87 N.Y.S.2d 892* (N.Y.A.D. 3 Dept. 1949), *aff'd, 90 N.E.2d 63 (N.Y. 1949); Lembeck v. Nye, 24 N.E. 686 (Ohio 1890); Olson v. Huntamer, 61 N.W. 479 (S.D. 1894); Providence Forge Fishing & Hunting Club v. Miller Mfg. Co., 83 S.E. 1947 (Va. 1915); Snively v. Jaber, 296 P.2d 1015 (Wash. 1956)* (boating, swimming, fishing and similar rights in nonnavigable lakes are held by all riparian owners as tenants in common); *Snively v. State, 9 P.2d 773 (Wash. 1932); Bernot v. Morrison, 143 P. 104 (Wash. 1914).* A boundary in a deed as the meanders of a contour line of a lake where the grantor had previously given an easement to a federal authority to flood to the contour line carried title only to the contour line and not to the center of the lake but gave an easement to use the land below the contour line to the water's edge as lake frontage; *Ulbricht v. Friedsam, 325 S.W.2d 669 (Tex. 1959).*

(n634)Footnote 1335. *Linthicum v. Shipley, 116 A. 871 (Md. 1922); Haines v. McLean, 276 S.W.2d 777 (Tex. 1955).* But if there is a body of swamp or wasteland between the government meander line and the river bank, the patents do not cover such land but run only to the meander line; *McDonald v. Mason, 76 P.2d 212* (Cal. 1 Dist. App. 1938).

(n635)Footnote 1336. *Stewart v. Turney, 142 N.E. 437 (N.Y. 1923); Ubricht v. Friedsam, 325 S.W.2d 669 (Tex. 1959)* (denying ownership to the center of the bed where it was too difficult to measure).

(n636)Footnote 1337. *St. Helen Shooting Club v. Mogle, 207 N.W. 915 (Mich. 1926).* In Arkansas each riparian owner holds title of the bed to the center if nonnavigable lake; *Person v. Johnson, 235 S.W.2d 876 (Ark. 1949),* and this is the presumption in New York; *Johnson v. Smith, 219 S.W.2d 926 (Ark. 1949); Lewis v. Clark, 133 N.Y.S.2d 892 (1954); Hammel v. Camp Ranger, 87 N.Y.S.2d 892* (N.Y.A.D. 3 Dept. 1949), *aff'd, 90 N.E.2d 63 (N.Y. 1949).* So in Michigan; *Ottowa Shores Home Owners Ass'n v. Lechlak, 73 N.W.2d 840 (Mich. 1955); Burt v. Munger, 23 N.W.2d 117 (Mich. 1946).* Ownership of bed of nonnavigable lake is in severalty among the riparian owners; *Schmidt v. Marschel, 2 N.W.2d 121 (Minn. 1942).* Deed to land on Aeast side" of pond conveyed to the center; *Confer v. Pirman, 286 N.Y.S. 192* (N.Y.A.D. 3 Dept. 1936), *aff'd, 7 N.E.2d 706 (N.Y. 1937).* Those who acquire title from the United States to land bordering a nonnavigable lake acquire title to the bed of the lake; *Ozark-Mahoning Co. v. State, 37 N.W.2d 488 (N.D. 1949).* So in Utah if lake was nonnavigable at time of admission of state to the union; *Monroe v. State, 175 P.2d 759 (Utah 1946).* So also North Dakota; *State v. Brace, 36 N.W.2d 30 (N.D. 1949).* Land under public pond as belonging to people in sovereign character, *See State v. Quattropani, 133 A. 352 (Vt. 1926).*

(n637)Footnote 1338. *Hardin v. Shedd, 190 U.S. 508, 23 S. Ct. 685, 47 L. Ed. 1156 (1903); Boardman v. Scott, 30 S.E. 982 (Ga. 1897); Noyes v. Collins, 61 N.W. 250 (Iowa 1894); Stevens v. King, 76 Me. 197 (1884); Patapsco Guano Co. v. Bowers-White Lbr. Co., 59 S.E. 538 (N.C. 1907); Diedrich v. Northwestern Union R.R., 42 Wis. 248 (1877).* In Pennsylvania the mere fact that a conveyance contains a call bounding on a nonnavigable lake with no course and distance does not carry the grantee's title beyond the lake shore or give any rights of fishing therein; *Matthews v. Bagnik, 41 A.2d 875 (Pa. Super. 1945).* If the state is the grantor, title goes only to the edge of the lake, *Strayhorn v. Jones, 300 S.W.2d 623 (Tex. 1957); Heard v. Refugio, 103 S.W.2d 728 (Tex. 1937); Welder v. State, 196 S.W. 868 (Tex. App. 1917),* or to the bank of a river. In Texas the rule that a call was to the center of a nonnavigable stream is not applicable to lakes. In the case of lakes the call excludes the bed; *Friedsam v. Ulbricht, 315 S.W.2d 442 (Tex. App. 1958), aff'd in part, rev'd in part, 325 S.W.2d 669 (Tex. 1959).*

(n638)Footnote 1339. *Clute v. Fisher, 31 N.W. 614 (Mich. 1887).* Where a lake-shore line is uneven before the area of the bed owned by the respective riparian owners is determined, all must be joined in a court action; *Grand Rapids Ice & Coal Co. v. South Grand Rapids Ice & Coal Co., 60 N.W. 681 (Mich. 1894); Snively v. Jaber, 296 P.2d 1015 (Wash. 1956); Seattle Factory Sites Co. v. Saulsberry, 229 P. 10 (Wash. 1924).*

(n639)Footnote 1340. *Lynnfield v. Peabody, 106 N.E. 977 (Mass. 1914); Watuppa Reservoir Co. Fall River, 28 N.E. 257 (Mass. 1891).*

(n640)Footnote 1341. *See Flisrand v. Madson, 152 N.W. 796 (S.D. 1915).*

(n641)Footnote 1342. *Axline v. Shaw, 17 So. 411 (Fla. 1895); Allen v. Weber, 50 N.W. 514 (Wis. 1891). Contra*, a deed to low watermark and thence along the shore ran to center of pond; *Hammel v. Camp Ranger, 87 N.Y.S.2d 892 (N.Y.A.D. 1949), aff'd, 90 N.E.2d 63 (N.Y. 1949).*

(n642)Footnote 1343. *Brophy v. Richeson, 36 N.E. 424 (Ind. 1894); Sherman v. Brown, 146 N.Y.S. 867* (N.Y.A.D. 3 Dept. 1914).

(n643)Footnote 1344. *Fowler v. Vreeland, 14 A. 116* (N.J. Err. & App. 1888); *Lembeck v. Nye, 24 N.E. 686 (Ohio 1890).*

(n644)Footnote 1345. *Honebein v. Monticello, 31 N.Y.S.2d 532 (N.Y.A.D. 1941), aff'd, 46 N.E.2d 363 (N.Y. 1943); Middle Island Land & Water Co. v. Hutner, 19 N.Y.S.2d 176 (N.Y.A.D. 1940); Barcus v. Blanchard, 39 A.2d 499 (N.J. Ch. 1944), aff'd, 42 A.2d 271* (N.J. Err. & App. 1945); *Holden v. Chandler, 18 A. 310 (Vt. 1889).* In Pennsylvania the mere fact that a conveyance contains a call bounding on a nonnavigable lake with no course and distance does not carry the grantee's title beyond the lake shore or give any rights of fishing therein; *Matthews v. Bagnik, 41 A.2d 875 (Pa. Super. 1945).*

(n645)Footnote 1346. *In re Whitney, 91 N.E. 855 (Mass. 1910).* To the "side" comes to the center of the lake unless otherwise stated; *White v. Knickerbocker Ice Co., 172 N.E. 452 (N.Y. 1930).*

(n646)Footnote 1347. *Jones v. Parker, 5 S.E. 383 (N.C. 1888); Loughran v. Matylewicz, 81 A.2d 879 (Pa. 1951).*

(n647)Footnote 1348. *Greenspan v. Yaple, 189 N.Y.S. 115 (1919), rev'd, 194 N.Y.S. 658 (N.Y.A.D. 1922).*

(n648)Footnote 1349. *Jefferson v. Davis, 95 A.2d 617 (N.J. Super. Ch. 1953).*

(n649)Footnote 1350. *Hardin v. Jordan, 140 U.S. 371, 11 S. Ct. 808, 35 L. Ed. 428 (1891); Lembeck v. Nye, 24 N.E. 686 (Ohio 1890); Hogg v. Beerman, 41 Ohio St. 81 (Ohio 1884); Akron Canal & Hydraulic Co. v. Fountaine, 50 N.E.2d 897 (Ohio App. 1943); State v. West Tennessee Land Co., 158 S.W. 746 (Tenn. 1913).* State owns bed of inland lake; *McDowell v. Internal Imp. Fund, 90 So. 2d 715 (Fla. 1956).*

(n650)Footnote 1351. *Smith v. Rochester, 92 N.Y. 463 (1883).*

(n651)Footnote 1352. In some states title to the waters of private lakes is exclusively in the owners of the soil beneath such waters and there is no right of all the owners in common to use the waters; *Walden v. Pines Lake Land Co., 8 A.2d 581* (N.J. Err. & App. 1939); *Mix v. Tice, 298 N.Y.S. 441 (1937); Miller v. Lutheran Conference & Camp Ass'n, 200 A. 646 (Pa. 1938); Taylor Fishing Club v. Hammett, 88 S.W.2d 127 (Tex. App. 1935). But see Upper Greenwood Lake Property Owners Ass'n v. Grozing, 69 A.2d 896 (N.J. Super. Ch. 1949).* In other states the riparian owners may use the waters in common for fishing and boating; *Burt v. Munger, 23 N.W.2d 117 (Mich. 1946); Swartz v. Sherston, 300 N.W. 148 (Mich. 1941); Improved Realty Corp. v. Sowers, 78 S.E.2d 588 (Va. 1953).* So as to great ponds as long as the use is reasonable. Such riparian owners have the right to reasonable use of waters of great ponds in addition to their rights as members of the public; *Whitcher v. State, 181 A. 549 (N.H. 1935).*

(n652)Footnote 1353. *Kirkpatrick v. Yates Ice Co., 45 Mo. App. 335 (1891).*

(n653)Footnote 1354. *Wilkinson v. Watts, 141 N.E. 383 (Ill. 1923). See Doemel v. Jantz, 193 N.W. 393 (Wis. 1923).* Riparian owner holds title to center of nonnavigable lake but only to high watermark of navigable lake; *McGahhey v. McCollum, 179 S.W.2d 661 (Ark. 1944).* In Florida title to land under navigable waters is held by the state

in trust for the public; *McDowell v. Internal Imp. Fund, 90 So. 2d 715 (Fla. 1956).* In South Dakota by statute the private owner holds to low watermark of navigable lakes and streams; *Hillebrand v. Knapp, 274 N.W. 821 (S.D. 1937).*

(n654)Footnote 1355. *Kirkpatrick v. Yates Ice Co., 45 Mo. App. 335 (1891).* In Wisconsin if one has been in peaceful adverse possession of public land lying between meander lines of inland rivers and lakes as originally surveyed and as subsequently resurveyed under a patent issued before January 21, 1953 he or she is entitled thereto. *43 U.S.C. § 1221.*

(n655)Footnote 1356. *Sherwin v. Bitzer, 106 N.W. 1946 (Minn. 1906).* If lots contiguous to a lakesite had fixed dimensions and the shore line was not a boundary the lots did not follow a retreating shore line; *Fudge v. Hogge, 323 S.W.2d 663 (Tex. App. 1959).*

(n656)Footnote 1357. *Indiana v. Milk, 11 F. 389 (2nd Cir. 1882); Trustees of Schools v. Schroll, 12 N.E. 243 (Ill. 1887); Stevens v. King, 76 Me. 197 (1884); Wood v. Kelley, 30 Me. 47 (1849); Bradley v. Rice, 13 Me. 198 (1836); Lincoln v. Davis, 19 N.W. 103 (Mich. 1884); Castle v. Elder, 59 N.W. 197 (Minn. 1894); Lamprey v. State, 53 N.W. 1139 (Minn. 1893),* per Mitchell, J.; *Wayzata v. Great Northern R.R., 52 N.W. 913 (Minn. 1892); Kanouse v. Stockbower, 21 A. 197 (N.J. Ch. 1891), rev'd, Stockbower v. Kanouse, 26 A. 333* (N.J. Err. & App. 1893); *Sloan v. Biemiller, 34 Ohio St. 492 (1878); Slauson v. Goodrich Transp. Co., 69 N.W. 990 (Wis. 1897).* In *Hardin v. Jordan, 140 U.S. 371 (1891);* the case of *Boorman v. Sunnuchs, 42 Wis. 233 (1877);* was reviewed and discarded, as it did not correctly declare the common law of the state.

(n657)Footnote 1358. *Kentucky Lbr. Co. v. King, 65 S.W. 156 (Ky. 1901); McBurney v. Young, 32 A. 492 (Vt. 1895).*

(n658)Footnote 1359. *Wood v. Kelley, 30 Me. 47 (1849),* essentially overruling *Bradley v. Rice, 13 Me. 198 (1836); Hathorn v. Stinson, 12 Me. 183 (1835).*

(n659)Footnote 1360. *Wood v. Kelley, 30 Me. 47 (1849).*

(n660)Footnote 1361. *People v. Jones, 20 N.E. 577 (N.Y. 1889); Gouverneur v. National Ice Co., 11 N.Y.S. 87 (1890).*

(n661)Footnote 1362. *Lewis v. Roper Lbr. Co., 13 S.E. 701 (N.C. 1891).*

(n662)Footnote 1363. *Felder v. Bonnett, 27 S.C.L. 44 (S.C. 1841).*

(n663)Footnote 1364. *Fuller v. Dauphin, 16 N.E. 917 (Ill. 1888).*

(n664)Footnote 1365. *Rowe v. Cape Fear Lbr. Co., 38 S.E. 896 (N.C. 1901), modified on reh'g, 39 S.E. 748 (N.C. 1901).*

(n665)Footnote 1366. *Winnipesaukee Camp -- Meeting Ass'n v. Gordon, 29 A. 412 (N.H. 1892). See Madison v. Mayers, 73 N.W. 43 (Wis. 1897).*

(n666)Footnote 1367. *Lamprey v. State, 53 N.W. 1139 (Minn. 1893).*

(n667)Footnote 1368. *Cobb v. Davenport, 32 N.J.L. 369 (1867).*

(n668)Footnote 1369. *See West Point Water Power & Land Imp. Co. v. State, 68 N.W. 507 (Neb. 1896).*

(n669)Footnote 1370. *Dolbeer v. Suncock Waterworks Co., 58 A. 504 (N.H. 1904).*

(n670)Footnote 1371. *Richard T. Green Co. v. Chelsea, 149 F.2d 927 (1st Cir. 1945), cert. denied, 326 U.S. 741,*

66 S. Ct. 53, 90 L. Ed. 442 (1945); Hartvedt v. Harpst, 173 S.W.2d 65 (Ala. 1888); Matthews v. Bagnik, 41 A.2d 875 (Pa. Super. 1945). In Florida, by statute title to submerged lands of navigable waters is in the upland owner; *see Duval Engineering & Cont. R.R. v. Sales, 77 So. 2d 431 (Fla. 1954).* The public has a servitude on lands adjacent to navigable watercourses for the purpose of riparian works such as levees; *Delaune v. Board of Comm'rs, Pontchartrain Levee Dist., 87 So. 2d 749 (La. 1956).* "Fast lands" are those above high water; *Early v. South Carolina Public Service Authority, 90 S.E.2d 472 (S.C. 1955).* In Texas title to beds of both navigable and nonnavigable streams is in the public; *Heard v. Refugio, 103 S.W.2d 728 (Tex. 1937).*

(n671)Footnote 1372. *Coldwater v. Tucker, 36 Mich. 474 (1877); State v. Eason, 19 S.E. 88 (N.C. 1894); Brown Oil Co. v. Caldwell, 13 S.E. 42 (W. Va. 1891).* Title was to low watermark of navigable water; *Cordovana v. Vipond, 94 S.E.2d 295 (Va. 1956).*

(n672)Footnote 1373. *Nelson v. De Long, 7 N.W.2d 342 (Minn. 1942).*

(n673)Footnote 1374. *Boerner v. McCallister, 89 S.E.2d 23 (Va. 1955).*

(n674)Footnote 1375. Land bounding on a lake or pond runs only to the water's edge if a natural body of water, but to the middle of the stream in its natural state, if the pond is artificially created by damming the stream; *Baker v. Normanoch Ass'n, Inc., 136 A.2d 645 (N.J. 1957).*

(n675)Footnote 1376. *Goodyear v. Shanahan, 43 Conn. 204 (1875); Agawam Canal Co. v. Edwards, 36 Conn. 476 (1870); Bishop v. See ley, 18 Conn. 389 (1847); Warner v. Southworth, 6 Conn. 471 (1827); Tagliaferri v. Grande, 120 P. 730 (N.M. 1911); Warren v. Gloversville, 80 N.Y.S. 912 (N.Y. App. Div. 1903); Richmond v. Thompson, 81 S.E. 105 (Va. 1914).*

(n676)Footnote 1377. *Morgan v. Bass, 14 F. 454 (C.C. Ind. 1882); Mill River Woolen Mfg. Co. v. Smith, 34 Conn. 462 (1867); Mansur v. Blake, 62 Me. 38 (1873); Robinson v. White, 42 Me. 209 (1856); Lowell v. Robinson, 16 Me. 357 (1839); Primm v. Raboteau, 56 Mo. 407 (1874); Union R. & Transit Co. v. Skinner, 9 Mo. App. 189 (1880); Holden v. Chandler, 18 A. 310 (Vt. 1889); Church v. Stiles, 10 A. 674 (Vt. 1887); Carter v. Chesapeake & O. R.R., 26 W. Va. 644 (1885).*

(n677)Footnote 1378. *Nichols v. New England Furn. Co., 59 N.W. 155 (Mich. 1894).*

(n678)Footnote 1379. *Scholl v. Emercih, 36 Pa. Super. 404 (1908).*

(n679)Footnote 1380. *Mad River Co. v. Pracney, 123 A. 918 (Conn. 1924); Mill River Woolen Mfg. Co. v. Smith, 34 Conn. 462 (1867); Lowell v. Robinson, 16 Me. 357 (1839); Roberts v. Decker, 97 N.W. 519 (Wis. 1903).*

(n680)Footnote 1381. *Patapsco Guano Co. v. Bowers-White Lbr. Co., 59 S.E. 538 (N.C. 1907).*

(n681)Footnote 1382. *Greenspan v. Yaple, 194 N.Y.S. 658 (N.Y. App. Div. 1922).*

(n682)Footnote 1383. *Roberts v. Decker, 97 N.W. 519 (Wis. 1903).*

(n683)Footnote 1384. *Lowell v. Robinson, 16 Me. 357 (1839); Mansur v. Blake, 62 Me. 38 (1873).*

(n684)Footnote 1385. *Boardman v. Scott, 30 S.E. 982 (Ga. 1897); Patapsco Guano Co. v. Bowers-White Lbr. Co., 59 S.E. 538 (N.C. 1907).* If an artificial pond is constructed the title to the bed is not affected by title to the bank; *Skalitsky v. Consolidated Badger Coop., 31 N.W.2d 153 (Wis. 1948).*

(n685)Footnote 1386. *Jones v. Parker, 5 S.E. 383 (N.C. 1888); Lynch v. Allen, 20 N.C. 190 (1838).*

(n686)Footnote 1387. *Lowell v. Robinson, 16 Me. 357 (1839).* In New Hampshire the beds of great ponds are

owned by the public; *Whitcher v. State, 181 A. 549 (N.H. 1935).* State's title to lake beds and beds of great ponds runs to natural high watermark; *State v. George C. Stafford & Sons, Inc., 105 A.2d 569 (N.H. 1954).*

(n687)Footnote 1388. *Norcross v. Griffiths, 27 N.W. 606 (Wis. 1886); Smith v. Ford, 2 N.W. 134 (Wis. 1879).* Where deed conveyed all land covered by a millpond it was deemed to extend to low watermark of the pond at date of deed; *Prescott v. Herring, 94 S.E.2d 417 (Ga. 1956).*

(n688)Footnote 1389. *Denver v. Pearce, 22 P. 774 (Colo. 1889); Ladies Seamens Friend Soc. v. Halstead, 19 A. 658 (Conn. 1889); Church v. Meeker, 34 Conn. 421 (1867); Simons v. French, 25 Conn. 346 (1856); People ex rel. Burnham v. Jones, 20 N.E. 577 (N.Y. 1889); Norcross v. Griffiths, 27 N.W. 606 (Wis. 1886); Smith v. Ford, 2 N.W. 134 (Wis. 1879). See also Ford v. Butte County, 145 P.2d 640 (Cal. App. 1944).*

(n689)Footnote 1390. *Jones v. Parker, 5 S.E. 383 (N.C. 1888); Lamb v. Rickets, 11 Ohio 311 (1842); Hopkins v. Kent, 9 Ohio 13 (1839); Allen v. Weber, 50 N.W. 514 (Wis. 1891).*

(n690)Footnote 1391. *Howard v. Ingersoll, 54 U.S. 381, 14 L. Ed. 189 (1851); Handly v. Anthony, 18 U.S. 374,* (1820); *Dunlap v. Stetson, 8 F. Cas. 75* No. 4164 (C.C. Me. 1867); *Thomas v. Hatch, 23 F. Cas. 946,* No. 13,899 (C.C. Me. 1838); *Drake v. Russian River Land Co., 103 P. 167 (Cal. App. 1909); People v. ex rel. Highway Comm'rs v. Supervisors, 17 N.E. 147 (Ill. 1888); Murphy v. Copeland, 10 N.W. 786 (Iowa 1881); Stone v. Augusta, 46 Me. 127 (1858); Bradford v. Cressey, 45 Me. 9 (1858); Jones v. Parker, 5 S.E. 383 (N.C. 1888); Martin v. Nance, 40 Tenn. 649 (1859); Holden v. Chandler, 18 A. 310 (Vt. 1889); Carter v. Chesapeake & O. R.R., 26 W. Va. 644 (1885); Chandos v. Mack, 46 N.W. 803 (Wis. 1890); Greene v. Nunnemacher, 36 Wis. 50 (1874).* In *Bradford v. Cressey, 45 Me. 9 (1858),* the language is: "Thence east until it strikes the creek on which the mill stands; thence southwesterly on the west bank of said creek;" and it was held that "the grantee was restricted to the bank of the creek."

(n691)Footnote 1392. *Huffman v. Charles, 97 S.W. 775 (Ky. 1906).*

(n692)Footnote 1393. *Nichols v. Howland, 5 N.Y.S. 252 (1889).*

(n693)Footnote 1394. *Haight v. Hamor, 22 A. 369 (Me. 1891); Erskine v. Moulton, 66 Me. 276 (1877); Bradford v. Cressey, 45 Me. 9 (1858).*

(n694)Footnote 1395. *Haight v. Hamor, 22 A. 369 (Me. 1891); In re Jackson's Case, 20 N.E.2d 401 (Mass. 1939).*

(n695)Footnote 1396. *Putnam v. Stewart, 97 N.Y. 411 (1884); Cornell v. Todd, 2 Denio 130 (N.Y. 1846).*

(n696)Footnote 1397. *Denver v. Pearce, 22 P. 774 (Colo. 1889).*

(n697)Footnote 1398. *Kingsley v. Jacobs, 149 P.2d 950 (Or. 1944).*

(n698)Footnote 1399. *Deering v. Gahm, 84 N.W.2d 223 (Iowa 1957).*

(n699)Footnote 1400. *Haynie v. May, 252 N.W. 749 (Iowa 1934); Smith v. Whitney, 74 P.2d 450 (Mont. 1937); Johnson v. Butler, 245 P.2d 720 (Okla. 1952).*

(n700)Footnote 1401. *Bryant v. Chicago Mill & Lbr. Co. 120 F. Supp. 463 (E.D. Ark. 1954), aff'd, 216 F.2d 727 (8th Cir. 1954); Caples v. Taliaferro, 197 So. 861 (Fla. 1940).*

(n701)Footnote 1402. *Deering v. Gahm, 84 N.W.2d 223 (Iowa 1947).*

(n702)Footnote 1403. *Mutual Chem. Co. v. Baltimore, 33 F. Supp. 881 (D. Md. 1940); Driesback v. Lynch, 234 P.2d 446 (Idaho 1951).* The shore line could not be treated as a cove where the headlands were four miles apart; *Columbia Land Co. v. Van Dusen Inv. Co., 91 P. 469 (Or. 1907).* In Wisconsin, it has been held that as to United States

survey where the river is a boundary, the starting point projecting the division line between lots extended out into the stream is the bank of the river itself at the time of the government survey rather than the meander line; *Menasha Wooden-Ware Co. v. Lawson, 36 N.W. 412 (Wis. 1888).*

(n703)Footnote 1404. *Johnston v. Jones, 66 U.S. 209, 17 L. Ed. 117 (1861); Jones v. Jonston, 59 U.S. 150, 15 L. Ed. 320 (1855); Emerson v. Taylor, 9 Me. 42 (1832); Sparhawk v. Bullard, 42 Mass. 95 (1840); Clark v. Campau, 19 Mich. 325 (1869). See* the following cases: *Blodgett v. Davis Lbr. Co. v. Peters, 49 N.W. 917 (Mich. 1891); Bay City Gas-Light Co. v. Industrial Works, 28 Mich. 182 (1873); Aborn v. Smith, 12 R.I. 370 (1879); Northern Pine Land Co. v. Bigelow, 54 N.W. 496 (Wis. 1893); Menasha Wooden-Ware Co. v. Lawson, 36 N.W. 412 (Wis. 1888). See In re Application of Central Nebraska Public Power & Irr. Dist., 295 N.W. 386 (Neb. 1940).* Tide line boundaries must be extended out from the shore at right angles to the shore line or the line of navigable water instead of extending the course of the upland division line; *Oregon Coal & Nav. Co. v. Anderson, 206 F. 404 (9th Cir. 1913); Shawmut Mfg. Co. v. Benton, 122 A. 49 (Me. 1923).* The upland boundary lines are to be continued into the river in the regular course so as to determine the ownership of land beneath the water; *Hagan v. Campbell, 8 Ala. 9 (1838).* Where the shore line is fairly straight the tendency is to project the division line out into the river at right angles from the line of the shore but from a base line representing the shore line; *Frazers Million Dollar Pier Co. v. Ocean Park Pier Co. v. Ocean Park Pier Co., 197 P. 328 (Cal. 1921), 198 P. 212 (Cal. 1921); Baltimore v. Baltimore & Philadelphia Steamboat Co., 65 A. 353 (Md. 1906); Manufacturers Land & Imp. Co. v. Board of Commerce & Nav., 121 A. 337 (N.J. Supp. 1923), aff'd, 127 A. 924* (N.J. Err. & App. 1925); *People ex rel. Cornwall v. Woodruff, 51 N.Y.S. 515 (N.Y. App. Div. 1898); O'Neal v. Rollison, 192 S.E. 688 (N.C. 1937); Ludwig v. Overly, 19 Ohio C.C. 709 (1895); McCullough v. Wall, 4 S.C. 68 (1850); Lambert's Point Co. v. Norfolk & W. R.R., 74 S.E. 156 (Va. 1912).* Line drawn perpendicular to the line or general course of the channel; *Merril Stevens Co. v. Durkee, 57 So. 428 (Fla. 1912).* In the case of *Hayes v. Bowman, 91 So. 2d 795 (Fla. 1957),* involving tidal waters, it was held that the riparian rights of an upland owner must be preserved over an area as near as practicable in the direction of the channel so as to distribute equitably the submerged lands between the upland and the channel. Running the side line as perpendicular to the thread of the stream; *Ulbright v. Baslington, 119 P. 292 (Idaho 1911); Bay City Gas-Light Co. v. Industrial Works, 28 Mich. 182 (1873).* Title to accretions is determined by extending the boundary lines of the upland; *McCamon v. Stagg, 43 P. 86 (Kan. App. 1896).* In *Emerson v. Taylor, 9 Me. 42 (1832),* title plats were divided by drawing a base line from the corner of each lot where they strike the shore and extending these corners in a parallel line to the low watermark at right angles to the base line. This method was attacked in *Stockham v. Browning, 18 N.J.Eq. 390 (1867)* and in *Call v. Carroll, 40 Me. 31 (1855),* was held to apply only to the original division of lots on the upland and not to be applicable so as to change the areas, boundaries and plats by reason of any subsequent subdivision of any upland lot. In other cases the dividing line is made by projecting at right angles to the "course of the river;" *A. M. Campau Realty Co. v. Detroit, 127 N.W. 365 (Mich. 1910).* The following general rules for the apportionment of riparian rights are firmly established: If the shore line is straight, the riparian lines are to be extended from the divisional lines on shore into the water, perpendicular to the shore line. If, on the other hand, the shore line is concave, converging lines shall be run from the divisional shore lines to the line of navigability; *Baltimore v. Baltimore & Philadelphia Steamboat Co., 65 A. 353 (Md. 1906).* If the shore lines are convex, the lines will be divergent to the line of navigability; *Mutual Chem. Co. v. Baltimore, 33 F. Supp. 881 (D. Md. 1940).* Division line between adjoining riparian tracts should run out from the shore so as to strike the thread of the river at right angles under the Michigan rule; *Bay City Gas-Light Co. v. Industrial Works, 28 Mich. 182 (1873), McKain v. Central Nebraska Public Power & Irr. Dist., 295 N.W. 386 (Neb. 1940).* If there has been an official bulkhead line, or pierhead line or harbor line extended out into the river for improvements such as for wharfage purposes, a few cases have apportioned the river area by drawing division lines perpendicular to such officially prescribed lines extending along the river; *Columbia Land Co. v. Van Dusen Inv. Co., 91 P. 469 (Or. 1907); Taber v. Hall, 51 A. 432 (R.I. 1902); Manchester v. Point Street Iron Works, 13 R.I. 355 (1881); Aborn v. Smith, 12 R.I. 370 (1879).* General principles from which the disputed boundary line may be determined: First: In adjudicating the ownership of tidelands between adjoined upland owners on a concave shore line, each upland owner is entitled to a proportionate share of the tidelands extending to the low watermark. Second: The course or courses of the boundaries of the upland properties should be disregarded, each upland owner being entitled to share ratably in the adjoining tidelands having regard only to the amount of shore line which the owner owns, lying between the points where the lateral boundaries of the upland meet

the shore line or the government meander line, whichever, in the particular case constitutes the water boundary of the upland. Third: Tidelands should be apportioned between the respective upland owners to that as the whole length of the low waterline, so is each landowner's proportion of the shore line to each owner's share of tidelands along the line of low water. Tidelands may be divided between adjoining owners by erecting lines perpendicular to the general course of shore line only in cases where the shore line is straight, or substantially so. In *Spath v. Larsen, 148 P.2d 834 (Wash. 1944),* each owner of uplands along a concave shore line of navigable waters was held entitled to share ratably in adjoining tidelands considering only the amount of shore line which the owner owns between points where the lateral boundaries of the upland meet shore lines or government meander line, whichever is the boundary.

(n704)Footnote 1405. *Frasers Million Dollar Pier Co. v. Ocean Park Pier Co., 197 P. 328 (Cal. 1921), 198 P. 212 (Cal. 1921).*

(n705)Footnote 1406. *A. M. Campau Realty Co. v. Detroit, 127 N.W. 365 (Mich. 1910).* The plaintiff owned land which was bordered by a highway platted but never laid out and on the water side of which was a small irregular tract of unplatted land. The plaintiff was not a riparian owner entitled to accretion; *Earle v. McCarty, 70 So. 2d 314 (Fla. 1954).*

(n706)Footnote 1407. *Bay City Gas-Light Co. v. Industrial Works, 28 Mich. 182 (1873).*

(n707)Footnote 1408. *Northern Pine Land Co. v. Bigelow, 54 N.W. 496 (Wis. 1893); Menasha Wooden-Ware Co. v. Lawson, 36 N.W. 412 (Wis. 1888).* Some cases have followed the rule of giving proportionate frontage projection on curving or irregular shores and channels; *Johnston v. Jones, 66 U.S. 209 (1861); Groner v. Foster, 27 S.E. 493 (Va. 1897).*

(n708)Footnote 1409. *Hayes v. Bowman, 91 So. 2d 795 (Fla. 1957); Montgomery v. Shaver, 66 P. 923 (Or. 1901); Dordovana v. Vipond, 94 S.E.2d 295 (Va. 1956); J.S. Thornton & Co. v. Smith, Grant & Co., 10 R.I. 477 (1873).*

(n709)Footnote 1410. *Clark v. Campau, 19 Mich. 325 (1869); Waverly Water-Front & Imp. Co. v. White, 33 S.E. 534 (Va. 1899).* Where the shore line of a river is irregular and varies in distance from the navigable portion of the river the court in apportioning the soil under the waters between the riparian owners should give each a parcel of land of a width at its outer edge along the line of navigability proportioned to what he has at the shore end; *Cordovana v. Vipond, 94 S.E.2d 295 (Va. 1956).*

(n710)Footnote 1411. *United States v. Ruggles, 27 F.Cas. 911,* No. 16,204 (C.C. N.Y. 1861); *Montgomery v. Shaver, 66 P. 923 (Or. 1901).*

(n711)Footnote 1412. *Grand Rapids Ice & Coal Co. v. South Grand Rapids Gas & Coal Co., 60 N.W. 681 (Mich. 1894).*

(n712)Footnote 1413. *Hilt v. Weber, 233 N.W. 159 (Mich. 1930); Lamprey v. State, 53 N.W. 1139 (Minn. 1893); Richardson v. Sims, 80 So. 4 (Miss. 1918).*

(n713)Footnote 1414. *Lincoln v. Davis, 19 N.W. 103 (Mich. 1884).*

(n714)Footnote 1415. *Ladies Seamens Friend Soc. v. Halstead, 19 A. 658 (Conn. 1889); Axline v. Shaw, 17 So. 411 (Fla. 1895); Erskine v. Moulton, 24 A. 841 (Me. 1892); Erskine v. Moulton, 66 Me. 276 (1877); Stone v. Augusta, 46 Me. 127 (1858); Pike v. Munroe, 36 Me. 309 (1853); Deering v. Long Wharf, 25 Me. 51 (1845); Knox v. Pickering, 7 Me. 106 (1830); Palmer v. Farrell, 18 A. 761 (Pa. 1889); Bright v. Superior, 156 N.W. 600 (Wis. 1916).*

(n715)Footnote 1416. Dunlap v. Stetson, F. Cas. 75 (C.C. Me. 1827); *Orange v. Resnik, 109 A. 864 (Conn. 1920); Nickerson v. Crawford, 16 Me. 245 (1839); Richards v. Page Inv. Co., 228 P. 937 (Or. 1924).*

(n716)Footnote 1417. *Brown v. Heard, 27 A. 182 (Me. 1893); Montgomery v. Reed, 69 Me. 510 (1879); Stone v.*

Augusta, 46 Me. 127 (1858); Bradford v. Cressey, 45 Me. 9 (1858); Nickerson v. Crawford, 16 Me. 245 (1839); Litchfield v. Ferguson, 6 N.E. 721 (Mass. 1886). A deed to low watermark and thence along the shore ran to center of pond; *Hammel v. Camp Ranger, 87 N.Y.S.2d 892* (N.Y.A.D. 3 Dept., 1949), *aff'd, 90 N.E.2d 63 (N.Y. 1949).*

(n717)Footnote 1418. *Erskine v. Moulton, 66 Me. 276 (1877); Pike v. Munroe, 36 Me. 309 (1853).*

(n718)Footnote 1419. *Litchfield v. Scituate, 136 Mass. 39 (1883); Hathaway v. Wilson, 123 Mass. 359 (1877).*

(n719)Footnote 1420. *Dillingham v. Roberts, 75 Me. 469 (1883).*

(n720)Footnote 1421. *Fellman v. Tidewater Mill Co., 152 P. 268 (Or. 1915).*

(n721)Footnote 1422. *McDonald v. Whitehurst, 47 F. 757 (C.C.E.D. Va. 1891), aff'd, 52 F. 633 (4th Cir. 1892).*

(n722)Footnote 1423. *Nickerson v. Crawford, 16 Me. 245 (1839).* If the boundary is a sound the line runs from headland to headland; *In re Site for Hunts Point Sewage Treatment Works, 138 N.Y.S.2d 118 (1954), rev'd, 146 N.Y.S.2d 167* (N.Y.A.D. 1 Dept. 1955), *aff'd, 143 N.E.2d 789 (N.Y. 1957).*

(n723)Footnote 1424. *Bradford v. Cressey, 45 Me. 9 (1858).*

(n724)Footnote 1425. *Stone v. Augusta, 46 Me. 127 (1858).*

(n725)Footnote 1426. *In re Opening West Farms Road, 106 N.E. 102 (N.Y. 1914).*

(n726)Footnote 1427. *Deering v. Gahm, 84 N.W.2d 223 (Iowa 1957).*

(n727)Footnote 1428. *Whitney v. Dudley, 40 N.Y.S.2d 838 (1943), aff'd, 45 N.Y.S.2d 725* (N.Y.A.D. 4 Dept. 1943).

* This chapter is drawn in part from chapter 45 of George W. Thompson, Commentaries on the Modern Law of Real Property (John S. Grimes ed. 1979), which made a significant contribution to preserving the American common law governing land descriptions and boundaries.

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CHAPTER 90 LAND DESCRIPTIONS, BOUNDARIES AND SURVEYS *

10-90 Thompson on Real Property, Thomas Editions § 90.04

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§ 90.04 Land Surveys.

[Go To Supp]

§ 90.04(a) Official Surveys.

Lines established by official surveys control over those made by private parties. Particularly is this true in the case of original surveys made by the United States government. These surveys, however erroneous, are conclusive and cannot be barred by private act, since they are extensive and comprehensive in nature and the entire survey system depends on interlocking. If the original government survey is shown with certainty, a purchaser of a subdivision of such survey takes by that survey, and calls in the purchaser's deed that are inconsistent with such survey must yield to it. n1429 The original government survey, even though incorrect, is conclusive between individual buyers and sellers who deal with the property on the basis of such survey, n1430 and the courts will protect the rights of property acquired on the faith of an original survey. n1431 However, a deed purporting to convey a half of a government quarter section of land that has not been previously subdivided is operative as a conveyance of a quantitative half of the tract without regard to the rules of the United States Land Department with reference to the subdivision of such tracts. n1432

Where a line was actually run and a division made in an original government survey, established in accordance with the field notes, and the line of division was marked by corners or natural objects, the patentee from the government will take according to such survey without regard to a mistaken description of courses and distances or quantity. n1433 Where the description in a deed is by government section numbers, the land conveyed is such only as is situated within the designated sections as surveyed and platted by the government, the original government corners and lines being such sections' true and only boundaries. n1434 Although, by reason of errors or defects in the original survey, a section has been divided unequally and the purchaser of one "quarter" or "forty" in such section has acquired a larger acreage than the purchaser of another "quarter" or "forty" therein, the former is under no obligation, either legal or equitable, to divide the excess with the latter. n1435

Where the line of an older survey is given as a boundary, but the distance given in the course towards the survey will not carry the land to the line thereof, the survey line will control, n1436 but where a survey calls for the lines of another survey, courses and distances must yield, so that the survey may run with the lines called for. n1437

In a conflict between two surveys, the later of which was not made on the ground, but in the office of the surveyor from

the surveyor's memory of the former survey, calls for certain trees as an established corner must yield to the earlier survey. n1438

A deed of a lot by number conveys the lot as it is bounded by the lines actually run by the survey, when they can be ascertained. n1439

The object of all rules for the establishment of boundaries is to ascertain the actual location of the boundary as made at the time. n1440

Statutes in some states provide for establishing disputed boundaries by an official survey. n1441 To make such a survey final and binding upon the parties, notices must be given, and all proceedings had in substantial conformity with the statute. n1442 The fact that notice was given to the parties to be affected should appear on the face of the proceedings; n1443 but such notice may be waived by appearing and asking the decision of the court on an agreed statement of facts with a view of appealing from the survey. n1444

Such official survey may establish the permanent boundaries between two tracts of land, but cannot change the title to the land. n1445 A survey made under a state law without regard to government corners, and with no thorough attempt to locate obliterated or lost corners is not binding. n1446 An official survey merely establishing the true lines and corners has been held not to affect the location of an independent agreed boundary or ownership or possession depending on a valid boundary agreement. n1447 A proceeding to establish a boundary line is a special proceeding so that it is competent for the defendant to plead the equitable defense of mutual mistake. n1448 Authority under an equitable proceeding to ascertain the true boundary lines between adjacent lands cannot be extended to the determination of the title. Title must be determined by a suit at law to recover the land. It is true that the determination of the boundary may involve the title to some portion of the land. n1449

What constitutes a boundary line is matter of law to be determined by the court, but where the boundary is, is a matter of fact to be ascertained by the jury. n1450

COMPUTER-ASSISTED RESEARCH

LEXIS: Survey! w/10 official

§ 90.04(b) Government Surveys as Controlling.

As a general rule, government surveys, even though incorrect, are conclusive on private persons. n1451 A survey governs a plan in a dispute over a boundary as regards grants in severalty of lots of land laid off on a particular plot. n1452 Field notes and a plat of government surveys of record are controlling, even though the established monuments have disappeared. n1453 Where government section corners are obliterated, the resurvey must, if possible, locate the corners where they were originally placed by the government, even though the government survey was inaccurate and to thus relocate the corners will distort the shape of the section or other tract of land affected. n1454

The plats and surveys made by the United States government cannot be contradicted by parol evidence, private surveys, and plats. n1455 If the stakes or monuments set by the government surveyors cannot be found, the point of the original location must be determined from other evidence. n1456 After the title to public land has passed out of the government by the issuance of a valid patent, the courts will protect private rights thereby acquired against interference by corrective surveys subsequently made by the federal land department. n1457 A government survey, even though incorrect, is conclusive where there is a controversy between persons asserting conflicting claims under grants or patents based on such survey. n1458 Corners shown to have been originally made by government surveyors are conclusive, and must be accepted as the true corners, no matter how inaccurately they may have been originally established. n1459

If the cornerstones or other monuments established by the government surveyor can be ascertained as originally located, these control the survey, and the lines shown by the field notes of the survey must be disregarded. n1460 If such a corner is made a starting point of a description, it will prevail as against an actual survey and a corner fixed by the grantor at the time of the conveyance. n1461 Where it is doubtful which of two lines of monuments is the true government line, other things being equal, that one is to be so considered which most nearly conforms to the field notes. n1462 A surveyor called on to locate government corners and lines should merely locate those without acting as arbiter of disputes or correcting mistakes in the original survey. n1463 A purchaser has a right to be protected in the land which purchased with reference to the original monuments or locations, whether right or wrong. n1464 A statute, providing for the permanent survey of lands, confers no power upon the commissioners to run new boundary lines, but their duty is simply to ascertain as near as possible lost corners, and to retrace and reestablish the lines of the original government survey and those by which purchasers have been influenced and governed in previous conveyances. n1465

Official government surveys are not open to attack between private parties in boundary disputes. n1466 Where there is a discrepancy in a government survey between the monuments and the distances given in the field notes, the monuments will control, even though the result be that some of the quarter sections will contain less than their proper number of acres. n1467 There is a presumption, however, that the corners were established at the places indicated by the field notes; and the proof that they were not so established must be clear and convincing where the actual location as claimed does not accord with the section lines in adjoining sections, and will establish the claim in an irregular shape. n1468 Where the location of the government corner is established by clear and satisfactory evidence, it will control over the field notes of the government survey. n1469 In relocating lost corners on township lines, when the monuments claimed to be government monuments are disputed and not clearly established, these should be established on a line coinciding with the township line at the points indicated by the government field notes, that is, on a straight line connecting known and undisputed government monuments on such township line. n1470

Monuments and boundary lines as established by the government survey control the description of lands patented by the United States, and mistakes in the surveys cannot be corrected by the judicial department of the government. n1471 If the field notes of the government survey afford sufficient data for running the lines of that survey, the fact that certain monuments marking the corners of the survey cannot be found does not render the lines unknown or uncertain so that they can be proved by parol evidence. n1472

An original government survey, under which adjoining owners have purchased, governs the boundary between them as against a subsequent survey made many years afterwards under an act of Congress which recited that the town had never been properly surveyed. n1473 Where it appears that a purchaser of a part of a government section of land built a fence upon the boundary lines as located by a surveyor at that time, and he testifies that he found the original stake of the government survey and used it as a starting point, this line will prevail over one surveyed twenty years later, when the corner stake had disappeared. n1474

A government description point will control over conflicting calls for course and distance. n1475 Official government surveys are not subject to attack by private persons in boundary disputes. n1476 Surveys run by county surveyors are only prima facie correct. n1477 Where both titles are derived from a common grantor the older deed governs as to a disputed boundary. n1478 Errors in United States surveys cannot be corrected by the courts since such surveys create boundaries and do not merely ascertain them. n1479 There is a presumption in favor of the correctness and regularity of an official survey. n1480

COMPUTER-ASSISTED RESEARCH

LEXIS: Survey! w/10 government

§ 90.04(c) Tracing Survey Lines Backwards

It sometimes becomes necessary to make a resurvey of land in order to find lost lines or monuments, n1481 and in such case the original survey must be retraced when possible, n1482 using the field notes of the original survey for this purpose. n1483 The original survey may be traced backward as well as forward. n1484 Thus, if in running a line in one direction, a difficulty is met with and all of the known calls in the survey can be met by running in the reverse direction, the running of such reverse course is permissible. n1485 The beginning corner of a survey is of no higher dignity than any other corner. n1486 In establishing lost corners, one should go to the known corners of the survey and reverse the calls, and in that manner find the lost corner. n1487 It is true, nevertheless, that "the natural order of survey is that which the deed shows the parties to the deed adopted to identify, to their own satisfaction, the land intended to be conveyed by the one to the other. It may be considered as their direction for how the identity shall be established by survey at any future time, and it supposes certain points as the beginning to be established. If, therefore, the description of a particular line be complete in itself, the court cannot vary from that description of a posterior line, unless the description of the latter be more specific than the former, and unless from the latter a mistake in the former can be clearly inferred." n1488

COMPUTER-ASSISTED RESEARCH

LEXIS: Survey! w/10 (trac! w/5 backward!)

§ 90.04(d) Comparing Conflicting Surveys.

A resurvey does not affect rights previously vested, its purpose being to ascertain the lines of the original survey without regard to their correctness. n1489 Where there is a conflict between the field notes of different surveys, the field notes of the senior survey will prevail. n1490 A surveyor's call to tie to a junior survey has been held not to control over another call to tie to a senior survey. n1491

Where adjoining owners have entered into possession of land according to boundaries marked by stakes, these are monuments which prevail over the courses and distances of a subsequent corrected survey. n1492 It has been held that a survey merely establishing the true lines and corners does not affect the location of an independent agreed boundary or ownership or possession depending on a valid boundary agreement. n1493 Subsequent surveys may aid in finding lost corners, but where the old and recognized corners are well known, these must control. n1494 When a boundary mark made in a government survey has been obliterated or lost, in relocating it by a resurvey made by township officers the question is, not where the mark ought to be, if the township had been correctly surveyed, but where it is according to the original survey. n1495 A "lost corner" is a point of a survey the position of which cannot be determined beyond reasonable doubt, either from original traces or from other reliable evidence as to the position of the original monument, and the restoration of which on the ground can be effected only by means of a proper survey with reference to interdependent existent corners. n1496

If a purchaser takes possession of the land and fences it soon after the making of a survey, and the person who made the plat pointed out the bounds, it is presumed that the purchaser's possession was taken according to the lines of the actual survey. n1497 It is also competent to establish the lines and courses of a tract of land by showing where the surveyor actually ran when making the survey at the instance of the parties to the conveyance, and with a view to its execution. n1498

Where a description called for a stake on the quarter section line, the deed was held to convey no land beyond that line notwithstanding that the parties may have placed the stake at some other point.

In the absence of other means of identifying a survey it may be identified by known calls of other surveys. n1499 As a general rule, where there is a conflict between the lines of different surveys, it is the lines of the older survey which will prevail. n1500 Where there is a conflict between the field notes of a patent and the field notes of a surveyor filed in the general land office, if the surveyor's field notes represent the footsteps of the surveyor on the ground, the original field

notes rather than those contained in the patent control. n1501 A call for another and older survey will be taken to be the correct boundary, and the location will extend to such survey when no material excess of land is shown. n1502 Where a survey calls for the lines of another survey, these control courses and distances, so that the survey may run with the lines called for. n1503 A call for another survey definitely located is properly ignored where, if followed, it necessitates a total disregard of course and distance, and causes the remaining bounds to conflict with other surveys, and to make the quantity of land very different from that called for. n1504

COMPUTER-ASSISTED RESEARCH

LEXIS: Survey! w/10 (conflict w/20 compar!)

§ 90.04(e) Influence of Field Notes.

A survey is to be located by the calls of its own field notes, and such notes cannot be varied by extrinsic evidence. n1505 Field notes will be read into a deed when they are referred to therein. n1506 Objects not called for in the deed cannot be accepted as corners if they conflict with the field notes. n1507 The field notes of a junior survey may be admissible as evidence of the boundaries of a senior survey, but their relevancy and materiality must be shown. n1508 A certified copy of the surveyor's field notes is admissible to identify the land. n1509 The original field notes and plats of a survey are admissible to identify the land, or to remove doubts as to the description, without any reference being made to them in the deed. n1510 Field notes do not locate lines on the ground, but merely furnish data by which surveyors can locate them. n1511

The boundaries of a survey may be located by surrounding surveys referred to in its field notes, even though its corners and lines cannot be found on the ground, and even though there is a discrepancy in its area between the field notes and its boundaries as so located. n1512 Where the boundaries of a survey cannot be located by its own calls and field notes, they may be established by the field notes of adjacent surveys. n1513 The field notes of a block constituting a prior survey might be explained by subsequently made field notes of another block. n1514 To render field notes of the surveyor admissible as evidence to identify the land, under a statute requiring the county surveyor to record all surveys with the county with plats thereof, it is necessary to certify that the field notes were correctly copied from the record. n1515 In an action involving a disputed boundary, the field notes of a survey of the land made when it was owned by the parties' common grantor was held inadmissible, where it did not appear under what circumstances the survey was made and the defendant's deed in no way referred to it.

An identified government monument will prevail over a call of the field notes for measurements. n1516 Calls for monuments in the field notes of a government survey control in relocating the boundaries. Thus, when a patent is issued with boundaries as described in a survey and with a map made by a government surveyor who has also made field notes giving not only courses and distances, but also monuments and the various topographical features of the country, the calls for monuments will control the courses and distances. n1517 Incidental calls for monuments, or natural objects noted in field notes as such in passing, unless specially designated in such manner as to show an intention to make them locative, are not such calls as will ordinarily have precedence over calls for courses and distances. n1518 A court will attach considerable importance to a call in a grant from a Mexican state for stone monuments in the field notes, where the law of the state required corners to be erected on quarried rock and lime mortar. n1519 In establishing a boundary between coterminous quarter sections within the interior of a township, where the government corners are obliterated and their locations cannot be established by witnesses who know the sight thereof, surveys according to the government field notes from known government corners, both north and south and east and west of the corner in dispute, so as to locate the contested corner on a line with other corners on both of those lines, and to give each owner an equal amount of land, should ordinarily be preferred to a survey which does not commence at a known or conceded government corner, and gives to one owner much more land than is accorded the other. n1520

An actual survey established by evidence controls course and distance. n1521 The monuments of the original survey

control if these can be found, or the places where they were established can be ascertained; n1522 but if a monument cannot be located or definitely identified, it must give way to a more certain method of locating the boundary. n1523

A house referred to in the field notes of a survey, and marked upon a map, becomes a monument as much as a tree or a stake. n1524

Generally, the location of corners of a survey may not be established or controlled by artificial objects or marks not called for in the field notes. n1525 In relocating old points the footsteps of the surveyor should be followed. n1526

COMPUTER-ASSISTED RESEARCH

LEXIS: Survey! w/10 (field note!)

§ 90.04(f) Control by Lines Marked or Surveyed.

The line actually run is the true boundary, n1527 provided the actual survey can be found and identified as the one called for, n1528 and prevails over maps, plats, and field notes. n1529 Lines actually run and marked upon the ground control calls for natural or other fixed boundaries, and calls for adjoining boundaries and for courses and distances. n1530 The lines marked on the ground constitute the actual survey, and where those lines are located is a matter to be determined by the jury from all the evidence. n1531 If the stakes and monuments set at the corners of the parcel in making the survey have disappeared, it is competent to show their location by parol evidence. n1532 It is presumed that a line in a call from one monument to another is a straight line; n1533 but this is rebutted when the language of the deed shows that a different line was intended. n1534 When a line was actually run and marked and corners made, and the marks and corners can be found, the line will control, although the deed calls for a natural object not reached by such line. n1535 It is only when the marked lines can be identified on the ground that they will control a call for course and distance. n1536 A call for course and distance will control a call for an unmarked line which cannot itself be ascertained except by running the boundaries of another survey according to course and distance. n1537 Generally where an artificial object such as a marked line is called for as a monument, the monument when found and identified will be taken as a better guide in following the footsteps of the surveyor than the call for distance. n1538 A new survey cannot affect lines established pursuant to an earlier survey. n1539

COMPUTER-ASSISTED RESEARCH

LEXIS: Survey! w/10 (lines w/5 mark!)

§ 90.04(g) Superiority of Calls for Monuments.

Where a deed has calls or other descriptions which are not in agreement, certain general laws have been established to govern the conflicts. The basic rule governs priority of calls. In the absence of proof of a conflict between natural objects or monuments and other elements, such as courses and distances, the presumption is that no conflict exists. n1540

A "monument" is a tangible landmark, n1541 and monuments, as a general rule, prevail over courses and distances, for the purpose of determining the location of a boundary, n1542 even though this means either the shortening or lengthening of distance, n1543 unless the result would be absurd and one clearly not intended, n1544 or all the facts and circumstances show that the call for courses and distances is more reliable than the call for monuments. n1545 This general rule is applicable to all lines sought to be established by field notes containing calls for either natural or artificial objects. This rule does not apply when it is evident that the call for a natural object or established boundary line was made under a mistaken belief with reference to the survey. n1546 These preferences are merely constructional preferences and will yield to the manifest intent of the grantor if this can be ascertained. n1547 This, however, is limited

by the absurdity theory holding that the monuments will yield to the course and distance if the following monuments will defeat the conveyance, but if barring course and distance would effectuate all the other parts of the description. n1548 Nor does the rule apply where the reference to a natural monument is incidental. n1549

Generally, in determining boundaries, natural and permanent monuments are the most satisfactory evidence and control all other means of description, n1550 in the absence of which the following calls are resorted to, and generally in the order stated: First, natural boundaries; second, artificial marks; third, adjacent boundaries; fourth, course and distance, course controlling distance, or distance controlling course, according to circumstances. n1551 Area is the weakest of all means of description. n1552 The rationale of these rules is that mistakes are deemed more likely to occur with respect to courses and distances than in regard to objects which are visible and permanent; n1553 monuments are considered more reliable evidence than courses and distances. n1554

In determining a common corner of four sections, monuments left by a United States survey on the ground are the best evidence as to where the corner should be, and any monument so established can only be disputed by evidence of other monuments. n1555 A description by course and distance is regarded as the most uncertain kind of description, because mistakes are likely to occur in the making of the survey, in entering the minutes of it, and in copying the same from the field book. n1556

When it comes to courses and distances, the latter yield to the former. n1557 The weight of authority gives courses control over distances. n1558 There is no magic, however, in a monument which gives invariable control in cases of conflicting calls. It controls only because it is regarded as more certain than a given course and distance. If it should in a given case be less certain, the rule would fail with the reason for it, and the monument would yield to course and distance, and artificial monuments would yield more readily than natural ones. n1559 The rule naturally does not apply when no call is made for the particular monument, because objects not called for in the deed cannot be looked to as corners, if they are in conflict with field notes. n1560

The general rule that gives monuments controlling effect does not apply where the monuments are uncertain or cannot be identified, n1561 or the calls therefor are admittedly erroneous. n1562 Natural objects cannot prevail where they are doubtful, in which case recourse is had to artificial marks or monuments or other calls of inferior accuracy. n1563

The rule applies where the monuments or boundaries described in the deed are certain, or capable of being made certain, n1564 but where there is a doubt as to the monuments, as well as to the course and distance, there is no reason for declaring that the monuments shall prevail. n1565 It does not apply where the monuments or boundaries cannot be found, where they contravene all the other terms of the description, or where an adherence to them would defeat the evident intent of the parties. n1566 Though the monument referred to does not actually exist at the time, but is afterwards erected by the parties with the intention that it shall conform to the deed, it will control. n1567 Where natural monuments referred to in the deed can be found, they fix the boundary, though they correspond neither with the courses and distances nor with the quantity of land specified in the deed. n1568 It has been held that the rule that courses and distances in a deed give way to monuments in the ground is inapplicable to a deed conveying a seam of coal by deed wherein the descriptions extended by courses and distances to Athe coal crop line," since the coal crop line cannot be regarded as a fixed monument. n1569 If the land be described by courses and distances only, or by natural objects not distinguishable from others of the same kind, course and distance, though not safe guides, are the only guides given, and must be used. n1570

The rule is not applicable moreover where the reference to the monument is incidental, the monument is an intermediate point and no clear intention is shown to make such call locative. n1571

The monument rule is a rule of construction and not one of law and is not imperative and exclusive, but is to be applied in determining the intent of the grantor. n1572 So a call for a monument in a deed does not control absolutely, so as to preclude the consideration of other evidence as to the true locality of the land. n1573 Calls for distance and quantity

must yield to conflicting calls for natural or artificial objects, in the absence of extraneous evidence showing a contrary intention. n1574 Courses and distances will prevail over monuments, if the former best comport with the circumstances of the case and the manifest intention of the parties, n1575 or where it is obvious that the former furnish the most certain guides to the location and quantity of the land. n1576 Courses and distances will prevail over monuments, if it appears that the latter were inserted by mistake, or were laid down by conjecture, and without regard to the rule. n1577 When it is manifest that there is a mistake as to the monument, or the monuments are uncertain, inferior evidence of location may control the higher. n1578 Where the boundary is not fixed and known, and the location of monuments is in dispute, is lost, or is left in doubt by the evidence, courses and distances will be considered in fixing boundaries. n1579 Where no monuments are referred to in the description, and none are intended to be erected, the distance stated therein must control the location. n1580

The rule that courses and distances yield to monuments will not be applied where to give it effect would result in destroying the continuity of a line and such continuity can be preserved by rejecting a call which is manifestly erroneous. n1581 A monument inadvertently referred to, or inconsistent with the rest of the description, may be rejected. n1582 So, if the monuments described in a deed cannot be found, nor their location proved, resort must be had to other parts of the description to identify the land; and courses and distances, if they are given and appear to be correct, may be relied upon. n1583 "The courses and distances," said Chief Justice Marshall, "are less certain and less permanent guides to the land which was actually surveyed and granted than natural and fixed objects on the ground; but they are guides to some extent, and, in the absence of all others, must govern us. If a grant be made which describes the land granted by course and distance only, or by natural objects not distinguishable from others of the same kind, course and distance, though not safe guides, are the only guides given us, and must be used." n1584

If it is not proved that the monument exists at the point in conflict with stated courses, courses prevail. n1585

When it is apparent upon the face of the deed that the intention was to convey a specific quantity of land, if the courses and distances given would include that precise quantity, but the description by fixed monuments would embrace more or less, it is clear that the courses and distances should be followed. To do otherwise would be to defeat the plain intent of the parties. n1586

Where the starting point in a description is known, or ascertained by a survey, but at the time of making the deed the parties placed a monument in another place as the starting point, this must yield to the survey and the requirements of the description given. n1587

The metes and bounds in a description prevail in a conveyance of the land Awith the buildings thereon," even though one of the buildings extends five feet over upon other land of the grantor; the deed does not convey the strip of land covered by the building, or any easement therein; n1588 but all the calls for monuments must be satisfied if this is reasonably possible. n1589 Where it appears by a survey actually made for the purpose of conveying the land that a different corner was established or a different line was actually run and marked, courses and distance will control. n1590

Some of the natural objects referred to in deeds as monuments are streams, rivers, ponds, lakes, shores, beaches, rocks, highways, streets, trees, and hills. n1591 They are objects permanent in character which are found on the land as they were placed by nature. n1592 Such natural objects serve the same purpose as artificial monuments and are better because they are more permanent and more readily ascertained. A call for "the hills" might in many cases be too indefinite a monument; but if there is a studied repetition of this call in several deeds, effect must be given to it, and it will prevail over a call for distance. n1593 As a general rule, where by the original survey and government plat, a tract of land appears to have as its boundary a body of water, such body of water is a natural monument, and will constitute the boundary, however distant or variant from the position indicated for it by the meander line, and hence will control as a call of the survey over either distances or quantity of land designated in the conveyance or on the government plat. n1594 The margin of a lake, the location of which is shown to vary, is not such a natural monument as will control

courses and distances. n1595 Natural objects called for in field notes of a survey are of controlling importance in locating a survey on the ground. n1596 A call for a river will prevail over calls for stakes or movable stones, where there is no evidence that there was a mistake in the call for the river or that there is no river at the place called for. n1597

Boundaries marked out on the ground by vendor and purchaser control over courses and distances set out in the subsequent deed of conveyance. n1598

When different and conflicting monuments are given, that which is the most substantial, the most clearly identified, and must certain to be that with reference to which the patties contracted, must be regarded as controlling. n1599 Where one of two conflicting monuments corresponds with courses and distances, it is the one which should prevail. n1600 Where there is a conflict in the calls of description, such elements of description will be preferred as are the least susceptible to mistake. n1601 The owner of a large tract of land, divided into lots for houses, sold a lot with a house built upon it, bounding it, beginning at a fence two hundred and thirty feet distant, and thence by a line running around the lot, the courses and distances of which were given. One of the conditions of the conveyance was that the house should occupy the entire width of the lot, and it was recited that the house then upon the lot was in compliance with the conditions named. Afterwards the owner sold the adjoining house and lot by a deed containing a similar description. It was held that the center of the partition wall between the two houses was the true boundary, although the effect of measuring from the fence referred to would be to place the whole of the partition wall on the lot last sold. The house itself was the controlling monument rather than the distant fence. n1602

When there is conflicting evidence as to natural objects named in running the lines, this is not to be put wholly out of view; but if the jury, after considering such evidence, are left in doubt, they will be justified in locating the land by referring to such natural objects mentioned as are certain. n1603

The initial monument of a survey is not usually of any more importance in determining the location of the survey than any other monument therein. n1604 When a monument is named as the point of beginning, words descriptive of the locality do not control, except as indicating the general locality of the monument. n1605 Thus in a grant "beginning on the side of Gallon Creek, at a small oak, John Edward's corner," the side of the creek is merely a description of the locality. The true point of beginning is the small oak. n1606

The starting call of a description, being more important than any other call, usually controls any other call with which it is in conflict, for it is supposed that a mistake in regard to that is less likely to occur; n1607 but when the succeeding calls are as readily ascertained, and are as little susceptible to mistake, they are of equal dignity with the first; and when all the subsequent calls conflict with the first, and agree with each other, their united testimony controls the point of beginning. n1608

Artificial monuments are more readily disregarded than natural monuments in favor of other modes of description. n1609 When it is apparent from the designation of quantity or other elements of description that the courses and distances given are correct, an artificial monument is readily discarded in favor of the description by courses and distances. n1610 The general rule that monuments control over courses and distances applies to artificial monuments as well as to natural monuments, though the former are less certain than the latter. n1611 A ditch may be dug as a boundary, but the evidence must establish the fact that it was the intention in the digging of the ditch that it was to constitute the boundary line. n1612 A deed of a house and lot in a row or block of houses described the side lines as being "eighty feet, or a fraction more or less." The grantor owned the land only to the depth of about sixty-five feet from the front; and extrinsic evidence showed that at the time of the conveyance a fence ran along the rear of the block of houses at that depth from the front. It was held that the fence formed a visible boundary and controlled the distance as expressed in the deed, and consequently there was no breach of the covenant of ownership. n1613

Monuments erected by the parties immediately after a conveyance have the same effect as if they had been in existence

at the time of the conveyance. n1614 Long recognized landmarks do not yield to private surveys. n1615 If the monuments themselves have disappeared, the positions where they were placed may be shown, and, when established with reasonable certainty by evidence, they govern, just as the monuments themselves, had they been found, would govern. n1616 In boundary disputes, courses and distances must yield to natural objects proved and established by evidence, and where courses and distances are not in harmony, courses must yield to distances. n1617 Roads and well-marked outlines which have been recognized by people over a long period of time control in a boundary dispute. n1618

A boundary upon a river is a monument that controls courses and distances as well as the corners and meander lines of a survey. n1619 A ditch is spoken of as a natural monument. n1620 Highways, fences, and walls are regarded as artificial monuments when referred to in deeds and the land conveyed abuts upon them. n1621 Houses, fences, and the like, may be adopted as landmarks in the place of natural landmarks, and their removal does not affect the boundaries of the land bought and sold with reference thereto. n1622 If a fence or wall on or near a boundary line is not called for or mentioned in a deed, there is no presumption that it was or was not intended for a line. Any inference from the fact is for the jury. n1623

A boundary by a monument has its legal terminus at the monument's central point, n1624 unless the monuments are structures such as a house, which ordinarily includes the land it stands upon. n1625 The presumption that the description runs to the center of the monument applies to both public and private rights-of-way, n1626 and regardless of whether opened at the time to the public. n1627 The weight of authority is that outside evidence cannot be introduced to contradict the running of a description to the center of a monument. n1628

Where the grantor owns the fee under the monument but no land on the other side, most cases -- on grounds of public policy against retention of a dangling strip -- hold the description to run under the entire monument, n1629 unless it is to the advantage of the grantor to retain the other half of the strip. n1630 The majority rule applies, even though the sovereign is the grantor. n1631 The measurement of the area, however, begins from the side of the monument. n1632

Ordinarily, if the boundary of land runs to or by the line of an object, the exterior limit of the object is intended. n1633 When a boundary is by a building, whether the boundary line is wholly outside of every portion of the building is a question upon which there is conflict of authority. In one case, where a deed described one of the boundaries of the land as four feet from the "northerly side" of a building, the boundary was held to be four feet from the most extreme part of the building, which in that case was the edge of the eaves. n1634 Where a conveyance described the boundary line of the land as commencing twelve and one-half feet east of a house, it was held that the distance should be measured from the foundation of such house; n1635 but in another case, where a deed described one of the boundaries as eight feet four inches from the "south side" of a building, that court held that measurement should be made from the corner board on the side of the building. n1636

The decision calling for measurement from the most extreme part of the building seems to be the better one in the case of a boundary by a building. The parties may well be presumed to intend that the boundary line shall be wholly on one side of every portion of the building; for it would be unreasonable to assume that the parties to the conveyance intended that the main portion of the building should be on one side of the line, and the cornices, and other projecting finish, on the other. n1637 This inference, however, may be controlled by other expressions in the deed, or rebutted by competent evidence showing a practical location by the parties, or working an estoppel of the plaintiff; n1638 but however this may be, in the case of a right-of-way, even if created by express grant, it is not an unreasonable presumption that such way was intended to extend under the projecting finish of a building. n1639

Some of the states decline to give a stake the dignity of a monument. n1640 In other states description by reference to stakes was held good, since parol evidence could show location of stakes. n1641 So a description by stakes is valid, even though stakes are not actually set. n1642 Stakes, when relied upon by purchasers. prevail over survey notes. n1643

COMPUTER-ASSISTED RESEARCH

LEXIS: Survey! w/10 (call! w/10 monument!)

§ 90.04(h) Adjoining or Adjacent Lands as Monuments.

Where there are inaccuracies in the descriptions of large bodies of land, courses and distances yield to calls for lines of adjacent owners. n1644 The line of adjoining land may constitute a monument n1645 and control courses and distances, n1646 unless the call for such line was a mistake or was based on conjecture, n1647 or the boundaries of the adjoining land are indefinite. n1648 The line which is to prevail, however, is not necessarily the line of occupancy n1649 but is the true line n1650 at the date of the deed. n1651 A description by well-ascertained monu-ments prevails over a description by reference to the limits of the lands of adjacent owners. n1652 If a boundary be by the line of a railroad, the line of the railroad becomes a monument and controls the boundary, instead of a line running "to a stake and stones"; n1653 if the railroad is then located, but not built, a subsequent change of location does not affect the boundary. n1654

If there are no monuments or marks upon the ground, a call for the adjoining lands prevails in case there is any discrepancy between such call and the courses and distances given. n1655 The length of the boundary line upon adjoining land is that named in the deed, if the distance is given. n1656

When a boundary is "by land of" another, the phrase means land belonging to that other owner, and does not include land in which that owner has simply an easement, n1657 such as a right-of-way, and does not include land occupied by that owner without having the title. n1658 The true line of the ownership of the adjoining land is the monument, rather than the line marked by possession, n1659 or that which the parties supposed was the line at the time the deed was executed; n1660 or that which the adjoining owner had contracted to purchase, and had paid the price for, and was occupying as the adjoining owner's own land, but for which that owner received no conveyance. n1661 If line of an adjoining owner's land, or a corner of the land referred to, has not been determined, the line or corner is wherever it may be finally located. n1662 If a mistake be made in the name of an owner of adjoining land, as where the name given is that of the owner's agent instead of the owner, this fact may be shown, and the boundary is sufficiently identified. n1663 A connecting call in the description of two tracts by metes and bounds cannot be disregarded, such call being a part of the description to be considered in determining the true intention of the parties. n1664 Under a deed wherein a particular description contained two calls, the court properly adopted the call in harmony with the preceding general description describing the land by calls for adjoining surveys rather than a call which undertook to describe the land by course and distance specifications conflicting with the preceding general description, since the general description is not to be disregarded where it can be harmonized with the particular one, and in case of conflict, the lot and block number by which the tract is conveyed will prevail over a specific description by metes and bounds. n1665

In the absence of monuments or calls for adjoiners to designate the land conveyed, the courses and distances in the deed must govern. n1666 Boundaries and abuttals in the description control the estimate of quantity. n1667

COMPUTER-ASSISTED RESEARCH

LEXIS: Survey! w/10 (adjoin! or adjacent w/10 monument!)

§ 90.04(i) Courses and Distances.

Courses and distances control the lines of a survey in the absence of calls for natural or artificial monuments or lines, n1668 or in case the monuments cannot be found, n1669 or in case the survey was erroneous. n1670 Where the description in a deed of land is by course and distance only, or by natural objects not distinguishable from others of the same kind, course and distance, though not safe guides, are the only guides given, and must be used. n1671

Course and distance will prevail over less certain descriptive elements where there is no practical location of the parties or no monuments in the deed are to be ascertained by the evidence. n1672 A metes and bounds description will control over a general description unless the parties contemplated otherwise. n1673

A supposititious call in a survey, made under a mistake as to the location of the object called for, will yield to a call for course and distance, whether the survey was an office survey or was actually made on the ground. n1674 An unmarked line is neither a natural nor an artificial monument, and it does not, when called for in a deed, overcome a call for distance. n1675 A description of land by courses and distances, without any mention of monuments, is not controlled by monuments subsequently erected. n1676 While monuments capable of identification always control courses and distances, the measurements of lines where courses and distances are given should not be disregarded in determining the identity of the monuments claimed to have been found with those referred to in a deed. n1677 Where the location of a boundary is not fixed and shown, and monuments are uncertain or left in doubt by the evidence, courses and distances will be considered in fixing the boundaries. n1678 Course and distance in a description will be preferred according to the intention of the parties. n1679 The courses and distances of a disputed survey prevail over the courses and distances of adjacent surveys. n1680 A course is given priority over a distance. n1681 A stated angle of a boundary line will control the line, even though it changes the distance from the end of the line to the next monument. n1682 Distances may control determination of boundaries if clearly expressed. n1683

COMPUTER-ASSISTED RESEARCH

LEXIS: Survey! w/10 (course! or distance!)

§ 90.04(j) Control of Boundary Line Angle.

The angle of a boundary line will control as against a measurement of another boundary line, when it appears to have been the intention of the parties to make the angle a controlling consideration. Thus, if a boundary line is described as running at a right angle to a street, this determines the shape of the lot, though this makes the area of the lot, and the measurement of it on the street, much more than the area and measurement expressed in the deed, these being given with the qualification of the words "more or less." n1684 A call in a description for a boundary line parallel with the center line of a section, is controlled by shown angles and end measurements which locate such boundary line as not parallel with such section line. n1685

It is sometimes said that courses control measurements. This can hardly be given as a rule. When there is a discrepancy between a course and distance, one or the other is preferred, according to circumstances. n1686 Thus, where corners marking three successive lines of a survey are lost, the distance of the three lines will be altered proportionately to make them conform to the known parts of the boundary rather than to radically alter the course of one of the lines. n1687

A deed describing a line as running at right angles to a creek or other stream of water is not on its face void for uncertainty, in the absence of anything to show that the creek does not run in a straight course, or that a straight line drawn along the thread of the stream would not intersect the beginning point. A perpendicular line drawn from this base line would answer the call in the deed. n1688 A call in a deed for a line running from a street at right angles thereto is not varied because the next call is for a distance of thirty feet, more or less, from the end of the line to a monument, when in fact the end of the line run at right angles is thirty-three feet and six inches from the monument. n1689 Where a boundary line is to run to an extended line, such as a river, a swamp, or the line of another tract of land, such line must run to the nearest point on such river, swamp, or line of another tract; and in carrying out this rule, even a call for a course and distance will be disregarded. n1690 Thus, where a deed to a lot described the property as beginning at a certain post and running to a certain street line, "in all being sixty feet," it was held to be the intention of the grantor merely to convey the land between those two monuments, and not an unconditional sixty feet. n1691 The course of a line beginning at a street or any other extended boundary line is presumed to be at a right angle to the street when the

angle is not specified. Magnetic variations must be considered in running old lines. n1692

COMPUTER-ASSISTED RESEARCH

LEXIS: Survey! w/10 (boundar! w/5 angle!)

§ 90.04(k) Control by Corners.

Marked corners are conclusive n1693 and will control over courses and distances. n1694 Although stakes and monuments are susceptible to being displaced or removed, they control so long as it is certain that they mark the corners of the original survey. n1695

If a line in the description of land in a deed is given as running a certain distance to a stake and stones, and no such monument exists, the end of the line, in the absence of evidence showing a contrary intent, is to be determined by the measurement. n1696

In case there is no error or inconsistency in the boundaries described in a deed until the last line is reached, which is declared to run a given course and distance Ato the place of beginning," but the given course and distance would not bring it to that point, nor complete the enclosure of any land, the course and distance of the last line should be rejected as erroneous, and effect be given to the more certain designation, "thence to the place of beginning." n1697

Town lots may be located according to the stakes found planted and recognized, and no subsequent survey can be allowed to unsettle the lines. n1698 Points marked by the original stakes and monuments placed by the government surveyors, if they can be found, or the place where they were can be identified, govern. n1699 The stakes of an original survey of city lots are more satisfactory evidence of the boundaries thereof than a location based upon marks and field notes of a subsequent survey not shown to be correct. n1700 A call for the corners of the land described in a lease, which were actually fixed on the ground and could be located, control over a call for a survey, so that the lease covered land within such boundaries regardless of whether they were included in the designated survey. n1701

The actual beginning corner, if this can be ascertained, must control in locating original surveys; n1702 yet, when a survey is made upon paper, and not upon the ground, the intention of the parties making the survey should control. This intention is to be ascertained by all the facts and circumstances connected with the case. n1703 Where the location of the survey's beginning corner is uncertain, the survey's lines may be run by starting with any other corner which is marked by either a natural or an artificial object called for, found, and identified. n1704 The beginning corner of the original survey does not control more than any other corner definitely ascertained, and it is not necessary to follow the calls of the grant in the order they stand in the field notes thereof, but they may be reversed and the lines traced the opposite way whenever by so doing the land embraced will more nearly harmonize all the calls and objects of the grant. n1705 In order to have a valid survey there must be a beginning point established by government or other official survey. n1706

If the beginning corner of a survey is on the bank of a stream, in running the other lines measurement must be made from the place where the beginning corner stood at the date of the deed, or else the whole tract would move with the bank of the stream. n1707

The question of the location of a starting point of a survey is one of fact for the jury, and not one of theory to be determined finally upon the opinion of surveyors or experts. Expert opinion as to the location of a corner post by a survey made more than forty years before is inadmissible. n1708

Testimony of a civil engineer that he had taken pains to establish the correctness of a stake designating a section corner; that he knew it to be approximately the location of the original section corner; that he had used the stake so frequently

with reference to other surveys that he was perfectly sure of its correctness; and that, if it were not correct, the streets would all be thrown out of line, is sufficient to warrant the admission of a survey the starting point of which was the stake alluded to, as against an objection that such point had not been located. n1709

Various definitely fixed corners from which a surveyor must operate and from which a court must form conclusions control in a boundary dispute. n1710 A corner or boundary well established by marks or monuments controls a description by a map or plat or survey, although this is made contemporaneously with the grant. The map or plat made by the surveyor is admissible in evidence as indicating the location of the survey, but at last the question of boundary is one of fact to be determined by the force and character of the testimony. Looking at the evidence in this way, the conclusion which is the most reasonable and satisfactory is the one to be adopted. n1711

Where a survey can be located according to its own field notes from established corners called for therein, such is the proper method of location rather than to look to the field notes of other surveys. n1712 A call for corners which were actually fixed on the ground and could be located were held to control over a call for survey, so that a lease embraced the land within such boundaries regardless of whether included in the designated survey. n1713 Where two corners of a survey can be definitely identified, the courses and distances may be ascertained from the field notes, and the entire survey constructed therefrom, and in such case the distance and quantity must yield to course. n1714 Where the monuments of the original survey of a town site have been destroyed, the descriptive words in a plat of the town site are controlling as to the location of the town site. n1715

Although the survey be an official one, if the surveyors were directed to establish a beginning corner, and then confine themselves to strict courses and distances, inasmuch as such a direction adopts the most unreliable indicia of location and boundaries know to conveyancers, the courts, in locating these surveys, will resort to every kind of evidence that is competent to establish a disputed boundary. n1716 The reference in the field notes to a brook may control as against a quarter corner marked by a stone not shown to have been in place. n1717 Government monuments of corners, as placed upon public lands surveyed, control the calls of the maps, plats, and field notes. n1718 A section corner of a government survey, when shown with certainty, must control even though it is in a different place from that given in the field notes and plat. n1719 An "obliterated corner" is one where no trace remains of the original surveyor's work but which may be located by competent evidence, while a "lost corner" cannot be replaced by reference to any existing data or sources of information. n1720

COMPUTER-ASSISTED RESEARCH

LEXIS: Survey! w/10 (corner w/10 control)

§ 90.04(*l*) Locating Lost Corners.

Distinction must be made between the legal processes of re-establishing obliterated corners of government surveys and of locating lost corners. The United States government has from time to time established procedures for use by its surveyors in locating lost corners. It must be emphasized that these procedures do not create new boundaries but are merely governmental regulations to establish acreage and federal titles. They are not binding upon private individuals as to former government land now in private hands.

COMPUTER-ASSISTED RESEARCH

LEXIS: Survey! w/10 (corner w/5 lost)

§ 90.04(m) Parallel Lines.

Parallel lines are strictly and usually straight lines; but sometimes lines which are not straight are so designated. n1721

Thus a line may be described as parallel to a winding river. The sides of a stream are presumed to be parallel. n1722 In identifying a tract of land, it will be presumed that lines are to run straight and parallel with other lines, unless a contrary intention expressly appears; n1723 but a line described as running along the top of a hill down a creek was held to run with the hill only so far as it ran parallel with the creek, and not to encircle the watershed of a tributary of the creek. n1724 Where a line is marked for only a part of a required distance, it should be followed in the same direction unless there is some marked corner to divert it. n1725 A stated amount of acres off of one side is taken to be by parallel lines and is an adequate description. n1726

COMPUTER-ASSISTED RESEARCH

LEXIS: Survey! w/10 (parallel w/5 line!)

§ 90.04(n) Locating Dividing Lines of Fractions of Sections.

Where the description of land in a deed calls for legal subdivision of a section of surveyed land, the quarter section corners being lost and the section exceeding six hundred and forty acres in area, the division lines of the fractions of the section are determined by a division pro rata of the lines of the section as they appear upon the ground. n1727 This method should not be applied, however, if there are data in the field notes and maps from which the court may find and declare the actual position or location of the line. n1728

The center of a section cannot be ascertained by running a line directly south from the quarter section corner on the north side and marking off 160 rods on such line. Lines must be run from quarter section corner to quarter section corner and the center must be placed on the intersection of these lines. n1729

Where a tract of land was platted into many lots, all but two of which were of a uniform width of twenty-five feet, and two were irregular, containing the remnant of the tract, but the tract was too small to leave the two irregular lots as wide as they appeared upon the plat, it was held that the regular lots were entitled to the full size as platted, and that the width of the irregular lots must be diminished. n1730

A space left between two surveys made at the same time by the same surveyor, calling for each other, will be apportioned to the owners of the tracts in proportion to their respective interests, in case no boundary line was fixed on the ground. n1731 This rule presupposes that the other corners of the surveys are fixed and certain. In case there is no defined line between the two surveys, and a common boundary is not reached by running from the established corners towards the boundary of the two surveys by course and distance, even though there was a manifest mistake in the distance, there is no rule of law which, in the absence of evidence, would raise a presumption against or in favor of either survey. n1732

While the interior subdivision lines of a section are not surveyed or marked in the government survey, yet they are not the less certain in legal contemplation than section lines and hence cannot be relocated by acts of the parties. n1733

COMPUTER-ASSISTED RESEARCH

LEXIS: Survey! w/10 (divid! w/3 line! and fraction! w/5 section!)

§ 90.04(o) Detached and Block Surveys.

If a tract is part of a block, it must be so located, and can be located in no other way. If it is a separate survey, it must be located by its own monuments, aided, if need be, by the legal presumption that the lines were run as returned. Where the lines which enclose four surveys in the interior of a block of surveys are marked on the ground by interior lines of the block and by lines peculiar to the four surveys, the lines which separate them from each other cannot be located by

marks on the lines which enclose the block. If marks of the original survey are found on three sides of a tract, and some of these marks are peculiar to the tract, and are not common to the other tracts alleged to form part of the block, and individual or separate location is established. n1734 It is held that the field notes of a block constituting a prior survey may be explained by subsequently made field notes of another block. n1735

In determining the true location of a block, the conditions and circumstances surrounding its location, as well as the lines actually run and the corners fixed on the ground by the surveyor, should be taken into consideration to ascertain, if possible, the surveyor's intent in placing the block. n1736

COMPUTER-ASSISTED RESEARCH

LEXIS: Survey! w/10 (detach! or block)

FOOTNOTES:

(n1)Footnote 1429. *Watrous v. Morrison, 14 So. 805 (Fla. 1894); Smith v. Boone, 19 S.W. 702 (Tex. 1892); Shelton v. Bone, 26 S.W. 224 (Tex. App. 1894).*

(n2)Footnote 1430. *Horne v. Smith, 159 U.S. 40 (1895); Russell v. Maxwell Land-Grant Co., 158 U.S. 253, 15 S. Ct. 827, 39 L. Ed. 971 (1895); Stoneroad v. Stoneroad, 158 U.S. 240, 15 S. Ct. 822, 39 L. Ed. 966 (1895); DuPriest v. Anthony, 194 S.W.2d 769 (Ark. 1956); Barringer v. Davis, 120 N.W. 65 (Iowa 1909); Kraut v. Crawford, 18 Iowa 549 (1865); Ufford v. Wilkins, 33 Iowa 110 (1871).*

(n3)Footnote 1431. *Pittsmont Dopper Co. v. Vanina, 227 P. 46 (Mont. 1924); Hickman v. Jones, 183 N.W. 980 (Neb. 1921).*

(n4)Footnote 1432. *Kirkpatrick v. Schaal, 110 N.W. 730 (Neb. 1906).*

(n5)Footnote 1433. *Kirch v. Florida Highlands Co., 100 So. 169 (Fla. 1924); Kirch v. Persinger, 100 So. 166 (Fla. 1924).*

(n6)Footnote 1434. *Goff v. Avent, 84 So. 134 (Miss. 1920).*

(n7)Footnote 1435. *Cooper v. Quade, 182 N.W. 798 (Iowa 1921).*

(n8)Footnote 1436. *Goodson v. Fitzgerald, 135 S.W. 696 (Tex. App. 1911); Worsham v. Chisum, 28 S.W. 905 (Tex. App. 1894); Williams v. Beckham, 26 S.W. 652 (Tex. App. 1894); Worsham v. Morgan, 28 S.W. 918 (Tex. App. 1893).*

(n9)Footnote 1437. *Brashears v. Joseph, 108 S.W. 307 (Ky. 1908).*

(n10)Footnote 1438. *Shelton v. Bone, 26 S.W. 224 (Tex. App. 1894); Fenley v. Flowers, 23 S.W. 749 (Tex. App. 1893); Wyatt v. Duncan, 22 S.W. 665 (Tex. App. 1893).*

(n11)Footnote 1439. *Root v. Cincinnati, 54 N.W. 206 (Iowa 1893); Ufford v. Wilkins, 33 Iowa 110 (1871).*

(n12)Footnote 1440. *Wood v. Harmon, 157 S.W.2d 292 (Ky. 1941).*

(n13)Footnote 1441. A line run by county surveyor without notice is not binding; *Dunn v. Cambron, 109 So. 2d 705 (Ala. 1959).* Act of a county surveyor in performance of his or her duty is official and his or her survey is prima facie evidence of its own correctness; *Grimes v. Armstrong, 304 S.W.2d 793 (Mo. 1957).*

(n14)Footnote 1442. *See in general Caylor v. Luzadder, 36 N.E. 909 (Ind. 1894); Wagner v. Meyer, 101 N.E. 397 (Ind. App. 1913); Hootman v. Hootman, 111 N.W. 60 (Iowa 1907); Elting v. Duncan, 121 P. 353 (Kan. 1912);*

Anderson v. Roberts, 119 P. 354 (Kan. 1911); Edwards v. Fleming, 112 P. 836 (Kan. 1911); Schwab. v. Stoneback, 31 P. 142 (Kan. 1892); Holliday v. Maddox, 18 P. 299 (Kan. 1888); Anding v. Smith, 189 So. 362 (La. App. 1839); Andrews v. Pitts, 95 A. 203 (Md. 1915); Beauchamp v. Pike, 158 S.W. 321 (Mo. 1913); Vaught v. McClymond, 155 P.2d 612 (Mont. 1945); McCanless v. Ballard, 24 S.E.2d 525 (N.C. 1943); Bernheim v. Talbot, 100 P. 1107 (Or. 1909); Pool v. Baker, 154 P. 328 (Wyo. 1916). Necessity of notice to interested party, *See Robinson v. Rice, 154 N.E. 391 (Ind. App. 1926); Great Western Petroleum Corp. v. Allen, 241 P. 248 (Kan. 1925).*

(n15)Footnote 1443. *Davis v. Terrell, 28 S.E.2d 590 (Ga. App. 1944).*

(n16)Footnote 1444. *Caylor v. Luzadder, 36 N.E. 909 (Ind. 1894).* A public officer such as a county surveyor is presumed to act in compliance with his or her legal duty until the contrary is shown; *Cody v. England, 19 S.E.2d 10 (N.C. 1942).*

(n17)Footnote 1445. *Edwards v. Fleming, 112 P. 836 (Kan. 1911).* Presumption in favor of correctness of court authorized survey; *Kelley v. Carter, 98 So. 2d 679 (La. App. 1957).*

(n18)Footnote 1446. *Mason v. Braught, 146 N.W. 687 (S.D. 1914).*

(n19)Footnote 1447. *Chessmore v. Terrell, 146 P. 1152 (Kan. 1915).*

(n20)Footnote 1448. *Smith v. Johnson, 184 S.E. 486 (N.C. 1936).*

(n21)Footnote 1449. An order, homologating, or ratifying, the report of a surveyor in a boundary action does not have the effect of establishing the correct boundary of the contiguous estates and cannot be regarded as a disposal of the case on its merits; *Painten v. Pilie, 4 So. 2d 804 (La. 1941).* The distinction is between cases which are prosecuted with the ostensible object of determining the true boundary line between the parties and those brought to recover lands claimed by the defendant to be embraced within this boundary line as against the line claimed by the plaintiff; *King v. Brigham, 31 P. 601 (Or. 1892); Love v. Morrill, 24 P. 916 (Or. 1890).*

(n22)Footnote 1450. *McCanless v. Ballard, 24 S.E.2d 525 (N.C. 1943).*

(n23)Footnote 1451. *Galt v. Willingham, 11 P.2d 757 (C.C.A.S. 1926); Cornelious v. State, 113 So. 475 (Ala. App. 1927); Thompson v. Darr, 298 S.W. 1 (Ark. 1927); Kelsey v. Lake Childs Co., 112 So. 887 (Fla. 1927); Houston Ice & Brew. Co. v. Murray Oil Co., 88 So. 802 (La. 1921); Poch v. Urlaub, 98 N.W.2d 509 (Mich. 1959); Anderson v. Johanesen, 193 N.W. 730 (Minn. 1923); Gee v. Sherman, 293 S.W. 789 (Mo. App. 1927); Vaught v. McClymond, 155 P.2d 612 (Mont. 1945); Fellows v. Willett, 224 P. 298 (Okla. 1923).* Private surveys must observe government corners and boundaries; *J. R. Buckwalter Lbr. Co. v. Wright, 132 So. 443 (Miss. 1931).*

(n24)Footnote 1452. *Susi v. Davis, 177 A. 610 (Me. 1935).*

(n25)Footnote 1453. *Slovensky v. O'Reilly, 233 S.W. 478 (Mo. 1921). See Halley v. Harriman, 183 N.W. 665 (Neb. 1921); Lawson v. Viola, 210 N.W. 979 (S.D. 1926).*

(n26)Footnote 1454. *Fellows v. Willett, 224 P. 298 (Okla. 1923).*

(n27)Footnote 1455. *Bates v. Illinois Cent. R.R., 66 U.S. 204, 17 L. Ed. 158 (1861); Breen v. Donnelly, 15 P. 845 (Cal. 1887); Chapman v. Polack, 11 P. 764 (Cal. 1886); Miller v. White, 2 So. 614 (Fla. 1887); Nesselrode v. Parish, 13 N.W. 746 (Iowa 1882); Spawr v. Johnson, 31 P. 664 (Kan. 1892); Shackelford v. Walker, 160 S.W. 807 (1913); Taylor v. Stacey, 131 S.W. 491 (Ky. 1910); Brown v. Morrill, 51 N.W. 700 (Mich. 1892); Hess v. Meyer, 41 N.W. 422 (Mich. 1889); Britton v. Ferry, 14 Mich. 53 (1866); Chan v. Brandt, 47 N.W. 461 (Minn. 1890); Turner v. Union P. R.R. 20 S.W. 673 (Mo. 1892); Knight v. Elliott, 57 Mo. 317 (1874); Campbell v. Clark, 8 Mo. 553 (1844); Arneson v. Spawn, 49 N.W. 1066 (S.D. 1891); Jones v. Kimble, 19 Wis. 429 (1865).*

(n28)Footnote 1456. *North v. Jones, 100 N.E. 84 (Ind. App. 1912).*

(n29)Footnote 1457. *United States v. State Inv. Co., 264 U.S. 206 (1924); Vaught v. McClymond, 155 P.2d 612 (Mont. 1945). See Ben Realty Co. v. Gothberg, 109 P.2d 455 (Wyo. 1941).*

(n30)Footnote 1458. *Barringer v. Davis, 120 N.W. 65 (Iowa 1909).*

(n31)Footnote 1459. *Billingsley v. Bates, 30 Ala. 376 (1857); Liberty v. Burns, 19 S.W. 1107 (Mo. 1892), 21 S.W. 728 (Mo. 1893); Runkle v. Welty, 126 N.W. 139 (Neb. 1910); Arneson v. Spawn, 49 N.W. 1066 (S.D. 1891); Ayers v. Beaty, 24 S.W. 366 (Tex. App. 1893); Greer v. Squire, 37 P. 545 (Wash. 1894).*

(n32)Footnote 1460. *Cragin v. Powell, 128 U.S. 691 (1888); Hubbard v. Dusy, 22 P. 214 (Cal. 1889); Nesselrode v. Parish, 13 N.W. 746 (Iowa 1882); Tarpenning v. Cannon, 28 Kan. 665 (1882); Beardsley v. Crane, 54 N.W. 740 (Minn. 1893); Chan v. Brandt, 47 N.W. 461 (Minn. 1890); Jacobs v. Moseley, 4 S.W. 135 (Mo. 1887); Climer v. Wallace, 28 Mo. 556 (1859); Peterson v. Skjelver, 62 N.W. 43 (Neb. 1895); Woods v. West, 58 N.W. 938 (Neb. 1894); Thompson v. Harris, 58 N.W. 712 (Neb. 1894); Johnson v. Preston, 4 N.W. 83 (Neb. 1880); Arneson v. Spawn, 49 N.W. 1066 (S.D. 1891); Greer v. Squire, 37 P. 545 (Wash. 1894).*

(n33)Footnote 1461. *Powers v. Jackson, 50 Cal. 429 (1875); Shelton v. Bone, 26 S.W. 224 (Tex. App. 1894).*

(n34)Footnote 1462. *Hubbard v. Dusy, 22 P. 214 (Cal. 1889).*

(n35)Footnote 1463. *Woodland v. Hodson, 152 P. 205 (Idaho 1915).*

(n36)Footnote 1464. *Rippey v. Harrison, 119 P. 178 (Wash. 1911).*

(n37)Footnote 1465. *Burns v. Kimber, 176 Ill. App. 515 (1912).*

(n38)Footnote 1466. *Henrie v. Hyer, 70 P.2d 154 (Utah 1939).*

(n39)Footnote 1467. *Galbraith v. Parker, 153 P. 283 (Ariz. 1915); Weaver v. Howatt, 118 P. 519 (Cal. 1911); Gordon v. Booker, 32 P. 593 (Cal. 1893); Hubbard v. Dusy, 22 P. 214 (Cal. 1889); Lillis v. Urrutia, 99 P. 992 (Cal. App. 1908); England v. Vandermark, 35 N.E. 465 (Ill. 1893); Ogilvie v. Copeland, 33 N.E. 1085 (Ill. 1893); Hensley v. Burt & Brabb Lbr. Co., 116 S.W. 316 (Ky. 1909); Van Dusen v. Shively, 29 P. 76 (Or. 1892); Goodman v. Myrick, 5 Or. 65 (Or. 1873); Greer v. Squire, 37 P. 545 (Wash. 1894); McEvoy v. Loyd, 31 Wis. 142 (1872); Martin v. Carlin, 19 Wis. 454 (1865).*

(n40)Footnote 1468. *Rollins v. Davidson, 50 N.W. 1061 (Iowa 1892); Hess v. Meyer, 41 N.W. 422 (Mich. 1889); Cadeau v. Elliott, 34 P. 916 (Wash. 1893). See Morgan v. Renfro, 99 S.W. 311 (Ky. 1907).*

(n41)Footnote 1469. *Coulter v. Gudehus, 139 N.W. 330 (S.D. 1913).*

(n42)Footnote 1470. *Hanson v. Red Rock, 57 N.W. 11 (S.D. 1893).*

(n43)Footnote 1471. *Cragin v. Powell, 128 U. S. 691, 9 S. Ct. 203, 32 L. Ed. 566 (1888);* It is very clear, as remarked by the court in *Haydel v. Dufresne, 58 U.S. 23, 15 L. Ed. 115 (1854),* "that great confusion and much litigation would ensue if judicial tribunals, state and federal, were permitted to interfere and overthrow the public surveys;" *Doolittle v. Bailey, 52 N.W. 337 (Iowa 1892); Chan v. Brandt, 47 N.W. 461 (Minn. 1890).*

(n44)Footnote 1472. *Pickett v. Nelson, 47 N.W. 936 (Wis. 1891).* "Field notes and plats of the original government survey are competent evidence in ascertaining where monuments are located, in case a government corner is destroyed, or the point where it was originally placed cannot be found, or the location of the original corner is in dispute; but, when it is shown by uncontradicted evidence that a section corner was located by the government surveyors at a certain point,

such location must control, even though it is at a place different from that given in the field notes and plat;" *Woods v. West, 58 N.W. 938 (Neb. 1894).*

(n45)Footnote 1473. *Burt v. Busch, 46 N.W. 790 (Mich. 1890).*

(n46)Footnote 1474. *Carpenter v. Monks, 45 N.W. 477 (Mich. 1890).*

(n47)Footnote 1475. *Hanson v. Grubb, 94 N.W.2d 504 (N.D. 1959).*

(n48)Footnote 1476. *Henrie v. Hyer, 70 P.2d 154 (Utah 1937).*

(n49)Footnote 1477. *Reeves v. Jackson, 184 S.W.2d 256 (Ark. 1944).*

(n50)Footnote 1478. *Hughes v. Palmer, 47 So. 2d 483 (La. App. 1950); Goodwin v. Greene, 74 S.E.2d 630 (N.C. 1953); Merlino v. Eannotti, 110 A.2d 783 (Pa. Super. 1955).*

(n51)Footnote 1479. *Vaught v. McClymond, 155 P.2d 612 (Mont. 1945).*

(n52)Footnote 1480. *Cody v. England, 19 S.E.2d 10 (N.C. 1942); Leone Plantation, Inc. v. Roach, 187 S.W.2d 674 (Tex. App. 1945); Home Owners Loan Corp. v. Dudley, 141 P.2d 160 (Utah 1943).*

(n53)Footnote 1481. *Wilson v. Giraud, 234 S.W. 110 (Tex. App. 1916).*

(n54)Footnote 1482. *Miller v. Meyer, 190 S.W. 247 (Tex. App. 1916).* Omitted call cured by running first call and reversing other calls so as to furnish three sides of parallelogram; *Scaling v. Beggs, 334 S.W.2d 209 (Tex. App. 1960).*

(n55)Footnote 1483. *Wilson v. Giraud, 234 S.W. 110 (Tex. App. 1916).*

(n56)Footnote 1484. *W. T. Carter & Bro. v. Kirby Lbr. Co., 152 F. 622 (5th Cir. 1907); Ellinwood v. Stancliff, 42 F. 316 (C.C.S.D. Cal. 1890); Cahill v. Mullins, 97 S.W. 370 (Ky. 1906); Coffey v. Greer, 86 S.E.2d 441 (N.C. 1955); Asheville Land Co. v. Lang, 59 S.E. 703 (N.C. 1907).* Where a corner cannot be located it is permissible to go to a known corner and reverse directions; *Batson v. Bell, 107 S.E.2d 562 (N.C. 1959).*

(n57)Footnote 1485. *Simmons Creek Coal Co. v. Doran, 142 U.S. 417, 12 S. Ct. 239, 35 L. Ed. 1063 (1892); Ayers v. Watson, 137 U.S. 584, 11 S. Ct. 201, 34 L. Ed. 803 (1891); Pool v. State ex rel. Johnson, 112 So. 59 (Fla. 1927); Ralston v. Dwiggins, 225 P. 343 (Kan. 1924); Simpkins v. Wells, 26 S.W. 587 (Ky. 1894); Alluvial Realty Co. v. Himmelberger-Harrison Lbr. Co., 229 S.W. 757 (Mo. 1921); Norwood v. Crawford, 19 S.W. 349 (N.C. 1894); Miles v. Sherwood, 19 S.W. 853 (Tex. 1892); Swenson v. Willsford, 19 S.W. 613 (Tex. 1892); Scott v. Pettigrew, 12 S.W. 161 (Tex. 1888); Schnackenberg v. State, 229 S.W. 934 (Tex. App. 1921); Edson v. Knox, 36 P. 698 (Wash. 1894).*

(n58)Footnote 1486. *Miles v. Sherwood, 19 S.W. 853 (Tex. 1892). See Reast v. Donald, 19 S.W. 795 (Tex. 1892); Scott v. Pettigrew, 12 S.W. 161 (Tex. 1888); Turner v. Creech, 108 P. 1084 (Wash. 1910).*

(n59)Footnote 1487. *Combs v. Valentine, 137 S.W. 1080 (Ky. 1911).* If the tract is in the shape of a square and one corner can be found it will be the base point to locate the tract; *Union Bag-Camp Paper Corp. v. Coffee County Hunting & Fishing Club, 114 S.E.2d 511 (Ga. 1960).*

(n60)Footnote 1488. *Locklear v. Oxendine, 65 S.E.2d 673 (N.C. 1951); Norwood v. Crawford, 19 S.E. 349 (N.C. 1894); Redmond v. Stepp, 6 S.E. 727 (N.C. 1888); Den ex dem. Harry v. Graham, 18 N.C. 76 (1834).*

(n61)Footnote 1489. *Wing v. Wallace, 246 P. 8 (Idaho 1926). See Hollars v. Rains, 267 S.W. 1097 (Ky. 1925).*

(n62)Footnote 1490. *State v. Talkington, 274 S.W. 314 (Tex. App. 1925).* The original survey controls where in

conflict with a resurvey; *Bishop v. Johnson, 100 So. 2d 817 (Fla. App. 1958).*

(n63)Footnote 1491. *Weatherly v. Jackson, 98 S.W.2d 1037 (Tex. App. 1936).*

(n64)Footnote 1492. *Jones v. Poundstone, 14 S.W. 824 (Mo. 1890).*

(n65)Footnote 1493. *Terrell v. Chessmore, 146 P. 1152 (Kan. 1915).*

(n66)Footnote 1494. *Hess v. Meyer, 50 N.W. 290 (Mich. 1891).* A resurvey purporting to change the line to correct inaccuracies is not admissible to show true line fixed by original plat; *Bishop v. Johnson, 100 So. 2d 817 (Fla. App. 1958).*

(n67)Footnote 1495. *Hoekman v. Iowa Civil Tp., 132 N.W. 1004 (S.D. 1911).*

(n68)Footnote 1496. *Thomsen v. Keil, 226 P. 309 (Nev. 1924), 232 P. 1080 (Nev. 1925).*

(n69)Footnote 1497. *Root v. Cincinnati, 54 N.W. 206 (Iowa 1893).*

(n70)Footnote 1498. *Euliss v. McAdams, 13 S.E. 162 (N.C. 1891).*

(n71)Footnote 1499. *Booker v. Hart, 12 S.W. 16 (Tex. 1889).* Succeeding calls when as readily ascertainable and as little liable to mistake are of equal dignity with first calls, though the latter are ordinarily controlling; *Van Valkenburg v. Seron, 31 So. 2d 767 (Ala. 1947).* "Where a junior survey is undertaken to be established and located by calls for the corners and lines of older and well-established surveys, it must be made to conform to, coincide with, and harmonize with the lines and calls of the older surveys, and ... any erroneous calls of the junior or locative survey cannot be made to control or change the location of the older surveys, especially when the older survey contains in its own calls elements of complete description and identity. Under such circumstances, the junior survey must be located by the older and not the older by the junior;" *State v. Franks, 113 S.W.2d 589 (Tex. App. 1937); Ruth v. Carter-Kelley Lbr. Co., 286 S.W. 322 (Tex. App. 1926); Hagerman v. Thompson, 235 P.2d 750 (Wyo. 1951).*

(n72)Footnote 1500. *Snodgrass v. Snodgrass, 101 So. 837 (Ala. 1924).*

(n73)Footnote 1501. *State v. Sun Oil Co., 114 S.W.2d 936 (Tex. App. 1938).*

(n74)Footnote 1502. *Moore v. Reiley, 5 S.W. 618 (Tex. 1887).*

(n75)Footnote 1503. *Bell v. Powers, 121 S.W. 991 (Ky. 1909); Brashears v. Joseph, 108 S.W. 307 (Ky. 1908).*

(n76)Footnote 1504. *Gregg v. Hill, 17 S.W. 838 (Tex. 1891); Duff v. Moore, 4 S.W. 530 (Tex. 1887); Gerald v. Freeman, 4 S.W. 256 (Tex. 1887).*

(n77)Footnote 1505. *Texas Co. v. Van Deventer, 290 S.W. 560 (Tex. App. 1926).* Presumption that surveyor ran the course as shown in field notes unless by following the surveyor's footsteps it is shown that the surveyor's calls were incorrect; *Strayhorn v. Jones, 300 S.W.2d 623 (Tex. 1957).*

(n78)Footnote 1506. *Carrett v. Cook, 200 P.2d 21 (Cal. App. 1948); Temple Lbr. Co. v. Mackechney, 228 S.W. 177 (Tex. Com. App. 1921).*

(n79)Footnote 1507. *Hays v. Clawson, 286 S.W. 857 (Tex. App. 1926).*

(n80)Footnote 1508. *Rose v. Curry, 262 S.W. 192 (Tex. App. 1924).* Cf. *Barnes v. Callaway, 269 S.W. 1085 (Tex. App. 1924).* When a junior survey has not been made upon the ground, and the calls are for the surrounding surveys, the lines of such surveys will be the lines of the junior survey; *Kuechler v. Wilson, 18 S.W. 317 (Tex. 1891).* Field notes

contained in the deed prevail if specific and unambiguous; *Friedsam v. Ulbricht, 315 S.W.2d 442 (Tex. App. 1958).*

(n81)Footnote 1509. *Susi v. Davis, 177 A. 610 (Me. 1935).*

(n82)Footnote 1510. *Ayers v. Watson, 137 U.S. 584, 11 S. Ct. 201, 34 L. Ed. 803 (1891); Larson v. Larson, 202 P.2d 121 (Cal. App. 1949); Ogilvie v. Copeland, 33 N.E. 1085 (Ill. 1893); Turner v. Union Pac. R.R., 20 S.W. 673 (Mo. 1892); Peterson v. Skjelver, 62 N.W. 43 (Neb. 1895); Morrison v. Neff, 24 N.W. 555 (Neb. 1885); Hanson v. Red Rock, 57 N.W. 11 (S.D. 1893); Disney v. Coal Creek, Min. & Mfg. Co., 79 Tenn. 607 (1883); Williams v. Winslow, 19 S.W. 513 (Tex. 1892); Stanus v. Smith, 30 S.W. 262 (Tex. App. 1894); Ratliff v. Burleson, 25 S.W. 983 (Tex. App. 1894), 26 S.W. 1003 (Tex. App. 1894).* A photographic copy of the field notes of a survey is admissible as bearing on the question whether a certain line was actually measured; *Ayers v. Harris, 13 S.W. 768 (Tex. 1890). See Galbraith v. Parker, 153 P. 283 (Ariz. 1915); Weaver v. Howatt, 118 P. 519 (Cal. 1911); State v. Ball, 133 N.W. 412 (Neb. 1911).*

(n83)Footnote 1511. *International & G. N. R.R. v. Morin, 116 S.W. 656 (Tex. App. 1909).*

(n84)Footnote 1512. *Standlee v. Burkitt, 14 S.W. 1040 (Tex. 1890); Longoria v. Shaeffer, 14 S.W. 160 (Tex. 1890).* Obliterated corner is to be restored by reference to natural objects described in field notes; *Chandler v. Hibberd, 332 P.2d 133 (Cal. App. 1958).*

(n85)Footnote 1513. *Adair v. White, 34 P. 338 (Cal. 1893).*

(n86)Footnote 1514. *McCormack v. Crawford, 181 S.W. 485 (Tex. App. 1915).*

(n87)Footnote 1515. *Sullivan v. Solis, 114 S.W. 456 (Tex. App. 1908).*

(n88)Footnote 1516. *Cooper v. Horridge, 205 N.W. 454 (Iowa 1925). See Texas Co. v. Hawthorne, 21 N.E.2d 565 (Ill. 1939); Mitchell v. Hawkins, 189 N.W. 175 (Neb. 1922).*

(n89)Footnote 1517. *Tognazzini v. Morganti, 23 P. 1085 (Cal. 1890).* See *Galbraith v. Parker, 153 P. 283 (Ariz. 1915); State v. Ball, 133 N.W. 412 (Neb. 1911); Mitchell v. Robinson, 136 S.W. 501 (Tex. App. 1911).*

(n90)Footnote 1518. *Hanson v. Red Rock, 57 N.W. 11 (S.D. 1893); Randall v. Burk, 57 N.W. 4 (S.D. 1893); Jones v. Andrews, 9 S.W. 170 (Tex. 1888).*

(n91)Footnote 1519. *State v. Palacious, 150 S.W. 229 (Tex. App. 1912).*

(n92)Footnote 1520. *Stanely v. Hermanson, 130 N.W. 573 (Neb. 1911); Horne v. Moody, 146 S.W.2d 505 (Tex. App. 1940).*

(n93)Footnote 1521. *Graham v. Dewees, 20 S.W. 127 (Tex. 1892). See Andrews v. Wheeler, 103 P. 144 (Cal. App. 1908); Brown v. White, 156 S.W. 96 (Ky. 1913); Lewis v. Durham, 139 S.W. 952 (Ky. 1911).*

(n94)Footnote 1522. *McAninch v. Freeman, 4 S.W. 369 (Tex. 1887); Miner v. Brader, 27 N.W. 313 (Wis. 1886).*

(n95)Footnote 1523. *Lillis v. Urrutia, 99 P. 992 (Cal. App. 1908).*

(n96)Footnote 1524. *Wise v. Burton, 14 P. 678 (Cal. 1887).*

(n97)Footnote 1525. *Pritchard v. Burnside, 167 S.W.2d 159 (Tex. Com. App. 1943).*

(n98)Footnote 1526. *Chandler v. Hibberd, 332 P.2d 133 (Cal. App. 1958)* (presumption in favor of correctness of surveyor's notes); *Thomas Jordan, Inc. v. Skelly Oil Co., 296 S.W.2d 279 (Tex. App. 1956).*

(n99)Footnote 1527. *Langle v. Brauch, 185 N.W. 28 (Iowa 1921); Kentucky Union Co. v. Hevner, 275 S.W. 513*

(Ky. 1924).

(n100)Footnote 1528. *Hamman v. San Jacinto Rice Co., 229 S.W. 1008 (Tex. App. 1921), rev'd, 247 S.W. 500 (Tex. Com. App. 1923).*

(n101)Footnote 1529. *Pyburn v. Campbell, 250 S.W. 15 (Ark. 1923).*

(n102)Footnote 1530. *United States v. Big Bend Transit Co., 42 F. Supp. 459 (E.D. Wash. 1941); Watrous v. Morrison, 14 So. 805 (Fla. 1894); Riley v. Griffin, 16 Ga. 141 (1854); Fisher v. Bennehoff, 13 N.E. 150 (Ill. 1887); Ballew v. Denny, 177 S.W.2d 152 (Ky. 1944); Wood v. Harmon, 157 S.W.2d 292 (Ky. 1941); Vaught v. McClymond, 155 P.2d 612 (Mont. 1945); King v. Brigham, 25 P. 150 (Or. 1890); Raymond v. Coffey, 5 Or. 132 (1873); Goodman v. Myrick, 5 Or. 65 (1873); Lewis v. Lewis, 4 Or. 209 (1871); Klapman v. Hook, 32 S.E.2d 882 (S.C. 1945); Hanson v. Red Rock, 57 N.W. 11 (S.D. 1893); Moore v. Whitcomb, 4 S.W. 373 (Tex. 1887); Titterington, Trees, 14 S.W. 692 (Tex. 1890); Duff v. Moore, 4 S.W. 530 (Tex. 1887); State v. Franco-American Securities, 172 S.W.2d 731 (Tex. App. 1943).*

(n103)Footnote 1531. *Akin v. Godwin, 49 So. 2d 604 (Fla. 1950); Ayres v. Huddleston, 66 N.E. 60 (Ind. App. 1903),* and cases cited.

(n104)Footnote 1532. *Larned v. Dawson, 90 F. Supp. 14 (D. Alaska 1950); Lankford v. Pope, 57 S.E.2d 538 (Ga. 1950); Turnbull v. Schroeder, 11 N.W. 147 (Minn. 1882).*

(n105)Footnote 1533. *McCoy v. Galloway, 3 Ohio 283 (1827); Smith v. Davis, 4 Va. 50 (Va. Gen. Ct. 1816).*

(n106)Footnote 1534. *Fratt v. Woodward, 32 Cal. 219 (1867); Ratliff v. Burleson, 25 S.W. 983 (Tex. App. 1894), reh'g denied, 26 S.W. 1003 (1894).*

(n107)Footnote 1535. *Hedge v. Sims, 29 Ind. 574 (1868); Maguire v. Sturtevant, 5 N.E. 644 (Mass. 1885).*

(n108)Footnote 1536. *Ross Wetzel & Co. v. Mountain Oil Co., 132 S.W. 1040 (Ky. 1911); Stanley v. Hermanson, 130 N.W. 573 (Neb. 1911); Reed v. Marsh, 8 Ohio 147 (1837); Collins v. Clough, 71 A. 1077 (Pa. 1909); Moore v. Whitcomb, 4 S.W. 373 (Tex. 1887); Boydston v. Sumpter, 14 S.W. 996 (Tex. 1890); Duff v. Moore, 4 S.W. 530 (Tex. 1887); Fagan v. Stoner, 3 S.W. 44 (Tex. 1887); Adams v. Alkire, 20 W. Va. 480 (1882).* Even an unmarked line of one survey, but which can be otherwise identified and its true locality established, when called for as one of the intended boundaries of another survey, will prevail over the call for distance when there is a conflict in the two calls; *Maddox v. Fenner, 15 S.W. 327 (Tex. 1891). See Moore v. Reiley, 5 S.W. 618 (Tex. 1887). See*: *Page v. Whatley, 50 So. 116 (Ala. 1909); Rock Creek Property Co. v. Hill, 172 S.W. 671 (Ky. 1915); Shackelford v. Walker, 160 S.W. 807 (Ky. 1913); Thurman v. Leach, 116 S.W. 300 (Ky. 1909); Shreveport v. Simon, 60 So. 795 (La. 1912); Bowen v. John L. Roper Lbr. Co., 69 S.E. 258 (N.C. 1910); Lance v. Rumbaugh, 63 S.E. 357 (N.C. 1908); McDowell v. Carothers, 146 P. 800 (Or. 1915); Thatcher v. Matthews, 105 S.W. 317 (Tex. 1907); Grigsby v. Earle, 138 S.W. 448 (Tex. App. 1911); Ridgell v. Atherton, 107 S.W. 129 (Tex. Civ. 1908).*

(n109)Footnote 1537. *Baker v. Light, 16 S.W. 330 (Tex. 1891); Johnson v. Archibald, 14 S.W. 266 (Tex. 1890); McAninch v. Freeman, 4 S.W. 369 (Tex. 1887); Davidson v. Killen, 4 S.W. 561 (Tex. 1887); Duff v. Moore, 4 S.W. 530 (Tex. 1887); Gerald v. Freeman, 4 S.W. 256 (Tex. 1887); Robertson v. Mooney, 21 S.W. 143 (Tex. App. 1892).*

(n110)Footnote 1538. *Texas Co. v. Andrade, 52 S.W.2d 1063 (Tex. App. 1932).*

(n111)Footnote 1539. *Appeal of Moore, 252 P.2d 875 (Kan. 1953); Wates v. Crandall, 144 N.Y.S.2d 211 (1955), aff'd, 152 N.Y.S.2d 874* (N.Y.A.D. 2 Dept. 1956); *Tippett v. Woolley, 230 S.W.2d 283 (Tex. App. 1949); Hagerman v. Thompson, 235 P.2d 750 (Wyo. 1951).*

(n112)Footnote 1540. *Ogunquit Beach Dist. v. Perkins, 21 A.2d 660 (Me. 1941).* A call to stakes will not control

course of distances unless the deed itself definitely places the stake; *Crowell v. Jones, 83 S.E. 551 (N.C. 1914).*

(n113)Footnote 1541. *Cornelious v. State, 113 So. 475 (Ala. App. 1927); Republic Steel Corp. v. Wheeler, 215 S.W.2d 994 (Ky. 1948).* Stakes may be natural monuments; *Winbourne v. Russell, 50 So. 2d 721 (Ala. 1951); Arnold v. Hanson, 204 P.2d 97 (Cal. App. 1949); Dean v. Thompson, 213 S.W.2d 327 (Tex. App. 1948). Contra Reed v. Shenck, 14 N.C. 65 (1831).* Creek is natural monument; *Byrd v. Carolina Spruce Co., 87 S.E. 241 (N.C. 1915).* Tree; *McNeely v. Laxton, 63 S.E. 278 (N.C. 1908).* Ditch; *Shrrod v. Battle, 70 S.E. 834 (N.C. 1911).* Island; *Clarke v. Wagner, 76 N.C. 463 (1877).* Lake; *Literary Fund v. Clark, 31 N.C. 58 (1848).* Swamp; *Den ex dem. Pollock v. Harris, 2 N.C. 252 (1796).*

(n114)Footnote 1542. *Oklahoma v. Texas, 268 U.S. 252, 45 S. Ct. 497, 69 L. Ed. 937 (1925); United States v. State Inv. Co., 264 U.S. 206, 44 S. Ct. 289, 68 L. Ed. 639 (1924); Ayers v. Watson, 113 U.S. 594, 5 S. Ct. 641, 28 L. Ed. 1093 (1885); Bartlett Land & Lbr. Co. v. Saunders, 103 U.S. 316, 26 L. Ed. 546 (1880); Morrow v. Whitney, 95 U.S. 551, 24 L. Ed. 456 (1877); Brown v. Huger, 62 U.S. 305, 16 L. Ed. 125 (1858); Barclay v. Howell, 31 U.S. 498, 8 L. Ed. 477 (1832); McIver's Lessee v. Walker, 17 U.S. 444, 4 L. Ed. 611 (1819); McIver's Lessee v. Walker, 13 U.S. 173, 3 L. Ed. 694 (1815); United States v. Big Bend Transit Co., 42 F. Supp. 459 (E.D. Wash. 1941); Cities Service Oil Co. v. Dunlap, 115 F.2d 720 (5th Cir. 1940), reh'g denied, 117 F.2d 31 (1941), cert. denied, 313 U.S. 566 (1941); Galt v. Willingham, 11 F.2d 757 (4th Cir. Fla. 1926); Cordell Petroleum Co. v. Michna, 276 F. 483 (5th Cir. Tex. 1921); United States v. Murray, 41 F. 862 (D. Me. 1890); Nelson v. Hall, 7 F. Cas. 1324 (C.C. Ohio 1839); Cleaveland v. Smith, 5 F. Cas. 1003 (C.C. Me. 1842); Marengo County v. Wilcox County, 112 So. 243 (Ala. 1927); Guilmartin v. Wood, 76 Ala. 204 (1884); Stallcup v. Stevens, 329 S.W.2d 184 (Ark. 1959); David v. Strong, 186 S.W.2d 776 (Ark. 1945); Cooper v. Woods, 110 S.W.2d 701 (Ark. 1937); Meyer v. Board of Imp. Paving Dist. No. 3, 231 S.W. 12 (Ark. 1921); Birk v. Hodgkins, 114 P. 822 (Cal. 1911); Stoll v. Beecher, 29 P. 327 (Cal. 1892); Anderson v. Richardson, 28 P. 679 (Cal. 1892); Adair v. White, 24 P. 663 (Cal. 1890); Tognazzini v. Morganti, 23 P. 1085 (Cal. 1890); Beaudry v. Doyle, 8 P. 694 (Cal. 1885); Penry v. Richards, 52 Cal. 496 (1877); Walsh v. Hill, 38 Cal. 481 (1869); Piercy v. Crandall, 34 Cal. 334 (1867); Colton v. Seavey, 22 Cal. 496 (1863); Wagnor v. Blume, 161 P.2d 1001 (Cal. App. 1945); Devlin v. Powell, 227 P. 231 (Cal. App. 1924); Lugon v. Crosier, 240 P. 462 (Colo. 1925); Frank Towers Corp. v. Laviana, 97 A.2d 567 (Conn. 1953); Nichols v. Turney, 15 Conn. 101 (1842); Belden v. Seymour, 8 Conn. 19 (1830); Conaway v. Isaacs, 94 A. 769 (Del. Supp. 1915); Mitchell v. Moore, 13 So. 2d 314 (Fla. 1943); Andreu v. Watkins, 7 So. 876* (Fla. 190); *Hogans v. Carruth, 19 Fla. 84 (1882); Daggett v. Willey, 6 Fla. 482 (1855); Varnell v. O'Bryant, 31 S.E.2d 661 (Ga. 1944); Stewart v. Latimer, 30 S.E.2d 633 (Ga. 1944); Warsaw Turpentine Co. v. Fort Barrington Club, 195 S.E. 755 (Ga. 1937); Cherokee Ochre Co. v. Georgia Peruvian Ochre Co., 134 S.E. 616 (Ga. 1926); Benton v. Horsley, 71 Ga. 619 (1883); Harris v. Hull, 70 Ga. 831 (1883); Georgia R. & Banking Co. v. Hamilton, 59 Ga. 171 (1877); Kelekolio v. Onomea Sugoar Co., 29 Haw. 130 (1926); People ex rel. McCallister v. Keokuk & Hamilton Bridge Co., 129 N.E. 87 (Ill. 1920); Read v. Bartlett, 99 N.E. 345 (Ill. 1912); England v. Vandermark, 35 N.E. 465 (Ill. 1893); Shepherd v. Nave, 25 N.E. 220 (Ind. 1890); Caspar v. Jamison, 21 N.E. 743 (Ind. 1889); Simonton v. Thompson, 55 Ind. 87 (1876); Hollars v. Stephenson, 99 N.E.2d 258 (Ind. App. 1951); State v. Tuesburg Land Co., 109 N.E. 530 (Ind. App. 1915), reh'g denied, 111 N.E. 342 (Ind. 1916); Tomlinson v. Golden, 138 N.W. 448 (Iowa 1912); Yocum v. Haskins, 46 N.W. 1065 (Iowa 1890); Walrod v. Flanigan, 39 N.W. 645 (Iowa 1888); Bolton v. Eggleston, 16 N.W. 62 (Iowa 1883); Moreland v. Page, 2 Iowa 139 (1855); Bailey v. McConnell, 14 S.W. 337 (Ky. 1890); Lainhart v. Shepherd, 246 S.W.2d 460 (Ky. 1952); Wagers v. Wagers, 238 S.W.2d 125 (Ky. 1951); Taylor v. Collins, 185 S.W.2d 388 (Ky. 1945); Duff v. Fordson Coal Co., 182 S.W.2d 955 (Ky. 1944); Watlington v. Kasey, 168 S.W.2d 988 (Ky. 1943); Fore v. Gilliam, 76 S.W.2d 893 (Ky. 1934); Morris v. Jody, 288 S.W. 332 (Ky. 1926); Shanahan v. McIntire, 183 S.W. 529 (Ky. 1916); Gilbert v. Parrott, 182 S.W. 859 (Ky. 1916); Dupoyster v. Miller, 170 S.W. 182 (Ky. 1914); Dufrene v. Bernstein, 181 So. 859 (La. 1938); Tulane Educ. Fund v. Stair, 86 So. 595 (La. 1920); Gughlielhmi v. Geismar, 14 So. 501 (La. 1894); Small v. Sweetser, 86 A. 317 (Me. 1913); Bryant v. Maine Cent. R.R., 9 A. 736 (Me. 1887); Tyler v. Fickett, 73 Me. 410 (1882); Carville v. Hutchins, 73 Me. 227 (1882); Cilley v. Childs, 73 Me. 130 (1882); Melcher v. Merryman, 41 Me. 601 (1856); Haynes v. Young, 36 Me. 557 (1853); Dundalk Holding Co. v. Easter, 73 A.2d 877 (Md. 1950); Wood v. Hildebrand, 42 A.2d 919 (Md. 1945); Stewart v. May, 73 A. 460 (Md. 1909); Friend v. Friend, 1 A. 865 (Md. 1885); Heck v. Remka, 47 Md. 68 (1877); Thomas v. Godfrey, 3 Md. 142 (1831);*

Wilson v. Inloes, 6 Md. 121 (1847); Morse v. Kelley, 26 N.E.2d 326 (Mass. 1940); Temple v. Benson, 100 N.E. 63 (Mass. 1912); Fley v. McCarthy, 32 N.E. 669 (Mass. 1892); Dodd v. Witt, 29 N.E. 475 (Mass. 1885); McMurtry v. Abbey, 295 N.W. 628 (Mich. 1941); Stolte v. Krentel, 260 N.W. 127 (Mich. 1935); Brown v. Morrill, 51 N.W. 700 (Mich. 1892); Twogood v. Hoyt, 4 N.W. 445 (Mich. 1880); Yanish v. Tarbox, 51 N.W. 1051 (Minn. 1892); Nicolin v. Schneiderhan, 33 N.W. 33 (Minn. 1887); Coles v. Yorks, 31 N.W. 353 (Minn. 1887); Turnbull v. Schroeder, 11 N.W. 147 (Minn. 1882); Ball v. Louisville, 56 So. 2d 4 (Miss. 1952); Holcomb v. McClure, 52 So. 2d 922 (Miss. 1951); Potts v. Canton Cotton Compress & Warehouse Co., 12 So. 147 (Miss. 1892); O'Herrin v. Brooks, 6 So. 844 (Miss. 1889); Hartvedt v. Harpst, 173 S.W.2d 65 (Mo. 1943); Bartlett v. Boyd, 175 S.W. 947 (Mo. 1915); Blumenthal Real Estate & Inv. Co. v. *Broch, 29* S.W. 836 (Mo. 1895); *Harding v. Wright, 24 S.W. 211 (Mo. 1893); Smith v. Catlin Land & Imp. Co., 22 S.W. 1083 (Mo. 1893); West v. Bretell, 22 S.W. 705 (Mo. 1893); Shewalter v. Pirner, 55 Mo. 218 (1874); Cooley v. Warren, 53 Mo. 166 (1873); Rutherford v. Tracy, 48 Mo. 325 (1871); Jamison v. Foplano, 48 Mo. 194 (1871); Kellogg v. Mullen, 45 Mo. 571 (1870); Campbell v. Johnson, 44 Mo. 247 (1869); Kronenberger v. Hoffner, 44 Mo. 185 (1869); Climer v. Wallace, 28 Mo. 556 (1859); Wittelsey v. Kellogg, 28 Mo. 404 (1859); Vaught v. McClymond, 155 P.2d 612 (Mont. 1945); Bock v. Porterfield, 114 N.W. 597 (Neb. 1908); Thompson v. Harris, 58 N.W. 712 (Neb. 1894); Johnson v. Preston, 4 N.W. 83 (Neb. 1880); Gagan v. Grady, 131 A.2d 441 (N.H. 1957); Douglass v. Belknap Springs Land Co., 81 A. 1086 (N.H. 1911); Curtis v. Aaronson, 7 A. 886 (N.J. Supp. 1887); Model Plan Agency v. Diamond, 135 A. 506 (N.J. Ch. 1927), aff'd, 138 A. 921* (N.J. Err. & App. 1927); *McCullough v. Absecom Beach Land & Imp. Co., 21 A. 481 (N.J. Ch. 1891); Upton v. Santa Rita Min. Co., 89 P. 275 (N.M. 1907); Seneca Nation v. Hugaboom, 30 N.E. 983 (N.Y. 1892); Muhlker v. Ruppert, 26 N.E. 313 (N.Y. 1891); Thayer v. Finton, 15 N.E. 615 (N.Y. 1888); Case v. Dexter, 13 N.E. 449 (N.Y. 1887); Morgan v. McLoughlin, 163 N.Y.S.2d 51 (1957), aff'd, 174 N.Y.S.2d 890* (N.Y.A.D. 2 Dept. 1958), *aff'd, 158 N.E.2d 498 (N.Y. 1959); Hunter v. Van Keuren, 224 N.Y.S. 153 (1927); Green v. Horn, 112 N.Y.S. 993* (N.Y.A.D. 3 Dept. 1908); *Casey v. Dunn, 8 N.Y.S. 305 (1890); Brown v. Hodges, 61 S.E.2d 603 (N.C. 1950); Allison v. Kenion, 79 S.E. 1110 (N.C. 1913); Cox v. McGowan, 21 S.E. 108 (N.C. 1895); Buckner v. Anderson, 16 S.E. 424 (N.C. 1892); Shaffer v. Hahn, 15 S.E. 1033 (N.C. 1892); Cowles v. Reavis, 13 S.E. 930 (N.C. 1891); Bonaparte v. Carter, 11 S.E. 262 (N.C. 1890); Proctor v. Pool, 15 N.C. 370 (1833); Wyckoff v. Stephenson, 14 Ohio 13 (1846); Alshire v. Hulse, 5 Ohio 534 (1832); Federspiel v. Mitchell Brick Co., 153 N.E. 279* (Ohio App. 1 Dist. 1926); *Seward v. Casler, 103 P. 740 (Okla. 1909); Hickey v. Daniel, 195 P. 812 (Or. 1921); Johns v. Pendleton, 134 P. 312 (Or. 1913); King v. Brigham, 25 P. 150 (Or. 1890); Anderson v. McCormick, 22 P. 1062 (Or. 1889); Lewis v. Lewis, 4 Or. 177 (1871); Albert v. Schenley Auto Sales, Inc., 100 A.2d 605 (Pa. 1953); Muia v. Herskovitz, 128 A. 828 (Pa. 1925); Collins v. Clough, 71 A. 1077 (Pa. 1909); Morse v. Rollins, 15 A. 645 (Pa. 1888); Appeals of Dallas, 82 A.2d 676 (Pa. Super. 1951); Matthews v. Bagnik, 41 A.2d 875 (Pa. Super. 1945); But see New York State Natural Gas Corp. v. Roeder, 120 A.2d 170 (Pa. 1956); Howarth v. Miller, 115 A.2d 222 (Pa. 1955); Cooperative Bldg. Bank v. Hawkins, 73 A. 617 (R.I. 1909); Klapman v. Hook, 32 S.E.2d 882 (S.C. 1945); Sturgeon v. Floyd, 3 S.C. 80 (1846); Fulwood v. Graham, 1 S.C. 491 (1844); Bleidorn v. Pilot Mountain Coal & Min. Co., 15 S.W. 737 (Tenn. 1890); Disney v. Coal Creek Min. & Mfg. Co., 79 Tenn. 607 (1883); Lewis v. Oakley, 57 Tenn. 483 (1873); Patterson v. T. J. Moss Tie Co., 330 S.W.2d 344 (Tenn. App. 1959); Wheeler v. Stanolind Oil & Gas Co., 252 S.W.2d 149 (Tex. 1952); Thatcher v. Matthews, 105 S.W. 317 (Tex. 1907); Davis v. Baylor, 19 S.W. 523 (Tex. 1892); Wyatt v. Foster, 15 S.W. 679 (Tex. 1891); Titterington v. Trees, 14 S.W. 692 (Tex. 1890); Randall v. Gill, 14 S.W. 134 (Tex. 1890); Luckett v. Scruggs, 11 S.W. 529 (Tex. 1889); Linney v. Wood, 17 S.W. 244 (Tex. 1886); Giles v. Kretzmeier, 239 S.W.2d 706 (Tex. App. 1951); Davis v. Woolverton, 184 S.W.2d 659 (Tex. App. 1944); Gilstrap v. Imperator Oil Corp., 168 S.W.2d 300 (Tex. App. 1942); Thompson v. Allen, 11 S.W.2d 791 (Tex. App. 1937); William Cameron & Co. v. Taylor, 288 S.W. 268 (Tex. App. 1926); Bland v. Smith, 26 S.W. 773 (Tex. App. 1894); Roberts v. Helms, 20 S.W. 1004 (Tex. App. 1892); Finlayson v. Denver & R. G. W. R.R., 172 P.2d 142 (Utah 1946); Home Owners Loan Corp. v. Dudley, 141 P.2d 160 (Utah 1943); Bullion Beck & Champion Min. Co. v. Eureka Hill Min. Co, 103 P. 881 (Utah 1909); Church v. Stiles, 10 A. 674 (Vt. 1887); Fentress v. Pocahontas Fowling Club, 60 S.E. 633 (Va. 1908); Norfolk Trust Co. v. Foster, 78 Va. 413 (1884); Clements v. Kyles, 13 Va. 468 (Va. 1856); Cles v. Wooding, 2 Va. 189 (1856); Smith v. Davis, 4 Va. 40 (1847); Campbell v. Seattle, 110 P. 546 (Wash. 1910); Hollenbeck v. Sykes, 29 P. 380 (Wash. 1892); West Virginia Pulp & Paper Co. v. J. Natwick & Co., 21 S.E.2d 368 (W. Va. 1941); Lyons v. Fairmont Real Estate Co., 77 S.E. 525 (W. Va. 1912); Teass v. St. Albans, 17 S.E. 400 (W. Va. 1893); Gwynn v. Schwartz, 9 S.E. 880 (W. Va. 1889); Adams v. Alkire, 20 W. Va. 480 (1882); Fehrman v. Bissell Lbr. Co., 204 N.W. 582 (Wis. 1925), reh'g*

denied, 205 N.W. 905 (Wis. 1925); Brew v. Nugent, 117 N.W. 813 (Wis. 1908); Borkenhagen v. Vianden, 52 N.W. 260 (Wis. 1892); Miner v. Brader, 27 N.W. 313 (Wis. 1886); Fleischfresser v. Schmidt, 41 Wis. 223 (1876); Marsh v. Mitchell, 25 Wis. 706 (1868). A marked corner or line influences all other surveys, even though it changes calls for courses and distances; *Strayhorn v. Jones, 289 S.W.2d 321 (Tex. App. 1956).* Rule applies only where monuments are designated in title papers; *Trimmer v. Martin (126 S.E. 217 (Va. 1925).*

(n115)Footnote 1543. *Kruger & Birch, Inc. v. DuBoyce, 241 F.2d 849 (3d Cir. 1957); Hughes v. Yates, 311 S.W.2d 179 (Ark. 1958); Combs v. Griffiths, 238 S.W. 165 (Ky. 1922); Sheppard Envelope Co. v. Arcade Malleable Iron Co., 138 N.E.2d 777 (Mass. 1956); Hunter v. VanKeuren, 224 N.Y.S. 153 (1927); Dwelle v. Greenshields, 305 P.2d 1038 (Okla. 1956).*

(n116)Footnote 1544. *Post v. Wilkes-Barre Connecting R.R., 133 A. 377 (Pa. 1926); Cates v. Reynolds, 228 S.W. 695 (Tenn. 1921); Montgomery v. Nicely, 301 S.W.2d 379 (Tenn. App. 1956)* (unless the monument results in an absurd conclusion and one manifestly not intended).

(n117)Footnote 1545. *Findlay v. State, 238 S.W. 956 (Tex. App. 1921), reh'g overruled, 239 S.W. 996 (Tex. 1922).*

(n118)Footnote 1546. *Albertson v. Chicago Veneer Co., 197 S.W. 831 (Ky. 1917).* A call for distance was held to prevail over a call to a boundary line where the ownership of the line was incorrectly stated; *Olivas v. Garcia, 329 P.2d 435 (N.M. 1958).* A call to a recognized line of an adjoining tract is a call to a natural boundary; *Wilson Lbr. & Milling Co. v. Hutton, 68 S.E. 2 (N.C. 1910).*

(n119)Footnote 1547. "Ordinarily in deeds, courses are regarded as more certain than distances in stating boundaries but where the intention is clearly expressed distances may control in the determining of boundaries;" *Losee v. Jones, 235 P.2d 132 (Utah 1951). Machado v. Title Guarantee & Trust Co., 99 P.2d 245 (Cal. 1940); Dittrich v. Ubl, 13 N.W.2d 384 (Minn. 1944); Miller v. Southland Life Ins. Co., 68 S.W.2d 558 (Tex. Civ. Ap. 1934).*

(n120)Footnote 1548. *White v. Luning, 93 U.S. 514, 23 L. Ed. 938 (1876).*

(n121)Footnote 1549. *Garnsey v. Poston, 127 P.2d 17 (Cal. App. 1942).*

(n122)Footnote 1550. *Metropolitan Life Ins. Co. v. Hoskins, 117 S.W.2d 180 (Ky. 1937); Dittrich v. Ubl, 13 N.W.2d 384 (Minn. 1944)* (conclusive evidence of location of lines originally run); *Baston v. Bell, 107 S.E.2d 562 (N.C. 1959).*

(n123)Footnote 1551. *Gordon v. Booker, 32 P. 593 (Cal. 1893); Fisher v. Bennehoff, 13 N.E. 150 (Ill. 1887); Sheppard Envelope Co. v. Arcade Malleable Iron Co., 138 N.E.2d 777 (Mass. 1956)* (monuments govern distances in deed construction); *Morse v. Kelley, 26 N.E.2d 326 (Mass. 1940); Yanish v. Tarbox, 51 N.W. 1051 (Minn. 1892); Wachovia Bank & Trust Co. v. Miller, 89 S.E.2d 765 (N.C. 1955)* (natural boundaries prevail over courses and distances); *Albert v. Schenley Auto Sales, Inc., 100 A.2d 605 (Pa. 1953)* (monuments prevail over courses and distances), *But see Howarth v. Miller, 115 A.2d 222* (Pa. 1955; *Will v. Piper, 134 A.2d 41 (Pa. Super. 1957)* (ancient monuments prevail over description in deed); *Fulwood v. Graham, 1 S.C. 491 (1844); Rand v. Cartwright, 18 S.W. 794 (Tex. 1891); Teass v. St. Albans, 17 S.E. 400 (W. Va. 1893).*

(n124)Footnote 1552. *Hollars v. Stephenson, 99 N.E.2d 258 (Ind. App. 1951); Metropolitan Life Ins. Co. v. Hopkins, 117 S.W.2d 180 (Ky. 1937).*

(n125)Footnote 1553. *Morrow v. Whitney, 95 U.S. 551, 24 L. Ed. 456 (1877); McIver's Lessee v. Walker, 13 U.S. 173, 3 L. Ed. 694 (1815); Clements v. Pearce, 63 Ala. 284 (1879); Ferris v. Coover, 10 Cal. 589 (1858).*

(n126)Footnote 1554. *Goss v. Golinsky, 106 P. 604 (Cal. App. 1909);* McBeth v. White, 253 P.212 (Kan. 1927); *Esmond v. Tarbox, 7 Me. 61 (1830); Stefanick v. Fortona, 109 N.E. 878 (Mass. 1915)* (less liability of mistake); *Hogan*

v. Cable, 60 N.W. 466 (Mich. 1894) (so, where course will not enclose the land); *Whitehead v. Ragan, 17 S.W. 307 (Mo. 1891); Racine v. Emerson, 55 N.W. 177 (Wis. 1893).*

(n127)Footnote 1555. *Carter v. Bank of American Nat. Trust & Sav. Ass'n, 158 P.2d 423 (Cal. App. 1945).*

(n128)Footnote 1556. *Wallace v. Hirsch, 350 P.2d 560 (Colo. 1960); Wilson Lbr. & Milling Co. v. Hutton, 68 S.E. 2 (N.C. 1910); Houser v. Belton, 32 N.C. 358 (1849); Herbert v. Wise, 3 Va. 239 (1802).* "Consequently, if marked trees and marked corners be found conformably to the calls of the patent, or if watercourses be called for in the patent, or mountains or other natural objects, distances must be lengthened or shortened and courses varied so as to conform to those objects;" *McIver's Lessee v. Walker, 13 U.S. 173, 3 L. Ed. 694 (1815); Randall v. Gill, 14 S.W. 134 (Tex. 1890); Dogan v. Seekright, 4 Va. 125 (1809).*

(n129)Footnote 1557. *United States v. State Inv. Co., 264 U.S. 206, 44 S. Ct. 289, 68 L. Ed. 639 (1924); Fidelity Realty Co. v. Flahaven Land Co., 236 S.W. 260 (Ky. 1922); Tulane Educ. Fund v. Stair, 86 So. 595 (La. 1920).*

(n130)Footnote 1558. *United States v. State Inv. Co., 264 U.S. 206, 44 S. Ct. 289, 68 L. Ed. 639 (1924); Meyer-Clarke-Rowe Mines Co. v. Steinfield, 80 P. 400 (Ariz. 1905), rev'd, 85 P. 1067 (Ariz. 1906); Forest Preserve Dist. v. Lehmann Estate, 58 N.E.2d 538 (Ill. 1944); Wood v. Hildebrand, 42 A.2d 919 (Md. 1945); Morse v. Kelley, 26 N.E.2d 326 (Mass. 1940).* But holding that distances control over courses; *Farmers Nat'l Bank of Somerset v. Bolton, 97 S.W.2d 406 (Ky. 1936); Meyer v. Comegys, 86 So. 307 (La. 1920).* Holding that neither take preference; *Preston v. Bowmar, 19 U.S. 580, 5 L. Ed. 336 (1821); Hall v. Eaton, 29 N.E. 660 (Mass. 1885); Davies v. Wickstrom, 105 P. 454 (Wash. 1909).*

(n131)Footnote 1559. *Thompson v. Hill, 73 S.E. 640 (Ga. 1912).*

(n132)Footnote 1560. *Pritchard v. Burnside, 167 S.W.2d 159 (Tex. Com. Ap. 1943); Hays v. Clawson, 286 S.W. 857 (Tex. App. 1926).* In Louisiana, it is held that Asurvey stakes and natural objects referenced thereto, courses as shown by the field notes, structures shown to have been built with reference to surveys, monuments then standing, and, lastly, distances, are entitled to weight in the order named;" *Mahaffey v. Miller, 105 So. 731 (La. 1925).*

(n133)Footnote 1561. *Lilly v. Marcum, 283 S.W. 1059 (Ky. 1926); Hoge v. Lee, 113 S.E. 776 (N.C. 1922); Post v. Wilkes-Barre Connecting R.R., 133 A. 377 (Pa. 1926); Antone v. Hoffman, 256 S.W. 656 (Tex. App. 1923); Whitman v. Dailey, 115 A. 559 (Vt. 1921).*

(n134)Footnote 1562. *Barrataria Land Co. v. Louisiana Meadows Co., 84 So. 334 (La. 1920).* The monument rule is not used where it becomes absurd; *Schroeder v. Engroff, 155 A.2d 15 (N.J. Super. A.D. 1959), cert. granted, 157 A.2d 363 (N.J. 1960), rev'd, 162 A.2d 845 (N.J. 1960).*

(n135)Footnote 1563. *Duff v. Fordson Coal Co., 182 S.W.2d 955 (Ky. 1944).*

(n136)Footnote 1564. *Crandall v. Mary, 135 P. 188 (Or. 1913); Gerald v. Freeman, 4 S.W. 256 (Tex. 1887); Lynn v. Manning, 297 S.W.2d 687 (Tex. App. 1956)* (call for stake prevailed over distance); *Coughran v. Alderete, 26 S.W. 109 (Tex. App. 1894).*

(n137)Footnote 1565. *Duncan v. Eagle Rock Gold Min. & Reduction Co., 111 P. 588 (Colo. 1910); Losee v. Jones, 235 P.2d 132 (Utah 1951).*

(n138)Footnote 1566. *White v. Luning, 93 U.S. 514, 23 L. Ed. 938 (1876); Mizell v. Simmons, 79 N.C. 182 (1878), aff'd, 82 N.C. 1 (1880); Hanson v. Red Rock, 57 N.W. 11 (S.D. 1893); Davidson v. Killen, 4 S.W. 561 (Tex. 1887).*

(n139)Footnote 1567. *Kennebec Purchase v. Tiffany, 1 Me. 219 (1821).*

(n140)Footnote 1568. *Miles Land Co. v. Hudson Coal Co., 91 A. 1061 (Pa. 1914).*

(n141)Footnote 1569. *Newcomer v. South Fayette Coke Co., 176 A. 228 (Pa. 1934).*

(n142)Footnote 1570. *Chinoweth v. Haskell, 28 U.S. 92, 7 L. Ed. 614 (1830).*

(n143)Footnote 1571. *Luginbuhl v. Hammond, 179 Cal. App. 2d 350 (Cal. App. 1960).*

(n144)Footnote 1572. *Russo v. Corideo, 129 A. 849 (Conn. 1925).*

(n145)Footnote 1573. *Buckner v. Hendrick, 1 S.W. 646 (Ky. 1886); Cannon v. Emmans, 46 N.W. 356 (Minn. 1890); Jones v. Andrews, 9 S.W. 170 (Tex. 1888); Linney v. Wood, 17 S.W. 244 (Tex. 1886).*

(n146)Footnote 1574. *Schultz v. Maxey, 210 S.W.2d 950 (Ky. 1948); Tice v. Winchester, 36 S.E.2d 257 (N.C. 1945); John Hancock Mut. Life Ins. Co. v. Faries, 112 S.W.2d 500 (Tex. App. 1938).*

(n147)Footnote 1575. *White v. Luning, 93 U.S. 514, 23 L. Ed. 938 (1876); Sharpless v. Adkins, 22 So. 2d 692 (La. App. 1945); Hamilton v. Foster, 45 Me. 32 (1858); Hale v. Cottle, 28 P. 901 (Or. 1892); Titterington v. Trees, 13 S.W. 692 (Tex. 1890); Scott v. Weisburg, 21 S.W. 769 (Tex. App. 1893); Pritchard v. Burnside, 167 S.W.2d 159 (Tex. Com. App. 1943); Teass v. St. Albans, 17 S.E. 400 (W. Va. 1893); Ruffner v. Hill, 7 S.E. 13 (W. Va. 1888).*

(n148)Footnote 1576. *Barker v. Mobile Elec. Co., 55 So. 364 (Ala. 1911).*

(n149)Footnote 1577. *Weaver v. Howatt, 118 P. 519 (Cal. 1911); Goss v. Golinsky, 106 P. 604 (Cal. App. 1909); Andrews v. Wheeler, 103 P. 144 (Cal. App. 1908); Nevin v. Disharoon, 66 A. 362 (De. Super. 1907); Sackett v. Kentucky Coal Lands Co., 170 S.W. 164 (Ky. 1914); Morse v. Freeman, 72 S.E. 1056 (N.C. 1911); Tate v. Johnson, 61 S.E. 741 (N.C. 1908); Crosby v. Stevenson, 156 S.W. 1110 (Tex. App. 1913); Guill v. O'Bryan, 121 S.W. 593 (Tex. App. 1909).*

(n150)Footnote 1578. *Blackburn v. Nelson, 34 P. 775 (Cal. 1893); Hollenbeck v. Sykes, 29 P. 380 (Colo. 1892); Yanish v. Tarbox, 51 N.W. 1051 (Minn. 1892); Cannon v. Emmons, 46 N.W. 356 (Minn. 1890); Fulwood v. Graham, 1 S.C. 491 (1844).*

(n151)Footnote 1579. *Yocum v. Haskins, 46 N.W. 1065 (Iowa 1890); Hanson v. Red Rock, 57 N.W. 11 (S.D. 1893).*

(n152)Footnote 1580. *Chinoweth v. Haskell, 28 U.S. 92, 7 L. Ed. 614 (1830),* per Marshall, C. J.; *Dale v. Travellers Ins. Co., 89 Ind. 473 (1883); Breneiser v. Davis, 19 A. 433 (Pa. 1890).*

(n153)Footnote 1581. *State v. Anderson, 125 P. 453 (Kan. 1923).*

(n154)Footnote 1582. *White v. Luning, 93 U.S. 514, 23 L. Ed. 938 (1876); Gordon v. Booker, 32 P. 593 (Cal. 1893); Garsey v. Poston, 127 P.2d 17 (Cal. App. 1942); Fitzgerald v. Brennan, 18 A. 743 (Conn. 1889); Chandler v. Green, 69 Me. 350 (1879); Talbot v. Copeland, 32 Me. 251 (1850); Benton v. McIntire, 15 A. 413 (N.H. 1888); Redmond v. Stepp, 6 S.E. 727 (N.C. 1888); Hale v. Cottle, 28 P. 901 (Or. 1892).*

(n155)Footnote 1583. *Lincoln v. Edgecomb, 28 Me. 275 (1848); Den ex dem. Harry v. Graham, 18 N.C. 76 (1834); Talkin v. Anderson, 19 S.W. 350 (Tex. 1892); Gregg v. Hill, 17 S.W. 838 (Tex. 1891); Rand v. Cartwright, 18 S.W. 794 (Tex. 1891); Boydston v. Sumpter, 14 S.W. 996 (Tex. 1890); Gerald v. Freeman, 4 S.W. 256 (Tex. 1887); Fagan v. Stoner, 3 S.W. 44 (Tex. 1887).*

(n156)Footnote 1584. *Chinoweth v. Haskell, 28 U.S. 92, 7 L. Ed. 614 (1830).*

(n157)Footnote 1585. *Schroeder v. Engroff, 144 A.2d 808 (N.J. Super. L. 1958), rev'd, 155 A.2d 15 (N.J. Super. A.D. 1959),* cert. granted, *157 A.2d 363 (N.J. 1960), rev'd, 162 A.2d 845 (N.J. 1960).*

(n158)Footnote 1586. *Doe v. Vallejo, 29 Cal. 385 (1866).*

(n159)Footnote 1587. *Parkinsn v. McQuaid, 11 N.W. 682 (Wis. 1882).*

(n160)Footnote 1588. *Griffiths v. Morrison, 12 N.E. 580 (N.Y. 1887). See Old South Soc. v. Wainwright, 5 N.E. 843 (Mass. 1886).*

(n161)Footnote 1589. *Budd v. Brooke, 3 Md. 198 (1845).*

(n162)Footnote 1590. *Lance v. Rumbough, 63 S.E. 357 (N.C. 1908); Mitchell v. Welborn, 63 S.E. 113 (N.C. 1908).*

(n163)Footnote 1591. *Mitchell v. Smale, 140 U.S. 406, 35 L. Ed. 44 (1891); Ayers v. Watson, 113 U.S. 594, 5 S. Ct. 641, 28 L. Ed. 1093 (1891); Travellers Ins. Co. v. Yount, 98 Ind. 454 (1883); Winthrop v. Curtis, 3 Me. 110 (1824); Myers v. St. Louis, 82 Mo. 367 (1884).*

(n164)Footnote 1592. *Miles Land Co. v. Hudson Coal Co., 91 A. 1961 (Pa. 1914).*

(n165)Footnote 1593. *Clamorgan v. Hornsby, 6 S.W. 651 (Mo. 1888); Clamorgan v. Baden & St. L. R.R., 72 Mo. 139 (1880); Clamorgan v. Hornsby, 13 Mo. App. 550 (1883).*

(n166)Footnote 1594. *Mitchell v. Smale, 140 U.S. 406, 35 L. Ed. 44 (1891); Ford v. Butte County, 145 P.2d 640 (Cal. App. 1944); Hartvedt v. Harpst, 173 S.W.2d 65 (Mo. 1943); Brown v. Dunn, 115 N.W. 1097 (Wis. 1908); Lyon v. Fairbanks, 48 N.W. 492 (Wis. 1908).*

(n167)Footnote 1595. *Smith v. Hutchison, 58 S.W. 226 (Tenn. 1900).*

(n168)Footnote 1596. *Texas Co. v. Hawthorne, 21 N.E.2d 565 (Ill. 1939); Cockrell v. Work, 94 S.W.2d 784 (Tex. App. 1936); Home Owners Loan Corp. v. Dudley, 141 P.2d 160 (Utah 1943).*

(n169)Footnote 1597. *Whitehead v. Ragan, 17 S.W. 307 (Mo. 1891)* (natural monument prevails over artificial); *Schnackenberg v. State, 229 S.W. 934 (Tex. App. 1921).*

(n170)Footnote 1598. *Paurley v. Harris, 268 P.2d 351 (Idaho 1954).*

(n171)Footnote 1599. *New York & Texas Land Co. v. Votaw, 150 U.S. 24, 14 S. Ct. 1, 37 L. Ed. 982 (1893); Hubbard v. Dusy, 22 P. 214 (Cal. 1889); Kelekolio v. Onomea Sugar Co., 29 Haw. 130 (1926); North Mankato v. Carlstrom, 2 N.W.2d 130 (Minn. 1942); Zeibold v. Foster, 24 S.W. 155 (Mo. 1893); Robertson v. Mooney, 21 S.W. 143 (Tex. App. 1892).* In cases where the known and fixed monuments do not agree with each other, the court must of necessity decide them; *Fitzgerald v. Brennan, 18 A. 743 (Conn. 1889); Harrell v. Morris, 5 S.W. 625 (Tex. 1887); Roberts v. Helms, 20 S.W. 1004 (Tex. App. 1892).*

(n172)Footnote 1600. *Zeibold v. Foster, 24 S.W 155 (Mo. 1893); Jamison v. Fopiano, 48 Mo. 194 (1871); Post v. Wilkes-Barre Connecting R.R., 133 A. 377 (Pa. 1926).*

(n173)Footnote 1601. *Upton v. Santa Rita Min. Co., 89 P. 275 (N.M. 1907).*

(n174)Footnote 1602. *Sanborn v. Rice, 129 Mass. 387 (1880).*

(n175)Footnote 1603. *New York & Texas Land Co. v. Votaw, 150 U.S. 24, 14 S. Ct. 1, 37 L. Ed. 983 (1893).*

(n176)Footnote 1604. *Combs v. Valentine, 137 S.W. 1080 (Ky. 1911); Rosenthal v. Sun Co., 156 S.W. 513 (Tex. App. 1913); Francis v. Patterson, 143 S.W. 678 (Tex. App. 1911); Ramseaur v. Ball, 125 S.W. 590 (Tex. App. 1910); Turner v. Creech, 108 P. 1084 (Wash. 1910).*

(n177)Footnote 1605. *Cleaveland v. Smith, 5 F. Cas. 1003 (C.C. Me. 1842); Franklin v. Faulkner, 104 S.E.2d 841 (N.C. 1958)* (ditch or road is a natural boundary).

(n178)Footnote 1606. *Wilson v. Inloes, 6 Md. 121 (1847); Bonaparte v. Carter, 11 S.E. 262 (N.C. 1890).*

(n179)Footnote 1607. *Hord v. Olivari, 5 S.W. 57 (Tex. 1887).*

(n180)Footnote 1608. *Hughes v. Cawthorn, 35 F. 248 (C.C.S.D. Cal. 1888); Walsh v. Hill, 38 Cal. 481 (1869); Norwood v. Crawford, 19 S.E. 349 (N.C. 1894); Cowles v. Reavis, 13 S.E. 930 (N.C. 1891); Harry v. Graham, 18 N.C. 76 (1834); Lancaster v. Ayers, 12 S.W. 163 (Tex. 1889);* Scott v. Pettigrew (Tex. 1888).

(n181)Footnote 1609. *Ayers v. Watson, 113 U.S. 594, 5 Ct. 641, 28 L. Ed. 1093 (1885); Fisher v. Bennehoff, 13 N.E. 150 (Ill. 1887); Duff v. Fordson Coal Co., 182 S.W.2d 955 (Ky. 1944); North Mankato v. Carlstrom, 2 N.W.2d 130 (Minn. 1942); Reed v. Shenck, 14 N.C. 65 (1831); Wyckoff v. Stephenson, 14 Ohio 13 (1846); Fulwood v. Graham, 1 S.C. 491 (1844). See Ridgell v. Atherton, 107 S.W. 129 (Tex. App. 1908); Matheny v. Allen, 60 S.E. 407 (W. Va. 1908).*

(n182)Footnote 1610. *Baldwin v. Brown, 16 N.Y. 359 (1857).*

(n183)Footnote 1611. *Ayers v. Watson, 113 U.S. 594, 5 S. Ct. 1* L. Ed. 1093 (1885).

(n184)Footnote 1612. *Aubrey v. Deggs, 165 So. 719 (La. App. 1885).*

(n185)Footnote 1613. "The expression 'house and lot,' used in reference to premises in a city, ordinarily imports a house with a curtilage, shut off from the neighboring grounds by some physical objects. Thus the deed bears upon its face intimation that the land to be conveyed by it is inclosed within visible boundaries, and, although the character of these boundaries be not indicated in the instrument, nevertheless the law permits extrinsic evidence of the actual condition of things for the purpose of ascertaining the situation of the land;" *Smith v. Negbauer, 42 N.J.L. 305 (1880).*

(n186)Footnote 1614. *Kennebec Purchase v. Tiffany, 1 Me. 219 (Me. 1821); Fleischfresser v. Schmidt, 41 Wis. 223 (1876).*

(n187)Footnote 1615. *Cornelious v. State, 113 So. 475 (Ala. App. 1927).*

(n188)Footnote 1616. *Benton v. Horsley, 71 Ga. 619 (1883); Yanish v. Tarbox, 51 N.W. 1051 (Minn. 1892); Turnbull v. Schroeder, 11 N.W. 147 (Minn. 1882).*

(n189)Footnote 1617. *Farmers Nat'l Bank v. Bolton, 97 S.W.2d 406 (Ky. 1936).*

(n190)Footnote 1618. *Texas Co. v. McMillan, 13 F. Supp. 407 (N.D. Tex. 1935).*

(n191)Footnote 1619. *Sphung v. Moore, 22 N.E. 319 (Ind. 1889); Board of Park Comm'rs v. Taylor, 108 N.W. 927 (Iowa 1906); Morgan v. Renfro, 99 S.W. 311 (Ky. 1907); Shelton v. Maupin, 16 Mo. 124 (1852).*

(n192)Footnote 1620. *Greenleaf v. Brooklyn, F. & C. I. R.R., 3 N.Y.S. 222 (1888).*

(n193)Footnote 1621. *Henderson v. Hatterman, 34 N.E. 1041 (Ill. 1893); Morgan v. Givens, 19 S.W. 582 (Ky. 1892).*

(n194)Footnote 1622. *Whitwell v. Spiker, 142 S.W. 248 (Mo. 1911).*

(n195)Footnote 1623. *Perich v. Maurer, 155 P. 471* (Cal. 3 Dist. App. 1915); *Blackington v. Sumner, 69 Me. 136 (1874); Schwalm v. Beardsley, 56 S.E. 135 (Va. 1907); Wunnicke v. Dederich, 152 N.W. 139 (Wis. 1915).*

(n196)Footnote 1624. *Vanderbilt University v. Williams, 280 S.W. 689 (Tenn. 1926); Willie v. Local Realty Co.,*

175 P.2d 718 (Utah 1946) (line runs to center of boundary wall). *See Desantis v. Zell, 98 N.E.2d 68 (Ohio Com. PI. 1951). See Freeman v. Bellegarde, 41 P. 289 (Cal. 1895).*

(n197)Footnote 1625. *White's Bank v. Nichols, 64 N.Y. 65,* per Allen, J. (1876).

(n198)Footnote 1626. *Gould v. Wagner, 82 N.E. 10 (Mass. 1907); Finlaw v. Hunter, 96 N.E.2d 319 (Ohio App. 1949); Saccone v. West End Trust Co., 73 A. 971 (Pa. 1909).*

(n199)Footnote 1627. *Anderson v. Citizens Sav. & Trust Co., 197 P. 113 (Cal. 1921)* (if street had been once opened description ran to center though abandoned at time of grant); *Bowers v. Atchison, T. & S. F. R.R., 237 P. 913 (Kan. 1925)* (if the description abuts on a monument which is not mentioned it was to the center of the monument); *Schneider v. Jacob, 5 S.W. 350 (Ky. 1887); Suburban Land Co. v. Billerica, 49 N.E.2d 1012 (Mass. 1943); Loud v. Brooks, 217 N.W. 34 (Mich. 1928). Contra, Elliott v. McIntosh, 183 P. 692* (Cal. 1 Dist. App. 1919); *Bangor House Proprietary v. Brown, 33 Me. 309 (1851).*

(n200)Footnote 1628. *Kassner v. Alexander Drug Co., 147 P.2d 979 (Okla. 1943). Contra Suburban Land Co. v. Billerica, 49 N.E.2d 1012 (Mass. 1943).*

(n201)Footnote 1629. *Johnson v. Grenell, 81 N.E. 161 (N.Y. 1907); Saccone v. West End Trust Co., 73 A. 971 (Pa. 1909). Contra Gould v. Wagner, 82 N.E. 10 (Mass. 1907).*

(n202)Footnote 1630. *Geddes Coarse Salt Co. v. Niagara, Lockport & Ontario Power Co., 101 N.E. 456 (N.Y. 1913).*

(n203)Footnote 1631. *Dunlop v. O'Donnell, 43 P.2d 873* (Cal. 4 Dist. App. 1935).

(n204)Footnote 1632. *Joens v. Baumbach, 226 P. 400 (Cal. 1924)* (on the theory the parties intended to mention only the area usable by the grantee); *Dodd v. Witt, 29 N.E. 475 (Mass. 1888). But see Rossi v. Sophia, 300 P. 522 (Wash. 1931).* Riparian owners take accretions in proportion to frontage owned; *Hamilton v. Horan, 97 S.W.2d 637 (Ark. 1936); Swarzwald v. Cooley, 31 P.2d 381 (Cal. 1934); Conkey v. Knudsen, 8 N.W.2d 538 (Neb. 1943).*

(n205)Footnote 1633. *Brooks v. Morrill, 42 A. 357 (Me. 1898).*

(n206)Footnote 1634. *Millett v. Fowle, 62 Mass. 150 (1851). See Meeks v. Willard, 29 A. 318 (N.J. Sup. 1894).*

(n207)Footnote 1635. *Kendall v. Green, 42 A. 178 (N.H. 1894).*

(n208)Footnote 1636. *Calais v. Bradford, 51 Me. 414 (1864).*

(n209)Footnote 1637. *Farnsworth v. Rockland, 22 A. 394 (Me. 1891),* per Walton, J.; *Meeks v. Willard, 29 A. 318 (N.J. Sup. 1894).*

(n210)Footnote 1638. *Meeks v. Willard, 29 A. 318 (N.J. Sup. 1894).*

(n211)Footnote 1639. *Farnsworth v. Rockland, 22 A. 394 (Me. 1891),* Walton, J., said: "Not only cornices, but small balconies and bay windows, often overhand sidewalks; and, if they do not in any way interfere with or incommode the public travel, such structures are not unlawful. The owner of land over which a public way passes has a right to occupy the land above and below its surface to any extent that will not impair its usefulness for a way. Of course a bay window, or a balcony, or a cornice even, may be so low down, and project so far into the street, as to obstruct or incommode the public travel; and in such a case the structure would be a public nuisance, and its removal could be compelled."

(n212)Footnote 1640. *Boudreaux v. Shadyside Co., 111 So. 2d 891 (La. App. 1959)* (calls for stakes do not control

over course and distance unless there is sufficient data to give a legal meaning to the stake); *Brown v. Hodges, 61 S.E.2d 603 (N.C. 1950)* (a stake is not suitable as a permanent monument to mark a corner); *Tice v. Winchester, 36 S.E.2d 257 (N.C. 1945). Contra Winbourne v. Russell, 50 So. 2d 721 (Ala. 1951); Arnold v. Hanson, 204 P.2d 97* (Cal. 3 Dist. App. 1949); *Dean v. Thompson, 213 S.W.2d 327 (Tex. App. 1948).*

(n213)Footnote 1641. *Lagomarsino v. San Jose Abstract & Title Ins. Co., 178 Cal. App. 2d 538 (Ga. 1950); Schroeder v. Engroff, 155 A.2d 15 (N.J. Super. A.D. 1959), cert. denied, 157 A.2d 363 (N.J. 1960), rev'd, 162 A.2d 845 (N.J. 1960).*

(n214)Footnote 1642. *Lankford v. Pope, 57 S.E.2d 538 (Ga. 1950).*

(n215)Footnote 1643. *Arnold v. Hanson, 204 P.2d 97* (Cal. 3 Dist. App. 1949); *Neeley v. Maurer, 195 P.2d 628 (Wash. 1948).*

(n216)Footnote 1644. *Hardison v. Jordan, 50 A.2d 447 (Me. 1946); Phoenix Mut. Life Ins. Co. v. Kingston Bank & Trust Co., 112 S.W.2d 381 (Tenn. 1938); Dean v. Willis, 228 S.W.2d 215 (Tex. App. 1950), aff'd, 233 S.W.2d 564 (Tex. App. 1950).*

(n217)Footnote 1645. *Perkins v. Jacobs, 129 A. 4 (Me. 1925); Essex v. Lukas, 159 A.2d 612 (R.I. 1960); Fagan v. Walters, 197 P. 635 (Wash. 1921).*

(n218)Footnote 1646. Bartlett land & *Lbr. Co. v. Saunders, 103 U.S. 316 (1880); Winnipisiogee Paper Co. v. New Hampshire Land Co., 59 F. 542 (C.C. N.H. 1893); Bolton v. Sears, 78 S.W.2d 914 (Ky. 1935); Gilbert v. Tribble, 265 S.W. 261 (Ky. 1924); Perkins v. Jacobs, 129 A. 4 (Me. 1925); Bryant v. Maine Cent. R.R., 9 A. 736 (Me. 1887); Wood v. Hildebrand, 42 A.2d 919 (Md. 1945); Howell v. Merrill, 30 Mich. 282 (1874); Smith v. Catlin Land & Imp. Co., 22 S.W. 1083 (Mo. 1893); Whittelsey v. Kellogg, 28 Mo. 404 (1859); Buckner v. Anderson, 16 S.E. 424 (N.C. 1892); State v. Franco-American Securities, 172 S.W.2d 731 (Tex. App. 1943); Sansing v. Bricka, 159 S.W.2d 142 (Tex. App. 1941); Anderson v. Schaefer, 275 S.W. 300 (Tex. App. 1925); Harrison v. Manvel Oil Co., 180 S.W. 909 (Tex. App. 1915); Church v. Stiles, 10 A. 674 (Vt. 1887); Fagan v. Walters, 197 P. 635 (Wash. 1921).* Where a line was described as running south to the Anorthwest corner of Burton; thence westerly along the northern line of Waterville," both parties assuming that the northeast corner of Waterville was at the northwest corner of Burton, but it afterwards turned out that the Waterville corner and north line were a substantial distance farther south; the grant only went to the Burton corner, and the southern boundary had to be run westerly therefrom, and parallel with the north line of Waterville, thus excluding the intervening territory.

(n219)Footnote 1647. *Standefer v. Vaughan, 219 S.W. 484 (Tex. App. 1920).*

(n220)Footnote 1648. *Staff v. Hawkins, 64 A.2d 176 (Conn. 1949); Edmonds v. Wery, 27 Haw. 621 (1923); Wachovia Bank & Trust Co. v. Miller, 89 S.E.2d 765 (N.C. 1955).*

(n221)Footnote 1649. *Smith v. Vermont Marble Co., 133 A. 355 (Vt. 1926).*

(n222)Footnote 1650. *Ayer v. Harris, 132 A. 742 (Me. 1926); Smith v. Vermont Marble Co., 133 A. 355 (Vt. 1926).*

(n223)Footnote 1651. *Smith v. Bailey, 127 S.E. 89 (Va. 1925); Yonker v. Grimm, 133 S.E. 695 (W. Va. 1926).*

(n224)Footnote 1652. *Spreckles v. Ord, 13 P. 158 (Cal. 1887); Benedict v. Gaylord, 11 Conn. 32 (1836); Tomlinson v. Golden, 138 N.W. 448 (Iowa 1912); Ross v. Hagenstein, 116 N.W. 1064 (Iowa 1908); Clement v. Bank of Rutland, 17 A. 717 (Vt. 1889); Matheny v. Allen, 60 S.E. 407 (W. Va. 1908).*

(n225)Footnote 1653. *Blake v. Cuneo, 111 P.2d 485 (Okla. 1941); Church v. Stiles, 10 A. 674 (Vt. 1887).*

(n226)Footnote 1654. *King v. Norfolk & W. R.R., 17 S.E. 868 (Va. 1893).*

(n227)Footnote 1655. *Andrews v. Wheeler, 103 P. 144 (Cal. App. 1908); Hogans v. Carruth, 19 Fla. 84 (1882); Evell v. Hauser, 131 S.W. 186 (Ky. 1910); Clamorgan v. Hornsby, 6 S.W. 651 (Mo. 1888); Stroup v. McCloskey, 10 A. 421 (Pa. 1886); Roane v. Anderson, 14 S.W. 1079 (Tenn. 1890).*

(n228)Footnote 1656. *Thomasson v. Hanna, 18 S.W. 227 (Ky. 1892). See Van Ness v. Boinay, 101 N.E. 979 (Mass. 1913); Goyett v. Keenan, 82 N.E. 427 (Mass. 1907).*

(n229)Footnote 1657. *Jones v. Hargis, 150 S.W.2d 928 (Ky. 1941).*

(n230)Footnote 1658. *See Powers v. Jackson, 50 Cal. 429 (1875).*

(n231)Footnote 1659. *Umbarger v. Chaboya, 49 Cal. 525 (1875); Jewett v. Hussey, 70 Me. 433 (1879); Howell v. Merrill, 30 Mich. 282 (1874); Kellogg v. Mullen, 45 Mo. 571 (1870).*

(n232)Footnote 1660. *Umbarger v. Chaboya, 49 Cal. 525 (1875), aff'd, 97 U.S. 280, 24 L. Ed. 893 (1877).*

(n233)Footnote 1661. *Cornell v. Jackson, 50 Mass. 150 (1845); Crosby v. Parker, 4 Mass. 110 (1808).*

(n234)Footnote 1662. *Edson v. Knox, 36 P. 698 (Wash. 1894).*

(n235)Footnote 1663. *McKeon v. Millard, 47 Cal. 581 (1874).*

(n236)Footnote 1664. *Ford v. McRae, 96 S.W.2d 80 (Tex. Com. App. 1936).*

(n237)Footnote 1665. *Ross v. Houston Oil Fields Ass'n, 88 S.W.2d 586 (Tex. App. 1935).*

(n238)Footnote 1666. Call to a boundary will not prevail if made by the original surveyor under mistaken belief as to its location. In such a case bearings and distances will control; *Republic Steel Corp. v. Wheeler, 215 S.W.2d 994 (Ky. 1948).*

(n239)Footnote 1667. *Morrison v. Johnson, 29 A.2d 132 (N.H. 1942).*

(n240)Footnote 1668. *Stallcup v. Stevens, 329 S.W.2d 184 (Ark. 1959); Bridges v. Thomas, 118 So. 2d 549 (Fla. App. 1960)* (distances must be lengthened to meet monuments); *Andrews v. Pitts, 95 A. 203 (Md. 1915); Van Ness v. Boinay, 101 N.E. 979 (Mass. 1913); Bowen v. John L. Roper Lbr. Co., 69 S.E. 258 (N.C. 1910); Patterson v. T. J. Moss Tie Co., 330 S.W.2d 344 (Tenn. App. 1959); Layton v. New York & T. Land Co., 29 S.W. 1120 (Tex. App. 1895); Ratliff v. Burleson, 25 S.W. 983 (Tex. App. 1894), 26 S.W. 1003 (Tex. App. 1894); Davies v. Wickstrom, 105 P. 454 (Wash. 1909).* Course prevails over distance; *Hall v. Eaton, 29 N.E. 660 (Mass. 1885). Contra, Davies v. Wickstrom, 105 P. 454 (Wash. 1909),* where the parties had acted differently. An established survey prevails over a course or distance; *Burkholder v. Markley, 98 P. 37 (Cal. App. 1908).* So also where location of an easement is involved; *Pacific Gas & Elec Co. v. Minnette, 252 P.2d 642 (Cal. App. 1953).* Where there is a conflict between course and distance, the facts and circumstances surrounding the parties at the time of the transaction may be weighed and considered in determining whether the distance of one line should control the course of another or vice versa; *Warren v. Boggs, 111 S.E. 331 (W. Va. 1922).*

(n241)Footnote 1669. *McNichol v. Flynn, 153 N.Y.S. 308 (N.Y.A.D. 1915); Tippen v. McCampbell, 26 S.W. 647 (Tex. App. 1894).*

(n242)Footnote 1670. *Boudreaux v. Shadyside Co., 111 So. 2d 891 (La. App. 1959); O'Gorman v. Baker, 338 P.2d 638 (Or. 1959), 347 P.2d 85 (Or. 1959); Reast v. Donald, 19 S.W. 795 (Tex. 1892); Gregg v. Hill, 17 S.W. 838 (Tex. 1891); Aransas Pass Colonization Co. v. Flippen, 29 S.W. 813 (Tex. App. 1895).*

(n243)Footnote 1671. *Chinoweth v. Haskell, 28 U.S. 92, 7 L. Ed. 614 (1830); Koff v. Frank, 194 N.Y.S.2d 753*

1959) (metes and bounds control over general description); *Blain v. Woods, 115 S.E.2d 88 (W. Va. 1960)* (courses are unnecessary if monuments can be located).

(n244)Footnote 1672. *Floyd v. Carswell, 83 S.E.2d 586 (Ga. 1954)* (metes and bounds and calls prevail over land lot numbers); *Wagers v. Wagers, 238 S.W.2d 125 (Ky. 1951); Cherry v. Slade, 7 N.C. 82 (1819).*

(n245)Footnote 1673. *Koff v. Frank, 194 N.Y.S.2d 753 (1959).*

(n246)Footnote 1674. *Findlay v. State, 238 S.W. 956 (Tex. App. 1921), second reh'g denied, 239 S.W. 996 (Tex. App. 1922).*

(n247)Footnote 1675. *Dolphin v. Klann, 151 S.W. 956 (Mo. 1912).*

(n248)Footnote 1676. *Talbot v. W. K. Smith Secur. Sav. & Trust Co., 107 P. 480 (Or. 1910), 108 P. 125 (Or. 1910).* Distances yield to courses; *Hoskins v. Louisvile Cooperage Co., 297 S.W.2d 49 (Ky. 1956).*

(n249)Footnote 1677. *Chisholm v. Thompson, 82 A. 67 (Pa. 1911).*

(n250)Footnote 1678. *Coulter v. Gudehus, 139 N.W. 330 (S.D. 1913).*

(n251)Footnote 1679. *May v. Wolf Valley Coal Co., 180 S.W. 781 (Ky. 1915).*

(n252)Footnote 1680. *Tippen v. McCampbell, 26 S.W. 647 (Tex. App. 1894).*

(n253)Footnote 1681. *Forest Preserve Dist. v. Lehmann Estate, Inc., 58 N.E.2d 538 (Ill. 1944); Tice v. Winchester, 36 S.E.2d 257 (N.C. 1945). Contra, Hall v. Eaton, 29 N.E. 660 (Mass. 1885).*

(n254)Footnote 1682. *Joffe v. Gliksman, 51 A.2d 467 (N.J. Ch. 1947).*

(n255)Footnote 1683. *Losee v. Jones, 235 P.2d 132 (Utah 1951).*

(n256)Footnote 1684. *Hall v. Eaton, 29 N.E. 660 (Mass. 1885).*

(n257)Footnote 1685. *Lundell v. Allen & Nelson Mill Co., 106 P. 626 (Wash. 1910).*

(n258)Footnote 1686. *Preston v. Bowmar, 19 U.S. 580, 5 L. Ed. 336 (1821),* per Story, J.

(n259)Footnote 1687. *Morgan v. Renfro, 99 S.W. 311 (Ky. 1907).*

(n260)Footnote 1688. *Irwin v. Towne, 42 Cal. 326 (1871); Hicks v. Coleman, 25 Cal. 122 (1864).*

(n261)Footnote 1689. *Platt v. Bente, 10 A. 283* (N.J. Err. & App. 1887).

(n262)Footnote 1690. *Austrian v. Davidson, 21 Minn. 117 (1874); Allen v. Sallinger, 12 S.E. 896 (N.C. 1891).*

(n263)Footnote 1691. *McCrosky v. Wilson, 138 S.W. 379 (Ky. 1911).*

(n264)Footnote 1692. *Goodwin v. Greene, 74 S.E.2d 630 (N.C. 1953).*

(n265)Footnote 1693. *Mitchell v. Mays, 268 S.W. 806 (Ky. 1925); Miller v. Michel, 198 N.W. 950 (Mich. 1924); Hays v. Clawson, 286 S.W. 857 (Tex. App. 1926).* A subdivision of a section must be referred to an established corner; *Marshfield v. Haggard, 304 S.W.2d 672 (Mo. App. 1957).*

(n266)Footnote 1694. *Fordson Coal Co. v. Spurlock, 19 F.2d 820 (6th Cir. 1927); Hill v. Taylor, 4 N.E.2d 1008*

(Mass. 1936); Lawler v. Rice & Goodhue Counties, 178 N.W. 317 (Minn. 1920); Littlejohn v. Fink, 190 N.W. 1020 (Neb. 1922); Muldoon v. Sternenberg, 161 S.W.2d 783 (Tex. Com. App. 1942); Puget Mill Co. v. North Seattle Imp. Co., 206 P. 954 (Wash. 1922); West Virginia Pulp & Paper Co. v. J. Natwick & Co., 21 S.E.2d 368 (W. Va. 1941). See Stewart v. Latimer, 30 S.E.2d 633 (Ga. 1944).

(n267)Footnote 1695. *Lankford v. Pope, 57 S.E.2d 538 (Ga. 1950); Jones v. Poundstone, 14 S.W. 824 (Mo. 1890); Brown v. Hodges, 61 S.E.2d 603 (N.C. 1950)* (otherwise, if a beginning corner).

(n268)Footnote 1696. *Lincoln v. Edgecomb, 28 Me. 275 (1848); Meade v. Leon & H. Blum Land Co., 22 S.W. 298 (Tex. App. 1893).*

(n269)Footnote 1697. *Owings v. Freeman, 51 N.W. 476 (Minn. 1892).*

(n270)Footnote 1698. *Le Compte v. Lueders, 51 N.W. 542 (Mich. 1892).*

(n271)Footnote 1699. *Radford v. Johnson, 77 N.W. 601 (N.D. 1898).*

(n272)Footnote 1700. *Kuglin v. Bock, 54 N.E. 907 (Ill. 1899).*

(n273)Footnote 1701. *Farrell & Co. v. Arkansas Fuel Oil Co., 84 F.2d 887 (C.C.A. 5 1936).* The true boundary lines of a city lot are where they are actually marked by the monuments placed by the surveyor to indicate where they are to be found, and the most satisfactory evidence of the place where the lines were located is afforded by the original stakes. The monuments must necessarily control the field notes and maps of the survey, as well as courses, distances, and quantity. These monuments are facts. The field notes and plats are but descriptions which serve to assist in ascertaining facts; *Decaur v. Niedermeyer, 48 N.E. 72 (Ill. 1897).*

(n274)Footnote 1702. Evidence of a survey which did not start with a government corner is not probative; *Stevens v. French, 302 S.W.2d 286 (Ark. 1957); Klaar v. Lemperis, 303 S.W.2d 55 (Mo. 1957).* Corner can be located from the plat and field notes of the original survey or by competent extrinsic evidence; *Marshfield v. Haggard, 304 S.W.2d 672 (Mo. App. 1957).* True corner unless lost is where the surveyor actually located it regardless of error; *Martin v. Neeley, 347 P.2d 529 (Wash. 1959).* To begin at the posterior corner of property it must appear that the anterior corner is not established and known and the posterior corner is; *Martin v. Neeley, 347 P.2d 529 (Wash. 1959).*

(n275)Footnote 1703. *Ocean Beach Ass'n v. Yard, 20 A. 763 (N.J. Ch. 1890); Norwood v. Crawford, 19 S.E. 349 (N.C. 1894). See Broadwell v. Morgan, 55 S.E. 340 (N.C. 1906).*

(n276)Footnote 1704. *Kennard v. Maxwell, 287 S.W. 60 (Tex. App. 1926).*

(n277)Footnote 1705. *Ayers v. Watson, 137 U.S. 584, 11 S. Ct. 201, 34 L. Ed. 803 (1891); Justice v. Kentland Coal & Coke Co., 327 S.W.2d 740 (Ky. 1959); Coffey v. Greer, 106 S.E.2d 209 (N.C. 1958)* (calls in a deed are not competent evidence to locate a corner in a second deed which is a beginning corner of the first deed).

(n278)Footnote 1706. *Childers v. Hoffer, 277 P.2d 625 (Kan. 1954).*

(n279)Footnote 1707. *Ashville Land Co. v. Lang, 59 S.E. 703 (N.C. 1907).*

(n280)Footnote 1708. *Burt v. Busch, 46 N.W. 790 (Mich. 1890); Lemon v. Chicago & G. T. R.R., 26 N.W. 791 (Mich. 1886); Gregory v. Knight, 14 N.W. 700 (Mich. 1883); Stewart v. Carleton, 31 Mich. 270 (1875); Randall v. Gill, 14 S.W. 134 (Tex. 1890).*

(n281)Footnote 1709. *Manistee Mfg. Co. v. Cogswell, 61 N.W. 884 (Mich. 1885).*

(n282)Footnote 1710. *Texas Co. v. McMillan, 13 F. Supp. 407 (N.D. Tex. 1935).*

(n283)Footnote 1711. *Riley v. Griffin, 16 Ga. 141 (1854); Hall v. Pratt, 134 S.W. 900 (Ky. 1911); Jacobs v. Moseley, 4 S.W. 135 (Mo. 1887); Reed v. Marsh, 8 Ohio 147 (1837); Bleidorn v. Pilot Mountain Coal & Min. Co., 15 S.W. 737 (Tenn. 1890); New York & T. Land Co. v. Thomson, 17 S.W. 920 (Tex. 1891); Montague v. Clay County Land & Cattle Co., 15 S.W. 902 (Tex. 1891); Withers v. Connor, 13 S.W. 743 (Tex. 1890).*

(n284)Footnote 1712. *State v. Sun Oil Co. v. Arkansas Fuel Oil Co., 114 S.W.2d 936 (Tex. App. 1938).*

(n285)Footnote 1713. *Farrell & Co. v. Arkansas Fuel Oil Co., 84 F.2d 887 (5th Cir. 1936).*

(n286)Footnote 1714. *Rand v. Cartwright, 18 S.W. 794 (Tex. 1891).*

(n287)Footnote 1715. *Sperry v. Wesco, 38 P. 623 (Or. 1894).*

(n288)Footnote 1716. *Yard v. Ocean Beach, 24 A. 729* (N.J. Err. & App. 1892); *Scott v. Yard, 18 A. 359 (N.J. Ch. 1889).*

(n289)Footnote 1717. *Beaver Book Resort Co. v. Stevens, 230 P. 121 (Colo. 1924).*

(n290)Footnote 1718. *Galbraith v. Parker, 153 P. 283 (Ariz. 1915).*

(n291)Footnote 1719. *Peterson v. Skjelver, 62 N.W. 43 (Neb. 1895); Woods v. West, 58 N.W. 938 (Neb. 1894); Thompson v. Harris, 58 N.W. 712 (Neb. 1894).*

(n292)Footnote 1720. *Martin v. Neeley, 347 P.2d 529 (Wash. 1959)* (the burden of proof is on one *See* king to establish that a corner was lost, not merely obliterated). In relocating lost or obliterated corners surveyors can consider extrinsic evidence only if the field notes are uncertain; *Glenn v. Whitney, 209 P.2d 257 (Utah 1949).* If the corners cannot be relocated a resurvey is run from the east boundary westward so as to preserve the amount of land included in the government patent; *Glenn v. Whitney, 209 P.2d 257 (Utah 1949).*

(n293)Footnote 1721. *Fratt v. Woodward, 32 Cal. 219 (1867); Hicks v. Coleman, 25 Cal. 122 (1864).* The west 50 feet of Lot 13 means a strip of land 50 feet in width measured on a perpendicular to the west side, not along the frontage (land in form of a parallelogram); *Walters v. Tucker, 281 S.W.2d 843 (Mo. 1955).* In a trapezoid shaped tract 100 acres on the east end was a valid description; *O'Dwyer v. Ream, 136 A.2d 90 (Pa. 1957).*

(n294)Footnote 1722. *Minor v. Daspit, 54 So. 413 (La. 1911).*

(n295)Footnote 1723. *Collins v. Dresslar, 32 N.E. 883 (Ind. 1892); DeLong v. Starkey, 92 N.E.2d 228 (Ind. App. 1950).*

(n296)Footnote 1724. *Burchett v. Clark, 172 S.W. 1048 (Ky. 1915).*

(n297)Footnote 1725. *Banks v. Talley, 194 A. 362 (Del. Super. 1937).*

(n298)Footnote 1726. *Hassie Hunt Trust Co. v. Proctor, 60 So. 2d 551 (Miss. 1952)* (Aten acres off the south side" meant by parallel lines); *Fowler v. Tarbet, 274 P.2d 341 (Wash. 1954)* (Atwo acres in width" was a valid description).

(n299)Footnote 1727. *Eshleman v. Malter, 35 P. 860 (Cal. 1894); Miller v. Topeka Land Co., 24 P. 420 (Kan. 1890).*

(n300)Footnote 1728. *Weaver v. Howatt, 118 P. 519 (Cal. 1911).*

(n301)Footnote 1729. *Poleske v. Jones, 185 N.W. 917 (Iowa 1921).*

(n302)Footnote 1730. *Baldwin v. Shannon, 43 N.J.L. 596 (1881).*

(n303)Footnote 1731. *Johnson v. Knippa, 127 S.W. 905 (Tex. App. 1910); Ware v. McQuinn, 26 S.W. 126 (Tex. App. 1894).*

(n304)Footnote 1732. *Duff v. Moore, 4 S.W. 530 (Tex. 1887).*

(n305)Footnote 1733. *Upton v. Read, 56 So. 2d 644 (Ala. 1952).*

(n306)Footnote 1734. *Ferguson v. Bloom, 23 A. 49 (Pa. 1891).*

(n307)Footnote 1735. *McCormack v. Crawford, 181 S.W. 485 (Tex. App. 1915).*

(n308)Footnote 1736. *Standefer v. Vaughan, 219 S.W. 484 (Tex. App. 1920).*

* This chapter is drawn in part from chapter 45 of George W. Thompson, Commentaries on the Modern Law of Real Property (John S. Grimes ed. 1979), which made a significant contribution to preserving the American common law governing land descriptions and boundaries.

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CHAPTER 90 LAND DESCRIPTIONS, BOUNDARIES AND SURVEYS *

10-90 Thompson on Real Property, Thomas Editions § 90.05

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§ 90.05 Bibliography.

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Supp. To CHAPTER 90 LAND DESCRIPTIONS, BOUNDARIES AND SURVEYS

10-90 Thompson on Real Property, Thomas Editions Supp. to § 90.02

Supp. to § 90.02 Land Descriptions.

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§ 90.02(a) The Purpose of a Description in a Conveyance of Land. [Go To Main]

After the citation for Warner Communications, Inc. v. Keller, add:

rev'd 928 S.W.2d 479 (Tex. 1996) .

Add:

Miller v. The Provident Bank, 260 B.R. 158 (D. Ida. 2001) (lack of legal description of land in the deed of trust did not affect the validity of the deed as between the parties).

Change citation for Allen v. Sallinger to:

Allen v. Sallinger, 12 S.E. 896 (N.C. 1891) .

Change the spelling of the citation for Lavendar v. Ball to:

Lavender v. Ball.

Change the date on Magnolia Petroleum Co. v. Marks to:

Magnolia Petroleum Co. v. Marks, 74 So. 2d 36 (La. 1954) .

Cousatte v. Collins, 61 P.3d 728 (Kan. App. 2003) (lis pendens could not be applied without a property description).

Change the citation for *Anderson-Cottonwood Irr. Dist. v. Zinzer, 125 P.2d 106* to:

Anderson-Cottonwood Irr. Dist. v. Zinzer, 125 P.2d 82 .

Add:

McClung v. Atlanta Real Estate Acquisitions, LLC, 639 S.E.2d 331 (Ga. App. 2006) (insufficient description did not satisfy the statute of frauds).

Change the date on ardy v. California Trojan Powder Co. to:

Hardy v. California Trojan Powder Co., 219 P. 197 (Or. 1923) .

Change the date for Sullivan v. Fant to:

Sullivan v. Fant, 160 S.W. 612 (Tex. App. 1913) .

Add:

Fairfax Homes, Inc. v. Blue Belle, Inc., 2006 Ohio 2261 (Ohio Ct. App. 2006) (the land description was definite and sufficient so a contract for the sale of land could be enforced).

§ 90.02(b) The Requirement of Certainty in a Description. [Go To Main]

Add:

Town of Brilliant v. City of Winfield, 1999 Ala. LEXIS 310 (Dec. 3, 1999) (Alabama courts hold that "substantial accuracy, not perfection, is all that is required in an annexation description."); *Berger v. Fitzgerald, 739 A.2d 287 (Conn. App. 1999)* (if doubt exists concerning the land at issue, the owner of real property must go beyond the land

description in a notice of tax sale); *Coulter & Smith, Ltd. v. Russell, 976 P.2d 1218 (Utah App. 1999)* (extrinsic evidence used to identify the property); *Shelton v. Williamson, 975 S.W.2d 508 (Mo. App. 1998)* (adequate land descriptions derived from tax receipts and handwritten notation).

Add:

Hilbert v. Hough, 969 P.2d 836 (Idaho App. 1998) (land description in purchase agreement was inadequate and incomplete).

In re Vondall, 364 B.R. 668 (8th Cir. 2007) (an error in the legal description in a mortgage prevented the mortgage from giving constructive or implied notice of the mortgagee's interest; *In re Walterman Implement, Inc. 360 B.R. 275 (N.D. Iowa 2007)* (erroneous description in a mechanics lien statement prevented validity of mechanics' lien).

Add:

Ratcliff v. Cyrus, 544 S.E.2d 93 (W. Va. 2001) (extrinsic evidence needed to determine the location of an easement).

Add:

Daniel Mill, LLC v. Lyons, 642 S.E.2d 226 (Ga. App. 2007) (the description of the property in a contract was too indefinite to satisfy the statute of frauds).

§ 90.02(c) Rules of Construction for Land Descriptions. [Go To Main]

Add:

City of Kellogg v. Mission Mountain Interests, Ltd., Co., 16 P.3d 915 (Ida. 2000) (the description "the lodge and the land on which it is located, along with the ski lift" was sufficient to identify what property was being conveyed).

Christopher Steadham, "Land Description Errors: Recognition, Avoidance, and Consequences," 78 *J. Kan. B.A.* 20 (September 2009).

Add:

Gateway Family Worship Centers, Inc. v. H.O.P.E. Foundation Ministries, Inc., 535 S.E.2d 286 (Ga. App. 2000) (sales contract did not contain a valid property description or the key to identifying the property by extrinsic evidence).

Add:

Preston Exploration Co. v. Chesapeake Energy Corp., 2009 U.S. Dist. LEXIS 126694 (S.D. Tex. 2009) (holding that a land description must be written in the contract regardless of an actual mutual understanding of the property descriptions).

Change the date for Gates v. Asher to:

Gates v. Asher, 280 S.W.2d 247 (Tex. 1955) .

Change the date for Department of Conservation ex rel. People v. Fairless to:

Department of Conservation ex rel. People v. Fairless, 653 N.E.2d 446 (Ill. App. 1995) .

§ 90.02(c)(3) Rules of Construction for Descriptions Generally.

Change the date for Arab Corp. v. Bruce to:

Arab Corp. v. Bruce, 142 F.2d 604 (5th Cir. 1944) .

Change spelling of Jayore v. Hall to:

Jayroe v. Hall.

Add:

Belcher v. Stone, 998 S.W.2d 759 (Ark. App. 1999) (A deed is not void for uncertainty if any reasonable construction can be made).

§ 90.02(c)(4) Rules of Construction for "Mother Hubbard" Descriptions.

After first sentence of subsection, Add new Note 141.1: n141.1

§ 90.02(c)(5) Rules of Construction for Descriptions Incorporated by Reference to Other Instruments.

Add:

Agricredit Acceptance Company v. Singleton, 767 So. 2d 137 (La. App. 2000) (the lender's security agreement incorporated by reference the land description in an attachment to the financing statement).

Change the date for M.C. Dixon Lumber Co. v. Mathiason to:

M.C. Dixon Lumber Co. v. Mathison, 266 So. 2d 841 (Ala. 1972) .

Change spelling in Robbins v. HNG Oil Co. to:

Robbins v. HNG Oil Co.

After *Nodvin v. Plantation Pipe Line Co., 420 S.E.2d 322 (Ga. App. 1992)* add:

abrogated by Yaali Ltd. v. Barnes & Noble Inc., 506 S.E.2d 116 (Ga. 1998) .

§ 90.02(c)(7) Exclusion of the Highway from the Description.

§ 90.02(c)(7)(iv) The Effect of Abandoning the Highway.

Add:

Martini v. Smith, 42 P.3d 629 (Colo. 2002) (an ordinance de-annexing a subdivision did not conclusively vacate the public roadways in the subdivision); *U.S. Silica Company v. Wooldridge, 799 So. 2d 693 (La. App. 2001)* (although roadway was abandoned, landowner did not own the land under the road).

Add:

Martini v. Smith, 42 P.3d 629 (Colo. 2002) (an ordinance de-annexing a subdivision did not conclusively vacate the public roadways in the subdivision).

§ 90.02(c)(11) Identifying and Resolving Latent and Patent Ambiguities in Description.

§ 90.02(c)(11)(i) Latent Ambiguities.

Add:

Andersen v. Mazza, 684 N.Y.S.2d 687 (App. Div. 1999) (While parol evidence may be used to explain latent ambiguities, it cannot be used to vary valid boundary descriptions in a deed description).

§ 90.02(d) Types of Descriptions. [Go To Main]

§ 90.02(d)(1) General and Particular Descriptions.

Change date for Carter v. White to:

Carter v. White, 7 S.E. 473 (N.C. 1888) .

§ 90.02(d)(2) Maps and Plats as Descriptions.

Add:

Lawrence v. Jones, 18 P.3d 1245 (Ariz. App. 2001) (supplementary zoning map constituted a legal description of the property).

Add:

Clark v. Smay, 110 P.3d 140 (Utah App. 2005) (boundary was controlled by the metes and bounds description in a deed, rather than by a creek as drawn on the plat map).

§ 90.02(d)(7) Description by Abbuttals.

Change date for Hofer v. Carino to:

Hofer v. Carino, 72 A.2d 335 (N.J. 1950) .

Trustees of Freeholders and Commonality of Town of Southampton v. Buoninfante, 756 N.Y.S.2d 629 (2003) (ambulatory boundary based on high water mark of the bay).

§ 90.02(d)(8). Weighing the Importance of Different Modes of Description.

Add:

Khalsa v. Ward, 101 P.3d 843 (Utah App. 2004) (a description referring to a ditch as the boundary line controlled over a metes and bounds description).

§ 90.02(e) Defective Descriptions. [Go To Main]

§ 90.02(e)(1) Conflicting Descriptions.

Add:

In re Thomas, 387 B.R. 4 (N.D. Iowa 2008) (erroneous legal description of mortgaged land prevented recording from providing constructive notice).

§ 90.02(e)(2) Correcting Descriptions.

Add:

First National Bank of Polk County v. Carr, 2003 Ga. App. LEXIS 409 (No. A02A1816, Mar. 20, 2003) (no mutual mistake of fact regarding property description).

Anderson v. City Development Board of the State of Iowa, 631 N.W.2d 671 (Iowa 2001) (typographical errors in the description of the land did not invalidate the conveyance).

§ 90.02(e)(3). Acts of Parties to Cure Defective Descriptions.

Add:

Pullar v. Huelle, 73 P.3d 1038 (Wyo. 2003) (a description of real property as "as parcel of land" was insufficient for an enforceable real estate contract).

FOOTNOTES:
(n1)Footnote 141.1. *Ultra Resources, Inc. v. Hartman, 226 P.3d 889 (Wyo. 2010)* (interpretation of net profit interest agreement regarding leases outside the unit).

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Supp. To CHAPTER 90 LAND DESCRIPTIONS, BOUNDARIES AND SURVEYS

10-90 Thompson on Real Property, Thomas Editions Supp. to § 90.03

Supp. to § 90.03 Land Boundaries.

[Go To Main]

§ 90.03(a) Establishing Boundary Lines. [Go To Main]

§ 90.03(a)(1) Methods of Establishing Boundary Lines.

Add new footnote at end of next to last sentence on the page: n706.1

In the third line of the second paragraph, change "words to" to:

"words of."

§ 90.03(a)(3) Fences as Boundaries.

Add:

Griffin v. Anderson, 162 P.3d 755 (Idaho 2007) (the parties did not establish a boundary by agreement, because the fence was built to hold cattle, not to mark the boundary of the land).

In the third line, change "with" to:

"without."

Change spelling of Scanlon v. Miller to:

Scanlan v. Miller

Add:

Wilson v. Handley, 119 Cal. Rptr. 2d 263 (2002) (a row of trees planted on or near the boundary line could serve as a fence or a structure in the nature of a fence).

§ 90.03(a)(5) Court Determination of Boundaries.

Add:

Ramsey v. O'Neal, 812 So. 2d 324 (Ala. 2001) (the trial court did not have authority to establish new boundaries by ordering the parties to engage in a land exchange).

§ 90.03(a)(6) Admissibility of Evidence to Establish Boundaries.

Add:

Dowley v. Morency 737 A.2d 1061 (Me. 1999) (The existence of a blaze line is evidence of the boundary).

§ 90.03(a)(7) Acquiescence in Establishing Boundaries.

Add:

Myers v. Yingling, 279 S.W.3d 83 (Ark. 2008) (boundary by acquiescence to fence); *Boyster v. Shoemake, 272 S.W.3d 139 (Ark. App. 2008)* (boundary by acquiescence to fence).

Sanders v. Thomas, 821 So. 2d 1214 (Fla. App. 2002) (title not affected by adverse possession, boundary by acquiescence or boundary by agreement).

Oliphant v. Zubrod, 711 N.W.2d 732 (Iowa App. 2006) (parties acquiesced in barbed wire fence as boundary).

Huntington v. Riggs, 862 N.E.2d 1263 (Ind. App. 2007) (title to a strip of land obtained through acquiescence).

Add:

Griffel v. Reynolds, 34 P.3d 1080 (Ida. 2001) (in an unusual decision, the court held that an agreement between adjacent landowners created a boundary by acquiescence, thus confusing the two concepts and that farming lines had remained stable, despite significant evidence to the contrary).

Add:

Beitner v. Marzahl, 819 N.E.2d 1266 (Ill. App. 2004) (boundary by acquiescence marked by a fence); *Paseka v. Weaver Farms Limited Liability Company, 682 N.W.2d 81 (Iowa App. 2004)* (boundary by acquiescence marked by a dirt ridge).

Add:

Argyle v. Jones, 118 P.3d 301 (Utah App. 2005) (in Utah, mere failure to object is insufficient to establish boundary by acquiescence).

line 2, change "1028" to superscript.

Add:

Paseka v. Weaver Farms Limited Liability Company, 2004 Iowa App. LEXIS (No. 03-0417, Mar. 24, 2004) (a dirt ridge was sufficiently definitive for boundary by acquiescence).

§ 90.03(b) Boundaries Related to Water. [Go To Main]

Add:

Edlund v. 4-S, LLC, 702 N.W.2d 812 (Neb. App. 2005) (the thread of the river channel lies in its main channel).

Add:

Madson v. TBT Ltd. Liability Co., 686 N.W.2d 85 (Neb. App. 2004) (ownership of land established through the theory of accretion).

§ 90.03(b)(3) Title to Bed of Navigable or Public Streams.

Add:

Idaho v. United States, 533 U.S. 262 (2001) (an executive order reserving to the Indian tribe the title to submerged lands within the reservation precluded the state from acquiring titles to those lands upon statehood).

Change 'What constitutes Abed" of navigable stream' to:

What constitutes "a bed" of navigable stream.

§ 90.03(b)(4) Title to Tide Lands.

Add:

Estate of Hobbs, 2002 Mont. LEXIS 186 (Feb. 16, 2002) (claimant was determined to be not the owner of land between the high water mark and the lake meander line).

Trustees of Freeholders and Commonality of Town of Southampton v. Buoninfante, 756 N.Y.S.2d 629 (2003) (one boundary of the property was ambulatory and based on the high water mark of the bay).

§ 90.03(b)(5) Ownership of the Seashore.

Add:

But see Riceland Petroleum Company v. North American Land Co., Inc. 869 So. 2d 894 (La. App. 2004) (the state retained ownership of accretion that formed between the boundary of state land and the sea).

Change the Marcus Sayre Co. v. Newark citation to read:

Marcus Sayre Co. v. Newark, 45 A. 985 (N.J. Err. & App. 1900) .

§ 90.03(b)(12) Determining Title to an Irregular Shoreline.

Add:

Daisy Farm Ltd. Partnership v. Morrolf, 886 N.E.2d 604 (Ind. App. 2008) ("straight extension method" used to determine riparian boundaries of abutting lots).

FOOTNOTES:
(n2)Footnote 706.1. *Wanha v. Long, 255 Neb. 849, 587 N.W.2d 531 (Neb. 1998)* (adverse possession claim not defeated by the fact that the disputed property was platted).

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Supp. To CHAPTER 90 LAND DESCRIPTIONS, BOUNDARIES AND SURVEYS

10-90 Thompson on Real Property, Thomas Editions Supp. to § 90.04

Supp. to § 90.04 Land Surveys.

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§ 90.04(a). Official Surveys. [Go To Main]

Add:

Crowe v. Boofter, 790 N.E.2d 608 (Ind. App. 2003) (surveyor shielded from a purchaser's claim of negligence by an exculpatory clause in the survey location report and the claimant's acknowledgment of the clause).

§ 90.04(b) Government Surveys as Controlling. [Go To Main]

Add:

Newfound Management Corp. v. Sewer, 34 F. Supp. 2d 305 (D.V.I. 1999) (survey by party's own expert held sufficient to establish boundaries).

§ 90.04(d). Comparing Conflicting Surveys. [Go To Main]

Add:

Graves v. S. E. Downey Registered Land Surveyor, 885 A.2d 779 (Maine 2005) (land surveyor liable for professional

negligence).

§ 90.04(g) Superiority of Calls for Monuments. [Go To Main]

Change the Andreu v. Watkins citation to read:

Andreu v. Watkins, 7 So. 876 (Fla. 1890) .

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10-90 Thompson on Real Property, Thomas Editions Supp. to § 90.05

Supp. to § 90.05 Bibliography

[Go To Main]

Add to Books

Flushman, Bruce. *Water Boundaries: Demystifying Land Boundaries Adjacent to Tidal 011176 or Navigable Waters* (John Wiley & Sons, Inc., 2002).

Articles

Add to Articles:

Bales, Richard F. "Land Surveyor Liability to Third Parties in Illinois," *95 Ill B.J. 136* (March, 2007).

Phillips, Rob. "Boundary by Agreement in Idaho." *47 Advocate 18* (March, 2004) .

Pineau, Robert J. "Drawing New Boundaries," *81 Mich. B.J. 30* (August, 2002).

Steadham, Christopher. "Land Description Errors: Recognition, Avoidance, and Consequences," 78 *J. Kan. B.A.* 20 (September 2009).

Vargas, Jorge A. "Is the International Boundary Between the United States and Mexico Wrongly Demarcated? An Academic Inquiry into Certain Diplomatic, Legal, and Technical Considerations Regarding the Boundary in the San Diego-Tijuana Region," *30 Cal. W. Int'l L.J. 215 (Spring 2000).*

Annotations

Annotation, Admissibility of parol evidence to explain ambiguity in description of land in deed or mortgage, 68 A.L.R. 4 .

Annotation, Boundary under conveyance of land bordering on a railroad right, 85 A.L.R. 404 .

Annotation, Description in memorandum defective or silent as to boundary line of land retained by seller as sufficient to satisfy statute of frauds, 139 A.L.R. 965 .

Annotation, Description of land in deed or mortgage by reference to map, plat, plan, sketch, or diagram as prevailing over description by words, 130 A.L.R. 643 .

Annotation, Easement by prescription for use of land near boundary line, 58 A.L.R. 1037 .

Annotation, Inconsistency between description of land in instruments conveying same or affecting title thereto and description in another instrument referred to therein, 134 A.L.R. 1041 .

Annotation, *Owner's Surveying of Land as Entry Thereon Tolling Running of Statute of Limitations for Purposes of Adverse Possession, 76 A.L.R.3d 1202* .

Annotation, Property rights in respect of building, fence, or other structure placed upon another's land through mistake as to boundary or location, 130 A.L.R. 1034 .

Annotation, Sufficiency of description of land in notice of tax sale, 67 A.L.R. 890 .

Annotation, *Surveyor's Liability for Mistake In, or Misrepresentation as to Accuracy of Survey of Real Property, 17 A.L.R.5th 23* .

Annotation, Use of abbreviations in description of land in tax proceedings, 1 A.L.R. 1228 .

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CHAPTER 91 TITLE AND MARKETABLE TITLE *

11-91 Thompson on Real Property, Thomas Editions 91.syn

AUTHOR: Professor David A. Thomas J. Reuben Clark Law School Brigham Young University

§ 91.syn Synopsis to Chapter 91: TITLE AND MARKETABLE TITLE *

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§ 91.02 The Concept of Title.

§ 91.02(a) Title and Possession.

§ 91.02(b) Title and Ownership.

§ 91.02(c) Title and Estate.

§ 91.02(d) The Concept of Marketable Title.

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§ 91.05(b) Historical Types of Escheat.

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§ 91.05(d) Interests Subject to Escheat.

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§ 91.06(b) Title of Forfeiture of Property Held by Felons or Used in Committing Crimes.

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§ 91.07 Title by Abandonment.

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§ 91.09 Marketable Title.

§ 91.09(a) The Common Law.

§ 91.09(a)(1) Various Definitions of Marketable Title.

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§ 91.09(a)(4) Title Based on Adverse Possession.

§ 91.09(a)(5) Abstracts as Requirements of Marketable Title.

§ 91.09(a)(6) Vendee's Rights When the Vendor's Title Is Inadequate.

§ 91.09(b) Marketable Title Acts and Other Curative Acts.

§ 91.09(b)(1) Curative Acts Generally.

§ 91.09(b)(2) The Uniform Marketable Title Act.

§ 91.10 Bibliography.

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CHAPTER 91 TITLE AND MARKETABLE TITLE *

11-91 Thompson on Real Property, Thomas Editions § 91.01

AUTHOR: Professor David A. Thomas J. Reuben Clark Law School Brigham Young University

§ 91.01 Introduction.

This chapter defines the concept of title in Anglo-American law and discusses some of the less familiar ways that title may be transferred by operation of law, including escheat, forfeiture, abandonment. The chapter also covers the concept of marketable title, reviews the wide variety of definitions of marketable or merchantable title issued by the state courts, and reviews the impact of marketable record title acts.

* This chapter is based in part on Chs. 34-36, 57 of George W. Thompson, Commentaries on the Modern Law of Real Property (John S. Grimes ed. 1963, 1978), which made a significant contribution toward preserving the American common law governing title to real property interests.

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CHAPTER 91 TITLE AND MARKETABLE TITLE *

11-91 Thompson on Real Property, Thomas Editions § 91.02

AUTHOR: Professor David A. Thomas J. Reuben Clark Law School Brigham Young University

§ 91.02 The Concept of Title.

[Go To Supp]

Any attempt to define "title" to real estate is problematic. If "property" is the sum of all the rights, powers, privileges, and immunities that a society recognizes in a certain specific thing, then title is the sum total of all such interests that the society permits any person or entity to exercise.

§ 91.02(a) Title and Possession.

In a society without law, title and possession are synonymous. As legal rights are evolved it becomes possible to separate possession and title. Title is still sometimes defined in terms of a just right of possession n1 exclusive in the title holder. n2 It is better described as a combination of all the possessory and statutory rights that the political philosophy of the jurisdiction permits to be held by persons. n3 It is not a thing of physical attributes, but is a conglomerate of jurisdiction and substantive legal rights fused with the residuals of equitable remedies all developed historically out of feudal notions and medieval conditions. n4

§ 91.02(b) Title and Ownership.

As used with respect to real estate, title is usually conceived as a fee interest. n5 A person is said to have title to that which is by right that person's property, and that property is that over which the person may by right exercise an exclusive dominion. Actual or constructive possession of the property, coupled with the legal right of possession, will constitute a good and sufficient title. So, the union of possession, the right of possession, and the right of property constitute a complete title to lands, tenements, and hereditaments. n6

The term indicates the evidence of ownership, or the channel through which an estate in land is acquired, and when used in a legal sense, it is sometimes said to mean:

- ownership, n7
- an estate in fee, n8

- a right of possession, n9 or
- the evidence of one's right of possession. n10

It must be understood, however, that while there must be a union of these elements to constitute a complete and perfect title, one may have title to a lesser estate than a fee simple. n11

Title signifies, not the fact of one's possession, but the right of possession. n12 Possession is prima facie evidence of a title in fee and implies a right to possession and ownership of title conclusive except as against one who proves a better title. n13 Possession is title as against all the world except the true owner in many states, n14 and it may be synonymous with title as in the acquisition of abandoned property or unclaimed land, and possession may ripen into title by adverse possession.

§ 91.02(c) Title and Estate.

Sometimes the word "title" is used in a general sense, as including any title or interest; but "title" in common acceptance, and when used in reference to real property, implies an estate in fee. n15 An estate in real property is something entirely distinct, not only from the property itself, but also from the method of holding it and from the title by which it may be acquired or held. The term "estate" signifies the relation in which one stands with regard to the property, or the interest one has therein, while "title" indicates the evidence of ownership or the channel through which it is acquired, or the means whereby one is able to assert, maintain, or continue one's possession. n16 Title to real estate is in someone at all times, hence there is no such thing as an unvested title. n17

§ 91.02(d) The Concept of Marketable Title.

The adjectives imperfect, good, marketable, merchantable, clear, and perfect are often applied to title generally to denote the presence or absence of facts that would indicate that another than the one claiming to be the owner may be claiming an interest in or to hold a claim against the property, or to have made such claim at one time. The words insurable title have also come into prominence, being used to denote a claim of ownership so supported by the facts that an insurance policy can be written thereon insuring against any other claims to the property asserted by others and not specifically excepted.

A clear and perfect title is one that shows an unblemished record in the chain from the original grant by the sovereign down to the present owner or where any defects of record have been cleared by proper judicial proceedings, such as a quiet title suit, together with the absence of any parol evidence denoting hidden claims or equities. n18 The words good, merchantable, or marketable n19 are commonly used to denote a title that, while subject to some defects of record, can be proven by affidavits, proof of adverse possession, or other evidence supportable in a court of law, to be valid as against all comers, i.e., one that could be sustained if tested in a legal proceeding. n20 Other courts take the position, however, that a title is not marketable if it must depend on parol evidence to clear a defect of record. n21 The courts are divided as to whether a title can be said to be "good" unless all claimants can be brought before the court that is called to pass upon it. n22

Actually a title may present a perfect record and still not be "good." n23 Deeds may be forged or there may be foreign adoptions, divorces, marriages, or other situations not shown on the record that give rise to valid legal or equitable interests in the property enforceable against even bona fide purchasers for value without notice. But if the title is clear of record a burden is placed on one questioning it to prove the existence of facts off the record that establish the existence of other claims. n24 If the title is not "clear" of record some jurisdictions permit the alleged owner to prove its validity in a dispute with a third party, n25 while others decline to hold the title "good" in such circumstances, n26 because the party in whose favor the defect runs is not before the court, holding in effect that a title dependent upon adverse

possession is not "good." n27 While there has been some attempt to make "insurability" and "marketability" synonymous, most courts distinguish between the two, holding, however, that a title that cannot be insured is also not "marketable." n28 Marketable title is discussed more fully in this chapter at § 91.09 *infra*.

FOOTNOTES:

(n1)Footnote 1. *Horney v. Price, 128 S.E. 321 (N.C. 1925). Yoder v. State, 438 S.E.2d 689 (Ga. App. 1993)* (property owner has right to possess his property); *In re M & L Business Mach. Co., 160 B.R. 851 (Bankr. D. Colo. 1993)* (one of the interests in property included in the total bundle of property rights is the right of possession).

(n2)Footnote 2. *Petition of Borough of Boyertown, 466 A.2d 239 (Pa. Commw. 1983). City of Lansing v. Edward Rose Realty, 502 N.W.2d 638 (Mich. 1993)* (a component of a private owner's property rights is the right to exclude others); *Mobil Pipe Line Co. v. Smith, 860 S.W.2d 157 (Tex. App. 1993)* (owner of land has title and is entitled to possession of premises and may grant rights to other parties to use either surface or subsurface).

(n3)Footnote 3. *Harris v. Southeast Portland Lumber Co., 262 P. 243 (Or. 1927). In re Estate of Mocny, 630 N.E.2d 87 (Ill. App. 1993)* (owner of property has absolute right during his lifetime to dispose of his property as he sees fit).

(n4)Footnote 4. *United States v. Gossler, 60 F. Supp. 971 (D. Or. 1945).*

(n5)Footnote 5. *United States v. Hunter, 21 F. 615 (C.C.D. Mo. 1884).*

(n6)Footnote 6. *In re Lee Rd. Partners, 155 B.R. 55 (Bankr. E.D.N.Y. 1993)* (under Florida law, "constructive possession" is that which law annexes to title; one must knowingly have power and intention to exercise dominion or control over property such as making ordinary use and taking ordinary profits of the land, rent, taxes, or mortgage).

(n7)Footnote 7. *Society for Sav. v. Bragg, 444 A.2d 919 (Conn. Super. 1981) overruling recognized, H&P Enterprises v. Jeffrey B. Harris, 1999 Conn. Super. LEXIS 698* (Mar. 4, 1999); *Rent Control Bd. v. Praught, 619 N.E.2d 346 (Mass. App. 1993)* (record title is evidence of ownership but not decisive factor, particularly in the context of rent control); *Missouri Mexican Prods., Inc. v. Dunafon, 873 S.W.2d 282 (Mo. App. 1994)* (at common law, title is prima facie evidence of ownership, but is not the *sine qua non* of ownership).

(n8)Footnote 8. *Reaux v. Iberia Parish Police Jury, 454 So. 2d 227 (La. App. 1984), writ denied, 458 So. 2d 120 (La. 1984).*

(n9)Footnote 9. *Central Kansas Power Co. v. State Corp. Comm'n, 561 P.2d 779 (Kan. 1977); Farmland Indus., Inc. v. State Corp.. Comm'n, 971 P.2d 1213 (Kan. App. 1999).*

(n10)Footnote 10. *Ganbaum v. Rockwood Realty Corp., 308 N.Y.S.2d 436 (1970).*

(n11)Footnote 11. *Sterner v. Nelson, 314 N.W.2d 263 (Neb. 1982).*

(n12)Footnote 12. *Ganbaum v. Rockwood Realty Corp., 308 N.Y.S.2d 436 (1970); Indiana Waste Sys. v. Indiana Dep't of State Revenue, 633 N.E.2d 359 (Ind. 1994)* (possession is not tantamount to ownership, but raises rebuttable presumption of ownership).

(n13)Footnote 13. *Michelsen v. Leskowicz, 55 N.Y.S.2d 831 (1945) aff'd, 63 N.Y.S.2d 191 (1946).*

(n14)Footnote 14. *Anthony v. Int'l Paper Co., 180 S.W.2d 828 (Ark. 1944).*

(n15)Footnote 15. *Kohl Indus. Park Co. v. Rockland County, 710 F.2d 895 (2d Cir. 1983); Gillespie v. Broas, 23 N.Y. (Barb.) 370 (1856).*

(n16)Footnote 16. *Howard v. Mitchell, 105 S.W.2d 128 (Ky. 1936).*

(n17)Footnote 17. *Calvary Presbyterian Church of Baltimore City v. Presbytery of Baltimore United Presbyterian Church in U. S., 386 A.2d 357 (Md. App. 1978).*

(n18)Footnote 18. *First Am. Title Co. of El Paso v. Prata, 783 S.W.2d 697 (Tex. App. 1989); Hanlon v. McLain, 242 P.2d 732 (Okla. 1952); Chemicals Inc. v. Holland, 1999 Tex. App. LEXIS 7658.*

(n19)Footnote 19. *Patten of N.Y. Corp. v. Geoffrion, 598 N.Y.S.2d 355 (1993).*

(n20)Footnote 20. *Wilson Close, Ltd. v. Crane, 499 N.W.2d 732 (Iowa App. 1993).* Jeremy I. Farkas, *Feature: Real Estate Law--Biachi II/S. 144, 25 Ver. B. J. & L. Dig. 57 (Dec. 1999).*

(n21)Footnote 21. *Caselli v. Messina, 567 N.Y.S.2d 972 (1990). aff'd, 193 A.D.2d 775 (N.Y. App. Div. 1993).*

(n22)Footnote 22. *Chesman v. Cummings, 7 N.E. 13 (Mass. 1886).* Keith L. Butler, Notes & Comments: *Long Live the Dead Hand: A Case for Repeal of the Rule of Perpetuities in Washington, 75 Wash. L. Rev. 1237 (2000).*

(n23)Footnote 23. *Cornell v. Andrews, 35 N.J. Eq. 7 (1882).*

(n24)Footnote 24. *Douglass v. Ransom, 237 N.W. 260 (Wis. 1931).*

(n25)Footnote 25. *Minister Reformed Protestant Dutch Church v. Madison Ave. Bldg. Co., 108 N.E. 444 (N.Y. 1915). In re Stacy, 99 B.R. 142 (Bankr. D. Mass. 1989)* (commenting on the difference between "clear" or "record" title and "marketable" title).

(n26)Footnote 26. *Lynbrook Gardens, Inc. v. Ullman, 53 N.E.2d 353 (N.Y. 1943) cert. denied, 322 U.S. 742 (1944).*

(n27)Footnote 27. *Pratt v. Eby, 67 Pa. 396 (1871).*

(n28)Footnote 28. *Green v. Sams, 433 S.E.2d 678 (Ga. App. 1993). In re Oyster Bay Cove, Ltd., 161 B.R. 338 (Bankr. E.D.N.Y. 1993)* (under New York law, marketable title does not assure the purchaser of title free from doubt or every encroachment but from defects in title that are more than simply possible or very remote; marketability of title rests on whether there is objection to title that would interfere with sale or with market value of property; there is a distinction between marketable and insurable title; easements that are open and notorious do not make title unmarketable).

* This chapter is based in part on Chs. 34-36, 57 of George W. Thompson, Commentaries on the Modern Law of Real Property (John S. Grimes ed. 1963, 1978), which made a significant contribution toward preserving the American common law governing title to real property interests.

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CHAPTER 91 TITLE AND MARKETABLE TITLE *

11-91 Thompson on Real Property, Thomas Editions § 91.03

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§ 91.03 Slander of Title.

[Go To Supp]

Slander of title is the oral or written false and malicious statement, made in disparagement of a person's title to real or personal property causing the titleholder special damage. The essential elements of such an action are:

- the uttering and publication of the slanderous words by the defendant,
- the falsity of the words,
- malice, and
- special damages. n29

In an early New York case it was said that the cause of action "is denominated slander of title, by a figure of speech, in which the title to land is personified, and made subject to many of the rules applicable to personal slander, when the words themselves are not actionable." n30 The element of malice, express or implied, in making slanderous statements respecting the title of another's property, is essential to the recovery of damages, and in the absence of proof of such malice the action will fail. n31 While the statement may be false, or made without right, there can be no legal malice and no action will lie, if the statement is made in good faith and with probable cause. n32 If the statement is made by a stranger, the law presumes malice; but if the party making the statement is also interested in the matter and announces the defect of title in good faith, either to protect the party's own interest or to prevent the commission of a fraud, malice is not presumed. n33

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LEXIS: slander! w/15 title w/15 property

FOOTNOTES:

(n1)Footnote 29. *Kennedy v. Kennedy, 819 S.W.2d 406 (Mo. App. 1991). Rorvig v. Douglas, 873 P.2d 492 (Wash. 1994)* (Elements of Slander of Title: 1. False words, 2. maliciously published, 3. with reference to some pending sale or purchase of property, 4. which goes to defeat plaintiff's title, and 5. results in plaintiff's pecuniary loss. Malice is not satisfied when made in good faith or prompted by reasonable belief in its veracity); *Sannerud v. Brantz, 879 P.2d 341 (Wyo. 1994)* (Slander of Title: False and malicious statement in disparagement of person's title to real or personal property or of some right causing him real, not speculatory, special damage); *Morford v. Eberly & Meade, Inc., 879 P.2d 841 (Okla. App. 1994)* (Slander of title: publication of a false statement with malice and ownership or possession of the property that is the object of the publication); *Scott-Kinnear, Inc. v. Eberly & Meade, Inc., 879 P.2d 838 (Okla. App. 1994)* (Slander of title: publication of a false statement with malice and ownership or possession of the property that is the object of the publication); *Wilton v. Mountain Wood Homeowners Ass'n, 22 Cal. Rptr. 2d 271 (Cal. App. 1993)* (Disparagement of title is when a person without privilege publishes matter that is untrue and disparaging to another's property that would lead a reasonable person to foresee that conduct of a third person as purchaser or lessee might be determined thereby); *Stalberg v. Western Title Ins. Co.,32 Cal. Rptr.2d 750 (Cal. App. 1994)* (Slander of title: when an unprivileged publication of a false statement disparages the title to property and causes pecuniary loss); *Hicks v. McLain's Bldg. Materials, 433 S.E.2d 114 (Ga. App. 1993)* (Must prove special damages as a result of defamatory words to sustain defamation of title action); *Coppock & Teltschik v. Mayor, Day & Caldwell, 857 S.W.2d 631 (Tex. App. 1993)* (Purchasers of property are required to prove loss of specific sale or sales to recover in slander of title action); *In re Burzynski, 989 F.2d 733 (5th Cir. 1993)* (The elements of a business disparagement claim are publication of disparaging and false words with malice by a person without privilege to do so, causing special damages); *Brown v. Nevins, 499 N.W.2d 736 (Iowa App. 1993)* (The elements for slander of title are uttering or publication of slanderous words, falsity, malice, special damages to plaintiffs with an estate or other interest in the property slandered); *Tym v. Ludwig, 538 N.W.2d 600 (Wis. App. 1995)* (recovery in slander of title may be based on loss of market). *LaBarge v. City of Concordia, 927 P.2d 487 (Kan. App. 1996); Frempong-Atuahene v. Redevelopment Auth. of the City of Philadelphia, 1999 U.S. Dist. LEXIS 3608 (E.D. Pa. 1999); Worldwide Forest Prods. v. Winston Holding Co., 1999 U.S. Dist. LEXIS 2605 (N.D. Miss. 1999)* (claimed barred by statute of limitations); *Arrowhead by the Lake Ass'n, Inc. v. Arrowhead by the Lake, 1999 Conn. Super. LEXIS 125 (Conn. Super. 1999); Maragos v. Union Oil Co., 584 N.W.2d 850 (N.D. 1998); Builders Servs. v. Habitat Condo. Owners' Ass'n, 1999 Ohio App. LEXIS 104 (Ohio App. 1999); Windsor Props., Inc. v. Dolphin Head Constr. Co, 498 S.E.2d 858 (S.C. 1998); Hoppel v. De Buys, 91 Wash. App. 1039 (Wash. App. 1998).*

(n2)Footnote 30. *Kendall v. Stone, 5 N.Y. 14 (1851).*

(n3)Footnote 31. *Stanton v. Dachille, 463 N.W.2d 479 (Mich. App. 1990). Contract Dev. Corp. v. Beck, 627 N.E.2d 760.* (Ill. App. 1994) (Act of maliciously recording a document that clouds another's title to real estate is actionable as slander of title); Anvil v. CBS 60 Minutes, 836 F. Supp. 740 (E.D. Wash. 1993) (Plaintiff carries initial burden to show by clear and convincing evidence that the objectionable statement was false and made with actual malice); *Sun Valley Land & Minerals, Inc. v. Burt, 853 P.2d 607 (Idaho App. 1993)* (There must be false and published claims with malice for slander of title); *Trotter v. Indiana Waste Sys., 632 N.E.2d 1159 (Ind. App. 1994)* (Plaintiff must prove false statements made with malice and that they sustained pecuniary loss as a necessary and proximate cause of the slanderous statements); *Patterson v. United Companies Lending Corp., 4 F. Supp. 2d 1349 (M.D. Ala. 1998)* (under Alabama law, malice may be established by proof that defendant intentionally disparaged plaintiff's title to property or recklessly disparaged plaintiff's title without information sufficient to support a bona fide belief).

(n4)Footnote 32. *Hamilton v. Amwar Petr. Co., 769 P.2d 146 (Okla. 1989). Rorvig v. Douglas, 873 P.2d 492 (Wash. 1994)* (Elements of Slander of Title: 1. False words, 2. maliciously published, 3. with reference to some pending sale or purchase of property, 4. which goes to defeat plaintiff's title, and 5. results in plaintiff's pecuniary loss. Malice is not satisfied when made in good faith or prompted by reasonable belief in its veracity); *Sisson v. J.F. Day and Co., 619 So. 2d 1339 (Ala. 1993)* (A bona fide action on a colorable claim cannot support slander of title); *Chillemi v. Rorabeck, 629 So. 2d 206 (Fla. App. 1993)* (Lien not wrongfully filed with malice by vendors who had warranted that the property was free and clear of encumbrances); *Greenland Homes, Inc. v. E&S Marketing Resources, Inc., 227 B.R. 710 (Bankr. S.D. Ind. 1998)* (no malice in filing Notice of Intent and refusal to release Mechanic's Lien on property); *In re* Nielsen,

1998 Bankr., Lexis 816 (Bankr. D. Minn 1998) (The court acknowledged that in a Minnesota slander of title case, a finding of malice must be based on disparaging statements made without a good faith belief in their truth. This requirement is different from the "actual ill will" standard used to define malice in defamation cases).

(n5)Footnote 33. *Maass v. Christensen, 414 So. 2d 255 (Fla. App. 1984).*

* This chapter is based in part on Chs. 34-36, 57 of George W. Thompson, Commentaries on the Modern Law of Real Property (John S. Grimes ed. 1963, 1978), which made a significant contribution toward preserving the American common law governing title to real property interests.

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CHAPTER 91 TITLE AND MARKETABLE TITLE *

11-91 Thompson on Real Property, Thomas Editions § 91.04

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§ 91.04 Acquisition of Title.

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The common-law writers recognized the methods of acquiring title to real property as acquisition in case of abandonment, by descent, by act of law, and by purchase or act of the parties. n34 Acquisition by act of law may be said to include escheat and forfeiture. n35 By "descent or hereditary succession" is understood the means whereby a person upon the death of the ancestor acquires the estate of the ancestor as the ancestor's heir at law. n36 It is only when the law transfers property to an heir that title is obtained by descent. n37 The principal distinction between title by descent or succession and title by purchase is that the estate by purchase acquires a new inheritable quality and is rendered descendible to the blood in general of the person acquiring it. An estate thus acquired does not, like that acquired by descent, render the owner answerable for the acts of the ancestors. n38 Such statutory rules as require ancestral blood as a prerequisite to descent do not operate upon estates acquired by purchase. n39 Whenever one's heirs obtain title to lands by a will in which estates or shares are devised in a manner different from that in which the law would give it, they get it by purchase, but where the heirs take neither a greater nor a lesser estate by the devise than they would have done without it, they are deemed to get it by descent. n40

A record title is the best evidence of ownership and is not easily defeated. n41 Ordinarily the transfer or assignment of realty must be by a deed of conveyance. n42 One cannot lose vested title to land by an oral admission that it is the property of another. Disclaimer of freehold can only be by deed or in a court of record. n43

For convenience, title by purchase may be divided into two divisions: First, title by purchase other than by alienation; and second, title by alienation. Under the first division are included:

(1) Title by escheat,

(2) by occupancy,

(3) by accretion,

(4) by forfeiture,

(5) by abandonment,

(6) by eminent domain,

(7) by estoppel,

(8) by prescription, or title by adverse possession.

Title by alienation may be divided into:

(1) alienation other than by private grant, and

(2) alienation by private grant.

Alienation other than by private grant may be divided into these divisions: by devise, by matter of record, by special custom, by public grant, and title by office grant. The term "alienation" embraces every mode of passing real estate by act of the parties, as distinguished from passing it by operation of law. n44

FOOTNOTES:

(n1)Footnote 34. *Commerce Union Bank v. Warren County, 707 S.W.2d 854 (Tenn. 1986).*

(n2)Footnote 35. *See, e.g., Butterworth v. Caggiano, 605 So. 2d 56 (Fla. 1992). But see: In re Mesa, 232 B.R. 508 (Bankr. S.D. Fla. 1999); In re Kravitz, 225 B.R. 515 (Bankr. D. Mass. 1998). Distinguished by Smith v. Smith, 761 So. 2d 370 (Fla. Ct. App. 5th District 2000).*

(n3)Footnote 36. *First Nat'l Bank of Nev. v. Wolff, 202 P.2d 878 (Nev. 1949).* Gregory M. Stein, *Article: Who Gets the Takings Claim? Changes in Land Use Law, Pre-Enactment Owners, and Post-Enactment Owners, 61 Ohio St. L.J. 89 (2000).*

(n4)Footnote 37. *Newlin v. Gill, 237 S.E.2d 819 (N.C. 1977).*

(n5)Footnote 38. *Hardy v. Wheaton, 374 So. 2d 790 (Miss. 1979).*

(n6)Footnote 39. *Ramsey v. Ramsey, 7 Ind. 607 (1856).*

(n7)Footnote 40. *National Shawmut Bank of Boston v. Joy, 53 N.E.2d 113 (Mass. 1944). superseded by statute as stated in, Harrison v. Marcus, 486 N.E.2d 710 (Mass. 1985).*

(n8)Footnote 41. *Estate of Mark v. H.H. Smith Co., 547 N.E.2d 796 (Ind. 1989).*

(n9)Footnote 42. *Bounds v. Makar, 493 So. 2d 268 (La. App. 1986). In re Application of Olmstead, 646 N.E.2d 1275 (Ill. App. 1995)* (a tax deed conveys title free from all other liens and encumbrances, including existing leases).

(n10)Footnote 43. *Home Ins. Co., New York v. Latimer, 264 P. 103 (Ariz. 1928); Huddleston v. Huddleston, 265 S.W.2d 942 (Ky. 1954).*

(n11)Footnote 44. *Industrial Trust Co. v. Pendleton, 40 A.2d 849 (R.I. 1945).*

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CHAPTER 91 TITLE AND MARKETABLE TITLE *

11-91 Thompson on Real Property, Thomas Editions § 91.05

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§ 91.05 Title by Escheat.

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All states today have some type of legislation that provides for title to property, of one who dies intestate with no heirs within the statutory circle of consanguinity, to pass to the state. Some have other causes for the state acquiring title. n45 And even the United States has reasons for sharing in such windfalls. n46

§ 91.05(a) Origin of Escheat.

The historical origin of escheat in English law dates back to the Norman Conquest when all title rested with the crown. Grants by the king to tenants in chief were either defeasible life estates or defeasible fees. In either situation the feoffor retained a future interest when the feoffee or his successors died without lawful heirs. This reversion was in addition to the possibility of forfeiture for failure to pay the feudal dues and reliefs and for greater or lesser treason. Under subinfeudation, such escheat or forfeiture would benefit the immediate feoffor rather than the king. But with the workings of Quia Emptores Terrarium n47 over the years, which halted the process of subinfeudation, the crown became the beneficiary of escheat.

Today under certain peculiar circumstances the sovereign may acquire, or under the philosophy of seisin, reacquire, title to land other than by purchase or eminent domain. To such methods of acquisition is given the general term of "escheat." Escheat or forfeiture of title under one theory or another was the custom in many ancient lands. n48 It arose either through misconduct of the owner toward the sovereign, or through death of the owner without heirs recognized by the state as such. n49 What is now embraced in the modern conception of escheat had several sources of origin at common law. While seisin and subinfeudation were in full flower a felon's lands escheated to the lord and the felon's heirs were disinherited. n50 This was modified by statute n51 and escheat for treason can operate in the United States only during the lifetime of the traitor. n52 Moreover, state statutes generally prohibit attainder for felony today. Likewise, when a feoffee died without heirs, the feoffee's lands escheated to the lord. n53 If a corporation held lands and the corporation became extinct, the land reverted to the donor and did not escheat to the lord since a grant to a corporation was a grant upon condition subsequent that if it be dissolved the grantee could reenter. n54

§ 91.05(b) Historical Types of Escheat.

Common-law escheat arose from two sources:

(1) escheat propter singalis, or escheat because of failure of the blood, and

(2) escheat propter delictum tenentis, n55 or escheat by reason of the tenant's delinquency.

Escheat propter delictum tenentis, or punishment for felony, was really a type of forfeiture, since it operated to terminate the tenant's interest immediately rather than waiting until the tenant's death. Escheat propter singalis or for failure of the blood was escheat as we recognize it today. The word "escheat" originally signified anything going accidentally, or by chance, and when applied to realty it meant the going back or reversion thereof to the original owner. n56 According to the common law, the word escheat means the return of real property to the lord of the fee when the person last seised dies without heirs, or that person's blood has been attainted. n57 It seems to have been founded on the want of a tenant to perform the services required by the tenure. n58

In England the ground upon which land escheated to the lord was based on the fact that no person remained to perform the feudal services that were the condition upon which the land was granted, the interest of the lord being in the nature of the reversion contingent upon the property becoming tenantless; n59 as a result of Quia Emptores n60 virtually all land came to be held of the crown, hence, escheats were to the crown.

Originally escheat was one of the incidents of feudal tenure, and is still occasionally mentioned as marking the feudal origin of land titles in this country. But the term is generally applied in a sense far different from its original meaning. Escheat, in this country, depends upon positive statutes. In some states the doctrine of escheat rests upon the broad principle that when the title to land fails from defect of heirs, or when from any cause there ceases to be an individual proprietor of the land, it reverts back to the community. n61 Under the feudal system escheat was a privilege of the feudal lord, but in modern times, it is the collective right of all when the individual right has failed. n62 In this country "escheat" is an attribute of sovereignty, n63 the term signifying a falling of a decedent's estate into the general property of the state upon the decedent's death intestate and without lawful heirs, and is applied to all kinds of property of whatever nature. n64 The state is deemed to occupy the place and hold the rights of the feudal lord in case the property escheats, n65 and there is nothing about it now but the name which is feudal. n66 In the United States the state stands in the shoes of the crown and escheats benefit the state.

§ 91.05(c) The Theory of Modern Escheat.

In this country "escheat" now means the passing of an intestate's property into the general property of the state on the death of the intestate owner without heirs. It is applied indifferently to all rights of property on the theory that, when the owner dies leaving no one entitled to take it either by will or descent, the state is the universal heir, n67 it is a fundamental principle that, if the ownership of property becomes vacant, the right must necessarily subside into the whole community in whom it was vested at the origin of society. n68 Some courts hold that the state, in its right of sovereignty, has original and ultimate property rights in all lands within its jurisdiction, and on the death of the owner of realty intestate and without heirs, the property shall return to the state. n69 The abolition of feudal tenure and the making of all land in the state allodial makes "escheat" an incident of sovereignty instead of an incident of tenure. n70 Under this theory the state is the original and ultimate proprietor of all lands within its limits, and thus the state takes the land of the owner who dies intestate without lawful heirs as the sovereign, and not as an heir. n71 Other courts treat the state as the ultimate heir and thus consider escheat as a type of descent. n72

If the state does take as the feudal lord, then it so reacquires title through something in the nature of a reversion. This would indicate that--as at early English law after the conquest--the holder of even a fee simple title holds of the sovereign and, upon escheat, the land reverts to the sovereign free of all encumbrances with which it had been burdened at the time of escheat. n73 If, however, the state merely takes as the ultimate heir, then the title in the hands of the state

after escheat is subject to the same encumbrances as it had in the hands of the former title holder. The public policy in favor of freedom of alienation would seem to demand this interpretation. Otherwise, land as security for debt would be an uncertain factor depending upon the lienee not dying intestate without heirs. This is the English rule today. n74

It would appear both in the common-law history and from the standpoint of public property that in the case of real property the state should take the title at the moment there ceases to be an owner. The theory found in the law of personalty that abandoned property becomes as a wild animal, title to which passes to the first person to reduce it to possession would lead to endless litigation in realty. Hence, the state in the absence of statute should take title to realty as soon as it is ascertained that there is no owner, even in the absence of statute. Where there is a title holder, however, that holder cannot be divested of that title in the absence of statute and subsequent proper judicial proceedings. Cases and statutes on the subject of escheat are of comparative rarity in the United States.

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LEXIS: escheat w/15 title or property or interest!

§ 91.05(d) Interests Subject to Escheat.

Originally equitable interests did not escheat, since common-law escheat arose out of the principle of seisin. n75 Now it is generally held that, tenure no longer existing, the state may also take equitable interests by escheat. n76 At common law only land was subject to escheat. n77 In the United States the word "escheat" is sometimes used and applied to all kinds of property of whatever nature and is not always used in the sense of reversion of real property alone. n78 The common-law rule limiting escheat to real estate or an interest therein has, in some states been changed by statute so that all property, real and personal, and every right in property of whatever nature is subject to escheat to the state. n79 The principle underlying American escheat is that all property not belonging to anybody else shall go to the state, n80 since a freehold cannot be held in abeyance. n81 Therefore, the practically uniform rule of this country is that both legal and equitable interests escheat to the state. n82 An estate held in trust may be subject to escheat when the trust expires. n83 At common law, trustees held beneficially on the death of the beneficiary intestate and without heirs. n84 But as a general rule today, the beneficiary's portion of trust corpus escheats upon death of the beneficiary without heirs. n85 Where all members of a partnership have died intestate and without heirs or known kindred, the property of the firm escheats to the state. n86 Only the balance of an estate after the expense of administration and claims against the estate have been paid will escheat. n87 All doubt as to whether the property is subject to escheat is resolved against the state. n88

§ 91.05(e) Reasons Underlying Modern Escheat.

The United States Constitution has effected substantial changes in the law of escheat by prohibiting bills of attainder for murder and treason. This has caused dissent among the courts over whether this prohibition extended to inheritance in the case of killers benefiting from their crime and in the case of disfranchised felons. Likewise, the United States Supreme Court frowned upon laws prohibiting inheritance by aliens where treaties intervened and nowhere today does lack of virginity affect inheritance.

Forfeiture of property for such causes cannot extend beyond the criminal's lifetime. Very few states today carry in their criminal codes civil penalties for murder except where the killer profits from the crime. Hence, escheat today arises from one of four causes, death without legal heirs, alienage, termination of corporation and special bona vacantia or abandoned property statutes. When a person dies intestate and leaves no heirs capable of inheriting the real estate, the title thereto vests at once, by escheat, in the state, n89 since a freehold must always vest somewhere. n90 But title does not vest in the state pending the outcome of an action brought to determine heirship. n91 The rule that land escheats on failure of heirs does not, of course, apply where the owner dies leaving a will disposing of the land thereby. n92 If the deceased attempted to dispose of his property by will, but the will is void or ineffective as to all or part of the property

devised, and as a result the ownership is left as though the deceased had died intestate, the property may escheat. n93 Although the decedent may have left heirs capable of inheriting the land, it escheats on failure of such heirs to claim the land. n94 Some statutes provide that if any person shall disappear and the person's whereabouts remain unknown for the period of stated years, and no knowledge of such person can be procured for a period of time, the person shall be presumed to be dead, and if there are no person or persons found who would be the heir or heirs-at-law, if such person were dead, the estate of such absentee escheats to the state. n95

At common law if an alien who was entitled to hold and did hold bond died without having made a conveyance of land acquired by deed or devise, the same vested immediately by escheat in the state, without any inquest of office found. n96 This was sometimes spoken of as a punishment to the alien for attempting to acquire realty. n97 If all the heirs of the intestate are aliens the title escheats to the state without office found. n98 At common law a nonresident alien could take and hold real estate by act of the parties, that is, by grant, deed, or will. The alien could hold against all the world except the state, and could hold even as against the state until office found or other equivalent act. In this regard no distinction was made between alien friends and alien enemies. n99 Before death and until the state brings proceedings to enforce the escheat, the alien has complete dominion over the property which has been acquired by grant or demise, and by making a valid conveyance may defeat the right to an escheat; n100 but if it be shown that such conveyance was fraudulently made for the purpose of preventing the escheat, it may be set aside by the state. n101 Likewise, the possibility of an escheat cannot be avoided by taking title in the name of a trustee for the benefit of an alien. n102 If heirs at law are incapable of taking by reason of their alienage, the situation is the same as if there were no heirs, and the property escheats. Where only some of the persons who are heirs at law are incapable of taking by reason of their alienage, the land does not escheat, but the whole title vests in those heirs who are competent to take. n103 In order that an estate may escheat on account of alienage of heirs, it is necessary that all the heirs be aliens; but if those who are not aliens trace their descent through an alien, they will not stand in the way of an escheat. n104 Lacking federal interference, a state may impose such conditions as to it may seem proper, upon the right of aliens to take property within the jurisdiction of the state by will or by succession. n105 The necessity for judicial proceedings is denied in some jurisdictions. n106 By statute in many states the disability of aliens to take and hold lands has been wholly removed, so that an alien, whether a resident or not, is permitted to take and hold lands in fee simple absolute, thus permitting the alien to transmit the property by descent to children, or to alien heirs. n107

The right of states to limit inheritance by aliens has been greatly restricted by decisions of the Supreme Court to the effect that under its treaty-making power the federal government may override state laws and make aliens of a particular nation heirs despite contrary state laws. This is particularly true where there are reciprocal inheritance rights. n108

Ironically title to land on which Indians are settled rests in the United States under long-established doctrine. n109 Traditionally, in the absence of any special right given by treaty or special act of Congress the Indians had but a right of occupancy and when actual occupancy ceased the land reverts to the United States. n110

Sometimes corporation statutes or charters, particularly those governing charitable or nonprofit organizations, contemplate that upon dissolution of the corporation, all of its property or so much of the funds otherwise distributable to its members or shareholders who cannot be located shall escheat to the state. n111 Other statutes prohibit the holding of land by certain types of corporations and provide for forfeiture to the state of lands so illegally held.

Some states today have adopted bona vacantia (ownerless property) statutes. Under the theory of these laws the state becomes the custodian of property of those who have disappeared or who for any reason have failed to claim such property, whether abandoned or placed in the custody of others. Such statutes usually contemplate that the state shall take possession of all property which has not been claimed for a period of years, and if the owner does not appear within a reasonable time, usually after advertisement, the title passes permanently to the state as a form of escheat. n112 The true escheat statutes thus differ from bona vacantia laws. In the former situation, the title vests immediately in the sovereign. In bona vacantia situations, the state becomes custodian of the property with the responsibility of seeking the owner; only after statutory time has elapsed does title pass to the state by escheat. In some states, if there is a devise for

charitable purpose which cannot be carried out, the property escheats, rather than passing by intestacy. n113

Many states have adopted the Uniform Disposition of Unclaimed Property Act providing for disposition of abandoned property and property of those who have died intestate without leaving legal heirs. n114

Where escheat is based on the philosophy that the state takes as the ultimate heir, property goes to the state, subject to all mortgages, judgment liens, mechanics' liens, easements, and other restrictions and encumbrances thereon at the time the escheat occurs. n115 The state is not considered a purchaser for value and takes only such title and right as the owner actually had when the title was escheated. n116 Lands that have escheated to the state are subject to the widow's dower. n117 At common law where the theory was that the king or the lord took by forfeiture or by way of reversion and not as the ultimate heirs, however, the creditors of the late owner lost all means of recourse to the land for the purpose of the satisfaction of their debts. n118 None of the present American statutes proceed upon the theory of reversion to the lord or of forfeiture, except in the case of property illegally used. Hence, the state takes such property subject to outstanding interests and valid liens. n119

§ 91.05(f) Enforcement of Escheat.

As a general rule no one can enforce or establish an escheat except the state. n120 An action in escheat is essentially one in rem and the court must have jurisdiction over the res. n121 An inquest is not always necessary in order that there may be an escheat. Thus, where a citizen dies intestate without heirs, the real property immediately reverts to the state without the necessity of a judicial proceeding n122 or office found. n123 The state need not enter upon the land nor obtain a judgment of a court to consummate title of an estate under an escheat. n124 In some states, however, a judicial proceeding is required to effect an escheat for want of inheritable blood. n125 Thus a valid escheat proceeding must necessarily establish the fact of death and that there is no one qualified after such death to take the property. n126 The declaration and enforcement of an escheat is ordinarily a special proceeding regulated by statute. n127 The initiation and prosecution of escheat proceedings must be in conformity with the statute. n128 When the statute allows a period of time within which heirs may appear and claim the property, no escheat can be declared until after the expiration of such period of time. n129 An escheat proceeding cannot be maintained while administration upon the estate is pending. n130 Some statutes for enforcing escheat require an administration of the estate to determine whether the estate has escheated by default of heirs, even though there are no outstanding debts. n131

There is a presumption that an intestate left heirs and such presumption obtains until the claimant by escheat overcomes it by strong and convincing evidence. n132 The statutes ordinarily give the attorney general the power and the duty of instituting or causing to be instituted actions to enforce escheats to the state. n133 When the estate is under administration the proper method of procedure is for the state to appear in response to the usual statutory notice that the estate is about to be distributed and present its claim, although the state is entitled to intervene in the probate proceedings. n134 A statute dispensing with such preliminary notice of the appointment of an administrator has been held constitutional. n135

At common law, upon the death of a person intestate and without heirs, the escheat takes place instantly, and the title passes to the state without any legal procedure or ceremony. n136 No interval elapses between the death of the owner without heirs and the vesting of the title in the state under a constitutional provision that all lands, the title to which shall fail from defect of heirs, shall escheat to the people. n137 Some judicial process may be necessary to dispossess a tenant or occupant, n138 but the title has usually passed before such action is taken. The same interest passes to the state as would have passed to the intestate's heirs if there had been any. n139 A judgment escheating property to the state is conclusive and binding upon all persons having either actual or constructive notice of the proceedings. The proceedings are presumed regular but this presumption does not prevail against record evidence of insufficiency or conclusive evidence of basic falsity. In a collateral attack on a judgment or decree of escheat only the existence of jurisdiction in the trial court can be considered. n140 The judgment or decree, made under statutory authority, after appropriate notice, is not open to collateral attack by a person claiming title as heir, n141 and such decree, if made in a state court having

jurisdiction of property located in such state, is binding against the world. n142 While a judgment of escheat is res judicata as to persons claiming as heirs, yet it is not conclusive of the nonexistence of heirs where the statute under which the escheat was taken provides for a restoration upon proof of heirship. n143 Real estate subject to escheat as where improperly held by a corporation or an alien, may be conveyed to a third person and good title passed as against the state prior to the institution of escheat proceedings. n144

The Uniform Unclaimed Property Act swallows most of the common-law instances of escheat. n145 The uniform act treats the state as the custodian of property which has not been claimed by its owner for seven years. The holder of such property is required to deliver it to the state which advertises for its owner, holds in custody for five years and then takes measures to escheat it.

FOOTNOTES:

(n1)Footnote 45. *Louisiana Health Serv. and Indem. Co. v. Tarver, 635 So. 2d 1090 (La. 1994)* (Reasons for custodial escheat law include: revenue-raising device; state receives use of unclaimed property and any income it may provide pending a claim by the missing owner, unclaimed property should benefit citizenry and return to stream of commerce. Also, discussion of Louisiana's Uniform Disposition of Unclaimed Property Act).

(n2)Footnote 46. *25 U.S.C. § 373b; 38 U.S.C. § 5201.* Ellen P. Aprill, *Article: Inadvertence and the Internal Revenue Code: Federal Tax Consequences of State Unclaimed Property Laws, 62 U. Pitt. L. Rev. 123 (Fall 2000).*

(n3)Footnote 47. 18 Edw. I, ch. 1.

(n4)Footnote 48. *See* II William Blackstone, Commentaries 252 (Saxon Law).

See Escheat of Funds of Unknown Person - Interpretation of an Ancient Statute, 29 Conn. B.J. 123.

(n5)Footnote 49. *Standard Oil Co. v. New Jersey, 341 U.S. 428 (1951).*

The effects of those in debt to the crown escheated to the king until the debt was satisfied. Provisions of Oxford, William Stubbs, Select Charts and Other Illustrations of English Constitutional History (9th ed. 1942).

Full faith and credit prevents multiple escheat of personalty. *Standard Oil Co. v. New Jersey, 341 U.S. 428 (1951).*

See Escheat /- Abandoned Property /- Full Faith and Credit as a Bar to Multiple Escheat of Intangibles, 59 Mich. L. Rev. 756.

(n6)Footnote 50. Called escheat propter delictum tenentis, Kenelm Edward Digby, An Introduction to the History of Real Property, c. 2, § 5; Coke on Littleton, § 13a; 1 Britton 14b, 15; 2 Britton 236b. Once the king had the right to lay waste the land, Bracton, 129. This right was given up by Magna Carta, c. 22 and the right of the king to the rents for a year and a day substituted, Britton, 14b. Later the king reacquired both rights statute prerogativa regis, 17 Edw. II.

If the heir was attainted of treason the lands on the father's death went to the lord. But if the terre-tenant was attainted of high treason the land escheated to the crown, Coke on Littleton, § 13a, even though the terre-tenant was a feoffee to uses. There was no attainder if hanged in furore belli, Coke on Littleton, § 13a, Littleton, 745, 746, 747. Attainder occurred if hanged or fled the realm or was outlawed, Coke on Littleton, § 92b.

(n7)Footnote 51. 7 Anne, c. 21; 17 Geo. II, c. 39; 54 Geo. III, c. 145; 384 Will. IV, c. 106, § 10.

Gavelkind was not escheatable for felony. "The father to the bough; the son to the plough." Francis Bacon, the Use of the Law, (1630).

Geo. II, c. 145 prevcated attainder for any crime except treason or murder from operating after death of the felon. 7 Anne 22 abolished forfeiture for treason after the pretender's death, beyond life of the felon. But this was repealed by 39 Geo. III, c. 93.

(n8)Footnote 52. U.S. Const., art. 3, § 3 prevents forfeiture for treason beyond the felon's death.

(n9)Footnote 53. Britton, 96b; Kenelm Edward Digby, An Introduction to the History of Real Property, c. 2, § 283. This was called escheat propter defectum sanguinis. Coke on Littleton, § 13a; 2 Glanvill, c. 17.

But note if the land escheated to the lord on death of the disseisor or his grantee without heirs, the disseisee could enter upon the lord. Littleton, 1, 3, c. 6, § 390.

(n10)Footnote 54. "Efchaeta apnd nos dicitur quiquid tenae proedir; alteruifue emolumenti quod vel mortua five haerede tenete vel ratione custodial haeredis yies infra aetatem exiftentis vel ex coufa alicujus (quod vacant) foresfactural clomina obvenit foldati. Moriente enion fine haerede tenente ad dominum remeat tenementum tanquam ad superiorem haeredem ex lege cinfeti tutum. Semiliter v rei capitalis (upta felmae) domanato nom of corruptionem serguinis haeredem jam habere non intelligitus." Henrici Spelmann, Glofforium, (1614).

(n11)Footnote 55. Stat. 25 Edw. III, c. 2, § 12.

Coke on Littleton, § 18a, indicates that where land of a tenant in capite escheated for treason the estate merged with the king's reversion so the king had the whole estate.

(n12)Footnote 56. *State v. Phoenix Sav. Bank & Trust Co., 132 P.2d 637 (Ariz. 1942); In re O'Brine's Estate, 371 N.Y.S.2d 453 (1975).*

(n13)Footnote 57. *Louisiana Health Serv. & Indem. Co. v. McNamara, 561 So. 2d 712 (La. 1990); Kavanaugh v. Cohoes Power & Light Corp., 187 N.Y.S. 216 (1921). Distinguished by 5-Star Premium Fin., Inc. v. Wood, 2000 U.S. Dist. LEXIS 15582.*

(n14)Footnote 58. Attorney-General v. Sands, Hardr. 488, 2 *Freem. 129, 3 Ch. Rep. 33 (1670).*

(n15)Footnote 59. *Burgess v. Wheate, 10 Eng. Rul. Cas. 614, 661.*

Holdsworth insists this was not a reversion. 3 William Searle Holdsworth, A History of English Law (3d ed. 1938) 133. *See also*, Frederic W. Hardman, *The Law of Escheat, 4 Law Q. Rev. 318 (1888).*

(n16)Footnote 60. 18 Edw. I, c. 1.

(n17)Footnote 61. *Walker v. Caldwell, 67 A. 1085 (Del. Ch. 1896).*

(n18)Footnote 62. *Petition of Abrams, 512 N.Y.S.2d 962 (1986).*

(n19)Footnote 63. *City of Providence v. Solomon, 444 A.2d 870 (R.I. 1982).*

(n20)Footnote 64. *In re Brine's Estate, 371 N.Y.S.2d 453 (1975); See Maine Beer & Wine Wholesalers Ass'n v. State, 619 A.2d 94 (Me. 1993)* (unclaimed bottle deposit values); *Presley v. County of Nassau, 560 N.Y.S.2d 173 (1990), aff'd, 591 N.Y.S.2d 72 (1992)* (ticket sales proceeds for concert that had been canceled after singer's death); *Baker v. West Carrollton, 597 N.E.2d 74 (Ohio 1992)* (unclaimed stolen property).

(n21)Footnote 65. 4 James Kent, Commentaries on American Law (rev. ed. 1889) 423, 424.

(n22)Footnote 66. *Wallace v. Harmstad, 44 Pa. 492 (1863).*

(n23)Footnote 67. *In re Twenty-one Slot Machines, 236 P.2d 733 (Ariz. 1951). superseded by statute as noted in State v. Clifton Lodge No. 1174, Benev. and Protective Order of Elks of U. S., 514 P.2d 265 (Ariz. App. 1973).*

(n24)Footnote 68. *Robinson v. State, 87 S.W.2d 297 (Tex. Civ. App. 1935).*

(n25)Footnote 69. *Klein v. Brodbeck, 15 F. Supp. 473 (D. Pa. 1934). Goldstein v. PHH Co., 123 Md. App. 214 (Md. Ct. Spec. App. 1998)* (stating that legislation was passed to promote the policy of ensuring that abandoned property would not fortuitously enrich private citizens but would escheat to the state for the benefit of the public).

(n26)Footnote 70. *Safane v. Cliffside Park Borough, 5 N.J. Tax 82 (1982).*

(n27)Footnote 71. *People ex rel. Kuntsman v. Shinsaku Nagano, 59 N.E.2d 96 (Ill. 1945).*

(n28)Footnote 72. *In re Lindquist's Estate, 154 P.2d 879 (Cal. 1944), cert. denied, California v. United States, 325 U.S. 869 (1945).*

In Pennsylvania the state takes as the ultimate heir. *United States v. Board of Fin. & Revenue, 85 A.2d 156 (Pa. 1951).*

Personal estate of veteran dying in a Veterans' Administration facility goes to the United States and not to the state, though the latter is by statute an ultimate heir. *In re Skriziszouski's Estate, 116 A.2d 841 (Pa. 1955); Matter of Kenny's Estate, 436 N.Y.S.2d 589 (1981).*

(n29)Footnote 73. *In re Melrose Ave., 136 N.E. 235 (N.Y. 1922).*

(n30)Footnote 74. Administration of Estates Act, 15 Geo. V. 323.

(n31)Footnote 75. Burgess v. White, 28 E.R.652 (1 Eden 177).

(n32)Footnote 76. *Johnston v. Spicer, 13 N.E. 753 (N.Y. 1887).*

(n33)Footnote 77. *Realty Assocs. of Portland v. Women's Club, 369 P.2d 747 (Or. 1962).*

(n34)Footnote 78. *Boswell v. Citronelle-Mobile Gathering, Inc., 294 So. 2d 428 (Ala. 1974). Maine Beer and Wine Wholesalers Ass'n v. State, 619 A.2d 94 (Me. 1993)* (statute held constitutional that requires beverage sellers to remit to the state 50% of unclaimed deposit values).

(n35)Footnote 79. *State v. Kearns, 257 P. 1002 (Mont. 1927); State v. Lancaster, 105 S.W. 858 (Tenn. 1907).*

(n36)Footnote 80. *Croner v. Cowdrey, 34 N.E. 1061 (N.Y. 1893). Delaware v. New York, 113 S. Ct. 1550 (1993)* (states as sovereigns may take custody of or assume title to abandoned personal property).

(n37)Footnote 81. *In re Estate of Johnson, 208 Cal. Rptr. 821 (1984); Mannheim v. Superior Court of Los Angeles County, 91 Cal. Rptr. 585 (1970). but see Bogert v. Davis, 214 Cal. App. 3d 774 (Cal. App. 1989).* Fractional interests in property often escheat to the state. *See Estate of Starkweather v. United States Fidelity & Guaranty Co., 64 Cal. App. 4th 580 (Cal. App. 1998).*

(n38)Footnote 82. 4 James Kent, Commentaries on American Law (rev. ed. 1889) 426.*Matthews v. Ward, 10 Gill & J (Md.) 443 (1839)* ; *Johnston v. Spicer, 13 N.E. 753 (N.Y. 1887); Commonwealth v. Naile, 88 Pa. 429 (1879).*

(n39)Footnote 83. *Smith v. Pratt, 63 A.2d 237 (N.H. 1949).*

(n40)Footnote 84. *American Colonization Soc'y v. Latrobe, 104 A. 120 (Md. 1918).*

(n41)Footnote 85. *United States v. Klein, 106 F.2d 213 (3d Cir. 1939), cert. denied, 308 U.S. 618 (1939).*

(n42)Footnote 86. *Commonwealth v. North American Land Co., 57 Pa. 102 (1868).*

(n43)Footnote 87. *In re O'Brine's Estate, 322 N.Y.S.2d 441 (1971), decree aff'd, 354 N.Y.S.2d 589 (N.Y. App. Div. 1974), order aff'd, 371 N.Y.S.2d 453 (1975).*

(n44)Footnote 88. *First Nat'l Bank of Oregon v. Townsend, 555 P.2d 477 (Or. App. 1976).*

(n45)Footnote 89. *In re Clark's Estate, 329 N.Y.S.2d 995 (1972).*

(n46)Footnote 90. *Calvary Presbyterian Church of Baltimore City v. Presbytery of Baltimore of United Presbyterian Church in U.S., 386 A.2d 357 (Md. App. 1978).*

(n47)Footnote 91. *McVeigh v. First Trust Co. of Wichita, 34 P.2d 571 (Kan. 1934).*

(n48)Footnote 92. *In re Moll's Estate, 495 P.2d 854 (Ariz. App. 1972).*

(n49)Footnote 93. *In re Kwatkowski's Estate, 29 P.2d 639 (Colo. 1934); Ottaviano v. Garlick, 150 A.2d 611 (Conn. Super. 1958).*

(n50)Footnote 94. *In re Skriziszouski's Estate, 116 A.2d 841 (Pa. 1955).*

(n51)Footnote 95. *Beckwith v. Bates, 200 N.W. 151 (Mich. 1924).*

(n52)Footnote 96. II William Blackstone, Commentaries 255.

(n53)Footnote 97. II William Blackstone, Commentaries 250.

(n54)Footnote 98. *In re Gogabashvele's Estate, 16 Cal. Rptr. 77 (1961). but see, In re Larkin's Estate, 416 P.2d 473 (Cal. 1966).*

(n55)Footnote 99. *Ripley v. Von Zedtwitz, 256 S.W. 1106 (Ky. 1923).*

(n56)Footnote 100. *Matter of Wilson's Estate, 237 N.W.2d 835 (Neb. 1976).*

(n57)Footnote 101. *Louisville Sch. Bd. v. King, 107 S.W. 247 (Ky. 1908).*

(n58)Footnote 102. *Legget v. Dubois, 5 Paige N.Y. 112 (1835).*

(n59)Footnote 103. *Pavlick v. Meriden Trust & Safe Deposit Co., 107 A.2d 262 (Conn. 1954).*

(n60)Footnote 104. *Schultze v. Schultze, 33 N.E. 201 (Ill. 1893).*

(n61)Footnote 105. *In re Zimmermann's Estate, 283 P.2d 68 (Cal. App. 1955); State By & Through State Land Bd. v. Pakarek, 378 P.2d 734 (Or. 1963).*

(n62)Footnote 106. *Dutton v. Donahue, 8 P.2d 90 (Wyo. 1932).*

(n63)Footnote 107. *In re Krachler's Estate, 263 P.2d 769 (Or. 1951). But see Zschernig v. Miller, 389 U.S. 429 (U.S. 1968).*

(n64)Footnote 108. *See* § 12.02, Right of Aliens to Own Property, in Vol. 2, above.

(n65)Footnote 109. *Blatchford v. Gonzales, 670 P.2d 944 (N.M. 1983), cert. denied, Blatchford v. Winans, 464*

U.S. 1033 (1984).

(n66)Footnote 110. *State v. Elliott, 616 A.2d 210 (Vt. 1992), cert. denied, Elliott v. Vermont, 113 S. Ct. 1258 (1993).*

(n67)Footnote 111. At common law upon the dissolution of a corporation, the land owned by it returned to the donor and did not escheat to the lord. For a grant to a corporation as a body politic was upon a condition subsequent with a right of reentry in the grantor in case of dissolution. Coke's Institutes 2 I, c. XIII, 196.

(n68)Footnote 112. *See* Ky. Rev. Stat., 393.120. *In re Drexel Burnham Lambert Group, 151 B.R. 684 (Bankr. S.D.N.Y. 1993)* (According to New York law, property or securities held by a brokerage firm for an account of a person, unclaimed for three years is abandoned and escheats to the state).

(n69)Footnote 113. *See* II William Blackstone, Commentaries 256.

(n70)Footnote 114. For a current list of states that have adopted the Uniform Disposition of Unclaimed Property Act, see § 9.03(a)(12), in Vol. 2 above: *Alabama.* Ala. Code §§ 35-12-20 - 35-12-48. *Citronelle-Mobile Gathering, Inc. v. Boswell, 341 So. 2d 933 (Ala. 1977).* Ga. Code Ann. § 44-12-190 et seq.; Haw. Rev. Stat. § 523A-1 et seq.; Ill. Rev. Stat. ch. 765, Act 1025/o1 et seq.; Ind. Code §§ 32-9-1.5-2 et seq.; Iowa Code §§ 556.1 - 556.29; LA. Rev. Stat. § 9:151 *et seq.*; Md. Code Ann., Com. Law II, §§ 17-101 - 17-128; Minn. Stat. §§ 345.31 - 345.60; Neb. Rev. Stat. §§ 69-1301 -69-1329; N.M. Stat. Ann. §§ 7-8A-1 - 7-8A-40.; Okla. Stat. Ann., tit. 60, §§ 651 - 687; R.I. Gen. Laws §§ 33-21.1-1 - 33-21.1-41; S.C. Code Ann. §§ 57-240.1 - 57-240.36; S.D. Codified Laws Ann. §§ 43-41B-1 - 43-41B-38; W. Va. Code §§ 36-8-1 -36-8-31; Wis. Stat. §§ 177.01 - 177.41.

Idaho has adopted substantially the Uniform Disposition of Unclaimed Property Act. Idaho Code 1979, §§ 14-501 - 14-532.

Escheat Act. Mich. Stat. Ann., §§ 26.1035(1) - 26.1035(6), as amended by Mich. Acts 1993. *Louisiana Health Serv. and Indem. Co. v. Tarver, 635 So. 2d 1090 (La. 1994).* (Reasons for custodial escheat law include: revenue raising device; state receives use of unclaimed property and any income it may provide pending a claim by the missing owner, unclaimed property should benefit citizenry and return to stream of commerce. Also, discussion of Louisiana's Uniform Disposition of Unclaimed Property Act). *See also Matter of Estate of Peterson, 720 A.2d 676 (N.J.Super. 1998)* (interpreting Uniform Unclaimed Property Act); *Matter of November 8, 1996, Determination of State of New Jersey, Dept. of Treasury, Unclaimed Property Office, 706 A.2d 1177 (N.J. Super. 1998)* (Act applies to gift certificates); *State ex. rel. Harvey v. State ex rel. Corp. Com'n, 969 P.2d 367 (Okla. Civ. App. 1998)* (Act does not apply if court or administrative agency provides for disposition of property).

The majority of states have adopted the Uniform Unclaimed Property Act (1981 Act) including:

Alaska, A.S. 34.45.110 to 34.45.780; *Arizona,* A.R.S. §§ 44-301 to 44-340; *Colorado,* West's C.R.S.A. §§ 38-13-101 to 38-13-134; *Florida,* West's F.S.A. §§ 717.001 to 717.1401; *Georgia,* GA. CODE ANN. §§ 44-12-190 to 44-12-235; *Hawaii,* H.R.S. §§ 523A-1 to 523A-41; *Idaho,* I.C. §§ 14-501 to 14-542; *Indiana,* West's A.I.C. 32-9-1.5-1 to 32-9-1.5-52; *Iowa,* I.C.A. §§ 556.1 to 556.29; *Kansas,* K.S.A. 58-3934 to 58-3978; *Louisiana,* L.S.A.-R.S. 9:151 to 9:188; *Maine,* 33 M.R.S.A. §§ 1801 to 1875; *Maryland,* Code, Comm. Law §§ 17-101 to 17-326; *Michigan,* M.C.L.A. §§ 567.221 to 567.265; *Minnesota,* M.S.A. §§ 345.31 to 345.60; *Nevada,* N.R.S. 120A.010 to 120A.450; *New Hampshire,* R.S.A. 471-C:1 to 471-C:43; *New Jersey,* N.J.S.A. §§ 46:30B-1 to 46:30B-109; *North Dakota,* N.D.C.C. 47-30.1-01 to 47-30.1-38; *Oklahoma,* 60 Okl. St. Ann. §§ 651 to 686; *Oregon,* O.R.S. 98.302 to 98.436; *Rhode Island,* Gen. Laws 1956, §§ 33-21.1-1 to 33-21.1-41; *South Carolina,* Code 1976, §§ 27-18-10 to 27-18-400; *South Dakota,* S.D.C.L. 43-41B-1 to 43-41B-38; *Tennessee,* West's Tenn.Code §§ 66-29-101 to 66-29-136; *Utah,* U.C.A. 1953, 67-4a-101 to 67-4a-902; *Vermont,* 27 V.S.A. §§ 1208 to 1238; *Virgin Islands,* 28 V.I.C. §§ 651 to 687; *Virginia,* Code 1950, §§ 55-210.1 to 55-210.30; *Washington,* West's R.C.W.A. 63.29.010 to 63.29.905; *Wisconsin,* W.S.A. 177.01 to

177.41; *Wyoming,* W.S. 1977, §§ 34-24-101 to 34-24-140.

(n71)Footnote 115. *Marsh v. Nebraska State Bd. of Agriculture, 350 N.W.2d 535 (Neb. 1984).*

(n72)Footnote 116. Thorton, Ltd. v. Metropolitan San. Dist. of Greater Chicago.

(n73)Footnote 117. *Pacific Bank v. Hannah, 90 F. 72 (9th Cir. 1898); Criswell v. Noble, 113 N.Y.S. 954 (1908).*

(n74)Footnote 118. *O'Hanlin v. Den, 20 N.J.L. 31, 21 N.J.L. 582 (1842).*

(n75)Footnote 119. *Puyoulet v. Gehrke, 78 So. 571 (La. 1918).*

(n76)Footnote 120. *American Mtg. Co. v. Tennille, 13 S.E. 158 (Ga. 1891).*

(n77)Footnote 121. *TXO Prod. Corp. v. Oklahoma Corp. Comm'n, 829 P.2d 964 (Okla. 1992). George E. Failing Co. v. Watkins, 14 P.3d 52 (Okla. 2000).*

(n78)Footnote 122. *Scott v. State ex rel. Stansbury, 134 N.E. 219 (Ind.App. 1922). Board of Educ. v. Browning, 635 A.2d 373 (Md. 1994)* (escheat signifies that property revert to the state when no persons exist who are entitled to inherit the property).

(n79)Footnote 123. *Tucson Press Club v. Eyman, 236 P.2d 733 (Ariz. 1951). superseded by statute as stated in, State v. Clifton Lodge No. 1174, Benev. and Protective Order of Elks of U. S., 514 P.2d 265 (Ariz. App. 1973).*

(n80)Footnote 124. *Arizona Land & Stock Co. v. Markus, 296 P. 251 (Ariz. 1931).*

(n81)Footnote 125. State v. Savings Union Bank & Trust Co., 199 P.26 (Cal. 1921); *Sid Mannheim v. Superior Ct. of Los Angeles County, 478 P.2d 17 (Cal. 1970). but see Bogert v. Davis, 214 Cal.App.3d 774 (Cal. App. 1989).*

(n82)Footnote 126. *Clovis Nat'l Bank v. Calloway, 364 P.2d 748 (N.M. 1961).*

(n83)Footnote 127. *Northwestern Clearance Co. v. Jennings, 209 P. 875, 210 P. 884 (Or. 1922).*

(n84)Footnote 128. *In re Coe's Estate, 202 P.2d 1022 (Cal. 1949).* So by statute. *In re Melrose Ave., 136 N.E. 235 (N.Y. 1922).*

(n85)Footnote 129. *Gibson v. Rikard, 141 S.E. 726 (S.C. 1928).*

(n86)Footnote 130. *In re French's Estate, 228 P. 194 (Utah 1924).*

(n87)Footnote 131. *In re Germanovich's Estate, 122 F. Supp. 169 (D.D.C. 1954).*

(n88)Footnote 132. *Frazier v. Kutz, 139 F.2d 380 (D.C. Cir. 1943). See Estate of Parks v. Hodge, 623 N.E.2d 227 (Ohio App. 1993)* (law of escheat must be last resort in the construction of a will based on an unquestionable determination that there are no next of kin).

(n89)Footnote 133. *Scott v. State ex rel. Stansbury, 134 N.E. 219 (Ind. 1922).*

(n90)Footnote 134. *In re French's Estate, 228 P. 194 (Utah 1924).*

(n91)Footnote 135. *Braun v. McPherson, 269 N.W. 211 (Mich. 1936).*

(n92)Footnote 136. *St. Paul & Tacoma Lumber Co. v. State, 360 P.2d 142 (Wash. 1961).*

(n93)Footnote 137. *In re Melrose Ave., 136 N.E. 235 (N.Y. 1922).*

(n94)Footnote 138. *People v. Cutting, 3 Johns 1808 (N.Y. 1808);* Catham v. State, (2 Head) 553 (1859); 39 *Tenn. Commonwealth v. Hite, 6 Leigh (Va.) 588 (1835).*

(n95)Footnote 139. *State v. United States Steel Corp., 126 A.2d 168 (N.J. 1956).*

(n96)Footnote 140. *Cox v. Kivby Lumber Corp., 197 F.2d 812 (5th Cir. 1952).*

(n97)Footnote 141. *Christianson v. King, 239 U.S. 356 (1915).*

(n98)Footnote 142. *First Trust Co. v. Matheson, 246 N.W. 1 (Minn. 1932).*

(n99)Footnote 143. *Gorny v. Milwaukee County Orphans Bd., 93 F.2d 107 (7th Cir. 1937).*

(n100)Footnote 144. *Simler v. Wilson, 110 F. Supp. 761 (W.D. Okla. 1953). rev'd, 210 F.2d 99 (10th Cir. 1953).*

(n101)Footnote 145. *See* John S. Grimes, *Escheat in Indiana and the Uniform Unclaimed Property Act of 1967, 4 Val. U. L. Rev. 43 (1970).*

* This chapter is based in part on Chs. 34-36, 57 of George W. Thompson, Commentaries on the Modern Law of Real Property (John S. Grimes ed. 1963, 1978), which made a significant contribution toward preserving the American common law governing title to real property interests.

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CHAPTER 91 TITLE AND MARKETABLE TITLE *

11-91 Thompson on Real Property, Thomas Editions § 91.06

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§ 91.06 Title by Forfeiture.

[Go To Supp]

Blackstone n146 recognized forfeiture as one of the recognized means of passing title to real estate at common law. Today forfeiture is to all interests a type of escheat if it involves a taking of title by the state. Forfeiture has been defined as "a punishment annexed by law to some illegal act or negligence in the owner of lands, tenements or hereditaments whereby he loses all his interests therein." n147 To some extent as in the case of a convicted felon, the passing of title by forfeiture and escheat were synonymous: the felon forfeited the lands and they passed by escheat to the lord, since the felon had no inheritable blood.

§ 91.06(a) Title by Forfeiture of Property Wrongfully Acquired.

From very early times English public policy also struck at the accumulation by religious institutions of great amounts of land which was thus, theoretically at least, forever locked up out of the channels of trade. The constitutions of Clarendon n148 and later the statutes of Edward II n149 prohibited alienations in "mortmain," i.e., to the church, religious institutions or religious personages. One of the motivating factors of the development of the "use" n150 may have been to avoid mortmain. But even the use was limited for this purpose by the statutes of Richard II and Henry VIII. n151 The effect of these acts was to forfeit to the lord, or to the king if the lord failed to act, all lands or leaseholds so held in mortmain. n152 To a limited extent the mortmain prohibitions continued after the reformation but rather to prohibit gifts than as forfeitures. n153 The mortmain statutes have been reenacted in this country only to a limited extent and with respect to charitable gifts. The doctrine affected corporation law substantially. The statutes and the cases dealing with such improper holding of lands by corporations talked loosely of "escheat," yet their approach was more akin to that of Blackstone's attitude of forfeiture. Statutes restricting the power of corporations to acquire land usually provided in terms or by implication that land acquired by the corporation in violation of such restriction should be forfeited to the state; n154 but in the absence of such a provision for forfeiture, the state could not declare a forfeiture of the land which the corporation has wrongfully acquired. n155 While the inherent right of a corporation to acquire lands is generally recognized, n156 yet in the absence of express statutory license to retain such lands, the general policy of mortmain has been held to apply n157 and so where the corporation has no statutory license to hold land, such lands when acquired are forfeited to the state. n158 The statutes of some states today specifically prohibit certain types of corporations from owning land, n159 or limit the amount of land other corporations can hold n160 or the time of

holding. n161 These acts operate so as to forfeit the improperly held land to the state n162 after appropriate judicial proceedings. n163 Such results are to be distinguished from statutes that merely prohibit certain conveyances, devises or gifts. In this latter situation the transfer fails and the title remains in the original owner.

These statutes prohibit corporations from holding lands, except for the purposes of their charters, or from holding more than a prescribed quantity. A violation of such statutory restrictions has been held not of themselves to accomplish an escheat. n164 Although a corporation may have acquired real estate in such a manner as to render it subject to be escheated by proper action begun for that purpose, yet if such corporation shall, prior to the commencement of such proceedings, make a bona fide sale or conveyance of said real estate for value, the purchaser at such sale will take a good title thereto. n165 The right of a corporation to hold property in excess of that which is necessary to carry on its legitimate business can be questioned only by the state. n166

At common law, the state acquired by forfeiture the property of a felon who, with heirs, devisees, and legatees, were deprived of it on account of, and as a punishment for, high crimes. n167 All the property real and personal, of one attainted was forfeited, and the blood so corrupted that nothing could pass by inheritance to, from, or through the attainted one. n168

§ 91.06(b) Title of Forfeiture of Property Held by Felons or Used in Committing Crimes.

In the United States this doctrine was deemed repugnant to the ideas of justice and was not included as part of the common law, so conviction of an offense does not work corruption of blood or forfeiture of estate. n169 However, it is provided by the laws of the United States that no attainder of treason shall work corruption of blood or forfeiture, except during the life of the person attainted, and several of the state constitutions have provided that no attainder of treason or felony shall work corruption of blood or forfeiture of estate except during the life of the offender, while others of them have taken away the power of forfeiture absolutely, without any such exception. n170 Forfeiture of an estate is not an incident of conviction of a felony. n171 A felony is not subject to forfeiture of property rights as a penalty. n172 At the common law, an attainder or conviction of treason or felony worked a forfeiture of the culprit's lands to the king.

In the case of treason the forfeiture was forever, and in the case of any other felony, for the life of the felon and a year and a day thereafter. n173 A state has a right to declare a forfeiture of property used in the commission of a criminal offense. n174 Occasionally, a state statute provides for complete forfeiture of property for some specified cause, n175 but the general trend of the constitutions and legislation is not to allow any forfeiture to the state for crime, for longer than the life of the criminal; and in many states even this result cannot flow from any crime but treason. n176 Today, forfeiture depends upon the applicable statute. n177

§ 91.06(c) Title by Forfeiture for Other Landholder Misconduct.

Sometimes, as between individuals, the term forfeiture is used to denote the method by which an interest or estate in lands reverts to a former owner by operation of law, as by a breach of condition in a deed or lease. n178 More properly, upon the breach of such a condition subsequent, the grantor could exercise a right of reentry to regain the fee and put an end to the fee upon condition subsequent. Forfeitures at common law did arise to put an end to estates of less than fee (a) by attempted alienation of a greater estate than the tenant held (b) by waste and (c) disclaimer or denial of the superior title as where a lessee denies the lessor's title. n179

A tenant for life or years usually holds the land subject to certain implied conditions; and if the tenant violates any of these conditions, the tenancy estate is thereby forfeited to the remainderman or reversioner. At common law, the life tenant held subject to an implied prohibition against making an attempted feoffment of the life estate in fee simple, since this divested the whole fee-simple title, and by so doing the life tenant forfeited the life estate. This ground of forfeiture is now obsolete, since a modern conveyance, though purporting to pass a fee simple, passes only such interest as the grantor has; n180 but life tenants and other temporary owners may forfeit their estates to the reversioners or

remaindermen by the commission of waste. n181 Also, tenants for years and the holders of lesser interests may lose their estates or interests by reason of illegal use or through attempted disclaimer of the landlords' titles. n182 Forfeitures are not favored in law, n183 and courts eagerly seize hold of any circumstance by which forfeitures may be defeated, and where adequate compensation can be made, the law in many cases, and equity in all cases, discharges the forfeiture upon such compensation being made. n184 In some jurisdictions forfeitures have been done away with by statute. n185

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FOOTNOTES:
(n1)Footnote 146. William Blackstone, Commentaries I, c. 18.

(n2)Footnote 147. *United States v. Alpine Land & Reservior Co., 965 F.2d 731 (9th Cir. 1992). opinion amended, superseded, 983 F.2d 1487 (9th Cir. 1992). cert. denied, Alpine Land & Reservoir Co. v. United States, 510 U.S. 813 (1993).*

(n3)Footnote 148. *See Methodist Church v. Remington, 1 Pa. (Watts) 219 (1832); Miller v. Porter, 53 Pa. 292 (1866).*

(n4)Footnote 149. 13 Edw. I, c. 32, 27 Edw. I, c. 2, 34 Edw. I, c. 3.

(n5)Footnote 150. *See* Theodore F.T. Plucknett, A Concise History of the Common Law (2d ed. 1936) p. 575 *et seq*.

(n6)Footnote 151. *15 Rich. 2,* c. 5, *23 Hen. 8,* c. 10.

(n7)Footnote 152. *Magna Carta, 91 Hen. 3,* c. 36.

(n8)Footnote 153. *9 Geo. 2,* c. 36, 7 & 8 Will.3, c. 37

(n9)Footnote 154. *Commonwealth v. New York, L.E. & W.R., 21 A. 528 (Pa. 1891).*

(n10)Footnote 155. *Union Nat'l Bank v. Matthews, 98 U.S. 621 (1878).*

(n11)Footnote 156. 4 James Kent, Commentaries on American Law (rev. ed. 1889) 282; *Methodist Church v. Remington, 1 Pa. (Watts) 219 (1832).*

(n12)Footnote 157. *In re Estate of McGraw, 19 N.E. 233 (N.Y. 1888).*

(n13)Footnote 158. *Leazure v. Hillegas, 7 Serg. & R. 313 (Pa. 1821).*

(n14)Footnote 159. *National Bank of Commerce v. Oklahoma, 368 P.2d 997 (Okla. 1962).*

(n15)Footnote 160. *See* Zallmon, American Law of Charities (1924), c. 12.

(n16)Footnote 161. *National Bank of Commerce v. Oklahoma, 368 P.2d 997 (Okla. 1962).*

(n17)Footnote 162. *Chamberlin v. Chamberlin, 43 N.Y. 424 (1871).*

(n18)Footnote 163. *Hubbard v. Worcester Art Museum, 80 N.E. 490 (Mass. 1907).*

(n19)Footnote 164. *State of N.J. v. U.S. Steel Corp., 126 A.2d 168 (N.J. 1956).*

(n20)Footnote 165. *Lord v. Schultz, 211 N.W. 210 (Neb. 1926).*

(n21)Footnote 166. *Chesapeake & O. R.R. v. Rosskamp, 200 S.W. 496 (Ky. 1918).*

(n22)Footnote 167. 2 William Blackstone, Commentaries *267, *268; 4 William Blackstone, Commentaries *381-385.

(n23)Footnote 168. *Fields v. Metropolitan Life Ins. Co., 249 S.W. 798 (Tenn. 1923).*

(n24)Footnote 169. *Head v. State, 24 S.E.2d 145 (Ga. 1943); superseded by statute as noted in, State v. Cross, 401 S.E.2d 510 (Ga. 1991). Prudential Ins. Co. v. Rice, 52 N.E.2d 624 (Ind. 1944); Fields v. Metropolitan Life Ins. Co., 249 S.W. 798 (Tenn. 1923),* (insured executed for crime, liability of life insurance company on policy). *See Howard v. State, 237 P. 203 (Ariz. 1925); overruled in part, Ridgway v. Superior Court, 245 P.2d 268 (Ariz. 1952). Wenker v. Landon, 88 P.2d 971 (Or. 1939). overruled in part, Hargrove v. Taylor, 389 P.2d 36 (Or. 1964).*

(n25)Footnote 170. 4 James Kent, Commentaries on American Law (rev. ed. 1889) 386.

Shields v. Shiff, 124 U.S. 351 (1888); Atlantic Coast Shipping Co. v. Golubiewski, 9 F. Supp. 315 (D. Md. 1934).

(n26)Footnote 171. *Howard v. State, 237 P. 203 (Ariz. 1925); overruled in part, Ridgway v. Superior Court, 245 P.2d 268 (Ariz. 1952). Fields v. Metropolitan Life Ins. Co., 249 S.W. 798 (Tenn. 1923).*

(n27)Footnote 172. *In re Weber's Estate, 1 N.Y.S.2d 809 (1938); State v. Youst, 59 N.E.2d 167 (Ohio App. 1943).*

(n28)Footnote 173. William Blackstone, Commentaries 267, 268; *Avery v. Everett, 18 N.E. 148 (N.Y. 1888).*

(n29)Footnote 174. *City of Sparks, Police Dep't, Washoe County v. Nason, 807 P.2d 1389 (Nev. 1991).* United States v. 755 Forest Rd., 985 F.2d 70 (2d Cir. 1993) (innocent owners must prove they did all reasonably expected to prevent illegal activity once they learned of it); United States v. 427 & 429 Hall St., 853 F. Supp. 1389 (D. Ala. 1994) (fundamental principle underlying forfeiture law is that even an owner negligent in allowing property misused by another is to be properly punished for that negligence), *aff'd, 74 F.3d 1165 (11th Cir. 1996);* United States v. 4003-4005 Fifth Ave., 855 F. Supp. 50 (E.D.N.Y. 1994) (claimant must prove by preponderance of the evidence that property was not used unlawfully or that illegal conduct occurred without owner's knowledge or consent), *aff'd, 55 F.3d 78 (2nd Cir. 1995);* United States v. 163 Renwick St., 859 F. Supp. 93 (S.D.N.Y. 1994) (United States must show that illegal activity occurred in connection with the property and the owner then has the burden to establish ignorance of or reasonable efforts to prevent the activities on the property); *Bennis v. Michigan, 516 U.S. 442 (1996)* (here the Supreme Court upheld an in rem forfeiture for property used in the commission of a crime in spite of the wife's innocent owner defense for the co-owned property); United States v. One Parcel of Real Prop. with *Bldgs., Appurtenances and Known as 170 Westerfield Drive, 34 F. Supp. 2d 107 (D. R.I. 1999)* (under Comprehensive Drug Abuse Prevention and Control Act of 1970, § 511(d), *21 U.S.C. § 881*(d), federal government has interest in value of real property up to value of illicit money); *United States v. 3814 NW Thurman Street, 164 F.3d 1191 (9th Cir. 1999)* (defendant's commission of mail and wire fraud and false statements traced to loan, with equity in real property then subject to civil forfeiture); United States v. One Parcel of Real Property with *Bldgs., Appurtenances, and Improvements, Known as 154 Manley Road, 4 F. Supp. 2d 65 (D.R.I. 1999); Spurs v. State, 850 S.W.2d 611 (Tex. App. 1993)* (in a contested forfeiture proceeding, the state must establish a link between the property to be forfeited and the statutorily defined criminal activity).

Cf. State v. American Banking Ins. Co., 622 A.2d 261 (1993) (rights of lessors not affected unless they have knowledge of any act upon which the right of forfeiture is based). *See also United States v. New Silver Palace Restaurant, Inc., 810 F. Supp. 440 (E.D.N.Y. 1993)* (possession may be a basis for standing in a forfeiture proceeding without being an owner or lien holder).

(n30)Footnote 175. *King v. Mullins, 171 U.S. 404 (1898).*

(n31)Footnote 176. 4 James Kent, Commentaries on American Law (rev. ed. 1889) 426; U.S.C., Const. Art. 3, § 3. *Wallach v. Van Riswick, 92 U.S. 202 (1875).*

(n32)Footnote 177. *Department of Wildlife & Fisheries v. Trawler Baltimore, 36 So. 2d 1 (La. 1948).* United States v. One 1974 Learjet 24D, *191 F.3d 668 (6th Cir. 1999)* (in some instances if the government believes a certain property is subject to forfeiture, the government can authorize seizure of the property for safekeeping while the forfeiture proceeding is in progress).

(n33)Footnote 178. *Cassell v. Crothers, 44 A. 446 (Pa. 1899); Oxford Orphanage v. Kittrel, 27 S.E.2d 133 (N.C. 1943).*

(n34)Footnote 179. 2 William Blackstone, Commentaries 274.

(n35)Footnote 180. 4 James Kent, Commentaries on American Law (rev. ed. 1889) 83; *Smith v. Cooper, 59 Ala. 494 (1877); Quimby v. Dill, 40 Me. 528 (1855); Foote v. Sanders, 72 Mo. 616 (1880); Middleton v. Dougherty, 46 N.J.L. 350 (1884); McCorry v. King, 22 Tenn. (3 Hum.) 267 (1842).*

(n36)Footnote 181. *Prettyman v. Walston, 34 Ill. 175 (1864); Stetson v. Day, 51 Me. 434 (1863); Crowe v. Wilson, 5 A. 427 (Md. 1886); Sackett v. Sackett, 25 Mass. (8 Pick.) 309 (1829); Oxford Orphanage v. Kittrel, 27 S.E.2d 133 (N.C. 1943); McMillan v. Robbins, 5 Ohio 28 (1831).*

(n37)Footnote 182. *Willison v. Watkins, 28 U.S. (3 Pet.) 43 (1830); Zeller v. Eckert, 45 U.S. (4 How.) 289 (1846); Abbey Homestead Ass'n v. Willard, 48 Cal. 614 (1874); Doty v. Burdick, 83 Ill. 473 (1876); Newman v. Rutter, 8 Pa. 51 (Watts 1839); North v. Barnum, 10 Vt. 220 (1838); Sherman v. Champlain Transp. Co., 31 Vt. 162 (1858).*

(n38)Footnote 183. *State v. One 1985 Ford Bronco, N.J. Reg. No. EUN-91K (Newell), 619 A.2d 668 (N.J. 1993)* (Forfeitures are not favored in law); *People v. Braden, 611 N.E.2d 575 (Ill. App. 1993)* (Forfeiture not favored in law and statutes authorizing it must be strictly construed); Vieira v. Prince George's County, *aff'd, 667 A.2d 898 (Md. App. 1995)* (Forfeiture statutes must be strictly construed).

(n39)Footnote 184. *In re McManis' Estate, 31 P.2d 912 (Colo. 1934).*

(n40)Footnote 185. *State v. La Fayette, 188 A. 918 (N.J. 1937).*

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CHAPTER 91 TITLE AND MARKETABLE TITLE *

11-91 Thompson on Real Property, Thomas Editions § 91.07

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§ 91.07 Title by Abandonment.

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As noted earlier, title to personalty could be acquired by occupancy of abandoned property. "Abandonment" is the final relinquishment of a right; the giving up of something to which one is entitled, but without vesting the ownership thereof in any other person. n186 The legislature may determine the subject of abandoned property. n187 The intention to abandon and the act of abandonment must concur. n188 Property is "abandoned" when the owner absolutely discards it with no intention to again claim it or exercise rights of ownership over it. n189 It is the giving up of a thing absolutely, without reference to any particular person or purpose. n190

There is a distinction between the abandonment of property and the mere neglect thereof. n191 "Abandonment'" is a voluntary act which must be proved by competent evidence. n192 It means the intentional relinquishment of a known right. n193 "The abandonment of property is the relinquishing of all title, possession or claim to or of it,--a virtual intentional throwing away of it." n194 The word "abandonment" has a well-defined meaning in law, which does not embrace a sale or gift of the property. If it were made for a consideration, it would be a sale or barter; and if without consideration, but with an intention that some other person should become the possessor, it would be a gift. n195

Where an act is induced entirely by misrepresentation and fraud there is no abandonment. n196 The characteristic element of abandonment is the voluntary relinquishment of ownership. n197 It depends on an intention to abandon or relinquish, coupled with some overt act or some failure to act, which carries the implication that the owner neither claims nor retains any interest in the subject-matter of the abandonment. n198 Mere nonuser, n199 or neglect n200 to assert rights in an estate does not result in the loss of ownership thereof in the absence of adverse possession. n201 But nonuser, coupled with an intention on the part of the dominant owner to release the right of ownership, constitutes an abandonment. n202 However, if the nonuser continues during the statutory period of limitation of actions to recover the right of property, this is evidence of an abandonment, n203 and may be entitled to great weight, when considered with other circumstances. n204 Abandonment is a question of fact to be determined by the jury from the circumstances of each particular case. n205 Time is not an essential element of abandonment. The moment the intention to abandon and the relinquishment of possession unite, the abandonment is complete. n206 Direct evidence of an intent to abandon property or rights of property is not required, but may be inferred from all the circumstances. n207

The problem of abandonment never seems to have arisen as affecting realty at common law. Presumably whenever a tenant departed the problem was solved by reversion to the overlord resulting from nonpayment of the feudal dues. The doctrine of abandonment does not apply to a perfect title which is the possession, right of possession, and right of property. n208 So it is the general rule today that no legal title to corporeal real property can be lost or destroyed by any act of abandonment on the part of the owner. n209 Certainly it does not appear that where liability attaches by reason of ownership of realty the owner could plead abandonment as a defense. Thus one is not divested of title by reason of the fact that for many years one was unaware of one's interest in the land and practically abandoned it when title was a matter of record. n210 One does not abandon title by acquiring a new title. n211 The doctrine of abandonment does not apply to a perfect title, but only to imperfect titles, n212 hence a vested fee simple title to real estate cannot be abandoned; n213 a writing signed by the owner being the only way of passing title thereto, in view of the statute of frauds. n214 "An abandonment ... so far as it relates to a vested estate in real property is ineffectual to transfer the title." n215 A merely equitable title not perfected into a grant or vested by deed, as in the case of settlers under the public land laws, may be lost by abandonment; n216 but legal rights, when once vested, must be divested according to law. n217 Once properly vested, a legal title can be divested by abandonment only when the circumstances of the case are sufficient to raise an estoppel, or where the possession is acquired by one in consequence of the abandonment, and held under claim of title for the period of limitation. n218 Once title vests it stays vested until it passes by grant, descent, adverse possession, or some operation of law such as escheat or forfeiture. n219

The owner of a fee simple title to land, even under an unrecorded deed, or a vendor in an executory contract for the sale of land, does not forfeit title by failure to assert it affirmatively for any period of time. n220 One in possession of land under a record title did not abandon such possession by putting a tenant on the land. n221

It is generally recognized that a householder for the purposes of health, pleasure, business, or for any cause deemed sufficient, may be absent from the homestead without forfeiting homestead rights, and when no new homestead has been acquired, absence from the old one, unless for an extended period, does not create a presumption of its abandonment. n222 A few cases have spoken of abandonment of real property, n223 but one authority n224 has concluded that the true doctrine of abandonment does not exist with respect to realty in the common law. There can be no such thing as an abandonment of land in favor of a particular person, or for a consideration. Such an act would be a gift or sale. n225 Abandonment of real estate does not confer title on the next occupant or any other person, but disentitles the person who has abandoned it to reclaim it. n226 A true abandonment must result in returning that which is abandoned to the public domain. n227 The term "abandonment" is somewhat loosely used in connection with the yielding up of claims to or interests in real estate. But in such cases the interest so given up goes to some person or persons, not to the public domain to be seised upon by the first occupant. To constitute abandonment of real property by the owner, there must be a concurrence of the act of leaving the premises vacant so that they may be appropriated by the next occupant, and the intention of not returning. n228

Interests in the land of another, such as easements, licenses and profits, may be yielded by the holder, n229 and such an act is often spoken of as an abandonment. So easements and other incorporeal rights may be lost by abandonment; n230 but not a fee simple. n231 Actually, however, the courts require an intent to release such interests. n232 Mere nonuse, though for long periods, does not constitute "abandonment." n233 The equitable doctrine of laches or abandonment applies only to easements or licenses or other claims against or by surrender or release of rights in lands and has no application to an actual estate in the land itself which can only be lost or barred by operation of the statute of limitations. n234 The title, though not lost by abandonment, may be barred by estoppel or by the statute of limitations n235 in favor of a third person. But this actually means a transfer of title from one individual to another through the doctrine of adverse possession, not an abandonment and occupancy as in the case of personalty. If there is such a doctrine as loss of title to realty by abandonment, then the title reverts to the state, which acts as the ultimate owner under the theory of escheat.

A boundary line may be changed by acquiescence so as to constitute abandonment over a period of time other than that

required for adverse possession. n236 Abandonment by the owner of an easement therein or other charge against the realty is distinguished from dedication in that in the case of dedication the land is set apart or appropriated for some public use. n237 Mining claims on the public domain may be lost by abandonment. n238

Until title by adverse possession n239 has become absolute by operation of the statute of limitations, it may be lost or destroyed by surrender of possession. As to the effect of abandonment of the possession of land after the title thereto has become absolute by adverse possession under the statute of limitations the cases are conflicting. Such a title cannot be lost by abandonment after the full statutory period has expired. n240 Thus, where title of the former owner has been divested by adverse possession for the statutory period, a lapse in possession thereafter does not defeat the title of the adverse holder. n241 Other courts, however, have held that title by adverse possession affects only the remedy of the original owner and that the right so acquired may be lost by abandonment. n242 It seems the better rule to hold that a title acquired by adverse possession can no more be lost by abandonment than a title acquired by deed or descent from the true owner. Abandonment by one in adverse possession under color of title before the expiration of the statutory period of limitations has elapsed would break the continuity of possession, and would prevent such possession from ripening into a title. After such possession has ripened into a title, and the period ends, abandonment cannot destroy the title already acquired, unless such abandonment brings about an estoppel, or unless the title to the abandoned property afterwards goes into another by reason of such other's adverse possession. n243 Reentry by the original owner, after the bar is complete, does not revest the title in the original owner. n244

Renunciation has been defined as "a legal act by which a person abandons a right without transferring it to another." n245 A problem exists as to whether renunciation by an heir in the ancestor's estate is a type of abandonment. One authority insisted that on the ancestor's death realty passed automatically to the heir, who could not renounce, n246 although the heir could renounce personalty as next of kin. This view has received American support. n247 Thus an attempted release by the heir after the ancestor's death would amount to a gift. Modern taxing authorities n248 have accepted the proposition n249 that real estate descended to the heir by operation of law and that the heir could not renounce. Since mort d'ancestor n250 was designed at least in part to force the lord to permit the heir to enter, the historical correctness of this doctrine at least under the concepts of seisin is open to question.

A grantee who has voluntarily consented to the destruction or surrender of the deed, with the intention of defeating the grantee's title, is not allowed to have an affirmation of the deed. Such a grantee is estopped from setting the deed up, or from showing the deed's contents by parol evidence. n251 In this way the destruction of the deed has the effect of a reconveyance, because there is no competent evidence that the title ever passed by deed. The destruction of the deed by consent of both parties is not a reconveyance, but in its effect operates like a conveyance. n252 The mere cancellation, destruction, or surrender of a deed does not divest the grantee of the title, nor revest it in the grantor, though such was the intention of the parties. n253 A written indorsement upon a deed surrendered, that the grantee "relinquishes all his right and title to the within deed," does not operate as a reconveyance of the legal title, though it may be evidence of an agreement to reconvey, which a court of equity might enforce by specific performance if it is supported by a valuable consideration. n254 An effective abandonment would result from a surrender of the deed only where the circumstances give rise to an estoppel, or where all the muniments of title have been voluntarily destroyed and the grantee would have to resort to parol evidence to prove title. n255 Upon the delivery of an executed deed the legal title passes to the grantee, and any subsequent alteration of the deed by changing the name of the grantee does not divest the grantee of title or revest title in the grantor. n256 A surrender can only be made to the grantor, and nothing short of cancelation or destruction of a deed before the same is recorded would have the effect of passing the title back to him. n257

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LEXIS: title w/15 abandon!

FOOTNOTES:
(n1)Footnote 186. *Rich v. Runyon, 627 P.2d 1265 (Or. App. 1981). Hays v. Montague, 860 S.W.2d 403 (Tenn. App.*

1993) (abandonment is voluntary relinquishment by the owner with intention of terminating ownership, possession, and control without vesting ownership in any other person).

(n2)Footnote 187. *Matter of Yellowstone River, 832 P.2d 1210 (Mont. 1992).* While not traditionally considered "abandoned" property, even sunken ships can be the subject of abandonment proceedings. See, *California v. Deep Sea Research Inc., 523 U.S. 491 (1998)* (A California company brought an action under the Abandoned Shipwreck Act of 1987 (ASA), petitioning for title to a ship that sank in 1867 with valuable cargo on board. The Supreme Court declined to comment on whether the ship was "abandoned" under the ASA, and remanded to the District Court).

(n3)Footnote 188. *Wright v. Hazen Inv., Inc., 632 P.2d 1328 (Or. App. 1981). rev'd, 648 P.2d 360 (Or. 1982). Routh Wrecker Serv. v. Wins, 847 S.W.2d 707 (Ark. 1993)* (Abandonment is the property that is thrown away or the possession of which is voluntarily forsaken by the owner, requiring a manifest act which expresses the owner's intent to forsake); *Town of Newfane v. Walker, 637 A.2d 1074 (Vt. 1993)* (Abandonment is failure to use the property and intent to abandon); *Savage Lateral Ditch Water Users Ass'n v. Pulley, 869 P.2d 554 (Idaho 1993)* (Intent to abandon is evidenced by a clear, unequivocal, and decisive act of the alleged abandoning party).

(n4)Footnote 189. *Purcell v. Summers, 145 F.2d 979 (4th Cir. 1944).*

(n5)Footnote 190. *O'Connor v. Maryland Motor Car Ins. Co., 122 N.E. 489 (Ill. 1919). Railroad Comm'n v. Waste Mgmt., 880 S.W.2d 835, reh'g denied* (Tex. App. 1994) (Abandonment means to give up absolutely and when applied to personal property also includes intent by owner to leave property free to be appropriated by any other person).

(n6)Footnote 191. *Log Owners Booming Co. v. Hubbell, 97 N.W. 157 (Mich. 1903).*

(n7)Footnote 192. *Olin v. Goehler, 694 P.2d 1129 (Wash. App. 1985). Historic Charleston Found. v. Krawcheck, 443 S.E.2d 401 (S.C. App. 1994)* (Abandonment must be a discontinuance of use with intent to relinquish the right to use the property; intent must be determined from all surrounding facts and circumstances). *Review denied* by *Olin v. Goehler, 694 P.2d 1129 (Wash. App. 1985).*

(n8)Footnote 193. *United States v. Holmes, 687 P.2d 662 (Mont. 1984).*

(n9)Footnote 194. *Foulke v. New York Consol. R.R., 127 N.E. 237 (N.Y. 1920). but see, People v. Wilson, 711 N.E.2d 633,* (N.Y. 1999).

(n10)Footnote 195. *Stephens v. Mansfield, 11 Cal. 363 (1858); St. Peter's Church v. Bragaw, 56 S.E. 688 (N.C. 1907); Commonwealth v. Koontz, 101 A. 863 (Pa. 1917).*

(n11)Footnote 196. *Lady v. Realty Assocs., 31 A.2d 875 (D.C. 1943).*

(n12)Footnote 197. *Rich v. Runyon, 627 P.2d 1265 (Or. App. 1981).*

(n13)Footnote 198. *Vogl v. Mayor & City Council of Baltimore, 179 A.2d 693 (Md. App. 1962). Metzger v. Bensalem Twp. Zoning Hearing Bd., 645 A.2d 369 (Pa. App. 1994)* (Actual abandonment cannot be inferred from non-use alone; abandonment may be determined by overt acts, failure to act, or statements).

(n14)Footnote 199. *Summers v. Atchinson, T. & S.F.R., 2 F.2d 717 (E.D. Miss. 1924).*

(n15)Footnote 200. *Petition of Indiana County, 62 A.2d 3 (Pa. 1948).*

(n16)Footnote 201. *Martinez v. Continental Enters., 730 P.2d 308 (Colo. 1986).*

(n17)Footnote 202. *Flint v. Grand T.W.R.R., 69 F.2d 604 (E. Mich. 1932).*

(n18)Footnote 203. *Vogl v. Mayor & City Council of Baltimore, 179 A.2d 693 (Md. App. 1962).*

(n19)Footnote 204. *Glotzer v. Keyes, 5 A.2d 1 (Conn. 1939).*

(n20)Footnote 205. *Gilbert Contr'g Co. v. Hook, 255 F. Supp. 687 (E.D. Pa. 1966).*

(n21)Footnote 206. *Helvering v. Jones, 120 F.2d 828 (8th Cir. 1941).*

(n22)Footnote 207. *Southern Bell Tel. & Tel. Co. v. City of Meridian, 131 So. 2d 666 (Miss. 1961).*

(n23)Footnote 208. *A. D. Graham & Co. v. Pennsylvania Tpk. Comm'n, 33 A.2d 22 (Pa. 1943).*

(n24)Footnote 209. *Waldrop v. Whittington, 57 So. 2d 298 (Miss. 1952).*

(n25)Footnote 210. *Hornblower v. Masonic Cemetery Ass'n, 214 P. 978 (Cal. 1923).*

(n26)Footnote 211. *McConnell v. Crittenden County, 63 S.W.2d 329 (Ky. App. 1933).*

(n27)Footnote 212. *Dyer v. Siano, 11 N.E.2d 451 (Mass. 1937).*

(n28)Footnote 213. *Christofani v. Board of Educ., 632 A.2d 447 (Md. 1993)* (Fee simple interest in land may not be lost by abandonment. Abandonment of a right in less than fee creates reversion of abandoned right to fee owner).

(n29)Footnote 214. *Turk v. Wilson, 98 S.W.2d 4 (Ky. 1936).*

(n30)Footnote 215. *Sharkey v. Candiani, 85 P. 219 (Or. 1906).*

An abandonment does not arise from the omission of a portion of a claim by error from a survey for a patent by a surveyor where a senior locator in attempting to relocate the same ground makes a mistake. *Simmons v. Muir, 291 P.2d 810 (Wyo. 1955).*

(n31)Footnote 216. *Bird v. Lisbros, 9 Cal. 1 (1858); Phy v. Hatfield, 126 S.W. 105 (Tenn. 1910).*

(n32)Footnote 217. 4 James Kent, Commentaries on American Law (rev. ed. 1889) 448; *Dikes v. Miller, 24 Tex. 417 (1859); Picket v. Dowdall, 2 Va. 106 (1795).*

(n33)Footnote 218. *Chicago, Wilmington & Franklin Coal Co. v. Jilek, 42 F. Supp. 200 (E.D. Ill. 1942).*

(n34)Footnote 219. *Faulks v. Schrider, 99 F.2d 370 (D.C. Cir. 1938).* Eric Kades, Article: *History and Interpretation of the Great Case of Johnson v. M'Intosh, 19 Law & Hist. Rev. 67 (Spring 2001).*

(n35)Footnote 220. *Hadley v. Platte Valley Cattle Co., 10 N.W.2d 249 (Neb. 1943).*

Title is not lost by mere nonuser or abandonment. *Slatin's Props., Inc. v. Hassler, 271 N.E.2d 665 (Ill. App. 1971). rev'd, 291 N.E.2d 641 (Ill. 1972).*

(n36)Footnote 221. *Skaggs v. Ohio Valley Rock Asphalt Co., 166 S.W.2d 1005 (Ky. 1942).*

(n37)Footnote 222. *Lehman v. Cottrell, 19 N.E.2d 111 (Ill. App. 1939).*

(n38)Footnote 223. *Dikes v. Miller, 24 Tex. 417 (1859); Tiebout v. Millican, 61 Tex. 514 (1884). See State v. West Tenn. Land Co., 158 S.W. 746 (Tenn. 1913).*

(n39)Footnote 224. James W. Simonton, *Abandonment of Interests in Land, 25 Ill. L. Rev. 261 (1931).*

(n40)Footnote 225. *State v. West, 235 S.E.2d 150 (N.C. 1977).*

(n41)Footnote 226. *Sharpp v. Stodghill, 86 S.W.2d 934 (Ark. 1935), 87 S.W.2d 577 (Ark. 1935).*

(n42)Footnote 227. 2 William Blackstone, Commentaries 10; *Del Giorgio v. Powers, 81 P.2d 1006 (Cal. App. 1938).*

(n43)Footnote 228. *Willson v. Cleaveland, 30 Cal. 192 (1866); Bell v. Bed Rock Tunnel & Min. Co., 36 Cal. 214 (1866); Judson v. Malloy, 40 Cal. 299 (1870); Nichols v. Lantz, 47 P. 70 (Colo. App. 1896); Oviatt v. Big Four Min. Co., 65 P. 811 (Or. 1901); Mitchell v. Carder, 21 W. Va. 277 (1883).*

(n44)Footnote 229. *See Hopkins the Florist, Inc. v. Fleming, 26 A.2d 96 (Vt. 1942).*

(n45)Footnote 230. *See Tatum v. Green, 535 So. 2d 87 (Ala. 1988). Chatham v. Blount County, 2001 Ala. LEXIS 6.*

(n46)Footnote 231. *Simpkin v. New York Cent. R.R., 214 N.E.2d 661 (Ind. App. 1966).*

(n47)Footnote 232. *Tract Dev. Serv. v. Kepler, 246 Cal. Rptr. 469 (1988).*

(n48)Footnote 233. *Williams Telecommunications Co. v. Gragg, 750 P.2d 398 (Kan. 1988).*

(n49)Footnote 234. *Cox v. Collossal Cavern Co., 276 S.W. 540 (Ky. 1925).*

(n50)Footnote 235. *Morris v. Ross, 271 P.2d 823 (N.M. 1954).*

(n51)Footnote 236. *Herrmann v. Woodell, 693 P.2d 1118 (Idaho App. 1985).*

(n52)Footnote 237. *Shahan v. Northern Tex. Traction Co., 266 S.W. 850 (Tex. App. 1924).*

(n53)Footnote 238. *Laguna Dev. Co. v. McAlester Fuel Co., 572 P.2d 1252 (N.M. 1977).*

(n54)Footnote 239. *Picken v. Richardson, 77 A.2d 191 (Me. 1950).*

(n55)Footnote 240. *DeShon v. St. Joseph Country Club, 755 S.W.2d 265 (Mo. App. 1988).*

(n56)Footnote 241. *Roberts v. Mitchell, 437 So. 2d 512 (Ala. 1983).*

(n57)Footnote 242. *Vickery v. Benson, 26 Ga. 582 (1858).*

(n58)Footnote 243. *Smelcer v. Rippetoe, 147 S.W.2d 109 (Tenn. App. 1940).*

(n59)Footnote 244. *Crossman v. Foster, 183 N.E. 925 (Ohio App. 1932).*

(n60)Footnote 245. *In re Johnston's Estate, 203 N.W. 376 (Wis. 1925).*

(n61)Footnote 246. The heir did not become seised on the ancestor's death until he entered. 1 Britton 107, ch. 11.

If the estate per autre vie was given to the life tenant "and his heirs," then the heir of the life tenant could enter upon his death as a special occupant for the balance of the term. 2 William Blackstone, Commentaries 259; Vaughn 201.

But by statute in England 29 Car. II, c. 3; 14 Geo. II, c. 10 and in most of the states the estate per autre vie is part of the assets of the deceased as a chattel real and can be passed by will. *Mosher v. Yost, 33 N.Y. (Barb.) 277, 280.*

However it appears that the heir could allow the lord to accept a younger son as tenant. Bracton Note Book;

Michaelmas 1299, A.R. 13-14, 370.

(n62)Footnote 247. *Keinath v. Commissioner Internal Revenue, 480 F.2d 57 (8th Cir. 1973).*

(n63)Footnote 248. *Hardenbergh v. Commissioner Internal Revenue, 198 F.2d 63* (8th Cir.), *cert. denied, 344 U.S. 836 (1952).*

Contra: Edward T. Roehner & Sheila M. Roehner, *Renunciation as a Taxable Gift -- Unconstitutional Federal Tax Decision, 8 Tax L. Rev. 289 (1953).*

(n64)Footnote 249. Joshua Williams, Principles of the Law of Real Property 119 (24th ed. 1933).

(n65)Footnote 250. Assize of Northampton (1176), c. 4. *See* Frederick Pollock & Frederic William Maitland, A History of English Law Before the Time of Edward I 50-60, Vol. 2 (2d ed. 1898).

(n66)Footnote 251. *Pinsky v. Sloat, 279 P.2d 584 (Cal. App. 1955).*

(n67)Footnote 252. *Kramer v. Dursch, 115 N.W.2d 457 (Neb. 1962).*

(n68)Footnote 253. *Wood v. Johnson, 108 So. 2d 202 (Miss. 1959).*

(n69)Footnote 254. *Tunstall v. Cobb, 14 S.E. 28 (N.C. 1891).*

(n70)Footnote 255. *Patterson v. Yeaton, 47 Me. 308 (1859).*

(n71)Footnote 256. *Lima v. Lima, 570 N.E.2d 158 (Mass. App. 1991).*

(n72)Footnote 257. *Wood v. Johnson, 108 So. 2d 202 (Miss. 1959).*

* This chapter is based in part on Chs. 34-36, 57 of George W. Thompson, Commentaries on the Modern Law of Real Property (John S. Grimes ed. 1963, 1978), which made a significant contribution toward preserving the American common law governing title to real property interests.

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CHAPTER 91 TITLE AND MARKETABLE TITLE *

11-91 Thompson on Real Property, Thomas Editions § 91.08

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§ 91.08 Title by Occupancy.

Under the feudal concept, title depended upon possession. Hence when one was ousted from possession one also lost title. Today this precept has almost entirely vanished in the realm of real property. The doctrines of prescription and adverse possession have replaced title by occupancy.

A discussion of the power to acquire title of ownerless things by occupancy lies primarily in the field of personal rather than real property. Occupancy in its technical sense is the taking possession of those things corporeal which are without an owner, with an intention of appropriating them to one's own use. In the realm of personal property, ferae naturae, n258 wild things, and abandoned property bona vacantia n259 are subject to acquisition of title by occupancy. Either there is no outstanding title to such property or, as is the case of wild game in some states, title is in the public but may be acquired by individuals through capture.

Title to realty by occupancy under the English law is of more limited scope than that of personalty. Unquestionably, however, the Anglo-Saxon tribal states as they developed into a nation, despite Danish retardation, did unfold the property concept as to all areas except wild lands. n260 The Norman conquest was merely a transfer of titles that had already become fixed. Under the English theory the ultimate source of title of all lands came eventually to rest in William the Conqueror. Only a few of the channel isles were owned allodially. There was therefore no doctrine of ferae naturae applicable to realty, and the crown graciously extended its seisin to the American continent. Even the Jamestown settlements, allodial at first, in theory eventually admitted the overlordship of Charles II. n261 Thus, the English crown and its successors in title, the thirteen original states and the United States of America held basic title to all land as successor to the English crown by virtue of the treaty of Ghent. n262 Some grants from foreign sovereigns were acknowledged in certain parts of this country, areas formerly under French and Spanish rule and in areas later acquired by treaty. But the doctrine of original title in realty in an individual never has found root in the United States. Not even the aboriginal population were accorded titular rights to the lands occupied by them. Under the philosophy of the white conqueror the Indian had no legal title, but merely a possessory interest.

In its broad sense, the term occupancy has reference to the right or title derived from an original state of nature. Thus the native Indian population had a certain right or title to the lands they occupied, and while the courts have respected these rights, they have held that the right does not extend to property in the soil. This government, while acknowledging

the Indian right of occupancy, and recognizing the principle of acquiring their claims by purchase, has at least until recent years ever reserved the exclusive right to extinguish this title by conquest. n263 The claim of Indian tribes of a right, because of immemorial occupancy, to roam certain territory to the exclusion of any other Indians is known as "Indian Title" or "right of occupancy." n264 This was true even where the Indians had themselves recognized some individual interest in particular tracts, such as among the agricultural Cherokees and the Hopis and Navajos of the southwest.

To achieve the concept of possession there must be (1) an object capable of being possessed (2) an animus possidendi or intent to possess and (3) manucaptione or occupancy to the extent required by the law considering the nature and location of the property. n265 Possession is itself a property right of a low degree. n266 One having possession may defend this right against all the world except the true owner, n267 and some cases go so far as to give the possessor titular rights as against all the world except the true owner. n268 Others permit the stranger to plead "ius tertia" or title in a third person as a defense against a real property action brought by an occupant. n269 As against the holder of the legal title, a mere occupant has no rights. Nor does mere occupancy ever give use to title. n270 There must be a claim of right against the true owner before adverse possession begins to run.

American laws do not recognize any such thing as general or common lands. All American lands are held and owned either by private individuals, or by the state or federal government. n271 Mere settlement upon public lands without taking some steps required by law to acquire title thereto is wholly inoperative as against the United States; n272 but while a person who enters upon public lands without license from the government is a mere trespasser, the policy of the government toward actual settlers has been a liberal one, and occupation of land has been often recognized or sanctioned as initiating a right to acquire it. n273 While settlers who have made valuable improvements on public lands with a view of purchasing or acquiring them under the law prescribing the method of acquiring title thereto, have a possessory right therein, as against the general public, a mere settlement on or occupancy of such lands confers no rights upon such settlers as against the government or persons claiming by reason of a legal title issued by the federal government. n274 It is not uncommon for general grants of public land to except from location thereunder land in the occupancy of persons who have settled upon it without right. n275 A private citizen cannot initiate or acquire under public land laws rights in land occupied by others claiming under the United States, though the claim and occupation of the others is fraudulent and wrongful as against the government. n276 Under some particular circumstances, however, an occupant may acquire property rights. So some states permit the filing of mining claims on public lands, and in a few states the owner or discoverer of an outcrop of a mineral lode may follow it into the bowels of the earth, even though the mine may lead down beneath another property.

Today, the problem of acquiring fee title by occupancy arises only in connection with new lands. Where the lands arise out of nonnavigable waters, the problem is solved by application of the principles governing accretion and reliction. Where the new lands arise out of navigable waters and accretion or reliction does not apply, the title is in the sovereign. It then becomes a question as to whether the sovereign is the United States or the individual state. n277 In the case of tidelands this point has been resolved by judicial decision in favor of the United States. n278 The point is certain to be pressed further as attempts are made to artificially create new land along the shores of the oceans and the Great Lakes. Heretofore, there seems to have been a strong assumption that such new-made land belonged to the state. n279 This thinking may now be seriously altered by the tidelands decisions. Under statutes of the states riparian owners are permitted to reclaim land that is submerged under private waters and to take title thereto. n280 This rule has also been applied to lands under waters over which the Federal government has control. n281 Even though such lands are again submerged, title so acquired is not lost. n282 Today, the sovereign is moving into the field of abandoned property and is, under the doctrine of escheat resulting from the *bona vacantia*, taking away much of the individual's rights to acquire title to abandoned goods through occupancy.

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FOOTNOTES:

(n1)Footnote 258. *Barrow v. Holland, 125 So. 2d 749 (Fla. 1960).*

(n2)Footnote 259. *Parsons v. Standard Oil Co., 74 A.2d 565 (N.J. 1950). aff'd, Standard Oil Co. v. State of N.J., by Parsons, 341 U.S. 428 (U.S. 1951).*

(n3)Footnote 260. Frederic Seebohm, the English Village Community (4th ed. 1890). *See* William Walsh, History of Anglo-American Law (2d ed.) at 11-47.

(n4)Footnote 261. *See* Burton J. Hendrick, the Lees of Virginia (1944).

(n5)Footnote 262. It has been pointed out, however, that Virginia and some of the other colonies claimed to be the successors of the English crown rather than the United States and that cessions by the colonies to the United States were in trust rather than outright.

(n6)Footnote 263. *In re Wilson, 177 Cal. Rptr. 336 (1981).*

(n7)Footnote 264. *In re Wilson, 177 Cal. Rptr. 336 (1981).* Eric Kades, Article: *History and Interpretation of the Great Case of Johnson v. M'Intosh, 19 Law & Hist. Rev. 67 (Spring 2001).*

(n8)Footnote 265. *Brooks v. Bruyn, 18 Ill. 539 (1857).*

(n9)Footnote 266. Burke Shartel, *Meanings of Possession, 16 Minn. L. Rev. 611 (1932).*

(n10)Footnote 267. *Tabscott v. Cobbs, 52 Va. 172 (1854).*

(n11)Footnote 268. *Lindner v. Hartford Fire Ins. Co., 294 N.Y.S.2d 422 (1968). rev'd, 33 A.2d 686 (N.Y. App. Div. 1969).*

(n12)Footnote 269. *Anderson v. Gouldberg, 53 N.W. 636 (Minn. 1892). People v. Lapcheske, 86 Cal. Rptr. 2d 565 (1999)* (The defendant acquired title by occupancy by placing his tenants on the land in question. Because the defendant acquired title by occupancy he became subject to the California Civil Code's rules for rent skimming. However, the defendant was not guilty of grand theft and therefore was entitled to keep the rent earned).

(n13)Footnote 270. *Patterson v. Reigle, 4 Pa. 201 (1846).*

(n14)Footnote 271. 1 Joseph Story, Commentaries on the Constitution of the United States 3 (2d ed. 1851).

(n15)Footnote 272. *Test v. Reichert, 14 N.W.2d 853 (Neb. 1944). But see, Kiowa Creek Land & Cattle Co., Inc. v. Nazarian, 554 N.W.2d 175,* (Neb. App. 1996) (distinguishing *Test,* because neither party in *Test* could trace their rights to the government).

(n16)Footnote 273. *Hall v. Russell, 101 U.S. 503 (1879).*

(n17)Footnote 274. *Ortiz v. Manning, 82 P.2d 897 (Ariz. 1938).*

(n18)Footnote 275. *See, Johnson v. Drew, 171 U.S. 93 (1898).*

(n19)Footnote 276. *Putnam v. Ickes, 78 F.2d 223 (D.C. Cir. 1935).*

(n20)Footnote 277. *United States v. Louisiana, 339 U.S. 699 (1950).*

(n21)Footnote 278. *United States v. Texas, 339 U.S. 707 (1950).*

(n22)Footnote 279. *De Simone v. Kramer, 252 N.W.2d 653 (Wis. 1977).*

(n23)Footnote 280. *Padgett v. Central & S. Fla. Flood Control Dist., 178 So. 2d 900 (Fla. App. 1965).*

(n24)Footnote 281. *City of Los Angeles v. Venice Peninsula Props., 182 Cal. Rptr. 599 (1982). rev'd, Summa Corp. v. California ex rel. State Lands Com'n, 466 U.S. 198 (1984).*

(n25)Footnote 282. *Coastal Indus. Water Auth. v. York, 520 S.W.2d 494 (Tex. App. 1975). aff'd, 532 S.W.2d 949 (Tex. 1976).*

* This chapter is based in part on Chs. 34-36, 57 of George W. Thompson, Commentaries on the Modern Law of Real Property (John S. Grimes ed. 1963, 1978), which made a significant contribution toward preserving the American common law governing title to real property interests.

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CHAPTER 91 TITLE AND MARKETABLE TITLE *

11-91 Thompson on Real Property, Thomas Editions § 91.09

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§ 91.09 Marketable Title.n283

[Go To Supp]

§ 91.09(a) The Common Law.

§ 91.09(a)(1) Various Definitions of Marketable Title.

If the real estate sale contract directly or by inference contemplates that the vendor shall furnish to the vendee a marketable or merchantable title, the question of what is a marketable title in a particular situation may be as easy to answer as what is right and what is wrong. A marketable title is one that a prudent person with full knowledge of all facts would be willing to accept. n284 The leading rule follows the principle that to make a title unmarketable it is not necessary that proof establish that it is defective, if there is reasonable doubt in the minds of the court. n285 The doubt must be not remote but rational. n286 The test has been said to be whether a court could direct a verdict. n287 A vendee who takes possession under the contract of sale may not dispute the vendor's title. n288

A merchantable or marketable title has also been defined as one that is "a title that a man of reasonable prudence, familiar with the facts and apprised of the questions of law involved, would in ordinary course of business accept." n289 The test of a marketable title is not the hazard of possible litigation but the chance of successful attack. n290 A marketable title must be salable without abatement of price and salable on the face of the record. n291 If the defect complained of is not applicable to bona fide purchasers the title is considered "marketable." n292

The term "marketable title," when applied to real estate, means a "title free from reasonable doubt." n293 It means a title that is reasonably free from such doubts as will affect the market value of the estate; one which a reasonably prudent person with knowledge of all the facts and their legal bearing would be willing to accept. n294 It has even been held to be a title in which there is no doubt involved either as to a matter of law or fact. n295 It is one in which the possession can be acquired and retained without litigation or judicial decision. n296 It is a title free from apparent defects, grave doubts, and litigious uncertainties. n297 A title is "unmarketable" when for the purchaser to accept the title proffered would lay the purchaser open to a fair probability of vexatious litigation with the possibility of serious loss. n298

The test is whether the purchaser can peaceably enjoy and use the property for the intended and announced purposes. n299 "Less certainty of proof is required to justify vendee's refusal to accept title than to open up a case after title is

passed and the consideration has been paid." n300 A title subject to an encumbrance is not a good marketable title. n301 A "clear record title" requires that the record should show an indefeasible unencumbered estate. n302 The purchaser is entitled to have a title which is not doubtful and which does not suggest the possibility of a lawsuit, but which a well-informed and prudent person paying full value would be willing to take. n303 The doubt to render a title unmarketable must be a reasonable doubt that would induce a prudent person to hesitate. n304

An "equitable title" is not a "marketable title." n305

> A title open to reasonable doubt is not a marketable title. The court cannot make it such by passing upon an objection depending upon a disputed question of fact or a doubtful question of law, in the absence of the party in whom the outstanding right was vested. Such party would not be bound by the adjudication, and could raise the same question in a new proceeding ... It would especially be unjust to compel a purchaser to take a title, the validity of which depended upon a question of fact, where the facts presented upon the application might be changed on a new inquiry or are open to opposing influences. n306

A reasonable doubt concerning the title exists when there is uncertainty as to some fact appearing in the course of its deduction, and the doubt must be such as affects the value of the property or will interfere with its sale. n307

The title should not only be good, but indubitable. n308 It should at least be such a title as would insure to the purchaser a peaceful enjoyment of the property. n309 If a reasonable doubt remains, after the vendor has produced all the proof the vendor is able to produce, the title is not marketable, and the purchaser is not obliged to take it. n310 A title may be perfect, and yet not marketable. For instance, suppose the validity of A's title depends upon whether or not A is next of kin to B. If A is in fact the next of kin to B, A's title is perfect; but if A is unable to show that fact to the court beyond a reasonable doubt, then A's title, although really perfect if all the facts could be shown, will be deemed unmarketable. n311 The title may be good in fact; but to be marketable it must be possible to be good of record. n312 It may be marketable if there is no reasonable doubt how the fact is and the proof is readily accessible at any time to show how it is. n313 Such proof, however, must be very clear. n314 The sufficiency of a title may depend on proof of facts not of record. n315 Some courts take the view that the fact that the title is capable of being made good by the production of oral testimony or by affidavits does not make it a marketable title where the record does not show the title to be good. n316 However, the vendee is not entitled to demand a title absolutely free from all suspicion or possible defect, n317 or that it will be satisfactory to the vendee or his attorney, unless the contract so provides. n318 The doubt must be rational or real, and not fanciful. n319 The purchaser may waive the right to a marketable title, n320 and may bargain to take realty subject to existing encumbrances. n321 The motive of the vendee in raising the question of unmarketability is not important if the title is actually unmarketable. n322 Statutory uniform title standards have been approved. n323

The courts are not in agreement as to the extent to which a title will be held marketable where the facts are in dispute. n324 So by one rule the vendee cannot be compelled to accept a title based on affidavits where the vendee is entitled to marketable title, n325 under another rule the opposite result is reached. n326

Where all parties having a possible interest are not before the court, not only will a purchaser not be required to take a title depending upon a doubtful question of fact, which is applicable to all cases, but will also not be required to take a title depending upon a doubtful question of law, since the decision thereof would not be binding upon those who are not parties to the action and who might thereafter assert a claim of title. n327 If doubt exists as to the title the courts will usually avoid determining the title to make it marketable. n328

Judicial opinions divide as to whether, in an action between the vendor and the vendee, the court may pass upon a title that requires a determination of a question of fact or of law where all the parties are not before the court. n329 Under the New York rule, if the court in which specific performance is brought can determine the question of title, it may hold the title to be marketable. But if the same question can later be raised in another court, such as where a federal

constitutional question is involved, the title is not marketable. n330 But Massachusetts refuses in a specific performance action to determine whether or not a state constitution question is involved. n331

Under one rule the court will determine the marketability of the title and then decree specific performance if it is satisfied with the law, even though all of the persons who might raise the question are not before the court. n332 Under another rule, if all parties cannot be brought before the court the court will not try the title. But some courts will try the title in a specific performance action if all parties are joined. n333 It has been squarely held that the question of marketability of a title is one of law and that the opinion of witnesses is not receivable. n334

§ 91.09(a)(2) The Effect of Area Discrepancies on Marketability.

If the vendor is unable to deliver the area expected by the vendee the court must determine whether the agreement contemplated the sale of a certain unit of property regardless of its size or whether a definite area played a part in the agreement, i. e., whether the sale was in bulk. If there is a deficiency the "lex non curat de minimis" rule must be considered. If the deficiency is material and such part is not contemplated by the agreement--the question of the vendee's remedy is material--may the vendee rescind or elect to pay a pro tanto diminished purchase price? If the realty is deficient in quantity the weight of authority denies specific performance to the vendor, n335 unless the de minimis rule applies, n336 or the vendee had prior notice of the deficiency before executing the contract, n337 or the contract had waived deficiencies. n338 Where a designated tract is sold as a whole for a gross sum and there is no express or implied warranty as to quantity the sale is deemed to be in gross and not by the acre. n339 Where the sale is not in bulk and there is a material deficiency in quantity the vendee may have specific performance with corresponding abatement in price. n340 Thus where the purchase price has not been paid, the purchaser may have the deficiency in the land conveyed credited against the amount agreed to be paid. n341

If the parties to a contract for the sale of land estimate the quantity at so much and the amount of land has a direct influence on the price to be paid or was a controlling motive in entering into the contract, equity will grant relief in case there is a material excess or deficiency, by compelling a reconveyance of the excess, n342 or fixing an equitable compensation, n343 or rescinding the agreement. n344 Where the sale of a tract of land was in gross and described as containing one hundred fifty-two acres and a fraction in fact only contained one hundred thirty-one acres, more or less, it was held that the extent of the deficiency was sufficient to entitle the purchaser to relief. n345 Where a purchaser agreed to purchase property described with reference to a certain map, the tender of a deed which conveyed the property according to its exact dimensions on the map was held a substantial compliance with the terms of the contract of sale. n346 Where the land is sold in bulk for a lump sum, then quantity is not generally of the essence of the contract and the parties take the risk of deficiency or excess, n347 except in cases where there is actual fraud. n348 Mere shortage does not conclusively show that the purchaser is entitled to compensation for such shortage, but other facts and circumstances tending to show the intention of the parties must be taken into consideration in order to determine whether the contract would have been consummated if both of the parties had known the facts. n349 Quantity is of essence in cases where the sale is by the acre and abatement is allowed for deficiency. n350 It is not essential to the right to abatement that the vendor should have known of the acreage shortage. n351 The words "more or less" mean "substantially" or "approximately" and imply that both parties assume the risk of an ordinary, n352 but not of a gross, discrepancy, n353 except where fraud is practiced in the transaction. n354 Where both parties were mistaken as to the land described, the courts will usually allow abatement of the purchase price for deficiency. n355 Specific performance has been refused in several instances where the mistake was not mutual but was caused by the act of the other party. n356 Specific performance was refused where the purchaser knew that the vendor was making a mistake as to the size of the lot to be conveyed, n357 or where it would be inequitable to enforce the agreement. n358 However, where a tract of land is sold as a whole, the amount may be immaterial even though greater than the vendor supposed, and the contract be valid and enforceable. n359 The vendee cannot have any action for misrepresentation as to quantity where the vendee has information as to the area before the consummation of the contract. n360 If both vendor and vendee believe that the land contracted to be sold contains a certain number of acres and the transaction is based on that belief, the vendee may recover for the deficiency where the acreage is subsequently discovered to be deficient. n361 The

general rule of compensation or abatement in case of deficiency in the quantity of land sold is according to the average value per acre of the whole tract, unless particular circumstances require a departure therefrom. n362

Whether the sale is intended to be in bulk or by the acre is to be determined from all the terms of the contract, including a lump-sum purchase price, conduct of the parties, value and extent, and location of the land and its description. n363 If the vendor has fraudulently misrepresented the quantity the vendor cannot defend on grounds that the sale was in bulk. n364 The use of the words "more or less" or "approximately" n365 are evidence, n366 but not conclusive evidence, n367 that the parties expected a deficiency, but do not excuse a large deficiency. n368 It is not a defense to specific performance at the suit of the vendor that there was a highway across the premises which took a portion of the premises, where the contract did not call for a specific acreage. n369 Where the vendor represented that the land contained more than the number of acres conveyed to the purchaser, the purchaser may recover the proportionate part of the amount paid, if the deficiency is sufficient to warrant it. n370

§ 91.09(a)(3) Situations Making Title Unmarketable.

For a title to be unmarketable the defect must be a reasonable one. n371 A purchaser seeking specific performance must take deed subject to dower, is not entitled to abatement for purchase price because of dower, and must rely on covenants of warranty. n372 Recitals in deeds are not usually allowed to be marketable title. n373 Most of the cases hold that a restriction against the manufacture or sale of intoxicating liquor on the premises makes the title unmarketable. n374

A title derived from a tax deed is marketable if there are no defects in the proceedings under the leading rule, n375 but some cases hold that a tax deed of itself is not prima facie evidence of merchantable title, lacking independent proof that all provisions of the statutes regarding tax sales were met. n376 Tax sales supported by affidavits of adverse possession have been held to support marketable title. n377 An easement makes a title unmarketable unless open and notorious. n378

Under one rule, to make a title marketable a grantor must be shown to have been unmarried, n379 but other cases hold there is no presumption that the grantor was married. n380

A prospective assessment for contemplated improvements which had not become a lien when the title was closed was held not an encumbrance or valid objection to taking title under the contract. n381 A land purchaser assumes the annoyance involved in an adjoining prior existing landowner's use of the land in a reasonable manner. n382 The vendor and the vendee contract with notice of visible easements. n383

A vendee was not bound by constructive notice of zoning ordinance which the vendor was violating. n384 It is possible for a title to be "marketable" and yet contain such collateral infirmities as would deny specific performance to the vendor. n385 Ordinarily, the vendor must have discharged all encumbrances before tendering a deed and may not impose on the purchaser the burden of procuring satisfaction of encumbrances. n386 The inability of the vendor to convey a full title because of a reservation of riparian water rights may or may not excuse performance of the contract by the purchaser, this depending upon the value of the rights reserved. n387

The purchaser cannot be compelled to take a partial interest, n388 and also cannot be compelled to accept a title under encumbrance which the vendor cannot or will not remove and which the purchaser cannot remove by application of the purchase money. n389 Very generally, an encumbrance will not render the title unmarketable where it may be removed by the vendee out of the purchase money to be paid, n390 or the vendor is obligated to pay it out of the money to be received. n391 An encumbrance will include charges which burden, obstruct, or impair the use of the land or impair its transfer. n392 Other matters considered as encumbrances warranting rejection of title as unmarketable are outstanding dower interests, n393 future interests, n394 a pending suit for condemnation of part of the property, n395 judgments, n396 executions, n397 unreleased mortgages, n398 easements, n399 encroachments on the premises, n400 the encroachment of buildings on the premises over adjoining premises or streets, n401 party walls, n402 building and

business restrictions, n403 tax titles n404 or tax liens, n405 an outstanding oil lease, n406 sale of coal and mineral rights, n407 an unascertained transfer tax lien, n408 income tax liens, n409 mechanics' liens, n410 the undisposed of interests of minors, n411 administrators' or guardians' deeds without showing court authority for such deeds, n412 titles containing restrictive covenants, n413 confusion and differences in names and initials of prior grantors, n414 corporate deeds not showing authorization by the corporation, n415 options to purchase, n416 and titles on decrees still subject to appellate or other review. n417 A permanent easement visible to the purchasers, such as a public road or telephone right-of-way, has been held not to be an encumbrance. n418 Authorities divide as to whether public highways are encumbrances. n419

Where the lien can be satisfied out of the unpaid purchase price the title is generally held marketable. n420 The title is not marketable if it depends upon an unconstitutional statute, n421 but it is marketable if the statute which would have created the encumbrance is unconstitutional. n422 Indeed the cases are divided on whether a vendee must accept a title subject to an encumbrance, even though there is reserved from the purchase money a sufficient amount to pay the lien when determined. n423

Marketable title vests title and is more than a statute of limitations being valid as against those under disability. n424 Encroachments are not fatal to title if removable before closing. n425

A purchaser of property entitled to a "marketable title" may not be required to accept a conveyance if the title is in such condition that the purchaser may be required to defend litigation challenging possession and interest. n426 A title may be regarded as unmarketable if a reasonably careful and prudent man, familiar with the facts, would refuse to accept the title in the ordinary course of business. It is not necessary that the title be actually bad in order to render it unmarketable. It is sufficient if there is such a doubt or uncertainty as may reasonably form the basis of litigation. n427

A condition is implied in a land sales contract that the seller shall convey a marketable title, n428 unless the contrary is stipulated, n429 but after the deed is executed this condition is usually merged and the grantee must depend upon the covenants in the deed for relief. n430 The willingness of a title company to insure is not a test of marketability. n431 Marketable title must be of record and not be based on parol evidence. n432

An equity of rescission because of fraud of a former grantee in obtaining the deed makes the title unmarketable. n433

A zoning regulation does not make the title unmarketable, unless the present use is in violation of the zoning ordinance. n434

Where the record owner has died and the estate has not been settled so as to cut off the creditors, the cases are not in accord as to whether the title is marketable. n435 There is also a problem in such instances as to the determination of heirs or devisees. n436 The cases are at variance as to whether the purchaser can be required to accept a title where there has been no administration of the estate of the deceased titleholder. n437 Where the interest of a minor or of an unborn person is involved, the title is not marketable if the interest has not been properly divested of record. n438 A vendee's interest in a land contract must be foreclosed to clear the title. n439 The question of marketability of the real estate of a deceased person upon a sale by the purported heirs also depends on the possibility of an outstanding will. n440 It further depends upon who are the true heirs. n441

An interloping mortgage is not a defect, n442 and a mortgage that can be paid out of the purchase price is not a defect. n443

The vendor and the vendee contract with notice of visible easements. n444

Under the leading rule the taking of possession by the purchaser prior to the closing day does not waive any objections to the title, n445 but there is contrary authority. n446 A third rule holds that no waiver occurs if the purchaser is

ignorant of the particular defect, n447 but the cases do hold that the purchaser, by retaining possession after making title objections waives such objections. n448 Other cases do not see a waiver by retaining possession where the vendee was ignorant of the objections at the time of the contract. n449 Of course if the vendee is responsible for the defect, the vendee cannot rescind. n450 Where it is apparent that the vendor can never acquire good title, the vendee may rescind before closing. n451 Some cases have placed a burden on the vendee by holding that the vendee waives all objections to title unless the vendee particularly calls attention to them if they were of such a character that they could be cured by the vendor. n452

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LEXIS: unmarketable w/2 title

§ 91.09(a)(4) Title Based on Adverse Possession.

While adverse possession will transfer title, such transfer is dependent upon a number of diverse facts. n453 The final conclusion as to whether there has been "adverse possession" for the requisite period, therefore, is one that must be determined by judicial opinion. Can a buyer be required to accept a title which rests on the concept of adverse possession? Ordinarily, where the contract calls for record title, the title by adverse possession will not suffice. n454 Marketable title requires an abstract "free from reasonable doubt in law and in fact as to its validity." Affidavits and claim of adverse possession are not sufficient. n455 Where the contract does not call for a perfect record title, a title by adverse possession will suffice; but the proof must be convincing and readily available. n456 In many jurisdictions, clear title by adverse possession is marketable, and the purchaser may be required to accept it. n457

Undoubtedly a title by prescription is as high as any known to the law, but the facts upon which it is based should be legally established. n458 A court of equity will never compel a purchaser to take a title where the point on which it depends is too doubtful to be settled without litigation, or where the purchaser would be exposed to the hazard of such proceeding. n459 So, under a contract to furnish a marketable title, one rule holds that a marketable title must be shown on the abstract and not by adverse possession. n460 An agreement to convey by warranty deed, with abstract showing good title, is not satisfied by the offer of a title based on oral evidence of adverse possession. n461 Where the contract calls for a "perfect title," the purchaser may insist upon good title of record, and a perfect title by adverse possession is insufficient. n462 It has even been held that in the absence of a stipulation to furnish a title of record the purchaser is not required to accept a title based on adverse possession which requires parol proof to establish it. n463 On the other hand, where the contract does not stipulate for a title of record, the cases in most jurisdictions hold that the purchaser is bound to accept a title resting upon a hostile, adverse, and uninterrupted possession under color of title for a period of time sufficient to bar the rights of any possible adverse claimant. n464 It has been held that a vendor who for the full period of limitation prescribed by statute has been in peaceable and uninterrupted possession of lands has a marketable title which the vendee who has stipulated for a "clear and indefeasible title" is bound to accept. n465 If the fact as to adverse possession is clear, the title is marketable and the purchaser may be required to accept it. n466 A contract calling for a conveyance by "a good and sufficient general warranty deed, in fee simple" is satisfied by the giving of a good and marketable title, which is a title not open to reasonable objection; and such is a title by prescription. n467 It has been held that a purchaser is not entitled to rescind a land contract on the ground that a reasonable doubt existed as to whether the vendor's title was good, where a will gave power of sale to trustees under whom the vendor claimed title and such a long time had elapsed since the death of the testator that his heirs could not successfully claim the property. n468

Distinction is made between a "clear title" and a "marketable title," n469 but there is considerable confusion as to the extent to which a marketable title can be established by bolstering the record with affidavits. n470 A title based on adverse possession is good if proved. n471 The statute of limitations ordinarily cannot be relied upon as to unreleased or defectively released mortgages because of the danger that the mortgagor may have taken an action to keep the mortgage alive. n472 An adverse possession claim is invalid against Torrens property where no disputed interest existed at the

time of registration and where there was no ambiguity in the property description. n473

COMPUTER-ASSISTED RESEARCH

LEXIS: title w/15 adverse possession

§ 91.09(a)(5) Abstracts as Requirements of Marketable Title.

The contract may contemplate that the vendor will furnish the vendee with an abstract of title or in the alternative with title insurance. The vendor is under no duty to furnish an abstract where the contract does not require it. n474 The vendee may waive a provision in the contract to furnish an abstract. n475 An agreement in the contract to furnish an abstract means an abstract taken from the record, n476 and is to be furnished to the vendee on or before tender of the deed. n477 An abstract is not contemplated to be the complete evidence of title, but is a mere synopsis of the record as to the title, n478 but the purchaser is entitled to rely on the abstract. n479 The abstract may be supplemented in some instances by affidavits clearing omissions and obscure and defective recitals. n480 Under an agreement to furnish "an abstract of title" the contract was held to require a record title and would not be satisfied by furnishing extrinsic evidence of title by adverse possession. n481 The contract may provide for the approval of the abstract by an attorney, and his decision will generally be conclusive. n482 The provision requiring the vendor to furnish an abstract showing a good and merchantable title means that this title should be in the vendor. n483 The abstract is generally held not defective for omission of the original government grant. n484 The vendee has a reasonable time for the examination of the abstract, n485 and the vendor should have a reasonable time to correct defects. n486 Objections to defects in the abstract may be waived. n487

The abstracter ordinarily insures the accuracy of the work. n488 An abstracter is not liable for loss incurred by one who, at the time of taking the action resulting in the loss, does not rely on the abstract. n489 If the vendor agrees to furnish an abstract showing title, the vendee is not liable if such abstract is not furnished. n490

The weight of authority does not place upon the vendor, in the absence of contract, the duty of furnishing an abstract of title. n491 If the contract requires the vendor to furnish an abstract such abstract is a condition precedent to the vendee's liability to perform, n492 and the vendor may not have specific performance without furnishing the abstract. n493 The abstract must show all matters of record detrimental to the title. n494 It must show grantor's marital status. n495 It must show all defective descriptions. n496 The abstract must reveal the present status of all liens and encumbrances of record. n497 It must contain an abstract of all court proceedings affecting the title. n498 If the instrument appears in the abstract of title, it gives notice to the purchaser even though the instrument was not itself entitled to record because of a defective acknowledgment. n499 The abstract must reveal all instruments of record affecting title to the realty. n500 Where the chain of title depends on court proceedings the abstract must show sufficient indication thereof to support the title. n501

COMPUTER-ASSISTED RESEARCH

LEXIS: requir! w/15 abstract! w/30 marketable title

§ 91.09(a)(6) Vendee's Rights When the Vendor's Title Is Inadequate.

If the vendor cannot furnish the title contemplated by the contract the vendee may rescind, and the court will not decree specific performance of a contract to convey if the grantor cannot make a good title to the property, if the title is doubtful, n502 or not marketable, n503 or if the vendor can convey only an undivided interest therein. n504 It is the duty of a vendor to tender to the vendee a safe title, and a purchaser is never bound to accept a defective title in the absence of express agreement. n505 A promise to convey such title is always implied in an executory contract for the sale of real estate, and a purchaser is never bound to accept a defective title, unless the purchaser expressly stipulates to

take such title, knowing its defects. n506 In the absence of a specific provision to the contrary, the vendor must convey a title that is free from encumbrances. n507

When a vendor agrees to sell a parcel of land, the law imputes to the vendor a covenant to convey a marketable title, unless the vendee stipulates to accept something less. n508 An agreement to convey, unless otherwise provided, obligates a conveyance of a title in fee simple free from liens and encumbrances. n509 A purchaser who has been promised a good title cannot be compelled to accept a defective title even though the vendor is ignorant of the defect when making the promise. n510

Where the vendor agrees to convey to the vendee "by warranty deed with abstract showing good title," this has reference to the record title, which may be epitomized in the abstract, and is a condition precedent to the vendor's right to demand the deferred payments. n511 In case of defect of title as to which the vendor was ignorant, the vendee may rescind or disaffirm the contract and sue to recover any part of the purchase money he has paid. n512 Where the seller of a business free and clear of encumbrances refused the purchaser's demand to comply with bulk sales law, it was a failure to perform and the purchaser is entitled to return of the escrow deposit. n513

Where the contract stipulates the character of title to be conveyed, effect will be given to such stipulation. n514 The covenant for "good and lawful title" intends a title free from encumbrance. n515 The title must be a good record title and not one that may be shown to be good by oral proof or writings not subject to registration. n516 Thus, a contract providing for the conveyance of an estate in fee simple, clear of all encumbrances whatever, by a good and sufficient warranty deed, requires a conveyance of a good, merchantable title. n517 Strictly speaking, there is no such title as a "perfect title," but where the contract calls for such title the purchaser is entitled to a title free from reasonable doubt and fairly deducible of record, n518 and cannot be compelled, for example, to accept a title encumbered by a recorded oil and gas lease. n519

Where the phrase, "perfect title," was embodied in a contract of sale, it was said to mean such a title as is perfect and safe to a moral certainty; a title which does not disclose a patent defect that suggests the possibility of a lawsuit to defend it; a title such as a well-informed and prudent person paying full value for the property would be willing to take. n520 "A perfect title always carries with it, in legal contemplation, a lawful seisin and possession. Such seisin and possession is coextensive with the right, and deemed to continue until ouster by actual possession of another under claim of right." n521

Like a "perfect title," a "complete title" requires the union in one person, from one or more sources, the possession, the right of possession, and the right of property. n522

Where the contract contemplates the conveyance of a good title when the purchase price is paid, it is the duty of the vendor to have such title and to be able to convey same when the time for performance arrives. n523 The purchaser is not required to accept a defective title, n524 and is not required to accept title from a third person. n525 The term "good title," used in a contract of sale, does not necessarily mean one perfect of record. n526 It consists in the rightful ownership of property and in the rightful possession thereof, together with the appropriate legal evidence of rightful ownership. As between vendor and purchaser, it means the legal estate in fee, free and clear of all valid claims, liens or encumbrances whatsoever. n527 It means a title free from all litigation, palpable defects, and grave doubts. It should consist of both legal and equitable titles, fairly deducible of record; n528 but the purchaser will not be permitted to object to the title on account of the bare possibility that it will prove defective. n529 A defect which will excuse performance must be such as to cast a cloud on the title in the minds of reasonable persons. n530 "A good title means not merely a title valid in fact, but a marketable title, which can again be sold to a reasonable purchaser or mortgaged to a person of reasonable prudence as security for a loan of money. A purchaser will not generally be compelled to take a title when there is a defect in the record title which can be cured only by a resort to parol evidence." n531 In a contract to convey a good title, the word "good" comprehends all that the word "clear" does. n532 The term "clear title," as used in such contract, means that there are no encumbrances on the land. n533 An agreement to convey "in fee simple, clear

of all encumbrances whatsoever, by a good and sufficient warranty deed" requires conveyance of a good title in law, which means a good merchantable title. n534

It is the duty of vendors to tender to their vendees a safe title, and purchasers are never bound to accept a defective title in the absence of express agreement. A promise to convey such title is always implied in an executory contract for the sale of real estate, and purchasers are never bound to accept a defective title, unless they expressly stipulate to take such title, knowing its defects. n535 Where there was a failure to furnish title insurance as stipulated for in the contract, the purchaser was held not bound to perform the contract. n536 Likewise, a failure to furnish an abstract showing a clear title as provided in the contract will absolve the purchaser from performance thereof. n537 A purchaser is not compelled to take property, the possession of which the purchaser may be obliged to defend by litigation. n538

Title to a whole tract will not suffice if title to any part of it is bad. n539 It is the condition of the title at the time fixed for performance which determines the rights of the parties. A vendor may not have title at the time of the contract and yet will fulfil the obligation if title is held at the time of closing. n540 Where the time to perform is indefinite, it is sometimes held that the vendor will be given a reasonable time to perform after the time is fixed and definite. n541 The purchaser is not obligated to advance money to the vendor to enable the vendor to secure title. n542 The contract may give the vendor a reasonable time in which to cure defects, n543 and it may obligate the vendor to furnish an abstract showing good title, which will constitute a condition precedent to payment of the purchase money. n544

In order to entitle a vendor to the equitable relief of specific performance, he must tender to the vendee a marketable title by a conveyance containing the usual covenants, unless the contract provides otherwise. n545 Equity will not compel a purchaser to accept a doubtful title. n546 The title of the vendor of land must be marketable although the contract does not so stipulate. Such a condition is implied in all contracts for sale of real property. n547

The purchaser, before being required to pay the purchase price, is entitled, unless stipulated to the contrary, to receive a marketable title, n548 a title that is fairly deducible of record and not depending on matters resting in parol, n549 but it is said that a "marketable title" is not necessarily one that can be fully established merely by recourse to the public records. n550

The purchaser may enforce rescission where the vendor is unable or unwilling to perform his contract to convey a merchantable title. n551 The purchaser also may rescind for failure of title to a portion of the land covered by the contract. n552 Where a contract for the sale of realty is executory on both sides, a failure of title is a failure of consideration, and a rescission of the contract may be had and the consideration recovered, but the vendee must restore the possession and the estate of the vendor. n553 This rule applies to a contract for the exchange of land. n554 On refusal of the vendor to deliver a deed according to the terms of the contract, the vendee may sue for rescission and the recovery of the purchase price already paid in. n555 Where a vendor is unable to convey good title within the time stipulated in his contract, the purchaser may rescind without tendering the remainder of the unpaid purchase money, n556 and it is immaterial that the vendor believed the vendor had a good title. n557 A purchaser will not be denied the right to rescind a contract because of the falsity of the vendor's representation that the title was good, or by the fact that by the lapse of time the title has become good. n558 It has been held, however, that equity will refuse a purchaser relief if the defects of which the purchaser complains might with reasonable diligence have been discovered prior to the execution of the contract. n559 The prevailing rule in this country is that in a sale of real estate the vendor is bound to disclose any defect in the title to or encumbrance on the property sold, known to the vendor and not known to the purchaser, and that failure so to do will render the contract voidable at the vendee's option. n560 This has been held to be true even though the encumbrance is of record. n561 In the absence of fraud, an executed sale of real estate will not be rescinded for failure of title, but the purchaser's remedy then is an action on the covenants of the deed. n562 Time fixed for the performance of such contract is generally of the essence thereof, and a long delay in offering a marketable title agreed to be purchased warrants the purchaser in rescinding the contract; n563 but rescission will not be decreed unless facts are pleaded showing why the vendor will not be able to perform when the time for performance arrives. n564 The failure of title that will warrant rescission is the failure of title at the time the contract is to be performed. The

seller has until that time, or a reasonable time thereafter, to make the title good. n565 Ordinarily, there will be no case for rescission for a partial failure of title which does not materially take away the enjoyment, and which can be compensated in damages. n566 Expressions of opinion as to the sufficiency of the title, when the means of information on the subject are accessible to the purchaser, do not ordinarily amount to deceit. n567

The vendor must furnish the exact title called for by the contract. n568 In an action by the vendor for specific performance, the defendant must point out defects relied upon to defeat the action. n569 Where the title is good, specific performance will be decreed although the abstract through oversight failed to show clear title. n570 In a case where the vendor's title was through one described as "agent," specific performance was decreed where it appeared that such agent had an absolute fee-simple title. n571 Where there was a failure to furnish title insurance n572 or an abstract showing a clear title as stipulated in the contract, specific performance was denied. n573

A purchaser cannot be compelled to take a doubtful title, but will not be permitted to object to a title on account of a bare possibility that it will prove defective. n574 Where there is any doubt about the title being free from liens or encumbrances, the court will not decree a specific performance. Its validity must not rest upon some fact not before the court. n575 Specific performance will not be decreed even at the suit of the vendee, if it would compel the vendee to accept an imperfect title which was not in the contemplation of the parties when the contract was made. n576 The vendor must own the land at the time suit is brought or the relief will usually be denied. n577 Where the vendor's title rests on an indefeasible title under the statute of limitations, however, it has been held that equity may enter a decree in his favor enforcing specific performance of the contract. n578

Where the wife has a dower right, most courts permit the vendee to have specific performance plus abatement of the purchase price. n579 Where the wife may contract and convey without the husband's consent, the problem as to curtesy is handled the same as outstanding dower.

Where a defense of lack of marketability is raised based on title defects the action may be only between the parties, or the plaintiff may have made all holders of alleged outstanding interests parties in the nature of a quiet title action. The standard test of the sufficiency of the vendor's title to justify a decree of specific performance is its marketability. n580 The vendor cannot be forced to take action to clear the title. n581

Where a clause in a sales contract required that by accepting deed vendee acknowledged full performance of sales contract to deliver good title, vendee could not complain of an outstanding lease which was not discovered until after deed delivered. n582 It is not essential that the vendor actually have the legal title if the vendor has the certain means of procuring it, or can control it and have it conveyed to the purchaser and offers to do so. n583 Where a vendor has been acting in bad faith a court of equity may require the vendor to correct title defects so as to convey a marketable title. n584

If the vendor is the equitable owner of the property, is under contract to convey, and has the right to call for the legal title, the vendee may have specific performance of the contract. n585 Unless time is held to be of the essence, the vendor is allowed a reasonable time after the closing date in which to clear the title. n586

Many contracts now call for a marketable or an "insurable title." n587 If the contract calls for an insurable title, a title that is good but not insurable is insufficient. n588 An "insurable title" is one which the insurance company will insure without exceptions. n589

A vendor who cannot make out a clear and good title, cannot set up, in defense, the plaintiff's delay in payment, even though there is a stipulation that the contract shall be avoided if the payment is not made at the time. This is in accordance with the rule that a defendant cannot rely as a defense upon a breach which the defendant has caused. n590 Where a title defect or other defect exists and the extent of such defect can be measured in monetary terms, the courts will modify the contract to permit the vendee to pay the purchase price so reduced. n591 The vendee's failure to give

timely notice of defects is a waiver. n592 In order to rescind a contract because of defects in a title, the party must act promptly and within a reasonable time. n593 To justify rescission there must be a reasonable doubt as to the validity of the title, one which will cause a prudent person to hesitate to invest money. A mere possibility of a defect does not justify rescission. n594 Where a "perfect title" is called for the vendor must furnish a title free from litigation, palpable defects or grave doubts, and a legal and equitable title fairly deducible from the record. n595

A title is not marketable if it exposes the owner to the hazard of litigation. n596

Marketable title is decided as of date of closing. n597

Title which requires parol evidence to prove its validity is not marketable. n598

"Marketable title" is what a man of ordinary prudence would find sufficient. n599 Under one rule, if the vendor is able to pay off a lien out of the purchase money the title is not unmarketable. n600 There is contrary authority. n601 A third rule depends on contract. n602 Marketable title is one free from reasonable doubt. Mere possibility or suspicion of defect is not unmarketable. n603 The standard applied in marketability of title is not that the complainant must show a reasonable probability of litigation in order to have the title held unmarketable, but that the party asserting the validity of the title must show with reasonable certainty that litigation will not occur. n604 Some courts make the marketability problem depend upon whether the action is at law or in equitity, refusing specific performance where the title has reasonable doubt, but on the law side requiring a showing that the title is bad. n605

The problem of marketable title has been ameliorated in a few states through the passage of so-called "marketable title" acts. These purport to terminate the existence of outstanding future interests and other title clouds after a period of time, usually limited to fifty years or less. Some statutes cut off all outstanding interests more than fifty years old if not rerecorded within a period of time, usually one year, after passage of the statute. n606 Two states have held unconstitutional at least parts of marketable title acts that destroy existing future interests not rerecorded within the time specified by the act. n607 Others have held such provisions constitutional. n608

Marketable title acts have the effect of converting defeasible fees, possibly even life estates, into fee simple absolutes. n609

State statutes on marketable title are limitations and cannot interfere with the relationship of trust and guardianship between the United States and Indians and cannot be enforced. n610

COMPUTER-ASSISTED RESEARCH

LEXIS: vendee! w/5 right! w/30 title w/5 inadequate or doubtful or unmarketable

§ 91.09(b) Marketable Title Acts and Other Curative Acts.

§ 91.09(b)(1) Curative Acts Generally.

Theoretically, obtaining assurance of good or marketable title is much facilitated by a reliable recording system in which one may examine all the essential conveyancing documents in the chain of title for a particular parcel of land. In fact, various small imperfections in every aspect of both conveyancing procedures and recording systems can, in their cumulative effect, render almost every title subject to some sort of defect, many of them only minor. In addition, certain types of future interests may be unlikely to ripen into possession, but remain matters of record, retarding the free marketability of the lands to which they apply.

Several types of state legislation have attempted to relieve these burdens on real property titles. The most basic of these enactments are statutes of limitations that bar actions to recover interests in land after relatively few years from the time

such rights arise. These provisions are most commonly manifested in situations of adverse possession, of which it has been said: "There is no doubt that adverse possession has cured millions of title defects; indeed, that is probably the main justification for the doctrine." n611

Another type of curative legislation is represented by provisions that declare certain real property-related documents valid and recordable despite minor defects in execution or contents. n612 Other acts cut off certain types of very old interests, such as reversionary interests and old mortgages (which may sometimes be foreclosed even if the underlying debt is barred by a statute of limitations).

Many states have enacted a variety of marketable record title acts, which effectively

> void most types of claims to land if they are not reflected in the records between the date of the "root of title" and a date some stated number of years later. The root of title is defined as the most recent deed or other title transaction recorded in an unbroken chain of title at least some specified number of years in the past--typically 20 to 40 years. For example, if the statute specified 30 years and a search were being made in 1985, a deed recorded in 1960 could not be the root of title, but one recorded in 1950 could be. If there were no exceptions to the coverage of the acts, it would be entirely unnecessary to search earlier than the root of title, since nothing found there could affect the present title. n613

The effectiveness of these acts in clearing land titles tends to be compromised by a number of standard and nonstandard special interest exceptions. n614

COMPUTER-ASSISTED RESEARCH

LEXIS: curative w/2 act! w/30 marketable w/2 title

§ 91.09(b)(2) The Uniform Marketable Title Act.

The Uniform Marketable Title Act was originally promulgated by the National Conference of Commissioners on Uniform State Laws as part of the Uniform Simplification of Land Transfers Act in 1977. It was approved as a separate act in 1990. The drafters have described the main features of this act as follows:

> The basic idea of the Marketable Title Act is to codify the venerable New England tradition of conducting title searches back not to the original creation of title, but for a reasonable period only. The Model Act is designed to assure a title searcher who has found a chain of title starting with a document at least 30 years old that he need search no further back in the record.
>
> Provisions for rerecording and for protection of persons using or occupying land are designed to prevent the possibility of fraudulent use of the marketable record title rules to oust true owners of property.
>
> The most controversial issue with respect to marketable title legislation is whether or not an exception should be made for mineral rights. This Act follows the Model Act in making no such exception. Any major exception largely defeats the purpose of marketable title legislation, by forcing the title examiner to search back for an indefinite period for claims falling under the exception. n615

The text of the Uniform Marketable Title Act is as follows:

UNIFORM MARKETABLE TITLE ACT

1990 ACT n616

§ 1. Definitions.

§ 2. Notice; Knowledge; Giving Notice; Receipt of Notice.

§ 3. Marketable Record Title.

§ 4. Matters to Which Marketable Record Title is Subject.

§ 5. Interests Extinguished by Marketable Record Title.

§ 6. Effect Upon Marketable Record Title of Recording Notice of Intent to Preserve an Interest.

§ 7. Interests Not Barred by [Act].

§ 8. Effect of Contractual Liability as to Interests Antedating Root of Title.

§ 9. Limitations of Actions.

§ 10. Abandonment in Fact.

§ 11. Effect of Indefinite Reference in Recorded Instrument.

§ 12. Uniformity of Application and Construction.

§ 13. Short Title.

§ 14. Severability.

§ 15. Time of Taking Effect, Provisions for Transition.

§ 1. Definitions.

In this [Act], unless the context otherwise requires:

"Conveyance" means a transfer of real estate other than by will or operation of law.

(2) "Document" means a writing, plat, or map, and includes information in electronic, mechanical, or magnetic storage; microfilm; electronic data transmission signals; and other media that can be converted into a legible writing, plat, or map by a machine or device.

(3) "Effective date of root of title" means the date on which the root of title is recorded.

(4) "Law" includes statutes, case law, administrative actions, and legislative acts of local governments.

(5) "Marketable record title" means a title of record, complying with Section 3, that operates to extinguish interests and claims existing before the effective date of the root of title, as provided in Section 5.

(6) "Person" means an individual, corporation, business trust, estate, trust, partnership, association,

joint venture, government, governmental subdivision or agency, or other legal or commercial entity. [In the case of a land trust, however, the term means the beneficiary of the trust rather than the trust or the trustee.]

(7) "Real estate" means an estate or interest in, over, or under land, including minerals, structures, fixtures, and other things that by custom, usage, or law pass with a conveyance of land though not described or mentioned in the contract of sale or instrument of conveyance and, if appropriate to the context, the land in which the interest is claimed. The term includes rents and the interest of a landlord or tenant.

(8) "Record," used as a verb, means to present to the recording officer for the place in which the land is situated a document that the recording officer accepts and either enters in a daily log or notes thereon an identifying number, whether or not under applicable law the recording officer is directed to file the document or otherwise to maintain a record of it. "Recorded" and "recording" have corresponding meanings.

(9) "Record chain of title" means the series of recorded documents creating or evidencing rights of the successive holders of title to real estate.

(10) "Record location" means the location by book and page, document number, electronic retrieval code, or other specific place of a document in the public records accessible in the same recording office in this State where the document containing the reference to the location is found.

(11) "Recording office" means [].

(12) "Records" includes probate and other official records available in the recording office.

(13) "Restriction" means a covenant, condition, easement, or other limitation created by agreement, grant, or implication affecting the use or enjoyment of real estate, but does not include a security interest or lien.

(14) "Root of title" means a conveyance or other title transaction, whether or not it is a nullity, in the record chain of title of a person, purporting to create or containing language sufficient to transfer the interest claimed by that person, upon which that person relies as a basis for marketability of title, and which was the most recent to be recorded as of a date 30 years before the time marketability is being determined.

(15) "Signed" includes the use of a symbol executed or adopted by a party with present intention to authenticate a writing.

(16) "Title" means the right to an interest in real estate, including the interest of an owner, lessee, possessor, lienor, holder of a security interest, and beneficiary of a restriction including an owner of an easement.

(17) "Title transaction" means a transaction purporting to affect title to real estate, including title by will or descent, by tax deed, by trustee's, referee's, guardian's, executor's, administrator's, master in chancery's, or sheriff's deed, by decree of a court, by warranty deed, by quitclaim deed, and by a security interest.

(18) "Utility easement" means an easement (i) of way for a railroad, subway, street railway, or trolley bus line; (ii) for the transmission line for the transmission of electricity, electronic communications, water, oil, gas, or other goods; (iii) for sewerage or drainage; or (iv) for similar utility

uses.

(19) "Writing" includes printing; typewriting; electronic, mechanical, or magnetic storage; microfilm; electronic data transmission signals; and any other intentional reduction of language to tangible form that can be converted into legible form by a machine or device.

§ 2. Notice; Knowledge; Giving Notice; Receipt of Notice.

(a) A person has notice of a fact if:

(1) the person has actual knowledge of it;

(2) the person has received a notice of it; or

(3) from all the facts and circumstances known to the person at the time in question that person has reason to know it exists.

(b) Except as provided in subsection (e), a person has knowledge or learns of a fact or knows or discovers a fact only when the person has actual knowledge of it.

(c) A person notifies or gives or sends notice to another, whether or not the other person actually comes to know of it, by taking steps reasonably required to inform the other in ordinary course, but if this [Act] specifies particular steps to be taken to notify or to give or send notice, those steps must be taken.

(d) A person receives a notice at the time it:

(1) comes to the person's attention; or

(2) is delivered at the place of business through which the person conducted the transaction with respect to which the notice is given or at any other place held out by the person as the place for receipt of the communication.

(e) Notice, or knowledge of a notice, received by a person is effective for a particular transaction at the earlier of the time it comes to the attention of the individual conducting the transaction or the time it would have come to the individual's attention had the person maintained reasonable routines for communicating significant information to the individual conducting the transaction and had there been reasonable compliance with the routines. Reasonable compliance does not require an individual acting for the person to communicate information unless the communication is part of the individual's regular duties or the individual has reason to know of the transaction and that the transaction would be materially affected by the information.

§ 3. Marketable Record Title.

(a) A person who has an unbroken record chain of title to real estate for 30 years or more has a marketable record title to the real estate, subject only to the matters stated in Section 4.

(b) A person has an unbroken chain of title if the official public records disclose a conveyance, or other title transaction, of record not less than 30 years before the time marketability is determined, and the conveyance or other title transaction, whether or not it was a nullity, purports to create the interest in or contains language sufficient to transfer the interest to:

(1) the person claiming the interest; or

(2) some other person from whom, by one or more conveyances or other title transactions of record, the purported interest has become vested in the person claiming the interest.

(c) If anything appears of record, in either case described in subsection (b), purporting to divest the claimant of the purported interest, the chain of title is broken.

§ 4. Matters to Which Marketable Record Title Is Subject.

The marketable record title is subject to:

(1) all interests and defects that are apparent in the root of title or inherent in the other muniments of which the chain of record title is formed, but a general reference in a muniment to an easement, restriction, encumbrance, or other interest created before the effective date of the root of title is not sufficient to preserve it unless a reference by record location is made in the muniment to a recorded title transaction that created the easement, restriction, encumbrance, or other interest;

(2) all interests preserved by the recording of proper notice of intent to preserve an interest;

(3) all interests arising out of title transactions recorded after the effective date of the root of title, and which have not been previously extinguished; [and]

(4) all interests preserved under Section 7 [; and][.]

[(5) all interests preserved by the [Torrens Title Act].]

§ 5. Interests Extinguished by Marketable Record Title.

(a) In this section, "person dealing with the real estate" includes a purchaser of real estate, the taker of a security interest, a levying or attaching creditor, a real estate contract vendee, or another person seeking to acquire an estate or interest therein, or impose a lien thereon.

(b) Subject to Section 4, a marketable record title is held by its owner and is taken by a person dealing with the real estate free and clear of all interests, claims, and charges, the existence of which depends upon an act, transaction, event, or omission that occurred before the effective date of the root of title. All interests, claims, or charges, however denominated, whether legal or equitable, present or future, whether the interests, claims, or charges are asserted by a person who is or is not under a disability, whether the person is within or without the state, whether the person is an individual or an organization, or is private or governmental, are null and void.

(c) Recording an interest after the effective date of the root of title does not revive an interest previously extinguished.

§ 6. Effect Upon Marketable Record Title of Recording Notice of Intent to Preserve an Interest.

(a) A person claiming an interest in real estate may preserve and keep the interest, if any, effective by recording during the 30-year period immediately following the effective date of the root of title of the person who would otherwise obtain marketable record title, a notice of intent to preserve the interest. Disability or lack of knowledge of any kind on the part of anyone does not suspend the running of the 30-year period. The notice may be recorded by the claimant or by another person acting on behalf of a claimant who is:

(1) under a disability;

(2) unable to assert a claim on his [or her] own behalf; or

(3) one of a class, but whose identity cannot be established or is uncertain at the time of recording the notice of intent to preserve the interest.

(b) The notice must:

(1) state the name of the person claiming to be the owner of the interest to be preserved;

(2) contain a reference by record location to a recorded document creating, reserving, or evidencing the interest to be preserved or a judgment confirming the interest;

(3) be signed by or on behalf of the person claiming to be the owner of the interest; and

(4) state whether the person signing claims to be the owner or to be acting on behalf of the owner.

(c) A notice recorded to preserve a utility easement claimed in the real estate of another may include a map incorporating the claim.

§ 7. Interests not Barred by [Act].

This [Act] does not bar:

(1) a restriction the existence of which is clearly observable by physical evidence of its use;

(2) a use or occupancy inconsistent with the marketable record title, to the extent that the use or occupancy would have been revealed by reasonable inspection or inquiry;

(3) rights of a person in whose name the real estate or an interest therein was carried on the real property tax rolls within three years before marketability is to be determined, if the relevant tax rolls are accessible to the public when marketability is to be determined; [and]

(4) a claim of the United States not subjected by federal law to the recording requirements of this State and which has not terminated under federal law[; and] [.]

[(5) oil, gas, sulphur, coal, and all other mineral interests, whether similar or dissimilar to those minerals specifically named.]

§ 8. Effect of Contractual Liability as to Interests Antedating Root of Title.

This [Act] does not relieve a person of contractual liability with respect to an interest antedating the person's root of title to which the person has agreed to be subject by reason of the provision of a deed or contract to which the person is a party, but a person under contractual liability may create a marketable record title in a transferee not otherwise subjected to the interest antedating root of title by this [Act].

§ 9. Limitations of Actions.

This [Act] does not extend the period for bringing an action or for doing any other required act under a statute of limitations.

§ 10. Abandonment in Fact.

This [Act] does not preclude a court from determining that an interest has been abandoned in fact, whether before or after a notice of intent to preserve it has been recorded.

§ 11. Effect of Indefinite Reference in Recorded Instrument.

(a) Unless a reference in a document is a reference to another document by its record location, a person by reason of the reference is not charged with knowledge of the document or an adverse claim founded on it, and the document is not in the record chain of title by reason of the reference to it.

(b) References that are not to a record location and are too indefinite to charge a person with knowledge of an interest or to bring the document within the record chain of title include:

(1) "subject to the terms of a deed dated July 4, 1976, from A to B;"

(2) "subject to a mortgage from A to B;"

(3) "subject to existing encumbrances;"

(4) "subject to easements of record;"

(5) "subject to mortgages of record;" and

(6) "excepting so much of the described premises as I have heretofore conveyed."

(c) This section does not prevent an indefinite reference from constituting a waiver or exception or from being taken into account in determining the existence of:

(1) a contractual obligation or condition between the immediate parties to the document in which the reference occurs; or

(2) a negation of a warranty of title.

This section does not limit the effect of recording a memorandum of lease or other document the recording of which is permitted by law.

§ 12. Uniformity of Application and Construction.

This [Act] shall be applied and construed to effectuate its general purpose to make uniform the law with respect to the subject of this [Act] among states enacting it.

§ 13. Short Title.

This [Act] may be cited as the Uniform Marketable Title Act.

§ 14. Severability.

If any provision of this [Act] or its application to any person or circumstance is held invalid, the invalidity does not affect other provisions or applications of this [Act] which can be given effect without the invalid provision or application, and to this end the provisions of this [Act] are severable.

§ 15. Time of Taking Effect, Provisions for Transition.

(a) Except as otherwise provided in this section, this [Act] takes effect at 12:01 a.m. on [].

(b) If a period of limitation specified in this [Act] would result in prohibiting commencement of a judicial proceeding before the effective date of this [Act] or within two years after its effective date, the period during which the proceeding may be brought is extended until two years have expired after the effective date, but only if the period would have continued to run under the former law until after the effective date. In all other cases the period of limitation is that specified in this [Act].

(c) A person who claims an interest that would be extinguished under this [Act] may preserve the interest by recording a notice of intent to preserve the interest within two years the effective date of this [Act]. The notice has the effect provided in Section 6.

FOOTNOTES:
(n1)Footnote 283. *See also* § 96.17 *below.*

(n2)Footnote 284. *North Mankato v. Carlstrom, 2 N.W.2d 130 (Minn. 1942).*

(n3)Footnote 285. *Spencer v. Sandusky, 33 S.E. 221 (W. Va. 1899).*

(n4)Footnote 286. *Tolosi v. Lese, 104 N.Y.S. 1095 (1907). In re Ilana Realty, 154 B.R. 21 (S.D.N.Y. 1993)* (Under New York law, marketability of title rests on whether there is objection to title that would interfere with sale or with market value of property; marketability of title cannot be separated from assessment of intended use of title property. It does not assure the purchaser of title freedom from doubt or every encroachment but from defects in title that are more than simply possible or very remote. If visible, open, and notorious, easements do not make title unmarketable); *In re Oyster Bay Cove, Ltd., 161 B.R. 338 (Bankr. E.D.N.Y. 1993).* (Under New York law, marketable title does not assure the purchaser of title free from doubt or every encroachment but from defects in title that are more than simply possible or very remote; marketability of title rests on whether there is objection to title that would interfere with sale or with market value of property. There is a distinction between marketable and insurable title. Easements that are open and notorious do not make title unmarketable).

(n5)Footnote 287. *Shriver v. Shriver, 86 N.Y. 575 (1881).*

(n6)Footnote 288. *Thompson v. Ellenz, 59 N.W. 1023 (Minn. 1894).*

(n7)Footnote 289. *Tesdell v. Hanes, 82 N.W.2d 119 (Iowa 1957).*

A merchantable title is "a title not subject to such reasonable doubt as would create a just apprehension of its validity in the mind of a reasonable, prudent and intelligent person; one that persons of reasonable prudence and intelligence, guided by competent legal advice, would be willing to take and pay the fair value of the land for." *Eggers v. Busch, 39 N.E. 619 (Ill. 1895).*

Title is marketable even though there is a possibility of defect if such possibility is not sufficient to raise a reasonable doubt. *Morse v. Stober, 123 N.E. 780 (Mass. 1919).*

A title may be regarded as unmarketable if a reasonably careful and prudent man, familiar with the facts, would refuse to accept the title in the ordinary course of business. It is not necessary that the title be actually bad in order to render it unmarketable. It is sufficient if there is such a doubt or uncertainty as may reasonably form the basis of litigation. *Williams v. Bricker, 109 P. 998 (Kan. 1910),* quoted in *Bartos v. Czerwinski, 34 N.W.2d 566 (Mich. 1948).*

The obligation to give a marketable title is not necessarily altered by a stipulation in the contract of sale that the conveyance will be by quitclaim deed. *Wallach v. Riverside Bank, 100 N.E. 50 (N.Y. 1912).*

The chancery rule in England is that a merchantable title is one "which at all times and under all circumstances, may be forced upon an unwilling purchaser." *Pyrke v. Waddingham, 10 Hare 1 (1852). See also Gibbs v. G.K.H., Inc., 427 S.E.2d 701 (S.C. App. 1993)* (To be marketable, title need not be flawless. Marketable title is one free from encumbrances and reasonable doubt to its validity; one which a reasonable purchaser, well-informed as to the facts and their legal significance, is ready and willing to accept); *Wilson Close, Ltd. v. Crane, 499 N.W.2d 732 (Iowa App. 1993)* (Marketable title is one which a reasonable purchaser, well-informed as to the facts and their legal significance, is ready and willing to accept; marketable title must be furnished on the date required under contract); *Mostrong v. Jackson, 866 P.2d 573 (Utah App. 1993)* (Whether or not a title may be marketable may be a question of law or mixed law and fact, depending on circumstances; marketable title need not be free from defects, but must be one which a reasonable purchaser, well-informed as to the facts and their legal significance, is ready and willing to accept).

(n8)Footnote 290. *Whittier Estates, Inc. v. Manhattan Sav. Bank, 48 N.Y.S.2d 111 (1944).*

The law assures to a buyer a title free from reasonable doubt, but not from every doubt. *Crocker Point Ass'n v. Gouraud, 120 N.E. 737 (N.Y. 1918); Goldberg v. McCord, 166 N.E. 793 (N.Y. 1927).* If "the only defect in the title" is "a very remote and improbable contingency," a "slender possibility only," a conveyance will be decreed. *Cambreleng v. Purton, 26 N.E. 907 (N.Y. 1891); Ferry v. Sampson, 20 N.E. 387 (N.Y. 1889); Greenblatt v. Hermann, 38 N.E. 966 (N.Y. 1894).*

There is no such thing as a mathematical certainty of a good title. *Lyddal v. Weston, 2 Atk. 20 (1739). Industrial Comm'n v. McKenzie County Nat'l Bank, 518 N.W.2d 174 (N.D. 1994)* (Marketable title is free from reasonable doubt; the threat of litigation alone is enough to make title unmarketable if the litigation danger is apparent and real, not merely imaginary or illusory).

(n9)Footnote 291. *Weaver v. Richards, 108 N.W. 382 (Mich. 1906); McLaughlin v. Nelson, 202 N.W. 871 (Neb. 1925). In re Ilana Realty, 154 B.R. 21 (S.D.N.Y. 1993)* (Under New York law, marketability of title rests on whether there is objection to title that would interfere with sale or with market value of property; marketability of title cannot be separated from assessment of intended use of title property. It does not assure the purchaser of title freedom from doubt or every encroachment but from defects in title that are more than simply possible or very remote. If visible, open, and notorious, easements do not make title unmarketable); *In re Oyster Bay Cove, Ltd., 161 B.R. 338 (Bankr. E.D.N.Y. 1993)* (Under New York law, marketable title does not assure the purchaser of title free from doubt or every encroachment but from defects in title that are more than simply possible or very remote; marketability of title rests on whether there is objection to title that would interfere with sale or with market value of property. There is a distinction between marketable and insurable title. Easements that are open and notorious do not make title unmarketable).

(n10)Footnote 292. *Chastain v. McKinney, 203 F.2d 712 (6th Cir. 1953); Gordon v. Holman, 250 P.2d 875 (Okla. 1952).*

(n11)Footnote 293. *Hocking v. Title Ins. & Trust Co., 234 P.2d 625 (Cal. 1951); Federal Farm Mtg. Corp. v. Schmidt, 126 P.2d 1036 (Cal. 1942); Winkler v. Neilinger, 14 So. 2d 403 (Fla. 1943); Smith v. Huber, 277 N.W. 557 (Iowa 1938); Austin v. Barnum, 53 N.W. 1132 (Minn. 1892); Hubachek v. Maxbass Sec. Bank, 134 N.W. 640, 187 (Minn. 1912); North Mankato v. Carlstrom, 2 N.W.2d 130 (Minn. 1942); Robinson v. Bressler, 240 N.W. 564 (Neb. 1932); Sproule v. Davies, 75 N.Y.S. 229 (1902); Farrell v. Zibro, 48 N.Y.S.2d 854 (1944); Reid v. Johnson, 121 N.Y.S. 750 (1959); Kennedy v. Dennstadt, 154 N.W. 271 (N.D. 1915); Holmes v. Woods, 32 A. 54 (Pa. 1895); Morrison v. Waggy, 27 S.E. 314 (W. Va. 1897). See What Constitutes Marketable Title in Oregon, 33 Or. L. Rev. 77 (1953). See also Industrial Comm'n v. McKenzie County Nat. Bank, 518 N.W.2d 174 (N.D. 1994)* (Marketable title is free from reasonable doubt; the threat of litigation alone is enough to make title unmarketable if the litigation danger is apparent and real, not merely imaginary or illusory); *Voorheesville Rod and Gun Club v. E.W. Tomkins Co., 626 N.E.2d 917 (N.Y. 1993)* (Without contrary stipulation in purchase contract, it is presumed that marketable title is to be conveyed; marketable title is free from reasonable, but not every, doubt. Marketability of title is concerned with impairments on title to property relating to the right to unencumbered ownership and possession); *Gibbs v. G.K.H., Inc., 427 S.E.2d 701*

(S.C. App. 1993) (To be marketable, title need not be flawless. Marketable title is one free from encumbrances and reasonable doubt to its validity, one that a reasonable purchaser, well-informed as to the facts and their legal significance, is ready and willing to accept). *Forty Bon, Inc. v. St. Louis Inv. Properties, Inc., 965 S.W. 2d 471 (Mo. App. 1998)* (marketable title is free from encumbrances and any reasonable doubt).

(n12)Footnote 294. *Turner v. McDonald, 18 P. 262 (Cal. 1888); Williams v. Bricker, 109 P. 998 (Kan. 1910) 30 L.R.A. (N.S.) 343; Sinclair v. Weber, 104 A.2d 561 (Md. 1954); Howe v. Coates, 107 N.W. 397 (Minn. 1906); Hubachek v. Maxbass Sec. Bank, 134 N.W. 640 (Minn. 1912); Justice v. Button, 131 N.W. 736 (Neb. 1911); Northouse v. Torstenson, 19 N.W.2d 34 (Neb. 1945); Kennedy v. Dennstadt, 154 N.W. 271 (N.D. 1915); Roberts v. McFaddin, 74 S.W. 105 (Tex. 1903).*

(n13)Footnote 295. *Burton v. Mellor, 154 P.2d 108 (Kan. 1944). But see Mostrong v. Jackson, 866 P.2d 573 (Utah App. 1993)* (Whether or not a title may be marketable may be a question of law or mixed law and fact, depending on circumstances; marketable title need not be free from defects, but must be one which a reasonable purchaser, well-informed as to the facts and their legal significance, is ready and willing to accept).

(n14)Footnote 296. *Barnard v. Brown, 70 N.W. 1038 (Mich. 1897); Adkins v. Gillespie, 189 S.W. 275 (Tex. 1916).*

The exercise of equity jurisprudence respecting the specific performance of contracts is not a matter of right in either party, but of sound and reasonable discretion in the court, and the court, in the exercise of that discretion, will not compel a party to take a title which may expose him to litigation, even though it may believe the title to be good. *Cornell v. Andrews, 35 N.J. Eq. 7 (1882),* citing *Storys Equity Juris 742 and Pyrke v. Waddingham, 10 Hare 1 (1852).*

(n15)Footnote 297. *Savage v. Shields, 293 F. 863 (8th Cir. 1923); Ewing v. Plummer, 140 N.E. 42 (Ill. 1923); Cappel v. Potts, 185 N.W. 148 (Iowa 1921); Kurtz v. Gramenz, 198 N.W. 325 (Iowa 1924); Culley v. Dixon, 201 N.W. 582 (Iowa 1925); Praegner v. Kinnebrew, 100 So. 247 (La. 1924); Marsh v. Lorimer, 113 So. 808 (La. 1927)* (title reasonably suggesting litigation); *McMillan v. Lorimer, 113 So. 812 (La. 1927)* (title reasonably suggesting litigation); *O'Meara v. Gleason, 140 N.E. 426 (Mass. 1923); Hershorn v. Rubenstein, 156 N.E. 251 (Mass. 1927); Shonsey v. Clayton, 187 N.W. 113 (Neb. 1922); McLaughlin v. Nelson, 202 N.W. 871 (Neb. 1925); Sharpe v. Stretch, 130 A. 231 (N.J. 1925); Breitman v. Jaehnal, 132 A. 291 (N.J. 1926); Brengard v. Meighan, 136 A. 502 (N.J. 1927); Bier v. Walbaum, 131 A. 888 (N.J.L. 1926); McCarty v. Lingham, 146 N.E. 64 (Ohio 1924); Satterthwaite v. Van Dissen, 226 P. 583 (Okla. 1924); Ammerman v. Karnowski, 234 P. 774 (Okla. 1924); Pearce v. Freeman, 254 P. 719 (Okla. 1927); Ritter v. Hill, 127 A. 455 (Pa. 1925); Larson v. Thomas, 215 N.W. 927 (S.D. 1927); Blomstrom v. Wells, 239 S.W. 227 (Tex. 1922); Austin v. Carter, 296 S.W. 649 (Tex. 1928); Davis v. Buery, 114 S.E. 773, reh'g denied, 115 S.E. 527 (Va. 1922); Empey v. Northwestern & Pac. Hypotheekbank, 225 P. 226 (Wash. 1924); Bowden v. Laing, 138 S.E. 449 (W. Va. 1927).*

It is such a title as can be sold or mortgaged to a person of reasonable prudence. *Dickerson v. Morse, 212 N.W. 933 (Iowa 1927).*

The term implies a fee simple estate to the entire realty. *Herman v. Engstrom, 214 N.W. 588 (Iowa 1927).*

(n16)Footnote 298. *Vandermade v. Appert, 5 A.2d 868 (N.J. 1939); Schoenberg v. O'Connor, 185 A. 377 (N.J. 1935); Larson v. Thomas, 215 N.W. 927 (S.D. 1927). but see, Wolken v. Wade, 406 N.W.2d 720 (S.D. 1987). Create 21 Chuo, Inc. v. Southwest Slopes, Inc., 918 P.2d 1168 (Haw. App. 1996)* (archaeological sites on land rendered title unmarketable).

(n17)Footnote 299. *McConnell v. Deal, 246 S.W. 594 (Mo. 1922); Ogg v. Herman, 227 P. 476 (Mont. 1924); Vibroplex Co. v. Jacob May Realty Co., 198 N.Y.S. 327 (1922). In re Ilana Realty, 154 B.R. 21 (S.D.N.Y. 1993)* (Under New York law, marketability of title rests on whether there is objection to title that would interfere with sale or with market value of property; marketability of title cannot be separated from assessment of intended use of title property. It

does not assure the purchaser of title freedom from doubt or every encroachment but from defects in title that are more than simply possible or very remote. If visible, open, and notorious, easements do not make title unmarketable); *Patten of N.Y. Corp. v. Geoffrion, 598 N.Y.S.2d 355 (N.Y.A.D. 1993)* (Unmarketable title can occur from an unexpected inhibiting development of property for residential use as intended by purchaser); *Vandervort v. Higginbotham, 634 N.Y.S.2d 800 (1995)* (Vendors could deliver marketable title despite the presence on the property of possible sources of underground discharge of petroleum products).

(n18)Footnote 300. *Ohlbaum v. Mayer, 131 A. 858 (Pa. 1926).*

(n19)Footnote 301. *Nicolopoolos v. Hill, 117 So. 185 (Ala. 1928); Bloshinski v. Falaz, 79 A.2d 798 (Pa. 1951).*

A slight encroachment upon municipal property does not make title unmarketable. *Sinclair v. Weber, 104 A.2d 561 (Md. 1954).*

Zoning ordinance does not make title unmarketable. *Lincoln Trust Co. v. Williams Bldg. Corp., 128 N.E. 209 (N.Y. 1920). Nelson v. Anderson, 676 N.E.2d 735 (Ill. App. 1997)* (covenant in recorded plat).

(n20)Footnote 302. *Empire Gas & Fuel Co. v. Stern, 15 F.2d 323 (8th Cir. 1926); Cleval v. Sullivan, 154 N.E. 920 (Mass. 1927).*

(n21)Footnote 303. *Flitch v. Boyle, 89 P.2d 912 (Kan. 1939); Patzman v. Howey, 100 S.W.2d 851 (Mo. 1936).*

> "However, a title, to be marketable, need not be free from every conceivable technical criticism, but only from those possibilities of defect which are sufficient to raise a reasonable doubt. It is not every possibility of defect or even threat of contest that will be sufficient to make a title unmarketable, for it may be practically impossible for a vendor to anticipate all imaginable objections which, if they existed, would defeat his title.* * * For instance, equity will decree specific performance of a contract for the sale of land even where the title is based upon adverse possession, if the title is so clearly proved and so free from doubt that it may serve as a proper foundation for a decree against the purchaser.* * * In other words, a title, to be marketable, must be one which a reasonably intelligent purchaser, who is well informed as to the facts, would be willing to accept in the exercise of ordinary business prudence.* * *" *Garner v. Union Trust Co., 45 A.2d 106 (Md. 1945). But cf. Holly Hill Holdings v. Lowman, 619 A.2d 853 (Conn. App. 1993)* (Vendor with out-of-service underground petroleum storage tank failed to give required notice of it to the Department of Environmental Protection on the sale of the facility; there was no breach of warranty of title and no unmarketable title despite possibility of filing of environmental lien by the state); *Stewart Title Guar. Co. v. Greenlands Realty, 58 F.Supp.2d 370 (D. N.J. 1999)* (The court defined marketable title as free from doubt to the extent that in a suit for specific performance the court could compel the perspective purchaser to take the title).

(n22)Footnote 304. *Liberty Oil Co. v. Condon Nat'l Bank, 291 F. 293 (8th Cir. 1923); Fenner v. Reeher, 230 S.W. 581 (Ark. 1921); Cappel v. Potts, 185 N.W. 148 (Iowa 1921); Kurtz v. Gramenz, 198 N.W. 325 (Iowa 1924); Vanderwilt v. Broerman, 206 N.W. 959 (Iowa 1926); Messenbrink v. Bliesman, 215 N.W. 232 (Iowa 1927)* (judgments against purchaser himself); *Smith v. Huber, 277 N.W. 557 (Iowa 1938); Bentley v. Keegan, 202 P. 70 (Kan. 1921)* (absence of notary seal on deed ten years old); *Duncan v. Clore, 224 S.W. 678 (Ky. 1920); Norton v. Enos, 104 So. 194 (La. 1925); Potter v. Lumsden, 117 A. 31 (N.J. 1922); Postley v. Kafka, 211 N.Y.S. 382 (1925); Nasha Holding Corp. v. Ridge Bldg. Corp., 223 N.Y.S. 223 (1927); Bashara v. Glasscock, 289 S.W. 128 (Tex. Civ. App. 1927).*

Omission of second initial of former grantor not material. *Vanderwilt v. Broerman, 206 N.W. 959 (Iowa 1926).*

Doubt is resolved in favor of purchaser. *Reeves v. Roberts, 242 S.W. 956 (Mo. 1922).*

Impending litigation must have some possibility of success. *Standard Realty Co. v. Gates, 132 A. 487 (N.J. Eq. 1926).*

(n23)Footnote 305. *Alpha Portland Cement Co. v. Shirk, 227 F. 966 (7th Cir. 1915).*

(n24)Footnote 306. *Fleming v. Burnham, 2 N.E. 905 (N.Y. 1885).*

(n25)Footnote 307. *Wesley v. Eells, 177 U. S. 370 (1900); Turner v. McDonald, 18 P. 262 (Cal. 1888); Smith v. Hunter, 89 N.E. 686 (Ill. 1909); Williams v. Bricker, 109 P. 998 (Kan. 1910); Conley v. Finn, 50 N.E. 460 (Mass. 1898); Howe v. Coates, 107 N.W. 397 (Minn. 1906); Shonsey v. Clayton, 187 N.W. 113 (Neb. 1922); Curatelli v. Barnard, 200 A. 795 (N.Y. 1938); Kursheedt v. Union Dime Sav. Inst., 23 N.E. 473 (N.Y. 1980); Vought v. Williams, 24 N.E. 195 (N.Y. 1890); Herman v. Somers, 27 A. 1050 (Pa. 1893); Schenck v. Wicks, 65 P. 732 (Utah 1901); Cummings v. Dolan, 100 P. 989 (Wash. 1909).*

(n26)Footnote 308. *Ormsby v. Graham, 98 N.W. 724 (Iowa 1904).*

(n27)Footnote 309. *Barnard v. Brown, 70 N.W. 1038 (Mich. 1897).*

(n28)Footnote 310. *Shriver v. Shriver, 86 N.Y. 575 (1881).*

(n29)Footnote 311. *Eggers v. Busch, 39 N.E. 619 (Ill. 1895); Reynolds v. Strong, 31 N.Y.S. 329 (1894).*

(n30)Footnote 312. *Block v. Ryan, 4 App. D.C. 283 (1894); Close v. Stuyvesant, 24 N.E. 868 (Ill. 1890); Brown v. Widen, 103 N.W. 158 (Iowa 1905); Horn v. Butler, 40 N.W. 833 (Minn. 1888); Rudisaile v. De Beughem, 237 S.W.2d 166 (Mo. 1951); Kane v. Rippey, 23 P. 180 (Or. 1890); Speakman v. Forepaugh, 44 Pa. 363 (1863).*

(n31)Footnote 313. *Hedderly v. Johnson, 44 N.W. 527 (Minn. 1890); Barrette v. Whitney, 106 P. 522 (Utah 1909).*

(n32)Footnote 314. *Townshend v. Goodfellow, 41 N.W. 1056 (Minn. 1889); Howe v. Coates, 107 N.W. 397 (Minn. 1906); Moore v. Williams, 22 N.E. 233 (N.Y. 1889); Irving v. Campbell, 24 N.E. 821 (N.Y. 1890).*

A title is not marketable if it requires examination of matters of record outside the state where ancillary administration in the state could be made to perfect the title. *Paradis v. Bancroft, 91 A.2d 925 (N.H. 1952).*

(n33)Footnote 315. *Messer-Johnson Realty Co. v. Security Sav. & Loan Co., 94 So. 734 (Ala. 1922).*

The *idem sonans* rule may not be resorted to to make a title marketable even though it is usable in actions of ejectment and trespass to try title. *Douglass v. Ransom, 237 N.W. 260 (Wis. 1931).*

(n34)Footnote 316. *Howe v. Coates, 107 N.W. 397 (Minn. 1906); Speakman v. Forepaugh, 44 Pa. 363 (1863).*

(n35)Footnote 317. *Kling v. A.H. Greef Realty Co., 148 S.W. 203 (Mo. App. 1912); Clinton v. Miller, 226 P.2d 487 (Mont. 1951); Pooler v. Sammet, 115 N.Y.S. 578 (1909).*

(n36)Footnote 318. *Wiemann v. Steffen, 584, 172 S.W. 472 (Mo. App. 1915).*

But if the contract calls for a title approved by the vendee's attorney the provision is not against public policy and is enforceable. *Campbell v. Hart, 256 S.W.2d 255 (Tex. Civ. App. 1953).*

(n37)Footnote 319. *Zelman v. Kaufherr, 73 A. 1048 (N.J. 1909); Salvin v. Weidemann, 95 N.Y.S.2d 434 (1950)* (even where the contract specified a title satisfactory to vendee's attorney); *Garibaldi v. Yonkers, 102 N.Y.S.2d 200 (1949).*

(n38)Footnote 320. *Alexander v. Abernathy, 108 So. 849 (Ala. 1926); Tuffin v. Warfield, 237 P. 64 (Cal. App. 1925); Alyea v. Baringer, 307 Ill. 113, 138 N.E. 280 (Ill. 1923); Young v. Kich, 15 N.E.2d 692 (Ill. 1938); Dennett v. Norwood Hous. Ass'n, 135 N.E. 866 (Mass. 1922); Jenkins v. Wiley, 254 S.W. 94 (Mo. 1923); Grunt v. Olsan, 101, 139 A. 163 (N.J. 1927); Schifferdecker v. Busch, 225 N.Y.S. 106 (1927); Kinney v. Schlussel, 239 P. 818 (Or. 1925); Andrews v. New Bethlehem Window Glass Co., 112 A. 90 (Pa. 1920).*

(n39)Footnote 321. *Schifferdecker v. Busch, 225 N.Y.S. 106 (1927).*

(n40)Footnote 322. *Goodman v. Marx, 195 N.Y.S. 368 (1922).*

(n41)Footnote 323. *Hughes v. Fairfield Lumber & Supply Co., 123 A.2d 195 (Conn. 1956); Hartley v. Williams, 287 S.W.2d 129 (Mo. App. 1956).*

Requirement of re-recording of future interests held constitutional. *Tesdell v. Hanes, 82 N.W.2d 119 (Iowa 1957); Wichelman v. Messner, 83 N.W.2d 800 (Minn. 1957).*

Marketable Title Act held unconstitutional. *Murrison v. Fenstermacher, 203 P.2d 160 (Kan. 1949).* Kansas has a new statute, Gen. Stat. 1959 Supp., § 67-612a. *See 9 U. Kan. L. Rev. 57.*

Denying consideration to the title examination standards adopted by the bar association. *Riggs v. Snell, 350 P.2d 54 (Kan. 1960), 352 P.2d 1056 (Kan. 1960).*

See Validity of Nebraska Reverter Act, 39 Nebr. L. Rev. 757.

(n42)Footnote 324. *Contrast, Barger v. Gery, 53 A. 483 (N.J. Eq. 1902),* holding to the limited rule, with *Fahy v. Cavanagh, 44 A. 154 (N.J. 1899),* where the court stated: "That titles must be held marketable, although dependent on the proofs of facts, cannot be disputed. If this were not so, a vendor holding title as heir or devisee, in a large number of cases, could not have the remedy of specific performance." When the authorities speak of the hazard of litigation to which the purchaser must not be subjected, it seems to me that they must refer to a hazard which is to be determined by the chance of successful attack as viewed by the court in the suit for specific performance. When, also, they speak of a doubt or a supposed flaw as affecting the salability of a title, they must refer to the character of the doubt or flaw as the court views it, and not as it may be viewed by the intermediate judgment of the real estate market. Some purchasers, guided by cautious counsel, will not accept a title against which the slightest possibility of doubt is suggested; and yet there is no title concerning which a possible doubt or the possibility of a future flaw cannot be raised.

> "The authorities, I think, establish the rule as a safe one that a title dependent on a fact must be regarded as marketable when (1) the fact is so conclusively proved in the suit for specific performance that a verdict against the existence of the fact would not be allowed to stand in a court of law, and (2) where there is no reasonable ground for apprehending that the same fact cannot be, in like manner, proved, if necessary, at any time thereafter for the protection of the purchaser."

In the case of marketable title the idem sonans rule must be such as to preclude questions of identity. *Douglass v. Ransom, 237 N.W. 260 (Wis. 1931).*

(n43)Footnote 325. *Danzer v. Moerschel, 214 S.W. 849 (Mo. 1919).*

(n44)Footnote 326. Title by affidavits held marketable. *Schmidt v. Fontron Loan & Trust Co., 211 P. 630 (Kan. 1923); Moser v. Cochrane, 35, 13 N.E. 442 (N.Y. 1887).*

(n45)Footnote 327. *Imlach v. Seigel, 191 N.Y.S. 814 (1922).*

(n46)Footnote 328. *Kane v. Rippey, 33 P. 936 (Or. 1893).*

(n47)Footnote 329. *Slack v. Mullenix, 66 N.W.2d 99 (Iowa 1954).*

(n48)Footnote 330. *Lynbrook Gardens, Inc. v. Ullman, 53 N.E.2d 353 (N.Y. 1943).*

(n49)Footnote 331. *Daniel v. Shaw, 44 N.E. 991 (Mass. 1896).*

(n50)Footnote 332. *Minister, Reformed Protestant Dutch Church v. Madison Ave. Bldg. Co., 108 N.E. 444 (N.Y. 1915).*

(n51)Footnote 333. *Ladd v. Weiskopf, 64 N.W. 99 (Minn. 1895).*

(n52)Footnote 334. *Evans v. Gerry, 51 N.E. 615 (Ill. 1898).*

(n53)Footnote 335. *Simpson v. Johnson, 597 P.2d 600 (Idaho 1979); Goodman v. Fisher, 131 N.Y.S.2d 184 (1954).*

(n54)Footnote 336. *Baugh v. Johnson, 641 S.W.2d 730 (Ark. App. 1982); Van Blarcom v. Hopkins, 52 A. 147 (N.J. 1902).*

(n55)Footnote 337. *Neill v. Wright, 247 N.Y.S.2d 217 (1964); Blumenstein v. Wegman, 14 N.Y.S.2d 525 (1939).*

(n56)Footnote 338. *Brown v. Robinson, 354 So. 2d 272 (Ala. 1977); Coppage v. King, 99 S.E.2d 541 (Ga. App. 1957); Nasha Holding Corp. v. Ridge Bldg. Corp., 223 N.Y.S. 223 (1927).*

(n57)Footnote 339. *Faithful v. Gardner, 799 S.W.2d 232 (Tenn. App. 1991); Branch v. Walker, 247 P.2d 172 (N.M. 1952).*

(n58)Footnote 340. *C. Lambert & Assocs. v. Horizon Corp., 748 P.2d 504 (N.M. 1988); Hagenbuch v. Chapin, 500 N.E.2d 987 (Ill. App. 1986). but see, Beal v. Schewe, 683 N.E.2d 1019 (Ill. App. 1997).*

(n59)Footnote 341. *B & R Dev., Inc. v. Rogers, 561 S.W.2d 639 (Tex. Civ. App. 1978); Kilburn v. Pierson, 169 S.W.2d 326 (Ky. 1943).*

(n60)Footnote 342. *Speedway Enters. v. Hartsell, 251 P.2d 641 (Ariz. 1952).*

(n61)Footnote 343. *C. Lambert & Assocs. v. Horizon Corp., 748 P.2d 504 (N.M. 1988); Folsom v. Howell, 21 S.E. 136 (Ga. 1894).*

(n62)Footnote 344. *Lundeen v. Lappi, 361 N.W.2d 913 (Minn. App. 1985); Williams v. Marshall, 235 P.2d 372 (Cal. 1951).*

(n63)Footnote 345. *Harlan v. Buckley, 103 S.W.2d 946 (Ky. 1937). But see, Williams v. J.W. Black Lumber Co., 628 S.W.2d 13 (Ark. 1982).*

(n64)Footnote 346. *Blumenstein v. Wegman, 14 N.Y.S.2d 525 (1939).* Purchasers are not required to accept a tract with different dimensions and location than shown on an accurate plat. *Island Harbors, Inc. v. Reed, 159 So. 2d 99 (Fla. App. 1963).*

(n65)Footnote 347. *McKnight v. Cagle, 331 S.E.2d 707 (N.C. App. 1985); Branton v. Jones, 281 S.E.2d 799 (Va. 1981).*

(n66)Footnote 348. *Hancock v. Nashville Inv. Co., 195 S.E.2d 674 (Ga. App. 1973); Bridges v. Thomas, 118 So. 2d*

549 (Fla. App. 1960). The excess may be so great as to raise a presumption of fraud. *Parcel v. Meyers, 697 P.2d 92 (Mont. 1985).*

(n67)Footnote 349. *Burk v. Hefley, 798 S.W.2d 109 (Ark. App. 1990); Birch Brook v. Ragland, 485 S.W.2d 225 (Ark. 1972).*

(n68)Footnote 350. *Harris v. Milloway, 660 S.W.2d 174 (Ark. App. 1983); Carrel v. Lux, 420 P.2d 564 (Ariz. 1966).*

(n69)Footnote 351. *Koenig v. Wachholtz, 309 N.W.2d 803 (Minn. 1981); Queen v. Sisk, 78 S.E.2d 152 (N.C. 1953).*

(n70)Footnote 352. *Branton v. Jones, 281 S.E.2d 799 (Va. 1981); Burk v. Hefley, 798 S.W.2d 109 (Ark. App. 1990); Bankhead v. Jackson, 57 So. 2d 609 (Ala. 1952).*

(n71)Footnote 353. *Harris v. Milloway, 660 S.W.2d 174 (Ark. App. 1983); Kite v. Pittman, 278 S.W. 830 (Mo. App. 1926).*

(n72)Footnote 354. *McIntyre v. Varner, 275 S.E.2d 90 (Ga. App. 1980); Mangham v. Cobb, 127 S.E. 408 (Ga. 1925).*

(n73)Footnote 355. *Snow's Auto Supply, Inc. v. Dormaier, 696 P.2d 924 (Idaho App. 1985); Harris v. Axline, 36 N.W.2d 154 (Mich. 1949).*

(n74)Footnote 356. *Bloedel Timberlands Dev., Inc. v. Timber Indus., 626 P.2d 30 (Wash. App. 1981); Perlmutter v. Bacas, 149 A.2d 23 (Md. 1959).*

(n75)Footnote 357. *Chute v. Quincy, 30 N.E. 550 (Mass. 1892).*

(n76)Footnote 358. *Christy Co. v. Ainbinder/Searcy Ltd., 621 S.W.2d 886 (Ark. App. 1981); Tayyara v. Stetson, 492 P.2d 73 (Colo. App. 1971).*

(n77)Footnote 359. *McKnight v. Cagle, 331 S.E.2d 707 (N.C. App. 1985); Vaughn v. Ray, 598 S.W.2d 772 (Tenn. 1980); Williams v. Daniel, 545 S.W.2d 120 (Tenn. App. 1976).*

(n78)Footnote 360. *Smith v. Hornkohl, 90 N.W.2d 347 (Neb. 1958).*

(n79)Footnote 361. *Koenig v. Wachholtz, 309 N.W.2d 803 (Minn. 1981); Wolcott v. Moore, 92 N.E. 880 (Ind. App. 1910).*

(n80)Footnote 362. *Alexander Myer & Co. v. Hopke, 565 P.2d 80 (Wash. 1977); McComb v. Gilkeson, 66 S.E. 77 (Va. 1909).*

(n81)Footnote 363. *Faithful v. Gardner, 799 S.W.2d 232 (Tenn. App. 1991); Ewing v. Bissell, 777 P.2d 1320 (Nev. 1989).*

(n82)Footnote 364. *Vaughn v. Ray, 598 S.W.2d 772 (Tenn. 1990); Paul v. Swears, 122 N.Y.S. 740 (1910).*

(n83)Footnote 365. *Garibaldi Realty & Constr. Co. v. Santangelo, 149 N.Y.S. 669 (1914).*

(n84)Footnote 366. *Turner v. Ferrin, 757 P.2d 335 (Mont. 1988); Federal Land Bank of Springfield v. Smith, 136 N.Y.S.2d 640 (1955).*

(n85)Footnote 367. *Burk v. Hefley, 798 S.W.2d 109 (Ark. App. 1990); Hagenbuch v. Chapin, 500 N.E.2d 987 (Ill. App. 1986). but see, Beal v. Schewe, 683 N.E.2d 1019 (Ill. App. 1997).*

(n86)Footnote 368. *Burk v. Hefley, 798 S.W.2d 109 (Ark. App. 1990); Arrott v. Smith, 225 S.W.2d 639 (Tex. App. 1949).*

(n87)Footnote 369. *Dierksen v. Pahl, 190 N.W. 423 (Iowa 1922).*

(n88)Footnote 370. *Ewing v. Bissell, 777 P.2d 1320 (Nev. 1989); Cundiff v. Cline, 752 S.W.2d 409 (Mo. App. 1988); Flygare v. Brundage, 302 P.2d 759 (Wyo. 1956).*

(n89)Footnote 371. *Knight v. Devonshire Co., 736 P.2d 1223 (Colo. App. 1986); Peatling v. Baird, 213 P.2d 1015 (Kan. 1950). Yamashita v. Guam, 59 F.3d 114 (9th Cir. 1995)* (no documentary evidence of title in the earliest grantor in the chain of title). Adam Forman, Comment: *What You Can't See Can Hurt You: Do Latent Violations of a Restrictive Land Use Ordinance, Existing Upon Conveyance, Constitute a Breach of the Covenant Against Encumbrances?, 64 Alb. L. Rev. 803 (2000).*

(n90)Footnote 372. *Cities Serv. Oil Co. v. Viering, 89 N.E.2d 392 (Ill. 1949); but see Napleton v. Ray Buick, Inc., 704 N.E.2d 864 (Ill. App. 1998). Pearson v. Adams, 68 N.E.2d 777 (Ill. 1946); Patters v. McComas, 37 N.E.2d 655 (Ohio App. 1941).*

(n91)Footnote 373. *Peckman v. Stewart, 97 Cal. 147 (1893).*

(n92)Footnote 374. *Burns Trading Corp. v. Blue Front Mkt., 85 A.2d 320 (N.J. 1951).*

(n93)Footnote 375. *Walker v. Douglas, 12 So. 2d 839 (La. App. 1943); Maxon v. Gates, 116 N.W. 758 (Wis. 1908).*

(n94)Footnote 376. *Heaton v. Nelson, 194 P. 614 (Colo. 1920).*

(n95)Footnote 377. *Eisenhut v. Marion DeVries, Inc., 269 N.Y.S. 483 (1934).*

(n96)Footnote 378. *Egeter v. West and North Props., 758 P.2d 361 (Or. App. 1988); Siegel v. Shaw, 148 N.E.2d 393 (Mass. 1958).*

(n97)Footnote 379. *Grand Lodge A.O.U.W. v. Fischer, 21 N.W.2d 213 (S.D. 1945).*

(n98)Footnote 380. *Judd v. Skidmore, 22 N.W. 183 (Minn. 1885).*

(n99)Footnote 381. *Hadley Realty Corp. v. Lawyers Title Corp. of New York, 37 N.Y.S.2d 658 (1942).*

(n100)Footnote 382. *Waschak v. Moffat, 109 A.2d 310 (Pa. 1954).*

(n101)Footnote 383. *Waters v. North Carolina Phosphate Corp., 312 S.E.2d 428 (N.C. 1984). Condellone v. Condellone, 528 S.E.2d 639,* (N.C. App. 2000).

(n102)Footnote 384. *Barder v. McClung, 209 P.2d 808 (Cal. App. 1949).*

(n103)Footnote 385. *Micbar Realty Corp. v. Truval Realty Corp., 120 N.Y.S.2d 150 (1952).*

(n104)Footnote 386. *Haase v. Richmond, 570 S.W.2d 341 (Mo. App. 1978).*

(n105)Footnote 387. *Clarke v. Title Guar. Co., 353 P.2d 1002 (Haw. 1960).*

(n106)Footnote 388. *Smith v. MacAlister, 294 N.E.2d 441 (Mass. App. 1977).*

(n107)Footnote 389. *Wheeler v. Sullivan, 106 So. 876 (Fla. 1925).*

(n108)Footnote 390. *Riley v. Wheat, 187 N.W. 425 (S.D. 1922).*

(n109)Footnote 391. *James J. Parks Co. v. Lakin, 292 N.W.2d 21 (Neb. 1980).*

(n110)Footnote 392. *Johnson v. Bridge, 213 P. 512 (Cal. App. 1923).*

(n111)Footnote 393. *Proffitt v. Isley, 683 S.W.2d 243 (Ark. 1985).*

(n112)Footnote 394. *Hoskins v. Walker, 255 S.W.2d 480 (Ky. 1953).*

(n113)Footnote 395. *Lansburgh v. Market St. Ry., 220 P.2d 423 (Cal. App. 1950).*

(n114)Footnote 396. *Brown v. Barngrover, 47 N.W. 1082 (Iowa 1891).*

(n115)Footnote 397. *National Fin. Corp. v. Eicholz, 142 S.E. 134 (Ga. 1928).*

(n116)Footnote 398. *Russell v. Ferrell, 311 P.2d 347 (Kan. 1957).*

(n117)Footnote 399. *Wertheimer v. Byrd, 153 N.W.2d 252 (Minn. 1967).*

(n118)Footnote 400. *Wilson v. Elliott, 589 N.E.2d 259 (Ind. App. 1992).*

(n119)Footnote 401. *Johnson v. Bridge, 213 P. 512 (Cal. App. 1923).*

(n120)Footnote 402. *Hershorn v. Rubenstein, 156 N.E. 251 (Mass. 1927).*

(n121)Footnote 403. *Allen v. Bowman, 10 So. 2d 905 (Fla. 1943). Create 21 Chuo, Inc. v. Southwest Slopes, Inc., 918 P.2d 1168 (Haw. App. 1996)* (archaeological sites on land rendered title unmarketable).

(n122)Footnote 404. *Heaton v. Nelson, 194 P. 614 (Colo. 1920). Wilson v. Moseley, 488 S.E.2d 862 (S.C. 1997).*

(n123)Footnote 405. *Weeks v. Rastelli Contr'g Corp., 113 N.Y.S.2d 734 (1952).*

(n124)Footnote 406. *Bailey v. First Mtg. Corp. of Boca Raton, 478 So. 2d 502 (Fla. App. 1985).*

(n125)Footnote 407. *Kruger v. Agnor, 32 N.W.2d 365 (Mich. 1948).*

(n126)Footnote 408. *Warner v. Doscher, 210 N.Y.S. 83 (1925).*

(n127)Footnote 409. *Minsky v. Zieve, 152 N.E. 41 (Mass. 1926).*

(n128)Footnote 410. Corey v. *Clarke, 56* N.W. 1063 (Minn. 1893).

(n129)Footnote 411. *Succession of Fay, 109 So. 824 (La. 1926).*

(n130)Footnote 412. *Ammerman v. Karnowski, 234 P. 774 (Okla. 1924).*

(n131)Footnote 413. *George v. Colvin, 219 P.2d 64 (Cal. App. 1950).*

(n132)Footnote 414. *Gepford v. Burge, 5 F.2d 829 (D. Colo. 1925).*

(n133)Footnote 415. *Goodman v. Marx, 195 N.Y.S. 368 (1922).*

(n134)Footnote 416. *Buxton v. Glennon, 448 A.2d 420 (N.H. 1982).*

(n135)Footnote 417. *Ewing v. Plummer, 140 N.E. 42 (Ill. 1923).*

(n136)Footnote 418. *Maelender v. Barasch, 112 N.Y.S.2d 259 (1952).*

(n137)Footnote 419. *Old Falls, Inc. v. Johnson, 212 A.2d 674 (N.J. App. 1965). Howell v. Brozzetti, 667 N.Y.S. 2d 831 (N.Y. App. Div. 1998)* (state appropriation left property landlocked; lack of legal right of access made title unmarketable).

(n138)Footnote 420. *Joslyn v. Irwin Dick Co., 209 N.W. 889 (Minn. 1926).*

(n139)Footnote 421. *Agliata v. D'Agostino, 124 N.Y.S.2d 212 (1953).*

(n140)Footnote 422. *Forster v. Scott, 32 N.E. 976 (N.Y. 1893).*

(n141)Footnote 423. *McClosky v. Johnston, 54 So. 2d 517 (Fla. 1951).*

(n142)Footnote 424. *Tesdell v. Hanes, 82 N.W.2d 119 (Iowa 1957).*

(n143)Footnote 425. *De Felice v. Peace, 80 A.2d 321 (N.J. App. 1951).*

(n144)Footnote 426. *Wilson v. Elliott, 589 N.E.2d 259 (Ind. App. 1992).*

(n145)Footnote 427. *Sanders v. Coastal Capital Ventures, Inc., 370 S.E.2d 903 (S.C. App. 1988).*

(n146)Footnote 428. *Medallion Homes, Inc. v. Thermar Invs., Inc., 698 S.W.2d 400 (Tex. App. 1985); but see Ojeda de Toca v. Wise, 748 S.W.2d 449 (Tex. 1988).*

(n147)Footnote 429. *Whitman v. Larson, 568 N.Y.S.2d 485 (1991).*

(n148)Footnote 430. *Bakken v. Price, 613 P.2d 1222 (Wyo. 1980).*

(n149)Footnote 431. *New York Investors, Inc. v. Manhattan Beach Bathing Parks Corp., 243 N.Y.S. 548 (1930). Haw River Land & Timber Co. v. Lawyers Title Ins. Corp., 152 F.3d 275 (4th Cir. 1998)* (Timber company purchased land and later found out that a municipal ordinance prohibited timbering in 179 acres of the newly acquired land. The Timber company sued the title company claiming the title to the 179 acres was unmarketable. The court held for the Title company).

(n150)Footnote 432. *Regan v. Lanze, 387 N.Y.S.2d 79 (1976).*

(n151)Footnote 433. *Wollenberge v. Rose, 78 P. 751 (Or. 1904).*

(n152)Footnote 434. *Lincoln Trust Co. v. Williams Bldg. Corp., 128 N.E. 209 (N.Y. 1920).*

(n153)Footnote 435. *Turner v. McDonald, 18 P. 262 (Cal. 1888).*

(n154)Footnote 436. *Carter v. Girasuolo, 373 A.2d 560 (Conn. App. 1976).*

(n155)Footnote 437. *Seidel v. Snider, 44 N.W.2d 687 (Iowa 1950).*

(n156)Footnote 438. *Delnay v. Woodruff, 221 N.W. 614 (Mich. 1928).*

(n157)Footnote 439. *Petersen v. Hartell, 219 Cal. Rptr. 170 (1985).*

(n158)Footnote 440. *Kilpatrik v. Barron, 26 N.E. 925 (N.Y. 1891).*

(n159)Footnote 441. *In re Oppelt's Estate, 203 N.W.2d 213 (Iowa 1972).*

(n160)Footnote 442. *Flemetis v. McArthur, 226 P.2d 124 (Utah 1951).*

(n161)Footnote 443. *Toler v. Pacific Int'l Petr. Inc., 465 So. 2d 925 (La. App. 1985).*

(n162)Footnote 444. *Waters v. North Carolina Phosphate Corp., 312 S.E.2d 428 (N.C. 1984).*

(n163)Footnote 445. *Bank of Columbia v. Hagner, 26 U.S. 455 (1828).*

(n164)Footnote 446. *Roach v. Rutherford, 4 S.C. 126 (Des. 1873). Soames v. Young Oil Co., 732 N.E.2d 1236 (Ind. Ct. App. 2000).*

(n165)Footnote 447. *Kutschinski v. Thompson, 138 A. 569 (N.J. 1927).*

(n166)Footnote 448. *Worley v. Nethercott, 27 P. 767 (Cal. 1891).*

(n167)Footnote 449. *Bank of Columbia v. Hagner, 26 U.S. 455 (1828).*

(n168)Footnote 450. *Cradock v. Kaiser, 133 S.W.2d 916 (Ky. 1939).*

(n169)Footnote 451. *Werth v. Willer, 250 N.W. 543 (N.D. 1933).*

(n170)Footnote 452. *Cowdery v. Greenlee, 55 S.E. 918 (Ga. 1906).*

(n171)Footnote 453. *Howe v. Coates, 107 N.W. 397 (Minn. 1906).* William Hayden Spitler, Case Note: *Over a Century of Doubt and Confusion: Adverse Possession in Arkansas, Intent to Hold Adversely and Recognition of Superior Title in Fulkerson v. Van Buren, 53 Ark. L. Rev. 459 (2000).*

(n172)Footnote 454. *Conklin v. Davi, 388 A.2d 598 (N.J. 1978).*

(n173)Footnote 455. *Alexander v. Cleveland, 79 So. 2d 852 (Fla. 1955).*

(n174)Footnote 456. *Dalton v. Lybarger, 237 S.W. 694 (Ark. 1922).*

(n175)Footnote 457. *Alewine v. Pitcok, 47 So. 2d 147 (Miss. 1950).*

(n176)Footnote 458. *Taccone v. DiRenzi, 401 N.Y.S.2d 722 (1978).*

(n177)Footnote 459. *Glaser v. Minnesota Fed. Sav. & Loan Ass'n, 389 N.W.2d 763 (Minn. App. 1986).*

(n178)Footnote 460. *Hillenbrenner v. Odom, 375 S.W.2d 664 (Ark. 1964).*

(n179)Footnote 461. *Fagan v. Hook, 105 N.W. 155 (Mich. 1905).*

(n180)Footnote 462. *Gwin v. Calegaris, 73 P. 851 (Cal. 1903).*

(n181)Footnote 463. *Gwin v. Calegaris, 73 P. 851 (Cal. 1903).*

(n182)Footnote 464. *Clarke v. Lacy, 132 A.2d 478 (Md. 1957).*

(n183)Footnote 465. *Schlosser v. Creamer, 284 A.2d 220 (Md. 1971).*

(n184)Footnote 466. *Taccone v. DiRenzi, 401 N.Y.S.2d 722 (1978).*

(n185)Footnote 467. *Brown v. Yacht Club of Coeur D'Alene, Ltd., 722 P.2d 1062 (Idaho App. 1986).*

(n186)Footnote 468. *Taccone v. DiRenzi, 401 N.Y.S.2d 722 (1978).*

(n187)Footnote 469. *Fraiden v. State, 583 A.2d 1065 (Md. 1991), cert. denied, 589 A.2d 57 (Md. 1991).*

(n188)Footnote 470. *Salmon v. Perez, 545 N.E.2d 21 (Ind. App. 1989).*

(n189)Footnote 471. *Conklin v. Davi, 388 A.2d 598 (N.J. 1978).*

(n190)Footnote 472. *Benjamin v. Harley, 30 N.Y.S.2d 471 (1941).*

(n191)Footnote 473. In the *Matter of the Petition of McGinnis, 536 N.W.2d 33 (Minn. App. 1995).*

(n192)Footnote 474. *Koedding v. Slaughter, 481 F. Supp. 1233 (E.D. Mo. 1979), aff'd, 634 F.2d 1095 (8th Cir. 1980).*

(n193)Footnote 475. *Pfister v. Sime, 202 N.W. 476 (S.D. 1925).*

(n194)Footnote 476. *Savage v. Shields, 293 F. 863 (8th Cir. 1923).*

(n195)Footnote 477. *Sorrells v. Bailey Cattle Co., 595 S.W.2d 950 (Ark. App. 1980).*

(n196)Footnote 478. *Sheehan v. McKinstry, 210 P. 167 (Or. 1922).*

(n197)Footnote 479. *Lucas v. Independent Sch. Dist. No. 284, 433 N.W.2d 94 (Minn. 1988). But see Menuskin v. Williams, 145 F.3d 755 (6th Cir. 1998)* (under Tennessee law, neither vendor's employees nor title company nor attorney responsible were liable for negligence to purchasers when there was fraud by vendor's principal).

(n198)Footnote 480. *Ewing v. Plummer, 140 N.E. 42 (Ill. 1923).*

(n199)Footnote 481. *Creel v. Hammans, 13 N.W.2d 305 (Iowa 1944).*

(n200)Footnote 482. *Curtis v. Roberts, 230 P. 916 (Okla. 1924).*

(n201)Footnote 483. *Bart v. Wysoki, 558 So. 2d 1326 (La. App. 1990).*

(n202)Footnote 484. *Pestal v. O'Donnell, 254 P. 764 (Colo. 1927).*

(n203)Footnote 485. *Payne v. Meeker, 295 N.E.2d 239 (Ill. App. 1973).*

(n204)Footnote 486. *Callister v. Millstream Assocs., 738 P.2d 662 (Utah App. 1987).*

(n205)Footnote 487. *In re Estate of Kraeuchi, 729 S.W.2d 566 (Mo. App. 1987).*

(n206)Footnote 488. *Adams v. Greer, 114 F. Supp. 770 (W.D. Ark. 1953). In re Lisa, 224 B.R. 173 (D. Kan. 1998)* (title insurance company acting as abstractor must use reasonable and ordinary care and diligence as other attorneys or conveyancers in community); *But see Gildea v. Guardian Title Co. of Utah, 970 P.2d 1265 (Utah 1998)* (a preliminary title report simply states the conditions under which the insurer will issue its title policy; it does not subject title insurance company to abstractor liability).

(n207)Footnote 489. *Lawrence v. Chicago Title Ins. Co., 237 Cal. Rptr. 264 (1987). Seigle v. Jasper, 867 S.W.2d 476 (Ky. App. 1993)* (Abstracter's duty of care goes to the customer, the purchaser, and others involved in the real estate transaction when the abstracter knows or should know the customer wants the abstract for a prospective purchaser and

the prospect buys the property in reliance on the abstract; however, if the abstract falls into the hands of a party in connection with a subsequent transaction, the abstracter owes no duty of care to them).

(n208)Footnote 490. *Brown v. Griffen, 436 P.2d 695 (Mont. 1968).*

(n209)Footnote 491. *Department of Pub. Works & Bldgs. v. Halls, 220 N.E.2d 167 (Ill. 1966).*

(n210)Footnote 492. *Darby v. Keeran, 505 P.2d 710 (Kan. 1973).*

(n211)Footnote 493. *Brown v. Griffen, 436 P.2d 695 (Mont. 1968).*

(n212)Footnote 494. *Moore v. Title Ins. Co., 714 P.2d 1303 (Ariz. App. 1985).*

(n213)Footnote 495. *Bragg v. Chilcote, 176 Ill. App. 371 (1912).*

(n214)Footnote 496. *Reeves v. Roberts, 242 S.W. 956 (Mo. 1922). But cf. Lombardo v. Pierson, 852 P.2d 308 (Wash. 1993)* (Title insurer had no duty to call attention to an "Agreement to Retain Land in Irrigable Status" with prior owner, U.S. government, and the irrigation district).

(n215)Footnote 497. *Moore v. Title Ins. Co., 714 P.2d 1303 (Ariz. App. 1985). Barthels v. Santa Barbara Title Co., 33 Cal. Rptr. 2d 579 (Cal. App. 1994)* (Abstracter liable to purchaser when he negligently reported a 15' easement when only a 7' easement existed); *Delaware v. Continental Land Title Co., 20 Cal. Rptr. 2d 438 (Cal. App. 1993)* (A recorded conditional use permit is an "encumbrance" on the title, creating a duty to report it on an abstract). *But see Mickam v. Joseph Louis Palace Trust, 849 F. Supp. 516 (E.D. Mich. 1993)* (Title company is not liable to purchaser of the land under the title policy though it failed to list tax liens on the property).

(n216)Footnote 498. *L.V.O. Federal Credit Union v. Wolfe, 574 P.2d 293 (Okla. 1977).*

(n217)Footnote 499. *Woolridge v. LaCrosse Lumber Co., 236 S.W. 294 (Mo. 1921).*

(n218)Footnote 500. *Evinger v. McDaniel Title Co., 726 S.W.2d 468 (Mo. App. 1987). Smith v. Boyd, 639 A.2d 413 (N.J. 1993)* (Title insurance company negligently prepared a title report when it omitted a mortgage reported by a title examiner); *Fidelity Nat'l Title Ins. Co. v. Tri-Lakes Title Co., Inc., 968 S.W.2d 727 (Mo.App. 1998)* (abstract company liable for negligent misrepresentation when it prepared title report that omitted recorded easements).

(n219)Footnote 501. *Smith v. Hunter, 89 N.E. 686 (Ill. 1909).*

(n220)Footnote 502. *Barter v. Palmerton Area Sch. Dist., 581 A.2d 652 (Pa. Super. 1990).*

(n221)Footnote 503. *Brown v. Yacht Club of Coeur D'Alene, Ltd., 722 P.2d 1062 (Idaho App. 1986). In re Oyster Bay Cove, Ltd., 196 B.R. 251 (E.D.N.Y. 1996).*

(n222)Footnote 504. *McIver Park, Inc. v. Brinn, 27 S.E.2d 548 (N.C. 1943).*

(n223)Footnote 505. *McCain v. Cox, 531 F. Supp. 771 (N.D. Miss. 1982), aff'd, 692 F.2d 755 (5th Cir. 1982).*

(n224)Footnote 506. *Whitman v. Larson, 568 N.Y.S.2d 485 (1991).*

(n225)Footnote 507. *Hill v. McGarity, 347 S.E.2d 679 (Ga. App. 1986). Santa Fe Energy Operating Partners, L.P. v. Carrillo, 948 S.W.2d 780 (Tex. Ct. App. 1997); Howell v. Brozzetti, 667 N.Y.S. 2d 831 (N.Y. App. Div. 1998)* (presumption that title must be marketable).

(n226)Footnote 508. *Wallach v. Riverside Bank, 100 N.E. 50 (N.Y. 1912).*

(n227)Footnote 509. *Micheli v. Taylor, 159 P.2d 912 (Colo. 1945).*

(n228)Footnote 510. *Carter Coal Co. v. Litz, 54 F. Supp. 115 (W.D. Va. 1943), aff'd, 140 F.2d 934 (4th Cir. 1944). Warner v. Denis, 933 P.2d 1372.* (Haw. App. 1997).

(n229)Footnote 511. *Lessenich v. Sellers, 93 N.W. 348 (Iowa 1903).*

(n230)Footnote 512. *Carter Coal Co. v. Litz, 54 F. Supp. 115 (W.D. Va. 1943), aff'd, 140 F.2d 934 (4th Cir. 1944).*

(n231)Footnote 513. *Ashton v. Leysen, 237 S.W.2d 713 (Tex. Civ. App. 1951).*

(n232)Footnote 514. *Howe v. Coates, 107 N.W. 397 (Minn. 1906); Rife v. Lybarger, 31 N.E. 768 (Ohio 1892); Hawkins v. Wright, 226 P.2d 957 (Okla. 1951); Stillman v. Canales, 25 Tex. 313 (1860).*

(n233)Footnote 515. *Greenberg v. Ray, 108 So. 385 (Ala. 1926); Wheeler v. Sullivan, 106 So. 876 (Fla. 1925); Culley v. Dixon, 201 N.W. 582 (Iowa 1925); Harris v. Bills, 213 N.W. 929 (Iowa 1927); Ogg v. Herman, 227 P. 476 (Mont. 1924).; Garber v. Stern, 138 A. 920 (N.J. 1927); Winn v. Taylor, 190 P. 342, 194 P. 857 (Or. 1921); Ritter v. Hill, 127 A. 455 (Pa. 1925); Veselka v. Forres, 283 S.W. 303 (Tex. 1926); Morris v. Risk, 102 S.E. 725 (W. Va. 1920).*

Good and sufficient deed means warranty deed. *Ford v. Street, 106 S.E. 379 (Va. 1921).*

(n234)Footnote 516. *Meek v. Green, 266 S.W. 451 (Ark. 1924); Williams v. Belling, 245 P. 455 (Cal. App. 1926); O'Meara v. Gleason, 140 N.E. 426 (Mass. 1923); Potter v. Lumsden, 117 A. 31 (N.J. 1922); Ammerman v. Karnowski, 234 P. 774 (Okla. 1924); Pearce v. Freeman, 254 P. 719 (Okla. 1927); Crenshaw v. True, 295 S.W. 632 (Tex. Civ. App. 1927).*

(n235)Footnote 517. *Deem v. Miller, 135 N.E. 396 (Ill. 1922).*

(n236)Footnote 518. *Allen v. Globe Grain & Milling Co., 104 P. 305 (Cal. 1909); Reed v. Sefton, 103 P. 1095 (Cal. 1909).*

(n237)Footnote 519. *Linscott v. Moseman, 114 P. 1088 (Kan. 1911).*

(n238)Footnote 520. *Birge v. Bock, 44 Mo. App. 69 (1891).*

(n239)Footnote 521. *Altschul v. O'Neill, 58 P. 95 (Or. 1899). See Hanlon v. McLain, 242 P.2d 732 (Okla. 1952). overruled in part, Boe v. Arnold, 102 P. 290 (Or. 1909).*

(n240)Footnote 522. *Dingey v. Paxton, 60 Miss. 1038 (1883); Ehle v. Quackenboss, 6 Hill 537 (N.Y. 1844).*

(n241)Footnote 523. *Manke v. Peterson, 42 P.2d 39 (Wash. 1935). James v. McCombs, 936 P.2d 520 (Alaska 1997); Barnes v. McKellar, 644 A.2d 770 (Pa. 1994)* (vendor's inability to convey any title on the settlement date was a breach of sales agreement and entitled purchaser to damages).

(n242)Footnote 524. *Kinsey v. Drury, 126 A. 125 (Md. 1921); Hogsed v. Gillett, 199 P. 907 (Mont. 1921); Rollton Syndicate, Inc. v. Widlitz, 219 N.Y.S. 383 (1927). Rodolitz Holding Corp. v. Bel Canto Fancy Foods, Ltd., 206 B.R. 657 (Bankr. E.D.N.Y. 1997), aff'd, 1999 U.S. Dist. LEXIS 3723 (E.D.N.Y. 1999).*

(n243)Footnote 525. *McChesney v. Oppek, 194 N.W. 882 (Minn. 1923).*

(n244)Footnote 526. *Block v. Ryan, 4 App. D.C. 283 (1894).*

(n245)Footnote 527. *Weber v. Hempstead, 105 N.Y.S.2d 256 (1951).*

(n246)Footnote 528. *Reynolds v. Borel, 25 P. 67 (Cal. 1890); Snowden v. Derrick, 111 P. 757 (Cal. App. 1910).*

(n247)Footnote 529. *Attebery v. Blair, 91 N.E. 475 (Ill. 1910).*

(n248)Footnote 530. *Geithman v. Eichler, 107 N.E. 180 (Ill. 1914).*

(n249)Footnote 531. *Moore v. Williams, 22 N.E. 233 (N.Y. 1889); Hawkins v. Wright, 226 P.2d 957 (Okla. 1951).*

(n250)Footnote 532. *Oakey v. Cook, 7 A. 495 (N.J. 1886).*

(n251)Footnote 533. *Roberts v. Bassett, 105 Mass. 409 (1870). See Frank v. Murphy, 29 N.E.2d 41 (Ohio App. 1940).*

(n252)Footnote 534. *Geithman v. Eichler, 107 N.E. 180 (Ill. 1914); Deem v. Miller, 135 N.E. 396 (Ill. 1922).*

(n253)Footnote 535. Garnett v. Macon, 10 F. Case 12 (E.D. Va. 1825) (No. 5,245); *Boylan v. Wilson, 79 So. 364 (Ala. 1918); Asbury v. Cochran, 9 So. 2d 887 (Ala. 1942); Kittinger v. Rossman, 112 A. 388 (Del. 1921); Brunswick Co. v. Dart, 20 S.E. 631 (Ga. 1894); McDonald v. Minnick, 35 N.E. 367 (Ill. 1893); Dole v. Shaw, 118 N.E. 1044 (Ill. 1918); Baker v. Baker, 120 N.E. 525 (Ill. 1918); Lowther-Kaufman Oil & Coal Co. v. Gunnell, 212 S.W. 593 (Ky. 1919); Lockhart v. Smith, 16 So. 660 (La. 1895); Hill v. Hobart, 16 Me. 164 (1839); Peabody Heights Co. v. Willson, 32 A. 386, 1077 (Md. 1895);* Corey v. *Clarke, 56* N.W. 1063 (Minn. 1893); *Barthel v. Engle, 168 S.W. 1154 (Mo. 1914); Bowen v. Vickers, 2 N.J. Eq. 520 (1839); Thomas v. Scheible, 111 A. 519 (N.J. 1920); Irving v. Campbell, 24 N.E. 821 (N.Y. 1890); Chesebro v. Moers, 134 N.E. 842 (N.Y. 1922); Rife v. Lybarger, 31 N.E. 768 (Ohio 1892); Knolhoff v. Mark, 136 P. 893 (Or. 1913); Burwell v. Sollock, 32 S.W. 844 (Tex. Civ. App. 1895). Methonen v. Stone, 941 P.2d 1248 (Alaska 1997)* (purchaser charged with constructive notice of encumberances where the record title appears complete and perfect but purchaser knew of extraneous facts regarding possible encumberances and could have discovered title defects through reasonable inquiry); *B.R.L. Equip. Rentals LTD v. Seabring Marine Indus., 168 F.3d 413 (11th Cir. 1999)* (in a sale involving voidable title, the equitable remedy of rescission is available to the seller).

(n254)Footnote 536. *Drake v. Gaffney, 171 N.Y.S. 131 (1918); Peplinski v. Campbell, 226 P.2d 211 (Wash. 1951).*

(n255)Footnote 537. *Eller v. Newell, 141 N. W. 52 (Iowa 1913); Ranck v. Wickwire, 164 S.W. 460 (Mo. 1914); Neill v. McClung, 76 S.E. 878 (W. Va. 1912).*

(n256)Footnote 538. *McPherson v. Schade, 43 N.E. 527 (N.Y. 1986); Chesebro v. Moers, 134 N.E. 842 (N.Y. 1922); St. Andrews Protestant Episcopal Church v. Crisfield Homes, Inc., 11 N.Y.S.2d 16 (1939). Trujillo v. Grimmett, 215 B.R. 200* (Bankr. 9th Cir. 1997), *aff'd, 1998 U.S. App. LEXIS 32013 (9th 1998).*

(n257)Footnote 539. *Quisenberry v. Grant, 104 So. 284 (Ala. App. 1925); Bell v. Tucker, 139 S.E. 573 (Ga. App. 1927); Succession of Fay, 109 So. 824 (La. 1926); Ammerman v. Karnowski, 234 P. 774 (Okla. 1924). See Bourland v. Huffhines, 269 S.W. 184 (Tex. Cir. App. 1924),* aff'd, *280 S.W. 561 (Tex. Civ. App. 1926).*

(n258)Footnote 540. *Craig v. White, 202 P. 648 (Cal. App. 1920); Anderson v. Willson, 191 P. 1016 (Cal. App. 1920); Marlowe v. Chicago Title & Trust Co., 55 N.E.2d 101 (Ill. App. 1944); Dickerson v. Morse, 212 N.W. 933 (Iowa 1927); Schmidt v. Martin, 251 S.W. 999 (Ky. App. 1923); Vogt v. Shumate, 281 S.W. 514 (Ky. 1926); Smith v. Kurtzenacker, 180 N.W. 243 (Minn. 1920); Hogsed v. Gillett, 199 P. 907 (Mont. 1921); Bozdech v. Montana Ranches Co., 216 P. 319 (Mont. 1923); Friedman v. Fishbein, 213 N.Y.S. 158 (1926); Searles v. Auld, 111 S.E. 785 (S.C. 1922); Long v. Martin, 234 S.W. 91 (Tex. Civ. App. 1921), error dism, 247 S.W. 827 (Tex. 1923); Sweet v. Berry, 236 S.W. 531 (Tex. Civ. App. 1921); Le Marinel v. Bach, 196 P. 22 (Wash. 1921). Noel v. Pelican Well Logging Serv., 640 So. 2d 529 (La. App. 1994)* (Vendor not required to own property when vendor executes the agreement to sell; only when vendor fails to deliver title at the time contracted does purchaser have the right to return of deposit).

(n259)Footnote 541. *Dollar v. Knight, 224 S.W. 983 (Ark. 1920); Smith v. Biddle, 286 S.W. 801 (Ark. 1926); Keifer v. Dreier, 205 N.W. 472 (Iowa 1925); Trainer v. Lammers, 201 N.W. 540 (Minn. 1925); Hudson v. Barnes, 278 S.W. 395 (Mo. 1925); Quigley v. Bartlett, 260 S.W. 494 (Mo. App. 1924); Wilson v. Corcoran, 237 P. 521 (Mont. 1925); Strain v. Statler, 240 P. 614 (Okla. 1925); Peplinski v. Campbell, 226 P.2d 211 (Wash. 1951). Fritsch v. Hilton Land & Cattle Co., 513 N.W.2d 534 (Neb. 1994)* (vendor failed to cure defective title within "reasonable time" so purchaser had contract right to rescind).

(n260)Footnote 542. *Keifer v. Dreier, 205 N.W. 472 (Iowa 1925).*

(n261)Footnote 543. *Meek v. Green, 266 S.W. 451 (Ark. 1924); Massey v. Butts, 221 S.W. 153 (Mo. App. 1920); Moter v. Hershey, 205 N.W. 239 (S.D. 1925); Schramm v. Hoch, 241 S.W. 1087 (Tex. Civ. App. 1922). Hamm v. Slavin, 683 N.Y.S. 2d 661 (N.Y. App. Div. 1999)* (grantor's quitclaim deed cured defect in title).

(n262)Footnote 544. *Jacobs v. Teachout, 219 P. 38 (Wash. 1923); Sorensen v. Larue, 252 P. 494 (Idaho 1926); Hayne v. Fenton, 151 N.E. 877 (Ill. 1926); Lahner v. Schaum, 201 N.W. 80 (Iowa 1924); Knudson v. Trebesch, 187 N.W. 613 (Minn. 1922); Williams v. Ellis, 239 S.W. 157 (Mo. App. 1922); Perryman v. City Home Bldrs., 248 P. 605 (Okla. 1926); Hawkins v. Wright, 226 P.2d 957 (Okla. 1951); Wurfel v. Bockler, 210 P. 213 (Or. 1922); McCurdy v. Gray, 266 S.W. 396 (Tex. 1924); Mathews v. Caldwell, 258 S.W. 810 (Tex. App. 1924); Sweet v. Berry, 236 S.W. 531 (Tex. Civ. App. 1922); Dunniven v. Turner, 259 S.W. 267 (Tex. Civ. App. 1924).*

See In re First Nat'l Bank, 230 S.W. 358 (Kan. App. 1921); Sheehan v. McKinstry, 210 P. 167 (Or. 1922).

(n263)Footnote 545. *Funk v. Baird, 295 N.W. 87 (N.D. 1940).*

(n264)Footnote 546. *Caparell v. Goodbody, 29 A.2d 563 (N.J. 1942).*

(n265)Footnote 547. *Messer-Johnson Realty Co. v. Security Sav. & Loan Co., 94 So. 734 (Ala. 1922); Matthews v. Bartee, 95 So. 289 (Ala. 1923); Eaton v. Sadler, 110 So. 10 (Ala. 1926); Craig v. White, 202 P. 648 (Cal. 1921); Martin v. Pritchard, 199 P. 846 (Cal. App. 1921); Block v. Citizens Trust & Sav. Bank, 207 P. 510 (Cal. Ct. App. 1922); Willingham Loan & Trust Co. v. Moore, 128 S.E. 751 (Ga. 1925); Langford v. Berry, 22 S.E.2d 349 (Ga. App. 1942); Schofield v. Spencer, 253 P. 833 (Idaho 1926); Weberpals v. Jenny, 133 N.E. 62 (Ill. 1921); Deem v. Miller, 135 N.E. 396 (Ill. 1922); Firebaugh v. Wittenberg, 141 N.E. 379 (Ill. 1923); Hayne v. Fenton, 151 N.E. 877 (Ill. 1926); Winn v. Strong, 194 N.W. 50 (Iowa 1923); Ely v. Joslin, 208 P. 628 (Kan. 1922); Hershorn v. Rubenstein, 156 N.E. 251 (Mass. 1927); Oliver v. Poulos, 44 N.E.2d 1 (Mass. 1942); Ross & Roberts, Inc. v. Simon, 92 N.E.2d 570 (Mass. 1950)* (a contract provision that the contract shall be terminated if marketable title cannot be conveyed is automatic in its operation); *Barber v. Lang, 211 N.W. 70 (Mich. 1926); Rogers v. Gruber, 174 S.W.2d 830 (Mo. 1943); Bozdech v. Montana Ranches Co., 216 P. 319 (Mont. 1923); Stern v. Gepo Realty Corp., 45 N.E.2d 440 (N.Y. 1942); Weinberg v. Sanders, 198 N.Y.S. 121 (1923); Treibus v. McIlroy, 200 N.Y.S. 433 (1943); Obrey v. Collins, 200 N.Y.S. 75 (1923); Magrill v. Langan, 43 N.Y.S.2d 210 (1943); McCarty v. Lingham, 146 N.E. 64 (Ohio 1924); Security Sav. & Trust Co. v. Latta, 247 P. 777 (Or. 1926); Rossum v. Wick, 56 N.W.2d 770 (S.D. 1953); Sweet v. Berry, 236 S.W. 531 (Tex. 1921); Ackerman v. Carpenter, 29 A.2d 922 (Vt. 1943); Cutter v. Greene, 201 N.W. 373 (Wis. 1924).*

See Title Insurance in California, 39 Cal. L. Rev. 235 (1951); Basye, *Is Requirement of Marketable Title Outmoded,* Report Section Real Property, Probate and Trust Law (1954), American Bar Ass'n; Survey of the Doctrine of Marketable Title in New England, *36 B.U. L. Rev. 100 (1956).*

If title is not marketable vendee may rescind. *Guleserian v. Pilgrim Trust Co., 120 N.E.2d 193 (Mass. 1954).* True only where it would be inequitable to permit vendor to retain payments made or both have agreed to rescind. *Evangelista v. Antonio De Cubellis, Inc., 85 A.2d 69 (R.I. 1951). Tulsa Energy, Inc. v. K.P.L. Prod. Co., 111 F.3d 88 (10th Cir. 1997).*

(n266)Footnote 548. *In re Stacy, 99 B.R. 142 (Bankr. D. Mass. 1989).*

(n267)Footnote 549. *Tri-State Hotel Co. v. Spinx Inv. Co., 510 P.2d 1223 (Kan. 1973).*

(n268)Footnote 550. *Daybill v. Lucas, 187 A. 734 (N.J. 1937). rev'd, 191 A. 750 (N. J. 1937).*

(n269)Footnote 551. *Camp v. Commonwealth Land Title Ins. Co., 787 F.2d 1258 (8th Cir. 1986). Fritsch v. Hilton Land & Cattle Co., 513 N.W.2d 534 (Neb. 1994)* (vendor failed to cure defective title within "reasonable time" so purchaser had contract right to rescind). Loretta Wells, Department: CBA News, Legislative Program Set, 15 CBA Record 12 (Feb./Mar. 2001).

(n270)Footnote 552. *Sorenson v. Wright, 268 N.W.2d 203 (Iowa 1978).*

(n271)Footnote 553. *Hartman v. Rizzuto, 266 P.2d 539 (Cal. 1954).*

(n272)Footnote 554. *Zunker v. Kuehn, 88 N.W. 605 (Wis. 1902).*

(n273)Footnote 555. *Ball v. Roney, 150 So. 240 (Fla. 1933).*

(n274)Footnote 556. *Howerton v. Callaway, Carey & Foster, Inc., 52 P.2d 845 (Okla. 1935).*

(n275)Footnote 557. *Snow's Auto Supply, Inc. v. Dormaier, 696 P.2d 924 (Idaho App. 1985). but see, Watts v. Krebs, 962 P.2d 387 (Idaho 1998)* (distinguishing a case of fraud by nondisclosure from intentional misrepresentation).

(n276)Footnote 558. *Lindlots Realty Corp. v. Suffolk County, 278 N.Y. 45 (1938).*

(n277)Footnote 559. *Dodd v. Mills, 240 S.W.2d 25 (Ark. 1951).*

(n278)Footnote 560. *Ollerman v. O'Rourke Co., 288 N.W.2d 95 (Wis. 1980). Mickam v. Joseph Louis Palace Trust, 849 F. Supp. 516 (E.D. Mich. 1993)* (under Michigan law, buyer of land may recover damages equal to the benefit of the bargain from seller who sold in bad faith by concealing known title defects).

(n279)Footnote 561. *Furlow v. Sturgeon, 436 S.W.2d 485 (Ky. 1968).*

(n280)Footnote 562. *Milwaukee Mechanics' Ins. Co. v. Ramsey, 149 P. 542 (Or. 1915).*

(n281)Footnote 563. *Resnick v. Goldman, 133 So. 2d 770 (Fla. App. 1961).*

(n282)Footnote 564. *Schaff v. Kennelly, 61 N.W.2d 538 (N.D. 1953).*

(n283)Footnote 565. *Bryan v. Bishop, 302 S.W.2d 524 (Ark. 1957).*

(n284)Footnote 566. *Central Life Assur. Soc'y v. Impelmans, 126 P.2d 757 (Wash. 1942).*

(n285)Footnote 567. *Pacific Portland Cement Co., Consol. v. Placer County Land Co., 201 P. 126 (Cal. 1921).*

(n286)Footnote 568. *South Cent. Enters. v. Farrington, 485 U.S. 1021 (1988). Baker v. Cambridge Chase, Inc., 725 A.2d 757 (Pa. Super. App. 1999)* (quit-claim deed did not satisfy contract for fee simple title).

(n287)Footnote 569. *State ex rel. Appleman v. Lake Circuit Ct., 108 N.E.2d 898 (Ind. 1952).*

(n288)Footnote 570. *Carson v. Mikel, 216 N.W. 60 (Iowa 1927).*

(n289)Footnote 571. *Freeman v. Rose, 135 S.E. 870 (N.C. 1926).*

(n290)Footnote 572. *Bakken v. Price, 613 P.2d 1222 (Wyo. 1980).*

(n291)Footnote 573. *Eller v. Newell, 141 N.W. 52 (Iowa 1913).*

(n292)Footnote 574. *Guleserian v. Pilgrim Trust Co., 120 N.E.2d 193 (Mass. 1954).*

(n293)Footnote 575. *Close v. Stuyvesant, 24 N.E. 868 (Ill. 1890); Burns v. Berry, 3 N.W. 924 (Mich. 1879); Deseumeur v. Rondel, 74 A. 703 (N.J. Ch. 1909); Doutney v. Lambie, 78 A. 746 (N.J. Eq. 1911).*

No specific performance where there is a breach of covenant by vendor. *Vogel v. Rogers, 108 A.2d 448 (N.J. Super. 1954).*

(n294)Footnote 576. *Solomon v. Shewitz, 152 N.W. 196 (Mich. 1915).*

(n295)Footnote 577. *Smith v. Bangham, 104 P. 689 (Cal. 1909); Clifton v. Charles, 116 S.W. 120 (Tex. Civ. App. 1909).*

(n296)Footnote 578. *Watkins v. Pfeiffer, 92 S.W. 562 (Ky. App. 1906).*

(n297)Footnote 579. *Leach v. Forney, 21 Iowa 271 (1866)* (the court permitted the vendee to obtain enough of the purchase price to protect himself against the wife's interest); *Walker v. Kelly, 51 N.W. 934 (Mich. 1892)* (the court abated the purchase price to the extent of the wife's interest); *Frakes v. Eghigian, 100 N.W.2d 297 (Mich. 1960)* (where vendor's wife did not join in the sales contract the court required the vendor to convey good title by obtaining the wife's signature to the contract or pay damages for breach).

(n298)Footnote 580. *Cogito v. Dart, 33 S.E.2d 759 (Va. 1945).*

One having only a limited interest in land cannot claim benefit of the marketable title act to the detriment of the other interests. *Smith v. Berberich, 95 N.W.2d 325 (Neb. 1959).*

(n299)Footnote 581. *Bartos v. Czerwinski, 34 N.W.2d 566 (Mich. 1948).*

(n300)Footnote 582. *Fanger v. Leeder, 99 N.E.2d 533 (Mass. 1951).*

(n301)Footnote 583. *Ladegaard v. Connell, 281 N.W. 656 (Wis. 1938).*

(n302)Footnote 584. *LaFond v. Frame, 99 N.E.2d 51 (Mass. 1951).*

(n303)Footnote 585. *Miller v. Dyer, 127 P.2d 901 (Cal. 1942).*

(n304)Footnote 586. *Sturgis v. Meadors, 266 S.W.2d 81 (Ark. 1954).*

(n305)Footnote 587. As to what constitutes an insurable title, *see Mackenzie v. McLean, 90 A.2d 515 (N.J. Super. 1952).*

(n306)Footnote 588. *Ward v. Downey, 213 P.2d 523 (Cal. App. 1950); Brinn v. Mennen Co., 73 A.2d 541 (N.J. 1951); Salvin v. Weidemann, 95 N.Y.S.2d 434 (1950); Friedman v. Handelman, 90 N.E.2d 31 (N.Y. 1949); Hebb v. Severson, 201 P.2d 156 (Wash. 1948).*

(n307)Footnote 589. *Korb v. Spray Beach Hotel Co., 93 A.2d 578 (N.J. Super. 1952).*

(n308)Footnote 590. *Fambrough v. Townson, 85 So. 476 (Ala. 1920); Zempel v. Hughes, 85 N.E. 641 (Ill. 1908); Cape Girardeau-Jackson Interurban R. v. Light & Dev. Co., 210 S.W. 361 (Mo. 1919); George Wiedemann Brewing*

Co. v. Maxwell, 84 N.E. 595 (Ohio 1908); Shannon v. Freeman, 109 S.E. 406 (S.C. 1921); Alexander v. Lewes, 175 P. 572 (Wash. 1918).

Contra, however, *see O'Brien v. Perry, 62 P. 927 (Cal. 1900).*

(n309)Footnote 591. *Wilfamco, Inc. v. Interstate Elec. Co., 58 So. 2d 833 (La. 1952).*

In *McCreary v. Stallworth, 102 So. 52 (Ala. 1924),* the measure of abatement, if granted, is described as follows: "Whether this abatement be looked upon as an allowance for partial failure of consideration, or by way of compensation or damages for the loss resulting from nonperformance in full, it is the measure of relief in equity, to which the vendee is entitled because of partial failure of title, when he elects to claim partial performance. It is not questioned that, if full performance is had in equity, it is a bar to an action at law for damages for a breach of the contract."

(n310)Footnote 592. *Groskin v. Knight, 138 A. 843 (Pa. 1927).*

(n311)Footnote 593. *Hart v. Copper Dist. Power Co., 286 N.W. 191 (Mich. 1939).*

(n312)Footnote 594. *Ryder v. Garden Estates, 105 N.E.2d 854 (Mass. 1952).*

(n313)Footnote 595. *Hanlon v. McLain, 242 P.2d 732 (Okla. 1952).*

(n314)Footnote 596. *Hedgecock v. Stewart Title & Guar., 676 P.2d 1208 (Colo. App. 1983). Huizar v. Allstate Ins. Co., 2000 Colo. App. LEXIS 2040.*

(n315)Footnote 597. *Perkinson v. Burford, 623 S.W.2d 30 (Mo. App. 1981)*

(n316)Footnote 598. *Rose v. Mitsubishi Int'l Corp., 423 F. Supp. 1162 (E.D. Pa. 1976)*

(n317)Footnote 599. *Woods v. Schmitt, 439 N.W.2d 855 (Iowa 1989)*

(n318)Footnote 600. *Robeson-Marion Dev. Co. v. Powers Co., 183 S.E.2d 454 (S.C. 1971)*

(n319)Footnote 601. *Nicolopoolos v. Hill, 117 So. 185 (Ala. 1928)*

(n320)Footnote 602. *Edberg v. George C. Lemcke Co., 251 P. 128 (Wash. 1926)*

(n321)Footnote 603. *Willener v. Sweeting, 730 P.2d 45 (Wash. 1986)*

(n322)Footnote 604. *Michaelson v. Tieman, 541 P.2d 182 (Wash. 1926)*

(n323)Footnote 605. *O'Reilly v. King, 28 How. Prac. 408 (N.Y. Super. 1865)*

(n324)Footnote 606. Michigan has a 20-year statute concerning oil and gas leases, Mich. Comp. Laws § 554.281, similar to the 40-year marketable title act, Mich. Comp. Laws § 565.101

The Marketable Record Title Act does not extinguish interests that have been properly recorded or easements or servitudes as long as they are used. Fla. Stat. § 712.03, as amended by Laws 1973, No. 73-218.

Kansas has adopted a 40-year marketable record title act. Kan. Stat. Ann. §§ 58-3401 through 58-3412.

Thirty-year bar to rights of reentry and possibilities of reverter. Md. Real Prop. Code Ann. § 6-101.

North Carolina has adopted a 30-year marketable title act with numerous exceptions. N.C. Gen. Stat. §§ 47B-1 -

47B-9. *See 10 Wake Forest L. Rev. 312.*

Ohio has a 40-year marketable title act. Ohio Rev. Code § 5301:49 (A). In Ohio, coal and other mineral interests are, under the 1952 act, effective September 30, 1974, exempted from the provisions of the 40-year marketable title act (§§ 5301.47 - 5301.56). Ohio Rev. Code § 5301.53.

In Wisconsin restrictive covenants existing within a city block and existing for more than 30 years are voided if 75% or more of the area has not been developed as allowed by the restrictions. Wis. Stat.§ 847.03. Marketable title act cannot be applied retrospectively except where the savings clause is included. *Trustees of Tufts College v. Triple R. Ranch, Inc., 275 So. 2d 521 (Fla. 1973); Williston Highlands Dev. Corp. v. Hogue, 277 So. 2d 260 (Fla. 1973). See* Fla. Stat. § 704.05 (mining claims). The marketable record title act is valid. *Marshall v. Hollywood, Inc., 236 So. 2d 114 (Fla. 1970). See* Fla. Stat. §§ 712.01 - 712.10.

See Street, *Need for Legislation to Eliminate Royalty Interests,* 42 Mich. S. B.J. 49; *Title Insurance and Marketable Title, 31 Fordham L. Rev. 559 (1963);* Swenson, Robert W., *The Utah Marketable Title Act, 8 Utah L. Rev. 200 (1963).*

See also Barnett, Walter E., *Marketable Title Acts*: *Panacea or Pandemonium, 53 Cornell L.Q. 45 (1967);* Webster, James A., *Toward Greater Marketability of Land Titles--Remedying the Defective Acknowledgment Syndrome, 46 N.C. L. Rev. 56 (1967); Marketable Title Legislation for Maine, 20 Maine L. Rev. 283 (1968).*

See Payne, John C., *The Alabama Law Institute's Land Title Acts Project: Part II 24 Ala. L. Rev. 647 (1972);* Polstone, Ronald W., *Legislation, Existing and Proposed, Concerning Marketability of Mineral Titles, 7 Land & Water L. Rev. 73 (1972); Remedial Title Legislation for Wyoming, 7 Land & Water L. Rev. 561 (1972); Retroactive Termination of Interests in Land--Nebraska Reverter Act Held Constitutional [Hiddleston v. Nebraska Jewish Educ. Soc'y, 186 N.W.2d 904 (Neb. 1971)] 38 Mo. L. Rev. 140,* Ryman, Arthur E., Jr., *The Iowa "Stale Uses and Reversions Statute": Parameters and Constitutional Limitations, 19 Drake L. Rev. 56 (1969); The Mechanics of Iowa's Marketable Title Legislation, 22 Drake L. Rev. 326 (1973). See* Iowa Code § 614.17.

See Okla Stat. Ann., tit. 16 §§ 71 - 81.

See Property Law--North Carolina's Marketable Title Act--Will the Exceptions Swallow the Rule? *52 N.C. L. Rev. 211 (1983).*

The Georgia Marketable Title Act limits the enforceability of restrictive covenants to 20 years. *House v. James, 207 S.E.2d 201 (Ga. 1974).*

Under N.C. Gen. Stat. § 47-18, as amended, the conveyances or contracts to convey or options to lease for more than three years are valid as against creditors for purchasers for valuable consideration, only from the time of the registration thereof in the county where the land lies.

North Carolina has adopted the Marketable Title Act. N.C. Gen. Stat. § 47-B *et seq*.

Ohio has a Marketable Title Act. Ohio Rev. Code § 5301.47 *et seq.*

Vermont has a Marketable Record Title Act. Vt. Stat. Ann., tit. 27, § 601 *et seq.*

Attempted conveyance of fee held a "root of title" under *Marketable Title Act. ITT Rayonier, Inc. v. Wadsworth, 346 So. 2d 1004 (Fla. 1977).*

Marketable Title Act had no effect on reversions which had occurred before passage. *Caldwell v. Brown, 553 S.W.2d*

692 (Ky. 1977).

Conveyances by the state more than 30 years old vest absolute title where the state has made no effort to correct erroneous deeds. *Starnes v. Marcom Inv. Group, 571 F.2d 1369 (5th Cir. 1978).*

Connecticut has a 40-year marketable title act. Conn. Gen. Stat. § 47-33 *et seq.*

South Dakota has a marketable title act. S.D. Comp. Laws. Ann. § 43-30-1 *et seq.* This includes unrecorded mineral interests. S.D. Comp. Laws § 43-80-8.1. Utah has a 40-year marketable title act. Utah Code §§ 57-9-1 *et seq.* Railroad easements are not barred. *Boise Cascade Corp. v. Union P. Co., 454 F. Supp. 531 (D. Utah 1978).*

Wyoming has a 40-year marketable title act. Wyo. Stat. Ann. § 34-10-101 *et seq*. Marketable title statute extinguished all remainder interests predating a certificate of title. *ITT Rayonier, Inc. v. Wadsworth, 346 So. 2d 1004 (Fla. 1977).*

(n325)Footnote 607. *Biltmore Village v. Royal, 71 So. 2d 727 (Fla. 1954)* and *Board of Educ. of Cent. Sch. Dist. No. 1 v. Miles, 207 N.E.2d 181 (N.Y. 1965).*

(n326)Footnote 608. *Marshall v. Hollywood, Inc., 224 So. 2d 743 (Fla. App. 1969), writ discharged, 230 So. 2d 114 (Fla. 1970), cert. denied 400 U.S. 964 (1970)* and *Hiddleston v. Nebraska Jewish Educ. Soc'y, 186 N.W.2d 904 (Neb. 1971).*

(n327)Footnote 609. *Marshall v. Hollywood, Inc., 224 So. 2d 743 (Fla. App. 1969), cert. denied, 400 U.S. 964 (1970).*

(n328)Footnote 610. *Schaghticoke Tribe of Indians v. Kent School Corp., 423 F. Supp. 780 (D. Conn. 1976).*

(n329)Footnote 611. William B. Stoebuck and Dale A. Whitman, The Law of Property 898 (3d ed. 2000).

(n330)Footnote 612. *See* Paul E. Basye, Clearing Land Titles 463-470 (2d ed. 1970). *See Hersh Props. v. McDonald's Corp., 588 N.W.2d 728 (Minn. 1999)* (discussing the Minnesota marketable title act); *see also, Haw River Land & Timber Co. v. Lawyers Title Ins. Corp., 152 F.3d 275 (4th Cir. 1998)* (the North Carolina marketable title act does not look at the value of the property when determining the marketability of title).

(n331)Footnote 613. William B. Stoebuck and Dale A. Whitman, *The Law of Property* 900 (3d ed. 2000).

(n332)Footnote 614. *See, e.g., Water Control Dist. v. Davidson, 638 So. 2d 521 (Fla. App. 1994), reh'g denied, 648 So.2d 722 (Fla. 1994)* (Marketable Record Title Act should be broadly construed to protect rights or easements acquired for the use and benefit of the public); *Chicago Title Ins. Co. v. Florida Inland Navigation Dist., 635 So.2d 104 (Fla. 1994), reh'g denied, 649 So.2d 451 (Fla. 1994)* (Marketable Record Title Act cannot be used to extinguish a property interest of the United States in a perpetual easement granted by the State of Florida); *Foster v. Bergstrom, 515 N.W.2d 581 (Minn. 1994)* (Marketable Record Title Act contains a standard of presumption of abandonment).

(n333)Footnote 615. Prefatory Note, "Uniform Marketable Title Act," 13 Uniform Laws Annotated 92 (Supp. 1993).

(n334)Footnote 616. Uniform Marketable Title Act, © 1990 National Conference of Commissioners on Uniform State Laws, reprinted with permission from the National Conference of Commissioners on Uniform State Laws.

* This chapter is based in part on Chs. 34-36, 57 of George W. Thompson, Commentaries on the Modern Law of Real Property (John S. Grimes ed. 1963, 1978), which made a significant contribution toward preserving the American common law governing title to real property interests.

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CHAPTER 91 TITLE AND MARKETABLE TITLE *

11-91 Thompson on Real Property, Thomas Editions § 91.10

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§ 91.10 Bibliography.

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Annotation, *What Constitutes Special Damages in Action for Slander of Title, 4 A.L.R. 4th 532.*

Annotation, *Who Is Exempt from Forfeiture of Real Property under "Innocent Owner" Provision of 21 U.S.C.S. § 881(a)(7), 110 A.L.R. Fed. 569.*

* This chapter is based in part on Chs. 34-36, 57 of George W. Thompson, Commentaries on the Modern Law of Real Property (John S. Grimes ed. 1963, 1978), which made a significant contribution toward preserving the American

common law governing title to real property interests.

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Supp. to § 91.02 The Concept of Title.

Add to "§ 91.10 Bibliography" to chapter contents.
[Go To Main]

§ 91.02(a) Title and Possession. [Go To Main]

Add:

Strother v. Bootheel Rail Properties, Inc., 66 S.W.3d 751 (Mo. App. 2001) (when the holder of a perpetual easement abandons the easement, title to the fee is in the owner of the underlying land).

Add:

Lee v. Southern Telecom Co., 694 S.E.2d 125 (Ga. App.2010) (Possession alone is sufficient to bring an action in trespass); *Guiffrida v. Storico Dev., 876 N.Y.S.2d 793 (2009)* (A right to possession is sufficient to seek damages for conversion.)

§ 91.02(b) Title and Ownership. [Go To Main]

Add:

Besnilian v. Wilkinson, 25 P.3d 187 (Nev. 2001) (one spouse cannot transfer title to homestead property without the consent of the other spouse).

Koepp v. Holland, 2010 U.S. Dist. LEXIS 9606 (N.D.N.Y Feb. 4, 2010) (A continuous chain of title is evidence of property ownership.)

Add:

Poruba v. Poruba, 919 N.E.2d 1066 (Ill. App. 2009) (For purposes of partition, concurrent rights to possession are necessary for "co-ownership.")

§ 91.02(c) Title and Estate. [Go To Main]

Add:

Idaho v. United States, 533 U.S. 262 (2001) (the state does not have title to lands submerged by lake and river within the boundaries of the Indian reservation); *Roach v. Gwinnett County, 545 S.E.2d 912 (Ga. 2001)* (termination of life estate by condemnation leaves remainderman as exclusive title holder); *Cox v. F-S Prestress, Inc., 797 So.2d 839 (Miss. 2001)* (change in river course by avulsion does not affect title to land).

§ 91.02(d) The Concept of Marketable Title [Go To Main]

Add:

Mansur v. Muskopf, 977 A.2d 1041 (N.H. 2009) (Bona fide purchasers are obligated to investigate discrepancies in chain of title)

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Supp. to § 91.03 Slander of Title.

Add to "§ 91.10 Bibliography" to chapter contents.
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Add:

Sanders v. Brown, 571 S.E.2d 532 (Ga. App. 2002) (claim to title by adverse possession of land in dispute constituted slander of title); *Boaz v. Latson, 2003 Ga. App. LEXIS 319* (No. A02A1663, Mar. 7, 2003) (slander of title can arise from document prepared according to statutory requirements).

Pelc v. Berg, 893 N.Y.S.2d 404 (2009) (A pleading of special damages is required for a slander of title action.); *Glenn v. Dunlop, 2009 U.S. Dist. LEXIS 14912 (D.V.I. 2009)* (Plaintiff must prove pecuniary losses and provide evidence of actual and concrete damages, estimated in money and expressed in figures.); Manhattan Loft, LLC v. Mercury Liquors, Inc., *93 Cal. Rptr. 3d 457 (Cal. App. 2d Dist. 2009)* (Plaintiff must demonstrate actual pecuniary losses.)

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Supp. to § 91.04 Acquisition of Title.

Add to "§ 91.10 Bibliography" to chapter contents.
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Add:

In re Estate of Savich, 671 N.W.2d 746 (Minn. App. 2003) (quitclaim deeds conveying land to grantee, delivered after her death, were void).

Gargano v. Gargano, 2009 Mass. LCR LEXIS 10 (Mass. Land Ct. 2009) (A conveyance obtained by threats or fraud is voidable.)

Add:

Caruso v. Parkos, 262 Neb. 961, 637 N.W.2d 351 (Neb. 2002) (title acquired by deed that was properly delivered and not subject to undue influence).

Add:

Baker v. Lang, 2002 Cal. Unpub. LEXIS 7946 (No. A095695, Aug. 23, 2002) (title to real property passed to husband's girlfriend who used fictitious name of wife, as the intended recipient); *Behymer v. Six, 2002 Ohio App. LEXIS 6217* (No. CA02-006, Nov. 20, 2002) (title passed when deed presented for recording, not later when full purchase price received).

Szawicki v. Szawicki, 772 N.W.2d 110 (Neb. App. 2009) (A deed from husband to wife does not need to be signed by the wife to be valid.)

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Supp. to § 91.05 Title by Escheat

Add to "§ 91.10 Bibliography" to chapter contents.
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Add:

Azure Limited v. I-Flow Corp., 210 P.3d 1110 (Cal. 2009) (The dual purposes of California's Unclaimed Property Law are to protect the property until a true owner makes claim and to give the state the benefit of the property's use.)

§ 91.05(f) Enforcement of Escheat. [Go To Main]

Add:

Kinney v. Overton, *63 Cal. Rptr. 3d 136 (2007)* (action by residential landowners to compel the state to take title by escheat).

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Supp. to § 91.06 Title by Forfeiture.

Add to "§ 91.10 Bibliography" to chapter contents.
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§ 91.06(b) Title of Forfeiture of Property Held by Felons or Used in Committing Crimes. [Go To Main]

Add:

United States v. Hull, 606 F.3d 524 (8th Cir. Iowa 2010) (Property used, or intended to be used, in the commission of a crime is subject to forfeiture. Property need not be indispensible to the commission of the crime. A home used in the commission of a child pornography offense is subject to forfeiture.); *United States v. Herder, 594 F.3d 352 (4th Cir. 2010)* (Property that allows the commission of the crime to be less difficult or more or less free from obstruction or hindrance may be subject to forfeiture.)

Add:

United States v. Totaro (345 F.3d 989 (8th Cir. 2003) (wife's claim to property interest under RICO forfeiture provision).

§ 91.06(c) Title for Forfeiture for Other Landholder Misconduct. [Go To Main]

Add:

New Covenant Worship Center v. Wright, 601 S.E.2d 245 (N.C. App. 2004) (a deed from grantors who had never re-entered the property or terminated the precedent estate after obtaining the right to do so was ineffective to convey title).

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Supp. to § 91.07 Title by Abandonment.

Add to "§ 91.10 Bibliography" to chapter contents.
[Go To Main]

Add:

Crystal Farms, Inc. v. Road Atlanta, LLC, 690 S.E.2d 666 (Ga. App. 2010) (Abandonment of an easement need not be evidenced by an affirmative act. Definite and intentional nonuse may suffice.)

Wiser v. Elliott, 209 P.3d 337 (Or. App. 2009) (Non-use alone is insufficient proof of abandonment.)

Grady v. Narragansett Elec. Co., 962 A.2d 34 (R.I. 2009) (There must be evidence of a decisive action by the holder of an easement demonstrating an unequivocal intent to abandon.)

Add:

Cragnolin v Gallagher, 892 N.Y.S.2d 197 (2010) (Failure to use or maintain only certain portions of an easement is not sufficient evidence of abandonment.); *Wiser v. Elliott, 209 P.3d 337 (Or. App. 2009)* (The change in the nature of use, i.e. from railroad to paved road, does not evidence the abandonment of an easement.)

Add:

McAdams v. Town of Barnard, 936 A.2d 1310 (Vt. 2007) (action to quiet title to lands upon state's discontinuance of roads).

Add:

Calhan Chamber of Commerce v. Town of Calhan, 166 P.3d 200 (Colo. App. 2007) (title to former railroad land reverts automatically to the town after abandonment by the railroad).

Timberlake, Inc. v. O'Brien, 902 N.E.2d 843 (Ind. App. 2009) (Upon abandonment of a railroad easement, the interest in the land reverts to the grantor.)

Add:

Stone v. U.S.D. 222, 77 P.3d 509 (Kan. App. 2004) (reversion of land to adjacent owners after abandonment by railroad).

Add:

Laughlin v. Nouveau Body & Tan, L.L.C. (In re Laughlin), 602 F.3d 417 (5th Cir. 2010) (In bankruptcy proceeding, a prepetition renunciation of interest is not a transfer of property.)

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Supp. to § 91.09 Marketable Title.

Add to "§ 91.10 Bibliography" to chapter contents.
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§ 91.09(a) The Common Law. [Go To Main]

§ 91.09(a)(1). Various Definitions of Marketable Title.

Add:

Legacy Development v. Liberatore, 886 N.Y.S.2d 275 (2009) (Marketable title is such that a reasonable and prudent person would ordinarily purchase the property.)

Add:

325 *Schermerhorn, LLC v. Nevins Realty Corp., 886 N.Y.S.2d 69 (2009)* (A marketable title is free from reasonable doubt but not from all doubt. Impairments and encumbrances affecting ownership and possession create marketability defects.)

Add:

Johnson v. Lambros, 147 P.3d 100 (Idaho App. 2006) (vendor has implied obligation to make a good faith effort to obtain a marketable title).

§ 91.09(a)(2) The Effect of Area Discrepancies on Marketability.

Add:

Holoubek v Romshek, 749 N.W.2d 901 (Neb. App. 2008) (purchasers entitled to rescind purchase agreement for vendors' failure to provide marketable title; neighbors claimed 27 feet of the land to be purchased).

§ 91.09(a)(3) Situations Making the Title Unmarketable.

Add:

Apple Valley Gardens Ass'n v. MacHutta, 763 N.W.2d 126 (Wis. 2009) (A condominium subject to a bylaw prohibiting the rental of the condominium is not considered unmarketable.)

After "are," add "no right of access, n. 392.1"

Add new note 392.1

Haines v. Old Republic Nat. Title Ins. Co., 178 P.3d 1086 (Wyo. 2008) .

Add:

Legacy Development v. Liberatore, 886 N.Y.S.2d 275 (2009) (Holding that an easement blocking one of several points of access to the property did not render title unmarketable, even if the blocked point of access would be landowner's preferred point of access.)

Add:

Cavagnaro v. Coldwell Banker Alfonso Realty, Inc., 995 So. 2d 754 (Miss. App. 2008) (vendors unable to provide marketable title because their driveway encroached on adjacent land).

Add:

Cavagnaro v. Coldwell Banker Alfonso Realty, Inc., 2008 Miss. App. LEXIS 108 (Miss. Ct. App. Feb. 19, 2008) (vendors unable to provide marketable title because of driveway encroachment).

Add:

Homeside Dev. Corp. v. Dassa Brill, LLC, 2006 NY Slip Op 1711 (N.Y. App. Div. 2006) (a deed restriction that the property be used for community rather than residential or commercial purposes did not render the title unmarketable).

Holoubek v. Romshek, 16 Neb. App. 677 (Neb. Ct. App. 2008) (marketability breached when it was revealed that the neighbors claimed the southernmost 27 feet of the land).

Add:

Gloucester Landing Associates Limited Partnership v. Gloucester Redevelopment Authority, 802 N.E.2d 1046 (Mass. App. 2004) (no mutual mistake of fact regarding whether owner held marketable title).

§ 91.09(a)(6) Vendee's Rights When the Vendee's Title is Inadequate.

Add:

Schaumberg v. Friedmann, 888 N.E.2d 963 (Mass. App. 2008) (various recoveries, including treble damages awarded against vendor who refused to provide marketable title).

§ 91.09(b) Marketable Title Acts and Other Curative Acts. [Go To Main]

§ 91.09(b)(1) Curative acts Generally

Add:

Blanton v. City of Pinellas Park, 854 So. 2d 729 (Fla. App. 2003) (a claim for a statutory way of necessity was subject to the limitations period in the state marketable record title act).

Add:

Irving v. Firehouse Associates, LLC, 898 A.2d 270 (Conn. App. 2006) (right of way not extinguished under state marketable title act); *Bitting v. Gray, 897 A.2d 25 (R.I. 2006)* (easement not extinguished by the state marketable title act); *Cupola Golf Course, Inc. v. Dooley, 898 A.2d 134 (Vt. 2006)* (real covenant enforcement not prevented by the state marketable title act).

Add:

Jackson v. Lee, 2009 Conn. Super. LEXIS 1344 (2009) (A general and vague reference of a "right of way" is insufficient to put a title searcher on notice according to the Marketable Title Act.)

Add:

King Associates, LLPv. Bechtler Development Corp., 632 S.E.2d 243 (N.C. App. 2006) (exception for railroad rights of way in state marketable title act).

Ung v. Koehler, *37 Cal. Rptr. 3d 311 (2005)* (Marketable Record Title Act time limit on enforcing liens did not apply to non-judicial foreclosure); *Pinkney v. Southwick Invs., L.L.C., 2005 Ohio 4167 (Ohio Ct. App. 2005)* (Nos. 85074, 85075, Ohio App., Aug. 11, 2005) (the Marketable Title Act was held to be not unconstitutional retroactive legislation).

Berger v. Riverwind Parking, LLP, 2003 Fla. App. LEXIS 2862 (No. 5D02-726, Mar. 7, 2003) (Marketable Record Titles to Real Property Act extinguished subdivision restrictions which were over 30 years old); *State v. Hess, 684 N.W.2d 414 (Minn. 2004)* (possibility of reverter extinguished by the state Marketable Title Act).

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Supp. To CHAPTER 91 TITLE AND MARKETABLE TITLE

11-91 Thompson on Real Property, Thomas Editions Supp. to § 91.10

Supp. to § 91.10 Bibliography.

Add to "§ 91.10 Bibliography" to chapter contents.
[Go To Main]

Add to Articles:

Alsup, J. Alton. "Preparation of Documentation Affecting Title to Texas Real Property As the Unauthorized Practice of Law," 61 *Consumer Fin. L.Q. Rep.* 475 (Fall, 2007).

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Walsh, Tara M. "Rails to Trails in Pennsylvania: The Emergence of a New Abandonment Doctrine," *17 Penn St. Envtl. L. Rev. 355 (2009).*

Add to Annotations

Annotation, "Construction and effect of 'marketable record' statutes," *31 A.L.R.4th 11* .

Annotation, Construction of "marketable title, "ancient claims extinguishment," and like statutes, terminating or limiting enforcement of rights, interests, and claims respecting real property, based on old records, instruments, or events," *71 A.L.R.2d 846* .

Annotation, "Effect of doubtful constructiion of will devising property upon marketability of title," *65 A.L.R.3d 450* .

Annotation, "Marketability of title as affected by fact that grantor or mortgagor in chain of title acquired complete or perfect title after conveyance," 163 A.L.R. 437 .

Annotation, "Marketability of title as affected by question as to constitutionality of statute upon which vendor's title depends, or of statute creating encumbrance or restriction upon the property," 152 A.L.R. 963 .

Annotation, "Marketable title," 57A.L.R. 1253.

Annotation, "Necessity of judicial proceeding to vest title to real property in state by escheat," 79 A.L.R. 1364).

Add to Annotations:

Annotation, "Pendency of Criminal Prosecution as Ground for Continuance or Postponement of Civil Forfeiture Action Involving Facts or Transactions Upon Which Prosecution Is Predicated--Federal Cases," *35 A.L.R. Fed. 2d 143* .

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CHAPTER 92 RECORDING, REGISTRATION, AND SEARCH OF TITLE

11-92 Thompson on Real Property, Thomas Editions 92.syn

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CHAPTER 92 RECORDING, REGISTRATION, AND SEARCH OF TITLE

11-92 Thompson on Real Property, Thomas Editions § 92.01

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§ 92.01 Overview of Recording, Registration, and Search of Title.

Governmentally maintained land title record systems are used in many countries throughout the world. n1 These systems serve the dual and often conflicting purposes of providing security of ownership and facilitating transfer of real estate. Security of ownership means that title to real estate should not be diminished or lost except through either the consensual act of the owner or through some specific legal process, such as foreclosure, condemnation, or execution. Facility of transfer means that purchasers and certain other transferees should be able to acquire an interest in real estate promptly, inexpensively, and with assurance that the title is as indicated by the land title system records. These purposes may conflict. Measures that promote security of ownership may impair facility of transfer and vice versa. For example, a land title record system that protects good faith purchasers promotes facility of transfer, but at the expense of security of title, because the system may give the good faith purchaser's interest priority over a prior owner's title.

Public land title record systems may be classified as either recording or title registration systems. Under title registration systems the governmental entity that maintains the system affirms the existence or priority of registered interests in the real estate and the identities of their owners or claimants. Recording systems generally do not provide such affirmations. Instead, such systems provide notice or written evidence of claims which interested persons may use to assess priority or ownership. Under recording systems the governmental agency that maintains the system is only a record keeper. Land title record systems in actual use frequently have both title registration and recording characteristics. Some title registration systems generally affirm ownership or priority of most interests, but simply give notice of other possible interests or claims. Except for a few localities where the Torrens system of land title registration is used, land title record systems in the United States are recording systems. n2

American recording systems effectively promote security of ownership, usually at the cost of facility of transfer. There are two ways in which facility of transfer is inhibited under the American recording systems. First, searching and examining title in a recording system can be expensive and time-consuming. Because of the sorry state of the public records in many areas, searching for the information pertaining to a particular interest can be a lengthy and difficult process, a process that may have to be repeated every time the title is examined. Poorly organized or maintained public records have caused the wasteful duplication of these records by private entities (mainly abstracting and title insurance companies). n3 Examination of the assembled title information can also be time-consuming where the relevant amount of data is large. Inefficient duplication of effort occurs where identical data have to be reevaluated in subsequent

transactions involving the same interest. For example, a purchaser of a parcel of real estate may have to review all of the prior documents concerning that real estate. These same documents may have to be reevaluated every time an interest in the property is transferred.

Second, recording systems fail to serve facility of transfer because certain claims or interests may be valid even though a purchaser has no notice of them from the record or any other source. These "off the record risks" include the very serious possibility that the title or interest of the purported owner that is being searched and examined is completely void. n4

The perceived deficiencies of the recording system as a source of land title assurance to purchasers have stimulated voluminous commentary. n5 This commentary criticizes recording systems and proposes solutions to their problems. Some proposals to improve recording systems have been implemented, the most noteworthy of which are the marketable title acts currently in force in at least eighteen states. These acts attempt to promote facility of transfer by voiding old title claims not preserved under the act by a filing within a specified time period.

The most radical reform proposal made from time to time was to replace the American recording systems with a Torrens title registration system. There was great interest in Torrens title registration in the United States during the late 19th and early 20th centuries. Twenty states or territories enacted Torrens system enabling legislation during this time. Torrens, therefore, was a substantial success in enactment, but it was almost a total failure in implementation. Torrens enabling legislation was later repealed by many enacting states. Torrens is not used today in most of those jurisdictions that have not repealed the enabling legislation. Illinois, one of the jurisdictions with the most substantial use of Torrens, repealed its enabling legislation in 1991. n6

After the initial legislation was passed, interest in Torrens faded except for periods of renewed interest in the 1930s and 1970s. Currently, there appears to be a consensus among real estate lawyers and academics that there is no foreseeable prospect for implementation of Torrens or any other type of title registration system in the United States. n7

Developments in recent decades have helped make recording systems more effective in facilitating real estate transfer. These developments include the greatly increased use of title insurance and the greater availability of computers to maintain and manage land title records. While some lawyers and academics were devising improvements in the recording system, such as marketable title acts or proposing replacement of the system with Torrens, the title insurance industry was evolving. Title insurance is now the dominant method of title assurance in most urban areas of the United States and in the entire western portion of the nation. The services provided by the title insurance industry do much to remedy the inadequacies of the recording system as a source of title assurance. Some critics of the industry argue, however, that the cure comes at too great a cost to consumers. n8

Computers are causing a revolution in land title record management. In the 1960s, title insurance companies and governments used the growing access to mainframe computers to begin implementing computerized land title record systems. The tremendous decrease in the cost of acquiring and maintaining computer-based systems brought on by the advent of the low-cost microcomputer in the mid to late 1970s led to increased use of computerized land title records. In 1984, after years of study, the Province of Ontario, Canada, began implementation of an official computerized land title record system. n9 Unofficial systems currently used by some local governments and title insurance companies in the United States are similar. With computerization, title searches that consumed hours in manual records may be completed in minutes or seconds. A process called "imaging" allows documents to be scanned and stored electronically, enabling persons with access to retrieve them through modems and remote terminals. n10 Access to the records through remote terminals, where available, saves time and promotes efficiency. Computers are also used to prepare documentation required in real estate transactions. A number of providers sell software used in searching titles and preparing documentation. n11 It is generally agreed by persons in the real estate title services industry that computers substantially facilitate real estate transfer by accurately and efficiently producing documentation and by greatly increasing the speed and efficiency of title searches and examinations.

COMPUTER-ASSISTED RESEARCH:

In LEXIS, state codes may be searched for provisions dealing with recording, registration, and search of title. Using "title" as a search term is essential but problematic. The term "title" is also used in reference to titles for personal property, such as automobiles and boats, and as a popular name for state and federal legislation. When used without further qualifiers, "title" will retrieve the voluminous statutory references to those activities. To sharpen the search, "title" must be combined with other terms typically found in provisions dealing with titles to real property, such as record, register, land, real property, search, torrens, index, grantor, grantee, parcel identifier, marketable, curative, and notice. Even this search will miss miscellaneous provisions associated with titles to real property but not containing any of those terms, or the occasional isolated provision. Using the term "deed" rather than "title" in the search will miss those provisions associated with titles to real property that do not contain the term "title." For best results, the direct search of the code provisions should be combined with a search of the code's general index.

FOOTNOTES:

(n1)Footnote 1. *See* John L. McCormack, *Torrens and Recording: Land Title Assurance in the Computer Age, 18 Wm. Mitchell L. Rev. 61, 70 n.31 (1992).*

(n2)Footnote 2. The U.S. systems generally provide no affirmations. Recordation may provide presumptive evidence that recorded documents actually created or transferred the claims or interests described in them.

(n3)Footnote 3. These private entities, however, perform a valuable service in that it is usually much easier and much less time consuming to search privately held records. These records are extremely expensive to create and maintain. Some critics argue that governments should be urged to overhaul public records and create a more efficient system. Jon W. Bruce & James W. Ely Jr., Cases and Materials on Property Law 577 (3d ed. 1994). Alternatives to the usual grantor-grantee system include: computerized data banks; block indexing, currently used in New York City, Baltimore, and Mississippi; tract indexes; and self-indexing, adopted in Alabama. *Id.* at 578. The federal Department of Housing and Urban Development also sponsored several studies that examined how "to improve the efficiency of public records and to lower costs for title searching and examinations." *Id.*

(n4)Footnote 4. *E.g., Stone v. French, 14 P. 530 (Kan. 1887).*

(n5)Footnote 5. Some of the best articles include John E. Cribbet, *Conveyancing Reform, 35 N.Y.U. L. Rev. 1291 (1960);* Harry M. Cross, *Weaknesses of the Present Recording System, 47 Iowa L. Rev. 245 (1962);* and Francis S. Philbrick, *Limits of Record Search and Therefore of Notice, 93* U. Pa. L. Rev. 125 (1944).

(n6)Footnote 6. Ill. Rev. Stat. ch. 30, para. 120 (1991) *et seq.*, now 765 Ill. Comp.Stat. 35/83 *et seq.*

(n7)Footnote 7. John E. Cribbet & Corwin W. Johnson, Principles of the Law of Property 352 (3d ed. 1989).

(n8)Footnote 8. Noel D. Uri, *The Title Insurance Industry: A Reexamination,* 17 Real Est. L.J. 313 (1989); John C. Christie, Jr., *The Title Insurance Industry: A Reexamination Revisited,* 18 Real Est. L.J. 354 (1990).

(n9)Footnote 9. Land Registration Reform Act, R.S.O. ch. 32 (1984).

(n10)Footnote 10. *Cutting the Paper Chase; Service Companies Find Computer Imaging Technology Boosts Productivity, Cuts Costs,* Wash. Post., Aug 17, 1992, at F.

(n11)Footnote 11. Some of these include SoftPro Corporation, Raleigh, North Carolina; Landata System, Inc., Houston, Texas; LandTech, West Palm Beach, Florida; and Display Systems, Inc., Okeechobee, Florida. Chicago Title Insurance Company has created its own software. Jacqueline Rosenberg, Computer Software and the Title Insurance Industry (Jan. 1993) (unpublished paper on file with the author).

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CHAPTER 92 RECORDING, REGISTRATION, AND SEARCH OF TITLE

11-92 Thompson on Real Property, Thomas Editions § 92.02

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§ 92.02 Historical Background.

The American recording system has five basic characteristics:

(1) instruments are operative without recordation;

(2) recording instruments perfect the legal priority of transferees named in them;

(3) the entire texts of the instruments are copied into the record, not just summaries or memoranda of them;

(4) government does not evaluate the legal effect of recorded instruments; and

(5) instruments are not entitled to recordation unless they are acknowledged before public officials.

A system having all of these features was being used in Massachusetts Bay Colony by the mid-1600s. n12 This system had numerous antecedents in the North American colonies and in Europe. Direct influences on the Massachusetts system may have included the Dutch recording system, English borough and manorial recording customs, and various colonial record-keeping practices, primarily those used in the Plymouth and Massachusetts Bay Colonies.

By American colonial times, three different types of public land title records were used in Europe: n13

(1) Systems where parties to a transaction appeared before a public or quasi-public official and acknowledged the transaction, after which the official made a short note of the substance and effect of the transaction;

(2) Systems where instruments were either completely copied or a memorial of them was entered in the public record; and

(3) Systems where title was registered with largely conclusive effect and the act of registration was

necessary to give the transaction legal effect.

The system that eventually developed in the United States was a combination of the first two types.

Dutch institutions and practices probably influenced the development of the American recording system. n14 The earliest known record of a deed in what is now the United States is an original instrument written into a 1627 record book of Plymouth Colony. n15 The Dutch recording system had been in operation for many years when the Pilgrims who later settled Plymouth Colony arrived at Leyden in the Netherlands. n16 By the 1500s, the Dutch also required acknowledgment of land transfers before courts. n17 It seems reasonable to surmise that early New England real estate record keeping practices were Dutch influenced because of the sojourn of the Pilgrims in the Netherlands and the proximity of the Dutch in New Netherlands (later New York).

The English Statute of Enrollments n18 probably did not directly influence the early Massachusetts Recording Act. n19 The wording of the Statute differs substantially from that of the 1640 Massachusetts Bay Colony Ordinance. The ordinance provided:

> For avoyding all fraudulent conveyances, & that every man may know what estate or interest other men may have in any houses, land or other hereditaments they are to deale in, it is therefore ordered that after the end of this month no morgage, bargaine, sale, or graunt hearafter to bee made of any houses, lands, rents, or other hereditaments, shalbee of force against any other person except the graunter & his heires, unlesse the same bee recorded, as in hereafter expressed: And that no such bargain, sale, or graunt already made in way of morgage, where the graunter remaines in possession, shalbee of force against any other but the graunter or his heires, except the same shalbee entered, as is hereafter expressed, within one month after the end of this Courte, if the partye bee within this jurisdiction, or else within 3 months after hee shall returne. And if any such graunter, etc, being required by the grauntee, etc, to make an acknowledgment of any graunt, etc, by him made, shall refuse so to do, it shalbee in the power of any magistrate to send for the party so refuseing, & commit him to prison without baile or mayneprize, until he shall acknowledge the same.
>
> And the grauntee is to enter his caution with the recorder, & this shall save his interest in the meane time; & if it bee doubtfull whether it bee the deed or graunt of the party, hee shall be bound with surities to the next court, & the caution shall remaine good as aforesaid.
>
> And for the recording of all such bargaines, etc, it is further ordered, that there shalbee one appointed at Ipswich, for which Mr. Samuel Symonds is chosen for that Court to enter all such bargaines, sales, etc, of all lands, etc, within the jurisdiction of that Court; & Mr. Emmanuell Downing is chosen in like sort for the jurisdiction of the Court of Salem; & all the rest to bee entered by Mr. Stephen Winthrop, the recorder at Boston.
>
> And that it is not intended that the wholebargaine, sale, etc, shalbee entered, but only the names of the graunter and grauntee, the thing & the estate granted, & the date; and all such entryes shalbee certified to the recorder at Boston within 6 months yearely.
>
> And it is ordered that the fee for every such entry shalbee 6[d].
>
> And it is hereby declared, that this order shall not extend to any graunt made or to bee made by any township. n20

In contrast, the English Statute of Enrollments, provided, in part:

> Be it enacted ... That ... no manors, lands, tenements or other hereditaments, shall pass, alter or

> change from one to another ... by reason only of any bargain and sale thereof, except the same bargain and sale be made by writing indented sealed, and enrolled ... to the intent that every party that hath to do therewith, may resort and see the effect and tenor of every such writing so inrolled. n21

Later American recording acts were clearly influenced by the Statute of Enrollments. n22

The Massachusetts Bay Colony ordinance was amended in 1647 to require recordation of copies of the instruments rather than just memoranda of them. n23 Additionally, the amendment clarified that the statute applied only to conveyances where the grantor remained in possession. n24 This limitation on applicability remained in effect throughout the colonial period. n25

This early legislation was intended to prevent fraudulent conveyances of land and to publicize real estate ownership. n26 As recording systems evolved over the years, a broader purpose has emerged. Modern recording systems are aimed primarily at facilitating real estate transfer by protecting good faith purchasers who may have relied on the record as indicating the actual state of ownership.

COMPUTER-ASSISTED RESEARCH:

LEXIS: Statute of Enrollments w/50 title or deed

NOTE:
Many cases relevant to this section pre-date the earliest cases in the database.

FOOTNOTES:
(n1)Footnote 12. George L. Haskins, *The Beginnings of the Recording System in Massachusetts, 21 B.U. L. Rev. 281-83 (1941).* Mark DeWolfe Howe has shown that the Colonial Massachusetts recording act only applied to conveyances where the grantor remained in possession. Mark DeWolfe Howe, *The Recording of Deeds in the Colony of Massachusetts Bay, 28 B.U. L. Rev. 1 (1948).*

(n2)Footnote 13. Sir Ernest Dobson & V.L.O. Sheppard, Land Registration: 46 2d ed. 1964; Rudolph Huebner, A History of Germanic Private Law 219-21 (Francis S. Philbrick, trans., 1918).

(n3)Footnote 14. Professor Beale's conclusion that it was not probable that Pilgrim colonists were influenced by the Dutch system was based on his belief that the Dutch system was a title registration system, not a recording system. Joseph H. Beale, *The Origins of the System of Recording Deeds in America*, 19 the Green Bag 335, 338 (1907). As pointed out by Professor Haskins, an "unregistered" conveyance under the Dutch system was effective between the parties. "The deed, in other words, was clearly the instrument of transfer, and was fully as important as the act of registration--a fact which considerably narrows the gap between the Dutch practice and the system which was worked out at Plymouth." George L. Haskins, *The Beginnings of the Recording System in Massachusetts, 21 B.U. L. Rev. 281, 291 (1941).* Because of the use of "registration" to refer to both recording or title registration, is sometimes difficult to ascertain readily whether the system being referred to is one or the other. The difficulty may be exacerbated where the system is referred to in a foreign language in writings that are centuries old. The modern Dutch system is clearly recording, not title registration. "Although registration on the public registers is an indispensable requirement for an effective conveyance, on the other hand the fact that registration has taken place does not guarantee that the transferee has indeed become owner. This is called the *negatief stelsel (negative system)* which is known in common law countries as Registration of Deeds, as distinct from Registration of Title." W.M. Kleijn, *The Law of Property, in* Introduction to Dutch Law for Foreign Lawyers 86 (1978).

(n4)Footnote 15. Rufford G. Patton & Carroll G. Patton, Land Titles, § 6 (1957).

(n5)Footnote 16. George L. Haskins, *The Beginnings of the Recording Systems in Massachusetts, 21 B.U. L. Rev.*

281, 290 (1941).

(n6)Footnote 17. George L. Haskins, *The Beginnings of the Recording Systems in Massachusetts, 21 B.U. L. Rev. 281, 290 (1941).*

(n7)Footnote 18. 27 Henry VIII, c. 16 (1536).

(n8)Footnote 19. Joseph H. Beale, Jr., *The Origins of the Systems of Recording Deeds in America*, the Green Bag 335, 339 (1970); George L. Haskins, *The Beginnings of the Recording Systems in Massachusetts, 21 B.U. L. Rev. 281, 292-93 (1941).*

(n9)Footnote 20. 1 Records of the Governor and Company of the Massachusetts Bay in New England 306-07 (Nathaniel Shurtleff ed. 1853-54).

(n10)Footnote 21. A Collection of Important English Statutes Showing the Principal Changes in the Law of Property 38 (3d ed. 1888).

(n11)Footnote 22. Francis S. Philbrick, *Limits of Record Search and Therefore of Notice, Part I, 93 U. Pa. L. Rev. 125, 140 (1944).* While a general system of recording never developed in England, the British influenced the early evolution of American recording acts in many ways besides through the Statute of Enrollments. English judicial decisions, for instance, held that purchasers with notice of unregistered conveyances would not be protected by that country's registration statutes. Additionally, legislation passed by the British Parliament clearly affected recording acts legislation in the newly formed American states. *See, e.g.*, Curtis J. Berger & Quintin Johnstone, Land Transfer and Finance 713-715 (4th ed. 1993). *See also* note 282, *infra*, and accompanying text.

(n12)Footnote 23. Laws and Liberties of Massachusetts, 1684, 13-14 (Max Ferrand ed., 1929). The amendment was made in 1647 and published in 1648.

(n13)Footnote 24. Mark DeWolfe Howe, *The Recording of Deeds in the Colony of Massachusetts Bay, 28 B.U. L. Rev. 1, 3 (1948).*

(n14)Footnote 25. Mark DeWolfe Howe, *The Recording of Deeds in the Colony of Massachusetts Bay, 28 B.U. L. Rev. 1, 3 (1948).*

(n15)Footnote 26. Alejandro M. Garro, the Louisiana Public Records Doctrine and the Civil Law Tradition 73 (1989).

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CHAPTER 92 RECORDING, REGISTRATION, AND SEARCH OF TITLE

11-92 Thompson on Real Property, Thomas Editions § 92.03

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§ 92.03 Common-Law Priority Rules.

Recording acts or other statutes may apply to determine the priority of conflicting claims to real estate. For example, if O conveys to A and later purports to convey the same interest to B, B will have priority over A if B qualifies for protected party status under the applicable recording act. If no statute applies to determine priority, then priority is determined by common law rules. The basic common-law priority rule was "first in time, first in right." n27 However, in certain specific instances, there were exceptions to this basic rule. These exceptions resulted primarily from: (1) the law and equity dichotomy; and (2) the application of equitable doctrines, particularly the doctrine of good faith purchase. The common-law priority rules and exceptions may be summarized as follows:

> (1) Where the conflicting interests are legal claims, priority is determined by order of time, unless a prior claimant is estopped from asserting priority.
>
> (2) Where the conflicting interests are equitable claims, priority is determined by order of time, unless estoppel applies to subordinate a prior claimant or unless a subsequent equitable claimant becomes a good faith purchaser of the legal title (i.e., acquires the legal title without notice of the prior equitable interest and for a valuable consideration).
>
> (3) Where one claim is legal and the other is equitable, the legal claim will have priority: (a) if it is prior in time; or (b) if subsequent in time and it was purchased for a valuable consideration without notice of the prior equitable claim.

The development of these rules and exceptions was influenced by the former separation of law and equity. The law courts recognized and enforced only legal interests. Therefore, the priority problems addressed by law courts involved legal interests only and their priority was determined in order of time: "first in time, first in right." n28 Except where estoppel applied to subordinate a prior claimant, questions of good faith, notice, and payment of valuable consideration were immaterial when the law courts considered a priority problem. n29

Equity courts, on the other hand, recognized both types of interests and created exceptions to the "first in time, first in right" rule. Where the conflicting claims were purely equitable, the equity courts refused to follow the "first in time,

first in right" rule when the equities were unequal. n30 Where the conflict was between an equitable interest and a legal interest, the legal interest prevailed if it was prior in time. If the legal interest was subsequent in time, it was subordinate unless its holder was a good faith purchaser. In that event, the equity court declined to exercise jurisdiction, leaving the problem to the law courts, which solved it by refusing to recognize the validity of the prior equitable claim, thereby giving precedence to the legal interest. n31

Because law and equity have been merged in the United States for many years, the resolution of a priority problem should not be based on whether particular interests were historically considered legal or equitable interests. If the exceptions to the "first in time, first in right" rule are founded in policies that are presently sound, then the exceptions should apply regardless of whether the prior or subsequent interests are labelled "equitable" or "legal." In other words, if there are current policies that support giving priority to a subsequent purchaser without notice of an earlier interest, then priority should be given to that purchaser regardless of the historical label attached to the purchaser's claims. n32 Nevertheless, the refusal to give good faith purchasers of equitable claims priority over at least some previous conflicting interests still persists. For example, the interest of a subsequent good faith vendee, which is an equitable interest, is subject to prior equities; however, the interest of a subsequent good faith purchaser of legal title is not. n33

All other things being equal, assignment of priority to the prior or subsequent claimant should depend on whether security of ownership or facility of transfer is considered paramount. Favoring the prior claim promotes security of ownership, while favoring the subsequent good faith purchaser promotes facility of transfer. One reason for denying priority to a subsequent good faith purchaser of an equitable interest over earlier claims might be to promote predictability in law and stability of titles. The good faith purchase exception to the "first in time, first in right" rule of priority has been limited to legal title purchasers by long-established and followed authority. However, modern recording acts reflect a legislative policy judgment that security of ownership should yield to facility of transfer in cases of good faith purchase. Where recording acts are used to solve priority problems, it generally does not matter whether the conflicting interests are labelled "legal" or "equitable." Perhaps the common law should follow suit in priority cases where no statute applies.

COMPUTER-ASSISTED RESEARCH:

LEXIS: first in time w/50 first in right

NOTE:
Many cases relevant to this section pre-date the earliest cases in the database.

FOOTNOTES:
(n1)Footnote 27. Ralph W. Aigler, *The Operation of the Recording Acts, 22 Mich. L. Rev. 405, 406 (1924).*

(n2)Footnote 28. II John N. Pomeroy, Equity Jurisprudence as Administrated in the United States of America § 679 (Spencer W. Symons ed., 5th ed. 1941).

(n3)Footnote 29. II John N. Pomeroy, Equity Jurisprudence as Administrated in the United States of America § 679 (Spencer W. Symons ed., 5th ed. 1941).

(n4)Footnote 30. Sherman Steele, Equity Jurisprudence 721 (1927).

(n5)Footnote 31. Sherman Steele, Equity Jurisprudence 721 (1927).

(n6)Footnote 32. J. B. Ames, *Purchase for Value Without Notice, 1 Harv. L. Rev. 1, 3 (1887)* (expressing this basic notion).

(n7)Footnote 33. *See* Restatement (Second) of Trusts § 310 (1959); *Hocking v. Hocking, 484 N.E.2d 406 (Ill. App.*

1985); Neeley v. Intercity Mgt. Corp., 623 S.W.2d 942 (Tex. App. 1981). Walker v. Wilson, 469 So. 2d 580 (Ala. 1985).

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CHAPTER 92 RECORDING, REGISTRATION, AND SEARCH OF TITLE

11-92 Thompson on Real Property, Thomas Editions § 92.04

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§ 92.04 The American Recording System.

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§ 92.04(a) General Operation.

American recording systems are administered mainly at the county level of government; thus, records are maintained on a county-by-county basis. n34 By contrast, in some foreign countries records are maintained by districts separate from political subdivisions, such as counties or municipalities. It has been estimated that approximately 3,600 counties or other local jurisdictions in the United States maintain title records. n35

The American recording systems operate through private initiative. n36 The administrators of American recording systems are essentially data custodians. The data are contained in copies of recorded real estate transaction documents which indicate the creation or transfer of interests or claims. The administrators have very little control over input of data into their systems. The government makes no affirmations about the legal effect or even accuracy of the data. The evaluation of land title data in governmental custody is left entirely to interested private parties. Consequently, recording systems are relatively easy for governments to administer and they demand less government resources than title registration systems. Title registration systems, however, are easier for title examiners to use.

Initiation of recordation also is largely left to the discretion of private parties. Generally, an interest claimant is not required by law to record and, with some localized exceptions, recordation is not a prerequisite to validity of a transfer between the immediate parties. The incentive to record is that ownership or priority may be lost if a real estate claim created or evidenced by a written instrument is not recorded.

Publicly maintained land title record systems are intended to facilitate transfer of real estate interests by enabling purchasers to acquire interests promptly, inexpensively, and with assurance that title to the interests is as indicated by the records. Recording acts facilitate transfer by voiding or subordinating certain prior unrecorded claims evidenced by written instruments in favor of subsequent transferees entitled to the protection of the applicable recording act. The New York recording act provides a specific illustration:

> A conveyance of real property ... may be recorded... . Every such conveyance not so recorded is void as against any person who subsequently purchases ... in good faith and for a valuable consideration, from

the same [transferor,] ... and whose conveyance ... is first duly recorded... ." n37

Modern American recording law was influenced by the equitable doctrine of bona fide purchase. n38 The law mainly protects purchasers for a valuable consideration and certain other persons who may have changed their positions in reliance on title actually being as indicated by the record. Almost universally, donees are not protected. Other transferees, such as judgment creditors, may or may not be protected, depending on the wording and interpretation of the applicable statute. In addition to payment of value, with few exceptions, the recording acts require a party to be in good faith or without notice to attain protection. Good faith generally means that the party must be without knowledge or notice of the prior unrecorded claim or interest. n39 Actual knowledge will disqualify a person from protection. Additionally, in some situations a party will not attain protection because the law will impute knowledge or notice to that party. Such imputed knowledge is referred to as constructive or inquiry notice. About half of the recording acts in the United States additionally require that in order to be protected the subsequent transferee must record before the instrument evidencing the prior claim or interest is recorded. Recording a deed six days after disbursing sale proceeds to the seller is considered negligent, and buyers can be damaged by a cloud on their title caused by a judgment entered against the seller before the recording. n40

COMPUTER-ASSISTED RESEARCH:

LEXIS: good faith purchase* w/30 deed or value bona fide purchase* w/30 deed or value

NOTE:
Many cases relevant to this section pre-date the earliest cases in the database.

§ 92.04(b) Physical Components.

Generally, recording functions are not regulated by federal, state, or regional agencies. The Uniform Simplification of Land Transfers Act (USOLTA) proposes the creation of a "State Recording Officer." n41 This official would be authorized to regulate local recording offices and to approve consolidations of local offices to lower costs. Neither the USOLTA nor this specific proposal has been adopted in any jurisdiction. However, consolidation of local recording offices has been initiated in some states. n42

Title records are usually found in a number of different places, not in a single office. There has been a trend over many years to consolidate all records in a single office headed by an official who is elected (or, in places, appointed) and designated the "Recorder of Deeds," "Register of Deeds," or by some similar title. n43 Although the trend has been to consolidate local records in a single office, it is still usually necessary to visit at least a few other offices to gather all relevant title data. These offices may include places where records of real property taxes or assessments, judgment dockets or probate records are kept.

A recorder's office records and copies instruments presented for recordation. The originals are normally returned to the person who initiated recordation, or to such person's designee. The copies are stored and indexed in the recorder's office. These records are public and accessible to anyone, usually free of charge. Generally, the recorder's office plays a very small or no formal role in the retrieval of recorded documents. Interested parties must retrieve recorded instruments using the available indexes.

When an instrument is presented for recordation, it is reviewed for form. If it appears to satisfy the few formal requirements for recordability, it will be accepted for recordation upon payment of a recordation fee. Upon acceptance, the document will be:

(1) date and time stamped;

(2) assigned a document number; and

(3) noted in a document log.

A copy may be immediately made so that the original can be returned at once. Usually, however, the original will be retained for a short time for copying and other processing. The copies are photographic and may be full sized or in microform. Where the copies are full sized, they are usually stored in bound volumes. The instruments that are placed in bound volumes can be located by volume and page numbers. Equivalent location identifiers are used when storage is in microform. While electronic storage is not widely used today, it will most likely become prevalent in the future.

Indexing is a highly important function of a recorder's office. Because of the often large number of recorded instruments, an index is necessary to enable retrieval of documents containing information relevant to the titles of particular interests. While computer-based indexing will eventually become dominant, most indexes in current use are manual. Deeds and mortgages are usually indexed by either names or parcels. Indexes based on names are called grantor-grantee indexes; indexes based on parcels are called tract indexes. Filed judgment liens are normally indexed alphabetically by the debtors' names in a separate index. There may be other separate indexes for different kinds of instruments.

Grantor-grantee indexes are widely used. They are relatively undemanding of government resources to administer, but they are more difficult for title searchers to use. Documents are indexed in chronological order in grantor-grantee indexes according to the initial letter or letters of the grantors' or grantees' surnames. n44

The grantee index is used to reach back into time to establish the chain of ownership. The search is begun with the name of the current owner, as a grantee. The index is used to ascertain the identity of the apparent present owner's transferor. Once the transferor is ascertained, the grantee index is then examined to discover that person's transferor and so on until the chain of ownership is determined. Once the chain has been established, the grantor index is examined for recorded adverse conveyances or encumbrances indexed under each owner's name as grantor.

Tract indexes are much less common than grantor-grantee indexes. n45 Nationally, they are used in less than one-third of all recorders' offices. n46 Tract indexes are authorized or required by statute in only 10 states. Usually, such indexes are "unofficial" and are maintained in addition to the "official" grantor-grantee index. Although tract indexes are much easier for title searchers to use, they are more costly and difficult for recorders to administer and maintain.

In tract indexes, instruments are indexed according to the specific property affected by them. There may be a segment of the index that includes a number of different parcels. For example, there might be a segment for indexing all instruments involving lots in a particular platted subdivision or in a block of such a subdivision. Instruments affecting a parcel within the group (e.g., the subdivision) may be indexed in the segment for that group with an entry indicating the particular parcel involved. A tract index may be parcel specific. There may be a segment of the index exclusively for indexing instruments affecting a single parcel. Tract indexes may be supported by maps marked to indicate the parts of the index that include instruments affecting land located in specific areas. The Uniform Simplification of Land Transfers Act requires recorders to maintain tract indexes supported by maps that are sufficient to enable title searchers to determine the portion of the index that should be consulted. n47 Computer-based systems may also use specific land parcel identifiers (usually numbers) assigned to individual parcels to organize and retrieve recorded documents affecting particular parcels. n48

COMPUTER-ASSISTED RESEARCH:

LEXIS: uniform simplification of land transfers act usolta

§ 92.04(c) Formal Requirements.

The administrators of American recording systems have very little authority to reject instruments presented for recordation. n49 There are some formal requirements which may be enforced by the administrator. A certificate of acknowledgment or attestation is universally required to qualify an instrument for recordation. n50 While other formal requirements created by statute or local rules may be in force, American recorders do not have the authority to screen documents for substantive content similar to that given to recorders in Latin America, France, Scotland and Spain. n51 For example, recorders in France and Spain must determine whether the person appearing as the transferor in the document filed for record has the power to transfer or encumber the property. Thus, if the instrument filed for record is a contract of sale, the recorder must reject the petition for recordation whenever the seller does not appear as the owner of record. n52 In contrast, administrators of American recording systems typically pay little or no attention to the substantive contents of the instruments they accept. n53

Generally, recording statutes authorize recordation of any instrument that creates, transfers, or evidences a claim or interest in real estate. n54 Such instruments include deeds, mortgages, mortgage assignments, contracts, powers of attorney, long-term leases, options to purchase, judgments, and various written notices, statements, and affidavits. Statutes differ in the detail in which the types of instruments eligible for recordation are described. For example, the Illinois statute is broad and sweeping: "Deeds, mortgages, powers of attorney, and other instruments relating to or affecting the title to real estate... ." n55 In contrast, the Alaska statute contains a long list of instruments eligible for recordation and then ends with "any other document that creates an interest in real property." n56 The Colorado statute is somewhere in between: "All deeds, powers of attorney, agreements, or other instruments in writing conveying, encumbering, or affecting the title to real property, certificates, and certified copies of orders, judgments, and decrees of courts of record... ." n57 The short-term written lease is the only type of written instrument affecting real estate that is expressly ineligible for recordation in a substantial number of states. n58 Formerly, real estate sales contracts were not entitled to recordation in some jurisdictions, but this is no longer true.

The most common and important formal requirement for recordability is a certificate of acknowledgment or attestation. Less common formal requirements may include sealing, typed or printed names of signers, and names and addresses of preparers of instruments. Other requirements found in some statutes include permanent attachment of riders (to facilitate microfilming), n59 disclosure of the actual consideration paid for transferred property (for tax purposes), transfer tax stamps and permanent identification numbers assigned to the parcels. The Uniform Simplification of Land Transfers Act ("USOLTA") proposes the elimination of the formal requirements of acknowledgment, sealing, and witnessing. n60

No American jurisdiction currently requires conveyances to be on state-prescribed forms to be eligible for recordation. Commentators have argued that use of state-prescribed forms should be required to promote economy and efficiency in recording and title examination. n61 Ontario, Canada, has authorized the use of prescribed forms since 1984 and it is possible that U.S. jurisdictions may in the future. n62

If the recorder accepts an instrument that lacks a required formality, the consequences vary. If a required certificate of acknowledgment or attestation is absent: (1) the recording may be a nullity; or (2) the instrument may give constructive record notice to subsequent purchasers, but may not be admissible in evidence as a self-proved document. In a limited number of jurisdictions, absence of a required certificate of acknowledgment may affect the validity of the instrument between the parties. n63 In the case of most formalities, there usually is no legal consequence if the formality is absent.

In most jurisdictions, instruments are not eligible for recordation unless they are either acknowledged or authenticated in some other way. n64 Acknowledgment is a practice with deep historical roots. In some parts of Germany almost 1,000 years ago, acknowledgment in court was necessary to carry out legal transactions affecting land. n65 Currently, the maker of the instrument or witness to its execution may be required to acknowledge the instrument before a notary public, a judge, or some other state official. A person acknowledging the transaction evidenced by the instrument recites the facts of execution and states that the instrument was voluntarily executed. The notary or other official then certifies that the acknowledgment was made and also usually certifies that the person giving the acknowledgment was known to

the official as in fact being that person.

Requiring a certificate of acknowledgment is intended to achieve two goals:

> (1) Facilitation of real estate transfer by making the record more reliable. This goal is attained in two ways. First, the certificate of acknowledgment provides evidence that the document was validly executed. Second, the acknowledged recorded document is admissible into evidence without any additional foundation for its admission being necessary, i.e., the document is self-proving.
>
> (2) Prevention of the recordation of documents that are void because of fraud, forgery, or duress. This goal is achieved through two requirements. First, the person giving the acknowledgment is required to recite that it was freely executed. Second, the officer taking the acknowledgment is required to certify the identity of the person giving the acknowledgment. n66

The USOLTA proposal to eliminate the formal requirements of acknowledgments, seals or witnesses generated some controversy. Members of an American Bar Association Committee that studied the USOLTA argued that an authentication of some kind should still be required, perhaps by an attorney or bank officer. They noted "that even the transfer of a simple corporate stock certificate requires some guaranty of the signature." n67

The USOLTA proposal is sound. The drafters were sound in their contention that requirements for acknowledgments, seals, and witnesses are anachronisms that cause unnecessary trouble and do very little to prevent fraud. Most acknowledgments are taken by notaries public who, except in Louisiana, qualify for their offices by paying a required fee, furnishing a bond, and by not having a serious criminal record. n68 It is ludicrous to refer to such common-law state notaries as "state officials." If such notaries routinely performed as they are supposed to when taking acknowledgments, perhaps there would be at least some reason for retaining the requirement. In actual practice, however, many common-law state notaries notarize any instrument presented to them without regard to the circumstances of its alleged execution or the identity of its maker. n69 Instead of abandoning the present ineffectual authentication procedures, as proposed by USOLTA, one alternative would be to develop effective authentication procedures, perhaps by relying on attorneys or bank officials to perform the basic function. Whether legislators would perceive attorneys or bank officials as potentially more responsible authenticators is, of course, an open question. Increasing the professionalism of notaries is another alternative.

In most jurisdictions, unacknowledged or unwitnessed instruments are effective between the parties. n70 In a few states, unauthenticated instruments will transfer equitable but not legal interests. n71 A Florida statute provides that no estates or interests for a term of more than one year shall be transferred other than by an instrument in writing signed in the presence of subscribing witnesses. n72 When this statute is applicable, an unwitnessed instrument will be ineffective to pass any interest, whether equitable or legal in nature.

When an unauthenticated instrument is accepted by the recorder and physically placed in the records, that instrument usually does not give constructive or record notice of the transaction it evidences. n73 However, a subsequent purchaser searching the public real estate records may discover the unauthenticated instrument and thereby acquire actual notice of the contents. n74 Therefore, a subsequent purchaser who does not comply with the duty to search the public records will not have notice, but the diligent purchaser who performs the duty will have actual notice. Although this result is anomalous, it represents the prevailing view in the United States. n75 In a few states, instruments not qualified for recordation but physically recorded will not give actual notice, even if they are found by subsequent purchasers. n76 While this view may be soundly based in policy, it is not adequately supported by logic. One has notice of what one knows.

In some states, unauthenticated instruments accepted for recordation will give constructive record notice. For example, an Illinois statute provides that recorded instruments shall give constructive notice from the time of recordation, "though

not acknowledged or proven according to law... ." n77 This kind of statute is generally referred to as a "curative act" because it cures defects caused by a failure to comply with legal requirements. Curative acts concerned with defective acknowledgments are in effect in almost every state. Frequently, they cover defects due to formalities of execution and recording, in addition to acknowledgment. n78 In some states, the instrument must be on the record for a period of time before the statute applies to cure the defect. For example, a Colorado statute provides that an unacknowledged or defectively acknowledged instrument must be on the record for ten years before it will give constructive record notice. n79 The reason for the ten-year requirement is unclear. Perhaps the idea is that an unauthenticated recorded instrument may qualify for authenticated status through seniority, or it may be some indication that the instrument is authentic if the authenticity of the instrument has been not successfully challenged during the ten-year period.

COMPUTER-ASSISTED RESEARCH

LEXIS: certificate* of acknowledgment w/30 record! w/10 deed certificate* of attestation w/30 record! w/10 deed

FOOTNOTES:

(n1)Footnote 34. U.S. Dep't of Hous. & Urban Dev., Land Title Recordation Practices: A State-of-the-Art Study 12 (1980). In a few places, cities, towns and townships administer recording systems. *Id.*

(n2)Footnote 35. U.S. Dep't of Hous. & Urban Dev., Land Title Recordation Practices: A State-of-the-Art Study 12 (1980). *Farro v. Tax Claim Bureau of Monroe County, 704 A.2d 1137 (Pa. Cmmw. Ct. 1997)* (fifth class county not required to maintain a property ownership registry because of size).

(n3)Footnote 36. *See* Paul E. Goldstein, Real Estate Transactions: Cases and Material on Land Transfer, Development and Finance (2d ed. rev. 1985).

(n4)Footnote 37. N.Y. Real Prop. Law § 291.

(n5)Footnote 38. *See, e.g., Barrett v. Littles, 607 N.Y.S.2d 134 (N.Y. App. Div. 1994),* where the court held that the purported owner of a parcel of land could not invoke the protection of the recording act because he failed to establish as a matter of law that he was a bona fide purchaser for valuable consideration; *Sun Valley Land & Minerals, Inc. v. Burt, 853 P.2d 607 (Idaho 1993),* where the court recognized a mortgagee as a bona fide purchaser, because it found the existence of valuable consideration, good faith, and lack of notice.

(n6)Footnote 39. *In re Carpio, 213 B.R. 744 (Bankr. W.D. Mo. 1997)* (good faith purchase for value is valid despite bankruptcy proceeding in progress at time of foreclosure sale); *In re D'Alfonso, 211 B.R. 508 (Bankr. E.D. Pa. 1997); In re McDonald, 210 B.R. 648 (Bankr. S.D. Fla. 1997).*

(n7)Footnote 40. *Meerhoff v. Huntington Mortgage Co., 658 N.E.2d 1109 (Ohio App. 1995).*

(n8)Footnote 41. §§ 6-302, 6-302. Ethan Glass, *Old Statutes Never Die ... Nor Do They Fade Away: A Proposal for Modernizing Mechanics' Lien Law by Federal Action, 27 Ohio N.U.L. Rev. 69 (2000).*

(n9)Footnote 42. Unif. Simplification of Land Transfers Act § 6-302, cmt. 4, 14 U.L.A. 371 (1990).

(n10)Footnote 43. **Bureau of Conveyances:**
Haw. Rev. Stat. § 502-83.

City or Town Clerk:
R.I. Gen. Laws § 34-11-1.3.
Vt. Stat. Ann. tit. 27, § 402.

Clerk of the Circuit Court:

Md. Real Prop. Code Ann. § 3-301.
Va. Code Ann. § 55-96.

County Recorder:
Ariz. Rev. Stat. Ann. § 33-411.
Minn. Stat. Ann. § 507.34.
Utah Code Ann. § 17-16-2.

Office of the Clerk/County Clerk:
Colo. Rev. Stat. Ann. § 38-35-108.
Ga. Code Ann. § 44-2-1.
Ky. Rev. Stat. Ann. § 382.120.
Miss. Code Ann. § 89-5-5.
Mont. Code Ann. § 70-21-302.
N.M. Stat. Ann. § 14-8-1.
N.Y. Real Prop. Law § 29.
Or. Rev. Stat. § 93.620.
Tex. Prop Code Ann. § 11.004.
W. Va. Code § 39-2-1.
Wyo. Stat. § 34-1-121.
Conn. Gen. Stat. Ann. § 47-11.
Vt. Stat. Ann. tit. 27, § 402.

Office of Recorder:
Ark. Code Ann. § 14-15-404.
Iowa Code Ann. § 558.41.
Mo. Ann. Stat. § 442.38.
N.J. Stat. Ann. § 46:22-1.
Ohio Rev. Code Ann. § 5301.25.
Pa. Stat. Ann. tit. 21, § 351.
Wash. Rev. Code Ann. § 65.08.070.

Office of Judge of Probate:
Ala. Code § 35-4-50.

Parish Recorder:
La. Rev. Stat. Ann. § 9:2721.

Register:
Tenn. Code. Ann. § 66-24-101.

Register of Deeds:
Kan. Stat. Ann. § 58-2221.
Me. Rev. Stat Ann. tit. 33, § 201.
Mich. Comp. Laws Ann. § 565.29.
Mass. Ann. Laws ch. 193, § 4.
Neb. Rev. Stat. § 76-237.
N.H. Rev. Stat. Ann. § 477:3-a.
N.C. Gen. Stat. § 47-17.1.
N.D. Cent. Code § 47-19-08.

Okla. Stat. Ann. tit. 16, § 15.
S.D. Codified Laws Ann. § 43-28-1.
Wis. Stat. Ann. § 706.05.
S.C. Code Ann. § 30-7-10.
Wyo. Stat. § 34-1-121.

Recorder:
Alaska Stat. § 40.17.070.
Del. Code Ann. tit. 25, § 151.
Idaho Code § 55-812.
Ind. Code Ann. § 32-1-2-16.
Nev. Rev. Stat. § 111.320.

Recorder of Deeds:
D.C. Code Ann. § 45-801.

Town Recorder:
Conn. Gen. Stat. Ann. § 47-11.

(n11)Footnote 44. For a detailed account of the administration of a grantor-grantee index in one jurisdiction, *see* Richard B. Johnson, *Title Examination in Massachusetts, in* Cases and Text on Property 869-75 (A. James Casner & W. Barton Leach eds., 3d ed. 1984).

(n12)Footnote 45. U.S. Dep't of Hous. and Urban Dev., Land Title Recordation Practices: A State-of-the-Art Study 12 (1980).

(n13)Footnote 46. Grant S. Nelson & Dale A. Whitman, Real Estate Finance Law 797 (2d ed. 1985).

(n14)Footnote 47. Unif. Simplification of Land Transfers Act §§ 6-206, 6-207, 14 U.L.A. 367, 368 (1990). *Diversified, Inc. v. Hall, 1999 Tex. App. LEXIS 6873.*

(n15)Footnote 48. American Bar Foundation, Land Parcel Identifiers for Information Systems (1973); Paul E. Basye, *A Uniform Land Parcel Identifier /- Its Potential for All Our Land Records, 22 Am. U. L. Rev. 251 (1973).*

(n16)Footnote 49. Kenneth G. Lore, Comment, *A Facelift for the Recorder of Deeds: Tendering a Calumet to Real Estate Reformers, 22 Am. U. L. Rev. 639, 640 (1973). S & H Petroleum Corp., Inc. v. Register of Deeds for County of Bristol, 707 N.E.2d 843 (Mass. App. 1999)* (county registry of deeds has ministerial function to record documents; county register of deeds does not owe a duty to advise members of the public regarding the applicable law, referring to M.G.L.A. c. 36, § 1 *et seq.*).

(n17)Footnote 50. Robert Brussack, *Reform of American Conveyancing Formality, 32 Hastings L. J. 561, 571 (1981).*

(n18)Footnote 51. Alejandro M. Garro, the Louisiana Public Records Doctrine and the Civil Law Tradition 188 (1989); Ted J. Fiflis, *Security and Economy In Land Transactions: Some Suggestions From Scotland and England, 20 Hastings L. J. 171, 189 (1968);* Alejandro M. Garro, *Recording of Real Estate Transactions in Latin America: A Comparison with the Recording System in the United States,* 1984 Ariz. J. OF and Comp. L. 90, 110-11.

(n19)Footnote 52. Alejandro M. Garro, the Louisiana Public Records Doctrine and the Civil Law Tradition 113 (1989).

(n20)Footnote 53. John E. Cribbet & Corwin W. Johnson, Principles of the Law of Property 307 (3d ed. 1989).

However, a property description in a mortgage that states only what town and county the property was located in was "grossly inadequate" under state law. *In re Poteat, 176 B.R. 734 (Bankr. D. Del. 1995).*

(n21)Footnote 54. *WorldCom Network Services, Inc. v. Thompson, 698 N.E.2d 1233 (Ind. App. 1998)* (general recording statute refers to conveyances but not to public highway right-of-way established by law, referring to West's A.I.C. 32-1-2-16 and IC 8020-1-1 *et seq* (1988 Ed.)); *Bolen v. Ferry Trust, 949 P.2d 82 (Colo. App. 1997)* (purpose is to give notice of ownership and provide accessible history of title); *Feinzig v. Ficksman, 674 N.E. 2d 1329* (purpose is to provide method for making titles to land certain, indefeasible, and readily ascertainable, referring to M.G.L.A. c. 185, § 1 *et seq*); *Estate of Bowgren v. C.I.R., 105 F.3d 1156 (7th Cir. 1998)* (land trust permitting greater secrecy in ownership is not required to be matter of public record).

(n22)Footnote 55. 765 Ill. Comp. Stat. 5/28.

(n23)Footnote 56. Alaska Stat. § 40.17.080. The Alaska statute (40.17.080) now contains no list of instruments eligible for recordation, but instead, Alaska Stat. 40.17.035 clearly states that the recorder may not consider whether the contents of documents submitted for recordation are legally sufficient to create an interest in the property.

(n24)Footnote 57. Colo. Rev. Stat. Ann. § 38-35-109(1).

(n25)Footnote 58. Alaska Stat. § 40.17.080(b) (lease for less than one year not required to be recorded); Ariz. Rev. Stat. Ann. § 33-411.01 (all leases); Conn. Gen. Stat. Ann. § 47-19 (leases for one year or less); Fla. Stat. Ann. § 695.01 (leases for less than one year); Haw. Rev. Stat. § 502-83 (leases for one year or less); Idaho Code § 55-812 (leases for less than one year); Ind. Code Ann. 32-1-2-11 (leases for three years or less); Ky. Rev. Stat. Ann. § 382.080 (leases for five years or less); Me. Rev. Stat. Ann. Tit. 33, § 201 (leases for two years or less); Mass. Gen. L. Ann. ch. 183, § 4 (leases for seven years or less); Mich. Comp. Laws Ann. § 565.35 (leases for three years or less); Minn. Stat. Ann. § 507.01 (leases for three years or less); N.J. Stat. Ann. § 46:16-1(a) (leases for life or less than two years); N.Y. Real Prop. Law § 290(3) (leases for less than three years); N.C. Gen. Stat. § 47-18(a)(iv) (leases for three years or less); Okla. Stat. Ann. Tit. 16, § 15 (leases for less than one year); R.I. Gen. Laws § 34-11-1 (leases for one year or less); S.C. Code Ann. § 30-7-10 (leases for one year or less); S.D. Codified Laws Ann., § 43-28-17 (leases for one year or less); Tenn. Code Ann. § 66-7-101 (leases for three years or less); VT. Stat. Ann., Tit. 27, § 342 (leases for one year or less); W. VA. Code § 40-1-8 (leases for five years or less); Wash. Rev. Code Ann. § 65.08.060(3) (leases for two years or less); Wyo. Stat. § 34-1-102 (leases for three years or less).

(n26)Footnote 59. 765 Ill. Comp. Stat. 5/35c.

(n27)Footnote 60. Uniform Simplification of Land Transfers Act § 2-301. Ethan Glass, *Old Statutes Never Die ... Nor Do They Fade Away: A Proposal for Modernizing Mechanics' Lien Law by Federal Action, 27 Ohio N.U.L. Rev. 69 (2000).*

(n28)Footnote 61. Dale A. Whitman, *Optimizing Land Title Assurance Systems, 42 Geo. Wash. L. Rev. 40 (1973).*

(n29)Footnote 62. Registration Division, Ministry of Consumer & Commercial Relations, Ontario Document User Guide, Land Registration Reform Act, 1984 (1986).

(n30)Footnote 63. Robert D. Brussack,*Reform of American Conveyancing Formality, 32 Hastings L. J. 561, 567 (1981).*

(n31)Footnote 64. Lewis M. Simes, A Handbook for More Efficient Conveyancing 27 (1961).

(n32)Footnote 65. Rudolf Huebner, A History of Germanic Private Law 219 (Francis S. Philbrick trans., 1918).

(n33)Footnote 66. *In re Franklin, 214 B.R. 826, 833 (Bankr. E.D. Va. 1997)* ("in deciding when [the] deed was

admitted to record ... [the] court is not bound by clerk's certificate as to the date and time of recordation but may examine parol evidence to determine when recordation actually occurred").

(n34)Footnote 67. James M. Pedowitz, *Uniform Simplification of Land Transfers Act--A Commentary*, 13 Real Prop., Prob. & Tr. J. 696, 701 (1978).

(n35)Footnote 68. North Carolina is the only common-law state that requires applicants for notary commissions to satisfy an educational requirement; they must graduate from a community college course. Carol Kleinman, *Notaries Give Work Stamp of Approval*, Chi. Trib., April 19, 1992, § 8, at 1.

(n36)Footnote 69. *See Hoffman v. Schroeder, 186 N.E.2d 381 (Ill. App. 1962)* (describing how a modern common-law state notary typically performs her duties as a "public official").

(n37)Footnote 70. Robert D. Brussack, *Reform of American Conveyancing Formality, 32 Hastings L.J. 561, 567 (1981).*

(n38)Footnote 71. Robert D. Brussack, *Reform of American Conveyancing Formality, 32 Hastings L.J. 561, 568 (1981).*

(n39)Footnote 72. Fla. Stat. Ann. § 689.01.

(n40)Footnote 73. Robert D. Brussack, *Reform of American Conveyancing Formality, 32 Hastings L. J. 561, 573 (1981).*

(n41)Footnote 74. Robert D. Brussack, *Reform of American Conveyancing Formality, 32 Hastings L. J. 561, 574 (1981).*

(n42)Footnote 75. Robert D. Brussack, *Reform of American Conveyancing Formality, 32 Hastings L. J. 561, 574 (1981).*

(n43)Footnote 76. Robert D. Brussack, *Reform of American Conveyancing Formality, 32 Hastings L. J. 561, 576-78 (1981).*

(n44)Footnote 77. 765 Ill. Comp. Stat. 5/31.

(n45)Footnote 78. Lewis M. Simes & Clarence B. Taylor, the Improvement of Conveyancing by Legislation 26 (1960).

(n46)Footnote 79. Colo. Rev. Stat. Ann. § 38-35-106.

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CHAPTER 92 RECORDING, REGISTRATION, AND SEARCH OF TITLE

11-92 Thompson on Real Property, Thomas Editions § 92.05

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§ 92.05 Recording System Indexes.

[Go To Supp]

§ 92.05(a) Grantor-Grantee and Tract.

The public land title records in populous urban counties already contain vast amounts of information, and additional information is pouring in daily. In 1978, the Cook County, Illinois (i.e., the Chicago area, with a population of 4,774,850 at that time) recorder's office processed 246,983 documents. n80 Even in rural counties, the amount of data stored annually may be substantial. For example, in 1978, the recorder's office in largely rural Jefferson County, Wisconsin (with a population of 60,000 at that time) processed 10,518 documents. n81 Necessarily, access to this data is through indexes. n82 The task of searching in these records for title data concerning specific property would be virtually impossible without adequate indexes. The two types of indexes in general use in the United States are name (grantor-grantee) and parcel (tract) indexes.

§ 92.05(a)(1) Grantor-Grantee Indexes.

Indexes that are based on names are called grantor-grantee indexes. In grantor indexes, instruments are indexed according to the initial letter or letters of transferors' surnames. In grantee indexes, instruments are indexed according to the initial letter or letters of transferees' surnames. Usually, no attempt is made to keep the entries in strict alphabetical order. However, in some places, pressure-sensitive strip indexes are arranged alphabetically on a daily basis or annual computer-generated indexes in strict alphabetical order are produced. n83 Both grantor and grantee indexes will usually give the names of the parties, the date of recordation, the date of the instrument, the kind of instrument and the place in the records where a copy of the instrument may be found, usually by book and page numbers. There may be separate indexes for different kinds of instruments, such as judgment liens. n84

The grantor-grantee type of index is by far the more prevalent type of publicly maintained index. It is the type of index that the recorder is required by statute to maintain (as the "official" index) in all but a very few states. n85 It is the only type of index available in about two-thirds of recorders' offices nationwide. n86 The prevalence of the public grantor-grantee index is not due to its recognized superiority; it is generally appreciated that this type of index is not user-friendly. From the user's perspective, tract or parcel indexes are clearly superior. Proof of this superiority is found in the fact that all privately maintained sets of land title records ("title plants") use tract or parcel deed and mortgage

indexes. The popularity of the official grantor-grantee index is due to the relatively low cost and ease of administration involved with this type of index, compared with that of tract or parcel indexes. Government employees indexing instruments are only required to be able to recognize the initial letter of letters of grantor and grantee surnames. Also, grantor-grantee indexes do not require maps because indexing is by name instead of parcel. Indexing in a tract index is more difficult, as it requires some degree of knowledge and skill on the part of the government employees indexing the documents, because they have to identify the specific property affected and the part of the index where the entry should be made. Maps are very useful because they show the segments of the index where entries affecting specific parcels are located.

§ 92.05(a)(2) Tract Indexes.

In tract indexes, a page, sets of pages or a book is devoted to a segment of land, such as an individual parcel, particular blocks in a subdivision, an entire subdivision, or a segment of land (such as a quarter-quarter section under the U.S. Government Rectangular Survey System). Maps may be maintained that will show the areas covered by different segments of the index. Instruments are indexed according to the property affected by them. Index references may include the names of the parties, the date of recordation, the date of the instrument, the kind of instrument and the book and page where a copy of the instrument is stored. Unless the tract index is parcel-specific, the index reference will also contain information in order to enable the searcher to determine the specific parcel affected by the instrument. A few places use combined tract and grantor-grantee indexes; the county is divided into segments such as blocks in the tract index, and instruments affecting land located within a particular block or other segment are indexed in a grantor-grantee index for that block or other segment. n87

Searching a title using a tract index is very easy. The searcher simply locates the segment of the index that includes the property to be searched. The searcher then goes back in time, noting the book and page references to instruments that may affect the subject property. Normally, as one goes back into the past, a point will be reached where the index was reorganized, usually due to subdivisions that created additional titles. The index will contain a reference to the prior segment of the index where entries concerning the subject property were made prior to the reorganization.

The superiority of tract indexes has been appreciated for many years. The Uniform Simplification of Land Transfers Act quite sensibly would require official tract ("geographic") indexes. n88 Nonetheless, official tract indexes are found in only a few states and there appears to be no movement toward replacement of grantor-grantee indexes with tract or parcel indexes, despite the long-standing consensus that such replacement would make the public land title records substantially more user friendly. These should be sobering facts to land-law reformers inclined to propose more ambitious schemes, such as replacement of recording with Torrens or some other form of title registration. n89 Many county governments simply do not want the additional fiscal and administrative burdens involved with tract indexes. n90 Tract indexes require that recording office employees be able to identify the subject property usually from the legal description, with or without the aid of accurate maps.

§ 92.05(a)(3) Using the Grantor-Grantee Index.

Searching a title using grantor-grantee indexes can be an arduous and sometimes nearly impossible task in some places. In Cook County, Illinois, the recorder keeps an official grantor-grantee index and an unofficial tract index, but it is time-consuming to complete a search using the official index. n91 A reason for this is that the entries are not in strict alphabetical order. The physical difficulty of searching title may also be compounded by the sheer number of index books that might have to be consulted or re-consulted. In some places, separate books were kept for each class of recordable instruments. In Cook County, Illinois, separate books for each calendar-year quarter were kept. n92 Usable grantor-grantee indexes do in fact exist. In Massachusetts, for example, grantor-grantee indexes are reorganized in strict alphabetical order on an annual basis. n93 Full computerization of grantor-grantee indexes would make constant alphabetization possible.

In the grantee index, conveyances are indexed alphabetically and then chronologically, according to the initial letter or letters of the grantees' surnames. The grantee index exists to enable the searcher to reach back into the past in order to establish the chain of ownership. The searcher starts in the present with the name of an apparent present owner. The grantee index is then used to ascertain the name of the person who transferred the property to the apparent present owner. Once that person has been identified, the grantee index is used to discover that person's transferor. The process is repeated for each owner in turn until the chain of title has been established. The record has to then be examined for adverse conveyances made by or against each owner during the time when that person was a record or actual owner. This means that the grantor index has to be examined as well, because that is where references to conveyances indexed by each owner's name are found.

It would be more descriptive to call the grantor index an index of owners. Each owner in the chain should be searched in the appropriate segment of the grantor index. Like the grantee index, the grantor index lists conveyances alphabetically and chronologically, according to the initial letter or letters of the grantors' surnames. If the number of entries in each appropriate segment are few in number, it would not be unreasonable to expect the searcher to examine them all, beginning with the oldest entry down to the most recent one. In practice, however, requiring this would be unreasonable because of the large number of entries that would have to be examined for each owner in the chain of title.

§ 92.05(a)(4) Chain of Title Doctrine.

Under the chain of title doctrine, the scope of a reasonable search of each owner in the grantor index is limited by time boundaries. The entries in the grantor index are in chronological order. Each owner should be examined in the grantor index from the date such owner actually acquired the title interest being searched through the date of recordation of the transaction that transferred the interest from the owner. n94 Transactions indexed before or after these time boundaries may be considered to be recorded outside of the chain of title. Under strict chain of title doctrine, recordation outside of the chain of title is equivalent to not being recorded at all. As a result, a searcher is not charged with notice of any documents outside the chain of title.

§ 92.05(a)(5) Examination of Recorded Documents.

Whether the searcher has used a grantor-grantee or tract index, the next step is to examine the copies of the recorded instruments using the page and volume references found in the indexes. The copies originally were written by clerks into books by hand. Handwritten copying was replaced with typing and then photographic means as they became available. Prior to photographic copying, recording errors occurred from time to time when clerks miscopied instruments. The risk of loss due to such errors was borne by the party initiating recordation whose recourse, if any, was against the recorder on his or her bond. The advent of photocopying has virtually eliminated this kind of error. Storage today, especially in populous counties with large amounts of data to manage, is frequently in microform with microfilming being fairly common. As technology develops, it is likely that electronic storage will become prevalent.

§ 92.05(a)(6) Attachment or Judgment Lien Indexes.

Examination of the grantor-grantee or tract index and the copies of the instruments referred to in the index is the central part, but only one part, of the search. Almost all jurisdictions provide for separate attachment or judgment lien indexes. Originally, when a judgment for money was docketed, the judgment attached as a lien against the real estate of the judgment debtor in the county or other geographic jurisdiction for the court that entered the judgment. The judgment would remain viable as a lien or potential lien for a period of time provided by statute, such as seven to ten years. This basic period was sometimes extendable. After the lien was docketed and while it was still viable, it would attach to any real estate acquired by the judgment debtor in the county or other geographic jurisdiction of the court. Once a judgment attached to a title, it remained attached during the period of the judgment's viability, even if the real estate was later transferred. Thus, the property subject to a judgment lien was normally rendered unmarketable, which is exactly what the creators of judgment lien laws intended. They thought that the encumbrance on the debtor's land would pressure the

debtor to pay the debt without further court involvement. Further court involvement was possible through a proceeding to execute or foreclose the judgment lien, which would result in a forced public sale of the property to satisfy the debt.

Because judgment liens would bind the land even after it was transferred, it was incumbent on title searchers to examine the judgment dockets of various courts to determine if the title being searched was encumbered by any judgment liens. Before modern court reform, various state trial courts with different functions or jurisdictions had the power to enter judgments or decrees that could attach to real estate. Federal courts could also enter judgments that could attach as liens against the judgment debtors' real estate. As a result, the title searcher had to also examine the judgment dockets in the clerks' offices for these various courts. n95 This became an increasingly difficult task physically as the volume of judgments being entered in particular counties increased. In response to this growing burden, there has been a tendency to consolidate judgment lien records in the recorder's or court clerk's office. Currently, in a number of states, judgment liens will not attach unless an abstract of the judgment has been filed in the recorder's or court clerk's office for the county in which the debtor's land is located. n96 This is now also generally true of federal court judgments because Congress has generally consented to the application of state recording laws to federal judgments. n97

Judgment liens are indexed alphabetically according to the judgment debtors' names. In almost all states, a judgment does not have to be filed specifically against identified real estate that might belong to the debtor to attach as a lien against that real estate. Instead, a general filing by the debtor's name will suffice; specific real estate owned by the debtor does not have to be identified. n98 Because more than one individual may have the identical or nearly identical name, it is normally impossible to ascertain from the record alone whether a judgment debtor and an owner in the chain of title with a similar name are the same person. Title insurance companies may require affidavits from parties stating information that might enable the companies to determine whether a particular judgment debtor and such an owner are the same person. This procedure may be adequate if the affiants are truthful and knowledgeable about the relevant facts.

It would be a significant improvement in the system if judgment creditors were required: (1) to file abstracts of all judgments in the applicable recorder's office; and (2) to identify in the filings each specific property against which the lien is to attach. Torrens title registration acts have required filing of judgment liens against particular titles before the judgments would attach as liens. n99 Nevertheless, the drafters of the Uniform Simplification of Land Transfers Act (USOLTA) were convinced by creditors' interests that it would be politically impossible to replace the current system of filing by debtor's name with a system of filing by property affected, even though such replacement would promote economy and efficiency in real estate transfers. n100 Instead, the drafters proposed a compromise. Under this compromise, the viability of a lien as to a subsequent good faith purchaser would be limited to three years from the time of its recording n101 and all general lien indexes would be located in the recorder's office. n102

§ 92.05(a)(7) Other Liens.

The title searcher may have to visit other offices that store information concerning other liens or adverse claims. Liens to secure general real property taxes or special assessments made against specific real estate by units of local government have to be searched and notice of them may not be found in the recorder's office. Instead, notice of these liens may be found in the offices of county or municipal clerks, treasurers or assessors. n103 Regardless of where these lien records are kept, they are organized by parcel and not by the names of owners or debtors. Consequently, they are usually easier to identify and locate than are judgment liens. It would be more efficient to integrate these tax lien records into the recorder's office. Of course, with computerization, these records could be accessed from the recorder's office or elsewhere through remote terminals.

In addition to judgment and tax liens, the searcher may have to search for other liens in the recorder's office or elsewhere. Persons furnishing labor or materials to premises are usually entitled to mechanics' liens (called "construction liens" in the USOLTA) on the properties benefitted to secure payment for the work or materials. n104 To perfect the lien as to subsequent purchasers, the lienor must file timely notice of the lien in the recorder's office. When the lien is filed, its priority will normally relate back to some earlier time. Consequently, purchasers of real estate may

take subject to a "hidden mechanic's lien" when they purchase real estate, i.e., a lien that has not yet been filed but that may be filed and relate back to a date prior to the purchase of the property. Typically, the mechanic liens are filed against named owners and the recorder keeps an alphabetical index of these liens by owners' names.

The title searcher also has to look for other liens. One study identified 47 different statutory liens created by state law. n105 For examples, Illinois statutes authorize public aid assistance liens, n106 sales tax liens, n107 liens to secure employer unemployment contributions n108 and mobile home tax liens. n109 There are various liens that may secure the payment of other state or federal taxes. These liens are normally filed in the recorder's office and are indexed either separately or together in a miscellaneous lien index. State law may also provide for financing statement filings in the recorder's office under the Uniform Commercial Code (U.C.C.). n110 When a U.C.C. filing concerns a security interest in fixtures, it should be indexed in the official index in the same way that real estate mortgages are indexed; however, the recorder may fail to do so. Therefore, it may be prudent for the title searcher to examine the U.C.C. financing statement index to ascertain whether there are any fixture filings against the title being searched. Certificates of release, such as for federal tax liens, should sufficiently identify the lien and recording information for the filed and refiled notices of lien. n111

§ 92.05(a)(8) Other Methods of Transfer.

Interests in real estate may also transfer by will or intestate succession. Generally, notice of such transfer need not be recorded in the recorder's office because the transferees are not required to record their interests to perfect their priority with respect to subsequent purchasers. n112 Where a decedent's estate has been formally administrated, records of the administration will be maintained in the office of the probate court clerk or elsewhere. Currently, in most places, title searchers also have to examine these records as part of a complete search.

The indexes in probate record offices are alphabetical according to the names of the decedents. Where only the grantor-grantee index is available to the title searcher, it may be difficult to ascertain the name of a decedent who held title to the property being searched. As discussed in § 92.07(c) *supra*, a searcher reaches back in time by using the grantee index to discover the names of prior owners. Where an interest passes through a decedent's estate, normally no entry is made in the grantee index. As a result, the grantee index will not reveal the name of a prior owner's transferor where the transfer to the owner was through a decedent's estate. The title searcher must use ingenuity and effort to locate the relevant probate records to determine the name of the prior owner's transferor. The searcher may begin by checking the probate index for decedents with surnames identical to the name of the last known prior owner, on the assumption that the transfer may have been from a relative (such as a spouse or parent) with the same surname. If a tract index is available, it is usually not difficult to discover the name of a decedent owner, because the name will usually appear in the tract index. Even in places with available tract indexes, some notice of transfers at death should be in the recorder's records. In areas where the records are computerized, information concerning transfers at death should be readily accessible.

COMPUTER-ASSISTED RESEARCH

LEXIS: official index!
tract index!
grantor-grantee index!
torrens

§ 92.05(b) Computers and Land Parcel Identifiers. n113

Commentators appear to agree that there is a world-wide movement toward the computerization of land title record systems. n114 American title insurance companies have been developing computerized title plants since the 1960s. n115 Computerization of a Torrens system was initiated in Australia in 1969. n116 By 1982, computerization of the

Austrian title registration system was well underway. n117 American local governments have been implementing unofficial computerized land title record systems since the late 1970s. By 1978, at least eight counties in Illinois had at least partially computerized their title records. n118 In 1984, Ontario, Canada, authorized an official computerized recording and title registration system called "POLARIS." n119 There is reason to believe that computerization of land title records will further accelerate. Appreciation of computer capabilities was limited when computers were only expensive mainframes operated by skilled specialists. The microcomputer revolution that began in the late 1970s contributed to a vastly increased and wider understanding of the great power of computers as data management and retrieval tools, while making them more user-friendly and affordable to individuals and organizations with limited resources. n120 Land title records in the future will be largely computer-based. Electronic storage will eventually replace paper records.

The computerized land title record system that appears to be emerging has two basic components:

(1) a database containing information relevant to questions of ownership and title, consisting primarily of information concerning past title transactions and past legal evaluations of such information; and

(2) computer-based maps showing the units of ownership in the system with a permanent identifying symbol, called a land parcel identifier, assigned to each unit.

Systems using permanent numbers to identify land parcels for real property taxation purposes have been used for many years in various parts of the United States. n121 These systems are really parcel-specific tract indexes. Their suitability for use in computer-based land title data systems is readily apparent. Currently, computerized title plants maintained by some U.S. local governments and title insurance companies use permanent identification numbers as does the POLARIS system in Ontario, Canada. n122 Where the party initiating recordation or registration is required to supply the identifier for the parcel affected, administration of the indexing system is even less burdensome to government than is a grantor-grantee index.

Identifying land titles and parcels by permanent numbers is not as simple as identifying human beings with such numbers. The development of a usable system of permanent land parcel identifiers is difficult, because the dimensions and quantity of parcels may change over time through subdivisions, consolidations, and other accretions and deletions. There are two basic approaches which may be used in combination:

(1) systems based on grid coordinates and

(2) systems not based on grid coordinates.

In the first type of system, a grid is established with lines that intersect at regular intervals. The points of intersection are assigned permanent, unique identifiers. Land parcels are identified by the intersection point or points located within their boundaries. n123 While this type of system does not require renumbering when boundaries change, it has a number of drawbacks. Very accurate maps showing precise location of parcel boundaries are necessary because inaccurate maps may cause an incorrect identifier to be used to refer to a parcel. Additionally, as boundaries change, an identification point may refer to different parcels at different times. Under our system of real estate ownership, the parcel remains a unit even though it may increase or decrease in size with a change of boundaries. Therefore, it would be important to know what the parcel boundaries were at various times when retrieving data through grid coordinate identifiers. Consequently, making a historical search of the title to a particular parcel using grid coordinate identifiers would require a map history search in order to perform an accurate and thorough document search. Another drawback to ordinary grid coordinate identifiers is that they can be used to describe two-dimensional parcels, but not three-dimensional condominium unit ownerships.

Under systems not based on grid coordinates, a permanent number is assigned to each parcel or condominium unit. The

number may be purely arbitrary or it may be geo-coded in some way. For example, part of the number may indicate that the property is located within a particular township or section under the U.S. Government Rectangular Survey System, or it may refer to a particular subdivision or block within a subdivision. A point established by general grid coordinates may be referred to by a particular part of an identifier. The main difficulty with numbering systems not based on grid coordinates is that renumbering is required when subdivisions occur and, usually, when there are consolidations. Experience has shown that renumbering due to consolidations and subdivisions can be handled administratively without great difficulty or delay. n124

Maps are still used under this system; however, boundaries do not have to be depicted with exactness if no affirmation of boundaries is made by government. n125 The maps are sufficient if they adequately identify the various numbered parcels so that each can be distinguished from other parcels. Therefore, a costly comprehensive survey is not necessary. Adequate maps can be assembled mainly from existing tax assessment maps or subdivision and condominium plats. n126 Maps for rural areas covered by the U.S. Government Rectangular Survey System can be derived largely from that system and aerial mapping, when necessary. n127

Digitizing the boundaries of individual parcels on computers is a cost-effective way of assembling computer-based maps from existing paper maps. n128

Computerization of recording systems can do much to improve them. Computer searches using land parcel identifiers take seconds rather than hours to complete. n129 Computers and the use of land parcel identifiers to identify parcels may finally put to rest the archaic grantor-grantee indexes.

COMPUTER-ASSISTED RESEARCH

LEXIS: parcel identifier*
rectangular survey system

FOOTNOTES:
(n1)Footnote 80. U.S. Dep't of Hous. & Urban Dev., Land Title Recordation Practices: A State-of-the-Art Study 71 (1980).

(n2)Footnote 81. U.S. Dep't of Hous. & Urban Dev., Land Title Recordation Practices: A State-of-the-Art Study 71 (1980).

(n3)Footnote 82. U.S. Dep't of Hous. & Urban Dev., Land Title Recordation Practices: A State-of-the-Art Study 71 (1980).

(n4)Footnote 83. U.S. Dep't of Hous. & Urban Dev., Land Title Recordation Practices: A State-of-the-Art Study 17 (1980).

(n5)Footnote 84. *In re Bruder, 207 B.R. 151 (Bankr. N.D. Ill. 1997)* (a recorded instrument is effective against subsequent purchasers and creditors if it operates to give notice to anyone looking through the grantor-grantee index).

(n6)Footnote 85. Note, *The Tract and Grantor-Grantee Indices, 47 Iowa L. Rev. 481 (1962).*

(n7)Footnote 86. U.S. Dep't of Hous. & Urban Dev., Land Title Recordation Practices: A State-of-the-Art Study 17 (1980). John R. Lee, Esq., *A Primer on Conducting Oil and Gas Operations in the Northern Rocky Mountain States: A Strange New World?, 38 Alberta L. Rev. 74 (June 2000).*

(n8)Footnote 87. *See, e.g.*, Allison Dunham, *Land Parcel Identifiers and the Uniform Land Transactions Act, 43 U. Cin. L. Rev. 469, 481-83 (1974).*

(n9)Footnote 88. § 6-207, 14 U.L.A. 368 (1990).

(n10)Footnote 89. *E.g.*, Martin Lobel, *A Proposal for a Title Registration System for Realty, 11 U. Rich. L. Rev. 501 (1977);* Barry Goldner, Comment, *The Torrens System of Title Registration: A New Proposal for Effective Implementation, 29 U.C.L.A. L. Rev. 661 (1982).*

(n11)Footnote 90. In Illinois, the state where the author is admitted and has practiced, the official index is grantor-grantee. A number of counties maintain unofficial tract indexes in addition to the official indexes. The most populous county in Illinois, Cook, has a publicly maintained tract index. Many counties, however, do not. For example, Lake County, the county just north of Cook, has no public tract index. A private company, the Chicago Title Insurance Company, maintains a tract index for Lake County records in its Waukegan, Illinois, office. Lake County is currently implementing a computerized index. Penn Title Ins. Co. v. Deshler, *appeal denied, 670 A.2d 145 (Pa. 1995). 661 A.2d 481 (Pa. Commw. 1995)* (recorder of deeds has no duty to index a mortgage by location).

(n12)Footnote 91. Cornelius Houtsma, Recording Procedure, Registration Procedure and Title Searching in Cook County 6 (2d ed. 1966).

(n13)Footnote 92. Cornelius Houtsma, Recording Procedure, Registration Procedure and Title Searching in Cook County 6 (2d ed. 1966).

(n14)Footnote 93. Richard B. Johnson, *Title Examination in Massachusetts, in* Cases and Text on Property 869, 875 (A. Casner & W. Leach eds., 3d ed. 1984).

(n15)Footnote 94. Edward S. Bade, Cases and Material on Real Property Conveyancing 237 (1954). *Yamashita v. Guam, 59 F.3d 114 (9th Cir. 1995)* (good title not proved where no documentary evidence existed for earliest grantor in the chain of title).

(n16)Footnote 95. *See* George W. Warevelle, A Practical Treatise on Abstracts and Examinations of Title to Real Property 403-19 (1883) (describing how judgment liens might be attached to real estate and discovered by a title searcher in Illinois in the early 1880s).

(n17)Footnote 96. U.S Dep't of Hous. & Urban Dev., Land Title Recordation Systems: Legal Constraints and Reforms II-32 (1979). *Bianchi v. Lorenz, 701 A.2d 1037, 1042 (Vt. 1997)* ("traditional encumbrances, such as mortgages, easements, liens, judgments ...must be recorded in the land records and indexed so that one may readily ascertain their existence or nonexistence").

(n18)Footnote 97. *28 U.S.C.A. § 1962* (this statute does not, however, apply to judgments entered in favor of the United States). *Borgman v. Aikens, 681 N.E.2d 213 (Ind. Ct. App. 1997), reh'g denied, transfer denied by, 698 N.E.2d 1182 (Ind. 1998).* (purpose of federal lien statute is to ensure that a properly indexed judgment is treated in the same manner as a state court judgment).

(n19)Footnote 98. *Hole-In-One, Inc. v. Kansas Land Corp., 913 P.2d 1225.* (Kan. App. 1996).

(n20)Footnote 99. *See* Minn. Stat. Ann. § 508.63.

(n21)Footnote 100. Peter B. Maggs, *Land Records of the Uniform Simplification of Land Transfers Act*, 1981 So. Ill. L.J. 491, 502.

(n22)Footnote 101. Unif. Simplification of Land Transfers Act § 3-210, 14 U.L.A. 280 (1990).

(n23)Footnote 102. Unif. Simplification of Land Transfers Act § 6-208, 14 U.L.A. 368 (1990).

(n24)Footnote 103. U.S. Dep't of Hous. & Urban Dev., Land Title Recordation Systems: Legal Constraints and

Reforms II-41 (1979).

(n25)Footnote 104. *See* Grant S. Nelson & Dale A. Whitman, Real Estate Finance Law 860-82 (2d ed. 1985). *Home Lumber Co. v. Kopfmann Homes, Inc., 535 N.W.2d 302 (Minn. 1995)* (payments made out of a construction loan but after a mechanics' lien attached retained their priority as of the date the mortgage was recorded).

(n26)Footnote 105. Fairfax Leary, Jr. & David G. Blake, *Twentieth Century Real Estate Business and Eighteenth Century Recording, 22 Am. U. L. Rev. 275, 330-331 (1973). First Community Bank of Blanchard v. Hodges, 907 P.2d 1047 (Okla. 1995)* (filing a divorce decree in the county where property is located perfects a wife's decree-imposed lien).

(n27)Footnote 106. 305 Ill. Comp. Stat. 5/3-10.

(n28)Footnote 107. 35 Ill. Comp. Stat. 120/5a.

(n29)Footnote 108. 820 Ill. Comp. Stat. 405/2401.

(n30)Footnote 109. 35 Ill. Comp. Stat. 515/1.

(n31)Footnote 110. 810 Ill. Comp. Stat. 5/9-401(1) & 5/9-403(4).

(n32)Footnote 111. *Griswold v. United States, 59 F.3d 1571 (11th Cir. 1995).*

(n33)Footnote 112. U.S. Dep't of Hous. & Urban Dev., Land Title Recordation Systems: Legal Constraints and Reforms II-40 (1979).

(n34)Footnote 113. Portions of the text in § 92.05(b) have been adapted from John V. Orth, *Torrens and Recording: Land Title Assurance in the Computer Age, 18 Wm. Mitchell L. Rev. 61 (1992),* and used with the permission of *The William Mitchell Law Review.*

(n35)Footnote 114. A.G. Lang, *Computerized Land Title and Land Information, 10 Monash U. L. Rev. 196, 213 (1984).*

(n36)Footnote 115. Ted J. Fiflis, *Security and Economy in Land Transactions: Some Suggestions From Scotland and England, 20 Hastings L. J. 171, 173 (1968).*

(n37)Footnote 116. A.G. Lang, *Computerized Land Title and Land Information, 10 Monash U. L. Rev. 196, 213 (1984).*

(n38)Footnote 117. A.G. Lang, Computerized Land Title and Land Information, 43 (1983).

(n39)Footnote 118. Michael J. Rooney, Searching Illinois Real Estate Titles § 4.10 (1983).

(n40)Footnote 119. Land Registration Reform Act, R.S.O. ch. 32 (1984).

(n41)Footnote 120. Before the microcomputer revolution greatly increased the public awareness of computer capabilities, some commentators tended to disparage the idea that computer technology could solve many of the serious problems with recording systems as sources of land title assurance. *E.g.,* Martin Lobel, *A Proposal for a Title Registration System for Realty, 11 U. Rich. L. Rev. 501, 511 (1977);* Dale A. Whitman, *Optimizing Land Title Assurance Systems, 42 Geo. Wash. L. Rev. 40, 66 (1973).*

(n42)Footnote 121. The permanent numbering system used by the Assessor in Cook County, Illinois, was authorized by the Illinois legislature in 1945. 1945 Ill. Laws § 1. *See also* Richard R. Almay, *Assessors' Parcel*

Identification Systems, in Land Parcel Identifiers for Information Systems I-277 (D. David Moyer & Kenneth P. Fisher eds., 1973). This book has a wealth of information about land parcel identifiers.

(n43)Footnote 122. Data is retrievable from the Chicago Title Insurance Company computer by street address as well as permanent identification number. Data may be retrieved from POLARIS through names of parties, document numbers, street addresses and permanent identification numbers. Province of Ontario Ministry of Consumer and Commercial Relations, Introducing POLARIS 5 (Nov. 1989).

(n44)Footnote 123. *See* D. David Moyer, *County Cadastres and Compatible Parcel Identifiers: Needs and Costs, in* Land Parcel Identifiers for Information Systems I-65 (D. David Moyer & Kenneth P. Fisher eds. 1973).

(n45)Footnote 124. *See* Real Property Registration Branch, Ministry of Consumer and Commercial Relations, *An Introduction to POLARIS, Appendix B 9, in* Canada Bar Association--Ontario, POLARIS Update (June 4, 1990). The Ontario maps are computer-based. An effort is made to update them continuously as subdivisions or consolidations occur. In Cook County, Illinois, the County Clerk is responsible for processing applications to change or issue new permanent identification numbers. Currently, it is taking about two years to process these applications.

(n46)Footnote 125. The government of Ontario does not affirm boundaries depicted by the POLARIS computer-based maps. The maps used in Cook County, Illinois, also give no guarantees of accuracy. They were prepared and maintained by a private company, the Sidwell Company of West Chicago, Illinois.

(n47)Footnote 126. These are the main source for the Ontario POLARIS computer-based maps. John L. McCormack, *Torrens and Recording: Land Title Assurance in the Computer Age, 18 Wm. Mitchell L. Rev. 61, 120 n.243 (1992). Hersh Props., LLC v. McDonald's Corp, 588 N.W.2d 728 (Minn. 1999).*

(n48)Footnote 127. For a description of how maps were developed for a rapidly growing county, see John C. Lay, *Fairfax County Maps--Their Origin and Cost, in* Land Parcel Identifiers for Information Systems I-129 (D. David Moyer & Kenneth P. Fisher eds. 1973). Eric Kades, *The Dark Side of Efficiency: Johnson v. M'Intosh and the Expropriation of American Indian Lands, 148 U. Pa. L. Rev. 1065 (Apr. 2000).*

(n49)Footnote 128. Digitizing is the process of recording numerical representations of geographical points on a map in a computer. A.G. Lang, *Computerized Land Title and Land Information, 10 Monash U. L. Rev. 196, 214 (1974).* "Graphic recording, or digitizing, involves the recording of individual land parcels, by manually pointing a device (like an electronic pen) at the lot corners already drawn on the standard maps. The computer then automatically calculates the lot's position on the earth's surface." A.G. Lang, Computerized Land Title and Land Information 215 (1983).

(n50)Footnote 129. In July 1991, the author visited Toronto, Ontario, and observed searches made in POLARIS using land parcel identifiers. The computer searches in POLARIS took less than one minute to complete. The current plan in Ontario is to authorize remote terminals for interested solicitors who will be able to search title or register documents in POLARIS from terminals in their offices. This will eliminate the need for lawyers or clerks to visit Land Registration Branch offices. The computer searches in the Chicago Title Insurance Company Cook County title plant are also rapid and can be made from remote terminals in branch offices of Chicago Title Insurance Company and other companies with access. In Florida, attorneys participating in the Lawyers' Title Guaranty Fund have access to title information in the Fund database through terminals in their offices. Taylor Mattis, *The Uniform Simplification of Land Transfers Act: Article 2--Conveyancing and Recording,* 1981 So. Ill. L.J. 511, 535 n 124.

Thompson on Real Property, Thomas Editions

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CHAPTER 92 RECORDING, REGISTRATION, AND SEARCH OF TITLE

11-92 Thompson on Real Property, Thomas Editions § 92.06

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§ 92.06 Statutes of Limitation, Curative Acts and Marketable Title Acts.

[Go To Supp]

In the American system of ownership, title to real estate is determined by the aggregate legal effect of past transactions involving the subject property. Evidence of these past transactions may or may not be found in the public real estate records. The relevance of a past transaction to the question of the current state of the title can be diminished by the mere passage of time. Additionally, the effect of a past transaction can be nullified or reduced by a statute of limitation or a marketable title act. Generally, these acts may extinguish or diminish old title defects.

Statutes of limitation are not very effective in curing title defects or limiting the length of title searches. In part, this is because statutes of limitation operate by barring a claimant's right to bring a lawsuit to enforce the claim. If the claimant suffers from a legal disability, the running of the statute of limitations may be suspended. Consequently, a cause of action may be viable even though the time period referred to in the statute of limitations has expired. Furthermore, the statute normally will not begin to run against a future interest holder until the interest becomes possessory. Moreover, as statutes of limitation have become a part of our constitutional doctrine of procedural due process, judges and lawyers are limited in their freedom to adapt the statutes to changing circumstances and specific cases. n130

By the second decade of this century, land-law reformers realized that a new form of statute was needed to cleanse title defects and to reduce the burden of title search and examination. In title registration systems such as Torrens, the current governmental statement about the state of the title is intended to provide a "curtain" which will eliminate the relevance of prior transactions and the need for historical searches. n131 Land-law reformers attempted to create similar curtains for recording systems in the form of marketable title acts.

Marketable title acts were at the heart of the reforms of the recording system proposed by the American Bar Association and the University of Michigan Research Project headed by Professor Lewis M. Simes. n132 Marketable title acts operate by extinguishing claims against the title holder of record that were not preserved by recording within the immediately preceding period specified by the act. Unlike statutes of limitation, the running of this period is not suspended by legal disability and the same time period applies to all claims regardless of their type, unless specifically excepted. Marketable title acts clearly promote marketability of titles by eliminating old title defects in favor of holders

of record title. However, marketable title acts fail to provide an adequate curtain that would eliminate the need to do lengthy historical searches. Due to various policy considerations and political pressures, certain interests are excepted from extinguishment by marketable title acts. As a result, the title searcher must search back into the past beyond the period of the marketable title act, or accept the risk that an interest not extinguished by the marketable title act might encumber the title.

COMPUTER-ASSISTED RESEARCH

LEXIS: adverse possession w/30 title w/15 defect

§ 92.06(a) Statutes of Limitation.

Statutes of limitation limit the time during which an action may be brought to enforce a claim or right. Statutes providing for limited periods in which actions may be brought to assert real estate claims are as ancient as the actions themselves. n133 Early English statutes provided that novel disseisin could not be brought to restore possession if the disseisin complained of took place before particular dates, such as the coronation day of a king or the date of the king's last voyage to Britanny. n134 Modern American statutes typically provide for a period of ten to twenty years after a right of action accrues during which a person, claiming to be a paramount owner, is permitted to bring an action to enforce the claim where the land is in the adverse possession of another. n135 If no action is brought within the statutory period, the right to bring the action is extinguished and the adverse possessor becomes the owner in the eyes of the law.

Adverse possession has served to cleanse numerous titles of defects. Nevertheless, it does not provide a great deal of aid to the title examiner because its existence depends on a number of facts that normally do not appear in the record. To qualify as adverse possession, for the time period specified in the statute of limitations, the possession must be:

(1) hostile or adverse,

(2) actual,

(3) visible, notorious and exclusive,

(4) continuous, and

(5) under claim of ownership. n136

Facts establishing the existence to these requirements normally will not be found in the public real estate records. Even if an adverse possessor records a document such as an affidavit that sets forth a claim to ownership by adverse possession and factual allegations in support of the claim, the title examiner could not safely rely on such a statement because it may later be found to be untrue by a court. A final judgment validating the adverse possession claim in an action such as quiet title would be required by the prudent title examiner. A title insurance company might agree to indemnify an insured on the basis of an affidavit supporting a claim of adverse possession. In such a case, the company would be accepting the risk that the facts stated in the affidavit may be found to be inadequate or untrue.

The utility of statutes of limitation to title examiners is also limited because of the manner in which the statutes operate. The statutes work by limiting the time in which a lawsuit may be brought to enforce a claim. A statute will not begin to run until a cause of action accrues and the wronged party is qualified to sue. Because a person under a legal disability such as infancy or insanity cannot sue on his or her own behalf, the running of the statute is suspended as long as the disability continues. n137 Consequently, the adverse possession may have to continue beyond the time period in the

statute before it will ripen into legal ownership.

Future interests in the property may also extend a statute of limitations. n138 The statute normally will not begin to run against a future interest holder until the interest becomes possessory. Adverse possession is not a wrong to a future interest holder because that holder does not have a presently possessory interest in the property. Therefore, the holder will not have a right to sue the adverse possessor until such time as the future interest may become possessory.

Statutes of limitation frequently do not apply to bar governmental claims to real estate. n139 This exception for government is intended to prevent persons from obtaining public real estate through adverse possession. When the real estate is held for public use such as streets, roads or parks, the exemption is justifiable; however, this exception is not justified in all instances and some statutes now provide that certain real estate held by government is subject to adverse possession. n140

Another difficulty involved with using statutes of limitation in title examination is that it is often difficult to determine which statute may apply to a particular claim or transaction.

> Local statutes are often so incongruous, disorganized, overlapping and filled with varying exceptions that it is difficult or impossible to say which one may apply or whether it is fully effective according to its terms. In some collections of statutes there is no clear method of determining which apply to real property and which to personal actions. Often different provisions apply to titles acquired from judicial or official sales; and still different provisions may be found for asserting specific interests. n141

However, statutes of limitation are of some general assistance to the title examiner. While it is generally impossible to determine with certainty whether a particular claim has been extinguished by a statute from facts in the public real estate records, the probability of extinguishment of certain claims increases with time. This allows title examiners to give record facts which may indicate a defect less weight as the facts grow older. The farther back in the record that the possible defect appears, the higher the probability that the adverse claimant will be barred by the statute of limitations from asserting the claim.

Statutes of limitation have also been useful in resolving boundary disputes. From time to time, a question may arise concerning the precise location of a boundary between two parcels, sometimes as a result of conflicting legal descriptions. Where the parcels are separated by a fence or other physical evidence of possession, adverse possession may serve to establish the legal boundary at the location of the fence or other physical evidence. Because the possession in these situations frequently will be under color of title with payment of real estate taxes, a short statutory period may be applicable.

Statutes of limitations also serve to correct title defects caused by encroachments. There are basically two types of encroachment defects:

> (1) where a structure on adjacent property encroaches on the subject property or violates a building line established for its benefit; or
>
> (2) where a structure on the subject property encroaches on adjacent property or violates a building line established for its benefit.

Both types of encroachment may create serious title defects. The latter type frequently creates a substantial defect because the owner of the adjacent property generally has a right to demand the removal of the encroachment, even if the owner of the subject property is willing to pay fair and adequate compensation. Removal might involve substantial

damage to or destruction of the structure. However, an encroachment will not have to be removed if the owner of the adjacent property does not bring an action against the owner of the encroachment within the period of time in the applicable statute of limitations.

Some legislative provisions aimed at extinguishing specific claims or types of interests, have been very effective in cleansing defects from titles. These include provisions concerning ancient mortgages, interests of vendees under land sale contracts, judgment liens, and possibilities of reverter and rights of entry.

§ 92.06(a)(1) Ancient Mortgage Statutes.

Generally, when the obligation secured by a mortgage ceases to exist, the lien of the mortgage ends. n142 Until a release of the mortgage is recorded, however, a recorded mortgage will remain a lien of record even though it is no longer a lien in fact. Occasionally, releases of mortgages that are no longer valid liens are not obtained and recorded. This is probably caused in part by the failure of debtors to appreciate the necessity of recording such releases to clear title. While the lender may be knowledgeable about this necessity, it no longer has any interest in the title to the security property once the debt has been paid. Normally, mortgagees will not give a release for a mortgage that is no longer a lien because the obligation it secured has been extinguished or barred, but not paid. For example, the statute of limitation for the enforcement of a debt secured by a mortgage may have expired. In a minority of jurisdictions, when the remedy on the obligation is barred, enforcement of the mortgage is also barred. n143 In such a case, it is unlikely that the mortgagee would voluntarily execute a release of the lien.

As a result, many old mortgages remain on the record as unsatisfied, even though it is probable that they are not liens in fact. Near the end of the 19th century, state legislatures began enacting corrective measures known collectively as "ancient mortgage statutes." n144

An ancient mortgage statute terminates mortgage liens of record where the mortgage has not been preserved by recordation of notice within the immediately preceding period provided in the statute. Much ancient mortgage legislation in the United States is based on either provisions in an earlier draft of the Uniform Real Estate Mortgage Act or a section in the final approved draft. n145 The earlier draft and the legislation based on it are more effective than the final version in their approach to ancient mortgages. n146 The Illinois statute is representative of this group of legislation. n147 The statute automatically terminates mortgage liens that have not been preserved by a filing within twenty years after the due date stated in the mortgage. If no due date is stated, the applicable period is thirty years from the date of the mortgage. The period can only be extended by a filing. It does not matter whether the mortgagee was under the type of disability that might suspend the running of an ordinary statute of limitation. n148 It is, also, immaterial whether subsequent transferees failed to pay value or had notice of the mortgage lien.

The Ohio statute is typical of the legislation based on the final approved draft of the Uniform Real Estate Mortgage Act. n149 This statute provides that a recorded mortgage with a date or debt maturity date (if both are stated, then whichever is later) more than twenty-one years old will not give constructive or inquiry notice to subsequent bona fide purchasers for value unless the lien is preserved by recording a prescribed notice within the immediately preceding twenty-one years. n150 The lien of the mortgage, unless preserved, is deemed to be expired with respect to such purchasers. The facts that establish that a party was a bona fide purchaser are normally not ascertainable through an examination of the record. Consequently, this type of statute is less effective in eliminating title defects caused by old mortgages because its application depends on whether particular transferees were entitled to the protection of the statute (i.e., on whether a particular transferee was a bona fide purchaser for value).

§ 92.06(a)(2) Statute of Limitations on Installment Land Contracts.

The installment land contract is a popular alternative to mortgage financing of real estate purchases. Under the usual contract, the purchaser takes possession while agreeing to pay the seller for the property through regular installments

which extend over a period of time, perhaps for many years. The seller retains legal title to the property as security. The buyer usually has an equitable title interest in the property. At some point, either after full payment or at some earlier time, the buyer will be entitled to a deed conveying legal title. The contract will contain a provision that authorizes the seller to declare a forfeiture if the buyer defaults. In the event of forfeiture, the buyer's right to possession is terminated, and the usual contract purports to allow the seller to keep all payments made by the buyer.

Recordation of an installment land contract can cloud title. n151 A title examiner may be unable to determine from the record alone whether the buyer still has enforceable rights. It is not unusual for a recorded land contract to have been forfeited or abandoned in fact but not released of record. n152 Several states have statutes aimed at removing clouds on title caused by recorded land contracts that are no longer in force. For example, an Iowa statute frees titles of defects resulting from recorded contracts that have been executed more that ten years earlier if the record does not disclose performance and "more than ten years have elapsed since the contract by its terms was to be performed... ." n153 The Iowa statute also provides that on or after July 1, 1992, it will apply to contracts that have not been recorded but that are referred to in a recorded document. n154 Another approach to this problem is to provide for a formal contract termination procedure with written notices that may be recorded in order to establish extinguishment of the buyer's interest. n155

§ 92.06(a)(3) Statute of Limitations on Judgment Liens.

Judgments against persons may attach as liens on their real estate within the county or territorial jurisdiction of the courts rendering the judgments. n156 Judgment liens are subject to special statutes of limitation. These statutes limit the lifetimes of judgment liens to a specific number of years, usually from five to fifteen years, with a ten-year period being fairly common. n157 Some statutes permit extensions of the basic period under varied conditions or circumstances. n158 Unlike ordinary statutes of limitation, the running of the period cannot usually be suspended by disabilities. In a few instances, the duration of the lien may depend on the duration of the judgment itself, which may be limited by an ordinary statute of limitations. If that is the case, then it is possible that the duration of the lien may be extended by a disability. n159

§ 92.06(a)(4) Statute of Limitations on Possibilities of Reverter and Rights of Entry.

Possibilities of reverter and rights of entry may present difficult problems to title examiners. These interests arise in transferors when certain defeasible estates are created in transferees. For example, a land owner might convey it to a church "so long as the property is used for church purposes" or "on the condition that the property shall be used for church purposes; when the property is no longer used for church purposes, the grantor or her transferees shall have the right to enter." The first conveyance would create a fee simple determinable in the church and a possibility of reverter in the transferor. The second would create a fee simple on a condition subsequent in the transferee and a right of entry in the grantor. These defeasible estates are usually employed by donors to create land use or ownership restrictions that, if violated, can cause title to the land to revert to the holder of the reversionary future interest. Normally, the record will not disclose whether the restrictions have been violated. As a result, it may be difficult or impossible to determine from the record whether title has been or may be lost because of a violation. The mere presence of a defeasible estate as an essential link in the chain of title may render the title unmarketable. n160 Not infrequently, older defeasible estate restrictions are inappropriate in the modern context and many appear to serve no appropriate purpose.

The impact of possibilities of reverter and rights of entry on the marketability of titles is exacerbated because they are not subject to the rule against perpetuities. n161 Furthermore, equitable defenses to the enforcement of restrictive covenants are generally inapplicable to these interests. Finally, it may be difficult or impossible to obtain a release from the future interest holder.

Legislation aimed at title problems caused by these reversionary future interests has been proposed and adopted. The Commissioners on Uniform State Laws promulgated a Uniform Act Relating to Reverter of Realty in 1944. n162 The

Uniform Simplification of Land Transfers Act has a section that will eliminate stale possibilities of reverter and rights of entry. n163 A number of states have enacted legislation concerning this problem. The existing legislation is far from uniform. Some statutes provide for an absolute maximum duration of these interests. n164 Others specify a maximum lifetime for reversionary interests but provide for extensions by re-recording the interest or filing a notice of an intent to preserve it. n165 Some statutes are prospective and apply only to interests created after the effective date of the legislation. n166 Others purport to have retroactive effect as well. n167 A Minnesota statute makes equitable defenses available in suits to enforce restrictive covenants also available in actions to enforce reversionary future interests. n168

COMPUTER-ASSISTED RESEARCH

LEXIS: ancient mortgage
installment land contract* w/50 statute of limitation*
judgment lien* w/50 statute of limitation*
possibilit! of reverter w/50 statute of limitation*
"right* of entry" w/50 "statute of limitation*"
"right* of re-entry" w/50 "statute of limitation*"

NOTE:
Many cases relevant to this section pre-date the earliest cases in the database.

§ 92.06(b) Marketable Title Acts.

The first marketable title act was enacted in Iowa in 1919. n169 Currently, marketable title acts are in force in eighteen states. At least fourteen n170 of these acts are based on the Model Marketable Title Act (the "Model Act"). n171 The Uniform Simplification of Land Transfers Act 1 (USOLTA) contains a proposed marketable title act. n172 Although these actual and proposed statutes vary in language and specific provisions, most of them share the same basic pattern. If the owner has a chain of title going back to a title transfer conveyance (usually referred to as the "root of title") that was recorded prior to a time period specified by the act (the periods vary from twenty to fifty years, with forty years being the most common), title to the property is generally subject only to claims and interests recorded within the basic period plus any additional time back to the root of title. Claims recorded prior to the root of title are generally invalid if they have not been re-recorded after the root of title, unless they qualify under one of the exceptions to the act. Exceptions to a marketable title act may include claims and interests of the United States, state governmental interests, interests of lessors upon the termination of leases, adverse possession interests where some part of the adverse possession occurred after the root of title, easements observable by physical inspection, railroad or utility easements, mineral interests, reversionary future interests and restrictive covenants, remainders, and mortgages and other property security interests. n173

To qualify for the protection of most American recording acts, one must be a good faith purchaser for value without notice of the prior conflicting interest. In contrast, the marketable title acts currently in force do not require a person to be good faith purchaser for value to qualify for the protection of the act. n174 The original Iowa marketable title act required one to be in possession to qualify for its benefits. n175 Currently, possession is required by statute only in North Dakota. n176 The Minnesota Act, by judicial interpretation, benefits only persons claiming fee simple titles. n177 The Model Act, the USOLTA provisions and most of the other enacted statutes protect persons claiming any interest in the real estate. n178 Disabilities that might suspend the running of a statute of limitation are irrelevant under marketable title acts.

§ 92.06(b)(1) Objectives.

Marketable title acts have two objectives:

(1) to promote economy in title examination by limiting the scope of title search and examination to the fairly recent past; and

(2) to promote marketability of titles by cleansing them of various types of older title defects.

While the acts are effective to promote the second objective, the exceptions to extinguishment of claims by the acts greatly undermine attainment of the first objective. If a title examination only goes back to the root of title, there will be a risk that some excepted interest may be on the prior record. As a result, conservative title examiners will search and examine back beyond the root of title. n179

Conservative title examiners may also decline to rely on a marketable title act where the constitutionality of the act has not been upheld by the highest court of the state. A marketable title act may be found to be unconstitutional because it may extinguish a real estate interest recorded before the root of title with no notice of any kind being given to its holder. The holder of such an interest may claim that the act is unconstitutional under due process or impairment of contractual obligation clauses. n180

Marketable title acts are aimed at facilitating commerce in real estate by making title examination less burdensome and title more marketable by extinguishing old title defects. Clearly, these objectives of marketable title acts promote important public interests and, therefore, provide a sound basis for these acts as constitutionally permissible exercises of police power. The harder question is whether individuals are unfairly deprived of property rights because they are not given individual notice that their interests will be extinguished unless they are preserved by a filing under the marketable title act.

The United States Supreme Court has never considered the constitutionality of any of the general purpose marketable title acts and few state supreme courts have passed on the validity of their acts. n181 Perhaps the best available United States Supreme Court precedent is Texaco, Inc. v. Short, n182 which involved the validity of the Indiana Mineral Lapse Act. n183 The Act reunited severed mineral interests with surface rights where the interests were not used for twenty years. An owner of unused mineral rights could preserve them by filing a claim in the local recorder's office. The statute was retroactive; however, holders of mineral rights unused for eighteen years or more were given a grace period of two years after the statute became effective to preserve their rights by filing a claim. After the Indiana Supreme Court upheld the statute, n184 an appeal was taken to the United States Supreme Court. The Supreme Court affirmed in a five-to-four decision with a dissent by Justice Brennan joined by Justices White, Marshall and Powell.

The majority opinion by Justice Stevens emphasized that a state has the power to condition the retention of a property interest on the performance of reasonable conditions that indicate an intention to retain the interest. He further observed that the Indiana statute was similar to a recording statute. "Such statutes provide that a valid transfer of property may be defeated by a subsequent purported transfer if the earlier transfer is not properly recorded." n185 The Court found that the statute furthered legitimate state goals and used reasonable means to achieve them. The Court also determined that the two-year grace period gave persons who might lose their property interests a reasonable amount of time to become familiar with the law. The Court was persuaded that those subject to losing mineral interests by operation of the statute were not entitled to specific notice from the State or from surface owners until litigation was commenced to establish that mineral rights had been extinguished by the statute. A holder of mineral rights argued that the statute unconstitutionally impaired the obligation of contracts because the holder had leased the mineral rights to a third party. Justice Stevens noted, however, that the mineral leases were made after the rights had lapsed under the statute. "The statute cannot be said to impair a contract that did not exist at the time of its enactment." n186

In his dissent, Justice Brennan agreed that the legislation promoted a legitimate state interest. He also agreed that extinguishment of a mineral owner's rights may be an appropriate sanction for a failure to file a claim. His main disagreement with the majority was about the retroactive effect of the statute. Justice Brennan thought that the two-year grace period was inadequate to give the persons about to lose their interests sufficient notice of the imminent loss.

Texaco, Inc. v. Short indicates that the United States Supreme Court would most likely uphold retroactive general purpose marketable title acts with grace periods against attacks based on federal constitutional claims. The state interest in stabilizing land titles and providing certainty to real estate ownership appears to provide a sound basis for this particular exercise of police power. The most serious constitutional problem with general purpose marketable title acts comes from their retroactive application. Justice Brennan's dissent shows that Professor Payne's concerns about the retroactive effect of marketable title acts with no specific notice to those losing interests was not unfounded. n187 However, the majority opinion held that even the relatively brief grace period of two years was sufficient to satisfy due process notice requirements.

Wichelman v. Messner n188 is the leading case upholding the validity of a general purpose marketable title act against a constitutionality challenge. In *Wichelman*, the subject property was conveyed by Hoppenstedt in 1887 subject to a condition or limitation which provided that the property was to revert to the grantors, their heirs or assigns whenever it ceased being used as a school house site. This transfer created a determinable fee or a fee upon a condition subsequent. n189 The school on the site was closed in 1946. In 1952, the school district which then owned the property sold and conveyed the property to Messner. Wichelman, who had also bid for the property when it was sold to Messner, contacted the Hoppenstedt heirs. The heirs released or quitclaimed to Wichelman any interests they then had in the subject property. Wichelman then sued Messner and others seeking to establish that the title reverted to the Hoppenstedt heirs when the property ceased to be used for school purposes. Wichelman claimed ownership as the purchaser from the heirs. The trial court held for Wichelman, apparently on the ground that title reverted to the Hoppenstedt heirs in 1946 when the school use ceased.

The Supreme Court of Minnesota reversed, holding that the Minnesota Marketable Title Act (the "Act") applied to extinguish any reversionary interests that were created by the 1887 conveyance. At the time, the Minnesota Act protected an owner with a record chain of title at least forty years old from claims founded upon any event or transaction that was more than forty years old, unless the claimant recorded notice of the claim within forty years after the occurrence of the event or transaction. Because no notice was recorded to preserve the reversionary interests that may have been created by the 1887 conveyance, they were extinguished by the Act.

In discussing the constitutional challenges made to the Act, the Court was mainly concerned about its retroactive effect. The interest, if any, acquired by Wichelman from the Hoppenstedt heirs and extinguished by the statute was created years before the enactment of the statute. The Hoppenstedt heirs were not notified that they would have only nine months to preserve their interest by filing notice. Wichelman argued that the statute violated both the due process and the impairment of the obligation of contract clauses because the statute extinguished pre-existing interests without notice to their owners and gave only a brief nine-month grace period in which to preserve them. The Court rejected this argument, relying on precedents upholding the validity of curative acts, statutes of limitation and recording acts against similar challenges.

The Court observed that the Act was a comprehensive plan for reform in conveyancing procedures which combined the collective sanctions of curative acts, statutes of limitation, and recording acts. n190 Curative acts do not impair the obligation of contracts even though they are a form of retrospective legislation because "[t]hey operate to complete a transaction which the parties intended to accomplish but carried out imperfectly." n191 Statutes of limitation promote valid public purposes and may have retrospective effect if persons whose claims may be extinguished are given a reasonable time to assert those claims. "It is recognized that an amendment to a recording statute which shortens or limits the time during which a recorded instrument shall be effective and provides for renewal of such instrument by recording or refiling is constitutional as to existing recorded instruments where a reasonable time is allowed for compliance with the statute." n192 The Court refused to hold the nine-month grace period to be unreasonably brief, emphasizing legislative discretion in setting such periods and observing that the Bar of Minnesota had knowledge of the enactment of the legislation.

§ 92.06(b)(2) Other Concerns.

While a marketable title act that extinguishes prior interests with no notice to their owners and with little opportunity for them to learn of the impending extinguishment may satisfy minimum constitutional requirements, there remains a question about the basic fairness of such an act. A commentator has articulated the central concern:

> The crucial argument made in justification of allowing marketable title acts to extinguish express interests outstanding of record is that, even if live interests of possibly continuing social utility are subject to extinguishment, they can all be preserved by the simple expedient of filing notices of claim. But how are people going to learn of this saving procedure, or even of the threat of extinguishment? n193

To say that everyone is presumed to know the law is an unsatisfactory response to this concern, which is based on the practical realities, and not on what the law might presume. The problem is that many people will not know that they have an interest or that the statute that may extinguish that interest exists. There is no red flag of possession or notice from some other source that might catch their attention. The clock of the marketable title act silently advances. On the other hand, identifying, searching for, and specially notifying those who might lose interests would be costly and time-consuming. A general notice by publication might adequately warn corporations that routinely examine published legal notices; however, other owners are not likely to acquire notice in fact through such means.

§ 92.06(b)(3) Competing Chains of Title.

One of the more troubling aspects of marketable title acts is their application to the problem presented by competing chains of title to the same interest. The competing chains of title situation is uncommon but occurs frequently enough to be a cause of concern. Competing chains of title may arise when an owner conveys the same interest to two or more persons. This situation can also occur because of a "wild deed" executed by a grantor with no record ownership of the interest, or when a subsequent deed contains a legal description that overlaps the description in a prior deed. A marketable title act may apply to this situation so as to reverse the result that would be reached under the common-law priority rules and the recording acts.

For example, suppose that in 1950, O, the then owner in fact and of record of Blackacre, conveyed it to A, who promptly recorded. In 1951, O conveyed the same interest to M, who also promptly recorded. Generally, under the common-law priority rules n194 and the recording acts, n195 A would have priority over M. However, under a marketable title act with a basic 40-year period, in 1991, M could attain priority over A if no further transfers or recordation occurred. M would have an unbroken chain of title with a root of title recorded at least 40 years ago. As a result, A's interest would be extinguished. The same result can be reached if the second deed was a forgery or "wild," executed by a complete stranger to the title. n196

Under marketable title acts, perfectly genuine claims to title may be extinguished by forged or otherwise void conveyances. Under recording acts, a real estate owner cannot lose title through a void conveyance, even to a good faith purchaser for value without notice unless estoppel applies. n197 However, a marketable title act may validate a chain of title based on a void conveyance. For example, in a Florida case, n198 a man died in 1923, leaving to his wife and sole heir his interest in a corporation that owned land in Florida. The widow died in 1945, never having learned of her inheritance. After the man died, a wrongdoer set into motion a scheme designed to defraud the decedent's estate of all interests in the corporation and the real estate it held. A deed from the corporation to the wrongdoer and his accomplices was forged. These grantees then purported to convey the property to another corporation which, in turn, purported to transfer it to a third corporation. This third corporation then sold portions of the land to apparently innocent parties. Some of the buyers improved their lots. In 1966, a brother of the decedent uncovered the wrongdoer's actions. The brother then sued the current owners of the land in 1967 to establish title in the heirs of the decedent. Upon the defendants' motion, the complaint was dismissed for failure to state a cause of action because the estate's claims were

barred by the Florida Marketable Title Act. In affirming the lower court's dismissal, the Florida Supreme Court upheld the interests of the current owners because the thirty-year period of the Florida marketable title act had passed, even though their roots of title were forged deeds.

The early marketable title statutes were enacted in states where official and unofficial (both publicly and privately maintained) tract indexes were used. The problem of competing chains of title to the same interest is not as serious where such indexes are used because the tract index will normally disclose the problem to a prospective purchaser. In some of the later states to enact marketable title legislation, the only available public indexes are grantor-grantee indexes. n199 While a genuine recorded interest may be extinguished through the recordation of a forged or wild deed regardless of the index used, tract indexes will disclose the existence of conflicting chains of title to subsequent purchasers. Where grantor-grantee indexes are used, it is likely that a person searching one of the conflicting chains of title will not discover the existence of another chain, unless both chains involved a common grantor and the root of the other chain was recorded in the chain of title for the interest being searched.

Several approaches to this problem have been suggested. One commentator has proposed that the benefit of marketable title acts should be limited to persons claiming ownership where they and any predecessors in title have paid the real estate taxes on the property for the preceding five years, and where no conflicting claimant has paid the taxes during the same five-year period. n200 The reasoning behind this proposal seems to be that the claim of the taxpaying party is similar to that of an adverse possessor under color of title with payment of taxes, which justifies the application of a shorter statute of limitations. Furthermore, if a claimant is paying taxes, conflicting claimants who are not paying taxes or not being billed for them should have notice that someone may be claiming their interests. The local tax records will most likely reveal the identity of that person. While this proposal has merit, it would deny the benefits of marketable title acts to tax exempt organizations such as churches, charities, and governments. The USOLTA contains a variation on this proposal. n201 Instead of limiting the benefits of marketable title acts to real estate taxpayers, the USOLTA preserves the "rights of a person in whose name the real estate or an interest therein was carried on the real property tax rolls within 3 years of the time when marketability is to be determined, if the relevant tax rolls are accessible to the public... ." n202

Another approach to the problem of conflicting chains of title is to preserve the rights of parties in possession from extinguishment by the marketable title act. The drafters of the Model Marketable Title Act rejected this approach because it violated their fundamental principle that the record should be a "mirror" of title. n203 Excepting the rights of parties in possession from extinguishment by the marketable title act alone would be enough to make a physical inspection of the property imperative. The USOLTA excepts the interests of parties in possession where their occupancy would be revealed by a reasonable inspection or inquiry "where their use or occupancy is inconsistent with the marketable record title... ." n204

The USOLTA approach to the problem of conflicting chains of title provides a solution that is both satisfactory and practical. Under the Uniform Act, an examination of the property and the relevant tax rolls will almost always give a purchaser of real estate notice of any conflicting chain of title. The interest of the real estate owner in possession or paying taxes will be protected from extinguishment by the marketable title act. While this solution is inconsistent with the goal of making the record a full and accurate mirror of the state of the title, experience with recording and title registration shows that the goal is, in any event, unattainable. n205

§ 92.06(b)(4) Exceptions.

A basic objective of marketable title acts is to reduce the burden of title search and examination of the record to the fairly recent past (the period of time specified in a particular act; usually forty years plus any additional time back to the root of title). The attainment of this goal is greatly impaired by the exception of certain interests from extinguishment by the acts. A searcher who stops at the root of title is taking a risk that an excepted interest lies beyond.

Because of the Supremacy Clause of the United States Constitution, state laws cannot extinguish claims held by the United States without its consent. Therefore, all marketable title acts, the Model Act, and the USOLTA exclude interests of the United States. The Model Act simply excepts "any right, title or interest of the United States... ." n206 The USOLTA exception for interests held by the United States is limited to claims "not subjected by federal law to the recording requirements of [the] State... ." n207 This leaves open the possibility that a claim of the United States could be extinguished if the United States adequately consents.

Although the Model Act and the USOLTA do not except interests held by state or local government, at least eight of the eighteen enacted statutes do except these interests. While it would appear to be reasonable to except publicly owned streets, alleys and observable easements, the exception of other governmental claims is difficult to justify. Obviously, in states with these exceptions, the legislative intent was to promote economy of government by relieving state and local governments from the burden of keeping track of their interests and recording or filing under the marketable title act to preserve them. This is not an adequate basis, however, for exempting state and local governments from the rules that apply to private individuals and organizations. Generally, private individuals and organizations are in no better position than the state or local government to keep track of and preserve their interests. The governmental exception is also not justified by public policy. This exception appears to be a product of reluctance by state legislators to impose an avoidable fiscal burden on state and local governments.

In addition to the exceptions for state and local government interests, there are other exceptions in the enacted statutes that appear to be politically based. These include utility easements, railroad easements, water rights, and mineral interests.

Utility and railroad easements apparent by use present little or no difficulty to purchasers. Underground utility easements are more troublesome because they may not be apparent through a physical inspection. Usually, underground easements will not, however, interfere with the owner's use of the surface. As it would be unduly burdensome on utility companies to keep track of and re-record these easements owing to their great number, their exemption from marketable title acts appears justified.

Unused utility and railroad easements are another matter. These easements may not be apparent due to lack of use. Furthermore, non-use for a long period of time suggests that these easements have little or no utility to their owners or society. In this case, the twin goals of marketable title acts, to reduce the burden of searches and to enhance the marketability of titles, should take precedence. Utility companies and railroads should be required to keep track of these interests and preserve them by re-recording.

The Model Act and the acts that have been enacted exempt easements that are observable by physical inspection. n208 The USOLTA excepts "a restriction, the existence of which is clearly observable by physical evidence of its use ... ." n209 This exemption appears to be justified, because a prudent purchaser of real estate will make a physical inspection of the property. For the same reason, exceptions for parties in possession which are found in some statutes are also justifiable. The Model Act and the USOLTA contain no exceptions for mineral interests. However, seven of the eighteen enacted statutes do except these interests. A commentator has referred to the omission of any reference to minerals as an "almost inexplicable defect" in the Model Act. n210 Mineral rights may be easements ("*profits a prendre*" in older terminology) or separate estates. If mineral rights are easements, they are encumbrances on or claims against general ownership. However, if they exist as separate estates, they are estates in their own right. Under the latter view, a commentator has argued that a conveyance of mineral rights "divides the land horizontally, just as the sale of a single lot from a larger tract divides the land vertically. A marketable title in the owner of the surface, therefore, does not defeat title to the severed minerals any more than a marketable title in Lot A defeats title to Lot B in the same subdivision." n211 After referring to decisions stating that a marketable title act did not extinguish severed mineral rights, Simes and Taylor, drafters of the Model Act, quote from a contrary Ontario decision and point out that the Model Act was directly influenced by the Ontario Act. n212 They also assert that under the Model Act "it is very clear that re-recording of mineral rights is necessary..." n213 to preserve them. However, these authors do advise that it may be

desirable in mineral areas to make the Model Act "even more explicit in its application to mineral interests." n214 The Model Act clearly would apply to extinguish mineral rights held as easements; however, contrary to the drafters' assertion, it is not at all clear that it would similarly affect mineral rights held as separate estates.

In states with significant mining activity, it is vital for real estate purchasers to know whether mineral rights are included in the purchase or whether they may be held by someone else. The owner of the mineral interest may have broad rights to use the surface to reach the minerals. Exercise of these rights can effectively damage or completely destroy the use of the land by the surface owners, with no obligation to pay them compensation.

In Appalachian and Western states, there are thousands of outstanding mineral deeds, many over a century old. n215 Because some land title records are disorganized and poorly maintained, the precise state of ownership of various mineral rights is undetermined. Mining companies are very reluctant to sort through and identify the real estate in which they may hold mining interests so that those interests can be preserved by re-recording. Instead, the mining companies prefer to wait until deposits are discovered before attempting to search for and ascertain the precise legal state of mineral rights and associated interests in specific locations. n216 The mining companies' basic approach toward marketable title legislation has been to lobby for an exception for mineral interests. A blanket exception for mineral interests in marketable title acts greatly undermines the goal of limiting the length of searches. Because of the drastic effect that mineral rights can have on marketability of the title to the surface, no prudent purchaser would end a search at the root of title in states where mineral interests are excepted from the acts.

A few marketable title acts except rights of entry, possibilities of reverter and restrictive covenants. A few also except reversionary interests and remainders. Because of the adverse impact on marketability of titles caused by rights of entry and possibilities of reverter, it is difficult to justify excepting them from a marketable title act. As time passes, the social utility, if any, of a use restriction may decrease and, at some point, giving effect to a long-dead grantor's intent may be the only plausible basis for enforcement. After the basic time period referred to in a marketable title act has passed, the policy of promoting marketability of titles should prevail over the policy of giving effect to the grantor's intent, and these interests should be extinguished unless preserved by re-recording. n217 Restrictive covenants present a different problem. They do not necessarily have a severely negative effect on marketability. As a result, the case for their extinguishment is not as strong. Nonetheless, there is some basis for limiting their lifetimes, because the utility of covenant use restrictions may also diminish with time. n218

Remainders and reversions are excepted by some marketable title acts. These exceptions are justifiable. Extinguishment of such interests defeats the intent of their creators. Furthermore, in many cases the owners may not be aware of the threat of extinguishment and may not be aware of the need to preserve them by re-recording. However, these interests are currently of little importance. Life estates, remainders, and reversions are rarely created today as legal estates in land. These interests are normally created as equitable interests in trusts which may include legal title to real estate in the trust corpus. Dividing real estate into legal estates and future interests is unwise because such a division negatively affects marketability. No prudent developer will invest substantial sums in improving a life estate which might terminate at any time.

§ 92.06(b)(5) Summary.

While marketable title acts do promote marketability of titles by voiding old defects in a number of instances where they would have remained viable, n219 in general they have failed to accomplish their objectives. The goal of making the root of title a "curtain" which would cut off the need to conduct historical searches has not been achieved due to the exceptions in the acts. The principal architect of a proposed but never enacted marketable title act for Alabama reported that the Alabama Law Institute preferred to withdraw the bill rather than proceed with a blanket exception for mineral interests. n220 While a marketable title act with such a debilitating exception can still accomplish some good, the position of the Alabama Law Institute has merit. Marketable title acts do not come cost free. Compliance costs include keeping track of interests and re-recording them. From a cost-benefit perspective, a minimally effective statute may not

be worth the costs it generates.

COMPUTER-ASSISTED RESEARCH

LEXIS: marketable w/20 act w/20 record! or title wild deed

FOOTNOTES:
(n1)Footnote 130. U.S. Dep't of Hous. & Urban Dev., Land Title Recordation Systems Legal Constraints and Reforms II-79 (1979).

(n2)Footnote 131. However, historical searches may be required in title registration systems because of "holes in the curtain," *i.e.*, exceptions to the conclusiveness of the register.

(n3)Footnote 132. Lewis M. Simes & Clarence B. Taylor, the Improvement of Conveyancing by Legislation (1960).

(n4)Footnote 133. 2 Frederick Pollock & Frederic Maitland, the History of English Law 51 (2d ed. 1959).

(n5)Footnote 134. 2 Frederick Pollock & Frederic Maitland, the History of English Law 51 (2d ed. 1959).

(n6)Footnote 135. Paul E. Basye, Clearing Land Titles § 54 (1970). *E.g.*, Wis. Stat. Ann. § 893.25. Where possession is under color of title, in good faith or with payment of real estate taxes, a shorter period may apply. *E.g.*, 735 Ill. Comp. Stat. 5/13-101.; Wis. Stat. Ann. §§ 893.26 & 893.27.

(n7)Footnote 136. *E.g., Wanless v. Wraight, 559 N.E.2d 798, 800 (Ill. App. 1990).*

(n8)Footnote 137. Lewis M. Simes, A Handbook for More Efficient Conveyancing 52 (1961); U.S. Dep't of Hous. & Urban Dev., Land Title Recordation Systems Legal Constraints and Reforms II-72 (1979).

(n9)Footnote 138. Lewis M. Simes, A Handbook for More Efficient Conveyancing 58 (1961).

(n10)Footnote 139. Paul E. Basye, Clearing Land Title § 51 (1970).

(n11)Footnote 140. Paul E. Basye, Clearing Land Title § 53 (1970).

(n12)Footnote 141. Paul E. Basye, Clearing Land Title § 52 (1970).

(n13)Footnote 142. Grant S. Nelson & Dale A. Whitman, Real Estate Finance Law § 2.1 (2d ed. 1985). There are a number of exceptions and qualifications to this general proposition. *See id.*

(n14)Footnote 143. Grant S. Nelson & Dale A. Whitman, Real Estate Finance Law 453 (2d ed. 1985).

(n15)Footnote 144. Grant S. Nelson & Dale A. Whitman, Real Estate Finance Law § 71 (2d ed. 1985). *See id.* §§ 78 to 114 for description of the statutes in force in various states.

(n16)Footnote 145. Grant S. Nelson & Dale A. Whitman, Real Estate Finance Law § 76 (2d ed. 1985); Uniform Real Estate Mortgage Act, § 12.

(n17)Footnote 146. Carol M. Rose, *Crystals and Mud in Property Law, 40 Stan. L. Rev. 577 (1988).*

(n18)Footnote 147. Carol M. Rose, *Crystals and Mud in Property Law, 40 Stan. L. Rev. 577 (1988).*

(n19)Footnote 148. *See Livingston v. Meyers, 129 N.E.2d 12 (Ill. 1955).*

(n20)Footnote 149. Ohio Rev. Code Ann. § 5301.30 (Anderson).

(n21)Footnote 150. Ohio Rev. Code Ann. § 5301.30 (Anderson).

(n22)Footnote 151. To prevent recordation, sellers may deliberately omit certificates of acknowledgement or prohibit recordation in contract provision.

(n23)Footnote 152. Paul E. Bayse, Clearing Land Titles § 132 (1970).

(n24)Footnote 153. Iowa Code Ann. § 558.5.

(n25)Footnote 154. Iowa Code Ann. § 558.5.

(n26)Footnote 155. *E.g.*, Minn. Stat. Ann. § 559.21. In some cases, contract sellers concerned about the quality of their titles after forfeiture will use mortgage foreclosure, where available, to terminate the buyer's interest.

(n27)Footnote 156. Rufford G. Patton & Carroll G. Patton, Patton on Land Titles § 571 (1957).

(n28)Footnote 157. Paul E. Basye, Clearing Land Titles § 134 (1970).

(n29)Footnote 158. Lewis M. Simes & Clarence B. Taylor, the Improvement of Conveyancing by Legislation 161-62 (1960).

(n30)Footnote 159. Lewis M. Simes & Clarence B. Taylor, the Improvement of Conveyancing by Legislation 162 (1960).

(n31)Footnote 160. Marygold S. Melli, *Subdivision Control in Wisconsin, 1953 Wis. L. Rev. 391, 450-51.*

(n32)Footnote 161. Lewis M. Simes & Allen F. Smith, the Law of Future Interests 311, § 825 (2d ed. 1956); Lewis M. Simes, Handbook of the Law of Future Interests 264 (2d ed. 1966).

(n33)Footnote 162. Handbook of the National Conference of Commissioners on Uniform State Laws and Proceedings of the Fifty-Fourth Annual Conference 209-10 (1944).

(n34)Footnote 163. Unif. Simplification of Land Transfers Act § 3-409, 14 U.L.A. 301 (1990).

(n35)Footnote 164. Fla. Stat. Ann. § 689.18 (21 years); Minn. Stat. Ann. § 500.20 (if unrecorded, until subsequent conveyance is properly recorded). *Knights and Ladies of Samaria v. Board of Educ. of Charles County, 688 A.2d 933 (Md. App. 1997)* (the out-of-possession owner of a fee simple absolute title, acquired by a reversion after the determinable event occurs, must institute an action for possession within the seven-year statutory period or lose all claim to the land).

(n36)Footnote 165. Iowa Code Ann. § 614.24; Md. Real Prop. Code Ann. § 6-102; Mass. Ann. Laws ch. 184, § 19; N.Y. Real Prop. Law § 345; Or. Rev. Stat. § 105.772.

(n37)Footnote 166. Fla. Stat. Ann. § 689.18; Md. Real Prop. Code Ann. § 6-101; Mass Ann. Laws ch 183, § 19; Minn. Stat. Ann. § 500.2; N.Y. Real Prop. Law § 345; Or. Rev. Stat. § 105.772.

(n38)Footnote 167. 765 Ill. Comp. Stat. 330/5.

(n39)Footnote 168. Minn. Stat. Ann. § 500.20(1).

(n40)Footnote 169. *Tesdell v. Hanes, 82 N.W.2d 119, 121-22 (Iowa 1957);* Kenneth D. Benhart, Note, *The Mechanics of Iowa's Marketable Title Legislation, 22 Drake L. Rev. 326 (1973).* Rebecca C. Bell, *Virtual Adoption: The*

Difficulty of Creating an Exception to the Statutory Scheme, 29 Stetson L. Rev. 415 (Fall 1999).

(n41)Footnote 170. Powell on Real Property § 82.04[3][a] (Michael Allan Wolf ed., Matthew Bender).

(n42)Footnote 171. Lewis M. Simes & Clarence B. Taylor, the Improvement of Conveyancing by Legislation 6-10 (1960).

(n43)Footnote 172. Unif. Simplification of Land Transfers Act §§ 3-301 - 3-309, 14 U.L.A. 290-95 (1990 & Supp. 1992). The U.S.O.L.T.A. Proposal is based on the Model Marketable Title Act.

(n44)Footnote 173. U.S. Dep't of Hous. & Urban Dev., Land Title Recordation Systems: Legal Constraints and Reforms II-59 TO II-66 (1979).

(n45)Footnote 174. A proposed act for Alabama would have required protected persons to be good faith purchasers for value. *See* John C. Payne, *The Alabama Law Institute's Land Title Acts Project: Part 1, 24 Ala. L. Rev. 175, 183-84 (1971).*

(n46)Footnote 175. Iowa Code Ann. § 614.17.

(n47)Footnote 176. N.D. Cent. Code § 47-19.1-01.

(n48)Footnote 177. *Wichelman v. Messner, 83 N.W.2d 800, 816 (Minn. 1957). See Weber v. Eisentrager, 498 N.W.2d 460 (Minn. 1993),* in which the Minnesota Supreme Court discusses the amendments to the state's Marketable Title Act, enacted after the *Wichelman* case.

(n49)Footnote 178. Conn. Gen. Stat. §§ 47-33d - 33l.; Fla. Stat. Ann. §§ 712.01 - 712.10; Ind. Code Ann. §§ 32-1-5 - 32-1-10; Iowa Code Ann. §§ 614.29 - 614.38; Kan. Stat. Ann. §§ 58-3401 - 58-3412; Mich. Comp. Laws Ann. §§ 565.101 - 565.123; Minn. Stat. Ann. § 541.23; Neb. Rev. Stat. §§ 76-288 - 76-298; N.C. Gen. Stat. §§ 47B-1 - 47B-9; N.D. Cent. Code §§ 47-19.1-.01 - 47-19.1-.11; Ohio Rev. Code Ann. §§ 5301.47 - 5301.56; Okla. Stat. Tit. 16; §§ 71 - 80; S.D. Codified Laws Ann. §§ 43-30-1 - 43-30-15; Utah Code Ann. §§ 57-9-1 - 57-9-10; Wis. Stat. Ann. § 893.33; Wyo. Stat. §§ 34-10-101 - 34-10-109.

(n50)Footnote 179. For example, in Cook County, Illinois, the Chicago Title Insurance Company searches back beyond the root of title when it does an initial search for a particular title.

(n51)Footnote 180. *E.g., Board of Educ. of Cent. Sch. Dist. No. 1 v. Miles, 207 N.E.2d 181 (N.Y. 1965)* (holding the New York statute voiding stale reversionary interests unconstitutional on these grounds). *But see Trustees of Sch. of Twp. No. 1 v. Batdorf, 130 N.E.2d 111 (Ill. 1955)* (upholding the Illinois state reversionary interest statute).

(n52)Footnote 181. Three state supreme courts have upheld the constitutional validity of marketable title acts. *Miami v. St. Joe Paper Co., 364 So. 2d 439 (Fla. 1978); Presbytery of Southeast Iowa v. Harris, 226 N.W.2d 232 (Iowa 1975);* and *Wichelman v. Messner, 83 N.W.2d 800,* (Minn. 1957). *See also Tesdell v. Hanes, 82 N.W.2d 119 (Iowa 1957);* Ralph W. Aigler, *Constitutionality of Marketable Title Acts, 50 Mich. L. Rev. 185 (1951);* Ralph W. Aigler, *A Supplement to "Constitutionality of Marketable Title Acts" /- 1951-1957, 56 Mich. L. Rev. 225 (1957);* and Note, *Constitutionality of Marketable Title Legislation, 47 Iowa L. Rev. 413 (1962).*

(n53)Footnote 182. *454 U.S. 516 (1982).*

(n54)Footnote 183. Ind. Code §§ 32-5-11-1 to 32-5-11-8.

(n55)Footnote 184. *Short v. Texaco, Inc., 406 N.E.2d 625 (Ind. 1980).*

(n56)Footnote 185. *454 U.S. 516, 528.*

(n57)Footnote 186. *454 U.S. 516, 531.*

(n58)Footnote 187. John C. Payne, *The Alabama Law Institute's Land Title Acts Project: Part I, 24 Ala. L. Rev. 175, 182-84 (1971).*

(n59)Footnote 188. *83 N.W.2d 800 (Minn. 1957).*

(n60)Footnote 189. The Minnesota Supreme Court did not decide which type of defeasible fee was created because it held that the marketable title act applied "with equal force to both a determinable fee and a fee upon condition subsequent... ." *83 N.W.2d at 810.*

(n61)Footnote 190. *83 N.W.2d at 816.*

(n62)Footnote 191. *83 N.W.2d at 816.*

(n63)Footnote 192. *83 N.W.2d at 817.*

(n64)Footnote 193. Walter E. Barnett, *Marketable Title Acts--Panacea or Pandemonium, 53 Cornell L. Rev. 45, 89 (1967).*

(n65)Footnote 194. A is first in time.

(n66)Footnote 195. A has recorded in the chain of title. Recording acts void or subordinate prior unrecorded claims evidenced by written instruments.

(n67)Footnote 196. *See Miami v. St. Joe Paper Co., 364 So. 2d 439 (Fla. 1978); Whaley v. Wotring, 225 So. 2d 177 (Fla. App. 1969); Mobbs v. City of Lehigh, 655 P.2d 547 (Okla. 1982); see also* Lewis M. Simes & Clarence B. Taylor, the Improvement of Conveyancing by Legislation 13-14 (1960). *But see Exchange Nat'l Bank v. Lawndale Nat'l Bank, 243 N.E.2d 193 (Ill. 1968),* where the Illinois Supreme Court held that the Illinois marketable title act was not intended to apply to a case involving two competing record chains of title. The Illinois Supreme Court cited no statutory authority for this holding other than the legislative purpose of "simplifying and facilitating land title transactions by allowing persons to rely on a chain of title... ." *243 N.E.2d at 196.*

(n68)Footnote 197. *Stone v. French, 14 P. 530 (Kan. 1887); Clevenger v. Moore, 259 P. 219 (Okla. 1927). But see Eliason v. Wilborn, 281 U.S. 457 (1930)* (holding that, under the Torrens system of land title registration, an owner may lose title to a subsequent purchaser in good faith through the registration of a void conveyance).

(n69)Footnote 198. *Marshall v. Hollywood, Inc., 236 So. 2d 114 (Fla. 1970).*

(n70)Footnote 199. North Carolina, Connecticut and Vermont.

(n71)Footnote 200. John C. Payne, *The Alabama Law Institute's Land Title Acts Project: Part I, 24 Ala. L. Rev. 175, 184-86 (1971).*

(n72)Footnote 201. Unif. Simplification of Land Transfers Act § 3-306(3), 14 U.L.A. 50 (Supp. 1992).

(n73)Footnote 202. Unif. Simplification of Land Transfers Act § 3-306(3), 14 U.L.A. 50 (Supp. 1992).

(n74)Footnote 203. Lewis M. Simes & Clarence B. Taylor, the Improvement of Conveyancing by Legislation 353 (1960). Even Simes and Taylor thought that the rights of a party in possession for 40 years or more should be protected from extinguishment by a record chain of title based on a void or wild deed. *Id.* at 8 & 353.

(n75)Footnote 204. Unif. Simplification of Land Transfers Act § 3-306(2), 14 U.L.A. 50 (Supp. 1992).

(n76)Footnote 205. *See* Thomas W. Mapp, Torrens' Elusive Title (1978) which shows that even title registration systems fall short of achieving this goal.

(n77)Footnote 206. Model Marketable Title Act § 6; Lewis M. Simes & Clarence B. Taylor, The Improvement of Conveyancing by Legislation 6 (1960).

(n78)Footnote 207. Unif. Simplification of Land Transfers Act § 3-306(4), 14 U.L.A. 50 (Supp. 1992).

(n79)Footnote 208. Lewis M. Simes & Clarence B. Taylor, the Improvement of Conveyancing by Legislation 9 (1960); U.S. Dept. of Hous. & Urban Dev., Land Title Recordation Systems: Legal Constraints and Reforms II-59 to II-61 (1979); Kerri M. Millikan, *The Lucas Exception: Inclusion, Exclusion, and a Statute of Limitations, 68 Geo. Wash. L. Rev. 134 (Dec. 1999).*

(n80)Footnote 209. Unif. Simplification of Land Transfers Act § 3-306(1), 14 U.L.A. 50 (Supp. 1992).

(n81)Footnote 210. John C. Payne, *The Alabama Law Institute's Land Title Acts Project: Part I*, Ala. L. Rev. 175, 186 (1971).

(n82)Footnote 211. John C. Payne, *The Alabama Law Institute's Land Title Acts Project: Part I*, Ala. L. Rev. 175, 186 (1971).

(n83)Footnote 212. Lewis M. Simes & Clarence B. Taylor, the Improvement of Conveyancing by Legislation 246 (1960).

(n84)Footnote 213. Lewis M. Simes & Clarence B. Taylor, the Improvement of Conveyancing by Legislation 246 (1960).

(n85)Footnote 214. Lewis M. Simes & Clarence B. Taylor, the Improvement of Conveyancing by Legislation 246 (1960).

(n86)Footnote 215. U.S. Dep't of Hous. & Urban Dev., Land Title Recordation Systems Legal Constraints and Reforms II-62 (1979).

(n87)Footnote 216. U.S. Dep't of Hous. & Urban Dev., Land Title Recordation Systems Legal Constraints and Reforms II-62 (1979).

(n88)Footnote 217. Walter E. Barnett, *Marketable Title Acts - Panacea or Pandemonium, 53 Cornell L. Rev. 45, 87 (1967)* (noting preservation of a reversionary future interest by a re-recording is no guarantee that the interest has any social utility). While this is true, the act of preservation indicates that the actor thought that the interest was worth the cost of re-recording.

(n89)Footnote 218. Florida's marketable title act, for instance, denotes several exceptions to the act, such as easements and use restrictions, which are not extinguished. Fla. Stat. § 712.03. These exceptions apply, however, only when evidence of such restrictions can be found in prior recorded instruments or "muniments of title." *Id. See, e.g., Sunshine Vistas Homeowners Ass'n v. Caruana, 623 So. 2d 490 (Fla. 1993).*

(n90)Footnote 219. In many instances, statutes of limitation or the mere passage of time will terminate old defects, legally or practically.

(n91)Footnote 220. John C. Payne, *The Alabama Law Institute's Land Title Acts Project: Part I, 24 Ala. L. Rev. 175, 193 (1971).*

Thompson on Real Property, Thomas Editions

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CHAPTER 92 RECORDING, REGISTRATION, AND SEARCH OF TITLE

11-92 Thompson on Real Property, Thomas Editions § 92.07

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§ 92.07 Off the Record Risks.n221

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A major deficiency of recording systems as sources of land title assurance is that title as shown by the record and title in fact may be substantially different. Various claims and interests may be valid even though no reference to them appears in the record and even though a purchaser of the real estate does not have any kind of notice about them. These claims and interests are generally referred to as "off the record risks."

There are several types of off the record risks. They include governmental claims to real estate legally exempt from recordation requirements, defects due to recorded void conveyances, short-term leases, claims perfected by possession or not based on written instruments entitled to recordation, hidden mechanics' liens, risks due to indexing errors, and traditionally non-title related matters such as zoning, building laws and environmental restrictions.

§ 92.07(a) Federal Interests.

Under the Supremacy Clause of the United States Constitution, n222 real estate interests held by the United States and transfers by it are exempt from state recording laws unless a federal statute consents to the applicability of state recording laws to federal interests. The United States has consented to record its tax liens. n223 Generally, under federal statutes, an innocent purchaser of real estate from the taxpayer does not take subject to a tax lien unless the Internal Revenue Service has filed a notice of its lien in a place designated by state law. Most state laws designate the recorder's office for the county in which the real estate is located as the place of filing. n224 Additionally, the federal government follows a policy of recording instruments of conveyance when it acquires real estate. Except in cases where recordation is mandated by federal statute, however, a failure to record has no general legal effect and a purchaser's title is subject to any unrecorded federally owned interests.

§ 92.07(b) Recordation of Void or Defective Instrument.

Under recording statutes, instruments are not effective to transfer legal interests until they are properly executed. An instrument that appears to be valid on its face may be void or voidable because of non-delivery, forgery, incapacity, fraud or other reasons. Recordation of a void instrument does not make the conveyance effective, although recordation

may raise a presumption of execution. n225 Consequently, a purchaser of real estate under a recording act usually takes subject to a risk that title may be void or defective because of a void or defective link in the chain of title. n226 The recording system provides no protection to the subsequent purchaser because of the manner in which it operates. Recording systems void or subordinate prior unrecorded claims in favor of subsequent transferees entitled to the protection of the system, who are usually purchasers for value without notice. Recording statutes simply do not address the situation where there is a prior recorded void conveyance that a subsequent purchaser may have relied on as being an effective conveyance. n227

§ 92.07(c) Claims of Parties in Possession.

In many jurisdictions, a purchaser of real estate has a duty to physically inspect it and is charged with notice of all facts that a reasonable inspection would have revealed. Where this duty exists, an unrecorded claim may be perfected by its owner's possession.

§ 92.07(d) Short-Term Leases.

Many recording statutes exempt short-term leases from recordation. A majority of these statutes limit the exemption to leases for terms not exceeding one year (or terms of less than one year). The remaining statutes refer to two-, three-, five- or seven-year periods. In most of these statutes, the time period refers to the basic term of the lease. In several instances, however, the reference is from the time of its making to the end of the term. n228

The justification for exempting short-term leases from recording acts is to relieve lessees and recorders from the burdens involved with recording leasehold interests of brief duration and of normally little value. Usually, the purchaser will have notice of the lessee's interest because the lessee will be in possession. However, the exemption preserves leases that otherwise might be extinguished by recording acts regardless whether the tenant is in possession. It is not likely that this would result in hardship to purchasers of the real estate in most cases. However, in some cases even a short-term lease could have a severe impact on a purchaser's plans for the future development, sale or use of the property.

§ 92.07(e) Claims Not Based on Written Instruments.

Recording acts operate by voiding or subordinating claims to real estate evidenced or created by written instruments in favor of subsequent purchasers qualified for the protection of the acts. Some claims to real estate are not based on or created by instruments. Recording acts do not apply to such claims because there is nothing to record. These claims include adverse possession and easements by prescription or implication.

Under the doctrine of adverse possession, a person in wrongful possession of the land of another may acquire title to the property. The length of the adverse possession must be for the period of time under the applicable statute of limitation in which the owner could bring an action to remove the adverse possessor. n229

Prescription is similar to adverse possession. Prescription involves adverse use of the land. If no action is brought to terminate the adverse use within the period established by the statute of limitations, the owner is barred from bringing an action. The adverse user acquires an easement by prescription, giving the user a legal right to continue the use. n230

An easement by implication does not involve adverse use or statutes of limitation. Such an easement is based on an implication of an intent to create it. An easement by implication may arise where a use of one part of a parcel of real estate then in single ownership benefits another part of that same parcel. When the parcel of land is subdivided in a manner that separates the portion of the parcel benefitted from the portion of the parcel that provided the beneficial use, an easement may arise by implied grant or reservation if the use would be apparent to a purchaser of the burdened portion, i.e., the parcel that provided the benefit. n231 Such an easement will give the owner of the portion benefitted a

legal right to continue the use of the burdened portion, even though it is owned by someone else. For example, suppose a parcel with a building that has a utility pipe running underground from the building out to an exterior facility. The parcel is then subdivided so that part of the underground pipe and the building are now on separate parcels. An easement appurtenant to the parcel with the structure may be implied giving its owner the right to maintain the pipe through the other parcel. In cases involving buried pipes or other facilities, there may be a serious question about whether the adverse use was sufficiently apparent to a subsequent good faith purchaser of the burdened parcel to give rise to an implied easement. n232

Possession or use alone may be adequate to give a purchaser notice of the possessor's or the user's claim. A purchaser of real estate is generally obliged to make a reasonable physical inspection of the property. The inspection will normally uncover possessory claims to the real estate or, at least, give the purchaser reason to conduct further inquiries which may reveal the existence of adverse claims. While adverse possession or use must be open and notorious for it to ripen into title or an easement, once the statute has tolled, the adverse claim may be valid against a good faith purchaser, even if the possession or use is no longer apparent. n233 The leading case supporting this proposition is *Mugass v. Smith*. n234

In Mugass v. Smith, Mrs. Mugass was in adverse possession of a strip of land adjacent to her property for the requisite period of time to acquire title. During the period of adverse possession, a fence on the property provided some physical notice of the adverse possession. But after the claim ripened into title, the fence disintegrated. When the defendants purchased the property which had once included the strip acquired by Mugass, the fence no longer existed. The defendants claimed that they acquired the strip as bona fide purchasers of the real estate because the record did not disclose Mugass's claim and there was no physical indication of it. The Washington Supreme Court disagreed, concluding that the recording act did not apply to a transfer of title by adverse possession because no unrecorded instrument was involved. Recording acts void or subordinate prior unrecorded claims based on written instruments.

While Mugass v. Smith is consistent with basic recording act principles, its negative impact on facility of transfer is obvious. If the adverse possessor does not have to remain in possession to preserve the claim once it has ripened, purchasers from or through the former owner may have no notice of any kind of it. Furthermore, it seems anomalous to require implied easements to be preserved by apparent use without requiring the same for adverse possession titles and prescriptive easements. Identical considerations are involved: possessory claims to real estate not created by documents and the rights of subsequent purchasers.

§ 92.07(f) Spousal Rights.

Various claims may attach to real estate through the marital relationship. These include dower n235 and curtesy, n236 homestead rights, n237 and community property rights. n238 These interests do not have to be recorded to be enforceable against subsequent good faith purchasers. n239

It is customary to specify the marital status of an individual party to a deed so that title examiners are able to ascertain whether marital claims may be attached to the title being examined. n240 Indeed, the custom is so well established that title examiners may object if the marital status of an individual party to a deed in the chain of title is not specified. n241 While it is customary to state marital status, there is no assurance that the statement is accurate. If the statement is inaccurate, there may be no recourse against the person, if any, responsible for the inaccuracy.

At common law, dower and curtesy were a significant cause of insecurity and unmarketability of titles because dower and curtesy attached to all real estate owned in fee simple or fee tail by the other spouse during the marriage, not just to real estate owned at death. A spouse could release a dower or curtesy interest by joining in a conveyance of the property. If the interest was not released, the spouse's interest in the real estate became possessory if he or she survived the spouse who once owned the property, even if the property was now held by an innocent third party purchaser.

Where the record indicated that the real estate was transferred by a married individual whose spouse did not join in the conveyance or otherwise waive the dower or curtesy right, it was clear that a title defect was created. Where the record indicated that a conveyance was made by an unmarried person, it was always the possible that the individual was, in fact, married at the time. If so, the spouse of that individual may have had a valid dower or curtesy interest in the property that was not extinguished. Today, in most states, dower and curtesy are no longer the plague on title examiners that they once were. Curtesy has been universally abolished n242 and dower also has been abolished in most states. n243 In some states that still retain dower, it applies only to real estate owned by the decedent spouse at death. n244 This modification of common-law dower eliminates the most objectionable feature of it from the title examiner's perspective, because the examiner does not have to be concerned about whether a dower right may have attached to the title through some prior owner.

Homestead rights remain a source of some concern for title examiners. n245 Homestead rights are state constitutional or statutory rights. Any possessory interest in property that is used as a home may be homestead property. The homestead may be titled in the name of any member of a family. Usually, the real estate will be held in the name of the husband or wife, or in the names of both spouses. If the homestead is owned solely by the husband or wife, it cannot be transferred free of homestead rights unless the instrument of conveyance is executed by both spouses in the manner prescribed by statute. n246

Homestead rights create problems for title examiners because it is frequently impossible to determine from the records whether property was a homestead at the time it was conveyed. If a conveyance in the chain of title of real estate was made by a married person, with no release of the homestead right by the other spouse, it is possible that the conveyance was void or defective if the property was, in fact, a homestead.

Various factors ameliorate the impact of homestead rights on marketability of titles. Homestead rights may be terminated by abandonment or divorce. A few states have curative acts that remove defects caused by homestead rights, usually after the conveyance made by the titled spouse has been recorded for a period of time. n247 The Model Act Limiting Actions with Respect to Marital Interests in Real Property bars actions asserting homestead rights where the conveyance made by only one spouse has been recorded for twenty years. n248 Because the maximum duration of a homestead right is for a spouse's life, the passage of time also works to cure defects due to homestead rights. Some title examination standards reflect this by providing that the failure of a spouse to join in a conveyance may be disregarded if a specific period of time has passed since the conveyance was executed or recorded. n249

In the nine community property states, n250 real estate may be titled in only one spouse but still be owned by both in community. Statutes in some community property states provide that conveyances of community real estate made by one spouse are void unless the spouse conveying the property has a sufficient power of attorney from the other spouse. n251 This is true even if the property is titled in the sole name of the conveying spouse. Such a conveyance may be void even if made to good faith purchasers. n252

§ 92.07(g) *Lis Pendens*.

The common-law doctrine of *lis pendens* created a serious risk for real estate purchasers. While it is not completely accurate to call this risk an "off the record" one, it was such a risk *de facto*. The common law doctrine of *lis pendens* provided that a purchaser of real estate involved in litigation was bound by the eventual outcome. The filing of a complaint involving real estate was constructive notice to purchasers that the property was in litigation. n253

The *lis pendens* doctrine assured that the court retained power over property involved in the litigation regardless of whether a purchaser knew of the pending litigation. n254 The property could be transferred during the pendency of the suit but the purchaser was bound by the court's judgment because filing the suit gave constructive notice of the litigation to any subsequent purchaser.

While purchasers took with constructive notice of pending litigation, as a practical matter, it was often very difficult, if not impossible, for them to learn of it by searching court records. To ameliorate the often harsh impact of *lis pendens* on innocent purchasers, statutes were enacted in most states requiring the filing of notice of pending litigation concerning real estate in recorders' offices. n255 This notice must identify the pending action, the parties to it and the property. n256 These filing requirements make it much less difficult for prospective purchasers to discover whether particular real estate is the subject of litigation.

§ 92.07(h) Hidden Mechanics' Liens.

Mechanics' lien acts give persons who furnish labor or material to real estate the right to obtain liens on the real estate to secure payment. n257 These liens are purely statutory and were unknown at common law. Such liens present a serious off the record risk to real estate purchasers. n258 The person furnishing labor or material to premises may have a fixed period of time after the completion of the work to perfect the lien by filing notice of it in the recorder's office. n259 The priority of a lien that has been properly filed will relate back to some earlier date. n260 In many states, all mechanics' liens relating to a particular construction project relate back to the beginning of the project, including the liens of mechanics whose work was done at some time after the project was commenced. n261 This relation back aspect of mechanics' lien laws is responsible for the "hidden" mechanic's lien. A person may purchase real estate subject to an unfiled mechanic's lien. If the mechanic files within the statutory period, the priority of the lien may relate back to some time before the purchase was made. The lien will have priority over the purchaser, even though the lien was not of record at the time of purchase and the purchaser had no notice of the lien. Physical inspection of the property may reveal recent improvements or repairs which may indicate a greater probability that there may be hidden mechanics' liens. Affidavits and other statements by sellers, owners or other parties may provide some protection, but the most effective protection is title insurance to cover the risk.

§ 92.07(i) Indexing Errors and *Idem Sonans*.

Because of the great number of recorded instruments, the title searcher must use indexes to locate the instruments pertaining to a particular title or interest. If an indexing error is made, an instrument may be difficult or impossible for a title searcher to find. n262 In 1864, in distinguishing a Vermont case, the Iowa Supreme Court described the critical importance of indexes to title searchers:

> With us the practice has always been to search for titles through the names of the successive owners, and by means of the index. With us alienations of real estate are easy and numerous. There is not, as in Vermont, a registry in each town, but only one for each county. The record books are consequently numerous and voluminous. It is utterly impracticable to examine them page by page. It is stated in the argument that the record books in Lee county already number some thirty volumes. An index is a necessity... .
>
> A deed, in the language of counsel, might as well be "buried in the earth as in a mass of records without a clue to its whereabouts,' or in the language of the Supreme Court of Vermont,... the instrument might as well be written "on a slate or copied into the Recorder's family Bible, as into a book without being indexed'. n263

Although it is difficult or impossible to locate relevant documents without the aid of an index, the prevailing view in the United States is that the index is not an essential part of the record. n264 An innocent purchaser of real estate is deemed to have notice of a recorded document even if an error in indexing made it very difficult or impossible for a title searcher to find the document in the course of a reasonable search. n265 Some courts adopting this view have argued that it is unfair to penalize a party initiating recording because of the negligence of the recording officer. It also has been asserted that it would be impractical to require the party initiating recording to verify that the instrument has been properly recorded and indexed. The Supreme Court of Vermont asserted that if the recorder does not promptly complete the task of recording and indexing, several visits to the recorder's office might be necessary to see if the work has been

properly completed. n266 Furthermore, the Court said that imposing on a grantee the responsibility to check the recorder's work would particularly disadvantage an "out-of-state filer." n267

Whether a purchaser should have record notice of a recorded but misindexed instrument is an issue of risk allocation. Frequently, misconduct by a party is the basis for allocating a risk; however, the reported cases dealing with misindexing usually involve situations where neither party was guilty of misconduct. n268 In allocating the risk to either the party initiating recording or the subsequent purchaser, the cost of avoiding the risk may be a consideration. The cost to the party initiating recording to review the work of the recorder would not be great. n269 At most, it would involve a single visit to the recorder's office by the party or his or her agent. Usually, repeated visits would not be necessary. The party initiating recording in many places will direct the recorder to return the original document to the party after the recording process has been completed. The return of the document to the party may serve as notice that the recorder believes that the process of recording has been completed. Upon receipt of such notice, the party could then verify that the instrument has been properly recorded and indexed. An out-of-state filer could have an agent such as a title company or attorney review the work of the recorder. On the other hand, the subsequent purchaser has no efficient way to uncover indexing errors. Generally, the only way for the purchaser to check would be by examining every recorded conveyance. Finally, the recording system goal of facilitating real estate transfer is better served by a more reliable record. The reliability of the record would be enhanced if the index is held to be an essential part of it and the party initiating the recording was required to review the recorder's work or bear the risk that an error was made. As applied to title searching, the doctrine of *idem sonans* accords constructive notice to different spellings of the record owner's name if they are pronounced alike and begin with the same letter. However, recent cases demonstrate courts' reluctance to apply or extend the doctrine. n270

§ 92.07(j) Encroachments.

Encroachment defects are ascertainable through surveys or physical inspection of the property but they normally will not appear on the record. There are two types of title defects due to encroachments:

(1) a structure on the subject property encroaches on adjacent property or violates a building line on the subject property established by a restriction for the benefit of adjacent property; or

(2) a structure on adjacent property encroaches on the subject property or violates a building line established for the benefit of the subject property. n271

If the encroachment is substantial, it creates a title defect which may render the title unmarketable. n272 Both types may present serious title problems. However, the first type is usually more serious because it may result in the costly removal or even destruction of the encroaching structure. The second type presents a serious problem when the encroachment interferes with the beneficial use of the subject property. An examination of a current survey of the property can provide a real estate purchaser with satisfactory protection against encroachments defects because the survey will normally reveal them. Where the encroachment involves a structure on the subject property crossing a building or lot line, title insurance coverage of the risk may be available. n273

§ 92.07(k) Planning, Zoning, Building and Environmental Regulations.

Restrictions on ownership and use created by planning, zoning, building and environmental laws traditionally have not been considered title matters, although violations have sometimes been considered title defects. n274 Recording systems typically do not include information regarding restrictions on ownership and land use created by such laws, even though these restrictions may have a dramatic impact on real estate value or suitability for a purchaser's intended use. By the 1960s, with powerful computer technology widely available, proposals surfaced to create computer data banks containing a wide variety of data about individual real estate parcels. n275 Some of these proposals recommended the inclusion of data on applicable planning, zoning and similar laws not contained in existing recording

systems. n276 It is questionable whether land title records should contain information about planning, zoning and similar laws. The experience of the title industry is instructive.

Title insurance companies were reluctant to provide zoning coverage because of difficulties in determining the zoning classification and provisions applicable to specific properties. n277 Standard American Land Title Association title insurance policies exclude from coverage any losses caused by a "law, ordinance or government regulation (including, but not limited to, building and zoning ordinances ...)." n278 Under pressure from lending interests, the title insurance industry agreed to offer limited zoning coverage by endorsement to policies. n279 If title insurance companies find that zoning coverage involves personnel and administrative problems, government should anticipate similar difficulties in attempting to store zoning and other land use legislation information for particular parcels.

COMPUTER-ASSISTED RESEARCH

LEXIS: negative easement
easement w/30 "prior use"
plat! subdiv! w/20 impli! w/30 easement
easement w/30 statute of limitation*
covenant w/10 run**** w/10 land
covenant w/30 statute of frauds
inten! w/10 covenant w/10 run**** w/10 bind***
dower w/10 deed or title
curtesy w/10 deed or title
homestead w/10 deed or title
community property w/10 deed or title
lis pendens w/10 deed or title
idem sonans w/10 deed or title
encroach! w/10 deed or title

FOOTNOTES:
(n1)Footnote 221. Portions of the text in § 92.07 have been adapted from John L. McCormack, *Torrens and Recording: Land Title Assurance in the Computer Age, 18 Wm. Mitchell L. Rev. 61 (1992),* and used with the permission of the *William Mitchell Law Review.*

(n2)Footnote 222. U.S. Const. art. VI.

(n3)Footnote 223. I.R.C. §§ 6321, 6322, 6323; George E. Osborne, Handbook on the Law of Mortgages § 221A (2d ed. 1970).

(n4)Footnote 224. *See* Unif. Fed. Tax Lien Registration Act, 7A U.L.A. 373.

(n5)Footnote 225. 1 Rufford G. Patton & Carroll G. Patton, Patton on Land Titles § 62 (1957). The presumption may be based on case law or a statute. *See* Utah Code Ann. § 57-4a-4 for an example of a very specific set of presumptions raised by recordation.

(n6)Footnote 226. The purchaser may prevail where the true owner is estopped from claiming priority.

(n7)Footnote 227. *Stone v. French, 14 P. 530 (Kan. 1887).*

(n8)Footnote 228. Ind. Code Ann. § 32-1-2-11; Mass. Ann. Laws ch. 183, § 4 (Law. Co-op.); and Vt. Stat. Ann. tit. 27, § 342.

(n9)Footnote 229. *Erck v. Church, 11 S.W. 794 (Tenn. 1889); Wilson v. Braden, 49 S.E. 409 (W. Va. 1904); Pittman v. Cottonwood Sch. Dist. No. 4, Coal County, 614 P.2d 582 (Okla. App. 1980). Denman v. Gans, 607 N.W.2d 788 (Minn. Ct. App. 2000)* (finding that, between co-tenants, the limitations period does not begin to run until there has been an ouster).

(n10)Footnote 230. *State ex. rel. Haman v. Fox, 594 P.2d 1093 (Idaho 1979); Leesch v. Krause, 65 N.E.2d 370 (Ill. 1946); Northwest Cities Gas Co. v. Western Fuel Co., 123 P.2d 771 (Wash. 1942); Haines v. Galles, 303 P.2d 1004 (Wyo. 1956).*

(n11)Footnote 231. *Tiller v. Hinton, 482 N.E.2d 946 (Ohio 1985).* Canali v. Satre, *appeal denied, 699 N.E.2d 1030 (Ill. 1998). 688 N.E.2d 351, 353 (Ill. App. Ct. 1997)* ("an easement implied from a prior existing use arises by law when one portion of an estate derives a benefit and advantage from another, of a permanent, open, and visible character; when that portion is severed, the grantee takes that portion with all the benefits and burdens that appear to belong to it"); Tedder v. Alford, *review denied, 501 S.E.2d 917 (N.C. 1998). 493 S.E.2d 487 (N.C. App. 1997); Penny v. Burch, 941 P.2d 1049 (Or. App. 1997).*

(n12)Footnote 232. *Otero v. Pacheo, 612 P.2d 1335 (N.M. App. 1980)* (concluding that the purchasers had notice from the "visibility" of a buried sewer line); *see also*, Annotation, *Implied Easement in Respect of Drains, Pipes or Sewers Upon Severance of Tract*, 58 A.L.R. 824 (1929).

(n13)Footnote 233. *Mugass v. Smith, 206 P.2d 332 (Wash. 1949); Crescent Harbor Water Co. v. Lyseng, 753 P.2d 555 (Wash. App. 1988).*

(n14)Footnote 234. *206 P.2d 332 (Wash. 1949).*

(n15)Footnote 235. Powell on Real Property § 15.04 (Michael Allan Wolf ed., Matthew Bender).

(n16)Footnote 236. Powell on Real Property § 15.05 (Michael Allan Wolf ed., Matthew Bender). Curtesy was a right given to surviving widowers.

(n17)Footnote 237. Thomas E. Atkinson, Handbook of the Law of Wills § 34 (2d ed. 1953).

(n18)Footnote 238. Statutes in some jurisdictions protect bona fide purchasers of community real estate where title was held in the name of only one of the spouses. W.S. Mcclanahan, Community Property in the United States § 9.10 (1982).

(n19)Footnote 239. *Smith v. Fuller, 115 N.W. 912 (Iowa 1908).*

(n20)Footnote 240. In a few states, recital of the marital status of individual parties to instruments is one of the qualifications for recordation. Paul E. Basye, Clearing Land Titles § 35 (2d ed. 1970).

(n21)Footnote 241. Paul E. Basye, Clearing Land Titles § 276 (2d ed. 1970).

(n22)Footnote 242. The term "curtesy" is still used in a few states. "Curtesy" in these states refers to a form of dower for surviving husbands. Powell on Real Property § 15.05 (Michael Allan Wolf ed., Matthew Bender).

(n23)Footnote 243. Powell on Real Property § 15.04 (Michael Allan Wolf ed., Matthew Bender).

(n24)Footnote 244. Conn. Gen. Stat. Ann. § 45a-436.; Mass. Gen. Laws Ann. ch. 189, § 1.

(n25)Footnote 245. 2 Rufford G. Patton and Carroll G. Patton, Patton on Land Titles §§ 395, 396 (1957).

(n26)Footnote 246. For example, in Illinois the instrument of conveyance must contain "a clause expressly

releasing or waiving [the homestead] ... right." 765 Ill. Comp. Stat. 5/27. Where the right is limited to a maximum value, a conveyance made by one spouse may be effective to transfer the property that is subject to the homestead right to the extent of the land's excess in value over the statutory amount. The deed coveys no interest and the title remains in the grantor for all homestead property whose value does not exceed the statutory amount. *Mitchell v. Mitchell, 159 N.E. 274 (Ill. 1927); White v. Van Patten, 117 N.E. 472 (Ill. 1917).*

(n27)Footnote 247. Paul E. Basye, Clearing Land Titles § 275 (2d ed. 1970).

(n28)Footnote 248. Model Act Limiting Actions with Respect to Marital Interests in Real Property, § 3 (reprinted in its entirety in Lewis M. Simes & Clarence B. Taylor, the Improvement of Conveyancing by Legislation 192-194 (1960)).

(n29)Footnote 249. For example, in Illinois, the period is twenty years. "Failure to properly convey homestead shall be disregarded after twenty years from the date of conveyance in the absence of evidence that homestead is being claimed by virtue of such failure to convey." Ill. State Bar Ass'n, Revised Recommended Uniform Rules for the examination of Abstracts of Title Rule 6-2 (1959).

(n30)Footnote 250. These states are Arizona, California, Idaho, Louisiana, Nevada, New Mexico, Texas, Washington, and Wisconsin. Wisconsin joined the community property states in 1986 when the Wisconsin Marital Property Act became effective. *See* W.S. Mcclanahan, Community Property in the United States 270-86 (1982).

(n31)Footnote 251. Idaho Code § 32-912; La. Civ. Code Ann. art. 2347; Nev. Rev. Stat. Ann. § 123.230; and N.M. Stat. Ann. § 40-3-13.

(n32)Footnote 252. In *Marquez v. Marquez, 513 P.2d 713 (N.M. 1973),* the titled spouse purported to convey community real estate to his son and his wife. The grantor's wife died and the son and his wife then sued to quiet title in the property. The New Mexico Supreme Court held that the grantor's deed was a nullity because his wife did not join and, therefore, he was the owner of the property. California also requires conveyances of community real estate to be made jointly by both spouses. Where the real estate is titled in the name of one of the spouses, however, a conveyance made by the titled spouse is not void, only voidable. A conveyance made by the titled spouse to a purchaser in good faith without knowledge of the marriage relation is presumed to be valid. Furthermore, after a conveyance by the titled spouse of community real estate held in the name of that spouse only has been recorded for one year, an action to set it aside is barred by statute. Cal. Civil Code § 5127. *But see* Wis. Stat. Ann. § 766.57 which protects bona fide purchasers who take title from a solely titled spouse.

(n33)Footnote 253. *Admiral Bldrs. Corp. v. Robert Hall Village, 427 N.E.2d 1032, 1035 (Ill. App. Ct. 1981). Matter of 2003 & 2007 Ala Wai Blvd, City & County of Honolulu, 944 P.2d 1341 (Haw. App. 1997)* (*lis pendens* gives constructive notice to any prospective purchaser that the property is the subject of ongoing litigation and that the purchaser will be bound by the outcome of the litigation); *Cortellesso v. Zanni, 694 A.2d 751 (R.I. 1997); Disabatino v. Salicete, 695 A.2d 1118 (Del. 1997); Breeding v. NJH Enters., LLC., 940 P.2d 502 (Okla. 1997); Garza v. Pope, 949 S.W.2d 7 (Tex. App. 1997); Redondo Const. Corp. v. U.S., 157 F.3d 1060 (6th Cir. 1998)* (under Kentucky law, lis pendens notice alone does not create lien on property, referring to KRS 382.440); *Sheehan v. Mahoney Chevrolet-Olds, Inc., 23 F. Supp. 2d 926 (N.D. Ind. 1998)* (purpose is to give constructive notice to third parties); *U.S. v. Property Identified as Lot Numbered 718, 20 F. Supp. 2d 27 (D.D.C. 1998)* (lis pendens in civil forfeiture action); *In re Lee, 223 B.R. 594 (Bankr. M.D.Fla. 1998)* (Under Florida law, filing lis pendens does not create a lien); *In re Borison, 226 B.R. 779 (Bankr. S.D.N.Y. 1998)* (purpose under Oklahoma law); *In re Medlin, 229 B.R. 353 (Bankr. E.D.N.C. 1998)* (under North Carolina law, lis pendens puts world on notice of attachment to property); *Lewis v. Jordan Inv., Inc., 725 A.2d 495 (D.C. 1999)* (under lis pendens, one acquiring interest in property while suit is pending is bound by the results of the litigation); *Russell v. Lawrence, 507 S.E.2d 161 (Ga. App. 1998)* (referring to Ga. Code Ann. § 23-1-18); *Grubb v. Childers, 705 N.E.2d 180 (Ind. App. 1998)* (lis pendens allows person to put third parties on notice that interest in real property is subject of pending legal dispute); *Crawfordsville Apt. Co. v. Key Trust Co. of Florida, 692 N.E.2d 478 (Ind.*

App. 1998) (referring to West's A.I.C. 34010401 *et seq*); *Savasta v. Duffy, 683 N.Y.S.2d 511 (N.Y. App. Div. 1999)* (cooperative apartment shares are not real property, and no lis pendens is required); *Lake George Park, L.L.C. v. IBM Mid America Employees Federal Credit Union, 576 N.W.2d 463 (Minn. App. 1998)* (lis pendens provides notice of claim but does not change parties' rights); *Interlaken Service Corp. v. Interlaken Condo. Ass'n, Inc., 588 N.W. 2d 262 (Wis. App. 1998)* (plaintiff which brought action for breach of contract seeking money damages against condominium association could properly file lis pendens, since any judgment would be a judgment against each unit in a proportional share); *TSA Int'l Ltd. v. Shimizu Corp., 990 P.2d 713 (Haw. 1999)* (stating that "[a]t common law under the doctrine of lis pendens the mere existence of a lawsuit affecting real property was considered to impart constructive notice that anyone who acquired an interest in the property after the suit was filed would be bound by any judgment in that suit").

(n34)Footnote 254. 5303 *Realty Corp. v. O & Y Equity Corp., 476 N.E.2d 276, 280 (N.Y. 1984). In re Borison, 226 B.R. 779 (Bankr. S.D.N.Y. 1998)* (lis pendens supports jurisdiction, power, and control which court retains over property).

(n35)Footnote 255. *See, e.g., Admiral Bldrs. Corp. v. Robert Hall Village, 427 N.E.2d 1032, 1036 (Ill. App. 1981); In re Thomas and Agnes Carvel Found., 36 F. Supp. 2d 144 (S.D.N.Y. 1999)* (state statute [N.Y. McKinney's CPLR 6501] requires plaintiff to file lis pendens, and federal district court could not validly file lis pendens with land records at request of plaintiff).

(n36)Footnote 256. *See, e.g.*, 735 Ill. Comp. Stat. 5/2-1901. *In re Borison, 226 B.R. 779 (Bankr. S.D.N.Y. 1998)* (party in federal action must still comply with statutory requirements of state law); *Stratman v. Leisnoi, Inc., 969 P.2d 1139 (Alaska 1998)* (administrative action to decertify native village was pending action for purposes of lis pendens statute, referring to AS 09.45.940); *Joge Investments, Inc. v. Millennium Capital, 724 So. 2d 728 (Fla. App. 1999)* (lis pendens was defective when it did not make proper statement of relief sought and failed to include the time of the institution of the action); *Rose v. Montt Assets, Inc., 673 N.Y.S.2d 406 (N.Y. App. Div. 1998)* (litigant must strictly comply with statutory requirements); *Doughty v. Birkholtz, 964 P.2d 1108 (Or. App. 1998)* (subject of suit must be actual interest in property, not a speculative future one).

(n37)Footnote 257. *See generally* Grant S. Nelson & Dale A. Whitman, Real Estate Finance Law § 12.4 (2d ed. 1985). *Westminster v. Brannan Sand & Gravel Co., Inc., 940 P.2d 393 (Colo. 1997)* (finding that the mechanic's lien relates back to the time the lienholder commenced work).

(n38)Footnote 258. The seriousness of this risk is indicated by the claims experience of title insurance companies. Their aggregate annual claim payments due to losses caused by mechanics' liens have ranged over a number of years from 8.7% to 22% of total annual claims paid. Jack Tickner, *Mechanics Liens*, Title News, Jan. 1976, at 40.

(n39)Footnote 259. For example, in Minnesota, the period is 120 days. Minn. Stat. Ann. § 514.08. The date of completion may be at issue and difficult to determine. *See, e.g., Daily v. Mid-America Bank & Trust Co. of Carbondale, 474 N.E.2d 788 (Ill. App. 1985).*

(n40)Footnote 260. Grant S. Nelson & Dale A. Whitman, Real Estate Finance Law § 12.4 (2d ed. 1985).

(n41)Footnote 261. Robert Kratovil, Modern Mortgage Law and Practice § 214 (1972).

(n42)Footnote 262. In some places with official grantor-grantee indexes, it is impossible to find desired information using the official index, which results in the searcher resorting to an unofficial tract index to find the desired information. With photographic copying methods, recording errors are presently rare. However, consider *First Constitution Bank v. Harbor Village L.P., 230 Conn. 807 (1994)*, where the Supreme Court of Connecticut validated a mechanic's lien even though the description of the property, required by law to be attached to the certificate of the mechanic's lien, became detached from the certificate before it was recorded.

(n43)Footnote 263. *Barney v. McCarty, 15 Iowa 510, 520-21 (1864).* Currently, there are hundreds of thousands

and even millions of documents lodged in some recorders' offices. U.S. Dep't of Hous. & Urban Dev., Land Title Recordation Systems: Legal Constraints and Reforms [unpublished] II-21 (1979).

(n44)Footnote 264. *Gregor v. City of Fairbanks, 599 P.2d 743 (Alaska 1979); Haner v. Bruce, 499 A.2d 792 (Vt. 1985);* and 4 American Law of Property § 17.25 (A. James Casner ed., 1952); Annotation, *Failure Properly to Index Conveyance or Mortgage of Realty Affecting Constructive Realty Affecting Constructive Notice*, 63 A.L.R. 1057 (1929). Statutes in some states make the index an essential part of the record. 1 Rufford G. Patton & Carroll G. Patton, Patton on Land Titles § 68 (2d ed. 1957).

(n45)Footnote 265. *Gregor v. City of Fairbanks, 599 P.2d 743 (Alaska 1979); Haner v. Bruce, 499 A.2d 792 (Vt. 1985).*

(n46)Footnote 266. *Haner v. Bruce, 499 A.2d 792 (Vt. 1985).*

(n47)Footnote 267. *Haner v. Bruce, 499 A.2d 792 (Vt. 1985)* Some courts, however, have held that the index does constitute an essential part of the record, and the title searcher will therefore be considered to have no constructive notice of a recorded instrument that cannot be found through the official index. D. Barlow Burke, Real Estate Transactions 178 (1993). Courts in Iowa, North Carolina, Pennsylvania, Washington, and Wisconsin treat indexing as the final necessary step in recording. An innocent purchaser therefore has no obligation to check the record for mistakes in indexing. *Id. In Mlecka v. Citrus County, 610 So. 2d 677 (Fla. App. 1992),* a Florida appellate court also refused to hold the innocent purchaser responsible for indexing errors. *See also* Curtis J. Berger & Quintin Johnstone, Land Transfer and Finance 756 (4th ed. 1993).

(n48)Footnote 268. *See, e.g., Mortensen v. Lingo, 99 F. Supp. 585 (D. Alaska 1951).*

(n49)Footnote 269. *See Prouty v. Marshall, 74 A. 550 (Pa. 1909)* (holding that a person who initiated recordation has a duty to see that the instrument was properly recorded).

(n50)Footnote 270. *See, e.g., Teschke v. Keller, 650 N.E.2d 1279 (Mass. App. 1995)* (recording under hyphenated name insufficient to provide constructive notice); *Orr v. Byers, 244 Cal. Rptr. 13 (1988)* (variant spelling did not impart constructive notice to bona fide purchaser).

(n51)Footnote 271. 2 Rufford G. Patton & Carroll G. Patton, Patton on Land Titles § 676 (2d ed. 1957).

(n52)Footnote 272. 2 Rufford G. Patton & Carroll G. Patton, Patton on Land Titles § 676 (2d ed. 1957); *Warner v. Denis, 933 P.2d 1372 (Haw. App. 1997)* (encroachment was sufficient to make title to remainder of property unmarketable).

(n53)Footnote 273. *Title Insurance: The Lawyer's Expanding Role*, 1985 A.B.A. Sect. Pub. Real Property, Probate and Trust Law 160 (James M. Pedowitz ed.); Michael J. Rooney, Attorneys' Guide to Title Insurance 7-17 (Ill. Inst. for CLE, 1984); Charles B. Allott, *The Ebb and Flow of the Public Trust Doctrine, 48 RI Bar J. 5 (June 2000).*

(n54)Footnote 274. 2 Rufford G. Patton & Carroll G. Patton, Patton on Land Titles § 676 (2d ed. 1957). *WorldCom Network Services, Inc. v. Thompson, 698 N.E.2d 1233 (Ind. App. 1998)* (public highway right-of-way established by 1905 law not required to be recorded in county recorder's office).

(n55)Footnote 275. *See* Robert N. Cook, *Land Data Systems: The Next Step, 43 U. Cin. L. Rev. 527, 527-38 (1974).*

(n56)Footnote 276. For a fairly recent proposal,*see* A.G. Lang, *Computerized Land Title and Land Information, 10 Monash U. L. Rev. 196, 209-13 (1984).*

(n57)Footnote 277. *See* Charles C. Smith, *Title Insurance and Zoning Coverage*, the Guarantor, Spring 1976, at 3.

These difficulties included retaining persons competent to sort through complex zoning ordinances and the poor record-keeping of some municipalities. Smith also suggested that providing zoning coverage might constitute the unauthorized practice of law.

(n58)Footnote 278. Usually, this provision is found in Part One of the "Exclusions From Coverage" in standard A.L.T.A. policies. D. Barlow Burke, Jr., Law of Title Insurance § 3.2 (1986).

(n59)Footnote 279. *See* Allen Axelrod et al., Land Transfer and Finance: Cases and Materials 798-99 (3d ed. 1986).

Thompson on Real Property, Thomas Editions

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CHAPTER 92 RECORDING, REGISTRATION, AND SEARCH OF TITLE

11-92 Thompson on Real Property, Thomas Editions § 92.08

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§ 92.08 Types of Recording Acts.

[Go To Supp]

At the time that American states or territories first adopted recording statutes, there was no uniform or model recording act. As a result, there is much diversity in the specific wording of these acts. However, some of the acts are similar because some states or territories modeled their legislation after the recording statutes of other states. n280 While the recording acts are far from uniform, there are only three basic types:

(1) race,

(2) notice, and

(3) race-notice. n281

Recording acts operate by conferring priorities on persons who qualify for the protection of the acts. The three types of acts differ in the requisites for qualifying for protection.

§ 92.08(a) Race Recording Acts.

The race recording act is the oldest type of recording act. n282 Such an act protects the first purchaser to record. While one must be a purchaser to be protected, notice or knowledge of prior unrecorded claims is irrelevant. For example, if the owner conveys to Purchaser 1, who does not record, and then to Purchaser 2, who does record, Purchaser 2 has priority over Purchaser 1. It does not matter whether Purchaser 2 had knowledge or notice of the conveyance to Purchaser 1. This type of recording act is called "race" because it involves a race to record. The purchaser who wins the race prevails.

Race recording acts of general application are found in only two states: Louisiana and North Carolina. n283 Some other states have race statutes applicable to mortgages, but have notice or race-notice statutes for other conveyances. n284

The strengths of a race recording act are simplicity and certainty of application. The purchaser shown by the record to be the first to record has priority. The record is very reliable because notice or knowledge is irrelevant. There is no chance that the first person to record may be disqualified due to knowledge or notice of some prior unrecorded claim. The weakness of a race recording act is that it gives no deference at all to the fundamental notion of Anglo-American justice that persons who take with notice of an interest should be bound by it. n285

§ 92.08(b) Notice Recording Acts.

About half of the states have notice type recording acts. n286 The notice type recording acts developed mainly through judicial decisions interpreting race recording acts. By the early 1800s, courts had held that if a subsequent purchaser had notice of a prior unrecorded instrument, the subsequent purchaser could not attain priority over the prior claimant. To hold otherwise, would work a fraud on the prior claimant. n287 Gradually, legislation was enacted to require those seeking the protection of recording acts to be without notice of prior unrecorded claims to prevail over them.

Notice recording acts confer on subsequent purchasers, who pay value without notice or knowledge of the prior unrecorded claims, priority over them. One need not record to qualify for the protection of a notice type recording act. For example, if the owner conveys to Purchaser 1, who does not record, and then to Purchaser 2 who pays value without knowledge or notice of the conveyance to Purchaser 1, Purchaser 2 has priority even if Purchaser 2 has not recorded. If Purchaser 1 then records before Purchaser 2 does, the recordation has no effect. Purchaser 2 retains priority.

Notice statutes are more in accordance with our notions of fairness and justice than race recording acts. Under a notice act, a purchaser who takes with notice of a prior conflicting unrecorded claim is not protected while such a purchaser will be protected under a race statute. Notice recording acts, therefore, may lead to fairer results. But this greater fairness is achieved at the expense of efficiency and reliability of the record. Whether a subsequent purchaser had knowledge or notice of the prior unrecorded claim may depend on facts that do not appear on record and that may require extensive investigation and litigation to determine.

§ 92.08(c) Race-Notice Recording Acts.

Race-notice statutes are in force in about half of the states. n288 The Uniform Simplification of Land Transfers Act includes a race-notice statute. n289 As is the case under notice statutes, a person seeking the protection of a race-notice act must be a purchaser for value without knowledge or notice of the prior unrecorded claim. However, race-notice statutes have an additional requirement to qualify a purchaser for protection. The person seeking protection must record before the prior unrecorded claim is recorded. For example, the owner conveys the real estate to Purchaser 1 who does not immediately record. Then the owner conveys the same interest to Purchaser 2 who pays value without knowledge or notice of the prior conveyance. Before Purchaser 2 records, Purchaser 1 records. Purchaser 1 has priority over Purchaser 2 even though Purchaser 2 paid value without notice of the conveyance to Purchaser 1. Recordation by Purchaser 1 before Purchaser 2 results in it being impossible for Purchaser 2 to qualify for the protection of a race-notice recording act.

The rationale for the additional requirement that a claim be recorded first is not clear. It has been said that such a requirement encourages prompt recordation because a purchaser can not qualify for protection until recordation occurs. On the other hand, pure notice statutes also appear to promote prompt recordation. Under pure notice, until a transferee records, priority may be lost immediately to a subsequent purchaser without notice when the subsequent purchase occurs, with no need for the subsequent purchaser to record.

It is possible that the combination of race and notice elements was a product of deliberate choice. The race aspect of race-notice statutes may be due to a notion that one who seeks the benefits of recording laws should be required to record. On the other hand, the basis for race-notice may be mainly historical and due to inertia. As the early race recording acts evolved to include a notice element, the "race to the records" feature may have been retained in some

cases without serious thought being given to whether its retention was appropriate and based on sound policy. A number of the early American recording acts were patterned after the English registry act adopted in 1707 for Middlesex County. n290 It is inaccurate to refer to this English statute as a recording act. n291 However, this law was much like an American pure race recording act. The American statutes based on it added an express notice element. These early recording acts, in turn, influenced recording statutes adopted in many other states and territories. n292 The Uniform Simplification of Land Transfers Act proposes a race-notice statute in § 3-202. The comments to the section do not explain why a race-notice type act was chosen instead of pure notice. Published commentaries by the drafters of the Uniform Act concerning the act do not address the question. n293

§ 92.08(d) Notice or Race-Notice: Lessons from Illinois and Colorado.

It is usually not very difficult to determine whether a recording act was intended to be pure notice or race-notice. For examples, the statutes in Michigan, New Jersey, New York and Wisconsin were obviously intended to be race-notice. The Florida, Massachusetts and Texas statutes are clearly pure notice acts. Although a statute on its face may appear to be one type or the other, judicial gloss may make the appearance misleading. For example, respected scholars continue to classify the Illinois act as a notice type, ignoring an 1882 Illinois Supreme Court decision n294 applying the act as if it were race-notice. n295

In Simmons v. Stum, n296 the property was owned by McHenry. McHenry mortgaged it to the plaintiff, Stum, who did not record until much later. McHenry then transferred the property to Cochran and Strong who knew about Stum's unrecorded mortgage and, therefore, took subject to it. Cochran and Strong then conveyed the property to defendant Simmons who claimed she purchased it in good faith. The Court suspected that she knew or had reason to know of Stum's mortgage, although the record contained no direct proof of any such knowledge or notice. The Court decided that it was unnecessary to determine whether Simmons knew or had notice of Stum's mortgage. Two days after the property was conveyed to Simmons, the mortgage to Stum was finally recorded. Because Simmons failed to plead and prove that her deed was recorded before Stum's mortgage, the Court held that she took subject to the mortgage. If the Illinois recording act had been a typical notice statute, Simmons would have earned priority at the instant she paid value without notice for the property. Whether or when she recorded would be immaterial.

The Illinois statute provides:

> All deeds, mortgages and other instruments of writing which are authorized to be recorded, shall take effect, and be in force, from and after the time of filing the same for record, and not before, as to all creditors and subsequent purchasers, without notice; and all such deeds and title papers shall be adjudged void as to all such creditors and subsequent purchasers, without notice, until the same shall be filed for record. n297

The statute as quoted in the Court's opinion lacks a few commas found in the modern version. The Court interpreted the statute as meaning that the deed to Simmons could not cut off Stum's mortgage until the deed was recorded. This interpretation seems to be a misapplication of the statute. The language referring to instruments not being effective as to creditors and subsequent purchasers without notice seems to refer to an unrecorded prior conveyance, not a subsequent conveyance made to a transferee claiming priority over the previous unrecorded instrument. The Court's interpretation applies the "not taking effect until recorded" language to Simmons' deed, a conveyance subsequent to the prior unrecorded one, Stum's mortgage. n298 This is contrary to the usual operation of recording acts which void or subordinate prior unrecorded claims in favor of subsequent transferees who qualify for the protection of the acts.

Because of Simmons v. Stum, it is not completely clear whether the Illinois recording act is notice, race-notice or unique unto itself. n299 While the status of the Illinois recording act has been muddled for over a century, the distinction of having the most muddled status probably belonged to the Colorado recording act. In 1968, the Colorado Supreme Court labelled the act a "race-notice statute." n300 A dissenting opinion in a subsequent Supreme Court case

called this characterization *"obiter dictum"* and concluded that the statute was "pure notice" n301 with the majority's approval. n302 In 1984, the Colorado act was amended to include the following statement: "[t]his is a race-notice recording act." n303

COMPUTER-ASSISTED RESEARCH

LEXIS: recording act* w/10 race or notice or race-notice

FOOTNOTES:
(n1)Footnote 280. 4 American Law of Property § 17.5 (A. James Casner ed., 1952).

(n2)Footnote 281. Lewis M. Simes, A Handbook for More Efficient Conveyancing 18 (1961); Corwin W. Johnson, *Purpose and Scope of Recording Statutes, 47 Iowa L. Rev. 231 (1962).* Some commentators also discuss a fourth type of recording act, period of grace. Period of grace recording acts preserved the priority of the prior unrecorded instrument for a brief time, usually fifteen days, during which its holder was given an opportunity to record. Period of grace provisions were appropriate in the past when travel and communication were relatively slow. Delaware was the last state with a period of grace statute which was repealed in 1968. 56 Del. Laws 318.

(n3)Footnote 282. Carol M. Rose, *Crystals and Mud in Property Law, 40 Stan. L. Rev. 577, 586 (1988).*

(n4)Footnote 283. La. Rev. Stat. Ann. § 2721, N.C. Gen. Stat. § 47-18. North Carolina, however, may have become a race-notice state by judicial decision. *See, e.g.,* Rowe v. Walker, *aff'd by, 455 S.E.2d 160 (N.C. 1995). 441 S.E.2d 156 (N.C. 1994)* (John, J., dissenting) (finding that the state's recording statutes require a purchaser to be innocent and without notice, and citing *Hill v. Pinelawn Mem'l Park, 304 N.C. 159 (1981),* where the state Supreme Court held purchasers must be innocent to be protected by recording statutes).

(n5)Footnote 284. 4 American Law of Property § 17.5, 545 n.63 (A. James Casner ed., 1952).

(n6)Footnote 285. *See, e.g., Tulk v. Moxhay, 41 Eng. Rep. 1143 (1848).*

(n7)Footnote 286. Ala. Code § 35-4-90; Ariz. Rev. Stat. Ann. §§ 33-411 & 33-412; Ark. Code Ann. § 14-15-404; Conn. Gen. Stat. Ann. § 47-10; Del. Code Ann. Tit. 25, § 153; Fla. Stat. Ann. § 695.01; Iowa Code Ann. § 558.41; Kan. Stat. Ann. §§ 58-2221-58-2223; Ky. Rev. Stat. Ann. § 383.080; Me. Rev. Stat. Ann. Tit. 33, § 201; Mass. Ann. Laws ch. 183, § 4; Mo. Ann. Stat. §§ 442.380, 442.390, 442.400; N.H. Rev. Stat. Ann. § 477:3-a; N.M. Stat. Ann. §§ 14-9-1-14-9-3; Ohio Rev. Code Ann. § 5301.25; Okla. Stat. Ann. Tit. 16, §§ 15 & 16; R.I. Gen. Laws § 34-11-1; S.C. Code Ann. § 30-7-10; Tenn. Code Ann. § 66-5-106; Tex. Prop. Code Ann. §§ 13.001 & 13.002; Vt. Stat. Ann. Tit. 27, § 342; Va. Code Ann. § 55-96; W. Va. Code §§ 40-1-8 & 40-1-9. While Alabama enacted a notice recording act, Ala. Code § 35-4-90, it may have become race-notice by recent judicial decision. *See Baxter v. South Trust Bank of Dothan, 584 So. 2d 801, 804 (Ala. 1989); Nelson v. Barnett Recovery Corp., 652 So. 2d 279. 1994 Ala. Civ. App. LEXIS 544, 4* (noting that "when two or more persons claim an interest in the same piece of property, the order of priority is determined by the order in which the instruments or documents creating the interests are filed for record"). South Carolina, like Alabama, may have become race-notice by a recent judicial decision, despite notice statute. *See Mi Co., Ltd. v. Mclean, 482 S.E.2d 597, 602 (S.C. App. 1997).*

(n8)Footnote 287. Francis S. Philbrick, *Limits of Record Search and Therefore of Notice (Part 1), 93 U. Pa. L. Rev. 125, 159 (1944).*

(n9)Footnote 288. Alaska Stat. § 40.17.080; Cal. Civ. Code § 1107; Colo. Rev. Stat. Ann. §§ 38-35-108 & 38-35-105; D.C. Code Ann. §§ 45-801 & 45-802; Ga. Code Ann. § 695.01; Haw. Rev. Stat. § 502-83; Ind. Code Ann. §§ 32-1-2-11 & 32-1-2-16; 765 Ill. Comp. Stat. 5/30 (by judicial decision, this act is considered a race-notice act); Idaho Code § 55-812; Md. Real Prop. Code Ann. § 3-203; Mich. Comp. Laws Ann. § 565.29; Minn. Stat. Ann. § 507.34;

Miss. Code Ann. § 89-5-5; Mont. Code Ann. §§ 70-21-201, 70-21-302 & 70-21-304; Neb. Rev. Stat. §§ 76-237 & 76-238; Nev. Rev. Stat. §§ 111.320 & 111.325; N.J. Stat. Ann. § 46:22-1; N.Y. Real Prop. Law § 291; N.D. Cent. Code § 47-19-41; Or. Rev. Stat. § 93.640; Pa. Stat. Ann. Tit. 21, § 351; S.D. Codified Laws Ann. § 43-28-17; Utah Code Ann. § 57-3-103.; Wash. Rev. Code Ann. § 65.08.070; Wis. Stat. Ann. § 706.08; Wyo. Stat. § 34-1-121. Alabama may also be a race-notice jurisdiction. *See Baxter v. SouthTrust Bank of Dothan, 584 So. 2d 801, 804 (Ala. 1989).*

(n10)Footnote 289. Unif. Simplification of Land Transfers Act § 3-202, 14 U.L.A. 281 (1990).

(n11)Footnote 290. Rufford G. Patton & Carroll G. Patton, Patton on Land Titles § 10 (2d ed. 1957).

(n12)Footnote 291. Ralph W. Aigler, *Foreword; Symposium--Notice and Recordation, 47 Iowa L. Rev. 221, 225 (1962).* The English statute required the subsequent purchaser to record first to prevail over the prior claimant. While the statute did not require the subsequent purchaser to be without notice, it appears that some English courts denied priority to subsequent purchasers who took with notice, even though they recorded first. *See Hine v. Dodd, 26 Eng. Rep. 569 (1741).*

(n13)Footnote 292. According to the Pattons, the Pennsylvania statute alone was the model for the recording acts of about one-third of the states. 1 Rufford G. Patton & Carroll G. Patton, Patton on Land Titles § 10 (2d ed. 1957).

(n14)Footnote 293. *See, e.g.*, Peter B. Maggs, *Land Records of the Uniform Simplification of Land Transfers Act*, 1981 S. Ill. L. J. 491.

(n15)Footnote 294. *Simmons v. Stum, 101 Ill. 454 (1882).*

(n16)Footnote 295. *See,e.g.*, 4 American Law of Property § 17.5 (A. James Casner ed., 1952 & Supp. 1977).

(n17)Footnote 296. *101 Ill. 454 (1882).*

(n18)Footnote 297. The wording of the statute still remains unchanged. 765 Ill. Comp. Stat. 5/30.

(n19)Footnote 298. For additional criticism of *Simmons v. Stum, see*, Ralph W. Aigler, Cases on Titles 848, n.17 (3d ed. 1942). Professor Aigler concluded that the Illinois Supreme Court "read something into the statute." Commentators have put forward a creative interpretation of *Simmons v. Stum*: "The statute made unrecorded instruments void 'as to all creditors and subsequent purchasers without notice.' The first conveyee in the case took a mortgage rather than a deed, and was therefore a 'creditor.' Since the word 'subsequent' in the statute seemed to modify only 'purchasers' and not 'creditors,' the Court reasoned that even prior creditors were protected, and hence that the second conveyee could prevail only by recording first." Roger A. Cunningham et al., the Law of Property 777, n.17 (1984). The Court does not articulate its reasoning as clearly as this comment indicates. The authors' version of the Court's reasoning may be correct, but it is not fully supported by the rather cryptic opinion of the Illinois Court. The reference to "creditors" in the Illinois recording act was added in 1833, after the Illinois Supreme Court held that judgment lien creditors were not entitled to recording act protection, in order to bring them within the protection of the act. *See Guard v. Rowan, 3 Ill. (Breese) 499 (1830).* The word "creditors" in the statute refers to judgment lien creditors and not to mortgagees or creditors in general. *Martin v. Dryden, 6 Ill. (1 Scam.) 187, 217 (1844).*

(n20)Footnote 299. The Illinois recording act is generally believed to be a race-notice act. Patrick M. McFadden, *Oral Transfers of Land in Illinois, 1988 U. Ill. L. Rev. 667, 702 n.161.*

(n21)Footnote 300. *Eastwood v. Shedd, 442 P.2d 423, 425 (Colo. 1968).*

(n22)Footnote 301. *Page v. Frees-Krey, Inc., 617 P.2d 1188, 1200 (Colo. 1980).*

(n23)Footnote 302. *Page v. Frees-Krey, Inc., 617 P.2d 1188, 1191 (Colo. 1980).* It is clear that the majority's approval of the dissent's characterization was *obiter dictum*.

(n24)Footnote 303. Colo. Rev. Stat. Ann. § 38-35-109.

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CHAPTER 92 RECORDING, REGISTRATION, AND SEARCH OF TITLE

11-92 Thompson on Real Property, Thomas Editions § 92.09

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§ 92.09 Qualifying for Recording Act Protection.

[Go To Supp]

Notice and race-notice recording acts are statutory expressions of the equitable doctrine of bona fide purchase. Unrecorded claims evidenced by written instruments are subordinated by these acts in favor of bona fide purchasers. n304 The basic idea is that the expectations of a person who changes his or her position by paying value in reliance on the record as indicating the true state of title and ownership should not be defeated. Persons who knew about or could have discovered the existence of prior adverse claims through reasonable investigations should not be protected. n305 Therefore, the application of a notice or race-notice recording act may involve two central inquiries:

(1) Did the person seeking protection pay sufficient value?; and

(2) Did the person do so without knowledge or notice of the prior claim?

Where a race-notice recording act applies, there is the additional question of whether the person seeking protection was the first to record. This last question usually presents no great difficulty because instruments are usually date and time stamped when they are presented for recordation. The stamp supplies at least presumptive evidence of the time of recording and cases where recording of conflicting claims has occurred at the same instant are very rare. Usually, the recordations will be separated by at least a few minutes. n306

§ 92.09(a) Burden of Proof and Presumptions.

The determination of whether a person is entitled to the protection of a notice or race-notice recording act may involve issues of payment of value and notice. The practical effectiveness of a recording system as the foundation of land title assurance for real estate purchasers depends substantially on the allocation of the burden of proof n307 on these issues. n308 If the subsequent purchaser seeking protection has the burden of proof on these issues, recording systems will generally provide weaker title assurance than if the burden were placed elsewhere.

The recording statutes generally do not allocate the burden of proof. n309 The cases support a variety of positions: n310

burden on prior unrecorded claimants; burden on persons seeking the protection of the act as good faith purchasers; burden on purchasers of equitable rather than legal interests; burden on subsequent purchasers but not on judgment lien creditors; and burden on subsequent purchasers (on the payment of value issue) and on unrecorded prior claimants (on the notice issue).

While some authorities disagreed, the subsequent purchaser usually had the burden of proving good faith and payment of value under the equitable doctrine of bona fide purchase. n311 The purchaser was required to plead and prove that the purchase was for value and in good faith. n312 This requirement had a practical basis. In most cases, compared to other parties, the purchaser was likely to have more knowledge about and access to facts concerning the circumstances of the purchase. Nelson v. Hughes, n313 a recent case involving the allocation of the burden of proof under a recording act, adopted this basis for placing the burden on a subsequent purchaser.

Where the problem is the allocation of the burden of proof under the doctrine of bona fide purchase where a recording act is not involved, it may be appropriate to consider access to proof, relative fault or other factors. n314 When the problem arises under a recording act, however, the advantage should tip strongly in favor of the subsequent purchaser. A basic goal of modern recording acts is to facilitate real estate transactions by providing information to purchasers which should enable them to ascertain ownership and the state of title. Reliability of the record is central to the achievement of this goal. The record is more reliable to purchasers if the burden of establishing the validity or priority of non-record claims is on those holding them. If the burden of proof is on the party who failed to record, the record is, *prima facie* the true state of the title and, as a result, it is more reliable. n315

§ 92.09(b) Purchaser for Value.

Almost all recording acts protect only purchasers for value. Even if the applicable statute simply refers to "purchasers," without mentioning "value" or "valuable consideration," payment is required to qualify a party for protection. n316 The basic notion is that protection should be limited to persons who may have parted with value in reliance on title being as indicated by the record. Actual reliance on the record is not required. A person who paid value without notice of a prior unrecorded interest may be protected even if such person did not examine the record at all.

§ 92.09(b)(1) Purchaser for Value: Status of Devisees and Other Donees.

Heirs, devisees, and donees are not entitled to recording act protection because they are not purchasers for value. n317 While an heir or devisee takes subject to unrecorded conveyances made by the ancestor or testator, purchasers from the heir or devisee may be protected. n318

§ 92.09(b)(2) Value: Full Fair Market to Nominal Consideration.

Clearly, money or property approximately equal to the fair market value of the interest purchased would be "value." There is general agreement that less than fair market value will suffice if the amount is not grossly inadequate. n319 The difficult question is how much below full fair market may the consideration be and still satisfy the payment of value requirement. Nominal consideration has been held to be sufficient, n320 but usually more is required. n321

If the law required approximately full fair market to satisfy the payment of value requirement, the reliability of recording systems as sources of title assurance for purchasers would be impaired. If full consideration were required, there would always be a substantial risk that a court might subsequently find that the consideration was insufficient. A purchaser who paid a substantial amount might be held unprotected because the amount paid fell short of fair market value. The benefits of recording acts should not be withheld from persons simply because they struck good bargains. The guideline should be whether the purchasers substantially changed their position in exchange for the conveyance of the interest to them.

It is questionable whether the payment of nominal consideration should suffice. The basic policy of recording acts and the doctrine of bona fide purchase is that those who materially change their positions should be protected. Payment of a nominal consideration involves no such change of position. One who pays a nominal consideration is practically a donee. On the other hand, a rule that nominal consideration is sufficient does have the administrative advantages of certainty and ease of application. This is true because once it is established that payment was made, the value payment requirement is satisfied. There is no need to inquire into the adequacy of payment.

§ 92.09(b)(3) Value: Promise as Value.

Generally, a promise to give valuable consideration is insufficient. n322 Even a promise to pay value secured by a property security interest will not suffice. n323 If the promise is revocable, it does not involve a permanent change of position and, as a result, it is not supported by the basic policy that only purchasers who materially change their position should be protected. However, there may be cases where the promisor has irrevocably and materially changed position. In such cases, the promisor should be entitled to the protection of the recording act. n324

A non-negotiable promissory note is not value for recording act purposes. n325 Negotiable instruments dishonored by a bank were held to be value, however, as the purchaser was irrevocably bound to make payment. n326 An instrument negotiated to a holder in due course should constitute value, because the holder takes it free of most defenses to payment. n327

A fully executed promise may be value. n328 In Larkins v. Howard, n329 the owner conveyed an interest in the property to Howard, who did not record. In 1927, the owner, then aged and infirm, executed a will giving all of his property to his wife in consideration for her promise to care for and support him for the rest of his life. The wife carried out her part of the bargain. The owner died on October 17, 1942. On October 24, 1942, the conveyance to Howard was finally recorded. The Alabama Supreme Court held that the wife was a purchaser for value under the recording act and, as a result, took the real estate free and clear of the conveyance to Howard. Although donees and devisees are not normally considered to be purchasers for value, the wife in this case qualified as such a purchaser because her fully performed promise to care for the owner was valuable consideration.

§ 92.09(b)(4) Notice After Partial Payment.

A purchaser may receive actual notice of a prior unrecorded claim after paying only part of the agreed consideration. It is generally agreed that the purchaser cannot qualify as a *bona fide* purchaser for value with respect to the unpaid balance. n330 A number of cases hold that a subsequent purchaser who has not paid the entire consideration prior to receiving actual notice of the prior claim becomes a *bona fide* purchaser *pro tanto*. n331 The prior claimant is given priority but the subsequent purchaser (i.e., the *bona fide* purchaser *pro tanto*) is entitled to reimbursement from the claimant for all sums paid before the actual notice was received. n332 In a case where a purchaser received actual notice of a prior ineffectively recorded mortgage before completing payment, the lien of the mortgage bound the land to the extent of the amount of the remaining unpaid balance. n333

A different situation is presented where the prior claimant records before the subsequent purchaser completes payment. The problem then becomes whether the recordation should give the subsequent purchaser constructive record notice of the claim. n334 Some courts have held that the recordation is constructive notice to the subsequent purchaser of the prior claim. n335 Other courts have held that recordation of the prior conveyance before the subsequent purchaser completes payment does not give constructive notice to the subsequent purchaser. n336 As the specific wording of the applicable recording act may dictate the result in a particular case, n337 an important consideration should be whether the subsequent purchaser had a duty to search the record during the period after the prior claim was recorded but before payment by the subsequent purchaser was completed. If the real estate already has been deeded to the purchaser, it might be unreasonable to expect that purchaser to conduct a subsequent search of the record. Furthermore, if the subsequent purchaser is paying for the property through a series of installment payments, as is often the case, it may be

unreasonable to expect the purchaser to search the record before paying each installment. n338

§ 92.09(b)(5) Payment of Value: Pre-existing Debt as Value.

A debtor may convey an interest in either real or personal property to a creditor in satisfaction of or as security for a pre-existing ("antecedent") debt. In many jurisdictions, subject to certain exceptions, it has been held that a person who gave only a release of an antecedent debt in exchange for property was not entitled to the protection of the equitable doctrine of *bona fide* purchase. n339 It, also, has been generally held that a security interest given to secure an antecedent debt was not valuable consideration, subject to exceptions. n340 The rationale behind these holdings was that if the property or security was taken away or subordinated, the transferee was no worse off than before the transfer; therefore, the transfer did not involve a permanent, detrimental change of position. The exceptions that allowed the antecedent debt to serve as valuable consideration mainly involved cases where a permanent change of position occurred at the time of the transfer. For example, when a transfer was given to secure an antecedent debt, the secured creditor was considered to have paid value if as part of the exchange the creditor gave the debtor a binding extension of time in which to pay. Generally, the courts that have considered whether an antecedent debt is value sufficient to qualify a purchaser for the protection of recording statutes have followed these principles. n341

Years ago, commentators criticized the general rule that a transfer for or to secure an antecedent debt was not a purchase for value. n342 It was argued that a person who enters into a commercial transaction expects to receive the benefit of the bargain. Where a purchaser releases a debt owed for a conveyance of real estate, reviving the debt may restore the status quo but the purchaser does not receive the benefit of the bargain. Furthermore, restoring the debt does not necessarily restore the status quo. If the transfer had not been made, the creditor may have taken steps to enforce or collect the debt. Collection or enforcement of the debt may have become more difficult or impossible with the passage of time. Where the transfer was of a security interest to secure an antecedent debt, it may be inaccurate to say that voiding or subordinating the interest results in the creditor being in no worse position than before. It is possible that the creditor was then an unsecured creditor with a reasonable chance of collecting the debt and is now has little or no chance of collecting. These considerations may have influenced the drafters of the Uniform Simplification of Land Transfers Act, who define "value" to include rights given as security for, or in satisfaction of, a "pre-existing claim." n343

§ 92.09(b)(6) Payment of Value: Judgment Lien Creditors.

By statute, a judgment for money based on a debt or tort may attach as a lien against real estate owned by the judgment debtor. The precise time of the attachment of such a lien depends largely upon the applicable statute. n344 In many jurisdictions, judgment liens will not attach until docketed in court records or filed in the recorder's office. n345 The judgment lien will normally attach to any real estate owned by the judgment debtor in the county in which the lien is docketed or recorded. The lien will also attach to any real estate subsequently acquired by the debtor in that county while the lien is still viable. In some states, judgment liens will not attach until formal attachment and execution proceedings are commenced. n346 Once the judgment has attached, it remains a lien on the real estate even if the real estate is transferred. A money judgment may not, however, attach to property when the judgment debtor has already conveyed the property and delivered the deed before the judgment was recorded, even when the judgment was recorded first. n347

Judgment lien creditors are not "purchasers" in the ordinary sense of the word. As a result, they are not protected by the recording acts of many states. n348 Judgment lien creditors may also be denied protection on the basis that their liens can only attach to the actual interests of judgment debtors, rather than the debtors' apparent interests. n349 The statutes of about half of the states provide protected status to creditors under the recording act. n350 Some acts clearly provide that protected parties may be "subsequent judgment creditors." n351 Other statutes are less precise and refer to "creditors" generally without specifying whether the creditor must have judgments or the debt must be subsequent to the prior unrecorded conveyance. n352 While there is authority to the contrary, these latter statutes are usually construed as

including only subsequent creditors who have fastened an attachment, judgment, or execution lien upon the property. n353

Most, but not all, statutes protecting creditors expressly require the creditor to be without notice in order to qualify for protection. n354 For statutes that do not state that creditors must be without notice, it has generally been implied that they must be without notice where that requirement applies to purchasers. n355

If the guiding policy is to protect persons who may have relied on the title as disclosed by the record, it is debatable whether judgment lien creditors should be protected. An opinion in an old case asserts that creditors "in giving credit, confide as much, and rely as confidently for the payment of their dues, upon the real estate to which their debtors appear, by the records, to have title, as upon the personalty...". n356 While this argument might have some merit with respect to judgments based on contractual debts, it has no force at all where the judgments are based on torts. Furthermore, lenders rarely search public real estate records before extending credit. n357 Protecting judgment lien creditors from prior unrecorded conveyances might prevent fraud on creditors where a pre-dated deed, which is claimed to have been executed by the debtor before the attachment of the lien, was actually executed afterwards. It is uncertain whether the possibility of such fraud justifies recording act protection for judgment creditors. This type of fraud could only occur in pure notice jurisdictions, as the lien creditor would normally prevail under race-notice acts as the first to record. Furthermore, this type of fraud is really a specific aspect of a larger problem, one that is caused by the tendency of debtors to protect their property from creditors by any available means, legal or illegal. Fraudulent conveyance laws may provide sufficient remedies. n358

COMPUTER-ASSISTED RESEARCH

LEXIS: purchase* for value w/10 deed
purchase* for value w/10 title

NOTE:
Many cases relevant to this section pre-date the earliest cases in the database.

§ 92.09(c) In Good Faith, Without Notice.

Notice and race-notice statutes n359 protect persons who are without notice of prior unrecorded interests that are subject to the recording act. There are several kinds of notice that may disqualify a person from attaining the protection of a notice or race-notice recording act:

(1) **Actual notice:** notice from the subsequent purchaser's actual knowledge of the prior interest;

(2) **Constructive notice:** the subsequent purchaser is deemed to have notice of all facts that a reasonable physical inspection of the property and a reasonable title search of the public real estate records would have revealed;

(3) **Inquiry notice:** notice from the subsequent purchaser's actual knowledge or constructive notice of facts which would have caused a reasonable person to make further inquiries; a subsequent purchaser is deemed to have notice of all facts that such inquiries would have uncovered.

The doctrine of constructive notice is based on two duties of the purchaser of real estate, the duty to examine the real estate and the duty to search the record. The purchaser is deemed to have notice of all facts that a physical examination of the property would have revealed. In many cases, received or imputed facts do not directly notify the purchaser of an adverse claim; instead, they may form the basis for inquiry notice. For example, a physical inspection may reveal a

well-worn path which appears to be used by the occupants of adjacent property. The inspection does not establish that this use is wrongful, permissive or a matter of right. Notice of the use would probably be enough to put the purchaser on inquiry. Further inquiry may reveal whether there is an unrecorded easement or some other legal basis providing the adjacent occupants a right to use the path. If a reasonable investigation would have uncovered the existence of an unrecorded easement of right of way or an irrevocable license, then the purchaser would have inquiry notice of it.

A purchaser of real estate also has a duty to search the record. It is sometimes stated that recordation of an instrument is "notice to the world" of the facts stated in it. n360 Such statements are overly broad. It is more precise to say that recorded instruments give constructive notice to those who are bound to search for them. n361 A purchaser of real estate has a duty to search the public real estate records using the official index (usually of the grantor-grantee type) and is deemed to have notice of all facts contained in legally recorded instruments that would have been found through such a search, whether the search was in fact conducted. This can lead to some anomalous results. Under the laws of many states, an instrument not entitled to recordation, such as an unacknowledged deed, will not give constructive record notice, even if it is recorded in fact. It is sometimes said that such an instrument is recorded in fact, but not in law. Most purchasers of real estate, however, do search the record. If a purchaser actually searches the record, the purchaser will probably come across such an instrument and will, in a majority of jurisdictions, thereby have actual notice of the instrument. If the purchaser had not searched the title, however, the purchaser would not have constructive notice of this actually recorded instrument, because it was not entitled to be recorded. Thus, a purchaser who complies with the duty to search the record is penalized by gaining actual knowledge of the recorded instrument, while a purchaser who does not comply with this duty is rewarded by not being deemed to have constructive knowledge of the recorded instrument.

§ 92.09(c)(1) Actual Notice.

The development of the American law of recording was influenced by the equitable doctrine of good faith purchase. Early recording statutes did not require subsequent purchasers to be in good faith or without notice for the statutes to apply. The courts, however, influenced by the doctrine of good faith purchase, read such a requirement into the statutes. n362 Eventually, the statutes in most states expressly provided that they applied only where a subsequent purchaser lacked notice or was in good faith. The precise wording of the requirement varies. A fairly large number of recording acts state that the purchaser must be "bona fide" or in "good faith" without referring to "notice" or its absence. n363 Another fairly large number state that the purchaser must be without "notice" with no reference to good faith. n364 A few require absence of "actual notice." n365 Some state that the purchaser must be in good faith (*or bona fide*) without "notice" or "actual notice." n366 At least two states provide that the purchaser must be without "knowledge." n367 Pennsylvania requires the purchaser to be "*bona fide*" "without actual or constructive notice." n368

Courts and commentators differ about how the different kinds of notice should be defined and classified. Upon analysis, even the seemingly simple concept of "actual notice" becomes slippery and hard to define. It is generally agreed that actual knowledge of the existence of the claim directly and personally communicated to the purchaser is actual notice. n369 But there is a wide diversity of opinion about how complete the information about the claim must be before the purchaser has actual notice of it. n370 To have actual notice, the purchaser should not need to know the precise nature of the prior claim. Knowledge of its existence should be sufficient. The purchaser should not have to know that the claim is valid. The purchaser should have notice if the purchaser has enough information to determine that there is a reasonable probability that the claim is valid.

Many authorities also find actual notice where the purchaser has actual knowledge, not of the existence of the prior interest itself, but of facts that would have caused a prudent purchaser to make further inquiries which would then have uncovered the interest. n371 Whether notice from such inquiries should be considered "actual" is questionable. It does seem more consistent and sensible to treat all legally imputed notice, including all forms of inquiry notice, as constructive rather than actual notice. n372 In many jurisdictions, it is of little importance whether actual notice also includes this species of inquiry notice. Whether the notice is labelled "actual" or "inquiry," the purchaser will be denied recording act protection if, as most do, the jurisdiction recognizes the doctrine of inquiry notice. n373

The source of actual notice may be oral or written statements. Sometimes, a title searcher will come across a recorded instrument that is ineffective to give constructive record notice. n374 In a majority of jurisdictions, the purchaser will be held to have actual notice of the claim or interest evidenced by the instrument. n375 Sometimes a purchaser will have actual knowledge or constructive notice of a statement in a recorded instrument that refers to a prior unrecorded claim. Such a statement may be sufficient to give notice or to put the purchaser on inquiry. n376 The knowledge may be from almost any source but a mere rumor will not suffice to give notice or to put the purchaser on inquiry. n377 Notice to the purchaser's agent, such as an attorney, is notice to the principal if the agent receives notice while acting in that capacity. n378

§ 92.09(c)(2) Constructive Notice.

A purchaser of real estate has a duty to search the public real estate records pertaining to the interest being purchased, to make a reasonable physical inspection of the property, and in most states, to make inquiries of anyone found in possession. n379 These duties provide the foundation of the doctrine of constructive notice. n380

Originally, the doctrine of constructive notice was judge-made, not statutory. n381 The early recording statutes did not say that a purchaser of real estate shall be deemed to have notice of all facts that title searches would have uncovered. These statutes did not explicitly create any duty to search. They did not say that a recorded instrument shall be effective to give notice. Instead, the consequences of failing to record were stated: unrecorded instruments shall be void as to persons entitled to protection. If an instrument is effectively recorded, the statute cannot apply to void or subordinate it. Currently, the doctrine of constructive notice is statutory in at least a dozen states. Statutes in these states explicitly provide that recordation of an instrument will give constructive notice. n382

§ 92.09(c)(2)(A) Record Notice: Duty to Search the Records.

Courts continue to make broad statements to the effect that recordation is "notice to the whole world" of the claim evidenced by the document. n383 It is more accurate to say that information contained in a recorded document will be imputed to a person who is bound to search for it. n384 A person who does not have an interest in the title to the property has no duty to search the record. n385 However, purchasers of an interest are bound to search the records pertaining to that interest. The purchaser is, in general, only bound to search the direct chain of title for the interest being purchased. n386 Furthermore, the purchaser is not bound to search all public records that may contain information about claims or interests in real estate. n387

§ 92.09(c)(2)(B) Record Notice: Chain of Title.

Early recording statutes did not provide for indexes to recorded documents. n388 Until indexes were made available, title searches must have involved paging through the volumes of recorded documents. n389 Today, title searches are initiated in indexes. Because of the thousands or, in some places, even millions of instruments on the record in some counties, searching title without using an index would be impossible. n390 The most common type of index currently in use is the grantor-grantee or name index. The index has two major parts, one for grantors and the other for grantees. At the time an instrument is recorded, it is indexed twice, once in the grantor index and again in the grantee index. The grantee index is used to build the chain of ownership, because it generally identifies the transferor of each owner. The grantor index is used to find adverse conveyances made by or through each owner in the chain of ownership.

§ 92.09(c)(2)(B)(i) Problems Encountered Using Grantor-Grantee Indexes.

Deeds, mortgages and other instruments are indexed chronologically in grantor-grantee indexes according to the initial letter of letters of the grantors' or grantees' surnames. For example, there may be a segment in a grantor index for surnames beginning with "Aa" through "Ad." The reference for each recorded instrument will name the grantor and grantee, describe the instrument and property involved, contain the date of recordation and will refer to the precise place

in the record (e.g., by book and page) where a copy of the instrument may be found.

A particular segment of a grantor index may contain references to hundreds or even thousands of recorded documents. Therefore, in all offices with a large volume of recorded documents, it is nearly impossible to examine the entire relevant segment of the grantor index for adverse conveyances made by or through each owner in the chain of title. Consequently, title searchers may focus on only a portion of the grantor index when looking for adverse conveyances. This portion is the part of the index beginning with the date of the transfer of ownership to the grantor down to the time of the recordation of the transaction through which the grantor gave up ownership. n391 In other words, the grantor index will be examined for each owner from the time each actually became an owner down to the time that each ceased being an owner of record. Conveyances recorded within these time boundaries are said to be recorded "within the chain of title." If conveyances made by an owner are indexed before the owner took title or after the recordation of the transaction through which the owner parted with ownership, the conveyances are recorded "outside the chain of title." It is not likely that the title searcher will discover such conveyances.

One general situation where conveyances may be recorded too soon to be within the chain of title involves the doctrine of estoppel by deed or after acquired title. Under this doctrine, if a grantor purports to convey an interest that the grantor does not have, the interest may effectively transfer to the grantee should the grantor subsequently acquire it. n392 Suppose a grantor purports to convey an interest by warrantee deed that the grantor does not have and the grantee promptly records. Then the owner of the interest conveys it to the grantor. If the doctrine of after acquired title applies, the grantee in the first conveyance becomes the owner of the interest. Suppose the grantor promptly records the deed from the owner and then purports to convey the interest to a second grantee, who purchases without knowledge of the conveyance to the first grantee. The problem here is whether the subsequent purchaser should be held to have had constructive record notice of the first deed. n393 Resolution of this problem requires a choice between security of ownership and facility of transfer.

Security of ownership favors the first grantee. The first grantee has, in fact, recorded and usually can do no more to perfect his or her interest except re-record, an act that first grantee would not be likely to perform. The recording acts do not provide any express basis for voiding or subordinating the first grantee's interest. It is sometimes argued that the first grantee should lose because the first grantee was on notice, actual or constructive, that the grantor did not own the interest at the time of the conveyance. This argument fails to recognize the manner in which recording statutes operate. They provide an exception to the result that would be reached under the "first in time, first in right" principle in favor of a subsequent purchaser who qualifies for protection. Under the recording acts, unless fraud or estoppel applies, what a prior grantee knew or had notice of should be irrelevant. n394 A better argument for giving priority to the subsequent purchaser is that doing so is more in accord with the foal of recording acts to facilitate real estate transfer by protecting purchasers from undisclosed claims. n395 As a practical matter, it is unlikely that the first grantee's deed would be found through a search of the record. If the first grantee prevails, there is another "off the record" risk for purchasers and the reliability of the recording system as a source for land title assurance consequently less.

A majority of the courts have held that the subsequent purchaser prevails over the prior grantee claiming after acquired title. n396 However, a substantial number of cases hold for the prior grantee. n397

Another general situation involves the recordation of an adverse conveyance after the recordation of the transaction showing its maker giving up ownership. An owner conveys to a first grantee who does not immediately record. The owner then conveys to a second grantee who records but does not prevail over the prior unrecorded interest because the second grantee does not qualify for recording act protection for some reason, such as actual notice of the prior interest or a failure to pay value. (If the second grantee did qualify for protection, the prior unrecorded interest would be subordinated or cut off entirely. It would not matter whether a subsequent transferee from the protected grantee took with notice. After the property passes to a party protected by a recording act, the unrecorded claim is "filtered out" and the protected party generally may transfer the interest to almost anyone, even persons with notice. n398) Suppose after the conveyance to the disqualified (second) grantee, the prior adverse conveyance to the first grantee is finally recorded

and indexed in the grantor index under the former owner's name. Suppose the disqualified second grantee then transfers to a person who would qualify for recording act protection, except for the possibility that he or she took with constructive notice because the adverse conveyance was finally recorded before he or she took title. The relevant considerations in this problem are almost the same as those encountered with the after acquired title problem previously discussed. However, there are arguments that the situations are distinguishable.

First, in the case of the recordation after the deed out from the owner, it might not be unreasonable to require the searcher to continue the search to the present after the deed out, especially in cases where only a few years of the grantor index would have to be examined before the searcher would reach the last entry made. In contrast, excluding the time in the distant past when the records first began being kept, there is no second time boundary to limit the search where the search is back into the past after the date of the acquisition of ownership by the owner. Second, the after acquired title prior claimant has the expedient method of protecting his or her interest by re-recording within the chain of title. By contrast, once the deed out by the owner has been recorded, the prior unrecorded claimant has no such expedient method available to bring notice of his or her claim into the chain of title. Regardless of the merit of these arguments, this problem also boils down to a choice between security of title and facility of transfer, a choice that may be resolved by the value placed on each. Again, the effectiveness of the recording system in giving assurance to purchasers is impaired if the late recorded instrument gives constructive record notice.

There are reported cases on both sides. Some hold that the late recorded instrument is ineffective to give record notice because it is recorded outside of the chain of title and, therefore, not likely to be found by the title searcher. n399 In jurisdictions that accept this view, a purchaser might sometimes be deemed to have notice of the late recorded instrument where the purchaser had notice of facts that would have caused a prudent purchaser to continue the search for some time after the recordation of the deed out from the owner. n400 Other cases have held the late recordation effective to give notice. n401

There is another chain of title problem that is also encountered only when grantor-grantee indexes are used to search title. This problem is sometimes referred to as the "wild deed" problem. The basic outline of this problem involves an adverse conveyance by the owner to a transferee who does not record. The transferee then transfers the interest to a second transferee who does record. The original owner then transfers to a purchaser who is entitled to recording act protection, except for the possibility that the purchaser has constructive record notice of the transfer to the second transferee because it is recorded. While the conveyance to the second transferee is on the record, it is very unlikely that the subsequent purchaser from the original owner would find it using a grantor-grantee index. Neither the first nor the second transferee will be known to the purchaser, because the conveyance to the first transferee is not recorded and, therefore, it will not be found in the grantor index under the name of the original owner. The conveyance to the second transferee would appear to be a "wild deed" because the record shows no connection between the transferor and the chain of title to the property. Because the conveyance to the second transferee would rarely be found through a search of the record by the purchaser, it is generally held that it is recorded outside of the chain of title and, consequently, the purchaser does not have constructive record notice of it. n402

The problems discussed above disappear when tract (or parcel) indexes are used to search title. n403 In tract indexes, instruments are indexed according to the property affected. Unless the recorder makes an indexing error, all instruments will be found regardless of when they are recorded. A failure to record a link in the chain of title makes no difference because the searcher does not search through the names of parties to instruments. There is, however, another chain of title problem encountered when using either tract or grantor-grantee indexes. This problem occurs where a common owner of two or more parcels conveys one of them while purporting to encumber retained land in the instrument of conveyance.

§ 92.09(c)(2)(B)(ii) Problems Encountered Where a Common Grantor Encumbers Property Retained in a Conveyance of Other Property.

The owner of two or more parcels may encumber n404 property retained by the owner in a conveyance of one of the parcels. If the grantor later conveys the encumbered retained parcel to a purchaser, there may be a problem concerning whether the purchaser has constructive record notice of the encumbrance. The recorder should have indexed the conveyance that created the encumbrance as affecting the retained land. However, it is quite possible that the recorder indexed the instrument as affecting only the conveyed property. If so, the purchaser of the retained land probably would not discover the encumbrance while searching the title to that land. This problem may be encountered with tract as well as grantor-grantee indexes.

The reported cases are about equally divided on whether a purchaser of the retained property has constructive record notice of an encumbrance created in a conveyance of another parcel owned by the grantor. n405 At least one case holding that the subsequent purchaser of retained property has constructive notice is based on the dubious conclusion that the failure of the recorder to index the first conveyance as affecting the retained property is immaterial because the recorder is not required by statute to index instruments by parcel. n406 This argument has no basis at all in the few jurisdictions with official tract indexes where recorders are required to index by parcel. n407

In practice, the title searcher will not find the instrument creating the encumbrance unless it is indexed as affecting the title to the subject property. The problem here is related to the question of whether the index is an essential part of the record, and whether the risk of recorders' indexing errors is allocated to the party initiating recordation or to the subsequent purchaser. n408 As is true with a number of other recording act problems, security of ownership and facility of transfer are important considerations. If the purchaser is deemed to have record notice of an instrument that probably would not be uncovered by a search, the title to the encumbrance is made more secure at the cost of reduced facility of transfer and reliability of the record. Economics may also be an appropriate consideration. It may be more efficient to require the party owning or having the benefit of the encumbrance to be responsible for proper indexing, rather than to require subsequent purchasers to bear the costs of looking outside the chain of title for adverse conveyances. n409

§ 92.09(c)(3) Inquiry Notice.

The doctrine of inquiry notice is contrary to one of the fundamental goals of recording systems: to facilitate real estate transactions by enabling interested parties to swiftly and efficiently determine ownership and the state of the title by examining the public real estate records. The broadening of the concept of notice sufficient to disqualify a purchaser, from actual knowledge and record notice to include other types of imputed notice, is clearly contrary to this fundamental goal. n410 Under the doctrine of inquiry notice, a purchaser of real estate is held to have a duty to make inquiries where the purchaser has actual knowledge from any source or constructive notice of facts that would have aroused the suspicions of a prudent purchaser and caused that purchaser to make further investigations. n411 The purchaser is deemed to have notice of all facts that such investigations would have revealed. Whether certain facts would have been discovered, of course, is determined with the benefit of hindsight, a benefit the purchaser does not have. As a result, in jurisdictions that recognize inquiry notice, the purchaser always faces the risk that the interest purchased may be later be held to be subordinate to some unrecorded claim, because the purchaser should have made some inquiry or investigation which would have revealed it. Furthermore, even if the purchaser did make an investigation, a court might later decide that the investigation was insufficient to satisfy the duty to inquire. n412

§ 92.09(c)(3)(A) Notice from Possession.

In many jurisdictions, the purchaser of real estate has a duty to make a reasonable physical inspection of the property and is deemed to have notice of all facts (mainly those indicating possession) that such an inspection would have revealed. n413 The indications of possession must be actual and visible and in existence at the time of purchase. n414

In most states, there is no statutory foundation at all for the doctrine of constructive notice based on a duty to make a physical inspection of the property. n415 Some cases reject the doctrine, n416 as do statutes in a few states. n417 In the few places in the United States with Torrens registered real estate, the doctrine does not apply to registered real estate.

n418 While a purchaser of real estate has no duty to make a physical inspection of the property in some jurisdictions, such an inspection would be very advisable. An inspection is likely to uncover such off the record risks as adverse possession claims, encroachments, prescriptive easements and short-term leases not subject to the recording act. n419

Usually, the indications of possession alone are not enough to give constructive notice to the purchaser of the existence and nature of the prior unrecorded claim. However, actual or constructive notice of physical facts suggesting the possible existence of an adverse claim may be enough to trigger a duty to inquire. n420 And if further inquiry would have uncovered the adverse claim, the purchaser will be deemed to have inquiry notice of it. Because of the frequently close association between inquiry notice and constructive notice from possession, it is frequently considered to be a form of inquiry notice. n421

Possession inconsistent with record title is a type of use or occupancy that may give rise to a duty to inquire. n422 Generally, the duty to inquire arises where the purchaser has actual knowledge of the possession or constructive notice from the duty to search or inspect. n423 Where, after examination of the public records, the person in possession is someone other than the person who appears to be the record owner, the purchaser is under a duty to inquire into the possessor's right, if any, to occupy the property. The purchaser is charged with constructive notice of the information that the inquiry would have revealed. Where the possession is consistent with record title, there is no duty on the purchaser to inquire. n424 For example, where the fee owners were in possession of the property, the purchasers of mineral interests were not charged with inquiry notice of the owners' non-record claim, that the mineral deeds they executed to the purchasers' predecessor were obtained by fraud, because the possession was entirely consistent with record title. n425

Generally, no inquiry need be made of those in possession along with the record owner. n426 There is also no duty to inquire where an inquiry would be fruitless. n427 If an inquiry is made and if no information about the adverse claim is produced, the possession becomes immaterial. n428 However, the inquiry made may be held to have been inadequate. n429

Not infrequently, a tenant will be in possession of the property at the time of purchase. The tenant's possession is generally effective to give notice of the lease. n430 An examination of the lease itself may not uncover all of the tenant's rights. The purchaser may be held to inquiry notice of other rights such as prepaid rent, options to purchase, lease extensions and rights under an unrecorded contract to purchase the property. n431 Consequently, where a tenant is in possession, the purchaser may have inquiry notice of unrecorded tenant rights, even if the lease is recorded and thus the tenant's possession is consistent with record title. However, possession by the tenant consistent with record title may not give inquiry notice of the rights of a third party creditor with a security interest in the tenant's lease. n432 Where the purchase was made from a person other than the landlord, the tenant's possession will give inquiry notice of the landlord's rights in the land. n433

The acts of possession that will either give constructive notice or cause the purchaser to have a duty to inquire depend on the particular facts and circumstances. Important considerations include the nature of the unrecorded claim and the physical characteristics and location of the property. In Wineberg v. Moore, n434 the subject property was 880 acres of timberland in northern California. The plaintiff claimed ownership under a deed that was not recorded until after the property was sold to purchasers who recorded before plaintiff did. At the time of the purchase by plaintiff, there was a residence and garage on the property. A wire fence extended along two sides of the property. The road leading to the property was obstructed by a gate which bore a "No Trespassing" sign with the plaintiff's name and address on it. There were other "No Trespassing" signs on the property. The plaintiff and his friends used the property occasionally for recreational purposes. He paid the taxes on it and left personal property in the residence which was identifiable as his. Even though the property was not completely enclosed by the fence and although only a small portion contained visible signs of use, the court held that the plaintiff's possession was sufficiently open, notorious and visible to put the purchasers on inquiry. The court emphasized that the physical inspection required in this case was to go onto the land itself. Although an inspection from the air might be sufficient if the property was inaccessible by land, in this case the

land was accessible by automobile. A person coming to inspect the land would have discovered the sign on the gate and that, coupled with other facts, would have apprised them of plaintiff's possible claim which would have been discovered upon further inquiry.

Another leading case, Miller v. Green, n435 involved a tenant who contracted to purchase the property under a contract that was not recorded until after the landlord deeded the property to a purchaser who promptly recorded. The property was a 63-acre tract, 40 acres of which were cultivated land and 23 acres of which were pasture and woods. The buildings on the land included a small house, a barn and some sheds. The house was uninhabitable and the buildings were dilapidated and unused for years. When the property was deeded to the purchaser in December, the crops had already been harvested and the livestock had been removed with the onset of cold weather in early November. At the time of the purchase, the tenant's father was hauling 59 to 60 loads of manure onto the land. Prior to the purchase, the tenant had plowed two of the 63 acres and the plowed area was visible from the abutting highway. Part of the 63-acre tract was visible from the purchaser's farm which was about one half mile away. The majority of the Wisconsin Supreme Court held that the acts of possession were sufficiently "open, visible, exclusive and unambiguous" to give inquiry notice to the purchaser, given that they were the customary acts of possession that could be exercised on unoccupied farmland at such time of the year. The dissenting judge thought that the acts of possession were insufficient to impart notice, especially since they were not inconsistent with the record ownership.

Various possessory acts may be sufficient to put a purchaser on inquiry notice of unrecorded easements or restrictive covenants. Where a utility company was maintaining power lines and poles pursuant to a valid but unrecorded easement, a purchaser was held to have had inquiry notice of the easement. n436 The presence of manholes on the surface may be sufficient to give a purchaser inquiry notice that water and sewer lines are being maintained below by the municipality pursuant to easements. n437 However, manhole covers that might have been sufficient to give notice of a sewer easement held by the municipality did not give the purchaser notice of a private sewer easement claim. n438 And where there was no external evidence of the existence of buried sewer pipes, the purchaser was not charged with notice of the easement. n439 The strictly uniform residential character of the area in the vicinity of the subject property was sufficient to give the purchaser inquiry notice of a restrictive covenant limiting use to residential, even though it was not recorded in the direct chain of title. n440

§ 92.09(c)(3)(B) Notice from Reference in a Recorded Instrument.

In many jurisdictions, a reference in a document in the chain of title to a claim evidenced by a document not in the chain may be notice of the claim or, at least, enough to put the purchaser on inquiry. n441 This doctrine may create a serious burden for the title searcher. As a practical matter, it may be difficult or impossible for the title searcher to locate the other document. As a result, the searcher may not even attempt to find the document, the purchaser takes subject to an additional risk, and the reliability of the recording system as a source of land title assurance is reduced. On the other hand, if the reference to the other document includes the precise location in the public record, or in some other not inconvenient place where it may be found, it is not unreasonable to require the searcher to look for the document in that location.

Statutes in a few states limit notice from references in recorded documents to cases where the reference is to an instrument recorded in the county or district where the real estate is located. n442 The Model Act Concerning Indefinite References n443 provides that an "indefinite reference" to encumbrances or interests in a recorded instrument will not give notice. The definition "indefinite reference" includes all references that do not refer to a recorded instrument and identify the place in the public records where the instrument may be found. The Uniform Simplification of Land Transfers Act also has a provision dealing with indefinite references which is based on the Model Act Provision. n444 Under the Uniform Act, a reference to another document does not impart notice of it unless its "record location" is included. "Record location" refers to a specifically identified file, or book and page.

§ 92.09(c)(3)(C) Notice from Taking by a Quitclaim Deed.

Statutory deeds are used today in many states. n445 The statutes provide for warranty and quitclaim deeds. n446 When real estate is conveyed by warranty deed, the grantor makes various warranties to the grantee. The precise content and scope of these warranties depends on the applicable law of the jurisdiction but, generally, they warrant that the grantor has a good fee simple title to the property and has the power to convey that title. n447 When the conveyance is by quitclaim deed, no warranties are given. Both types of deed may be effective to transfer the title or interest of the grantor in the property. n448 If the grantor has a perfect title, either type of the deed will transfer it to the grantee. If the grantor has a defective title or no title at all, that is what the grantee will receive. A conveyance by warranty deed will not cure a defective title. However, if the grantee of a warranty deed suffers a loss because of a defect, the grantee may be able to recover from the grantor if the presence of the defect caused a breach of one of the warranties.

In applying the equitable doctrine of *bona fide* purchase, some courts have held that one who takes by quitclaim deed cannot be a *bona fide* purchaser because the deed purports to convey only such right, title or interest as the grantor may have, and thus the deed carries notice of every defect in the grantor's title. n449 Similar reasoning has been used to deny grantees of quitclaim deeds the protection of recording acts. n450 However, the precise reasoning in some cases seems to be that the quitclaim deed is sufficient to give inquiry notice to the grantee that the grantor's title is defective. n451

The prevailing view, however, is that conveyance by quitclaim deed does not disqualify the grantee from recording act protection. n452 Some statutes specifically provide that taking by quitclaim deed shall not constitute notice of prior unrecorded conveyances. n453 Most of the minority of jurisdictions that deny the grantee who took by quitclaim deed recording act protection held that a taker by warranty deed could have protected status, even if the grantor or some other prior owner took by a quitclaim. n454 In some jurisdictions, taking by quitclaim deed alone may not be enough to give the grantee inquiry notice about the state of the title, but a quitclaim deed coupled with other facts may be sufficient. n455

The prevailing view that a quitclaim deed grantee may be protected by the recording acts is sound. A refusal to convey by warranty deed might be an indication that the grantor believes title to be defective. However, it is at least as likely that the refusal indicates that the grantor does not know the current state of the title and does not wish to be potentially liable for losses caused by possible title defects for an indefinite period of time. n456 Conveyance by quitclaim deed occurs because grantors wish to break cleanly from the property. The effectiveness of the recording statutes in facilitating real estate transfers is reduced where quitclaim grantees do not qualify for protection.

COMPUTER-ASSISTED RESEARCH

LEXIS: actual notice w/10 deed
actual notice w/10 title
constructive notice w/10 deed
constructive notice w/10 title
record notice w/10 deed or title
inquiry notice w/10 deed or title

NOTE:
Many cases relevant to this section pre-date the earliest cases in the database.

FOOTNOTES:
(n1)Footnote 304. *Associates Fin. Servs. of Am., Inc. v. District of Columbia, 689 A.2d 1217 (D.C. 1997)* (purchaser for value takes title free of any claims of the estate and incurs no personal liability to the estate).

(n2)Footnote 305. *City of Fargo v. D.T.L. Properties, IMC., 564 N.W.2d 274 (N.D. 1997)* (a good faith purchaser is not protected if the purchaser is aware or should be aware of the deficiencies in title).

(n3)Footnote 306. *See, e.g., Daughters v. Preston, 476 N.E.2d 445 (Ill. App. 1985).* In that case, the Appellate Court held that prior purchasers had superior title where they recorded their deeds one hour before subsequent purchaser recorded his deed, even if the subsequent purchaser was a bona fide purchaser for value and without notice at the time he acquired his deed, which occurred before recordation by the prior purchasers.

(n4)Footnote 307. "Burden of proof" is ambiguous. The term may refer to the burden of producing evidence or the burden of persuasion. Charles Tilford Mccormick, Mccormick on Evidence § 336 (John William Strong ed., 4th ed. 1992).

(n5)Footnote 308. *Corwin W. Johnson, Purpose and Scope of Recording Statutes, 47 Iowa L. Rev. 231, 237 (1962).*

(n6)Footnote 309. However, recordation may raise presumptions. *See, e.g.,* Utah Code Ann. § 57-4a-4. Under this statute, recordation raises, among others, presumptions that the transferee was in good faith and paid any necessary consideration. *See also* Unif. Simplification of Land Transfers Act § 2-305, 14 U.L.A.; Model Act Concerning Evidentiary Effect of the Record, Lewis M. Simes & Clarence B. Taylor, the Improvement of Conveyancing by Legislation 30-31 (1960); and Wis. Stat. Ann. § 706.09(1)(d).

(n7)Footnote 310. Corwin W. Johnson, *Purpose and Scope of Recording Statutes, 47 Iowa L. Rev. 231, 237 (1962).*

(n8)Footnote 311. George E. Osborne, Handbook on the Law of Mortgages §§ 208, 364 (2d ed. 1970).

(n9)Footnote 312. George E. Osborne, Handbook on the Law of Mortgages §§ 208, 365 (2d ed. 1970).

(n10)Footnote 313. *625 P.2d 643 (Or. 1980).* This case was decided solely on the allocation of burden of proof. The unrecorded prior claimants did not allege that the subsequent purchaser was not a bona fide purchaser for value. The subsequent purchaser did not allege that she purchased in good faith without notice.

(n11)Footnote 314. George E. Osborne, Handbook on the Law of Mortgages §§ 208, 366 (2d ed. 1970).

(n12)Footnote 315. An argument can also be made that placing the burden on the party who fails to record is more economically efficient. Recording is relatively inexpensive and doing so precludes subsequent expensive litigation in which the application of the recording act may be considered. If one accepts the premise that placing the burden of proof on the prior claimant encourages parties to record, then one may conclude that such an allocation of the burden promotes economic efficiency. An obvious problem with this argument is that it assumes that parties to real estate instruments would in fact be aware of the allocation of the burden of proof and that this awareness would actually influence their decision of whether to record.

(n13)Footnote 316. American Law of Property § 17.10 (A. James Casner ed., 1952).

(n14)Footnote 317. *Whetstone v. Michigan Consol. Gas Co., 219 F. Supp. 121 (E.D. Mich. 1963).* The Colorado recording act appears to be the only act that protects donees. *Eastwood v. Shedd, 442 P.2d 423 (Colo. 1968).* The Colorado statute does not use the terms "purchaser," "for value" or "valuable consideration." Colo. Rev. Stat. Ann. § 38-35-109.

(n15)Footnote 318. *Earle v. Fiske, 103 Mass. 491 (1870); Reddoch v. Williams, 92 So. 831 (Miss. 1922);* 5 Herbert Thorndike Tiffany, the Law of Real Property § 1278 (Basil Jones ed., 3d ed. 1939). There is some authority to the contrary. *Id.*

(n16)Footnote 319. American Law of Property § 17.10 (A. James Casner ed., 1952).

(n17)Footnote 320. *Strong v. Whybark, 102 S.W. 968 (Mo. 1907).* In this case, "natural love and affection and five

dollars" was held to be adequate. *See also Bagala v. Bagala, 110 So. 2d 526 (La. 1959).* The definition of "value" in the Uniform Simplification of Land Transfers Act, taken from the Uniform Commercial Code, includes "any consideration sufficient to support a simple contract." Unif. Simplification of Land Transfers Act § 1-201(31)(iv), 14 U.L.A. 46.

(n18)Footnote 321. *Alexander v. O'Neil, 267 P.2d 730 (Ariz. 1954); Anderson v. Anderson, 435 N.W.2d 687 (N.D. 1989); Phillips v. Latham, 523 S.W.2d 19 (Tex. Civ. App. 1975);* 4 American Law of Property § 17.10 (A. James Casner ed., 1952).

(n19)Footnote 322. American Law of Property § 17.10 (A. James Casner ed., 1952).

(n20)Footnote 323. *Chevron Oil Co. v. Clark, 291 F. Supp. 552, 559 (S.D. Miss. 1968), rev'd in part, 432 F.2d 280 (5th Cir. 1969).*

(n21)Footnote 324. American Law of Property § 17.10 n.11 (A. James Casner ed., 1952).

(n22)Footnote 325. American Law of Property § 17.10 (A. James Casner ed., 1952).

(n23)Footnote 326. *Dunn v. Stack, 418 So. 2d 345 (Fla. App. 1982). See also Middlemas v. Wright, 493 S.W.2d 282 (Tex. Civ. App. 1973)* (holding that a grantee's personal check was sufficient consideration even though the check was never presented for payment by the payee during her lifetime).

(n24)Footnote 327. U.C.C. § 3-305(2), 2 U.L.A. 577 (1991).

(n25)Footnote 328. *Larkins v. Howard, 39 So. 2d 224 (Ala. 1949).* James C. Hardin III, *Transfer of Real Estate at Death--Do Probate Code Changes Resolve the Issue, 12 S. Carolina Lawyer 20* (Jan./Feb. 2001).

(n26)Footnote 329. *39 So. 2d 224 (Ala. 1949).*

(n27)Footnote 330. *Westpark, Inc. v. Seaton Land Co., 171 A.2d 736 (Md. 1961);* Annotation, *Right of One Otherwise Protected by Recording Law Against Prior Unrecorded Deed or Mortgage as Affected by Fact that All or Part of the Consideration Was Unpaid at the Time He Received Notice, Actual or Constructive, of the Prior Instrument*, 109 A.L.R. 163 (1937).

(n28)Footnote 331. Annotation, *Right of One Otherwise Protected by Recording Law Against Prior Unrecorded Deed or Mortgage as Affected by Fact that All or Part of the Consideration Was Unpaid at the Time He Received Notice, Actual or Constructive, of the Prior Instrument*, 109 A.L.R. 163 (1937).

(n29)Footnote 332. Annotation, *Right of One Otherwise Protected by Recording Law Against Prior Unrecorded Deed or Mortgage as Affected by Fact that All or Part of the Consideration Was Unpaid at the Time He Received Notice, Actual or Constructive, of the Prior Instrument*, 109 A.L.R. 163 (1937).

(n30)Footnote 333. Annotation, *Right of One Otherwise Protected by Recording Law Against Prior Unrecorded Deed or Mortgage as Affected by Fact that All or Part of the Consideration Was Unpaid at the Time He Received Notice, Actual or Constructive, of the Prior Instrument*, 109 A.L.R. 163, 170 (1937).

(n31)Footnote 334. If the applicable statute is race-notice, the subsequent purchaser, of course, will be subordinate if his or her instrument has not been recorded.

(n32)Footnote 335. *Alexander v. Andrews, 64 S.E.2d 487 (W. Va. 1951);* 3 John N. Pomeroy, Equity Jurisprudence as Administered in the United States of America § 759b (Spencer W. Symons ed., 5th ed. 1941).

(n33)Footnote 336. *Dame v. Mileski, 340 P.2d 205, 212 (Wyo. 1959);* John N. Pomeroy, Equity Jurisprudence as Administered in the United States of America § 759b (Spencer W. Symons ed., 5th ed. 1941).

(n34)Footnote 337. John N. Pomeroy, Equity Jurisprudence as Administered in the United States of America § 759b (Spencer W. Symons ed., 5th ed. 1941).

(n35)Footnote 338. In *Alexander v. Andrews, 64 S.E.2d 487 (W. Va. 1951),* the subsequent purchaser paid $1,000 when the property was deeded to him. As additional consideration, the purchaser agreed to care for the grantor for the rest of his life and bury him after he died. Before the rest of the consideration was given, the prior grantee recorded her deed. The court held that the recordation of the prior deed was constructive notice to the subsequent purchaser. The subsequent purchaser was, however, entitled to reimbursement for all consideration given before the prior deed was recorded. This decision indicates that the court did not recognize that the doctrine of constructive record notice is based on a duty to search the record. In *Alexander*, the continuing consideration at the time the prior deed was recorded was caring for the grantor for the rest of his life and burying him after death. It follows from the court's decision that the subsequent purchaser was obligated to conduct frequent searches of the record as the purchaser grantee continued to provide the agreed upon consideration to the grantor.

(n36)Footnote 339. George E. Osborne, Handbook on the Law of Mortgages § 187 (2d ed. 1970); 3 John N. Pomeroy, Equity Jurisprudence as Administered in the United States of America § 749a (Spencer W. Symons ed., 5th ed. 1941); and Austin Wakeman Scott, Abridgment of the Law of Trusts § 304 (1960).

(n37)Footnote 340. George E. Osborne, Handbook on the Law of Mortgages § 188 (2d ed. 1970); 3 John N. Pomeroy, Equity Jurisprudence as Administered in the United States of America § 749 (Spencer W. Symons ed., 5th ed. 1941); and Austin Wakeman Scott, Abridgment of the Law of Trusts § 305 (1960).

(n38)Footnote 341. American Law of Property § 17.10 n.29 (A. James Casner ed., 1952); Annotation, *Extension of Time or Forbearance to Sue as Consideration Constituting Mortgagee Bona Fide Purchaser, 39 A.L.R.2d 1088 (1955).*

(n39)Footnote 342. Samuel Williston, the Law Governing Sales of Goods at Common Law and Under the Uniform Sales Act [Williston on Sales], § 620 (2d ed. 1924). "The importance of giving value is that thereby a purchaser from one whose title was only voidable acquires an indefeasible title... .The question involved has been much litigated in the law of negotiable paper, and it [is] almost uniformly held ... that the cancellation or payment of an antecedent debt was sufficient value to make an indorsee a purchaser for value, as he would have been had he taken money. By the great weight of authority, the transfer of a negotiable instrument to secure a precedent debt also made the indorsee a holder for value... .Many courts have taken a distinction between chattels and negotiable paper, so that it has been generally held that taking chattels even in absolute payment of a pre-existing debt does not constitute the holder a purchaser for value. But in England, and in some of the United States, it is held that such a person is a purchaser for value. On principle the latter view seems clearly right. The cancellation of a debt is a surrender of something valuable... .It is also most commonly held that one who takes chattels as collateral security for an antecedent debt is not a purchaser for value. Some States, however, here also regard the taker as a purchaser for value... . There seems no reason to distinguish what constitutes value where negotiable paper is purchased and where property of other sorts is purchased. The purchaser for value of negotiable paper may get greater rights than the purchaser for value of property of other kinds, but it seems an unnecessary and undesirable complication of the law to maintain a distinction as to what constitutes value." *Id.*, at 1561-1563 (citations omitted); *see also* Austin Wakeman Scott, Trusts § 298.5 (1st ed. 1939).

(n40)Footnote 343. Unif. Simplification of Land Transfers Act § 1-201 (31)(ii), 14 U.L.A. 46. The definition is taken directly from the U.C.C. § 1-201(44), 1 U.L.A. 70.

(n41)Footnote 344. A.C. Freeman, A Treatise on the Law of Judgments § 918 (Edward W. Tuttle ed., 5th ed. 1925).

(n42)Footnote 345. Allan Axelrod et al., Land Transfer and Finance 698-99 (3d ed. 1986).

(n43)Footnote 346. Richard B. Johnson, *Title Examination in Massachusetts, in* A. James Casner & W. Barton Leach, Cases and Text onProperty 886, 917 (1st standard ed. 1964).

(n44)Footnote 347. *See, e.g., Casey v. Gray, 16 Cal. Rptr. 2d 538 (1993).*

(n45)Footnote 348. *In re Mellor, 734 F.2d 1397, 1401 n.4 (9th Cir. 1984); Holden v. Garrett, 23 Kan. 98 (1879); Kartchner v. State Tax Comm'n, 294 P.2d 790 (Utah 1956).*

(n46)Footnote 349. *Hannah v. Martinson, 758 P.2d 276 (Mont. 1988).*

(n47)Footnote 350. *See., e.g.,* Ark. Code Ann. § 14-15-404(b); 765 Ill. Comp. Stat. 5/31.; N.J. Stat. Ann. § 46:22-1; and S.C. Codee Ann. § 30-7-10; 4 American Law of Property § 17.29 (A. James Casner ed., 1952).

(n48)Footnote 351. N.J. Stat. Ann. § 46:22-1.

(n49)Footnote 352. 765 Ill. Comp. Stat. 5/31.

(N50)Footnote 353. George E. Osborne, Handbook on the Law of Mortgages § 210 (2d ed. 1970).

(n51)Footnote 354. Rufford G. Patton & Carroll G. Patton, Patton on Land Titles § 17 (2d ed. 1957).

(n52)Footnote 355. Rufford G. Patton & Carroll G. Patton, Patton on Land Titles § 17 (2d ed. 1957).

(n53)Footnote 356. *Martin v. Dryden, 6 Ill. (1 Scam.) 187, 214 (1844).*

(n54)Footnote 357. *Osin v. Johnson, 243 F.2d 653, 657 (D.C. Cir. 1957);* John Hanna, *The Extension of Public Recordation, 31 Colum. L. Rev. 617, 629 (1931);* Corwin W. Johnson, *Purpose and Scope of Recording Statutes, 47 Iowa L. Rev. 231, 235-37 (1962).*

(n55)Footnote 358. John G. Curran, Note, *Status of Judgment Creditors Under the Recording Act, 32 Notre Dame Law. 471, 474 (1957).*

(n56)Footnote 359. Pure race statutes protect purchasers who record first; notice plays no part in the statutory scheme.

(n57)Footnote 360. *Klock v. Echols, 295 N.E.2d 319, 320 (Ill. App. 1973).*

(n58)Footnote 361. *Mountain States Tel. & Tel. Co. v. Kelton, 285 P.2d 168 (Ariz. 1955).*

(n59)Footnote 362. Francis S. Philbrick, *Limits of Record Search and Therefore of Notice, 93* U. Pa. L. Rev. 128-29 (1944).

(n60)Footnote 363. *See, e.g.,* Cal. Civil Code § 1214; Mich. Comp. Laws Ann. § 565.29; and Wis. Stat. Ann. § 706.08.

(n61)Footnote 364. *See, e.g.,* Ariz. Rev. Stat. Ann. § 33-411; 2 Iowa Code Ann. § 558.41; and N.Y. Real Prop. Law § 291.

(n62)Footnote 365. *See, e.g.,* Mass. Ann. Laws ch. 183, § 4; and Mo. Ann. Stat. § 442.38.

(n63)Footnote 366. *See, e.g.,* Alaska Stat. § 40.17.080; and N.J. Stat. Ann. § 46:22-1.

(n64)Footnote 367. N.M. Stat. Ann. § 14-9-3; and Ohio Rev. Code Ann. § 5301.25.

(n65)Footnote 368. Pa. Stat. Ann. tit. 21, § 351.

(n66)Footnote 369. *Olympia Produce Co. v. Associates Fin. Servs. of Ala., Inc., 584 So. 2d 477 (Ala. 1991)* 2 John

N. Pomeroy, Equity Jurisprudence as Administered in the United States
OF America § 595 (Spencer W. Symons ed., 5th ed. 1941). *Petition of Willmus, 568 N.W.2d 722 (Minn. Ct. App. 1997)* (actual notice requires actual knowledge); *Commonwealth Land Title Ins. Co. v. Ozark Global, L.C., 956 F. Supp. 989 (S.D. Ala. 1997)* (tax liens listed in warranty deed gave purchaser actual notice of encumbrances on the property). *aff'd by, 127 F.3d 41 (11th Cir. 1997).*

(n67)Footnote 370. Powell on, Real Property § 82.02 (Michael Allan Wolf, ed., Matthew Bender).

(n68)Footnote 371. *First Ala. Bank of Tuscaloosa v. Brooker, 418 So. 2d 851 (Ala. 1982); First Ala. Bank of Huntsville v. Key, 394 So. 2d 67 (Ala. Civ. App. 1981); Chisholm v. Mid-Town Oil Co., 419 S.W.2d 194 (Tenn. App. 1966);* Herbert T. Tiffany, the Law of Real Property § 1284 (Basil Jones ed., 3d ed. 1939).

(n69)Footnote 372. Roger A. Cunningham et al., the Law of Property § 11.10 n.26 (1984).

(n70)Footnote 373. However, consider *Emrick v. Multicon Bldrs., Inc., 566 N.E.2d 1189 (Ohio 1991),* in which the court held that it had to be determined that the purchaser actually knew that the prior unrecorded restrictions applied to the property purchased. It was not sufficient if the purchaser had notice of facts that might put a purchaser on inquiry. The Ohio recording act says that the purchaser, to be protected, must have "no knowledge" of the prior conveyance or interest. Ohio Rev. Code Ann. § 5301.25. This has been interpreted to mean "without actual knowledge" in the strict sense. *Varwig v. Cleveland, Cincinnati, Chicago & St. Louis R.R. Co., 44 N.E. 92, 94 (Ohio 1896). See also In re Dlott, 43 B.R. 789 (Bankr. D. Mass. 1983).* As a result, Ohio appears to be one of the few jurisdictions in which the doctrine of inquiry notice is not recognized. Recording acts elsewhere refer to purchasers being "without notice" or "in good faith," terms which leave more room for finding notice through the doctrine of inquiry notice.

(n71)Footnote 374. In many jurisdictions, instruments recorded in fact which were ineligible for recordation, due to the absence of some formal requirement (such as acknowledgement), will not give constructive record notice. H.D. Warren, Annotation, *Record of Instrument Without Sufficient Acknowledgment as Notice, 59* A.L.R.2d 1299 (1958). A recorded in fact instrument may also fail to give constructive notice because it is recorded outside of the chain of title. *Witter v. Taggart, 577 N.E.2d 338, 340 (N.Y. 1991); Fleet Mortgage Corp. v. Nieves, 272 A.D.2d 435 (N.Y. App. Div. 2000).*

(n72)Footnote 375. *Anderson v. Anderson, 96 N.E. 265 (Ill. 1911).* In that case, in 1899 the owner of the subject property signed a ten-year lease with her son, who retained in the contract an option to purchase the land at anytime during the lease at a particular price. In September 1904, the mother asked the son to purchase the subject property at a price much higher than the option price. The son refused, and then filed the contract in the Recorder's Office on September 14, 1904. On September 23, 1904, the mother conveyed the subject property to her daughters for the expressed consideration of one dollar. The circuit court dismissed the son's bill filed against the daughters for the specific performance of a contract for the sale of real estate. The Illinois Supreme Court reversed and remanded (with directions to enter a decree in conformity with the prayer of the bill), holding that "[t]here is nothing unconscionable in enforcing the contract as against the daughters and declaring the deed void, as the record shows conclusively that they took the deed with full notice of the contract, and knew at the time it was executed and delivered to them that appellant claimed his contract was enforceable." *Id. at 268.*

(n73)Footnote 376. *Bays v. Matthews, 440 N.E.2d 142 (Ill. App. 1982).* In that case, plaintiffs brought action to quiet title to the mineral estate in certain described real estate, and the trial court found that the action was barred by laches and that title to the mineral estate was vested in defendants. Plaintiffs claim title to the mineral estate as heirs of Robert A. Prowell, who acquired title to the mineral estate of the property in 1909. However, plaintiffs made no attempt to search the county records to determine who was paying the property taxes, after they discovered by published notice in 1961 that the property was on the delinquent tax roll. Plaintiffs testified they first received actual notice that someone else was claiming the mineral estate in 1974 or 1975, when they first searched the records after learning that the mineral rights had been granted to someone else. Through this search, plaintiffs discovered the tax deed to the subject property

issued in 1947 to Williams, through which defendants claim title to the mineral estate. The Appellate Court affirmed, holding the plaintiffs "are chargeable with constructive notice of the public records... .The test is not what the appellant knows, but what he might have known by the use of the means of information within his reach with the vigilance the law requires of him." *Id. at 147* (citation omitted).

(n74)Footnote 377. *Jaeger v. Hardy, 27 N.E. 863, 865 (Ohio 1891). See also Illinois Nat'l Bank v. Chegin, 220 N.E.2d 226 (Ill. 1966).* The trial court entered a decree of specific performance of vendee's agreement to buy land, despite vendee's assertion of unmarketability due to possible existing and future liens based upon a recent criminal forfeiture statute. The Illinois Supreme Court affirmed, holding that "purchasers have reposed in the thought that they could rely on public records in security, and that they would be subject to unrecorded claims only if they had or were in some manner chargeable with actual notice thereof. And because any departure from the security placed on recordation could endanger the structure upon which our land economy rests, as well as the stability of land titles, it has been held that the legislative intent to depart from a policy of recordation will not be implied but must be clearly expressed... .In the present case there was no *lis pendens* notice of pending litigation, no record of unpaid fines or judgments arising under the forfeiture statute with respect to the contract property, and defendant conceded that she had no actual knowledge which would deny her the protection afforded to a *bona fide* purchaser for value." *Id. at 229.*

(n75)Footnote 378. *Tamburine v. Center Sav. Ass'n, 583 S.W.2d 942, 949 (Tex. Civ. App. 1979); Dunlap Investors Ltd. v. Hogan, 650 P.2d 432, 435 (Ariz. 1982). See also* USOLTA § 3-205(b), 14 U.L.A. § 3-205(b) (1990).

(n76)Footnote 379. *Bump v. Dahl, 133 N.W.2d 295 (Wis. 1965).*

(n77)Footnote 380. Professor Philbrick used "constructive notice" to refer solely to notice imputed to purchasers arising out of the duty to search the record. Francis S. Philbrick, *Limits of Record Search and Therefore of Notice, 93* U. Pa. L. Rev. 125 n.1 (1944). The term "constructive notice" in common usage has a broader meaning; it is sometimes used to refer to any form of imputed notice including "inquiry notice." *First American Title Ins. Co. v. J.B. Ranch, Inc., 966 P.2d 834 (Utah 1998)* (there are two kinds of constructive notice, notice arising from documents filed with county recorder and inquiry notice).

(n78)Footnote 381. Francis S. Philbrick, *Limits of Record Search and Therefore of Notice, 93* U. Pa. L. Rev. 129-30 (1944).

(n79)Footnote 382. Ala. Code § 35-4-51; Alaska Stat. § 40.17.080; Ark. Code Ann. § 14-15-404 (a) (Michie); Idaho Code § 55-811; Kan. Stat. Ann. § 58-2222; Mo. Ann. Stat. § 442.390 (Vernon); Mont. Code Ann. § 70-21-302 (1); Nev. Rev. Stat. Ann. § 111.320; N.M. Stat. Ann. 14-9-2; Okla. Stat. Ann. Tit. 16, § 16; Utah Code Ann. § 57-3-2 (1); and Wyo. Stat. § 34-1-121(a). Ala. Code § 35-4-51; Alaska Stat. § 40.17.080; Ark. Code Ann. § 14-15-404 (a) (Michie); Idaho Code § 55-811; Kan. Stat. Ann. § 58-2222; Mo. Ann. Stat. § 442.390 (Vernon); Mont. Code Ann. § 70-21-302 (1); Nev. Rev. Stat. Ann. § 111.320; N.M. Stat. Ann. 14-9-2; Okla. Stat. Ann. Tit. 16, § 16; Utah Code Ann. § 57-3-102; and Wyo. Stat. § 34-1-121(a). *Orange Improvements P'ship v. Cardo, Inc., 984 F. Supp. 85 (D. Conn. 1997)* (constructive notice is given only of that which could be revealed by a search of the change of title); *order aff'd by, 1998 WL 998575 (2nd Cir. 1999). Matter of Estate of Zahn, 702 A.2d 482 (N.J. Super. Ct. App. Div. 1997)* ("when a deed conveyed by a mortgagor is absolutely silent about outstanding mortgage, if the grantee has actual or constructive notice by record or otherwise, grantee takes land encumbered by mortgage"); *Matter of Hamilton, 125 F.3d 292 (5th Cir. 1997)* (defines statutory requirements for constructive notice).

(n80)Footnote 383. *See, e.g., Nile Valley Fed. Sav. & Loan Ass'n v. Security Title Guar. Corp., 813 P.2d 849, 852 (Colo. App. 1991).* At least one legislature made the same broad statement: "Such records shall be notice to all the world of the existence and contents of the instruments so recorded from the time of recording." N.M. Stat. § 14-9-2. The New Mexico Supreme Court has limited "all the world" to include only those who were bound to search the record. *Angle v. Slayton, 697 P.2d 940, 942 (N.M. 1985);* and *Romero v. Sanchez, 492 P.2d 140, 143-144 (N.M. 1971).*

(n81)Footnote 384. *Angle v. Slayton, 697 P.2d 940, 942 (N.M. 1985);* and *Romero v. Sanchez, 492 P.2d 140, 143-144 (N.M. 1971). Caballero Planting Co., Inc. v. Hymel, 713 So. 2d 1277 (La. App. 1998)* (unrecorded verbal lease not protected by record notice doctrine, but landlords still obligated to honor unrecorded lease).

(n82)Footnote 385. *Mountain States Telephone & Telegraph Co. v. Kelton, 285 P.2d 168, 170-171 (Ariz. 1955).*

(n83)Footnote 386. *Genovese Drug Stores, Inc. v. Connecticut Packing Co., Inc., 732 F.2d 286, 289-290 (2d Cir. 1984)* (applying Connecticut law); *Witter v. Taggart, 577 N.E.2d 338 (N.Y. 1991).*

(n84)Footnote 387. *Ellingsen v. Franklin County, 778 P.2d 1072, 1075-1076 (Wash. App. 1989)* (holding that information regarding a road in county board minutes was not imputed to purchasers because they had no duty to search the voluminous minutes, for which there was no usable index).

(n85)Footnote 388. Harry M. Cross, *The Record "Chain of Title" Hypocrisy, 57 Colum. L. Rev. 787, 792 (1957).*

(n86)Footnote 389. Harry M. Cross, *The Record "Chain of Title" Hypocrisy, 57 Colum. L. Rev. 787, 788 (1957).*

(n87)Footnote 390. Over twenty years ago, the recorder's office in Suffolk County, Massachusetts (Boston) received approximately 7,000 instruments per month; in Cook County, Illinois (Chicago) about 15,000 per month; and in Los Angeles, California, between 5,000 and 6,000 per day. Paul E. Basye, *A Uniform Land Parcel Identifier--Its Potential for All Our Land Records, 22 Am. U. L. Rev. 251 (1973).*

(n88)Footnote 391. *Friendship Manor, Inc. v. Greiman, 581 A.2d 893, 896-897* (N.J. Super., 1990); 4 American Law of Property § 17.19 (A. James Casner ed., 1952); Edward S. Bade, Cases and Materials on Real Property and Conveyancing 238 (1954).

(n89)Footnote 392. Harry M. Cross, *The Record "Chain of Title" Hypocrisy, 57 Colum. L. Rev. 787, 794 (1957). See, e.g.*, 765 Ill. Comp. Stat. 5/7.

(n90)Footnote 393. *Glen Ellyn Sav. & Loan Ass'n v. State Bank of Geneva, 382 N.E.2d 1267 (Ill. App. 1978)* involved a variation on this basic problem situation. In this case, one of the mortgagors had contracted to sell the property before they acquired title. The contract was recorded and then title was conveyed to the mortgagor. The mortgagors then mortgaged the property to the mortgagee. The court held that the mortgagee did not have constructive notice of the contract because it was recorded too soon to be in the chain of title. *Id., at 1273.*

(n91)Footnote 394. Of course, under other law (*e.g*., estoppel) what the prior grantee had notice of may be very relevant.

(n92)Footnote 395. *Wheeler v. Young, 55 A. 670, 672 (Conn. 1903).*

(n93)Footnote 396. *Sabo v. Horvath, 559 P.2d 1038, 1044 (Alaska 1976);* Stanley M. Johanson, *Estoppel by Deed and the Recording System: The "Ayer Rule" Reexamined, 43 B.U. L. Rev. 441, 442, 458 n.83 (1963).*

(n94)Footnote 397. Stanley M. Johnson, *Estoppel by Deed and the Recording System: The "Ayer Rule" Reexamined, 43 B.U. L. Rev. 441, at 460 n.91 (1963).*

(n95)Footnote 398. John N. Pomeroy, Equity Jurisprudence § 754 (Spencer W. Symons ed., 5th ed. 1941). The filtering effect is necessary for the protection of the protected party. If those who took from the protected party also had to qualify for protection themselves, the universe of potential purchasers from the protected party might be small or non-existent. The exception to the filtering effect is where an owner who was disqualified from attaining protection reacquires the property. This revives or restores the priority of the unrecorded claim. *Id.* Sometimes the filtering effect is also referred to as the "shelter" principle. Roger A. Cunningham et al., The Law of Property § 11.10, 794 (1984).

(n96)Footnote 399. *Morse v. Curtis, 2 N.E. 929 (Mass. 1885),* is the leading case of several adopting this view. Oddly, a leading case holding that a prior after acquired title claimant prevails over a subsequent claimant, even though the prior deed was recorded prior to the grantor's acquisition of the interest, was decided by the Massachusetts Supreme Court less than a decade later. *Ayer v. Philadelphia & Boston Face Brick Co., 34 N.E. 177 (Mass. 1893).*

(n97)Footnote 400. *Friendship Manor, Inc. v. Greiman, 581 A.2d 893 (N.J. Super. 1990). Cox v. RKA Corp., 753 A.2d 1112 (N.J. 2000).*

(n98)Footnote 401. *Woods v. Garnett, 16 So. 390 (Miss. 1894)* is the leading case.

(n99)Footnote 402. 1 Rufford G. Patton & Carroll G. Patton, Patton on Land Titles § 4 (2d ed. 1957).

(n100)Footnote 403. When computerization of land title records becomes universal, these chain of title problems will be of interest only to legal historians. In computer systems, data is retrievable by the property affected, usually by a land parcel identifier (the computer-age version of a parcel-specific tract index) assigned to the property. Paul E. Basye, *A Uniform Land Parcel Identifier--Its Potential for All Our Land Records, 22 Am. U. L. Rev. 251 (1973);* Paul E. Basye, Clearing Land Titles § 9, at 2-7 (2d ed. Supp. 1989).

(n101)Footnote 404. The encumbrance is usually a restrictive covenant (*e.g., Bishop v. Rueff, 619 S.W.2d 718 (Ky. App. 1981))* or an easement (*e.g., Piper v. Mowris, 351 A.2d 635 (Pa. 1976)).*

(n102)Footnote 405. *Bishop v. Rueff, 619 S.W.2d 718 (Ky. App. 1981); Guillette v. Daly Dry Wall, Inc., 325 N.E.2d 572 (Mass. 1975); Buffalo Academy of the Sacred Heart v. Boehm Bros., Inc., 196 N.E. 42 (N.Y. 1935); Finley v. Glenn, 154 A. 299 (Pa. 1931);* 4 American Law of Property § 17.24 (A. James Casner ed., 1952).

(n103)Footnote 406. *Guillette v. Daly Dry Wall, Inc., 325 N.E.2d 572 (Mass. 1975).* This reasoning is consistent with the equally dubious notion that the index is not an essential part of the record. *Id., at 575.*

(n104)Footnote 407. Roger A. Cunningham et al., the Law of Property § 11.11, 802 (1984).

(n105)Footnote 408. *See* § 92.05 and § 92.08 *supra*.

(n106)Footnote 409. *Bishop v. Rueff, 619 S.W.2d 718, 723 (Ky. App. 1981)* (concurring opinion).

(n107)Footnote 410. Carol M. Rose, *Crystals and Mud in Property Law, 40 Stan. L. Rev. 577, 589-90 (1988).* Professor Philbrick blames John Norton Pomeroy (the original author the treatise on equity jurisprudence which has been cited many times in this chapter) for much of the damage done to the recording system by the importation of broad notice concepts from equity. Francis S. Philbrick, *Limits of Record Search and Therefore of Notice (Part II), 93* U. Pa. L. Rev. 259, 267-73 (1945). Professor Carol M. Rose's article suggests that deeper forces may have been behind the "mudding" of pristine original "crystalline" recording system concepts. Pomeroy may have been as influential as Philbrick believed, but the influence of Pomeroy's thinking may have been due largely to a readiness of judges to accept it. If another scholar had contemporaneously published views supporting a narrow concept of notice, those views may have been disregarded by courts. *First American Title Ins. Co. v. J.B. Ranch, Inc., 966 P.2d 834 (Utah 1998)* (there two kinds of constructive notice, record notice and inquiry notice arising from a knowledge of facts that should impart to a person knowledge of the ultimate fact).

(n108)Footnote 411. *Grose v. Sauvageau, 942 P.2d 398 (Wyo. 1997)* (a third party's possession of the property was not contrary to the rights of the record title holder and therefore does not trigger inquiry notice); *Matter of Hamilton, 125 F.3d 292 (5th Cir. 1997)* (inquiry into deed would have been sufficient to put purchaser on inquiry notice).

(n109)Footnote 412. *Willis v. Stager, 481 P.2d 78, 82-83 (Or. 1971).*

(n110)Footnote 413. *Wineberg v. Moore, 194 F. Supp. 12 (N.D. Cal. 1961); Bump v. Dahl, 133 N.W.2d 295 (Wis.*

1965); and *Miller v. Green, 58 N.W.2d 704 (Wis. 1953).*

(n111)Footnote 414. 5 Herbert T. Tiffany, the Law of Real Property § 1288 (3d ed. 1939).

(n112)Footnote 415. In Maryland, by statute, possession by a grantee under an unrecorded deed that is inconsistent with record title will give constructive notice "of what an inquiry of the possessor would disclose as to the existence of the unrecorded deed." Md. Real Property Code Ann. § 3-202. The USOLTA provides for a duty to inspect and constructive notice of facts concerning use and occupancy that would have been revealed "by reasonable inspection or inquiry... ." Unif. Simplification of Land Transfers Act § 3-302 (a) (2), 14 U.L.A. § 3-302 (a) (2) (1990).

(n113)Footnote 416. *Kansas City Granite & Monument Co. v. Jordan, 295 S.W. 763, 768-770 (Mo. 1927).*

(n114)Footnote 417. N.M. Stat. Ann. § 14-9-3; Va. Code Ann. § 55-96 (A)(1). *But see Platte Valley Cattle Co. v. Goldberg, 1993 Neb. App. LEXIS 60* (Neb. App. Feb. 9, 1993) (not approved for publication in permanent law reports), where the purchaser had a duty not only to inspect the property and question the seller about a possible easement that had not been recorded, but also to make further inquiry even after the seller misled the purchaser about the use of a well-traveled path.

(n115)Footnote 418. 2 Rufford G. Patton & Carroll G. Patton, Patton on Land Titles § 682 (2d ed. 1957).

(n116)Footnote 419. Dale A. Whitman, *Transferring North Carolina Real Estate Part I: How the Present System Functions, 49 N.C. L. Rev. 413, 430 (1971).*

(n117)Footnote 420. *Miller v. Green, 58 N.W.2d 704 (Wis. 1953).*

(n118)Footnote 421. *See, e.g.*, Powell on Real Property § 82.02 (Michael Allan Wolf ed., Matthew Bender).

(n119)Footnote 422. *McCannon v. Marston, 679 F.2d 13 (3d Cir. 1982)* (applying Pennsylvania law).

(n120)Footnote 423. 4 American Law of Property § 17.12 (A. James Casner ed., 1952). In some jurisdictions, constructive notice of the fact of possession will not suffice; the purchaser must have actual knowledge of the possession before there is a duty to inquire. *Id.* In Ohio, even actual knowledge may not give rise to a duty to inquire. *Varwig v. Cleveland, Cincinnati, Chicago & St. Louis R.R., 44 N.E. 92 (Ohio 1896).* Possession will give notice of all of the rights of the party in possession, rather than just part of the rights, but it will not give notice of any rights obtained by a third party through the possessor. *Mellon Nat'l Mtg. Co. of Ohio v. Jones, 374 N.E.2d 666 (Ohio App. 1977).* Generally, Ohio cases appear to value facility of real estate transfer over the security of title to non-record claims. The doctrine of inquiry notice is barely recognized in Ohio, if at all. *See, e.g., Emrick v. Multicon Bldrs., Inc., 566 N.E.2d 1189 (Ohio 1991).*

(n121)Footnote 424. *Valley Nat'l Bank of Ariz. v. Avco Dev. Co., 480 P.2d 671, 676 (Ariz. App. 1971).*

(n122)Footnote 425. *Dixon v. Kaufman, 58 N.W.2d 797 (N.D. 1953).*

(n123)Footnote 426. Roger A. Cunningham, et al., the Law of Property § 11.10 (1984). There are a few contrary decisions. *Id.*

(n124)Footnote 427. American Law of Property § 17.12 (A. James Casner ed., 1952).

(n125)Footnote 428. American Law of Property § 17.12 (A. James Casner ed., 1952).

(n126)Footnote 429. *Bacote v. Wyckoff, 310 S.E.2d 520 (Ga. 1984); Willis v. Stager, 481 P.2d 78 (Or. 1971); Webb v. Stewart, 469 P.2d 609 (Or. 1970).*

(n127)Footnote 430. *Dana Point Condo. Ass'n v. Keystone Serv. Co., 491 N.E.2d 63 (Ill. App. 1986).*

(n128)Footnote 431. *Cohen v. Thomas & Son Transfer Line, 586 P.2d 39 (Colo. 1978); Martinique Realty Corp. v. Hull, 166 A.2d 803 (N.J. Super. 1960); Miller v. Green, 58 N.W.2d 704 (Wis. 1953);* 4 American Law of Property § 17.12 (A. James Casner ed., 1952).

(n129)Footnote 432. *Valley Nat'l Bank of Ariz. v. Avco Dev. Co., 480 P.2d 671 (Ariz. App. 1971).*

(n130)Footnote 433. *Mader v. Kallos, 365 N.W.2d 408 (Neb. 1985);* Powell on Real Property § 82.02 (Michael Allan Wolf ed., Matthew Bender).

(n131)Footnote 434. *194 F. Supp. 12 (N.D. Cal. 1961).*

(n132)Footnote 435. *58 N.W.2d 704 (Wis. 1953).*

(n133)Footnote 436. *Florida Power & Light Co. v. Rader, 306 So. 2d 565 (Fla. App. 1975).*

(n134)Footnote 437. *Lake Meredith Dev. Co. v. City of Fritch, 564 S.W.2d 427 (Tex. Civ. App. 1978).*

(n135)Footnote 438. *Fanti v. Welsh, 161 S.E.2d 501 (W. Va. 1968).*

(n136)Footnote 439. *Wolek v. Di Feo, 159 A.2d 127 (N.J. Super. 1960).*

(n137)Footnote 440. *Sanborn v. McLean, 206 N.W. 496 (Mich. 1925).*

(n138)Footnote 441. *Harper v. Paradise, 210 S.E.2d 710 (Ga. 1974); Guerin v. Sunburst Oil & Gas Co., 218 P. 949 (Mont. 1923);* Lewis M. Simes & Clarence B. Taylor, the Improvement of Conveyancing by Legislation 101 (1960). However, where a statute requires the purchaser to have "actual notice," a mere reference to an unrecorded mortgage in a probate inventory will not be sufficient and knowledge of facts that ordinarily would put a person on inquiry will not be enough. *Tramontozzi v. D'Amicis, 183 N.E.2d 295 (Mass. 1962).*

(n139)Footnote 442. Colo. Rev. Stat. Ann. § 38-35-108; Mass. Ann. Laws ch. 184, § 25; Neb. Rev. Stat. §§ 76-275.04, 76-275.06. New Jersey and New York have statutes of more limited application. N.J. Stat. Ann. § 46:22-2; New York Real Property Law § 291 (McKinney). The Colorado statute has been applied in two reported cases. *Swofford v. Colo. Nat'l Bank of Denver, 628 P.2d 184 (Colo. App. 1981); Gilpin Inv. Co. v. Blake, 712 P.2d 105 (Colo. App. 1985).*

(n140)Footnote 443. Lewis M. Simes & Clarence B. Taylor, the Improvement of Conveyancing by Legislation 103-06 (1960).

(n141)Footnote 444. USOLTA § 3-207, 14 U.L.A. 285 (1990).

(n142)Footnote 445. Rufford G. Patton & Carroll G. Patton, Patton on Land Titles § 4 (2d ed. 1957).

(n143)Footnote 446. *See, e.g.,* 765 Ill. Comp. Stat. 5/9 (warranty deed); 765 Ill. Comp. Stat. 5/10 (quitclaim deed).

(n144)Footnote 447. *Brown v. Lober, 389 N.E.2d 1188 (Ill. 1979).*

(n145)Footnote 448. 2 William F. Walsh, Commentaries on the Law of Real Property § 202 (1947).

(n146)Footnote 449. K.A. Drechsler, Annotation, *Rights or Interests Covered by Quitclaim Deed,* 162 A.L.R. 556, 560-62 (1946).

(n147)Footnote 450. Manville M. Heisel, Comment, *Deeds - Quitclaim Grantee as a Bona Fide Purchaser, 28 Or.*

L. Rev. 258 (1949); Annotation, *Grantee or Mortgagee by Quitclaim Deed or Mortgage in Quitclaim Form as within Protection of Recording Laws*, 59 A.L.R. 632 (1929).

(n148)Footnote 451. *Rucker v. Tennessee Coal, Iron and R. Co., 58 So. 465, 468 (Ala. 1912).*

(n149)Footnote 452. Manville M. Heisel, Comment,*Deeds--Quitclaim Grantee as a Bona Fide Purchaser, 28 Or. L. Rev. 258 (1949);* Annotation, *Grantee or Mortgagee by Quitclaim Deed or Mortgage in Quitclaim Form as within Protection of Recording Laws*, 59 A.L.R. 632 (1929).

(n150)Footnote 453. Mich. Comp. Laws Ann. § 565.29; Minn. Stat. Ann. § 507.34; N.D. Cent. Code § 47-19-41; and Va. Code Ann. § 55-96. In at least Michigan and Virginia, the statutes reject contrary prior state supreme court decisions. *Peters v. Cartier, 45 N.W. 73 (Mich. 1890); Virginia & T. Coal & I. Co. v. Fields, 26 S.E. 426 (Va. 1896).*

(n151)Footnote 454. Manville M. Heisel, *Comment, Deeds--Quitclaim Grantee as a Bona Fide Purchaser, 28 Or. L. Rev. 258, 259 (1949).*

(n152)Footnote 455. *Harper v. Paradise, 210 S.E.2d 710 (Ga. 1974); Knutson v. Christeson, 684 S.W.2d 549 (Mo. App. 1984).*

(n153)Footnote 456. For instance, in Cook County, Illinois, corporate trustees of Illinois land trusts routinely refuse to execute conveyances with warranties for this reason. These trustees are typically paid very little for acting as trustees, because they have very few responsibilities and little liability.

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CHAPTER 92 RECORDING, REGISTRATION, AND SEARCH OF TITLE

11-92 Thompson on Real Property, Thomas Editions § 92.10

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§ 92.10 Title Registration.n457

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Commentators have exhaustively discussed the weaknesses of the American recording system n458 as a source of land title assurance. n459 Many reforms of the system have been proposed and a few have even been implemented. n460 One of the most radical reform proposals is to replace the recording system with the Torrens system of title registration. n461 Unlike recording, title registration does not usually create or transfer a legal interest until government makes a conclusive assessment of the current state of the title.

While title registration has been used in continental Europe since the early Middle Ages, n462 modern European title registration systems were not established until the 1800s. n463 England considered adopting a recording system during the 1800s, but in 1862 it adopted a registration system instead. n464 England employed some antecedents of the American recording system to a limited extent, but a comprehensive land title records system did not exist in England until this century. After substantial modifications and a number of false starts, n465 registration was finally implemented throughout England and Wales after the enactment of the Land Registration Act of 1925. n466 In Australia, Sir Robert Richard Torrens invented and implemented the Torrens system of title registration in the 1850s. n467

§ 92.10(a) The Torrens System.

Sir Robert Richard Torrens based his system of land title registration on the English method of ship registration. Each ship was assigned a page in the registry, on which there appeared the ship's name and description, the name of the ship's owner, and a statement of the liens and encumbrances against the ship. The owner of the ship received a duplicate of the page as a certificate of title and proof of ownership. Upon sale of the ship, the instrument of transfer and the certificate were sent to the registry office, and a new page was then prepared to evidence the transfer of ownership.

Sir Robert reasoned that a similar system could be used to register ownership of real estate, and he drafted legislation to accomplish that result. Sir Robert promised that the new system would have four "grand characteristics": certainty, economy, simplicity, and facility. n468 In 1857, his proposed legislation was enacted in South Australia, and enactment of similar legislation in other British territories soon followed. n469

Torrens is one of five general types of title registration systems used in the world, n470 and it is the only type used in the United States. In 1895, Illinois became the first American state to enact Torrens legislation; n471 Torrens was adopted by nineteen other states within the next few decades. n472 Since that time, nine of those states have either repealed the legislation or have allowed it to lapse. n473 Today, the Torrens system is used to a substantial extent in only five states: Hawaii, Illinois, Massachusetts, Minnesota, and Ohio. n474

In Hawaii and Massachusetts, Torrens is used state-wide. In the other three states, its use is limited to a few localities: Illinois (Cook County only), Minnesota (Hennepin and Ramsey Counties, with minimal registrations elsewhere) and Ohio (Hamilton County, with minimal registrations elsewhere). In none of these states or localities are a majority of parcels registered under Torrens. The highest incidence of use is most probably in Hawaii, where nearly forty-five percent of all parcels are so registered. n475

§ 92.10(b) The Torrens System in Operation: Mirror, Curtain and Indemnity.

The Torrens system of title registration has three major components:

(1) the register of titles;

(2) the document vault; and

(3) the assurance or indemnity fund.

The basic goal is to make the governmentally maintained record a conclusive statement of ownership and of the condition of title. This conclusive statement is intended to function both as a "mirror" of the true state of the title and as a "curtain" between the present and the past so as to make it unnecessary to conduct the kind of historical searches performed in recording systems. n476

Under Torrens, original certificates of title are maintained by the administrator of the system, normally called the Registrar of Titles. The certificate names the owner, describes the property and the estate owned, and contains a list of the liens or encumbrances on the property. n477 Where these liens or encumbrances are created by registered instruments, the original or a copy of the instrument can be retrieved from the document vault or other storage facility for examination.

Upon initial registration or a transfer of ownership, the transferee receives a duplicate certificate of title. n478 The owner's duplicate is not normally kept up-to-date as subsequent claims, liens, or other encumbrances are registered on the original. The deed of conveyance and the owner's duplicate, or an acceptable substitute, must be presented to register a transfer of ownership. When an interest is transferred, the former certificate showing the transferor as owner is canceled, and a new certificate is issued showing the transferee as the new owner. Any active liens or encumbrances on the old certificate are carried forward to the new one.

At the time an instrument is presented for registration, the Torrens office may compare the signature on the instrument with a specimen of the owner's signature on file. When this procedure is followed, Torrens has a built-in protection against the registration of forged instruments; recording systems have no comparable protection against recordation of forgeries.

The assurance or indemnity fund is the third important component of the Torrens system. This fund is used to compensate those who suffer losses because of errors of the Torrens office personnel and those who wrongfully lose interests in real estate due to the operation of the Torrens system. n479 Upon initial registration, or at some time thereafter, the owner or other party may be required to make a contribution to this fund.

Confidence in the Torrens system in California was shaken in 1937 when the entire state assurance fund was wiped out by a single claim; n480 repeal of the California Torrens Act followed in 1955. n481 In Illinois and Massachusetts, local funds are backed up by the assets and credit of the state or local government. n482 In Hawaii and Minnesota, special state funds supply this back-up. n483

§ 92.10(c) Initial Registration.

Initial registration of title is not a simple matter. The procedure has often been compared to an action to quiet title. n484 Once an initial registration becomes final, it has about the same effect as a final judgment in a quiet title action. Aside from the important exceptions of off-certificate risks and overriding interests, the registration is binding against the whole world. Indeed, it is often said that the main difference between recording and Torrens is that in Torrens the title itself is registered, while under recording the evidences of title are recorded. n485

Since initial registration usually involves a binding determination of the rights in the title being registered, possible claimants must be given due process under state and federal constitutions. Reasonable efforts must be made to identify and notify these claimants of the initial registration, and they must be given sufficient opportunity to be heard on their claims. This process requires title searches and examinations and the possible expense of preparing and conducting hearings on claims. Until fairly recently, initial registration under American statutes was handled almost exclusively through judicial proceedings. n486

Initial registration of a title can be expensive. It is generally agreed that the high cost of initial registration was a primary cause of the failure of Torrens to take hold in much of the United States. n487 In addition to the required contribution to the assurance fund, the title must be examined to identify possible encumbrances or claimants, the property may be surveyed, court documents must be filed, notices must be published, and hearings may be held before the initial registration of the title. Attorneys and other experts may be also required.

It is difficult to determine precisely the average cost of initial registration, even in a particular location. Attorney fees can vary considerably. Depending on local practices and procedures, some of the costs may be absorbed by the public, but most are usually borne by the owner seeking registration. In the rare occurrence of a registration being contested, these costs will rapidly escalate. In 1985, Richard W. Edblom, the Examiner of Titles for Hennepin County, Minnesota, estimated the cost to the registrant for the initial registration of a parcel in the Minneapolis-St. Paul area at somewhere between one and two thousand dollars. n488 This estimate is not inconsistent with published cost figures for other localities, adjusted for inflation. n489

§ 92.10(d) Administrative Initial Registration of Possessory Title.

In 1982, Minnesota became the first American state to authorize administrative initial registration of possessory titles. n490 These titles become absolute after a certain period of time. n491 Apparently, administrative initial registration of possessory titles is valid under American due process clauses if adequate notice is given to possible claimants and if the period during which a possessory title registration could be challenged is sufficiently long. n492 The Minnesota authorizing legislation was heralded as having "the potential for removing the remaining disincentive for Torrens registration--the high cost of registering uncontested titles by judicial proceeding." n493

As is the case with judicial registrations proceedings, the Minnesota possessory title registration statute requires the applicant to submit an abstract of title with the application for registration. n494 This is done so that record claimants can be identified and notified of the registration, thereby satisfying due process requirements. The cost of preparing this abstract should be about the same as that for preparing one for a sale under the attorney opinion method of title assurance. This cost may be a financial disincentive for owners to register, unless they feel reasonably sure that registration will significantly lower their title costs in a subsequent sale or loan transaction. n495

On August 1, 1990, approximately eight years after passage, Hennepin n496 became the first Minnesota county to adopt the statute. n497 While Ramsey n498 and Anoka Counties have also expressed an interest in adopting possessory title initial registration, as of November, 1990, neither had done so. n499 While representatives of the Minnesota title insurance industry opposed the adoption of possessory title registration, n500 its failure to be adopted elsewhere in Minnesota may be due to a perception that it does not significantly reduce the disincentive to the property owner to register.

The main thrust of the Minnesota possessory title registration statute is to take initial registration out of the courts and into the administrative jurisdiction of the Examiner of Titles. Even if it is assumed that this alone will result in savings, the costs of identifying claimants to the title and giving them due process still remain, and these costs still have to be borne by either property owners or government. The financial disincentive to register remains if the property owner is assigned a major portion of these costs.

While American Torrens advocates recognize that the cost of initial registration is a serious barrier to implementation, most of them fail to appreciate that the quality and security of registered titles or interests are not as great as they may appear to be. Usually, a prospective transferee of a registered interest still needs professional title examination services. Furthermore, while the need for title insurance or its equivalent is not as great for registered titles as for recorded ones, registered titles usually involve title risks that may make such coverage appropriate, if not necessary. As a result, from a cost-benefit perspective, the incentives for an individual to register and for the government to both mandate registration and to accept the burdens of administering registration are not as great as they may initially appear. While a registered title may appear more secure to a transferee than a recorded title, the question is whether this apparent greater security justifies the related costs and difficulties.

§ 92.10(e) The Torrens System in Operation: Security of Title.

Initially, Torrens appears to have an appealing simplicity compared with recording. Instead of having to search for and examine the entire recorded legal history of a parcel, it seems that the title examiner under Torrens simply has to examine the original certificate of title which "conclusively establishes the legal status of the parcel's title, subject to some limited exceptions." n501 These so-called "limited" exceptions are usually referred to as "off-certificate risks" or "overriding interests." These exceptions make the Torrens register substantially less conclusive than it is sometimes perceived to be. n502 Except where a party loses an interest in land to a good faith purchaser from a party due to fraud, those suffering losses from off-certificate risks are generally not entitled to indemnification from the assurance fund, unless the registrar's actions constituted misconduct. n503

In no title registration system is the register absolutely conclusive. n504 Exceptions to conclusiveness found in Torrens systems, which are both statutory and judge-made, n505 fall into eight categories: n506

1. Caveats: notices on certificates of possible claims or interests which are not technically registered; n507

2. Governmental Interests:(a) rights under federal law in nations with federal systems of government, (b) liens or equivalent interests which secure payment of taxes, and (c) governmental lands for uses such as streets and highways;

3. Private special interest exceptions:(a) mechanics liens, and (b) judgment creditor or execution liens;

4. Possessory interests:(a) short-term leases, usually where the lessee is in possession, (b) easements by implication, and (c) other private easements (although these are rare);

5. Equity: equitable title, due process, and fairness claims or interests: (a) rights to appeal or contest initial registrations, (b) exceptions in certain cases of fraud, (c) exceptions to protect the relatively weak or disadvantaged, such as contract vendees or the uniformed, and (d) equitable title interests;

6. Error exceptions: Exceptions due to errors in the administration of the system;

7. Encroachments:(a) encroachments by structures on the property onto adjacent property or over a building line, and (b) encroachments by structures on adjacent property onto the subject property or over building lines;

8. Non-title related restrictions on ownership or use:(a) planning laws, (b) zoning ordinances or statutes, (c) building or housing codes, (d) environmental laws or regulation, and (e) lack of access to the property. n508

Even with these exceptions, the typical register is probably more reliable than the record in the typical recording system, and thus Torrens better promotes facility of transfer. The register also provides better, though by no means perfect, protection against non-record interests. Nonetheless, the belief that registration systems may be capable of eliminating the roles played by title insurance companies or attorneys in modern conveyancing is probably overly optimistic. The prudent purchaser of a registered interest will still need professional title services. In addition, the exceptions to the conclusiveness of the register may make title insurance advisable in many cases. n509

§ 92.10(f) Torrens and Title Insurance Compared: Recovery from the Torrens Assurance Fund.

The coverage afforded by the assurance fund is sometimes likened to title insurance; however, the two kinds of protection have important differences. First, title insurance may provide indemnification for insureds when the state of title turns out to be other than as insured. In contrast, the Torrens assurance fund may provide compensation for those who lose or fail to attain interests because of errors or misdeeds by the registrar, or because they are barred by the Torrens Act from recovering interests. n510 The typical title insurance policy will cover the insured against losses due to either off-the-record risks under recording or to off-certificate risks under Torrens. n511 The Torrens assurance fund, however, will generally not provide indemnification for losses caused by off-certificate risks, unless registrar misconduct is involved.

Second, title insurance and the Torrens assurance fund differ in the coverage of litigation expenses. The typical title insurance policy contains an agreement by the insurer to either defend the title as insured or to indemnify the insured for litigation expenses incurred because of covered title defects. n512 In contrast, the Torrens registered owner or claimant may have to bear the cost of title litigation alone. Pursuant to established policy, the Registrar in Cook County, Illinois, intervened in litigation concerning Torrens titles; n513 this policy tended to supply the title defense coverage available from title insurance.

Third, a Torrens claimant may have to exhaust remedies against those who might be responsible for the loss before the claimant is entitled to claim from the fund. Under some Torrens acts, a lawsuit against the registrar may be required before a claim is paid; n514 in other Torrens systems, the registrar may pay claims without being sued. In Cook County, Illinois, the Registrar could recommend to the county that a claim should be paid without a lawsuit being necessary. n515 In contrast, a title insurance company may pay claims without being sued, and the insured does not have to exhaust remedies against others in order to recover. Furthermore, where others may be responsible, the insured is simply obligated to assist the title insurance company in being subrogated to the rights of the insured against other responsible parties. Of course, title insurance companies may unjustifiably refuse to pay claims.

Fourth, contributory negligence may bar recovery from a Torrens fund. n516 In Illinois, contributory negligence did not bar recovery from the assurance fund where the Registrar committed gross errors contributing to the loss. n517

Contributory negligence does not bar recovery under the terms of the typical title insurance policy. However, failure to disclose known adverse material facts to the company at the time of the issuance of the policy may bar recovery.

Fifth, individual claims against a Torrens fund are not usually limited to a maximum money amount; title insurance claims are subject to a limit set at the date the policy was issued (which in some instances may be adjusted upward with inflation through optional inflation endorsements). n518 In some jurisdictions, insureds under title policies may be able to recover in excess of policy limits where bad faith or tortious conduct is proved. n519

Finally, various coverages are available from title insurance companies which are simply not provided by the Torrens assurance fund. The typical title policy issued currently covers off-certificate risks not covered by the Torrens assurance fund, such as some statutory overriding interests, and off-the-record risks not included in the protection given good faith purchasers under the recording system, such as a void link in the chain of title. This coverage may also include certain tax liens in existence at the date of policy, right of access to the property, hidden mechanics liens, zoning classifications or violations, and encroachments.

In summary, the coverage provided by typical title insurance policies is more extensive than that available from existing Torrens assurance funds, with the important exception of the policy limit on claims in title insurance policies. Of course, if it is decided that such coverage should be furnished by government, the title registration assurance fund component could always be expanded to include the broader coverages found in title insurance policies. n520

§ 92.10(g) User Difficulties with Torrens.

At first glance, Torrens appears to be more user-friendly than recording. It is obviously less burdensome for the user to examine the original certificate of title in the register than it is for him or her to wade through an often complicated recorded chain of title. While title examiners may find a registration system less painful and arduous, the parties initiating registration may have a quite different experience. The rigidity and inflexibility of a Torrens office can be frustrating and time-consuming.

Under recording, users ordinarily evaluate title data whenever they deem it necessary. These evaluations do not absolutely control whether data are added to the record. The recorder's acceptance of data for recording does not subject government to potential liability from an erroneous evaluation because the recorder usually makes no such evaluation. In contrast, title registration operates as a piecemeal yet never-ending quiet title action, albeit without all of the due process requirements applicable to initial registration. n521 Government makes the evaluations one at a time, and they usually are conclusive. The act of acceptance includes a governmental judgment that the instrument was effective to create, transfer, modify or cancel the interest referred to therein. Consequently, the government may be liable for erroneous or wrongful evaluations. Under these circumstances, it is not surprising that registrars are frequently quite careful about accepting instruments for registration.

An Australian lawyer's comment about registrar attitudes in his country, where initial registration is administrative rather than judicial, is pertinent to this discussion, although he was specifically referring only to acceptance of applications for initial registration:

> One of the principal criticisms of the administration of the Australian Torrens acts ... has been that registrars have been far too finicky in scrutinizing applications for registration... . n522 These failures on the part of the administrators of the Torrens scheme do not reveal a fundamental inefficiency or incompetence on their part, but simply a lack of imagination in seeking the most effective means of implementing the goals of the scheme. They have not been able to appreciate that their duty does not lie in protecting the assurance fund at all costs, but also in broadening the reach of the scheme, and their real duty lies in achieving a sensible accommodation between these two aims. n523

Critics of Torrens have referred to registrar inflexibility as a problem, usually without describing or even citing specific examples. n524

Instruments are examined when they are presented for registration. If the examiner believes the instrument is irregular or defective in some respect, the examiner will refuse registration. n525 For example, at some offices, the examiner may refuse registration if the signature appears to be forged. Registration of a forged instrument may cause the true owner to lose title to the land. n526 To satisfy the registrar, a proceeding subsequent to registration may be necessary or, at a minimum, the transferring owner may have to appear in the Torrens office to acknowledge the authenticity of the signature and to prove his or her identity. n527

Examiners may also refuse to accept instruments that contain minor discrepancies in the description of the parties or the property. To satisfy the registrar, an owner may have to either continue an error or to resort to court or administrative proceedings to correct it. n528 Such administrative inflexibility inconveniences the parties to a Torrens transaction n529 and creates additional user costs, such as time expenditures and added closing costs.

The inflexibility that may be encountered in Torrens systems causes other problems as well. For example, registrars may refuse to remove memorials of encumbrances which no longer exist, even those that cannot reasonably still exist. n530 While memorials may render the title unmarketable, they may only be eliminated through a subsequent proceeding in court. n531 This process is costly and further undermines the owner's confidence in Torrens. At times, Torrens systems also require subsequent proceedings in court to establish title or the transfer of title. For example, upon the death of a registered owner, the Torrens office may require a subsequent proceeding, separate from any probate proceedings, in order to establish devolution of ownership. n532

Title insurance companies and title examiners under the attorney opinion method of title assurance are often inflexible and overly conservative, but their pronouncements are not backed up by the state. In addition, title insurance companies will generally retract their objections after the owner either pays an additional premium or furnishes statements, affidavits, or title indemnity bonds. All of these items are usually less costly and more expeditious than obtaining court or administrative orders. n533 Finally, an unsatisfied owner usually has the option of using another company or examiner, but he or she cannot choose another Torrens office.

§ 92.10(h) Operation and Administration of Torrens: Economy and Efficiency?

At their extreme, registration advocates paint the private title industry as being populated by parasites who feed off of the inefficiencies of the recording system. n534 These advocates claim that the replacement of recording with Torrens registration will result in substantial savings to the public through the elimination or reduction of title examination or insurance costs. However, the comparative public and private costs of different land title assurance systems are difficult to assess. The available data are incomplete and, in some instances, unreliable.

Even if reliable data were readily available, meaningful quantification of the relevant costs presents difficult analytical problems. Despite the well-financed and in-depth studies of recordation and title registration in the United States made in the 1970s by Arthur D. Little, Inc. n535 and Booz, Allen & Hamilton, Inc., n536 a statement published in 1966 by Professor Ted Fiflis remains true today: "There is no reliable, current analysis of the comparative out-of-pocket costs under the title registration, recording, and title insurance systems." n537 Thus, the economics of Torrens in relation to recordation remain difficult to quantify and evaluate.

While the comparative user costs of Torrens and recording have not been satisfactorily determined and measured, governmental costs of operation are another matter. In contrast to the paucity of reliable and meaningful comparative user cost data, published reliable data on comparative governmental costs are available. This data includes information from the County of York, Ontario, and three American jurisdictions where Torrens and recording systems operate side by side: Illinois (Cook County), Minnesota (Hennepin County) and Ohio (Hamilton County).

Comparative governmental costs have frequently been overlooked in published commentary comparing Torrens and recording. They are of vital significance in explaining the failure of Torrens to take hold in much of the United States. In order to work efficiently and satisfactorily, a title registration office must be adequately staffed with competent people who are capable of swiftly and accurately evaluating instruments presented for registration. These staffing requirements make it more costly to run a title registration office than a recorder's office.

In 1978, under contract from HUD, Booz, Allen & Hamilton, Inc., conducted extensive field research on actual land record-keeping activities at twenty sites in the United States. n538 The Booz, Allen report on this research contains comparative cost data on three locations with dual Torrens and recording systems: Cook County, Illinois; Hennepin County, Minnesota; and Hamilton County, Ohio.

The following table is excerpted from a table in the Booz, Allen report: n539

RECORDER'S COSTS:	**COOK n540**	**HENNEPIN**	**HAMILTON**
Documents Processed	246,983	88,060	82,584
Transfers	81,112	26,683	27,230
Total Expenditures	$1,556,628	$536,964	$425,902
Cost Per Document	$6.30	$6.10	$5.16
Cost Per Transfer	$19.19	$20.12	$15.64

TORRENS COSTS:	**COOK n541**	**HENNEPIN**	**HAMILTON**
Documents Processed	35,825	50,310	15,403
Transfers	16,324	17,000	5,080
Total Expenditures	$2,000,084	$546,000	$104,604
Cost Per Document	$55.83	$10.85	$6.79
Cost Per Transfer	$122.52	$32.12	$20.59

The Ontario Law Reform Commission data for the County of York also indicate that the cost to government of operating a title registration office is greater than the cost of operating a title recordation office. The staff costs for each recordation in the recording office was $4.50, the cost for space was $2.50, and the entire cost for one recordation was $7.75. To register a title, the cost was significantly higher: the staff costs for each registration was $6.50, the cost for space was $2.25, and the entire cost for one registration was $9.50. n542

The Booz, Allen study also reveals that American recorder's offices are profit centers for their counties. n543 In contrast, American Torrens offices usually require a subsidy because the income they receive often falls short of operational costs. n544 While the high cost of initial registration and the opposition from the title assurance industry may have contributed to the failure of Torrens to take hold in the United States, the high public cost and burden of continuing administration of Torrens has been the most significant contributing factor behind this failure. For users, Torrens is actually or potentially a more efficient and less costly system of land title assurance and transfer than is recording. Arguably, title risks are or can be made to be so much less under Torrens compared with recording that title insurance may be unnecessary. It is clear, however, that Torrens, or any other true registration system, is more costly and difficult for government to administer than is recording. This higher cost is inherent in title registration systems because much of the data consolidation, evaluation and management done by private parties under recording is done by government employees or their agents under registration. n545 While title registration procedures can be reformed or improved, n546 this aspect of title registration cannot thereby be reduced to insignificance, except perhaps through

either a radical (and probably unacceptable) simplification of a jurisdiction's real property laws or through limiting registerable interests to a very few types.

Since local governments have had a first-hand appreciation of the administrative difficulties and costs involved with Torrens, it is not surprising that some of the most effective opposition to title registration came from local governments responsible for its implementation and not, contrary to conventional wisdom, from the title assurance industry. n547 The worst enemies of Torrens included administrators charged with implementing it who were generally ill-equipped and disinclined to do so. Informed n548 government administrators are not likely to welcome with enthusiasm a system that is more difficult and costly for them to administer. Informed local legislators and administrators normally will not support replacing a system that generates profits with one that may require a subsidy. The high cost to local government for continued administration tends to make government unsupportive of registration, unless adequate resources are allocated to support the greater burden. n549 The failure to provide adequate resources has contributed to an inertia that caused little registration to occur after twenty states passed enabling legislation, except in a few instances where special facts and circumstances overcame this inertia. n550

§ 92.10(i) Prospects for Implementing Title Registration in the United States.

Torrens is superior to recording in a number of respects. An Ontario Law Reform Commission Study indicates that the overall economic efficiency of title registration is greater than that of recording. This greater efficiency is mainly due to the superior data management and retrieval characteristics of title registration compared to recording. Usually, no involved historical search is necessary, as most of the relevant information is consolidated on the register. The repeated re-evaluation of data that occurs in recording systems does not often take place in title registration systems. These comparative advantages of title registration are reduced somewhat by the practice of abstracting recorded titles and preserving the abstracts. Reliance by title examiners on previous searches and examinations of recorded titles also lessens the comparative economic superiority of title registration over recording systems. The growing computerization of land title records has further reduced the difference by replacing the slow and cumbersome manual indexes to data in the recording system with rapid and flexible electronic means of assembling relevant data.

Torrens might have had a chance to replace recording in the United States if its administration had been entrusted to competent administrators with access to adequate resources. Instead, for political reasons, the elected county recorders were charged with implementing Torrens in most of the states that passed enabling legislation. Because these officials were not particularly qualified to administer title registration systems, their poor performance in doing so should have been predictable. The higher administrative costs associated with Torrens compounded the difficulties in administering it. While the prospects for implementing Torrens in the Unites States were never very good, today they are non-existent. The existence of recording systems that functioned reasonably well was, by itself, enough to cause Torrens to fail. At present, the good quality of service provided by title insurance companies and other segments of the title assurance industry makes replacement of recording with title registration unwarranted, absent a showing of a substantial savings to the public. Even if such a savings can be demonstrated, the political and practical barriers to the implementation of title registration in the United States appear to be insurmountable.

COMPUTER ASSISTED RESEARCH

LEXIS: torrens
assurance fund*
indemnity fund*
initial registration
possessory title*

NOTE:
Many cases relevant to this section pre-date the earliest cases in the database.

FOOTNOTES:

(n1)Footnote 457. Portions of the text in § 92.10 have been adapted from John L. McComack, *Torrens and Recording: Land Title Assurance in the Computer Age, 18 Wm. Mitchell L. Rev. 61 (1992),* and used with the permission of *The William Mitchell Law Review*.

(n2)Footnote 458. The term "recording" will be used to refer to land title record systems where the government simply acts as a custodian of land title data. "Title registration" will refer to systems where the government evaluates data, usually as it comes in, and where the record maintained is intended to be a generally conclusive governmental statement concerning ownership and title. The term "Torrens" will refer specifically to the title registration system adopted in Australia in 1857 and systems found elsewhere in the world which are directly based on the Australian model.

Some commentators use "Torrens" to refer to systems, actual or proposed, which may include some aspects of the Australian model without intending to refer to such model in its entirety. Of course, classifications are rarely perfect and some systems do not neatly fit into either the, "recording," or "registration," categories as defined above. Indeed, title registration systems usually store some data for notice purposes without affirming that the data represent valid interests, while some recording systems give affirmations that certain data stored in the database represent legally binding interests or events.

(n3)Footnote 459. Much of this commentary exaggerates the inefficiencies and weaknesses of the recording system. *See, e.g.*, Barry Goldner, Comment, *The Torrens System of Title Registration: A New Proposal for Effective Implementation, 29 UCLA L. Rev. 661, 665-67 (1982).* For a comprehensive and fairly balanced discussion, *see generally* U.S. Dep't of Hous. & Urban Dev., Land Title Recordation Systems: Legal Constraints and Reforms IV-1 (1979).

(n4)Footnote 460. The principal reforms adopted include Marketable Title acts and official tract (parcel) indexes.

(n5)Footnote 461. *See* Martin Lobel, *A Proposal for a Title Registration System for Realty, 11 U. Rich. L. Rev. 501 (1977)* (proposing the adoption of a Torrens system for the District of Columbia).

(n6)Footnote 462. Sir Ernest Dowson & V.L.O. Sheppard, Land Registration, Colonial Research Pub. No. 13, 173 (2d ed. 1964); Rudolf Huebner, A History of Germanic Private Law 218-19 (Francis S. Philbrick trans., reprint 1968) (1918).

(n7)Footnote 463. Sir Ernest Dowson & V.L.O. Sheppard, Land Registration, Colonial Research Pub. No. 13, 63, 180, 187 (2d ed. 1964); Rudolph Huebner, A History of Germanic Private Law 252 (Francis S. Philbrick trans., reprint 1968) (1918). Land title record systems similar in basic concept to the American recording system were adopted in Europe many years ago and are still used today. European countries using recording include Greece, Belgium, the Netherlands, France, the Republic of Ireland, Northern Ireland, and Scotland; the Republic of Ireland, Northern Ireland, and Scotland are currently converting (very slowly) to the English form of title registration. European countries using title registration include the United Kingdom, the Republic of Ireland, Germany, Austria, Hungary, Poland, Czechoslovakia, Yugoslavia, Denmark, Norway, Sweden, and Switzerland. *See* John L. McCormack, *Torrens and Recording: Land Title Assurance in the Computer Age, 18 Wm. Mitchell L. Rev. 61, 70 n.31 (1992).* Land title assurance in Italy appears to be based on notaries. *See* Paul B. Rava, *Italian Procedure in Real Estate Conveyancing, 1964 A.B.A. Sec. Pub. International and Comparative Law* (1965).

Torrens was established in Brazil in 1890, but it did not take hold and it is not used much there today. Torrens also failed to take hold in other parts of Latin America and Spain. *See* Alejandro M. Garro, the Louisiana Public Records Doctrine and the Civil Law Tradition § 36, at 81 n.18 (1989); Francisco V. Igartua, *The Public Registry of Property in Mexico, 11 Miami L.Q. 457 (1957).* Puerto Rico uses notaries, registration and title insurance. *See* U.S. Dep't of Hous. & Urban Dev. and VA Report on Mortgage Settlement Costs 1213 (Supp. 1972). Very little about Asian land title

record practices has been published in English. *See* Thomas H. Clarke, *Mortgage and Title Assurance in Asia*, 11 Int'l Bus. Law. 127 (1983). *See also* Batalov, Lev. S., The Russian Title Registration for Realty and Its Effect on Foreign Investors, *73 Wash. L. Rev. 989 (1998).*

(n8)Footnote 464. Sir Ernest Dowson & V.L.O. Sheppard, Land Registration 39 (2d ed. 1964); *See also* C. Dent Bostick, *Land Title Registration: An English Solution to an American Problem, 63 Ind. L.J. 55, 74-75 (1987).*

(n9)Footnote 465. Land Transfer Act, 1875, 38 & 39 Vict., ch. 87 (Eng.).

(n10)Footnote 466. Land Registration Act, 1925, 15 & *16 Geo. 5,* ch. 21 (Eng.). The English program of compulsory registration is approaching completion of the mammoth task of registering every parcel in England and Wales. *See* C. Dent Bostick, *Land Title Registration: An English Solution to an American Problem, 63 Ind. L.J. 55, 74-77 (1987);* Ted J. Fiflis, *Security and Economy in Land Transactions: Some Suggestions from Scotland and England, 20 Hastings L.J. 171, 201-06 (1968).*

(n11)Footnote 467. A.G. Lang, *Computerized Land Title and Land Information, 10 Monash U.L. Rev. 196, 197 (1984).*

(n12)Footnote 468. A.G. Lang, *Computerized Land Title and Land Information, 10 Monash U.L. Rev. 196, 197 (1984).*

(n13)Footnote 469. British Honduras (Belize), 1859; Vancouver Island (British Columbia), 1860; Tasmania, 1862; New South Wales, 1862; Ireland, 1865; New Zealand, 1870; Wales, 1875; Jamaica, 1888; Nova Scotia, 1904; and Uganda, 1908. Blair C. Shick & Irving H. Plotkin, Torrens in the United States 17 (1978); U.S. Dep't of Hous. & Urban Dev., Land Title Recordation Practices: A State-of-the-Art Study 23 (1980). The Torrens system continues to be successful in South Australia. Today, the South Australian system encompasses much more than information regarding ownership. It also contains other data, such as: (1) existing land uses; (2) land uses permitted on the site; (3) planning proposals to change these uses; (4) the location of utility cables and easements; (5) topographical features (flood plains, drainage, sea levels); (6) geological features (groundwater, liquefaction, landfills); (7) soils (type, Ph structure); (8) rainfall conditions; (9) biological environmental data (vegetation, fauna, land cover, endangered species); (10) pollution management and transport information; and (11) a description of all buildings on the site. George Lefcoe, Real Estate Transactions 230 (1993).

(n14)Footnote 470. Sir Ernest Dowson & V.L.O. Sheppard, Land Registration, 98 (2d ed. 1964). The other four are the English, German, Swiss, and Ottoman title registration systems. *Id.* Anh T. Le, *Property--The Effect of the Hersh Decision on the Torrens Act: Getting to the Root of the Problem, 26 Wm. Mitchell L. Rev. 601 (2000).*

(n15)Footnote 471. The system was approved by the voters in Cook County on November 5, 1895; however, the statute was held unconstitutional in the following year. *People ex rel. Kern v. Chase, 46 N.E. 454 (Ill. 1896).* A second act was adopted and approved by the voters in 1897; this statute was held constitutional. *People ex rel. Deneen v. Simon, 52 N.E. 910 (Ill. 1898).* The Torrens office in Cook County opened on March 1, 1899, and has been in continuous operation ever since. However, in January 1991, legislation was signed which abolished Torrens in Illinois, effective January 1, 1992. 1990 Ill. Legis. Serv. 2959 (West); *see also* David Heckelman, *Bill Abolishes Torrens Title Registration*, Chi. L. Bull., Jan. 15, 1991, at 1.

(n16)Footnote 472. U.S. Dep't of Hous. & Urban Dev., Land Title Registration Systems: Proposals for Improvement III-4 (1979); *see also* U.S. Dep't of Hous. & Urban Dev. and VA, Report on Mortgage Settlement Costs II-A-4 (Supp. 1972).

(n17)Footnote 473. U.S. Dep't of Hous. & Urban Dev. and VA, Report on Mortgage Settlement Costs II-A-4, II-A-9; U.S. Dep't of Hous. & Urban Dev., Land Title Registration Systems: Proposals for Improvement III-4 (1979). The National Conference of Commissioners on Uniform State Laws adopted the Uniform Land Registration Act in

1916; this act was withdrawn by the commissioners as obsolete in 1934. *See* U.S. Dep't of Hous. & Urban Dev., Land Title Registration Systems: Proposals for Improvement III-6 (1979).

(n18)Footnote 474. *See* U.S. Dep't of Hous. & Urban Dev., Land Title Registration Systems: Proposals for Improvement III-4, III-5 (1979).

(n19)Footnote 475. U.S. Dep't of Hous. & Urban Dev., Land Title Registration Systems: Proposals for Improvement III-10 (1979). In Hawaii, Torrens did not have to displace a well-entrenched recording system.

(n20)Footnote 476. Historical searches are sometimes necessary in Torrens. *See, e.g.*, Ivan L. Head, *Real Property--Torrens System of Land Registration in Saskatchewan--Exception to Indefeasibility--Error in Not Reserving Minerals to Crown Pursuant to Original Grant*, 34 Canadian B. Rev. 736, 737-38 (1956). Likewise, historical searches are a necessary part of the Ontario title registration system. *See* D.J. Donahue & P.D. Quinn, Real Estate Practice in Ontario 20 (4th ed. 1990). In the *Matter of the Petition of Carolyn McGinnis, 536 N.W.2d 33 (Minn. App. 1995)* (an adverse possession claim is invalid against Torrens property where no disputed interest existed at the time of registration and there was no ambiguity in the property description).

(n21)Footnote 477. *See* 2 Rufford G. Patton & Carroll G. Patton, Patton on Land Titles §§ 683, 684 (2d ed. 1957). *Assistant Recorder of the North Registry Dist. of Bristol County v. Spinelli, 651 N.E.2d 411 (Mass. App. 1995)* (the assistant recorder had statutory authority to petition the land court to amend a certificate of title that contained an error).

(n22)Footnote 478. In Cook County, Illinois, the owner must give the Registrar a receipt (called a "signature card") for the duplicate bearing the owner's signature.

(n23)Footnote 479. *See* Minn. Stat. § 508.76; 765 Ill. Comp. Stat. 35/101; Mass. Gen. Laws Ann. ch. 185, para. 101.

(n24)Footnote 480. *See Gill v. Johnson, 69 P.2d 1016 (Cal. App. 1937).*

(n25)Footnote 481. Land Title Law, Cal. Gov't Code, foll. § 27297.5, *repealed by* 1955 Cal. Stat. ch. 332, § 1.

(n26)Footnote 482. 765 Ill. Comp. Stat. 35/102a; Mass. Gen. Laws Ann. ch. 185, § 104.

(n27)Footnote 483. *See* Haw. Rev. Stat. § 501-214; Minn. Stat. § 508.75; *see also* Comment, *Possessory Title Registration: An Improvement of the Torrens System, 11 Wm. Mitchell L. Rev. 825, 839 (1985).*

(n28)Footnote 484. *See, e.g.*, John E. Cribbet & Corwin W. Johnson, Principles of the Law of Property 353 (3d ed. 1989).

(n29)Footnote 485. *See, e.g., People v. Mortenson, 88 N.E.2d 35, 38 (Ill. 1949).*

(n30)Footnote 486. The first American Torrens act, enacted in Illinois, was held unconstitutional because it provided for administrative initial registration. A second Illinois act was passed in 1897 providing for *in rem* judicial initial registration. *See People ex rel. Deneen v. Simon, 52 N.E. 910, 911 (Ill. 1898).*

(n31)Footnote 487. Barry Goldner, Comment, *The Torrens System of Title Registration: A New Proposal for Effective Implementation, 29 UCLA L. Rev. 661, 688 (1982).*

(n32)Footnote 488. Comment, *Possessory Title Registration: An Improvement of the Torrens System, 11 Wm. Mitchell L. Rev. 825, 838 (1985).*

(n33)Footnote 489. In the late 1970s, uncontested initial registrations in the United States cost about $550 to $750. *See* U.S. Dep't of Hous. & Urban Dev., Land Title Registration Systems: Proposals for Improvement III-14 (1979).

(n34)Footnote 490. Act of March 10, 1982, ch. 396, 1982 Minn. Laws 192 (codified as amended at Minn Stat. §§ 508A.01-.85 (1990)). Administrative initial registration of possessory titles has been used for years in England and Australia. See U.S. Dep't of Hous. & Urban Dev., Improving Land Title Registration Systems V-19 (1979).

(n35)Footnote 491. This period is five years in Minnesota. Minn. Stat. § 508A.01, subd. 2 (1990). Hawaii authorities perform initial registration of possessory titles, but such titles do not ripen into absolute ones. Haw. Rev. Stat. § 501-72 (1988).

The Minnesota legislation was initially prepared by Mr. Richard W. Edblom, Examiner of Titles, Hennepin County, Minnesota, and his staff at the request of a HUD consultant. Interview with Richard W. Edblom, Examiner of Titles, and Jan Witkowski, Registered Property Analyst, Office of the Registrar of Titles, Minneapolis, Hennepin County, Minnesota (Nov. 26, 1990). At the time, Torrens advocates were hopeful that administrative registration of possessory titles could lead to effective implementation of Torrens throughout the United States. The attractiveness of possessory title registration would be greater if such titles could be administratively registered without the expense of searching for, identifying, and notifying possible claimants. Such a "pure" form of possessory title registration probably would be unconstitutional under due process clauses, unless the registration remained inconclusive for a long time, such as 10 or 20 years. *See id.* It is possible that "pure" possessory registrations could be made immediately conclusive if a provision is made to pay just compensation to those who lose interests. This would be a novel application of the power of eminent domain. *Petition of Geis, 576 N.W.2d 747 (Minn. App. 1998)* (Torrens confers conclusive title, free from all adverse claims and encumbrances not listed on certificate of title); *But see Hersh Properties, L.L.C. v. McDonald's Corp., 573 N.W.2d 386 (Minn. App. 1999)* (certificate is conclusive evidence of an interest, but it does not conclusively establish validity of the interest; it may contain invalid interests).

(n36)Footnote 492. U.S. Dep't of Hous. & Urban Dev., Land Title Registration Systems: Proposals for Improvement V-9 - V-12 (1979); *See also* Barry Goldner, Comment, *The Torrens System of Title Registration: A New Proposal for Effective Implementation, 29 UCLA L. Rev. 661, 700-03 (1982).*

(n37)Footnote 493. Diana Sclar, *Minnesota Simplifies Land Registration,* 11 Real Est. L.J. 258, 261 (1983).

(n38)Footnote 494. Minn. Stat. § 508A.11. Among other things, the abstract identifies record interest holders or claimants who should be notified of the proceeding. Hennepin County requires the abstract to "be certified to all of the land to be registered, as of a recent date, and must include the deed or other instrument by which the applicant acquired title." Richard W. Edblom, *Registration of Title Without a Court Proceeding* 2 (1990) (unpublished report, on file with author).

(n39)Footnote 495. While not used as often as in Cook County, Illinois, title insurance is commonly used in Torrens transactions in Hennepin County, Minnesota. *See* Blair C. Shick & Irving H. Plotkin, Torrens in the United States 98-99 (1978).

(n40)Footnote 496. Hennepin County includes the Minneapolis area.

(n41)Footnote 497. Richard W. Edblom, *Registration of Title Without a Court Proceeding* 1 (1990) (unpublished report, on file with author). The Hennepin County Board did not choose to limit eligibility for possessory registration to cases where applicants owned tracts that were already partially registered. *Id.*

(n42)Footnote 498. Ramsey County includes St. Paul and the surrounding area.

(n43)Footnote 499. Comment, *Possessory Title Registration: An Improvement of the Torrens System, 11 Wm. Mitchell L. Rev. 825, 844 n.144 (1985); See also* Interview with Richard W. Edblom, Examiner of Titles, and Jan Witkowski, Registered Property Analyst, Office of the Registrar of Titles, Minneapolis, Hennepin County, Minnesota (Nov. 26, 1990). In addition to Hennepin, another county in northern Minnesota may have adopted the statute in 1991. Letter from Richard W. Edblom, Examiner of Titles, Hennepin County, to Kathleen Milner, Staff Member, *William*

Mitchell Law Review 2 (Nov. 26, 1991) (on file with the *William Mitchell Law Review*).

(n44)Footnote 500. Comment, *Possessory Title Registration: An Improvement of the Torrens System, 11 Wm. Mitchell L. Rev. 825, 843 (1985). Contra* Barry Goldner, Comment, *The Torrens System of Title Registration: A New Proposal for Effective Implementation, 29 UCLA L. Rev. 661, 692 (1982).*

(n45)Footnote 501. Barry Goldner, Comment, *The Torrens System of Title Registration: A New Proposal for Effective Implementation, 29 UCLA L. Rev. 661, 678-79 (1982). Matter of 2003 & 2007 Ala Wai Blvd, City & County of Honolulu, 944 P.2d 1341 (Haw. App. 1997)* (purpose of Torrens system is to establish an indefeasible title free from all rights or claims not registered); *Petition of Willmus, 568 N.W.2d 722 (Minn. App. 1997)* (purpose of Torrens system of land registration is to ensure that person need look no further than certificate of title); *Scanlan v. Nielsen, 561 N.W.2d 917 (Minn. App. 1997)* (when ownership is transferred in a Torrens registered property to a good faith purchaser for value and subsequently the interest of record is transferred without notice to prior owner or good faith purchaser to another good faith purchaser, the registered interest prevails).

(n46)Footnote 502. "[R]egistration is neither as conclusive nor indefeasible in fact as in theory." Milton R. Friedman, Contracts and Conveyances of Real Property § 3.12, at 304 (4th ed. 1984).

(n47)Footnote 503. *See* 765 Ill. Comp. Stat. 35/101; Mass. Gen. Laws Ann. ch. 185, § 101; Minn. Stat. § 508.76.

(n48)Footnote 504. The English title registration statute permits a broad range of overriding interests: legal easements, rights relating to adverse possession and "rights of every person in actual occupation of the land or in receipt of the rents and profits thereof, save where enquiry is made of such person and the rights are not disclosed." Additionally, the administrator has authority to change the record by "rectifying" it. Land Registration Act, 15 & *16 Geo. 5,* ch. 21, § 70 (1) (Eng.); *see also* C. Dent Bostick, *Land Title Registration: An English Solution to an American Problem, 63 Ind. L.J. 55, 94 (1987).*

(n49)Footnote 505. The existence of some of these excepted claims or interests can, in some instances, be discovered through other records in the registration office (and elsewhere) and through physical inspection of the property.

(n50)Footnote 506. At least some strong or pervasive influences or policies are involved because these exceptions are not peculiar to title registration; some are found in recording systems and marketable title acts as well. Carol M. Rose, *Crystals and Mud in Property Law, 40 Stan. L. Rev. 577, 589 n.70 (1988). See, e.g., Hersh Properties, L.L.C. v. McDonald's Corp., 588 N.W.2d 728 (Minn. 1999)* (stating that Torrens registration allows state of title to be determined by the certificate of title, citing Minn. Stat. Ann. § 508.24); Minn. Stat. Ann. § 508.24, which lists the seven statutory exceptions as:

(1) liens, claims, or rights arising or existing under the laws or the constitution of the United States, which this state cannot require to appear of record;

(2) the lien of any real property tax or special assessment for which the land has not sold at the date of the certificate of title;

(3) any lease for a period not exceeding three years when there is actual occupation of the premises thereunder;

(4) all rights in public highways upon the land;

(5) the right of appeal, or right to appear and contest the application, as is allowed by this chapter;

(6) the rights of any person in possession under deed or contract for deed from the owner of the certificate of title; and

(7) any outstanding mechanics lien rights which may exist under sections 514.01 to 514.17.

(n51)Footnote 507. Illinois abolished caveating in 1979 because it was little used there. 1979 Ill. Laws 415, § 1 (effective Jan. 1, 1980).

(n52)Footnote 508. For a full discussion of these exceptions to conclusiveness, see John L. McCormack, *Torrens and Recording: Land Title Assurance in the Computer Age, 18 Wm. Mitchell L. Rev. 61, 91-98 (1992).* In the *Matter of the Petition of Carolyn McGinnis, 536 N.W.2d 33 (Minn. App. 1995)* (an adverse possession claim is invalid against Torrens property where no disputed interest existed at the time of registration and there was no ambiguity in the property description).

(n53)Footnote 509. The Torrens assurance fund usually does not provide compensation for losses caused by off-certificate risks. *See, e.g.*, Minn. Stat. § 508.76. However, in *Shevlin-Mathieu Lumber Co. v. Fogarty, 153 N.W. 871 (Minn. 1915),* the court held that the failure of the Registrar to report the existence of an overriding U.S. government interest was an "omission" within the meaning of the Minnesota statute, entitling the insured purchaser to recover from the assurance fund. *Shevlin-Mathieu Lumber Co. v. Fogarty, 153 N.W. 873 (Minn. 1915).* Another serious risk is lack of access to the property, which can result in catastrophic loss and is usually covered by title insurance, but it is not covered by the Torrens assurance fund. *See, e.g., L. Smirlock Realty Corp. v. Title Guar. Co., 418 N.E.2d 650, 652 (N.Y. 1981)* (rendering real estate worth over $600,000 valueless from lack of access).

(n54)Footnote 510. *See* Mass. Gen. Laws Ann. ch. 185, § 101.

(n55)Footnote 511. *See* Michael J. Rooney, *A Primer for Attorneys, in* Title Insurance and You: What Every Lawyer Should Know! 3, 4 (1979).

(n56)Footnote 512. *See* Michael J. Rooney, *A Primer for Attorneys, in* Title Insurance and You: What Every Lawyer Should Know! 9 (1979).

(n57)Footnote 513. *See, e.g., Echols v. Olsen, 347 N.E.2d 720 (Ill. 1976).*

(n58)Footnote 514. *See, e.g.*, Mass. Gen. Laws Ann. ch. 185, §§ 101 & 102, Minn. Stat. § 508.76. In Minnesota, however, a party is entitled to recovery under § 508.76 only when the Torrens registration laws preclude the party from bringing an action regarding the registered property. A party may not recover under this statute after litigating and losing an action. *See, e.g., Zahradka v. State, 515 N.W.2d 611 (Minn. App. 1994).*

(n59)Footnote 515. *See, .e.g.*, 765 Ill. Comp. Stat. 35/101-102a.

(n60)Footnote 516. *See, e.g.*, Mass. Gen. Laws Ann. ch. 185, § 101.

(n61)Footnote 517. *See, e.g., Hoffman v. Schroeder, 186 N.E.2d 381, 388 (Ill. App. 1962)* (holding set forth in supplemental opinion).

(n62)Footnote 518. *See* Michael J. Rooney, Attorneys' Guide to Title Insurance 14 (1984). However, *see* Minn. Stat. Ann. § 508.78, limiting recovery from the Torrens assurance fund to no more than the fair market value of the subject real estate "at the time of the last payment into such fund, on account thereof."

(n63)Footnote 519. *See, e.g., Heyd v. Chicago Title Ins. Co., 354 N.W.2d 154 (Neb. 1984).*

(n64)Footnote 520. *See generally* D. Barlow Burke, Jr., Law of Title Insurance (1986 & Supp. 1991). Nigel Bankes and Alicia Quesnel, *Recent Judicial Developments of Interest to Oil and Gas Lawyers, 38 Alberta L. Rev. 294 (June 2000).*

(n65)Footnote 521. *See, e.g., Eliason v. Wilborn, 281 U.S. 457 (1930).*

(n66)Footnote 522. Ronald Sackville, *Some Aspects of the Torrens System in Victoria: A Comparison* 37 (1966) (unpublished manuscript on file with the Yale Law School Library collection), *quoted in* Allen Axelrod et al., Land Transfer and Finance: Cases and Material 908-09 (3d ed. 1986).

(n67)Footnote 523. Ronald Sackville, *Some Aspects of the Torrens System in Victoria: A Comparison* 37 (1966) (unpublished manuscript on file with the Yale Law School Library collection), *quoted in* Allen Axelrod et al., Land Transfer and Finance: Cases and Material 908-09 (3d ed. 1986). Registrar zeal in protecting the indemnity or assurance fund reached its zenith (or perhaps its nadir) in *Hoffman v. Schroeder, 186 N.E.2d 381 (Ill. App. 1962).* In this case, the court held that a savings and loan that took a forged mortgage from an imposter did not acquire a lien against the property, even though a memorial of the mortgage was registered. *Id. at 388.* The court said that the Illinois Torrens Act protects those who take from a party to fraud only where they take from a registered owner in good faith. *Id. at 386.* Since the savings and loan took from an imposter and since it lacked good faith because its officer improperly notarized the mortgage, no lien attached to the subject property. *Id.* However, the court held that the savings and loan was entitled to indemnification because of the Registrar's failure to discover the "palpable" forgeries on the mortgage documents. *Id. at 388.* In his petition for rehearing, the Registrar cited an 1889 New Zealand decision holding that contributory negligence may bar a party from recovering from the assurance fund. *Id. at 388-89* (*citing* case Miller v. Davy, 7 N.Z.L.R. 515 (P.C. 1889)). The Registrar argued that the improper notarization by the officer of the savings and loan was contributory negligence which barred recovery from the assurance fund. The court rejected this argument:

> As we pointed out in our opinion, the indemnity fund is in the nature of insurance against mistakes of the registrar... .To import into this type of transaction the doctrine of contributory negligence, whereby gross errors of a registrar might be completely cancelled out by some slight mistake on the part of an insured, could discredit the whole system and destroy it as an effective means of assuring titles in this county.

Hoffman v. Schroeder, 186 N.E.2d 381, 389 (Ill. App. 1962)

(n68)Footnote 524. Richard C.B. Risk, *The Records of Title to Land: A Plea for Reform, 21 U. Toronto L.J. 465, 478 (1971). See, e.g., Capitol Indem. Corp. v. West Fargo Plumbing & Heating, Inc., 145 F.3d 998 (8th Cir. 1998)* (Minnesota's Torrens registration system did not recognize lien between parties, in spite of indemnity agreement assigning to surety all of principal's interest in property, until the instrument was registered).

(n69)Footnote 525. This examination process, of course, has the advantage of detecting potential defects before they are entered into the record. A similar method of quality control exists in the Scottish recording system. There, the recorder (called the "Keeper of the Public Register") examines the instruments presented for recordation. *See* Ted J. Fiflis, *Security and Economy in Land Transactions: Some Suggestions from Scotland and England, 20 Hastings L.J. 171, 189 (1968).*

Under this process of examination, mistakes are caught rather than buried, as is the case under the American recording system. This positive feature of the Torrens system, however, may not be worth the cost to government and the cost and aggravation to the users of the system. Adjournment of real estate closings and repeated trips to the government office until the bureaucrats are satisfied are real costs, although difficult to measure. Few real defects are caught, and the Registrar's objections often appear to be bureaucratic nitpicking.

Years ago, scandals occasionally arose in the Torrens office in Cook County, Illinois, involving the bribing of counterpersons. In some instances, it appears that illegal payments were used to inject flexibility into the system. *See United States v. Gannon, 684 F.2d 433* (7th Cir.) (en banc) (affirming conviction of counterman at Cook County Recorder of Deeds office for accepting payments in excess of what law required), *cert. denied, 454 U.S. 940 (1981);*

William Juneau, *Boss Defends Bribed Aide as "a Bit Guilty,"* Chi. Trib ., Sept. 25, 1980, at 1, 22 (quoting Cook County Recorder of Deeds). Presently, a cleaner regime prevails in Cook County, Illinois. Since 1977, the following notice has been displayed conspicuously at several places in the Torrens office: "ATTENTION--Office regulations prohibit members of the staff from accepting gratuities from any source in the conduct of office business." *United States v. Gannon, 684 F.2d 433, 435* (7th Cir.); *see also* Fred I. Feinstein, *The Torrens System*, in 2 Basic Real Estate Practice 1-7, 1-43 (Ill. Inst. of Continuing Legal Educ., 1988 Supp. 1990).

(n70)Footnote 526. *See Eliason v. Wilborn, 281 U.S. 457, 459 (1930).*

(n71)Footnote 527. The author once represented a person who owned a Torrens-registered condominium unit. He wanted to convey the unit to his fiance and himself in joint tenancy. The Registrar in Cook County, Illinois, refused to accept the deed that was prepared to accomplish that result because the Torrens office workers suspected that the signature might have been forged. The client was accordingly required to appear in person with two pieces of identification to prove his identity and acknowledge the execution of the deed.

(n72)Footnote 528. *See Workshop on the Torrens System: A Panel Discussion*, Title News, Jan. 1977, at 34. For example, where the name or marital status of an owner has changed since the previous registration, a proceeding subsequent to registration may be necessary to establish the owner's identity or claim to ownership. *Id.* By contrast, the Registrar in Cook County, Illinois, normally will accept affidavits to establish identities or claims to ownership after legal name changes or changes in marital status; as a result, subsequent court proceedings are usually unnecessary.

(n73)Footnote 529. Torrens closings in Cook County, Illinois, must take place in the Torrens office because the paperwork has to be scrutinized by the employees or deputies of the Registrar. Members of the general public must reserve closing space at least one month in advance. *See* Report of the Blue Ribbon Committee Prepared at the Request of Carol Moseley Braun, Cook County Recorder of Deeds/Registrar of Titles 51 (June 13, 1989) (unpublished report on file with author).

(n74)Footnote 530. *Workshop on the Torrens System: A Panel Discussion*, Title News, Jan. 1977, at 34.

(n75)Footnote 531. In an attempt to cure this problem, a 1979 amendment to the Illinois Torrens Act authorized the Registrar to cancel memorials claimed to be no longer valid, in return for a title indemnity agreement backed by a surety bond from a title insurance company, a bonding company, or some other such security. If the Registrar later paid a claim from the assurance fund because the cancellation was wrongful, the Registrar would be entitled to indemnification under the title indemnity agreement. *See* 765 Ill. Comp. Stat. 35/65a. Previously, the established title insurance practice had been to furnish a title insurance company with a title indemnity bond (frequently issued by itself or a related company) to induce the company to remove an exception to coverage based on a title defect of questionable validity.

(n76)Footnote 532. *See* Rufford G. Patton, *Evolution of Legislation on Proof of Title to Land, 30 Wash. L. Rev. 224, 234 (1955).* In Illinois, this kind of proceeding was called a "transmission proceeding." In the early 1970s, the Registrar in Cook County, Illinois, without statutory authority, began transferring certificates without court orders from transmission proceedings. If the estate had been probated, the Registrar relied on the determinations made by the probate court. If no proceedings had been conducted in probate court, the Registrar administratively determined the devolution of the property and accordingly re-registered the property. While this chagrined the judges who normally conducted transmission proceedings, the Illinois Legislature amended §§ 71 and 72 of the Illinois Torrens Act in 1977 to authorize the Registrar's creative way of enabling owners to avoid transmission proceedings. *See* 765 Ill. Comp. Stat. 35/71.

(n77)Footnote 533. In Cook County, Illinois, the Registrar has developed a set of affidavits which may suffice to cure objections without going to court. Additionally, transferee title objections to Torrens titles can often be satisfied by title insurance coverage.

(n78)Footnote 534. *See, e.g.*, Myres S. McDougal & John W. Brabner-Smith, *Land Title Transfer: A Regression, 48 Yale L.J. 1125, 1142 (1939).*

(n79)Footnote 535. The Arthur D. Little study was conducted mainly for the American Land Title Association. *See* Blair C. Shick & Irving H. Plotkin, Torrens in the United States 17 (1978).

(n80)Footnote 536. The reports include the following: Land Title Systems: Legal Bibliography (1978), Land Title Recordation Systems: Legal Constraints and Reforms (1979), Land Title Recordation Systems: Eliminating Repetitive Title Searches (1979), and Land Title Registration Systems: Proposals for Improvement (1979).

(n81)Footnote 537. Ted J. Fiflis, *Land Transfer Improvement: The Basic Fact and Two Hypotheses for Reform, 38 U. Colo. L. Rev. 431, 458 (1966).* The cost comparisons published since 1965 include Ted J. Fiflis, *Land Transfer Improvement: The Basic Facts and Two Hypotheses for Reform, 38 U. Colo. L. Rev. 431 (1966);* Ontario Law Reform Commission, Dep't of Justice, Report on Land Registration (1971); Joseph T. Janczyk, *An Economic Analysis of the Land Title Systems for Transferring Real Property, 6 J. Legal Stud. 213 (1977);* and Blair C. Shick & Irving H. Plotkin, Torrens in the United States. For a discussion and criticism of these studies, *see* John L. McCormack, *Torrens and Recording: Land Title Assurance in the Computer Age, 18 Wm. Mitchell L. Rev. 61, 105-10 (1992).*

(n82)Footnote 538. U.S. Dep't of Hous. & Urban Dev., Land Title Recordation Practices: A State-of-the-Art Study 68 (1980).

(n83)Footnote 539. U.S. Dep't of Hous. & Urban Dev., Land Title Recordation Practices: A State-of-the-Art Study 71 (1980). Anyone who evaluates this data should be aware that the three Torrens systems were hardly equivalent. For example, Cook County, Illinois, checked the signatures on documents presented for registration for forgeries, while Hennepin County, Minnesota, did not. Also, at that time, Cook County government was still saddled with the burdens of a now largely defunct political patronage system. When recording and Torrens costs are compared, it should be appreciated that the Registrar or Examiner of Titles performs quasi-judicial functions. The Registrar or Examiner determines title questions that otherwise might have to be handled by the general court system. Letter from Richard W. Edblom, Examiner of Titles, Hennepin County, to Kathleen Milner, Staff Member, *William Mitchell Law Review* 2 (Nov. 26, 1991) (on file with the *William Mitchell Law Review*). There is no available data that could be used to assess the economic impact of these quasi-judicial functions.

(n84)Footnote 540. This excludes costs incurred by Chicago Title Insurance Company.

(n85)Footnote 541. *Id.*

(n86)Footnote 542. Ontario Law Reform Commission Dep't of Justice, Report on Land Registration 22 (1971).

(n87)Footnote 543. In 1972, the total operating expenses of the U.S. recording offices were in excess of $137 million; revenue received in the same year exceeded $240 million. U.S. Dep't of Hous. and Urban Dev., Land Title Recordation Practices: A State-of-the-Art Study 13 (1980).

(n88)Footnote 544. Blair C. Shick & Irving H. Plotkin, Torrens in the United States 58 (1978). "While there are considerable variances among the data-reporting formats used by the different systems examined, we estimate that the 1976 'subsidy' ranged from $140,000 in Ramsey County to a high of $625,000 for the statewide Massachusetts program." *Id.*

Shick and Plotkin's cost conclusions are in accord with recent Cook County data. The Blue Ribbon Committee appointed by the Cook County Recorder/Registrar estimated 1989 Torrens office revenues of $3,305,000 and expenditures of $3,850,000. This deficit was expected, even though fully one-half of Torrens transfers are handled by deputized title insurance company employees who are not on the County payroll. Report of the Blue Ribbon Committee Prepared at the Request of Carol Moseley Braun, Cook County Recorder of Deeds/Registrar of Titles 44 (June 13,

1989) (unpublished report on file with author). The Hennepin County, Minnesota, Torrens office currently requires no subsidy. Letter from Richard W. Edblom, Examiner of Title, Hennepin County, to Kathleen Milner, Staff Member, *William Mitchell Law Review* 2 (Nov. 26, 1991) (on file with the *William Mitchell Law Review*).

(n89)Footnote 545. Experience in Ontario, Canada, indicates that computerization can reduce this burden on government.

(n90)Footnote 546. Over the years, Illinois has developed the following improvements to its Torrens system: (1) created tax lien files for federal and state tax liens and required the Registrar to search for and memorialize filed liens against a registered title whenever a memorial is entered on the original certificate for such title; (2) replaced lost certificates by affidavits without resort to subsequent proceedings; (3) used title indemnity bonds to induce the Registrar to remove memorials of encumbrances which are probably no longer valid without having to resort to subsequent proceedings; (4) administratively processed the devolution of descendants' interests; (5) required judgment lien creditors to memorialize their judgments on original title certificates; and (6) backed up the assurance fund with the assets and credit of the county. *See* 765 Ill. Comp. Stat. 35/40, 58, 65a, 70-71, 85, 102a.

(n91)Footnote 547. The Cook County Recorder/Registrar led a successful campaign to eliminate her Torrens system, the oldest and one of the largest (in terms of the numbers of titles registered) in the United States. No credible evidence exists that the title industry was behind this effort to abolish Torrens. While title insurance company officials did serve on the committee that recommended abolition of Torrens, the industry certainly had little or no financial interest in the outcome, as it was insuring over 90% of Torrens transactions in Cook County at the time the effort to eliminate Torrens was initiated. Report of the Blue Ribbon Committee Prepared at the Request of Carol Moseley Braun, Cook County Recorder of Deeds/Registrar of Titles 52 (June 13, 1989) (unpublished report on file with author). The Torrens system in Cook County, Illinois, failed after 91 years precisely because the government failed to provide the resources necessary to make the system reasonably efficient. *See* Fred I. Feinstein, *The Torrens System, in* 2 Basic Real Estate Practice 1-7, 15-3 (Ill. Inst. for Continuing Legal Educ., 1988 & 1990 Supp.).

The demise of Torrens in southern California in 1955, after 40 years of implementation, appears to have been due to grossly incompetent management. Blair C. Shick & Irving H. Plotkin, Torrens in the United States 149 (1978). To attribute this incompetence to a title assurance industry anti-Torrens conspiracy is absurd. The "reputation of American county government for being incompetent" referred to by Professor Johnstone is well founded. Quintin Johnstone, *Systems of Land Title Protection in the United States and Possibilities for Their Improvement, reprinted in* James L. Winokur, American Property Law: Cases, History, Policy and Practice 1096 (1982). This incompetence is largely due to the fiscal or political constraints that bind many county governments, rather than the people who administer and work for these governments.

In some states, Torrens acts were repealed, not at the urging of the title industry, but at the request of local recorders, who found the existence of little-used registration statutes to be a nuisance. Blair C. Shick & Irving H. Plotkin, Torrens in the United States 18 (1978); Charles D. Knight, Comment, *A Fly-Specker's Manual for the Illinois Torrens Act, 1978 U. Ill. L.F. 487, 488 n.13.* In Minnesota, Torrens administrators successfully lobbied for amendments making possessory registration available, at the option of each county, only where a part of the applicant's tract was already registered. The administrators feared the costs and burdens that a relatively sudden and substantial increase in registrations would place on county government. Comment, *Possessory Title Registration: An Improvement of the Torrens System*, 11 Wm. Mitchell L. Rev.825, 848-49 (1985).

The conventional wisdom that the title assurance industry was a major cause of the failure of Torrens in the United States is rather simplistic. As Professor Percy Bordwell pointed out in 1940, the conventional wisdom does not explain why Torrens was a relative success in the state legislatures (20 states or territories enacted Torrens acts between 1895 and 1917, when both state legislatures and the title assurance industry were dominated by lawyers), and an almost complete failure in implementation. If the title assurance industry was a major force in blocking Torrens, one wonders

why the industry was relatively ineffectual at the state legislative level. *See* Percy Bordwell, *The Resurrection of Registration of Title, 7 U. Chi. L. Rev. 470 (1940).* The title assurance industry may have contributed to the failure of Torrens by remedying problems caused by weaknesses in the recording system, and thereby removing the need for its replacement.

The notion that the title assurance industry's lobbying against or disparagement of Torrens significantly caused its failure is not based on established fact. Today, title insurers generally believe that Torrens is cumbersome, archaic and no serious threat to their industry. For example, William McAuliffe, then Senior Vice President of the American Land Title Association, stated that the Torrens system "has not proven itself" and is unlikely to "'put the title companies out of business.'" Cheryl Frank, *Title Firms Dying?*, A.B.A. J., Nov. 1985, at 33. Furthermore, according to Leonard Donahoe, then General Counsel for Chicago Title Insurance Company, even in an ideal system, "'[t]here are still going to be elements of risk, exposure and potential loss.'" *Id.* Thus, property owners may still need title insurance.

(n92)Footnote 548. One source of their information about the costs and administrative difficulties involved with Torrens was almost certainly the title assurance industry.

(n93)Footnote 549. However, consider a 1972 newsletter issued by the late Sidney Olsen, then the Cook County, Illinois, Recorder/Registrar, who touted the alleged superiority of registration and urged owners to register. *See* Sidney R. Olsen, *A Dozen Reasons Why You Should Register Your Property Under the Torrens System*, Cook Co. Recorder, Sept. 1, 1972, at 9. Despite his urging, few Cook County real estate owners followed his advice. Between 1969 and 1981, only 120 initial registrations occurred; no initial registrations have been made in Cook County since 1981. Report of the Blue Ribbon committee Prepared at the Request of Carol Moseley Braun, Cook County Recorder of Deeds/Registrar of Titles 40 (June 13, 1989) (unpublished report on file with author).

A former Cook County Recorder/Registrar, Carol Moseley Braun, a lawyer and former state legislator, led the successful movement to abolish Torrens in Illinois. *Recorder Urges End to Torrens System*, Chi. Trib., May 31, 1990, § 2 at 6. Former Recorder Braun was elected to the United States Senate in 1992.

(n94)Footnote 550. In Cook County, Illinois, these special facts included the need for re-establishing title after the Great Chicago Fire of 1871 destroyed the public land title records.

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CHAPTER 92 RECORDING, REGISTRATION, AND SEARCH OF TITLE

11-92 Thompson on Real Property, Thomas Editions § 92.11

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§ 92.11 Responsibilities and Liabilities of Title Service Providers.

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Because the title to real estate in the United States is frequently complex, purchasers of real estate interests usually find it necessary or, at least, advisable to use professional title examination services. Because title registration is very little used in the United States, most title services are provided by the private sector and not government. n551 However, in some localities using recording systems, abstracts or certificates of title may be prepared by government employees or officials and those suffering damages because of their negligence may be able to recover from government. n552 Even where the Torrens system of land title registration is used, private sector title service providers are not infrequently used and these service providers may be subject to professional liability.

Title service providers in the United States include Torrens title registration offices, other governmental title certifiers or insurers, title insurance companies, abstractors, surveyors and lawyers. All of these providers owe duties to persons who use their services and, in some cases, third parties who rely on their work. A breach of one of these duties may entitle an injured party to recover from the title service provider. In the following sections of this chapter, the duties owed to those who may be injured by acts or omission of abstractors, surveyors and lawyers providing title services are considered. The liability of Torrens offices is generally governed by statute and is largely limited to the terms of statutes providing for assurance funds. n553 The duties of title insurance companies owed to their insureds and third parties are discussed in the following chapter. n554

The professional liabilities of real estate brokers or salespersons providing title examination services n555 are not considered herein because such acts generally would be considered the unauthorized practice of law. While real estate brokers in some states are permitted to prepare a wide range of real estate transaction documents, n556 title examination services provided by brokers and salespersons involving the interpretation of title evidence would appear to be the unauthorized practice of law. n557 Brokers providing real estate transaction services traditionally considered to be the practice of law may be held to the standard of care of attorneys regardless of whether the actions of the brokers constitute the "authorized" or "unauthorized" practice of law. n558

§ 92.11(a) Responsibilities and Liabilities of Abstractors of Title.

Abstractors of title prepare summaries of the public real estate records pertaining to a particular title. n559 An abstractor has a duty to search for and report all matters that may affect the subject property that could be discovered in the course of a reasonably diligent search of the public real estate records. n560 The abstractor is liable for all damages proximately caused by a breach of this duty. The abstractor's liability is based on his or her contract with his or her customer which is reflected by the abstractor's certificate attached to the abstract and normally signed by him or her. n561

In actual practice, persons other than the abstractor's customer will rely on the abstract. Traditionally, the lack of privity of contract between the abstractor and third parties has been a bar to recovery for injuries caused by abstractor's negligence. n562 There is some authority that an injured party may recover as a third party beneficiary of the abstractor's contract. n563 Statutes in a number of states have created a direct liability from abstractors to third parties. n564 In recent years, the privity requirement has been avoided by basing the liability of the abstractor on a tort theory, one of the most popular being negligent misrepresentation. n565 The leading case holding that an abstractor may be liable to a person proximately injured by his or her negligent misrepresentation is *Williams v. Polgar*. n566

In the *Williams* case, the vendees furnished the purchasers with an abstract of title which failed to report a prior recorded deed which conveyed a portion of the subject property to the county government. After the contract was executed, the purchasers alleged that they then learned of the county's interest under the deed and as a result of the county's claim, the purchasers alleged that they were required to remove an entire building and that they incurred other damages as well. The Michigan Supreme Court held that a third party injured by an abstractor's negligent misrepresentation of title may be able to recover where it was foreseeable that the third party would rely on the abstract. n567 A subsequent Michigan case holds that the privity requirement may still apply where an action is based on contract and not tort. n568

§ 92.11(b) Responsibilities and Liabilities of Attorney Title Examiners.

An attorney examining a real estate title will base his or her opinion on an attorney search of the public real estate records, an abstract of title, a survey of the property or a title insurance commitment or policy. Where the attorney searches the records to obtain the data necessary for a title opinion, the attorney is under a duty to make a diligent, reasonable search. If the attorney breaches this duty, he or she may be liable under the contract of employment to the client and possibly to other persons. Where the attorney's opinion is based on an abstract, survey or title insurance, the attorney is generally not responsible for errors by the title information provider--abstractor, surveyor or title insurer--unless the errors were reasonably apparent on the face of the abstract, survey or title insurance document. In the absence of an agency relationship that makes the attorney responsible for the errors of title information providers, the attorney is not liable for such errors. n569

An examining attorney does not guarantee that title to the property is good but does warrant to the client that the title examination has been conducted with reasonable skill and care. n570 To have the requisite skill, the attorney must possess knowledge of the applicable law sufficient to enable the attorney to evaluate the available information relevant to determining the current state of the title. n571 The knowledge required includes statutes and decisions in the jurisdiction in addition to settled principles which should be known by real estate conveyancers. n572

An attorney examining title serves as an adviser. When the attorney advises the client whether a title is marketable, the client must be advised of any reasonable doubts about the title. n573 Reasonable title examiners, however, may differ about whether particular matters render a title unmarketable. However, in advising whether a title is marketable, the attorney will not liable to the client if his or her opinion is simply erroneous. n574 The attorney is not liable for good faith errors of judgment not involving negligence. However, a failure by the attorney to report the existence of a record lien, encumbrance or other adverse claim that may be valid may be actionable negligence. n575 Attorneys may also be liable for client losses caused by their failure to report errors in the legal description of the property discernible from instruments recorded in the chain of title or a survey. n576

Parties other than an attorney's client may rely on the attoney's title opinion. For example, purchasers of homes are often not represented by independent counsel and rely on title opinions of their sellers' or lenders' attorneys. This reliance is commonly known among conveyancers. n577 Although commentators have argued that lack of privity of contract between the negligent examining attorney and a foreseeably injured third party should not bar his or her recovery, n578 courts have been reluctant to extend liability to attorneys for sellers for negligent misrepresentation of title in favor of allegedly injured buyers. n579 Mortgagors have met some success in attempts to hold attorneys or their mortgagee-lenders responsible for losses caused by allegedly negligent title examination. n580 Lender and borrower, and buyer and seller, are in adversarial relationships. Therefore, it is arguable that a party to one of these relationships has no right to rely on the opinions or advice of the other party's attorney. Consequently, cases holding abstractors of title liable under tort theories to third parties who foreseeably might rely on the abstractors' work product are distinguishable. n581

Where an attorney is liable because of a negligent title examination, the measure of damages depends on the specific facts and circumstances. Generally, the lawyer will be liable to the extent of the impairment of the client's interest in the property. n582 The damages may be the difference in value between what the client actually received and what the client would have received if the attorney had not been negligent. n583 If the title can be cleared by purchasing the interest causing the loss, the cost of doing so may be used as the measure. n584 Consequential damages may also be recoverable. This may include costs such as litigation expenses incurred in trying to correct or cope with the attorney's error. n585 Other consequential damages may also be recoverable. n586

§ 92.11(c) Responsibilities and Liabilities of Surveyors.

A surveyor may be liable to a client or third parties who foreseeably suffer losses proximately caused by defective surveys attributable to the surveyors' negligence. n587 It is highly foreseeable that third parties such as buyers from or mortgage-lenders will rely on a survey procured by the surveyor's client in order to examine the title to the subject property. Consequently, lack of privity is generally no impediment to recovery by a third party against a surveyor. n588

FOOTNOTES:

(n1)Footnote 551. In addition to title services provided by government employees in Torrens title registration offices, government employees may search records that are not available to private sector searchers. *See Chemical Bank v. Title Servs., Inc., 708 F. Supp. 245 (D. Minn. 1989).*

(n2)Footnote 552. *See. e.g., American Legion Ed Brauner Post, Inc. v. Southern Title & Ins. Co., 218 So. 2d 612 (La. 1969).*

(n3)Footnote 553. *See* § 92.10(f) *supra*.

(n4)Footnote 554. *See* Chapter 93 *infra*. *N.E. Properties, Inc. v. Chicago Title Ins. Co., 660 A.2d 926 (Me. 1995)* (insurer owed no duty to insured to exercise due care in generating a description of the mortgaged property); *Somerset Sav. Bank v. Chicago Title Ins. Co., 649 N.E.2d 1123 (Mass. 1995)* (the policy did not cover a statutory restriction on use of the property); *Citibank, N.A. v. Chicago Title Ins. Co., 632 N.Y.S.2d 779 (1995)* (no cause of action for insured's alleged negligence in conducting a title search); *Charney v. Commonwealth Land Title Ins. Co., 625 N.Y.S.2d 911 (1995)* (no policy coverage unless certain prior conditions are met).

(n5)Footnote 555. Merely searching for recorded documents, by itself, would not be the practice of law.

(n6)Footnote 556. *See, e.g., Pope County Bar Ass'n v. Suggs, 624 S.W.2d 828 (Ark. 1981).*

(n7)Footnote 557. Eric L. Brossman & Moses K. Rosenberg, *Title Companies And The Unauthorized Practice Rules: The Exclusive Domain Reexamined, 83 Dick. L. Rev. 437, 452-53 (1979).*

(n8)Footnote 558. *See, e.g., Cultum v. Heritage House Realtors, Inc., 694 P.2d 630 (Wash. 1985).*

(n9)Footnote 559. *See Attebery v. Blair, 91 N.E. 475 (Ill. 1910).*

(n10)Footnote 560. *Erskine Fla. Properties v. First Am. Title Ins. Co., 557 So. 2d 859 (Fla. App. 1989); Garton v. Title Ins. and Trust Co., 165 Cal. Rptr. 449 (1980);* Ray E. Sweat, *Abstractor or Abstracter,in* Practicing Law Institute, Title Insurance 1987: the New Policy Forms 347, 348 (James M. Pedowitz ed., 1987).

(n11)Footnote 561. Ray E. Sweat, *Abstractor or Abstracter, in* Practicing Law Institute, Title Insurance 1987: the New Policy Forms 347, 348 (James M. Pedowitz ed., 1987).

(n12)Footnote 562. 1 Rufford G. Patton & Carroll G. Patton, Patton on Land Titles § 44 (2d ed. 1957); Susan Lorde Martin, *If Privity Is Dead, Let's Resurrect It: Liability of Professional to Third Parties for Economic Injury Caused by Negligent Misrepresentation, 28 Am. Bus. L.J. 649, 649-50 (1991).*

(n13)Footnote 563. *See, e.g., Glanzer v. Shepard, 135 N.E. 275, 276 (N.Y. 1922)* (dicta, opinion by Cardozo, J.).

(n14)Footnote 564. William B. Johnson, Annotation, *Negligence in Preparing Abstract of Title as Ground of Liability to One Other than Person Ordering Abstract, 50 A.L.R.4th 314, 363-67 (1986);* Oscar A. Hall, Comment, *Abstracter's Liability in Examination of Title, 6 Wyo. L.J. 184 (1952).*

(n15)Footnote 565. William B. Johnson, Annotation, *Negligence in Preparing Abstract of Title as Ground of Liability to One Other than Person Ordering Abstract, 50 A.L.R.4th 314, 358-63 (1986).*

(n16)Footnote 566. *215 N.W.2d 149 (Mich. 1974).*

(n17)Footnote 567. *Williams v. Polgar, 215 N.W.2d 149, 156 (1974).* The opinion of the court is followed by a summary of the liabilities of abstractors to third parties in all 50 states and the District of Columbia. *Id. at 160-65.*

(n18)Footnote 568. *National Sand, Inc. v. Nagel Const., Inc., 451 N.W.2d 618 (Mich. App. 1990), appeal denied, 456 N.W.2d 390;* Associated Mut. Hosp. Serv. v. Health Care Serv. Corp., 2000 U.S. 6th Dist. LEXIS 17136.

(n19)Footnote 569. The attorney is not a guarantor of the title; the attorney merely undertakes to exercise reasonable care in examining the title. 1 Rufford G. Patton & Carroll G. Patton, Patton on Land Titles § 52 (2d ed. 1957).

(n20)Footnote 570. 1 Rufford G. Patton & Carroll G. Patton, Patton on Land Titles § 52 (2d ed. 1957).

(n21)Footnote 571. 1 Rufford G. Patton & Carroll G. Patton, Patton on Land Titles § 52 (2d ed. 1957).

(n22)Footnote 572. Ronald E. Mallen & Jeffrey M. Smith, Legal Malpractice § 25.8 (3d ed. 1989).

(n23)Footnote 573. Ronald E. Mallen & Jeffrey M. Smith, Legal Malpractice § 25.8 (3d ed. 1989).

(n24)Footnote 574. 1 Rufford G. Patton & Carroll G. Patton, Patton on Land Titles § 52 (2d ed. 1957).

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(n29)Footnote 579. Joan Teshima, Annotation, *What Constitutes Negligence Sufficient To Render Attorney Liable To Person Other Than Immediate Client, 61 A.L.R.4th 464,* § 24 (1988).

(n30)Footnote 580. Joan Teshima, Annotation, *What Constitutes Negligence Sufficient To Render Attorney Liable To Person Other Than Immediate Client, 61 A.L.R.4th 464,* § 26 (1988).

(n31)Footnote 581. Gerald W. Boston, *Liability of Attorneys to Nonclient in Michigan: A Re-examination of Friedman v. Dozorc and a Rule of Limited Liability, 68 U. Det. L. Rev. 307, 311 (1991).*

(n32)Footnote 582. John H. Bauman, *Damages For Legal Malpractice: An Appraisal Of The Crumbling Dike And The Threatening Flood*, Temp. L. Rev. 1127, 1151 (1988).

(n33)Footnote 583. John H. Bauman, *Damages For Legal Malpractice: An Appraisal Of The Crumbling Dike And The Threatening Flood*, Temp. L. Rev. 1127, 1151 (1988).

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(n37)Footnote 587. Walter G. Robillard & Lane J. Bouman, Clark on Surveying and Boundaries § 2.04 (7th ed LEXIS); James R. Adams, *From Babel to Reason: An Examination of the Duty Issue, 31 Mcgeorge L. Rev. 25 (Fall 1999).*

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CHAPTER 92 RECORDING, REGISTRATION, AND SEARCH OF TITLE

11-92 Thompson on Real Property, Thomas Editions § 92.12

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Annotation, *Abstracter's Duty and Liability to Employer Respecting Matters to Be Included in Abstract, 28 A.L.R. 2d 891.*

Annotation, *Construction and Application of Statutory Provision Respecting Registration of Mortgages or Other Liens on Personal Property in Case of Residents of Other States, 10 A.L.R. 2d 764.*

Annotation, *Defect in, or Condition of, Adjacent Land or Way as Within Coverage of Title Insurance Policy, 8 A.L.R. 4th 1246.*

Annotation, *Description with Reference to Highway as Carrying Title to Center or Side of Highway, 49 A.L.R. 2d 982.*

Annotation, *Liability of Attorney for Negligence in Connection with Investigation or Certification of Title to Real Estate, 59 A.L.R. 3d 1176.*

Annotation, *Liability on One Preparing Abstract of Title, for Deficiency Therein, to One Other Than Person Directly Contracting for Abstract, 34 A.L.R. 3d 1122.*

Annotation, *Negligence, Inattention, or Professional Incompetence of Attorney in Handling Client's Affairs in Matters Involving Real-Estate Transactions as Ground for Disciplinary Action-Modern Cases, 65 A.L.R. 4th 24.*

Annotation, *Negligence in Preparing Abstract of Title as Ground of Liability to One Other Than Person Ordering Abstract, 50 A.L.R. 4th 314.*

Annotation, "*Real Property Quiet-Title Actions Against United States Under Quiet Title Act (28 U.S.C. § 2409A),*" *60 A.L.R. Fed. 645.*

Annotation, *Title by Adverse Possession as Affected by Recording Statutes, 9 A.L.R. 2d 850.*

Annotation, *Title Examination Activities by Lending Institutions, Insurance Company, or Title and Abstract Company, as Illegal Practice of Law, 85 A.L.R. 2d 184.*

Annotation, *Title Insurer's Negligent Failure to Discover and Disclose Defect Bases for Liability in Tort, 19 A.L.R. 4th 695.*

Annotation, *Transferees Entitled to Protection under Torrens Act Certificate of Title, 42 A.L.R. 2d 1387.*

Annotation, *Validity, Construction, and Application of Entirety Clause in Oil and Gas Lease, 48 A.L.R. 3d 706.*

Annotation, *Validity, Construction, and Effect of Land Sale Contract Providing That Title Must Be Satisfactory to Purchaser, 47 A.L.R. 2d 455.*

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Supp. To CHAPTER 92 RECORDING, REGISTRATION, AND SEARCH OF TITLE

11-92 Thompson on Real Property, Thomas Editions Supp. to § 92.04

Supp. to § 92.04 The American Recording System.

[Go To Main]

§ 92.04(a) General Operation. [Go To Main]

Add:

Island Venture Assocs. v. N.J. Dep't of Envtl. Prot., 179 N.J. 485, 846 A.2d 1228 (N.J. 2004) (a developer was not bound by a restriction that could not be found by a diligent search of the record title).

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Supp. To CHAPTER 92 RECORDING, REGISTRATION, AND SEARCH OF TITLE

11-92 Thompson on Real Property, Thomas Editions Supp. to § 92.05

Supp. to § 92.05 Recording System Indexes.

[Go To Main]

§ 92.05(a) Grantor--Grantee and Tract. [Go To Main]

§ 92.05(a)(1) Grantor-Grantee Indexes.

Add new footnote 86.1 at end of line 6, paragraph 2: n86.1

§ 92.05(a)(4) Chain of Title Doctrine.

Add:

Richardson v. Amresco Residential Mortgage Corp., 592 S.E.2d 65 (Va. 2004) (recorded instruments in the chain of title placed mortgagees under a duty of inquiry).

Add:

Langley v. Billiot, 28 So. 3d 1154 (La. App. 2009) (unbroken chain of title back to the sovereign required).

FOOTNOTES:
(n1)Footnote 86.1. *First Citizens National Bank v. Sherwood, 817 A.2d 501 (Pa. Super. 2003)* (with regard to a mortgage that was properly recorded but defectively indexed, the result of the record search constituted notice).

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Supp. To CHAPTER 92 RECORDING, REGISTRATION, AND SEARCH OF TITLE

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Supp. to § 92.06 Statutes of Limitation, Curative Acts, and Marketable Title Acts.

[Go To Main]

§ 92.06(b) Marketable Title Act. [Go To Main]

Add:

Blanton v. City of Pinellas Park, 854 So.2d 729 (Fla. App. 2003) (a claim for a statutory way of necessity was subject to the limitations period of the marketable record title act).

§ 92.06(b)(1) Objectives.

Add:

Berger v. Riverwind Parking, LLP, 842 So.2d 918 (Fla. App. 2003) (subdivision restrictions more than 30 years old and recorded prior to the root of title were extinguished by the marketable record title act).

Add:

Mannweiler v. LaFlamme, 781 A.2d 497 (Conn. App. 2001) (a failure to record a notice of subdivision restrictions, as required by the marketable record title act, did not extinguish those restrictions).

§ 92.06(b)(4) Exceptions.

At the end of the first sentence in the third paragraph of the subsection, add new footnote: n207.1

FOOTNOTES:
(n2)Footnote 207.1. *Dennison v. N.D. Dep't of Human Servs., 2002 ND 39, 640 N.W.2d 447 (N.D. 2002)* (the restraint on alienation is a right or interest excepted from the state's marketable record title act).

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Supp. To CHAPTER 92 RECORDING, REGISTRATION, AND SEARCH OF TITLE

11-92 Thompson on Real Property, Thomas Editions Supp. to § 92.07

Supp. to § 92.07 Off the Record Risks.

[Go To Main]

§ 92.07(b) Recordation of Void or Defective Instrument. [Go To Main]

Add:

Burger v. Singh, 816 N.Y.S.2d 478 (2006) (issue of due care when imposter signed fraudulently at closing).

§ 92.07(h) Hidden Mechanics' Liens [Go To Main]

Add:

Imperial Developers, Inc. v. Calhoun Development, LLC, 775 N.W.2d 895 (Minn. App. 2009) (mortgage interests not memorialized on the certificate of title were not interests of record when mechanics' liens attached).

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Supp. To CHAPTER 92 RECORDING, REGISTRATION, AND SEARCH OF TITLE

11-92 Thompson on Real Property, Thomas Editions Supp. to § 92.08

Supp. to § 92.08 Types of Recording Acts.

[Go To Main]

§ 92.08(a) Race Recording Acts. [Go To Main]

change the first sentence of paragraph 2 of the section to read as follows:

Race recording acts of general application are found in only three states: Delaware, Louisiana, and North Carolina.[283].

Add at the beginning of the footnote:

Del. Code Ann. § tit. 25, § 153; *N & W Development Co. v. Carey, 1983 Del. Ch. LEXIS 410* (Civil Action No. 6885, Jan. 26, 1983).

§ 92.08(b) Notice Recording Acts. [Go To Main]

delete:

N.H. Rev. Stat. Ann. § 477:3-a; *S.C. Code Ann. § 30-7-10*.

§ 92.08(c) Race-Notice Recording Acts. [Go To Main]

Add:

N.H. Rev. Stat. Ann. § 477:3-a, Amoskeag Bank v. Chagnon, 133 N.H. 11, 572 A.2d 1153 (N.H. 1990); S.C. Code Ann. § 30-7-10, Leasing Enterprises v. Livingston, 363 S.E.2d 410 (S.C. App. 1987) .

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Supp. To CHAPTER 92 RECORDING, REGISTRATION, AND SEARCH OF TITLE

11-92 Thompson on Real Property, Thomas Editions Supp. to § 92.09

Supp. to § 92.09 Qualifying for Recording Act Protection.

[Go To Main]

Add:

Salt Lake County v. Metro West Ready Mix, Inc., 53 P.3d 499 (Utah App. 2002) (bona fide purchaser protected by the recording statute, even though purchasers' grantor never had legal title); *Salt Lake County v. Metro West Ready Mix, Inc., 89 P.3d 155 (Utah 2004)* (a purchaser through a wild deed cannot be a good faith purchaser as against an unrecorded interest in the property).

§ 92.09(c) In Good Faith, Without Notice. [Go To Main]

§ 92.09(c)(2) Constructive Notice.

Add:

United Savings and Loan Bank v. Pallis, 27 P.3d 629 (Wash. App. 2001) (lis pendens gives constructive notice of a claim).

§ 92.09(c)(2)(B) Record Notice: Chain of Title.

§ 92.09(c)(2)(B)(I) Problems Encountered Using Grantor-Grantee Indexes.

Add:

Salt Lake County v. Metro West Ready Mix, Inc., 89 P.3d 155 (Utah 2004) (a purchaser acquiring by means of a wild deed is not a good faith purchaser as against an unrecorded interest in the land).

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Supp. To CHAPTER 92 RECORDING, REGISTRATION, AND SEARCH OF TITLE

11-92 Thompson on Real Property, Thomas Editions Supp. to § 92.10

Supp. to § 92.10 Title Registration.

[Go To Main]

§ 92.10(a) The Torrens System. [Go To Main]

Add:

McLaughlin v. Town of Marblehead, 863 N.E.2d 61 (Mass. App. 2007) (petition filed by landowners seeking to register title to their land).

§ 92.10(c) Initial Registration. [Go To Main]

Add:

Cowan v. Fifth Third Mortgage Co., 70 Fed. Appx. 797 (6th Cir. 2003) (mortgage interest not properly perfected under state registration act).

Add:

Poor v. Lombard, 893 N.E.2d 1255 (Mass. App. 2008) (action to confirm title without registration: evidence showed a lost, unrecorded deed).

§ 92.10(e) The Torrens System in Operation: Security of Title. [Go To Main]

Add:

Bavely v. Huntington National Bank, 273 B.R. 98 (Bankr. 6th Cir. 2002) (the doctrine of equitable estoppel may not be used to create an interest in registered land, which interest is in derogation of a registered title).

§ 92.10(h) Operation and Administration of Torrens: Economy and Efficiency? [Go To Main]

Add:

Cowan v. Huntington National Bank, 273 B.R. 98 (6th Cir. 2001) (mortgagee could not use the doctrine of equitable estoppel to create an interest in registered land in derogation of the state's Registration of Land Titles Act).

Add:

Walther v. Lundberg, 654 N.W.2d 694 (Minn. App. 2002) (registrar had a duty to refer the certificate to the examiner of titles).

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Supp. To CHAPTER 92 RECORDING, REGISTRATION, AND SEARCH OF TITLE

11-92 Thompson on Real Property, Thomas Editions Supp. to § 92.11

Supp. to § 92.11 Responsibilities and Liabilities of Title Service Providers.

[Go To Main]

Add:

Fidelity National Title Insurance Co. of New York v. Suburban West Abstractors, 2004 Pa. Super. LEXIS 1243 (No. 2290 EDA 2003, May 24, 2004) (action against title search company for failing to discover judgment entered against mortgagors); *Fountainhead Title Group Corporation v. Courthouse Search of Northern Virginia, 122 Fed. Appx. 10 (4th Cir. 2005)* (action by title insurance corporation against title search company for negligence in connection with the title search (failure to report a judgment on the property)).

Add:

Ex Parte Watson, 589 S.E.2d 760 (S.C. 2003) (examining titles and preparing title abstracts constitute the unauthorized practice of law in this state).

Bender v. Kansas Secured Title and Abstract Co., 119 P.3d 670 (Kan. App. 2005) (blanket pipeline easement overlooked during title search); *Fountainhead Title Group Corp. v. Courthouse Search of Northern Virginia, 122 Fed. Appx. 10* (4th Cir. 2005) (action against title search company for negligence and breach of contract).

§ 92.11(a) Responsibilities and Liabilities of Abstractors of Title. [Go To Main]

Add:

In re Crystal Cascases Civil, LLC, 398 B.R. 23 (D. Nev. 2008) (the standard for what is a reasonable title search is from the perspective of a nonprofessional title searcher).

Add:

Wackrow v. Niemi, 899 N.E.2d 273 (Ill. 2008) (legal malpractice claim against an attorney who failed to conduct a sufficient title search).

U.S. Bank, N.A. v. Integrity Land Title Corp., 914 N.E.2d 320 (Ind. App. 2009) (title company failed to discover a prior recorded lien in its title search); *Stewart Title Guar. Co. v. Residential Title Services, Inc., 607 F. Supp. 2d 959 (E.D. Wis. 2009)* (claim that issuer of title insurance policy failed to timely update its title search).

Add:

Midwest Bankcentre v. Old Republic Title Co. of St. Louis, 247 S.W.3d 116 (Mo. App. 2008) (negligence action against title company for not recording deed of trust); *Chicago Title Ins. Co. v. Arkansas Riverview Development, LLC, 573 F. Supp. 2d 1152 (E.D. Ark. 2008)* (action in tort for negligent failure to conduct a diligent title search not permitted).

§ 92.11(b) Responsibilities and Liabilities of Attorney Title Examiners. [Go To Main]

Add:

Erpenbeck v Kentucky Bar Ass'n, 295 S.W.3d 435 (Ky. 2009) (attorney conducted faulty title searches).

Add:

Doe v. Condon, 568 S.E.2d 356 (S.C. 2002) (title search and preparation of title documents for a lender without attorney supervision constitute the unauthorized practice of law in South Carolina).

Add:

Lawyers Title Insurance Corp. v. Groff, 808 A.2d 44 (N.H. 2002) (an attorney may delegate to an independent contractor the duty to examine land title in real estate transactions).

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[Go To Main]

Add to Articles:

Baker, Matthew, et al. "Optimal Title Search," *31 J. Legal Stud. 139* (January, 2002).

Burton, Bruce W. "Search of John Constable's White Horse: A Case Study in Tortured Provenance for A Torrens-Like System of Title Registration for Art Works," *59 Fla. L. Rev. 531* (July, 2007).

McStotts, Jennifer Cohoon. "In Perpetuity or for Forty Years, Whichever is Less: The Effect of Marketable Record Title Acts on Conservation and Preservation Easements," *27 J. Land Resources & Envtl. L. 41 (2007).*

Meyer, Malcolm A. "Louisiana Heirship Property: Solutions for Establishing Title," *55 La. B.J. 328* (February/March 2008).

Poliakoff, Gary A. and Donna D. Berger, "The Reinstatement of Covenants, Conditions, and Restrictions Extinguished by the Marketable Record Title Act," *79 Fla. B.J. 14* (May, 2005).

Stroud, Joel. "Looking Beyond the Title Search: Attorneys Must Consider Environmental Regulations." *25 N.C. Cent. L. J. 182 (Spring 2003).*

"Title Systems and Land Values," *45 J.L. & Econ. 565* (October, 2002).

Annotations

Add:

Annotation, "Necessity of recording tax deed to protect title as against interest derived from former owner," 65 A.L.R. 1015 .

Annotation, "Rule which makes priority of title depend upon priority of record as applied to record of later instruction in second chain of title which antedates record of original instrument in first chain, record of which, however, antedated record of original instrument in second chain," 133 A.L.R. 886 .

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CHAPTER 93 TITLE INSURANCE

11-93 Thompson on Real Property, Thomas Editions 93.syn

AUTHOR: Professor John L. McCormack School of Law Loyola University Chicago

§ 93.syn Synopsis to Chapter 93: TITLE INSURANCE

§ 93.01 Overview of the Title Insurance Industry.

§ 93.02 Nature of Title Insurance.

§ 93.02(a) Introduction.

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§ 93.02(c) The Title Policy.

§ 93.02(d) Construction of Title Policies.

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§ 93.03(a)(3) Access to and from the Land.

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§ 93.04(f) Unenforceability of the Lien of the Insured Mortgage Because of Failure to Comply with Applicable "Doing Business" Laws.

§ 93.04(g) Invalidity or Unenforceability of Mortgage Lien Because of Usury or Consumer Credit Protection or Truth in Lending Laws.

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§ 93.05(b)(3)(A) Negligent Search and Examination.

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§ 93.06(f) Taxes or Special Assessments Not Shown as Liens by the Public Records.

First AmendmentEndorsements.

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§ 93.09 Other Types of Real Property Insurance.

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§ 93.09(b) Property Insurance.

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§ 93.10 Bibliography.

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CHAPTER 93 TITLE INSURANCE

11-93 Thompson on Real Property, Thomas Editions § 93.01

AUTHOR: Professor John L. McCormack School of Law Loyola University Chicago

§ 93.01 Overview of the Title Insurance Industry.n1

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A purchaser of an interest in real estate faces many title risks. The public land title records are not reliable indicators of title and ownership. Claims against a title may be valid or enforceable even if there is no record or other indication of their existence. The record owner may not be the owner in fact, an apparently good title may be defective or encumbered in fact, an owner in the chain of title may have lacked the power or capacity to transfer, or a transfer may have been void or defective for some other reason. n2 Furthermore, the information derived from the public land records may be imperfect because of errors in their administration. Other title risks include errors in the collection and evaluation of title data. Any of these risks could cause losses. If risks cannot be eliminated, the purchaser may bear the risk of loss alone or seek to shift it elsewhere.

The warranty deed is a means of title risk shifting. The warranties given by the grantor to the grantee usually include some, but not all, potential title defects. Compensation for losses through deed warranties may depend on whether a judgment against the warrantor/grantor can be obtained and satisfied.

Hiring an attorney to examine title may shift search and examination error risks to the attorney but will provide no protection against risks due to imperfections of the public land title records. Attorneys will not assume risks that cannot be ascertained by an examination of the public real estate records and a survey. Furthermore, a party suffering a loss caused by a title defect will have the burden of proving that the loss was caused by the attorney's negligence.

Title insurance is an effective means of shifting and spreading both known and unknown title risks. It is the dominant form of land title assurance in much of the United States, and in some areas it is almost the sole form used. n3 Title insurance is basically a non-casualty type of insurance. The term "title insurance" is almost a misnomer. A title policy does include insurance against title risks, but the primary service furnished by title insurers is title search and examination. When called upon to insure a title, the company searches and examines the title records. If this examination reveals a possible adverse claim, the insurer will normally report it to the prospective insured. A reported matter will be excepted from the coverage of the title policy when it is finally issued, unless the insurer has been persuaded to waive the exception based on the possible adverse claim. If the company fails to report a title defect or

encumbrance of record which later causes the insured to suffer a loss, the title insurance company is generally obligated by the contract of insurance to indemnify the insured or to defend the insured in any litigation based on the title defect.

Whether the company either was negligent or exercised reasonable care in searching and examining the title is immaterial when the insured's claim is based on the contract of insurance. The liability of an attorney for an erroneous title opinion requires proof of negligence. n4 In contrast, the title insurer, under the policy, is strictly liable for covered losses resulting from title defects not reported to the insured and not excepted or excluded from coverage by a policy provision. The examining attorney is only responsible for title claims or defects that can be determined from information on the record, but the typical title policy will cover many of the title risks that do not appear on the record, including the possibility of a total failure of title due to a void link in the chain of title.

Title insurance was an American innovation, and little title insurance is written today outside of the United States. Whether the use of title insurance will increase outside of the United States in the future, however, is an open question. n5

The first organization created to insure titles was established in Philadelphia in 1853. n6 State enabling legislation for the incorporation of title insurance companies was enacted in Pennsylvania in 1874, and the first title insurance company was incorporated in Philadelphia in 1876. n7 Within a short time, title insurance companies were established in New York and Baltimore. n8 By 1895, a standard text on insurance stated that passing notice must be given to corporations organized in many large cities which combined title insurance with the business of searching titles. n9 In the 1909 edition of this same work, the author stated that title insurance had assumed such commercial importance that it required more than passing notice. n10 Between World War I and World War II, title insurers developed a national market for their policies. n11 As the realization grew that the relatively standardized coverage provided by title insurers made mortgage paper more marketable in the developing secondary mortgage markets, lenders began to require borrowers to title insure their mortgages. n12 After World War II, the title insurance business experienced tremendous growth, displacing attorneys as the dominant source of land title assurance in much of the United States. n13 Between 1968 and 1981, operating revenues of the title insurance industry grew from $317 million to $1.285 billion. n14

As the volume of title insurance business increased, the number of commercial title insurers decreased. By the 1950s, approximately 150 corporations wrote title insurance. n15 By 1980, about fifteen large insurance holding companies dominated the commercial title insurance industry. n16 During the 1980s, the trend toward consolidation and reduction in the number of insurers continued.

As the title insurance industry grew tremendously during the post-World War II period, attorneys began to implement an effective response to their loss of title examination business to commercial title insurers. This response was the development of bar-related title insurance funds. The first bar-related title insurance organization was created in Florida in 1947. n17 By the mid-1980s, ten title companies were members of the National Association of Bar-Related Title Insurers, and bar-related title insurers were operating in at least nineteen states. n18 The most significant feature which distinguishes bar-related title insurers from other title insurers is that the title policies are issued through member attorneys. Some bar-related title insurers are sponsored by or affiliated with bar associations. n19 Most of the bar-related title insurance companies are incorporated, but a few conduct business as trusts. n20 Once an attorney becomes a member, the attorney is usually authorized to issue title policies within certain established limits. n21 The policy is backed by the assets and credit of the bar-related insurer. Essentially, a member attorney can offer the same insurance services that are available from commercial title companies.

Commercial title insurance companies have bitterly opposed bar-related insurers. n22 Nationally, the bar-related insurers have only a small fraction of the business; n23 in certain areas, however, bar-related companies have captured a significant portion of the title insurance business. n24 For example, a commercial title insurer, Chicago Title Insurance, had a virtual monopoly on the title insurance business in the Chicago area (Cook County, Illinois) for many years. In the mid-1970s, however, the Attorneys' Title Guaranty Fund (the Illinois bar-related insurer) entered the market in Cook

County, and by 1989, the fund insurer led Chicago Title in the residential resale market and had 21 percent of the total Cook County market compared to Chicago Title's 38 percent. n25

Because of poor public records, n26 and possibly other reasons, title insurance companies sometimes find it economical to partially or even completely duplicate public records. These privately maintained records are referred to as "title plants." The scope of private title plants varies from county to county, depending mainly on the quality of the public records and on the volume of title insurance business done in the county. In some counties where no public tract index is available, title insurance companies may maintain a tract index to the public records. Searches may be conducted in the public records by using the private tract index. In other places, the title plant may duplicate much or all of the public records. Elaborate title plants are maintained jointly by several companies in Los Angeles County, elsewhere in California, Maricopa County (the Phoenix area) in Arizona, Denver, and Dallas. n27 The computerized title plant maintained by the Chicago Title Insurance Co. for Cook County, Illinois, is probably unique because it not only duplicates the public records but also contains more data than the public records. n28 In some localities, the volume of title business may be insufficient to warrant the maintenance of a title plant, or even an office. In such places, title companies may rely on approved attorneys who search and examine titles using abstracts or public records before policies are issued.

When a title insurance company is requested to insure a title, it will search and examine the title using a private title plant, public records, or a combination of the two. Title companies keep records of their searches and examinations, and normally if the company has previously insured the title, it will simply update the prior examination. Sometimes a company may update a search and examination made by another company. n29

After the title examination, the company will issue a commitment to insure the title. In some places, this commitment is referred to as a "preliminary title report," "binder," or "certificate of title." n30 The report serves the same purposes, among others, as an attorney's title opinion where that method is used to prove title. n31 As is the case with abstracts and attorney title opinions, the report is used by vendors to prove that their titles meet the quality standards of the sales contract. The commitment is also used by mortgage lenders, along with other information, to evaluate the subject real estate as security for their loans.

The commitment contains an undertaking by the company to insure the title, subject to certain exceptions. The "special exceptions" include defects, liens, encumbrances, and other adverse claims revealed by the title examination. Basically, the company uses the commitment to inform the proposed insured that these matters will not be covered by the final title policy. After the commitment is furnished, the company may be persuaded to waive special exceptions upon the presentation of various forms of evidence indicating that the exceptions do not represent true title defects. Where permitted by state law, a company may agree to waive an exception that may very well represent a valid defect, often upon the payment of an additional premium. This is called "insuring over" or "insuring around" the risk. When a company does this, it is truly providing insurance because it is assuming a known risk. If a special exception has been waived, it will not appear on the final title policy.

There is a national organization of title companies n32 called the American Land Title Association (ALTA). Among other things, ALTA promulgates title insurance policy forms. Major revisions of ALTA forms were completed in 1970, n33 1987, n34 and 1990. n35 Title insurers are currently using both the 1970 and 1990 forms. Most title insurers issue their policies on ALTA forms, the exceptions being mainly in California, New York n36 and Texas. Consequently, there is substantial uniformity in title insurance policies issued by different companies.

Title insurance is used to insure owners and lenders. The interest insured by an owner's policy usually is a fee simple estate but other ownership interests such as leasehold estates are also insured. A policy which insures the title to a lender's mortgage is called a "loan" or "mortgagee's" policy. ALTA provides separate policy forms for the two kinds of insurance, i.e., owner's and lender's insurance. In addition to ALTA forms, California title insurers also use California Land Title Association (CLTA) forms. n37 The CLTA promulgates combined policy forms which can be used to insure

both owners and lenders in one policy. n38 These forms are also sometimes used in Arizona, Idaho, Nevada, Utah, and Wyoming. n39 In New York and Texas, forms unique to each state are also used. n40

COMPUTER-ASSISTED RESEARCH

LEXIS: "American Land Title Association" or (ALTA w/50 title)

FOOTNOTES:

(n1)Footnote 1. The most useful works on title insurance are D. Barlow Burke, Jr., Law of Title Insurance (2d. ed. 1993) and Joyce D. Palomar, Title Insurance Law (1994). Despite its vintage, the best general law review article on title insurance is Quintin Johnstone, *Title Insurance, 66 Yale L.J. 492 (1957).* For a more current expression of Professor Johnstone's thoughts on title insurance and other subjects, *see* Quintin Johnstone, *Land Transfers: Process and Processors, 22 Val. U. L. Rev. 493 (1988).* Other good articles, among others, include Joyce D. Palomar, *Bank Control of Title Insurance Companies: Perils to the Public That Bank Regulators Have Ignored, 44 SW. L.J. 905 (1990);* James M. Pedowitz, *Title Insurance--What Every New York Lawyer Should Know, 52 N.Y. ST. B.J. 292 (1980);* and Michael M. Rooney, *Title Insurance: A Primer for Attorneys, 14 Real Prop. Prob. & TR. J. 608 (1979).* Except for Burke's treatise and Palomar's treatise and law review articles, the best recent commentary on title insurance has been made mostly by practicing lawyers and title insurance company officials.

(n2)Footnote 2. Some, but by no means all, non-record defects, interests, or claims can be discovered by searches or investigations beyond the land title records.

(n3)Footnote 3. These include most metropolitan areas and the entire Pacific Coast of the United States. U.S. Dep't of Hous. & Urban Dev., Land Title Recordation Systems: Legal Constraints and Reforms I-2 (1979). In Cook County, Illinois, the jurisdiction where the author teaches and has practiced, title insurance has been almost the sole form of land title assurance for recorded real estate titles for over forty years. Until recently, Cook County was one of the few places in the United States that had many titles registered under a Torrens system. At the time that the Cook County Torrens title registration system was abolished, approximately 95% of all Torrens transfers were title insured. Report of the Blue Ribbon Committee Prepared at the Request of Carol Moseley Braun, Cook County Recorder of Deeds/Registrar of Titles 52 (June 13, 1989) (unpublished report on file with author).

(n4)Footnote 4. Title insurers may also be liable: (1) under tort law for negligent search, examination, or misrepresentation of title; or (2) for a bad faith breach of the contract of insurance. The tort liabilities of title insurers will be discussed later in this chapter.

(n5)Footnote 5. Some title insurance is written in Canada, England, the Caribbean, Mexico and Tahiti. Allen Axelrod, et al., Land Transfer and Finance 764 n.20 (Boston, Toronto and London; Little, Brown 1986). An American title insurance company official has predicted that title insurance will spread to Canada, England, perhaps other parts of western Europe, and Japan by the 21st century. Russell W. Jordan, III, *Title Insurance in the 21st Century*, 69 Title News 12 (Aug. 1990). Efforts to market title insurance in the United Kingdom in the 1970s faced stiff opposition from solicitors. John C. Payne, *Second Thoughts on the Future of Title Insurance in England*, 124 Solic. J. 699 (1980). After about a 10-year effort, Chicago Title Insurance, one of a few American companies that attempted to penetrate the British market, terminated its operations in the United Kingdom in the mid 1980s. Telephone Interview with Michael Nolan, Corporate Communications Office, Chicago Title Insurance Co., in Chicago, Illinois (Sept. 14, 1990). As of 1989, at least six companies were pursuing title insurance business across Canada. Linda A. Sequin, *Title Insurance, in* Canadian Bar Ass'n-Ontario, Real Property Hot Spots 1 (1989). A Canadian commentator expressed doubt about whether the admitted benefits of title insurance justified its cost and predicted that title insurance would not become entrenched in Canada unless lenders banded together to require it. James D. M. Fraser, *Title Insurance--Do We Need It?, in* Canadian Bar Ass'n--Ontario, Real Property Hot Spots 11 (1989). It seems reasonable to predict that title insurers would have a more difficult marketing task than they faced in the United Kingdom in European civil law countries because notaries in those countries provide services that are similar to some of the services provided by title insurance

companies in the United States. A French lawyer once described to the author her frustration in failing to convince American investors in a development in Tahiti that title insurance on their interests was "completely unnecessary" because the notary "takes care of everything." As of the early 1980s, title insurance was not used at all in Asia. Thomas H. Clarke, *Mortgage and Title Assurance in Asia*, 11 Int'l Bus. Law 127 (1983).

(n6)Footnote 6. Sumner B. Young, et al., *Report of the Special Committee of the Hennepin County Bar Association Appointed to Study Title Insurance, 19 Minn. L. Rev. 354, 357 (1935).*

(n7)Footnote 7. Sumner B. Young, et al., *Report of the Special Committee of the Hennepin County Bar Association Appointed to Study Title Insurance, 19 Minn. L. Rev. 354, 357 (1935).* For a more extensive discussion of the development of title insurance in Pennsylvania, *see* Joyce D. Palomar, Title Insurance Law § 1.01[2] (1994).

(n8)Footnote 8. Ernest F. Roberts, Jr., Et Al., Public Regulation Of Title Insurance Companies and Abstracters 2 (1961).

(n9)Footnote 9. Ernest F. Roberts, Jr., Et Al., Public Regulation Of Title Insurance Companies and Abstracters 2 (1961).

(n10)Footnote 10. Ernest F. Roberts, Jr., Et Al., Public Regulation Of Title Insurance Companies and Abstracters 2 (1961).

(n11)Footnote 11. D. Barlow Burke, Jr., Law of Title Insurance § 1.1 (1986).

(n12)Footnote 12. D. Barlow Burke, Jr., Law of Title Insurance § 1.1 (1986). Purchasers in a secondary mortgage market purchase debts from the original lenders. At the time of the purchase, the debt and the mortgage security interest are assigned to the purchaser. If the title to the mortgage is insured, the title policy will also be assigned to the purchaser. While title policies insuring owners are normally not assignable by sellers to buyers, policies covering mortgage are assignable.

(n13)Footnote 13. Allen Axelrod, Et Al., Land Transfer and Finance 764 (1986); Noel D. Uri, *The Title Insurance Industry: A Reexamination*, 17 Real Estate L.J. 313, 314 (1989). Attorneys still dominate the land title assurance field in New England, much of the rural South and Midwest, and in the state of Iowa where it is illegal for a private insurer to issue a title policy on Iowa land within the state. However, the Attorney General of Iowa has opined that it is permissible for an out-of-state title insurer to issue a policy out-of-state on Iowa real estate. D. Barlow Burke, Jr., Law of Title Insurance § 1.1 (1986). Since 1987, the Iowa State Finance Authority has been authorized to offer what appears to be a form of title insurance. iowa Code Ann. §§ 220.2, 220.91. When title insurance is used as land title assurance, attorneys still play a role as a source of independent advice about title insurers, title insurance documents and the different coverages which may be advisable. This role is lesser in several respects than that played by the attorney when title insurance is not involved. The attorney's malpractice exposure is less because a title insurer assumes the principal liability for the quality of the search and examination. The in-depth knowledge of applicable real property law that is required to evaluate a chain of title in the record or on an abstract is not required to evaluate a title insurance commitment or policy. Furthermore, examining title insurance documents requires less time than required for examination of record chains or abstracts of title. This may make it difficult for an attorney to justify a large fee for title examination.

(n14)Footnote 14. Michael J. Rooney, Attorneys' Guide To Title Insurance 1-8 (Illinois Institute for Continuing Legal Education, 1984). In constant 1968 dollars, the growth was from $317 million to $492.2 million. *Id.*

(n15)Footnote 15. Michael J. Rooney, Attorneys' Guide To Title Insurance 1-8 (Illinois Institute for Continuing Legal Education, 1984).

(n16)Footnote 16. Michael J. Rooney, *Bar-Related Title Insurance: The Positive Perspective*, 1980, S. Ill. U. L.J.

263, 292 n.149.

(n17)Footnote 17. Michael J. Rooney, *The Role of the Lawyer as a "Member" of a Bar Guaranty Fund*, *in* A.B.A., Section of Real Property, Probate and Trust Law, Title Insurance: the Lawyer's Expanding Role 333, 334 (1985). See Joyce D. Palomar, Title Insurance Law § 2.05 (1994).

(n18)Footnote 18. Michael J. Rooney, *The Role of the Lawyer as a "Member" of a Bar Guaranty Fund*, *in* A.B.A., Section of Real Property, Probate and Trust Law, Title Insurance: the Lawyer's Expanding Role 335 (1985); D. Barlow Burke, Jr., Law of Title Insurance § 1.1 (1986).

(n19)Footnote 19. Michael J. Rooney, *The Role of the Lawyer as a "Member" of a Bar Guaranty Fund*, *in* A.B.A., Section of Real Property, Probate and Trust Law, Title Insurance: the Lawyer's Expanding Role 333, 336 (1985).

(n20)Footnote 20. Michael J. Rooney, *The Role of the Lawyer as a "Member" of a Bar Guaranty Fund*, *in* A.B.A., Section of Real Property, Probate and Trust Law, Title Insurance: the Lawyer's Expanding Role 337 (1985).

(n21)Footnote 21. Michael J. Rooney, *The Role of the Lawyer as a "Member" of a Bar Guaranty Fund*, *in* A.B.A., Section of Real Property, Probate and Trust Law, Title Insurance: the Lawyer's Expanding Role 338 (1985).

(n22)Footnote 22. Quintin Johnstone, *Land Transfers: Process and Processors, 22 Val. U. L. Rev. 493, 511 (1988).*

(n23)Footnote 23. Quintin Johnstone, *Land Transfers: Process and Processors, 22 Val. U. L. Rev. 493, 511 (1988).*

(n24)Footnote 24. Quintin Johnstone, *Land Transfers: Process and Processors, 22 Val. U. L. Rev. 493, 511 n.50 (1988).*

(n25)Footnote 25. J. Linn Allen, *Who Cares about Title Insurance?*, Chi. Trib., Apr. 30, 1989, § 16, at 1.

(n26)Footnote 26. The quality of public land title record-keeping varies from place to place. For examples, the public land title records in Minneapolis-St. Paul and parts of New England are very good. In some other localities, the quality ranges from poor to atrocious. Additionally, the only available index to the records in approximately two-thirds of recorders' offices nationwide is the grantor-grantee name index type. Where this type of index is well kept and periodically reorganized so that entries are in strict alphabetical order, the index is usable to conduct a chain of title search. Grantor-grantee indexes that are not so well maintained are difficult or practically impossible to use. In the Chicago area (Cook County, Illinois), the official grantor-grantee index to deeds and mortgages is unusable to conduct a search. Fortunately, Cook County also maintains a usable, unofficial tract index.

(n27)Footnote 27. U.S. Dep't of Hous. & Urban Dev., Land Title Recordation Practices: A State-of-the-Art Study 43 (1980).

(n28)Footnote 28. The official Cook County records were destroyed by the Chicago fire in 1871. A predecessor of Chicago Title Insurance Co. was maintaining a tract index that was saved from the fire. By statute, these pre-fire records may be treated as prima facie evidence of the information that they contain. 765 ILCS 45/8 & 24. Title insurance companies may make access agreements under which one company may have access to the computerized records of another company through remote terminals.By statute, these pre-fire records may be treated as prima facie evidence of the information that they contain. 765 ILCS 45/8 & 24.

(n29)Footnote 29. The results of a company's examination appear in the final title policy which is dated. When a company relies on a prior examination, the company may be liable for defects, liens, or encumbrances that were not reported in the prior title policy. Where the prior policy was issued by another company, there normally will be no

recourse for the subsequent title insurance company against the other company for losses it must indemnify that were not reported on the prior policy but that existed when it was issued. Title insurance companies have no duty to issue title insurance when requested. *Quelimane Co., Inc. v. Stewart Title Guaranty Co., 54 Cal. Rptr. 2d 364 (1996), rev'd on other grounds, 960 P. 2d 513 (Cal. 1998).*

(n30)Footnote 30. *See, e.g., Caravan Prods. Co. v. Ritchie, 259 A.2d 223, 226 (N.J. 1969).*

(n31)Footnote 31. To avoid abstractors' liabilities, title companies may state in the commitment that it is a contract to insure the title as described therein and nothing more. *See Jarchow v. Transamerica Title Ins. Co., 122 Cal. Rptr. 470 (1975)* (holding that title insurance commitments could be a source of abstractors' liabilities for negligent search was overruled by statute); *Southland Title Corp. v. Superior Ct., 282 Cal. Rptr. 425, 427 (Cal. 1991).* Although a title insurance commitment is not an abstract because it does not attempt to summarize the entire recorded chain of title, whether title companies should have at least some of the responsibilities of abstractors is still a complex question. Parties to real estate transactions expect and believe the commitment to be a current report of the state of the title.

(n32)Footnote 32. The member companies are mainly title insurers; however, a few abstracting companies which apparently do not offer title insurance are currently members. Lawyers and other persons in the real estate industry may be admitted as associate members.

(n33)Footnote 33. The 1970 forms were substantially revised in 1984. Although the 1970 forms have been officially withdrawn by ALTA effective December 31, 1990, some title insurers were still using them in 1992. Practicing Law Institute, Current Developments in Title Insurance 1992, 496 (1992). Chicago Title Insurance Co. uses the 1970 forms as the "Formerly 1970" forms.

(n34)Footnote 34. Practicing Law Institute, Title Insurance 1988: Comparing the 1987 and 1970 ALTA Policies (1988).

(n35)Footnote 35. Practicing Law Institute, Current Developments in Title Insurance 1992, 299-324 (1992).

(n36)Footnote 36. In 1991, the New York State Insurance Department directed the exclusive use of the 1990 ALTA forms with a "New York Endorsement" after January 1, 1992. New York State Insurance Department, Title Insurance, Memorandum Decision & Opinion (Nov. 19, 1991). Among other things, the New York Endorsement provides broad coverage of mechanics' liens, as well as coverage of the "gap" between the date of the policy and any later recordation date of the instrument creating the insured interest. The Endorsement does not provide full coverage for all liens and encumbrances which might attach during a "gap" period. Intervening real estate taxes, assessments, water charges and sewer rents are not covered. Practicing Law Institute, Title Insurance 15-16 (1994).

(n37)Footnote 37. ALTA policies are compared with CLTA policies in *Lick Mill Creek Apts. v. Chicago Title Ins. Co., 283 Cal. Rptr. 231, 233 (Cal. Ct. App. 1991).*

(n38)Footnote 38. Raymond J. Werner, *The Basics of Title Insurance, in* A.B.A., Section of Real Property, Probate and Trust Law, Title Insurance: The Lawyer's Expanding Role 3, 7 (1985).

(n39)Footnote 39. Raymond J. Werner, *The Basics of Title Insurance, in* A.B.A., Section of Real Property, Probate and Trust Law, Title Insurance: The Lawyer's Expanding Role 3, 7 (1985).

(n40)Footnote 40. In Texas, title insurers must use forms promulgated by the Texas State Board of Insurance. Tex. Ins. Code Ann., art. 9.07, ch. 9, Texas Title Ins. Act.

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CHAPTER 93 TITLE INSURANCE

11-93 Thompson on Real Property, Thomas Editions § 93.02

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§ 93.02 Nature of Title Insurance.

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§ 93.02(a) Introduction.

Title insurance is a unique form of insurance because generally it does not insure against future risks but only against those in existence at the time the policy is issued. Another unique feature of title insurance is that the coverage continues indefinitely, and only a single premium is paid. Another different feature of title insurance is that the insurer, upon notification of the loss, frequently has the option of curing the title defect causing the loss, in lieu of compensating the insured for the loss.

Commentators have sometimes compared title insurance with boiler insurance where inspections aimed at the elimination of risks may be of more value to the insured than the assumption of risks through the insurance coverage. n41 Title insurance is issued only after a search and examination of the title. n42 Most substantial risks disclosed by this process will be reported to the prospective insured and excluded from coverage, unless the company can be persuaded to cover them. The focus on risk elimination results in low loss ratios for title insurers. Most losses are due to either negligence in search and examination or to risks that are not readily ascertainable through searches and examinations. n43

§ 93.02(b) Contract of Indemnity.

Modern title insurance policies are contracts of indemnity and not of guaranty. n44 The title insurer as indemnitor is not obligated to take action until the insured has suffered a loss covered by the policy. The title insurer does not guarantee that the title is good, marketable, and free of defects. n45 The insurer does not agree to pay for a loss suffered because of title defects, as a guarantor would. Instead, the insurer undertakes to "make good" on losses covered by the policy. n46 When a loss occurs, the insurer may choose to make good by paying the insured for the loss, but other forms of indemnification may also be available. The insurer may indemnify the insured by clearing the title or by pursuing others who may be responsible, such as grantors who warranted that the title was free of the defect that caused the loss. n47

§ 93.02(c) The Title Policy.

There are basically two kinds of title insurance policies, owner's and loan. n48 Owner's policies are used to insure the titles to ownership interests such as fees simple or leaseholds. n49 Loan (sometimes called "mortgagees") policies insure the title to mortgages or other real property security interests. Both types of policies are divided into six parts:

(1) statement of coverage;

(2) exclusions from coverage;

(3) conditions and stipulations;

(4) Schedule A (which includes the name of insured, a description of interest insured, the date of policy, and the amount of insurance);

(5) Schedule B (which includes general exceptions, if any, in owner's policies, and special exceptions, if any, which are mainly title defects or possible adverse claims found by the insurer when searching and examining the title); and

(6) endorsements, if any.

§ 93.02(d) Construction of Title Policies.

One of the most basic principles of insurance law is that ambiguities in the policy are to be construed against the insurer. n50 Insurance contracts have been considered one-sided contracts of adhesion which tend to deny consumers the protection they expect or are led to believe that they will receive. The principle that ambiguities in a policy are construed against the insurer provides some relief to the consumers of insurance services. This rule of construction also applies to title insurance policies. n51

It may not be appropriate to apply to all title insurance policies the principle that ambiguities in an insurance policy should be construed against the insurer. While owners who purchase title insurance policies have relatively little direct input regarding the substance of ALTA owner's policy forms, n52 the lending industry has substantially influenced the provisions in ALTA loan policies and the underwriting practices of title insurers. Additionally, it is debatable whether the principle of construing ambiguities against the insurer should be applied with the same force to loan policies in which the insured is a large corporate lender, for example, if a rationale for the principle is that it serves to protect the weak from the strong by giving some relief from generally one-sided bargains. n53

§ 93.02(e) Obligation of Good Faith and Fair Dealing.

Title insurance transactions include an implied obligation to deal fairly and in good faith with the other party to a contract of insurance. An insurer who breaches this obligation may be liable in damages to the insured. n54 A title insurance company that wrongfully handles a claim may be liable in damages for bad faith breach of the policy. n55 While most of the cases dealing with this implied obligation have concerned the duties of the insurer, the insured is also obligated to deal fairly and in good faith with the insurer. Although some courts in recent years have characterized the relationship between insured and insurer as a "fiduciary" one, the relationship is normally not truly fiduciary. n56 The implied obligation of fair dealing does not by itself make the relationship between the insured and the insurer a fiduciary one. n57

COMPUTER-ASSISTED RESEARCH

LEXIS: constru! w/5 ambig! w/20 (policy or policies) and "title insurance"

FOOTNOTES:

(n1)Footnote 41. Raymond J. Werner, *The Basics of Title Insurance, in* A.B.A., Section of Real Property, Probate and Trust Law, Title Insurance: The Lawyer's Expanding Role 4 (1985). Werner states that a more current analogy may be found in environmental impairment liability insurance. *Id.*

(n2)Footnote 42. At one time, "casualty" title insurance was not uncommon. Casualty title insurers issued title policies without searching and examining the titles involved. In some states, conventional title insurers successfully lobbied state legislatures to prohibit the issuance of casualty insurance. Joyce Dickey Palomar, *Title Insurance Companies' Liability For Failure To Search Title And Disclose Record Title, 20 Creighton L. Rev. 455, 468-69, n.73 (1987).* Of course, there is a casualty aspect to all title insurance. Title insurance usually covers certain "off the record" risks which may not be discoverable through a reasonable search and examination of the property records. And the typical policy may also cover losses caused by matters discoverable by search and examination but not reported to the insured. Finally, when permitted by applicable law, title insurers may assume known risks, usually upon the payment of an additional premium. Joyce D. Palomar, Title Insurance Law § 1.03[2] (1994).

(n3)Footnote 43. Hidden mechanics' liens (liens that do not appear on the record at the time of a search but that may be perfected by a later recordation) have been a significant cause of title insurer claim payments. Jack Tickner, *Mechanics Liens*, Title News, Jan. 1976, at 40.

(n4)Footnote 44. *Sattler v. Philadelphia Title Ins. Co., 162 A.2d 22 (Pa. Super. 1960).* However, because of the title search and examination which normally precede the issuance of a policy, a few courts have held that a "title insurance policy is more in the nature of a covenant against encumbrances or a title guaranty." Joyce D. Palomar, Title Insurance Law § 1.03[3] (1994). *In re Seko Inv., Inc., 156 F.3d 1005 (9th Cir. 1998)* (contract of indemnity); *Golden Sec. Thrift & Loan Ass'n v. First American Title Ins. Co., 61 Cal. Rptr. 2d 442 (Cal. App. 1997)* (contract for indemnity).

(n5)Footnote 45. *Compare First Fed. Sav. & Loan Ass'n v. Transamerica Title Ins. Co., 793 F. Supp. 265, 270 (D. Colo. 1992) with Citicorp Sav. of Ill. v. Stewart Title Guar. Co., 840 F.2d 526 (7th Cir. 1988).*

(n6)Footnote 46. D. Barlow Burke, Jr., Law of Title Insurance § 1.3.1 (1986). *In re Seko Inv., Inc., 156 F.3d 1005 (9th Cir. 1998)* (contract of indemnity); *Golden Sec. Thrift & Loan Ass'n v. First American Title Ins. Co., 61 Cal. Rptr. 2d 442 (Cal. App. 1997)* (contract for indemnity). *Oak Park Trust & Sav. Bank v. Intercounty Title Co. of Illinois, 678 N.E.2d 723 (Ill. App. 1997)* (purpose is to protect insured from possible losses through defects that may cloud title).

(n7)Footnote 47. D. Barlow Burke, Jr., Law of Title Insurance § 1.3.1 (1986); *Baum v. Colombian Nat'l Title Ins. Co., 763 S.W.2d 194 (Mo. App. 1988).*

(n8)Footnote 48. The American Land Title Association promulgates separate forms for owners' and loan policies. The California Land Title Association publishes a joint protection policy which may be used to insure an owner or lender. Sheldon Rubin, *Title Insurance, in* 3 the American Law of Real Property § 24.02[4], [3] (Arthur R. Gaudio ed. 1991).

(n9)Footnote 49. A policy insuring a leasehold interest is sometimes referred to as a "lessee's" policy.

(n10)Footnote 50. Warren Freedman, Freedman's Richard on the Law of Insurance § 11:2[f] (6th ed. 1990). Other rules of construction from general insurance law have also been applied to title insurance policies. For a list of these rules, *see* Joyce D. Palomar, Title Insurance Law § 1.03[4] (1994).

Stewart Title Guar. Co. v. Kiefer, 984 F. Supp. 984 (E.D. La. 1997) (citing *Louisiana Ins. Guar. Assoc. v. Interstate Fire & Casualty Co., 630 So. 2d 759, 764 (La. 1994)* holding "if after applying the other general rules of construction an ambiguity remains, the ambiguous contractual provision is to be construed against the drafter").

(n11)Footnote 51. *Lick Mill Creek Apts. v. Chicago Title Ins. Co., 283 Cal. Rptr. 231, 234 (1991); Paramount Props. Co. v. Transamerica Title Ins. Co., 83 Cal. Rptr. 394, 398 (1970). See* Jerome J. Curtis, Jr., *Title Assurance in Sales of California Residential Realty: A Critique of Title Insurance and Title Covenants with Suggested Reforms, 7 Pac. L.J. 1, 8-10 (1976). United Bank v. Chicago Title Ins. Co., 168 F.3d 37 (1st Cir. 1999)* (where title's insurer's certificate of title explicitly disclaimed liability after policy issued, the certificate could not be relied upon to provide coverage not listed in policy, especially where policy was an integrated document stating the full scope of insurer's obligations); *Utting v. Commwealth Land Title Ins. Co., 676 N.Y.S. 2d 637 (N.Y. App. Div. 1998)* (ambiguous exception language was insufficient to qualify as exception from coverage); *First American Title Ins. Co. v. J.B. Ranch, Inc., 966 P.2d 834 (Utah 1998)* (unless policy provision is deemed ambiguous, insured is not entitled to strong presumption of coverage); *Rosen v. Nations Title Ins. Co., 66 Cal. Rptr. 2d 714 (Ct. App. 1997)* (title insurance construed according to law applicable to general insurance policies).

(n12)Footnote 52. Consumer influence may be expressed in policy forms approved or promulgated by state agencies or through statutory requirements.

(n13)Footnote 53. *See generally Eagle Leasing Corp. v. Hartford Fire Ins. Co., 540 F.2d 1257 (5th Cir. 1976), cert. denied, 431 U.S. 967 (1977)* (stating that the court did "not feel compelled to apply ... the general rule that an insurance policy is construed against the insurer in the commercial insurance field when the insured is not an innocent but a corporation of immense size... ." *Id.* at 1261).

(n14)Footnote 54. 2 Warren Freedman, Freedman's Richards on the Law of Insurance 9.1 (6th ed. 1990). *Stewart Title Guaranty Co. v. Aiello, 911 S.W.2d 463 (Tex. App. 1995)* (the insurer's duty of good faith and fair dealings survived the entry of an agreed judgment), *aff'd in part, rev'd in part by, 491 S.W.2d 68 (Tex. 1997)* (Texas Supreme Court held that the duty ended when parties signed agreement and judgment was entered by the trial court).

(n15)Footnote 55. 2 Warren Freedman, Freedman's Richards on the Law of Insurance 9.15 (6th ed. 1990). Some jurisdictions do not recognize bad faith breach of an insurance policy as an independent tort. *See, e.g., Heinson v. Porter, 772 P.2d 778 (Kan. 1989). Lawyers Title Ins. Corp. v. Dearborn Title Corp., 904 F. Supp. 818 (N.D. Ill. 1995)* (insurer liable for misconduct of its agent); *Forman v. Chicago Title Ins. Co., 38 Cal. Rptr. 2d 790 (1995)* (the two-year statute of limitations period on a title insurance policy was equitably tolled while the insurer took 16 months to determine whether to honor or reject a claim that was timely filed); *Wainco Funding v. First American Title Ins. Co. of N.Y., 631 N.Y.S.2d 81 (1995)* (insurer was prejudiced and had no liability under the policy when the insured delayed for 20 months notifying the insurer of a proceeding).

(n16)Footnote 56. William T. Barket et al., *Is An Insurer A Fiduciary To Its Insureds?, 25 Tort & Ins. L.J. 1 (1989).*

(n17)Footnote 57. *Hassard, Bonnington, Roger & Huber v. Home Ins. Co., 740 F. Supp. 789, 791 (S.D. Cal. 1990). United States v. Barrett, 51 F.3d 86 (7th Cir. 1995)* (although insurer's employee participated in misconduct, insurer could still be considered a victim).

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CHAPTER 93 TITLE INSURANCE

11-93 Thompson on Real Property, Thomas Editions § 93.03

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§ 93.03 Statement of Coverage.

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§ 93.03(a) Insuring Clauses.

Most title insurance policies are issued on American Land Title Association (ALTA) forms, with the important exceptions of policies issued in California and Texas. Forms promulgated in 1970 have been revised in 1987, 1990, 1992, and 1998. n58 In response to "plain language" legislation requiring legal documents to be in "plain language" understandable to non-lawyers, in 1979 ALTA approved a short form "Residential Title Insurance Policy" for one-to-four family residences supposedly written in "plain language." n59 This "plain language" form was revised in 2000.

The coverage statements in the 1970, 1992, and 1998 forms begin by emphasizing that the coverage afforded is subject to the exclusions, exceptions, conditions, and stipulations stated in the policy. This introductory portion of the coverage statement also makes it clear that the contract is an indemnity contract. The coverage statement provides that as of the date specified in Schedule A, the insurer insures against losses or damages, not in excess of the amount of insurance, sustained or incurred due to one of the specific causes stated in the policy.

All of the forms refer to specific potential causes of loss which are covered, including title being vested other than as stated; defect in or lien or encumbrance on the title; lack of right of access; and other items. n60

§ 93.03(a)(1) Title Being Vested Other Than as Stated.

Schedule A names the insured and contains a legal description of the property and a description of the nature of the estate or interest held by the insured, i.e., fee simple, leasehold, mortgage or other interest. The statement of coverage contains the obligation of the title insurer to indemnify the insured for any loss or damage caused by the title vested in the insured being different than the title as stated in Schedule A. If the insured owns (or in the case of a loan policy, has a mortgage on) an interest which is other than as stated in Schedule A (e.g., a life estate when Schedule A states that the interest is a fee simple), then any actual loss suffered by the insured is covered unless an exclusion or exception applies. If the legal description in Schedule A is defective, this provision may obligate the insurer to indemnify the insured for any actual loss due to the defective legal description. n61 Generally, application of this provision to claims against

insurers has presented courts with relatively little difficulty.

§ 93.03(a)(2) Any Defect in or Lien or Encumbrance on Such Title.

One of the coverage provisions in ALTA policies is loss or damage sustained or incurred by reason of "[a]ny defect in or lien or encumbrance on such title." The words "defect," "lien," and "encumbrance" are often used loosely and imprecisely even by lawyers and title insurers. Strictly speaking, the three words have distinct meanings.

A "defect" in title is a want or absence of something needed for perfection or completeness. n62 For example, if a person granting an option owns less land than described in the option, the option has a "defect in title," not a "deficiency in quantity," for the optionor does not have title to all of the land covered by the option. n63 A title is defective if it is void or voidable. n64

The term "encumbrance" is broader than "lien" and includes a variety of rights or interests in land (e.g., liens, easements, or restrictive covenants) which may diminish the value of the encumbered property but which are not inconsistent with the transfer of fee simple title. n65 In contrast, a "lien" is a specific type of encumbrance which secures the performance of an obligation. Liens may be voluntary or involuntary. A mortgage creates a voluntary lien. n66 Examples of involuntary liens include judgment liens, tax liens, and special assessment liens. If the obligation secured by a lien is not satisfied, the secured party has recourse against the security property either directly or by forcing its sale. n67

§ 93.03(a)(3) Access to and from the Land.

Even though lack of access to real property traditionally has not been considered to be a title defect, it can have a dramatic impact on the value of the property. n68 A survey of the property or a physical inspection may not always show whether there is adequate access. Standard ALTA policies insure against loss or damage by reason of lack of a right of access to and from the land. Whether the insured has sufficient access to the property depends on the particular facts and circumstances. n69 The title insurer does not, however, insure that the insured will have the most convenient access to the property n70 or that the access route will be physically passable. n71 The policy insures a legal "*right of access*," rather than "access" only. n72

In Gates v. Chicago Title Insurance Co., n73 the insured was told at the time of purchase that there was access to the property by way of a well-maintained gravel county road. The purchaser later discovered that this road was private, and its owner denied him use. As a result, the purchaser's only remaining access was by way of a road he described as a "goat path," which, from the highway to the property, was about twice as long as the private gravel road. A witness described the road or path as negotiable by foot, horseback, or four-wheel drive when the road was dry. The purchaser sued the title insurer for his loss due to lack of a right of access. Although the jury awarded the purchaser $50,000, the trial judge granted the title insurer's motion for judgment notwithstanding the verdict, and the appellate court affirmed. The appellate court acknowledged that the access road was a difficult one of limited usefulness. Nonetheless, the purchaser failed to make a *prima facie* case for recovery under the policy because he had a *right of access* to the property. The court stated: "A title insurance company may not be expected to investigate the physical condition of a way of legal access to the insured property to determine if it is passable." n74 The dissenting judge argued that "right of access" must be given a reasonable, rather than a strict, construction. n75

Title insurers are specialists in searching and examining records pertaining to real estate titles and normally do not evaluate the physical condition or characteristics of property. Indeed, title policies specifically exclude or except a number of matters ascertainable by physical inspection. n76 A strict construction of the Lack of Access Clause to mean legal right of access may be warranted if the focus is on the type of service provided by the title insurers. If the problem is viewed from the perspective of the consumer of the service, however, a more liberal interpretation of the policy language may be appropriate. The consumer expects that if the right of access is insured, the consumer will be able to

reach the property through some reasonable means. Absent very unusual circumstances, a title insurer would be liable under the Access Clause to the insured owner of a completely landlocked parcel, even though the insured has a legal right to access the property by air using a helicopter. The decision of the *Gates'* court that access was adequate to preclude coverage where the property could be reached on foot, horseback, or by four-wheel drive when the road was dry, may have been defensible because the insured knew that the parcel was in rough country and fairly isolated.

§ 93.03(a)(4) Unmarketability of the Title. n77

Title insurance policies written on ALTA forms insure against the risk of loss because of unmarketability of the title. n78 The concept of "marketable" or "merchantable" title is difficult to define. The usual definitions are not very helpful in conveying an understanding of the concept. The Illinois Supreme Court defined "marketable" title as "one that persons of reasonable prudence and intelligence, guided by competent legal advice, would be willing to take and pay the fair value of the land for." n79 A better understanding of the concept can be gained by reviewing a list of the specific matters which have formed the basis of title litigation. Some seventy Illinois title marketability cases "turned on the following points: will construction, deed construction, necessary party omitted in a proceeding, break in chain of record title, mortgage, dower, lease, taxes, special assessments, judgments, claims against a decedent's estate, building restrictions, easements, encroachments, title based on judicial or tax sale, defectively executed instruments, variation in names, defect in description of realty, lack of possession by vendor, competency of the grantor, lost deed, outstanding contract of purchase, title tainted with fraud, no patent or land grant from the government, and suits pending against the vendor." n80

A title defect does not have to be a defect in fact to cloud the title and affect its marketability. Title will be clouded if the title records, a survey, or an examination of the property itself reveals facts which could reasonably provide a basis for litigation about the title. n81

Generally, defects that merely diminish the value of the property and that do not cloud its title will not render title unmarketable within the meaning of a title insurance clause insuring marketability. n82 Marketability is a legal concept, not an economic one. A defect in the property which reduces its market value without creating a cloud on title will not render the title to the property unmarketable in the legal sense. For example, lack of access to the subject property may substantially diminish its value but will not in itself render the title unmarketable. n83 In a case where the title insurer failed to report a proposed change in the grade of a street abutting the subject property, the court held that the title insurer was not liable. The proposed change appeared on a map that had been adopted by the appropriate governmental entity and that was on file in a public office at the time the policy was issued. When the change was later implemented, the insured had to have a structure on the property razed. The trial court entered judgment in favor of the insured for the expenses incurred, but the reviewing court reversed. After quoting from the policy, the court said that the policy "provisions concern themselves with defects to the *title* to the property or an incumbrance or lien upon the property, any one of which would cause the title to be unmarketable. These provisions do not concern any situation affecting the value of the property as distinguished from affecting the title to the property." n84

§ 93.03(b) Coverages Included in Loan Policies Only.

The four coverages discussed above are found in both owner's and loan policies. The loan policy forms contain additional coverages which are not found in the owner's policies but which are of concern to real estate secured lenders. These provisions are included in loan policies because they insure the lien of the mortgage and its priority, in addition to the state and quality of the underlying title to the encumbered property as security. These provisions are as follows:

(1) the invalidity or unenforceability of the lien of the insured mortgage,

(2) the priority of any lien or encumbrance over the lien of the insured mortgage,

(3) lack of priority of the lien of the insured mortgage over certain mechanics' liens, and

(4) the invalidity or unenforceability of any assignment of the insured mortgage.

After these insuring clauses, a commitment to pay litigation costs incurred in defending the title or the lien of the insured mortgage appears on current ALTA forms. n85

The coverage for the "invalidity or unenforceability of the lien" is an agreement by the company to indemnify the insured for losses caused by the invalidity or unenforceability of the mortgage lien. A mortgage may be invalid if improperly executed, not supported by an underlying obligation, n86 or void against a person protected by a recording act. A mortgage may also be invalid or unenforceable under statutes such as usury or consumer protection laws. n87 However, such policies do not cover losses resulting from invalid notes that are evidence of the mortgage debt. n88

The coverage of the "priority of any lien or encumbrance over the lien of the insured mortgage" obviously complements the invalidity coverage. In the event of default by the mortgagor, the value of the lien as security may depend on its priority in relation to other claims against the property. n89 Generally, no indemnifiable loss exists if enough value remains in the property, after satisfying the prior lien, to repay the amount due to the insured. However, if a prior lien covered by the policy causes the insured to become undersecured, the insurer may be obligated to indemnify the insured before foreclosure by clearing the title to the mortgage. n90

A "mechanic's lien" is a special statutory lien which may attain a priority over a previously attached mortgage lien. Persons furnishing labor or materials in the improvements of premises may acquire a mechanic's lien on the title to the premises. This lien secures the payment for the labor or material. The mechanic's lien can be a serious off-the-record risk because the mechanic may have some time after completion of the work to file notice of it in the recorder's office. When timely filed, the priority of the lien may relate back to an earlier date defined by the applicable statute, e.g., the date of the mechanic's contract or the date the work was commenced. As a result, the purchaser of real estate, including the mortgagee, faces the risk of a hidden mechanic's lien which may be perfected by a filing after the date of purchase which may attain priority over the purchaser's interest. While inspections of the premises for signs of recently completed work and statements of parties may provide the purchaser with some protection, title insurance provides better protection. n91

Although the coverage for losses due to certain mechanics' liens in the 1970 and 1987-1992 ALTA loan policy forms is basically the same, the specific language used in the coverage provisions substantially differs. Both policy forms provide coverage where mechanics' liens gain priority over the lien of the insured mortgage with stated exceptions. A provision in the 1970 form excepts losses where the mechanic's lien arose "from an improvement on the land contracted for and commenced subsequent to Date of Policy not financed in whole or in part by proceeds of the indebtedness secured by the insured mortgage which at Date of Policy the insured has advanced or is obligated to advance." The 1990 form affirmatively provides coverage for losses caused by subsequent liens "(a) arising from an improvement or work related to the land which is contracted for or commenced prior to Date of Policy; or (b) arising from an improvement or work related to the land which is contracted for or commenced subsequent to Date of Policy and which is financed in whole or in part by proceeds of the indebtedness secured by the insured mortgage which at Date of Policy the insured has advanced or is obligated to advance."

Under both policy forms, mechanics' liens arising out of a project contracted for or commenced after the date of policy are not covered unless financed, at least in part, by funds secured by the mortgage and advanced by the date of policy, or after that date if the insured was obligated to make them. These provisions cover losses due to record and hidden mechanics' liens in existence as of the date of policy.

Under mechanics' lien statutes, subsequent mechanics' liens which have no relation to a prior insured mortgage may gain priority over the prior mortgage to the extent that the labor or material furnished to the property enhanced its value.

A literal reading of the American Title Association Loan Policy Forms in use prior to 1960 seems to indicate that they covered such mechanics' liens. n92 Additionally, the policy forms then in use appear to have required the title insurer to defend the mortgagee in litigation brought by a subsequent mechanic's lien claimant, even though the lien had nothing whatsoever to do with the loan and the insured mortgage. Since 1960, the mechanic's lien is covered only if some portion of the work which was the basis for the lien is to be paid for by proceeds of the insured mortgage. n93 The loan policy provides no protection against the risk of subsequent mechanics' liens unless the work is financed, at least in part, by an advance made by the date of policy or an obligatory advance made thereafter.

The final additional loan policy coverage insures against "the invalidity or unenforceability of any assignment of the insured mortgage, provided the assignment is shown in Schedule A, or the failure of the assignment shown in Schedule A to vest title to the insured mortgage in the named insured assignee free and clear of all liens." n94 Many mortgages are sold by the original lenders in the secondary mortgage market. Normally, when a person purchases a mortgage, the debt and the mortgage security are assigned to the buyer. When the debt is assigned, the insurance covering the title to the security automatically extends to the assignee of the debt. n95 No amendment or endorsement of the policy is necessary. In fact, the insurer does not even have to be notified of the assignment. However, there is a serious risk that the assignment itself could be invalid and that risk is not covered unless the assignment is shown in Schedule A. Therefore, when the insured mortgage is assigned, it is customary for the policy to be amended or endorsed to show the assignment.

COMPUTER-ASSISTED RESEARCH

LEXIS: "vested other than as stated" w/50 title defect w/5 lien w/5 encumbrance w/20 land w/20 title unmarketability w/20 title

FOOTNOTES:

(n1)Footnote 58. The 1970 forms have been officially withdrawn by ALTA but some title insurers continued to use them.

(n2)Footnote 59. A copy of this form may be found in ABA, Section of Real Property Section of Real Property, Probate and Trust Law, Title Insurance: the Lawyer's Expanding Role (1985) 96.

(n3)Footnote 60. The 1998 form lists 29 categories of covered risks.

(n4)Footnote 61. *See, e.g., Stewart Title Guar. Co. v. Treat, 810 S.W.2d 953 (Ark. 1991)* (upholding lower court's decision that title was vested otherwise than the title insured where the legal descriptions in both Schedule A and the insured mortgage, erroneously included 32.5 acres which did not belong to the mortgagors, which resulted in the mortgage not attaching to 32.5 acres of land that the mortgagors did own and which the parties had intended to encumber). *See also Laabs v. Chicago Title Ins. Co., 241 N.W.2d 434 (Wis. 1976); Rancher's Life Ins. Co. v. Banker's Fire & Marine Ins. Co., 190 So. 2d 897 (Miss. 1966). See, e.g.,* Joyce D. Palomar, Title Insurance Law § 5.04 (1994).

(n5)Footnote 62. *Devlin v. Bowden, 641 P.2d 1094, 1098 (N.M. 1982). See, e.g.,* Joyce D. Palomar, Title Insurance Law § 5.05 (1994). *Linder v. Ticor Title Ins. Co. of Cal., Inc., 647 N.E.2d 37 (Ind. App. 1995)* (the insured was not entitled to the full amount of the policy because the defect was not entirely removed and the insured therefore did not receive title to the extent insured by the policy).

(n6)Footnote 63. *Lawton v. Byck, 124 S.E.2d 369, 372-373 (Ga. 1962). See, e.g.,* Joyce D. Palomar, Title Insurance Law § 5.05 (1994).

(n7)Footnote 64. *See, e.g., Livingston v. American Title & Ins. Co., 133 So. 2d 483 (Fla. App. 1961). See, e.g.,* Joyce D. Palomar, Title Insurance Law § 5.05 (1994).

(n8)Footnote 65. *Compare Hopkins v. Lawyers Title Ins. Co., 514 So. 2d 786 (Ala. 1987)* (holding that a release agreement under which a developer agreed to waive all rights for itself and its successors in title against the city for damages caused by flooding was held to be an "encumbrance" within the meaning of a title policy) *with Lick Mill Creek Apts. v. Chicago Title Ins. Co., 283 Cal. Rptr. 231 (1991)* (holding that the presence of hazardous material on the land did not create an "encumbrance" even though federal and state agencies might impose liens on the property for violations of environmental laws).

(n9)Footnote 66. *Personal Fin. Co. v. Commonwealth Land Title Ins. Co., 678 So. 2d 463 (Fla. App. 1996)* (no insurer defense to claim based on forged mortgage).

(n10)Footnote 67. The largest number of cases construing this clause involve liens for taxes or special assessments. In the typical case, a unit of local government authorizes a public improvement. At the time the title policy is issued, the improvement might have been completed or the governing body may have authorized an assessment against the subject property. The problem occurs when no notice appears in the public real estate records. The question presented is whether there was a "lien or encumbrance" in existence as of the date of the policy. Most courts hold that no lien or encumbrance existed at that time. Joyce D. Palomar, Title Insurance Law § 5.05 (1994).

(n11)Footnote 68. *See, e.g., L. Smirlock Realty Corp. v. Title Guar. Co., 418 N.E.2d 650 (N.Y. 1981),* where property worth at least $600,000 was rendered valueless by lack of access.

(n12)Footnote 69. In a case where the subject property was located adjacent to a heavily traveled street in a densely developed commercial district, pedestrian access only was insufficient and vehicular access was intended by the parties. *Marriott Fin. Servs. v. Capitol Funds, Inc., 217 S.E.2d 551 (N.C. 1975).* "We hold that when an insurer contracts to insure against lack of access to property, it must be deemed to have insured against the absence of access which, given the nature and location of the property, is *reasonable* access under the circumstances. In the instant case mere pedestrian access cannot be deemed to be reasonable access."*Id. at 565* (emphasis in original).

(n13)Footnote 70. *MacBean v. St. Paul Title Ins. Corp., 405 A.2d 405, 408 n.2 (N.J. Super. 1979). Riffle v. United General Title Ins. Co., 984 S.W.2d 47 (Ark. App. 1998)* (no coverage for insureds -- lack of access easement to landlocked riverfront property for recreational use).

(n14)Footnote 71. *Gates v. Chicago Title Ins. Co., 813 S.W.2d 10 (Mo. App. 1991); Title & Trust Co. v. Barrows, 381 So. 2d 1088 (Fla. App. 1979).*

(n15)Footnote 72. D. Barlow Burke, Jr., Law of Title Insurance § 2.2.4 (1986).

(n16)Footnote 73. *813 S.W.2d 10 (Mo. App. 1991).*

(n17)Footnote 74. *Gates v. Chicago Title Ins. Co., 813 S.W.2d 10, 12 (Mo. App. 1991).*

(n18)Footnote 75. *Gates v. Chicago Title Ins. Co., 813 S.W.2d 10, 12 (Mo. App. 1991)* (dissenting opinion) (citing *Marriott Fin. Servs. v. Capitol Funds, Inc., 217 S.E.2d 551 (N.C. 1975)).*

(n19)Footnote 76. *See, e.g., 1987 ALTA Owner's Policy Form Exclusions 1(a)(ii) & (iv), in* Practicing Law Institute, Supplemental Materials For Title Insurance 1988; Comparing THE 1987 AND 1970 ALTA Policies 8 (1988). Title policies commonly exclude matters that would be disclosed by an accurate survey and inspection of the premises. *See Walker Rogge, Inc. v. Chelsea Title & Guar. Co., 562 A.2d 208, 216 (N.J. 1989).*

(n20)Footnote 77. The 1970 ALTA Owner's Policy, Form A, did not include this coverage.

(n21)Footnote 78. "Marketable" and "merchantable" are usually used as synonymous terms. Sometimes "merchantable title" is used to refer to a title which can be readily transferred.

(n22)Footnote 79. *Eggers v. Busch, 39 N.E. 619, 620 (Ill. 1895). See* John E. Cribbet & Corwin W. Johnson, Principles of the Law of Property 174-177 (3d ed. 1989); 3 american Law of Property §§ 11.48 *et seq.* (A. James Casner ed. 1952).

(n23)Footnote 80. John E. Cribbet, et al., Cases and Materials on Property 1062-1063 (6th ed. 1990).

(n24)Footnote 81. In 1987, ALTA added the following definition of "unmarketability of title" to its policy forms: "an alleged or apparent matter affecting the title to the land, not excluded or excepted from coverage, which would entitle a purchaser of the estate or interest described in Schedule A to be released from the obligation to purchase by virtue of a contractual condition requiring the delivery of marketable title." ALTA 1992 Owner's And Loan Policy Forms, *Condition and Stipulation* (1)(g). The words "alleged or apparent" make it clear that those who are insured do not have to get a judgment that their title is unmarketable, before being entitled to title defense or indemnification from the title insurance company. Furthermore, the language "which *would* entitle a purchaser ... to be released" indicates that the coverage may apply even if there is no actual purchase contract from which a purchaser would be entitled to escape. "It would seem to be sufficient for the insured to establish the existence of a lien, encumbrance or other title defect 'which would entitle' any purchaser to rescind the contract on the basis that the title is unmarketable." Joyce D. Palomar, Title Insurance Law § 5.06 (1994).

(n25)Footnote 82. Joel E. Smith, Annotation, *Defects Affecting Marketability of Title Within Meaning of Title Insurance Policy, 18 A.L.R. 4th 1311, 1313 (1982). See* Jerome J. Curtis, Jr., *Title Assurance in Sales of California Residential Realty: A Critique of Title Insurance and Title Covenants with Suggested Reforms, 7 Pac. L.J. 1, 10 (1976)* for criticism of this position. According to Professor Curtis, "the average purchaser of a title policy would not be impressed with the subtle distinction" between marketability of the title and marketability of the land, and that any ambiguity about the meaning of the "marketability" in a title policy "should have been resolved in favor of the insured." *Id.*

(n26)Footnote 83. *Sinks v. Karleskint, 474 N.E.2d 767 (Ill. App. 1985).*

(n27)Footnote 84. *Sperling v. Title Guar. & Trust Co., 236 N.Y.S. 553, 557 (1929). See also Riffle v. United General Title Ins. Co., 984 S.W.2d 47 (Ark. App. 1998)* (where insured could not obtain easement to access landlocked riverfront property for recreational use, there was no coverage because insureds were aware of problem when purchasing property, and the problem was reflected in lower purchase price); *Haw River Land & Timber Co. v. Lawyers Title Ins. Corp., 152 F.3d 275 (4th Cir. 1998)* (policy covers right of owner to assert ownership against others even if property has no value); *Logan v. Barretto, 675 N.Y.S.2d 102 (N.Y. App. Div. 1998)* (county department of health issued notices of non-compliance due to sewage discharges on property; notices were not deemed to render title unmarketable).

(n28)Footnote 85. In addition to general loan policy forms, ALTA has promulgated leasehold loan and construction loan policy forms. A construction loan form is compared to a general loan policy form in Edmund T. Urban, *Future Advances and Title Insurance Coverage, 15 Wake Forest L. Rev. 329 (1979).*

(n29)Footnote 86. Grant S. Nelson & Dale A. Whitman, Real Estate Finance Law § 2.1 (2d ed. 1985).

(n30)Footnote 87. *See* discussion of exclusion of losses due to invalidity caused by usury or consumer credit protection or truth in lending laws, *infra* § 93.04(g). *See also* Joyce D. Palomar, Title Insurance Law § 5.08 (1994).

(n31)Footnote 88. Joyce D. Palomar, Title Insurance Law § 5.08 (1994).

(n32)Footnote 89. In the days prior to the "deregulation" of the banking industry, statutes and regulations generally limited commercial banks to making first mortgage loans. These laws also addressed acquiring a lien with first priority for that reason.

(n33)Footnote 90. *Stewart Title Guar. Co. v. Goldome Credit Corp., 494 So. 2d 10 (Ala. 1986).* Obtaining less than

the full amount owed at foreclosure is the most common but not the exclusive way to establish a loss attributable to a prior lien. Joyce D. Palomar, Title Insurance Law § 5.08 (1994).

(n34)Footnote 91. *See generally* Grant S. Nelson & Dale A. Whitman, Real Estate Finance Law § 12.4 (2d ed. 1985).

(n35)Footnote 92. The coverage provision in the ALTA 1946 Loan Policy Form stated that "[a]ny statutory lien for labor or material which now has gained or hereafter may gain priority over the lien upon said land of said mortgage or deed of trust... ." was covered. Ray E. Sweat, *Obligatory Advances: Mechanics' Liens and the 1987 ALTA Loan Policy*, *in* Practicing Law Institute, Title Insurance 1988; Comparing The 1987 And 1970 ALTA Policies 389, 392 (1988).

(n36)Footnote 93. Ray E. Sweat, *Obligatory Advances: Mechanics' Liens and the 1987 ALTA Loan Policy*, *in* Practicing Law Institute, Title Insurance 1988; Comparing The 1987 And 1970 ALTA Policies 393 (1988).

(n37)Footnote 94. ALTA 1992 Loan Policy Form Insuring Clause 8.

(n38)Footnote 95. *See* § 93.05(a)(1)(A), *infra.*§ 93.04. Exclusions from Coverage.

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CHAPTER 93 TITLE INSURANCE

11-93 Thompson on Real Property, Thomas Editions § 93.04

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§ 93.04 Exclusions from Coverage.

[Go To Supp]

The exclusions from coverage are after the insuring clauses in the ALTA title insurance policies. These provisions limit the applicability of the insuring clauses. n96 Since title insurance is a non-casualty form of insurance, certain risks which can only be insured on a pure casualty basis are excluded from coverage. These risks include matters that the insurer cannot discover and evaluate through land title records or other readily accessible sources. n97 These matters include police power regulations, such as zoning, building, or environmental laws, n98 unless notice of a defect, lien, or encumbrance resulting from a violation of a police power regulation has been recorded at the date of policy. n99 Exercise by government of the power of eminent domain is also excluded unless notice of such exercise has been recorded as of the policy date. n100

§ 93.04(a) Matters Exclusively Known or Controlled by the Insured.

Certain matters within the exclusive knowledge or control of the insured are also excluded. These matters include defects, liens, encumbrances, adverse claims, and other matters "created, suffered, assumed or agreed to by the insured claimant... ." Generally, courts have applied this exclusion to cases where the loss resulted from the insured's deliberate, wrongful conduct. n101 While mere negligence that contributes to or causes a title defect will not bring this exclusion into play, n102 intentional, deliberate conduct will. n103 This policy language (or its plain English equivalent) has appeared basically unchanged in ALTA policy forms for many years, and a number of reported cases have construed it. n104 Most of those cases are in accord with a leading case, Arizona Title Insurance & Trust Co. v. Smith. n105

In the *Arizona Title* case, the City of Tucson levied a special assessment on the subject property in 1964. The insured agreed to exchange certain property that he owned for the subject property. At the time the insured acquired the subject property in May 1966, approximately $13,000 remained unpaid on the 1964 assessment. The exchange contract stated that the property was to be conveyed subject to twenty first mortgages payable at "$6,756 including principal, interest at the rate of 6% per annum on the balance remaining from time to time unpaid, taxes, insurance, and assessments... ." n106 The printed form portion of the contract referred to assessments in two other places. The 1964 special assessment was not, however, specifically referred to anywhere in the agreement. The balance due and the amount of the annual payments on the assessment were not stated. The title insurance commitment (i.e., the preliminary title report) failed to

mention the assessment even though it was recorded because of an admitted error by the title company employee who searched the title. The estate of the insured, after his death, sued the title company for the remaining balance of the special assessment. The jury awarded the plaintiff $13,000, and the title company appealed.

The title company argued that the loss was excluded because it was caused by a defect which was "created, suffered, assumed or agreed to by the Insured... ." n107 The court rejected this contention. After first referring to the rule that any ambiguity in an insurance policy is to be construed against the insurer and in favor of coverage, the court said that "created" would require some affirmative act on the part of the insured in bringing about the assessment. n108 Furthermore, "the word 'suffered' is synonymous with the word 'permit' and implies the power to prohibit or prevent the lien which has not been exercised... ." n109 The court concluded that since the insured did not bring about the assessment or allow it to be brought about, he did not "create" or "suffer" the assessment. Furthermore, the insured did not "assume" the assessment because "to assume" means to agree to be personally liable on an obligation. Finally, the insured did not "agree" to the assessment because he was not a party to an agreement creating it. The court expressed doubt whether "agreed" referred to assent by the buyer in the exchange contract to accept the title with the defect. n110 The court assumed for the sake of argument that the term included such assent. The court held that actual knowledge on the part of the insured about the full extent and amount of the assessment would be required before there could be an "agreement" to the defect in the exchange contract. Because no such knowledge was proved, the exclusion did not apply.

Another exclusion excepts losses caused by defects actually known by the insured and not known to the Company, not recorded in the public records at Date of Policy, but known to the insured claimant and not disclosed in writing to the Company by the insured claimant prior to the date the claimant became an insured... . n111 This exclusion is similar in some respects to the Misrepresentation Clause found in policies used in New York and elsewhere which states, "[a]ny untrue statement made by the insured with respect to any material fact, or any suppression of or failure to disclose any material fact, or any untrue answer by the insured to material inquiries before the issuance of this policy shall void this policy." n112

The New York Misrepresentation Clause has been construed in a number of cases. n113 This clause has been interpreted to mean that the policy is not rendered void unless the insured has been guilty of intentional concealment tantamount to fraud. n114 The insured has no duty to disclose facts which are readily ascertainable from the public records. n115 A fact is construed to be "material" under this clause if it is information that might reasonably affect the insurer's decision to accept or reject the application for insurance. n116 The question is not whether the company might have issued the policy even if the information had been furnished, n117 but whether the information might be useful to the insurer in deciding whether to insure.

The ALTA disclosure exclusion has also been a subject of litigation. n118 The exclusion explicitly provides that the insured claimant has no duty to disclose facts that are recorded in the public records. The exclusion does not require disclosure of matters in the public record even if the insured claimant had actual knowledge of them. n119 The 1970 ALTA policy forms briefly defined "public records" to include "those records which by law impart constructive notice of matters relating to ... land." n120 The 1990 ALTA policy forms contain the following expanded definition: "records established under state statutes at Date of Policy for the purpose of imparting constructive notice of matters relating to real property to purchasers for value and without knowledge. With respect to ... [the disclosure exclusion], "public records' shall also include environmental protection liens filed in the records of the clerk of the United States District Court for the district in which the land is located." n121 The 1998 homeowner's form, in Definition 1.g of Conditions, defines public records simply as "records that give constructive notice of matters affecting your title, according to the state statutes where the land is located."

The meaning of "public records" in the disclosure exclusion has been discussed in a number of reported cases. A defect will be considered on the public record if notice of it appears in records which are customarily examined by title searchers. For example, a pending housing code violation lawsuit was on the public record within the meaning of the

disclosure exclusion even though no *lis pendens* giving notice of the suit had been filed in the recorder's office. n122 The term "public records" includes more than just the records in the recorder's office. One case even held that the Federal Register was a "public record" within the meaning of a title policy definition almost identical to the one in the 1970 ALTA forms. n123 Court records are also "public records" because they are routinely searched by title insurers. n124 However, if a defect is not discovered in the course of a reasonable search of the public real estate records, it may not be of record within the meaning of the exclusion even if the defect is recorded in fact. For example, a judgment lien recorded in the judgment debtor's maiden name only was considered recorded outside the chain of title because it was unlikely that a title searcher would find the judgment lien since only the debtor's married name was used to identify her as an owner. Even though the judgment was physically present in the records, it was not considered recorded within the meaning of the exclusion because a purchaser would not have constructive notice of the lien. n125

Under ALTA form policies currently used, the insured claimant must have actual knowledge of the defect before incurring a duty to disclose it to the insurer. n126 The 1990 ALTA policy forms define knowledge as "actual knowledge, not constructive knowledge or notice which may be imputed to an insured by reason of the public records... ." n127 In reliance on this definition, courts have held that constructive notice will not suffice to give rise to a duty to disclose. n128 Constructive notice also has been rejected as a basis for applying the exclusion without express reliance on such a definition. n129 Inquiry notice is sometimes considered to be a form of actual notice. By the weight of authority, inquiry notice also will not usually suffice to invoke the exclusion. A leading case Enterprise Timber, Inc. v. Washington Title Ins. Co. n130 which held that inquiry notice may be sufficient to make the disclosure exclusion applicable, apparently construed a title insurance policy that did not contain the definition of "knowledge" that appears in current ALTA form policies.

The more recent cases have rejected the view that inquiry notice may be sufficient to qualify under the exclusion for failure to disclose. n131 Generally, these cases appear to be on sounder ground. The exclusion requires "actual *knowledge*" not *"notice."* "Knowledge" and "notice" are not synonyms. "'Knowledge' is what one actually perceives while 'notice' is what the law tells us that the person has knowledge of even if it was never actually perceived... ." n132 The decisions in these cases are also supported by the principle that ambiguities in the insurance policy should be construed against the insurer. In addition to these somewhat formalistic reasons which support these recent cases, there are policy reasons which support this new view.

There is a strong modern policy that contracts should be construed to reflect the reasonable expectations of the parties. The application of the doctrine of inquiry notice to the disclosure exclusion is inconsistent with a principle reason for purchasing title insurance. Title insurance provides assurance that unknown title risks are borne by the insurer who investigated the title. This assurance is more apparent than real if a court may hold that the insured is barred from recovery because the defect would have been discovered if an investigation had been made.

On the other hand, semantic distinctions between "notice" and "knowledge" should not be carried to the point where proof is required of the insured claimant's subjective perception of the defect. Mere knowledge by the insured claimant that a party to a transaction may have engaged in "shady dealings" in the past should not trigger a duty to make further inquiries. n133 However, in cases where the insurer proves that the insured claimant actually knew of strong indications that something might be wrong with the title, application of the exclusion could be appropriate if the insured claimant did not disclose the indications to the insurer. n134 The insurer should not be allowed to escape liability where further investigation by the insured claimant reveals title defects, for it is the insurer's job to investigate the title. If the insurer proves, however, that the insured claimant had knowledge of facts which by themselves, and without further investigation, strongly pointed to a substantial probability of title defects or adverse claims, the disclosure exclusion should apply if the other requirements for applicability are satisfied. n135 Also, the "intentional concealment tantamount to fraud" standard developed in the New York Misrepresentation Clause n136 certainly should apply to exclude coverage when such conduct is proved and the relevant facts do not appear on the public record. n137

§ 93.04(b) Defect Resulting in No Loss or Damage.

The presence of a defect, lien, or encumbrance by itself does not necessarily obligate the insurer to indemnify the insured because title insurance policies are contracts of indemnity and not guarantees of good title. n138 When notified of an insured defect, the title insurance company may be obligated to clear the title but may have no immediate obligation to indemnify the insured because of a diminution of the value of the property attributable to the defect. n139

Title policies usually require the insured to suffer an "actual loss" before there is an obligation to indemnify. n140 Generally, no compensable loss has occurred until the insurer has been given an opportunity to pursue the various indemnification options that may be open to it. n141 If the insured has suffered a loss, however, and the only option available to the insurer is paying the insured, then a compensable loss has occurred unless the company has some valid defense to a claim for payment. n142

Generally, there is no actual loss unless the title defect covered by the policy reduces the value of the property or otherwise has an economic impact on the insured. n143 Where the policy insures an owner, any substantial diminution of the value of the property provides a basis for establishing a loss.

In the case of a loan policy insuring the title to a mortgagee's security interest, there is no loss unless the secured obligation is not performed and the security proves to be inadequate because of the covered title defect. n144 Policies do not insure that the loans will be repaid or that the value of the security property will not diminish because of market forces unrelated to covered title defects. The title insurer insures the title to the mortgage and agrees to indemnify the insured for losses that would not have occurred but for the covered title defect. To the extent that the inadequacy of the security is attributable to an insured title defect, there is an actual loss. n145 An actual loss appears most clearly after foreclosure occurs, when a deficiency can subsequently be attributed to a covered superior lien or defect in the title to the mortgage. An indemnifiable loss, however, can be established apart from foreclosure. If the superior lien or title defect impairs the insured mortgagee's security, the title insurer may be obligated "to make the insured good" by acting within a reasonable time to defend or clear the title. n146 An insured mortgagee may be entitled to indemnification for interest lost because the title to the mortgage failed. n147 One commentator argued that an indemnifiable loss may occur because of the mere existence of a covered prior lien. She contended that original lenders routinely sell mortgages to investors in the secondary mortgage market. The existence of a prior lien may diminish the value of the mortgage in this market. "Thus, the insured lender may experience an actual loss even where no party has commenced a foreclosure action or asserted a superior claim and the prior lien(s) have not made the lender undersecured." n148

Apparent defects appearing on the record that are not defects in fact may still be the causes of "actual losses." Sometimes a recorded adverse claim will be invalid on its face or the probability of it being a defect in fact will be very low. n149 If the recorded claim is obviously invalid, there may be a question whether the insurer should be required to indemnify the insured by clearing title or paying for the loss. One court has suggested that the insurer should not be obligated to clear a title unless the facts and circumstances of the case contain "some indicia that the encumbrance with which the policy holder is concerned is a genuine cloud upon his title." n150 Perhaps the test should be whether the adverse claim has a substantial impact on the market value of the insured interest or would serve as a reasonable basis for title litigation. Even if an experienced title examiner opines that the probability of the adverse claim being genuine is slight or non-existent, there is an economic loss if it substantially depreciates the market value of the property. The market may be uninformed or irrational in giving an obviously invalid adverse claim any credence at all, but the insured has still suffered an economic loss.

If a defect merely diminishes the value of a mortgagee's security, that alone does not establish an "actual loss" under the typical loan policy. n151 Mere diminution in market value alone may be insufficient to establish an actual loss under an owner's policy as well. Some additional event or circumstance triggering the obligation of the insurer to indemnify the insured may also be required. Generally, there should be a fairly immediate impact on the insured's rights as the owner of the property in order to trigger the obligation. Suppose that the holder of a covered adverse claim is not asserting it, n152 the insured has no immediate plans to sell the property or use it for security, and the claim does not interfere in

any way with the insured's present or future use of the real estate. It is debatable whether the insured has realized an actual loss even though the adverse claim is in existence. If, in such a situation, the insurer pays the insured an amount equal to the diminution in value of the property due to the defect, the insured will receive a windfall if the defect is later extinguished, e.g., by a Marketable Title Act.

In several cases, title insurers have argued that the "no loss" exclusion barred recovery by the insured where the insured actually received less than was believed to have been purchased and described in the title policy. In these cases the title insurer argued that the insured had not suffered any loss because the insured never received the missing interests and could not lose what the insured never had. n153 The courts have rejected this argument. If the argument of the title insurance companies had prevailed, the exclusion could have barred recovery in all cases where the actual title received was less than the title represented in the title policy. Indeed, if this argument is carried to its logical extreme, the exclusion would bar recovery in cases where the insured suffered a complete failure of title on the basis that the insured never received anything and had therefore lost nothing. A New York court articulated perhaps the best response by stating, "[t]he word 'loss' is a relative term. Failure to keep what a man has or thinks he has is a loss... . To say that when a defect subsequently develops he has lost nothing and, therefore, can recover nothing, is to misinterpret the intention both of the insured and the insurer... ." n154

Cases where the insured received less than what the insured believed was purchased and insured are distinguishable from situations where the insured received what was bargained for but where the policy, usually through mistake, described and insured a larger interest. If the insured received what was bargained for, the insured has suffered no compensable loss where an erroneous legal description in the deed and title policy included a greater amount of property than the insured actually received. n155 However, the loss of use or of rental value of property during litigation of a claim that the property was included in the descriptions in the deed and title policy through fraud or mistake was held to be a compensable loss. n156 Also, the expense of defending the insured's apparent interest in litigation over such an erroneous description may also be compensable. n157

The title insurer should not be liable simply because the legal description in the title policy erroneously included land or interests that the insured did not in fact receive where the insured did not expect and was not entitled to receive them. The basic insuring clause, however, provides coverage where "[t]itle to the estate or interest described in Schedule A ... [is] vested otherwise than stated therein... ." If the insured did not know that the description in Schedule A was erroneous and did not contribute to the error, it should be appropriate for the insurer to indemnify the insured for economic losses, such as litigation expenses, attributable to the error. The legal description and the statement of ownership in Schedule A is what the company undertakes to insure. Where the description is erroneous, the insurer undertakes to indemnify the insured for losses attributable to the error unless the insured is responsible for them.

§ 93.04(c) Defects That Attach or Are Created After the Policy Date.

Title insurance is a unique form of insurance because it provides coverage for losses due to title risks in existence at the time the policy is issued. Losses due to defects, liens, or encumbrances that come into existence after the policy date are generally not covered. The exclusion of losses due to defects, liens, or encumbrances attaching after the date of policy emphasizes and amplifies the statement on the coverage page that the insurance is as of date of policy shown in Schedule A.

Most cases concerning whether a lien or encumbrance existed at the date of the policy involve a common set of facts: A local government authorizes a public improvement, to be financed by future assessments against the benefited property. The improvement may be completed or bonds to finance it may be issued before any assessments are made. At the date the title insurance policy is issued, no lien in fact exists. Under the applicable statutes, a lien to secure the payment of the assessment will not attach until some official action is taken. The official action required might be filing the assessment ordinance with a county clerk, entering it on an assessment roll or even filing against specific property after the assessment against it is unpaid. n158 Before the official action is taken to create a lien in fact, the insured purchases

an interest in benefitted property which is almost certain to be specially assessed. The title policy is issued without any mention in Schedule B or anywhere else of the high probability (almost a certainty) that the subject property will be specially assessed in the future. The insured then discovers the "inchoate" lien and claims that the policy covers the loss because a lien or encumbrance was in existence as of the date of the policy. Most of the reported cases hold that the insured is not entitled to recover because there was no "lien" as of the policy date. n159 Coverage has been denied even where the statute authorizing the special assessment is on the public record as of the policy date. n160

The "date of policy" exclusion in the ALTA 1990 loan policy form contains an exception not found in the owner's policy form: "except to the extent that this policy insures the priority of the lien of the insured mortgage over any statutory lien for services, labor or material... ." n161 This refers to provision 7 of the insuring clauses which provides coverage for certain mechanics' liens which may attach or be perfected after the date of policy. n162 The exception makes it clear that the "date of policy" exclusion is inapplicable to insured mechanics' liens even though they attach or are perfected after that date.

§ 93.04(d) Loss or Damage That Would Not Have Been Sustained If the Insured Had Paid Value.

Under the recording acts of most states, a transferee must qualify as a "purchaser for value" without notice of a prior conflicting interest to attain legal priority over the prior interest. n163 Both the 1990 owner's and loan policy forms exclude losses that would not have been sustained if the insureds had paid value for the interest insured. n164 This provision could apply where an insured purchaser suffers a loss due to a prior unrecorded interest that is valid against the purchaser because the purchaser failed to qualify for protection under the recording act. For example, if a mortgage is given to secure an antecedent debt, the prevailing but criticized view is that the antecedent debt is not "value" sufficient to entitle the mortgagee to recording act protection. n165 Donees are not entitled to recording act protection in most states because they do not pay value for their interests. This exclusion could apply to preclude coverage for a donee who suffers a loss because of a failure to qualify for recording act protection.

Under federal law, a donee takes subject to an unrecorded federal tax lien, and the exclusion could apply to preclude recovery on the title policy for any resulting loss. Unrecorded federal tax liens are not valid against a "purchaser." Federal statutes define "purchaser" as "a person who, for adequate and full consideration in money or money's worth, acquires an interest (other than a lien or security interest) in property which is valid under local law against subsequent purchasers without actual notice." n166

§ 93.04(e) Creditors' Rights.

In 1990, ALTA added a creditors' rights exclusion to its policy forms. n167 Generally, the creditors' rights exclusion applies to losses arising out of a transaction creating or purporting to create the insured interest which is defective under federal bankruptcy law, similar state laws, or the law of fraudulent conveyances. The exclusion would apply to cases where the transaction purporting to create the interest is held to be void or defective as either a preference under the bankruptcy law or a fraudulent conveyance. n168 It is not coincidental that ALTA adopted this exclusion following the Savings and Loan debacle and the era of leveraged buyouts of the 1980s, n169 at a time of steadily increasing claims against title insurers.

Because the creditors' rights exclusion is relatively new, there is little reported case law on it. In practice, title insurers sometimes have been willing to waive the exclusion in loan policies upon request. If a transaction presents a high risk of either bankruptcy of the insured or a fraudulent conveyance attack, a waiver will not usually be granted.

Title insurers will not grant a waiver where the mortgage was given as part of a leveraged buyout. In a leveraged buyout, the acquisition of a corporation or its assets may be financed by a loan secured by the assets of the acquired corporation. n170 A mortgage on the real estate given to secure such a loan may be found to be part of a fraudulent transfer. n171 The mortgage can be vulnerable to such an attack because the money obtained through the loan does not

remain with the borrower corporation but is paid to those bought out, frequently leaving the borrower corporation assets depleted or even insolvent.

Title insurers may also refuse to waive the exception when the mortgage is given to secure an antecedent debt because such a mortgage is vulnerable to attack as a preference under the bankruptcy law since the creditor does not extend any new money or other value. n172 It is also possible that a mortgage given to secure an antecedent debt may also be deemed a fraudulent conveyance under federal or state law.

§ 93.04(f) Unenforceability of the Lien of the Insured Mortgage Because of Failure to Comply with Applicable "Doing Business" Laws.

The 1990 ALTA loan policy form excludes losses caused by "[u]nenforceability of the lien of the insured mortgage because of the inability or failure of the Insured at Date of Policy, or the inability or failure of any subsequent owner of the indebtedness, to comply with the applicable doing business laws of the state in which the land is situated." n173 Foreign corporations must qualify under a state's "doing business" laws to conduct intrastate business. n174 These laws generally require the filing of documents disclosing certain information along with a copy of the articles of incorporation and a designation of a resident agent for service of process. n175 There are various sanctions for failing to comply with these laws, including disability of the foreign corporation to sue in the state's courts generally or on contracts made within the state. n176 If a foreign corporation mortgagee has failed to comply with the "doing business" laws of the state in which the real estate is located, the mortgage lien may be unenforceable. Under the "doing business" exclusion, the mortgagee will not be covered for any loss attributable to the unenforceability of the mortgage lien. This exclusion is reasonable because compliance with "doing business" laws is almost entirely within the control of the insured foreign corporation mortgagee. While non-compliance may be ascertainable from public records maintained by state officers or county recorders, n177 it is not customary for title searchers to search and examine these particular records. n178 Furthermore, it is not unreasonable to place the risk of loss due to non-compliance on a corporate mortgagee, since that is the one who failed to comply.

§ 93.04(g) Invalidity or Unenforceability of Mortgage Lien Because of Usury or Consumer Credit Protection or Truth in Lending Laws.

The ALTA 1992 Loan Policy excludes losses caused by the "[i]nvalidity or unenforceability of the lien of the insured mortgage, or claim thereof, which arises out of the transaction evidenced by the insured mortgage and is based upon usury or any consumer credit protection or truth in lending law." n179 The 1970 loan policy form had no such exclusion; however, losses due to unenforceability of the mortgage due to these laws were excepted in the insuring clauses. n180 Title insurers took the position that these causes of invalidity should be excepted because it was the responsibility of the lender to ensure that these laws were not violated. The lending industry was not pleased with these exceptions, especially the one concerning usury laws because of the unclear state of usury laws in some jurisdictions. The lenders have been successful in getting title insurers to remove these exceptions in some instances, usually by means of an endorsement to the policy. n181

The exclusion has been held to apply only when the insured was found guilty of knowledgeable and intentional wrongdoing. n182 While courts have held that an assignee of a mortgage will not be imputed to have knowledge of the assignor's violation of truth in lending laws, assignees should request a nonimputation endorsement from the title insurer. Such an endorsement insures against the risk that violations of usury or consumer protection laws will be imputed to the assignee. n183

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LEXIS: "created, suffered, assumed or agreed" "known to the insured claimant" "public records" w/15 ("constructive notice" or "actual knowledge" (usury or "consumer protection" or "truth in lending") w/50 "title insurance"

FOOTNOTES:

(n1)Footnote 96. Oscar Beasley, *Special Forms of Coverage, in* A.B.A., Title Insurance: the Lawyer's Expanding Role 19, 20 (James M. Pedowitz ed. 1985). *Lawyers Title Ins. Corp. v. JDC (America) Corp., 52 F.3d 1575 (11th Cir. 1995)* (no coverage for challenges to collectability of the underlying debt); *Somerset Sav. Bank v. Chicago Title Ins. Co., 649 N.E.2d 1123 (Mass. 1995)* (no coverage for statutory restriction on use of the property).

(n2)Footnote 97. *Peoples Bldg. & Loan Co. v. Safeco Title Ins. Co., No. 10569, 1988 Ohio App. LEXIS 2782* (Ohio App. July 5, 1988).

(n3)Footnote 98. The 1970 ALTA policies were amended in 1984 to expressly exclude the effect of any law, statute or regulation pertaining to environmental protection unless notice of a violation has been recorded. This exclusion was also included the 1990 policy forms. *See* 1990 ALTA Owner's and Loan Policy Forms, Exclusion 1(a). *See* Timothy G. Hayes & William J. Dinkin, *Environmental Liability in Real Property Transactions, 23 U. Rich. L. Rev. 349 (1989)* (discussing liabilities which may be incurred in real estate transactions due to environmental laws). *Aldrich v. Hawrylo, 656 A.2d 1304 (N.J. Super. 1995)* (police power exclusion applies to loss caused by setback requirement).

(n4)Footnote 99. Limited zoning coverage may be offered in an endorsement to the policy. *Haw River Land & Timber Co. v. Lawyers Title Ins. Corp., 152 F.3d 275 (4th Cir. 1998)* (environmental buffer zone created by municipal zoning ordinance fell under exclusion where there was no recorded notice of enforcement or notice of violation or ordinance).

(n5)Footnote 100. In addition to excluding certain risks from coverage that cannot be discovered through an examination of land title records, the language of these policies also eliminates certain title defects for which the insured bears at least some responsibility. Such exclusions supplement other policy provisions by denying coverage where the insured has suffered no loss or damage. Joyce D. Palomar, Title Insurance Law § 6.01 (1994).

(n6)Footnote 101. Raymond J. Werner, *The Basics of Title Insurance, in* A.B.A., Section of Real Property, Probate and Trust Law, Title Insurance: the Lawyer's Expanding Role 27 (James M. Pedowitz ed. 1985). Ticor Title Ins. Co. of Cal. v. FFCA/IIP 1988 Property Co., 898 F. Supp. 633 (N.D. Ind. 1995) (coverage precluded by defects created by insured); *Insured Titles, Inc. v. McDonald, 911 P.2d 209 (Mont. 1996)* (exclusion for loss created by insured applied).

(n7)Footnote 102. *Title Ins. Corp. v. Wagner, 431 A.2d 179 (N.J. Super. 1981); Keown v. West Jersey Title & Guar. Co., 371 A.2d 370 (N.J. Super. 1977).*

(n8)Footnote 103. Proof of an insured's mere knowledge of prior encumbrances will not establish that the insured "agreed" to them as defects. It must be proved that the insured "agreed" that its interest would be subordinate to the prior encumbrances. *Taussig v. Chicago Title & Trust Co., 171 F.2d 553 (7th Cir. 1948). Chicago Title Ins. Co. v. Resolution Trust Corp., 53 F.3d 899 (8th Cir. 1995); Insured Titles, Inc. v. McDonald, 911 P.2d 209 (Mont. 1996).*

(n9)Footnote 104. Most of these cases are discussed or cited in Joel E. Smith, Annotation, *Title Insurance: Exclusion of Liability for Defects, Liens, or Encumbrances Created, Suffered, Assumed, or Agreed to by the Insured, 87 A.L.R.3d 515 (1978).*

(n10)Footnote 105. *519 P.2d 860 (Ariz. App. 1974).*

(n11)Footnote 106. *Arizona Title Insurance & Trust Co. v. Smith, 519 P.2d 860, 862 (Ariz. App. 1974).*

(n12)Footnote 107. *Arizona Title Insurance & Trust Co. v. Smith, 519 P.2d 860, 862 (Ariz. App. 1974).*

(n13)Footnote 108. In another case, "created" in the title policy was construed to mean conscious, deliberate causation. *Hansen v. Western Title Ins. Co., 33 Cal. Rptr. 668 (1963).* Most of the cases are in accord and hold that "created" means that the defect must be caused by the deliberate or conscious action of the insured. *See, e.g., Safeco*

Title Ins. Co. v. Moskopoulos, 172 Cal. Rptr. 248 (1981); Feldman v. Urban Commercial, Inc., 209 A.2d 640 (N.J. Super. 1965).

(n14)Footnote 109. *Arizona Title Ins. & Trust Co. v. Smith, 519 P.2d 860, 863 (Ariz. App. 1974).* Other courts have also adopted this interpretation of "suffer." *E.g., Bourland v. Title Ins. Co. of Minn., 627 S.W.2d 567 (Ark. App. 1982).*

(n15)Footnote 110. Several cases have accepted this interpretation. *See, e.g., First Nat'l Bank of Minneapolis v. Fidelity Nat'l Title Ins. Co., 572 F.2d 155 (8th Cir. 1978).*

(n16)Footnote 111. The duty to disclose is on the "insured claimant." An "insured claimant" may be a person other than the insured named in the policy (usually in Schedule A). Even if the named insured had knowledge of the defect which was not disclosed to the insurer, the insured claimants, who were different from the insured, were not precluded from recovery where the mortgage was assigned to them and they had no knowledge of the defect. *Southern Title Ins. Co. v. Crow, 278 So. 2d 294 (Fla. App. 1973).*

(n17)Footnote 112. New York Board of Title Underwriters Form 100E, Condition 9. ALTA, California and Texas policy forms contained the quoted exclusion but no Misrepresentation Clause similar to the one used in New York.

(n18)Footnote 113. These cases are discussed in Wanda Ellen Wakefield, Annotation, *Misrepresentation or Concealment by Insured or Agent Avoiding Liability by Title Insurer, 17 A.L.R.4th 1077 (1982).*

(n19)Footnote 114. *L. Smirlock Realty Corp. v. Title Guar. Co., 418 N.E.2d 650 (N.Y. 1981).*

(n20)Footnote 115. *L. Smirlock Realty Corp. v. Title Guar. Co., 418 N.E.2d 650 (N.Y. 1981). See also Dinges v. Lawyers Title Ins. Corp., 485 N.E.2d 944 (Ill. App. 1982).*

(n21)Footnote 116. *First Nat'l Bank & Trust Co. v. New York Title Ins. Co., 12 N.Y.S.2d 703 (1939).*

(n22)Footnote 117. *First Nat'l Bank & Trust Co. v. New York Title Ins. Co., 12 N.Y.S.2d 703 (1939).*

(n23)Footnote 118. Indeed, this has been one of the most litigated title insurance policy provisions. Joyce D. Palomar, Title Insurance Law § 6.05 (1994).

(n24)Footnote 119. *Cameron v. Benson, 643 P.2d 1360, 1365 (Or. App. 1982), rev'd on other grounds, 664 P.2d 412 (Or. 1983); Laabs v. Chicago Title Ins. Co., 242 N.W.2d 434, 438 (Wis. 1976)* (dictum).

(n25)Footnote 120. ALTA 1970 Owner's and Loan Policy Forms, Condition and Stipulation 1(f).

(n26)Footnote 121. ALTA 1990 Owner's and Loan Policy Forms, Condition and Stipulation 1(f).

(n27)Footnote 122. *Radovanov v. Land Title Co. of Am., 545 N.E.2d 351 (Ill. App. 1989).*

(n28)Footnote 123. *Hahn v. Alaska Title Guar. Co., 557 P.2d 143 (Alaska 1976).* In the 1990 forms, the Federal Register would not be a "public record" because it is not established under state statutes.

(n29)Footnote 124. *Radovanov v. Land Title Co. of Am., 545 N.E.2d 351, 355 (Ill. App. 1989)*

(n30)Footnote 125. *Ball v. Vogtner, 362 So. 2d 894 (Ala. 1978)*(dictum).

(n31)Footnote 126. *Zions First Nat'l Bank v. National Am. Title Ins. Co., 749 P.2d 651, 654 (Utah 1988).*

(n32)Footnote 127. ALTA 1990 Owner's and Loan Policy Forms, Condition and Stipulation 1(c); the 1970 policy forms contained a similar definition. ALTA Standard Loan Policy Revised - 1946, Condition and Stipulation 2 has a similar definition of "knowledge," but it applies only to the duty to notify the company of the assertion of an adverse

claim against the title after the policy has been issued. This policy form does not have an "Exclusions" section. However, Condition and Stipulation 8 provides, among other things, that the Company will not be liable for losses due to defects in existence "at the date of this Policy and known to the Insured claiming such loss or damage ...but not known to The Company or disclosed to it in writing by the Insured." No exception is made for losses due to defects which are on the record. The 1998 homeowner's form refers simply to "things about which you have actual knowledge." Definition 1.b of Conditions.

(n33)Footnote 128. *See, e.g., International Charter Mtg. Corp. v. Commonwealth Land Title Ins. Co., 538 F. Supp. 1154, 1157 (D.P.R. 1982). See also Jesko v. American-First Title & Trust Co., 603 F.2d 815, 819 (10th Cir. 1979).* In *Jesko,* the insured claimant made some inquiries which might have revealed the adverse claim if they had been more vigorously pursued. Although the court said that the claimant "could have done more to discover" the adverse claim, the law did not require him to do more. *Id.* The court did not rely on any definition of "knowledge" in the policy which excluded forms of constructive notice.

(n34)Footnote 129. *Zions First Nat'l Bank v. National Am. Title Ins. Co., 749 P.2d 651, 654 (Utah 1988).*

(n35)Footnote 130. *457 P.2d 600 (Wash. 1969).*

(n36)Footnote 131. *International Charter Mtg. Corp. v. Commonwealth Land Title Ins. Co., 538 F. Supp. 1154, 1157 (D.P.R. 1982); Lawyers Title Ins. Corp. v. First Fed. Sav. Bank & Trust, 744 F. Supp. 778 (E.D. Mich. 1990); Peoples Bldg. & Loan Co. v. Safeco Title Ins. Co., No. 10569, 1988 Ohio App. LEXIS 2782* (Ohio App. July 5, 1988); *Zions First Nat'l Bank v. National Am. Title Ins. Co., 749 P.2d 651, 654 (Utah 1988).*

(n37)Footnote 132. *Peoples Bldg. & Loan Co. v. Safeco Title Ins. Co., No. 10569, 1988 Ohio App. LEXIS 2782* (Ohio App. July 5, 1988). The Ohio court's analysis was based on the work of John Norton Pomeroy.

(n38)Footnote 133. *International Charter Mtg. Corp. v. Commonwealth Land Title Ins. Co., 538 F. Supp. 1154 (D.P.R. 1982).*

(n39)Footnote 134. If the insured claimant knew enough to adopt a "don't tell me, I don't want to know" stance, it would seem fair to require the insured to disclose what the insured in fact knew to the title company. *Enterprise Timber, Inc. v. Washington Title Ins. Co., 457 P.2d 600, 602 (Wash. 1969).*

(n40)Footnote 135. In *Peoples Bldg. & Loan Co. v. Safeco Title Ins. Co., 534 N.E.2d 357 (Ohio 1988),* the insured was an experienced banker who was previously defrauded by a wrongdoer. Later, the banker extended additional credit to the wrongdoer on the security of a forged mortgage. The wrongdoer told the banker that the owners of the property could not appear at the closing because of their vacation plans. The banker was persuaded to give the wrongdoer unsigned mortgage documents for execution by the owners "at some unknown location south of town." It is difficult to believe that the banker did not at least suspect the possibility of forgery unless he was suffering from some mental infirmity at the time which is not disclosed in the court's opinion. The banker did not disclose any of these suspicious circumstances to the title company. The signatures obtained later were found to be forged and, as a result, the mortgage was worthless as security. A majority of the court held that the disclosure exclusion did not apply to bar recovery because it was not proved that the banker had actual knowledge that the mortgage might be void or defective. The dissenting justice argued that "Even in criminal cases, which require proof beyond a reasonable doubt, the proof of the element of knowledge is frequently dependent upon attending facts and circumstances... ." While it was not proved that the banker actually knew that the mortgage was forged, the circumstances known to the banker pointed to that possibility.

(n41)Footnote 136. *L. Smirlock Realty Corp. v. Title Guar. Co., 418 N.E.2d 650 (N.Y. 1981);* Wanda Ellen Wakefield, Annotation, *Misrepresentation or Concealment by Insured or Agent Avoiding Liability by Title Insurer, 17 A.L.R.4th 1077 (1982).*

(n42)Footnote 137. *See Conway v. Title Ins. Co., 277 So. 2d 890 (Ala. 1973),* where the conduct of the insureds met this standard.

(n43)Footnote 138. *Sattler v. Philadelphia Title Ins. Co., 162 A.2d 22 (Pa. Super. 1960). Bear Fritz Land Co. v. Kachemak Bay Title Agency, Inc., 920 P.2d 759 (Alaska 1996).*

(n44)Footnote 139. *Sattler v. Philadelphia Title Ins. Co., 162 A.2d 22 (Pa. Super. 1960). Bear Fritz Land Co. v. Kachemak Bay Title Agency, Inc., 920 P.2d 759 (Alaska 1996). Hatch v. First American Title Ins. Co., 895 F. Supp. 10 (D. Mass. 1995)* (coverage precluded if defect was cleared by litigation within a reasonable time).

(n45)Footnote 140. *In re Seko Inv., Inc., 156 F.3d 1005 (9th Cir. 1998)* (no duty to pay benefits absent a "loss").

(n46)Footnote 141. *In re Seko Inv., Inc., 156 F.3d 1005 (9th Cir. 1998)*

(n47)Footnote 142. *Davis v. Stewart Title Guar. Co, 726 S.W.2d 839 (Mo. App. 1987).*

(n48)Footnote 143. In *Fidelity Nat'l Title Ins. Co. v. Kidd, 349 S.E.2d 225 (N.C. App. 1990),* the insureds were held to have suffered no actual losses where the insured purchaser and insured purchase money mortgagee/ovendor agreed that the purchaser's note was for $650,000.00 "or such proportionate amount as her [the vendor's] ultimate interest in property may bear to 100% with such payment to occur upon final clearing of title." Even though the title policy failed to report the existence of liens and encumbrances which clouded the title, the purchaser suffered no loss because it received what it bargained for and was obligated to pay for no more. The mortgagee/vendor suffered no loss, because she was entitled to payment only to the extent the title proved to be clear. On the other hand, there may be a loss where the policy insured that the customer was receiving more that she or he actually received. Where the property actually received is worth less than the amount insured, there may be a loss. In other words, a failure to receive what a person thinks she or he has received may be a compensable loss. *See, e.g., First Nat'l Bank & Trust Co. v. New York Title Ins. Co., 12 N.Y.S.2d 703 (1939).* While it may not be logical to say that a person has lost what she or he never had in the first place, this result is sensible in the context of the service provided by title insurers to their customers.

(n49)Footnote 144. *Falmouth Nat'l Bank v. Ticor Title Ins. Co., 920 F.2d 1058 (1st Cir. 1990); McHenry Sav. Bank v. Pioneer Nat'l Title Ins. Co., 540 N.E.2d 357 (Ill. App. 1989). See, e.g., Karl v. Commonwealth Land Title Ins. Co., 24 Cal. Rptr. 2d 912* (Cal. App. 4 Dist. 1993), *aff'd, review denied by, 70 Cal. Rptr. 2d 374 (Cal. App. 4th. 1997).*

(n50)Footnote 145. *First Nat'l Bank & Trust Co. v. New York Title Ins. Co., 12 N.Y.S.2d 703 (1939).*

(n51)Footnote 146. *Stewart Title Guar. Co. v. Goldome Credit Corp., 494 So. 2d 10 (Ala. 1986).*

(n52)Footnote 147. *McHenry Sav. Bank v. Pioneer Nat'l Title Ins. Co., 540 N.E.2d 357 (Ill. App. 1989).*

(n53)Footnote 148. Joyce D. Palomar, Title Insurance Law § 6.06 (1994).

(n54)Footnote 149. For example, the holder of a recorded easement of right of way may purport to grant an identical right of way without giving up her or his interest. Such an easement on an easement may be obviously void. If the obviously void conveyance is recorded, it should not be considered as creating a title defect. *See Myers v. Berven, 137 P. 260 (Cal. 1913); Galletly v. Bockius, 82 P. 1109 (Cal. 1905); Jarchow v. Transamerica Title Ins. Co., 122 Cal. Rptr. 470 (1975).* The precedential value of *Jarchow* in California was greatly eroded by subsequent cases and legislation. *See Southland Title Corp. v. Superior Ct., 282 Cal. Rptr. 425 (1991).*

(n55)Footnote 150. *Southland Title Corp. v. Superior Ct., 282 Cal. Rptr. 425, 489 n.18 (1991).*

(n56)Footnote 151. *Falmouth Nat'l Bank v. Ticor Title Ins. Co., 920 F.2d 1058 (1st Cir. 1990); McHenry Sav. Bank v. Pioneer Nat'l Title Ins. Co., 540 N.E.2d 357 (Ill. App. 1989).*

(n57)Footnote 152. In *Lawyers Title Ins. Corp. v. McKee, 354 S.W.2d 401 (Tex. Civ. App. 1962),* the insurer was held to have had a duty to act to clear the title where the adverse claim might have been validated by adverse possession in the absence of prompt action.

(n58)Footnote 153. *Fohn v. Title Ins. Corp., 529 S.W.2d 1 (Mo. 1975); Title Ins. Corp. v. Wagner, 431 A.2d 179 (N.J. Super. 1981); First Nat'l Bank & Trust Co. v. New York Title Ins. Co., 12 N.Y.S.2d 703 (1939); Laabs v. Chicago Title Ins. Co., 241 N.W.2d 434 (Wis. 1976).*

(n59)Footnote 154. *First Nat'l Bank & Trust Co. v. New York Title Ins. Co., 12 N.Y.S.2d 703, 711 (1939).*

(n60)Footnote 155. *Booth v. New Jersey Hwy. Auth., 159 A.2d 460 (N.J. Super. 1960); Aja v. Appleton, 472 P.2d 524, 526 (Nev. 1970).*

(n61)Footnote 156. *Title Ins. Corp. v. Wagner, 431 A.2d 179 (N.J. Super. 1981).*

(n62)Footnote 157. *Polsfoot v. Transamerica Title Ins. Co., 614 P.2d 1173, 1178 (Or. App. 1980).*

(n63)Footnote 158. *See supra* note 64 and accompanying text. Joyce D. Palomar, Title Insurance Law § 6.07 (1994).

(n64)Footnote 159. *Edwards v. St. Paul Title Ins. Co., 563 P.2d 979 (Colo. App. 1977); Union Realty Co. v. Ahern, 93 A.2d 84 (D.C. 1952); Metropolitan Life Ins. Co. v. Union Trust Co., 27 N.E.2d 225 (N.Y. 1940); compare* Joel E. Smith, Annotation, *What Constitutes a Charge, Encumbrance, or Lien within Contemplation of Title Insurance Policy, 87 A.L.R.3d 764, 766-769 (1978) with Atlanta Title & Trust Co. v. Inman, 155 S.E. 364 (Ga. App. 1931)* (holding that the "inchoate" lien was an "encumbrance" within the meaning of the policy); *Bel-Air Motel Corp. v. Title Ins. Corp., 444 A.2d 1119 (N.J. Super. 1981)* (holding that an "inchoate" special assessment to finance a completed public improvement, although not a "lien," was a "defect" within the meaning of the policy). *Citibank, N.A. v. Commonwealth Land Title Ins. Co., 645 N.Y.S.2d 826 (1996).*

(n65)Footnote 160. *Strass v. District-Realty Title Ins. Corp., 358 A.2d 251 (Md. App. 1976); Cummins v. United States Life Title Ins. Co. of N.Y., 357 N.E.2d 975 (N.Y. 1976).* Title insurers usually take the position that a title policy does not cover a lien unless notice of it appeared in the real estate records normally searched by title insurers before they issue policies. Joyce D. Palomar, Title Insurance Law § 6.07 (1994). These records include those found in the county recorder's office and in court files. Courts do not always agree with this position. *See, e.g., Pohrer v. Title Insurance Co. of Minnesota, 652 F. Supp. 348 (N.D. Ill. 1987) vacated by, 882 F. Supp. 114 (N.D. Ill. 1987).*

(n66)Footnote 161. ALTA 1990 Loan Policy Form, Exclusion from Coverage 3(d). *See also* the ALTA Expanded Coverage Residential Loan Policy, adopted Oct. 31, 2001.

(n67)Footnote 162. ALTA 1990 Loan Policy Form, Insuring Clause 7. The 1970 Loan Policy Form contains similar language in Insuring Clause 7.

(n68)Footnote 163. *See* § 92.14 *supra.*

(n69)Footnote 164. Exclusion 3(e). The 1970 ALTA Owner's Policy Form contained a similar exclusion while the 1970 ALTA Loan Policy Form did not.

(n70)Footnote 165. *Gabel v. Drewrys Ltd., 68 So. 2d 372 (Fla. 1953).*

(n71)Footnote 166. I.R.C. § 6323(h)(6).

(n72)Footnote 167. Bernard M. Rifkin, *Title Insurance and Creditors' Rights, in* Practicing Law Institute, Current Developments in Title Insurance 1992, 35 (1992). In October 1992, the exclusion was modified to include language

from the New York policy forms. For the New York policy language, *see* James M. Pedowitz, *The Creditors' Rights Exclusion: Belt and Suspenders?, in* Practicing Law Institute, Current Developments in Title Insurance 1992, 16-17. *See also* Joyce D. Palomar, Title Insurance Law § 6.13 (1994).

(n73)Footnote 168. *See, e.g., First Nat'l Bank & Trust Co. v. New York Title Ins. Co., 12 N.Y.S.2d 703 (1939),* where a mortgage given to secure an antecedent debt was held to be an unenforceable preference under the Federal Bankruptcy Act.

(n74)Footnote 169. Hugh A. Brodkey, *Title Insurance Considerations for Lenders in Troubled Times, in* American Law Institute-American Bar Association, Commercial Real Estate Financing in the 1990's: Drafting and Negotiation for Troubled Times 181-185 (1991). The savings and loan debacle is described in Paul Zane Pilzer, Other People's Money (1989). Congress enacted the Financial Institutions Reform, Recovery, and Enforcement Act of 1989, signed by the President, on August 9, 1989, in response.

(n75)Footnote 170. *See generally,* Deborah A. DeMott, *Directors' Duties in Management Buyouts and Leveraged Recapitalization, 49 Ohio St. L. J. 517, 519-534 (1988).*

(n76)Footnote 171. *See, e.g., Wieboldt Stores, Inc. v. Schottenstein, 131 B.R. 655 (N.D. Ill. 1991).*

(n77)Footnote 172. Robert Kratovil, Modern Mortgage Law and Practice § 416 (1972).

(n78)Footnote 173. Exclusion 4. The 1970 ALTA Loan Policy Form had a similar exclusion. The 1990 form language makes it clear that coverage is excluded if the insured is unable to qualify to do business and consequently suffers a loss because the mortgage lien cannot be enforced.

(n79)Footnote 174. Harry G. Henn and John R. Alexander, Laws of Corporations and Other Business Enterprises § 100 (3d ed. 1983).

(n80)Footnote 175. Harry G. Henn and John R. Alexander, Laws of Corporations and Other Business Enterprises § 100 (3d ed. 1983).

(n81)Footnote 176. Harry G. Henn and John R. Alexander, Laws of Corporations and Other Business Enterprises § 100, 101 (3d ed. 1983). An unqualified corporation may defend suits and may or may not be able to assert counterclaims. *Id.* The statute of at least one state, Colorado, provides for criminal penalties. *See Title Ins. Co. of Minnesota v. American Sav. & Loan Ass'n, 866 F.2d 1284 (10th Cir. 1989).*

(n82)Footnote 177. *See, e.g.,* Ill. Ann. Stat. ch. 32, paras. 101.10, 113.15.

(n83)Footnote 178. Michael J. Rooney, *The Art of Title Searching, in* Ward on Title Examination 11-1 (Illinois Institute for Continuing Legal Education 1986).

(n84)Footnote 179. Exclusion 5.

(n85)Footnote 180. ALTA 1970 Loan Policy Form, Insuring Clause 5.

(n86)Footnote 181. Raymond J. Werner, *The Basics of Title Insurance, in* A.B.A., Section of Real Property, Probate and Trust Law, Title Insurance: the Lawyer's Expanding Role 17 (James M. Pedowitz, ed., 1985).

(n87)Footnote 182. *Hartford Life Ins. Co. v. Title Guar. Co., 520 F.2d 1170 (D.C. Ct. App. 1975).*

(n88)Footnote 183. Joyce D. Palomar, Title Insurance Law § 6.11 (1994).

Thompson on Real Property, Thomas Editions

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CHAPTER 93 TITLE INSURANCE

11-93 Thompson on Real Property, Thomas Editions § 93.05

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§ 93.05 Conditions and Stipulations.

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The conditions and stipulations contain:

(1) definitions of terms;

(2) a stipulation which may continue coverage after the insured has conveyed the interest; n184

(3) provisions concerning the insurer's obligation to defend the title and the insured's duty to assist or cooperate in the defense;

(4) limitations on the insurer's liability;

(5) a provision subrogating the insurer to the rights of the insured claimant where the insurer has settled a claim, and, since 1987,

(6) an arbitration clause.

§ 93.05(a) Definitions.

Generally, the most important definition in the conditions and stipulations is that of the "insured." This definition has been the subject of a substantial amount of litigation. It is important because it defines the persons who are entitled to claim benefits under the terms of the title policy. As will be seen in the following discussion, those persons will not necessarily be the original purchasers of the title policies from the insurers.

Perhaps the second most important definition is that of "public records." This definition is important principally because a number of the Exclusions or General Exceptions from coverage are inapplicable if the claim or defect causing a loss appears in the "public records."

§ 93.05(a)(1) Definition of "Insured."

The term "insured" is defined differently in the ALTA loan and owner's policy forms. In the loan policy, the term includes purchasers of the secured debt, e.g., investors in the secondary mortgage market. The term as defined in the owner's policy, on the other hand, does not include purchasers of the property from the named insured. The owner's policy, however, does cover transferees from the named insured who do not take by purchase, such as heirs, devisees, and corporate or fiduciary successors.

§ 93.05(a)(1)(A) The Meaning of "Insured" in the Loan Policy.

The definition of "insured" in the loan policy form includes the insured named in Schedule A, "the owner of the indebtedness secured by the insured mortgage and each successor in ownership of the indebtedness ...," n185 and any governmental agency or instrumentality which has insured or guaranteed the indebtedness. n186 Under this definition, the coverage of the policy is automatically assigned along with a transfer of the mortgage debt. The definition further provides that the insurer reserves defenses with respect to successors that it would have had against predecessor owners of the debt, unless the successor "acquired the indebtedness as a purchaser for value without knowledge of the of the asserted defect, lien, encumbrance, adverse claim or other matter ... covered by the policy." n187 These provisions facilitate the operation of the secondary mortgage market. When an insured mortgage debt is sold in the secondary mortgage market, no formal assignment of the title policy is required. The assignee of the debt is automatically covered. Under the 1992 ALTA loan policy form, transfer of the ownership of the debt is further facilitated because purchasers take free of prior defenses unless they had actual knowledge of the title defect or other covered risk which gave rise to the loss. It is not necessary that the assignor amend the policy or even notify the insurer to extend coverage to the assignee. However, it is possible that the assignment itself could be invalid. That risk is not covered by the policy unless the assignment is shown in Schedule A. Therefore, when the insured mortgage is assigned, the policy is usually amended or endorsed to show the assignment on Schedule A. n188

Because the definition of "insured" in the ALTA loan policy is clear and straightforward, there are relatively few reported cases concerning it. In one of them, *Capital America, Incorporated v. Industrial Discounts, Incorporated*, n189 an uninsured purchaser of the equity of redemption paid off the insured mortgage. It was later discovered that the property was still encumbered by some mortgages which had been fraudulently represented to the insured mortgagee as released. Apparently, the insured mortgagee's title policy did not except these prior mortgages from coverage. The purchaser argued that it was entitled to be subrogated to the rights of the insured mortgagee in his title policy. If the mortgage had been assigned to the purchaser instead of being paid off, the purchaser would have been covered as a successor in ownership of the debt. The court rejected this argument, noting that there was no privity between the purchaser and the title insurer, and the definition of "insured" in the policy did not include the purchaser. n190

§ 93.05(a)(1)(B) The Meaning of "Insured" in the Owner's Policy.

The definition of "insured" in the ALTA owner's policy forms differs substantially from its counterpart in the loan policy forms and has generated a number of reported cases. While those who purchase the debt secured by an insured mortgage will be covered by the mortgage seller's loan policy, purchasers of the property itself are not intended to be covered by their sellers' policies. The owner's policy defines "insured" as "the insured named in Schedule A, and, subject to any rights or defenses the Company would have had against the named insured, those who succeed to the interest of the named insured by operation of law as distinguished from purchase including, but not limited to, heirs, distributees, devisees, survivors, personal representatives, next of kin, or corporate or fiduciary successors." n191

There is an obvious justification for distinguishing transfers by purchase from other types of transfers. At the time of purchase, it is normal to search and examine title because the purchaser wants assurance that the title conveyed will be worth the consideration given in return. When a transfer is not through purchase, the transferee gives no consideration and, as a result, has little or no economic incentive to examine the title.

The distinction between taking "by operation of law" and "from purchase" is imperfect because it implies that all real estate transfers fall under one of the two categories when, in fact, all transfers do not neatly fit under one or the other. Recipients of inter vivos gifts of real estate do not take "by operation of law"; instead, they take by the volitional acts of the donor of giving and the donees of accepting. The owner's policy definition of "insured" includes "devisees" and may exclude inter vivos donees. n192 Neither type of transferee is a purchaser; one is clearly included in the definition of "insured," and the other is not. The only real difference between the two appears to be that in one case the transfer occurs during the donor's lifetime, while in the other case the transfer occurs at the donor's death. Perhaps the taking "by operation of law" concept should be abandoned and replaced by a definition that includes as "insureds" all persons who take "other than by purchase."

Pioneer National Title Insurance Co. v. Child, Incorporated, n193 and *Historic Smithville Development Co. v. Chelsea Title & Guaranty Co.* n194 are presently the two leading cases addressing the meaning of "taking by operation of law" in the owner's policy definition of "insured." owner title policies. Both cases address the meaning of the concept of taking "by operation of law." *Pioneer National* describes "taking by operation of law" as "a generic term or phrase commonly used to express the manner in which rights (and/or liabilities) attach to a person by the "mere application to the particular transaction of the established rules of law, without the act or cooperation' of that person." n195 Under this approach, a distinction is made between voluntary transfers made by personal intervention and involuntary transfers made without it. *Historic Smithville* points out, however, that most transfers involve voluntary personal intervention: "[t]ruly automatic transfers of title to real property occur only by survivorship in a joint tenancy and through intestate succession." n196

In *Pioneer National*, title to the subject property had been held by Child Foundation which was the named insured in the title policy issued by Pioneer. Child Foundation conveyed the property to Henry du Pont, who with his wife, in turn, conveyed it to Child, Incorporated. The purpose of the transfers was to establish for the du Ponts a charitable deduction for income tax purposes. Child, Incorporated, later contracted to sell the property, but the buyer refused to close because of an alleged title defect. n197 Child, Incorporated, then sued the title insurer, Pioneer, claiming coverage under the policy issued to Child Foundation. Child, Incorporated, argued that it was an "insured" within the meaning of the policy because it succeeded to the interest of the named insured, Child Foundation, by operation of law. The trial court, construing the policy against the insurer, held that Child, Incorporated, was an insured because it was a corporate successor to Child Foundation. The reviewing court disagreed.

The reviewing court began its analysis by rejecting the notion that a dispute about the meaning of a policy provision which is not known to a certainty should be resolved against the insurer: "We agree that in the search for meaning, ambiguities and any uncertainty of meaning or language should be resolved against Pioneer [the insurer]. This presupposes, of course, that two or more meanings may be given to the language under scrutiny. It does not mean that because we do not know for certain what is intended that the ruling goes against Pioneer." n198 Then the court focused on whether Child, Incorporated, took from Child Foundation "by operation of law." The court decided that transfers by the voluntary act of the parties are distinct from those "by operation of law," where the transfers are automatic and occur by the application of the rules of law to the particular facts of the transactions. Since the corporations and the du Ponts made the transfers voluntarily, the court held that they were not made by operation of law and that therefore, Child, Incorporated, was not an insured within the meaning of the title policy.

The other leading case, *Historic Smithville Development Co. v. Chelsea Title & Guaranty Co.* n199 took a different approach to the policy language. Several times in its opinion, the court invoked the principle that title policies should be liberally construed in favor of the insured. The "automatic transfer" interpretation of "by operation of law" was rejected. The court observed that the policy "does not limit the terms 'insured' and 'operation of law' to strictly involuntary transferees." n200 Under express policy language, devisees, distributees, and fiduciary and corporate successors are insureds even though they do not take by strictly involuntary transfers.

The *Historic Smithville* case involved real estate owned by Historic Smithville Inns, Incorporated (Inns), a wholly owned subsidiary of ABC Leisure Attractions, Incorporated, a wholly owned subsidiary of the American Broadcasting Companies, Incorporated (ABC). In 1978, ABC sold Inns to a group which ultimately became known as Historic Smithville Development Co., a partnership. The group wished to purchase the assets of Inns, but ABC insisted upon a purchase of the stock of Inns. n201 At the time of the purchase, title to some of the real estate owned by Inns was being challenged in litigation and defended at the title company's expense. After the stock sale, Historic Smithville Development Co. adopted a plan for the liquidation of Inns, and the title to its real estate was deeded to the Development Co. Shortly thereafter the title insurer took the position that it was no longer obligated to defend the title litigation since the Development Co. was not an "insured" within the meaning of the title policy because it was a "purchaser." The court disagreed.

The court began its analysis by rejecting the premise of *Pioneer National Title Insurance Co. v. Child, Incorporated* n202 that "taking by operation of law" referred to automatic or involuntary transfers. In doing so, the court, in sharp contrast to the *Pioneer* court, relied on the rule that policies must be liberally construed in favor of the insured and strictly construed against the insurer. The court stated that the policy specifically referred to certain types of voluntary transfers as instances of taking "by operation of law." These transfers included taking by devise, distribution, and fiduciary or corporate succession. The court observed that truly automatic transfers of real estate occur only by joint tenancy survivorship and intestate succession and that "lands are 'purchased' whenever they are acquired by means other than descent or inheritance." n203

The sale of the stock of a corporation owning title insured real estate is not a "purchase" of the real estate by the stock buyer. The corporation is the "insured," not the stockholder. Therefore, when the Development Co. bought the stock of Inns, it did not become a purchaser of its real estate. The title insurer admitted that ABC would have been an "insured" if Inns had been liquidated instead of being sold to the Development Co. This admission was fatal to the insurer's argument that the transfer to the Development Co. of the real estate owned by Inns was a "purchase" because it was voluntary. The court concluded that "[a] transfer in dissolution to ABC is no different, in terms of voluntariness, than the transfer to the Development Co. in dissolution." n204

The insurer also made a "substance over form" argument in *Historic Smithville* which had some appeal. If the Development Co. members had directly purchased the real estate from Inns, there would have been no question that they were takers by "purchase" within the meaning of the policy. The title insurer argued that in substance the Development Co. was a new owner of the property which the insurer never intended to insure. The court rejected the argument observing that the policy, liberally construed, did appear to include those succeeding to the assets of a dissolved corporation:

> Here, an insurance policy must be interpreted, and our rules require a liberal construction, favoring coverage. If Chelsea's [the insurer's] policy may be so read, there *is* coverage regardless of the substance of the transaction. There is no reason, as a matter of law, why a title policy may not cover the successor in title to a dissolved corporation. The policy *may* recognize form over substance, at the discretion of the insurer. Chelsea's policy has been here construed to cover plaintiff. No more is necessary. The question of substance over form has no relevance. n205

The law on the meaning of the definition of "insured" might benefit by applying the familiar intention of the parties' standard. Since the named insured in an owner's policy almost never has input into the framing of policy provisions, realistically it is the intent of the insurer, which is assented to by the insured, that should be ascertained. Unclear, ambiguous provisions should be construed against the insurer under the usual rule of construction.

The policy provision distinguishes between transfers by "purchase" and other types of transfer. Before the listing of various specific transfers which take place "by operation of law," the words "including, but not limited to," are used. These words support a construction that the insurer intended the policy to transfer to all those who succeed to ownership

of the insured interest except by purchase, e.g., donees and shareholders on dissolution of a corporation. Attempts to define taking "by operation of law" by distinguishing between voluntary and involuntary transfers are unsatisfactory, formalistic, and off the mark. The intent of the insurer as expressed in the language used is a better guide. The time of purchase is an opportune time to sell title services because purchasers giving consideration for the transfers need the services at that time for assurance of the current state of the title. The insurer intended the policy to be non-assignable to a transferee in only that situation.

As indicated by *Pioneer National* and *Historic Smithville,* the question of whether a transferor's policy covers a transferee could be complicated if one or more of the parties is a legal entity such as a corporation, trust or partnership. When an insured corporation is merged into or consolidated with another corporation, title insurance normally continues in favor of the successor because "corporate successors" are expressly referred to in the definition as those who succeed to the interest of the named insured "by operation of law as distinguished from purchase... ." n206 This is true even if the acquiring corporation obtained the insured corporation through purchasing it or its assets. Likewise, when a corporation dissolves and its assets are distributed to its shareholders, title insurance covering distributed real estate continues, because "distributees" are also expressly referred to in the policy definition of "insured." n207

Rate manuals filed with the New York Insurance Department address the situation where the insured title is transferred by a parent to a wholly owned subsidiary, by a wholly owned subsidiary to its parent, by a wholly owned subsidiary to another subsidiary in the same corporate group, or by an individual to a corporation in exchange for all of its stock. n208 In these situations, the New York rules provide that the title policy will cover the transferee where there has been "no real change in ownership." n209 However, at least one court has held that when a corporation acquires an insured title from individuals in exchange for shares of its stock, the corporation is not covered by the title insurance issued to the individuals. n210

Where the named insured is a corporation or trust, a change in ownership through a transfer of the corporate stock or the beneficial interest of the trust will not affect title insurance coverage of the corporation or trust. n211 This is true regardless of whether the transfer of stock or the beneficial interest is by purchase or otherwise and even if all of the stock or the entire beneficial interest is transferred. As a result, it is possible to structure a purchase of real estate as a stock or trust beneficial interest transfer to save title insurance premiums. The purchasers will get the benefit of the title policy covering the corporation or trust without having to pay any new or additional premium. However, it may be advisable for the new shareholders or beneficial interest owners to obtain title insurance to the date of their acquisition through a new policy or by a "date down" endorsement to the existing one. Otherwise, the existing policy only provides coverage as of the date it was issued to the insured corporation or trust. Defects, liens, encumbrances or adverse claims attaching thereafter are not covered. Additionally, in the case of stock transfers, the new shareholders may be barred from recovering on the title policy through the corporation, because former officers or directors failed to disclose material facts to the title insurer. A "non-imputation" endorsement may be sought from the insurer. Such an endorsement waives the insurer's defense based on what some prior party knew but failed to disclose to the insurer. n212

The purchase of shares in a title insured corporation should not, however, normally extend the benefits of the title policy directly to the stock purchaser. Extending the benefit of title insurance issued in the name of the corporation to its stock purchasers is contrary to the intent of the policy and could be unfair to the insurer. In structuring title policies and assessing risks, title insurers rely on their insureds being able in certain cases to attain priority over non-record claims through recording acts. n213 Purchasers of real estate may qualify for recording act protection. In contrast, purchasers of corporate stock are not entitled to recording act protection. A corporate purchaser of real estate may take subject to a non-record claim because the corporation has knowledge of it. As a taker with notice, the usual title policy exclusion where the insured has actual knowledge of the adverse claim might apply to bar recovery on the title policy by the corporation. If the benefits of the corporations's title policy are extended to its stock purchasers, the title company might be obligated to indemnify them in a case where no loss would have occurred if they had been real estate purchasers. As such purchasers, they might have avoided incurring a loss by attaining priority over the non-record claim through the

recording act, but because they are stock purchasers, they will be denied recording act protection and the non-record claim retains priority over them even if they had no knowledge or notice of it. Although transfer of stock in a corporation has no effect on the title insurance issued to it, a transfer of a general partnership interest generally terminates title insurance issued to the partnership. Under partnership law, a general partnership may dissolve when a partner transfers the partner's interest in the partnership. Usually, a new partnership is formed with the transferee taking the place of the former partner. Technically, the new partnership is an entity separate from the former one. Where the former partnership was named as the insured under a title policy, that title insurance will not cover the new partnership. A leading case, Fairway Development Co. v. Title Ins. Co. of Minn., n214 held that the new partnership is a separate entity not covered by the former partnership's title policy. In *Fairway Development*, two of three general partners transferred their interests in the named insured partnership to the remaining partner and a third-party purchaser who formed a new partnership. The court held that the original partnership dissolved and that the new partnership was a separate entity which was not covered by the title policy. Currently, title insurers may offer what has been commonly termed a "Fairway" endorsement. This endorsement continues coverage in favor of a new general partnership formed when a predecessor named insured partnership was dissolved by the withdrawal of a former partner and the admission of a substitute. n215 By contrast, the transfer of a limited partnership interest is treated the same as a transfer of stock in a title insured corporation. The transfer does not affect the title insurance coverage. The limited partnership is not dissolved and the title insurance for the limited partnership continues in force. n216 However, withdrawal of a general partner from a limited partnership may dissolve it. A successor limited partnership may not be an "insured" under a title policy issued to the dissolved predecessor. n217

In some cases parties were entitled to enforce a title insurance policy even though the parties did not fit within the definition of "insured." In Happy Canyon Investment Co. v. Title Insurance Co. of Minnesota, n218 the title insurer was aware that the named insured was acting as the nominee for the real party in interest which was held to have standing to enforce the title policy in an action on its own behalf. In another case, although the title policy was issued in the name of a trustee, the beneficiaries of the trust were entitled to enforce directly the policy against the insurer where it was aware that the beneficiaries held equitable title. n219 In a third case, n220 the policy was issued in the name of a joint venture and a party to the joint venture was "entitled to invoke the protection of the policy." n221 Absent special circumstances, however, parties not in privity with the insurer have generally been unsuccessful in attempts to enforce title policies under third-party beneficiary or negligent misrepresentation theories. n222

§ 93.05(a)(2) Effect of Property Transfer on Meaning of "Insured"

Commentators have suggested that owners' policies should be assignable in order to eliminate repetitive title searches and examinations. n223 Implementation of this proposal would mean that the title search and examination at purchase could end at the date of the last title policy issued for the property with assurance that the purchaser would be covered for adverse claims insured against by the prior policy. Title insurers may be expected to oppose any law mandating assignability of owners' policies. A former title insurance company officer has written that owners' policies are not automatically assignable to purchasers from covered owners out of "economic necessity" because "the policies are issued for a one time premium... ." n224 In other words, if the owners' policies were assignable to purchasers, title insurance companies might receive less premium income. The balance sheets of title insurers might also be further enhanced if loan policies were not automatically assigned with the secured debts.

Some considerations weigh against making owners' policies assignable to purchasers. There is a very basic difference between owner's and loan policies. A loan policy has a built-in lifetime that expires when the secured debt no longer exists. By contrast, title insurers might reasonably object to insuring a potentially perpetual chain of owners even though the risks assumed by the insurer would be limited exclusively to those in existence at date of policy. n225 Such an objection could be met by providing for expiration of an owner's policy which had been assigned after some definite time period, such as forty years from issuance.

Another consideration weighing against assignability of owners' policies is that title insurers base their premiums on the

assessment of their risk and exposure. Under current policies, a sale of the real estate terminates the seller's policy, except to the extent that the seller may be liable on deed warranties for insured adverse title matters. Making owners' policies assignable may cause title insurers to raise their premiums if they determine that assignment will increase their exposure. The reply to this argument is that most of the premium is to cover the cost of the title search and examination, while only a small portion covers the insurer's assumption of title risks. Therefore, assignability should not result in a substantial increase in premiums.

The effect of non-assignability or assignability on consumers buying homes should also be considered. Sophisticated real estate purchasers are likely to understand that the seller's title policy is a personal contract. Many consumers purchasing homes, however, may not understand that the seller's title policy does not cover subsequent purchasers. n226 While most consumers may understand that insurance contracts are normally personal, the term "title insurance" may cause confusion. The term may be misunderstood to mean that the property itself is insured when in fact the "insured" is some person who fits the definition of "insured" in the policy. n227 On the other hand, assignment of a seller's policy to a buyer may give the buyer a false sense of security, since the buyer may not realize that the coverage is as of the date of policy which may have been before serious adverse matters attached to the title.

§ 93.05(b) The Duty to Search Title and Report Adverse Matters.

Provisions in title policies attempt to limit the insurer's risk exposure. Title insurance policies specify a maximum amount of insurance, usually in Schedule A. In addition to covered litigation expenses, this amount is intended to be the maximum exposure of the insurer under the policy. n228 If the property subsequently increases in value, the amount of insurance stated in Schedule A will remain the same unless either the insured subsequently purchases additional coverage or the policy contains a provision which increases the amount of insurance when the value of the insured title increases. n229 Title policies also attempt to limit the type of damages which are compensable to title clearance, litigation expenses, and diminution in value of the subject real estate caused by the covered adverse claim or title defect. n230 Other consequential damages, even if foreseeable, are not included in the description of "losses" insured against by the typical title policy. These other consequential damages might include lost profits, lost opportunities (e.g., loss of a potential buyer), n231 delay in development plans due to the title problems, or emotional distress. n232 Exclusions, exceptions, conditions, and stipulations are intended to restrict further the insurer's exposure to risk.

In order to avoid policy limits on recovery, or the effect of policy exclusions or limitation on the insurers' liability, n233 plaintiffs have resorted to contract theories (both express and implied) and tort theories of recovery against title insurers with varying degrees of success. n234 The basic claim in most of these cases is that the insurer breached its duty to the plaintiff to search for and report adverse claims. Some of the cases involve failures to report adverse claims in the commitment (i.e., "preliminary report" or "binder"), which usually precedes the issuance of a final title policy. Others concern failures to report adverse claims in title policies.

In what appears to be a unique case, Red Lobster Inns of America, Inc. v. Lawyers Title Insurance Corporation, n235 a court held that a restaurant chain was entitled to recover lost profits caused by a delay in opening a store due to the title company's failure to report a restriction of record which prohibited use of the subject property as a restaurant site. In the *Red Lobster* case, the restaurant chain had entered into a national agreement with the title insurer under which the title insurer agreed to give the chain priority service in return for the bulk of its national title insurance business. The title insurer's liability for lost profits was based on this agreement and not on the title policy.

§ 93.05(b)(1) The Insurer's Duty to Search for and Report Adverse Claims.

Two of the most widely used methods of land title assurance in the United States are the attorney-abstract system and title insurance. Title insurance is now predominant, and the attorney-abstract system is declining. In some localities, title insurance is the sole method of land title assurance used. When the attorney-abstract system is used, abstractors search public real estate records and prepare abstracts of title. These abstracts are summaries of all of the instruments found,

with quotations, where appropriate, of exact language used. The abstractor does not exercise discretion in deciding whether to report an instrument. n236 The abstract is then presented to an attorney for an opinion evaluating the information contained in the abstract. n237

Title insurance commitments and abstracts both provide evidence of the current state of the seller's title, but the two types of title evidence differ in an important respect. Title insurance commitments are issued after an evaluation of the data uncovered in a search. Indeed, statutes in some states require title insurers to search and examine a title before insuring it. n238 Risk elimination is a primary purpose of the search and examination. By reporting the adverse claims uncovered as special exceptions in the commitment, the insurer is providing notice that they will not be covered in any policy subsequently issued. The commitment will not report all relevant title data. It will report only matters which the insurer has determined could lead to losses which might otherwise be covered by the title policy. Title insurers may make an underwriting decision to omit reporting irregularities where the probability that they represent truly adverse matters is low. In contrast, the abstractor undertakes to find, summarize and report all of the relevant title information without exception. A title insurance commitment, therefore, is not the equivalent of an abstract of title.

While title insurance commitments are not equivalent to abstracts, they are used by parties to real estate transactions as if they were. Because of the manner in which title insurance is advertised and promoted, parties to real estate transactions frequently expect that: (1) the title search and examination conducted by the title company was performed for the benefit of the parties, n239 and (2) the parties should be able to rely on the commitment and any final title policy as an accurate report of the current state of the title. n240 Title insurers sometimes attempt to counter these expectations of the parties with express language in the commitments providing otherwise. n241

A majority of the jurisdictions that have considered the question whether the search and examination is conducted for the benefit of the insured as well as the insurer have answered in the affirmative. n242 A substantial number of cases, however, have held that the search and examination is conducted for the sole benefit of the insurer and that the insurer owes no duty to the insured beyond that which is assumed in the policy. n243 The theories used to hold the insurer liable include implied contract, negligent search and examination, and negligent misrepresentation of the state of the title. Attempts to extend the duty of the insurer to search and examine title competently to others not in privity with the insurer on the basis of third-party beneficiary contract theories have generally failed. n244

§ 93.05(b)(2) Duty to Search and Report Defects: Based on Implied Contract.

Title insurance commitments and policies contain no express obligation on the insurer to search for and report adverse matters. n245 Some statutes impose a duty to search and report, and courts have implied such an obligation from sources such as the issuance of a commitment, a listing of title defects in the title policy or from the surrounding circumstances. n246 A number of cases have found liability because the insurer acts as a conveyancer or abstractor when it issues the commitment and thereby assumes the responsibilities of conveyancers or abstractors. n247 Basing the insurer's responsibility to search for and report defects on implied contract theories is hard to reconcile with policy provisions which attempt to limit the insurer's liability to those risks expressly undertaken and clauses in commitments which purport to terminate all liability under them when the policies are issued. n248 It is also difficult to reconcile an implied duty to search with express policy provisions which except from coverage many items that are clearly within the scope of a reasonable search. n249

§ 93.05(b)(3) Duty to Search and Report Defects: Based on Tort.

§ 93.05(b)(3)(A) Negligent Search and Examination.

The duty of title insurers to search and report defects may be tort based. The tort theories relied on by courts in finding such a duty are general negligence or negligent misrepresentation. n250 The leading case holding a title insurer responsible for its search and examination on a pure negligence theory is Jarchow v. Transamerica Title Insurance Co.

n251 In *Jarchow*, Transamerica, the title insurer, reported in the commitment the existence of an easement of right of way (hereinafter "the Hill easement") reserved by prior owners of the subject property, the Hills, for the benefit of other property which they retained. After the conveyance, the Hills purported to grant by a recorded conveyance an easement on their easement over the subject property to Pete and Annie Perez. The Perezes owned other property in the vicinity, and the purported easement was used for access. The court observed that reference to the Perez easement was omitted from the commitment "for some inexplicable reason." n252 Before the final title policy was issued, the title insurer was persuaded to waive the special exception for the Hill easement. Shortly after the insureds took title, they learned of the Perez easement claim. They contacted Transamerica and requested that Transamerica clear their title. Transamerica refused to take any action, taking the position that it was not obligated to take any action because the Perez easement claim was excluded from coverage. n253 The insureds then sued the Perezes and Transamerica, seeking damages and attorney fees. The insureds subsequently filed a supplemental complaint in which they sought general and punitive damages based on Transamerica's tortious failure to discover, disclose, or eliminate the Perez claim. Among the claimed torts were bad faith and negligent infliction of emotional distress. While the action was pending, plaintiffs applied to the city for site plan approval of the development they planned on the subject property. The Perezes had notified the city of the easement claim, and the approval of the site development plan was conditioned upon keeping access for the Perezes open. Because of the cloud on the title, the plaintiffs decided not to proceed with development.

The trial court found that the deed purporting to convey the easement to the Perezes was a void conveyance and was therefore excluded from coverage by the title policy. The court also found, however, that the failure to report the Perezes' claim on the commitment was negligent. Because of Transamerica's negligence, the court found that the insured had suffered $172 in actual damages and had incurred attorneys' fees of $7,184 in quieting the Perezes' claim. n254 After a jury trial on the tort claims, the jury found that each of the four plaintiffs was entitled to $50,000 in damages because of the emotional distress caused, in part, by Transamerica's negligent failure to disclose the Perezes' claim in the commitment. n255 The appellate court affirmed.

In affirming the decision that Transamerica was negligent in failing to report the recorded Perezes' claim in the commitment, the court said that the insurer breached the duty that an abstractor of title has to "list *all* matters of public record regarding the subject property... ." n256 Following this rather broad statement, the court then quoted from another California case in which it was stated that the abstractor must report all matters which could affect the client's interest and which are readily discoverable from the public records ordinarily examined by a diligent title searcher. n257 If the author of the *Transamerica* opinion really meant that a title insurer has a duty to report all matters of public record regarding the subject property, the author had a less-than-sophisticated understanding of the difference between abstracts of title and title insurance commitments or preliminary reports. A title insurer seeking to eliminate title risks from policy coverage exercises judgment in reporting possible adverse claims found in the record. The insurer may fail to except a claim of record when the insurer determines that the probability of the claim being a reasonable basis for litigation is extremely low or non-existent. n258 The title insurer may omit to report an adverse claim where the insurer decides to assume the risk of the validity of the claim. In contrast, the duty of the abstractor *is* a duty to summarize and report the entire record. The *Jarchow* court was simply wrong if it really meant that abstracts and title insurance commitments or reports are equivalent. Post-*Jarchow* California statutory law now makes it clear that the two types of title evidence are most certainly not equivalent in that state. n259

Southland Title Corporation v. Superior Court of California n260 made it clear that *Jarchow* is no longer good law in California on the question of the title insurer's liability under general negligence law for failure to report recorded adverse claims in title insurance commitments. In the *Southland Title* case, the title insurer failed to report a recorded flood control easement in the commitment. After the insureds took title, they discovered the easement and sued the company, seeking $100,000: the difference between the alleged value of the property without the easement ($150,000) and the alleged value encumbered with the easement ($50,000). The insureds claimed greater than the maximum amount of insurance stated in the policy, which was $92,000. The insureds alleged that they relied on the commitment in making their final decision to complete the purchase. The title insurer demurred to the insureds' complaint, the trial court overruled the demurrer, and the appellate court issued a writ of mandate to the trial court with directions to enter

an order sustaining the insurer's demurrer.

The insureds argued that §§ 12340.10 and 12340.11 added to the California Insurance Code in 1981 were enacted in order to define the contractual relationship between title insurers and their customers, not to change the liability of title insurers for negligence in failing to accurately describe the title. The court rejected this argument relying on language in the statutes particularly the following language in § 12340.11: "'Preliminary report,' "commitment,' or "binder' are reports furnished in connection with an application for title insurance... . The reports are not abstracts of title, nor are any of the rights, duties or responsibilities applicable to the preparation and issuance of an abstract of title applicable to the issuance of any report." n261 While the "title insurer is abstractor" aspect of *Jarchow* has been laid to rest in the jurisdiction of its origin, it continues to be alive elsewhere. n262

§ 93.05(b)(3)(B) Negligent Misrepresentation of Title.

Negligent misrepresentation of title is another tort theory used to hold title insurers responsible for a failure to report title defects in commitments. Hawkins v. Oakland Title Insurance Co. n263 is a leading case using this theory. In *Hawkins*, the title insurer failed to report in the commitment a recorded grant of access held by the state. Relying on the commitment which apparently indicated clear title, the purchaser bought the property and improved it with a service station. After the state acted on its rights of access, the insured had to close the service station business. The trial court found that the insured failed to state a cause of action based on negligence. The appellate court reversed, finding that the insurer owed a duty to make an accurate report of the state of the title, quoting and approving § 552 of the *Restatement of Torts*. Section 552 of the *Restatement* holds those in the business of providing information liable for negligence in obtaining and communicating information to those who suffer harm in justifiable reliance on the information.

Courts in other jurisdictions have also held title insurers liable for failure to accurately report the state of title under the negligent misrepresentation theory. n264 One of the more interesting recent cases is Bank of California v. First American Title Insurance Co. n265 In Bank of California, the owner of the subject property deeded a fifty percent interest in it to his daughter. After the deed was recorded, Security Title issued a commitment for title insurance which incorrectly stated that the owner was the sole owner. No mention was made of the daughter's fifty percent interest received through the recorded deed. The owner alone then deeded the property to a corporation of which he was president and majority stockholder. The Bank of California made a loan to the corporation on the security of a mortgage executed by it on the subject property. After the closing of the loan transaction, First American Title issued a loan policy to the Bank insuring the title to its mortgage.

The mortgagor corporation eventually defaulted and filed for protection under Chapter 11 of the Bankruptcy Code. Several months, later, the Bank learned of the daughter's interest in the property. The Bank then sued both title companies, First American and Security Title, claiming breach of contract and negligent misrepresentation. The trial court granted the title companies' motion to dismiss, and the Bank appealed. The Supreme Court of Alaska reversed, holding that title insurance companies owe their customers a duty of care concerning the preliminary title information they furnish them, citing § 552 of the *Restatement (Second) of Torts*. The court concluded that breach of this duty could make an insurer liable to its customer for negligent misrepresentation of title.

In support of its conclusion that title insurers could be liable for negligent misrepresentation of title, the court utilized a multi-factor analysis which it had employed in a prior negligent misrepresentation case. n266 These factors were:

> (1) knowledge that the information was desired for a serious purpose and that the recipient intended to rely on it;
>
> (2) the foreseeability of harm;
>
> (3) the "degree of certainty" that harm would result;

(4) the directness of causation, and

(5) the policy of preventing future harm. n267

The court decided that all of the factors were present when title insurers issue commitments which report the result of the insurers' search and examination of title.

The court observed that title insurers know that the information in commitments or preliminary reports will be relied upon by real estate purchasers and lenders in deciding whether or how to complete transactions. Furthermore, the court stated:

> Title searches are frequently required in situations involving transactions where the state of the title must be known accurately or the customer will foreseeably suffer harm which is both certain and direct. Further, the policy of preventing future harm is somewhat served by imposing a duty of care on the part of title insurers, although the deterrent supplied by tort liability is not likely to be of much additional consequence since the title company is usually liable under the title policy which ordinarily follows the preliminary commitment. n268

The court also considered whether a statement in the commitment was effective to disclaim negligence liability. The statement said: "This report and commitment shall have no force or effect except as a basis for the coverage specified herein." n269 The court applied a rule of strict construction of disclaimers of negligence liability and found that the language did not clearly state that the title company would not be liable even if it negligently misrepresented the title to the Bank. The court also expressed agreement with a California decision holding an exculpatory provision in a preliminary title report invalid on the ground that the insurer was engaged in a business which affected the public interest and, therefore, could not exculpate itself from negligence liability in a contract of adhesion. n270

The Alaska Supreme Court then considered whether certain policy clauses effectively precluded tort claims until the insurer had an opportunity to clear title. One clause provided that any claim of loss or damage "whether or not based on negligence" shall be restricted as provided in the policy. The Court said that this first clause did no more than trigger a review of the policy provisions to see if any of them applied to the case. The other clause relied on was a standard clause found in ALTA and other forms which reinforces the indemnity contract nature of title insurance. This is the provision which states that no claim shall be maintainable under the policy until the title company has been given a reasonable time to clear the title after being notified of an adverse claim. The provision further states that if the company clears the title within a reasonable time after notification, the company shall not be liable. This other clause was held to be inapplicable because it applied to claims arising under the policy and not to a claim based on negligent misrepresentation of title in the commitment.

§ 93.05(b)(4) Proper Scope of the Insurer's Duty to Search and Report Defects.

There are persuasive reasons that support limiting the liabilities of title insurers to those expressly assumed in the policy. Title insurance commitments are not intended to be abstracts of title. Instead, they are offers to issue title insurance policies in accordance with the specifications contained in the commitment. Strictly speaking, title insurance policies are not proof or evidence of title. They are contracts of indemnity under which the insurer undertakes to indemnify the insured in the event of losses caused by covered title defects. A failure to report record defects may not be due to careless or negligent search or examination. Defects may not be reported in commitments or policies because the title insurer may have made an underwriting decision that those defects are not defects in fact. Known defects may be omitted from commitments or policies because the insurer may have decided to assume the risk of losses due to such defects.

On the other hand, the manner in which title insurance is promoted by title companies and used by customers supports the imposition of greater liability than that expressly assumed in title policies. Consumers of title insurance services believe that commitments and policies are issued only after a careful search and examination of the record pertaining to the subject property. Title insurance industry advertising has frequently encouraged this perception. Title insurers successfully lobbied a number of state legislatures to require searches and examinations before issuance of title insurance. n271

Title insurance documents are used and accepted as "evidence" of title in many places. As title insurance has replaced the attorney-abstract method of title assurance, people naturally believed and expected the new service (i.e., title insurance) to be at least as extensive as the service replaced. As a result, parties to real estate transactions expect the commitment to be a report of the title problems found by the title company. When title insurers decide to ignore risks deemed minor or trivial, the insurer should at least report their existence to the insured or proposed insured. Similarly, when a title insurer decides to assume a risk by "insuring around" it, the existence of the risk should also be reported to the consumer.

§ 93.05(b)(5) Summary of Duty to Search Rules.

The court in Jarchow v. Transamerica Title Insurance Co. n272 perhaps incorrectly treated title insurance commitments as the equivalent of abstracts. The court was probably unfair when it characterized the conduct of Transamerica as "inexplicable" and "fatuous." Under the facts of the case, the affirmance of a judgment awarding each of the four plaintiffs $50,000 in damages for negligent infliction of emotional distress was questionable. But the heart of the *Jarchow* decision was sound. Title insurers should have a duty to search and examine title competently, and they should be accountable if they are negligent in performing that duty.

§ 93.05(c) The Duty to Defend.

Title defense is one of the most important benefits provided by title insurance. Before the insurer is obligated to defend the title, the insured must make a written request. n273 The insured is also obligated to give the insurer written notice of any adverse title claims promptly after the insured has actual knowledge of them. n274 A failure to give this notice terminates the insurer's liability under the policy to the extent that the failure prejudices the insurer. The insurer must show that late notice caused "appreciable" harm to its position in order to establish prejudice. n275 If the insurer has actual notice of the adverse claim from a source other than the insured, a failure by the insured to give prompt notice causes no prejudice to the insurer. n276 The burden of proving prejudice is on the insurer. n277

The 1970 ALTA policy forms described the insurer's obligation to defend as follows:

> The Company, at its own cost and without undue delay, shall provide for the defense of an insured in all litigation consisting of actions or proceedings commenced against such insured, or defenses, restraining orders or injunctions interposed against a foreclosure of the insured mortgage or a defense interposed against an insured in an action to enforce a contract for a sale of the estate or interest in said land, to the extent that such litigation is founded upon an alleged defect, lien, encumbrance, or other matter insured against by this policy. n278

This provision appears to require the insurer to defend in cases: (1) where the insured is being sued and the action is based on an adverse claim covered by the policy, or (2) where the insured is suing (such as in an action for specific performance of a real estate sales contract) a defendant who raises a covered title defect as a defense (such as a claim that title is unmarketable). There is no express language in the 1970 ALTA policy forms which requires the insurer to quiet or cure title in the absence of a lawsuit.

In the 1992 ALTA policy forms, the provision obligating the insured to defend contains a substantially different

statement of the title defense obligation:

> Upon written request by the insured ... , the Company, at its own cost and without unreasonable delay, shall provide for the defense of an insured in litigation in which any third party asserts a claim adverse to the title or interest as insured, but only as to those stated causes of action alleging a defect, lien or encumbrance or other matter insured against by this policy. n279

This revised language in the 1990 form appears to limit expressly the obligation to defend exclusively to those claims which are covered by the policy. n280

Other policy provisions generally give the insurer the right to control any title defense litigation. n281 The 1970 ALTA policy forms did not, however, contain a provision giving the title insurer an express right to select title defense counsel. n282 In contrast, the 1992 ALTA policy forms give the insurer an express, qualified right to select counsel:

> The Company shall have the right to select counsel of its choice (subject to the right of the insured to object for reasonable cause) to represent the insured as to those stated causes of action and shall not be liable for and will not pay the fees of any other counsel. n283

The selection of counsel is a potentially serious matter because the interests of the insured and insurer may come into conflict. Even if the insurer has a general right to control any title litigation, the insurer may be required to provide independent counsel to the insured in the event of a conflict of interest between the insurer and the insured. n284

When the insured requests a defense, the title insurer has a number of alternatives which include the following:

1. Defend the title in litigation (with or without a reservation of rights); n285

2. Bring a declaratory judgment action to determine whether the insurer is obligated to defend while the insurer defends with a reservation of rights;

3. Take affirmative action to clear the title through whatever means may be available;

4. Pay the insured the lesser of the amount of any loss or the maximum amount of insurance stated in Schedule A; or

5. Refuse to defend on the ground that no action is required.

The last alternative may be a risky choice for the insurer. By not defending, the insurer gives up its right to control the title litigation. If the insurer refuses to defend, it may be bound by an adverse determination which could have been avoided if the insurer had defended the insured. Furthermore, the insurer may be liable for damages based on a claim of a breach of the duty to defend. Such a liability may not be serious if the damages are limited to what the insurer might have spent anyway defending and indemnifying the insured. The insurer's breach, however, may result in tort liability for consequential damages for which it would not generally be responsible under the terms of the policy. n286 Furthermore, if an insurer wrongfully refuses to defend, it may be liable to satisfy a judgment for which it would not have been responsible, had the insurer defended the action. n287 In cases where the breach of the duty to defend is found to have been intentional and particularly egregious, punitive damages may be assessed. Unless it is very clear that the insurer is not obligated to defend, the insurer is well advised to provide a defense while reserving its rights if the insurer thinks that the matter involved is not covered by the policy.

A title insurer is not obligated to defend when the basis of the adverse claim is not covered by the policy. n288 The insurer may, however, be obligated to defend if a formal claim against the insured alleges facts which are within the

coverage of the policy, even if the actual facts are different than those alleged. n289 It is frequently difficult or even impossible to determine if an adverse claim is covered by the title policy when the claim is asserted because title insurance and real property title problems are often difficult or complex. Necessarily, the obligation to defend has to be determined at the time that the adverse claim is first asserted and not when it is finally resolved. It would be absurd and contrary to the intent of the parties to require the insured under a title insurance contract to prove that the insurer will be obligated to indemnify the insured before the duty to defend arises. As a result, the duty to defend is a broader obligation than the insurer's ultimate liability under its duty to indemnify. n290

Generally, courts construe language describing the obligation to defend broadly and in accordance with the principle that ambiguities should be construed against the insurer. n291 The promise to defend is a promise to provide a service separate and distinct from the promise to indemnify the insured for covered losses. The reasonable expectations of the insured, regarding when this separate and distinct defense service would be provided, has guided the courts in these cases. n292 The title insurer's "duty to defend encompasses all claims potentially within the policy's coverage." n293

In Ticor Title Insurance Co. v. American Resources, Ltd., n294 a mortgagee purported to release an unrecorded mortgage by an unrecorded release. Later the mortgagee sued (among others) a participant in the insured joint venture, claiming that the release was obtained unfairly or fraudulently and seeking reinstatement of the mortgage. n295 The defendant requested the insurer to defend. The insurer elected to defend under a reservation of rights, but it also initiated a declaratory judgment action seeking to establish that it had no duty to defend or indemnify the insured.

The trial court granted summary judgment to the insurer, and the defendant appealed. The court of appeals reversed. The title insurance company relied on two principal arguments to support its claim that it was not obligated to defend. First, the trial court found that a settlement agreement between the mortgagee and the participants in the joint venture, including the defendant, meant that there was "no real possibility" that the defendant would face damages as a result of the litigation concerning whether the release of the mortgage was fraudulent or unfair. The insurer argued that since it was not possible for the insured to suffer a loss based on the title claim, the insured defendant no longer had an insurable interest. The court rejected this argument, stating:

> An insurer is not relieved of its duty to defend against a claim merely because the insured may be entitled to assert a valid affirmative defense such as the 1986 settlement agreement. Rather, we look to the face of the underlying complaint and try to determine therefrom whether any of the alleged claims fall within the title policy's coverage. n296

The court also stated:

> We observe that adoption of Ticor's [the insurer's] view would mean that an insured would have to defend itself in all situations where there exists an affirmative defense under a title insurance policy. For example, the insured would have to raise the defense of the statute of limitations, or, as in this case, a release or settlement agreement. Such a result is inconsistent with title insurance law. n297

The court also observed that an insurer may be obligated to defend frivolous, meritless, or false claims even though there is "no real possibility" of the insured being held liable for damages. n298

The insurer's second principal argument was that the defendant was not covered because it knowingly created a title defect when the defendant mortgaged the property and later obtained the release. Therefore, the insurer argued, the exclusion for non-record defects created by the insured and not disclosed to the insurer applied to preclude coverage. The court disagreed. After stating that the court had to assume that the release of the mortgage was valid for purposes of summary judgment, the court said:

> [T]he determination whether a duty to defend exists should not be made dependent on how the court anticipates the underlying dispute between the insured and the party suing will be resolved. Courts must not be lured into adjudicating the merits of that underlying dispute when deciding the threshold issue of the insurance company's duty to defend. Where genuine issues of disputed fact exist regarding the underlying events, the threshold question must be resolved on the basis of the factual version which supports coverage. n299

However, where the facts alleged in the adverse claim establish that the claim is specifically excluded or not covered, the insurer is not obliged to defend. n300

Current ALTA policy forms state that an insurer may terminate its obligation to defend by paying the insured claimant the amount of insurance stated in Schedule A "together with any costs, attorneys' fees and expenses incurred by the insured claimant, which were authorized by the Company, up to the time of [such] payment... ." n301 A similar provision was held effective to relieve a title insurer of the obligation to defend where the face amount of the policy was tendered to the insureds. n302

In some cases, it may be financially advantageous for the insurer to promptly tender the maximum amount stated in Schedule A to the insured because the insurer's maximum exposure under ALTA policy forms is that amount plus covered title defense expenses. If it appears likely that a claim will equal or exceed the amount stated in Schedule A, the most advantageous course for the insurer may be to "bail out" of the case before title defense expenses mount. It is possible, however, that some courts may not be willing to allow insurers to escape title defense liability so readily in this manner.

Title policies expressly require the insurer to defend in pending litigation where an adverse claim has been asserted against the title. There is no express obligation that requires the insurer to initiate litigation or other measures to quiet or cure title in the absence of a lawsuit. It is not unreasonable, however, to infer from policy language that the insurer is obligated to initiate measures to clear title under certain circumstances. The conditions and stipulations that give the insurance company the right to control title litigation refer to actions that the company may "institute and prosecute" n303 and cases where the company is permitted or required "to prosecute or provide for the defense of any action... ." n304

In Lawyers Title Insurance Corporation v. McKee, n305 the claimants were in adverse possession of the disputed land. If an action to remove them was not initiated, it was possible that the claimants could have eventually prevailed as adverse possessors without regard to the merits of the underlying claim. The insured requested that the title insurance company clear the title, and it refused. The insured then brought an action against the adverse claimants to try the title while continuously providing the insurer with information about the litigation and demanding that the insurer defend the insured's title. At the conclusion of the title action, the court entered a judgment validating the adverse claim and divesting the insured of his claim of title to the disputed land. The insured then sued the title company seeking to recover, among other items, costs incurred in prosecuting the unsuccessful action to try the title. The court held that the title company had been obligated to defend the insured's title by prosecuting the action against the adverse claimants:

> Plaintiff [the insured], being out of possession, stood in peril of losing the title by limitations if he did nothing, and was compelled to prosecute the suit so filed by bringing it to trial and obtaining an adjudication of his title. This was also necessary if plaintiff was to lay a predicate for his suit against the company under the policy, unless he was willing to forget his trespass to try title suit and in suit against the company assume the burden of proving that the Nash heirs' [adverse claimants'] title was superior to his own. n306

Jarchow v. Transamerica Title Insurance Co. n307 also held that a title insurer had an affirmative obligation to clear title, even though the adverse claimants were not suing the insureds and no covered title defect was being asserted as a defense in an action brought by the insureds. In *Jarchow*, the adverse parties claimed an easement of right of way over the subject property. Instead of asserting this claim in a lawsuit against the insureds, the claimants persuaded the city planning commission to restrict the insureds' proposed development so that the claimed easement would be kept open. n308

A title insurer should not be required to take affirmative steps to clear title in every case where a covered adverse claim comes to light. An insured should not expect the title insurer to act until an obligation to clear title has matured. If loss has occurred or is imminent, the insurer may be bound to act, but title insurers do not guarantee that title is clear. Instead, title insurers undertake to indemnify insureds for covered losses. Once the insured has performed the policy obligation of notifying the insurer of adverse claims, the insurer should have some discretion in determining when and what action may be required in a particular case. Sometimes, the wisest approach to a title problem is to do nothing. With the passage of time, an adverse claim may be extinguished by, for instance, a statute of limitations or a marketable title act. Taking prompt action may notify an unaware claimant of a claim. Additionally, because title insurers do not undertake to guarantee that title is good, insecurity or anxiety in the mind of the insured should not by itself trigger a duty for an insurer to act affirmatively to clear title in the absence of present or impending economic impact. n309

§ 93.05(c)(1) The Insurer's Obligation to Defend Covered Grounds.

A person insured under a liability insurance policy may be sued by a plaintiff alleging both covered and non-covered grounds for recovery. For example, a defendant may be sued for violations of anti-discrimination laws and a tort. n310 If the defendant's liability insurer is obligated by the policy to defend the tort claim and not the discrimination claim, the addition of the discrimination claim will not relieve the insurer of the obligation to defend the tort claim. n311

§ 93.05(c)(2) The Insurer's Obligation to Defend Non-Covered Grounds.

While it is clear that the insurer has to defend the covered claim, the authorities disagree on whether the insurer has to bear the cost of defending the non-covered claim as well. Some cases follow the "in for one, in for all" rule holding that the insurer is obligated to defend the entire action including any non-covered claims. n312 Other cases hold that the insurer need only pay the costs of defending the covered claims where the costs of defense may be apportioned between covered and non-covered claims. n313

Few reported title insurance cases deal with the problem whether the "in for one, in for all" rule applies to suits involving title insurance. Generally, this problem could be resolved by a policy provision subject to the usual rule of strict construction of any ambiguity. The 1970 ALTA policy forms contained no specific language addressing the problem. The forms stated that the company was obligated to defend title litigation: "... to the extent that such litigation is founded upon an alleged defect, lien, encumbrance, or other matter insured against by this policy." n314 Arguably, the words "to the extent that" are ambiguous because they could refer to claims covered by the policy in an action involving other claims or any litigation which is founded on matters covered by the policy. In interpreting this language, some courts have followed the "in for one, in for all" rule while others have not.

In *Enron Corporation v. Lawyers Title Insurance Corporation*, n315 the insured mortgagee foreclosed its mortgage. Lienholders defended on two grounds: (1) that their lien was actually prior to the plaintiff's, and (2) that another lien was a sham because its holder and the plaintiff were actually one and the same. The title insurer defended the priority claim, and separate counsel for the insured defended the sham lien claim which was not shown to be covered by the policy. After a settlement was reached, the insured submitted a claim to the title insurer for the expenses of its separate counsel. When the insurer refused to pay on the ground that the claim defended against was not covered by the policy, the insured sued the title insurer.

The trial court, following the "in for one, in for all" rule, held for the insured. The court of appeals reversed, stating:

> ... courts have taken a strong stand against holding insurers liable for the defense costs of claims their policies do not cover, even when those claims are joined with covered claims. For example, the Fifth Circuit has joined the Sixth Circuit in holding that an insurer should be held liable for the defense of covered and uncovered claims only where "there is no reasonable means of prorating the costs of defense between the covered and not-covered items." n316

The ALTA 1992 Policy Forms contain the following language: "The Company will not pay any fees, costs or expenses incurred by the insured in the defense of those causes of action which allege matters not insured against by this policy." n317 This provision is an apparent attempt to limit the insurer's liability for defense costs to expenses incurred in defending covered claims. Whether the provision will accomplish its objective remains to be seen.

§ 93.05(d) Subrogation.

American Land Title Association (ALTA) Forms contain express subrogation clauses. n318 The clauses provides that if the insurer makes a payment on a claim to an insured claimant, the insurer is subrogated to the rights the insured claimant may have had against third parties with respect to the claim. For example, if the insurer settles a claim based on a title defect which may have been a breach of a deed warranty in the deed to the insured claimant from the insured claimant's grantor, the insurer is subrogated to the insured claimant's rights against the grantor under the deed. Through these rights, the insurer may be able to shift at least some of the claim settlement costs to the third-party grantor.

The insurer paying a claim might be entitled to subrogation to the rights of the insured claimant under general law even if no express subrogation right were contained in the policy. n319

The express clause, however, makes the insurer's case for subrogation stronger. The ALTA Subrogation Clause also states that the insurer will be relieved of its liability to the extent that the acts of the insured claimant impair the insurer's rights to subrogation. Courts have not been very sympathetic toward the claims of title insurers that their rights of subrogation have been impaired by their insureds. n320

§ 93.05(e) Arbitration of Claims.

In the 1980s, title insurance company litigation costs in handling claims increased significantly. Since 1987, the conditions and stipulations of ALTA policy forms have contained an arbitration clause. n321 The New York Board of Title Underwriters policy form has contained an arbitration clause in its Payment of Loss provision for many years. n322 The arbitration clause was added to ALTA forms in the hope that it would help to control both litigation costs and the amount of time taken to dispose of claims. n323 Under the clause, where the amount of insurance stated in Schedule A is $1,000,000 or less, any arbitrable dispute between the insured and the insurer may be submitted to arbitration at the option of either, unless prohibited by law. Where the amount of insurance is greater than $1,000,000, both parties must agree to submit the dispute to arbitration. Since its adoption, the ALTA Arbitration Clause has not actually been invoked very often by title insurers or attorneys for claimants. n324

§ 93.05(f) Measurement of Losses Under Title Insurance Policies.

Measurement of a mortgagee's loss under a loan policy where title to its mortgage is defective is fairly complex. The title insurer does not guarantee that the obligation secured by the mortgage will be performed. The insurer does not guarantee that the property will be adequate security. The insurer does, however, undertake to indemnify the mortgagee if a covered title defect causes the insured to suffer an economic loss. Therefore, if the real estate security turns out to be inadequate for reasons not involving the title to the insured mortgage, the insurer is not liable. If the title to the insured mortgage fails--totally or partially-- the insurer is not liable if the insured mortgagee is fully paid. If the mortgagee receives only partial satisfaction, the insurer is liable only to the extent that the deficiency is attributable to the failure of

the title to be as it was insured in the loan policy. n325 Under owners' policies, the measurement of losses presents somewhat different problems.

One of the conditions and stipulations in the ALTA owner's policy form purports to limit the maximum liability of the title insurer under the policy, in addition to covered litigation expenses, to the lesser of (a) the amount of insurance stated in Schedule A, or (b) the difference between the value of the insured property as insured over its value subject to the title defect or encumbrance covered by the policy. n326 Prior to 1987, ALTA forms defined the upper limit of the company's liability under the policy as the lesser of the amount of insurance or the "actual loss" of the insured claimant. n327

When an insured owner suffers a total loss of title, the measure of the insured's loss is the value of the entire property. In most cases, this will at least equal the maximum amount of insurance stated in Schedule A. When the insured's loss is partial, there are two basic approaches to measuring the loss: (1) the diminution in value of the property caused by the covered defect or encumbrance, or (2) the cost of removing the defect or encumbrance to make the title as it was insured to be. n328 The second alternative is available only when it is feasible to remove the defect or encumbrance. n329 The most recent ALTA policy language appears to express a preference for the first approach.

The ALTA policy forms have never specified a valuation date for partial losses. Where a difference in value or diminution in value approach is used to measure an insured's loss, the loss may vary greatly with the valuation dates used. For example, in Overholtzer v. Northern Counties Title Ins. Co., when the title policy was issued, the subject property was being used for agricultural purposes. When an easement covered by the policy was discovered, the property was being used for industrial purposes. The easement diminished the value of the property for industrial use by at least $15,000. In contrast, using the value of the property for agricultural uses, the easement was found to have diminished the value of the property by only $1,000. n330

A majority of the courts that have considered the valuation date problem prefer to use the date on which the defect was discovered. n331 Other dates, however, have been used, including the date of purchase, the date of the policy, the date the insured contracted to resell, and the date of trial. n332

COMPUTER-ASSISTED RESEARCH

LEXIS: "operation of law" and "title insurance" (attorney or lawyer) w/20 abstract and "title insurance" "title insurance commitment" (search or examination w/20 neglig! w/50 title misrepresent! w/20 neglig! w/20 title

FOOTNOTES:

(n1)Footnote 184. ALTA Loan Policy Forms also have a stipulation which continues coverage in favor of the insured mortgagee after it has acquired title to the property.

(n2)Footnote 185. ALTA 1992 Loan Policy Form, Condition and Stipulation 1(a)(i).

(n3)Footnote 186. ALTA 1992 Loan Policy Form, Condition and Stipulation 1(a)(i).

(n4)Footnote 187. ALTA 1992 Loan Policy Form, Condition and Stipulation 1(a)(i). The 1970 ALTA Loan Policy does not contain this specific provision. Defenses against purchaser successors are reserved with no exception for purchasers without knowledge of the adverse claim. *See* ALTA 1970 Loan Policy Form, Condition and Stipulation 1(a).

(n5)Footnote 188. *See supra*, note 80.

(n6)Footnote 189. *383 So. 2d 936 (Fla. App. 1980),* discussed in Daniel E. Murray, *1980 Developments in Florida Law: Part One, Commercial Law, 35 U. Miami L. Rev. 465 (1981).*

(n7)Footnote 190. *Capital Am., Inc. v. Industrial Discounts, Inc., 383 So. 2d 936, 938 (Fla. App. 1980). Steinle v. Knowles, 961 P.2d 1228 (Kan. 1998)* (policy purchased by vendor who took back mortgage from purchaser only covered insured as lender and not in capacity as vendor).

(n8)Footnote 191. 1992 ALTA Owner's Policy, Condition and Stipulation 1(a).

(n9)Footnote 192. It is not clear whether such donees are "insureds" within the meaning of the policy definition. *See Pioneer Nat'l Title Ins. Co. v. Child, Inc., 401 A.2d 68, 70 (Del. 1979);* Michael J. Rooney, Attorneys' Guide to Title Insurance 4-21 (Illinois Institute For Continuing Legal Education 1984).

(n10)Footnote 193. *401 A.2d 68, 70 (Del. 1979).*

(n11)Footnote 194. *445 A.2d 1174, 1179 (N.J. Super. 1981),* decision that appellant was insured by the policy, *aff'd, 464 A.2d 1177 (N.J. Super. 1983).*

(n12)Footnote 195. *Pioneer Nat'l Title Ins. Co. v. Child, Inc., 401 A.2d 68, 70 (Del. 1979),* citing *Black's Law Dictionary*.

(n13)Footnote 196. *Historic Smithville Dev. Co. v. Chelsea Title & Guar. Co., 445 A.2d 1174, 1179 (N.J. Super. 1981),* decision that appellant was insured by the policy, *aff'd, 464 A.2d 1177 (N.J. Super. 1983).* These transfers may not be "truly automatic" either, where the heir or surviving tenant may disclaim the property.

(n14)Footnote 197. *Child, Inc. v. Rodgers, 377 A.2d 374, 376 (Del. 1977).* The alleged defect was a restrictive covenant. *Id.*

(n15)Footnote 198. *Pioneer Nat'l Title Ins. Co. v. Child, Inc., 401 A.2d 68, 70 (Del. 1979).* To be "ambiguous" in the ordinary sense, a term does not have to have two or more meanings, usually, a lack of clarity is all that is required.

(n16)Footnote 199. *445 A.2d 1174, 1179 (N.J. Super. Ct. Ch. Div. 1981),* decision that appellant was insured by the policy, *aff'd, 464 A.2d 1177 (N.J. Super. Ct. App. Div. 1983).*

(n17)Footnote 200. *Historic Smithville Development Co. v. Chelsea Title & Guaranty Co., 445 A.2d 1174, 1179 (N.J. Super. Ct. Ch. Div. 1981),* decision that appellant was insured by the policy, *aff'd, 464 A.2d 1177 (N.J. Super. Ct. App. Div. 1983).*

(n18)Footnote 201. If the members of the groups had their way, there would have been no question that the transfer was a "purchase" of the real estate and it would have been clear that the members were not "insureds" within the meaning of the Chelsea Title & Guaranty Co. title policy.

(n19)Footnote 202. *401 A.2d 68, 70 (Del. 1979).*

(n20)Footnote 203. *445 A.2d 1174, 1179 (N.J. Super. Ct. Ch. Div. 1981),* decision that appellant was insured by the policy, *aff'd, 464 A.2d 1177 (N.J. Super. Ct. App. Div. 1983).*

(n21)Footnote 204. *445 A.2d 1174, 1180 (N.J. Super. Ct. Ch. Div. 1981),* decision that appellant was insured by the policy, *aff'd, 464 A.2d 1177 (N.J. Super. Ct. App. Div. 1983).*

(n22)Footnote 205. *Historic Smithville Dev. Co. v. Chelsea Title & Guar. Co., 445 A.2d 1174, 1181 (N.J. Super. Ct. Ch. Div. 1981)* (emphasis in original), decision that appellant was insured by the policy, *aff'd, 464 A.2d 1177 (N.J. Super. Ct. App. Div. 1983).*

(n23)Footnote 206. ALTA 1992 Owner's and Loan Policy Forms, Condition and Stipulation (1)(a).

(n24)Footnote 207. ALTA 1992 Owner's and Loan Policy Forms, Condition and Stipulation (1)(a).

(n25)Footnote 208. James M. Pedowitz, *Twenty Common Questions About Title Insurance, in* Practicing Law Institute, Title Insurance 1990: the Basics and Beyond 49 (1990).

(n26)Footnote 209. James M. Pedowitz, *Twenty Common Questions About Title Insurance, in* Practicing Law Institute, Title Insurance 1990: the Basics and Beyond 49 (1990).

(n27)Footnote 210. *Hawkins v. Oakland Title Ins. & Guar. Co., 331 P.2d 742 (Cal. App. 1958).*

(n28)Footnote 211. Marc Weinrich, *Commercial Transactions: Who Does the Title Insurance Cover?, 6 Prob. & Prop. 42, 43 & 46* (Mar./Apr. 1992).

(n29)Footnote 212. Marc Weinrich, *Commercial Transactions: Who Does the Title Insurance Cover?, 6 Prob. & Prop. 42, 43 & 44* (Mar./Apr. 1992).

(n30)Footnote 213. Raymond J. Werner, *The Basics of Title Insurance, in* A.B.A., Section of Real Property, Probate and Trust Law, Title Insurance: The Lawyer's Expanding Role 43 (James M. Pedowitz ed. 1985).

(n31)Footnote 214. *621 F. Supp. 120 (N.D. Ohio 1985).*

(n32)Footnote 215. Marc Weinrich, *Commercial Transactions: Who Does the Title Insurance Cover?, 6 Prob. & Prop. 42, 46* (Mar./Apr. 1992).

(n33)Footnote 216. Marc Weinrich, *Commercial Transactions: Who Does the Title Insurance Cover?, 6 Prob. & Prop. 42, 46* (Mar./Apr. 1992).

(n34)Footnote 217. Marc Weinrich, *Commercial Transactions: Who Does the Title Insurance Cover?, 6 Prob. & Prop. 42, 46* (Mar./Apr. 1992).

(n35)Footnote 218. *560 P.2d 839 (Colo. App. 1977).*

(n36)Footnote 219. *Spellings v. Lawyers Title Ins. Corp., 644 S.W.2d 804 (Tex. App. 1982).*

(n37)Footnote 220. *Ticor Title Ins. Co. v. American Resources, Ltd., 859 F.2d 772 (9th Cir. 1988)* (applying language in a loan policy under Hawaiian law).

(n38)Footnote 221. *Ticor Title Ins. Co. v. American Resources, Ltd., 859 F.2d 772, 774 (9th Cir. 1988).*

(n39)Footnote 222. *See generally, Calamari v. Grace, 469 N.Y.S.2d 942 (1983);* John Platt, Comment, *Does A Title Insurer Qua Title Insurer Owe A Duty To Any But Its Insured?, 7 Okla. City U. L. Rev. 293 (1982).*

(n40)Footnote 223. *See, e.g.*, Dale A. Whitman, *Optimizing Land Title Assurance Systems, 42 Geo. Wash. L. Rev. 40, 51 (1973).*

(n41)Footnote 224. Raymond J. Werner, *The Basics of Title Insurance, in* A.B.A., Section of Real Property, Probate and Trust Law, Title Insurance: the Lawyer's Expanding Role 39 (James M. Pedowitz ed., 1985).

(n42)Footnote 225. Under current policy language, it is theoretically possible that a title insurer might insure a perpetual string of heirs, devisees and others who take by "operation of law" as distinct from purchase. The possibility is more theoretical than real in today's mobile society where transfers of real estate are frequent. The coverage of transferees "by operation of law" under current policies "also affects the inability of title insurers to obtain reinsurance from insurance carriers whose business is other than title insurance." James M. Pedowitz, *Twenty Common Questions*

About Title Insurance, in Practicing Law Institute, Title Insurance 1990: the Basics and Beyond 51-52 (1990).

(n43)Footnote 226. Purchasers also sometimes mistakenly believe that their titles are insured by their lenders' loan policies. *See Ortego v. First Am. Title Ins. Co., 569 So. 2d 101, 106 (La. App. 1990)* (holding that a mortgagee's loan policy did not cover the purchaser who had an opportunity to purchase coverage was refused). *Siegel v. Fidelity Nat'l Title Ins. Co., 54 Cal. Rptr. 2d 84 (1996).*

(n44)Footnote 227. Perhaps for this reason some owner's policies contain the following statement on the first page in a prominent place: IMPORTANT This policy necessarily relates solely to the title as of the date of the policy. In order that a purchaser of the real estate described herein may be insured against defects, liens or encumbrances, this policy should be reissued in the name of such purchaser." Chicago Title Ins. Co., ALTA Owner's Policy Form B-1970 (Amended 10-17-70).

(n45)Footnote 228. ALTA 1992 Owner's Policy Form, Condition and Stipulation 7. Where the policy insures an owner, the title company normally requires the amount of insurance in Schedule A to be at least equal to the purchase price for the property. If the policy insures the title to a mortgage securing a loan, the insurer normally requires the amount of insurance to be at least equal to the amount of the loan.

(n46)Footnote 229. D. Barlow Burke, Jr., Law of Title Insurance § 14.7 (1986). Inflation coverage has been offered by some title insurers since 1974. Such coverage may be in the policy or an endorsement to it. *Id.* Without such coverage, the owner becomes more and more underinsured, as the value of the property increases or inflates.

(n47)Footnote 230. *See, e.g.,* ALTA 1992 Owner's Policy Form, Condition and Stipulation 7(a): "The liability of the Company under this policy shall not exceed ... (ii) the difference between the value of the insured estate or interest as insured and the value of the insured estate or interest subject to the defect, lien or encumbrance insured against by this policy."

(n48)Footnote 231. *See, e.g., Devlin v. First Am. Title Ins. Co., 641 P.2d 1094 (N.M. App. 1982).*

(n49)Footnote 232. *See* Comment, *Title Insurance: Recovery for Emotional Distress for Wrongful Failure to Defend, 1976 B.Y.U. L. Rev. 895.*

(n50)Footnote 233. *See* Comment, *Title Insurance: The Duty to Search, 71 Yale L.J. 1161, 1162-1163 (1962).*

(n51)Footnote 234. One of most successful cases against a title insurer based on both implied contract and tort theories was *Jarchow v. Transamerica Title Ins. Co., 122 Cal. Rptr. 470 (1975). Jarchow* was effectively overruled by legislation. *Southland Title Corp. v. Superior Ct., 282 Cal. Rptr. 425 (1991).*

(n52)Footnote 235. *656 F.2d 381 (8th Cir. 1981)* (applying Arkansas law).

(n53)Footnote 236. For example, suppose the record reveals a mortgage that encumbered the title followed by a recorded release. The abstractor will summarize both the mortgage and the release.

(n54)Footnote 237. For example, the attorney may determine that a mortgage no longer encumbers the title because of an effective release.

(n55)Footnote 238. *See, e.g.,* Alaska Stat. § 21.66.170 (requiring a "reasonable search and examination of title"); Colo. Rev. Stat. § 10-11-106 (requiring "a reasonable examination of the title" and "a determination of insurability of title in accordance with sound underwriting practices"); Tex. Ins. Code Ann. § 9.34 (requiring a search and "a determination of insurability of title in accordance with sound underwriting practices"); and Wyo. Stat. § 26-28-101 (requiring a title policy to be "based upon adequate evidence of the current condition of title"). These statutes were lobbied for by title insurers to prohibit "casualty" title insurance from being written. So-called "casualty" title insurers

issue title policies without examining the title involved. Few, if any, casualty title policies are being written in the areas where the practice is allowed under statutes and regulations.

(n56)Footnote 239. D. Barlow Burke, Jr., Law of Title Insurance § 12.3 (1986).

(n57)Footnote 240. *See, e.g., Jarchow v. Transamerica Title Ins. Co., 122 Cal. Rptr. 470, 479-80 (1975); Malinak v. Safeco Title Ins. Co., 661 P.2d 12, 15 (Mont. 1983);* Susan M. Stanley, Comment, *Washington Title Insurers' Duty To Search And Disclose*, 4 U. Puget Sound L. Rev. 212, 214 (1980).

(n58)Footnote 241. *In Malinak v. Safeco Title Ins. Co., 661 P.2d 12 (Mont. 1983),* the commitment contained the following statement: "This Commitment is further conditioned by the conditions and stipulation and exclusions from coverage of the basic form of the policy or policies committed to be issued. The examination of the public records made by Company as to the land set out in schedule A was made wholly for determining the insurability of the title to said land and not for reporting on the condition of the record." *Malinak v. Safeco Title Ins. Co., 661 P.2d 12, 15 (Mont. 1983).*

(n59)Footnote 242. *Bank of Cal. v. First American Title Ins. Co., 826 P.2d 1126 (Alaska 1992);* Joyce Dickey Palomar,*Title Insurance Companies' Liability For Failure To Search Title And Disclose Record Title, 20 Creighton L. Rev. 455, 491-492 (1987).*

(n60)Footnote 243. Joyce Dickey Palomar,*Title Insurance Companies' Liability For Failure To Search Title And Disclose Record Title, 20 Creighton L. Rev. 455, 492 (1987); Brown's Tie & Lumber Co. v. Chicago Title Co., 764 P.2d 423 (Idaho 1988);* and *Walker Rogge, Inc. v. Chelsea Title & Guar. Co., 562 A.2d 208 (N.J. 1989). Citibank, N.A. v. Chicago Title Ins. Co., 632 N.Y.S.2d 779 (1995)* (the mortgagee could recover under the policy only to the extent of the loss in value of its title as a result of the defects covered by the policy).

(n61)Footnote 244. *See Walters v. Marler, 147 Cal. Rptr. 655 (1978); Sherrill v. Louisville Title Ins. Co., 214 S.E.2d 410 (Ga. App. 1975); Gaines v. American Title Ins. Co., 220 S.E.2d 469 (Ga. App. 1975);* and John Platt, Comment, *Does A Title Insurer Qua Title Insurer Owe A Duty To Any But Its Insured?, 7 Okla. City U. L. Rev. 293 (1982).* However, in *Spellings v. Lawyers Title Ins. Corp., 644 S.W.2d 804 (Tex. App. 1982),* the title policy named a trustee holding title to the land in trust as the "insured." The court held that the beneficiaries of the trust were entitled to sue the title insurer directly on the basis that they were third-party beneficiaries of the contract of insurance.

(n62)Footnote 245. Courts in a few cases have found an express undertaking to search and examine title in title insurance documents. *See* Joyce Dickey Palomar, *Title Insurance Companies' Liability For Failure To Search Title And Disclose Record Title, 20 Creighton L. Rev. 455, 470-472 (1987).*

(n63)Footnote 246. *See* Joyce Dickey Palomar, *Title Insurance Companies' Liability For Failure To Search Title And Disclose Record Title, 20 Creighton L. Rev. 455, 472 (1987).*

(n64)Footnote 247. *See* Joyce Dickey Palomar, *Title Insurance Companies' Liability For Failure To Search Title And Disclose Record Title, 20 Creighton L. Rev. 455, 473 (1987).* The basis for liability in *Jarchow v. Transamerica Title Ins. Co., 122 Cal. Rptr. 470 (Cal. Ct. App. 1975),* was tort, not implied contract. However, the *Jarchow* court stated that the insurer assumed the responsibilities of an abstractor by presenting the preliminary title report: "When a title insurer presents a buyer with both a preliminary title report and a policy of title insurance, two distinct responsibilities are assumed. In rendering the first service, the insurer serves as an abstractor of title and must list *all* matters of public record regarding the subject property in its preliminary report." *Id. at 485.* In 1981, the California Insurance Code was amended to include the following statement: "'Preliminary report', 'commitment', or 'binder' are reports furnished in connection with an application for title insurance... . The reports are not abstracts of title, nor are any of the rights, duties or responsibilities applicable to the preparation and issuance of an abstract of title applicable to the issuance of any report." Cal. Ins. Code § 12340.11.

(n65)Footnote 248. Joyce Dickey Palomar, *Title Insurance Companies' Liability For Failure To Search Title And Disclose Record Title, 20 Creighton L. Rev. 455, 474 (1987).* "This Commitment is preliminary to the issuance of such policy or policies of title insurance and all liability and obligations hereunder shall cease and terminate six months after the Effective Date hereof or when the policy or policies committed for shall issue... ." Attorneys' Title Guaranty Fund, Inc. (Illinois), Fund Form 100, Commitment to Insure Title (Rev. May 1983).

(n66)Footnote 249. Joyce Dickey Palomar, *Title Insurance Companies' Liability For Failure To Search Title And Disclose Record Title, 20 Creighton L. Rev. 455, 475 n.94 (1987).*

(n67)Footnote 250. Joyce Dickey Palomar, *Title Insurance Companies' Liability For Failure To Search Title And Disclose Record Title, 20 Creighton L. Rev. 455, 477 (1987).*

(n68)Footnote 251. *122 Cal. Rptr. 470 (1975).*

(n69)Footnote 252. *122 Cal. Rptr. 470, 477 (1975).* The attempt to create an "easement on an easement" may have appeared to the title insurer to be so obviously ineffective under California law that no encumbrance existed. *See Myers v. Berven, 137 P. 260 (Cal. 1913); Galletly v. Bockius, 82 P. 1109 (Cal. 1905).* The owner of the servient tenement may grant additional easements if such easements and their use do not interfere with the use and enjoyment of a prior easement. *Pasadena v. California-Michigan Land & Water Co., 110 P.2d 983 (Cal. 1941).* The owner of the easement, however, has no right to grant additional easements in the original easement without the consent or authorization of the owner of the servient tenement. The failure of Transamerica to report the existence of the obviously invalid Perez easement claim may have been unwise but it was hardly "inexplicable."

(n70)Footnote 253. The title insurer was probably obligated to defend the title by taking some action to clear it of the Perez claim. However, because the Perez claim was so obviously invalid, it is arguable that it was not an "encumbrance on title" within the meaning of the 2nd Insuring Clause in the California Land Title Association Standard Coverage Policy. The insurer erred--especially when its failure to act is viewed from hindsight--in refusing to clear title but its position was not "fatuous," as the court described it.

(n71)Footnote 254. The Hill claim was found to have resulted in "substantial damages." However, no monetary amount was specified in this finding. While the action was pending, Transamerica obtained a release of the Hill easement from the Hills' successor-in-interest.

(n72)Footnote 255. The jury also found that the plaintiffs' emotional distress was caused by the insurer's bad faith breach of the title policy in failing to take prompt action to clear the title of the Perez and Hill easement claims.

(n73)Footnote 256. *122 Cal. Rptr. 477, 485 (Cal. App. 1975)* (emphasis in original).

(n74)Footnote 257. *122 Cal. Rptr. 477, 485 (Cal. App. 1975)* (emphasis in original).

(n75)Footnote 258. Title insurers tend to be very conservative in deciding whether to report adverse claims of record as exceptions to coverage. Generally, if there is the slightest probability that the claim may be upheld or serves as a reasonable basis for litigation, it will be reported and excepted from coverage. For example, the Chicago Title Insurance Co. continued to except racially restrictive covenants from coverage for years after the United States Supreme Court held them unenforceable under the Fourteenth Amendment *in Shelley v. Kramer, 334 U.S. 1 (1948),* and *Barrows v. Jackson, 346 U.S. 249 (1953).*

(n76)Footnote 259. Cal. Ins. Code § 12340.11. Title insurers may be willing to prepare true abstracts of title for those willing to pay for them. In the author's geographical region (northeastern Illinois), title insurance customers rarely request this service.

(n77)Footnote 260. *282 Cal. Rptr. 425 (1991).*

(n78)Footnote 261. *Southland Title Corporation v. Superior Court of California, 282 Cal. Rptr. 425, 427 n.2 (1991).*

(n79)Footnote 262. *See, e.g., Moore v. Title Ins. Co., 714 P.2d 1303 (Ariz. App. 1985); Ford v. Guar. Abstract & Title Co., 553 P.2d 254 (Kan. 1976); Malinak v. Safeco Title Ins. Co., 661 P.2d 12 (Mont. 1983); Heyd v. Chicago Title Ins. Co., 354 N.W.2d 154 (Neb. 1984).* Cases taking the position that a title insurer is not an abstractor include *Booth v. New Jersey Hwy. Auth., 159 A.2d 460 (N.J. Super. 1960); Anderson v. Title Ins. Co., 655 P.2d 82 (Idaho 1982); Horn v. Lawyers Title Ins. Corp., 557 P.2d 206 (N.M. 1976).*

(n80)Footnote 263. *331 P.2d 742 (Cal. App. 1958).*

(n81)Footnote 264. Joyce Dickey Palomar, *Title Insurance Companies' Liability For Failure To Search Title And Disclose Record Title, 20 Creighton L. Rev. 455, 478 (1987).*

(n82)Footnote 265. *826 P.2d 1126 (Alaska 1992).*

(n83)Footnote 266. *Howarth v. Pfeifer, 443 P.2d 39 (Alaska 1968).*

(n84)Footnote 267. *Bank of California v. First American Title Ins. Co., 826 P.2d 1126, 1129 (Alaska 1992).*

(n85)Footnote 268. *Bank of California v. First American Title Ins. Co., 826 P.2d 1126, 1130 (Alaska 1992).*

(n86)Footnote 269. *Bank of California v. First American Title Ins. Co., 826 P.2d 1126, 1130 (Alaska 1992).*

(n87)Footnote 270. *White v. Western Title Ins. Co., 221 Cal. Rptr. 509 (1985).*

(n88)Footnote 271. *See, e.g.,* Alaska Stat. § 21.66.170 (requiring a "reasonable search and examination of title"); Colo. Rev. Stat. § 10-11-106 (requiring "a reasonable examination of the title" and "a determination of insurability of title in accordance with sound underwriting practices"); Tex. Ins. Code Ann. § 9.34 (requiring a search and "a determination of insurability of title in accordance with sound underwriting practices"); and Wyo. Stat. § 26-28-101 (requiring a title policy to be "based upon adequate evidence of the current condition of title"); Quintin R. Johnstone, *Title Insurance, 66 Yale L.J. 492, 516 (1957).*

(n89)Footnote 272. *122 Cal. Rptr. 470 (Cal. App. 1975). See,* Donald A. Wochna, "Personal Property and Security Interests: The Duty to Search," *9 Probate & Property 43* (May/June 1995).

(n90)Footnote 273. *See, e.g.,* 1992 ALTA Owner's Policy Form, Condition and Stipulation 4(b).

(n91)Footnote 274. 1992 ALTA Owner's Policy Form, Condition and Stipulation 3.

(n92)Footnote 275. *Costagliola v. Lawyers Title Ins. Corp., 560 A.2d 1285, 1289 (N.J. Super. 1988).*

(n93)Footnote 276. *McLaughlin v. Attorneys' Title Guar. Fund, Inc., 378 N.E.2d 355, 360 (Ill. App. 1978).*

(n94)Footnote 277. *Moe v. Transamerica Title Ins. Co., 98 Cal. Rptr. 547 (1971).*

(n95)Footnote 278. ALTA 1970 Loan Policy Form, Condition and Stipulation 3(a). *Gebrayel v. Transamerica Title Ins. Co., 888 P.2d 83 (Or. App. 1995)* (no duty to defend with respect to claims that come within the policy exclusions).

(n96)Footnote 279. ALTA 1992 Loan Policy Form, Condition and Stipulation 4(a).

(n97)Footnote 280. Under the general insurance law of some jurisdictions, if a complaint against the insured alleges some covered claims, the insurer may be obligated to defend against all claims, including those which are not

covered. *See, e.g., Donnelly v. Transp. Ins. Co., 589 F.2d 761, 765 (4th Cir. 1978). American Title Ins. Co. v. Carter, 670 So. 2d 1115 (Fla. App. 1996),on appeal aff'd, 710 So.2d 1020 (Fla. App. 1998)* (no duty to defend); *But see, Steinle v. Knowles, 948 P.2d 670 (Kan. App. 1997)* (policy for sale of land paid for by promissory note secured by mortgage extended duty to defend to claims against validity of mortgage and duty to defend defects to title of land).

(n98)Footnote 281. *See, e.g.,* ALTA 1970 Loan Policy Form, Condition and Stipulation 3; ALTA 1990 Loan Policy Form, Condition and Stipulation 4.

(n99)Footnote 282. Condition and Stipulation 3(e) of those forms supported the proposition that the insurer had a general right to select counsel, but the right was not expressly stated: "In all cases where this policy permits or requires the Company to prosecute or provide for the defense of any action or proceeding, the insured hereunder shall secure to the Company the right to so prosecute or provide defense... ."

(n100)Footnote 283. ALTA 1992 Loan Policy Form, Condition and Stipulation 4(a).

(n101)Footnote 284. *See San Diego Navy Fed. Credit Union v. Cumis Ins. Soc'y, 208 Cal. Rptr. 494 (1984) contra, Tank v. State Fire & Cas. Co., 715 P.2d 1133 (Wash. 1986);* 69th *Street & 2nd Ave. Garage Assocs. v. Ticor Title Guar. Co., 622 N.Y.S.2d 13 (1995)* (a conflict of interest entitled the insured to counsel of its own choosing).

(n102)Footnote 285. When an insurer defends under such a reservation, it expressly reserves the right to deny that it is obligated to indemnify the insured for any losses which may result from the adverse claim. *Eliopoulos v. Nation's Title Ins. of N.Y., Inc., 912 F. Supp. 28 (N.D.N.Y. 1996)* (duty to defend did not obligate the insurer to assist the insured in efforts to remove the clouds on the title).

(n103)Footnote 286. Comment, *Title Insurance: Recovery for Emotional Distress for Wrongful Failure to Defend, 1976 B.Y.U. L. Rev. 895.*

(n104)Footnote 287. *Samson v. Transamerica Ins. Co., 178 Cal. Rptr. 343 (1981).*

(n105)Footnote 288. *Safeco Title Ins. Co. v. Moskopoulos, 172 Cal. Rptr. 248 (1981). United Bank v. Chicago Title Ins. Co., 168 F.3d 37 (1st Cir. 1999)* (where policy protected "right of access," there was no duty to defend a lawsuit regarding a breach of promise for a "deeded access"); *Penney v. Capitol City Transfer, Inc., 707 A.2d 387 (Me. 1998)* (insurer required to defend insured in trespass suit, although insurer claimed that suit was a boundary dispute not covered by policy); *Steinle v. Knowles, 948 P.2d 670 (Kan. App. 1997)* (even if possibility of coverage is remote, insurer owes duty of defense).

(n106)Footnote 289. Daniel A. Miller, Note, *The Insurer's Duty to Defend Made Absolute*: Gray v. Zurich, *14 UCLA L. Rev. 1328, 1329 (1967).*

(n107)Footnote 290. *Mattson v. St. Paul Title Ins. Co. of the South, 641 S.W.2d 16 (Ark. 1982);* 7C John Alan Appleman, Insurance Law and Practice § 4684 (Walter F. Berdal ed. 1979).

(n108)Footnote 291. *Ticor Title Ins. Co. v. American Resources, Ltd., 859 F.2d 772, 775 (9th Cir. 1988)* (applying Hawaiian law).

(n109)Footnote 292. *Ticor Title Ins. Co. v. American Resources, Ltd., 859 F.2d 772, 775 (9th Cir. 1988).*

(n110)Footnote 293. *Transamerica Title Ins. Co. v. Alaska Fed. Sav. and Loan Ass'n, 833 F.2d 775, 776 (9th Cir. 1987)* (applying Alaska law).

(n111)Footnote 294. *859 F.2d 772, 775 (9th Cir. 1988)* (applying Hawaiian law).

(n112)Footnote 295. A total of three lawsuits were eventually filed raising similar allegations.

(n113)Footnote 296. *859 F.2d 772, 774 (9th Cir. 1988).*

(n114)Footnote 297. *859 F.2d 772, 775 (9th Cir. 1988).*

(n115)Footnote 298. *859 F.2d 772, 775 n.4 (9th Cir. 1988).*

(n116)Footnote 299. *859 F.2d 772, 775-776 (9th Cir. 1988).*

(n117)Footnote 300. *Safeco Title Ins. Co. v. Moskopoulos, 172 Cal. Rptr. 248 (Cal. App. 1981).*

(n118)Footnote 301. ALTA 1992 Loan Policy Form, Condition and Stipulation 6(a)(i).

(n119)Footnote 302. *Batdorf v. Transamerica Title Ins. Co., 702 P.2d 1211 (Wash. App. 1985).*

(n120)Footnote 303. For example, *see* 1992 ALTA Loan Policy Form, Condition and Stipulation 4(b).

(n121)Footnote 304. 1992 ALTA Loan Policy Form, Condition and Stipulation 6(d).

(n122)Footnote 305. *354 S.W.2d 401 (Tex. Civ. App. 1962).*

(n123)Footnote 306. *354 S.W.2d 401, 407 (Tex. Civ. App. 1962).*

(n124)Footnote 307. *122 Cal. Rptr. 470 (Cal. Ct. App. 1975).*

(n125)Footnote 308. *122 Cal. Rptr. 470, 487 (Cal. Ct. App. 1975).*

(n126)Footnote 309. In the *Jarchow* case, the insureds suffered more than mental distress. The adverse claim interfered with their plans to develop the subject property. *122 Cal. Rptr. 470, 487 (Cal. Ct. App. 1975).*

(n127)Footnote 310. *E.E.O.C. v. Southern Pub'g Co., 894 F.2d 785 (5th Cir. 1990).*

(n128)Footnote 311. R.D. Hursh, Annotation, *Refusal of Liability Insurer to Defend Action against Insured Involving Both Claims within Coverage of Policy and Claims Not Covered, 41 A.L.R.2d 434 (1955).*

(n129)Footnote 312. *Golotrade Shipping and Chartering, Inc. v. Travelers Indem. Co., 706 F. Supp. 214, 218 (S.D.N.Y. 1989)* (applying New York law).

(n130)Footnote 313. *Okada v. M.G.C.I. Indem. Corp., 823 F.2d 276, 282 (9th Cir. 1987)* (applying Hawaii law).

(n131)Footnote 314. ALTA 1970 Owner's and Loan Policy Forms, Condition and Stipulation 3(a).

(n132)Footnote 315. *940 F.2d 307 (8th Cir. 1991)* (applying both Nebraska and U.S. Virgin Islands law).

(n133)Footnote 316. *940 F.2d 307, 311 (8th Cir. 1991).*

(n134)Footnote 317. ALTA 1992 Owner's and Loan Policy Forms, Condition and Stipulation 4(a).

(n135)Footnote 318. ALTA 1992 Owner's Policy Form, Condition and Stipulation 14.

(n136)Footnote 319. Robert E., Keeton & Alan I. Widiss, Insurance Law § 3.10 (1988).

(n137)Footnote 320. *See, e.g., Marandino v. Lawyers' Title Ins. Corp., 159 S.E. 181 (Va. 1931).*

(n138)Footnote 321. *See* ALTA 1992 Owner's Policy Form, Condition and Stipulation 13; ALTA 1990 Loan Policy Form, Condition and Stipulation 12.

(n139)Footnote 322. NYBTU Form 100E, Condition 5 (10-77).

(n140)Footnote 323. Oscar H. Beasley, *Title Insurance: The New Policy Forms*, in Practicing Law Institute, Title Insurance 1987: The New Policy Forms 11, 27-28 (James M. Pedowitz ed., 1987).

(n141)Footnote 324. For a successful attempt by the insurer to invoke the clause, *see Imperial Sav. Ass'n v. Lewis, 730 F. Supp. 1068 (D. Utah 1990).* Some of the difficulties involved in implementing and invoking Title Insurance Claim Arbitration Clauses are discussed in Samuel Kirschenbaum, *Prosecuting and Defending Title Claims, in* Practicing Law Institute, Current Developments In Title Insurance 1992, 125, 168-175 (James M. Pedowitz, et al., eds. 1992). Mister Kirschenbaum, a New York City practitioner, concludes that "It remains to be seen whether practitioners in this field or the insurance companies themselves will resort to arbitration as a means of resolving disputes between an insurer and insured." *Id.* at 175.

(n142)Footnote 325. *Blackhawk Prod. Credit Ass'n v. Chicago Title Ins. Co., 423 N.W.2d 521 (Wis. 1988);* D. Barlow Burke, Jr., Law of Title Insurance § 10.3 (1986); *see* ALTA 1990 Loan Policy Form, Conditions and Stipulations 7, 8 & 9.

(n143)Footnote 326. ALTA 1992 Owner's Policy Form, Condition and Stipulation 7.

(n144)Footnote 327. ALTA 1970 Owner's Policy Form, Condition and Stipulation 6.

(n145)Footnote 328. *Safeco Title Ins. Co. v. Reynolds, 452 So. 2d 45, 48 (Fla. App. 1984).*

(n146)Footnote 329. *Evinger v. McDaniel Title Co., 726 S.W.2d 468, 475 (Mo. App. 1987).*

(n147)Footnote 330. *Overholtzer v. Northern Counties Title Ins. Co., 253 P.2d 116 (Cal. App. 1953).* Of course, the value of property may increase apart from any change of use because of inflation or other factors.

(n148)Footnote 331. Dolph Barnhouse, Note, *Title Insurance - New Mexico Sets the Date for Determination of Value in Title Insurance Cases:* Hartman v. Shambaugh, *12 N.M. L. Rev. 833 (1982).*

(n149)Footnote 332. D. Barlow Burke, Jr., Law of Title Insurance § 10.4 (1986).

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CHAPTER 93 TITLE INSURANCE

11-93 Thompson on Real Property, Thomas Editions § 93.06

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§ 93.06 Exceptions.

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The exceptions to coverage are found in Schedule B of the ALTA, CLTA, Texas, and New York policies. The core of Schedule B, and of the policy itself, is the "special exceptions" portion of this schedule. Generally, the special exceptions are adverse matters uncovered by the insurer's search and examination of the title. Special exceptions that are commonly reported include unpaid real property taxes, mortgages and other liens, restrictive covenants, utility and other easements, possible judgments, *lis pendens*, building lines, and encroachments. The special exceptions are normally first reported in the commitment to issue a title insurance policy (i.e., the "preliminary report" or the "binder"). The commitment will then be sent to the lender and the buyer for review. If a party objects to a particular special exception, the insurer may agree to waive it, usually upon the presentation of evidence that indicates that the exception does not represent a valid claim or defect. In jurisdictions where title insurers are permitted n333 by law to "insure over" or "around" risks, the title company may simply remove n334 a particular special exception upon request, with or without the payment of additional premium, even if the claim or defect involved may be valid.

§ 93.06(a) General Exceptions.

The ALTA Owners' Policy Form and some of the other forms include pre-printed, boilerplate general exceptions in Schedule B. n335 Title insurers may be willing to waive these general exceptions upon presentation of certain documents which tend to establish that it is unlikely that the excepted matters are involved with the particular title. n336 The ALTA loan policy forms do not contain any general exceptions. n337 The ALTA Residential Title Insurance policy form (the so-called "plain language" form) also does not contain general exceptions; the influence of consumer interest groups is apparently responsible for this.

The matters generally excepted primarily consist of adverse claims that do not appear in the real estate records normally searched and examined by title insurance companies. n338 The following general exceptions appear in the 1990 ALTA owner's policy form: "(1) rights or claims of parties in possession not shown by the public records; (2) encroachments, overlaps, boundary line disputes, or other matters which would be disclosed by an accurate survey and inspection of the premises; (3) easements or claims of easements not shown by the public records; (4) any lien, or right to a lien for services, labor, or material heretofore or hereafter furnished which is imposed by law and not shown by the public

records; and (5) taxes or special assessments which are not shown as existing liens by the public records."

§ 93.06(b) Rights of Parties in Possession.

Title insurers normally do not physically inspect the property when they search and insure a title. The primary service that the title insurer provides is searching and examining the records pertaining to the title. In contrast, buyers usually do inspect the property. Therefore, it is reasonable to except adverse claims that the buyer would likely discover through an inspection which the insurer will not find notice of in the record. Consequently, ALTA owners' policy forms generally except rights or claims of parties in possession not shown by the public records. n339 The application of this exception, and others similar to it, has raised a number of problems which have been addressed in reported cases.

The exception does not apply unless the adverse claimant is a "party in possession." The acts of possession should be actual, apparent upon inspection, and sufficient to give the buyer notice of the adverse claim. n340 For example, in a case where a water company pipeline was not apparent from an inspection of the surface, there was insufficient possession for the rights of parties in possession exception to apply to the water company's recorded easement. n341 In another case, an unreported and unexcepted power company easement was located directly adjacent to another power company easement which was reported and excepted from coverage by the insurer. n342 The title insurer failed to report the first easement because it was mis-indexed in the public records. n343 A representative of the insured buyer testified that he saw power lines when he inspected the property and assumed that they were located on the reported easement. n344 The court held that there was insufficient possession to make the parties in possession exception applicable: "Generally, 'possession' within the context of title insurance policies refers to an open, visible and exclusive use. [Citations omitted.] As the possession was not visible, this exemption from coverage does not apply here." n345

Current ALTA forms limit the parties in possession exception to where the claims are "not shown by the public records." If a claim is on the record and if the insurer does not report and specifically except in the claim, the general exception does not apply regardless of whether the adverse claimant is in possession. In other words, the general exception will not apply to cases where the title insurer could have discovered the adverse claim by searching and examining the record even if the insured could have acquired notice of the claim by inspecting the property.

Several reported cases have involved claims of parties in possession exceptions which did not expressly limit the exception to cases where the claims were not of record. In one of these cases, a drainage district had a recorded easement giving it the right to maintain a drainage ditch 200 feet wide across the property. n346 The title insurer did not report or specially except this easement. The insured admitted that he knew that the district was maintaining a ditch 25 to 40 feet wide but did not know that the district had a 200-foot-wide easement. The court held that the general exception did not apply, based on the purpose of the exception which:

> ... is to except from the coverage of the policy the rights of parties in actual possession whose right or title is not of record. Therefore, we find it unnecessary to belabor the question of whether Drainage District was in actual possession of the ditch. Its easement was of record and there is nothing in the policy that suggested that the Insurer is not liable for damages flowing from recorded instrument which are not specifically excepted from coverage. n347

Another court, however, refused to imply that the exception applied only where the claim of the party in possession was not of record saying, "[w]e cannot, under the guise of construction, force from plain words unusual or unnatural meanings." n348

§ 93.06(c) Encroachments or Other Matters Which Would Be Disclosed by an Accurate Survey and Inspection.

Another general exception which may appear in ALTA owners' policy forms excepts loss or damage caused by

"[e]ncroachments, overlaps, boundary line disputes or other matters which would be disclosed by an accurate survey and inspection of the premises." n349 This "survey exception" has been the subject of many reported cases. n350

As is the case with the exception for claims of parties in possession, the survey exception reflects the basic notion that the principal service provided by a title insurance company is searching and examining the real estate records pertaining to the title. Generally, title and other risks that are ascertainable from sources other than the records are not the responsibility of the title insurer. The survey exception is aimed at excluding from coverage certain risks that can be ascertained by a physical inspection of the property. The risks excepted specifically include those which can be discovered by examining both the property and an accurate survey of it. n351 For example, encroachment defects will normally appear on an accurate and current survey. n352 Overlaps and boundary line disputes also may be disclosed by such a survey. n353

In the current ALTA forms, the four other general exceptions that may appear on Schedule B are expressly limited to matters not shown by the public records. The survey exception contains no such express limitation and appears to apply to risks that would be disclosed by an accurate survey and inspection, even if notice of such risks also appears in the public records. Judicial construction of the exception, however, has resulted in it being inapplicable where the risk is ascertainable from the public records. n354

The survey exception has also been held inapplicable where the title insurer's agent represented that "the survey has been insured." n355 Furthermore, where the insurer deletes the survey exception due to its acceptance of a survey, the insurer may be held to have insured the accuracy of the survey. n356

The meaning of "what an accurate survey would disclose" has been litigated in a number of reported cases. An "accurate" survey should show encroachments, n357 buildings, and other visible improvements on the property. n358 An accurate survey should also relate to the legal description of the insured property as stated in the policy; n359 if the legal description is erroneous, however, an accurate survey should show where building or boundary lines are actually located and not where they would be located if the erroneous legal description was accurate. n360 If the legal description stated in the policy is by metes and bounds, then the survey should be a graphic depiction of the courses, distances, and monuments stated. But where the description is by reference to a recorded plat, a survey based on the plat may be sufficient. n361 The survey exception applies only to specified risks that are discoverable by examining an accurate survey and the property. If such an examination would not disclose the risk, this exception does not apply. n362

While the meanings of "encroachments," "overlaps," and "boundary line disputes" under the survey exception have been litigated, the meaning of "other matters" has presented one of the most difficult construction problems. Because the specific "encroachments," "overlaps," and "boundary line disputes" refer to claims which adjoining landowners could have against the owner of the subject property, it is arguable that "other matters" is limited to other similar matters, i.e., claims involving adjacent property. The New Jersey Supreme Court, in Walker Rogge, Inc. v. Chelsea Title & Guaranty Co., n363 rejected such a narrow interpretation of the language.

In the *Rogge* case, a survey done in 1975 incorrectly indicated that the subject property contained 18.01 acres. Both the title policy and the deed of conveyance used legal descriptions based on the incorrect 1975 survey, but did not state any specific amount of acreage. The insured paid $16,000 per acre for 18 acres when, in fact, it received 12.43 acres. In a suit by the insured against the title insurer, the trial court awarded the plaintiff $88,000 in damages for the shortage. On appeal, the New Jersey Supreme Court reversed, holding that the accurate survey exception absolved the title insurer from liability under the policy. The trial court had decided that the exception did not apply because the shortage did not involve any claim by an abutting property owner; therefore, it was not an "other matter" within the meaning of the survey exception. The Supreme Court disagreed:

> Whatever else the phrase "other matter" might mean in a survey exception, it clearly refers to the

> dimensions of the lot lines and the size of the lot. The size of a tract simply cannot be ascertained with any certainty from a search of public records alone. The reason is that land exists on the ground, not on paper. When a description refers to a point in the line of another, only a survey can reveal the actual size of a piece of property and the amount of land included in a deed. A shortage in acreage is one of the facts that an accurate survey would disclose. n364

The Court in *Rogge* also rejected an argument that "accurate survey" meant a survey based on the legal description in the title insurance documents even if the description was erroneous.

§ 93.06(d) Easements Not Shown by the Public Records.

"Easements or claims of easements not shown by the public records... ." are the subject of another general exception. This exception is intended to preclude coverage for unrecorded easements which may be discoverable by a physical inspection of the land. n365

The exception clearly applies to exclude coverage where the easement was created or evidenced by an unrecorded instrument. Easements may, however, be created by implication or prescription with no written instrument being involved. Such easements will normally not be discoverable by examining the public record and sometimes not even by an inspection of the property. While the exception should apply to exclude coverage where an unrecorded easement is apparent from a physical inspection, perhaps there should be coverage where the easement is not so apparent. In other words, an unrecorded easement not discoverable through a physical inspection should perhaps be treated as one of the off-record risks covered by title policies. n366

§ 93.06(e) Hidden Mechanics' Liens.

In some jurisdictions, the hidden mechanics' lien is a serious off record risk. A mechanic or person furnishing labor or material may have a fixed period of time after the completion of the work to perfect a mechanic's lien to secure payment by recording notice of the claim. n367 Once filed, the priority of the lien may relate back to some earlier date, such as the date of the mechanic's contract or the date work commenced. As a result, real estate purchasers face the risk that an unrecorded mechanic's lien may exist which could be recorded later and gain priority over the purchaser's interest. A purchaser may reduce risk by inspecting the premises for signs of recent work, making inquiries, or getting affidavits from owners, but the best protection is title insurance.

A general exception used in ALTA policies specifically excepts coverage of these hidden liens: "Mechanics' or materialmen's liens or other statutory liens for labor or material not shown of record." This exception does not normally appear in loan policies which insure real estate secured lenders but may appear on other policies. n368 Title insurers may remove the exception from other policies if given affidavits and other evidence which indicate that no hidden mechanics' liens are likely to exist. Coverage of mechanics' liens has been an important source of title insurance company claims liability. Title insurance companies' aggregate annual claim payments due to mechanics' liens have ranged over a number of years from 8.7% to 22% of total annual claims paid. n369

§ 93.06(f) Taxes or Special Assessments Not Shown as Liens by the Public Records.

Taxes and special assessments may attach as liens against real estate. Whether taxes or special assessments are liens in fact depends on the specific application of state law. Generally, taxes or special assessments do not become liens in fact until notice of them appears in the public record. n370 Sometimes municipalities finance public improvements by issuing bonds which will be paid off in the future, at least in part, by periodic special assessments against real property benefitted by the improvements. These assessments may not become actual liens against the property until they are entered on the annual tax roll or entered in some other public record. n371 While the probable future assessments are not liens in fact, where improvements have been made and financed by money received from bonds, the probability may

be very high that the assessments will attach as liens in the future.

Whether unrecorded taxes or special assessments are liens in existence at the date of policy has been litigated in a number of title insurance cases. n372 Generally, the courts have held that no coverage exists if the taxes or assessments were not liens in fact at the date of policy, even in cases where the probability that they would become liens in fact in the future was very high or almost a certainty. n373 These cases generally have involved title policies that did not use the current ALTA general exception which excepts "Taxes or special assessments which are not shown as existing liens by the public records."

COMPUTER-ASSISTED RESEARCH

LEXIS: "parties in possession" w/50 title (encroachment or overlap or "boundary line") w/50 "title insurance" accurate w/20 "title insurance" (tax or "special assessment") w/10 "title insurance"

FOOTNOTES:

(n1)Footnote 333. In a few jurisdictions, title insurers are restricted by law in assuming known title risks. Michael J. Rooney, Attorneys' Guide to Title Insurance 2-5 (Illinois Institute for Continuing Legal Education, 1984).

(n2)Footnote 334. Physically, exceptions are normally removed by a stamp on the commitment which states that the exception is "waived." Sometimes an exception will remain on the commitment and any title policy issued thereafter with "removal" being accomplished by an endorsement to the policy which has the practical effect of canceling the exception.

(n3)Footnote 335. In some of the other forms, matters excluded in ALTA forms appear as general exceptions. For a good discussion of the exceptions in New York policies, *see* James M. Pedowitz, *Title Insurance--What Every New York Lawyer Should Know, 52 N.Y. St. B.J. 292, 324-325 (1980).* Exceptions in Texas policies are discussed in Jerel J. Hill, *Title Insurance in Texas / A Guide for the General Practitioner, 20 S. Tex. L. J. 289, 291-294 (1979).*

(n4)Footnote 336. The documentation may include: (1) a current survey of the property unless it is a condominium unit in which case no survey is required; (2) a composite mortgage statement signed by all persons holding title to the subject property during the preceding six months; and (3) satisfactory evidence (usually affidavits by owners) that all persons who furnished labor or materials to the premises in the recent past have been paid in full. Some insurers will not grant the waiver if the purchase price for the property exceeds some amount such as $100,000. The waiver may be granted without payment of additional premium. In some areas of the United States, an increased premium will be required.

(n5)Footnote 337. The ALTA Loan Policy Forms do not contain any general exceptions. This may be another example of the influence that the lending industry has on the content of ALTA Loan Policy Forms. Some or all of the exceptions which appear in the Owners' Policy Form may be added to a specific loan policy. The ALTA Residential Title Insurance Policy Form (the so-called "plain language" form) also does not contain general exceptions.

(n6)Footnote 338. *McDaniel v. Lawyers' Title Guar. Fund, 327 So. 2d 852, 855 (Fla. App. 1976). Somerset Sav. Bank v. Chicago Title Ins. Co., 649 N.E.2d 1123 (Mass. 1995)* (no protection for governmentally imposed impediments on the use of the land or impairments in the value of the land). *In re Opinion 682 of the Advisory Com. on Professional Ethics, 687 A.2d 1000 (N.J. 1997)* (exceptions to coverage include defects that would be apparent if property was physically inspected, defects that arise after policy is issued, defects known to insured, and hidden defects not disclosed by proper examination of public records).

(n7)Footnote 339. Joel E. Smith, Annotation, *Construction of Clause in Title Insurance Policy Excepting Defects Resulting from the Rights of Parties in Possession, 94 A.L.R.3d 1188 (1979).* Joyce Palomar, *Title Insurance: The Exclusion for Creditors' Rights After 1992,* 21 *Real Est. L.J.* 377 (Spring 1993).

(n8)Footnote 340. *Carefree Villages, Inc. v. Keating Props., Inc., 489 So. 2d 99 (Fla. App. 1986); Horn v. Lawyers Title Ins. Corp., 557 P.2d 206 (N.M. 1976); Halverson v. Nat'l Title & Abstract Co., 391 S.W.2d 112 (Tex. Civ. App. 1965).*

(n9)Footnote 341. *Guarantee Abstract & Title Ins. Co. v. St. Paul Fire & Marine Ins. Co., 216 So. 2d 255 (Fla. App. 1968). See also Shaver v. National Title & Abstract Co., 361 S.W.2d 867 (Tex. 1962).*

(n10)Footnote 342. *Happy Canyon Inv. Co. v. Title Ins. Co., 560 P.2d 839 (Colo. App. 1976).*

(n11)Footnote 343. *Happy Canyon Inv. Co. v. Title Ins. Co., 560 P.2d 839, 841 (Colo. App. 1976).*

(n12)Footnote 344. *Happy Canyon Inv. Co. v. Title Ins. Co., 560 P.2d 839, 842 (Colo. App. 1976).*

(n13)Footnote 345. *Happy Canyon Inv. Co. v. Title Ins. Co., 560 P.2d 839, 842 (Colo. App. 1976). See also McDaniel v. Lawyers' Title Guar. Fund, 327 So. 2d 852 (Fla. App. 1976),* where a recorded utility easement that was not reported by the insurer ran across the edge of the property. The insureds asserted that they saw the power line when they purchased the land but did not know that the line crossed the subject property. (Apparently, they assumed that the line was over adjacent property.) They contended "that they relied upon the guarantee of the policy that there were no recorded encumbrances against the property." *McDaniel v. Lawyers' Title Guar. Fund, 327 So. 2d 852, 855 (Fla. App. 1976).* The court held that there was insufficient possession to make the exception for claims of parties in possession applicable.

(n14)Footnote 346. *Pruett v. Mississippi Valley Title Ins. Co., 271 So. 2d 920, 921 (Miss. 1973).*

(n15)Footnote 347. *Pruett v. Mississippi Valley Title Ins. Co., 271 So. 2d 920, 922 (Miss. 1973).*

(n16)Footnote 348. *Horn v. Lawyers Title Ins. Corp., 557 P.2d. 206, 209 (N.M. 1976).*

(n17)Footnote 349. ALTA 1992 Owner's Policy Form, General Exception 2.

(n18)Footnote 350. Some of the more significant recent reported cases concerning the exception include *McDaniel v. Lawyers' Title Guar. Fund, 327 So. 2d 852 (Fla. App. 1976); U.S. Life Title Ins. Co. v. Hutsell, 296 S.E.2d 760, 763 (Ga. App. 1982); Downing v. Eubanks, 557 N.E.2d 1027 (Ind. App. 1990); Muscat v. Lawyers Title Ins. Corp., 351 N.W.2d 893 (Mich. App. 1984); Waterview Assocs. v. Lawyers Title Ins. Co., 186 N.W.2d 803 (Mich. App. 1971); Heyd v. Chicago Title Ins. Co., 354 N.W.2d 154 (Neb. 1984); Walker Rogge, Inc. v. Chelsea Title & Guar. Co., 562 A.2d 208 (N.J. 1989); MacBean v. St. Paul Title Ins. Corp., 405 A.2d 405 (N.J. Super. 1979); Swanson v. Mid-South Title Ins. Co., 692 S.W.2d 415 (Tenn. App. 1984); Stewart Title Guar. Co., v. City Nat'l Bank, 796 S.W.2d 308 (Tex. App. 1990).* Professor Burke has stated that there has been a relatively large amount of litigation over this exception because it is easy for litigants to get past the summary judgment stage since surveys traditionally present questions of fact that must be reached on the merits. D. Barlow Burke, Jr., Law of Title Insurance § 13.3 (1986). *Golden Security Thrift & Loan Ass'n v. First American Title Ins. Co., 61 Cal. Rptr. 2d 442 (1997); Lawyers Title Ins. Corp. v. Knopf, 674 A.2d 65 (Md. App. 1996).*

(n19)Footnote 351. *Walker Rogge, Inc. v. Chelsea Title & Guar. Co., 562 A.2d 208, 217 (N.J. 1989).*

(n20)Footnote 352. A good discussion of encroachment defects is in 1 Rufford G. Patton & Carroll G. Patton, Patton on Land Title § 676 (2d ed. 1957).

(n21)Footnote 353. *See Kuhlman v. Title Ins. Co., 177 F. Supp. 925 (W.D. Mo. 1959).*

(n22)Footnote 354. *McDaniel v. Lawyers' Title Guar. Fund, 327 So. 2d 852, 855 (Fla. App. 1976). See also Kentucky Title Co. v. Hail, 292 S.W. 817 (Ky. 1927); Dallas Title Guar. Co. v. Valdes, 445 S.W.2d 26 (Tex. Civ. App. 1969).*

(n23)Footnote 355. *Hutsell v. United State Life Title Ins. Co., 278 S.E.2d 730 (Ga. App. 1981).*

(n24)Footnote 356. *United State Life Title Ins. Co. v. Hutsell, 296 S.E.2d 760, 763 (Ga. App. 1982).*

(n25)Footnote 357. *Muscat v. Lawyers Title Ins. Corp., 351 N.W.2d 893, 895 (Mich. App. 1984).*

(n26)Footnote 358. *Muscat v. Lawyers Title Ins. Corp., 351 N.W.2d 893, 895 (Mich. App. 1984); Happy Canyon Inv. Co. v. Title Ins. Co., 560 P.2d 839 (Colo. App. 1976).*

(n27)Footnote 359. *Waterview Assocs. v. Lawyers Title Ins. Corp., 186 N.W.2d 803, 812 (Mich. App. 1971).*

(n28)Footnote 360. *Walker Rogge, Inc. v. Chelsea Title & Guar. Co., 562 A.2d 208, 217 (N.J. 1989).*

(n29)Footnote 361. *Dallas Title & Guar. Co. v. Valdes, 445 S.W.2d 26, 30 (Tex. Civ. App. 1969).*

(n30)Footnote 362. *Happy Canyon Inv. Co. v. Title Ins. Co. of Minn., 560 P.2d 839, 841-842 (Colo. App. 1976); Nautilus, Inc. v. Transamerica Title Ins. Co., 534 P.2d 1388, 1391 (Wash. App. 1975).*

(n31)Footnote 363. *562 A.2d 208, 217 (N.J. 1989).*

(n32)Footnote 364. *Walker Rogge, Inc. v. Chelsea Title & Guar. Co., 562 A.2d 208, 216-217 (N.J. 1989).*

(n33)Footnote 365. *Hahn v. Alaska Title Guar. Co., 557 P.2d 143, 147 (Alaska 1976). First American Title Ins. Co. v. J.B. Ranch, Inc., 966 P.2d 834 (Utah 1998)* (public road across land shown on road map filed with county clerk was not covered under unrecorded easement exception because public record definition only allowed constructive notice with easements recorded with county recorder).

(n34)Footnote 366. At least one case holds to the contrary. In *Louisville Title Ins. Co. v. Guerard, 409 So. 2d 514 (Fla. App. 1982),* the court held that the title insurer had no duty to defend a suit based on a claim of a prescriptive easement and statutory way of necessity because coverage of unrecorded easements was excepted on Schedule B of the policy involved. The trial court had held that there was a duty to defend, making a distinction between unrecorded easements and unrecorded *claims* of easements. *Louisville Title Ins. Co. v. Guerard, 409 So. 2d 514, 515 (Fla. App. 1982).*

(n35)Footnote 367. *See, e.g.*, Minn. Stat. § 514.05(1); *Armstrong v. Lally, 296 N.W. 405, 406 (1941);* A list of statutes appears in D. Barlow Burke, Jr., Law of Title Insurance § 13.5 n.1 (1986).

(n36)Footnote 368. Russell W. Jordan, *Mechanics' Lien Coverage, in* Practicing Law Institute, Title Insurance 1988, 355 (James M. Pedowitz ed., 1988).

(n37)Footnote 369. Jack Tickner, *Mechanics Liens*, Title News, Jan. 1976, at 40.

(n38)Footnote 370. D. Barlow Burke, Jr., Law of Title Insurance § 13.6 (1986).

(n39)Footnote 371. *See, e.g., Metropolitan Life Ins. Co. v. Union Trust Co., 27 N.E.2d 225 (N.Y. 1940).*

(n40)Footnote 372. These cases are cited or discussed in Joel E. Smith, Annotation, *What Constitutes a Charge, Encumbrance, or Lien Within Contemplation of Title Insurance Policy*, 87 A.L.R. 764, § 3 (1978).

(n41)Footnote 373. Joel E. Smith, Annotation, *What Constitutes a Charge, Encumbrance, or Lien Within Contemplation of Title Insurance Policy*, 87 A.L.R. 764, § 3 (1978).

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CHAPTER 93 TITLE INSURANCE

11-93 Thompson on Real Property, Thomas Editions § 93.07

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§ 93.07 Endorsements.

[Go To Supp]

The provisions of a title insurance policy may be modified or supplemented by endorsements to it. Endorsements may be either tailor-made or based on standard forms for a particular transaction. Sometimes an endorsement will be issued for no additional charge, but usually an additional premium is required. Endorsements may be issued routinely or as the result of negotiation between the insurer and a party to a real estate transaction. n374 They are normally used to extend the coverage provided by the basic policy. For example, endorsements are commonly used to cover encroachments revealed by surveys that would not be otherwise covered by the title policies. n375 Additionally, general or special exceptions to coverage on Schedule B may be waived by endorsement instead of directly on the Schedule B. n376 However, sometimes endorsements are used to limit the liability of the title insurer. n377 For example, an endorsement may be used to exclude a specific risk which would otherwise be covered by the policy.

In addition to policy forms, the American Land Title Association (ALTA) also promulgates standard endorsement forms. n378 Individual companies have also prepared endorsement forms. Some of the more commonly used standard endorsements which add to the basic coverage of title policies include Inflation, Variable Rate Mortgage, n379 Location, Encroachment, Condominium, n380 Zoning, n381 and Environmental Lien Endorsements. n382

The maximum liability of a title insurer under a particular policy is limited to the amount of insurance stated in Schedule A plus covered litigation costs. When the insurance is issued in the course of a purchase and sale transaction, the amount of insurance stated in Schedule A of an owner's policy is usually the purchase price for the property. If the value of the property subsequently increases because of inflation or other causes, the insured may progressively become underinsured. n383 While it is possible to increase the amount of insurance by purchasing additional coverage, most owners, especially owners of modest residences, are unlikely to do so. During the 1970s, an increased awareness developed that inflation caused underinsurance. In response, title insurers began routinely issuing, for no additional premium, inflation endorsements to policies insuring the owners of modest single-family residences. These endorsements automatically increase the amount of insurance by reference to an index. The most common index used is the U.S. Department of Commerce Composite Construction Cost Index (base period 1967). n384 The endorsement usually contains a ceiling on how much the amount of insurance may be increased by the endorsement, with 150% of

the original amount of insurance being common. n385

The inflation of the late 1970s and early 1980s also contributed to the growth in the use of variable rate mortgage instruments. Before that inflationary period, almost all mortgages originating after World War II had been fixed rate, level payment mortgages under which the rate of interest remained constant throughout the life of the loan. In the mid-1960s, the average interest rate charged for first mortgage loans was around 6%. By 1981, rates had climbed to over 17%. Mortgage lenders such as Savings and Loans found themselves holding long-term portfolios of relatively low interest loans. In the 1970s, lenders began making many more loans with variable interest rates which could be adjusted upward or downward to reflect the fluctuation in market rates. Variable rate mortgages present special title risks to lenders, which include possible unenforceability of the mortgage security interest due to the variable rate and a loss of priority because of a change in interest rate.

Variable rate mortgages may involve a phenomenon called "negative amortization." For example, where a variable rate mortgage has a payment cap limiting the periodic payments due to a maximum dollar amount, an increase in rate may result in the periodic payment due being insufficient to cover the amount of interest on the loan. In such a case, the mortgage may provide for automatic advances to cover the deficiency which is then added to the principal debt. While the mortgage documents may include provisions intended to give such advances a priority equal to that of the original debt, there is a risk that these provisions may not be effective to do so. Another risk to lenders involved with negative amortization is that interest on the amount advanced to cover the deficiency may be treated as illegal (and hence uncollectible) interest on interest under state law. n386 There is also some risk that the entire loan agreement may be unenforceable on public policy grounds if it is construed as providing for forbidden interest on interest. Lenders demanded protection against these risks from title insurers, and the title industry complied by providing for variable rate mortgage endorsements which may cover these special risks. Of course, whether the endorsement will be issued in a particular case is at the discretion of the individual title insurer and, normally, an additional premium is charged for these endorsements. Additionally, these endorsements do not cover losses caused by lack of compliance with federal or state statutes or regulations.

Encroachments may create title defects which are not reflected in the public real estate records. There are two general kinds of encroachments: (1) a permanent structure on the subject property encroaches on adjacent property or crosses a building line on the subject property; or (2) a permanent structure on adjacent property encroaches on the subject property or crosses a building line on adjacent property established for the benefit of the subject property. n387 Either type may carry a serious risk of loss. The best way to discover encroachments is through an examination of a current accurate survey of the property. If an encroachment is discovered, there are several possibilities. If the encroachment has been in place for a long time, the owner of the structure may have acquired the right to maintain it under the doctrine of adverse possession or prescription. If a structure is easily moveable, an encroachment defect may be curable by moving the structure. Title insurers may insure an encroachment defect through an encroachment endorsement. Usually, an additional premium will be charged for this endorsement, and it may be issued only if the company determines under all the facts that the structure is not easily moveable and the risk of loss due to the encroachment is low.

The location endorsement is similar to the encroachment endorsement in that it deals with improvements to the property. Location endorsements are issued with loan policies because they address a matter of special concern to real estate secured lenders. A mortgage security interest attaches to land and permanent improvements on the land. Because the security includes these improvements, lenders want assurance that the improvements which they believe are on the encumbered land are in fact there. Location endorsements give lenders such assurance.

During the 1960s and 1970s, condominiums, which previously had been virtually unknown, n388 rapidly proliferated through new construction and conversion of rental projects. Most condominiums are residential, and by 1980 they had become a significant element in the housing market, especially in larger urban areas. n389 Condominiums present special risks to mortgagees and other purchasers, which include the possibilities that (1) the condominium may not

validly exist under applicable law, (2) the subject condominium unit may not in fact be a unit in the condominium development, (3) a lien in favor of the condominium to secure assessments due from the subject unit may gain priority over the purchaser's interest, (4) the subject unit is in violation of condominium covenants, by-laws, or rules or encroaches on airspace belonging to another unit or allocated to common areas, or (5) title may fail because of a right of first refusal held by the condominium association. Title insurers may cover these risks by issuing condominium endorsements. n390

Restrictions on ownership and use created by planning, zoning, building, and environmental laws traditionally have not been considered title matters, although violations of these laws have sometimes been considered title defects. n391 Standard ALTA policies exclude from coverage losses caused by a "law, ordinance or governmental regulation (including, but not limited to, building and zoning ordinances... .") n392 In current ALTA forms, this exclusion does not apply where notice of a defect, lien, or encumbrance resulting from a violation of these laws has been recorded in the traditional public land title records. The current definition of "public records" in the ALTA policy forms does not include records in zoning or building departments, health boards, and the like. n393

Under pressure from lending interests, title insurers agreed to offer limited zoning coverage by endorsement. Title insurers were reluctant to provide zoning coverage because of difficulties in determining the zoning classification and the provisions applicable to specific properties. n394 The initial zoning endorsement form promulgated by ALTA provided rather modest zoning coverage. This endorsement assures that the owner can use the property for a specific purpose and that the existing improvements meet the requirements of the applicable zoning ordinance. n395 A newer ALTA endorsement form goes further and provides assurance that the applicable ordinances will not be violated with respect to (1) area, width, or depth of the land as a building site for an intended structure, (2) floor area of such structure, (3) setback of the structure from property lines, and (4) height of the structure. n396

COMPUTER-ASSISTED RESEARCH

LEXIS: endorsement w/20 (inflation or "variable rate mortgage" or location or encroachment or condominium or zoning or "environmental lien")

In the years since 1970, federal and state environmental laws have increasingly created risks for real estate purchasers. n397

Some of the most serious of these are from state and federal legislation addressed to the problem of hazardous wastes and responsibility for their cleanup. Under federal law, an owner or operator of land may be responsible for hazardous substance cleanup costs even if the owner had nothing at all to do with bringing hazardous substances to the property. n398 For example, a purchaser of real estate may be liable for the cost of cleaning up hazardous wastes deposited on the property prior to the purchase, unless the purchaser can establish an "innocent land owner" defense. A purchaser seeking to establish an "innocent land owner" defense must show that the purchaser did not know and had no reason to know that hazardous substances were on the property. n399 To establish this, the purchaser must show that an appropriate inquiry was made into the previous ownership and uses of the property. n400

Real estate secured lenders may assume cleanup cost liabilities in several ways. A mortgagee purchasing at its own foreclosure sale or accepting a deed in lieu of foreclosure may become liable as an owner of the property, unless the mortgagee establishes an "innocent landowner" defense. n401 A lender holding "indicia of ownership" primarily to protect its security interest is not an owner or operator unless it participates in the management of the property containing hazardous substances. n402 Real estate secured lenders not infrequently participate in the management of their real property security. This participation may be as slight as casual business advice. It may involve as much as day-to-day control, such as when a lender becomes a mortgagee in possession or when it forecloses on personal property security interests and takes over the management of the debtor's business on the land in the process. n403

Potential liability for cleanup costs is a casualty risk and not an appropriate subject for title insurance. Searching for and reporting adverse environmental claims disclosed by the traditional public real estate records is, however, a suitable activity for title insurers. The services of a title insurance company in searching title may also be employed in establishing that a purchaser made the appropriate inquiries necessary to qualify the purchaser as an innocent owner.

In addition to potential liability for cleanup costs, real estate secured lenders also face the risk that their mortgages may be subordinate to environmental liens that subsequently attach to their security properties. Where government finances a cleanup, it may acquire a "superlien" against the property to secure reimbursement. n404 Such a lien may attain priority over a previously recorded mortgage. n405 This creates a title risk which may be appropriate for title insurance coverage. n406

Until 1984, it was unclear whether losses due to title defects or adverse claims caused by environmental regulations were covered, excluded, or excepted by the 1970 ALTA policy forms. In 1984, the forms were amended to expressly exclude losses due to these risks unless notice of a defect lien or encumbrance resulting from a violation of environmental laws had been recorded in the public records by the date of the policy. n407 This exclusion was continued in the 1990 forms. n408 While the statement of coverage in the 1990 forms does not expressly cover losses caused by environmental laws, the exclusion indicates that losses due to violations are covered if notice of resulting title defects is recorded and not reported on schedule B or elsewhere by the title insurer. Liens, encumbrances or defects not in existence as of the date of policy are not currently covered. This is the case even if physical conditions in existence on the property at the date of policy may cause environmental liens to attach in the future. n409

A standard ALTA endorsement form may be used to provide limited coverage of environmental law risks to insured mortgagees. n410 The endorsement is effective only if the land is used or is to be used for residential purposes. Paragraph (a) of this form affirmatively covers any loss or damage caused by a lack of priority of the lien of the insured mortgage over certain environmental protection liens. These include liens not excepted in Schedule B which, as of the policy date, are recorded in the traditional public land title records or filed with the clerk of the U.S. court for the district in which the land is located. Under this paragraph, the title insurer is obligated to search for and report recorded or filed environmental protection liens. This obligation and service is very appropriate for title insurers because searching for and reporting recorded adverse claims to the insured or proposed insured is the principal service they provide.

Paragraph (b) of the endorsement is used to report any state statute which may affect the priority of the insured mortgage. This is essentially an opinion by the title insurer that there are no state statutes, other than those referred to on the endorsement, which could affect the priority of the insured mortgage. As one commentator has stated, paragraph (b) of the endorsement is really a legal opinion of the insurer. n411 It is arguable that the coverage afforded is not an appropriate one for title insurance. Before issuing an endorsement including paragraph (b), the prudent title insurer will search state statutes or codes and not just public real estate records. This is the type of service most often provided by lawyers and is clearly the practice of law. n412

FOOTNOTES:

(n1)Footnote 374. *Burnett v. Cincinnati Ins. Co., 690 N.E.2d 747 (Ind. App. 1998)* (endorsement for additional insurance was provided for an additional premium).

(n2)Footnote 375. *Chemical Bank v. Affiliated FM Ins. Co., 970 F. Supp. 306 (S.D.N.Y. 1997)* (facts show that endorsements were extended to cover goods during shipment and while in storage. The endorsement was also used to limit the liability of the insurer), *aff'd in part, vacated in part* by *Chemical Bank v. Affiliated FM Ins. Co., 196 F.3d 373 (2d Cir.1999) rev'd by, 169 F.3d 121 (2d Cir. 1999)* (policy validly terminated at the time of losses).

(n3)Footnote 376. In his treatise, Professor Burke defines "endorsement" as an agreement to extend the basic coverage of the policy "for matters of special concern to the insured." He distinguishes an "endorsement" as so defined from other supplements to title policies which are also called "endorsements" by title insurers. For example,

"endorsements" which are ued to update commitments to a more current date are called "date down" endorsements. Such "endorsements" do not fit Professor Burke's definition because they do not add any new additional basic coverage for matters of special concern to the insured even though they may increase the exposure of the title insurer issuing them. D. Barlow Burke, Jr., Law of Title Insurance § 14.1 (1986).

(n4)Footnote 377. *Affiliated FM Ins. Co. v. Jou Jou Designs, Inc., 1997 U.S. Dist. LEXIS 3617 (S.D.N.Y. 1997)* (showing endorsement used to limit the liability of the insurer).

(n5)Footnote 378. Current ALTA endorsement forms are reprinted in Practicing Law Institute, Title Insurance 1990, 613-25 (James M. Pedowitz ed., 1990).

(n6)Footnote 379. ALTA Forms 6, 6.1 and 6.2.

(n7)Footnote 380. ALTA Form 4.

(n8)Footnote 381. ALTA Forms 3 and 3.1.

(n9)Footnote 382. ALTA Form 8.1.

(n10)Footnote 383. When the author of this chapter was a practicing attorney, he handled a real estate transaction where the owner had owned the property for over 45 years. The title policy issued when the owner acquired the property in the late 1920s stated a maximum amount of insurance of approximately $5,000 for real estate which sold for almost $100,000 in the 1970s.

(n11)Footnote 384. Michael J. Rooney, *A Primer for Attorneys, in* A.B.A., Section of Real Property, Probate and Trust Law, Title Insurance and You: What Every Lawyer Should Know! 14 (James M. Pedowitz ed., 1979).

(n12)Footnote 385. *Id.*

(n13)Footnote 386. *See Giventer v. Arnow, 333 N.E.2d 366 (N.Y. 1975).*

(n14)Footnote 387. 1 Rufford G. Patton & Carroll G. Patton, Patton on Land Titles § 676 (2d. ed. 1957).

(n15)Footnote 388. Curtis J. Berger, *Condominium: Shelter on a Statutory Foundation, 63 Colum. L. Rev. 987 (1963).*

(n16)Footnote 389. David A. Fine, Comment, *The Condominium Conversion Problem: Causes and Solutions, 1980 Duke L.J. 306.*

(n17)Footnote 390. The current ALTA Condominium Endorsement Form (ALTA Endorsement Form 4) covers all of these risks and some additional ones as well.

(n18)Footnote 391. Richard H. Howlett, *Report of Title Insurance Standard Forms Committee*, Title News, Jan. 1962, at 63, 65.

(n19)Footnote 392. ALTA 1992 Owner's Policy Form, Exclusion 1(a).

(n20)Footnote 393. ALTA 1992 Owner's Policy Form, Condition and Stipulation 1(f). "Public records" are defined as "records established under state statutes at Date of Policy for the purpose of imparting constructive notice of matters relating to real property to purchasers for value without knowledge." Federal records are also not included except for environmental protection liens "filed with the clerk of the United States District Court for the district in which the land is located. *Id.* Applying a prior definition of "public records" which did not limit the definition to records established under state statutes, the Alaska Supreme Court held that the Federal Register was a public record within the meaning of

the policy definition. *Hahn v. Alaska Title Guar. Co., 557 P.2d 143 (Alaska 1976).*

(n21)Footnote 394. Charles C. Smith, *Title Insurance and Zoning Coverage*, the Guarantor, Spring 1976, at 3.

(n22)Footnote 395. ALTA Endorsement Form 3.

(n23)Footnote 396. ALTA Endorsement Form 3.1.

(n24)Footnote 397. Robert S. Bozarth, *Environmental Liens and Title Insurance, 23 U. Rich. L. Rev. 305 (1989);* Timothy G. Hayes & William J. Dinkin, *Environmental Liability in Real Property Transactions, 23 U. Rich. L. Rev. 349 (1989).*

(n25)Footnote 398. *See New York v. Shore Realty Corp., 759 F.2d 1032, 1037 (2d Cir. 1985).*

(n26)Footnote 399. *42 U.S.C. § 9601*(35)(A).

(n27)Footnote 400. *42 U.S.C. § 9601*(35)(B).

(n28)Footnote 401. Robert S. Bozarth, *Environmental Liens and Title Insurance, 23 U. Rich. L. Rev. 305, 311 (1989).* Under the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA), the purchaser of previously contaminated real estate has the burden of proving by a preponderance of the evidence that the purchaser was an "innocent landowner." *42 U.S.C. § 9601* (35).

(n29)Footnote 402. *42 U.S.C. § 9601*(20)(A).

(n30)Footnote 403. *See United States v. Fleet Factors Corp., 901 F.2d 1550 (11th Cir. 1990), cert. denied, 111 S. Ct. 752.*

(n31)Footnote 404. *United States v. Fleet Factors Corp., 901 F.2d 1550 (11th Cir. 1990), cert. denied, 111 S. Ct. 752.*

(n32)Footnote 405. *United States v. Fleet Factors Corp., 901 F.2d 1550 (11th Cir. 1990), cert. denied, 111 S. Ct. 752.*

(n33)Footnote 406. Title insurers may cover subordination of an insured mortgage by a subsequently recorded mechanic's lien.

(n34)Footnote 407. Russell W. Jordan, III, *Title Insurance and Environmental Protection Liens, in* Practicing Law Institute, Title Insurance 1990: the Basics and Beyond 487, 491 (1990).

(n35)Footnote 408. Exclusion 1(a)(iv).

(n36)Footnote 409. *Chicago Title Ins. Co. v. Kumar, 506 N.E.2d 154 (Mass. 1987);* Robert S. Bozarth, *Environmental Liens and Title Insurance, 23 U. Rich. L. Rev. 305, 334 (1989).*

(n37)Footnote 410. ALTA Endorsement Form 8.1. While there is no affirmative coverage of environmental law related risks in the basic policy forms, the exclusion of these risks in both Loan and Owners' policy forms "except to the extent that ...a notice of a defect, lien or encumbrance resulting from a violation affecting the land has been recorded in the public records at Date of Policy."

(n38)Footnote 411. Robert S. Bozarth, *Environmental Liens and Title Insurance,* 23 U. Rich. L. Rev.305, 341 (1989).

(n39)Footnote 412. The author has no opinion concerning whether provision of this service by a title insurer would

be the *unauthorized* practice of law.

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CHAPTER 93 TITLE INSURANCE

11-93 Thompson on Real Property, Thomas Editions § 93.08

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§ 93.08 Regulation of Title Insurers.n413

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With the exception of Iowa, where issuance of title insurance by private insurers is prohibited, all states regulate the title insurance industry. n414 Generally, title insurers are not as strictly regulated as other insurers. n415 This undoubtedly is due to the comparatively low loss ratios of title insurance companies. Present state regulation of title insurers is mainly aimed at (1) protecting their solvency and ability to pay claims, and (2) protecting consumers of title insurance services from unfair policy provisions, rates, and practices. n416

By late 1991, it became apparent that the title insurance industry would experience a fourth consecutive year of operating losses (exclusive of investment income). Regulators and the media expressed increasing concern about the ability of the industry to meet its claim payment responsibilities. Some even predicted the demise of the industry. The National Association of Insurance Commissioners (NAIC) decided that the industry needed closer examination to determine if additional regulation might be necessary. A Working Group appointed by the NAIC has developed the Model Title Insurer Act and the Model Title Insurance Agent Act. Among other things, these Acts would create new provisions intended to promote title insurance company solvency. n417 If these Acts are widely adopted, title insurers will be regulated substantially more than they have been in the past. Whether these Model Acts will be widely adopted by state legislatures is presently an open question.

Regulation of the title insurance industry at the federal level is minimal. The Real Estate Settlement Procedures Act of 1974 n418 prohibits the payment of kickbacks to those referring business to title insurers, among others. n419 Another section of this act prohibits sellers of property that will be purchased with the assistance of a federally related mortgage loan from requiring the buyer to purchase title insurance from a particular company. n420 Application of federal antitrust law to the business of title insurance is limited, largely because of the McCarran-Ferguson Act n421 and the state action exception to the federal antitrust laws. n422

§ 93.08(a) Regulation Aimed at Assuring Ability of Insurers to Pay Claims.

State regulations intended to promote the solvency of title insurers and their ability to pay claims commonly include minimum capitalization, paid-in surplus, and minimum reserve for loss payment requirements. n423 Almost all

jurisdictions have minimum capitalization requirements. n424 The required amount ranges from $1,000,000 to $100,000, with a few states having substantially lower required amounts. n425 In addition to minimum capital, title insurers are also required to have a minimum amount on hand to pay claims. n426 In a number of states, a specified amount must be deposited with the state agency that regulates insurance companies. n427 Additionally, many states require title insurers to maintain an "unearned premium reserve fund." n428 This fund usually consists of a specified portion of premiums received. n429 Periodically, specified portions of the amount set aside may be released in those jurisdictions that require a relatively high percentage of premiums to be set aside. n430 Finally, some jurisdictions require title insurers to set aside an amount to cover claims made or claims of which the insurer has been notified. n431 The amount set aside is usually calculated by the insurer itself based on its claim estimates. n432

Some states limit the size of a single risk assumed by a title company to a percentage of its capital, surplus, or assets. n433 In the states with single risk limitations, title insurers may reinsure the excess over and above the single risk limitation with other insurers. n434 In jurisdictions having no single risk limitations, title insurers following sound business practices will routinely reinsure large risks, sometimes with a number of reinsurers. When a risk is reinsured, the primary insurer allocates a portion of the risk to the reinsurer. n435 The primary insurer remains fully liable under its policy to the extent of the policy limits. There is no privity of contract between the reinsurer and the insured, who may be completely unaware that the risk has been reinsured. When a risk has been reinsured, the rights of the insured against the reinsurer are unclear. n436 Direct rights have usually been asserted by insureds against reinsurers under third-party beneficiary contract theories.

Reinsurance should be distinguished from coinsurance. Coinsurers are primary insurers for specified portions of the total amount of insurance stated in the policy. When a loss occurs, it is apportioned among the coinsurers in accordance with the percentage of the total amount of insurance allocated to each. In contrast to the reinsurance situation, the insured has direct rights against each coinsurer. n437

Generally, the statutory restrictions on the investments of insurance companies also apply to title insurers. n438 Title insurers may be expressly authorized to invest in title plants, n439 but the percentage of a title insurer's assets that may be so invested may be limited. n440

§ 93.08(b) Other Consumer Protection Regulations.

Almost all states regulate the rates and policy forms of title insurers. n441 In most states, insurers are required to file their forms and rates with the state agency having jurisdiction over insurance companies. n442 Forms or rates may not be used unless they have been on file for a specified time period. n443 In most states with such filing requirements, the state regulator has authority to disapprove rates or forms which do not meet statutory or regulatory standards. n444 In a few jurisdictions, however, filing alone appears to satisfy the legal requirements. n445 Where the state has the authority to review and disapprove filed rates, the extent to which this authority can, in fact, be exercised varies from broadly to almost not at all. n446

In a few jurisdictions, rates or forms are set or promulgated by the state commissioner or board of insurance. n447

COMPUTER-ASSISTED RESEARCH:

LEXIS: "real estate settlement procedures act"

FOOTNOTES:
(n1)Footnote 413. Some useful works on the regulation of title insurers include D. Barlow Burke, Jr., Law of Title Insurance §§ 5.1-7.6.5 (1986); Ernest F. Roberts, Jr., Et al., Public Regulation of Title Insurance Companies and Abstractors (1961); Joyce D. Palomar, *Bank Control of Title Insurance Companies: Perils to the Public That Bank Regulators Have Ignored, 44 Sw. L.J. 905 (1990);* E.F. Roberts, *Title Insurance: State Regulation and the Public*

Perspective, 39 Ind. L.J. 1 (1963); Noel D. Uri, *The Title Insurance Industry: A Reexamination*, 17 Real Est. L.J. 313 (1989); and Note, *The Title Insurance Industry and Governmental Regulation, 53 Va. L. Rev. 1523 (1967).*

(n2)Footnote 414. Note, *The Title Insurance Industry and Governmental Regulation, 53 Va. L. Rev. 1523, 1526 n.27 (1967).*

(n3)Footnote 415. Note, *The Title Insurance Industry and Governmental Regulation, 53 Va. L. Rev. 1523, 1527 (1967).* Texas and a few other states comprehensively regulate the title insurance industry. *Id.*

(n4)Footnote 416. Note, *The Title Insurance Industry and Governmental Regulation, 53 Va. L. Rev. 1523, 1526 (1967); In re Opinion 682 of the Advisory Committee on Professional Ethics, 687 A.2d 1000 (N.J. 1997).*

(n5)Footnote 417. Richard W. McCarthy, *Two Model Title Acts Advance*, 73 Title News, No. 5, 6 (Sept./Oct. 1994).

(n6)Footnote 418. *12 U.S.C. §§ 2601*-2617.

(n7)Footnote 419. *12 U.S.C. §§ 2607.*

(n8)Footnote 420. *12 U.S.C. §§ 2608.*

(n9)Footnote 421. *15 U.S.C. §§ 1011*-1015 (1976).

(n10)Footnote 422. *See F.T.C. v. Ticor Title Ins. Co., 112 S. Ct. 2169 (1992).*

(n11)Footnote 423. Note, *The Title Insurance Industry and Governmental Regulation, 53 Va. L. Rev. 1523, 1527 (1967). See, e.g.,* Ill. Rev. Stat. ch. 73, paras. 1404, 1409, 1410 and 1411. Until 1990, the title insurance industry was virtually unregulated in Illinois. The Illinois Title Insurance Act (Ill. Rev. Stat. ch. 73, paras. 1401-1425), effective January 1, 1990, authorized comprehensive regulation of the industry. For financial data of specific commercial title insurance companies and bar-related funds including capital and surplus and statutory premium reserves as of November 1, 1978, *see* A.B.A., Section of Real Property, Probate and Trust Law, Title Insurance and You: What Every Lawyer Should Know! 105-115 (1979). One commentator has observed: "For most insurers, these financial requirements are easily met. Such is their financial capability that the question arises as to why states bother with such requirements." D. Barlow Burke, Jr., Law of Title Insurance § 5.3 (1986).

(n12)Footnote 424. D. Barlow Burke, Jr., Law of Title Insurance § 5.3 n.1 (1986).

(n13)Footnote 425. D. Barlow Burke, Jr., Law of Title Insurance § 5.3.1 (1986).

(n14)Footnote 426. D. Barlow Burke, Jr., Law of Title Insurance § 5.3.1 (1986).

(n15)Footnote 427. D. Barlow Burke, Jr., Law of Title Insurance § 5.3.1 (1986). *See, e.g.,* ohio Rev. Code Ann. § 3953.06 (Anderson). California requires a deposit of $100,000 with the Insurance Commissioner or other designated official of the title insurer's home state. Cal. Ins. Code § 12350.

(n16)Footnote 428. D. Barlow Burke, Jr., Law of Title Insurance § 5.3 (1986). *See, e.g.,* ohio Rev Code Ann. § 3953.11 (10% of premiums).

(n17)Footnote 429. *See, e.g.,* Arizona requires the fund to include 10cent(s) for each $1,000 of "net retained liability." Ariz. Rev. Stat. Ann. § 20-1569. Mich. Comp. Laws Ann. § 500.7305 (5% of gross premiums. After an amount is held for 10 years, 10% per year may be released).

(n18)Footnote 430. D. Barlow Burke, Jr., Law of Title Insurance § 5.3 (1986). *See, e.g.,* mich. Comp. Laws Ann. §

500.7305.

(n19)Footnote 431. *See, e.g.*, Ariz. Rev. Stat. Ann. § 20-1572; Mich. Comp. Laws Ann. § 500.7306 and Ohio Rev. Code Ann. § 3953.12.

(n20)Footnote 432. D. Barlow Burke, Jr., Law of Title Insurance § 5.3 (1986).

(n21)Footnote 433. *See, e.g.*, Ill. Rev. Stat. ch. 73, para. 1408.

(n22)Footnote 434. Ill. Rev. Stat. ch. 73, para. 1408.

(n23)Footnote 435. *See generally* Reinsurance (Robert W. Strain ed., 1980).

(n24)Footnote 436. D. Barlow Burke, Jr., Law of Title Insurance § 5.3.1 (1986).

(n25)Footnote 437. D. Barlow Burke, Jr., Law of Title Insurance § 5.7.2 (1986).

(n26)Footnote 438. Ernest F. Roberts, Jr., et al., Public Regulation of Title Insurance Companies and Abstractors 202-220 (1961).

(n27)Footnote 439. D. Barlow Burke, Jr., Law of Title Insurance § 5.8 (1986). *See, e.g.*, ill. Rev. Stat., ch. 73, para. 1407(b).

(n28)Footnote 440. D. Barlow Burke, Jr., Law of Title Insurance § 5.8 (1986).

(n29)Footnote 441. A.B.A., Section of Real Property, Probate and Trust Law, Title Insurance and You: What Every Lawyer Should Know! 229-236 (1979).

(n30)Footnote 442. A.B.A., Section of Real Property, Probate and Trust Law, Title Insurance and You: What Every Lawyer Should Know! 229-236 (1979).

(n31)Footnote 443. *See, e.g.*, Cal. Ins. Code § 12401.7 (rates must be filed at least 30 days before they may be used).

(n32)Footnote 444. *See, e.g.*, Cal. Ins. Code § 12401.3.

(n33)Footnote 445. A.B.A., Section of Real Property, Probate and Trust Law, Title Insurance and You: What Every Lawyer Should Know! 229-236 (1979).

(n34)Footnote 446. *See F.T.C. v. Ticor Title Ins. Co., 112 S. Ct. 2169, 2174-76 (1992).*

(n35)Footnote 447. *See, e.g.*, Tex. Ins. Code Ann. § 9.07.

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CHAPTER 93 TITLE INSURANCE

11-93 Thompson on Real Property, Thomas Editions § 93.09

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§ 93.09 Other Types of Real Property Insurance.

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§ 93.09(a) Title Insurance Compared to Some Other Types of Real Property Insurance.

In addition to title insurance, certain other types of insurance are commonly involved in real estate transactions, most notably property and mortgage insurance. n448

Title and property insurance are both contracts of indemnity. Title insurance provides indemnification where a covered title risk has caused the insured to suffer an economic loss. Property insurance will indemnify the insured where a physical injury to the property has triggered a covered loss. Property insurance is a form of fire or casualty insurance; n449 it covers the interest of the insured in the property against economic loss caused by physical injury or damage due to covered perils.

Property insurance does not insure the property itself but the interest of the insured in it. n450 To qualify for property insurance, the insured must have an "insurable interest" in the property. n451 The insurable interest requirement means that there must be some significant relationship between the insured and the property. n452 The insured must receive a benefit from the interest or suffer a pecuniary loss from its destruction. n453 Legal or equitable title to the property, or a right to use or possess it, is a basis for insurability, but an insured may have an insurable interest in property without having title or possessory rights. n454 In addition to legal title ownership of the property, other insurable interests include those of vendors and vendees under real estate sales contracts, optionees, lessors and lessees, and mortgagees and other lienors.

Mortgage insurance is like title insurance in that it is a special kind of insurance that does not fit into any of the three traditional principal classes of insurance: "fire and marine," "life and accident," and "casualty" insurance. n455 Title insurance on a mortgagee's interest does not insure that the secured debt will be paid. By contrast, mortgage insurance does insure payment. Modern mortgage insurance creates a relationship similar to suretyship. The insurer, in effect, stands as a kind of surety for the principal debtor, the mortgagor. If the mortgagor does not satisfy the debt, the insured mortgagee, or its successor, may recover from the insurer. This relationship, however, is not truly one of suretyship. In a suretyship relationship, the surety, after paying the creditor, is subrogated to its rights against the principal debtor, including any personal obligations. By contrast, the mortgage insurer is usually limited to the insured's interest in the

land and will have no right to reach the debtor through any personal obligation owed to the insured.

§ 93.09(b) Property Insurance.

Various parties to real estate transactions may have insurable interests in the property that is the subject of the particular transaction. In addition to general owners, these parties may include, among others, vendors and vendees, optionees, lessors and lessees, and mortgagees and other lien holders. The parties to a real estate transaction will frequently contract about insurance coverage for the property and the responsibility to procure or maintain it. For example, mortgage lenders commonly require their borrowers to maintain property insurance which is payable directly to the lenders. n456 Long-term installment land contracts often require the vendee to maintain insurance for the benefit of the vendor. Additionally, real estate sales contracts sometimes provide that the vendor will add the vendee as a named insured on the vendor's insurance, or they may contain agreements that the vendee will be entitled to the proceeds. n457 Not infrequently, however, the contract is silent about a duty to insure and the right of a party to receive the benefit of the other party's insurance.

While a real estate sales contract is executory, the property may be damaged by fire or other casualty without either party being at fault. If the parties have made an agreement which applies to allocate the loss, the agreement will generally be enforced. In the absence of an agreement, the statutory or case law will allocate the loss. At least five different views about how the burden of such a loss should be allocated by the law have been adopted or advanced. n458 Depending on the provisions of the contract or the applicable law, either the vendee or vendor may solely bear the risk of loss.

In most jurisdictions, where the vendee has the risk of loss but inadequate or no insurance and where the contract is silent about insurance, the vendee is entitled to the benefit of the proceeds of the vendor's insurance. n459 This is true even if the vendee contributed nothing to the maintenance of the insurance. n460 An early English decision, Rayner v. Preston, n461 took a contrary position. The basis of the decision was that insurance is a personal contract and does not run with the land for the benefit of persons who were not parties to it. As a result, the insured vendor was entitled to the insurance proceeds and the full purchase price from the vendee. n462 The apparent unfairness of allowing the vendor to receive the insurance proceeds and the full purchase price from the vendee for the damaged property was recognized by Parliament in 1922, when it enacted legislation providing that the vendee was entitled to the benefit of the insurance proceeds, absent any agreement to the contrary. n463

The leading American case approving the rule of Rayner v. Preston is Brownell v. Board of Education n464 decided by the New York Court of Appeals in 1925. In approving the rationale of Rayner v. Preston, the court emphasized that the contract of insurance is a personal one and that the insurance covers the insured's interest in the property and not the property itself. n465 The majority of American cases reject the reasoning of Rayner v. Preston and hold that the vendee is entitled to the benefit of the insurance proceeds. n466 The usual rationale given for the majority position is that the vendor holds the legal title to the property as a trustee for the vendee. The insurance proceeds represent the property that has been destroyed. n467 The vendor holds the proceeds as a constructive trustee for the vendee in order to prevent a windfall to the vendor. n468 If the vendor declines to pursue the claim against the insurer, the vendee may compel payment by the insurer to the vendor as constructive trustee for the vendee. n469 The vendee may be required to reimburse the vendor for premiums paid on the policy. n470 If the vendee has sufficient insurance to cover the loss, the vendee may have no right to the benefit of the vendor's insurance. n471

Commentators have praised the majority rule as "more sensible." n472 Many years ago it was argued that the majority rule was in accord with the expectation of the "business public" and that "business usage substitutes the insurance money for the insured property, despite the general rule that the two are not legally connected... ." n473 While the arguments in favor of the majority rule are persuasive, the minority view has some support. A court, in refusing to follow the majority rule, argued that:

> [g]ranting buyer the proceeds of the insurance policy of sellers would result in a windfall to the buyer. It would be a clear case of unjust enrichment, since the buyer would gain the benefits of insurance coverage for which she never contracted or paid... . There is no windfall or unjust enrichment to sellers. Sellers, just as buyers, had an insurable interest in this property. Sellers contracted and paid for fire insurance. When the fire occurred, the sellers received exactly what they contracted and paid for--the proceeds of the fire insurance policy. n474

Of course, the "unjust enrichment" to the vendee may be ameliorated by requiring reimbursement to the vendor of insurance premiums paid.

While the vendee bearing the risk of loss is generally entitled to receive the benefit of the vendor's insurance, the reverse is not true (in the absence of special equities) when the vendor bears the risk and the vendee is insured. n475 This inconsistent treatment of the vendor and the vendee has been justified on both legal and practical, or policy, grounds.

The legal arguments advanced for allowing the uninsured vendee the benefit of the vendor's insurance while denying a reciprocal benefit to the uninsured vendor from the vendee's insurance are unsatisfactory. In both situations, there is an economic loss, an uninsured party to a contract, and another party to that contract who has insurance which covers that party's interest. There does not seem to be a logical basis for distinguishing the two situations so as to rationalize the inconsistent treatment.

Under the majority view, where the vendee bears the risk of loss and the vendor is insured, the vendor's insurer is liable, even though its insured may have suffered no real economic loss because that loss is borne by the vendee. The rationale is that the vendor's insurance is a contract of indemnification. The premiums are computed according to the value of the property and the risk involved without regard to collateral remedies, such as recovery of the full purchase price from a vendee despite a physical injury to the property. As a result, recovery on the vendor's policy is allowed because the vendor has a valuable insurable interest at the time of the casualty, even though the vendee bears the risk of loss between the parties. n476 It appears that the same rationale would support giving the vendor the benefit of the vendee's insurance. Commentators have argued that when the risk of loss is on an uninsured vendor and the vendee is insured, a different situation is presented. n477 In the event of loss, the vendee usually has the option of withdrawing from the transaction or completing it with an abatement of the purchase price. In either case, the insurer may claim that the insured has suffered no indemnifiable loss. n478 When the shoe is on the other foot, however, and the uninsured vendee has the risk of loss, the insured vendor is not forced to withdraw from the transaction and stay with the ruined property but may compel the vendee to take the property through specific performance, or its functional substitute, benefit of the bargain damages. If these remedies can be enforced against a particular vendee, the vendor's insurer could also convincingly argue that no indemnifiable loss occurred.

Commentators have also argued that the insured vendee, entitled to escape the contract or abatement of the purchase price, would have difficulty establishing more than an expectancy loss, such as anticipated profits on resale. The loss of a claimed expectancy interest probably would not be indemnifiable. n479 To establish a loss, the insured vendee would have to show that the insured event left the insured in a worse position than if the event had not occurred. Therefore, the vendee will be unable to prove a loss unless the vendee is allowed to recover the proceeds for the benefit of the vendor. n480 That is precisely the central problem. If the vendee must show that the insured event left the vendee worse off, it would seem to follow that the same requirement should apply to the insured vendor where the vendee has the risk of loss.

The practical and policy considerations for giving the vendee the benefit of the vendor's insurance, while denying a similar benefit to the uninsured vendor with the risk of loss, are more compelling:

> Since the constructive trust theory has been applied to allow the purchaser to reach the insurance

> proceeds in the hands of the vendor it might seem to follow, in the interest of symmetry if nothing else, that the purchaser too could be held as a constructive trustee for the benefit of the vendor. The equities are not really parallel, however, since the vendor, having been owner all along and being the apparent bearer of the risk of loss, might be expected to carry insurance for the benefit of all interested parties. The purchaser, on the other hand, is a "Johnny-come-lately" to the property and if he insures at all, he will probably do so solely to protect his own interests. n481

In other types of real estate transactions, a party is not directly entitled to the benefit of another party's insurance proceeds unless the party has a contractual right to them. In these instances, the principle that insurance is a personal contract between the insurer and the insured is generally followed. For example, a mortgage or vendor's lien holder has no right to the proceeds of the owner's insurance unless the owner agreed to carry the insurance for the lienor's benefit or unless a right to the proceeds was provided for in the policy. n482 Mechanics' and judgment lienors have no special claim to the proceeds of the debtors' or owners' insurance. n483

Fire insurance policies frequently contain provisions that cover the mortgagee's interest in the event that the property is damaged or destroyed by fire. Presently, the coverage is almost universally provided by the Standard or Union Mortgage Clause. n484 This Standard Clause provides that loss, if any, shall be payable to the mortgagee as its interest may appear and that the mortgagee's right in the insurance proceeds shall not be barred by any act or neglect by the mortgagor. n485 Cases are in conflict about whether a claimant who is not technically a mortgagee, such as a vendor's lienor, is entitled to recover under the clause. n486 Generally, courts have exhibited a propensity to expand the term "mortgagee" to include claimants that do not fit within a narrow definition of the term. n487

Commonly, the mortgagee will acquire the security property through a deed in lieu of foreclosure or by purchase at its own foreclosure sale. If the mortgagor's insurance is not assigned to the mortgagee, the mortgagor should obtain owner's coverage before accepting the ownership of the property. Nevertheless, it is not uncommon for fire or other casualty to damage the property, either before or after the mortgagee acquires it, before the mortgagee is fully insured as the owner of the property. The question then is whether the mortgagee, now the owner, can recover under the Standard Mortgage Clause of the mortgagor's policy.

When the mortgagee acquires the property after the loss, recovery on the Standard Mortgage Clause is limited to the amount of the secured debt, if any, which was not satisfied by the sale or transfer to the mortgagee. If the debt was fully satisfied, the mortgagee is not entitled to any of the policy proceeds. n488 The rationale is that the mortgagee's insurable interest in the property was the lien security at the time of the loss. Consequently, the mortgagee is entitled to recover no more than the amount of the unsatisfied debt at the time of the loss. If the mortgagee takes the damaged property in satisfaction of the debt, the claim of the mortgagee on the policy is reduced by the amount the debt is satisfied. n489 Where the mortgagee purchases at its own foreclosure sale, its right to the insurance proceeds may be limited to the deficiency judgment, if any. n490 If the mortgagee does not obtain a deficiency judgment, it may have no right to the insurance proceeds even if there is an actual deficiency. n491 If the mortgagee takes the property as full satisfaction, its interest in the insurance proceeds terminates. n492

Where the loss occurs after the mortgagee acquires the property, a different situation is presented. Generally, under the Standard Mortgage Clause, the mortgagee's recovery is not limited to the amount of the mortgage debt. Instead, it may extend to the full amount of the loss. n493 The rationale is that the mortgagee's insurable interest at the time of the loss has been increased from a security interest to general ownership through the purchase of the property. n494 Therefore, the mortgagee's recovery is no longer limited by the amount of the debt or deficiency. Where the loss occurs after the mortgagee purchases at the foreclosure sale but before legal title is deeded to the mortgagee, the mortgagee is the equitable owner of the property and, as such, has an owner's insurable interest at the time of the loss. n495 Consequently, the mortgagee's recovery under the Standard Clause is not limited to the amount of the debt or any deficiency. n496

§ 93.09(c) Mortgage Insurance.

A loan policy of title insurance does not insure that the loan secured by the insured mortgage will be paid. The title insurer agrees to indemnify the creditor secured by the mortgage against loss or damage caused by a defect in the title to the insured mortgage covered by the policy. If the defect reduces the value of the security and thereby prevents the creditor from obtaining full satisfaction, a covered loss may have occurred. By contrast, mortgage insurance provides a guarantee that the loan secured by the mortgage will be paid.

The availability of mortgage insurance may induce mortgage lenders to make loans that they would not have otherwise made. Studies and lender experience establish that the risk of default increases with the loan-to-value ratio (i.e., the less the borrower pays down, the greater the chance of default, assuming that the purchase price is equal to the value of the property). As a result, private mortgage lenders generally refuse to make loans that are in excess of eighty percent of the value of the security property unless they are covered by mortgage insurance. If at least part of the loan is covered by mortgage insurance, lenders may make loans with ratios as high as ninety-five or even one hundred percent. Consequently, mortgage insurance enables buyers to purchase real estate with very small or no down payments. In the absence of mortgage insurance, low- or no-down payment real estate buyers might have to buy either on an installment land contract or not at all. n497

Mortgage insurance is issued by government and private insurers. At the federal level, mortgage insurance is issued by the Federal Housing Administration (FHA), a division of the United States Department of Housing and Urban Development (HUD). n498 The Veterans Administration (VA) also guarantees mortgage loans. Strictly speaking, the VA guarantees are not insurance because the VA does not charge insurance premiums, as the FHA does. The VA does charge borrowers fees based on a percentage of the loans. Since these fees are used to finance VA programs, they are very similar to premiums. Practically speaking, the VA guarantee programs are insurance programs and will be treated as such in the discussion which follows.

§ 93.09(c)(1) Federal Mortgage Insurance.

Federal mortgage insurance has greatly impacted the residential mortgage market. n499 In some years, the percentage of federally insured or guaranteed mortgages outstanding on one- to four-unit family homes has considerably exceeded twenty-four percent of all mortgages on such homes. n500

The FHA-insured mortgage was created in 1934. n501 The FHA programs are numerous and the agency's activities, governing statutes, and regulations have frequently been modified. Specific programs have been discontinued, and new ones have been created. Consequently, anyone interested in current programs and specific aspects of them should consult very current sources. n502 While the details of FHA programs have changed frequently, their broad outlines have remained relatively constant. A central purpose of the FHA has been to make housing more attainable by insuring loans with high loan-to-value ratios that the lenders probably would not have made without insurance. Congress intended the FHA to be operated so that revenues received from fees and premiums would support operations with little or no need for a subsidy. n503

Borrowers do not borrow directly from FHA. Instead, they obtain funds from approved private lenders. If the borrower defaults, the lender is usually required to obtain title to the property and convey it to HUD in exchange for payment of the outstanding balance, interest, and certain costs. n504 HUD then normally sells the property, after making necessary repairs, through private real estate agents. n505

As is true of private insurers, the FHA attempts to control its losses by reviewing and refusing to accept certain risks. n506 It examines all applications for FHA insurance under eligibility standards which may apply to the borrower and the security property. n507 Furthermore, the FHA is authorized to insure a loan only if the lender has been approved by HUD "as responsible and able to service the mortgage properly." n508

Since its inception, the operations of FHA have been supported by fees and premiums. The FHA currently charges an up-front fee and annual premiums. n509 For many years, no up-front fee was charged, and the annual premium was one-half of one percent of the outstanding balance. n510 In 1983, the annual premium for most loans was replaced by an up-front charge of 3.8 percent of the initial loan amount for loans with terms in excess of 25 years, with slightly smaller percentages for loans with shorter terms. In 1990, Congress, concerned about the adequacy of the FHA's income to finance its programs, enacted legislation which required HUD to charge both an up-front fee and annual premiums. n511

The Veterans' Administration (VA) program was begun as part of the Serviceman's Readjustment Act of 1944. n512 The Act was intended to facilitate the return to civilian life of the many millions of Americans who had been mobilized into the U.S. military forces during World War II. The statute was also intended to compensate the former soldiers and sailors for the disruption of their careers and lives caused by their service and to demonstrate the appreciation of a grateful nation. The VA home mortgage guarantee program was intended to enable eligible veterans to purchase homes with little or no down payments. Subsequent amendments extended benefits to veterans of the Korean Conflict and those serving after January 31, 1955.

Like the FHA programs, the VA program mainly operates by guaranteeing payment of mortgage loans made by private lenders. n513 But, unlike the FHA programs, the VA program is not insurance because borrowers are not charged premiums. They are, however, charged a "funding fee," which is a small percentage of the amount of the loan. n514 While FHA insurance usually covers the entire loan, a VA loan guaranty only covers a top portion of the loan. n515 The amount of the VA guaranty is determined by a fairly complex set of rules. n516 The maximum amount of the guaranty depends on the size of the loan. For example, in 1993, for loans in excess of $56,250 and not more than $144,000, the maximum guaranty was the lesser of $36,000 or forty percent of the original principal loan. n517 Therefore, the maximum guarantee for a loan of $60,000 was $24,000 (40% of $60,000) and for a loan of $100,000 was $36,000 (the lesser of 40% of $100,000 or $36,000). Even though the coverage is limited to only a part of the loan, the amount is large enough to give the insured lender a comfortable margin of safety.

The VA also reviews the applicant's credit before agreeing to coverage. n518 While FHA loans and those covered by private mortgage insurance normally involve some down payment by the borrower, VA loans typically are made with little or no down payment. In effect, the VA guaranty often serves as a substitute for a down payment by the borrower.

Foreclosure of VA guaranteed mortgages is governed by detailed regulations. n519 The lender may be required to give the VA notice that the borrower is in default n520 and at least 30 days notice of an intention to foreclose. n521 After the VA receives a notice of default, an appraisal of the property will be ordered. The value determined by this appraisal is referred to as the "specified amount." If the lender acquires the property and conveys it to the VA, it will give the lender a credit for the property no greater than the "specified amount," regardless of what the lender actually bid for the property. If the successful bid for the property is less than the "specified amount," the lender's deficiency, if any, will be computed by subtracting that amount, not the bid, from the balance due.

§ 93.09(c)(2) Private Mortgage Insurance.

While the FHA-insured and the VA-guaranteed mortgage loans have been major presences in the residential real estate markets, lenders prefer to make so-called "conventional" loans. Certain FHA and VA practices and requirements are objectionable to mortgage lenders, such as regulations that require certain terms in the contracts with the borrowers and the loan approval process, which may result in substantial delays in making loans. n522 Lenders also dislike the VA requirement that guaranteed loans have to be "assumable" and not subject to acceleration through a Due on Sale Clause upon transfer of the property. Lender dislike of government insurance program requirements and delays contributed to the rapid growth of the modern private mortgage insurance industry since its inception in 1957.

In the late 19th century, title insurance companies, mainly in New York, began issuing mortgage insurance. n523 Mortgage insurance in this initial era of the industry was sold along with the mortgages by the companies to investors. n524 The insurance was issued after the loan was made, not as a condition of the origination of the loan. During the Great Depression, the New York mortgage insurance industry met disaster. In 1933, the state of New York took over most of the companies. A subsequent investigation revealed that the companies were grossly undercapitalized, engaged in deceptive practices, and suffered from conflicts of interest which contributed to unsound underwriting by the companies and questionable lending practices by bank subsidiaries. Instead of implementing reforms suggested by the investigators, the New York Legislature responded to these revelations by outlawing mortgage insurance. n525 Because the mortgage insurance industry had existed almost solely in New York, the industry came to a virtual end.

Revival of the private mortgage insurance industry began in 1957 when a Milwaukee, Wisconsin, lawyer founded the Mortgage Guaranty Insurance Corporation. By the mid-1980s, there were approximately 20 companies writing Private Mortgage Insurance (PMI). As the financial debacles of the 1980s unfolded, industry losses mounted, causing a number of companies to cease doing business. After the 1980s, about 12 companies remained. Most mortgage insurance companies belong to an international organization, the Mortgage Insurance Companies of America (MICA), which includes nine American companies and one each from Canada and Australia.

Private Mortgage Insurance (PMI) is similar to VA guarantees in that only a top portion of the loan is insured, generally twenty to twenty-five percent. n526 But, unlike VA coverage, the amount covered is computed on the loan balance as of the time a claim is made, not on the original amount of the loan. n527 Lenders will not normally make loans with loan-to-value ratios greater than eighty percent without mortgage insurance, and purchasers in secondary mortgage markets will not buy loans with ratios in excess of eighty percent that are not insured. While the VA may guarantee a loan with a ratio of one hundred percent, private mortgage insurers will not insure loans with ratios greater than ninety-five percent. Like the FHA, private mortgage insurers charge premiums which may include up-front charges and periodic (usually monthly) payments. The borrower pays these premiums; the original lenders and any assignees from the lenders are the insureds.

Private mortgage insurers will not normally insure loans until they make a master policy contract with a particular lender. The master policy will define the procedures that the lender must follow in making insured loans, actions to be taken in the event of borrower default, and claim procedures. n528 After the master policy contract has been made, the lender is authorized to submit applications for insurance on individual loans. In contrast to the delays of four to six weeks or more involved with FHA and VA approvals, the majority of individual loan applications are accepted or rejected in one business day. n529

In 1993, a Chicago private mortgage insurer announced a program under which approved lenders would be authorized to make insured loans which meet a set of criteria without prior review by the insurer. n530 The announced program is not really a radical departure from actual practice. Before a private mortgage insurer will approve an individual application for insurance, the various risks factors involved, such as the credit-worthiness of the borrower and the quality of the property security, will be assessed. In actual practice, the insurer will rely very heavily on the underwriting of the lender. This reliance is largely responsible for the very rapid processing of most applications.

COMPUTER-ASSISTED RESEARCH

LEXIS: "property insurance"
"mortgage insurance"
"mortgage insurance" and (FHA or "housing administration")
"mortgage insurance" and (HUD or "housing and urban development")
"mortgage insurance" and (veteran/s administration)
mortgagor/s "life insurance"
"environmental impairment"

"flood insurance"
"Mortgage Guaranty Insurance Corporation"
"Mortgage Insurance Companies of America"

FOOTNOTES:

(n1)Footnote 448. Other types that should be mentioned are environmental impairment and other liability, federal flood (a special type of property insurance) and mortgagor life insurance. Environmental impairment liability insurance is discussed and compared with title insurance in Robert S. Bozarth, *Environmental Liens and Title Insurance, 23 U. Rich. L. Rev. 305, 343-47 (1989).* Federal flood insurance is discussed in Powell, Powell on Real Property § 92A.05 (Michael Allan Wolf, ed., Matthew Bender). Mortgagor life insurance is a form of credit life insurance. See Robert E. Keeton & Alan I. Widiss, Insurance Law (1988) for a good general discussion of the law of insurance. Standard multi-volume works on the law of insurance include John Alan Appleman, Appleman's Insurance Law and Practice (Rev. ed. by Edward J. & David F. Bander 1987) and George J. Couch, Cyclopedia of Insurance Law (2d ed. by Ronald A. Anderson, 1982).

(n2)Footnote 449. Sometimes liability insurance is combined with property insurance. *See* Alan R. Miller, *Property Insurance Environmental Claims - Physical Loss and Damage to Insured Property, in* A.B.A., Tort and Insurance Practice Section, Environmental Claims and Property Insurance Coverage 30, 31 (1989).

(n3)Footnote 450. Third Establishment, Inc. v. 1931 North Park Apts., 417 N.E.2d 167, 173 (Ill. App. 1981).

(n4)Footnote 451. Robert E. Keeton & Alan I. Widiss, Insurance Law 135 (1988).

(n5)Footnote 452. Robert E. Keeton & Alan I. Widiss, Insurance Law 135 (1988).

(n6)Footnote 453. *Home Ins. Co. v. Mendenhall, 45 N.E. 1078 (Ill. 1897).*

(n7)Footnote 454. *Prince v. Royal Indem. Co., 541 F.2d 646, 649 (7th Cir. 1976).*

(n8)Footnote 455. Robert E. Keeton & Alan I. Widiss, Insurance Law 18 (1988).

(n9)Footnote 456. *See, e.g., English v. Fischer, 660 S.W.2d 521, 522-23 (Tex. 1983);* A.B.A., Tort and Insurance Practice Section, the Standard Mortgage Clause: Protecting All Parties (1987).

(n10)Footnote 457. D. Barlow Burke, Jr., Real Estate Transactions: Examples and Explanations 51 (1993); *Smith v. Buege, 387 S.E.2d 109 (W. Va. 1989).*

(n11)Footnote 458. For descriptions and discussions of the different views, see *Skelly Oil Co. v. Ashmore, 365 S.W.2d 582 (Mo. 1963);* Randy R. Koenders, Annotation, *Risk of Loss by Casualty Pending Contract for Conveyance of Real Property--Modern Cases, 85 A.L.R. 4th 233 (1991);* Allen P. Fineberg, *Risk of Loss in Executory Contracts for the Sale of Real Property,* 14 Colum. J. L. & Soc. Prob. 453 (1979). Under the prevailing yet diminishing common-law rule, the risk of loss while the contract is executory is on the vendee if the contract is mutually enforceable, under the theory of equitable conversion. *See, e.g., Ridenour v. France, 442 N.E.2d 716 (Ind. App. 1982); Bleckley v. Langston, 143 S.E.2d 671 (Ga. App. 1965).* A statute adopted in eleven states, the Uniform Vendor and Purchaser Risk Act, places the risk of loss on the vendor until the first to occur of a transfer of possession or legal title to the vendee. *See* D. Barlow Burke, Jr., Real Estate Transactions 47-51 (1993).

(n12)Footnote 459. F.M. English, Annotation, *Rights of Vendor and Purchaser, as between Themselves, in Insurance Proceeds, 64 A.L.R. 2d 1402, 1406 (1959).*

(n13)Footnote 460. F.M. English, Annotation, *Rights of Vendor and Purchaser, as between Themselves, in Insurance Proceeds, 64 A.L.R. 2d 1402, 1406 (1959).*

(n14)Footnote 461. *18 Ch. D. 1 (1881).*

(n15)Footnote 462. The vendor, however, held the purchase money in trust for the insurer. *Castellain v. Preston, 11 Q.B.D. 380 (1883).*

(n16)Footnote 463. 12 & 13 Geo. V, ch. 16, § 105 (1922).

(n17)Footnote 464. *146 N.E. 630 (N.Y. 1925).*

(n18)Footnote 465. Because the risk of loss was placed on the vendor by the contract, the discussion in *Brownell* about the rule of Rayner v. Preston is dicta.

(n19)Footnote 466. F.M. English, Annotation, *Rights of Vendor and Purchaser, as between Themselves, in Insurance Proceeds, 64 A.L.R. 2d 1402, 1406 (1959).*

(n20)Footnote 467. *Heinzman v. Howard, 366 N.W.2d 500 (N.D. 1985); Millville Aerie v. Weatherby, 88 A. 847, 848 (N.J. Eq. 1913).*

(n21)Footnote 468. *Alabama Farm Bur. Mut. Ins. Co. v. Meyers, 516 So. 2d 661, 663 (Ala. App. 1987).*

(n22)Footnote 469. *Dubin Paper Co. v. Insurance Co. of N. Am., 63 A.2d 85 (Pa. 1949).*

(n23)Footnote 470. *Alabama Farm Bur. Mut. Ins. Serv. v. Nixon, 105 So. 2d 643 (Ala. 1958).*

(n24)Footnote 471. *Hanson v. Hamnes, 460 N.W.2d 647 (Minn. App. 1990);* Allen P. Fineberg, Comment, *Risk of Loss in Executory Contracts for the Sale of Real Property, 14 Colum. J.L. & Soc. Probs. 453, 482 (1979).*

(n25)Footnote 472. John E. Cribbet & Corwin W. Johnson, Principles of the Law of Property 198 (3d ed. 1989); *see also* John E. Cribbet, *Insurance and the Executory Contract for the Sale of Real Estate, 51 Ill. B.J. 124 (1962).*

(n26)Footnote 473. William R. Vance, *Vendee's Claim to Insurance Money Received by Vendor, 34 Yale L.J. 87, 91 (1924).*

(n27)Footnote 474. *Long v. Keller, 163 Cal. Rptr. 532, 536 (1980).* The court affirmed the trial court's judgment that the vendee was entitled to rescind the contract, but was not entitled to share in the insurance proceeds, even though she had contributed $5,795.35 to the insured improvements that were destroyed by a fire. Apparently, the vendors did not appeal the trial court's judgment that the vendee was entitled to a return of her $1,000 down payment. The reviewing court stated that the vendee had the risk of loss and "was not relieved from her duty to perform, nor was she entitled to recover any portion of the price already paid." *163 Cal. Rptr. at 534.*

(n28)Footnote 475. John E. Cribbet & Corwin W. Johnson, Principles of the Law of Property 199-200 (3d ed. 1989). Where the insured vendee bears the risk of loss, the vendor may reach the insurance proceeds in satisfaction of the balance due under the contract. *Kindred v. Boalbey, 391 N.E.2d 236 (Ill. App. 1979).*

(n29)Footnote 476. *Wolf v. Home Ins. Co., 241 A.2d 28, 32 (N.J. Super. 1968).*

(n30)Footnote 477. Roger A. Cunningham, et al., the Law of Property 708-09 (1984).

(n31)Footnote 478. Roger A. Cunningham, et al., the Law of Property 708-09 (1984); *see Sanford v. Breidenbach, 173 N.E.2d 702 (Ohio App. 1960).*

(n32)Footnote 479. Robert E. Keeton & Alan I. Widiss, Insurance Law 326 (1988).

(n33)Footnote 480. Robert E. Keeton & Alan I. Widiss, Insurance Law 326 (1988).

(n34)Footnote 481. John E. Cribbet & Corwin W. Johnson, Principles of the Law of Property 199 (3d ed. 1989); *see also* John E. Cribbet, *Insurance and the Executory Contract for the Sale of Real Estate, 51 Ill. B.J. 124 (1962);* William R. Vance, *Vendee's Claim to Insurance Money Received by Vendor, 34 Yale L.J. 87, 91 (1924).*

(n35)Footnote 482. *Andrello v. Nationwide Mut. Fire Ins. Co., 289 N.Y.S.2d 293 (1968);* L.S. Tellier, Annotation, *Right of Holder of Mortgage or Lien to Proceeds of Property Insurance Payable to Owner Not Bound to Carry Insurance for Former's Benefit, 9 A.L.R.2d 299 (1950).*

(n36)Footnote 483. *Oregon Mut. Ins. Co. v. Cornelison, 330 P.2d 161 (Or. 1958);* L.S. Tellier, Annotation, *Right of Holder of Mortgage or Lien to Proceeds of Property Insurance Payable to Owner Not Bound to Carry Insurance for Former's Benefit, 9 A.L.R.2d 299, 305-07 (1950).*

(n37)Footnote 484. James R. Dwyer & Carey S. Barney, *Analysis of Standard Mortgage Clause and Selected Provisions of the New York Standard Fire Policy, in* A.B.A. Tort and Insurance Practice Section, The Standard Mortgage Clause: Protecting All Parties 1, 3 (1987). For a discussion of other provisions that have been used in the past or that are infrequently used, *see* Robert E. Keeton & Alan I. Widiss, Insurance Law § 4.1(B)(2). (1988).

(n38)Footnote 485. James R. Dwyer & Carey S. Barney, *Analysis of Standard Mortgage Clause and Selected Provisions of the New York Standard Fire Policy, in* A.B.A. Tort and Insurance Practice Section, the Standard Mortgage Clause: Protecting all Parties 1, 2 (1987).

(n39)Footnote 486. James R. Dwyer & Carey S. Barney, *Analysis of Standard Mortgage Clause and Selected Provisions of the New York Standard Fire Policy, in* A.B.A. Tort and Insurance Practice Section, the Standard Mortgage Clause: Protecting all Parties 7 (1987). *Compare General Elec. Credit Corp. v. Aetna Cas. & Sur. Co., 263 A.2d 448 (Pa. 1970)* and *Aetna Ins. Co. v. C.I.T. Corp., 74 F.2d 516 (5th Cir. 1934).*

(n40)Footnote 487. James R. Dwyer & Carey S. Barney, *Analysis of Standard Mortgage Clause and Selected Provisions of the New York Standard Fire Policy, in* A.B.A. Tort and Insurance Practice Section, the Standard Mortgage Clause: Protecting All Parties 1, 8-9 (1987).

(n41)Footnote 488. *Partel, Inc. v. Harris Trust & Sav. Bank, 437 N.E.2d 1225 (Ill. App. 1982).*

(n42)Footnote 489. *Travelers Ins. Co. v. Providence Wash. Ins. Group, 530 N.Y.S.2d 390* (390). In the latter case, the court [without citing it] applied the New York statute which limits deficiency judgments to the debt minus the fair market value of the property, or the foreclosure sale price, whichever is higher. *See* N.Y. Real Prop. Actions Law § 1371 (McKinney). The mortgagee's recovery on the insurance policy was limited to the deficiency as determined under the statute. This was a windfall to the insurer because the actual deficiency was $13,900 more than the deficiency allowed by the New York statute. For a discussion of the case, *see* Dan D. Kohane, *Insurance Law, 40 Syracuse L. Rev. 433, 450 (1989).*

(n43)Footnote 490. *See Whitestone Sav. & Loan Ass'n v. Allstate Ins. Co., 270 N.E.2d 694 (N.Y. 1971).*

(n44)Footnote 491. *Moke Realty Corp. v. Whitestone Sav. & Loan Ass'n, 370 N.Y.S.2d 377 (1975) aff'd, 363 N.E.2d 587 (N.Y. 1977).*

(n45)Footnote 492. 495 *Corp. v. New Jersey Ins. Underwriting Ass'n, 430 A.2d 203, 208 (N.J. 1981).*

(n46)Footnote 493. Annotation, *Right of Mortgagee, Who Acquires Title to Mortgaged Premises in Satisfaction of Mortgage, to Recover, under Fire Insurance Policy Covering Him as "Mortgagee" for Loss or Injury to Property thereafter Damaged or Destroyed by Fire, 19 A.L.R.4th 779, 783-786 (1983).*

(n47)Footnote 494. 495 *Corp. v. New Jersey Ins. Underwriting Ass'n, 430 A.2d 203, 206 (N.J. 1981).*

(n48)Footnote 495. *Estate of Brindisi v. State Farm Ins. Co., 564 N.Y.S.2d 985 (1991).*

(n49)Footnote 496. *Estate of Brindisi v. State Farm Ins. Co., 564 N.Y.S.2d 985 (1991)*

(n50)Footnote 497. In most jurisdictions, the position of the installment land contract buyer is less desirable than that of the mortgagor-borrower. Default by the contract buyer may result in a loss of all payments made on the contract in addition to the loss of the land itself. By contrast, the mortgagor has the protection of the equity of redemption and the right to the surplus value of the property after deduction of the debt and the costs of foreclosure.

(n51)Footnote 498. *42 U.S.C. § 3533.*

(n52)Footnote 499. Quintin Johnstone. *Land Transfers: Process and Processors, 22 Val. U. L. Rev. 493, 520 (1988).*

(n53)Footnote 500. Quintin Johnstone, *Land Transfers: Process and Processors, 22 Val. U. L. Rev. 493, 520-21 (1988).*

(n54)Footnote 501. *12 U.S.C. § 1701 et seq.* The FHA is now a division of HUD.

(n55)Footnote 502. A good way to begin is by consulting the available HUD publications, which are available at regional offices of HUD, about the Department's housing programs.

(n56)Footnote 503. The Congressional goal of little or no subsidy has not been consistently achieved. For example, massive defaults in the 1980s required massive subsidies. Sharon Stangenes, *Privatize FHA, Professor Urges, Citing Tab for Presidential Towers*, Chi. Trib., June 14, 1993, § 4, at 2

(n57)Footnote 504. HUD, Administration of Insured Home Mortgages, HUD Handbook 4330.1 REV-2, ch. 9 (1991).

(n58)Footnote 505. *See* HUD, How to sell HUD Homes (1991).

(n59)Footnote 506. Because the FHA is part of a federal government program to make housing more affordable, the agency cannot freely use risk review to control its losses. As a government agency, it is susceptible to political pressure to accept risks. This restricted freedom to control exposure by rejecting risks may not be inappropriate. The essence of FHA insurance is to make acceptable to private lenders loans that otherwise might be too risky for those lenders.

(n60)Footnote 507. *12 U.S.C. § 1709.*

(n61)Footnote 508. *12 U.S.C. § 1709*(b)(1).

(n62)Footnote 509. 24 C.F.R. § 203.259a. Both charges are based on a percentage of the loan or outstanding balance.

(n63)Footnote 510. Grant S. Nelson & Dale A. Whitman, Real Estate Finance Law § 11.2 (2d ed. 1985).

(n64)Footnote 511. This requirement was in the Cranston-Gonzalez National Affordable Housing Act of 1990. *See 12 U.S.C. § 1709*(c)(2). The charges in 1993 were up-front premiums of 2.25 percent of the original loan and annual premiums of .50 or .55 of one percent of the balance. The duration of the annual premium varied with the loan-to-value ratio with longer periods for loans with higher ratios. The annual premium of .55 of one percent was for loans with ratios greater than 95 percent.

(n65)Footnote 512. 58 Stat. § 291. This statute was more commonly known as the "GI Bill of Rights."

(n66)Footnote 513. Eligible veterans who show that private funds are unavailable may be able to obtain direct loans from the VA. *38 U.S.C. § 1811*. This rarely occurs.

(n67)Footnote 514. *38 U.S.C. § 3729.*

(n68)Footnote 515. This coverage is usually satisfactory to the lender because the covered top portion of the loan and the proceeds from the security property will normally be sufficient to cover most, if not all, of the obligation owed.

(n69)Footnote 516. 38 C.F.R. § 36.4302.

(n70)Footnote 517. 38 C.F.R. § 36.4302.

(n71)Footnote 518. 38 C.F.R. §§ 36.4206, 36.4337.

(n72)Footnote 519. 38 C.F.R. § 36.4315 *et seq.*

(n73)Footnote 520. 38 C.F.R. § 36.4315.

(n74)Footnote 521. 38 C.F.R. § 36.4317.

(n75)Footnote 522. Diana G. Browne, *The Private Mortgage Industry, The Thrift Industry and The Secondary Mortgage Market: Their Interrelationships, 12 Akron L. Rev. 631, 637 (1979).*

(n76)Footnote 523. Diana G. Browne, *The Private Mortgage Industry, The Thrift Industry And The Secondary Mortgage Market: Their Interrelationships, 12 Akron L. Rev. 631, 633 (1979).*

(n77)Footnote 524. Diana G. Browne, *The Private Mortgage Industry, The Thrift Industry And The Secondary Mortgage Market: Their Interrelationships, 12 Akron L. Rev. 631, 635 (1979).*

(n78)Footnote 525. Diana G. Browne, *The Private Mortgage Industry, The Thrift Industry And The Secondary Mortgage Market: Their Interrelationships, 12 Akron L. Rev. 631, 637 (1979).*

(n79)Footnote 526. Mortgage Insurance Companies of America, 1992-1993 Factbook & Membership Directory 17 (1992).

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(n83)Footnote 530. Chuck Doherty, *New Mortgage Insurance Set: Lender to Pay for and Approve Policy*, Milwaukee Sentinel, April 7, 1993, at 1D, cols. 5 & 6.

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CHAPTER 93 TITLE INSURANCE

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Annotations

Annotation, *Amount of Recovery, Measure, Extent, or Amount of Recovery on Title Insurance Policy, 60 A.L.R.2d 972.*

Annotation, *Attorney's Personal Liability for Expenses Incurred in Relation to Services for Client, 66 A.L.R.4th 256.*

Annotation, *Construction of Clause in Title Insurance Policy Excepting Defects Resulting from the Rights of Parties in Possession, 94 A.L.R. 3d 1188.*

Annotation, "*Defect in, or Condition of, Adjacent Land or Way as Within Coverage of Title Insurance Policy*," *8 A.L.R.4th 1246.*

Annotation, *Defects Affecting Marketability of Title Within Meaning of Title Insurance Policy, 18 A.L.R. 4th 1311.*

Annotation, "*Duty of Applicant or His Agent to Disclose Facts Arising or Discovered After Application for Title Insurance*," *75 A.L.R. 3d 600.*

Annotation, *Enforceability of Single Mechanic's Lien Upon Several Parcels Against Less than the Entire Property Liened, 68 A.L.R.3d 1300.*

Annotation, *Errors and Omissions Policy -- Insurance Agents' and Brokers' Professional Liability Insurance, 55 A.L.R.5th 681.*

Annotation, *Fraud Predicated on Vendor's Misrepresentation or Concealment of Danger or Possibility of Flooding or Other Unfavorable Water Conditions, 90 A.L.R.3d 568.*

Annotation, *Insurable Interest in Property of Lessee with Option to Purchase Property, 74 A.L.R. 4th 883.*

Annotation, *Misrepresentation or Concealment by Insured or Agent Avoiding Liability by Title Insurer, 17 A.L.R. 4th 1077.*

Annotation, *Necessity and Reasonableness of Vendor's Notice to Vendor of Requisite Time of Performance of Contract After Prior Waiver or Extension of Original Time of Performance, 32 A.L.R.4th 8.*

Annotation, *"Redlining," Consisting of Denial of Home Loans or Insurance Coverage in Certain Neighborhoods, as Discrimination in Violation of §§ 804 and 805 of Fair Housing Act (42 U.S.C.S. §§ 3604, 3605), 73 A.L.R. Fed. 899.*

Annotation, *Retroactive Effect of Zoning Regulation, in Absence of Saving Clause, on Pending Application for Building Permit, 50 A.L.R.3d 596.*

Annotation, *Scope and Exemptions of State Deceptive Trade Practice and Consumer Protection Acts, 89 A.L.R.3d 399.*

Annotation, *Title Examination Activities by Lending Institution, Insurance Company or Title and Abstract Company, as Illegal Practice of Law, 85 A.L.R. 2d 184.*

Annotation, *Title Insurance Company's Rights in Title Information, 38 A.L.R. 4th 968.*

Annotation, *Title Insurance: Exclusion of Liability for Defects, Liens, or Encumbrances Created, Suffered, Assumed, or Agreed to by the Insured, 87 A.L.R. 3d 515.*

Annotation, *Title Insurer's Negligent Failure to Discover and Disclose Defect as Basis for Liability in Tort, 19 A.L.R. 5th 786.*

Annotation, *Validity and Construction of Insurance Anti-Rebate Statutes, 90 A.L.R.4th 213.*

Annotation, *Variance Between Offer and Acceptance in Regard to Title as Affecting Consummation of Contract for Sale of Real Property, 16 A.L.R.3d 1424.*

Annotation, *Waiver by Insured or Insured's Agent of Required Notice of Cancellation of Insurance Policy, 86 A.L.R.4th 886.*

Annotation, *What Constitutes a Charge, Encumbrance, or Lien Within Contemplation of Title Insurance Policy, 87 A.L.R.3d 764.*

Annotation, *What Is An "Insurance Company" under § 831(a)(1) of Internal Revenue Code of 1954 (26 U.S.C.S. § 831(a)(1)), or Its Predecessors, Providing for Tax on Insurance Companies Other Than Life or Mutual, 49 A.L.R. Fed. 452.*

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Supp. To CHAPTER 93 TITLE INSURANCE

11-93 Thompson on Real Property, Thomas Editions Supp. to § 93.01

Supp. to § 93.01 Overview of the Title Insurance Industry.

[Go To Main]

Add:

Barstad v. Stewart Title Guaranty Company, Inc., 39 P.3d 984 (Wash. 2002) (title insurers have no general duty to disclose known or potential title defects when issuing preliminary title commitments); *Hess v. Baccarat, 731 N.Y.S.2d 296 (2001)* (preliminary title report is merged in the final policy).

Add:

Donald Roth, "Building a House in the Sand: The Intersection of Good Law and Bad Policy in First American Title Insurance Co. v. Combs," 62 *Tax Law.* 1137 (Summer, 2009) (brief history of title insurance beginning in 1853).

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Supp. To CHAPTER 93 TITLE INSURANCE

11-93 Thompson on Real Property, Thomas Editions Supp. to § 93.02

Supp. to § 93.02 Nature of Title Insurance.

First Amendment

§ 93.02(a) Introduction. [Go To Main]

After the word "indefinitely" in line 2, add new note 39.1 n39.1

§ 93.02(b) Contract of Indemnity. [Go To Main]

Add:

GE Capital Mortgage Services, Inc. v. Privetera, 788 A.2d 324 (N.J. Super. 2002) (mortgagee was not a third-party beneficiary of the title insurance contract).

Add:

Commonwealth Land Title Ins. Co. v. Graoch Assocs., 2010 U.S. Dist. LEXIS 29318 (E.D. Ky. 2010)) (title insurance does not insure that no lien or encumbrance will be found).

Add:

Chi. Title Ins. Co. v. Runkel Abstract & Title Co., 610 F. Supp. 2d 973 (W.D. Wis. 2009) (the title agency was liable after damages were suffered by the policy holder since the agency was negligent); *Amato v. United Gen. Title Ins. Co., 2009 U.S. Dist. LEXIS 21266 (E.D. Pa. 2009)* (a title insurance company guarantees the correctness of title searches and insures property owners against loss or damage incurred as a result of defects in their titles); *Griffin v. Chi. Title Ins. Co., 2010 U.S. Dist. LEXIS 26812 (D. Md. 2010)* (an insurer has a duty to defend a suit against the insured by a third party, for any claim that is potentially covered under the insurance policy; the potential success of the underlying claim is irrelevant).

Add:

National Mortgage Warehouse, LLC, v. Bankers First Mortgage Co., Inc., 190 F. Supp. 2d 774 (D. Md. 2002) (the insurance underwriter was not liable as a principal for the fraudulent acts of a title agent).

§ 93.02(d) Construction of Title Policies [Go To Main]

Add:

Northern Sec. Ins. Co. v. Doherty, 987 A.2d 253 (Vt. 2009) (if the plain meaning of policy terms is difficult to determine, the resulting ambiguity will be construed in favor of coverage for the insured); *James McHugh Constr. Co. v. Zurich Am. Ins. Co., 2010 Ill. App. LEXIS 318 (Ill. App. Ct. 1st Dist. 2010)* (if the words in a policy could have more than one reasonable interpretation, the court must consider them ambiguous and interpret them in favor of the insured).

Add:

Szelc v. Stanger, 2009 U.S. Dist. LEXIS 112911 (D.N.J. 2009) (a title insurance policy whose terms are clear will be enforced as written, but when the meaning of an insurance policy is ambiguous, the ambiguity is construed in favor of the insured and against the insurer); *Fleishour v. Stewart Title Guar. Co., 2010 U.S. Dist. LEXIS 12905 (E.D. Mo. 2010)* (ambiguous policy provisions, along with those that purport to restrict or eliminate coverage, are construed strongly against the insurer); *Nationwide Life Ins. Co. v. Commonwealth Land Title Ins. Co., 579 F.3d 304 (3d Cir. 2009)* ; *Jaco Envtl., Inc. v. Am. Int'l Specialty Lines Ins. Co., 2009 U.S. Dist. LEXIS 51785 (W.D. Wash. 2009)* .

§ 93.02(e) Obligation of Good Faith and Fair Dealing. [Go To Main]

Add:

In re Carter, 553 F.3d 979 (6th Cir. 2009) (action under RESPA anti-kickback and anti-fee-splitting provisions, permitted even without allegation of overcharging).

Robinson v. Fountainhead Title Group Corp., 447 F. Supp. 2d 478 (D. Md. 2006) (title insurer subject to liability for

violation of RESPA provisions).

Stewart Title Guaranty Co., v. Hadnot, 101 S.W.3d 642 (Tex. App. 2003) (action for breach of policy accrues when coverage is denied, rather than when loss was sustained); *Harms v. Burt, 40 P.3d 329 (Kan. App. 2002)* (insurers have no general duty to disclose potential or known title defects at the time they issue a preliminary title commitment).

Chi. Title Ins. Co. v. Runkel Abstract & Title Co., 610 F. Supp. 2d 973 (W.D. Wis. 2009) (a company did not act in good faith and forfeited its right to indemnity under state law by failing to give an agency an opportunity to protect its own interests); *Stewart Title Co. v. Investors Funding Corp., 2010 U.S. Dist. LEXIS 46334 (D. Haw. 2010)* (insurer sued because it failed to list both properties the insured believed were being protected by their insurance policy).

Add:

Fidelity National Title Insurance Co. v. Matrix Financial Services Corp., 567 S.E.2d 96 (Ga. App. 2002) (bad faith penalities for insurer's refusal to pay the claim).

New note 55.1, at end of fourth sentence: n55.1

FOOTNOTES:
(n1)Footnote 39.1. *First Midwest Bank v. Stewart Title Guaranty Company, 823 N.E.2d 168 (Ill. App. 2005)* (when a wraparound loan paid of purchase and construction loans, the title insurer's liability under a lender's policy was terminated).

(n2)Footnote 55.1. *Archambo v. Lawyers Title Insurance Corp., 646 N.W.2d 170 (Mich. 2002)* (the statement in the title insurance policy requiring disclosure of any known lien was not a condition precedent to the policy being in effect).

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Supp. to § 93.03 Statement of Coverage.

[Go To Main]

§ 93.03(a) Insuring Clauses. [Go To Main]

§ 93.03(a)(2) Any Defect in or Lien or Encumbrance on Such Title.

Add:

Hanson Business Park, L.P. v. First Nat. Title Ins. Co., 209 S.W.3d 867 (Tex. App. 2006) (flood plain designation was not a defect in the title);

Elysian Investment Group, LLC v. Stewart Title Guaranty Co., 129 Cal. Rptr 2d 372 (2002) (a notice of the premises being classified as substandard did not constitute a defect in or lien or encumbrance on the title); *Universal Holdings II Limited Partnership v. Overlake Christian Church, 60 P.3d 1254 (Wash. App. 2003)* (title insurer liable for loss resulting from erroneous legal description).

Commonwealth Land Title Ins. Co. v. Graoch Assocs., 2010 U.S. Dist. LEXIS 29318 (E.D. Ky. 2010) (a defect in title occurs when the rights, privileges and powers of property ownership are subject to the claims of others).

Add:

Universal Holdings II Limited Partnership v. Overlake Christian Church, 60 P.3d 1254 (Wash. App. 2003) (insurer liability for erroneous legal description).

Gordon v. Terrace Mortg. Co., 571 F.3d 1342 (11th Cir. 2009) (lack of notary seal on the deed was not sufficient to be

a defect because an affidavit filed with the deed had a signature signed by a notary); *Fleishour v. Stewart Title Guar. Co., 2010 U.S. Dist. LEXIS 12905 (E.D. Mo. 2010)* (adverse possession of a portion of the property is deemed a defect in the property title and the insurer is liable); *Griffin v. Chi. Title Ins. Co., 2010 U.S. Dist. LEXIS 26812 (D. Md. 2010)* (mere negligence by the insured is not sufficient to establish a policy exclusion for a defect); *Morrison v. Wells Fargo Bank, N.A., 2010 U.S. Dist. LEXIS 45312 (M.D. Pa. 2010)* (defect in title occurred when the insurer insured a property not realizing that the property was owned by someone else with the same name and initials, but different middle name); *Nielson v. Equitable Title Agency, Inc., 2010 Bankr. LEXIS 837 (Bankr. M.D. Fla. 2010)* (an encumbrance on the property, which prevented purchasers from refinancing, selling, or conveying their home, was deemed a defect in the title and the insurer was liable).

Ray H. Rhone & Denise Rhone v. First Am. Title Ins. Co., 2010 Ill. App. LEXIS 422 (Ill. App. Ct. 1st Dist. 2010) (an encumbrance may be broader than a lien and may include any right to, or interest in, land which may subsist in a third party).

Add:

Frazier v. Citifinancial Corp., LLC, 2010 U.S. App. LEXIS 8960 (11th Cir. 2010) (bank was given an equitable lien on the property after the borrower refused to repay the mortgage); *First Am. Bank v. First Am. Transp. Title Ins. Co., 585 F.3d 833 (5th Cir. 2009)* (two ships were sold in foreclosure for the value of necessaries liens).

Add:

Park 100 Investment Group II, LLC v. Ryan, *103 Cal. Rptr. 3d 218 (Cal. App. 2009)* (even where a parcel is not landlocked, the lack of access to an easement can have devastating effects).

Add:

Riordan v. Lawyers Title Insurance Corporation, 393 F. Supp. 2d 1100 (D. N.M. 2005) (title policy covered lack of access, but there was no such lack of access as would invoke coverage under the policy).

Uzzle v Nunzie Ct. Homeowners Assn., Inc., 895 N.Y.S.2d 203 (2010) (insured claimed damages because he had no legal right to access the premises).

Add:

A.R.S. § 11-809(G)(1) (in Arizona, legal access is defined as a public right of vehicular ingress and egress between the lots, parcels or fractional interests being created).

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Supp. to § 93.04 Exclusions from Coverage.

[Go To Main]

Add:

Nielson v. Equitable Title Agency, Inc., 2010 Bankr. LEXIS 837 (Bankr. M.D. Fla. 2010) (generally, title insurance coverage extends to existing unsatisfied mortgages, unless one of the following exceptions applies: "(i) the condition was physically observable by an inspection of the premises; (ii) the insured expressly assumed the condition; (iii) the condition resulted from the fraud of the insured; or (iv) the insured had actual, express knowledge of the condition").

Add:

Nationwide Life Ins. Co. v. Commonwealth Land Title Ins. Co., 579 F.3d 304 (3d Cir. 2009) (in order to except restrictions from coverage, the insurer, and not the insured, is required to list the actual restriction in such a schedule).

Add:

Kandasha v. First Am. Title Ins. Co., 2009 Mich. App. LEXIS 1428 (Mich. Ct. App. 2009) (although the condemnation proceedings were available to the public at the time of the policy, the police power exclusion applies because the records were not considered sufficiently "public" to give the insurer adequate notice).

§ 93.04(a) Matters Exclusively Known or Controlled By the Insured [Go To Main]

Add:

Commonwealth Land Title Ins. Co. v. IDC Properties, Inc., 547 F.3d 15 (1st Cir. 2008) (policy held null and void because of material misrepresentations by the insured).

Add:

Murnan Spring Hill Trust v. Stewart Title Guar. Co., 2010 U.S. App. LEXIS 6619 (4th Cir. 2010) (tax liens were excluded from coverage under a title insurance policy because the insured was aware of IRS tax judgments against her when she purchased the property and those judgments automatically became liens on all property held by her); Jerel J. Hill and Jennifer Pugh Stephens, "Recent Developments in Title Insurance Law," *44 Tort & Ins. L.J. 745 (2009)* (sometimes courts will go beyond the form of a title insurance policy to find for the insurer when the insured failed to disclose information that it had regarding the status of title).

Add:

Kandasha v. First Am. Title Ins. Co., 2009 Mich. App. LEXIS 1428 (Mich. Ct. App. 2009) (the condemnation proceedings not considered "public records" even though although they were available to the public); *Morrison v. Wells Fargo Bank, N.A., 2010 U.S. Dist. LEXIS 45312 (M.D. Pa. 2010)* (owner of a property did not have constructive notice that a mortgage was erroneously recorded on his property, because the owner would have no reason to check the property records at random to determine if a mortgage was erroneously recorded); *United States v. Buenting, 2009 Bankr. LEXIS 2612 (9th Cir. 2009)* (it is irrelevant what the insurer should have or would have done to discover the liens, as the issue is only whether a subsequent purchaser has constructive notice of the tax liens through inspection of the public records).

§ 93.04(b) Defect Resulting in No Loss or Damage [Go To Main]

Add:

BLACK'S LAW DICTIONARY 963 (8th ed. 2004) (actual loss is a loss resulting from the real and substantial destruction of insured property); *First Am. Bank v. First Am. Transp. Title Ins. Co., 585 F.3d 833 (5th Cir. 2009)* (consequential damages, losses that do not flow directly and immediately from an injurious act but that result indirectly from the act, are not included in "actual losses")

§ 93.04(c) Defects That Attach or Are Created After the Policy Date. [Go To Main]

Add:

U.S. Bank Nat. Ass'n TR U/A DTD 12/01/98 v. Stewart Title Co., 832 N.Y.S.2d 223 (2007) (defect was covered because it arose before the date of the title insurance policy).

Commonwealth Land Title Ins. Co. v. Graoch Assocs., 2010 U.S. Dist. LEXIS 29318 (E.D. Ky. 2010) (lack of access to the property, although covered in the policy, was excluded because it occurred by the insured failing to make assessment payments after the date of the policy).

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Supp. to § 93.05 Conditions and Stipulations.

[Go To Main]

§ 93.05(a) Definitions. [Go To Main]

§ 93.05(a)(1) Definition of "Insured."

§ 93.05(a)(1)(A) The Meaning of "Insured" in the Loan Policy.

Add:

Lone Star Steakhouse and Saloon, Inc. v. Quaranta, 2003 Ohio App. LEXIS 2957 (No. 02-CA-156, Jun. 18, 2003) (vendors were not intended third-party beneficiaries of the purchaser's title insurance policy).

Add:

See also First American Title Ins. Co. v. XWarehouse Lending Corp., *98 Cal. Rptr. 3d 801 (Cal. App. 2009)* (defined an insured as the owner of the indebtedness secured by the insured mortgage or a successor in ownership and held that for an entity to meet the definition of an insured in the title insurance policies, there had to be an existing indebtedness between the named borrower and the lender); See generally Jerel L. Hill and Jennifer Pugh Stephens. "Recent Developments in Title Insurance Law," *44 Tort & Ins. L.J. 745 (2009)* (general discussion on the recent developments of the term "insured" in title insurance).

Add:

Gray v. First American Title Insurance Co., 2003 Cal. App. LEXIS 403 (No. B158535, Feb. 3, 2003) (claim not covered under a title insurance policy that extended coverage for only so long as the insured owned an interest in the land).

Add:

Carney-Dunphy v. Title Co., 2009 U.S. Dist. LEXIS 55418 (D.N.J. 2009) (voluntary lifetime transfers do not occur by operation of law and consequently do not meet the requirements of being insured).

§ 93.05(b) The Duty to Search Title and Report Adverse Matters. [Go To Main]

§ 93.05(b)(1) The Insurer's Duty to Search for and Report Adverse Claims.

Add:

Fleishour v. Stewart Title Guar. Co., 2010 U.S. Dist. LEXIS 12905 (E.D. Mo. 2010) (the maximum recoveyr for the loss of damages was limited to the related section on Schedule A).

Add:

First Am. Bank v. First Am. Transp. Title Ins. Co., 585 F.3d 833 (5th Cir. 2009) (the plain language of "actual damages" in title insurance policies does not require restitution for consequential damages).

Add:

Barrington Reinsurance, Ltd. v. Fidelity Natl. Title Ins. Co., 172 P.3d 168 (N.M. App. 2007) (the benefit of the insurer's duty to search and examine title did not run to third parties).

§ 93.05(b)(2) Duty to Search and Report Defects: Based on Implied Contract.

Add:

First Midwest Bank v. Stewart Title Guaranty Company, 843 N.E.2d 327 (Ill. 2006) (the title insurer was held to be not in the business of providing information when it issued a title commitment).

Commonwealth Land Title Ins. Co. v. Graoch Assocs., 2010 U.S. Dist. LEXIS 29318 (E.D. Ky. 2010) (title insurance does not insure that no lien or encumbrance will be found and an insured's claim must be based on the policy itself rather than on negligence by the insurer).

Add:

Christensen v. Reed, 941 A.2d 333 (Conn. App. 2008) (failure to conduct complete title search of all abutting properties precluded proof that there were no alternative means of access).

Add:

Chi. Title Ins. Co. v. Dewrell Sacks, LLP, 2009 U.S. Dist. LEXIS 109757 (M.D. Tenn. 2009) (the insured's claim must be based in contract, not negligence); First American Title Ins. Co. v. XWarehouse Lending Corp., *98 Cal. Rptr. 3d 801 (Cal. App. 2009)* (in California, title insurance is a contract for indemnity under which the insurer is obligated to indemnify the insured against losses sustained in the event that a specific contingency occurs; accordingly, when the contingency insured against under the policy occurs, the title insurer is not liable to the insured for damages in contract or tort, but rather is obligated to indemnify the insured under the terms of the policy).

Add:

Wallace v. Frontier Bank, 903 So. 2d 792 (Ala. 2004) (title company was not acting as a title examining agent).

§ 93.05(b)(3) Duty to Search and Report Defects: Based on Tort.

§ 93.05(b)(3)(A) Negligent Search and Examination.

Add:

House v. First American Title Co., 883 N.E.2d 197 (Ind. App. 2008) (claim that title search had not revealed two judgment liens against mortgagors).

Chi. Title Ins. Co. v. Runkel Abstract & Title Co., 610 F. Supp. 2d 973 (W.D. Wis. 2009) (the title agency was liable for damages suffered by the policy holder since the agency was negligent in not properly searching).

Add:

Alfaro v. Community Housing Improvement System & Planning Assn., Inc., *89 Cal. Rptr. 3d 659 (Cal. App. 2009)* (the reports serve to apprise the prospective insured of the state of title against which the insurer is willing to issue a title insurance policy).

Add:

Fidelity National Title Insurance Co. of N.Y. v. Suburban West Abstractors, 2004 Pa. Super. LEXIS 1243 (No. 2290 EDA 2003, May 24, 2004) (title insurer liable for failing to discover a judgment against the insured's mortgagors).

§ 93.05(b)(3)(B) Negligent Misrepresentation of Title

Add:

Brown & Brown of Tex., Inc. v. Omni Metals, Inc., 2010 Tex. App. LEXIS 2338, 60-61 (Tex. App. Houston 1st Dist. 2010) (the law imposes a duty on the title insurer to know whether a statement made to the seller is true, and it holds the insurer responsible for an affirmative representation that is the "producing cause" of damages to the insured).

§ 93.05(b)(4) Proper Scope of the Insurer's Duty to Search and Report Defects.

Add:

Vorgitch v. Fidelity National Title Insurance Company, 2002 Cal. App. Unpub. LEXIS 4635 (Jan. 23, 2002) (title insurer had no duty to describe an easement as an encumbrance on insureds' property).

§ 93.05(c) The Duty to Defend. [Go To Main]

Add:

LLJBJ Partnership v. Commonwealth Land Title Ins. Co., 816 N.Y.S.2d 529 (2006) (obligation to defend included payment of insured's attorney fees, costs and expenses in the underlying action).

Ben-Avraham v. Lawyers Title Insurance Corp., 786 N.Y.S.2d 272 (2004) (insurer obligated to tender a defense).

Add:

Kirwan v. Chicago Title Insurance Company, 624 N.W.2d 644 (Neb. 2001) (the insureds' failure to give the insurer notice of a claim of which they were awarded excluded their claim from coverage under the title insurance policy).

Morgan v. Chicago Title Insurance Co., 65 Fed. Appx. 184 (9th Cir. 2003) (a letter from the insureds triggered the titler insurer's duty to defend).

Add:

Chicago Title Insurance Co. v. 100 Investment Limited Partnership, 355 F.3d 759 (4th Cir. 2004) (the title insurer had a duty to defend in a trespass action filed after the policy period but based on actions that occurred within the period).

Decaro v. M. Felix, Inc., 864 N.E.2d 890 (Ill. App. 2007) (the duty to defend did not require the insurer to take an interlocutory appeal from the trial court's denial of a motion to allocate proceeds).

Add:

Travelers Prop. Cas. Co. of Am. v. Hillerich & Bradsby Co., 598 F.3d 257 (6th Cir. 2010) (an insurer is liable in a bad faith action for all damages flowing from its refusal to defend based on mistaken, though good faith, belief that coverage did not extend to the claim).

Add:

Hauck Holdings Columbia SC, LLC v. Target Corp., 2010 U.S. Dist. LEXIS 28512 (S.D. Ohio 2010) (no duty to defend was found because insured presented no contentions that, if proven true, would invoke coverage); *Szelc v. Stanger, 2009 U.S. Dist. LEXIS 112911 (D.N.J. 2009)* (where the policy contained an exclusion for title risks that were created, allowed, or agreed to by the insured or that were known to the insured, there was no duty to defend where the insured knowingly participated in the alleged fraud); But see *Travelers Prop. Cas. Co. of Am. v. Hillerich & Bradsby Co., 598 F.3d 257 (6th Cir. 2010)* (an insurer has a duty to defend any allegation which potentially, possibly or might come within the coverage terms of the insurance policy).

Add:

Chicago Title Insurance Company v. The Kent School Corporation, 361 F. Supp. 2d 4 (D. Conn. 2005) (duty to defend could not be terminated by the insurer tendering the full amount of its indemnity obligation).

Add:

Jaco Envtl., Inc. v. Am. Int'l Specialty Lines Ins. Co., 2009 U.S. Dist. LEXIS 51785 (W.D. Wash. 2009) (if the complaint is ambiguous, it will be liberally construed in favor of triggering the insurer's duty to defend); *Morrison v. Wells Fargo Bank, N.A., 2010 U.S. Dist. LEXIS 45312 (M.D. Pa. 2010)* (any uncertainties regarding the insurer's duty to defend must be resolved in the insured's favor).

Add:

Schneider v. Commonwealth Land Title Ins. Co., 844 N.Y.S.2d 657 (2007) (insurer had duty to appeal from a judgment in the neighbor's adverse possession action against the insureds).

§ 93.05(c)(1) The Insurer's Obligation to Defend Covered Grounds.

Add:

Chicago Title Insurance Company v. The Kent School Corporation, 361 F. Supp. 2d 4 (D. Conn. 2005) (the title insurer's duty to defend is not relieved by tendering the full amount of the indemnity obligation).

Add:

Spurgeon v. Coan & Elliott, 180 S.W.3d 593 (Tex. App. 2005) (title insurer had no duty to defend its client in other real estate litigation).

§ 93.05(c)(2) The Insurer's Obligation to Defend Non-Covered Grounds

Add:

Quigley v. Travelers Prop. Cas. Ins. Co., 630 F. Supp. 2d 1204 (E.D. Cal. 2009) (an insurer is required to defend against both covered and noncovered claims until the insurer produces undeniable evidence supporting an allocation of a specific portion of the defense costs to a noncovered claim); *Cooper Indus. LLC v. Am. Int'l Specialty Lines Ins. Co., 350 Fed. Appx. 876 (5th Cir. 2009)* (if covered and noncovered causes combine to create a harm, the insurer is liable only for the portion of the loss caused solely by the covered cause and the insured bears the burden of showing that a loss is covered); *Walton v. First American Title Insurance Company, 844 N.E.2d 143 (Ind. App. 2006)* (no duty to defend).

§ 93.05(d) Subrogation [Go To Main]

Add:

Tiffany v. Chevy Chase Bank, F.S.B., 342 Fed. Appx. 303 (9th Cir. 2009) (equitable subrogation); *Columbia Cmty. Credit Union v. Chi. Title Ins. Co., 2010 U.S. Dist. LEXIS 12624 (W.D. Wash. 2010)* .

§ 93.05(e) Arbitration of Claims. [Go To Main]

Add:

Henderson v. Lawyers Title Insurance Corporation, 843 N.E.2d 152 (Ohio 2006) (the insurer was unable to demonstrate that an arbitration clause is a usual and customary term in title insurance policies).

§ 93.05(f) Measurement of Losses Under Title Insurance Policy. [Go To Main]

Add:

GE Capital Mortgage Services v. Privetera, 788 A.2d 324 (N.J. Super. 2002) (the mortgagee was not a third-party beneficiary of this insurance policy).

Add:

Rose Dev. Corp. v. Einhorn, 886 N.Y.S.2d 59 (2009) (if it is a total loss of title, the loss is usually the market value of the property within the policy limit).

Add:

First Internet Bank of Ind. v. Lawyers Title Ins. Co., 2009 U.S. Dist. LEXIS 59673 (S.D. Ind. 2009) (date of resale used).

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Supp. To CHAPTER 93 TITLE INSURANCE

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Supp. to § 93.06 Exceptions.

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§ 93.06(b) Rights of Parties in Possession [Go To Main]

Add:

Crossman v. Yacubovich, 290 S.W.3d 775 (Mo. Ct. App. 2009) (insurers do not insure every title defect, and exceptions from coverage do not constitute an unfair trade practice or violate public policy).

Add:

Edison v. Chicago Title Ins. Co., 2010 U.S. Dist. LEXIS 11608 (E.D. Mo. 2010) .

Add:

Doyle v. Siddo, 865 N.Y.S.2d 126 (2008) (upholding policy provision excepting from coverage all liability incurred by reason of rights of persons in possession of the property).

§ 93.06(c) Encroachments or Other Matters Which Would Be Disclosed by an Accurate Survey and Inspection. [Go To Main]

Add:

Bennett v. Investors Title Ins. Co., 635 S.E.2d 649 (S.C. App. 2006) (policy did not insure against surveying errors).

Add:

Morton v. Attorneys' Title Ins. Fund, Inc., 2009 Fla. App. LEXIS 9453 (Fla. Dist. Ct. App. 2d Dist. 2009) (survey exception did not apply where the insurer overlooked a recorded easement that resulted in the insurer receiving less than they originally anticipated).

Add:

Morton v. Attorneys' Title Ins. Fund, Inc., 2009 Fla. App. LEXIS 9453 (Fla. Dist. Ct. App. 2d Dist. 2009) (survey exception did not apply because notice of defect could have been found in public record).

§ 93.06(f) Taxes or Special Assessments Not Shown as Liens by the Public Records [Go To Main]

Add:

Rhone v. First Am. Title Ins. Co., 2010 Ill. App. LEXIS 422 (Ill. App. Ct. 1st Dist. 2010) (although the assessment of property taxes was virtually certain, they were not liens at the date of policy and the insurer was not liable).

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Supp. to § 93.07 Endorsements

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Add:

Nationwide Life Ins. Co. v. Commonwealth Land Title Ins. Co., 579 F.3d 304 (3d Cir. 2009) (for a specific endorsement to a title insurance policy to be valid, the insurer, and not the insured, must actually list restriction in such a schedule in order to except them).

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Supp. to § 93.08 Regulation of Title Insurers.

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Add:

Alston v. Countrywide Fin. Corp., 585 F.3d 753 (3d Cir. 2009) ; *Gerhart v. Beazer Homes Holdings Corp., 2009 U.S. Dist. LEXIS 24297 (E.D. Cal. 2009)* .

Add:

Munoz v. PHH Corp., 659 F. Supp. 2d 1094 (E.D. Cal. 2009) .

§ 93.08(a) Regulation Aimed at Assuring Ability of Insurers to Pay Claims. [Go To Main]

Add:

National Mortgage Warehouse v. Bankers First Mortgage Co, Inc., 190 F. Supp. 2d 774 (D. Md. 2002) (the insurance underwriter was not liable as a principal for the fraudulent acts of the title agent).

Add:

Dolan v. Fid. Nat'l Title Ins. Co., 2010 U.S. App. LEXIS 2814 (2d Cir. 2010) (new rates must be filed with the state insurance department).

§ 93.08(b) Other Consumer Protection Regulations. [Go To Main]

Add:

Kingsberry v. Chicago Title Ins. Co, 586 F. Supp. 2d 1248 (W.D. Wash. 2008) (rates governed by state insurance statute).

Add:

Roussin v. AARP, Inc., 664 F. Supp. 2d 412 (S.D. N.Y. 2009) (reason for the filed rate doctrine is that agencies are designed for the specific purpose of setting uniform rates and courts are not institutionally well suited to judge the reasonableness of rates); *Dolan v. Fid. Nat'l Title Ins. Co., 2010 U.S. App. LEXIS 2814 (2d Cir. 2010)* (filed rate doctrine holds that a filed rate is per se reasonable and unassailable in judicial proceedings because the governing regulatory agency approved the rate).

Add:

Randleman v. Fidelity Nat. Title Ins. Co., 247 F.R.D. 528 (N.D. Ohio 2008) (class action alleging excessive title insurance premiums); *Alberton v. Commonwealth Land Title Ins. Co, 247 F.R.D. 469 (E.D. Pa. 2008)* (class action alleging overcharges on title insurance); *In re Escher, 369 B.R. 862 (E.D. Pa. 2007)* (plaintiffs did not establish the title insurance charges were unreasonable).

Lewis v. First Am. Title Ins. Co., 2010 U.S. Dist. LEXIS 16516 (D. Idaho 2010) (class action alleging overcharges on title insurance for refinanced mortgages).

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§ 93.09(a) Title Insurance Compared to Some other Types of Real Property Insurance [Go To Main]

Add:

Beckon, Inc. v. AMCO Ins. Co., 620 F. Supp. 2d 996 (E.D. Mo. 2009) (examples of parties having an insurable interest in the property include mortgagor-mortgagee, life tenant-remainderman, lessor-lessee, vendor-vendee, and vendor and optionee).

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Supp. To CHAPTER 93 TITLE INSURANCE

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Supp. to § 93.10 Bibliography.

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CHAPTER 94 CONVEYANCING PROCEDURES *

11-94 Thompson on Real Property, Thomas Editions 94.syn

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CHAPTER 94 CONVEYANCING PROCEDURES *

11-94 Thompson on Real Property, Thomas Editions § 94.01

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§ 94.01 Introduction.

The origin of the practice of utilizing a contract of sale during the conveyance process may trace its roots to the English Statute of Uses. The Statute of Uses was relied upon for the creation of common-law executory estates. These executory estates then evolved into fee simple transfers of real property through the contractual instrument.

Another key element to the evolution of the conveyance process was the enaction of the Statute of Frauds. The English Statute of Frauds required that after 1677 deeds for the transfer of real property be in writing. The English Statute of Frauds was later codified as § 40 of the Law of Property Act 1925.

Although real estate conveyancing procedures vary greatly from state to state and even within states, a core of common or equivalent procedures, administered under similar rules of law, can be found in almost all jurisdictions. This chapter describes those with helpful examples from the most common conveyancing situations.

* Parts of this chapter have been adapted from George Lefcoe, Real Estate Transactions (Michie 1993).

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CHAPTER 94 CONVEYANCING PROCEDURES *

11-94 Thompson on Real Property, Thomas Editions § 94.02

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§ 94.02 Key Steps and Documents in a Residential Transaction.

§ 94.02(a) Overview.

The first part of this chapter provides a brief overview of the sequence and major documents involved in a typical residential property transfer. Customarily, a residential real estate deal begins when the owners decide to sell, and then interview several brokers to find one acceptable to them. Through the **Listing Agreement**, which is an agency agreement between the seller and the broker, the owners authorize the broker to search for a buyer, and put a sale together.

The broker markets the property to the public by targeting potential buyers through newspaper advertising, "for sale" signs on the premises, and "open house" notices. The broker reaches other brokers by placing information about the property in a multiple listing service (MLS) -- a regional pool of broker listings -- or by holding "broker open houses."

Potential buyers parade through during "open house" day or by appointment. With luck, one of them signs a contract of sale often called a **Binder** or **Deposit Receipt**. The buyer may be represented by a second broker, or may be shown the property by the listing broker or a colleague of the listing broker.

After negotiating a deal, the buyer and seller both sign a **Purchase and Sale Agreement**. This agreement reduces the negotiated terms to a single writing in compliance with the Statute of Fraud's provision that all real estate contracts be in writing.

In some states buyers and sellers take the advice of the American Bar Association (ABA), and see their "attorney before signing any paper in connection with a real estate transaction," n1 before signing a purchase and sale agreement, and maybe even before signing a listing agreement. In some places, buyers and sellers sign contracts before consulting attorneys but include this language: "subject to the approval of the attorneys for the parties within_____days."

The American Bar Association makes its case for attorney involvement by cautioning buyers and sellers that brokers, lenders, or others in the process "may have interests that differ from those of the buyer or seller. Oftentimes they offer

well-meaning advice, but they may not be aware of important legal concepts. The only person who is trained in knowing and understanding your legal rights and who is there solely to look after and protect *your* interests is your *real estate attorney*." n2

Nonetheless, in many states, including California, attorneys are rarely involved in single-family home transactions as a matter of simple economics. Their time at current billing rates can't be justified in terms of the contribution they might make. When lawyers are involved, it is usually as a favor for special clients or friends, or because the value of the house is so great the parties don't mind paying a few thousand dollars to get the little details right. In California, once the deal is signed, it is most often a broker, not a lawyer, who guides the buyer and seller through to closing.

The broker's commission is usually a percentage of the actual sales price, contingent on making a deal. Very few brokers enjoy the luxury of billing by the hour and those who do mostly represent commercial buyers. Since brokers work on contingent fees, they prefer short, simple contracts and quick closings. They have no incentive to encourage protracted negotiations. Brokers stick pretty much to filling in the blanks on standard printed forms. n3

In California and other western states, the broker typically works with an escrow agent. In these "Western style" closings, the escrow agent acts as a stakeholder and expediter. n4 Besides holding money from the buyer and a deed signed by the seller, the escrow agent processes the sale to closing based on a set of **Escrow Instructions** signed by buyer and seller. These instructions translate the terms of the contract into a series of tasks the buyer, seller, and their lenders must perform to close the deal. The escrow agent then tracks these tasks to completion. n5 Escrow agents may be employed by banks or title companies, or may be independent.

In "Eastern style" or "New York style" closings within states that don't use escrow agents, the escrow functions may be handled by real estate brokers, lenders, special non-attorney agents, "closers," lawyers, the sellers, or a title company.

To close a sale, someone must prepare several key items:

(1) evidence of seller's title, usually a preliminary title report followed by a title insurance policy;

(2) cash or equivalent from the buyer and new lender in the amount of the agreed purchase price;

(3) prepared and executed loan documents; and

(4) a signed and acknowledged deed from the seller granting title to the buyer;

The deed and any mortgages or deeds of trust should be promptly placed in the public land records. This is notice to the world that title has shifted to the new owner. If outstanding loans were paid off, mortgage satisfactions and reconveyances of deeds of trust from the lender will be recorded. In many states, including California, escrow agents and title insurers see that documents are recorded. In other states lawyers do it.

Upon closing, the seller usually vacates and turns over possession of the house to the buyer. If the buyer requires earlier possession or the seller needs to remain in possession after the closing, the parties should contract specially for it.

Where real estate brokers oversee closings, they are responsible for making sure deeds and mortgages get recorded, and are liable to buyers who suffer losses because the deed conveying title to them was not recorded.

The closing is the juridical moment when title passes from seller to buyer. That moment is usually when each party has done all that the contract specified they do as a condition to closing, and when all other contract contingencies have been met, unless the parties agreed that some items could be cleared post-closing. Typically, the closing occurs only when the buyer has paid the purchase price and the seller has conveyed marketable title, a title free of liens,

encumbrances and defects.

Before closing, the seller is responsible for maintaining the property, paying taxes and keeping the property insured. From the very instant title passes to the buyer, the buyer becomes responsible for taxes, insurance, and maintenance. For example, suppose title passes at 10 a.m.; at 10:01 a.m. a hurricane rips the roof off, the damage is the buyer's problem.

§ 94.02(b) Elements of the Transaction and Related Forms.

§ 94.02(b)(1) Listing Agreement.

The first document signed in most home sales is the broker's listing agreement. This establishes an agency agreement between the seller and the real estate broker. The seller designates the broker as the agent to market the property. The agreement is called a "listing" agreement because the broker obtains the right to place the seller's property on the broker's list of properties for sale.

Typically, the agreement calls for the broker to receive as a commission a fixed percentage of the sales price, most commonly 5-7%. n6 The broker could have agreed to a flat fee-- a set price-- to sell the house. Or the broker could have agreed to keep as a commission all of the sales price in excess of an agreed amount. This is called a net listing -- illegal in some states. n7 But almost all listing agreements are for contingent fees. The seller pays the broker out of sales proceeds. No sale, no brokerage fee. Thus, signing the listing agreement is costless for the seller. The seller pays nothing to the broker until there is a sale.

Buyers use brokers, too. But the broker shuttling the buyer from house to house less frequently insists on a written agency agreement. When buyer's broker does, they usually insist on being the buyer's exclusive agent for a time. The buyer's broker is almost always paid by the seller's broker splitting the commission on closing.

Signing the listing agreement is painless for the seller because the seller pays nothing to the broker until a sale closes, and then the broker is paid out of the sale proceeds. n8

§ 94.02(b)(2) Purchase-and-Sale Agreement.

The purchase-and-sale agreement is the sale contract between the seller and the buyer: it specifies that the buyer promises to pay money, and the seller promises to sign the deed and other instruments necessary to convey title. This document often takes the form of a deposit receipt, usually signed first by an eager purchaser as an offer to the seller. Commonly, the seller will "counter" (counteroffer); the buyer may counter the counter and so forth until an agreement is reached. It should incorporate all the negotiated terms and conditions in the purchase/sale. n9

Sensible people put all important deals in writing. Smart brokers insist on it as evidence that they found a "ready, willing and able" buyer, so as to become entitled to their commissions. The Statute of Frauds n10 requires a writing for land sale contracts signed by "the party to be charged." Thus, the seller as well as the buyer will have to sign for each of them to be bound by it. n11 The Statute of Frauds is susceptible to attack in some states through the doctrine of partial performance. n12 In *Sutton*, an oral lease with an option to buy was entered into by tenants in possession. The tenants put forth a down payment toward the purchase price, increased their monthly rent payment to an amount equivalent to the monthly mortgage payment, reimbursed the owners semi-annually for the property taxes, and completed many improvements to the property. The property appreciated and the owners tried to force the tenants into paying a higher price for the property. The court held that the tenants' continued possession of the property and other actions were sufficiently related to the oral option contract to constitute part performance.

Many buyers, flush with excitement at a Sunday Open House, hand over a check and sign the so-called deposit receipt thinking it is only proof they are seriously interested in the property and a receipt for their check. The short form receipt

describes the property, the price, and the parties, and may even set a tentative closing date.

Buyers and sellers alike must exercise caution when obtaining the signature of the other party on the purchase-and-sale agreement. Just as with contracts that are not for the sale of land, an infirm signature may render the transaction meaningless. Parties should confirm that the signing party is the rightful owner or has the power of attorney for the rightful owner of the property. Similarly, if the seller was married when the property was acquired or if a marriage occurred at a later date, the buyer should insist on the spouse either signing the purchase-and-sale agreement or a separate waiver of all rights in the property. Finally, the signing parties must have capacity to contract. Among the factors affecting capacity are whether the person is a minor, of unsound mind, placed under guardianship or a prisoner. If any of these factors are implicated, state law should be consulted in order to assure capacity and thereby an enforceable agreement.

Buyers seldom ask why *they* have had to sign a receipt for their own deposit. Buyers curious enough to ask may even be reassured by their broker that purchase contract details can be sorted out after the seller accepts the offer, "when we go into escrow." This advice is plainly wrong. The signed pieces of paper *are* the contract, full and final. Buyers may overlook the clear warning on the document itself that it is more than a deposit receipt. n13 It is an offer to purchase and becomes a binding contract when accepted by the seller!

Many deposit receipt forms do not address the *risk* of the buyer not being able to obtain financing, absent any contrary agreement with buyer. If the buyer isn't able to get the needed loan, the buyer could be found in breach of contract. Alternately, the buyer can insert language in the deposit receipt making the obligation to purchase contingent on obtaining financing.

Title need not be perfect to complete the transaction (few things are); but to be legally sufficient ("marketable"), the seller's title must satisfy prevailing local practice standards. Defects that make the title unmarketable must be waived by the buyer or cleared by the seller before the deal closes. In many states, brokers are abandoning the use of simple deposit receipt or short-form contracts for long printed forms detailing every aspect of the transaction. These take longer to fill out, and may scare off some potential buyers. But the long form specifies so many aspects of the deal that it reduces the chance of later confusion and conflict. Brokers have an enormous incentive to avoid disputes and collisions, since their commissions are often due only if there is a closing.

Take one example: Say the buyer had the right to review a preliminary title report and make a physical inspection of the property. But the contract did not specify the time within which these tasks were to be completed. The buyer wants six weeks but the seller thinks two weeks is ample. Unless they can agree, the deal might fall apart. Both parties risk their time demands being adjudged "unreasonable" and their being found in breach. But the range of "reasonable" times for performing most tasks is pretty big. A long-form contract typically provides how many days the buyer has to rescind due to title or physical inspection defects. Once these contingency periods expire, the contract locks the buyer into performing unless the buyer made timely objections within time provided.

§ 94.02(b)(3) Preliminary Title Report and Title Insurance Policy.

The buyer will usually have the right to approve title based on a lawyer's opinion or a preliminary title report describing any defects that appear in the public records. A preliminary title report shows whether the purported seller actually owns the house. It will also show any mortgages, easements, liens for unpaid taxes and other encumbrances affecting the title. The title company utilizes its own resources and data base (or one it shares with other firms), public land records and court records to prepare the preliminary report.

On closing, the buyer will usually obtain a policy of title insurance which assures the buyer that the seller is transferring marketable title, subject to specific defects mentioned in the preliminary title report and excluded from coverage in the title policy. A separate policy also assures the buyer's lender that its lien will have the priority agreed upon to secure the

loan.

In some states, lawyers examine an "abstract" of title -- a collation of all the documents affecting title -- and then write an opinion summarizing what the lawyer has discovered on reviewing the abstract. If the lawyer opines that title is good, and the lawyer turns out to be wrong, the buyer's recourse against the lawyer depends on whether the lawyer has been negligent. There are dozens of possible "hidden defects" for which lawyers are not held accountable. This has led to buyers relying on title insurance policies promising to reimburse the purchaser for any defect in title that the insurer didn't disclose and exclude from the coverage of the policy. n14

§ 94.02(b)(4) Deed.

The actual transfer is effected by a simple document -- seldom more than half a page -- called a deed, signed by the seller, granting title to the buyer. The deed is the official instrument of conveyance: "X" grants to "Y" certain described property.

Deed formalities vary from state to state. In most states only the grantor needs to sign the deed (although a grantee must be identified). In a few states both grantor and grantee need to sign the deed. In most states deeds do not need to be witnessed, although in a few, Florida among them, witnesses are required. In many states deeds need to be acknowledged and notarized, but are valid between buyer and seller even if they are not acknowledged and notarized. However, in most states, acknowledgement is a condition that must be satisfied for the deed to be accepted by the county recorder and included in the publicly accessible land records of the county. In an acknowledgement, the party signing a document, the grantor in the case of a deed, "acknowledged" to a notary "that he/she/they executed the same in his/her/their authorized capacity(ies)."

Until the deed is recorded, the buyer is at a huge risk because the seller, by first recording a deed to another property, may be able to give that buyer superior title. The outcome depends on the language of the recording acts, the sequence of the transactions, what each purchaser knew about the rights of the competing claimant, and whether the subsequent purchaser paid "valuable consideration." For this reason, only the most naive and gullible buyers will pay good money for an unacknowledged and, hence, unrecordable deed.

§ 94.02(b)(5) Escrow Instructions.

Where lawyers handle closings, the closing lawyer makes a list of things to do based on the contract. Lawyers don't usually prepare formal escrow instructions for transactions they are processing in-house. Even where escrow agents are involved, sometimes they are just given a copy of the contract and told to take care of it. But most clients and escrow agents prefer to see the agents' obligations spelled out and escrow instructions signed by buyer and seller incorporating the terms of the purchase-and-sale agreement into specific, objective instructions for the escrow agent to follow in completing the transaction.

Where escrow agents are involved, signed escrow instructions will incorporate terms of the purchase-and-sale agreement into specific, n15 objective instructions for the escrow agent to follow in completing the transaction.

The escrow agency is a limited one: the agent is charged with implementing the exact conditions both parties contracted for--no more, no less. The escrow agent passes funds to the seller and the deed to the buyer. The escrow agent also prorates taxes and insurance premiums. The escrow agent pays the real estate broker the commission from sale proceeds if the escrow instructions authorize it.

Any instructions requiring subjective decisions on the part of the escrow agent will be rejected. The escrow officer is not a mediator, or a lawyer, or a broker, or a marriage counselor, or a tax advisor--just a skilled expediter. Thus, the escrow agent should avoid offering legal advice to either party. Otherwise, the escrow agent could unwittingly be

engaging in the unauthorized practice of law. It is both illegal and bad business practice for escrow officers to give legal advice. It takes time, seldom helps parties to resolve differences, and distracts the escrow officer from the assigned mission.

The "close of escrow" is often defined in the general escrow instructions as the day the deed and any other essential documents are recorded.

Why is a stakeholder so commonly used in real estate sales? Because buyers are asked to come up with a chunk of cash along with their offers to buy. They balk at handing hard cash to a seller they have never met before, whose title may not be verified, and who has yet to keep the other promises in the contract. Hence, an escrow agent, real estate broker, lawyer, or title insurer may be called upon to serve as stakeholder.

For sellers, the use of the escrow agent as stakeholder means a temporary deferral of payment. If a deal-breaking dispute darkens the horizon, the sellers have lost their grip on a big umbrella. The sellers won't be in nearly as strong a bargaining position as when they are holding the buyer's deposit personally. Until both parties consent to the release of the funds in escrow, the sellers won't get any protective cash cover even though the sellers' title to the property will almost always have been clouded by the dispute. n16

In states where escrows or other stakeholders aren't used, sellers often hold the cash, or the sellers' lawyer holds the buyer's down payment in a special trust or escrow account. The parties or their representatives will actually meet to close the deal. Documents such as deeds and mortgages are signed, funds are passed across the table, prorationed figures are agreed upon, and the seller hands a deed to the buyer over a conference table laden with the closing documents.

§ 94.02(b)(6) Promissory Note.

A buyer can finance the purchase in four ways:

(1) by paying the full price in cash;

(2) by taking title subject to any loans already on the property, and paying the difference in cash between those and the purchase price;

(3) by obtaining a new loan either from a lender or from the sellers, usually in the form of a note and deed of trust or mortgage in their favor; or

(4) a combination of (2) and (3).

The buyer, not paying all cash, will probably have to sign a note and a mortgage or deed of trust in favor of the lender. The *promissory note* is an IOU, a personal promise by the buyer to repay the loan. It states the terms and conditions of the loan, including the principal amount owed, the applicable interest rate, and how it is to be repaid, usually through monthly payments.

§ 94.02(b)(7) Mortgage or Deed of Trust.

Consider why the buyer's note (and IOU) is usually not good enough to induce a lender to extend tens or hundreds of thousands of dollars unsecured for a condominium or home purchase. Even a buyer with a good job may default. The lender wants a security interest in the condo so that, upon default, it can order the property sold to cover the debt.

The mortgage or deed of trust is that security interest--a separate document giving the lender a lien against the subject

property until the loan is paid back. This document gives the lender the right to order the property sold at a foreclosure sale in the event the borrower doesn't pay back the loan. The lender credits the foreclosure sale proceeds against what the borrower owes the lender.

Although the lender could combine in a single instrument the affirmative promise to repay with the pledge of security, lenders rarely do that. One reason is that the combined document would not be a negotiable instrument.

Usually the person who signs the note and the person who pledges the security property in a mortgage or deed of trust are one and the same; and the borrower puts up the house as security to repay the loan. But the borrower and the pledgor of the security property need not be the same. For instance, parents or a friend could agree to subject property they own as security for the loan. They would do this by signing a mortgage or deed of trust in favor of the lender. Alternately, they could cosign the note to the lender, in this way becoming personally liable to repay the debt.

Sometimes the *seller* agrees to finance the sale, taking back a note and deed of trust or mortgage for part of the purchase price. The form of note and security instrument should be agreed as part of the contract of purchase-and-sale.Otherwise, if the buyer and seller later can't reach a consensus on the repayment terms, the deal may fall apart and be unenforceable under the Statute of Frauds.

The buyer who expects to assume or take subject to a loan already in place should ask to see the existing note and mortgage or deed of trust before signing the contract. The informed buyer needs to be sure of the legal right to assume the existing loan, and she also wants to verify its other terms and conditions.

§ 94.02(b)(7)(i) Parties to a Security Instrument.

In a mortgage, is the debtor/property owner the mortgag*ee* or the mortgag*or*? In a deed of trust, is the debtor/property owner, the trust*or*, the trust*ee*, or the beneficiary?

There are two parties to a mortgage. Only the owner of the property can create a valid voluntary lien against it. The property owner (usually also the borrower) is the mortgag*or*, the creator of the security interest. The lender is the mortgag*ee*. The mortgagor holds title to the property subject to the mortgage. n17 In the event the mortgagor defaults on the promissory note to the lender, the mortgagee will initiate a lawsuit to foreclose on the secured property, ending in a judicial foreclosure sale.

There are three parties to a deed of trust. The property owner is the trustor--the creator of the security interest. The lender is the *beneficiary*. The deed of trust is created *for the benefit of* the beneficiary. The difference between a mortgage and a deed of trust is that a deed of trust has a third party, the *trustee*. The trustee (designated by the lender in most states) holds a limited legal title to the property for the purpose of enforcing the lender's security interest. In the event the trustor/borrower defaults on the promissory note, the beneficiary/lender will notify the trustee and instruct the trustee to foreclose. The trustee will then initiate either a judicial foreclosure (just as with a mortgage), or more often, the trustee will hold a private auction sale of the property. A trustee's sale is quicker and cheaper than a judicial foreclosure, but private sales are only allowed in about half the states.

§ 94.02(b)(7)(ii) Evidence of Release, Reconveyance, and Satisfaction.

Unless the buyer agrees to keep the seller's existing loan in place, the seller will be required to pay it off to clear the title. Prior to closing, the lender on a deed of trust will be asked to provide a "beneficiary's" statement or an estoppel letter indicating the exact amount of principal, interest, and pay-off fees, if any, required to satisfy the debt in full. n18 In many cases, the loans will actually be paid off with the buyer's purchase money at the close of the transaction by the title company (or escrow companies in the West).

Once a debt underlying the lien of a mortgage or deed of trust has been paid off, the lien expires automatically, but the debtor must be able to prove payment. The best proof is the lender's signed statement that the debt has been satisfied, coupled with a recordable release of mortgage or reconveyance of a deed of trust.

Once the loan is paid off, the lender must deliver the original note and security instrument (whether mortgage or deed of trust) to the seller, and eliminate the security instrument through reconveyance. A reconveyance is a recordable document that provides notice that the borrower has repaid the debt, and that the lender has released its security interest. A mortgagee can sign its own satisfaction of mortgage. A beneficiary must direct the trustee to reconvey a deed of trust. n19

Loans aren't always paid off just because the property is being transferred. Sometimes they are paid off because the principal has become due. In these cases, the borrower usually will not have the assistance of a title officer, broker, or attorney. When sellers carry back mortgages, they are likely to be just as inexperienced in the mechanics of documenting the payoff as the borrower. Even if the loan is paid off, the security instrument will remain "open" on the public record until the recordation of a satisfaction of mortgage or reconveyance of a deed of trust.

"Open trust deeds [and mortgages] are a very real problem for the home buyer and seller... . Experts estimate that 1 million to 2 million paid-off trust deeds remain unconveyed in California." n20 An open mortgage or deed of trust will not affect the homeowner's enjoyment of the property. But at the time the owner decides to refinance or sell, the owner will have to find the lender to get the lien formally erased of record. Erasing the security instrument may be difficult if many years have passed since the loan was paid off because the lender may have moved, gone out of business, or lost its records.

State and federal regulations add other forms to the list, geared to protecting homebuyers and borrowers. The state and federal requirements can be substantial. For example, sellers may be required to provide buyers with disclosure forms describing the condition of the property. n21 (*See* a summary of laws requiring sellers to disclose negative background, characteristics, and condition of real property at § 96.20 *below*.) Federal law requires all lenders to tender to borrowers a "Truth-in-Lending" statement outlining the costs of the loan. n22

This is only a partial list and is subject to change whenever Congress or state legislators meet. Many of these forms are mentioned later.

FOOTNOTES:

(n1)Footnote 1. American Bar Association, Buying or Selling your Home (prepared by the ABA Standing Committee on Lawyers' Title Guaranty Funds) 2 (1991).

(n2)Footnote 2. American Bar Association, Buying or Selling your Home (prepared by the ABA Standing Committee on Lawyers' Title Guaranty Funds) 1 (1991).

(n3)Footnote 3. Bar associations have challenged this work as the "unauthorized practice of law." Brokers usually win these fights although they can't draft legal documents from scratch, or charge fees for filling in the blanks in standard forms. In some states brokers' forms must contain "see a lawyer" or "this is a legally binding document" warning labels. *Cultum v. Heritage House Realtors, Inc., 694 P.2d 630 (Wash. 1985); Chicago Bar Ass'n v. Quinlan & Tyson, Inc., 214 N.E.2d 771 (Ill. 1966); New Jersey State Bar Ass'n v. New Jersey Ass'n of Realtor Boards, 461 A.2d 1112 (N.J. 1983); Pope County Bar Ass'n v. Suggs, 624 S.W.2d 828 (Ark. 1981); State ex rel. Reynolds v. Dinger, 109 N.W.2d 685 (Wis. 1961); Conway-Bogue Realty Inv. Co. v. Denver Bar Ass'n, 312 P.2d 998 (Colo. 1957).*

(n4)Footnote 4. M.A. Beasley, Pitfalls in Closing, Real Estate Law and Practice Course Handbook Series, Title Insurance 1-6 (1984). *See also Choi v. Manhattan Mortg. Co., 63 F. Supp. 2d 874* (N.D. Ill., 1999) ("Escrow" is created when one party to a transaction delivers a sum to a third party, the escrow agent, for him or her to hold until the

performance of any number of conditions and then to deliver it to the other party to the transaction); *also see American State Bank v. Adkins, 458 N.W.2d 807* (S.D., 1990) (Escrow account is designed for third-party person to hold property of promisor for delivery to the promisee upon completion of specific conditions); *and In re* Handy Andy Home Imp. Centers, Inc., 196 B.R.87 (Bkrtcy. N.D. Ill., 1996).

(n5)Footnote 5. Escrow agents are licensed in California and process nearly all home sales in that state. For an instrument to be held in escrow, there must be (1) an agreement regarding the subject matter and delivery of the deposit or instrument (2) a third-party depository; (3) delivery of the funds to a third party conditioned upon the performance of an act or occurrence of some event; and (4) relinquishment by the grantor or depositor. *Lennar Northeast Partners Ltd. Parthnership v. Gifaldi, 695 N.Y.S.2d 448 (1999). See also Johnson v. Exclusive Properties Unlimited, 720 A.2d 568 (Me. 1998).*

(n6)Footnote 6. Brokers' fees vary considerably from country to country. In Britain and Australia, 2-3%; Japan and Belgium, 3%; France, 5%; Germany, 5-6%; Canada and the U.S., 6%. *House Prices*, The Economist, Dec. 26-Jan. 8, 1993 at 97.

(n7)Footnote 7. Net listings are generally frowned upon because (a) the seller should receive the highest possible price for her property with the broker being paid in accordance with her ability to obtain that price, and (b) it encourages brokers to use "straws" in order to purchase the property at its net price and resell it later at a handsome profit. Net listings are either prohibited or regulated in Alabama, California, Georgia, Maryland, Michigan, Tennessee, and Utah. Robert William Semenow, Questions and Answers on Real Estate 71 (9th ed. 1978). *See, e.g.,* Ala. Code § 34-27-36(a)(20); Ky. Rev. Stat. Ann. § 24.160(4); Mass. Gen. L. ch. 112, § 87AAA(1); Minn. Stat. § 327B.09(4); S.D. Codified Laws Ann. § 36-21A-71(26); Md. Code Ann., Bus. Occ. & Prof. § 17-322(a)(11); Kan. Stat. Ann. § 58-3062(a)(18); R.I. Gen. Laws § 5-20.5-14(a)(22).

(n8)Footnote 8. *Phillips v. Feldott, 1998 U.S. Dist. LEXIS 1389 (N.D. Ill. 1998)* (court interprets the meaning of a listing agreement in which the term governing payment of the commission paid is ambiguous); *Torelli v. J.P. Enters., 52 Cal. App. 4th 1250 (1997)* (documents other than listing agreement may be held to guarantee commission to broker.)

(n9)Footnote 9. *Wainwright v. Boulos, 89 F.3d. 17 (1st Cir. 1996)* (Plaintiff's claim that ambiguous Purchase and Sale agreement was ground for nonpayment of commission was overruled).

(n10)Footnote 10. The English Statute of Frauds was codified as Section 40 of the Law of Property Act 1925 and has since been replaced by Section 2 of the Law of Property Act 1989. Most states' statutes of fraud are modeled after the English original.

(n11)Footnote 11. *See, e.g.,* Cal. Civ. Code. § 1550, which requires that agreements for the sale of real property must be in writing and signed by the parties to be bound. *See also Johnson v. Maki & Assocs., 682 N.E.2d 1196 (Ill. App. 1997)* (escrow agent is under a fiduciary duty to follow escrow instructions).

(n12)Footnote 12. *See Sutton v. Warner, 12 Cal. App. 4th 415 (1993).*

(n13)Footnote 13. The term "deposit receipt" has a special meaning in Florida where it is used to describe a particular type of purchase contract: "a single payment short term contract under which the seller remains in possession until title is passed to the buyer." Letter to author from Professor Ronald Benton Brown, July 18, 1994.

(n14)Footnote 14. *Siegel v. Fidelity Nat'l Title Ins. Co., 46 Cal. App. 4th 1181 (1996)* (Court warns of risk of reliance on preliminary title report without buying title insurance); *Tess v. Lawyers Title Ins. Corp., 251 Neb. 501, 557 N.W.2d 696 (1997)* (Title Company has tort liability for failure to report a known, but unrecorded lien or covenant).

(n15)Footnote 15. *Frangipani v. Boecker, 75 Cal. Rptr. 2d 407 (1998)* (the terms of escrow instructions signed after a memorandum agreement shall take precedence over the memorandum agreement if there are any inconsistencies

between the escrow instructions and memorandum).

(n16)Footnote 16. For this reason, even in California, there are a few commercial brokerage firms that insist buyers place sizeable sums directly with the seller to assure "good faith" performance. These firms believe this motivates buyers to close the deal. They still use escrow agents to process the closing and handle all the cash in the transactions except for the "good faith" deposit which was given directly to the seller.

(n17)Footnote 17. This is true in "lien" states. In some states, however, the lender, the mortgagee, is said to hold a limited title for security purposes. The practical difference between these two formulations is slight.

(n18)Footnote 18. Why not use plain English and call it a "lender's" statement? Some people do. However, without the use of obscure terminology, what mysteries could real estate professionals claim as their own?

(n19)Footnote 19. In some states the beneficiary is authorized to sign the reconveyance.

(n20)Footnote 20. De Wolfe, *Title Matters: The Deed May Not Be Done*, Los Angeles Times, Aug. 4, 1991, § K, at 1.

(n21)Footnote 21. *See, e.g.*, California Civil Code § 1102.2 requires sellers to provide buyers with a full disclosure form describing the condition of the property. Under California law, subdividers also must hand to tract homebuyers a "public report" detailing facts about the project, the area, and facilities securing both. Cal. Bus. & Prof. Code § 11018.1.

See also Real Estate Brokerage Law and Practice, ch. 3A, *Federal and State-by-State Summary of Broker's Duty to Disclose* (Matthew Bender).

(n22)Footnote 22. *15 U.S.C. §§ 1601*-93r.

* Parts of this chapter have been adapted from George Lefcoe, Real Estate Transactions (Michie 1993).

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CHAPTER 94 CONVEYANCING PROCEDURES *

11-94 Thompson on Real Property, Thomas Editions § 94.03

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§ 94.03 Lawyer Involvement in Residential Closings.

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§ 94.03(a) The Case for Lawyer Involvement in Residential Closings.

Potentially, attorneys could be involved in real estate transactions in four ways:

(1)

(a) negotiating and drafting contracts, or

(b) reviewing drafts brokers have prepared;

(2) presiding over the execution of the contract:

(a) overseeing title matters and property inspections,

(b) making sure deeds, notes and mortgages are properly executed, negotiating and reviewing loan documents,

(c) assisting the buyer to shop, find and perfect financing

(d) making sure funds are good, and recording or making sure all documents that should be recorded are done so promptly;

(3) resolving or litigating disputes.

In many states, nearly every real estate sale is handled by an attorney. "Conveyancing" is a bread-and-butter part of the practice in these states where, not uncommonly, practitioners profit by delegating routine closing tasks to paralegals. In other states, including California, Texas, and most western states, attorneys are rarely involved in single-family home transactions as a matter of simple economics. Their time at current billing rates can't be justified in terms of the

contribution they make. Closings are processed by title companies and independent escrow agents instead of by law firms. In these states lending institutions, title insurance companies, and brokerage firms are often represented by corporate counsel, but buyers and sellers are not. When lawyers are involved, it is usually as a favor for special clients or friends, or because the value of the house is so great the parties don't mind paying a few thousand dollars to get little details right. In California, once the deal is signed, it is most often a real estate broker, not a lawyer, who guides the buyer and seller through to a closing. If case disputes arise, brokers hope the buyer and seller have initialled a binding arbitration clause so even then attorneys will not become involved.

Attorneys are deeply involved in most of the east coast (except in New York City and Washington, D.C.) and in much of the midwest and south. Smart clients get their money's worth by consulting their attorneys before signing a binding contract. But in many instances the lawyer becomes involved only after a standard form contract, usually prepared by a Realtors'" Association, is signed. Many clients ignore the advice of the American Bar Association, to see their attorney "before signing any paper in connection with a real estate transaction." n23 In some places, buyers and sellers sign contracts before consulting attorneys but include this language: "subject to the approval of the attorneys for the parties within _____days." n24 These clauses are enforceable. They give either party a way out of the contract for any reason or no reason as long as the withdrawal is preceded by review by a licensed attorney.

The case for lawyer involvement in the routine house closing is that the lawyer's chief rivals, real estate brokers, are ill equipped and poorly motivated to protect the interests of buyers and sellers against each other, lenders and brokers. The real estate broker's commission is usually a percentage of the actual sales price, contingent on making a deal. Very few brokers enjoy the luxury of billing by the hour and those who do mostly represent commercial buyers. Since brokers work on contingent fees, they prefer short, simple contracts and quick closings. They have no incentive to encourage comprehensive negotiations or to warn clients of potential risks in the contracts they are about to sign. Brokers stick pretty much to filling in the blanks on standard printed forms. n25

The American Bar Association makes its case for early and continuous attorney involvement by cautioning that brokers, lenders, or others in the process "may have interests that differ from those of the buyer or seller. Oftentimes they offer well-meaning advice, but they may not be aware of important legal concepts. The only person who is trained in knowing and understanding your legal rights and who is there solely to look after and protect *your* interests is your *real estate attorney*." n26

§ 94.03(b) The Case Against Lawyer Involvement in Residential Closings.

Real estate brokers seldom welcome attorney involvement in states where closings are customarily handled without lawyers. Lawyers can be deal killers. n27 Their insistent fine-tuning on behalf of one party may drive the other party away. Their underlining of potential risks may scare their own client out of the deal. Brokers could also point out that billing by the hour rewards lawyers for wasting time defining and allocating risks highly unlikely ever to occur. For a lawyer paid by the hour, the longer it takes to nail down all the details, the higher the fee. Even if the deal breaks apart in disputes over fine points, the lawyer's fee is protected. It isn't contingent on a closing, like the broker's.

Another drawback to lawyer involvement is that during the time it takes lawyers to review and revise documents, buyers and sellers have a chance to rethink their tentative commitments to each other. By refusing to sign the contract when the lawyers finally get it ready, either party can sink the deal. In the United Kingdom, for example, it takes lawyers two to five weeks to come up with a contract ready for signing. n28 Volatile U.K. property markets led to "gazumping" and "gazundering," new words in the real estate lexicon. A buyer got "gazumped" when the seller in a hot market found a buyer who would pay more while still chewing over the fine points of the first offer. A seller got "gazundered" in a soft market when the buyer, following the customary delay in drafting a final contract, insisted on a reduction in the original price -- or threatened to walk. Many British brokers envied their California counterparts who could "seal" a deal within hours of the buyer and seller agreeing to it by having them sign a standard purchase-and-sale agreement, often on a form prepared by the realtor's trade association. n29

Advocates for lawyer involvement see delay as giving the client a chance to step back and take a clear-headed look at the deal. This affords the client, like in much consumer protection law, a "cooling off" period during which the consumer can change his or her mind and rescind without penalty. The case for lawyer involvement was dented by a study of lawyers in Ohio home-buying transactions. It concluded that buyers who used lawyers were no better informed than those who did not. n30 In fact, they were less likely to be satisfied with the deal. n31 Further, they were "just as likely to find after signing a contract that it contain[ed] matters which had not been explained to them or which they did not expect." n32 The case isn't advanced either by the fact that the number of malpractice claims against attorneys arising out of real estate deals is second only to malpractice claims arising out of personal injury suits. n33

Even the A.B.A. Committee on Professionalism has grudgingly acknowledged that while "many real estate closings required the services of a lawyer ... it can no longer be claimed that lawyers have the exclusive possession of the esoteric knowledge required." n34

§ 94.03(c) Conflict Issues Arising from One Attorney Acting for Both Sides.

There are local variations on attorney involvement in those states where attorneys are involved at all. n35 In some states it is common for one attorney to represent both parties. Elsewhere, each is represented by separate counsel. n36

The American Bar Association favors separate counsel so that conflicts of interests between lawyer and client can be avoided and conflicts between purchaser and vendor can be anticipated and clearly resolved. Some courts have recognized a narrow exception to the inevitability of a conflict of interest where both parties are represented by the same lawyer. That exception is when the lawyer acts primarily as a "scrivener," drafting an agreement the parties have already negotiated between themselves. As long as the lawyer follows the parties' instructions and draws up the agreement on the terms already agreed, the lawyer stays out of the conflict of interest stew. n37 When lawyers do more than put their clients' wishes in writing, conflicts of all sorts are inevitable. So the A.B.A. recommends essentially an adversary or advocacy model for real estate closings, with each party represented by separate counsel. The adversary model is supplanted in states where one lawyer represents both parties and where lawyers have been replaced entirely by brokers, escrow agents, and title insurers. These professionals attempt to represent the interests of both parties with a view to making the deal happen.

Within the United States there are several types of arrangements for processing real estate sales. Attorneys are involved in most of the east coast (except in New York City and Washington, D.C.) and in much of the midwest and south. In the west and in Texas, title companies, real estate brokers, and escrow agents shepherd the process, and attorneys are seldom seen in the residential closing. There are many local variations. n38

Lending institutions, title insurance companies, and brokerage firms are often represented by corporate counsel, but buyers and sellers are not. In some parts of the country it is common for one attorney to represent both parties. Elsewhere each is represented by counsel. n39

The buyer may pay for the lender's lawyer but is not legally entitled to rely on that lawyer's opinion regarding the status of the security property's title.

The American Bar Association favors each party being represented by counsel so that potentially conflicting interests can be anticipated and resolved. Where lawyers have been upstaged by brokers, escrow agents, and title insurers in the residential sales transaction, an adversary model is replaced by a cooperative one as these other professionals attempt to represent the interests of all parties with a view to making the deal happen.

One ABA committee points out that each of these professionals has individual interests to consider in addition to those of the buyer and seller. Yet, a study of the role of lawyers in Ohio homebuying transactions concluded that buyers who

used lawyers were no better informed than those who did not. n40 In fact they were less likely to be satisfied with the deal. n41 Further, they were "just as likely to find after signing a contract that it contain[ed] matters which had not been explained to them or which they did not expect." n42

§ 94.03(d) An Alternative Model in Europe.

In Europe, property transfers are overseen by specially trained professionals called notaries. In many countries they are lawyers who have completed additional requirements. n43 Notaries public in this country who wield rubber stamps to qualify documents for entry in the public land records are but a pale transplant of their European models. The European notary is a legally trained impartial third party who oversees the transactions process. The notary is obligated to prepare and explain the meaning of legal documents to the parties. The notarial system avoids the potentially costly and deal-threatening aspects of the adversary process while providing a buffer between innocent buyers and sellers and their brokers who could be so anxious to make a deal that they may mislead the parties into making a bad one.

In the course of an author's interview of a successful notary in Barcelona, Spain, it was explained that European property systems derive from Roman law, not the common law. They have no Statute of Frauds. As a result, oral promises for buying and selling land, if they can be proved, are perfectly valid in most European countries. However, such transactions are rare. For one thing, they can't be placed on record, and public records are at least as important in Spain as they are in the United States.

Most European countries, Spain included, have land registration systems, n44 as do most Latin American Countries. n45 In Spain, a land registry (Registro de la Proprieadad) is maintained in each town and district by the Ministry of Justice. They are *not* mere repositories for documents like our recording offices. The local *registador* (the registrar) examines each document submitted and determines its authenticity. The registrar copies a document into the public records, then signs it, signifying its authenticity. The registrar won't sign unless it is consistent with the condition of the title appearing in previously recorded documents. Each piece of property is assigned a separate page (finca) in the registry. On that page are details about the property (dimensions in square meters, location, names of owners since the property was first registered, and encumbrances).

People may request copies of the notary's certificates of title confirming the ownership of each new grantee who requests it within the notary's jurisdiction, and they are legally entitled to rely on them. If the notary makes an error, the notrary and the registration system are financially liable for it. There is no title insurance in Spain.

No document, contract, deed, mortgage or other encumbrance can be accepted by the registrar unless it has been signed by a notary. Some documents that affect title, such as purchase and sale contracts, may remain private and need not be recorded. Unless registered, the contract is not binding on third parties, although it is binding on the parties to it. Deeds, however, are "public" documents and must be notarized and registered.

Imagine that a buyer and seller are considering a purchase and sale of a house or apartment. A broker may well have brought them together, and they probably have reached tentative agreement on a deal. The first step may be a pre-contract (Precontrato), which is a statement of intent to enter a contract. n46 It is often accompanied by a deposit (arros or senal). A purchaser who changes his mind after signing a pre-contract that the buyer and seller agreed would be binding forfeits his deposit. A seller who wants to get out of a pre-contract owes the buyer a penalty equal to the deposit. Remember that pre-contracting is optional, however; the parties may proceed directly to the contract stage.

Customarily, the buyer and seller will then go to a notary's office where the details of the agreement are reported to a clerk in the notary's office or to the notary himself. If there was a pre-contract, the details could be gleaned from it. If there wasn't, the notary would ask them about such contract details as financing, the timing of possession and transfer, the allocation of responsibility for paying transfer fees and taxes, and any representation about defects in title. The notary or his clerk works from a checklist of items customarily addressed in well-drafted contracts.

Based on what the parties tell the clerk or notary, a document will be drafted, usually in about a week, called a *Compra-Venta* (buy-sell). This document will become the document of conveyance once it is signed by the parties and the notary. The notary will verify the signatures of the parties, determine if there are prior liens against the property (by obtaining a certificate of charges from the registrar), and ascertain how the parties expect these liens to be satisfied. When a prior lender is supposed to be paid off out of sale proceeds, the notary will do that, and obtain from the lender a *carta de pago* (letter of payment).

Once the *Compra-Venta* is signed and its conditions fulfilled, the notary sees that it is taken to the registrar for authentication and recordation. The notary keeps the original on file, once the *registador* returns it, for 25 years, and gives the parties copies. The notary's fee is usually about 0.5% of the selling price and is customarily paid by the seller. The buyer pays for additional copies of the documents from the notary and also pays the registration fee, typically another 0.5%.

Lawyers seldom appear with buyers or sellers of individual houses or apartments, and when they do, they contribute little or nothing to the process. Brokers sometimes accompany the parties, but the broker cannot be a notary, and vice-versa. A solid curtain is drawn between those who make a living marketing properties and those who oversee the contracting process. This curtain screens buyers from acting in the heat of the moment, gives them a cooling-off period, and allows review of the contract by someone who isn't quite as close to the situation as the broker.

In Spain, the seller is obligated to pay a steep capital gains tax, and the buyer must pay a large local transfer fee, both calibrated to the price of the property. This provides both of them with a large incentive to understate the true selling price in their formal documents. As a result, the buyer often pays part of the price in cash "under the table." Although professional developers don't play this tax-dodging game, amateur sellers often do. Thus, a notary may observe the parties politely excusing themselves for a few minutes from the final closing session, or the buyer may slip the seller a big stuffed envelope just before the *Compra-Venta* is signed. In some situations, if the contract price is seen as inordinately low (less than half the property's true market value), an administrative agency has the right to buy the property at the contract price stated on the documents.

Confidence in the notarial system runs so high in Spain and most of Latin America that there is a folk saying, "Notaria Abierto, Juzgado Cerrado"-- When the notary is open the court is closed. The meaning is that by using notaries, property buyers and sellers can avoid court fights. n47

The Spanish notary represents both parties. A U.S. lawyer is forbidden from representing both parties without full disclosure and consent by all of the parties. The lawyer approaching the parties must explain how this might affect the lawyer's independent professional judgment on behalf of each. n48

FOOTNOTES:

(n1)Footnote 23. ABA, Buying or Selling Your Home (prepared by the ABA Standing Committee on Lawyer's Title Guaranty funds) 2 (1991).

(n2)Footnote 24. In New Jersey, brokers are required to insert such an "attorney review" clause in their contracts as a way of regulating the unauthorized practice of law by real estate brokers and salespersons. *New Jersey Bar of Realtor Boards, 461 A.2d 1112 (N.J. 1983):* "The buyer or seller may choose to have an attorney study this contract. If an attorney is consulted, the attorney must complete his or her review ... within a three-day period. This contract will be legally binding at the end of this three-day period unless an attorney for the buyer or seller reviews and disapproves of the contract, and notifies the other party within three days."

(n3)Footnote 25. Bar associations have challenged brokers preparing contracts as the "unauthorized practice of law." Brokers usually win these fights although conceding that they will refrain from drafting legal documents from

scratch, or charge fees for filling in the blanks in standard forms. So brokers are not entirely to blame for their sticking to printed forms. Bar associations often insist they do no more on threat of "unauthorized practice" lawsuits. In some states, brokers' forms must contain "see a lawyer" or "this is a legally binding document" warning labels. *Cultum v. Heritage House Realtors, Inc., 694 P.2d 630 (Wash. 1985); Chicago Bar Ass'n v. Quinlan & Tyson, Inc., 214 N.E.2d 771 (Ill. 1966); New Jersey State Bar Ass'n v. New Jersey Ass'n of Realtor Bds., 461 A.2d 1112 (N.J. 1983); Pope County. Bar Ass'n v. Suggs, 624 S.W.2d 818 (Ark. 1981); State ex rel. Reynolds v. Dinger, 14 Wis. 2d 193, 109 N.W.2d 685 (Wis. 1961); Conway-Bogue Realty Inv. Co. v. Denver Bar Ass'n, 398 P.2d 998 (Colo. 1957).*

(n4)Footnote 26. ABA, Buying or Selling Your Home, at 1.

(n5)Footnote 27. Robert J. Bruss, *Using Lawyer Can Kill Real Estate Deal*, Los Angeles Times, July 24, 1994 (Real Estate Q & A) at K2. A paralegal trying to sell a house asked a real estate lawyer in her office to review a purchase offer. The lawyer wrote a 16-page counter offer. The buyer rejected it and withdrew. A syndicated real estate columnist, Robert Bruss observed: "Apparently you and your wife consulted a "deal killer" lawyer. He was looking out for your best interests but, in doing so, he killed the sale. Unless the home sale is very complicated, a 16-page counteroffer is unnecessary ... .My fellow attorneys won't like me saying this, but we often cause more problems than we solve or prevent. In your attorney's zeal to look out for you, he went too far and killed the sale by overwhelming the buyer with that massive counteroffer ... .Unfortunately, some attorneys try to justify their fees by creating more paperwork than necessary. In the future, if you want your attorney to review a purchase offer, let him or her know you wish to get your home sold and want the attorney to advise you only on any legally unacceptable clauses. A one-page counteroffer is usually sufficient to change any terms in the original offer that you find unacceptable."

(n6)Footnote 28. Buyers and sellers each retain counsel customarily in England, although occasionally they may contract with the same solicitor to represent both of them or may handle the contract drafting and title review on their own. Without attempting to account for the factors that determine whether lawyers are indispensable parties to a real estate transfer, certain features of the British legal framework do make the involvement of lawyers understandable. There is no title insurance and reviewing title can be an exacting task.

Only since 1990 have land registers been open to the public, so buyers who were not solicitors might have had trouble accessing the record system. Land registration has become compulsory throughout the whole of England and Wales. Unregistered titles must be registered on transfer. Title to unregistered land has to be proven by the seller's title deeds--documentary evidence showing the seller and her predecessors owned the land for a long time (fifteen years, usually). The applicant must submit the title documents, a statutory application form, and a fee. If the registry finds everything in order, it issues an official land certificate. When property already registered is sold, the deed must be sent to the registry so the land certificate can be modified. All this may be overwhelming for the amateur. Not surprisingly, a conveyancing practice is the "bread-and-butter" of many a law firm in England.

(n7)Footnote 29. New Jersey courts have held that provisions giving buyer and seller three days for an attorney to review the contract do allow either party out of the deal for any reason. *See, e.g., Kargen v. Kerr, 590 A.2d 255 (N.J. Super. 1991)* (holding that the seller could invoke the provision even though notice was late because broker failed to provide buyer's address on the contract as required by New Jersey administrative law).

(n8)Footnote 30. Braunstein and Genn, *Odd Man Out: Preliminary Findings Concerning the Diminished Role of Lawyers in the Home-Buying Process, 52 Ohio St. L.J. 469, 479 (1991).*

(n9)Footnote 31. Braunstein and Genn, *Odd Man Out: Preliminary Findings Concerning the Diminished Role of Lawyers in the Home-Buying Process, 52 Ohio St. L.J. 469, 480 (1991).*

(n10)Footnote 32. Braunstein and Genn, *Odd Man Out: Preliminary Findings Concerning the Diminished Role of Lawyers in the Home-Buying Process, 52 Ohio St. L.J. 469, 480 (1991).*

(n11)Footnote 33. William L. Gates and Sheree L. Swetin, *Characteristics of Legal Malpractice: Report of the National Legal Malpractice Data Center*, table 1, p.2 (ABA 1989). Personal injury -- plaintiff accounted for 25.1% of claims, real estate for 23.3%. Collection and bankruptcy was next with 10.5%.

(n12)Footnote 34. ABA Comm. on Professionalism, ... in the Spirit of Public Service; a Blueprint for Rekindling of Lawyer Professionalism 52 (1986).

(n13)Footnote 35. Burke, American Conveyancing Practice (1978); Dansby, *Survey of Lawyers' Current Role in the Title Insurance Process*, Prob. & Prop. 43 (Sept./Oct. 1990).

(n14)Footnote 36. *See* Comment, *One For All is Worth Two in the Bush: Mixing Metaphors Creates Lawyer Conflict of Interest in Residential Real Estate Transactions, 56 U. Cin. L. Rev. 639 (1987).*

(n15)Footnote 37. *See Beal v. Mars Larsen Ranch Corp. Inc., 586 P.2d 1378, 1384 (Idaho 1978). See also*, Annotation, *Attorney and Client: Conflict of Interest in Real Estate Closing, 68 A.L.R. 3d 967 (1976).*

(n16)Footnote 38. D. Barlow Burke, American Conveyancing Patterns (1978); Bishop Dansby, Survey of Lawyers' Current Role in the Title Insurance Process, Probate and Property 43 (Sept./Oct. 1990).

(n17)Footnote 39. *See* Comment, *One for all is worth two in the bush: mixing metaphors creates lawyer conflict of interest in residential real estate transactions, 56 U. Cin. L. Rev. 639 (1987).*

(n18)Footnote 40. Michael Braunstein and Hazel Genn, *Odd Man Out: Preliminary Findings Concerning the Diminished Role of Lawyers in the Home-Buying Process, 52 Ohio St. L.J. 469, 479 (1991).*

(n19)Footnote 41. Michael Braunstein and Hazel Genn, *Odd Man Out: Preliminary Findings Concerning the Diminished Role of Lawyers in the Home-Buying Process, 52 Ohio St. L.J. 469, 480 (1991).*

(n20)Footnote 42. Michael Braunstein and Hazel Genn, *Odd Man Out: Preliminary Findings Concerning the Diminished Role of Lawyers in the Home-Buying Process, 52 Ohio St. L.J. 469, 479 (1991).*

(n21)Footnote 43. *See,e.g.*, Paul Karon and D.G. Foulke, *Commercial Real Estate Practices and Development in Northwestern Mexico*, 2 Ariz. J. of Int'l & Comp. Law 10, 41 (1984).

(n22)Footnote 44. There are excellent descriptions of these. *See, e.g.*, Alejardro M. Garro, *The Louisiana Public Records Doctrine and the Civil Law Tradition* (Paul M. Hebert Law Center Publications Institute, 1989). The German system was codified in the Civil Code, Burgerliches Gesetzbuch [BGB] arts. 873-902, 926-928 (1896).

(n23)Footnote 45. *See, e.g.*, Boris Kozolchyk, *the Mexican Land Registry: A Critical Evaluation, 12 Ariz. L. Rev. 308 (1970);* Garro, *Recording of Real Estate Transactions in Latin America: A Comparison with the Recording System in the United States, 2 Ariz. J. Int'l & Comp. Law 90 (1984).*

(n24)Footnote 46. *See* Jones & Day, Legal Aspects of Acquiring and Leasing Real Estate in Europe 30-36 (1992).

(n25)Footnote 47. Interview by author with Oscar Salas, President, First American Title Insurance Co., Miami, Florida, 4/28/92.

(n26)Footnote 48. Model Code of Professional Responsibility DR 5-105 (1980).

* Parts of this chapter have been adapted from George Lefcoe, Real Estate Transactions (Michie 1993).

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CHAPTER 94 CONVEYANCING PROCEDURES *

11-94 Thompson on Real Property, Thomas Editions § 94.04

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§ 94.04 Two Types of Closings.

Like all contracts, the purchase-and-sale agreement is a bundle of promises. Somehow those promises must be geared into performance for a deal to "close" and title to shift from seller to buyer. A real estate contract is said to close on the fulfillment of all its conditions, when the buyer has paid the price and the seller conveys the quality of title promised in the contract. Sometimes the "closing" of escrow is further conditioned on key documents being recorded and title policies being issued according to the buyer's and lender's prior instructions.

§ 94.04(a) The New York Style Closing.

In states where escrows aren't used, this process may be handled directly between buyer and seller, through attorneys, or through title insurers. Where attorneys handle the closing, some local bar associations have adopted and published closing standards and, in such communities, the basic contract agreement may specify that closings will be handled according to these standards. In the New York style closing, all parties actually meet in a conference room. Witnesses and a notary may be standing by. Arrangements are made at the meeting for how delivery of possession is to take place. The closing statement detailing the financial aspects of the deal are reviewed and approved. Documents are reviewed and executed. The buyer hands over the money unless the parties have arranged for the purchaser's attorney to hold the funds until the seller's deed has been recorded. The title insurer insures the buyer's title and rushes to record the deed, trusting the seller not to have signed any prior grants or liens that could be recorded ahead of the buyer's deed or the purchase money lender's mortgage. n49 After the closing, each client is usually sent a final closing financial statement with copies of all the relevant closing documents.

§ 94.04(b) The California Closing.

In the California closing n50 the parties don't have to meet. All documents have been prepared in advance by an attorney or title insurer, executed, and placed into escrow. The seller and lenders, if any, have placed funds with the escrow agent who, hopefully, has placed them into a proper trust account. The escrow agent holds the buyer's funds until the title insurer notifies her that the seller's deed was recorded and there were no prior adverse interests of record. n51 The title insurer is able to do this because by custom all title insurance documents are accepted for recordation first thing in the morning. The title insurer's staff stays up the night before to make sure no prior recorded instruments were recorded the previous day that would cloud the buyer's title. In large transactions the insurers may agree to mid-day

special recordings. They are sometimes asked to do this for buyers and lenders when huge fund transfers are involved. Buyers don't want to fund a day early and lose a day's interest on a small fortune overnight. By recording at, say, 2 p.m. the title insurer assumes the risks of an adverse interest having been stealthily recorded earlier in the day. Once the title insurer notifies the escrow agent that documents have been recorded, the escrow agent disburses funds. Later, she mails each party a financial closing statement.

FOOTNOTES:

(n1)Footnote 49. How this trust could be abused is graphically described in an engrossing detective story by former New York lawyer, Stephen Paul Cohen, in Island of Steel (William Morrow & Co. 1988). An unscrupulous property lawyer and two equally depraved real estate developers come close to refinancing a $20,000,000 loan with *four* new loans totaling $80,000,000 to net a $60,000,000 gain -- less the cost of a couple of murders to make sure the lenders and their title insurers don't get wind of the swindle in time to prevent it. The miscreants thought they could get away with it because recorded documents aren't available for public inspection for a week or more. Thus, lenders must trust borrowers not to double-cross them by having made mortgage loans superior to theirs which are of record, but not yet indexed and accessible at the public recorder's office. Title insurers often insist on sellers signing an indemnity agreement holding the insurer harmless if the seller conveys a second time. Of course, an indemnity from a seller ready to flee or file bankruptcy may not be worth much to the title insurer.

(n2)Footnote 50. Also referred to as a "Western Style Closing."

(n3)Footnote 51. On the use of escrows generally, *see* John Mann, *Escrows -- Their Use and Value, 1949 U. Ill. L. F. 398 (1949)* Note, *Escrow Agreements, 8 Miami L.Q. 75 (1953). Stokes v. Firestone, 198 B.R. 168 (Bankr. E.D. Va. 1996).*

* Parts of this chapter have been adapted from George Lefcoe, Real Estate Transactions (Michie 1993).

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CHAPTER 94 CONVEYANCING PROCEDURES *

11-94 Thompson on Real Property, Thomas Editions § 94.05

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§ 94.05 Preparations for Closing.

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Lawyers and escrow agents prepare for closing by making lists of documents each party owes the other under the contract. It is the seller's obligation (where escrows aren't used) to clear the title and present the buyer with evidence-- an abstract of title and/or a title policy-- showing that the title is free of liens and encumbrances. Part of that documentation could include quitclaim deeds from third parties removing clouds on title arising out of their potential claims.

§ 94.05(a) An Escrow Agent's Steps to Prepare for Closing.

Here are some of the steps commonly taken to process a simple single-family residence sale closing:

- Obtain pertinent information from the parties or from their deeds, title policies, preliminary reports, or the purchase and sale agreement.
- Order a preliminary report on the property.
- Request a pay-off demand from the current lender on the property and order a full reconveyance of the deed of trust, unless the loan is to be assumed and remain a lien against the property.
- Obtain escrow instructions and loan documents from the buyer's new lender... .
- Receive any initial deposits and issue a receipt for funds.
- Prepare all documents (such as deeds, promissory notes, deeds of trust, requests for reconveyance) and obtain signatures of the proper parties.

- Deliver other documents (such as estoppel certificates, rent rolls, certificates of insurance) to the escrow holder.

- Prepare and sign buyer's and seller's escrow instructions.

- Compute prorations.

- Estimate and receive the funds needed to close the escrow.

- Prepare a Uniform Settlement Statement... .

- Order a title insurance policy to reflect the state of title at the time of recording.

- Record all documents requiring recordation. (Escrow instructions commonly provide that this event constitutes close of escrow, i.e., the transfer of record title to the property from seller to buyer.)... .

- Disburse funds and deliver documents (such as the commission to the seller's broker), including the Uniform Settlement Statement, to the respective parties or third parties. n52

In the escrow-administered closing the parties never face each other over a table groaning with unsigned documents, where everyone is given one more chance to rethink the wisdom of the deal. Escrow closings are usually painless affairs. Pieces of paper change hands through the mail or by messenger until finally the purchase price is paid, the necessary deeds of trust funded, the deed has been recorded, and the deal is closed.

§ 94.05(b) A Lawyer's Steps to Prepare for Closing.

In states where lawyers regularly process residential real estate closings, indispensable "how to" guides are often made available by the state bar association. n53

The following illustrative checklist contains typical conditions precedent to closing:

		Due Date	**Completed**
Conditions Respecting Title			
A. Real Property			
	1. Order abstract/title commitment	_____	_____
	2. Examine abstract/title commitment	_____	_____
	3. Note title exceptions	_____	_____
	4. Obtain copies of excepted items:		
	a. Plats	_____	_____

	b. Restrictions	_____	_____
	c. Mortgages	_____	_____
	d. Leases	_____	_____
	e. Easements	_____	_____
5. Title report to client		_____	_____
6. Note exceptions waived		_____	_____
7. Notice of title objections		_____	_____
8. Curative documents required:			
	a. Affidavits	_____	_____
	b. Deeds	_____	_____
	c. Releases	_____	_____
	d. Subordinates	_____	_____
9. Title approved/rejected		_____	_____
B. Personal Property			
1. Search names:			
	a. Secretary of State	_____	_____
	b. Circuit court	_____	_____
2. Review seller's invoices		_____	_____
3. Verify prior ownership		_____	_____
4. Title approved/rejected		_____	_____

Conditions Respecting Property

A. Survey

1. Order and obtain survey _____ _____ _____ _____

2. Compare legal description with contract and abstract description _____ _____ _____ _____

3. Note encroachments content _____ _____ _____ _____

4. Check certificate _____ _____ _____ _____

5. Survey approved/rejected _____ _____ _____ _____

B. Inspections

1. Order inspections

a. Air conditioning _____ _____ _____ _____

b. Appliances and equipment _____ _____ _____ _____

c. Electrical _____ _____ _____ _____

d. Elevators _____ _____ _____ _____

e. Foundation _____ _____ _____ _____

f. Pest infestation _____ _____ _____ _____

g. Plumbing _____ _____ _____ _____

h. Roof _____ _____ _____ _____

i. Seawall _____ _____ _____ _____

j. Swimming pool _____ _____ _____ _____

	2. Inspections approved	_____ _____	_____ _____
	3. Inspections rejected	_____ _____	_____ _____
	4. Notice to seller of corrections required	_____ _____	_____ _____
	5. Deficiencies completed	_____ _____	_____ _____
Additional Conditions			
A. Financing			
	1. Obtain mortgage commitment	_____ _____	_____ _____
	2. Commitment acceptable/not acceptable	_____ _____	_____ _____
B. Verify use of the land			
	1. Permitted uses	_____ _____	_____ _____
	2. Prohibited uses	_____ _____	_____ _____
	3. Nonconforming uses	_____ _____	_____ _____
	4. Access	_____ _____	_____ _____
	5. Land determined suitable/unsuitable	_____ _____	_____ _____
C. Determine availability of utilities			
	1. Water	_____ _____	_____ _____
	2. Sewer	_____ _____	_____ _____
	3. Storm drainage	_____ _____	_____ _____
	4. Electricity	_____ _____	_____ _____
	5. Telephone	_____	_____

		_____	_____
	6. Trash removal	_____	_____
		_____	_____
	7. Utilities available/not available	_____	_____
		_____	_____
D. Permits and licenses required		_____	_____
		_____	_____
	1. Determine required permits and licenses	_____	_____
		_____	_____
	2. Verify validity and transferability of existing Permit and licenses	_____	_____
		_____	_____
	3. Permits and licenses available/not available	_____	_____
		_____	_____
E. Inspection of books and records			
	1. Order audit of records	_____	_____
		_____	_____
	2. Inspect rent rolls	_____	_____
		_____	_____
	3. Financial information accepted/not obtained	_____	_____
		_____	_____
F. Approvals required			
	1. Corporate resolution	_____	_____
		_____	_____
	2. Court order	_____	_____
		_____	_____
	3. Mortgagee consent	_____	_____
		_____	_____
	4. Landlord approval	_____	_____
		_____	_____
	5. Approvals obtained/not obtained	_____	_____
		_____	_____

Notice Respecting Conditions		
A. Notify seller of conditions fulfilled or waived; conditions not fulfilled and not waived	_____ _____	_____ _____
B. Demand closing; demand return of deposits	_____ _____	_____ _____

Here are a few of the typical closing documents that might be required for a commercial transaction:

(1) Deed.

(2) Indemnity agreements called for in the contract of sale.

(3) Insurance policies if they are to be assigned along with evidence the most recent premiums have been paid.

(4) Mortgages or deeds of trust to be executed by the buyer.

(5) Releases of encumbrances, mortgages, and other liens the seller is obligated to remove.

(6) Pest control reports and other required inspections.

(7) Survey.

(8) Leases and a tenant roster.

(9) Tenant estoppel certificate.

(10) Warranties and assignments of them from builders, appliance manufacturers, roofers, plumbers.

(11) Ongoing contracts with managers, trash collectors, exterminator services. n54

Savvy closing lawyers recommend that documents be exchanged in advance of the closing-- the deed, mortgage, note, survey, leases, assignments-- to avoid last minute objections. When escrow agents process closings they should be instructed to obtain the buyer's prior approval of any title-affecting documents. Financial closing statements should be approved by seller and buyer in advance of closing--whether the closing is handled by a title insurer, broker, attorney or escrow agent. Even after the closing, a buyer or seller who detects accounting errors in the closing statement may seek their correction. n55 Accounting statements, being "collateral" to the transfer of title, don't "merge" in the deed. But hunting down the overpaid party after a closing and persuading that party to disgorge is a lot harder than getting things right before the closing.

§ 94.05(c) Tax Considerations Before Closing.

§ 94.05(c)(1) FIRPTA Compliance.

Federal law prompts the necessity of documentation to establish an exemption or meet the withholding requirements of the Foreign Investment in Real Property Tax Act (FIRPTA), n56 modified by the Deficit Reduction Act of 1984. FIRPTA eliminates a long-standing tax advantage for foreign investors by equalizing tax treatment of foreign and domestic investors in U.S. Real Estate. n57 It requires the buyer to withhold 10% of the sales price as security for the foreign seller's potential tax liability. The buyer becomes potentially liable for the seller's federal capital gains tax on the sale if the seller is a foreign person. The buyer customarily avoids this requirement, and potential liability, by obtaining an affidavit of non-foreign status from the seller, with her name, address and taxpayer identifying number. Under the law the buyer may rely on this affidavit even if it is false in not withholding 10% of the sales price. There are other exemptions as well.

§ 94.05(c)(2) Tax Reporting of the Sale.

The Internal Revenue Code requires brokers to file a return showing the gross sales of transactions in which they are involved. n58 The parties to the deal are entitled to see this statement before the broker submits it to the IRS. It includes the seller's taxpayer identifying number. If the seller refuses to release that number, the broker may have to deduct and withhold 20% of the sales price. n59 The fact that escrow agents supply this statement and many other forms is one more reason why their use is becoming common.

§ 94.05(d) Inspections and Inspection Contingencies Before Closing.

An informed buyer inspects the property at least twice. The buyer goes out early to see if there are encroachments, parties in possession who shouldn't be there, possible easements. Later, just before closing, the buyer makes sure the property is in the same condition as it was and all appliances and mechanical systems (heating, air conditioning, pool equipment) are in good working order. If the buyer observed glitches in the second inspection as the closing date nears, the contract should give the sellers a few days to make things right or reduce the purchase price so the buyer will have funds to correct these final flaws after the closing. The buyer may need a third inspection a day or two before closing to check on the seller's last minute performance of any promises made following the buyer's second visit.

§ 94.05(e) The Loan Closing.

When financing is necessary there will be a parallel closing, a loan closing. The lender will forward the promised proceeds in exchange for a security instrument and note executed by the borrower. The loan closes when the lender funds the loan to the borrower, and in return the lender gets a note signed by the borrower, a recorded deed of trust or mortgage and a title policy insuring the validity of the lender's lien. The lender usually funds the loan to the escrow or to the title company in a sub-escrow account. The loan proceeds are then credited to the buyer's account in order to complete the purchase.

Among the costs a lender typically deducts from the loan payment are:

(1) Interest accruing on the loan from the closing date to the beginning of the period covered by the first regularly scheduled loan payment.

(2) The fee for the lender's title policy.

(3) Loan origination fees, also known as points.

(4) Other closing costs including fees for appraiser, recording the mortgage, and the lender's attorney.

§ 94.05(f) The RESPA Forms.

The closing statement for most residential sale-and-loan closings is one promulgated by the U.S. Department of Housing and Urban Development (HUD). n60 Federal law requires lenders within three days of a loan application to show the borrower a good faith estimate of likely loan closing (settlement) charges and give the borrower a copy of a HUD booklet, *Buying Your Home: Settlement Costs and Helpful Information* (Form HUD-398-H(4)).

RESPA also prohibits "any agreement or understanding, oral or otherwise, that business incident to or a part of a settlement service involving a federally related mortgage loan shall be referred to any person." n61

(1) Section 8 of RESPA permits a payment:

(i) To an attorney at law for services actually rendered;

(ii) By a title company to its duly appointed agent for services actually performed in the issuance of a policy of title insurance;

(iii) By a lender to its duly appointed agent or contractor for services actually performed in the origination, processing, or funding of a loan;

(iv) To any person of a bona fide salary or compensation or other payment for goods or facilities actually furnished or for services actually performed; or

(v) Pursuant to cooperative brokerage and referral arrangements or agreements between real estate agents and brokers.

(2) Section 8 of RESPA does not prohibit:

(i). Normal promotional and educational activities that are not conditioned on the referral of business and that do not involve the defraying of expenses that otherwise would be incurred by persons in a position to refer settlement services or business incident thereto;

(ii). An employer's payment to its own employees for any referral activities; or

(iii). Any payment by a borrower for computer loan origination services, so long as disclosure ... is provided the borrower.

(3) The Department may investigate high prices to see if they are the result of a referral fee or a split of a fee. If the payment of a thing of value bears no reasonable relationship to the market value of the goods or services provided, then the excess is not for services or goods actually performed or provided. These facts may be used as evidence of a violation of § 8 and may serve as a basis for a RESPA investigation. High prices standing alone are not proof of a RESPA violation. The value of a referral (i.e., the value of any additional business obtained thereby) is not to be taken into account in determining whether the payment exceeds the reasonable value of such goods, facilities or services. The fact that the transfer of the thing of value does not result in an increase in any charge made by the person giving the thing of value is irrelevant in determining whether the act is prohibited.

(4) Multiple services. When a person in a position to refer settlement service business, such as an attorney, mortgage lender, real estate broker or agent, or developer or builder, receives a payment for providing additional settlement services as part of a real estate transaction, such payment must be for services that are actual, necessary and distinct from the primary services provided by such person. For

example, for an attorney of the buyer or seller to receive compensation as a title agent, the attorney must perform core title agent services (for which liability arises) separate from attorney services. Such services include: the evaluation of the title search to determining the insurability of the title, the clearance of underwriting objections, the actual issuance of the policy or policies on behalf of the title insurance company; where customary, issuance of the title commitment, and the conducting of the title search and closing.

(5) Record-keeping. Any documents provided to this section shall be retained for five (5) years from the date of execution. n62

Sarah is buying a house from Gertrude and Harry. The loan balance on Gertrude and Harry's home mortgage is approximately $145,000. The purchase price is $300,000. Sarah has paid $30,000 into escrow before the closing. She plans to pay the rest with a $270,000 loan from a third party lender.

§ 94.05(g) The Closing Statement.

The "bottom line" in a closing is revealed in the closing statements prepared for buyer and seller. It is important for lawyers representing the parties, and the parties to the closing themselves, to anticipate the quite substantial costs involved in closing a real estate sale and to reserve the right to see the closing statement in advance of the closing so there will be no last minute surprises. n63

A homebuyer who agreed to purchase for $300,000 with a loan of $270,000 might naively expect to need $30,000 in cash to close. She will often need quite a bit more -- $40,000 plus.

Much of the shortfall will be attributable to fees related to the loan: credit report, processing fee, origination fee (part of the interest rate), and administration fee. These are all part of the real cost of credit.

"Some of the fees are so vague that even lenders are hard-pressed to define them ... 'administrative fee,' 'trustee fee,' 'financing statement fee,' and 'computer fee.'" n64 Most documents are now drawn up on computers. How much "administration" does a lender really do to process a form note and deed of trust? Turn on the printer, go to the directory and press the "print" key? Lenders may be trying to recoup software costs. One financial executive estimates $75 as a reasonable charge. n65

Consider messenger fees. How many were necessitated because the escrow company was late preparing documents and then had to hire a messenger service to put everything in place on time?

After obtaining loan approval, the buyer should have received an estimate of closing costs (required by the federal Truth-in-Lending laws). Her lender or mortgage broker may have told her the estimates are on the high side so lenders don't risk violating the disclosure requirements of the Truth-in-Lending law. Still, it is not unheard of for lenders to exceed their estimates and present the borrower with a take-it-or-leave-it option at the eleventh hour, knowing the borrower seldom possesses any choices but to pay up or lose the deal. Lenders can be quite inventive in labeling and assessing loan closing costs.

If the buyer is obligated to take out private mortgage insurance, the premium will be added to the sums the buyer needs to pay. The buyer may have to kick in some cash for property tax and insurance payments if her loan requires the lender to collect these in monthly contributions from the borrower. The lender then forwards the insurance premiums and property taxes later when they fall due. On top of this, there may be city or state real estate transfer taxes and recording fees, as well as property tax pro-rations.

The bottom line for the sellers may result in their receiving a much smaller sum than they may have expected,

especially if they haven't kept in mind what they owe their real estate broker. Broker's fees take a big bite out of the price the seller receives. There may be local transfer taxes and recording fees as well, possibly a buyer's protection plan insuring the physical condition of the property if the seller agreed to pay for it, the buyer's title insurance premium (in some jurisdictions), and a loan prepayment fee if the sellers are paying off an existing debt as a condition of the sale.

FOOTNOTES:

(n1)Footnote 52. This material is reprinted with permission from California Real Property Sales Transactions, § 13.34, *Usual Steps in Escrow*, 3d ed (Cal CEB 1998), copyright by the Regents of the University of California.

Note that, in California, "both the timing and the party performing each step may differ between Northern and Southern California...." California Real Property Sales Transactions, § 13.34, *Usual Steps in Escrow*, 3d ed (Cal CEB 1998), copyright by the Regents of the University of California.

(n2)Footnote 53. *See, e.g.*, Gene Esser, *The Closing*, Florida Real Property Sales Transactions.

(n3)Footnote 54. A full discussion of these and other closing documents can be found in Raymond J. Werner, Real Estate Closings ch. 2 (2d ed. 1987). The complete list from which this excerpt is taken appears in Robert Kratovil & Raymond J. Werner, Real Estate Law 187-88 (9th ed. 1988). *See*, Joyce Palomar, "The War Between Attorneys and Lay Conveyancers--Empirical Evidence Says 'Cease Fire?'" *31 Conn. L. Rev. 423* (Winter, 1999).

(n4)Footnote 55. *Vanderveer v. Gross, 614 N.Y.S.2d 29 (1994).*

(n5)Footnote 56. I.R.C. § 1445(b)(2). *See* Lee F. Holdmann, *The New FIRPTA Withholding Rules-- Brokers, Agents, Settlement Officers, Attorneys: Beware!, 12 J. Real Est. Tax'n 261 (1985).*

(n6)Footnote 57. *See* James A. Frechter, *Alien Landownership in the United States: A Matter of State Control, 14 Brook. J. Int'l L. 147, 156-57 (1988).*

(n7)Footnote 58. I.R.C. § 6045(e). *See* Gerald F. Stack, *Real Estate Reporting Requirements Under the 1986 Internal Revenue Code, 59 N.Y. St. B.J. 24 (Dec. 1989).*

(n8)Footnote 59. I.R.C. § 3406(b)(3)(c).

(n9)Footnote 60. HUD's authority comes from the Real Estate Settlement Procedures Act (RESPA), *12 U.S.C. § 2601*. HUD's form was promulgated at 24 C.F.R. § 3500.7(d).

(n10)Footnote 61. 24 C.F.R. Part 3500.14.

(n11)Footnote 62. 24 C.F.R. Part 3500.14.

(n12)Footnote 63. *See* Susan I. Teifenblun, *Hidden Costs of Buying and Selling Property in New York*, N.Y. L.J. (Oct. 9, 1991) 1.

(n13)Footnote 64. Daniel Foster, *How Loan Fees Can Really Add Up: Most Borrowers Are Aware of the Big Charges, But a Few Dollars Here, Another Service Charge There and Surprise -- You're Talking Real Money*, L.A. Times, Oct. 17, 1993 at K1.

(n14)Footnote 65. Daniel Foster, *How Loan Fees Can Really Add Up: Most Borrowers Are Aware of the Big Charges, But a Few Dollars Here, Another Service Charge There and Surprise -- You're Talking Real Money*, L.A. Times, Oct. 17, 1993 at K1, quoting Tom Dunlap, President, Jon Douglas Financial.

* Parts of this chapter have been adapted from George Lefcoe, Real Estate Transactions (Michie 1993).

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CHAPTER 94 CONVEYANCING PROCEDURES *

11-94 Thompson on Real Property, Thomas Editions § 94.06

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§ 94.06 The Escrow.

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§ 94.06(a) History.

The origin of escrow services in California dates back nearly a century. n66 Although "escrow agents" have probably been functioning ever since man began exchanging or selling property - and we have seen traces of them in Mexican California - the flowering of "escrow service" in California as distinct from title service, seems to date from the 1890s. The late L. J. Beynon, a former official of Title Insurance and Trust Company, told of the beginnings of escrow service there in these words: "One day in 1895 a man came into the office of the company and left an order for a certificate of title. He said he was obliged to leave town for a few days and asked if the order clerk would take his executed deed, deliver it to the buyer, together with the certificate of title, and collect from him the sum of $1,000.00. This simple transaction was our first escrow." Soon afterward an escrow department was installed. Presently the employment of a title company to hold funds and documents and to see that proper payments and deliveries were made when the condition of the title met requirements, became common practice. n67

§ 94.06(b) Choosing an Escrow Agent.

Selecting an escrow agent is much like selecting any other professional. Spend an hour in a successful escrow office, especially in late December when taxpayers are rushing their deals to beat the new year, and you will be astonished by the volume of work, the diversity of transactions, and the range of competence.

Buyers, sellers, real estate brokers and lenders want an agent whose office is conveniently located to them. Everyone wants an agent who has time and competence to process the deal, financial stability, integrity, and a good track record. They base their selection on their own experiences with agents and advice from other real estate people (attorneys, brokers, lenders, property owners). They may check with the state agency that licenses escrow agents. n68

The party who is going to get stuck with the bill wants the best price. Comparative shopping for price is a good idea. Escrow fees aren't regulated and are negotiable. But there is no sure way to make the price-quality trade-off.

Escrow departments can be found in title companies and many banks. Real estate brokers may handle escrows for their

own sales. Attorneys, too, may act as escrow agents n69 but they do so at their peril n70 since they would seldom have the volume of business necessary to keep abreast of industry customs and rules. Further, if the attorney represents only one of the parties in the transaction, the attorney risks conflict of interest problems in trying to serve as an independent escrow agent for both of them. n71

Private, independent escrow firms, usually smaller, were often started by star performers in the escrow departments of these institutions who saw an opportunity to get into a business for themselves and took it. They may be more savvy than some of the agents employed by big title companies and banks. However, few of these small firms have the assets to cover big losses should their employees mess up badly. As a result, clients must sometimes choose between the competence of the independent agent and the solvency of the big institutional escrow department.

It is always comforting to do business with people who have performed well in the past. But be wary of the other party to the transaction designating an escrow firm too friendly to them. Remember, an escrow agent who depends on the other party for repeat business and has to make some close calls in your deal, may call you out. (For this reason real estate developers in California cannot require the use of an escrow in which the developer has a financial interest as a condition to the sale of a single-family house. n72)

For big, complicated commercial transactions some lawyers avoid escrows altogether, or use them only for document processing. They know that the escrow business is based on high volume and quick turnover, agents are often harried, and don't have time for nuance. Few are schooled in the subtleties of law, accounting or real estate. Yet even in the most complicated deals attorneys work with escrow agents because of their skill in coordinating lenders to pay off old loans and fund new ones; computing prorations of property taxes, insurance and rents; ordering title company searches and policies; and making sure deeds and mortgages are neatly executed and perfectly prepared for recordation.

§ 94.06(c) Escrow Instructions.

Since escrow instructions are not a contract for the sale of land, they don't have to be in writing to satisfy the Statue of Frauds. n73 But they almost always are, and consist usually of two parts. One part is special or specific instructions, containing the particulars of the transaction at hand. "Specific" instructions can be drafted from scratch, inserted on a printed form, or could consist of no more than a copy of the underlying contract. Attached to the special instructions will be a set of printed conditions defining the escrow-principal relationship. These are called "general" instructions. n74

All escrow instructions are drafted mainly to keep escrow agents away from hard and controversial choices, and to limit their liability if the parties to the escrow have a falling out.

Instead of the escrow special instructions giving the agent authority to judge whether items excluded from title coverage render title unmarketable, instructions will provide that the escrow agent is to proceed towards closing unless the buyer, unsatisfied with the title report, notifies the agent in writing to halt. A similar approach is taken to inspections of the property, review of leases, and so forth. Some items in the contract may be handled "outside escrow" and the instructions will state that. For example, the contract may specify: "Seller warrants to paint the house." The escrow instructions may provide: "Escrow agent is to take no notice of whether the seller has painted the house. This matter is to be resolved by the parties outside escrow. This is a matter with which escrow is not to be concerned."

If the parties end up at loggerheads, the escrow agent's general instructions allow impounding the funds and bringing both parties into court for a final judgment resolving their differences - at no cost to the escrow agent.

Although lawyers involved in closings often scrutinize with meticulous care the special or specific instructions translating contract terms into performance standards, they tend to overlook the general instructions. In the Appendix, Form 3, we reprinted one escrow firm's "general instructions." Perhaps lawyers assume these printed items aren't

negotiable. Maybe they know that horrific language in the general instructions will be unenforceable such as that purporting to inculpate the escrow agent from negligence. n75

A little blue penciling of the general instructions can often help. To offer one small example: Buyer and seller may agree to split escrow costs fifty-fifty. But often the escrow general instructions will make each of them responsible "jointly and severally." If one party reneges the escrow agent can collect the entire fee from the most solvent or available one. Few agents will balk at a lawyer deleting the "jointly and severally liable" provision.

Another example concerns the payment of interest on funds held in escrow. According to the form escrow general instructions, it is clear that funds will be held by the escrow company pending closing. If closing is delayed that period can easily reach three or four months. In California escrow agents, by statute, are required to deposit funds in noninterest-bearing accounts absent contrary instructions. By statute in Maryland, interest earned on escrowed funds and not allocated by the parties is paid into a state housing trust fund for the development of low and moderate income housing. n76 In either state the parties could have specified that the funds be placed in an interest-bearing account for the benefit of the buyer before closing and for the benefit of the seller afterward. A thoughtful buyer or seller will stipulate in the special instructions that funds are to be placed in interest-paying accounts and credited to the buyer before closing and the seller after closing.

General instructions will be the same for buyer, seller, and lender in one escrow. Additionally, buyer and seller, and sometimes lender, often sign separate special or specific instructions since they are each directing escrow to do different but complementary things. n77 This can lead to the agent receiving conflicting instructions.

The contract of sale stipulates that the deal is "subject to purchaser obtaining a satisfactory loan approval within 60 days from the signing of this contract."

The buyer's execution of loan documentation is deemed sufficient evidence of compliance.

If the buyer fails to procure written loan approval the sellers have the option of cancelling by depositing a demand for cancellation into escrow.

If the sellers cancel or the buyer fails to receive written loan approval, the escrow officer rescinds, returns the buyer's funds, and if a dispute arises, is promised indemnity by buyer and seller.

§ 94.06(d) When Escrow Malfunctions, Who Is Liable?

Case law and the Escrow Agent Registration Act require escrow agents to secure a $250,000 fidelty bond that insures against fraudulent acts committed by escrow agents or their employees. n78 In California, all escrow agents are licensed by the state, n79 need a minimum net worth of $50,000, a minimum $25,000 in liquid assets, n80 and must subscribe to the Escrow Agents Fidelity Corporation, n81 an insurance fund. n82 Agents' premiums depend on their potential liabilities. Escrow companies must maintain records, provide audits to and be audited by the Commissioner of Corporations, keep escrow funds in a separate trust account, and obtain fidelity bonds on officers and employees having access to funds.

Escrow agents, like all mortals, sometimes err. On rare occasions escrow companies commingle client funds, sometimes steal them and flee. In states where lawyers carry out the escrow function of closing a title, attorneys have been known to steal funds, too. n83 The buyer's title insurer may be liable when a closing attorney it approved steals escrowed funds. In states where real estate brokers perform escrow functions, defrauded clients may have recourse to a state fund. n84 Sometimes an escrow agent wrongfully conveys the deed signed by the seller to a third party who forges the grantee's name and reconveys to a bona fide purchaser. The story will feature interviews with distraught sellers and buyers whose deals were put on hold for months as state administrators stepped in to sort things out.

Rights Upon Embezzlement of Money in Escrow n85

> The parties' rights when the escrow holder embezzles funds on deposit in escrow or goes into bankruptcy depend on which party has title to the funds. If the conditions of the escrow have not been met because, for instance, the title insurance has not yet been procured, title to the money is still in the buyer and the buyer must suffer the loss. ... *[Pagan v. Spencer (1951) 104 Cal. App. 2d 588, 590-592, 232 P.2d 323* ; *Shreeves v. Pearson (1924) 194 Cal. 699, 707-711, 230 P. 488.]* Even if the deed had been recorded, title to the money and the loss on embezzlement was still with the buyer if the deed was recorded before the seller's conditions had been met and was thus ineffective to pass title to the buyer. ... *[Todd v. Vestermark (1956) 145 Cal. App. 2d 374, 379-380, 302 P.2d 347]* If, however, the conditions of the escrow have all been met, title to the money is in the seller and the seller must suffer the loss. ... *[Greenzweight v. Title Guar. & Tr. Co. (1934) 1 Cal. 2d 577, 580-582, 36 P.2d 186.]* There is an exception to the rule that the loss falls on the party who had title to the embezzled funds. If the negligence of one party caused the loss, that party will bear the loss regardless of who had technical title to the money. This rule was held to be possibly applicable when the buyer's money had been on deposit with the escrow holder for 15 months prior to its bankruptcy due to the seller's delay in prosecuting a quiet title action. ... *[Majors v. Butler (1950) 99 Cal. App. 2d 370, 374-375, 221 P.2d 994.]* n86

Observe the subtle gap between how the law characterizes the cash and deed held in escrow and how escrow practice treats these items. According to the letter of the law, the cash belongs to the buyer until closing, and then to the seller thereafter. Vice versa for the deed. Never do both parties own the cash or the title jointly. Yet, if a dispute arises, it won't be settled peaceably without the consent of both parties--as if cash and title were owned in common by them both!

Because of the possibility of escrow agent embezzlement, principals involved in multi-million dollar transactions often balk at the idea of dealing with independent escrow companies. They prefer using the escrow department at one of the large, national title companies. That way they are secure that the company can cover any losses due to their employee's indiscretions.

Alternately, if the parties truly want to use an independent escrow company, there are ways of reducing the risk of loss. For example, prior to opening escrow they may want to examine the escrow company's financial statements or inquire about the size of their bond. They can also arrange for the opening of a sub-escrow at their title company. A sub-escrow typically involves the receiving of loan proceeds from the new lender and the disbursement of payoffs to the past lender(s). Most institutional lenders insist on the use of a sub-escrow, refusing to fund the loan directly to the escrow company regardless of the size of the transaction.

In states where lawyers carry out the escrow function of closing a title, attorneys have been known to steal funds too. n87 The buyer's title insurer may be liable when an attorney is approved to handle the closing and steals the escrow funds.

That is precisely the result of the New Jersey Supreme Court's opinion in Clients' Security Fund of the Bar of N.J. v. Security Title & Guar. Co. n88 An attorney representing the buyer handled the closing. The attorney had been selected from a list of attorneys approved by the buyer's title insurer to effectuate the purchase of title insurance. The buyer paid all cash, part to be used to pay off the seller's existing loan. The attorney absconded with the funds, so the existing lender was never paid off, and its loan remained in place. The buyer recovered only a portion of the loss attributable to his attorney's misappropriation. The attorney was disbarred and went to jail. The buyer, however, was still left with a property subject to a loan when his purchase price was supposed to have gotten him the property free and clear.

In states where title companies approve attorneys as agents, they often make available to lenders a closing protection letter specifically insuring the lender that if the approved attorney makes off with funds intended for the insured lender,

the title company will make good on the defalcation. These letters are offered lenders at no additional cost. No such letter was offered the buyer in this case, but the New Jersey Supreme Court implied such coverage anyway, and placed the purchaser's loss on the title insurer.

The rationale for title insurers being held liable when approved attorneys embezzle, is that an agency relationship exists between the attorney and the title insurer. The insurer can control the way attorneys use escrowed funds, and third parties rely on the attorney's apparent authority to act for the title insurer.

The buyer expected title insurance of a fee simple absolute, free of the existing mortgage in exchange for his insurance premium. And that is what the court awarded the buyer--at the insurer's expense. The title insurer was held liable to the defrauded buyer on a finding that the closing attorney acted as an agent to the title insurer. The insurer paid off the mortgage, and was instructed to see that the mortgage lien was released of record. The buyer was left in the position he would have enjoyed had the attorney not absconded. The attorney was criminally convicted, imprisoned and disbarred.

§ 94.06(e) Escrow Agent's Duties.

An escrow agent is supposed to make sure the parties perform according to instructions. The escrow agent who was instructed to take a security instrument before releasing funds is liable for ignoring the instruction, and releasing funds before obtaining the instrument. Similarly, if the terms of the proffered mortgage differ materially from those agreed in the instructions, the agent is liable. If there were no instructions on the terms, the agent needs to get both parties to agree to mortgage terms before closing.

Required to collect money, and presented a check as payment, the agent needs to cash the check promptly. The agent who delays cashing it when the check bounces, becomes liable but only if the check would have cleared had it been cashed on time. n89

The agent is required to disclose, when asked, title defects she knows about but has no duty to search title or otherwise discover defects.

The escrow agent should steer clear of drafting documents or offering legal advice. But when an agent does proffer legal advice, that proves wrong, the agent is fully liable for the consequences of the principal having relied on the agent's bad advice. In one case, buyers of a new house were hesitant to close because they heard there were unpaid subcontractors working on the house. The agent told them not to worry. Unpaid subs were the builder's problem, not theirs. Thus reassured, they closed. The subs filed mechanics' liens. The buyers sued the agent and prevailed against a challenge to their pleadings based on negligence. "Once having undertaken to give advice, the defendant was under an obligation to proceed with a reasonable degree of care." n90

The agent has no duty to discover whether a fraud is being committed in an escrow but may have an obligation to disclose frauds apparent and obvious, or withdraw when she must choose between breaching client confidentiality and failing to disclose a potential fraud.

An example of how sticky this can get: suppose the buyers got a terrific deal and have already contracted to resell, subject to their deal closing with sellers. The buyers got a terrific deal and have already contracted to resell, subject to their deal closing with sellers. They open a second escrow to facilitate the resale, using the same escrow officer. Should an escrow officer owe the seller the duty to disclose the planned resale - especially after the seller has told the escrow agent he thought the sale price was too low?

Duty to Disclose n91

An escrow holder has a fiduciary duty to communicate to the parties to the escrow knowledge that

> the escrow holder acquires in the course of its agency with respect to material facts that might affect either party's decision with respect to the transaction, particularly when the escrow holder knows that a party is looking to the escrow holder for protection as to those very facts of which the escrow holder has knowledge. ... *[Kirby v. Palos Verdes Escrow Co. (1986) 183 Cal. App. 3d 57, 64-65, 227 Cal. Rptr. 785.]* However, because an escrow holder's agency is limited to carrying out the escrow instructions, an escrow holder is not required to go beyond the instructions and notify each party of any suspicious fact or circumstance that has come to the escrow holder's attention before or during the escrow that could conceivably affect a party to the escrow, when the fact or circumstance is not related to the party's specific escrow instructions. ... *[Lee v. Title Ins. & Trust Co. (1968) 264 Cal. App. 2d 160, 162-163, 70 Cal. Rptr. 378.]* Thus, an escrow holder in an escrow for the sale of land was not held to be under any duty to disclose to the buyer the fact that the seller was purchasing the land from the record owner in the same escrow and reselling it to the buyer at a substantial profit when the buyer's instructions did not include a demand for such information. ... *[Lee v. Title Ins. & Trust Co. (1968) 264 Cal. App. 2d 160, 162-163, 70 Cal. Rptr. 378* ; *Blackburn v. McCoy (1934) 1 Cal. App. 2d 648, 654-655, 36 P.2d 153.]* Similarly, a title insurer who has been engaged only to perform basic escrow functions, such as paying out funds, recording documents, and preparing a preliminary title report, and not to perform as an abstractor of title, owes no duty to disclose recorded liens or clouds on title. ... *[Siegel v. Fidelity Nat. Title Ins. Co. (1996) 46 Cal. App. 4th 1181, 1190, 54 Cal. Rptr. 2d 84.]* n92

The agent, in fulfilling a duty to disclose fraud-in-the-escrow, does not have to look outside the immediate escrow and play detective to discover it. Escrow agents are presently liable for making sure everything in the escrow they are overseeing is in good order. If the buyer's check bounces, the agent must inform the seller. If the seller's signature on the deed looks different from the one on the escrow instructions, the agent must say so. Imposing on the escrow agent the duty of keeping a watchful lookout for obvious fraud, as in a double escrow, may be seen as adding little to the escrow agent's present duties.

An Arizona case, Berry v. McLeod, n93 illustrates the nuances of this "fraud-in-the-escrow" exception. In that case an escrow agent was held liable in a "double" escrow. The buyer was a corporation formed by the sellers' real estate broker. The same escrow agent was employed by the broker to oversee a resale of the property from the dummy corporation to the broker. The Arizona court thought the escrow agent should have warned the seller that the broker was buying the property through a dummy corporation. At least one law review commentator agrees with the Arizona holding. n94

A case can be made against the fraud exception embodied in the Arizona rule. The escrow function requires almost machine-like precision, attention to detail, and speed. Escrow agents typically handle 100 escrows at a time. Some believe that the system would work best if escrow agents were required to disclose only information made subject to disclosure by explicit instruction.

In most states the escrow agent is free from liability if the agent (1) complies strictly with the terms of the escrow agreement, (2) maintains confidentiality, and fulfills the instructions with "scrupulous honesty, skill, and diligence." n95 The Arizona Supreme Court went further in Burkons v. Ticor Title Insurance Co., and held an agent liable for failing to report that a buyer was using borrowed funds to make the down payment from a loan secured by a lien superior to the seller's purchase money loan. The buyer was perpetrating a fraud on the seller and the Arizona Supreme Court held that the escrow agent "should have been aware of it." If you are having trouble figuring out what the buyer did that was wrong, think of the escrow agent's situation. The Arizona Supreme Court allows parties to go to trial to prove what "reasonable escrow agents" should know and do when -- with a little digging -- they could unearth a fraud one party to an escrow is committing against another. n96

So far, California courts haven't gone nearly this far. They haven't even required disclosure of "double escrows," even when a real estate broker is buying the seller's property through a "straw" and reselling it to garner a secret profit. n97

However, escrow agents have settled some cases brought against them for failure to disclose double escrows. Los Angeles real estate lawyer, Alan Wayte, gives this example: Partners A and B owned an office building. Partner A ran it and knew more about its true value than Partner B. When they got an offer from Corporation C, Partner A said, "Sell," and Partner B took A's advice. Partner A actually controlled Corporation C, and arranged for C to convey to A in a back-to-back escrow handled simultaneously by the same agent who completed the A + B to C sale. Eventually B learned he had been duped and sued A for fraud and the escrow agent for nondisclosure. The agent settled. So it may be that the Arizona rule needs to be reckoned with in California. n98

§ 94.06(f) Inconsistencies Between Escrow Instructions and the Purchase-and-Sale Contract.

Escrow instructions should coincide perfectly with the underlying contract unless the parties expressly consent in writing to a contract modification. Conflicts, however, between the contract and the escrow instructions are possible, and can become the focus of litigation once the parties have a falling out, and the deal fails to close. There are conflicting common-law rules regarding inconsistencies. One rule is that the contract governs since escrow instructions are designed merely to implement the contract. The other is the well-known rule of contract law that the last agreement in a series usually governs. Almost always, the escrow instructions come later than the contract. Matters are further complicated because escrow instructions frequently specify that the contract is to prevail.

> Inconsistencies [between purchase agreement and escrow instructions] that do occur usually arise because of an error in drafting the instructions, because one party's interpretation of the purchase agreement differs from the other's, or because the parties orally modified the agreement after it was executed. Inconsistencies in the buyer's and the seller's instructions because of a drafting error are usually resolved easily. Inconsistencies because of conflicting interpretations of the agreement may require further negotiation before the transaction can close.
>
> In resolving inconsistencies, the general rule is that, when more than one document between the same parties pertains to the same subject matter, both documents are to be interpreted together to the extent they are not inconsistent. ...
>
> [W]hen the inconsistency results from a provision in the purchase agreement being omitted from the instructions, ... the instructions are held to be merely supplemental to the agreement and both are interpreted together--the agreement controlling when the instructions are silent. ... n99

§ 94.06(g) Delivery.

§ 94.06(g)(1) Delivery Defined and the Impetus for Using Escrows.

A deed becomes effective only on delivery. An undelivered deed can look perfectly valid and be recorded and yet not convey good title. Suppose an unscrupulous grantee grabs an executed deed from the grantor's hands before paying the purchase price. Then the grantee sells to an innocent purchaser. That purchaser is out of luck. The stolen deed wasn't valid because it hadn't been delivered. n100

"Delivery" is a question of fact of the grantor's objective intent, objectively determined. Usually the delivery requires:

> (1) an intent to deliver, and
>
> (2) some evidence of that intent unless the grantor's intent is so clear that it requires no corroborating evidence.

The grantor handing the deed to the grantee is good evidence of intent to deliver, but it is not conclusive. n101 The

grantor retaining possession of the deed is presumptive evidence of a lack of intent to deliver. However, in either situation the presumption of physical possession can and occasionally is rebutted by other evidence of the grantor's intent. Winning grantees, lacking actual possession, are sometimes said to have been in constructive possession.

The grantor must intend a *present* transfer of ownership. So a grantor who gives a deed to the grantee or a third party intending to convey title several months or years in the future hasn't "delivered" the deed. A typical case: mother hands a friend a deed to her house naming her son as grantee with this instruction: "I am giving my son the house when I die. Take this deed and give it to him after my death. Until then I will continue to own the house." There is no delivery here unless the mother can be said to have conveyed a vested remainder subject to her own life estate. n102

You can see the mischief that could result from a failure of delivery. A grantee who holds a seemingly valid deed and records it can easily deceive a bona fide purchaser (BFP). Between the BFP and the grantor, most courts place the loss on the grantor if the deed was delivered "conditionally" to the grantee. n103 But the BFP loses if the grantor never handed the deed to the grantee - if, for instance, the grantee stole it.

> [T]he matter of whether a grantor "intended" delivery is left to the trier of fact. In the case of a "conditional" delivery, if the court wants to find for the grantor, it will cite the rule that a deed delivered to the grantee conditionally is a conveyance absolute - in order to protect innocent third parties from the carelessness of grantors. A court impressed with the hardship this might cause in an individual case could determine a lack of the requisite intent to deliver, and hold the deed void as undelivered. n104

A few states make the presumption of delivery conclusive when the deed is recorded. n105 This helps title insurers by enabling them to insure the validity of deeds once recorded without worrying about whether each deed was, in fact, "delivered."

Even when the deed has not been delivered, if the grantor has put the grantee in a position to deceive their parties, the grantor may have to bear some of the burden of the deception. The grantor's deed may be treated as valid if the grantor "has been negligent, or is estopped to claim a lack of delivery, as against innocent third persons." n106

§ 94.06(g)(2) Conditional Delivery of Deed to Grantee Becomes a Deed Absolute Free of Conditions.

Sometimes sellers hand over deeds to buyers before the buyer has met all the conditions of closing the deal. In California by statute, n107 and in many jurisdictions by common law, n108 a deed that the grantor delivers conditionally to the grantee is conclusively presumed to be delivered and becomes a deed absolute -- unless the conditions are written on the deed itself, and they seldom are. Latent conditions cease to be enforceable as a lien on the property although they may be enforced in a damage action by the grantor against the grantee. If the grantee sells to a BFP, the BFP takes title free of the conditions.

> The no-conditional-delivery rule is not universally accepted. H, a model husband in the eyes of the trial court, was married to W, unpleasant and unfaithful in the opinion of the same trier of fact. H gave W a deed to their house when he left for a military tour, during the war between nationalist and communist forces in China, in 1946, on the condition that she would reconvey to him, if he returned safely. He wasn't sent to China after all, but to Japan, and did return. W refused to give back the deed, and when H sued for its return, she sued for a divorce and for custody of their daughter. The same court which gave custody to H, unusual enough since the wife ordinarily gets custody of younger children, overruled Maryland's conditional delivery rule and compelled the wife to reconvey. Acknowledging the majority rule on conditional deliveries to grantees, the court concluded that this rule was wrong:
>
> "But there is actually no logical reason why a deed should not be held in escrow by the grantee as well as by any other person. The ancient rule is not adapted to present-day conditions and is entirely unnecessary for the protection of the rights of litigants. After all, a conditional delivery is purely a

> question of intention, and it is immaterial whether the instrument, pending satisfaction of the condition, is in the hands of the grantor, the grantee, or a third person. After the condition is satisfied, there is an operative conveyance which is considered as having been delivered at the time of the conditional delivery, for the reason that it was then that it was actually delivered, although the ownership does not pass until the satisfaction of the conditions. We, therefore, hold that it is the intention of the grantor of a deed that determines whether the delivery of the deed is absolute or conditional, although the delivery is made by the grantor directly to the grantee." *Chillemi v. Chillemi, 197 Md. 257, 264-65, 78 A.2d 750, 753 (1951).* n109

Some of the most difficult cases involving the concept of delivery arise not in commercial or residential sales but in the cases where the grantor gives property to a relative or friend conditioned on the grantor's death.

Gifts *causa mortis* (in contemplation of death) are often invalidated as ineffective testamentary dispositions (wills) for failing to meet the formal requirements of the Statute or Wills or because as wills such gifts are revocable and the grantor's final will is deemed to constitute a revocation. Encouraged by a provision in the Uniform Probate Code which appears to validate conveyances and other acts conditioned on the grantor's death, at least one court has upheld a deed conditioned on the grantor's death by stretching the delivery requirement. n110 The delivery was held effective when a mother intending a property transfer to take place on her death placed deeds naming daughter as grantee in joint safety deposit box. If the court had construed the time of the intended delivery to have been at the grantor's death, the delivery would not have been timely. The property would have passed by will. To avoid this result, the court found that delivery occurred earlier. Other courts are inclined to save such gifts by characterizing them as having conveyed vested remainders subject to life estates in the grantor.

§ 94.06(g)(3) Conditional Delivery of Deed to Third Party Can't Be Validly Delivered Until Conditions Are Met.

The seller who places an executed deed in the hands of an escrow agent is presumed to have delivered the deed because the agent is also receiving it as the buyer's agent. Cautious sellers don't execute deeds much before closing, nor do they turn them over to escrow early. However, the seller's "delivery" of a deed into escrow is conditional; the conditions are whatever the parties instructed the escrow agent to do. n111

This means that a seller who wants to avoid risking any loss of title before the buyer has kept all promises, can't hand the deed directly to the buyer before the buyer fully performs. The seller has to wait until all the conditions of closing are met, or hand the deed--with conditions--to a third party, that is, anyone but the buyer. Hence, the impetus for using escrows. The seller is usually protected when the escrow agent wrongfully delivers or records the deed before all the conditions of escrow have been fulfilled. n112

If met with contradictory conditions, the agent may not proceed by favoring one party over another. The agent must halt the escrow and resolve the controversy before proceeding.

Conditions inserted for the benefit of one party to a deal may be waived by that party. In such a case, the deed is deemed delivered free of conditions. Say the seller is to take back a note and deed of trust for part of the purchase price. The deed of trust is never properly executed because the escrow agent messes up. After closing, the buyer seeks rescission but the seller would rather keep the sale closed even though this means the seller will remain unsecured for the purchase money. The seller prevails if the condition for a security instrument was there for the benefit of the seller alone. In that case, it is the seller's to waive. n113

Even a BFP takes nothing who acquires a deed wrongfully delivered by an escrow agent. There is a minority view -- that since the grantor chose the escrow agent, the grantor should be estopped from denying the escrow agent's apparent authority to convey free of conditions.

Everywhere, the escrow agent who wrongfully delivers or records the deed before all the conditions of escrow have been fulfilled is also liable to the grantor for misfeasance. n114

§ 94.06(g)(4) How the Delivery Rule Can Save Sellers from a Devious or Careless Escrow Agent.

An escrow agent failing to follow instructions regarding the recording of deeds of trust led to the case of Powell v. Goldsmith. n115 The Goldsmiths agreed to sell a condo to an existing mortgage to Rancho Conje Realty (RCR), a corporation wholly owned by John F. McInerney, for $51,500 - $25,000 cash plus a promissory note secured by a second deed of trust on the condo for the balance, $26,500. The Goldsmiths didn't know that the buyer was borrowing $42,000 cash from passive investors--the Powells--to make the purchase and that the Powells thought their $42,000 would be secured by a second deed of trust superior to the Goldsmiths'. The Powells were lured into the deal by the Pyramid Home Loan Corporation (Pyramid).

The Goldsmiths' escrow agent was instructed to record their deed and purchase money deed of trust promptly, but didn't. The Goldsmiths were to have gotten a second deed of trust for $26,500. Instead the agent handed the documents to Pyramid.

The money Pyramid was putting into the deal--$42,000--wouldn't be well secured at all by a THIRD deed of trust as the Pyramid investors, the Powells, were to discover later.

The buyer, RCR, was borrowing twice for the same purchase price--$26,500 from the Goldsmiths, $42,000 from the Powells. Absent a spectacular increase in value, one or the other of these lenders was bound to be disappointed.

Pyramid, acting for the Powells, wanted to assert a second, not a third deed of trust on the condo. So instead of letting the escrow agent record as instructed, Pyramid took possession of the Goldsmiths' deed and their purchase money mortgage and behaved as any unscrupulous trust deed "manufacturer." It recorded the grant deed and its own deed of trust, and for several weeks withheld from record the Goldsmith purchase money deed of trust. In this way Pyramid could show the Powells a lien of record superior under recording act principals to the Goldsmiths'.

Who was the careless escrow agent who handed over these documents without seeing to their timely recordation? Why, someone at RCR Escrow, another corporation wholly owned by McInerney! Need more be said about the importance of a truly neutral escrow agent to the innocent buyer or seller who wants to stay that way?

In the Powell case, the deed was fraudulently obtained by the grantee. Since the conditions of the deed weren't satisfied, the Goldsmith deed was never delivered. Title did not pass to the grantee, but remained with the Goldsmiths. The Goldsmiths' case was strong because they were purchase money mortgagees. "The privity of a purchase money deed of trust over any liens against a buyer is the primary exception to the general rule that deeds of trust obtain their priority by date of creation or date of recordation." n116

The Powell court embraced the generally prevailing rule, that delivery of a deed on conditions to a third party is void until the conditions are fulfilled. Many courts treat a wrongful delivery by an escrow agent as they would a deed stolen directly from the grantor but there is considerable dissent. n117

What about the equally innocent investors, the Powells, who thought they were buying a second deed of trust when, in the end, they would have nothing for their investment funds but a cause of action from the promoter, Pyramid? While there was no evidence Powell or McInerney knew what Pyramid had done in reversing the agreed order of recordation, knowledge of Pyramid's fraudulent scheme "cancels their claim of being bona fide purchasers for value." n118

The facts of Powell v. Goldsmith may discourage your using an escrow agent. After all, the Goldsmiths didn't get a sale

and a purchase money second deed of trust. They got a lawsuit, and luckily, a rescission of the sale. The Powells, who also trusted an escrow agent to secure the loan that they were making with a second deed of trust, ended up with no security interest at all, just a lawsuit against a persuasive and unscrupulous second trust deed marketeer. The Powells' agent sold them out. But take heart. Most escrow agents are competent, trustworthy and efficient -- seldom perfect, but who is?

§ 94.06(g)(5) The Presumptive Delivery Date in an Escrow Closing.

At common law, escrow closed and the deed was deemed delivered when the buyer paid the price, and the seller executed a deed and turned it over to the escrow agent. Today, the escrow isn't usually deemed closed until the deed has been recorded, because the buyer specifies in most escrow instructions that closing takes place only when the deed has been filed for record.

§ 94.06(g)(6) Escrows and "Relation Back" Theories Determine the Date of Delivery.

When deeds are delivered to escrow, sometimes courts presume delivery "relates back" to the time the grantor first placed the deed into escrow "in trust" for the purchaser, or back to the time the grantor executed the deed. The "relation back" doctrine is an exception to the rule that title doesn't pass until all the conditions of escrow are met. The doctrine is a legal fiction, usually applied in favor of a buyer to defeat the claims of third parties acquired during escrow who had notice of the buyer's rights. n119

§ 94.06(g)(7) The Doctrine of Inurement.

A title insurance company employee is supposed to record documents from a closing in this sequence:

(i) release of existing loan signed by deed of trust trustee,

(ii) deed from seller to buyer,

(iii) new purchase money deed of trust from buyer as trustor to lender as beneficiary.

On the way to the Hall of Records, the employee is forced to a sudden, jarring stop when a cat darts in front of the car. The documents scatter across the front seat. As a result, the new purchase money deed of trust is recorded first. Thus, at the time the deed of trust is recorded, the buyer doesn't actually own the property the buyer is purporting to convey.

However, the state has a statute like this one which codifies the common-law doctrine of inurement:

California Civil Code § 2930 n120

> Title acquired by the mortgagor subsequent to the execution of the mortgage, inures to the mortgagee as security for the debt in like manner as if acquired before the execution.

Which of these answers is the best concerning the title company's potential liability for the employee's document shuffle?

(a) The new deed of trust is a "wild deed," not in the chain of title, and the title insurance company is liable to the lender not on the terms of the title policy, but for negligently recording the deed of trust.

(b) The new deed of trust is a "wild deed," not in the chain of title and the title company is liable both to the lender and the buyer on their respective policies of title insurance.

(c) Under the doctrine of inurement, codified in California Civil Code § 2930, the new lender obtains a security interest in the borrower's title from the moment she acquires title, even if that moment happens to occur after her conveyance to the lender becomes effective. The title company is therefore liable to no one since no one will be harmed by the messed up recording sequence.

The right answer is (c)--which explains why title companies are enthusiastic advocates for the doctrine of inurement.

FOOTNOTES:

(n1)Footnote 66. Today the terms "escrow" and "escrow agent" have statutory definitions in California. "Escrow" means any transaction wherein one person, for the purpose of effecting the sale, transfer, encumbering, or leasing of real or personal property to another person, delivers any written instrument, money, evidence of title to real or personal property, or other thing of value to a third person to be held by such third person until the happening of a specified event or the performance of a prescribed condition, when it is then to be delivered by such third person to a grantee, grantor, promisee, promisor, obligee, obligor, bailee, bailor, or any agent or employee of any of the latter. Cal. Fin. Code § 17003. "Escrow agent" means any person engaged in the business of receiving escrows for deposit or delivery. Cal. Fin. Code § 17004.

Other California statutes provide for licensing, bar unlicensed persons from acting as escrow agents, set minimum capitalization and accounting standards, and require a state insurance fund to cover client losses if escrow companies fail. Cal. Fin. Code §§ 17000 - 7010. *For example, in Johnson v. Exclusive Unlimited, 720 A.2d 568 (Me. 1998),* the court held that no particular form of words is necessary to constitute an escrow. *Yet in Lennar Northest Partners Ltd. Partnership v. Gifaldi, 695 N.Y.S.2d 448 (1999),* the court stated that merely calling an act an escrow does not necessarily make it such. *See also Kallas v. Harnen, 709 A.2d 586 (Conn. App. 1998)* (where the money was left in the hands of an attorney or agent of one of the parties such money was not delivered in escrow). Under Florida law, a written instrument must be deposited with a third party who agrees to act as an escrow agent and such instrument must embody conditions mutually beneficial to both parties. Dickerson v. Central Florida Radiation Oncology Group, 225 B.R.241 (M.D. Fla. 1998).

(n2)Footnote 67. W.W. Robinson, Land in California 222-23 (University of California Press, 1948, reprinted by Arno Press, 1979).

(n3)Footnote 68. In California, this is the Department of Corporations for escrow agents and the Insurance Commissioner for title companies. California Continuing Eduction of the Bar, california Real Property Sales Transactions § 11:32, at 615 (1981).

(n4)Footnote 69. *See Fisk v. Peoples Liberty Bank & Trust Co., 570 S.W.2d 657 (Ky. 1978). See also Calcagno v. Drew, 694 N.Y.S.2d 248 (1999)* (Where letters exchanged between attorneys for the buyer and seller of a business, in which the buyer's attorney stated that he would instruct his client to make payments on the note to the attorney's office, to be held in escrow, and the seller's attorney said that he had no objections, a valid escrow agreement was created).

(n5)Footnote 70. *Spalding v. Coulson, 2001 Ohio App. LEXIS 2626* (Ohio App. 8 Dist.) (1998) (Attorneys are not punished for violation of the law or for malpractice when acting in the dual role as escrow agents).

(n6)Footnote 71. *Patel v. Gannaway, 726 F.2d 382 (8th Cir. 1984).*

(n7)Footnote 72. Cal. Civ. Code § 2995.

(n8)Footnote 73. *See Lewis v. Shawnee State Bank, 596 P.2d 116 (Kan. 1974). See also In re* D. Jay Hyman Const. Co., 15 B.R.765 (Bkrtcy.D.Md. 1981) (Oral escrow agreements are enforceable); *Hills Lone Pine Assoc. v. Texel Land Co., Inc., 572 N.W.2d 256 (Mich. App. 1997)* (Escrow agreements, like all other types of contracts, are to be construed

to effectuate the intent of the parties involved); *Johnson v. Exclusive Properties Unlimited, 720 A.2d 568* (Me.,1998) (The party who asserts the existence of an escrow agreement has the burden of proof, and the burden is met by the preponderance of the evidence); *In re Anthony Sicari, Inc., 151 B.R. 60 (S.D.N.Y. 1993)* (Judicial action can become the surrogate for an escrow agreement in establishing the parties' commitment to create an escrow).

(n9)Footnote 74. *Johnson v. Maki & Assocs., 682 N.E.2d 1196 (Ill. App. 1997)* (escrow agent fiduciary duty to follow escrow instructions).

(n10)Footnote 75. *See, e.g., Banville v. Schmidt, 112 Cal. Rptr. 126 (1974); Akin v. Business Title Corp., 70 Cal. Rptr. 287 (1968).* In some states, exculpatory clauses are enforceable. *See Lynch v. Santa Fe Nat'l Bank, 627 P.2d 1247 (N.M. 1981).*

(n11)Footnote 76. Md. Code Ann., Fin. Inst.§ 13-604.

(n12)Footnote 77. *See* California Continuing Education of the Bar, california Real Property Sales Transactions § 11:34, at 617 (1981).

(n13)Footnote 78. *Commonwealth Land Title Ins. Co. and Transnational Title Ins. Co. v. Gulf Underwriters Ins. Co., 91 Wash.App. 1013 (1998).*

(n14)Footnote 79. Cal. Fin. Code § 17200. Bank, title company and real estate brokers acting as escrows are governed by banking, insurance, and real estate regulators. *See* Comment, *The Independent Escrow Agent and the Licensee, 38 So. Cal. L. Rev. 289 (1965).*

(n15)Footnote 80. Cal. Fin. Code § 17210 (effective July 1, 1993).

(n16)Footnote 81. Cal. Fin. Code § 17312.

(n17)Footnote 82. Cal. Fin. Code §§ 17330-17350.

(n18)Footnote 83. *See, e.g., Sears Mortgage Corp. v. Rose, 634 A.2d 74 (N.J. 1993).* The attorney was criminally convicted, imprisoned and disbarred. The title insurer was held liable to the defrauded purchaser on a finding that the closing attorney acted as an agent of the title insurer.

(n19)Footnote 84. *See, e.g.,* Fla. Stat. Ann. § 475.482, establishing the Florida Real Estate Recovery Fund as a separate account in the Professional Regulation Trust Fund. The fund totals $750,000, but each claim is limited to $25,000.

(n20)Footnote 85. California Real Estate Law and Practice § 91.40[2] (Matthew Bender).

(n21)Footnote 86. Footnotes within the text of original have been incorporated above as bracketed material.

(n22)Footnote 87. *See, e.g., Sears Mortgage Corp. v. Rose, 634 A.2d 74 (N.J. 1993).*

(n23)Footnote 88. *634 A.2d 90 (N.J. 1993).*

(N24)Footnote 89. *See* Burke, Title Insurance, 437-439 (1986).

(n25)Footnote 90. *McDonald v. Title Ins. Co. of Oregon, 621 P.2d 654 (Or. 1980).*

(n26)Footnote 91. California Real Estate Law and Practice § 91.14 (Matthew Bender).

(n27)Footnote 92. Footnotes within the text of original have been incorporated above as bracketed material.

(n28)Footnote 93. *604 P.2d 610 (Ariz. 1979).*

(n29)Footnote 94. Karen Lee Jacobsen, Note, *California Escrow Agents*: A Duty to Disclose Known Fraud, *17 Pac. L.J. 309 (1985).*

(n30)Footnote 95. *Burkons v. Ticor Title Ins. Co., 798 P.2d 1308, 1312-13 (Ariz. App. 1990).*

(n31)Footnote 96. *See* Robin C. Martindale, *Expanding the Duties of Arizona Escrow Agents: Burkons v. Ticor Title Insurance Co., 24 Ariz. St. L.J. 821.* The article concludes: "The 'reasonable escrow agent' is an impracticable standard." *Id. at 837.*

(n32)Footnote 97. *See also Axley v. Transamerica Title Ins. Co., 586 P.2d 1317 (Ariz. 1978)* (escrow agent had no duty to warn seller deeds of trust were undersecured); *Gordon v. New Mexico Title Co., 421 P.2d 433 (N.M. 1966)* (no duty to investigate or report unfiled mechanic's liens). *Gebrayel v. Transamerica Title Ins. Co., 888 P.2d 83 (Or. App. 1995)* (no duty to inform buyer of not-of-record claim against property prior to closing).

(n33)Footnote 98. The escrow agent may not have been unduly cautious to settle. *See, e.g., Manley v. Ticor Title Ins. Co., 798 P.2d 1327 (Ariz. App. 1988)* (escrow agent liable for not disclosing diversion of construction loan proceeds to non-construction purposes).

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(n35)Footnote 100. *Lange v. Wyoming Nat'l Bank, 706 P.2d 659 (Wyo. 1985). Wurzl v. Holloway, 46 Cal. App. 4th 1740 (1996)* (fraudulent inducement to deliver deed makes delivery voidable by the court).

(n36)Footnote 101. *See Martinez v. Martinez, 678 P.2d 1163 (N.M. 1984),* in which parents delivered a deed to their son and daughter-in-law to hold until the kids performed their obligations under a real estate contract. The kids were supposed to make payments on the existing loan. If the kids defaulted, they were required to reconvey title back to parents. The kids did default on the mortgage. Their son was willing to reconvey, but their daughter-in-law was not. Parents sued and got back the title. *See also Tzanetatos v. Scott, 659 N.Y.S.2d 438 (1997)* (holder of escrow account improperly released funds, despite the buyer's timely notice of objection that was delivered to escrow holder as required by the agreement. The holder could not defend release on basis that notice was defective); *Fantino v. Lenders Title and Guar. Co., 707 N.E.2d 756 (Ill. App. 1999)* (Escrow agent did not breach a fiduciary duty owed to the owners of a home under construction by failing to conduct proper inspections, failing to procure proper lien waivers, and failing to procure owner's written authorization before releasing funds, because agreement read such inspections, etc., were to be ordered "for the benefit of the lender only").

(n37)Footnote 102. *Compare Meairs v. Kruckenberg, 233 P.2d 472 (Kan. 1951)* (grantor held to have reserved a life estate) with *Johnson v. Johnson, 54 A. 378 (R.I. 1903)* (similar facts, but grantor advertised the property for sale during her lifetime, negating inference that she intended to reserve only a life estate).

(n38)Footnote 103. *See State by Pai v. Thom, 563 P.2d 982 (Haw. 1977); Bennis v. Alexander, 574 P.2d 450 (Alaska 1978); Herron v. Underwood, 503 N.E.2d 1111 (Ill. App. 1987);* N.D. Cent. Code § 47-09-07. *Contra, Raim v. Stancel, 339 N.W.2d 621 (Iowa 1983).*

(n39)Footnote 104. George Lefcoe, Land Development Law 537 (2d ed. 1974).

(n40)Footnote 105. Mass. Ann. Laws ch. 183 § 5.

(n41)Footnote 106. Harry D. Miller & Marvin B. Starr, 2 Calif. Real Est. 2d 571 (1989).

(n42)Footnote 107. "A grant cannot be delivered to the grantee conditionally. Delivery to him, or to his agent as such, is necessarily absolute, and the instrument takes effect thereupon, discharged of any condition on which the deliver was made." Cal. Civ. Code § 1056.

(n43)Footnote 108. *Osby v. Reynolds, 103 N.E. 556 (Ill. 1913); Clevenger v. Moore, 259 P. 219 (Okla. 1927); Blakney v. Home Owners' Loan Corp., 135 P.2d 339 (Okla. 1943); Mays v. Shields, 45 S.E. 68 (Ga. 1903).*

(n44)Footnote 109. George Lefcoe, Land Development Law 535-36 (2d ed. 1974).

(n45)Footnote 110. *See, e.g., In re Estate of O'Brien, 749 P.2d 154 (Wash. 1988).*

(n46)Footnote 111. *Bixby Ranch Co. v. United States, 35 Fed. Cl. 674* (Fed. Cl.,1996) (Set-aside escrow is generally used to salvage closing of a sale that otherwise would cancel due to discovery of cloud on title).

(n47)Footnote 112. *See, e.g., Sanders v. Park Towne, Ltd., 578 P.2d 1131 (Kan. 1978)* (when title insurer insured a second mortgage and recorded the second mortgage late, so that it was at best a third, insurer as escrow agent was liable).

(n48)Footnote 113. *See Kish v. Bay Counties Title Guar. Co., 62 Cal. Rptr. 494 (1967).*

(n49)Footnote 114. *See Kish v. Bay Counties Title Guar. Co., 62 Cal. Rptr. 494 (1967).*

(n50)Footnote 115. *199 Cal. Rptr. 554 (1984).*

(n51)Footnote 116. *199 Cal. Rptr. 554, 557 (Cal. App. 1984).*

(n52)Footnote 117. The cases contrary to the rule in the *Powell* case are collected in 28 Am. Jur. 2d *Escrow* § 26, at 38 (1966):

> [I]n some jurisdictions the doctrine that an innocent purchaser from a grantee in a deed left in escrow but delivered wrongfully before the condition of the escrow has been performed will be protected has been upheld, in accordance with the maxim that where one of two innocent persons must suffer a loss, and a fortiori in cases where one has misled the other, he who is the cause of that confidence by which the loss has been occasioned ought to bear the loss.

(n53)Footnote 118. *199 Cal. Rptr. 554, 556 (Cal. App. 1984).*

(n54)Footnote 119. California Continuing Education of the Bar, California Real Property Sales Transactions § 11:19, at 607-08 (1981).

(n55)Footnote 120. Cal. Civ. Code § 2930.

* Parts of this chapter have been adapted from George Lefcoe, Real Estate Transactions (Michie 1993).

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CHAPTER 94 CONVEYANCING PROCEDURES *

11-94 Thompson on Real Property, Thomas Editions § 94.07

AUTHOR: Professor George Lefcoe The Law Center University of Southern California

§ 94.07 Aspects of Deeds Especially Pertinent to Conveyancing.

[Go To Supp]

§ 94.07(a) Deed as Evidence of Transfer, Not Title.

The deed is only one method of transferring legal title; it isn't the only way. Title can be transferred by will, court decree, intestate succession, and legislative act. Still, transfer by deed is the most common means of conveyance and nearly always what contracting parties contemplate.

Owners don't pass the same deed down one to another in succession. Each owner prepares and executes a new deed for delivery to the grantee. Owners may like saving their deeds, but if a recorded deed is lost an owner can obtain a certified copy from the county recorder's office.

§ 94.07(b) Types of Deeds.

In each state there is usually a statute or custom that dictates the particular form of deed in common use unless the parties contract for a different one. n121

These conventional elements are barely detectable in many standard form deeds. They are overshadowed by requirements imposed by county recorders' offices and taxing authorities. All this tax and recording information has no bearing on the validity of the deed. But its absence could result in the recorder declining to accept the deed for recordation.

The types of deeds are:

(1) general warranty,

(2) special warranty or grant, and

(3) quitclaim.

§ 94.07(b)(1) General Warranty.

§ 94.07(b)(1)(i) Where They Are Used.

In many states, deeds containing the general warranty covenants are the only acceptable form of conveyance. A seller who proposes to convey only by quitclaim risks being looked upon with great suspicion. The purchaser who accepts title by quitclaim risks being denied title insurance and BFP status in a few states. Even where general warranty deeds are commonly used, it is often possible for the grantor to contract only to sign a grant or special warranty deed.

§ 94.07(b)(1)(ii) The Common-Law Warranties.

The general warranty deed contains the broadest warranties, traditionally the following:

(1) *Covenant of Seisin*. The grantor's promise that the grantor is seised of the land at the time of conveyance means that the grantor has an "absolute, rightful and indefeasible estate in fee simple." n122

In a few states the grantor's covenant of seisin isn't breached if the grantor lacks title and merely holds possession which has not ripened into adverse possession. The buyer would do better in those states to insist on a covenant that the grantor has fee simple title.

If the grantor transfers while an adverse possessor or tenant is in possession, courts differ on whether to hold that the grantor is in breach of the covenant of seisin for lacking possession.

The fact that the grantor's title is subject to an encumbrance like a lease, a mortgage, a tax lien, or an easement doesn't cause her to be in violation of the covenant of seisin. The grantor still has a fee simple title regardless of how encumbered it is.

(2) *The Covenant of Right to Convey*. This is the grantor's promise that the grantor had the right to convey the property as of the day of the conveyance. If the grantor is in possession wrongfully, this covenant is breached.

If someone holds a power of attorney for the grantor, this covenant is a promise by the holder of the power that it is valid, and gives the holder the right to convey on the grantor's behalf.

(3) *The Covenant of Encumbrances*. This is the grantor's promise that there are no encumbrances. An encumbrance is any right or interest held by someone other than the grantee or grantor which diminishes the value of the estate but not so much that it leaves the grantee with no title at all. The word encumbrance has no precise meaning but includes security instruments, leases, mechanics' liens, property tax assessment, liens, easements, future interests and covenants running with the land at the time of conveyance, other than those specifically set forth in the deed. By this covenant, the grantor impliedly promises to indemnify the grantee for any loss from the existence of encumbrances not specifically excluded from the grant.

Zoning ordinances are not regarded as encumbrances. Sewer or utility easements are encumbrances. n123

A mortgage is an encumbrance. A paid-off mortgage loan is not an encumbrance even though the lien hasn't been released of record.

If the grantee has agreed to take title subject to some of these encumbrances, the cautious, well-advised grantor lists those encumbrances as exceptions on the face of the deed. A grantee, who saw, could easily have seen, or knew about an encumbrance, could be kept from successfully invoking the covenant against encumbrances depending on the circumstances of the case and the inclinations of the trier of fact (as you would anticipate).

(4) *The Covenant of Warranty*. This is the grantor's promise to warrant and defend the title of the land against all lawful claims and demands. If the grantor only owns part of the property or a fractional interest in it and had purported to convey it all, the covenant is breached if the grantor refuses or is unable to procure the title promised. If the grantor lacks title to fixtures on the property, that is a breach and the grantor must make good for their lost value if the grantee won't clear title to them.

(5) *The Covenant of Quiet Enjoyment*. This is the grantor's promise that no one with superior title will disrupt the grantee's title or possession of the property.

The covenant isn't breached just because someone else may possibly be in a position to assert an adverse claim. The grantee must be physically or "constructively" evicted by an adverse claimant asserting a claim of right inconsistent with the warranted title before the covenantor becomes liable. "Constructive" eviction includes: a court order ejecting the present occupant, the holder of superior title demanding that the covenantee vacate the land, or the grantee surrendering possession because she realizes the invalidity of her claim.

(6) *The Covenant of Further Assurances*. This is the grantor's promise to do anything necessary to perfect title to the grantee. This could include executing documents necessary to perfect the conveyance or assure title. "The covenant is enforceable in equity by a decree of specific performance." n124

As you can see, there is some degree of overlap in the covenants, particularly the covenants of "warranties" and of "quiet enjoyment." As a result, one or more of the covenants may sometimes not be listed in the deed.

§ 94.07(b)(1)(iii) The Statutory Short Forms.

Long ago, grantors used to handwrite these covenants onto the deed. Today, the contents of covenants impliedly contained in deeds are often specified in state statutes.

In some states, a "bargain and sale deed *with full covenants*" has the same effect as a general warranty deed. n125 In Alaska, n126 Illinois, n127 Kansas, n128 Michigan, n129 and Minnesota, n130 the words *convey* and *warrant* make a deed a general warranty deed. The same result is achieved in Maryland, n131 Virginia, n132 and West Virginia n133 by use of the words *warrant generally*, and in Arkansas, n134 Florida, n135 Kentucky, n136 and North Dakota n137 by the words *grant, bargain*, and *sell*.

General warranty deeds don't mean that the seller has good title. Anyone can sign a deed to any property. The general warranty deed just gives the grantee a cause of action against the seller who doesn't own what she purported to sell.

§ 94.07(b)(2) Special Warranty Deed and Grant Deed.

§ 94.07(b)(2)(i) The Context of a Grant or Special Warranty Deed.

The covenants in grant deeds are more or less the same as those contained in special warranty deeds. Grantors of special warranty deeds and grant deeds do not promise that they are the true owner of the property or that they will protect the grantees against all claims of superior or paramount title. They only promise that no title defects have arisen or will arise *due to the acts or omissions of the grantor*. They promise that no one *claiming by, through, or under the grantor* will be able to assert a title superior to the covenantee's title. n138

Perhaps the most significant difference between the special warranty deed and grant deed, typically, is that the special warranty often contains a covenant by the grantor to "warrant and defend" the title against any challenges "claiming by, through or under, the grantor." Such a covenant, pertaining as it does to a future event, "runs with the land" for the

benefit of subsequent purchasers. Generally, grant deeds lack a covenant of "special warranty." They contain only present covenants. Grant deed covenants are held to be for the benefit of the immediate grantee only -- and do not "run with the land" for the benefit of subsequent purchasers in the chain of title.

In some states, the grant deed is the form of choice and the one the law will imply unless the parties specify some other form of deed. California's grant deed statutes have been on the books since 1872. The seller under a grant deed is not even claiming to own the property being sold. The covenant of seisin is not one of the covenants in a grant deed.

The grantor who signs a grant deed isn't promising good title. If he was the victim of a forgery, so that his deed conveyed nothing to his grantee, he can't be held liable for breach of the covenants of a grant deed. *He* didn't commit the forgery. His grantor did. *He* didn't encumber the property. Even if the grantor had forged the deed to himself, there is at least one case holding that he still hasn't breached the implied covenants of the grant deed as long as he hasn't previously tried to convey the *forged* deed. The grantee may be able to rescind the transaction since the grantee got nothing for her money. But that is the grantee's sole remedy. n139 The grantee has no valid cause of action based on the grant deed implied covenants.

California Civil Code § 1092:

Form of Grant. A grant of and estate in real property may be made in substance as follows:

I, A B grant to C D all that real property situated in (insert name of county) County, State of California, bounded (or described) as follows: (here insert description, or if the land sought to be conveyed has a descriptive name, it may be described by the name, as for instance, "The Norris Ranch.")

Witness my hand this (insert day) day of (insert month), 20_____.

California Civil Code § 1113:

Implied Covenants. From the use of the word "grant" in any conveyance by which an estate of inheritance or fee simple is to be passed, the following covenants, *and none other*, on the part of the grantor for himself and his heirs to the grantee, his heirs, and assigns, are implied, unless restrained by express terms contained in such conveyance.

1. That previous to the time of the execution of such conveyance, the grantor has not conveyed the same estate, or any right, title, or interest therein, to any person other than the grantee;

2. That such estate is at the time of the execution of such conveyance free from encumbrances done, made, or suffered by the grantor, or any person claiming under him.

Such covenants may be sued upon in the same manner as if they had been expressly inserted in the conveyance.

The challenge is to figure out what a grant deed does NOT imply. The grantor, clearly enough, is guaranteeing *she* didn't convey the property to anyone else, and *she* hasn't "done, made or suffered" any encumbrances on it. "If the grantor has in no way encumbered the title, but later an outstanding title is asserted by some third person, the grantor is not liable." n140

"Suffered" in this context doesn't mean "tolerated." It means "caused to be placed." Consider the case of a property owner not paying property taxes. Eventually, the state will assert a lien against the property for unpaid taxes. It would be incorrect to say that the grantor "created" the lien; the state did. But the grantor "suffered" it to be created by failing to pay. n141 If, however, the present owner paid the taxes but the predecessor didn't, and that is why the lien arose, the

owner has no implied obligation to cure it, or any other flaw in title the owner didn't create. We are sure of this because the first paragraph of California Civil Code § 1113 states that the grantor impliedly makes the quoted promises, "and none other." n142

The Arizona legislature has made it easy for grantors and grantees to avoid all the nuances of the "done, made, or suffered" exception to the covenant against encumbrances by specifying that the use of the word *conveys* implies that (1) the grantor hasn't previously conveyed the property to anyone else, and (2) the estate is free from encumbrances. No ands, ifs, buts; dones, mades, or suffereds. n143

§ 94.07(b)(2)(ii) Why Grant or Special Warranty Deeds Are Used in Some States.

Although they are not prohibited, general warranty deeds are seldom seen in California real estate transactions. Special warranty deeds are also the presumed form of grant in Pennsylvania where title insurance got started. Why are buyers calmed by the custom to accept deeds promising as little as the grantor of a grant or special warranty deed promises? Maybe they just don't know any better. But even sage real estate transactions lawyers buying houses in California or Pennsylvania accept grant deeds as they advance their hard-earned down payments. This is because they, like most California buyers, usually rely on title insurance, not the seller's promises about title.

Why do buyers accept these limited seller warranties? First, people seldom negotiate the terms of the deed. Local custom governs. Second, if the buyer is unhappy with the seller's title, the buyer invokes the seller's contract promise of a marketable or insurable title and refuses to close. Third, buyers usually rely on title insurance, not the seller's promises about title.

There are very few occasions when a seller's warranty is an acceptable substitute for title insurance. Why pay a title insurance premium if you've got a well-heeled seller, and the seller can be persuaded to sign a general warranty deed? Real estate transaction lawyers Lesley Wolf and Alan Wayte offer these explanations: n144

> (1) The seller may have left the jurisdiction or become insolvent by the time title problems eventually surface.
>
> (2) The preliminary title report tells the buyer what to expect and the disclosure aspect of the title insurance function isn't matched by a warranty.
>
> (3) Title insurance isn't very expensive and is the custom in California.

§ 94.07(b)(2)(iii) When a General Warranty Deed Might Be Used in a Grant Deed State.

When might a warranty deed make its infrequent appearance in a California sale? In an odd case, Los Angeles attorney Alan Wayte suggested one of those. To build its light rail line the Los Angeles County Transportation Commission (LACTC) had to acquire rights-of-way from railroad companies in southern California. The LACTC accepted warranty deeds from the railroads without title insurance. LACTC legal advisors believed the railroads had better title records than title companies, and were at least as solvent. The railroads, too, were comfortable warranting the quality of their titles, and were happy to save the costs of title insurance.

§ 94.07(b)(2)(iv) Language to Further Restrict the Grantor's Liability Under a Grant Deed.

A grantor who wants to limit even her limited exposure under a grant deed could add to the description in the deed a disclaimer like this:

> ... subject to any interest in real property the grantor may previously have done, made or suffered, whether those interests are recorded or not, visible or not.

These blanket disclaimers are commonly accepted by buyers in California, which only proves that buyers don't often appreciate the fine points of conveyancing law.

§ 94.07(b)(2)(v) Statutory Short Forms for Special Warranty or Grant Deeds.

Just using that word "grant" will imply the grant deed covenants in California, Idaho, n145 and South Dakota. n146 The same result follows the use of the phrase "grant, bargain and sell" in Missouri n147 and Nevada. n148

Similar statutory language is implied following the use of the phrase "warrant specially" in the District of Columbia, n149 Kentucky, n150 Maryland, n151 Mississippi, n152 Virginia, n153 and West Virginia. n154 The same result is achieved in some states by the use of "bargain and sale deed with covenants against grantor's acts." n155

§ 94.07(b)(3) Quitclaim Deed.

§ 94.07(b)(3)(i) Why Quitclaim Deeds Are Used.

This form of deed is customarily used as an accommodation and not to convey title. By using it, the grantor conveys only her present "right, title and interest" in the property. At common law its use excludes any implication that the grantor has good title, or any title at all. n156 If the grantor owns no title, nothing is transferred. Quite often the release by quitclaim is sought simply to put to rest a dormant or doubtful claim. The quitclaim deed may also be used by sellers who aren't sure of their titles. If the seller turns out to have good title, the grantee of a quitclaim deed gets it.

Co-signers of a grant deed are jointly and severally liable. Even someone who never previously conveyed or encumbered the property, asked to *co-sign* a grant deed, is better off insisting on signing only a quitclaim. Why? A perfectly innocent grant deed co-signer could end up having to reimburse a grantee for a breach of covenant committed by a *co-grantor*. n157 Grantors are jointly and severally liable for each other's breaches of grant deed covenants. n158

Husband is selling property. Wife signs the grant deed as an accommodation only and receives no consideration for it. The property is located in a community property state. The husband did not actually own the property he purported to convey. Apparently he had sold it earlier, without the wife's knowledge. The husband dies. The disappointed grantee sues the wife. Held, the wife is jointly and severally liable for husband's breach of the grant deed covenants. n159 The court pointed out: "Appellant [wife] could have protected herself from liability as a codefendant by executing a quitclaim deed." n160

§ 94.07(b)(3)(ii) After-Acquired Property Doesn't Pass by Quitclaim Deed.

Quitclaim and grant deeds differ in their consequences for after-acquired property. What is "after-acquired" property? Say you sell by grant deed a house that you had inherited. Because of deficiencies in probate you didn't actually have good title at the time. Yet a court confirms your title *after you sold*. Your buyer who took by grant deed gets good title even though you didn't actually acquire or perfect it until after you had conveyed it! A grantee by quitclaim wouldn't. n161 Even someone who never previously conveyed or encumbered the property, asked to co-sign a grant deed, is better off insisting on signing only a quitclaim. Why? A perfectly innocent signatory to a grant deed could end up having to reimburse a grantee for a breach of covenant committed by a co-grantor. n162 Grantors are jointly and severally liable for each other's breaches of grant deed covenants. n163

In some states, quitclaim grantees may not be regarded as bona fide purchasers. n164

§ 94.07(b)(3)(iii) Some Quitclaim Short Form Statutes Imply Obligations on the Part of the Grantor.

Some states have enacted statutes that define the obligation of a grantor who uses a statutory short-form quitclaim deed,

and in several states, the statutory short-form quitclaim deed implies covenants or warranties that have the effect of converting the quitclaim into a grant or warranty deed. n165 In South Dakota, the word "quitclaim," used in a conveyance of an interest in real property, implies the same two promises as a grant deed in California. n166 This could surprise a grantor persuaded to sign a quitclaim deed solely as an accommodation to help clear a clouded title. In fact the grantor would be promising a great deal more. Grantors are not required to use the statutory short form.

In jurisdictions where no one can sign a quitclaim deed without justifiable concern about future liability, lawsuits to quiet title may be the only way to clear clouded titles. Say a husband in a community property state wants to sell property that is clearly his separate property. Should his wife agree without running any legal risks? Suppose she had earlier signed a deed of trust at her husband's request. Could she be liable to the quitclaim grantee for the existence of the earlier deed of trust or for failing to disclose it? Would she be liable to the deed of trust beneficiary if the deed of trust prohibited sale of the security property without the beneficiary's consent? Louisiana's statutes added a provision for quitclaim deeds: "A person may transfer to another whatever rights to a thing he may then have, without warranting the existence of any such rights." n167 This is what quitclaim deeds are supposed to do--allow grantors to sign accommodation deeds risk-free. It is important to have a form of deed that grantors may freely use without fear of potential liability, whether they believe they have good title and even if they are pretty sure, or even certain, that they don't.

§ 94.07(b)(3)(iv) Quitclaim Grantee May Not Be a Bona Fide Purchaser.

In some states, but only a few, there is dicta in court opinions that a grantee by quitclaim is presumed by definition not to be a bona fide purchaser. n168 The rationale is that grantees should be suspicious of grantors not willing to warrant the title they purport to sell.

Similar dicta may be found regarding grantees who accept title by special warranty deed where general warranty deeds are the norm. Special warranty deeds, too, come under a cloud of suspicion in a general warranty deed jurisdiction. In a 1945 Missouri case, n169 for instance, the grantee of a special warranty deed was held not to be an innocent purchaser but one placed on inquiry notice. His title was subject to all the disadvantages it had in the hands of his grantor. Perhaps what courts are saying is that when someone accepts a deed from a grantor who makes fewer than normal promises or assurances, that grantee should realize something is wrong, should make inquiry of the grantor and others familiar with the title situation, and may be charged with what a reasonable inquiry under the circumstances would have shown.

§ 94.07(c) Damages for Breach of Title Covenants.

§ 94.07(c)(1) Distinguishing Future from Present Covenants.

The six standard covenants in a warranty deed are divided into two groups historically: present and future covenants. The first three (seisin, right to convey, and encumbrance) are said to be breached, if at all, at the moment the covenant becomes operative, when the deed is "delivered." n170 They are thus called present covenants. The statute of limitations starts running against claims based on present covenants at the moment of the conveyance. n171

The second triad (warrant, quiet enjoyment, further assurance) are said to be breached, if at all, sometime after the covenants become effective, when a third party claims to be the true owner or has the right to occupy the property. n172

§ 94.07(c)(2) Little or No Damage Usually Accompanies Breach of Present Covenants.

At the time present covenants are breached there may be very little or no damage. Usually the party who holds a superior claim has yet to come forward. In this case the grantee isn't damaged yet, and could prove, at most, nominal damage. That is what most courts will award though even these modest sums could prove excessive if the potential adversary never appears or far too small if that adverse claimant actually ousts the grantee eventually.

§ 94.07(c)(3) Damage for Breach of Future Covenants Can Be Sizeable But Is Usually Limited to the Purchase Price.

Breach of the three future covenants usually comes with the appearance of a rival claimant asserting a claim. At that time, if the grantee's right to title or possession proves faulty, the grantor could take a substantial loss. In fact, if the property has appreciated in value since it was acquired, or if valuable improvements were built on the site, the actual loss may greatly exceed what the grantor paid for the property.

Should the grantee be entitled to damages reflecting the benefit of the bargain, and the foreseeable loss incurred because the grantor built on the site, believing the grantor had conveyed good title to it? Or should the claim against the grantor be limited to the amount paid for the deed?

Most courts will award no more than the consideration paid to the covenantor plus interest, or a proportionate share of that consideration if the loss of title is partial. A few courts have awarded the covenantee the benefit of her bargain, the loss in value at the date the dispute is decided, even though that amount greatly exceeds what was paid for the property. n173 In the case where the grantee loses only a portion of the land, at least one court awarded the present value of the missing portion (not to exceed the original purchase price of the entire property). n174 But this is a minority. If the land was conveyed as a gift, courts split on whether the grantee should get: (1) the full present value of the land, since there is no deed price to use as a ceiling in setting the recovery, or (2) nothing since nothing was paid for it. n175

§ 94.07(d) Distinctions Between Marketable Title Standard and Deed Covenants for Good Title.

A contract purchaser before closing has much greater protection under the implied "marketable title" standard than a grantee after closing, relying on a warranty deed for good title.

(1) The purchaser can get rescission and restitution and sometimes specific performance with abatement. The grantee is limited usually to damages, and not even "benefit of the bargain" damages, just the actual cost of clearing the defect up to the price paid for the deed. n176

(2) A "marketable" title is better than a "good" one. Adverse claims which can only be removed by litigation make a title "unmarketable" even if, eventually, they are removed and the title proves good. Suppose there is no evidence on the public records that the grantor's predecessor acquired title to an abandoned railroad easement that bisects the property. The missing deed from the railroad company renders title unmarketable.

If the grantor can produce the deed or the grantee wins a suit to quiet title against the railroad company, the title is good. The grantor owes the grantee nothing on the deed covenants for a good title. The grantee who paid the costs of the suit to quiet title can't recover from the grantor. His obligation was only to convey a good title - and the title turned out to be good. Only if the grantee lost the case could the grantor get reimbursement from the grantor both for the defective title and for the grantor's failure to "warrant and defend."

§ 94.07(e) Enforcement by Remote Grantees.

Suppose that A grants title by warranty deed to B, who later sells to C, who sells to D. A didn't have the right to convey. By the time someone finally shows up with a title superior to A's, D is the owner. Has D, the remote grantee, a good claim against A?

Why doesn't D sue C? Maybe C is hard to locate, dead or insolvent. Maybe C only quitclaimed the property to D.

Anyway, requiring D to sue C to sue B to sue A only complicates the dispute. D has suffered the loss. Time and money can be saved in resolving the dispute by leaving B and C out of it.

The common-law view was based on the distinction between present and future covenants. D could sue on the future covenants if she were in possession at the time they were breached. But she could not sue on the present covenants because they were breached, if at all, at the moment A conveyed to B. A few jurisdictions have seen that while this is technically correct, it is practically foolish, and have allowed D to recover against A on all the covenants. D might also have been able to recover if B had assigned rights under A's present covenants to C and C had assigned them to D.

All courts hold that future covenants "touch and concern" land and run with it to the benefit of covenantees in A's chain of title.

A similar problem arises under statutes of limitations which usually allow enforcement of title covenants for periods running from five to ten years, varying state by state. The statute of limitations on future covenants is generally held to run only from the time the covenantee is actually or constructively evicted. That solves the remote grantee's problem under future covenants.

Most courts have held, though, that the statute of limitations runs on present covenants at the date they first became effective. Thus, the original covenantee and all successors may find themselves out of luck if an adverse claimant appears after the statute has run. They can sue only on the future, not the present covenants. One jurisdiction (Iowa) has ruled that the statute doesn't start to run until the covenantee experiences substantial damage. n177

§ 94.07(f) Formalities: Recording, Tax Statements, and Documentary Transfer Tax Information.

State statutes require a good deal more for a deed to be recorded than the common law requires for a deed to convey valid title from seller to buyer.

Until the deed is recorded, it is potentially voidable. Once the deed has been copied into the public records the recorder will mail it to the buyer. The new owner stands to lose the most from the deed not being recorded and should oversee its recordation. The name of whoever actually handed the deed to the recorder will go in the "recording requested by" blank. Usually that will be the name of the title company.

The recorder stamps the precise time of filing on the deed measured to the minute. That time stamp establishes the priority of the document under the recording act.

In the California grant deed is space for ownership information that the property tax assessor requires. The new owner is obliged by statute to report the details of the transaction to the county tax assessor for a "change of ownership" reassessment. Property tax statements need to be sent to the new owner because if taxes aren't paid, it is the new owner who will suffer.

Documentary transfer tax information is required. The documentary transfer tax is pocketed by state, county, or local governments. n178

Instruments are valid even if the tax hasn't been paid.

Some transactions are exempt from it, such as transfers between spouses dividing marital property.

These details vary from state to state. That is why lawyers preparing a deed for the first time check the form they are using with those who process deeds for recordation regularly--another lawyer, a title company officer, or an escrow agent.

§ 94.07(g) Formalities: Acknowledgment.

Only in a few states is acknowledgement a condition to a deed being valid. n179 The more common sanction for lack of acknowledgement is that the deed cannot be recorded, n180 or if it is, it doesn't impart constructive notice to subsequent purchasers. n181 Few buyers want unrecordable titles so most deeds are recorded. n182 Nonetheless, an unacknowledged deed in most states still conveys title to the grantee even though a grantee has the option of refusing to accept an unacknowledged deed.

An acknowledgment is a declaration made before a public officer, usually a state-licensed notary public, n183 by a person who has signed or witnessed a deed, mortgage or other instrument, that she signed it voluntarily or that she witnessed the grantor signing it. This act is proof that the instrument was properly executed. If the grantor is acting on behalf of some other entity such as a partnership or corporation, (in California at least) acknowledgement is "prima facie evidence that the instrument is the duly authorized act of the entity named in the instrument and shall be conclusive evidence thereof in favor of any good faith purchaser, lessee, or encumbrancer." n184 The officer taking the acknowledgement fills out a certificate of acknowledgement prescribed by state law.

An acknowledgment isn't the same as an affidavit which notaries are also sometimes required to certify. An affidavit is a statement made under oath, in writing, signed by the person making the statement. The notary recites that the affiant took the oath and signed it. "An affidavit is not acceptable as a substitute for an acknowledgement. The two serve different purposes. The acknowledgement merely makes the *prima facie* showing that the instrument was duly executed. The affidavit or verification goes to the truth of the matters there set forth." n185

§ 94.07(h) Curative Acts.

A curative act is a statute of limitations that sets a time limit for challenging documents because of irregularities in the way they were executed. Typically, curative acts "cure" faulty acknowledgments or instruments not properly sealed.

These laws are particularly important for title companies. Many types of defects aren't apparent on the face of the instrument. How could a title searcher know, for instance, that a notary's license had expired thus invalidating the witnessing of the grantor's acknowledgment? By validating otherwise invalid instruments they immunize title searchers from losses that otherwise might have come their way as a result of defectively executed instruments.

Some curative acts provide that all instruments executed before a certain date are henceforward deemed proper. These types of laws must be reenacted periodically.

Other curative acts read like statutes of limitations, providing that if an instrument is of record for a prescribed time it is conclusively presumed to have been properly executed. n186

§ 94.07(i) Notaries and Forged Deeds.

A notary public is required to take the grantor's acknowledgment in many states. The notary is required to keep a journal of all official acts performed containing the signatures of credible witnesses severing or affirming the identity of the individual or type of document, the serial or identifying number of the document (e.g., the grantor's passport number or driver's license) and the date of issue or expiration of the document. In California, to discourage and detect forgeries, if the document is a deed or deed of trust, "the notary shall require the party signing the document to place his or her right thumbprint in the journal." n187

Given the limited responsibilities of the notary, you wouldn't expect to see the fallout from a forgery scam land on a notary's head. n188 But it did in McDonald v. Plumb. n189 Stanley Scott Singley forged the signature of Elizabeth Esterline to property she owned in Los Angeles County, and deeded the property to Frank Debbas. Debbas then deeded it to innocent buyers, Jack W. and Patricia L. McDonald. A court held the notary of the forged deed liable to the

McDonalds, the forgery victim, for their loss.

> ... It seems fundamental to us that the requirement of notarial acknowledgment in real estate transactions as this is calculated to prevent fraud. The failure of the notary in this case to fulfill his duty permitted Singley to defraud the McDonalds. This failure was a basic underlying cause of the loss and, if not the sole proximate cause, at least a proximate cause thereof.
>
> Without citation of authority it is urged by Plumb that the issuance of a policy of title insurance at McDonalds' request indicated a lack of reliance upon the original notarial acknowledgement, thus breaking the chain of causation. This contention is answered to the contrary in Inglewood Park Mausoleum Co. v. Ferguson, ... *9 Cal. App. 2d 217, 49 P.2d 305.* While it is true that the McDonalds did not rely directly upon the false acknowledgement in the original deed, direct reliance is not required. On the contrary, indirect reliance is sufficient. In relying upon the record title as of the date of sale, the McDonalds were relying upon the chain of title creating such record title, one link of which was the validity of the deed from Esterline to Debbas. We conclude that the trial court erred in finding and concluding that the false acknowledgment by Plumb was not a proximate cause of the injury to the McDonalds. We find to the contrary. n190

Judge Allport didn't mention it in McDonald v. Plumb, n191 but it can't have helped the notary's case (Glen E. Plumb was the hapless fellow) that the forger-grantor was Stanley Scott Singley and the name he had to have been forging was Elizabeth Esterline. (Unlike Dustin Hoffman's Tootsie, there is nothing in the record of this case to suggest that Stanley Scott Singley was a man who became a better man for having been a woman.)

Following that case, the Legislature clarified the precise proof on which a notary could rely. n192 The notary might "personally know" the signatory but that isn't necessary. "Satisfactory evidence" will do, including an identification card, driver's license, or passport.

An unacknowledged deed isn't supposed to be recordable in most states. The county recorder should not accept it for recordation. But suppose the recorder does file it in the public records anyway. The first taker's title based on an unacknowledged deed is at risk. A subsequent purchaser would not be charged with constructive notice of the earlier defectively acknowledged deed-- if the grantor were bloody-minded enough to make a second conveyance of the same property. The subsequent taker would upset the first taker's title unless the subsequent taker actually knew about the earlier transfer or had failed to pay valuable consideration for the title.

Say the county recorder accepts the faultily acknowledged deed. In many states the defective acknowledgement is deemed cured after it has been of record long enough. California Civil Code § 1207, n193 for instance, cures the instrument "notwithstanding any defect, omission, or informality in the execution, or in the certificate of acknowledgement, or the absence of any such certificate," *one year* after the instrument has been copied into the proper book of records in the office of any county recorder. If the seller waits long enough to make a second (wrongful) conveyance, the first purchaser of a recorded but defectively executed deed will prevail.

§ 94.07(j) Identification of Grantor.

The names of all current owners of the property should be listed in the deed. If the grantor took the property by a different name, that name must also be mentioned. In a splendid and useful book on how to prepare a deed, Mary Randolph's *The Deeds Book*, n194 this example is given and its rationale explained:

> If there is a possibility of confusion about someone's name--for example, if the grantor took possession of the property under a different name than she is conveying it by--then all names must be included in the deed. This will make it clear that the different names refer to the same person and avoid the possibility of an apparent gap in the chain of title.

The easiest way to link the name is with "a.k.a." or "also known as." For example, if Maria Smith bought property but has since married and changed her name to Jones, the deed should identify her as "Maria Jones, a.k.a. Maria Smith."

Under California law, if the name under which the grantor took title (the name on the earlier deed which transferred property to the grantor) is not included in the deed, the deed does not give later purchasers notice of the transfer, and the transfer is valid only between the parties and persons who have actual notice of it. That is, later purchasers can't be expected to know about the transfer if it was made under a different name. For example, if Maria Jones neglects to add "a.k.a. Maria Smith" to the deed, years later when a prospective buyer goes to the county recorder's office and looks up "Maria Jones" in the Grantor-Grantee Index, the earlier deed to Maria Smith won't appear.

§ 94.07(k) Grantor Competency.

The grantor must be of legal age, of sound mind, and possessed of the mental capacity to understand the nature of the transaction and its consequences on her rights and interests. When, due to old age, illness, ignorance or weakness, the grantor is incapable of coping with the grantee, the deed may be set aside.

A widower becomes too infirm to care for himself. He hires a nurse who moves in and takes care of him around the clock for three years. The widower grows senile. The nurse prepares a deed of the widower's house to herself and urges him to sign it just before his death. Shortly after the funeral, his children file a suit to show he was too senile to understand what he was doing when he signed the deed. They want the court to set it aside. "Cases of this sort occur by the thousands." n195

§ 94.07(l) Forged and Void Deeds.

A deed with a false signature or one which has been altered after it was signed is forged. It does NOT convey title to a bona fide purchaser. n196 A deed procured by fraud may be either void or voidable depending on the nature of the fraud--the extent to which the grantor contributed by some act or omission to her own undoing. The consequence of a deed being voidable is that a BFP gets good title. The grantor's remedy is only against the person who defrauded her. The consequence of a deed being void is that the BFP gets no title, just like the BFP from a forger.

"Fraud in the inducement" is the prototype of fraud leading only to voidability. This type of fraud occurs when the grantor is given a bad check, false financial statements about the grantee, or other misrepresentations which persuaded the grantor to sign the deed.

"Fraud in the factum" is the prototype of fraud leading to a deed being absolutely void. It is typified by a grantee slipping in a deed while the grantor is signing other documents (leases, mortgages, contracts). It helps a grantor in this situation to be "old, illiterate, disabled, confused." n197 If the grantor is competent and alert, and deals with the grantee at arm's length, the court is more likely to paste the "voidable" label on the deed, protecting the later BFP; it may even call the grantor negligent for his failure to examine more closely the documents he signed." n198

If the grantor understands the deed is being signed, but the contents are misrepresented, this is likely to lead to voidability and not to the deed being void even if the grantor is infirm.

§ 94.07(m) Words of Transfer.

Every deed must contain words of *present* conveyance. A grantor who writes that the grantor *will* grant isn't making a present transfer. At most the grantor is promising to convey sometime in the future. This is not what most buyers expect. They want title now.

Depending on the type of deed intended, the operative word of conveyance is "grant," "quitclaim," or "convey and warrant." "Don't get creative," Mary Randolph warns, "It may not hurt in most cases, but it sure doesn't help."

§ 94.07(n) Identification of New Owners (Grantees).

The deed must identify the grantee. If no grantee is identified, the deed is void. It should also specify how he, she, they, or it (a trust, corporation, partnership) is taking title. The grantee must be "legally capable of taking title at the time of the conveyance." n199

A deed to a grantee not living, or to a nonexistent entity, is void. But a deed identifying a living grantee by a name she doesn't ordinarily use, yet chooses for this occasion, is valid. It is usually a mistake to take title in a nickname or an unregistered fictitious name because "chain of title" problems may arise if the grantee later mortgages or sells, using a different name. But deeds to a nonexistent entity are invalid, while deeds to a person or entity described by an existing assumed, fictitious, trade or inaccurate name are valid. The grantee is identified even if identified under an assumed name. Absent an explicit statutory prohibition or proof of fraud, a fictitious name may be used even if it is unregistered. State statutes providing for the registration of fictitious names are, generally, regarded as permissive, not mandatory, designed to protect the user of the name from copycats, not to protect the public from users of assumed names.

§ 94.07(o) Signature of the Grantor.

This sounds straightforward enough, but, remember, all owners need to sign. Those who don't aren't bound. And they need to sign exactly as their names appear in the grantor identification.

Someone with a power of attorney, a recorded written authorization to transfer title, needs to sign her name *and* the name of the grantor. The landowner must first have executed a valid *power of attorney* authorizing the attorney in fact to sell.

Even when an attorney in fact prepares a deed, the grantor named in it must be the landowner, not the attorney. The name signed to the deed is also the landowner's. The attorney signs the grantor's name and places her own beneath that. The grantor must be alive on the date of transfer because with the grantor's death all agency agreements (of which powers of attorney are but one example) are presumed to terminate *absent express language to the contrary in the authorization*. The attorney also needs to be ready to establish that the agency hadn't been revoked or terminated by the grantor before it was exercised. Prudent title insurers asked to insure a deed signed by an "attorney in fact" (as the holder of a power of attorney is called) will require a letter from the property owner verifying the continuing validity of the power of attorney.

Sometimes someone other than the grantor or an attorney in fact signs the landowner's name to it. That doesn't necessarily invalidate the deed as a forgery if the grantee can prove that the grantor authorized or ratified the signature (as by pocketing the purchase money). But a truly forged deed conveys nothing. Never. Well, hardly ever. n200

§ 94.07(p) Date.

The date each person signs should be placed on the deed. Deeds aren't effective except from delivery and delivery is presumed to be the date of signing.

§ 94.07(q) Acceptance.

Most jurisdictions require the grantee to accept the deed as a condition to its becoming effective. n201 Acceptance need not be express. It can be inferred from the grantee taking possession, paying taxes, granting or refusing to grant the property to someone else. An escrow agent is usually deemed authorized to accept the deed for the grantee. Occasionally, grantees resist title by invoking the doctrine of acceptance to avoid tax, tort or toxic clean-up liabilities.

Sometimes the grantor wants to affirm or disclose earlier encumbrances, ones the grantor didn't create, but which the grantor wants the grantee to accept because they are already there. A useful caution in drafting affirmations of interests already of record is for the grantor to make the deed subject to the easement previously reserved. A grantor may be tempted to insert the same exception in the deed as appeared in the deed by which the grantor created the exception. By repeating the exception, the grantor appears to be reserving a new easement for the grantor's own benefit. A grantor who seeks only to affirm the earlier easement, should do that explicitly by identifying it in that deed, conveying "subject to that easement of record at book 1, page 1, in the public records of Blissful County." In one case, a son showed no interest in owning property deeded to him by his father. The son was to assume the property tax and maintenance burdens. Thirteen years after the execution of the deed, oil was discovered on the land. The grantee recorded the deed, started paying taxes, and executed an oil and gas lease on the property. The court, however, held that acceptance had come too late, long after the father had deeded the same property to another son. n202

§ 94.07(r) Covenants, Exceptions and Reservations.

The grantor may have previously granted a utility easement to the gas company, a boundary concession to cure a neighboring owner's building encroachment, a long-term lease to a tenant, or a license to a nearby restaurateur to park employee cars after 6 p.m. Unless the grantor "excepts" or "reserves" these prior interests in the deed, the grantor may be in breach of his grant or warranty deed covenants.

Disclosure alone isn't usually taken as sufficient to remove a warranty, implied or expressed. To be safe the grantor needs to reserve or except the previously conveyed interest on the face of the deed. n203

Deeds are sometimes drafted by attorneys who are uncertain of the difference between an "exception" and a "reservation." n204 The difference between an exception and a reservation is simply this. An *exception* is a reference to an interest created earlier ("excepting an easement along the north boundary to PacTel in book X, page Y, ..."). A *reservation* is the creation of a new interest in the grantor or a third party ("reserving for the benefit of the grantor's adjoining parcel and successors in the interest to that parcel, a strip of land 10' running along the boundary between the two properties, as an easement for a common driveway, identified as ... ,").

While deed ambiguities are usually read against the grantor, the opposite is true of exceptions. They are interpreted giving the benefit of the doubt to the grantor. n205

§ 94.07(s) Legal Description of the Property.

Buyers seldom pay much attention to the legal description in the deed by which they acquire title -- unless they ordered a survey and studied the results. They just figure the description in the purchase-and-sale agreement must have been right or someone -- the title insurer, attorney, broker -- would have signaled the problem. They assume the description inscribed in the deed is the same as the one in the contract. The buyer's claim against the seller, even on a warranty deed is based, presumptively, on what is in the deed, a result rationalized as flowing from the doctrine of merger. n206

Clients also assume the description in the deed identifies the property they think they are buying. They could be wrong. Say the yard is fenced. Buyers assume they own everything within the fence. The title described in the deed could be considerably less land than what is inside the fence. Without a surveyor staking the property boundaries and matching them to the legal description, the buyers have no way of knowing for sure what they are getting.

Some descriptions are faulty when matched against the maps or plats to which they refer. A legal description could read: Lot 3 of that certain subdivision known as Happy Acres according to the map or plat on file and recorded in the office of the clerk of the Circuit court of Lee County, Florida, in Plat Book 3, page 42. The description will be useless if the subdivision contains four blocks, A, B, C, and D. Each contains a Lot 3. No surveyor could say for sure which lot 3

was intended. Parol evidence is only admissible to clarify latent ambiguities. n207

Lawyers drafting legal descriptions must advise their clients that there is no guarantee the legal description will convey the exact parcel of land the clients have seen and believe they are buying.

The exact location of the boundaries of the tract described in the deed, the exact acreage contained within those boundaries and the relation of those boundaries to any physical improvements can only be determined by a surveyor. Lawyers should so advise their clients. n208

The purpose of the property description in a contract or deed is to describe precisely the physical location on the ground or, in the case of condominiums, the exact dimensions of airspace being conveyed. "The description delineates a specific piece of land and cannot apply to any other." n209 You can easily see why many ways of describing property for other purposes won't necessarily work in deeds: a street address, "Harry's place on Third Street," "the green house fourth on the left across Maple." n210 Whether a description is sufficient to transfer the property depends on whether a surveyor can locate the property on the ground. The surveyor must be able to make that determination at the effective date of the deed. A deed that provides for the boundaries of the property to be determined by a *future* survey lacks the requisite timely specificity. n211

To determine whether a description actually describes a specific piece of ground adequately, the surveyor establishes whether the description forms a mathematically closed figure and whether the description reasonably conforms to the physical evidence on the earth's surface. n212

Lawyers and title officers meticulously copy land descriptions from the deed by which the grantor obtained it unless the grantor has recorded a new subdivision map and seeks to convey only part of what he himself acquired. In most states only licensed surveyors may prepare property descriptions. n213

Surveyors usually have the right to enter private property only when they are working for governments, making public surveys. When they are working on private surveys they need the consent of the property owner or are liable as trespassers. They are also liable for cutting trees, breaking fences, and damaging crops in the course of their work.

Surveyors are liable for errors in their surveys, predicated on negligence standards or for breach of contract. "Reasonable" care, not absolute perfection, is the standard.

Most legal land descriptions are by (a) metes and bounds (all the original colonies and a few other states), (b) subdivision map, lot and block number (the most common method for conveying developed sites in urban areas), or (c) government survey (encompassing most of the states west of the original colonies, as a consequence of an act passed by the Continental Congress, May 1785).

§ 94.07(s)(1) Metes and Bounds.

In older portions of the United States nearly all the original land grants were of parcels irregular in shape and bounded by streams, fences, forest and ridge lines. Early land descriptions used these natural and manmade landscape features: "Bounded on the north by Bog Creek ... bounded on the east by a stone wall ... ." n214

As land became more valuable these litigation-inspiring descriptions gave way to descriptions more precisely measuring the lengths and directions (called **metes**) and the boundaries (**bounds**) of the property being conveyed. n215 Lengths are measured in feet or chains, and directions in bearings computed from angular measurements. These descriptions read like a walk around the perimeter of the property led by a surveyor who starts the walk at a well-marked point of beginning and, hopefully, ends there as well so that the property description forms a complete self-contained parcel. Landmarks called **monuments** sometimes mark the corner of the description and can be natural (a tree or river) or

artificial (a fence, stake, or plate placed in the ground).

Example:

> beginning at the most southerly corner of the land described in parcel 1 above; thence along the southeasterly line of said land described in said parcel 1, north 18 degrees 20' 32" east 15.00 feet; thence parallel with the northeasterly line of mulholland highway, 100 feet wide south 71 degrees 39' 32" east 88.28 feet; thence south 18 degrees 20' 32" west 5.00 feet; thence southeasterly along a line parallel with and distant northeasterly 10.00 feet, measured at right angles, from said northeasterly line of mulholland highway, to a point in the northwesterly line of the land described in parcel 1 of the deed to grace elizabeth yeaton, recorded april 15, 1948 in book 26942 page 401 official records; thence southeasterly in a direct line to the westerly terminus of the certain course described in said last mentioned parcel 1 as having a bearing of north 87 degrees 1' 50" west a length of 36.00 feet; being a point in said northeasterly line of mulholland highway; thence northwesterly along said northeasterly line to the point of beginning.

§ 94.07(s)(2) The Government Survey.

When the U.S. Government acquired the Northwest Territory (now Indiana, Illinois, Ohio, Michigan and Wisconsin) the rectangular system of surveys, The Government Survey, got under way in earnest so the government could sell off these lands to repay the Revolutionary War debt.

The Government Survey started with the surveyor selecting a point on a north-south line called a **prime or principal meridian**. The meridian runs from the north to the south pole along the surface of the earth. At the equator all meridians are parallel. Above and below the equator they converge because the earth is an oblate spheroid, a bit longer than it is wide. n216

Most surveys ignore convergence because it is very slight and only becomes significant in surveys of large areas that must be precise.

Some principal meridians are numbered (the First Principal Meridian which runs north from the mouth of the Great Miami River). Some are named (Tallahassee Meridian, Humboldt, San Bernardino, Mt. Diablo).

The next step in the Government Survey process was to run an east-west line intersecting the principal or prime meridian. This line was called a **baseline**. The First Principal Meridian longitude is 84 degrees 48' 50" W and the latitude of the baseline is 41 degrees 00' 00" N.

To divide the territory into eventually salable grids, the Government Survey procedure called for **guide meridians** at 24-mile intervals east and west of the principal meridian and standard parallels at 24-mile intervals north and south of the baseline. n217

Congress required these lands to be further subdivided into areas called **townships** that would be 6 miles square, each containing 36 sections 1 mile square. Each row, or tier, of townships running east and west is called a range. Each row of townships north and south are identified by the number of townships between it and the baseline.

Townships are divided into 36 tracts called **sections**. Each is approximately one mile square or 640 acres (not counting for convergence). They are numbered 1 to 36 starting in the northeast corner and proceeding snake-like to the southeast corner.

Sections may be divided into halves, quarters, eighths, and sixteenths (quarter-quarters).

In this system, property is described by designating the section number, township, and principal meridian, e.g., the NE 1/4 of the SE 1/4, Section 20, T. 1 S., R. 3 E. of the San Bernardino Meridian.

The government surveys were far from perfect. Besides errors attributable to the simple instruments available at the time, surveyors had to traverse rugged terrain, and measure across lakes, rivers, and streams. Some human error was inevitable. Different surveying teams often began measuring the same general area at different points. The result was that some sections contained more and some less than 640 acres. So sections were divided into as many 160-acre quarter sections as possible and the deficient sections were designated government lots. Someone acquiring one of these is often getting less than 160 acres. n218

> The importance of these government surveys lies in the principle that the description of land and the location of the section lines and of the section corners as laid out in the government surveys are binding upon all parties concerned. The sections, which were established by the surveys, determined the location, size, and acreage of all property within the section surveyed. The government surveys are conclusive as to the location and acreage even though property rights are established by state law. n219

§ 94.07(s)(3) Subdivision Maps.

As areas become urban they are often subdivided into salable, buildable lots. Mostly real estate developers do this, usually working with civil engineers. These maps must be approved by local government and meet the standards of state Subdivision Map Acts before they can be accepted for recordation in the public land records. Subdivision maps depict the size and shape of lots and number each of them. They specify the location of roads, parks, public open spaces and often utility easements. Once a subdivision map becomes part of the public land records, it can be used as the basis for a legal description. Lots in an officially approved subdivision can be sold by identifying the lot and block number, the name of the subdivision, and the volume and page of the public records where a copy of the map can be found.

Sometimes legal descriptions combine a metes and bounds or recorded subdivision map description with an identification of the site from the government survey.

None of the three types of descriptions described above works well for rights-of-ways or other types of easements. For those "point descriptions" and "centerline descriptions" are often employed.

When the course of a tract of land described by either metes and bounds or point description encounters a property line, right-of-way line, or any other line established by public division of land (section line, township line, monument, property corner, centerline of street or highway, etc.), this information is recited in the description to insure establishment of full intent. The area of the tract described is included at the end of the description.

Many utility installations are constructed within a uniform width right-of-way easement that follows the path of a described centerline. Since the project centerline serves as the centerline of the easement area, an accurately drawn plan of the centerline alignment becomes the basis for this type of description.

FOOTNOTES:

(n1)Footnote 121. In construing deeds, there is a presumption that the grantor of the deed conveys all the grantor has to convey by way of the deed. *Terrill v. Tuckness, 985 S.W.2d 97 (Tex. App. 1998).*

(n2)Footnote 122. Powell on RealProperty § 81A.06 (Michael Allan Wolf, ed., Matthew Bender). *Stambovsky v. Ackley, 572 N.Y.S.2d 672 (1st Dept. 1991)* (vendor could not deliver the premises empty, because of the admitted presence of two ghosts).

(n3)Footnote 123. *But see Bianchi v. Lorenz, 701 A.2d 1037 (Vt. 1997)* (property in violation of zoning ordinance held to have an encumbrance due to the diminution of value caused).

(n4)Footnote 124. Grant S. Nelson & Dale A. Whitman, Real Estate Transfer, Finance, and Development 83 (3d ed. 1987). For additional material on the six covenants, *see* Powell on, Real Property § 81A.03 (Michael Allan Wolf, ed., Matthew Bender); Leonard Levin, *Warranties of Title--A Modest Proposal, 29 Vill. L. Rev. 649 (1984).*

(n5)Footnote 125. Powell on, Real Property § 81A.03 (Michael Allan Wolf, ed., Matthew Bender).

(n6)Footnote 126. Alaska Stat. § 34.15.030.

(n7)Footnote 127. 765 Ill. Comp. Stat. 5/9.

(n8)Footnote 128. Kan. Stat. Ann. § 58-2203.

(n9)Footnote 129. Mich. Comp. Laws Ann. § 565.151.

(n10)Footnote 130. Minn. Stat. Ann. § 507.07.

(n11)Footnote 131. Md. Code Ann., Real Prop. § 2-105.

(n12)Footnote 132. Va. Code Ann. § 55-68.

(n13)Footnote 133. W. Va. Code § 36-4-2.

(n14)Footnote 134. Ark. Code Ann. § 18-12-102.

(n15)Footnote 135. Fla. Stat. Ann. § 689.02.

(n16)Footnote 136. Ky. Rev. Stat. Ann. § 382.030.

(n17)Footnote 137. N.D. Cent. Code §§ 47-10-04, -06.

(n18)Footnote 138. *See, e.g.,* Va. Code § 55-69. A special warranty grantor agrees "...to forever warrant and defend such property unto the grantee, his heirs, and personal representatives and assigns, against the claims and demands of the grantor, and all persons claiming or to claim by, through or under him."

(n19)Footnote 139. *Gaffe v. Welk, 189 P. 300 (Cal. 1920)* (A, B, and C owned property as tenants-in-common. A forged deeds from B and C to himself. A then purported to sell all the property to D. When D learned the truth, he sued A for breach of the covenants in the grant deed but without offering to rescind. Held, A had not previously conveyed the property to anyone else. So A hadn't breached the implied covenants in a grant deed.).

(n20)Footnote 140. Robert Kratovil & Raymond J. Werner, Real Estate Law 62 (9th ed. 1988).

(n21)Footnote 141. By the same token, the special warranty deed grantor would warrant against the lien because it *arose* from the grantor's failure to pay the tax.

(n22)Footnote 142. Under a general warranty deed, the grantor would still be liable for the lien because she warrants that the title is free of defects no matter how they may arise.

(n23)Footnote 143. Ariz. Rev. Stat. Ann. § 33-435.

(n24)Footnote 144. Lesley Wolf (Gibson, Dunn & Crutcher) & Alan Wayte (Dewey, Ballantine, Bushby, Palmer & Wood), Lecture in *Real Estate Transactions*, U.S.C. Law Center (Feb. 14, 1992).

(n25)Footnote 145. Idaho Code § 55-612.

(n26)Footnote 146. S.D. Codified Laws Ann. § 43-25-10.

(n27)Footnote 147. Mo. Ann. Stat. § 442.420.

(n28)Footnote 148. Nev. Rev. Stat. Ann. § 111.170.

(n29)Footnote 149. D.C. Code Ann. § 45-505.

(n30)Footnote 150. Ky. Rev. Stat. Ann. § 382.040.

(n31)Footnote 151. Md. Code Ann., Real Prop. § 2-106.

(n32)Footnote 152. Miss. Code Ann. § 89-1-35.

(n33)Footnote 153. Va. Code Ann. § 55-69.

(n34)Footnote 154. W. Va. Code § 36-4-3.

(n35)Footnote 155. N.Y. Real Prop. Law § 258.

(n36)Footnote 156. Powell on, Real Property § 81A.03 (Michael Allan Wolf, ed., Matthew Bender). Common law is often codified. *See*, e.g., Wis. Stat. Ann. § 706.10 (a quitclaim deed passes whatever title the grantor has but "shall not warrant or imply the existence, quantity, or quality of any such interest."). *See also* Conn. Gen. Stat. Ann. § 47-30f. Other states achieve the same result through statutes providing that "no covenant shall be implied in any conveyance of real estate." Mich. Comp. Laws Ann. § 565.5; Md. Code Ann., Real Prop. §§ 2-115, 4-202, 4-203; Minn. Stat. Ann. §§ 507.16, 507; Alaska Stat. §§ 34-15.080, -15.040.

(n37)Footnote 157. *Holzheier v. Hayes, 133 Cal. 456 (1901).*

(n38)Footnote 158. *Evans v. Faught, 42 Cal. Rptr. 133, 141 (1965).*

(n39)Footnote 159. *Platner v. Vincent, 229 P. 24 (Cal. 1924).*

(n40)Footnote 160. *194 Cal. at 444.*

(n41)Footnote 161. The following statute, Cal. Civ. Code § 1106, supports the after-acquired property distinction. The operative word is "grant":

> Subsequently acquired title passes by operation of law. Where a person purports by proper instrument to grant real property in fee simple, and subsequently acquires any title, or claim of title thereto, the same passes by operation of law to the grantee, or his successors.

(n42)Footnote 162. *Holzheier v. Hayes, 133 Cal. 456 (1901).*

(n43)Footnote 163. Evans v. Faught, 42. Cal. Rptr. 133, 141 (1965). *See, e.g, Platner v. Vincent, 194 229 P. 24 (Cal. 1924).*

(n44)Footnote 164. *See, Indian Harbor, Inc. v. Sea & Pines, Inc., 1987 W.L. 12424 (Del. Super. 1987).*

(n45)Footnote 165. *See* R.I. Gen. Laws § 34-11-17; N.H. Rev. Stat. Ann. § 477:28; Mass. Ann. Laws ch. 183, 11.

(n46)Footnote 166. S.D. Codified Laws Ann. § 43-25-11. However, it *does not* imply the final sentence which begins "Such covenants may be sued upon... ."

(n47)Footnote 167. La. Civ. Code. Ann. art. 2502. *See* Comment, *Does This Piece Fit? A Look at the Common-Law Quitclaim Deed and After-Acquired Title Doctrine in Louisiana's Civil Code, 55 La. L. Rev. 159 (1994).*

(n48)Footnote 168. *See, e.g., Pankins v. Jackson, 891 S.W.2d 845 (Mo. App. E.D. 1995)* (dicta).

(n49)Footnote 169. *McAboy v. Packer, 187 S.W.2d 207 (Mo. 1945).*

(n50)Footnote 170. Covenant of seisin, covenant of right to convey, and covenant against encumbrances are breached, if at all, at the time of conveyance of real property, while covenants of warranty, quiet enjoyment, and further assurances are breached, if at all, only after the closing. *Juanita Valley Bank v. Martin Oil Co., 736 A.2d 650* (Pa. Super. App., 1999).

(n51)Footnote 171. *See, e.g.*, Neb. Rev. Stat. § 25-205(1) (reissue 1989), *cited in Omega Chem. Co. v. Rogers, 524 N.W.2d 330 (Neb. 1994).* Thus it is important to distinguish correctly a present from future covenant. *See In re Country World Casinos, Inc., 181 F.3d 1146 (10th Cir. 1999)* (environmental contamination was not an "encumbrance" for purposes of the covenant against encumbrances in a warranty deed because of the absence of a specific warranty regarding environmental conditions on the conveyed property).

(n52)Footnote 172. *In re Country World Casinos, Inc., 181 F.3d 1146 (10th Cir. 1999).*

(n53)Footnote 173. Powell on, Real Property Ch. 81A (Michael Allan Wolf, ed., Matthew Bender). The "benefit of the bargain" rule is defended in Groetzinger, *Breach of the Warranty Covenants in Deeds and the Allowable Measure of Damages, 17 N.H. B.J. 1 (1975).*

(n54)Footnote 174. *Gonzales v. Garcia,552 P.2d 468 (N.M. 1976).*

(n55)Footnote 175. *See* Grant S. Nelson & Dale A. Whitman, Real Estate Transfer, Finance, and Development 211 n.4 (West 3d ed. 1987).

(n56)Footnote 176. *But see Fechtner v. Lake County Sav. & Loan Ass'n, 361 N.E.2d 575 (Ill. 1977)* (allowing covenantee to recover substantial damages for certain judgment liens even though nothing had been paid for their removal). The Uniform Land Transactions Act would give the grantee a 2-year right of rescission and restitution. ULTA § 2-402.

(n57)Footnote 177. Powell on, Real Property Ch. 81A (Michael Allan Wolf, ed., Matthew Bender).

(n58)Footnote 178. Documentary transfer taxes in the U.S. date back to Revolutionary days when it caused the dumping of British tea into the harbor at Boston. Albert H. Monacelli, Note, *The Documentary Stamp Tax and Its Application to Government Instrumentalities, 24 Geo. L.J. 455, 456 (1935).* The U.S. government levied a tax on all title transfers, a federal conveyance stamp tax, which was phased out in 1934. 47 Stat. § 725, Part I (1932). State and local governments had imposed stamp or documentary transfer taxes on deeds and mortgages of real property. With the abolition of the federal tax, many more states and local governments began imposing a stamp or documentary transfer tax in its place. Some locally imposed real estate transfer taxes are the lineal descendants of the original stamp duty. *See Cohn v. City of Oakland, 272 Cal. Rptr. 714 (1990)* (upholding City of Oakland real estate transfer tax of 0.75% to 0.95% against Proposition 13 challenge. Tax held not a "special" tax requiring two-thirds vote because proceeds went into general fund).

(n59)Footnote 179. Ariz. Rev. Stat. Ann. § 33-401(B); Ohio Rev. Code Ann. § 5301.01.

(n60)Footnote 180. Annotation, *Record of Instrument Without Sufficient Acknowledgment as Notice, 59* A.L.R.2d 1299 (1958).

(n61)Footnote 181. *See* the discussion in Chapter 4, at p. 210, distinguishing patent from latent defects in

acknowledgments. In some states, only patently defective acknowledgments result in the document, if recorded, not conveying constructive notice.

(n62)Footnote 182. Robert Kratovil & Raymond J. Werner, Real Estate Law 82-83 (9th ed. 1988).

(n63)Footnote 183. Someone out of the state where the property is located who needs an acknowledgment should examine the state statutes to see what form of acknowledgment is required and who may take it. There is a uniform law on the subject, the Uniform Recognition of Acknowledgments Act, 14 ULA 233 (1990) enacted in sixteen states.

(n64)Footnote 184. Cal. Civ. Code § 1190. The last sentence of § 1190 provides: ' "Duly authorized person,' with respect to a domestic or foreign corporation, includes the president, vice president, secretary, and assistant secretary of the corporation." A revised acknowledgment form appears in Cal. Civ. Code § 1189, in which the grantor acknowledges that he/she/they executed the same in "his/her/their ...authorized capacity(ies) ...and that by his/her/their signature(s) on the instrument the person(s), or the entity upon behalf of which the person(s) acted, executed the instrument."

(n65)Footnote 185. Robert Kratovil & Raymond J. Werner, Real Estate Law 81-82 (9th ed. 1988).

(n66)Footnote 186. *See* Powell on, Real Property Ch. 82 (Michael Allan Wolf, ed., Matthew Bender).; Paul E. Bayse, Clearing Land Titles § 201, at 463 (2d ed. 1970).

(n67)Footnote 187. Cal. Gov't Code § 8206. If the right thumbprint is not available, the left thumbprint or any available finger will do.

(n68)Footnote 188. California notaries are required to be bonded for a minimum of $10,000, so the bonding company is sometimes the loser and can lose more than $10,000 if it wrongfully denies liability and causes the claimants to incur legal and court costs. *See Harris v. Northwestern Nat'l Ins. Co., 18 Cal. Rptr. 2d 234 (1992).*

(n69)Footnote 189. *90 Cal. Rptr. 822 (1970).*

(n70)Footnote 190. *90 Cal. Rptr. 822, 825-26 (1970).*

(n71)Footnote 191. *90 Cal. Rptr. 822 (1970).*

(n72)Footnote 192. Cal. Civ. Code § 1185.

(n73)Footnote 193. California Civil Code § 1207.

(n74)Footnote 194. Mary Randolph, the Deeds Book: How to Transfer Title to California Real Estate 6:15-6:16 (1987).

(n75)Footnote 195. Robert Kratovil & Raymond J. Werner, Real Estate Law 63 (9th ed. 1988).

(n76)Footnote 196. *Horton v. Verhelle, 588 N.W.2d 144 (Mich. App.1998)* (similar to property owners who cannot lose property rights to innocent purchasers through a forged deed, construction lienholders cannot lose lien rights to innocent homeowners through forged waivers).

(n77)Footnote 197. Grant S. Nelson & Dale A. Whitman, Real Estate Transfer, Finance, and Development 169 (4th ed. 1992).

(n78)Footnote 198. Grant S. Nelson & Dale A. Whitman, Real Estate Transfer, Finance, and Development 169 (4th ed. 1992); *United States v. Green, 201 F.3d 251 (3d Cir. 2000)* (the Internal Revenue Service could foreclose a lien against property that a husband had transferred to his wife more than 10 years before the foreclosure; the conveyance of residence from husband to wife for inadequate consideration gave rise to presumption of actual fraud, regardless of

whether husband was solvent at time).

(n79)Footnote 199. *Roeckl v. FDIC, 855 P.2d 1067, 1070 (Ala. 1994).*

(n80)Footnote 200. *See Marshall v. Hollywood, Inc., 224 So. 2d 743 (Fla. App. 1969)* (grantee's title under a forged deed rendered unassailable by statute of limitations and marketable title act).

(n81)Footnote 201. *But see Halleck v. Halleck, 337 P.2d 330 (Or. 1959),* in which the requirement of acceptance was terminated. *See* Annotation, *What Constitutes Acceptance of Deed by Grantee, 74 A.L.R. 2d 992 (1960).*

(n82)Footnote 202. *Seibert v. Seibert, 41 N.E.2d 544 (Ill. 1942).*

(n83)Footnote 203. At common law, a grantor could not "reserve" an interest in a third party since no words of grant appear in a reservation clause. To confer an incidental interest in a third party at common law, the grantor had to take two steps: (1) reserve the interest from the original deed, and (2) convey the interest reserved from the first deed to designated third parties by a second deed -- utilizing traditional words of conveyance ("grant," "warrant," "convey"). That requirement is often relaxed in favor of fulfilling a grantor's intent to reserve interests in third parties. *See, e.g.,* In the *Matter of the Marriage of Ron D. Wade & Katherine Sue Wade, 884 P.2d 736 (Kan. App. 1995).*

(n84)Footnote 204. *See, e.g., Campbell v. Johnson, 622 N.E.2d 717 (Ohio App. 1993).*

(n85)Footnote 205. Cal. Civ. Code § 1069. The "benefit of the doubt" rule saved the rights to methane gas royalties for the grantor's heirs in *Cantley v. Hubbard, 623 So. 2d 1079 (Ala. 1994).* The other claimants to the methane gas royalties were the heirs of a 1929 grantee to whom the grantor had conveyed in 1929 by warranty deed with "All mineral reserved to the United States." The U.S. had sold the land in 1924 to the grantor, reserving only the coal. The grantor, selling in 1929, should have excepted the coal rights previously retained by the U.S. and reserved all other mineral rights in the grantor. No matter. That is what the court assumed the grantor in 1929 had intended. The court awarded gas royalties to the grantor's heirs and not to the heirs of the 1929 grantee.

But see Bambauer v. Menjoulet, 29 Cal. Rptr. 874 (Cal. App. 1963) (grantors' reservation "in and to all minerals" was held not to include a right to gravel deposits on site because there was no uniform chemical content of gravel deposits, no "constant in the character of commercial gravel by which to identify it as a mineral ...").

See Marshall v. City of Yachats, 973 P.2d 374 (Or. App. 1999) (Where it was inferred that deeds "excepting" an area containing a prescriptive public easement for a walking trail was meant to convey the area subject to encumbrances rather than exclude the area from the conveyance).

(n86)Footnote 206. *Barber v. Peringer, 877 P.2d 223 (Wash. 1994).*

(n87)Footnote 207. This example comes from C. Michael Jackson, *Descriptions*, Florida Real Estate Property Sales Transactions § 7.5 at 335 (1994).

(n88)Footnote 208. Florida Real Estate Property Sales Transactions § 7.11 at 240 (1994).

(n89)Footnote 209. Robert Kratovil & Raymond J. Werner, Real Estate Law 44 (9th ed. 1988).

(n90)Footnote 210. For a parade of horrible legal descriptions, *see* Annotation, *Specificity of Description of Premises as Affecting Enforceability of Contract to Convey Property--Modern Cases, 73 A.L.R. 4th 135 (1989).* Where one part of the description of a property conveyed by deed is defective, but the context locates the property, the description is good. *Bass Pro Outdoor World, L.P. v. Wilson, 965 S.W.2d 890 (Mo. App. 1998).* Description clause of a deed may be employed to describe quality as well as dimensions and quantity of the estate conveyed. *CSX Transp., Inc. v. Rabold, 691 N.E.2d 1275 (Ind. App. 1998).*

(n91)Footnote 211. *McMichael Realty & Ins. Agency, Inc. v. Tysinger, 270 S.E.2d 88 (Ga. 1980).*

(n92)Footnote 212. *Kings Farm v. Concordia Parish Police Jury, 709 So. 2d 953 (La. App.1998)* (Courts cannot correct errors in official government surveys. However, courts can locate the lines of surveys on the ground and locate any tract of land in relation to the property in question).

(n93)Footnote 213. *See, e.g.*, Cal. Bus. & Prof. Code § 8726; Fla. Stat. Ann. § 472.005(b); 15 McKinney's Consol. Laws of New York Annot. N.Y. Law § 72.08 (only surveyors can determine real property boundaries).

(n94)Footnote 214. Raymond E. Davis et al., Surveying: Theory and Practice 582 (McGraw-Hill 5th ed. 1966).

(n95)Footnote 215. In metes and bounds descriptions, the locations of land corners can also be described by a system of coordinates established in 1935 by the U.S. Coast and Geodetic Survey. Jack B. Evett, Surveying 217 (Prentice-Hall 2d ed. 1991).

(n96)Footnote 216. Raymond E. Davis et al., Surveying: Theory and Practice 2-3, fig. 1-2 (McGraw-Hill 5th ed. 1966).

(n97)Footnote 217. Raymond E. Davis et al., Surveying: Theory and Practice at 601, fig. 23-1 (McGraw-Hill 5th ed. 1966).

(n98)Footnote 218. American Right of Way Association, Principles of Right of Way 72 (1972).

(n99)Footnote 219. Lewis M. Kanner, *What You Should Know About Surveys*, 5 Prac. Real Est. Law 3, 19 (May 1989).

* Parts of this chapter have been adapted from George Lefcoe, Real Estate Transactions (Michie 1993).

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CHAPTER 94 CONVEYANCING PROCEDURES *

11-94 Thompson on Real Property, Thomas Editions § 94.08

AUTHOR: Professor George Lefcoe The Law Center University of Southern California

§ 94.08 Surveys.

People order surveys for many reasons. There is no universally agreed standard governing what a survey is supposed to show, and how the calculations are to be made although title insurers have promulgated minimum standards for title surveys. n220 Clients must be forewarned to think clearly about their objectives and match their survey contract closely to these goals or risk disappointment when the survey proves inadequate for its intended purpose. n221

A majority of all surveying is associated with construction. n222 In a real estate development project, for instance, surveys may be called for at several times.

(1) The developer needs a survey of the vacant site to learn how much acreage is being acquired, where its boundaries are, whether the property abuts streets, and where utility easements cross the site. The developer wants the surveyor to prepare a map of the site and a written legal description.

(2) Local government will require a survey as a condition to the developer recording a subdivision map.

(3) The developer hires an architect to prepare construction plans. The architect will need to know the precise location of all nearby roads, railroads, utility installations, sewers, adjacent buildings, and the elevation and topography of the site. The resulting map is called a *plot plan*. n223

(4) During preliminary design, test borings may be made to determine the suitability of the soil to hold the weight of the proposed structure. Holes must be bored at critical points, and the surveyor stakes these.

(5) Later, when construction commences, the construction lender may require confirmation of the size of the site, that easements which interfered with development have actually been relocated, and so on.

(6) Before construction begins, surveyors will be called to stake out the site showing the footprint of the proposed building and to mark the boundaries for foundation work.

(7) If footings are to be placed below ground, surveyors will be asked to inspect and survey them before the foundation

is poured. This avoids disputes with neighboring owners who might later claim the footings encroach on their sites.

(8) When the project is completed, the permanent lender will seek an "as built" survey to confirm that the project lies entirely on its own site, to make sure the setbacks, height and bulk of the building conform to zoning and building codes, and so on.

(9) Most buyers and their lenders will order surveys in order to obtain an ALTA Extended Coverage Owner's Policy, without which their title policies will be subject to "any state of facts an accurate survey may show." The survey enables the title insurer to remove the "survey exception."

> The survey exception is usually not removed, however, but replaced with a "survey reading," which, again, *excepts* from insurance coverage the specific defects which the survey reveals. If the survey shows that the lot doesn't close or that there are overlaps or gores with adjoining properties, or that there are encroachments of improvements or easements, these are simply not insured against (although if there is a sound legal basis for encroachments to remain, the title company *can* insure them). In addition, there are many things that an accurate survey would show that the policy does not and cannot insure against because they are not deemed to be title defects, such as zoning compliance, setback requirements, utilities, etc.
>
> The decision to eliminate or limit the survey exception is both a legal and economic one. On a lender's policy, the exception is very likely to be taken out because most sophisticated mortgage lenders and their attorneys insist that it be taken out. On owner's policies it often costs more in premiums to have it removed, and many attorneys don't realize its significance. In the event of a loss due to a boundary line mislocation or encroachment, the title company's liability can be limited to the face amount of the policy, which may be far below market value. The owner faces the loss of possession, costs to remove encroachments, etc., which may be far in excess of the insurance coverage. Not only are the title insurer's survey concerns different than a property owner's, but its risk of loss can also be substantially lower.
>
> This can be seen in the wide range of acceptable ways to remove the survey exception: visual "inspections" by title company employees, the notorious "mortgage map," the "location service" provided by Chicago Title (until the execution of a consent decree in April 1986 with the Professional Land Surveyors of Ohio), or affidavits from the current owners that they haven't had a boundary dispute with any of their neighbors within the statutory period for adverse possession. Each of these will remove or limit the survey inspection: None of them could be relied upon in order to erect a fence along a property line. n224

Lawyers can be liable for failing to caution a client to get a survey when one was really called for.

FOOTNOTES:

(n1)Footnote 220. Bernard M. Rifkin, "Land Surveys and the Law of Real Property," *Minimum Standard Detail Requirements for ALTA/ACSM Land Title Surveys*, in Land Surveys: A Guide for Lawyers 42-48 (American Bar Association 1989).

(n2)Footnote 221. *See also*, Mitchell A. Williams & Harlan J. Onsrud, *What Every Lawyer Should Know About Title Surveys, Land Surveys: A Guide for Lawyers* 49 (ABA, Chicago, 1988); Vanessa L. Washington, *What You Should Know About Survey Certificates*, 9 Practical Real Estate Law. 21 (March 1993).

(n3)Footnote 222. Jack B. Evett, Surveying 183 (Prentice-Hall 2d ed. 1991).

(n4)Footnote 223. *See* Charles A. Herubin, Principles of Surveying 2-3 (4th ed. 1991).

(n5)Footnote 224. Mitchell G. Williams, A Code for Title Insurer: The 1988 ALTA/ACSM Standards for Title Surveys (unpublished speech, 1989, on file with author).

* Parts of this chapter have been adapted from George Lefcoe, Real Estate Transactions (Michie 1993).

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CHAPTER 94 CONVEYANCING PROCEDURES *

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AUTHOR: Professor George Lefcoe The Law Center University of Southern California

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Articles

Brown, Joseph C. Jr. "Comment: The Implied Warranty of Habitability Doctrine in Residential Property Conveyances: Policy-Backed Change Proposals."

Wash. L. Rev. Vol. 62 (Fall 1987) 743.

Annotations

Annotation, *Conveyance as Fraudulent Where Made in Contemplation of Possible Liability for Future Tort, 38 A.L.R. 3d 597.*

Annotation, *Conveyance of Land as Including Mature but Unharvested Crops, 51 A.L.R. 4th 1263.*

Annotation, *Failure of Vendor to Comply with Statute or Ordinance Requiring Approval or Recording of Plat Prior to Conveyance of Property as Rendering Sale Void or Voidable, 77 A.L.R. 3d 1058.*

Annotation, *Severance or Termination of Joint Tenancy by Conveyance of Divided Interest Directly to Self, 7 A.L.R. 4th 1268.*

Annotation, *Validity and Effect of One Spouse's Conveyance to Other Spouse of Interest in Property Held as Estate by the Entireties, 18 A.L.R. 5th 230.*

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Supp. To CHAPTER 94 CONVEYANCING PROCEDURES

11-94 Thompson on Real Property, Thomas Editions Supp. to § 94.03

Supp. to § 94.03 Lawyer Involvement in Residential Closings.

[Go To Main]

§ 94.03(b) The Case Against Lawyer Involvement in Residential Closings [Go To Main]

Add:

Bluehaven Funding, LLC, v. First American Title Insurance Co., 594 F.3d 1055 (8th Cir. 2010) (title insurer's agent mishandled escrow accounts and real estate closings); *Murray v. Fidellity Nat. Financial, Inc., 594 F.3d 419 (5th Cir. 2010)* (title company allegedly overcharged to record documents related to real estate closings; class action status denied); *In re Anderson, 685 S.E.2d 711 (Ga. 2009)* (disciplinary proceeding against attorney for failing to supervise employees who committed misconduct relating to real estate closings).

Add:

International Electron Devices (USA) LLC v. Menter, Rudin & Trivelpiece, P.C., 898 N.Y.S.2d 388 (2010) (malpractice against attorney alleging failure to conduct thorough environmental investigation prior to commercial real estate closing).

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Supp. To CHAPTER 94 CONVEYANCING PROCEDURES

11-94 Thompson on Real Property, Thomas Editions Supp. to § 94.05

Supp. to § 94.05 Preparations for Closing.

[Go To Main]

§ 94.05(a) An Escrow Agent's Steps to Prepare for Closing. [Go To Main]

Add:

Those who supervise closings also need to be alert to the possibility of forgery at the closing. *See Keyingham Investments, LLC v. Fidelity Nst. Tit. Ins. Co., 680 S.E.2d 442 (Ga. App. 2009)* .

§ 94.05(b) A Lawyer's Steps to Prepare for Closing. [Go To Main]

Add:

In the *Matter of Lester, 578 S.E.2d 7 (S.C. 2003)* (an attorney who failed to be present at the closing while representing a client in the real estate transaction committed misconduct warranting a public reprimand).

§ 94.05(d) Inspections and Inspection Contingencies Before Closing. [Go To Main]

Add new note 59.1 at the end of the subsection: n59.1

FOOTNOTES:

(n1)Footnote 59.1. *Lane v. A.J.M. Oustalet, 2002 Miss. App. LEXIS 323* (No. 2000-CA-01814-COA, Jun. 4, 2002) (no obligation to furnish a closing certificate from a licensed termite company).

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Supp. To CHAPTER 94 CONVEYANCING PROCEDURES

11-94 Thompson on Real Property, Thomas Editions Supp. to § 94.06

Supp. to § 94.06 The Escrow.

[Go To Main]

§ 94.06(e) Escrow Agent's Duties. [Go To Main]

Add:

Chen v. Dynasty Escrow, Inc., 2002 Cal. App. Unpub. LEXIS 1930 (No. B144808, Jun. 6, 2002) (escrow holder not required to obtain the purchaser's permission before disbursing the funds to a third party).

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Supp. To CHAPTER 94 CONVEYANCING PROCEDURES

11-94 Thompson on Real Property, Thomas Editions Supp. to § 94.07

Supp. to § 94.07 Aspects of Deed Especially Pertinent to Conveyancing.

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§ 94.07(b) Types of Deeds. [Go To Main]

§ 94.07(b)(3) Quitclaim Deed.

§ 94.07(b)(3)(i) Why Quitclaim Deeds Are Used.

Add:

Des Lacs Valley Land Corp. v. Herzig, 621 N.W.2d 860 (N.D. 2001) (parol evidence not admitted to contradict grant in unambiguous quitclaim deed).

§ 94.07(e) Enforcement by Remote Grantees. [Go To Main]

Add:

Stone v. Jetmar Properties, LLC, 733 N.W.2d 480 (Minn. App. 2007) (a conveyance to a limited liability company that was not in existence at the time of the conveyance was void).

§ 94.07(l) Forged and Void Deeds. [Go To Main]

Add:

Hixon v. Anderson, 317 B.R. 771 (8th Cir. 2004) (deed was forged and ineffective to convey a property interest).

Campbell v. Campbell, 854 N.Y.S.2d 543 (2008) (action to annul conveyance because of confidential relationship between the parties and undue influence).

Add:

Buckley v. Ritchie Knop, Inc., 838 N.Y.S.2d 84 (2007) (action to cancel deed because of fraud in the execution).

Add:

Peggy Rose Revocable Trust v. Eppich, 640 N.W.2d 601 (Minn. 2002) (18-month limit on exercise of arbitration right was not reasonable in view of buyers' claim of fraud); *The Florida Bar v. Baker, 810 So. 2d 876 (Fla. 2002)* (wife's name forged on real estate sale documents); *Prudential Farms of Nassau County v. Morris, 729 N.Y.S.2d 156 (2001)* (conveyance of husband's interest in marital residence to wife without consideration was fraudulent); *Ford v. Martino, 722 N.Y.S.2d 574 (2001)* (transaction made with actual intent to defraud).

§ 94.07(n) Identification of New Owners (Grantees). [Go To Main]

Add:

Preshaz v. Przyziazniuk, 858 N.Y.S.2d 290 (2008) (action to cancel a deed based on grantor's lack of capacity and on the procurement of the conveyance through undue influence).

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Add to Books:

Lefcoe, George. *Real Estate Transactions, Finance and Development* (6th ed. 2009).

Add to Articles:

Dawson, Janet Kennedy. "The Role of Laypersons in the Closing of Residential Real Estate Transactions: North Carolina's New Approach," *7 N.C. Banking Inst. 277 (April 2003).*

Gravina, Peter J. "The Real Estate Attorney in a Residential Closing." *78 Fla. B. J. 8 (Apr. 2004).*

Marsh, Tanya D. and Robert G. Solloway. "Let the Seller Beware: The Slow Demise of Caveat Emptor in Real Property Transactions and Other Recent Developments in Indiana Real Property Law," *38 Ind. L. Rev. 1317 (2005).*

Stern, Stephanie. "Temporal Dynamics of Disclosure: The Example of Residential Real Estate Conveyancing," *2005 Utah L. Rev. 57.*

Szypszak, Charles. "Public Registries and Private Solutions: An Evolving American Real Estate Conveyance Regime." *24 Whittier L Rev. 663 (Spring 2003).*

Walker, Melissa K. "Sharing Their Piece of the Real Estate Pie: An Analysis of the Necessity of Lawyers at Residential Real Estate Closings in the Context of the Adoption of Recent Opinions of the North Carolina State Bar." *26 Campbell L. Rev. 59 (Spring 2004).*

Add to Annotations

Annotation, "Effect of unauthorized delivery or fraudulent procurement of escrow on title or interest in property," 54 A.L.R. 1246 .

Annotation, "Duty and liability of escrow holder as affected by time of performance of, or offer to perform, conditions upon which delivery was to be made by him," 107 A.L.R. 948 .

Annotation, "Measure of recovery by vendee under executory contract for purchase of real property where a vendor is unable or refuses to convey," 68 A.L.R. 137 .

Annotation, "Relation back of title or interest embraced in escrow instrument upon final delivery or performance of condition," 117 A.L.R. 69 .

Annotation, " 'Rights and remedies where depositary fails or refuses to deliver instrument or property placed in escrow, notwithstanding performance of conditions of delivery," 95 A.L.R. 293 .

Annotation, "Venue of action to set aside as fraudulent conveyance of real property," *37 A.L.R.2d 568.*

Annotation, "Who must bear loss resulting from defaults or peculations of escrow holder," *15 A.L.R.2d 870.*

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CHAPTER 95 REAL ESTATE BROKERS +

11-95 Thompson on Real Property, Thomas Editions 95.syn

AUTHOR: Professor David A. Thomas §§ 95.01 - 95.06 J. Reuben Clark Law School Brigham Young UniversityProfessor George Lefcoe §§ 95.07 - 95.09 The Law Center University of Southern California

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§ 95.03(a) Real Estate Broker Licensing Provisions from a Representative Sample of States.

§ 95.03(a)(1) Who Must and May Be Licensed.

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§ 95.03(a)(3) Conduct Affecting License.

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§ 95.04 Fiduciary and Other Duties of Brokers.

§ 95.05 Listing Agreements and Commissions.

§ 95.05(a) Listing Agreements.

§ 95.05(b) Commissions.

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§ 95.07(a)(2) How Brokers Work.

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§ 95.07(d)(2) Emerging Rule: No Commission Unless the Deal Closes.

§ 95.07(d)(3) In All States, the Seller Owes the Broker a Commission for "Willful" Breach, But What Is "Willful" May Not Always Be Obvious.

§ 95.07(d)(4) California Lets Sellers Off the Hook for Brokerage Commissions When Deals Are Subject to Conditions That Aren't Met.

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§ 95.08 Bibliography.

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FOOTNOTES:
(n1)Footnote *.
§§ 95.01 - 95.06

(n2)Footnote **.
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CHAPTER 95 REAL ESTATE BROKERS +

11-95 Thompson on Real Property, Thomas Editions § 95.01

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§ 95.01 Introduction.

This chapter will provide an overview of the role played by brokers in real estate transactions. While no real estate transaction is dependent upon the participation of a broker as a condition of its legal validity, brokers are enormously important in the function of the real estate market and transactional processes generally. And even though their role is extra-legal with respect to the validity of the transaction itself, legal relationships, rights and liabilities abound in connection with the work of brokers. These will be explored in this chapter. n1

FOOTNOTES:
(n1)Footnote 1. The role of the broker in real estate transactions is explored further in Real Estate Brokerage Law and Practice (Matthew Bender).

+ §§ 95.07 - 95.09 have been adapted from George Lefcoe, Real Estate Transactions (Michie 1993).

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CHAPTER 95 REAL ESTATE BROKERS +

11-95 Thompson on Real Property, Thomas Editions § 95.02

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§ 95.02 History of Real Estate Brokerage in the United States.

The emergence of persons who specialized in creating and conducting real estate transactions was a phenomenon of the second half of the 19th century, mostly as a result of massive disposals of public lands. These disposals generated enormous numbers of real estate transactions, prompted mostly by sales of railroad lands and by efforts of land speculators, who obtained large holdings out of the public domain. Colonization of the western half of the country was promoted by, among other things, railroads, whose huge landholdings could be turned into cash which could, in turn, sustain railroad development and bring in new settlers who would be railroad customers. Also, as lands in the public domain were made available for individual settlers, frequently land speculators took up large tracts for later re-sale. In these and other similar settings, the actual promotion and closing of real estate sales was conducted by land agents who had no professional training and achieved their ends with a variety of methods.

While individual real estate specialists were beginning to function during the last half of the 19th century, their organization into business entities--the real estate firms--came about even later, probably early in the 20th century. Today, there are over one million licensed real estate agents, who generate fees and commissions about equal to the total amount of attorney fees generated in the United States each year. Over 100,000 real estate brokerage firms function in the United States today; most of them are single office firms, but a growing minority consists of franchise firms and local offices of large corporations. Many real estate brokers are members of national and state trade associations, and many firms engage in a form of cooperative enterprise known as a multiple listing service.

Multiple listing services [M.L.S.] grew out of local exchanges between real estate firms in the 1920s. The modern multiple listing service has been succinctly described as follows:

> The M.L.S. collects, publishes, and distributes listings; after the transaction is closed, it sends sales price information to its members. To initiate these listings, the M.L.S. generally prescribes the use of a data sheet on the listing which the listing agent can submit along with his or her own listing contract. M.L.S. rules generally require that this sheet be completely filled out.
>
> The completed sheet includes a description of the property and the division of fees proposed for the brokers cooperating on the sale... . The M.L.S., operating as a part of the local brokers' organization or as

> a subsidiary corporation [as distinguished from the approximately 40% of M.L.S. that are independent entities], transfers these data to a master list, arranged by neighborhood or street number. The real estate is included in this list of properties on the market until the listing expires or the property is sold. These periodically published lists are in loose-leaf form or in a book, with supplementary sheets published weekly. Some M.L.S.s have computer terminals in member brokers' offices to update their publications.
>
> After the property is sold, M.L.S. regulations usually require that the selling broker notify the M.L.S. of the transaction and the sales price, which is compiled along with similar properties by neighborhood or street and used to appraise or determine the value of "comparable" properties coming onto the market in the future. n2

In addition to M.L.S. arrangements, which are a sort of institutionalized form of cooperative brokering, brokers often enter into other, more *ad hoc* forms of cooperative brokerage agreements. These arrangements, which are sometimes rather informal, essentially acknowledge that the cooperating brokers are working together to complete a sale of certain property, and they have agreed upon a certain division of the brokerage fee. Cooperative brokers can be characterized as principal and agent, but they are more often viewed as joint venturers.

Another variant of brokerage activity arises when brokers work so closely with real estate developers, investors, financiers, and builders that they are considered joint venturers with these other parties in real estate developments. Such arrangements can expose the brokerage to the full range of liabilities arising out of such business ventures. n3

FOOTNOTES:

(n1)Footnote 2. D. Barlow Burke, Jr., Law of Real Estate Brokers 1:12 to 1:14 (2d ed. 1992). See also *Penne v. Greater Minneapolis Bd. of Realtors, 604 F.2d 1143 (8th Cir. 1979);* Note, *Arbitrary Exclusion from Multiple Listings: Common Law and Statutory Remedies, 52 Cornell L.Q. 570 (1967).* Ronald Benton Brown, Joseph M. Grohman, Real Estate Brokers: Shouldering New Burdens, *11 Prob. & Prop. 14* (May/June, 1997); Annotation, *Activities of Real-Estate Agent Or Association As Subject To Federal Antitrust Laws, 44 A.L.R. Fed. 743;* Annotation, *Application of State Antitrust Laws To Activities Or Practices Of Real-Estate Agents or Associations, 22 A.L.R. 4th 103;* Annotation, *Validity, Construction, And Effect of Real-Estate Brokers' Multiple-Listing Agreement, 45 A.L.R. 3d 190;* Marjorie Ramseyer, *Reinsurance And Coinsurance*, 416 PLI/Real 415 (Nov. 1996) (exemption for a payment pursuant to cooperative brokerage).

(n2)Footnote 3. *See, e.g., Modern Air Conditioning Inc. v. Cinderella Homes, Inc., 596 P.2d 816 (Kan. 1979). See, e.g.,* Steven A. Loewy, *Federal Regulation of Real Estate Brokers*, 4 Real Prop., Prob. & Tr. L. of the A.B.A. 29 (Dec. 1990) (discussing areas under federal law where real estate brokers have been held liable);, *Imposing Tort Liability on Real Estate Brokers Selling Defective Housing, 99 Harv. L. Rev. 1861 (1986)* (discussing tort liability of brokers "for failing to inform buyers about defects that could injure persons or property or about other factors materially affecting the value of property"); Guy P. Wolf and Marianne M. Jennings, *Seller/Broker Liability in Multiple Listing Service Real Estate Sales: A Case for Uniform Disclosure*, 20 Real Est. L.J. 22-53 (1991). *But see Woodhouse v. Re/Max Northwest Realtors, 878 P.2d 464 (Wash. App. 1994)* (holding that although a broker is responsible for any subordinate salesperson, the customer does not have a private cause of action against the broker).

Thomas v. Gray Lumber Co., 486 S.E.2d 142 (W. Va. 1997) (summary judgment reversed and case remanded to find whether vendor/broker was in better position to detect defects in workmanship than ordinary purchaser, and whether it was involved in joint venture with construction company which built home); *Eads v. Kinstler Agency, Inc., 929 S.W.2d 289 (Mo. App. 1996)* (the court held that: (1) the real estate agent's status at time of the injured's car accident was that of independent contractor, and (2) agent and agency were not engaged in joint adventure). *But see Gennari v. Weichert Co. Realtors, 691 A.2d 350 (N.J. 1997)* (home buyers could not recover in negligence from brokerage firm that marketed builder's shoddy and defective construction, absent expert testimony to establish standard of care in real estate industry); *Gennari v. Weichert Co. Realtors, 672 A.2d 1190 (N.J. Super. A.D. 1996).*

Marjorie Ramseyer Bardwell, *Reinsurance and Coinsurance*, 416 PLI/Real 415 (Nov. 1996); Annotation, *Construction of Agreement Between Real-Estate Agents to Share Commissions*, *71 A.L.R.3d 586.*

+ §§ 95.07 - 95.09 have been adapted from George Lefcoe, Real Estate Transactions (Michie 1993).

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CHAPTER 95 REAL ESTATE BROKERS +

11-95 Thompson on Real Property, Thomas Editions § 95.03

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§ 95.03 Statutes and Regulations Affecting Brokers.

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All states and the District of Columbia statutorily regulate the conduct of real estate brokers by a variety of licensure provisions. In this section the statutory real estate broker licensing provisions from several states are presented as they relate to several standard issues. n4 Also, other issues arising from state regulation of real estate brokers are discussed.

§ 95.03(a) Real Estate Broker Licensing Provisions from a Representative Sample of States.

§ 95.03(a)(1) Who Must and May Be Licensed.

Cal. Bus. & Prof. Code §§ 10131, 10131.1, 10131.2, 10131.3

§ 10131. "Real estate broker."

A real estate broker within the meaning of this part is a person who, for a compensation or in expectation of a compensation, regardless of the form or time of payment, does or negotiates to do one or more of the following acts for another or others:

(a) Sells or offers to sell, buys or offers to buy, solicits prospective sellers or purchasers of, solicits or obtains listings of, or negotiates the purchase, sale or exchange of real property or a business opportunity.

(b) Leases or rents or offers to lease or rent, or places for rent, or solicits listing of places for rent, or solicits for prospective tenants, or negotiates the sale, purchase or exchanges of leases on real property, or on a business opportunity, or collects rents from real property, or improvements thereon, or from business opportunities.

(c) Assists or offers to assist in filing an application for the purchase or lease of, or in locating or entering upon, lands owned by the state or federal government.

(d) Solicits borrowers or lenders for or negotiates loans or collects payments or performs services for borrowers or lenders or note owners in connection with loans secured directly or collaterally by liens on real property or on a business opportunity.

(e) Sells or offers to sell, buys or offers to buy, or exchanges or offers to exchange a real property sales contract or a promissory note secured directly or collaterally by a lien on real property or on a business opportunity, and performs services for the holders thereof.

§ 10131.1. Inclusion of person transacting business respecting real property sales contracts or promissory notes.

A real estate broker within the meaning of this part is also a person who engages as a principal in the business of buying from, selling to, or exchanging with the public, real property sales contracts or promissory notes secured directly or collaterally by liens on real property, or who makes agreements with the public for the collection of payments or for the performance of services in connection with real property sales contracts or promissory notes secured directly or collaterally by lines on real property.

As used in this section, "in the business" means any of the following:

(a) The acquisition for resale to the public, and not as an investment, of eight or more real property sales contracts or promissory notes secured directly or collaterally by liens on real property during a calendar year.

(b) The sale to or exchange with the public of eight or more real property sales contracts or promissory notes secured directly or collaterally by liens on real property during a calendar year. However, no transaction negotiated through a real estate licensee shall be considered in determining whether a person is a real estate broker within the meaning of this section.

As used in this section, "sale," "resale," and "exchange" include every disposition of any interest in a real property sales contract or promissory note secured directly or collaterally by a lien on real property, except the original issuance of a promissory note by a borrower or a real property sales contract by a vendor, either of which is to be secured directly by a lien on real property owned by the borrower or vendor.

§ 10131.2. Inclusion of persons dealing with advance fees for transfer of real property.

A real estate broker within the meaning of this part is also a person who engages in the business of claiming, demanding, charging, receiving, collecting or contracting for the collection of an advance fee in connection with any employment undertaken to promote the sale or lease of real property or of a business opportunity by advance fee listing, advertisement or other offering to sell, lease, exchange or rent property or a business opportunity, or to obtain a loan or loans thereon.

§ 10131.3. Inclusion of person engaged in real estate syndicate security transactions: Excluded Corporate Securities Law licensees.

A real estate broker within the meaning of this part is also a person who, for another or others, for compensation or in expectation of compensation, issues or sells, solicits prospective sellers or purchasers of, solicits or obtains listings of, or negotiates the purchase, sale, or exchange of securities as specified in Section 25206 of the Corporations Code.

The provisions of this section do not apply to a broker-dealer or agent of a broker-dealer licensed by the Commissioner of Corporations under the provisions of the Corporate Securities Law of 1968.

Fla. Stat. Ann. § 475.01

§ 475.01. Definitions.

(1) As used in this part:

(a) "Broker" means a person who, for another, and for a compensation or valuable consideration directly or indirectly paid or promised, expressly or impliedly, or with an intent to collect or receive a compensation or valuable consideration therefor, appraises, auctions, sells, exchanges, buys, rents, or offers, attempts or agrees to appraise, auction or negotiate the sale, exchange, purchase, or rental of business enterprises or business opportunities or any real property or any interest in or concerning the same, including mineral rights or leases, or who advertises or holds out to the public by any oral or printed solicitation or representation that he is engaged in the business of appraising, auctioning, buying, selling, exchanging, leasing, or renting business enterprises or business opportunities or real property of others or interests therein, including mineral rights, or who takes any part in the procuring of sellers, purchasers, lessors, or lessees of business enterprises or business opportunities or the real property of another, or leases, or interest therein, including rights, or who directs or assists in the procuring of prospects or in the negotiation or closing of any transaction which does, or is calculated to, result in a sale, exchange, or leasing thereof, and who receives, expects, or is promised any compensation or valuable consideration, directly or indirectly therefor; and all persons who advertise rental property information or lists. A broker renders a professional service and is a professional within the meaning of 95.11(4)(a). Where the term "appraise" or "appraising" appears in the definition of the term "broker," it specifically excludes those appraisal services which must be performed only by a state-licensed or state-certified appraiser, and those appraisal services which may be performed by a registered appraiser as defined in Part II. The term "broker" also includes any person who is a general partner, officer, or director of a partnership or corporation which acts as a broker. The term "broker" also includes any person or entity who undertakes to list or sell one or more time-share periods per year in one or more time-share plans on behalf of any number of persons, except as provided in 475.011 and 721.20.

Mass. Gen. L. ch. 112, § 87PP

§ 87PP. Definitions

"Real estate broker," hereinafter referred to as broker, any person who for another person and for a fee, commission or other valuable consideration, or with the intention or in the expectation or upon the promise of receiving or collecting a fee, commission or other valuable consideration, does any of the following: --sells, exchanges, purchases, rents or leases, or negotiates, or offers, attempts or agrees to negotiate the sale, exchange, purchase, rental or leasing of any real estate, or lists or offers, attempts or agrees to list any real estate, or buys or offers to buy, sells or offers to sell or otherwise deals in options on real estate, or advertises or holds himself out as engaged in the business of selling,

exchanging, purchasing, renting or leasing real estate, or assists or directs in the procuring of prospects or the negotiation or completion of any agreement or transaction which results or is intended to result in the sale, exchange, purchase, leasing or renting of any real estate.

Mo. Rev. Stat. § 339.010

§ 339.010. Definitions -- applicability of chapter.

1. A "real estate broker" is any person, copartnership, association or corporation, foreign or domestic who, for another, and for a compensation or valuable consideration, as a whole or partial vocation does, or attempts to do, any or all of the following:

(1) Sells, exchanges, purchases, rents, or leases real estate;

(2) Offers to sell, exchange, purchase, rent or lease real estate;

(3) Negotiates or offers or agrees to negotiate the sale, exchange, purchase, rental or leasing of real estate;

(4) Lists or offers or agrees to negotiate the sale, exchange, purchase, rental or leasing of real estate.

(5) Buys, sells, offers to buy or sell or otherwise deals in options on real estate or improvements thereon;

(6) Advertises or holds himself out as a licensed real estate broker while engaged in the business of buying, selling, exchanging, renting, or leasing real estate;

(7) Assists or directs in the procuring of prospects, calculated to result in the sale, exchange, leasing or rental of real estate;

(8) Assists or directs in the negotiation of any transaction calculated or intended to result in the sale, exchange, leasing or rental of real estate;

(9) Engages in the business of charging an advance fee in connection with any contract whereby he undertakes to promote the sale of real estate through its listing in a publication issued for such purpose intended to be circulated to the general public.

(10) Performs any of the foregoing acts as an employee of, or on behalf of, the owner of real estate, or interest therein, or improvements affixed thereon, for compensation.

§ 95.03(a)(2) Qualifications for Licensing.

Cal. Bus. & Prof. Code §§ 10150.6, 10153, 10153.2, 10153.3

§ 10150.6. Conditions precedent to issuance of original real estate broker's license.

The Real Estate Commissioner shall not grant an original real estate broker's license to any person who has not held a real estate salesman's license for at least two years and qualified for renewal real estate salesman status, within the five-year period immediately prior to the date of his application for the broker's license, and during such time was not actively engaged in the business of real estate salesman, except that an applicant for a real estate broker's license having at least the equivalent of two years' general real estate experience or graduation from a four-year college or university course, which course included specialization in real estate, files a written petition with the Department of Real Estate setting forth his qualifications and experience, and the commissioner approves, he may be issued a real estate broker's license immediately upon passing the examination and satisfying the other requirements of this article.

§ 10153. Ascertainment of qualification by written examination.

In addition to the proof of honesty and truthfulness required of any applicant for a real estate license, the commissioner shall ascertain by written examination that the applicant, and in case of a corporation applicant for a real estate broker's license that each officer, or agent thereof through whom it proposes to act as a real estate licensee, has all of the following:

(a) An appropriate knowledge of the English language, including reading, writing, and spelling and of arithmetical computations common to real estate and business opportunity practices.

(b) An understanding of the principles of real estate and business opportunity conveyancing, the general purposes and general legal effect of agency contracts, deposit receipts, deeds, mortgages, deeds of trust, chattel mortgages, bills of sale, land contracts of sale and leases, and of the principles of business and land economics and appraisals.

(c) A general and fair understanding of the obligations between principal and agent, of the principles of real estate and business opportunity practice and the canons of business ethics pertaining thereto, of the provisions of this part, of Chapter 1 (commencing with Section 11000) of Part 2, and of the regulations of the Real Estate Commissioner as contained in Title 10 of the California Administrative Code.

§ 10153.2. Education requirements.

(a) An applicant to take the examination for an original real estate broker license shall also submit evidence, satisfactory to the commissioner, of successful completion, at an accredited institution, of:

(1) A three-semester unit course, or the quarter equivalent thereof, in each of the following:

(A) Real estate practice.

(B) Legal aspects of real estate.

(C) Real estate appraisal.

(D) Real estate financing.

(E) Real estate economics or accounting.

(2) A three-semester unit course, or the quarter equivalent thereof, in any of the following:

(A) Advanced legal aspects of real estate.

(B) Advanced real estate finance.

(C) Advanced real estate appraisal.

(D) Business law.

(E) Escrows.

(F) Real estate principles.

(G) Property management.

(H) Real estate office administration.

(3) On and after January 1, 1986, an applicant shall submit evidence of successful completion of each of the courses listed in paragraph (1) and any three of the courses listed in paragraph (2).

(b) The commissioner shall waive the requirements of this section for an applicant who is a member of the State Bar of California and shall waive the requirements of this section for an applicant who is a member of the State Bar of California and shall waive the requirements for which an applicant has successfully completed an equivalent course of study as determined under Section 10153.5.

(c) The commissioner shall extend credit under this section for any course completed to satisfy requirements of Section 10153.3 or 10153.4.

§ 10153.3. Completion of course in real estate principles by applicant for salesperson license; Waiver.

In order to take an examination for a real estate salesperson license after January 1, 1986, an applicant shall submit evidence, satisfactory to the commissioner, of successful completion, at an accredited institution, of a three-semester unit course, or the quarter equivalent thereof, in real estate principles.

The commissioner shall waive the requirements of this section for an applicant who is a member of the State Bar of California, or who has completed an equivalent course of study, as determined under Section 10153.5, or who has qualified to take the examination for an original real estate broker license by satisfying the requirements of Section 10153.2.

Fla. Stat. Ann. § 475.17

§ 475.17. Qualifications for practice.

(1)

(a) An applicant for licensure who is a natural person must be at least 18 years of age; hold a high school diploma or its equivalent; be honest, truthful, trustworthy, and of good character; and have a good reputation for fair dealing. An applicant for an active broker's license or a salesman's license must be competent and qualified to make real estate transactions and conduct negotiations therefor with safety to investors and to those with whom he may undertake a relationship of trust and confidence. If the applicant has been denied registration or a license or has been disbarred, or his registration or license to practice of conduct any regulated profession, business, or vocation has been revoked or suspended, by this or any other state, any nation, or any possession or district of the United States, or any court or lawful agency thereof, because of any conduct or practices which would have warranted a like result under this chapter, or if the applicant has been guilty of conduct or practices in this state or elsewhere which would have been grounds for revoking or suspending his license under this chapter had the applicant then been registered, the applicant shall be

deemed not to be qualified unless, because of lapse of time and subsequent good conduct and reputation, or other reason deemed sufficient, it appears to the commission that the interest of the public and investors will not likely be endangered by the granting of registration.

(b) An application may be disapproved if the applicant has acted or attempted to act, or has held himself out as entitled to act, during the period of 1 year next prior to the filing of the application, as a real estate broker or salesman in the state in violation of this chapter. This paragraph may be deemed to bar any person from licensure who has performed any of the acts or services described in s. 475.01(3), unless exempt pursuant to s. 475.011, during a period of 1 year next preceding the filing of the application, or during the pendency of the application, and until a valid current license has been duly issued to him, regardless of whether the performance of the act or service was done for compensation or valuable consideration.

(2)

(a) In addition to other requirements under this part, the commission may require the satisfactory completion of one or more of the educational courses or equivalent courses conducted, offered, sponsored, prescribed, or approved pursuant to § 475.04, taken at an accredited college, university, or community college, at an area technical center, or at a registered real estate school, as a condition precedent for any person to become licensed or to renew her or his license as a broker, broker-salesperson, or salesperson. The course or courses required for one to become initially licensed shall not exceed a total of 63 classroom hours of 50 minutes each, inclusive of examination, for a salesperson and 72 classroom hours of 50 minutes each, inclusive of examination, for a broker. The satisfactory completion of an examination administered by the accredited college, university, or community college, by the area technical center, or by the registered real estate school shall be the basis for determining satisfactory completion of the course. However, notice of satisfactory completion shall not be issued if the student has absences in excess of 8 classroom hours. Such required course or courses must be made available by correspondence or other suitable means to any person who, by reason of hardship, as defined by rule, cannot attend the place or places where the course is regularly conducted.

(b) A person may not be licensed as a real estate broker unless, in addition to the other requirements of law, the person has held:

1. An active real estate salesperson's license for at least 12 months during the preceding 5 years in the office of one or more real estate brokers licensed in this state or any other state, territory, or jurisdiction of the United States or in any foreign national jurisdiction;

2. A current and valid real estate salesperson's license for at least 12 months during the preceding 5 years in the employ of a governmental agency for a salary and performing the duties authorized in this part for real estate licensees; or

3. A current and valid real estate broker's license for at least 12 months during the preceding 5 years in any other

state, territory, or jurisdiction of the United States or in any foreign national jurisdiction. This paragraph does not apply to a person employed as a real estate investigator by the Division of Real Estate, provided the person has been employed as a real estate investigator for at least 24 months. The person must be currently employed as a real estate investigator to sit for the real estate broker's examination and have held a valid and current salesperson's license for at least 12 months.

(c) A person who has been licensed as a real estate salesperson in Florida during the preceding 5 years may not be licensed as a real estate broker unless, in addition to the other requirements of law, she or he has completed the salesperson postlicensure educational requirements, if these requirements have been prescribed by the commission pursuant to paragraph (3)(a).

(3)

(a) The commission may prescribe a postlicensure education requirement in order for a person to maintain a valid salesman's license, which shall not exceed 45 classroom hours of 50 minutes each, inclusive of examination, prior to the first renewal following initial licensure. If prescribed, this shall consist of one or more commission-approved courses which total at least 45 classroom hours on one or more subjects which include, but are not limited to, property management, appraisal, real estate finance, or the economics of real estate management. Required postlicensure courses must be taken at an accredited college, university, community college, area vocational-technical center, or at a registered real estate school or given by a commission-approved sponsor.

(b) Satisfactory completion of the postlicensure requirement is demonstrated by successfully meeting all standards established for the commission-prescribed or commission-approved institution, or school. However, notice of satisfactory completion shall not be issued if the student has absences in excess of 10 percent of the required classroom hours.

(c) The license of any salesman who does not complete the postlicensure education requirement prior to the first renewal following initial licensure shall be considered null and void. Such person wishing to again operate as a real estate salesman must requalify by satisfactorily completing the salesman's prelicensure course and passing the state examination for licensure as a salesman.

(d) A salesman who is required to complete any postlicensure education requirement must complete any postlicensure education requirement in order to be eligible for licensure as a broker.

(4)

(a) The commission may prescribe a postlicensure education requirement in order for a person to maintain a valid broker's license, which shall not exceed 60 classroom hours of 50 minutes each, inclusive of examination, prior to the first renewal following initial licensure. If prescribed, this shall consist of one or more commission-approved courses

which total at least 60 classroom hours on one or more subjects which include, but are not limited to, advanced appraisal, advanced property management, real estate marketing, business law, advanced real estate investment analyses, advanced legal aspects, general accounting, real estate economics, syndications, commercial brokerage, feasibility analyses, advanced real estate finance, residential brokerage, or real estate brokerage office operation. Required postlicensure courses must be taken at an accredited college, university, community college, area vocational-technical center, or at a registered real estate school, or be given by a commission-approved sponsor.

(b) Satisfactory completion of the postlicensure requirement is demonstrated by successfully meeting all standards established for the commission /- presatisfactory completion shall not be issued if the student has absences in excess of 10 percent of the required classroom hours.

(c) The license of any broker who does not complete the postlicensure education requirement prior to the first renewal following initial licensure shall be considered null and void. If the licensee wishes to operate as a salesman, he may be issued a salesman's license after providing proof that he has satisfactorily completed the 14-hour continuing education course within the 6 months following expiration of his broker's license. To operate as a broker, he must requalify by satisfactorily completing the broker's prelicensure course and passing the state examination for licensure as a broker.

(5)

(a) The commission may allow an additional 6-month period after the first renewal following initial licensure for completing the postlicensure education courses for salesmen and brokers who cannot, due to individual physical hardship, as defined by rule, complete the courses within the required time.

(b) Except as provided in subsection (4), salesmen and brokers are not required to meet the 14-hour continuing education requirement prior to the first renewal following initial licensure.

(c) The commission shall provide for postlicensure education courses to be made available by correspondence or other suitable means to any person who, by reason of hardship, as defined by rule, cannot attend the place or places where courses are regularly conducted.

(6) The postlicensure education requirements of this section, and the education course requirements for one to become initially licensed, do not apply to any applicant or licensee who has received a 4-year degree in real estate from an accredited institution of higher education.

Mass. Gen. L. ch. 112, § 87SS

§ 87SS. Applicants for license; requisites; attorney at law; examinations; rules and regulations.

No license to engage as a broker or salesman shall be issued to any applicant unless he has complied with all the

pertinent provisions of this section and sections eighty-seven TT to eighty-seven DDD, inclusive, and if the applicant is an individual, unless he shall have satisfactorily passed a written examination conducted by the board or an independent testing service designated by the board, and, in the case of an application for a broker's license by an individual resident of the commonwealth, unless he shall have had his principal place of abode within the commonwealth for one year next prior to the issuance of such license; provided, however, that any applicant who is an attorney at law of the commonwealth shall not be required to take such examination or to have had such principal place of abode for such period.

Every individual applicant for a license as a salesman who is required to take an examination therefor shall, as a prerequisite to taking such examination, submit proof satisfactory to the board that he has completed courses in real estate subjects approved by the board, such courses to total twenty-four classroom hours of instruction; provided, however, that applicants having successfully completed a course in real property while enrolled in an accredited law school in the commonwealth may also take such examination. Every individual applicant for a license as a broker who is required to take an examination therefor shall, as a prerequisite to taking such examination, submit proof satisfactory to the board that he has been actively associated with a real estate broker for a period of one year as a real estate salesman and that he has completed additional courses in real estate subjects approved by the board, such courses to total thirty classroom hours of instruction.

Such examination shall be prepared by the board or the designated independent testing service to enable the board to determine the competence of the applicant to transact the business of a broker or a salesman. The board or its designated independent testing service shall conduct such examinations at least six times in each calendar year for salesman's examinations. There shall be no limit placed on the number of applicants who may take the examinations on any examination date. In determining competence the board shall require proof that the applicant has a fair understanding of the principles of real estate practice, real estate agreements and principal and agent relations, of the rudimentary provisions of sections eighty-seven PP to eighty-seven DDD, inclusive. The examination for a salesman's license shall be based upon the same general subject matter as for a broker's license, but shall be more elementary in character.

The board may make, and from time to time alter, amend or repeal rules and regulations for the conduct of such examinations not inconsistent herewith.

Mo. Rev. Stat. § 339.040

§ 339.040. Licenses granted to whom -- examination -- qualifications -- fee -- temporary broker's license, when -- renewal, requirements.

1. Licenses shall be granted only to persons who present, and corporations, associations or partnerships whose officers, associates, or partners present, satisfactory proof to the commission that they:

(1) Are persons of good moral character; and

(2) Bear a good reputation for honesty, integrity, and fair dealing; and

(3) Are competent to transact the business of a broker or salesperson in such a manner as to safeguard the interest of the public.

2. In order to determine an applicant's qualifications to receive a license under this chapter, the commission shall hold oral or written examinations at such times and places as the commission may determine.

3. Each applicant for a broker or salesperson license shall be at least eighteen years of age and shall pay the broker examination fee or the salesperson examination fee.

4. Each applicant for a broker license shall be required to have satisfactorily completed the salesperson license examinations prescribed by the commission. For the purposes of this section only, the commission may permit a person who is not associated with a licensed broker to take the salesperson examination.

5. Each application for a broker license shall include a certificate from the applicant's broker or brokers that the applicant has been actively engaged in the real estate business as a licensed salesperson for at least one year immediately preceding the date of application, or in lieu thereof, shall include a certificate from a school accredited by the commission under the provisions of section 229.045 that the applicant has, within six months prior to the date of application, successfully completed the prescribed broker curriculum or broker correspondence course offered by such school. Provided, however, that the commission may waive all or part of the educational requirements set forth above when an applicant presents proof of other educational background or experience acceptable to the commission.

6. Each application for a salesperson license shall include a certificate from a school accredited by the commission under the provisions of section 339.045 that the applicant has within six months prior to the date of application, successfully completed the prescribed broker curriculum or broker correspondence course offered by such school. Provided, however, that the commission may waive all or part of the educational requirements set forth above when an applicant presents proof of other educational background or experience acceptable to the commission.

7. The commission shall require every active broker, salesperson, officer or partner to present upon license renewal evidence that during the two years preceding he has completed twelve hours of real estate instruction in courses approved by the commission. The commission may, by rule and regulation, provide for individual waiver of this requirement.

8. Each entity that provides continuing education required under the provisions of subsection 7 of this section may make available videotapes and audiotapes of instruction courses that the entity conducts. The commission shall by rule set standards for the production of such taped courses, which may include the requirement that individuals purchasing such tapes also purchase an accompanying written study document. The commission shall authorize individuals required to complete instruction under the provisions of this subsection to fulfill such continuing education requirements by utilizing such videotape and audiotape courses. The commission may by regulation require the individual completing such videotape or audiotape course to complete an examination on the contents of the course. Such examination shall be designed to ensure that the licensee displays adequate knowledge of the subject matter of the course, and shall be

designed by the entity producing the taped course and approved by the commission.

9. In the event of the death or incapacity of a licensed broker, or of one or more of the licensed partners or officers of a real estate partnership or corporation whereby the affairs of the broker, partnership, or corporation cannot be carried on, the commission may issue, without examination or fee, to the legal representative or representatives of the deceased or incapacitated individual, or to another individual approved by the commission, a temporary broker license which shall authorize such individual to continue for a period to be designated by the commission to transact business for the sole purpose of winding up the affairs of the broker, partnership or corporation under the supervision of the commission.

§ 95.03(a)(3) Conduct Affecting License.

Cal. Bus. & Prof. Code §§ 10176, 10177

§ 10176. Investigation of actions of licensees; Grounds for suspension of revocation of licenses.

The commissioner may, upon his own motion, and shall, upon the verified complaint in writing of any person, investigate the actions of any person engaged in the business or acting in the capacity of a real estate licensee, within this state, and he may temporarily suspend or permanently revoke a real estate license at any time where the licensee, while a real estate licensee, in performing or attempting to perform any of the acts within the scope of this chapter has been guilty of any of the following:

(a) Making any substantial misrepresentation.

(b) Making any false promises of a character likely to influence, persuade or induce.

(c) A continued and flagrant course of misrepresentation or making of false promises through real estate agents or salesmen.

(d) Acting for more than one party in a transaction without the knowledge or consent of all parties thereto.

(e) Commingling with his own money or property the money or other property of others which is received and held by him.

(f) Claiming, demanding, or receiving a fee, compensation or commission under any exclusive agreement authorizing or employing a licensee to perform any acts set forth in Section 10131 for compensation or commission where such agreement does not contain a definite specified date of final and complete termination.

(g) The claiming or taking by a licensee of any secret or undisclosed amount of compensation, commission or profit or the failure of a licensee to reveal to the employer of such licensee the use of any provision allowing the licensee to buy, or exchange real estate or a business opportunity for compensation or commission, except when such licensee prior to or coincident with election to exercise such option to purchase reveals in writing to the employer the full amount of licensee's profit and obtains the written consent of the employer approving the amount of such profit.

(h) The use by a licensee of any provision allowing the licensee an option to purchase in an agreement authorizing or employing such licensee to see, buy, or exchange real estate or a business opportunity for compensation or commission, except when such licensee prior to or coincident with election to exercise such option to purchase reveals in writing to the employer the full amount of licensee's profit and obtains the written consent of the employer approving the amount of such profit.

(i) Any other conduct, whether of the same or a different character than specified in this section, which constitutes fraud or dishonest dealing.

(j) Obtaining the signature of a prospective purchaser to an agreement which provides that such prospective purchaser shall either transact the purchasing, leasing, renting or exchanging of a business opportunity property through the broker obtaining such signature, or pay a compensation to such broker if such property is purchased, leased, rented or exchanged without the broker first having obtained the written authorization of the owner of the property concerned to offer such property for sale, lease, exchange or rent.

§ 10177. Additional grounds for suspension or revocation of licenses; Grounds for denial of licenses.

The commissioner may suspend or revoke the license of any real estate licensee, or may deny the issuance of a license to an applicant, who has done, or may suspend or revoke the license of, or deny the issuance of a license to, a corporate applicant if an officer, director, or person owning or controlling 10 percent or more of the corporation's stock has done, any of the following:

(a) Procured, or attempted to procure, a real estate license or license renewal, for himself or herself or any salesperson, by fraud, misrepresentation or deceit, or by making any material misstatement of fact in an application for a real estate license, license renewal or reinstatement.

(b) Entered a plea of guilty or nolo contendere to, or been found guilty of, or been convicted of, a felony or a crime involving moral turpitude, and the time for appeal, irrespective of an order granting probation following that conviction, appeal, suspending the imposition of sentence, or of a subsequent order under Section 1203.4 of the Penal Code allowing that licensee to withdraw his or her plea of guilty and to enter a plea of not guilty, or dismissing the accusation or information.

(c) Knowingly authorized, directed, connived at, or aided in, the publication, advertisement, distribution, or circulation of any material false statement or representation concerning his or her business, or any business opportunity or any land or subdivision (as defined in Chapter 1 (commencing with Section 11000) of Part 2) offered for sale.

(d) Willfully disregarded or violated the Real Estate Law (Part 1 (commencing with Section 10000)) of Chapter 1 (commencing with Section 11000) of Part 2 of the rules and regulations of the commissioner for the administration and enforcement of the Real Estate Law and Chapter 1 (commencing with Section 11000) of Part 2.

(e) Willfully used the term "realtor" or any trade name or insignia of membership in any real estate organization of which the licensee is not a member.

(f) Acted or conducted himself or herself in a manner which would have warranted the denial of his or her application for a real estate license, or has either had a license denied or a license issued by another agency of this state, another state, or the federal government, revoked or suspended for acts which if done by a real estate licensee would be grounds for the suspension or revocation of a California real estate license, if the action of denial, revocation, or suspension by the other agency or entity was taken only after giving the licensee or applicant fair notice of the charges, an opportunity for a hearing, and other due process protections comparable to the Administrative Procedure Act (Chapter 3.5 (commencing with Section 11340), Chapter 4 (commencing with Section 11370), and Chapter 5 (commencing with Section 11500) of Part 1 of Division 3 of Title 2 of the Government Code), and only upon an express finding of a violation of law by the agency or entity.

(g) Demonstrated negligence or incompetence in performing any act for which he or she is required to hold a license.

(h) As a broker licensee, failed to exercise reasonable supervision over the activities of his or her salespersons, or as the officer designated by a corporate broker licensee, failed to exercise reasonable supervision and control of the activities of the corporation for which a real estate license is required.

(i) Has used his or her employment by a governmental agency in a capacity giving access to records, other than public records, in such manner as to violate the confidential nature of the records.

(j) Engaged in any other conduct, whether of the same or a different character than specified in this section, which constitutes fraud or dishonest dealing.

(k) Violated any of the terms conditions, restrictions, and limitations contained in any order granting a restricted license.

(l) Solicited or induced the sale, lease, or the listing for sale or lease, of residential property on the ground, wholly or in part, of loss of value, increase in crime, or decline of the quality of the schools, due to the present or prospective entry into the neighborhood of a person or persons of another race, color, religion, ancestry, or national origin.

(m) Violated the Franchise Investment Law Division 5 (commencing with Section 31000) of Title 4 of the Corporations Code) or regulations of the Commissioner of Corporations pertaining thereto.

(n) Violated the Corporations Code or the regulations of the Commissioner of Corporations relating to securities as specified in Section 25206 of the Corporations Code.

(o) Failed to disclose to the buyer of real property in a transaction in which the licensee is an agent for the buyer, the nature and extent of a licensee's direct or indirect ownership interest in that real property. The direct or indirect ownership in the property by a person related to the licensee by blood or marriage, by an entity in which the licensee has an ownership interest, or by any other person with whom the licensee occupies a special relationship shall be disclosed to the buyer.

If a real estate broker that is a corporation has not done any of the foregoing acts, either directly or through its employees, agents, officers, directors, or persons owning or controlling 10 percent or more of the corporation's stock, the commissioner may not deny the issuance of a real estate license to, or suspend or revoke the real estate license of, the corporation, provided that any offending officer, director, or stockholder, who has done any of the foregoing acts individually and not on behalf of the corporation, has been completely disassociated from any affiliation or ownership in the corporation.

Colo. Rev. Stat. § 12-61-113

§ 12-61-113. Investigation -- revocation -- actions against licensee.

(1) The commission, upon its own motion, may, and, upon the complaint in writing of any person, shall, investigate the activities of any licensee or any person who assumes to act in such capacity within the state, and the commission, after the holding of a hearing pursuant to section 12-61-114, has the power to impose an administrative fine not to exceed two thousand five hundred dollars for each separate offense and to censure a licensee, to place the licensee on probation and to set the terms of probation, or to temporarily suspend or permanently revoke a license when the licensee has performed, is performing, or is attempting to perform any of the following acts and is guilty of:

(a) Knowingly making any misrepresentation or knowingly making use of any false or misleading advertising;

(b) Making any promise of a character which influences, persuades, or induces another person when he could not or did not intend to keep such promise;

(c) Knowingly misrepresenting or making false promises through agents, salespersons, advertising, or otherwise;

(c.5) Violating any provision of the "Colorado Consumer Protection Act", article 1 of title 6, C.R.S.;

(d) Acting for more than one party in a transaction without the knowledge of all parties thereto;

(e) Representing or attempting to represent a real estate broker other than the licensee's employer without the express knowledge and consent of that employer;

(f) In the case of a salesperson or of a broker registered as in the employ of another broker, failing to place, as soon after receipt as is practicably possible, in the custody of that licensed broker-employer any deposit money or other money or fund entrusted to the employee by any person dealing with the employee as the representative of that licensed broker-employer;

(g) Failing to account for or to remit, within a reasonable time, any moneys coming into his possession which belong to others, whether acting as real estate brokers, salespersons, or otherwise, and failing to keep records relative to said moneys, which records shall contain such information as may be prescribed by the rules and regulations of the commission relative thereto and shall be subject to audit by the commission;

(g.5) Converting funds of others, diverting funds of others without proper authorization, commingling funds of others with the broker's own funds, or failing to keep such funds of others in an escrow or a trustee account with some bank or recognized depository in this state, which account may be any type of checking, demand, passbook, or statement account insured by an agency of the United States government, and to so keep records relative to the deposit which contain such information as may be prescribed by the rules and regulations of the commission relative thereto, which records shall be subject to audit by the commission;

(h) Failing to provide the purchaser and seller of real estate with a closing statement of the transaction, containing such information as may be prescribed by the rules and regulations of the commission or failing to provide a signed duplicate copy of the listing contract and the contract of sale or the preliminary agreement to sell to the parties thereto;

(i) Failing to maintain possession, for future use or inspection by an authorized representative of the commission, for a period of seven years, of the documents or records prescribed by the rules and regulations of the commission or to produce such documents or records upon reasonable request by the commission or by authorized representative of the

commission;

(j) Paying a commission or valuable consideration for performing any of the functions of a real estate broker or real estate salesperson, as described in this part 1, to any person not licensed under the provisions of this part 1; except that a licensed broker may pay a finder's fee or a share of any commission on a cooperative sale when such a payment is made to a real estate broker licensed in another state or country. If a country does not license real estate brokers, then the payee must be a citizen or resident of said country and represent that the payee is in the business of selling real estate in said country.

(k) Disregarding or violating any provision of this part 1, violating any reasonable rule or regulation promulgated by the commission in the interests of the public and in conformance with the provisions of this part 1; violating any lawful commission orders; or aiding and abetting a violation of any rule, regulation, commission order, or provision of this part 1;

(l) Repealed, L. 89, p. 744, § 25, effective July 1, 1989.

(m) Conviction of, entering a plea of guilty to, or entering a plea of nolo contendere to any crime in article 3 of title 18, C.R.S., in part 4 of article 4 of title 18, C.R.S., or in part 1, 2, 3, or 5 of article 5 of title 18, C.R.S., or any other like crime under Colorado law, federal law, or the laws of other states. A certified copy of the judgment of a court of competent jurisdiction of such conviction or other official record indicating that such plea was entered shall be conclusive evidence of such conviction or plea in any hearing under this part 1.

(m.5) Violating or aiding and abetting in the violation of the Colorado or federal fair housing laws;

(m.6) Failing to immediately notify the commission in writing of a conviction, plea, or violation pursuant to paragraph (m) or (m.5) of this subsection (1);

(n) Having demonstrated unworthiness or incompetency to act as a real estate broker or salesperson by conducting business in such a manner as to endanger the interest of the public;

(o) In the case of a broker licensee, failing to exercise reasonable supervision over the activities of licensed employees;

(p) Procuring, or attempting to procure, a real estate broker's license or a real estate salesperson's license or renewing,

reinstating, or reactivating, or attempting to renew, reinstate, or reactivate, a real estate broker's license or a real estate salesperson's license by fraud, misrepresentation, or deceit or by making a material misstatement of fact in an application for such license;

(q) Claiming, arranging for, or taking any secret or undisclosed amount of compensation, commission, or profit or failing to reveal to the licensee's principal or employer the full amount of such licensee's compensation, commission, or profit in connection with any acts for which a license is required under this part 1;

(r) Using any provision allowing the licensee an option to purchase in any agreement authorizing or employing such licensee to sell, buy, or exchange real estate for compensation or commission, except when such licensee, prior to or coincident with election to exercise such option to purchase, reveals in writing to the licensee's principal or employer the full amount of the licensee's profit and obtains the written consent of such principal or employer approving the amount of such profit;

(s) Fraud, misrepresentation, deceit, or conversion of trust funds which results in the payment of any claim from the real estate recovery fund, pursuant to part 3 of this article;

(t) Any other conduct, whether of the same or a different character than specified in this subsection (1), which constitutes dishonest dealing;

(u) Repealed, L.86 p. 1217, § 11, effective May 30, 1986.

(v) Having had a real estate broker's or salesperson's, or subdivision developer's license suspended or revoked in any jurisdiction, or having had any disciplinary action taken against the broker, salesperson, or subdivision developer in any other jurisdiction if the broker's, salesperson's or subdivision developer's action would constitute a violation of this subsection (1). A certified copy of the order of disciplinary action shall be prima facie evidence of such disciplinary action.

(w) Failing to keep records documenting proof of completion of the continuing education requirements in accordance with section 12-61-110.5 for a period of seven years from the date of compliance with said section.

(1.5) Every person licensed pursuant to section 12-61-101(2)(j) shall give a prospective tenant a contract or receipt; and such contract or receipt shall include the address and telephone number of the real estate commission in prominent letters and shall state that the regulation of rental location agents is under the purview of the real estate commission.

(2) In the event a firm, partnership, limited liability company, association, or corporation operating under the license of a member, manager, or officer designated and licensed as representative of said firm, partnership, limited liability company, association, or corporation is guilty of any of the foregoing acts, the commission may suspend or revoke the right of the said firm, partnership, limited liability company, association, or corporation to conduct its business under the license of said member, manager, or director, whether or not the designated member, manager, or director had personal knowledge thereof and whether or not the commission suspends or revokes the individual license of said member, manager, or director.

(3) Upon request of the commission, when any real estate broker or salesperson is a party to any suit or proceeding, either civil or criminal, arising out of any transaction involving the sale or exchange of any interest in real property or out of any transaction involving a leasehold interest in the real property and when such broker or salesperson is involved in such transaction in such capacity as a licensed broker or salesperson, it shall be the duty of said broker or salesperson to supply to the commission a copy of the complaint, indictment, information, or other initiating pleading and the case and of the nature and amount of any judgment, verdict, finding, or sentence which may be made, entered, or imposed therein.

(4) This part 1 shall not be construed to relieve any person from civil liability or criminal prosecution under the laws of this state.

(5) Complaints of records in the office of the commission and the results of staff investigations may, in the discretion of the commission, be closed to public inspection, except as provided by court order, during the investigatory period and until dismissed or until notice of hearing and charges are served on a licensee.

(6) When a complaint or an investigation discloses an instance of misconduct which, in the opinion of the commission, does not warrant formal action by the commission but which should not be dismissed as being without merit, the commission may send a letter of admonition by certified mail, return receipt requested, to the licensee against whom a complaint was made and a copy thereof to the person making the complaint, but the letter shall advise the licensee that the licensee has the right to request in writing, within twenty days after proven receipt, that formal disciplinary proceedings be initiated to adjudicate the propriety of the conduct upon which the letter of admonition is based. If such request is timely made, the letter of admonition shall be deemed vacated, and the matter shall be processed by means of formal disciplinary proceedings.

(7) All administrative fines collected pursuant to this section shall be transmitted to the state treasurer, who shall credit the same to the real estate recovery fund established in section 12-61-301.

Fla. Stat. Ann. § 95.03(a)(3)

§ 475.25. Discipline.

(1) The commission may deny an application for licensure, registration, or permit, or renewal thereof; may place a

licensee, registrant, or permittee on probation; may suspend a license, registration, or permit for a period not exceeding 10 years; may revoke a license, registration, or permit; may impose an administrative fine not to exceed $1,000 for each count or separate offense; and may issue a reprimand, and any or all of the foregoing, if it finds that the licensee, registrant, permittee, or applicant;

(a) Has violated any provision of s. 475.42 or of s. 455.227(1).

(b) Has been guilty of fraud, misrepresentation, concealment, false promises, false pretenses, dishonest dealing by trick, scheme, or device, culpable negligence, or breach of trust in any business transaction in this state or any other state, nation, or territory; has violated a duty imposed upon him by law or by the terms of a listing contract, written, oral, express, or implied, in a real estate transaction; has aided, assisted, or conspired with any other person engaged in any such misconduct and in furtherance thereof; or has performed an overt act in furtherance of such intent, design, or scheme. It is immaterial to the guilt of the licensee that the victim or intended victim of the misconduct has sustained no damage or loss; that the damage or loss has been settled and paid after discovery of the misconduct; or that such victim or intended victim was a customer or a person in confidential relation with the licensee or was an identified member of the general public.

(c) Has advertised property or services in a manner which is fraudulent, false, deceptive, or misleading in form or content.

(d)

1. Has failed to account or deliver to any person, including a licensee under this chapter, at the time which has been agreed upon or is required by law or, in the absence of a fixed time, upon demand of the person entitled to such accounting and delivery, any personal property such as money, fund, deposit, check, draft, abstract of title, mortgage, conveyance, lease, or other document or thing of value, including a share of a real estate commission if a civil judgment relating to the practice of the licensee's profession has been obtained against the licensee and said judgment has not been satisfied in accordance with the terms of the judgment within a reasonable time, or any secret or illegal profit, or any divisible share or portion thereof, which has come into his hands and which is not his property or which he is not in law or equity entitled to retain under the circumstances. However, if the licensee, in good faith, entertains doubt as to what person is entitled to the accounting and delivery of the escrowed property, or if conflicting demands have been made upon him for the escrowed property, which property he still maintains in his escrow or trust account, the licensee shall promptly notify the commission of such doubts or conflicting demands and shall promptly:

a. Request that the commission issue an escrow disbursement order determining who is entitled to the escrowed property;

b. With the consent of all parties, submit the matter to arbitration;

c. By interpleader or otherwise, seek adjudication of the matter by a court; or

d. With the written consent of all parties, submit the matter to mediation. The department may conduct mediation or may contract with public or private entities for mediation services. However, the mediation process must be successfully completed within 90 days following the last demand or the licensee shall promptly employ one of the other escape procedures contained in this section. Payment for mediation will be as agreed to in writing by the parties. The department may adopt rules to implement this section.

If the licensee promptly employs one of the escape procedures contained herein, and if he abides by the order of judgment resulting therefrom, no administrative complaint may be filed against the licensee for failure to account for, deliver, or maintain the escrowed property.

2. Has failed to deposit money in an escrow account when the licensee is the purchaser of real estate under a contract where the contract requires the purchaser to place deposit money in an escrow account to be applied to the purchase price if the sale is consummated.

(e) Has violated any of the provisions of this chapter or any lawful order or rule made or issued under the provisions of this chapter or chapter 455.

(f) Has been convicted or found guilty, regardless of adjudication, of a crime in any jurisdiction which directly relates to the activities of a licensed broker or salesperson, or involves moral turpitude or fraudulent or dishonest dealing. Any plea of nolo contendere shall be considered a conviction for purposes of this paragraph. The records of a conviction certified or authenticated in such form as to be admissible in evidence under the laws of the state shall be admissible as prima facie evidence of such guilt.

(g) Has had a broker's or salesperson's license revoked, suspended, or otherwise acted against, or has had an application for such licensure denied, by the real estate licensing agency of another state, territory, or country.

(h) Has shared a commission with, or paid a fee or other compensation to, a person not properly licensed as a broker, broker-salesperson, or salesperson under the laws of this state, for the referral of real estate business, clients, prospects, or customers, or for any one or more of the services set forth in s. 475.01(1)(c) For the purposes of this section, it is immaterial that the person to whom such payment or compensation is given made the referral or performed the service from within this state or elsewhere; however, a licensed broker of this state may pay a referral fee or share a real estate brokerage commission with a broker licensed or registered under the laws of a foreign state so long as the foreign broker does not violate any law of this state.

(i) Has become temporarily incapacitated from acting as a broker or salesperson with safety to investors or those in a fiduciary relation with him because of drunkenness, use of drugs, or temporary mental derangement; but suspension of a license in such a case shall be only for the period of such incapacity.

(j) Has rendered an opinion that the title to any property sold is good or merchantable, except when correctly based upon a current opinion of a licensed attorney at law, or has failed to advise a prospective purchaser to consult his attorney on the merchantability of the title or to obtain title insurance.

(k) Has failed, if a broker, to immediately place, upon receipt, any money, fund, deposit, check, or draft entrusted to him by any person dealing with him as a broker in escrow with a title company, banking institution, credit union, or savings and loan association located and doing business in this state, or to deposit such funds in a trust or escrow account maintained by him with some bank, credit union, or savings and loan association located and doing business in this state, wherein the funds shall be kept until disbursement thereof is properly authorized; or has failed, if a salesperson, to immediately place with his registered employer any money, fund, deposit, check, or draft entrusted to him by any person dealing with him as agent of his registered employer. The commission shall establish rules to provide for records to be maintained by the broker and the manner in which such deposits shall be made.

(l) Has made or filed a report or records which the licensee knows to be false, has willfully failed to file a report or record required by state or federal law, has willfully impeded or obstructed such filing, or has induced another person to impede or obstruct such filing but such reports or records shall include only those which are signed in the capacity of a licensed broker or salesperson.

(m) Has obtained a license by means of fraud, misrepresentation, or concealment.

(n) Is confined in any county jail, post-adjudication; or is confined in any state or federal prison or mental institution; or, through mental disease or deterioration, can no longer safely be entrusted to deal with the public or in a confidential capacity.

(o) Has been found guilty, for a second time, of any misconduct that warrants his suspension or has been found guilty of a course of conduct or practices which show that he is so incompetent, negligent, dishonest, or untruthful that the money, property, transactions, and rights of investors, or those with whom he may sustain a confidential relation, may not safely be entrusted to him.

(p) Has failed to inform the commission in writing within 30 days after pleading guilty or nolo contendere to, or being convicted or found guilty of any felony.

(q) Has failed to give written notice to a party to a sale, exchange, purchase, or lease of real property or any interest in real property, before such party has signed any contractual offer or lease agreement related to the transaction, that he is an agent, employee, independent contractor, or representative of another party in the negotiation of such sale, exchange, purchase, or lease. The commission shall implement this provision by rule.

(r) Has failed in any written listing agreement to include a definite expiration date, description of the property, price and terms, fee or commission, and a proper signature of the principal(s); and has failed to give the principal(s) a legible, signed, true and correct copy of the listing agreement within 24 hours of obtaining the written listing agreement. The written listing agreement shall contain no provision requiring the person signing the listing to notify the broker of the intention to cancel the listing after such definite expiration date.

(s) Has had a registration suspended, revoked, or otherwise acted against in any jurisdiction. The record of the disciplinary action certified or authenticated in such form as to be admissible in evidence under the laws of the state shall be admissible as prima facie evidence of such disciplinary action.

(t) Has violated any standard for the development or communication of a real estate appraisal or other provision of the Uniform Standards of Professional Appraisal Practice, as defined in § 475.611, as approved and adopted by the Appraisal Standards Board of the Appraisal Foundation, as defined in § 475.611. This paragraph does not apply to a real estate broker or salesperson who, in the ordinary course of business, performs a comparative market analysis. However, in no event may this comparative market analysis be referred to as an appraisal, as defined in § 475.611.

(2) A license may be revoked or canceled if it was issued through the mistake or inadvertence of the commission. Such revocation or cancellation shall not prejudice any subsequent application for licensure filed by the person against whom such action was taken.

(3) The department shall reissue the license of a licensee against whom disciplinary action was taken upon certification by the commission that the licensee has complied with all of the terms and conditions of the final order imposing discipline.

(4) The commission may adopt rules allowing the Director of the Division of Real Estate to grant to a licensee placed on probation additional time within which to complete the terms of probation, but the rules must allow the licensee to appeal any denial to the commission.

Mass. Gen. L. ch. 112, § 87AAA

§ 87AAA. Complaints; investigation by board; revocation or suspension of license; grounds; penalties.

The board may, and upon the verified complaint in writing of an aggrieved person shall, investigate the action of any broker or salesman or any person who attempts to act in such capacity within the commonwealth, and in addition to any grounds herein before enumerated, may suspend, revoke or refuse to renew any license which it has found to have been obtained by false or fraudulent representation. The board may suspend, revoke or refuse to renew any license when the board has found as a fact that the licensee, in performing or attempting to perform any act authorized by his license, has (a) knowingly made any substantial misrepresentation; (b) acted in the dual capacity of broker and undisclosed principal in the same transaction; (c) acted for more than one party to a transaction without the knowledge and consent of all the parties for whom he acts; (d) failed, within a reasonable time, to account for or remit any moneys belonging to others which have come into his possession as a broker or salesman; (e) paid commissions or fees to or divided the same with any person, who, being required to be licensed as a broker or salesman in this or any other state, is not so licensed; (f) accepted, given or charged any undisclosed commission, rebate or profit on expenditures for a principal; (g) induced any party to a contract or lease relating to real estate to break the same when such action is effected for the personal gain of the licensee; (h) commingled the money or other property of his principal with his own; (i) failed to give to both the buyer and seller a copy of the purchase and sale agreement; (j) committed any act expressly prohibited in sections eighty-seven RR to eighty-seven CCC, inclusive; (k) affirmatively solicited for sale, lease, or the listing for sale or lease, of residential property on the grounds of alleged change of value due to the presence or the prospective entry into the neighborhood of a person or persons of another race, economic level, religion or ethnic origin or distributes, or causes to be distributed, material or makes statements designated to induce a residential property owner to sell or lease his property due to such change in the neighborhood; or (l) accepted from a prospective seller a net listing, an agreement to sell real estate for a stated price which authorized the broker to keep as commission any amount of money received from the sale of said real estate in excess of the stated price. The board shall, after notice by the Massachusetts commission against discrimination that said commission has made a finding, which finding has become final, that a licensed broker or salesman committed an unlawful practice in violation of chapter one hundred and fifty-one B arising out of or in the course of his occupation as a licensed broker or salesman, shall suspend forthwith the license of said broker or salesman for a period of sixty days, and if the said commission finds that said violation by such licensed broker or salesman occurred within two years of the date of a prior violation of said chapter one hundred and fifty-one B, which finding has been final, it shall so notify the board, and the board shall forthwith suspend the license of such broker or salesman for a period of ninety days. Whoever violates the provisions of clause (k) shall be punished by a fine of not less than one thousand nor more than twenty-five hundred dollars, or by imprisonment for not more than six months, or both.

No broker shall engage in a sale in the commonwealth of real property located in a land development in another state which is the subject of promotional advertising in the commonwealth unless the owner or developer of such land has submitted to the board full particulars regarding such land and the proposed terms of sale thereof and has deposited with the board such sum as it shall determine, to pay the expense of the investigation hereinafter prescribed. Any broker acting for such owner or developer, and his salesmen, shall comply with such rules, regulations, restrictions and conditions pertaining thereto as the board in its discretion may impose. The board shall investigate such matters and all reasonable expenses incurred by the board in such investigation shall be borne by the owner or developer of the property involved. No broker or salesman shall in any manner refer to the board of registration of real estate brokers and salesmen or to any member or employee thereof, in selling, offering for sale, or advertising or otherwise promoting the sale, mortgage, or lease of any such property, nor make any representation whatsoever that such property has been inspected or approved or otherwise passed upon by said board or by any official, department or employee of the commonwealth. The board may suspend, revoke or refuse to renew any license when it has found that the licensee has failed to comply with the requirement of this paragraph or any part thereof.

The board may also suspend, revoke or refuse to renew any license when it has found that the licensee has been convicted of a criminal offense by a court of competent jurisdiction of this or any other state which demonstrates his lack of good moral character to act as a broker or salesman as the case may be.

The board may reconsider any decision made by it and may reinstate any license which has been suspended and

reissue any license which has been revoked.

Any person whose license is suspended or revoked shall also be liable to such other punishment as may be provided by law.

Mo. Rev. Stat. § 339.100

§ 339.100. Investigation of certain practices, procedure -- subpoenas -- formal complaints -- revocation or suspension of licenses -- digest may be published.

1. The commission may, upon its own motion, and shall upon written complaint filed by any person, investigate any business transaction of a person, copartnership or corporation licensed under this chapter. In conducting such investigation, the commission shall have the power to hold an investigatory hearing to determine whether there is a probability that the licensee has performed or attempted to perform any act or practice declared unlawful under this chapter. In conducting such a hearing, the commission shall have the power to issue a subpoena and to compel the production of records and papers bearing on the complaint. The commission shall have the power to issue a subpoena and to any person in this state to come before the subpoenas and subpoenas duces tecum issued pursuant to this section shall be served in the same manner as subpoenas in a criminal case. The fees and mileage of witnesses shall be the same as that allowed in the circuit court in civil cases.

2. The commission may cause a complaint to be filed with the administrative hearing commission as provided by law when the commission believes there is a probability that a licensee has performed or attempted to perform any of the following acts:

(1) Failure to maintain and deposit in a special account, separate and apart from his personal or other business accounts, all moneys belonging to others entrusted to him while acting as a real estate broker, or as escrow agent, or as the temporary custodian of the funds of others, until the transaction involved is consummated or terminated, unless all parties having an interest in the funds have agreed otherwise in writing;

(2) Making substantial misrepresentations or false promises or suppression, concealment or omission of material facts in the conduct of his business or pursuing a flagrant and continued course of misrepresentation through agents, salespersons, advertising or otherwise in any transaction;

(3) Failing within a reasonable time to account for or to remit any moneys, valuable documents or other property, coming into his possession, which belongs to others;

(4) Representing to any lender, guaranteeing agency, or any other interested party, either verbally or through the preparation of false documents, an amount in excess of the true and actual sale price of the real estate or terms differing from those actually agreed upon;

(5) Failure to deliver, immediately at the time of signing, a duplicate original of any and all instruments to any party or parties executing the same where the instruments have been prepared by the broker or under his supervision or are within his control, including, but not limited to, the instruments relating to the employment of the broker or to any matter pertaining to the consummation of a lease, listing agreement or the purchase, sale, exchange or lease of property, or any type of real estate transaction in which he may participate as a broker;

(6) Acting for more than one party in a transaction without the knowledge of all parties for whom he acts, or accepting a commission or valuable consideration for services from more than one party in a real estate transaction without the knowledge of all parties to the transaction;

(7) Paying a commission or valuable consideration to any person for acts or services performed in violation of this chapter;

(8) Guaranteeing or having authorized or permitted any broker or salesperson to guarantee future profits which may result from the resale of real property;

(9) Having been finally adjudicated and been found guilty of the violation of any state or federal statute which governs the sale or rental of real property or the conduct of the real estate business as defined in subsection 1 of section 339.010;

(10) Obtaining a real estate license for himself or anyone else by false or fraudulent representation, fraud or deceit;

(11) Representing a real estate broker other than the broker with whom associated without the express knowledge and consent of that broker, or accepting a commission or valuable consideration for the performance of any of the acts referred to in section 339.010 from any person except the broker with whom associated;

(12) Using prizes, money, gifts or other valuable consideration as inducement to secure customers to purchase, lease, sale or listing; or soliciting, selling or offering for sale real property by offering free lots, or conducting lotteries or contests, or offering prizes for the purpose of influencing a purchaser or prospective purchaser of real property;

(13) Placing a sign on any property offering it for sale or rent without the consent of the owner or his duly authorized agent;

(14) Willfully or repeatedly violating any of the provisions of this chapter or any rule or regulation promulgated hereunder;

(15) Committing any act which would otherwise be grounds for the commission to refuse to issue a license under section 339.040;

(16) Failure to submit all written bona fide offers to a seller when such offers are received prior to the seller accepting an offer in writing and until the broker has knowledge of said acceptance;

(17) Being found guilty in a court of this state, or of any other state, or of the United States, of forgery, embezzlement, obtaining money under false pretenses, extortion, criminal conspiracy to defraud or other like offenses;

(18) Any other conduct which constitutes untrustworthy, improper or fraudulent business dealings, or demonstrated bad faith or gross incompetence.

(19) Disciplinary action against the holder of a license or other right to practice any profession regulated under sections 339.010 to 339.180 granted by another state, territory, federal agency, or country upon grounds for which revocation, suspension, or probation is authorized in this state;

(20) Been found by a court of competent jurisdiction of having used any controlled substance, as defined in chapter 195, RSMo, to the extent that such use impairs a person's ability to perform the work of any profession licensed or regulated by sections 339.010 to 339.180;

(21) Been finally adjudged insane or incompetent by a court of competent jurisdiction;

(22) Assisting or enabling any person to practice or offer to practice any profession licensed or regulated under sections 339.010 to 339.180 who is not registered and currently eligible to practice under sections 339.010 to 339.180;

(23) Use of any advertisement or solicitation which is knowingly false, misleading or deceptive to the general public or persons to whom the advertisement or solicitation is primarily directed.

3. After the filing of such complaint, the proceedings will be conducted in accordance with the provisions of law

relating to the administrative hearing commission. A finding of the administrative hearing commissioner that the licensee has performed or attempted to perform one or more of the foregoing acts shall be grounds for the suspension or revocation of his license by the commission, or the placing of the licensee on probation on such terms and conditions as the real estate commission shall deem appropriate.

4. The commission may prepare a digest of the decisions of the administrative hearing commission which concern complaints against licensed brokers or salespersons and cause such digests to be mailed to all licensees periodically. Such digests may also contain reports as to new or changed rules adopted by the commission and other information of significance to licensees.

§ 95.03(b) Common Issues Under State Licensing Statutes.

The holding of a valid license frequently becomes an issue in real estate brokerage activity. While the brokerage itself may be licensed, any transaction that is effected through the additional efforts of an unlicensed salesperson or cooperating broker or some other unlicensed person may be unlawful and will prevent qualifying for the commission. n5 As may be perceived from the statutory provisions quoted in § 95.03(a)(1), states vary widely in identifying parties who need to be licensed or who are permitted to be licensed. At one end of the spectrum are statutes establishing a party as a broker after only one act, n6 while others require a pattern of conduct. n7

States also vary in licensing practices among brokerage firms and individual brokers. Some states require individual licenses for the principals before the brokerage firm itself can be licensed; n8 others license the brokerage but require designation of which principals will be functioning as brokers. n9 Because, in this latter circumstance, the misconduct of an individual broker can endanger the firm license, the trend is toward requiring individual licenses for all functioning brokers. n10 Real estate salespersons are also required to be licensed; a salesperson is one who engages in the same types of activities as a broker but does so under the supervision of a broker. In some states, it is required that an applicant for a broker's license have had prior experience as a salesperson. n11

From the statutory provisions quoted in the preceding subsection, it is also clear that states vary greatly in what kinds of activities require licensing or enable a license to be granted. n12 One common element of these lists of regulated activities, however, is the requirement that the activity be undertaken for some sort of compensation arrangement. Some activities and persons who might come under the statutory definition of parties needing to be licensed are specifically exempted. Exemptions vary widely from state to state, but the range of exemptions has been summarized as follows:

> persons (not otherwise brokers) acting *pro se*; public officials; banks, trust companies, and insurance companies acting in a fiduciary capacity; attorneys; trustees in bankruptcy; persons selling cemetery lots; and railroads and public utilities. In addition some states exempt auctioneers, although there is a definite split on this; some exempt on-site apartment managers, but some narrow this exemption still further by requiring that the managerial work be performed on an incidental basis. Further, some exempt newspapers and periodicals carrying advertisements for the sale of real property and land developers complying with the provisions of the federal Interstate Land Sales Disclosure Act, or improving real estate with new construction, shopping centers, office buildings or industrial parks. n13

A line of cases has developed over the issue of whether rental agencies that only distribute information need to be licensed. Generally, if any of the following factors are present in the agency's activities, the likelihood that licensing is required increases:

- direct contact with prospective customers,

- a confidential (or a fiduciary) relationship with customers,
- functioning as an intermediary in negotiations,
- drafting of transaction documents,
- receipt of compensation,
- serving the vendor as agent, or
- providing specialized services for individual customers. n14

Persons who act in the capacity of finders (for a fee), are exempt from licensing by statute in a few jurisdictions, but otherwise a finder is usually required to be licensed if the activity is conducted for compensation. n15

It will also be noted from the statutory provisions quoted above that the lists of prohibited conduct are very extensive. In the cases arising from such provisions, the most common complaint is against misrepresentation and false advertising. n16 Under the statutes it may sometimes be necessary to determine if the defendant's conduct was knowing or intentional. n17 In a few states, a judgment for damages against a broker may be satisfied out of a real estate recovery fund. n18 A fund that makes such a payment is subrogated to the claimant's rights against the broker, up to the amount of the payment.

FOOTNOTES:

(n1)Footnote 4. For additional discussion of state licensing requirements for real estate brokers, see Real Estate Brokerage Law and Practice, ch. 6, *Licensing*(Matthew Bender).

(n2)Footnote 5. *See, e.g.,* Tex. Rev. Civ. Stat. Ann. art 6573a, § 14(a). *Winsor v. Maine Real Estate Comm' n, 695 A.2d 1198 (Me. 1997)* (real estate commission concluded that designated broker for real estate agency had violated statute by allowing broker not licensed to work for agency to perform brokerage services); *Smith v. Stevens, 1996 Ohio App. LEXIS 4951* (Ohio App. 2 Dist. 1996) (a licensed real estate salesperson was found not to be a licensed broker under the state law, and therefore, he was not entitled to pursue unpaid commissions against the principals).

(n3)Footnote 6. *See, e.g.,* Va. Code Ann. § 54.1-2107.

(n4)Footnote 7. *See, Annotation. Who Is Real Estate Agent, Salesman, or Broker Within the Meaning of Statute,* 167 A.L.R. 774.

(n5)Footnote 8. *See, e.g.,* Fla. Stat. Ann. § 475.15.

(n6)Footnote 9. *See, e.g.,* Mass. Gen. Laws. Ann. ch. 112, § 87VV.

(n7)Footnote 10. *Annotation Revocation of Broker's License for Violation of Statutes or Regulation Prohibiting Use of Unlicensed Persons in Carrying Out Duties, 68 A.L.R.3d 530.* John D. Hastie, *Real Estate Acquisition, Development, and Disposition from the Developer's Perspective,* SB08 ALI-ABA 1 (Aug. 14, 1996).

(n8)Footnote 11. *See, e.g.,* Wash. Rev. Code Ann. § 18.85.090(1).

(n9)Footnote 12. Shane L. Goudey, Comment, *Too Many Hands in ihe Cookie Jar: The Unauthorized Practice of Law By Real Estate Brokers, 75 Or. L. Rev. 889 (Fall 1996).*

(n10)Footnote 13. D. Barlow Burke, Jr., Law of Real Estate Brokers §§ 9:15-9:17 (2d ed. 1992).

(n11)Footnote 14. *See, e.g., Brill v. Nevada Real Estate Div. of the Dept. of Commerce, 604 P.2d 113 (Nev. 1979); State v. Rentex, 365 N.E.2d 1274 (Ohio App. 1977); North Carolina Real Estate Licensing Bd. v. Aikens, 228 S.E.2d 493 (N.C. App. 1976); Whitaker v. Arizona Real Estate Bd., 548 P.2d 841 (Ariz. App. 1976).*

(n12)Footnote 15. Comment, *Recovery of Commissions by Unlicensed Real Estate Brokers, 80 Dick. L. Rev. 500, 502-504 (1976); Annotation Validity, Construction, and Enforcement of Business Opportunities or Finder's Fee Contract, 24 A.L.R.3d 1160. Smith v. Real Estate Agency, 939 P.2d 77 (Or. App. 1997)* (commissioner rationally determined that petitioners were equal partners in arranging purchase transaction and, thus, that half of finder's fee represented amount by which one petitioner profited from his unlicensed activities for purposes of determining penalty to be imposed).

(n13)Footnote 16. Robert D. Sack, P. Cameron DeVore, *Advertising and Commercial Speech,* 462 PLI/Pat 371 (Nov. 1996).

(n14)Footnote 17. *See, e.g.,* Md. Bus. Occ. Code Ann. § 16-322(a)(4).

(n15)Footnote 18. *See, e.g., Utah Code Ann* . §§ 61-2a-1, *et seq*.

+ §§ 95.07 - 95.09 have been adapted from George Lefcoe, Real Estate Transactions (Michie 1993).

Thompson on Real Property, Thomas Editions

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CHAPTER 95 REAL ESTATE BROKERS +

11-95 Thompson on Real Property, Thomas Editions § 95.04

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§ 95.04 Fiduciary and Other Duties of Brokers.

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A broker's fiduciary obligation to the client rests upon an agency relationship and a confidential or fiduciary duty. n19 The three components of this fiduciary obligation are:

- good faith and loyalty,
- use of reasonable care and diligence, and
- disclosure of information pertaining to the transaction. n20

Good faith and loyalty are violated, for example, by the broker making unilateral changes in the listing agreement, n21 engaging in any form of self-dealing (such as by becoming a participant in the transaction), n22 or executing an agreement on behalf of the customer. n23

The duty of reasonable care and due diligence is violated if a broker fails to inform the client of essential information (e.g., not clarifying the terms of a contract) n24 or fails to protect the client's interests (e.g., failing to advise a client to obtain a security interest). n25

The duty of disclosure is violated, for instance, if the broker fails to disclose known comparable sales prices. n26 Brokers have also wrongfully failed to disclose and obtain consent to dual agency relationships with both vendor and purchaser, but such dual agencies are increasingly coming under statutory or professional regulatory prohibition. n27 A dual agency may somewhat inadvertently arise in a property exchange when the broker selects from existing clients' properties an appropriate tract to exchange with the property of the specific client. n28

If the broker provides no services beyond those of finder or intermediary, then the only obligation and appropriate role is to bring the principals together; without further subsequent activity or duty, no further fiduciary duties attach. n29

If a breach of fiduciary duty is shown, the client need not show any damages but will probably be able to deny to the broker payment of the commission and will also be able to recover secret profits. n30

A wronged client may have an alternative cause of action in tort, especially for misrepresentation. While various statements of the elements of this tort have been formulated by the courts, it may generally be said that misrepresentations as to real estate transactions are tortious, if it is established:

(1) that they were made as statements of fact;

(2) that they were untrue and known by the defendant to be untrue;

(3) that they were made for the purpose of inducing the plaintiff to act upon them;

(4) that the plaintiff was in fact induced to act upon them, and

(5) that in so acting he was legally injured. n31

In one jurisdiction, a cause of action in products liability arose when a brokerage firm that was a wholly-owned subsidiary of a developer of a cooperative marketed a defective apartment. n32 This decision has not enjoyed wide acceptance.

FOOTNOTES:
(n1)Footnote 19. *Batson v. Strehlow, 68 Cal. Rptr. 589 (1968).* Ronald Benton Brown, Joseph M. Grohman, *Real Estate Brokers: Shouldering New Burdens, 11 Prob. & Prop. 14* (May/June, 1997).

(n2)Footnote 20. *Vivian Arnold Realty Co. v. McCormick, 506 P.2d 1074 (Ariz. App. 1973). Valentine v. Department of Licensing, 894 P.2d 1352 (Wash. App. 1995)* (broker breached fiduciary duty to vendor by distributing real estate contract proceeds before accounts relating to the property were settled).

Jay M. Feinman, *Economic Negligence In Residential Real Estate Transactions*, 25 Real Est. L.J. 110 (Fall 1996) (the broker has a duty of reasonable care to the buyer to make sure that the information it transmits is accurate); John D. Hastie, *Real Estate Acquisition, Development, and Disposition from the Developer's Perspective*, SB08 ALI-ABA 1 (Aug. 14, 1996); Katherine A. Pancak, Thomas J. Miceli and C.F. Sirmans, *Residential Disclosure Laws: The Further Demise of Caveat Emptor,* 24 Real Est. L.J. 291 (Spring 1996); Alan M. Weinberger, *Let the Buyer Be Well Informed? -- Doubting The Demise of Caveat Emptor, 55 Md. L. Rev. 387 (1996).*

Edmonds v. John L. Scott Real Estate, Inc., 942 P.2d 1072 (Wash. App. 1997); Letsos v. Century 21-New West Realty, 675 N.E.2d 217 (Ill. App. 1996) (transaction between real estate broker and property owner is presumptively fraudulent, to the extent that, at time of transaction, fiduciary relationship existed between parties and broker appears to benefit from transaction. Real estate broker can rebut presumptively fraudulent nature of transactions between himself and principal from which broker appears to benefit by showing that broker fully disclosed all relevant information to property owner before entering into transaction, paid adequate consideration, and provided principal with competent and independent advice); *Olsen v. Vail Assocs. Real Estate, Inc., 935 P.2d 975 (Colo. 1997)* (brokers did not breach fiduciary duty to vendors by not revealing that purchaser was negotiating to purchase adjoining property and ultimate sale price of that property). *But see* H. Glenn Boggs, *Real Estate Brokerage and Agency: Florida Contemplates Change, 71 Fla. B.J. 46 (Feb. 1997).*

(n3)Footnote 21. *Carnell v. Watson, 578 P.2d 308 (Mont. 1978).*

(n4)Footnote 22. *Lestoque v. M.R. Mansfield Realty, Inc., 536 P.2d 1146 (Colo. App. 1975). See, e.g., BAII Banking Corp. v. UPG, Inc., 985 F.2d 685 (2d Cir. 1993)* (New York courts rule that a broker employed by a principal may not engage in a related transaction on his own behalf without full and frank disclosure of his relation to the transaction to his principal).

(n5)Footnote 23. *Brezina v. Hill, 277 N.W.2d 224 (Neb. 1979).*

(n6)Footnote 24. *Wisnieski v. Harms, 199 N.W.2d 405 (Neb. 1972). Goldberg Realty Group v. Weinstein, 669 A.2d 187 (Me. 1996)* (broker breached fiduciary duty by failing to disclose a commission agreement to the vendor; commission was forfeited); *Smith v. Coldwell Banker Real Estate Services, 122 F. Supp. 2d 267 (D. Conn. 2000)* (seller, agent and broker held liable for not providing copy of lead paint report, even though the required disclosure form was provided); Stephanie A. Waxler, *Liabilities of Homeowners and Real Estate Brokers for Non-Disclosure in Illinois, 2000 Loy. Consumer L. Rev. 340; Brokers: Liability for Non-Disclosure of Lead Paint*, 30 Real Est. L. Rep. 4 (Feb. 2001); Residential Lead-Based Paint Hazard Reduction Act of 1992, *42 U.S.C. § 4851 et seq.*

(n7)Footnote 25. *Banville v. Schmidt, 112 Cal. Rptr. 126 (1974). Romereo v. Hariri, 911 P.2d 85 (Haw. App. 1996)* (investor deceived by broker; punitive damages awarded).

(n8)Footnote 26. *Moore v. Turner, 71 S.E.2d 342 (W. Va. 1952). Fitzgerald v. Midwest Bldg. Inspection, Inc., 911 S.W.2d 676 (Mo. App. 1995)* (broker's failure to disclose violated real estate commission regulation, but by itself did not give rise to a private cause of action).

Nancy Ann Connery, *Precontract Considerations*, 414 PLI/Real 75 (May 1996); Ann J. Rosenthal, R. Stuart Phillips, *Tell It Like It Is -- Sellers' Duties Of Disclosure In Real Estate Transactions Under California Law, 26 Golden Gate U.L. Rev. 473* (Spring, 1996); Annotation, *Real Estate Broker's Rights And Liabilities As Affected By Failure To Disclose Financial Information Concerning Purchaser, 34 A.L.R.4th 191.*

(n9)Footnote 27. *See, e.g., Frey v. Fraser Yachts, 29 F.3d 1153 (7th Cir. 1994)* (holding that a broker who fails to disclose his dual representation and obtain respective parties' consents forfeits his commission).

(n10)Footnote 28. *Buck v. Woodson, 209 S.W. 244 (Tex. Civ. App. 1919). Gryder v. Century 21 Oviedo Realty, Inc., 665 So. 2d 1134 (Fla. App. 1996)* (vendor's broker held not to have acted as a dual agent).

J. Clark Pendergrass, Commentary, *The Real Estate Consumer's Agency And Disclosure Act: The Case Against Dual Agency, 48 Ala. L. Rev. 277 (Fall 1996).*

(n11)Footnote 29. *See, Northeast Gen. Corp. v. Wellington Adver., Inc., 624 N.E.2d 129 (N.Y. 1993)* (A company hired to introduce a corporation to candidates interested in either acquiring or being acquired by the corporation was a "finder," having no fiduciary-type duties toward the corporation, rather than a "broker" who would have a defined fiduciary duty to act in the best and more involved interest of the principal; a "finder" is required to introduce and bring the parties together, without any obligation or power to negotiate the transaction, while a "broker" performs the same introduction task, and then must ordinarily also bring the parties to agreement).

(n12)Footnote 30. *Haymes v. Rogers, 219 P.2d 339 (Ariz. 1950). See, e.g., Hamady v. Trammell Crow Asset Co., 824 F. Supp. 580 (E.D. Va. 1993)* (holding that a real estate broker who fails to exercise the highest fidelity towards the principal is barred from recovering a commission); *Goldberg Realty Group v. Weinstein, 669 A.2d 187 (Me. 1996)* (a real estate broker's breach of fiduciary duty, as agent for seller of real estate, by failing to disclose material information to seller results in forfeiture of commission by broker; information is "material" to transaction if person with degree of business acumen would want that information before proceeding); *Letsos v. Century 21-New West Realty, 675 N.E.2d 217 (Ill. App. 1996)* (to the extent that real estate broker and brokerage firm breached their fiduciary duties to property owner by failing to disclose, prior to broker's closing on purchase of property owner's land, that broker had found third

party to purchase land, property owner might be entitled to return of commission paid in connection with sale of his property to broker as well as to profit that broker earned upon resale of property to third party). *But see Enright v. Jonassen, 931 P.2d 1212 (Idaho 1997)* (purchaser of ranch property who had prevailed on breach of fiduciary duty claim against real estate firm and listing agent based on failure to discover and disclose that property was located in floodplain district was not entitled to recover as damages commission paid to firm and agent by vendor of property out of sale proceeds, and had no standing to pursue disgorgement of commission). *See also* Roy T. Black, *Client Liability To Real Estate Brokers: From Contract To Punitive Damages*, 25 Real Est. L.J. 78 (Summer 1996).

(n13)Footnote 31. *Harper v. Adametz, 113 A.2d 136 (Conn. 1955). Edmonds v. John L. Scott Real Estate, Inc., 942 P.2d 1072 (Wash. App. 1997)* (broker engaged in unfair or deceptive practice when, with knowledge that vendors' representations were false, it gave purchaser a property information form indicating that vendors were aware of no existing problem with drainage); *Gennari v. Weichert Co. Realtors, 691 A.2d 350 (N.J. 1997)* (real estate broker held to have engaged in common-law fraud and violations of the Consumer Fraud Act in knowingly misrepresenting builder's experience and qualifications, and brokerage firm's own misrepresentations under the Consumer Fraud Act, and each was a proximate cause of damages sustained by purchasers of defective housing, which could be apportioned under the Comparative Negligence Act); *Williams v. Wells & Bennett Realtors, 52 Cal. App. 4th 857 (Cal. App. 1997)* (the duties of a seller's broker included "the affirmative duty to conduct a reasonably competent and diligent inspection of the residential property listed for sale and to disclose to prospective purchasers all facts materially affecting the value or desirability of the property that such an investigation would reveal); *Moser v. DeSetta, 816 F. Supp. 1039, 1054 (E.D. Pa. 1991).*

James R. Pomeranz, Note, *The State of Caveat Emptor In Alaska As It Applies to Real Property, 13 Alaska L. Rev. 237 (Dec. 1996);* Annotation, *Liability of Vendor Or Real-Estate Broker for Failure to Disclose Information Concerning Off-Site Conditions Affecting Value of Property, 41 A.L.R.5th 157 (1996).*

(n14)Footnote 32. *Berman v. Watergate West, Inc., 391 A.2d 1351 (D.C. 1978). See, e.g.,* Note, *Imposing Tort Liability on Real Estate Brokers Selling Defective Housing, 99 Harv. L. Rev. 1861 (1986)* (discussing tort liability of brokers "for failing to inform buyers about defects that could injure persons or property or about other factors materially affecting the value of property"); Anthony A. Babcock, Case note, *Peterson v. Superior Court: What Happened To The Paramount Policy? 28 Pac. L.J. 373 (Winter 1997)* (Products liability imposed upon landlords and developers).

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CHAPTER 95 REAL ESTATE BROKERS +

11-95 Thompson on Real Property, Thomas Editions § 95.05

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§ 95.05 Listing Agreements and Commissions.

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§ 95.05(a) Listing Agreements.

The listing agreement formally establishes the relationship between broker and client, but the incidents and terms of that relationship depend both on the type of listing agreement used and on the extent to which courts are willing to imply terms or interpret matters of ambiguity. n33

Six varieties of listing agreements have been described as follows:

> The first and most informal type of brokerage agreement is an *open listing*. Under it, the vendor is obligated to pay a brokerage commission only if and when the broker with a listing is the procuring cause in the production of a ready, willing, and able purchaser; ready, willing, and able, that is, to buy on the vendor's terms or, at least, with only an insubstantial deviation from those terms. When a listing agreement is silent as to type it is usually presumed to be an open listing; when the terms of a brokerage agreement are only partially stated, the vendor is liable for the commission as if it were an open listing.
>
> When several brokers have been contacted, the first one to produce this ready, willing, and able purchaser effects a termination of all other agencies... .The owner retains a broad power to terminate all agencies before any broker produces a suitable prospective purchaser... .Were this not the case, the vendor might encounter multiple liability... .
>
> The second type of listing is an *exclusive agency contract*. Here, the vendor designates a particular broker as "the vendor's exclusive agent" for the specified time the listing is in effect, but the vendor still retains the right to sell the property himself... .
>
> A third type of listing agreement is an *exclusive right to sell*. This is an exclusive agency agreement with one extra feature: the broker acquires the right to deal for the property in place of the vendor himself; conversely, the vendor loses the right to sell the property himself... .The negation of the owner's

right must be clear... .

A fourth kind of brokerage contract is the *net listing*, when the broker takes his or her commission exclusively from the purchase price received over the vendor's specified price. If the property is sold at the specified price, the broker gets nothing.

As of the mid-1980s, 17 states were reported to forbid net listings by statute. The use of this type of contract is discouraged in other states by regulation of the state real estate commission. Both the statutory prohibition, and certainly the administrative discouragement, of net listings, represent a sound public policy.

A fifth type of listing is the *option listing*, which is also discouraged by state regulators. The broker acquires an option to buy the property at a specified price, and when the broker exercises the option, his or her profit must be revealed. Indeed, when the contract is made, the broker should disclose all pending offers and other material information he possesses about the property. Otherwise, the fiduciary duty of the broker to the vendor may well be violated... .

A sixth type of brokerage agreement is the use of a *multiple listing service*. Here, each member broker agrees to refer his listing to all other members of the service and to share commissions on a predetermined basis with any other member who sells the listed property. n34

It is common practice for brokers to submit only some kind of exclusive listing agreement to prospective clients.

It can be said that the typical listing agreement is not mutual as to the term of consideration. The client promises to pay a commission if a buyer is found, but the broker does not promise to find a buyer. If, on the other hand, it is implied in the listing agreement that the broker use best efforts to find a buyer, then the consideration term becomes mutual. The agreement is usually revocable before the broker finds a buyer, although dispute has occurred over whether substantial effort by the broker before revocation amounts to a kind of compensable partial performance.

In addition to an indication of the type of agreement, the standard elements of a listing agreement include an adequate description of the property and the type of interest being sold, the price (possibly including a requirement of a minimum price for the sale), the commission, and the expiration date of the agreement. n35 Other terms may relate to special defects or restrictions in the title of the land being sold, handling of deposits, or damages upon purchaser default.

In most jurisdictions, an owner retains an implied right of revocation, even of an agreement for an exclusive right to sell for a definite period of time, unless the agreement specifically denies that right. n36 To reduce the likelihood of an untimely withdrawal by the owner, a broker may ask the owner to agree to a provision in the listing agreement that guarantees payment of the commission upon a sale that occurs even after withdrawal. Reciprocally, sometimes the inclusion of such a provision also leads to an inferred commitment by the broker to use best or reasonable efforts in finding a buyer. n37

Some listing agreements contain extension clauses intended to protect the broker from a seller who delays selling until after expiration of the listing agreement and then sells to a party already contacted by the broker. These clauses generally require payment of the commission in the event that such a sale occurs, and they have been upheld against challenges of unconscionability and voidness as against public policy. n38

§ 95.05(b) Commissions.

The most significant issue related to commissions is whether the commission is payable even under some circumstances where the actual sale does not take place. According to the majority rule, a broker is entitled to payment of the agreed upon commission if a buyer is presented who is ready, willing, and able to buy according to the seller's terms. n39

Under these circumstances the commission becomes payable when a contract of sale is executed and even if, because of the seller's misconduct, the transaction itself does not occur. n40 Some courts recognize, however, that if the contract contains contingencies--such as obtaining financing--the entitlement to payment of the commission does not arise until the contingencies are satisfactorily resolved. n41 Also,

> a broker is not entitled to recover a commission when his or her efforts merely produced one event in a chain of actions which contributed to a sale of the listed real property. These events must be the primary, predominant, efficient, or procuring cause of the transaction or transfer. A *procuring cause* is one originating a series of events which proceed without a break in continuity. [It] accomplishes the primary objective of [the broker's] employment--the procurement of a ready, willing, and able purchaser for the listed real property. n42

In some *procuring cause* cases, the awarding of damages is based not on the amount of the commission, but as compensation for services in *quantum meruit*. n43 A broker's failure to comply with applicable laws and regulations may prevent entitlement to commission. n44

This rule of sometimes leaving a seller liable for payment of the commission even when the purchaser has defaulted in failing to carry out the contract of sale has led to the appearance of a minority rule, deferring commission payment until a closing actually occurs. This position was adopted in the well-known case of Ellsworth Dobbs, Inc. v. Johnson. n45 Under this holding, if a purchaser defaults because of the purchaser's inability to pay or for any other reason beyond the seller's control, the commission has not been earned. This position, and variants of the position relating to different circumstances of culpability between buyer and seller, are being adopted by a growing minority of jurisdictions. n46

In some cases, the defaulting purchaser has left a deposit, which is forfeited upon the default. Quite frequently the deposit is divided equally between the seller and the broker, in lieu of payment of the commission. n47

FOOTNOTES:

(n1)Footnote 33. *See, e.g., Chicago Title Agency of Las Vegas, Inc. v. Schwartz, 851 P.2d 419 (Nev. 1993)* (Real estate brokers earn commissions on open listing agreements once they have produced a purchaser ready, willing, and able to purchase on the precise terms, and subsequent default by the purchaser will not limit the broker's right to commission without a specific contract to the contrary); *In re Southold Dev. Corp., 173 B.R. 63 (Bankr. N.Y. 1994)* (holding that commissions are due when the ready, willing, and able buyers are produced); *Southpace Properties v. Acquisition Group, 5 F.3d 502 (11th Cir. 1993)* ("If the property is sold or exchanged through the efforts of the broker or if the broker locates a prospect ready, willing, and able to purchase or exchange for the property, or in the event that the property is sold or exchanged while this agreement is in force, by the owner or anyone else, the broker will be entitled to a commission ... ."); IFA, Inc. v. Ellco Leasing Corp., No. 90-*C4895, 1993 U.S. Dist. LEXIS 4376 (N.D. Ill. 1993)* (contains two-part test for determining difference between exclusive agency contract and exclusive right to sell).

(n2)Footnote 34. D. Barlow Burke, Jr., Law of Real Estate Brokers§§ 2:13-2:36 (2d ed. 1992). *DiSalle Real Estate Co. v. Howell, 1996 690 N.E.2d 25 (Ohio App. 1996)* (the court discussed the distinction between "an exclusive agency contract" and "an exclusive right to sell"); *Eva Pendley Realty, Inc. v. Bagley, 464 S.E.2d 850 (Ga. App. 1995)* (advertising brochure signed by vendors did not create a written listing agreement entitling the broker to a lien for unpaid commission).

Ronald Benton Brown, Joseph M. Grohman, *Real Estate Brokers: Shouldering New Burdens, 11 Prob. & Prop. 14* (May/June, 1997); Matthew J. Leeds, *Outline*, 419 PLI/Real 9 (May 1997); John D. Hastie, *Real Estate Acquisition, Development, And Disposition From The Developer's Perspective*, SB08 ALI-ABA 1, at 92 (Aug. 14, 1996) (description of several customary contractual arrangements which are entered into between brokers and sellers); Annotation, *Validity, Construction, and Effect of Real-Estate Brokers' Multiple-Listing Agreement, 45 A.L.R.3d 190.*

(n3)Footnote 35. Annotation, *Validity, Construction, and Effect of Provision in Exclusive Listing Agreement for Payment of Commission on Termination by Owner, 39 A.L.R.3d 1270.*

(n4)Footnote 36. *See, e.g., Hood v. Gillespie, 230 S.W.2d 997 (Tenn. 1950).*

(n5)Footnote 37. *See, e.g., Baumgartner v. Meek, 272 P.2d 552 (Cal. App. 1954).*

(n6)Footnote 38. *See, e.g., Kaye v. Coughlin, 443 S.W.2d 612 (Tex. Civ. App. 1969).*

(n7)Footnote 39. *See McGavock v. Woodlief, 61 U.S. (20 How.) 221 (1858). See, e.g.,* Steven K. Mulliken, *When Does the Seller Owe the Broker a Commission? A Discussion of the Law and What It Teaches About Listing Agreements, 132 Mil. L. Rev. 265-87 (1991); Kaplon-Belo Assocs. v. Farrelly, 633 N.Y.S.2d 522 (1995)* (default on lease by lessee did not affect broker's right to commission); *Century 21 Pinetree Properties, Inc. v. Cason, 469 S.E.2d 458 (Ga. App. 1996)* (realty company acting on behalf of vendor could recover its commission from purchaser, in action arising from unconsummated sale of property, under plain language of purchase contract providing that purchasers would pay commission if they failed or refused to perform under contract); *In re John Chezik Imports, Inc., 195 B.R. 417 (Bankr. E.D. Mo. 1996)* (under Missouri law, when contract for sale is conditional contract, contract cannot become binding obligation upon parties unless and until all conditions are met and, until such conditions are met, broker has not earned commission because broker has not produced ready, willing and able buyer); *Loyola Fed. Sav. Bank v. Hill, 689 A.2d 1268 (Md. App. 1997)* (broker's claim for commission was granted because the court found that broker was "procuring cause" of sale to purchaser); *Muirloch Realty, Inc. v. Periodical Charter & Leasing, Inc., 1996 Ohio App. LEXIS 115* (Ohio App. 10 Dist. 1996) (where there is an exclusive listing contract, if a buyer, who was ready, willing and able to consummate the real estate transaction on appellees' terms, was procured within the period of the listing contract, the brokers are entitled to their commission); *Blackstone v. Thalman, 949 S.W.2d 470 (Tex. App. 1997)* (holding that prospective purchaser produced by real estate broker was not ready, willing and able to purchase vendor's property, on "any other price and terms acceptable to owner," as required to recover commission under listing agreement. As a matter of law, the phrase "at any other price and terms acceptable to owner," does not include proposed terms conditionally "agreed" to by the owner during negotiations, but never "accepted" by the successful conclusion of an agreement between the parties, i.e., an earnest money contract); *Aasheim v. Reum, 277 Mont. 471, 922 P.2d 1167 (1996); Professionals 100 v. Prestige Realty, Inc., 911 P.2d 1358 (Wash. App. 1996)* (under "procuring cause of sale" rule, when party is employed to procure purchaser and does procure purchaser to whom sale is eventually made, that party is entitled to commission regardless of who makes sale).

But see Moore and Moore Real Estate v. Aloi, 650 N.Y.S.2d 450 (N.Y.A.D. 1996) (broker who worked with unsuccessful bidders was not "procuring cause" of sale of residence, precluding recovery of brokerage commission from vendors, absent agreement on closing date or proof that unsuccessful bidders had financial ability to complete transaction); *Cushman & Wakefield, Inc. v. 214 East 49th Street Corp., 639 N.Y.S.2d 1012 (N.Y.A.D. 1996)* (broker's duty is to bring minds of buyer and seller to agreement on sale, i.e., its terms and rights, and until that is accomplished, no right to commissions accrues; it is not enough simply to open negotiations between parties).

(n8)Footnote 40. *See, e.g., Fourth Street Restaurant v. Venture Realty Group, Inc., 533 So. 2d 784 (Fla. App. 1988). DiSalle Real Estate Co. v. Howell, 690 N.E.2d 25 (Ohio App. 1996)* (Finding that seller rescinded contract in bad faith in attempt to escape having to pay two separate commissions was supported by evidence that the day after rescinding contract, seller contacted buyer directly to resume negotiations over property without broker's involvement, and that there was no material difference between rescinded contract and executed contract, except that latter contract excluded broker's six percent commission).

(n9)Footnote 41. *See, e.g., Shumaker v. Lear, 345 A.2d 249 (Pa. Super. 1975). Schenck v. HJI Assocs., 685 A.2d 481 (N.J. Super. Ct. App. Div. 1996)* (In real estate broker's commission agreement drafted in relation to contingent lease, where language of contract and interrelation of its provisions, along with parties' relationship and knowledge of situation, made it clear that broker knew the only way he would receive a commission would be if defendants obtained

financing, contractual provision that commission was earned upon signing of agreement did not override provisions that made any commission contingent upon defendant obtaining financing); *Asset Realty, Inc. v. Guyuron, 1996 Ohio App. LEXIS 5620* (Ohio App. 8 Dist., Dec. 12, 1996); *Tesco Real Estate, Inc. v. K-Y Residential, Commercial & Indus. Dev. Corp., 1997 Ohio App. LEXIS 2829* (Ohio App. 11 Dist., June 27, 1997).

(n10)Footnote 42. D. Barlow Burke, Jr., Law of Real Estate Brokers §§ 3:45-46-3:48 (2d ed. 1992). *Cushman & Wakefield, Inc. v. 214 East 49th Street Corp., 639 N.Y.S.2d 1012 (N.Y.A.D. 1996)* (Real estate broker failed to establish entitlement to commission in connection with eventual sale of property after broker's exclusive brokerage agreement lapsed, even though agreement entitled broker to commission if property was submitted to purchaser during term of agreement and even though broker had made two contacts with son of eventual purchaser during term of agreement; even if, as broker apparently alleged, purchaser merely acted as alter ego for son in transaction, property was first submitted to son by another party, and there was no evidence of proximate link between broker's two encounters with son and eventual purchase under terms different from those that had been proposed by broker); *Coldwell Banker Town & Country Realty of Hastings, Inc. v. Johnson, 544 N.W.2d 360 (Neb. 1996)* (Real estate broker was not entitled to a commission on sale of property, where no sale was made during existence of agreement between vendors and broker, sale was the result of work of vendors' attorney, not the result of anything done by broker, and neither list price nor offer obtained by broker was on substantially the same terms as were finally agreed upon).

(n11)Footnote 43. *Marta v. Nepa, 385 A.2d 727 (Del. 1978).*

(n12)Footnote 44. *McDade & Co. v. Friendswood Dev. Co., 911 S.W.2d 541 (Tex. App. 1995).*

(n13)Footnote 45. *236 A.2d 843 (N.J. 1967).*

(n14)Footnote 46. *Annotation. Real-Estate Broker's Right to Recover Commission from Seller Where Sale Fails Because of Seller's Failure to Deliver Good Title/-Modern Cases, 28 A.L.R.4th 1007. See also,* D. Barlow Burke, Jr., Law of Real Estate Brokers §§ 4:1-4:81 (2d ed. 1992). *See also* Annotation, *Modern View As To Right Of Real Estate Broker To Recover Commission From Seller-Principal Where Buyer Defaults Under Valid Contract of Sale, 12 A.L.R.4th 1083.*

(n15)Footnote 47. *See, e.g., Taylor Real Estate & Ins. Co. v. Greene, 151 So. 2d 397 (Ala. 1963).*

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CHAPTER 95 REAL ESTATE BROKERS +

11-95 Thompson on Real Property, Thomas Editions § 95.06

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§ 95.06 Restrictions on Brokers' Activities.

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§ 95.06(a) Unauthorized Practice of Law.

The issue of whether a broker is improperly engaging in the practice of law is most often joined over the matter of filling in standard form contracts for real estate transactions. Generally, it is held that the broker may indeed fill in the contract forms but may not go so far as to draft a deed or complete forms that are so complex that legal advice is required to understand the consequences of such forms. According to one judicial rationale, filling in the blanks of standard form contracts is acceptable when it is incidental to the broker's business. n48 Countervailing considerations evaluate whether clients and the public generally are adequately protected from mistakes, whether their convenience is adequately served, and whether the courts usually conclude that it is in the public interest, or at least not harmful, to permit brokers to fill in standard forms. n49

If a broker goes beyond filling in terms of a standard form, such as by adding or deleting provisions, or if separate compensation for such services is given, a charge of unauthorized practice of law may succeed. n50 These judicial pronouncements may be adjusted by statute n51 or constitution. n52

§ 95.06(b) Antitrust Violations.

The earlier practice among brokers' groups of publishing and adhering to schedules of uniform prices for services has been held to be illegal price-fixing under the Sherman Act. n53

It has also been held that a requirement to be a member of the National Association of Realtors degrees before obtaining access to a local multiple listing service may be an anti-trust violation as an unreasonable restraint of trade. n54

§ 95.06(c) Civil Rights Violations.

Brokers are prominently featured (and restricted in their discriminatory activities, if any) in the Fair Housing Act of 1968, n55 which prohibits various forms of discrimination in the advertising, selling, and renting of housing. Brokerage

activity may also be restrained by the Civil Rights Act of 1866, n56 which prohibits various forms of racial discrimination.

FOOTNOTES:

(n1)Footnote 48. *See, e.g., Duncan & Hill Realty, Inc. v. Department of State, 405 N.Y.S.2d 339, appeal dismissed, 409 N.Y.S.2d 210 (1978). See, e.g.,* Edward B. Strong, *Unauthorized Practice of Law in Real Estate Transactions, 15 J. Legal Prof. 441-45 (1990);* Shane L. Goudey, *Too Many Hands In The Cookie Jar: The Unauthorized Practice Of Law By Real Estate Brokers, 75 Or. L. Rev. 889 (Fall 1996);* R. Randy Lee, *The Limited Ability Of Real Estate Brokers To Prepare Contracts, 69 N.Y. St. B.J. 32* (Mar./Apr., 1997); Peter J. Birnbaum, *Illinois Real Estate Lawyers And The Battle To Control Residential Closings, 84 Ill. B.J. 132 (Mar. 1996);* Elizabeth S. Holmes, *What Is The Unauthorized Practice Of Law And How Is It Regulated? 76 Mich. B.J. 580 (June 1997);* Michael Braunstein, *Structural Change And Inter-Professional Competitive Advantage: An Example Drawn From Residential Real Estate Conveyancing, 62 Mo. L. Rev. 241 (Spring 1997)* (The article explains how United States lawyers lost the monopoly they once enjoyed over residential real estate conveyancing and how structural change, whether economic, technological or both, influences the demand for professional, including legal, services); R. Randy Lee, *Title Work And The Unauthorized Practice Of Law, 68 N.Y. St. B.J. 16 (Dec. 1996)* (discusses the unauthorized practice of law in real estate conveyances in light of legal and ethical responsibilities); Annotation, *Grounds for Revocation or Suspension of License of Real-Estate Broker Or Salesperson. 7 A.L.R.5th 474; The War Between Attorneys and Lay Conveyancers - Empirical Evidence Says "Cease Fire! 31 Conn. L. Rev. 423 (Winter 1999).*

Perkins v. CTX Mortgage Company, 969 P.2d 93 (Wash. 1999) (a real estate broker is permitted to complete simple printed standardized real estate forms, which forms must be approved by a lawyer, it being understood that these forms shall not be used for other than simple real estate transactions which arise in the usual course of the broker's business and that such forms will be used only in connection with real estate transactions actually handled by such broker as a broker, and then without charge for the simple service of completing the forms); *Price v. Stewart, 28 Pa. D. & C.4th 352 (1996)* (A woman who enlisted the aid of a non-lawyer broker to prepare deeds conveying two properties to her daughter in exchange for a life estate stated a cause of action for unauthorized practice of law where the broker allegedly omitted the provision for a life estate and where there was no allegation the deeds were incident to another transaction which the broker was entitled to handle). *See,* Shane L. Goudey, "Too Many Hands in the Cookie Jar: The Unauthorized Practice of Law By Real Estate Brokers," *75 Oregon L. Rev. 889 (Fall 1996).*

(n2)Footnote 49. *See, Pope County Bar Ass'n v. Suggs, 624 S.W.2d 828 (Ark. 1981).*

(n3)Footnote 50. *Cornell Assoc. Realty Ltd. v. Shaffer, 619 N.Y.S.2d 822 (1994)* (real estate broker and salesperson engaged in the unauthorized practice of law by failing to provide a promised refund in a dual agency situation); *but see Herring v. New York State Dep't of State, 92 A.D.2d 720, 461 N.Y.S.2d 114 (1983)* (brokers interpreting the relevant statute that allowed them to retain the buyer's commission upon the buyer's default did not constitute the unauthorized practice of law).

(n4)Footnote 51. Utah Code Ann. § 61-2-20.

(n5)Footnote 52. The Arizona Constitution now permits brokers to draft any type of document, without charge, deemed incidental to real estate transactions. Ariz. Const. Art. XXVI.

(n6)Footnote 53. *United States v. National Ass'n of Real Estate Boards, 339 U.S. 485 (1950). See, e.g.,* Annotation, *Activities of Real-Estate Agent or Association as Subject to Federal Antitrust Laws,* 44 A.L.R. 743. *Re/Max Int'l, Inc. v. Realty One, Inc., 924 F. Supp. 1474 (N.D. Ohio 1996)* (Real estate brokers had not established that competitor with 48 percent market share in one city and 50.6 percent market share in another monopolized market in those cities; no evidence was presented that competitors' market share had increased after they initiated alleged anticompetitive activity and there was no evidence that there were entry barriers to real estate industry).; Annotation, *Application of State Antitrust Laws to Activities Or Practices of Real-Estate Agents Or Associations, 22 A.L.R.4th 103;* Annotation,

Activities Of Real-Estate Agent Or Association As Subject To Federal Antitrust Laws, 44 A.L.R. Fed. 743.

(n7)Footnote 54. *Thompson v. Metropolitan Multi-List, Inc., 934 F.2d 1566 (11th Cir. 1991).* Bruce D. Greenberg, Gary K. Wolinetz, *25 Years of the New Jersey Antitrust Act, 26 Seton Hall L. Rev. 637, at 652 (1996).*

(n8)Footnote 55. *42 U.S.C. § 3601 et seq.* Case Law Development, *Zoning, Housing, Custody,* 20 Mental & Physical Disability L. Rep. 375 (May/June 1996) (An Illinois federal court held that the parents of two adult men with developmental disabilities and a real estate broker had standing to sue a condominium association under the Fair Housing Act Amendments (FHAA) for discriminatorily impeding a housing sale to those men); *Fair Housing Council of Suburban Philadelphia v. Boyertown Area Times, 945 F. Supp. 826 (E.D. Pa. 1996).*

(n9)Footnote 56. *42 U.S.C. § 1982. See also DeKalb Real Estate Bd., Inc. v. Chairman, 372 F. Supp. 748 (N.D. Ga. 1973)* (Homeowner-sellers are not subject to the Federal Fair Housing Act rules; however, brokers are subject to the Federal Fair Housing Act and must sell regardless of race); *People v. C. Betts Realtors, Inc., 361 N.E.2d 581 (Ill. 1977)* (The Illinois statute that forbids buyers from contacting potential seller after the buyer has notice that potential seller is not interested in selling does not violate the constitutional right to free speech); *but see Pearson v. Edgar, 965 F. Supp. 1104 (N.D. Ill. 1997)* (statute prohibiting real estate brokers from soliciting owner to list or sell the house if owner has provided notice of his desire not to be solicited violated the First Amendment right to free speech); *A Requiem for Blockbusting; Law, Economics, and Race-Based Real Estate Speculation 67 Fordham L. Rev. 1145 (1998).*

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CHAPTER 95 REAL ESTATE BROKERS +

11-95 Thompson on Real Property, Thomas Editions § 95.07

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§ 95.07 Practical Aspects of Real Estate Brokers' Activities.

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§ 95.07(a) Selecting a Broker.

§ 95.07(a)(1) Should Home Sellers Use Brokers?

Dollar-conscious sellers must decide whether to deal with a broker or try to market their own houses as "for sale by owner" ("fsbo") to save the broker's commission. n57 For the real estate-wise seller arranging an uncomplicated deal, the savings can be significant. The brokerage commission of 5-7% of the selling price may siphon as much as one-third of the seller's net equity after the seller has paid his mortgage. n58 Still, brokers are involved in eight or nine out of ten home sales in the United States.

The seller who attempts to sell without a broker assumes responsibility for performing the broker's functions. A real estate novice selling without a broker runs the risk of (1) delaying or losing the deal, (2) getting outmaneuvered by a savvy buyer or selling broker, (3) and becoming liable for failure to comply with government regulations concerning closings. Frequently, sellers list with a broker only after being unable to sell the property on their own.

§ 95.07(a)(2) How Brokers Work.

The seller's broker is called the listing broker. A listing broker markets the property by running ads, preparing brochures, holding weekend "open houses," and arranging to show the property to prospects. Brokers are frequently better able to show homes, since sellers are unable to view their homes objectively and negative comments from prospective buyers could easily spark disputes. ("Oh, what hideous wallpaper and those dumb-looking chintz curtains!")

The broker also arranges to list the house in the area-wide Multiple Listing Service (MLS). Brokers who subscribe to the MLS agree to pool their listings and to split commissions between the listing and selling broker. n59 The MLS issues a consolidated book and maintains a computerized database of available listings indexed by price and area. This system allows buyers easily to preview the market and view only houses that meet their criteria and are within their price range.

When a likely buyer is found, the broker puts the deal together, first by getting the buyer to sign an offer (often in the form of a deposit receipt), and then working with the seller to counter until both agree and sign a contract.

Brokers can help buyers and sellers reconcile their disparate price expectations by showing them actual recent sales prices in the neighborhood. Listing brokers may recommend needed repairs and improvements that would make the house easier to sell. They may offer buyers the names of qualified inspectors. Successful brokers work regularly with title insurers, escrow agents and lenders, and are often in a better position than buyers or sellers to appreciate and recommend reliable ones. The real estate broker may serve as an escrow agent, holding the buyer's funds and the seller's deed. n60

The contract will usually have contingencies attached to time frames. A good real estate agent keeps a deal on schedule by making sure the parties open escrow quickly, and that the buyer promptly receives the title report, conducts inspections, fills out loan applications, and so on. The agent has a great incentive to marshal the deal to closing since the agent won't be paid until then.

§ 95.07(a)(3) Finding a Broker.

Finding a good broker takes work. It's easy to see which brokers are active in the neighborhood since "For Sale" and "Sold" signs carry the listing broker's name. n61 Disguised as a buyer, a seller can join the "lookie loos" at an open house to judge the competence of a broker firsthand. A seller should interview two or three brokers to ask about their experience, marketing plan for new listings, and recommendations about cosmetic work to maximize the marketability of the house. n62 The seller should also ask the brokers to recommend a listing price, keeping in mind that the broker isn't promising that the house will sell at that price. The broker who recommends the highest listing price is not necessarily the best. Some brokers lure sellers by pegging their suggested listing price well above current values, only to persuade the seller to reduce the price after the property has lingered on the market for months and the listing has grown stale. The best brokers recommend realistic listing prices based on current market conditions. Finally, the seller should contact client references to ensure that they were satisfied with the service received.

When the seller has selected the broker, the parties agree on terms and often sign a written listing agreement.

§ 95.07(a)(4) Should Homebuyers Use Their Own Brokers?

Prospective buyers must decide whether to rely on the seller's broker alone or seek guidance by latching onto a broker of their own. This may depend on whether the buyer is set on buying a newly built house or expects to canvass the "pre-owned" house market. One consumer publication says buyers "don't need an agent just to drive to a model home" and introduce the buyer to a developer. The agent-less buyer can negotiate the developer out of the fee the developer would otherwise pay to the agent, not necessarily by getting a reduction in the sales price but through "significant upgrades." n63

The buyer's broker is called the "selling" or "cooperating" broker. Prospective buyers must decide whether to rely on the seller's broker alone or seek guidance by latching on to a broker of their own.

Only occasionally will *buyers* sign written agreements with brokers. When they do, these agreements may be for exclusive representation, hourly fees for services, or "open" commitments to pay the broker for leading the buyer to a deal. Typically, however, the buyer signs no written agency agreement with the broker. The industry relies on the seller's broker (the listing broker) to have put the listing agreement in writing, and to have obtained the seller's written consent for the listing broker to cooperate with other brokers.

A buyer's broker matches MLS offerings to the buyer's needs and ability to pay. The would-be "selling" broker takes

buyers from house to house, offers advice, helps negotiate and close the deal--usually for nothing more than a share of a fee the seller is already obligated to pay through the listing agreement. The agent or broker often knows where financing can be found and shepherds buyers to it. Some real estate firms combine real estate and mortgage brokerage services. In their capacity as mortgage brokers they actually raise mortgage capital and make it available to their real estate sales clients. n64

Many prospective buyers shop alone, relying on newspaper ads, "for sale" signs, and word of mouth. Among those who use brokers, few buyers obligate themselves to a single broker as their exclusive agent in finding a house. n65 A small percentage of brokers insist the buyer agree to deal exclusively with that broker as the buyer's representative. Most buyers trudge from broker to broker to see what each will present. Only the broker lucky enough to lead the buyer to the "winning" house gets to split the commission with a "listing" broker working an "exclusive."

In the future, the Internet will probably become a valuable resource for the homebuyer. Currently, companies exist to relay MLS listings over the Internet to potential buyers. The buyer fills out a form specifying her home-shopping needs. The company then simplifies and downloads understandable MLS listings to the consumer's home computer for review. Once the potential buyer sees a property she likes, the broker arranges a showing.

Because the buyer's broker is paid out of the sales proceeds by the listing broker, her services are "free" to the buyer. Occasionally, however, when the buyer and seller wrestle over the last few dollars, especially in a slow market, the listing broker may consent to reduce the commission. This is easier to do when there is only one broker in the deal. A buyer who has enlisted the help of an independent agent must persuade the agent to cut the agent's fee as well.

In the event that two buyers are competing heatedly for the same property, one represented by a broker other than the listing agent, and the other not, the listing agent has a financial incentive to steer the seller towards the unrepresented buyer. If the unrepresented buyer wins the bidding war, the listing broker keeps all the sales commission and doesn't have to share it with a buyer's agent.

Suppose a buyer exploits a broker to the fullest, rejecting deal after deal, finally signing a valid purchase-and-sale agreement and then breaching it. Does the buyer owe her broker a commission independent of what she may owe the seller and the seller's broker as a consequence of breaching the purchase-and-sale contract? Yes. *The buyer may be liable to her own broker for the full commission.* The buyer's broker is *not* bound by a liquidated damage clause in the purchase-and-sale agreement. Under these provisions, typically, even the seller's broker can claim no more against the breaching buyer than a share of the liquidated damages retained by the seller -- minus the seller's out-of-pocket costs. In any event, the purchase-and-sale agreement is between the buyer on one hand and the seller and seller's broker on the other hand. The buyer's broker isn't a party to that contract. So the buyer's broker isn't barred from suing the breaching buyer for actual damages. Courts in several states have implied a promise by the buyer running in favor of the buyer's broker to pay a full commission for breaching the purchase contract. The buyer's broker becomes a third-party beneficiary of the buyer's promise made to the seller to buy the property. n66 Some brokerage firms devise procedures to screen out this bias, but no screen is flawless.

§ 95.07(a)(5) Broker Licensing Requirements.

In all states, real estate agents and brokers must acquire and maintain an agent's or broker's license. n67 They can't recover commissions unless they comply. n68 In this section the terms "broker" and "sales agent" are used synonymously, but in the industry they imply distinct licensing standards. n69 In order to obtain an agent's license, state legislatures typically require the applicant to have passed the appropriate exam, be of good standing and reputation, and pay an annual license fee. n70 Brokers' licensing requirements are usually more stringent. For example, California law requires a broker applicant to have obtained at least two years of agent's experience or its equivalent, or a four-year college degree with a real estate emphasis, n71 in addition to taking a much more comprehensive exam.

The constitutionality of broker licensing laws has been challenged and universally upheld. In a landmark opinion, Justice Cardozo explained:

> [t]he Legislature has a wide discretion in determining whether a business or occupation shall be barred to the dishonest or incompetent. Callings, it is said, there are, so inveterate and basic, so elementary and innocent, that they must be left open to all alike, whether virtuous or vicious. If this be assumed, that of broker is not one of them. The intrinsic nature of the business combines with practice and tradition to attest the need of regulation. The real estate broker is brought by his calling into a relation of trust and confidence. Constant are the opportunities by concealment and collusion to extract illicit gains. We know from our judicial records that the opportunities have not been lost. With temptation so aggressive, the dishonest or untrustworthy may not reasonably complain if they are told to stand aside. Less obtrusive, but not negligible, are the perils of incompetence... .The Broker should know his duty. To that end, he should have "a general and fair understanding of the obligation between principal and agent... ." Disloyalty may have its origin in ignorance as well as fraud. He should know, as the Legislature has said ... what is meant by a deed or a lease or a mortgage... . n72 ... We hold that the Legislature acts within its lawful powers when it establishes a system of licenses for real estate brokers with annual renewals. n73

The licensing sections of the California Business and Professions Code, §§ 10130 through 10148, begin with the admonition: "It is unlawful for any person to engage in the business, act in the capacity of, advertise or assume to act as a real estate broker or a real estate salesman within this state without first obtaining a real estate license... ." n74 Violators can be brought by the Commissioner of Real Estate "before any court of competent jurisdiction." n75

The Code forbids suits for brokerage fees without the claimant alleging and proving to be a duly licensed real estate broker or real estate salesman at the time the cause of action arose. n76 An exception, however, is made for an attorney at law rendering legal services to a client. n77 Attorneys are also allowed to collect fees as real estate brokers, but only if they are licensed as brokers and perform brokerage--not legal--services at the time. n78 As a result, many people hold licenses both as brokers and lawyers. They maintain dual licenses and sometimes earn brokerage commissions. Their challenge comes in building and maintaining an impervious wall to separate their legal from their brokerage services.

An attorney purporting to advise a buyer or seller who also stands to benefit from a closing by raking in a broker's commission isn't well-positioned to offer independent legal judgment, since he has so great a stake in the deal closing. The attorney may advise the client to close on terms detrimental to the client just to pocket the commission.

Owners marketing their own property are exempt from broker licensing laws by implication since the purpose of the act is to protect the public against amateurs posing as qualified professionals.

State real estate commissions can suspend or revoke the licenses of salespeople and brokers for misconduct, and brokers are accountable for the behavior of the salespeople who work for them. n79

A broker who has had his or her license revoked, yet still continues to enter listing agreements representing him or herself as a licensed broker, may be guilty of fraud and intentional misrepresentation, possibly liable for punitive damages. n80

Another exception to the "no license, no commission" rule is for finders. People without a broker's license often claim and are able to collect commissions as finders. n81

> A finder is ... a middleman who introduces the parties, supplies the information to one or both about the other and is required to do little else, whereas a broker negotiates on behalf of one of the parties or performs, with the interests of one party and against the interest of the other... .The finder is a person

> whose employment is limited to bringing the parties together so that they may negotiate their own contract. n82 ... But any participation, however slight, in the negotiations will bring him within the definition of a broker and require him to be licensed. n83

Many states refuse to distinguish between brokers and finders, not wanting to sanction a big loophole in their brokerage licensing statutes. n84 Other states accept the distinction between a finder and a broker, n85 reasoning that finders, whose duties are limited solely to introducing one party to another, don't need the competence, training, and professionalism required of brokers as long as they don't step over the line by participating in the negotiations, drafting the contract, or closing the deal. n86

§ 95.07(b) Listing Agreement: Is a Writing Required?

§ 95.07(b)(1) An Even Split.

In half the states, brokers' listing agreements need not be in writing. Broker agency agreements are not generally regarded as contracts for the sale of real estate, and so aren't covered by general Statute of Frauds provisions. n87

In half the states, there is a special provision appended to the state's Statute of Frauds requiring brokerage agency agreements to be in writing; a provision in the licensing statutes to that effect; or state administrative regulations requiring listing agreements to be in writing. n88 To satisfy these requirements, the writing must be signed by the broker and the owner, describe the property to be sold, and the amount of the commission. n89 California's Statute of Frauds, for example, has a paragraph covering "an agreement authorizing or employing an agent, broker, or any other person to purchase or sell real estate, or to lease real estate for a longer period than one year ... for compensation or a commission." n90

None of these laws requires a written agreement among brokers to split commissions. A person licensed as both an attorney and a broker brought suit to recover a commission and was met with a defense that he lacked a written listing agreement. He argued that since attorneys don't need written agreements to collect their fees, he could collect his commission as an attorney. The Texas appellate court found the services he had rendered as an attorney incidental to the brokerage services he had performed. He was not exempt from the statute requiring written broker's listing agreements, just for being an attorney. n91

§ 95.07(b)(2) Which Group of States Is Correct?

Should promises to pay brokerage commissions have to be in writing for brokers to enforce them? This sort of question lies behind all Statute of Frauds requirements. The case for written listing agreements, like the case for Statutes of Frauds generally, is based on bringing home to people the seriousness of what they are doing and in clarifying the details of the engagement: the amount of the commission, the property to be sold, at what price, and the type of listing agreement as well as the broker's obligations under it. In addition, a written listing agreement gives the seller evidence that a fiduciary relationship has been created between the seller and broker. One author has put in economic terms the calculation legislators should have been making: "Although the requirement increases the transaction costs associated with the preparation of the writing, a net savings results because the requirement eliminates the costs associated with the fraud, perjury, and misrecollection that otherwise would be prevalent." n92

The writing requirement for listings as well as broker licensing laws has been cynically ascribed to the lobbying efforts of successful brokers as a way of keeping out part-timers, like housewives, out-of-work actors, and moonlighting schoolteachers. Consumers, though, may be grateful. The writing requirement may save some naive homeowners from unwittingly obligating themselves to pay commissions to brokers who try to solicit listings and claim later they got a go-ahead from a homeowner who thought she was just being polite by not saying "no, get lost."

As one commentator explains, "The truism 'talk is cheap' is not necessarily true for an owner/seller talking with a real estate broker... . [O]wners who wish to market property should deal with brokers only pursuant to written agreement." n93

Commercial developers are enthusiastic about the written listing requirement because it cuts down on the flood of unsolicited letters they receive from brokers offering potential development sites who would later claim commissions if the developer bought one of those sites, even if the developer had learned about the site without outside help.

As a written agency agreement may protect sellers against brokers falsely claiming commissions, similarly, the requirement of a written listing agreement may protect brokers against reneging sellers falsely denying what they owe.

An argument often put forward against the writing requirement is that disputes over commissions that would have been avoided by a written listing agreement are rare and don't justify the burden of mountains of paperwork put on everyone. The volume of litigation won't diminish, just the content of the suits. In other words, there are as many disputes likely to arise because a broker neglected to obtain a written listing agreement as there are suits likely to be prevented because the broker did obtain a written listing.

The written listing requirement may also be faulted because once the brokers put their minds to drafting form listing agreements, those contracts are going to be specifically designed to benefit the broker. Sellers will fare far worse on many occasions than they would have under the common law of agency (designed to protect principals) if they are required to sign a form listing designed to protect agents.

§ 95.07(b)(3) Exceptions to the Writing Requirement.

§ 95.07(b)(3)(i) Finders.

The states where brokerage agency agreements must be in writing are split on whether unlicensed "finders" can collect a commission without a written agency contract. n94

In jurisdictions that require brokers and/oor finders to have written listing agreements, those who don't produce signed contracts are unable to recover quantum meruit--for the value of their efforts. n95 For finders, there are four possibilities under state licensing laws and requirements regarding written listing agreements:

(1) some states require neither a license nor a written agreement,

(2) some states require both,

(3) some states require a broker's license but no written listing authorization agreement, and

(4) some states require a written authorization to find but no broker's license. n96

§ 95.07(b)(3)(ii) Equitable Estoppel.

There is a well-established exception to the statute of frauds when one party has partly or completely performed the bargain. A variation of this exception appears in brokers' suits for commissions on oral listings in states requiring that those listings be written.

The exceptions are for fraud or equitable estoppel. The cases arise typically when the client actually buys or sells property with the broker's assistance. The broker claims to have been promised a commission if the deal worked out; the broker performed; the client got the benefit of the transaction, and then refused to pay the broker. The broker asks the

court to "equitably estop" the client from denying the promise. n97

§ 95.07(b)(3)(iii) Fraud.

A fraud claim in this setting can be asserted in either of two forms:

(1) the client promised to pay the commission;

(2) the client also promised to put the promise into written form or said it was already in writing, and it wasn't.

Honoring claims for commissions based on fraud or equitable estoppel defeats the writing requirement. Many courts recognize this and aren't sympathetic to the fraud and equitable estoppel exception. For instance, in California, although finders are allowed to present and collect claims based on equitable estoppel theories, n98 brokers are not.

The landmark California case denying brokers the equitable estoppel defense to the Statute of Frauds is Phillippe v. Shapell. n99 A broker, Phillippe, had spent several years trying to locate development sites for a major commercial homebuilder, Shapell. He finally succeeded in identifying a site that Shapell bought nearly two years after Phillippe, himself, had abandoned efforts to conclude the sale. Shapell was also a licensed broker and a successful developer, and refused to pay a commission, contending he had identified the site on his own. The court dismissed the broker's case.

Other state courts have done the same. n100 In *Dooley v. Lachut*, n101 the broker claimed fraud where the seller refused to sign the listing broker's written commission agreement, stating that he was a man of his word and that the commission would be paid. The seller then sold the property to a buyer the broker had found. The Rhode Island Supreme Court maintained its firm stance against brokers without written agreement:

> Real estate brokers who enter into oral agreements in contravention of clause sixth [which requires the commission agreement to be in writing] of our statute of frauds can expect no assistance from the courts in their effort to extricate themselves from their own folly. If a real estate broker fails to obtain a written contract of employment from his customer, the broker proceeds at the broker's own peril. The plaintiffs' allegations as to the fraud practiced upon them by the defendants are of no avail. To hold otherwise would reopen the floodgates of litigation which were closed when clause sixth became law. n102

§ 95.07(b)(4) Seller's Broker May Recover Against Buyer for Unlawful Interference--Even Without a Written Listing Agreement.

Ironically, a *buyer* who takes advantage of a broker's efforts may be liable in tort for the commission even if the broker had no enforceable listing agreement and thus no case for a commission against the seller who hired the broker.

Assume, for example, K entered an oral open listing for his farm with broker M. Broker M drove client D to the site, showed him around, told him the price was $30,000, and waited for D's call, promised five or six weeks hence if D was interested. The call never came because D went to K directly and bought the farm for $25,000. "Are you sure no broker showed you to the property?" K asked. "Absolutely sure," lied D, and signed a written statement to that effect. K wouldn't have cut his price $5,000 if he had thought a broker's commission was due.

Soon M learned about the sale. Irked, broker M sued buyer D for the lost commission on the theory that D had *unlawfully interfered with M's business, resulting in a deprivation of prospective or potential economic advantage*.

Did it matter that M had no written agreement with K, the seller, and hence no contract right to collect a commission

directly from K? "Not at all," a New Jersey appellate court decided.

> The circumstance that Kramer's agreement to pay a commission was oral and did not satisfy the Statute of Frauds does not remove the present action in tort against Deppert from the application of the above principles. The Statute of Frauds was enacted for the protection of the party sought to be charged. It is personal and not available to strangers to the agreement. n103

The legal basis for the broker's claim in a case like this is that the buyer tortiously interfered with the broker's prospective advantage. The elements of the tort are:

> 1. An economic relationship either between seller and broker or buyer and broker, with the probability of future economic benefit for the broker. Note the phrase "economic relationship," no binding contract is needed.
>
> 2. The defendant knew the relationship existed.
>
> 3. The defendant intentionally acted to disrupt the relationship.
>
> 4. The defendant succeeded in disrupting the relationship.
>
> 5. The defendant's act proximately caused damage to the plaintiff. n104

Vendors, too, may be liable in tort if they interfere with a listing or selling broker's legitimate efforts to fulfill the terms of their agreement. Remember, the absence of a written listing agreement will foreclose a cause of action in contract when the state requires written listing agreements, but the tort claim door remains wide open, writing or not.

§ 95.07(c) Negotiating the Listing Agreement.

The written listing agreement should contain the following information: "(1) the names of the parties; (2) a description of the property; (3) the sales price, including terms of payment; (4) the amount of compensation; (5) the termination date of the broker's employment; and (6) any additional specific provision, e.g., whether there is an exclusive agency or right to sell." n105

Theoretically, all the provisions of the listing agreement are negotiable. The form listing agreements are prepared by brokerage firms and state Realtors degrees Associations, and thus tend to favor the real estate broker. n106 The homeowner who has never before seen a listing agreement should consider:

> (1) narrowing the search for a broker to two or three, and comparing the terms of their agreements;
>
> (2) keeping in mind that the key deal points are usually the amount of the commission which is negotiable -- within limits -- and a detailed marketing plan;
>
> (3) reading the proposed listing agreement carefully for specific problems the seller might have with it (e.g., the seller plans to renew an existing lease during the listing period and won't want to pay a commission on a short-term lease renewal);
>
> (4) if possible, reviewing the agreement with a friend or advisor familiar with the brokerage business who can suggest which terms are negotiable and which are not;
>
> (5) accepting the reality that large firms may be less flexible in changing the form provisions to minimize the administrative burden of keeping track of what is in each agreement and to avoid

favoritism among clients; and

(6) the firm able to offer the most seller-friendly listing agreement may not be the firm best positioned to market the property for the highest price in the shortest time.

§ 95.07(c)(1) Types of Listings: Open Listing, Exclusive Agency, Exclusive Right to Sell.

Listings are divided into three types, n107 based on whether the broker becomes entitled to a commission only if the broker finds a buyer directly, and whether the broker gets paid if the house is sold to a buyer found by another broker or by the seller.

(1) *Open Listing*. An "open" listing promises a broker a commission only if the broker and the broker alone finds a buyer on terms acceptable to the seller. Under an open listing, the seller may list the property with as many brokers as the seller chooses, and may sell it personally without paying anyone a commission. Only a broker who actually finds a buyer earns a commission on an open listing. For this reason a prudent broker might hesitate to share an open listing except with other brokers who had promised to split their take with the listing broker. To obtain the commission, the broker working on an open listing must establish that she was the "procuring proximate cause" of the contract or sale.

Were you to examine closely all the cases in which sellers dispute brokers' claims to being the "procuring cause" of a sale, you would come away slightly dazed by the crazy quilt of the fact patterns. Introducing the parties is not enough. The consummated deals need to be analyzed closely to determine whether the parties made their deal in spite of the broker's efforts or because of those efforts. The upshot is that even when a broker finds the prospect who ultimately buys the property, the broker on an open listing is not automatically entitled to collect a commission unless and until the broker shepherds the parties into a contract and, in some states, a closing.

Brokers in residential real estate don't think much of open listings. As one lawyer-broker explains: "Most real estate agents will work on open listings only if the potential sales commission is large and it is a rainy day with nothing better to do. Rarely will an agent spend money advertising an open listing, and most multiple listing services will not accept open listings." n108

(2) *Exclusive Agency*. If the broker becomes the "exclusive agent," then the broker is the seller's only sales representative. The broker gets all or an agreed share of the commission even if another broker is the "procuring cause" of the sale. The broker gets nothing if the *owner himself* finds a buyer without the broker's help. n109

(3) *Exclusive Right to Sell*. A broker with the "exclusive right to sell" is assured of being the seller's sole sales agent. If *anyone* sells the property--another agent or even the seller--the listing broker collects a fee. In such a listing agreement the broker becomes entitled to a commission if "the property is sold" during the term of the listing "by broker, by seller, or by another broker, or through any source." n110 A listing broker who is a member of a multiple listing service agrees to split the commission with any broker who actually finds a buyer, usually 50/50. If the seller finds the buyer, there is usually no split.

The broker wants an "exclusive" for obvious reasons, and some will work only on "exclusives." Most brokers will try to persuade the seller to give them an exclusive by explaining that only exclusives can be listed with the MLS. Not listing the property there means a reduced market, a longer selling time, and possibly a lower sale price for the seller, or no sale at all.

Of course, no law prohibits brokers who obtain open listings from agreeing to split their commissions with the broker who ultimately finds a buyer. That is what often occurs in commercial deals where open listings are common and "exclusives" are rare.

By contrast, home *seekers* seldom obligate themselves to a single broker as their exclusive agent in *finding* a house. n111 Some prospective buyers shop alone, relying on newspaper ads, "for sale" signs, and word-of-mouth. Others trudge from broker to broker, to see what each will present. Only the broker lucky enough to lead the buyer to the "winning" house gets to split the commission with the "listing" broker working an "exclusive." In England, listings are generally open. Brokers (estate agents) don't cooperate with each other. The buyer shuffles from one agent to the next, hoping eventually to discover all the properties on offer that might suit the buyer. There are no multiple listing services, no commission splits, and thus little incentive for estate agents to accompany buyers from site to site. They just set up appointments. They don't necessarily conduct negotiations, and their fees are 2-2.5%. In the words of a Californian buying in London: "While this lack of assertiveness may at first seem attractive compared with the aggressiveness of some American Realtors, it soon became frustrating." n112

§ 95.07(c)(2) Amount of Commission.

The listing agreement form invites the seller to negotiate the amount of the commission. This invitation can be seen as a response to an antitrust price-fixing challenge addressed by the U.S. Supreme Court in McLain v. Real Estate Board of New Orleans. n113 The court held that brokers are sufficiently involved in interstate commerce to be subject to Section 1 of the Sherman Antitrust Act. n114 Broker efforts to squelch commission discounters continue to be a source of antitrust litigation, n115 and discount brokers become victims "of harassing phone calls, a campaign of false and discrediting rumor and stolen signs ... boycotts and price-fixing." n116 Industry representatives insist: "A 6% commission rate is no longer that prevalent. All kinds of rates are in effect, and the market dictates what they will be." n117 One broker-to-the-wealthy reports that "those buying a home in the $1 million to $5 million range may haggle over price and fees, those buying homes above $5 million are in a different league ... for the mega-rich, price isn't an overriding concern." n118

One option is to have the commission percentage vary, escalating from say 6% to 7%, if the broker achieved a price greater than the vendor and broker anticipated the property would bring. A seller in a hurry could try to spur a quick sale by offering a higher percentage for the broker producing a buyer in 30 days, a reduced percentage for a buyer in 60 days, less still in 90 days. Such arrangements are rare. Maybe this is because the commission is a percentage of the selling price, and sellers believe brokers already have ample incentive to procure a buyer at the highest possible price. Maybe brokers believe the percentage they already achieve is as much as they would be able to negotiate in this sliding scale arrangement. Maybe the complexity of a sliding scale discourages its widespread use. What if a broker was to earn 5% on any sale up to $200,000 and 6% for a sale above $200,000? The seller for $199,000 would owe $2,050 less in commissions than for a sale at $200,000. Maybe sellers feel brokers would discourage buyers from making offers at low prices, even though many sellers might prefer low offers to no offers. (Sellers considering an offer below the listing price could always renegotiate the brokerage fee as a condition to accepting the offer.)

Brokers often negotiate commissions, particularly on "big ticket" properties, if the listing price is realistic and the broker feels confident the property will sell quickly. The listing broker will point out that a below-market fee could discourage *other* brokers from showing the property. If the listing does not specify the commission price, the broker is entitled to recover the ordinary and usual commission charged in the area.

Once a buyer is hooked, some sellers find it easier to negotiate a commission reduction as they haggle over price. Trying to knock down the fee earlier could discourage the broker from working as hard to sell the house as with a full commission. n119 Sellers try particularly hard to reduce the broker's commission if the buyer isn't represented by a broker because in this case the seller or listing broker does not have to split the commission with anyone.

When determining broker compensation and the commission, note that the average broker in the U.S. earned about $35,000 a year in 1993 and worked 60 hours per week. This is about $11.00 an hour, so $180, or even $90, is well above the average rate.

Traditionally, in jurisdictions where MLS cooperation agreements are the norm, commissions are split. First, the listing broker splits the fee with the buyer's broker, usually 50/50. Then, the broker or sales agent splits that fee with her firm. Remember, the firm pays all or most of the bills. The split between the broker or sales agent and the firm can vary greatly and is typically based on experience in the business; 30/70 (agent/firm) for novice agents and 80/20 or even 90/10 for a very few superstar agents.

In Minnesota, the average commission is 7% of the purchase price, and the customary split is 45% to the buyer's broker, and 55% to the listing broker. To encourage in-house sales, many dual agency companies (discussed later) pay the dual agent, formerly the buyer's agent, a "bonus" that brings the commission to a total of 55% of the purchase price. The company can afford to do this because they are getting a split from both dual agents as opposed to only getting one from the listing broker or the buyer's broker.

To illustrate this, assume the total commission received from the sale is $10,000; the listing broker gets 55% ($5,500) and the buyer's broker gets 45% ($4,500). Two agents or the same agent, acting as dual agent(s) in the same firm with a 60% split, would split with the firm as follows: the dual agent on the seller's side gets his normal 60% ($3,300), the dual agent of the buyer's side also gets $3,300 (this includes a $600 bonus for selling in-house), and the company gets the rest ($3,400). Without this in-house sale, the company would have received a split from only one side, either $2,200 from the listing broker or $1,800 from the buyer's broker. The buyer's broker would only get $2,700.

Clearly, the company and the former buyer's broker (now dual agent) have a monetary incentive to sell "in-house." Most sellers should like this idea because all the agents at the listing company are more motivated to show the seller's house, yet the seller still pays the same commission. As for the buyers, they may be disadvantaged because agents would be less likely to show them houses listed with other companies, but the buyers are free to ask the agent to show them these houses.

The Greater Boston Real Estate Board requires that the listing contract specifically include the fee arrangement. Some may wonder if this disclosure is adequate to the buyer or seller who probably doesn't understand the ramifications of the varying splits.

§ 95.07(c)(3) Length or Term of Listing.

A listing agreement should have a fixed duration to protect sellers from ineffectual or lazy brokers. Brokers, on the other hand, need enough time to sell the property so as to recoup their investment in marketing.

According to a 1983 Federal Trade Commission survey of brokerage contacts, 12.4% specified a listing period of 31-60 days, 55.2% between 61 and 90 days, and 23.5% more than 120 days. n120

Brokers on "exclusives" are required by case law and statute to put a time limit on them or risk having their listings declared invalid or lapsed. n121 In some states, brokers are required "to include a definite expiration date" in the written listing. n122

A well-established Los Angeles firm with numerous brokers and offices throughout the prime housing areas in southern California, has a standard form that contemplates a 180-day exclusive listing period. A more aggressive, small, local firm gives listing sellers the right to revoke on 24 hours' notice, which brings them quite a few listings they would otherwise lose to well-established firms.

§ 95.07(c)(4) Cancellable Listings.

Brokers protest cancellation clauses and many won't accept them. They spend money printing brochures, running newspaper ads, posting signs, conducting open houses. Why should they risk the seller cancelling just as offers are

starting to come through? If brokers work hard promoting a property subject to a 30-day cancellation, they could be robbed of the right to pick the fruit off the tree they planted. If the broker holds back, and doesn't expend much effort marketing a property because it has a 30-day cancellation clause, the seller isn't well served. In either case, cancellation clauses are no substitute and could even deter an agreed, aggressive marketing campaign. At any rate, that is the broker's case against 30-day cancellation clauses.

§ 95.07(c)(5) Defining the Scope of the Broker's Marketing Efforts.

Some clients aren't content to rely on a "due diligence" or "best efforts" promise in a listing agreement. They demand to know precisely what steps the broker plans to take in marketing the property and when. Most brokers have no trouble promising to submit the listing to the MLS (although firms hold the listing back a week or two, hoping to sell it "in-house" to a buyer the firm also represents). Brokers will also usually promise to "caravan" the property -- show it to other brokers on their weekly tours of new listings. Will they develop a flyer? Magazines? The knowledgeable seller dealing with an agent for the first time might insist on approving a detailed marketing plan as part of the listing agreement.

§ 95.07(d) When Do Brokers Earn Their Commissions?

§ 95.07(d)(1) Traditional Rule: Once a "Ready, Willing and Able" Buyer Has Been Produced. n123

Many real estate sales contracts are never closed. The rationale is that the broker has produced a "ready, willing and able" purchaser when the buyer and seller strike a deal. Even if the purchaser proves financially incapable of closing, courts in these states reason that the seller should have demanded evidence of financial ability *before* signing the contract. n124 Most states, before awarding a commission, require a signed formal purchase-and-sale agreement. In a few states, the broker becomes entitled to a commission even before a contract is signed -- when the parties reach a "meeting of the minds." Most reported cases, however, do involve a purchase-and-sale agreement, so courts rarely have need to specify whether a written contract is a necessary predicate to commission recovery. In most of those states, the broker's right to a commission vests when the buyer and seller sign a contract -- not when the sale closes.

Sellers can condition their obligation to pay a commission on the occurrence of a future event --successful completion of the sale or leasing of the property. In many states, if sellers don't include this contingency, they become liable for commission on deals that fall through. n125

§ 95.07(d)(2) Emerging Rule: No Commission Unless the Deal Closes.

Should sellers be liable when the buyer breaches or when the deal fails due to circumstances beyond either party's control? A growing number of state courts have adopted the rule that if the deal fails for any reason other than the seller's *willful* breach, the broker's commission is forfeited. n126 The rationale behind this view is best explained in Ellsworth Dobbs, Inc. v. Johnson: n127

> The [traditional view] is deficient as an instrument of justice. It permits a broker to satisfy his obligation to the owner simply by tendering a human being ... so long as the owner enters in a sale contract with such person. The implication of the rule is that the owner has the burden of satisfying himself as to the prospective purchaser's ability, financial or otherwise, to complete the transaction. He cannot rely at all on the fact that the purchaser was produced in good faith by the broker as a person willing and able to buy the property... .Such a rule, considered in the context of the real relationship between broker and owner, empties the word 'able' of substantially all of its significant content and imposes an unjust burden on vendors of property. It seems to us that fairness requires that the arrangement between broker and owner be interpreted to mean that the owner hires the broker with the expectation of becoming liable for a commission only in the event a sale of the property is consummated, unless the title does not pass because of the owner's improper or frustrating conduct.

> * * *
>
> In a practical world, the true test of a willing buyer is not met when he signs an agreement to purchase; it is demonstrated at the time of closing of title, and if he unjustifiably refuses or is unable financially to perform *then*, the broker has not produced a willing buyer. n128

In perhaps 40 states the courts follow a formal rule that the broker is entitled to her commission even if the deal falls through. n129

Even courts in states that formally adhere to the traditional rule often deny brokers their commissions when deals fail. They cite ambiguous provisions in the purchaser-and-sale contract, escrow instructions or other documents to support a conclusion that the parties contracted out of the commission-due-when-buyer-found rule.

Even courts in states that formally adhere to the traditional rule often deny brokers their commissions when deals fail. They cite ambiguous provisions in the purchase-and-sale contract, escrow instructions or other documents to support a conclusion that the parties contracted out of the commission-due-when-buyer-found rule. n130 They determine that the buyer was not financially able to buy the property at any time. So the broker hadn't produced a ready, willing or able buyer after all. n131 They cite minuscule differences between the terms of the purchase offer and the listing agreement to find a noncomplying contract or offer. n132 They find the purchase-and-sale agreement flawed. n133 They find broker misconduct. n134 All in all, even courts in states not actually adopting the "no closing, no commission" rule manage to find ways to deny brokers their commissions on failed deals more than half the time. n135 In sum, the so-called majority rule probably isn't applied a majority of the time because courts perceive it as inexcusably unfair in many cases. The rule is a "default" rule; a rule to be applied only in the absence of a contract provision to the contrary. Many courts and scholars believe the default rule should favor the principal, not the agent. The broker should bear the risk when the broker and seller have not decided in advance whether the broker is to be entitled to a commission should the deal fall through at no fault of the seller. Most sellers are not even aware such a risk exists. Putting on them the burden of anticipating it seems harsh.

Policy Factors to Select Which Rule Governs "When Commission Is Due." Professor Burke defends the majority rule advancing four points in its favor: (1) once a purchase-and-sale contract is signed, the deal is beyond the broker's control; (2) the vendor can sue on the contract if the buyer breaches; (3) the vendor, when the property is put back on the market, can increase the purchase price to recover the commission paid on the failed deal, and (4) "the vendor's income and livelihood are not at stake -- the broker's are." n136

These points can be contested:

(1) Although buyers and sellers may destroy their own deals after signing purchase-and-sale contracts, brokers are supposed to steer the contract to closing. Their responsibilities don't end when the contract is signed. Most brokers accept the fact that it is easier to collect a commission on a completed transaction than on a failed one. If the contract fails through no fault of the vendor, the breach was as much beyond the vendor's control as it was the broker's. On the other hand, if the contract fails because the vendor was at fault, the broker should be able to recover against the vendor.

(2) Professor Burke contends that the vendor can sue the breaching buyer, but so can the brokers -- unless they have explicitly limited their rights by signing a liquidated damage addendum to the purchase-and-sale agreement. There are practical reasons why vendors decide not to sue breaching buyers. One is that litigation outcomes are unpredictable, and if either party seeks specific performance, the seller will not be able to sell the property until the lawsuit is resolved. Even if the vendor wins the suit, the vendor may incur non-reimbursable legal fees and incidental costs.

(3) The vendor cannot "increase the purchase price to recover the commission on the failed deal when the property is put back on the market" because the vendor has no control over market prices. If property values rise enough, the

vendor may not be harmed by having to pay the broker a commission in the first deal; but if values fall, paying the first commission will compound the seller's loss.

(4) The broker's first concern as a fiduciary should be fulfilling the client's reasonable expectations, regardless of the fact that brokers make a living off commissions. Most sellers would be surprised by a broker insisting on a commission when the deal fails due to a buyer's breach. Few thoughtful sellers would contract to pay a commission on a failed deal. It is difficult to imagine that brokers would insert an explicit waiver in the listing agreement, even in states where the seller may relinquish his rights to the "no closing, no commission" rule by contract, if the buyer breaches.

In 1975, Massachusetts adopted the "no closing, no commission" rule explicitly as a default rule, inviting brokers to reverse it by contract. One broker made a halting effort to do so. The broker had simply restated the familiar rule that the broker would be entitled to a commission on finding a "ready, willing, and able" buyer. The appellate court ruled that this was insufficient to reverse the default rule which favors the seller in Massachusetts. The broker had failed to make clear that she intended to earn a commission even if the deal fell apart through no fault of the seller. The appellate court appreciated that sellers, "not practiced in the subtleties of real estate sales," would need an explicit warning before they could rightly be deemed on notice of the "commission even if no closing" rule. n137

§ 95.07(d)(3) In All States, the Seller Owes the Broker a Commission for "Willful" Breach, But What Is "Willful" May Not Always Be Obvious.

Sometimes the seller gets stuck with the commission when the buyer backs out because the seller gave the buyer a good reason not to complete the sale. n138 In Dworak v. Michals, n139 the seller exaggerated (misrepresented) the rental income of his apartment house, printing unrealistic rental income projections in the listing material. This misrepresentation gave the buyer a good legal reason not to go through with the deal. After the buyer walked, the seller was held liable to the broker for a commission even though the buyer had canceled the contract.

Sometimes the seller refuses to go through with a sale because of unusual conditions the seller wants to write into the purchase-and-sale agreement but failed to include in the listing agreement. Maybe the seller doesn't want to sell without taking back a big mortgage for the lion's share of the purchase price; or maybe the seller doesn't want to pay the prepayment penalty that will be due on the existing loan. Perhaps the house can't be delivered vacant because the seller recently leased it for two years to a trial lawyer. The seller might insist on keeping the antique light fixture hanging in the bedroom or replacing it with a reproduction. n140 In all these cases the seller must specify her special conditions in the listing agreement. The seller doesn't have to sign a purchase-and-sale agreement without them; however, the seller will owe a commission to the broker who finds a buyer willing to buy on terms consistent with the listing agreement but unwilling to accept these "special" conditions, if they are not specified in the listing agreement.

A seller could even be held liable for willful breach to a broker for a commission when the property is destroyed or damaged during escrow. Under the Uniform Vendor and Purchaser Risk Act (UVPRA), the buyer doesn't have to take the damaged property, and may elect to rescind the contract. If the buyer elects to rescind, the seller may have to pay the broker's commission anyway. n141

Consider the case of a the seller who inherited property and discovered during escrow a serious flaw in the probate process. The seller can't convey marketable title without further litigation--a suit to quiet title, perhaps. Is the breach "willful," triggering liability for a commission even though the deal failed? n142 Probably so if she can't convey a marketable title. The Colorado legislature enacted a law to protect sellers caught in such a bind. n143

A good listing agreement anticipates disputes and avoids them by requiring that the seller warrant ownership of the property, that there be no undisclosed defects in mechanical or electrical systems, that the seller provide a termite report, and that the property isn't involved in a bankruptcy proceeding. Sometimes cautious commercial brokers actually include a detailed purchase-and-sale contract as part of the listing agreement, evidencing the exact terms and conditions

the listing seller agrees to accept--or pay the broker a commission for not accepting.

If the broker knew about the title defect before the listing agreement was entered, and had no special reason to believe the seller would be able to clear it, the broker may not be entitled to a commission. n144 For instance, a widow told the broker she only owned a one-third undivided interest in the property but thought she could gain the assent of the other owners. When she couldn't, the deal failed. The broker sued for a commission and lost. The broker's commission was contingent on there being a closing. Since the seller had explained she owned only a part of the property, this put the broker on notice of the potential defect from the start. n145 Similarly, a broker also lost a suit for commission when the contract of purchase-and-sale explicitly gave the seller the right to cancel for not being able to convey good title, and the seller canceled for precisely that reason. n146 But a co-owner who lures the broker to accept a listing by assuring the broker he can and will procure the approval of the other owners, and fails, can become liable to the broker for a commission. n147

When only one spouse signs a listing agreement, the broker may assume the spouse represents the couple, and that both will sign a purchase-and-sale agreement later. Should the other refuse to go along later, the broker will have a cause of action against the listing spouse -- unless the broker knows that the marriage is likely to be terminated.

§ 95.07(d)(4) California Lets Sellers Off the Hook for Brokerage Commissions When Deals Are Subject to Conditions That Aren't Met.

At least one California court adopted a compromise position on the broker's commission entitlement when a deal failed and the seller *did not* willfully breach. If a contract contains contingencies such as a "subject to financing" or "subject to inspection" clause, the broker earns a commission only if the deal actually closes. But if the contract was "clean" and unconditional, the broker's entitlement vested when the contract was signed, n148 although payment was deferred to closing as a convenience to the seller. Presumably, the "no conditions" deal fails, and the broker is entitled to a commission even in a no-fault or buyer default.

§ 95.07(d)(5) Sellers Can Protect Themselves By Contracting That They Won't Be Liable for a Commission Unless the Deal Closes.

Listing agreements and purchase-and-sale contracts sometimes afford protection from unlimited liability for a commission in the event of a no-fault or buyer default. Listing agreements condition the broker's entitlement on "sale." Purchase-and-sale contracts sometimes limit the seller's liability to splitting with the listing broker any of the buyer's money retained as damages. Sellers often sign these promises without considering whether the sum left them after the split is likely to cover their actual losses in the event of buyer's breach. Sellers also give little thought to the possibility that they may prefer relinquishing their right to keep a down payment in exchange for the buyer's agreeing to free the property of any claims so the seller can put the property back on the market quickly without threat of the buyer suing. Yet, sellers seldom reserve in their listing agreements the right to release a reluctant buyer and return the down payment without liability to the broker. Brokers might be wary of granting sellers this much discretion for fear of side deals between buyer and seller that could undercut the broker's legitimate right to a commission if they defer their closing to a time safely past the listing agreement termination date. Not uncommonly, the broker contracts for the right to a full commission if the parties terminate mutually.

A seller could protect himself from being liable for a commission in the event of a no-fault or buyer default. By including in the listing agreement a statement that no commission will be due in case of a failure to close for any reason other than fraud or bad faith by the seller, the seller would have the right to release a reluctant buyer prior to closing without risking liability to the broker. n149

A clause that protects the seller from a claim for a commission unless the sale closes doesn't necessarily protect the buyer. Generally, the buyer is not liable to the listing broker for a commission unless the buyer agreed to pay it. n150

However, the buyers may be liable to their own brokers if that broker identifies a property meeting the buyer's specifications, the buyer contracts to buy it and then breaches. n151

In a few jurisdictions, the buyer who breaches may be liable to the listing or seller's broker as well if the purchase-and-sale agreement authorized a commission to be paid on closing, as most contracts do. The seller's broker becomes a third-party beneficiary of the purchase-and-sale agreement. A buyer who breaches that agreement also breaches an implied promise to complete the transaction, which would result in the seller's broker or listing broker having the right to be paid from the sale proceeds. n152

§ 95.07(d)(6) Time for Payment Does Not Determine When Right to Payment Has Been Earned.

Absent a provision to the contrary, a broker's commission becomes due *and* payable when the seller's completes the services promised to be performed. By an express stipulation in the contract of employment, however, the time may be advanced or postponed as the parties see fit. n153 Even in states where the broker becomes entitled to a commission when the buyer and seller sign a contract, payment of the commission is usually deferred until the closing so the seller can pay the broker from sale proceeds.

§ 95.07(e) The Broker's Listing Agreement Provisions to Deter Seller Fraud.

§ 95.07(e)(1) Why Brokers Worry About Sellers Trying to Beat Them Out of Their Commissions.

Brokers worry a lot that sellers will appropriate the value of their work and cheat them out of their commissions. Occasionally, a seller and buyer, the latter located by a broker, will conclude a deal after a decent interval following expiration of the listing agreement. n154

§ 95.07(e)(2) Extension Clauses as a Way of Discouraging Sellers from Defeating a Broker's Claim to a Commission.

Extension clauses provide that the broker is entitled to a commission notwithstanding the expiration of the term of the listing agreement if the property is sold to one with whom the broker, prior to such expiration, negotiated or had some other form of dealing described in the agreement. The purpose of such a clause is to protect the broker by preventing the owner from postponing acceptance until the listing agreement has expired and thereby circumvent the broker's right to compensation for locating a purchaser. The validity and enforceability of extension clauses have been universally upheld. n155

Admittedly, it is wrong for the seller to profit from the broker's work without paying the commission. But it is also wrong for a broker who wasn't able to strike a deal to claim a full commission just for introducing a buyer to the property when it took the efforts of another broker to close the deal.

Disputes arise in extension clauses when the broker's contact with the buyer was minimal and fleeting. Some clauses require the broker to have "negotiated" with the buyer, whereas others require only that the broker have "introduced and interested" the prospect. When the broker provides the seller with a list of prospective buyers and the ultimate buyer's name is on it, the seller is estopped from claiming he didn't know the broker first introduced him to the buyer. If the broker does not present the seller a list with the ultimate buyer's name on it, the seller may seek protection against potential broker claims by asking buyers if they have had contact with a broker. If the buyer says "no," and affirms that in writing, the seller has gone pretty far toward establishing a claim of "innocence." Should the broker later claim a commission on a quantum meruit or unjust enrichment theory, the seller may be in a position to show that she has not been unjustly enriched because she reduced the purchase price to take account of the fact that she believed no commission would be due on the sale. n156 The first broker's claim to a commission on unjust enrichment grounds would also be defeated if the buyers were represented by their own broker, and the seller paid that broker a commission. n157

Disputes may also arise when the seller did not realize there had been contact between broker and buyer. Extension clauses avoid this problem by requiring brokers to give sellers a list of all the people the broker introduced to the property. That is one reason brokers insist that every viewer "sign in" at an open house.

Extension clauses are valid for a specified time (90-180 days is typical), after which the seller may deal freely with prospects the broker had found. Unless the broker can prove that the parties delayed their deal just to avoid the commission, the broker is out of luck if they enter into a contract after the extension period. n158

§ 95.07(e)(3) Limits on Seller's Right to Revoke Listing Agreement.

Courts reach different results in cases where sellers attempt to cancel before the broker has expended any marketing effort and the listing agreement has no cancellation clause. Once the broker begins to market the property, courts hold sellers fully liable for commissions if the broker finds a buyer on exactly the terms of the listing. n159

§ 95.07(e)(4) Limitations on Seller's Right to Withdraw Property from Sale.

Many listing agreements give brokers a right to the full commission if the seller withdraws the property from the market before the broker has found a buyer. Is this a penalty (an excessive sum extracted for breach) or forfeiture? The broker gets a full commission under a withdrawal-from-sale clause even if there was no full-price buyer anywhere in sight, and even though brokers seldom sell as many as half their listings. Full-commission-on-withdrawal clauses have been upheld against forfeiture challenges in California, but not in Oregon unless the broker can show that a sale was imminent or reasonably likely at the listing price when the listing was terminated. n160

California courts have enforced full-commission-on-withdrawal clauses citing various arguments. Some courts declare them not penalties for breach, but contracts for alternate performance as long as the fee for withdrawal does not exceed the full commission. California courts do note a preference for having a withdrawal fee. As for limiting the broker to out-of-pocket expenses up to the point of withdrawal, California courts explain that brokers don't work just to break even. The "benefit of the bargain" is the full commission, and that is what the seller who cancels should pay on withdrawing without justifiable cause.

§ 95.07(e)(5) Are Sellers Obliged to Sell?

A typical form appears to give the broker the right "to sell the property," but it doesn't. The buyer isn't a party to the listing agreement nor even an intended third-party beneficiary of it. The broker has the authority to find a purchaser, but not to execute a sales contract or a deed on the seller's behalf. Only a power of attorney, or a quite explicit form, would be construed to authorize the broker to actually sell the property. n161 The seller isn't required to sell even if the broker manages to locate a prospective buyer "ready, willing and able" to pay the full listing price. Until the seller signs a purchase-and-sale contract, the seller's only duty under the listing agreement is to pay the broker a commission when the broker locates a willing buyer. Thus, a seller who decides not to sell may be out of a commission but not out of a house up to the moment the seller signs the purchase-and-sale agreement. Brokers must be careful to make sure prospective buyers understand that the broker cannot commit the seller to a deal, and that the buyer has no enforceable deal with the seller until all the material terms are put in writing and signed by the seller. The broker who relays a verbal acceptance from seller to buyer, as if there were a done deal, without an appropriate cautionary warning, risks becoming liable to the buyer if the buyer relies on the broker's reassurance, passing up a chance at a good deal on another property, and the seller reneges.

A broker is concerned that a greedy seller may try to avoid a brokerage commission by colluding with a prospective purchaser. Consider the devious seller's options. The seller may withdraw the property from sale or wait for the listing to expire and then enter a contract with the buyer. If the seller has already entered a contract with the buyer, the seller

may agree to rescind and sell to the buyer several months later.

§ 95.07(f) Agency Relationships Created by the Listing Agreement.

"The law of agency imposes on the agent the duty of utmost good faith, integrity, honesty, and loyalty in her transactions with her principal." n162 A broker, as an agent, is held to this standard. n163 One of the duties the listing broker owes the seller is a duty to expend reasonable effort to sell the property. Sometimes the seller and broker agree to a marketing strategy, but, more frequently, the details of marketing are left to the broker. The seller who feels not enough is being done must prove that the broker's efforts fell below a "reasonableness" threshold to justify revoking the listing or recovering damages against the broker. As long as the broker expends reasonable effort, she bears no responsibility for the seller's loss. The listing agreement is not a guarantee that there will be a sale on the listing terms. For example, a broker, expending reasonable efforts, is not liable if a financially strapped seller loses the property through foreclosure because the broker failed to find a buyer on time.

The broker must also exercise reasonable skill and care in providing the seller price advice. n164 If the property doesn't sell because it was listed at too high a price, and the market falls before the seller figures this out, the seller may seek to hold the broker accountable for the price the seller could have gotten had the property been properly priced and sold at the outset. Similarly, if the seller receives an offer and is advised by the broker to accept it, does accept, and is soon swamped with back-up offers at prices considerably above the accepted price, the seller may seek to cover the difference between the price she accepted and the price she could have received, claiming the broker should have told her the first offer was too low.

A broker representing a buyer has a duty to make sure the title is as represented -- or to advise the buyer to contact a title insurer or attorney to ascertain whether the seller's title is good, free of liens and encumbrances. n165

The broker owes all others a non-fiduciary "good faith" and "fair dealing" obligation, bounded by tort theories of fraud, misrepresentation, and negligence.

§ 95.07(f)(1) The Listing Broker Is the Seller's Agent.

The listing agreement makes the listing broker an agent of the seller. n166

> There flows from this agency relationship and its accompanying obligation of utmost fidelity and good faith, the legal, ethical, and moral responsibility on the part of the listing broker, *as well as his subagents*, to exercise reasonable care, skill, and judgment in securing for the principal the best bargain possible; to scrupulously avoid representing any interest antagonistic to that of the principal in transactions involving the principal's listed property, or otherwise self-dealing with that property, without the explicit and fully informed consent of the principal; and to make, in all instances, a full, fair, and timely disclosure to the principal of all facts within the knowledge or coming to the attention of the broker *or his* subagents which are, or may be, material in connection with the matter for which the broker is employed and which might affect the principal's rights and interests or influence his actions. n167

Notice the mention of the listing broker's subagents. They are included because most written listing agreements authorize the listing broker to employ subagents, usually the buyer's broker.

§ 95.07(f)(2) Is the Selling Broker the Buyer's Agent or the Seller's Subagent?

Majority Rule: The Cooperating Broker is the Subagent of the Seller and of the Listing Broker. The Cooperating Broker Is Not an Agent of the Buyer. In a majority of states, the cooperating broker n168 (the broker first approached by the buyer) is not the buyer's agent. The cooperating broker is considered a subagent of the seller and the listing broker.

The Restatement (Second) of Agency § (1) (1957) defines a subagent as "a person appointed by an agent empowered ... to perform functions undertaken by the agent for the principal, but for whose conduct the agent agrees with the principal to be primarily responsible." The subagent is the agent of both the appointing agent and the principal. n169

Courts most often find that the subagency relationship begins when a listing broker lists a property in an MLS. The act of listing a property in an MLS "constitutes *an offer of subagency* by the listing broker to other [MLS] members to procure a buyer in exchange for a percentage of the sale commission." n170 "Most courts accept the MLS subagency at face value and do not undertake the more complicated task of assaying what relationship does exist between member brokers." n171 Other courts have elaborated, attributing the subagency relationship to industry custom n172 or the fiduciary relationship that is formed when the seller agrees to pay the selling broker's commission. n173

According to a government survey, over 70% of all buyers surveyed believed that the cooperating broker was acting as their agent. n174 These homebuyers, unaware of the subagency, "[r]eposing confidence and trust in the broker ... are potentially exposed to manipulation and exploitation." n175

Buyers in states following the majority rule are not completely without protection. Although they cannot bring an action for breach of duty, buyers can sue in tort for misrepresentations made by selling brokers. n176 Further, buyers can avoid the majority rule by designating the cooperating broker as their agent *in a written agreement*. However, courts stress that this intention must be in writing. "The prevailing perception of the broker as an agent of the seller is too firmly imbedded in the real estate business to permit such a finding on the basis of conduct alone." n177

One commentator explains that the

> technical issue of subagency often determines the substantive rights of the parties to a lawsuit. An entire cause of action or defense may stand or fall on a finding of subagency. The following contexts in which the issue has arisen demonstrate this dependency: n178
>
> (a) Cooperating broker sues the seller and/or listing broker, claiming wrongful refusal to pay the agreed-upon share of the fee-split. The seller and the listing broker claim the cooperating broker lacks contractual privity, and therefore has no right to the fee. The broker counters by asserting a subagency relationship to the listing broker, entitling the broker to a fee as the procuring cause of sale. n179
>
> (b) The buyer claims the seller and listing broker are responsible for the misrepresentation or concealment of a material fact by the cooperating broker, even though the seller and listing broker made full disclosure to the cooperating broker. n180
>
> (c) The seller sues the cooperating broker for breach of fiduciary duty when the cooperating broker fails to give advice to the seller, tells the buyer the lowest price the seller is likely to accept, or informs the buyer of several intangible factors adverse to the seller that do not reach the level of material facts (which give rise to a common-law duty to disclose). n181
>
> (d) The buyer sues the cooperating broker for breach of fiduciary duty, claiming an implied agency relationship existed between them. The cooperating broker asserts subagency to show that he or she was not an agent of the buyer. n182
>
> (e) One party backs out of the sale and the other sues for breach of contract or specific performance. The defendant claims the cooperating broker was an agent of the buyer as well as a subagent of the seller, justifying rescission by either party due to undisclosed dual agency. n183
>
> (f) A real estate broker who was denied access to the MLS argues that the membership requirements

violate antitrust laws. The MLS claims its function as a mechanism for the appointment of subagents justifies reasonable access restrictions. n184 The same can be asserted for denying consumer access. n185

Minority Rule: The Cooperating Broker is the Agent of the Buyer. n186 One commentator has illustrated the problem faced by a buyer in a majority rule state:

> Often, the broker has been in the company of the purchaser for many hours and has conducted some fairly confidential interviews with the prospective purchaser. Given such extensive contact with the buyer, and such minimal contact with the seller, the buyer is justified in believing that the agent will do his best to obtain the property for the buyer at the lowest possible price and on the most advantageous terms. Of course, for the agents to attempt to do so is a violation of the agent's duty to the seller. However, it would be unrealistic to expect the buyer to feel that a broker who has worked with him extensively is attempting to obtain the highest possible price for the seller, which, in actuality, is the agent's duty. n187

Some state courts have rejected the majority rule and hold the cooperating broker to be solely and exclusively the agent of the buyer. These courts believe this is more in line with the buyer's expectations.

Courts and some states legislatures have rejected the subagency rule for several reasons:

(1) the MLS serves as a means for exchanging information, not to establish agency relationships; n188

(2) the fact that the commission is split is not indicative of an agency relationship because the brokers could have achieved the same commission distribution acting as independent contractors; n189

(3) the buyer's broker is often working with the buyer to locate a suitable property *before the seller lists the property*. n190

Even in states where, as a matter of law, the buyer's broker is the buyer's agent exclusively, the broker isn't insulated from the temptation of pushing the buyer into closing a deal quickly and at a sturdy price. After all, the buyer's broker depends for the fee on splitting a commission with the listing broker.

Nor will the buyer's being represented by a broker nominally acting as the buyer's own agent act as a barrier to the buyer later suing the buyer's own broker, the listing broker, and the seller if the buyer is unhappy about the condition of the property or the neighborhood and what the seller and broker didn't tell the buyer.

Characterizing the buyer's broker as the buyer's agent does free that broker to offer independent advice to the buyer.

§ 95.07(f)(3) In Some States a Broker May Be Agent to Both Buyer and Seller: The Dual Agency.

A broker, who collects a fee from anyone other than the broker's principal without prior disclosure, breaches a fiduciary duty. n191 In some states, however, the same firm or broker may represent both the buyer and the seller, as long as they both know and consent to the dual representation. This type of agency is known as a dual agency. In the dual agency, the listing broker becomes the buyer's agent but doesn't collect a separate fee from the buyer. The listing buyer simply keeps the entire commission instead of having to split it with another agent.

The dual agency often arises from the "open houses" that the listing broker stages. At these events the broker meets potential buyers, and the unrepresented buyer may want the listing agent to be a dual agent looking out for his interests no less than those of the seller. The listing broker has a great incentive to represent the buyer as well. Besides not

having to split the commission, the listing broker maintains control over the transaction and avoids the hassle of dealing with another broker.

The dual agency, however, does not exist merely because a broker represents both buyers and sellers. The broker must bring the parties together to create a dual agency, by showing the seller's property to the buyer. n192

In response to changes in brokerage relationships, like the emergence of dual agencies, many states have enacted laws requiring that brokers disclose, in writing, the type of agency involved. n193 Some states have very detailed laws, n194 and others just have a vague requirement of disclosure. n195 In the states that have detailed laws, the statutes usually specifically state that the broker may *not* disclose:

> (1) that the seller will accept a price less than the asking price or listed price, unless otherwise instructed in writing by the seller,
>
> (2) that the buyer will pay a price greater than the price submitted in a written offer to the seller, unless otherwise instructed in writing by the buyer,
>
> (3) the motivation of any party for selling, buying, or leasing a property, unless otherwise instructed in writing by the respective party,
>
> (4) that a seller or buyer will agree to financing terms other than those offered.

Similar to most states, Minnesota, by statute, allows the broker to serve as dual agent, representing seller and buyer in the same transaction, as long as the dual agency is disclosed, and the parties consent in writing. Nonetheless, Edina Realty, Inc., a Minneapolis area firm with about 2000 sales associates, was sued for two hundred ten million dollars in real estate commissions collected from more than twenty thousand clients because "it hadn't adequately disclosed dual-agent relationships." n196 Although ultimately the firm settled for a mere $14 million, the Edina Realty litigation caused an "uproar among brokers." n197 Learning a lesson, the Edina firm no longer represents buyers with its own listings; it only represents the seller.

A dual agency creates significant potential for conflicts of interest. n198 In representing the seller, the broker is supposed to negotiate the highest price with the fewest contingencies, yet in representing the buyer, the broker is supposed to negotiate a low price, and warranties against defects. Despite the heroic efforts of skilled and honest brokers, it isn't easy to be a fiduciary to opposing parties at the same time. One commentator observes: "Imagine hiring a lawyer to represent both the prosecution and the defense in the same case. In short, no man can serve two masters." n199 This may be an overstatement. Opposing parties to a deal aren't necessarily engaged in an adversary proceeding where one party's win is the other's loss. They may both be winners if the deal closes, especially after the contract price and terms are settled and all contingencies have been fulfilled. At that point, it seldom takes two brokers to process the deal through closing.

The National Association of Realtors degrees, studying the potential confusion when one broker represents both parties, concluded in 1986 that a disclosure program may be instituted to eliminate the confusion. Brokers representing both parties must disclose the dual agency and get each party to consent as soon as practicable. n200 Many states implemented this recommendation, and, in those states, the courts hold that a broker's failure to disclose and obtain buyer and seller's consent to a dual agency is a breach of fiduciary duty. As a result, a broker who fails to disclose a dual agency and obtain consent, risks losing her commission even if the parties are unable to show actual damage. n201

The legitimacy of the dual agency has been vigorously challenged. There is no justification for permitting brokers, who are not qualified to explain or understand the legal ramifications of conflicts of interest, to undertake dual agency. n202

Maryann Taormina, a broker-owner of Century 21 Gold Key Realty in Riverdale, New Jersey comments, "If the seller says to us, 'I'm getting transferred, bring us any offer,' I can't disclose that [to a possible buyer] without written permission. In contrast, a buyer's broker who knows that the seller is being transferred is obligated to tell the client." n203

There is one potential advantage to clients in a dual agency. n204 "Because clients receive less service when a firm represents both sides, many in the industry believe consumers ultimately will insist on reducing the commissions real estate agents are paid in those situations." n205

§ 95.07(f)(4) California's Statutory Approach to Regulating the Broker's Agency Relationship.

In 1988, California enacted Civil Code §§ 2373-2382 in order to clarify the rules regarding agency relationships. The Code doesn't choose between the majority and minority views regarding subagency. Instead the statutes invite the parties to select their own agency relationship. n206 Section 2375 offers a model disclosure form that the broker is required to hand buyers and sellers:

> When you enter into a discussion with a real estate agent regarding a real estate transaction, you should from the outset understand what type of agency relationship or representation you wish to have with the agent in the transaction.
>
> **Seller's Agent**
>
> A Seller's agent under a listing agreement with the Seller acts as the agent for the Seller only. A Seller's agent or a subagent of that agent has the following affirmative obligations:
>
> To the Seller:
>
> (a) A fiduciary duty of utmost care, integrity, honesty, and loyalty in dealing with the Seller.
>
> To the Buyer and the Seller:
>
> (a) Diligent exercise of reasonable skill and care in performance of the agent's duties.
>
> (b) A duty of honest and fair dealing and good faith.
>
> (c) A duty to disclose all facts known to the agent materially affecting the value or desirability of the property that are not known to, or within the diligent attention and observation of, the parties.
>
> An agent is not obligated to reveal to either party any confidential information obtained from the other party which does not involve the affirmative duties set forth above.
>
> **Buyer's Agent**
>
> A selling agent can, with a Buyer's consent, agree to act as agent for the Buyer only. In these situations, the agent is not the Seller's agent, even if by agreement the agent may receive compensation for services rendered, either in full or in part from the Seller. An agent acting only for the Buyer has the following affirmative obligations:
>
> To the Buyer:
>
> (a) A fiduciary duty of utmost care, integrity, honesty, and loyalty in dealing with the Buyer.
>
> To the Buyer and the Seller:

(a) Diligent exercise of reasonable skill and care in performance of the agent's duties.

(b) A duty of honest and fair dealing and good faith.

(c) A duty to disclose all facts known to the agent materially affecting the value or desirability of the property that are not known to, or within the diligent attention and observation of, the parties. An agent is not obligated to reveal to either party any confidential information obtained from the other party which does not involve the affirmative duties set forth above.

Agent Representing Both Seller and Buyer

A real estate agent, either acting directly or through one or more associate licensees, can legally be the agent of both the Seller and the Buyer in a transaction, but only with the knowledge and consent of both the Seller and the Buyer.

In a dual agency situation, the agent has the following affirmative obligations to both the Seller and the Buyer:

(a) A fiduciary duty of utmost care, integrity, honesty and loyalty in the dealings with either the Seller or the Buyer.

(b) Other duties to the Seller and the Buyer as stated above in their respective sections.

In representing both Seller and Buyer, the agent may not, without the express permission of the respective party, disclose to the other party that the Seller will accept a price less than the listing price or that the Buyer will pay a price greater than the price offered. Betty Broker obtains a listing on seller's condo, and begins trying to sell it. She knows her job is to reel in the highest price for the seller.

§ 95.07(f)(5) The Distinction Between Fiduciary and Negligence-Based Obligations.

A recent case depicted the difference between the duty of ordinary care a broker owes to the party in the deal who is not her client, and the duty the broker owes her own client. In Salahutdin v. Alcantara & Coldwell Banker, n207 the husband plaintiff was the child of Russian peasants who fled the 1917 Russian Revolution for Korea. He and his wife were born in Korea but despite that fact, were legally regarded as stateless persons there and not allowed to own property. Eventually, they settled in California and bought a home in San Mateo County. When they sold that home and were ready to invest, they decided to buy a property big enough so it could eventually be subdivided into two lots -- one for their son and one for their daughter. They never wanted themselves or their children to be landless again.

They told this to broker David Seigal, who worked with Coldwell Banker when they solicited his help to find them a house in Hillsborough. He explained how subdivision processing worked in Hillsborough, and indicated they would need at least a one-acre site in order to subdivide it. He told them such properties were rare. They promised patience.

Then Mr. Seigal came upon a listing in his own office for a house on "1 acre +." The listing agent was Betty Kruse. She had got the idea the property was one acre or more from the sellers. The property was fenced and the area within the fence was more than one acre. The plaintiffs bought for $274,000. That was in 1979.

Ten years later, their southerly neighbor tore down the old fence and replaced it, moving it northward. The plaintiffs protested that the new fence encroached on their property. A survey was made. The survey revealed that the southerly neighbors were right. The plaintiff's property was smaller than they had been led to believe by the brokers. In fact, it was just short of an acre, .998 acres, and in all probability could not be subdivided.

They sought recourse against Betty Kruse and David Seigal. Betty Kruse was exonerated. Her misrepresentation, based on what the seller had told her, was innocent. California does not penalize brokers for innocent misrepresentation.

Seigal's situation was different. He was a fiduciary. His breach was labeled "constructive fraud." It could as well have been labeled "negligent misrepresentation." This is more a matter of pleadings and trial court conclusions based on the facts than a hard and fast or bright line distinction.

"Constructive fraud" is constructive because there is no actual intent to deceive. The label is affixed when a fiduciary does wrong.

The primary difference between constructive fraud and negligent misrep-resentation is the measure of damage that accompanies each. To some extent -- although case law is in some disarray -- the more serious the infraction, the more unfavorable the measure of damage socked to the defendant.

Two competing measures are: (1) the restitution measure, sometimes called out-of-pocket, calculated to be the amount necessary to put the plaintiffs where they were originally; and (2) benefit of the bargain, what the plaintiffs would have gotten had the representation been true. Here, the plaintiffs' appraiser conceded that the property was worth $925,000 when the "fraud" was discovered. "Out of pocket" the plaintiffs weren't. They bought for $274,000 property now worth over three times as much -- in the opinion of their own appraiser. But there were benefits of the bargain losses. Had it been subdividable, it would have been worth $1,100,000 according to their own appraiser. David Seigal (or his insurer) paid the difference in damages -- $175,000.

The fact that Betty Kruse lost nothing and the misrepresentation cost David Seigal $175,000 shows the difference between fiduciary and non-fiduciary standards, or maybe between innocent and negligent misrepresentation.

§ 95.07(f)(6) The Emergence of the Transaction Broker.

A licensee who facilitates a brokerage transaction between the seller and a buyer is an agent known as a Transaction Broker. Transaction brokers do not affirmatively represent either the buyer or seller as an agent. By statute, they represent the deal, not the parties. No fiduciary duties exist, except for the duty to use skill, care, and diligence and the duty of accounting. n208

By acting as a transaction broker, a broker can reduce liability. The broker is non-representative, merely bringing the parties together, not participating in the negotiation of the deal. The broker is still required, however, to treat the seller and buyer with honesty and fairness, disclosing to all parties all known facts that materially affect the value of the property.

Where a broker is entitled to act as a transaction broker by state statute, the licensee must become a transaction broker at the onset -- with prior written notice to the parties. If the buyer and seller are not given prior written notice, the licensee is deemed to be an agent of either the buyer, the seller, or both. n209 The amount of compensation does not determine whether an agency or transactional brokerage has been created. n210

One Florida real estate firm holds itself out exclusively as a transaction broker. At one time, however, the firm distributed advertisements that the company was acting as the "exclusive agent" of two sellers. This shows that there is still a misunderstanding between real estate agents and brokers as to what the various agency roles entail. n211

§ 95.07(g) The Listing Broker's Implied Obligations to the Seller.

Brokers, like lawyers dealing with their clients, are fiduciaries, and held to "the highest ethical conduct." Some obligations to their clients are enforceable even though not specified in the listing agreement.

§ 95.07(g)(1) What A Broker Buying Property from Seller Must Disclose.

The listing broker has a fiduciary duty to advise sellers what the listing price should be and when they are asking too little. n212 There are some brokers, though, who, like Oscar Wilde, can resist anything but temptation. Brokers are occasionally tempted to buy the client's underpriced property themselves, and maybe resell it. n213 Brokers are legally obligated to disclose these purchases. A broker who decides to sneak a purchase might arrange for a friend, relative, or employee to buy it for her secretly.

Sellers have good grounds for refusing to sell to the listing broker, rescinding on a broker who secretly bought through a "straw," n214 or refusing to pay a commission to a broker when one of the broker's employees buys the property without telling the seller that the buyer works for the brokerage firm. n215

The "Real Estate Q and A" column of the *Los Angeles Times* carried a letter from a reader who had tried to sell her house for four months with no luck. As the listing was about to expire, her broker brought forward a purchase offer from the broker's brother--at $15,000 below the asking price:

> [B]ecause the house was vacant and we were paying on two mortgages, we decided to accept. The contract provided for a 60-day closing time. Unknown to us, during the 60 days the brother of the agent found another buyer who paid over $10,000 more than we sold the house to the agent's brother. At the closing, we thought it was strange that our deed was to the ultimate buyer, not to the agent's brother. We feel the agent's brother made a quick $10,000 profit at our expense. Do you think we should do anything about this? n216

The following excerpt suggests the answer:

> A broker is under the duty to disclose the name of a prospective purchaser to his principal, at least in response to a request by the principal. However, if an actual sale is consummated, there is a strong tendency, in most circumstances, to regard the commission as having been earned notwithstanding his failure to disclose the purchaser's identity. In some jurisdictions the court may find that the admitted nondisclosure, concealment, or misrepresentation by the broker was not material, or was not harmful or prejudicial in any way to the principal. Nevertheless, in the situation where the broker effects a sale of the vendor's property to his partner, or to a firm in which the broker himself owns an interest, such fact not being revealed to the vendor, or where the property is sold by an employee of the broker without the knowledge of the broker to a nominal purchaser with the intention of a secret resale later at a profit, the cases have usually been resolved in favor of the vendor, and brokers have been denied commissions. n217

Answering the letter in his *Los Angeles Times* "Real Estate Q and A" column, attorney-broker Robert Bruss replied:

> In most states there is nothing illegal about a double escrow if full disclosure is made to the seller.
>
> However, in your sale, the realty agent had a fiduciary duty to you to disclose all material facts, including the second sale by the agent's brother at a profit of over $10,000. That is called a "secret profit." It was received at your expense by a close relative of the realty agent.
>
> Perhaps it was just a coincidence that a second buyer was found who would pay $10,000 more than you received for the house. I suggest you report the matter to the state real estate commissioner for investigation and possibly revocation of the real estate agent's license. You also might want to sue the parties involved for your $10,000 lost profit. n218

Once the broker resells to an innocent buyer, courts won't set the sale aside. The innocent buyer has done no wrong, and

probably paid full price. Yet, only when the property is resold can the seller prove exactly how good a deal the broker got. If the broker's resale occurs long after the first closing, it may reflect a rising market and not a listing price below market. What the seller wants is a constructive trust to be imposed on the broker's illicit gain: a judgment that the broker turn over the profit to the seller. The seller's theory is that if the broker had been truthful and told the seller what the property was worth, the seller would have realized that gain by selling directly to the eventual buyer. The claim of constructive trust is misplaced if the broker's resale occurs long after the first closing because it may reflect a rising market and not a listing price below market.

Anti-double dealing rules protect buyers as well. The buyer may be protected against a broker in a secret double escrow even when the broker is exclusively the seller's agent.

Assume that a listing broker tells a motivated buyer that the seller insists on a purchase price of no less than $100,000 for the property. The broker parlays the buyer's down payment to buy the property at $90,000, and resells it for $100,000 to the buyer in a double escrow. Upon learning of having been duped out of $10,000, the *buyer* sues the broker. Can the buyer recover even though the listing broker wasn't the buyer's agent? "Yes," ruled the Florida Supreme Court over four decades ago:

> Generally speaking an agent is responsible only to his principal. This, however, is different. The broker in Florida occupies a status under the law with recognized privileges and responsibilities. The broker in this state belongs to a privileged class and enjoys a monopoly to engage in a lucrative business... .The statute requires: "... all applicants who are natural persons shall be competent, honest, truthful, trustworthy, of good character and bear a reputation for fair dealing... ." n219

Notice the quoted language omits the word "fiduciary." The listing broker is not the buyer's agent and owes no fiduciary duty to the buyer. Still, courts find sufficient leeway in the concepts of ordinary due care, good faith and truthfulness to protect the buyer from overpaying when the listing broker is bent on pocketing the overpayment.

The listing broker is also held to a high ethical standard when competing against buyers to purchase the listed property. The broker must deal "firmly and honestly with the prospective buyer." n220 The listing broker, as bidder, has an advantage against all other buyers -- especially if they are not represented by brokers. The listing broker can offer the seller a price minus the brokerage commission. In a case where a fee was 10%, a broker named Palermo made an offer to buy property at $270,000. With no broker's commission, this was equal to the competing buyer's offer at $300,000. If that buyer had bought, the seller would have owed Palermo a commission of $30,000. Palermo and his salesmen took an active role in the negotiations between seller and prospective purchaser Palermo and Palermo Realty Co., Inc. [may well have] violated their duty toward Bush [the competing buyer] by failing to disclose Palermo's interest in buying the subject parcel n221

Palermo was alleged to have used a feasibility study that the rival buyer had prepared. It apparently indicated that the property was a good buy. The buyer's remedy might be damages or a court decree that Palermo convey the property to Bush. Another possibility is to have Palermo hold title as trustee for Bush, liable to account to Bush for all resale profit Palermo might realize.

Seller Not Liable for Commission When Broker Offers to Buy on Terms of Listing Agreement. Suppose the broker offers to buy the property at the full listing price and discloses his status as purchaser. The seller is getting her price in full, and the broker is doing nothing sneaky. But the seller refuses to sell. Has the broker earned a commission then? Probably not.

> To preserve and ensure the fiduciary relationship between broker and seller, a broker may neither purchase from nor sell to his principal unless the principal expressly assents thereto or acquiesces in such a course, with full knowledge of all the facts and circumstances. n222

Even if the seller agrees to let the broker purchase the property, the broker is not entitled to a commission. Once an agent ceases to represent the principal and becomes a party to the deal, there arises a potential for conflict with the principal, no matter how fair the agent may be in that particular situation. A broker can't legitimately claim a commission in a transaction to which she has become a party because she can no longer represent her principal's interests adequately.

§ 95.07(g)(2) The Limits of the Broker's Obligations in Handling Price Negotiations.

Offers and counter-offers are usually relayed from buyer to buyer's broker to seller's broker to seller and back again with not much "schmoozing." Brokers seldom introduce the parties to each other, perhaps because they fear the parties will not get along and kill the deal or get along so well that they will collude to cheat the broker(s) out of a commission.

Brokers often hear things that would be of great value to the other party and must decide whether relaying what they have learned is in their client's best interest. Confidentiality is required of fiduciaries, but there is an exception when "telling a secret" advances the principal's interests, and the principal never told the broker not to tell. In dual agency situations, the broker's duty to disclose material facts often conflicts with the duty of confidentiality. When studying California's dual agency rules, some believe that the legislature favors disclosure over confidentiality when a choice must be made. Consider the typical examples:

> (1) The sellers are about to file for divorce and agree to sell the house before filing so buyers won't think they are desperate to sell fast -- but they are.
>
> (2) The buyers are a couple, and one of them says she has got to have the house at any price.
>
> (3) Sometimes the seller's broker learns the seller's reservation price -- the lowest price the seller would take -- from a previous negotiation. The price is well below the asking price.
>
> (4) May the seller's broker disclose this information to prospective buyers to keep them from being unduly discouraged by a listing price they deem unacceptable?

> There must be "bad faith" in informing the purchaser that the piece of property may be purchased for less than the listing price. In most cases, the broker is allowed to recover the commission and found not to have breached his duty. [This is] because courts are slow to assume the existence of bad faith on the part of the broker from a mere statement made to the purchaser. n223

Haymes v. Rogers, a case often quoted in real estate transactions casebooks, rejects the majority rule. n224

> One of the propositions of law relied upon by the appellant is as follows: "The law requires that a real estate broker employed to sell land must act in entire good faith and in the interest of his employer, and if he induces the prospective buyer to believe that the property can be bought for less, he thereby fails to discharge that duty and forfeits all his rights to commission and compensation for his work."
>
> There is no doubt that the above proposition of law is correct. A real estate agent owes the duty of utmost good faith and loyalty to his principal. The immediate problem here is whether the above proposition is applicable to the facts in this instance.
>
> The question is, is it a breach of a fiduciary duty and a betrayal of loyalty for a real estate broker to inform a prospective purchaser that a piece of realty may be purchased for less than the list price? We believe that such conduct is a breach of faith and contrary to the interests of his principal, and, therefore,

> is a violation of the fiduciary relationship existing between agent and principal which will preclude the agent from receiving a commission therefrom. n225

The undisputed facts were that the broker had obtained a listing for $9,500 on property ultimately sold for $8,500. The listing broker told the purchasers to try an offer of $8,500. The listing broker had also told the sellers that $9,500 was too high, and that repeated efforts to sell at that price had failed.

The dissent argued the listing broker had done nothing wrong.

> Udall, Justice (dissenting).
>
> There is no disagreement between us as to the high standard which the law prescribes must be maintained in dealings between an agent and his principal ... .The difficulty comes in applying the law to the facts of this case.
>
> The great majority of the reported cases denying a brokerage fee involve instances where (1) the agent acts adversely for the purpose of securing a secret profit for himself or otherwise advancing his own welfare at the expense of that of his employer; (2) an agent disclosing the necessitous circumstances of his principal; (3) the agent is guilty of fraud or dishonesty in the transaction of his agency; (4) his conduct is disobedient or constitutes a willful and deliberate breach of his contract of service; or (5) were he to withhold information from his principal which it is his duty to disclose... . n226

Ultimately, the Arizona court left to trial whether the broker had acted in bad faith. Considering *Haymes*, you may decide the authors should have framed their proposition in the conjunctive. n227

§ 95.07(g)(3) The Broker's Duty to Verify Buyer's Creditworthiness.

Buyers don't usually provide financial statements to brokers or sellers; they provide them to prospective lenders once escrow has opened. The broker's commission usually depends on the broker producing a "ready, willing, and able" buyer. "Able" means financially capable of completing the deal. If the buyer turns out to lack the cash or creditworthiness to complete the deal, does the seller owe the broker a commission anyway?

In most states, no:

> [t]he broker's right to his commission is not defeated by a subsequent default on the customer's part, unless the principal's promise to the broker is expressed to be conditional upon actual performance by the customer, or unless the broker has failed to reveal to the principal facts known to him which would indicate the likelihood of such default, or unless he is guilty of some similar breach of duty to the principal. n228

The seller can reduce the risk of becoming liable to the broker if the buyer breaches for lack of ability to complete the sale by:

> (1) Obtaining a statement from the broker before signing a purchase-and-sale agreement that if the buyer proves financially unable to complete, the broker will waive the commission,
>
> (2) Conditioning the listing broker's entitlement to a commission on the actual deal closing,
>
> (3) Insisting on a credit check before accepting the buyer's offer, or
>
> (4) Making sure the purchase-and-sale contract is conditioned on the buyer proving his creditworthiness

> and obtaining the necessary financing or satisfactory loan commitment.

In about a dozen states, though, brokers can't collect on failed deals, particularly when the sale is not consummated because of a purchaser's default due to financial inability. n229 In these jurisdictions courts accept the fact that sellers seldom are in a position to check out the buyer's credit before signing a contract.

Even under the majority rule, the broker must prove the buyer was financially "able" to complete the purchase at the contract date. n230 Further, the broker who conceals or misrepresents facts about the purchaser's wherewithal risks forfeiting the commission and having to pay the seller's damages. n231 This can happen when the broker secretly lends the purchaser the down payment, reports the purchasers have the money to swing the deal when the broker knows they don't, or the buyer requested the deposit check be held in escrow without cashing it, and broker did so without telling the seller. When a seller defers a part of the purchase price, taking back a mortgage or deed of trust, the seller becomes, in effect, a lender, dependent on the buyer's creditworthiness for eventual payment of the purchase price. In this situation, if the buyer supplies the broker with false credit information and the broker makes no effort to verify it, the broker may end up paying off the purchase money loan when the buyer defaults.

That is exactly what happened in Schoenberg v. Romike Properties. n232 The buyer offered a second trust deed on a downtown Los Angeles building he owned as security for a purchase money note. The buyer represented the value of the building to be $895,000, based on an appraisal that he himself had ordered, and the brokers advised the sellers that a security interest on the downtown building would be safer than a security interest on the home being sold. Had either the brokers or the seller made even a cursory investigation, they would have discovered that the building was located in "skid row" and was worth less than $100,000 rather than $895,000. Subsequently, the buyer defaulted and the sellers' security disappeared behind the existing first trust deed. In holding that the brokers and the buyer were liable for fraud and negligence, the court stated:

> [E]ven though, in their ignorance, they may have believed the sale would be to the advantage of [sellers] their gross neglect of their duties as fiduciaries, to act in the utmost good faith and to refrain from the slightest false statement or concealment which would reasonably influence the judgment of their principals rendered them guilty of constructive fraud.
>
> * * *
>
> [The sellers] had a right to rely upon the statements and recommendation that were made to them, and had no duty to make an independent investigation. n233

As it turned out, the buyer had skipped town and never appeared in court, leaving the brokers alone to cover the sellers' losses. On cross-complaint, the broker tried to shift all liability onto the buyer. The court ruled that "the fact that the [brokers] were among [the buyer's] victims cannot affect the rights of [sellers] to compensation for their loss." n234 The buyer's misrepresentation *to the brokers* fell short of fraud.

§ 95.07(h) The Listing Broker's Obligation to Disclose to the Buyer the Condition of the Premises.

§ 95.07(h)(1) Generally.

A disgruntled buyer who discovers a defect in the property may look to the listing broker to cover the costs of cure. "Until recently, real estate brokers named as defendants in post-transaction, property defect lawsuits shielded themselves behind the common-law doctrine of caveat emptor." n235 That defense still holds up in a few states. But the case law trend is decidedly in the buyer's favor as buyers invoke various tort theories: misrepresentations (intentional, negligent, even innocent in some states) or negligence. Cases holding brokers liable for negligent or intentional misrepresentations are more frequent than cases holding them liable for innocent misrepresentations. Innocent misrepresentations arise in situations where the defect was unforeseeable, maybe even undetectable, and the broker

acted in good faith, perhaps relying on the seller's word.

A listing broker (even though representing only the seller) is duty-bound to tell the buyer any facts "materially affecting the value or desirability of the property offered for sale, facts known or accessible only to him [and his principal], and ... not ... within the reach of the diligent attention and observation of the buyer... ." n236

The landmark case of *Easton v. Strassburger* n237 extended broker liability. n238 The agents inspected the property prior to sale and allegedly saw "red flags" marking soil problems. One or both of the agents involved in the transaction knew the house was built on fill and that erosion problems are common on improperly compacted fill. One of the agents had noticed an uneven floor in the house, a common indicator of soil problems. They kept to themselves what they saw, perhaps on the mistaken view that their only duty was to the seller who had employed them.

The house was later damaged by landslides and the purchasers sued everyone potentially liable, including the listing brokers. The purchase price had been $170,000, but in its damaged condition it might have been worth as little as $20,000, with repair estimates ranging as high as $212,000. Under California's comparative negligence rules, the jury found the agents liable for just 5% of the loss, but they got stuck having to pay all of it because of the doctrine of joint and several liability. The listing broker's loss far exceeded the commission.

The court held that listing brokers have a duty to conduct a reasonable investigation for the benefit of potential buyers. Buyers expect it, reasoned the court, and brokers can easily comply. In its opinion, the court cited the Code of Ethics of the National Association of Realtors degrees, that a broker must not only "avoid concealment of pertinent facts but has an affirmative obligation to discover adverse factors that a reasonably competent and diligent investigation would disclose." n239 The *Easton* court reproduced this example in footnote 6:

> [6] In fact, one of the examples provided by the Association to explain the operation of Article 9 is analogous to the facts of this case: "Shortly after Realtor A negotiated the sale of a home to Buyer B a complaint came to the Board charging Realtor A with failure to disclose a substantial fact concerning the property. The charge was that the house was not connected to the city sanitary sewage system, but had a septic tank, whereas the buyer claimed he had every reason to believe the house was connected with the sewer line.
>
> In a statement to the Board's Grievance Committee, Buyer B agreed that the subject was not discussed during his various conversations with Realtor A about the house. However, he pointed out that his own independent inquiries had revealed that the street on which the house was located was "sewered" and he had naturally assumed the house was connected. He had since determined that every other house on the street for several blocks in both directions was connected. He stated that Realtor A, in not having disclosed the exceptional situation, had failed to disclose a pertinent fact.
>
> Realtor A's defense in hearing before the Board's Professional Standards Committee was (1) that he did not know this particular house was not connected with the sewer; (2) that in advertising the house he had not represented it as being connected; (3) that at no time, as Buyer B conceded, had he orally stated that the house was connected; that the fact under discussion was not a "pertinent fact" within the meaning of the Code of Ethics.
>
> The Committee determined that the absence of sewer connection in an area where other houses were connected was a substantial and pertinent fact in the transaction; that the absence of any mention of this fact in advertising or oral representation made it no less pertinent; that ascertaining the failure of previous owners to connect with the available sewer line was within Realtor A's obligation under Article 9 of the Code; that he was, therefore, in violation of Article 9. n240

Stunned into action, California's brokers lobbied the legislature for relief. They got very little. California Civil Code §§

2079 to 2079.9 required the broker who has a listing on a one- to four-family dwelling to:

> Conduct a reasonably competent and diligent visual inspection of the property offered for sale and to disclose to that prospective purchaser all facts materially affecting the value or desirability of the property that such an investigation would reveal... . n241

The statute mandates only a "diligent visual inspection." This would seem to protect brokers from having to know if the house is served by septic tanks or linked to a sewer system, n242 whether the roof leaks, or the house was built on poorly compacted fill. All of these involve areas normally inaccessible to inspection. n243 The statute specifies the degree of care as what a prudent real estate licensee would exercise, measured by the knowledge, education, and experience required to obtain a license. The broker need not disclose every minor detail--just enough to alert the buyer to protect herself. n244

> Although the broker does not have a responsibility to conduct an independent investigation of latent defects, if the broker volunteers to secure an inspection of the premises by retaining a third-party inspector on behalf of the purchaser, then the broker may be held liable to the purchaser for damages caused by the inspector if the broker is negligent in the selection or retention of that inspector. The broker does not have a duty to conduct a comprehensive inquiry into the inspector's credentials, but the broker should exercise reasonable diligence to discover facts demonstrating clear incompetence for the task at hand. n245

The statute imposes a two-year statute of limitations from the date the buyer takes possession. n246 The statute also contains an admonition that buyers are to protect themselves by exercising reasonable care, diligent attention and observation. n247 The state Real Estate Commissioner administers an indemnity fund to reimburse purchasers whose brokers have failed to fulfill their statutory disclosure obligations.

At least one California court has held that the statutory duty to inspect is an obligation of the listing broker only, not of the buyer's broker; n248 and Alabama courts have rejected outright the notion that either the seller's or the buyer's broker is supposed to inspect the property for the benefit of the buyer. n249

But even in Alabama brokers are held liable for concealing or failing to disclose material facts known to them and not readily discernible by the buyer.

A broker who misrepresents facts about the property and has no reasonable way to know the truth, may be liable for an innocent misrepresentation. n250 Innocent misrepresentations give rise to broker liability in Alaska, District of Columbia, Illinois, Minnesota, South Carolina, Texas, Utah and Wisconsin. Elsewhere, brokers are only liable for intentional or negligent misrepresentations. n251 In other states, brokers are not so fortunate.

The rationale for innocent misrepresentation liability: "Real Estate brokers are licensed professionals, possessing superior knowledge of the realty they sell... .Prospective purchasers recognize this ... and tend to rely ... ." n252

This quote is from the leading case flatly rejecting broker liability for intentional misrepresentations. In that case, a broker relied on the seller's mistaken belief that the boundary was 20 feet from where it actually was and the broker's statement that a fence, corral, cattle run and horse shed were all within the property boundary. They were not. This was a great disappointment to the buyers, who were active 4-H Club members. The Washington Supreme Court exonerated the broker because to do otherwise, to hold brokers accountable for innocent misrepresentations, would be to impose a standard of "strict liability."

The Washington Court reasoned: (1) Strict liability would induce brokers to silence for fear of exposure, thus giving buyers less, rather than more, information. (2) Half the jurisdictions rejecting broker liability for innocent

misrepresentations rationalize their results by pointing out that the broker represents the seller. n253 (3) Other professionals are held only to a standard of reasonable prudence. There is no good reason to hold real estate brokers to a higher standard of care than lawyers, physicians, surgeons or chiropractors. (4) Brokers should not be made guarantors of the seller's representations. Buyers can purchase such guarantees from title insurers, casualty insurers, or homeowner warranty programs if they want.

Although much legal writing is premised on the significant distinction between a negligent and an innocent misrepresentation standard, the two sometimes blur into one another. The difficulty of distinguishing innocent from negligent misrepresentations is evident in the above cited Washington case. A dissenting judge thought the broker had been negligent. The judge saw it this way: the seller claimed his erroneous belief about the location of the boundary had been based on an earlier survey. A witness had testified that if there had been any such survey, it would have been made part of the public land records. But no survey had been made. The broker could have discovered this by checking the public records, and was *negligent* in having failed to do so.

Even in jurisdictions not recognizing innocent misrepresentations, real estate agents expose themselves to considerable liability when making representations to purchasers. Any material misstatements about the property will likely constitute reckless or negligent misrepresentations, and any material nondisclosure of property defects will likely constitute silent misrepresentations. The resulting lawsuits are expensive, time-consuming, and damaging to the agent's reputation.

Therefore, real estate agents engaged in selling must carefully protect themselves from misrepresentation claims. They should disclose to purchasers, in writing, all material defects of which they are aware. Additionally, they should have the seller complete a standard disclosure form, and provide a copy to prospective purchasers. Finally, they should place the responsibility on the purchasers to discover defects by recommending that they hire an independent inspector. These simple preventive measures are easily effected and constitute a minimal expenditure of time and money when compared to the overwhelming consumption of resources that accompanies litigation. n254

§ 95.07(h)(2) Real Estate Agents' Disclosure Duties with Respect to Lead-Based Paint Hazards.

§ 95.07(h)(2)(i) Sellers' and Lessors' Disclosure Duties with Respect to Lead-Base Paint Hazards.

Congress enacted the Residential Lead-Based Paint Reduction Act, which became effective October 28, 1992. n255 The Act required the Secretary of Housing and Urban Development and the Administrator of the Environmental Protection Agency to promulgate regulations requiring sellers or lessors of housing constructed before 1978 to disclose to the purchaser or lessee "the presence of any known lead-based paint, or any known lead-based paint hazards, in such housing and provide to the purchaser or lessee any lead hazard evaluation report available to the seller or lessor ... ." n256 Regulations implementing these mandates for pre-1978 housing generally went in effect in 1996. n257 Similar regulations were issued September 15, 1999, for HUD-owned multifamily residential property or a multifamily residential property for which HUD is identified as mortgagee-in-possession. n258 In addition to disclosure, these federal laws also require the seller to provide the purchaser or lessee with a lead hazard information pamphlet; give purchasers a 20-day opportunity to conduct a risk assessment or inspection; and attach specific disclosure and warning language to the sales or leasing contract before the purchaser or lessee is obligated under a contract to purchase or lease. n259

§ 95.07(h)(2)(ii) Brokers' Duties to Inform and Ensure Disclosure By Sellers and Lessors.

The Residential Lead-Based Paint Reduction Act of 1992 also requires brokers (1) to inform sellers and lessors of their obligations under the Act, (2) to inform sellers and lessors that they must certify and acknowledge all disclosures in writing, and (3) to inform sellers that buyers are entitled to conduct an inspection of the premises. Brokers must also ensure that the sellers and lessors they represent have performed their duties under the Act and have otherwise fully

complied with the Act. n260 Failure to fulfill these responsibilities can result in fines, criminal penalties, and civil damages. n261

§ 95.07(i) Sellers May (or May Not) Be Held Responsible for the Misrepresentations of Their Agents.

A principal is sometimes liable for the actions of an agent. The broker's authority, as an agent, is limited to finding a buyer for the property. A real estate agent has "at least implied actual authority or apparent authority to make representations concerning the description and characteristics of the property to be sold." n262 A seller, as principal, can be liable for a broker's unauthorized statements.

Sellers are rarely put in direct touch with buyers. Brokers act as intermediaries conveying information from seller to buyer and back again. Conscientious sellers may convey cautions about the property to their brokers, expecting and even insisting that brokers relay those warnings to buyers. If, however, the brokers prove to be poor messengers and don't pass the warnings forward, misled buyers may have recourse against both the broker and the seller -- despite the seller's having come clean to the broker and never intentionally having misled the buyer directly.

This point is illustrated in *Friedman v. Kasser*. n263 Two couples -- the Friedmans and the Feldmans -- owned a large tract of land, subdivided into three lots. They hired a broker to sell the lots. Everything concerning the sale was left to one of the owners, Leonard Feldman. He met the listing broker at the site and paced off what he assumed were the boundaries of one of the lots, Lot 3. He staked the site and tied pieces of cloth to each stake. Leonard Feldman, however, knew he was not a surveyor, so he admonished the broker that the staking was probably "off a little bit," and that "whoever bought the property should obtain his own survey."

The Kassers bought the property, and the broker never cautioned them that the stakes might be in error. Relying on the stakes as boundary markers, a contractor, whom the Kassers hired, built a house for them.

Later, one of the couples, the Friedmans, decided to buy one of the lots for their own use from their co-partners. As the Friedmans developed their lot, they discovered what they assumed were considerable encroachments by the Kassers: a carport, driveway, and parts of the Kassers' house -- taking into account the township's rule requiring a minimum fifteen foot side yard between new construction and neighboring lines. The couple ordered a survey and found that the Kassers had built on portions of the Friedmans' adjoining lot, a lot the Kassers did not own, relying on Mr. Feldman's erroneous staking.

The Kassers' purchase agreement stipulated that there were no prior representations, and the contract was the "whole agreement" between buyers and sellers. The Kassers did not know the stakes failed to describe the true boundaries, since the broker never told them, so their assent to these provisions wasn't binding. These clauses are like waivers, and waivers are not enforceable unless the party knows what she is waiving and does so intentionally.

The Friedmans filed suit, petitioning the court to order the Kassers to remove the encroaching structures. Instead, to the Friedmans considerable disappointment, the trial court ordered the Friedmans to rectify the boundary error by conveying to the Kassers enough of the Friedmans' lot to make the broker's representations of the boundaries true.

The Friedmans appealed, relying on the proposition that a principal is only liable for his agent's misrepresentations that he knows are false. The court pointed out that this rule only applies in cases of fraud. A principal is not liable for fraud based on an agent's false statements unless the principal knows those statements were false. But this rule was unenforceable here because the Kassers' claim was not based on fraud. It was based on the agency relationship between the Friedmans as sellers and their broker. The Friedmans had some responsibility as principals for their agent's error. "The liability of a principal to third parties for the act of an agent may rest on expressly conveyed authority, implied authority, apparent authority or agency by estoppel." n264 The broker had no express authority because Feldman told the broker to caution the buyers not to rely on his amateur staking effort. Nor was there implied authority, which is the

"authority to do all that is proper, usual and necessary in the exercise of the authority actually granted." n265 Since Mr. Feldman had explicitly warned the broker not to represent the stakes as accurate, the broker had no implied authority to do so.

The broker, however, did have apparent authority to represent the boundaries were accurate. The sellers had put the broker in a position where buyers would naturally assume the agent had the right to make those representations on the sellers' behalf. The broker had unequivocally represented to the Kassers that the boundaries were as staked, and they relied on that representation. Given the integration clause in the contract, the court concluded that the Kassers' reliance was reasonable and upheld the ruling by the trial court.

In sum, the Friedmans lost part of the lot they had purchased because their co-owner, Leonard Feldman, staked boundaries in error, and their broker never cautioned the buyers that the stakes may be inaccurate, as Feldman instructed.

The traditional view, challenged by cases like *Friedman v. Kasser*, is that vendors are protected from their agents' misrepresentations. n266 The courts find it unjust to hold sellers as having authorized statements that their brokers made when the principal didn't even know about it. These courts believe vendors should not be presumed to have meant for their agents to lie and should not be held liable when brokers do lie.

Disclaimers. Sellers often disclaim responsibility for acts or promises of their agents in purchase-and-sale agreements. These disclaimers, however, are not necessarily effective to bar recovery when buyers are found to have justifiably relied on oral representations. In a few states, such disclaimers are void by statute. n267

Seller Recovery Against Broker. When a seller is held liable to a buyer for misdeeds of a broker or agent, there is always a chance the seller will be able to recoup from the broker some of the damages the seller is forced to pay the buyer. This happens in states with comparative equitable indemnity (comparative negligence) statutes. n268

When Owner Is or Is Not Liable for False Property Size and Boundary Information. The *Restatement (Second) of Torts* Section 552C(1) holds owners accountable for innocent misrepresentations of material facts made to induce others to rely, who do so rely, and suffer pecuniary losses as a result. Not all courts find sellers liable for innocent misrepresentations. Some courts restrict liability to negligent or intentionally misleading statements.

In these states, a broker who mistakenly advertises the property as being bigger than it is won't implicate the seller unless the seller either knows the representation is false, was actually responsible for it in some way, or intentionally or negligently contracted to sell more property than she owned. In Miller v. Sullivan, n269 property was described in an MLS printout as having been measured at 1417 square feet, constituting the heated and cooled area of the house. One year after purchasing the house, the buyers attempted to sell it and discovered that the heated and cooled portion was only 1092 square feet. Approximately 300 square feet -- a garage and utility room -- had been erroneously included in the higher square footage count.

The buyer's cause of action against the seller was dismissed summarily because there was no evidence that the sellers made any fraudulent or negligent representations about the correct square footage of the house, nor had the square footage been incorporated as a condition of the purchase-and-sale agreement. n270 The dismissal was affirmed on appeal.

The case against the broker was sent back to trial to determine "disputed issues of fact bearing upon whether [the broker] was guilty of fraud or negligence in handling the real estate transaction." These issues included whether the square footage figure on MLS printouts is understood in the real estate community to represent heated and cooled areas, and whether the listing agent has a duty to double-check and measure the square footage. n271

Broker liability to third parties has been circumscribed. Brokers are only liable to the parties *in the transaction*.

In a California case, brokers were not liable for failing to disclose defects that led to third parties being injured when a balcony collapsed. The 36 plaintiffs, suing the broker for personal injury and wrongful death, alleged that a structural engineer had inspected the balcony, discovered defects, told the brokers, and the brokers had either misrepresented or failed to disclose the dangerous condition to the buyers. The court ruled that the brokers, as a matter of law, could not be held liable to parties not involved in the transaction because they are not beneficiaries of the broker services nor the intended beneficiaries of California's disclosure statutes. n272

§ 95.07(j) The Broker's Duty to Third Parties.

There is little question that a real estate broker owes a duty of care to third persons in the transaction, where the broker does not have privity with, or fiduciary duties to, such third person. The question is the extent of that duty that will be imposed on the broker. The basic test in determining the extent of the duty in any particular case, and whether that duty has been breached, is a question of fact which is determined by weighing certain factors, including: (1) the extent that the transaction was intended to affect the third party; (2) the foreseeability of harm; (3) the degree of certainty that the third party suffered injury; (4) the closeness of the connection between the broker's conduct and the injury suffered; (5) the moral blame attached to the broker's conduct; and (6) the policy of preventing future harm. n273

That standard was applied in Norman I. Krug Real Estate Invs., Inc. v. Praszker, n274 and it cost the broker a bundle. An investor, Krug, put money into an apartment house deal at the urging of an entrepreneur, Gilbert. The deal soured and so Gilbert agreed to convert Krug's equity interest into a note and deed of trust secured by the investment property. Gilbert then attempted to sell the property, listing it with Praszker, the broker, who knew about the investor Krug's deed of trust and who also knew Krug hadn't recorded it. Praszker found a potential buyer and informed him about the unrecorded lien. Praszker also warned Krug to protect his security interest by recording before the sale closed. Krug shrugged off the advice and didn't record his deed of trust. But the sale fell through.

The ever persevering Praszker eventually landed a second buyer. This time Praszker kept the Krug lien his little secret. Nor did Praszker repeat his warning to Krug to record the deed of trust before this second sale closed.

The sale was consummated. According to common-law priority rules, the buyer, an innocent purchaser, took title free of Krug's unrecorded security interest. Krug sued Praszker for the money he would have been paid out of the purchase price if his lien had been valid against the purchaser. The court held that Praszker was liable, but only partly. Krug, too, should bear some responsibility for "complete failure to take any sort of action to protect his security... ." Krug's own expert at trial admitted Krug had been "an idiot not to react" the first time. Still, Praszker was stuck with partial liability for Krug's idiocy in not recording--a liability that was reduced by the seller's contributory negligence. This resulted in a previous damage award of $40,000 being reduced to $14,929.60. n275 The implication for brokers is clear enough. As real estate professionals, they have a duty to disclose a known unrecorded lien to a buyer on penalty of liability to the lienor--even though the lienor isn't the broker's client, the buyer, or the seller.

Is the Listing Broker Obligated to Disclose Defects in the Seller's Property to the Buyer?

In most states, brokers who pass forward seemingly reliable information given them by sellers aren't making negligent misrepresentations to buyers, "unless aware the representations are false." n276 However, a broker might be negligently misrepresenting the condition of the roof if the buyer specifically asks about it, indicates some doubt about the seller's story, and the broker reassures the buyer without having made an independent n277 inquiry.

The broker may have a duty to disclose to the buyer that the broker had seen water stains and to advise the buyer to have an inspector pay close attention to whether the leakage problem had really been solved.

§ 95.07(k) Brokers and the Anti-Discrimination Laws. n278

Real estate brokers must keep a watchful eye on anti-discrimination laws. Many laws are aimed to prevent discrimination in the sale or leasing of real property. This section includes an overview of the main laws prohibiting discrimination, a list as to what is an invidious and what is a permissible basis for discrimination, sales activities that give rise to anti-discrimination actions against brokers, and the problems that discriminatory activity by either a broker or a client can visit upon the other.

95.07(k)(1) The Applicable Statutes.

§ 95.07(k)(1)(i) The Federal Fair Housing Act Amendments.

Congress in 1968 enacted the Federal Fair Housing Act (hereafter, the Act): (1) to prohibit discrimination in housing on the basis of race, color, religion, sex or national origin; and (2) to direct the Secretary of Housing and Urban Development to affirmatively advance fair housing in federal housing urban development programs. n279 The Act prohibited refusal to sell, rent, negotiate for the sale or rental of, or otherwise make unavailable or deny, a dwelling to any person because of race, color, religion, or national origin. n280 Twenty years later, the Fair Housing Act Amendments (FHAA) added familial status and handicap to the types of discrimination proscribed. n281 The FHAA also prohibits discriminating against any person or other entity engaged in residential "real estate-related transactions." n282 The FHAA definition of "real estate-related transaction" includes making or purchasing residential loans (discrimination by commercial lenders had been prohibited in the 1968 Act), and "[t]he selling, brokering, [and] appraising of residential real property." n283

In an effort to cut down losses and improve the management of single family mortgages, Congress passed the new Single Family Mortgage Foreclosure Act as part of HUD's appropriation bill. This act provides that single family mortgages, held by HUD in any state, may be foreclosed by commissioners appointed by HUD who will use a nonjudicial power of sale. This is especially significant in states that presently use a judicial foreclosing process. n284

A final rule by HUD streamlined the regulations governing the (1) Section 312 Rehabilitation Loan Program; n285 (2) Rental Rehabilitation Grant Program; and (3) the Urban Homesteading Program. The rule became effective March 25, 1996. n286

§ 95.07(k)(1)(ii) State Statutes.

State governments have followed the federal government in trying to eradicate discrimination in housing. n287 In fact, forty-seven states and the District of Columbia have enacted fair housing laws. n288 Some state statutes go beyond the Fair Housing Act by prohibiting discrimination based on marital status. n289

To avoid having enforcement of these discrimination laws duplicated, when HUD receives a housing discrimination complaint from a state or locality that contains a fair housing law "substantially equivalent" to the federal law, the federal government utilizes state fair housing law administrators. n290 HUD is required to refer the case to the appropriate state or local agency for handling. n291

§ 95.07(k)(1)(iii) Invidious Discrimination Categories.

Listed below are prohibited bases for discrimination under the federal fair housing acts and state fair housing laws.

Race, Color, and National Origin. Despite state and federal regulatory efforts, housing discrimination is widespread in neighborhoods undergoing racial or ethnic change and in presently all-white areas. One study found that minorities were subject to discrimination over one-fourth of the time in such neighborhoods. n292

Some progress has been made. For example, some groups frequently subjected to discrimination, such as African-Americans, have been able to move from inner cities to the suburbs where they find higher quality for a low price, access to better jobs and schools, and the benefit of lower crime rates. n293

A typical example of overt racial discrimination can be seen in the facts leading to Johnson v. Hale. n294 The plaintiffs responded to Hale's advertisement of apartments for rent and were invited by phone to view the available units. When the plaintiffs arrived, Ms. Hale, after seeing that they were African-American, refused to show them the apartments, explaining that her husband would not allow her to rent to "Negro men." n295

Another more recent case of discrimination involved a white family harassing their neighbors, a Puerto Rican family. n296 In this case, after the neighbors sued for racial harassment, the judge ordered the white family to sell its home of 20 years and move. This exemplifies the serious measures courts are willing to take in order to eradicate racial discrimination. As Jeremy Margolis, the lawyer of the Puerto Rican family, says, "It is unprecedented. They are being excised like a cancer on the community." n297

Racial discrimination this blatant is declining. n298 Today, discrimination based on race, color, or national origin is usually more subtle. The African-American or Hispanic applicant may be quoted a higher price, shown a less desirable apartment, put through a more exhaustive application or credit check process, or kept on hold while other applicants are swiftly accepted. n299

Securing probative evidence of subtle discrimination is difficult. The use of "testers" can help. "'Testers' are individuals who, without an intent to rent or purchase a home or apartment, pose as renters or purchasers for the purpose of collecting evidence of unlawful steering practices." They are usually paired Caucasians and African-Americans or paired Caucasians and Hispanics who respond to the same "for rent" or "for sale" ad. n300 Situations where the African-American or Hispanic is told the property has already been sold or rented, while the Caucasian is wooed or treated differently in other respects, provides circumstantial evidence to support an aggrieved person's assertions of discrimination. n301 "Testing plays a vital part in uncovering racist attitudes and discriminatory housing practices that lead to segregated neighborhoods." n302

Religion. The Fair Housing Act prohibits brokers, sellers and lenders from discriminating against potential occupants on the basis of religion. The statute, however, does allow religious organizations to limit the sale, rental or occupancy of dwellings that are owned or operated for reasons other than a commercial purpose to persons of the same religion, as long as membership in such religion is not restricted on account of race, color, or national origin. n303

A claim of religious discrimination was made in Bachman v. St. Monica's Congregation. n304 In *Bachman*, a Catholic parish decided to sell a house it owned. A Jewish couple made them an offer, and, in response, the parish briefly withdrew the house from the market to see whether any of its own parishioners were interested. No parishioners responded, so the parish put the house back on the market. Soon after, the parish accepted an offer from a Catholic couple who were not members of the parish. The offer from the Catholic couple was for a higher purchase price than the one offered from the Bachmans, but was contingent on financing and the sale of a previous home. The Bachmans claimed that these contingencies made the accepted offer worse for the parish, and the only reason the parish accepted the other couple's offer was because of a discriminatory preference for Catholics over Jews. The Bachmans lost. The jury found that the church was not discriminating when they accepted a contingent offer at a higher price, and the only proven discrimination was taking the house off the market to give the parishioners a chance to bid. On appeal, the court affirmed the decision, noting that the proven discrimination had no causal relation to the Bachmans' loss of the deal because no parishioners had stepped forward to buy during the time the house was taken off the market. n305

Sex. In 1974, Congress added "sex," meaning gender, as a prohibited basis upon which to deny housing to a person. "Sex" discrimination can involve both disparate treatment of the sexes and sexual harassment. n306

Washington attorney, D. Jean Veta, argues that "women seem to be prime candidates" for being quoted and charged higher points and other fees on mortgage applications, especially with mortgage overages, n307 which is a padding on the rate or fee that goes to the loan officer. If true, these loan officers expose their firms to potentially severe civil rights and fair housing penalties. Some argue that this result of higher fees charged to women is due to the fact that women aren't as good at negotiating as men. Is this true or a biased assumption? n308

Most claims of gender discrimination are brought by women, however, men also suffer gender discrimination in real estate transactions. In Baumgardner v. Secretary, United States Dept. of Housing & Urban Dev., n309 the male plaintiff (Holley) responded to a "for rent" sign, advertising a four-bedroom home owned by Baumgardner. Holley talked to Baumgardner, providing information about the rent and estimated utility bills. Baumgardner asked who would be living there. Holley answered the house would be shared by him and three male friends. Baumgardner inquired whether they were students. Holley told Baumgardner all were employed adults. Baumgardner rejected Holley stating, "I'm not interested in renting to males. My past experience has been that males are messy and unclean." Holley filed a claim based on gender discrimination. The judge agreed that Baumgardner had violated the Fair Housing Act by refusing to rent the house based on the fact that the prospective tenants were male. The judgment was upheld on appeal. n310

Familial Status. In 1988, in an effort to insure housing is available for families with children, Congress added "familial status" as a protected class under the statute. n311 Sellers and real estate agents violate federal law if they deny selling to families with children in favor of "adults only" policies. n312

The Act, however, does not preempt density limits imposed by local, state or federal restrictions. n313 Large families or groups of unrelated individuals may be denied housing under "reasonable" government-imposed density controls. n314

Handicap. "Handicap" was also added in 1988 to the anti-discrimination list. A handicapped person is defined as one with "(1) a physical or mental impairment which substantially limits one or more of [a] person's major life activities, (2) a record of having such an impairment, or (3) being regarded as having such an impairment." n315 The Act specifically rejects, as a justification for discrimination against the handicapped, unfounded speculation about the threat to the safety of others or the handicapped themselves that their admission to a project may pose.

Disputes about whether this provision has been violated arise when brokers disclose to prospective buyers that the seller has AIDS. The broker has a common-law duty to disclose to the buyers any material facts regarding the property. The issue then is whether knowledge that the seller has AIDS is a material fact to the buyer. At least sixteen states and the District of Columbia have responded by enacting legislation that protects the broker who fails or refuses to disclose to the buyer that the previous occupant of the sale property was afflicted with or died of AIDS. n316 A Texas statute obligates the broker to tell the truth, but only if the buyer asks directly. n317 Federal courts have held that AIDS is a handicap and discrimination or a failure to disclose could subject the broker to liability under the Fair Housing Act. n318

Marital Status. Unmarried couples are not protected by the Fair Housing Act. They are, however, protected by many state fair housing laws. Under federal law, two other areas may protect unmarried couples. First, the Equal Credit Opportunity Act prohibits discrimination on the basis of marital status in credit transactions regarding housing. n319 An example of what is prohibited is how lenders treat a second wage earner's income. If full credit would be given when the loan applicants are married, then full credit must be extended to unmarried applicants with the same wage-earning potential. Second, federal law protects unmarried couples from discrimination in public housing. n320

Nearly all litigants seeking protection as an unmarried cohabitating couple turn to state law. Note, however, that no state statute expressly prohibits discrimination against unmarried couples. Protection is given through judicial interpretation. The courts perform a two-stage analysis. First they ascertain if unmarried couples are impliedly intended to be protected by the state statute. n321 Second, if they are, and the defendants claim to be discriminating for religious reasons, then the court must determine whether the anti-discrimination law can be enforced constitutionally or under federal law and

still guarantee individuals the right to the free exercise of religion. This analysis often involves a balancing test. n322

Religious Beliefs and State Law. State statutes that prohibit discrimination based on marital status may be subject to a First Amendment challenge as a violation of the right to practice one's religion when landlords are unable to discriminate in renting apartments to unmarried, cohabitating couples based on religious beliefs. n323 As of December 1995, four states have examined marital status anti-discrimination housing laws in the context of free exercise of religious defense claims. Only Alaska has rejected the defense. n324 The court held that the constitutional right to exercise religion is not absolute. The government has a "transactional interest in preventing acts of discrimination based on irrelevant characteristics" -- including marital status -- that outweigh the landlord's interest. n325

Minnesota's fair housing law expressly prohibits discrimination based on marital status. n326 Despite this fact, a Minnesota landlord rescinded his agreement to rent a house to a single woman upon learning she would be sharing the house with her fiance. The landlord was opposed to the cohabitation of unmarried couples, believing it was morally wrong and created the "appearance of evil." The landlord argued that the couple's interpretation of the fair housing law violated the landlord's right to freely practice his religion, and that it also violated Minnesota's anti-fornication statute which makes sexual intercourse between "any man and a single woman" a misdemeanor. n327 The Minnesota court ruled 4-3 for the landlord based on its interpretation of what the legislature had meant by "marital status" discrimination. n328

A California appellate court reached the same result when landlords, who were devout Roman Catholics, refused to rent to an unmarried couple. The landlords didn't want to aid another person in "a sinful facilitation of impermissible behavior."

The court held that the landlords had a constitutional right to freely exercise their religious beliefs, and that this right outweighs the cohabitating unmarried couple's right under California's fair housing law to be free of discrimination on marital status. n329

Sexual Orientation. The Federal Fair Housing Act does not prohibit discrimination on the basis of sexual orientation. Some states, however, have modified their fair housing acts to do so. n330 Many localities have also enacted legal protections against housing discrimination on the basis of sexual orientation. n331 In jurisdictions without sexual orientation anti-discrimination laws, sellers and brokers may refuse to sell homes or apartments to gay men and lesbians. n332 In jurisdictions with sexual orientation anti-discrimination laws, sellers and landlords may invoke the same "free exercise of religion" defense asserted in the cohabitating unmarried couples cases. No court, it seems, has directly addressed this defense. n333

§ 95.07(k)(1)(iv) Permissible Discrimination Categories.

Income Requirements. Federal courts have concluded that the Fair Housing Act does not preclude owners and brokers from investigating the background, financial ability, and general responsibility of prospective occupants, so long as the owner or broker does not discriminate on any of the bases specified in the Act. n334

Federal courts hold that discrimination based on the potential occupant's income is acceptable as long as it is applied evenly to all groups. For example, in *Boyd v. Lefrak Organization,* n335 the U.S. Court of Appeals for the Second Circuit held that a private landlord's requirement that a rental applicant either have a weekly net income equal to 90% of the monthly rental of the apartment or obtain a co-signer whose weekly net income was 110% of the month's rent did not violate the Act. The court concluded that although such an income requirement has the effect of excluding many public assistance recipients, a large majority of whom are African-American or Puerto Rican, the rule does not violate the Act because it applies evenly to all racial groups. n336

Some state courts concur with federal courts and permit income-based selection. The California Supreme Court upheld

the rights of landlords to rent only to tenants who met the landlord's required three-to-one income-to-rent ratio. n337 The rejected applicants were female heads of low-income households whose income consisted solely of public assistance benefits. The California Supreme Courts, admitting that the "objective" financial criteria could result in a barring of most welfare recipients, poor people, or women, have upheld the use of income-to-rent ratios, explaining that the objective ratios actually preclude invidious discrimination because of their very objectivity. For instance, an African-American who meets the income qualifications and is still turned away gives powerful evidence of invidious discrimination.

Many other businesses, including lending institutions and retail and wholesale sellers, are in the position of extending money, goods, or services in exchange for promises to pay or repay in the future. They use minimum income policies, as well as other financial criteria, to make risk-oriented decisions regarding what customers to deal with and on what terms. These businesses, as well as others, could be subjected to legal challenges to their policies based on summary allegations that they had acted "arbitrarily." Plaintiff's approach would require that each business defend its policies as "reasonable" in a trial on the merits. Those trials, like the one plaintiffs propose here, would impose expense and uncertainty on a massive scale with little or no demonstrable benefit to the anti-discrimination policy of the Unruh Act. n338

With this reasoning, the court upheld income-to-rent ratios as reasonably related to default risks, even though there was no trial to determine if empirical evidence supports linking the chance of default with income-to-rent ratios.

Fair Housing Act Exemptions: Owner-Occupied Dwellings. Under § 3603(b), single-family homeowners who own no more than three homes, and owner-occupied dwellings intended for four or fewer families, are exempt from all of the discrimination prohibitions except for advertising, in § 3604. n339 While owners may discriminate on any basis in the sale or rental of their private residence, they may not use a real estate broker and may not advertise their discriminatory intention. n340

The Private Club Exemption. Section 3607 exempts private clubs from the Fair Housing Act. The section states in relevant part:

> Nor shall anything in this subchapter prohibit a private club not in fact open to the public, which as an incident to its primary purpose or purposes provides lodgings which it owns or operates for other than a commercial purpose, from limiting the rental or occupancy of such lodgings to its members or from giving preference to its members. n341

§ 95.07(k)(2) Types of Violations.

§ 95.07(k)(2)(i) Advertising.

The Fair Housing Act makes unlawful certain advertising practices associated with the sale or rental of housing:

> To make, print, or publish, or cause to be made, printed, or published any notice, statement, or advertisement, with respect to the sale or rental of a dwelling that indicates any preference, limitation, or discrimination based on race, color, religion, sex, handicap, familial status, or national origin, or an intention to make any such preference, limitation, or discrimination. n342
>
> Blatant discrimination in real estate advertising such as "For Rent -- Furnished basement apartment in private white home," has become less common, however, more subtle practices have emerged and been called into question. n343
>
> The language in an advertisement may imply an illegal preference and lead to discriminatory practices. For example, consider this hypothetical inspired by a Los Angeles Times article:

Exclusive bachelor apartment with huge walk-in closet near country clubs. Perfect for students and singles. Quiet neighborhood near biking and jogging trails. Great for active adults and within walking distance to churches, synagogues, and shopping.

This hypothetical advertisement may not intend to state an illegal preference but could risk violating the Fair Housing Act by discriminating in the following ways:

4. Words such as "exclusive" and "near country club" may imply income barriers and discourage those who are not professionals.

5. "Bachelor apartment" may imply a preference for males.

6. The word "bachelor" coupled with "students" and "singles" could discriminate against married people or families.

7. "Quiet neighborhood" and "active adults" may further a no-kids connotation.

8. Mentioning "jogging and biking trails" suggests that those with handicaps are unwelcome, as does use of the term "walking distance," "active adults" and "walk-in" closets.

9. Mentioning "churches and synagogues" might be interpreted as screening out members of other religions, those who do not attend services regularly, or those who do not believe in any religion.

Many brokers and real estate agents in their zeal to market a property have been fined by HUD or their state fair housing agency for inadvertent violations. Compliance is made difficult because HUD and many state agencies have yet to publish a list of "not acceptable" words or phrases. Leonard Lanfranco, Executive Director of the Oregon Newspaper Publisher's Association, puts the problem this way: "It's like if you move to a new town and you're told they have certain motor vehicle laws, but they won't post any signs, and they'll arrest you if you violate them. That's what H.U.D. has done to all of us." n344 On the other hand, Thomas Honore, Director of the Fair Housing Division of H.U.D.'s Los Angeles office, explains, "We demean the law by saying it's just about a list of words. I don't believe in having lists because no list will by its nature be all-inclusive, and you have to look at the context. People are looking for a simple answer to a much more complex issue. It's a long and sad tradition of people assuming that some people are less worthy or less attractive and deserve less of a welcome." n345

The bottom line is that in order to avoid violations of the federal or state fair housing advertising laws, brokers should consult their state newspaper association, state fair housing office, or regional H.U.D. office for guidance when placing advertisements.

Another challenged practice is when only one race of human models is used in advertisements. Whether intended or not, this may convey a message to buyers or renters, not of the same race as the models, that they are unwelcome.

Federal courts have held advertisements for housing, suggesting to the ordinary reader that a particular race is preferred or disfavored, are in violation of the Act. n346 The "ordinary reader" standard was defined in *Ragin* as "neither the most suspicious nor the most insensitive of our citizenry. Such a reader does not apply a mechanical test to every use of a model of a particular race." n347

The Sixth Circuit has held that, as a matter of law, a single advertisement cannot violate the Act for exclusively using

white models, unless the number of models is large and more than select. n348 Also, the publisher of an advertisement using only white models cannot be held to have violated the Act if the advertisement is from a different project or advertisers. A housing complex, on the other hand, that ran advertisements several times a week for a year depicting numerous white models as consumers and black models as doormen or custodial employees had difficulty persuading a trier of fact that the ads did not indicate a racial preference. n349

A showing of a broker or owner's subjective intent to discriminate is not necessary to establish a violation of the Fair Housing Act. n350 The likely effect of the advertisement is sufficient. Evidence of intent to indicate an illegal preference, however, bears on the question of whether the words in fact do so. n351 In 1980, H.U.D. promulgated regulations to "provide guidance" to newspapers and others concerning how to avoid discrimination in real estate advertising. n352 The use of human models is discussed as follows:

> If models are used in display advertising campaigns, the models should be clearly definable as reasonably representing majority and minority groups in the metropolitan area, both sexes, and, when appropriate, families with children. Models, if used, should portray an equal social setting and indicate to the general public that the housing is open to all without regard to race, color, religion, sex, handicap, familial status or national origin, and is not for the exclusive use of one such group. n353

HUD's comments regarding 24 C.F.R. § 109.30(b):

> The term "reasonably representing" is intended to assure that models will convey a message of general inclusiveness of persons covered by Title VIII, not a literal display of each minoritygroup. For example, the use of two white models, one male and one female, would not convey such inclusiveness. In a small town with no minority groups other than blacks, however, use of two models of different sexes, one white and one black, would "reasonably represent" majority and minority groups of both sexes. n354
>
> Federal courts do not limit the unlawful use of human models to just racial discrimination. All of the classifications listed under § 3406(c) are protected from discrimination in real estate advertising. n355 These complex rules may be one reason for the decline in the use of human models in real estate advertisements.

§ 95.07(k)(2)(ii) Steering and Showings.

Steering is the practice of showing minority clients property only in neighborhoods populated predominantly by minorities. Racial steering is prohibited by the Fair Housing Act, n356 but it occurs regularly. n357

Generally, brokers who treat clients differently because of race may be violating Title VIII; n358 however, what constitutes "steering" is not precisely defined in the Act. Federal courts have provided some guidance. In Village v. Dwivedi n359 the Seventh Circuit exonerated a real estate broker who, in assisting his African-American clients, took the listing book out of their hands whenever the couple looked at listings of suburbs not predominantly black and turned the pages to a suburb that was becoming predominantly black. This conduct was deemed insufficient to support a finding that the broker had engaged in racial steering. n360 On the other hand, when a broker misrepresents that there are no homes available or refuses a customer's explicit request to be shown a house in a neighborhood that the broker wants to reserve for persons of a differing race, that broker is violating the Act. n361

§ 95.07(k)(2)(iii) Shielding Sellers Who Discriminate.

Real estate brokers and agents may be liable for their principals' actions when they perpetuate discrimination in violation of the Act -- even if they are just trying to accommodate their bigoted principals. Under agency law, an agent has no obligation to carry out his principal's order to do an illegal act, and an agent who assists his principal in

committing a tort is himself liable as a joint tortfeasor. n362

Brokers can protect themselves from a seller's bigotry by putting a fair housing clause in the listing agreement -- "Real estate is available to any prospective purchaser, regardless of race, color, religion, sex, handicap, familial status, national origin, or ancestry." The broker should put this "fair housing" clause in all promotional material. As a precaution, brokers may want to read this clause to prospective sellers before accepting listings. If a seller balks, the broker should refuse to take the listing.

Brokers sometimes get themselves into trouble if they hide the fact that the seller rejected the buyers because of race. For example, in Dillon v. AFBIC Dev. Corp., n363 a property owner refused to sell his home to Jean Dillon, after his agent informed him that Ms. Dillon was black. When Ms. Dillon questioned the agent about her rejected offer, the agent lied and told Ms. Dillon that her offer had been rejected because the owner decided to sell it to a member of his family. The court found the agent in violation of the Act, because the agent made misrepresentations to assist the seller in committing a racially motivated refusal to sell the home. In these situations, the agent's own conduct violates the Act. n364 If, on the other hand, an agent truthfully tells prospective buyers that the rejection of an offer was racially motivated, courts have held that the agent did not violate the Act. n365

Brokers may also find themselves in violation of the Act if they provide sellers with racial information about buyers. In Green v. Century 21, n366 the seller of an apartment building received an offer from two financially qualified African-Americans. The owners asked about the race of the buyers, and the agent told them they were black. Thirty minutes later, another agent in the office presented a second offer from a less financially qualified single white female. The second offer was for the same price, but with a lower down payment. With the new offer on the table, the owners rejected the offer from the two African-Americans, despite their superior financial resources. Later, the white buyer could not come up with a large enough earnest money deposit. The sellers rescinded, but still refused to sell to the two African-Americans, who, in turn, brought suit under *42 U.S.C. § 3604.* The court found that both the owners and the brokers had violated the Act. n367

The California Attorney General limited a broker's disclosure options under the California Fair Employment and Housing Act: n368

> A real estate broker who furnishes information to an owner concerning the ethnic background of a prospective buyer engages in a discriminatory practice. This is true whether the broker furnished the information voluntarily or at the owner's request. A broker may not voluntarily indicate to the owner the race of a prospective buyer and must decline to provide that information if the owner requests it. n369

§ 95.07(k)(3) Seller Liability for Broker's Acts.

Generally, principals are liable for the actions of their agents done within the scope of their employment. "Scope of employment" defenses, however, are by no means a safe haven for owners. n370 Under the Fair Housing Act, a principal cannot free himself of liability by delegating to an agent a duty to not discriminate. n371 In Walker v. Crigler, n372 an apartment owner issued instructions to his rental agent not to discriminate. Despite these instructions, the rental agent refused to rent an apartment to the plaintiff because she was a woman. The Fourth Circuit held that the owner could not dispose of his duty to prevent sexual discrimination in the renting of his property by simply telling agents not to discriminate. n373 Supervision may be required and, in this case, was minimal. Note, however, that when an owner is found liable for acts of his agent, the owner may seek contribution from the agent. n374

§ 95.07(k)(4) Damages for Violating Anti-Discrimination Laws Can Be Sizable.

Recent federal legislation has expanded the scope of damage remedies and made it easier to get administrative relief from discriminatory housing practices. n375 A Georgetown law professor settled a case against a luxury housing

developer for excluding African-Americans from their promotional campaign. The developer settled, without admitting liability, for $325,000, paid to two nonprofit housing organizations. n376 As a result of this and other cases, the National Association of Home Builders warns members not to use human models in their advertisements unless the guidelines provided in a fair housing compliance manual are followed. Many real estate advertisers just avoid using human models altogether. n377

Courts differ as to what types of damages are available in discrimination cases. Some courts allow the victim of discrimination to be awarded compensatory damages. n378 Other courts do not award victims compensatory damages. These courts feel that compensatory damages are meant to make the victim whole, not merely to vindicate rights. Discrimination, a violation of a constitu-tional right, has no real measure of damage and cannot support an award that is more than nominal. n379 Punitive damages are awarded in a discrimination action for acting recklessly or with callous indifference to a prospective client's civil rights. n380

Monetary damages can never fully compensate a victim of discrimination, but, at the very least, they demonstrate that the courts and the nation take these injuries seriously. Damages send a warning to discriminators. n381 Discrepancies exist as to the amount of damages awarded in Federal Fair Housing Act cases. Damages can range anywhere from one dollar to $2.4 million. n382

FOOTNOTES:

(n1)Footnote 57. A 1979 study on home sales in Canada shows that 25% of all home sales were by owner (in Montreal the figure is 38.9%; in Toronto, 16.4%; and in Vancouver 23.4%). The for-sale-by-owner ratio tracked commission rates, with higher commissions and owner-sales rates going hand-in-hand. "These data suggest a significant substitution of owner services for broker services when commission rates are high. But as [the gatherers of the data] Goldberg and Horwood point out, these data are merely suggestive. Other differences among these three Canadian cities might also account for the variation in their by-owner sales." Stephen W. Salant, *For Sale by Owner: When to Use a Broker and How to Price the House*, 4 J. Real Est. Fin. & Econ. 157 (1991).

(n2)Footnote 58. *E.g.*,

Selling price		$100,000
Mortgages (80% loan/value ratio)	-	80,000
Net before closing costs		20,000
Closing costs (2% of gross sales price, includes title insurance, recording, escrows or legal fees)	-	2,000
		18,000
Brokerage commission	-	6,000
Net to seller		$12,000

(n3)Footnote 59. The Ninth Circuit has upheld against antitrust challenge the MLS restricting access to members of the local Board of Realtors degrees. *Supermarket of Homes, Inc. v. San Fernando Valley Bd. of Realtors, 786 F.2d 1400 (9th Cir. 1986).* The exclusion of part-time workers from MLS access was held a violation of California's antitrust law in *Marin County Bd. of Realtors v. Palsson, 549 P.2d 833 (Cal. 1976). See* Comment, *Exclusion from Real Estate Multiple Listing Services As Antitrust Violations*, 14 Cal. West. L. Rev. 298 (1978); Annotation, *Validity, Construction & Effect of Real Estate Brokers' Multiple Listing Agreements, 45 A.L.R.3d 190 (1971).* Bruce D. Greenberg, Gary K.

Wolinetz, *25 Years Of The New Jersey Antitrust Act, 26 Seton Hall L. Rev. 637 (1996)* (Group boycotts under the Act have also arisen in the real estate context).

Re/Max Int'l., Inc. v. Realty One, Inc., 924 F. Supp. 1474 (N.D. Ohio 1996) (Real estate brokers had not established that competitor with 48 percent market share in one city and 50.6 percent market share in another monopolized market in those cities; no evidence was presented that competitors' market share had increased after they initiated alleged anticompetitive activity and there was no evidence that there were entry barriers to real estate industry); Annotation, *Activities of Real-Estate Agent Or Association As Subject to Federal Antitrust Laws, 44 A.L.R. Fed. 743;* Annotation, *Validity, Construction, And Effect of Real-Estate Brokers' Multiple-Listing Agreement, 45 A.L.R.3d 190.*

(n4)Footnote 60. *See* Fla. Stat. Ann. § 475.25(d).

(n5)Footnote 61. While some localities have tried to ban "for sale" signs from front lawns as unsightly or contributing to neighborhood instability, the U.S. Supreme Court has shielded "for sale" signs under the *First Amendment. Linmark Assocs. v. Township of Willingboro, 431 U.S. 85 (1977).* P. Cameron DeVore, Robert D. Sack, *Advertising And Commercial Speech*, 462 PLI/Pat 371, at 862 (Nov. 1996) (regulation prohibiting the posting of "For Sale" sign or requiring a fee before posting the sign is held to be in violation of First Amendment).

See also Pearson v. Edgar, 965 F. Supp. 1104 (N.D. Ill. 1997) (statute prohibiting real estate brokers from soliciting owner to list or sell his home if owner has provided notice of his desire not to be solicited violated First Amendment); *Cleveland Area Bd. of Realtors v. City of Euclid, 88 F.3d 382 (6th Cir. 1996)* (Organization of real estate brokers brought suit challenging validity of city ordinances regulating the size, number, and placement of signs in residential neighborhoods, as violative of the First Amendment); *Americas Homes, Inc. v. Esler, 668 So. 2d 239 (Fla. App. 1996)* (Seller of homes sued to enjoin homeowners from posting sign on their property that stated that their property was for sale due to local flooding. The court held that homeowners were exercising their right to free speech).

(n6)Footnote 62. *See* Robert J. Bruss, *Choosing a Good Real Estate Agent*, Los Angeles Times, Aug. 27, 1989 (Real Estate Section), at 9.

(n7)Footnote 63. *Money Newsline, Q & A*, 22 Money, July 1993.

Hagedorn v. Elwyn, 645 N.Y.S.2d 77 (N.Y.A.D. 3 Dept. 1996) (Essential feature of real estate broker's employment is to bring parties together in amicable frame of mind, with attitude toward each other and toward transaction in hand which permits their working out terms of their agreement).

(n8)Footnote 64. For a description of one firm's program for soliciting mortgage money from investors and lending it to buyers, *see Wharton v. Smith, 561 A.2d 1169 (N.J. 1989).* In this case the broker diverted funds clients had meant to be invested in real estate mortgages. Bilked investors sought recovery from the state Real Estate Guaranty Fund. Their claim was rebuffed when the court concluded that the fund had been set up to protect real estate brokerage clients -- purchasers and sellers -- only, and not investors in mortgage banks whose principals also happened to be real estate brokers.

(n9)Footnote 65. For helpful ideas for negotiating a buyer's broker agreement, see Marsh, Real Property Transactions 148-67 (1992).

(n10)Footnote 66. *See Tanner Assocs. v. Ciraldo, 161 A.2d 725 (N.J. 1960); Chan v. Tsang, 3 Cal. Rptr. 2d 13 (1991)* (The breaching buyer was held liable to his own broker for the same commission the broker would have earned had the buyer not breached).

(n11)Footnote 67. Real Estate Brokerage Law and Practice, Ch. 6, *Licensing of Brokers and Salespersons* (Matthew Bender).

The Association of Real Estate License Law Officials (ARELLO) publishes an annual Digest of Real Estate License Laws, which can be obtained by telephoning (334-260-2902), or can be ordered from ARELLO's web site: http://www.arello.org/.

Compare Hermitage House Square, L.P. v. England, 929 S.W.2d 356 (Tenn. App. 1996) (Statute prohibiting individual from acting as real estate broker without license only applies when individual is acting for another; when individual is acting on his own behalf, there is no requirement that person acquire real estate license before negotiating conveyance of land).

With Smith v. Real Estate Agency, 939 P.2d 77 (Or. App. 1997) (substantial evidence that petitioner was not partner in purchaser of property when petitioner arranged purchase transaction supported finding that petitioner had engaged in professional real estate activity "for another" within meaning of statute precluding such action without license).

(n12)Footnote 68. *Shehab v. Xanadu, Inc., 698 S.W.2d 491 (Tex. Civ. App. 1985). Ashton Gen. P'ship v. Federal Data Corp., 682 A.2d 629 (D.C. App. 1996)* (Investment banker that mediated sale of corporation's assets cannot recover real estate broker's commission since he did not possess the real estate license at the time of the transaction); *Smith v. Stevens, 1996 Ohio App. LEXIS 4951* (Ohio App. 2 Dist. 1996).

But see Roberts v. Gaskins, 486 S.E.2d 771 (S.C. App. 1997) (To prevent a business broker from enforcing a legal claim to a commission earned from the sale of business assets simply because the business includes real estate would extend the real estate broker licensing provisions beyond their stated definitions and purposes).

Compare Thomas v. Daubs, 684 N.E.2d 1011 (Ill. App. 1997) (that business broker that did not possess real estate broker's license was barred by Real Estate License Act from recovering finder's fee for oral contract for sale of landfill business in which real estate component, which encompassed more than 180 acres, was more than incidental).

(n13)Footnote 69. Brokers are sometimes called "Realtors degrees." That term refers to members of National Association of Realtors degrees, the leading private organization representing brokers and agents.

(n14)Footnote 70. *E.g., State v. Spears, 259 P.2d 356, 359 (N.M. 1953)* (citing 1951 N.M. Laws Ch. 224, § 9, listing New Mexico's licensing requirements).

(n15)Footnote 71. Cal. Bus. & Prof. Code § 10150.6. Occasionally, a broker obtains a license after the seller signs a listing agreement, but before a sale is closed. Under these circumstances, the broker's entitlement may depend on the precise wording of the licensing statute. In California, the broker would prevail under such circumstances since the statute only requires the broker be licensed at the time the cause of action arises.

(n16)Footnote 72. *Roman v. Lobe, 152 N.E. 461 (N.Y. 1926).*

(n17)Footnote 73. *152 N.E. at 463.*

(n18)Footnote 74. Cal. Bus. & Prof. Code § 10130.

(n19)Footnote 75. *Id. see also Sheetz v. Edmonds, 247 Cal. Rptr. 776 (Cal. App. 1988)* (the power of attorney executed to allow a family friend to manage the sale of real property did not exempt the friend from the real estate licensing requirements of California even though the friend managed no other properties).

(n20)Footnote 76. Cal. Bus. & Prof. Code § 10136.

(n21)Footnote 77. Cal. Bus. & Prof. Code § 10133.

(n22)Footnote 78. In New York, however, an attorney who is not licensed as a real estate broker may act as co-broker with a licensed real estate broker and share the brokerage commission. N.Y. Real Prop. Law § 442(f) ("the provisions of this Article shall not apply to ...attorneys at law").

(n23)Footnote 79. *See Dougherty v. Commonwealth State Real Estate Comm'n, 513 A.2d 555 (1986), appeal denied, 527 A.2d 547 (Pa. 1987)* (broker's license suspended for one year because of salespersons' failure to mention that property was being sold "as is" and representations of seller guarantees when seller had made no guarantees). *Goldsten v. District of Columbia Real Estate Comm'n, 709 A.2d 1178 (D.C. App. 1998)* (the court upheld D.C. Code Ann. § 45-1941 which called for the mandatory revocation of a real estate broker's license if the broker had been convicted of a crime involving dishonesty or fraud); *Maneri v. New York State Dep't of State, 660 N.Y.S.2d 26* (N.Y.A.D. 2 Dept. 1997) (Substantial evidence supported revocation of broker's real estate broker's license and his notary public commission based on finding that he was untrustworthy and had engaged in misconduct, where broker had participated in scheme in which several pieces of real property were sold without owners' knowledge or consent, and broker notarized deeds without signatories having appeared before him). Annotation, *Grounds for Revocation Or Suspension of License of Real-Estate Broker Or Salesperson, 7 A.L.R. 5th 474.*

(n24)Footnote 80. *Romero v. Hariri, 911 P.2d 85 (Haw. App. 1996)* (holding that the deception of a real estate broker who misrepresented that he was still licensed warranted an award of punitive damages of $1 million).

(n25)Footnote 81. *Touhey & Barton v. Anaheim Mem. Hosp., 231 Cal. Rptr. 706 (1986). Thomas v. Daubs, 684 NE.2d 1011 (Ill. App. 1997)* (Real Estate License Act does not bar cause of action to collect finder's fee by business broker who does not hold real estate broker's license if real estate component is only incidental to sale of entire business). Annotation, *Validity, Construction, and Enforcement of Business Opportunities or "Finder's Fee" Contract, 24 A.L.R. 3rd 1160 (1998).*

(n26)Footnote 82. *Amerofina, Inc. v. United States Indus., 335 A.2d 448, 451 (Pa. Super. 1975).*

(n27)Footnote 83. *Evans v. Riverside Int'l Raceway, 47 Cal. Rptr. 187, 193 (1965); see, e.g.,* D. Barlow Burke, the Law of Real Estate Brokers § 4.5.2, at 212-14 (1982). *Lindenstadt v. Staff Bldrs., Inc., 55 Cal. App. 4th 882 (1997)* (the rationale for the finder's exception as follows: "One who merely introduces two parties to a real estate transaction, whether or not he solicits those persons, does not need to be as knowledgeable about real estate transactions as a licensed broker, unless, of course, he participates in the negotiations"); *Greenlee v. Rainbow Auction/Realty Co., 553 N.W.2d 257 (Wis. App. 1996)* (Discussion on the term "Broker").

(n28)Footnote 84. *Diversified General Corp. v. White Barn Golf Course, Inc., 584 P.2d 848 (Utah 1978)* (the court stated that "[t]he essential feature of a broker's employment is to bring the parties together in an amicable frame of mind, with an attitude toward the transaction in hand which permits their working out the terms of their agreement," and that because "[t]hey may reach agreement without his aid and interference" doesn't mean that the broker has not negotiated the transaction. The court took this position so that Utah's licensing statute would not be a "toothless enactment," allowing unlicensed finders to engage in what they saw as the practice of brokering.); *see also, Brakhage v. Georgetown Assocs., 523 P.2d 145 (Colo. App. 1974); First Equity Corp. of Fla. v. Riverside Real Estate Inv. Trust, 307 So. 2d 866 (Fla. App. 1975); Gregory v. Roedenbeck, 174 S.W.2d 585 (Tex. 1943); Baird v. Krancer, 246 N.Y.S. 85 (Sup. Ct. 1930); Corson v. Keane, 72 A.2d 314 (N.J. 1950). Hagedorn v. Elwyn, 645 N.Y.S.2d 77 (N.Y.A.D. 1996)* (For real estate broker to be entitled to commission, although broker need not be present for actual negotiations, he or she must do more than simply introduce parties, call property in question to attention of potential buyer, or provide that buyer with limited information); *Consolidated Realty Group v. Sizzling Platter, Inc., 930 P.2d 268 (Utah App. 1996)* (Real estate broker that entered into contract to obtain lease for owner of commercial property was entitled to commission when tenant entered into lease with partnership, one partner of which was owned by the same principal as property owner, where broker arranged meeting that resulted in lease formation); *Roberts v. Gaskins, 486 S.E.2d 771 (S.C. App. 1997)* (a business broker unlicensed as a real estate broker may enforce a commission contractually earned on the sale of the personal property of a business, irrespective of the form of sale, even though the sale may include real

estate; provided, of course, no commission can be based either directly or indirectly on the value of the real property involved); *Buck v. Cimino, 658 N.Y.S.2d 676 (N.Y.A.D. 1997)* (Real estate broker was "procuring cause" of sale of listed real estate to third party that he informed of property and showed the exterior to, though broker did not participate in any of sales negotiations that resulted in execution of purchase agreement by third party less than two weeks thereafter, where evidence suggested that negotiations between third party and vendors were minimal at best, and where broker was prevented from participating in negotiations by third party's affirmative misrepresentation that she lacked any interest in property when the contrary was clearly true).

But see M.A. Salazar, Inc. v. Levy, 655 N.Y.S.2d 612 (N.Y.A.D. 1997) (Real estate broker failed to establish that he had procured prospective purchaser who agreed to all essential terms customarily encountered in real estate transactions, including closing date, and thus was not entitled to commission, even though broker produced evidence that prospective purchaser and seller had agreed on price).

See also Agawam Realty, Ltd. v. Haggerty, 636 N.Y.S.2d 379 (N.Y.A.D. 1996) (To recover real estate brokerage fees stemming from unclosed transaction, plaintiff must establish that he or she has procured prospect who has reached agreement with seller on essential terms and is ready, willing, and able to perform).

Compare Nooney Krombach Co. v. Blue Cross & Blue Shield of Mo., 929 S.W.2d 888 (Mo. App. 1996) (Under terms of agreement between real estate broker and client with regard to sale of client's property, broker did not have to be procuring cause of sale or show that agreement gave it exclusive right to sell in order to recover commission; broker was promised a commission in consideration for its role as client's representative in sale, and broker was not retained to seek out purchasers).

(n29)Footnote 85. *Lloyd v. Saffa, 719 P.2d 844 (Okla. App. 1985) overruled by Commodore Home Sys. Inc. v. Citicorp Acceptance Co., 780 P.2d 674 (Okla. 1989). Tyrone v. Kelly, 507 P.2d 65, 69, 72 (Cal. 1973); Bottomley v. Coffin, 399 A.2d 485 (R.I. 1979); White v. Miriam Realty Co., 547 S.W.2d 184 (Mo. App. 1977). but see Tenzer v. Superscope Inc., 702 P.2d 212 (Cal. 1985); Property House v. Kelly 715 P.2d 805 (Haw. 1986); Shinberg v. Bruk, 875 F.2d 973 (1st Cir. 1989); King v. Clifton, 648 S.W.2d 193 (Mo. App. 1983).*

(n30)Footnote 86. Don Augustine and Peter Fass, *Finder's Fees in Security & Real Estate Transactions, 35 Bus. Law 485, 489 (1980).*

(n31)Footnote 87. In a small number of transactions, a broker could lose a commission for want of a written agreement because of the standard provision in most statutes of frauds requiring writing for contracts not to be performed within one year.

Say the client owns a house in a soft sales market and agrees to lease it for two years, giving the tenant the option to buy anytime in the second year of the lease. The option is an agreement that will not be performed within one year. Suppose a broker successfully produces a lessee who enters this lease with option. The broker will be counting on a sales commission when the tenant exercises the option. A commission on the sale would be much larger than the commission on the lease--but the broker's commission entitlement would fail for want of a writing. The landlord's obligation to pay it is contingent on an event that won't take place within one year. N.Y. Gen. Oblig. Law § 5-701, n.31 (1989), *construed in* 53 Op. Att'y Gen. (1963).

(n32)Footnote 88. These states with special Statute of Frauds provisions are: Alaska, Arizona, California, Hawaii, Idaho, Indiana, Iowa, Kentucky, Michigan, Montana, Nebraska, New Jersey, New Mexico, Oregon, Rhode Island, South Carolina, Texas, Utah, Virginia, Washington, and Wisconsin. The states with licensing statute requirements for listing agreements to be in writing are: Connecticut, Minnesota, Nevada, and Texas. The states with administrative requirements are South Carolina, Vermont, and Iowa. J. Clark Pendergrass, *The Real Estate Consumer's Agency and Disclosure Act: The Case Against Dual Agency 48 Ala. L. Rev. 277 (Fall 1996)* (the Alabama Real Estate Consumer's Agency and Disclosure Act requires that in order to establish an agency relationship there must be a written, bilateral

agreement); Perry J. Woodward, *Intentional Interference with Prospective Economic Advantage: A Tort That Eviscerates The Real Estate Brokers' Statute of Frauds, 36 Santa Clara L. Rev. 1219 (1996)* (A broker may not raise equitable estoppel as a defense to bar Statute of Frauds unless the defendant has engaged in fraudulent conduct which the broker, charged with knowledge of the statute of frauds, reasonably relies upon); John D. Hastie, *Real Estate Acquisition, Development, And Disposition From The Developer's Perspective,* SB08 ALI-ABA 1, at 89 (Aug. 14, 1996).

Bowen v. Wyoming Real Estate Com'n, 900 P.2d 1140 (Wyo. 1995) (The commission cannot suspend a real estate broker's license based on the fact that he failed to obtain a written listing agreement before advertising the property involved); *Trammell Crow Co. No. 60 v. Harkinson, 944 S.W.2d 631 (Tex. 1997)* (Real estate broker's claim for tortious interference with oral commission agreement between broker and landlord, or alternatively for tortious interference with prospective business relation, stated claim for recovery of real estate commission and was thus barred under provision of Real Estate License Act (RELA) prohibiting action for recovery of real estate commission absent written agreement); *Texas Builders v. Keller, 928 S.W.2d 479 (Tex. 1996)* (Solicitation letter which was sent by landlord owner to real estate broker which stated that owner had 58,333 square feet available for lease at building, which was part of larger building also owned by landlord, did not describe property ultimately leased directly to tenant who was initially shown property by broker with sufficient certainty to satisfy Real Estate Licensing Act, and thus, broker could not sue landlord to recover commission).

But see Fred Ezra Co. v. Pedas, 682 A.2d 173 (D.C. App. 1996) (Real Estate Licensure Act did not bar enforcement of unwritten implied- in-fact contracts to pay commission); *R.B. Ventures, Ltd. v. Shane, 112 F.3d 54 (2d Cir. 1997)* (Under New York law, real estate broker's oral contract claims against developer for unpaid commissions were not precluded by the Statute of Frauds, as licensed real estate brokers are exempt from Statute's requirement that brokerage commission contracts be in writing to be enforceable); *Tower Int'l, Inc. v. Caledonian Airways, Ltd., 969 F. Supp. 135 (E.D.N.Y. 1997)* (under New York law, quantum meruit or unjust enrichment recovery is not available for services rendered by broker in absence of writing evidencing contractual relationship); *M.K.D. Capital Corp. v. Miller, 652 N.Y.S.2d 919 (N.Y. Sup. 1996)* (informing purchasers about property and providing materials to assist in preparing offer only before broker became licensed precluded broker from seeking compensation; and equitable estoppel did not apply to require compensation).

(n33)Footnote 89. *Marathon Realty Corp. v. Gavin, 398 N.W.2d 689 (Neb. 1987). Proctor v. MacDonald, 689 A.2d 1330 (N.H. 1997)* (relationship between brokers and owner subsequent to expiration of original commission agreement incorporated commission schedule contained in original agreement; implied agreement to pay commissions upon lease renewals and extensions did not violate statute of frauds).

Annotation, *Admissibility of Oral Agreement as to Specific Time for Performance Where Written Contract is Silent, 85 A.L.R.2d 1269 (1997);* Annotation, *Admissibility of Oral Agreement Respecting Duration of Employment or Agency Where Written Contract Is Silent, 85 A.L.R.2d 1331 (1997);* Annotation, *Applicability of Parol Evidence Rule to Written Listing Agreement of Real-Estate Broker, 38 A.L.R.2d 542 (1997).* Annotation, *Statutory Necessity and Sufficiency of Written Statement as to Amount of Compensation in Broker's Contract to Procure Purchase, Sale, or Exchange of Real Estate, 9 A.L.R.2d 747 (1997). See,* Orlando Lucero, "The Nuts and Bolts of Commercial Lease Listing Agreements," *14 Prob. & Prop. 7* (July/August 2000).

(n34)Footnote 90. Cal. Civ. Code § 1624(a)(4).

(n35)Footnote 91. *Sherman v. Bruton, 497 S.W.2d 316 (Tex. App. 1973).*

(n36)Footnote 92. Michael Braunstein, *Remedy, Reason, and the Statute of Frauds: A Critical Economic Analysis, 1989 Utah L. Rev. 383, 385.* Annotation, *Sufficiency Under Statute of Frauds, of Description or Designation of Property in Real Estate Brokerage Contract, 30 A.L.R.3d 395 (1999).*

(n37)Footnote 93. David M. Goldberg, *Brokerage Agreements for Commercial Sales and Leases*, 17 Real Est. Rev. 86 (Fall 1987).

(n38)Footnote 94. To illustrate the confusion, consider that Vermont, where listing agreements must be in writing to be enforceable, has allowed an unlicensed finder to collect based on his oral contract with a broker to split a commission. *Garfano v. Wells, 458 A.2d 1122 (Vt. 1983).* Alternately, Iowa, which also requires listing agreements to be in writing, has refused finder's fees based upon oral agreements. *Buckingham v. Stille, 379 N.W.2d 30 (Iowa App. 1985); see also Annotation, Validity, Construction, and Enforcement of Business Opportunities or "Finder's Fees" Contracts, 24 A.L.R.3d 1160 (1960).*

In 1963, to ensure that the writing requirement for listing agreements applied to finders, the California legislature added to what is now Civil Code § 1624(d) this phrase: "or to procure, introduce or *find* a purchaser or seller of real estate."

(n39)Footnote 95. E. Allen Farnsworth, Contracts § 6.11, at 453 (2d ed. 1990). *In re License of Topik, 761 P.2d 32 (Ut. App. 1988)* (The court disciplined a real estate broker for, among other things, offering to pay a finder's fee to an unlicensed person); *Thomas v. Daubs, 684 N.E.2d 1011 (Ill. App. 1997)* (a business broker that did not possess real estate broker's license was barred by Real Estate License Act from recovering finder's fee for oral contract for sale of landfill business in which real estate component, which encompassed more than 180 acres, was more than incidental); *Lindenstadt v. Staff Bldrs., Inc., 55 Cal. App. 4th 882 (Cal. App. 1997)* (the purpose of the broker's licensing statute -- the promotion of competency and trust -- is not served by denying Lindenstadt a finder's fee on transactions where he merely introduced the principals (Staff Builders and the acquired entity) to one another, and Staff Builders thereafter negotiated the acquisition); *Tower Int'l, Inc. v. Caledonian Airways, Ltd., 969 F. Supp. 135 (E.D. N.Y. 1997)* (Under New York law, recovery of finders's fee in quantum meruit under theory of unjust enrichment is precluded by statute in absence of effective written note or memorandum establishing contract for services of broker).

(n40)Footnote 96. Annotation, *Broker's Right To Commission on Sales Consummated after Termination of Employment, 27 A.L.R.2d 1348;* Annotation, *Relative Rights and Liabilities of Vendor and His Broker to Down Payment or Earnest Money Forfeited by Vendee for Default under Real-Estate Contract, 9 A.L.R.2d 495;* Perry J. Woodward, *Intentional Interference With Prospective Economic Advantage: A Tort That Eviscerates The Real Estate Brokers' Statute Of Frauds, 36 Santa Clara L. Rev. 1219 (1996)* (A broker may not raise equitable estoppel as a defense to bar Statute of Frauds unless the defendant has engaged in fraudulent conduct which the broker, charged with knowledge of the statute of frauds, reasonably relies upon); Eric Mills Holmes, *Restatement Of Promissory Estoppel, 32 Willamette L. Rev. 263, 443-444, 507-509 (Spring 1996)* (Promissory estoppel or equitable estoppel exception to the Statute of Frauds in Oregon and Wyoming).

M.K.D. Capital Corp. v. Miller, 652 N.Y.S.2d 919 (N.Y. Sup. 1996) (Equitable estoppel did not require compensation services rendered before real estate broker became licensed; applying statute of frauds bar did not result in extraordinary and unconscionable injury to broker).

(n41)Footnote 97. *Daigle Commercial Group v. St. Laurent, 734 A.2d 667 (Me. 1999)* (The seller's promises created an "open" agreement that did not require writing; therefore the broker was entitled to the commission based on promissory estoppel).

(n42)Footnote 98. *Tenzer v. Superscope, Inc., 702 P.2d 212 (Cal. 1985).* Shortly after joining the board of Superscope, Tenzer learned that unless the company could sell its headquarters building, it would have to file for bankruptcy. The building had been marketed for nearly a year with no offers. Tushinsky, a fellow board member, implored him to find a suitable buyer. The parties agreed that Tenzer was entitled to a 10% finder's fee if he was successful. After Tenzer found a buyer and the sale closed, the board refused to pay the fee. Tenzer sued. The Court concluded that if Tenzer acted as a finder rather than as an unlicensed broker, was able to prove the promise and his reliance on it, as well as Superscope's unjust enrichment, then Superscope should be equitably estopped from denying

liability. The case was settled: Tenzer got paid.

(n43)Footnote 99. *743 P.2d 1279 (Cal. 1987)* (Distinguishing between Phillippe, who lost, and Tenzer, who won, the California Supreme Court pointed out that brokers, because they were subject to licensing requirements, are presumed to know the law, and should realize written notice is required to claim commissions. For finders, ignorance of the written requirement is pardonable when equitable estoppel can be proved. This distinction between finders and brokers rests on the finder's presumed, rather than actual, knowledge since few people--brokers or finders--are as knowledgeable about real estate as Michael Tenzer, a seasoned and hugely successful southern California real estate developer.)

(n44)Footnote 100. *See Weiner v. Hazer, 430 N.W.2d 269 (Neb. 1988)* (licensed broker can't recover commission based on equitable estoppel and an oral listing agreement. Broker is presumed to know a listing agreement needs to be written).

(n45)Footnote 101. *234 A.2d 366 (R.I. 1967). Zexter v. Cerrone, 265 A.2d 328 (R.I. 1970)* (The Rhode Island Supreme Court applies the same rule to oral agreements between brokers and seller involving leases as to those involving sales).

(n46)Footnote 102. *234 A.2d 366, 368 (R.I. 1967).* Of course, in this case the court didn't give fraud the precise and narrow definition California courts have reserved in this context, where fraud means that the seller said he had signed or would sign a written listing agreement, not that he would pay the commission. In California, the promise to pay a commission gives rise to an equitable estoppel claim that only finders, not brokers, can invoke. The more restricted fraud-based claim for a commission ("he said he signed and didn't") is open both to finders and brokers in California. Perry J. Woodward, *Intentional Interference with Prospective Economic Advantage: A Tort That Eviscerates the Real Estate Brokers' Statute of Frauds, 36 Santa Clara L. Rev. 1219 (1996)* (A broker may not raise equitable estoppel as a defense to bar Statute of Frauds unless the defendant has engaged in fraudulent conduct which the broker, charged with knowledge of the statute of frauds, reasonably relies upon).

Byblos Corp. v. Salem Farm Realty Trust, 692 A.2d 514 (N.H. 1997) (When certain factors, such as fraud, part performance or other equitable considerations, are present in settlement agreement regarding transfer of interest in land, trial court may dispense with statute of frauds' requirement of written agreement. However, lessee failed to meet burden of establishing basic elements of estoppel).

(n47)Footnote 103. *McCue v. Deppert, 91 A.2d 503, 505 (N.J. App. 1952).*

(n48)Footnote 104. *Buckaloo v. Johnson, 537 P.2d 865 (Cal. 1975); Cushman & Wakefield of N.J., Inc. v. Alexander Summer Co., 295 N.J. Super. 173, 684 A.2d 975 (N.J. Super. A.D. 1996)* (original broker had identified premises for lessee and had brought parties together, and second broker who received commission was "interloper"); *Torelli v. J.P. Enters., Inc., 52 Cal. App. 4th 1250 (Cal. App. 1997)* (Having made an agreement to pay the broker a commission which was memorialized in the counteroffer, the seller could not thereafter, consistent with the implied covenant of good faith, make a deal with the buyer on substantially the same terms as it contemplated in the counteroffer without paying the broker the agreed commission.); *South Pacific Enters., Ltd. P'ship v. Cornerstone Realty, Inc., 672 So. 2d 568 (Fla. App. 1996)* (Real estate broker was entitled to commission, as procuring cause of sale of real property, even though broker had not introduced vendors to purchasers; broker had played "pivotal role in generating interest in the subject property").

But see, Atlanta Apartment Invs,. Inc. v. New York Life Ins. Co., 469 S.E.2d 831 (Ga. App. 1996) (Absent proof that commission was due, broker had no cause of action for intentional interference with its business relations for inducing vendor not to pay broker real estate commission allegedly due).

See also Trammell Crow Co. No. 60 v. Harkinson, 944 S.W.2d 631 (Tex. 1997) (Real estate broker's claim for tortious

interference with oral commission agreement between broker and landlord, or alternatively for tortious interference with prospective business relation, stated claim for recovery of real estate commission and was thus barred under provision of Real Estate License Act (RELA) prohibiting action for recovery of real estate commission absent written agreement).

See also Friendswood Dev. Co. v. McDade & Co., 926 S.W.2d 280 (Tex. 1996) (Party is excused from interfering with another's contract for purposes of tortious interference with contract action if it exercises its own legal rights or good faith claim to colorable legal right, even though that claim ultimately proves to be mistaken).

Compare Letsos v. Century 21-New West Realty, 675 N.E.2d 217 (Ill. App. 1996) (To the extent that real estate broker and brokerage firm breached their fiduciary duties to property owner by failing to disclose, prior to broker's closing on purchase of property owner's land, that broker had found third party to purchase land, property owner might be entitled to return of commission paid in connection with sale of his property to broker as well as to profit that broker earned upon resale of property to third party).

With Goldberg Realty Group v. Weinstein, 669 A.2d 187 (Me. 1996) (A real estate broker's breach of fiduciary duty, as agent for seller of real estate, by failing to disclose material information to seller results in forfeiture of commission by broker, information is "material" to transaction if person with degree of business acumen would want that information before proceeding); *ERA Carico Real Estate Co., Inc. v. Manfredonia, 689 So. 2d 1208* (Fla. App. 3 Dist. 1997) (real estate agents who initially brought property to purchaser's attention were procuring cause of sale, and entitled to commission even if they were not intentionally excluded from sale by vendor and purchaser).

Robert S. Roche, *Torts-Tortious Interference with Contract--Plaintiffs Must Prove "Improper Conduct" By The Defendant to Prevail in an Action For Tortious Interference With Contract; Merely Proving Truthful Information Which Is Aimed At Foiling a Contract Is Inadequate: Glass v. Kennedy, 7 Seton Hall J. Sport L. 159,* at footnote 78 (1997); Roy T. Black, *Client Liability To Real Estate Brokers: From Contract To Punitive Damages*, 25 Real Est. L.J. 78, 85 (Summer 1996) (When the buyer and seller collude to deprive the broker, the elements of conspiracy may be present; the cause of action can be characterized as tortious interference with a prospective economic advantage or tortious interference with a contract); Mark P. Gergen, *Tortious Interference: How It Is Engulfing Commercial Law, Why This Is Not Entirely Bad, And A Prudential Response, 38 Ariz. L. Rev. 1175 (Winter 1996);* Perry J. Woodward, *Intentional Interference with Prospective Economic Advantage: A Tort That Eviscerates The Real Estate Brokers' Statute of Frauds, 36 Santa Clara L. Rev. 1219 (1996).*

(n49)Footnote 105. Powell on Real Property § 84C.03 (Michael Allan Wolf, ed., Matthew Bender).

(n50)Footnote 106. *Richardson v. Afdahl, 313 N.W.2d 457 (S.D.1981)* (Where the listing agreement calls for a negotiation of terms, the broker is not entitled to a commission until an agreement on the terms is reached between the buyer and the seller).

(n51)Footnote 107. Some commentators also include a fourth, the net listing. However, net listings have nothing to do with the exclusivity of the listing. They merely describe a type of commission structure in which the broker keeps as she commission everything above a fixed "net" price. D. Barlow Burke, Jr. lists six types of listings. Besides the open, exclusive agency, exclusive right to sell, and net, he describes the option listing -- the broker obtains an option to buy at a specified price and exercises it after locating a buyer. The sixth is the MLS, an exclusive right to sell for the listing broker but an open listing shared by all MLS members among buyers. D. Barlow Burke, Jr., Law of Real Estate Brokers §§ 2:13-2:36 (2d ed. 1992).

(n52)Footnote 108. Robert J. Bruss, *Open Listing is Not the Best Route to Go*, the Miami Herald, Aug. 7, 1988 (Real Estate Section). There is probably a direct link between the success of brokers in resisting open listings and the existence of multiple listing services. Brokers representing buyers are depending on the seller's listing agreement with the seller for their compensation. If that relationship is weak because the seller's broker has only an open listing, affiliated brokers representing buyers may downplay the listing when they come across it in the listing book.

Following is evidence of the connection between the dominance of "exclusives" in the marketplace and the existence of multiple listing services: in England, where there are no multiple listing services, estate agents (brokers) try valiantly to get exclusives and even offer commission discounts for them, but many sellers use open listings anyway, realizing full well that buyers are likely to shop the offerings at many estate agents' firms before making an offer. In commercial property markets in the United States, where multiple listing services don't figure prominently, open listings are quite common.

(n53)Footnote 109. *Dorman Realty & Ins. Co. v. Stalvey, 212 S.E.2d 591, 593 (S.C. 1975)* (the court ruled that the "right of an owner to sell his own property is an implicit condition of every contract of agency unless negatived").

(n54)Footnote 110. *See* Appendix, Exclusive Listing Agreement Form, p. 1, para. 1; *see also Flynn v. LaSalle Nat'l Bank, 13 N.E.2d 71 (Ill. 1956); Berven Co. v. Newman, 281 N.W.2d 268 (S.D. 1979). But see OTI Shelf, Inc. v. Schair & Assoc., 517 S.E.2d 542 (Ga. App. 1999)* (an exclusive right to sell does not by itself prohibit the owner from selling the property independently of all brokers and avoid incurring liability to the broker for a commission); Annotation, *"Exclusive Right to Sell" and other Terms in Real-Estate Broker's Contract as Excluding Owner's Right of Sale, 88 A.L.R.2d 936 (1963).*

(n55)Footnote 111. For helpful ideas for negotiating a buyer's broker agreement, *see* Lucy Allei Marsh, Real Property Transactions 148-67 (1992).

(n56)Footnote 112. A description of the travails of a prospective buyer in London was written by two Californians, Alina Tugen, *Don't Get "Gazumped": First-Timers Survive Home-Buying in England,* Los Angeles Times, Aug. 28, 1994, at K1, col. 3, col. 6 (Real Estate Section).

Brickell Bayview Real Estate, Inc. v. Cooper, 691 So. 2d 1094 (Fla. App. 1997) (The court denied Fortune's complaint for real estate commissions pursuant to an oral open listing agreement with appellee, Roy Cooper, after it found that a broker other than Fortune was the procuring cause for the sale of Cooper's property); *Hagedorn v. Elwyn, 645 N.Y.S.2d 77 (N.Y.A.D. 1996); DiSalle Real Estate Co. v. Howell, 690 N.E.2d 25 (Ohio App. 1996)* (an agreement of agency for the sale of property should be construed, if possible, to give the owner himself the right to sell his property without incurring liability for the payment of a commission; as a result, the court found an "exclusive agency" agreement instead of an "exclusive to sell" agreement); *Foxfield Realty, Inc. v. Kubala, 678 N.E.2d 1060* (Ill. App. 2 Dist. 1997) (The court held that one seller's quitclaim of her interest in property to another according to marriage dissolution proceeding which ordered division of sellers' assets did not obligate sellers to pay commission to broker under an "exclusive right to sell" agreement); *Nicholson v. Myers, 931 S.W.2d 183 (Mo. App. S.D. 1996)* (broker, pursuant to an "exclusive right to sell listing agreement" for the sale of a motel, was entitled to receive commission where agreement had been reached during time of listing agreement even though documents were not signed until after listing expired).

Compare with Nooney Krombach Co. v. Blue Cross & Blue Shield of Mo., 929 S.W.2d 888 (Mo. App. 1996) (Under terms of agreement between real estate broker and client with regard to sale of client's property, broker did not have to be procuring cause of sale or show that agreement gave it exclusive right to sell in order to recover commission; broker was promised a commission in consideration for its role as client's representative in sale, and broker was not retained to seek out purchasers).

But see Friendswood Devel. Co. v. McDade & Co., 926 S.W.2d 280 (Tex. 1996) ("Exclusive right to obtain lease" granted to the broker by a lessee, with an exception of certain transactions between the lessee and certain prospective lessors excluded from the contract).

(n57)Footnote 113. *444 U.S. 232 (1980).*

(n58)Footnote 114. *15 U.S.C. § 1.*

(n59)Footnote 115. *See, e.g., Park v. El Paso Bd. of Realtors, 764 F.2d 1053 (5th Cir. 1985)* (discount broker boycotted; court found no evidence of damage); Owen R. Phillips & Henry N. Buttler, *The Law and Economics of Residential Real Estate Markets in Texas: Regulation and Antitrust Implications, 36 Baylor L. Rev. 623 (1987). Re/Max Int'l, Inc. v. Realty One, Inc., 924 F. Supp. 1474 (N.D. Ohio 1996)* (Real estate brokers had not established that competitor with 48 percent market share in one city and 50.6 percent market share in another monopolized market in those cities; no evidence was presented that competitors' market share had increased after they initiated alleged anticompetitive activity and there was no evidence that there were entry barriers to real estate industry).

(n60)Footnote 116. Leslie Berger, *Discount Real Estate Agent Sues, Alleging She's Been Blacklisted*, Los Angeles Times (Valley ed.), Jan. 29, 1990, at B3.

(n61)Footnote 117. Leslie Berger, *Discount Real Estate Agent Sues, Alleging She's Been Blacklisted*, Los Angeles Times (Valley ed.), Jan. 29, 1990, at B3 (quoting William M. Pfeiffer, Vice President and General Counsel for the California Association of Realtors). *Jones v. Best, 950 P.2d 1 (Wash. 1998)* (broker was allowed to recover the full amount of the commission despite vendor's arguments that vendor orally refused to accept the purchase price unless the broker lowered his commission); *Schettino v. Roizman Dev. Inc., 708 A.2d 446 (N.J. Super. Ct. App. Div. 1998)* (broker seeking commission did not comply with the statute of frauds by providing a writing containing essential terms such as signatures and amount of commission); *Kaplon-Belo Assoc. v. Cheng, 685 N.Y.S.2d 768 (1999)* (when the listing agreement is silent regarding the specific amount of the commission, the broker is entitled to a commission that is fair and customary for the community); *but see Parkway Group Ltd. v. Modell's Sporting Goods, 678 N.Y.S.2d 656 (1998)* (brokerage agreement was unenforceable because it lacked amount of commission to be paid, which is an essential term; instead the agreement provided only for a commission to be negotiated in the future); Annotation, *Real-Estate Broker's Right to Recover Commission from Seller where Sale Fails because of Seller's Failure to Deliver Good Title-Modern Cases, 28 A.L.R.4th 1007;* Annotation, *Construction of Agreement Between Real-Estate Agents to Share Commissions, 71 A.L.R.3d 586;* Annotation, *Construction of Provision in Real-Estate Broker's Listing Contract that Broker Shall Receive Commission on the Sale After Expiration of Listing Period to one with whom Broker has "Negotiated" During Listing Period, 51 A.L.R.3d 1149.*

(n62)Footnote 118. June Fletcher, *Brokers Will Do Extra Chores for Pricey Sales*, Wall St. J., Sept. 22, 1995, at B10.

(n63)Footnote 119. The same principle applies to wage negotiations. It is usually better for a job applicant to wait until chosen before haggling over wages.

(n64)Footnote 120. FTC Los Angeles Regional Office, The Residential Real Estate Brokerage Industry (1983).

(n65)Footnote 121. *See Plymouth Port, Inc. v. Smith, 530 N.E.2d 194 (Mass. App. 1988)* (exclusive with no termination date valid for a "reasonable time," and four years wasn't reasonable).

(n66)Footnote 122. *See* Fla. Stat. Ann. § 475.25(r). *Brian Properties, Inc. v. Burley, 662 N.E.2d 522 (Ill. App. 1996)* (Agreement between property owner and broker was determined to be a "listing agreement" and not a "management agreement"; therefore the listing agreement is void based upon the Real Estate License Act for failure to contain an expiration date); *Parks v. Morris, 914 S.W.2d 545 (Tenn. App. 1995)* (the fact that a real-estate listing was oral and did not have an expiration date did not violate Tennessee law because indefinite contracts are required to be performed within a reasonable time).

(n67)Footnote 123. For additional discussion of the "ready, willing and able" requirement, *see* Real Estate Brokerage Law and Practice, ch. 5, *The "Ready, Willing and Able" Requirements--Proof of Purchaser's Financial Ability to Consummate the Transaction* (Matthew Bender).

(n68)Footnote 124. *Bernard Klibanow & Co. v. Shafer, 276 N.E.2d 446 (Ill. App. 1971); but see O'Connor Realty Servs. v. Higgins, 539 N.Y.S.2d 975 (1989)* (purchaser who can't finance the acquisition is not *able* to perform).

Glassberg v. Warshawsky, 638 N.E.2d 749 (Ill. App. 1994) (broker's commission accrues when the broker produces a buyer who is ready, willing, and able to buy, regardless of whether the deal closes); *Smith v. Cannell, 723 A.2d 876 (Me. 1999)* (broker is not entitled to commission unless the buyer is ready, willing, and able to buy); Annotation, *What constitutes financial ability to perform within rule entitling broker to commission for producing ready, willing, and able purchaser of real property, 87 A.L.R.4th 11;* Annotation, *Modern View as to Right of Real Estate Broker to Recover Commission from Seller-Principal where Buyer Defaults under Valid Contract of Sale, 12 A.L.R.4th 1083. M.K.D. Capital Corp. v. Miller, 652 N.Y.S.2d 919 (1996); B & H Assos. v. Buscemi, 645 N.Y.S.2d 538 (1996); Hagedorn v. Elwyn, 645 N.Y.S.2d 77 (1996).*

(n69)Footnote 125. *See, e.g., In re Jones, 98 B.R. 399 (Bankr. D. Ill. 1988).*

(n70)Footnote 126. The evolution of Massachusetts case law illustrates some of the conflicting positions courts take on this issue. Prior to 1975, Massachusetts courts held that, absent an express stipulation to the contrary, a broker was entitled to a commission upon completion of the services the broker was hired to perform. The success or failure of the deal was irrelevant, so long as failure was not due to any fault of the broker. In *Tristam's Landing, Inc. v. Wait, 327 N.E.2d 727 (Mass. 1975),* Massachusetts adopted New Jersey's rule that a broker has no right to the commission where the deal failed through no fault of the seller. *See Ellsworth Dobbs, Inc. v. Johnson, 236 A.2d 843 (N.J. 1967).* The no deal, no commission rule is followed in *Oregon, Idaho, Kansas, Massachusetts, and Nebraska. Brown v. Grimm, 481 P.2d 63 (Or. 1971); Winkleman v. Allen, 519 P.2d 1377 (Kan. 1974); Tristam's Landing v. Wait, 327 N.E.2d 727 (Mass. 1975); Dworak v. Michals, 320 N.W.2d 485 (Neb. 1982); Wayne v. Lipsky, 846 P.2d 904 (Idaho 1984).* Alabama followed the closing rule long before *Dobbs. See Taylor Real Estate & Insurance Co. v. Greene, 151 So. 2d 397 (Ala. 1963).* A split of authority has resurfaced in Louisiana law in the period after *Dobbs. Compare Puckett v. Broussard, 356 So. 2d 1021 (La. 1977), with Clesi v. Quaglina, 137 So. 2d 500 (La. 1962) and Wendel v. Dixon Real Estate Co., 232 So. 2d 791 (La. 1970).* Courts in Alaska and Vermont have praised the closing rule without explicitly adopting it. *See Staab v. Messier, 264 A.2d 790 (Vt. 1970); Drake v. Hosley, 713 P.2d 1203 (Alaska 1986).*

Torelli v. J.P. Enters., Inc., 52 Cal. App. 4th 1250 (1997) (Having made an agreement to pay the broker a commission which was memorialized in the counteroffer, the seller could not thereafter, consistent with the implied covenant of good faith, make a deal with the buyer on substantially the same terms as it contemplated in the counteroffer without paying the broker the agreed commission).

(n71)Footnote 127. *236 A.2d 843 (1967).*

(n72)Footnote 128. *236 A.2d 843, 855 (1967). See also Tristam's Landing, Inc. v. Wait, 327 N.E.2d 727 (Mass. 1975); Strout Realty, Inc. v. Milhous, 689 P.2d 222 (Idaho 1984);* Colo. Rev. Stat. §§ 12-61-201-12-61-202; *Goldblatt Assocs. v. Panva, 587 A.2d 433 (Conn. App. 1991). Schenck v. HJI Assocs., 685 A.2d 481 (N.J. Super. App. 1996)* (In real estate broker's commission agreement drafted in relation to contingent lease, where language of contract and interrelation of its provisions, along with parties' relationship and knowledge of situation, made it clear that broker knew only way he would receive a commission would be if defendants obtained financing).

(n73)Footnote 129. *See, e.g., Callaway v. Overholt, 796 S.W.2d 828 (Tex. App. 1990)* (broker earns commission on an agreement to pay a commission when parties enter a purchase-and-sale agreement). Restatement (Second) of Agency § 445 cmt. d (1985); George J. Seidel, Real Estate Law 159 (1979); Karl B. Holtzschue, Real Estate Contracts 5 (1985) (*but see* the 1987 Supplement; states that a valid contract is required in New York); California Real Property Sales Transactions § 2.87 (Gordon L. Graham, ed., 2d ed. 1993) (stating the general rule for California). *Consolidated Realty Group v. Sizzling Platter, Inc., 930 P.2d 268 (Utah App. 1996)* (Real estate broker that entered into contract to obtain lease for owner of commercial property was entitled to commission when tenant entered into lease with partnership, one partner of which was owned by the same principal as property owner, where broker arranged meeting that resulted in lease formation); *Century 21 Pinetree Properties, Inc. v. Cason, 469 S.E.2d 458 (Ga. App. 1996)* (Realty company acting on behalf of vendor could recover its commission from purchaser, in action arising from unconsummated sale of property, under plain language of purchase contract providing that purchasers would pay commission if they failed or

refused to perform under contract).

(n74)Footnote 130. *Stewart Title & Trust v. Ordean, 528 F.2d 894 (9th Cir. 1976); Ralph Hochman & Co. v. Fort Stanwix Mfg. Co., 284 F. Supp. 995 (N.D.N.Y. 1967); First Federal Savings & Loan Ass'n v. Pardue, 545 F. Supp. 433 (N.D. Tex. 1982); Donaldson v. LeNore, 540 P.2d 671 (Ariz. 1975); Cavanagh v. Schaefer, 545 P.2d 416 (Ariz. 1976); Maslin v. Rucker, 438 P.2d 326 (Ariz. App. 1968); Barrett v. Duzan, 559 P.2d 693 (Ariz. 1976); Kopf v. Milam, 387 P.2d 390 (Cal. 1963); Lawrence Block Co., Inc. v. Palston, 266 P.2d 856 (Cal. 1954), overruled on other grounds by Mattei v. Hopper, 330 P.2d 625 (Cal. 1958); Manzin v. United Bank & Trust Co., 506 A.2d 169 (Conn. App. 1986); Nugent v. Del Vecchio, 415 A.2d 1339 (Conn. 1980); Lindquist v. Burklew, 123 So. 2d 261 (Fla. 1960); Harding Realty, Inc. v. Turnberry Towers Corp., 436 So. 2d 983 (Fla. 1983); Arvida Realty Sales, Inc. v. William R. Tinnerman & Co., 536 So. 2d 1041 (Fla. 1988); Ragsdale v. Smith,138 S.E.2d 916 (Ga. App. 1964); Armstrong v. Lattimore, 296 S.E.2d 188 (Ga. App. 1982); Cooper v. Liberty Nat'l Bank, 75 N.E.2d 759 (Ill. App. 1947); Fox v. Stewart, 414 N.E.2d 881 (Ill. App. 1980); Oldham v. Jones, 136 So. 2d 310 (La. 1961); Chamberlain v. Porter, 562 A.2d 675 (Me. 1989); Wyand v. Patterson Agency, Inc., 319 A.2d 308 (Md. 1974); Prince Georges Props., Inc. v. Rogers, 341 A.2d 804 (Md. 1975); De Franceaux Realty Group, Inc. v. Leeth, 391 A.2d 1209 (Md. 1978); Storch v. Ricker, 471 A.2d 1079 (Md. App. 1984), overruled on other grounds* by *Lake Short Investors v. Rite Aid Corp., 509 A.2d 727 (Md. 1986); Kostan v. Glasier, 60 N.W.2d 283 (Mich. 1953); Cunningham v. Garber, 104 N.W.2d 746 (Mich. 1960); Hayman Mgt. Co. v. Dura Corp., 206 N.W.2d 754 (Mich. App. 1973); McIntosh v. Frisinger, 507 S.W.2d 419 (Mo. 1974)* (share of the earnest money only); *Perkinson v. Burford, 623 S.W.2d 30 (Mo. App. 1981)* (share of the earnest money only); *Diehl & Assocs. v. Houtchens, 567 P.2d 930 (Mont. 1977)* (earnest money only) *overruled by Ehly v. Cady, 687 P.2d 687 (Mont. 1984); Martin v. Community Gas & Oil Co., 668 P.2d 243 (Mont. 1983); Craig v. Margrave, 446 P.2d 653 (Nev. 1968); DiGregorio v. Marcus, 475 P.2d 97 (Nev. 1970); Ferrara v. Firsching, 533 P.2d 1351 (Nev. 1975); Gingras v. Stark Estates, Inc., 248 A.2d 86 (N.H. 1968); Shumaker v. Lear, 345 A.2d 249 (Pa. Super. 1975); Gartner v. Higgins, 214 A.2d 849 (R.I. 1965); V/oW Realty Sales Agency v. Long Meadows Country Club, Inc., 537 S.W.2d 533 (Tex. 1976); Real Estate Exch. v. Kingston, 420 P.2d 117 (Utah 1966); Mansfield v. Smith, 277 S.W.2d 740 (Wis. 1979).*

(n75)Footnote 131. *Holland v. Dietz, 595 S.W.2d 931 (Ark. 1980); Potter v. Ridge Realty Corp., 259 A.2d 758 (Conn. Supp. 1969); Wetzel v. De Groot, 86 A.2d 737 (D.C. 1952); Bryan v. Justice, 247 So. 2d 340 (Fla. 1971); Chanton v. Drucker, 299 So. 2d 145 (Fla. 1974); Cabry v. Ionidas, 248 N.E.2d 45 (Ill. App. 1970); Nelson v. Bolton, 391 N.E.2d 182 (Ill. App. 1979); Munson v. Larguier, 50 So. 2d 808 (La. 1951); Nettles v. Vignes, 49 So. 2d 371 (La. 1950); Adams v. Adams, 283 So. 2d 503 (La. 1973); Demarest v. Enna, 472 So. 2d 56 (La. 1985); Hare v. Bauer, 26 N.W.2d 359 (Minn. 1947); Dunn v. Staples, 248 A.2d 635 (N.H. 1968); Trenga Realty v. Wedgewood Homes, Inc., 526 N.Y.S.2d 251 (1988); Goetz v. Anderson, 274 N.W.2d 175 (N.D. 1978); Allied Realty, Inc. v. Boyer, 302 N.W.2d 774 (N.D. 1981); Haugen v. Schatz, 359 N.W.2d 851 (N.D. 1984); Nugent v. Scharff, 476 S.W.2d 414 (Tex. 1971); Staab v. Messier, 264 A.2d 790 (Vt. 1970); Record Realty, Inc. v. Hull, 552 P.2d 191 (Wash. App. 1976). Schenck v. HJI Assocs., 685 A.2d 481* (N.J. Super. App., 1996) (In real estate broker's commission agreement drafted in relation to contingent lease, where language of contract and interrelation of its provisions, along with parties' relationship and knowledge of situation, made it clear that broker knew only way he would receive a commission would be if defendants obtained financing, contractual provision that commission was earned upon signing of agreement did not override provisions that made any commission contingent upon defendant obtaining financing).

(n76)Footnote 132. *Richardson v. Kelley Land & Cattle Co., 504 F.2d 30 (8th Cir. 1974); Bishop v. Norell, 353 P.2d 1022 (Ariz. 1960);* Diamond v. Haydis, 356P.2d 643 (Ariz. 1960); *Trimmer v. Ludtke, 462 P.2d 809 (Ariz. 1969); Dea v. Davy, 309 P.2d 894 (Cal. App.1957); Born v. Koop, 19 Cal. Rptr. 379 (1962); Maldonado v. Linza, 24 Cal. Rptr. 608 (1962); Rylee v. De Fini, 285 P.2d 115 (Cal. App. 1955); Horton-Cavey Realty Co. v. Reese, 527 P.2d 914 (Colo. App. 1974); The Sherman Agency v. Carey, 568 P.2d 75 (Colo. App. 1977); Bernhardt v. Luke, 122 A.2d 124 (Del. 1956); Restifo v. Pastor, 129 A.2d 533 (D.C. 1957); Sikes v. Markham, 41 S.E.2d 828 (Ga. App. 1947); Waring v. John J. Thompson & Co., 46 S.E.2d 364 (Ga. App. 1948); Selton v. Dowling, 54 S.E.2d 763 (Ga. App. 1949); Thornton v. Lewis, 126 S.E.2d 869 (Ga. App. 1962); Clover Realty Co. v. Gouyd, 264 S.E.2d 547 (Ga. App. 1980); Spilky v. McDonald, 236 N.E.2d 907 (Ill. App. 1968); Sharkey v. Snow, 300 N.E.2d 279 (Ill. App. 1973); Rodes v. Preston Corp.,*

377 N.E.2d 1190 (Ill. App. 1978); Solomon v. Baron, 462 N.E.2d 756 (Ill. App. 1984); Lindsay Realty Corp. v. Bellina,320 So. 2d 572 (La. 1975); C. J. Brown, Inc. v. Miller, 388 So. 2d 103 (La. 1980); Sterk & Vogel, Inc. v. Kuzee, 54 N.W.2d 219 (Mich. 1952); Adams v. Kerr, 655 S.W.2d 49 (Mo. 1983); Thompson-McClean, Inc. v. Campbell, 134 S.E.2d 671 (N.C. 1964); Pope v. Gerhard Corp., 74 N.E.2d 121 (Ohio 1947); Bayer v. McDade, 610 S.W.2d 171 (Tex. 1980); Hansen v. Snell, 354 P.2d 1070 (Utah 1960); Peter M. Chalik & Assocs. v. Hermes, 201 N.W.2d 514 (Wis. 1972). Mautner-Glick Corp. v. Dime Sav. Bank of Williamsburgh, 647 N.Y.S.2d 782 (N.Y.A.D. 1996) (Broker was not entitled to commission in connection with sale of property where neither of conditions contained in brokerage agreement signed by broker's agent, which conditioned entitlement to commission upon execution of assignment agreement was fulfilled as the buyer had elected not to sign agreement); *Schwey v. Vara, 674 So. 2d 935 (Fla. App. 1996)* (Real estate broker that produced a prospective purchaser for vendors' property was not entitled to a commission after holder of right of first refusal on the property exercised that right and purchased property; contract between vendors and broker provided that contract would be void and that broker would not receive a commission if holder of right of first refusal executed an identical contract).

(n77)Footnote 133. *Gatzemeyer v. Vogel, 544 F.2d 988 (8th Cir. 1976); Maricopa Realty & Trust Co. v. V.R.D. Farms, Inc., 460 P.2d 195 (Ariz. App. 1969) overruled by Donaldson v. LeNore, 540 P.2d 671 (Ariz. 1975); Ira Garson Realty Co. v. Brown, 4 Cal. Rptr. 734 (1960); Chapman v. Gilmore, 34 Cal. Rptr. 515 (1963); Billings v. Rexford Park Apts., 52 Cal. Rptr. 914 (1966); Paulsen v. Leadbetter, 72 Cal. Rptr. 819 (1968); Fitzgan v. Burke, 61 A.2d 721 (D.C. 1948); Bryan v. Rusk, 78 S.E.2d 853 (Ga. App. 1953); Kenerly v. Yancey, 241 S.E.2d 28 (Ga. App. 1977); Postal Union Life Ins. Co. v. Hensley, 186 P.2d 802 (Okla. 1947).*

(n78)Footnote 134. *Pasley v. Barber, 368 P.2d 549 (Alaska 1962); Huttlinger v. Far West Enters., 281 P.2d 554 (Cal. App. 1955); Schoenberg v. Romike Props., 59 Cal. Rptr. 359 (1967); Hensley Ins. Co. v. Echols, 31 So. 2d 625 (Fla. 1947); Zide v. Zenchenko, 101 So. 2d 64 (Fla. 1958); Prall v. Corum, 403 So. 2d 991 (Fla. 1981); Reisman v. Massey, 67 S.E.2d 585 (Ga. App. 1951); United Investors, Inc. v. Tsotsos, 477 N.E.2d 40 (Ill. App. 1985); Dunn v. Kramer, 208 S.W.2d 41 (Ky. 1948); Crabtree v. Board of Trustees, 512 S.W.2d 311 (Ky. 1974); Werner, McShan & Robertson, Inc. v. Bonnette, 160 So. 2d 334 (La. 1964); Perry v. MacArthur, 358 A.2d 385 (Me. 1976); Goss v. Hill, 149 A.2d 10 (Md. 1959); The Lake Co. v. Charles Molan, 131 N.W.2d 734 (Minn. 1964);*

Herb Tillman Co., Inc. v. Sissel, 348 S.W.2d 819 (Mo. 1961); Pointer v. Edward L. Kuhs Co., 678 S.W.2d 836 (Mo. 1984); Flaherty v. Hensley, 529 P.2d 1389 (Mont. 1974); McGarry v. McCrone, 118 N.E.2d 195 (Ohio App. 1954); Eastern Okla. Land & Cattle Co. v. Dorris, 549 P.2d 78 (Okla. 1976); Jackson v. Williams, 510 S.W.2d 645 (Tex. 1974); Kingsland Land Corp. v. Lange, 60 S.E.2d 872 (Va. 1950); Hercules v. Robedeaux, 329 N.W.2d 240 (Wis. 1982). Letsos v. Century 21-New West Realty, 675 N.E.2d 217 (Ill. App. 1996) (To the extent that real estate broker and brokerage firm breached their fiduciary duties to property owner by failing to disclose, prior to broker's closing on purchase of property owner's land, that broker had found third party to purchase land, property owner might be entitled to return of commission paid in connection with sale of his property to broker as well as to profit that broker earned upon resale of property to third party); *In re Mehdipour, 202 B.R. 474 (9th Cir. 1996)* (Under California law, not all breaches of fiduciary duty based on disclosure violations deprive broker of compensation, and broker will be deprived of his commission only when there is breach of fiduciary duty which involves intentional disloyalty or bad faith. In this case, broker was entitled to payment of compensation as administrative expense); *Goldberg Realty Group v. Weinstein, 669 A.2d 187 (Me. 1996)* (A real estate broker's breach of fiduciary duty, as agent for seller of real estate, by failing to disclose material information to seller results in forfeiture of commission by broker; information is "material" to transaction if person with degree of business acumen would want that information before proceeding).

(n79)Footnote 135. *See*, Lance Entrekin, *The Commission Recovery Rate for Brokers in Failed Deals 1947-88* (on file with author). The author found that in states with rules allowing commissions on failed deals, the brokers' recovery rate in such cases declined from 55.3% from 1947 to 1967 (Pre-*Dobbs*) to 39.5% since 1967. Mr. Entrekin relied on cases from the following A.L.R. notes updated by a Lexis search.

Annotation, *Brokers' Right to Commission Where Customer Repudiates or Fails to Complete Contract or Promise Which Is Oral or Not Specifically Enforceable, 12 A.L.R.2d 1410 (1950);* Annotation, *What Deviation in Prospective Vendee's Proposal from Vendor's Terms Precludes Broker from Recovering Commission for Producing a Ready, Willing, and Able Vendee, 18 A.L.R.2d 376 (1951);* Annotation, *Broker's Return of Deposit to Purchaser as Waiver of Right to Demand Commission from Seller, 69 A.L.R.2d 1224 (1960);* Annotation, *Real Estate Broker's Right to Commission as Affected by Failure or Refusal of Customer (Prospect) to Comply With Valid Contract, 74 A.L.R.2d 437 (1960) but see* Annotation, *Modern View as to Right of Real Estate Broker to Recover Commission from Seller-Principal where Buyer Defaults Under Valid Contract of Sale, 12 A.L.R.4th 1083;* Annotation, *Broker's Right to Commission on Sale Rejected by Principal Because of Buyer's Fraud or Misrepresentation, 79 A.L.R.2d 1055 (1961);* Annotation, *Real Estate Broker's Right to Compensation as Affected by Failure or Refusal of Principal's Spouse to Join in Contract of Sale, 10 A.L.R.3d 665 (1966);* Annotation, *Modern View as to Right of Real Estate Broker to Recover Commission from Seller-Principal Where Buyer Defaults Under Valid Contract of Sale, 12 A.L.R.4th 1083 (1982);* Annotation, *Real Estate Broker's Right to Recover Commission from Seller Where Sale Fails Because of Seller's Failure to Deliver Good Title-Modern Cases, 28 A.L.R.4th 1007 (1984);* Annotation, *Real Estate Broker's Rights and Liabilities as Affected by Failure to Disclose Financial Information Concerning Purchaser, 34 A.L.R.4th 191 (1984);* Randy R. Koenders, Annotation, *What Constitutes Financial Ability to Perform Within Rule Entitling Broker to Commission for Producing Ready, Willing, and Able Purchaser of Real Property, 87 A.L.R.4th 11 (1991).* Matthew J. Leeds, *The Residential Real Estate Contract Form*, 414 PLI/Real 9 (May 1996). *Leadership Real Estate, Inc. v. Harper, 638 A.2d 173 (N.J. Super. Ct. Law Div. 1993)* (Broker has a right to recover commission when vendor acts in bad faith by refusing without legal justification to close title; the vendor impliedly covenants not to do anything that would destroy a broker's commission).

(n80)Footnote 136. D. Barlow Burke, Jr., the Law of Real Estate Brokers 3:69 - 3:71 (2d ed. 1992).

(n81)Footnote 137. *Currier v. Kosinski, 506 N.E.2d 895, 897 (Mass. App. 1987).*

(n82)Footnote 138. *Werner v. Katal Country Club, 650 N.Y.S.2d 866 (N.Y.A.D. 1996)* (Broker is entitled to recover commission where owner terminates his or her activities in bad faith and as mere device to escape payment of commission); *Century 21 Volpe Realty, Inc. v. Kim, 647 N.Y.S.2d 552* (N.Y.A.D. 2 Dept. 1996) (Real estate broker was entitled to its commission, where vendor, after having entered into valid and enforceable contract with would-be purchaser for sale of property, willfully breached agreement and thus caused failure of transfer of title).

(n83)Footnote 139. *Dworak v. Michals, 320 N.W.2d 485 (Neb. 1982).*

(n84)Footnote 140. Bernard R. Goldstein, *When Does a Real Estate Broker Earn His Commission?, 27 Prac. Law 43 (July 1981)* (citing *Freeman v. Creelman, 212 P. 56 (1922)). See also Tanenbaum v. Boehm, 95 N.E. 708 (N.Y. 1911).*

(n85)Footnote 141. *Hecht v. Meller, 296 N.Y.S.2d 561, 244 N.E.2d 77 (1968). In re Tully, 202 B.R. 481 (9th Cir. 1996)* (Under California law, broker is entitled to commission, even if escrow does not close, when vendor arbitrarily refuses to proceed with transaction).

(n86)Footnote 142. The general rule is that, absent a stipulation to the contrary, the seller still owes commission to a broker if a broker, acting in good faith, procured a purchaser willing and able to purchase the property on the terms offered by the seller. It is not the broker's fault if the sale fails because of a defect in title of which the broker had no notice. The broker is clearly entitled to a commission where the buyer refused to accept a defective title. *Phelps v. Prusch, 23 P. 1111 (Cal. 1890).See also Bennett v. McCabe, 808 F.2d 178 (Cal. Mass. 1st Cir. 1987); Meridian Interests, Inc. v. J. A. Peterson Enterprises, Inc., 693 S.W.2d 179 (Mo. App. 1985); Emerich v. Leviton, 454 N.E.2d 45 (Ill. App. 1983).*

(n87)Footnote 143. § 12-61-201, "When entitled to commission," reads as follows: "No real estate agent or broker

is entitled to a commission for finding a purchaser who is ready, willing and able to complete the purchase of real estate as proposed by the owner until the same is consummated or is defeated by the refusal or neglect of the owner to consummate the same as agreed upon."

§ 12-61-202, "Objections on account of title," reads as follows: "No real estate agent or broker is entitled to a commission when a proposed purchaser fails or refuses to complete his contract or purchase because of defects in the title of the owner, unless such owner, within a reasonable time, has said defects corrected by legal proceedings or otherwise."

(n88)Footnote 144. Annotation, *Real Estate Broker's Right to Recover Commission from Seller When Sale Fails Because of Seller's Failure to Deliver Good Title -- Modern Cases, 2 A.L.R. 4th 1008 (1984).*

(n89)Footnote 145. *Eastern Oklahoma Land & Cattle Co. v. Dobbs, 549 P.2d 78 (Okla. 1976).*

(n90)Footnote 146. *Stutzman Realty, Inc. v. Petralia, 554 N.Y.2d 714 (1990); Cardoza v. Moorehouse, 17 Cal. Rptr. 28 (1961).*

(n91)Footnote 147. *Mayberry v. Davis, 178 N.W.2d 911 (Minn. 1970)* (co-tenant liable for commission when other co-tenants refused to join in the sale even though broker knew co-tenant lacked 100% ownership).

(n92)Footnote 148. *Cardoza v. Moorehouse, 17 Cal. Rptr. 28 (1961).*

(n93)Footnote 149. *Sopher v. Martin, 243 A.2d 459 (1997)* (broker seeking commission was not entitled to summary judgment because the commission agreement provided that the commission was due at closing).

(n94)Footnote 150. Annotation, *Liability of Defaulting Purchaser to Owner's Broker or Auctioneer, 30 A.L.R.3d 1395 (1970).*

(n95)Footnote 151. *Belk v. Oehlert, 324 So. 2d 668 (Fla. 1975); Wendel v. Dixon Real Estate Co., 232 So. 2d 791 (La. App. 1970), app. den., 236 So. 2d 29 (La. 1970).*

(n96)Footnote 152. *Chan v. Tsang, 3 Cal. Rptr. 2d 14 (1991).* The buyer's broker may recover his share of the full commission and is not limited by any liquidated damage clause in the purchase-and-sale agreement, which typically provides for the broker to get half of what the seller recovers in damages. *See Tanner Assocs., Inc. v. Ciraldo, 161 A.2d 725 (N.J. 1960).* California courts have extended the right of recovery to the seller's broker or listing broker, and the buyer agreed in the sales contract to pay the commission. However, if the broker and buyer have no preexisting relationship and the buyer isn't obligated to pay the commission in the purchase-and-sale agreement, courts have refused to find an *implied* promise of payment by the buyer. *Century 21 Pinetree Properties, Inc. v. Cason, 469 S.E.2d 458 (Ga. App. 1996)* (Realty company acting on behalf of vendor could recover its commission from purchaser, in action arising from unconsummated sale of property, under plain language of purchase contract providing that purchasers would pay commission if they failed or refused to perform under contract).

(n97)Footnote 153. *See Ballas v. Lake Weir Light & Water Co., 130 So. 421 (Fla. 1930),* and *Lincoln Realty Co. v. Garden City Land & Immigration Co., 143 N.W. 230 (Neb. 1913).*

(n98)Footnote 154. *See, e.g., Snoddy v. Wallace, 625 S.W.2d 81 (Tex. App. 1981).* Buyers persuaded the seller to take a reduced purchase price of $2,350,000 for an apartment complex in East Palo Alto the sellers had listed for sale at $2,500,000. The key to the price reduction was the buyers' proposal to delay the sale until after the listing agreement expired. This way the seller could save the 6% commission. The broker found out about the deal and obtained its commission through arbitration since the parties met and decided to defer their closing specifically to avoid the broker's commission.

The buyers had promised to indemnify the seller if the seller got stuck with the commission, but that promise hadn't been put into the purchase and sale agreement. Maybe the parties figured that putting an indemnity clause in the contract would be a red flag to the broker if the broker ever got wind of the deal.

Anyway, after getting socked for the commission, the seller sought the promised reimbursement from the buyers. The buyers refused payment; the seller sued. In court, the buyers prevailed because the commission indemnity provision hadn't been put in the final written sales contract. The court invoked the parol evidence rule, which excludes oral or written evidence to vary or contradict the terms of a written contract. The parties could have put the indemnity provision in the contract. Having failed to do that, the obligation didn't survive the final written contract. *EPA Real Estate Partnership v. Hee Duk Kang, 15 Cal. Rptr. 2d 209 (1992). ERA Carico Real Estate Co., Inc. v. Manfredonia, 689 So. 2d 1208 (Fla. App. 1997)* (real estate agents who initially brought property to purchaser's attention were procuring cause of sale, and entitled to commission even if they were not intentionally excluded from sale by vendor and purchaser); *Coldwell Banker Town & Country Realty of Hastings, Inc. v. Johnson, 544 N.W.2d 360 (Neb. 1996)* (Real estate broker was not entitled to a commission on sale of property, where no sale was made during existence of agreement between vendors and broker, sale was the result of work of vendors' attorney, not the result of anything done by broker, and neither list price nor offer obtained by broker was on substantially the same terms as were finally agreed upon); *Nicholson v. Myers, 931 S.W.2d 183 (Mo. App. 1996)* (broker, pursuant to an "exclusive right to sell listing agreement" for the sale of a motel, was entitled to receive commission where agreement had been reached during time of listing agreement even though documents were not signed until after listing expired).

(n99)Footnote 155. *Mellos v. Silverman, 367 So. 2d 1369 (Ala. 1979).*

(n100)Footnote 156. *Bear Kaufman Realty v. Spec. Dev., 645 N.E.2d 244 (Ill. App. 1994).*

(n101)Footnote 157. *See also Mollyann, Inc. v. Demetaides, 614 N.Y.S.2d 437 (N.Y.A.D. 1994)* (broker held not entitled to commission when initial offer was rejected, and another broker later negotiated a successful sale to the same purchasers).

(n102)Footnote 158. *Century 21 Flavin Realty, Inc. v. Erwin Heirs, Inc., 657 So.2d 108 (La. App. 1995)* (broker who negotiated with a purchaser who eventually acquired the property one year after the extension clause expired was not entitled to a commission); *Leadership Real Estate, Inc. v. Harper, 638 A.2d 173 (N.J. Super. Ct. Law Div. 1993)* (Broker is entitled to commission if a written contract has been executed by the vendor and purchaser before the expiration of the extension clause, even if the sale is not consummated and title is not passed until after the expiration of the extension clause).

(n103)Footnote 159. 20 Cal. Jur. 3d Brokers § 84, at 564-66 (1974) (where broker has expended time and effort to sell the property, the principal cannot terminate the listing agreement without the payment of commissions). Page Roy T. Black, *Client Liability to Real Estate Brokers: From Contract To Punitive Damages*, 25 Real Est. L.J. 78, at 83 (Summer 1996).

(n104)Footnote 160. *Compare Blank v. Borden, 524 P.2d 127 (Cal. 1974),* with *Wright v. Schutt Constr. Co., 500 P.2d 1045 (Or. 1972). Larson-Hegstrom & Assoc., Inc. v. Jeffries, 701 P.2d 587 (Ariz. App. 1985)* (Brokers are universally entitled to commissions when they produce a ready, willing, and able buyer, and the seller then withdraws the property).

(n105)Footnote 161. 10 Cal. Jur. 3d Brokers § 66, at 543-44 (1974) ("The broker's authority under the ordinary employment contract is limited to finding a purchaser. He therefore has no power to enter into a contract of sale on behalf of his principal, in the absence of special authorization."). *See also* Annotation, *Power of Real-Estate Broker to Execute Contract of Sale in Behalf of Principal*, 48 A.L.R. 634 (1927).

(n106)Footnote 162. Molly Moore Romero,*Theories of Real Estate Broker Liability: Arizona's Emerging*

Malpractice Doctrine, 20 Ariz. L. Rev. 767, 774 (1978) (paraphrasing Restatement (Second) of Agency §§ 367 - 77, 379 - 81, 383, 387 - 91, 394 - 95 (1957)).

(n107)Footnote 163. *See, e.g., Hassenpflug v. Jones, 323 P.2d 296, 298 (Ariz. 1958); Haymes v. Rogers, 222 P.2d 789, 790 (Ariz. 1950); Batson v. Strehlow, 441 P.2d 101, 109-10 (Cal. 1968); Mersky v. Multiple Listing Bureau of Olympia, Inc., 437 P.2d 897, 899 (Wash. 1968). Wardley Corp. v. Welsh, 962 P.2d 86 (Utah App. 1998)* (the evidence supports the finding that a broker was only a finder in this instance and therefore was not an agent of the vendor, because the vendor disclaimed the agency relationship. An agency relationship will not be equitably implied); *Olsen v. Vail Assoc. Real Estate, Inc., 935 P.2d 975 (Colo. 1997)* (The broker did not breach fiduciary duties to the seller by not disclosing to the seller that the purchaser was acquiring the adjoining property); *Holst v. Fireside Realty, Inc., 948 P.2d 858 (Wash. App. 1997)* (If either the listing broker or the selling broker expressly or impliedly forms an agency relationship with the buyer, the broker will be held to be the purchaser's agent).

(n108)Footnote 164. James L. Riegelhaupt, Jr., Annotation, *Liability to Real Property Purchaser for Negligent Appraisal of Property's Value, 21 A.L.R. 4th 867 (1983).*

(n109)Footnote 165. *See Wilson v. Hisey, 305 P.2d 686 (Cal. App. 1957).*

(n110)Footnote 166. *Stortroen v. Beneficial Fin. Co. of Colo., 736 P.2d 391, 396 (Colo. 1987)* ("In the context of residential real estate sale transactions, it is a widely accepted rule of agency law that a real estate broker operating under an exclusive listing contract with the seller stands in an agency relationship with the seller."); *see, e.g., Marcotte Realty & Auction, Inc. v. Schumacher, 624 P.2d 420 (Kan. 1981).* J. Clark Pendergrass, *The Real Estate Consumer's Agency And Disclosure Act: The Case Against Dual Agency,48 Ala. L. Rev. 277 (Fall 1996)* (Under the Alabama Real Estate Consumer's Agency and Disclosure Act, in the absence of a signed brokerage agreement, a real estate broker is not an agent but rather is a "contract broker" with none of the fiduciary duties). *Moore and Co. v. T-A-L-L, Inc., 792 P.2d 794 (Colo. 1990).*

(n111)Footnote 167. *Mersky v. Multiple Listing Bureau of Olympia, Inc., 437 P.2d 897, 899 (Wash. 1968)* (emphasis added).

(n112)Footnote 168. Also referred to as the selling broker.

(n113)Footnote 169. Restatement (Second) of Agency § 5 (1957); note that the court in *Mersky* held the subagents to exactly the same high standards of duty and responsibility as the listing brokers. *Holst v. Fireside Realty, Inc., 948 P.2d 858 (Wash. App. 1997)* (subagents are held to the same standards as agents).

(n114)Footnote 170. *People ex rel. Woodard v. Colorado Springs Bd. of Realtors, 692 P.2d 1055, 1059 (Colo. 1984)* (emphasis added). Ronald Benton Brown, Joseph M. Grohman, *Real Estate Brokers: Shouldering New Burdens, 11 Prob. & Prop. 14* (May/June 1997).

(n115)Footnote 171. D. Barlow Burke, The Law of Real Estate Brokers § 1.5, at 10 (1982).

(n116)Footnote 172. *Stortroen v. Beneficial Fin. Co. of Colo., 736 P.2d 391, n.2 (Colo. 1987)* (citing the Colorado Real Estate Commission's *Real Estate Manual*, ch. VIII, at 3, which states "[g]enerally [a multiple listing] is an exclusive right to sell listing, *with the additional feature that other participating brokers may also sell the property as sub-agents of the listing broker*" (emphasis added)).

(n117)Footnote 173. *Frisell v. Newman, 429 P.2d 864 (Wash. 1967).*

(n118)Footnote 174. FTC Los Angeles Regional Office, the Residential Real Estate Brokerage Industry 83-84 (1983).

(n119)Footnote 175. Barry A. Currier, *Finding the Broker's Place in the Typical Residential Real Estate Transaction, 33 U. Fla. L. Rev. 655, 662-63 (1981).*

(n120)Footnote 176. *See Johnson v. Geer Real Estate Co., 720 P.2d 660 (Kan. 1986)* (buyers told broker they didn't want a house served by a septic tank. Seller had told broker the house was on septic tanks; broker forgot. Broker was held liable for negligent failure to observe and pass this information to purchaser). *But see Mahler v. Keenan Real Estate Inc., 876 P.2d 609 (Kan. 1994)* (After the *Johnson* case the Kansas legislature overruled *Johnson* in K.S.A. 1993 Supp. § 58-3034(b), which refuses to give a private right of action for negligent misrepresentation. The court in the present case determined that although the amended statute prohibited an action for negligent or fraudulent misrepresentation, it didn't necessarily preclude other common law suits. An action for negligent misrepresentation as defined in § 552 of the Restatement of Torts does exist in Kansas).

Jay M. Feinman, *Economic Negligence In Residential Real Estate Transactions*, 25 Real Est. L.J. 110 (Fall 1996) (the broker has a duty of reasonable care to the buyer to make sure that the information it transmits is accurate).

(n121)Footnote 177. *Stortroen, 736 P.2d at 400.* Nancy Ann Connery, *Precontract Considerations,* 414 PLI/Real 75 (May 1996) (The buyer's broker must provide the disclosure form to the buyer prior to entering into an agreement to act as the buyer's agent).

(n122)Footnote 178. Mathew M. Collette, *Sub-Agency in Residential Real Estate Brokerage; A Proposal to End the Struggle With Reality, 61 S. Cal. L. Rev. 399, 404-06 (1988).*

(n123)Footnote 179. *See, e.g., Rosenthal v. Art Metal, Inc., 229 A.2d 676 (N.J. Super. 1967), aff'd, 243 A.2d 828 (N.J. 1968), aff'd, 250 A.2d 747 (N.J. 1969).*

(n124)Footnote 180. *See, e.g., Fennel v. Ross, 711 S.W.2d 793 (Ark. 1986); First Church of the Open Bible v. Cline J. Dunton Realty, Inc., 574 P.2d 1211 (Wash. App. 1978).* ***Fennel v. Ross* citation:** *but see Continental Assur. Co. v. Cedar Rapids Pediatric Clinic 957 F.2d 588 (8th Cir. 1992)* (Holding that *Fennel* does not necessarily prohibit dual agency in Arkansas); *Whitten v. Harold Austin Construction Inc., 935 S.W.2d 579 (Ark. App. 1996)* (The court limited the holding in *Fennel* to "garden variety" MLS cases); Ellis L. Tudzin, *Real Property, 49 SMU L. Rev. 1281* (May-June 1996) (Under Texas's Real Estate License Act, neither the party nor the broker is liable for misrepresentations or concealments by a subagent unless they were aware of those statements or concealments).

Enright v. Jonassen, 931 P.2d 1212 (Idaho 1997) (Finding that real estate firm through which ranch property was listed for sale, which acted as both listing and selling agency, and firm's listing agent breached fiduciary duty owed to purchaser of property by failing to determine and to disclose to purchaser that property was in floodplain district was supported by acknowledgement of firm and agent that they did not look at flood insurance maps referred to in county ordinance describing floodplain district).

(n125)Footnote 181. *See, e.g., Frisell v. Newman, 429 P.2d 864 (Wash. 1967).* William D. Le Moult, *The Duty Of Residential Real Estate Brokers And Salespersons To Disclose Property Condition To Buyers, 70 Conn. B.J. 435, 445 (Dec. 1996);* J. Clark Pendergrass, *The Real Estate Consumer's Agency And Disclosure Act: The Case Against Dual Agency, 48 Ala. L. Rev. 277 (Fall 1996); Letsos v. Century 21-New West Realty, 675 N.E.2d 217 (Ill. App. 1996)* (To the extent that real estate broker and brokerage firm breached their fiduciary duties to property owner by failing to disclose, prior to broker's closing on purchase of property owner's land, that broker had found third party to purchase land, property owner might be entitled to return of commission paid in connection with sale of his property to broker as well as to profit that broker earned upon resale of property to third party); *Goldberg Realty Group v. Weinstein, 669 A.2d 187 (Me. 1996)* (A real estate broker's breach of fiduciary duty, as agent for seller of real estate, by failing to disclose material information to seller results in forfeiture of commission by broker; information is "material" to transaction if person with degree of business acumen would want that information before proceeding).

Compare Olsen v. Vail Assocs. Real Estate, Inc., 935 P.2d 975 (Colo. 1997) (Real estate brokers did not breach fiduciary duty to vendors by not revealing that purchaser was negotiating to purchase adjoining property and ultimate sale price of that property; only fact of contract for sale of adjoining property and price to be paid under such contract would have been material to vendors' deliberations in their dealings with purchaser, and brokers did not learn of purchase price until after vendors entered into contract with purchaser).

(n126)Footnote 182. *See, e.g., Menzel v. Morse, 362 N.W.2d 465, 474-76 (Iowa 1985)* (defense unsuccessful).

(n127)Footnote 183. Woodard, *Real Estate Groups Draw Clearer Lines for Who Represents Whom*, the Christian Science Monitor, Mar. 1, 1985, at 24 (attorneys are using subagency to argue for rescission based on undisclosed dual agency). J. Clark Pendergrass, *The Real Estate Consumer's Agency And Disclosure Act: The Case Against Dual Agency, 48 Ala. L. Rev. 277 (Fall 1996).*

(n128)Footnote 184. *See, e.g., Brown v. Indianapolis Bd. of Realtors, 177 Trade Cas. (CCH) par. 61,435 (S.D. Ind. 1977).*

(n129)Footnote 185. *See, e.g., Derish v. San Mateo-Burlingame Bd. of Realtors, 186 Cal. Rptr. 390 (1982).*

(n130)Footnote 186. Ronald Benton Brown, *Real Estate Brokers: Shouldering New Burdens*, Prob. & Prop. 14 (May/June, 1997) (41 states have passed statutes that allow a variety of relationships. Brokers can still enter into a traditional agency relationship with a buyer or seller. A selling broker can still be a subagent of the seller, and it is still possible to be a buyers' agent. Now, however, in these states it is also possible to be a dual agent or a non-agent).

(n131)Footnote 187. Molly Moore Romero, *Theories of Real Estate Broker Liability: Arizona's Emerging Malpractice Doctrine, 20 Ariz. L. Rev. 767, 772-73 (1978)* by the Arizona Board of Regents. Reprinted with permission.

(n132)Footnote 188. *Wise v. Dawson, 353 A.2d 207, 209 (Del. Super. 1975).*

(n133)Footnote 189. *Wise v. Dawson, 353 A.2d 207, 209 (Del. Super. 1975);* Cal. Civ. Code § 2079.19 ("the payment of compensation ...is not necessarily determinative of a particular agency relationship").

(n134)Footnote 190. *Menzel v. Morse, 362 N.W.2d 465, 475 (Iowa 1985); Mead v. Hummel, 121 P.2d 423, 425 (Ariz. 1942).*

(n135)Footnote 191. *Kunz v. Warren, 725 P.2d 794 (Colo. App. 1986)* (broker was listing broker, and seller said he "would not have gone through with the deal" had he known about the undisclosed commission).

(n136)Footnote 192. Ronald Benton Brown, Joseph M. Grohman & Manuel R. Valcarcel, *Real Estate Brokerage: Recent Changes in Relationships and a Proposed Cure, 29 Creighton L. Rev. 25, 97 (1995).*

(n137)Footnote 193. Ronald Benton Brown, Joseph M. Grohman & Manuel R. Valcarcel, *Real Estate Brokerage: Recent Changes in Relationships and a Proposed Cure, 29 Creighton L. Rev. 25, 51 (1995).*

(n138)Footnote 194.

California Cal. Civ. Code §§ 2079.13 - 2079.24;

Colorado Colo. Rev. Stat. §§ 12-61-803;

Florida Fla. Stat. Ann. § 475.25;

Georgia Ga. Code Ann. §§ 10-6A-1-14;

Illinois Ill. Rev. Stat. ch. 225 para. 455 §§ 38.1-.65;

Indiana Ind. Code §§ 25-34.1-10-1 - 10-16;

Maine Me. Rev. Stat. Ann. tit. 32 §§ 13271-13281;

Maryland Md. Code Ann., Real Prop. §§ 17-101 - 614;

Michigan Mich. Comp. Laws §§ 339.2501-2516;

Minnesota Minn. Stat. §§ 82.17-34;

Nebraska Neb. Rev. Stat. §§ 76-2401 - 2430;

New York N.Y. Real. Prop. Law § 443;

Oregon Or. Rev. Stat. §§ 696.800-870;

Rhode Island R.I. Gen. Laws §§ 5-20.6-1-8; and

Wisconsin Wis. Stat. §§ 452.01-23.

(n139)Footnote 195.

Alabama Ala. Code §§ 34-27-1-11;

Arkansas Ark. Code Ann. §§ 17-35-101 - 17-35-603;

Delaware Del. Code Ann. tit. 24, §§ 2901-2929A;

Louisiana La. Civ. Code §§ 37:1431-37:1468; and

S.D. Codified Laws Ann §§ 36-21A-1-123.

(n140)Footnote 196. Karen Blumenthal, *Could Your Broker Be a Double Agent?* Wall. St. J., Sept. 3, 1995, at B8.

(n141)Footnote 197. Ronald Benton Brown, Joseph M. Grohman & Manuel R. Valcarcel, *Real Estate Brokerage: Recent Changes in Relationships and a Proposed Cure, 29 Creighton L. Rev. 25, 44 (1995).*

(n142)Footnote 198. *See* Levine, *The Dual Agency Trap,* 15 Real Est. Rev. 96 (1986).

(n143)Footnote 199. Victor S. Voinovich, Jr., *Agent Cannot Represent Both Buyer and Seller,* Real Est. Fin. J. 92, 93 (Summer 1995).

(n144)Footnote 200. 12 Am. Jur. 2d Brokers § 67 at 821; *Goldstein v. Department of State, Div. of Licensing, 533 N.Y.S.2d 1002 (N.Y.A.D. 1988)* (broker violated fiduciary relationship by representing both parties without prior disclosure and consent).

(n145)Footnote 201. *L. Byron Culver & Assoc. v. Jaoudi Indus. & Trading Corp., 1 Cal. Rptr. 2d 680 (Cal. App. 1992)* (broker was denied a commission for failing to disclose that he was representing both buyer and seller. California statutes require written disclosures of dual agency for 1-4 residential units. This, however, was an unimproved site of 33.5 acres, and there is no statute requiring such disclosure in commercial deals. The court denied the broker a commission anyway: "An agent has a fiduciary duty to his principal to disclose all information in the agent's possession relevant to the subject matter of the agency.").

(n146)Footnote 202. Ronald Benton Brown, Joseph M. Grohman & Manuel R. Valcarcel, *Real Estate Brokerage: Recent Changes in Relationships and a Proposed Cure, 29 Creighton L. Rev. 25 (1995).*

(n147)Footnote 203. Karen Blumenthal, *Could Your Broker Be a Double Agent?*, Wall St. J., Sept. 9, 1995, at B8.

(n148)Footnote 204. Karen Blumenthal, *Could Your Broker Be a Double Agent?*, Wall St. J., Sept. 9, 1995, at B8.

(n149)Footnote 205. Karen Blumenthal, *Could Your Broker Be a Double Agent?*, Wall St. J., Sept. 9, 1995, at B8.

(n150)Footnote 206. Cal. Civ. Code § 2375.5.

(n151)Footnote 207. *Salahutdin v. Walley of California, Inc., 29 Cal. Rptr. 2d 463 (App. 1994).*

(n152)Footnote 208. Ronald Benton Brown, Joseph M. Grohman & Manuel R. Valcarcel, *Real Estate Brokerage: Recent Changes in Relationships and a Proposed Cure, 29 Creighton L. Rev. 25, 28 (1995).*

(n153)Footnote 209. Cal. Bus. & Prof. Code § 475.25 at 2.

(n154)Footnote 210. Cal. Bus. & Prof. Code § 475.25 at 2.

(n155)Footnote 211. Fla. Stat. Ann. § 475.25; Ronald Benton Brown, Joseph M. Grohman & Manuel R. Valcarcel, *Real Estate Brokerage: Recent Changes in Relationships and a Proposed Cure, 29 Creighton L. Rev. 25, 97 (1995).*

(n156)Footnote 212. Annotation,*Real-Estate Broker's or Agent's Misrepresentation to, Failure to Inform, Vendor Regarding Value of Vendor's Real Property, 33 A.L.R 4th 944 (1984). See also* Annotation, *Liability to Real-Property Purchaser for Negligent Approval of Property's Value, 21 A.L.R.4th 867 (1983).*

(n157)Footnote 213. Used car dealers don't get penalized for buying cars low and selling high. Unlike real estate brokers, used car dealers are expected to buy old cars as cheaply as they can. A used car owner can try, of course, to unload the vehicle directly, but used car "brokers" are rare. Most used car dealers own the cars they are selling. Why are used houses and used cars traded so differently, and what does this tell us about the real estate brokerage industry? For possible answers, see Paul M. Anglin and Richard Arnott, *Residential Real Estate Brokerage as a Principal-Agent Problem*, 4 J. Real Est. Fin. & Econ. 99, 117-118 (1991). These authors rely considerably on earlier work by A.W. Jenkins, Home Sweet Home: Real Estate Brokerage in Canada (Fraser Ins. 1989). *In re Sanders, 233 B.R. 168 (Bankr. M.D. Ga. 1999)* (Broker failed to disclose an offer to purchase the property. Broker instead purchased property himself and waived the commissions. The sale to the broker netted the sellers more profit than the undisclosed offer would have provided. Nonetheless, sellers are still entitled to sue the broker for failure to disclose the offer, despite the fact that the sellers suffered no damages). *Johnson v. Neuville, 595 N.W.2d 100 (Wis. App. 1999)* (Broker failed to verify a representation made concerning an access easement, and structured the transaction in a way that would make it difficult for the buyer to verify the easement. Because the broker was negligent, buyer was allowed to sue the broker despite the law which states that brokers cannot be sued for failure to disclose if a qualified third person makes a disclosure); *Brown v. FSR Brokerage, Inc., 72 Cal. Rptr. 2d 828 (Cal. App. 1998)* (A broker can be sued for failing to properly disclose a dual agency status); Annotation, *Liability of Vendor's Real-Estate Broker or Agent to Purchaser or Prospect for Misrepresenting or Concealing Offer or Acceptance 55 A.L.R.2d 342 (1957); Letsos v. Century 21-New West Realty, 675 N.E.2d 217 (Ill. App. 1996)* (To the extent that real estate broker and brokerage firm breached their fiduciary duties

to property owner by failing to disclose, prior to broker's closing on purchase of property owner's land, that broker had found third party to purchase land, property owner might be entitled to return of commission paid in connection with sale of his property to broker as well as to profit that broker earned upon resale of property to third party).

(n158)Footnote 214. Also known as a "straw man" or an "accommodator." A straw is one made to appear the owner of record who actually holds title for another. *Ballantine's Dictionary*, 1222 (3d ed. 1969).

(n159)Footnote 215. *392 N.W.2d 250 (Minn. Ct. App. 1986).*

(n160)Footnote 216. Robert J. Bruss, *Double Escrow Created Illegal Secret Profit*, Los Angeles Times, Nov. 11, 1990 (Real Estate Section), at K4.

(n161)Footnote 217. Annotation, *Duty of Real-Estate Broker to Disclose Identity of Purchaser or Lessee, 2 A.L.R.3d 1119 (1965).* The broker is under the duty to disclose the name of a prospective purchaser to his principal, at least in response to a request by the principal. However, if an actual sale is consummated, there is a strong tendency to regard the commission as having been earned notwithstanding the broker's failure to disclose the purchaser's identity, unless the seller had asked for it before closing, and the broker died. But there are some cases in which the court has found that the admitted nondisclosure, concealment, or misrepresentation by the broker was not material, or was not harmful or prejudicial in any way to the principal.

(n162)Footnote 218. Bruss, *Double Escrow Created Illegal Secret Profit*, Los Angeles Times, Nov. 11, 1990 (Real Estate Section), at K4.

(n163)Footnote 219. *Zichlin v. Dill, 25 So. 2d 4 (Fla. 1946).*

(n164)Footnote 220. *Bush v. Palermo, 443 So. 2d 104 (Fla. App. 1983), reh'g denied.*

(n165)Footnote 221. *Bush v. Palermo, 443 So. 2d 104, 106 (Fla. App. 1983), reh'g denied.*

(n166)Footnote 222. *Young v. Field, 548 So. 2d 784, 785 (Fla. 1989).*

(n167)Footnote 223. Frederick J. Fisher, Broker Beware: Selling Property Within the Law 54 (Reston Publishing 1981). *See also*, Annotation, *Effect That Property May Be Bought For Less Than Listing Price Is Breach Of Duty That Bars Claim For Commission, 17 A.L.R. 2d 904.*

(n168)Footnote 224. *Haymes v. Rogers, 219 P.2d 339, rev'd on rehearing, 222 P.2d 789 (Ariz. 1950).*

(n169)Footnote 225. *219 P.2d at 340.*

(n170)Footnote 226. *219 P.2d at 341-42.*

(n171)Footnote 227. For a description of the broker's dilemma, see Arthur Stambler & Jacob A. Stein, *The Real Estate Broker--Schizophrenia or Conflict of Interest*, 28 J. Bar Ass'n D.C. 16 (1961).

(n172)Footnote 228. Annotation, *The seller is estopped from denying the qualifications of a purchaser "with whom he is willing to contract" if the contract is unconditional. Kopf v. Milam, 387 P.2d 390, 393 (Cal. 1963). Modern view as to right of real estate broker to recover commission where buyer defaults under valid contract of sales. 12 A.L.R.4th 1083, 1088 (1982). Asset Realty, Inc. v. Guyuron, 1996 Ohio App. LEXIS 5620* (Ohio App. 8 Dist. 1996) (A person is not "ready, willing and able" to buy when he is dependent upon third parties who are in no way bound to furnish the funds to complete the purchase).

(n173)Footnote 229. Annotation, *Modern View as to Right of Real Estate Broker to Recover Commission from Seller Principal Where Buyer Defaults Under Valid Contract of Sale. 12 A.L.R.4th 1083, at 1096.*

(n174)Footnote 230. Annotation, *What Constitutes Financial Ability to Perform Within Rule Entitling Broker to Commission for Producing Ready, Willing, and Able Purchaser of Real Property, 87 A.L.R.4th 11 (1991).*

(n175)Footnote 231. Annotation, *Real Estate Broker's Rights and Liabilities as Affected by Failure to Disclose Financial Information Concerning Purchaser, 34 A.L.R.4th 191 (1984). Egan v. Burkhart, 657 N.E.2d 401 (Ind. App. 1995)* (Broker's failure to disclose that one broker loaned money to the purchaser to help with the down payment was a material breach of the duty of good faith, because it went to the purchaser's creditworthiness); *Garcia v. Unique Realty & Property Management Co., Inc., 424 S.E.2d 14 (Ga. App. 1992)* (Seller sued the broker for alleged misrepresentations of the buyer's creditworthiness. The seller could not recover from the broker because the broker's representations were statements of opinions).

(n176)Footnote 232. *59 Cal. Rptr. 359 (1967). But see* McDonald v. Century 21 Real Estate Corp., 390 N.W.2d 68 (Wis. Ct. App. 1986) (brokers failed to "pre-qualify" buyer despite provision in listing agreement that they would. Seller and buyer entered contract. Seller began constructing another house, expecting the sale of his present residence to close. Buyer turned out to be financially precarious, and breached. Seller sued broker for failure to pre-qualify buyer. Court held that seller may have had a contract action but no tort suit against brokers for their failure to pre-qualify buyer).

(n177)Footnote 233. *59 Cal. Rptr. at 366.*

(n178)Footnote 234. *59 Cal. Rptr. at 366.*

(n179)Footnote 235. Jacqueline S. Leung, *Caveat Emptor or Caveat Broker?*, 23 Real Est. Rev. 91 (1993).

(n180)Footnote 236. *Lingsch v. Savage, 29 Cal. Rptr. 201, 204 (1963); see also Ditcharo v. Stepanek, 538 So. 2d 309 (La. App. 1989)* (broker owes duty to both parties to relay accurate information about the property); Charles P. Edmonds & Rudolph Lindbeck, *How Brokers Can Reduce Vulnerability to Lawsuits*, 17 Real Est. Rev. 90 (Spring 1987); Carol R. Goforth, *Sales of Structurally Defective Homes: The Potential Liability of Sellers and Real Estate Brokers, 41 Okla. L. Rev. 447 (1988);* Annotation, *Real Estate Broker's Liability to Purchaser for Misrepresentation or Nondisclosure of Physical Defects in Property Sold*, 45 A.L.R. 546 (1986); Craig A. Peterson, *Tort Claims by Real Estate Purchasers Against Sellers and Brokers: Current Illinois Statutory Strategies*, So. Ill. L. J. 161 (1983). *M&D, Inc. v. W.B. McConkey, 585 N.W.2d 33 (Mich. Ct. App. 1998)* (Neither the real estate company nor its brokers had a duty to disclose material defects when the purchaser acquired the property under an "as is" agreement); *Deckert v. Foster, 495 S.E.2d 656 (Ga. Ct. App. 1998)* (Real estate agents were not required to disclose to the purchasers that the property might be subject to erosion and runoff problems unless a proper drainage system was installed, because the purchasers should have been aware of these facts themselves due to the steep grade of the property they acquired); *Darrisaw v. Old Colony Realty Co., 501 S.E.2d 187 (W. Va. 1997)* (In West Virginia, the broker may be liable if (1) the broker makes material misrepresentations concerning the habitability or fails to disclose defects, (2) which substantially affect the value of the property, (3) of which the broker is aware or should be reasonably aware and the buyer would not be aware after a reasonable inspection, (4) and the misrepresentation or concealment was a substantial factor in inducing the buyer to purchase the property); *McEneaney v. Chestnut Hill Realty Corp., 650 N.E.2d 93 (Mass. App. 1995). But see Bando v. Achenbaum, 651 N.Y.S.2d 74 (N.Y.A.D. 1996)* (Home purchasers' allegations that vendor, real estate broker, and real estate brokerage corporation failed to disclose extent of termite damage in home failed to support cause of action for fraudulent misrepresentation, given that termite infestation was not peculiarly within knowledge of vendor, purchasers inspected house and knew infestation was ongoing, vendor never told purchasers anything that was untrue, and purchasers signed contract of sale which contained provision pursuant to which purchasers specifically disclaimed reliance on any representations, written or oral, of vendor and his representatives); *Haberstick v. Gordon A. Gundaker Real Estate Co., Inc., 921 S.W.2d 104 (Mo. App. 1996)* (Representations by agents of real estate sales company to prospective purchasers of lots in subdivision which adjoined land containing hazardous wastes, in response to inquiries about adjoining land, which did not disclose existence of hazardous wastes and told purchasers that adjoining land could not be developed and would remain farmland and that no threat was posed were sufficiently specific to allow recovery by purchasers in fraudulent misrepresentation action against company; representations were misleading representations

of existing fact and speculative promises of future action).

Katherine A. Pancak, Thomas J. Miceli and C.F. Sirmans, *Residential Disclosure Laws: The Further Demise Of Caveat Emptor*, 24 Real Est. L.J. 291 (Spring, 1996); Alan M. Weinberger, *Let The Buyer Be Well Informed? -- Doubting The Demise Of Caveat Emptor, 55 Md. L. Rev. 387 (1996). Smith v. Coldwell Banker Real Estate Services, 122 F. Supp. 2d 267 (D. Conn. 2000)* (seller, agent and broker held liable for not providing copy of lead paint report, even though the required disclosure form was provided); Stephanie A. Waxler, "Liabilities of Homeowners and Real Estate Brokers for Non-Disclosure in Illinois," *2000 Loy. Consumer L. Rev. 340;* "Brokers: Liability for Non-Disclosure of Lead Paint," 30 *Real Est. L. Rep.* 4 (Feb. 2001); Residential Lead-Based Paint Hazard Reduction Act of 1992, *42 U.S.C. § 4851 et seq.*.

(n181)Footnote 237. *199 Cal. Rptr. 383 (1984).* In many states where the listing broker was once held to have no duty to disclose material fact to a prospective purchaser, courts are abandoning the "no duty to non-client defense." In *Sawyer Realty v. Jarvis Corp., 432 N.E.2d 849 (Ill. 2d 1982),* the brokers were considering the possibility of bidding for the property on their own account even as they assisted the purchasers in preparing an offer. This the court found to have been an actionable wrong: "The primary fiduciary duties that run from the broker to the seller are not undermined by the obligation the broker owes to the prospective buyer. Real estate brokers occupy a position of trust with respect to purchasers with whom they are negotiating." *Id. at 851-52. Sawyer* requires the selling broker to tell buyer what "material facts" the broker knows. But brokers can rely on seller representations, even negligently made ones, unless the broker knows the representation is false. "...[a] realtor has no duty ...to independently substantiate the representation of a disclosed seller... ." *Lyons v. Christ Episcopal Church, 389 N.E.2d 623, 625 (Ill. App. 1979).*

(n182)Footnote 238. *See* Cal. Civ. Code § 2079.12 (In this code section, the California legislature states its intent that Cal. Civ. Code § 2079 - 2079.6 should be construed as the definition of duty of care found to exist by the holding in *Easton*).

(n183)Footnote 239. Article 9. the National Association of Realtors degrees, Interpretations of the Code of Ethics (7th ed. 1978). *See Johnson v. Geer Real Estate Co., 720 P.2d 660 (Kan. 1986)* (Broker liable who sold buyer a house on a septic tank when they said they were not interested in a house served by a septic tank only. Broker had relied on sellers' representation that the house was served by city sewers). *But see Lyons v. Christ Episcopal Church, 389 N.E.2d 623 (Ill. App. 1970).* A broker was held free of negligent misrepresentation who relayed the sellers' assurance to the buyer that the house was hooked up to city sewers when it was not. The buyers recovered the costs of the hookup from the sellers but the broker was exonerated. Brokers have no "duty to independently corroborate" the sellers' representations unless aware the representations are false.

(n184)Footnote 240. *199 Cal. Rptr. at 389.*

(n185)Footnote 241. Cal. Civ. Code § 2079.

(n186)Footnote 242. *See also Herbert v. Saffell, 877 F.2d 267 (4th Cir. 1989).* The broker was held to have no duty to make an independent investigation for hidden defects, in this case, soil conditions precluding use of an ordinary septic tank system. *Robinson v. Grossman, 67 Cal. Rptr. 2d 380 (Cal. App. 1997)* (sellers' listing broker and agent had no duty to independently verify or disclaim accuracy of sellers' representations).

Annotation, *Construction And Effect of Provision in Contract for Sale of Realty by Which Purchaser Agrees to Take Property "As Is" or in its Existing Conditio* n, *8 A.L.R.5th 312,* (1992); Annotation, *Real-Estate Broker's Power to Bind Principal by Representations as to Character, Condition, Location, Quantity, or Title of Property, 58 A.L.R.2d 10 (1958).*

(n187)Footnote 243. "The inspection ...does not [have to] include ...an inspection of areas that are reasonably and normally inaccessible... ." Cal. Civ. Code § 2079.3.

(n188)Footnote 244. The boundaries of § 2079 were tested in *Vaill v. Edmonds, 6 Cal. Rptr. 2d 1 (1991).* The court ordered the Commissioner of the California Department of Real Estate to vacate an order revoking Vaill's real estate salesperson's license. The decision overruled the Commissioner's finding that the real estate agent was negligent in failing to disclose to the buyers the occurrence of a neighborhood meeting regarding a potentially hazardous groundwater situation affecting the property. The broker got to keep her license because: (1) the agent had provided the buyer with a 1972 geological report about the property; (2) the buyers obtained their own geological report on the property; (3) the buyers physically inspected the property; (4) the agent and the sellers informed them that the neighbor two homes away had installed and operated a water pump to handle a water problem that had caused a landslide on the neighbor's property in 1971; (5) the sellers informed the buyers that a geological fault ran across the back of the property; and (6) the agent recommended that the buyers discuss the geology with their nephew, a developer who had built several homes in the neighborhood. *Rudolph v. Turecek, 658 N.Y.S.2d 769 (N.Y.A.D. 1997)* (Purchasers of home, for which it was unlikely that well could be drilled that would provide suitable and adequate water source, failed to prove fraud and negligence on part of real estate agents; agents' only knowledge of defect on property was that existing well had very slow recovery rate, which was fully disclosed to purchasers); *Osborne v. Ladner, 691 So. 2d 1245 (La. App. 1997)* (Real estate broker did not breach duty owed to purchaser to provide correct information regarding home, and thus, was not liable for termite damage to home under theory of negligent misrepresentation; broker disclosed information she had been given about leaks in stucco to purchaser, and did not have knowledge at time of sale of condition of interior structural problems caused by termite damage or leaking); *Helms v. Holland, 478 S.E.2d 513 (N.C. App. 1996)* (Purchasers did not have negligent misrepresentation claim against brokers for failing to disclose that county health department disapproved property for use as family care facility in absence of any evidence of brokers' knowledge of such disapproval); *Reeves v. Keesler, 921 S.W.2d 16 (Mo. App. 1996)* (Real estate agency, real estate sales associate of agency, and manager of agency did not have knowledge that there was problem with septic system and ducts and so did not have duty to disclose problems as required for home purchasers to succeed in action against them on claim of fraudulent concealment, even though prior prospective purchaser had alleged such problems, since allegations were refuted by home vendor and by inspection).

(n189)Footnote 245. *Thomson v. McGinnis, 465 S.E.2d 922 (W. Va. 1995)* (holding that when a broker retains some control over an inspection, the broker may be liable for the negligent hiring and work of the independent contractor if the broker knew or should have known of the contractor's incompetence).

(n190)Footnote 246. Cal. Civ. Code § 2079.4.

(n191)Footnote 247. Cal. Civ. Code § 2079.5.

(n192)Footnote 248. *Murray v. Hayden, 259 Cal. Rptr. 257 (1989).*

(n193)Footnote 249. *Blackmon v. First Real Estate Corp., 529 So. 2d 955 (Ala. 1988); see also Harrell v. Dodson, 398 So. 2d 272 (Ala. 1981).* The buyer's broker, asked about the plumbing, wiring, roof, and foundation, told the buyer that if the house passed the Virginia inspection, and it had, it was OK. Later, after closing, the house cracked, walls bulged, floors buckled, and engineers pronounced settling the cause of the problems. The broker won a directed verdict. The broker's statements about the condition of the property are opinion, not representations of material fact-- in Alabama--so the buyer's broker isn't liable either.

(n194)Footnote 250.

> [T]he plaintiff-purchaser must prove: (1) the broker made a false representation of material fact; (2) the broker knew or should have known that the representation was false; (3) the broker intended that the purchaser rely on the representations; (4) the purchaser reasonably relied on the representation; and (5) the reliance proximately caused injury to the purchaser.

Jacqueline S. Leung, *Caveat Emptor or Caveat Broker?,* 23 Real Est. Rev. 91, 93 (Summer 1993).

(n195)Footnote 251. The elements of this tort are: (1) the broker owed the purchaser a duty; (2) the broker breached that duty; (3) the purchaser suffered some harm; and (4) the broker's misrepresentation or nondisclosure is the proximate cause of that harm. Because the plaintiff-purchaser who sues under this theory need not show that the broker either had the intent to deceive or had actual knowledge of the falsity of the statement, negligent misrepresentation is frequently raised although it is recognized only in a minority of jurisdictions. Jacqueline S. Leung, *Caveat Emptor or Caveat Broker?,* 23 Real Est. Rev. 91, 93 (Summer 1993).

(n196)Footnote 252. *Hoffman v. Connal, 736 P.2d 242 (Wash. 1987). See also* Fossey & Roston, *The Brokers' Liability in a Real Estate Transaction: Bad News and Good News for Defense Attorneys, 12 UCLA-Alaska L. Rev. 37, 40* (1982-1983); *Bevins v. Ballard, 655 P.2d 757, 763 (Alaska 1982).*

(n197)Footnote 253. Citing Note, *Realtor Liability for Innocent Misrepresentation and Undiscovered Defects: Balancing the Equities Between Brokers and Buyers, 20 Val. U. L. Rev. 255 (1986).*

(n198)Footnote 254. Clarence E. Hagglund, et al., *Caveat Misrepresenter: The Real Estate Agent's Liability to the Purchaser,* 5 Hofstra Prop. L.J. 381, 403-404 (Spring 1993).

(n199)Footnote 255. *42 U.S.C. §§ 4851*-4856.

(n200)Footnote 256. *42 U.S.C. § 4852d*(a)(1)(B).

(n201)Footnote 257. 40 C.F.R. § 745.100 *et seq.*

(n202)Footnote 258. 24 C.F.R. § 35.800 *et seq.*

(n203)Footnote 259. For a more detailed discussion of these federal requirements, see Real Estate Brokerage Law and Practice, Ch. 15A, *Lead-Based Paint Disclosure* (Matthew Bender).

(n204)Footnote 260. 24 C.F.R. § 35.94(a)-(b)(1).

(n205)Footnote 261. For a more detailed discussion of these federal requirements, see Real Estate Brokerage Law and Practice, Ch. 15A, *Lead-Based Paint Disclosure* (Matthew Bender).

(n206)Footnote 262. *Mahler v. Keenan Real Estate, Inc., 876 P.2d 609 (Kan. 1994)* (The Sellers were not held liable for their agent's apparent misrepresentation of the fact that the water being discharged from a pipe in the side of the house came only from the sink, shower, and dishwasher, because there was no evidence that the sellers made this representation to the agent); *Outlaw v. McMichael, 397 So. 2d 1009, 1010 (Fla. App. 1981). See generally,* Billie J. Ellis, Jr., et al., *A Compliance Guide to Land Sales Marketing Regulation,* 1992 A.B.A. Sec. Real Prop., Prob. & Tr. L. 96; Katherine A. Pancak, *Residential Disclosure Laws: The Further Demise Of Caveat Emptor,* 24 Real Est. L.J. 291, 298 (Spring 1996) (Seller's Duty); Leonard A. Bernstein & George F. Magera, *Seller Disclosure Laws Gain Popularity,* 9 Loy. Consumer L. Rep. 43 (1997); Robert Kwong, *Fraud And The Duty To Disclose Off-Site Land Conditions: Actual Knowledge vs. Seller Status, 24 B.C. Envtl. Aff. L. Rev. 897* (Summer, 1997).

(n207)Footnote 263. *481 A.2d 886 (Pa. Super. Ct. 1984).*

(n208)Footnote 264. *481 A.2d 886, 890 (Pa. Super. Ct. 1984).*

(n209)Footnote 265. *481 A.2d 886, 890 (Pa. Super. Ct. 1984).*

(n210)Footnote 266. *See, e.g., Hammond v. Matthes, 311 N.W.2d 357 (Mich. App. 1981).*

(n211)Footnote 267. *See, e.g.,* Ariz. Rev. Stat. 32-2185.06. "[I]f the transaction involves a lot or parcel offered for present or future residential use, the contract, agreement or lease shall not waive or disclaim liability for prior material

representations relied upon by the purchaser made by the seller and such seller's agents concerning the subdivision and lot or parcel involved, and any provision attempting to waive or disclaim liability is void."

(n212)Footnote 268. *See, e.g., Baird v. Jones, 21 Cal. App. 4th 684 (1993).*

(n213)Footnote 269. *475 So. 2d 1010 (Fla. 1985).*

(n214)Footnote 270. *475 So. 2d 1010, 1011 (Fla. 1985).*

(n215)Footnote 271. *475 So. 2d 1010, 1012 (Fla. 1985).*

(n216)Footnote 272. *FSR Brokerage, Inc. v. Los Angeles Superior Court, 35 Cal. App. 4th 69, 41 Cal. Rptr. 2d 404* (Cal. App. 2 Dist. 1995).

(n217)Footnote 273. Harry D. Miller & Marvin B. Starr, 2 California Real Estate § 3:27 at 157-58 (2d ed. 1989) (footnotes omitted).

(n218)Footnote 274. *220 Cal. App. 3d 35, 269 Cal. Rptr. 228 (1990).*

(n219)Footnote 275. Krug appealed again but at an appellate settlement conference, the parties agreed to dismiss the appeal and sought a joint stipulated reversal of the $14,929.60 San Francisco trial court judgment. The Court of Appeal refused the joint stipulated reversal because to do so would deprive the California Real Estate Commissioner of his ability to suspend or revoke broker Praszker's license based on a civil judgment against him. *Norman I. Krug Real Estate Investments, Inc. v. Praszker, 24 Cal. Rptr. 2d 532 (1992). Norman I. Krug Real Estate Investments, Inc. v. Praszker, 22 Cal. App. 4th 1814,* (Cal. App. 1994).

(n220)Footnote 276. *Lyons v. Christ Episcopal Church, 389 N.E.2d 623 (Ill. App. 1979).*

(n221)Footnote 277. *See Johnson v. Geer Real Estate Co., 720 P.2d 660 (Kan. 1986)* (Broker held liable who sold buyers a house on a septic tank when buyers said they weren't interested in seeing any house not served by city sewers. The seller erred in assuring the broker the house was served by city sewers even though it wasn't. The broker was held liable anyway.) *but see Mahler v. Keenan Real Estate Inc., 876 P.2d 609 (Kan. 1994)* (after the *Johnson* case the Kansas legislature overruled *Johnson* in Kan. Stat. Ann. 1993 Supp. § 58-3034(b), which refuses to give a private right of action for negligent misrepresentation against a broker. The court in the present case determined that, although the amended statute prohibited an action for negligent or fraudulent misrepresentation, it did not necessarily preclude other common law actions. An action for negligent misrepresentation as defined in § 552 of the Restatement of Torts does exist in Kansas).

(n222)Footnote 278. The first draft of this section was provided by Paul Roman, research assistant, at U.S.C. Law Center, Fall 1995.

For additional discussion of brokers and anti-discrimination laws, see Real Estate Brokerage Law and Practice, Ch. 9, *The Broker and Discrimination*(Matthew Bender).

(n223)Footnote 279. *42 U.S.C. § 3601 et seq.*

(n224)Footnote 280. *42 U.S.C. § 3604.*

(n225)Footnote 281. *See* Pub. L. 100-430. In 1974, Pub. L. 93-383 inserted, "sex" after "religion".

(n226)Footnote 282. *42 U.S.C. § 3605.*

(n227)Footnote 283. *42 U.S.C. § 3605.* Paula Beck, *Fighting Section 8 Discrimination: The Fair Housing Act's*

New Frontier, 31 Harv. C.R.-C.L. L. Rev. 155 (Winter, 1996); John V. Picone III, *We Have Met The Enemy And They Are Us: Saving HUD From Themselves And Protecting The Viability of the Fair Housing Amendments Act, 36 Santa Clara L. Rev. 1097 (1996)* (The Fair Housing Amendments Act is a valuable tool to combat discrimination. It provides a variety of enforcement options, realistic penalties, and sufficient remedies. However, if HUD continues to abuse its enforcement mechanisms, allowing the Act to bludgeon and stifle legitimate, nonviolent political discourse on important public issues, portions of the Act may be declared unconstitutional).

(n228)Footnote 284. Single Family Mortgage Foreclosure Act, *12 U.S.C. § 3751; see also* Nelson A. Diaz, *HUD's New Foreclosure Act: Cutting Losses and Improving Business Management, 68 N.Y. L.J. 30 (Jan. 1996).*

(n229)Footnote 285. *42 U.S.C. § 5312.*

(n230)Footnote 286. *61 Fed. Reg. 7060 at 1.*

(n231)Footnote 287. Beside federal and state law, real estate trade associations also prohibit discrimination in the denial of equal professional services. *See, e.g., Article 10*, Code Of Ethics and Standards Of Practice National Association Of Realtors, January 1, 1995.

(n232)Footnote 288. *See* Matthew Smith, Comment, *The Wages of Living in Sin: Discrimination in Housing Against Unmarried Couples, 25 U.C. Davis L. Rev. 1055, 1074 n. 78 (1992)* (only Arkansas, Mississippi and Wyoming have not enacted fair housing laws).

(n233)Footnote 289. *See, e.g.*, Cal. Gov't Code § 12995(B).

(n234)Footnote 290. *See* Robert Schwemm, *The Future of Fair Housing Litigation, 26 J. Marshall L. Rev. 745, 748 (1993).*

(n235)Footnote 291. *42 U.S.C. § 3610*(f).

(n236)Footnote 292. Anthony Downs, Strategy for Designing a Fully Comprehensive National Housing Policy for the Federal Government of the United States 12 (1988). *See also* Note, *Affordable Housing, Exclusionary Zoning, and American Apartheid: Using Title VIII to Foster Statewide Integration, 68 N.Y.U. L. Rev. 89 (1993).*

(n237)Footnote 293. Johnson & Roseman, *SAG Newsletter* 11, *Ass'n Am. Geographers* (June 1990); Margery Austin Turner, *Discrimination in Urban Housing Markets: Lessons From Fair Housing Audits*, in Discrimination in the Housing and Mortgage Markets (Federal National Mortgage Ass'n 1992) (a lessening of racial isolation in Los Angeles 1980-1990). *See also* William P. O'Hare & William H. Frey, *Booming, Suburban, and Black*, 14 Am. Demographics 30, 36 (Sept. 1992) ("Suburban blacks are a fast-growing market segment within a slow-growing country.")

(n238)Footnote 294. *13 F.3d 1351 (9th Cir. 1994).*

(n239)Footnote 295. *13 F.3d 1351, 1352 (9th Cir. 1994).*

(n240)Footnote 296. *Ramos v. Kraft, 1996 U.S. Dist. LEXIS 959 (N.D. Ill. 1996).* This decision may not be released for publication.

(n241)Footnote 297. *Racial Harassment Costs Chicago Family Its House*, Wash. Post., Nov. 3, 1994, at A20.

(n242)Footnote 298. *See* Teresa Coleman Hunter and Gary L. Fisher, *Fair Housing Testing -- Uncovering Discriminatory Practices, 28 Creighton L. Rev. 1127, 1129 (1995)*, quoting *United States v. Gilman, 341 F. Supp. 891, 903 (S.D.N.Y. 1972)* ("...discrimination is usually covert and often appears in insidious and subtle forms.").

(n243)Footnote 299. *See* Victoria A. Roberts, *With a Handshake and a Smile: The Fight to Eliminate Housing*

Discrimination, 27 Mich. L.J. 276 (March 1994).

(n244)Footnote 300. *Midpeninsula Citizens for Fair Housing v. Westwood Investors, 221 Cal. App. 3d 1377,* (Cal. App. 1990) (California refused to follow the Supreme Court by stating that the standing rule under the California state law had different requirements than the Supreme Court had mentioned in *Coleman* as applied to the Federal Fair Housing Act. Several other states have refused to follow the standing requirements stated in *Coleman* by distinguishing the facts of their cases from the facts in *Coleman*); *Havens Realty Corp. v. Coleman, 455 U.S. 363, 373 (1982),* stating that Coleman, the African-American tester, had standing as a tester to sue based on her statutory right to truthful housing information under § 804(d) of the Fair Housing Act, and that she and Willis, the Caucasian tester, had sufficiently alleged injury as individuals based on petitioners depriving them of "the right to the important social, professional, business and economic, political and aesthetic benefits of inter-racial associations that arise from living in integrated communities free from discriminatory housing practices." *Havens Realty Corp. v. Coleman, 455 U.S. 363, 376 (1982).*

(n245)Footnote 301. *See Austin v. Strauss, 866 F.2d 431 (1989)* (unpublished disposition). For full opinion, see Nos. 88-3030 and 88-3048 (6th Cir. 1989) (defendant settled for $15,000 in damages out of court and was ordered to pay approximately $14,000 in attorney's fees).

(n246)Footnote 302. Teresa Coleman Hunter and Gary L. Fisher, *Fair Housing Testing -- Uncovering Discriminatory Practices, 28 Creighton L. Rev. 1127, 1141 (1995).*

(n247)Footnote 303. *42 U.S.C. § 3607*(a).

(n248)Footnote 304. *902 F.2d 1259 (7th Cir. 1990).*

(n249)Footnote 305. *902 F.2d 1259, 1261 (7th Cir. 1990); Doane v. National Westminster Bank USA, 938 F. Supp. 149 (E.D.N.Y. 1996); Osborn v. Kellogg, 547 N.W.2d 504 (Neb. App. 1996).*

(n250)Footnote 306. *Honce v. Vigil, 1 F.3d 1085 (10th Cir. 1993). See also Abrams v. Merlino, 694 F. Supp. 1101 (1988)* (sexual harassment of female customers by a real estate broker during provision of services is prohibited by the Fair Housing Act, regardless of whether housing is lost as a result).

(n251)Footnote 307. Kenneth R. Harney, *Investigators Target Higher Loan Fees Charged to Women, Minority Applicants*, Wash. Post, Sept. 23, 1995, at F01.

(n252)Footnote 308. Kenneth R. Harney, *Investigators Target Higher Loan Fees Charged to Women, Minority Applicants*, Wash. Post, Sept. 23, 1995, at F01.

(n253)Footnote 309. *960 F.2d 572 (6th Cir. 1992).*

(n254)Footnote 310. *960 F.2d 572, 579 (6th Cir. 1992); Krueger v. Cuomo, 115 F.3d 487 (7th Cir. 1997)* (Evidence supported award by administrative law judge of $20,000 in emotional distress damages to tenant for landlord's violation of Fair Housing Act provisions relating to sex discrimination by making unwanted sexual advances and attempting to evict tenant when she filed sexual harassment complaint; tenant testified that landlord had grabbed and touched her in front of her children, that landlord came unannounced to her apartment three or four times a week, that he made her feel "real dirty," "like a bad person," and "scared her," and that she concluded she had no alternative but to leave her long sought-for apartment)

(n255)Footnote 311. Senior citizen-only housing is specifically exempt from the Fair Housing Act. *See 42 U.S.C. § 3607*(b)(1) (stating in relevant part, "[N]or does any provision in this subchapter regarding familial status apply with respect to housing for older persons").

(n256)Footnote 312. *See* Jennifer Jolly Ryan, *A Real Estate Professional's and Attorney's Guide to the Fair Housing Laws Recent Inclusion of Familial Status as a Protected Class, 28 Creighton L. Rev. 1143 (1995). See also Fair Housing Council of Orange County, Inc. v. Ayres, 855 F. Supp. 315 (1994)* (holding that a landlord's occupancy restriction of two persons per unit had a disparate impact on families with children and supported a prima facie case of familial status discrimination under the Fair Housing Act; the restriction was facially neutral by treating adults and children similarly, but it excluded a large percentage of families with children from renting apartments); *United States v. Lepore, 816 F. Supp. 1011 (M.D. Pa. 1991)* (holding that a trailer park owner's policy of limiting the occupancy of the trailers to two people was an unreasonable restriction and a disguised substitute for a previous adults-only policy).

(n257)Footnote 313. *42 U.S.C. § 3607*(b)(1).

(n258)Footnote 314. *See Elliott v. City of Athens, 960 F.2d 975, cert. denied, 113 S. Ct. 376 (11th Cir. 1992)* (city zoning ordinance permitting a maximum of four unrelated individuals to occupy a single residence was within the meaning of the occupancy limit exemption to the FHA). *But see City of Edmonds v. Washington State Bldg. Code Council, 18 F.3d 802 (9th Cir. 1994)* (provision of FHA, exempting from the Act restrictions regarding maximum number of occupants permitted to occupy a dwelling, did not apply to a city zoning ordinance prohibiting five or more unrelated individuals from occupying single-family dwellings).

United States v. Branella, 972 F. Supp. 294 (D.N.J. 1997) (In absence of direct evidence of discriminatory intent, housing discrimination plaintiff must present sufficient evidence that complainant is member of protected class, complainant applied for and was qualified to rent unit in question, she was rejected, and unit remained available after she was rejected, and then burden shifts to defendant who must articulate legitimate nondiscriminatory reason for rejecting prospective tenant, and if such nondiscriminatory reason is profferred, plaintiff must produce evidence to establish that defendant's reason is pretextual); *Martin v. Palm Beach Atlantic Ass'n,, 696 So. 2d 919 (Fla. App. 1997)* (Although publication of condominium association rules prohibiting occupancy by children under age 12 would constitute facial violation of Fair Housing Act (FHA) section prohibiting statement or advertising indicating illegal preference, limitation, or discrimination, association's contention that it did not demonstrate intent to discriminate could be considered by jury as to issues of damages and their causation); *Gilligan v. Jamco Dev. Corp., 108 F.3d 246 (9th Cir. 1997)* (Family who received Aid to Families with Dependent Children (AFDC) benefits stated action against apartment complex owner and manager for discrimination on basis of familial status in violation of Fair Housing Act (FHA), where family alleged they were members of a class protected under the FHA, that owner had policy of refusing to negotiate for sale or rental of units to families receiving AFDC, and that enforcement of policy was prohibited by the FHA); *Children's Alliance v. City of Bellevue, 950 F. Supp. 1491 (W.D. Wash. 1997)* (city ordinance, imposing additional burdens on staffed group homes for youths, some of whom were generally handicapped, violated both Fair Housing Act (FHA) and Washington Law Against Discrimination by its differential treatment of persons based on familial status and handicap); *Simovits v. Chanticleer Condominium Ass'n, 933 F. Supp. 1394 (N.D. Ill. 1996)* (Condominium unit owners had standing to sue under Fair Housing Act for condominium association's alleged discrimination in refusing to allow owners to sell condo to buyers with children under age 18 where owners alleged that they lost opportunities to sell their condominium at a higher price because of the "no children" rule and that they suffered financial strain due to additional mortgage payments they incurred as result of the rule); *Hernandez v. Ever Fresh Co., 923 F. Supp. 1305 (D. Or. 1996).*

(n259)Footnote 315. *42 U.S.C. § 3602*(h).

(n260)Footnote 316. *See* Michael D. Isacco, *A Massachusetts Real Estate Broker's Duty to Disclose: The Quandary Presented by AIDS Stigmatized Property, 27 New Eng. L. Rev. 1211, 1224 (Summer 1993).*

(n261)Footnote 317. Tex. Rev. Civ. Stat. Ann. 6573a, §§ 15C-D (1991). For an analysis of the different types of AIDS disclosure statutes and a recommendation for a tighter version more consistent with anti-discrimination laws, *see* Neville-Ewell, *Residential Real Estate Transactions: The AIDS Influence*, 5 Hofstra Prop. L.F. 301 (1993).

(n262)Footnote 318. *See A.F.A.P.S. v. Regulations & Permits Admin., 740 F. Supp. 95 (D.P.R. 1990)* (holding that individuals infected with AIDS were within the definition of handicapped and protected by the provisions of the FHA); *Baxter v. City of Belleville, 720 F. Supp. 720 (S.D. Ill. 1989)* (holding that Congress intended to include those who are HIV-positive among handicapped persons). *But see Bryant Woods Inn, Inc. v. Howard County, Md., 911 F.Supp. 918 (D. Maryland 1996)* (Under a "disparate impact" claim under the FHA, the plaintiff challenges a facially neutral law that has the effect of causing discrimination. This court reasoned that a claim of disparate impact does not arise from one isolated incident. The court refused to follow the two previously cited cases because they represent a "clear error of law" by allowing an isolated incident to give rise to a disparate impact claim).

F. Willis Caruso, *Fair Housing Modifications and Accommodations in the '90s, 29 J. Marshall L. Rev. 331(Winter 1996);* Kelly D. Klimkiewicz, *City Of Edmonds v. Oxford House, Inc.: Handicapped Residents Of Group Homes Are Finally Recognized As A Protected Class Under The Fair Housing Act, 6 Widener J. Pub. L. 227 (1996).*

United States v. Wagner, 940 F. Supp. 972 (N.D. Tex. 1996) (First Amendment did not protect neighbors' lawsuit to block sale of house for use as group home for mentally retarded children and, therefore, did not preclude recovery against neighbors for violation of Fair Housing Act); *Franklin Bldg. Corp. v. City of Ocean City, 946 F. Supp. 1161 (D.N.J. 1996)* (Allegations in developer's complaint, that city and individual city defendants discriminated on basis of handicap, based on misperception that potential residents of housing project would be incapable of independent living because of their age, and alleging that developer had suffered economic injury as result of that discrimination, were sufficient to confer standing on developer to seek damages under Fair Housing Amendments Act on its claim that city counsel wrongfully blocked developer's proposed housing project).

(n263)Footnote 319. *15 U.S.C. § 1691.*

(n264)Footnote 320. *See, e.g., Hann v. Hous. Auth., 70 F. Supp. 605 (E.D. Pa. 1989)* (holding that a local housing authority's definition of family was impermissibly restrictive).

(n265)Footnote 321. David Kushner, *Free Exercise, Fair Housing and Marital Status -- Alaskan Style, 12 Alaska L. Rev. 335, 338 (1995).* "Courts in nine of the twenty-two jurisdictions in which fair housing laws prohibit discrimination on the basis of marital status have determined whether the term 'marital status' protects unmarried couples. The results appear to be nearly evenly split, although some holdings are equivocal. Roughly speaking, courts in Alaska, California, Massachusetts and New Jersey have found 'marital status' to include unmarried couples, whereas courts in Illinois, Maryland, Minnesota, New York and Washington have found it does not. Courts in three jurisdictions have found marital status provisions to apply to same-sex roommates."

(n266)Footnote 322. David Kushner, *Free Exercise, Fair Housing and Marital Status -- Alaskan Style, 12 Alaska L. Rev. 335, 337 (1995);* Rebecca A. Wistner, *Cohabitation, Fornication And The Free Exercise Of Religion: Landlords Seeking Religious Exemption From Fair Housing Laws, 46 Case W. Res. L. Rev. 1071 (Summer 1996).*

(n267)Footnote 323. *See, e.g., Attorney General v. Desilets, 636 N.E.2d 233 (Mass. 1994); Smith v. Fair Employment & Hous. Comm'n, 30 Cal. Rptr. 2d 395 (1994), rev'd in part, Smith v. Fair Employment & Housing Comm'n., 12 Cal. 4th 1143,* (Cal. App. 1996); *State v. French, 460 N.W.2d 2 (Minn. 1990); Donahue v. Fair Employment & Hous. Comm'n, 2 Cal. Rptr. 2d 32 (Cal. App. 1991)* (the California Supreme Court dismissed review and depublished the appellate opinion).

(n268)Footnote 324. *Swanner v. Anchorage Equal Rights Comm'n, 115 S. Ct. 460 (1994). See also* Kushner, *12 Alaska L. Rev. at 335.*

(n269)Footnote 325. *Swanner v. Anchorage Equal Rights Comm'n, 115 S. Ct. 460 (1994). See also* Maureen E. Markey, *The Price of Landlord's Free Exercise of Religion: Tenant's Right to Discrimination Free Housing and Privacy*, 22 Fort. Urb. L.J. 699, 831 (1995) (labeling the "free exercise" exception a travesty, "an unwarranted

exemption," "a mockery not only of the legitimate free exercise exemption, but also of the civil rights laws.")

(n270)Footnote 326. Minn. Stat. § 363.12, Subdiv. 1.

(n271)Footnote 327. Minn. Stat. § 609.34.

(n272)Footnote 328. *State v. French, 450 N.W.2d 2 (Minn. 1990),* which made note of *Anti-Discrimination Law--Marital Status Discrimination, 18 Wm. Mitchell L. Rev. 563 (1991).*

(n273)Footnote 329. *Donahue v. Fair Employment & Hous. Comm'n, 2 Cal. Rptr. 2d 32 (Cal. App. 1991).* The California Supreme Court dismissed review and depublished the appellate opinion. James C. Geoly and Kevin R. Gustafson, *Religious Liberty And Fair Housing: Must A Landlord Rent Against His Conscience*? *29 J. Marshall L. Rev. 455 (Winter 1996).*

(n274)Footnote 330. *See, e.g.,* Mass. Gen. Laws Ann. ch. 151B, § 4 which is representative and states in pertinent part "It shall be unlawful for the owner ...licensed real estate broker ...to refuse to rent or lease or sell or negotiate for sale ...because of ...sexual orientation ... ." Wis. Stat. Ann. § 101.22; Conn. Gen. Stat. Ann. § 46a-81e; Haw. Rev. Stat. § 368-1; Minn. Stat. Ann. § 363.03; Vt. Stat. Ann. tit. 9, § 4503; N.J. Stat. Ann. § 105:-4.

(n275)Footnote 331. David B. Cruz, *Piety and Prejudice: Free Exercise Exemption From Laws Prohibiting Sexual Orientation Discrimination, 60 N.Y.U. L. Rev. 1176, 1181 (1994).*

(n276)Footnote 332. David B. Cruz, *Piety and Prejudice: Free Exercise Exemption From Laws Prohibiting Sexual Orientation Discrimination, 60 N.Y.U. L. Rev. 1176, 1183 (1994). See also Kramarsky v. Stahl Mgmt., 401 N.Y.S.2d 943, 945 (N.Y. Sup. Ct. 1977)* ("Absent a supervening statutory prescription, a landlord is free to do what he wishes with his property and to rent or not rent to any given person at his whim."). *See* Okla. Stat. Ann. tit. 25 §§ 1451-52 (statute does not mention sexual orientation as a protected basis against which landlords and brokers may not discriminate and specifically excludes sexual orientation discrimination as a handicap).

(n277)Footnote 333. David B. Cruz, *Piety and Prejudice: Free Exercise Exemption From Laws Prohibiting Sexual Orientation Discrimination, 60 N.Y.U. L. Rev. 1176, 1191 (1994).*

(n278)Footnote 334. *Baumgardner v. Secretary, United States Dep't of Housing & Urban Dev, 960 F.2d at 579.*

(n279)Footnote 335. *509 F.2d 1110, reh'g denied, 517 F.2d 918, cert. denied, 423 U.S. 896 (1975).*

(n280)Footnote 336. *But see* Bronson v. Crestwood Lake Section 1 Holding Corp., 724 F. Supp. 148 (S.D.N.Y. 1989) (statistical formulations showing percentage of minority households and non-minority households excluded from apartment building by owner's policy of rejecting holder of Section 8 vouchers and policy of requiring tenants have income three times the amount of rent make prima facie showing of disparate impact on minority tenants); *United States v. Reece, 457 F. Supp. 43 (1978)* (holding that to prevent an unequal burden on women applicants, apartment owners must consider alimony and child support payments in determining whether a divorced woman would meet the owner's requirements regarding the ability to pay rent).

(n281)Footnote 337. *Harris v. Capital Growth Investors XIV, 805 P.2d 873 (Cal. 1991). See also* Baumgardner at 579 (holding that the FHA does not preclude owners and brokers from investigating the background, financial ability, and general responsibility of prospective occupants, so long as the owner or broker does not discriminate on any of the bases specified in the Act).

(n282)Footnote 338. *Harris* at 887-88. *Bean v. Missouri Comm'n on Human Rights, 913 S.W.2d 419 (Mo. App. 1996)* (Applicants for rental unit failed to establish prima facie case of racial discrimination in connection with denial of application; although applicants were African-American and thus protected by statute, and applicants made bona fide

offer to rent unit, applicants did not meet landlord's legitimate nondiscriminatory criteria for acceptance, in view of lack of nonfamily or other objective references and applicants' lack of sufficient income from local employment, and of the fact that other African-Americans were tenants in complex).

(n283)Footnote 339. Section 3603(b) states in relevant part: Nothing in section 3604 of this title (other than subsection (c)) shall apply to:

(1) any single-family house sold or rented by an owner: provided, That such private individual owner does not own more than three such single-family houses at any one such time; Provided further, That in the case of the sale of any such single-family house by a private individual owner not residing in such house at the time of such sale or who was not the most recent resident of such house prior to such sale, the exemption granted by this subsection shall apply only with respect to one such sale within any twenty-four month period; Provided further, That such bona fide private individual owner does not own any interest in, nor is there owned or reserved on his behalf, under any express or voluntary agreement, title to or any right to all or a portion of the proceeds from the sale or rental of more than three such single-family houses at any one time; Provided further, That after December 31, 1969, the sale or rental of any such single-family house shall be excepted from the application of this subchapter only if such house is sold or rented (A) without the use in any manner of the sales or rental facilities or the sales or rental services of any real estate broker, agent, or salesman, or person, and (B) without the publication, posting or mailing, after notice, of any advertisement or written notice in violation of section 3604(c) of this title; but nothing in this proviso shall prohibit the use of attorneys, escrow agents, abstractors, title companies, and other such professional assistance as necessary to perfect or transfer the title, or

(2) rooms or units in dwellings containing living quarters occupied or intended to be occupied by no more than four families living independently of each other, if the owner actually maintains and occupies one of such living quarters as his residence.

(n284)Footnote 340. *See United States v. Hunter, 459 F.2d 205 (4th Cir. 1972) cert. denied, 409 U.S. 934,* reh'g denied, *413 U.S. 923 (1975)* (a private single-family homeowner or landlord, who is permitted by § 3603(b) to effectuate discriminatory preferences by refusing to sell or rent certain dwellings to a particular racial, religious or ethnic group, is not entitled either as a constitutional right or as a matter of statutory construction to communicate via commercial advertising that intent to discriminate); *Singleton v. Gendason, 545 F.2d 1224 (1976)* (persons offering a single-family residence for rental were not entitled to the "single-family" exemption when they listed such rentals with a multiple listing service; even though a multiple listing service was not a real estate broker, dealer, or agent, the services it offered fell within the broad category of services embraced in the language "business of renting dwellings").

(n285)Footnote 341. *42 U.S.C. § 3607*(a). *See United States v. Columbus Country Club, 915 F.2d 877, cert. denied, 501 U.S. 1205 (3d Cir. 1990)* (Fair Housing Act's private club exemption permitting limitations on "rental or occupancy" of lodgings does not exempt sale of lodgings, even if sale has effect of limiting rental or occupancy of lodgings).

(n286)Footnote 342. *42 U.S.C. § 3604*(c).

(n287)Footnote 343. *See* United States v. Hunter at 215 (advertisements stating that apartments are in a "white home" indicate a racial preference, and, therefore, are prohibited by § 3604(c)). *See also* Brian Edwards, *Hidden Bias: How to Recognize Rental Discrimination,* Chicago Tribune, Mar. 19, 1993;Kirsten Lagtree, *Fighting Words: Effort to Avoid Housing Discrimination Has Changed the Way Realty Ads Are Written*, Los Angeles Times, Feb. 12, 1995 (reprints "not acceptable words" list compiled by the Oregon Newspaper Publishers Ass'n aimed to help owners, landlords, realtors and others stay in compliance with the FHA's ban on discriminatory language).

(n288)Footnote 344. Kirsten Lagtree, *Fighting Words: Effort to Avoid Housing Discrimination Has Changed the Way Realty Ads Are Written*, Los Angeles Times, Feb. 12, 1995, sec. K.

(n289)Footnote 345. Kirsten Lagtree, *Fighting Words: Effort to Avoid Housing Discrimination Has Changed the Way Realty Ads Are Written*, Los Angeles Times, Feb. 12, 1995, sec. K.

(n290)Footnote 346. *See Ragin v. New York Times Co., 923 F.2d 995 (2d Cir. 1991); Spann v. Colonial Village, Inc., 899 F.2d 24 (D.C. Cir. 1990); United States v. Hunter, 459 F.2d 205, 215 (4th Cir. 1972), cert. denied, 409 U.S. 934, 93 S. Ct. 235 (1972).*

(n291)Footnote 347. *Ragin v. New York Times Co., 923 F.2d 995, 1002 (2d Cir. 1991).*

(n292)Footnote 348. *Housing Opportunities Made Equal v. Cincinnati Enquirer, 943 F.2d 644, 648 (6th Cir. 1991).*

(n293)Footnote 349. *Ragin v. New York Times Co., 923 F.2d 995, 1002 (2d Cir. 1991).*

(n294)Footnote 350. *See Janick v. HUD, 44 F.3d 553, 556 (7th Cir. 1995); HOME, 943 F.2d at 646; Ragin, 923 F.2d at 1000.*

(n295)Footnote 351. *See, e.g., Janick v. HUD, 44 F.3d 553, 556 (7th Cir. 1995).*

(n296)Footnote 352. 24 C.F.R. Part 109.

(n297)Footnote 353. 24 C.F.R. § 109.30(b).

(n298)Footnote 354. *45 Fed. Reg. 57, 105.*

(n299)Footnote 355. *See, e.g., Janick v. HUD, 44 F.3d 553 (7th Cir. 1995)* (holding that an advertisement containing the words "mature person preferred" may be a violation of the Act).

Peter Engel, *The Reading Room: Fairer Housing: Proposals For Improving The Fair Housing Act*, 5 J. Affordable Hous. & Community Dev. L. 114 (Winter 1996); Reginald Leamon Robinson, *White Cultural Matrix And The Language Of Nonverbal Advertising In Housing Segregation: Toward An Aggregate Theory Of Liability, 25 Cap. U. L. Rev. 101 (1996);* P. Cameron DeVore and Robert D. Sack, *Advertising And Commercial Speech*, 462 PLI/Pat 371, 743 (Nov. 1996).

Martin v. Palm Beach Atlantic Ass'n, 696 So. 2d 919 (Fla. App. 1997) (Publication of condominium association rules prohibiting occupancy by children under age 12 would constitute facial violation of Fair Housing Act section prohibiting statement or advertising indicating illegal preference, limitation, or discrimination); *Tyus v. Urban Search Mgmt., 102 F.3d 256 (7th Cir. 1996)* (Only when enough "all-whites" ads have run to allow a pattern to emerge is Fair Housing Act violation likely to become apparent); *Wilson v. Glenwood Intermountain Properties, Inc., 98 F.3d 590 (10th Cir. 1996)* (Fair Housing Act provision that prohibits discriminatory advertisements, but does not expressly state that such advertisements and statements to "any person" are unlawful, does not give all persons an express statutory right to be free from discriminatory advertising); *State v. Keding, 553 N.W.2d 305 (Iowa 1996)* (Owners' distribution of newsletter to park members fell within scope of housing discrimination provision of Iowa Civil Rights Act that prohibited publication of discriminatory statements by advertisements or "in any other manner"; objective standard is used for determining whether particular statement or advertisement is discriminatory, so as to be in violation of federal Fair Housing Act or housing discrimination provision of Iowa Civil Rights Act; determination must be made as to how "ordinary reader" would interpret publication).

(n300)Footnote 356. *See 42 U.S.C. § 3604*(d).

(n301)Footnote 357. *See Heights Community Congress v. Hilltop Realty, Inc., 774 F.2d 135, 139 (6th Cir. 1985). See also 554 Fordham L. Rev. 563; Village of Bellwood v. Dwivedi, 895 F.2d 1521, 1534 (7th Cir. 1990)* ("There

unquestionably is discrimination in housing against blacks in this country today."). *But see Fair Housing Council of Philadelphia v. Montgomery Newspapers, 141 F.3d 71 (3rd Cir. 1998).*

(n302)Footnote 358. *See Zuch v. Hussey, 394 F. Supp. 1028, 1046 (1975)* (holding that the Fair Housing Act bans all racially discriminatory conduct by real estate agents in the sale of housing).

(n303)Footnote 359. *895 F.2d at 1521.*

(n304)Footnote 360. *895 F.2d at 1528.*

(n305)Footnote 361. *895 F.2d at 1529.* Kimberlianne Podlas, *A New Sword To Slay The Dragon: Using New York Law To Combat Environmental Racism, 23 Fordham Urb. L.J. 1283, 1303 (Summer 1996);* Stephen E. Haydon, *A Measure Of Our Progress: Testing For Race Discrimination In Public Accommodations, 44 UCLA L. Rev. 1207 (Apr. 1997).*

(n306)Footnote 362. Restatement (Second) of Agency § 411, 343 comment d.

(n307)Footnote 363. *597 F.2d 556 (5th Cir. 1979).*

(n308)Footnote 364. *See Jeanty v. McKey & Poague Inc., 496 F.2d 1119 (7th Cir. 1974)* (agents held liable for giving false reasons for the owner's refusal to lease when the false reasons were subterfuge for racial discrimination).

(n309)Footnote 365. *See, e.g., Vargas v. Hampson, 57 Cal. 2d 479 (1962).*

(n310)Footnote 366. *740 F.2d 460 (6th Cir. 1984).*

(n311)Footnote 367. *See Zuch v. Hussey, 394 F. Supp. 1028, 1051, n.11 (E.D. Mich. 1975)* (buyer initiating discussions of race may not absolve the real estate broker of liability under the Fair Housing Act).

(n312)Footnote 368. Cal. Gov't Code §§ 12900-12996.

(n313)Footnote 369. 53 Op. Cal. Att'y Gen. 195 (1970).

(n314)Footnote 370. An act, although forbidden or done in a forbidden manner, may be within the scope of employment. Restatement of Agency (Second) § 230 (1958).

(n315)Footnote 371. *Chicago v. Matchmaker Real Estate Sales Center, 982 F.2d 1086, 1096 (7th Cir. 1992)* (the doctrine of respondeat superior applies in Federal Housing Act claims); *Marr v. Rife, 503 F.2d 735 (6th Cir. 1974)* ("The discriminatory conduct of an apartment manager or rental agent is, as a general rule, attributable to the owner and property manager of the apartment complex, both under the doctrine of respondeat superior and because the duty to obey the law is non-delegable.").

(n316)Footnote 372. *976 F.2d 900 (4th Cir. 1992).*

(n317)Footnote 373. *976 F.2d 900, 915 (4th Cir. 1992).*

(n318)Footnote 374. Restatement (Second) of Agency § 317. Corina R. Caplan,*The Decline and Recent Revival of Absolute Vicarious Liability Under the Fair Housing Act, 48 Rutgers L. Rev. 581 (Winter 1996).*

(n319)Footnote 375. *42 U.S.C. §§ 3601*-3631.

(n320)Footnote 376. Note, *Section 3604(c) of the Fair Housing Act of 1968, as Amended: What Is It and How Is It Changing the Use of Human Models With Real Estate Advertising*, 3 Hofstra Prop. L.J. 49, 62 (1989).

(n321)Footnote 377. Note, *Section 3604(c) of the Fair Housing Act of 1968, as Amended: What Is It and How Is It Changing the Use of Human Models With Real Estate Advertising,* 3 Hofstra Prop. L.J. 49, 64, n. 127 (1989).

(n322)Footnote 378. *HUD v. Blackwell, 908 F.2d 864 (11th Cir. 1990)* (court upheld an award of compensatory damages for the victim's embarrassment, humiliation, and emotional distress).

(n323)Footnote 379. *Memphis Community Sch. Dist. v. Stachura, 477 U.S. 299, 308 (1986); Carey v. Piphus, 435 U.S. 247 (1978).*

(n324)Footnote 380. *Portee v. Hastava, 853 F. Supp. 597 (E.D.N.Y. 1994)* (court awarded punitive damages against both a real estate agent and the owner of real estate office stating that the principal of a real estate firm has a duty to not act discriminatorily and to insure that his agents do not as well).

(n325)Footnote 381. Kale Williams, *Forward-Maximizing Damages in a Fair Housing Case, 26 J. Marshall L. Rev. 1 (1992).*

(n326)Footnote 382. Larry R. Rogers & Kelly N. Kalus, *From One Dollar to $2.4 Million: Narrowing the Spectrum of Damage Awards in Fair Housing Cases Through Basic Tort Litigation Tactics, 26 J. Marshall L. Rev. 29 (1992).*

+ §§ 95.07 - 95.09 have been adapted from George Lefcoe, Real Estate Transactions (Michie 1993).

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CHAPTER 95 REAL ESTATE BROKERS +

11-95 Thompson on Real Property, Thomas Editions § 95.08

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§ 95.08 Bibliography.

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Annotations

Annotation, "Application of State Antitrust Laws to Activities or Practices of Real Estate Agents or Associations," *22 A.L.R.4th (1983) 103.*

Annotation, "Fraud Actions" Right to Recover for Mental or Emotional Distress," *11 A.L.R.5th (1993) 88.*

Annotation, "What Constitutes Financial Ability to Perform Within Rule Entitling Broker to Commission for Producing Ready, Willing and Able Purchaser of Real Property," *87 A.L.R.4th (1991) 11.*

Annotation, *Broker's Liability for Fraud or Misrepresentation Concerning Development or Nondevelopment of Nearby Property, 71 A.L.R. 4th 511.*

Annotation, *Grounds for Revocation or Suspension of License of Real-Estate Broker or Salesperson, 7 A.L.R. 5th 474.*

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Annotation, *Real Estate Brokers: Statute or Regulation Forbidding Use of Prizes, Gifts, or Premiums as Inducement to Secure Customers, 62 A.L.R. 4th 1044.*

Annotation, *Revocation or Suspension of Real-Estate Broker's License for Conduct Not Connected With Business as a Broker, 22 A.L.R. 4th 136.*

Annotation, *Right of Attorney, as Such, to Act or Become Licensed to Act as Real-Estate Broker, 23 A.L.R. 4th 230.*

Annotation, *Right to Private Action Under State Statutes or Regulations Governing Real-Estate Brokers or Salesmen, 28 A.L.R. 4th 199.*

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Annotation, *Validity and Application of Regulation Prohibiting Licensed Real-Estate Broker from Negotiating Sale or Lease with Owner Known to Have Exclusive Listing Agreement With Another Broker, 17 A.L.R. 4th 763.*

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Supp. To CHAPTER 95 REAL ESTATE BROKERS

11-95 Thompson on Real Property, Thomas Editions Supp. to § 95.03

Supp. to § 95.03 Statutes and Regulations Affecting Brokers.

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Cambas v. Department of Business and Professional Regulation, 6 So. 3d 668 (Fla. App. 2009) (broker who drove under the influence and left the scene of an accident had his license suspended).

Forsalebyowner.com Corp. v. Zinnemann, 347 F. Supp. 2d 868 (E.D. Calif. 2004) (a statute requiring licensing of real estate brokers was not a violation of the *First Amendment* when applied to the operator of an Internet site that providing listings of available California real estate); *Kerley v. Real Estate Agency, 96 P.3d 1211 (Or. 2004)* (a broker's license could be revoked for acts of embezzlement he committed before he obtained the license).

§ 95.03(a) Real Estate Broker Licensing Provisions from a Representative Sample of States. [Go To Main]

Add new footnote at end of Florida section: n4.1

§ 95.03(b) Common Issues Under State Licensing Statutes. [Go To Main]

Add:

G. C. Timmis & Company v. Guardian Alarm Company, 635 N.W.2d 370 (Mich. App. 2001) (a firm without a broker's license could not enforce a compensation agreement for actions that fell within the brokers' licensing act); *Fieger v. Pitney Bowes Credit Corporation, 251 F.3d 386 (2nd Cir. 2001)* (financial adviser engaged in real estate activity for which a real estate broker's license was required). *Gibbons v. Bureau of Professional and Occupational Affairs, 921 A.2d 551 (Pa. Commw. 2007)* (broker's license can be suspended for failure to supervise employee salespersons).

Add:

Younkin v. Bureau of Professional and Occupation Affairs, State Real Estate Commission, 774 A.2d 1281 (Pa. Commw. 2001) (auctioneer who declared no sale and then sold property later to a non-bidder was held to have brokered the sale of real estate without a license).

FOOTNOTES:
(n3)Footnote 4.1. *Schickedanz Bros.-Riviera, Ltd. v. Harris, 800 So.2d 608 (Fla. 2001)* (professional services provided by marketing consultant were not real estate sales or brokerage services).

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Supp. To CHAPTER 95 REAL ESTATE BROKERS

11-95 Thompson on Real Property, Thomas Editions Supp. to § 95.04

Supp. to § 95.04 Fiduciary and Other Duties of Brokers.

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Add:

Handy v. Cohen, 2003 N.Y. Misc. LEXIS 69 (No. 00-0800, Jan. 21, 2003) (broker's violation of licensing provisions warranted damages equal to four times the amount of illegally collected broker fees).

Darone v. Cary, 2002 Cal. App. Unpub. LEXIS 4993 (Jan. 11, 2002) (a mortgage broker for the purchaser did not owe a fiduciary duty to the vendor).

Mississippi Real Estate Commission v. McCaughan, 2004 Miss. App. LEXIS (No. 2003-CC-01153-COA, Nov. 2, 2004, Miss. App. 2004) (broker liable for failure to supervise activities of agents).

Add:

Crawford v. Mintz, 673 S.E.2d 746 (N.C. App. 2009) (action against brokers for negligent misrepresentation that the property was connected to the city sewer system); *Sutton v. Ebby Halliday Real Estate, Inc., 279 S.W.3d 418 (Tex. App. 2009)* (action against real estate broker for allegedly knowing that the property flooded and allegedly concealing that information).

Handy v. Cohen, 2005 N.Y. Misc. LEXIS 709 (Apr. 13, 2005) (a purchase and broker committed fraud by not revealing to the vendor that they operated as related entities); *Smith v. Mayes, 851 So.2d 785 (Fla. App. 2003)* (action against broker for opening garage door, which injured prospective house buyer). *Nichols v. Minnick, 885 N.E.2d 1 (Ind. 2008)* (a broker who lent the down payment to the purchaser had the duty to disclose that fact as material information).

Add:

In re Washington, 297 B.R. 662 (S.D. Fla. 2003) (broker acted improperly in forging purported debtor's signature on the bankruptcy petition).

Kirshenbaum v. Fidelity Federal Bank, 941 A.2d 213 (R.I. 2008) (real estate broker obtained a mortgage in his own name in behalf of his clients; mortgagee was required to assign the mortgage to the broker once the debt was paid in full).

Add:

110 *Amity Associaties, LLC v. Grubb & Ellis New York, Inc., 875 N.Y.S.2d 64 (2009)* (action against brokers for alleged tortious interference with prospective contract).

Portell International Realty, Inc. v. Jacobson, 802 So.2d 431 (Fla. App. 2001) (a broker did not have a duty to return to the clients and tell them that the broker had agreed to reduce the deposit for the broker).

Bilodeau v. Jordan, 2003 Ohio App. LEXIS 1475 (No. C-020496, Mar. 28, 2003) (unsuccessful action against broker for personal injury suffered when a sister of the purchaser visited the house after the purchase agreement had been signed and was injured by the garage door).

Add:

Wong v. Wong, 2003 Cal. App. Unpub. LEXIS 5539 (No. A098623, Jun. 6, 2003) (the broker owed no duty to advise the vendor about possibly pursuing a tax-free exchange as part of the real property sale).

Add:

Habeeb v. Ohio Dept. of Commerce, 2004 Ohio App. LEXIS 130 (No. 82784, Jan. 15, 2004) (a broker representing the seller failed to make timely disclosure of his agency to the buyer and the license was suspended).

Add:

Hulse v. First American Title Company of Crook County, 2001 WY 95, 33 P.3d 122 (Wyo. 2001) (any misrepresentation made by the brokerage after the purchase agreement was executed can not be the basis of an actionable fraud); *Nu Pointe East v. Bulliard, 2002 La. App. LEXIS 821* (Mar. 13, 2002) (a broker's duties to the vendor terminate on the day of the sale).

Add:

Queens Structure Corp. v. Jay Lawrence Associates, Inc., 758 N.Y.S.2d 664 (2003) (brokers breached fiduciary duty to vendors by entering into a secret agreement with purchasers to obtain a 2% "consulting fee").

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Supp. To CHAPTER 95 REAL ESTATE BROKERS

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Supp. to § 95.05 Listing Agreements and Commissions.

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§ 95.05(b) Commissions. [Go To Main]

Add:

Mitchell v. DiMare, 936 So. 2d 1178 (Fla. App. 2006) (commission not owed when no enforceable contract arose between vendor and purchaser).

Trimble v. Wescom, 673 N.W.2d 864 (Neb. 2004) (broker not entitled to commission on a sale not consummated within four months after expiration of the listing agreement). *See e.g., Steven G. Walther, Inc. v. Taranto, 791 N.Y.S.2d 803 (2005)* (purchasers procured by the broker were ready, willing and able to complete the purchase).

Add:

C.H.E.G., Inc. v. Millenium Bank, 99 Cal. App. 4th 505, 121 Cal. Rptr. 2d 443 (2002) (broker's right to a commission is an interest that can be extinguished by a bankruptcy court).

Add:

Korin Group v. Emar Building Corporation, 737 N.Y.S.2d 367 (2002) (it is not necessary in this jurisdiction for the transaction to close for the brokerage to earn its commission); *Upper Cape Realty v. Morris, 756 N.E.2d 1193 (Mass. App. 2001)* (the broker was entitled to the commission for introducing the buyer to the property).

Add:

Loeb Partners Realty v. Edward A. Sears Associates, 733 N.Y.S.2d 390 (2001) (the broker was not the procuring cause and therefore not entitled to the commission); *Venturvest Realty Corporation v. A.K.S.I.P. Corporation, 793 So.2d 1054 (Fla. App. 2001)* (the broker was the procuring cause of the sale and was entitled to the commission); *Finley v. Amyot, 728 N.Y.S.2d 832 (2001)* (the broker was not the procuring cause of the sale).

Add:

The Binswanger Companies v. Merry-Go-Round Enterprises, Inc., 258 B.R. 608 (Bankr. D. Md. 2001) (broker could not collect commission because some of its employees who performed services did not hold the required license).

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Supp. to § 95.06 Restrictions on Brokers' Activities.

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§ 95.06(b) Commissions [Go To Main]

Add:

Reynolds Properties, Inc. v. Bickelmann, 685 S.E.2d 450 (Ga. App. 2009) (even though the purchase and sale agreement entitled the broker to collect the commission from the nonperforming party, no commission was payable after the parties terminated the agreement and released the purchaser from the obligation to proceed with the purchase).

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Supp. To CHAPTER 95 REAL ESTATE BROKERS

11-95 Thompson on Real Property, Thomas Editions Supp. to § 95.07

Supp. to § 95.07 Practical Aspects of Real Estate Brokers' Activities.

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§ 95.07(b) Listing Agreement: Is a Writing Required? [Go To Main]

§ 95.07(b)(1) An Even Split

Add:

C. Porter Vaughan, Inc. v. DiLorenzo, 689 S.E.2d 656 (Va. 2010) (the contract for the sale of real property was sufficient written evidence of the listing agreement to satisfy the statute of frauds).

§ 95.07(c) Negotiating the Listing Agreement. [Go To Main]

§ 95.07(c)(1) Types of Listings: Open Listing, Exclusive Agency, Exclusive Right to Sell.

Add:

Gretencord v. Cryder, 784 N.E.2d 384 (Ill. App. 2003) (under the listing agreement, the client was required to refer a potential purchaser to the broker).

§ 95.07(c)(3) Length or Term of Listing.

Add:

Levy, Miller, Maretz, LLC v.*Vuoso, 797 A.2d 574 (Conn. App. 2002)* (broker was entitled to a commission for a lease

agreement that was concluded during the broker's term of exclusive right); *Nu Pointe East, L.L.C. v. Bulliard, 813 So.2d 545 (La. App. 2002)* (the broker's duties to the vendor ended on the date of sale).

§ 95.07(d) When Do Brokers Earn Their Commissions? [Go To Main]

§ 95.07(d)(1) Traditional Rule: Once a "Ready, Willing and Able" Buyer Has Been Produced.

Add:

Norma Reynolds Realty, Inc. v. Miral, 753 N.Y.S.2d 67 (2003) (without a meeting of the minds the broker is not entitled to the commission).

Add:

Fairbourn Commercial, Inc. v. American Housing Partners, Inc., 2003 Ut. App. LEXIS 36 (No. 20020060-CA, Apr. 3, 2003) (closing is not a condition precedent to payment of the commission).

§ 95.07(d)(2) Emerging Rule: No Commission Unless the Deal Closes.

Add:

Korin Group v. Emar Building Corp., 291 A.D.2d 270, 737 N.Y.S.2d 367 (it is not necessary for the transaction to close for the broker to earn the commission); *Cal Pac Associates, Inc. v. Coussoulis Development Co., 2002 Cal. App. Unpub. LEXIS 7455* (No. E030902, Aug. 7, 2002) (the seller was not obligated to pay the commission after the buyer defaulted).

§ 95.07(d)(6) Time for Payment Does Not Determine when Right to Payment Has Been Earned.

Add:

Wright v. Shepherd, 2003 Kan. App. LEXIS 299 (No. 89, 343, Apr. 18, 2003) (broker was not entitled to commission for exercise of option, when the exercise occurred after the listing agreement expired).

§ 95.07(f) Agency Relationships Created by the Listing Agreement. [Go To Main]

§ 95.07(f)(3) In Some States a Broker May Be Agent to Both Buyer and Seller: The Dual Agency.

Add:

Thomas v. Namba, 154 Fed. Appx. 673 (9th Cir. 2005) (dual agency permissible under California law).

§ 95.07(h) The Listing Broker's Obligation to Disclose to the Buyer the Condition of the Premises. [Go To Main]

§ 95.07(h)(1) Generally.

Add:

Walker v. Johnson, 278 Ga. App. 806 (Ga. Ct. App. 2006) (No. A05A1871, Ga. App., Mar. 27, 2006) (action against broker seeking damages for drainage problems on the property); *Coldwell Banker Whiteside Associates v. Ryan Equity Partners, Ltd., 181 S.W.3d 879 (Tex. App. 2006)* (zoning status was not a material defect required to be disclosed by broker).

Berger-Vespa v. Rondack Building Inspectors Inc., 2002 N.Y. App. Div. LEXIS 3648 (April 11, 2002) (the broker did not negligently misrepresent the condition of the basement).

Cendant Mobility Financial Corp. v. Asuamah, 684 S.E.2d 617 (Ga. 2009) (under doctrine of caveat emptor, the vendor was not liable for a faulty repair; therefore, the broker was also not liable).

Add:

Berger-Vespa v. Rondack Building Inspectors Inc., 740 N.Y.S.2d 504 (2002) (the broker was held to not have negligently misrepresented the condition of the premises).

Svendsen v. Stock, 23 P.3d 455 (Wash. 2001) (the broker's knowledge of a drainage problem was independent of the broker's role in filling out the seller's disclosure form, thus preserving an independent cause of action under the state consumer protection act).

Add:

White v. J.D. Reece Company, 26 P.3d 701 (Kan. App. 2001) (brokers not able to rely on seller's disclosure statement to shield themselves from liability for failure to make full disclosure).

Add:

Boguch v. Landover Corp., 224 P.3d 795 (Wash. App. 2009) (a broker who posted an inaccurate aerial photo of the property was not liable for negligence absent evidence of proximate cause between the inaccurate photo and the alleged damage).

Add:

Throckmartin v. Century 21 Top Realty, 226 P.3d 793 (Wyo. 2010) (brokers required to disclose to prospective purchases only those adverse material facts about the premises actually known to the brokers).

§ 95.07(k) Brokers and the Anti-Discrimination Laws. [Go To Main]

§ 95.07(k)(2) Types of Violations.

§ 95.07(k)(2)(i) Advertising.

At end of subsection, Add new text and footnote 355.1:

A municipal ordinance prohibiting an agent from advertising property without first obtaining a certificate of compliance has been held to violate the *First Amendment*.

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Add to articles:

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Councilman, Sephanie. "The Requirement of Statute of Frauds for Real Estate Brokers to Receive Commissions and the Festering Minority View of Equity." *10 Tex. Wesleyan L. Rev. 441 (Spring 2004).*

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Nagalski, Beth. "Ending the Uniformity of Residential Real Estate Brokerage Services," *73 Brooklyn L. Rev. 771* (Winter, 2008).

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Vaughn, Jabari M. "Achieving the American Dream: May Financial Holding Companies Engage in Real Estate Brokerage?" *9 N.C. Banking Inst. 443 (April 2005).*

Add to Annotations

Annotation, "Exclusive right to sell" and other terms in real-estate broker's contract as excluding owner's right of sale, *88 A.L.R.2d 936* .

Annotation, "Illegality of transaction or proposed transaction as affecting right of real estate broker to commission for promoting it," 85 A.L.R. 274 .

Annotation, Liability of real-estate broker or agent to principal for concealing or failing to disclose offer, *7 A.L.R.3d 693.*

Annotation, Liability of vendor's real-estate broker or agent to purchaser for misrepresentations as to, or nondisclosure of, physical defects of property sold, *8 A.L.R.3d 550.*

Annotation, "Real-estate broker's right to commission for procuring lease, where lease terminates before contemplated term," *54 A.L.R.3d 1171.*

Annotation, "Right of real estate broker to commission under a contract providing for payment of commissions out of purchase price," 20 A.L.R. 289 .

Annotation, "Right of real-estate broker to commission where listing contract is for sale of property and it is subsequently leased to one with whom broker had negotiated," *42 A.L.R.3d 1430.*

Annotation, Suspension or revocation of real-estate broker's license on ground of discrimination. *42 A.L.R.3d 1099.*

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CHAPTER 96 Vendors and Purchasers

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CHAPTER 96 Vendors and Purchasers

11-96 Thompson on Real Property, Thomas Editions § 96.01

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§ 96.01 Introduction to the Chapter.

Parties' agreements for transferring interests in realty may generate conflicting applications of property law and contract law. Property law concepts, both in common law and in public policy, traditionally govern the agreement's execution and interpretation and consequences; contract law applies to execution. The most frequent areas of conflict are in the areas of the offer and acceptance, statute of frauds, construction of the contract, time as of the essence, reformation and alteration of the contract, rescission, specific performance, and damages.

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CHAPTER 96 Vendors and Purchasers

11-96 Thompson on Real Property, Thomas Editions § 96.02

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§ 96.02 Agreements to Sell Realty the Vendor Does Not Yet Own.

The courts are divided as to whether public policy prohibits contracts to sell real property interests that the vendor does not own. n1 In some states, n2 and under common law, n3 a sale of realty that the vendor does not own but expects to acquire, a so-called short sale, may be void as against public policy. In other states, such a sale is not contrary to public policy n4 if the contract is undertaken in good faith and the interest is actually tendered at the agreed time. n5

The attitude toward short sales varies widely among the states. Some jurisdictions refuse to recognize short sales of realty. n6 Other states do not favor short sales, but do not require the vendor to have title at the time the contract is executed; instead they require only that title be tendered at the agreed closing time. n7 In still other states, short sales are not recognized only if the vendor concealed the lack of title from the purchaser. n8 Some states ignore the short sales doctrine altogether if the vendor acquires and tenders title by the law day. n9

FOOTNOTES:

(n1)Footnote 1. Future sales in real estate were upheld. *Williams v. Bell, 190 S.E.2d 818 (Ga. Ct. App. 1972).* One may contract to sell land he does not own. *Callisch v. Farnham, 188 P.2d 775 (Cal. Ct. App. 1948). Nakatsukasa v. Wade, 274 P.2d 918 (Cal. Ct. App. 1954).*

(n2)Footnote 2. *Bonvillain v. Bodenheimer, 42 So. 273 (La. 1906); Bickham v. Kelley, 110 So. 637 (La. 1926); Fidelity Nat'l Bank of Baton Rouge v. Vuci, 68 So. 2d 781 (La. 1953); Tennet v. Caffery, 113 So. 167 (La. 1927); Abney v. Levy, Kuhn v. Breard, 92 So. 52 (La. 1922).*

(n3)Footnote 3. *Nance v. Sexton, 203 S.W. 649 (Mo. Ct. App. 1918), modified, Perkinson v. Burford, 623 S.W.2d 30 (Mo. Ct. App. 1981).*

(n4)Footnote 4. *Godgar v. North Fulton Realty Co., 127 S.E.2d 189 (Ga. Ct. App. 1962). Wood v. Zor, Inc., 154 So. 2d 632 (La. Ct. App. 1963)* (may be ratified and enforced by the vendee). *Scriven v. Abrams, 236 N.Y.S2d 360 (1962).* Breach of short sale gives rise to action for damages. *Williams v. Bell, 190 S.E.2d 818 (Ga. Ct. App. 1972).* Hawaii recognizes short sales of interest in real property. *State Sav. & Loan Assn. v. Kauaian Dev. Co., 445 P.2d 109 (Haw. 1968).* Ownership by vendor no necessary for validity of option. *Commuter Dev. and Investments, Inc. v. Gramlich, 279 N.W.2d 394 (Neb. 1979). Brown v. Peterson, 233 P. 895 (Ariz. 1925); Armstrong v. Sacramento Valley*

Realty Co., 198 P. 217 (Cal. Ct. App 1921); Beck v. Swank, 203 P. 1010 (Cal. Ct. App. 1921); Kunzmann v. Petteys, 221 P. 888 (Colo. 1923); Paynesville Land Co. v. Grabow, 200 N.W. 481 (Minn. 1924); Daly v. Duwane Constr. Co., 106 N.W.2d 631 (Minn. 1960); Hollensteiner v. Anderson, 252 P. 796 (Mont. 1927); Wilson v. Neligh, 193 N.W. 704 (Neb. 1923); Tierney v. Dietsch, 194 N.W. 475 (Neb. 1923); Searles v. Auld, 111 S.E. 785 (S.C. 1922); Busby v. Hamby, 117 S.E. 223 (S.C. 1923); Renner v. Crisman, 127 N.W.2d 717 (S.D. 1964); Drew v. Bowen, 146 A. 254 (Vt. 1929); Finch v. Sprague, 202 P. 257 (Wash. 1921); Lewis v. King, 103 So. 19 (La. 1925); Bickham v. Kelly, 110 So. 637 (La. 1926); Neal v. Cunningham, 1 La. App. 640 (1925).

(n5)Footnote 5. *See Ellsworth Dobbs, Inc. v. Johnson: A Re-examination of the Broker-Buyer-Seller Relationship in New Jersey, 23 Rutgers L. Rev. 83 (Fall 1968). See also Conveyancing--The Roles of the Real Estate Broker and the Lawyer in Ordinary Real Estate Transactions--Wherein Lies the Public Interest?, 19 DePaul L. Rev. 319 (Winter 1969). Masters v. Van Wart, 134 A. 539 (Me. 1926); American Nat'l Bank v. Haggerton 250 S.W. 279 (Tex. Civ. App. 1922); Schalow v. Schalow, 329 P.2d 592 (Cal. Ct. App. 1958)* (An agreement to pay more for land than provided under state statute for loans to veterans was void against public policy.).

(n6)Footnote 6. Short sale is not a nullity and may be enforced by purchaser. *Wood v. Zor, Inc., 154 So. 2d 632 (La. Ct. App. 1963).* Promise to convey the land to be inherited where the promisor had neither title nor possession of the land at the time the agreement was made is invalid. *Wilhoite v. Nelson, 319 So. 2d 265 (Ala. 1975). Lebovitz v. Porter, 252 S.W.2d 144 (Tenn. Ct. App. 1952); Isaacs v. Bokor, 566 S.W.2d 532 (Tenn. 1978); see* John C. Payne, *The Why, What and How of Uniform Title Standards, 7 Ala. L. Rev. 25 (Fall 1954);* Ohio St. B. Assn., *Standards of Title Examination,* 3 Clev.-Marshall L. Rev. 9 (Spring 1954); Charles Liebert Crum, *Five Steps Toward Sounder Record Title, 32 N.D. L. Rev. 223 (Jan. 1956).*

(n7)Footnote 7. *Hepburn v. Dunlop & Co., 14 U.S. 179 (1816); Chrisman v. Partee, 38 Ark. 31 (1881); Nicolopoolos v. Hill, 117 So. 185 (Ala. 1928); Backman v. Park, 108 P. 686 (Cal. 1910); Gibson v. Brown, 73 N.E. 578 (Ill. 1905); Smith v. Hunter, 89 N.E. 686 (Ill. 1909); Curtis v. Aspinwall, 114 Mass. 187 (1873); Gregory v. Christian, 44 N.W. 202 (Minn. 1890); Brown v. Haff, 5 Paige 235 (N.Y. Ch. 1835); Hill v. Doerfler, 47 P.2d 260 (Or. 1935).*

(n8)Footnote 8. A sales contract is valid even though the seller does not have title when the contract is executed if he is able to tender deed as required by the contract at the proper time. *Madigan v. Beuhr, 260 N.E.2d 431 (Ill. App. Ct. 1970).* In absence of bad faith, a vendor who does not have title at time of signing of contract may acquire title before closing date. *Jennings v. Realty Developers, Inc., 171 S.E.2d 829 (Va. 1970). Townshend v. Goodfellow, 41 N.W. 1056 (Minn. 1889); Mason v. Madson, 4 P.2d 475 (Mont. 1931)* (when fraud is present, rescission applicable only when damages occur).

(n9)Footnote 9. Upholding short sales of real estate. *Barkhorn v. Adlib Associates, Inc., 222 F. Supp. 339 (D. Haw. 1963). Wolff v. Cloyne, 106 P. 104 (Cal. 1909); Darrow v. Houlihan, 272 P. 1049 (Cal. 1928); Dresel v. Jordan, 104 Mass. 407 (1870); Gray v. Smith, 76 F. 525 (C.C.N.D Cal. 1896).*

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CHAPTER 96 Vendors and Purchasers

11-96 Thompson on Real Property, Thomas Editions § 96.03

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§ 96.03 Types of Agreements to Sell Land.

[Go To Supp]

American law recognizes four basic types of agreements to sell land. Listed in order of the purchaser's increasing interest, these four types may be denominated:

(1) the first call (often referred to as the right of first refusal),

(2) the option,

(3) the executory contract, and

(4) the so-called conditional sales contract.

The first call merely gives the purchaser the first opportunity to purchase if and when the vendor desires to sell, but imposes no duty on the vendor to sell to anyone. The option gives the purchaser the right to purchase within a certain time, for a stated price and under determined terms but imposes no duty of purchase. The executory contract imposes a duty on the vendor to sell and on the purchaser to buy and creates certain legal relationships. The conditional sale is an executed contract to sell with title reserved in the vendor by way of security until the purchase price or a stated portion thereof is paid.

§ 96.03(a) Elements of a Contract of Sale.

A test whether an instrument is a contract of sale or a contract of agency is to determine whether or not each of the parties may require specific performance of the contract for the sale and purchase of the land. n10 A long-time lease is not a sale. n11 Mutuality is essential to the validity of these contracts. n12 There must be mutual assent by vendor and vendee and they must assent to the same thing in the same sense. n13 A contract has this element where all its terms are reduced to writing and the parties have proceeded to carry it into effect although not signed by one of the purchasers. n14

§ 96.03(b) Distinctions Between First Calls and Options.

One who has an option has a right to buy the property, while one who has a "first call" merely has the privilege of first refusal if the owner desires to sell. n15 Another distinction is that options create a property right against the land and are assignable, but first calls are purely personal rights. Thus, a so-called option that is really a first call is a personal right that is not subject to the rule against perpetuities. n16

§ 96.03(c) Governing Law and Policy.

An effective agreement for sale of land requires a grantor capable of conveying, a grantee capable of receiving, an agreement satisfying the statute of frauds, a sufficient consideration and an interest capable of being conveyed. A contract to sell land is based originally on contract law, but when executed it gives rise to definite property rights which are to be interpreted by the property law. n17

The right to convey real estate is clearly one of the paramount incidents of ownership; n18 but the right to alienate property is always dependent upon and defined by law. So long as vested rights are not disturbed, the law may at any time change the tenure upon which the land is held, and may alter the conditions under which it may be alienated and modify the rules of evidence *by* which the title is to be determined. n19 While the right of alienation of is one of the most important real property rights, and there is a strong public policy in its favor, it may not apply to all types of property interests. Yet the right is broad enough that the vendor may sell such interests as the equitable title, or partial title, or title subject to encumbrance. n20

§ 96.03(d) Characteristics of the Writing.

The parties to a contract for the sale of land typically reduce their agreement to writing, and these agreements are subject to the general rules that govern all contracts. The agreement is sometimes put in the form of a bond for a deed, but it generally takes the form of a simple executory contract whereby the vendor agrees, for a consideration paid or to be paid, to convey the described real property interest to the purchaser. The writing should contain the whole agreement, including the names of the parties, the price to be paid, all stipulations intended to bind the parties, and such a description of the land as will enable anyone acquainted with it to learn the property is intended to be sold, the time when the purchase money must be paid, and the date when the conveyance is to be made. n21 Where these essential details are not covered, but are left to be fixed definitely by a subsequent contract, no binding contract exists. n22

§ 96.03(e) Executory Contracts.

Such a writing usually creates an executory contract, which obligates the vendor to sell and the purchaser to buy. n23 An executory contract of sale exists where there remains something to be done, the performance of which is a condition precedent to the transfer of title to the property. n24 An "executed contract" is one where nothing remains to be done by either party, while an "executory contract" is one where something remains to be done by one or more of the parties. n25 An executory contract in its inception does not become an executed contract until the purchase price has been paid and the owner has delivered his deed conveying the property simultaneously with such payment. n26 The question whether a contract is one or the other has frequently been before the courts. n27 "An executory contract is one in which a party binds himself to do or not to do a particular thing ... * * * A contract executed is one in which the object of the contract is performed; and this, says Blackstone, differs in nothing from a grant." n28 Where the effect of the agreement is concluded or completed at the time the agreement is made, so that no obligation remains outstanding, it is the agreement rather than the contract that is executed. n29

A contract to sell land is usually an executory contract, preliminary to the sale and not the sale itself and also subject to rescission by agreement between the parties. n30 Traditionally, it could be said that the contract for the sale of land is wholly executory until the conveyance is made, the vendor remaining the owner and having the right to convey it free

from any claim of the one holding under such prior contract. n31 However, the simplicity of this doctrine has been disturbed by multi-faceted and shifting rules of "equitable conversion," conferring forms of property rights on purchasers under signed and enforceable contracts. While the contract remains executory and no deed has passed, the vendor may mortgage retained rights, although the terms of the mortgage cannot restrict the rights of the purchaser. n32

An executory contract of sale becomes executed when the deed is itself completely executed and title passes. If a transaction is ambiguous as to its status of execution, the issue is determined by the terms of the instrument and the acts of the parties. n33 Under certain peculiar circumstances what appears to be an invalid executed sale may be treated as an executory contract to sell. So some states hold that a deed by a prospective heir to the expected inheritance is a mere but valid contract to sell when and if the expectancy is realized.

§ 96.03(f) Contracts of Sale Connected with Security Interests.

An agreement in form of an executory land contract is treated as a mortgage if made to secure a loan. n34 Before the emergence and dominance of title insurance, agreements for conveyance sometimes took the form of a sealed obligation under penalty on the part of the vendor to convey a good title, in which case the instrument is known as a "bond for a deed" or a "title bond." n35 A "title bond" gives the holder an equitable title, convertible into a legal title, on payment of the consideration. n36 This instrument transfers to the obligee an equitable interest in the premises agreed to be conveyed, which is measured by the amount paid on account of the purchase. The legal title remains in the obligor, in trust for the purchaser, who, upon payment of the entire consideration, acquires the whole equitable interest, and may maintain a suit to compel the specific performance of the contract, if the obligor refuses to keep the covenants. n37 A vendor who has given a bond for title and taken purchase-money notes therefor does not by their hypothecation pass the legal title to the premises to the purchaser. n38 In such case, the bond is considered in the nature of a conveyance to the purchaser, and the land in equity becomes that of the vendee, while the notes constitute a lien on the land in the nature of a mortgage. A transfer of the notes carries with it the lien, which the transferee may enforce in equity. n39 Where a bond is given and notes taken for the purchase price, the vendor has only the interest of a mortgagee in the premises, and the purchaser, in analogy to the mortgagor, is the owner of an equity of redemption which is the beneficial estate, and which is descendible by inheritance, devisable by will, and alienable by deed, precisely as if it were an absolute estate of inheritance at law. n40 Where the obligor, after part payment of the purchase price and possession taken by the obligee, transfers the remainder of the purchase-money notes to a third person for value, and conveys the land to another, such grantee takes with notice of the rights of the obligee in the bond and acquires no rights against the obligee, and a payment by such obligee to the holder of the notes gives the obligee a complete equity in the land, both as against the vendor and the grantee in the deed from him. n41 Where the purchaser has knowledge of imperfections in the title, but takes a bond for a deed, the purchaser waives all right of rescission, and must sue on the bond in case of loss by reason of defective title. n42 The assignee of a bond for title acquires all the rights and equities to which the assignor was entitled thereunder. n43 A vendee, accepting a bond for title containing a power to sell in the vendor in case of nonpayment of the purchase-money notes, is bound by such power although he did not sign the bond. n44 The statutes of some of the states require bonds for title to be executed and recorded with the formalities of deeds, n45 and record is notice to subsequent purchasers and lienors. n46 The effect is to create a mortgage on the land in favor of the vendor to secure the purchase price. n47 The purchaser becomes the equitable owner. n48 The description of the land is sufficient if capable of identification. n49 The bond calls for the conveyance of a good and sufficient title, although there is no express language to this effect in the instrument. n50 The bond may be assigned. n51 Long refusal to make payments may amount to abandonment by the purchaser. n52

FOOTNOTES:

(n1)Footnote 10. "Bond for title" is a contract to convey. *Sanders v. Danley, 267 So. 2d 169 (Ala. 1972). McMillan v. Lorimer, 107 So. 239 (La. 1926); Paschen v. Lovett, 255 S.W. 385 (Tex. Civ. App. 1923); Warren v. La Salle Co. 262 S.W. 527 (Tex. Civ. App. 1924). See* Minnesota Land Contract Law in Action, *39 Minn. L. Rev. 93 (1954).*

(n2)Footnote 11. *Wolley v. Wycoff, 273 P.2d 181 (Utah 1954).*

(n3)Footnote 12. Power of attorney authorizing sale of realty did not authorize gift. *Creasy v. Henderson, 173 S.E.2d 823 (Va. 1970). Kowal v. Day, 98 Cal. Rptr. 118 (1971); City Builders Fin. Co. v. Stahl, 106 So. 77 (Fla. 1925); Hall v. Wingate, 126 S.E. 796 (Ga. 1924); Atlanta v. DeKalb County, 26 S.E.2d 334 (Ga. 1943); Zaring v. Lavatta, 211 P. 557 (Idaho 1922); McCandless v. Schick, 380 P.2d 893 (Idaho 1963); Kellogg v. Kartte, 154 N.E. 231 (Ill. 1926); Obering v. Swain-Roach Lumber Co., 155 N.E. 712 (Ill. App. Ct. 1927); Kokomo Veterans, Inc. v. Schick, 439 N.E.2d 639 (Ind. Ct. App. 1982)* (conditional contract does not lack mutuality); *Hughes v. Knapp, 197 P. 862 (Kan. 1921); McGeorge v. White, 174 S.W.2d 532 (Ky. 1943); Sala & Ruthe Realty v. Campbell, 515 P.2d 394 (Nev. 1973); Zilmaur Realty Corp. v. Pinkney, 203 N.Y.S. 715 (1924); Alpert v. G.R.E. Constr. Corp., 215 N.Y.S. 322 (1926); contra Vanzandt v. Heilman, 214 P.2d 864 (N.M. 1950); see Clay v. Callaway, 177 F.2d 741 (5th Cir. 1949); Woolley v. Hoffmann-La Roche, Inc., 491 A.2d 1257 (N.J. 1985)* (overruled employer immunity from lack of mutuality requirement in *Schlenk v. Lehigh Valley R.R. Co., 62 A.2d 380 (N.J. 1948)); see* J.W. Thomas, Jr., *The Inequity of Mutuality of Remedy, 2 Baylor L. Rev. 54 (1949); Exclusive Sales Rights Given to Real Estate Brokers, 6 DePaul L. Rev. 107 (1956); Bell v. Hagmann, 107 S.E.2d 426 (Va. 1959)* (A sales contract permitting vendee, but not vendor, to cancel if the property was not zoned commercial within a year did not create a condition precedent but merely fixed a closing time).

(n4)Footnote 13. *Ashurst v Rosser, 153 So. 2d 240 (Ala. 1963). Whelchel v. Waters, 111 S.E. 25 (Ga. 1922).*

(n5)Footnote 14. *Kellogg v. Kartte, 154 N.E. 231 (Ill. 1926).*

(n6)Footnote 15. To exercise a first call, there must be a matching of the original offer; conditions cannot be attacked by the optionee. *Coastal Bay Golf Club, Inc. v. Holbein, 231 So. 2d 854 (Fla. Dist. Ct. App. 1970).* The offer which the first call holder must meet must be made by one having the financial ability to meet, not a shoestring speculation. *Imperial Refineries Corp. v. Morrissey, 119 N.W.2d 872 (Iowa 1963).* The right of first refusal gives no interest or title in the land. *Sunray DX Oil Co. v. Lewis, 426 S.W.2d 44 (Mo. 1968). See* Comment, *Exclusive "Right to Sell Contracts," 8 DePaul L. Rev. 100 (1959).* Execution of an oil and gas lease was a sale of an interest in land and so violated a first refusal right held by another. *Sanchez v. Dickinson, 551 S.W.2d 481 (Tex. Civ. App. 1977).* A right of first refusal does not carry over into a holdover tenancy. *Nevala v. McKay, 583 P.2d 1065 (Mont. 1978). Sander v. Schwab, 146 N.E. 509 (Ill. 1925); Assoc. Truck Lines v. Baer, 77 N.W.2d 384 (Mich. 1956); Beets v. Tyler, 290 S.W.2d 76 (Mo. 1956)* (partially overruled on another point of law); *Hayes v. O'Brien, 37 N.E. 73 (Ill. 1894)* (A first right to buy in a lease creates an option in the lessee); *Cortese v. Connors, 135 N.E.2d 28 (N.Y. 1956)* (A first call provision in a lease is not met until the lessee rejects an offer the lessor is willing to accept.).

(n7)Footnote 16. Execution of an oil and gas lease was a sale of an interest in land and so violated a first refusal right held by another. *Sanchez v. Dickinson, 551 S.W.2d 481 (Tex. Civ. App. 1977). Campbell v. Campbell, 230 S.W.2d 918 (Ky. 1950).*

(n8)Footnote 17. An equitable estate may be assigned. *Merrick v. Daehler, 282 N.E.2d 163 (Ill. App. Ct. 1972). Bond for Deed Contracts, 31 La. L. Rev. 587 (1971). See* P. Herzog, *The Conflict of Laws in Land Transactions: The Borderland Between Contract and Property Matters--A Comparative View, 8 Syracuse L. Rev. 191 (1957).*

(n9)Footnote 18. *Bicocchi v. Casey-Swasey Co., 42 S.W. 963 (Tex. 1897); see* W.S. Miller, Jr., *Problems in the Sale and Lease-Back, 4 Ark. L. Rev. 328 (1950).*

(n10)Footnote 19. *Arndt v. Griggs, 134 U.S. 316 (1890); People ex rel. Deneen v. Simon, 52 N.E. 910 (Ill. 1898); State ex rel. Douglas v. Westfall, 89 N.W. 175 (Minn. 1902).*

(n11)Footnote 20. *Knapp v. Davidson, 192 N.W. 75 (Wis. 1923).*

(n12)Footnote 21. *Long v. Needham, 96 P. 731 (Mont. 1908); Der Hagopian v. Eskandarian, 153 A.2d 897 (Pa. 1959)* (mental competence to execute contract is presumed).

(n13)Footnote 22. *Roberts v. Lebrain, 248 P.2d 810 (Cal. Ct. App. 1952); Federal Land & Securities Co. v. Hatch, 125 N.W. 837 (Iowa 1910).*

(n14)Footnote 23. *Burmeister v. Council Bluffs Inv. Co., 268 N.W. 188 (Iowa 1936).*

(n15)Footnote 24. *Peterson v. Moresi, 186 So. 737 (La. 1939).*

(n16)Footnote 25. *McCutchen v. Klaes, 143 P. 143 (Colo. Ct. App. 1914); Lewis v. Lambros, 194 P. 152 (Mont. 1920).*

(n17)Footnote 26. *Miller v. Kemp, 160 S.E. 203 (Va. 1931); see Cole v. Haynes, 62 So. 2d 779 (Miss. 1953); Stevahn v. Meidinger, 57 N.W.2d 1 (N.D. 1952); Asher v. Hull, 250 P.2d 866 (Okla. 1952); Seguin v. Maloney-Chambers Lumber Co., 253 P.2d 252 (Or. 1953)* (Until vendee has fully performed and deed is delivered, equity treats the contract as executory with the vendor as trustee for the title.).

(n18)Footnote 27. *Chapman v. Glassell, 13 Ala. 50 (1848); Atwood v. Cobb, 33 Mass. 227 (1834); Coates v. Cooper, 140 N.W. 120 (Minn. 1913); De Bergere v. Chaves, 93 P. 762 (N.M. 1908); Jackson ex dem. Ludlow v. Myers, 3 Johns. 388 (N.Y. Sup. 1808); Bartlesville Oil & Improvement Co. v. Hill, 121 P. 208 (Okla. 1912); Phillips v. Swank, 13 A. 712 (Pa. 1888); Fritz v. Menges, 36 A. 213 (Pa. 1897); Cross v. Buskirk-Rutledge Lumber Co., 201 S.W. 141 (Tenn. 1918); Dicken v. Cruse, 176 S.W. 655 (Tex. Civ. App. 1915).*

(n19)Footnote 28. *Fletcher v. Peck, 10 U.S. 87 (1810).*

(n20)Footnote 29. *See Morrow v. Southern Express Co., 28 S.E. 998 (Ga. 1897); Long v. Godfrey, 32 S.E.2d 306 (Ga. 1944).*

(n21)Footnote 30. Where the words "subject to the loan approval" are used in connection with real estate contracts, the final loan approval is a condition of the obligation. *Blakley v. Currence, 361 N.E.2d 921 (Ind. Ct. App. 1977). Watts v. England, 269 S.W. 585 (Ark. 1925). See* E. George Rudolph, *The Installment Land Contract as a Junior Security, 54 Mich. L. Rev. 929 (1956).*

(n22)Footnote 31. *Vermont Marble Co., v. Mead, 80 A. 852 (Vt. 1911); Waite v. Stanley, 92 A. 633 (Vt. 1914).*

(n23)Footnote 32. *Marion Mortg. Co. v. Grennan, 143 So. 761 (Fla. 1932).*

(n24)Footnote 33. *Jones v. Continental Royalty Co., 115 F.2d 731 (5th Cir. 1941).*

(n25)Footnote 34. *Minnesota Bldg. & Loan Assn. v. Closs, 234 N.W. 872 (Minn. 1931).*

(n26)Footnote 35. *See* Bond for Deed Contracts, *31 La. L. Rev 587 (1971). Vardeman v. Lawson, 17 Tex. 10 (1856).*

(n27)Footnote 36. *B. P. Jones & Co. v. Cash, 226 S.W. 352 (Ky. 1920); Olive-Sternenberg Lumber Co. v. Gordon, 159 S.W.2d 845 (Tex. 1942); Faddell v. Taylor, 239 S.W. 931* (Tex. Comm'n App. 1922).

(n28)Footnote 37. *Clinton v. Miller, 226 P.2d 487 (Mont. 1951); Sievers v. Brown, 56 P. 171 (Or. 1899).*

(n29)Footnote 38. *Morrison v. Chambers, 30 S.E. 141 (N.C. 1898).*

(n30)Footnote 39. *Lewis v. Shearer, 59 N.E. 580 (Ill. 1901).*

(n31)Footnote 40. *Strauss v. White, 51 S.W. 64 (Ark. 1899).*

(n32)Footnote 41. *Georgia St. Bldg. & Loan Assn. v. Faison, 40 S.E. 760 (Ga. 1902). See S. Bldg. & Loan Assn. v.*

Page, 33 S.E. 336 (W. Va. 1899).

(n33)Footnote 42. *Horne v. Rogers, 35 S.E. 715 (Ga. 1900); Russell v. Handy, 59 S.W. 320 (Ky. 1900); Green v. Finucane, 6 Miss. 542 (1848); Baldridge v. Cook, 27 Tex. 565 (1864); contra Bellows v. Cheek, 20 Ark. 424 (1859).*

(n34)Footnote 43. *Walker v. Maddox, 31 S.E. 165 (Ga. 1898).*

(n35)Footnote 44. *Morrison v. Chambers, 30 S.E. 141 (N.C. 1898).*

(n36)Footnote 45. *Guaranty Inv. & Loan Co. v. Athens Engr. Co., 110 S.E. 873 (Ga. 1922); Doyle v. Wohlrabe, 66 N.W.2d 757 (Minn. 1954)* (Parol evidence showing the fact of delivery and the receipt of the several writings; including time, place, situation of property and parties and other circumstances; may be received to aid in interpreting the provisions of a contract to transfer bond).

(n37)Footnote 46. *Brown Loan & Abstract Co. v. Willis, 102 S.E. 814 (Ga. 1920); Hancock v. Gumm, 107 S.E. 872 (Ga. 1921); Pierce v. Dennett, 136 S.E. 440 (Ga. 1927).*

(n38)Footnote 47. *Fairbairn v. Pofahl, 222 S.W. 16 (Ark. 1920); Robbins v. Fuller, 229 S.W. 8 (Ark. 1921); Crittenden Lumber Co. v. Ward, 284 S.W. 354 (Tenn. 1925).*

(n39)Footnote 48. *Robbins v. Fuller, 229 S.W. 8 (Ark. 1921); Rosette v. Shelton, 126 S.E. 242 (Ga. 1924)* (may sue for trespass); *see Curry v. Curry, 182 N.W. 98 (Mich. 1921); Pierce v. Dennett, 136 S.E. 440 (Ga. 1927)* (A vendor retains no title after payment of purchase notes.).

(n40)Footnote 49. *McKenzie v. Marshall, 119 S.E. 338 (Ga. App. 1923); see Eversole v. Huff, 265 S.W. 797 (Ky. App. 1924).*

(n41)Footnote 50. *Cudd v. Wood, 89 So. 52 (Ala. 1921); Goldstein v. Ehrlick, 124 A. 761 (N.J. Ch. 1924).*

(n42)Footnote 51. *Robbins v. Fuller, 229 S.W. 8 (Ark. 1921); Rems v. Habersham Bank, 129 S.E. 89 (Ga. 1925); Few v. Pou, 124 S.E. 372 (Ga. Ct. App. 1924); Neal v. Harber, 134 S.E. 349 (Ga. Ct. App. 1926).*

(n43)Footnote 52. *Fincher v. Douglas, 128 S.E. 584 (Ga. 1925).*

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CHAPTER 96 Vendors and Purchasers

11-96 Thompson on Real Property, Thomas Editions § 96.04

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§ 96.04 The "Conditional Sale" Contract.n53

A relatively recent development in real estate transactions is the conditional sale or installment sale contract, which is almost a throwback to the "bargain and sale" practice before the Statute of Uses. n54 Whenever a party desires to purchase land but is unable or unwilling to pay the entire purchase price a problem is presented as to how the seller may secure the payment of the balance of the purchase price. The classic legal answer is the passing of title to the buyer with the seller receiving back a purchase-money mortgage, or a vendor's lien, but highly favored as is the purchase-money mortgage and the vendor's lien in the law, in most states the vendor can realize upon the security in the case of default only after expensive and often protracted legal proceeding. This cost, and the resultant deterioration of the mortgage security during the pendency of the legal action, requires that the seller retain at the consummation of the sale a sufficient margin of equity and charge an interest rate sufficient to protect the investment. This limits in turn the extent to which the buyer can purchase.

The so-called conditional sales contract permits the buyer to enter into possession with a smaller down payment and discharge the balance of the obligation in installments. It also permits the seller to retain the title as security and thus, in case of the buyer's default, be able to terminate the buyer's interest and regain possession at a minimum cost and loss of time. n55

Under such circumstances the courts are faced with the problem as to whether public policy requires that a rapacious seller be prevented from forfeiting the contract upon a minimum default; similarly, in an earlier age, the equity courts stepped in to arrest such exploitation under common-law mortgages. The disadvantage of such equitable intervention is that it will discourage sellers from entering into such arrangements and leave some buyers unable to purchase under more demanding terms.

This problem ultimately is one of public policy. Is it better to give protection to the buyer by protecting the equitable interest against arbitrary forfeiture, if by so doing the creditor's cost of realization on the security is increased. The creditor, for self-protection, must demand a larger down payment and a higher interest rate as well as, where permissible, attorney's fees and court costs. The alternative is to ease credit by enabling the creditor to enforce the security easily and cheaply even though the debtor suffers a hardship.

The conditional sale or land purchase contract differs from the deed and purchase mortgage back in these essentials: when the deed is taken legal title passes and the mortgagee, in lien states, has merely a lien, whereas under the land sale contract the vendee gets only an equitable title until the deed is finally executed. In some states land sales contracts were eligible to be recorded, so that the purchaser was not protected against others subsequently claiming under the vendor unless possession is taken. In each case the buyer assumes the risk of loss and in most, but not all jurisdictions, the buyer must pay taxes.

Where the contract is in installments the vendee cannot defeat the vendor's right to the full interest by accelerating the payments. n56 Provisions in the contract retaining possession in the vendor are valid. n57 A contract to sell land on the installment plan is a contract to sell, not a sale. n58

FOOTNOTES:

(n1)Footnote 53. Chapter 250, 1968, Acts of Maryland, provides that land installment contracts must recite the total number of periodic payments. Florida does not require witnesses to sales contract. *Carroll v. Dougherty, 355 So. 2d 843 (Fla. Dist. Ct. App. 1978). See* Clark, Installment Land Contracts in South Dakota, *6 S.D. L. Rev. 248 (Fall 1961);* Uhlman & Duke, 1968 Truth and Lending Act, *31 Tex. Bar J. 825* (Oct. 22, 1968). *See also* Nelson & Whitman, *The Installment Land Contract - A National Viewpoint, 1977 BYU L. Rev. 541 (1977); Installment Land Contracts in Missouri Pose Potential Hazards for Lenders, 45 Mo. L. Rev. 528 (Summer 1980). See* E. George Rudolph, The Installment Land Contract as a Junior Security, *54 Mich. L. Rev. 929 (1965);* James R. Hancock, *Installment Contracts for the Purchase of Land in Nebraska, 38 Neb. L. Rev. 953 (1959);* J.H. Beuscher, *Buying Farms on Installment Land Contracts--A Preface, 1960 Wis. L. Rev. 379 (1960); Jameson v. Wurtz, 396 P.2d 68 (Alaska 1964)* (abandonment of property v. abandonment of interest discussed in light of conditional sale contract); *Ellis v. Butterfield, 570 P.2d 1334 (Idaho 1977)* (Bistline, dissenting) (general description of land sale contracts); *Stenehjem v. Kyn Jin Cho, 631 P.2d 482 (Alaska 1981)* (limiting of land contract).

(n2)Footnote 54. Statutes 27 Henry VIII., ch. 10; *Farmers & Merchants Ins. Co. v. Jensen, 78 N.W. 1054 (Neb. 1899)* (discussion of whether the statute of uses is applicable); *Smith v. Wright, 779 S.W.2d 177 (Ark. 1989)* (purposes of statute of uses); *Henderson v. Adams, 48 P. 398 (Utah 1897)* (brief history of statute of uses); *Chi. Title & Trust Co. v. Mercantile Trust & Sav. Bank, 20 N.E.2d 992 (Ill. App. Ct. 1939)* (statute of uses explained in terms of personal and real property).

(n3)Footnote 55. Shelley J. Lashkowitz, *Land Purchase Contracts in North Dakota, 36 N.D. L. Rev. 159 (Jan. 1960).*

(n4)Footnote 56. *Goetz v. Hubbell, 266 N.W. 836 (N.D. 1936); Carpenter v. Winn, 566 P.2d 370 (Colo. Ct. App. 1977)* (neither debtor or creditor has right to accelerate payment); *Metro. Life Ins. Co. v. Promenade Towers Mut. Hous. Co., 581 A.2d 846 (Md. Ct. Spec. App. 1990)* (minority rule that when the agreement is silent, prepayment is permitted); *Prudential Ins. Co. of Am. v. Rand & Reed Powers Partn., 972 F. Supp. 1194 (N.D. Iowa 1997)* ("perfect tender in time" rule treated).

(n5)Footnote 57. *Bentler v. Brynjolfson, 165 N.W. 553 (N.D. 1917); Snipes v. Dexter Gin Co., 116 P.2d 1019 (N.M. 1941)* (discussion of ownership of crops absent a lien on the crops in a conditional contract).

(n6)Footnote 58. *Ashurst v. Rosser, 153 So. 2d 240 (Ala. 1963). Franzke v. Fergus County, 245 P. 962 (N.D. 1926); Neponsit Holding Corp. v. Ansorge, 214 N.Y.S. 91 (1926); see In re Ghosh, 38 B.R. 600 (Bankr. E.D.N.Y. 1984)* (sale forced upon the debtor by a mortgagee distinguished from the usual buyer/seller relationship in *Neponsit*). *See* Frank R. Lacy, The Uniform Vendor and Purchaser Risk Act and the Need for a Law-Revision Commission in Oregon, *36 Or. L. Rev. 106 (Dec. 1956); Ide v. Leiser, 24 P. 695 (Mont. 1890)* (sale of lands, an agreement to sell lands, and options discussed); *Wright Land & Inv. Co. v. Even, 186 P. 681 (Mont. 1919)* (sale contingent upon fulfillment of contract terms); *Wright v. Bowlus, 205 P. 210 (Mont. 1922)* (no sale until conditions are met).

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CHAPTER 96 Vendors and Purchasers

11-96 Thompson on Real Property, Thomas Editions § 96.05

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§ 96.05 The Option.

§ 96.05(a) In General.

One who has a legal right but not a duty to buy land or other property holds an option; the option is a contract by which the owner agrees to give another the exclusive right to buy property at a fixed price within a specified time. It is merely an agreement to hold an offer to sell property open for a specified time. The party giving the option parts with the right to sell for a limited time. n59 A "binding option" for the purchase of land is a contract, but it is also an offer which, when accepted, will create another contract. n60 It is described as a unilateral contract signed by one party, the other becoming a party by paying the consideration and accepting the instrument. n61 The purpose of an option is to bind the owner of the land, for a valuable consideration, not to withdraw a specified offer for the sale of the land during a fixed period, thereby obligating the owner to convey the land to another if the other within a specified time accepts the offer and complies with the terms proposed. n62

An option is not an actual or existing contract, but is a continuing offer of a contract. If the offeree decides to exercise the right to demand the conveyance, the offeree must signify that fact to the offeror. n63

The option is not a sale. It is not even an agreement for a sale. At best, it is but a right of election in the party securing that party to exercise a privilege, and only when that privilege has been exercised by acceptance does the option become a contract to sell. n64 The owner parts with the right to sell to another for such time and gives to the optionee the exclusive privilege to buy on the terms set forth in the option. n65 By contrast, a contract of sale imposes upon the vendee an obligation to buy. Unlike the contractual right of first refusal, during its term an option to purchase permits the holder to force a sale even if the subject property is not otherwise on the market. n66 A right of first refusal ripens into an option when the owner elects to sell. n67

An option confers a privilege or right to elect to buy, but it does not impose any obligation to buy. n68 One may contract to sell property and reserve the right or option to repurchase at a fixed price. n69

In determining whether a particular transaction constitutes an option or a completed contract of sale, many difficult questions of interpretation arise. n70 The questions are usually by the intent of the parties. This intent, however, often

can only be determined by the legal consequences specified in the contract and which would legally flow from the existence of an option or a contract. Ordinarily an option to purchase or a contract to sell realty may be converted into a contract of sale by the optionee's agreement to pay the purchase price. n71 But this state of contractual relationship may be merely transitory if the optionee tenders the purchase price at the time of giving notice of exercising the option and the vendor promptly delivers the deed.

Whether an instrument in writing agreeing to sell and convey real estate is considered as an absolute conveyance, or an agreement to convey, or an option to purchase, depends not on any particular words but on the intention of the parties to be derived from the instrument itself by a consideration of all its parts; and when that is doubtful, it is to be determined from the circumstances attending it. n72 The rights and obligations arising out of an option to purchase are to be contrasted rather than merely to be compared with the rights and obligations arising out of a contract of sale. n73

There is some difficulty in harmonizing the cases in which questions of this character have arisen. Where the contract did not bind the prospective purchaser, some courts have held the instrument to be an option, n74 while others hold that the fact that the purchaser is not so bound is not conclusive. n75 Some earlier cases hold that such agreements are unenforceable for want of mutuality. n76 These decisions cannot be taken as authority for it is now universally held that when an option is accepted, no other element entering in, it becomes an executory contract for the sale of the property with mutuality of obligation and remedy. n77

In this paragraph are described several miscellaneous rules regarding options in a variety of legal and transactional settings. An option may be given to sell land as well as to buy. n78 The option contract is distinguished from the executory contract of sale in that in the latter case the party is bound unconditionally to pay the purchase price. n79 A provision in a sales contract that if the vendor's title cannot be made good within a specified time the contract shall become void and the initial payment shall be refunded, does not convert the contract into an option contract. n80 A provision in a contract for liquidated damages makes the contract one of sale rather than of option. n81 It has been held that an agreement to sell and convey real estate to another at a future time, at a fixed price, was not a mere option, where the purchaser was put into possession and agreed to commit no waste and to pay taxes, assessments, and interest. n82 A contract authorizing a person to undertake the sale of property for a specified price for a certain commission is a contract of agency and not an option contract. n83 The option contract is not a contract of hire. n84 An option to repurchase may be reserved in a deed. n85 A renewal of a lease containing an option also renews the option. n86 A reasonable time for exercise of the option will be implied, if none is specified. n87

A binding option contract requires a valuable consideration. n88 The option contract is nothing more or less than an offer by one party to remain open usually for a specific time, and such offer may or may not be revoked by the party giving it, if the promise to keep it open has been supported by a consideration. So, it is essential to the continuation of the option for the time specified that it be supported by a valuable consideration. n89 Unless supported by a consideration, the option is considered as a mere offer and may be withdrawn at any time before acceptance. However, on acceptance, the contract becomes binding notwithstanding the lack of consideration. n90 Although a promise by one party without any corresponding promise, consideration, or obligation on the part of the other is voidable, an option contract, although unsupported by consideration, may be accepted before it expires or is withdrawn, and this will obviate the original lack of consideration and make a binding contract so far as that objection is concerned. n91 An oral contract for the sale of land is sufficient as to consideration where it provides that the premises shall be sold to the purchaser for the highest price bid for the same. n92 There is a presumption of consideration for the option; n93 and an option contract supported by a sufficient consideration is valid and enforceable. n94 The option so given may or may not be supported by a sufficient consideration. If it is not so supported, the offer is a mere gratuity which may be withdrawn at any time before acceptance; n95 but if an option unsupported by a consideration is accepted before it expires or is withdrawn, a binding contract is thus formed. n96 As in the case of other contracts, the inadequacy of the consideration given for the option is not sufficient reason for refusing to grant specific performance of the agreement based thereon. n97 If the consideration given be of an appreciable value, the contract will, as a general rule, be upheld. An option given in consideration of one dollar has been held valid. n98 However, the holding in these cases has not

gone unchallenged and the consideration of one dollar has been held insufficient. n99 The assumption by the purchaser in the option to purchase of a mortgage on the realty constituted a valid consideration for the option. n100 To set aside a contract for the sale of real estate on the ground of inadequacy of consideration, such inadequacy must be gross. n101 The mere recital of the receipt of a nominal consideration in a simple written contract for an option is held not to preclude proof that the consideration was never paid for the purpose of showing the invalidity of the instrument for want of consideration. n102 At common law an option under seal requires no consideration, for the seal imports a consideration. n103 In case the option given is under seal, the adequacy of the consideration given is immaterial where the common-law rule prevails, since in such jurisdictions want of consideration cannot be set up as a defense to an action in which it is sought to enforce the contract resulting from an acceptance of an option under seal. n104 In certain cases, however, it is held that since a suit for specific performance is an equitable proceeding, want of consideration may be shown even though the option is under seal, as in equity the real consideration may be inquired into since the parties are not concluded by the recitals in the contract, although under seal. n105 An agreement to extend the option requires a consideration, for it is in effect a new option. n106 The consideration must be separate and distinct from the purchase price. n107 In case an option has been given for a valuable consideration and there is a promise to extend the time for the exercise of the option which is not based on any additional or new consideration such agreement is a bare agreement. It is a mere continuing offer to sell at a price previously fixed not based upon any consideration and may be withdrawn at any time before acceptance. The old consideration will not make the promise to extend the option binding. n108

§ 96.05(b) Property Rights Created by the Option.

While an option is sometimes said to give a mere privilege it is more usually thought of as creating unilateral legal relationships, a right in the optionee but no duty to buy and a duty but no right in the optionor to sell. The option contract conveys no title, legal or equitable, to the property; n109 it only confers the right to specific performance. n110

Although an option does not pass to the optionee any interest in the land, a contract of sale does; therefore, an optionee with nothing except the right to elect to buy may, by acceptance of the option, transform the option into a contract of sale and changes from an optionee to a vendee. n111 When an optionee so becomes a vendee, in most jurisdictions, the rights in land arising from the position as vendee are deemed to date from the contract of sale. n112

The optionee, while an optionee, assumes no obligation to the optionor. n113 It has been held that where the building is destroyed before acceptance of the terms of the option, the optionee was not entitled to accept the contract and require the optionors to account for the insurance proceeds. n114

Under the doctrine of relation back, upon exercise of the option the optionee may become the equitable owner as of the date of the option. n115

When land under option is subject to condemnation proceedings, some courts, viewing the optionee as able to convert the option into a property right at the optionee's discretion, hold the optionee entitled to the condemnation award. n116 Other courts hold that parties to an option are absolved from their obligations under the option if the property is wholly or substantially taken by eminent domain. n117

One who buys land with notice of an option takes subject to the option, n118 although the option does not, before acceptance, vest in the optionee any interest, legal or equitable, in the land itself. n119 While an option creates no estate in land it does give rise to an inchoate interest that equity will protect. n120 An optionee is in some cases treated as the owner. n121

§ 96.05(c) Exercise of the Option.

An option to purchase becomes a contract to sell only when the privilege has been exercised by acceptance. n122 Notice

by the holder of the option of the election to purchase converts the contract into an executory sales contract. n123 A lease option becomes a sales contract as and when the option is accepted. n124 The cases divide as to whether the exercise of a lease option after death of the optionee relates back to the date of the contract. n125

The privilege to purchase under the option becomes binding only when the option is exercised in strict accordance with the terms of the agreement. n126 An option must be exercised within the time limited and upon the terms specified; n127 acceptance of the option converts the option into a bilateral contract of purchase and sale. n128 To effect a contract of sale capable of specific enforcement, the acceptance of an option must conform with the terms of the offer, and ordinarily must be unequivocal, absolute, and free from any condition. n129 Acceptance can be made only on the terms contained in the option, n130 and an attempt to accept on different terms amounts to a rejection of the option. n131 A substantial compliance with the terms of an option is not sufficient to constitute an acceptance of the offer. n132 The option must be exercised within the time specified, n133 as in all such instruments time is held to be of the essence thereof, n134 since it is a mere offer to sell and vests no estate in the property to be sold; n135 and the rights of a purchaser in a mere option contract cease on his failure to exercise the option within the time, and on the terms prescribed. n136 Where the terms of an option required the optionee to pay a mortgage on the land as a part of the purchase price, the optionee, by agreeing with just one of the optionors, acting for himself alone, to pay the mortgage before maturity and at the time of consummating the sale, was held not to create a new or different contract. n137 The optionor may waive informalities in the method of acceptance. n138

When a contract by its terms gives one of the parties an option to rescind, the exercise of the option terminates the rights of the parties under the contract, and the other party may be bound to restore any consideration received. n139

Where the option relates to a fractional part of a tract, the optionee in the notice of acceptance should designate the part to be taken. n140 The optionee may direct the title to be conveyed to another. n141 Notes given as evidence of payments to be made are not binding where the option is not accepted. n142 It is the duty of one giving an option to maintain the property in the condition it was in when the option was given. n143 The failure to furnish an abstract required by the option has been held an excuse for failure to pay the purchase price at the time specified. n144

This acceptance, if unconditional, constitutes a binding contract and cannot be thereafter repudiated. n145 After acceptance of an option, the validity of the contract thereby created is not affected by the fact that the option originally was without consideration and might have been withdrawn before acceptance. n146 The optionee must notify the vendor of the acceptance within the time specified. n147 The acceptance relates back to the date of the option. n148

Where the terms of the option do not require acceptance to be made in writing, acceptance may be made orally. n149 Where written notice of acceptance is required by the contract, a verbal notice of acceptance is not sufficient. n150

The optionee, to obtain a right to purchase under the option, must accept all the conditions contained in the option. n151 Under an option contract, tender of the purchase price by the vendee is generally necessary to put the vendor in default, but it is unnecessary where the vendor has waived the necessity for tender. n152 A coal lease and option to buy could not be exercised without paying back rents. n153 However, an executory contract arises only when the option is exercised according to its terms. n154 The option cannot be converted into a sale except by acceptance and performance of the conditions expressed in the option to be performed. n155 When all the acts are performed as specified, the contract to convey becomes irrevocable; n156 the acceptance of the option in the manner and within the time specified is sufficient to bind both parties and removes the objection to the enforcement of the agreement for want of consideration. n157 The option, being unilateral, becomes binding only when the party to whom it is given exercises it. n158 If an option to purchase land within a certain time at a certain price is exercised within the time limited, the person to whom it is given, or the person's assignee, may enforce it. n159

The early English rule that in the case of options equitable conversion on exercise of the option related back to the date of the option n160 is no longer the leading rule today. n161 Under what appears the majority rule where an option to

purchase is exercised after the death of the optionor the exercise does not relate back to the date of death so the heirs take the proceeds.

§ 96.05(d) Termination of the Option.

The legal relationships arising out of an option are terminated either by the exercise of the option giving rise to a sales contract, by the giving of a deed, or by a surrender or forfeiture of the option. As a general rule, an option supported by a consideration is irrevocable before the expiration of the time agreed upon. n162 If the offer to sell is supported by a sufficient consideration it cannot be withdrawn prior to the expiration of the time specified. n163 Thus, an offeror who has become bound by taking a consideration for the promise to grant a specific time for acceptance or refusal, is powerless to retract the offer. It is a continuing offer until the expiration of the time mentioned, and its acceptance by the other party during that interval completes the contract and exhausts the option. n164 However, an option unsupported by a consideration may be withdrawn at any time before acceptance, if the party to whom it is given has knowledge of such withdrawal prior to acceptance. n165 If the offer by its terms fixes a time within which acceptance must be made, the offer is deemed withdrawn by the expiration of the time, n166 and the same is the case where the option is indeterminate as to time. n167 After the expiration of the time for acceptance, no contract exists which can be breached or enforced by either party. n168 The revocation operates only from the time it is received by the optionor. n169 The intention to abandon must be clearly shown. n170 The parties may contract to waive the provisions for rescission of the contract. n171 An offer by the optionee that departs from the terms of the option as to the time of payment of the purchase price amounts to a rejection of the option, and such option may not be revived by a subsequent unconditional acceptance. n172 Where an option given for a consideration is for a definite time, an extension of the option without consideration is a new agreement and the option is revocable before acceptance. n173 If the option becomes impossible of performance, such as through condemnation of the property, the option terminates and the optionor is not liable to the optionee in damages. n174

FOOTNOTES:

(n1)Footnote 59. Option is a unilateral obligation. *Goldstein v. Allen, 306 F.2d 711 (10th Cir. 1962); Stanley v. Like, 190 N.E.2d 697 (Ct. Common Pleas 1962).* Statement "purchaser agrees to buy" created a contract, not an option. *In re Gauthier's Estate, 493 P.2d 377 (Colo. Ct. App. 1972).* An agreement for sale whereby the purchaser was required to make certain payments periodically, but was entitled to withdraw before the third payment forfeited the earlier payments, was an option. *One Twenty Realty Co. v. Baer, 272 A.2d 377 (Md. 1971). See State v. New Jersey Zinc. Co., 193 A.2d 244 (N.J. 1963). See also* Christopher, Options to Purchase Real Property in North Carolina, *44 N.C. L. Rev. 63 (1966). Suburban Improvement Co. v. Scott Lumber. Co., 59 F.2d 711 (4th Cir. 1932); Crowe v. Gary St. Bank, 123 F.2d 513 (7th Cir. 1941)* (whether an instrument is an option is a matter of law); *W. A. Drake, Inc. v. Comm'r Intl. Revenue, 145 F.2d 365 (10th Cir. 1944); In re Kofoed, 46 F. Supp. 118 (E.D. Wash. 1942); Erswell v. Ford, 100 So. 96 (Ala. 1924); Gadsen Homes, Inc. v. Ala. Financery 27 So. 2d 626 (Ala. 1946)* (option may be assigned if not prohibited in contract); *Wilson v. Spry, 223 S.W. 564 (Ark. 1920); Duclos v. Turner, 166 S.W.2d 251 (Ark. 1942); Alegretti v. Gardner, 241 P. 408 (Cal. Ct. App. 1925); Seeburg v. El Royale Corp., 128 P.2d 362 (Cal. Ct. App. 1942); Skeritt Inv. Co. v. City of Englewood, 248 P. 6 (Colo. 1926); Mitchell v. Espinosa, 243 P.2d 412 (Colo. 1952); Foster v. Newport Nat'l Bank, 113 A. 908 (Del. Super. Ct. 1921); Frissell v. Nichols, 114 So. 431 (Fla. 1927); Mattox v. West, 21 S.E.2d 428 (Ga. 1942); Reeve v. Hicks, 28 S.E.2d 649 (Ga. 1944); Jones v. Vereen, 182 S.E. 627 (Ga. App. 1935); Keogh v. Peck, 147 N.E. 266 (Ill. 1925); Morris v. Goldthorp, 60 N.E.2d 857 (Ill. 1945); Huffer v. Crago, 216 Ill. App. 596 (1920); Keefer v. United Elec. Coal Co., 10 N.E.2d 836 (Ill. App. Ct. 1937); Robbs v. Illinois Rural Rehabilitation Corp., 40 N.E.2d 549 (Ill. App. Ct. 1942); Wilson v. Holub, 210 N.W. 593 (Iowa 1926); Smith v. Balbou, 277 S.W. 286 (Ky. 1925); Kinberger v. Drouet, 90 So. 367 (La. 1922); Glover v. Abney, 106 So. 735 (La. 1926); Morgan v. Forbes, 128 N.E. 792 (Mass. 1920); Bailey v. Grover, 213 N.W. 137 (Mich. 1927); Nu-Way Serv. Stations v. Vandenberg Bros. Oil Co., 278 N.W. 683 (Mich. 1938); Morrison v. Johnson, 181 N.W. 945 (Minn. 1921); Nielson v. Hendrickson, 210 P. 905 (Mont. 1922); Libby Lumber. Co. v. Pacific States Fire Ins. Co., 255 P. 340 (Mont. 1927); Gessleman v. Phillips, 193 N.W. 750 (Neb. 1923); Spitzli v. Guth, 183 N.Y.S. 743 (1920); Farone v. Hall, 220 N.Y.S. 1 (1927); H. C. King Motor Sales Corp. v. Peterson, 201 N.Y.S. 510 (1923); State v. Crum, 292 N.W. 392 (N.D. 1940); Landrum v. Jordan,*

220 P. 182 (Okla. 1924); Strong v. Moore, 245 P. 505 (Or. 1922); McHale v. Reilly, 117 A. 912 (Pa. 1922); Branstetter v. Hook, 251 S.W. 257 (Tex. Civ. App. 1923); Chournos v. Evona Inv. Co., 94 P.2d 470 (Utah 1939); Durfee House Furnishing Co. v. Great A. & P. Tea Co., 136 A. 379 (Vt. 1927) (option contract requires acceptance); *Ackerman v. Carpenter, 29 A.2d 922 (Vt. 1943); Skeen v. Clinchfield Coal Corp., 119 S.E. 89 (Va. 1923); West Virginia Pulp & Paper Co. v. Cooper, 106 S.E. 55 (W. Va. 1921); Vogt v. Ganlisle Holding Co., 15 N.W.2d 91 (Minn. 1944)* (In Minnesota an agreement to sell realty at any time up to Dec. 1, 1942 and containing recitals if the "second party" should purchase was an option, not a contract to sell.); *Samonds v. Cloninger, 127 S.E. 706 (N.C. 1925)* (a continuing offer to sell during entire period); *Edwards Lumber. & Land Co. v. Smith, 132 S.E. 593 (N.C. 1926)* (A contract for sale on condition that purchaser accept offer on or before a certain day is an option.); *see* Noel Hauser, Some Aspects of the Law of Option Contracts, *23 Brook. L. Rev. 69 (Dec. 1956).*

(n2)Footnote 60. Contract conditioned upon purchaser making down payment by a certain date was a mere option. *Parks v. Jacobs, 129 S.E.2d 884 (N.C. 1963).* The critical difference between an option and a contract is essentially that the option imposed no binding obligation on the option holder to complete the purchase. *State, By Comr. of Transp. v. Baker's Basin Realty Co., 350 A.2d 236 (N.J. Super. Ct. App. Div. 1975).* The difference between an option and a contract is that in an option no one is obligated to buy. *Grasman v. Jelsema, 246 N.W.2d 322 (Mich. Ct. App. 1976). Smith v. Tomlin, 1 N.E.2d 297 (Ind. App. 1936); In re Levy's Estate, 8 N.Y.S.2d 858 (1938); Assoc. Truck Lines, Inc. v. Baer, 77 N.W.2d 884 (Mich. 1956)* (distinguishing between a first call and an option); *see also Beets v. Tyler, 290 S.W.2d 76 (Mo. 1956); Wurdemann v. Hjelm, 102 N.W. 2d 811 (Minn. 1960)* (Transaction was lease option and not a contract of purchase where there was no evidence of agreed purchase price other than that contained in the option agreement.); *Cortese v. Connors, 135 N.E.2d 28 (N.Y. 1956)* (A first call provision is not met until the lessee rejects an offer the lesser is willing to accept.).

(n3)Footnote 61. *Keefer v. United Elec. Coal Cos., 10 N.E.2d 836 (Ill. App. Ct. 1937); Robbs v. Illinois Rural Rehabilitation Corp., 40 N.E.2d 549 (Ill. App. Ct. 1942); Sulzberger v. Steinhauer, 209 N.W. 68 (Mich. 1926); Farone v. Hall, 220 N.Y.S. 1 (1927); In re Cardon's Estate, 122 A. 234 (Pa. 1923); Whitworth v. Enitai Lumber. Co., 220 P.2d 328 (Wash. 1950); see Stark v. Bauer Cooperage Co., 3 F.2d 214 (6th Cir. 1926)* (signature by optionee does not make a bilateral contract).

(n4)Footnote 62. *Colligan v. Smith, 366 S.W.2d 816 (Tex. Civ. App. 1963).* An option is not itself a sale but a right to exercise a privilege. *Clore v. Frederick, 552 S.W.2d 239 (Ky. Ct. App. 1977).* The seller could not reject an option because the description was too vague, if he could personally supply the correct one. *Brady v. Fausett, 546 P.2d 246 (Utah 1976). Lively v. Tabor, 107 S.W.2d 62 (Mo. 1937); Ackerman v. Carpenter, 29 A.2d 922 (Vt. 1943).*

(n5)Footnote 63. An option is not itself a sale but a right to exercise a privilege. *Clore v. Frederick, 552 S.W.2d 239 (Ky. Ct. App. 1977).* An option to purchase in a lease is neither a giving of a new lease on a n extension or renewal of the old. *Mister Donut v. Kemp. 368 Mass. 220, 330 N.E.2d 810, 89 A.L.R.2d 896.* Options are to be construed in favor of the maker. *Ferguson v. Phillips, 150 S.E.2d 518 (N.C. 1966).* In cases of ambiguity construction as a contract rather than an option is favored. *Wood v. Wood, 224 S.E.2d 159 (Va. 1976). Denco, Inc. v. Belk, 97 So. 2d 261 (Fla. 1957)* (option to purchase is not affected by the non-claim statute on death of the optionor); *Gaskins v. Walz, 97 N.E.2d 798 (Ill. 1951); Rivers v. Oak Lawn Sugar Co., 27 So. 118 (La. 1900); Strong v. Moore, 245 P. 505 (Or. 1922); Sizer v. Clark, 93 N.W. 539 (Wis. 1903).*

(n6)Footnote 64. Distinguishing between an option, where upon exercise the owner is required to sell and a pre-emption, where the owner is required to sell and a pre-emption, where the owner need not sell, but if the owner does, must first offer to the holder. *Smerchek v. Hamilton, 606 P.2d 491 (Kan. Ct. App. 1980). Hopwood v. McCausland, 94 N.W. 469 (Iowa 1903); Rampton v. Dobson, 136 N.W. 682 (Iowa 1912).*

(n7)Footnote 65. *Greenspun v. Roos, 48 F. Supp. 281 (E.D.N.Y. 1942); Montgomery v. Waldeck, 2 Alaska 581 (1905); Swift v. Erwin, 148 S.W. 267 (Ark. 1912); Seeburg v. El Royale Corp., 128 P.2d 362 (Cal. Ct. App. 1942); Gard v. Thompson, 123 P. 497 (Idaho 1912); Myers v. J. J. Stone & Son, 102 N.W. 507 (Iowa 1905); Cameron v. Shumway,*

113 N.W. 287 (Mich. 1907); Ide v. Leiser, 24 P. 695 (Mont. 1890); Trogden v. Williams, 56 S.E. 865 (N.C. 1907); Pollock v. Brookover, 53 S.E. 795 (W. Va. 1906).

(n8)Footnote 66. *Booker v. Hall, 548 S.E.2d 391 (Ga. App. 2001); Stuart v. D'Ascenz, 22 P.3d 40 (Colo. App. 2000).*

(n9)Footnote 67. *Riley v. Compeau Homes (Texas), Inc., 808 S.W.2d 184 (Tex. App. 1991).*

(n10)Footnote 68. A purported sales contract "permeated with unresolved provisions and contingencies" is an option, not a binding contract. *Zwirn v. Gelvan, 268 So. 2d 539 (Fla. Dist. Ct. App. 1972). W. A. Drake, Inc. v. Comm'r Internal Revenue, 145 F.2d 365 (10th Cir. 1944); Stelson v. Haigler, 165 P. 265 (Colo. 1917); Hanscom v. Blanchard, 105 A. 291 (Me. 1918); Fargo v. Wade, 142 P. 830 (Or. 1914); Strong v. Moore, 207 P. 179 (Or. 1922); Milwaukee Mech. Ins. Co. v. B.S. Rhea & Son, 123 F. 9 (6th Cir. 1903); Parks v. Lyons, 64 S.E.2d 123 (S.C. 1951)* (An option is nothing more than a continuing offer to sell; but until it is accepted it does not become a contract of sale, for it lacks the element of agreement between the minds of the parties. It is only when there has been an acceptance of a proposal to sell that the vendee becomes in any sense the equitable owner of the subject matter of the option.); *Ide v. Leiser, 24 P. 695 (Mont. 1890)* ("[The owner] does not sell his land; he does not then agree to sell it, but he does then sell something, viz., the right or privilege to buy at the election, or option, of the other party. The second party gets *in proesenti*, not lands, or an agreement that he shall have lands, but he does get something of value, that is the right to call for and receive lands if he elects."); *Clark v. Am. Developing & Mining Co., 72 P. 978 (Mont. 1903)* ('There is a decided distinction between an option to purchase, which may be exercised or not by the prospective purchaser, and an absolute contract of sale, wherein one of the parties agrees to sell and the other to buy certain property, the sale to be completed within an agreed time. In the latter case, of course, the mere lapse of time with a contract unperformed, does not entitle either party to refuse to complete it, and therefore time is not of the essence of the contract. But where the contract is merely an option, generally without consideration, and especially as applied to mining property, of course ...time is of its essence ...') (citation omitted); *see Suburban Imp. Co. v. Scott Lumber Co., 59 F.2d 711 (4th Cir. 1932); Libby Lumber Co. v. P. States Fire Ins. Co., 255 P. 340 (Mont. 1927).*

(n11)Footnote 69. Real estate broker's agreement held merely an agreement to negotiate and not a binding contract upon acceptance. *Devereaux v. Harper, 26 Cal. Rptr. 837 (1962).* Option terminates on death.*Inglehart v. Jenifer, 371 A.2d 453 (Md. Ct. Spec. App. 1977). Gearhart v. W. Lumber Co., 90 S.E.2d 10 (Ga. 1955).*

(n12)Footnote 70. *See John Hancock Mut. Life Ins. Co. v. Behr, 295 N.W. 436 (Iowa 1940).*

(n13)Footnote 71. *Russell v. Golden Rule Mm. Co., 159 P.2d 776 (Ariz. 1945).*

(n14)Footnote 72. An option is sufficiently definite for specific performance if the price can be determined by the court without any new expression of the parties. *Stockwell v. Lindeman, 40 Cal. Rptr. 555 (1964).* An agreement merely giving a first chance if the owner desires to seel land is too indefinite for specific performance. *Rolfs v. Mason, 119 S.E.2d 238 (Va. 1961).* It was held a repurchase option not a mortgage where original negotiations were for sale, the buyer paid taxes and the purchase price was not significantly less than the true value. *Swallow Ranches, Inc. v. Bidart, 525 F.2d 995 (9th Cir. 1975). Barnes v. Rea, 68 A. 836 (Pa. 1908); McHenry v. Mitchell, 68 A. 729 (Pa. 1908). See Corbin v. Hume-Sinclair Coal Mining Co., 237 S.W.2d 81 (Mo. 1951).*

(n15)Footnote 73. A trustee or an executor has no power to give an option even if he has a power to sell. *Adler v. Adler, 118 S.E.2d 456 (Ga. 1961). Strong v. Moore, 207 P. 179 (Or. 1922).*

(n16)Footnote 74. *See Watts v. England, 269 S.W. 585 (Ark. 1925); White v. Bank of Hanford, 83 P. 698 (Cal. 1906); Stelson v. Haigler, 165 P. 265 (Colo. 1917); Hodnett v. Mann, 73 S.E. 1082 (Ga. Ct. App. 1912); Schoonover v. Petcina, 100 N.W. 490 (Iowa 1904); Fields v. Vizard Inv. Co., 182 S.W. 934 (Ky. 1916); Union Sawmill Co. v. Lake Lumber Co., 44 So. 1000 (La. 1907); Hanscom v. Blanchard, 105 A. 291 (Me. 1918); Grabenhorst v. Nicodemus, 42 Md. 236 (1875); Womack v. Coleman, 100 N.W. 9 (Minn. 1904); Dunaway v. Day, 63 S.W. 731 (Mo. 1901); Darr v.*

Mummert, 77 N.W. 767 (Neb. 1899); Alston v. Connell, 53 S.E. 292 (N.C. 1906); Scott v. Merrill, 146 P. 99 (Or. 1915); Swank v. Fretts, 59 A. 264 (Pa. 1904); First Fed Sav. & Loan Assn v. Wick, 322 N.W.2d 860 (S.D. 1982); Gira v. Harris, 86 N.W. 624 (S.D. 1901); Runck v. Dimmick, 111 S.W. 779 (Tex. Civ. App. 1908); Title Guarantee & Trust Co. v. McDonnell, 73 P. 484 (Wash. 1903); Nelson v. Stephens, 82 N.W. 163 (Wis. 1900).

(n17)Footnote 75. *See generally Gutierrez del Arroyo v. Graham, 227 U.S. 181 (1913); Smith v. Post, 138 P. 705 (Cal. 1914); Ellis v. Bryant, 48 S.E. 352 (Ga. 1904); Kessler v. Pruitt, 93 P. 965 (Idaho 1908); Golden v. Lewis, 195 S.W. 144 (Ky. 1917); Whited v. Calhoun, 47 So. 415 (La. 1908); Abel v. Gill, 145 N.W. 637 (Neb. 1914), modified, 147 N.W. 686 (Neb. 1914); Benedict v. Pincus, 84 N.E. 284 (N.Y. 1908); Davis v. Martin, 59 S.E. 700 (N.C. 1907); Heath v. Huffhines, 152 S.W. 176 (Tex. Civ. App. 1912); Roberts v. Braffett, 92 P. 789 (Utah 1907); Wright v. Suydam, 131 P. 239 (Wash. 1913); Monongah Coal & Coke Co. v. Fleming, 26 S.E. 201 (W. Va. 1896).*

(n18)Footnote 76. *Jenkins v. Locke, 3 App. D.C. 485 (1894); Boucher v. Van Buskirk, 9 Ky. 345 (1820).*

(n19)Footnote 77. *Smith v. Post, 138 P. 705 (Cal. 1914); Mohr Park Manor Inc. v. Mohr, 424 P.2d 101 (Nev. 1967); Ryland Group Inc. v. Wills, 331 S.E.2d 399 (Va. 1985); Tate v. Wood, 289 S.E.2d 432 (W. Va. 1982).*

(n20)Footnote 78. *Skeen v. Clinchfield Coal Corp., 119 S.E. 89 (Va. 1923).*

(n21)Footnote 79. *Le Blanc v. Watson, 13 F.2d 76 (5th Cir. 1926); Watts v. England, 269 S.W. 585 (Ark. 1925); Barney v. Curtis, 218 P. 190 (Idaho 1923); Rooney v. Dayton Hudson Corp., 246 N.W.2d 170 (Minn. 1976); Zitzow v. Diederich, 337 N.W.2d 799 (N.D. 1983); McCreight v. Girardo, 287 P.2d 414 (Or. 1955); Turner v. Hall, 104 S.E. 861 (Va. 1920); Fechner v. Finseth, 179 N.W. 701 (N.D. 1920)* (An earnest money contract of sale is not an option.).

(n22)Footnote 80. *Ballard v. Friedman, 187 N.W. 518 (Minn. 1922); Cole v. Haynes, 62 S.2d 779 (Miss. 1953).*

(n23)Footnote 81. *DeFeyter v. Riley, 606 P.2d 453 (Colo. Ct. App. 1979); State by Commr. of Transp. v. Bakers Basin Realty Co., 376 A.2d 1189 (N.J. 1977); Tabor v. Ragle, 526 S.W.2d 670 (Tex. Civ. App. 1975). See Huffhines v. Bourland, 269 S.W. 184 (Tex. Civ. App. 1926).*

(n24)Footnote 82. *Wilson v. Holub, 210 N.W. 593 (Iowa 1926).*

(n25)Footnote 83. *Hardesty v. Martin Ebersbach Co., 294 F. 5 (6th Cir. 1923); Gray v. Yarbrough, 215 P. 914 (Cal. Ct. App. 1923); Partee v. People, 20 So. 2d 73 (Miss. 1944). See Greenough v. Willcox, 213 N.W. 175 (Mich. 1927). Cf. Smith v. Blodget, 201 P. 584 (Cal. 1921).*

(n26)Footnote 84. *Sherlock v. Bradley Polytechnic Instn.,198 N.W. 756 (Wis. 1924).*

(n27)Footnote 85. No restraint on alienation permitted in conveyance of a fee simple. An attempted reservation of first call in grantor was invalid. *Smith v. Mitchell, 261 S.E.2d 231 (N.C. Ct. App. 1980). Wilkins v. Ferguson, 310 So. 2d 879 (Ala. 1975).*

(n28)Footnote 86. *Raffensperger v. Van. Kooy, 51 N.W.2d 488 (Wis. 1952).*

(n29)Footnote 87. Giving a reasonable time to exercise option to buy where lease is silent. *Sid Farber Hempstead Corp. v. Buckley, 317 N.Y.S.2d 30 (1970); Ruff v. Schmeichel, 219 N.W.2d 823 (N.D. 1974).* Time if specified of essence in an option. *Roberts v. Canning, 455 P.2d 302 (Okla. 1969); Mayer v. Boston Met. Airport, 244 N.E.2d 568 (Mass. 1969). Aspinwall v. Ryan, 226 P.2d 814 (Or. 1951); Fleischman v. Zimmermann, 45 N.W.2d 616 (Wis. 1951).*

(n30)Footnote 88. *Koplin v. Bennett, 155 So. 2d 568 (Fla. Dist. Ct. App. 1963).* Option contemplating a down payment is not binding until payment is made. *Caldwell v. Dalaray Mines, Inc., 156 P.2d 52 (Cal. Ct. App. 1945).* Option to renew at terms to be agreed upon is enforceable. *Moolemar v. Co-Build Companies, Inc., 354 F. Supp. 980 (E.D. Pa. 1973); Cassinari v. Mapes, 542 P.2d 1069 (Nev. 1975); Playmate Club Inc. v. Country Clubs, Inc., 462*

S.W.2d 890 (Tenn. Ct. App. 1970); Drees Farming Assn. v. Thompson, 246 N.W.2d 883 (N.D. 1976) (Said to be the modern but still the minority view). Lease containing an option is sufficient consideration for option. *Farris v. Interstate Enterprises, Inc., 270 So. 2d 230 (La. Ct. App. 1972).* Option signed under seal is valid without consideration. *Johnson v. Norton Housing Authority, 375 N.E.2d 1209 (Mass. 1978).* One dollar held sufficient consideration for option. *Bobo v. Bigbee, 548 P.2d 224 (Okla. 1976). Estero Bay Estates v. Giddens, 14 F.2d 171 (S.D. Fla. 1926); Donahue v. Davis, 68 So. 2d 163 (Fla. 1953); Wolfe v. Deaton, 169 S.E.2d 311 (Ga. 1969); Berryman v. Kmoch, 559 P.2d 790 (Kan. 1977); Ford v. McGregor, 234 S.W.2d 493 (Ky. 1950); Bailey v. Grover, 213 N.W. 137 (Mich. 1927); Morrison v. Johnson, 181 N.W. 945 (Minn. 1921)* (one dollar and other valuable consideration sufficient); *Normile v. Miller, 326 S.E.2d 11 (N.C. 1985); Am. Handkerchief Corp. v. Frannat Realty Co., 109 A.2d 793 (N.J. 1955); Diamond v. Davis, 38 N.Y.S.2d 103 (1942); Kucera v. Kavan 84 N.W.2d 207 (Neb. 1957); Mohr Park Manor, Inc. v. Mohr, 424 P.2d 101 (Nev. 1967); Aspinwall v. Ryan, 226 P.2d 814 (Or. 1951); Syrovy v. Alpine Resources, Inc., 859 P.2d 51 (Wash. 1993); Bidache, Inc. v. Martin, 899 P.2d 872 (Wyo. 1995); Wayne Woods Land Co. v. Beeman, 178 N.W. 696 (Mich. 1920)* (one dollar and other valuable consideration sufficient); *Windiate v. Lorman, 211 N.W. 62 (Mich. 1926); Sulzberger v. Steinhauer, 209 N.W. 68 (Mich. 1926)* (Consideration may be nominal.); *Friedman v. Tappan Dev. Corp., 120 A.2d 633 (N.J. Super. Ct. App. Div. 1956)* (A gratuitous option is revocable until acceptance.); *Kelley v. Coldren, 290 S.W.2d 424 (Ark. 1956).*

(n31)Footnote 89. *Richardson v. Hardwick, 106 U.S. 252 (1882); Ford v. McGregor, 234 S.W.2d 493 (Ky. 1950); Murphy, Thompson & Co. v. Reed, 101 S.W. 964 (Ky. 1907); Litz v. Goosling, 19 S.W. 527 (Ky. 1892); Gustin v. Union Sch. Dist. of Bay City, 54 N.W. 156 (Mich. 1893); Morrison v. Johnson, 181 N.W. 945 (Minn. 1921); Ide v. Leiser, 24 P. 695 (Mont. 1890); Hawralty v. Warren, 18 N.J. Eq. 124 (1866); Levin v. Dietz, 87 N.E. 454 (N.Y. 1909); Bryant Timber Co. v. Wilson, 65 S.E. 932 (N.C. 1909); Friendly v. Elwert, 105 P. 404 (Or. 1909)* (overruled on different point of law); *Cummins v. Beavers, 48 S.E. 891 (Va. 1904); Weaver v. Burr, 8 S.E. 743 (W. Va. 1888), modified, Randolph v. Koury Corp., 312 S.E.2d 759* (W. Va).

(n32)Footnote 90. *Hogan v. Richardson, 266 S.W. 299 (Ark. 1924); Braselton v. Vokal, 200 P. 670 (Cal. Ct. App. 1921); North Confidence Mining & Dev. Co. v. Morrice, 204 P. 851 (Cal. Ct. App. 1922); Morrison v. Johnson, 181 N.W. 945 (Minn. 1921); Hollingsworth v. Bilbo, 51 So. 2d 229 (Miss. 1951); Von Knuth v. Ryan, 186 N.W. 81 (Neb. 1921); Fitzgerald v. Boyle, 193 P. 1109 (Utah 1920).*

(n33)Footnote 91. *See* Leases and Options, *8 DePaul L. Rev 385* (Spring/Summer 1959). An option to purchase is renewed upon an extension of the lease absent provisions to the contrary. *Shuford Dev. Co. v. Chrysler Corp., 449 F.2d 429 (5th Cir. 1971). Smith v. Bangham, 104 P. 689 (Cal. 1909); Murphy, Thompson & Co. v. Reed, 101 S.W. 964 (Ky. App. 1907); Ide v. Leiser, 24 P. 695 (Mont. 1890); Bryant Timber Co. v. Wilson, 65 S.E. 932 (N.C. 1909); Carter v. Hook, 83 S.E. 386 (Va. 1914); Weaver v. Burr, 8 S.E. 748 (W. Va. 1888), modified, Randolph v. Koury Corp., 312 S.E.2d 759 (W. Va. 1984); Frank v. Stratford-Handcock, 77 P. 134 (Wyo. 1904); see Clark v. Cagle, 82 S.E. 21 (Ga. 1914)* (a contract held mutual and not a mere option); *Turman v. Smarr, 89 S.E. 214 (Ga. 1916)* (Where a lease at a specified annual rental to lessee contained privilege of purchasing at such amount as might be offered by another, the option was supported by general consideration for entire contract and was not unilateral.).

(n34)Footnote 92. *Heffernan v. Chester-Cambridge Bank & Trust Co., 27 Del. Co. 578 (Pa. Com. Pl. 1938).*

(n35)Footnote 93. *Braselton v. Vokal, 200 P. 670 (Cal. Ct. App. 1921).*

(n36)Footnote 94. *Feisthamel v. Campbell, 205 P. 25 (Cal. Ct. App. 1921); Blaffer v. Gulf Pipe Line Co., 218 S.W. 89 (Tex. Civ. App. 1919)* (An option is valid and enforceable although there is no independent consideration if it is a part of a contract supported by sufficient consideration.).

(n37)Footnote 95. *Cahaba Coal Co. v. Veitch, 65 So. 75 (Ala. 1914); Raymer v. Hobbs, 146 P. 906 (Cal. Ct. App. 1915); Corbett v. Cronkhite, 87 N.E. 874 (Ill. 1909); Murphy, Thompson & Co. v. Reed, 101 S.W. 964 (Ky. 1907); Stamper v. Combs, 176 S.W. 178 (Ky. 1915); Von Knuth v. Ryan, 186 N.W. 81 (Neb. 1921); Hardy v. Ward, 64 S.E. 171*

(N.C. 1909).

(n38)Footnote 96. *Murphy, Thompson & Co. v. Reed, 101 S.W. 964 (Ky. 1907); Bryant Timber Co. v. Wilson, 65 S.E. 932 (N.C. 1909).*

(n39)Footnote 97. *Smith v. Bangham, 104 P. 689 (Cal. 1909).*

(n40)Footnote 98. *Duclos v. Turner, 166 S.W.2d 251 (Ark. 1942); Smith v. Bangham, 104 P. 689 (Cal. 1909); Lovett v. E. Oil Co., 70 S.E. 707 (W. Va. 1911); Rust v. Fitzhugh, 112 N.W. 508 (Wis. 1907); see Adams v. Peabody Coal Co., 82 N.E. 645 (Ill. 1907).*

(n41)Footnote 99. *Rude v. Levy, 96 P. 560 (Colo. 1908); Murphy, Thompson & Co. v. Reed, 101 S.W. 964 (Ky. 1907); Von Knuth v. Ryan, 186 N.W. 81 (Neb. 1921); Great Western Oil Co. v. Carpenter, 95 S.W. 57 (Tex. Civ. App. 1906).*

(n42)Footnote 100. *Duclos v. Turner, 166 S.W.2d 251 (Ark. 1942).*

(n43)Footnote 101. *Wharton v. Meyers, 21 N.E.2d 772 (Ill. 1939).*

(n44)Footnote 102. *Kay v. Spencer, 213 P. 571 (Wyo. 1923).*

(n45)Footnote 103. *Lewis v. Bollinger, 187 N.Y.S. 563 (1921); In re Levy's Estate, 8 N.Y.S.2d 858 (1938); Thomason v. Bescher, 97 S.E. 654 (N.C. 1918); Samonds v. Cloninger, 127 S.E. 706 (N.C. 1925); Casto v. Cook, 112 S.E. 502 (W. Va. 1922).*

(n46)Footnote 104. *Willard v. Tayloe, 75 U.S. 557 (1869); Horgan v. Russell, 140 N.W. 99 (N.D. 1913), modified, Phoenix Iron & Steel v. Wilkoff Co., 253 F. 165 (6th Cir. 1918); Yerkes v. Richards, 26 A. 221 (Pa. 1893); Watkins v. Robertson, 54 S.E. 33 (Va. 1906).*

(n47)Footnote 105. No specific performance of an option unless terms are specific or a means is provided for fixing terms definitely. *Myers v. Lovetinsky, 189 N.W.2d 571 (Iowa 1971). Rude v. Levy, 96 P. 560 (Colo. 1908); Hartford-Connecticut Trust Co. v. Devine, 116 A. 239 (Conn. 1922); Crandall v. Willig, 46 N.E. 755 (Ill. 1897); Corbett v. Cronkhite, 87 N.E. 874 (Ill. 1909); Graybill v. Braugh, 17 S.E. 558 (Va. 1893), overruled in part, Watkins v. Robertson, 54 S.E. 33 (Va. 1906).*

(n48)Footnote 106. A new option does not require new consideration. *Wolfe v. Deaton, 169 S.E.2d 311 (Ga. 1969).* An option holder is entitled to damages for breach of option though the holder had not exercised his option. *Fullington v. M. Penn Phillips Co., 395 P.2d 124 (Or. 1964). Broadwell v. Smith, 108 S.E. 609 (Ga. 1921).*

(n49)Footnote 107. *Braig v. Frye, 179 N.W. 635 (Iowa 1920); Morrison v. Johnson, 181 N.W. 945 (Minn. 1921).*

(n50)Footnote 108. *Cummins v. Beavers, 48 S.E. 891 (Va. 1904); see note Harris v. Murphy, 25 S.E. 708 (N.C. 1896).*

(n51)Footnote 109. *Haney v. Denny, 193 N.E.2d 648 (Ind. Ct. App. 1963). State v. New Jersey Zinc Co., 193 A.2d 244 (N.J. 1963). Harden v. Vermont Dept. of Taxes, 352 A.2d 685 (Vt. 1976).* Admitting parol evidence to establish that an option to repurchase was not alienable. *Masterson v. Sine, 65 Cal. Rptr. 545 (1968).* But admitting presumption that option is fully alienable. Option to purchase conveys no right to property prior to exercise. *Coons v. Baird, 265 N.E.2d 727 (Ind. Ct. App. 1970).* Lease with option creates no estate. Fourth Nat. Bank in *Wichita v. Hill, 314 P.2d 312 (Kan. 1957). Neely v. Sheppard, 196 S.E. 452 (Ga. 1938)* (An option to purchase though not an interest in lands was held under the statute within the statute of frauds.); *Harwood v. Harwood, 105 N.E.2d 719 (Ill. 1952); Fried v. Barad, 530 N.E.2d 93 (Ill. App. Ct. 1998); Hilker v. Curdes, 133 N.E. 851 (Ind. Ct. App. 1922); Butsch v. Swallow, 134 N.E. 877 (Ind. Ct. App. 1922); Lacey v. Morgan, 282 N.E.2d 344 (Ind. Ct. App. 1972); Roberts v. Armstrong, 231 S.W. 371* (Tex.

Comm'n App. 1921); *Knox v. Brown, 277 S.W. 91* (Tex. Comm'n App. 1925); *Durfee House Furnishing Co. v. Great A. & P. Tea Co., 136 A. 379 (Vt. 1927); Buchannon v. Billings, 238 A.2d 638 (Vt. 1968); Krupinsky v. Birsky, 278 A.2d 757 (Vt. 1971); McGuirk v. Ward, 55 A.2d 610 (Vt. 1947); W. Va. Pulp & Paper Co. v. Cooper, 106 S.E. 55 (W. Va. 1921); Knight v. Chamberlain, 315 P.2d 273 (Utah 1957)* (Minority view that an option to purchase is an interest in realty within the meaning of the statute of frauds.).

(n52)Footnote 110. *Ludy v. Zurnwalt, 259 P. 52 (Cal. Ct. App. 1927).*

(n53)Footnote 111. An unexercised option to purchase does not create a property right in the realty. *Haney v. Denny, 193 N.E. 648 (Ind. Ct. App. 1963). Ohio Oil Co. v. Detamore, 73 N.E. 906 (Ind. 1905); Gamble v. Garlock, 133 N.W. 175 (Minn. 1911); Kingsley v. Kressly, 111 P. 385 (Or. 1910); Strong v. Moore, 207 P. 179 (Or. 1922); Herndon v. Armstrong, 38 P.2d 44 (Or. 1934); Rockwell v. Nelson, 970 P.2d 666 (Or. Ct. App. 1998).*

(n54)Footnote 112. *Caldwell v. Frazier, 68 P. 1076 (Kan. 1902); Gilbert v. Port, 28 Ohio St. 276 (1876); Sprague v. Schotte, 87 P. 1046 (Or. 1906); contra* 23 *Tracts of Land v. U.S., 177 F.2d 967 (6th Cir. 1949).*

(n55)Footnote 113. Options are subject to strict rules of construction against the optionee. *Kadansky v. Fickett, 294 N.E.2d 262 (Ill. 1973). Kenyon v. Suburban Realty Corp., 139 N.E. 172 (Mass. 1923).*

(n56)Footnote 114. *Strong v. Moore, 207 P. 179 (Or. 1922); Brooks v. Yawkey, 200 F.2d 663 (1st Cir. 1953)* (The optionee could not enforce the option if the land is taken by condemnation before acceptance of the option.); *Larson v. Trachsel, 577 P.2d 928 (Or. 1978).*

(n57)Footnote 115. 23 *Tracts of Land v. U.S., 177 F.2d 967 (6th Cir. 1949); but see Smith v. Loewenstein, 34 N.E. 159 (Ohio 1893)* (repudiates Lawes v. Bennett, 1 Cox Eq. Cas. 167 (1785)).

(n58)Footnote 116. *In re Powell's Appeal, 123 A.2d 650 (Pa. 1956); Shaffer v. Flick, 520 A.2d 50 (Pa. Super. Ct. 1987).*

(n59)Footnote 117. *See* Note, *Eminent Domain--Options--Rights of Optionee to Compensation in a Condemnation Proceeding When Option Is Exercised After the Taking, 14 Wayne L. Rev. 660 (1968). Brooks v. Yawkey, 200 F.2d 663 (1st Cir. 1953);* J. Levey, *Vendor and Purchaser--Requisites and Validity of Contract--Whether or Not an Option to Purchase Becomes a Nullity When the Land is Expropriated Prior to Exercise of the Option, 32 Chi.-Kent L. Rev. 174 (1954).*

(n60)Footnote 118. Option to purchase in lease runs with the land. *Valley Oil Co. v. Barberian, 183 N.E.2d 109 (Mass. 1962); Guarantee Title & Trust Co. v. Moores, 68 N.E.2d 365; Humble Oil & Ref. Co. v. Lennon, 182 A.2d 306 (R.I. 1962). Connolly v. Des Moines & C. Iowa Ry. Co., 68 N.W.2d 320 (Iowa 1955).*

(n61)Footnote 119. Optionee is not an "owner" of land prior to the exercise of the option. *Hayward Lbr. & Inv. Co. v. Starley, 12 P.2d 66 (Cal. Ct. App. 1932).* An option to purchase is an interest in land under the statute of frauds. *Bratt v. Peterson, 143 N.W.2d 538 (Wis. 1966). Reeve v. Hicks, 28 S.E.2d 649 (Ga. 1944); Martin v. Schindley, 442 S.E.2d 239 (Ga. 1994).*

(n62)Footnote 120. Lease containing option to purchase creates a contractual right not an interest in land. *Gautier v. Laprof, 91 So. 2d 324 (Fla. 1956). Moore v. Kirgan, 250 S.W.2d 759 (Tex. Civ. App. 1952).*

(n63)Footnote 121. The holder of an unexercised option has such an interest in the land that he may incur a mechanic's lien thereon which is superior to the purchase money mortgage executed when the option is subsequently executed after the making of the improvements but before the notice of the lien is filed. *Sontag v. Abbott, 344 P.2d 961 (Colo. 1959), 58 Mich. L. Rev 1072 (April 1960), Albert S. Eastwood Lumber Co. v. Britto, 155 A. 354 (R.I. 1931); contra Hayward Lumber & Inv. Co. v. Starley, 12 P.2d 66 (Cal. Ct. App. 1932); Martin-Welch Hardware & Plumbing*

Co. v. Moor, 16 S.W.2d 667 (Mo. Ct. App. 1929).

(n64)Footnote 122. The exercise of the option converts it into a contract of sale. *Atlantic Richfield Company v. Couture, 344 N.E.2d 917 (Mass. App. Ct. 1976); Indreland v. Martinez, 451 P.2d 92 (Mont. 1968). Smith v. Tomlin, 1 N.E.2d 297 (Ind. Ct. App. 1936).*

(n65)Footnote 123. An option becomes a bilateral contract upon acceptance. *Bobo v. Bigbee, 548 P.2d 224 (Okla. 1976).* An option to purchase in a lease is enforceable against a transferee of the lessor. *Zale Corporation v. Decorama, Inc., 470 S.W.2d 406 (Tex. Civ. App. 1971). Merrion v. Scorup-Somerville Cattle Co., 134 F.2d 473 (10th Cir. 1943); Carr v. Rawlings, 123 S.E. 875 (Ga. 1924); Walton's Exec. v. Franks, 228 S.W. 1025 (Ky. 1921); Kenyon v. Suburban Realty Corp., 139 N.E. 172 (Mass. 1923); Ludwig v. Hall, 208 N.W. 436 (Mich. 1926); Galbraith v. Buffalo Vegetable Mktg. Co., 217 N.Y.S. 737 (1926); Strong v. Moore, 207 P. 179 (Or. 1922); W. Va. Power & Transmission Co. v. Voight, 114 S.E. 138 (W. Va. 1922).*

(n66)Footnote 124. Where lease contains an option to purchase, the acceptance of the option terminates the lessor-lessee relationship and substitutes new relationship of vendor and purchaser. *Charles Young Constr., Inc. v. Look, 508 F.2d 275 (9th Cir. 1973).* Oral acceptance converts option into contract. *Steele v. Northup, 143 N.W.2d 302 (Iowa 1966).* When the option to purchase is exercised the relationship changes to vendor-vendee from landlord and tenant. *Amann v. Frederick, 257 N.W.2d 436 (N.D. 1977).* Option need not be exercised in writing. *Pleger v. Bouman, 233 N.W.2d 82 (Mich. Ct. App. 1975). Cary v. Kautzman, 53 N.W.2d 99 (N.D. 1952)* (The lease was a contract from the beginning when the down payment was initially made.).

(n67)Footnote 125. *Walker v. Bradley, 153 N.Y.S. 686 (1915)* (relates back).

(n68)Footnote 126. An option contract is not divisible unless so stated. *Kastner v. Dalton Dev., Inc., 122 N.W.2d 183 (Minn. 1963).* It was held in *Draper v. Gochman, 400 S.W.2d 545 (Tex. 1966),* that where a tenant had a first option to purchase, if the landlord desired to sell, such option was not exercisable where the land had been sold on foreclosure of a mortgage. Instead, the purchaser at the mortgage sale took the land subject to the lease and also subject to the option to purchase. Breach of lease covenant does not void option to purchase unless lease so provides. *Phillips v. Hill,555 P.2d 1043 (Okla. 1976). Crancer v. Lareau, 1 F.2d 117 (8th Cir. 1924); Merrion v. Scorup-Somerville Cattle Co., 134 F.2d 473 (10th Cir. 1943); Asbury v. Cochran, 9 So. 2d 887 (Ala. 1942); Ludy v. Zumwalt, 259 P. 52 (Cal. Ct. App. 1927); Orlando Realty Board Bldg. Corp. v. Hilpert, 113 So. 100 (Fla. 1927); Frissell v. Nichols, 114 So. 431 (Fla. 1927); Gaskins v. Walz, 97 N.E.2d 798 (Ill. 1951); Hilker v. Curdes, 133 N.E. 851 (Ind. 1922); Conn v. Heaps, 216 N.W. 73 (Iowa 1928); Redden v. Bausch, 204 P. 752 (Kan. 1922); Asher v. Roberts, 266 S.W. 1089 (Ky. 1924); Beardslee v. Grindley, 210 N.W. 486 (Mich. 1926); McLear v. Balmat, 186 N.Y.S. 180 (1921); Galbraith v. Buffalo Vegetable Mktg. Co., 217 N.Y.S. 737 (1926); Hudson v. Cozart, 102 S.E. 278 (N.C. 1920); Samonds v. Cloninger, 127 S.E. 706 (N.C. 1925); Landrum v. Jordan, 229 P. 182 (Okla. 1924); Hartman v. Selling, 189 P. 887 (Or. 1920); Grey v. Nickey Bros., 271 F. 249 (5th Cir. 1921)* (Acceptance was unequivocal where telegram stated: "Will exercise our option. Mail deed with draft. Answer.").

(n69)Footnote 127. *Castle Creek Water Co. v. Aspen, 146 F. 8 (8th Cir. 1906); Greenspun v. Roos, 48 F. Supp. 281 (E.D.N.Y. 1942); Fields & Combs v. Vizard Inv. Co., 182 S.W. 934 (Ky. 1916); Agar v. Streeter, 150 N.W. 160 (Mich. 1914); Kottler v. Martin, 85 S.E.2d 314 (N.C. 1955)* (Tender is not essential in exercising an option to buy.).

(n70)Footnote 128. After exercise of option to purchase, tenant's possession is that of vendee. *Ruark v. Peterson, 491 P.2d 75 (Colo. Ct. App. 1971). Wachovia Bank & Trust Co. v. United States, 98 F.2d 609 (4th Cir. 1938); Onekama Realty Co. v. Carothers, 129 P.2d 918 (Ariz. 1942); Taylor v. Hartman, 87 A.2d 785 (Pa. 1952).*

(n71)Footnote 129. *Kastner v. Dalton Dev., Inc., 122 N.W.2d 183 (Minn. 1963).* Where, in a contract, the purchaser is given time to procure loan and, if a loan commitment is not given within 30 days, the contract is void and the escrow deposit returned, this is an option, not a sales contract. *White v. Miller, 518 S.W.2d 383 (Tex. Civ. App.*

1974). An option requires unqualified, absolute, unconditional, unequivocal, unambiguous and positive acceptance, without reservation, to be effectual. Exercise of option requires strict compliance with its terms. *Oshtemo Tp, Kalamazoo Country v. City of Kalamazoo, 257 N.W.2d 260 (Mich. Ct. App. 1977).* Merger of lessor into another corporation held not a sale under the terms of a first right of refusal. *Torrey Delivery, Inc. v. Chautauqua Truck Sales & Service, Inc., 366 N.Y.S.2d 506 (1975). Hunter Inv., Inc. v. Divine Engr., Inc., 83 N.W.2d 921 (Iowa 1957); Strong v. Moore, 207 P. 179 (Or. 1922).*

(n72)Footnote 130. *Kastner v. Dalton Dev., Inc., 122 N.W.2d 183 (Minn. 1963).* An option to purchase given in a will must be exercised within the time provided in the will unless prevented by an act of the optionor. *In re Estate of Beaver, 206 N.W.2d 692 (Iowa 1973). Rude v. Levy, 96 P. 560 (Colo. 1908); Harding v. Gibbs, 17 N.E. 60 (Ill. 1888); Louisville & Nashville R.R. Co. v. Gulf of Mexico Land & Improvement Co., 33 So. 845 (Miss. 1903); Fargo v. Wade, 142 P. 830 (Or. 1914); Gambill v. Snow, 189 S.W.2d 33 (Tex. Civ. App. 1945); Tilton v. Sterling Coal & Coke Co., 77 P. 758 (Utah 1904); Triplett v. Gudebrod, 79 S.E. 1045 (Va. 1913); Pollock v. Brookover, 53 S.E. 795 (W. Va. 1906); Mueller v. Nortmann, 93 N.W. 538 (Wis. 1903); Raffensperger v. Van Kooy, 51 N.W.2d 488 (Wis. 1952).*

(n73)Footnote 131. *Roemhild v. Jones, 283 F.2d 70 (8th Cir. 1960)* (The court permitted the admission of parol evidence to construe an option provision.); *Weadock v. Champe, 160 N.W. 564 (Mich. 1916); Tilton v. Sterling Coal & Coke Co., 77 P. 758 (Utah 1904).*

(n74)Footnote 132. Failure to strictly comply with terms of option by optionee excused when failure is caused by the acts of the optionor. *Colligan v. Smith, 366 S.W.2d 816 (Tex. Civ. App. 1963). Beecher v. Morse, 282 N.W. 226 (Mich. 1938).*

(n75)Footnote 133. Time is of the essence in an option to purchase. *Evans Products Co. v. Swanger, 363 F. Supp. 808 (E.D. Pa. 1973).* If Option carries no time limit, it must be exercised within a reasonable time. *United States v. 969.46 Acres of Land, 386 F. Supp 793 (M.D.N.C. 1974).* But holding reasonable time for option if none specified. *Smith v. Cleveland, 268 So. 2d 14 (Ala. 1972).* Time is of essence in option. *Steele v. Northup, 143 N.W.2d 302 (Iowa 1966).* The exercise of an option to purchase in a lease comes too late if the lease has expired and the lessor was not bound to accept. *Kogos v. Lemann, 285 So. 2d 548 (La. Ct. App. 1973).* An option which contained no time limit held lost through laches. *Lindler v. Adcock, 158 S.E.2d 192 (S.C. 1967).* Timely exercise of an option required to prevent forfeiture. *Harrison v. Puga, 480 P. 2d 247 (Wash. Ct. App. 1971).* Time is of essence in lease option. *Conrad Milwaukee Corp. v. Wasilewski, 141 N.W.2d 240 (Wis. 1966).* Time is of essence in option. *Robinson v. Martel Enterprises, Inc., 337 So. 2d 698 (Miss. 1976).* Holding option to purchase could be exercised though lease covenants breached. Lessor had not elected to rescind before option exercised. *Summa Corp. v. Richardson, 564 P. 2d 181 (Nev. 1977).* Holder of a right of first refusal must meet the exact terms of the offer of a person seeking to buy from the owner and must show bad faith in the owner to recover in specific performance. *Weber Meadow-View Corp. v. Wilde, 575 P.2d 1053 (Utah 1978).* Time of essence in option. *Sports Premium, Inc. v. Kaemmer, 595 P.2d 696 (Colo. Ct. App. 1979).* Renewal of lease extends option. *Ledford v. Skinner, 328 So. 2d 219 (Fla. Ct. App. 1979).* Contra result where lease silent on renewal. *Darden v. Riverdale Terminal Corp., 273 N.E.2d 263 (Ill. App. Ct. 1971).* Acceptance of rent waived failure to exercise option to renew. *Ledford v. Skinner, 328 So. 2d 219 (Fla. Ct. App. 1979). Raymer v. Hobbs, 146 P. 906 (Cal. Ct. App. 1915); Stone v. Powell, 150 N.W. 15 (Iowa 1914); Samuelson v. Palmer, 152 P. 627 (Kan. 1915); Millikan v. Simmons, 93 S.E.2d 59 (N.C. 1956)* (An oral agreement to extend the period of an option is valid only if it is entered into before the period expires).

(n76)Footnote 134. *Waterman v. Banks, 144 U.S. 394 (1892); Harding v. Gibbs, 17 N.E. 60 (Ill. 1888); Fields & Combs v. Vizard Inv. Co., 182 S.W. 934 (Ky. 1916); Coleman v. Applegarth, 11 A. 284 (Md. 1887); Trogden v. Williams, 56 S.E. 865 (N.C. 1907); Douglass v. Brooks, 87 S.E.2d 258 (N.C. 1955); Kingsley v. Kressly, 118 P. 678 (Or. 1910); Tilton v. Sterling Coal & Coke Co., 77 P. 758 (Utah 1904); Dyer v. Duffy, 19 S.E. 540 (W. Va. 1894); Pollock v. Brookover, 53 S.E. 795 (W. Va. 1906); Mueller v. Nortmann, 93 N.W. 538 (Wis. 1903); see White v. Ralph, 154 P.2d 167 (Idaho 1944); Gambill v. Snow 189 S.W.2d 33 (Tex. Civ. App. 1945).*

(n77)Footnote 135. Exercise of an option does not require the payment of cash until title examination is completed. *Kidd v. Early, 222 S.E.2d 392 (N.C. 1976). Leslie v. Fed. Fin. Co., 92 P.2d 906 (Cal. 1939).*

(n78)Footnote 136. *Stewart v. Gardner, 153 S.W. 3 (Ky. 1913); Friendly v. Elwert, 112 P. 1085 (Or. 1911); see Anderson v. Riegel, 281 N.W. 915 (Wis. 1938).*

(n79)Footnote 137. *N. Ill. Coal Corp. v. Cryder, 197 N.E. 750 (Ill. 1935).*

(n80)Footnote 138. *Loughney v. Quigley, 124 A. 84 (Pa. 1924).*

(n81)Footnote 139. *Rigsby v. Boon County St. Bank of Lebanon, Ind., 241 S.W. 207 (Tex. Civ. App. 1922).*

(n82)Footnote 140. *Orlando Realty Board Bldg. Corp. v. Hilpert, 113 So. 100 (Fla. 1927); Alexander Lumber Co. v. Swindlehurst, 32 N.E.2d 637 (Ill. App. Ct. 1941); Sautkulis v. Conklin, 150 N.Y.S.2d 356 (1956)* (An option to purchase a portion of the leased premises cannot be specifically enforced against the lessor/vendor and the vendee of the whole.).

(n83)Footnote 141. *Bridges v. Shirling, 105 S.E. 862 (Ga. Ct. App. 1921).*

(n84)Footnote 142. *Gabel v. Riley, 254 P. 329 (Kan. 1927).*

(n85)Footnote 143. *McCarroll v. Newsham, 278 F. 4 (5th Cir. 1922).*

(n86)Footnote 144. *Ludwig v. Hall, 208 N.W. 436 (Mich. 1926).*

(n87)Footnote 145. An option when accepted dates back to the time of creation. *Anthony v. Enzler, 132 Cal. Rptr. 553 (1976). Castle Creek Water Co. v. Aspen, 146 F. 8 (8th Cir. 1908); Rheingans v. Smith, 119 P. 494 (Cal. 1911); Walter G. Reese Co. v. House, 124 P. 442 (Cal. 1912); Breen v. Mayne, 118 N.W. 441 (Iowa 1908); Murphy Thompson & Co. v. Reed, 101 S.W. 964 (Ky. 1907); Pickett v. Boutwell, 125 So. 2d 822 (Miss. 1961)* (an option was not enforced which had been obtained by false misrepresentations of the optionee as to the stated facts even though the optionor had not relied upon such statements); *McFerran v. Heroux, 269 P.2d 815 (Wash. 1954).*

(n88)Footnote 146. *McCowen v. Pew, 123 P. 191 (Cal. Ct. App. 1912).* The optionor cannot reject the acceptance of the option if the optionor has not withdrawn it before the acceptance. *Roy Annett, Inc. v. Kerezsy, 57 N.W.2d 483 (Mich. 1953).*

(n89)Footnote 147. *Orlando Realty Board Bldg. Corp. v. Hilpert, 113 So. 100 (Fla. 1927); Carr v. Rawlings, 123 S.E. 875 (Ga. 1924); Rowell v. H.L. Harrell Realty Co., 103 S.E. 717 (Ga. Ct. App. 1920); Russell v. Combs, 195 P. 605 (Kan. 1921); Beardslee v. Grindley, 210 N.W. 486 (Mich. 1926); Knox v. Brown, 277 S.W. 619* (Tex. Comm'n App. 1925).

(n90)Footnote 148. *Cullen & Vaughn Co. v. Bender Co., 170 N.E. 633 (Ohio 1930).*

(n91)Footnote 149. *Trogden v. Williams, 56 S.E. 865 (N.C. 1907); Kottler v. Martin, 85 S.E.2d 314 (N.C. 1955); Friendly v. Elwert, 105 P. 404 (Or. 1909); Turner v. McCormick, 49 S.E. 28 (W. Va. 1904).*

(n92)Footnote 150. *Wheeling, O. & E.R. Co. v. Wheeling Coal R. Co., 119 S.E. 551 (W. Va. 1923).*

(n93)Footnote 151. What appears to be the majority opinion that the optionee must first make tender is shown in *Miller v. Carmody, 384 P.2d 77 (Colo. 1963); Kritz v. Moon, 163 N.E. 112 (Ind. Ct. App. 1928); Sinclair Ref. co. v. Martin, 270 S.W.2d 576 (Tenn. Ct. App. 1954).* An extension which acts as a new option requires new consideration. *Wolfe v. Deaton, 169 S.E.2d 311 (Ga. 1969)* (distinguishing option and contract). *Rolfs v. Mason, 119 S.E.2d 238 (Va. 1961); Morris v. Goldthorp, 60 N.E.2d 857 (Ill. 1945)* (Requisite definiteness of price to be paid in event of exercise of

option for purchase of property).

(n94)Footnote 152. *Kentucky Consumers Oil Co. v. General Bonded Warehousing Corp., 184 S.W.2d 972 (Ky. 1945).*

(n95)Footnote 153. *Anderson v. United Coal & Coke Co., 227 P.2d 700 (Wyo. 1951).*

(n96)Footnote 154. An unexercised option does not effect an equitable conversion so as to enable the optionee to claim the condemnation award. *In re Port of New York Auth, 207 N.Y.S.2d 791 (1960),* but optionee is entitled to damages for the loss of his interest. *In re Governor Mifflin Joint School Authority Petition, 164 A.2d 221 (Pa. 1960).* If the option does not specify the mode of acceptance an unqualified manifestation of acceptance is sufficient. *Figge v. Clark, 174 N.W.2d 432 (Iowa 1970).* Violation of covenant did not prevent exercise of option to purchase. *Schlegel v. Hansen, 570 P.2d 292 (Idaho 1977).* Option to purchase not affected by lease covenant violations happening after exercise of option. *Ford v. Lord, 586 P.2d 270 (Idaho 1978).* Lessee's breach of covenant did not prevent exercise of option. *Atlantic Richfield Co. v. Couture, 344 N.E.2d 917 (Mass. App. Ct. 1976); Phillips v. Hill, 555 P.2d 1043 (Okla. 1976). Asbury v. Cochran, 9 So. 2d 887 (Ala. 1942); Swift v. Erwin, 148 S.W. 267 (Ark. 1912); Myers v. J. J. Stone & Son, 102 N.W. 507 (Iowa 1905); Bras v. Sheffield, 31 P. 306 (Kan. 1892); Associated Truck Lines v. Baer, 77 N.W.2d 384 (Mich. 1956)* (distinguishing between an option and a first call); *Ide v. Leiser, 24 P. 695 (Mont. 1890); Barton v. Thaw, 92 A. 312 (Pa. 1914); Tilton v. Sterling Coal & Coke Co., 77 P. 758 (Utah 1904); Pollock v. Brookover, 53 S.E. 795 (W. Va. 1906).*

(n97)Footnote 155. *Briles v. Paulson, 149 P. 169 (Cal. 1915); Barnes v. Rea, 68 A. 836 (Pa. 1908).*

(n98)Footnote 156. When the optionor repudiates the option the optionee may bring a suit for damages without first attempting to exercise the option. *Fullington v. M. Penn Phillips Co., 395 P.2d 124 (Or. 1964), 50 Iowa L. Rev. 1298 (1965)* (minority view). *Smith v. Cauthen, 54 So. 844 (Miss. 1911).*

(n99)Footnote 157. *Smith v. Bangham, 104 P. 689 (Cal. 1909).*

(n100)Footnote 158. An option to purchase in a lease becomes a contract of sale when the option is exercised. *Schomaker v. Osborne, 58 Cal. Rptr. 827 (1967). Wilkins v. Hardaway, 55 So. 817 (Ala. 1911); Smith v. Bangham, 104 P. 689 (Cal. 1909); Hardy v. Ward, 64 S.E. 171 (N.C. 1909); Winders v. Kenan, 77 S.E. 687 (N.C. 1913).*

(n101)Footnote 159. *Chesbrough v. Vizard Inv. Co., 160 S.W. 725 (Ky. 1913). See Beecher v. Morse, 282 N.W. 226 (Mich. 1938).*

(n102)Footnote 160. Lawes v. Bennett, 1 Cox 167, *29 Eng. Rep. 1111 (1785).*

(n103)Footnote 161. *Rockland-Rockport. Lime Co. v. Leary, 97 N.E. 43 (N.Y. 1911); Smith v. Loewenstein, 34 N.E. 159 (Ohio 1893); Durepo v. May, 54 A.2d 15 (R.I. 1947).*

(n104)Footnote 162. *Johnston v. Guice, 114 So. 409 (Ala. 1927); Duclos v. Turner, 166 S.W.2d 251 (Ark. 1942); Wagner v. McClay, 138 N.E. 164 (Ill. 1923); Walton's Exec. v. Franks, 228 S.W. 1025 (Ky. 1921); Hunter v. Sutton, 205 P. 785 (Nev. 1922); Johnson v. Ford, 245 S.W. 531 (Tenn. 1922).* Voluntary relinquishment requires no consideration. *Daugherty v. Roasberry, 229 S.W. 924 (Tex. Civ. App. 1921).*

(n105)Footnote 163. *Marsh v. Lott, 97 P. 163 (Cal. Ct. App. 1908); R. A. C. Realty Co. v. W. O. U. F. Atlanta Realty Corp., 52 S.E.2d 617 (Ga. 1949); Murphy, Thompson & Co. v. Reid, 101 S.W. 964 (Ky. 1907); Tibbs v. Zirkle, 46 S.E. 701 (W. Va. 1904); Weaver v. Burr, 8 S.E. 743 (W. Va. 1888); Frank v. Stratford-Handcock, 77 P. 134 (Wyo. 1904).*

(n106)Footnote 164. *Castle Creek Water Co. v. Aspen, 146 F. 8 (8th Cir. 1906).*

(n107)Footnote 165. *Duclos v. Turner, 166 S.W.2d 251 (Ark. 1942); Walter G. Reese Co. v. House, 124 P. 442 (Cal. 1912); Diggs v. El Royale Corp., 154 P.2d 444 (Cal. Ct. App. 1944); Canty v. Brown, 105 P. 428 (Cal. Ct. App. 1909); Mitchel v. Gray, 97 P. 160 (Cal. Ct. App. 1908); Goodman v. Spurlin, 62 S.E. 1029 (Ga. 1908); Wagner v. McClay, 138 N.E. 164 (Ill. 1923); Barnett v. Lovejoy, 186 N.W. 1 (Iowa 1922); State v. Owen, 19 N.W.2d 491 (Mich. 1945); Bowen v. McCarthy, 48 N.W. 155 (Mich. 1891); Von Knuth v. Ryan, 186 N.W. 81 (Neb. 1921); Winders v. Kenan, 77 S.E. 687 (N.C. 1913); Strong v. Moore, 207 P. 179 (Or. 1922); Mossie v. Cyrus, 119 P. 485 (Or. 1911); Granger Real Estate Exch. v. Anderson, 145 S.W. 262 (Tex. Civ. App. 1912).*

(n108)Footnote 166. Time is of the essence in an option. *White v Miller, 518 S.W.2d 383 (Tex. Civ. App. 1974).*

Waterman v. Banks, 144 U.S. 394 (1892); Whitworth v. Enitai Lbr. Co., 220 P.2d 328 (Wash. 1950).

(n109)Footnote 167. *Lankford v. Holton, 24 S.E.2d 292 (Ga. 1943); Von Knuth v. Ryan, 186 N.W. 81 (Neb. 1921).*

(n110)Footnote 168. Option to purchase did not survive the expiration of an agreed lease term and often the tenant had become a month-to-month tenant. *Lazarus v. Flournoy, 280 N.Y.S.2d 745 (1967). McVay v. Swift, 24 F. Supp. 200 (W.D. La. 1938); Michael v. Busby, 162 S.W.2d 662 (Tex. 1942).*

(n111)Footnote 169. *Wagner v. McClay, 138 N.E. 164 (Ill. 1923).*

(n112)Footnote 170. *Lankford v. Holton, 24 S.E.2d 292 (Ga. 1943); Macy v. Brown, 158 N. E. 216 (Ill. 1927); Kitching v. Browne, 197 N.Y.S. 441 (1922). See Nielson v. Benedict, 194 N.W. 83 (Iowa 1923); Redden v. Bausch, 204 P. 752 (Kan. 1922).*

(n113)Footnote 171. Harvey v. Prest, *113 S. 847 (La. 1927); Holden v. Efficient Craftsman Corp., 138 N.E. 85 (N.Y. 1922). See Hall v. Proctor, 191 N.W. 205 (Mich. 1922).*

(n114)Footnote 172. *Beaumont v. Prieto, 249 U.S. 554 (1919).*

(n115)Footnote 173. *See* Berg, Long-Term Options and the Rule Against Perpetuities, *37 Cal. L. Rev. 235 (1949).* Holding option to purchase could be exercised though lease covenants breached. Lessor had not elected to rescind before option exercised. *Summa Corp. v. Richardson, 564 P.2d 181 (Nev. 1977). Gambill v. Snow, 189 S.W.2d 33 (Tex. Civ. App. 1945).*

(n116)Footnote 174. *Brooks v. Yawkey, 200 F.2d 663 (1st Cir. 1953).*

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CHAPTER 96 Vendors and Purchasers

11-96 Thompson on Real Property, Thomas Editions § 96.06

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§ 96.06 Equitable Conversion.

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§ 96.06(a) The Theory of Equitable Conversion. n175

The legal cliche, that equity treats that as being done which should be done, is the basis of the theory of equitable conversion. n176 Hence, when the vendee contracts to buy and the vendor to sell, though legal title has not yet passed, in equity the vendee becomes the owner of the land, the vendor of the purchase money. In equity the vendee has a real interest and the vendor a personal interest. n177 Equity treats the executory contract as a conversion, whereby an equitable interest in the land is secured to the purchaser for whom the vendor holds the legal title in trust. n178 This is the doctrine of equitable conversion.

By the doctrine of equitable conversion under an executory contract of sale, the equitable estate, in its entirety, passes immediately to the purchaser at the moment the contract becomes effective and the bare legal title for security purposes remains in the vendor. n179 The purchaser of the land is looked on and treated as the owner thereof, and the vendor, though holding the legal title, holds it as a trustee for the purchaser. n180 The vendee holds the purchase money in trust for the vendor. n181

The vendee in a contract to convey real estate is the equitable owner of the land, n182 but the vendee obtains the equitable title only by such performance that the vendee is in a position to compel specific performance. n183 Some cases state that the vendee is the beneficial owner. n184 Often the parties are spoken of as being trustees for each other and a vendee who has fully performed the vendee's part of the contract becomes the beneficiary of a trust in the legal title which is held for the vendee by the vendor. n185 The legal effect of a title bond or agreement for a deed is sometimes said to be like a deed by the vendor and a mortgage back by the vendee. n186

So long as the contract remains executory, it conveys in law no title to the property. n187 A mere executory contract to sell and convey does not give the prospective purchaser a legal estate in the land. n188 Even the purchaser who takes possession may still not dispute the title of the vendor. n189 In that instance, the contract should provide for possession of the premises pending payment of the purchase price. n190 The vendee acquires no rights under a forged contract of sale. n191 The general rule is that the vendor retains the legal title under the contract and the equitable title goes to the purchaser in possession. n192 The vendor holds the legal title, and all persons must necessarily take notice of it; if the

vendee entered into possession, a deed from the vendee would convey only the equitable title. n193

Equitable conversion may come about through provisions for sale in a will, inter vivos contracts to sell, sale under order of court, partnership property, and insurance proceeds. Equitable conversion arises under an executory contract of sale from the date of the contract to the vendee, n194 but does not arise under an option contract before acceptance. n195 It seems to be well settled that a person who takes a conveyance of the legal title to land, with knowledge that the grantor has agreed to sell to another, holds it subject to the equitable estate already vested in such intending purchaser. In some states, such a grantee is treated as a trustee for the first vendee. n196 When a vendor enters into an executory agreement to convey real estate on the payment of the purchase money, the vendor sustains, in substance, the same relation to the vendee as a mortgagee does to a mortgagor, the vendee holding the equity which the vendor may foreclose. n197 When the contract is abandoned, the vendee's equitable title is terminated n198 without the necessity of further transfer. n199

The cases are divided as to whether under court sales the time of conversion occurs on entry of the order n200 or on the date the sale becomes final. n201 Equitable conversion does not come about until the option is converted into an enforceable contract. n202 The American majority rule does not follow the English doctrine. n203 This majority rule does not relate equitable conversion back to the date the option is signed but only to the date it is exercised. n204

Equitable conversion also arises in instances where the testator in a will directs realty to be sold. The cases under such circumstances are not harmonious as to when the realty is in equity converted into personalty and how this is done. It seems clear that where title to the land is devised to the executors as trustees with a positive direction to sell, there occurs an equitable conversion n205 unless the testator has expressed a contrary intent. Usually the conversion takes place as of the death of the testator, even if the direction is to sell thereafter. Some contrary authority holds that the equitable conversion occurs as of the sale date. Equitable conversion by will occurs only where the testator gives or clearly intends a positive direction to sell. n206 Where the executor's power to sell is discretionary, the equitable conversion occurs only upon the sale. n207 Though the will effects an equitable conversion, the widow's rights in the realty are not affected. n208 Equitable conversion ends when default occurs. n209

§ 96.06(b) How Equitable Conversion Affects Rights of Vendors and Purchasers.

The concept of equitable conversion is not carried to its logical conclusion by all courts. n210 Where equitable conversion is accepted, the equitable title is vested from the date of the contract or from the date the vendee takes possession; from that date any increment, advantage, or enhancement to the property inures to the vendee's benefit, and any detriment, depreciation, or loss without the fault of either party must be borne by the vendee. n211

§ 96.06(b)(1) Changing an Interest from Real Property to Personal Property.

Where a mortgage on property of deceased vendor was foreclosed before the sale was consummated and the property was purchased by a vendee at the sheriff's sale, equitable conversion applied to give the purchase money to deceased vendor's administrator as personalty. n212 Under the doctrine of equitable conversion the vendee's interest descends to the heir as realty. n213 Upon death of the vendor, if there is no provision for disposition of the proceeds of the realty such proceeds go to the heir of the vendor, n214 and the executor holds these as trustee for the heir. n215 Where the direction is to sell at some future time, the property remains realty until sale. n216 If the vendor breaches the contract after the vendee's death, the heirs at law of the vendee, not the personal representative of the vendee, are the ones to bring specific performance. n217

In states where personalty is used first to satisfy debts, equitable conversion makes available the purchase money from sale of the realty. n218 Where the will provides that realty shall be sold and the proceeds paid to the beneficiaries as personalty, n219 it does not defeat the interest of the beneficiary in the proceeds. So lacking a special statute, a vendee's interest in realty under a sales contract cannot be touched by a lien of a judgment. n220 The vendee's interest is alienable. n221 Lacking special statutes a creditor's only remedy in reaching an equitable interest in land is by a bill in

equity, since equitable interests are not subject to the lien of a judgment at common law. n222

If a judgment lien arises against the vendor after the sales contract has been entered into but before the entire purchase price has been paid the weight of authority permits the lien to attach to the vendor's interest. n223 A judgment lien against the vendor has priority over a subsequent contract of sale of the realty, n224 but the lien does not attach if all of the purchase price has been paid. n225 The vendee takes all the benefits burdened with the inconveniences. n226

§ 96.06(b)(2) Conveying or Encumbering Title.

The vendor can convey n227 or mortgage n228 the title subject to the vendee's rights under the contract. The vendor and vendee have separate insurable interests and the vendee may collect on both policies after acquiring the title. n229

Where joint tenants contract to sell, the cases divide as to whether the doctrine of equitable conversion so severs the joint tenancy as to prevent survivorship in the proceeds. n230 In the absence of statute a contract made by husband and wife to sell real estate ownedby them as joint tenants destroys the joint tenancy in real estate and effects an equitable conversion of it into personalty consisting of a contract for the sale of real estate owned as tenants in common. n231 A contract to buy taken in the name of a husband and wife creates a tenancy by the entireties in equity. n232 If dower is still recognized in the jurisdiction generally, no dower attaches against the vendee where the contract to sell was executed before marriage, n233 and on the death of the vendor the property passes as personalty. n234 Where following a contract of sale a mortgage on the property was foreclosed, it was held equitable conversion occurred and the administrator of the seller took the surplus proceeds of sale. n235 Where the vendor under a contract to sell realty dies, the residuary legatee may obtain the proceeds as personalty, even though the liability of vendee was conditioned upon obtaining financing. n236 The courts are divided as to whether a judgment against a vendor attaches to the balance due the vendee on the purchase price. n237

Insurance proceeds on realty become themselves realty if the insurance is on the fee. n238 Where a life estate exists, the life tenant who insures may under one rule take all of the proceeds, but other cases require the life tenant to hold as trustee for the remainderman. n239

§ 96.06(b)(3) Under Eminent Domain.

The doctrine of equitable conversion applies where the land is subjected to eminent domain after the contract is signed; this results in the vendee being entitled to the award. n240 In some states under the equitable conversion doctrine the interests of vendors as tenants by the entireties are converted into a tenancy in common with respect to executory contracts for the sale of land, unless the vendors intended otherwise. n241

Escape clauses in a contract for land sale do not justify a zoning board regarding rights of purchaser as different from or less than the rights of the legal owner. n242 The execution of a contract for sale of realty revokes a devise of the realty. n243 The cases divide as to whether the vendor's interest is subject to execution. n244 The majority rule makes the vendee's interest subject to execution; n245 it is also subject to a mechanic's lien n246 and it may be mortgaged.

§ 96.06(b)(4) Right of Possession.

Varying consequences ensue in the different jurisdictions out of the creation of the vendor and purchaser relationship, nor are the states consistent in their own thinking as to the rights and liabilities which arise. Thus, even where equitable conversion is the accepted theory, the vendee is not entitled to possession prior to delivery of title unless the contract so stipulates. The vendee's interest is subject to taxation. n247 The vendee in possession is not impeachable for waste unless the security is impaired. n248 Some cases create a fiduciary relationship between the vendor and vendee similar to that of landlord and tenant, so that a vendee is estopped from acquiring and asserting a title adverse to the vendor without rescission of the contract. n249

A vendee has no right of possession before obtaining a deed unless the contract so specifies or the vendor voluntarily permits entry into possession; n250 and where possession is given the to vendee under contract, the possession remains the possession of the vendor while the contract remains executory. n251 Ordinarily, in the absence of an agreement giving right of possession, the purchaser under an executory contract is not entitled to possession, until full performance has occurred. n252 This intent to give the purchaser immediate possession must be expressed in the contract or be plainly inferable from the terms of the contract or the surrounding circumstances. n253 The purchaser's right to actual possession will further depend on existing leases of which the purchaser has notice. n254

Upon the giving of a bond for a deed, providing only for the payment of stipulated sums, the obligee is entitled to possession, n255 and after the obligee has taken possession the obligor cannot oust the obligee until the equitable estate has been divested by foreclosure, and cannot until then maintain an action to quiet title against the obligee. n256 Delivery of possession is normally essential to the transfer of a good title, and the purchaser may reject a title not accompanied by immediate possession unless there be an agreement to the contrary. n257 When possession has been taken and the purchase price paid, that is sufficient to enable the purchaser to obtain specific performance for delivery of the title. n258 A deed passing a present title in fee simple carries the right of immediate possession, use, and enjoyment of the property. n259 A seller is under no obligation to permit buyer to have visitation rights until the buyer performs. n260

§ 96.06(b)(5) Risk of Loss.

While nearly all courts deny the vendee the right to possession until title passes, they show little inconsistency in how they treat the risk of loss to the property in the interim. n261 The purchaser's risk of loss or destruction under the doctrine of equitable conversion is subject to modification by terms of the contract, and a contract may call for conveyance of property in the same condition as existed at the time of execution of the contract. n262

It is competent for a vendor and purchaser to agree as to which of them shall bear the loss in case of accidental injury or destruction of the property before final delivery of the deed; but where the contract contains no such express provision, the authorities are not in agreement as to which party shall bear the loss. The weight of judicial decisions upon the subject support the view that where the loss occurs between the making of the contract and the time for conveyance, and the loss is not the fault of the vendor and the vendor is at the time able to convey, the purchaser must bear the loss. n263 All the decisions agree that the loss should be borne by the owner, but there is some diversity of opinion upon the question as to which party, vendor or purchaser, is to be regarded as the owner. The cases supporting the rule above stated are based upon the theory that equity regards that as done which ought to be done, and that when a valid and enforceable contract for the sale of land has been made, equity will regard the vendor as holding the title for the benefit of the purchaser, and the purchaser as holding the unpaid purchase money for the benefit of the vendor, and that, therefore, the purchaser must be regarded in equity as the real owner. The rule is not applicable unless there is an ability, as well as a willingness, on the part of the vendor to convey, and it has been held that where the vendor cannot make title according to the contract, and the property is damaged, the loss will fall upon the vendor. n264 What has been denominated the minority view on this question holds that where the buildings are damaged or destroyed before the time for performance of the contract, the loss must be borne by the vendor. n265 In stating the principles on which the minority view is based, the Supreme Court of Oregon stated: "In every contract for the conveyance of property, there is an implied condition that the subject matter of the contract shall be in existence when the time for the performance of the contract arrives. That is the contract, the understanding of the parties. If it has ceased to exist when that time arrives, each party is discharged from his contract, the vendor from his contract to convey, the vendee from paying the purchase price." n266 A vendor, while in possession pending delivery of possession to the purchaser, is under a duty to exercise ordinary care to protect the property from fire. n267 Where the covenant is to deliver premises in condition existing at the execution of the contract, the loss prior to delivery is borne by the vendor. n268

The transfer of the equitable estate from the vendor to the purchaser takes place when the contract becomes absolute

according to the conditions expressed in the contract, until which time the property sold remains at the vendor's risk. n269 The vendee in possession may prosecute actions for injury to the premises during this period. n270 The vendee when entitled to possession may require premises to be delivered in good condition. n271 A number of cases have distinguished between law and equity, letting the vendor bear the loss at law, the vendee in equity. n272 There is division, however. n273 The Uniform Vendor and Purchaser Risk Act throws the risk of loss back on the vendor until the vendee takes possession or receives title. n274 This rule has been adopted by some courts. n275

The leading rule is that the vendee who bears the risk of loss is entitled to the insurance proceeds. n276 This is variously explained as follows:

(a) the vendor collects the insurance as trustee for the vendee who becomes entitled to the insurance upon completing the contract, n277

(b) the vendee is the beneficial owner of the insurance since it stands in the place of land, n278

(c) the insurance benefits the thing insured, not the insurer, n279 and

(d) the vendee should receive proceeds to avoid unjust enrichment of vendor. n280

The Uniform Vendor and Purchaser Risk Law where adopted n281 has shifted this risk to the vendor in specified circumstances.

It is held that a purchaser in possession under a contract requiring fire insurance for the vendor's benefit, and retaining title in the vendor solely as security, must bear fire loss, and cannot rescind the contract because of such loss, n282 but some cases hold that the vendee is entitled to credit received by the vendor on insurance on buildings destroyed by fire; n283 other cases deny the insurance proceeds to the vendee. n284 A few courts have required the vendor to hold the proceeds of a fire insurance policy in trust for the vendee. n285 Other cases refuse to permit the vendee to claim the insurance proceeds. n286 The parties may, however, directly or indirectly contract that the vendee shall benefit from the insurance. n287 The vendee can by contract require vendee's insurer to pay insurance proceeds to vendor in trust for vendee. n288

Authorities divide on the issue of where risk of loss in condemnation falls. n289 Under the weight of authority in condemnation cases the vendee bears the loss but has an equitable interest in the award. n290

§ 96.06(b)(6) Liability for Taxes and Assessments.

Liability for taxes and assessments may be governed by the Uniform Vendor and Purchaser Risk Act, where adopted, n291 but may also be governed by contract between the parties. n292 Generally, the party in possession must pay taxes. n293 But where vendor and vendee expressly agree as to the payment of taxes, they will be bound by the agreement. n294 The parties may agree that the vendor shall pay unmatured assessments, and when such an agreement is made the purchaser may recover the amount of the assessment that exists against the land. n295

Ordinarily, in the absence of a stipulation as to the payment of taxes levied on the land prior to the execution of the contract, and which are a lien on the property, the vendor is liable therefor. n296 A vendor was liable under contract for a street assessment not confirmed until after closing of sale. n297 Especially is this true where the contract requires the vendor to give a title free from encumbrances. n298 The vendor is not liable for taxes becoming a lien after time for conveyance. n299 Where the vendor retains possession or right to possession during the interval between the making of the contract and its performance by the purchaser, the general rule is that the vendor must pay the taxes imposed during such interval, n300 but the vendee in possession is usually held liable for taxes assessed after the contract is made, unless there is a provision in the contract to the contrary. n301 If title is to pass on a fixed date and possession or use of

the land is not surrendered to the purchaser before that date, taxes becoming a lien after the execution of the contract and before the deed is delivered are chargeable to the purchaser. n302 The vendor of land against which unpaid taxes were outstanding has been held not liable for the payment of such taxes after the conveyance of the land. n303 Where the contract is to convey by quitclaim deed, it would seem that the vendor would not be liable to pay taxes due and payable. n304 A purchaser's covenant to pay taxes runs with the land. n305 Where the purchaser fails to pay taxes that the purchaser has agreed to pay, the vendor may pay the taxes to protect vendor's rights, and include such payment and interest thereon in the debt. n306 The holder of an option who is obligated to pay taxes payable during the existence of the option will be liable for taxes payable during the existence of the option, although the law does not require payment until a date subsequent to the expiration of the option. n307 A contract to convey lots free from encumbrance for paving is held to cover all present and future liens for existing paving at the time of the contract. n308 Generally, the purchaser will be allowed to retain out of the consideration the amount paid on unpaid taxes. n309 Although a purchaser has knowledge that the grantor may be subjected to liability for unpaid personal taxes, the purchaser nevertheless takes the property free from the payment of personal taxes, unless previous to such purchase, personal property taxes had become a lien on such real estate in accordance with the statute. n310 In a case where the grantee took property subject to all existing indebtedness thereon, in part consideration for a conveyance made by the grantee to the grantor, it was held that such grantee was not personally liable for the payment of taxes so as to constitute the amount thereof a debt owing from the grantee to the grantor. n311 Where the contract is silent regarding apportionment of taxes, the taxes are to be apportioned according to the statute. n312

§ 96.06(b)(7) Liability for Injury to Vendees and Third Parties.

According to the general and traditional rule, a vendor of real property, after parting with title and possession, is not liable for subsequent injury to the vendee or to third parties resulting from dangerous conditions existing on the premises at the time of sale. n313 It is the duty of the vendee to inspect the premises before buying under the caveat emptor theory. n314 The purchaser takes the burden of injury from conditions known to the purchaser at the time of entering into the contract. n315 The vendor, after parting with title and possession, is no longer liable for subsequent injuries to the vendee or third persons for conditions on the premises. n316 The doctrine of nonliability of the vendor has been distinguished from the continuing liability of the lessor on the basis of the relationship of landlord and tenant with its privity of title which remains after the lessee takes possession. n317 There is no liability to third persons since the vendor has no control over the premises. n318 The vendor, like the lessor, has no duty to third parties, because the vendor has no control over or the right to repair the premises. n319 This rule, again like that of the lessor, is subject to the concealment exception where the vendor has exclusive knowledge of the latent danger. n320 The cases here are in disagreement as to the exact time the liability shifts as regards third persons. One theory dates it as of the time of sale. n321 Another gives the vendee a reasonable time to obtain notice of and repair the dangerous condition. n322 The majority rule holds the vendor still liable if the vendor has knowledge of the dangerous condition and fails to report it to the vendee. n323

This traditional rule has been much modified by both decision and statute. Decisions are imposing more comprehensive affirmative disclosure requirements on vendors, and statutes in many states require disclosures of specific types of conditions on the land. These matters, which are not related specifically to the context of equitable conversion, are treated in § 96.20 *below.*

§ 96.06(b)(8) Liability for Damage.

The vendor in possession is not responsible for depreciation due to normal wear and tear, n324 but is responsible to the vendee for damage caused by trespassers n325 and is also liable for fire caused by the vendor's own negligence. n326 The party in possession is responsible for waste. n327 The vendee in possession may sue a third party trespasser in some states. n328 The vendee in possession has been held entitled to recover all damages resulting to the land from trespasses occurring after the vendee became the purchaser. n329 The owner of the equitable title may bring an action for damages to the freehold. n330 The vendor may sue for protection from such waste as impairs the security. n331

FOOTNOTES:

(n1)Footnote 175. *Cox v. RKA Corp., 753 A.2d 1112 (N.J. 2000); In re Estate of Flynn, 606 N.W.2d 104 (N.D. 2000); Poierce v. Farm Bureau Mut. Ins. Co., 548 N.W.2d 551 (Iowa 1966);* Equitable title passes in Pennsylvania upon the execution of the contract. *Kaufman v. Mellon Nat. Bank & Trust Co., 366 F.2d 326 (3d Cir. 1966).* Gift of proceeds of realty directed to be sold by executor is personally under equitable conversion. *Keller v. Schobert, 300 N.E.2d 800 (Ill. App. Ct. 1973). See* Hermann, *The Doctrine of Equitable Conversion: Conversion by Contract, 12 De Paul L. Rev. 1* (Autumn/Winter 1962); Hancock, *Equitable Conversion and the Land Taboo in Conflict of Laws, 17 Stan. L. Rev. 1095 (July 1965). See also* Church, *Equitable Conversion in Wisconsin, 1970 Wis. L. Rev. 404 (1970).* Equitable conversion. *J. C. Penney Co., Inc, v. Koff, 345 So. 2d 732 (Fla. Dist. Ct. App. 1977); Laurin v. DeCarolis Constr. Co., Inc., 363 N.E.2d 675 (Mass. 1977).* Repudiating equitable conversion. *Cascade Security Bank v. Butler, 567 P.2d 631 (Wash. 1977), 13 Gonz. L Rev. 571 (1978).* Equitable conversion. *State By Pai v. Thom, 563 P.2d 982 (Haw. 1977); Beren Corp. v. Spader, 255 N.W.2d 247 (Neb. 1977); Matter of Houton's Estate, 371 A.2d 735 (N.J. Super. Ct. App. Div. 1977).* Equitable conversion. *In re Marriage of Harshman, 567 P.2d 667 (Wash. Ct. App. 1977).* For the respective interests of the parties to the contract of sale, see the following cases:

Larson v. Metcalf, 207 N.W. 382 (Iowa 1926); Harrington v. Feddersen, 226 N.W. 110 (Iowa 1929); Caltrider v. Caples, 153 A. 445 (Md. 1931); J. J. Newberry Co. v. Shannon, 167 N. E. 292 (Mass. 1929); Summers v. Midland Co., 209 N.W. 323 (Minn. 1926); Benjamin v. Savage, 191 N.W. 408 (Minn. 1923); Thompson Yards v. Bunde, 196 N.W. 312 (N.D. 1923); Sheehan v. McKinstry, 210 P. 167 (Or. 1922); Strong v. Moore, 207 P. 179 (Or. 1922); Hess v. Vinton Colliery Co., 99 A. 218 (Pa. 1916); Dooley v. Stillson, 128 A. 217 (R.I. 1925); See John P. Browne, Student Author, *"Land into Money"--The Doctrine of Equitable Conversion as Applied in Michigan, 37 U. Det. L.J. 258 (1960).*

(n2)Footnote 176. *Holscher v. James, 860 P.2d 646 (Idaho 1993);* Equitable title in vendee of contract subject to the performance of specific conditions. *Citizens First National Bank v. United States, 254 F. Supp. 766 (E.D. Tex. 1966).* Will directing that all property by reduced to cash created an equitable conversion. *Lampman v. Sledge, 502 S.W.2d 957 (Tex. Civ. App. 1973). See* Hermann, *The Doctrine of Equitable Conversion, 12 DePaul L. Rev. 1* (Autumn/Winter 1962). Equitable conversion. *J.C. Penney Co., Inc, v. Koff, 345 So. 2d 732 (Fla. Dist. Ct. App. 1977); Laurin v. DeCarolis Constr. Co. Inc., 363 N.E.2d 675 (Mass. 1977).* Equitable conversion. *Kindred v. Boalbey, 391 N.E.2d 236 (Ill. App. Ct. 1979); Marks v. City of Tucumcari, 595 P.2d 1199 (N.M. 1979); Zent v. Zent, 281 N.W.2d 41 (N.D. 1979).* Equitable conversion. *Didonato v. Reliance Standard Life Ins. Co., 249 A.2d 327 (Pa. 1969). Rodisch v. Moore, 107 N.E. 108 (Ill. 1914).*

(n3)Footnote 177. *Holscher v. James, 860 P.2d 646 (Idaho 1993); Larson v. Metcalf, 207 N.W. 382 (Iowa 1926); People's Water Co. of Millville v. City of Millville, 123 A. 747 (N.J. 1924); Keirsey v. Hirsch, 265 P.2d 346 (N.M. 1954)* (interest of vendee on his death passes to his heirs); *Thomson v. Smith, 63 N.Y. 301 (1875); Leedy v. Ellis County Fair Assn., 110 P.2d 1099 (Okla. 1941); Smith v. Glen Alden Coal Co., 32 A.2d 227 (Pa. 1943); Tremont Co. v. Paasche, 81 So. 2d 489 (Fla. 1955)* (The lien of a materialman in privity only with the vendee does not attach to the vendor's interest unless the terms of the sale required the making of the improvements.); *Bucher v. Young, 158 N.E. 581 (Ind. Ct. App. 1927)* (Equitable conversion operates as of the effective date of the contract.); *Olsen v. Ortell, 59 N.W.2d 473 (Wis. 1953)* (The vendee not being deceased, wife of the vendor has no dower.).

(n4)Footnote 178. *DeShields v. Broadwater, 659 A.2d 300 (Md. 1995); United Bank v. Trout, 480 N.W.2d 742 (N.D. 1992); First Mustang St. Bank v. Garland Bloodworth, Inc., 825 P.2d 254 (Okla. 1991); Sec. St. Bank v. Luebke, 737 P.2d 586 (Or. 1987); Grass v. Ward, 451 S.2d 803 (Ala. 1984).* Vendee acquires equitable title when contract becomes binding. *Peavey v. United States, 214 F. Supp. 934 (D. Kan. 1963).* Balance owed vendor on real estate sales contract passed under vendor's will as realty, not personalty. *Rowe v. Newman, 276 So. 2d 412 (Ala. 1972).* Vendee holds legal title as trustee as security and has a lien on the equitable estate for the purchase price. *Jasper v. Orange Lake Homes, Inc., 151 So. 2d 331 (Fla. Dist. Ct. App. 1963); Payne v. Clark, 187 A.2d 769 (Pa. 1963).* Doctrine of equitable ownership arises upon execution of a contract for sale of real estate. *Rosewood Corp. v. Fisher, 263 N.E.2d 833 (Ill. 1970).* Equitable conversion arising from contract of sale of real estate. *Board of Comm'rs. v. Midwest Associates, Inc.,*

245 N.E.2d 853 (Ind. Ct. App. 1969). Where the United States government had contracted to sell land on executory contract, the real estate as to the vendor was converted by equitable conversion in to personalty from the date for the execution of the contract. *Board of Comm'rs. v. Midwest Associates, Inc., 245 N.E.2d 853 (Ind. Ct. App. 1969).* Purchaser gas equitable title. *Rural Acceptance Corp. v. Pierce, 298 N.E.2d 499 (Ind. Ct. App. 1973).* Where purchasers were in possession under realty contract calling for monthly payments, they were possessed under "equitable" color of title withing the unlawful detainer statute. *Olstowlki v. Schreck, 219 A.2d 210 (N.J. Dist. Ct. 1966).* Vendee does not have legal title while contract remains executory. *Seguin v. Maloney, 253 P.2d 252 (Or. 1953).* In Oregon under the "equitable conversion" theory the vendor's interest is treated as personalty. *Heider v. Dietz, 380 P.2d 619 (Or. 1963).* Equitable conversion arising upon exercise in the contract. *Davis v. Rio Rancho Estates, Inc., 410 F. Supp. 1045 (S.D.N.Y. 1976).* In Massachusetts, however, the rights of the vendee are contract rather than property rights. *Laurin v. DeCarolis Constr. Co., In., 363 N.E.2d 675 (Mass. 1977).* Equitable conversion, *Century Federal Saving & Loan Assn, of Bridgeton v. Van Glahn, 364 A.2d 558 (N.J. Super. Ct. Ch. Div. 1976).* Recognizing equitable conversion. *Matter of Estate of Houghton, 371 A.2d 735 (N.J. Super. Ct. App. Div. 1977).* Insurance proceeds upon destruction of a dwelling were personalty under equitable conversion. *Matter of Estate of McGee, 383 N.E.2d 1012 (Ill. App. Ct. 1978). Mitchell v. White, 14 So. 2d 687 (Ala. 1943); Davis v. Williams, 30 So. 488 (Ala. 1901); Newman v. Mountain Park Land Co., 107 S.W. 391 (Ark. 1908); Smith v. Phenix Ins. Co., 27 P. 738 (Cal. 1891); Maddox v. Rowe, 23 Ga. 431 (1857); Stevenson v. Loehr, 57 Ill. 509 (1871); Knapp.v. Ellyson Realty Co., 5 N.E.2d 973 (Ind. 1937); Hare v. Chisman, 101 N.E.2d 268 (Ind. 1951); McClellan v. Beatty, 53 N.E.2d 1013 (Ind. App. 1944); Indiana Trust Co. v. Sherer, 180 N.E. 603 (Ind. Ct. App. 1932); Kimberlin v. Templeton, 102 N.E. 160 (Ind. Ct. App. 1913); Henkenberns v. Hauck, 236 S.W.2d 703 (Ky. 1951); Lanibert v. Allard, 136 A. 121 (Me. 1927); William Skinner & Sons Ship-Bldg. & Dry-Dock Co. of Baltimore City v. Houghton, 48 A. 85 (Md. 1900); Lamm v. Armstrong, 104 N.W. 304 (Minn. 1905); Savings Trust Co. of St. Louis v. Skain, 131 S.W.2d 566 (Mo. 1939); Martindell v. Fiduciary Counsel, 30 A.2d 281 (N.J. 1943); Mesich v. Board of Commrs. of McKinley County, 129 P.2d 974 (N.M. 1942); Sewell v. Underhill, 90 N.E. 430 (N.Y. 1910); Fouts v. Foudray, 120 P. 960 (Okla. 1912); Miles v. Hemenway, 111 P. 696 (Or. 1910); Hess v. Vinton Colliery Co., 99 A. 218 (Pa. 1916); City of Garland v. Wentzel, 294 S.W.2d 145 (Tex. Civ. App. 1956)* (vendee in a purchase contract acquires an equitable title and can sue in trespass); *Means v. Hamlin, 174 S.W.2d 499 (Tex. Civ. App. 1943); Wilkins v. Somerville, 66 A. 893 (Vt. 1907); Krakow v. Wille, 103 N.W. 1121 (Wis. 1905). See Blakely v. McCrory, 274 P.2d 1013 (Okla. 1954)* (there is no equitable title in vendee until he performs); Gordon v. Hipwell, [1951] 2 D.L.R. 733. *See* Richard E. Baston, Jr., Student Author, Passage of Equitable Title in Texas Under an Executory Contract for the Sale of Land, *5 Sw. L.J. 107 (1951);* M.M. MacIntyre, *Modern Consequences of Earlier Confusion Between a Vendor's Lien and the Interest of a Cestui Que Trust, 30 Can. B. Rev. 1016 (1952).*

(n5)Footnote 179. *Pierce v. Farm Bureau Mut. Ins. Co., 548 N.W.2d 551 (Iowa 1996); Grass v. Ward, 451 S.2d 803 (Ala. 1984); Hudson v. Hudson, 701 S.2d 13 (Ala. Civ. App. 1997); Buck v. Mcnab, 139 So. 2d 734 (Fla. Dist. Ct. App. 1962); United Accounts, Inc. v. Larson, 12 N.W.2d 628 (Minn. 1943).* After contract of sale, only legal title remains in the vendor. *Dean v. Pioneer Co-op. Fire Ins. Co., 231 F.2d 18 (5th Cir. 1956); Sanderson v. Sanderson, 109 S.W.2d 744 (Tex. 1937).* Upon death of a vendeee the vendee's rights may not be canceled without administration of his estate. *Furman v. Sanchez, 523 S.W.2d 253 (Tex. Civ. App. 1975).* Equitable conversion becomes effective the date of the execution of contract. *Clarence M. Bull, inc, v. Goldman, 353 A.2d 661 (Md. Ct. Spec. App. 1976). Smith v. Smith, 172 N.E. 32 (Ill. 1930); Barrell v. Britton, 138 N.E. 579 (Mass. 1923)* (vendor holds legal title subject to equitable obligation to convey on payment); *Petition of S.R.A., Inc., 18 N.W.2d 442 (Minn. 1945).*

When a vendor of real estate enters into an executory agreement to convey title on the payment of the purchase money, he sustains, in substance, the same relation to the vendee as a mortgagee does to a mortgagor. Each has a legal title which, in the absence of stipulations for possession, will maintain an action of ejectment. Each can retain his legal title against the other, until the purchase money or mortgage debt is paid, unless he permits the other to remain in undisturbed possession for 20 years. Yet each is at last but a trustee of the legal title for the mortgagor or vendee, if the purchase money or mortgage debt, as the case may be, is paid, or seasonably tendered. The same mutual rights and remedies, legal and equitable, and the same limitation to the right of recovery, obtains in the one relation and in the other. *Moses v. Johnson, 7 So. 146 (Ala. 1890); Sweeney v. Bixler, 69 Ala. 539 (1881); Chapman v. Lee, 64 Ala. 483*

(1879); Bizzell v. Nix, 60 Ala. 281 (1877); Relfe v. Relfe, 34 Ala. 500 (1859).

(n6)Footnote 180. *Cox v. RKA Corp., 753 A.2d 1112 (N.J. 2000).* In Kansas title passes when binding contract is signed. *Peavey v. United States, 214 F. Supp. 934 (D. Kan. 1963). Mitchell v. White, 14 So. 2d 687 (Ala. 1943).*

(n7)Footnote 181. *Pierce v. Farm Bureau Mut. Ins. Co., 548 N.W.2d 551 (Iowa 1996); Timberlake v. Heflin, 379 S.E.2d 149 (W. Va. 1989).* Risk of loss attaches to the vendee upon the execution of a sale contract for real estate. *Skendzel v. Marshall, 301 N.E.2d 641 (Ind. 1973). Conway v. Moore, 160 P.2d 865 (Cal. Ct. App. 1945); Cole v. Haynes, 62 So. 2d 779 (Miss. 1953); Martindell v. Fiduciary Counsel, 30 A.2d 281 (N.J. 1943); Stevahn v. Meidinger, 57 N.W.2d 1 (N.D. 1952); Lea v. Blokland, 257 P. 801 (Or. 1927); Spratt v. Albert M. Greenfield & Co., 124 A. 126 (Pa. 1924); Biddle Concrete Co. v. McOlvin, 111 S.E. 843 (W. Va. 1922). See Taylor v. Groll, 286 N.W. 88 (Mich. 1939).* When full purchase price is paid, purchaser's title is complete and deed is not necessary. *Anania v. Serenta, 119 A. 554 (Pa. 1923).*

(n8)Footnote 182. *Stiernagle v. County of Waseca, 511 N.W.2d 4 (Minn. 1994); Rush v. Anestos, 661 P.2d 1229 (Idaho 1983); United Accounts, Inc. v. Larson, 121 N.W.2d 628 (N.D. 1963).* Vendee has an equitable interest which can be mortgaged. *Lambert Inc. v. Starbrand Sales Corp., 422 F.2d 621 (7th Cir. 1970).* Illinois, in *Shay v. Penrose, 185 N.E.2d 218 (Ill. 1962),* has repudiated its earlier doctrine of *Chappell v. McKnight, 108 Ill. 570 (1884),* which held there was no equitable conversion until the vendee had completed all of the contract and then specific performance would lie. Equitable title vests in the vendee when the contract is consummated. *Skendzel v. Marshall, 301 N.E.2d 641 (Ind. 1973).* Vendee can mortgage equity and mortgage can foreclose. *Norlin v. Montgomery, 367 P.2d 621 (Wash. 1961).* The vendee's equitable title is not affected by a judgement rendered against the vendor after execution of sales contract. *Clarence M. Bull, Inc. v. Goldman, 353 A.2d 661 (Md. Ct. Spec. App. 1976).* Where the husband and wife and the husband's mother were vendees under a land sales contract and the mother-in-law deeded her interest to the husband and wife each held and undivided on-half equitable interest. *Adamson v. Adamson, 541 P.2d 460 (Or. 1975). Rankin v. Dean, 47 So. 1015 (Ala. 1908); Ehrenstrom v. Phillips, 77 A. 81 (Del. Ch. 1910); Stearns v. Kennedy, 103 N.W. 212 (Minn. 1905); McGregor v. Putney, 71 A. 226 (N.H. 1908); Grider v. Turnbow, 94 P.2d 285 (Or. 1939); Collins v. Creason, 106 P. 445 (Or. 1910); Township of Lower Chichester v. Lower Chichester School Dist., 36 Pa. D. & C. 616 (1940); Mueller v. Novelty Dye Works, 78 N.W.2d 881 (Wis. 1956).*

An agreement for making improvements, being a contingency of a sale contract, which was merged with the terms of the deed and had no effect because it was not expressly carried over in the terms of the deed. *Dependabilt Homes, Inc. v. Grant Wayne Co., 158 N.E.2d 358 (Ohio 1959). See* Rights of a Judgment Creditor Against a Vendor or Vendee Following an Executory Contract for the Sale of Land, *43 Iowa L. Rev. 366 (1958).*

(n9)Footnote 183. *Butler v. Wilkinson, 740 P.2d 1244 (Utah 1987); Langley v. Norris, 167 S.W.2d 603 (Tex. Civ. App. 1942); Smith v. Jones, 60 P. 1104 (Utah 1900).*

The vendor's interest in a contract to sell real estate is not subject to a judgment lien taken against the vendor and docketed after the execution of the land contract. *Mueller v. Novelty Dye Works, 78 N.W.2d 881 (Wis. 1956).*

(n10)Footnote 184. *Est. of Guterman, 476 N.Y.S.2d 1006 (N.Y. Sur. 1984).* Contract to convey vests equitable title in the vendee. *Monsen, Inc. v. Hasselman, 211 N.E.2d 127 (Ill. App. Ct. 1965). Marion Mtg. Co. v. Grennan, 143 So. 761 (Fla. 1932); Hernandez v. Prieto, 162 S.W.2d 829 (Mo. 1942). See* Sidney P. Simpson, Legislative Changes in the Law of Equitable Conversion by Contract, *44 Yale L.J. 754 (1935).*

(n11)Footnote 185. *Conway v. Moore, 160 P.2d 865 (Cal. Ct. App. 1945).*

(n12)Footnote 186. *Hardin v. Boyd, 113 U.S. 756 (1885); Moses v. Johnson, 7 So. 146 (Ala. 1890); Richardson v. Wren, 95 P. 124 (Ariz. 1908); Wells v. Francis, 4 P. 49 (Colo. 1884); Willman v. Friedman, 35 P. 37 (Idaho 1893); Bigler v. Jack, 87 N.W. 700 (Iowa 1901); Petition of S.R.A., Inc., 7 N.W.2d 484 (Minn. 1943). See* Donn A. Southern,

Student Author, Tort Liability of Vendor of Real Property, *24 Tenn. L. Rev. 1170 (1957);* Rights of a Judgment Creditor Against a Vendor or Vendee Following an Executory Contract for the Sale of Land, *43 Iowa L. Rev. 366 (1958).*

(n13)Footnote 187. Where vendee is in default, equitable conversion does not prevent partition by vendor. *Hartman v. Hartman, 297 N.E.2d 199 (Ill. App. Ct. 1973). Davis v. Williams, 30 So. 488 (Ala. 1901); Lamm v. Armstrong, 104 N.W. 304 (Minn. 1905).*

The vendor's interest in the contract to sell real estate is not subject to a judgment lien against the vendor docketed after the execution of the land contract. *Mueller v. Novelty Dye Works, 78 N.W.2d 881 (Wis. 1956).*

(n14)Footnote 188. *In re Booth, 43 B.R. 197 (Bankr. Vt. 1984)* (as vendee makes payments on land contract, vendor becomes trustee for him of legal estate and he becomes in equity owner of land to extent of payments made). Equitable conversion does not apply if parties intended otherwise or equitable considerations intervene. *Hartman v. Hartman, 297 N.E.2d 199 (Ill. App. Ct. 1973). Young v. Latham, 31 So. 448 (Ala. 1902). See Thomas v. Pullman Trust & Sav. Bank, 20 N.E.2d 832 (Ill. App. Ct. 1939); Louisiana Delta Farms Co. v. Davis, 12 So. 2d 213 (La. 1943); Cady v. Kerr, 118 P.2d 182 (Wash. 1941).*

(n15)Footnote 189. *Mid-St. Homes, Inc. v. Moore, 460 S.2d 172 (Ala. Civ. App. 1984); Wickwire v. McFadden, 633 P.2d 278 (Alaska 1981); Stansky v. Shermet, 433 N.Y.S.2d 577 (N.Y. App. Div. 1st Dept. 1980)* (purchaser of real property who enters into possession pending a contract and who finds that title to the property is defective cannot remain in possession, but must either consummate the contract, taking risk of the defects, or give up possession); *Layton v. Hamilton, 107 So. 830 (Ala. 1926); Flint v. Conner, 200 P. 37 (Cal. Ct. App. 1921); Latin-American Bank v. Rogers, 99 So. 546 (Fla. 1924); Consolidated-Progressive Oil Corp. v. Standard Oil Co., 105 So. 36 (La. 1925); Lawrence v. Kennedy, 111 S.E. 142 (W. Va. 1922). See Trembath v. Berner, 148 N.E. 729 (N.Y. 1925).*

(n16)Footnote 190. *Polczynski v. Nowicki, 198 N.W. 976 (Mich. 1924).*

(n17)Footnote 191. *Sabawi v. Carpentier, 778 S.2d 1091 (Fla. App. 5th Dist. 2001); Cmmw. Land Title Ins. Co. v. Nelson, 889 S.W.2d 312 (Tex. App. 1994); First Nat'l Bank v. Enriquez, 634 P.2d 1266 (N.M. 1981); Whitney v. Whitney, 235 P. 293 (Or. 1925).*

(n18)Footnote 192. *In re Est. of Flynn, 606 N.W.2d 104 (N.D. 2000); Wolf Org., Inc. v. Oles, 705 A.2d 40 (Md. App. 1998); Stiernagle v. County of Waseca, 511 N.W.2d 4 (Minn. 1994); Green v. Gustafson, 482 N.W.2d 842 (N.D. 1992); Stapley v. Am. Bathtub Liners, Inc., 785 P.2d 84 (Ariz. App. 1989); Fall v. Eastin, 215 U.S. 1 (1909)* (an equity decree from a Washington court ordering a husband to convey Nebraska land to wife did not cut off the rights of a third party purchaser); *United States v. Sode, 93 F. Supp. 398 (D. Neb. 1950); Boozer v. Blake, 17 So. 2d 152 (Ala. 1944); Willm v. Dedman, 290 S.W. 361 (Ark. 1927); Stromerson v. Averill, 141 P.2d 732 (Cal. 1943); Retsloff v. Smith, 249 P. 886 (Cal. Ct. App. 1926); Orange Cove Water Co. v. Sampson, 248 P. 526 (Cal. Ct. App. 1926); Felt v. Morse, 85 So. 656 (Fla. 1920); Carter v. Johnson, 119 S.E. 22 (Ga. 1923); McClellan v. Beatty, 53 N.E.2d 1013 (Ind. Ct. App. 1944); Duntz v. Ames Cemetery Assn., 186 N.W. 443 (Iowa 1922); O'Brien v. Paulsen, 186 N.W. 440 (Iowa 1922); Durband v. Ney, 191 N.W. 385 (Iowa 1923); Wheeler v. Gahan, 267 S.W. 227 (Ky. 1924); Royal Ins. Co. v. Drury, 132 A. 635 (Md. 1926); Kinsey v. Drury, 126 A. 125 (Md. 1924); Beal v. Attleboro Sav. Bank, 142 N.E. 789 (Mass. 1924); Rosenthal v. Shapiro, 52 N.W.2d 859 (Mich. 1952); Barker v. Klingler, 4 N.W.2d 596 (Mich. 1942); Heppner v. Smith, 213 N.W. 119 (Mich. 1927); Petition of S. R. A., Inc., 18 N.W.2d 442 (Minn. 1945); Mark v. Liverpool & London & Globe Ins. Co., 198 N.W. 1003 (Minn. 1924); Towers v. Lusby, 175 S. W.2d 921 (Mo. Ct. App. 1943); Wandell v. Johnson, 227 P. 58 (Mont. 1924); Epstein v. Kroopf, 218 N.Y.S. 644 (1926); Hoffman v. Hoffman, 208 N.Y.S. 734 (1925); Persico v. Guernsey, 220 N.Y.S. 689 (1927); Davison v. MacDonald, 209 N.Y.S. 145 (1925); Rochester Yacht Club Co. v. Rochester Boat Works, 212 N.Y.S. 572 (1925); Conners v. Winans, 204 N.Y.S. 142 (1924); In re Kirkwood's Will, 51 N.Y.S.2d 490 (1944); Crawford v. Allen, 127 S.E. 521 (N.C. 1925); Henry S. Grinde Corp. v. Klindworth, 44 N.W.2d 417 (N.D. 1950); Thompson Yards v. Bunde, 196 N.W. 312 (N.D. 1923); Semmler v. Beulah Coal Mining Co., 188 N.W. 310 (N.D. 1922); Ware v. Hall, 243 P. 740 (Okla. 1925); Akers v. Brooks, 229 P. 544 (Okla. 1924); Anania v. Serenta,*

119 A. 554 (Pa. 1923); Greenwood v. Maxey, 231 S.W.2d 315 (Tenn. 1950); Mondragon v. Mondragon, 257 S.W. 215 (Tex. 1923); Garland v. Wentzel, 294 S.W.2d 145 (Tex. Civ. App. 1956) (vendee in a purchase contract acquires an equitable title and can sue in trespass); *Langley v. Norris, 167 S.W.2d 603 (Tex. Civ. App. 1942); Payne v. Beaumont, 245 S.W. 94 (Tex. Civ. App. 1922); Sale v. Swann, 120 S.E. 870 (Va. 1924); Harris v. Halverson, 211 N.W. 295 (Wis. 1926);* see the following cases: *Capps v. National Union Fire Ins. Co., 149 N.E. 247 (Ill. 1925); Page v. Loeffler, 84 So. 194 (La. 1920); Richardson v. Caloavello, 3 La. App. 535 (1926); Cullins v. Elerick, 236 P. 886 (Okla. 1925); Feuchtenberger v. Williamson, Carroll & Saunders, 120 S.E. 257 (Va. 1923); Norman v. Levenhagen, 253 P. 113 (Wash. 1927); In re Kuhn's Estate, 233 P. 293 (Wash. 1925).* Equitable title does not pass under undelivered deed where no part of purchase price paid. *Helms v. Helms, 108 So. 509 (Ala. 1926).* The vendor's title is subject to attachment. *Latin-American Bank v. Rogers, 99 So. 546 (Fla. 1924).* Purchaser liable for loss occurring between execution and completion of contract. *Wheeler v. Gahan, 267 S.W. 227 (Ky. 1924).* Purchaser may assign. *Miner v. Zweifel, 245 P. 729 (Or. 1926).* Equitable title passed though vendor's deed void for defective description. *Polk v. Carey, 247 S.W. 568 (Tex. Civ. App. 1922). See* Sidney P. Simpson, Legislative Changes in the Law of Equitable Conversion by Contract, *44 Yale L.J. 754 (1935).*

(n19)Footnote 193. *In re Booth, 43 B.R. 197 (Bankr. Vt. 1984); New York & Cleveland Gas Coal Co. v. Plumer, 96 Pa. 99 (1880).*

(n20)Footnote 194. *Brooks v. Council of Co-owners, 445 S.E.2d 630 (S.C. 1994).* Title does not pass to buyer until contract is completed. *Geat American Ins. Co v. Merchants & Mfrs. Mut. Ins. Co., 423 F.2d 1143 (6th Cir. 1970).* Grantee in an escrow deed has equitable title. *Alworth v. Ellison, 27 S.W.2d 639 (Tex. Civ. App. 1930). Neitch v. Darrough, 145 P.2d 429 (Okla. 1944).*

(n21)Footnote 195. *Martin v. Schindley, 442 S.E.2d 239 (Ga. 1994); Reeve v. Hicks, 28 S.E.2d 649 (Ga. 1944).*

(n22)Footnote 196. *Speiss v. Martin, 232 S.W. 615 (Ky. App. 1921).*

(n23)Footnote 197. *Lamberth v. McDaniel, 506 S.E.2d 295 (N.C. App. 1998); Milbrandt v. Huber, 440 N.W.2d 807 (Wis. App. 1989).* Where vendor resorts to strict foreclosure of land contract, defaulting purchaser permitted to redeem only upon payment of entire balance due or purchase price even though contract contained no acceleration clause making whole sum due and payable upon default. *Kallenback v. Lake Publications, Inc., 142 N.W.2d 212 (Wis. 1966). Hardin v. Boyd, 113 U.S. 756 (1885); Moses v. Johnson, 7 So. 146 (Ala. 1890).*

(n24)Footnote 198. *First Mustang St. Bank v. Garland Bloodworth, Inc., 825 P.2d 254 (Okla. 1991); Adair v. Bracken, 745 P.2d 849 (Utah App. 1987); Asher v. Hull, 250 P.2d 866 (Okla. 1952).*

(n25)Footnote 199. *Evans v. Rancho Royale Hotel Co., 250 P.2d 283 (Cal. Ct. App. 1952).*

(n26)Footnote 200. *Shaffner v. Briggs, 36 Ind. 55 (1871); Cook v. Todd's Estate, 90 N.W.2d 23 (Iowa 1958); Newcomer v. Orem, 2 Md. 297 (1852).*

(n27)Footnote 201. *Jones v. Jones, 1 Bland. 443 (Md. 1827); Greenough v. Small, 20 A. 553 (Pa. 1890).*

(n28)Footnote 202. *Masters v. Masters, 156 N.E. 481 (Ill. 1927).*

(n29)Footnote 203. Lawes v. Bennett, 1 Cox 167, *29 Eng. Rep. 1111.*

(n30)Footnote 204. Brush Grocery Kart, Inc. v. Sure Fire Market, Inc., 2001 LEXIS 749 (Colo. App. 2001); *Eddington v. Turner, 38 A.2d 738 (Del. 1944); Inghram v. Chandler, 161 N.W. 434 (Iowa 1917); Rockland-Rockport Lime Co. v. Leary, 97 N.E. 43 (N.Y. 1911); Smith v. Loewenstein, 34 N.E. 159 (Ohio 1893); In re Bisbee's Estate, 187 N.W. 653 (Wis. 1922).*

(n31)Footnote 205. *In re Est. of Line, 701 N.E.2d 1028 (Ohio App. 1997); Coe v. Hays, 661 A.2d 220 (Md. App. 1995); In re Marr's Estate, 87 A. 621 (Pa. 1913); State v. American Baptist Home Mission Soc., 123 S.E. 440 (W. Va. 1924).*

(n32)Footnote 206. *In re Est. of Line, 701 N.E.2d 1028 (Ohio App. 1997); Coe v. Hays, 661 A.2d 220 (Md. App. 1995); Grove v. Willard, 117 N.E. 489 (Ill. 1917); Ducker v. Wear & Boogher Dry Goods Co., 34 N.E. 558 (Ill. 1893); Porter v. Union Trust Co. of Indianapolis, 108 N.E. 117 (Ind. 1915); Greenman v. McVey, 147 N.W. 812 (Minn. 1914); In re Schilling's Will, 237 N.W. 122 (Wis. 1931).*

(n33)Footnote 207. *Cal. Acad. of Sciences v. County of Fresno, 192 Cal. App.3d 1436 (Cal. App. 5th Dist. 1987)* (discretionary authority granted to executors to sell real property did not permit application of equitable conversion doctrine); *Ducker v. Wear & Boogher Dry Goods Co., 34 N.E. 558 (Ill. 1893); Rockland-Rockport Lime Co. v. Leary, 97 N.E. 43 (N.Y. 1911); In re Tatham's Estate, 95 A. 520 (Pa. 1915); Ford v. Ford, 33 N.W. 188 (Wis. 1887).*

(n34)Footnote 208. *Grissom v. Moore, 6 N.E. 629 (Ind. 1886); Geiger v. Bitzer, 88 N.E. 134 (Ohio 1909).*

(n35)Footnote 209. *Williams v. Haddock, 39 N.E. 825 (N.Y. 1895).*

(n36)Footnote 210. *See* Orville P. Cockerill, Equitable Conversion in California, *1 So. Cal. L. Rev. 309 (1913);* Harlan F. Stone, Equitable Conversion by Contract, *13 Colum. L. Rev. 369 (1928);* C. C. Langdell, Equitable Conversion, *18 Harv. L. Rev. 1, 83, 245 (1904).*

(n37)Footnote 211. *Pierce v. Farm Bur. Mut. Ins. Co., 548 N.W.2d 551 (Iowa 1996); Guzman v. Acuna, 653 S.W.2d 315 (Tex. App. 4th Dist. 1983); St. Life Ins. Co. v. St. ex rel. Kehn, 135 P.2d 965 (Okla. 1942); Taylor v. Herrin 127 S.W.2d 945 (Tex. Civ.App.1939). See Brooks v. Yawkey, 200 F.2d 663 (1st Cir. 1953). Flood loss. Torluemke v. Abernathey, 258 P.2d 282 (Kan. 1953)* (but requiring possession or steps to take possession to invoke rule).

(n38)Footnote 212. *Courtney v. Hanson, 61 A.2d 274 (N.J. Super. 1948).*

(n39)Footnote 213. *Casino Reinvestment Dev. Auth. v. Atlantic City, 18 N.J. Tax 463 (N.J. Tax 1999); Gay v. Radford, 59 S.E.2d 915 (Ga. 1950).*

(n40)Footnote 214. *Casino Reinvestment Dev. Auth. v. Atlantic City, 18 N.J. Tax 463 (N.J. Tax 1999); Ingraham v. Chandler, 161 N.W. 434 (Iowa 1917); Kern v. Robertson, 12 P.2d 565 (Mont. 1932); Tazewell v. Smith's Admin., 22 Va. 313 (1823).* Contra, giving proceeds to the personal representative. *Kerr v. Day, 14 Pa. 112 (1850).*

(n41)Footnote 215. *Casino Reinvestment Dev. Auth. v. Atlantic City, 18 N.J. Tax 463 (N.J. Tax 1999); Newby v. Skinner, 21 N.C. 488 (1836).*

(n42)Footnote 216. *Greenland v. Waddell, 22 N.E. 367 (N.Y. 1889). But see In re Seifert's Est., 242 A.2d 64 (N.H. 1968)* (if will contains positive, unqualified and mandatory direction to sell realty and distribute proceeds, for purposes of distribution under will real property will be treated as personal property even before sale to give effect to intent of testator); *Eq. Trust Co. v. Ward, 48 A.2d 519 (Del. Ch. 1946)* (a positive and unconditional direction to sell realty on the happening of some future event that must take place will usually be regarded in equity under doctrine of "equitable conversion" as a conversion of the realty into personal property at time of testator's death).

(n43)Footnote 217. *Green v. Gustafson, 482 N.W.2d 842 (N.D. 1992); Buck v. Eaman, 18 Ill. 529 (1857).* The vendor's heirs hold title as security for the money payable to the personal representative who may force them to convey to the vendee by joining them in an action for specific performance. *Butman v. Butman, 72 N.E. 821 (Ill. 1904).*

(n44)Footnote 218. *Sutherland v. Harrison, 86 Ill. 363 (1877).*

(n45)Footnote 219. *Sherman v. Flack, 119 N.E. 293 (Ill. 1918); Dickey v. Citizen's St. Bank, 180 N.E. 36 (Ind.*

App. 1932); In re Jackson's Est., 252 N.W. 775 (Iowa 1932); Greenman v. McVey, 147 N.W. 812 (Minn. 1914); Chambers v. Preston, 193 S.W. 109 (Tenn. 1917). The vendee in an action for specific performance should join the heirs and the personal representative. *Potter v. Ellice, 48 N.Y. 321 (1872).*

(n46)Footnote 220. *Stiernagle v. County of Waseca, 511 N.W.2d 4 (Minn. 1994); Oaks v. Kendall, 73 P.2d 1255 (Cal.App. 3d Dist. 1937); Cummings v. Duncan, 134 N.W. 712 (N.D. 1912); Bank of Ohio v. Lawrence, 120 N.E.2d 88.*

(n47)Footnote 221. *Est. of Guterman, 476 N.Y.S.2d 1006 (N.Y. Surr. 1984); Rogers Dev. Co. v. S. Cal. Real Est. Inv. Co., 115 P. 934 (Ohio 1954).*

(n48)Footnote 222. *Cummings v. Duncan, 134 N.W. 712 (N.D. 1912).*

(n49)Footnote 223. *Deshields v. Broadwater, 659 A.2d 300 (Md. 1995); Cannefax v. Clement, 786 P.2d 1377 (Utah App. 1990); Sec. St. Bank v. Luebke, 737 P.2d 586 (Or. 1987); Chain O'Mines, Inc. v. Williamson, 72 P.2d 265 (Colo. 1937); Bauermeister v. McDonald, 247 N.W. 424 (Neb. 1932); Coggshall v. Marine Bank Co., 57 N.E. 1086 (Ohio 1900); Reid v. Gorman, 158 N.W. 780 (S.D. 1916); Heoth v. Dodson, 110 P.2d 845 (Wash. 1941).* Contra, *State Bank v. Sanders, 170 S.W. 86 (Ark. 1914); Gumming v. First Nat'l Bank, 202 N.W. 556 (Iowa 1925); Chisholm. v. Andrews, 57 Miss. 636 (Miss. 1880); Moore v. Byers, 65 N. Car. 240 (N.C. 1871).*

(n50)Footnote 224. *Monroe v. Lincoln City Employees Credit Union, 279 N.W.2d 866 (Neb. 1979)* (judgment against vendor after executing contract for sale but before execution of deed operated as a lien against vendor); *In re Buchner, 205 F. 454 (7th Cir. 1913).*

(n51)Footnote 225. *Thomas v. Kennedy, 24 Iowa 397 (Iowa 1868); Lee v. Wrixon, 79 P. 489 (Wash. 1905).*

(n52)Footnote 226. *Duvall v. 20th Century Coal Co., Inc., 104 F. Supp. 725 (D. Ky. 1952).*

(n53)Footnote 227. *Cox v. RKA Corp., 753 A.2d 1112 (N.J. 2000); Smith v. MRCC Partn., 792 S.W.2d 301 (Ark. 1990); Watson v. Chapman, 55 N.W.2d 555 (Iowa 1952).* In Ohio the interest of the vendor who retains title as security for the purchase price is assignable. *Butcher v. Kagey Lumber Co., 128 N.E.2d 54 (Ohio 1955).*

(n54)Footnote 228. *Cox v. RKA Corp., 753 A.2d 1112 (N.J. 2000); Smith v. MRCC Partn., 792 S.W.2d 301 (Ark. 1990); Lancaster v. Robinson, 256 S.W.2d 330 (Ark. 1953).*

(n55)Footnote 229. *DeFoor v. Northbrook Excess & Surplus Ins. Co., 471 N.E.2d 938 (Ill. App. 1st Dist. 1984); Vogel v. N. Assur. Co., 114 F. Supp. 591 (E.D. Pa. 1953); Insurance - Purchaser Permitted Recovery Under His Own and Vendor's Policy n Excess of Property Value, 102 U. Pa. L. Rev. 677 (1954).*

(n56)Footnote 230. *Est. of Phillips v. Nyhus, 874 P.2d 154 (Wash. 1994)* (joint tenancy not severed by sale); *In re Est. of Baker, 78 N.W.2d 863 (Iowa 1956)* (joint tenancy severed by sale). *See also Matter of Robinson, 791 S.W.2d 844 (Mo. App. 1990)* (making of an executory contract of sale by joint tenants does not equitably convert proceeds of sale to one of joint tenancy); *Watson v. Watson, 126 N.E.2d 220 (Ill. 1955)* (a joint tenancy is not severed by sale of the realty).

(n57)Footnote 231. *Matter of Est. of Martinek, 488 N.E.2d 1332 (Ill. App. 2d Dist. 1986); Buford v. Dahlke, 62 N.W.2d 252 (Neb. 1954);* Leland Stuart Beck, Student Author, Real Property: Cotenancy: Effect of a Contract to Convey by Joint Tenants: *Buford v. Dahlke, 150 Neb. 39, 62 N.W.2d 252 (1954), 41 Cornell L.Q. 154 (1955).*

(n58)Footnote 232. *Oscsenda v. Oscsenda, 63 A.2d 897 (N.J. Super. 1949).*

(n59)Footnote 233. *Matlack v. Arend, 63 A.2d 812 (N.J. Super. 1949).*

(n60)Footnote 234. *In re Heuer's Est., 85 N.E.2d 857 (Ill. App. 1st Dist. 1949).*

(n61)Footnote 235. *Courtney v. Hanson, 65 A.2d 530 (N.J. Super. App. Div. 1949).*

(n62)Footnote 236. *Casino Reinvestment Dev. Auth. v. Atlantic City, 18 N.J. Tax 463 (N.J. Tax 1999); Horton v. Horton, 62 A.2d 503 (N.J. Super. 1949).*

(n63)Footnote 237. Lien does not attach, *DeShields v. Broadwater, 659 A.2d 300 (Md. 1995).* Lien attaches, majority rule. *Chain O'Mines, Inc. v. Williamson, 72 P.2d 265 (Colo. 1937); Bauermeister v. McDonald, 247 N.W. 424 (Neb. 1932); Heath v. Dodson, 110 P.2d 845 (Wash. 1941).* Contra, *State Bank v. Sanders, 170 S.W. 86 (Ark. 1914); Cumming v. First Nat'l Bank, 202 N.W. 556 (Iowa 1925).*

(n64)Footnote 238. *Chase v. Swayne, 30 S.W. 1049 (Tex. 1895).*

(n65)Footnote 239. *Green v. Green, 27 S.E. 952 (S.C. 1897).*

(n66)Footnote 240. *St. Farm Gen. Ins. Co. v. Stewart, 681 N.E.2d 625 (Ill. App. 1st Dist. 1997)* (an exercise of eminent domain does not relieve vendee from a duty to pay the purchase price, nor may he recover what he has already paid); *Hill v. Doerfler, 47 P.2d 260 (Or. 1935); Rands v. Ewing, 250 P.2d 921 (Or. 1953).*

(n67)Footnote 241. *Panushka v. Panushka, 349 P.2d 450 (Or. 1960).*

(n68)Footnote 242. *O'Neill v. Philadelphia Zoning Bd. of Adjustment, 120 A.2d 901 (Pa. 1956);* Joseph M. Smith, Student Author, Zoning - Non-Conforming Use - Requested Change to Less Undesirable Use, *2 Vill. L. Rev. 140 (1956).*

(n69)Footnote 243. *In re Bernhard's Est., 112 N.W. 86 (Iowa 1907); Farrar v. Earl of Winterton, 5 Beav. 1, 49 Eng. Rep. 476 (M.R. 1842).*

(n70)Footnote 244. Subject to execution. *Ohio Cas. Ins. Co. v. Holz & Holz, Inc., 129 N.W.2d 330 (Wis. 1964).* Not subject to execution. *Snow Bros. Hardware Co. v. Ellis, 21 S.W.2d 162 (Ark. 1929); Jones v. Howard, 43 S.W. 635 (Mo. 1897).* Subject to execution but payments by vendee take priority. *May v. Emerson, 96 P. 454 (Or. 1908).*

(n71)Footnote 245. *Butler v. Wilkinson, 740 P.2d 1244 (Utah 1987); Evins v. Sandefur-Julian Co., 98 S.W. 677 (Ark. 1906); Joseph v. Donovan, 157 A. 638 (Conn. 1931); Thomassen v. Degoey, 110 N.W. 581 (Iowa 1970); Hook v. N.W. Thresher Co., 98 N.W. 463 (Minn. 1904); Higgins v. McConnell, 29 N.E. 978 (N.Y. 1892); First Nat'l Bank v. Logue, 106 N.E. 21 (Ohio 1914).*

(n72)Footnote 246. *Westfair Corp. v. Kuelz, 280 N.W.2d 364 (Wis. App. 1979); Seipoid v. Gibbud, 148 A. 328 (Conn. 1930); Fitzhugh v. Smith, 62 Ill. 486 (Ill. 1872).*

(n73)Footnote 247. *Sherman v. Quinn, 192 P.2d 17 (Cal. 1948).*

(n74)Footnote 248. *Wood v. Donohue, 736 N.E.2d 556 (Ohio App. 1st Dist. 1999); Miller v. Waddingham, 27 P. 750 (Cal. 1891).*

(n75)Footnote 249. *Adams v. Smith, 232 S.W.2d 482 (Mo. 1955).*

(n76)Footnote 250. *Stapley v. Am. Bathtub Liners, Inc., 785 P.2d 84 (Ariz. App. 1989); Chelan County v. Wilson, 744 P.2d 1106 (Wash. App. 1987); Rourke v. Cloud, 398 S.2d 57 (La. App. 3d Cir. 1981); Burnett v. Caldwell, 76 U.S. 290 (1869);* Nelson v. Shelby Mfg. & Imp. Co., *11 S. 695 (Ala. 1892); Mason v. Curro, 41 A.2d 164 (D.C. App. 1945); Nuquist v. Bauscher, 227 P.2d 83 (Idaho 1951); Coleman v. Connolly, 139 Ill. App. 383 (Ill. App. 2d Dist. 1908); Doe ex dem. Brumfield v. Brown, 7 Blackf. 142 (Ind. 1844); In re Boyle's Est., 134 N.W. 590 (Iowa 1912); Duff v. United States Trust Co., 97 N.E.2d 189 (Mass. 1951); Foley v. Wyeth, 84 Mass. 131 (Mass. 1861); Emmons v. State, 9 N.W.2d 657 (Mich. 1943); Way v. Root, 140 N.W. 577 (Mich. 1913); Teller v. Schulz, 108 N.Y.S. 325 (N.Y. App. Div. 2d Dept.*

1908); Sievers v. Brown, 56 P. 171 (Or. 1899); Weakland v. Hoffman, 50 Pa. 513 (Pa. 1865); White v. Coates, 137 P.2d 113 (Wash. 1943); Welch v. Hover-Schiffner Co., 75 Wash. 130 (Wash. 1913); N.W. Iron Co. v. Meade, 21 Wis. 474 (Wis. 1867); Frank v. Stratford-Handcock, 77 P. 134 (Wyo. 1904). See Liability of Vendor of Real Property for Personal Injuries, *44 Minn. L. Rev. 144 (1959).*

(n77)Footnote 251. *Vatterott v. Kay, 672 S.W.2d 733 (Mo. App. 1984); Burke v. Scharf, 124 N.W. 79 (N.D. 1909). See Stevens v. Fitzpatrick, 118 S.W. 51 (Mo. 1909).*

(n78)Footnote 252. *Dixon v. O'Connor, 143 N.W.2d 364 (Neb. 1966); Hoover v. Odle, 250 P. 993 (Ariz. 1926);* Warfield v. Cotton, *90 S. 374 (La. 1922); Barrell v. Britton, 148 N.E. 134 (Mass. 1925); Emmons v. St. Land Off. Bd., 9 N.W.2d 657 (Mich. 1943); Sanders v. Detlaff, 188 N.W. 446 (Mich. 1922); Stukenholtz v. Parriott, 202 N.W. 873 (Neb. 1925); Hoffman v. Hoffman, 208 N.Y.S. 734 (N.Y. App. Div. 4th Dept. 1925); Milligan Coal Co. v. Polowy, 124 S.E. 674 (W. Va. 1924). See* Forrester v. Granberry, *100 S. 551 (Ala. 1924); Lee v. Shide, 288 N.W. 556 (N.D. 1939).*

(n79)Footnote 253. *Jaycox v. E.M. Harris Bldg. Co., 754 S.W.2d 931 (Mo. App. 1988); Gold v. Phelan, 208 P. 1001 (Cal. App. 2d Dist. 1922); First Nat'l Bank v. Mont. Emporium Co., 197 P. 994 (Mont. 1921).*

(n80)Footnote 254. *In re Marriage of Cloney, 110 Cal. Rptr. 2d 615 (Cal. App. 1st Dist. 2001); Walker v. Cosgrove, 273 S.W. 450 (Ky. App. 1925). See Norman v. Wengert, 187 N.W. 708 (Minn. 1922).*

(n81)Footnote 255. *Chomko v. Patmon, 563 A.2d 311 (Conn. App. 1989), cert. denied, 565 A.2d 539 (Conn. 1989)* (a bond for deed is "an installment sale contract of real property where the buyer takes possession of the property but does not receive fee simple title of the property until a later date."); Able v. Gunter, *57 S. 464 (Ala. 1912).*

(n82)Footnote 256. *Phillis v. Gross, 143 N.W. 373 (S.D. 1913). See* Valley Camp, W.O.W. v. Bethany Lodge, F. & A.M., *190 S. 833 (La. App. 2d Cir. 1939).*

(n83)Footnote 257. *Watson v. Calvin, 9 S.W.3d 571 (Ark. App. 2000); Am.-Italian Bldg. & Loan Assn. v. Liotta, 189 A. 118 (N.J. 1937).*

(n84)Footnote 258. *Davis v. Martin Stave Co., 168 S.W. 553 (Ark. 1914).* Possession alone is not enough. *Weir v. Weir, 122 N.E. 868 (Ill. 1919); Harrison v. Eassom, 176 N.W. 460 (Mich. 1920).*

(n85)Footnote 259. *Mann v. Mann, 671 N.E.2d 73 (Ill. App. 3d Dist. 1996); McCall v. Morgan, 14 S.2d 374 (Ala. 1943).*

(n86)Footnote 260. *Glenn v. Price, 86 N.E.2d 542 (Ill. App. 3d Dist. 1949).*

(n87)Footnote 261. *See* generally, Randy R. Koenders, Risk of Loss By Casualty Pending Contract For Conveyance of Real Property--Modern Cases, *85 A.L.R.4th 233 (1991). See* Harlan F. Stone, Equitable Conversion by Contract, *13 Colum. L. Rev. 369 (1913);* Harry W. Vanneman, Risk of Loss, in Equity, Between the Date of Contract to Sell Real Estate and Transfer of Title, *8 Minn. L. Rev. 127 (1924);* Sidney P. Simpson, Legislative Changes in the Law of Equitable Conversion by Contract, *44 Yale L.J. 559, 754 (1935).*

(n88)Footnote 262. *Coolidge & Sickler, Inc. v. Regn, 80 A.2d 554 (N.J. 1951).*

(n89)Footnote 263. *Riddle, ex rel. Riddle v. Elk Creek Salers, Ltd., 2001 Mo. App. LEXIS 1408 (Mo. App. 2001); Wood v. Donohue, 736 N.E.2d 556 (Ohio App. 1st Dist. 1999); Munshower v. Martin, 641 S.2d 909 (Fla. App. 3d Dist. 1994); Holsher v. James, 860 P.2d 646 (Idaho 1993); Stapley v. Am. Bathtub Liners, Inc., 785 P.2d 84 (Ariz. App. 1989);* Winterchase Townhomes Inc. v.*Koether, 387 S.E.2d 361 (Ga. App. 1989); Ala. Farm Bureau Mut. Ins. Serv., Inc. v. Nixon, 105 S.2d 643 (Ala. 1958); Ross v. Bumstead, 173 P.2d 765 (Ariz. 1946); Hough v. City Fire Ins. Co., 29 Conn. 10 (Conn. 1860); Thompson v. Norton, 14 Ind. 187 (Ind. 1860); O'Brien v. Paulsen, 186 N.W. 440 (Iowa 1922);*

Davidson v. Hawkeye Ins. Co., 32 N.W. 514 (Iowa 1887); Torluemke v. Abernathey, 258 P.2d 282 (Kan. 1953); G.T. Van Bebber, Student Author, Vendor and Purchaser - Modification or Recission of Contract - Injury to Property, 2 U. Kan. City L. Rev. 301 (1954); *Martin Grocery Co. v. E. Meng Co., 279 S.W. 661 (Ky. App. 1926); Wheeler v. Gahan, 267 S.W. 227 (Ky. App. 1924); Cottingham v. Fireman's Fund Ins. Co., 14 S.W. 417 (Ky. App. 1890); Brewer v. Herbert, 30 Md. 301 (Md. 1869); Libman v. Levenson, 128 N.E. 13 (Mass. 1920); Mahan v. Home Ins. Co., 226 S.W. 593 (Mo. App. 1920); McGinley v. Forrest, 186 N.W. 74 (Neb. 1921); Cropper v. Brown, 74 A. 987 (N.J. Ch. 1909); Coolidge & Sickler, Inc. v. Regn, 80 A.2d 554 (N.J. 1951)* (under a contract of sale of realty, purchaser's risk of loss or destruction under the doctrine of equitable conversion is subject to modification by terms of the contract, and the present contract called for conveyance of property in the same condition as existed at the time of execution of the contract); *Mesich v. McKinley County Bd of Commrs., 129 P.2d 974 (N.M. 1942); Sewell v. Underhill, 90 N.E. 430 (N.Y. 1910); Persico v. Guernsey, 220 N.Y.S. 689 (N.Y. Sup. 1927), aff'd, 225 N.Y.S. 890 (N.Y. App. Div. 4th Dept. 1927); Farmers Tobacco Warehouse Co. v. E. Car. Warehouse Corp., 117 S.E. 625 (N.C. 1923); Sutton v. Davis, 55 S.E. 844 (N.C. 1906); Gunsch v. Gunsch, 71 N.W.2d 623 (N.D. 1955)* (vendee entitled to insurance recovered by vendor); *Woodward v. McCollum, 111 N.W. 623 (N.D. 1907); Oak Bldg. & Roofing Co. v. Susor, 166 N.E. 908 (Ohio App. 6th Dist. 1929); Dunn v. Yakish, 61 P. 926 (Okla. Terr. 1900); Spratt v. Albert M. Greenfield & Co., 124 A. 126 (Pa. 1924); Parcell v. Grosser, 1 A. 909 (Pa. 1885); Russell v. Elliott, 186 N.W. 824 (S.D. 1922); Barker v. Smith, 35 Tenn. 289 (Tenn. 1855); N. Tex. Realty & Constr. Co. v. Lary, 136 S.W. 843 (Tex. Civ. App. 1911); Va. Ry. Co. v. Jeffries' Adminstr., 66 S.E. 731 (Va. 1909); Maudru v. Humphreys, 98 S.E. 259 (W. Va. 1919); Wetzler v. Duffy, 47 N.W. 184 (Wis. 1890); Rayner v. Preston, 18 Ch. Div. 1 (Ch. 1879); Paine v. Meller, 6 Ves. Jr. 347, 31 Eng. Rep. 1088. See* Cavell v. Trichell, *100 S. 249 (La. 1924); Hawkes v. Kehoe, 79 N.E. 766 (Mass. 1907).* A vendee under an executory land contract is entitled to recover fire insurance taken out by the vendee, even where the vendor bears the risk of loss. *Lampesis v. Travelers Ins. Co. 143 A.2d 104 (N.H. 1958).* Where the vendee is required to keep the property insured in the vendor's name, New York requires that the proceeds be applied on the purchase price. *Raplee v. Piper, 3 N.Y.2d 179 (N.Y. 1957).* The vendor is required to turn over to the vendee fire insurance proceeds only if the contract required the purchaser to insure. The vendee must take the damaged property and pay the full price unless the contract provides otherwise. *Raplee v. Piper, 3 N.Y.2d 179 (N.Y. 1957).* Under the Uniform Vendor and Purchaser Risk Law the risk of loss falls on the vendee only when he has taken possession or title. N.Y. [Real Property Law] § 240-a. *Rosenbloom v. Md. Ins. Co., 15 N.Y.S.2d 304 (N.Y. App. Div. 4th Dept. 1939).* Contract may place damage on seller. *Pellegrino v. Giuliani, 193 N.Y.S. 258 (N.Y. Sup. 1922).* The doctrine that risk of loss falls on the vendee has been changed by some statutes. *N.Y. Medical College v. 15-21 E. 111th St. Corp., 90 N.Y.S.2d 591 (N.Y. Sup. 1949)* (applying statute to judicial sales). *See* L. Tennent Lee, III & Jerry B. Tucker, Student Authors, Risk of Loss Under an Executory Contract for the Sale of Realty in Alabama, *12 Ala. L. Rev. 379 (1960);* Harlan F. Stone, Equitable Conversion by Contract, *13 Colum. L. Rev. 369 (1913).*

(n90)Footnote 264. *Sharbono v. Darden, 715 P.2d 433 (Mont. 1986); Phillips v. Bacon, 267 S.E.2d 249 (Ga. 1980); Anderson v. Yaworski, 181 A. 205 (Conn. 1935); Capps v. Nat'l Union Fire Ins. Co., 149 N.E. 247 (Ill. 1925); Durham v. McCready, 151 A. 544 (Me. 1930); Wells v. Calnan, 107 Mass. 514 (Mass. 1871); Bissonnette v. Keyes, 64 N.E.2d 926 (Mass. 1946); Kinney v. Hickox, 38 N.W. 816 (Neb. 1888); Lampesis v. Travelers Ins. Co., 143 A.2d 104 (N.H. 1958); Connell v. Sav. Bank, 129 A. 803 (R.I. 1925).* Where the contract provided that insurance would be taken out by the vendee in the name of the vendor, the vendor was required to apply to the balance of the contract price the proceeds of a fire policy in the vendor's name, the premiums of which had been paid by the vendee under the contract. *Raplee v. Piper, 3 N.Y.2d 179 (N.Y. 1957).*

(n91)Footnote 265. *Conlin v. Osborn, 120 P. 755 (Cal. 1911); Gould v. Murch, 70 Maine 288 (Me. 1879); Libman v. Levenson, 128 N.E. 13 (Mass. 1920); Hawkes v. Kehoe, 79 N.E. 766 (Mass. 1907); Bautz v. Kuhworth, 1 Mont. 133 (Mont. Terr. 1869); Wilson v. Clark, 60 N.H. 352 (N.H. 1880); Powell v. Dayton, S. & G. R.R. Co., 8 P. 544 (Or. 1885).*

(n92)Footnote 266. *Powell v. Dayton, S. & G. R.R. Co., 8 P. 544 (Or. 1885).*

(n93)Footnote 267. *Osterloh v. Osterloh, 285 N.W. 742 (Wis. 1939).*

(n94)Footnote 268. *Brownell v. Board of Educ., 146 N.E. 630 (N.Y. 1925). See Rhomberg v. Zapf, 208 N.W. 276 (Iowa 1926).*

(n95)Footnote 269. *Sposit v. Navratil, 595 N.E.2d 467 (Ohio App. 8th Dist. 1991); C. Com. Oil Co. v. Indian Terr. Illuminating Oil Co., 41 P.2d 683 (Okla. 1935).*

(n96)Footnote 270. *Alechoff v. Los Angeles Gas & Elec. Corp., 257 P. 569 (Cal. App. 2d Dist. 1927); Mathews v. Silsby Bros., 201 N.W. 94 (Iowa 1924); Matthews v. James Lumber Co., 122 S.E. 480 (N.C. 1924). See S. Lumber Co. v. Edwards, 117 S.E. 252 (Ga. App. 1923).*

(n97)Footnote 271. *Rhomberg v. Zapf, 208 N.W. 276 (Iowa 1926).*

(n98)Footnote 272. *First Mustang St. Bank v. Garland Bloodworth, Inc., 825 P.2d 254 (Okla. 1991); Matter of Houghton's Est., 371 A.2d 735 (N.J. Super. App. Div. 1977); Lombard v. Chicago Sinai Congregation, 64 Ill. 477 (Ill. 1872)* (dictum). Vendee bears the risk in equity. *O'Brien v. Paulsen, 186 N.W. 440 (Iowa 1922); Brewer v. Herbert, 30 Md. 301 (Md. 1869); Snyder v. Murdock, 51 Mo. 175 (Mo. 1872); Bautz v. Kuhworth, 1 Mont. 133 (Mont. Terr. 1869); McGinley v. Forrest, 186 N.W. 74 (Neb. 1921)* (dictum); *Persico v. Guernsey, 220 N.Y.S. 689 (N.Y. Sup. 1927), aff'd, 225 N.Y.S. 890 (N.Y. App. Div. 4th Dept. 1927); Sewell v. Underhill, 90 N.E. 430 (N.Y. 1910); Dunn v. Yakish, 61 P. 926 (Okla. Terr. 1900).* Vendor bears the risk at law. Ford v. Russell, *128 S. 310 (La. App. 1930); Durham v. McCready, 151 A. 544 (Me. 1930); Hawkes v. Kehoe, 79 N.E. 766 (Mass. 1907); Smith v. McCluskey, 45 Barb. 610 (N.Y. Sup. 1866); Wicks v. Bowman 5 Daly 225* (N.Y.); *Powell v. Dayton, S. & G. R.R. Co., 8 P. 544 (Or. 1885); Ashford v. Reese, 233 P. 29 (Wash. 1925), rev'd in part on other grounds, Cascade Sec. Bank v. Butler, 567 P.2d 631 (Wash. 1977). See* 7 Williston on Contracts, § 928 et seq. (3d. ed. 1963); Who Must Bear Loss Due to Destruction or Deterioration of Real Property Pending Contract for its Conveyance?, 22 A.L.R. 575 (1923); William A. Keener, The Burden of Loss, *1 Colum. L. Rev. 1 (1901);* Harlan F. Stone, Equitable Conversion by Contract, *13 Colum. L. Rev. 369 (1913);* Nelson R. Pirnie, Student Author, Equity: Risk of Loss in Executory Contract for the Sale of Realty, *6 Cornell L.Q. 111 (1920);* Risk of Loss After an Executory Contract for the Sale of Real Estate, *23 Harv. L. Rev. 476 (1909);* Rights and Liabilities of Parties to an Executory Contract for the Purchase of Real Estate, *12 Iowa L. Rev. 179 (1927);* Vendor and Purchaser - Contract to Sell Real Estate - Risk of Loss Pending Conveyance, *6 Minn. L. Rev. 513 (1922);* Harry W. Vanneman, Risk of Loss in Equity Between the Date of Contract to Sell Real Estate and Transfer of Title, *8 Minn. L. Rev. 127 (1924);* S.D.C., Student Author, Accidental Loss to Real Estate Occurring Between Contract of Sale and Execution of Conveyance, *58 U. Pa. L. Rev. 561 (1910);* Morris Karon, Student Author, Vendor and Purchaser - Risk of Loss Under an Executory Contract for Sale of Real Estate, *2 Wis. L. Rev. 174 (1922);* Executory Contracts for the Sale of Real Property, Should the Risk of Loss be Upon the Vendee From the Time of Agreement?, *23 Yale L.J. 266 (1914).*

(n99)Footnote 273. Loss falls on vendor. *Phinizy v. Guernsey, 36 S.E. 796 (Ga. 1900); Gould v. Murch, 70 Maine 288 (Me. 1879); Hawkes v. Kehoe, 79 N.E. 766 (Mass. 1907); Libman v. Levenson, 128 N.E. 13 (Mass. 1920); Kinney v. Hickox, 38 N.W. 816 (Neb. 1888); Wilson v. Clark, 60 N.H. 352 (N.H. 1880); Smith v. McCluskey, 45 Barb. 610 (N.Y. Sup. 1866); Wicks v. Bowman, 5 Daly 225* (N.Y.); *Powell v. Dayton, S. & G. R.R. Co., 8 P. 544 (Or. 1885); Elmore v. Stephens-Russell Co., 171 P. 763 (Or. 1918); Huguenin v. Courtenay, 21 S.C. 403 (S.C. 1884).*

(n100)Footnote 274. *See* the following statutes: Cal. Civ. Code, § 1662 (Deering); Haw. Rev. Stat., § 203-1 (1955); Mich. Comp. Laws § 565.701-565.703 (1948); N.Y. [Real Property Law] § 240-a; N.C. Gen. Stat., § 39-37-39-39; Or. Rev. Stat. § 93.290; S.D. Codified Laws § 37-1807 (1939); Wis. Stat. § 235.72 (1961).

(n101)Footnote 275. *Ware v. Security First Nat'l Bank, 61 P.2d 936 (Cal. 1936); Phinizy v. Guernsey, 36 S.E. 796 (Ga. 1900); Oakes v. Wingfield, 99 S.E.2d 241 (Ga. App. 1957)* (otherwise where vendee is in possession); *Good v. Jarrard, 76 S.E. 698 (S.C. 1912); Bowdle v. Jencks, 99 N.W. 98 (S.D. 1904); Appleton Elec. Co. v. Rogers, 228 N.W. 505 (Wis. 1930).*

(n102)Footnote 276. *Guzman v. Acuna, 653 S.W.2d 315 (Tex. App. 4th Dist. 1983); Dolan v. Spencer, 21 P.2d 411 (Colo. 1933)* (permitting lessee optionee to take insurance premiums); Nelson Properties v. Denham, *167 S. 35 (Fla. 1936)* (permitting lessee-optionee to take insurance premiums); *Brady v. Welsh, 204 N.W. 235 (Iowa 1925); Russell v. Elliott, 186 N.W. 824 (S.D. 1922).*

(n103)Footnote 277. *Pasker v. Harleysville Mut. Ins. Co., 469 A.2d 41 (N.J. Super. App. Div. 1983); Guzman v. Acuna, 653 S.W.2d 315 (Tex. App. 4th Dist. 1983); William Skinner & Sons Ship Bldg. & Dry-Dock Co. v. Houghton, 48 A. 85 (Md. 1900).*

(n104)Footnote 278. *Millville Aerie, No. 1836, Fraternal Order of Eagles v. Weatherby, 88 A. 847 (N.J. Ch. 1913).*

(n105)Footnote 279. *Dolan v. Spencer, 21 P.2d 411 (Colo. 1933).*

"The courts have also announced a rule * * * to the effect that when the language employed in an insurance contract is ambiguous, or when a doubt arises in respect to the application, exceptions to, or limitations of, liability thereunder, they should be interpreted most favorably to the insured, or to the beneficiary or mortgagee to whom the loss is payable as his interest may appear. Such contracts are to be interpreted in the light of the fact that they are drawn by the insurer, and are rarely understood by the insured, to whom every rational indulgence should be given, and in whose favor the policy should be liberally construed. Where the language and terms of a policy are framed and formulated by the insurer, every ambiguity and uncertainty therein should be resolved in favor of the insured.

* * * Policies of title insurance furnish no exception to the general rules of construction." *Coast Mut. Bldg.-Loan Assn. v. Security Title Ins. & Guarantee Co., 57 P.2d 1392 (Cal. App. 2d Dist. 1936); Marandino v. Laws. Title Ins. Corp., 159 S.E. 181 (Va. 1931).*

(n106)Footnote 280. *Shaw v. Cramton, 239 N.W. 366 (Mich. 1931)* (applying proceeds of insurance to the debt); *World Exhibit Corp. v. City Bank Farmers Trust Co., 61 N.Y.S.2d 889 (N.Y. App. Div. 2d Dept. 1946)* (allowing vendee to have specific performance with abatement of purchase price to extent of insurance proceeds); *Gunsch v. Gunsch, 71 N.W.2d 623 (N.D. 1955)* (if vendor insures he must apply the proceeds toward the contract price). The lessee with option to buy was entitled to claim credit on the purchase price for the proceeds of fire insurance received by the lessor when the lessee exercised his option. *Gard v. Razanskas, 85 N.W.2d 612 (Iowa 1957).* If the contract requires vendee to carry fire insurance, the proceeds received by the vendor are applicable on the purchase price, but not if the vendor has on his own account taken out his own insurance. *Raplee v. Piper, 3 N.Y.2d 179 (N.Y. 1957).* Minority adhering to *Rayner v. Preston, 18 Ch. Div. 1 (Ch. 1879)* (divided opinion).

(n107)Footnote 281. Under the Uniform Vendor and Purchaser Risk Act, the risk of loss is in the party in possession at the time of loss. Unif. Vendor and Purchaser Risk Act, 9C U.L.A. 313. Adopted by: Cal. Civ. Code, § 1662 (Deering); Haw. Rev. Stat., § 203-1 (1955); Mich. Comp. Laws § 565.701-565.703 (1948); N.Y. [Real Property Law] § 240-a; N.C. Gen. Stat., § 39-37-39-39; Or. Rev. Stat. § 93.290; S.D. Codified Laws § 37-1807 (1939); Wis. Stat. § 235.72 (1961).

(n108)Footnote 282. *Kelly v. Smith, 24 P.2d 471 (Cal. 1933).*

(n109)Footnote 283. *Hillard v. Franklin, 41 S.W.3d 106 (Tenn. App. 2000)* (vendee entitled to have insurance proceeds credited toward the purchase price); *Gunsch v. Gunsch, 71 N.W.2d 623 (N.D. 1955).* An optionee exercising option after partial loss is entitled to have insurance proceeds applied against purchase price. *Dolan v. Spencer, 21 P.2d 411 (Colo. 1933); Williams v. Lilley, 34 A. 765 (Conn. 1895);* Nelson Props. v. Denham, *167 S. 35 (Fla. 1936); Gard v. Razanskas, 85 N.W.2d 612 (Iowa 1957);* Charles Hoffman, Student Author, Optionee Entitled to Insurance Proceeds On Destroyed Leased Premises When He Exercises the Option After Property is Destroyed, *9 Syracuse L. Rev. 321 (1958); William Skinner & Sons Ship Bldg. & Dry-Dock Co. v. Houghton, 48 A. 85 (Md. 1900).* Where the risk of loss falls upon the vendor, either by reason of contract, stipulation or rule of law, his right to the insurance is indisputable.

Phinizy v. Guernsey, 36 S.E. 796 (Ga. 1900); Adams v. N. Am. Ins. Co., 96 N.E. 1094 (Mass. 1912). The vendor holds the insurance in trust for the purchaser. *Brady v. Welsh, 204 N.W. 235 (Iowa 1925);* Vendor and Purchaser - Insurance - Vendee's Claim to Insurance Money Received by Vendor in Absence of Assignment, *35 Yale L.J. 240 (1925); Russell v. Elliott, 186 N.W. 824 (S.D. 1922);* Vendor and Purchaser - Fire Insurance - Right of Vendee to Proceeds of Policy Taken Out By Vendor, *6 Minn. L. Rev. 607 (1922).* See *Shaw v. Cramton, 239 N.W. 366 (Mich. 1931).* Vendor need not credit vendee with purchase price where not required by the contract to insure. *Raplee v. Piper, 3 N.Y.2d 179 (N.Y. 1957).*

(n110)Footnote 284. *Upham v. Lowry, 485 N.Y.S.2d 680 (N.Y. Sup. 1985); Brownell v. Bd. of Educ., 146 N.E. 630 (N.Y. 1925).* Modified to give the vendee the proceeds if he had paid the premiums on a policy taken out in the vendor's name. *Raplee v. Piper, 3 N.Y.2d 179 (N.Y. 1957);* Rudolph v. Parr, Student Author, Vendor's Insurance Applied to Reduce Purchase Price, *9 Syracuse L. Rev. 155 (1957).*

(n111)Footnote 285. *Guzman v. Acuna, 653 S.W.2d 315 (Tex. App. 4th Dist. 1983)*

Vendee permitted to sue insurance company. *Vogel v. N. Assur. Co., 114 F. Supp. 591 (E.D. Pa. 1953); Brady v. Welsh, 204 N.W. 235 (Iowa 1925); Dubin Paper Co. v. Ins. Co. of N. Am., 63 A.2d 85 (Pa. 1949).*

(n112)Footnote 286. *Upham v. Lowry, 485 N.Y.S.2d 680 (N.Y. Sup. 1985); Alexander v. Security-First Nat'l Ban, 652 P.2d 735 (Cal. 1936); Brownell v. Bd. of Educ., 146 N.E. 630 (N.Y. 1925).*

(n113)Footnote 287. Vendee required to pay premiums under sales contract. *Raplee v. Piper, 3 N.Y.2d 179 (N.Y. 1957).*

(N114)Footnote 288. *Mut. Benefit Ins. Co. v. Goschenhoppen Mut. Ins. Co., 572 A.2d 1275 (Pa. Super. 1990).*

Dubin Paper Co. v. Ins. Co. of N. Am., 63 A.2d 85 (Pa. 1949).

(n115)Footnote 289. *Jelco v. Third Jud. Dist. Ct., 511 P.2d 739 (Utah 1973)* (buyer entitled to condemnation proceeds); *Lansburgh v. Market St. Ry. Co., 220 P.2d 423 (Cal. App. 1st Dist. 1950).*

(n116)Footnote 290. *Reife v. Osmers, 169 N.E. 399 (N.Y. 1929).*

(n117)Footnote 291. Cal. Civ. Code, § 1662 (Deering); Haw. Rev. Stat., § 203-1 (1955); Mich. Comp. Laws § 565.701-565.703 (1948); N.Y. [Real Property Law] § 240-a; N.C. Gen. Stat., § 39-37-39-39; Or. Rev. Stat. § 93.290; S.D. Codified Laws § 37-1807 (1939); Wis. Stat. § 235.72 (1961).

(n118)Footnote 292. *Homeland Communities, Inc. v. Rahall & Fryer, P.C., 509 S.E.2d 714 (Ga. App. 1998); Machen v. Yost, 296 F. 1008 (D.C. App. 1924); Hamilton v. Coster, 144 N.E. 226 (Mass. 1924); Johnston v. Mohrabacker, 247 P. 389 (Okla. 1926); Grogan v. Lea, 269 S.W. 1070 (Tex. Civ. App. 1925).*

(n119)Footnote 293. *Millville Aerie, No. 1836, Fraternal Order of Eagles v. Weatherby, 88 A. 847 (N.J. Ch. 1913). See Wolvos v. Meyer, 668 N.E.2d 671 (Ind. 1996)* (absent express contrary agreement, seller is responsible for any taxes and other obligations incurred before date of sale).

(n120)Footnote 294. *Wolvos v. Meyer, 668 N.E.2d 671 (Ind. 1996); Miranda v. Smyrna Bldg. Corp., 693 N.Y.S.2d 382 (N.Y. City Civ. Ct. 1998); Gibbs v. Peoples Nat'l Bank, 64 N.E. 1060 (Ill. 1902); Carter v. Reaume, 123 N.W. 539 (Mich. 1909); Locander v. Lounsbery, 24 N.J. Eq. 417 (N.J. Ch. 1874); Manhattan Life Ins. Co. v. Jersey City, 35 A.2d 628 (N.J. Dist. Ct. 1943); Lathers v. Keogh, 17 N.E. 131 (N.Y. 1888); Hudson Coal Co. v. Ogden, 61 A. 902 (Pa. 1905).*

(n121)Footnote 295. *United Brick & Tile Co. v. Ault, 123 S.W.2d 39 (Mo. 1938).* Where vendors by contract assumed liability for assessments made on improvements completed before sale though assessments not yet levied held

applicable even though assessments could not be paid off by anticipation of future payments. *Morris v. Ehlers, 124 A.2d 776 (Md. 1956).*

(n122)Footnote 296. *Wis. Town Lot Co. v. Astleford, 222 N.W.2d 285 (Minn. 1974); Helvering v. Johnson County Realty Co., 128 F.2d 716 (8th Cir. 1942); Baker v. Smith, 70 S.E. 239 (Ga. 1911); Clinton v. Shugart, 101 N.W. 785 (Iowa 1904); Hyman v. Fischer, 52 N.Y.S.2d 553 (N.Y. Sup. 1944); Curtis Land & Loan Co. v. Interior Land Co., 118 N.W. 853 (Wis. 1908).*

(n123)Footnote 297. *Tunkel v. Filippone, 66 A.2d 339 (N.J. Super. App. Div. 1949).*

(n124)Footnote 298. *Tippets v. Gifford, 565 P.2d 117 (Wyo. 1977); Hous. Auth. v. Fidelity & Deposit Co., 309 S.2d 920 (La. App. 3d Cir. 1975); Taylor v. Fitzsimmons, 41 S.W. 263 (Ky. App. 1897); Skinner v. Christie, 29 A. 772 (N.J. Ch. 1894); Mandel v. Hess, 107 N.Y.S. 766 (N.Y. Sup. 1907); Curtis Land & Loan Co. v. Interior Land Co., 118 N.W. 853 (Wis. 1908).*

(n125)Footnote 299. *Tedco Dev. Corp. v. Overland Hills, Inc., 287 N.W.2d 49 (Neb. 1980); Gage v. Leslie, 254 P. 362 (Kan. 1927); Waller v. Lieberman, 183 N.W. 235 (Mich. 1921).*

(n126)Footnote 300. Johnson v. McKinnon, *34 S. 272 (Fla. 1903); Nat'l Bank v. Danforth, 7 S.E. 546 (Ga. 1887); Mallory v. Gray, 103 N.W. 1015 (Iowa 1905); Clinton v. Shugart, 101 N.W. 785 (Iowa 1904); Densmore v. Haggerty, 59 Pa. 189 (Pa. 1868).*

(n127)Footnote 301. *Bradford v. Union Bank, 54 U.S. 57 (1851); Wood v. Deskins, 141 F. 500 (4th Cir. 1905); Vance v. Newman, 80 S.W. 574 (Ark. 1904); Nat'l Bank v. Danforth, 7 S.E. 546 (Ga. 1887); Glancy v. Elliott, 14 Ill. 456 (Ill. 1853); Cole v. Wright, 70 Ind. 179 (Ind. 1880); Lillie v. Case, 6 N.W. 254 (Iowa 1880); Pringle v. Wagnoer, 68 N.W. 423 (Mich. 1896); Fritz v. O'Brien Land Co., 136 N.W. 301 (Minn. 1912); Watson v. Sawyers, 54 Miss. 64 (Miss. 1876); Brown v. Brown, 27 S.W. 552 (Mo. 1894); Cobb v. Bohm, 11 Ohio Dec. Rep. 844,* 30 Bull. 142 (1893); *Free v. Little, 88 P. 407 (Utah 1907); Angell v. Bashaw, 73 A. 23 (Vt. 1909); Spies v. Butts, 53 S.E. 897 (W. Va. 1906); Hunholz v. Helz, 124 N.W. 257 (Wis. 1910).*

(n128)Footnote 302. *Mallory v. Gray, 103 N.W. 1015 (Iowa 1905).*

(n129)Footnote 303. *Boyd v. Brown, 181 A. 142 (N.J. 1935).*

(n130)Footnote 304. *Headrick v. Wisehart, 41 Ind. 87 (Ind. 1872).*

(n131)Footnote 305. *Oregon & W. Colonization Co. v. Strang, 260 P. 1002 (Or. 1927).*

(n132)Footnote 306. S. Inv. Co. v. Galloway, *90 S. 300 (Ala. 1921); Anderson v. Savage, 139 N.E. 497 (Mass. 1923); Oregon & W. Colonization Co. v. Strang, 260 P. 1002 (Or. 1927); Harris v. Lucca, 133 A. 815 (R.I. 1926). See United States v. Consolidated Elevator Co., 141 F.2d 791 (8th 1944); Highbaugh v. Nolan, 270 S.W. 64 (Ky. App. 1925).*

(n133)Footnote 307. *Farmers St. Bank v. Neese, 665 N.E.2d 534 (Ill. App. 4th Dist. 1996); Brady v. Fowler, 188 P. 320 (Cal. App. 1st Dist. 1920).*

(n134)Footnote 308. *Glenmary Land Co. v. Stewart, 290 S.W. 503 (Ky. App. 1927).*

(n135)Footnote 309. *Rayburn v. Norton, 243 P. 560 (Or. 1926). See Grogan v. Lea, 269 S.W. 1070 (Tex. Civ. App. 1925).*

(n136)Footnote 310. *Wolvos v. Meyer, 668 N.E.2d 671 (Ind. 1996); Kan. City Life Ins. Co. v. Gehant, 198 N.E. 703 (Ill. 1935).*

(n137)Footnote 311. *Coke v. Bargaimes, 116 S.W.2d 904 (Tex. Civ. App. 1938).*

(n138)Footnote 312. *In re Stenardo, 991 F.2d 1089 (3d Cir. 1993); Moran v. Fifteenth Ward Bldg. & Loan Assn., 25 A.2d 426 (N.J. Ch. 1942).*

(n139)Footnote 313. *McClenan v. Brancato Iron and Fence Works, 724 N.Y.S.2d 438 (N.Y. App. Div. 2d Dept. 2001); Palmore v. Morris, Tasker & Co., 37 A. 995 (Pa. 1897).*

(n140)Footnote 314. *Rogers v. Hill, 706 N.E.2d 438 (Ohio App. 4th Dist. 1998); Otto v. Bolton, 1 All. Eng. 960, 2 K.B. 46 (1936).*

(n141)Footnote 315. *Rogers v. Hill, 706 N.E.2d 438 (Ohio App. 4th Dist. 1998); Norris v. Mitchell, 495 S.E.2d 809 (Va. 1998); Payne v. Smith, 249 S.W. 995 (Ky. App. 1923).*

(n142)Footnote 316. *Palmore v. Morris, Tasker & Co., 37 A. 995 (Pa. 1897).*

"It seems to be well settled in this state and other jurisdictions that, absent an express agreement to the contrary, a seller of real estate can not be held liable for defective condition of the premises. *Langdon v. Green, 49 Mo. 363; Smith v. Tucker, 151 Tenn. 347, 270 S.W. 66,* 41 A. L. R. 830; *Palmore v. Morris, Tasker & Co., 37 A. 995 (Pa. 1897); Slavitz v. Morris Park Estates, 98 Misc. 314, 162 N.Y.S. 888; Upp v. Darner, 150 Iowa 403, 130 N.W. 409, 32 L. R. A. (N. S.) 743,* Ann. Cas. 1912D, 574." *Cornbow v. Kansas City Ground Inv. Co., 218 S.W.2d 539 (Mo. 1949).*

(n143)Footnote 317. *Smith v. Tucker, 270 S.W. 66 (Tenn. 1925).*

(n144)Footnote 318. *McClenan v. Brancato Iron and Fence Works, 724 N.Y.S.2d 438 (N.Y. App. Div. 2d Dept. 2001); Copfer v. Golden, 288 P.2d 90 (Cal. App. 2d Dist. 1955); Upp v. Darner, 130 N.W. 409 (Iowa 1911); McQuillan v. Clark Thread Co., 172 A. 370 (N.J. Sup. 1934); Slavitz v. Morris Park Ests., 162 N.Y.S. 888 (N.Y. Sup. 1917); Palmore v. Morris, Tasker & Co., 37 A. 995 (Pa. 1897).*

(n145)Footnote 319. *Copfer v. Golden, 288 P.2d 90 (Cal. App. 2d Dist. 1955); Upp v. Darner, 130 N.W. 409 (Iowa 1911); McQuillan v. Clark Thread Co., 172 A. 370 (N.J. Sup. 1934).*

(n146)Footnote 320. *Graham v. Claypool, 978 P.2d 298 (Kan. App. 1999); Stanley v. Turtle Mt. Gas & Oil Co., 567 N.W.2d 345 (N.D. 1997); United States v. Inmon, 205 F.2d 681 (5th Cir. 1953); Caporaletti v. A-F Corp., 137 F. Supp. 14 (D. D.C. 1956); Derby v. Pub. Serv. Co., 119 A.2d 335 (N.H. 1955); Kilmer v. White, 171 N.E. 908 (N.Y. 1930); Palmore v. Morris, Tasker & Co., 37 A. 995 (Pa. 1897).*

(n147)Footnote 321. *Stanley v. Turtle Mt. Gas & Oil Co., 567 N.W.2d 345 (N.D. 1997).*

Palmore v. Morris, Tasker & Co., 37 A. 995 (Pa. 1897). Equitable conversion occurs the moment the contract becomes effective. *Pet. of S.R.A., Inc., 18 N.W.2d 442 (Minn. 1945).*

(n148)Footnote 322. *Westwood Pharmaceuticals, Inc. v. National Fuel Gas Distrib. Corp., 737 F. Supp. 1272 (W.D.N.Y. 1990); Pharm v. Lituchy, 27 N.E.2d 811 (N.Y. 1940).*

(n149)Footnote 323. *Lorenzen-Hughes v. MacElhenny, Levy & Co., 30 Cal. Rptr. 2d 210 (Cal. App. 2d Dist. 1994); Goodrich v. Seamands, 870 P.2d 1061 (Wyo. 1994).*

United States v. Inmon, 205 F.2d 681 (5th Cir. 1953); Derby v. Pub. Serv. Co., 119 A.2d 335 (N.H. 1955); Kilmer v. White, 171 N.E. 908 (N.Y. 1930); Palmore v. Morris, Tasker & Co., 37 A. 995 (Pa. 1897). Contra, *McIntosh v. Goodwin, 292 S.W.2d 242 (Tenn. App. 1954); Ropeke v. Palmer, 6 Tenn App. 348 (Tenn. App. 1927); Otto v. Bolton, 1 All. Eng. 960, 2 K.B. 46 (1936).*

(n150)Footnote 324. *Hellreigel v. Manning, 97 N.Y. 56 (N.Y. 1884).* Under the English rule, the vendor in possession is a "trustee" for the vendee, liable for deterioration by neglect and entitled to credit for expenses of preservation. Phillips v. Silvester, 8 L.R.-Ch. App. 173 (Ch. 1872). *See* The Vendor's Liability for Permissive Waste, *48 Harv. L. Rev. 821 (1935).*

(n151)Footnote 325. *Clarke v. Ramuz, 2 Q.B. 456 (1891).*

(n152)Footnote 326. *Gibson v. Eller, 13 Ind. 124 (Ind. 1859).*

(n153)Footnote 327. Moses v. Johnson, *7 S. 146 (Ala. 1890).*

(n154)Footnote 328. *First Mustang St. Bank v. Garland Bloodworth, Inc., 825 P.2d 254 (Okla. 1991); Williams v. Lynd Tp., 312 N.W.2d 110 (Minn. 1981); Alechoff v. Los Angeles Gas & Elec. Corp., 257 P. 569 (Cal. App. 2d Dist. 1927); Hueston v. Miss. & Rum River Boom Co., 79 N.W. 92 (Minn. 1899);* George v. Fisk; *32 N.H. 32 (N.H. 1855); Matthews v. James Lumber Co., 122 S.E. 480 (N.C. 1924); Gotshall v. J. Langdon & Co., 16 Pa. Super. 158 (Pa. Super. 1900); Kateiva v. Snyder, 254 P. 857 (Wash. 1927). But see Foley v. Wyeth, 84 Mass. 131 (Mass. 1861).* Contra, if injury is permanent. *New Albany v. Lines, 51 N.E. 346 (Ind. App. 1898).* In accord if a continuing nuisance. *Frazier v. Westerville, 36 N.E.2d 812 (Ohio App. 1941).*

(n155)Footnote 329. *Lawrenz v. Langford Elec. Co., 288 N.W. 727 (Minn. 1939).*

(n156)Footnote 330. *Kimsey v. Burgin, 806 S.W.2d 571 (Tex. App. 1991); Garland v. Wentzel, 294 S.W.2d 145 (Tex. Civ. App. 1956).*

(n157)Footnote 331. *Conners v. Winans, 204 N.Y.S. 142 (N.Y. Sup. 1924).*

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CHAPTER 96 Vendors and Purchasers

11-96 Thompson on Real Property, Thomas Editions § 96.07

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§ 96.07 Vendee's Title to Rents and Crops.

The cases divide as to whether the vendor or vendee is entitled to the rent accruing prior to the bargain day. n332 As between vendor and purchaser under an executory contract for the sale of land, the purchaser is not, in the absence of a special contract to that effect, entitled to rents of the property between the time of contract execution and deed delivery; the rents belong to the person holding the legal title, in the absence of a contract providing otherwise. n333 It has been held that upon the giving of a bond for a deed, providing only for the payment of stipulated sums, the vendee is entitled to the rents. n334 On the execution of the deed, the accruing rents and rents not due go to the purchaser, n335 including rents from the vendor occupying the premises after the vendor should have conveyed on proper tender made; n336 but the parties may contract to the contrary. n337 Rent which has already accrued at the time of sale is personalty and does not pass to the purchaser. n338 The purchaser will be entitled to the proceeds of a rent note not matured at the time of the conveyance. n339 Prior to conveyance, the rents as a general rule belong to the vendor. n340 A vendee in possession of realty as a tenant holds as vendee without liability for rent after default of vendor in closing the title. n341 The purchaser in possession must account to the vendor for rents during the vendor's occupancy where the contract is abrogated without being consummated. n342 Where a parol contract for the sale and purchase of land is repudiated by either party thereto, the vendor is entitled to rent from the beginning of the purchaser's possession equal to legal interest on the purchase n343 As a general rule, interest is not payable on the purchase price where vendor remains in possession and collects the rents and profits. n344

Where crops have matured and have been severed from the land at the time the contract is entered into, they remain the property of the vendor, n345 but if the vendee is given possession under the contract the vendee is entitled to the unmatured crops on the land at the date of the contract. n346 The right of possession and rents go with the legal title so that rents falling due before title passes belong to the vendor. n347 The vendee is entitled to the rents and profits during the time the vendor delays performing, n348 or has the alternative of having to pay no interest during the delay. n349

FOOTNOTES:
(n1)Footnote 332. Vendor receives. *In re Boyle's Est., 134 N.W. 590 (Iowa 1912).* Contra, where vendee pays interest. *Scott v. Sloan, 84 P. 117 (Kan. 1906); Turner v. Bryant, 137 N.Y.S. 466 (N.Y. App. Div. 3d Dept. 1912).*

(n2)Footnote 333. *Jackson v. Creek, 94 N.E. 416 (Ind. App. 1911); In re Boyle's Est., 134 N.W. 590 (Iowa 1912);*

Tucker v. McLaughlin-Farrar Co., 129 P. 5 (Okla. 1912). Contra, *Wilson v. Thompson, 51 S.2d 20 (Ala. 1951); Griffith v. Whittier, 223 P.2d 1062 (Wash. 1950).*

(n3)Footnote 334. Able v. Gunter, *57 S. 464 (Ala. 1912).*

(n4)Footnote 335. *McCall v. Morgan, 14 S.2d 374 (Ala. 1943); Nelson v. Joshel, 137 N.E. 389 (Ill. 1922);* Carmouche v. Jung, *102 S. 518 (La. 1925);* Lesseigne v. Cedar Grove Realty Co., *91 S. 136 (La. 1922); Nat'l Bank of Comm. v. Lefferdink, 193 N.W. 916 (Neb. 1923); Currie v. Harris, 172 S.W.2d 404 (Tex. Civ. App. 1943); Faircloth v. Flewellen, 130 S.W.2d 1098 (Tex. Civ. App. 1939); Wootton v. Bishop, 257 S.W. 930 (Tex. Civ. App. 1923); Leonard v. Caruthers, 236 S.W. 189 (Tex. Civ. App. 1921),* modified, *254 S.W. 779 (Tex. Com. App. 1923).*

(n5)Footnote 336. *Highbaugh v. Nolan, 270 S.W. 64 (Ky. App. 1925).*

(n6)Footnote 337. *Davis v. Aydelott, 238 S.W. 1011 (Tex. Civ. App. 1922); Cahill v. McCown, 227 P. 502 (Wash. 1924).*

(n7)Footnote 338. *Becker v. Hwy. Trailer Co., 3 N.W.2d 725 (Wis. 1942); Walther v. Steward, 88 P.2d 475 (Wyo. 1939).*

(n8)Footnote 339. Greenwood v. Bennett, *95 S. 159 (Ala. 1922).*

(n9)Footnote 340. *Mintz v. Tannous, 600 N.E.2d 269 (Ohio App. 1991);* Dailey v. Walden; *648 P.2d 258 (Kan. App. 1982); Sachs v. Norton-Wheeler Stave Co., 240 S.W. 16 (Ark. 1922); Nelson v. Joshel, 137 N.E. 389 (Ill. 1922); Luly Stores Co. v. Hartman, 235 Ill. App. 319 (Ill. App. 4th Dist. 1925); Barrell v. Britton, 155 N.E. 193 (Mass. 1927); Bonfils v. Geeslin, 247 P. 673 (Okla. 1926); Peck v. Farmers Nat'l Bank, 243 P. 861 (Wash. 1926).* Vendee in possession entitled to. profits. *Sale v. Swann, 120 S.E. 870 (Va. 1924).*

(n10)Footnote 341. *Kemp v. Levy, 205 N.Y.S. 545 (N.Y. Sup. 1924).*

(n11)Footnote 342. *Dunham v. Phillips, 241 S.W. 361 (Ark. 1922); Ryan v. Shoenberger, 224 Ill. App. 308 (Ill. App. 1st Dist. 1922). See Hovsepian v. Eskender, 231 P. 364 (Cal. App. 1st Dist. 1924).*

(n12)Footnote 343. *Duncan v. Duncan, 83 S.W.2d 485 (Ky. App. 1935).*

(n13)Footnote 344. *Rambusch v. Burke, 223 N.Y.S. 464 (N.Y. App. Div. 2d Dept. 1927); Nasset v. Houska, 186 N.W. 255 (N.D. 1921); Security Sav. & Trust Co. v. Latta, 247 P. 777 (Or. 1926).*

(n14)Footnote 345. *Speicher v. Lacy, 115 P. 271 (Okla. 1911).*

(n15)Footnote 346. *Falk v. Amsberry, 633 P.2d 799 (Or. App. 1981); Speicher v. Lacy, 115 P. 271 (Okla. 1911).*

(n16)Footnote 347. *Moran v. Fifteenth Ward Bldg. & Loan Assn., 25 A.2d 426 (N.J. Ch. 1942).*

(n17)Footnote 348. *Gage v. Leslie, 254 P. 362 (Kan. 1927)* (less interest plus taxes); *McCleneghan v. Powell, 180 N.W. 576 (Neb. 1920); Haffey v. Lynch, 77 N.Y.S. 587 (N.Y. Sup. 1902), aff'd, 85 N.E. 817 (N.Y. 1908); Harper v. Battle, 104 S.E. 658 (N.C. 1920); Sweeney v. Brow, 100 A. 593 (R.I. 1917).*

(n18)Footnote 349. Pearce v. Third Ave. Imp. Co., *128 S. 396 (Ala. 1930); Mitchell v. Mutch, 179 N.W. 440 (Iowa 1920); Crockett v. Gray, 18 P. 905 (Kan. 1888); King v. Ruckman, 24 N. J. Eq. 556 (N.J. 1873); Worrall v. Munn, 53 N.Y. 185 (N.Y. 1873).*

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CHAPTER 96 Vendors and Purchasers

11-96 Thompson on Real Property, Thomas Editions § 96.08

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§ 96.08 The Offer.

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The rather complex problems of offer and acceptance are as applicable to real estate sales contracts as to other types of contracts. The offer to sell and the acceptance of the offer make a binding contract between the parties. n350 An offer of terms on the one side and an assent to or acceptance of those terms on the other side, communicated between the parties is the form of every agreement. There must be an offer expressed or implied, and this offer must be accepted according to its tenor before a binding contract is formed. In order to supply this requisite, there must be a meeting of the minds as to the essential elements. n351 The offer is the proffer or proposal of something for acceptance or rejection. n352 A "bid" on real property is a binding offer to make a contract. n353 One who agrees to purchase property under the terms of a listing agreement is making an offer, not accepting the offer. n354

To constitute a valid contract for the sale of real estate, there must be a definite and unconditional offer on the one part, and an absolute acceptance on the other. n355 One who makes an offer has a right to stipulate in the offer any conditions desired, and the acceptance to conclude the agreement must in every respect meet and correspond with the offer. n356 The parties must mutually assent and there must be an intention common to all who are to be bound. n357 Both parties must understand the same thing in the same sense and both parties must be bound or neither. n358 The offer may be withdrawn before acceptance, but, if accepted without conditions, and without varying its terms, and the acceptance is communicated to the other party, without unreasonable delay, neither party can withdraw at pleasure. n359 A distinction is to be made between an offer to sell and an invitation to negotiate. n360 An offer to sell that is not founded upon a consideration may be withdrawn by the offeror at any time before its acceptance. n361

The transaction leading to the consummation of the contract may be conducted by mail, n362 telegraph, n363 or telephone. n364 If the parties exchange letters or telegrams, and a contract is entered into by such means, the contract becomes complete when the latest proposition by one party is accepted by the other party. n365 This happens at the time an unqualified assent to the offer is deposited in the post office properly directed and stamped, n366 unless the offer is so qualified as to require the actual receipt of the letter of acceptance before the agreement is completed. n367 Posting an acceptance of an offer may be sufficient where it can be fairly inferred from the circumstances of the case that the acceptance might be sent by post. In other words, where the circumstances are such that it must have been

within the contemplation of the parties that the post was to be or might be used as a means of communicating an acceptance of the offer, then the acceptance by post is justified. In general, when a proposition is sent by mail the sender impliedly authorizes its acceptance through the same means and that such implication arises when the post is used to make the offer and no other mode is suggested. n368 This doctrine, however, is loosely stated. It certainly is somewhat artificial to speak of the person to whom the offer is made as having implied authority of the other party to send the acceptance by post. The offeree needs no authority to transmit the acceptance through any particular channel; the offeree may select any means desired provided it is within the contemplation of the parties and according to the ordinary usages of mankind, the post office no less than any other. Offerees are not required to tender acceptance by the same method used in making the offer, although if any other means of communication is adopted the acceptor uses that means at the acceptor's own risk. n369 The post office is merely an agent to convey communications, not to receive them, and cannot be considered as the only means by which an acceptance may be communicated. n370

An offer by letter to purchase for a specified sum is presumed to be an offer of the amount in cash. n371 Where the offer is conditioned on an amicable adjustment with a tenant, a telegram accepting the offer before the adjustment will not create an enforceable contract. n372 A provision for notice of acceptance by mail is satisfied by the personal delivery of a written notice. n373 The acceptance of an offer by telephone, followed by a letter of confirmation, has been held to be a binding acceptance, and not a new offer, notwithstanding that the offeror requested the offeree to "wire" acceptance at once. n374

Since time is of the essence in an option, any extension of time is a new option and must be in writing. n375 This is not true, however, of sales contract closing dates where time is not of the essence. n376

FOOTNOTES:

(n1)Footnote 350. *Gross v. Regor Fin. Co., 96 F.2d 37 (5th Cir. 1938); Gibson v. Boyd, 172 S.W.2d 928 (Ark. 1943); Wilson v. Spry, 223 S.W. 564 (Ark. 1920); Perkins v. Simmons, 15 S.2d 289 (Fla. 1943);* Frissell v. Nichols, *114 S. 431 (Fla. 1927); Walton's Exec. v. Franks, 228 S.W. 1025 (Ky. App. 1921); Fitzgerald v. Hyland, 6 S.2d 321 (La. 1942); Wabst v. Serial Fed. Sav. & Loan Assn., 51 N.Y.S.2d 555 (N.Y. App. Div. 2d Dept. 1944); Strong v. Moore, 207 P. 179 (Or. 1922); McMahan v. McMahon, 115 S.E. 293 (S.C. 1922); Fickas v. Bowles, 158 S.W.2d 118 (Tex. Civ. App. 1941).* The offer to be effective must be a binding offer. Turner v. Snype, *110 S. 109 (La. 1926).*

(n2)Footnote 351. *Dishinger v. Potter, 2001 Utah App. LEXIS 51* (Utah App. June 28, 2001); *Carr v. Duval, 39 U.S. 77 (1840); Loaiza v. Super. Ct., 24 P. 707 (Cal. 1890); Phelps v. Good, 96 P. 216 (Idaho 1908); British-Am. Portland Cement Co. v. Citizens' Gas Co., 164 S.W. 468 (Mo. 1913); Egger v. Nesbit, 27 S.W. 385 (Mo. 1894); MacLaeon v. Lipchitz, 56 N.Y.S.2d 609 (N.Y. Sup. 1945); Davis v. Brigham, 107 P. 961 (Or. 1910); Ballou v. Carter, 137 N.W. 603 (S.D. 1912); Todorovich v. Kinnickinnic Mut. Loan & Bldg. Assn., 298 N.W. 226 (Wis. 1941).*

(n3)Footnote 352. Frissell v. Nichols, *114 S. 431 (Fla. 1927).*

(n4)Footnote 353. *Dalto, Inc. v. Village of Mineola, 681 N.Y.S.2d 312 (1998); GFF Corp. v. Associate Wholesale Grocers, Inc., 130 F.3d 1381 (10th Cir. 1997).*

(n5)Footnote 354. *Hanes v. Davis, 601 N.E.2d 685 (Ohio Misc. 1992).*

(n6)Footnote 355. *McCormick v. Bonfils, 60 P. 296 (Okla. Terr. 1900). See Shortridge v. Ghio, 253 S.W.2d 838 (Mo. App. 1952).*

(n7)Footnote 356. Fed. Land Bank v. Bridgeforth, *173 S. 66 (Ala. 1937).*

(n8)Footnote 357. *Mountain Properties, Inc. v. Tyler Hill Realty Corp., 767 A.2d 1096 (Pa. Super. 2001): Perkins v. Simmons, 15 S.2d 289 (Fla. 1943); Springfield Fire & Marine Ins. Co. v. Snowden, 191 S.W. 439 (Ky. App. 1917).*

(n9)Footnote 358. *Am. Can Co. v. Agric. Ins. Co., 106 P. 720 (Cal. App. 1st Dist. 1909).*

(n10)Footnote 359. *Hendricks. v. Behee, 786 S.W.2d 610 (Mo. App. 1990);* Tucker v. Gray, *90 S. 158 (Fla. 1921); Kamenjarin v. Williams, 158 N.E. 568 (Ill. 1927); Turner v. Hall, 104 S.E. 861 (Va. 1920).*

(n11)Footnote 360. *Blakeslee v. Nelson, 207 N.Y.S. 676 (N.Y. App. Div. 3d Dept. 1925); Patrick v. Kleine, 215 N.Y.S. 305 (N.Y. Sup. 1926).*

(n12)Footnote 361. *McCutchan v. Iowa State Bank, 5 N.W.2d 813 (Iowa 1942).*

(n13)Footnote 362. *Farmers Equity Coop. Creamery Assn. v. U.S., 132 F.2d 738 (10th Cir. 1943); Richardson v. Stuberfield, 271 S.W. 345 (Ark. 1925); Harper v. Thurlow, 270 S.W. 607 (Ark. 1925); Carlsen v. Hay, 195 P. 103 (Colo. 1921); Griffin v. Lester, 114 S.E. 87 (Ga. App. 1922); Wagner v. McClay, 138 N.E. 164* (acceptance); *Petersen v. Jensen, 177 N.W. 74 (Iowa 1920); Custer v. Royse, 204 P. 995 (Kan. 1922);* Morrison v. Mioton, *113 S. 456 (La. 1927);* Southport Mill v. Ansley, *106 S. 720 (La. 1926); Carrig v. Earle, 135 N.E. 872 (Mass. 1922); Lawrence v. Rosenberg, 130 N.E. 189 (Mass. 1921); O'Shea v. Smith, 5 N.W.2d 348 (Neb. 1942); Nos. 2 and 4 Roman Ave. v. Goddard, 221 N.Y.S. 284 (N.Y. App. Div. 2d Dept. 1927); Atlas Portland Cement Co. v. American Brick & Clay Mfg. Co., 124 A. 650 (Pa. 1924); Cullen v. Donahue, 121 A. 392 (R.I. 1923). See* Henry W. Keyes & Philip J. Lawrence, Passing Papers, 1 Boston B. J. 24 (1957).

(n14)Footnote 363. *Grey v. Nickey Bros., 271 F. 249 (5th Cir. 1921); Marti-Matter Co. v. Thomas, 202 P. 703 (Colo. 1921); Lloyd v. Mickelson, 210 N.W. 586 (Minn. 1926); Mitchell v. Morgan, 181 N.W. 958 (S.D. 1921); Craven v. Escajeda, 280 S.W. 225 (Tex. Civ. App. 1926).*

(n15)Footnote 364. Barchus v. Johnson, *92 S. 566 (La. 1922).*

(n16)Footnote 365. *Moore v. Pierson, 6 Iowa 279 (Iowa 1858); Gates v. Dudgeon, 66 N.E. 116 (N.Y. 1903); Curtis Land & Loan Co. v. Interior Land Co., 118 N.W. 853 (Wis. 1908).*

(n17)Footnote 366. *Patrick v. Bowman, 149 U.S. 411 (1893); Kempner v. Cohn, 1 S.W. 869 (Ark. 1886); Moore v. Pierson, 6 Iowa 279 (Iowa 1858); Scottish-Am. Mortg. Co. v. Davis, 74 S.W. 17 (Tex. 1903); Parker v. California State Life Ins. Co., 40 P.2d 175 (Utah 1935); Weaver v. Burr, 8 S.E. 743 (W.Va. 1888).*

(n18)Footnote 367. *Cobb v. Dunlevie, 60 S.E. 384 (W.Va. 1908).*

(n19)Footnote 368. *Scottish-Am. Mortg. Co. v. Davis, 74 S.W. 17 (Tex. 1903).*

(n20)Footnote 369. *Scottish-Am. Mortg. Co. v. Davis, 74 S.W. 17 (Tex. 1903).*

(n21)Footnote 370. *Phenix Ins. Co. v. Schultz, 80 F. 337 (4th Cir. 1897); Perry v. Mount Hope Iron Co., 5 A. 632 (R.I. 1886).*

(n22)Footnote 371. *Lawrence v. Rosenberg, 130 N.E. 189 (Mass. 1921).*

(n23)Footnote 372. *Polich v. Severson, 216 P. 785 (Mont. 1923).*

(n24)Footnote 373. *Atlas Portland Cement Co. v. American Brick & Clay Mfg. Co., 124 A. 650 (Pa. 1924).*

(n25)Footnote 374. *Zimmerman Bros. & Co. v. First Nat'l Bank, 263 N.W. 361 (Wis. 1935).*

(n26)Footnote 375. *Gulf Oil Corp. v. Willcoxon, 86 S.E.2d 507 (Ga. 1955).*

(n27)Footnote 376. *Scheer v. Doss, 83 S.E.2d 612 (Ga. 1954).*

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CHAPTER 96 Vendors and Purchasers

11-96 Thompson on Real Property, Thomas Editions § 96.09

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§ 96.09 The Acceptance.

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For an offer to sell or purchase realty to result in a binding contract there must be a valid acceptance. n377 A purported acceptance is a rejection if it is coupled with a condition not contained in the offer. n378 Until the offer is accepted, it is not a pending contract between the parties. n379 If the conduct, declarations or letters of the owner were merely to start negotiations which may subsequently result in a contract or are intended to call forth an offer from the one to whom addressed, acceptance thereof does not consummate a contract. n380 The fact that the parties do intend a subsequent agreement to be made is strong evidence to show that they do not intend the previous negotiations to amount to any proposal or acceptance. n381 The offer must be so complete that its acceptance will form an agreement containing all the terms necessary and intended by the parties, n382 because it is obvious that no agreement arises until its terms are settled, n383 and that an offer which is not complete is merely a step in the negotiations. n384

If one makes a proposition to sell land, with suggestions as to the method of consummation, one cannot withdraw the offer after the purchaser has accepted it and endeavored in good faith to comply with the suggestions made. n385

A verbal acceptance will suffice. n386 In one case, an acceptance was achieved by the filing of a bill for specific performance, with an agreement to purchase land attached, within time limit prescribed by an option, which called for the "delivery of an agreement to purchase." n387

An acceptance of an offer to sell real estate must be unconditional and in absolute agreement with the very terms of the offer; otherwise it is unenforceable. n388 It is well recognized that any change of any material stipulation n389 or imposition of conditions amounts to a rejection of the offer. n390 An offer to purchase which is unconditionally accepted by the person to whom the offer is made constitutes a binding contract, and is not subject to be withdrawn; n391 but the offer must be unconditionally accepted, n392 and free from any provision that would amount to a counteroffer. n393 Where one party makes an offer to purchase, and the owner makes a counteroffer to such party, no contract arises. n394 To constitute a binding contract between the offeror and the owner of the property, there must be a meeting of minds. n395 Where the owner misdescribed land sold to the offeror, causing the offeror to examine other lands than that sold, no meeting of minds arose sufficient to establish a binding contract. n396 If the acceptance

attempts to impose additional terms, it is not an acceptance. n397

If, after a nonconforming acceptance, the offeree gives a subsequent acceptance in accordance with the terms of the proposal, the second acceptance is ineffective. The rejection of an offer terminates it, and it is beyond the power of the acceptor to revive the proposal by a subsequent acceptance. n398 An acceptance amounts to a rejection of the offer, if it is made upon the condition that the title be perfect, n399 or that it be acceptable to the purchaser's attorney. n400 However, certain statements in the acceptance may not constitute a conditional acceptance. Thus, where the acceptance states that which the vendor impliedly agreed to do in the offer, such statement does not impose any new condition such as will render the acceptance conditional. n401 In case the acceptance is unconditional in the first instance, a subsequent letter or notice requesting the offerer to attend to incidental matters relative to the closing of the transaction, but which are not required in the offer, will not render the acceptance conditional. n402

Where an offer to sell for a stated sum, part of which was to be paid in cash and the balance secured by a purchase-money mortgage, was accepted with the condition that the balance be secured by a second mortgage, it was held that the condition was a counter offer to sell and operated as a rejection of the original offer. n403

American case law universally affirms that the offer must be accepted unconditionally and unequivocally. The acceptance must be in strict compliance with the terms of the offer. n404 If the terms of the offer are changed or any new ones added by the acceptance, no meeting of the minds and, consequently, no contract arises. n405 The assent must be absolute and final. n406 No unconditional assent occurred, where the prospective purchaser stated that the papers were to pass when the vendor was ready to vacate, and the vendor insisted on immediate payment and execution of the deed. n407 In a case where a written acceptance was required within forty-eight hours, it was held that the mere exhibition of a written acceptance to a clerk of the offerer in his absence within the time limit was not sufficient. n408 Where a written acceptance is required, a verbal acceptance will not suffice. n409 Where purchaser makes an offer and agrees to pay deposit on written acceptance, the posting of the deposit after acceptance was held a condition precedent to completion of the contract. n410 A condition precedent is a condition to be performed before the obligation of the contract commences. n411 The one who makes an offer cannot be bound by a conditional acceptance. n412

Not only must the acceptance be unconditional but it must be identical with the terms of the offer. n413 It must not vary from the proposal either by way of omission, addition, or alteration. If it does, neither party is bound. n414 An acceptance varies from the terms of the offer when it omits certain features of the proposal and assent is given to only part of its terms. n415 Thus, where one party offered to sell all the timber on his land at a certain price and the other responded by offering to buy only that standing on a part of the land, there was no contract. n416 Likewise, if the acceptance adds to or goes beyond the terms proposed, no contract is formed. n417

The doctrine that the acceptance must be unequivocal has been carried in some cases to the extreme. Thus, a resident of California wrote to a resident of Iowa, offering to sell certain land, and added: "Let me hear from you at once." The receiver of the letter telegraphed his acceptance to the offer and added "money at your order at First National Bank here." It was held that as the proposal said nothing about the place where the money was to be paid, it was payable in California, and depositing it in the bank in Iowa was not an unconditional acceptance of the offer. n418 Where a person in Connecticut wrote to a man in Wisconsin offering to sell land for a certain sum, nothing being said about the place of payment or delivery of the deed, a letter was written accepting this proposal, and this was added: "You may make out the deed, leaving the name of the grantee in blank, and forward the same to X or to your agent, if you have one here to be delivered to me on payment." It was held this was no unconditional acceptance. n419 In these latter cases, the courts do not recognize that the reply may go beyond the terms of the proposal without qualifying the acceptance. The addition may be such as fairly to impart a request instead of a condition, n420 or the words inserted may be immaterial, such as where the offer is accepted provided the title is good. n421 An offeror who receives an acceptance which is too late or otherwise defective cannot regard it as valid, but such acceptance constitutes a counteroffer which must in turn be accepted by the original offeror. n422 However, where acceptance by the purchaser of the vendor's counteroffer followed in every essential element the language of the counteroffer, no further assent on the vendor's part was needed

to create an enforceable contract of sale. n423

Time is the essence of an option to purchase within a fixed time and the option must be exercised within the time limit. n424 After an offer has been withdrawn, no acceptance of the withdrawn offer will make a binding contract; n425 but before a revocation will be effective it must be brought to the attention of the one to whom the offer was made. n426 A knowledge on the part of the proposed purchaser that the property has been sold to a third person is sufficient notice of the revocation. n427 The offer may or may not specify the time within which it must be accepted. In case the time is fixed by the offeror, it may be accepted at any time before the expiration of that period, provided there is no revocation by the offeror before acceptance. n428 Where no time for acceptance is specified, the law will imply that a reasonable time is intended. n429 A time limit may be waived, and this will occur where the purchase money is accepted after the expiration of the time limit. n430 A 95-day option for the purchase of land providing for ten days to procure an abstract and ten days to examine the abstract was construed to require election to purchase within ninety-five days. n431 In case of an agreement, based on a valuable consideration, to keep the offer open for a specified time, the offer may be accepted within that time, and no revocation can defeat this right of the acceptor. n432 An offer made by telegram specifying no time for an answer requires an answer within a reasonable time, and implies a quick reply by telegram, and it has been held that a reply a week thereafter is too late. n433 An offer made by letter which concludes, "Let me know by return mail," must be accepted by return mail. n434 Also, where an offer contained a stipulation which read, "This is for a wired acceptance on receiving this letter, or no trade," an acceptance wired the day following the receipt of the letter was held insufficient. n435 Should there be nothing to indicate the time within which acceptance must be made, the proposition must be accepted within a reasonable time. n436 As between the parties, an oral acceptance to purchase may be withdrawn any time before the acceptance is included within an executed written instrument. n437

At common law an offer under seal cannot be terminated during the time fixed therein, or, if no time is fixed, within a reasonable time, either by revocation or by the offeror's death or insanity. n438 An offer which is not under seal or given for a consideration may be revoked at any time before acceptance. n439 The burden of proof of such a withdrawal is on the party asserting it. n440 The offer is revoked by death before acceptance, n441 and a revocation also occurs if the offeree actually knows that the offeror has entered into a contract for sale of the property to another. n442 Where time for performance is not of the essence of the contract neither party may rescind without giving a reasonable time for performance. n443 An option to purchase land at a fixed price within a certain time given by the owner without any consideration may be revoked by the optioner at any time before an acceptance thereof has been communicated, n444 and the mere incurring of expenses on the part of the optionee does not constitute such a consideration as will prevent the exercise of this right. n445 This is true even though the option expressly provides that it shall be irrevocable for a certain time, where there is no consideration for the offer or for the agreement not to revoke. n446

Where real estate is sold at an auction, the fall of the auctioner's hammer creates the contract, which can be specifically performed. n447

FOOTNOTES:

(n1)Footnote 377. *Gibson v. Boyd, 172 S.W.2d 928 (Ark. 1943).*

(n2)Footnote 378. *State v. McClaine, 300 N.E.2d 342 (Ind. 1973); Rahm v. Cummings, 155 N.W. 201 (Minn. 1915).*

(n3)Footnote 379. *Clark v. Potts, 99 N.E. 364 (Ill. 1912).*

(n4)Footnote 380. *Brunette v. Vulcan Materials Co., 256 N.E.2d 44 (Ill. App. Ct. 1970); Connell v. Nickey, 167 S.W. 813 (Tex. Civ. App. 1914).*

(n5)Footnote 381. *Monahan v. Allen, 130 P. 768 (Mont. 1913); Irish v. Pulliam, 48 N.W. 963 (Neb. 1891).* Unconditional acceptance of an offer completes the contract though minor details remain to be worked out under language "subject to," *Carver v. Britt, 85 S.E.2d 888 (N.C. 1955),* but "subject to approval of title by our attorneys" was

a counter offer. *Richardson v. Greensboro Warehouse & Storage Co., 26 S.E.2d 897 (N.C. 1943).*

(n6)Footnote 382. *Rahm v. Cummings, 155 N.W. 201 (Minn. 1915); Colleton Realty Co. v. Folk, 67 S.E. 156 (S.C. 1910); Ballou v. Carter, 137 N.W. 608 (S.D. 1912); Donnell v. Currie & Dohoney, 131 S.W. 88 (Tex. Civ. App. 1910); Connell v. Nickey, 167 S.W. 313 (Tex. Civ. App. 1914).*

(n7)Footnote 383. *Halsell v. Renfrow, 202 U.S. 287 (1906); Wardell v. Williams, 28 N.W. 796 (Mich. 1886).*

(n8)Footnote 384. *Stagg v. Compton, 81 Ind. 171 (Ind. 1881).*

(n9)Footnote 385. *McMahan v. McMahon, 115 S.E. 293 (S.C. 1922).* A counter offer is a rejection of the offer and the original offer cannot later be accepted without the offerer's consent. *Ebline v. Campbell, 121 A.2d 828, 121 A.2d 928 (Md. 1956).*

(n10)Footnote 386. *Cullen v. Donahue, 121 A. 392 (R.I. 1923); Morris v. Risk, 102 S.E. 725 (W.Va. 1920); Crowley v. Vaughan, 106 S.E. 539 (W.Va. 1921).*

(n11)Footnote 387. *Shiller v. Lange, 185 N.W. 699 (Mich. 1921); Rashken v. Smith, 210 N.W. 485 (Mich. 1926).*

(n12)Footnote 388. *Quinn v. Johnston, 122 S.W.2d 266 (Tex. Civ. App. 1938).*

(n13)Footnote 389. *Fraser v. Jarrett, 112 S.E. 487 (Ga. 1922); Butsch v. Swallow, 134 N.E. 877 (Ind. App. 1922); Foltz v. Evans, 49 N.E.2d 358 (Ind. App. 1943); Goodman v. Delfs, 188 N.W. 809 (Iowa 1922); Wallace v. Bogigian, 194 P. 632 (Kan. 1921); McCullough v. Weller, 290 S.W. 675 (Ky. App. 1927); Brearley v. Schoening, 210 N.W. 588 (Minn. 1926); Crews v. Sullivan, 113 S.E. 865 (Va. 1922).*

(n14)Footnote 390. *Normile v. Miller, 326 S.E.2d 11 (N.C. 1985); Koplin v. Bennett, 155 S.2d 568 (Fla. App. 1963); Donohue v. Monroe, 250 S.E.2d 571 (Ga. App. 1978); Todorovich v. Kinnickinnic Mut. Loan & Bldg. Assn., 298 N.W. 226 (Wis. 1941); Curtis Land & Loan Co. v. Interior Land Co., 118 N.W. 853 (Wis. 1908).*

(n15)Footnote 391. *Fitzgerald v. Hyland, 6 S.2d 321 (La. 1942); Beach & Clarridge Co. v. American Steam Gauge & Valve Mfg. Co., 94 N.E. 457 (Mass. 1911).* There is the waiver of an objection that the offer to purchase was made to a third person where the offer is accepted by the person to whom the offer should have been made in the first instance. *Barnett v. Lovejoy, 186 N.W. 1 (Iowa 1922). See Dalton v. Callahan, 119 A. 380 (Me. 1923); Cullen v. Donahue, 121 A. 392 (R.I. 1923).*

(n16)Footnote 392. *Foltz v. Evans, 49 N.E.2d 358 (Ind. App. 1943); Sennett v. Melville, 122 N.W. 851 (Neb. 1909); Alexanian v. Fidelity-Philadelphia Trust Co., 30 A.2d 651 (Pa. Super. 1943).* Letter to vendee constituted revocable offer until accepted. *Gale v. Wood, 247 P.2d 67 (Cal. App. 3d Dist. 1952).*

(n17)Footnote 393. *Tencza v Hyland, 569 N.Y.S.2d 242 (1991); Flegel v. Dowling, 102 P. 178 (Or. 1909); Alexanian v. Fidelity-Philadelphia Trust Co., 30 A.2d 651 (Pa. Super. 1943). See Dixon v. Fed. Farm Mortg. Corp., 1 S.E.2d 732 (Ga. 1939).*

(n18)Footnote 394. *McCullough v. Weller, 290 S.W. 675 (Ky. App. 1927);* Fowler v. Nunnery, *89 S. 156 (Miss. 1921); Richardson v. Greensboro Warehouse & Storage Co., 26 S.E.2d 897 (N.C. 1943); Harder v. Parkes, 215 P. 609 (Okla. 1923); Shumway v. Kitzman, 134 N.W. 325 (S.D. 1912).*

(n19)Footnote 395. *Gordon v. Churchill, 148 N.W. 848 (S.D. 1914).*

(n20)Footnote 396. *Plank v. Maxwell, 136 P. 465 (Colo. App. 1913).*

(n21)Footnote 397. *Federal Land & Securities Co. v. Hatch, 125 N.W. 837 (Iowa 1910); Antle v. Haas, 251*

S.W.2d 290 (Ky. 1952). A contract of purchase "subject to G.I. loan" was conditional upon the obtaining of the loan. *Roberts v. Maxwell, 94 S.E.2d 764 (Ga. App. 1956).* So also as to a condition of obtaining an *F.H.A. loan. Chappas v. Sandefur, 91 S.E.2d 46 (Ga. App. 1955).*

(n22)Footnote 398. *Egger v. Nesbit, 27 S.W. 385 (Mo. 1894).*

(n23)Footnote 399. *Corcoran v. White, 7 N.E. 525 (Ill. 1886).*

(n24)Footnote 400. *Stevens v. Manchester, 714 N.E.2d 956 (Ohio Ct. App. 1998);* Hussey v. Home-Payne, 4 App. Cas. 311 (H.L. 1879).

(n25)Footnote 401. *Curtis Land & Loan Co. v. Interior Land Co., 118 N.W. 853 (Wis. 1908).*

(n26)Footnote 402. *Horgan v. Russell, 140 N.W. 99 (N.D. 1913); Western Timber Co. v. Kalama River Lbr. Co., 85 P. 338; Turner v. McCormick, 49 S.E. 28 (W.Va. 1904).*

(n27)Footnote 403. *Cook v. Mielke, 40 P.2d 301 (Cal. App. 4th Dist. 1935).*

(n28)Footnote 404. The rule that the acceptance must be a mirror image of the offer was historically construed to forbid even minor variations. Many modern courts have relaxed the rule, holding that only material differences prevent contract formation. *Gresser v. Hotzler, 604 N.W.2d 379 (Minn. Ct. App. 2000). See Ajax Holding Co. v. Heinsbergen, 149 P.2d 189 (Cal. App. 2d Dist. 1944); Fraser v. Jarrett, 112 S.E. 487 (Ga. 1922); Whelchel v. Waters, 111 S.E. 25 (Ga. 1922); Kaufman v. Young, 122 S.E. 822 (Ga. App. 1924); Quinn v. Daly, 133 N.E. 290 (Ill. 1921); McCutchan v. Iowa State Bank of Fort Madison, 5 N.W.2d 813 (Iowa 1942); Myers v. Smith, 196 N.W. 989 (Iowa 1924); Colorado Inv. Co. v. Grimes, 200 P. 296 (Kan. 1921);* Barchus v. Johnson, *92 S. 566 (La. 1922); Robinson v. Johnson, 113 A. 121 (Md. 1921); Lawrence v. Rosenberg, 130 N.E. 189 (Mass. 1921); Bailey v. Grover, 213 N.W. 137 (Mich. 1927); Olson v. Sash, 187 N.W. 346 (Mich. 1922);* Chapman v. Lott, *110 S. 793 (Miss. 1927); Smith v. Bertrand, 186 N.W. 83 (Neb. 1921); Muller v. Raskind, 135 A. 682 (N.J. Ch. 1927); Wabst v. Serial Federal Sav. & Loan Assn. of New York City, 51 N.Y.S.2d 555 (N.Y. App. Div. 2d Dept. 1944); Richardson v. Greensboro Warehouse & Storage Co., 26 S.E.2d 897 (N.C. 1943); Steel v. Murphy, 10 Ohio App. 150 (Ohio App. 7th Dist. Belmont Co. 1918); Fry v. Foster, 65 P.2d 1224 (Okla. 1937); Landrum v. Jordan, 229 P. 182 (Okla. 1924); Strong v. Moore, 207 P. 179 (Or. 1922); Ray v. Blue, 173 S.W.2d 258 (Tex. Civ. App. 1943); Quinn v. Johnston, 122 S.W.2d 266 (Tex. Civ. App. 1938); Whitaker-Glessner Co. v. Clark, 126 S.E. 340 (W. Va. 1925); Helmholz v. Greene, 181 N.W. 221 (Wis. 1921). See Lescher v. Baird, 294 S.W. 17 (Ark. 1927).*

(n29)Footnote 405. *Robbins v. Pacific Eastern Corp., 65 P.2d 42 (Cal. 1937); Richardson v. Greensboro Warehouse & Storage Co., 26 S.E.2d 897 (N.C. 1943).* Demand for warranty deed where none mentioned in offer was a rejection and counter offer. *Master Laboratories v. Chestnut, 49 N.W.2d 693 (Neb. 1951).*

(n30)Footnote 406. *Carr v. Duval, 39 U.S. 77 (1840);* McGowin Lumber & Export Co. v. R.J. & B.F. Camp Lumber Co., *68 S. 263 (Ala. 1915); Corcoran v. White, 7 N.E. 525 (Ill. 1886); Sawyer v. Brossart, 25 N.W. 876 (Iowa 1885); Wardell v. Williams, 28 N.W. 796 (Mich. 1886); Egger v. Nesbit, 27 S.W. 385 (Mo. 1894); Frahm v. Metcalf, 106 N.W. 227 (Neb. 1905); Raleigh Real Est. Co. v. Moser, 95 S.E. 498 (N.C. 1918); Kennedy v. Gramling, 11 S.E. 1081 (S.C. 1890); Scottish-Am. Mortg. Co. v. Davis, 74 S.W. 17 (Tex. 1903); Weaver v. Burr, 8 S.E. 743 (W. Va. 1888); Curtis Land & Loan Co. v. Int. Land Co., 118 N.W. 853 (Wis. 1908); N.W. Iron Co. v. Meade, 21 Wis. 474 (Wis. 1867).*

(n31)Footnote 407. *Hackett v. Ladson, 110 S.E. 232 (Ga. 1922).*

(n32)Footnote 408. *Brach v. Matteson, 131 N.E. 804 (Ill. 1921).*

(n33)Footnote 409. *Van Hoosen v. Briscoe, 259 P. 1115 (Cal. App. 1st Dist. 1927); Wheeling, O. & E.R. Co. v. Wheeling Coal R. Co., 119 S.E. 551 (W. Va. 1923).*

(n34)Footnote 410. State ex rel. Bond v. Register of Conveyances, *110 S. 559 (La. 1926).*

(n35)Footnote 411. *Faulkner v. Otto, 230 S.W. 447 (Tex. Civ. App. 1921).*

(n36)Footnote 412. *Corcoran v. White, 7 N.E. 525 (Ill. 1886); Sawyer v. Brossart, 25 N.W. 876 (Iowa 1885); Alexanian v. Fidelity-Philadelphia Trust Co., 30 A.2d 651 (Pa. Super. 1943).*

(n37)Footnote 413. *Sharp v. West, 150 F. 458 (W.D. Ark. 1907); Lacey v. Thomas, 164 F. 623 (D. Or. 1908); Stansbury v. Cooper, 152 P. 948 (Cal. App. 2d Dist. 1915); Gray v. Lynn, 77 S.E. 156 (Ga. 1913); Foltz v. Evans, 49 N.E.2d 358 (Ind. App. 1943); Knox v. McMurray, 140 N.W. 652 (Iowa 1913);* Elmer v. Hart, *46 S. 619 (La. 1908); Bradley v. Haven, 94 N.E. 268 (Mass. 1911); Rahm v. Cummings, 155 N.W. 201 (Minn. 1915); Ross v. Craven, 121 N.W. 451 (Neb. 1909); Sennett v. Melville,122 N.W. 851 (Neb. 1909); Lopeman v. Colburn, 118 N.W. 116 (Neb. 1908); Hall v. Jones, 80 S.E. 228 (N.C. 1913); Atwood v. Rose, 122 P. 929 (Okla. 1912); Lichty v. Daggett, 121 N.W. 862 (S.D. 1909); Moon v. Bollwinkel, 154 P. 939 (Utah 1916); Cram v. Long, 142 N.W. 267 (Wis. 1913); Curtis Land & Loan Co. v. Interior Land Co., 118 N.W. 853 (Wis. 1908).*

(n38)Footnote 414. *Chittum v. Potter, 219 S.E.2d 859 (Va. 1975); Curtis Land & Loan Co. v. Int. Land Co., 118 N.W. 853 (Wis. 1908).*

(n39)Footnote 415. *Crabtree v. St. Paul Opera-House Co., 39 F. 746 (D. Minn. 1889).* Where the contract is subject to obtaining a mortgage the vendee must make a reasonable attempt to obtain it. *In re King's Estate, 130 A.2d 245 (Pa. Super. 1957).*

(n40)Footnote 416. *Davenport v. Newton, 42 A. 1087 (Vt. 1898).*

(n41)Footnote 417. Elmer v. Hart, *46 S. 619 (La. 1908); Rahm v. Cummings, 155 N.W. 201 (Minn. 1915).*

(n42)Footnote 418. *Sawyer v. Brossart, 25 N.W. 876 (Iowa 1885).*

(n43)Footnote 419. *Baker v. Holt, 14 N.W. 8 (Wis. 1882).*

(n44)Footnote 420. *Bushmeyer v. McGarry, 166 S.W. 168 (Ark. 1914).*

(n45)Footnote 421. Ryder v. Johnston, *45 S. 181 (Ala. 1907).*

(n46)Footnote 422. *Wax v. Northwest Seed Co., 64 P.2d 513 (Wash. 1937).*

(n47)Footnote 423. *Blumenstein v. Wegman, 14 N.Y.S.2d 525 (N.Y. Sup. 1939).*

(n48)Footnote 424. *Rice Lands & Products Co. v. Blevins, 215 P. 402 (Cal. App. 3d Dist. 1923); Lloyd v. Mickelson, 210 N.W. 586 (Minn. 1926); Converse v. Jenson, 197 N.W. 490 (Minn. 1924); Brown v. California & Western Land Co., 177 N.W. 774 (Minn. 1920); Douglass v. Brooks, 87 S.E.2d 258 (N.C. 1955); Edwards Lumber & Land Co. v. Smith, 132 S.E. 593 (N.C. 1926); Gambill v. Snow, 189 S.W.2d 33 (Tex. Civ. App. 1945). See Estero Bay Estates v. Giddens, 14 F.2d 171 (S.D. Fla. 1926).* For time to be of the essence in a sales contract it must be so specifically provided. *Sobczak v. Kotwicki, 79 N.W.2d 471 (Mich. 1956).*

(n49)Footnote 425. Abbott v.' 76 Land & Water Co., 53 P. 445 (Cal. 1898); *Smith v. Brennan, 28 N.W. 892 (Mich. 1886); McCotter v. City of New York, 35 Barb. 609 (N.Y. Sup. 1861).*

(n50)Footnote 426. *Weaver v. Burr, 8 S.E. 743 (W.Va. 1888); Frank v. Stratford-Handcock, 77 P. 134 (Wyo. 1904).*

(n51)Footnote 427. *Normile v. Miller, 306 S.E.2d 147 (N.C. Ct. App. 1983); Coleman v. Applegarth, 11 A. 284*

(Md. 1887); Hollingshead v. Morris, 137 N.W. 527 (Mich. 1912).

(n52)Footnote 428. *Hollingshead v. Morris, 137 N.W. 527 (Mich. 1912); Mossie v. Cyrus, 119 P. 485 (Or. 1911); Weaver v. Burr, 8 S.E. 743 (W.Va. 1888); Frank v. Stratford-Handcock, 77 P. 134 (Wyo. 1904).*

(n53)Footnote 429. *Sterngass v. Maisel, 519 N.Y.S.2d 569 (1987); Newman v. Kellogg, 110 S.W.2d 693 (Ark. 1937); Adams v. Pendarvis, 217 Ill. App. 535 (Ill. App. 3d Dist. 1920); Artz v. McCarthy, 199 P. 99 (Kan. 1921); McTernan v. LeTendre, 351 N.E.2d 566 (Mass. App. 1976)* (acceptance becomes effective by posting letter on last day of term); *Kesterson v. Marsh, 185 N.W. 346 (Neb. 1921); Lean v. Leeds, 114 A. 402 (N.J. 1921); Tobias v. Lynch, 182 N.Y.S. 643 (N.Y. App. Div. 2d Dept. 1920); In re McPherson, 186 N.Y.S. 661 (N.Y.Surrog. 1921); Savage v. Weigel, 219 N.Y.S. 99 (N.Y. Sup. 1926); Gnad v. Herman, 203 N.Y.S. 783 (N.Y. Sup. 1923); Cullen v. Donahue, 121 A. 392 (R.I. 1923).*

(n54)Footnote 430. *Mattingly v. Mattingly, 122 A. 40 (Md. 1943). See White v. Ralph, 154 P.2d 167 (Idaho 1944).*

(n55)Footnote 431. *Crolius v. Lorge, 212 N.W. 253 (Wis. 1927).* Option lost by laches after seven years. *Sandlin v. Weaver, 83 S.E.2d 806 (N.C. 1954).*

(n56)Footnote 432. *Tibbs v. Zirkle, 46 S.E. 701 (W.Va. 1904); Weaver v. Burr, 8 S.E. 743 (W.Va. 1888).*

(n57)Footnote 433. *Thompson v. Burns, 99 P. 111 (Idaho 1908).*

(n58)Footnote 434. *Ackerman v. Maddux, 143 N.W. 147 (N.D. 1913).*

(n59)Footnote 435. *Eagle Mill Co. v. Caven, 76 Mo. App. 458 (Mo. App. 1898).*

(n60)Footnote 436. *Mossie v. Cyrus, 119 P. 485 (Or. 1911); Keible v. Gebhart, 35 Berks (Pa.) 329; Bowen v. Speer, 166 S.W. 1183 (Tex. Civ. App. 1914); Brown Bros. Lumber Co. v. Preston Mill Co., 145 P. 964 (Wash. 1915).*

(n61)Footnote 437. *Grossman v. Herman, 194 N.E. 694 (N.Y. 1935).* Oral acceptance of option is valid. *Kottler v. Martin, 85 S.E.2d 314 (N.C. 1955).*

(n62)Footnote 438. *Chain v. Wilhelm, 84 F.2d 138 (4th Cir. 1936), rev'd in part on other grounds, United States ex rel. Wilhelm v. Chain, 300 U.S. 31 (1937); Lankford v. Holton, 24 S.E.2d 292 (Ga. 1943).*

(n63)Footnote 439. *Duclos v. Turner, 166 S.W.2d 251 (Ark. 1942);* Frissell v. Nichols, *114 S. 431 (Fla. 1927); Dixon v. Fed. Farm Mortg. Corp., 1 S.E.2d 732 (Ga. 1939); Weber v. Hulbert, 225 Ill. App. 321 (Ill. App. 1st Dist. 1922); McCutchan v. Iowa State Bank, 5 N.W.2d 813 (Iowa 1942);* Snell v. Union Sawmill Co., *105 S. 728 (La. 1925);* Bancroft v. Martin, *109 S. 859 (Miss. 1926), error overruled,* Bancroft v. Martin, *111 S. 434 (Miss. 1927); Cochran v. Taylor, 7 N.E.2d 89 (N.Y. 1937); Fickas v. Bowles, 158 S.W.2d 118 (Tex. Civ. App. 1941); Helmholz v. Greene, 181 N.W. 221 (Wis. 1921).*

(n64)Footnote 440. *Crowley v. Vaughan, 106 S.E. 539 (W. Va. 1921).*

(n65)Footnote 441. *Groh v. Calloway, 292 S.W. 65 (Mo. 1927).*

(n66)Footnote 442. Bancroft v. Martin, *109 S. 859 (Miss. 1926), error overruled,* Bancroft v. Martin, *111 S. 434 (Miss. 1927); Von Knuth v. Ryan, 186 N.W. 81 (Neb. 1921). See Alexander v. Wingett, 206 P. 1088 (Mont. 1922).*

(n67)Footnote 443. *Nass v. Munzing, 138 A. 922 (N.J. 1927).*

(n68)Footnote 444. *Brown v. San Francisco Sav. Union, 66 P. 592 (Cal. 1901); Gordon v. Darnell, 5 Colo. 302 (Colo. 1880); Walton's Exec. v. Franks, 228 S.W. 1025 (Ky. App. 1921); Litz v. Goosling, 19 S.W. 527 (Ky. App. 1892),*

rev'd in part on other grounds, Murphy Thompson & Co. v. Reid, 101 S.W. 964 (Ky. 1907); Coleman v. Applegarth, 11 A. 284 (Md. 1887); Ide v. Leiser, 24 P. 695 (Mont. 1890); Brown v. Farmers' & Merchants' Nat'l Bank, 147 P. 537 (Or. 1915); Connor v. Renneker, 25 S. Car. 514 (S.C. 1886).

(n69)Footnote 445. *Corbett v. Cronkhite, 87 N.E. 874 (Ill. 1909).*

(n70)Footnote 446. *Roth v. Moeller, 197 P. 62 (Cal. 1921).*

(n71)Footnote 447. *Johnson v. Haynes, 532 S.W.2d 561 (Tenn. Ct. App. 1975); Stanley v. Whitmire, 212 S.E.2d 845 (Ga. 1975).*

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CHAPTER 96 Vendors and Purchasers

11-96 Thompson on Real Property, Thomas Editions § 96.10

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§ 96.10 Consideration for the Contract.

The consideration for the contract is presumptively in cash, in the absence of other provision. n448 To be binding, a contract for the sale of real estate must be based on a sufficient consideration. n449 Even if a real estate contract is reduced to writing and signed by the parties, it is unenforceable unless it shows a consideration of benefit moving to the vendor, or detriment to the purchaser or agreement to purchase the property. n450 Specific performance may be denied by a court of equity if a contract is not fair, reasonable, and based on adequate consideration, but mere inadequacy of consideration does not justify denial of specific performance. n451 Under the Statute of Frauds, price is a necessary element to every enforceable contract for sale of lands. n452 A "valuable consideration" may be something other than the actual payment of money and may consist of acts to be done after the conveyance. n453 Regarding whether the consideration is adequate, the mere showing of some advantage to the purchaser will not warrant a cancellation of the contract. n454

In some states, a statute expressly provides that the consideration need not appear in the memorandum, n455 while in others the statute requires the consideration to appear. n456 Authorities are almost unanimous in holding that the words "for value received" constitute a sufficient showing of the consideration. n457 This seems to be so, both in those states whose statute expressly requires the consideration to be expressed and in those whose courts follow the English case law doctrine requiring the memorandum to contain the consideration for the promise. n458 The consideration may be the payment of money, the performance of some other benefit, or nothing more than the promise to do such stipulated act in the future. n459 A contract provision that the purchaser may pay to any one of multiple sellers is valid and binding. n460

A release of "any and all interest, right, or title" which one party to the contract "may now have or may hereafter have" in certain realty is a good and sufficient consideration for the other party's promise to pay a stated sum for such interest, right, or title. n461 Also, the consideration may consist of the assumption of a mortgage, n462 the performance of services, n463 the payment of the debt of the vendor on the premises, n464 or the cancellation of vendor's note. n465 A promise for a promise is consideration. n466 The consideration may be expressed as the sum of one dollar and other valuable considerations. n467 If the purchaser relinquishes a right to enforce the collection of a note, this is a sufficient consideration to support the vendor's agreement to convey land. n468 A quitclaim deed to land, in the absence of fraud or mistake, is a sufficient consideration to defeat a plea of total failure of consideration. n469

Where the contract is supported by a legal consideration, its validity is not defeated by the fact that there existed between the parties a collateral agreement that is unenforceable. n470 The vendor is ordinarily not entitled to interest on deferred payments unless the contract expressly so provides. n471

An oral contract for the sale of real estate is sufficient as to consideration, where it provides that the real estate shall be sold to the purchaser for the highest price bid for the same. n472 Where consideration is executory and touches the land the doctrine that price is without the statute of frauds cannot be extended to include the broader concept of consideration. n473

FOOTNOTES:

(n1)Footnote 448. *Builders Sand, Inc. v. Turtur, 678 S.W.2d 115 (Tex. App. 1984); Albert v. Pearson, 229 P. 998 (Cal. App. 2d Dist. 1924)* (check cashed); *Purgett v. Weinrank, 219 Ill. App. 28 (Ill. App. 2d Dist. 1920); Nasset v. Houska, 186 N.W. 255 (N.D. 1921). See Kopeyka v. Woodstrom, 137 N.E. 137 (Ill. 1922).*

(n2)Footnote 449. *English v. Shipley, 234 P. 334 (Cal. App. 1st Dist. 1925); California. Loaiza v. Superior Court, 24 P. 707 (Cal. 1890); Fly v. Cline, 193 P. 615 (Cal. App. 2d Dist. 1920); Orange Cove Water Co. v. Sampson, 248 P. 526 (Cal. App. 3d Dist. 1926); Mutter v. Metzger, 155 N.E. 280 (Ill. 1927); Barnes v. McCartney, 3 La. App. 145 (La. App. 2d Cir. 1925)* (worthless automobile insufficient consideration); *Bean v. Burbank, 16 Maine 458 (Me. 1840); Pancoast v. Dinsmore, 75 A. 43 (Me. 1909); Bartlett v. Smith, 109 N.W. 260 (Mich. 1906); Estrada v. Hanson, 10 N.W.2d 223 (Minn. 1943); Ide v. Leiser, 24 P. 695 (Mont. 1890); Cruthis v. Steele, 131 S.E.2d 344 (N.C. 1963)* (doubting that "love and affection" were sufficient consideration); *Exum v. Lynch, 125 S.E. 15 (N.C. 1924); Dept. of Pub. Assistance v. Kovaes, 46 D. & C. 652* (C.P. Fayette County, Pa. 1942); *Botello v. Misener-Collins Co, 469 S.W.2d 793 (Tex. 1971); Latimer v. Holladay, 134 P.2d 183 (Utah 1943); Cummins v. Beavers, 48 S.E. 891 (Va. 1904); Keffer v. Grayson, 76 Va. 517 (Va. 1882); Weaver v. Burr, 8 S.E. 743 (W. Va. 1888). See* Derek H. Davis, Student Author, Requirements under the Statute of Frauds for Contract to Convey Real Property, *24 Baylor L. Rev. 406 (1972).*

(n3)Footnote 450. *Richardson v. Hardwick, 106 U.S. 252 (1882); Huffman v. Foreman, 323 N.E.2d 651 (Ind. App. 1975); Bean v. Burbank, 16 Me. 458 (Me. 1840); Warren v. Castello, 19 S.W. 29 (Mo. 1892); Tucker v. Woods, 12 Johns. 190 (N.Y. Sup. 1815); Le Roy v. Jacobosky, 48 S.E. 796 (N.C. 1904); Cummins v. Beavers, 48 S.E. 891 (Va. 1904).*

(n4)Footnote 451. *Kuntz v. Kuntz, 595 N.W.2d 292 (N.D. 1998); In re Looney, 975 S.W.2d 508 (Mo. Ct. App. 1998); In re Estate of Mihm, 497 A.2d 612 (Pa. Super. Ct. 1985); Harrington v. Harrington, 365 N.W.2d 552 (N.D. 1985); Rossiter v. Vogel, 134 F.2d 908 (2d Cir. 1943); Andrews v. Andrews, 28 Ala. 432 (Ala. 1856); Shields v. Trammell, 19 Ark. 51 (Ark. 1857); Wilson v. White, 119 P. 895 (Cal. 1911); Winter v. Goebner, 40 P. 570 (Colo. 1895);* Maloy v. Boyett, *43 S. 243 (Fla. 1907); Wyche v. Greene, 16 Ga 49 (Ga. 1854); Bear Track Mining Co. v. Clark, 54 P. 1007 (Idaho 1898); Corbett v. Cronkhite, 87 N.E. 874 (Ill. 1909); Wyatt v. Mayfield, 91 Ill. 577 (Ill. 1879); Holland v. Hensley, 4 Iowa 222 (Iowa 1857); Northup v. Standifer, 23 S.W. 348 (Ky. App. 1893); Coleman v. Applegarth, 11 A. 284 (Md. 1887); Stone v. Hackett, 78 Mass. 227 (Mass. 1858); Vasser v. Vasser, 23 Miss. 378 (Miss. 1852); Lipscomb v. Adams, 91 S.W. 1046 (Mo. 1906); Cruthis v. Steele, 131 S.E.2d. 344 (N.C. 1963)* (love and affection of parent and child will not support contract to convey realty); *Schroeder v. Gemeinder, 10 Nev. 355 (Nev. 1875); Sprague v. Schotte, 87 P. 1046 (Or. 1906); Appeal of Heath, 100 Pa. 1 (Pa. 1882); Williams v. Graves, 26 S.W. 334 (Tex. Civ. App. 1894); Price v. Lloyd, 86 P. 767 (Utah 1906); Graybill v. Braugh, 17 S.E. 558 (Va. 1893); Hanson v. Michelson, 19 Wis. 498 (Wis. 1865).*

(n5)Footnote 452. *Malone Constr. Co. v. Westbrook, 194 S.E.2d 619 (Ga. App. 1972); Hanlon v. Hayes, 89 N.E.2d 51 (Ill. 1949).*

(n6)Footnote 453. *Allen v. Mayo, 279 N.W.2d 617 (Neb. 1979); Cowman v. Allen Monuments, Inc., 500 S.W.2d 223 (Tex. Civ. App. 1973); Gage v. Wimberley, 476 S.W.2d 724 (Tex. Civ. App. 1972); Sheldon & Co. v. Emory U., 184*

S.E. 401 (Ga. App. 1936).

(n7)Footnote 454. *Hardin v. Baynes, 82 S.E.2d 384 (Ga. 1944); Wharton v. Meyers, 21 N.E.2d 772 (Ill. 1939).*

(n8)Footnote 455. *Dunlap v. Hopkins, 95 F. 231 (7th Cir. 1899)* (construing Illinois statute); *Edgerton v. Edgerton, 8 Conn. 6 (Conn. 1830); Hiatt v. Hiatt, 28 Ind. 53 (Ind. 1867); Scott v. Bush, 26 Mich. 418 (Mich. 1873); Neibert v. Baghurst, 25 A. 474 (N.J. Ch. 1892).*

(n9)Footnote 456. *Dillworth v. Holmes Furniture & Vehicle Co., 73 So. 288 (Ala. App. 1916); Catterlin v. Bush, 59 P. 706 (Or. 1900), aff'd 65 P. 1064; Saunders v. Bank of Mecklenburg, 71 S.E. 714 (Va. 1911). See* D. Kent Meyers, *Real Estate Transactions, Rates and the Uniform Consumer Credit Code, 23 Okla. L. Rev. 263 (1970).*

(n10)Footnote 457. *Dillworth v. Holmes Furniture & Vehicle Co., 73 So. 288 (Ala. App. 1916); Kuenzie v. Jansen, 130 N.W. 450 (Wis. 1911).*

(n11)Footnote 458. *Brooks v. Morgan, 1 Del. 123 (Del. Super. 1832); Whitney v. Stearns, 16 Maine 394 (Me. 1839); Edelen v. Gough, 5 Gill 103 (Md. 1847); D.M. Osborne & Co. v. Baker, 25 N.W. 606 (Minn. 1885); Miller v. Cook, 23 N.Y. 495 (N.Y. Sup. 1861); McMorris v. Herndon, 2 Bailey 56 (S.C. App. 1831); Lapham v. Barrett, 1 Vt. 247 (Vt. 1828); Kuenzie v. Jansen, 130 N.W. 450 (Wis. 1911); Dahlman v. Hammel, 45 Wis. 466 (Wis. 1878); Wain v. Warlters, 5 East 10, 102 Eng. Rep. 972 (1804).*

(n12)Footnote 459. *Peterson Homes, Inc. v. Johnson, 691 So. 2d 563 (Fla. Dist. Ct. App. 1997); Atlanta Six Flags Partnership v. Hughes, 381 S.E.2d 605 (Ga. Ct. App. 1989); Guild v. Atchison, T. & S.F.R. Co., 45 P. 82 (Kan. 1896); Kentucky. Murphy Thompson & Co. v. Reid, 101 S.W. 964 (Ky. App. 1907); Babcock v. Wilson, 17 Maine 372 (Me. 1840); Curtis v. Blair, 26 Miss. 309 (Miss. 1853); Rodman v. Robinson, 47 S.E. 19 (N.C. 1904); McPherson v. Fargo, 74 N.W. 1057 (S.D. 1898); Cummins v. Beavers, 48 S.E. 891 (Va. 1904); Curtis Land & Loan Co. v. Interior Land Co., 118 N.W. 853 (Wis. 1908).*

(n13)Footnote 460. *Goodson v. Smith, 243 P.2d 163 (Wyo. 1952).*

(n14)Footnote 461. *Latimer v. Holladay, 134 P.2d 183 (Utah 1943).*

(n15)Footnote 462. *Crooke v. Nelson, 191 N.W. 122 (Iowa 1922); Thomas v. Williams, 176 N.W. 968 (Iowa 1920).*

(n16)Footnote 463. *Bloech v. Hyland Homes Co., 247 P. 761 (Or. 1926); Norton v. Ball, 225 S.W. 581 (Tex. Civ. App. 1920). See Underwood v. Hogg, 261 S.W. 556 (Tex. Civ. App. 1924).*

(n17)Footnote 464. *Dept. of Pub. Assistance v. Kovacs, 46 D. & C. 652* (C.P. Fayette County, Pa. 1942); *Midkiff v. Glass, 123 S.E. 329 (Va. 1924).*

(n18)Footnote 465. *Hoard v. McFarland, 229 S.W. 687 (Tex. Civ. App. 1921).*

(n19)Footnote 466. *In re Estate of Mounts, 39 S.W.3d 499 (Mo. Ct. App. 2000); Crowley v. Vaughan, 106 S.E. 539 (W. Va. 1921).*

(n20)Footnote 467. *Linse v. Zastrow, 207 P. 119 (Mont. 1922); Moller v. Paulivico, 149 N.E. 829 (N.Y. 1925).*

(n21)Footnote 468. *Woolum v. Sizemore, 102 S.W.2d 323 (Ky. App. 1937). See* The Interstate Land Sale Full Disclosure Act, *21 Rutgers L. Rev. 714 (1967).*

(n22)Footnote 469. *Turpin v. Jackson County, 35 S.E.2d 180 (N.C. 1945).*

(n23)Footnote 470. Thomas v. Little, *96 S. 896 (Ala. 1923).*

(n24)Footnote 471. *Murphy v. Frank P. Miller Corp., 200 N.W. 974 (Mich. 1924).*

(n25)Footnote 472. *Heffernan v. Chester-Cambridge Bank & Trust Co., 27 Del. Co. (Pa.) 578; Barto v. Hicks, 184 S.E.2d 188 (Ga. App. 1971)* (a sales contract based on the purchaser being able to obtain financing at "current prevailing rate" was not too indefinite to be enforceable).

(n26)Footnote 473. *Theberge v. Canadian P. Ry. Co., 122 A.2d 848 (Vt. 1956).*

Thompson on Real Property, Thomas Editions

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CHAPTER 96 Vendors and Purchasers

11-96 Thompson on Real Property, Thomas Editions § 96.11

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§ 96.11 Terms of the Contract.

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§ 96.11(a) Construction of the Contract. n474

The intention of the parties must be gathered from the language used or the conduct of the parties or both, n475 and where the conduct of the parties discloses a practical construction, it will be adopted by the court. n476 Basic rules of contract apply to real estate contracts, because they are simply irrevocable and continual offers to sell. n477

The court must give each particular clause of a contract the qualification whose intent is evident from the other parts of the contract. n478 The contract must be construed as a whole, n479 and when several instruments which refer to the same subject matter between the same parties are made as parts of substantially one transaction, they should be considered as one contract and receive the same construction as if their several provisions were in one and the same instrument. n480 The contract, the deed and the purchase-money mortgage should be construed together. n481 Collateral covenants in sales contracts are not merged in subsequent deed. n482

The court cannot make a contract for the parties by construction where none exists. n483 The primary object of all rules of interpretation and construction is to arrive at and give effect to the mutual intention of the parties as expressed in the contract, when not forbidden by law. This applies to contracts for the sale of real estate as well as to other contracts. n484

Real estate contracts are within the rule that a contract is subject to an implied condition that the parties shall be excused in case performance becomes impossible or the purpose of the contract is frustrated before a breach thereof and without the fault of either party, performance becomes impossible or the purpose of the contract is frustrated. An excuse of performance for impossibility or frustration of purpose arises if the parties must have known that the contract could not be fulfilled unless, when the time for performance arrived, some particular thing or condition continued to exist. n485 The agreement should, if possible, be rendered operative, as the parties are supposed to have intended something by their agreement. n486

Construction of the contract is neither needed nor appropriate where the contract is plain and unambiguous. n487 It is only where the meaning of the contract is doubtful or open to more than one construction that the court is required to

construe the agreement. n488 When the contract is ambiguous and open to construction, the true end to be reached is to ascertain what the parties intended, and when that intention is found, it prevails over verbal inaccuracies, inapt expressions, and dry words of stipulations. The court should as far as possible place itself in the position of the parties when their minds met upon the terms of the agreement, and then from a consideration of the writing itself, its purpose, and the circumstances surrounding the transaction endeavor to ascertain what they intended and what they agreed to do, that is, upon what sense or meaning of the terms used, their minds actually met. n489 The rule in the Uniform Commercial Code that a contract is not void for indefiniteness if the parties intended to make a contract and a reasonable remedy is available, has been applied to contracts for the sale of realty. n490 An agreement to be attached to a contract for the sale of land should be construed against the purchaser who prepared it, if it be ambiguous or requires judicial interpretation. n491 Thus, a purchase agreement between a subdivision developer and a lot purchaser is construed against the developer as drafter of the doubtful provisions. n492

When the provisions are partly in writing and partly printed and the written and printed parts are inconsistent with each other, the written part is presumed to express the true intention of the parties and will govern the printed matter, for the reason that printed forms are very general in their terms, and are intended for any like occasion, while the written words are considered as having been especially selected by the parties themselves for the particular case. n493 Where there is substantial doubt as to whether the covenants are dependent or independent, they will ordinarily be construed as dependent. n494 A covenant is independent where its performance by one party is not related to the duty of the other party to perform covenants. n495 The court may give consideration to the practical construction placed upon the contract by the parties. n496 All oral negotiations are superseded by a deed and a contemporaneous written contract. n497 Written matter will control printed matter in the contract if they are inconsistent. n498 The contracts are construed with reference to the law of the place where they are made or are to be performed. n499 If a land sale contract provides that the interest rate increases if the statutory limit is raised, that provision applies only as to contracts executed after the rate is raised by statute. n500 The contract may provide for approval of title by the attorney for the vendee, n501 for the furnishing of abstracts, n502 for the expenses of correction of errors, n503 or for the giving of mortgages as part of the purchase price. n504 Where the contract is silent or ambiguous as to the time of payment n505 or the time of conveyance, the law implies a reasonable time. n506

Some courts have held that the term "encumbrance" in stating the "premises are free from encumbrance" means liens on the premises which require the payment of money to discharge them and does not refer to restrictions and easements. n507 The instrument will not become a completed contract while anything essential to close the transaction remains to be done. n508 Where a broker acts for a purchaser, the contract is complete when signed and placed in the hands of the broker. n509 A receipt for earnest money has been held not to be a contract amounting to a sale. n510 The vendor may waive payment on the day specified in the contract, n511 and the same is true as to the time agreed upon to perfect the title. n512 Where a note is accepted as payment the contract is fully performed by the purchasers and they are entitled to their deed whether the note is paid at maturity or not. n513 Where provision is made for alternative methods of settlement with the right of election in the first instance in the purchaser and the purchaser refuses to exercise the right, then the right of election shifts to the seller. n514 Although the contract provides for settlement on or before a fixed date, yet this does not give either party the right to require settlement before the date fixed. n515 Generally, where the contract carries no stipulation for interest, the purchaser is liable for interest only from the time possession begins. n516

A covenant by the vendor in a sales agreement not to compete with the vendee is valid if the time and area limitations are reasonable, n517 and, if some of the limitations are not reasonable, other limitations may be preserved if they are reasonable and severable. n518 The courts are in dispute, however, as to whether the court itself in reformation of the contract can limit the area so as to be reasonable, or whether the court must be able to find such right to limit from the language. n519 If a contract contains conflicting descriptions, the description that will not encroach on adjoining property is the preferred and proper one. n520

§ 96.11(b) Modification by Mutual Consent.

The contract is subject to modification by the parties at any time. n521 "Until consummated by deed, an executory contract of sale is subject to modification by agreement of the parties." n522 A written contract for the sale of real estate may be modified by a subsequent written agreement or by an oral agreement based on a valuable consideration. n523 Where a contract for a deed was in writing, it was held that there could be no subsequent alterations binding on the parties unless the subsequent alterations were in writing or by an executed contract. n524 The prevailing rule is that the parties may contract orally to modify their agreement as respects the manner of performance. n525 Also, a parol modification with respect to the amount or medium of payment of the purchase price has been upheld. n526 A contract may be modified orally, as regards the time of payment, unless to do so would violate the statute of frauds requiring performance within one year. n527

If a contract is modified by agreement of the parties, a new contract comes into existence, n528 into which the original one is merged. While the parties may agree to modify the contract, they ordinarily do not at the same time contemplate the fact that they execute a new contract by their very act of modification. n529 The rule that parol, prior, and contemporaneous stipulations are merged in the written contract n530 is not applicable to subsequent oral agreements. n531 Parties who have the power to make a contract have the power to unmake or modify it regardless of self-imposed limitations, and notwithstanding they insert in their written contract an agreement expressed in the strongest terms prohibiting its alteration except in a particular manner, they may, by a subsequent agreement based upon a sufficient consideration, modify their contract in any manner they choose. n532

The modification may consist in the substitution of a new purchaser, n533 or the extension of the time of payment. n534 It has been held that where there has been partial performance under a parol agreement for the sale of land, such agreement does not become merged in a written one to the extent that it cannot be employed to show acts done or rights acquired under it, the merger going no further than to preclude the establishment of a variance between the two contracts. n535 The burden of proof of modification is on the party relying on an oral modification of the contract. n536 Where fraud induced the original contract, this fraud is not waived by a subsequent modification of the contract. n537 Where the contract is unambiguous and without fraud, all parol negotiations are merged in the written contract. n538 Thus, a bond for a deed which made time of the essence governed the rights of the parties, notwithstanding earlier contracts did not contain such a provision. n539 The conduct of the parties subsequent to the expiration of the date of a modified contract in carrying on negotiations looking toward the completion of their obligations thereunder has been held to show that they intended to keep the modified contract alive. n540 Where the purchaser refused to complete the deal and the parties agreed to reduce the amount to be paid, and which amount was paid, the deed, abstract, and original agreement were delivered to the purchaser; the transaction being thus fully performed would not be declared a nullity for want of consideration. n541

§ 96.11(c) Reformation of the Sales Contract.

A contract for sale of land is like any other contract subject to reformation in equity for fraud or mistake. n542 However, real estate contracts have special features that must be considered in any reformation. Contracts for sale of land create, under the doctrine of equitable conversion, property rights in the real estate in the vendee; and the rights of other persons to the equitable interests of the vendee complicate the rights of the vendor and vendee to change the language of the contract and the property rights that have arisen thereunder. Also, where the rights of bona fide purchasers for value have arisen dependent upon the language of the sales contract, the contract cannot be reformed in conflict with such rights. n543 If the third person has notice of the rights of the parties involved, before the claim of such third party arises, the contract may be reformed as against such third party. n544 An instrument is subject to reformation as against those who cannot claim to be bona fide purchasers for value without notice. n545 Any extension of time must be supported by a writing. n546 A formal written contract cannot be modified by a parol "executory contract." n547 Under the Statute of Frauds, a land contract in writing may be modified orally as regards time of payment unless not to be performed within a year. n548 The vendee's acquiescence in a wrongful repudiation of the contract by the vendor effects a mutual rescission. n549 The vendee's equitable interest may be lost by abandonment. n550

An oral agreement reducing amount of monthly payments and extending time is not binding if there is no consideration, n551 but a contract modifying the former contract, by reducing the purchase price but accelerating payments, was based on a valid consideration where the vendee was in default and the vendor needed money. n552 An agreement to modify specific provisions of a land contract as to interest cannot be implied; contract provisions must be express and openly uttered and avowed. n553 If the old contract is fully rescinded and a new contract is entered into, there is consideration for the new contract though the purchase price is lower. n554 A provision that time shall be of the essence may be waived by conduct of the parties. n555

§ 96.11(d) Varying the Written Contract.

Traditionally, a written contract for the sale of land which is complete in itself and the validity of which is conceded cannot be varied by showing that prior or contemporaneous agreements were made which were not reduced to writing but, in accordance with the understanding of the parties thereto, were to remain in full force and effect. n556 Thus, where a contract to convey land is in writing, parol evidence is not admissible to establish a reservation of growing timber. n557 Extrinsic evidence as to the prices quoted for separate tracts in negotiations preceding their purchase is inadmissible as tending to vary the terms of a written contract of sale which specifies the purchase price as a lump sum. n558 A contract for the purchase of land cannot be shown to be a contract for an easement. n559 When the parties reduce their contract to writing, and there is no fraud or mistake in the words which express it, parol evidence is not admissible to change or modify it. n560 The presumption is that the purchaser executed the contract voluntarily and with full knowledge of its contents. n561 However, the rule forbidding parol evidence contradicting the terms of a written contract does not render inadmissible such evidence to establish fraud and deceit invalidating such a contract. n562 In case of ambiguity, it is permissible to show the negotiations leading up to the contract, and what was said and done then, not for the purpose of incorporating such negotiations or statements in the written agreement, but of reading the words used in the writing in the light of the circumstances of the case. n563 This is upon the principle that the construction of a written document is the ascertainment of the intention of the parties, determined like a question of fact by the natural weight of competent evidence and not by the application of arbitrary rules. The principle just stated does not authorize the use as evidence of matter not proper for consideration in the interpretation of a writing; nor does it abolish the well-established rule that an instrument cannot be contradicted or varied by parol extraneous evidence. n564

Partial performance of an executory contract is a sufficient consideration to support all of its provisions. n565 Where the sale is to several persons, the notice must be given to all the purchasers. n566

There is a presumption that the vendor and purchaser have contracted with reference to applicable principles of law. n567 Extrinsic evidence may be received to fix the locality and boundaries of the land where the description is vague or uncertain. n568 The evidence for this purpose may come from surveyors n569 or other persons who know the location of the property by the description given, n570 or by reference to maps n571 or surveys n572 or other separate documents. n573 The rule as to exactness of description is liberal in favor of sufficiency of description. n574 Also, where, by mutual mistake of the parties, the deed fails to embody the clearly expressed terms of the contract, or does not effect what both parties intended by their contract, a court of equity will reform the deed in accordance with their manifest intention. n575 The statute of frauds is applicable to alterations in the contract. n576 The right to have a prior deed or mortgage reformed cannot prevail as against a subsequent bona fide purchaser for value under an unrecorded deed. n577

§ 96.11(e) Merger of the Contract into the Deed. n578

In accordance with contract law generally, all provisions in the contract are merged n579 into the deed when executed and delivered except those covenants which are deemed to be collateral to the sale. n580 Thus, the deed regulates the rights and liabilities of the parties. n581

Courts have made varied pronouncements on the doctrine of merger in connection with real estate contracts. Contractual provisions not embodied in the deed are superseded and merged only if the parties intended to surrender them. n582 A deed given pursuant to a contract for the sale of realty results in a merger of the contract into the deed, and action cannot thereafter be maintained on the contract. n583 All preliminary negotiations and agreements made prior to the conveyance are merged into the deed, and parol evidence is not admissible to contradict the terms of the conveyance. n584 Oral representations made before the written contract are merged into the contract and parol evidence of those is inadmissible. n585 If the contract mentions certain duties that cannot be performed before or at the closing, those duties outlive the consummation of the sale and are not merged in the deed. n586 If the parties agree that certain contractual acts will be performed after execution of the deed, no merger occurs as to those acts. n587 Therefore, the time in which a contract covenant is to be performed may be an important factor. n588 If the deed constitutes only part of the performance of the contract, the doctrine of merger does not apply to unperformed portions. n589 A contract of sale is merged in a deed only if all terms of the contract are fulfilled by delivery of the deed. n590 If delivery of the deed is intended only as part performance, the doctrine of merger does not apply. n591

Covenants of warranty as to quality and improvements are collateral to the conveyance and are not merged into nor satisfied by the deed. n592 A covenant in the contract is deemed collateral and not merged must not be or appear to be connected with the title, possession, quantity or emblements of the land being sold. n593 Indeed, some courts have held that only the title covenant is necessarily merged in the deed; independent contract provisions relating to possession, quantity and emblements may not be merged. n594

In the absence of fraud or mistake n595 a deed is deemed to be an executed contract modifying the former executory contract of sale. n596 To effect merger by operation of law, estates meet in one and the same person at one and the same time and in one and the same right. n597 No merger occurs if there are outstanding interests. n598

Intention is essential to merger in equity. n599 A collateral agreement is not merged in a deed if evidence shows it was not so intended. n600 Evidence of contradictory earlier agreements cannot be introduced to vary the terms of a deed. n601 The exception to this rule is the case of mortgage agreements. When a deed of conveyance is delivered and accepted as performance of such contract, the contract becomes merged in the deed, and the rights of the parties rest thereafter solely on the deed. n602 There may be cases, however, where a stipulation in a contract, instead of becoming merged in the deed, survives it and confers an independent cause of action. Thus, where, in a contract for the sale and purchase of land, there was a provision that if the purchaser did not build a factory on the land he should reconvey to the vendor. The purchaser took possession, made payment, and obtained a deed but failed to construct a factory in accordance with the terms of the contract. It was held that the provision relating to the construction of the factory was not merged in the deed. n603 The contract of sale is merged in the deed. n604 There is not, however, a merger of collateral and independent agreements. n605 Where a contract of sale contemplates a collateral act such as the erection of a building, the contract is not merged into the subsequent deed. n606 These collateral agreements in a contract to give a deed which do not merge in the deed may be treated as separate covenants on which suit may be brought. n607 If the sales contract is not essential or germane to the deed it is not merged into the deed. n608 Contractual provisions as to the payment of the purchase price are not merged with the deed and may subsequently be shown by evidence extrinsic to the deed. n609

If there is no fraud or mistake, the acceptance of a deed or writing containing provisions in contravention of a prior parol agreement amounts to a modification of the former agreement. n610 Probative evidence may be introduced to show that no merger was intended or that a mistake has occurred. n611 Where, in pursuance of a written contract to convey certain real estate, a deed is executed and delivered which contains stipulations to be performed by the grantee that were not a part of the original contract, the contract is not necessarily merged in said deed. The rights of the parties must be determined by a consideration of both instruments and the surrounding circumstances. n612 Written warranties in the contract are collateral and do not merge in the deed. n613

FOOTNOTES:

(n1)Footnote 474. *Katz v. Brooks, 212 N.E.2d 508 (Ill. App. 1965); Patton v. Graves, 224 A.2d 411 (Md. 1966); See* David Levingston, Student Author, Bond for Deed Contracts, *31 La. L. Rev. 587 (1971);* Aiken, "Subject to Financing" Clauses in Interim Contracts for Sale of Realty, 43 Mari. L. Rev. 265; *see also* Elizabeth Hazen Pope, Student Author, Property Law - The North Carolina Association of Realtors Contract of Sale, *51 N.C. L. Rev. 346 (1972).*

(n2)Footnote 475. *Dunlap v. Lewis, 130 P. 973 (Or. 1913).*

(n3)Footnote 476. *Stone v. Powell, 150 N.W. 15 (Iowa 1914).*

(n4)Footnote 477. *Nafstad v. Merchant, 228 N.W.2d 548 (Minn. 1975).*

(n5)Footnote 478. *Fresno Irrigation Dist. v. Smith, 136 P.2d 382 (Cal. App. 4th Dist. 1943); Emerson v. King, 394 A.2d 51 (N.H. 1978)* (upholding provision in sales contract that vendor could reacquire ownership for a sum far below market value).

(n6)Footnote 479. *Margaret H. Wayne Trust v. Lipsky, 846 P.2d 904 (Idaho 1993); Magri v. Lee, 470 So. 2d 910 (La. Ct. App. 1985); Victory Bottle Capping Mach. Co. v. O. & J. Mach. Co., 280 F. 753 (1st Cir. 1922); Pima Farms Co. v. McDonald, 244 P. 1022 (Ariz. 1926); Dixon v. Malloy, 160 P.2d 896 (Cal. App. 2d Dist. 1945); Little v. Kennedy, 260 P. 890 (Cal. App. 2d Dist. 1927); Chicago Home for Girls v. Carr, 133 N.E. 344 (Ill. 1921);* C.A. Andrews Coal Co. v. Board of Directors of Public Schools, *92 S. 303 (La. 1922); C.H. Steinberg & Sons v. Nodaway Drainage Dist. No. 2, 218 S.W. 960 (Mo. App. 1920); Urbis Realty Co. v. Globe Realty Co., 139 N.E. 238 (N.Y. 1923); Frederick Zittel & Sons v. Schwartz, 182 N.Y.S. 638 (N.Y. App. Div. 1st Dept. 1920); Johnson Constr. Co. v. Austin, 215 N.W. 484 (N.D. 1927); Friend v. Southern States Life Ins. Co., 194 P. 204 (Okla. 1920); Johnson v. Homestead-Iron Dyke Mines Co., 193 P. 1036 (Or. 1920); Giddings v. Nefsy, 212 N.W. 507 (S.D. 1927),* followed *Stock Growers' Bank v. Nefsy, 212 N.W. 512 (S.D. 1927)* (separate writings); *Willeford v. Wlaker, 499 S.W.2d 190 (Tex. Civ. App. 1973); Newcom v. Ford, 222 S.W. 591 (Tex. Civ. App. 1920); Hunter v. Gulf Production Co., 220 S.W. 168 (Tex. Civ. App. 1919); Riggins v. Post, 172 S.W. 210 (Tex. Civ. App. 1914); Foltz v. Conrad Realty Co., 109 S.E. 463 (Va. 1921); McLaren v. Narrows Land Co., 191 P. 389 (Wash. 1920); Mikusch v. Beeman, 188 P. 780 (Wash. 1920).*

(n7)Footnote 480. *Philippi Collieries Co. v. Thompson, 163 F. 23 (4th Cir. 1908); Atchison, T. & S.F.R. Co. v. Chicago & W.I.R. Co., 44 N.E. 828 (Ill. 1896); Lechner v. Strauss, 98 N.E. 444 (Ind. App. 1912); Knight v. Dyer, 57 Maine 174 (Me. 1869); Jennings v. Todd, 24 S.W. 148 (Mo. 1893); Bradtfeldt v. Cooke, 40 P. 1 (Or. 1895); Weber v. Rothchild, 15 P. 650 (Or. 1887).*

(n8)Footnote 481. *Lakeland Realty Co. v. Reese, 46 N.W.2d 696 (N.D. 1951).*

(n9)Footnote 482. *Re v. Magness Constr. Co., 117 A.2d 78 (Del. Super. 1955)* (agreement to make improvements and repairs); *Campbell v. Heller, 115 A.2d 644 (N.J. 1955).*

(n10)Footnote 483. *Palmere v. Curtis, 789 So. 2d 126 (Miss. Ct. App. 2001); Flipps v. CSC Assoc. III, L.L.C., 547 S.E.2d 216 (Va. 2001);* R.P. Harris & Co. v. Thomas, *88 S. 51 (Ala. App. 1921); Corey v. Mercantile Ins. Co., 169 S.W.2d 655 (Ark. 1943); Reliable Constr. & Realty Co. v. Waterproofing Service, 34 A.2d 124 (D.C. App. 1943); Windham v. Windham, 11 S.2d 797 (Fla. 1943); Joseph v. Carter, 47 N.E.2d 471 (Ill. 1943); Wilhoit v. Furnish, 174 S.W.2d 515 (Ky. App. 1943); Blanke Bro. Realty Co. v. American Surety Co., 247 S.W. 797 (Mo. 1923); Anderson v. Broad St. Nat'l Bank, 109 A. 205 (N.J. 1920); Tracy Dev. Co. v. Empire Gas & Elec. Co., 189 N.Y.S. 836 (N.Y. 1921); Anthis v. Sullivan Oil & Gas Co., 203 P. 187 (Okla. 1921); Romans v. Shannon, 195 P. 298 (Okla. 1921); Hyland v. Oregon Agric. Co., 225 P. 728 (Or. 1924); Salem King's Products Co. v. Ramp, 196 P. 401 (Or. 1921); Dunlop v. McGehee's Exec., 124 S.E. 199 (Va. App. 1924).* May not make new contract when existing contract is unreasonable. *McNamer Realty Co. v. Sunburst Oil & Gas Co., 247 P. 166 (Mont. 1926).*

(n11)Footnote 484. *Atchison, T. & S.F.R. Co. v. Chicago & W.I.R. Co., 44 N.E. 823 (Ill. 1896); Hospital for Women v. U.S. Fidelity & Guar. Co., 11 A.2d 457 (Md. 1940); Atwood v. Cobb, 33 Mass. 227 (Mass. 1834);*

Greenwood v. Ligon, 18 Miss. 615 (Miss. 1848); Post v. Weil, 22 N.E. 145 (N.Y. 1889); Tieri v. Orbell, 162 A.2d 248 (Pa. Super. 1960) (provision in a sales agreement that was conditioned upon the purchaser's ability to obtain financing in a stated amount, gave the buyer the right to determine terms of financing he would expect); *Kuhl v. Roberson, 289 S.W. 433 (Tex. Civ. App. 1926); Southern Wire & Iron Co. v. Thomas, 256 S.W. 607 (Tex. Civ. App. 1923); Johnson v. Seagull Inv. Co., 237 P. 945 (Utah 1925); Yukon Pocahontas Coal Co. v. Ratliff, 24 S.E.2d 559 (Va. 1943); Adney v. Kraus, 183 N.W. 988 (Wis. 1921).* Construed most strongly against person drafting contract. *Coates v. Cotteral, 138 A. 756 (Pa. 1927).* Construed most strongly against vendor. *Felton v. Stacey, 185 N.W. 536 (Wis. 1921).*

(n12)Footnote 485. *Olbum v. Old Home Manor, Inc., 459 A.2d 757 (Pa. Super. Ct. 1983); Anderson v. Yaworski, 181 A. 205 (Conn. 1935).*

(n13)Footnote 486. *Atwood v. Cobb, 33 Mass. 227 (Mass. 1834).*

(n14)Footnote 487. *Geren v. Geren, 29 P.3d 448 (Kan. Ct. App. 2001) Keller v. Bones, 615 N.W.2d 883 (Neb. 2000);* Smith Sons Lumber Co. v. Steiner, *85 S. 758 (Ala. 1920); Hughes v. Pacific Wharf & Storage Co., 205 P. 105 (Cal. 1922); Yule v. Miller, 252 P. 733 (Cal. App. 1st Dist. 1927); Machen v. Yost, 296 F. 1008 (D.C. App. 1924); Sampson v. McRae, 116 S.E. 651 (Ga. App. 1923); John Gabel Mfg. Co. v. Murphy, 62 N.E.2d 401 (Ill. 1945); Olson v. Beer, 220 P. 1021 (Kan. 1923); Buffalo Pressed Steel Co. v. Kirwan, 113 A. 628 (Md. 1921); Schulman v. Cornman, 223 N.Y.S. 19 (N.Y. App. Div. 1st Dept. 1927); Hinton v. Vinson, 104 S.E. 897 (N.C. 1920); Goble v. Bell Oil & Gas Co., 223 P. 371 (Okla. 1924); Platts v. Arney, 278 P.2d 657 (Wash. 1955)* (in a contract for the exchange of real estate the defense of uncertainty in the terms is not applicable in an action based upon the contract when performance has made it certain in every respect in which it might have been regarded as uncertain).

(n15)Footnote 488. *Coal & Delivery Co., Inc. v. Howard, 265 F. 566 (3d Cir. 1920); Anderson v. Willson, 191 P. 1016 (Cal. App. 2d Dist. 1920); Gross v. Clark, 113 A. 115 (R.I. 1921); Extraction Resources, Inc. v. Freeman, 555 S.W.2d 156 (Tex. Civ. App. 1977)* (issues as to quantum of estate conveyed are construed against the vendor); *Texas P. Coal & Oil Co. v. Harris, 230 S.W. 237 (Tex. Civ. App. 1921).* Obscure or ambiguous clauses are construed against the vendor. Hudson v. Tilly, *98 S. 265 (La. 1923); Rosenblath v. Marabella, 3 La. App. 584 (La. App. 2d Cir. 1926); Olsen v. Fry, 207 N.W. 803 (Mich. 1926).* Parol evidence may be admitted to clear up an ambiguity in a land sales contract. *Stokes v. Tutvet, 328 P.2d 1096 (Mont. 1958).*

(n16)Footnote 489. Bergeron v. Daspit, *43 S. 894 (La. 1907); Weingart v. Delgado, 16 S.2d 254 (La. 1943), Kelley v. Ellis, 76 N.W.2d 540 (Wis. 1956).* Real estate contracts are to be construed most strictly against person who drew the agreement. *Hous. Auth. v. Fidelity & Deposit Co., 309 S.2d 920 (La. App. 3d Cir. 1975); Yelkin v. Yelkin, 229 N.W.2d 59 (Neb. 1975).*

(n17)Footnote 490. *Rego v. Decker, 482 P.2d 834 (Alaska 1971).*

(n18)Footnote 491. Rumas v. *Baldwin, 62 P.2d 1345 (Wash. 1936).*

(n19)Footnote 492. *Butler v. Crescent Land & Dev. Co., Inc., 499 So. 2d 1163 (La. Ct. App. 1986);* 731 *West Lake Road, Inc. v. Boheen, 397 N.Y.S.2d 507 (N.Y. App. Div. 1977).*

(n20)Footnote 493. *Modulars by Design, Inc. v. DBJ Dev. Corp., 571 N.Y.S.2d 168 (1991).*

Davis v. Lee, 100 P. 752 (Wash. 1909); Gilbert v. Stockman, 44 N.W. 845 (Wis. 1890). See Smith v. Worsham, 552 S.W.2d 367 (Mo. App. 1977) (written or typewritten provisions of contract control over printed provision); *Rispo Realty Co. v. Wisniewski, 186 N.E.2d 758 (Ohio App. 1962)* (typewritten provisions took precedence over printed terms); *Innes v. Webb, 538 S.W.2d 237 (Tex. Civ. App. 1976).* Written or typewritten provisions prevail over printed material. *Buford v. Dearing, 500 S.W.2d 931 (Ark. 1973); Kern v. Pawlega, 146 N.W.2d 689 (Mich. App. 1966).*

(n21)Footnote 494. *Davis v. First Nat'l Bank, 229 P. 391 (Ariz. 1924); Monteverde v. Brooke Realty Co., 224 P.*

247 (Cal. App. 3d Dist. 1924); Lunde v. Minch, 136 A. 552 (Conn. 1927); Cobb v. Willrett, 144 N.E. 834 (Ill. 1924); Conners v. Winans, 204 N.Y.S. 142 (N.Y. Sup. 1924); Jones w. Tschetter, 194 N.W. 839 (S.D. 1923). Covenant to improve and covenant to purchase and pay price dependent. *Folkerts v. Maysville Land Co., 210 N.W. 231 (Mich. 1926).* Covenants to convey and pay purchase money are dependent. *Graves v. Chambers, 236 P. 25 (Okla. 1924).* Covenants to pay and convey are dependent covenants. *Benton v. Davison, 212 N.W. 500 (S.D. 1927).*

(n22)Footnote 495. *Benjamin v. Savage, 191 N.W. 408 (Minn. 1923); Conners v. Winans, 204 N.Y.S. 142 (N.Y. Sup. 1924). See Walker v. Hewitt, 220 P. 147 (Or. 1923).* Covenant to pay note and covenant to convey independent. *Gillett v. Cheairs, 243 P. 1112 (Colo. 1926).* Covenant to pay installment is independent covenant. *Conners v. Winans, 204 N.Y.S. 142 (N.Y. Sup. 1924).*

(n23)Footnote 496. *Gompert v. Frost, 177 N.W. 71 (Iowa 1920); Rosenblath v. Marabella, 3 La. App. 584 (La. App. 2d Cir. 1926).*

(n24)Footnote 497. *In re* Estate of Rosenbaum, 624, N.W.2d 821 (S.D. 2001); *Morehouse v. N. Land Co., 216 P. 792 (Mont. 1923); Kurtz v. Busch, 128 A. 552 (N.J. 1925).*

(n25)Footnote 498. *Flower v. Coe, 196 N.W. 139 (Neb. 1923); Govier v. Wilson, 195 N.W. 840 (Neb. 1923); Spielvogel v. Veit, 189 N.Y.S. 899 (N.Y. App. Div. 2d Dept. 1921).*

(n26)Footnote 499. Brown v. Case, *86 S. 684 (Fla. 1920);* Fox v. Corry, *89 S. 410 (La. 1921); Goedhard v. Folstad, 195 N.W. 281 (Minn. 1923).*

(n27)Footnote 500. *Campbell v. Gawart, 208 N.W.2d 607 (Mich. App. 1973).*

(n28)Footnote 501. Quisenberry v. Grant, *104 S. 284 (Ala. App. 1925).*

(n29)Footnote 502. *Adaian v. Boranian, 211 P. 806 (Cal. App. 1st Dist. 1922); Sorensen v. Larue, 252 P. 494 (Idaho 1926); Abercrombie v. Stoddard, 228 P. 232 (Idaho 1924); Cobb v. Willrett, 144 N.E. 834 (Ill. 1924); Kincaid v. Dobrinsky, 225 Ill. App. 85 (Ill. App. 2d Dist. 1922).*

(n30)Footnote 503. Haughey v. Heaney, *103 S. 400 (Fla. 1925).*

(n31)Footnote 504. *Westphal v. Buenger, 154 N.E. 426 (Ill. 1926).*

(n32)Footnote 505. *Barnes v. Barker, 202 N.W. 430 (Neb. 1925); Nations v. Stone, 217 P. 1031 (Okla. 1923). See Pegg v. Olson, 223 P. 223 (Wyo. 1924).*

(n33)Footnote 506. *Sisters and Brothers Inv. Group v. Vermont Nat'l Bank, 773 A.2d 264 (Vt. 2001); Jarecki v. Commonwealth of Pa. Unemployment Compensation Fund, 202 B.R. 385 (W.D. Pa. 1995); Wayne v. Butterfield, 210 N.W. 663 (S.D. 1926).*

(n34)Footnote 507. *Jackson v. Snow, 216 P. 60 (Cal. App. 1st Dist. 1923).* Encumbrance includes a party wall agreement. *Bennett v. Sheinwald, 147 N.E. 28 (Mass. 1925).* Easements are encumbrances. *Ritter v. Hill, 127 A. 455 (Pa. 1925).* Restrictions on use of property are encumbrances. *Ritter v. Hill, 127 A. 455 (Pa. 1925).*

(n35)Footnote 508. *Weinhold v. Weinhold, 223 P. 297 (Kan. 1924).*

(n36)Footnote 509. *Welsh v. Ford, 127 A. 431 (Pa. 1925).*

(n37)Footnote 510. *Zitzow v. Diederich, 337 N.W.2d 799 (N.D. 1983);* Terrebonne v. Cheramie, *92 S. 388 (La. 1922);* McCain v. Hicks, *90 S. 506 (La. 1922); Belbird Realty Corp. v. Wolfson, 222 N.Y.S. 659 (N.Y. App. Div. 1st Dept. 1927). See Mann v. Becker, 176 N.W. 765 (Wis. 1920).*

(n38)Footnote 511. *Dwight v. Parham, 107 S.E. 908 (S.C. 1921).*

(n39)Footnote 512. *Ginger v. Smith, 196 N.W. 298 (S.D. 1923).*

(n40)Footnote 513. *Valley Mercantile Co. v. Bailey, 216 P. 789 (Mont. 1923).*

(n41)Footnote 514. *Bockelman v. Spires, 193 N.W. 334 (Neb. 1923).*

(n42)Footnote 515. *Loutuff v. Friedenberg, 131 A. 574 (N.J. Ch. 1925).*

(n43)Footnote 516. *Moore v. Moore, 104 S.E. 266 (W. Va. 1920).*

(n44)Footnote 517. *Heuer v. Rubin, 61 A.2d 567 (N.J. Ch. 1948); Ward v. Christopherson, 518 S.W.2d 273 (Tex. Civ. App. 1975)* (not void as a restraint against alienation).

(n45)Footnote 518. *Oregon Steam Nav. Co. v. Winsor, 87 U.S. 64 (1873).*

(n46)Footnote 519. Can itself limit the language. *Foltz v. Struxness, 215 P.2d 133 (Kan. 1950); Whiting Milk Cos. v. O'Connell, 179 N.E. 169 (Mass. 1931).* Must find power from the language. *Creter v. Creter, 145 A.2d 149 (N.J. Super. App. Div. 1958).*

(n47)Footnote 520. *McCoshum v. Hoselton, 543 P.2d 657 (Or. 1975).*

(n48)Footnote 521. *Crancer v. Lareau, 1 F.2d 117 (8th Cir. 1924); California Sch. Township v. Kellogg, 33 N.E.2d 363 (Ind. App. 1941); Glenn v. Lowther, 293 S.W. 947 (Ky. App. 1927); Moskow v. Burke, 152 N.E. 321 (Mass. 1926); Buccilli v. Padgen, 204 N.W. 130 (Mich. 1925); Caplan v. Palace Realty Co., 110 A. 584 (N.J. Ch. 1920); Anderson v. Morse, 222 P. 1083 (Or. 1924); Searles v. Auld, 111 S.E. 785 (S.C. 1922); Wright v. Fischer, 148 S.W.2d 49 (Tenn. App. 1940).*

(n49)Footnote 522. *William James Sons Co. v. Hutchinson, 90 S.E. 1047 (W. Va. 1916).*

(n50)Footnote 523. *Empire Properties, Inc. v. Equireal, Inc., 674 A.2d 297 (Pa. Super. Ct. 1996); N. Wyo. Land Co. v. Butler, 252 F. 971 (8th Cir. 1918); Hicks v. Revels, 83 S.E. 115 (Ga. 1914); Prairie Dev. Co. v. Leiberg, 98 P. 616 (Idaho 1908); August v. Collins, 214 N.W. 951 (Mich. 1927); Clark v. Dye, 197 N.W. 209 (Minn. 1924); Norris v. Letchworth, 124 S.W. 559 (Mo. App. 1910); Crane v. De Luca, 138 A. 919 (N.J. 1927); Green-Shrier Co. v. State Realty & Mortg. Co., 92 N.E. 98 (N.Y. 1910); Shrut v. Huselton, 116 A. 43 (Pa. 1922); Graboyes v. Kapner, 176 A. 40 (Pa. Super. 1935); Lewis v. Gilmore, 7 Fay. L.J. (Pa.) 211; Langley v. Norris, 173 S.W.2d 454 (Tex. 1943); Hogan v. Swayze, 237 P. 1097 (Utah 1925).* A contract to convey implies giving a warranty deed. *Ray v. Wooster, 270 S.W.2d 743 (Mo. 1954).*

(n51)Footnote 524. *Bauer v. Monroe, 158 P.2d 485 (Mont. 1945).*

(n52)Footnote 525. *Foft v. Page, 245 N.W. 312 (Iowa 1932); Moskow v. Burke, 165 N.E. 416 (Mass. 1929); Osborne v. Eldriedge, 280 P. 497 (Or. 1929); Mollet v. Bloedorn, 275 N.W. 896 (Wis. 1937).*

(n53)Footnote 526. *McClure v. Wilson, 185 S.W.2d 878 (Mo. App. 1945); Kohoot v. Gurbisz, 139 A. 223 (N.J. 1927); Badger v. Boyd, 65 S.W.2d 601 (Tenn. App. 1933).*

(n54)Footnote 527. *Vaudreuil Lumber Co. v. Culbert, 263 N.W. 637 (Wis. 1935).* The courts reach different results as to oral modification of contracts of sale. *Garcia v. Karam, 276 S.W.2d 255 (Ga. 1955)* (contract modified); *Gulf Oil Corp. v. Willcoxon, 86 S.E.2d 507 (Ga. 1955)* (contract not modified).

(n55)Footnote 528. *Morrison v. Roberts, 23 S.E.2d 164 (Ga. 1942); Lochwitz v. Pine Tree Mining & Milling Co.,*

108 P. 1128 (Utah 1910).

(n56)Footnote 529. *See Parkside Realty Co. v. MacDonald, 137 P. 21 (Cal. 1913); Wellington Realty Co. v. Gilbert, 131 P. 803 (Colo. App. 1913); Morrison v. Roberts, 23 S.E.2d 164 (Ga. 1942); Kitchener v. Jehlik, 118 P. 1058 (Kan. 1911); Reiff v. Coulter, 92 P. 436 (Wash. 1907).*

(n57)Footnote 530. *Warren v. Harrison, 139 S.E. 549 (Ga. 1927); Hutchinson v. Coonley, 70 N.E. 686 (Ill. 1904); Darragh v. Knolk, 254 N.W. 22 (Iowa 1934); Brummel v. Clifton Realty Co., 125 A. 905 (Md. 1924); Rocca v. Calabrese, 130 A. 447 (N.J. 1925); Yara Engr. Corp. v. City of Newark, 42 A.2d 632 (N.J. Ch. 1945); Emmanuel v. Hughes, 145 A. 586 (Pa. 1929).*

(n58)Footnote 531. *Hogan v. Swayze, 237 P. 1097 (Utah 1925).*

(n59)Footnote 532. *First Nat'l Bank v. Tate, 13 S.W.2d 587 (Ark. 1929); Carman v. Harrah, 170 S.W. 388 (Mo. App. 1914).*

(n60)Footnote 533. *Rose v. Howell, 284 S.W. 776 (Ark. 1926); Pearson v. Courson, 59 S.E. 907 (Ga. 1907); Johnson v. Smith, 280 S.W. 158 (Tex. 1926).* The doctrine of "idem sonans" is now applied in Florida where deed has been recorded for seven years. Fla. Stat. Ann. § 689.19.

(n61)Footnote 534. *Valley Planing Mill Co. v. Lena Lumber Co., 272 S.W. 860 (Ark. 1925); Carrig v. Earle, 135 N.E. 872 (Mass. 1922); Colburn v. Keyser, 123 S.E. 430 (W. Va. 1924).*

(n62)Footnote 535. *Mills v. Matthews, 7 Md. 315 (Md. 1854).*

(n63)Footnote 536. *Eddy v. Short, 179 N.W. 818 (Iowa 1920).*

(n64)Footnote 537. *Delta Land & Water Co. v. Perry, 207 P. 393 (Cal. App. 2d Dist. 1922). See Ball v. Warner, 251 P. 929 (Cal. App. 2d Dist. 1926).* A deed requiring grantee to bear costs of clearing title to land known to be subject to adverse possession was champertous and void. *Gregory v. First State Bank, 305 S.W.2d 538 (Ky. 1957).*

(n65)Footnote 538. *Warren v. Harrison, 139 S.E. 549 (Ga. 1927); South Texas Land Co. v. Sorensen, 202 N.W. 552 (Iowa 1925); Brummel v. Clifton Realty Co., 125 A. 905 (Md. 1924); Shapero v. Picard, 209 N.W. 576 (Mich. 1926); Stepanian v. Moskovitz, 206 N.W. 359 (Mich. 1925); Sovell v. First Nat'l Bank, 209 N.W. 22 (Minn. 1926); Rocca v. Calabrese, 130 A. 447 (N.J. Sup. 1925); Richards v. Cox, 152 N.E. 682 (Ohio App. 1926); Hofheinz v. Wilson, 286 S.W. 958 (Tex. Civ. App. 1926). See Butler v. Ginsburg, 117 S.E. 262 (Ga. App. 1923); Burstein v. Alldis, 208 N.W. 31 (Mich. 1926).*

(n66)Footnote 539. *Westerman v. Raid, 212 N.W. 134 (Iowa 1927).*

(n67)Footnote 540. *Schultz v. Union C. Life Ins. Co., 271 N.W. 249 (Minn. 1937).*

(n68)Footnote 541. *Nordfors v. Knight, 60 P.2d 1115 (Utah 1936).*

(n69)Footnote 542. "Before a court of equity will reform a written instrument it must appear that there was a valid agreement, that the written instrument failed to express such agreement, that this failure was due to mistake, and this must all appear by clear and convincing proof." *See Morris v. Gilliam, 213 Ky. 763, 281 S. W. 1026; M. P. Bros Co. v. Kirkpatrick, 214 Ky. 560, 283 S. W. 424, Bass v. Hieatt Bros., 215 Ky. 313, 284 S. W. 1076." Ky. Title Co. v. Hail, 292 S.W. 817 (Ky. App. 1927).* In a sales contract conditioned on vendee's ability to obtain financing, the court permitted parol evidence to be introduced to clarify the type of financing indicated and permitted return of the purchase money where it could not be obtained. *Tieri v. Orbell, 162 A.2d 248 (Pa. Super. 1960).*

(n70)Footnote 543. Copeland v. Keller, *129 S. 571 (Ala. 1930); Anderson v. Juanita Coal & Coke Co., 267 P. 400*

(Colo. 1928); Fordson Coal Co. v. Potter, 35 S.W.2d 298 (Ky. App. 1931) (reforming boundary line); *Heissen v. Bleznak, 149 A. 630 (N.J. Ch. 1930); Lytle v. Hulen, 275 P. 45 (Or. 1929); Billings v. Billings, 287 P. 46 (Wash. 1930).*

(n71)Footnote 544. Possession is sufficient notice as to permit reformation against subsequent purchasers or encumbrances. *Graham v. Brand, 148 S.E. 84 (Ga. 1929); Pearce v. Osterman, 175 N.E. 416 (Ill. 1931);* Russell v. Scarborough, *124 S. 648 (Miss. 1929); Luker v. Moffett, 38 S.W.2d 1037 (Mo. 1931); Deubel v. Dearwester, 172 N.E. 640 (Ohio App. 1930); Robert Oil Corp. v. Jones, 23 S.W.2d 472 (Tex. Civ. App. 1929); Miles v. Craig, 266 P. 182 (Wash. 1928).*

(n72)Footnote 545. *Alger v. Smith, 948 P.2d 1244 (Or. Ct. App. 1997); Flaspohler v. Hoffman, 652 S.W. 703 (Mo. Ct. App. 1983);* Phoenix Chair Co. v. Daniel, *155 S. 363 (Ala. 1934); Beeson v. Byars, 63 S.W.2d 540 (Ark. 1933)* (reformed as against one who had not paid full consideration); *Graham v. Brand, 148 S.E. 84 (Ga. 1929); Fed. Land Bank v. Kenshalo, 258 Ill. App. 1 (Ill. App. 4th Dist. 1930)* (reformed as against judgment creditors); *Isaacs v. Wiley, 154 N.E. 512 (Ind. App. 1926); Taylor v. Lindenmann, 235 N.W. 310 (Iowa 1931); Davis v. Bunnell, 225 N.W. 6 (Iowa 1929)* (reformed as against judgment creditors); Owens v. Owens, *135 S. 87 (La. App. 2d Cir. 1931); Adams v. Smith, 6 La. App. 187 (La. App. 2d Cir. 1927)* (not reformed as against judgment creditors); *Stolte v. Krentel, 260 N.W. 127 (Mich. 1935); Elizabethport Banking Co. v. Delmore Realty Co., 173 A. 331 (N.J. Ch. 1934)* (reformed as against pre-existing debt security); *Burlingham v. Hanrahan, 251 N.Y.S. 55 (N.Y. Sup. 1931); Grossett v. McQueen, 169 S.E. 829 (N.C. 1933)* (reformed as against judgment creditors); *Deubel v. Dearwester, 172 N.E. 640 (Ohio App. 1930); Miles v. Craig, 266 P. 182 (Wash. 1928).*

(n73)Footnote 546. *Harrell v. Stumberg, 57 S.2d 692 (La. 1952).*

(n74)Footnote 547. *Bauer v. Monroe, 158 P.2d 485 (Mont. 1945).*

(n75)Footnote 548. *Vaudreuil Lumber Co. v. Culbert, 263 N.W. 637 (Wis. 1935).*

(n76)Footnote 549. *Morrison v. Kandler, 334 P.2d 459 (Or. 1958).*

(n77)Footnote 550. *Melco Inv. Co. v. Gapp, 105 N.W.2d 907 (Minn. 1960).*

(n78)Footnote 551. *Singer v. Hoffman Cake Co., 275 N.W. 177 (Mich. 1937).*

(n79)Footnote 552. *Straley v. Polifronio, 294 N.W. 401 (Mich. 1940).*

(n80)Footnote 553. *Johnson v. Douglas, 274 N.W. 780 (Mich. 1937).*

(n81)Footnote 554. *Williams v. Cassidy, 23 N.W.2d 423 (Iowa 1946).* No new or additional consideration is necessary to modify an executory earnest money agreement. *Becker v. Lagerquist Bros., Inc., 348 P.2d 428 (Wash. 1960).*

(n82)Footnote 555. *Stitzer v. Dunkin Donuts, Inc., 87 F. Supp. 2d 104 (D. Conn. 2000); Di Giuseppe v. Di Giuseppe, 96 A.2d 874 (Pa. 1953).*

(n83)Footnote 556. *In re Yates Dev., Inc., 256 F.3d 1285 (11th Cir. 2001); Yellowstone II Dev. Group Inc. v. First Am. Title Ins. Co., 20 P.3d 755 (Mont. 2001); Richardson v. Hardwick, 106 U.S. 252 (1882); Murphy v. Schnell, 93 N.E. 738 (Ill. 1910); Minn. & St. Louis Ry. Co. v. Cox, 41 N.W. 24 (Iowa 1988); Bacon v. Leslie, 31 P. 1066 (Kan. 1893); Anthony v. Hudson, 114 S.W. 782 (Ky. App. 1908); Baltimore Perm. Bldg. & Land Soc. v. Smith, 54 Md. 187 (Md. 1880); Marshall v. Haney, 4 Md. 498 (Md. 1853); Atwood v. Cobb, 33 Mass. 227 (Mass. 1834); Roden v. Williams, 158 N.W. 360 (Neb. 1916); McCornick v. Levy, 106 P. 660 (Utah 1910); Sandstone Brick & Lime Co. v. Lawler, 101 P. 360 (Wash. 1909); Light v. E.M. Grant & Co., 79 S.E. 1011 (W. Va. 1913); Gilbert v. Stockman, 44 N.W. 845 (Wis. 1890).* The Uniform Commercial Code does not apply to transfers of realty. *Gallegos v. Graff, 508 P.2d*

798 (Colo. App. 1973). Extensions of sales contracts must be in writing. *Wells v. Spears, 255 S.2d 215 (La. App. 1971).* Written or typewritten provisions of contract control over printed provisions. *Smith v. Worsham, 552 S.W.2d 367 (Mo. App. 1977).*

(n84)Footnote 557. *Alexander v. Herndon, 65 S.E. 1048 (S.C. 1909).*

(n85)Footnote 558. *Halsey v. Minn.-S.C. Land & Timber Co., 177 S.E. 29 (S.C. 1934).*

(n86)Footnote 559. *Camden & Trenton Ry. Co. v. Adams, 51 A. 24 (N.J. Ch. 1902).*

(n87)Footnote 560. *Texaco, Inc. v. Newton and Rosa Smith Charitable Trust, 471 So. 2d 877 (La. Ct. App. 1985); Anthony v. Hudson, 114 S.W. 782 (Ky. App. 1908); Thornbury v. Bolt, 116 S.W. 1177 (Ky. App. 1909).* Contra, as to parol extensions of time for performance. *Williams v. Sanacore, 78 A.2d 91 (N.J. Super. App. Div. 1951).* The above contra applies only to bilateral contracts. *Willow Brook Recreation Ctr., Inc. v. Selle, 233 A.2d 77 (N.J. Super. App. Div. 1967).*

(n88)Footnote 561. *Klee v. Chicago Trust Co., 6 N.E.2d 442 (Ill. 1937).*

(n89)Footnote 562. *Tyson v. Jones, 63 S.E. 734 (N.C. 1909).*

(n90)Footnote 563. *Stubblefield v. Farmer, 165 S.W.2d 556 (Ky. App. 1942); McSurley v. Venters, 104 S.W. 365 (Ky. App. 1907).*

(n91)Footnote 564. *Zehnder v. Michaud, 145 F.2d 713 (8th Cir. 1944); Lancaster & Jefferson Elec. Light Co. v. Jones, 71 A. 871 (N.H. 1909).*

(n92)Footnote 565. *City of Marshall v. Kalman, 190 N.W. 597 (Minn. 1922).*

(n93)Footnote 566. *Krost v. Moyer, 207 N.W. 311 (Minn. 1926).*

(n94)Footnote 567. Eaton v. Sadler, *110 S. 10 (Ala. 1926).*

(n95)Footnote 568. *Jacobson v. Gulbransen, 623 N.W.2d 84 (S.D. 2001); Richardson v. Stuberfield, 271 S.W. 345 (Ark. 1925); Lescher v. Baird, 294 S.W. 17 (Ark. 1927); Coleman v. Edgar, 257 P. 452 (Cal. App. 3d Dist. 1927); LeWitt v. Park Ecclesiastical Soc., 130 A. 387 (Conn. 1925); Petretes v. Atlanta Loan & Trust Co., 131 S.E. 510 (Ga. 1926); Lewis v. Trimble, 106 S.E. 101 (Ga. 1921); Dean v. Turner, 105 S.E. 602 (Ga. 1921); Stroud v. Moore, 104 S.E. 633 (Ga. 1920); Bridges v. Shining, 105 S.E. 862 (Ga. App. 1921); Sulzberger v. Steinhauer, 209 N.W. 68 (Mich. 1926); Green v. Harshaw, 121 S.E. 456 (N.C. 1924); Bloech v. Hyland Homes Co., 247 P. 761 (Or. 1926); In re Frederick's Est., 49 D. & C. 261* (C.P. of Blair County, Pa. 1943); *Mitchell v. Morgan, 181 N.W. 958 (S.D. 1921); Baleja v. Henderson, 241 S.W. 1080 (Tex. Civ. App. 1922); McElroy v. Danciger, 241 S.W. 1098 (Tex. Civ. App. 1922); Smith v. Bailey, 127 S.E. 89 (Va. 1925).* Description as "her lands in sections 16 and 17, A. township, S. county, Ill., commonly called the B. farm," held sufficient. *Vincent v. McElvain, 136 N.E. 502 (Ill. 1922).* If the sale is by acreage and the exact acreage is essential to the contract, the corresponding adjustment as to purchase price occurs when the actual acreage is found to be less than that listed in the contract. *Bicknell v. Barnes, 501 S.W.2d 761 (Ark. 1973).*

(n96)Footnote 569. *Weber v. Adler, 143 N.E. 95 (Ill. 1924); Paynesville Land Co. v. Grabow, 200 N.W. 481 (Minn. 1924); Curlee v. Phelps, 242 S.W. 517 (Tex. Civ. App. 1922).*

(n97)Footnote 570. *Baker v. Puffer, 132 N.E. 429 (Ill. 1921); Midkiff v. Glass, 123 S.E. 329 (Va. 1924).*

(n98)Footnote 571. *MTrust Corp. N.A. v. LJH Corp., 837 S.W.2d 250 (Tex. Ct. App. 1992); Martin v. Gulf Coast Orchard & Products Co., 279 F. 8 (5th Cir. 1922); Security Inv. Co. v. Bartram, 202 P. 337 (Cal. App. 2d Dist. 1921); Stone-Hood Awning Co. v. Zipp, 203 N.Y.S. 691 (N.Y. Sup. 1924).*

(n99)Footnote 572. *Katzin v. Kruvant, 133 A. 516 (N.J. Ch. 1926).*

(n100)Footnote 573. *Siegert v Seneca Resources Corp., 28 S.W.3d 680 (Tex. Ct. App. 2000); Bloech v. Hyland Homes Co., 247 P. 761 (Or. 1926).*

(n101)Footnote 574. *Johnson v. Schimpf, 239 P. 401 (Cal. 1925); Russell v. Ramm, 254 P. 532 (Cal. 1927).*

(n102)Footnote 575. *Elliott v. Sackett, 108 U.S. 132 (1883).*

(n103)Footnote 576. *Rucker v. Harrington, 52 Mo. App. 481 (1893)* (to be covered to the same extent as the original contract by the statute of frauds, any subsequent change must be in writing).

(n104)Footnote 577. Copeland v. Keller, *129 S. 571 (Ala. 1930);* Barlow v. Stevens, *150 S. 245 (Fla. 1933); Carpenter v. Young, 280 Ill. App. 116 (Ill. App. 3d Dist. 1935); Federal Land Bank v. Pace, 48 P.2d 480 (Utah 1935).*

(n105)Footnote 578. Merger of contract into the deed. *Lovlie v. Plum, 250 N.W.2d 56 (Iowa 1977); Tamm, Inc. v. Pildis, 249 N.W.2d 823 (Iowa 1976). See* Allison Dunham, Merger By Deed: Was It Ever Automatic?, *10 Ga. L. Rev. 419 (1976);* Smedley & Blunk, Oral Understandings at Variance with Absolute Deeds, *34 Ill. L. Rev. 189.*

(n106)Footnote 579. *Duncan v. McAdams, 257 S.W.2d 568 (Ark. 1953); Pryor v. Aviola, 301 A.2d 306 (Del. Super. 1973); Bryant v. Turner, 256 S.E.2d 667 (Ga. App. 1979); Slocum v. Bracy, 56 N.W. 826 (Minn. 1893).* A sales contract was treated as an equitable mortgage requiring foreclosure with a reasonable time to redeem. *Nelson v. Robinson, 336 P.2d 415 (Kan. 1959).* "The decided weight of authority and the better reasoning support the view that there cannot be an implied agreement for the occupancy of land, in the face of the express contract that the vendee holds possession under his right to purchase." *Carpenter v. U.S., 84 U.S. 489 (1873); Griffith v. Collins, 42 S.E. 748 (Ga. 1902); Quertemious v. Hatfield, 14 S.W. 1096 (Ark. 1890); Brown v. Randolph, 62 S.W. 981 (Tex. Civ. App. 1901).* "The right of the vendee to purchase continued after breach by him and until such time as the vendors saw fit to exercise the option given them by the contract to terminate it; so that it cannot be said that the contract to purchase was in full force and effect, and at the same time there was in effect, also, an implied agreement that the vendee should hold as tenant. The action of the parties under this contract completely negatives the idea that either ever intended that their relation should be that of landlord and tenant." *Arnold v. Fraser, 117 P. 1064 (Mont. 1911).* Prior agreements are merged into the deed, but this does not prevent reformation on grounds of mutual mistake of fact, misrepresentation or fraud. *Bicknell v. Barnes, 501 S.W.2d 761 (Ark. 1973).* Merger of sales contract in deed is a matter of intention. *Ga. Mobile Home Dev. Corp. v. Kuter, 168 S.E.2d 858 (Ga. App. 1969).* Prior agreements are generally merged into the deed. *Dept. of Transp. v. W. Nat'l Bank, 316 N.E.2d 663 (Ill. App. 1974).* Where certain deeds contained no reference to antecedent contracts reserving possession in the vendor, but contained the usual covenant, whereby, under this section, grantees were given, in praesenti, the right to enter, receive the rents and enjoy the premises without interruption and free from encumbrance, as the stipulations in the contracts of sale and the covenants in the deeds were in irreconcilable conflict on the question of possession, the antecedent contracts were merged in the deeds, and the vendees were entitled to possession. *Woodson v. Smith, 104 S.E. 794 (Va. 1920),* applied in *Adams v. Seymour, 61 S.E.2d 23 (Va. 1950).* In provisions of contracts for sale, all private negotiations and agreements are merged into the deed. *Cullens v. Woodruff, 223 S.E.2d 293 (Ga. App. 1976); Peoples Nat'l Bank v. Nat'l Bank of Comm., 420 P.2d 208 (Wash. 1966).* However, collateral contracts are not merged into the deed. *Rhenish v. Deunk, 219 N.E.2d 822 (Ohio App. 1963).* Acceptance of the deed merges all prior negotiations and terms of the contract into the deed and the deed is determined by the rights of the parties. *Reed v. Dudley, 533 P.2d 507 (Colo. App. 1975); Snyder v. Sperry & Hutchinson Co., 333 N.E.2d 421 (Mass. 1975).* Preliminary agreements are merged into the deed. *Bennett v. Behring Corp., 466 F. Supp. 689 (S.D. Fla. 1979); Hueg v. Sunburst Farms Mut. Water & Agric. Co., 594 P.2d 538 (Ariz. App. 1979).* Contract warranties and representations are lost by merger. *Elderkin v. Gaster, 288 A.2d 771 (Pa. 1972).*

(n107)Footnote 580. *Mason v. Loveless, 24 P.3d 997 (Utah Ct. App. 2001); Waterville Indus., Inc. v. Finance Authority of Me., 758 A.2d 986 (Me. 2000); Maxey v. Quintana, 499 P.2d 356 (N.M. App. 1972); Blake-McFall Co. v.*

Wilson, 193 P. 902 (Or. 1920).

(n108)Footnote 581. *Richardson v. Hardin, 5 P.3d 393 (Wyo. 2000).*

Van Ness v. City of Washington, 29 U.S. 232 (1830); Wing v. Forest Lawn Cemetery Assn., 101 P.2d 1099 (Cal. 1940); Turner v. Cool, 23 Ind. 56 (Ind. 1864), rev'd in part on other grounds, *Heavilon v. Heavilon, 29 Ind. 509 (Ind. 1868); Wickersham v. Orr, 9 Iowa 253 (Iowa 1859); Smith v. Smith, 287 N.W. 411 (Mich. 1939); Howes v. Barker, 3 Johns. 506 (N.Y. Sup. 1808); Coleman v. Whittle, 60 S.E. 523 (S.C. 1908); Kansas City Land Co. v. Hill, 11 S.W. 797 (Tenn. 1889); Miller v. Kemp, 160 S.E. 203 (Va. 1931); Davis v. Lee, 100 P. 752 (Wash. 1909).*

(n109)Footnote 582. *Jensen v. Miller, 570 P.2d 375 (Or. 1977).*

(n110)Footnote 583. *Sanford v. Breidenbach, 173 N.E.2d 702 (Ohio App. 1960).*

(n111)Footnote 584. *Dept. of Transp. v. W. Nat'l Bank of Cicero, 347 N.E.2d 161 (Ill. 1976).*

(n112)Footnote 585. *Lacy v. White, 288 N.E.2d 178 (Ind. App. 1972).*

(n113)Footnote 586. *Neppl v. Murphy, 736 N.E.2d 1174 (Ill. App. Ct. 2000); Yaksich v. Relocation Realty Serv. Corp., 391 N.Y.S.2d 822 (N.Y. Sup. 1977);* Brockport Developers, Inc. v. 47 Ely Corp., 369 N.Y.S.2d 601 (N.Y. Sup. 1975).

(n114)Footnote 587. *Carson v. Parks, 233 S.E.2d 857 (Ga. App. 1977).*

(n115)Footnote 588. *Morris v. Whitcher, 20 N.Y. 41 (N.Y. 1859); Raguso v. Ferreira, 60 N.Y.S.2d 418 (N.Y. Sup. 1946).*

(n116)Footnote 589. *Reed v. Dudly, 533 P.2d 507 (Colo. App. 1975); Kahn-Reiss, Inc. v. Detroit & N. Sav. & Loan Co., 228 N.W.2d 816 (Mich. App. 1975).*

(n117)Footnote 590. *Fitzpatrick v. Allied Contracting Co., 182 N.E.2d 183 (Ill. 1962).*

(n118)Footnote 591. *Knudson v. Weeks, 394 F. Supp. 963 (W.D. Okla. 1975); Carson v. Parks, 233 S.E.2d 857 (Ga. App. 1977); San Joi, Inc. v. Peek, 231 S.E.2d 145 (Ga. App. 1976); Stevens v. Vail Assn., Inc., 472 P.2d 729 (Colo. App. 1970); Meyers v. Antone, 227 A.2d 56 (D.C. App. 1967); Soper v. Stine, 184 S.2d 892 (Fla. App. 1966); Dubois County Mach. Co. v. Blessinger, 274 N.E.2d 279 (Ind. App. 1971); Cullins v. Woodward, 223 S.E.2d 293 (Ga. 1976),* rev'd in part on other grounds, *Holmes v. Worthey, 282 S.E. 919 (Ga. App. 1981); Stubbs v. Hemmert, 567 P.2d 168 (Utah 1977); Reed v. Dudley, 533 P.2d 507 (Colo. App. 1975).*

(n119)Footnote 592. *Rouse v. Brooks, 383 N.E.2d 666 (Ill. App. 5th Dist. 1978).*

(n120)Footnote 593. *Bull v. Willard, 9 Barb. 641* (Steuben Cir., N.Y. 1850).

(n121)Footnote 594. *Siebros Fin. Corp. v. Kirman, 249 N.Y.S. 497 (N.Y. App. Div. 1st Dept. 1931).*

(n122)Footnote 595. *Marshall v. Haney, 4 Md. 498 (Md. 1853).*

(n123)Footnote 596. *Miller v. Kemp, 160 S.E. 203 (Va. 1931).*

(n124)Footnote 597. Walter J. Dolan Properties v. Vonnegut, *184 S. 757 (Fla. 1938).*

(n125)Footnote 598. *Nat'l Bank of Com. v. Fountain, 514 P.2d 194 (Wash. App. 1973).*

(n126)Footnote 599. *Dourountoudakis v. Alesi, 706 N.Y.S.2d 476 (N.Y. App. Div. 2000); Dennett v. Mt. Harvard*

Dev. Co, 604 P.2d 699 (Colo. App. 1979) (contract not merged into deed where intent not contrary); PoIk Bond & Mortg. Co. v. Dwiggins, *147 S. 855 (Fla. 1933); Helmer v. Hegidio, 210 S.E.2d 332 (Ga. App. 1974).* A sales contract is merged into a deed only where it is reasonable to assume parties intended extinction of their contractual rights. *City of N. Bend v. Coos County, 485 P.2d 1226 (Or. 1971).* Intent that collateral agreements of the vendor survive the deed must be clearly apparent from the contract where not made a covenant in the deed. *Oremus v. Wynhoff, 123 N.W.2d 441 (Wis. 1963).* No merger of deed if contrary to the intent of the parties, or where contract provision was not an integral part of the contract to convey. *Yaksich v. Relocation Realty Serv. Corp., 391 N.Y.S.2d 822 (N.Y. Sup. 1977).*

(n127)Footnote 600. 1455 *Washington Ave. Assocs. v. Rose and Kiernan Inc., 687 N.Y.S.2d 791 (N.Y. App. Div. 1999); C & G Candler, Inc. v. Ga. Power Co., 226 S.E.2d 87 (Ga. App. 1976).*

(n128)Footnote 601. In *Hidden Valley Lake, Inc. v. Kirsey, 348 N.E.2d 674 (Ind. App. 1976); Times v. Shannon, 19 Md. 296 (Md. 1862); Edwards v. Clark, 47 N.W. 112 (Mich. 1890); Cook v. Combs, 39 N.H. 592 (N.H. 1859); Cabot v. Christie, 42 Vt. 121 (Vt. 1869); Trout v. Norfolk & W. Ry. Co., 59 S.E. 394 (Va. 1907).*

(n129)Footnote 602. *Trapp v. Gordon, 7 N.E.2d 869 (Ill. 1937); Slocum v. Bracy, 56 N.W. 826 (Minn. 1893); West. Coast Mfg. & Inv. Co. v. West Coast Improvement Co., 72 P. 455 (Wash. 1903).*

(n130)Footnote 603. *Doty v. Sandusky Portland Cement Co., 91 N.E. 569 (Ind. App. 1910). See Reynolds v. Wilson, 173 S.E.2d 256 (Ga. App. 1970)* (no merger where part of contract is intended to be performed after delivery of the deed).

(n131)Footnote 604. Alger-Sullivan Lumber Co. v. Union Trust Co., *92 S. 254 (Ala. 1922); Fretwell v. Nix, 288 S.W. 8 (Ark. 1926); O'Bar v. Hight, 277 S.W. 533 (Ark. 1925); Mills v. Richmond Co., 206 P. 486 (Cal. App. 1st Dist. 1922); Thomas v. Dunnean, 225 P. 253 (Colo. 1924); Pierce v. Dennett, 136 S.E. 440 (Ga. 1927)* (bond for title); *Willingham v. Anderson, 84 S.E.2d 471 (Ga. App. 1954); Wayne Intl. Bldg. & Loan Assn. v. Beckner, 134 N.E. 273 (Ind. 1922); Maple v. Truax, 250 S.W. 124 (Ky. App. 1923); Aragona v. Parrella, 91 N.E.2d 778 (Mass. 1950)* (preliminary negotiations are merged into a deed); *Michelson v. Sherman, 39 N.E.2d 633 (Mass. 1942); New York, N. H. & H. R.R. Co. v. Plimpton, 130 N.E. 498 (Mass. 1921); Weinburgh v. Saier, 6 N.W.2d 921 (Mich. 1942); Bernard v. Schneider, 117 N.W.2d 755 (Minn. 1965); Humble v. St. John, 234 P. 475 (Mont. 1925); Morehouse v. Northern Land Co., 216 P. 792 (Mont. 1923); Duvall v. Stone, 213 P.2d 212 (N.M. 1949)* (all preliminary negotiations are merged into a deed); *Andrew D. Baird Holding Corp. v. Burns Bros., 204 N.Y.S. 820 (N.Y. App. Div. 2d Dist. 1924); Rabel v. Downs, 155 N.E. 403 (Ohio App. 1926); Mitchell v. Schmelzer, 132 P.2d 332 (Okla. 1942); Van Hee v. Rickman, 220 P. 143 (Or. 1923); Blake-McFall Co. v. Wilson, 193 P. 902 (Or. 1920); Dobkin v. Landsberg, 116 A. 814 (Pa. 1922); Charleston & W. Carolina Ry. Co. v. Joyce, 99 S.E.2d 187 (S.C. 1957); Johnson v. Ford, 245 S.W. 531 (Tenn. 1922); Minor v. Belk, 360 S.W.2d 477 (Tenn. App. 1962); Michael v. Busby, 162 S.W.2d 662 (Tex. 1942); Whitehead v. Weldon, 264 S.W. 958 (Tex. Civ. App. 1924); Charles v. McClanahan, 108 S.E. 858 (Va. 1921); Woodson v. Smith, 104 S.E. 794 (Va. 1920); Watson-Loy Coal Co. v. Monroe Coal Mining Co., 102 S.E. 485 (W. Va. 1920). See* James A. Catalfimo, Student Author, Merger of Land Contract in Deed, *25 Alb. L. Rev. 122 (1961).*

(n132)Footnote 605. *South Texas Land Co. v. Sorenson, 202 N.W. 552 (Iowa 1925); Goodspeed v. Nichols, 204 N.W. 122 (Mich. 1925); Newmyer v. Williams, 245 S.W. 56 (Mo. App. 1922); Merchants & Traders Developing Co. v. Mercer Realty Co., 123 A. 875 (N.J. 1924). See Swensen v. Union C. Life Ins. Co., 280 N.W. 600 (Iowa 1938).* A provision in the purchase contract that the vendor would make certain improvements and convey the land free from liens attaching prior to the date of the contract did not merge into the deed, where because of a reassessment the vendee was obliged to pay increased cost for improvements made. *Gawron v. Robert Dev. Corp., 107 N.W.2d 878 (Mich. 1961).* Covenants to build or repair in a land sales contract are not merged in the deed. *Galvin v. Keen, 135 N.E.2d 769 (Ohio App. 1954).* Merger of the contract into the deed is a matter of intention. *Killen v. High Point Forest, Inc., 123 S.E.2d 10 (Ga. App. 1961).* Where an option paragraph called for a condition after delivery of the warranty deed, the option agreement was not merged into the warranty deed. *Kahn-Reiss, Inc. v. Detroit & N.W. Sav. & Loan Assn., 228 N.W.2d 816 (Mich. App. 1975).* A contract of sale did not merge into deed, where contract was clear that subsequent

deed was intended to merely serve as a vehicle for passing title for the purpose of using the land for the purposes specified in the contract. *Land Reclamation, Inc. v. Riverside Corp., 492 P.2d 263 (Or. 1972).* Option given to purchase two tracts not merged in deed to optionee of one tract. *Scott v. Lester, 251 S.E.2d 257 (Ga. 1978).*

(n133)Footnote 606. *Re v. Magness Const. Co., 117 A.2d 78 (Del. Super. 1955).* Limitation of use of property. *Campbell v. Heller, 115 A.2d 644 (N.J. Super. Ch. Div. 1955).* Covenant for reservation of fixtures not merged in deed. *Brunswick Constr. Co. v. Burden, 101 N.Y.S. 716 (N.Y. App. Div. 1st Dept. 1906).* Contract to complete a house not merged in deed. *Price v. Woodward-Brown Realty Co., 190 N.Y.S. 561 (N.Y. Sup. 1921), aff'd, 192 N.Y.S. 947 (N.Y. App. Div. 1st Dept. 1922).* Contract for completion of grading not merged in deed. *Terry v. Raif, 130 N.Y.S.2d 159 (N.Y. Co. Ct. 1954).* Agreement in sales contract to pay special assessments was not merged into deed but was collateral. *Rhenish v. Deunk, 219 N.E.2d 822 (Ohio App. 1963).* Oral promises to repair found to have survived deed. *P.B.R. Enter., Inc. v. Perren, 253 S.E.2d 765 (Ga. 1979).*

(n134)Footnote 607. *Herbert v. Corby, 17 A.2d 541 (N.J. 1940).* All prior contemporaneous negotiations or executory agreements, written or oral, leading up to the execution of deed are merged by acceptance of the grantee in absence of fraud or mistake, but independent or collateral agreements are not merged. *Dubois County Mach. Co. v. Blessinger, 274 N.E.2d 279 (Ind. App. 1971).* Oral warranty as to habitability was a collateral agreement and not merged in deed. *City of Gering v. Jones, 122 N.W.2d 503 (Neb. 1963).*

(n135)Footnote 608. *Shetzen v. C.C. Aycock Realty Co., 92 S.E.2d 114 (Ga. App. 1956),* superseded by statute on other grounds as stated in *Allen v. Bobo, 113 S.E.2d 138 (Ga. 1960).*

(n136)Footnote 609. *Ludeke v. Sutherland, 87 Ill. 481 (Ill. 1877); Woollen v. Hillen, 9 Gill. 185 (Md. 1850); Cardinal v. Hadley, 33 N.E. 575 (Mass. 1893); Butt v. Smith, 99 N.W. 328 (Wis. 1904).*

(n137)Footnote 610. *Dawson v. Sears, 110 P.2d 910 (Okla. 1940).* In the absence of fraud the description in a contract is merged into the deed. *Fields v. Davies, 218 S.E.2d 828 (Ga. 1975).* Fraud of vendor's agent prevented merger of contract into deed. *Russell v. Hixon, 369 A.2d 192 (N.H. 1977).*

(n138)Footnote 611. *Rasmussen v. Martin, 223 S.E.2d 663 (Ga. 1976); Miller v. Reynolds, 223 S.E.2d 883 (Va. 1976).*

(n139)Footnote 612. *Berry v. Cleveland Trust Co., 5 N.E.2d 702 (Ohio App. 1935).* A deed of gift cannot be reformed on grounds of mistake. *Sorrells v. Smith, 180 S.E.2d 238 (Ga. 1971).* But holding a contract was not merged in a deed where the descriptions were different. *Rasmussen v. Martin, 223 S.E.2d 663 (Ga. 1976).* Contract not merged in deed where deed is only part performance for the contract. *Cullens v. Woodruff, 223 S.E.2d 293 (Ga. App. 1976).*

(n140)Footnote 613. *Rouse v. Brooks, 383 N.E.2d 666 (Ill. App. Ct. 1978); Re v. Magness Const. Co., 117 A.2d 78 (Del. Super. 1955); Cullens v. Woodruff, 223 S.E.2d 293 (Ga. App. 1976)* (warranty in a contract for construction and sale of house held not to merge with deed); *Greenfield v. Liberty Const. Corp., 81 N.Y.S.2d 550 (N.Y. Sup. 1948); Russ v. Lakeview Dev., 133 N.Y.S.2d 641 (N.Y. City Ct. 1954).*

Thompson on Real Property, Thomas Editions

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CHAPTER 96 Vendors and Purchasers

11-96 Thompson on Real Property, Thomas Editions § 96.12

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§ 96.12 Assignment of the Agreement.

An "assignment" creates an interest in the property; a "lien" is a charge on the property. n614 The word "assign" is usually, but not always, used in connection with the transfer of a thing in action. It may be used to indicate an act whereby title to property is conveyed by one living person to another. n615 Contracts for sale and options are assignable, n616 unless the contract legally forbids assignment without consent of the other party. n617 A provision prohibiting assignment without the vendor's consent is for the benefit of the vendor only and does not affect the validity of an assignment without consent as between the assignor and the assignee. n618 A provision against alienation of a sales contract without the consent of the other party is unenforceable where the contract has been performed or performance has been tendered. n619 An option to purchase in a lease may be transferred, unless the lessor has relied upon the personal credit of the lessee. n620 Some courts doubt the extent to which the common-law rule against restraints on alienation applies to the vendee's interest in a real estate sales contract. n621

The assignee of the purchaser is entitled to the same rights as the original purchaser, and all the remedies which were open to the assignor for the enforcement of the obligation are available to the assignee. n622 An assignee of a land sales contract may have specific performance n623 and this is so even if there is a covenant against assignment, n624 but if there is a covenant to perform an additional personal service the contract is unassignable. n625 Under the majority view a judgment is a lien upon the purchaser's equitable interest and upon his after-acquired title. n626

A contract to sell or purchase real estate cannot impose liability or confer rights upon a stranger to the agreement. In certain instances, however, one of the parties may substitute, by assignment, a third party as a party to the contract. As the term "assignment" is here used, it signifies the means whereby the interest of one party in a contract is caused to vest in another person who was not an original party thereto. n627 Parties may stipulate that the contract shall not be assigned and such a stipulation will usually be enforced. n628 Thus, a provision in a contract for the conditional sale of real estate to the effect that no assignment of the agreement would be valid without the consent and signature of the vendor has been upheld. n629 A prohibition against assignment of a real estate contract does not apply where the assignee tenders full performance of the contract. n630 An assignment may be valid as between the immediate parties thereto although not binding upon the vendor. n631 A vendor not a party to the assignment is under no duty to tender performance to the assignee, but it is sufficient if performance is tendered to the original purchaser. n632

It has been said that the assignee of a contract for the sale of real estate in which there is neither fraud nor warranty, like the assignor under whom he claims, purchases at his peril. n633 In the absence of a stipulation to the contrary, a vendee may assign the written contract of purchase, and the assignee succeeds to all vendee's rights thereunder; n634 such assignee may enforce specific performance of the contract, as against the vendor, upon complying with the terms of such contract. n635 However, the mere assignment by the vendee, although followed by possession, does not by implication impose upon the assignee liability to pay the price agreed to in the contract, although by its terms its obligations are extended to the assignees of the parties. n636 The assignee takes no greater interest than that of the assignor. n637 The assignment by the vendor usually carries with it the obligation of assignor to the purchaser, n638 except in cases where the assignment is only for security. n639 The assignment will not affect the rights and liabilities of the assignor. n640 The vendor will take the benefit of obligations assumed by the assignee of the vendee, although the vendor is not a party to the contract of assignment. n641 The assignee will not be liable on obligations not assumed, n642 but by accepting the assignment and assuming the obligation for the purchase price, even the vendee who does not sign the assignment is liable in equity. n643 The assignment of a purchaser's contract carries no implied warrant that the contract will be performed by the vendor. n644

An assignment of a contract of purchase as security is a mortgage, and when the assignee has completed the payments, and taken a conveyance, the relation of the parties remains the same. n645 The principles of waiver are equally applicable to assignees of vendors. n646 The assignee of a purchaser's contract may rescind for fraud. n647 A provision against assignment in a contract may be waived by the parties thereto. n648 A contract granting an option to purchase real estate, and. binding the owner to convey on stated terms, does not, before acceptance by the optionee, vest in the optionee any estate or interest in the property; but since the vendee has such control of the title that by performance the vendee can compel a conveyance, and so secure the property, the vendee may, before the option expires, lawfully assign it to a third party. n649 The assignee of an optional contract takes subject to the defects which could be asserted against the assignor. n650 Where the option ran to the optionee "and to his heirs and assigns," it was held subject to assignment, notwithstanding it contained a clause that the original optionee was to be the judge as to whether the title was free from defects. n651

Where the contract contemplates a purchase-money mortgage, a covenant against assignment by the vendee may be implied upon the theory the vendor was entitled to look to the credit of the original vendee. n652 A provision forbidding the assignment of the purchaser's interest in an executory land contract is a valid restriction. n653 Part performance by an assignee may be sufficient to entitle the vendor to specific performance against the assignee. n654 A release by the vendor of an assignee of the vendee's interest in a contract of purchase, the assignee having assumed and agreed to perform the terms of the contract, has been held to terminate the liability of an intermediate assignee, who had also agreed to perform the terms of the contract. n655 Where no provision exists against assignment of a conditional sales contract of realty, the vendor must accept the assignee. n656

FOOTNOTES:

(n1)Footnote 614. *Rankin v. Marion Phosphate Co., 12 F.2d 67 (S.D. Fla. 1926)* (no interest before performance of conditions); *Millsap v. Sparks, 188 P. 135 (Ariz. 1920). See Colley v. Chowchilla Nat'l Bank, 255 P. 188 (Cal. 1927).* Mortgage held not a prohibited assignment of an option to repurchase. *Rosenthal v. Le May, 72 S.2d 289 (Fla. 1954).* An absolute assignment passes the whole interest in the thing assigned, while a mortgage creates only a lien, and a pledge transfers only possession. *Thurston v. Buxton, 34 N.E.2d 549 (Ind. 1941).*

(n2)Footnote 615. *Commercial Discount Co. v. Cowen, 116 P.2d 599 (Cal. 1941).*

(n3)Footnote 616. *Harris v. Miller, 235 P. 981 (Cal. 1925); Colley v. Chowchilla Nat'l Bank, 255 P. 188 (Cal. 1927); In re Beffa's Estate, 201 P. 616 (Cal. App. 3d Dist. 1921); Casady v. Scott, 237 P. 415 (Idaho 1924); Davidson v. Dingeldine, 129 N.E. 79 (Ill. 1920); Briley v. Madrid Imp. Co., 122 N.W.2d 824 (Iowa 1963)* (use of sales contract by vendor as collateral); *Kinser v. McMurray, 181 N.W. 691 (Iowa 1921); Barnard v. Huff, 233 N.W. 213 (Mich. 1930); Cutler v. Lovinger, 180 N.W. 462 (Mich. 1920); Bales v. Hendrickson, 290 S.W. 638 (Mo. App. 1927); Kavanaugh v.*

Cohoes Power & Light Corp., 187 N.Y.S. 216 (N.Y. Sup. 1921); Farone v. Hall, 220 N.Y.S. 1 (N.Y. Sup. 1927); Semmler v. Beulah Coal Mining Co., 188 N.W. 310 (N.D. 1922); Butcher v. Kagey Lumber Co., 128 N.E.2d 54 (Ohio 1955); Dobkin v. Landsberg, 116 A. 814 (Pa. 1922); Welling v. Crosland, 123 S.E. 776 (S.C. 1924); Johnson v. Miller, 173 S.W.2d 280 (Tex. Civ. App. 1943). Person with nothing to assign assigns nothing. *Jansen v. Clark, 207 N.W. 338 (Iowa 1926).* Assignment must be supported by consideration. *Beaden v. Bransford Realty Co., 232 S.W. 958 (Tenn. 1921).* The interests of both the vendor and purchaser of a land contract are assignable unless the contract provides otherwise. *Coraci v. Noack, 212 N.W.2d 164 (Wis. 1973).* Vendee's interest in a land sales contract is assignable. *Beren Corp. v. Spader, 255 N.W.2d 247 (Neb. 1977).*

(n4)Footnote 617. *Coles v. Denslow, 270 F. 22 (8th Cir. 1921); Hisser v. Union Sec. Co., 205 N.W. 648 (Iowa 1925); Spilman v. New Rockford Inv. Co., 201 N.W. 691 (N.D. 1924); Raasch v. Goulet, 204 N.W. 838 (N.D. 1925); McLaren v. Narrows Land Co., 191 P. 389 (Wash. 1920); Boyd v. Bondy, 194 P. 393 (Wash. 1920).* A provision against assignment is only intended to provide for payment and assignment may be made and the vendee's assignee may have specific performance if he in turn performs. *Cheney v. Bilby, 74 F. 52 (8th Cir. 1896); Gunsch v. Gunsch, 71 N.W.2d 623 (N.D. 1955).* Optionor cannot question the validity of an assignment of an option. *Reynolds v. Earley, 85 S.E.2d 904 (N.C. 1955).* An independent contract was not violation of agreement not to assign. *Park v. McCoy, 208 P. 1098 (Wash. 1922).* No assignment clause in land contract covers mortgages of vendee's interest. *Nat'l Lumber Co. v. Goodman, 123 N.W.2d 147 (Mich. 1963).*

(n5)Footnote 618. *Johnston v. Landucci, 180 P.2d 405 (Cal. 1942); Dopitz v. Oakland, 561 P.2d 441 (Mont. 1977)* (vendee's transfer of his interest without the required consent of the vendor is a default not merely a breach.).

(n6)Footnote 619. *Riffey v. Schulke, 227 N.W.2d 4 (Neb. 1975).*

(n7)Footnote 620. *Rosello v. Hayden, 79 S.2d 682 (Fla. 1955).*

(n8)Footnote 621. *See Hull v. Hostettler, 194 N.W. 996 (Mich. 1923)* (restraint on alienation) and § 2015.

(n9)Footnote 622. *Homeland Communities, Inc. v. Rahall & Fryer, P.C., 509 S.E.2d 714 (Ga. Ct. App. 1998); Lutz v. Dutmer, 282 N.W. 431 (Mich. 1938); Pelser v. Gingold, 8 N.W.2d 36 (Minn. 1943).* The vendor's assignee must perform the contract. *Semmler v. Beulah Coal Mining Co., 188 N.W. 310 (N.D. 1922).* The transfer of title by the vendor to a third party does not bind the third party to obligations incurred by the vendor in a contract of sale other than the mere duty to convey upon payment of the purchase price. *Kastner v. Dalton Dev., Inc., 122 N.W.2d 183 (Minn. 1963).* Use of the words "heirs and assigns" referring to an optionee but not used when referring to the optionor made the rights pass to the personal representative to the optionee, but the optionor's obligation was personal and terminated on his death. *Inglehart v. Jenifer, 371 A.2d 453 (Md. App. 1977).*

(n10)Footnote 623. *Michaud v. Ruch, 545 S.W.2d 703 (Mo. App. 1976).*

(n11)Footnote 624. *Espadron v. Davis, 52 N.E.2d 716 (Ill. 1944); Gunsch v. Gunsch, 71 N.W.2d 623 (N.D. 1955).*

(n12)Footnote 625. *Harris v. Clinton, 112 A.2d 885 (Conn. 1955).*

(n13)Footnote 626. Contra, *Bank of Ohio v. Lawrence, 120 N.E.2d 88 (Ohio 1954).*

(n14)Footnote 627. *See Moore v. Gariglietti, 81 N.E. 826 (Ill. 1907); Rice v. Gibbs, 50 N.W. 486 (Neb. 1891); Royce v. Carpenter, 66 A. 888 (Vt. 1907).* Vendor is not charged with constructive notice of subsequent mortgage of contract purchaser's equity. Mortgagee is required to notify vendor to protect security interest. *Kendrick v. Davis, 452 P.2d 222 (Wash. 1969).* Assignment by purchasers of a contract of sale of property without written consent of the vendors as required by the contract did not void the contract. *Martin v. Baxter, 254 N.W.2d 420 (Neb. 1977).*

(n15)Footnote 628. *Navin v. New Colonial Hotel, 90 N.E.2d 128 (Ind. 1950); Nat'l Lumber Co. v. Goodman, 123*

N.W.2d 147 (Neb. 1977) (nonassignment clause valid); *De Vita v. Loprete, 77 A. 536 (N.J. 1910); Lockerby v. Amon, 116 P. 463 (Wash. 1911).* Cf., *Portuguese-American Bank v. Welles, 242 U.S. 7 (1916).*

(n16)Footnote 629. *Montgomery v. De Picot, 96 P. 305 (Cal. 1908); Andrew v. Meyerdirck, 40 A. 173 (Md. 1898); Stover v. Bryant & Detwiler Improvement Corp., 45 N.W.2d 364 (Mich. 1951); Lockerby v. Amon, 116 P. 463 (Wash. 1911).* Cf. the foregoing eases, *Cheney v. Bilby, 74 F. 52 (8th Cir. 1896); Johnson v. Eklund, 75 N.W. 14 (Minn. 1898); Wagner v. Cheney, 20 N.W. 222 (Neb. 1884).* An oral stipulation not to transfer property made in open court was not within the statute of frauds. *Anders v. Anders, 179 N.Y.S.2d 274 (N.Y. App. Div. 1958). See* Daniel Scanlon, Jr., Student Author, Oral Stipulation to Transaction on Real Property Made in Open Court Not Within the Prohibition of the Statute of Frauds, *10 Syracuse L. Rev. 358 (1959).*

(n17)Footnote 630. *Murray First Thrift & Loan Co. v. Stevenson, 534 P.2d 909 (Utah 1975); Riffey v. Schulke, 227 N.W.2d 4 (Neb. 1975).*

(n18)Footnote 631. *Sproull v. Miles, 102 S.W. 204 (Ark. 1907); Johnston v. Landucci, 130 P.2d 405 (Cal. App. 4th Dist. 1942). See Montgomery v. De Picot, 96 P. 305 (Cal. 1908)* (vendor may be estopped to deny the contract is no assignable).

(n19)Footnote 632. Pierce & Stevenson v. Jones, *147 S. 842 (Fla. 1933).*

(n20)Footnote 633. Carrier v. Eastis, *20 S. 595 (Ala. 1896).*

(n21)Footnote 634. *Perry v. Paschal, 29 S.E. 703 (Ga. 1897); Hooper v. Van Husan, 63 N.W. 522 (Mich. 1895).*

(n22)Footnote 635. *Goldring v. Sletko Realty, Inc., 494 N.Y.S.2d 56 (N.Y. Sup. Ct. 1985); Paperchase Partnership v. Bruckner, 693 P.2d 587 (N.M. 1985);* Craver v. Spencer, *23 S. 880 (Fla. 1898); In re Sprigg's Est., 20 Erie (Pa.) 80.*

(n23)Footnote 636. *Lisenby v. Newton, 52 P. 813 (Cal. 1898).*

(n24)Footnote 637. *Le Porin v. State Exch. Bank, 213 P. 650 (Kan. 1923); Clarke v. Bussard, 189 N.W. 873 (Mich. 1922); Orr v. Allen, 45 N.W.2d 737 (S.D. 1951); Surry v. Baker, 231 P. 791 (Wash. 1925). See Roark v. Citizens Bank, 188 N.W. 337 (Mich. 1922).* Takes nothing under forged assignment. *Whitney v. Whitney, 235 P. 293 (Or. 1925).*

(n25)Footnote 638. *Nat'l P. Oil Co. v. Waterson, 193 P. 133 (Cal. 1920); Brady v. Fowler, 188 P. 320 (Cal. App. 1st Dist. 1920); Andrews v. Mohrenstecher, 128 N.E. 729 (Ill. 1920); Behrendt v. Acocella, 150 N.E. 913 (Ill. 1926)* (takes subject to defenses against assignor); *McLaren v. Narrows Land Co., 191 P. 389 (Wash. 1920). See Barberich v. Pooshichian, 211 P. 236 (Cal. App. 1st Dist. 1922).* Sale of an apartment building did not transfer to the buyer security deposits made by the tenants. *Federated Mortg. Investors v. Am. Sav. & Loan Assn., 121 Cal. Rptr. 137 (Cal. App. 1975).* The assignee of a land contract is subject to any defenses which could be asserted against the assignor by the other party. *Fajen v. Powless, 561 P.2d 388 (Idaho 1977).*

(n26)Footnote 639. *Lewis v. Crenshaw, 191 P. 72 (Cal. App. 2d Dist. 1920); Polokoff v. Vebb, 198 N.W. 194 (Mich. 1924). See Roullard v. Rosenberg Bros. & Co., 224 P. 449 (Cal. 1924).*

(n27)Footnote 640. *Bredensteiner v. Oviatt, 210 N.W. 133 (Iowa 1926); Pollard v. Larson, 211 N.W. 998 (Neb. 1927); Kutschinski v. Thonpson, 138 A. 569 (N.J. Ch. 1927).*

(n28)Footnote 641. *McGregor Subdivision Co. v. Mabie, 191 N.W. 117;* Or. & *W. Colonization C. v. Strang, 260 P. 1002 (Or. 1927).*

(n29)Footnote 642. *Meyer v. Droegemueller, 206 N.W. 391 (Minn. 1925);* 328 *E. Twenty-Sixth St. Realty Co., Inc. v. Kahn, 184 N.Y.S. 95 (N.Y. Sup. 1920).*

(n30)Footnote 643. *Barnard v. Huff, 233 N.W. 213 (Mich. 1930).*

(n31)Footnote 644. *Kleinman v. Strassburg, 189 N.Y.S. 633 (N.Y. Sup. 1921). See* Ratcliff v. McIlhenny, *102 S. 878 (La. 1925).*

(n32)Footnote 645. *Hays v. Hall, 4 Port. 374 (Ala. 1837); Smith v. Cremer, 71 Ill. 185 (Ill. 1873); Sibley v. Ross, 50 N.W. 379 (Mich. 1891).*

(n33)Footnote 646. *Neil v. Kennedy, 149 N.E. 775 (Ill. 1925); Distasio v. Gervazio, 208 N.W. 440 (Mich. 1926).*

(n34)Footnote 647. *Harris v. Miller, 235 P. 981 (Cal. 1925).*

(n35)Footnote 648. *Cheney v. Bilby, 74 F. 52 (8th Cir. 1896); Camp v. Wiggins, 34 N.W. 461 (Iowa 1887); Maday v. Roth, 125 N.W. 13 (Mich. 1910).* The execution of a deed of trust by the vendee was not a violation of the provision in the contract and that the contract was unassignable. *Fincher v. Miles Homes of Mo., Inc., 549 S.W.2d 848 (Mo. 1977).* Violation by purchasers of a sale of property without written consent of the vendors as required by the contract did not void the contract. *Martin v. Baxter, 254 N.W.2d 420 (Neb. 1977).*

(n36)Footnote 649. *Simmons v. Zimmerman, 79 P. 451 (Cal. 1904); Krhut v. Phares, 103 P. 117 (Kan. 1909); Roper v. Milbourn, 142 N.W. 792 (Neb. 1913); Kerr v. Day, 14 Pa. 112 (Pa. 1850).*

(n37)Footnote 650. *Nat'l Oil & Pipe Line Co. v. Teel, 68 S.W. 979 (Tex. 1902).*

(n38)Footnote 651. *Simmons v. Zimmerman, 79 P. 451 (Cal. 1904).*

(n39)Footnote 652. *Harry's Cadillac-Pontiac Co., Inc. v. Norburn, 51 S.E.2d 916 (N.C. 1949)* (contra). *See* Mortgages-Notice-Vendor and Purchaser-Vendor Not Charged With Constructive Notice of Subsequent Mortgage of Contract Purchasers Equity -Mortgagee Required to Notify Vendor to Protect Security Interest, *45 Wash. L. Rev. 645.*

(n40)Footnote 653. *Jankowski v. Jankowski, 18 N.W.2d 848 (Mich. 1945).*

(n41)Footnote 654. *Westervelt v. Ciarletta, 35 A.2d 896 (N.J. Ch. 1944).*

(n42)Footnote 655. *McCurdy v. Van Os, 287 N.W. 890 (Mich. 1939).*

(n43)Footnote 656. *Harry's Cadillac-Pontiac Co., Inc. v. Norburn, 51 S.E.2d 916 (N.C. 1949).*

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CHAPTER 96 Vendors and Purchasers

11-96 Thompson on Real Property, Thomas Editions § 96.13

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§ 96.13 Time As of the Essence.

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The legal cliche "time is of the essence of the contract" is particularly applicable to sales of realty. Time may expressly be made the essence of a contract. n657 This may be accomplished by the extension of contracts not having that ingredient, n658 or impliedly where the terms of the contract are such as clearly show an intent to that end, n659 but as a general rule the cases require this intent to be set out expressly in the contract. n660 A provision that time shall be of the essence of a contract to sell land is made for the benefit of the vendor and may be waived by the vendor. n661 Where the parties have made such a stipulation, a court of equity cannot relieve a purchaser who has made default. n662 Time may be made of the essence of a contract to convey, either expressly or by implication arising from the nature of the property, or the avowed objects of the vendor or purchaser. n663 If time is of the essence is not expressly in the contract, performance must be within a reasonable time. n664 An extension of time given by one party does not by itself nullify a stipulation that time is of the essence. n665

Time may have become of the essence of the contract by the rise or depreciation of the value of the premises contracted to be sold. Time may be of the essence of the contract, by reason of the nature of the interest in the property which is to be conveyed. n666 Time may be of the essence of the contract when there is an express stipulation to that effect, and where the contract is executory at the time of the default, no part or no considerable part of the purchase money having been paid. And this is on a very plain principle that the performance by the vendee is a condition precedent to the performance of the contract by the vendor. n667

Where the vendor informed the vendee by letter that he was ready to perform on a certain date, such letter made time of the essence, and the vendor could resell and keep purchase price upon failure of the vendee to perform. n668 Time is of the essence in contracts of sale of realty, at least as respects buyer's action for specific performance. n669 Thus, a stipulation that the balance of the consideration is to be paid by a day named, in default of which the vendee is to forfeit the interest in the land, manifests such an intention, n670 but the intention must clearly appear, or be expressly provided in the contract. n671 Time for the vendor's payment of delinquent taxes may be essential to the right to require counter performance under the contract. n672 Time is usually of vital importance where the subject matter of the contract is one of rapidly fluctuating values. n673 The precise phraseology is not important. The intention of the parties as expressed

by the agreement controls on this question. n674 A subsequent tender of the balance due from a judgment creditor of the vendee is of no avail against a stipulation that time should be of the essence of the contract. n675 The vendor does not waive the right to insist upon such a provision by expressing a willingness to assist the vendee to carry out the contract, after the time limit has expired. n676 Time is not of the essence of an absolute contract for the sale of land wherein one of the parties agrees to sell and the other to buy, the sale to be completed within an agreed time. n677

Time is usually of the essence of option contracts. n678 The provision may be waived or temporarily suspended expressly or by implication. n679 This may be done by the acceptance of payments after the time specified, n680 or by the extension of the contract. n681

Parol evidence may be used to show the intent of the parties on this question so long as it does not tend to vary or contradict the terms of the contract. n682

Where under an agreement by the vendor extending the time of payment the vendee made valuable improvements on the land, it was held that the vendor was bound by the extension agreement and that an additional consideration was not required. n683

Contracts to purchase realty come within an exception to the rule that time is not of the essence of an ordinary contract where the character of the property to be purchased renders it liable to fluctuation in value. n684 Since time is not of the essence in a real estate contract, unless expressly made so, a title defect will not prevent specific performance if it can be cured before the decree. n685 Even if time is of the essence in a contract of sale, the delay may be excused if the vendor's contract causes the purchaser to refrain from making the down payment timely. n686

FOOTNOTES:

(n1)Footnote 657. *Davy v. Ogier, 198 P.2d 92 (Cal. App. 1st Dist. 1948); Lindsey v. Wright, 258 P. 438 (Cal. App. 1st Dist. 1927); Pitt v. Mallalieu, 192 P.2d 24 (Cal. App. 2d Dist. 1948); Huckaby v. Northam, 228 P. 717 (Cal. App. 3d Dist. 1924); Troughton v. Eakle, 208 P. 161 (Cal. App. 3d Dist. 1922); White v. Greenamyre, 234 P. 164 (Colo. 1925);* Felt v. Morse, *85 S. 656 (Fla. 1920); Butler v. Cortner, 246 P. 314 (Idaho 1926); Burns v. Epstein, 109 N.E.2d 774 (Ill. 1953)* (where time is not expressly of the essence a reasonable time for performance is presumed); *Robnett v. Miller, 135 N.E. 705 (Ill. 1922); Mintle v. Sylvester, 211 N.W. 367 (Iowa 1926);* Tobey v. Boagni, *102 S. 515 (La. 1925); Minsky v. Zieve, 152 N.E. 41 (Mass. 1926); Johnson v. Schuchardt, 63 S.W.2d 17 (Mo. 1933); McLaughlin v. Nelson, 202 N.W. 871 (Neb. 1925); Moore v. Markel, 201 N.W. 147 (Neb. 1924); Canepa v. Durham, 198 P.2d 290 (Nev. 1948); Orange Socy. v. Konski, 121 A. 448 (N.J. Ch. 1923); Curtis v. Factory Site Co., 12 Ohio App. 148 (Ohio App. 8th Dist. Cuyahoga Co. 1919); Johnson v. Berns, 209 P. 94 (Or. 1922); Mansfield v. Redding, 112 A. 437 (Pa. 1921); Shields v. Dunlap, 174 S.W.2d 642 (Tex. Civ. App. 1943); Neumann v. Gorak, 11 N.W.2d 155 (Wis. 1943).*

(n2)Footnote 658. Isom v. Johnson, *87 S. 543 (Ala. 1920); Marshall v. Gilster, 201 P. 711 (Idaho 1921); Hart v. Turner, 226 P. 282 (Idaho 1924); Reade v. McKenna, 134 A. 371 (N.J. Ch. 1926).*

(n3)Footnote 659. *Michelsen v. Patterson, 658 S.W.2d 413 (Ark. App. 1983); Lopez v. Bell, 24 Cal. Rptr. 626 (Cal. App. 1962); Matthews v. Gaubler, 49 S.2d 774 (La. App. 1951); Soehnlein v. Pumphrey, 37 A.2d 843 (Md. 1944); Budacz v. Fradkin, 126 A. 220 (Md. 1924); Minsky v. Zieve, 152 N.E. 41 (Mass. 1926); Moskow v. Burke, 152 N.E. 321 (Mass. 1926); Chatalian v. Di Fusco, 139 N.E. 174 (Mass. 1923); Preferred Underwriters v. N.Y., New Haven & Hartford Ry. Co., 137 N.E. 590 (Mass. 1923); Plas v. Aldrich, 213 N.W. 80 (Mich. 1927)* (provision for voiding or failure to make payments); *Elbom v. Pavsner, 196 N.W. 442 (Mich. 1923); Waller v. Lieberman, 183 N.W. 235 (Mich. 1921); Gaddis v. Mayfield, 239 S.W. 1010 (Tex. Civ. App. 1922); Nicholson v. Whyte, 236 S.W. 770 (Tex. Civ. App. 1921); McDaniel v. Daves, 123 S.E. 663 (Va. 1924).*

(n4)Footnote 660. *Rankin v. Marion Phosphate Co., 12 F.2d 67 (S.D. Fla. 1926);* Forrester v. Granberry, *100 S. 551 (Ala. 1924); Bothe v. Noack, 232 S.W. 606 (Ark. 1921); Lindsey v. Wright, 258 P. 438 (Cal. App. 1st Dist. 1927);*

Flora v. Glover, 193 P. 665 (Colo. 1920); Tex. Co. v. Crown Petroleum Corp., 75 A.2d 499 (Conn. 1950); Foster v. Newport Nat'l Bank, 113 A. 908 (Del. Super. 1921); Minnehaha Groves Co. v. Harper, *105 S. 100 (Fla. 1925);* Felt v. Morse, *85 S. 656 (Fla. 1920); Wormward v. Taylor, 221 P.2d 686 (Idaho 1950); Fowler v. Dieleman, 185 N.W. 79 (Iowa 1921); Schmidt v. Martin, 251 S.W. 999 (Ky. App. 1923); Fox v. Doll, 59 S.2d 443 (La. 1952); Robinson v. Johnson, 113 A. 121 (Md. 1921); Dennett v. Norwood Hous. Assn., 135 N.E. 866 (Mass. 1922); Larkin v. Koether, 137 A. 849 (N.J. Ch. 1927); Patterson v. J.D. Loiseaux Lumber Co., 114 A. 336 (N.J. Ch. 1921); Rudy v. Newman, 220 P.2d 489 (N.M. 1950); Schifferdecker v. Busch, 225 N.Y.S. 106 (N.Y. Sup. 1927); Fordham Triangle Realty Co. v. Boyle, 209 N.Y.S. 695 (N.Y. Sup. 1925); Rosenblatt v. Bergen, 195 N.Y.S. 276 (N.Y. App. Div. 1st Dept. 1922); Strasbourger v. Hesu Realty Co., 191 N.Y.S. 133 (N.Y. App. Div. 1st Dept. 1921); Crawford v. Allen, 127 S.E. 521 (N.C. 1925); O'Brien v. Bradulov, 80 N.E.2d 685 (Ohio App. 1948); Dillard v. Ceaser, 243 P.2d 356 (Okla. 1952); Strain v. Statler, 240 P. 614 (Okla. 1925); Stork v. Felper, 270 N.W.2d 586 (Wis. App. 1978)* (time is not of the essence unless so specified); *W. Va. Power & Transmission Co. v. Voight, 114 S.E. 138 (W. Va. 1922); Collins v. Thomas, 105 S.E. 897 (W. Va. 1921).* In a provision for making down payment by the time the house was under roof, time was not of the essence where not expressly called for. *Harris Builders, Inc. v. Kopp, 311 N.E.2d 841 (Ind. App. 1974).* Time is not of the essence in sales contract unless specifically made so. *Poggioli v. Liebegott, 354 N.Y.S.2d 57 (N.Y. Sup. 1974). See also Eaton v. Harwood, 31 S.E.2d 473 (Ga. 1944).*

(n5)Footnote 661. *Nelson v. Vick, 462 So. 2d 935 (Ala. Civ. App. 1984); Grider v. Turnbow, 94 P.2d 285 (Or. 1939).* Waiver of delay in making contract payments does not constitute waiver of later delays. *Ashworth v. Hankins, 452 S.W.2d 838 (Ark. 1970).* Even if time is of the essence in a contract it may be extended by agreement or waiver. *Smith v. Hues, 540 S.W.2d 485 (Tex. Civ. App. 1976).*

(n6)Footnote 662. *Wright v. Burlison, 128 S.W.2d 238 (Ark. 1939); Terrell v. Gregory, 249 S.W.2d 560 (Ark. 1952).*

(n7)Footnote 663. *Stinson v. Dousman, 61 U.S. 461 (1857); Hays v. Hall, 4 Port. 374 (Ala. 1837); Three Sts. Lumber Co. v. Bowen, 129 S.W. 799 (Ark. 1910);. Glock v. Howard & Wilson Colony Co., 55 P. 713 (Cal. 1898); Nyder v. Champlin, 81 N.E.2d 923 (Ill. 1948); Turn Verein Eiche v. Kionka, 99 N.E. 684 (Ill. 1912); Young v. Daniels, 2 Iowa 126 (Iowa 1955); Rose v. Gilbert, 31 N.W.2d 690 (Mich. 1948); Branch v. Lee, 159 S.W.2d 677 (Mo. 1941); Rossbach v. Micks, 132 N.W. 526 (Neb. 1911); Moore v. Austin, 79 N.Y.S.2d 267 (N.Y. App. Div. 2d Dept. 1948); Kirby v. Harrison, 2 Ohio St. 326 (Ohio 1853); Keator v. Ferguson, 107 N.W. 678 (S.D. 1906). See Williams v. Shamrock Oil & Gas Co., 95 S.W.2d 1292 (Tex. Com. App. 1936).* Death of vendee did not extend time of performance. *Stein v. Bruce, 366 S.W.2d 732 (Mo. App. 1963).* Even where time is not of the essence in a contract of sale of realty, it may be made so unilaterally. *Drazin v. Am. Oil Co., 395 A.2d 32 (D.C. App. 1978).*

(n8)Footnote 664. *Augustine v. Chateau Homes, Inc., 324 N.E.2d 633 (Ill. App. 1975); Dowd Grain Co., Inc. v. Pflug, 227 N.W.2d 610 (Neb. 1975); Beck v. Strong, 572 S.W.2d 484 (Mo. App. 1978).*

(n9)Footnote 665. Church of God in *Christ, Inc. v. Congregation Kehillath Jacob, 332 N.E.2d 918 (Mass. App. 1975).*

(n10)Footnote 666. "But it is equally clear that there is a class of cases where time is of the essence of the contract; and where a disregard of the conditions of the contract will deprive a party of relief, both at law and in equity.

"1st. Time may have become of the essence of the contract by the rise or depreciation of the value of the premises contracted to be sold.

"2d. Time may be of the essence of the contract, by reason of the nature of the interest in the property which is to be conveyed. * * *

"3d. Time may be of the essence of the contract when there is an express stipulation to that effect. * * *' " *Edgerton v.*

Peckham, 11 Paige Ch. 352 (N.Y. Ch. 1844).

"The parties to a contract may by its terms make the time of performance essentially important and its observance in that respect requisite to relief. * * * And when that is not so either of the parties to the contract may, by a reasonable notice to the other party for that purpose, render the time of performance as of the essence of the contract and avail himself of forfeiture on default." *Schmidt v. Reed, 30 N.E. 373 (N.Y. 1892).* As the purchase of a reversionary interest, see *4 Ves. 492, 1 Sim. & S. 59.* Time for performance essential under statute of frauds. *David v. Tucker, 244 N.W.2d 197 (Neb. 1976).* Time, though not originally of the essence, may be made so unilaterally. *Drazin v. Am. Oil Co., 395 A.2d 32 (D.C. App. 1978). See Piland Corp. v. Rea Constr. Co., 672 F. Supp. 244 (E.D. Va. 1987).*

(n11)Footnote 667. *Dodge v. Galusha, 39 N.W.2d 539 (Neb. 1949); Doctorman v. Schroeder, 114 A. 810 (N.J. 1921); Edgerton v. Peckham, 11 Paige Ch. 352 (N.Y. Ch. 1844).*

"The general opinion has always been, that the day fixed was imperative on the parties at law. This was so laid down by Lord Kenyon, and has never been doubted in practice. The contrary rule would lead to endless difficulties. * * * The effect of this rule would be, that the appointment of a day would have no effect, and in every case it must be referred to a jury to consider whether the act was done within a reasonable time. The precise contract of the parties would be avoided, in order to introduce an uncertain rule, which would lead to endless litigation. * * * But equity, which from its peculiar jurisdiction is enabled to examine into the cause of delay in completing a purchase, and to ascertain how far the day named was deemed material by the parties, will in certain cases carry the agreement into execution, notwithstanding that the time appointed be elapsed; for, as Lord Eldon remarks, the title to an estate requires so much clearing and enquiry, that unless substantial objections appear, not merely as to the time, but an alteration of circumstances affecting the value of the thing; or objections arising out of circumstances, not merely as to the time, but the conduct of the parties during the time; unless the objection can be so sustained, many of the cases go the length of establishing, that the objections cannot be maintained. Perhaps there is cause to regret that even equity assumed this power of dispensing with the literal performance of contracts in cases like these." Sugden, Law of Vendors and Purchasers 328-352.(5th ed.).

Stipulation that time was of the essence prevents specific performance though equity will give relief against forfeiture. Steadman v. Drinkle, House of L., 1 App. Cas. 275 (1916).

(n12)Footnote 668. *Earlin v. Mors, 63 A.2d 531 (N.J. 1949),* rev'd in part, *Kutzin v. Pirnie, 591 A.2d 932 (N.J. 1991)* (a vendee may recover from his deposit any money in excess of the damages that the vendor actually suffers).

(n13)Footnote 669. *Di Cristina v. Weiser, 42 S.2d 868 (La. 1949).* Where no time for performance is specified, the court may fix a reasonable time. *Whitley v. Patrick, 172 S.E.2d 692 (Ga. 1970).* Time is not of the essence of a contract to sell land unless expressed. *Hing-Bo Gum v. Nakamura, 549 P.2d 471 (Haw. 1976); Wood v. Wood, 224 S.E.2d 159 (Va. 1976).*

(n14)Footnote 670. *Fishers Grain Co. v. Sparks, 58 N.E.2d 932 (Ind. 1945); Cadwell v. Smith, 120 N.W. 130 (Neb. 1909).*

(n15)Footnote 671. Acosta v. Anderson, *48 S. 260 (Fla. 1909); Burkhalter v. Roach, 82 S.E. 1059 (Ga. 1914); Zempel v. Hughes, 85 N.E. 641 (Ill. 1908); Knipe v. Troika, 141 P. 557 (Kan. 1914); Wiley v. Helen, 112 P. 158 (Kan. 1910); Monroe v. Bailey, 141 S.W. 412 (Ky. App. 1911); Diamond v. Shriver, 80 A. 217 (Md. 1911); Staples v. Mullen, 81 N.E. 877 (Mass. 1907); Davis v. Martin, 59 S.E. 700 (N.C. 1907).*

(n16)Footnote 672. *J.M. Hamilton Co. v. Battson, 44 P.2d 1064 (Mont. 1935).*

(n17)Footnote 673. Isom v. Johnson, *87 S. 543 (Ala. 1920); Thlocco Oil Co. v. Bay St. Oil & Gas Co., 247 P.2d 740 (Okla. 1952); Wilbanks v. Selby, 227 S.W. 371 (Tex. Civ. App. 1921). See Kersch v. Taber, 154 P.2d 934 (Cal. App. 3d Dist. 1945).*

(n18)Footnote 674. *Zempel v. Hughes, 85 N.E. 641 (Ill. 1908).*

(n19)Footnote 675. *Johnson v. Sekor, 101 P. 829 (Wash. 1909).*

(n20)Footnote 676. *McQuary v. Mo. Land Co., 130 S.W. 335 (Mo. 1910).* Failure of the vendor to make a demand on the vendee, either before or after the performance date, waived a clause in the sales contract to the effect that time is of the essence. *Berry v. Crawford, 373 S.W.2d 129 (Ark. 1963).*

(n21)Footnote 677. *Fretwell v. Crisafulli, 185 S.2d 504 (Fla. App. 1966)* (time is not of the essence in land sales contracts); *A.B.C. Auto Parts, Inc. v. Moran, 268 N.E.2d 844 (Mass. 1971)* (in sales contracts a reasonable time for transfer of title is presumed); *Solomon v. Shewitz, 152 N.W. 196 (Mich. 1915); Keiter v. Klinger, 57 Dauph. (Pa.) 26.*

(n22)Footnote 678. *Greenbaum v. Cortez, 644 S.W.2d 510 (Tex. App. 1982); Graham v. Jones, 275 F. 790 (5th Cir. 1921); Wightman v. Hall, 217 P. 580 (Cal. App. 2d Dist. 1923); Darter v. Schuyler, 190 P. 827 (Cal. App. 3d Dist. 1920); Winter Park Ranch, Inc. v. Richards, 545 P.2d 1367 (Colo. App. 1975); Mathews v. Kingsley, 100 S.2d 445 (Fla. App. 2d Dist. 1958); Broadwell v. Smith, 108 S.E. 609 (Ga. 1921); McGinnis v. Rogers, 279 A.2d 459 (Md. 1971); Stand. Oil Co. v. Murray, 183 N.W. 55 (Mich. 1921); Loughney v. Quigley, 124 A. 84 (Pa. 1924); Rhodes v. Good, 114 A. 494 (Pa. 1921); Wilbanks v. Selby, 227 S.W. 371 (Tex. Civ. App. 1921).* Offer to sell containing words "shall be open for acceptance until midnight" meant midnight on day offer was signed where parties lived in close proximity. *Noftsger Real Est., Inc. v. Berwanger, 269 N.E.2d 616 (Ohio App. 1971).* Delay of a year in exercising a first call after notice of the owner's desire to sell was too late. *Carroll v. Page, 215 S.E.2d 203 (S.C. 1975).* Time of reception of exercise of option, not time of mailing, controls. *Salminen v. Frankson, 245 N.W.2d 839 (Minn. 1976).*

(n23)Footnote 679. *Kerr v. Reed, 202 P. 142 (Cal. 1921); Retsloff v. Smith, 249 P. 886 (Cal. App. 1st Dist. 1926); Adams & McKee Land Co. v. Dugan, 228 P. 681 (Cal. App. 2d Dist. 1924); Compton v. Weber, 129 N.E. 764 (Ill. 1921); Davies v. Dayton, 131 N.E. 578 (Ill. 1921); Kohenn v. Plantation Baking Co., Inc., 336 N.E.2d 491 (Ill. App. 1975); Crooke v. Nelson, 191 N.W. 122 (Iowa 1922); Cole v. Murphy, 125 A. 40 (Md. 1924); Bammert v. Kenefick, 261 S.W. 78 (Mo. 1924); Schlake v. Healey, 187 N.W. 427 (Neb. 1922); Kobrin v. Drazin, 128 A. 796 (N.J. Ch. 1925); Crawford v. Allen, 127 S.E. 521 (N.C. 1925); Johnson v. Berns, 224 P. 624 (Or. 1924); Brackin v. P.E. Welton Engr. Co., 128 A. 818 (Pa. 1925); Hauert v. Kaufman, 208 N.W. 981 (S.D. 1926); Frank v. E.R. Thomas & Co., 233 P. 626 (Wash. 1925); Collins v. Thomas, 105 S.E. 897 (W. Va. 1921); Buntrock v. Hoffman, 189 N.W. 572 (Wis. 1922).* Time of performance of a sales contract is a mere formal defect which may be corrected by payment of the contract balance with interest where the vendor has not been deprived of the general object of a sales agreement. *Krentz v. Johnson, 343 N.E.2d 165 (Ill. App. 1976).*

(n24)Footnote 680. *Retsloff v. Smith, 249 P. 886 (Cal. App. 1st Dist. 1926); Spring Est. Co. v. Cohen, 204 P. 264 (Cal. App. 1st Dist. 1921); De Bairos v. Barlin, 190 P. 188 (Cal. App. 1st Dist. 1920); Leballister v. Morris, 211 P. 851 (Cal. App. 3d Dist. 1922); Clayton v. Fletcher Sav. & Trust Co., 155 N.E. 539 (Ind. App. 1927); Holman v. Joslin, 204 P. 697 (Kan. 1922); Pangburn v. Sifford, 184 N.W. 512 (Mich. 1921); Scheerer v. Scheerer, 229 S.W. 192 (Mo. 1921); In re Denning's Est., 229 P. 912 (Or. 1924).*

(n25)Footnote 681. *Williams v. Benton, 227 S.W. 410 (Ark. 1921); Cullumber v. Stahl, 203 N.W. 270 (Iowa 1925); Strauss v. Rabe, 130 A. 920 (N.J. 1925); Wyatt v. Bergen, 130 A. 595 (N.J. Ch. 1924),* affd, *130 A. 597 (N.J. 1925); Doctorman v. Schroeder, 114 A. 810 (N.J. 1921); Orange Soc. v. Konski, 121 A. 448 (N.J. Ch. 1923); Offner v. Engelen, 102 N.Y.S.2d 97 (N.Y. Sup. 1951); Glaser v. Eisen Realty Co., 187 N.Y.S. 171 (N.Y. Sup. 1921); Anderson v. Morse, 222 P. 1083 (Or. 1924); Shrut v. Huselton, 116 A. 43 (Pa. 1922);* Moter v. Hershey, 205.N.W. 239 (S.D. 1925); *Harris County Inv. Co. v. Davis, 230 S.W. 761 (Tex. Civ. App. 1921). See Benton v. Davison, 212 N.W. 500 (S.D. 1927).*

(n26)Footnote 682. *Johnson v. Schuchardt, 63 S.W.2d 17 (Mo. 1933). See Aiken v. Andrews, 63 S.E.2d 645 (N.C. 1951).*

(n27)Footnote 683. *Langley v. Norris, 173 S.W.2d 454 (Tex. 1943).*

(n28)Footnote 684. *Kersch v. Taber, 154 P.2d 934 (Cal. App. 3d Dist. 1945). See Limpus v. Armstrong, 322 N.E.2d 187 (Mass. App. 1975)* (mere specification of a date for closing does not make time of the essence; time is not of the essence in a contract to sell unless specified or implied); *Smith v. Warth, 483 S.W.2d 834 (Tex. Civ. App. 1972)* (time is not of essence in sales contract unless expressed).

(n29)Footnote 685. *Slack v. Mullenix, 66 N.W.2d 99 (Iowa 1954).* Giving a buyer a reasonable time to make up a default in an installment on a purchase contract where a payment was not made on time. *Lamont v. Evjen, 508 P.2d 532 (Utah 1973).*

(n30)Footnote 686. *Harris Builders, Inc. v. Kopp, 311 N.E.2d 841 (Ind. App. 1974).*

Thompson on Real Property, Thomas Editions

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CHAPTER 96 Vendors and Purchasers

11-96 Thompson on Real Property, Thomas Editions § 96.14

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§ 96.14 Statute of Frauds Issues.

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§ 96.14(a) Applicability of the Statute of Frauds. n687

Under the fourth clause in the fourth section of the statute of frauds, a contract relating to the sale of lands, tenements, hereditaments, or any interest in or concerning them must be in writing, and signed by the party to be charged, or by some other person by him thereunto lawfully authorized, n688 and the statute is binding on courts of equity and courts of law. n689 In most states, a verbal promise to devise land is held to be within the statute, n690 but in others it is held not to be within the statute, at least where based on a consideration performed, after it is made and before the death of the promisor. n691 Neither is such oral contract of sale available as a defense to an action in ejectment brought by the vendor. n692 A written offer to purchase, orally accepted, is neither a sale nor a contract of sale, where, by the terms of the offer, it was provided that, if the offeror should fail to sign the necessary papers, the earnest money might be forfeited and the maker released from payment; the terms of the sale as contained in the offer were not then agreed on, and the acceptance was qualified by the statement that subsequently a contract of sale would be entered into. n693

The cliche that the statute of frauds, though not moribund is senescent, is applicable to sales of interests or rights in land. So the statute is intended to prevent fraud, not to be a vehicle of fraud. n694 A parol agreement to convey real estate, which does not create a trust, violates the statute of frauds and is unenforceable. n695 A "contract of sale" of an "interest in or concerning" lands, tenements, hereditaments, includes contracts to convey any portion of the legal or equitable title of all realty whatsoever, such as a contract for the transfer of a preemption, n696 squatter's rights, n697 possessory right, n698 the interest of a vendee under an executory contract, n699 the beneficial interest of a cestui que trust, n700 or, in fact, any equitable interest in realty. n701 The statute protects an equitable estate in land as well as the legal, since equitable estates are more exposed to mischief which the statute was designed to remedy. n702

An "interest" is the broadest term applicable to claims in or on real property, including any right, title, or estate in, or lien thereon. n703 The term "real estate" at common law and in its generally accepted meaning, and as used in the statute of frauds, is synonymous with "real property." n704 An equity in lands is as much within the statute as the legal title, and it is no more competent to convey the one by parol than the other. n705 An oral contract for the exchange of lands is within the statute. n706

An oral promise by an assignee of a contract to sell land to pay the purchase price called for by the contract, which was not due for the period of eight years from the date of the assignment has been held void under the statute of frauds. n707 An oral promise by a parent to convey real estate to his child for a consideration not paid when the child is put in possession of the property is unenforceable. n708 Where consideration is executory and touches the land, the doctrine that price is outside the statute of frauds cannot be extended to include the broader concept of consideration. n709

Because of the statute of frauds, a listing of land with broker and the usual written communications with the broker are not sufficient authority to the broker to bind the owner by a contract of sale. n710 The weight of authority indicates that partnerships to hold or deal in realty need not be founded on a written agreement. n711 The statute of frauds does not apply to agreements between real estate brokers, n712 but does apply to sales at auction. n713

Stipulations made in open court as to transfer of land are not within the statute of frauds. n714 A strong line of authority holds that the vendor has an action of assumpsit for the purchase price based on the promise to pay and this is not within the statute of frauds. n715

To meet the requirements of the statute of frauds a contract to sell realty must show the parties, the subject matter, the promises on both sides, the price and the consideration. n716

The statute of frauds does not apply to a fully executed contract for the sale of real estate. n717 Executory contracts of sale are regarded in equity as executed so far as they concern the interest or estate in the subject matter and as they operate to transfer such interest to the vendee; although the vendor still has the legal title, the vendor holds it in trust for the vendee and the beneficial interest is vested in the vendee. n718

An equity of redemption in realty is within the statute, and can be effectively transferred only by means of an instrument in writing. n719 Options are within the statute of frauds. n720 Since time is of the essence in an option, any extension of time is a new option and must be in writing. n721 This is not true, however, of sales contract closing dates where time is not of the essence. n722 An unexecuted verbal agreement for the conveyance of land, without more, is within the statute and is unenforceable. n723 An oral executory promise to reconvey land if the grantor is not satisfied is void under the statute of frauds. n724

> Where, as is the case here, the owner of land, without making a valid executory contract to convey it, deposits a deed of it with a third person to be delivered to the grantee upon certain terms, he may cancel the instructions given to such third person and recall the deed at any time before the specified terms have been complied with; nor can such deed, invalid as a conveyance for want of delivery, be considered as a memorandum in writing, signed by the owner agreeing to convey the land therein described so as to authorize a decree of specific performance. A deed, which has not been delivered, is not, by its own force and aside from any contract to which it may be related, a sufficient writing to meet the requirements of the statute of frauds. n725

Courts divide as to whether oral express warranties transgress the statute of frauds. n726 The cases are not in accord as to whether an auctioneer can as the vendor's agent sign a memorandum of sale so as to comply with the statute of frauds. n727 The cases are divided as to whether a written contract of sale may be orally rescinded. n728 The courts also reach different results as to oral modification of contracts of sale. n729

§ 96.14(b) The Sufficiency of the Memorandum.

The statute of frauds indicates the necessity of a complete and enforceable contract. n730 By settled rule of law, a note or memorandum of a contract for a sale of land must identify by name or description the parties to the transaction, a seller and a buyer. n731 The memorandum must show an agreement or meeting of the minds of the contracting parties. n732 The date of a contract to convey can be established by parol evidence. n733 Thus a receipt for deposit describing

the property, the purchase price and the deposit was sufficient under the statute of frauds. n734 A memorandum which is on its face incomplete and which contemplates a formal contract does not comply with the statute. n735

Where the parties to a sales contract contemplate a written contract, the minds of the parties will not be considered as having fully met until the writing itself is agreed on and executed. n736 No meeting of minds arises where the death of one of the parties occurs before the contract is signed. n737 The character of the instrument is determined by its terms and by its designation. n738 It is well settled that the form of the writing required by the statute is not material. The contract may be evidenced by one writing or more. It may be shown entirely by written correspondence. Whatever form the agreement may assume, if the writing or writings, viewed as a whole, constitute in essence or substance, upon their face, a note or memorandum in writing, subscribed by the party sought to be charged, or the party's agent lawfully authorized in writing, showing who the contracting parties are, the subject matter of the sale, and the consideration, the statute is satisfied. n739 Likewise, the statute is met if the several writings, viewed in the light of the situation and circumstances of the parties at the time they were written, clearly relate to and connect themselves with each other; if, when their contents are adjusted to each other there appears to have been clearly made known the names of the contracting parties, the subject matter of the sale, and the consideration, and if it appears that all this has received the sanction of the subscription of the party sought to be charged, or some person thereunto lawfully authorized in writing, the statute requirement in reference to subscription, as well as all other particulars is met. n740 The modern authorities indicate that the memorandum is sufficient if it contains all the necessary elements n741 even though it contemplates the subsequent execution of a more comprehensive agreement. n742 An enforceable contract for the sale of land exists where the writing definitely and particularly describes the land, acknowledges receipt of payment, and provides for a deed on further payment. n743 The contract must recite the name of the grantee or point out a method by which the grantee may be ascertained. n744 The contract is not invalidated by the failure to specify the rate of interest, the date of possession n745 or the time for payment. n746

In a contract for sale of realty, a definite and certain price is an essential element. n747

Where the contracts are signed in duplicate, the failure to deliver a copy to one of the parties does not prevent enforcement of the contract. n748 A contract to sell need not be acknowledged. n749

It is held by the great weight of authority that, where negotiations relative to the sale of land are conducted through the mails, the contract is completed the moment the proposed purchaser mails a letter addressed to the party offering to sell, accepting the offer, if done within a reasonable time, and before the proposed purchaser receives notice of a withdrawal of the offer to sell. n750 A deed placed in escrow with a third person for delivery on performance by the grantee of a certain condition is not a sufficient memorandum under the statute, where, although it contains the names of the parties, recites the consideration, and describes the property, it does not state the contract or terms of sale. n751

A memorandum of sale of real estate must contain a description of the property sufficient to identify it or furnish means pointing to evidence of identification. n752 It must also state or indicate time and terms of payment. n753 A description is sufficient if the means of identification is supplied, n754 but if there is no description, it cannot be furnished by parol. n755

A contract to convey real estate need not be a formal document, complete in its parts, and signed by both parties. It may be evidenced by an offer by one party and an acceptance thereof by the other, and if the offer is made in proper form and accepted by the party to whom it is made before its withdrawal a valid executory contract of sale results. n756 The obligation is complete when an offer is made by the owner to another at a stated price and such other accepts in accordance with the terms of the offer. n757

The property description in a sales contract, to be adequate, must either be certain in itself or be capable of being reduced to certainty where there is a reference to something extrinsic. n758 The cases divide as to whether an indefinite description can be supplemented by parol evidence that the vendor owned only one piece of property. n759 The

majority rule requires in writing either the name of each party or a sufficient description of them so that they can be identified. n760 The statutes differ as to whether the memorandum need be signed only by the party to be charged. n761 The contract must furnish a sufficient identification of the subject matter. n762 The cases disagree as to whether a street number is a sufficient description. n763

§ 96.14(c) Partial Performance as Taking the Contract Out of the Statute of Frauds.

The statute of frauds has been spoken of as being senescent but not moribund. Many courts have expressed a strong dislike to the doctrine as more likely to create than to prevent actual fraud. So equitable doctrines are to be found intruding into the field to prevent a literal application of the statute where injustice would ensue. Two major differences are found in the various statutes of fraud among the states as respects realty. One concerns the question of whether only the party to be charged must sign the instrument or whether both must sign. The other concerns whether the section of the statute which speaks of application to interests in land is applicable or whether the section of the original statute also is applicable, i. e., whether all instruments which create obligations as to land, not to be performed within a stated time, must be in writing.

A major area of relief from a too onerous effect of the statute is found under the theory that, part performance by one of the parties will take the case out from under the statute. n764 Requisite acts of part performance vary with the conduct of the parties and the surrounding circumstances; mere continuance of possession or payment is usually not sufficient. n765 Most states take the position that mere payment of the purchase price does not take a contract to purchase out of the statute since the purchase price can be refunded. These states require a change of position of the party seeking to avoid the statute, such change having come from reliance on the contract and resulting in an injury to him not compensable by monetary payments.

The doctrine of part performance, as taking the transaction out from under the statute of frauds, is well grounded in the law. Part performance could consist of paying the purchase price, taking possession, making improvements, paying charges against the land, or in some manner changing the position of the party relying on the contract. n766 In some cases a taking of possession alone is sufficient part performance. n767 Others require additional acts such as the making of improvements. n768 Almost all cases will sustain part performance if the party has so changed position in reliance upon the agreement that the party is injured thereby and the injury cannot be measured in dollars.

The whole question of the nature of the doctrine that part performance will take an oral contract to sell land out of the statute of frauds can best be described by the word "chaos." The Restatement on Contracts, section 197, would require a combination of payment of part or all of the purchase price plus the making of valuable improvements or a taking or retention of possession, all with the vendor's consent. Among the various states, at least five rather confused theories are discernable: (1) Possession alone is sufficient. The cases here divide as to whether a taking of possession is required or a mere retention of possession is sufficient. Either usually requires a reference to the contract. n769 (2) Possession plus payment is sufficient. (3) Possession plus the making of valuable improvements is sufficient, even though the vendee could be reimbursed for the improvements. In some states there is a further requirement of payment of the purchase price. n770 (4) The vendee must not merely take possession but must make such a change in position that the loss cannot be compensated with money. (5) The doctrine of part performance is denied.

Under one rule part performance is a one-way street. The persons who perform the acts that constitute part performance may avoid the statute, because to hold otherwise would constitute a fraud on that party, but the other party cannot enforce the oral contract merely because the first has partly performed it. n771 The cases also divide as to whether mere delivery of possession is part performance. n772 The leading doctrine requires a taking of possession under the contract, n773 if the sale of a possessory interest is involved, but some cases consider a continuance in possession as sufficient.

Ordinarily, possession by the vendee is an indispensable element of part performance, required to take a parol contract to convey realty out of the statute of frauds, and such possession must be referable exclusively to the contract relied

upon. n774 A parol contract to sell is not taken out of the statute of frauds by an entry and making of improvements unless consideration is paid. n775

Those cases which use a taking of possession with reference to the contract differ as to whether a continuance of possession is also partial performance. n776 Others hold that possession plus payment of the purchase price are part performance. n777 Another position holds that taking of possession plus payment in full is part performance only if the parties cannot be restored to their former position. n778 The acts of part performance must be referable to the contract to invoke the doctrine of part performance. n779 An unalterable change in position by the vendee is generally considered to be sufficient part performance. n780 This is particularly true where the monetary injury cannot be measured. n781

To take a case out of the statute of frauds upon the ground of part performance the claimant must establish the contract by clear, unequivocal, and definite testimony, and that the acts claimed to be done thereunder should be equally clear and definite, and referable exclusively to the contract. n782 Detrimental reliance by one party on the oral promises of the other is sufficient to estop the provision from raising the defense of the statute of frauds in a contract to convey lands. n783 In an Iowa case, it was held that evidence that plaintiff moved on land after an alleged oral agreement, made improvements and payments contemplated by the alleged contract, when considered with other circumstances, warranted a decree for the plaintiff in a suit to establish title to the land under the alleged oral contract with the plaintiff's deceased father. n784

Clearly, for acts constituting part performance to take the situation out from under the statute of frauds, they must have been performed with reference to and in reliance on the terms of the agreement. n785 Whether celebration of a marriage is part performance is disputed. n786 The case is taken out of the statute of frauds if the party has changed position to the party's injury in reliance on the oral contract. n787 Under the early rule, immediately after the statute was passed, payment of part of the purchase price was not sufficient part performance to give specific performance. Later this was reversed; still later the amount of the payment determined whether or not it was part performance, but under the modern rule it is not. n788 Under one rule, evidence of part performance must be introduced prior to proving the agreement by parol evidence. n789 The other rule makes the order of evidence discretionary. n790

FOOTNOTES:

(n1)Footnote 687. *Watson v. McCabe, 527 F.2d 286 (6th Cir. 1975)* (holding that the statute of frauds applies to sale of real estate and holding option); *Brown v. Gravelee Lumber Co., 341 S.2d 907 (Miss. 1977)* (part performance and expenditure of money in reliance held not sufficient to take sales contract out of the statute of frauds); *Mattco, Inc. v. Mandan Radio Assn., Inc., 246 N.W.2d 222 (N.D. 1976)* (agreement for preemptive right to purchase property must be in writing and subscribed by the party to be charged). *See* Francis M. Burdick, A Statute for Promoting Fraud, *16 Colum. L. Rev. 273 (1916);* George P. Costigan, Jr., Date and Authorship of the Statute of Frauds, *26 Harv. L. Rev. 329 (1913);* Hugh Evander Willis, Statute of Frauds--A Legal Anachronism, *3 Ind. L.J. 427, 528 (1928);* Crawford D. Hening, Original Drafts of the Statute of Frauds and Their Authors, *61 U. Pa. L. Rev. 283 (1913);* Mary C. Cahill, Student Author, Changes Wrought in the Statute of Frauds by the Uniform Commercial Code, *48 Marq. L. Rev. 571 (1965);* Restitutionary Right of a Vendee in Default of an Oral Contract for the Sale of Land, *19 Hastings L.J. 1212 (1968);* Brendan F. Brown, Statute of Frauds and Land Transactions, *13 Clev-Mar. L.Rev. 205 (1964);* Frank Josselson, Student Author, The Ohio Statute of Frauds of Conveyances and Leases of Interests in Real Property, *38 U. Cin. L. Rev. 135 (1969).*

(n2)Footnote 688. *Donaldson v. Bernstein, 104 F.3d 547 (3d Cir. 1997);* Kyle v. Jordan, *71 S. 417 (Ala. 1916)* (contract for sale of land); Profile Cotton Mills v. Calhoun Water Co., *66 S. 50 (Ala. 1914)* (easements); *Moore v. White, 220 P.2d 918 (Cal. App. 1st Dist. 1950); Lasry v. Lederman, 305 P.2d 663 (Cal. App. 2d Dist. 1957)* (an agreement of joint adventure to purchase realty may arise by parol); *Niernberg v. Feld, 283 P.2d 640 (Colo. 1955)* (an executory contract involving title to, or interest in, lands may be changed by an agreement resting in parol); *Miller v. Murray, 68 S.2d 594 (Fla. 1953)* (the statute of frauds is avoided only by payment of consideration, possession by

vendee and making of valuable improvements or fraud and these acts must be specifically referable to the contract); *Hull v. Maryland Cas. Co., 79 S.2d 517 (Fla. 1955)* (an unrecorded deed assigned as security, which consignment was recorded, was held to be incorporated by reference and constituted notice of its own terms as well as of other facts which could be learned by examination of the record); *Lyons v. Bass, 34 S.E. 721 (Ga. 1899); Whitelaw v. Brady, 121 N.E.2d 785 (Ill. 1954)* (failure to determine amount and time of down payments made continuing offer void under statute of frauds); *Wolf v. Parker Holsman Co., 33 N.E.2d 235 (Ill. App. 1st Dist. 1941); Riffel v. Dieter, 157 P.2d 831 (Kan. 1945); Howton v. Gilpin, 69 S.W. 766 (Ky. App. 1902); Bibi v. Courville, 260 N.E.2d 156 (Mass. 1970)* (statute of frauds barred oral agreement for sale of land in absence of fraud or constructive trust); *Blood v. Hardy, 15 Maine 61 (Me. 1838); Patterson v. Cunningham, 12 Maine 506 (Me. 1835); Macurda v. Fuller, 114 N.E. 366 (Mass. 1916)* (promise to reconvey); *Hurley v. Donovan, 64 N.E. 685 (Mass. 1902); Evanoff v. Hall, 17 N.W.2d 724 (Mich. 1945); McCurdy v. Van Os, 287 N.W. 890 (Mich. 1939); Colstad v. Levine, 67 N.W.2d 648 (Minn. 1954)* (where the memo describes the real estate by street address it is adequate description to avoid application of statute of frauds); *Doyle v. Wohlrabe, 66 N.W.2d 757 (Minn. 1954)* (parol evidence showing the fact of delivery and the receipt of the several writings, including time, place, extension of property and parties and other circumstances may be received to aid in interpreting the provisions of a contract to transfer bond); *Hicks v. Rupp, 140 P. 97 (Mont. 1914)* (for sale of land); *Johnson v. Watson, 272 P.2d 580 (Nev. 1954)* (a description by street and number, town and state of real estate set out in a memo is sufficient to support an oral agreement to sell); *Knox v. Allard, 5 A.2d 716 (N.H. 1939); Glucksman v. Bowers, 52 A. 218 (N.J. Sup. Ct. 1902); Gracie Square Realty Corp. v. Choice Realty Corp., 305 N.Y. 271 (N.Y. 1953)* (part performance will not take the contract out of the statute of frauds unless referable to the contract); *Suddard v. Lewis, 162 N.Y.S. 493 (N.Y. App. Div. 3d Dept. 1916)* (contract to sell); *Loft, Inc. v. Glen Ridge Realty Corp., 12 N.Y.S.2d 577 (N.Y. Sup. 1939).* A memorandum of contract of sale was incomplete and nonenforceable because it did not state the rates for the proposed purchase money mortgage with the amount of installment payments of principal. *Monaco v. Levy, 209 N.Y.S.2d 555 (N.Y. App. Div. 1961). Burkhead v. Farlow, 146 S.E.2d 802 (N.C. 1966)* (an oral acceptance of a written offer to sell binds the seller); *Peele v. Le Roy, 22 S.E.2d 244 (N.C. 1942); Hughes v. Oberholtzer, 123 N.E.2d 393 (Ohio 1954); Thompson v. Giddings, 276 P.2d 229 (Okla. 1954)* (in an oral contract for the sale of an interest in real estate, the memorandum required is sufficient if it identifies the property with such particularity that it cannot be confused with or claimed to apply to, any other property); *Alery v. Alery, 277 P.2d 764 (Or. 1954)* (mere taking of possession though with vendor's consent and pursuant to alleged contract insufficient to avoid statute of frauds where neither personal services performed or substantial improvements made by alleged vendee); *Socy. of Indep. Doukhobors v. Hecker, 162 P. 851 (Or. 1917)* (oral assignment of contract for purchase of land); *Caples v. Morgan, 160 P. 1154 (Or. 1916)* (lease); *Havens v. Pearson, 6 A.2d 84 (Pa. 1939); Borie v. Satterthwaite, 37 A. 102 (Pa. 1897); Smith v. Warth, 483 S.W.2d 834 (Tex. 1972)* (oral authorization for agent to sign contract held sufficient); *Herren v. Hollingsworth, 188 S.W.2d 706 (Tex. Civ. App. 1945); Callan v. Walters, 190 S.W. 829 (Tex. Civ. App. 1916)* (easement); *Williams v. Muse, 369 S.W.2d 467 (Tex. Civ. App. 1963)* (contract to devise); *Clegg v. Brannan, 190 S.W. 812 (Tex. Civ. App. 1916)* (exchange of land); *Georges v. Loutsis, 145 P.2d 901 (Wash. 1944). See King v. Crone, 169 S.W. 238 (Ark. 1914); Scotti v. Bullock, 114 N.E. 674 (Mass. 1917); Walters v. Walters, 90 S.E. 304 (N.C. 1916); Fidelity Nat'l Bank v. Hosea, 160 P. 960 (Wash. 1916).* The minority view that a suit to collect the purchase price of an extra sum for sale of land will not lie even though the deed had been recorded where the agreement to pay was subject to the statute of frauds. *Williams v. Faile, 118 S.2d 599 (Fla. App. 1960).* Earnest money may be recovered where the contract is void under the statute of frauds. *Woodruff v. Camp, 112 S.E.2d 831 (Ga. App. 1960).* Options are subject to the statute of frauds. *Florence v. Rankin-Whitten Realty Co., 114 S.E.2d 70 (Ga. App. 1960).* Statute of frauds is not applicable where a grantee seeks to avoid building restrictions contained in the plat of the property purchased, on the ground that it was not signed by the grantee, *Doran v. Graham, 195 Ill. App. 65 (Ill. App. 1st Dist. 1915),* nor where one takes title to land under verbal agreement to convey to another on payment of certain sums of money, *Henry v. Britt, 197 Ill. App. 167 (Ill. App. 4th Dist. 1915),* nor to a parol partition. *Moore v. Reid, 186 S.W. 245 (Tex. Civ. App. 1916); Scott v. Watson, 167 S.W. 268 (Tex. Civ. App. 1914). See* James M. Ramsey, Student Author, Executed Agreements Under the Statute of Frauds, *4 Ark. L. Rev. 225 (1950);* Joseph P. McKeehan, The Statute of Frauds in Pennsylvania, *55 Dick. L. Rev. 96 (1951);* Past Performance Estoppel and the California Statute of Frauds, *3 Stan. L. Rev. 281 (1951);* Doctrine of Past Performance in Ohio, as applied to Agreements for the Transfer of Interests in Realty, 23 Ci L. Bull. 200.

(n3)Footnote 689. *Purcell v. Miner, 71 U.S. 513 (1866); Russell v. Briggs, 59 N.E. 303 (N.Y. 1901); Vick v. Vick, 35 S.E. 257 (N.C. 1900).* The statute of frauds does not apply to an agreement by the vendee made to the vendor to assume and agree to pay the mortgage debt and such oral promise can be enforced by the mortgagee. *Rosenberg v. Rolling Inn, Inc., 129 A.2d 924 (Md. 1957).* Courts of equity may decree a specific performance of parol contracts relating to the sale of lands, where there has been a part performance of the contract. But the ground of relief in such cases is fraud. *Lane v. Shackford, 5 N.H. 130 (N.H. 1830); Phillips v. Thompson, 1 Johns. Ch. 131 (N.Y. Ch. 1814); Buckmaster v. Harrop, 7 Ves. Jr. 341 (Eng. 1802). See Zeuske v. Zeuske, 103 P. 648 (Or. 1909).* Where a real estate broker, in violation of oral agreement to purchase for another, purchased land and took title in the name of a third party, a statute requiring that such agreements shall be void unless in writing, did not preclude equitable relief, since the statute was an extension of statute of frauds and was not intended to be used as an instrumentality of fraud. *Harris v. Dunn, 234 P.2d 821 (N.M. 1951).* A memorandum reading "price on farm" was not a sufficient description to satisfy the statute of frauds. *Prager v. McAdam, 161 A.2d 39 (Pa. 1960).* No specific performance of a parol contract to sell realty. *Aust v. Beard, 96 S.E.2d 558 (S.C. 1957).* Mere breach of a contract within the statute does not give rise to such an equity as will authorize specific performance. *Henderson v. Henrie, 71 S.E. 172 (W. Va. 1911).*

(n4)Footnote 690. *Carpenter v. Carpenter, 187 S.W.2d 282 (Ky. 1945); In re Roberts' Estate, 277 N.W. 549 (Minn. 1938); Daughtry v. Daughtry, 27 S.E.2d 446 (N.C. 1943); Brown v. Golightly, 91 S.E. 869 (S.C. 1917); Henderson v. Davis, 191 S.W. 358 (Tex. Civ. App. 1917). See Gernhert v. Straeffer's Exec., 189 S.W. 1141 (Ky. App. 1916); Lasher v. McDermott, 158 N.Y.S. 708 (N.Y. App. Div. 3d Dept. 1916); McClanahan v. McClanahan, 137 P. 479 (Wash. 1913).* An alleged oral contract will not lie in the face of a proper quitclaim deed. *Ollig v. Eagles, 78 N.W.2d 553 (Mich. 1956).* Contracts for sale of land must be in writing. *Reid v. Horne, 187 S.2d 316 (Miss. 1966).* Strongest evidence required to establish a contract to devise. *Cook v. Cook, 497 P.2d 584 (Wash. 1972).*

(n5)Footnote 691. *Gordon v. Spellman, 89 S.E. 749 (Ga. 1916); Woods v. Dunn, 159 P. 1158 (Or. 1916).* Oral contract to leave will upheld. *Luker v. Hyde, 45 S.2d 32 (Ala. 1950); In re Gary's Estate, 211 P.2d 815 (Ariz. 1949); Taylor v. Aulton, 231 S.W.2d 573 (Tenn. 1950).* An executory contract involving title to, or interest in, bonds may be rescinded by an agreement resting in parol. *Niernberg v. Feld, 283 P.2d 640 (Colo. 1955).* A memorandum is necessary to satisfy the Statute of Frauds where real estate is sold at auction. *Outpost Cafea, Inc. v. Fairhaven Sav. Bank, 322 N.E.2d 183 (Mass. App. 1975).* Oral contract to sell real estate is only voidable, not void. *Avinger v. Campbell, 499 S.W.2d 698 (Tex. Civ. App. 1973).* To the effect that a valid oral contract for sale of lands may exist until voided by Statute of Frauds properly pleaded. *Hewitt v. Hutter, 406 F. Supp. 976 (W.D. Va. 1975).* Oral contract to devise or convey is valid if supported by sufficient evidence. *McDonald v. Petty, 496 S.W.2d 365 (Ark. 1973).*

(n6)Footnote 692. *Zeuske v. Zeuske, 103 P. 648 (Or. 1909).* It may be otherwise, however, when there has been sufficient performance to take the case out of the statute. *Arguello v. Edinger, 10 Cal. 150 (Cal. 1858); Vanduzer v. Christian, 30 Ga. 336 (Ga. 1860); Chandler v. Neil, 26 P. 470 (Kan. 1891); South-Side Town Mining & Mfg. Co. v. Rhodes, 6 P. 278 (Kan. 1885); Holcomb v. Dowell, 15 Kans. 378 (Kan. 1875); Young v. Montgomery, 28 Mo. 604 (Mo. 1859); Ford v. Steele, 48 N.W. 271 (Neb. 1891); Bigler v. Baker, 58 N.W. 1026 (Neb. 1894); Souci v. Ouillette, [1906] 37 N.B.R. 393.* Part performance as avoiding statute of frauds. *Binz v. Helvetia Fla. Enter., Inc., 104 S.2d 124 (Fla. App. 1958).* A receipt for money paid did not comply with statute of frauds as contract for sale of land where there was no description. *Suchan v. Swope, 53 A.2d 116 (Pa. 1947).*

(n7)Footnote 693. *Diamond Cattle Co. v. Clark, 74 P.2d 857 (Wyo. 1937).*

(n8)Footnote 694. "No one shall be permitted to found any claim upon his own inequity or take advantage of his own wrong. The statute of frauds was not intended to offer an asylum of escape from that fundamental principle of justice." *Imperator Realty Co., Inc. v. Tull, 127 N.E. 268 (N.Y. 1920).*

(n9)Footnote 695. *Stone v. Fitts, 160 S.W.2d 1013 (Tex. Civ. App. 1942).* Parol agreements for sale of land are void under the *Statute of Frauds. San-Ann Serv., Inc. v. Bedingfield, 305 S.2d 374 (Ala. 1974); Kronenberger v. Beke, 517 S.W.2d 664 (Tex. Civ. App. 1975).* Agreement by purchaser under land contract that it be a loan to the possessor of the

premises who would repay the purchaser and take title was not within the *Statute of Frauds. McClellan v. Beatty, 55 N.E.2d 327 (Ind. App. 1944).* Contract for sale of real estate not in compliance with Statute of Frauds cannot be specifically enforced. *Boddy v. Gray, 497 S.W.2d 600 (Tex. Civ. App. 1973).*

(n10)Footnote 696. *Lester v. White's Heirs, 44 Ill. 464 (Ill. 1867).*

(n11)Footnote 697. *Hayes v. Skidmore, 27 Ohio St. 331 (Ohio 1875).*

(n12)Footnote 698. *East Omaha Land Co. v. Hansen, 90 N.W. 705 (Iowa 1902); Norton v. Webb, 35 Maine 218 (Me. 1853); Boyd v. Paul, 28 S.W. 171 (Mo. 1894); Howard v. Easton, 7 Johns. 205 (N.Y. Sup. Ct. 1810).*

(n13)Footnote 699. *Dougherty v. Catlett, 21 N.E. 932 (Ill. 1889); Grunow v. Salter, 76 N.W. 325 (Mich. 1898); Hackett v. Watts, 40 S.W. 113 (Mo. 1897).*

(n14)Footnote 700. *Richards v. Richards, 75 Mass. 313 (Mass. 1857).*

(n15)Footnote 701. *Hughes v. Moore, 11 U.S. 176 (1812); Ellis v. Hill, 44 N.E. 858 (Ill. 1896); Cox v. Roberts, 57 N.E. 937 (Ind. App. 1900).*

(n16)Footnote 702. *Coleman v. Coleman, 61 P.2d 441 (Ariz. 1936).*

(n17)Footnote 703. *Hatlestad v. Mut. Trust Life Ins. Co., 268 N.W. 665 (Minn. 1936).*

(n18)Footnote 704. *Dabney v. Edwards, 53 P.2d 962 (Cal. 1935).*

(n19)Footnote 705. *Morgart v. Smouse, 63 A. 1070 (Md. 1906); Scott v. McFarland, 13 Mass. 309 (Mass. 1816); Connor v. Tippett, 57 Miss. 594 (Miss. 1880); Marble v. Marble, 5 N.H. 374 (N.H. 1831); Kelley v. Stanbery, 13 Ohio 408 (Ohio 1844).*

(n20)Footnote 706. *Gordon v. Simmons, 124 S.W. 306 (Ky. App. 1910).* Statute of frauds applies to auction sales. *Polka v. May, 118 A.2d 154 (Pa. 1955).*

(n21)Footnote 707. *Adron v. Evans, 217 N.W. 397 (S.D. 1927).* Payment of purchase price alone is insufficient to take contract out of statute of frauds. *Kufta v. Hughson, 134 A.2d 463 (N.J. Super. Ch. Div. 1957).*

(n22)Footnote 708. *Gray v. McCormick, 663 So. 2d 480 (La. App. 1995); Holland v. Bonner, 218 S.W. 665 (Ark. 1920).*

(n23)Footnote 709. *Theberge v. Canadian P. Ry. Co., 122 A.2d 848 (Vt. 1956).* An undertaking to pay a mortgage is based on consideration independent of the consideration for the deed and need not be in writing. *Weiner v. Hroch, 196 N.W.2d 907 (Neb. 1972).*

(n24)Footnote 710. *Oakes v. Trumbo, 201 P.2d 916 (Okla. 1949).*

(n25)Footnote 711. *Dayvault v. Baruch Oil Corp., 211 F.2d 335 (10th Cir. 1954); Nelson v. Barnick, 63 N.W.2d 911 (Iowa 1954).*

(n26)Footnote 712. *Sorenson v. Brice Realty Co., 282 P.2d 1057 (Or. 1955); Polka v. May, 118 A.2d 154 (Pa. 1955).* If one broker does not act in that capacity the statute of frauds would apply. *Ehler v. Peck, 595 P.2d 1245 (Or. 1979).*

(n27)Footnote 713. *Polka v. May, 118 A.2d 154 (Pa. 1955).*

(n28)Footnote 714. *Anders v. Anders, 179 N.Y.S.2d 274 (N.Y. App. Div. 1958).*

(n29)Footnote 715. *Bell v. Hill Bros. Constr. Co., Inc. 419 So. 2d 574 (Miss. 1982); Lewis v. Grimes, 30 Ky. 336 (Ky. App. 1832); Root v. Burt, 118 Mass. 521 (Mass. 1875); Birch v. Baker, 90 A. 297 (N.J. 1914).*

(n30)Footnote 716. *Ray v. Wooster, 270 S.W.2d 743 (Mo. 1954); Irvmor Corp. v. Rodewald, 171 N.E. 747 (N.Y. 1930)* (contract must identify the buyer). Where it is intended to purchase subject to a loan, to be enforceable the contract must show: (1) who made the loan, (2) to whom payable, (3) do the semi-annual payments include interest, (4) if not, when and at what rate is the interest payable, (5) by what instrument is the loan evidenced, and (6) who is the present holder of the instrument. *Duvall v. Cox, 109 S.E.2d 593 (Ga. 1959).* Accurate legal description is essential in the contract. *Guenther v. Am.-Tex. Constr. Co., 534 S.W.2d 396 (Tex. Civ. App. 1976).*

(n31)Footnote 717. *TLZ Properties v. Kilburn-Young Asst Mgt. Corp., 937 F. Supp. 1573 (M.D. Fla. 1996); Duggar v. Quarterman, 12 S.E.2d 302 (Ga. 1940).* In Pennsylvania the Statute of Frauds, as respects real estate sales, does not apply to suits for damages for breach of oral contracts to convey. *Rea v. Ford Motor Co., 355 F. Supp. 842 (W.D. Pa. 1971).*

(n32)Footnote 718. *Martindell v. Fiduciary Counsel, 30 A.2d 281 (N.J. 1943). See State Life Ins. Co. v. State ex rel. Kehn, 135 P.2d 965 (Okla. 1942); Smith v. Glen Alden Coal Co., 32 A.2d 227 (Pa. 1943).*

(n33)Footnote 719. *Rutland County Nat'l Bank v. Swyer, 35 A.2d 658 (Vt. 1944).*

(n34)Footnote 720. *Coulter & Smith, Ltd. Russell, 976 P.2d 1218 (Utah App. 1999); McGuirk v. Ward, 55 A.2d 610 (Vt. 1947).* "If the original contract was modified and changed by subsequent agreement, the contract as changed became a new contract. * * * The original contract, being for the sale of real estate, was within the statute of frauds; and no action could be maintained upon it, unless it, or some memorandum thereof, was made in writing, signed by the parties. The modified contract, as alleged and attempted to be proved, was equally within the statute." *Malken v. Hemming Bros., 73 A. 752 (Conn. 1909).*

(n35)Footnote 721. *Gulf Oil Corp. v. Willcoxon, 86 S.E.2d 507 (Ga. 1955).*

(n36)Footnote 722. *Scheer v. Doss, 83 S.E.2d 612 (Ga. 1954).*

(n37)Footnote 723. *Foy v. Scott, 28 S.E.2d 107 (Ga. 1943); Moore v. Adams, 113 S.E. 383 (Ga. 1922); Seymour v. Nat'l Bldg. & Loan Assn., 42 S.E. 518 (Ga. 1902)* (sale of real estate at public outcry by mortgagee); *Riffel v. Dieter, 157 P.2d 831 (Kan. 1945); Carpenter v. Carpenter, 187 S.W.2d 282 (Ky. 1945); Weinburgh v. Saier, 6 N.W.2d 921 (Mich. 1942); McLennan v. Boutell, 76 N.W. 75 (Mich. 1898); Jones v. Jones, 63 S.W.2d 146 (Mo. 1933); Irvmor Corp. v. Rodewald, 171 N.E. 747 (N.Y. 1930); Hall v. Fisher, 35 S.E. 425 (N.C. 1900); Mitchell v. Schmelzer, 132 P.2d 332 (Okla. 1942); Cleveland v. Evans, 58 N.W. 8 (S.D. 1894); Collins v. Hall, 174 S.W.2d 50 (Tex. 1943). See Fargusson v. Duluth Improvement Co., 57 N.W. 480 (Minn. 1894); Sav. & Loan Corp. v. Bear, 154 S.E. 587 (Va. 1930); Hoge v. George, 200 P. 96 (Wyo. 1921).* In Florida, if an unmarried male vendor be alone involved only the statute of frauds need be satisfied. *Zimmerman v. Diedrich, 97 S.2d 120 (Fla. 1957).* But if a married woman be involved the statute regarding the conveyance of realty must be satisfied. *Petersen v. Brotman, 100 S.2d 821 (Fla. App. 2d Dist. 1958).* Florida requires the signature of two witnesses in sales contracts. *Wexler v. Griffith, 107 S.2d 147 (Fla. App. 2d Dist. 1958). See* Donald Kepner, Part Performance in Relation to Parol Contracts for the Sale of Lands, *35 Minn. L. Rev. 431 (1951).*

(n38)Footnote 724. *Carter v. Dabbs, 18 S.2d 747 (Miss. 1944).*

(n39)Footnote 725. *Campbell v. Thomas, 42 Wis. 437 (Wis. 1877),* quoted in *Kopp v. Reiter, 34 N.E. 942 (Ill. 1893); Main v. Pratt, 114 N.E. 576 (Ill. 1916). See Lewis v. State, 145 S.2d 345 (La. App. 1962)* (rule that vendor liable to make delivery is applicable to the state).

(n40)Footnote 726. *Void. Kerr v. Parsons, 82 N.E.2d 303 (Ohio App. 1st Dist. 1948). Valid. Stevens v. Milestone,*

57 A.2d 292 (Md. 1948); Greenfield v. Liberty Constr. Corp., 81 N.Y.S.2d 550 (N.Y. Sup. 1948) (inconsistent with deed).

(n41)Footnote 727. *Denton v. Hicks, 290 S.W.2d 833 (Ky. 1956)* (authority implied); *Polka v. May, 118 A.2d 154 (Pa. 1955)* (no authority).

(n42)Footnote 728. May be orally rescinded (majority rule). *Niernberg v. Feld, 283 P.2d 640 (Colo. 1955).* May not be orally rescinded but may be estopped to deny validity of oral rescission. *Carey v. Coombs, 294 P.2d 62 (Cal. App. 3d Dist. 1956); Pruitt v. Fontana, 300 P.2d 371 (Cal. App. 2d Dist. 1956).* Oral contracts are only voidable by the party to be charged. *Comm. Land Corp. v. Stuenkel, 436 S.W.2d 11 (Mo. 1968).*

(n43)Footnote 729. *Gulf Oil Corp. v. Willcoxon, 86 S.E.2d 507 (Ga. 1955)* (contract not modified); *Garcia v. Karam, 276 S.W.2d 255 (Tex. 1955)* (contract modified). Under statute, an oral agreement to rescind a contract to the sale of realty was valid. *Kirby v. Carlstedt, 240 N.E.2d 299 (Ill. App. 1968).* Time for performance of written contract for sale of land may be validly modified by parol. *Kennedy v. Brady, 204 N.W.2d 779 (Mich. App. 1972).*

(n44)Footnote 730. *Duvall v. Cox, 109 S.E.2d 593 (Ga. 1959)* (to be enforceable the contract must contain all of the essentials of a contract).

(n45)Footnote 731. *Zurcher v. Herveat, 605 N.W.2d 329 (Mich. App. 1999); Grafton v. Cummings, 99 U.S. 100 (1878); Mentz v. Newwitter, 25 N.E. 1044 (N.Y. 1890); Ward v. Hasbrouck, 62 N.E. 434 (N.Y. 1902); Irvmore Corp. v. Rodewald, 171 N.E. 747 (N.Y. 1930); Oakes v. Trumbo, 201 P.2d 916 (Okla. 1949).* "Received from Charles A. Haas twenty-five dollars as deposit on property Astoria Avenue, property to be three hundred and seventy-six feet frontage on Astoria Avenue and running to a depth of about three hundred feet more or less. Price $25,000, twenty-five thousand dollars, payable as follows: $2500 on signing of contract, $9500 on taking title, and balance first mortgage for five years standing. Contract to be for four months." *Irvmore Corp. v. Rodewald, 171 N.E. 747 (N.Y. 1930)* (void under statute of frauds).

(n46)Footnote 732. *Moore Bros. v. Kirkpatrick, 172 S.W.2d 135 (Tex. Civ. App. 1943).* A provision in an otherwise sufficient written contract of sale, that the parties would agree upon the payment of interest and amortization of principal of the purchase money mortgage made the contract void under the statute of frauds. *Willmott v. Giarraputo, 184 N.Y.S.2d 97 (N.Y. 1959).*

(n47)Footnote 733. *Snow v. Corsica Constr. Co., Inc. 329 A.2d 887 (Pa. 1974).*

(n48)Footnote 734. *Bernstein v. Rosenzweig, 62 A.2d 147 (N.J. Super. App. Div. 1948); Schlusselberg v. Rubin, 465 S.W.2d 226 (Tex. Civ. App. 1971)* (right of first refusal held unenforceable as too indefinite in price term).

(n49)Footnote 735. *Levine v. Lafayette Bldg. Corp., 148 A. 772 (N.J. 1930).* Purported land sale contracts which permit changes, additions, or modification do not give rise to binding legal obligations. *La Salle Nat'l Bank v. Intl. Ltd., 263 N.E.2d 506 (Ill. App. 1970).* Failure to specify a vendee in a contract for sale of real estate does not void the contract under the statute of frauds if all other essential elements are present. *Randazzo v. Kroenke, 127 N.W.2d 880 (Mich. 1964).*

(n50)Footnote 736. *Buechler v. Olson, 189 N.W. 741 (Iowa 1922); Stallings v. Eypper & Beckmann, Inc., 137 A. 784 (N.J. 1927); Kuskin v. Guttman, 132 A. 922 (N.J. 1926); Bettcher v. Knapp, 120 A. 39 (N.J. 1923); Kuskin v. Guttman, 130 A. 829 (N.J. Ch. 1925). See Poetker v. Dyck, 257 P. 185 (Cal. App. 2d Dist. 1927). But see Bierman v. Barbieri, 207 N.Y.S. 174 (N.Y. Sup. 1924); Sautter v. Rowland, 131 A. 733 (Pa. 1926).* A contract for sale of realty is enforceable though made subject to the execution of a "formal contract." *Riley v. Troll, 1 All E.R. 966. See* John M. Harrington, Student Author, Mortgages--Consideration and a Valid Debt or Obligation--Are Either or Both Necessary to the Validity of a Mortgage?, *19 S.C. L. Rev. 798 (1967).*

(n51)Footnote 737. *Groh v. Calloway, 292 S.W. 65 (Mo. 1927).*

(n52)Footnote 738. *Mahoney v. City and County of San Francisco, 257 P. 49 (Cal. 1927); Kinney v. Schlussel, 239 P. 818 (Or. 1925); Sautter v. Rowland, 131 A. 733 (Pa. 1926).* A contract between the parties although entitled "escrow instructions." *Tuso v. Green, 229 P. 327 (Cal. 1924).*

(n53)Footnote 739. *Gray v. Smith, 76 F. 525 (N.D. Cal. 1896), aff'd, 83 F. 824 (9th Cir. 1897);* Thompson v. New South Coal Co., *34 S. 31 (Ala. 1903); Jenkins v. Harrison, 66 Ala. 345 (Ala. 1880); Carter v. Shorter, 57 Ala. 253 (Ala. 1876); Allan v. Bemis, 94 N.W. 560 (Iowa 1903); Bell v. Kavy, 43 N.Y.S.2d 934 (N.Y. Sup. 1943).* As to agent's signature, see *Rolfe v. Johnson, 228 S.W.2d 482 (Ark. 1950); Fowler v. Cornwell, 43 N.W.2d 73 (Mich. 1950); Warren v. Hoch, 96 N.Y.S.2d 832 (N.Y. App. Div. 2d Dept. 1950); Joehl v. Tricarico, 67 N.Y.S.2d 126 (N.Y. App. Div. 2d Dept. 1946); Wyman v. Utech, 40 N.W.2d 378 (Wis. 1949),* modified, *42 N.W.2d 603 (Wis. 1950); Basma v. Wacks, 66 T. L. R. 1047, 66 L. Q. Rev. 281 (1950).* California is less strict in a contract than in a deed. *Johnson v. Schimpf, 239 P. 401 (Okla. 1928); United Truckmen v. Lorentz, 249 P.2d 352 (Cal. App. 1st Dist. 1952).* Contract may incorporate by reference a description in a plat book. *Crooke v. Prop. Mgt. Serv., Inc., 110 S.E.2d 677 (Ga. 1959).* Sales memorandum held insufficient under statute of frauds for failure to recite terms of payment of purchase money mortgage. *Israelson v. Bradley, 139 N.Y.S.2d 107 (N.Y. Sup. 1954).* The courts generally apply the same tests to validity of descriptions in contracts to convey as in deeds. *Broaddus v. Grout, 258 S.W.2d 308 (Tex. 1953). See Hoover v. Wukasch, 254 S.W.2d 507 (Tex. 1953).* An agreement specifying purchase price and property to be sold but contemplating a subsequent purchase contract was not sufficient to avoid the statute of frauds. *Hubbell v. Ward, 246 P.2d 468 (Wash. 1955).* A written contract for sale of real estate must contain, either by itself or with reference to other writings, names of parties, description of the land, the price, terms and conditions of the sale and must be signed by the party to be charged. *Brunette v. Vulcan Materials Co., 256 N.E.2d 44 (Ill. App. 1970).*

(n54)Footnote 740. *Brooks v. Miller, 30 S.E. 630 (Ga. 1898); Sinclair v. Weber, 104 A.2d 561 (Md. 1954); Mull v. Smith, 94 N.W. 183 (Mich. 1903); Peay v. Seigler, 26 S.E. 885 (S.C. 1897).* The payment of the purchase price and the making of improvements by a vendee in a parol contract for the sale of real estate takes the contract out of the statute of frauds. *Pembroke v. Logan, 74 S.W. 297 (Ark. 1903).* Several integrated instruments may compose the contract. *Mehler v. Huston, 57 S.2d 836 (Fla. 1952).* Several different contemporaneous writings taken together may constitute a complete agreement under the *Statute of Frauds. Whitley v. Patrick, 172 S.E.2d 692 (Ga. 1970).* Memorandum sufficient to take the writing out of the Statute of Frauds may consist of several writings. *Milkovich v. Orr, 529 P.2d 1382 (Mont. 1975).*

(n55)Footnote 741. *Ruth v. Crane, 392 F. Supp. 724 (E.D. Pa. 1975); Harrison v. Tinney, 250 S.W.2d 631 (Tex. Civ. App. 1952).* As to what are necessary elements, see Donald B. Waltman, The Statute of Frauds as a Defense to Insufficient Real Estate Contracts, *56 Dick. L. Rev. 434 (1952).*

(n56)Footnote 742. *Sewell v. Dolby, 237 P.2d 366 (Kan. 1951); In re Degenkolb's Est., 113 N.Y.S.2d 880* (N.Y. Surr. King's County 1952).

(n57)Footnote 743. *Zurcher v. Herveat, 605 N.W.2d 329 (Mich. App. 1999); Bass v. African Methodist Episcopal Church, 116 S.E. 816 (Ga. 1923). See Dixon v. Clayton, 44 S.2d 76 (Fla. 1950);* Hall v. Tircuit, *106 S. 677 (La. 1926); Perlman v. Barton Realty Corp., 97 N.Y.S.2d 699* (N.Y. Sup. Ct. Spec. Term. King's County 1950). In an oral contract for the sale of an interest in real estate the memorandum required is sufficient if it identifies the property with such particularity that it cannot be confused with or claimed to apply to any other property. *Thompson v. Giddings, 276 P.2d 229 (Okla. 1954).*

(n58)Footnote 744. *Koob v. Ousley, 240 S.W. 102 (Mo. 1922). But see Warren v. Hoch, 96 N.Y.S.2d 832 (N.Y. App. Div. 2d Dept. 1950).*

(n59)Footnote 745. *Janiszewski v. Shank, 202 N.W. 949 (Mich. 1925).* Contract enforceable even though part of

property was later to be selected by agreement of the parties. *Calder v. Third Jud. Dist. Ct., 273 P.2d 168 (Utah 1954).*

(n60)Footnote 746. *Pegg v. Olson, 223 P. 223 (Wyo. 1924).*

(n61)Footnote 747. *Miller v. Bloomberg, 324 N.E.2d 207 (Ill. App. 1975).*

(n62)Footnote 748. *George v. Smilansky, 214 N.W. 61 (Mich. 1927).*

(n63)Footnote 749. *McKenzie v. W. Detroit Land Co., 216 N.W. 438 (Mich. 1927); Mondragon v. Mondragon, 257 S.W. 215 (Tex. 1923); Fallers v. Pring, 257 P. 627 (Wash. 1927),* followed in *Bugge v. Pring, 257 P. 629 (Wash. 1927).*

(n64)Footnote 750. *Kempner v. Cohn, 1 S.W. 869 (Ark. 1886); Levy v. Cohen, 4 Ga. 1 (Ga. 1848); Hunt v. Higman, 30 N.W. 769 (Iowa 1886); Lungstrass v. German Ins. Co., 48 Mo. 201 (Mo. 1871); Hallock v. Com. Ins. Co., 26 N.J.L. 268 (N.J. 1857); Scottish-Am. Mortg. Co. v. Davis, 72 S.W. 217 (Tex. Civ. App. 1902).*

(n65)Footnote 751. *Main v. Pratt, 114 N.E. 576 (Ill. 1916).* Delivery of a deed with the grantee in blank accompanied by an oral power to fill in the name of the grantee created a power coupled with an interest which survived the death of the grantor. *Womack v. Stegner, 293 S.W.2d 124 (Tex. Civ. App. 1956).*

(n66)Footnote 752. *Hotze, Kuntzler & Co. v. Erskine, 130 N.E.2d 720 (Ohio App. 1954); Corrado v. Montuori, 139 A. 791 (R.I. 1928).* A description in the contract is sufficient if it can be located with the use of surveyor or recorded plats. *Alter v. Moellankamp, 179 N.E.2d 4 (Ill. 1962).* Wisconsin holds to the "void" not to the "unenforceable" theory of the statute of frauds, so where because of a defective description the sales contract failed to comply with the statute of frauds, a defaulting vendee could recover the down payment subject to vendor's expenses. *Stuesser v. Ebel, 120 N.W.2d 679 (Wis. 1963).* Test for description of land in contract is whether land can be found by a surveyor. *Carlson v. Richardson, 72 Cal. Rptr. 769 (Cal. App. 1st Dist. 1968).* Cannot use extraneous evidence to identify description. *Brooks v. Allard, 53 Cal. Rptr. 82 (Cal. App. 1st Dist. 1966).* Description in contract must be as complete as in a deed. *Allen v. Youngblood, 200 S.E.2d 758 (Ga. 1973).* Statute of frauds violated where boundaries could not be located; extrinsic evidence denied to clarify real estate sales contract. *McDaniel v. Silvernail, 346 N.E.2d 382 (Ill. App. 4th Dist. 1976).* Can use extrinsic evidence. Sears v. Polan's 5 cent to $ 1.00 Store, 243 A.2d 602 (Md. 1968).

(n67)Footnote 753. *Malone Constr. Co., Inc. v. Westbrook, 194 S.E.2d 619 (Ga. App. 1972); Latona v. Shore, 144 N.Y.S.2d 272 (N.Y. Sup. 1955)* (held sufficient); *Vallone v. Regan, 144 N.Y.S.2d 324 (N.Y. Sup. 1955).* Failure to give duration or amount of installment payments of purchase-money mortgage made sales contract inadequate. *Montanaro v. Pandolfini, 168 A.2d 550 (Conn. 1961); Monaco v. Levy, 209 N.Y.S.2d 555 (N.Y. App. Div. 2d Dept. 1961).* Contract not fatal where closing date was not set. *Johnson v. Kelley, 175 N.E.2d 391 (Mass. 1961).* Contract failing to state time for payment of annual installments held too indefinite. *Bryant v. Clark, 347 S.W.2d 635 (Tex. Civ. App. 1961).* Time for performance essential under statute of frauds. *David v. Tucker, 244 N.W.2d 197 (Neb. 1976).* Contra. *Overboe v. Overboe, 160 N.W.2d 650 (N.D. 1968)* (statement of time of payment is not essential).

(n68)Footnote 754. *McKinley v. Lagae, 24 Cal. Rptr. 454 (Cal. App. 2d Dist. 1962); Dowd v. Andrews, 134 N.E. 294 (Ind. App. 1922); Corrado v. Montuori, 139 A. 791 (R.I. 1928).*

(n69)Footnote 755. *Lawrence v. Jones, 864 P.2d 194 (Idaho App. 1993); Bennett v. Fuller, 313 S.E.2d 597 (N.C. App. 1984); Malevich v. Hakola, 278 N.W.2d 541 (Minn. 1970); Guy v. Barnes, 29 Ind. 103 (Ind. 1867).* Only party sought to be charged must sign. *Smith v. Smith, 8 Blackf. 208 (Ind. 1846); Laythorpe v. Bryant, 2 Bing. (N. C.) 735, 132 Eng. Rep. 283.* To comply with the statute both in letter and in spirit, as must be done to maintain the action, it is necessary that all essential elements and terms of the contract be made to appear in writing signed by the party to be charged therewith or by some person thereunto lawfully authorized, in order that no part of the agreement need to be proved by parol evidence. *Thurlow v. Perry, 77 A. 641 (Me. 1910).* Parol evidence could not supply statutory essential of sales contract. *Pollyanna Homes, Inc., v. Berney, 365 P.2d 401 (Cal. 1961).*

(n70)Footnote 756. *Ryan v. United States, 136 U.S. 68 (1890); Murphy, Thompson & Co. v. Reed, 101 S.W. 964 (Ky. App. 1907); Ide v. Leiser, 24 P. 695 (Mont. 1890); Gates v. Dudgeon, 66 N.E. 116 (N.Y. 1903); Stewart v. Gillett, 139 N.Y.S. 583 (N.Y. Sup. 1913),* aff'd. *156 N.Y.S. 1146 (N.Y. Sup. 1913); Bryant Timber Co. v. Wilson, 65 S.E. 932 (N.C. 1909); Yerkes v. Richards, 26 A. 221 (Pa. 1893); Frank v. Stratford-Handcock, 77 P. 134 (Wyo. 1904).* Main purpose exception to statute of frauds. *Cooper Petroleum Co. v. LaGloria Oil & Gas Co., 436 S.W.2d 889 (Tex. 1969).*

(n71)Footnote 757. Brady v. Fontenot, *61 S. 838 (La. 1913)* (offer made by authorized mandatory of owner).

(n72)Footnote 758. *Watts v. Ridenhour, 217 S.E.2d 211 (N.C. App. 1975); Saine v. Clark, 219 S.E.2d 407 (Ga. 1975).*

(n73)Footnote 759. *Williamson v. Burnett, 345 S.W.2d 80 (Mo. 1961)* (parol evidence admitted); *Corrado v. Montuori, 139 A. 791 (R.I. 1928)* (parol evidence admitted). Contra, *Draper v. Hoops, 135 Ill. App. 388 (Ill. App. 2d Dist. 1907).* Description in sales contract was sufficient where vendors owned only one tract in the particular county. *Stachnik v. Winkel, 213 N.W.2d 434 (Mich. App. 1973).* Contract for acreage out of a tract was void for failure to identify location. *Rhodes v. Wilkins, 498 P.2d 311 (N.M. 1972).*

(n74)Footnote 760. *Kohlbrecher v. Guettermann, 160 N.E. 142 (Ill. 1928); Tobias v. Lynch, 182 N.Y.S. 643 (N.Y. App. Div. 2d Dept. 1920).*

(n75)Footnote 761. In Florida a sales contract by a single male vendor need only comply with the statute of frauds, Fla. Stat. § 725.01, which merely requires a sufficient memorandum signed by the party to be charged. *Zimmerman v. Diedrich, 97 S.2d 120 (Fla. 1957).* But wherever the interest of a married woman in her separate property, sale of homestead, tenancy by entireties and dower are affected, the contract must conform to Fla. Stat. § 689.01, concerning conveyances. This requires witnesses and prevents the application of the doctrine of part performance. *Zimmerman v. Diedrich, 97 S.2d 120 (Fla. 1957); Wexler v. Griffith, 107 S.2d 147 (Fla. App. 2d Dist. 1958); Petersen v. Brotman, 100 S.2d 821 (Fla. App. 2d Dist. 1958); Lindgren v. Van Fleet, 101 S.2d 155 (Fla. App. 3d Dist. 1958).* It is not necessary to have two witnesses to a contract to convey property unless homestead, separate property of married woman or relinquishment of dower. *Con-Dev. of Vero Beach, Inc. v. Casano, 272 S.2d 203 (Fla. App. 1973).*

(n76)Footnote 762. *Crooke v. Prop. Mgt. Servs., Inc., 110 S.E.2d 677 (Ga. 1959)* (description in the contract may incorporate by reference to a plat book record); *Carswell v. Roberts, 110 S.E.2d 367 (Ga. 1959)* ("S. R. Roberts property bordered by railroad track, state park and field belonging to widow" was an insufficient description not warranting specific performance); *Pope v. Middlebrooks, 110 S.E.2d 354 (Ga. 1959)* (three acres in the northwest corner of a described 15-acre tract was an insufficient description); *Duvall v. Cox, 109 S.E.2d 593 (Ga. 1959)* (statute of frauds prevented specific performance of a written contract which merely stated the description of the land); *Suchan v. Swope, 53 A.2d 116 (Pa. 1947)* (stated purchase price of "61acres more or less" was insufficient to comply with statute of frauds).

(n77)Footnote 763. Parol evidence may not be introduced to validate a contract for sale of realty otherwise void for inadequate description. *Martin v. Seigel, 212 P.2d 107 (Wash. 1949).* Contra, *Sawert v. Lunt, 62 A.2d 34 (Pa. 1948).* If the description of the subject matter of the agreement between the parties is so uncertain and indefinite that it cannot be applied exclusively to any specific land, parol evidence cannot be received to complete the description; if the description is definite, though requiring extrinsic evidence to identify the land which it represents, parol evidence may be received for that purpose. *Corrado v. Montuori, 139 A. 791 (R.I. 1928).*

(n78)Footnote 764. *Fideler v. Norton, 30 N.W. 128 (Dakota Terr. 1886), 32 N.W. 57 (Dakota Terr. 1887).* Agreements for sale of interest in land within statute of frauds. *Pierce v. Murphree, 145 S.2d 207 (Ala. 1962); Miranda v. Miranda, 232 N.Y.S.2d 621 (N.Y. Sup. 1962).* Part performance removes a contract of sale from the Statute of Frauds and permits specific performance, even though contract is oral. *Pickett v. Paine, 199 S.E.2d 223 (Ga. 1973).* Part performance of oral contract to convey. *Tew v. Manwaring, 480 P.2d 896 (Idaho 1971). See* Stephen L. Beer, Student

Author, Oral Land Contract and the Doctrine of Part Performance in Idaho, *8 Idaho L. Rev. 205 (1971).* Part performance of contract of sale. *Callon v. Callon, 185 N.W.2d 762 (Iowa 1971).* Sufficient part performance as to make it inequitable to deny relief will take contract out from under statute of frauds. *Alvarez v. Alvarez, 383 P.2d 581 (N.M. 1963).* Taking of possession and making improvements was partial performance. *Brandhagen v. Burt, 117 N.W.2d 696 (N.D. 1962).* Part performance withdrawing contract from statute of frauds. *Williams v. Terebinski, 261 N.E.2d 920 (Ohio Com. Pl. 1970).* Partial performance by vendee permits action for specific performance if vendee cannot be restored to position he occupied when contract was made. *Collett v. DeHaven, 263 N.E.2d 252 (Ohio App. 1970).* Past performance of an agreement to convey. *Miller v. McCamish, 479 P.2d 919 (Wash. 1971).* Part performance by payment of price enables the taking of an oral contract out of the *Statute of Frauds. Holmgren Bros., Inc. v. Ballard, 534 P.2d 611 (Utah 1975).* To take the transaction out of the Statute of Frauds improvements must be permanent and substantial. *Stackhouse v. Cook, 248 S.E.2d 482 (S.C. 1978). See* Phillip H. Leonard, Student Author, Equity: Full Performance of Oral Contract to Convey Land and the Statute of Frauds, *16 Okla. L. Rev. 199 (1963). See also* Ernest R. Finney, Student Author, The Doctrine of Part Performance in Texas, *1 Tex. Tech. L. Rev. 325 (1970).*

(n79)Footnote 765. *Perkins v. Owens, 721 N.E.2d 289 (Ind. App. 1999); McMahan Constr. Co. v. Wegehoft Bros. Inc., 354 N.E.2d 278 (Ind. App. 1976).*

(n80)Footnote 766. *Pearson v. Gardner, 168 N.W. 485 (Mich. 1918).* Payment or partial payment alone is not sufficient to constitute partial performance under the *Statute of Frauds. McMahan Constr. Co. v. Wegehoft Bros., Inc., 354 N.E.2d 278 (Ind. App. 1976).* Earnest money possession and improvements were part performance. *Louron Indus., Inc. v. Holman, 502 P.2d 1216 (Wash. App. 1972). See* Dallas W. Isom, Student Author, The Doctrine of Part Performance as Applied to Oral Land Contracts in Utah, *9 Utah L. Rev. 91 (1964).*

(n81)Footnote 767. *Neal v. Neal, 69 Ind. 419 (Ind. 1880).*

(n82)Footnote 768. *Trilogy Variety Stores, Ltd. v. City Prods. Corp., 523 F. Supp. 691 (S.D. N.Y. 1982); Amato v. U.S., 94 F. Supp. 2d 1081 (D. Idaho 1999); Walter v. Hoffman, 196 N.E. 291 (N.Y. 1935); Erickson v. Wiper, 157 N.W. 592 (N.D. 1916)* (oral gift of land could not be rescinded after donee had entered and made substantial improvements). Texas requires payment of consideration, possession by the purchaser and value improvements made by him to take the contract out of the *Statute of Frauds. Harris v. Potts, 528 S.W.2d 321 (Tex. Civ. App. 1975).* Making of improvements and taking of possession by donee took an oral gift of land out of the *Statute of Frauds. Suter v. Suter, 546 P.2d 1169 (Idaho 1976).*

(n83)Footnote 769. *Burns v. McCormick, 135 N.E. 273 (N.Y. 1922); Strandberg v. Lawrence, 216 N.Y.S.2d 973 (N.Y. Sup. 1961)* (holding in effect that possession is not essential to part performance of a sales contract); *Eugene Pioneer Cemetary Assn. v. Spencer Butte Lodge, 363 P.2d 1083 (Or. 1961)* (requiring significant change in possession for part performance).

(n84)Footnote 770. *Muir v. Chandler, 113 N.W. 1038 (N.D. 1907).* The mere fact that the prospective vendees had surveyed the land and extended time and effort to reduce real estate taxes, assumed possession of the land to repair structures and store materials, and grazed animals on the land was not sufficient to be taken out from under the contract to purchase under the *Statute of Frauds. Brunette v. Vulcan Materials Co., 256 N.E.2d 44 (Ill. App. 1st Dist. 1970).* Taking possession and making improvements was sufficient part performance. *Magnus v. Matthews, 317 N.E.2d 306 (Ill. App. 2d Dist. 1974).* Full payment of purchase price required to take parol contract for sale of land out of *Statute of Frauds. Walker v. Walker, 448 S.W.2d 171 (Tex. Civ. App. 1969).* Oral contract valid if consideration paid, possession taken, improvements made. *Hooks v. Bridgewater, 229 S.W. 1114 (Tex. 1921). See* Iowa Land Installment Contracts: Acceptance of Part Payment as Waiver, *55 Iowa L. Rev. 729 (1970).*

(n85)Footnote 771. *Pearson v. Gardner, 168 N.W. 485 (Mich. 1918); Levine v. Lafayette Bldg. Corp., 142 A. 441 (N.J. Ch. 1928)* (the contract need only be signed by the party against whom specific performance is brought).

(n86)Footnote 772. *Durham v. Taylor, 29 Ga. 166 (Ga. 1859)* (not part performance); *Baldridge v. Centgraf, 108 P. 83 (Kan. 1910)* (not part performance). Part performance if fraud had induced a change in position. *Peek v. Peek, 19 P. 227 (Cal. 1888); Green v. Green, 10 P. 156 (Kan. 1886); Petty v. Petty, 43 Ky. 215 (Ky. App. 1843).* Contra, *Bradley v. Loveday, 119 A. 147 (Conn. 1922); Riley v. Haworth, 64 N.E. 928 (Ind. App. 1902).*

(n87)Footnote 773. Restatement of Contracts § 197. Similarly the sale of an easement requires making use of the easement.. *Hay v. Knauth, 62 N.E. 395 (N.Y. 1901).* Taking possession and making improvements was sufficient part performance. *Magnus v. Matthews, 317 N.E.2d 306 (Ill. App. 2d Dist. 1974).* Massachusetts will enforce, by specific performance, an oral contract for sale of property upon payment of the amount owing on the purchase price. *Raynor v. Russell, 231 N.E.2d 563 (Mass. 1967).* Parol gift of land become irrevocable when the donee took possession on the strength of the gift and improvements. *Barfield v. Hilton, 219 S.E.2d 719 (Ga. 1975).*

(n88)Footnote 774. *Schmitz v. Schulenburg, 296 N.W. 103 (Wis. 1941).*

(n89)Footnote 775. *Christopher v. Garrett, 292 S.W.2d 926 (Tex. Civ. App. 1956).* Mere possession of land for a long time takes contract out of statute of frauds. *Brystranowski v. Blauman, 133 N.E.2d 428 (Ohio App. 1955).* Parol gifts of realty upheld where donees had taken possession and made valuable improvements. *Wilson v. Mitchell, 299 S.W.2d 406 (Tex. Civ. App. 1957).*

(n90)Footnote 776. *Lloyd v. Lloyd, 48 N.E.2d 837 (Ind. App. 1943)* (mere continuance in possession is not referable to the contract). Taking of possession held insufficient to take oral real estate contract out of the *Statute of Frauds. Delfino v. Paul Davies Chevrolet, Inc., 209 N.E.2d 194 (Ohio 1965).* Continuance of possession held sufficient to take contract to buy out of the *Statute of Frauds. Walter C. Pressing Co. v. Hogan, 133 N.E.2d 419 (Ohio App. 1954).* Possession, improvements and rent took contract out of the *Statute of Frauds. Boettcher v. Van Lill, 282 A.2d 122 (Md. 1971).* Possession and improvements. *Cloniger v. Cloniger, 193 S.E.2d 647 (S.C. 1973).*

(n91)Footnote 777. *Wright v. Raftree, 54 N.E. 998 (Ill. 1899)* (all acts of part performance must be accompanied by payment of the purchase price); *Jamison v. Dimock, 95 Pa. 52 (Pa. 1880). See* Penney v. Norton, *81 S. 666 (Ala. 1919); Jutten v. Deeble, 295 P. 496 (Colo. 1931).* Cf. *Knoff v. Grace, 190 P. 526 (Colo. 1920). See* A.A. Goldstone, Student Author, Statute of Frauds in Colorado, *4 Rocky Mt. L. Rev. 29 (1932). Green v. Jones, 76 Maine 563 (Me. 1885); Stark v. Wilder, 36 Vt. 752 (Vt. 1864); Kinchloe v. Bounds, 86 S.E. 110 (Va. 1915); Frede v. Pflugradt, 55 N.W. 159 (Wis. 1893).* Mere payment of consideration insufficient to avoid *Statute of Frauds. Harris v. Potts, 476 S.W.2d 81 (Tex. Civ. App. 1971).* Consideration, possession, and improvements were all needed to take contract out of *Statute of Frauds. Hines v. Taylor, 476 S.W.2d 81 (Tex. Civ. App. 1971).*

(n92)Footnote 778. *Williams v. Carty, 91 N.E. 392 (Mass. 1910).*

(n93)Footnote 779. *Southern v. Southern, 438 P.2d 925 (Idaho 1968); Lydick v. Holland, 83 Mo. 703 (Mo. 1884); Cooper v. Colson, 58 A. 337 (N.J. 1904); Burns v. McCormick, 135 N.E. 273 (N.Y. 1922).*

(n94)Footnote 780. *Horner v. McConnell, 63 N.E. 472 (Ind. 1902); Derby v. Derby, 142 N.E. 786 (Mass. 1924).*

(n95)Footnote 781. *Willis v. Zorger, 101 N.E. 963 (Ill. 1913); Gladville v. McDole, 93 N.E. 86 (Ill. 1910); Jackson v. First Nat'l Bank & Trust Co., 57 N.E.2d 946 (Ind. App. 1944); Taylor v. Holyfield, 180 P. 208 (Kan. 1919); Best v. Gralapp, 96 N.W. 641 (Neb. 1903); Danenhauer v. Danenhauer, 148 A. 390 (N.J. Ch. 1930); Johnson v. Johnson, 154 A. 214 (R.I. 1931); Brinton v. Van Cott, 33 P. 218 (Utah Terr. 1893); Cannon v. Cannon, 163 S.E. 405 (Va. 1932); Velikanje v. Dickman, 168 P. 465 (Wash. 1917); Bryson v. McShane, 35 S.E. 848 (W. Va. 1900). See* Statute of Frauds - Personal Services as Part Performance of an Oral Contract to Convey Land, *16 Iowa L. Rev. 448 (1931);* J.W. Jones, Student Author, Performance of Services as Grounds For Taking an Oral Contract out of the Statute of Frauds, *19 Ky. L.J. 69 (1931).*

(n96)Footnote 782. *Moore v. Olson, 294 N.W. 305 (Iowa 1940).* Acts of part performance must be made in relation

to the contract to convey or lease. *Moon v. Stone Mt. Meml. Assn., 157 S.E.2d 461 (Ga. 1967).* Performance prior to contract is not part performance under *Statute of Frauds. Coronet Dev. Co. v. F.S.W., Inc., 142 N.W.2d 499 (Mich. 1966).*

(n97)Footnote 783. Placing deed irrevocably in hands of third party to deliver to grantee on grantor's death passed remainder to grantee immediately with life estate retained in grantor. *Hilliard v. Hilliard, 39 N.W.2d 624 (Iowa 1949).*

(n98)Footnote 784. *Blezek v. Blezek, 284 N.W. 180 (Iowa 1939).*

(n99)Footnote 785. *Gracie Square Realty Corp. v. Choice Realty Corp., 113 N.E.2d 416 (N.Y. 1953);* Gary L. Orenstein, Student Author, Enforcement of Oral Contract to Convey Easement, *5 Syracuse L. Rev. 106 (1954).* Doctrine of part performance not applicable unless the acts are exclusively referable to the oral contract. *Atkinson v. Triplett, 419 P.2d 4 (Or. 1966).*

(n100)Footnote 786. *Burns v. Garey, 125 A. 467 (Conn. 1924); Van Epps v. Redfield, 36 A. 1011 (Conn. 1897); Scheerer v. Scheerer, 229 S.W. 192 (Mo. 1921); Woolley v. Stewart, 118 N.E. 847 (N.Y. 1918).*

(n101)Footnote 787. *Brewood v. Cook, 207 F.2d 439 (D.C. Cir. 1953).* Payment of all or part consideration, and taking of possession were part performance taking case out of statute of frauds. *Cottages, Miami Beach v. Wegman, 57 S.2d 439 (Fla. 1952).*

North Carolina still refuses to recognize the part performance doctrine as taking an oral contract to convey lands out of the statute of frauds. *Grantham v. Grantham, 171 S.E.2d 331 (N.C. 1933),* but will not allow a vendee in default to recover part payments made. *Rochlin v. P.S. W. Constr. Co., 67 S.E.2d 464 (N.C. 1951). See* Frank E. Kane, Student Author, Part Performance in Ohio, *12 Ohio S. L.J. 452 (1951).*

(n102)Footnote 788. *Santoro v. Mack, 145 A. 273 (Conn. 1929); Windiate v. Leland, 225 N.W. 620 (Mich. 1929); Townsend v. Fenton, 21 N.W. 726 (Minn. 1884); Garner v. Stubblefield, 5 Tex. 552 (Tex. 1851); Miller v. Lorentz, 19 S.E. 391 (W. Va. 1894).*

(n103)Footnote 789. *McCallister v. McCallister, 173 N.E. 745 (Ill. 1930).*

(n104)Footnote 790. *Long v. Duncan, 10 Kan. 294 (1872); Shahan v. Swan, 26 N.E. 222 (Ohio 1891); Barrett v. Schleich, 62 P. 792 (Or. 1900); Hayes v. Hayes, 174 P. 579 (Or. 1918); Nunn v. Fabian, L.R. 1 Ch. 35 (1865).*

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CHAPTER 96 Vendors and Purchasers

11-96 Thompson on Real Property, Thomas Editions § 96.15

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§ 96.15 Termination of the Agreement.n791

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Substantial departure from general contract law concepts has occurred in the area of terminating land sales agreements and the rights of the parties related to those agreements. This variation is caused by differences among the jurisdictions as to the extent to which the contractually expressed rights of the parties should be varied by equitable ideas and by precepts of public policy. The courts are thus faced with a decision between two opposing theories of "have not" relief. Is it better to give a defaulting debtor protection against an aggressive vendor by preventing arbitrary forfeiture? Or should the person proposing to purchase be aided by making available a mode of purchase that will afford a small down payment and "easy monthly installments"? The former is the road of equity, n792 the latter assists the common-law philosophy of free alienation. n793 The latter particularly assists the small home buyer and is of vital importance in modern subdivisions. The alternative proposal is the underwriting of the vendee by government insured mortgages.

Where one party to a land contract defaults, the other has the following possible remedies:

(1) the contract may be avoided or annulled and the parties restored to their original position by true rescission through mutual agreement,

(2) the unilateral right of the other party to treat the default as an offer of rescission, n794

(3) strict foreclosure, quiet title, ejectment and similar actions which terminate the contract and the obligations of further performance, n795

(4) specific performance or actions for damages, n796 and

(5) forfeiture and liquidated damages. n797

Some state statutes permit rescission of vendor-purchaser contracts where breaches by the vendor are so material as to defeat the purchaser's object in making the contract. n798 Jurisdictions disagree as to

whether upon default the vendee becomes a tenant at will of the vendor. n799

One method of terminating the vendee's interest is by an action to quiet title. Where the contract specifies a method for terminating the vendee's interest, such method must be followed. n800 The vendor may also have a quiet title judgment against the vendee. n801

Some states have found it advisable to give statutory dignity to the vendee's interest in a land sale contract by preventing absolute and arbitrary forfeiture and providing specific methods for terminating the vendee's rights on default. n802 Other cases treat this type of statute as merely giving an alternative relief to the vendor. Some jurisdictions have rather steadily marched from the early forfeiture concept protecting the vendor to a right of redemption even to a defaulting vendee. n803 And some courts give the vendee a period in which to redeem before affording legal relief to the vendor. n804 Courts' usual reluctance to recognize conditions precedent in contracts has not been rigorously applied in real estate contracts with conditions referring to obtaining financing by the vendee. n805 If the contract is subject to a condition subsequent, the occurrence of the condition terminates the contract. n806

§ 96.15(a) Rescission of the Contract.

§ 96.15(a)(1) Right of Rescission of the Contract.

A contract for sale of realty may be rescinded by agreement of the parties. n807 It may also be rescinded by one of the parties, if the other breaches a material term of the contract. Fraud and mistake are also recognized as grounds for rescission. The power of the court to rescind an executed conveyance is an extraordinary one which should never be lightly exercised. n808

Grounds for rescission of the contract must be substantial. n809 Where the parties to an agreement are ignorant of facts which, if known, would have caused a different contract, the remedy is rescission. n810 The remedy of rescission of a contract is not one of absolute right, but rests in the sound discretion of the court to be exercised in accordance with what is reasonable and just under the particular circumstances. n811 The courts will require more than a mere showing that the performance of the contract may prove advantageous to one party and detrimental to the other. n812 Among other things, the vendee has been held entitled to rescission for undue delay by the vendor in giving the vendee possession of land, n813 for failure of the vendor to level ground by date when possession should be delivered, n814 for the failure of the vendor to procure a first mortgage within the time specified in the contract, n815 for failure of ownership in the vendor, n816 for a repudiation of the contract by the vendor, n817 for inability of the vendor to convey the entire body of land contracted for, n818 and because of the condemnation of the lot for a public purpose before the date of final payment under a conditional sale contract. n819 Upon rescission because the vendor's title has failed, the purchaser ordinarily is not liable for use and occupation. n820

For rescission by the vendee to be appropriate, the vendor must be in default, n821 and the purchaser usually cannot rescind without making tender. n822 Rescission, when applied, must be as to the entire transaction. n823 It is good ground for rescission or cancellation that the instrument is voidable for any reason. n824 When there is a legal reason for rescission, the motive of the party demanding the relief is not subject to inquiry. n825 Mere breach of contract is not of itself alone ground for rescission of a deed. n826 Fraud, accident, and misrepresentation are well-known grounds for equitable intervention and cancellation of a written instrument. n827 Generally, courts of equity have jurisdiction to decree the cancellation of an instrument vitiated by fraud or misrepresentation in its procurement. n828 Thus, where the execution and delivery or acceptance of a written instrument has been induced by fraud, and the defrauded party wishes to rescind the agreement and be relieved from its provisions, the proper remedy is by way of rescission and cancellation. n829 The fact that at the time of contract the vendor was not able to convey good title does not invalidate the contract if the vendor was able to convey good title by the time for completion of the contract. n830

Rescission is an equitable remedy, to be invoked by a court of equity. In the absence of fraud, mistake, trust, cloud on title, multiplicity of suits, necessity for cancellation, or some other independent ground of equitable jurisdiction, a court of equity will not interfere to rescind a contract on the sole ground that the defendant has failed to perform his part of the contract or has broken its warranties or conditions; in such cases, the remedy at law is usually deemed adequate. n831 Reformation is the proper remedy where the instrument, by reason of mistake, fails to express the actual agreement of the parties, but when the minds of both parties have failed to meet upon the same matter, so that no agreement at all has been made, or in some instances where the agreement is different, with respect to its subject matter or terms, from that which was intended, rescission is the proper remedy. n832 So, in order for the court to grant relief by way of rescission, it must generally appear that the contract was procured through fraud, mistake, failure of title or defects in title; or, at least, it must be shown that to deny plaintiff equitable relief will cause an injury for which a court of law cannot adequately compensate the plaintiff. n833 Shortage of the acreage is not ground for rescission; the remedy in that case is an action to recover for the shortage. n834 If the vendor repudiates the contract, the purchaser is relieved from tendering further performance. n835 Any act to ratify the contract, after knowledge of the facts authorizing a rescission, amounts to an affirmance and terminates the right to rescind. n836 A trustee of a bankrupt vendor may disaffirm an executory contract for sale of realty. n837

The right to rescind may be lost by laches. The law requires the injured person to seek a remedy without unreasonable delay after discovering the facts justifying rescission. n838 A person cannot be deprived of his remedy in equity on the ground of laches unless it appears that he had, or ought to have had, knowledge of his rights. Upon discovery of the grounds justifying rescission, the plaintiff must act with reasonable promptness to avoid the imputation of acquiescence, n839 and must act under circumstances consistent with good faith. n840 The period within which the right of rescission must be exercised is to be determined by the facts peculiar to each case. n841 As regards the right of a purchaser to rescind a contract for fraud, the rule as to laches becomes operative only after the purchaser has knowledge of the fraud and then delays taking action. n842 Even a vendee with constructive notice of a title defect still has a right to rescind. n843

The right to sue for rescission may be waived n844 or lost by acts indicating acquiescence in matters justifying rescission. n845 The waiver must be manifested in some unequivocal manner clearly evincing an intention to surrender the right to rescind. n846 It is necessary to waiver that the party have knowledge, actual or constructive, of the right allegedly waived. n847 The right to rescind for fraud is waived where the party having such right, after knowledge of the fraud, accepts any benefit under the contract or does any other act implying intent to abide by or affirm the contract. n848 The right to rescind will be denied if, after discovering the fraud, the plaintiff continues to make payments and to use the property, n849 assigns the contract, n850 leases the property, n851 or accepts a conveyance. n852 An extension of time after default may produce a waiver, n853 as may a purchaser's retention of possession after cause for rescission is known, n854 a purchaser taking possession after the vendor's failure to furnish abstract required by the contract, n855 a purchaser entering into new contracts, n856 a purchaser condoning the fraud by agreements for restitution, n857 and a purchaser tendering performance after accrual of right to rescind. n858

Tender of deed by the vendor is waived where a notice of election of purchasers to rescind is given before the expiration of the time provided. n859 As one cannot acquiesce in the performance of an act of which one is ignorant, so one cannot be said to neglect the prosecution of a remedy when one has no knowledge that one's rights have been invaded, excepting, always, that one's want of knowledge must not be the result of one's own culpable negligence. n860 If the delay is unreasonable, and the adversary party has changed position so that the party cannot be restored to the pre-contract position, rescission will be denied. n861 The defense of laches should be pleaded. n862

"Restoration to status quo," as respects contracts for the sale and purchase of real estate, means the restoration of what was received by the transaction. n863 It is a condition precedent to rescission, n864 for rescission being an equitable remedy, the party seeking such relief must, as a prerequisite, offer to do equity. n865 A party who is in default on payments required to be made by a contract is not entitled to a rescission of the contract. n866 To obtain rescission of a contract for fraud, whether such relief is sought informally or by formal decree in equity, the adversary party must

usually be placed in the pre-contract position by the party seeking relief. n867 Thus, the vendor of real estate seeking cancellation of a contract of sale must restore the cash payment if any has been made. n868 As a general rule, in order to dissolve a sale for nonpayment of the purchase price, the situation must be such as to put both parties in the same position as they were before the sale was made; n869 but where the contract contains a forfeiture clause and makes no reference to improvements on the land, the vendor is entitled to stand on the strict terms of the contract without being required to return or tender any part of the purchase money paid, if the purchaser can show a right to terminate the contract and declare a forfeiture. n870 The vendee in possession must restore the property to the vendor or offer to do so. n871 Such vendee cannot claim rescission if, because of the vendee's own conduct, status quo cannot be restored. n872 Also, a vendee of land who has taken possession under contract or conveyance must surrender possession and must reconvey, or at least be ready to do so, if the vendee has already received conveyance. n873

In cases in which whole or part performance has occurreed, rescission is usually the only remedy where the parties can be placed in status quo. n874 If, because of the acts of the adversary party, complete restoration is rendered impossible, a rescission will not be defeated thereby. n875 However, where rescission is sought on grounds other than fraud, a failure to restore the status quo will ordinarily defeat the remedy. n876 Where fraud is charged, restitution is held not necessary to suit for rescission. n877

In the case of mutual rescission, the payments made must be refunded unless otherwise provided in the contract. n878 The vendor risking rescission through suit must return or offer to return to the vendee the purchase money already paid, n879 where no rent or damages have accrued. n880 Where a note is given it should be returned; no recovery can be had on it after rescission, because the consideration has failed. n881

The vendee's assignee cannot have rescission against the vendor for alleged fraudulent misrepresentation to the vendee unless the cause of action was assigned with the contract. n882 If the rescinding purchaser is in possession, the purchaser should offer to restore possession to the vendor. n883

According to some decisions, rescission may be by parol. n884 However, where a contract subject to the statute of frauds is rescinded, the rescission must be in writing. n885

The vendee may rescind for deliberate false representations by the vendor, even if the vendee could have discovered the truth by investigation. n886 A rescission may occur without court action, by agreement of the parties, vendee deeding to the vendor and the vendor taking peaceful possession. n887

Rescission for failure of quantity may be based on innocent n888 as well as fraudulent n889 misrepresentation as long as the purchaser was induced to make the purchase on the strength of the misrepresentation. n890 Where there is a deficiency in quantity the vendee may have an action for rescission, n891 for damages if fraud was an element of the transaction, n892 abatement of purchase price, n893 reformation n894 or breach of seisin. n895 If the vendor breaches the contract the vendee is entitled to a return of the purchase price. n896 Upon a rescission without fault of either party the vendee is entitled to a return of the purchase price. n897 If both are in default neither can rescind without tender. n898 No performance by the vendee until the vendor tenders merchantable title. n899 The position has been taken that conveyance by the grantor to a third person prior to the law day is not anticipatory breach of the contract to convey. n900

The Interstate Land Sales Full Disclosure Act n901 permit the purchaser to sue the vendor or void the contract if the contract has been tainted by an untrue statement of a material fact. n902

A buyer in possession who is rescinding for cause is entitled to the actual value of any improvements made to the property. n903

A wrongful declaration of forfeiture by the vendor entitles the vendee to rescind. n904 Purchasers who rescind upon the

vendor's wrongful repudiation are liable to pay the fair rental value for the premises during the time they occupied the land. n905

When a purchaser rescinds, the parties must be restored to their original position, n906 but the courts have disagreed over whether a purchaser rescinding because of title defects may have an optional remedy of purchase price reduction. n907

§ 96.15(a)(2) Rescission by Mutual Agreement.

While a contract for the sale of real estate remains unexecuted, the parties thereto may mutually rescind it, if no rights of third parties intervene. n908 The parties may mutually rescind the contract, n909 but the proof of such rescission must be clear and convincing. n910 A land contract required to be in writing by the statute may not be rescinded by a subsequent oral agreement, n911 but some cases take a contrary view. n912 The rule of the Restatement of the Law is that: "A contract within the statute, whether or not made enforceable by satisfaction of its requirements, may be orally rescinded, unless the prior contract is enforceable and the contract to rescind involves the retransfer of some subject matter which is within the statute." n913 The rescission of a contract for the sale of land may be inferred from the purchaser's failure to take affirmative action to default the vendor within a reasonable time after the vendor's failure to comply with the demand of the purchaser, who has paid the amount due under the contract, to execute a deed as provided by the contract. n914 Rescission of the contract, to be effective, arises out of a mutual agreement or out of acts of the parties from which such agreement may be presumed, and rescission may be effected when there is a breach by one party to the contract and the other party treats such breach as an abandonment of the contract, thereby authorizing the breaching party to disaffirm the contract. n915

Such a rescission may be accomplished by parol. n916 The rule that a written agreement cannot be modified by an oral agreement unless the oral agreement is executed has no application in case of an oral abrogation of a written contract for the sale and purchase of real estate. n917 The mutual oral agreement to cancel a written contract is a sufficient consideration for its abandonment. n918

The minds of the parties must meet before there can be a rescission of a contract by agreement of the parties. n919 Such mutual rescission absolutely abrogates the contract and entitles each party to all benefits the other may have received. n920

The contract may be terminated by abandonment acquiesced in by both parties. n921 Where a contract is abandoned by one party thereto, the other party may treat the contract as at an end, thereby impliedly giving assent to a recission. n922 An agreement by the seller to resell for a purchaser at a higher price was held rescinded by a reconveyance to the seller at the original price without reservation. n923 The title of the purchaser who received a deed and gave a vendor's lien note as security for the purchase price, but who paid nothing for the property and made no improvements thereon, passed back to the vendor when the parties mutually agreed to a rescission of the sale. n924 The purchaser may be ousted by forcible entry and detainer upon failure to surrender the property on rescission. n925

§ 96.15(a)(3) Mistake as Ground for Rescission.

Contracts entered into through mistake bear in many respects a close similarity to those induced by fraud or misrepresentation. The reason contracts are avoided or reformed because of mistake is the same that underlies the avoidance of contracts for fraud: there is no real assent. In reality, it is not the mistake that avoids the agreement, but the want of assent to its terms. n926 In case of mistake, either mutual or unilateral, whereby the minds of the parties did not meet as to all the essential elements of the transaction, so that no real contract was made by them, equity may interpose to rescind and cancel the apparent contract as written. n927 Where there is an actual and honest misunderstanding, or if the language is equivocal, there is no contract because there is no meeting of the minds such as is necessary to perfect a contract. n928 In a sale in gross, equity may rescind for mutual mistake in amount but cannot alter the purchase price.

n929

The vendee is held to have a right of rescission on the ground of mistake as to the vendor's title, n930 price, n931 identity of the land, n932 boundaries, n933 quantity of land, n934 and the existence of water or springs on the land. n935 Discrepancy in acreage made through mistake, without fraud, and not gross, does not ordinarily authorize rescission. n936 Of course, there may be no rescission for discrepancy where the land is sold in gross and not by the acre, n937 unless the deficiency is so great as to warrant an inference of fraud. n938 A vendee may rescind the contract, where, through a mistake in pointing out the boundaries, mutually and honestly made by the parties, the vendee gets about half the quantity of land bargained for and less than half in value, although there was no fraud or intentional misrepresentation and the land was described as so many acres "more or less." n939

As with fraud or misrepresentation, in order to entitle a party to relief from a mistake, it must be material to the transaction and affect its substance, and not merely its incidents. n940 Mistake as to the identity of the subject matter is an error relative to the specific thing. Thus, in an action for the purchase price of land where it appeared that the contract was to buy a lot on one street and there were two streets with that name in the town and the purchaser meant a lot on one of them and the vendor a lot on the other, it was held that their minds did not agree on the subject matter of the sale and there was no contract whereby the purchaser could be bound. n941

As a general rule, a mistake of law, pure and simple, is not sufficient ground for rescission in equity, and it follows that a mistake of this nature, unmixed with matters of fact or any other reason for equitable relief, affords no ground for the rescission or reformation of the contract induced thereby. n942

If the purchaser has been induced to enter into a contract by an intentional misrepresentation, the purchaser may rescind even though the reliance may have been negligent. n943 If, by reason of fraud, accident, or mistake of law on the part of the drafter, the instrument does not fully express the intention of the parties, equity will afford relief. n944 It has been held that want of knowledge on the part of both parties with reference to the terms and conditions of a loan secured by a mortgage which the purchaser assumed and agreed to pay as a part of the purchase price of the property is not such mutual mistake of fact as warrants the rescission of the contract, although the terms of the loan were more onerous than the purchaser conceived them to be. n945 A mistake of law is, in strictness, an erroneous conclusion as to the legal effect of known facts. n946 On the other hand, many cases hold that a vendor or grantor who has parted with the estate or interest under a mistake of law as to the quantity, extent, or even the existence of such interest is entitled to equitable relief. n947 Also, a mutual mistake of law in respect to some fact determining the validity of the title the vendee was to receive has been held sufficient ground for relieving the vendee of the obligation under the contract. n948 Where a mistake of law is induced or accompanied by other special facts giving rise to an independent equity on behalf of the mistaken person, such as inequitable conduct of the other party and undue advantage thereby, equity will interpose its aid n949 Where ignorance of the law exists on one side, and that ignorance is known and taken advantage of by the other party, the mistaken party will be relieved, especially if the mistake was encouraged or induced by representations of the other party. n950 The cases that deny the remedy for mere mistake of law on one side are careful to add the qualification that there must be no improper conduct on the other. n951

The existence of an encumbrance does not justify rescission, but the vendee may require that the encumbrance be satisfied or security given therefor. n952 A buyer could not rely on a seller's affidavit that land was not held as community property. n953

Though recording is not necessary as against the grantor's heirs, it is necessary as against a purchaser from such heirs having no notice of the prior conveyance. n954 A few cases, however, have held that the protection afforded by the registration laws against unrecorded conveyances extends only to purchasers from the grantor himself, and not to purchasers from his heirs or devisees. n955 A purchaser is not estopped from seeking rescission of a contract because the purchaser remained in possession where the purchaser had promptly advised the vendor upon discovering that the vendor's representations concerning lot lines were not true. n956 The vendor selling the property to a third person after

breach elects to rescind and so is required to return down payments on purchase price, unless the contract provides for forfeiture. n957 When a purchaser, upon learning that the vendor's title was defective, moved the house to another location and refused to pay the balance of contract, a court held that the purchaser was unable to restore the status quo and therefore could not recover purchase price. n958 A vendee in possession, rescinding for title defects, is entited to hold a lien against the land for the reasonable value of its enhancement by improvements made before vendee knew or should have known of existence of defects, n959 or for the amount of the vendee's expenditures. n960

A mistake that will authorize rescission must be such that the contract would not have been made had the truth been known to the parties. n961 In a Massachusetts case, a deed to husband and wife creating a tenancy by the entirety was reformed to effectuate their intention, as expressed to the scrivener, that the conveyance of the premises was to be such as to give each spouse equal rights under the deed, where in accepting the deed the parties were acting under a mutual mistake as to the legal effect of the language used by the scrivener. n962 Wherever a person is ignorant or mistaken with respect to legal rights or duties, and enters into a transaction, the legal scope and operation of which the person correctly apprehends and understands, equity will grant its relief, defensive or affirmative, treating the mistake as analogous to, if not identical with, mistake of fact. n963 Where the vendor is negligent in not ascertaining facts that could have been ascertained by diligence and that would have prevented the vendor from executing a deed, a court of equity will not provide relief. n964 A vendor's unilateral mistake as to price and terms of the contract is insufficient grounds for rescission. n965

§ 96.15(a)(4) Rescission Based on Fraud. n966

As a general and basic rule, where fraud has occurred in the inducement in a contract for the sale and purchase of land the contract is subject to rescission. It has always been the peculiar province of courts to grant relief against fraud. n967 Fraud, in some form or other, is the most usual ground for invoking the aid of equity to rescind a contract for the sale of real estate. n968 No contract is formed until one party has given an unqualified and unconditional assent to the offer of another; but the offer and acceptance may appear to be complete in every respect, and notwithstanding this the contract be voidable at the option of one of the parties. Chief among the ways by which apparent consent may be induced are fraud and misrepresentation. Fraud as to material matter will vitiate, or render voidable, any contract. n969 Where the vendor fraudulently misrepresents acreage, the vendee has the option of rescinding or paying a proportionately lesser price. n970 "The essential elements of a plea of fraud are (1) false representations, (2) materiality, (3) scienter, (4) intent to deceive, (5) reliance, (6) resulting injury in damage." n971 Fraud is never presumed but must be proved. n972 Nothing but what is plainly injurious to good faith can constitute such a fraud as will form the basis of a rescission. n973

Fraud is something more than mere bad faith; it means proceeding or acting dishonestly, intentionally, and deliberately with a wicked motive, to cheat or deceive one party to a transaction; the fraud results in damage or loss to one party and in the advantage or gain for the other party. n974 Fraud in the consideration will invalidate a contract of purchase. n975 Fraud justifying rescission does not ordinarily include inadequacy of price, improvidence, surprise, or mere hardship. n976

The contract is void for fraud in misrepresenting the contents of the contract to an unlettered purchaser. n977 Many cases hold in effect that if it appears that the vendor has no intention of making an improvement in the vicinity of the land sold, the vendor's representation of intent to make such improvement will constitute a fraud against a purchaser who, as a person of ordinary prudence, relies on the representation and because of the reliance suffers damage. n978

The purchaser is charged with the duty of ordinary caution in the examination of the property. n979 The purchaser has the burden of showing that the purchase was induced by fraud, n980 and this burden is to be sustained by clear and convincing evidence. n981 The fraud may be established by circumstantial evidence, n982 but not by misrepresentations made after the transaction. n983 The purchaser may waive the fraud by ratification with knowledge. n984 The defense of fraudulent inducement in a contract to convey can be waived if after full discovery the party takes

steps to affirm the transaction. n985 The contract is rescinded as a whole. n986 The rescission for fraud destroys the contract ab initio and leaves the parties in the same situation as though no contract had been made. n987 The injured person may affirm the contract and sue for damages. n988 One induced to purchase land by fraudulent misrepresentations has an election to either bring an action for the fraud or for breach of the covenants of his deed. n989 The purchaser may elect to affirm the contract, retain the property received under it, and sue the vendor for damages in an action for deceit, and having chosen that course on discovery of the vendor's fraud, the purchaser need not continue performance but may properly withhold payments under the contract in an amount necessary to recoup the damages sustained. n990

The purchaser may either affirm the contract and sue for damages, or disaffirm it, and be reinstated in the position in the purchaser held before the contract was consummated. These remedies, however, are not concurrent, but wholly inconsistent. The adoption of one is the exclusion of the other. The purchaser who desires to rescind must act promptly, and return or offer to return what was received under the contract. The purchaser cannot retain the fruits of the contract awaiting future developments to determine whether it will be more profitable to affirm or disaffirm it. Any delay, especially his remaining in possession of the property received under the contract, and dealing with it as the purchaser's own, will be evidence of intention to abide by the contract. n991 It is a question for the jury to determine whether the purchaser has relied on the misrepresentation. n992

In addition to the remedies above mentioned, the purchaser may, upon discovery of the fraud, rescind the contract absolutely, and sue in an action at law, and recover the consideration given upon the fraudulent contract; and in such a case the purchaser must restore, or offer to restore, whatever was received by virtue of the contract. n993 A purchaser cannot, however, affirm that part of the contract which is advantageous and rescind that part which the purchaser considers disadvantageous. n994 Where a party to a contract is damaged by fraud and deceit, the party may rescind and recover damages or may affirm and recover for the resulting injury, but the remedies are inconsistent. n995 A party defrauded by misrepresentations in procuring a contract, which the party has elected to affirm, may still seek damages in tort for deceit. n996

A bill to rescind will lie where the purchaser has been deprived by false representations by the vendor, who at the time knew of their falsity, and the court has authority to retain jurisdiction of the cause to administer complete justice between the parties and decree a return of the purchase money paid. n997 The party seeking to rescind a contract for fraud or misrepresentation has the burden of establishing that the vendor had knowledge of the false representation. n998 In such a case the purchase money may be recovered although paid to an agent of the vendor who held the legal title to the property in trust for the vendor and with whom the contract was made. n999 The vendee's right of action for fraud cannot be assigned him and does not pass by conveyance to a third person. n1000

The measure of damages for a sale procured by the vendor's fraudulent representations is the difference between the actual value of the property at the time of the purchase and its value if the property had been what it was represented to be. n1001 The vendee may lose the right to sue for the fraud by ratification with full knowledge of the true conditions. n1002 However, a number of courts have adopted the rule that the defrauded party is not entitled to the benefit of the bargain, but only to the amount of "out of pocket" loss, which is the difference between the real value of the property and the amount paid therefor. n1003 Courts of equity have a tendency to permit the grantee to be divested of title by a cancellation of the deed. n1004 So far as the grantor is concerned, it is the well established rule that as between a fraudulent vendor and purchaser the contract is valid. n1005 Some courts invoke the support of equity to save an oral contract of sale and to prevent fraud. n1006

Where the purchaser of realty was induced to purchase it by fraudulent representation and desires a decree rescinding the contract and ordering the cancellation of the instrument of conveyance and return to him of notes or other obligations of debt, the remedy is in equity. n1007

Delay will not bar relief where the complainant has been ignorant of the fraud as to which relief is asked, as the duty to

institute suit arises only upon the discovery of the fraud, and a delay of several months in filing the bill after the discovery of the fraud has been held not to bar relief, where the complainant immediately notified the defendant of the intent to sue, and no adverse party is prejudiced by the lapse of time between the discovery of the fraud and the institution of suit. n1008 Where the purchaser promptly notified the vendor upon discovering that the vendor's representations concerning the lot lines were not true, the purchaser was held not estopped from seeking rescission of the contract because the purchaser remained in possession. n1009

The federal Truth in Lending Act is applicable to real estate transactions. n1010 The Interstate Land Sales Full Disclosure Act applies only to unimproved land. n1011 The purchaser must use reasonable care to inspect the premises, even if relying on the seller's misrepresentations. n1012 Where the vendee has offered to rescind and the offer is rejected, the vendee may either abandon the premises or may continue in possession as caretaker for the vendor. n1013

§ 96.15(a)(4)(i) Nondisclosure as Fraud. n1014

Problems of rescission on grounds of fraud turn on the interlacing of three doctrines, actual misrepresentation, improper concealment of knowledge of facts and caveat emptor. If the vendor has knowledge of facts concerning the property which affect it adversely, to what extent is the under a duty to disclose these to the vendee so that nondisclosure constitutes fraud, and how far may the vendor rely on caveat emptor in remaining silent? A purchaser is under no duty to reveal to the vendor a motive in seeking to acquire the property, n1015 but a buyer knowing of oil leasing negotiations has duty to tell seller upon inquiry. n1016

The general theme followed by the courts is that nondisclosure is not an actionable wrong unless there was a duty to speak. n1017 The earlier rule, at least, distinguished mere silence and concealment, n1018 but the vendor may not do anything to conceal or deliberately hide a material fact or defect or to lead the vendee to believe that a certain fact exists, and so to affirm it. n1019 Some cases, however, impose a duty on the vendor to speak where it would be "unconscionable conduct" for the vendor to remain silent. n1020 Other cases do not consider silence even as to concealed conditions as fraud. n1021

One line of authority requires the vendor to speak where the vendor is in possession of knowledge of adverse conditions of which the vendee could not learn even by reasonable investigation. n1022 Failure to disclose defects in amount of the property conveyed has been treated as fraud. n1023 Failure to disclose an unlawful use of the property by the vendor has also been considered fraud. n1024

The vendee on the other hand is not required to disclose any knowledge of facts that cause the vendee to desire to purchase the property. n1025 Even here, however, a minority rule has sometimes found a fiduciary duty on the vendee to disclose, n1026 and it has been said that if the vendee does undertake to disclose the vendee must tell all. n1027 The normal relationship of vendor and purchaser does not invoke a fiduciary concept, n1028 although sometimes the "arms length" doctrine has been invoked to create a fiduciary relationship requiring disclosure. n1029 Where, however, a fiduciary relationship exists apart from the mere vendor-vendee situation, full disclosure is indicated. n1030

§ 96.15(a)(4)(ii) The Doctrine of Caveat Emptor.

The common law wholly denied the doctrine of implied covenants of warranty of fitness to sales of realty. n1031 The doctrine of caveat emptor has been applicable in sales. So generally one who buys property upon which the seller is to construct a house receives no implied warranty of fitness of the property. n1032 One exception to caveat emptor requires the vendor to disclose situations where the vendor has special knowledge not available to the purchaser and the vendor is aware that those facts would be important to the purchaser. n1033

The effect of the doctrine of caveat emptor is that at common law there is no warranty of condition or fitness as respects realty. n1034 This is similar to the lease. Not even a statement of purpose in the contract is a condition under the caveat

emptor rule. n1035 The doctrine only applies where the parties have equal means of knowledge. n1036 However, few subjects of the law appear, upon a cursory examination of the authorities, to be in such a hopeless state of confusion as that which relates to what constitute proper exceptions to the rule of caveat emptor. It will be found, however, upon examination, that the cases on this subject are governed by certain general principles which, when applied, obviate much of the difficulty. The doctrine applies to the purchase of real estate, n1037 and will be invoked where necessary that one may not be deprived of one's rights, n1038 but will not be applied to assist the vendor in getting or keeping that to which the vendor is not entitled. n1039 It will not be invoked to aid the vendor in avoiding the consequences of fraudulent representations as to material facts, n1040 especially where the vendor is in a better position to know the facts than the purchaser. n1041 Thus, where a vendor knowingly and falsely makes representations of material facts to induce another to purchase real estate, and the purchaser in reliance on such representations enters into a contract and thereby sustains a loss, the purchaser is entitled to relief from the fraud practiced. n1042 However, the doctrine will be invoked to the of the ordinary physical condition of the property at the time of the purchase. n1043 A vendor cannot be held responsible for a fraudulent concealment of an adverse claim of which the vendor has no knowledge. n1044

The earlier rule absolved the vendor from any tort liability for unsafe condition of the premises after sale, even though the condition was known to the vendor. n1045 A later doctrine holds the builder-vendor liable. n1046

Courts have divided as to whether there is an implied warranty of quality in the sales of unfinished houses. n1047 In recent years some jurisdictions have recognized a doctrine of warranty of fitness by a builder-seller of houses, n1048 which may even carry tort liability. n1049 However, this trend toward avoiding caveat emptor in sales of new houses is not unanimous, n1050 and courts recognizing a right to fitness for habitation in new houses are cautious about the extent of this doctrine. n1051 Those courts extending the builder liability to remote grantees do so under different theories. n1052 In other jurisdictions, assignees of vendees cannot sue the builder-seller if the warranty is held to extend only to the first purchaser. n1053 In these situations would also apply the usual exception to caveat emptor when the knows and does not disclose to the purchaser information which would be important to the purchaser. n1054 The net effect of these cases is that more commonly now the liability of the vendor is being extended to third parties. n1055

Distinction is made in many cases between mere puffing and actual misrepresentation. Mere statements of opinion and shop talk are allowed in the sale of land. n1056 If the statement is based on alleged facts, it is a statement of fact and not an expression of opinion and, if relied on, amounts to a fraudulent misrepresentation. n1057 Caveat emptor yields to false representations by the vendor, n1058 even where the falsity is easily discernable, n1059 but unless there is a duty to speak, i. e., where no fiduciary relationship exists, mere nondisclosure is not fraud, n1060 unless, as held sometimes, the fact cannot be discovered by the vendee on inspection. n1061 As long as the vendor does not prevent an independent investigation and the parties are dealing at arms length, the purchaser cannot predicate an action to rescind on statements made by the vendor as to profits made from the business. n1062 The doctrine of caveat emptor as related to sales of land applies to title n1063 as well as quality and condition. n1064

While a vendee has not duty to investigate title, if facts known to the vendee constitute a warning that further inquiry is needed and such facts are of sufficient interest to invite inquiry, the vendee does have a duty to investigate the title. n1065 The doctrine of caveat emptor applies to inherent geological defects in real estate. n1066

A few states have developed specified exceptions by statute or by judicial decision to the caveat emptor doctrine. n1067

The doctrine of caveat emptor is not available to a vendor making misrepresentations to induce a sale. n1068 Caveat emptor is increasingly limited to situations where the seller did not know of the defect or was under no duty to disclose or where the buyer had opportunity to discover the defect. n1069 The doctrine of caveat emptor does not apply where a builder is to perform work after the close of the transaction. n1070 And, as mentioned above, in some states subsequent, remote purchasers from the builder-vendor have a cause of action for breach of the implied warranty of fitness for habitation. n1071 Thus courts are rapidly eroding the classic caveat emptor. n1072

§ 96.15(a)(4)(iii) The Extent to Which Representations May Constitute Fraud.

If a party is induced to enter into the contract by fraudulent representations as to a fact deemed material, and upon which the party has a right to rely, the party may rescind the contract upon the discovery of the fraud, n1073 and relief may be granted, even if the misrepresentations were not consciously made to defraud. n1074 However, the power is an extraordinary one, and should never be exercised unless the fraud is clearly made to appear. n1075 If the purchaser has been induced to enter into a contract by an intentional misrepresentation, the purchaser may rescind even if reliance was negligent. n1076

An innocent misrepresentation may be the basis of rescission. n1077 The misrepresentation must be as to a material matter. n1078 It must relate to a present or pre-existing fact, and cannot ordinarily be predicated on unfulfilled promises or statements as to future events. n1079 The contract may be avoided for false statements of fact made by the vendor to induce the sale and relied on by the purchaser. n1080 The purchaser may not rely on the representations of the vendor as to the recitals in the title deeds. n1081 A recital in a contract of sale that no statement should be binding upon the vendor unless the same be in writing does not prevent the purchaser from repudiating the contract if execution of the contract was fraudulently induced. n1082 It is not essential that the party making the representations knew them to be false. It is sufficient that the party ventured the assertions without knowing whether they were true or false, for the affirmation of what one did not know or believe to be true is equally in morals and law as unjustifiable as the affirmation of what is known to be positively false. n1083 Thus, false representations of a material fact justifies rescission of a real estate contract, even though the party making the misrepresentation was ignorant as to whether it was true or false. n1084 Such representation operates as a surprise and a misrepresentation on the party to whom it is made. n1085

The older rule was that misrepresentations by the vendor, to be material, were required to be dishonest. n1086 Today it is generally accepted that the misrepresentation need only be material. n1087 Ordinarily, a misrepresentation as to a matter of law by a person possessing no superior knowledge of the particular question of law is insufficient to support an action for fraud and deceit. n1088

No fraud arises where the complaining party has knowledge of all the facts. n1089 If the party complaining has the means of knowledge as readily at hand as the party making the false representations, it is incumbent upon the party to seek that knowledge, and upon neglect to do so, the party will usually not be entitled to relief. So, if it be that such a party has investigated, seeking from other quarters the verification of the statements, has not been impeded in the inquiry, and has made it as full and searching as desired, the party cannot insist that the party relied upon the verity of such statements. n1090 Misrepresentation entitling the purchaser to a rescission of the contract for the sale of land must be such as to mislead and induce the purchaser to buy on the faith thereof. n1091 An intent to deceive the purchaser by misrepresentation of material facts is said to be a necessary element to sustain a charge of fraud on the part of the vendor; n1092 but the better rule would seem to be that the purchaser's right to rescind for misrepresentation does not depend upon the motive or cause which actuated the vendor in making the misrepresentation, n1093 it being sufficient if the vendor made material representations without knowledge of their falsity. n1094

Fraudulent misrepresentations must be precisely alleged and established by clear and convincing proof. n1095 The vendee must account for any damages to the land. n1096 Fraud justifying recission may consist in material misrepresentation relied on by the purchaser as to quantity of the land or its boundaries, n1097 location of the land, n1098 character and value of the land, n1099 rentals, n1100 existence of springs or water supply on the premises, n1101 financial standing of the purchaser, n1102 or change of the purchase price in reducing the contract to writing. n1103 A purchaser induced to execute a contract of purchase by false representations may stand on the contract and recover damages caused thereby, or he may rescind the contract and return the land purchased and receive back what was paid. n1104 The purchaser need not rescind the transaction, but may confirm it, retain what was received, and recover damages sustained as the proximate consequence of the fraud. n1105 The right to a rescission on account of a vendor's fraudulent misrepresentations as to material facts which influence the transaction is not affected by the fact of the

solvency of the vendor or the vendor's good faith in making the representations. n1106 To justify rescission on the ground of the vendor's fraud, the misrepresentation must be based on an alleged past or presently existing fact. n1107

A statement as to the value or area of land may be such a statement of fact as will entitle the other party to rescission. n1108 Any material misrepresentation as to the location of land, or the like, whether made innocently or with a fraudulent intent, will, in general, entitle a person acquiring the land and relying on such statements to rescind the transaction and recover the amount paid on the purchase price. n1109 False representations made by a vendor as to title, although innocently made, upon which the vendee relies to the vendee's injury, may constitute such constructive fraud as will entitle the vendee to a rescission. n1110 A vendor is also entitled to have a contract canceled in a proper case on account of fraudulent misrepresentations of the purchaser. n1111 The judgment may rest upon any one material false representation. n1112 It is not material that the party making the representation believed it to be true and did not know that it was false. n1113 The representations are not material where they are mere opinions or ordinary sales talk, n1114 or where their falsity is known or obvious or could have become known by the exercise of ordinary prudence. n1115

In a misrepresentation that the premises could be used for the conduct of a particular business, the purchaser's intention so to use the property being made known to the vendor, it was held that the vendee could recover the deposit paid under the agreement if such use was in fact forbidden by a zoning ordinance. n1116 However, it has been held that fraud cannot be predicated upon a mere promise, even though the promise is accompanied by a present intention not to perform it. n1117 In a case of misrepresentation by the seller, the time for vendee's action begins to run from the time the facts were discovered, not from the time of sale. n1118

Misrepresentations by a stranger to the contract will not ordinarily be ground for an avoidance of the agreement, nor render the party benefitted liable for damages. The false representation of a third person will work this result, if the third person is acting under authority of, in collusion with, or as the agent for the party to the contract. n1119 This is true even though the principal may be innocent of fraud, provided the false statements of the agent were made within the scope of the agent's authority. n1120 False statements of material facts by the vendor's agent to induce execution of the contract and relied on and working injury to the purchaser will ordinarily be imputed to the principal and furnish ground to avoid the contract. n1121 The principal is liable even though the misrepresentation is committed for the benefit of the agent and does not benefit the principal. n1122 Ordinarily, where the purchaser inspects the premises, the purchaser may not urge reliance on the representations of the agent. n1123 Reckless representations by an agent as to the quantity of the land are fraudulent, even though the agent did not know that they were false; n1124 but if the false representations made by the agent are not within the scope of the agent's authority, and the principal has no knowledge of such misrepresentations and does not adopt them, the principal is not liable. n1125 The fraud of the agent will not generally be imputed to the principal where the contract provides that no statements or agreements are binding unless written in the contract. n1126

Representations made by a third person without any authority whatever may, however, be ratified by accepting the benefits or otherwise, and if this is done the result may be the same as if the beneficiary had expressly authorized the misstatements. n1127 The principal cannot affirm the action of the agent in making the sale and not assume responsibility for his representations. n1128 The agent's promise to a purchaser that the agent would resell the land for the purchaser's benefit would not be sufficient ground for rescission unless the promise was made by the agent without any intention to perform the promise. n1129 The purchaser may have relied on the representations even though the public records disclosed the true situation. n1130

Apparent authority in an agent to receive payment may be created by a course of dealing, or previous conduct, leading persons of ordinary prudence to believe such authority has been given the agent. Real estate brokers have no such authority to receive payments unless "apparent authority" exists. n1131 The cases are divided as to whether a broker is entitled to commission where the sale is at a price less than that stipulated between the owner and the broker. n1132 A real estate broker's agent is under a fiduciary duty to disclose to the vender a prospective purchaser's relationship to the broker. n1133

By the rule of the common law, a vendee who has knowledge of valuable minerals beneath the surface of the land of another, and of which the latter is ignorant, is under no legal obligation to disclose such fact in making the purchase. Under such circumstances, the vendee may remain silent, and not disclose facts in the vendee's knowledge, or answer inquiries as to such facts. However, if the vendee undertakes to answer or disclose, the vendee must disclose the whole truth, without concealment of material facts, and without doing anything calculated to prevent an investigation on the part of the vendor, especially if the vendor does not reside near the land and the vendee does. n1134 Very generally, the law places no obligation on a purchaser to disclose the purpose of the purchase or matters calculated to enhance the value of the land; n1135 neither is a purchaser on resale bound to acquaint the vendee with the terms of the vendor's purchase. n1136 Inadequacy of price paid by the purchaser is indicative of fraud only when the inadequacy is so great as to suggest that the vendor has been overreached or imposed upon. n1137

When no peculiar circumstances call for disclosure, such as some confidential or fiduciary relation existing between the parties, a purchaser, having superior knowledge of value, does not commit fraud merely by purchasing without disclosing knowledge of the value of the thing purchased. n1138 Thus, a purchaser of timber land having special knowledge of facts enhancing its value is under no obligation to inform the vendor. n1139 It has been held, however, that active or intentional concealment of material facts amounts to fraud which will prevent the enforcement of the contract by the party guilty of the fraud. n1140 The purchaser's misrepresentation of facts which essentially enter into the inducement on which the vendor makes a contract usually constitutes a ground for the avoidance of the contract. n1141 It has been held that a vendor is not entitled to a cancellation of a contract on the ground of the fraud of the purchaser in making a false statement that the purchaser had stock and equipment to farm the land. n1142 When gross inadequacy of consideration for a conveyance is accompanied by other inequitable incidents, such as misrepresentation, concealment, or undue advantage taken of ignorance or misplaced confidence, a court of equity will set aside such conveyance. n1143

If the contract contains a provision that both parties disclaim reliance upon any representation not contained in the contract, the cases divide as to whether there can be recovery in cases of actual fraud. n1144 The weight of authority seems to be that a provision in the contract that there have been no representations made is not an assertion that such representations actually have not been made, but is an agreement of the parties that their contractual rights are to be considered as though none had been made. n1145 Thus extrinsic evidence may come in to show fraud, n1146 but a provision in the contract to the effect that the seller has not made any representations with respect to the property is a bar in law to an action for damages brought by the vendee on the grounds of false representation. n1147

Under ordinary circumstances a purchaser's failure to disclose material facts within the purchaser's knowledge does not constitute "fraudulent concealment." For fraudulent concealment to arise against the purchser, it is not only necessary that great advantage should be taken in such a contract and that such advantage should arise from superiority of skill or information, but it is also necessary to show some obligation binding the purchaser to make such a disclosure. n1148

The following elements must be proved in an action based on fraud:

(1) The misrepresentation must be of a statement of fact;

(2) it must be made for the purpose of influencing the other party to act;

(3) it must be untrue;

(4) the party making the statement must know or believe it to be untrue;

(5) the person to whom it is made must believe and rely on the statement;

(6) the statement must be material. n1149

Rescission of a deed is allowed on parol statements of grantee's false representation of intended use. n1150 A purchaser's misleading statement to the vendor as to the probable future value of the land is held insufficient to show fraud such as would justify cancellation. n1151

§ 96.15(a)(4)(iv) Particular Misrepresentations That Will Constitute Fraud.

Very general false representations by the vendor regarding the quantity of the land sold or its boundaries or location, made as an inducement to purchase and which actually deceive the purchaser and are relied on by the purchaser, constitute fraud which entitles the purchaser to relief. n1152 Under one rule, rescission on the basis of fraudulent representation is not available unless injury or damage to the party has been prove. n1153 The purchaser is entitled to relief where the deficiency is so great as to justify an inference of fraud. n1154 A mere expression of opinion on these matters is not sufficient to taint the transaction with fraud. n1155 An owner presumptively knows the boundaries, particularly where the purchaser could only obtain this knowledge by scientific measurement of the property. n1156 However, authorities are in conflict as to whether an incorrect statement of area vitiates the contract or is actionable where the boundaries are correctly pointed out, n1157 the prevailing opinion being that the vendor's misrepresentations as to area constitute deceit regardless of the fact that the vendor pointed out the true boundaries of the land to the purchaser. n1158 A few jurisdictions depart from this general rule. n1159 The mere fact that the purchaser saw the land may not be conclusive that the purchaser did not rely on the misrepresentations. n1160 The fact that the purchaser made an examination and inspection of the land under such circumstances that the purchaser discovered or ought to have discovered the truth will usually defeat a recovery by the purchaser. n1161

Where the representation of the vendor as to the quantity of the land comprised in the description is made at the time of the negotiations for its purchase and antecedent to the written contract, with the intention of inducing the purchaser to execute the contract, such representation amounts to a warranty, and the purchaser has a right of action for damages for breach of warranty and not an action for compensation by way of abatement of the price. n1162 Purchasers who were induced to buy a lot by the representation of a vendor who had knowledge that the lot was being purchased as a site for a hotel and that there was a public street in front of the lot, were held entitled to a rescission of the contract, where the lot was surrounded by privately owned land. n1163 Representations by the vendor that the property has been zoned is a representation as to an existent fact and is actionable in damages. n1164

Three situations may arise where the sale has been in gross:

(a) Absent any reference to the quantity, no action for deficiency or excess acreage based on mutual mistake of fact will lie. n1165

(b) Though there is mention of the quantity it is obvious that the parties contemplated no recourse if it was inaccurate. There is no recovery here. n1166

(c) Where it is clear that the parties did not anticipate there would be a major discrepancy, recovery on mutual mistake lies here. n1167

Where there has been fraud there is recovery even though the sale was in gross. n1168

Statements concerning the depth of the top soil are not mere expressions of opinion, but constitute representations of a material fact. n1169 Any false representations as to the title to real estate, made as a fact or without regard to their truth or falsity, and in order to induce another to purchase the same, constitute actionable fraud, when such representations are relied on and induce the contract to purchase, and injury results. If the purchaser acts with reasonable promptness after discovering the fraud, the purchaser may maintain an action for the fraud and deceit or a rescission of the sale.

n1170 The right of the purchaser to rescind is not necessarily defeated by the fact that the statement made as to the character of the vendor's title was honestly or mistakenly made. n1171 Misrepresentation of title is fraud if it results in injury to the purchaser, but no fraud justifying rescission exists where the purchaser sustained no injury and the vendor entered into the contract in good faith, and is able to furnish a good title upon demand. n1172 Thus, representations by a vendor as to the title he held at the time of the sale, which the vendor believes to be true, but which are in fact untrue, will not justify a rescission of the contract. n1173 Representations that land is free and clear of encumbrances may be relied upon, and the person to whom it is made is not required to examine the records. n1174 The constructive notice furnished by the records will not relieve the party from the consequences of positive statements fraudulently made as to the land being unencumbered. n1175 A purchaser is justified in relying upon the vendor's representations in pointing out the lot lines. n1176 Material misrepresentations as to value falsely made and relied upon are grounds for invalidation of the contract of sale. n1177 Representations as to fertility, water supply, and other matters going to the value of the land are generally held to be representations of fact and thus material; n1178 but this does not include representations which are no more than mere expressions of opinion or ordinary sales talk. n1179 A mere erroneous statement or opinion as to the value will not ordinarily vitiate the contract, n1180 but material representations of quality or condition are grounds for rescission, even though they do not affect the value in any certain sum. n1181 Likewise, a false representation by the vendor in the sale of land that it is in good condition for cropping, or fertile and specially adapted to certain crops, or the like, are representations of fact entitling the purchaser to rescind and recover the purchase price when properly relied upon and the purchaser is thereby induced to make the purchase; or, in a proper case, the purchaser may maintain an action in damages for the fraud. n1182 The representations must have been relied on, and this cannot be said to have existed where the purchaser has knowledge of the value by inspection or otherwise. n1183

No legal obligation rests on the vendor to inform the purchaser that the purchaser is under such a mistake, when the mistake is not induced by the act of the vendor. Thus, where facts respecting the value of the land or the means of information concerning its condition are equally accessible to both vendor and vendee, and the vendor says or does nothing which tends to deceive or mislead the vendee, the vendee is in no position to complain that the vendor failed to disclose facts affecting the value of the land. n1184 However, the rule is different where the facts are accessible to the vendor only, and the vendor knows that such facts cannot, by reasonable diligence, observation, and judgment, exercised by the vendee, be ascertained. In such case, the vendor is bound to disclose the facts. n1185

Where a vendee is induced to enter into a contract of purchase by a false representation of the vendor as to the price paid for the land by the latter, the vendee may rescind the contract. n1186 False statements as to what property had cost, or as to what similar property had sold for, constitute fraud that will usually vitiate a contract and justify rescission, and it is generally actionable, at least when relied and acted upon and made the basis of the selling price or amount agreed to be paid. n1187 It is not proof of fraud that the vendor charged an excessive price to one ignorant of the value of the land. n1188 A vendor's false representation of a loan commitment was held to be ground for for rescission by vendee. n1189 Where the vendor innocently makes a false statement upon which the vendee relies, the cases divide as to whether the vendee can rescind, n1190 and some cases today permit an action for damages even where the misrepresentations were innocent. n1191

§ 96.15(a)(5) Actions for Rescission.

The rescission of a contract is to be enforced in equity, and it must be just and equitable under the circumstances of the case. n1192 An action for rescission will lie only in the absence of an adequate legal remedy. n1193 The remedy of rescission or cancellation of instruments is not one of absolute right, but rests in the sound discretion of the court to be exercised in accordance with what is reasonable and just under particular circumstances. n1194 The words "rescind," "annul," and "cancel" are interchangeable in the description of this form of action. n1195 "Rescission" and "cancellation" may be regarded as one and the same remedy; the decree for rescission generally directs the cancellation of the instrument which embodies the evidence of the contract in question, or of the obligation arising therefrom, thereby rendering the decree of the court effectual and complete. n1196 So, where rescission as well as cancellation is sought, the latter remedy is a mere auxiliary to effectuate the rescission. n1197

Rescission is a matter of equitable jurisdiction. n1198 The purpose of this remedy is to procure the cancellation of the instrument. A contract for the sale of real estate may be rescinded in this way on the ground of fraud or mistake. n1199 Rescission will not necessarily be denied merely because the contract has been executed, n1200 but where the contract is conscionable, and the complaining party has had the full benefit of it, it will not ordinarily be rescinded. n1201 State statutes are beginning to permit rescission of vendor-purchaser contract where breaches by the vendor are so material as to defeat the purchaser's object in making the contract. n1202 The equitable remedy of rescission is not one enforceable as a matter of right, but rests on the sound discretion of the court, n1203 and a court should not award it except in a clear case, n1204 nor unless some such element as actual fraud, accident, mistake or insolvency appears. n1205 A court of equity may declare a rescission of a contract of conveyance in order to prevent a manifest wrong. n1206

Where rescission is sought on several grounds, it is enough if the contention is sustained on one of the grounds. n1207 One who demands cancellation for nonperformance must show compliance with the terms of the contract or make tender of performance. n1208 The majority rule seems to be that proof of pecuniary damages need not be shown to entitle a purchaser to rescind the contract, even for a misrepresentation as to the quality or value of the property sold. n1209 A demand for performance is not necessary where it would be futile if made, n1210 such as where the vendor admits inability to perform, n1211 or the title is unmarketable. n1212

A fraudulent transaction must be affirmed or rescinded as a whole by the defrauded party. n1213 The vendor's fraudulent misrepresentations give the vendee the option of rescission or an action for damages. n1214 In cases where fraud is the ground for rescission, the defrauded party may treat the contract at an end and resort to a court of law for relief, or he may seek the aid of a court of equity to have the contract avoided, and perhaps incidentally to obtain further relief. n1215 The purchaser may not maintain suit for rescission for the purchaser's own default. n1216

The good faith of the party making the misrepresentations is not a defense. n1217 Notice to the parties of an intention to rescind is ordinarily required. n1218 This requirement in some jurisdictions is satisfied by the bringing of the action to rescind. n1219 No rescission arises by the offer of the vendee to reconvey at a discount. n1220 The election not to rescind is shown by suit to foreclose a vendor's lien. n1221 Rescission annihilates the contract and an offer to perform thereafter is without avail. n1222 The grounds for rescission must be related directly to the subject matter of the contract to be effective. n1223 Demand for performance is a condition precedent to rescission. n1224 So is tender, unless useless. n1225

Upon rescission for failure to convey good title, the vendee is chargeable with reasonable rent plus interest, and the vendor with return of the purchase money paid plus interest. n1226 Where the vendee has offered to rescind and the offer is rejected, the vendee may either abandon the premises or may continue in possession as caretaker for the vendor. n1227

§ 96.15(b) Forfeiture of the Contract. n1228

To obtain the greatest protection in face of the purchaser's breach, the vendor will seek the option of terminating all of the vendee's interest in the land and of the vendee's rights to possession thereof. Not unnaturally the vendor seeks to secure such option either by express provision in the contract or by construction thereof. To a greater or lesser degree this desire of the vendor is controlled by the courts or by the legislatures. n1229 At common law the vendor had the right to maintain an action of ejectment against the purchaser after condition broken, where the purchaser was let into possession under the contract. n1230 In some jurisdictions unlawful detainer is by statute made available for the vendor under similar circumstances. n1231 Some courts will uphold express forfeiture provisions in the contract. n1232 Generally a provision for default on breach of the contract is valid. n1233 The law does not supply a forfeiture clause in a contract where none exists. n1234 In some states the vendor may bring strict foreclosure on vendee's default, n1235 but other states deny the vendor's right to ejectment. n1236 Provisions in the contract that upon default the vendee will become a tenant at will have met conflicting treatment in the courts. n1237

Where the contract stipulates that for certain breaches the party shall lose rights under the contract or forfeit a fixed sum, this condition is called a "forfeiture." Forfeitures are not favored either in equity or in law, n1238 and, when their enforcement will work a hardship upon a party to the contract, the courts will consider all circumstances tending to show a waiver of the forfeiture. n1239 Thus, an express provision for the forfeiture of a contract to convey for nonpayment of the purchase price within a time specified was held waived by the vendor's act of holding the deposit money after the vendee's failure so to complete payment. n1240

Where time is clearly the essence of the contract the vendor may declare a forfeiture for failure to pay the purchase price or any installments when due. n1241 It is usually a condition precedent to forfeiture that the vendor make demand and tender of performance. n1242 The formal tender of performance by vendor is not required where it would have been fruitless if made. n1243 A vendor in default cannot declare a forfeiture. n1244 The vendor must be able to perform in order to forfeit the interest of the vendee under the contract to purchase. n1245

Notice is usually required of the intent to forfeit for default. n1246 The mere passage of time for the performance of an executory contract for the purchase of real estate does not alone work a forfeiture, as respects the necessity of notice of the forfeiture. n1247

A vendor whose title is found to be unmarketable is not automatically in default if the defect is curable with a reasonable time after law day. n1248 The vendor must serve upon the vendee a notice of intention to forfeit the real estate contract. n1249 A notice of forfeiture under the more modern rule merely informs the vendee that the delinquency must be cured and does not of itself terminate the contract. n1250 Where the conditional vendor had been in the habit of accepting late payments from the vendee, the vendor must give notice to the vendee that in the future the right of forfeiture will be exercised unless the default is paid within a reasonable and specified time. n1251

The provision for forfeiture is for the benefit of the vendor and may be waived by the vendor, n1252 and this will usually happen where the vendor accepts payments after default. n1253 Such an acceptance is generally held to be a waiver as to the installments that are past due. It amounts to a temporary suspension of the right to forfeit, subject to being restored at any time by definite notice, n1254 and where the payments were received at irregular intervals, n1255 acceptance of an installment after it becomes due does not, as a matter of law, waive the right to prompt payment of subsequent installments. n1256

A vendor waives the right to rescind the contract by demanding payment of the amount due thereunder from the vendee. n1257 The vendor may acquiesce in the breach of conditions of the contract; n1258 or the parties may agree that the contract shall remain in force. n1259 Waiver is a matter of defense to be pleaded and proved. n1260 When conduct amounts to a waiver of the provision making time of the essence of the contract, the vendor may not declare a forfeiture unless the vendor gives the purchaser reasonable notice and reasonable time to comply with the contract. n1261 The contract may provide against forfeiture for failure or delay in exercising the option to rescind. n1262 An abandonment may be inferred from long extended failure to perform with no demand for performance. n1263 The abandonment may not be inferred from failure to pay at the stipulated time where the title is in such condition that it cannot be transferred. n1264 Acquiescence in the forfeiture by the purchaser closes all of the purchaser's rights under the contract. n1265 Where forfeiture is declared, the vendor may not recover the unpaid portion of purchase price. n1266 A forfeiture may be set aside for fraud. n1267 Until the vendor exercises a right of forfeiture, the vendee in possession is not liable for rent. n1268 A party seeking forfeiture under a statute as to land contracts should fully and strictly follow the procedure there required. n1269 The vendor must strictly pursue the course of conduct prescribed by the contract in foreclosing the vendee's rights thereunder. n1270 The vendor may not forfeit without tendering a conveyance, n1271 unless the vendee admits inability to perform. n1272

Some states protect the vendee through statutory enactments as to forfeiture of sales contracts. n1273 A vendor may by conduct waive the right to declare a forfeiture. n1274 In some jurisdictions, despite the terms of the contract, an

installment land sales contract must be foreclosed as a mortgage and not by forfeiture. n1275 Indeed, where forfeitures of conditional sales contracts are not favored, the trend is to treat them as creating liens in favor of the vendor and to be required that they be foreclosed as mortgages, particularly if the vendee has made substantial payments. n1276 This trend is also noted in statutes giving the vendee the same protection as a mortgagor. n1277

FOOTNOTES:

(n1)Footnote 791. *See* Waalkes, A Vendor's Remedy in Summary Proceedings, *30 Mich. St. B. J. 24 (1951);* Leahy, Cancelation of Land Contracts, *32 N.D. L. Rev. 5 (1956);* Contracts: Termination of an Executory Land Sale Contract, *15 Okla. L. Rev. 456 (1962).*

(n2)Footnote 792. *See* Ballantine, Forfeiture for Breach of Contract, *5 Minn. L. Rev. 829 (1921).*

(n3)Footnote 793. *Gehl v. Milwaukee Produce Co., 81 N.W. 666 (Wis. 1900)* (market value used to determine vendor's damages); *See* Heoson, *Installment Land Contracts in Illinois--A Suggested Approach to Forfeiture, 7 DePaul L. Rev. 1 (1958).*

(n4)Footnote 794. *Feighner v. Sauter, 614 A.2d 1071 (N.J. Super. A.D. 1992)* (the usual grounds for rescission of contract to sell realty are for fraud, mutual mistake, undue influence, duress, lack of mental capacity, intoxication or inadequacy of consideration); *Dooley v. Stillson, 128 A. 217 (R.I. 1925); Pierson v. Dorff, 223 N.W. 579 (Wis. 1929); Gregor v. Olde, 176 N.W. 580 (Mich. 1920)* (Michigan has a statutory remedy for forfeiting the contract and possession-Mich. Comp. Laws § 630.12 (1948)--This statute is subject to strict construction.); *See* Van Zile, Land Contracts: Summary Proceedings for Forfeiture, *34 U. Det. L.J. 209 (1957);* Strausbaugh, Exorcising the Forfeiture Clause from Real Estate Conditional Sales Contracts, 4 Real Est. L.J. 71 (1976); *Papano v. Manning, 538 P.2d 1337 (Colo. Ct. App. 1975)* (After default there was a waiver of the right to terminate the contract.); *Smith v. Sturgeon, 342 N.E.2d 420 (Ill. App. Ct. 1976); contra Hansen v. Chapin, 232 N.W.2d 506 (Iowa 1975).*

(n5)Footnote 795. *Chartier v. Simon, 27 N.W.2d 751 (Wis. 1947); Mid-State Inv. Corp. v. O'Steen, 133 So. 2d 455 (Fla. Dist. Ct. App. 1961)* (In Florida a contract for sale of land is treated as a mortgage, and the seller on default must foreclose.); *See* Waterman, Foreclosure by Advertisement, *31 Mich. St. B. J. 7 (1952); H & L Land Co. v. Warner, 258 So. 2d 293 (Fla. Dist. Ct. App. 1972)* (The vendee who has paid part of the purchase price and gone into the possession is in the same position as one who has taken a deed and given a purchase-money mortgage so that summary eviction proceedings will not lie on default.).

(n6)Footnote 796. *See* Thomas, *The Inequality of Mutuality of Remedy, 2 Baylor L. Rev. 54 (1950);* Lathrop, *Land Contract Vendee Has Come of Age,* 32 Wis. B. Bull. 50 (1959).

(n7)Footnote 797. *Fargusson v. Talcott, 73 N.W. 207 (N.D. 1897).*

(n8)Footnote 798. *Degler v. Lake Holiday Ests., Inc., 406 F. Supp. 367 (W.D. Va. 1975).*

(n9)Footnote 799. *Martinez v. Daccarett, 865 S.W. 2d 161 (Tex. App. Corpus Christi 1993)* (Seller under contract for deed claimed that he was entitled to possession of property and that buyer who had defaulted had some form of lease, seller had right as "landlord" to bring detainer proceedings against "tenants" to determine right to possession, even though parties postured themselves as buyer and seller, provisions in contracts in contracts for deed stated that parties were related as landlord and tenant in event of default); *Carpenter v. U.S., 84 U.S. 489 (1873)* (The decided weight of authority and the better reasoning support the view that there cannot be an implied agreement for the occupancy of the land, in the face of the express contract that the vendee holds possession under his right to purchase.); *Griffith v. Collins, 42 S.E. 743 (Ga. 1902); Quertermous v. Hatfield, 14 S.W. 1096 (Ark. 1890); Brown v. Randolph, 62 S.W. 981 (Tex. Civ. App. 1901); Arnold v. Fraser, 117 P. 1064 (Mont. 1911)* (The right of the vendee to purchase continued after breach by him and until such time as the vendors saw fit to exercise the option given them by the contract to terminate it; so that it cannot be said that the contract to purchase was in full force and effect, and at the same

time there was in effect, also, an implied agreement that the vendee should hold as tenant. The action of the parties under this contract completely negatives the idea that either ever intended that their relationship should be that of landlord and tenant.).

(n10)Footnote 800. *Forest Preserve Real Est. Improvement Corp. v. Miller, 41 N.E.2d 526 (Ill. 1942).*

(n11)Footnote 801. *Oconto Co. v. Bacon, 195 N.W. 412 (Wis. 1923).*

(n12)Footnote 802. *Nelson v. McCue, 163 N.W. 724 (N.D. 1917)* (The statutory procedure for cancellation of land contracts does not exclude rescission in equity. The statutory method is merely cumulative.).

(n13)Footnote 803. *Ward v. Union Bond & Trust Co., 243 F.2d 476 (9th Cir. 1957); see* Hetland, California Land Contract, *48 Cal. L. Rev. 729 (1960),* tracing the present California abhorrence of forfeitures.

(n14)Footnote 804. *Rocky Mt. Gold Mines, Inc. v. Gold, Silver & Tungsten, Inc., 93 P.2d 973 (Colo. 1939)* (giving the vendee six months after default before allowing the vendor to reenter despite an express forfeiture clause). *See 22 Rocky Mt. L. Rev. 296 (1950); Morton v. Dickson, 14 S.W. 905 (Ky. 1890)* (denying the seller the right of ejectment and requiring him to bring specific performance or to foreclose his vendor's lien); *Maschinot v. Moore, 120 S.W.2d 750 (Ky. 1938)* (allowing ejectment where the down payment and monthly installments were only equivalent to rent); *Ellsworth Dobbs, Inc. v. Johnson, 236 A.2d 843 (N.J. 1967)* (Failure of purchaser to close title defeats right to compensation of broker.); *Varacalli v. Williams, 504 P.2d 790 (Wash. Ct. App. 1972)* (Vendee need not tender purchase price if vendor puts it beyond his power to perform.); Wilkinson, When Is Contract for Sale of Land Binding?, *117 New L.J. 855 (1967).*

(n15)Footnote 805. *Grier v. Brogdon, 505 S.E. 2d 512 (Ga. App. 1998)* (financing contingency in contract for sale of land created a condition precedent to performance of primary contractual obligations to buy and sell the property); *Creighton v. Milbauer, 594 N.Y.S. 2d 185* (N.Y.A.D. 1 Dept. 1993) (mortgage contingency clause is construed to create a condition precedent to contract of sale); *Beck v. Mason, 580 N.E.2d 290* (Ind. App. 3 Dist. 1991) (when real estate purchase agreement is conditioned on purchaser obtaining financing, purchaser has implied obligation to make reasonable and good faith effort to satisfy that condition); *Marlatt v. La Grange, 357 P.2d 927 (Colo. 1960); Fischer v. Kennedy, 138 A. 503 (Conn. 1927); Locke v. Bort, 103 N.W.2d 555 (Wis. 1960)* (finding that a statement as to when the vendee obtained financing created a condition precedent).

(n16)Footnote 806. *Dvorak v. Christ, 692 N.E.2d 920 (Ind. App. 1998)* (vendor did not breach purchase agreement when sold to another purchaser because initial prospective purchaser failed to satisfy condition precedent and condition subsequent); *Stearns v. Western, 232 N.E.2d 126 (Ill. App. Ct. 1967); Collings v. Scheen, 415 S.W.2d 589 (Ky. 1967).*

(n17)Footnote 807. *Preheim v. Ortman, 331 N.W.2d 62; Yett v. Houston Farms Dev. Co., 41 S.W.2d 305 (Tex. Civ. App. 1931)* (In Texas the vendor and yendee may rescind to close out a sub-vendee with notice of the vendor's claim.); *Bliss v. Carter, 182 N.W.2d 54 (Mich. App. 1970)* (Purchase contract contingent upon purchaser obtaining a rezoning was held for the sole benefit of the purchasers and not the seller and was subject to the purchasers' waiver.); *Beren Corp. v. Spader, 255 N.W.2d 247 (Neb. 1977)* (Where the vendees had given a mortgage on the contract, the contract could not be rescinded without the mortgagee's consent.).

(n18)Footnote 808. *Vakil v. Idnani, 748 S.W.2d 196 (Tenn. App. 1987)* (equitable remedy of rescission is not enforceable as matter of right, but is matter resting in sound discretion of trial court, the trial court should exercise discretion sparingly); *Easterling v. Ferris, 651 P.2d 677 (Ok. 1982)* (cancellation of deed is exertion of most extraordinary power of court of equity and power should not be exercised except in a clear and exceptional case); *Johnson v. Johnson, 166 S.W.2d 285 (Ky. 1942); DePuy v. Bodine, 509 S.W.2d 698 (Tex. Civ. App. 1974)* (dislike of recission of contract).

(n19)Footnote 809. *Coddon v. Youngkrantz, 562 N.W. 2d 39 (1997)* (only material breach or substantial failure in

performance gives vendor the right to terminate a contract for deed); *Rawcliffe v. Aguayo, 438 N.Y.S. 2d 697 (N.Y. Sup. 1981)* (material breach of real estate contract excuses the other party's performance and gives rise to a right of rescission); *Scanlan v. Gillan, 5 Cal. 182 (1855); Tanforan v. Tanforan, 159 P. 709 (Cal. 1916); Blake v. Osmundson, 159 N.W. 766 (Iowa 1916); Simmons v. Shafer, 160 P. 199 (Kan. 1916); Turner & Frazier v. Frazier, 163 S.W. 245 (Ky. 1914); Johnson v. Johnson, 166 S.W.2d 285 (Ky. 1942); Creach v. Home Owners' Loan Corp., 131 P.2d 108 (Okla. 1942); Bradley v. Little, 134 P.2d 126 (Okla. 1943); Gould v. McCormick, 134 P. 676 (Wash. 2d Dept. 1913).*

(n20)Footnote 810. *Rancourt v. Verba, 678 A.2d 886 (Vt. 1996)* (rescission was the only available remedy for mutual mistake of fact); *Murr v. Selag Corp., 747 P.2d 1302 (Id. App. 1987)* (rescission is proper where a mutual mistake of fact is material or fundamental to the creation of the contract); *Harley v. Magnolia Petroleum Co., 37 N.E.2d 760 (Ill. 1941).*

(n21)Footnote 811. *Hesselgrave v. Mott, 160 P.2d 521 (Wash. 1945);* J.H. Tigges, Annotation, *Circumstances justifying delay in rescinding land contract after learning of ground of rescission, 1 A.L.R.3d 542 (1965).*

(n22)Footnote 812. *Wapsie Power & Light Co. v. City of Tipton, 193 N.W. 643 (Iowa 1924); Lapadat v. Copeland, 197 N.W. 547 (Mich. 1924); see Klapka v. Shrauger, 281 N.W. 612 (Neb. 1938).*

(n23)Footnote 813. *Atlantic City Racing Assoc. v. Sonic Financial Corp., 90 F. Supp. 2d 497 (D.N.J. 2000)* (purchaser could terminate agreement when portion of property was subject of lease which could not be terminated for 2 years); *NA. P. Oil Co. v. Watson, 193 P. 133 (Cal. 1920); Weiner v. Roof, 74 P.2d 736 (Cal. 1937); Willhite v. Schurtz, 128 N.E. 551 (Ill. 1920); Norman v. Wengert, 187 N.W. 708 (Minn. 1922); Smeekens v. Bertrand, 311 N.E.2d 431 (Ind. Ct. App. 1973)* (Wrongful resumption of possession by a vendor constitutes a recission.).

(n24)Footnote 814. *Andreoli v. Hodge, 236 P. 333 (Cal. Dist. Ct. App. 1925).*

(n25)Footnote 815. *Goshein v. Chavenson, 158 N.E. 789 (Mass. 1927); see Kuhl v. Roberson, 289 S.W. 433 (Tex. Civ. App. 1926); Garner v. Brown, 171 S.E.2d 391 (Ga. Ct. App. 1969)* (A provision as to dependence upon financing must be definite.).

(n26)Footnote 816. *McCarrell v. Turbeville, 75 P.2d 361 (Ariz. 1938); Greer v. Sumney, 50 So. 2d 503 (La. Ct. App. 1951); Park v. McCoy, 208 P. 1098 (Wash. 1922); Portner v. Tanner, 216 P. 1069 (Wyo. 1923); Damazo v. Neal, 363 A.2d 252 (Md. Ct. Spec. App. 1976)* (A purchaser may rescind on failure of title.); *Williams v. Dunas, 352 N.E.2d 266 (Ill. App. Ct. 1976).*

(n27)Footnote 817. *Klingler v. Foster, 13 N.E.2d 906 (Ind. Ct. App. 1938); Cornely v. Campbell, 187 P. 1103 (Or. 1920); Kubicek v. Way, 102 So. 2d 173 (Fla. Dist. Ct. App. 1958)* (A clause giving the vendee the option to rescind if the vendor could not furnish marketable title within 120 days was for the benefit of the vendee.); Hutts v. Hancock, 1 D. L. R. 790 (1954) (A premature attempt of the settler to forfeit the contract enables the buyer to rescind); *Norman v. William Koch Motors, Inc., 342 S.W.2d 392 (Ky. 1961)* (Where vendor has conveyed to a third party, vendee must give vendor reasonable time to reacquire title.).

(n28)Footnote 818. *McFarlane v. Dixon, 187 N.W. 671 (Wis. 1922).*

(n29)Footnote 819. *Ogren v. Inner Harbor Land Co., 256 P. 607 (Cal. Dist. Ct. App. 1927); see Summers v. Midland Co., 209 N.W. 323 (Minn. 1926).*

(n30)Footnote 820. *Bates v. Simmons, 536 S.W.2d 292 (Ark. 1976).*

(n31)Footnote 821. *Wilson v. Corcoran, 237 P. 521 (Mont. 1925).*

(n32)Footnote 822. *Price v. Kittredge, 361 S.W.2d 721 (Tex. Civ. App. 1962).*

(n33)Footnote 823. *Thiel v. Perkins, 111 A. 666 (N.J. Ch. 1920); Rynhart v. Welch, 65 P.2d 1420 (Or. 1937); Haynes v. Dunstan, 104 S.W.2d 1025 (Mo. Ct. App. 1937)* (A vendor rescinding for failure to perform must return the status quo and may not retain the down payment unless he tenders the deed.).

(n34)Footnote 824. *Hironymous v. Hiatt, 199 P. 850 (Cal. Dist. Ct. App. 1921).*

(n35)Footnote 825. *De Bairos v. Barlin, 190 P. 188 (Cal. Dist. Ct. App. 1920).*

(n36)Footnote 826. *City of Cleveland v. Herron, 131 N.E. 489 (Ohio 1921).*

(n37)Footnote 827. *Scott v. Hatch, 280 Ill. App. 269 (1935).*

(n38)Footnote 828. *Hayward v. Passaic NA. Bank & Trust Co., 186 A. 728 (N.J. Ch. 1936); see* Wilkinson, *Enquiries Before Contract and Misrepresentation, 117 New L.J. 975 (1967); Davis v. Laurenzi, 397 A.2d 1 (Pa. 1978)* (Mere delay in payment of purchase price does not justify seller's rescission unless he is unduly harmed thereby.).

(n39)Footnote 829. *Douglas v. Douglas, 56 P.2d 362 (Okla. 1936).*

(n40)Footnote 830. *Waskey v. Thomas, 235 S.E.2d 346 (Va. 1977).*

(n41)Footnote 831. Birmingham Warehouse & Elevator Co. v. Elyton Land Co., *9 S. 235 (Ala. 1890);* Piedmont Land Improvement Co. v. Piedmont Foundry & Mach. Co., *11 S. 332 (Ala. 1892); Harrington v. Rutherford, 21 So. 283 (Fla. 1896); Farrar v. Bridges, 22 Tenn. 566 (1842); Moore v. Cross, 29 S.W. 1051 (Tex. 1895); Bd. of Supervisors of Douglas v. Walbridge, 38 Wis. 179 (1875); Forster v. Flack, 121 N.W. 890 (Wis. 1909); Mohave County v. Mohave-Kingman Ests., 586 P.2d 978 (Ariz. 1978)* (Forfeiture of contract will be enforced if the parties clearly so intended.); *Gruskin v. Fisher, 273 N.W.2d 893 (Mich. 1979)* (likening abrogation of contract to mortgage foreclosure).

(n42)Footnote 832. *Walden v. Skinner, 101 U.S. 577 (1879); Williams v. U.S., 138 U.S. 514 (1891); Railey v. Roberts, 109 S.W. 903 (Ky. 1908); Tryon v. Lyon, 118 N.Y.S. 5 (1909); Dietrich v. Hutchinson, 50 A. 810 (Vt. 1901).*

(n43)Footnote 833. *Stacey v. Walter, 28 So. 89 (Ala. 1899); Davis v. Moorefield, 40 Ga. 185 (1869); Gore v. Kramer, 7 N.E. 504 (Ill. 1886); Benton v. Morgan, 64 S.W. 119 (Mo. 1901); Slocum v. Leffler, 538 P.2d 906 (Or. 1975) (1975)* (Innocent misrepresentations may provide a sufficient basis for rescission of a land sales contract.).

(n44)Footnote 834. *Capps v. Clark, 195 N.W. 372 (Iowa 1923); Golly v. Grinnell College Found., 213 N.W. 252 (Iowa 1927); see Goodrich-Lockhart Co. v. Sears, 270 F. 971 (E.D. Ky. 1919).*

(n45)Footnote 835. *Engel v. Mahlen, 189 N.W. 422 (Minn. 1922).*

(n46)Footnote 836. *Klusack v. Ward, 507 S.E. 2d 1 (Ga. App. 1998)* (by accepting, after alleged fraud was discovered, revised deed containing description that was corrected to show that subject property contained 7.86 acres rather than 10 acres, as represented by vendors, purchasers affirmed contract and were precluded from bring action for fraud and rescission of sale); *Levin v. Garfinkle, 492 F. Supp. 781 (E.D. Pa. 1980)* (where plaintiff was aware of at least one of defendant's misrepresentations within month after purchasing property, plaintiff did not seek rescission at that time, whatever misrepresentations were made in negotiations were ratified by plaintiff); *Beck v. N.W. Fed. Sav. & Loan Assn., 288 N.W. 217 (Minn. 1939).*

(n47)Footnote 837. *In re New York Investors Mut. Group, Inc., 143 F. Supp. 51 (S.D.N.Y. 1956).*

(n48)Footnote 838. *Gray v. Gray, 671 A.2d 1166 (Pa.Super.App.1996)* (if seller waives purchaser's default in making payments under land contract, he may not thereafter take advantage of the default by seeking rescission of the contract on ground of late payment); *Bright v. Gass, 831 S.W. 2d 149 (Ark.App. 1992)* (forfeiture provisions, although valid and enforceable in contracts for sale of land, may be waived by acts and conduct of parties (such a waiver will be

found to exist when vendor habitually accepts delinquent payments)); *Wilson v. Witt, 952 P.2d 214 (Wyo. 1998)* (vendors' acceptance of purchaser's late payment that only partially cured defaults that were listed in default notice did waive their right to terminate agreement for warranty deed without further notice); *Salter v. Carter, 58 So. 2d 454 (Ala. 1952); Fleming v. Harris, 219 S.W. 33 (Ark. 1920); McCormick v. Daggett, 257 S.W. 358 (Ark. 1924); Snyder v. Bridewell, 267 S.W. 561 (Ark. 1924); Wilson v. Beazley, 199 P. 772 (Cal. 1921); Stone v. McCarty, 220 P. 690 (Cal. Dist. Ct. App. 1923)* (two months not unreasonable); *Fabian v. Alphonzo E. Bell Corp., 130 P.2d 779 (Cal. Dist. Ct. App. 1942); Young v. Leech, 240 P. 692 (Colo. 1925); Gillett v. Cheairs, 243 P. 1112 (Colo. 1926); Thomas N. Carlton Est., Inc. v. Keller, 52 So. 2d 131 (Fla. 1951); Colonial Hill Co. v. Greenoe, 134 S.E. 633 (Ga. Ct. App. 1926); Heinrich v. Norton, 219 Ill. App. 86 (1920); Resnick v. Varouxakis, 48 N.E.2d 555 (Ill. App. Ct. 1943); Spitler v. Perry Town Lot & Improvement Co., 179 N.W. 69 (Iowa 1920); Sharp v. Bremer, 185 N.W. 449 (Iowa 1921); Roszczewski v. Jozwiak, 196 N.W. 359 (Mich. 1923); Pesciarelli v. Trestain, 284 N.W. 656 (Mich. 1939); Ranck v. Springer, 53 N.W.2d 678 (Mich. 1952); Davis v. Godart, 180 N.W. 239 (Minn. 1920); Simon v. Williams, 105 So. 487 (Miss. 1925); Hudson v. Barnes, 278 S.W. 395 (Mo. 1925); Quigley v. Bartlett, 260 S.W. 494 (Mo. Ct. App. 1924); Edwards v. Muri, 237 P. 209 (Mont. 1925); Walker v. Burch, 178 N.W. 209 (Neb. 1920); Armijo v. Nuchols, 253 P.2d 317 (N.M. 1953); Bankers Fed. Sav. & Loan Assn. v. Rudd, 34 N.Y.S.2d 434 (1942); Creach v. Home Owners' Loan Corp., 131 P.2d 108 (Okla. 1942); Rayburn v. Norton, 243 P. 560 (Or. 1926); Riley v. Wheat, 187 N.W. 425 (S.D. 1922); Gustafson v. Am. Land Co., 234 S.W. 244 (Tex. Civ. App. 1921); Wilks v. McGovern-Place Oil Co., 207 N.W. 692 (Wis. 1926); Skendzel v. Marshall, 289 N.E.2d 768 (Ind. Ct. App. 1972), superseded, 301 N.E.2d 641 (Ind. 1973)* (No notice of rescission is required if one party has substantially breached the contract.).

(n49)Footnote 839. *Buckley v. Turner Heritage Homes, Inc., 248 Ga. App. 793 (Ga. App. 2001)* (purchaser's delay in notifying vendor of her intent to rescind the contract for sale of real estate until ten months after she discovered 30 problems with the home was unreasonable, and thus, she waived her claim for rescission); *Warner v. Denis, 933 P.2d 1372* (Hawai'i App. 1997) (while party may not alone rescind contract for sale of real property, he may by neglecting or refusing to perform it on his part place it in power of other party, who is not also derelict, to avoid the contract at his pleasure; right of rescission must be exercised within reasonable time after default, as equity will not permit party in whose favor right to rescind has arisen to delay unreasonably in exercising right and thus speculate on rise or fall in property's value); *Mott v. Lombard, 655 A.2d 362 (Me. 1995)* (rescission was no longer available as remedy to purchasers of property six and one-half years after sale of property, despite vendors' failure to remove lis pendens affecting property for over three years from date of sale); *Schwiegert v. Fowler, 784 P.2d 405 (Mont. 1990)* (to accomplish rescission of real estate contract, party must rescind promptly upon discovering facts that entitle him to rescind, and must restore or offer to restore property that was received under contract); *Benson v. Pyfer, 783 P.2d 923 (Mont. 1989)* (laches barred lot purchasers' claim against developers for rescission of contracts for deed; purchasers had continued making payments on contract for five years despite obvious indications that promised improvements had not been made and thus had not been reasonably diligent in asserting claim once right to rescind was apparent); Hirschman v. Hodges, O'Hara & Russell Co., *51 S. 550 (Fla. 1910); Provident Loan Trust Co. v. McIntosh, 75 P. 498 (Kan. 1904); Whitney v. Bissell, 146 P. 141 (Or. 1915).*

(n50)Footnote 840. *Old Colony Zinc & Smelting Co. v. Carrick, 153 F. 173 (8th Cir. 1907); Younis v. Hart, 138 P.2d 323 (Cal. Dist. Ct. App. 1943); Halm v. Wright, 168 P. 36 (Colo. 1917); Scott v. Desire, 175 Ill. App. 215 (1912); Crossland v. Evans, 102 S.W.2d 498 (Tex. Civ. App. 1937).*

(n51)Footnote 841. *Edwards v. Wilcoxen, 562 P.2d 1207 (Or. 1977)* (facts and circumstances in each case determine what constitutes prompt rescission of a contract for the purchase of a business); *Moresco v. Foppiano, 60 P.2d 430 (Cal. 1936); Dolecki v. Perry, 270 N.W. 184 (Mich. 1936).*

(n52)Footnote 842. *Egeter v. West and North Properties, 758 P.2d 361 (Or. App. 1988)* (a person seeking to rescind a contract must do so promptly after obtaining knowledge of the facts constituting the grounds for rescission); *Holcomb v. Zinke, 365 N.W. 2d 507 (N.D.1985)* (purchasers were entitled to have contract to purchase residential home rescinded, where vendors engaged in constructive fraud as to defective sewage, water, and heating systems for home, purchasers exercised reasonable diligence in rescinding promptly upon discovery of the fraud, and purchasers offered to

restore status quo, including reasonable value for use and occupancy of home); *Klee v. Chi. Trust Co., 1 N.E.2d 548 (Ill. App. Ct. 1936), rev'd, 6 N.E.2d 442 (Ill. 1936)* (complainant found guilty of laches).

(n53)Footnote 843. *Collins v. Slocum, 317 S.2d 672 (La. Ct. App. 1975).*

(n54)Footnote 844. *Holloman v. D.R. Horton, Inc., 524 S.E. 2d 790 (Ga. App. 1999)* (home purchasers waived their right to seek rescission of agreement with homebuilder; purchasers filed their complaint for breach of contract and fraud without seeking rescission and did not seek rescission for over two years after suit was filed); *Armstrong v. Irwin, 221 P. 222 (Ariz. 1923); Wilson v. Beazley, 199 P. 772 (Cal. 1921); Goldberg v. Krayeske, 128 A. 27 (Conn. 1925); Richards v. Jarvis, 238 P. 887 (Idaho 1925); Stand. Oil Co. v. Rice, 145 N.E. 768 (Ind. 1924); Spitler v. Perry Town Lot & Improvement Co., 179 N.W. 69 (Iowa 1920); Bogad v. Wachter, 283 S.W.2d 609 (Mo. 1955)* (A waiver was found on the part of the vendor where he had accepted late payments at an earlier time.); *Farmers Inv. Co. v. O'Brien, 189 N.W. 291 (Neb. 1922)* (by parole); *Claron v. Thommessen, 126 A. 308 (N.J. 1924); Trowbridge v. Oehmsen, 202 N.Y.S. 833 (1924); Feingold v. Scardaccione, 187 N.Y.S. 68 (1921); Johnston Farm Inv.Co. v. Huff, 204 N.W. 333 (N.D. 1925); Simmons v. Harris, 235 P. 508 (Okla. 1924); Leggett v. Crago, 213 N.W. 11 (S.D. 1927); Larson v. Thomas, 215 N.W. 927 (S.D. 1927); Maverick v. Perez, 228 S.W. 148* (Tex. Comm'n App. 1921); *Haddaway v. Burford, 239 S.W. 625 (Tex. Civ. App. 1922); Wilson v. Fay, 204 P. 800 (Wash. 1922).*

(n55)Footnote 845. *Paden v. Murray, 523 S.E. 2d 75 (Ga. App. 1999)* (evidence supported finding that home purchaser affirmed sales contract, and thus, his proper remedy against vendors for alleged defects was to sue for breach of contract, rather than for rescission based on fraudulent concealment; after moving into house, purchaser completely remodeled two sections of roof, changing its pitch, and he also repainted number of rooms and made other additions and alterations, including installation of termite monitoring system and replacement of front door); *McLeskey v. Ocean Park Investors, Ltd., 405 S.E.2d 846 (Va. 1991)* (if party, after discovering facts that would justify rescission of real estate contract, continues to treat contract as subsisting obligation, leading other party to believe that it is still in effect, right to rescind is waived); *Wolken v. Wade, 406 N.W. 2d 720 (S.D. 1987)* (purchaser may waive right to rescind by delay or conduct inconsistent with that right); *Uren v. Troup, 242 P.2d 895 (Cal. Dist. Ct. App. 1952)* (Acceptance by vendors of further payments after default was waived.); *Goldberg v. Krayeske, 128 A. 27 (Conn. 1925); Joiner v. S. Land Sales Corp., 124 S.E. 518 (Ga. 1924)* (retention of possession without complaint); *Hill v. Rogers, 99 N.E.2d 270 (Ind. Ct. App. 1951); Sylvester v. Lynde, 215 P. 305 (Kan. 1923); Roszczewski v. Jozwiak, 196 N.W. 359 (Mich. 1923); Clark v. Kirby, 153 N.E. 79 (N.Y. 1926); Burke Aviation Corp. v. Alton Jennings, Co., 377 P.2d 578 (Okla. 1962)* (One accepting the benefits of a real estate contract is estopped from denying its validity for failure to attach corporate seal.).

(n56)Footnote 846. *Chin v. Zoet, 418 N.W. 2d 191 (Minn. App.1988)* (to establish that purchasers waived their right to rescind contract for failure to provide marketable title, it must be shown that purchasers had full knowledge of facts, full knowledge of their legal rights, and intended to relinquish those rights); *Isom v. Johnson, 87 So. 543 (Ala. 1920); McMillen v. Betz, 224 Ill. App. 117 (1922); Couch v. Thompson, 129 S.E. 794 (Ga. Ct. App. 1925)* (no waiver of fraud by agreement to accept damages caused by fraud).

(n57)Footnote 847. *Bharodia v. Pledger, 11 S.W. 3d 540 (Ark. 2000)* (purchasers never abandoned right to terminate contract for sale of home under contract provision requiring vendors to provide disclosure statement on condition of property within three days of accepting offer, and thus, purchasers' failure to state in termination notice that non-receipt of disclosure statement was reason for terminating contract did not amount to a knowing and intentional "waiver" of that contractual right, where purchasers consistently argued breach of disclosure requirement as reason for termination, even before litigation was initiated); *England v. Nettesheim, 634 N.Y.S. 2d 797* (N.Y.A.D. 3 Dept. 1995) (delay by purchaser in terminating contract for purchase of home based on failure of appraisal to support purchase price, as required by appraisal contingency in addendum to contract, did not give rise to waiver barring purchaser from terminating contract where purchaser terminated contract shortly after becoming aware of contents of report, purchaser's conduct in attempting to resolve electrical and termite problems did not manifest intention to waive protection of clause or mislead vendor into thinking clause would not be enforced, and appraisal clause contained no time limitation); *Humphrey v. Camelot Retirement Community, 893 S.W. 2d 55* (Tex.App.-Corpus Christi 1994) (evidence supported trial

court's determination that purchaser did not intentionally relinquish or act inconsistently with her right to claim rescission of contract, and thus supported determination that vendor could not rely on defenses of waiver, promissory estoppel, or ratification to prevent rescission of contract); *Rogers v. Newton, 340 So. 2d 768 (Ala. 1976)* (Accepting payments after breach of contract does not waive right to rescind for later breaches.); *Craig v. White, 202 P. 648 (Cal. 1921); Stockburger v. Brooker, 127 S.E. 663 (Ga. Ct. App. 1925); Spitler v. Perry Town Lot & Improvement Co., 179 N.W. 69 (Iowa 1920); Keifer v. Dreier, 205 N.W. 472 (Iowa 1925); Cavell v. Trichell, 100 So. 249 (La. 1924).*

(n58)Footnote 848. *Smith v. McLeod Distributing, Inc. 744 N.E.2d 459 (Ind. App. 2000)* (ratification applies when a party to a contract, with knowledge of facts entitling that party to rescind the contract, treats the contract as a continuing and valid obligation, thus leading the other party to believe that the contract is still in effect); *Clear v. Missouri Coordinating Bd. for Higher Educ., 23 S.W. 3d 896 (Mo.App.E.Dist. 2000)* (an individual ratifies an agreement if he or she either expressly or by implication confirms or adopts the agreement with knowledge of its contents); *Stable Energy, L.P v. Newberry, 999 S.W. 2d 538 (Tex. App. Austin 1999)* (ratification of a contract occurs when a party recognizes the validity of the contract by acting under the contract, performing under the contract, or affirmatively acknowledging the contract); *Le Vine v. Whitehouse, 109 P. 2 (Utah 1910).*

(n59)Footnote 849. *Dean v. Garland, 779 A. 2d 911 (D.C. 2001)* (purchasers of home could not seek rescission of contract of sale as remedy for vendor's alleged breach of contract in failing to correct wet basement problem before settlement, even if vendor and real estate agents had fraudulently misrepresented that the problem had been corrected, where purchasers treated the property as their own and affirmed the contract through continued performance; purchasers had been aware that at least three agreed-upon repairs had not been completed before settlement, but they nevertheless proceeded with settlement and accepted the property with these problems, in exchange for payment from vendors and agents, and did not seek rescission for a year and a half after they had moved in); *McLeskey v. Ocean Park Investors, Ltd., 405 S.E. 2d 846 (Va. 1991)* (if party, after discovering facts that would justify rescission of real estate contract, continues to treat contract as subsisting obligation, leading other party to believe that it is still in effect, right to rescind is waived); *First Citizens Bank and Trust Co. of South Carolina v. Strable, 355 S.E. 2d 278 (S.C.App. 1987)* (purchaser of home was not entitled to rescission for failure of consideration where, after discovering latent defects, he acknowledged his debt to the seller and reaffirmed his intention to pay, renegotiated terms of payment, continued to live in the house, and sold timber from the property); *Kerns v. Bank of Manitou, 242 P.2d 817 (Colo. 1952); Deutsmann v. Kuntze, 125 N.W. 1007 (Iowa 1910); Ryan v. Brady, 366 A.2d 745 (Md. Ct. Spec. App. 1976)* (Where the purchaser has the right to rescind, he must exercise it promptly within a reasonable time after the discovery of the facts upon which the right is based.); *Dennis v. Jones, 14 A. 913 (N.J. 1888); Kent v. Church of St. Michael, 32 N.E. 704 (N.Y. 1892).*

(n60)Footnote 850. *Cooper v. Hillsboro Garden Tracts, 152 P. 488 (Or. 1915).*

(n61)Footnote 851. *Shappirio v. Goldberg, 192 U.S. 232 (1904); Cooper v. Hillsboro Garden Tracts, 152 P. 488 (Or. 1915).*

(n62)Footnote 852. *Engelking v. Field, 522 P.2d 439 (Or. 1974)* (where purchasers knew, as early as January 1971, the general condition of apartment building they had purchased, in March they knew specifically what was wrong with building and that it would have to be vacated if they did not bring it up to standards required by building code, but they waited until February 1972 to bring rescission suit and, before bringing action they had sold the property to another from whom they had accepted reconveyance, purchasers' conduct subsequent to sale constituted waiver of their right to rescind); *McMichael v. Webster, 41 A. 714 (N.J. 1898).*

(n63)Footnote 853. *Moch v. Moch, 562 N.W. 2d 558 (N.D.1997)* (since son made reduced payments of varying amounts on contracts for deed and father did not declare contracts to be in default and took no action to enforce his contractual remedies in event of default, trial court could reasonably conclude that father waived strict compliance with contracts); *United States v. Winterburn, 749 F.2d 1283 (C.A.9.Wash.1984)* (where vendor has granted defaulting purchaser indulgences by permitting payments after they were due without protest, under Washington law, strict performance is waived and forfeiture cannot be declared without notice of intention to do so and reasonable time for

vendee to perform); *Gorbett v. Estelle, 438 N.E. 2d 766* (Ind. App. 1 Dist. 1982) (where a party by his own indulgence has accepted late payments, he has waived right to terminate a contract which provides that time of payment is of the essence); *Martin v. Gulf Coast Orchard & Products Co., 279 F. 8 (5th Cir. 1922); Wishered v. Noonen, 205 P. 530 (Colo. 1922); Waller v. Lieberman, 183 N.W. 235 (Mich. 1921); Bodin v. Wilcox, 224 P. 558 (Wash. 1924); Larabee v. Gilbert, 190 N.W. 932 (Iowa 1923)* (request for extension not waiver of fraud).

(n64)Footnote 854. *Johnson v. Brado, 783 P.2d 92 (Wash. App. 1989)* (purchasers, by moving into house, waived right to rescind contract, but did not waive their right to enforce contract and sue broker and agent for damages arising from misrepresentation); *In re Fahnders, 66 B.R. 94 (Bkrtcy.C.D.Ill.1986)* (purchaser's continued possession of farm, albeit as self-proclaimed tenant, following breach of contract by vendors, effectively waived purchaser's right to rescind contract); *Fontaine v. Lyng, 202 P. 1112 (Mont. 1921); Randolph v. Gen. Investors Co., 124 A. 765 (N.J. Ch. 1924), rev'd, 128 A. 156 (N.J. 1925); James v. Ward, 190 P. 1105 (Or. 1920); McKellar Real Est. & Inv. Co. v. Paxton, 218 P. 128 (Utah 1923); Logwood v. Holland, 108 S.E. 571 (Va. 1921); Dieterich v. Rice, 215 P. 65 (Wash. 1923).*

(n65)Footnote 855. *Grams v. Novinger, 231 S.W. 265 (Mo. Ct. App. 1921); Black v. Emory, 275 S.W. 48 (Mo. Ct. App. 1925).*

(n66)Footnote 856. *Woodward v. Investors-Ryan, 600 So. 2d 855 (La.App. 3 Cir.1992)* (vendors lost remedy of dissolution, after they were sued on debts assumed by purchasers in assumption deeds, by entering into release and compromise agreement waiving all claims except for those specifically reserved in agreement); *Gamet v. Allender, 210 N.W. 49 (S.D. 1926).*

(n67)Footnote 857. *First Citizens Bank and Trust Co. of South Carolina v. Strable, 355 S.E. 2d 278 (S.C.App. 1987)* (Purchaser of home was not entitled to rescission for failure of consideration where, after discovering latent defects, he acknowledged his debt to the seller and reaffirmed his intention to pay, renegotiated terms of payment, continued to live in the house, and sold timber from the property); *Jensen v. Evans, 202 N.W. 969 (Mich. 1925); Schenck v. St. Line Tel. Co., 144 N.E. 592 (N.Y. 1924); Callaway v. Chrestman, 269 S.W. 908 (Tex. Civ. App. 1925); see McCaw v. O'Malley, 249 S.W. 41 (Mo. 1923); but see Kefuss v. Whitley, 189 N.W. 76 (Mich. 1922).*

(n68)Footnote 858. *Brown v. Cal. & W. Land Co., 177 N.W. 774 (Minn. 1920).*

(n69)Footnote 859. *Stanwood v. Welch, 922 F. Supp. 635 (D.D.C. 1995)* (actual manual tender of valid deed by vendor is not required where it would be useless ceremony because purchaser was not prepared to proceed to sale); *Kottis v. Cerilli, 612 A.2d 661* (R.I.,1992) (party need not perform its part of bargain before suing other parties for breach, but rather is only required to tender performance by providing notice to other party that it is ready to perform); *Benton v. Davison, 212 N.W. 500 (S.D. 1927); Lobdell v. Miller, 250 P.2d 357 (Cal. Dist. Ct. App. 1952)* (But to be so debarred from rescinding on grounds of fraud, the notice to the prospective purchasers must have been such as to create a duty to make inquiry before proceeding with the purchase.); Church of God in *Christ, Inc. v. Congregation Kehillath Jacob, 353 N.E.2d 669 (Mass. 1976)* (Vendor must give notice of rescission.).

(n70)Footnote 860. *McCall v. McCall, 123 N.W. 550 (Mich. 1909); Ott v. Pace, 115 P. 37 (Mont. 1911); Whitney v. Bissell, 146 P. 141 (Or. 1915); In re Mulholland's Estate, 73 A. 932 (Pa. 1909).*

(n71)Footnote 861. *Renth v. Krausz, 579 N.E. 2d 11* (Ill.App. 5 Dist. 1991) (laches barred action by purchasers to rescind real estate installment contract, brought on ground that vendor failed to attach certificate of compliance with building code, where purchasers delayed filing suit six years from time they should have known of availability of action and vendor was substantially prejudiced when value of property depreciated by 42% during delay); *Grymes v. Sanders, 98 U.S. 55 (1876); Truesdale v. Sidle, 67 N.W. 1004 (Minn. 1896); Sipola v. Winship, 66 A. 962 (N.H. 1907); Elsasser v. Wilcox, 596 P.2d 974 (Or. 1979)* (Rescission denied where vendor had not given vendee notice and an opportunity to cure breach.).

See contra

Anderson v. Doms, 984 P.2d 392 (Utah App. 1999) (loss in value of property did not by itself show that vendors were prejudiced by purchaser's delay in bringing rescission action, so as to raise laches bar to rescission claim); *Derouin v. Granite State Realty, Inc., 459 A.2d 231 (N.H.1983)* (rescission was not available remedy, where purchasers of property had undertaken substantial improvements to property so that property could not be returned to sellers in substantially same condition in which they received it).

(n72)Footnote 862. *Stone v. McCarty, 220 P. 690 (Cal. Dist. Ct. App. 1923).*

(n73)Footnote 863. *Barker v. Ness, 587 N.W. 2d 183 (N.D.1998)* (for purposes of equitable recission of real estate purchase contract, equity envisions a restoration of both parties to their pre-contractual positions); *Putman Const. & Realty Co. Inc., v. Byrd, 632 So. 2d 961 (Ala.1992)* (party seeking rescission of real estate contract must first restore consideration received, and land then becomes vendor's as though no contract had existed and money in hands of seller becomes property of purchaser); *Metcalfe v. Talarski, 567 A.2d 1148 (Conn. 1989)* (if vendee seeks equitable remedy of rescission, vendee must, in accordance with mandates of that remedy, restore to vendor any benefit that vendor has bestowed upon him or her); *Holcomb v. Zinke, 365 N.W. 2d 507 (N.D. 1985)* (to be effective, offer to restore status quo, as requirement for rescission, should include offer to remit any rent collected or reasonable value of using premises during period of occupancy and cannot be conditioned upon payment of damages); Or. *Mortg. Co., v. Renner, 96 F.2d 429 (9th Cir. 1938); Kent v. Clark, 128 P.2d 868 (Cal. 1942).*

(n74)Footnote 864. *Isaacs v. Bokor, 566 S.W. 2d 532 (Tenn.1978)* (it is usually required in action for rescission and restitution at law, that vendee, make offer of restitution prior to filing suit); *Strickland v. Strickland, 90 So. 345 (Ala. 1921)* (an offer in bill sufficient); *Rowland v. Hester, 90 So. 910 (Ala. 1921); Lost Creek Coal & Mineral Land Co. v. Hendon, 110 So. 308 (Ala. 1926); Conlin v. Osborn, 120 P. 755 (Cal. 1911); Couch v. Crane, 82 S.E. 459 (Ga. 1914); Williams v. Fouche, 129 S.E. 49 (Ga. 1925); Jones v. Clemons, 133 S.E. 744 (Ga. Ct. App. 1926); Chamberlin v. Ivens, 210 P. 580 (Idaho 1922); Bell v. Anderson, 127 N.E. 87 (Ill. 1920); Penkala v. Tomczyk, 148 N.E. 64 (Ill. 1925); Rickman v. Houck, 184 N.W. 657 (Iowa 1921); Messenbrink v. Bliesman, 215 N.W. 232 (Iowa 1927); Nicol v. Jacoby, 103 So. 33 (La. 1925); Getchell v. Kirkby, 92 A. 1007 (Me. 1915); Frye Pulpwood Co. v. Ray, 95 A. 1039 (Me. 1915); see Mettetal v. Hall, 284 N.W. 698 (Mich. 1939); Hirschman v. Healy, 202 N.W. 734 (Minn. 1925); Snyder v. Betker, 140 S.W. 323 (Mo. Ct. App. 1911); Quigley v. Bartlett, 260 S.W. 494 (Mo. Ct. App. 1924); Hicks v. Rupp, 140 P. 97 (Mont. 1914); Watkins v. Harrison, 194 N.W. 435 (Neb. 1923); Cox v. Boyden, 69 S.E. 504 (N.C. 1910); Moline Plow Co. v. Bostwick, 109 N.W. 923 (N.D. 1906); Young v. U.S. Hous. Corp., 86 Pa. Super. 341 (1925); Sartain v. Dixie Coal & Iron Co., 266 S.W. 313 (Tenn. 1924); Whitaker v. Willis, 146 S.W. 1004 (Tex. Civ. App. 1912); Obrecht v. Nielson Land & Water Co., 140 P. 117 (Utah 1914); Carpenter v. Mason, 193 N.W. 973 (Wis. 1923).*

(n75)Footnote 865. *Barker v. Ness, 587 N.W. 2d 183* (N.D., 1998) (in action for equitable recision of a home purchase contract, in addition to purchaser's remitting the reasonable use value gained from the transaction, such as rental income, vendors would also have to remit to purchaser the value of the use of the money paid to them for the purchase of the house, absent some countervailing equitable factor); *Woodlawn Theatre Co. v. Continental Sec. Corp., 185 So. 763 (Ala. 1939).*

(n76)Footnote 866. *Fitchner v. Walling, 279 N.W. 417 (Iowa 1938); Powers v. House, 88 A.2d 555 (Md. 1952); Crim v. Watson, 82 P.2d 172 (Wash. 1938); In re Estate of Berry, 82 P.2d 549 (Wash. 1938); Lawrence v. Demos, 244 P.2d 793 (Wyo. 1952).*

(n77)Footnote 867. *Barrows v. Harter, 130 P. 1050 (Cal. 1913); Couch v. Crane, 82 S.E. 459 (Ga. 1914); Frederick v. Davis, 110 N.W. 611 (Iowa 1907); Durrett v. Simpson's Representatives, 19 Ky. 517 (1826); Wright v. Dickinson, 35 N.W. 164 (Mich. 1887).*

(n78)Footnote 868. *Barrington Management Co., Inc. v. Paul E. Draper Family Ltd. Partnership, 695 N.E. 2d 135*

(Ind.App. 1998) (although the vendor could rescind a commercial real estate purchase agreement after the purchaser failed to meet conditions precedent and subsequent regarding the procurement of land-use and drainage approvals, it had to return the purchaser's $1,000 earnest money deposit in order to reestablish the status quo ante); *Joplin CMI, Inc. v. Spike's Tool and Die, Inc., 719 S.W. 2d 930 (Mo.App. S.D. 1986)* (when option to purchase real estate was rescinded by vendor, vendee was entitled to restitution for amount already paid to vendor); *United States v. Maniscalco, 523 F. Supp. 1338 (E.D.La. 1981)* (a condition precedent to dissolution of a sale for nonpayment of purchase price is obligation of vendor to return to purchaser as much of purchase price as may have been paid prior to dissolution); *Miller v. Louisville & Nashville R.R. Co., 4 So. 842 (Ala. 1887); Buckner v. Pacific & G.E. Ry. Co., 13 S.W. 332 (Ark. 1890); Hick v. Thomas, 27 P. 208 (Cal. 1891), modified, 27 P. 376 (Cal. 1891); Bowden v. Achor, 22 S.E. 254 (Ga. 1894); McParland v. Larkin, 39 N.E. 609 (Ill. 1895); Thrash v. Starbuck, 44 N.E. 543 (Ind. 1896); Jackson v. Lynn, 62 N.W. 704 (Iowa 1895); Kan. ex rel. Lewis v. Williams, 18 P. 727 (Kan. 1888); Anderson v. McDaniel, 22 S.W. 647 (Ky. 1893); Bryant v. Stothart, 15 So. 76 (La. 1894); Chase v. Hinckley, 74 Me. 181 (1882); Thomas v. Beals, 27 N.E. 1004 (Mass. 1891); Place v. Brown, 37 Mich. 575 (1877); Hanson v. Field, 41 Miss. 712 (1868); Blount v. Spratt, 20 S.W. 967 (Mo. 1892); Waite v. Vinson, 36 P. 828 (Mont. 1894); Eaton v. Eaton, 37 N.J. L. 108 (N.J. 1874); Riggan v. Green, 80 N.C. 213 (1879); Coddington v. Wells, 59 Tex. 49 (1883); O'Dell v. Burnham, 21 N.W. 635 (Wis. 1884).*

(n79)Footnote 869. *Cahow v. Hughes, 169 So. 801 (La. Ct. App. 1936).*

(n80)Footnote 870. *Rynhart v. Welch, 65 P.2d 1420 (Or. 1937).*

(n81)Footnote 871. *Keller v. Henderson, 545 S.E.2d 705 (Ga. App. 2001)* (to rescind a contract on the basis of fraud, one must return or offer to return the subject matter of the contract to place the vendor in the same situation in which he was before the sale); *Renner v. Kehl, 722 P.2d 262 (Ariz. 1986)* (rescinding purchasers of real estate were obliged to return land to sellers in exchange for purchasers' down payment, and in addition, to pay sellers fair rental value of land for duration of their occupancy); *Mills v. Richmond Co., 219 P. 465 (Cal. Dist. Ct. App. 1923); Williams v. Ryan, 130 P.2d 467 (Cal. Dist. Ct. App. 1942); Cohron v. Woodland Hills Co., 139 S.E. 56 (Ga. 1927); Burgess v. Murphey, 112 S.E. 165 (Ga. Ct. App. 1922); Culbertson v. Smith, 187 N.W. 38 (Iowa 1922); Gripp v. Scherer, 212 N.W. 113 (Iowa 1927); Dickerson v. Morse, 212 N.W. 933 (Iowa 1927)* (return of property sufficient, though depreciated in value); *Masters v. Van Wart, 134 A. 539 (Me. 1926); Zintz v. Golub, 156 N.E. 903 (Mass. 1927); Witte v. Hobolth, 195 N.W. 82 (Mich. 1923); Lackovic v. Campbell, 195 N.W. 798 (Mich. 1923)* (written release necessary); *see Va. Trust Co. v. Catoe, 99 So. 261 (Miss. 1924); Smith v. Christe, 201 P. 1011 (Mont. 1921); Schlake v. Healey, 187 N.W. 427 (Neb. 1922); Stuart v. Gough, 237 P. 847 (Okla. 1925); Wurfel v. Bockler, 210 P. 213 (Or. 1922); Young v. U.S. Hous. Corp., 86 Pa. Super. 341 (1925); Saunders v. Erickson, 189 N.W. 116 (S.D. 1922); Owens v. Neymeyer, 221 P. 160 (Utah 1923); French v. C.D. & E. Inv. Co., 195 P. 521 (Wash. 1921).*

(n82)Footnote 872. *Aliabadi v. McCar Dev. Corp., 249 Ga. App. 309 (Ga. App.2001)* (homebuyers were not entitled to rescission of contract, although they did not receive home free and clear of all encumbrances and homebuyer claimed that he had demanded rescission before tornado hit, as improvements homebuyers made while repairing the home were inconsistent with intention to repudiate the contract; homebuyers added French doors, changed damaged kitchen counters, added kitchen cabinet, replaced damaged kitchen fluorescent lights with can lights, replaced damaged carpeting with a better grade of carpeting, and in some places replaced pine under carpet with exposed hardwood oak); *Perry v. Meyer, 193 N.W. 717 (Neb. 1923); see Stockhausen v. Oehler, 201 N.W. 823 (Wis. 1925); Abrams v. Fin. Serv. Co., 374 P.2d 309 (Utah 1962)* (Purchasers in possession are required to pay rent when contract is rescinded for vendor's inability to perform.).

(n83)Footnote 873. *Putman Const. & Realty Co., Inc. v. Byrd, 632 So. 2d 961 (Ala.1992)* (party seeking rescission of real estate contract must first restore consideration received, and land then becomes vendor's as though no contract had existed and money in hands of seller becomes property of purchaser); *Metcalfe v. Talarski, 567 A.2d 1148* (Conn.,1989) (If vendee seeks equitable remedy of rescission, vendee must, in accordance with mandates of that remedy, restore to vendor any benefit that vendor has bestowed upon him or her); *Orendorff v. Tallman, 7 So. 821 (Ala. 1890); Johnson v. Walker, 25 Ark. 196 (1868); Buena Vista Fruit & Vineyard Co. v. Tuohy, 40 P. 386 (Cal. 1895);*

Godding v. Decker, 32 P. 832 (Colo. 1893); Ashmead v. Colby, 26 Conn. 287 (1857); Coffee v. Newsom, 2 Ga. 442 (1847); Strong v. Lord, 107 Ill. 25 (1883); Westhafer v. Patterson, 22 N.E. 414 (Ind. 1889); Mitchell v. Moore, 24 Iowa 394 (1868); Jeffers v. Forbes, 28 Kan. 174 (1882); Abel v. Cave, 42 Ky. 159 (1842); Formento v. Robert, 27 La. Ann. 489 (1875); Jandorf v. Patterson, 51 N.W. 352 (Mich. 1892); Shipp v. Wheeless, 33 Miss. 646 (1857); Bell v. Campbell, 25 S.W. 359 (Mo. 1894); Henninger v. Heald, 26 A. 449 (N.J. Ch. 1893); Waters v. Lemmon, 4 Ohio 229 (1829); Adams v. Reed, 40 P. 720 (Utah 1895); Nalle v. Va. Midland R.R. Co., 14 S.E. 759 (Va. 1892); Worthington v. Collins' Adminstr., 19 S.E. 527 (W. Va. 1894).

(n84)Footnote 874. *Norton v. Bohart, 16 S.W. 598 (Mo. 1891); Davey v. Brownson, 478 P.2d 258 (Wash. Ct. App. 1970)* (rescission where mutual mistake if parties would not have contracted had they known the true facts--termites).

(n85)Footnote 875. *Smith v. Highland Park St. Bank, 15 N.W.2d 142 (Mich. 1944); Brown v. Norman, 4 So. 293 (Miss. 1888); Paquin v. Milliken, 63 S.W. 417 (Mo. 1901); Metro. Elevated Ry. Co. v. Manhattan Ry. Co., 14 Abb. N. Cas. 103 (N.Y. Sup. 1884); Coffee v. Ruffin, 44 Tenn. 487 (1867).*

(n86)Footnote 876. Craft's Ocean Court, *Inc. v. Coast House, Ltd., 338 S.E.2d 277 (Ga. 1986)* (equity will not decree cancellation of instruments where anything of value has been received until repayment is either made or tendered, or defendant has stated that should tender be made, it would be refused); *Bennett v. Owen, 13 Ark. 177 (1852); Stringer v. Keokuk, 13 N.W. 308 (Iowa 1882).*

(n87)Footnote 877. *Brusseau v. Electronic Data Systems Corp., 694 F. Supp. 331(E.D.Mich. 1988)* (tender of consideration received in exchange for release within reasonable amount of time after any fraud is discovered is generally prerequisite to commencement of suit covered by subject matter of release; however, such tender is not required when release is challenged on ground of fraud in the execution **);** *Knaebel v. Heiner, 663 P.2d 551 (Alaska 1983)* (Restoration or tender of benefits received under the transaction being rescinded before suit is a necessary element in legal rescission but is fully superfluous as a prerequisite to commencement of the suit in equity for rescission or cancellation; equitable rescission differs from rescission at law in that it is not conditioned upon restoration of benefits nor does it require an offer of restoration); *Masters v. Van Wart, 134 A. 539 (Me. 1926); Alexander v. Walker, 239 S.W. 309 (Tex. Civ. App. 1922); El Jardin Immgr. Co. v. Karlan, 245 S.W. 1043 (Tex. Civ. App. 1922); Thompson v. Huston, 135 P.2d 834 (Wash. 1943).*

(n88)Footnote 878. *Young v. Brookshire Village Properties, 655 N.E.2d 1329* (Ohio App. 12 Dist. 1995) (under express terms of real estate contract, purchaser was entitled to return of his earnest money after termination of real estate contract); *Nebco & Associates v. U.S., 23 Cl.Ct. 635 (Cl.Ct. 1991)* (even where court finds mutual rescission of contract for sale of real estate, entitlement to return of down payment depends on whether parties agreed that down payment would be returned); *Naimoli v. Massa, 366 N.Y.S.2d 573 (N.Y.City Ct. 1975)* (purchasers, who along with vendors agreed to a mutual rescission of land contract, were entitled to restitution where denial of restitution would work an unjust enrichment to the vendors); *Chandler v. Wilder, 110 So. 306 (Ala. 1926); Hunt v. Inner Harbor Land Co., 214 P. 998 (Cal. Dist. Ct. App. 1923); Pinkerton v. Morton, 218 P. 770 (Cal. Dist. Ct. App. 1923); Aderholt v. Wood, 226 P. 950 (Cal. Dist. Ct. App. 1924); Holverson v. Evans, 224 P. 1067 (Idaho 1923); Fowler v. Dieleman, 185 N.W. 79 (Iowa 1921); McLain v. Smith, 202 N.W. 239 (Iowa 1925)* (return less value of use of property); *Facendini v. Hillman, 298 S.W. 1073 (Mo. Ct. App. 1927); Epplett v. Empire Inv. Co., 194 P. 461 (Or. 1921); Gillam v. Kahl, 256 P. 101 (Idaho 1927)* (no presumption of promise to restore payments).

(n89)Footnote 879. *Goodrich-Lockhart Co. v. Sears, 270 F. 971 (E.D. Ky. 1919);* Hunt v. Jones, *84 S. 718 (Ala. 1919); Stirnus v. Adams, 195 P. 955 (Cal. Dist. Ct. App. 1920); Brown Loan & Abstract Co. v. Willis, 102 S.E. 814 (Ga. 1920); McMillan v. Benfield, 126 S.E. 246 (Ga. 1924); Adams v. Blalock, 136 S.E. 146 (Ga. 1926); Peterson v. Weberg, 203 N.W. 209 (Minn. 1925); First Methodist Church of Poplar Bluff v. Berryman, 261 S.W. 73 (Mo. 1924); Minnehoma Oil Co. v. Florence, 217 P. 443 (Okla. 1923); Maverick v. Perez, 228 S.W. 148* (Tex. Comm'n App. 1921); *McDonald v. Simons, 280 S.W. 571* (Tex. Comm'n App. 1926); *Peterson v. Wagner, 198 P. 25 (Cal. Dist. Ct. App. 1921)* (No return necessary where damages are greater than the amount received.).

(n90)Footnote 880. *Stephens v. Bond, 115 S.E. 913 (Ga. 1923); Dooley v. Stillson, 128 A. 217 (R.I. 1925); Leis v. Van Dyke, 193 N.W. 975 (Wis. 1923).*

(n91)Footnote 881. *Hollingsworth v. Ruckman, 232 P. 180 (Mont. 1924); C.A. Finch Lumber Co. v. Weishaar, 215 N.W. 155 (N.D. 1927); Simmons v. Harris, 235 P. 508 (Okla. 1924).*

(n92)Footnote 882. *Norwest Financial Leasing, Inc. v. Morgan Whitney, Inc., 787 F. Supp. 895 (D.Minn. 1992)* (assignee of promissory note, mortgage, and rent and lease assignments lacked standing to rescind real estate sales agreement, as there was no privity of contract between assignee and prior seller of property subject to mortgage, and assignee was not intended third-party beneficiary of purchase agreement); *Weylin Hotel Corp. v. Ritter, 114 N.Y.S.2d 158 (1952).*

(n93)Footnote 883. *Beekhuis v. Palen, 245 P. 795 (Cal. Dist. Ct. App. 1926); Mears v. Holmes, 128 A. 9 (N.H. 1924); Owens v. Neymeyer, 221 P. 160 (Utah 1923).*

(n94)Footnote 884. *Niernberg v. Feld, 283 P.2d 640 (Colo. 1955)* (It seems to be the better-reasoned rule that an executory contract involving title to, or an interest in, lands may be rescinded by an agreement resting in parol. The statute of frauds concerns the making of contracts only, and does not apply to the matter of their revocation.); *Farthing v. Neely, 129 So. 2d 224 (La. Ct. App. 1961)* (oral rescission permitted); *contra Brody v. Rhoads, 214 N.Y.S.2d 10 (1961).*

(n95)Footnote 885. *Lenhardt v. Lenhardt, 618 N.W.2d 218 (Wis.App. 2000)* (under the statute of frauds, a contract to convey land must be in writing; however, under certain conditions a trial court may use equitable doctrines to enforce a promise to convey real estate despite noncompliance with the statute of frauds.); *Fleming v. Todd, 42 S.W.2d 123 (Tex. Civ. App. 1931).*

(n96)Footnote 886. *Fireison v. Pearson, 520 A.2d 1046 (D.C.App. 1987)* (real estate purchaser is required neither to examine land records, nor survey land, in order to determine correct acreage, but clearly has right to rely on vendor's representations as to boundaries and acreage of land; even when means of ascertaining falsity of vendor's representations are known and accessible, purchaser's failure to review land records will not bar his recovery); *Bishop v. E.A. Strout Realty Agency, 182 F.2d 503 (4th Cir. 1950); Bobak v. Mackey, 236 P.2d 626 (Cal. Dist. Ct. App. 1951); Yorke v. Taylor, 124 N.E.2d 912 (Mass. 1955); Gamble v. Beahm, 257 P.2d 882 (Or. 1953); Lake v. Thompson, 77 A.2d 364 (Pa. 1951)* (The law leans toward protecting even the foolishly credulous against the machinations of those who would defraud.); *see* Keeton, Rights of Disappointed Purchasers, *32 Tex. L. Rev. 1 (1954).*

(n97)Footnote 887. *Yates v. Darby, 131 S.W.2d 95 (Tex. 1939)* (In Texas, the right of rescission ends when the vendor's lien expires.).

(n98)Footnote 888. *Meeker v. Lanham, 604 P.2d 556 (Wyo. 1979)* (purchaser has right to rely upon representations of vendor as to boundaries of land, and if vendor misrepresents true boundary of land, whether innocently or intentionally, it is ground for rescission by purchaser); *Vaughn v. Ray, 598 S.W.2d 772 (Tenn. 1980)* (if deed recites number of acres and it subsequently turns out upon survey or otherwise that there is excess or deficiency, over or under acreage stated, so great as to justify inference of fraud, or of mistake equivalent in effect to fraud, relief will be granted); *Junius Constr. Corp. v. Cohen, 178 N.E. 672 (N.Y. 1931).*

(n99)Footnote 889. *Yocom v. Kindle, 766 S.W.2d 140 (Mo.App. S.D. 1989)* (misrepresentations that tract of property extended to shoreline of lake, and that length of tract at shoreline was 100 feet, when lot in fact lay 20 to 30 feet west of shoreline and only ran along lakefront for 80 feet, were sufficient to warrant rescission, where purchasers relied on representations in deciding to buy tract); *Snyder v. Potter, 521 N.Y.S.2d 175* (N.Y.A.D. 3 Dept. 1987) (material misrepresentations by vendor as to boundaries of parcel of land or the quantity of property, which are reasonably relied on by the purchaser, may constitute fraud); *Brink v. Larson, 411 N.W.2d 585 (Minn. App. 1987)* (vendors' false representations about the boundary lines, including number of lakeshore feet and condition of property,

upon which purchaser relied, were grounds for rescission of contract for deed for purchase of resort); *Dunn v. Dunn, 136 N.Y.S. 282 (1912); Meck v. Allen Properties, Inc., 132 N.Y.S.2d 674 (1954).*

(n100)Footnote 890. *Meck v. Allen Properties, Inc., 132 N.Y.S.2d 674 (1954).*

(n101)Footnote 891. *Meck v. Allen Properties, Inc., 132 N.Y.S.2d 674 (1954).*

(n102)Footnote 892. *Nathanson v. Murphy, 282 P.2d 174 (Cal. Dist. Ct. App. 1955); Paul v. Swears, 122 N.Y.S. 740 (1910).*

(n103)Footnote 893. *Barker v. Ness, 587 N.W.2d 183 (N.D. 1998)* (in action for equitable recision of a home purchase contract, in addition to purchaser's remitting the reasonable use value gained from the transaction, such as rental income, vendors would also have to remit to purchaser the value of the use of the money paid to them for the purchase of the house, absent some countervailing equitable factor); *Paine v. Upton, 87 N.Y. 327 (1882).*

(n104)Footnote 894. *Beatty v. Ireland, 137 N.Y.S. 456 (1912).*

(n105)Footnote 895. *Hunt v. Hay, 140 N.Y.S. 1070 (1913); Williams v. Dunas, 352 N.E.2d 266 (Ill. App. Ct. 1976)* (Failure of vendor to pay taxes resulting in tax sale, as such payment was required by the contract, pemits the buyer to rescind the contract.).

(n106)Footnote 896. *Riggle v. Janss Inv. Corp., 88 F.2d 111 (9th Cir. 1937); Catanzano v. Hydinger, 170 So. 214 (Ala. 1936); Darr v. Clevelin Realty Corp., 92 P.2d 475 (Cal. Dist. Ct. App. 1939); O'Steen v. Thomas, 200 So. 230 (Fla. 1941); Garionis v. Mickevice, 19 N.E.2d 108 (Ill. App. Ct. 1939); Trammel v. Kemler, 285 N.W. 196 (Iowa 1939); Parker v. Mouse, 84 P.2d 941 (Kan. 1938); Hornbeck v. Midwest Realty, 283 N.W. 39 (Mich. 1938); Vandermade v. Appert, 5 A.2d 868 (N.J. Ch. 1939); Hutchinson v. Fishman, 8 N.Y.S.2d 894 (1938); Viebahn v. Gudim, 142 N.W.2d 80 (Minn. 1966)* (Upon rescission, the vendor gets a fair rent while the vendee gets interest on his deposit.).

(n107)Footnote 897. *Gibula v. Sause, 194 A. 826 (Md. 1937); Smith v. Vernon, 286 N.E.2d 99 (Ill. App. Ct. 1972)* (Deposit return refused where vendees had not made a proper effort to obtain a loan where contract was subject to financing.).

(n108)Footnote 898. *Yellowstone II Development Group, Inc. v. First American Title Ins. Co., 20 P.3d 755 (Mont. 2001)* (as a general rule, a seller of real estate cannot enforce a forfeiture provision in a contract for deed if it has materially failed to perform a condition concurrent or precedent to the buyer's obligation to perform); *Nelson v. Fernando Nelson & Sons, 55 P.2d 859 (Cal. 1936); Associated Developers Co. v. Infanger, 376 P.2d 496 (Idaho 1962)* (Payment of purchase price and delivery of deed are dependent and conditional on each other.).

(n109)Footnote 899. *Webb v. Stephenson, 39 P. 952 (Wash. 1895); Miswald-Wilde Co. v. Armory Realty Co., 243 N.W. 492 (Wis. 1932), modified, 246 N.W. 305 (Wis. 1933); Mokar Properties Corp. v. Hall, 179 N.Y.S.2d 814 (1958)* (Vendor punished for loss of bargain by deliberately making himself unable to perform.).

(n110)Footnote 900. *Mitchell v. Evans, 375 P.2d 101 (Colo. 1962).*

(n111)Footnote 901. *15 U.S.C. §§ 1701*-1720 (1994).

(n112)Footnote 902. *Hall v. Bryce's Mt. Resort, Inc., 379 F. Supp. 165 (W.D. Va. 1974); see* Griffith, Truth-in-Lending and Real Estate Transactions: Some Aspects, 2 Oh. N.U. L. Rev. 1 (1974).

(n113)Footnote 903. *Hackney v. Sunset Beach Investments, 644 P.2d 138 (Wash.App. 1982)* (in rescission action, purchaser who is in possession of the property may recover its enhanced value if enhancement resulted from reasonable and necessary improvements); *Cutright v. Wilson, 410 So. 2d 1274 (La.App. 3 Cir. 1982)* (saves vendee who had improved land he thought he had purchased would be entitled to amount it cost him for fill dirt and culverts after sale

was set aside); *Smith v. Am. Motor Inns, Inc., 538 F.2d 1090 (5th Cir. 1976).*

(n114)Footnote 904. *Farmer v. Groves, 555 P.2d 1252 (Or. 1976). See Contra, Molalla Bowling Lanes, Inc. v. Corey, 697 P.2d 990 (Or. App. 1985)* (prematurely bringing an action for strict foreclosure of a land sales contract does not amount to a repudiation of the contract that enables the purchaser to effect a mutual rescission, rather, the purchaser's remedy is to seek an abatement or dismissal of the action.).

(n115)Footnote 905. *Farmer v. Groves, 555 P.2d 1252 (Or. 1976).*

(n116)Footnote 906. *Barker v. Ness, 587 N.W.2d 183 (N.D. 1998)* (for purposes of equitable recision of real estate purchase contract, equity envisions a restoration of both parties to their pre-contractual positions); *Metcalfe v. Talarski, 567 A.2d 1148 (Conn. 1989)* (if vendee seeks equitable remedy of rescission, vendee must, in accordance with mandates of that remedy, restore to vendor any benefit that vendor has bestowed upon him or her); *Howard v. Jones, 572 So. 2d 698 (La.App. 4 Cir. 1990)* (purchasers, who alleged that a one-half interest in the property which they contracted to purchase for $7,000 was previously sold to a transferee along with several other properties for $1,450 and that the sale to transferee was lesionary, sufficiently stated a cause of action for rescission of the sale based on lesionary grounds); *Williams v. Dunas, 352 N.E.2d 266 (Ill. App. Ct. 1976).*

(n117)Footnote 907. *Alexander Myers & Co. v. Hopke, 565 P.2d 80 (Wash. 1977)* (price reduced); *Dlug v. Wooldridge, 538 P.2d 883 (Colo. 1975)* (reduction refused).

(n118)Footnote 908. *Horine v. Greencastle Production Credit Ass'n, 505 N.E.2d 802* (Ind.App. 4 Dist. 1987) (parties mutually agreed to rescind land contract for farm, where purchasers failed to make payments required by contract, vendors received quitclaim and warranty deeds from escrow agent, vendors took possession of farm and there was no forfeiture clause in land contract); *Smith v. Mohan, 723 S.W.2d 94 (Mo.App. E.D. 1987)* (mutual release of contracted duties was consideration for purchaser's rescission of real estate sales contract); *Messer Real Est. & Ins. Co. v. Ruff, 64 So. 51 (Ala. 1913); Williams v. Jones, 186 S.W.2d 160 (Ark. 1945); Carter v. Fox, 103 P. 910 (Cal. Ct. App. 1909); King v. Seebeck, 118 P. 292 (Idaho 1911); Pardoe v. Jones, 143 N.W. 405 (Iowa 1913); Kilpatrick v. Smith, 19 N.W.2d 699 (Iowa 1945); Asher v. Helton, 101 S.W. 350 (Ky. 1907); Estey v. Whitney, 90 A. 1093 (Me. 1914); Grauel v. Rohe, 43 A.2d 201 (Md. 1945); White Pine Lumber Co. v. Manufacturers' Lumber Co., 158 N.W. 124 (Mich. 1916); Sieker v. Sieker, 130 N.W. 1033 (Neb. 1911); Wiiest v. Pounds, 8 N.W.2d 211 (Neb. 1943); Young v. Lee, 138 P.2d 259 (N.M. 1943); Guilfoyle v. Pettigrew, 56 N.E.2d 951 (Ohio Ct. App. 1943); Miles v. Hemenway, 111 P. 696 (Or. 1910); Mader v. James, 546 P.2d 190 (Wyo. 1976)* (A written contract for sale of realty may be rescinded by oral agreement or by acts of conduct.).

(n119)Footnote 909. *Todd v. Grayson, 270 S.W. 595 (Ark. 1925); Little v. Kennedy, 260 P. 890 (Cal. Dist. Ct. App. 1927); Haygood v. Kennedy, 109 S.E. 522 (Ga. Ct. App. 1921); Manley v. Underwood, 110 S.E. 49 (Ga. Ct. App. 1921); Feagin v. Georgia-Carolina Inv. Co., 11 S.E.2d 813 (Ga. Ct. App. 1940); King v. Walrath, 145 N.E. 94 (Ill. 1924); McLain v. Smith, 202 N.W. 239 (Iowa 1925); Wilson v. Holub, 210 N.W. 593 (Iowa 1926); Schwab v. Roberts, 263 N.W. 19 (Iowa 1936); Mathis v. Martin, 228 S.W. 431 (Ky. 1920)* (consideration necessary to release purchaser); *Osborn v. Osborn, 263 S.W. 738 (Ky. 1924); Flaherty v. Goldinger, 144 N.E. 374 (Mass. 1924); see Krause v. McDermott, 263 N.W. 788 (Mich. 1935); Miller v. Chinn, 223 S.W. 767 (Mo. Ct. App. 1920); Jose v. Aufderheide, 293 S.W. 476 (Mo. Ct. App. 1926)* (consideration necessary to mutual rescission of partially performed contract); *Beren Corp. v. Spader, 255 N.W.2d 247 (Neb. 1977)* (Where the vendees had given a mortgage on the contract, the contract could not be rescinded without the mortgagee's consent.); *Model Plan Fin. Corp. v. Dempsey, 138 A. 696 (N.J. 1927); Harrington v. Eggen, 199 N.W. 447 (N.D. 1924); C.A. Finch Lumber Co. v. Weishaar, 215 N.W. 155 (N.D. 1927); James v. Ward, 190 P. 1105 (Or. 1920)* (The mere fact that purchaser in default permits vendor to take possession does not amount to rescission.); *Builders Supplies Co. of Goldsboro, Inc. v. Gainey, 192 S.E.2d 449 (N.C. 1972)* (Contract may be abandoned by mutual oral agreement.); *Lieberman v. Har Nebo Cemetery Co., 82 Pa. Super. 178 (1923); Dooley v. Stillson, 128 A. 217 (R.I. 1925)* (Where purchaser surrenders possession on default, vendor may resell without rescinding.); *Johnson v. Smith, 280 S.W. 158 (Tex. 1926); Davis v. Cox, 239 S.W. 917* (Tex. Comm'n App. 1922);

Anderson v. Anderson, 223 P. 323 (Wash. 1924); Colburn v. Keyser, 123 S.E. 430 (W. Va. 1924).

(n120)Footnote 910. *Preheim v. Ortman, 331 N.W.2d 62 (S.D. 1983)* (mutual rescission of a real estate contract does not require a formal agreement but may result from any actions of parties clearly indicating their mutual understanding that contract is terminated); *Forsyth v. Pendleton, 617 P.2d 358 (Utah 1980)* (when the intent to abandon a uniform real estate contract by one party is coupled with the equal intention of the other party, such mutual abandonment may under certain circumstances, be found to constitute rescission of the contract); *McLain v. Smith, 202 N.W. 239 (Iowa 1925); Martin v. Work, 206 N.W. 288 (Iowa 1926); Denler & Denler Land Co. v. Eby, 269 N.W. 203 (Mich. 1936); Scales v. Warren, 293 S.W. 238 (Tex. Civ. App. 1927); Colburn v. Keyser, 123 S.E. 430 (W. Va. 1924).*

(n121)Footnote 911. *Barrett v. Durbin, 153 S.W. 265 (Ark. 1913); Stacy v. Feltner, 135 S.W. 276 (Ky. 1911); Pratt v. Morrow, 45 Mo. 404 (1870); Woolen v. Sloan, 162 P. 985 (Wash. 1917).*

(n122)Footnote 912. *Hastings v. Matlock, 217 Cal. Rptr. 856* (Cal.App. 6 Dist. 1985) (rescission of written contract for the purchase and sale of interest in real property may be accomplished by oral agreement); *Sabot v. Rykowsky, 363 N.W.2d 550 (N.D. 1985)* (mutual rights and obligations of parties to written contract for purchase and sale of real estate may be waived, and contract annulled and extinguished, by oral agreement); *Beach v. Covillard, 4 Cal. 315 (1854); Lewis v. Fitzsimmons, 122 P.2d 882 (Colo. 1942); Strickland v. Woods Brothers Indus. Corp., 40 P.2d 367 (Kan. 1935); Chamberlain v. Barrows, 184 N.E. 725 (Mass. 1933); Silcox v. McLean, 11 P.2d 540 (N.M. 1932); Moseley v. Witt, 60 S.E. 520 (S.C. 1908); Wilcox v. Scallon, 127 N.W. 1007 (Wis. 1910).*

(n123)Footnote 913. Restatement of Contracts, §§ 222, 509.

(n124)Footnote 914. *Savitsky v. Sukenik, 659 N.Y.S.2d 48* (N.Y.A.D. 2 Dept. 1997) (generally, abandonment of contract for purchase of real property need not be express, but may be inferred from conduct of parties and attendant circumstances); *Saunders v. Sharp, 840 P.2d 796 (Utah App. 1992)* (vendors' refusal to convey property which purchasers had paid for constituted substantial breach of real estate installment sales contract, impairing purchaser's ability to continue making installment payments on the property, and justifying abandonment of the contract; thus, purchasers were not liable for unpaid installment payments, but had no right to property for which they had not paid); *Kolling v. Martin, 7 N.E.2d 527 (Ind. Ct. App. 1937).*

(n125)Footnote 915. *Preheim v. Ortman, 331 N.W.2d 62 (S.D. 1983)* (mutual assent to abandon or rescind a real estate contract can sometimes be evidenced by failure of both parties to take action towards enforcement or performance of contract); *Forest Preserve Real Est. Improvement Corp. v. Miller, 41 N.E.2d 526 (Ill. 1942).*

(n126)Footnote 916. *Puller Mortg. Associates, Inc. v. Keegan, 829 F. Supp. 1507 (S.D. Ind. 1993)* (contract not fully performed on both sides may be rescinded or cancelled by mutual agreement, which agreement may be expressed orally or in writing, or may be implied by the conduct of the parties); *Shackelford v. Leavengood, 532 So. 2d 1194 (La. App. 2 Cir. 1988)* (cancellation of written contract does not need to be in writing, but may be effected by oral, mutual consent); *Tompkins v. Davidow, 149 P. 788 (Cal. Dist. Ct. App. 1915); Ill. Bankers Life Assurance Co. v. Price, 45 P.2d 585 (Kan. 1935); Murray v. Boyd, 177 S.W. 468 (Ky. 1915); Lewis v. Cooley, 62 S.E. 868 (S.C. 1908); Van Keulen v. Sealander, 49 P.2d 19 (Wash. 1st Dept. 1935).*

(n127)Footnote 917. *Prime Financial Group, Inc. v. Masters, 676 A.2d 528 (N.H. 1996)* (parties to contract cannot, even by express provision in contract, deprive themselves of power to alter or vary or discharge it by subsequent agreement; express provision in written contract that no rescission or variation shall be valid unless it too is in writing is ineffective to invalidate subsequent oral agreement to the contrary); *Nelson v. Appalachian Ins. Co. of Providence, 399 So. 2d 711 (La.App. 1 Cir. 1981)* (there is no requirement that subsequent modification or revocation of contracts required to be in writing be in writing itself); *San Roque Properties, Inc. v. Pierce, 63 P.2d 1198 (Cal. Dist. Ct. App. 1937).*

(n128)Footnote 918. *Vildibill v. Palmer Johnson of Savannah, Inc., 536 S.E.2d 779 (Ga. App. 2000)* (the parties to

a contract may rescind it by mutual agreement, and rescission of a written contract need not be in writing; one party to a contract may consent to rescission by the other party either impliedly or by conduct); *Haberman v. Sawall, 237 P. 776 (Cal. Dist. Ct. App. 1925); Osborn v. Osborn, 263 S.W. 738 (Ky. 1924).*

(n129)Footnote 919. *Smith v. Moran, 693 P.2d 1246 (Mont. 1985)* (although no written notice is required, both parties must assent to and be aware of rescission of contract in order for it to be effective); *White Pine Lumber Co. v. Manufacturers' Lumber Co., 158 N.W. 124 (Mich. 1916); Taylor v. Wentworth, 193 S.W. 158 (Tex. Civ. App. 1917).*

(n130)Footnote 920. *Smead v. Lampher, 86 A. 1005 (Vt. 1913).*

(n131)Footnote 921. *Truman v. Martin, 321 N.W.2d 420 (Neb. 1982)* (cancellation, abandonment, or rescission of written contract may not only be written but may also be oral; moreover, implied agreement to rescind contract may be given effect and assent of parties to rescission may be shown by their acts or conduct and surrounding circumstances; accordingly, in determining whether rescission took place, courts look not only to language of parties but to all circumstances); *Graceville St. Bank v. Hofschild, 206 N.W. 948 (Minn. 1926).*

(n132)Footnote 922. *Watts Const. Co. v. Cullman County, 382 So. 2d 520 (Ala. 1980)* (where acts and conduct of one party inconsistent with existence of a contract are acquiesced in by the other, such contract will be treated as abandoned or rescinded); *Saunders v. Sharp, 840 P.2d 796 (Utah App. 1992)* (refusal of vendors to convey a lot and roadway constituted substantial breach of real estate installment sales contract so as to materially impair vendor's ability to perform and to continue making installment payments on unplatted property, justifying abandonment of contract); *Pardoe v. Jones, 143 N.W. 405 (Iowa 1913); Greggo v. Wohl, 241 A.2d 522 (Del. 1968)* (Condition in sales contract that the property be usable for liquor store made the contract void where the license could not be obtained even though it was for the benefit of the vendee, heirs, and assigns.).

(n133)Footnote 923. *Bailey v. Gordon, 8 F.2d 672 (D.C. Cir. 1925).*

(n134)Footnote 924. *Akins v. Vermast, 945 P.2d 640 (Or. App. 1997)* (if conveyance to purchaser is canceled, any interests that purchaser purported to grant are canceled also, except as to subsequent purchasers who claim as affirmative defense that they are bona fide purchasers for value without notice); *Cutright v. Wilson, 410 So. 2d 1274 (La.App. 3 Cir. 1982)* (when sale has been rescinded, parties are returned as nearly as possible to situation as it existed prior to sale and vendee returns property to vendor and vendor returns purchase price, subject to whatever adjustments are necessary for vendee's use of property during period he possessed the same); *T.H. Mastin & Co. v. Kirby Lumber Co., 14 F. Supp. 858 (S.D. Tex. 1936).*

(n135)Footnote 925. *Pilgrim v. Grant, 9 Alaska 17 (1936); Fowler v. Dieleman, 185 N.W. 79 (Iowa 1921).*

(n136)Footnote 926. *U.S. Postal Service v. Phelps Dodge Refining Corp., 950 F. Supp. 504 (E.D.N.Y. 1997)* (mutual mistake supports cause of action for reformation or rescission of sale of real property when mistake is so fundamental it defeats object of contract and status quo is restorable); *Kidd v. Fowler, 498 So. 2d 969* (Fla.App. 4 Dist. 1986) ("mutual mistake" occurs where, by inadvertence, written real estate contract is drafted and executed contrary to intention of parties, such as when it is shown that parties agreed on one thing but said something different when they incorporated it into their contract); *Clark v. Kirsner, 74 A.2d 830 (Md. 1950); Curtis v. Albee, 60 N.E. 660 (N.Y. 1901); Miles v. Stevens, 3 Pa. 21 (1846); Pond v. Fisher, 112 S.E.2d 147 (Va. 1960)* (Unilateral mistake of vendee will not prevent specific performance.); *Metzler v. Bolen, 137 F. Supp. 457 (D.N.D. 1956)* (To justify the reformation of a contract to convey realty on the ground of mistake, the mistake must have been made in the drawing of the instrument and not in the making of the contract which it evidences.); *see* Aldridge, Truth-in-Lending in Real Estate Transactions, *48 N.C. L. Rev 427 (1970); Miller v. Reynolds, 223 S.E.2d 883 (Va. 1976)* (An innocent but erroneous representation by the vendor as to the suitability of the premises was grounds for recission as creating a mutual mistake.).

(n137)Footnote 927. *Home Savers, Inc. v. United Sec. Co., 741 P.2d 1355 (Nev. 1987)* (purchaser of property at trustee's sale was entitled to rescission of sale on basis of unilateral mistake; shortly after foreclosure sale, purchaser

discovered that it had bought parcel located in back of parcel it believed it had purchased, notice published by trustee was misleading in that it included street address for front parcel, no one would have anticipated that dilapidated back parcel would have served as security for loan with balance many times value of property, and purchaser telephoned trustee for purpose of investigating property and trustee gave purchaser tax parcel number for front parcel, not back parcel); *Murray v. Paquin, 173 F. 319 (W.D.N.C. 1909); Kan. City & Memphis Ry. Co. v. Smithson, 168 S.W. 555 (Ark. 1914); Van Loan v. Glaze, 106 P. 250 (Cal. Dist. Ct. App. 1909); Taber v. Piedmont Heights Bldg. Co., 143 P. 319 (Cal. Dist. Ct. App. 1914); Kerns v. Bank of Manitou, 242 P.2d 817 (Colo. 1952); Selby v. Matson, 114 N.W. 609 (Iowa 1908); McGeorge v. White, 174 S.W.2d 532 (Ky. 1943); Hoffman v. Chapman, 34 A.2d 438 (Md. 1943); Dzuris v. Pierce, 103 N.E. 296 (Mass. 1913); Barber-Paschal Lumber Co. v. Boushall, 84 S.E. 800 (N.C. 1915); McCrea v. Hinkson, 131 P. 1025 (Or. 1913).*

(n138)Footnote 928. *Harding v. Willie, 458 N.W.2d 612 (Iowa App. 1990)* (mutual mistake of material fact as to whether house's roof leaked existed and therefore minds of the parties did not meet and no contract to purchase a house was made); *Clark v. Stetson, 97 A. 273 (Me. 1916); Dover Pool & Racquet Club, Inc. v. Brooking, 322 N.E.2d 168 (Mass. 1975)* (Mutual ignorance of both parties, assuming that zoning bylaws interposed no obstacle to contemplated use of premises, made the contract voidable for mutual mistake of fact.); *Dvorak v. Kuhn, 175 N.W.2d 697 (N.D. 1970)* (Rescission allowed where vendor's agent made an innocent mistake and an unconscionable result would occur if rescission were refused.); *Graham Magnetics, Inc. v. Region, 471 S.W.2d 600 (Tex. Civ. App. 1971)* (Court will reform in case of mutual mistake so as to conform to intent of the parties.); *Davey v. Brownson, 478 P.2d 258 (Wash. Ct. App. 1970)* (Rescission where mutual mistake if parties would not have contracted had they known the true facts--termites.).

(n139)Footnote 929. *Moonves v. Hill, 360 A.2d 59 (Vt. 1976).*

(n140)Footnote 930. *Sunlight Funding Corp. v. Singer, 536 N.Y.S.2d 533* (N.Y.A.D. 2 Dept. 1989) (vendor was entitled to rescission of agreement amending contract for sale of real estate, and specific performance of original contract of sale, where contract was amended primarily because of parties' mutual mistake of fact as to vendor's marketable title); *Mitchell v. Cal.-P. Title Ins. Co., 248 P. 1035 (Cal. Dist. Ct. App. 1926); Bredensteiner v. Oviatt, 210 N.W. 133 (Iowa 1926); Jones v. Metzger, 96 So. 161 (Miss. 1923); Va. Trust Co. v. Catoe, 99 So. 261 (Miss. 1924); Ferguson v. Mounts, 281 S.W. 616 (Tex. Civ. App. 1926); contra U.S. Fidelity & Guar. Co. v. Bimco Iron & Metal Corp., 464 S.W.2d 353 (Tex. 1971).*

(n141)Footnote 931. *Donovan v. RRL Corp., 27 P.3d 702 (Cal. 2001)* (a significant error in the price term of a contract constitutes a mistake regarding a basic assumption upon which the contract is made, which ordinarily has a material effect adverse to the mistaken party, and thus may constitute a unilateral mistake of fact potentially sufficient to warrant recission of contract); *Neel v. Lang, 127 N.E. 512 (Mass. 1920); Speers v. Lucas, 279 S.W. 736 (Mo. Ct. App. 1926); Logwood v. Holland, 108 S.E. 571 (Va. 1921); Arko Enterprises, Inc. v. Wood, 185 So. 2d 734 (Fla. Dist. Ct. App. 1966)* (Eminent domain does not warrant rescission of sales contract.).

(n142)Footnote 932. *Punie v. Achong, 765 So. 2d 823 (Fla.App.4.Dist. 2000)* (in a sale of real estate, if one party believes he is buying a particular piece of property while the other thinks he is selling another piece, there is no meeting of minds so as to constitute a valid contract); *Hill-Shafer Partnership v. Chilson Family Trust, 799 P.2d 810 (Ariz. 1990)* (generally, if seller intends to sell and buyer intends to buy land other than that described in deed, case of mutual mistake is presented); *Brown v. Coker, 92 So. 585 (Miss. 1922); Park Addition Co. v. Sawyer, 245 P. 829 (Okla. 1926); Holloway v. Wheeler, 261 S.W. 467 (Tex. Civ. App. 1924), rev'd, Wheeler v. Holloway, 276 S.W. 653* (Tex. Comm'n App. 1925) (Relief in equity cannot be granted upon the ground of mistake alone.).

(n143)Footnote 933. *Bain v. Guntersville Realty Co., 100 So. 128 (Ala. 1924); Lombardi v. Sinanides, 235 P. 455 (Cal. Dist. Ct. App. 1925); Nelson v. Pedersen, 137 N.E. 486 (Ill. 1922); Kirkham v. Bortz, 188 N.W. 770 (Iowa 1922); Brown v. Coker, 92 So. 585 (Miss. 1922).*

(n144)Footnote 934. *Colas v. Donaldson, 1 La. App. 389 (1925); Ford v. Delph, 220 S.W. 719 (Mo. Ct. App.*

1920); Hohertz v. Durham, 224 S.W. 549 (Tex. Civ. App. 1920); Brewer v. Ross, 290 S.W. 781 (Tex. Civ. App. 1926).

(n145)Footnote 935. *Thieme v. Worst, 745 P.2d 1076 (Idaho App. 1987)* (at time contract was made, both vendor and purchaser mistakenly believed that irrigation water could be delivered to high corner of property, and hence, mutual mistake of fact occurred in formation of contract); *Peardon v. Markley, 195 P. 70 (Cal. Dist. Ct. App. 1920).*

(n146)Footnote 936. *Turner v. Ferrin, 757 P.2d 335 (Mont. 1988)* (alleged discrepancy of about six percent in sale of 96.73 acres of land in gross was not "material or substantial lack of consideration," and did not entitle purchasers to rescission; one purchaser was shown property boundaries, and no fraud, duress, or undue influence was alleged); *Lawson v. Floyd, 124 U.S. 108 (1888); Cox v. Fisher, 225 S.W. 305 (Ark. 1920); Owens v. Durham, 70 S.E. 989 (Ga. Ct. App. 1911); Rotermund v. Lauritzen, 225 Ill. App. 170 (1922); Hoxie v. Iiams, 42 N.W. 711 (Neb. 1889); Beatty v. Depue, 103 N.W.2d 187 (S.D. 1960)* (rescission of sales contract due to mutual mistake as to acreage).

(n147)Footnote 937. *Bowling v. Poole, 756 N.E.2d 983 (Ind. App. 2001)* (purchase agreement was for land "in gross," not for a specific acreage, and thus there was no mutual mistake between vendor and purchaser as to the amount of land to be sold, where purchase agreement described acreage as three acres, more or less, survey revealed actual acreage to be near six acres, and parties walked the land together and described the land for sale by using roads, a creek, and other boundary lines); *Ewing v. Bissell, 777 P.2d 1320 (Nev. 1989)* (even if there is significant mutual mistake of fact as to acreage contained in real estate parcel, purchaser is usually not entitled to relief if sale was of acreage in gross); *Clippard v. Kneibert, 226 S.W. 584 (Mo. Ct. App. 1920); see Nasha Holding Corp. v. Ridge Bldg. Corp., 223 N.Y.S. 223 (1927).*

(n148)Footnote 938. *Hays v. Hays, 81 S.W.2d 926 (Ark. 1935); Firstbrook v. Buzbee, 132 So. 673 (Fla. 1931); Wallace v. Mobley, 112 S.E. 264 (S.C. 1922); Rich v. Scales, 91 S.W. 50 (Tenn. 1905).*

(n149)Footnote 939. *Bigham v. Madison, 52 S.W. 1074 (Tenn. 1899); see Brown v. Bradley, 259 S.W. 676 (Tex. Civ. App. 1924).*

(n150)Footnote 940. An agreement may be avoided where parties contracted under a misconception or mistake of material fact.

(n151)Footnote 941. *Kyle v. Kavanagh, 103 Mass. 356 (1869); see Stong v. Lane, 68 N.W. 765 (Minn. 1896); Briggs v. Watkins, 70 S.E. 551 (Va. 1911); Sheldon v. Capron, 3 R.I. 171 (1855)* (Where one purchases a lot at public sale understanding the auctioneer to offer lot 25 when in fact he offered lot 24, no valid contract was made); *Page v. Higgins, 22 N.E. 63 (Mass. 1889)* (Mistakes as to tract of land agreed upon or location of the boundary line thereto, may prevent a formation of any contract.); *Bigham v. Madison, 52 S.W. 1074 (Tenn. 1899).*

(n152)Footnote 942. *Homeside Lending Inc. v. Miller, 31 P.3d 607 (Utah App. 2001)* (equity will not correct a mistake of law as to the legal effects of an agreement unconnected with a mistake of fact, fraud, imposition, or undue advantage); *In re Estate of Holden, 539 S.E. 2d 703 (S.C. 2000)* (equitable relief is available where the parties acted under a mistake of fact going to the essence of the particular transaction, but not if the mistake was one of law); *Sentry Ins. v. ClaimsCo Intern., Inc., 608 N.W. 2d 519 (Mich.App. 2000)* (a mistake of law is usually not a ground for equitable relief); *Pattridge v. Youmans, 109 P.2d 646 (Colo. 1941); Trigg v. Read, 24 Tenn. 529 (1845); Dover Pool & Racquet Club, Inc. v. Brooking, 322 N.E.2d 168 (Mass. 1975)* (If the parties to a sales contract entered into the agreement by mutual mistake of fact, assuming that zoning bylaws did not prohibit the intended use, the contract could be rescinded by purchaser.) *Hunt v. Rhodes, 26 U.S. 1 (1828); Gwynn v. Hamilton's Adminstr., 29 Ala. 233 (1856); Burns v. Hamilton's Adminstr., 33 Ala. 210 (1858); Burt v. Wilson, 28 Cal. 632 (1865); Vickerson v. Frey, 224 P.2d 126 (Cal. Dist. Ct. App. 1950)* (mistake as to effect of building restrictions as grounds for rescission); *Williams v. Hamilton, 73 N.W. 1029 (Iowa 1898); Men About Town, Inc. v. Budde, 166 S.W.2d 305 (Ky. 1942); Clark v. Carter, 136 S.W. 310 (Mo. 1911); Hawralty v. Warren, 18 N.J. Eq. 124 (1806); Storrs v. Barker, 6 Johns. Ch. 166 (N. Y. 1822); Champlin v. Laytin, 18 Wend. 407 (N.Y. 1837); Good v. Herr, 7 Watts & S. (Pa.) 253 (1844); Trigg v. Read, 24 Tenn. 529 (1845);*

Morgan v. Bell, 28 P. 925 (Wash. 1892); Birkhauser v. Schmitt, 45 Wis. 316 (1878); cf. Griswold v. Hazard, 141 U.S. 260 (1891); Kyle v. Fehley, 51 N.W. 257 (Wis. 1892); Bench v. Pace, 538 P.2d 180 (Utah 1975) (An omission from a real estate option of a reservation of oil and mineral estate was a mistake of fact and not of law and was subject to reformation.).

(n153)Footnote 943. *Bodenhamer v. Patterson, 563 P.2d 1212 (Or. 1977).*

(n154)Footnote 944. *Elliott v. Sackett, 108 U.S. 132 (1883); Simmons Creek Coal Co. v. Doran, 142 U.S. 417 (1892); Southard v. Curley, 31 N.E. 330 (N.Y. 1892); Dietrich v. Hutchinson, 50 A. 810 (Vt. 1901); Welch Publg. Co. v. Johnson Realty Co., 89 S.E. 707 (W. Va. 1916).*

(n155)Footnote 945. *Thiel v. Miller, 209 P. 1081 (Wash. 1922).*

(n156)Footnote 946. *Birkhauser v. Schmitt, 45 Wis. 316 (1878).*

(n157)Footnote 947. Lammot's Heirs v. Bowly's Heirs, *6 H. & J. 500 (Md. 1825); Kornegay v. Everett, 5 S.E. 418 (N.C. 1888); Irick v. Fulton's Exec., 44 Va. 193 (1846).*

(n158)Footnote 948. *Ark. v. Paup, 13 Ark. 129 (1852); Eisenbeis v. Shillington, 159 S.W.2d 641 (Mo. 1941).*

(n159)Footnote 949. *Salinas v. Stillman, 66 F. 677 (5th Cir. 1894); Jordan v. Stevens, 51 Me. 78 (1863); Livingstone v. Murphy, 72 N.E. 1012 (Mass. 1905); Kornegay v. Everett, 5 S.E. 418 (N.C. 1888); Lawrence v. Beaubien, 18 S.C. L. 623 (1832); Morgan v. Bell, 28 P. 925 (Wash. 1892).*

(n160)Footnote 950. *Louisville & Nashville R.R. Co. v. Hopkins County, 9 S.W. 497 (Ky. 1888); Titus v. Rochester German Ins. Co., 31 S.W. 127 (Ky. 1895).*

(n161)Footnote 951. *Silliman v. Wing, 7 Hill 159 (N.Y. 1844); Flynn v. Hurd, 22 N.E. 1109 (N.Y. 1889); Vanderbeck v. City of Rochester, 25 N.E. 408 (N.Y. 1890).*

(n162)Footnote 952. *Fox v. Doll, 59 So. 2d 443 (La. 1952).*

(n163)Footnote 953. *Harkness v. McQueen, 232 S.W.2d 629 (Tex. Civ. App. 1950).*

(n164)Footnote 954. *Kennedy v. Northup, 15 Ill. 148 (1853); Earle v. Fiske, 103 Mass. 491 (1870); Lyon v. Gleason, 42 N.W. 286 (Minn. 1889); Welch v. Ketcham, 51 N.W. 113 (Minn. 1892); Youngblood v. Vastine, 46 Mo. 239 (1870);* Powers v. McFerran, 2 Serg. & Rawle 44 (Pa. 1815).

(n165)Footnote 955. *Hill v. Meeker, 24 Conn. 211 (1855)* (This is the rule adopted in a Connecticut case, in which it was held that an unrecorded deed is valid after the death of the grantor, as against a purchaser from the grantor's heirs without notice of the former deed. Waite, C. J., dissenting, and saying that "this is the first case in the whole history of our jurisprudence in which it has even been holden that an unrecorded deed shall defeat the title of a bona tide purchaser or mortgagee having no knowledge of the existence of such deed."); *Ralls v. Graham, 20 Ky. 120 (1826)* (The rule in *Hall v. Meeker* prevailed in this former case); *Hancock v. Beverly, 45 Ky. 531 (1846).*

(n166)Footnote 956. *Thompson v. Huston, 135 P.2d 834 (Wash. 1943).*

(n167)Footnote 957. *Wagner v. Kepler, 104 N.E.2d 231 (Ill. 1952).*

(n168)Footnote 958. *Cole v. Atkins, 209 P.2d 859 (Ariz. 1949).*

(n169)Footnote 959. *Massey v. Tyra, 234 S.W.2d 759 (Ark. 1950).*

(n170)Footnote 960. *Krupp v. Nelson, 50 So. 2d 464 (La. Ct. App. 1951).*

(n171)Footnote 961. *McGeorge v. White, 174 S.W.2d 532 (Ky. 1943).*

(n172)Footnote 962. *Franz v. Franz, 32 N.E.2d 205 (Mass. 1941).*

(n173)Footnote 963. *Prudential Ins. Co. of Am. v. Nuernberger, 284 N.W. 266 (Neb. 1939).*

(n174)Footnote 964. *Hardin v. Baynes, 32 S.E.2d 384 (Ga. 1944).*

(n175)Footnote 965. *Garsick v. Dehner, 15 N.W.2d 235 (Neb. 1944).*

(n176)Footnote 966. *See* Goldfarb, Fraud and Non-disclosure in the Vendor-Purchaser Relation, *8 W. Res. L. Rev. 5 (1956).*

(n177)Footnote 967. *Scholes v. Stone, McGuire & Benjamin, 786 F. Supp. 1385 (N.D. Ill. 1992); Central Production Credit Ass'n v. Hans, 545 N.E.2d 1063 (Ill. App. 1989); Ill. ex rel. Alford v. Hendee, 279 Ill. App. 521 (1935); see Callner v. Greenberg, 33 N.E.2d 437 (Ill. 1941); Village of Hartford v. First NA. Bank, 30 N.E.2d 524 (Ill. App. Ct. 1940); Crocker v. Pitti, 16 A.2d 875 (Md. 1940); see generally Knight v. Behringer, 44 N.W.2d 852 (Mich. 1950)* (as to confidential relationship).

(n178)Footnote 968. *Williams v. Hall Stadium, Inc., 334 N.W.2d 354 (Iowa App. 1983); King v. Lamborn, 186 F. 21 (9th Cir. 1911); Shahan v. Brown, 52 So. 737 (Ala. 1910); Maxwell v. Sherman, 55 So. 520 (Ala. 1911); Brown v. Le May, 141 S.W. 759 (Ark. 1911); Murphy v. San Gabriel Mfg. Co., 222 P.2d 85 (Cal. Dist. Ct. App. 1950); Fountain Valley Land & Irrigation Co. v. Wagoner, 147 P. 333 (Colo. 1915); Wilcox v. Johnson, 18 A.2d 372 (Conn. 1941); Beardsley v. Clark, 294 N.W. 887 (Iowa 1940); Ison v. Sanders, 174 S.W. 505 (Ky. 1915); Getchell v. Kirkby, 92 A. 1007 (Me. 1915); Hillier v. Carpenter, 173 N.W. 886 (Mich. 1919); Kruithoff v. Goldstein, 284 N.W. 633 (Mich. 1939); Post v. Liberty, 121 P. 475 (Mont. 1912); Schechinger v. Gault, 130 P. 305 (Okla. 1913); Reger v. Henry, 150 P. 722 (Okla. 1915); Lightcap v. Nicola, 34 Pa. Super. 189 (1907); Kallison v. Poland, 167 S.W. 1104 (Tex. Civ. App. 1914); Winters v. Coward, 174 S.W. 940 (Tex. Civ. App. 1915); Abbott v. Dow, 113 N.W. 960 (Wis. 1907).*

(n179)Footnote 969. *Alliance Mortgage Co. v. Rothwell, 900 44 Cal. Rptr. 2d 354 (1995); Seeger v. Odell, 115 P.2d 977 (Cal. 1941); Hall v. Brown, 94 A. 530 (Md. 1915); Meyers v. Murphy, 28 A.2d 861 (Md. 1942); Nelson v. Nelson, 126 N.W. 731 (Minn. 1910); Leclerc v. Prudential Ins. Co. of Am., 39 A.2d 763 (N.H. 1944); Olston v. Or. Water Power & Ry. Co., 97 P. 538 (Or. 1908); Metro. Life Ins. Co. v. Hedgepath, 185 S.W.2d 906 (Tenn. 1945); Le Vine v. Whitehouse, 109 P. 2 (Utah 1910);* see Goldfarb, Fraud and Nondisclosure in the Vendor-Purchaser Relation, *8 W. Res. L. Rev. 5 (1956); Johnson v. Olsen, 381 P.2d 623 (Wash. 1963)* (intentional misrepresentation as to width of lot); *Osborne v. Cal-Am Financial Corp., 145 Cal. Rptr. 584 (1978)* (Vendee has a right to rescind for material misrepresentation.).

(n180)Footnote 970. *Marshall v. Keaveny, 248 S.E.2d 750 (N.C. Ct. App. 1978).*

(n181)Footnote 971. *Reeve v. Georgia-Pacific Corp., 510 N.E.2d 1378 (Ind. App. 1987); Hootman v. Beatty, 293 N.W. 32 (Iowa 1940); Martin v. Grutka, 278 N.E.2d 586 (Ind. Ct. App. 1972)* (Grantee's misrepresentation as to use property would be put was not one of an existing fact and does not justify relief for fraud.); *Kearney v. Maloney, 296 So. 2d 865 (La. Ct. App. 1973)* (Misrepresentation of condition of home by vendor justifies redhibition [voidance of sale because of defect in the interest sold].); *Johnson v. Olsen, 381 P.2d 623 (Wash. 1963)* (Vendor's knowledge that lot represented to be 60 feet wide was only 50 feet was material misrepresentation.); *Wise v. Dawson, 353 A.2d 207 (Del. Super. Ct. 1975)* (An exculpatory clause in a sales contract did not excuse tortious misrepresentation.).

(n182)Footnote 972. *Ficor, Inc. v. McHugh, 639 P.2d 385 (Col. 1982); Mescall v. W.T. Grant Co., 133 F.2d 209 (7th Cir. 1943); McClure v. U.S., 48 F. Supp. 531 (Ct. Cl. 1943); Wallick v. Eaton, 134 P.2d 727 (Colo. 1943); Keegan*

v. Lenzie, 135 P.2d 717 (Or. 1943).

(n183)Footnote 973. *Hirschman v. Hodges, O'Hara & Russell Co., 51 So. 550 (Fla. 1910).*

(n184)Footnote 974. *Offman v. Connall, 736 P.2d 242 (Wash. 1987); Eckert v. Miller, 111 P.2d 60 (Ariz. 1941); Clay v. Brand, 365 S.W.2d 256 (Ark. 1963)* (Contract will be rescinded for fraud by preponderance of the evidence, not necessarily clear and convincing preponderance.); *Alexander Myers & Co., Inc. v. Hopke, 541 P.2d 713 (Wash. 1976)* (An erroneous representation as to acreage is fraud even though there was no deceitful intent.), *rev'd on other grounds, 565 P.2d 80 (Wash. 1977).*

(n185)Footnote 975. *Emanuel v. Engst, 208 N.W. 840 (N.D. 1925).*

(n186)Footnote 976. *Lazar v. Superior Court, 909 P.2d 981 (Cal. 1996); Bramaric v. Churich, 226 P.2d 657 (Cal. Dist. Ct. App. 1951); Simon v. Williams, 232 P.2d 181 (Colo. 1951)* (inadequacy of price plus mental deficiency); *Intl. Realty Assoc. v. McAdoo, 99 So. 117 (Fla. 1924); Fuller v. Stone, 61 S.E.2d 467 (Ga. 1950)* (may if combined with lack of mental ability); *Fairbanks v. Johnson, 243 P. 1114 (Or. 1926); Nunge v. Crawford, 88 Pa. Super. 516 (1926); see Dearborn Elec. Light & Power Co. v. Jones, 299 F. 432 (8th Cir. 1924).*

(n187)Footnote 977. *Lewis v. Vargas, 787 S.W.2d 319 (Mo. App. 1990); Carpenter v. Wayne, 219 S.W. 735 (Ark. 1920); Hildebrand v. Graves, 275 S.W. 524 (Ark. 1925); McNac v. Brown, 208 P. 268 (Okla. 1922)* (illiterate Indian); *Thompson v. Coker, 241 P. 486 (Okla. 1925); Madole v. Miller, 119 A. 829* (Pa. 829); *Stephenson v. Arceneaux, 227 S.W. 729 (Tex. Civ. App. 1920).*

(n188)Footnote 978. *Pocatello Sec. Trust Co. v. Henry, 206 P. 175 (Idaho 1922).*

(n189)Footnote 979. *Wall v. Foster Petroleum Corp., 791 P.2d 1148 (Colo. App. 1989); Freedman v. Kensico Realty Co., 131 A. 916 (N.J. Ch. 1926); Kaston v. Zimmerman, 183 N.Y.S. 615 (1920); Com. Bank of Paris v. Callender, 264 S.W. 360 (Tenn. 1924);* Irvlor Realty Corp. v. 62-114 Imlay St. Corp., 151 N.Y.S.2d 191 (1956) (Where assessment of leasehold was matter of public record, element of reliance of purchaser upon alleged misrepresentations regarding takes on property required to prove fraud charge). *Bassford v. Cook, 380 P.2d 907 (Colo. 1963).*

(n190)Footnote 980. *Leisure American Resorts, Inc. v. Knutilla, 547 So. 2d 424 (Ala. 1989); Logan v. Chastang, 91 So. 867 (Ala. 1921); Grismore v. Utley, 252 S.W. 16 (Ark. 1923); Corbin v. Howard, 215 P. 920 (Cal. Dist. Ct. App. 1923); Glass v. Craig, 91 So. 332 (Fla. 1922); Grace v. Callahan, 178 N.W. 520 (Iowa 1920); Gerard v. Costin, 215 P. 1011 (Kan. 1923); Morneault v. Sanfacon, 119 A. 107 (Me. 1922); Borgmann v. Borgmann, 193 N.W. 711 (Neb. 1923); Harn v. Interstate Bldg. & Loan Co., 188 P. 343 (Okla. 1920); Sanders v. Rhea, 249 P. 350 (Okla. 1926); Troup v. Hine, 251 P. 43 (Okla. 1926).*

(n191)Footnote 981. *Unkle v. Wills, 281 F. 29 (8th Cir. 1922); Gregory v. Gregory, 227 S.W. 780 (Ark. 1921); Norsworthy v. Hicks, 281 S.W. 660 (Ark. 1926); Burandt v. Burandt, 149 N.E. 306 (Ill. 1925); Camp v. Kimbley, 223 S.W. 1005 (Ky. 1920); Morneault v. Sanfacon, 119 A. 107 (Me. 1922); Madole v. Miller, 119 A. 829 (Pa. 1923); Cyphers v. Dingus, 108 S.E. 565 (Va. 1921).*

(n192)Footnote 982. *Mills v. Glenn, 136 A. 831 (Md. 1927).*

(n193)Footnote 983. *Campbell v. Turley, 224 S.W. 528 (Tex. Civ. App. 1920).*

(n194)Footnote 984. *DeRoche v. Dame, 430 N.Y.S.2d 390 (1980); Warren v. Martin, 272 S.W. 367 (Ark. 1925); Emley v. Tenenbone, 255 P. 627 (Colo. 1927); Bain v. Ullerich, 177 N.W. 61 (Iowa 1920); Spitler v. Perry Town Lot & Improvement Co., 179 N.W. 69 (Iowa 1920); Montague v. Bank for Sav. in City of N.Y., 43 N.Y.S.2d 321 (1943); Meyer v. Barde, 228 P. 121 (Or. 1924); Deaton v. Rush, 252 S.W. 1025* (Tex. Comm'n App. 1923); *see Varn v. Gonzales, 222 S.W. 543* (Tex. Comm'n App. 1920).

(n195)Footnote 985. *R. Harris & Co. v. Weller, 280 F. 980 (D.C. Cir. 1922).*

(n196)Footnote 986. *Channell v. Anthony, 129 Cal. Rptr. 704 (1976).*

(n197)Footnote 987. *Diven v. Ashbaugh, 200 N.Y.S. 634 (1923); Myricks v. Heilbron, 170 S.W.2d 827 (Tex. Civ. App. 1943).*

(n198)Footnote 988. *Metropolitan Sav. & Loan Ass'n. v. Tarter, 730 S.W.2d 1 (Tex. App. 1987); Paolini v. Sulprizio, 258 P. 380 (Cal. 1927); Cherney v. Johnson, 238 P. 150 (Cal. Dist. Ct. App. 1925); Richter v. Schuett, 145 N.E. 402 (Ill. 1924); Sylvester v. Lynde, 215 P. 305 (Kan. 1923); Thibault v. Lalumiere, 60 N.E.2d 349 (Mass. 1945); Sandusky v. Waller, 272 S.W. 1045 (Mo. Ct. App. 1925); Goodwin v. Silverman, 43 A.2d 50 (R.I. 1945); Mason v. Peterson, 250 S.W. 142* (Tex. Comm'n App. 1923); *Dickson v. Day, 275 S.W. 307 (Tex. Civ. App. 1925); Landa v. Isern, 174 S.W.2d 310 (Tex. 1943).*

(n199)Footnote 989. *Pedalty v. George F. Nixon & Co., 6 N.E.2d 290 (Ill. App. Ct. 1937); Sellars v. Adams, 228 S.W. 424 (Ky. 1921).*

(n200)Footnote 990. *Kent v. Clark, 128 P.2d 868 (Cal. 1942).*

(n201)Footnote 991. *Riggs Nat'l Bank v. Ross, 180 B.R. 130 (Bankr. E.D. Va. 1995); Byars v. Sanders, 112 So. 127 (Ala. 1927); Phillips v. Malone, 136 So. 793 (Ala. 1931); Marston v. Simpson, 54 Cal. 189 (1880); Wicks v. Smith, 21 Kan. 412 (1879); Sellars v. Adams, 228 S.W. 424 (Ky. 1921); McFarland v. Cobb, 64 S.W.2d 931 (Mo. 1933); Williamson v. N.J. S. R.R. Co., 29 N.J. Eq. 311 (N.J. 1878); Schiffer v. Dietz, 83 N.Y. 300 (1881); Trowbridge v. Oehmsen, 202 N.Y.S. 833 (1924); Parmlee v. Adolph, 28 Ohio St. 10 (1875); Wesley v. Diamond, 109 P. 524 (Okla. 1910); Scott v. Walton, 52 P. 180 (Or. 1898); see Carter Coal Co. v. Litz, 54 F. Supp. 115 (W.D. Va. 1943); Hunt v. Sherrill, 15 So. 2d 426 (Miss. 1943); Thomas v. Thomas, 28 A.2d 540 (N.J. Ch. 1942); Landa v. Isern, 174 S.W.2d 310 (Tex. 1943).*

(n202)Footnote 992. *Harris v. Polk County Inv. Co., 177 N.W. 476 (Iowa 1920); Advance-Rumely Thresher Co. v. Bartzat, 206 N.W. 7 (Neb. 1925); Thompson v. Stadiem, 90 S.E.2d 518 (N.C. 1955)* (rescission of contract where vendee was blind and representations were made).

(n203)Footnote 993. *Vail v. Reynolds, 23 N.E. 301 (N.Y. 1890); Howe v. Martin, 102 P. 128 (Okla. 1909).*

(n204)Footnote 994. *Prasuhn v. Alfke, 11 N.E.2d 1000 (Ind. Ct. App. 1988).*

(n205)Footnote 995. *Akins v. Couch, 518 S.E.2d 674 (Ga. 1999); Gibraltar Colo. Life Co. v. Brink, 157 P.2d 134 (Colo. 1945); Thibault v. Lalumiere, 60 N.E.2d 349 (Mass. 1945); Goodwin v. Silverman, 43 A.2d 50 (R.I. 1945); Getty v. Jett Ross Mines, Inc., 159 P.2d 379 (Wash. 1945); Wilhite v. Mays, 235 S.E.2d 532 (Ga. 1977)* (Where the vendor was aware of defects of a septic tank, and the vendee was not, and vendor did not disclose them to the vendee, the vendor's suppression of the facts justified rescission of the contract.).

(n206)Footnote 996. *S.W. Packing Co. v. Cincinnati Butchers Supply Co., 139 F.2d 201 (5th Cir. 1943).*

(n207)Footnote 997. *Fields v. Yarborough Ford, Inc., 414 S.E.2d 164 (S. C. 1992); Byrn v. Walker, 267 S.E.2d 601 (S.C. 1980); Steed v. Upper Ashburton Realty Co., 184 A. 230 (Md. 1936); Essenburg v. Russell, 78 N.W.2d 136 (Mich. 1956)* (contract voidable for misrepresentation by seller); *Turner v. Carey, 87 S.E.2d 871 (S.C. 1955)* (If the contract has been induced by fraud the other party may either rescind or seek damages.).

(n208)Footnote 998. *Bassford v. Cook, 380 P.2d 907 (Colo. 1963).*

(n209)Footnote 999. *Graham v. L.A. First NA. Trust & Sav. Bank, 43 P.2d 543 (Cal. 1935).*

(n210)Footnote 1000. *Fuller v. Bilz, 126 N.W. 712 (Mich. 1910).*

(n211)Footnote 1001. *Asleson v. West Branch Land Co., 311 N.W.2d 533 (N.D. 1981); Lynch v. Mercantile Trust Co., 18 F. 486 (D. Minn. 1883); Phillips v. Malone, 136 So. 793 (Ala. 1931); Curry v. Windsor, 194 P. 958 (Ariz. 1921); Matlock v. Reppy, 14 S.W. 546 (Ark. 1886); Hines v. Brode, 143 P. 729 (Cal. 1914); Herfort v. Cramer, 4 P. 896 (Colo. 1884); Chandler v. Ziegler, 291 P. 822 (Colo. 1930); Murray v. Jennings, 42 Conn. 9 (1875); Gustafson v. Rustemeyer, 39 A. 104 (Conn. 1898); Okoomian v. Brandt, 126 A. 332 (Conn. 1924); Williams v. McFadden, 1 So. 618 (Fla. 1887); Drew v. Beall, 62 Ill. 164 (1871); Ginsburg v. Bartlett, 262 Ill. App. 14 (1931); Nysewander v. Lowman, 24 N.E. 355 (Ind. 1890); Perry Fry Co. v. Gould, 241 N.W. 666 (Iowa 1932); McDanel v. Whalen, 138 P. 590 (Kan. 1914); Dittcher v. Binkley, 64 S.W.2d 502 (Ky. 1933); Adams v. Burton, 77 A. 835 (Me. 1910); Morse v. Hutchins, 102 Mass. 439 (1869); Bryan v. Houseman-Spitzley Corp., 182 N.W. 111 (Mich. 1921); Kendrick v. Ryus, 123 S.W. 937 (Mo. 1909); McFarland v. Cobb, 64 S.W.2d 931 (Mo. 1933); Moller v. Mallory, 193 N.W. 912 (Neb. 1923); Page v. Parker, 43 N.H. 363 (1861); Krumm v. Beach, 96 N.Y. 398 (1884); Vail v. Reynolds, 23 N.E. 301 (N.Y. 1890); Warne v. Finseth, 195 N.W. 573 (N.D. 1923); Linerode v. Rasmussen, 59 N.E. 220 (Ohio 1900); Augur v. Smith, 18 S.W. 398 (Tenn. 1891); Shanks v. Whitney, 29 A. 367 (Vt. 1894).*

(n212)Footnote 1002. *Sarvis v. Vermont State Colleges, 772 A.2d 494 (Vt. 2001); Emley v. Tenenbone, 255 P. 627 (Colo. 1927); Dinnan v. Bloomfield Hills Land Co., 181 N.W. 986 (Mich. 1921); Bell v. Spain, 222 P. 322 (Or. 1924); see Payne v. Beaumont, 245 S.W. 94 (Tex. Civ. App. 1922); Collier v. Nolan, 211 A.2d 265 (Vt. 1965)* (The sale may be set aside for fraud, though the injured party becomes aware of the fraud between entering into the contract and its consummation.).

(n213)Footnote 1003. *Tooker v. Alston, 159 F. 599 (8th Cir. 1907); Fed.-Am. NA. Bank & Trust Co. v. McReynolds, 67 F.2d 251 (D.C. Cir. 1933); Gridley v. Ross, 217 P. 989 (Idaho 1923); Humphrey v. Sievers, 163 N.W. 737 (Minn. 1917); Curtiss-Warner Corp. v. Thirkettle, 137 A. 408 (N.J. 1927); Browning v. Rodman, 111 A. 877 (Pa. 1920);* J.F. Rydstrom, Annotation, *" 'Out of pocket' " or 'benefit of bargain' as proper rule of damages for fraudulent representations including contract for transfer of property," 13 A.L.R.3d 875 (1973); Horton v. O'Rourke, 321 So. 2d 612 (Fla. Dist. Ct. App. 1975)* (Florida does not use the "benefit of bargain" rule in case of termination of a sales contract for failure to provide title. Instead, in the absence of bad faith, the damages awarded are purchase money paid with interest and expense of investigating title and cost of improvements by the purchasers in contemplation of the conveyance.), *modified, Levine v. Fieni McFarlane, Inc., 690 So. 2d 712 (Fla. Dist. Ct. App. 1997).*

(n214)Footnote 1004. *Retail Prop. Investors v. Skeens, 471 S.E.2d 181 (Va. 1996); Wilder v. Det. Edison Co., 84 N.W.2d 243 (Mich. 1957)* (Failure to read a deed is no justification for cancelation.); *Cox v. Tanner, 98 S.E.2d 905 (S.C. 1956)* (Where deed was delivered and recorded in name of husband alone by mistake a new "correction deed" was executed and recorded in name of husband and wife, the new deed canceled and rescinded old deed for mistake.); *Bates v. Hall, 204 S.W.2d 487 (Ky. 1947)* (so on grounds of estoppel); *Emerson-Brantingham Implement Co. v. Cook, 206 N.W. 170 (Minn. 1925).*

(n215)Footnote 1005. *Angers v. Sabatinelli, 293 N.W. 173 (Wis. 1940).*

(n216)Footnote 1006. *Jones v. Linder, 247 S.W.2d 817 (Mo. 1952).*

(n217)Footnote 1007. *Carter Coal Co. v. Litz, 54 F. Supp. 115 (W.D. Va. 1943).*

(n218)Footnote 1008. *Klee v. Chi. Trust Co., 1 N.E.2d 548 (Ill. App. Ct. 1936), rev'd, 6 N.E.2d 442 (Ill. 1937)* (complainant was guilty of laches because, although he did not know of the fraud, he should have known).

(n219)Footnote 1009. *Thompson v. Huston, 135 P.2d 834 (Wash. 1943).*

(n220)Footnote 1010. *15 U.S.C. §§ 1635 et seq.*(1994); *Glover v. Doe Valley Dev. Corp., 408 F. Supp. 699 (W.D. Ky. 1975).*

(n221)Footnote 1011. *Dist. by Olsen v. Lake Country, 955 F.2d 203 (4th Cir. 1991); Nargiz v. Henlopen Developers, 351 A.2d 564 (Del. Super. Ct. 1976), rev'd, 380 A.2d 1361 (Del. 1977)* (A condominium unit that was actually completed two years from the date of contract was not improved property at the time of contract and, therefore, not an exemption from the Interstate Land Sales Full Disclosure Act.); *Paquin v. Four Seasons of Tenn., Inc., 519 F.2d 1105 (5th Cir. 1975)* (Action under the Interstate Land Sales Full Disclosure Act denied, where the purchasers could not show that the property report lacked factual substance or misrepresented the facts.).

(n222)Footnote 1012. *Collier v. Sinkoe, 218 S.E.2d 910 (Ga. Ct. App. 1975); Bermes v. Facell, 328 So. 2d 722 (La. Ct. App. 1976)* (Only a simple inspection is required.).

(n223)Footnote 1013. *Angle v. Marco Builders, 626 P.2d 126 (Ariz. 1981); Allan v. Martin, 574 P.2d 457 (Ariz. 1978)* (The right to rescind for material misrepresentation must be exercised within a reasonable time.).

(n224)Footnote 1014. *See* Keeton, Fraud, Concealment and Nondisclosure, *15 Tex. L. Rev. 1 (1936);* Goldfarb, Fraud and Nondisclosure in the Vendor-Purchaser Relation, *8 W. Res. L. Rev. 5 (1956); see also* Coffey & Welch, Federal Regulation of Land Sales: Full Disclosure Comes Down to Earth, *21 Case W. Res. L. Rev 5 (1969).*

(n225)Footnote 1015. 348-352 *W. 27th St. Corp. v. Dropkin, 36 N.Y.S.2d 740 (1942).*

(n226)Footnote 1016. *Trout v. Harrell, 233 S.W.2d 233 (Ark. 1950).*

(n227)Footnote 1017. *Sowards v. Rathbun, 8 P.3d 1245 (Idaho 2000); Bethlahmy v. Bechtel, 415 P.2d 698 (Idaho 1966)* (Builder-vendor liable for hidden defects known to him on the basis of fraud.); *Fegeas v. Sherrill, 147 A.2d 223 (Md. 1958)* (No duty to disclose facts of defects of dwelling house where there was no confidential relationship.); *contra Cohen v. Vivian, 349 P.2d 366 (Colo. 1960)* (finding vendor liable for latent defect known to him); *Walsh v. Edwards, 197 A.2d 424 (Md. 1964)* (No action lies for failure of the vendor to disclose to the vendee a material defect in new construction.); *Hinson v. Jefferson, 215 S.E.2d 102 (N.C. 1975)* (A purchaser is bound by latent defects or facts that a reasonable investigation would normally disclose.); *Haberman v. Greenspan, 368 N.Y.S.2d 717 (1975)* (Mere silence or nondisclosure by the vendor of a material fact is not fraud since there is no fiduciary relationship.); *contra Wilhite v. Mays, 232 S.E.2d 141 (Ga. Ct. App. 1976)* (Seller's suppression of known facts was fraud.); *Bodenhamer v. Patterson, 563 P.2d 1212 (Or. 1st Dept. 1977).*

(n228)Footnote 1018. *Stewart v. Wyo. Cattle-Ranche Co., 128 U.S. 383 (1888).*

(n229)Footnote 1019. *Statewide Rriev. Comm. v. Egbarin, 767 A.2d 732 (Conn. 2001); Gayne v. Smith, 134 A. 62 (Conn. 1926); Haddad v. Clark, 43 A.2d 221 (Conn. 1945); Egan v. Hudson Nut Prods., Inc., 114 A.2d 213 (Conn. 1955); Greenberg v. Glickman, 50 N.Y.S.2d 489 (1944).*

(n230)Footnote 1020. *In re Mediscan Research, Ltd, 940 F.2d 558 (9th Cir. 1991); Kallgren v. Steele, 279 P.2d 1027 (Cal. Dist. Ct. App. 1955); Forest Preserve Dist. of Cook County v. Christopher, 52 N.E.2d 313 (Ill. App. Ct. 1943); Crum v. McCoy, 322 N.E.2d 161 (Ohio Mun. 1974)* (Vendor has the duty to tell purchaser about water problems.).

(n231)Footnote 1021. *Rood v. Newberg, 718 N.E.2d 886 (Mass. 1999); Swinton v. Whitinsville Sav. Bank, 42 N.E.2d 808 (Mass. 1942)* (Where vendor knew that house was infested with termites, he was under no duty to speak even though the fact was not easily observable by the vendee.); *Day v. Frederickson, 190 N.W. 788 (Minn. 1922).*

(n232)Footnote 1022. *Fuller Ford, Inc. v. Ford Motor Co., 2001 U.S. Dist. LEXIS 12044 (D. N.H. 2001); Herzog v. Capital Co., 164 P.2d 8 (Cal. 1945); Clauser v. Taylor, 112 P.2d 661 (Cal. Dist. Ct. App. 1941); Milmoe v. Dixon, 225 P.2d 273 (Cal. Dist. Ct. App. 1950); Dugan v. Bosco, 108 A.2d 586 (Del. Ch. 1954); Weikel v. Sterns, 134 S.W. 908 (Ky. 1911); Kaze v. Compton, 283 S.W.2d 204 (Ky. 1955); Mincy v. Crisler, 96 So. 162 (Miss. Div. B 1923); Musgrave v. Lucas, 238 P.2d 780 (Or. 1951); Simmons v. Evans, 206 S.W.2d 295 (Tenn. 1947); Auger v. Chapdelaine, 209 A.2d*

710 (N.H. 1965) (Where deed indicated that grantee had access to city water, the grantee had right to damages where water was not available.); *Lawson v. Citizens & S. NA. Bank, 180 S.E.2d 206 (S.C. 1971)* (Failure to disclose concealed unsatisfactory condition of subsoil was fraud by vendor.); *Maguire v. Masino, 325 So. 2d 844 (La. Ct. App. 1975)* (Termite infestation not discoverable by simple inspection was a fault.); *Griffith v. Byers Constr. Co. of Kan., Inc., 510 P.2d 198 (Kan. 1973)* (Failure to disclose salty condition of soil was fraud.); *Dunaway v. Lewis, 554 P.2d 110 (Okla. Ct. App. 1976)* (Vendor held liable for failure to disclose known danger of flooding.).

(n233)Footnote 1023. *Nelson v. Cheney, 401 N.W.2d 472 (Neb. 1987); O'Shea v. Morris, 198 N.W. 866 (Neb. 1924); Daniel v. Porter, 397 S.W.2d 89 (Tex. Civ. App. 1965)* (Deed voided where vendor failed to inform purchaser of water rights existing underneath the land.).

(n234)Footnote 1024. *Smith v. David S. Shurtleff & Assocs., 858 P.2d 778 (Idaho App. 1993); Borzillo v. Thompson, 57 A.2d 195 (D.C. 1948); Ikeda v. Curtis, 261 P.2d 684 (Wash. 1953); contra Watt v. Patterson, 271 P.2d 200 (Cal. Dist. Ct. App. 1954).*

(n235)Footnote 1025. *Galuth Realty Corp. v. Greenfield, 478 N.Y.S.2d 51 (1984); Grenlac Holding Corp. v. Kahn, 106 N.Y S.2d 83 (1951); Holly Hill Lumber Co. v. McCoy, 23 S.E.2d 372 (S.C. 1942); James v. Anderson, 140 S.E. 264 (Va. 1927); Paquin v. Four Seasons of Tenn., Inc., 519 F.2d 1105 (5th Cir. 1975)* (Failure to disclose that the parent corporation was bankrupt was not a material misrepresentation under the Interstate Land Sales Full Disclosure Act.); *15 U.S.C. § 170 et seq.* (1994).

(n236)Footnote 1026. *Crompton v. Beedle, 75 A. 331 (Vt. 1910).*

(n237)Footnote 1027. *Stackpole v. Hancock, 24 So. 914 (Fla. 1898).*

(n238)Footnote 1028. *Noved Realty Corp. v. A.A.P. Co., 293 N.Y.S. 336 (1937).*

(n239)Footnote 1029. *Klika v. Albert Wenzlick Real Est. Co., 150 S.W.2d 18 (Mo. Ct. App. 1941).*

(n240)Footnote 1030. *Greenberg v. Glickman, 50 N.Y.S.2d 489 (1944).*

(n241)Footnote 1031. *Love v. Basque Cartel, 873 F. Supp. 563 (D. Wyo. 1995); Barnard v. Kellogg, 77 U.S. 383 (1870)* (All states where the common law prevails have the doctrine of caveat emptor.); *Berger v. Burkoff, 92 A.2d 376 (Md. 1952); Gilbert Constr. Co. v. Gross, 129 A.2d 518 (Md. 1957); Moore v. Berry, 288 S.W.2d 465 (Tenn. Ct. App. 1955)* (Conditions described by the seller or the owner and announced at the time and place of auction are binding on the purchaser, whether or not he knew or heard of them.); *see* Dunham, Vendor's Obligation as to Fitness of Land for a Particular Purpose, *37 Minn. L. Rev. 108 (1952)* (strong objections to the caveat emptor doctrine in realty).

(n242)Footnote 1032. *Allen v. Reichert, 237 P.2d 818 (Ariz. 1951); Berger v. Burkoff, 92 A.2d 376 (Md. 1952)* (no implied warranty as to sewer pipe); *Gilbert Constr. Co. v. Gross, 129 A.2d 518 (Md. 1957)* (warranty not implied as to furnace); *Levy v. C. Young Constr. Co., Inc., 134 A.2d 717 (N.J. Super. App. Div. 1957)* (warranty not implied as to sewer), *cf. Andreychak v. Lent, 607 A.2d 1346 (N.J. Super. Ct. App. Div. 1992)* (Vendor was liable to purchasers for breach of warranty of habitability in a malfunctioning septic system.); *see* Dunham, Vendor's Obligation as to Fitness of Land for a Particular Purpose, *37 Minn. L. Rev. 108 (1952).*

(n243)Footnote 1033. *Keller v. Henderson, 545 S.W.2d 705 (Ga. 2001); Wilhite v. Mays, 232 S.E.2d 141 (Ga. Ct. App. 1st Div. 1976); McPherson v. Purdue, 585 P.2d 830 (Wash. Ct. App. 1978)* (caveat emptor not rigidly applied).

(n244)Footnote 1034. *Berger v. Burkoff, 92 A.2d 376 (Md. 1952); Kerr v. Parsons, 82 N.E.2d 303 (Ohio Ct. App. 1948); Rodriguez v. Hudson, 79 So. 2d 578 (La. Ct. App. 1955)* (In Louisiana under the redhibition doctrine, an implied warranty arises even in sales of realty unless the buyer could have discovered the defect by a simple inspection.); *Walton v. Petty, 131 S.E.2d 655 (Ga. Ct. App. 1963), overruled, Holmes v. Worthey, 282 S.E.2d 919 (Ga. Ct. App.*

1981) (Development of Georgia has given rise to exceptions to the caveat emptor doctrine.); *Dooley v. Berkner, 147 S.E.2d 685 (Ga. Ct. App. 1966), overruled, Holmes v. Worthey, 282 S.E.2d 919 (Ga. Ct. App. 1981)* (Holmes rule applied to caveat emptor.); *Tudor v. Heugel, 178 N.E.2d 442 (Ind. Ct. App. 1961)* (Vendor is not liable in absence of false statements or representations as to a new house for defects in construction where the purchaser had inspected the house prior to purchase.), *overruled on other grounds, Theis v. Heuer, 280 N.E.2d 300 (Ind. 1972)* (Caveat emptor not applicable when a defective condition caused water and sewage to back up in a house, but implied warranty of fitness for human habitation was imposed.); *Pines v. Perssion, 111 N.W.2d 409 (Wis. 1961)* (To the effect that housing codes created an implied covenant on the part of the lessor that the premises are picked for decent, safe and sanitary habitation and meet minimum standards.); *Wilhite v. Mays, 235 S.E.2d 532 (Ga. 1977)* (Absent fraud, there is the rule of caveat emptor on purchases of realty.).

(n245)Footnote 1035. *Clay v. Landreth, 45 S.E.2d 875 (Va. 1948)* (where both the vendor and vendee knew the use to which the property was to be put after sale, the adoption, after the contract was executed, of a zoning ordinance prohibiting such use justified rescission).

(n246)Footnote 1036. Zack Cheek Builders, Inc. v. McLeod, 597 W.W.2d 888 (Tenn. 1980); *Nece v. Bennett, 28 Cal. Rptr. 117 (1963)* (A vendor is not held to full disclosure unless there is a relationship of trust and confidence.); *Angela Realty Corp. v. Pavsner Holding Corp., 236 N.Y.S.2d 634 (1962)* (Vendor must disclose facts unknown to him which will prevent vendee from applying property to its intended use.); *Belote v. Memphis Dev. Co., 346 S.W.2d 441 (Tenn. 1961)* (Caveat emptor doctrine denied where the vendor knew of the dangerous condition and knew the vendee could not ascertain it, so vendor was liable in tort for a injury to a member of the vendee's family.).

(n247)Footnote 1037. *Tudor v. Heugel, 178 N.E.2d 442 (Ind. Ct. App. 1961), overruled on other grounds, Theis v. Heuer, 280 N.E.2d 300 (Ind. 1972)* (Caveat emptor not applicable when a defective condition caused water and sewage to back up in a house, but implied warranty of fitness for human habitation was imposed.); *Walsh v. Schmidt, 92 N.E. 496 (Mass. 1910); see Davis v. Dunn, 58 So. 2d 539 (Fla. 1952); Fannon v. Carden, 240 S.W.2d 101 (Ky. 1951); see* Disclosure Problems in Sale and Leaseback Transactions, *16 U. Chi. L. Rev. 482 (1949);* Caveat Vendor--A Trend in the Law of Real Property, *5 DePaul L. Rev. 263 (1955).*

(n248)Footnote 1038. *Fisher v. Corner Plantation, Inc. 772 So. 2d 455 (Ala. 2000); Coneland Water Co. v. Nickalls, 242 P. 518 (Cal. Dist. Ct. App. 1925)* (no right to rely on prospectus in conflict with contract); *Gilbert Constr. Co. v. Gross, 129 A.2d 518 (Md. 1957); Mulheron v. Henry S. Koppin Co., 190 N.W. 674 (Mich. 1922)* (doctrine of caveat emptor inapplicable to latent defects), *aff'd, M & D, Inc. v. W.B. McConkey, 585 N.W.2d 33 (Mich. Ct. App. 1998)* (overruled Shimmons rule *[Shimmons v. Mortg. Corp. of Am., 520 N.W.2d 670 (Mich. Ct. App. 1994)]); Tarnow v. Carmichael, 116 N.W. 1031 (Neb. 1908); Indus. Sav. & Loan Co. v. Plummer, 92 A. 583 (N.J. 1914); Long v. Kendall, 87 P. 670 (Okla. 1906); Smith v. Tucker, 270 S.W. 66 (Tenn. 1925); Stewart v. Larkin, 134 P. 186 (Wash. 1913); Fosgate v. Nocatee Fruit Co., 299 F. 963 (S.D. Fla. 1924)* (Caveat emptor applies where purchaser familiar with land.); *Sanders v. King, 95 So. 19 (Ala. 1923)* (Where no suspicious circumstances, purchaser not required to make independent investigation.); *Koblick v. Larson, 207 P. 929 (Cal. Dist. Ct. App. 1922); Osborne v. Howard, 242 S.W. 852 (Ky. 1922); Darnell v. Bibb, 221 S.W. 1061 (Ark. 1920)* (It is essential that purchaser contract on the trust he reposes in representations of vendor.); *McCulla v. Brown, 258 S.W. 629 (Ark. 1924)* (There is no reliance on representation where purchaser is informed and makes independent investigation.); *Lone Rock Bank v. Pipkin, 276 S.W. 588 (Ark. 1925); Stockton v. Hind, 196 P. 122 (Cal. Dist. Ct. App. 1921); Carson v. Mikel, 216 N.W. 60 (Iowa 1927); McCaw v. O'Malley, 249 S.W. 41 (Mo. 1923); Hawthorne v. Odenson, 120 A. 797 (N.J. Ch. 1923)* (The doctrine is applicable to sales of realty.); *Freedman v. Kensico Realty Co., 131 A. 916 (N.J. Ch. 1926); Lewy v. Clark Ave., 217 N.Y.S. 185 (1926); Smith v. Tucker, 270 S.W. 66 (Tenn. 1925); Cashion v. Ahmadi, 345 So. 2d 268 (Ala. 1977)* (Caveat emptor upheld where no element of health or safety involved.).

(n249)Footnote 1039. *Cate v. Dover Corp., 790 S.W.2d 559 (Tex. 1990); Tarnow v. Carmichael, 116 N.W. 1031 (Neb. 1908); A & M Land Dev. Co. v. Miller, 94 N.W.2d 197 (Mich. 1959)* (Unsuitability of a portion of the premises was the vendee's misfortune, there being no fraud present.); *Humber v. Morton, 426 S.W.2d 554 (Tex. 1968)* (Implied

warranty of habitability imposed on builder-vendor.); *see* An Implied Warranty of Fitness and Suitability for Human Habitation as Applied to the Sales of New Homes in Texas, *6 Hous. L. Rev. 176 (1968).*

(n250)Footnote 1040. *Blorenzo v. Noel, 522 N.W.2d 724 (Michl. 1994); All v. Sweeney, 93 N.W.2d 298 (Mich. 1958)* (Vendor's silence concerning known defects in sewage facilities amounted to fraud justifying rescission by the vendee.); *Clark v. Thorpe Bros., 135 N.W. 387 (Minn. 1912); Prescott v. Brown, 120 P. 991 (Okla. 1911); Pitman v. Erskine, 94 P. 921 (Wash. 1908); Jenness v. Moses Lake Dev. Co., 234 P.2d 865 (Wash. 1951)* (false statements as to earnings).

(n251)Footnote 1041. *Atherton Condominium Apartment Owners Ass'n Bd. Of Directors v. Blume Dev. Co., 799 P.2d 250 (Wash. 1990); Fannon v. Carden, 240 S.W.2d 101 (Ky. 1951); Stewart v. Salisbury Realty & Ins. Co., 74 S.E. 736 (N.C. 1912); Obde v. Schlemeyer, 353 P.2d 672 (Wash. 1960)* (Washington has applied to a vendor-purchaser the landlord and tenant rule that where there are concealed defects in the premises, which are dangerous to the property, to the health or life of the occupiers, and which are known to the vendor, but not to the purchaser, and which a careful examination would not disclose, it is the vendor's duty to disclose them to the purchaser before sale, and failure to do so amounts to fraud.); *O'Donnell v. Novak, 183 So. 2d 884 (Fla. Dist. Ct. App. 1966)* (rescission of sales contract permitted where material misrepresentation).

(n252)Footnote 1042. Or. *Mortg. Co. v. Renner, 17 F. Supp. 727 (D. Idaho 1937); Younis v. Hart, 138 P.2d 323 (Cal. Dist. Ct. App. 1943).*

(n253)Footnote 1043. *Moore v. Carrollton Enters., 1995 Del. Super. LEXIS 94* (Del. Super. Ct. Feb. 7, 1995); *Eckman v. Beihl, 184 A. 430 (N.J. Super. 1936); see Levy v. C. Young Constr. Co., 139 A.2d 738 (N.J. 1958); Re v. Magness Constr. Co., 117 A.2d 78 (Del. Super. Ct. 1955)* (Warranty as to condition of premises in a sales contract was collateral, thus surviving the deed.); *Woelfel v. Tyng, 158 A.2d 311 (Md. 1960)* (The purchaser was required to take marshland where there was no right-of-way by land to the parcel and where he could have located the situation in respect to the property before sale, there being no representations of rights-of-way.); *Caporaletti v. A-F Corp., 137 F. Supp. 14 (D.D.C. 1956)* (builder-vendor liable in tort), *rev'd on other grounds, 240 F.2d 53 (D.C. Cir. 1957); Bethlahmy v. Bechtel, 415 P.2d 698 (Idaho 1966)* (Major defects in house justified rescission in sales contract with vendor.); *Kordig v. N. Constr. Co., 151 N.E.2d 470 (Ill. App. Ct. 1958)* (not liable if the defect is patent); *McQuillan v. Clark Thread Co., 172 A 370 (N.J. 1934)* (Vendor not liable in tort under nuisance theory unless multiple dwelling involved.), *overruled on other grounds, 74 A.2d 297 (N.J. 1950); Antonsen v. Bay Ridge Sav. Bank, 41 N.Y.S.2d 629 (1943), rev'd, 54 N.E.2d 338 (N.Y. 1944); McIntosh v. Goodwin, 292 S.W.2d 242 (Tenn. Ct. App. 1954); but see Bray v. Cross, 106 S.E.2d 315 (Ga. Ct. App. 1958); see* Liability of Vendor of Real Property for Personal Injuries, *44 Minn. L. Rev. 144 (1959); Kopetzke v. County of San Mateo ex rel. Bd. of Supervisors, 396 F. Supp. 1004 (N.D. Cal. 1975)* (Caveat emptor applies to loss resulting from inherent geological defects in properties.); *see also* Real Property-Implied Warranty: Seller of Land Limited by Restrictive Covenants Implied or Warrants that the Land Was Useable for the Restrictive Purpose, *54 N.C. L. Rev. 1097 (1976).*

(n254)Footnote 1044. *Einhorn v,. Ceran Corp., 426 A.2d 1076 (N.J. Super. 1980); Carter Coal Co. v. Litz, 54 F. Supp. 115 (W.D. Va. 1943); Miller v. Cannon Hill Ests., Ltd., 2 K.B. 113 (1931)* (implying a warranty on sale by the builder of a house under construction); *LeBlanc v. Ellerbee Builders, Inc., 317 So. 2d 1 (La. Ct. App. 1975)* (Breaches of warranty of construction affect only those in the chain of title.); *contra Barnes v. Mac Brown & Co., 342 N.E.2d 619 (Ind. 1976)* (permitting second vendee to recover from builder vendor).

(n255)Footnote 1045. *Meyer v. Bryson, 891 S.W.2d 223 (Ten. App. 1994); Evens v. Young, 264 S.W.2d 577 (Tenn. 1954), overruled, Johnson v. Oman Constr. Co., 519 S.W.2d 782 (Tenn. 1975)* (Even after the acceptance of the work by a contractee, a contractor is held to the standard of reasonable care and must protect third parties against foreseeable harm.); *Pollard v. Saxe & Yolles Dev. Co., 108 Cal. Rptr. 174 (Cal. Dist. Ct. App. 1973)* (Builder-developer was liable for defects.), *vacated, 525 P.2d 88 (Cal. 1974); H.B. Bolas Enters., Inc. v. Zarlengo, 400 P.2d 447 (Colo. 1965)* (Caveat emptor still applicable in sales of old houses.); *Waggoner v. Midwestern Dev., Inc., 154 N.W.2d 803 (S.D. 1967);*

Stewart v. Beegun, 261 N.E.2d 491 (Ill. App. Ct. 1970) (Sale of an apartment unit where the vendors had not relinquished possession and controlled the purchasers but the purchasers had taken over the management, both vendor and purchaser were liable to tenants for damages incurred through defective elevators, vendor and purchaser being common carriers.); *Di Pippo v. Meyer, 263 N.E.2d 907 (Ohio Ct. App. 1970)* (Where vendor of a house knew of defects in plumbing and equipment but did not disclose the information to the purchaser who did not know of the defects, the purchaser was entitled to recover amount expended to correct the defects and to rescind the contract.).

(n256)Footnote 1046. *De los Rios v. Nationsbank, N.E. 911 F. Supp. 8 (D.D.C. 1995); Hanna v. Fletcher, 231 F.2d 469 (D.C. Cir. 1956); Pastorelli v. Associated Engrs., Inc., 176 F. Supp. 159 (D.R.I. 1959); Dow v. Holly Mfg. Co., 321 P.2d 736 (Cal. 1958); Carter v. Livesay Window Co., 73 S.2d 411 (Fla. 1954); Kordig v. N. Constr. Co., 151 N.E.2d 470 (Ill. App. Ct. 1958); MacPherson v. Buick Motor Co., 111 N.E. 1050 (N.Y. 1916); Cochran v. Keeton, 252 So. 2d 313 (Ala. 1971)* (Caveat emptor inapplicable to builder's sale of new house.); *Wawak v. Stewart, 449 S.W.2d 922 (Ark. 1970)* (holding that a builder-vendor impliedly warranted, to the first purchaser of a house, against flooding of heating and air-conditioning duct-work embedded in ground before concrete slab floor was poured); *Connor v. Great W. Sav. & Loan Assn., 447 P.2d 609 (Cal. 1968); House v. Thornton, 457 P.2d 199 (Wash. 1969)* (implied warranty of proper construction); *Connor v. Conejo Valley Dev. Co., 61 Cal. Rptr. 333 (1967)* (lender who financed home building and took title under builder could repay loan held liable for defects) *vacated, Connor v. Great W. Sav. & Loan Assn., 447 P.2d 609 (Cal. 1968); Avner v. Longridge Ests., 77 Cal. Rptr. 633 (1969)* (manufacturer of a lot by grading and filling of a hillside held liable to buyer under strict liability for defective subsurface causing landslide.); *Carpenter v. Donohoe, 388 P.2d 399 (Colo. 1964)* (to the effect that there is an implied warrant that a house will be constructed in accordance with the local building code); *contra Walton v. Petty, 131 S.E.2d 655 (Ga. Ct. App. 1963), overruled, Holmes v. Worthey, 282 S.E.2d 919 (Ga. Ct. App. 1981); Reynolds v. Wilson, 173 S.E.2d 256 (Ga. Ct. App. 2d Div. 1970)* (no implied warranty against builder-seller of residential property), *overruled, Holmes v. Worthey, 282 S.E.2d 919 (Ga. Ct. App. 1981); Bethlahmy v. Bechtel, 415 P.2d 698 (Idaho 1966)* (Caveat emptor not applicable to inexperienced buyer from experienced builder.); *Tudor v. Heugel, 178 N.E.2d 442 (Ind. Ct. App. 1961), overruled, Theis v. Heuer, 280 N.E.2d 300 (Ind. 1972)* (holding an implied warranty of fitness in sale of home by the builder-vendor denying the rule of caveat emptor); *Lorio v. Kaizer, 277 So. 2d 633 (La. 1973)* (In Louisiana, a seller of a used home warrants against substantial defects that cannot be revealed by inspection.); *Gilbert Constr. Co. v. Gross, 129 A.2d 518 (Md. 1957)* (where no implied warranty of fitness, developer-seller may be liable on contract for failure to perform in a workmanlike manner); *Waggoner v. Midwestern Dev., Inc., 154 N.W.2d 803 (S.D. 1967)* (Vendor-builder liable under implied warranty for seepage of ground water into the basement.); *Gasteiger v. Gillenwater, 417 S.W.2d 568 (Tenn. Ct. App. 1966)* (Builder-vendor liable for defects which he should have known and which were not visible to the vendee.); *see* Application of Strict Liability to the Production of Defective Realty, *13 Ariz. L. Rev. 643 (1971);* Bixby, Let the Seller Beware: Remedies for the Purchase of a Defective Home, 49 J. Urb. L. 533 (1972); Implied Warranties in the Sale of New Hom.es, *23 U. Fla. L. Rev. 626 (1971);* Torts-Implied Warranty of Fitness Applied to Purchase of New Homes, *16 St. Louis U. L.J. 167 (1971);* Young, Quaere: Caveat Emptor or Caveat Venditor?, *24 Ark. L. Rev. 245 (1970); see also* Kennedy, Real Property: Liability of Builder-Vendor for Defects in a New House, *26 Okla. L. Rev. 111 (1971); Lingsch v. Savage, 29 Cal. Rptr. 201 (1963)* (Vendee entitled to recover under an implied warranty of habitability where the vendor was the builder.); *Elmore v. Blume, 334 N.E.2d 431 (Ill. App. Ct. 1975)* (Builder-vendor liable for express warranties.); Overcast v. *Baldwin, 544 P.2d 464 (Wyo. 1976); Garcia v. Hynes & Howes Real Est., Inc., 331 N.E.2d 634 (Ill. App. Ct. 1975); Norton v. Burleaud, 342 A.2d 629 (N.H. 1975); Lyon v. Ward, 221 S.E.2d 727 (N.C. Ct. App. 1976)* (Builder-vendor liable for failure of water supply.); *Tavares v. Horstman, 542 P.2d 1275 (Wyo. 1975); Maser v. Lind, 148 N.W.2d 831 (Neb. 1967)* (Seller must reveal existence of termites.); *Diesel Service Unit Co. v. Bonbright, 555 P.2d 452 (Or. 1976)* (Representations by vendor as to adequacy of sewage disposal required vendor to correct deficiency.); *Bolkum v. Staab, 346 A.2d 210 (Vt. 1975)* (Developer who contracted for building of home held liable to vendee for defects.); *see* Gravells, Defective Premises-Negligence Liability of Builders, 43 Conveyancer 97 (1979).

(n257)Footnote 1047. *Javins v. First Nat'l Realty Corp., 428 F.2d 1071 (D. C. Cir. 1970); Hoye v. Century Builders, Inc., 329 P.2d 474 (Wash. 1958)* (finding implied warranty of fitness of habitation); *Narup v. Higgins, 200*

N.E.2d 922 (Ill. App. Ct. 1964) (no warranty); *Coutrakon v. Adams, 188 N.E.2d 780 (Ill. App. Ct. 1963)* (no warranty); *Laurel Realty Co. v. Himelfarb, 72 A.2d 23 (Md. 1950)* (no warranty); *Vanderschrier v. Aaron, 140 N.E.2d 819 (Ohio Ct. App. 1957)* (no warranty); *Jones v. Gatewood, 381 P.2d 158 (Okla. 1963)* (no warranty); *Cochran v. Keeton, 252 So. 2d 313 (Ala. 1971)* (Purchase from builder-vendor implied warranty of fitness and habitability.); *Kriegler v. Eichler Homes, Inc., 74 Cal. Rptr. 749 (1969)* (strict liability for vendor-builder of houses); *State Stove Mfg. Co. v. Hodges, 189 So. 2d 113 (Miss. 1966), cert. den., 386 U.S. 912 (1967)* (strict liability for vendor-building of houses); *Schipper v. Levitt & Sons, Inc. 207 A.2d 314 (N.J. 1965)* (strict liability for vendor-builder of houses); *Glisan v. Smolenske, 387 P.2d 260 (Colo. 1963)* (implied liability on sale of unfinished house); *Carpenter v. Donohoe, 388 P.2d 399 (Colo. 1964)* (implied warranty on sale of house being built); *Gable v. Silver, 258 S.2d 11 (Fla. App. 4th Dist. 1972)* (Implied warranty of fitness and habitation applies to sale of new condominiums.); *Weeks v. Slavik Builders, Inc., 181 N.W.2d 271 (Mich. 1970)* (caveat emptor abolished in sale of new houses); *Staff v. Lido Dunes, Inc., 262 N.Y.S.2d 544 (1965)* (implied warranty in sale of house under construction); *Elderkin v. Gaster, 288 A.2d 771 (Pa. 1972)* (finding an implied warranty of fitness in sale of a dwelling); *Humber v. Morton, 426 S.W.2d 554 (Tex. 1968)* (holding an implied warranty of fitness of a human habitation against the builder-vendor); *Dawson Industries, Inc. v. Godley Constr. Co., 224 S.E.2d 266 (N.C. Ct. App. 1976)* (Implied warranty of habitability is not applicable to a commercial structure.); *McDonald v. Mianecki, 386 A.2d 1325 (N.J. Super. Ct. App. Div. 1978)* (Potable water is essential to habitability in the sale of realty.); *City of Philadelphia v. Page, 363 F. Supp. 148 (E.D. Pa. 1973)* (Implied warranty applies also to reconditioner vendors.); *Benson v. Dorger, 292 N.E.2d 919 (Ohio Ct. App. 1972)* (no implied warranty except for non-workmanlike conduct).

(n258)Footnote 1048. *Word v. Potomac Elec. Power Co., 742 A.2d 452 (D.C. 1999); F & S Constr. Co. v. Berube, 322 F.2d 782 (10th Cir. 1963); Cochran v. Keeton, 252 So. 2d 313 (Ala. 1971); Ramel v. Chasebrook Constr. Co., 135 So. 2d 876 (Fla. Dist. Ct. App. 1962); Gable v. Silver, 264 So. 2d 418 (Fla. 1972); Reynolds v. Wilson, 173 S.E.2d 256 (Ga. Ct. App. 1970); Hamilton v. Lockridge, 181 S.E.2d 910 (Ga. Ct. App. 1971); Griffith v. Byers Constr. Co. of Kan., 510 P.2d 198 (Kan. 1973); Polson v. Martin, 180 A.2d 295 (Md. 1962); Smith v. Old Warson Dev. Co., 479 S.W.2d 795 (Mo. 1972); Elderkin v. Gaster, 288 A.2d 771 (Pa. 1972); Staff v. Lido Dunes, Inc., 262 N.Y.S.2d 544 (1965); Theis v. Heuer, 280 N.E.2d 300 (Ind. 1972); Padula v. J.J. Deb-Cin Homes, Inc., 298 A.2d 529 (R.I. 1973); Waggoner v. Midwestern Dev., Inc., 154 N.W.2d 803 (S.D. 1967); Hollen v. Leadership Homes, Inc., 502 S.W.2d 837 (Tex. Civ. App. 1973); Barnes v. Mac Brown & Co., 342 N.E.2d 619 (Ind. 1976); Mitchell Homes, Inc. v. Tew, 319 So. 2d 258 (Ala. 1975); Elmore v. Blume, 334 N.E.2d 431 (Ill. App. Ct. 1975); Garcia v. Hynes & Howes Real Est., Inc., 331 N.E.2d 634 (Ill. App. Ct. 1975); Norton v. Burleaud, 342 A.2d 629 (N.H. 1975); Bermes v. Facell, 328 So. 2d 722 (La. Ct. App. 1976); Woods v. Langenbeck, 318 So. 2d 134 (La. Ct. App. 1975); Hartley v. Ballou, 209 S.E.2d 776 (N.C. 1974); Lyon v. Ward, 221 S.E.2d 727 (N.C. Ct. App. 1976); Yepsen v. Burgess, 525 P.2d 1019 (Or. 1974); Schmauch v. Johnston, 547 P.2d 119 (Or. 1976); Bolkum v. Staab, 346 A.2d 210 (Vt. 1975); Tavares v. Horstman, 542 P.2d 1275 (Wyo. 1975); House v. Thornton, 457 P.2d 199 (Wash. 1969); Coburn v. Lenox Homes, Inc., 378 A.2d 599 (Conn. 1977); Wawak v. Stewart, 449 S.W.2d 922 (Ark. 1970); Humber v. Morton, 426 S.W.2d 554 (Tex. 1968); Schipper v. Levitt & Sons, Inc., 207 A.2d 314 (N.J. 1965); Coney v. Stewart, 562 S.W.2d 619 (Ark. 1978); David v. B & J Holding Corp., 349 So. 2d 676 (Fla. Dist. Ct. App. 1977); Carroll-Leslie Builders, Inc. v. Serwitz, 222 S.E.2d 178 (Ga. Ct. App. 1975); Jeanguneat v. Jackie Hames Constr. Co., 576 P.2d 761 (Okla. 1978); Brown v. Elton Chalk, Inc., 560 S.W.2d 862 (Mo. 1978); Rutledge v. Dodenhoff, 175 S.E.2d 792 (S.C. 1970); Pugh v. Holmes, 384 A.2d 1234 (Pa. Super. Ct. 1978);* Overcast v. *Baldwin, 544 P.2d 464 (Wyo. 1976); Lyon v. Ward, 221 S.E.2d 727 (N.C. Ct. App. 1976); Crowder v. Vandendeale, 564 S.W.2d 879 (Mo. 1978); Sands v. R.G. McKelvey Bldg. Co., 571 S.W.2d 726 (Mo. Ct. App. 1978)* (punitive damages); *O'Dell v. Custom Builders Corp., 560 S.W.2d 862 (Mo. 1978); Lane v. Trenholm Building Co., 229 S.E.2d 728 (S.C. 1976); Berman v. Watergate West, Inc., 391 A.2d 1351 (D.C. 1978); McFeeters v. Renollet, 500 P.2d 47 (Kan. 1972); Smith v. Old Warson Dev. Co., 479 S.W.2d 795 (Mo. 1972); Diana v. Parks, 433 S.W.2d 761 (Tex. Civ. App. 1968).*

(n259)Footnote 1049. *Brewer v. Monsanto Corp., 644 F. Supp. 1267 (M.D. Tenn. 1986); Gasteiger v. Gillenwater, 417 S.W.2d 568 (Tenn. Ct. App. 1966); Kriegler v. Eichler Homes, Inc., 74 Cal. Rptr. 749 (1969); Humber v. Morton, 426 S.W.2d 554 (Tex. 1968); State Stove Mfg. Co. v. Hodges, 189 So. 2d 113 (Miss. 1966).*

(n260)Footnote 1050. Ventura Maritime Co., v. ADM Export Co., 44 S. Fupp. 2d 804 (E.D. La. 1999); *Burton-Dixie Corp. v. Timothy McCarthy Constr. Co., 436 F.2d 405 (5th Cir. 1971); Amos v. McDonald, 181 S.E.2d 515 (Ga. Ct. App. 1971), overruled, Holmes v. Worthey, 282 S.E.2d 919 (Ga. Ct. App. 1981)* (caveat emptor doctrine not upheld); *Benson v. Dorger, 292 N.E.2d 919 (Ohio Ct. App. 1972); Weeks v. Slavik Builders, Inc., 181 N.W.2d 271 (Mich. 1970); Security Bank of Or. v. Leathers, 427 P.2d 409 (Or. 1967); LeBlanc v. Ellerbee Builders, Inc., 317 So. 2d 1 (La. Ct. App. 1975); Neary v. Posner, 252 A.2d 843 (Md. 1969); Cohen v. Blessing, 192 S.E.2d 204 (S.C. 1972); Bruce Farms, Inc. v. Coupe, 247 S.E.2d 400 (Va. 1978).*

(n261)Footnote 1051. *Yepsen v. Burgess, 525 P.2d 1019 (Or. 1974); Crowder v. Vandendeale, 564 S.W.2d 879 (Mo. 1978).*

(n262)Footnote 1052. *Zack Cheek Builders, Inc. v. McLeod, 597 S.W.2d 888 (Tenn. 1980); Kriegler v. Eichler Homes, Inc. 74 Cal. Rptr. 749 (1969)* (tort); *Steinberg v. Coda Roberson Constr. Co., 440 P.2d 798 (N.M. 1968)* (negligence); *Belote v. Memphis Dev. Co., 346 S.W.2d 441 (Tenn. 1961)* (fraud).

(n263)Footnote 1053. *Crowder v. Vandendeale, 564 S.W.2d 879 (Mo. 1978).*

(n264)Footnote 1054. *Wilhite v. Mays, 232 S.E.2d 141 (Ga. Ct. App. 1976).*

(n265)Footnote 1055. *Carter v. Livesay Window Co., 73 So. 2d 411 (Fla. 1954).*

(n266)Footnote 1056. *Anserson, Greenwood & Co., v. Martin, 44 S.W.3d 2000 (Tex. App. 2001); Cox v. Hart, 226 S.W. 522 (Ark. 1921); Hanson v. Olson, 201 N.W. 36 (Iowa 1924); McCauley v. Smith, 146 S.W.2d 639 (Mo. Ct. App. 1940); Abraham v. Wechsler, 200 N.Y.S. 471 (1923); Mason v. Peterson, 250 S.W. 142* (Tex. Comm'n App. 1923).

(n267)Footnote 1057. *Southern Leasing Corp. v. Tufts, 804 P.2d 1321 (Ariz. App. 1991); Waddell v. White, 109 P.2d 843 (Ariz. 1941); French v. Freeman, 217 P. 515 (Cal. 1923); Harris v. Miller, 235 P. 981 (Cal. 1925); Seeger v. Odell, 115 P.2d 977 (Cal. 1941); Stockton v. Hind, 196 P. 122 (Cal. Dist. Ct. App. 1921); Stone v. McCarty, 220 P. 690 (Cal. Dist. Ct. App. 1923); Hermanson v. Seppala, 152 N.E. 363 (Mass. 1926)* (legal effect of deed); *Brender v. Stratton, 184 N.W. 486 (Mich. 1921)* (must be representations as to an existing fact); *Gable v. Niles Holding Co., 296 N.W. 525 (Minn. 1941); Lynch v. Fowler, 257 S.W. 948 (Tex. Civ. App. 1923); see* The Doctrine of Caveat Emptor as Applied to Both the Leasing and Sale of Real Property: The Need for Reappraisal and Reform, *2 Rut.-Cam. LJ 120 (1964).*

(n268)Footnote 1058. *Finefrock v. Carney, 263 P.2d 744 (Okla. 1953); Scroggin v. Worthy, 316 P.2d 480 (Wash. 1957).*

(n269)Footnote 1059. *Suraci v. Ball, 51 A.2d 404 (Pa. Super. Ct. 1947).*

(n270)Footnote 1060. *Statewide Griev. Comm. v. Egbarin, 767 A.2d 732 (Conn. 2001); Egan v. Hudson Nut Products, Inc., 114 A.2d 213 (Conn. 1955); Fegeas v. Sherrill, 147 A.2d 223 (Md. 1958); Swinton v. Whitinsville Sav. Bank, 42 N.E.2d 808 (Mass. 1942).*

(n271)Footnote 1061. *Mullin v. Bank of America, 245 Cal. Rptr. 66 (Cal. App. 1988); Curran v. Heslop, 252 P.2d 378 (Cal. Dist. Ct. App. 1953); Kaze v. Compton, 283 S.W.2d 204 (Ky. 1955); Simmons v. Evans, 206 S.W.2d 295 (Tenn. 1947); Curran v. Heslop, 252 P.2d 378 (Cal. Dist. Ct. App. 1953)* (Nondisclosure by seller of known violations of zoning or building laws permits buyer to rescind.); *Hartman v. Rizzuto, 266 P.2d 539 (Cal. Dist. Ct. App. 1954); Dillahunty v. Keystone Savings Assn., 303 N.E.2d 750 (Ohio Ct. App. 1973)* (The principle of caveat emptor applies to the sale of real estate relative to conditions open to observation.); *Dunaway v. Lewis, 554 P.2d 110 (Okla. Ct. App. 1976)* (Vendor held liable for failure to disclose known danger of flooding.).

(n272)Footnote 1062. *Pressman v. Wolf, 732 So. 2d 356 (Fla. App. 1999); Welbourn v. Cohen, 104 So. 2d 380*

(Fla. Dist. Ct. App. 1958); Hall v. Risley, 213 P.2d 818 (Or. 1950) (Buyer's duty to check on building controls unless dissuaded by seller from so doing.); *Millman v. Swan, 127 S.E. 166 (Va. 1925).*

(n273)Footnote 1063. *Mosley v. Magnolia Petroleum Co., 114 P.2d 740 (N.M. 1941); see* Builder Held Liable for Injuries Suffered by Owner's Tenants Where Construction Was Defective, 1 Real Est. L.J 1 (1972).

(n274)Footnote 1064. *Williams. v. Ditto, 601 So. 2d 482 (Ala. 1992); Parker v. Moulton, 114 Mass. 99 (1873); Lewy v. Clark Ave., 217 N.Y.S. 185 (1926); Druid Homes, Inc. v. Cooper, 131 So. 2d 884 (Ala. 1961)* (Doctrine of caveat emptor applied, holding no implied warranty in a sales contract that improvements on the property had been constructed in a workmanlike manner.), *overruled in part, Cochran v. Keeton, 252 So. 2d 313 (Ala. 1971).*

(n275)Footnote 1065. *Richmond v. Zapata Dev. Corp., 339 So. 2d 939 (La. Ct. App. 1977).*

(n276)Footnote 1066. *American Sav. & Loan Assoc. v. County of Marin, 653 F.2d 364 (9th Cir. 1981); Kopetzke v. County of San Mateo, 396 F. Supp. 1004 (N.D. Cal. 1975); Griffith v. Byers Constr. Co. of Kan., 510 P.2d 198 (Kan. 1973).*

(n277)Footnote 1067. *Taylor v. Nationsbank, N.A., 776 A.2d 645 (Md. 2001); Gilbert Constr. Co. v. Gross, 129 A.2d 518 (Md. 1957)* (A developer-seller was liable for defects in house built by him, which defects were not apparent at the time of sale); *J.D. Young Corp. v. McClintic, 26 S.W.2d 460 (Tex. Civ. App. 1930)* (If the contract of sale or lease is negotiated and completed with respect to an uncompleted structure which cannot be adequately inspected, the law has developed an implied covenant of fitness for intended use.); *but see Oliver v. Hartzell, 280 S.W. 979 (Ark. 1926)* (The building was being sufficiently com-pleted to permit inspection.); *Gable v. Silver, 258 So. 2d 11 (Fla. Dist. Ct. App. 1972)* (Implied warranty of fitness and habitability applies to purchase of new condominiums.); *Burger v. Hector, 278 So. 2d 636 (Fla. Dist. Ct. App. 1973)* (But there is no warranty of suitability of a lot.); *Hughes v. Stusser, 415 P.2d 89 (Wash. 2d Dept. 1966)* (modifying caveat emptor to extent that vendor is under duty to disclose material facts not readily observable to purchaser); *see* Contracts-Caveat Emptor-Implied Warranty of Habitability, *12 Duq. L. Rev. 109 (1973);* Implied Warranties in the Sale of Real Estate, *26 U. Miami L. Rev. 838 (1972); Hartley v. Ballou, 209 S.E.2d 776 (N.C. 1974)* (North Carolina has joined the ranks of those departing from the doctrine of caveat emptor with respect to defects in purchase and sale of newly constructed homes where the purchaser was unaware and could not discover by reasonable inspection the existence of the defect.); *Hinson v. Jefferson, 215 S.E.2d 102 (N.C. 1975); Barnes v. Mac Brown & Co., 342 N.E.2d 619 (Ind. 1976)* (holding that in an action of a subsequent purchaser against the builder for a breach of warranty of fitness for habitation, the owner may recover for economic loss resulting from injury to the property).

(n278)Footnote 1068. *Hartman Services, Inc. v. Southeast First Nat'l Bank, 399 So. 2d 404 (Fla. App. 1981); Johnson v. Olsen, 381 P.2d 623 (Wash. 1963); Cohen v. Landow, 242 So. 2d 801 (Fla. Dist. Ct. App. 1970)* (Broker's misrepresentations were held to be fraudulent, not merely puffing.); *Nolt v. Palumbo, 383 P.2d 1015 (Or. 1963)* (A misrepresentation that the premises were fit for residential purposes was held to be material.); *Carroll v. Beardon, 381 P.2d 295 (Mont. 1963)* (The vendor's bare knowledge of the intended use of the premises is not a basis for misrepresentation.); *Lawson v. Citizens and S. NA. Bank of S.C., 180 S.E.2d 206 (S.C. 1971).*

(n279)Footnote 1069. *Arbor Village Condominium Ass'n v. Arbor Village, Ltd., 642 N.E.2d 1124 (Ohio App. 1994); Crum v. McCoy, 322 N.E.2d 161 (Ohio Mun. 1974); Elderkin v. Gaster, 288 A.2d 771 (Pa. 1972).*

(n280)Footnote 1070. *Cullens v. Woodruff, 223 S.E.2d 293 (Ga. Ct. App. 1976), overruled, Holmes v. Worthey, 282 S.E.2d 919 (Ga. Ct. App. 1981); Little v. Merck, 183 S.E.2d 234 (Ga. Ct. App. 1971), overruled,* Holmes v. Worthey. 282 S.E.2d (Ga. Ct. App. 1981).

(n281)Footnote 1071. *Barnes v. Mac Brown & Co., 342 N.E.2d 619 (Ind. 1976).*

(n282)Footnote 1072. *Hirsch v. Feuer, 702 N.E.2d 265 (Ill. App. 1998); Russow v. Bobola, 277 N.E.2d 769 (Ill.*

App. Ct. 1972) (Failure to disclose flooding of a basement was fraud, even though the vendee made no inquiry.); *Ruggieri v. West. Forum Corp., 282 A.2d 304 (Pa. 1971).*

(n283)Footnote 1073. *Samuels v. Brooks, 519 N.E.2d 605 (Mass. 1988); Benjamin Foster Co. v. Commonwealth of Mass., 61 N.E.2d 147 (Mass. 1945); MacLaren v. Cochran, 46 N.W. 408 (Minn. 1890); Finley v. Keene, 42 A.2d 208 (N.J. Ch. 1945); Williams v. Kerr, 25 A. 618 (Pa. 1893); Potter v. Taggart, 11 N.W. 678 (Wis. 1882); contra Bomar v. Rosser, 31 So. 430 (Ala. 1901); Jakway v. Proudfit, 109 N.W. 388 (Neb. 1906); Friedberg v. Weissbuch, 287 P.2d 785 (Cal. Dist. Ct. App. 1955)* (false statements by seller justifying rescission); *Paquin v. Van Houtum, 72 N.W.2d 169 (Mich. 1955); Zager v. Setzer, 88 S.E.2d 94 (N.C. 1955); Paquin v. Van Houtum, 72 N.W.2d 169 (Mich. 1955)* (statement held relied upon by buyer or lessee); *McCarthy v. Tally, 289 P.2d 589 (Cal. Dist. Ct. App. 1956)* (lease not relied upon), *vacated, 297 P.2d 981 (Cal. 1956)* (Where liquidated damages provided for upon breach of lease were not shown to represent a reasonable endeavor to estimate actual damages, judgments would have to be reversed for further findings.); *Cherrington v. Woods, 290 P.2d 226 (Colo. 1955)* (Buyer held to have failed to exercise due care in ascertaining falsity of statement.); *Potakar v. Hurtak, 82 So. 2d 502 (Fla. Div. A 1955), modified, Besett v. Basnett, 389 So. 2d 995 (Fla. 1980)* (A recipient may rely on the truth of a representation, even though its falsity could have been ascertained had he made an investigation, unless he knows the representation to be false or its falsity is obvious to him.); *Tingle v. Seignious, 90 S.E.2d 408 (Ga. 1955); Scott v. Fulton NA. Bank of Atlanta, 89 S.E.2d 892 (Ga. Ct. App. 1955); Carufel v. Kounts, 232 N.W. 609 (N.D. 1930)* (Fraud makes contract voidable, not void. Inducing one to sign to the contract without reading it is not fraud.); *Kramer v. K.O. Lee & Son Co., 237 N.W. 166 (N.D. 1931)* (If action to rescind is not taken within a reasonable time, the right is waived.); *Russo v. Williams, 71 N.W.2d 131 (Neb. 1955)* (Misrepresentations of material facts, not encompassed by warranties, are actionable by the vendee.); *see* Interstate Land Sales Regulation: The Case for an Expanded Federal Role, *6 U. Mich. J.L. Reform 511 (1973).*

(n284)Footnote 1074. *Chisum v. Huggins, 154 P. 1146 (Okla. 1916).*

(n285)Footnote 1075. *Pressman v. Wolf, 732 So. 2d 356 (Fla. App. 1999); Welbourn v. Cohen, 104 So. 2d 380 (Fla. Dist. Ct. App. 1958)* (Fraud in the contract must be proved by clear and convincing evidence.); *Va. Iron, Coal & Coke Co. v. Crigger, 201 S.W. 298 (Ky. 1918); Blosick v. Warmbold, 187 N.W. 136 (Minn. 1922)* (False representation justifies rescission.); *Souza v. Jackson County Fed. Sav. & Loan Assn., 472 P.2d 272 (Or. 1970)* (A material representation, though innocent, is grounds for rescission.); *Halpert v. Rosenthal, 267 A.2d 730 (R.I. 1970)* (Innocent misrepresentation, termite infestation, is grounds for rescission.).

(n286)Footnote 1076. *Bodenhamer v. Patterson, 563 P.2d 1212 (Or. 1977).*

(n287)Footnote 1077. *Magnuson v. Bouck, 226 N.W. 702 (Minn. 1929).*

(n288)Footnote 1078. *Lewis v. S. Mills, 53 F. Supp. 443 (W.D.N.C. 1944); Osborne v. Howard, 242 S.W. 852 (Ky. 1922); Reigart v. Fisher, 131 A. 568 (Md. 1925); Kaston v. Zimmerman, 183 N.Y.S. 615 (1920); Sterling v. Gardner, 247 P. 462 (Wash. 1926).*

(n289)Footnote 1079. *Biberston v. New York Blower Co., 625 N.E.2d 1308 (Ind. App. 1993); Title Guarantee & Trust Co. v. Stahler, 59 P.2d 515 (Cal. Dist. Ct. App. 1936); Schnitz v. Grand River Ave. Dev. Co., 259 N.W. 900 (Mich. 1935); Long v. Freeman, 69 S.W.2d 973 (Mo. Ct. App. 1934); Logan v. Taylor, 118 S.W.2d 1094 (Tex. Civ. App. 1938); Nielson v. Leamington Mines & Exploration Corp., 48 P.2d 439 (Utah 1935); Carkonen v. Alberts, 83 P.2d 899 (Wash. 1938); Alropa Corp. v. Flatley, 277 N.W. 108 (Wis. 1938); Martin v. Grutka, 278 N.E.2d 586 (Ind. Ct. App. 1972)* (Misrepresentation must be as to an existing fact.).

(n290)Footnote 1080. Lyall v. DeYoung, 7ll P.2d 356 (Wash. App. 1985); *Carter Coal Co. v. Litz, 54 F. Supp. 115 (W.D. Va. 1943); Younis v. Hart, 138 P.2d 323 (Cal. Dist. Ct. App. 1943); Robbins v. Nelsen, 202 P. 707 (Colo. 1921); Gilbey v. Hamlin, 130 N.E. 702 (Ill. 1921); Towbin v. Pierro, 131 A. 923 (N.J. 1926); Pfeiffer v. Short, 186 N.W. 560 (S.D. 1922); Rodgers v. Johnson, 196 N.W. 295 (S.D. 1923); Hester v. Shuster, 234 S.W. 713 (Tex. Civ. App. 1921);*

Bell v. Gaines, 237 S.W. 346 (Tex. Civ. App. 1922); Payne v. Beaumont, 245 S.W. 94 (Tex. Civ. App. 1922); Hoyt v. First NA. Bank, 247 S.W. 637 (Tex. Civ. App. 1922); Hicks v. Wynn, 119 S.E. 133 (Va. 1923); Thompson v. Huston, 135 P.2d 834 (Wash. 1943); Gronlund v. Andersson, 227 P.2d 741 (Wash. 1951); Russo v. Williams, 71 N.W.2d 131 (Neb. 1955) (Misrepresentations of material facts not encompassed by warranties in a deed were actionable by the vendee who had relied upon such misrepresentations.).

(n291)Footnote 1081. *Union & Planters' Bank & Trust Co. v. Simmons, 265 S.W. 953 (Ark. 1924).*

(n292)Footnote 1082. *Alleco Inc. v. Harry and Jeanette Weinberg Found., 665 A.2d 1038 (Md. 1995); Ortel v. Upper Ashburton Realty Co., 190 A. 239 (Md. 1937).*

(n293)Footnote 1083. *Silverman v. Bell Sav. & Loan Assoc., 533 A.2d 110 (Pa. 1987); S. Dev. Co. v. Silva, 125 U.S. 247 (1888); Farrar v. Churchill, 135 U.S. 609 (1890); King v. Lamborn, 186 F. 21 (9th Cir. 1911); Gray v. Edmonds, 62 S.E.2d 77 (N.C. 1950); Lake v. Thompson, 77 A.2d 364 (Pa. 1951).*

(n294)Footnote 1084. *Johnson v. Scandia Assocs., 717 N.E.2d 24 (Ind. 1999); Degler v. Lake Holiday Ests., Inc., 406 F. Supp. 367 (W.D. Va. 1975); Barnes v. Mac Brown & Co., 342 N.E.2d 619 (Ind. 1976)* (holding that a subsequent purchaser who sued a builder for breach of warranty and fitness for habitation may recover for economic loss resulting from injury to the property).

(n295)Footnote 1085. *Bayles Bros. Drilling Co. v. Orion Industries, Ltd., 761 P.2d 278 (Colo. App. 1988); Grand Trunk W. R.R. Co. v. H.W. Nelson Co., 116 F.2d 823 (6th Cir. 1941); Pattridge v. Youmans, 109 P.2d 646 (Colo. 1941).*

(n296)Footnote 1086. *Cronin v. Executive House Realty, 1982 U.S.Dist. LEXIS 12662* (S.D.N.Y. May 5, 1982); *De Meo v. Horn, 334 N.Y.S.2d 22 (1972)* (Under the older rule, vendor's mere silence is not fraud.).

(n297)Footnote 1087. *People v. Termotto, 616 N.E.2d 496 (N.Y. 1993); Ham v. Hart, 273 P.2d 748 (N.M. 1954); Seneca Wire & Mfg. Co. v. A.B. Leach & Co., 159 N.E. 700 (N.Y. 1928); Passero v. Loew, 259 S.W.2d 909 (Tex. Civ. App. 1953).*

(n298)Footnote 1088. *Eq. Life Assn. of Okla. City v. Willis, 108 P.2d 110 (Okla. 1940).*

(n299)Footnote 1089. Deerfield Communications Corp. v. chesebrough-*Ponds, Inc., 68 N.Y.2d 954 (1986); Thames v. Smith, 280 S.W. 859 (Tex. Civ. App. 1926); Owen v. Al Parker Sec. Co., 296 S.W. 620 (Tex. Civ. App. 1927); George v. Bingham, 192 P. 980 (Wash. 1920); Danann Realty Corp. v. Harris, 157 N.E.2d 597 (N.Y. 1959)* (If the representations are not as to facts within the vendor's own peculiar knowledge and the vendee could ascertain the truth, there is no action based on fraud.).

(n300)Footnote 1090. *Galuth Realty Corp. v. Greenfield, 103 A.D.2d 819 (N.Y. 1984); Farrar v. Churchill, 135 U.S. 609 (1890); Farnsworth v. Duffner, 142 U.S. 43 (1891); Hays v. Hays, 81 S.W.2d 926 (Ark. 1935); Walton v. Ramsey, 50 Ga. 618 (1874); Holmes v. Walker, 63 S.E.2d 359 (Ga. 1951); Halla v. Chi. Title & Trust Co., 100 N.E.2d 518 (Ill. Ct. App. 1951), rev'd, 104 N.E.2d 790 (Ill. 1952)* (Purchaser allowed to rescind because fraudulent representations induced purchaser to complete contract to purchase realty.); *see Sands v. Sack Realty Co., 28 N.E.2d 349 (Ill. App. Ct. 1940); Grenlac Holding Corp. v. Kahn, 106 N.Y.S.2d 83 (1951).*

(n301)Footnote 1091. *Thompson v. Selvidge, 2000 Ark. App. LEXIS 233* (Ark. App. Mar. 15, 2000); *English v. North, 166 S.W. 577 (Ark. 1914).*

(n302)Footnote 1092. *Riverside Inv. Co. v. Gibson, 64 So. 439 (Fla. 1914); Griswold v. Sabin, 51 N.H. 167 (1871).*

(n303)Footnote 1093. *Pennington v. Roberg, 142 N.W. 710 (Minn. 1913); Straus v. Norris, 75 A. 980 (N.J. Ch. 1910); Silverman v. Minsky, 79 N.E. 1116 (N.Y. 1906).*

(n304)Footnote 1094. *Easterling v. Ferris, 651 P.2d 677 (Okla. 1982); Foster v. Kennedy's Adminstr., 38 Ala. 359 (1862); Small v. Kennedy, 33 N.E. 674 (Ind. 1893); Westerman v. Corder, 119 P. 868 (Kan. 1912); Aldrich v. Scribner, 117 N.W. 581 (Mich. 1908); Bullitt v. Farrar, 43 N.W. 566 (Minn. 1889); Johnson v. Gulick, 65 N.W. 883 (Neb. 1896); Howe v. Martin, 102 P. 128 (Okla. 1909).*

(n305)Footnote 1095. *Moller v. Moller, 1987 Va. Cir. LEXIS 184 (1987); Granberry v. Forrester, 97 So. 619 (Ala. 1923); Bain v. Guntersville Realty Co., 100 So. 128 (Ala. 1924); Rankin v. Kelso, 269 S.W. 359 (Ark. 1925); Kirkham v. Bortz, 188 N.W. 770 (Iowa 1922); King v. Dykema, 195 N.W. 233 (Iowa 1923); Herwehe v. Schultz, 184 N.W. 289 (Iowa 1921); Cohen Bros. Iron & Metal Co. v. Shackelford Brick Co., 198 N.W. 318 (Iowa 1924); Twohig v. Daly, 142 N.E. 700 (Mass. 1924); McKay v. Smith, 208 N.W. 450 (Mich. 1926); McCaw v. O'Malley, 249 S.W. 41 (Mo. 1923); Bell v. Spain, 222 P. 322 (Or. 1924); Geister v. Brown, 207 N.W. 98 (S.D. 1926); Strickland v. Cantonwine, 124 S.E. 292 (Va. 1924).*

(n306)Footnote 1096. *Saranthus v. McIntyre, 557 So. 2d 1275 (Ala. App. 1989); Sanders v. King, 95 So. 19 (Ala. 1923).*

(n307)Footnote 1097. *Omaha Nat'l Bank v. Manufacturers Life Ins. Co., 332 N.W.2d 196 (Neb. 1983); Lombardi v. Sinanides, 235 P. 455 (Cal. Dist. Ct. App. 1925); Kane v. Ott, 238 P. 126 (Cal. Dist. Ct. App. 1925); Jarrett v. McKinnon, 106 S.E. 809 (Ga. Ct. App. 1921); Kirkland v. Brewton, 122 S.E. 814 (Ga. Ct. App. 1924); Alexander v. Meek, 96 So. 101 (Miss. 1923); Fontaine v. Lyng, 202 P. 1112 (Mont. 1921); S. v. Sine, 123 S.E. 436 (W. Va. 1924); see Dyck v. Snygg, 292 N.W. 119 (Neb. 1940).*

(n308)Footnote 1098. *Cohron v. Woodland Hills Co., 139 S.E. 56 (Ga. 1927); Wiley v. Simons, 156 N.E. 23 (Mass. 1927); Day v. Taylor, 212 P. 170 (Wash. 1923).*

(n309)Footnote 1099. *City of Daytona Beach v. Bush, 742 So. 2d 335 (Fla. App. 1999); Montgomery v. Meyerstein, 199 P. 800 (Cal. 1921); Dickey v. Dunn, 252 P. 770 (Cal. Dist. Ct. App. 1927); Tatham v. Pattison, 245 P.2d 668 (Cal. Dist. Ct. App. 1952); McDonald v. Rose, 50 So. 2d 878 (Fla. 1951); Gilbey v. Hamlin, 130 N.E. 702 (Ill. 1921); King v. Dykema, 195 N.W. 233 (Iowa 1923); Zadel v. Simon, 190 N.W. 700 (Mich. 1922); Adcock v. Upton, 119 So. 190 (Miss. 1928); see Dyck v. Snygg, 292 N.W. 119 (Neb. 1940); Strickland v. Cantonwine, 124 S.E. 292 (Va. 1924); Dieterich v. Rice, 215 P. 65 (Wash. 1923); McBee v. Deusenberry, 128 S.E. 378 (W. Va. 1925).*

(n310)Footnote 1100. *Goldberg v. Krayeske, 128 A. 27 (Conn. 1925); Rykiel v. Sklaver, 156 N.E. 842 (Mass. 1927).*

(n311)Footnote 1101. *Tudor v. Raudabaugh, 278 F. 254 (D. Mont. 1922); McCracken v. Bangs, 229 S.W. 730 (Ark. 1921); Peardon v. Markley, 195 P. 70 (Cal. Dist. Ct. App. 1920); Bell v. Kyle, 192 P. 512 (N.M. 1920).*

(n312)Footnote 1102. *Olson v. Pettibone, 210 N.W. 149 (Minn. 1926).*

(n313)Footnote 1103. *Barnes v. Lucas, 196 N.W. 678 (Neb. 1923).*

(n314)Footnote 1104. *Filet Menu, Inc. v. C.C.L. & G., Inc., 94 Cal. Rptr 2d 438 (Cal. App. 2000); Porter v. Robinson, 93 S.W.2d 477 (Tex. Civ. App. 1936); Friedberg v. Weissbuch, 287 P.2d 785 (Cal. Dist. Ct. App. 1955)* (false statements by seller justifying rescission); *Paquin v. Van Houtum, 72 N.W.2d 169 (Mich. 1955)* (Statement held relied upon by buyer or lessee.); *Zager v. Setzer, 88 S.E.2d 94 (N.C. 1955); Cherrington v. Woods, 290 P.2d 226 (Colo. 1955)* (Buyer held to have failed to exercise due care in ascertaining falsity of statement.); *Potakar v. Hurtak, 82 So. 2d 502 (Fla. 1955), modified, Besett v. Basnett, 389 So. 2d 995 (Fla. 1980)* (A recipient may rely on the truth of a representation, even though its falsity could have been ascertained had he made an investigation, unless he knows the representation to be false or its falsity is obvious to him.); *Tingle v. Seignious, 90 S.E.2d 408 (Ga. 1955); Scott v. Fulton NA. Bank of Atlanta, 89 S.E.2d 892 (Ga. Ct. App. 1955); McCarthy v. Tally, 297 P.2d 981 (Cal. 1956)* (lease not relied upon).

(n315)Footnote 1105. *Wright v. Bryan, 311 S.E.2d 776 (Va. 1984); Brasher v. First NA. Bank of Birmingham, 168 So. 42 (Ala. 1936); Waskey v. Thomas, 235 S.E.2d 346 (Va. 1977)* (The fact that the vendor did not have capacity to convey good title on the date the contract does not invalidate the sale if he acquires capacity on the date fixed for delivery. But, if the sales contract was by installment payments and the delivery of the deed upon final payment and the vendor misrepresented his capacity to convey what he has contracted to convey, concealed defects in the title void the contract.).

(n316)Footnote 1106. *Shahan v. Brown, 52 So. 737 (Ala. 1910).*

(n317)Footnote 1107. *Apolito v. Johnson, 414 P.2d 442 (Ariz. Ct. App. 1966).*

(n318)Footnote 1108. *Anzalone v. Strand, 436 N.E.2d 960 (Mass. 1982); Horsnell v. Gilliland, 224 S.W. 722 (Ark. 1920); Younis v. Hart, 138 P.2d 323 (Cal. Dist. Ct. App. 1943); Lefevre v. Chamberlain, 117 N.E. 327 (Mass. 1917).*

(n319)Footnote 1109. *Lockwood v. Fitts, 7 So. 467 (Ala. 1890); Cooper v. Merritt, 30 Ark. 686 (1875); Mitchell v. McDougall, 62 Ill. 498 (1872); Gardner v. Mann, 76 N.E. 417 (Ind. Ct. App. 1905); Selby v. Matson, 114 N.W. 609 (Iowa 1908); Annis v. Ferguson, 84 S.W. 553 (Ky. 1905); Schmitz v. Peterson, 36 So. 915 (La. 1904); Match v. Hunt, 38 Mich. 1 (1878); Ballard v. Lyons, 131 N.W. 320 (Minn. 1911); Clinkenbeard v. Weatherman, 57 S.W. 757 (Mo. 1900); Ross v. Sumner, 78 N.W. 264 (Neb. 1899); Silverman v. Minsky, 95 N.Y.S. 661 (1905); Walsh v. Hall, 66 N.C. 233 (1872); Rasmussen v. Reedy, 84 N.W. 205 (S.D. 1900); Stevenson v. Cauble, 118 S.W. 811 (Tex. Civ. App. 1909); Freeman v. Gloyd, 86 P. 1051 (Wash. 1906); Hansen v. Allen, 93 N.W. 805 (Wis. 1903).*

(n320)Footnote 1110. *Peterson v. Kock Industries, Inc., 684 F.2d 667 (10th Cir. 1982); Baker v. Maxwell, 14 So. 468 (Ala. 1892); Groppengiesser v. Lake, 36 P. 1036 (Cal. 1894); Morris v. Courtney, 52 P. 129 (Cal. 1898); Ringel v. Pearson, 28 N.E.2d 576 (Ill. App. Ct. 1940); Woodruff v. Garner, 27 Ind. 4 (1866); West v. Wright, 98 Ind. 335 (1884); Bullitt v. Farrar, 43 N.W. 566 (Minn. 1889); Vaughn v. Smith, 55 P. 99 (Or. 1898); Migliaccio v. Continental Mining & Milling Co., 196 F.2d 398 (10th Cir. 1952)* (A mere statement of opinion as to title made in good faith does not justify rescission for fraud, however erroneous.).

(n321)Footnote 1111. *Gauerke v. Rozga, 319 N.W.2d 178 (Wis. App. 1982); Stackpole v. Hancock, 24 So. 914 (Fla. 1898); Mohler v. Carder, 35 N.W. 647 (Iowa 1887); Lofgren v. Peterson, 56 N.W. 44 (Minn. 1893); Crompton v. Beedle, 75 A. 331 (Vt. 1910); Kathan v. Comstock, 122 N.W. 1044 (Wis. 1909).*

(n322)Footnote 1112. *Kane v. Ott, 238 P. 126 (Cal. Dist. Ct. App. 1925); Massirer v. Milarn, 223 S.W. 302 (Tex. Civ. App. 1920).*

(n323)Footnote 1113. *Moller v. Moller, 1987 Va. Cir. 94* LEXIS 184 (1987); *Stirnus v. Adams, 195 P. 955 (Cal. Dist. Ct. App. 1920); see Herschberger v. Woodrow-Parker Co., 275 F. 908 (6th Cir. 1921); Mason v. Peterson, 250 S.W. 142* (Tex. Comm'n App. 1923); *Strickland v. Cantonwine, 124 S.E. 292 (Va. 1924); Bliss v. Clebanck, 238 P. 979 (Wash. 2d Dept. 1925).*

(n324)Footnote 1114. *Lee v. Bank of America, 32 Cal. Rptr. 2d 388 (Cal. App. 1994); Tahoe Pines Co. v. Newman, 210 P. 445 (Cal. Dist. Ct. App. 1922); Coleman v. Edgar, 257 P. 452 (Cal. Dist. Ct. App. 1927); Madsen v. Carpenter, 190 P. 528 (Colo. 1920); Converse v. Elliott, 205 N.W. 867 (Iowa 1925); Adcock v. Upton, 110 So. 774 (Miss. 1927).*

(n325)Footnote 1115. *Pennycuff v. Fetter, 409 N.E.2d 1179 (Ind. App. 1980); Davis v. Dunn, 58 So. 2d 539 (Fla. 1952); Clark v. Adams, 116 S.E. 122 (Ga. Ct. App. 1923); Briesenick v. Dimond, 126 S.E. 306 (Ga. Ct. App. 1925); Elliott v. Dolvin, 131 S.E. 300 (Ga. Ct. App. 1926); Anderson Drive-In Theatre, Inc. v. Kirkpatrick, 110 N.E.2d 506 (Ind. Ct. App. 1953); Condon v. Sandhowe, 127 A. 101 (N.J. Ch. 1925); Rocca v. Calabrese, 130 A. 447 (N.J. 1925); Helgeson v. N.W. Trust Co., 203 P. 586 (Or. 1922); Fairbanks v. Johnson, 243 P. 1114 (Or. 1926); Miller v. Protrka, 238 P.2d 753 (Or. 1951); Owen v. Al Parker Sec. Co., 296 S.W. 620 (Tex. Civ. App. 1927); Gudmundsen v. McEntyre,*

259 P. 196 (Utah 1927); see Dyck v. Snygg, 292 N.W. 119 (Neb. 1940).

(n326)Footnote 1116. *Gross v. William Penn Fire Ins. Co., 51 Pa. D. & C. 296 (Pa. Phila. County Ct. 1944).*

(n327)Footnote 1117. *McCauley v. Smith, 146 S.W.2d 639 (Mo. Ct. App. 1940).*

(n328)Footnote 1118. *Gaston v. Hartzell, 549 P.2d 632 (N.M. Ct. App. 1976)* (misrepresentation as to size of lot).

(n329)Footnote 1119. *Rose v. Zaring Homes, 122 Ohio App. 3d 739 (1997); Light v. Chandler Improvement Co., 261 P. 969 (Ariz. 1928); Rhoda v. Annis, 75 Me. 17 (1883); Mobley v. Quattlebaum, 85 S.E. 585 (S.C. 1915); Roof v. Jerd, 146 A. 250 (Vt. 1929); Manns v. Boston Harbor R., S. S. & Land Co., 144 P. 535 (Wash. 1914); McKinnon v. Vollmar, 43 N.W. 800 (Wis. 1889); Traverse v. Long, 135 N.E.2d 256 (Ohio 1956)* (Rule of caveat emptor applied despite representations of owner's agent where buyer has opportunity to make personal inspection.).

(n330)Footnote 1120. *Thyer v. Schleman, 1981 Ohio App. LEXIS 13027* (Aug. 27, 1981); *Veazie v. Williams, 49 U.S. 134 (1850); Gould v. Escondido Valley Poultry Assn., 133 P.2d 448 (Cal. Dist. Ct. App. 1943); Rhoda v. Annis, 75 Me. 17 (1883); Ballard v. Lyons, 131 N.W. 320 (Minn. 1911); Silverman v. Minsky, 79 N.E. 1116 (N.Y. 1906); Kohne v. Wood, 129 N.E.2d 865 (Ohio Ct. App. 1954)* (A real estate broker has apparent authority to receive payments on behalf of the seller); *Howe v. Martin, 102 P. 128 (Okla. 1909); Whitney v. Bissell, 146 P. 141 (Or. 1915); Griswold v. Gebbie, 17 A. 673 (Pa. 1889); Sutton v. Morgan, 27 A. 894 (Pa. 1893); Caughron v. Stinespring, 179 S.W. 152 (Tenn. 1915); Manley v. Holt, 161 S.W.2d 857 (Tex. Civ. App. 1942); O'Daniel v. Streeby, 137 P. 1025 (Wash. 1914); McKinnon v. Vollmar, 43 N.W. 800 (Wis. 1889); Gunther v. Ullrich, 52 N.W. 88 (Wis. 1892).*

(n331)Footnote 1121. Combined Newwork, Inc. v. Equitable Life Assurance soc., 805 f.2d 1292 (7th Cir. 1986); *Cornish v. Suiter, 189 P. 487 (Cal. Dist. Ct. App. 1920); Stirnus v. Adams, 195 P. 955 (Cal. Dist. Ct. App. 1920)* (age of orchard); *Handelman v. Arquilla, 95 N.E.2d 910 (Ill. 1950); Harris v. Polk County Inv. Co., 177 N.W. 476 (Iowa 1920); First Sav. Bank v. Edgar, 199 N.W. 1011 (Iowa 1925); Towbin v. Pierro, 131 A. 923 (N.J. 1926); Farmers' NA. Bank v. Smith, 268 S.W. 978 (Tex. Civ. App. 1925); Amato v. Latter & Blum, Inc., 79 So. 2d 873 (La. 1955)* (The vendor's agent is liable to the vendee for failure to communicate a purchaser's offer to the vendor.).

(n332)Footnote 1122. *Rhodes v. Uhl, 178 N.W. 394 (Iowa 1920).*

(n333)Footnote 1123. *Graziani v. Arundell, 299 F. 886 (D.C. Cir. 1924); see Heinrich v. Dickson, 219 Ill. App. 86 (1920); Burnett v. Boyer, 285 S.W. 670 (Tex. Civ. App. 1926)* (Overflow likelihood not disclosed by inspection.).

(n334)Footnote 1124. *Bradley v. Tolson, 85 S.E. 466 (Va. 1915); but see Mealor v. McNabb, 63 S.E.2d 702 (Ga. Ct. App. 1951).*

(n335)Footnote 1125. *Adams v. Servpro of Macon, Inc., 375 S.E.2d 894 (Ga. 1988); Rhoda v. Annis, 75 Maine 17 (1883); Lamm v. Port Deposit Homestead Assn., 49 Md. 233 (1878); Kennedy v. McKay, 43 N. J. L. 288 (1881).*

Where the principal who had never seen the land and knew nothing about it stated that the representations made by the agent were true, it was held that he adopted the agent's estimate as his own. *Aldrich v. Scribner, 117 N.W. 581 (Mich. 1908).* To same effect, see *Holcomb v. Noble, 37 N.W. 497 (Mich. 1888); Busch v. Wilcox, 46 N.W. 940 (Mich. 1890).*

Purchaser claiming misrepresentation must have used reasonable diligence in inspection. *Collier v. Sinkal, 218 S.E.2d 910 (Ga. Ct. App. 1975).*

(n336)Footnote 1126. *Citizens Bank, Vienna v. Bowen, 315 S.E.2d 437 (Ga. 1984);* Morgan v. Denton, 110 S.E.328 (Ga. Ct. App. 1921).

Where real estate broker, in violation of oral agreement to purchase for another, purchased land and took title in the name of a third party, statute requiring that such agreements shall be void unless in writing, does not preclude equitable relief, since statute is an extension of statute of frauds and was not intended to be used as an instrumentality of fraud. *Harris v. Dunn, 234 P.2d 821 (N.M. 1951).*

(n337)Footnote 1127. *Riser v. Walton, 21 P. 362 (Cal. 1889).*

(n338)Footnote 1128. *Schultheis v. Sellers, 72 A. 887 (Pa. 1909).*

(n339)Footnote 1129. *Ortell v. Upper Ashburton Realty Co., 190 A. 239 (Md. 1937).*

(n340)Footnote 1130. *Schlauderaff v. Worthain, 167 N.W. 118 (Minn. 1918).*

(n341)Footnote 1131. *Brock v. Freeman, 1989 U.S. Dist. LEXIS 9039* (W.D. Mo. July 31, 1989); *Curotto v. Hammack, 241 S.W.2d 897 (Mo. 1951); Kohne v. Wood, 129 N.E.2d 865 (Ohio Ct. App. 1954).*

(n342)Footnote 1132. *Cash v. Diamond, 144 N.Y.S.2d 627 (1939)* (entitled to commission); *Rogers v. McCune, 283 S.W.2d 872 (Mo. Ct. App. 1955); Smith v. Lewis, 291 P.2d 804 (Wyo. 1955)* (not entitled to commission).

(n343)Footnote 1133. *Curotto v. Hammack, 241 S.W.2d 897 (Mo. 1951).*

(n344)Footnote 1134. *Trout v. Harrell, 233 S.W.2d 233 (Ark. 1950); Stackpole v. Hancock, 24 So. 914 (Fla. 1898); Kohl v. Lindley, 39 Ill. 195 (1866); Swimm v. Bush, 23 Mich. 99 (1871); Morgan v. Dinges, 36 N.W. 544 (Neb. 1888); Smith v. Countryman, 30 N. Y. 655 (1864); Smith v. Beatty, 37 N. Car. 456 (1843); Caples v. Steel, 7 Ore. 491 (1879); Harris v. Tyson, 24 Pa. 347 (1855);* See *Independent Coal & Coke Co. v. United States, 274 U.S. 640 (1927).*

(n345)Footnote 1135. *Neal v. Owings, 194 P. 324 (Kan. 1920); Moberley v. Deatherage, 227 S.W. 289 (Ky. 1921); Stuart v. Dorow, 185 N.W. 662 (Mich. 1921); Furman v. Brown, 199 N.W. 703 (Mich. 1924); Blaisdell v. Derees, 139 A. 178 (N.J. 1927); Holly Hill Lbr. Co. v. McCoy, 23 S.E.2d 372 (S.C. 1942).*

(n346)Footnote 1136. *Ash Grove Lime & Portland Cenient Co. v. White, 238 S.W.2d 368 (Mo. 1951); Tierney v. Dietsch, 194 N.W. 475 (Neb. 1923).*

(n347)Footnote 1137. *Herwehe v. Schultz, 184 N.W. 289 (Iowa 1921); Freeman v. Woods 1 So. 2d 134 (La. Ct. App. 1941); Orr v. Allen, 45 N.W.2d 737 (S.D. 1951)* (or where vendor was mentally weak). See *Fernandez v. Wilkinson, 103 So. 537 (La. 1925).*

As a matter of law presumption of good faith is never upset by showing purchase price for less than half of its fair value. *Pae v. Stevens, 256 F.2d 208 (9th Cir. 1958).*

(n348)Footnote 1138. *Federal Deposit Ins. Corp. v. Palermo, 815 F.2d 1329 (10th Cir. 1987); Pratt Land & Imp. Co. v. McClam, 33 So. 185 (Ala. 1902); Bradley v. Little, 134 P.2d 126 (Okla. 1943); Harris v. Tyson, 24 Pa. 347, 64 Am. Dec. 661; Standard Steel Car Co. v. Stamm, 56 A. 954 (Pa. 1904); Boyd v. Leith, 50 S.W. 618 (Tex. Civ. App. 1899).*

(n349)Footnote 1139. *Culton v. Asher, 149 S.W. 946 (Ky. 1912).*

(n350)Footnote 1140. Faxon v. *Baldwin, 114* N.W. 40 (Iowa 1907); *Hays v. Meyers, 107 S.W. 287 (Ky. 1908); Toop v. Palmer, 151 N.W. 301 (Neb. 1915); Burrows v. Fitch, 57 S.E. 283 (W. Va. 1907).*

(n351)Footnote 1141. *Foster v. Illinois Zinc Co., 83 N.E. 859 (Ill. 1908); New York Brokerage Co. v. Wharton, 119 N.W. 969 (Iowa 1909); Parker v. Naylor, 151 S.W. 1096 (Tex. Civ. App. 1912); Crompton v. Beedle, 75 A. 331 (Vt. 1910); Burrows v. Fitch, 57 S.E. 283 (W. Va. 1907).*

(n352)Footnote 1142. *Kent v. Matheson, 267 N.W. 847 (Mich. 1936).*

(n353)Footnote 1143. *Benedict v. Dickens, 177 A. 715 (Conn. 1935).*

(n354)Footnote 1144. Fraud vitiates everything it touches. *Bryant v. Troutman, 287 S.W.2d 918 (Ky. 1956); Nyquist v. Foster, 268 P.2d 442 (Wash. 1954).*

Contra, *Danann Realty Corp. v. Harris, 184 N.Y.S.2d 599 (1959).*

(n355)Footnote 1145. *Quinn v. Bernat,97 A.2d 273 (R.I. 1953).*

(n356)Footnote 1146. *New York Univ. v. Continental Ins. Co., 639 N.Y.S.2d 283 (1995); Arnold v. National Aniline & Chem. Co., 20 F.2d 364 (2d Cir. 1927); Barnsdall Ref. Corp. v. Birnamwood Oil Co., 92 F.2d 817 (7th Cir. 1937); Bates v. Southgate, 31 N.E.2d 551 (Mass. 1941); Sabo v. Delman, 164 N.Y.S.2d 714 (1957); Dieterich v. Rice, 197 P. 1 (Wash. 1921).*

(n357)Footnote 1147. *People v. Anderson, 498 N.Y.S.2d 119 (1985); Danann Realty Corp. v. Harris, 184 N.Y.S.2d 599 (1959),* distinguishing other contra cases on the ground that there was in the instant case a clear statement that there had been no reliance; *Wittenberg v. Robinov, 213 N.Y.S.2d 430 (1961)* (provision in contract that seller was not liable for representations by seller's agent was upheld).

(n358)Footnote 1148. *Holly Hill Lbr. Co. v. McCoy, 23 S.E.2d 372 (S.C. 1942).*

(n359)Footnote 1149. *Bennett v. Hodge, 29 N.E.2d 524 (Ill. 1940).*

(n360)Footnote 1150. Roda v. Berko, 81N.E.2d 912 (Ill. 1948).

(n361)Footnote 1151. *Bradley v. Little, 134 P.2d 126 (Okla. 1943).*

(n362)Footnote 1152. *Frantz v. Cantrell, 711 N.E.2d 856 (Ind. App. 1999); Fosgate v. Nocatee Fruit Co., 299 Fed. 963 (S.D. Fla. 1924); Camp v. Camp, 2 Ala. 632 (1841); Lange v. Mayo, 294 S.W. 12 (Ark. 1927)* (necessity for reliance by purchaser); *Pacific Portland Cement Co. v. Placer County Land Co., 201 P. 126 (Cal. 1921); De Bairos v. Baxlin, 190 P. 188 (Cal. Dist. Ct. App. 1920); Lombardi v. Sinanides, 235 P. 455 (Cal. Dist. Ct. App. 1925); Younis v. Hart, 138 P.2d 323 (Cal. Dist. Ct. App. 1943); Manghani. v. Cobb, 127 S.E. 408 (Ga. 1926); Duncan v. Bailey, 134 S.E. 87 (Ga. 1926); Black v. Chapman, 126 S.E. 877 (Ga. 1926); Weatherford v. Fishback. 4 Ill. 170 (1841); Cowger v. Gordon, 4 Blackf. 110 (Ind. 1835); Selby v. Matson, 114 N.W. 609 (Iowa 1908); Rinella v. Faylor, 180 N.W. 983 (Iowa 1921);* Thomas v. Goodrum, 231 S.W.571 (Mo. 1921); *Hoock v. Bowman, 60 N.W. 391 (Neb. 1894); Walker v. Burch, 178 N.W. 209 (Neb. 1920); Bell v. Kyle, 192 P. 512 (N.M. 1920); Kaston v. Zimmerman, 183 N.Y.S. 615 (1920)* (misrepresentation in sale of apartment building); *Mason v. Peterson, 250 S.W. 142* (Tex. Comm'n App. 1923); *Massirer v. Milarn, 223 S.W. 302 (Tex. Civ. App. 1920); Gillespie v. Gray, 230 S.W. 1027 (Tex. Civ. App. 1921); Carver v. Moore, 275 S.W. 90 (Tex. Civ. App. 1925); Freeman v. Gloyd, 86 P. 1051 (Wash. 1906); Yarnall v. Knickerbocker Co., 206 P. 936 (Wash. 1922); Thompson v. Huston, 185 P.2d 834 (Wash. 1934).*

Even false representations as to value may sometimes constitute actionable fraud. *New v. Jackson, 95 N.E. 328 (Ind. Ct. App. 1911).*

So, also, as to misrepresentation as to material and property relied on. *Ballard v. Lyon, 131 N.W. 820 (Minn. 1911).*

The vendor was allowed to recover where the purchase price was based on the acreage. *Lyons v. Keith, 816 S.W.2d 785 (Tex. Civ. App. 1958).*

No allowance for acreage discrepancies in sales in gross, unless it is so great as to raise a presumption of fraud. *Meyer*

v. Ranson, 224 N.E.2d 293 (Ill. App. Ct. 1967).

See Haskell, The Case for an Implied Warranty of Quality in Sales of Real Property, *53 Geo. L.J 633 (1965).*

See also Applying the Interstate Land Sales Full Disclosure Act, *51 Or. L. Rev. 381 (1972).*

Giving damages to a vendee where vendor had represented that there was an appurtenant right to take water and where such appurtenant right had ceased five years before. *Bausch v. Myers, 541 P.2d 817 (Or. 1975).*

The representation of the vendor as to the extent of the acreage was held fraudulent even though he was in ignorance of the truth. *Alexander Myers & Co., Inc. v. Hopke, 565 P.2d 80 (Wash. 1977).*

Misrepresentation as to existence of ample water supply held material. *Kinkade v. Markus, 589 P.2d 1142 (Or. Ct. App. 1979).*

Rescission for misrepresentation and failure to disclose defects. *Grissom v. Moran, 290 N.E.2d 119 (Ind. Ct. App. 1972); Vormelker v. Oleksinshki, 189 N.W.2d 135 (Mich. Ct. App. 1971).*

Vendor's misrepresentations of boundaries are grounds for rescission. *Meeker v. Lanham, 604 P.2d 556 (Wyo. 1979).*

(n363)Footnote 1153. *Grundmeyer v. McFadin, 537 S.W.2d 764 (Tex. Civ. App. 1976).*

(n364)Footnote 1154. *William v. J.W. Black Lumber Co., 628 S.W.2d 13 (Ark. 1982); Hays v. Hays, 81 S.W.2d 926 (Ark. 1935); Mills v. Hellinger, 224 P.2d 34 (Cal. Dist. Ct. App. 1950); Firstbrook v. Buzbee, 132 So. 673 (Fla. 1931); Wallace v. Mobley, 112 S.E. 264.* (S.C. 1922); *Rich v. Scales,. 91 S.W. 50 (Tenn. 1905).*

(n365)Footnote 1155. *Fleming v. Harris, 219 S.W. 33 (Ark. 1920); Rotermund v. Lauritzen, 225 Ill. App. 170 (1922).*

(n366)Footnote 1156. *McPherson v. Hale, 1992 Ark. App. LEXIS 108* (Feb. 12, 1992); *Harder v. Lang Realty Co., 214 P. 1017 (Cal. Dist. Ct. App. 1923); Stevens v. Sweitzer, 201 P. 764 (Wash. 1921); Wilks v. McGovern-Place Oil Co., 207 N.W. 692 (Wis. 1926). See Del Grande v. Castelhun, 205 P. 18 (Cal. Dist. Ct. App. 1922).*

(n367)Footnote 1157. *Mabardy v. McHugh, 88 N.E. 894 (Mass. 1909).*

(n368)Footnote 1158. *Byars. v. Byars, 606 S.W.2d 595 (Ark. App. 1980); Quarg v. Scher, 69 P. 96 (Cal. 1902); Eichelberger v. Mills Land & Water Co., 100 P. 117 (Cal. Dist. Ct. App. 1908); Lovejoy v. Isbell, 47 A. 682 (Conn. 1900); Estes v. Odom, 18 S.E. 355 (Ga. 1893); Antle v. Sexton, 27 N.E. 691 (Ill. 1891); Ledbetter v. Davis, 22 N.E. 744.* (Ind. 1889); *Boddy v. Henry, 85 N.W. 771 (Iowa 1901);* Speed v. Hollingsworth, 38. P. 496 (Kan. 1894); *Boggs v. Bush, 122 S.W. 220 (Ky. 1909); Starkweather v. Benjamin, 32 Mich. 305 (1875); Stearns v. Kennedy, 103 N.W. 212 (Minn. 1905); Judd v. Walker, 89 S.W. 558 (Mo. Ct. App. 1905); Paine v. Upton, 87 N. Y. 327, 41 Am. Rep. 371 (1882); Cawston v. Sturgis, 43 P. 656 (Or. 1896); Griswold v. Gebbie, 17 A. 673 (Pa. 1889); Rich v. Scales, 91 S.W. 50.* (Tenn. 1905); *Walling v. Kinnard, 10 Tex. 508 (1853);* See *Tyler v. Morgan, 217 S.W.2d 606 (Ark. 1949).*

Generally contra where purchaser failed to make any investigation. *McDonald v. Rose 50 So. 2d 878 (Fla. 1951).*

(n369)Footnote 1159. *Crown v. Carriger, 66 Ala. 590; McDonald v. Rose, 50 So. 2d 878 (Fla. 1951); Mabardy v. McHugh, 88 N.E. 894 (Mass. 1909); Baker v. Bicknell, 44 P. 107 (Wash. 1896); Van Horn v. O'Connor, 85 P. 260 (Wash. 1906); Algee v. Hillman Inv. Co., 123 P.2d 332 (Wash. 1942).* Cf. *Roberts v. French, 26 N.E. 416 (Mass. 1891).*

(n370)Footnote 1160. *Vanderbilt v. Bishop, 199 F. 420 (9th Cir. 1918);* Garner v. Johns, 166 N.W.111 (Iowa

1918) (land pointed out by vendor different from that described in contract); *Blampey v. Pike, 119 N.W. 576 (Mich. Mich. 1909); Rudolphi v. Wright, 144 N.W. 430 (Minn. 1913).*

(n371)Footnote 1161. Housing Auth. v. Torres, 1983 Conn. Sluper. LEXIS 581 (Dec. 29, 1983); *Farrar v. Churchill, 135 U.S. 609 (1890); Stanio v. Berner Lohne Co., 17 A.2d 502 (Conn. 1941); Sohan v. Gibson, 80 S.W. 1173 (Ky. 1904); Williamson v. Harris, 151 S.W. 500 (Mo. Ct. App. 1912).*

Where he is still misled by fraud of the vendor or circumstances preventing discovery, see *Schmeisser v. Albinson, 138 N.W. 775 (Minn. 1912); Stonemets v. Head, 154 S.W. 108 (Mo. 1913); Aitken v. Bjerkvig, 150 P. 278 (Or. 1915); Ford v. Sims, 190 S.W. 1165 (Tex. Civ. App. 1917).*

(n372)Footnote 1162. Gilmour v. Trustee CG., 33 Manitoba 351, 4 Dom. L. R. 344, 13 British Rul. Cas. 825.

(n373)Footnote 1163. *Templeton v. Dreiss, 961 S.W.2d 645 (Tex. App. 1998); Nance v. McClellan, 89 S.W.2d 774 (Tex. 1936).* Rescission of contract to purchase summer resort realty was granted on the basis of fraud, where vendors represented to prospective purchasers that vendors were making "good money." Evidence held sufficient to sustain holding included persistent withholding of the account books of vendors in spite of purchaser's expressed desire to inspect them, disparity in the business experience of the mature vendors and youthful purchasers, and year by year loss of money in the operation by experienced vendors. *Spiess v. Brandt, 41 N.W.2d 561 (Minn. 1950).*

The vendor's duty is not an absolute legal requirement to disclose specific lots subject to overflow easement, but only to disclose material facts which could not be discovered by an investigation of ordinary care and diligence. *Smith v. NRC, Inc., 574 S.W.2d 639 (Tex. Civ. App. 1978).*

(n374)Footnote 1164. *Barnes v. Lopez, 544 P.2d 694 (Ariz. Ct. App. 1976).*

(n375)Footnote 1165. *Lawrence v. Simonton, 13 Tex. 220 (1854).*

No diminution in price due to shortage if a sale in gross. *Seyden v. Frade, 494 P.2d 1281 (Nev. 1972).*

(n376)Footnote 1166. *Sibley v. Hayes, 70 S.W. 538 (Tex. 1902).*

(n377)Footnote 1167. *Steward v. Jones, 633 S.W.2d 544 (Tex. App. 1982); O'Connell v. Duke, 29 Tex. 299 (1867).*

(n378)Footnote 1168. *Steward v. Jones, 633 S.W.2d 544 (Tex. App. 1982); Carpenter v. Bandy, 293 S.W.2d 126 (Tex. Civ. App. 1956).*

(n379)Footnote 1169. *Gould v. Escondido Valley Poultry Assn., 133 P.2d 448 (Cal. Dist. Ct. App. 1943).*

(n380)Footnote 1170. *Kayfirst Corp. v. Washington Terminal Co., 813 F. Supp. 67 (D.D.C. 1993); Linn v. Green, 17 F. 407 (D. Colo. 1883).*

Younge v. Harris, 2 Ala. 108; Meeks v. Garner, 8 So. 378 (Ala. 1890). Fitzhugh v. Davis, 46 Ark. 337 (1885); Grismore v. Utley, 252 S.W. 16 (Ark. 1923) (false representation that land was not in heavily assessed drainage district, material); *Muller v. Palmer, 77 P. 954 (Cal. 1904); Fenley v. Moody, 30 S.E. 1002 (Ga. 1898);* Drake v. Latham, 50 III. 270 (1869); *Craig v. Hamilton, 21 N.E. 315 (Ind. 1889); Riley v. Bell, 95 N.W. 170 (Iowa 1903); Provident Loan Trust Co. v. McIntosh, 75 P. 498 (Kan.1904); Fristoe v. Laytham, 36 S.W. 920 (Ky. 1896); Skinner v. Brigham, 126 Mass. 132 (1879); Stockham v. Cheeney, 28 N.W. 692 (Mich. 1886); Lackovic v. Campbell, 195 N.W. 798 (Mich. 1923)* (misrepresentation as to expiration of lease, material); *Reynolds v. Franklin, 38 N.W. 636 (Minn. 1888); Haight v. Hayt, 19 N.Y. 464 (1859); Jenkinson v. Stoneman, 4 Ohio Dec. Rep. 289 (1878); In re Wilson's Appeal, 7 A. 88 (Pa. 1995); In re Fleming's Estate, 109 A. 265 (Pa. 1919)* (forgery, ground for cancellation); *Morris v. Brown, 85 S.W. 1015 (Tex. Civ. App. 1905); Dehnhoff v. Hege, 230 P. 131 (Wash. 1924)* (fraudulent representation by bank as to ownership when its

sole right was that of owner of certificate of sale on a defective judgment); *Koepke v. Winterfield, 92 N.W. 437 (Wis. 1902).*

A positive statement that a title is good may be somewhat a matter of opinion, but it also implies that there are no facts affecting its validity within the knowledge of the vendor making the representation, and the purchaser is entitled to rely thereon. *Burns v. Dockray, 30 N.E. 551 (Mass. 1892).*

See Buchanan v. Burnett, 114 S.W. 406 (Tex. Civ. App. 1908), aff'd *119 S.W. 1141 (Tex. 1909). See*, however, *Conwell v. Clifford, 45 Ind. 392 (1873)* (a false representation by the vendor, who had a good title to certain land, is no defense to an action, by the person making the representation, upon notes given for the purchase price).

(n381)Footnote 1171. *Guerken v. Rozga, 319 N.W.2d 178 (Wis. App. 1982);* It is immaterial whether the vendor knew the representations to be false, if the representation is in relation to a material matter and the purchaser is misled thereby. *Lanier v. Hill, 25 Ala. 554 (1854); Bailey v. Jordan, 32 Ala. 50 (1858); Lindsey v. Veasy, 62 Ala. 421 (1878); Kiefer v. Rogers, 19 Minn. 32 (1878); Parham v. Randolph, 5 Miss. 435 (1840); Rimer v. Dugan, 39 Miss. 477 (1860); Zunker v. Kuebn, 88 N.W. 605 (Wis. 1902).*

The assertion is equivalent to an assumption of its. truth. *Piche v. Robbins, 53 A. 92 (R.I. 1902).*

The vendor is bound to make reparation, no matter whether the representation is made with or without his knowledge of its falsity. *Buchanan v. Burnett, 114 S.W. 406 (Tex. Civ. App. 1908), aff'd, 119 S.W. 1141 (Tex. 1909).*

The mere fact that the vendors refer to it as "my property" does not sufficiently establish fraud. *Reuter v. Lawe, 56 N.W. 472 (Wis. 1893). See Brown v. Manning, 3 Minn. 35 (1859); Buchall v. Higgins, 96 N.Y.S. 241 (1905).*

Where one who held a tax sale falsely represented such title to be perfect, there is such fraud in law as will entitle the one defrauded to rescind a contract induced thereby, even though the one making the representation believed it to be true. *Kathan v. Comstock, 122 N.W. 1044 (Wis. 1909).*

A vendor who represents his title as being a freehold when it is only a copyhold is guilty of a fraud where the purchaser relies upon the representation, and this is true even though the vendor believed in the truth of his statement. *Hart v. Swaine, 7 Ch. Div. 42.*

(n382)Footnote 1172. *Stover v. Whiting, 403 N.W.2d 575 (Mich. 1987); Walcrath Realty Co. v. Van Dyke, 248 N.W. 634 (Mich. 1933).*

(n383)Footnote 1173. *Towels v. Campbell, 264 S.W. 1107 (Ky. 1924).*

(n384)Footnote 1174. *Thompson v. Best, 478 N.E.2d 79 (Ind. App. 1985); Linn v. Green, 17 F. 407 (D. Colo. 1883); Carpenter v. Wright, 34 P. 798 (Kan. 1893); Petersen v. Graham, 110 P.2d 149 (Wash. 1941).*

(n385)Footnote 1175. *People v. Jory, 505 N.W.2d 228 (Mich. 1993);* A representation by an executor that land is unencumbered may render him personally liable for damages, although he did not know the representations were false. *West v. Wright, 98 Ind. 335 (1884); Weber v. Weber, 11 N.W. 389 (Mich. 1882).*

(n386)Footnote 1176. *Hoffman v. Connall, 736 P.2d 242 (Wash. 1987); Thompson v. Huston, 135 P.2d 834 (Wash. 1943).*

(n387)Footnote 1177. *Creamer v. Helferstay, 448 A.2d 332 (Md. 1982); Clark v. Kirsner, 74 A.2d 830 (Md. 1950); Thomas v. Goodrum, 231 S.W. 571 (Mo. 1921); Parish v. Casner, 282 S.W. 392 (Mo. 1926); Hawthorne v. Odenson, 120 A. 797 (N.J Ch. 1923);* Massirer v. Milam, 223 S.W.302 (Tex. Civ. App. 1920); *George v. Bingham, 192 P. 980*

(Wash. 1920); Spangler v. Kittel, 179 N.W. 758 (Wis. 1920); Carpenter v. Mason, 193 N.W. 973 (Wis. 1923).

Vendor's misrepresentation as to return on an investment was material and not a mere puffing. *Cohen v. Landlow, 242 So. 2d 801 (Fla. Dist. Ct. App. 1971).*

(n388)Footnote 1178. *Showcase Woodworking, Ltd. v. Dluor Daniel, Inc., 1990 U.S. Dist. LEXIS 19614* (E.D. Va. Apr. 17, 1990); *Malakul v. Altech Arkansas, Inc., 766 S.W.2d 433 (Ark. 1989); Lipschutz v. Phillips, 273 F. 748 (D.C. Cir. 1921); Lone Star Immigration Co. v. Johnson, 278 F. 515 (7th Cir. 1922); Massey v. Tyra, 234 S.W.2d 759 (Ark. 1950); French v. Freeman, 217 P. 515 (Cal. 1923); Scott v. Delta Land & Water Co., 207 P. 389 (Cal. Dist. Ct. App. 1922); Kane v. Ott, 238 P. 126 (Cal. Dist. Ct. App. 1925); Beushausen v. Handley, 221 P. 519 (Colo. 1923); Briesenick v. Dimond, 134 S.E. 350 (Ga. Ct. App. 1925); Wilson v. Sunnyside Orchard Co., 196 P. 302 (Idaho 1921); Heinrich v. Norton, 219 Ill. App. 86 (1920); Arnold v. Hosmer, 179 N.W. 92 (Iowa 1920); Martin v. Critton, 179 N.W. 38 (Mich. 1920); Reese v. Elliott, 185 N.W. 693 (Mich. 1921); Kefuss v. Whitley, 189 N.W. 76 (Mich. 1922)* (salability of sub-divided farm); *Sweet v. Martin, 207 N.W. 845 (Mich. 1926); Montague v. Bank for Savings, 43 N.Y.S.2d 321 (1943); Mason v. Peterson, 250 S.W. 142* (Tex. Comm'n App. 1923); *West v. Hoffman, 245 P. 419 (Wash. 1926).* Misrepresentation as to sewer facilities and possibility of improvements justified a rescission on the part of the vendee. *Slocum v. Leffler, 538 P.2d 906 (Or. 1975); Southeastern Assn. v. South Carolina Motor Inn Corp., 218 S.E.2d 422 (S.C. 1975); Degler v. Lake Holiday Estates, Inc., 406 F. Supp. 367 (W.D. Va. 1975).*

(n389)Footnote 1179. *Soursby v. Hawkins, 763 P.2d 725 (Ore. 1988); Byers v. Federal Land Co., 3 F.2d 9 (8th Cir. 1924); Beggs v. Spalding, 204 P. 429 (Cal. Dist. Ct. App. 1921); Glass v. Craig, 91 So. 332 (Fla. 1922); Bouxsein v. First Nat. Bank, 127 N.E. 133 (Ill. 1920); Hustad v. Cerney, 151 N.E. 871 (Ill. 1926); Osborne v. Howard, 242 S.W. 852 (Ky 1922); Sweet v. Martin, 207 N.W. 845 (Mich. 1926); McCaw v. O'Malley, 249 S.W. 41 (Mo. 1923); Fairbanks v. Johnson, 243 P. 1114 (Or. 1926).*

(n390)Footnote 1180. *Bell v. Morley, 223 F. 628 (9th Cir. 1915); Hall v. Brown, 94 A. 530 (Md. 1915); Realty my. Co. v. Shafer, 137 N.W. 873 (Neb. 1912); Long v. Kendall, 87 P. 670 (Okla. 1906);* Rasch v. Horne, 38 Manitoba 600, 16 British Rul. Cas. 421.

(n391)Footnote 1181. *Ford Motor Credit Co. v. Milburn, 615 F.2d 892 (10th Cir. 1980); Gould v. Escondido Valley Poultry Assn., 133 P.2d 448 (Cal. Dist. Ct. App. 1943); Pennington v. Roberg, 142 N.W. 710 (Minn. 1913); Williamson v. Harris, 151 S.W. 500 (Mo. Ct. App. 1912); Rawlins v. Myers, 148 N.W. 915 (Neb. 1914); Gibson v. Mendenhall, 224 P.2d 251 (Okla. 1950); Field v. Hood River Orchard Land Co., 146 P. 98 (Or. 1915); Boles v. Aldridge, 153 S.W. 373 (Tex. Civ. App. 1913).* Material misrepresentation of future performance justified rescission. *Degler v. Lake Holiday Estates, Inc. 406 F. Supp 367 (W.D. Va. 1975).*

(n392)Footnote 1182. *Lanning Constr. v. Rozell, 320 N.W.2d 522 (S.D. 1982); Bostwick v. Lewis, 1 Day 250 (Conn. 1804); King v. Dykerna, 195 N.W. 233 (Iowa 1923); Schmeisser v. Alhinson, 138 N.W. 775 (Minn. 1912)* (character of soil and amount of crops previous year); Petrie v. *Clarke, 147* N.W. 1097 (Minn. 1914) (that the land is tillable); *Drake v. Fairmount Drain Tile & Brick Co., 151 N.W. 914 (Minn. 1915)* (that land contained clay suitable for tile making); *Woodward v. Western Canada Colonization Co., 158 N.W. 706 (Minn. 1916); Cressler v. Rees, 43 N.W. 363 (Neb. 1889); Journey v. Hunt, 1 N. J. L. 274 (1794); O'Neal v. Weisman, 88 S.W. 290 (Tex. Civ. App. 1905); Elliott v. Fischer, 220 P.2d 338 (Wash. 1950); Danielson v. Skidmore, 189 S.W. 57 (Ark. 1916); Haener v. McKenzie, 154 N.W. 59 (Mich 1915);* Cf. *Saxby v. Southern Land Co., 63 S.E. 423 (Va. 1909).*

(n393)Footnote 1183. *Lipschutz v. Phillips, 273 F. 748 (D.C. Cir. 1921); Cohron v. Woodland Hills Co., 139 S.E. 56 (Ga. 1927); Newbern v. Milhollin, 120 S.E. 637 (Ga. Ct. App. 1923); Elliott v. Dolvin, 131 S.E. 300 (Ga. Ct. App. 1926); Kefuss v. Whitley, 189 N.W. 76 (Mich. 1922); Thomas v. Goodrunt 231 S.W. 571 (Mo. 1921).*

(n394)Footnote 1184. *Michie v. National Bank of Caruthersville, 558 S.W.2d 270 (Mo. App. 1977); Bean v. Herrick, 12 Maine 262 (1835); Barnard v. Duncan, 38 Mo. 170 (1866).*

(n395)Footnote 1185. *Ahterton Condominium Apartment Owners Ass'n Bd. of Direftors v. Blume Dev. Co., 799 P.2d 250 (Wash. 1990); Farrar v. Churchill, 135 U.S. 609 (1890); Camp v. Camp, 2 Ala. 632 (1841); Kavanagh v. Wade, 108 P.2d 475.* (Cal. Dist. Ct. App. 1940); *Atwood v. Chapman, 68 Maine 38 (1877); Parham v. Randolph, 5 Miss. 435 (1840); Barnard v. Duncan, 38 Mo. 170 (1866).* Failure to advise vendee that the house had been flooded twice and painting and washing away all watermarks visible after floods were false answers to questions for reason for sale and statement that drainage system was adequate, constituting active concealment of the vendors. *Russow v. Bobola, 277 N.E.2d 769 (Ill. App. Ct. 1972).* Failure of seller to disclose existence of landfill as fraud. *Sorrell v. Young, 491 P.2d 1312 (Wash. Ct. App. 1971).* Where the vendor was aware of the defects of a septic tank and the vendee was not and the vendor did not disclose them to the purchaser, the vendor's suppression of the facts justified rescission of the contract. *Wilhite v. Mays, 235 S.E.2d 532 (Ga. 1977).*

(n396)Footnote 1186. *Henry v. Farmer City State Bank, 808 F. 2d 1228 (7th Cir. 1986);* See *Dunlap v. Peirce, 168 N.E. 277 (Ill. 1929).*

(n397)Footnote 1187. *Florenzano v. Olson, 387 N.W.2d 168 (Minn. 1986); Crompton v. Beedle, 75 A. 331 (Vt. 1910).* Rescission of contract to purchase summer resort realty was granted on the basis of fraud, where vendors represented to prospective purchaser that vendors were making "good money." Evidence held sufficient to sustain, holding included persistent withholding of the account books of vendors in spite of purchaser's expressed desire to inspect them, disparity in the business experience of the mature vendors and youthful purchasers, and year by year loss of money in the operation by experienced vendors. *Spiess v. Brandt, 41 N.W.2d 561 (Minn. 1950).*

Damages for misrepresentation are based on the value of the property at the time of the sale. *McDonnell-Perkins Builders, Inc. v. Cranford, 328 S.W.2d 800 (Tex. Civ. App. 1959).*

(n398)Footnote 1188. *Edwards v. Wiley, 285 S.W. 54 (Ark. 1921); Davitt v. Long-Bell Farm Land Corp., 110 So. 88 (La. 1926).*

(n399)Footnote 1189. *Hercules & Co. v. Shama Restaurant Corp., 613 A.2d 916 (D.C. 1992); Owen v. Schwartz, 177 F.2d 641 (D.C. Cir. 1949).*

(n400)Footnote 1190. *Connecticut Nat'l Bank v. Giacomi, 659 A.2d 1166 (Conn. 1995);* Rescission allowed where vendee could not have learned the truth. *Spiess v. Brandt, 41 N.W.2d 561 (Minn. 1950); Power v. Esarey, 224 P.2d 323 (Wash. 1950),* even where vendee could have ascertained. *Yorke v. Taylor, 124 N.E.2d 912 (Mass. 1950).*

Rescission, denied under caveat emptor theory. *Egan v. Hudson Nut Products, Inc., 114 A.2d 213 (Minn. 1950); Fegeas v. Sherrill, 147 A.2d 223 (Md. Ct. App. 1958); Traverse v. Long, 135 N. E.2d 256 (Ohio 1956)* (information was available to vendor and vendee equally).

(n401)Footnote 1191. *Dresser v. Sunderland Apartments Tenants Ass'n, 465 A.2d 835 (D.C. 1983); Dugan v. Bosco, 108 A.2d 536 (Del. Ch. 1954); Spargnapani v. Wright 110 A.2d 82 (D.C. 1954); Lawlor v. Scheper, 101 S.E. 269 (S.C. 1957); Passero v. Loew, 259 S.W.2d 909 (Tex. Civ. App. 1953); Dixon v. MacGillivray, 185 P.2d 109 (Wash. 1947).*

(n402)Footnote 1192. *Carter Coal Co. v. Litz, 54 F. Supp. 115 (W.D. Va. 1943); Hartsfield v. Williams, 200 So. 220 (Fla. 1941); Funderburg v. Young, 281 N.W. 87 (N.D. 1938); Rozzano v. Moore, 27 P.2d 1096 (Wash. 1933).*

In Texas the holder of a vendor's lien has a superior title and can on default elect to rescind the contract. *Whiteside v. Bell, 347 S.W.2d 568 (Tex. 1961).*

Louisiana permits rescission of a sale of realty through lesion beyond moiety where a vendor of an immovable has received less than one half of the value of the property sold to him. La. Civ. Code, Art. 1860 (1987). So, where property

resold, the original seller could recover from the original purchaser the difference between the two sale prices. *O'Brien v. LeGette, 223 So. 2d 165 (La. 1969).*

See Herman, Reformation and Rescission, *1960 U. Ill. L. Forum 1 (1960).*

See also Reforming the Vendor's Remedies for Breach of Installment Land Sale Contracts, *47 S. Cal. L. Rev. 191 (1973).*

Death of vendor does not terminate an escrow agreement. *Fuqua v. Fuqua, 528 S.W.2d 896 (Tex. Civ. App. 1975).*

On breach of contract for acreage purchaser has election of damages or rescission. *Mills v. Brown, 568 S.W.2d 100 (Tenn. 1978).* Fact that buyer sold the land at a profit was immaterial.

(n403)Footnote 1193. *Deckert v. Independence Shares Corp., 311 U.S. 282 (1940); Citizens' Ins. Co. v. Mathis, 170 So. 481 (Ala. 1936); Hartsfield v. Williams, 200 So. 220 (Fla. 1941); National Life & Ace. Ins. Co. v. Preston, 22 S.E.2d 157 (Ga. 1942); Butler County v. Campbell, 182 S.W.2d 589 (Mo. 1944); Federal Land Bank v. Koslofsky, 271 N.W. 907 (N.D. 1937).*

Where the buyer is in possession under a contract and the seller then repudiates the contract, he cannot, by his wrongful act, convert the buyer into a trespasser or tenant. *Smeekens v. Bertrand, 302 N.E.2d 502 (Ind. Ct. App. 1969).*

Punitive damages may be awarded in a rescission suit. *Hutchinson v. Pyburn, 567 S.W.2d 762 (Tenn. Ct. App. 1977).*

(n404)Footnote 1194. *Hesselgrave v. Mott, 160 P.2d 521 (Wash. 1945).*

(n405)Footnote 1195. *Dow Chemical Co. v. U.S., 226 F.3d 1334 (Fed. Cir. 2000); Omlid v. Sweeney, 484 N.W.2d 486 (N.D. 1992); Vaughn v. Fey, 190 P. 1041 (Cal. Dist. Ct. App. 1920).*

(n406)Footnote 1196. *Scruggs v. Driver, 31 Ala. 274 (1857); Kirby v. Harrison, 2 Ohio St. 326 (1853); Wilson v. Getty, 57 Pa. 266 (1868).*

(n407)Footnote 1197. *Johnson v. United R. Co., 227 Mo. 423, 127 S.W. 63.*

(n408)Footnote 1198. *In re Atwater, 266 F. 278 (2d Cir. 1920), aff'd, Atwater v. Guernsey, 254 U.S. 423 (1921); International Realty Associates v. McAdoo, 99 So. 117 (Fla. 1924); Penkala v. Tomczyk, 148 N.E. 64 (Ill. 1925); Witherstine v. Snyder, 225 Ill. App. 189 (1922); Capps v. Clark, 195 N.W. 372 (Iowa 1923); Rathbun v. Baumel, 191 N.W. 297 (Iowa 1923); Huggins v. Mathews, 203 N.W. 242 (Iowa 1925); Lambert-son v. National Inv. & Finance Co., 202 N.W. 119 (Iowa 1925); Reid v. Wilder, 264 S.W. 849 (Ky 1924); Mulheron v. Henry S. Koppin Co., 190 N.W. 674 (Mich. 1922); Ronczkowskj v. Jozwiak, 203 N.W. 105 (Mich. 1925); Canty v. Halpin, 242 S.W. 97 (Mo. 1922); Kaston v. Zimmerman, 183 N.Y.S. 615 (1920); Ressler v. Sam-phimor Holding Corp., 194 N.Y.S. 363 (1922); Ryon v. John Wanamaker, New York, Inc., 190 N.Y.S. 250 (1921); Velsor v. Freeman, 194 N.Y.S. 191 (1922); Bradley v. Little, 134 P.2d 126 (Okla. 1943); True v. J. B. Deeds & Son, 271 S.W. 41 (Tenn. 1924); Maverick v. Perez, 228 S.W. 148* (Tex. Comm'n. App. 1921); *Cooley v. Buie, 291 S.W. 876* (Tex. Comm'n App. 1926); *Weinhagen v. Hayes, 178 N.W. 780 (Wis. 1920); Mueller v. Michels, 197 N.W. 201 (Wis. 1924).*

Right to rescind lost through laches. *Blinzler v. Andrews, 485 P.2d 957 (Idaho 1971).*

(n409)Footnote 1199. *Brown v. Norman, 4 So. 293 (Miss. 1888).*

(n410)Footnote 1200. *Brannon v. Hayes, 130 N.E. 803 (Ind. 1921); Lacey v. Layne, 228 S.W. 1 (Ky. 1921);* Louisville Point Lbr. Co. v. Thompson, 259.S.W. 345 (Ky. 1924); *Weigel v. Cook, 142 N.E. 444 (N.Y. 1923); Saunders*

v. Erickson, 189 N.W. 116 (S.D. 1922).

(n411)Footnote 1201. Oliver v. *Baldwin, 167* N.W. 910 (Mich. 1918).

(n412)Footnote 1202. *Degler v. Lake Holiday Estates, Inc., 406 F. Supp. 367 (W.D. Va. 1975).*

(n413)Footnote 1203. *Barrington Management Co., Inc. v. Paul E. Draper Family Ltd. Partnership, 695 N.E.2d 135 (Ind. Ct. App. 1998); Strandt v. Strandt, 270 N.W. 709 (Mich. 1936); Frierson v. International Agricultural Corp., 148 S.W.2d 27 (Tenn. Ct. App. 1940); Stimpson v. Stimpson, 169 N.W. 295 (Wis. 1918); Weinhagen v. Hayes, 178 N.W. 780 (Wis. 1921).*

(n414)Footnote 1204. *Lacey v. Layne, 228 S.W. 1 (Ky. 1921).*

(n415)Footnote 1205. *Stone v. Walker, 77 So. 554 (Ala. 1917); Shafer v. Shafer, 190 S.W. 323 (Mo. 1916); McMillan v. American Suburban Corp., 188 S.W. 615 (Tenn. 1916).*

(n416)Footnote 1206. *O'Ferrall v. O'Ferrall, 114 N.E. 561 (Ill. 1916); Huston v. Goemann, 162 P. 271 (Kan. 1917).*

(n417)Footnote 1207. *Younis v. Hart, 138 P.2d 323 (Cal. Dist. Ct. App. 1943); Bozdech v. Montana Ranches Co., 216 P. 319 (Mont. 1923).*

(n418)Footnote 1208. *Sims v. Birmingham, 49 So. 2d 302 (Ala. 1950); Nelson v. Fernando Nelson & Sons, 55 P.2d 859 (Cal. 1936); Savage v. Home 49 So. 2d 329 (Fla. 1951); Barney v. Curtis, 218 P. 190 (Idaho 1923); Zeta Bldg. Corp. v. Garst, 97 N.E.2d 331 (Ill. 1951); Olson v. Woodhouse, 112 Nebr. 527, 199* N.W.815; *Crim v. Watson, 82 P. 2d 172 (Wash. 1938).*

(n419)Footnote 1209. *Nance v. McClellan, 89 S.W.2d 774 (Tex. 1936).*

Cause of action for unjust enrichment upheld after cancellation of contract for deed. *Zirinsky v. Sheehan, 413 F.2d 481 (8th Cir. 1969).*

(n420)Footnote 1210. *National P. Oil Co. v. Watson, 193 P. 133 (Cal. 1920); Bernstein v. Kohn, 114 A. 543 (N.J. 1921); Conners v. Winans, 204 N.Y.S. 142 (1924).*

No notice of rescission is necessary before commencement of action. *Liebsch v. Abbott, 122 N.W.2d 578 (Minn. 1963).*

(n421)Footnote 1211. *Richards v. Jarvis, 238 P. 887 (Idaho 1925).*

Where the seller repudiates the contract, he does not convert the buyer in possession into a trespasser. *Smeekens v. Bertrand, 302 N.E.2d 502 (Ind. Ct. App. 1969).*

(n422)Footnote 1212. *Myers v. Fidelity-Philadelphia Trust Co., 138 A. 834 (Pa. 1927).*

(n423)Footnote 1213. *Bonnco Petrol, Inc. v. Epstein, 560 A.2d 655 (N.J. 1989); Jones v. Bay Cities Elec. Co., 133 P. 492 (Cal. Dist. Ct. App. 1913); Gordon-Tiger Mm. & Reduction Co. v. Brown, 138 P. 51 (Colo. 1914); Girouard v. Jasper, 106 N.E. 849 (Mass. 1914); Expansion Realty Co. v. Geren, 170 S.W. 928 (Mo. Ct. App. 1914); Collison v. Ream, 144 N.W. 1050 (Neb. 1914); Guild v. More, 155 N.W. 44 (N.D. 1915).*

(n424)Footnote 1214. *Bliss and Laughlin Industries, Inc. v. Malley, 364 So. 2d 65 (Fla. Dist. Ct. App. 1978).*

(n425)Footnote 1215. *Brown v. Norman, 4 So. 293 (Miss. 1888); Gould v. Cayuga County Nat. Bank, 86 N.Y. 75*

(1881); Engeman v. Taylor, 33 S.E. 922 (W. Va. 1899).

Holding that a seller-contractor was not liable to the vendee or spouse for emotional distress caused by living in unsuitable premises. *Rogowicz v. Taylor & Gray, Inc., 498 S.W.2d 352 (Tex. Civ. App. 1973).*

(n426)Footnote 1216. *Armstrong v. Irwin, 221 P. 222 (Ariz. 1923); Keifer v. Dreier, 205 N.W. 472 (Iowa 1925); Johnston Farm Inv. Co. v. Huff, 204 N.W. 333 (N.D. 1925); Lea v. Blokiand, 257 P. 801 (Or. 1927); Grigsby v. Hubbard, 216 N.Y.S. 716 (1926).*

Requiring vendor to return part of payments to defaulting vendee on rescission. *Johnson v. Carman, 572 P.2d 371 (Utah 1977).*

(n427)Footnote 1217. *Droz v. Trump, 965 S.W.2d 436 (Mo. Ct. App. 1998); Groothand v. Schueter, 949 S.W.2d 923 (Mo. Ct. App. 1997); Scott v. Delta Land & Water Co., 207 P. 389 (Cal. Dist. Ct. App. 1922)); Bradley v. Delta Land & Water Co., 207 P. 395 (Cal. Dist. Ct. App. 1922); Turner v. Brewer, 298 F. 685 (D.C. Cir. 1924).*

(n428)Footnote 1218. *Adams v. Rhodes, 220 S.W. 29 (Ark. 1920); Hyman v. Harbor View Land Co., 188 P. 828 (Cal. Dist. Ct. App. 1920); Miller v. Fletcher Say. & Trust Co., 133 N.E. 174 (Ind. Ct. App. 1921); Clayton v. Fletcher Say. & Trust Co., 155 N.E. 539 (Ind. Ct. App. 1927); Plas v. Aldrich, 213 N.W. 80 (Mich. 1927); Barba v. Gunsberg, 129 A. 747 (N.J. 1925); Wurfel v. Bockler, 210 P. 213 (Or. 1922); Hopp v. Bergdoll, 131 A. 698 (Pa. 1926); West Lbr. Co. v. Henderson, 238 S.W. 710 (Tex. Civ. App. 1922); McKellar Real Estate & Inv. Co. v. Paxton, 218 P. 128 (Utah 1923);* See *Gould v. Escondido Valley Poultry Assn., 133 P.2d 448 (Cal. Dist. Ct. App. 1943); Porter v. Ridge, 17 N.W.2d 239 (Mich. 1945).*

No notice is necessary where purchaser failed to pay within time specified. *Boardman v. Bubert, 155 N.E. 784 (Ill. 1927).*

No notice is required where vendor's lien retained. *Rooney v. Porch, 223 S.W. 245 (Tex. Civ. App. 1920).*

No notice is required where there has been no attempt to perform any part of the contract. *Canon v. Scott, 230 S.W. 1042 (Tex. Civ. App. 1921).*

A subvendee of an interest in the property which had been sold subject to purchase-money notes was not entitled to notice of the vendor's intended rescission. *Whiteside v. Bell, 347 S.W.2d 568 (Tex. 1961).*

(n429)Footnote 1219. *Duncombe v. Tromble, 188 N.W. 367 (Mich. 1922); Walker v. Burch, 178 N.W. 209 (Neb. 1920).*

(n430)Footnote 1220. *Gripp v. Scherer, 212 N.W. 113 (Iowa 1927).*

(n431)Footnote 1221. *Walls v. Cruse, 235 S.W. 199* (Tex. Comm'n App. 1921).

(n432)Footnote 1222. *Brown v. California & Western Land Co., 177 N.W. 774 (Minn. 1920).*

(n433)Footnote 1223. *Tribolini v. Federal Business Appraisers Co., 55 N.W.2d 17 (Wis. 1952).*

(n434)Footnote 1224. *Wilson v. Thompson, 51 So. 2d 20 (Ala. 1951).*

In Texas the vendor need not give a subvendee notice of rescission on the vendee's default. *Whiteside v. Bell, 347 S.W.2d 568 (Tex. 1961).*

Vendee may not rescind contract because of defective title until the time for performance of the contract arises. *Yale*

Dev. Co. v. Andermann, 344 N.E.2d 701 (Ill. App. Ct. 1976).

Rescission denied where vendor had not given vendee notice and opportunity to cure breach. *Elsasser v. Wilcox, 596 P.2d 974 (Or. 1979).*

(n435)Footnote 1225. *Glad Tidings Church of America v. Hinkley, 226 P.2d 1016 (1951).*

(n436)Footnote 1226. *Williams v. Dunas, 352 N.E.2d 266 (Ill. App. Ct. 1976).*

(n437)Footnote 1227. *McDonald v. Shore, 590 P.2d 218 (Or. 1979).*

(n438)Footnote 1228. *See* Enforcement of Forfeiture Provisions as a Remedy in Land Sale Contracts, *14 Hastings L.J. 44 (1962);* Recent Utah Development on Forfeitures in Real Estate Contracts, *7 Utah L. Rev. 95 (1960).*

See Hines, Forfeiture of Installment Land Contracts, *12 U. Kan L Rev. 475 (1964);* Installment Land Contracts, Legislative Protection of Defaulting Purchasers, *52 Harv. L. Rev. 129 (1938);* Van Zile, Land Contracts: Summary Proceedings for Forfeiture, *34 U. Det. L.J. 209 (1956);* Comment, Recent Utah Developments on Forfeitures in Real Estate Contracts, *7 Utah L. Rev. 95 (1960).*

See also Forfeiture and the Installment Land Contract, *35 Brook. L. Rev. 83 (1968).*

See Lewis & Reeves, How the Doctrine of Equitable Conversion Affects Land Sale Contract Forfeitures, 3 Real Est. L.J. 249 (1974).

Forfeiture of contract will be enforced if parties clearly so intended. *Mohave County v. Mohave-Kingman Estates, 586 P.2d 978 (Ariz. 1978).*

(n439)Footnote 1229. *Union Bond & Trust Co. v. Blue Creek Redwood Co., 128 F. Supp. 709 (N.D. Cal. 1955)* (statutory relief from forfeiture).

Forfeiture of a land contract is appropriate only where consonant with notions of fairness and justice. *Skendzel v. Marshall, 301 N.E.2d 641 (Ind. 1973).*

Michigan has a statute fixing an upset price on foreclosure of a land sales contract, Comp. Laws § 600.3155 (2000). *Kramer v. Davis, 124 N.W.2d 292 (Mich. 1963).*

Invoking the principle of equity and preventing acceleration of forfeiture clause in land contract where condition of the premises was in dispute. *Moore v. Bunch, 185 N.W.2d 565 (Mich. Ct. App. 1971).*

(n440)Footnote 1230. In *Whittier v. Stege, 61 Cal. 238 (1882),* the law is stated thus: "When, therefore, the defendants, after they had obtained possession lawfully, substituted repudiation of the contract and refusal to comply with its terms, for performance or willingness to perform, they divested themselves by their wrongful act of the equitable estate which they acquired under the contract, and became trespassers or tenants at will, against whom their repudiated vendors could maintain ejectment. The vendors were remitted to their legal title, and in an action upon it the defendants could not invoke as a defense to it a contract of sale which they repudiated and refused to perform."

Nebraska permits forfeiture without time for redemption. *Abbas v. Demont, 40 N.W.2d 265 (Neb. 1949).*

Where vendee is in default, equitable conversion does not prevent partition by vendor. *Hartman v. Hartman, 297 N.E.2d 199 (Ill. App. Ct. 1973).*

(n441)Footnote 1231. *Ruth v. Smith, 68 P. 278 (Colo. 1901); Haskins v. Haskins, 67 Ill. 446; Vos v. Dykema, 26 Mich. 399 (1873).*

(n442)Footnote 1232. Permitting forfeiture on grounds that equity should not aid one breaching an agreement to profit from his own wrong. *Flagler v. Kroonen, 214 P. 1006 (Cal. Dist. Ct. App. 1923); Dorman v. Fisher, 144 A.2d 805 (N.J. N.J. Super. Ct. App. Div. 1958); Lawrence v. Miller, 86 N.Y. 131 (1881); Pease v. Baxter, 41 P. 899 (Wash. 1895).*

(n443)Footnote 1233. *Moore v. Crandall, 124 N.W. 812 (Iowa 1910); Kaminshi v. London Pub, Inc. 301 A.2d 769 (N.J. Super. Ct. App. Div. 1973); Hale v. Flores, 506 P.2d 276 (Ariz. Ct. App. 1973).*

(n444)Footnote 1234. *Kinney v. Kan., 710 P.2d 1290 (Kan. 1985); Bagby v. Missouri-Kansas-Texas R. Co., 171 S.W.2d 673 (Mo. 1943).*

Where vendee had defaulted on a mortgage and vendor made the payments, there was no breach of the sales contract. *Briggs v. Johnson, 196 N.W.2d 470 (Minn. 1972).*

No acceleration on default unless contract specifies. *Cerullo v. Cerullo, 339 N.Y.S.2d 252 (1972).*

(n445)Footnote 1235. *Pearce v. Shurtz, 270 P.2d 442 (Utah 1954).*

(n446)Footnote 1236. *Hudson v. Maryland State Housing Co., 114 A.2d 421 (Md. 1955).*

The vendee who has paid part of the purchase price and gone into possession is in the same position as one who has taken a deed and given a purchase-money mortgage so that summary eviction proceedings will not lie on default. *H & L Land Co. v. Warner, 258 So. 2d 293 (Fla. Dist. Ct. App. 1972).*

(n447)Footnote 1237. *Upheld. State ex rel. Everson v. Municipal Court, 128 N.E.2d 467 (Ohio Ct. App. 1954).*

Rejected. Smith v. Keech, 112 N.Y.S.2d 803 (1952).

(n448)Footnote 1238. *Pen-Ken Gas & Oil Corp. v. Warfield Natural Gas Co., 137 F.2d 871 (6th Cir. 1943); Webber v. Herbert, 188 P. 819 (Cal. Dist. Ct. App. 1920); Holman v. Leo, 212 P. 33 (Cal. Dist. Ct. App. 1922); Chaplin v. Sullivan, 155 P.2d 868 (Cal. Dist. Ct. App. 1945); Walker Inv. Co. v. Fleming, 246 P. 207 (Colo. 1926)* (contract must provide for forfeiture); *Montana Wheat Land Co. v. Danaher, 225 Ill. App. 364 (1922), aff'd,* Montana Wheat Land Co. v. Northern P. R. Co., 139 N.E.876 (Ill. 1923); *Converse v. Elliott, 205 N.W. 867 (Iowa 1925); Wilson v. Begshaw, 196 P. 605 (Kan. 1925); De Good v. Gettle, 240 P. 960 (Kan. 1925); Gannaway v. Toler, 84 So. 129 (Miss. 1920); Urback v. Metropolitan Life Ins. Co., 82 A.2d 337 (N.J. 1943); Curtis v. Factory Site Co., 12 Ohio App. 148, 31 0.* C. A. 65; *Allen v. Effler, 235 S.W. 67 (Tenn. 1921).*

Party must show that forfeiture clearly comes within the terms of the contract. *Lott it. Anderson, 204 P. 673 (Idaho 1922).*

Contractual provisions as to forfeiture must be strictly followed. *Zeta Bldg. Corp. v. Garst, 97 N.E.2d 331 (Ill. 1951),* distinguishing between notice of an intent to forfeit and actual declaration of forfeiture.

See Henson, Installment Land Contracts in Illinois: a Suggested Approach to "Forfeiture," *7 DePaul L. Rev. 1 (1957).*

(n449)Footnote 1239. *Moody v. Eastern Oregon Land Co., 180 F. 532 (D. Or. 1910); Sewell v. Peavey, 65 So. 803 (Ala. 1914); Walker v. Estavillo, 240 P.2d 173 (Ariz. 1952); Boone v. Templernan, 110 P. 947 (Cal. 1910); Ruhl v. Johnson, 49 N.W.2d 687 (Neb. 1951); Miller v. Beck, 142 P. 603 (Or. 1914); Reidt v. Smith, 134 P. 1057 (Wash. 1913);*

Lawrence v. Demos, 244 P.2d 793 (Wyo. 1952).

Equity relieved a forfeiture and permitted full payment. *Moran v. Holman, 501 P.2d 769 (Alaska 1972); MacFadden v. Walker, 97 Cal. Rptr. 537 (1971).*

Refusing to enforce forfeiture and permitting the curing of default. *Rothenberg v. Follman, 172 N.W.2d 845 (Mich. Ct. App. 1969).*

(n450)Footnote 1240. *Three States Lbr. Co. v. Bowen, 129 S.W. 799 (Ark. 1910).*

See the following cases:

Bennie v. Becker-Franz Co., 149 P. 749 (Ariz. 1915); Rogers Dev. Co. v. Southern California Real Estate Inv. Co., 115 P. 934 (Cal. 1911); Noyes v. Schlegel, 99 P. 726 (Cal. Dist. Ct. App. 1908); Bronson v. Leibold, 87 A. 979 (Conn. 1913); Stewart v. Ellis, 61 S.E. 597 (Ga. 1908); Fletcher v. Painter, 105 P. 500 (Kan. 1909); Robberson v. Clark, 158 S.W. 854. (Mo. Ct. App. 1913); *Suburban Homes Co. v. North, 145 P. 2 (Mont. 1914); Kibbe it. Crossman, 124 N.Y.S. 3 (1910); Gray v. Pelton, 135 P. 755 (Or. 1913); Barnes v. Rea, 68 A. 836 (Penn.. 1908); Spolek v. Hatch, 113 N.W. 75 (S.D. 1907); Hudson v. Jones, 143 S.W. 197 (Tex. Civ. App. 1911); Van Dyke. v. Cole, 70 A. 593 (Vt. 1908).*

Where the vendee defaulted on a mortgage obtained to pay off the balance of the purchase price, there was no breach of sales contract. *Briggs v. Johnson, 196 N.W.2d 470 (Minn. 1972).*

(n451)Footnote 1241. *Watkins v. Maddox Medical Assoc., Inc., 509 S.E.2d 614 (Ga. 1998); Wade v. Texarkana Bldg. & Loan Assn., 233 S.W. 937 (Ark. 1921); Stark v. Norton, 211 P. 66 (Ariz. 1922); Kelso v. Ulrich, 155 P. 2d 407 (Cal. Dist. Ct. App. 1945);* Lanski v. Chicago Title & Trust Co., 155 N.E.296 (Ill. 1927); *Pruyn v. Gay, 106 So. 536 (La. 1925); Clark v. Dye, 197 N.W. 209 (Minn. 1924); Strauss v. Rabe, 130 A. 920 (N.J. 1925); Faysen Lake, Inc. v. Miller, 32 A.2d 506 (N.J. 1943); Grider v. Turnbow, 94 P.2d 285 (Or. 1939); Medak v. DePrez, 386 P.2d 805 (Or. 1963); Wilson v. Robertson, 223 S.W. 285 (Tex. Civ. App. 1919); Continental Royalty Co. v. Marshall, 239 S.W.2d 837 (Tex. Civ. App. 1951); Rauch v. Zander, 245 P. 17 (Wash. 1926).*

Equitable relief granted where tender of amount due on contract was made after the redemption period had expired and the vendor had rented to the purchasers. *Grist v. Carlton, 103 N.W.2d 356 (Mich. 1960).*

Strict enforcement of forfeiture provisions would require the court of chancery to be the organ and instrument of every Shylock who chose to insist upon the rigorous exaction of his pound of flesh. *Edgerton v. Peckham, 11 Paige 352 (N.Y. 1844).*

Contract providing for forfeiture of improvements on default of sales contract was valid as against mortgagee of improvements. *Eade v. Brownlee, 193 N.E.2d 786 (Ill. 1963).*

Where vendee assumes a mortgage as part of the purchase price, his default is a breach of the contract of purchase. *Kirk v. Welch, 3 N.W.2d 426 (Minn. 1942).*

In a sales contract absent a provision for acceleration on default of regular payments, there was no default of the entire amount when a single payment was missed. *Adkinson v. Nieburg, 344 So. 2d 614 (Fla. Dist. Ct. App. 1977).*

(n452)Footnote 1242. *Lombardi v. Sinanides, 235 P. 455 (Cal. Dist. Ct. App. 1925); Grimes v. Steele, 133 P.2d 874 (Cal. Dist. Ct. App. 1943); Walker mv. Co. v. Fleming, 246 P. 207 (Colo. 1926); Walsh v. Coghlan, 190 P. 252 (Idaho 1920); Abercrombie v. Stoddard, 228 P. 232 (Idaho 1924); Motor v. Hershey, 205 N.W. 239 (S.D. 1925); Taylor v. Martin, 215 N.W. 695 (S.D. 1927); Harris v. Seattle Land & Imp. Co., 211 P. 282 (Wash. 1922), 214 P. 1066 (Wash.*

1923).

See Club Laundry & Cleaning Co. v. Murphy, 109 A. 622 (Pa. 1920). But see Vanderwilt v. Broerman, 206 N.W. 959 (Iowa 1926); Bergman v. Lewis, 249 P. 470 (Utah 1926).

Tender of delinquent installments before declaration of forfeiture did not default contract. *Kelly v. Germania Sav & Loan Assn., 192 N.E.2d 813 (Ill. 1963).*

Seller must give reasonable notice before canceling contract for vendee's default. *Lamont v. Evjen, 508 P.2d 532 (Utah 1973).*

(n453)Footnote 1243. *Kessler v. Tortoise Dev. Inc. 1 P.3d 292 (Idaho 2000); R.C.P.S. Assocs. v. Karam Dev., 685 N.Y.S.2d 261 (N.Y. App. Div. 1999); Hoppin v. Munsey, 198 P. 398 (Cal. 1921); Flora v. Glover, 193 P. 665 (Colo. 1920).*

(n454)Footnote 1244. *Keifer v. Dreier, 205 N.W. 472 (Iowa 1925); McLaih v. Smith, 202 N.W. 239 (Iowa 1925); Woboveck v. Schueler, 19 Ohio App. 210 (1922). See Strain v. Statler, 240 P. 614 (Okla. 1925). But see Larkin v. Koether, 137 A. 849 (N.J. Ch. 1927).*

Vendor not record owner may not forfeit. *Marx v. King, 186 N.W. 680 (Iowa 1922).*

Defaulting purchaser may not enforce contract. *Honey v. Henry's Franchise Leasing Corp., 52 Cal. Rptr. 18 (1966).*

A vendee under an agreement for sale of real estate is in the same position and holds the same property as a mortgagor under a mortgage. *Hoffman v. Semet, 316 So. 2d 649 (Fla. Dist. Ct. App. 1975).*

(n455)Footnote 1245. *Sarazin v. Kunz, 286 N.W. 471 (Iowa 1939).*

(n456)Footnote 1246. *Johnson v. Crouch, 156 N.E. 754 (Ill. 1927)* (service by mail sufficient); *Clayton v. Fletcher Say. & Trust Co., 155 N.E. 539 (Ind. Ct. App. 1927); Votruba v. Hanke, 210 N.W. 753 (Iowa 1926); Mintle v. Sylvester, 211 N.W. 367 (Iowa 1926); Robitshek Inv. Co. v. Wick, 213 N.W. 551 (Minn. 1927); Shonsey v. Clayton, 187 N.W. 113 (Neb. 1922); Strauss v. Rabe, 127 A. 188 (N.J. Ch. 1925).*

Suit is sufficient notice of default. *Armstrong v. Irwin, 221 P. 222 (Ariz. 1923).*

Purchaser who agrees to forfeiture on written notice may not prevent forfeiture by leaving the state. *McDonald v. Bartlett, 155 N.E. 477 (Ill. 1927).*

Notice must comply with statute. *Fowler v. Dielernan, 185 N.W. 79 (Iowa 1921).*

Notice may be signed by attorney. *Cassady v. Mott, 212 N.W. 332 (Iowa 1927).*

Purchaser's vendee not entitled to notice. *Porter v. Barrett, 206 N.W. 532 (Mich. 1925).*

Contract not terminated for default until vendor indicates intention to forfeit. *Muirhead v. McCullough, 207 N.W. 886 (Mich. 1926).*

Notice was not required where purchaser abandons contract. *Epplett v. Empire mv. Co., 194 P. 700 (Or. 1921); Anderson v. Hurlbert, 219 P. 1092 (Or. 1923).*

Right to forfeit not defeated by overstatement of amount due in notice. *Harris v. Seattle Land & Imp. Co., 211 P. 282*

(Wash. 1922), 214 P. 1066 (Wash. 1923).

Vendor has reasonable time to cure defects. *Mitchell v. Evans, 375 P.2d 101 (Colo. 1962).*

Vendor must give reasonable notice to terminate vendee's rights on default. *Bob Holding Corp. v. Normal Realty Corp., 164 A.2d 457 (Md. 1960); Melco Inv. Co. v. Gapp, 105 N.W.2d 907 (Minn. 1960).*

Demand by vendor for payment is necessary to put vendee in default. *Green, Inc. v. Smith, 317 N.E.2d 227 (Ohio Ct. App. 1974).*

(n457)Footnote 1247. *Burmeister v. Council Bluffs Inv. Co., 268 N.W. 188 (Iowa 1936).*

(n458)Footnote 1248. *Nielson v. Benton, 903 P.2d 1049 (Alaska 1995); Cohen v. Kranz, 238 N.Y.S.2d 928 (1963).*

(n459)Footnote 1249. *Bradley v. Apel, 531 S.W.2d 678 (Tex. Civ. App. 1975).*

(n460)Footnote 1250. *Gruskin v. Fisher, 273 N.W.2d 893 (Mich. 1979).*

(n461)Footnote 1251. Koch v. Kostichek, 409 N.W.2d (Iowa 1987); *Nelson v. Butcher, 352 N.E.2d 106 (Ind. Ct. App. 1976).*

(n462)Footnote 1252. *Adams v. Smith, 94 So. 521 (Ala. 1922); Stark v. Norton, 211 P. 66 (Ariz. 1922); Wade v. Texarkana Bldg. & Loan Assn., 233 S.W. 937 (Ark. 1921); Chan v. Title Ins. & Trust Co., 246 P.2d 632 (Cal. 1952); Leak v. Colburn, 204 P. 249 (Cal. Dist. Ct. App. 1921); Weatherbee v. Sinn, 238 P. 134 (Ca. Dist. Ct. App. 1925); Hinkel v. Crowson, 256 P. 479 (Cal. Dist. Ct. App. 1927); Sullivan v. Burcaw, 208 P. 841 (Idaho 1922); Hill v. Rogers, 99 N.E.2d 270 (Ind. Ct. App. 1951); Shelt v. Baker, 137 N.E. 74 (Ind. Ct. App. 1922); Krell v. Cohen, 183 N.W. 53 (Mich. 1921); Muirhead v. McCullough, 207 N.W. 886 (Mich. 1926); Sliwinski v. Gootstein, 208 N.W. 47 (Mich. 1926); Malmquist v. Peterson, 183 N.W. 138 (Minn. 1921); Lynch v. Higgins, 191 N.W. 422 (Minn. 1923); Jandric v. Skahen, 50 N.W.2d 625 (Minn. 1951); Gannaway v. Toler, 84 So. 129 (Miss. 1920); Alexander v. Wingett, 206 P. 1088 (Mont. 1922); St. Onge v. Blakely, 245 P. 532 (Mont. 1926); Nelms v. Miller, 241 P.2d 333 (N.M. 1952); Woodard v. Speck, 245 P. 630 (Okla. 1926); In re Denning's Estate, 229 P. 912 (Or. 1924); Howorth v. Mills, 221 P. 165 (Utah 1923); Peryer v. Pennock, 115 A. 105 (Vt. 1921); Reinertson v. Grant, 249 P. 493 (Wash. 1926)* (extension of time).

Extension of time waiver for nonpayment of installment when due. *Dreier v. Sherwood, 238 P. 38 (Colo. 1925).*

Waiver of cash payment occurs where note is accepted. Baker v. Salzenstein, 145 N.E.355 (Ill. 1924).

Waiver of forfeiture for failure to pay taxes not waiver of default in payment of principal. *Westerman v. Raid, 212 N.W. 134 (Iowa 1927).*

Waiting for thirty minutes for vendee to pay was not a waiver. *Doctorman v. Schroeder, 114 A. 810 (N.J. 1921).*

Waiver must be by unequivocal acts evincing an intent to waive. *Surry v. Baker, 231 P. 791 (Wash. 1925).*

(n463)Footnote 1253. *France v. Ramsey, 107 So. 816 (Ala. 1926); Gatewood v. Hughes, 108 So. 562 (Ala. 1927); Bessemer Coal, Iron & Land Co. v. Bullard, 111 So. 5 (Ala. 1927); Wade v. Texarkana Bldg. & Loan Assn., 233 S.W. 937 (Ark. 1921); Beck v. Swank, 203 P. 1010 (Cal. Dist. Ct App. 1921); Neil v. Kennedy, 149 N.E. 775 (Ill. 1925).*

Lahr v. Broyles, 155 N.E. 709 (Ind. Ct. App. 1927); Day v. Miles, 265 S.W. 282 (Ky. 1924); Rubenstine v. Powers, 184 N.W. 589 (Mich. 1921); Woodard v. Speck, 245 P. 630 (Okla. 1926); Martin v. Palmer, 104 S.E. 308 (S.C. 1920); Cameron v. Purbaugh, 227 P. 858 (Wash. 1924); Shaw v. Morrison, 260 P. 666 (Wash. 1927).

Vendor may forfeit where payments represent only part of amount overdue. *Hoppin v. Munsey, 198 P. 398 (Cal. 1921).*

Vendor may' declare forfeiture for subsequent defaults. *Ewing v. Ryan, 231 P. 981 (Or. 1925).*

(n464)Footnote 1254. *Beck v. Swank, 203 P. 1010 (Cal. Dist. Ct. App. 1921); Riddle Co. v. Taubel, 120 A. 776 (Pa. 1923); Garvey v. Barkley, 104 P. 1108 (Wash. 1909).*

(n465)Footnote 1255. *Randolph v. Ellis, 144 S.W. 483 (Mo. 1912).*

(n466)Footnote 1256. *True v. Northern P. R. Co., 147 N.W. 948 (Mnn. 1914).*

(n467)Footnote 1257. *Hill v. Wilkinson, 90 P.2d 696 (Idaho 1939).*

(n468)Footnote 1258. *Hawkins v. Coston, 107 So. 50 (Ala. 1926); Zadigian v. Gard, 193 N.W. 783 (Mich. 1923); Bilandzija v. Shilts, 54 N.W.2d 705 (Mich. 1952).*

Waiver of time and forfeiture clause will not perpetually postpone performance by vendee. *Mintle v. Sylvester, 211 N.W. 367 (Iowa 1926).*

(n469)Footnote 1259. *Prideaux v. Miller, 215 Ill. App. 429 (1919).*

(n470)Footnote 1260. *Clifford v. Fleshman, 225 P. 45 (Cal. Dist. Ct. App. 1924); Montana Wheat Land Co. v. Northern P. R. Co., 139 N.E. 876 (Ill. 1923).*

(n471)Footnote 1261. *Brown v. Chowchilla Land Co., 210 P. 424 (Cal. Dist. Ct. App. 1922); Leballister v. Morris, 211 P. 851 (Cal. Dist. Ct. App. 1922); Adams & McKee Land Co. v. Dugan, 228 P. 681 (Cal. Dist. Ct. App. 1924); Berding v. Northwestern Securities Co., 211 P. 62 (Idaho 1922); Davies v. Dayton, 131 N.E. 578 (Ill. 1921); Foreman Trust & Say. Bank v. Bartlett, 154 N.E. 904 (Ill. 1926); Boardman v. Bubert, 155 N.E. 784 (Ill. 1927); Luther v. Hekking, 204 P. 523 (Kan. 1922); Letinsky v. Smith, 190 N.W. 229 (Mich. 1922); Malys v. W. C. Hood Realty Corp., 200 N.W. 943 (Mich. 1924); Sliwinski v. Gootstein, 208 N.W. 47 (Mich. 1922); Wisper v. Dix-Ferndale Land Co., 216 N.W. 393 (Mich. 1927); Ginger v. Smith, 196 N.W. 298 (S.D. 1923); Kuykendall v. Schell, 224 S.W. 298 (Tex. Civ. App. 1920); McBride v. Stewart, 249 P. 114 (Utah 1926); McGuire v. Morford, 194 P. 783 (Wash. 1920); Harris v. Seattle Land & Imp. Co., 211 P. 282 (Wash. 1922), 214 P. 1066 (Wash. 1923); Reinertson v. Grant, 249 P. 493 (Wash. 1926).*

See Realty Securities Corp. v. Johnson, 111 So. 532 (Fla. 1927); James v. Towne, 207 N.W. 790 (Iowa 1926).

(n472)Footnote 1262. *Miller v. Fletcher Say. & Trust Co., 133 N.E. 174 (Ind. Ct. App. 1921).*

(n473)Footnote 1263. *Roark v. Hogg, 292 S.W. 465 (Ky. 1927); Glenn v. Lowther, 293 S.W. 947 (Ky. 1927).*

Demand by vendor for payment is necessary to put vendee in default. *Green, Inc. v. Smith, 317 N.E.2d 227 (Ohio Ct. App. 1974).*

Purchaser's equitable interest may be extinguished by his abandonment of the contract. *Tucker v. Edwards, 376 P.2d 253 (Okla. 1962).*

See Payne, The Alabama Law Institute's Land Title Acts Project, Part I, *24 Ala. L. Rev. 175 (1972),* Part II, *24 Ala. L. Rev. 647 (1973).*

(n474)Footnote 1264. *In re Levinson, 295 F. 144 (W.D. Wash. 1923).*

(n475)Footnote 1265. *Savitsky v. Sukenik, 659 N.Y.S.2d 48 (N.Y. App. Div. 1997); Brehm v. Ramm, 214 N.W. 94 (Mich. 1927).*

(n476)Footnote 1266. *Orzechowski v. Kolodziejski, 275 N.W. 722 (Mich. 1937); Dollins v. Brooks, 229 S.W. 344 (Tex. Civ. App. 1921); Blenz v. Fogle, 220 P. 790 (Wash. 1923).*

Equitable relief against forfeiture where the lessee-vendee, under an option to purchase, was behind in rent was refused. *Brauer v. Freccia, 268 A.2d 645 (Conn. 1970).*

(n477)Footnote 1267. *McDonald v. Bartlett, 155 N.E. 477 (Ill. 1927).*

(n478)Footnote 1268. *Stafford v. McDonnell, 238 S.W.2d 432 (Mo. 1951).*

(n479)Footnote 1269. *Kilpatriek v. Smith, 19 N.W.2d 699 (Iowa 1945).*

See Strausbaugh, Exorcising the Forfeiture Clause from Real Estate Conditional Sales Contracts, 4 Real Est. L.J. 71 (1975).

(n480)Footnote 1270. *Shuey v. Hamilton, 381 P.2d 482 (Mont. 1963).*

(n481)Footnote 1271. *Monnette v. Title Guarantee & Trust Co., 86 P.2d 848 (Cal. Dist. Ct. App. 1939); Crim v. Watson, 82 P.2d 172 (Wash. 1938).*

Buyer's default on contract for sale of land precludes broker's right to commission. *Ellsworth Dobbs, Inc. v. Johnson, 236 A.2d 843 (N.J. 1967).*

(n482)Footnote 1272. *Sawyer v. Sterling Realty Co., 107 P.2d 449 (Cal. Dist. Ct. App. 1940).*

(n483)Footnote 1273. *Pursell v. Kelly, 152 So. 2d 36 (La. 1963); Liebsch v. Abbott, 122 N.W.2d 578 (Minn. 1963); Yelkin v. Yelkin, 229 N.W.2d 59 (Neb. 1975); Cook v. Merrifield, 335 So. 2d 297 (Fla. Dist. Ct. App. 1976).*

(n484)Footnote 1274. *Hockenbury v. Lorentz, 343 N.E.2d 90 (Ill. App. Ct. 1976).*

(n485)Footnote 1275. *Skendzel v. Marshall, 301 N.E.2d 641 (Ind. 1973),* cert. den., *415 U.S. 921 (1974).*

(n486)Footnote 1276. *Ogle v. Wright, 360 N.E.2d 240 (Ind. Ct. App. 1977).*

(n487)Footnote 1277. *Morris v. Weigle, 383 N.E.2d 341 (Ind. 1978).*

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CHAPTER 96 Vendors and Purchasers

11-96 Thompson on Real Property, Thomas Editions § 96.16

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§ 96.16 Remedies for Breach of Contract.

[Go To Supp]

Whenever the vendor or the vendee fails to meet any of the requirements imposed by the contract, the other party has a variety of remedies. The party may elect to waive or to rescind, or may bring an action for damages. The vendee and under some circumstances the vendor may have specific performance of the contract. The vendee who elects to rescind may have an action for recovery of purchase money paid. n1278 The various jurisdictions present a kaleidoscope of opinions as to the nature and extent of the remedies of the respective parties on default. n1279 To a considerable extent these determinations depend on whether the contract of sale is considered as in effect transferring title to the vendee with the vendor merely holding a security or whether the vendor retains all or most of the concepts of title. Or viewed from another point, should the public policy in favor of debtors govern or should the public policy in favor of free alienation afford the vendor a cheap and easy method of foreclosure. n1280 Courts are in major disagreement as to whether the equitable concept, that the vendee in an installment sales contract is the owner and the vendor holds the title as security for the purchase price, is to be extended to require the vendor to foreclose against a defaulting vendee. n1281

The breach of a contract may arise by the renunciation of liability thereunder, by failure to perform, or by doing some act rendering performance impossible. n1282 If the vendee breaches the contract the vendor may have an action for the purchase money. If the vendee has been placed in possession and defaults, many states give the vendor a possessory action to terminate the contract and at the same time recover possession, but other states deny the vendor's right to ejectment. In some states the vendor may bring strict foreclosure on the vendee's default. n1283 "Breach of contract" is the failure, without legal excuse, to perform any promise which forms the whole or part of the contract, and may be inferred from the refusal of a party to recognize the existence of a contract, or the doing of something inconsistent with its existence. n1284 A party to a contract cannot be prevented from breaching it, but may be held liable for rescinding it without legal justification. n1285

A contract for the sale of land may be breached in any one of three ways: First, by a positive statement of an intention not to be bound or to perform and an acceptance by the other party; second, by inability to perform; and third, by failure to perform. The first two forms of breach may take place while the contract is still executory and before performance can be legally demanded. The third form of breach can take place only at or during the time for performance. The effect

of a breach of contract by one party is to excuse performance by the other and generally, but not always, to discharge the contract. n1286 The breach of a contract may consist in a failure to perform in a matter which is vital to the existence of the contract. The principle is illustrated by the case of contracts which expressly state that the time of performance is of the essence of the contract. n1287

To work a release of a contract of sale of land, a refusal to perform must be distinct, unequivocal, and absolute, and must be acted upon as such by the party to whom the broken promise was made. n1288 The contract is breached by the inability of the vendor to make title n1289 or the refusal of either of the parties to comply with the terms of the contract, n1290 or by the announced declaration of the vendee not to be bound by the terms of the contract. n1291 Where the vendor is unable to convey such title as called for by the contract, and the purchaser has performed or offered to perform everything required to be performed, the purchaser is as much entitled to an action in damages against the vendor as if the latter had wilfully refused to perform the contract. n1292 If the vendor is not ready, able, and willing to perform the agreement on the day fixed for performance, the purchaser may elect to treat the contract as at an end and recover back the purchase money, or such part thereof as may have been paid. n1293 Likewise, if the vendee fails or refuses to perform the contract, the vendor may either tender the deed and compel payment of the price, or may maintain an action to recover damages. n1294 A litigant may not sue upon one cause of action and recover upon another. Accordingly, where a party injured by a breach of contract elects to stand on the contract, the party cannot generally recover on a quantum meruit, for the remedies are inconsistent. n1295 The vendor, in foreclosing a contract, can recover as a deficiency judgment damages caused by the vendee's waste, but not the difference between the foreclosure sale price and the original sale price. n1296

On the breach of a valid contract to devise certain property, the promisee may maintain an action at law against the estate of the deceased promisor. n1297 Some features of the contract may be breached without breaching the entire contract. n1298 The breach of a material covenant by the grantor amounts to a breach and justifies rescission by the purchaser. n1299 No tender of deed by the vendor is necessary where the purchaser refuses to perform. n1300 The grantee is not required to tender performance where the grantor has made it impossible to perform the grantee's part of the contract, n1301 or refuses to perform. n1302 Very generally, the courts will not declare a breach by a vendee for some immaterial defect which can be compensated for in the absence of express stipulations against such a defect. n1303 The contract is rescinded by the recovery of the purchase money for the breach of the contract. n1304 The action of a vendor in placing a caretaker on the premises to protect them after abandonment by vendee in default does not amount to an acceptance of surrender of the contract by the vendor. n1305 Fraud is not an essential requisite to recovery for deficient acreage. n1306

On breach of contract, the party not in fault must elect the remedy, and may either rescind and recover money paid, or may have specific performance or may sue for damages for the breach. n1307 The purchaser, for example, cannot have rescission and damages for the default of the vendor. n1308 Where the vendor has no title, the only remedy afforded the vendee is a suit for damages for breach of contract. n1309 In case of a suit for specific performance of a contract to convey real estate, where the vendor is unable to convey the title called for by the contract, the purchaser may usually elect to take what the vendor can give, and hold the vendor answerable in damages as to the rest. n1310 Such damages may be awarded in lieu of specific performance only when the case is one of equitable interposition, such as would entitle the complainant to specific performance but for intervening facts, n1311 and even though no equitable cause of action is stated, provided an answer was interposed. n1312 It is held that no such damages will be awarded where the purchaser at the time of the institution of the suit for specific performance knew of the inability of the vendor to perform. n1313

An agreement, made in advance of breach, fixing the damages therefor, is not enforceable as a contract and does not affect the damages recoverable for the breach, unless the amount so fixed is a reasonable forecast of just compensation for the harm that is caused by the breach, and the harm that is caused by the breach is one that is impossible or very difficult to estimate accurately. n1314

Neither party can enforce the contract against the other without showing performance or readiness or willingness to perform the party's own promise, n1315 and where one party has put it out of the power of the other party to perform, the first party cannot recover. n1316 This is also the form of remedy in case the purchaser wrongfully refuses to complete the contract n1317 However, as has been said, the vendor may elect to rescind the contract and recover the damages sustained by the purchaser's default, or may elect not to rescind and recover the price; n1318 but if there has been a conveyance, his remedy is at law for the unpaid purchase price. n1319 A suit to recover the purchase price is in effect a suit for specific performance. n1320 Generally, an action for the purchase price will not lie where the title has not passed, especially where it cannot pass without the doing of further acts, the performance of which equity cannot and will not compel. n1321 The party who does not elect to rescind is not entitled to recover the price in an ordinary action at law, but can recover damages only. n1322 The party in default cannot sue for breach of the contract. n1323 A vendee in default cannot place the vendor in default, so as to be entitled to recover payments made, by merely remaining quiet, without tender of the amount due, upon receiving notice that the balance due must be paid at once or the payments made will be forfeited; n1324 but an intention to rescind, so as to permit the purchaser to recover back what has been paid, is not evidenced by the vendor's service of notice of an intention to declare a forfeiture of the contract. n1325 The complaint against the vendor for breach of contract to convey should allege the making of the contract, the breach, the value at the time of the breach, and that the vendor without any just cause refused to make the conveyance. n1326 Where there has been no offer to perform, the pleader should show an excuse for this omission. n1327 If mutual extension is a defense, it must be pleaded specifically. n1328 The purchaser who alleges nonmarketability of the title tendered by the vendor has the burden of proof. n1329 Accordingly, in any action grounded on defect of title, the plaintiff must prove such defect, and the proof must be more substantial than the opinion of an attorney. n1330

If only one joint tenant signs a contract of sale it will be enforced against the signer with abatement of the purchase price on account of the surviving interest of the other cotenant. n1331 Where the purchaser has paid the consideration, and the vendor has failed to convey the premises to the purchaser within a reasonable time, the purchaser may treat the contract as abandoned, and bring an action against the vendor for money had and received. n1332 A failure by the vendor to tender performance is a defense when the covenants between the parties are dependent. n1333 The party in default may make tender before the other party acts on the default. n1334 Often the courts in several jurisdictions treat defaulted sales contracts as mortgages with regard to appropriate remedies. n1335

§ 96.16(a) Vendor's Action for Purchase Money.

§ 96.16(a)(1) Action for Purchase Money as an Action for Specific Performance.

In case of default by the purchaser, the vendor has three alternatives. The vendor may rescind, can tender compliance with the contract and bring an action for the balance of the purchase money, or can retain the land and bring an action for the excess in the agreement consideration over that upon a sale at a fair market price. n1336 An election will prevent rescission; n1337 but it is held that an ineffectual attempt to declare a forfeiture of the contract does not preclude the vendor under the doctrine of election of remedies from subsequently seeking to recover the purchase price. n1338 A suit for the recovery of purchase money by the vendor partakes in effect of the nature of an action for specific performance of a contract of purchase, and should he governed by the same equitable principles. n1339

§ 96.16(a)(2) Actions on Contracts for Installment Payments.

Where the contract provides that a deed shall be made on payment of all the installments, and all are not due, an action on an intermediate installment may be maintained without averring a tender of the deed. n1340 The vendor may sue for each installment as it becomes due, n1341 or, where the contract authorizes it, sue for the whole purchase price on default in payment of an installment. n1342 Thus, where the purchaser makes default in the payment of installments due under an executory contract, if the contract so specifically provides, the vendor may declare the entire remaining unpaid installments due and maintain an action to recover a money judgment for that amount. n1343 The vendor has a right,

upon default by the vendee to pay the purchase price in full, to stand on the contract and sue upon the debt, or maintain ejectment to regain possession of the land. n1344 Some courts hold that where the vendor fails to sue for prior installments falling due until the last installment becomes due, the vendor thereby waives the right to treat the prior installments as independent, and cannot recover any part of the unpaid purchase money unless the vendor is ready and willing to convey the land. n1345 However, where the contract is executory and the promise of the purchaser is independent of an agreement to convey, an action is held to lie for the unpaid purchase money, even though the vendor has shown no conveyance or willingness to convey. n1346 It is otherwise, however, where the stipulations to pay the first installments are independent and the stipulation to pay the last installment and to execute the deed are mutually dependent conditions. n1347 The courts generally hold that an unqualified and positive refusal to perform the contract before performance is due may be regarded as a complete breach of the contract where the renunciation goes to the whole contract, and the injured party may bring the action at once; n1348 but a contrary view is taken by some courts. n1349 Where a vendor is in default as to the covenant to make improvements, the vendor generally cannot maintain an action to recover either an installment of the purchase money or the whole amount remaining unpaid. n1350

§ 96.16(a)(3) Other Prerequisites to a Right of Action.

The vendor's failure to pay delinquent taxes, when the vendor is so obligated, will preclude an action for the unpaid balance of the purchase price, even though the contract provides that, in case the vendor fails to pay such taxes, the purchaser has the option to pay them and deduct the amount from the installments accruing on the contract. n1351 The provision for forfeiture and retention of money paid does not prevent suit by vendor for balance of purchase price. n1352 The vendor who is unable to convey may not sue. n1353 The authorities require the vendor to tender a deed as a condition to suit for the entire purchase price. n1354 The tender of a deed is not a condition precedent to the recovery on a note given for the purchase price where the contract binds the vendor to make the deed if the purchaser shall first make payment. n1355 The purchaser has the burden of sustaining his defense of payment. n1356

§ 96.16(b) Vendee's Right to Recover Down Payments. n1357

§ 96.16(b)(1) When Recovery Is Granted.

The rescission of an executory contract for the sale of real estate will generally entitle the purchaser to a recovery of any payments made. n1358 Refusal or inability to perform the contract by the vendor will entitle a purchaser who is not in default to disaffirm the contract and recover the purchase money paid. n1359 This the purchaser may do in lieu of the right of action for damages for breach of the contract. n1360 Where performance by the vendor is rendered impossible by reason of condemnation proceedings, the purchaser has a right to recover the installments paid. n1361 A purchaser may maintain an action for damages for fraud either with or without rescission, and, if with rescission, may recover the purchase price with interest. n1362 Where mutual rescission occurs and the contract is abandoned, the purchaser may recover any payments made. n1363 This is true even though the vendee may have been in default at the time of rescission. n1364 Under one rule a vendee, though in default, may rescind and recover back the payments if the vendor after default cannot perform. n1365 Under another theory the vendor is entitled after breach by the vendee to treat the contract as forfeited and resell or otherwise encumber the land and keep the partial payments. n1366

§ 96.16(b)(2) When Recovery Is Denied.

Generally where the vendee is in default and no rescission has occurred, the vendor on terminating the contract need not return the down payments. n1367 Earnest money deposited as part payment of the purchase price cannot be recovered back on forfeiture of the contract through the purchaser's default. n1368 A defaulting vendee could not recover the excess of the down payment over the vendor's actual damages. n1369 The test of the vendor's right to have the contract of sale rescinded for nonpayment of the purchase price is the return to the purchaser of a portion of the price paid and complete discharge as to unpaid portion of the price. n1370 Tender of the amount remaining due is not a prerequisite to a recovery by a purchaser of the payments already made upon the wrongful termination by the vendor of the contract of sale. n1371 A purchaser is entitled to recover a payment made after the contract has been mutually abandoned or

rescinded, although the contract provides that on default in payment the vendee shall forfeit rights and payments. n1372 Such mutual rescission nullifies the contract; hence the party is no longer bound by the contract, but an action will lie to recover the payments made by the vendee. n1373 Where vendor is unable or disabled to convey title or deposits according to contract, n1374 payments are recoverable in the absence of preventing provisions in the contract. n1375 This rule is applicable where the vendor is unable to convey a title of the quality contracted for. n1376 Likewise, the vendee may recover where the vendor does not make the title marketable within a reasonable time. n1377

§ 96.16(b)(3) Recovery of Payments by Defaulting Party.

Three theories with respect to the right of the defaulting vendee to recover back part payments after default are: (a) no right to recover n1378 though the contract is unenforceable, n1379 or there is no provision for forfeiture; n1380 (b) giving restitution if vendor has sold again, at least if the vendor has not given proper notice of termination and if the vendee has not abandoned the contract; n1381 and (c) giving restitution though vendee has been guilty of total breach, but only to the extent the down payment exceeds the vendor's damages. n1382 So a purchaser induced to purchase by false representations may rescind and recover money paid. n1383 A deed of bargain and sale containing no warranties operates solely as an instrument of conveyance, and, consequently, affords no basis for the recovery back of the purchase money on failure of title. n1384 Eviction of the grantee in a quit-claim deed by the holder of an outstanding paramount title does not, in the absence of fraud or mistake, entitle the grantee to recover the consideration paid for the deed. n1385 A few states permit the buyer to recover the amount paid less the seller's damages before returning possession to the seller. n1386 The vendor's wrongful declaration of forfeiture may amount to an abandonment equivalent to a mutual rescission. n1387 The purchaser is entitled to the return of money paid where the contract is illegal and void. In such a case, the contract creates no consideration. n1388 In order to sustain the action, the purchaser need only be ready, willing, and able to perform the purchaser's part of the contract. n1389 Tender, however, is not required where the vendor refuses to or cannot perform, n1390 or the title is unmarketable. n1391

§ 96.16(b)(4) Liens Based on Right to Recover Payments.

Upon an award of rescission the vendee is entitled to a lien for the purchase price paid. n1392 A purchaser has lien on land for deposit of purchase money, where the vendor fails to deliver merchantable title. n1393 A vendee is not entitled to an equitable lien if the vendee merely seeks damages instead of rescission. n1394 Where the purchaser has paid money in consideration of an oral contract for the sale of land, the purchaser cannot rescind and recover the money paid unless the vendor insists on the statute of frauds and refuses to perform the contract. n1395 It is generally held that a vendor who, because of the vendee's default, enforces a forfeiture provision of the contract cannot be compelled to return the money paid on the contract. n1396 There is disagreement as to whether a defaulting vendee has a lien for improvements n1397 or can recover earnest money where title is unmarketable. n1398 But a purchaser in default cannot recover back the purchase money through belated specious objections to the title. n1399 The dispute in such matters turns on the problem of unjust enrichment of the vendor. n1400

§ 96.16(c) Measure of Damages in Action for Breach of Contract.

§ 96.16(c)(1) The Variety of Approaches to Measure of Damages.

Under one rule where the vendor, through unanticipated causes which the vendor cannot control, and although acting in good faith, is unable to convey, the measure of damages is the amount of consideration actually paid and interest thereon. n1401 Under the English rule where the vendor is in good faith unable to convey the vendee is limited to expenses. n1402 The cases are not uniform as to the extent of the vendor's rights to damages when the vendee defaults. Some cases give the vendor the equivalent of specific performance by enabling the vendor to recover the full purchase price, not merely damages. n1403 The measure of damages for breach of contract of sale is the difference between the contract price and the value of the property at the time of the breach of the contract. These damages represent the loss of the bargain. n1404 On abatement of the purchase price, the measure of damages is the difference between the value of the land actually sold and that of the land represented to be sold; n1405 but before the plaintiff may recover more than

nominal damages, where there is no stipulation for liquidated damages, the plaintiff must show actual and substantial loss. n1406

Where, after the purchaser's breach of the contract, the property is resold, the damages recoverable are held to be the difference between the contract price and the amount received on resale. n1407 The courts of some jurisdictions hold to the view that the measure of damages in a case of this character is the contract price and interest thereon. n1408 This would seem the proper rule where the vendee has been put in possession and the vendor is tendered a proper deed. n1409 Where the breach consists of a failure to comply with a bid at an auction sale, the measure of damages is generally the difference between the contract price and the amount received on a resale where this amount is less than the amount bid. n1410 The general rules applicable to other contracts that the measure of damages should be just compensation to the vendor for the actual loss or injury sustained by reason of the breach, n1411 and such as might reasonably have been contemplated by the parties, n1412 apply to contracts for the purchase and sale of real estate.

§ 96.16(c)(2) Prevailing Rules for Measure of Damages.

Under the prevailing rule in the United States, in cases where the vendor refuses to convey according to the contract, the vendee may recover the market value of the land at the time of the breach, with interest, less the amount of the purchase price remaining unpaid. n1413 However, this rule is not everywhere accepted. In numerous jurisdictions, the recovery is limited to the purchase price paid, with interest and the expenses of investigating the title, n1414 unless the vendor is chargeable with fraud or a wilful refusal to convey, in which case substantial damages may be recovered. n1415 In these jurisdictions, it is the rule that, where the vendor acts in good faith and a breach results, the vendee can recover only the amount paid, with interest thereon, and if the vendor has paid nothing and incurred no expense, the vendor can recover only nominal damages, unless the vendor has, since the sale to the purchaser, voluntarily put it beyond the vendor's power to comply with the contract; or, if, having good title, the vendor refuses to convey, the vendor will be liable in substantial damages, the measure being the market value of the land at the time of the breach, less the unpaid purchase money and interest on such sum from that time. n1416 Nominal damages are recoverable only where the breach is shown and the damages are not proved, or, if proved, they are inconsequential. n1417

Damages for breach of the contract cannot be based upon a profit which could have been made on a resale of the land. n1418 Special damages resulting from a failure of the vendee to make a profitable resale are not recoverable, unless knowledge was brought to the vendor at the time of entering into the contract that the purchase was for the purpose of resale. A sufficient reason is that a loss of this character could not reasonably be supposed to have been in the contemplation of both parties, at the time they made the contract, as the probable result of its breach. n1419 Under the one rule, the measure of damages for a deficiency in quantity is the difference in value between the land contracted to be conveyed and that actually conveyed. n1420 Where possession is delayed on account of an outstanding lease and a tenant in possession, the purchaser's measure of damages is the fair rental value of the property during the time the tenant is kept out of possession. n1421

Where the contract provides for a certain sum to be paid in case of breach, it may, according to the intention of the parties, be either liquidated damages or a penalty. n1422 If the provision is for liquidated damages, it is necessary to show only the contract and its breach to entitle the plaintiff to recover. n1423 The fraud that will enlarge the damages recoverable by a purchaser for the breach of an oral contract for the sale of real property must be actual fraud on the part of the vendor that reaches back to the original contract. n1424 The fact that a purchaser has agreed to sell the land to another at a profit less than the foregoing measure of damages does not prevent the purchaser from recovering the full measure of damages. n1425

An unreasonable delay by purchaser in possession in giving notice of intention not to perform will entitle the seller to the profits of a crop the seller could have planted had the seller not been prevented by the delay. n1426 In an action at law for damages where, by reason of a breach of. the contract, the plaintiff is wrongfully deprived of the use of the land, the rental value may be allowed as damages, since it is considered to be a fair average measure of compensation for a

failure to perform the contract. n1427 The purchaser who breaches the contract is liable for waste of the premises while in the purchaser's possession. n1428 The vendor's damages for possession by purchaser after default is the rental value of the property during the time of the unlawful detention. n1429 The vendee kept out of possession is entitled to the rental value of the property for the time of the withheld possession. n1430

For breach of contract of purchaser to assume a mortgage, the measure of damages is the amount of the debt assumed. n1431 Nominal damages may be allowed although not prayed for. n1432 Such damages are recoverable where no money loss is proved. n1433

§ 96.16(c)(3) Liquidated and Exemplary Damages.

Exemplary damages may be given for vendor's fraud of vendee in a real estate sale. n1434 Where vendor who knowingly does not have good title contracts to convey full title, the vendor is liable for damages for loss of bargain. n1435 It is held that, in order to determine whether a stipulated sum is a penalty or liquidated damages, the court will consider the language used as the subject matter of the contract and the intention of the parties. n1436 A purchaser is entitled to recover special damages arising from circumstances peculiar to a particular case if those circumstances were communicated to or known by the other party when the contract was made. n1437 The equity courts have shown a considerable inclination to relieve against provisions calling for forfeiture of purchase price payments on the default of an installment. Courts show a tendency to limit the damage in such instances to the rental value as ameliorated by the vendee's improvements. n1438

§ 96.16(d) The Nature of Specific Performance. n1439

The remedy of specific performance is a purely equitable proceeding, n1440 and is a means of compelling a party to do precisely what the party ought to have done without being coerced by the court. n1441 The remedy is governed by the elements, conditions, and incidents that control the administration of all equitable remedies. n1442 Equity may compel a party to a contract to do that which in equity ought to have been done, and which was in contemplation of the parties as expressed in their contract, assuming there was no adequate remedy at law. n1443 It is available to the vendee where vendor refuses to perform. The remedy is inconsistent with other remedies available to purchasers and its election precludes resort to the remedy of action for damages or action for return of money paid by purchaser. n1444 It is not a remedy of right and whether it will be granted depends on all the circumstances of the case. n1445 No inflexible rule can be laid down to control specific performance of contracts in equity, since every case depends upon its specific facts and the circumstances attending the transaction. n1446 It is a character of relief which should be granted only where under the circumstances the thing ordered to be done is within the legal capacity of the party ordered to do it and the rights of parties not before the court are not involved. n1447 This remedy is of purely equitable nature, being a substitute for the legal remedy of compensation in damages when the latter is inadequate or impracticable, and lies within sound judicial discretion on consideration of all the circumstances surrounding the case. n1448 The remedy is granted on the theory that the award of damages will not put a party in a situation as beneficial to him as if the agreement were specifically performed. n1449 It is doubtful if the defense of adequacy of legal remedy can ever be advanced in actions for specific performance of land sales contracts, since there can be no monetary substitute for the precise land bargained for. n1450

Where a contract for the sale of real estate is entered into without misunderstanding on the part of the purchaser and without misrepresentation on the part of the vendor, specific performance will be granted as a matter of right and not as a matter of discretion. n1451 The vendor may ignore the right to forfeit and sue for specific performance. n1452 The vendor who elects specific performance may have interest on the purchase price but cannot also claim the interim rents and profits. n1453 The fact that the contract is for the conveyance of a greater interest than the vendor possesses does not prevent specific performance of whatever interest is possessed by the vendor. n1454

The vendee loses the right to the specific performance remedy by abandonment of the contract and the return of the

premises to the vendor. n1455 Specific performance within the time specified may be waived. n1456 Waiver by one of two vendors of purchaser's performance will not bind the other vendor. n1457 In the great class of cases where decrees enforcing the specific performance of contracts concerning land are granted, the decree necessarily and vitally affects the question of title, and yet it is firmly settled that a suit to enforce such a contract is a proceeding in personam and not in rem, and may be maintained where there is jurisdiction of the person, although the land involved in the controversy may be situated in another state. n1458 However, in a limited and qualified sense a decree for specific performance may also operate in rem in cases where the property to be conveyed under the contract is within the court's jurisdiction, but the defendant is absent therefrom. n1459 Inasmuch as every suit for specific performance must necessarily be determined largely on its own special facts, the rules governing the case must be applied with more or less flexibility. n1460 The remedy had its origin in the inability of the law courts to give any other remedy for breach of contracts than damages. n1461

A court of equity may compel the specific performance of an executory contract for the conveyance of real estate, n1462 for exchange, n1463 or lease, n1464 except mining leases. n1465 Specific performance is not the appropriate remedy for breach of a contract to give a license, in the absence of fraud or estoppel. n1466 It is held that the granting or withholding of specific performance of a mining lease is within the discretion of the court. n1467 Where parents agreed to give real estate to a son in consideration that he would render certain services for them, and the son made full performance of his part of the agreement, it was held that he was entitled to a decree for specific performance of the agreement. n1468

When either party to a contract for the sale of land has failed in the party's respective obligation, the other is entitled to the alternative remedy of specific performance in equity, or damages at law. n1469 The vendor, n1470 vendee, n1471 heirs or next of kin of the vendee, n1472 or the vendee's assignee, n1473 or an undisclosed principal, n1474 or the beneficiary under a contract for the benefit of a third person n1475 may, in a proper case, compel specific performance of a contract to convey land. While the assignee of such contract may ordinarily enforce specific performance, a contract to convey to "A and associates," will not be enforced in favor of the assignees of A alone, when it is not made to appear that such assignees were also the associates of A. n1476 An assignee who does not assume any of the burdens or obligations of the assigned contract cannot have specific performance, because there is no mutuality of obligation. n1477 The test of an assignee's right to specific performance of a land contract was whether the assignor could have enforced specific performance by the vendor if the assignor had not assigned. n1478 The vendee's assignee is entitled to specific performance upon completing the contract, even though the contract contains a covenant against assignment. n1479 But if the contract contains a covenant to perform an additional personal service, the contract is unassignable. n1480 A third person who is not an assignee of one of the parties to the agreement or who does not stand in privity of relationship to one of the parties is not entitled to specific performance. n1481 Specific performance will not be enforced against a person who is neither a party nor a privy to a contract. n1482 As between a purchaser who has fully performed his part of the contract to sell and a purchaser of the property at an execution sale, there exists no privity so as to entitle the purchaser under the contract to compel the purchaser at the execution sale to convey the legal title to the purchaser under the contract. n1483 Where the defendant in an action to enforce specific performance has an interest in the subject matter of the action, the defendant may be required to acquire title and then specific performance may be decreed. n1484 In case a vendor, after executing a contract for the sale of real estate, subsequently conveyed such land to another with notice of such contract, the grantee may be held liable for specific performance of the contract, in the absence of any countervailing equities. n1485 The doctrine of mutuality of obligation and remedy does not entitle the vendor to enforce an oral contract of purchase because the vendee might have done so. n1486 A vendor, electing to treat the contract as broken, may not sue for specific performance. n1487

Where a married man contracted to convey full title to realty but his wife owned half interest therein and both spouses refused to convey the property, such facts furnished sufficient basis for relief to the purchaser by specific performance or damages against the husband. n1488 Where two or more parties agree together on the purchase of land, one of them may, upon performance of his part of the contract, enforce specific performance by the other. n1489 An oral agreement that real estate be conveyed to the parties thereto, jointly, may be specifically enforced, and neither can have partition.

n1490 Where a husband contracted to convey the homestead without the wife's knowledge, and afterwards the land ceased to be a homestead, specific performance of the contract of sale was decreed against him. n1491

Under the equitable rule of mutuality, the vendor of real estate may sue for specific performance. n1492 He may proceed in equity for the specific performance, in a proper case, even if some relief might be obtained at law. n1493 It is held that the exercise of such remedy, where the contract is fair and just, is within the discretion of the court. n1494 The cases are not in accord as to whether the vendor can have specific performance for the purchase price. n1495 The cases further disagree on this point where the contract provides for liquidated damages. n1496 It rests entirely in judicial discretion, exercised according to settled principles of equity. n1497 It is a matter of grace and not of right, and the granting of specific performance rests in the sound discretion of a court of equity. n1498

§ 96.16(d)(1) Requisites of an Action for Specific Performance.

In order for a court to enter a proper decree for specific performance of a contract to purchase and sell realty the following requisites must be present:

(a) the court must have jurisdiction over both the subject matter and over the persons and there must be proper venue;

(b) a valid enforceable contract must be in effect;

(c) adequate consideration for the contract must exist;

(d) mutuality of obligation must exist;

(e) the party seeking specific performance must be capable of performing;

(f) the party seeking performance must have made tender or tender must have been waived in some adequate manner;

(g) the proper basis for equitable relief must be shown, i. e., either no adequate remedy at law or impossibility of measuring damages.

The general rule is that, to entitle a purchaser to demand a deed and maintain a bill for specific performance, it is sufficient that the purchaser is ready and offers to pay any sum that may be found to be due and still unpaid and to comply with the contract. n1499 It is enough that the purchaser is ready and willing, and in the pleading offers to perform. n1500

Where payment of the price is a condition precedent to the duty to convey, the offer of performance by the vendee must be made before suit will lie. n1501 In the case of a contract for the sale of land where the terms are fair, certain, and definite, and the purchaser tenders the purchase money, the purchaser is entitled to specific performance. n1502 Tender by the vendee is excused where the vendor refuses to accept the money and carry out the contract. n1503 An actual tender is not necessary to a vendor living outside the state. n1504 Objections to the sufficiency of the tender must be given at the time it is made. n1505 Good-faith purchasers of ninety-nine-year leases of individual apartments in an apartment building are entitled to specific performance of their contracts or to damages in lieu thereof. n1506

As a general rule, a contract will not be specifically enforced unless the obligations thereof are mutual. n1507 A contract lacked mutuality where the holder of a treasurer's deed and the owner of a deed of trust on the same land contracted that the latter should perfect the title and that from the date of the contract they should be equal owners of the land. n1508 Where one party to a contract cannot obtain specific performance, the other party is precluded from

enforcing the contract, n1509 for the right to specific performance must be mutual and reciprocal. n1510 There must be mutuality both as to obligation and remedy. n1511 Thus, if the contract is executory and only one of the parties thereto is bound, and the party not bound has not acted on the agreement, the same is not enforceable in equity by either party; n1512 but the rule does not apply where the contract has been performed by the party seeking specific performance; n1513 nor does it apply to option contracts or to one who did not sign the contract but is seeking specific performance against the party who did sign the same. n1514 So it is said that lack of mutuality of remedy is not a defense in an action for specific performance of a land sales contract. n1515 When a contract for the conveyance of land is otherwise valid, it will be enforced in a proper case although it lacked mutuality of remedy. n1516

While mutuality of remedy is not always indispensable to the granting of specific performance, it is a well-settled rule that equity will not compel specific performance by the defendant if, after performance, the common-law remedy of damages would be the sole security for the performance of the plaintiff's side of the contract. n1517 When it is not essential to the validity of the contract or to plaintiff's right to specific performance that there should be a reciprocal obligation or mutuality of remedy, as where plaintiff has performed all of the conditions of the contract and has come clearly within the terms of the contract, the plaintiff is entitled to specific performance. n1518 Where the vendor of real estate is unable to make a good title as agreed, the vendor cannot compel the purchaser to perform; n1519 nor can the purchaser, after refusal to accept such title as the vendor is able to make, maintain an action for specific performance. n1520

A minor is not, ordinarily, entitled to specific performance during minority unless the minor has fully performed the minor's obligations. n1521

While every case of specific performance necessarily must depend in a large degree upon its own special circumstances, yet where a written contract for the sale of real estate is entered into fairly and understandingly and its provisions are unambiguous, each party is entitled as a matter of right to specific performance of it. n1522 The rule of mutuality of remedy is not applicable where the unavailability of the remedy to the party against whom relief is sought resulted from the party's own default. n1523 Some jurisdictions deny the requirement of mutuality of obligation as a prerequisite to enforcement of specific preponderance. n1524 Specific performance should not be denied a petitioner who has performed the agreement simply because the defendant might not or could not obtain specific performance. n1525 The absence of mutuality of remedy at the time the contract was entered into does not render the promises of the parties less obligatory, and specific performance may be had if such mutuality is thereafter supplied. n1526

"Jurisdiction" is the authority to hear and determine a cause, while "venue" is the place in which an action may or must be brought. n1527 Courts of equity have exclusive jurisdiction of suits for specific performance of contracts involving the sale and purchase of real estate. n1528 Suits to compel specific performance of contracts to convey land are suits in personam and not in rem, and, therefore, a decree of specific performance against a nonresident served only by publication cannot be rendered. n1529 Where a third person holds in trust for another, jurisdiction over such person may be sufficient to compel conveyance although jurisdiction of the vendor is not secured. n1530 However, in a limited and qualified sense, a decree for specific performance may also operate in rem in case the property to be conveyed under the contract is within the court's jurisdiction, but the defendant is absent therefrom. n1531 It was held that an equitable action to require specific performance on the part of a trustee, who by the terms of the declaration of trust agreed to convey premises to another party as trustee if so requested by the beneficiaries, was required to be brought in the county where the realty constituting the trust corpus was situated. n1532 It was also held that a court of equity can decree specific performance of a contract to sell land in another state if it has jurisdiction of all the parties. n1533 Such a decree is effectual only upon the person, not upon the land. It remains the same as before the decree was granted until the person in whom the title resides either voluntarily or per force obeys the decree and divests the title by a conveyance valid under the lex loci. n1534 So, also, specific performance of a contract to convey land in one state may be decreed against an inhabitant of another state who has been personally served with process. n1535 A suit for specific performance operates only on the person and may, it has been held, be brought either in the county of the defendant's residence or in the county where the land is located. n1536 The vendor has a right to specific performance, although the

land is situated in another state, if both parties are within the court's jurisdiction, and such right is enforceable by and against privies in contract. n1537

Specific performance rests on the inadequacy of the remedy at law, n1538 and will be decreed only where there is no adequate legal remedy, or where nonperformance would amount to a fraud. n1539 When, therefore, no adequate remedy exists at law and the contract is legal, perfectly fair in its terms, and the parties stand upon an equality with respect to the remedy, and where its specific enforcement, in the light of all the circumstances existing at the time it is sought, would work no hardship or injustice to either party and such relief will put them in the position contemplated by the contract, specific performance will be granted; n1540 but it must appear that it would be unjust and inequitable to permit the contract to remain unexecuted. n1541 But elsewhere it is said that the defense of adequate remedy at law will not avail the defendant in the absence of special circumstances. n1542 A legal obligation, though valid, will not be specifically enforced when to do so would be inequitable, n1543 or where the circumstances are such as to thereby impose an inequitable burden. n1544 When an adequate remedy exists at law, it must be pursued instead of an action for specific performance. n1545

Specific performance will be decreed where the contract has been so performed by one party that the parties cannot be placed in status quo or damages awarded as full compensation. n1546 It must appear that some injury will result from a refusal to perform the contract before equity is warranted in awarding a decree of performance. n1547 It must appear that some definite provision of the contract has not been complied with. n1548 As a part of the appropriate and acknowledged jurisdiction of a court of equity, specific performance of a contract to convey land has been enforced from the earliest decisions of that court, although the vendor has, in most cases, another remedy by an action at law upon the agreement to purchase. n1549

The right of the vendee to maintain specific performance has also been, for a long period of time, a well-established right. n1550 The decree will not be denied to the vendee because the vendor is possessed of sufficient property to respond in the event a judgment for damages should be recovered against him. n1551 So, in case of a breach of a contract for the sale of real estate, the injured party is entitled to elect to bring suit for specific performance, and is not bound to bring an action at law for damages. n1552

The court's jurisdiction in such cases extends even to lands in another county and out of the jurisdiction of the court if the parties are within its jurisdiction. n1553 The theory upon which a court of equity grants relief in such cases is that its powers are exercised in personam and not in rem. n1554 Equity has jurisdiction of a suit to compel specific performance on the part of the purchaser of real estate, although the vendor has a remedy at law by action for the purchase money. n1555 Damages are not essential to such relief. n1556 If the parties in their contract of conveyance provide for a penalty to be forfeited on a failure of either to perform, there seems to be no question that it will not operate to prevent the relief of specific performance. n1557 Where a contract of sale and purchase of land contains a provision for a pecuniary forfeiture or penalty by the party in default, it is generally held that such provision does not affect the right to have specific performance, unless such provision was intended as a substitute for specific performance. n1558 Also, where the contract itself has assessed the damages which the defaulting party has to pay, equity will not interfere to enforce specific performance of the contract to prevent the recovery of damages. n1559

An action for damages for breach of a contract to convey real estate is not usually an adequate remedy, and equity has jurisdiction to decree a specific performance. n1560 The remedy is not a matter of right but is addressed to the sound discretion of the court. n1561 The relief is granted only where injustice results from permitting a contract to remain unexecuted. n1562 The minds of the parties must fully meet on the terms of the contract. n1563

For a court of equity to grant specific performance of a contract to purchase and sell realty the contract must be valid and enforceable. It must not contain elements of illegality and it must meet the requirements of the statute of frauds of the applicable jurisdiction. A contract may be specifically performed even though there is not mutuality of obligation. n1564 In the case of specific performance of contracts to sell realty, relief will be granted though there is an adequate

remedy at law even where there is inadequate consideration. n1565 Some cases refuse to allow the vendee to have specific performance where to do so would be to also require the vendor to clear a title defect. n1566 Specific performance is not made unavailable for a remedy by the fact that the contract contains a provision for the payment of liquidated damages in case of breach. Such a provision does not create an option between alternative contracts. n1567

§ 96.16(d)(2) Contracts that May Be Specifically Enforced.

It is essential to specific performance that the contract be definite and certain in the obligations it imposes. Uncertainty and vagueness will defeat enforcement. n1568 A contract for the sale of real estate which is not definite and certain will not be specifically enforced in equity. n1569 A greater degree of certainty is required in the terms of the contract sought to be specifically enforced in equity than is required in a contract which is the basis of an action at law for damages. n1570 The evidence must be clear and satisfactory, but it need not be direct; neither is it necessary that the contract be specific in all its terms. Thus, it has been held that an oral agreement which provided that a sister was to have a brother's property at his death in consideration of their removal to another state and caring for him could be specifically enforced, when performed by her. n1571 Likewise, it has been held that a contract to will one-third of one's property to another might be specifically enforced and that it was not necessary that the testator should designate the one-third to be devised. n1572 However, an option to buy oil, gas, and coal in place, which provided for the giving of a warranty deed containing provisions used for similar property, was held incapable of specific performance when it appeared that there was no uniform or customary form of deed for such purposes. n1573 Certainty as to time may be an element essential to the specific performance of a contract. Thus, it is held that an executory agreement for the sale of land which does not designate the time of payment is not enforceable in a court of equity. n1574 Also, a contract for the sale of realty which does not show the time of payment of a mortgage to be given for a part of the purchase price is held to be too indefinite to be specifically enforced. n1575 The rule requires certainty in the description of the premises to be conveyed, n1576 the time of performance, n1577 the parties, n1578 and the price to be paid. n1579

The essential basis of a decree for specific performance of a contract for the sale or exchange of property is a definite present agreement in regard to specific property, sufficiently designated as present to the minds of both parties, which is to be transferred from one to the other. n1580 Even though the description of the property set out in the contract proper is insufficient, if the evidence establishes a state of facts taking the case out of the statute of frauds, and supplying the description, the contract may be specifically enforced. n1581 The uncertainty in the description may be removed by extrinsic evidence. n1582 Before the contract will be specifically enforced, it must be complete in all its essential elements. n1583 The contract to be enforced must be complete with nothing left for future negotiation. n1584 In case it is a contract of sale, the price must be fixed with sufficient certainty. n1585 The foregoing principle applies not only to the price, but the time of payment as well. n1586 Thus, an option in a lease to purchase the property, but not naming any price, is not enforceable; n1587 but specific performance may sometimes be enforced when the incomplete portions of the contract are merely discretionary, and the discretion can be supplied by the court. n1588

It is held that mere inadequacy of consideration may justify a court in refusing to decree specific performance of a contract of bargain and sale. n1589 A binding contract to convey realty, in the absence of fraud, mistake, undue influence, or oppression, will be specifically enforced, and mere inadequacy of price without more does not as a rule, prevent the application of this principle. n1590 A contract to be specifically enforced must be supported by a valuable consideration, but the mutual promises of each party, as in a contract to exchange real estate, may be sufficient consideration to support an action for specific performance. n1591 When specific performance is sought after the death of the promisor, it is necessary to prove that the contract was based upon a proper consideration. n1592

Although mere inadequacy of consideration may not of itself bar the right to specific performance, n1593 it is a strong circumstance which, with others, may influence the court in withholding its decree. n1594 Generally, inadequacy of consideration, without fraud, will not prevent specific performance. n1595 Thus, where mere inadequacy of consideration is coupled with fraud, specific performance will be denied. n1596 Adequate consideration to warrant specific performance is a fair and reasonable price. n1597 Love and affection have been held not sufficient to support a

suit for specific performance. n1598 In an action for specific performance of contracts for the purchase and sale of real estate, market value furnishes the proper test of value. n1599 Lack of mutuality or consideration is not necessarily fatal to the enforcement of option contracts to purchase real estate, although the early cases seemed to recognize such rule. n1600 Where there is an unqualified and unconditional acceptance of an option to buy land, a contract is created which equity will enforce. n1601

The remedy is denied in cases where the contract is impossible of performance. n1602 The same rule holds where the ability to perform depends upon the consent of third persons, n1603 as where the property does not belong to the person contracting to convey the same, n1604 or where one holds an executory contract to purchase from a mortgagor against whom there has been foreclosure and sale. n1605 A purchaser deprived of the possession of the premises because third persons are in possession thereof cannot have specific performance against the vendor, since the court cannot order the vendor to deliver property possessed by others. n1606

Specific performance may not be ordered where the court is unable to enforce its decree. n1607 Neither will the courts decree specific performance in cases where it will operate oppressively or work hardship or injustice, n1608 but this does not mean mere inconvenience. n1609 As a general rule, specific performance will not be decreed in favor of a party who is financially unable to carry out his part of the contract. n1610 Fraudulent conveyance of the property to a third person will not necessarily defeat specific performance of an agreement to convey. n1611 Where a party has put it out of the party's power to perform according to the terms of the contract, the court may compel the party to perform in some practicable way. n1612 So, where the only thing which stood in the way of performance was the settlement of an estate, which could be procured by the vendor by a proceeding in the probate court, specific performance was decreed against the vendor. n1613

Specific performance of a contract to convey land has been granted when the plaintiff claimed that defendant had not disqualified defendant to convey title. The defendant is not concerned with controversies the plaintiff may subsequently have with others concerning the title. n1614 Where the defendant has not entirely divested the legal title on which the decree can operate, specific performance will be granted. n1615 Specific performance against the vendor under a contract for the sale of real estate will not be denied because there is a mortgage on the property which the vendor is unable to remove unless the purchase money is applied. n1616 The fact that a building on the premises which were contracted to be sold was destroyed by fire before the time for performance was no defense to a suit for specific performance by the vendee. n1617

It is no objection to the specific performance of a contract that the consent of a third person is necessary where the third party does or will consent, but where the defendant cannot perform without the consent of a third person and such consent is withheld, the contract will not be enforced. n1618 Thus, a contract to sell land signed by a husband alone will not be specifically enforced when the purchaser prays an abatement of the purchase price or an indemnity to protect himself from her claim for dower, the wife having refused to join in the conveyance. n1619 Where an executrix, by the terms of the will, was required to have sales of real estate confirmed by the county court, specific performance of a contract of sale was refused where such confirmation was not secured. n1620 Specific performance of the delivery of a deed by a married woman will be refused when the same is void because the husband has not joined. n1621 A rule for guidance of a court in the exercise of its discretion in granting or denying an application for the enforcement of a contract is that it must appear that specific performance will result in no injustice. n1622 A bad bargain, in the absence of fraud, will not relieve a party from specific performance of his contract. n1623

Specific performance will be refused if, under all the circumstances, it would be inequitable to grant such relief, n1624 even though no act of fraud or mistake appears to have been made. n1625 Specific performance will be denied where the contract is founded on fraud n1626 or misrepresentation. n1627 To obtain specific performance of a contract for the sale and purchase of real estate, it must be established that the contract was procured fairly and openly, and any misrepresentation in the procurement thereof will bar such enforcement, notwithstanding that the misrepresentation was innocently or ignorantly made. n1628 The rule is the same as to mistake of the parties. n1629 But the rule is well

established in the United States, that where the mistake or fraud in a written contract is such as admits the equitable remedy of reformation, the plaintiff may allege and prove by parol evidence the mistake or fraud, and the modification of the written contract made necessary thereby, and may obtain a decree for the specific performance of the agreement thus corrected. n1630

Specific performance of a contract will usually be denied if a mistake has occurred in its execution or where the contract does not express the intention of the parties; n1631 however, the omission by mistake of a provision favorable to the defendant will not prevent a decree of specific performance when the plaintiff is ready, willing and able to perform the whole contract, including the omitted provision. n1632 The courts will not enforce an illegal contract, n1633 or a contract against public policy. n1634 The mere misconception of the legal effect of an agreement will not operate to defeat specific performance; n1635 nor will specific performance be denied where a mistake does not go to the foundation of the contract, but is of such a character that it may be corrected by the decree. n1636

Specific performance will be refused when there has been misrepresentation of a material matter relied upon by the defendant or fraud in the execution of the contract. n1637 Thus, where one misrepresents the value n1638 or area of land, n1639 the value of capital stock to be exchanged for land, n1640 the date of maturity of mortgages on lands to be exchanged, n1641 the location with reference to a suburban street, of platted lots, where the plat is not accessible to the purchaser, n1642 or where the purpose for which the land is to be used is concealed, n1643 specific performance will be denied. Such principle is held to apply to misrepresentations made by an agent, even though the defendant conceals such fraudulent representations from the plaintiff. n1644 Specific performance will be denied a party who has obtained a contract by fraud, n1645 overreaching, trickery, or imposition on an ignorant person. n1646 To constitute a defense in a suit for specific performance, the misrepresentations must have been relied upon by the party with whom the contract was made. n1647 However, a party intentionally making false statements has been held not entitled to specific performance, even though such statements were not relied on by the other party to the contract. n1648

It may be stated as a general rule that a court of equity will not specifically enforce a contract void under the statute of frauds; n1649 but an oral contract to convey land may be enforced when the circumstances are such that to refuse specific performance would result in the perpetration of a fraud upon the plaintiff. n1650 In order to prevent the perpetration of a fraud, a court of equity will decree specific performance of an oral contract to convey at the instance of a purchaser who has taken possession of the land, paid a part of the purchase price, and made valuable improvements in reliance on the contract. n1651 To prevent the statute of frauds from becoming an instrument of fraud the law has engrafted an exception so as to permit specific performance to be decreed where there is no other adequate remedy at law. n1652

The statute of frauds will not prevent specific performance of oral contracts for the sale of lands substantially, n1653 or even partially performed. n1654 Specific performance of such a contract will be decreed where the contract has been so far executed that the party seeking relief cannot be restored to the former position. n1655 The performance must, of course, refer to the contract. n1656 It is only where the very justice of the thing is so clear that the refusal of relief would itself amount to a deep-seated wrong, and fraud upon the party, that equity will act to enforce specific performance of an oral contract to convey. n1657 To justify a decree in favor of a vendee for the specific performance of a parol contract for the sale of real estate, the contract and its performance on the part of the vendee must be clearly proved. n1658 Thus, it has been held that a court of equity, in order to defeat fraud, will compel specific performance of a parol contract for the sale of land, if established by clear and convincing proof. n1659

Generally, where the purchaser has made a conscientious effort fully and fairly to comply with the contract, specific performance will be granted. n1660 A parol contract for the sale of land may be enforced in equity where the party seeking the aid of the court has achieved partial performance, under the doctrine of equitable fraud. n1661 A partly performed oral contract may also be specifically enforced when a fiduciary relation exists, and the court's aid is necessary to prevent injustice. n1662 The part performance relied on to justify specific performance of a contract must place the performing party in such a situation that it would be a fraud on that party if the contract were not carried out.

n1663 Where a party seeks to enforce an oral agreement of a person now deceased to convey or devise lands, the proof to establish the circumstances of such oral agreement must he clear, satisfactory, and convincing. n1664 "While contracts of this kind are not favored and many times are not enforced upon oral proof, the power to make a valid agreement to dispose of property by will in a particular way has long been recognized ... The evidence, to sustain an oral promise to make a will, must be conclusive, definite, certain, and the contract must be established beyond all reasonable doubt." n1665

Whether the vendor or purchaser is the plaintiff three alternatives arise when the vendor is able to give only a performance nonconforming in quantity, quality or value: (1) to refuse the remedy of specific performance; (2) to enforce the contract without any regard to the partial failure; (3) to decree a conveyance and allow the vendee an abatement from price equal to the value of the deficiency in the performance. n1666 If the vendor cannot convey the agreed quantity of the estate the vendee may have specific performance with pro tanto abatement of purchase price. n1667

FOOTNOTES:

(n1)Footnote 1278. Upholding theory of restitution of money paid in part performance, on strict foreclosure of contract. *Schwartz v. Syver, 59 N.W.2d 489 (Wis. 1953); Henry Uihlein Realty Co. v. Downtown Dev. Corp., 101 N.W.2d 775 (Wis. 1960).*

(n2)Footnote 1279. Where a valid executory contract for the purchase and sale of real property is broken by the vendee's failure to pay the purchase money as stipulated in the contract, the vendor has in equity a choice of remedies. He may tender a deed and sue for the specific performance of the contract, or he may sue for a strict foreclosure of the contract. If the suit is for a specific performance of the contract, plaintiffs would be entitled to a decree requiring the vendee to pay the sums stipulated, as provided in the contract, while, if the suit is for a strict foreclosure, and the case is such that the granting of the remedy of strict foreclosure would not be inequitable, then the plaintiffs would be entitled to a decree requiring the defendants to pay the money due under the contract within such reasonable time as the court should direct, or be foreclosed of their equities in the property. If, however, the granting of the equitable relief of strict foreclosure would, for any reason, be inequitable, then it would be the duty of the court to decree that, if the purchase money be not paid within the time set by the court, the property should be sold and the vendor's interest be satisfied from the roceeds. *Sheehan v. McKinstry, 210 P. 167 (Or. 1922).* In any case where the relief sought is that of a strict foreclosure, the plaintiffs would not be entitled to have a judgment for the amount due and also at the same time have the contract strictly foreclosed. The payment of the money, whether under the compulsion of a judgment or voluntarily made, would operate to reinstate the contract and continue it in force, and thus preserve the vendee's equities under the contract, while the failure to pay the money would operate to entitle the plaintiffs to maintain a suit for strict foreclosure. *Marquardt v. Fisher, 295 P. 499 (Or. 1931).*

Under *Shenners v. Pritchard, 80 N.W. 458 (Wis. 1898),* and *Foster v. Lowe, 110 N.W. 829 (Wis. 1907),* it cannot be doubted that upon the breach of the conditions of a land contract the vendor has three remedies: (a) He may elect to sue for the unpaid purchase money; (b) he may elect to sue for specific performance of the contract; and (c) he may elect to declare the contract at an end. See, also, *Kunz v. Whitney, 167 N.W. 747 (Wis. 1918).* There can be no doubt that the election of one of these remedies waives the others. *Oconto Co. v. Bacon, 195 N.W. 412 (Wis. 1923).*

See Rights of a Vendee in Land Where There Is a Failure of Title: With Special Emphasis on the Law of Alabama, *13 Ala. L. Rev. 409 (1961);* Enforcement of Forfeiture Provisions as a Remedy in Land Sale Contracts, *14 Hastings L.J. 44 (1962);* Vanneman, Strict Foreclosure on Land Contracts, *14 Minn. L. Rev. 342 (1930).*

(n3)Footnote 1280. "The cases in this court go no farther than to hold that a vendor may proceed to foreclose the right of the vendee to have specific performance of his contract, on his failure to make the payments as agreed; and this court has established the rule that in such cases the only judgment the plaintiff can have is a judgment of strict foreclosure of the rights of the vendee, unaccompanied by any personal judgment for the unpaid purchase money.

Button v. SchrOyer, 5 Wis. 598 (1855)." In the cited case the lower court decreed foreclosure and sale and the court on appeal, reversed saying, "But as the title did not pass by the contract, but remained in the vendor, we think the decree of sale erroneous. The proper decree in such cases is, that the money due upon the contract be paid within such reasonable time as the court may direct, or that the vendee be foreclosed of his equity of redemption." *First National Bank v. Agnew, 45 Wis. 131 (1978).*

(n4)Footnote 1281. *Affirmative. Newton v. Canty, 203 P.2d 910 (Colo. 1949); Bedford v. Tetzlaff, 61 N.W.2d 60 (Mich. 1953); Pease v. Baxter, 41 P. 899 (Wash. 1895).*

Negative. Dorman v. Fisher, 144 A.2d 805 (N.J. Super. Ct. App. Div. 1958).

Strict foreclosure is the method of terminating the interest of the defaulting vendee, but vendor must allow vendee a reasonable time in which to make good a default. *Petersen v. Ridenour, 287 P.2d 848 (Cal. Dist. Ct. App. 1955).*

See Simpson, Legislative Changes in the Law of Equitable Conversion by Contract, *44 Yale L.J. 559 (1935).*

Vendor cannot maintain summary possession proceedings on default. *Cerullo v. Cerullo, 339 N.Y.S.2d 252 (1972).*

See Vendor and Purchaser:Defaulting Purchaser's Right Under Oklahoma Law, *23 Okla. L. Rev. 332 (1970).*

(n5)Footnote 1282. *Coleman v. Woodland Hills Co., 33 S.E.2d 20 (Ga. Ct. App. 1945).*

(n6)Footnote 1283. *Stroble v. Smith, 267 N.W. 526 (Neb. 1936); Sears, Roebuck & Co. v. Camp, 1 A.2d 425 (N.J. 1938).*

Strict foreclosure of land sales contract in default. *Henry Uihlein Realty Co. v. Downtown Dev. Corp., 101 N.W.2d 775 (Wis. 1960).*

(n7)Footnote 1284. *Friedman v. Katzner, 114 A. 884 (Md. 1921).*

A seller cannot declare the default by the vendee when the seller himself is in default. *Cook v. Moyle, 359 P.2d 58 (Wyo. 1961).*

(n8)Footnote 1285. *Epperly v. Johnson, 734 N.E.2d 1066 (Ind. Ct. App. 2000); Allapattah Serv., Inc. v. Exxon Corp., 161 F. Supp. 2d 1326 (1999); Federal Deposit Ins. Corp. v. Peterson, 67 P.2d 305 (Mont. 1937).*

(n9)Footnote 1286. *El Paso Cattle Co. v. Stafford, 176 F. 41 (6th Cir. 1909); Hursey v. Surles, 74 S.E. 618 (S.C. 1912); Dobson v. Zimmerman, 118 S.W. 236 (Tex. Civ. App. 1909).*

(n10)Footnote 1287. *Glock v. Howard & Wilson Colony Co., 55 P. 713 (Cal. 1898).*

(n11)Footnote 1288. *Armstrong v. Ross, 55 S.E. 895 (W. Va. 1906).*

(n12)Footnote 1289. *Baker v. Smith & Gottlieb, Inc., 132 F.2d 18 (D.C. Cir. 1942); Greenberg v. Ray, 108 So. 385 (Ala. 1926); Bank of Commerce v. Knowles, 124 S.E. 910 (Ga. Ct. App. 1921); Crenshaw v. Williams, 231 S.W. 45 (Ky. 1921).*

Breach by unreasonable delay in clearing title. *Quinn v. Olsen, 298 F. 704 (8th Cir. 1924).*

Vendee may recover deposit if title is unmarketable. *Smith v. MacAlister, 294 N.E.2d 441 (Mass. App. Ct. 1072).*

(n13)Footnote 1290. *Baker v. Smith & Gottlieb, Inc., 132 F.2d 18 (D.C. Cir. 1942); Greenberg v. Ray, 108 So. 385*

(Ala. 1926); Bank of Commerce v. Knowles, 124 S.E. 910 (Ga. Ct. App. 1921); Crenshaw v. Williams, 231 S.W. 45 (Ky. 1921).

Breach by unreasonable delay in clearing title. *Quinn v. Olsen, 298 F. 704 (8th Cir. 1924).*

(n14)Footnote 1291. *Honeycutt v. Whitten, 90 So. 230 (La. 1921).*

(n15)Footnote 1292. *Jenkins v. Hamilton, 154 S.W. 937 (Ky. 1913); Grant v. McArthur, 155 S.W. 732 (Ky. 1913).*

(n16)Footnote 1293. *Cox v. RKA Corp., 753 A.2d 1112 (N.J. 2000); Janulewycz v. Quagliano, 89 A. 897 (Conn. 1914); Kons v. Pallange, 11 N.W.2d 634 (Wis. 1943).*

A vendor taking possession after a defaulted land sale contract is a mortgagee in possession until the contract is terminated. *Brill v. Cherwin, 78 N.W.2d 122 (Mich. 1956).* The vendee in sales contract is entitled to equitable lien for purchase price or breach by vendor. *Cleveland Trust Co. v. Bouse, 127 N.E.2d 7 (Ohio 1955).*

(n17)Footnote 1294. *Barton v. Lerman, 649 N.Y.S.2d 107 (N.Y. App. Div. 1996)* (notwithstanding that vendor's actual damages may be less than the down payment, purchaser who defaults on real estate contract without lawful excuse cannot recover down payment); *Goldfarb v. Robertson, 82 So. 2d 504 (Fla. 1955)* (where there was no valid forfeiture provision in sales contract); *Dickson v. Turner, 149 Ill. App. 394 (1904); Waters v. Pearson, 144 N.W. 1026 (Iowa 1914); First M. E. Church v. North, 140 P. 888 (Kan. 1914); Houghton v. Collins, 73 N.W.2d 208 (Mich. 1955)* (vendee may lose his equity by abandonment of the contract); *Kirk v. Welch, 3 N.W.2d 426 (Minn. 1942); Dorman v. Fisher, 144 A.2d 805 (N.J. Super. Ct. App. Div. 1958)* (equity will not relieve against forfeiture of conditional sale contract of realty in absence of fraud); *Burchfield v. Hagoman, 151 N.W. 47 (S.D. 1915);* Clifton v. Charles, 116 S.W.120 (Tex. Civ. App. 1909); *Huckleberry v. Wilson, 284 S.W.2d 205 (Tex. Civ. App. 1955)* (where vendee in default, vendor can elect to forfeit and hold earnest money).

Holding valid the provision for liquidated damages in a real estate sales contract. *Valenti v. Coral Reef Shopping Center, Inc., 316 So. 2d 589 (Fla. Dist. Ct. App. 1975).*

(n18)Footnote 1295. *Dickson v. Turner, 149 Ill. App. 394 (1909).* Quantum meruit is an equitable doctrine meaning "as much as he deserves." It is the extent of liability on a contract implied by law to pay a reasonable amount for accepted services or materials even absent a specific contract therefore. Black's Law Dictionary 649 (abr. 5th ed. 1983).

Purchaser's damages for breach of oral agreement to sell was difference between value at time of stipulated conveyance and purchase price. *Rozene v. Sverid, 351 N.E.2d 541 (Mass. App. Ct. 1976).*

(n19)Footnote 1296. *Morris v. Weigle, 383 N.E.2d 341 (Ind. 1978).*

(n20)Footnote 1297. *Ballard v. Schoenberg, 541 A.2d 258 (N.J. Super. Ct. App. Div. 1988); Purviance v. Shultz, 44 N.E. 766 (Ind. Ct. App. 1986); Lisle v. Tribble, 17 S.W. 742 (Ky. 1891); Clark v. Cordry, 69 Mo. App. 6 (1897); Logan v. McGinnis, 12 Pa. 27 (1849).*

(n21)Footnote 1298. *Mitchell v. Owen, 127 S.E. 122 (Ga. 1925).*

(n22)Footnote 1299. *Monteverde v. Brooke Realty Co., 224 P. 247 (Cal. Dist. Ct. App. 1924); Savage v. Weigel, 219 N.Y.S. 99 (1927)* (delay in performance); *Harris County Mv. Co. v. Davis, 230 S.W. 761 (Tex. Civ. App. 1921); W. E. Stewart Land Co. v. Terrell, 266 S.W. 604 (Tex. Civ. App. 1924).*

(n23)Footnote 1300. *Mintle v. Sylvester, 211 N.W. 367 (Iowa 1926); Johnston v. Benjamin, 292 S.W. 801 (Ky. 1927); Charles v. Scheibel, 222 N.Y.S. 784 (1927); Bernstein v. Jacobson, 221 N.Y.S. 453 (1927); Seltzer v. Greene,*

117 A. 532 (R.I. 1922); McDaniel v. Daves, 123 S.E. 663 (Va. 1924).

(n24)Footnote 1301. *Griffin v. Smith, 125 A. 465 (Conn. 1924). See First Nat. Bank v. Le Barron, 208 N.W. 364 (Iowa 1926).*

Rejecting anticipatory breach. *Sterling v. Apple, 513 S.W.2d 255 (Tex. Civ. App. 1974).*

(n25)Footnote 1302. *Stanley v. Anthony Farms, 112 So. 57 (Fla. 1927); Blake v. Clark, 289 S.W. 287 (Ky. 1926).*

(n26)Footnote 1303. *Herring v. Esposito, 119 A. 765 (N.J. Ch. 1923). See Glaser v. Eisen Realty Co., 187 N. Y. 171 (1921).*

(n27)Footnote 1304. *Lost Creek Coal & Mineral Land Co. v. Hendon, 110 So. 308 (Ala. 1926).*

(n28)Footnote 1305. *Zane v. Hinds, 136 Wash. 352, 240 P. 6. See Gregory v. Peabody, 138 Wash. 591, 244 P. 998.*

(n29)Footnote 1306. *Capps v. Clark, 195 N.W. 372 (Iowa 1923). See Lantz v. Howell, 107 S.E. 437 (N.C. 1921).*

(n30)Footnote 1307. *Weatherford v. Adams, 251 P. 453 (Ariz. 1926); Kerr v. Reed, 202 P. 142 (Cal. Dist. Ct. App. 1921); Kempton v. Floribel Land & Imp. Co., 189 P. 478 (Cal. Dist. Ct. App. 1920); Michaelian v. Elba Land Co., 245 P. 476 (Cal. Dist. Ct. App. 1926); Wood v. Ellis, 161 P.2d 777 (Colo. 1945); Bell v. Tucker, 139 S.E. 573 (Ga. Ct. App. 1927); Voorhees v. Baier, 191 N.W. 125 (Iowa 1922); Benjamin v. Savage, 191 N.W. 408 (Minn. 1923); Miller v. Ruzicka, 198 N.W. 148 (Neb. 1924); Freggens v. Clark, 135 A. 681 (N.J. Ch. 1925); Robert H. Smith Corp. v. Kraushaar, 34 N.Y.S.2d 356 (1942); Kegerreis v. Citizens Trust Co., 3 N.E.2d 896 (Ohio Ct. App. 1936); Eldridge v. Vance, 261 P. 168 (Okla. 1927); Bricker v. Kline, 86 Pa. Super. 594 (1926); Gillespie v. Gray, 230 S.W. 1027 (Tex. Civ. App. 1921); McKellar Real Estate & Inv. Co. v. Paxton, 218 P. 128 (Utah 1923); Davis v. Buery, 114 S.E. 773 (Va. 1922), 115 S.E. 527 (Va. 1922); French v. C. D. & E. Inv. Co., 195 P. 521 (Wash. 1921).*

Rescission allowed for any breach by the opposite party sufficiently substantial to be a defense to an action to enforce the contract. *Hogsed v. Gillett, 199 P. 907 (Mont. 1921).*

Agreements for liquidated damages in sales of realty are valid unless the damages are readily ascertainable at the time the contract is made. *Hutchinson v. Tompkins, 259 So. 2d 129 (Fla. 1972).*

Vendors are not entitled to "benefit of the bargain" damages where the vendor fails to deliver marketable title, but only if the vendor has been guilty of bad faith; otherwise recovery is the purchase price plus interest, expenses of investigating title, and cost of improvement made by the purchasers. *Horton v. O'Rorck, 321 So. 2d 612 (Fla. Dist. Ct. App. 1975).*

Holding that a purchaser who received less land than he bargained for but who sold at a profit or an inflated market could still sue for damages. *Mills v. Brown, 568 S.W.2d 100 (Tenn. 1978).*

Vendors have a choice of forfeiture or suing for damages. *Anderson v. Long Grove Country Club Est., Inc., 249 N.E.2d 343 (Ill. App. Ct. 1969).*

(n31)Footnote 1308. *Buechler v. Olson, 189 N.W. 741 (Iowa 1922); Richardson v. Short, 207 N.W. 610 (Iowa 1926); Ontario Advancement Co. v. Stevens, 231 P. 127 (Or. 1924).*

Even where there is a provision for liquidated damages, the injured party to the real estate contract must prove damages. *Crouch v. Williams, 179 So. 2d 117 (Fla. Dist. Ct. App. 1965).*

(n32)Footnote 1309. *Leiseh v. Baer, 123 N.W. 719 (S.D. 1909); Speer v. Phillips, 123 N.W. 722 (S.D. 1909).*

Right to damages for breach of contract to convey is limited to moneys laid out and expenses incurred. *Rea v. Ford Motor Co., 355 F. Supp. 842 (W.D. Pa. 1972).*

Loss of profits on possible resale is too speculative in an action for breach of option to purchase land. *Callicott v. Gresham, 161 So. 2d 183 (Miss. 1964);* allowing loss of profits only where vendee had an actual resale contract. *Womack v. Sternberg, 162 So. 2d 119 (La. Ct. App. 1964);* allowing loss of profits where vendee had informed vendor of mere intention to resell. *Lynch v. Wright, 94 F. 703 (S.D.N.Y. 1899).*

(n33)Footnote 1310. *Kares v. Covell, 62 N.E. 244 (Mass. 1902); Corbett v. Schulte, 77 N.W. 947 (Mich. 1899); Bryant Timber Co. v. Wilson, 65 S.E. 932 (S.C. 1909).*

On this "cy pres" doctrine, see *Merritz v. Circelli, 64 A.2d 796 (Pa. 1949); Moore v. Maes, 52 S.E.2d 204 (S.C. 1949).*

Purchaser is entitled as damages for breach of seller to the difference between the actual value of the land and the agreed price. *Aboud v. Adams, 507 P.2d 430 (N.M. 1973).*

(n34)Footnote 1311. *Switzer v. Commissioners of the United States, 119 N.Y.S. 383 (1909); Clark v. West, 122 N.Y.S. 380 (1910).*

(n35)Footnote 1312. *Perfln v. Smith, 119 N.Y.S. 990 (1909).*

(n36)Footnote 1313. *McQueen v. Chouteaau, 20 Mo. 222 (1855).*

(n37)Footnote 1314. *Kelly v. Marx, 705 N.E.2d 1114 (Mass. 1999); Naporano Assoc., L.P. v. B&P Builders, 706 A.2d 1123 (N.J. Super. Ct. App. Div. 1998); Harris v. Dawson, 360 A.2d 706 (Pa. Super. Ct. 1976); Bennett v. Mason, 572 S.W.2d 756 (Tex. Civ. App. 1978).*

(n38)Footnote 1315. *Howe v. Mitchell, 17 Maine 85 (1840); Hunt v. Livermore, 22 Mass. 395 (1827); Raudabaugh v. Hart, 55 N.E. 214 (Ohio 1899).*

Where the vendor has rendered performance of his contract impossible by conveying the land to a third party, tender of performance by the purchaser before instituting action for breach of the contract is held unnecessary. *Mortgage Underwriters v. Stuckey, 27 N.E.2d 111 (Ind. Ct. App. 1940).*

(n39)Footnote 1316. *Gibson v. Dunnam, 1 Hill 289 (S.C. 1833).*

(n40)Footnote 1317. *Glock v. Howard & Wilson Colony Co., 55 P. 713 (Cal. 1898); Old Colony R. Corp. v. Evans, 72 Mass. 25 (1856); Allen v. Mohn, 49 N.W. 52 (Mich. 1891).*

(n41)Footnote 1318. *Norris v. Letchworth, 152 S.W. 421 (Mo. Ct. App. 1921).*

(n42)Footnote 1319. *Washington v. Soria, 19 So. 485 (Miss. 1896).*

(n43)Footnote 1320. *Caprito v. Grisham-Hunter Corp., 128 S.W.2d 149 (Tex. Civ. App. 1939).*

(n44)Footnote 1321. *Clifford v. White, 94 P.2d 875 (Ariz. 1939).*

The vendee who has paid part of the purchase price and gone into possession is in the same position as one who has taken a deed and given a purchase-money mortgage so that summary eviction proceedings will not lie on default. *H & L Land Co. v. Warner, 258 So. 2d 293 (Fla. Dist. Ct. App. 1972).*

(n45)Footnote 1322. *Freeman v. Paulson, 119 N.W. 651 (Minn. 1909).*

(n46)Footnote 1323. *Pitkin v. McCarthy, 158 N.E. 346 (Mass. 1927).*

(n47)Footnote 1324. *Newell v. E. B. & A. L. Stone Co., 184 P. 659 (Cal. 1919).*

(n48)Footnote 1325. *Lake v. Bernstein, 246 N.W. 790 (Iowa 1933).*

(n49)Footnote 1326. *Shaw v. Union Escrow & Realty Co., 200 P. 25 (Cal. App. 2d Dist. 1921). See Scott v. Lott, 247 S.W. 685 (Tex. Civ. App. 1922).* Must allege damages from breach. *McDonald v. Skinner, 209 N.Y.S. 219 (N.Y. Sup. 1925).*

(n50)Footnote 1327. *Lunde v. Minch, 136 A. 552 (Conn. 1927).*

(n51)Footnote 1328. *Nichtern v. Johnston, 192 N.Y.S. 784 (N.Y. App. Div. 3d Dept. 1922).*

(n52)Footnote 1329. *Waterman v. Taub, 131 A. 924 (N.J. 1926).*

(n53)Footnote 1330. *Wilkirson v. Yarbrough, 255 S.W. 1109 (Tex. Com. App. 1923),* rev'd in part on other grounds, *Wilkirson v. Yarbrough, 257 S.W. 535 (Tex. Com. App. 1924).*

(n54)Footnote 1331. *Ennis v. Johnson, 121 N.E.2d 480 (Ill. 1954).*

(n55)Footnote 1332. *Kolling v. Martin, 7 N.E.2d 527 (Ind. App. 1937).*

(n56)Footnote 1333. *Walsh v. Bellamy, 2 N.W.2d 102 (S.D. 1942).*

(n57)Footnote 1334. *Thomas N. Canton Est. v. Keller, 52 S.2d 131 (Fla. 1951).* Contra as requiring tender and demand by the vendee. *Terrell v. Gregory, 249 S.W.2d 560 (Ark. 1952).*

(n58)Footnote 1335. *Nelson v. Robinson, 336 P.2d 415 (Kan. 1959)* (the vendor was denied a forfeiture on default and the contract was treated as an equitable mortgage creating a court designated right of redemption).

(n59)Footnote 1336. *Olmo v. Matos, 653 A.2d 1 (Pa. Super. 1994); Neuman v. Demmer, 414 N.W.2d 240 (Minn. App. 1987); Miller v. Adelson, 51 F. Supp. 201 (W.D. Pa. 1943).* Forfeiture by vendee of down payment. *Melton v. Amar, 385 P.2d 406 (Idaho 1963); Davies v. Boyd, 385 P.2d 950 (N.M. 1963); Medak v. DePrez, 386 P.2d 805 (Or. 1963).* Vendors are not entitled to both interest on the unpaid purchase price and rent on the property. *Richards v. Saveway Oil Co., 314 N.E.2d 923 (Mass. App. 1974).*

(n60)Footnote 1337. *Ben Farmer Realty Co. v. Woodard, 441 S.E.2d 421 (Ga. App. 1994); Miller v. Adelson, 51 F. Supp. 201 (W.D. Pa. 1943); Tuso v. Green, 229 P. 327 (Cal. 1924); Maltby v. Conklin, 195 P. 280 (Cal. App. 1st Dist. 1920); Sec. Inv. Co. v. Bartram, 202 P. 337 (Cal. App. 2d Dist. 1921); Buck v. Duvall, 76 S.E. 1053 (Ga. App. 1912); First Nat'l Bank v. Le Barron, 208 N.W. 364 (Iowa 1926); Stephenson v. Neppel, 182 N.W. 369 (Iowa 1921); Norris v. Letchworth, 152 S.W. 421 (Mo. App. 1912); Faysen Lake, Inc. v. Miller, 32 A.2d 506 (N.J. Sup. 1943); Bridge Land Improvement Co. v. Myers, 28 A.2d 601 (N.J. Sup. 1942); Boyd v. Hoffman, 88 A. 675 (Pa. 1913); Wagner v. Curtis, 44 Lack. Jur. (Pa.) 2; Mozoch v. Sugg, 254 S.W. 770 (Tex. Com. App. 1923); Moore v. First St. Bank, 173 S.W. 231 (Tex. Civ. App. 1915); Bullen v. Petersen, 226 P. 464 (Utah 1924); Turner & Happersett v. Hall & Connor, 104 S.E. 861 (Va. 1920); Rose v. Rundall, 150 P. 614 (Wash. 1915); Portner v. Tanner, 216 P. 1069 (Wyo. 1923).* Vendor may cancel and enforce note and mortgage given for initial payment. *Andresen v. Simon, 213 N.W. 563 (Minn. 1927).* Vendor entitled to interest where purchaser takes possession without paying purchase money. *Obrey v. Collins, 200 N.Y.S. 175 (N.Y. Sup. 1923).*

(n61)Footnote 1338. *In re Berry's Est., 82 P.2d 549 (Wash. 1938). See Faysen Lake, Inc. v. Miller, 32 A.2d 506*

(N.J. Sup. 1943). If vendor gives notice of forfeiture before entire amount is due he waives right to balance of purchase price. *Geranios v. Annex Inv., Inc., 273 P.2d 793 (Wash. 1954).*

(n62)Footnote 1339. *Hoover v. Pontz, 114 A. 522 (Pa. 1921); Portner v. Tanner, 216 P. 1069 (Wyo. 1923).*

(n63)Footnote 1340. *Falkenstein v. Pishioneri, 720 P.2d 1341 (Or. App. 1986); Benjamin v. Savage, 191 N.W. 408 (Minn. 1923).*

(n64)Footnote 1341. *Hooven v. Woodiel, 327 N.E.2d 276 (Ill. App. 5th Dist. 1975); Rottkamp v. Eger, 346 N.Y.S.2d 120 (N.Y. Sup. 1973); Sec. Inv. Co. v. Bartram, 202 P. 337 (Cal. App. 2d Dist. 1921); Stephenson v. Neppel, 182 N.W. 369 (Iowa 1921); Bridge Land Improvement Co. v. Myers, 28 A.2d 601 (N.J. Sup. 1942); Am. Loan & Inv. Co. v. Borass, 188 N.W. 302 (N.D. 1922);* Or. & *W. Colonization Co. v. Strang, 260 P. 1002 (Or. 1927); Lea v. Blokland, 257 P. 801 (Or. 1927); Silverman v. Harmon, 250 S.W. 206 (Tex. Civ. App. 1923); Stevens v. Irwin, 231 P. 783 (Wash. 1925).*

(n65)Footnote 1342. *Barnett v. Oliver, 858 P.2d 1228 (Kan. App. 1993)* (if the purchaser fails to reinstate installment payments, vendor can sue for the entire unpaid amount under the doctrine of anticipatory repudiation, because the purchaser has clearly indicated an intent not to perform in the future); *Siem v. Cooper, 250 P. 1106 (Cal. App. 3d Dist. 1926).*

(n66)Footnote 1343. *Barnett v. Oliver, 858 P.2d 1228 (Kan. App. 1993); Ratterree Land Co. v. Sec. First Nat'l Bank, 80 P.2d 102 (Cal. App. 3d Dist. 1938).*

(n67)Footnote 1344. *Chambless v. Cain, 135 S.E.2d 463 (Ga. App. 1964); Clifford v. White, 94 P.2d 875 (Ariz. 1939). See Jenkins v. Conn, 256 S.W.2d 221 (Tex. Civ. App. 1953).* Loss of bargain plus consequential damages in breach of contract are allowable to the vendor. *530 P.2d 1230 (Kan. 1975).*

(n68)Footnote 1345. *Beck v. Combs, 337 P.2d 505 (Cal. App. 1959); McCroskey v. Ladd, 31 P. 558 (Cal. 1892); Sheeren v. Moses, 84 Ill. 448 (Ill. 1877); Eddy v. Davis, 22 N.E. 362 (N.Y. 1889); Beecher v. Conradt, 13 N.Y. 108 (N.Y. 1855); Shelly v. Mikkelson, 63 N.W. 210 (N.D. 1895); First Nat'l Bank v. Spear, 80 N.W. 166 (S.D. 1899); Dewing v. Crueger, 35 P. 393 (Wash. 1894).*

(n69)Footnote 1346. *Loud v. Pomona Land & Water Co., 153 U.S. 564 (1894); Sayre v. Craig, 4 Ark. 10 (Ark. 1842); Burrows v. Yount, 6 Blackf 458 (Ind. 1843); Coleman v. Rowe, 6 Miss. 460 (Miss. 1841); Hageman v. Sharkey, 2 Miss. 277 (Miss. 1836); Biddle v. Coryell, 18 N.J.L. 377 (N.J. 1842).*

(n70)Footnote 1347. *Ross v. McDougal, 87 P.2d 709 (Cal. App. 4th Dist. 1939); Sheeren v. Moses, 84 Ill. 448 (Ill. 1877); Headley v. Shaw, 39 Ill. 354 (Ill. 1866); Duncan v. Charles, 5 Ill. 561 (Ill. 1843); Ireland v. Chauncey, 4 Ind. 224 (Ind. 1853); Kane v. Hood, 30 Mass. 281 (Mass. 1832); Robinson v. Harbour, 42 Miss. 795 (Miss. 1869); Biddle v. Coryell, 18 N.J.L. 377 (N.J. 1842); Johnson v. Wygant, 11 Wend. 48 (N.Y. Sup. 1833); First Nat'l Bank v. Agnew, 45 Wis. 131 (Wis. 1878).*

(n71)Footnote 1348. *Baney v. Killmer, 1 Pa. 30 (Pa. 1845). See Roehm v. Horst, 178 U.S. 1 (1900).*

(n72)Footnote 1349. *Daniels v. Newton, 114 Mass. 530 (Mass. 1874).*

(n73)Footnote 1350. See *Palmer v. Fox, 264 N.W. 361 (Mich. 1936).*

(n74)Footnote 1351. *J.M. Hamilton Co. v. Battson, 44 P.2d 1064 (Mont. 1935).*

(n75)Footnote 1352. *Burg Bros. v. Bercut, 238 P. 166 (Cal. App. 1st Dist. 1925).*

(n76)Footnote 1353. *Wickwire v. McFadden, 576 P.2d 986 (Alaska 1978); Gillett v. Cheairs, 243 P. 1112 (Colo.*

1926); McLain v. Smith, 202 N.W. 239 (Iowa 1925); Lande v. Reif, 84 Pa. Super. 180 (Pa. Super. 1924).

(n77)Footnote 1354. *Wallace Real Est. Inv., Inc. v. Groves, 881 P.2d 1010 (Wash. 1994)* (vendor selling land may not put purchaser in default until vendor has offered to perform; payment of purchase price and delivering of deed are concurrent acts); *Beck v. Combs, 337 P.2d 505 (Cal. App. 1959); Glad Tidings Church of Am. v. Hinkley, 226 P.2d 1016 (Ariz. 1951); Grimes v. Steele, 133 P.2d 874 (Cal. App. 3d Dist. 1943); Stanaland v. Chastain, 137 S.E. 409 (Ga. App. 1927); Walsh v. Coghlan, 190 P. 252 (Idaho 1920); Thurman v. Alcott, 235 Ill. App. 545 (Ill. App. 3d Dist. 1924); Bruno v. Serio, 50 S.2d 78 (La. App. 1951); Bennett v. Sheinwald, 147 N.E. 28 (Mass. 1925); Bridge Land Improvement Co. v. Myers, 28 A.2d 601 (N.J. Sup. 1942); Sup. Hous. Corp. v. Schreiber, 125 Misc. 817, 211 N.Y.S. 586 (N.Y. Sup. 1924); Conners v. Winans, 204 N.Y.S. 142 (N.Y. Sup. 1924); Graves v. Chambers, 236 P. 25 (Okla. 1924); Segars v. Fobsom, 113 S.E. 495 (S.C. 1922); W.E. Stewart Land Co. v. Terrell, 266 S.W. 604 (Tex. Civ. App. 1924); Stevens v. Irwin, 231 P. 783 (Wash. 1925). See Geel v. Valiquett, 289 N.W. 306 (Mich. 1939); Jones v. Tschetter, 194 N.W. 839 (S.D. 1923).*

(n78)Footnote 1355. *Walker v. Hewitt, 220 P. 147 (Or. 1923).*

(n79)Footnote 1356. *Nunez v. Nunez, 396 S.2d 415 (La. App. 4th Cir. 1981); Moeskops v. Bodman, 155 N.E. 566 (Ohio App. 1926).*

(n80)Footnote 1357. Vendee's right to recover back amount piad under executory contract for sale of land. 59 A.L.R. 189 (1929); 134 A.L.R. 1064 (1941). *See* Arthur L. Corbin, The Right of a Defaulting Vendee to the Restitution of Installments Paid, *40 Yale L.J. 1013 (1931);* Ronald A. Norman, Student Author, Restitutionary Rights of a Vendee in Default of an Oral Contract for the Sale of Land, *19 Hastings L.J. 1212 (1968).*

(n81)Footnote 1358. *Costello v. Casale, 723 N.Y.S.2d 44 (N.Y. App. Div. 2d Dept. 2001); Bonnco Petrol, Inc. v. Epstein, 560 A.2d 655 (N.J. 1989);* Head v. Sanders, *66 S. 621 (Ala. 1914); Meier v. Hart, 220 S.W. 819 (Ark. 1920); Priest v. Stafford, 176 S.W.2d 714 (Ark. 1943); McGibbon v. Schmidt, 155 P. 460 (Cal. 1916); Seals v. Davis, 142 P. 905 (Cal. App. 1st Dist. 1914); Ramey v. Gent, 86 P.2d 1083 (Colo. 1939); Perkins v. Simmons, 15 S.2d 289 (Fla. 1943); Mourant v. Pullman Trust & Sav. Bank, 41 N.E.2d 1007 (Ill. App. 1st Dist. 1942); Treat v. Smith, 139 Ill. App. 262 (Ill. App. 1st Dist. 1908); Frey v. Stangl, 125 N.W. 868 (Iowa 1910); Monger v. Effland, 125 P. 46 (Kan. 1912); Swinney v. Davidson, 166 S.W.2d 41 (Ky. App. 1942); Tucker v. Denton, 106 S.W. 280 (Ky. App. 1907); Medlinsky v. Premium Cut Beef Co., 57 N.E.2d 31 (Mass. 1941); Porter v. Ridge, 17 N.W.2d 239 (Mich. 1945); Higbie v. Higbie, 11 N.W.2d 248 (Mich. 1943); Neilson v. Leach, 1 N.W.2d 822 (Neb. 1942); Rushton v. Campbell, 142 N.W. 902 (Neb. 1913); Feldblum v. Laurelton Land Co., 135 N.Y.S. 349 (N.Y. App. Div. 2d Dept. 1912); Torrey v. McFadyen, 81 S.E. 296 (N.C. 1914); Quid v. Spartanburg Realty Co., 77 S.E. 866 (S.C. 1913); Hogan v. Bechtel, 129 N.W. 914 (S.D. 1911); Smith v. Moore, 155 S.W. 1017 (Tex. Civ. App. 1913); Foxley v. Rich, 99 P. 666 (Utah 1909); Eby v. Larkin, 102 P. 236 (Wash. 1909); Kons v. Pallange, 11 N.W.2d. 634 (Wis. 1943).* If the vendor takes steps such as retaking possession or reselling the land, which amount to a rescission, the vendee is entitled to a return of the purchase money paid. *Winter v. Kitto, 279 P. 1024 (Cal. App. 1st Dist. 1929)* (even though the vendee was in default); *Himebaugh v. Chalker, 245 N.W. 576 (Mich. 1932); Cohen v. A.F.A. Realty Corp., 165 N.E. 285 (N.Y. 1929).* Under the Florida rule, in the absence of bad faith by the vendor on breach of contract, the vendee can recover only the purchase money paid, the expenses of investigating title and any profit received by the vendor as the result of a subsequent sale. But in the case of bad faith or if the vendor had no title but was expecting to acquire one, the measure of damages is the value of the land at the time of breach plus interest from that date. *Gassner v. Lockett, 101 S.2d 33 (Fla. 1958).* Upon a mutual agreement of rescission the vendee is entitled to a return of the purchase money. *Martin v. Bell-Woods Co., 57 S.W.2d 271 (Tex. Civ. App. 1932).* Purchaser may recover portion of purchase price even though contract was oral. *Lacey v. Morgan, 282 N.E.2d 344 (Ind. App. 1972).* Where the seller repudiates the contract, he does not convert the buyer in possession into a trespasser or tenant. *Smeekens v. Bertrand, 302 N.E.2d 502 (Ind. App. 3d Dist. 1973),* superceded, *311 N.E.2d 431 (Ind. 1974).* Vendee may recover deposit if title is unmarketable. *Smith v. MacAlister, 294 N.E.2d 441 (Mass. App. 1972).*

(n82)Footnote 1359. *Cox v. RKA Corp., 753 A.2d 1112 (N.J. 2000); Chalu v. Tov-Le Realty Corp., 632 N.Y.S.2d 806 (N.Y. App. Div. 2d Dept. 1995); Potter v. Oster, 426 N.W.2d 148 (Iowa 1988); Sawyer v. Firestone, 513 A.2d 36 (R.I. 1986); Larson v. Metcalf, 207 N.W. 382 (Iowa 1926)* (giving the rescinding vendee a lien for improvements). Vendee entitled to rescind if vendor breaches covenant to make improvements. Catanzano v. Hydinger, *170 S. 214 (Ala. 1936); Eighty-Five Park Ave. Corp. v. Am. U. Club, 286 N.Y.S. 786 (N.Y. Sup. 1936).* Vendee may rescind if title is defective. *Darr v. Clevelin Realty Corp., 92 P.2d 475 (Cal. App. 2d Dist. 1939);* Kehl v. Miami Title & Abstract Co., *196 S. 610 (Fla. 1940); Parker v. Mouse, 84 P.2d 941 (Kan. 1938); Roby v. Arterburn, 108 S.W.2d 873 (Ky. App. 1937); Gepo Realty Corp. v. Pierce, 25 N.Y.S.2d 25 (N.Y. Sup. 1940); Ladegaard v. Connell, 281 N.W. 656 (Wis. 1938).* In Iowa the occupying claimants statute covers the situation where the vendee on rescission seeks to recover improvements. *Aurand v. Perry Town Lot Improvement Co., 159 N.W. 779 (Iowa 1916). See* Notes and Legislation--Vendee's Recovery for Improvements in Iowa, *41 Iowa L. Rev. 117 (1955).* A repudiation of the contract by the vendor while it is still pending entitles the vendee to a return of the purchase money. *Schon v. Lawrence, 242 N.W. 745 (Mich. 1932).*

(n83)Footnote 1360. *Franklin v. Jordan, 225 S.E.2d 721 (Ga. App. 1976); Hurwitz v. David K. Richards & Co., 436 P.2d 794 (Utah 1968)* (purchaser had the option of: treating the entire contract as broken and sue for damages or rescind contract and sue for money paid or for value of services or property furnished); *Ankeny v. Clark, 148 U.S. 345 (1893); Riggle v. Janss Inv. Corp., 88 F.2d 111 (9th Cir. 1937);* Catanzano v. Hydinger, *170 S. 214 (Ala. 1936); Melone v. Ruffino, 62 P. 93 (Cal. 1900); Darr v. Clevelin Realty Corp., 33 Cal. App. 2d. 500, 92 P.2d 475 (Cal. App. 2d Dist. 1939);* O'Steen v. Thomas, *200 S. 230 (Fla. 1941); Clark v. Weis, 87 Ill. 438 (Ill. 1877); Garionis v. Mickevice, 298 Ill. App. 458, 19 N.E.2d 108 (Ill. App. 1st Dist. 1939); Trammel v. Kemler, 285 N.W. 196 (Iowa 1939); Wilhelm v. Fimple, 31 Iowa 131 (Iowa 1870); Parker v. Mouse, 84 P.2d 941 (Kan. 1938); Back v. Back's Adminstr., 135 S.W.2d 911 (Ky. App. 1940); Doherty v. Dolan, 65 Maine 87 (Me. 1876); Hornbeck v. Midwest Realty, 287 Mich. 230, 283 N.W. 39 (Mich. 1938); Bartlett v. Smith, 109 N.W. 260 (Mich. 1906); Buswell v. O.W. Kerr Co., 128 N.W. 459 (Minn. 1910); Klapka v. Shrauger, 281 N.W. 612 (Neb. 1938); Justice v. Button, 131 N.W. 736 (Neb. 1911); Vandermade v. Appert, 5 A.2d 868 (N.J. Ch. 1939); Hutchinson v. Fishman, 8 N.Y.S.2d 894 (N.Y. Sup. 1938); Moore v. Williams, 22 N.E. 233 (N.Y. 1889); Cleveland Trust Co. v. Bouse, 127 N.E.2d 7 (Ohio 1955)* (a vendee has an equitable lien on the property to the extent of payments on purchase price in event of breach by vendor); *Leedy v. Ellis County Fair Assn., 110 P.2d 1099 (Okla. 1941); Durham v. Wick, 59 A. 824 (Pa. 1904); Continental Southland Sav. & Loan Assn. v. Jones, 142 S.W.2d 401 (Tex. Civ. App. 1940); Brown v. Cleverly, 70 P.2d 881 (Utah 1937); Stow v. Stevens, 7 Vt. 27 (Vt. 1835); Osterloh v. Osterloh, 285 N.W. 742 (Wis. 1939).*

(n84)Footnote 1361. *Blockdel Realty Co. v. Doyle, 6 A.2d 670 (N.J. Ch. 1939).* Vendee in sales contract entitled to equitable lien for purchase price on breach by vendor. *Cleveland Trust Co. v. Bouse, 127 N.E.2d 7 (Ohio 1955).*

(n85)Footnote 1362. *Yellowstone II Dev. Group, Inc. v. First Am. Title Ins. Co., 20 P.3d 755 (Mont. 2001), Baker v. Cambridge Chase, Inc., 725 A.2d 757 (Pa. Super. 1999)* (purchasers' failure to elect rescission or damages was not fatal to the complaint); *Seaton v. Lawson Chevrolet-Mazda, Inc., 821 S.W.2d 137 (Tenn. 1991); Kotz v. Rush, 238 S.W.2d 634 (Ark. 1951); Crane v. Ferrier-Brock Dev. Co., 130 P. 429 (Cal. 1913); O'Neal v. Miller, 70 S.E. 971 (Ga. App. 1911); Horn v. Phillips, 149 N.W. 80 (Iowa 1914); R.W. Kevil & Sons v. Wilford, Stunston & Co., 104 S.W. 348 (Ky. App. 1907); Thomas v. Reece, 53 N.W.2d 505 (Mich. 1952)* (rescission is a condition precedent to recovery of the purchase money); *Smith v. Mich. Realty & Constr. Co., 141 N.W. 635 (Mich. 1913); Laubengayer v. Rohde, 133 N.W. 535 (Mich. 1911); Steele v. Brazier, 123 S.W. 477 (Mo. App. 1909); Pierce v. Hellenic Am. Realty Co., 135 N.Y.S. 605 (N.Y. Sup. 1912); Torrey v. McFadyen, 81 S.E. 296 (N.C. 1914); Schechinger v. Gault, 130 P. 305 (Okla. 1913); Vernam v. Wilson, 31 Pa. Super. 257 (Pa. Super. 1906); Martinez v. Coggin, 135 S.W. 699 (Tex. Civ. App. 1911); Baker v. Becker, 141 N.W. 304 (Wis. 1913).*

(n86)Footnote 1363. *Lewis v. Huff, 872 P.2d 701 (Idaho 1994); Kaiser v. Market Square Discount Liquors, Inc., 992 P.2d 636 (Colo. App. 1999); Grill v. Hunt, 7 Cal. Rptr. 2d 768 (Cal. App. 4th Dist. 1992);* Drake v. Nunn, *97 S. 211 (Ala. 1923);* Messer Real Est. & Ins. Co. v. Ruff, *64 S. 51 (Ala. 1913); Bernardo v. Soderman, 124 P. 866 (Cal. App. 1st Dist. 1912); Clark v. Powell, 117 S.E. 250 (Ga. App. 1923); Hall v. Yaryan, 138 P. 339 (Idaho 1914); Smith v.*

Treat, 85 N.E. 289 (Ill. 1908); Pedley v. Freeman, 109 N.W. 890 (Iowa 1906); Katzeff v. Goldman, 142 N.E. 924 (Mass. 1924); Le Mieux v. Cosgrove, 193 N.W. 586 (Minn. 1923); Bennett v. Adams, 238 S.W.2d 442 (Mo. App. 1951); Norris v. Letchworth, 152 S.W. 421 (Mo. App. 1912); Dietz v. Rabe, 211 P. 343 (Mont. 1922); Adler v. Kohn, 147 N.W. 1131 (Neb. 1914); Gahan v. Plant, 83 A. 775 (N.J. Sup. 1912); Lewis v. Gay, 65 S.E. 907 (N.C. 1909); Hurley v. Anicker, 151 P. 593 (Okla. 1915); Cornely v. Campbell, 186 P. 563 (Or. 1920). See Kilpatrick v. Smith, 19 N.W.2d 699 (Iowa 1945); Grauel v. Rohe, 43 A.2d 201 (Md. 1945). Where the vendor refused to complete the transfer of title unless paid a sum of money larger than that contemplated in the sales contract and the vendee made such payment, the vendee was allowed to recover the additional payment after the deed had been delivered. *Lord v. Die Polder, 113 S.2d 440 (Fla. App. 1959).*

(n87)Footnote 1364. *Haynes v. Dunstan, 104 S.W.2d 1025 (Mo. App. 1937); Knowles v. La Pure, 65 P.2d 1260 (Wash. 1937).*

(n88)Footnote 1365. *Parchen v. Rowley, 82 P.2d 857 (Wash. 1938).* A vendee may seek relief from default in order to complete the contract, but not to recover partial payments (time was of the essence in the contract). *Barkis v. Scott, 208 P.2d 367 (Cal. 1949).*

(n89)Footnote 1366. *Lawrence v. Demos, 244 P.2d 793 (Wyo. 1952)* (denying restitution to the defaulting vendee since this would permit him to take advantage of his own breach).

(n90)Footnote 1367. *Yellowstone II Dev. Group, Inc. v. First Am. Title Ins. Co., 20 P.3d 755 (Mont. 2001); Pierce v. Farm Bureau Mut. Ins. Co., 548 N.W.2d 551 (Iowa 1996); In re Butler, 552 N.W.2d 226 (Minn. 1996); McMurray Oil Co. v. Deucalion Research, Inc., 842 P.2d 584 (Wyo. 1992); Buckingham v. Ryan, 953 P.2d 33 (N.M. App. 1997);* 1776 *Assoc. Corp. v. Broadway W. 57th St. Assoc., 585 N.Y.S.2d 316 (N.Y. App. Div. 1st Dept. 1992); Kerr v. Reed, 202 P. 142 (Cal. 1921); Sawyer v. Sterling Realty Co., 107 P.2d 449 (Cal. App. 1st Dist. 1940); Ross v. S. Cal. Junior College, 59 P.2d 1038 (Cal. App. 4th Dist. 1936); Little v. Kennedy, 260 P. 890 (Cal. App. 2d Dist. 1927);* Catterlin v. Peterson, 213 P.515 (Cal. App. 2d Dist. 1923). *But see Barkis v. Scott, 208 P.2d 367 (Cal. 1949);* Irwin Jaye Nebron, Student Author, Vendor and Purchaser: Rights of the Defaulting Vendee, *37 Cal. L. Rev. 704 (1949); Beatty v. Flannery, 49 S.2d 81 (Fla. 1950); People ex rel. Nelson v. Union Bank, 304 Ill. App. 254, 26 N.E.2d 178 (Ill. App. 1st Dist. 1940); Ryan v. Shoenberger, 224 Ill. App. 308 (Ill. App. 1st Dist. 1922); Fitchner v. Walling, 279 N.W. 417 (Iowa 1938); Dimon v. Wright, 214 N.W. 673 (Iowa 1927); Hamaker v. Johnson, 202 N.W. 10 (Iowa 1925);* McCain v. Hicks, *90 S. 506 (La. 1922); King v. Milliken, 143 N.E. 511 (Mass. 1924); Nelson v. Hacker, 270 N.W. 720 (Mich. 1936); Nelson Real Est. Agency v. Seeman, 180 N.W. 227 (Minn. 1920); In re First Nat'l Bank, 230 S.W. 358 (Mo. App. 1921); Gilmore v. Cover, 279 N.W. 177 (Neb. 1938); Maloy v. Muir, 86 N.W. 916 (Neb. 1901).* But contra result, *Hawkins v. Mullen, 118 Nebr. 129, 223 N.W. 670 (Neb. 1929); Mikulich v. Diltz, 281 P.2d 800 (Nev. 1955)* (cannot claim value of improvements as unjust enrichment); *Thompson v. Killheffer, 119 A. 770 (N.J. Sup. 1923); Fleischer v. Lockwood Lumber Co., 16 N.Y.S.2d 205 (N.Y. App. Div. 2d Dept. 1939); Rollton Syndicate v. Widlitz, 219 N.Y.S. 383 (N.Y. App. Div. 2d Dept. 1927); Friedland v. Argentor Holding Corp., 211 N.Y.S. 896 (N.Y. App. Div. 1st Dept. 1925); Mosa v. Rubenstein, 191 N.Y.S. 496 (N.Y. Sup. 1921); Knowles v. Wallace, 188 S.E. 195 (N.C. 1936); Harrington v. Eggen, 199 N.W. 447 (N.D. 1924); Jackson v. Peddycoart, 224 P. 689 (Okla. 1924); McCracken v. Walnut Park Garage, 68 P.2d 123 (Or. 1937); Lea v. Blokland, 257 P. 801 (Or. 1927); Seekins v. King, 17 A.2d 869 (R.I. 1949); Champion v. Taylor, 229 S.W. 627 (Tex. Civ. App. 1921); Crim v. Watson, 82 P.2d 172 (Wash. 1938). See Schroeder v. Morris, 20 S.2d 437 (La. App. 1945); Pirman v. Kurtz, 45 N.Y.S.2d 508 (N.Y. App. Div. 3d Dept. 1943).* Under California statute, the defaulting purchaser is entitled to recover the difference between the amount of down payments and the damages caused by the breach of contract. *MacFadden v. Walker, 92 Cal. Rptr. 406 (Cal. App. 3d Dist. 1971);* Deering's Codes, Civil Code, §§ 1670, 1671, and 3294.

(n91)Footnote 1368. *Glock v. Howard & Wilson Colony Co., 55 P. 713 (Cal. 1898); Marlowe v. Chicago Title & Trust Co., 55 N.E.2d 101 (Ill. App. 1st Dist. 1944); Lake v. Bernstein, 246 N.W. 790 (Iowa 1933); Seekins v. King, 17 A.2d 869 (R.I. 1941).*

(n92)Footnote 1369. *Glenn v. Price, 86 N.E.2d 542 (Ill. App. 3d Dist. 1949); Dooley v. Stillson, 128 A. 217 (R.I.*

1925). Contra, defaulting vendee is entitled to return of payments less damages. *Kudokas v. Balkus, 103 Cal. Rptr. 318 (Cal. App. 1972).*

(n93)Footnote 1370. *Shapiro v. Kimbrough, 20 S.2d 24 (La. App. 1st Cir. 1944).*

(n94)Footnote 1371. *Raines v. Moran, 54 N.Y.S.2d 194 (N.Y. Sup. 1944); McBride v. Stewart, 249 P. 114 (Utah 1926).*

(n95)Footnote 1372. *Harman v. Franks, 68 P.2d 54 (Okla. 1936).*

(n96)Footnote 1373. *Houchin v. Braham Inv. Co., 279 N.W. 370 (Minn. 1938).*

(n97)Footnote 1374. *Cox v. RKA Corp., 753 A.2d 1112 (N.J. 2000); Warner v. Davis, 933 P.2d 1372 (Haw. App. 1997); Cook v. Snyder, 61 P.2d 53 (Cal. App. 2d Dist. 1936);* Kehl v. Miami Title & Abstract Co., *196 S. 610 (Fla. 1940); Brock v. Pomeroy, 27 N.E.2d 56 (Ill. App. 2d Dist. 1940); Roby v. Arterburn, 108 S.W.2d 873 (Ky. App. 1937); Curatelli v. Barnard, 200 A. 795 (N.J. Sup. 1938); Gepo Realty Corp. v. Pierce, 25 N.Y.S.2d 25 (N.Y. Sup. 1940); Moser v. Jacob Brown Bldg. & Loan Assn., 182 A. 531 (Pa. 1936); Ladegaard v. Connell, 281 N.W. 656 (Wis. 1938).* The vendee's advance rejection of curable title defects was unjustifiable and constituted default in the contract forfeiting the down payment. *Cohen v. Kranz, 238 N.Y.S.2d 928 (N.Y. 1963).*

(n98)Footnote 1375. *Cox v. RKA Corp., 753 A.2d 1112 (N.J. 2000); Warner v. Davis, 933 P.2d 1372 (Haw. App. 1997)* (holding "time is of the essence" clause cannot be used to cancel a contract with willing purchasers when vendor is unable to perform); *Young v. Brookshire Vill. Props., 655 N.E.2d 1329 (Ohio App. 12th Dist. 1995); Hickox v. Bell, 552 N.E.2d 1133 (Ill. App. 5th Dist. 1990); Shaw v. Owens, 18 F.2d 954 (5th Cir. 1927); Goodrich-Lockhart Co. v. Sears, 270 F. 971 (E.D. Ky. 1919); Tudor v. Raudabaugh, 278 F. 254 (D. Mont. 1922);* Chandler v. Wilder, *110 S. 306 (Ala. 1926); Leroy v. Harwood, 119 Ark. 418, 178 S.W. 427 (Ark. 1915); Ind. & Ark. Lumber & Mfg. Co. v. Pharr, 102 S.W. 686 (Ark. 1907); Darr v. Clevelin Realty Corp., 92 P.2d 475 (Cal. App. 2d Dist. 1939); Key v. Vidovich, 209 P. 375 (Cal. App. 1st Dist. 1922); Horne v. Hughes, 124 P. 736 (Cal. App. 2d Dist. 1912); Cabrera v. Payne, 103 P. 176 (Cal. App. 1st Dist. 1909);* Kehl v. Miami Title & Abstract Co., *196 S. 610 (Fla. 1940);* Dallas Inv. Co. v. Krouse Sec. Corp., *190 S. 489 (Fla. 1939);* Musselwhite v. Oleson, *53 S. 944 (Fla. 1910); Bank of Com. v. Knowles, 32 Ga. App. 800, 124 S.E. 910 (Ga. App. 1924); Jay v. Sweatt, 70 S.E. 16 (Ga. App. 1911); Boyd v. Boley, 139 P. 139 (Idaho 1914); Brock v. Pomeroy, 27 N.E.2d 56 (Ill. App. 2d Dist. 1940); Rochells v. Brockman, 152 Ill. App. 253 (Ill. App. 1st Dist. 1909); Gifford v. Wilcox, 143 N.E. 368 (Ind. App. 1924); Lahner v. Schaum, 201 N.W. 80 (Iowa 1924); Crooke v. Nelson, 195 Iowa 681, 191 N.W. 122 (Iowa 1922); Mathers v. Christianson, 154 N.W. 455 (Iowa 1915); Parker v. Mouse, 84 P.2d 941 (Kan. 1938); Robertson v. Talley, 115 P. 640 (Kan. 1911); Roby v. Arterburn, 108 S.W.2d 873 (Ky. App. 1937); Mann v. Campbell, 250 S.W. 110 (Ky. App. 1923);* Succession of Fay, *109 S. 824 (La. 1926); Cummings v. Cobb, 5 La. App. 646 (La. App. 1927); Leonard v. Wheeler, 158 N.E. 502 (Mass. 1927); Buckley v. Meer, 146 N.E. 227 (Mass. 1925); Chatalian v. Di Fusco, 139 N.E. 174 (Mass. 1923); Engel v. Mahlen, 153 Minn. 1, 189 N.W. 422 (Minn. 1922); Brown v. Cal. & W. Land Co., 177 N.W. 774 (Minn. 1920); Benson v. Watkins, 285 S.W. 407 (Mo. 1926); Parsons v. Kelso, 125 S.W. 227 (Mo. App. 1910); Dent v. Johnson, 195 N.W. 938 (Neb. 1923); Durland Trust Co. v. Augustyn, 195 N.W. 172 (Neb. 1923); Justice v. Button, 131 N.W. 736 (Neb. 1911); Naugle v. McVoy, 115 A. 393 (N.J. 1921); Vandermade v. Appert, 5 A.2d 868 (N.J. Ch. 1939); Composite Metal Lath Co. v. Glasco Ice Co., 157 N.Y.S. 363 (N.Y. App. Div. 1st Dept. 1916); Horowitz v. Bergen Assoc., 295 N.Y.S. 33 (N.Y. Sup. 1937); Schwimmer v. Roth, 182 N.Y.S. 12 (N.Y. Sup. 1920); First Nat'l Bank v. Kopp, 209 N.W. 974 (N.D. 1926); Hawkins v. Wright, 226 P.2d 957 (Okla. 1951); Gibson v. Brannum, 230 P. 861 (Okla. 1924); Bishoff v. Myers, 223 P. 165 (Okla. 1924); Joiner v. Ardmore Loan & Trust Co., 124 P. 1073 (Okla. 1912); Seguin v. Maloney-Chambers Lumber Co., 253 P.2d 252 (Or. 1953)* (a purchaser who learns of an unrecorded deed to a third party has a prior lien on the property to the extent of the purchase money paid before acquiring such knowledge); *Moser v. Jacob Brown Bldg. & Loan Assn., 182 A. 531 (Pa. 1936); Rayman v. Klare, 89 A. 591 (Pa. 1913); Croskey v. Stockley, 85 Pa. Super. 498 (Pa. Super. 1924); Standish v. Heaton, 123 A. 691 (R.I. 1924); Bentley v. Ringer, 248 S.W.2d 952 (Tex. Civ. App. 1952); Kroschewsky v. Northside Inv. Co., 139 S.W.2d 358 (Tex. Civ. App. 1940); Schaefer v. E.F. Gregory Co., 192 P. 968 (Wash. 1920); Davis v. Lee,*

100 P. 752 (Wash. 1909); Ladegaard v. Connell, 281 N.W. 656 (Wis. 1938). Purchaser entitled to refund of taxes paid by him. Hudson v. Tilly, *98 S. 265 (La. 1923).* Actual eviction need not be shown. *Tennent v. Caffery, 163 La. 976, 113 S. 167 (La. 1927).* Where under a parol contract of sale in good faith the vendee had made improvements, the vendor was required to pay for the improvements or permit the vendee to remove them. *Christopher v. Garrett, 292 S.W.2d 926 (Tex. Civ. App. 1956). See* Tommy E. Stinson, Student Author, Property--The Right to Compensation for Permanent and Valuable Improvements Placed Upon Land While in Good Faith Adverse Possession, *9 Baylor L. Rev. 437 (1957).*

(n99)Footnote 1376. *Robinson v. Bressler, 240 N.W. 564 (Neb. 1932).* The vendee is not required to advance any of the purchase price to assist the vendor in clearing the title. Nicolopoolos v. Hill, *117 S. 185 (Ala. 1928).*

(n100)Footnote 1377. *Warner v. Davis, 933 P.2d 1372 (Haw. App. 1997); Higgins v. Kenney, 126 S.E. 827 (Ga. 1925); Zapf Realty Co. v. Brown, 106 S.E. 748 (Ga. App. 1921); Kellogg v. Kartte, 154 N.E. 231 (Ill. 1926); Joslyn v. Irwin-Dick Co., 209 N.W. 889 (Minn. 1926); Sanders v. Sheets, 287 S.W. 1069 (Mo. App. 1926); Norton v. W.E. Stewart Land Co., 228 S.W. 838 (Mo. App. 1921); Lloyd v. Weinstock, 137 A. 917 (N.J. 1927); Cleveland Trust Co. v. House, 127 N.E.2d 7 (Ohio 1955); Seyfer v. Robinson, 219 P. 902 (Okla. 1923); McDermott v. Reiter, 124 A. 187 (Pa. 1924).*

(n101)Footnote 1378. *Kutzin v. Pirnie, 591 A.2d 932 (N.J. 1991); Chateau D'If Corp. v. City of New York, 641 N.Y.S.2d 252 (N.Y. App. Div. 1st Dept. 1996); Ochs v. Albin, 903 P.2d 906 (Or. App. 1995);* see also, *Cox v. RKA Corp., 753 A.2d 1112 (N.J. 2000)* (discussing vendor's lien as a remedy); *Hazleton v. Le Due, 10 App. D.C. 379 (D.C. App. 1897); Cowdery v. Greenlee, 55 S.E. 918 (Ga. 1906); Bartlett v. Wise, 348 N.E.2d 652 (Ind. App. 1976)* (allowing vendee defaulting to recover purchase payments made the date of the default which amounted to one-third the principal due); *Old Colony RR. Corp. v. Evans, 72 Mass. 25 (Mass. 1856); Griswold v. Sabin, 51 N.H. 167 (N.H. 1871); Keitel v. Zimmerman, 43 N.Y.S. 676 (N.Y. Sup. 1897); Kempner v. Heidenheimer, 65 Tex. 587 (Tex. 1886); Laird v. Pim, 7 M. & W. 474.* Contra, defaulting buyer permitted restitution of payments where sales contract is enforceable. *Freedman v. Rector, Wardens & Vestrymen of St. Mathias Parish, 230 P.2d 629 (Cal. 1951).* The cases are not in accord as to whether a defaulting buyer on an oral contract to sell realty recover the down payments. *Denied, Thompson v. Schurman, 150 P.2d 509 (Cal. App. 3d Dist. 1944).* Contra, and preventing forfeiture, *Raff v. Baird, 283 P.2d 927 (Idaho 1955). See,* Ronald A. Norman, Student Author, Restitutionary Rights of a Vendee in Default of an Oral Contract for the Sale of Land, *19 Hastings L.J. 1212 (1968).*

(n102)Footnote 1379. *Hansbrough v. Peck, 72 U.S. 497 (1866).*

(n103)Footnote 1380. *Seekins v. King, 17 A.2d 869 (R.I. 1941).*

(n104)Footnote 1381. *Lake v. Bernstein, 246 N.W. 790 (Iowa 1933); Schon v. Lawrence, 242 N.W. 745 (Mich. 1932); Himebaugh v. Chalker, 245 N.W. 576 (Mich. 1932); Pierson v. Dorff, 223 N.W. 579 (Wis. 1929).*

(n105)Footnote 1382. *Knedlick v. Dept. of Comm. & Econ. Dev., 803 P.2d 400 (Alaska 1990). See* discussion of cases in *Kutzin v. Pirnie, 591 A.2d 932 (N.J. 1991); Grill v. Hunt, 7 Cal. Rptr. 2d 768 (Cal. App. 4th Dist. 1992)* (defaulting vendee has the burden of proof); *McKiernan v. Valleau, 51 A. 102 (R.I. 1902).* Finally, it would be manifestly unfair and inequitable and constitute an unjust enrichment to permit defendants to retain the earnest money paid them by plaintiffs. First, because there is no showing that they were damaged by any act of plaintiffs; the damage, if any, resulting from acts of their own. Second, because the acts of defendants do not show entire candor or good faith in both their failure to warn plaintiffs before attempting to work a forfeiture, and their failure to live up to the conditions precedent of supplying the promised deed of conveyance for inspection or of getting a formal release from the lessees of at least that part of the lease containing the option to buy. And last, it is to be observed that the contract between the parties does not contain any forfeiture provision. *Hillman v. Busselle, 185 P.2d 311 (Ariz. 1947); Malmberg v. Baugh, 218 P. 975 (Utah 1923).*

(n106)Footnote 1383. *Simmons v. Pilkenton, 497 S.E.2d 613 (Ga. App. 1998)* (purchaser must allege all elements of fraud in the inducement not merely false representations) *Jones v. Cartee, 489 S.E.2d 141 (Ga. App. 1997); Turner v.*

Brewer, 298 F. 685 (D.C. App. 1924); Harris v. Miller, 235 P. 981 (Cal. 1925); Weber v. Hulbert, 225 Ill. App. 321 (Ill. App. 1st Dist. 1922); Silverman v. Rothfarb, 142 N.E. 152 (Mass. 1924); Lackovic v. Campbell, 195 N.W. 798 (Mich. 1923); Blosick v. Warmbold, 187 N.W. 136 (Minn. 1922); Hawthorne v. Odenson, 120 A. 797 (N.J. Ch. 1923); Iverson v. McDonald, 191 N.W. 1013 (N.D. 1923); Delafant v. Shapiro, 73 Pa. Super. 186 (Pa. Super. 1919); Knapp v. Davidson, 192 N.W. 75 (Wis. 1923).

(n107)Footnote 1384. 1776 *Assoc. Corp. v. Broadway W. 57th St. Assoc., 585 N.Y.S.2d 316 (N.Y. App. 1st Dept. 1992); Bend v. Title & Trust Co., 289 P. 1044 (Or. 1930).*

(n108)Footnote 1385. *Turpin v. Jackson County, 35 S.E.2d 180 (N.C. 1945).*

(n109)Footnote 1386. *Lytle v. Scottish Am. Mtg. Co., 50 S.E. 402 (Ga. 1905); Malmberg v. Baugh, 218 P. 975 (Utah 1923).*

(n110)Footnote 1387. *Sorensen v. Larue, 252 P. 494 (Idaho 1926);* Harvey v. Prest, *113 S. 847 (La. 1927); Calvert v. Joseph, 257 P. 680 (N.M. 1927); Knowles v. Wallace, 188 S.E. 195 (N.C. 1936); Rynhart v. Welch, 65 P.2d 1420 (Or. 1937); Knowles v. La Pure, 65 P.2d 1260 (Wash. 1937).*

(n111)Footnote 1388. *Interstate Agri Servs., Inc. v. Bank Midwest, N.A., 982 S.W.2d 796 (Mo. App. 1998); Smith v. Bach, 199 P. 1106 (Cal. App. 2d Dist. 1921); Poetker v. Dyck, 257 P. 185 (Cal. App. 2d Dist. 1927); Podolnick v. Hamilton, 349 S.W.2d 715 (Tex. 1961)* (permitting a married woman to recover earnest money made from her separate funds, and to disaffirm the contract). *See* Jack Beech, Student Author, Earnest Money - Married Woman's Power to Contract, *13 Baylor L. Rev. 285 (1961).*

(n112)Footnote 1389. *Vowers & Sons, Inc. v. Strasheim, 538 N.W.2d 756 (Neb. 1995); Steiner v. Bran Park Assoc., 582 A.2d 173 (Conn. 1990); Anderson v. Onsager, 455 N.W.2d 885 (Wis. 1990); Blunt v. Kelly, 219 Ill. App. 327 (Ill. App. 1st Dist. 1920); Brown v. Cal. & W. Land Co., 177 N.W. 774 (Minn. 1920); Jose v. Aufderheide, 293 S.W. 476 (Mo. App. 1927); Williams v. Ellis, 239 S.W. 157 (Mo. App. 1922); Sponsler v. Max, 203 N.W. 566 (Neb. 1925); Thrift v. Laird, 237 P. 689 (Or. 1925).* No tender necessary where vendor had no title. *Hopkins v. Phillips, 76 Pa. Super. 243 (Pa. Super. 1920).*

(n113)Footnote 1390. *Head v. Hastings, 509 S.E.2d 616 (Ga. 1998); Nowlin v. Davis, 538 S.E.2d 900 (Ga. App. 2000);* Hall v. Tircuit, *106 S. 677 (La. 1926); Leonard v. Wheeler, 158 N.E. 502 (Mass. 1927); McBride v. Stewart, 249 P. 114 (Utah 1926).*

(n114)Footnote 1391. *Benedict v. Nielsen, 215 N.W. 658 (Iowa 1927); Dichter v. Isaacson, 138 A. 920 (N.J. 1927).*

(n115)Footnote 1392. *Basil v. Vincello, 553 N.E.2d 602 (Ohio 1990); Robinson v. Bressler, 240 N.W. 564 (Neb. 1932).*

(n116)Footnote 1393. *Kruger v. Harber Realty Corp., 78 A.2d 621 (N.J. Super. Ch. 1951).*

(n117)Footnote 1394. *Smith v. Irvine, 68 S.2d 567 (Fla. 1953).*

(n118)Footnote 1395. *Garbarino v. Union Sav. & Loan Assn., 109 P.2d 688 (Colo. 1941).*

(n119)Footnote 1396. *Porter v. Smith, 486 N.W.2d 846 (Neb. 1992); Kutzin v. Pirnie, 591 A.2d 932 (N.J. 1991); McMurray Oil Co. v. Deucalion Research, Inc., 845 P.2d 158 (N.M. 1992); Sawyer v. Sterling Realty Co., 107 P.2d 449 (Cal. App. 1st Dist. 1940); Forest Preserve Real Est. Improvement Corp. v. Miller, 30 N.E.2d 126 (Ill. App. 1st Dist. 1940); Gregory v. Nelson, 78 P.2d 889 (Kan. 1938); Rynhart v. Welch, 65 P.2d 1420 (Or. 1937); Continental Southland Sav. & Loan Assn. v. Jones, 142 S.W.2d 401 (Tex. Civ. App. 1940); Crim v. Watson, 82 P.2d 172 (Wash. 1938); Henry Uihlein Realty Co. v. Downtown Dev. Corp., 101 N.W.2d 775 (Wis. 1960)* (defaulting vendee cannot recover money

paid in part performance where vendor is ready and willing to perform).

(n120)Footnote 1397. *Cox v. RKA Corp., 753 A.2d 1112 (N.J. 2000)* (lien); *Midland Sav. Bank FSB v. Stewart Group, LC, 533 N.W.2d 191 (Iowa 1995)* (no lien); *Raff v. Baird, 283 P.2d 927 (Idaho 1955)* (lien); *Mikulich v. Diltz, 281 P.2d 800 (Nev. 1955)* (no lien). *See* Arthur L. Corbin, The Right of a Defaulting Vendee to the Restitution of Installments Paid, *40 Yale L.J. 1013 (1931).*

(n121)Footnote 1398. *Sturgis v. Meadors, 266 S.W.2d 81 (Ark. 1954); Walker v. C.C. Bintz & Shaw, Inc., 280 P.2d 767 (Utah 1955).*

(n122)Footnote 1399. *Garibaldi v. City of Yonkers, 102 N.Y.S.2d 200 (N.Y. Sup. 1949).*

(n123)Footnote 1400. *Cedar Lane Inv. v. Am. Roofing Supply, 919 P.2d 879 (Colo. App. 1996); Freedman v. Rector, Wardens & Vestrymen, 230 P.2d 629 (Cal. 1951); Seekins v. King, 17 A.2d 869 (R.I. 1941)* (permitting the vendor to resell and reap a profit where vendee was wholly at fault in defaulting); *Malmberg v. Baugh, 218 P. 975 (Utah 1923).* Supported by Arthur L. Corbin, The Right of a Defaulting Vendee to the Restitution of Installments Paid, *40 Yale L.J. 1013 (1931).*

(n124)Footnote 1401. *Beard v. S/E Joint Venture, 581 A.2d 1275 (Md. 1990); Smith v. Herco, Inc., 900 S.W.2d 852 (Tex. App. 1995); Conger v. Weaver, 20 N.Y. 140 (N.Y. 1859).* Contra, *Hopkins v. Lee, 19 U.S. 109 (1821).* Recovery for loss of profits from contemplated sale or use of land, where vendor fails or refuses to convey, *11 A.L.R.3d 719 (1967).* Approving the restatement rule on contracts as to damages for breach. *Ashton v. Bennett, 503 S.W.2d 392 (Tex. Civ. App. 1974).*

(n125)Footnote 1402. Flureau v. Thornhill, 2 Wm. Black 1078, *96 Eng. Rep. 635; Bain v. Fothergill, L.R. 7 H.L. 158; Bulkley v. Rouken Glen, Inc., 226 N.Y.S. 544 (N.Y. App. Div. 2d Dept. 1928).*

(n126)Footnote 1403. *Pierce v. Farm Bureau Mut. Ins. Corp., 548 N.W.2d 551 (Iowa 1996); Doherty v. Dolan, 65 Maine 87 (Me. 1876)* (measure of damages for breach by vendor is value of land at time conveyance should have been made less the purchase price); *Corby v. Ward, 171 A. 818 (N.J. 1934)* (the vendor may recover the purchase price, not merely damages).

(n127)Footnote 1404. *Loda v. H.K. Sargeant & Assoc., Inc., 448 A.2d 812 (Conn.1982); Beard v. S/E Joint Venture, 581 A.2d 1275 (Md. 1990); Kerry Constr. Co. v. Hunt, 331 N.W. 2d 519 (Neb. 1983); Wilkens v. Kaufman, 615 S.2d 613 (Ala. Civ. App. 1992); Widener v. Ashkouti, 521 S.E.2d 215 (Ga. App. 1999); Annon II, Inc. v. Rill, 597 N.E.2d 320 (Ind. App. 1st Dist. 1992); Hall v. Lovell Regency Homes Ltd. Partn., 708 A.2d 344 (Md. App. 1998); Jones v. Lee, 971 P.2d 858 (N.M. App. 1998); Glezos v. Frontier Inv., 896 P.2d 1230 (Utah App. 1995); Phillips & Sager v. Kern, 271 F. 547 (D.C. App. 1921); Gabrielson v. Hogan, 298 F. 722 (8th Cir. 1924);* Greenberg v. Ray, *108 S. 385 (Ala. 1926); McGregor v. Echols, 289 S.W. 736 (Tex. Civ. App. 1926); Shurtleff v. Marcus Land & Inv. Co., 211 P. 244 (Cal. App. 2d Dist. 1922); Shaw v. Union Escrow & Realty Co., 53 Cal. App. 66, 200 P. 25 (Cal. App. 2d Dist. 1921); Dean v. Hawes, 131 P. 885 (Cal. App. 1st Dist. 1913); Lynam v. Harvey, 108 A. 850 (Del. Ch. 1919);* Key v. Alexander, *108 S. 883 (Fla. 1926); Mitchell v. Evans, 20 S.E.2d 782 (Ga. App. 1942); Beaullieu v. Atlanta Title & Trust Co., 4 S.E.2d 78 (Ga. App. 1939); Bell v. Tucker, 139 S.E. 573 (Ga. App. 1927); Killarney Realty Co. v. Wimpey, 118 S.E. 581 (Ga. App. 1923); King v. Brice, 88 S.E. 960 (Ga. 1916); McMillen v. Betz, 224 Ill. App. 117 (Ill. App. 2d Dist. 1922); Adams v. Pendarvis, 217 Ill. App. 535 (Ill. App. 3d Dist. 1920); Millikan v. Hunter, 100 N.E. 1041 (Ind. 1913); Buechler v. Olson, 189 N.W. 741 (Iowa 1922)* (time of suit and not time for performance); *Carter v. Schrader, 175 N.W. 329 (Iowa 1919); McAdam v. Leak, 208 P. 569 (Kan. 1922); First M.E. Church v. North, 140 P. 888 (Kan. 1914); Welch v. Jenkins, 227 S.W. 798 (Ky. App. 1921); Walsh v. Hennessy, 45 N.E.2d 952 (Mass. 1942); Craine v. Miller, 215 N.W. 355 (Mich. 1927); Frederick v. Hillebrand, 165 N.W. 810 (Mich. 1917); Howe v. Gray, 174 N.W. 612 (Minn. 1919); Legrotta v. Pittsburgh Plate Glass Co., 220 S.W. 705 (Mo. App. 1920); Householder v. Nispel, 195 N.W. 932 (Neb. 1923); Ridgeway v. E. Colo. Dev. Co., 180 N.W. 587 (Neb. 1920); Cohen v. Cyzam Realty Co., 130 A. 440 (N.J. Sup.*

1925); Ackley v. Parsons, 181 N.Y.S. 116 (N.Y. App. Div. 1920); Grosso v. Sporer, 206 N.Y.S. 227 (N.Y. Sup. 1924); Howell v. Pate, 106 S.E. 454 (N.C. 1921); McCarty v. Lingham, 146 N.E. 64 (Ohio 1924); S. B. Lawrence & Co. v. Conestoga Nat'l Bank, 49 Lane. Rev. (Pa.) 45; *Dooley v. Stillson, 128 A. 217 (R.I. 1925); McMahan v. McMahon, 115 S.E. 293 (S.C. 1922); Tidrick v. Hart, 213 N.W. 7 (S.D. 1927); Casey v. Jones, 189 S.W.2d 515 (Tex. Civ. App. 1945); Lee v. Watson, 181 S.W.2d 599 (Tex. Civ. App. 1944); Broun v. Shannon, 290 S.W. 802 (Tex. Civ. App. 1926); Stinson v. Sneed, 163 S.W. 989 (Tex. Civ. App. 1914); Malmberg v. Baugh, 218 P. 975 (Utah 1923); Spruill v. Shirley, 28 S.E.2d 705 (Va. 1944); Matthews v. LaPrade, 130 S.E. 788 (Va. 1925); McDaniel v. Daves, 123 S.E. 663 (Va. 1924); Greer v. Doriot, 120 S.E. 291 (Va. 1923); Mooring v. Warnock, 121 S.E. 732 (W. Va. 1924); McFarlane v. Dixon, 187 N.W. 671 (Wis. 1922).* Where contract provides for monthly payments, the measure of damages is the difference between the purchase price and the reasonable market value at the date of rescission, plus the amount paid on the purchase price, minus the reasonable rental value during the time the buyer had possession. *Legrotta v. Pittsburgh Plate Glass Co., 220 S.W. 705 (Mo. App. 1920).* Before a vendee is entitled to loss of profits on breach of contract to sell, there must be a reasonable certainty of amount of damages. *Gilmore v. Cohen, 386 P.2d 81 (Ariz. 1963).* California limits damages for breach of contract to sell to the difference between the pre-emptive price and the market value. *Mercer v. Lemmens, 40 Cal. Rptr. 803 (Cal. App. 1964).* There can be no damages for loss of bargain in breach of contract to sell land but only recovery of purchase money paid. *Mercer v. Lemmens, 40 Cal. Rptr. 803 (Cal. App. 1964); Frey v. Nakles, 112 A.2d 329 (Pa. 1955).* Allowing loss of bargain where vendor knew of deficit even though he thought it could be removed. *Diamond C., Inc. v. Gilbert, 216 N.Y.S.2d 609 (N.Y. App. Div. 1961); In re Craven's Est., 82 A.2d 60 (Pa. Super. 1951).* Allowing recovery for loss of bargain under all circumstances. *Land v. Coe, 136 S.E.2d 269 (N.C. 1964); Freedman v. Cholick, 379 P.2d 575 (Or. 1963).* Damages for breach of contract are difference between value on date of breach and on date of sale. *Popwell v. Abel, 226 S.2d 418 (Fla. App. 1969).* Denying loss of profits as damages. *Capaldi v. Burlwood Realty Corp., 214 N.E.2d 71 (Mass. 1966); Hardinger v. Till, 96 P.2d 262 (Wash. 1939).* Awarding damages to vendee for loss of profits. *Norman v. McClelland, 354 S.W.2d 906 (Mo. App. 1962); Merritt v. Adams County Land & Inv. Co., 151 N.W. 11 (N.D. 1915).* Vendee on vendor's breach of contract to sell recovers difference between market value at time conveyance should have been made and contract price. *Freedman v. Cholick, 379 P.2d 575 (Or. 1963).* Vendor may recover on default the difference between the rental value of the property and the payments made. *Johnson v. Gilbert, 382 P.2d 87 (Or. 1963).* In case of a partial failure of title (25 acres out of 125), the measure of damages is the ratio of the value of the defective title portion to the value of the entire portion. *Hepler v. Atts, 192 A.2d 138 (Pa. Super. 1963).* Damages awarded against a purchaser who breaches the contract is the difference between the unpaid principal balance of the land contract and the fair cash market value of the land on date of breach. *Mahoney v. Tingley, 520 P.2d 628 (Wash. App. 1974). See also, Flureau v. Thornhill, 96 Eng. Rep. 635 (1756).*

(n128)Footnote 1405. *Rubin v. Schottenstein, Zox & Dunn, 119 F. Supp. 2d 787 (S.D. Ohio 2000); Midwest Home Distrib., Inc. v. Domco Indus. Ltd., 585 N.W.2d 735 (Iowa 1998); Prospect Dev. Co. v. Bershader, 515 S.E.2d 291 (Va. 1999); Morehouse v. Behlmann Pontiac-GMC Truck Serv., Inc., 31 S.W.3d 55 (Mo. App. 2000); First A. Mgt. Corp. v. Dunlea Realty Co., 507 S.E.2d 56 (N.C. App. 1998); Metro. Life Ins. Co. v. Haney, 987 S.W.2d 236 (Tex. App. 1999);* Milton Realty Co. v. Wilson, *107 S. 92 (Ala. 1926); Valenti v. Coral Reef Shopping Ctr., Inc., 316 S.2d 589 (Fla. App. 1975)* (holding valid provision for liquidated damages in a real estate sales contract); *Bentley v. Barrett, 106 S.E. 815 (Ga. App. 1921); Jarrett v. McKinnon, 106 S.E. 809 (Ga. App. 1921); Taylor v. Hill, 221 S.W. 267 (Tex. Com. App. 1920); Logwood v. Holland, 108 S.E. 571 (Va. 1921); Rackham v. Koch, 216 P. 835 (Wash. 1923).* The California cases now seem to recognize liquidated damages in a land sale contract while denying clauses forfeiting down payments. *Freedman v. Rector, Wardens & Vestrymen, 230 P.2d 629 (Cal. 1951); Caplan v. Schroeder, 15 Cal. Rptr. 145 (Cal. 1961).* Purchaser entitled to loss of bargain on seller's breach of contract whether in good or bad faith. *Smith v. Warr, 564 P.2d 771 (Utah 1977). See* John R. Hetland, Real Property and Real Property Security: The Well-Being of the Law, *53 Cal. L. Rev. 151 (1965).*

(n129)Footnote 1406. *Clark v. Beverly Enters.-Missouri, Inc., 872 S.W.2d 522 (Mo. App. 1994); Sabrina W. v. Willman, 540 N.W.2d 364 (Neb. App. 1995); Millikan v. Hunter, 100 N.E. 1041 (Ind. 1913); Roper v. Milbourn, 153 N.W. 557 (Neb. 1915). See Denver-Laramie Realty Co. v. Wyo. Trout & Produce Co., 219 F. 155 (8th Cir. 1915).*

Plaintiff is entitled to at least nominal damage. *Gitson v. Yale Land Co., 180 N.W. 593 (Mich. 1920); Legrotta v. Pittsburgh Plate Glass Co., 220 S.W. 705 (Mo. App. 1920).* Agreements for liquidated damages in sales of realty are valid unless the damages are readily ascertainable at the time the contract is made. *Hutchison v. Tompkins, 259 S.2d 129 (Fla. 1972).* Vendor seeking to rescind must prove his damages. *Ward v. Union Bond & Trust Co., 243 F.2d 476 (9th Cir. 1957).*

(n130)Footnote 1407. *Kuhn v. Spatial Design, Inc., 585 A.2d 967 (N.J. Super. App. Div. 1991); Goodritz v. McMahon, 64 Pa.Super. 479 (Pa. Super. 1915).* Damage is for breach of covenant against encumbrances and is the difference between the value of the property with encumbrance and the value without the encumbrance. *In re Meehan's Est., 141 N.W.2d 218 (Wis. 1966).*

(n131)Footnote 1408. *Sheppard v. Stanich, 749 N.E.2d 609 (Ind. App. 2001); Gilpin County Min. Co. v. Drake, 9 P. 787 (Colo. 1886); Gray v. Meek, 64 N.E. 1020 (Ill. 1902); Goodpaster v. Porter, 11 Iowa 161 (Iowa 1860); Oatman v. Walker, 33 Maine 67 (Me. 1851); Inhabitants of Ama v. Plummer, 4 Maine 258 (Me. 1826); Latrobe v. Winans, 43 A. 829 (Md. 1899); Curran v. Rogers, 35 Mich. 221 (Mich. 1876); Garrard v. Dollar, 49 N. Car. 175 (N.C. 1856).*

(n132)Footnote 1409. *Curran v. Rogers, 35 Mich. 221 (Mich. 1876); Smith Granite Co. v. Newall, 47 A. 597 (R.I. 1900).*

(n133)Footnote 1410. *McBrayer v. Cohen, 18 S.W. 123 (Ky. App. 1892); Gardner v. Armstrong, 31 Mo. 535 (Mo. 1862).*

(n134)Footnote 1411. *Lafarge Corp. v. Wolff, Inc., 977 S.W.2d 181 (Tex. App. 1998); Norris v. Letchworth, 152 S.W. 421 (Mo. App. 1912); Mundy's Exec. v. Garland, 83 S.E. 491 (Va. 1914).* Even a defaulter may recover so much of the down payment as is in excess of the vendor's damages. *Freedman v. Rector, Wardens & Vestrymen, 230 P.2d 629 (Cal. 1951).* Vendor liable for damages for breach. *Goldgar v. N. Fulton Realty Co., 127 S.E.2d 189 (Ga. App. 1962).* To the effect that the vendor may rely on liquidated damage provisions, if there has been difficulty in fixing actual damages and the amount has been reasonably forecast. *United Sav. & Loan Assn. v. Reeder Dev. Corp., 129 Cal. Rptr. 113 (Cal. App. 1976).*

(n135)Footnote 1412. *Swanson v. Safeco Title Ins. Co., 925 P.2d 1354 (Ariz. App. Div. 1 1995); Roper v. Milbourn, 153 N.W. 557 (Neb. 1915); Roper v. Milbourn, 142 N.W. 792 (Neb. 1913).* The fact that the contract contemplates liquidated damages does not prevent specific performance from being granted. *Rootberg v. Richard J. Brown Associates, Inc., 302 N.E.2d 467 (Ill. App. 1973).* On breach of contract by vendor vendees could recover damages for their "loss of time." *McCullough v. D. Waldenmeyer, Inc., 185 N.E.2d 806 (Ohio Com. Pl. 1961).*

(n136)Footnote 1413. *BGW Dev. Corp. v. Mt. Kisco Lodge No. 1552, 669 N.Y.S.2d 56 (N.Y. App. Div. 2d Dept. 1998); Burgess v. Arita, 704 P.2d 930 (Haw. App. 1985);* Hamaker v. Coons, *23 S. 655 (Ala. 1898); Kempner v. Cohn, 1 S.W. 869 (Ark. 1886); Wells v. Abernethy, 5 Conn. 222 (Conn. 1824); Gibson v. Carraker, 9 S.E. 124 (Ga. 1889); Sanderson v. Read, 75 Ill. App. 190 (Ill. App. 1st Dist. 1897); Shirk v. Lingeman, 59 N.E. 941 (Ind. App. 1901); Hampe v. Sage, 125 P. 53 (Kan. 1912); Doherty v. Dolan, 65 Maine 87 (Me. 1876); Adams v. N. Am. Ins. Co., 96 N.E. 1094 (Mass. 1912); Atwood v. Walker, 61 N.E. 58 (Mass. 1901); Donlon v. Evans, 42 N.W. 472 (Minn. 1889); Gridley v. Tucker, Freem. Ch. 209 (Miss. 1840); Hartzell v. Crumb, 3 S.W. 59 (Mo. 1887); Nolde v. Gray, 102 N.W. 759 (Neb. 1905); Fairchild v. Llewellyn Realty Co., 82 A. 924 (N.J. 1912); Goodman v. Wolf, 88 N.Y.S. 934 (N.Y. App. Div. 1st Dept. 1904); Nichols v. Freeman, 33 N. Car. 99 (N.C. 1850); Neppach v. Or. & Cal. RR. Co., 80 P. 482 (Or. 1905); Barbour v. Nichols, 3 R.I. 187 (R.I. 1855); Shaw v. Wilkins' Adminr., 27 Tenn. 647 (Tenn. 1848); Williams v. Snider, 56 S.E.2d 63 (Va. 1949)* (where wilful breach); *Darlington v. J. L. Gates Land Co., 138 N.W. 72 (Wis. 1912); Muenchow v. Roberts, 46 N.W. 802 (Wis. 1890); Johnson v. McMullin, 21 P. 701 (Wyo. Terr. 1889).* In other words, there is a difference between the "value" and the "contract price" when there is an entire breach and no part of the price has been paid. *Beck v. Staats, 114 N.W. 633 (Neb. 1908).* Vendee may recover deposit if title is unmarketable. *Smith v. MacAlister, 294 N.E.2d 441 (Mass. App. 1972).*

(n137)Footnote 1414. *Beard v. S/E Joint Venture, 581 A.2d 1275 (Md. 1990); Wilson v. White, 119 P. 895 (Cal. 1911); Carpenter v. Froloff, 86 P.2d 691 (Cal. App. 2d Dist. 1939); Sweem v. Steele, 5 Iowa 352 (Iowa 1857); Duncan v. Tanner, 25 Ky. 399 (Ky. App. 1829); Baltimore Perm. Bldg. & Land Soc. v. Smith, 54 Md. 187 (Md. 1880); Hammond v. Hannin, 21 Mich. 374 (Mich. 1870); Gerbert v. Congregation of Sons of Abraham, 35 A. 1121 (N.J. 1896); Northridge v. Moore, 23 N.E. 570 (N.Y. 1890); Gray v. Howell, 54 A. 774 (Pa. 1903); Roberts & Corley v. McFadden, Weiss & Kyle, 74 S.W. 105 (Tex. Civ. App. 1903); Stuart v. Pennis, 42 S.E. 667 (Va. 1902); Marsh v. Cavanaugh, 46 P. 239 (Wash. 1896).*

(n138)Footnote 1415. *Warner v. Davis, 933 P.2d 1372 (Haw. App. 1997); Cullumber v. Winter, 134 N.W. 601 (Iowa 1912); Tracy v. Gunn, 29 Kans. 508 (Kan. 1883); Hartsock v. Mort, 25 A. 303 (Md. 1892); Dikeman v. Arnold, 40 N.W. 42 (Mich. 1888); Sloan v. Baird, 56 N.E. 752 (N.Y. 1900); Dustin v. Newcomer, 8 Ohio 49 (Ohio 1837).* "Bad faith" to justify damages for loss of bargain does not require showing of fraud. *Kahn v. Lischner, 275 P.2d 539 (Cal. App. 2d Dist. 1954).*

(n139)Footnote 1416. *Raisor v. Jackson, 225 S.W.2d 657 (Ky. 1950)* (market price determined as of time of contract); *Eagle Pass Lumber Co. v. The Amortibanc, 124 S.W.2d 186 (Tex. Civ. App. 1939); Mullen v. Cook, 71 S.E. 566 (W. Va. 1911), 8 Wash. & Lee L. Rev. 72.*

(n140)Footnote 1417. *Hummel v. Mid Dakota Clinic, P.C., 526 N.W.2d 704 (N.D. 1995); Simpkins v. Ryder Freight Sys., 855 S.W.2d 416 (Mo. App. 1993); Dady v. Condit, 58 N.E. 900 (Ill. 1900); Thompson v. Reising, 51 N.E.2d 488 (Ind. App. 1943); Sharp v. Colgan, 4 Mo. 29 (Mo. 1835); Carver v. Taylor, 53 N.W. 386 (Neb. 1892); Place v. Dudley, 58 N.Y.S. 671 (N.Y. App. Div. 1st Dept. 1899); Hennershotz v. Gallagher, 16 A. 518 (Pa. 1889); Stephens v. Barnes, 30 Pa. Super. 127 (Pa. Super. 1905); Spruill v. Shirley, 28 S.E.2d 705 (Va. 1944).*

(n141)Footnote 1418. *Carpenter v. Froloff, 86 P.2d 691 (Cal. App. 2d Dist. 1939);* James C. Turk, "Application of American and English Rules for Measure of Damages for Breach of Contract to Sell Land," *8 Wash. & Lee L. Rev. 72 (1951).* Contra, *AM/PM Franchise Assn. v. A. Richfield Co., 584 A.2d 915 (Pa. 1990);*

(n142)Footnote 1419. *Lynch v. Wright, 94 F. 703 (S.D.N.Y. 1899); Violet v. Rose, 58 N.W. 216 (Neb. 1894); Naylor v. Parker, 139 S.W. 93 (Tex. Civ. App. 1911).*

(n143)Footnote 1420. *Cannon v. Foster, 216 S.W. 698 (Ark. 1919); Taylor v. Hill, 221 S.W. 267 (Tex. Com. App. 1920).*

(n144)Footnote 1421. Derbonne v. Burton, *189 S. 473 (La. App. 1st Cir. 1939); Sanders v. Detlaff, 188 N.W. 446 (Mich. 1922).*

(n145)Footnote 1422. *Guiliano v. Cleo, Inc., 995 S.W.2d 88 (Tenn. 1999); Alexander v. Strong, 398 S.E.2d 390 (Ga. App. 1990); Worley v. McCarty, 93 N.W.2d 269 (Mich. 1958)* (deposit on a sales contract as liquidated damages); *Addesso v. Garagalli, 26 Pa. Dist. Ct. 169* (C.P. No. 2, Pa. County, Pa. 1914). Down payment liquidated damages rather than illegal penalty held valid. *Growney v. C.M.H. Real Est. Co., 238 N.W.2d 240 (Neb. 1976).*

(n146)Footnote 1423. *Alexander v. Strong, 398 S.E.2d 390 (Ga. App. 1990); Addesso v. Garagalli, 26 Pa. Dist. Ct. 169* (C.P. No. 2, Pa. County, Pa. 1914). *See Joyce v. Hagelstein, 163 S.W. 356 (Tex. Civ. App. 1914).*

(n147)Footnote 1424. *Seidlek v. Bradley, 142 A. 914 (Pa. 1928).*

(n148)Footnote 1425. *Butler v. Milam, 105 S.E. 628 (Ga. App. 1921).*

(n149)Footnote 1426. *Yocum v. Taylor, 195 P. 62 (Cal. App. 2d Dist. 1920).*

(n150)Footnote 1427. *Lombardi v. Laudati, 200 A. 1019 (Conn. 1938).*

(n151)Footnote 1428. *Oquirrh Assoc. v. First Nat'l Leasing Co., 888 P.2d 659 (Utah App. 1994); Barberich v. Pooshichian, 211 P. 236 (Cal. App. 1st Dist. 1922).*

(n152)Footnote 1429. *Gordon v. Williams, 986 S.W.2d 470 (Mo. App. 1998); Shelt v. Baker, 137 N.E. 74 (Ind. App. 1922).*

(n153)Footnote 1430. *Gvozdanovic v. Woodford Corp., 742 N.E.2d 1145 (Ohio App. 1st Dist. 2000); Sanders v. Detlaff, 188 N.W. 446 (Mich. 1922); Droege v. Arluck, 197 N.Y.S. 618 (N.Y. Sup. 1922); Thomas v. Collins, 117 S.E. 489 (W. Va. 1923). See Hoeft v. Raddatz, 212 N.W. 939 (Minn. 1927).*

(n154)Footnote 1431. *Kmetz v. De Ronde, 231 N.Y. 255 (N.Y. 1921).*

(n155)Footnote 1432. *Sampson v. McRae, 116 S.E. 651 (Ga. App. 1923); Gitson v. Yale Land Co., 180 N.W. 593 (Mich. 1920); Legrotta v. Pittsburgh Plate Glass Co., 220 S.W. 705 (Mo. App. 1920); Grosso v. Sporer, 206 N.Y.S. 227 (N.Y. Sup. 1924).*

(n156)Footnote 1433. *Merchant's & Traders' Developing Co. v. Mercer Realty Co., 123 A. 875 (N.J. 1924); Pabst Brewing Co. v. Nelson, 236 P. 873 (Okla. 1925); Spencer v. Davis, 298 S.W. 443 (Tex. Civ. App. 1927); Kelly v. Simon, 262 S.W. 202 (Tex. Civ. App. 1924); Mooring v. Warnock, 121 S.E. 732 (W. Va. 1924).*

(n157)Footnote 1434. *Malooley v. Alice, 621 N.E.2d 265 (Ill. App. 3d Dist. 1993); Smith v. Jordan, 220 S.W.2d 481 (Tex. Civ. App. 1949).*

(n158)Footnote 1435. *Raisor v. Jackson, 225 S.W.2d 657 (Ky. 1950).*

(n159)Footnote 1436. *Moser v. Gosnell, 513 S.E.2d 123 (S.C. App. 1999); A. J. Canfield Co. v. McGee, 28 N.E.2d 548 (Ill App. 1st Dist. 1940).* Agreements for liquidated damages in sales of realty are valid unless the damages are readily ascertainable at the time the contract is made. *Hutchinson v. Tompkins, 259 S.2d 129 (Fla. 1972).*

(n160)Footnote 1437. *Ky. Consumers Oil Co. v. Gen. Bonded Warehousing Corp., 184 S.W.2d 972 (Ky. 1945).*

(n161)Footnote 1438. *Williamson v. Smith, 256 P.2d 784 (Idaho 1953); Asher v. Hull, 250 P.2d 866 (Okla. 1952); Jenkins v. Conn, 256 S.W.2d 221 (Tex. Civ. App. 1953).*

(n162)Footnote 1439. As to specific performance of contracts to devise, see § 2603. *See* Ivan A. Elliott, Jr., Specific Performance, *1960 U. Ill. L. F. 72 (1960).*

(n163)Footnote 1440. *Seabaugh v. Keele, 775 S.W.2d 205 (Mo. App. E. Dist 1989); Strahan v. Haynes, 262 P. 995 (Ariz. 1928); Fierke v. Elgin City Banking Co., 7 N.E.2d 875 (Ill. 1937); Utterback v. Stewart, 277 N.W. 735 (Iowa 1938); In re Henry's Est., 137 P.2d 222 (Kan. 1943); Miller v. Prater, 100 S.W.2d 842 (Ky. App. 1937); Fidelity Loan Sec. Co. v. Moore, 217 S.W. 286 (Mo. 1919); Jacobson v. First Nat'l Bank, 31 A.2d 406 (N.J. Cir. Ct. 1943); Coppock v. Roberts, 240 P. 886 (Or. 1925); Coates v. Cotteral, 138 A. 756 (Pa. 1927); Wilson v. Beaty, 211 S.W. 524 (Tex. Civ. App. 1919). See Byers v. Fuller, 58 F. Supp. 570 (E.D. Ky. 1945); Karp v. Twenty-Three Thirty Ryer Corp., 56 N.Y.S.2d 783 (N.Y. Sup. 1945); In re Frederick's Est., 49 D. & C. 261 (C.P. Blair County Pa. 1943).* Specific performance to enforce real estate contract. *Toebben v. Campbell, 267 N.E.2d 327 (Ohio App. 1970).*

(n164)Footnote 1441. *Carter Oil Co. v. Owen, 27 F. Supp. 74 (E.D. Ill. 1939); Guadalupe County Bd. of Educ. v. O'Bannon, 195 P. 801 (N.M. 1921).* Failure of lessor's wife to sign lease did not prevent enforcement of option to buy where lessee was not demanding an abatement in purchase price. *Hill v. Gulf Oil Corp., 105 S.E.2d 625 (Va. 1958). See* Ivan A. Elliott, Jr., Specific Performance, 1960 Ill. L. F. 72 (1960).

(n165)Footnote 1442. *Bauer v. Bauer, 136 Nebr. 329, 285 N.W. 565 (Neb. 1939).* Specific performance is not a matter of right but is only granted in equity. *McColl v. Pataky, 280 A.2d 146 (Conn. 1971).*

(n166)Footnote 1443. *Duckwall v. Rees, 86 N.E.2d 460 (Ind. App. 1949); Kroll v. Zimmerman, 85 N.Y.S.2d 642 (N.Y. App. Div. 2d Dept. 1949); Edwards v. Tobin, 284 P. 562 (Or. 1930).*

(n167)Footnote 1444. *Buckmaster v. Bertram, 200 P. 610 (Cal. 1921); Burg Bros. v. Bercut, 238 P. 166 (Cal. App. 1st Dist. 1925); Cerrato v. Megaro, 126 A. 531 (N.J. 1924).*

(n168)Footnote 1445. *Crystal Restaurant Mgt. Corp. v. Calcagni, 732 A.2d 706 (R.I. 1999); McIntosh v. Leisk, 95 F.2d 164 (5th Cir. 1938); Devine v. Zimmerman, 133 F.2d 850 (8th Cir. 1943); Byers v. Fuller, 58 F. Supp. 570 (E.D. Ky. 1945); Cowin v. Salmon, 13 S.2d 190 (Ala. 1943);* Ala. Cent. R.R. Co. v. Long, *48 S. 363 (Ala. 1909); Mensch v. Gail, 74 A. 832 (Del. Ch. 1908); Young v. Kich, 15 N.E.2d 692 (Ill. 1938); McKennan v. Mickelberry, 89 N.E. 717 (Ill. 1909); Sugar v. Froehuich, 82 N.E. 414 (Ill. 1907); Velcich v. Malesh, 1 N.E.2d 278 (Ill. App. 1st Dist. 1936); Ames v. Ames, 91 N.E. 509 (Ind. App. 1910); N.Y. Brokerage Co. v. Wharton, 119 N.W. 969 (Iowa 1909); J.B. Brown & Sons v. Boston & Me. RR. Co., 76 A. 692 (Me. 1909); Taussig v. Van Deusen, 37 A.2d 915 (Md. 1944); Shikes v. Gabelnick, 173 N.E. 495 (Mass. 1930); Tincknell v. Ward, 280 N.W. 104 (Mich. 1938); Solomon v. Shewitz, 152 N.W. 196 (Mich. 1915); McQuary v. Mo. Land Co., 130 S.W. 335 (Mo. 1910); Gottfried v. Bray, 106 S.W. 639 (Mo. 1907); Furse v. Lambert, 124 N.W. 146 (Neb. 1910); Collins v. Leary, 74 A. 42 (N.J. Ch. 1909),* modified, *77 A. 518 (N.J. 1910); Brody, Adler & Koch Co. v. Hochstadter, 144 N.Y.S. 631 (N.Y. App. Div. 1st Dept. 1913); Jones v. Jones, 62 S.E. 417 (N.C. 1908); Ball v. Milliken, 76 A. 789 (R.I. 1910); Roberts v. Braffett, 92 P. 789 (Utah 1907); Creecy v. Grief, 61 S.E. 769 (Va. 1908); Voight v. Fidelity Inv. Co., 96 P. 162 (Wash. 1908); Helbig v. Bonsness, 277 N.W. 634 (Wis. 1938); Merrill v. Rocky Mt. Cattle Co., 181 P. 964 (Wyo. 1919).*

(n169)Footnote 1446. *Edmonds v. Gourley, 199 N.E. 287 (Ill. 1935).*

(n170)Footnote 1447. *Hotz v. Equitable Life Assur. Soc., 276 N.W. 413 (Iowa 1937);* Walshe v. Endom, *50 S. 656 (La. 1909).*

(n171)Footnote 1448. *Coral Gables v. Payne, 94 F.2d 593 (4th Cir. 1938);* Trimble v. Hart, *177 S. 710 (Fla. 1937); Fierke v. Elgin City Banking Co., 7 N.E.2d 875 (Ill. 1937); Hotz v. Eq. Life Assur. Soc., 276 N.W. 413 (Iowa 1937); Miller v. Prater, 100 S.W.2d 842 (Ky. App. 1937); J.B. Brown & Sons v. Boston & Me. RR. Co., 76 A. 692 (Me. 1909); Wiiest v. Pounds, 8 N.W.2d 211 (Neb. 1943); Rogalsky v. Ryan, 80 N.Y.S.2d 564 (N.Y. Sup. 1948); Mitchum v. Mitchum, 190 S.E. 104 (S.C. 1937); Genola Town v. Santaquin City, 80 P.2d 930 (Utah 1938).*

(n172)Footnote 1449. *Hotel Burnet Co. v. Union Cent. Life Ins. Co., 52 N.E.2d 754 (Ohio App. 1943).* A specific performance action by the seller enables hint to separate proofs on the question of security value from fair market value and places the burden on the vendee of proving fair market value. The seller may also recover the "demurrage," taxes, interest, insurance, upkeep, heating, repairs, etc. Specific performance may be denied where it would be contrary to equity and justice. *Rupniewski v. Miazga, 149 A. 193 (Pa. 1930); Welsh v. Ford, 127 A. 431 (Pa. 1925); Latta v. Hax, 68 A. 1016 (Pa. 1908); Maguire v. Heraty, 30 A. 151 (Pa. 1894); Friend v. Lamb, 25 A. 577 (Pa. 1893); Rennyson v. Rozell, 106 Pa. 407 (Pa. 1884); App. of Burk, 75 Pa. 141 (Pa. 1874); Workman v. Guthrie, 29 Pa. 495 (Pa. 1857); Henderson v. Hays, 2 Watts 148 (Pa. 1834); Spotts v. Eisenhauer, 31 Pa. Super. 89 (Pa. Super. 1906).*

(n173)Footnote 1450. *New Life Community Church of God v. Adomatis, 672 N.E.2d 433 (Ind. App. 1996); Itzkowitz v. Fertitta, 76 N.Y.S.2d 156 (N.Y. Sup. 1947). See* William Q. de Funiak, Contracts Enforceable in Equity, *34 Va. L. Rev. 637 (1948).*

(n174)Footnote 1451. *Parker v. Dameika, 23 N.E.2d 52 (Ill. 1939).* Equity may enforce a contract a breach of which might be the foundation of a civil action for damages. It will not always do so, but it lies in the power of the court to do so. *Stewart v. Todd, 173 N.W. 619 (Iowa 1919),* modified, *180 N.W. 146 (Iowa 1920).* Default of payment gives rise to both an action for specific performance or in the alternative for disaffirmance of the contract. *Sliman v. McBee, 311 S.2d 248 (La. 1975).*

(n175)Footnote 1452. *McNinch v. Rogers, 229 P. 78 (Kan. 1924).*

(n176)Footnote 1453. *Scarlata v. Finazzo, 125 N.Y.S.2d 110 (N.Y. Sup. 1953).*

(n177)Footnote 1454. *Preece v. Wolford, 246 S.W. 27 (Ky. App. 1922).*

(n178)Footnote 1455. *Dooley v. Stillson, 128 A. 217 (R.I. 1925).*

(n179)Footnote 1456. *Waller v. Lieberman, 183 N.W. 235 (Mich. 1921).*

(n180)Footnote 1457. *Mansfield v. Redding, 112 A. 437 (Pa. 1921).*

(n181)Footnote 1458. *Giles v. Gageby, 580 N.W.2d 52 (Minn. App. 1998); Thomas v. Pope, 43 N.E.2d 1004 (Ill. 1942); Monnett v. Turpie, 32 N.E. 328 (Ind. 1892); McQuerry v. Gilleland, 12 S.W. 1037 (Ky. App. 1890); Davis v. Headley, 22 N. J. Eq. 115 (N.J. Ch. 1871); A. Seaboard Nat'l Gas Co. v. Whitten, 173 A. 305 (Pa. 1934).*

(n182)Footnote 1459. *Wait v. Kern River Min., Mill & Development Co., 106 P. 98 (Cal. 1909).*

(n183)Footnote 1460. *Zempel v. Hughes, 85 N.E. 641 (Ill. 1908); Lewis v. Wellard, 114 P. 455 (Wash. 1911).*

(n184)Footnote 1461. *Brady v. Yost, 55 P. 542 (Idaho 1898); Peake v. Young, 18 S.E. 237 (S.C. 1893).*

(n185)Footnote 1462. *Dickinson v. McKenzie, 126 S.W.2d 95 (Ark. 1939); DeFloreo v. Tarvin, 20 S.E.2d 29 (Ga. 1942); Clark v. Cagle, 82 S.E. 21 (Ga. 1914); Knapp v. Ellyson Realty Co., 5 N.E.2d 973 (Ind. 1937); Mallow v. Eastes, 100 N.E. 836 (Ind. 1913); Farrington v. Hays, 182 S.W.2d 186 (Mo. 1944); Rice v. Griffith, 161 S.W.2d 220 (Mo. 1942); McCall v. Atchley, 164 S.W. 593 (Mo. 1914); In re Howe's Est., 132 N.Y.S.2d 855 (N.Y. Surr. 1954)* (a promise to devise given in separation agreement is enforceable); *Keiter v. Klinger, 57 Dauph. (Pa.) 26; Biddison v. Interurban Land Co., 152 S.W. 1167 (Tex. Civ. App. 1912).*

(n186)Footnote 1463. *Waldo v. Lockard, 148 N.W. 510 (Neb. 1914).*

(n187)Footnote 1464. *Dunkin Donuts Inc. v. Taseski, 47 F. Supp. 2d 867 (E.D. Mich. 1999); F.B. Norman Co. v. E.I. DuPont de Nemours & Co., 108 A. 743 (Del. Ch. 1920); Rigs v. Sokol, 61 N.E.2d 538 (Mass. 1945); Reo Motor Car Co. v. Young, 177 N.W. 249 (Mich. 1920); Shea v. Keeney, 140 N.Y.S. 912 (N.Y. App. Div. 1st Dept. 1913); Schwartz v. Church & Com. Corp., 53 N.Y.S.2d 666 (N.Y. Sup. 1945); Brune v. Vom Lehn, 183 N.Y.S. 360 (N.Y. Sup. 1920); RKO Distribg. Corp. v. Film Ctr. Realty Co., 5 N.E.2d 927 (Ohio App. 1936); Keiter v. Klinger, 57 Dauph. (Pa.) 26 (1945).*

(n188)Footnote 1465. *Browning v. Boswell, 215 F. 826 (4th Cir. 1914); Thurmes v. Gruenbauer, 17 N.W.2d 732 (Mich. 1945).*

(n189)Footnote 1466. *Baseball Pub. Co. v. Burton, 18 N.E.2d 362 (Mass. 1938).*

(n190)Footnote 1467. *McDonough v. S. Or. Min. Co., 159 P.2d 829 (Or. 1945).*

(n191)Footnote 1468. *Straatmann v. Straatmann, 809 S.W.2d 95 (Mo. App. 1991); Ryckman v. Cooper, 289 N.W. 252 (Mich. 1939).*

(n192)Footnote 1469. *Lutz v. Dutmer, 282 N.W. 431 (Mich. 1938); McMahan v. McMahon, 115 S.E. 293,* 26 A. L. R. 1295 (S.C. 1922). If specific performance is impossible, damages will be awarded. *Park v. Minton, 194 S.E.2d 465 (Ga. 1972).*

(n193)Footnote 1470. *Dixon v. City of Monticello, 585 N.E.2d 609 (Ill. App. 4th Dist. 1991); Waters v. Tillman, 22 S.E.2d 173 (Ga. 1942); Perrin v. Chidester, 139 N.W. 980 (Iowa 1913); Eisenbeis v. Shillington, 159 S.W.2d 641 (Mo. 1941); Mould v. Boehmer Coal Co., 237 S.W. 201 (Mo. App. 1921); Colson v. Johnson's Est., 197 N.W. 674 (Neb. 1924); Jones v. Tschetter, 194 N.W. 839 (S.D. 1923); Greer v. Doriot, 120 S.E. 291 (Va. 1923).*

(n194)Footnote 1471. *Dominion Investments v. Yasechko, 767 F.Supp 1460 (N.D. Ind. 1991); Stevens v. Los Angeles Dock & Terminal Co., 130 P. 197 (Cal. App. 2d Dist. 1912); Langley v. Norris, 173 S.W.2d 454 (Tex. 1943).*

(n195)Footnote 1472. *Gay v. Radford, 59 S.E.2d 915 (Ga. 1950); Thommen v. Smith, 103 A. 25 (N.J. Ch. 1918); Weidenbaum v. Raphael, 90 A. 683 (N.J. Ch. 1914); Morgan v. Sanborn, 122 N.E. 696 (N.Y. 1919).* Specific performance may be had against heir of deceased vendee, but warranty deed cannot be required. *Roeber v. DuBose, 510 S.W.2d 126 (Tex. Civ. App. 1974).* Heirs required to specifically perform seller's contract. *Allen v. Monk, 505 S.W.2d 523 (Tex. 1974).*

(n196)Footnote 1473. *Konda v. Lamkin, 66 P.2d 164 (Cal. App. 3d Dist. 1937); Espadron v. Davis, 52 N.E.2d 716 (Ill. 1944); Lewis v. McCreedy, 38 N.E.2d 170 (Ill. 1941); Kellogg v. Kartte, 154 N.E. 231 (Ill. 1926); Record v. Littlefield, 106 N.E. 142 (Mass. 1914); Lutz v. Dutmer, 282 N.W. 431 (Mich. 1938); South Jersey Furn. Co. v. Dorsey, 132 A. 923 (N.J. 1926); Epstein v. Kroopf, 218 N.Y.S. 644 (N.Y. App. Div. 2d Dept. 1926); Lewis v. Bollinger, 187 N.Y.S. 563 (N.Y. Sup. 1921). See* Young v. Cistac, *103 S. 100 (La. 1925).* One who is assigned a land contract given under power of attorney may bring specific performance, even though the power of attorney only authorized the contract to be executed in the name of the person who gave it. *Gould v. Stelter, 152 N.E.2d 869 (Ill. 1958).* It has even been held that a subassignee of a part of the contract may maintain an action against the vendor and the vendee-assignor to compel them to fulfill the principal contract so that the vendee cannot in turn perform with the subassignee. *Geo. v. Clark Co. v. N.Y., N. Haven & Hartford RR. Co., 107 N.Y.S.2d 721 (N.Y. App. Div. 1st Dept. 1951),* Right of Subvendee to Specific Performance, *26 St. Johns L. Rev. 348 (1952).*

(n197)Footnote 1474. *Lagumis v. Gerard, 190 N.Y.S. 207 (N.Y. Sup. 1921).*

(n198)Footnote 1475. *Bassett v. Am. Baptist Publication Soc., 183 N.W. 747 (Mich. 1921).*

(n199)Footnote 1476. Goodwin v. Rosser, *60 S. 341 (Fla. 1912).* A subpurchaser may have specific performance against both his vendor and the principal vendor. *Geo. v. Clark Co. v. N.Y., N. Haven & Hartford RR. Co., 107 N.Y.S.2d 721 (N.Y. App. Div. 1st Dept. 1951).*

(n200)Footnote 1477. *Lunt v. Lorscheider, 121 N.E. 237 (Ill. 1918); Schuyler v. Kirk-Brown Realty Co., 184 N.Y.S. 95 (N.Y. App. Div. 4th Dept. 1920).*

(n201)Footnote 1478. *Greenville Depositors' Corp. v. Ecker, 268 N.W. 831 (Mich. 1936).*

(n202)Footnote 1479. *Gunsch v. Gunsch, 71 N.W.2d 623 (N.D. 1955); Carpenter v. Fopper, 68 N.W. 874 (Wis. 1896)* (only the heirs of the deceased vendee can bring specific performance).

(n203)Footnote 1480. *Harris v. Clinton, 112 A.2d 885 (Conn. 1955).*

(n204)Footnote 1481. *Horwitz v. Kreuzer, 117 A. 563 (Md. 1922).*

(n205)Footnote 1482. *Fisher v. Bauer, 436 S.E.2d 602 (Va. 1993);* Burgin v. Sugg, *85 S. 533 (Ala. 1920).* Vendee may have specific performance subject to wile's dower if he desires. *May v. Bradley, 110 S.E.2d 520 (Va. 1959).*

(n206)Footnote 1483. Steinmetz v. Wisehart, *190 S. 13 (Fla. 1939).*

(n207)Footnote 1484. Beekman v. Sonntag Inv. Co., *64 S. 948 (Fla. 1914).*

(n208)Footnote 1485. *Blum v. William Goldman Theatres, Inc., 164 F.2d 192 (3d Cir. 1947); Millman Lumber Co. v. Bryant, 209 S.W.2d 878 (Ark. 1948); Adams v. Rhodes, 220 S.W. 29 (Ark. 1920); Copple v. Aigeltinger, 140 P. 1073 (Cal. 1914); Kresge v. Crowley, 47 App. D.C. 13 (D.C. App. 1917); Sperling v. Davie, 41 S.2d 318 (Fla. 1949);* Hannan v. Holz, *92 S. 874 (Fla. 1922);* Drake Lumber Co. v. Branning, *64 S. 263 (Fla. 1914); Finney v. Blalock, 65 S.E.2d 920 (Ga. 1951); Finney v. Blalock, 58 S.E.2d 429 (Ga. 1950); Threlkeld v. Norris, 133 N.E. 285 (Ill. 1921); Speiss v.*

Martin, 232 S.W. 615 (Ky. App. 1921); Melamed v. Donabedian, 130 N.E. 110 (Mass. 1921); Swanson v. Priest, 58 A.2d 207 (N.H. 1948); McLean v. Brown, 78 N.Y.S.2d 234 (N.Y. App. Div. 1st Dept. 1948). See Daliendo v. Minardi, 90 N.Y.S.2d 781 (N.Y. Sup. 1949). Horgan v. Russell, 140 N.W. 99 (N.D. 1913); Boehs v. Adelman, 188 P.2d 196 (Okla. 1948); Dillinger v. Ogden, 90 A. 446 (Pa. 1914); Vaughn v. Rosencrance, 38 N.W.2d 822 (S.D. 1949). Where no notice given: *Marsh v. Marsh, 210 S.W.2d 811 (Ark. 1948); Consol. Realty Inv., Inc. v. Gasque, 48 S.E.2d 510 (Ga. 1948); Troutfetter v. Backman, 193 P.2d 201 (Kan. 1948); Cottrell v. Prier, 212 P.2d 87 (Or. 1949); Kelly v. Sullivan, 30 N.W.2d 209 (Wis. 1947).* Where a vendor who, after making a parol contract of sale and placing his vendee in possession, makes valuable improvements, sells the land to another with knowledge of the prior contract, equity will compel specific performance against such other, upon the original purchaser's paying or tending the purchase money. *Peixouto v. Peixouto, 181 P. 830 (Cal. App. 1st Dist. 1919); Grooms v. Grooms, 81 S.E. 210 (Ga. 1914).*

(n209)Footnote 1486. *Walter v. Hoffman, 196 N.E. 291 (N.Y. 1935).*

(n210)Footnote 1487. *Suburban Improvement Co. v. Scott Lumber Co., 67 F.2d 335 (4th Cir. 1933).*

(n211)Footnote 1488. *Firebaugh v. Hanback, 443 S.E.2d 134 (Va. 1994); Schneidau v. Manley, 39 A.2d 885 (Conn. 1944).*

(n212)Footnote 1489. *Knapp v. Ellyson Realty Co., 5 N.E.2d 973 (Ind. 1937); Slattery v. Gross, 187 P. 300 (Or. 1920); Gledhill v. Malouf, 197 P. 725 (Utah 1921).*

(n213)Footnote 1490. *Ames v. Cheyne, 287 N.W. 439 (Mich. 1939),* overruled by, *Albro v. Allen, 454 N.W.2d 85 (Mich. 1990).*

(n214)Footnote 1491. *Hudgins v. Thompson, 211 S.W. 586.*

(n215)Footnote 1492. *McClurg v. Crawford, 209 F. 340 (8th Cir. 1913);* Morgan v. Lewis, *82 S. 7 (Ala. 1919); Dollar v. Knight, 224 S.W. 983 (Ark. 1920); Lewis v. Trimble, 106 S.E. 101 (Ga. 1921); Jones v. Bashaw, 188 N.W. 769 (Iowa 1922); Pearson v. Gardner, 168 N.W. 485 (Mich. 1918); Gambrell v. Tatum, 228 S.W. 287 (Tex. Civ. App. 1921).* In a suit for the performance of a contract for the sale of real estate against the vendee, held the vendor is entitled to a decree for the balance of the purchase money and for sale of the land to satisfy the same. *Marshall v. Porter, 80 S.E. 350 (W. Va. 1913).* Attorneys' fees are not allowable in a specific performance action. *Gallinaro v. Fitzpatrick, 267 N.E.2d 649 (Mass. 1971).*

(n216)Footnote 1493. *Kjesbo v. Ricks, 506 N.W.2d 326 (Minn. App. 1993); Schumacher v. Ihrke, 469 N.W.2d 329 (Minn. App. 1991); Shelton v. Wallace, 137 P. 694 (Okla. 1913).*

(n217)Footnote 1494. *Caplan v. Buckner, 91 A. 481 (Md. 1914).*

(n218)Footnote 1495. Specific performance granted. Morgan v. Lewis, *82 S. 7 (Ala. 1919); Corby v. Ward, 171 A. 813 (N.J. 1934); Prichard v. Mulhall, 103 N.W. 774 (Iowa 1905)* (vendor's recovery was limited to the difference between the contract price and the market value at the time of breach). For, to the vendor, the possession, until the contract shall be executed, is about, all that is left by the contract in him, the legal title being really but the shadow of that of which the possession is the substance, and the right to hold it is the vendor's best security for performance by the purchaser. The surrender of this right of possession to any control of the purchaser, to take effect prospectively, it is true, yet absolutely leaves the vendor no other remedy but in all cases to resort to equity for a specific performance. It takes away the protection of the rule that holds these covenants, which are to be concurrently performed, to be conditions precedent to each other, and that he is not bound to convey and deliver possession until the purchaser tenders performance on his part. Or putting the effect of the proposition in another point of view, as soon as the time for performance arrives it substantially executes the contract on the part of the vendor, and against him, without any tender of performance by the purchaser or readiness to perform, or perhaps even ability to perform. *Marvel v. Ortlip, 3 Del. Ch. 9 (Del. Ch. 1866).* Clause for liquidated damages prevented specific performance by the vendor. *Dekowski v.*

Stachura, 185 N.W. 549 (Wis. 1921).

(n219)Footnote 1496. "The rule is well established in this country that a provision, in a contract for the sale of land, such as is contained in the contract in this case, and termed a forfeiture clause, is a provision for the exclusive benefit of the vendor, and the vendee cannot, by his own default put an end to the contract." The clause is for the vendor's benefit and at his election. A provision for liquidated damages did not prevent specific performance for the vendor. *Rogers v. Dorrance, 117 A. 564 (Md. 1922).*

(n220)Footnote 1497. *Long v. Reiss, 160 S.W.2d 668 (Ky. App. 1942); Beard v. Morgan, 10 N.W.2d 253 (Neb. 1943); Masonic Temple v. Ebert, 18 S.E.2d 584 (S.C. 1942).*

(n221)Footnote 1498. *Mahon v. Sahration, 17 N.W.2d 753 (Mich. 1945).*

(n222)Footnote 1499. *Lewis v. McCreedy, 38 N.E.2d 170 (Ill. 1941).* A sales contract that specifies deferred payments but does not indicate the substance of the terms is not qualified for specific performance. *Tuscon v. Farrington, 240 N.W.2d 464 (Mich. 1976).* Specific performance of right of first call not permitted unless all terms are definite. *Myers v. Lovetinsky, 189 N.W.2d 571 (Idaho 1971).*

(n223)Footnote 1500. *Voin v. Szabo, 913 P.2d 717 (Or. App. 1996); Golden Needles Knitting & Glove Co., Inc. v. Dynamic Marketing Enterprises, Inc., 766 F. Supp. 421 (W.D.N.C 1991); Blanton v. Ky. Distilleries & Warehouse Co., 120 F. 318 (C.C.E.D. Ky. 1902); Tucker v. Thraves, 151 P. 598 (Okla. 1915).* An action for specific performance may be brought where the vendor has refused to perform even though the vendee has not made actual tender if there is an allegation of readiness and willingness to perform. *Rogowski v. Nelson, 262 N.E.2d 174 (Ill. App. 1970).* Specific performance. *Manning v. Potomac Elec. Power Co., 187 A.2d 468 (Md. 1963); Payne v. Clark, 187 A.2d 769 (Pa. 1963).*

(n224)Footnote 1501. *PR. Pension Fund v. Nakada, 809 P.2d 1139 (Haw. App. 1991); Bass v. Smith, 360 S.E.2d 162 (Va. 1987); Troughton v. Eakle, 208 P. 161 (Cal. App. 3d Dist. 1922). See Jose v. Aufderheide, 293 S.W. 476 (Mo. App. 1927); Hawkins v. Lasell, 198 N.W. 711 (S.D. 1924); Benton v. Davison, 212 N.W. 500 (S.D. 1927).* Tender may be excused if vendor repudiates the contract. *H.M.R., Inc. v. Boeckenhauer, 179 N.E.2d 613 (Ill. 1962).*

(n225)Footnote 1502. *Williams v. Cow Gulch Oil Co., 270 F. 9 (8th Cir. 1921); Black v. Milner Hotels, 22 S.E.2d 780 (Ga. 1942); Tolbert v. Short, 104 S.E. 245 (Ga. 1920); McVoy v. Baumann, 117 A. 725 (N.J. 1922); Dillinger v. Ogden, 90 A. 446 (Pa. 1914); Matney v. Barnes, 82 S.E. 801 (Va. 1914).* A contract to convey standing timber may be specifically enforced. *Anderson-Tully Co. v. Gillett Lumber Co., 222 S.W. 362 (Ark. 1920).*

(n226)Footnote 1503. *Hannan v. Carroll, 120 A. 665 (Pa. 1923); Mathews v. Caldwell, 258 S.W. 810 (Tex. Com. App. 1924); Russell v. Ives, 178 N.W. 300 (Wis. 1920).*

(n227)Footnote 1504. *Brown v. Hill, 124 A. 184 (Pa. 1924).*

(n228)Footnote 1505. *Leafgreen v. Labar, 124 A. 443 (Pa. 1924).*

(n229)Footnote 1506. A. J. Richey Corp. v. Garvey, *182 S. 216 (Fla. 1938).*

(n230)Footnote 1507. *Terex Trailer Corp. v. McIlwain, 579 S.2d 237 (Fla. App. 1st Dist. 1991); Southland Corp. v. Potter, 760 P.2d 320 (Utah. App. 1988); Laurens v. N. Iowa Gas & Elec. Co., 262 F. 712 (N.D. Iowa 1920);* Rushton v. McKee & Co., *77 S. 343 (Ala. 1917); Duclos v. Turner, 166 S.W.2d 251 (Ark. 1942); Dabney v. Key, 207 P. 921 (Cal. App. 1st Dist. 1922);* Headley v. Warmolts, *111 S. 252 (Fla. 1926); Waters v. Tillman, 22 S.E.2d 173 (Ga. 1942); Childs v. Reed, 202 P. 685 (Idaho 1921); Kovacs v. Krol, 53 N.E.2d 456 (Ill. 1944); Lunt v. Lorscheider, 121 N.E. 237 (Ill. 1918); Foltz v. Evans, 49 N.E.2d 358 (Ind. App. 1943); Hilker v. Curdes, 133 N.E. 851 (Ind. App. 1922); Harter v. Morris, 123 N.E. 23 (Ind. App. 1919); Garrick v. Garrick, 87 N.E. 696 (Ind. App. 1909); Lockie v. Baker, 218 N.W. 483*

(Iowa 1928); Marti v. Ludeking, 185 N.W. 476 (Iowa 1921); Duntz v. Ames Cemetery Assn., 186 N.W. 443 (Iowa 1922); Haas v. Cerami, 10 S.2d 61 (La. 1942); Fox v. Fraebel, 116 A. 876 (Md. 1922); Linden v. Hoshal, 12 N.W.2d 385 (Mich. 1943); Van Camp v. Van Camp, 289 N.W. 297 (Mich. 1939); Lutz v. Dutmer, 282 N.W. 431 (Mich. 1938); Heth v. Smith, 141 N.W. 583 (Mich. 1913); Falder v. Dreckshage, 227 S.W. 929 (Mo. App. 1921); Levin v. Dietz, 87 N.E. 454 (N.Y. 1909); Corney v. Kline Bldg. & Constr. Cc., 182 N.Y.S. 15 (N.Y. App. Div. 2d Dept. 1920); 580 *Fifth Ave. Corp. v. Taylor, 55 N.Y.S.2d 713 (N.Y. Sup. 1945); Alpert v. G.R.E. Constr. Corp., 215 N.Y. S. 322 (N.Y. Sup. 1926); Woolsey v. Draper, 201 P. 730 (Or. 1921); In re Kutz' Est., 103 A. 293 (Pa. 1918); Hoster's Comm. v. Zollman, 94 S.E. 164 (Va. 1917). See* W.D. Frederick, Jr. & Frank C. Logan, Specific Performance Against Married Women, *16 U. Fla. L. Rev. 353 (1963). See* however, *Pierce v. Watson, 39 S.2d 220 (Ala. 1949); Gottlaub v. Cohen, 51 A.2d 254 (N.J. Ch. 1947); Horton v. Horton, 62 A.2d 503 (N.J. Super. Ch. 1949); Burlew v. Hepps, 63 A.2d 827 (N.J. Super. Ch. 1949); Guzzi v. Czaja, 63 A.2d 426 (Pa. Super. 1949).*

(n231)Footnote 1508. *Scott v. Brown, 206 P. 572 (Colo. 1922).*

(n232)Footnote 1509. *Foltz v. Evans, 49 N.E.2d 358 (Ind. App. 1943); In re Byrne's Est., 186 A. 187 (Pa. Super. 1936).*

(n233)Footnote 1510. *Wilson v. Nelson, 262 N.W. 433 (Neb. 1935).*

(n234)Footnote 1511. *Heights Land Co. v. Swengel's Est., 179 A. 431 (Pa. 1935).* Want of mutuality is no longer a bar to specific performance in *Illinois. Gould v. Stelter, 152 N.E.2d 869 (Ill. 1958).*

(n235)Footnote 1512. *Volz v. Scully, 166 S.W. 1015 (Ky. App. 1914); Johnson v. Breckenridge-Stephens Title Co., 241 S.W. 195 (Tex. Civ. App. 1922). See Childs v. Reed, 202 P. 685 (Idaho 1921); Steltzer v. Compton, 149 N.W. 243 (Iowa 1914).*

(n236)Footnote 1513. *Smurr v. Kamen, 133 N.E. 715 (Ill. 1922); Stutsman v. Crain, 170 N.W. 806 (Iowa 1919).*

(n237)Footnote 1514. *Copple v. Aigeltinger, 140 P. 1073 (Cal. 1914); Lean v. Leeds, 114 A. 402 (N.J. 1921); Flegel v. Dowling, 102 P. 178 (Or. 1909).*

(n238)Footnote 1515. *Beets v. Tyler, 290 S.W.2d 76 (Mo. 1956)* (contract required plaintiff to render future services to defendant).

(n239)Footnote 1516. *Union Bag & Paper Corp. v. Bischoff, 255 F. 187 (E.D.N.Y. 1918); Gregory Co. v. Shapiro, 145 N.W. 791 (Minn. 1914); Peterson v. Johnson Nut Co., 283 N.W. 561 (Minn. 1939).*

(n240)Footnote 1517. *Knox v. Allard, 5 A.2d 716 (N.H. 1939).*

(n241)Footnote 1518. *Johnson v. Mansfield, 166 S.W. 927 (Tex. Civ. App. 1914); Utah Mercur Gold Min. Co. v. Herschel Gold Mine Co., 134 P.2d 1094 (Utah 1943).*

(n242)Footnote 1519. *Coe v. Hays, 614 A.2d 576 (Md. 1992); Empire Career Center, Inc. v. Town of Schuyler, 612 N.Y.S.2d 719 (N.Y. App. Div. 4th Dept. 1994);* McKinnon v. Johnson, *45 S. 451 (Fla. 1907).*

(n243)Footnote 1520. *Riley v. Allen, 81 P. 186 (Kan. 1905).*

(n244)Footnote 1521. *Tulin v. Johnston, 147 S.E. 206 (Va. 1929).*

(n245)Footnote 1522. *Kalinowski v. Yeh, 847 P.2d 673 (Haw. App. 1993); Curtis Casket Co. v. D.A. Brown & Co., 632 N.E.2d 204 (Ill. App. 1st Dist. 1994); Young v. Kich, 15 N.E.2d 692 (Ill. 1938).*

(n246)Footnote 1523. *Miller v. Dyer, 127 P.2d 901 (Cal. 1942).*

(n247)Footnote 1524. *Beets v. Tyler, 290 S.W.2d 76 (Mo. 1956),* apparently overruling *Kludt v. Connett, 168 S.W.2d 1068 (Mo. 1943),* particularly where the defendant is reasonably assured of the plaintiff's substantial performance of his contractual obligations. See *Epstein v. Gluckin, 135 N.E. 861 (N.Y. 1922).*

(n248)Footnote 1525. *Utah Mercur Gold Mm. Co. v. Herschel Gold Min. Co., 134 P.2d 1094 (Utah 1943).*

(n249)Footnote 1526. *Langley v. Norris, 167 S.W.2d 603 (Tex. Civ. App. 1942).*

(n250)Footnote 1527. *Cabanaw v. Cabanaw, 648 N.E.2d 694 (Ind. App. 4th Dist. 1995); Edgewater Realty Co. v. Tenn. Coal, Iron & RR. Co., 49 F. Supp. 807 (D. Md. 1943); Britton v. Davis, 103 S.W.2d 665 (Ky. App. 1937); Stanton Trust & Sav. Bank v. Johnson, 65 P.2d 1188 (Mont. 1937).*

(n251)Footnote 1528. *Willis v. Rauton, 310 S.E.2d 729 (Ga. App. 1983); In re Henry's Est., 137 P.2d 222 (Kan. 1943); Caparell v. Goodbody, 29 A.2d 563 (N.J. Ch. 1942); Pub. Market Co. v. Portland, 83 P.2d 440 (Or. 1938).*

(n252)Footnote 1529. *Griffith v. Stewart, 31 App. D.C. 29 (D.C. App. 1908); Thomas v. Pope, 43 N.E.2d 1004 (Ill. 1942); Snell v. Hill, 105 N.E. 16 (Ill. 1914); Bethell v. Bethell, 92 Ind. 318 (Ind. 1884); Coon v. Cook, 6 Ind. 268 (Ind. 1855); Close v. Wheaton, 70 P. 891 (Kan. 1902); Davis v. Parker, 96 Mass. 94 (Mass. 1867); Johnston v. Wadsworth, 34 P. 13 (Or. 1893); A. Seaboard Nat. Gas Co. v. Whitten, 173 A. 305 (Pa. 1934); Hearst's Heirs v. Kuykendall's Heirs, 16 Tex. 327 (Tex. 1856); Morgan v. Bell, 28 P. 925 (Wash. 1892). See Kinkead v. Clark, 239 S.W. 717 (Tex. Civ. App. 1922).* They may be rendered suits in rem or quasi in rem by statute; so that a court may assume jurisdiction where the land is within the jurisdiction and the parties without, or vice versa: *Light v. Doolittle, 133 N.E. 413 (Ind. App. 1921). See McVoy v. Baumann, 117 A. 717 (N.J. Ch. 1922)* (suit in quasi in rem).

(n253)Footnote 1530. *Snell v. Hill, 105 N.E. 16 (Ill. 1914).*

(n254)Footnote 1531. *Wait v. Kern River Min., Milling & Developing Co., 106 P. 98 (Cal. 1909).*

(n255)Footnote 1532. *Titus Mgt. Co. v. Kelsey, 268 N.W. 23 (Iowa 1936). See Pasley v. De Weese, 82 P.2d 1066 (Okla. 1938).*

(n256)Footnote 1533. *Poole v. Koons, 96 N.E. 556 (Ill. 1911); Meents v. Comstock, 296 N.W. 721 (Iowa 1941); Rea v. Ferguson, 102 N.W. 778 (Iowa 1905); Barringer v. Ryder, 93 N.W. 56 (Iowa 1903); Cleveland v. Burrill, 25 Barb. 532 (N.Y. Sup. 1857); Orr's Heirs v. Irwin's Heirs, 4 N. Car. 351 (N.C. 1816); Penn v. Hayward, 14 Ohio St. 302 (Ohio 1963).*

(n257)Footnote 1534. *Proctor v. Proctor, 74 N.E. 145 (Ill. 1905); Fall v. Fall, 106 N.W. 412 (Neb. 1905); Proctor v. Ferebee, 36 N.C. 143 (N.C. 1840).*

(n258)Footnote 1535. *Dooley v. Watson, 67 Mass. 414 (Mass. 1854).*

(n259)Footnote 1536. Burrow v. Clifton, *65 S. 58 (Ala. 1914); Tinkler v. Devine, 154 P.2d 119 (Kan. 1944). See Orr v. Thomas, 185 P. 1046 (Kan. 1919); Minn. v. Dist. Court of Pine County, 169 N.W. 420 (Minn. 1918).*

(n260)Footnote 1537. Coral Gables v. Patterson, *166 S. 40 (Ala. 1936).*

(n261)Footnote 1538. *Trainor v. Mut. Life Ins. Co., 131 F.2d 895 (7th Cir. 1942); Lamar v. Detroit Apartments Corp., 211 N.W. 643 (Mich. 1927); Caparell v. Goodbody, 29 A.2d 563 (N.J. Ch. 1942); Ayres v. Cook, 46 N.E.2d 629 (Ohio App. 1941), aff'd, 43 N.E.2d 287 (Ohio App. 1941).* Inadequacy of remedy at law required for specific performance. *Lineberger v. Welsh, 290 A.2d 847 (Del. Ch. 1972).*

(n262)Footnote 1539. *Gleason v. Gleason, 582 N.E.2d 657 (Ohio App. 4th Dist. 1991); Hill v. Imperial Sav., 852 F. Supp. 1354 (W.D. Tex. 1992); Jamison Coal & Coke Co. v. Goltra, 143 F.2d 889 (8th Cir. 1944); Holsz v. Stephen,*

200 N.E. 601 (Ill. 1936). Permitting specific performance although vendee had been in willful default. *MacFadden v. Walker, 488 P.2d 1353 (Cal. 1971).* New Jersey will not specifically enforce unless the property is unique and damages would be inadequate. *Centex Homes Corp. v. Boag, 320 A.2d 194 (N.J. Super. Ch. 1974).*

(n263)Footnote 1540. *McCall v. Atchley, 164 S.W. 593 (Mo. 1914).*

(n264)Footnote 1541. *Wisherd v. Bollinger, 127 N.E. 657 (Ill. 1920); Prideaux v. Muler, 215 Ill. App. 429 (Ill. App. 2d Dist. 1919).*

(n265)Footnote 1542. *Eichman v. Marshall, 50 N.E.2d 379 (Ohio App. 1942).*

(n266)Footnote 1543. *Sav. Bldg. & Loan Assn. v. McCall, 95 S.W.2d 933 (Tenn. App. 1935).*

(n267)Footnote 1544. *Jaeger v. Ridgewood Park Ests, 186 A. 724 (N.J. Ch. 1936).*

(n268)Footnote 1545. *Dixon v. City of Monticello, 585 N.E.2d 609 (Ill. App. 4th Dist. 1991); Marian Coal Co. v. Peale, 204 F. 161 (3d Cir. 1913); Harter v. Morris, 123 N.E. 23 (Ind. App. 1919); Toles v. Duplex Power Car Co., 168 N.W. 495 (Mich. 1918); Cahalan Inv. Co. v. Yakima Cent. Heating Co., 193 P. 210 (Wash. 1920).*

(n269)Footnote 1546. *Holsz v. Stephen, 200 N.E. 601 (Ill. 1936).*

(n270)Footnote 1547. *Ames v. Ames, 91 N.E. 509 (Ind. App. 1910).* A vendor will not be permitted to agree upon a method of performance, induce the purchaser to act accordingly, and then commit a gross fraud by repudiating his contract altogether. *Fletcher v. Painter, 105 P. 500 (Kan. 1909). See Wiley v. Verhaest, 100 P. 1008 (Wash. 1909).*

(n271)Footnote 1548. *Heard v. Houston Gulf Gas Co., 78 F.2d 189 (5th Cir. 1935).*

(n272)Footnote 1549. *Grand Rapids & Ind. RR. Co. v. Grand Rapids, K. & S.E. RR. Co., 140 N.W. 906 (Mich. 1913); Abbott v. Moldestad, 77 N.W. 227 (Minn. 1898); Brown v. Haff, 5 Paige Ch. 235 (N.Y. Ch. 1835); Crary v. Smith, 2 N.Y. 60 (N.Y. 1848); Cummings v. Nielson, 129 P. 619 (Utah 1912).*

(n273)Footnote 1550. *Stone v. Lord, 80 N.Y. 60 (N.Y. 1880).* If the optionee has made improvements specific performance is justified to avoid unjust enrichment. *Loveless v. Diehl, 364 S.W.2d 317 (Ark. 1963).*

(n274)Footnote 1551. *Jones v. Barnes, 94 N.Y.S. 695 (N.Y. App. Div. 3d Dept. 1905); Belanewsky v. Gallaher, 105 N.Y.S. 77 (N.Y. Sup. 1907); Schippicasse v. Church, 29 Ohio Cir. Ct. 678 (Ohio Cir. Ct. 1906).*

(n275)Footnote 1552. *Schroeppel v. Hopper, 40 Barb. 425 (N.Y. Sup. 1863); Baumann v. Pinckney, 23 N.E. 916 (N.Y. 1890); Bryson v. Peak, 43 N.C. 310 (N.C. 1852); Ayres v. Robins, 71 Va. 105 (Va. 1878).* A liquidated damage clause prevents the seller from having specific performance. *McMullin v. Shimmin, 349 P.2d 720 (Utah 1960).*

(n276)Footnote 1553. *W. Union Tel. Co. v. Pittsburgh, Cincinnati & St. Louis RR. Co., 137 F. 435 (C.C.N.D. Ill. 1905); Loaiza v. Levy, 24 P. 707 (Cal. 1890); Poole v. Koons, 96 N.E. 556 (Ill. 1911); Bethell v. Bethell, 92 Ind. 318 (Ind. 1884); Rea v. Ferguson, 102 N.W. 778 (Iowa 1905); McQuerry v. Gilleland, 12 S.W. 1037 (Ky. App. 1890); Brown v. Desmend, 100 Mass. 267 (Mass. 1868); Olney v. Eaton, 66 Mo. 563 (Mo. 1877); Silver Camp Min. Co. v. Dickert, 78 P. 967 (Mont. 1904); Lindley v. O'Reilly, 15 A. 379 (N.J. 1888); Hannon v. Robinson, 60 N.E.2d 515 (Ohio App. 1944); Penn v. Hayward, 14 Ohio St. 302 (Ohio 1863); Montgomery v. Ruppensburg, 31 Ont. 433* [Canada].

(n277)Footnote 1554. Isom v. Johnson, *87 S. 543 (Ala. 1920); Brown v. Desmond, 100 Mass. 267 (Mass. 1868); O.W. Kerr Co. v. Nygren, 130 N.W. 1112 (Minn. 1911).*

(n278)Footnote 1555. Morgan v. Eaton, *52 S. 305 (Fla. 1910); Andrews v. Sullivan, 7 Ill. 327 (Ill. 1845); Migatz v. Stieglitz, 77 N.E. 400 (Ind. 1906); Munro v. Syracuse Lakeshore & N. RR. Co., 93 N.E. 516 (N.Y. 1910).*

(n279)Footnote 1556. *Dunlap v. Foss, 136 A. 257 (N.H. 1926).*

(n280)Footnote 1557. *Kettering v. Eastlack, 107 N.W. 177 (Iowa 1906); Buckhcut v. Witwer, 122 N.W. 184 (Mich. 1909); Powell v. Dwyer, 112 N.W. 499 (Mich. 1907); Solomon Mier Co. v. Hadden, 111 N.W. 1040 (Mich. 1907); Newton v. Dickson, 116 S.W. 143 (Tex. Civ. App. 1909).*

(n281)Footnote 1558. *Leeper v. Morelock, 76 S.W.2d 335 (Tenn. 1934).* The presence of a liquidated damages clause does not of itself bar specific performance. *Bradford v. N.Y. Times Co., 501 F.2d 51 (2d Cir. 1974).*

(n282)Footnote 1559. *Amanda Consol. Gold-Min. Co. v. People's Min. & Mill. Co., 64 P. 218 (Colo. 1901); Palmer v. Gould, 18 N.Y.S. 638, aff'd, 34 N.E. 291, rev'd. on other grounds, 39 N.E. 378;* Bodine v. Glading, (Pa. 1853). Where the parties to the contract to convey have deposited mutual forfeits for failure of either to perform, the vendor cannot maintain specific performance; his only remedy is an action for damages and the sum stipulated is the true measure of damages for the breach. *Clark v. Asbury, 134 S.W. 286 (Tex. Civ. App. 1911).*

(n283)Footnote 1560. *Wilhite v. Skelton, 149 F. 67 (8th Cir. 1906); Foss v. Haynes, 31 Me. 81 (Me. 1849).*

(n284)Footnote 1561. *Jordan v. Boisvert, 632 S.2d 254* (Fla. App. 1 Dist. 1994); *Donohue v. Picinich, 852 F. Supp. 144 (D. Conn. 1994); Lockie v. Baker, 218 N.W. 483 (Iowa 1928); Stuart v. Gonyea, 224 N.W. 386 (Mich. 1929); Stanton v. Occidental Life Ins. Co., 261 P. 620 (Mont. 1927); Humphrey v. Brown, 139 A. 606 (Pa. 1927).*

(n285)Footnote 1562. *McDonald v. Bartlett, 155 N.E. 477 (Ill. 1927).*

(n286)Footnote 1563. *Lockie v. Baker, 218 N.W. 483 (Iowa 1928).*

(n287)Footnote 1564. The fact that the wife did not sign a sales contract for the sale of her separate property did not prevent the wife and husband from bringing specific performance action since this ratified the husband's agency in signing the contract on the wife's behalf. *Williams v. Noel, 105 S.2d 901 (Fla. App. 1958).*

(n288)Footnote 1565. *Losee v. Morey, 57 Barb. 561 (N.Y. Sup. 1865).* Where the vendors, after filing an action for specific performance, conveyed to a third party, the right to specific performance ceased, but the vendors could bring a new civil suit for damages. *Miller v. Rolfe, 97 S.2d 132 (Fla. App. 1957).*

(n289)Footnote 1566. *Bartos v. Czerwinski, 34 N.W.2d 566 (Mich. 1948).* In *Lingemann v. Naoumson, 212 N.W. 955 (Mich. 1927),* it was stated: "Courts of equity are loathe to impose and supervise the performance and execution of contracts freighted with contingencies or uncertainties, but leave the plaintiff to his remedy at law."

(n290)Footnote 1567. *Pa. Oil Co. v. Andrew, 288 N.W. 246 (Wis. 1939).*

(n291)Footnote 1568. *Karterman v. Jameson, 980 P.2d 574 (Idaho Ct. App. 1999); Shammas v. Bates, 9 F.2d 423 (S.D. Fla. 1925); Neely v. Broad Street Nat'l Bank, 16 F. Supp. 839 (D. N.J. 1936); Turner v. Stock, 251 P. 814 (Cal. App. 1st Dist. 1926); Boulenger v. Morison, 264 P. 256 (Cal. App. 3d Dist. 1928); Boro v. Ruzich, 137 P.2d 51 (Cal. App. 2d Dist. 1943); Patch v. Anderson, 151 P.2d 644 (Cal. App. 4th Dist. 1944); Mestas v. Martini, 155 P.2d 161 (Colo. 1944); Zamboni v. Graham, 88 P.2d 98 (Colo. 1939); Womack v. Madison Drug Co., 20 S.2d 256 (Fla. 1945);* Rundel v. Gordon, *111 S. 386 (Fla. 1927); O'Rear v. Lamb, 22 S.E.2d 74 (Ga. 1942); Thomas v. Pope, 43 N.E.2d 1004 (Ill. 1942); Crocker v. Smith, 9 N.E.2d 309 (Ill. 1937); Klein v. Hodgdon, 154 N.E. 197 (Ill. 1926); Grove v. Templin, 151 N.E. 514 (Ill. 1926); Velcich v. Malesh, 1 N.E.2d 278 (Ill. App. 1st Dist. 1936); Foltz v. Evans, 49 N.E.2d 358 (Ind. App. 1943); Johnstone v. Johnstone, 284 N.W. 379 (Iowa 1939); Lockie v. Baker, 218 N.W. 483 (Iowa 1927); Donovan v. Murphy, 212 N.W. 466 (Iowa 1927); Nichols v. Coppock, 261 P. 574 (Kan. 1927); Soehnlein v. Pumphrey, 37 A.2d 843 (Md. 1944); Joyce v. Dillon Props., Inc., 29 A.2d 273 (Md. 1942); Czeizler v. Radke, 15 N.W.2d 665 (Mich. 1944); Heller v. Sweeney, 135 A. 264 (N.J. Ch. 1926); Zukman v. Ihle, 133 A. 779 (N.J. Ch. 1926), aff'd, 135 A. 920 (N.J. Ch. 1926);* Burstin v. Buck, *90 P. L.J. (Pa.) 354; Fisher v. Wilson, 185 S.W.2d 186 (Tex. Civ. App. 1945); Truslow v. Ball,*

186 S.E. 71 (Va. 1936); Keys v. Klitten, 151 P.2d 989 (Wash. 1944); Lager v. Berggren, 60 P.2d 99 (Wash. 1936); Spradling v. Spindling, 190 S.E. 537 (W. Va. 1937). Where the oral agreement is satisfactorily established equity will grant specific performance. *Kelley v. Dodge, 54 N.W.2d 730 (Mich. 1952).*

(n292)Footnote 1569. *Hotopp v. Adair, 223 S.W. 393 (Ark. 1920);* Dixie Naval Stores Co. v. German-Am. Lumber Co., *79 S. 836 (Fla. 1918); Ga. S. & Fla. RR. Co. v. Taylor, 82 S.E. 1058 (Ga. 1914); Cline v. Strong, 100 N.E. 569 (Ind. App. 1913); McCall v. Atchley, 164 S.W. 593 (Mo. 1914); In re Roth's Est., 269 P.2d 278 (Utah 1954).* When the kind of conveyance is not specified in the contract, it will be presumed that a general warranty deed is intended. *Skinner v. Stone, 222 S.W. 360 (Ark. 1920).* The above rule applies to parol contracts. *Weir v. Weir, 122 N.E. 868 (Ill. 1919); Kimball v. Batley, 140 N.W. 915 (Mich. 1913); Hayworth v. Hayworth, 236 S.W. 26 (Mo. 1921); Hargreaves v. Burton, 206 P. 262 (Utah 1922).* Terms of sale must be stated. Nickerson v. Fithian Land Co., *80 S. 1 (Miss. 1918).* A provision "to improve the said property to the extent of no less than $10,000" is too uncertain. *H.M. Weill Co. v. Creveling, 168 N.Y.S. 385 (N.Y. App. Div. 1st Dept. 1917).* A contract for a long term lease providing for incorporating "the usual clauses contained in long time leases" with reference to certain matters is too uncertain. *Noonan v. Mott, 194 N.Y.S. 502 (N.Y. Sup. 1921),* aff'd. *194 N.Y.S. 962 (N.Y. App. Div. 1st Dept. 1922).* Purchase price must be definite and certain to enforce specific performance. *Bryant v. Clark, 358 S.W.2d 614 (Tex. 1962).*

(n293)Footnote 1570. *Becker v. Sunrise at Elkridge, 543 A.2d 977 (N.J. Super. Ct. App. Dev. 1988); Long Beach Drug Co. v. United Drug Co., 88 P.2d 698 (Cal. 1939).* Permitting specific performance for part of land and apportioning purchase price. *Wilcox v. Wyandotte World-Wide, Inc., 493 P.2d 251 (Kan. 1972).*

(n294)Footnote 1571. *Smith v. Cameron, 141 P. 596 (Kan. 1914); Sportsman v. Halstead, 147 S.W.2d 447 (Mo. 1941).*

(n295)Footnote 1572. *Oles v. Wilson, 141 P. 489 (Colo. 1914).*

(n296)Footnote 1573. *Threlkeld v. Inglett, 124 N.E. 368 (Ill. 1919).*

(n297)Footnote 1574. *Luzader v. Richmond, 27 N.E. 736 (Ind. 1891); Gates v. Gamble, 18 N.W. 631 (Mich. 1884); Shumway v. Kitzman, 134 N.W. 325 (S.D. 1912). See Blumenstein v. Wegman, 14 N.Y.S.2d 525 (N.Y. Sup. 1939). But see Mullins v. Benton, 419 S.E.2d 838 (S.C. Ct. App. 1992).*

(n298)Footnote 1575. *Tryce v. Dittus, 65 N.E. 220 (Ill. 1902).* Provision "subject to financing" in a contract of real estate makes the financing a condition precedent. *Makris v. Nolan, 335 A.2d 655 (N.H. 1975).*

(n299)Footnote 1576. *Kirkley v. Jones, 550 S.E.2d 686 (Ga. Ct. App. 2001); Vaughn v. Willard, 37 S.W.3d 413 (Mo. Ct. App. 2001); Whitson v. Owens, 115 So. 512 (Fla. 1928); Hammond v. Hacker, 111 So. 511 (Fla. 1927); Casler v. Anderson, 107 So. 631 (Fla. 1926); Martin v. Oakhurst Dev. Corp., 29 S.E.2d 179 (Ga. 1944); Sykes v. Reeves, 24 S.E.2d 688 (Ga. 1943); McNamara v. Marcum, 162 S.W.2d 205 (Ky. App. 1942); Helmik v. Pratt, 139 A. 559 (Md. 1927); Gilbert v. Wright, 141 S.E. 577 (N.C. 1928); Fisher v. Wilson, 185 S.W.2d 186 (Tex. Civ. App. 1945); Marshall & Ilsley Bank v. Schuerbrock, 217 N.W. 416 (Wis. 1928).* Specific performance will not be granted unless the contract furnishes the means by which the property may be identified with reasonable certainty. *Granato v. Bravo, 498 S.W.2d 499 (Tex. Civ. App. 1973).* Uncertainty as to beginning point of description denied specific performance. *Bland v. Lowery, 327 N.E.2d 477 (Ill. App. 1975).*

(n300)Footnote 1577. *Schellenbach v. Lagasse, 262 P. 304 (Cal. 1927);* Whitson v. Owens, *115 S. 512 (Fla. 1928); Donovan v. Murphy, 212 N.W. 466 (Iowa 1927).*

(n301)Footnote 1578. *Cisco v. Van Lew, 141 P.2d 433 (Cal. App. 4th Dist. 1943); Muller v. Cooper, 141 S.E. 300 (Ga. 1928).*

(n302)Footnote 1579. *Duke v. Whatley, 580 So. 2d 1267 (Miss. 1991); Ford v. Blinn, 623 P.2d 1110 (Or. Ct. App.*

1981); Kearns v. Andree, 139 A. 695 (Conn. 1928); Whitson v. Owens, *115 S. 512 (Fla. 1928); Trust Co. of Ga. v. Neal, 132 S.E. 385 (Ga. 1926); Nichols v. Coppock, 261 P. 574 (Kan. 1927); Terry v. Michalak, 3 S.W.2d 701 (Mo. 1928); Ansorge v. Kane, 155 N.E. 683 (N.Y. 1927); Marsh v. Marsh, 227 N.Y.S. 34 (N.Y. App. Div. 2d Dept. 1928).*

(n303)Footnote 1580. *Young v. Flournoy, 77 S.E. 807 (Ga. 1913); Brown v. Hughes, 90 A. 651 (Pa. 1914).* Specific performance denied where the contract was uncertain as to terms of a mortgage to be given as part of the purchase price. *Augustine v. Chateau Homes, Inc., 324 N.E.2d 633 (Ill. App. 1975).*

(n304)Footnote 1581. *Hirschman v. Forehand, 170 S.W. 98 (Ark. 1914).*

(n305)Footnote 1582. *Meyer v. Kesterson, 9590 P.2d 896 (Or. Ct. App. 1997); Reed v. Alvey, 610 P.2d 1374 (Utah 1980);* Rushton v. McKee & Co., *77 S. 343 (Ala. 1917); Kirby v. Malone, 215 S.W. 592 (Ark. 1919); Joyce v. Tomasini, 142 P. 67 (Cal. 1914); Barnes v. Cowan, 94 S.E. 564 (Ga. 1917); Clark v. Cagle, 82 S.E. 21 (Ga. 1914); Mosher v. Rogers, 81 S.E. 852 (Ga. 1914); Nelson v. McElroy, 168 N.W. 179 (Minn. 1918);* Phelps v. Dana, *83 S. 745 (Miss. 1920); Beebe v. Hanson, 169 N.W. 31 (N.D. 1918); O'Connell v. Cease, 110 A. 266 (Pa. 1920).*

(n306)Footnote 1583. *Wichita Water Co. v. Wichita, 280 F. 770 (8th Cir. 1922); Foltz v. Evans, 49 N.E.2d 358 (Ind. App. 1943); Marti v. Ludeking, 185 N.W. 476 (Iowa 1921); Grow v. Davis, 203 P. 683 (Kan. 1922); Boyers v. Boyers, 147 S.W.2d 473 (Mo. 1941); Pollak v. Roberts, 176 N.W. 957 (N.D. 1920).*

(n307)Footnote 1584. *Flannery v. Woolverton, 160 N.E. 762 (Ill. 1928); C.D. Gammon Co. v. Std. Trust & Sav. Bank, 158 N.E. 810 (Ill. 1927); Nichols v. Coppock, 261 P. 574 (Kan. 1927); Terry v. Michalak, 3 S.W.2d 701 (Mo. 1928); Schneider v. Crawford, 131 A. 687 (N.J. Ch. 1926); Hobelman v. Cavallo, 140 A. 432 (N.J. 1928); Marshall & Ilsley Bank v. Schuerbrock, 217 N.W. 416 (Wis. 1928).*

(n308)Footnote 1585. Citronelle Turpentine Co. v. Buhlig, *63 S. 951 (Ala. 1913); Caplan v. Buckner, 91 A. 481 (Md. 1914); Marshall v. Beason, 165 S.W. 75 (Tex. Civ. App. 1914).* The vendor may enforce the contract on default of the vendee when the price is fixed with sufficient definiteness. *Clark v. Cagle, 82 S.E. 21 (Ga. 1914).*

(n309)Footnote 1586. *Cline v. Strong, 100 N.E. 569 (Ind. App. 1913); Tharp U. Sch. v. Komus Realty Co., 167 S.W. 136 (Ky. App. 1914); Hume v. Bogle, 204 S.W. 673 (Tex. Civ. App. 1918).* Cf. *McAdam v. Leak, 208 P. 569 (Kan. 1922).*

(n310)Footnote 1587. *Wolf v. Lodge, 140 N.W. 429 (Iowa 1913).* Contra, *Cummings v. Nielson, 129 P. 619 (Utah 1912).*

(n311)Footnote 1588. *Kendall v. Kendall, 193 N.Y.S. 661 (N.Y. App. Div. 1st Dept. 1922).*

(n312)Footnote 1589. *Coleman v. Woodland Hills Co., 27 S.E.2d 226 (Ga. 1943).*

(n313)Footnote 1590. *Harrington v. Harrington, 365 N.W.2d 552 (N.D. 1985); Steuart v. McChesney, 444 A.2d 659 (Pa. 1982); Knott v. Cutler, 31 S.E.2d 359 (N.C. 1944).*

(n314)Footnote 1591. Christian Church v. Littleville Camp No. 258, *64 S. 9 (Ala. 1913); Gibson v. Riehle, 140 P. 933 (Colo. App. 1914); Swirsky v. Horwich, 51 N.E.2d 822 (Ill. App. 1st Dist. 1943); Strobe v. Netherland Co., 283 N.Y.S. 246 (N.Y. App. Div. 4th Dept. 1935).*

(n315)Footnote 1592. *Ver Standig v. St. Louis Union Trust Co., 129 S.W.2d 905 (Mo. 1939).*

(n316)Footnote 1593. *Coleman v. Woodland Hills Co., 27 S.E.2d 226 (Ga. 1943); In re Johnson's Est., 10 N.W.2d 664 (Iowa 1943); Cochran v. Taylor, 7 N.E.2d 89 (N.Y. 1937); Ward v. Albertson, 81 S.E. 168 (N.C. 1914).*

(n317)Footnote 1594. *Rossiter v. Vogel, 134 F.2d 908 (2d Cir. 1943); Baumann v. Kusian, 129 P. 986 (Cal. 1913);*

Eichholtz v. Nicoll, 151 P.2d 664 (Cal. App. 4th Dist. 1944); Gaskins v. Byrd, *63 S. 824 (Fla. 1913); Cline v. Strong, 100 N.E. 569 (Ind. App. 1913); In re Johnson's Est., 10 N.W.2d 664 (Iowa 1943); Warren Mfg. Co. v. Baltimore, 86 A. 502 (Md. 1913); Taft v. Henry, 106 N.E. 553 (Mass. 1914); Beard v. Morgan, 10 N.W.2d 253 (Neb. 1943); Sweeney v. Brow, 86 A. 115 (R.I. 1913); Cummings v. Nielson, 129 P. 619 (Utah 1912); McKinley Tel. Co. v. Cumberland Tel. Co., 140 N.W. 38 (Wis. 1913).*

(n318)Footnote 1595. *O'Connell v. Lampe, 274 P. 336 (Cal. 1929); Pestal v. O'Donnell, 254 P. 764 (Colo. 1927); Hankinson v. Hankinson, 147 S.E. 106 (Ga. 1929); Chicago Title & Trust Co. v. Ill. Merchants Trust Co., 160 N.E. 597 (Ill. 1928); Nunge v. Crawford, 88 Pa. Super. 516 (Pa. Super. 1926); Palmer v. Carpenter, 169 A. 745 (R.I. 1934).* The mere fact that the value had increase between 1967 and 1973 did not justify denying specific performance. *Slater v. Easter, 328 N.E.2d 526 (Mass. App. 1975).*

(n319)Footnote 1596. *Warren Mfg. Co. v. Baltimore, 86 A. 502 (Md. 1913); Ralphsnyder v. Titus, 82 S.E. 257 (W. Va. 1914).*

(n320)Footnote 1597. *Boulenger v. Morison, 264 P. 256 (Cal. App. 3d Dist. 1928).*

(n321)Footnote 1598. *Viau v. Viau, 207 P. 39 (Cal. App. 1st Dist. 1922).*

(n322)Footnote 1599. *Waratah Oil Co. v. Reward Oil Co., 139 P. 91 (Cal. App. 1st Dist. 1914).*

(n323)Footnote 1600. *Wolf v. Lodge, 140 N.W. 429 (Iowa 1913); Walton's Exec. v. Franks, 228 S.W. 1025 (Ky. App. 1921); Brewer v. Sowers, 86 A. 228 (Md. 1912).*

(n324)Footnote 1601. *Brewer v. Sowers, 86 A. 228 (Md. 1912); Trustees of Hamilton College v. Roberts, 119 N.E. 97 (N.Y. 1918); Horgan v. Russell, 140 N.W. 99 (N.D. 1913).*

(n325)Footnote 1602. *Harborgate Property Owners Ass'n, Inc. v. Mountain Lake Shores Dev. Corp., 551 S.E.2d 207 (N.C. Ct. App. 2001); Crittenden v. Hansen, 138 P.2d 37 (Cal. App. 1st Dist. 1943); Waldeck v. Hedden, 265 P. 340 (Cal. App. 1st Dist. 1928); Whiteway Neon-Ad. v. Maddox, 83 S.E.2d 676 (Ga. 1954); Coleman v. Woodland Hills Co., 27 S.E.2d 226 (Ga. 1943); Cline v. Strong, 100 N.E. 569 (Ind. App. 1913); Brown v. Ward, 81 N.W. 247 (Iowa 1899); Richmond v. African Methodist Episcopal Zion Church, 4 La. App. 191 (La. App. 1926); Lingemann v. Naoumson, 212 N.W. 955 (Mich. 1927); Franklin v. Zarmstorf, 15 N.W.2d 190 (Neb. 1944); Blockdel Realty Co. v. Doyle, 6 A.2d 670 (N.J. Ch. 1939); Roberts v. N.Y. Life Ins. Co., 186 N.Y.S. 422 (N.Y. App. Div. 1st Dept. 1921); McGrath v. Johnson, 42 N.Y.S.2d 556 (N.Y. App. Div. 2d Dept. 1943); Sorsby v. Thom, 168 S.W.2d 873 (Tex. Civ. App. 1943). See* James F. McKenzie, Student Author, Forfeiture Clause of Conditional Sales Contracts--A Cause for Equitable Intervention in Mississippi, *30 Miss. L. Rev. 57 (1958).*

(n326)Footnote 1603. *Wichita Water Co. v. Wichita, 280 F. 770 (8th Cir. 1922);* Bagley v. Bagley, *89 S. 739 (Ala. 1921); Napa Valley Elec. Co. v. Calistoga Elec. Co., 176 P. 699 (Cal. App. 1st Dist. 1918); McDermott v. Lingquist, 179 P. 147 (Colo. 1919);* Ray Richardson, Inc. v. Carlton, *191 S. 433 (Fla. 1939); Shankman v. Leavitt, 160 N.E. 340 (Mass. 1928); New River Lumber Co. v. Tenn. Ry. Co., 238 S.W. 867 (Tenn. 1922).* Specific performance may be had on a contract to convey of one cotenant alone. *Bolger v. Harrigan, 189 N.E.2d 377 (Ill. App. 1963).*

(n327)Footnote 1604. *Ferrero v. Coutts, 591 A.2d 1320 (N.H. 1991); Miller v. Dyer, 127 P.2d 901 (Cal. 1942); Nakatsukasa v. Wade, 274 P.2d 918 (Cal. App. 1st Dist. 1954); Jones v. Carpenter, 117 A. 559 (Del. Ch. 1922); Redden v. Bausch, 204 P. 752 (Kan. 1922); James S. Holden Co. v. William Tait Realty Co., 185 N.W. 837 (Mich. 1921); Saperstein v. Mechanics' & Farmers' Sav. Bank, 126 N.E. 708 (N.Y. 1920); Mandel v. Guardian Holding Co., 182 N.Y.S. 686 (N.Y. App. Div. 1st Dept. 1920); Manley v. Holt, 161 S.W.2d 857 (Tex. Civ. App. 1942); Blair v. Lowrey, 164 S.W. 14 (Tex. Civ. App. 1914).* When the contract provides that, if the vendor is unable to give title, the obligations of either party shall cease, the purchaser cannot compel the vendor to remove a cloud, or convey with a suitable deduction because of the cloud. *Old Colony Trust Co. v. Chauncey, 101 N.E. 423 (Mass. 1913).* One cannot obtain specific

performance, who knew, when the contract was executed by the secretary of the defendant company, that it did not own the property, and that a firm was the real owner's agent. *Vacarezza v. Realty Inv. Co., 165 S.W. 516 (Tex. Civ. App. 1914).*

(n328)Footnote 1605. *Bennett v. U.S. Land, Title & Legacy Co., 141 P. 717 (Ariz. 1914); Roach v. Irvin, 91 A. 243 (Pa. 1914).*

(n329)Footnote 1606. Derbonne v. Burton, *189 S. 473 (La. App. 1st Cir. 1939).* Where vendor has conveyed part of the property to a third party, specific performance will lie for the portion retained. *Lawing v. Jaynes, 202 S.E.2d 334 (N.C. App. 1974),* modified by, *206 S.E.2d 162 (N.C. 1974)*

(n330)Footnote 1607. Branch v. Acme Homestead Assn., *169 S. 129 (La. App. 1936).* Specific performance will not lie if the title is the least bit doubtful. *Smith v. MacAlister, 294 N.E.2d 441 (Mass. App. 1972).*

(n331)Footnote 1608. *Kessler v. Tortoise Dev. Inc., 1 P.3d 292 (Idaho 2000); Greenfield County Estates Tenants Ass'n, Inc. v. Deep, 666 N.E.2d 988 (Mass. 1996); Sharpley v. Sharpley, 132 A. 139 (Del. Ch. 1926); Todd v. Hyzer, 18 S.2d 888 (Fla. 1944);* Rundel v. Gordon, *111 S. 386 (Fla. 1927); Stuckrath v. Briggs, 161 N.E. 91 (Ill. 1928); Rogers Bros. Coal Co. v. Day, 1 S.W.2d 540 (Ky. App. 1927); Hilgedick v. Nothstine, 289 S.W. 939 (Mo. 1926); Manchester Dairy System v. Hayward, 132 A. 12 (N.H. 1926); Degheri v. Carobine, 135 A. 518 (N.J. Ch. 1927),* rev'd on other grounds, *140 A. 406 (N.J. 1928); Humphrey v. Brown, 139 A. 606 (Pa. 1927); Duncan v. Duncan, 140 S.E. 689 (W. Va. 1927); Barr v. Granahan, 38 N.W.2d 705 (Wis. 1949). But see Simmerman v. Fort Hartford Coal Co., 221 S.W.2d 442 (Ky. 1949).*

(n332)Footnote 1609. *Louis K. Liggett Co. v. Rose, 136 A. 651 (Md. 1927); Hurst v. Champion, 244 P. 419 (Okla. 1925).* Specific performance permitted to a wilfully defaulting vendee where no detriment to vendor by continuing performance. *McFadden v. Walker, 488 P.2d 1353 (Cal. 1971).*

(n333)Footnote 1610. *James v. Anderson, 51 P.2d 601 (N.M. 1935). See Sarazin v. Kunz, 286 N.W. 471 (Iowa 1939).*

(n334)Footnote 1611. *Zipperer v. Helmnly, 97 S.E. 74 (Ga. 1918),* rev'd on other grounds, *Peacock Constr. Co. v. Chambers, 156 S.E.2d 348 (Ga. 1967); Morris v. Basnight, 102 S.E. 389 (N.C. 1920).*

(n335)Footnote 1612. *Chesapeake & Ohio RR. Co. v. Dayton, 197 S.W. 969 (Ky. App. 1917).*

(n336)Footnote 1613. *Ogooshevitz v. Arnold, 163 N.W. 946 (Mich. 1917),* modified by, *165 N.W. 633 (Mich. 1917).*

(n337)Footnote 1614. *Wright v. Suydam, 131 P. 239 (Wash. 1913).*

(n338)Footnote 1615. *McGinn v. Willey, 141 P. 49 (Cal. App. 3d Dist. 1914); Freeman v. Elder, 63 N.W.2d 327 (Neb. 1954).* Where there is a major defect in title, a purchaser may be denied complete specific performance but is entitled to receive such partial performance as the vendor is capable of giving. *Wittick v. Miles, 545 P.2d 121 (Or. 1976).*

(n339)Footnote 1616. *Dennett v. Norwood Hous. Assn., 135 N.E. 866 (Mass. 1922).*

(n340)Footnote 1617. *Linn County Bank v. Grisham, 185 P. 54 (Kan. 1919); Boehm v. Platt, 189 N.Y.S. 16 (N.Y. Sup. 1921).*

(n341)Footnote 1618. *Brand v. Lowther, 285 S.E.2d 474 (W.Va. 1981);* Citronelle Turpentine Co. v. Buhlig, *63 S. 951 (Ala. 1913).*

(n342)Footnote 1619. *Haden v. Falls, 80 S.E. 576 (Va. 1914).* The rule is otherwise, where plaintiff is willing to accept a deed from defendant without the latter's wife joining therein and does not ask for abatement or indemnities. *Stratford v. Lukens, 52 Pa. Super. 355 (Pa. Super. 1912).*

(n343)Footnote 1620. *McDermott v. Lingquist, 179 P. 147 (Colo. 1919).*

(n344)Footnote 1621. Jackson Lumber Co. v. Bass, *61 S. 271 (Ala. 1913).*

(n345)Footnote 1622. *Jamison Coal & Coke Co. v. Goltra, 143 F.2d 889 (8th Cir. 1944).*

(n346)Footnote 1623. *Piziss v. Geddes, 771 P.2d 1028 (Or. Ct. App. 1989); Dean v. Gregg, 663 P.2d 502 (Wash. Ct. App. 1983); Knott v. Cutler, 31 S.E.2d 359 (N.C. 1944).*

(n347)Footnote 1624. *Cowin v. Salmon, 13 S.2d 190 (Ala. 1943);* Boylan v. Wilson, *79 S. 364 (Ala. 1918); Newman v. Freitas, 61 P. 907 (Cal. 1900); Crittenden v. Hansen, 138 P.2d 37 (Cal. App. 1st Dist. 1943); Coleman v. Woodland Hills Co., 27 S.E.2d 226 (Ga. 1943); Kirkland v. Downing, 32 S.E. 632 (Ga. 1899); Miller v. Clark, 133 N.E. 685 (Ill. 1922); Carver v. Brien, 43 N.E.2d 597 (Ill. App. 1st Dist. 1942); Griffin v. Nash, 174 N.W. 233 (Iowa 1919); Eisenbeis v. Shillington, 159 S.W.2d 641 (Mo. 1941); Ranck v. Wickwire, 164 S.W. 460 (Mo. 1914); Shinkle v. Vickery, 55 S.W. 456 (Mo. 1900); McGrath v. Johnson, 42 N.Y.S.2d 556 (N.Y. App. Div. 2d Dept. 1943); Ferguson v. Blackwell, 58 P. 647 (Okla. Terr. 1899); McHale v. Reilly, 117 A. 912 (Pa. 1922); Watters v. Ryan, 141 N.W. 359 (S.D. 1913); Eclipse Oil Co. v. S. Penn Oil Co., 34 S.E. 923 (W. Va. 1899).* Vendor who does not have title sufficient to convey by warranty deed is not entitled to specific performance. *Bradley v. Apel, 531 S.W.2d 678 (Tex. Civ. App. 1976).* Promise to convey merchantable title and promise to pay specific amount of property are mutually dependent conditions. *Anderson v. Pickering, 541 P.2d 1361 (Okla. App. 1975).*

(n348)Footnote 1625. *Favata v. Mercer, 99 N.E.2d 116 (Ill. 1951);* Equitable Discretion in Suits for Specific Performance, *1951 U. Ill. L. F. 677 (1951); Lexington & E. Ry. Co. v. Williams, 209 S.W. 59 (Ky. App. 1919); Lemp Hunting & Fishing Club v. Hackman, 156 S.W. 791 (Mo. App. 1913).* It is held that a town cannot be compelled to perform a water district's contract of purchase upon the dissolution of the water district, although, by statute, the town, upon dissolution of the water district, was liable for the indebtedness of such water district and was therefore liable in lieu of specific performance for damages suffered by the town by reason of the dissolution with the contract unfulfilled. *Echo Lake Corp. v. Mt. Pleasant, 285 N.Y.S. 545 (N.Y. App. Div. 2d Dept. 1936).*

(n349)Footnote 1626. Dale v. Jennings, *107 S. 175 (Fla. 1926); Robenson v. Yann, 5 S.W.2d 271 (Ky. App. 1928); Duncan v. Duncan, 140 S.E. 689 (W. Va. 1927).*

(n350)Footnote 1627. *Dergo v. Kollias, 567 N.W.2d 443 (Iowa Ct. App. 1997); Chalmette Petroleum Corp. v. Chalmette Oil Distribg. Co., 143 F.2d 826 (5th Cir. 1944); Boas v. Bank of Am. Nat'l Trust & Sav. Assn., 125 P.2d 620 (Cal. App. 1st Dist. 1942),* rev'd in part on other grounds, *Gagne v. Bertran, 275 P.2d 15 (Cal. 1954); Bayne v. Cinak, 150 N.E. 344 (Ill. 1926); Staly v. McNerney, 10 N.W.2d 584 (Iowa 1943); Dunkelbarger v. Brasted, 212 N.W. 676 (Iowa 1927); Beard v. Morgan, 10 N.W.2d 253 (Neb. 1943); Smith v. Reidy, 113 A. 774 (N.J. Ch. 1921); Hammer v. Michael, 154 N.E. 305 (N.Y. 1926); Guokas v. Bishara, 57 N.Y.S.2d 588 (N.Y. Sup. 1945); Holly Hill Lumber Co. v. McCoy, 23 S.E.2d 372 (S.C. 1942).*

(n351)Footnote 1628. *Pate v. Duke U., 1 S.E.2d 127 (N.C. 1939).* Inequitable conduct such as concealment of identity though not amounting to fraud will prevent specific performance. *Favata v. Mercer, 99 N.E.2d 116 (Ill. 1951).*

(n352)Footnote 1629. *Best v. Culhane, 677 S.W.2d 390 (Mo. Ct. App. 1984); Beard v. Morgan, 10 N.W.2d 253 (Neb. 1943); Guokas v. Bishara, 57 N.Y.S.2d 588 (N.Y. Sup. 1945); Duncan v. Duncan, 140 S.E. 689 (W. Va. 1927). See In re Mellinger's Est., 9 Som. (Pa.) 55.*

(n353)Footnote 1630. *Martin v. Hempstead County Levee Dist., 135 S.W. 453 (Ark. 1911); Bryant Elec. Co. v.*

Stein, 111 A. 204 (Conn. 1920); Corrigan v. Ralph, 107 N.E. 155 (Ill. 1914); Adams v. Wheeler, 23 N.E. 760 (Ind. 1890); Flynn v. Finch, 114 N.W. 1058 (Iowa 1908); Hickman v. Cave, 224 P. 57 (Kan. 1924); Scott v. Spurr, 184 S.W. 866 (Ky. App. 1916); O'Keefe v. Irvington Real Est. Co., 39 A. 428 (Md. 1898); Ziegenhagen v. Hartwig, 185 N.W. 382 (Minn. 1921); Mosby v. Wall, 23 Miss. 81 (Miss. 1851); Last Chance Min. Co. v. Tuckahoe Min. Co., 202 S.W. 287 (Mo. App. 1918); Bartlett v. Judd, 21 N.Y. 200 (N.Y. 1860); Davenport v. Sovil's Heirs, 6 Ohio St. 459 (Ohio 1856); Anderson v. Burgess, 223 P. 244 (Or. 1924); Martin v. La Boon, 107 S.E. 320 (S.C. 1921); Hughes v. Payne, 117 N.W. 363 (S.D. 1908); Bishop v. Tartt, 107 S.W. 359 (Tex. Civ. App. 1908).

(n354)Footnote 1631. *Double AA Corp. v. Newland & Co., 950 P.2d 138 (Mont. 1995); Samuel v. Cityco Realty Co., 118 A. 124 (Md. 1922); Caplan v. Buckner, 91 A. 481 (Md. 1914); Bredeson v. Nickolay, 180 N.W. 547 (Minn. 1920); Eisenbeis v. Shillington, 159 S.W.2d 641 (Mo. 1941); Streeter v. Archer, 176 N.W. 826 (N.D. 1920); In re Mellinger's Est. 9 Som. (Pa.) 55 (1938); Masonic Temple v. Ebert, 18 S.E.2d 584 (S.C. 1942); Anthony v. Eve, 95 S.E. 513 (S.C. 1918); Millman v. Swan, 127 S.E. 166 (Va. 1925); Printz v. McLeod, 104 S.E. 818 (Va. 1920); Hastings v. Montgomery, 122 S.E. 155 (W. Va. 1924).*

(n355)Footnote 1632. *Kies v. Warrick, 182 N.W. 998 (Minn. 1921).*

(n356)Footnote 1633. *Dacy v. Village of Ruidoso, 845 P.2d 793 (N.M. 1992); C.D. Gammon Co. v. Stand. Trust & Sav. Bank, 158 N.E. 810 (Ill. 1927).*

(n357)Footnote 1634. *Proctor v. Hansel, 218 N.W. 255 (Iowa 1928).*

(n358)Footnote 1635. *Hay v. Kirk, 116 Ill. App. 45 (Ill. App. 4th Dist. 1904); Greenleaf v. Blakeman, 56 N.Y.S. 76 (N.Y. Sup. 1898),* modified by, *58 N.Y.S. 76 (N.Y. App. Div. 1st Dept. 1899), aff'd, 60 N.E. 1111 (N.Y. 1901).* Illegality prevents specific performance. *Greve v. Leger, Ltd., 415 P.2d 824 (Cal. 1966).*

(n359)Footnote 1636. *Keim v. Lindley, 30 A. 1063 (N.J. Ch. 1895),* rev'd on other grounds, *O'Reilly v. Keim, 34 A. 1073 (N.J. 1896).*

(n360)Footnote 1637. *Dergo v. Kollias, 567 N.W.2d 443 (Iowa Ct. App. 1997); McMillan v. Branan, 101 S.E. 792 (Ga. 1920); Heitman v. Clancy, 148 N.W. 1011 (Iowa 1914); Bartley v. Big Branch Coal Co., 169 S.W. 601 (Ky. 1914); Rogers v. Dorrance, 117 A. 564 (Md. Md. 1922); Warren Mfg. Co. v. Baltimore, 86 A. 502 (Md. 1913); Edelstein v. Sell, 269 Pa. 288, 112 A. 435 (Pa. 1921); Brown v. Musgrave, 222 S.W. 606 (Tex. Civ. App. 1920); Le Marinel v. Bach, 196 P. 22 (Wash. 1921).*

(n361)Footnote 1638. *Muench v. Barnell, 144 N.W. 602 (Iowa 1913).*

(n362)Footnote 1639. *Best v. Culhane, 677 S.W.2d 390 (Mo. Ct. App. 1984); Muller v. Weiss, 108 A. 768 (N.J. Ch. 1919).*

(n363)Footnote 1640. *Neptune Fisheries Co. v. Cape May Real Est. Co., 105 A. 212 (N.J. 1918).*

(n364)Footnote 1641. *Chapman v. Hill, 137 P. 1041 (Wash. 1914).*

(n365)Footnote 1642. *Ballard v. Lyon, 131 N.W. 320 (Minn. 1911).*

(n366)Footnote 1643. *Gibb v. Mintline, 141 N.W. 538 (Mich. 1913).* Specific performance was denied where a pipe was not a legal encumbrance. *Kleinberg v. Ratett, 169 N.E. 289 (N.Y. 1929).*

(n367)Footnote 1644. *Heitman v. Clancy, 148 N.W. 1011 (Iowa 1914).*

(n368)Footnote 1645. *Boothe v. Bassett, 143 P. 449 (Wash. 1914).*

(n369)Footnote 1646. *McAllister v. Schettler, 521 A.2d 617 (Del. Ch. 1986); Wayne Woods Land Co. v. Beeman, 178 N.W. 696 (Mich. 1920).*

(n370)Footnote 1647. *Crotty v. Effler, 60 W. Va. 258, 54 S.E. 345 (W. Va. 1906).*

(n371)Footnote 1648. *Shikes v. Gabelnick, 173 N.E. 495 (Mass. 1930).*

(n372)Footnote 1649. *Nelson Dev. Co. v. Ohio Oil Co., 45 F. Supp. 933 (E.D. Ill. 1942); Cascaden v. Dunbar, 2 Alaska 408 (D. Alaska 1905),* overruled on other grounds, *157 F. 62 (9th Cir. 1907); Stewart v. Schnepf, 158 P.2d 529 (Ariz. 1945); Sebold v. Williamson, 158 S.W.2d 667 (Ark. 1942);* Battle v. Butler, *189 S. 846 (Fla. 1939); Etheridge v. Woodard, 32 S.E. 122 (Ga. 1898); Ruff Brewing Co. v. Schanz, 114 Ill. App. 508 (Ill. App. 3d Dist. 1904); Brown v. Freudenberg, 17 N.E.2d 865 (Ind. App. 1938); Sizemore v. Bowling's Adminr., 115 S.W. 737 (Ky. App. 1909); Boelter v. Blake, 12 N.W.2d 327 (Mich. 1943); Farina v. Madden, 163 S.W.2d 82 (Mo. 1942); Roth v. Goerger, 24 S.W. 176 (Mo. 1893); Clement v. Young Amusement Co., 65 A. 185 (N.J. 1906); Davis v. Yelton, 37 S.E. 464 (N.C. 1900);* Burstin v. Buck, *90 P. L.J. 354* (Pa.); *Aust v. Beard, 96 S.E.2d 558 (S.C. 1957)* (no specific performance of a parol contract to sell realty); *Young v. Levy, 32 S.E.2d 889 (S.C. 1945); Otis v. Payne, 8 S.W. 848 (Tenn. 1888); Fitts v. Stone, 166 S.W.2d 897 (Tex. 1943); Walker v. Scott, 164 S.W.2d 586 (Tex. Civ. App. 1942),* rev'd on other grounds, *170 S.W.2d 718 (Tex. Com. App. 1943); Bradley v. Howell, 126 S.W.2d 547 (Tex. Civ. App. 1939); King v. Upper, 106 P. 612 (Wash. 1910),* modified by, *106 P. 1135 (Wash. 1910); Henderson v. Henrie, 71 S.E. 172 (W. Va. 1911); Popp v. Swanke, 31 N.W. 916 (Wis. 1887). See* Albert S. Johnson, Specific Performance of Oral Contracts to Convey Real Estate, 28 Nebr. L. Rev. 231 (1948).

(n373)Footnote 1650. *Fleming v. Dillon, 18 N.E.2d 910 (Ill. 1939); Fierke v. Elgin City Banking Co., 7 N.E.2d 875 (Ill. 1937); Lyle v. Munson, 181 N.W. 1002 (Mich. 1921); Dieckmann v. Madden, 160 S.W.2d 724 (Mo. 1942); Finn v. Barnes, 101 S.W.2d 718 (Mo. 1937); Woodard v. Stowell, 222 S.W. 815 (Mo. 1920); Cannon v. Unruh, 202 P. 182 (Okla. 1921). Mondragon v. Mondragon, 239 S.W. 650 (Tex. Civ. App. 1922),* modified by, *257 S.W. 215 (Tex. 1923).*

(n374)Footnote 1651. *Hotel Candler v. Candler, 31 S.E.2d 693 (Ga. 1944); Walter v. Hoffman, 196 N.E. 291 (N.Y. 1935);* See *Brewood v. Cook, 207 F.2d 489 (D.C. Cir. 1953),* John E. Nolan, Jr., Student Author, Oral Agreement to Convey Land is a Binding Contract When It Is Found That It Was the Inducement for a Collateral Contract and the Buyer Has Entered into Possession and Made Substantial Improvements, *42 Geo. L.J. 184 (1953); Duncan v. Duncan, 284 N.W. 723 (Mich. 1939).*

(n375)Footnote 1652. *Parthenon Const. & Design, Inc. v. Neuman, 999 P.2d 1169 (Or. Ct. App. 2000); Stewart v. Schnepf, 158 P.2d 529 (Ariz. 1945).*

(n376)Footnote 1653. *White v. Smith, 253 P. 849 (Idaho 1926); Duncan v. Duncan, 284 N.W. 723 (Mich. 1939); Fox v. Fox, 245 P. 641 (Okla. 1926); Hanson v. Fiesler, 207 N.W. 449 (S.D. 1926). See Hecht v. Anthony, 283 N.W. 753 (Minn. 1939).* So, partial performance and compensation was refused in *Kaloumenos v. Bottaccio, 77 N.Y.S.2d 286 (N.Y. App. Div. 2d Dept. 1948),* where a hardship would have been imposed on the grantor to the unjust enrichment of the grantee.

(n377)Footnote 1654. *John O. Schofield, Inc. v. Nikkel, 731 N.E.2d 915 (Ill. App. Ct. 2000);* Cognevich v. Blazio, *106 S. 550 (La. 1925); Fields v. Fields, 243 P. 369 (Wash. 1926).*

(n378)Footnote 1655. *In re Estate of Gorton, 706 A.2d 947 (Vt. 1997); Pryor v. Cureton, 199 S.E. 175 (Ga. 1938); Shipp v. Thomas, 269 P.2d 741 (N.M. 1954). See Van Camp v. Van Camp, 289 N.W. 297 (Mich. 1939).*

(n379)Footnote 1656. *Houlette v. Johnson, 216 N.W. 679 (Iowa 1927); Stevens v. Hurley, 279 S.W. 723 (Mo. App. 1926); Lintz v. Apking, 18 N.W.2d 55 (Neb. 1945); Marshall & Ilsley Bank v. Schuerbrock, 217 N.W. 416 (Wis. 1928).*

(n380)Footnote 1657. *Selle v. Selle, 88 S.W.2d 877 (Mo. 1935).*

(n381)Footnote 1658. *Stever v. Torrent, 57 N.W. 1087 (Mich. 1894).*

(n382)Footnote 1659. *McCullough v. Sutherland, 153 F. 418 (C.C.N.D. 1907); Henderson v. McRae, 111 N.W. 1057 (Mich. 1907); Gallagher v. Gallagher, 120 N.Y.S. 18 (N.Y. App. Div. 1st Dept. 1909), aff'd, 96 N.E. 1115 (N.Y. 1911).*

(n383)Footnote 1660. *N. Ill. Coal Corp. v. Cryder, 197 N.E. 750 (Ill. 1935).*

(n384)Footnote 1661. *Bonner v. Kimball-Lacy Lumber Co., 169 S.W. 242 (Ark. 1914); Willis v. Zorger, 101 N.E. 963 (Ill. 1913); Ford v. Young, 282 N.W. 324 (Iowa 1938); Mannix v. Baumgardner, 42 A.2d 124 (Md. 1945); Caplan.v. Buckner, 91 A. 481 (Md. 1914); Guzorek v. Williams, 2 N.W.2d 796 (Mich. 1942); Bergstein v. Bergquist, 152 Minn. 358, 189 N.W. 120 (Minn. 1922); Sursa v. Cash, 156 S.W. 779 (Mo. App. 1913); Damkroeger v. James, 146 N.W. 936 (Neb. 1914); Doty v. Rensselaer County Mut. Fire Ins. Co., 176 N.Y.S. 55 (N.Y. App. Div. 3d Dept. 1919); Fried v. Lonski, 188 N.W. 582 (N.D. 1922); Tingley v. Jacques, 112 A. 781 (R.I. 1921); Martin v. LaBoon, 107 S.E. 320 (S.C. 1921); Wis. Cent. Ry. Co. v. Schug, 145 N.W. 177 (Wis. 1914).* There must be payment of at least a substantial part of the purchase money, taking possession and making substantial improvements. *Mondragon v. Mondragon, 239 S.W. 650 (Tex. Civ. App. 1922),* modified by, *257 S.W. 215 (Tex. 1923).*

(n385)Footnote 1662. *Willis v. Zorger, 101 N.E. 963 (Ill. 1913); Nelson v. Schoonover, 131 P. 147 (Kan. 1913); Becker v. Buffalo Package Co., 148 N.Y.S. 782 (N.Y. Sup. 1914); Kelley v. Devin, 132 P. 535 (Or. 1913).*

(n386)Footnote 1663. *Matter of Gosmire's Estate, 331 N.W.2d 562 (S.D. 1983); Holsz v. Stephen, 200 N.E. 601 (Ill. 1936).*

(n387)Footnote 1664. *Musselman v. Mitchell, 611 P.2d 675 (Or. Ct. App. 1980); Rogers v. Casady, 278 N.W. 267 (Neb. 1938).*

(n388)Footnote 1665. *McCullough v. McCullough, 280 P. 70 (Wash. 1929). See Maness v. Graham, 142 S.W.2d 1009,* (Mo. 1940).

(n389)Footnote 1666. *Van Blarcom v. Hopkins, 52 A. 147 (N.J. Ch. 1902).* In *Henschke v. Young, 28 N.W.2d 766 (Minn. 1947);* J.R. Mackenzie, Student Author, Specific Performance--Marketable Title to Realty--Perfecting Title By Litigation as an Incident to Specific Performance, *47 Mich. L. Rev. 103 (1948),* when in a specific performance action the court, which could not determine the validity of certain liens, ordered the vendor to file suit to determine them.

(n390)Footnote 1667. *Henschke v. Young, 28 N.W.2d 766 (Minn. 1947),* J.R. Mackenzie, Student Author, Specific Performance--Marketable Title to Realty--Perfecting Title By Litigation as an Incident to Specific Performance, *47 Mich. L. Rev. 103 (1948); Polisiuk v. Mayers, 200 N.Y.S. 97 (N.Y. App. Div. 2d Dept. 1923); English v. Jones, 274 S.W.2d 666 (Tex. 1955), 40 Minn. L. R. 85.*

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CHAPTER 96 Vendors and Purchasers

11-96 Thompson on Real Property, Thomas Editions § 96.17

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§ 96.17 What Is "Merchantable" or "Marketable" Title.n1668

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If the contract directly or by inference contemplates that the vendor shall furnish to the vendee a marketable or merchantable title, the question of what is a marketable title in a particular situation may be as easy to answer as what is right and what is wrong. A marketable title is one that a prudent person with full knowledge of all facts would be willing to accept. n1669 The leading rule follows the principle that to make a title unmarketable it is not necessary that proof establish that it is defective, if there is reasonable doubt in the mind of the court. n1670 The doubt must be not remote but rational. n1671 The test has been said to be whether a court could direct a verdict. n1672 A vendee who takes possession under the contract of sale may not dispute the vendor's title. n1673

A merchantable or marketable title has been defined as one that is "a title that a man of reasonable prudence, familiar with the facts and apprised of the questions of law involved, would in ordinary course of business accept." n1674 The test of a marketable title is not the hazard of possible litigation but the chance of successful attack. n1675 A marketable title must be salable without abatement of price and salable on the face of the record. n1676 If the defect complained of is not applicable to bona fide purchasers the title is considered "marketable." n1677

The term "marketable title," when applied to real estate, means a "title free from reasonable doubt." n1678 It means a title that is reasonably free from such doubts as will affect the market value of the estate; one which a reasonably prudent person with knowledge of all the facts and their legal bearing would he willing to accept. n1679 It has even been held to be a title in which there is no doubt involved either as to a matter of law or fact. n1680 It is one in which the possession can be acquired and retained without litigation or judicial decision. n1681 It is a title free from apparent defects, grave doubts, and litigious uncertainties. n1682 A title is "unmarketable" when for the purchaser to accept the title proffered would lay the purchaser open to a fair probability of vexatious litigation with the possibility of serious loss. n1683 The term is synonymous with "merchantable title," "good title," and "perfect title." n1684

The test is whether the purchaser can peaceably enjoy and use the property for the purchaser's intended and announced purposes. n1685 "Less certainty of proof is required to justify the vendee's refusal to accept title than to open up a case after title is passed and the consideration has been paid." n1686 A title subject to an encumbrance is not a good

marketable title. n1687 A "clear record title" requires that the record should show an indefeasible unencumbered estate. n1688 The purchaser is entitled to have a title which is not doubtful and which does not suggest the possibility of a lawsuit, but which a well-informed and prudent person paying full value would be willing to take. n1689 The doubt to render a title unmarketable must be a reasonable doubt that would induce a prudent person to hesitate. n1690

An "equitable title" is not a "marketable title." n1691 "A title open to reasonable doubt is not a marketable title. The court cannot make it such by passing upon an objection depending upon a disputed question of fact or a doubtful question of law, in the absence of the party in whom the outstanding right was vested. He would not be bound by the adjudication, and could raise the same question in a new proceeding ... It would especially be unjust to compel a purchaser to take a title, the validity of which depended upon a question of fact, where the facts presented upon the application might be changed on a new inquiry or are open to opposing influences." n1692 A reasonable doubt concerning the title exists when there is uncertainty as to some fact appearing in the course of its deduction, and the doubt must be such as affects the value of the property or will interfere with its sale. n1693

The title should not only be good, but indubitable. n1694 It should at least be such a title as would ensure to the purchaser a peaceful enjoyment of the property. n1695 If a reasonable doubt remains, after the vendor has produced all the proof the vendor is able to produce, the title is not marketable, and the purchaser is not obliged to take it. n1696 A title may be perfect, and yet not marketable. For instance, suppose the validity of A's title depends upon the question whether or not he is next of kin to B. If he is in fact the next of kin to B, his title is perfect; but if he is unable to show to the court beyond a reasonable doubt that he is such, then his title, although really perfect if all the facts could be shown, will be deemed unmarketable. n1697 The title may be good in fact; but to be marketable it must be good of record or able to be made good of record. n1698 It may be marketable if there is no reasonable doubt how the fact is and the proof is readily accessible at any time to show how it is. n1699 Such proof, however, must be very clear. n1700 The sufficiency of a title may depend on proof of facts not of record. n1701 According to some courts, the fact that the title is capable of being made good by. the production of oral testimony or by affidavits does not make it a marketable title where the record does not show the title to be good. n1702

However, the vendee is not entitled to demand a title absolutely free from all suspicion or possible defect, n1703 or that it will be satisfactory to the vendee or his attorney, unless the contract so provides. n1704 The doubt must be rational or real, and not fanciful. n1705 The purchaser may waive the right to a marketable title, n1706 and may bargain to take realty subject to existing encumbrances. n1707 The motive of the vendee in raising the question of unmarketability is not important if the title is actually unmarketable. n1708 Statutory uniform title standards have been approved. n1709

The courts are not in agreement as to the extent to which a title will be held marketable where the facts are in dispute. n1710 So by one rule the vendee cannot be compelled to accept a title based on affidavits n1711 where, under another rule, the vendee is entitled to marketable title. n1712 The Declaratory Judgments Act may determine the title to realty. n1713

Where all parties having a possible interest are not before the court, not only will a purchaser not be required to take a title depending upon a doubtful question of fact, which is applicable to all cases, but will not be required to take a title depending upon a doubtful question of law, since the decision thereof would not be binding upon those who are not parties to the action and who might thereafter assert a claim of title. n1714 If doubt exists as to the title the courts will usually avoid determining the title to make it marketable. n1715

Courts are divided as to whether in an action between the vendor and the vendee, the court may pass upon a title that requires a determination of a question of fact or of law where all the parties are not before the court. n1716 Under the New York rule if the court in which specific performance is brought can determine the question of title it may hold the title to be marketable. But if the same question can later be raised in another court as where a federal constitutional question is involved, the title is not marketable. n1717 But Massachusetts refuses in a specific performance action to determine whether or not a state constitution question is involved. n1718

Under one rule the court will determine the marketability of the title and then decree specific performance if it is satisfied with the law, even though all of the persons who might raise the question are not before the court. n1719 Under another rule, if all parties cannot be brought before the court the court will not try the title. But some courts will try the title in a specific performance action if all parties are joined. n1720 It has been squarely held that the question of marketability of a title is one of law and that the opinion of witnesses is not receivable. n1721

§ 96.17(a) Situations Making Title Unmarketable. n1722

For a title to be unmarketable the defect must be a reasonable one. n1723 Recitals in deeds are not usually allowed to be marketable title. n1724 Most of the cases hold that a restriction against the manufacture or sale of intoxicating liquor on the premises makes the title unmarketable. n1725 A title derived from a tax deed is marketable if there are no defects in the proceedings under the leading rule, n1726 but some cases hold that a tax deed of itself is not prima facie evidence of merchantable title lacking proof aliunde that all provisions of the statutes regarding tax sales were met. n1727 Tax sales supported by affidavits of adverse possession have been held marketable title. n1728 An easement makes a title.unmarketable unless the easement is open and notorious. n1729

Under one rule, to make a title marketable a grantor must be shown to have been unmarried, n1730 but other cases hold there is no presumption that the grantor was married. n1731 A prospective assessment for contemplated improvements which had not become a lien when the title was closed was held not an encumbrance or valid objection to taking title under the contract. n1732 A land purchaser assumes the annoyance involved in an adjoining prior existing landowner's use of land in a reasonable manner. n1733 The vendor and the vendee contract with notice of visible easements. n1734

A vendee was not bound by constructive notice of a zoning ordinance which the vendor was violating. n1735 It is possible for a title to be "marketable" and yet contain such collateral infirmities as would deny specific performance to the vendor. n1736 Ordinarily, the vendor must have discharged all encumbrances before tendering a deed and may not impose on the purchaser the burden of procuring satisfaction of encumbrances. n1737 The inability of the vendor to convey a full title because of a reservation of riparian water rights may or may not excuse performance of the contract by the purchaser, this depending upon the value of the rights reserved. n1738

The purchaser cannot be compelled to take a partial interest n1739 and cannot be compelled to accept a title under encumbrance which the vendor cannot or will not remove and which the purchaser cannot remove by application of the purchase money. n1740 Very generally, an encumbrance will not render the title unmarketable where it may be removed by the vendee out of the purchase money to be paid, n1741 or the vendor is obligated to pay it out of the money to be received. n1742 An encumbrance will include charges which burden, obstruct, or impair the use of the land or impair its transfer. n1743 Other matters considered as encumbrances warranting rejection of title as unmarketable are as follows: outstanding dower interests, n1744 future interests, n1745 a pending suit for condemnation of part of the property, n1746 judgments, n1747 executions, n1748 the pendency of padlock proceedings, n1749 unreleased mortgages, n1750 easements, n1751 encroachments on the premises, n1752 the encroachment of buildings on the premises over adjoining premises or streets, n1753 party walls, n1754 building and business restrictions, n1755 tax titles n1756 or tax liens, n1757 an outstanding oil lease, n1758 sale of coal and mineral rights, n1759 an unascertained transfer tax lien, n1760 income tax liens, n1761 mechanics' liens, n1762 the undisposed of interests of minors, n1763 administrators' or guardians' deeds without showing court authority for such deeds, n1764 titles containing restrictive covenants, n1765 confusion and differences in names and initials of prior grantors, n1766 corporate deeds not showing authorization by the corporation, n1767 options to purchase, n1768 and titles on decrees still subject to review. n1769 A permanent easement visible to the purchasers, such as a public road or telephone right-of-way, is held not an encumbrance. n1770 Courts divide as to whether public highways are encumbrances. n1771

Where the lien can be satisfied out of the unpaid purchase price the title is generally held marketable. n1772 The title is not marketable if it depends upon an unconstitutional statute, n1773 but it is marketable if the statute which would have

created the encumbrance is unconstitutional. n1774 Indeed the cases are divided as to whether a vendee must accept a title subject to an encumbrance, even though a sufficient amount is reserved from the purchase money to pay the lien when it is determined. n1775 Marketable title vests title and is more than a statute of limitations, being valid as against those under disability. n1776 Encroachments are not fatal to title if removable before law day. n1777

A buyer sued to recover the purchase price, because a public utility had the right to inundate the land. The court held the title was unmarketable, even though the reservation was beneficial to lake property. n1778 A purchaser of property entitled to a "marketable title" may not be required to accept a conveyance, if the title is in such condition that the purchaser may be required to defend litigation challenging the purchaser's possession and interest. n1779 A title may be regarded as unmarketable if a reasonably careful and prudent person, familiar with the facts, would refuse to accept the title in the ordinary course of business. It is not necessary that the title be actually bad in order to render it unmarketable. It is sufficient if there is such a doubt or uncertainty as may reasonably form the basis of litigation, n1780 but if there is an existing violation of building ordinances, the buyer may rescind, n1781 unless the building is protected by the nonconforming rule.

A condition is implied in a land sales contract that the seller shall convey a marketable title, n1782 unless the contrary is stipulated, n1783 but after the deed is executed this condition is merged and the grantee must depend upon the covenants in the deed for relief. n1784 The willingness of a title company to insure is not a test of marketability. n1785 Marketable title must be of record and not be based on parol evidence. n1786 An equity of rescission because of fraud of a former grantee in obtaining the deed makes the title unmarketable. n1787 A zoning regulation does not make the title unmarketable unless the present use is in violation of the zoning ordinance. n1788

Where the record owner has died and the estate has not been settled so as to cut off the creditors, the cases are not in accord as to whether the title is marketable. n1789 There is also a problem in such instances as to the determination of heirs or devisees. n1790 The cases are at variance as to whether the purchaser can be required to accept a title where there has been no administration of the estate of the deceased titleholder. n1791 Where the interest of a minor or of an unborn person is involved, the title is not marketable if the interest has not been properly divested of record. n1792 A vendee's interest in a land contract must be foreclosed to clear the title. n1793 The question of marketability of the real estate of a deceased person upon a sale by the purported heirs also depends on the possibility of an outstanding will. n1794 It further depends upon who are the true heirs. n1795 An interloping mortgage is not a defect, n1796 and a mortgage that can be paid out of the purchase price is not a defect. n1797

Under the leading rule the taking of possession by the purchaser prior to the law day does not waive any objections to the title, n1798 but contrary authority exists. n1799 A third rule holds that no waiver occurs, if the purchaser is ignorant of the particular defect, n1800 but the cases do hold that by retaining possession after making title objections waives such objections. n1801 Other cases do not see a waiver by retaining possession where the vendee was ignorant of the objections at the time of the contract. n1802 Of course the vendee who is responsible for the defect cannot rescind. n1803 Where it is apparent that the vendor can never acquire good title, the vendee may rescind before the law day. n1804 Some cases have placed a burden on the vendee by holding that the vendee waives all objections to title unless the vendee particularly calls attention to them and they were of such a character that they could be cured by the vendor. n1805

§ 96.17(b) Defense of Inadequate Quantity.

If the vendor is unable to deliver the area expected by the vendee the court must determine whether the agreement contemplated the sale of a certain unit of property regardless of its size or whether a definite area played a part in the agreement, i. e., whether the sale was in bulk. If there is a deficiency the "lex non curat de minimis" (the law does not pay attention to trifles) rule must be considered. If the deficiency is material and such part is not contemplated by the agreement, the question of the vendee's remedy is material: may the vendee rescind or elect to pay a pro tanto diminished purchase price? If the realty is deficient in quantity the weight of authority denies specific performance to

the vendor, n1806 unless the de minimis rule applies, n1807 or the vendee had prior notice of the deficiency before executing the contract, n1808 or the contract had waived deficiencies. n1809 Where a designated tract is sold as a whole for a gross sum and no express or implied warranty applies as to quantity, the sale is deemed to be in gross and not by the acre. n1810 Where the sale is not in bulk and a material deficiency in quantity exists, the vendee may have specific performance with corresponding abatement in price. n1811 Thus where the purchase price has not been paid, the purchaser may have the deficiency in the land conveyed credited against the amount the purchaser agreed to pay. n1812

If the parties to a contract for the sale of land estimate the quantity at so much, and the amount of land has a direct influence on the price to be paid or was a controlling motive in entering into the contract, equity will grant relief in case of a material excess or deficiency, by compelling a reconveyance of the excess, n1813 or fixing an equitable compensation, n1814 or rescinding the agreement. n1815 Where the sale of a tract of land was in gross and described as containing one hundred fifty-two acres and a fraction, and the tract in fact only contained one hundred thirty-one acres, more or less, it was held that the deficiency entitled the purchaser to relief. n1816 Where a purchaser agreed to purchase property described with reference to a certain map, the tender of a deed which conveyed the property according to its exact dimensions on the map was held a substantial compliance with the terms of the contract of sale. n1817 Where the land is sold in bulk for a lump sum, then quantity is not generally of the essence of the contract, and the parties take the risk of deficiency or excess, n1818 except in cases where there is actual fraud. n1819 Mere shortage does not conclusively show that the purchaser is entitled to compensation for such shortage, but other facts and circumstances tending to show the intention of the parties must be taken into consideration in order to determine whether the contract would have been consummated if both of the parties had known the facts. n1820 In Kentucky, there must be a deficiency of more than ten per cent in gross sales to authorize abatement. n1821

The sales in bulk rule is held not to apply to the sale of city lots. n1822 Quantity is of essence in cases where the sale is by the acre and abatement is allowed for deficiency. n1823 It is not essential to the right to abatement that the vendor should have known of the acreage shortage. n1824 The words "more or less" mean "substantially" or "approximately" and imply that both parties assume the risk of any ordinary, n1825 but not of a gross, discrepancy, n1826 nor where fraud is practiced in the transaction. n1827 Where both parties were mistaken as to the land described, the courts will usually allow abatement of the purchase price for deficiency. n1828 Specific performance has been refused in several instances where the mistake was not mutual but was caused by the act of the other party. n1829 This is also the rule, on the other hand, where the purchaser knew that the vendor was making a mistake as to the size of the lot to be conveyed, n1830 or where it would be inequitable to enforce the agreement. n1831 However, where a tract of land is sold as a whole, the amount may be immaterial even though greater than the vendor supposed, and the contract be valid and enforceable. n1832 The vendee cannot have any action for misrepresentation as to quantity where the vendee has information as to the area before the consummation of the contract. n1833 If both vendor and vendee believe that the land contracted to be sold contains a certain number of acres and the transaction is based on that belief, the vendee may recover for the deficiency where the acreage is subsequently discovered to be deficient. n1834 The general rule of compensation or abatement in case of deficiency in the quantity of land sold is according to the average value per acre of the whole tract, unless particular circumstances require a departure therefrom. n1835

Whether the sale is intended to be in bulk or by the acre is to be determined from all the terms of the contract, including a lump-sum purchase price, conduct of the parties, value and extent, and location of the land and its description. n1836 A vendor who has fraudulently misrepresented the quantity cannot defend on grounds that the sale was in bulk. n1837 The use of the words "more or less" or "approximately" n1838 are evidence, n1839 but not conclusive evidence, n1840 that the parties expected a deficiency, but do not excuse a large deficiency. n1841 It is not a defense to specific performance at the suit of the vendor that a highway across the premises took a portion of the premises where the contract did not call for a specific acreage. n1842 Where the vendor represented that the land contained more than the number of acres conveyed to the purchaser, the purchaser may recover the proportionate part of the amount paid, if the deficiency is sufficient to warrant it. n1843

§ 96.17(c) Where Title Depends upon Adverse Possession.

While adverse possession will transfer title, such transfer is dependent upon a number of diverse facts. n1844 The final conclusion as to whether there has been "adverse possession" for the requisite period, therefore, is one which must be determined by judicial opinion. Can a buyer be required to accept a title which rests on the concept of adverse possession? Ordinarily, where the contract calls for record title, the title by adverse possession will not suffice. n1845 Marketable title requires an abstract "free from reasonable doubt in law and in fact as to its validity." Affidavits and claim of adverse possession are not sufficient. n1846 Where a purchaser has contracted for a good title of record, the purchaser will not be compelled to take a title depending upon adverse possession under the statute of limitations, although it may be a good title, as that would be to enforce a different contract from that of the parties. n1847 Where the contract does not call for a perfect record title, a title by adverse possession will suffice; but the proof must be convincing and readily available. n1848 In many jurisdictions, clear title by adverse possession is marketable, and the purchaser may be required to accept it. n1849

Undoubtedly a title by prescription is as high as any known to the law, but the facts upon which it is based should be legally established. n1850 A court of equity will never compel a purchaser to take a title where the point on which it depends is too doubtful to be settled without litigation, or where the purchase would expose the purchaser to the hazard of such proceeding. n1851 So, under a contract to furnish a marketable title, one rule holds that a marketable title must be shown on the abstract and not by adverse possession. n1852 An agreement to convey by warranty deed, with abstract showing good title, is not satisfied by the offer of a title based on oral evidence of adverse possession. n1853 Where the contract calls for a "perfect title," the purchaser may insist upon good title of record, and a perfect title by adverse possession is insufficient. n1854 It has even been held that in the absence of a stipulation to furnish a title of record the purchaser is not required to accept a title based on adverse possession which requires parol proof to establish it. n1855

On the other hand, where the contract does not stipulate for a title of record, the cases in most jurisdictions hold that the purchaser is bound to accept a title resting upon a hostile, adverse, and uninterrupted possession under color of title for a period of time sufficient to bar the rights of any possible adverse claimant. n1856 It has been held that a vendor who for the full period of limitation prescribed by statute has been in peaceable and uninterrupted possession of lands has a marketable title which the vendee who has stipulated for a "clear and indefeasible title" is bound to accept. n1857 If the facts as to adverse possession are clear, the title is marketable and the purchaser may be required to accept it. n1858 A contract calling for a conveyance by "a good and sufficient general warranty deed, in fee simple" is satisfied by the giving of a good and marketable title, which is a title not open to reasonable objection; and such is a title by prescription. n1859 It has been held that a purchaser is not entitled to rescind a land contract on the ground that a reasonable doubt existed as to whether the vendor's title was good, where a will gave power of sale to trustees under whom the vendor claimed title and such a long time had elapsed since the death of the testator that the heirs could not successfully claim the property. n1860

A distinction is drawn between a "clear title" and a "marketable title," n1861 but considerable confusion exists as to the extent to which a marketable title can be established by bolstering the record with affidavits. n1862 A title based on adverse possession is good if proved. n1863 The statute of limitations ordinarily cannot be relied upon as to unreleased or defectively released mortgages because of the danger that the mortgagor may have taken an action to keep the mortgage alive. n1864

§ 96.17(d) Vendee's Rights When Vendor's Title Is Inadequate. n1865

If the vendor cannot furnish the title contemplated by the contract the vendee may rescind, and the court will not decree specific performance of a contract to convey if the grantor cannot make a good title to the property, if the title is doubtful, n1866 or not marketable, n1867 or if the grantor can convey only an undivided interest therein. n1868 It is the duty of a vendor to tender to the vendee a safe title, and a purchaser is never bound to accept a defective title in the absence of express agreement. n1869 A promise to convey such title is always implied in an executory contract for the sale of real estate, and a purchaser is never bound to accept a defective title, unless the purchaser expressly stipulates to

take such title, knowing its defects. n1870 In the absence of a specific provision to the contrary, the vendor must convey a title that is free from encumbrances. n1871

When a vendor agrees to sell a piece of land, the law imputes to the vendor a covenant that the vendor will convey a marketable title unless the vendee stipulates to accept something less. n1872 An agreement to convey, unless otherwise provided, obligates a conveyance of a title in fee simple free from liens and encumbrances. n1873 A purchaser who has been promised a good title cannot be compelled to accept a defective title, even though the vendor is ignorant of the defect when making the promise. n1874

Where the vendor agrees to convey to the vendee "by warranty deed with abstract showing good title," this has reference to the record title, which may be epitomized in the abstract, and is a condition precedent to the vendor's right to demand the deferred payments. n1875 In case of defect of title as to which the vendor was ignorant, the vendee may rescind or disaffirm the contract and sue to recover any part of the purchase money paid. n1876

Where the contract stipulates the character of title to be conveyed, effect will be given to such stipulation. n1877 The covenant for "good and lawful title" intends a title free from encumbrance. n1878 The title must be a good record title and not one that may be shown to be good by oral proof or writings not subject to registration. n1879 Thus, a contract providing for the conveyance of an estate in fee simple, clear of all encumbrances whatever, by a good and sufficient warranty deed, requires a conveyance of a good, merchantable title. n1880 Strictly speaking, there is no such title as a "perfect title," but where the contract calls for such title the purchaser is entitled to a title free from reasonable doubt and fairly deducible of record, n1881 and cannot be compelled to accept a title encumbered by a recorded oil and gas lease. n1882 Under such stipulation the purchaser has a right to demand a title that will enable the land to be held in peace, with reasonable assurance that no flaw will disturb its marketable value. n1883 To constitute a perfect title, as contemplated by the parties, there must be a union of three elements, namely, actual possession, the right of possession, and the right of property. n1884 Where the phrase, "perfect title," was embodied in a contract of sale, it was said to mean such a title as is perfect and safe to a moral certainty; a title which does not disclose a patent defect suggesting the possibility of a lawsuit to defend it; a title such as a well informed and prudent person paying full value for the property would be willing to take. n1885 "A perfect title always carries with it, in legal contemplation, a lawful seisin and possession. Such seisin and possession are coextensive with the right, and deemed to continue until ouster by actual possession of another under claim of right." n1886 Like a "perfect title," a "complete title" requires the union in one person, from one or more sources, the possession, the right of possession, and the right of property. n1887

Where the contract contemplates the conveyance of a good title when the purchase price is paid, it is the duty of the vendor to have such title and to be able to convey same when the time for performance arrives. n1888 The purchaser is not required to accept a defective title, n1889 and is not required to accept title from a third person. n1890 The term "good title," used in a contract of sale, does not necessarily mean one perfect of record. n1891 It consists in the rightful ownership of property and in the rightful possession thereof, together with the appropriate legal evidence of rightful ownership. As between vendor and purchaser, it means the legal estate in fee, free and clear of all valid claims, liens or encumbrances whatsoever. n1892 It means a title free from all litigation, palpable defects, and grave doubts. It should consist of both legal and equitable titles, fairly deducible of record; n1893 but the purchaser will not be permitted to object to the title on account of the bare possibility that it will prove defective. n1894 A defect that will excuse performance must be such as to cast a cloud on the title in the minds of reasonable persons. n1895

"A good title means not merely a title valid in fact, but a marketable title, which can again be sold to a reasonable purchaser or mortgaged to a person of reasonable prudence as security for a loan of money. A purchaser will not generally be compelled to take a title when there is a defect in the record title which can be cured only by a resort to parol evidence." n1896 In a contract to convey a good title, the word "good" comprehends all that the word "clear" does. n1897 The term "clear title," as used in such contract, means that there are no encumbrances on the land. n1898 Where the contract of sale provided that the vendor was to furnish an abstract of title "showing a good and clear title, free from defects," it was held that the contract was not performed where the abstract showed defects which may or may not exist

in the title as tested by the original records, and an encumbrance which may or may not be barred by limitation. n1899 An agreement to convey "in fee simple, clear of all encumbrances whatsoever, by a good and sufficient warranty deed" requires conveyance of a good title in law, which means a good merchantable title. n1900

It is the duty of a vendor to tender to the vendee a safe title, and a purchaser is never bound to accept a defective title in the absence of express agreement. A promise to convey such title is always implied in an executory contract for the sale of real estate, and a purchaser is never bound to accept a defective title, unless the purchaser expressly stipulates to take such title, knowing its defects. n1901 Where there was a failure to furnish title insurance as stipulated for in the contract, the purchaser was held not bound to perform the contract. n1902 Likewise, a failure to furnish an abstract showing a clear title as provided in the contract will absolve the purchaser from performance thereof. n1903 A purchaser is not compelled to take property, the possession of which the purchaser may be obliged to defend by litigation. n1904

A doubtful title, which a purchaser will not be compelled to accept, is one that may be reasonably and fairly questioned in the opinion of competent persons. n1905 Title to a whole tract will not suffice if title to any part of it is bad. n1906 It is the condition of the title at the time fixed for performance which determines the rights of the parties. A vendor may not have title at the time of the contract and yet will fulfil his obligation if the purchaser has title at the time set for conveyance. n1907 Where the time to perform is indefinite, it is sometimes held that the vendor will be given a reasonable time to perform after the time is fixed and definite. n1908 The purchaser is not obligated to advance money to the vendor to enable the vendor to secure title. n1909 The contract may give the vendor a reasonable time in which to cure defects, n1910 and it may obligate the vendor to furnish an abstract showing good title, which will constitute a condition precedent to payment of the purchase money. n1911

In order to entitle a vendor to the equitable relief of specific performance, the vendor must tender to the vendee a marketable title by a conveyance containing the usual covenants, unless the contract provides otherwise. n1912 Equity will not compel a purchaser to accept a doubtful title. n1913 The title of the vendor of land must be marketable, even if the contract does not so stipulate. Such a condition is implied in all contracts for sale of real property. n1914

The purchaser is entitled, unless stipulated to the contrary, to receive a marketable title, n1915 a title that is fairly deducible of record and not depending on matters resting in parol; n1916 but it is said that a "marketable title" is not necessarily one that can be fully established merely by recourse to the public records. n1917

The purchaser may enforce rescission where the vendor is unable or unwilling to perform the contract to convey a merchantable title. n1918 The purchaser may rescind for failure of title to a portion of the land covered by the contract. n1919 Where a contract for the sale of realty is executory on both sides, a failure of title is a failure of consideration, and a rescission of the contract may be had and the consideration recovered, but the vendee must restore the possession and the estate of the vendor. n1920 This rule also applies to a contract for the exchange of land. n1921 On refusal of the vendor to deliver a deed according to the terms of the contract, the vendee may sue for rescission and the recovery of the purchase price already paid in by him. n1922

Where a vendor is unable to convey good title within the time stipulated in the contract, the purchaser may rescind without tendering the remainder of the unpaid purchase money, n1923 and it is immaterial that the vendor honestly believed to have a good title. n1924 A purchaser will not be denied the right to rescind a contract because of the falsity of the vendor's representation that the title was good by the fact that by the lapse of time the title has become good. n1925 It has been held, however, that equity will refuse a purchaser relief if the defects might with reasonable diligence have been discovered prior to the execution of the contract. n1926 The prevailing rule in the United States is that in a sale of real estate the vendor is bound to disclose any defect in the title to or encumbrance on the property sold, known to the vendor and not known to the purchaser, and that failure so to do will render the contract voidable at the vendee's option. n1927 This has been held to be true even though the encumbrance is of record. n1928 In the absence of fraud, an executed sale of real estate will not be rescinded for failure of title, but the purchaser's remedy then is an action on the

covenants of the deed. n1929 The time fixed for the performance of such contract is generally of the essence thereof, and a long delay in offering a marketable title agreed to be purchased warrants the purchaser in rescinding the contract; n1930 but rescission will not be decreed unless facts are pleaded showing why the vendor will not be able to perform when the time for performance arrives. n1931

The failure of title that will warrant rescission is the failure of title at the time the contract is to be performed. The seller has until that time, or a reasonable time thereafter, to make the title good. n1932 Ordinarily, there will be no case for rescission for a partial failure of title which does not materially take away the enjoyment, and which can be compensated in damages. n1933 Expressions of opinion as to the sufficiency of the title, when the means of factual information on the subject are accessible to the purchaser, do not ordinarily amount to deceit. n1934

The vendor must furnish the exact title called for by the contract. n1935 Defendant must point out defects which the defendant relies upon to defeat an action for specific performance. n1936 Where the title is good, specific performance will be decreed although the abstract through oversight failed to show clear title. n1937 In a case where the vendor's title was through one described as "agent," specific performance was decreed where it appeared that such agent had an absolute fee-simple title. n1938 Where there was a failure to furnish title insurance n1939 or an abstract showing a clear title as stipulated in the contract, specific performance was denied. n1940

While a purchaser cannot be compelled to take a doubtful title, the purchaser will not be permitted to object to a title on account of a bare possibility that it will prove defective. n1941 Where there is any doubt about the title being free from liens or encumbrances, the court will not decree a specific performance. Its validity must not rest upon some fact not before the court. n1942 Specific performance will not be decreed even at the suit of the vendee where it would compel the vendee to accept an imperfect title which was not in the contemplation of the parties when the contract was made. n1943 The vendor must own the land at the time suit is brought or the relief will usually be denied. n1944 Where the vendor's title rests on an indefeasible title under the statute of limitations, however, it has been held that equity may enter a decree in the vendor's favor enforcing specific performance of the contract. n1945

The problem of the failure of the wife of the vendor to sign the contract is a special one. In most states if the property is owned by the entireties, the vendee has no relief except to recover the purchase price and damages against the husband, since the deed is void unless signed by both parties. Where the right of survivorship creates a future interest, the interest of the survivor cannot be transferred by one party unless that party is the survivor.

Where a defense of lack of marketability is raised based on title defects, the action may be only between the parties, or the plaintiff may have made all holders of alleged outstanding interests parties in the nature of a quiet title action. The standard test of the sufficiency of the vendor's title to justify a decree of specific performance is its marketability. n1946 The vendor cannot be forced to take action to clear the title. n1947

Where a clause in the sales contract that by accepting the deed the vendee acknowledged full performance of sales contract to deliver good title, the vendee could not complain of an outstanding lease not discovered until after deed was delivered. n1948 It is not essential that the vendor actually have the legal title if the vendor has the certain means of procuring it, or can control it and have it conveyed to the purchaser and offers to do so. n1949 Where a vendor has been acting in bad faith a court of equity may require the vendor to correct title defects so as to convey a marketable title. n1950

If the vendor is the equitable owner of the property to be conveyed and has the right to call for the legal title, the vendee may have specific performance of the contract. n1951 Unless time is held to be of the essence, the vendor is allowed a reasonable time after closing date in which to clear the title. n1952

Many contracts now call for a marketable or an "insurable title." n1953 If the contract calls for an insurable title, a title that is good but not insurable is insufficient. n1954 An "insurable title" is one which the insurance company will insure

without exceptions. n1955

A vendor who cannot make out a clear and good title, cannot set up, in defense, the plaintiff's delay in payment, even despite a stipulation that the contract shall be avoided if the payment is not made at the time. This is in accordance with the rule that a defendant cannot rely as a defense upon a breach which the defendant has caused. n1956 Where a title or other defect exists and the extent of such defect can be measured in monetary terms, the courts will modify the contract to the extent of permitting the vendee to pay the purchase price so reduced. n1957

The vendee's failure to give timely notice of defects is a waiver. n1958 In order to rescind a contract because of defects in a title, the party must act promptly and within a reasonable time. n1959 To justify rescission there must be a reasonable doubt as to the validity of the title, one which will cause a prudent person to hesitate in making the investment. A mere possibility of a defect does not justify rescission. n1960 Where a "perfect title" is called for the vendor must furnish a title free from litigation, palpable defects or grave doubts, and a legal and equitable title fairly deducible from the record. n1961

FOOTNOTES:

(n1)Footnote 1668. Walter Fairchild, Economic Aspects of Land Titles, *22 Cornell L. Q. 229 (1937);* Ralph Jossman, Forty Year Marketable Title Act: A Reappraisal, *37 U. Det. L.J. 422 (1960).* Void or wild deed is a root of title under marketable title act. *Marshall v. Hollywood, Inc., 224 S.2d 743 (Fla. App. 1969).* Quitclaim deed is not a root of title under the marketable title act. *Wilson v. Kelley, 226 S.2d 123 (Fla. App. 1969).* Kansas has adopted a 40-year marketable record title act. Kan. Stat. Ann., §§ 58-3401 - 58-3412. North Carolina has a 30-year marketable title act with numerous exceptions. N.C. Gen. Stat., §§ 47-B-1 - 47-B-0. *See* John M. Martin, Student Author, North Carolina Marketable Title Act - Section 47B-2(d) - Proof of Title - Relief at Last for the Plaintiff Instituting Land Actions, *10 Wake Forest L. Rev. 312 (1974).* Defining a marketable title. See Semachko v. Hopko [35 OhApp2dseries 205, 64 OhO2d 316, *301 N.E.2d 560]:* Ohio's Marketable Title Comes to the Fore, *23 Clev. St. L. Rev. 337. See* Edward C. King, Symposium on Real Property, Current Practices in Examination of Titles to Colorado Land; Clyde O. Martz, Survey of Title Irregularities, Curative Statutes and Title Standards in Colorado; John R. Moran, Mineral Title Examination, *35 U. Colo. L. Rev. 1, 21, 83 (1962). See also* Walter E. Barnett, Marketable Title Acts - Panacea or Pandemonium, *53 Cornell L. Rev. 45 (1967);* James A. Webster, Jr., The Quest for Clear Land Titles - Making Land Title Searches Shorter and Surer in North Carolina via Marketable Title Legislation, *44 N.C. L. Rev. 89 (1965);* Allan F. Smith, The New Marketable Title Act, *22 Ohio St. L.J. 712 (1961);* Henry G. Ruemmele, Title Evidencing in North Dakota, *43 N.D. L. Rev. 467 (1966);* Walter E. Straw, Off-Record Risks for Bona Fide Purchasers of Interest in Real Property, *72 Dick. L. Rev. 35 (1967);* James A. Webster, Jr., Toward Greater Marketability of Land Titles - Remedying the Defective Acknowledgment Syndrome, *46 N.C. L. Rev. 56 (1967);* James A. Webster, Jr., Doubt Reduction Through Conveyancing Reforms--More Suggestions in the Quest for Clear Land Titles, *46 N.C. L. Rev. 284 (1967);* James B. Sult, Student Author, Marketability and the Mining Law: The Effect of United States v. Coleman, *10 Ariz. L. Rev. 391 (1968);* Conrad J. DeSantis, Student Author, Marketable Title in Pennsylvania, *9 Vill. L. Rev. 654 (1964). See* Terrence L. O'Brien, Student Author, Remedial Title Legislation for Wyoming, *7 Land & Water L. Rev. 561 (1972).* In Rhode Island mortgages, except mortgages made by railroad companies for public utilities, are no longer a lien after the expiration of 50 years of final maturity date of indebtedness or the date of the recording whichever is greater, unless re-recorded within 60 days. R.I. Gen. Laws § 34-26-7 (1956). Marketable Title Act had no effect on reversions which had occurred before passage. *Caldwell v. Brown, 553 S.W.2d 692 (Ky. 1977).* Will reserving mineral rights was a title transaction within the *Marketable Title Record Act. Kittrell v. Clark, 363 S.2d 373 (Fla. App. 1978).* Marketable title statute terminated reversion, after fee simple determinable, thirty years after creation. *Hiddleston v. Neb. Jewish Educ. Soc., 186 N.W.2d 904 (Neb. 1971).*

(n2)Footnote 1669. *City of N. Mankato v. Carlstrom, 2 N.W.2d 130 (Minn. 1942).* A state may determine how title may be proved and the method of procedure. *Am. Land Co. v. Zeiss, 219 U.S. 47 (1911).* Absent express provision to the contrary, it is implied that the vendor can convey a merchantable title. *Brock v. Jernigan, 505 P.2d 1052 (Ariz. App. 1973).* Marketable title defeated. N.Y. [Real Property Law] § 345; *Bd. of Educ. of Cent. Sch. Dist. No. 1 v. Miles, 259*

N.Y.S.2d 129 (N.Y. 1965); Tesdell v. Hanes, 82 N.W.2d 119 (Iowa 1957); Wichelman v. Messner, 83 N.W.2d 800 (Minn. 1957); Minn. Stat. Ann. § 541.023; *Trustees of Schs. v. Batdorf, 130 N.E.2d 111 (Ill. 1955);* Ill. Rev. Stat. ch. 30 §§ 37b-37h (1967). A good and marketable title does not necessarily mean perfect title. *Allen v. Hyland, 215 N.Y.S.2d 587 (N.Y. Sup. 1961).* Implied contract to furnish a title "which will not expose the purchaser to the hazard of litigation or embarrass him in the peaceable enjoyment of the land." *Madbeth, Inc. v. Weade, 129 S.E.2d 667 (Va. 1963). See* Ronald W. Polston, Legislation, Existing and Proposed, Concerning Marketability of Mineral Titles, *7 Land & Water L. Rev. 73 (1972).* Purchaser entitled to marketable title, one which can be readily sold or mortgaged to a person of reasonable prudence, unless contract provides otherwise. *Regan v. Lanze, 387 N.Y.S.2d 79 (N.Y. 1976).* The title is not marketable if there is a doubt concerning either the facts or the law on which it is founded. *Keown v. West Jersey Title & Guaranty Co., 371 A.2d 370 (N.J. Super. 1977),* overruled on different grounds, *390 A.2d 715 (N.J. Super. App. Div. 1978).*

(n3)Footnote 1670. *Spencer v. Sandusky, 33 S.E. 221 (W. Va. 1899). See* Marketable Title in Equity and at Law, *22 Harv. L. Rev. 529 (1908).*

(n4)Footnote 1671. *Deleon v. WSIS, Inc. 728 So. 2d 1046 (La. Ct. App. 1999); Tolosi v. Lese, 104 N.Y.S. 1095 (N.Y. App. Div. 1st Dept. 1907).*

(n5)Footnote 1672. *Shriver v. Shriver, 86 N.Y. 575 (N.Y. 1881).*

(n6)Footnote 1673. *Thompson v. Ellenz, 59 N.W. 1023 (Minn. 1894).*

(n7)Footnote 1674. *Woods v. Schmitt, 439 N.W.2d 855 (Iowa 1989); Tesdell v. Hanes, 82 N.W.2d 119 (Iowa 1957).* A merchantable title is "a title not subject to such reasonable doubt as would create a just apprehension of its validity in the mind of a reasonable, prudent and intelligent person; one that persons of reasonable prudence and intelligence, guided by competent legal advice, would be willing to take and pay the fair value of the land for." *Eggers v. Busch, 39 N.E. 619 (Ill. 1895).* Title is marketable even though there is a possibility of defect if such possibility is not sufficient to raise a reasonable doubt. *Morse v. Stober, 123 N.E. 780 (Mass. 1919).* A title may be regarded as unmarketable if a reasonably careful and prudent man, familiar with the facts, would refuse to accept the title in the ordinary course of business. It is not necessary that the title be actually bad in order to render it unmarketable. It is sufficient if there is such a doubt or uncertainty as may reasonably form the basis of litigation. Williams v.*Bricker, 109 P. 998 (Kan. 1910),* quoted in *Bartos v. Czerwinski, 34 N.W.2d 566 (Mich. 1948).* The obligation to give a marketable title is not necessarily altered by a stipulation in the contract of sale that the conveyance will be by quitclaim deed. *Wallach v. Riverside Bank, 100 N.E. 50 (N.Y. 1912).* Marketable title, which is the same as merchantable title, is one that is free from reasonable doubt and will not expose the land to the hazards of litigation. *Darby v. Keeran, 505 P.2d 710 (Kan. 1973).* Any title that may require the purchaser to litigate was unmarketable. *Westerlind v. Dehon, 326 S.2d 24 (Fla. App. 1976).* Purchaser entitled to marketable title, one that can be readily sold or mortgaged to a person of reasonable prudence. *Regan v. Lanze, 387 N.Y.S.2d 79 (N.Y. 1976).*

(n8)Footnote 1675. *Whittier Ests., Inc. v. Manhattan Sav. Bank, 48 N.Y.S.2d 111 (N.Y. Sup. 1944).* The law assures to a buyer a title free from reasonable doubt, but not from every doubt. *Crocker Point Assn. v. Gouraud, 120 N.E. 737 (N.Y. 1918); Goldberg v. McCord, 166 N.E. 793 (N.Y. 1929).* If "the only defect in the title" is "a very remote and improbable contingency," a slender possibility only," a conveyance will be decreed. *Greenblatt v. Hermann, 38 N.E. 966 (N.Y. 1894); Ferry v. Sampson, 20 N.E. 387 (N.Y. 1889); Cambreleng v. Purton, 26 N.E. 907 (N.Y. 1891).* Merchantable title is one free from reasonable probability of litigation. *May v. Nyman, 278 N.E.2d 97 (Ill. App. 1972).* Success in a quiet title action must depend upon the strength of the plaintiff's title and not the weakness of the defendant. *Cady v. Morton, 527 F.2d 786 (9th Cir. 1975).*

(n9)Footnote 1676. *Weaver v. Richards, 108 N.W. 382 (Mich. 1906); McLaughlin v. Nelson, 202 N.W. 871 (Neb. 1925).* The existence of a building code violation is not of itself a violation of a covenant to provide good title. *Cox v. Sup. Sav. & Loan Assn., 262 N.E.2d 74 (Ill. App. 1970)*

(n10)Footnote 1677. *Chastain v. McKinney, 203 F.2d 712 (6th Cir. 1953),* Rights of Bona Fide Purchaser for Apparent Devisee or Distributee, *27 St. Johns L. Rev. 336 (1953); Gordon v. Holman, 250 P.2d 875 (Okla. 1952).* Building code violation does not prevent the title from being "good." *Ableman v. Slader, 224 N.E.2d 569 (Ill. App. 1967).*

(n11)Footnote 1678. *In re Rodolitz Holding Corp., 232 B.R. 573 (Bankr. E.D.N.Y. 1999); Shelton v. Ratterree, 181 S.W. 288 (Ark. 1915),* overruled in part on other grounds, *Hinton v. Martin, 236 S.W. 267 (Ark. 1922); Hocking v. Title Ins. & Trust Co., 234 P.2d 625 (Cal. 1951); F. Farm Mtg. Corp. v. Schmidt, 126 P.2d 1036 (Colo. 1942); Winkler v. Neilinger, 14 S.2d 403 (Fla. 1943); Smith v. Huber, 277 N.W. 557 (Iowa 1938); City of N. Mankato v. Carlstrom, 2 N.W.2d 130 (Minn. 1942); Hubachek v. Maxbass Sec. Bank, 134 N.W. 640 (Minn. 1912); Austin v. Barnum, 53 N.W. 1132 (Minn. 1892); Robinson v. Bressler, 240 N.W. 564 (Neb. 1932); Sproule v. Davies, 75 N.Y.S. 229 (N.Y. App. Div. 2d Dept. 1902); Farrell v. Zibro, 48 N.Y.S.2d 854 (N.Y. App. Div. 3d Dept. 1944); Reid v. Johnson, 121 N.Y.S. 750 (N.Y. Sup. 1909); Kennedy v. Dennstadt, 154 N.W. 271 (N.D. 1915); Holmes v. Woods, 32 A. 54 (Pa. 1895); Morrison v. Waggy, 27 S.E. 314 (W. Va. 1897). See* Leeroy O. Ehlers, Student Author, What Constitutes Marketable Title in Oregon, *33 Ore. L. Rev. 77 (1953).* Marketable title is one free from reasonable probability of a lawsuit. *Ableman v. Slader, 224 N.E.2d 569 (Ill. App. 1967).*

(n12)Footnote 1679. *Turner v. McDonald, 18 P. 262 (Cal. 1888); Williams v. Bricker, 109 P. 998 (Kan. 1910); Sinclair v. Weber, 104 A.2d 561 (Md. 1954); Hubachek v. Maxbass Sec. Bank, 134 N.W. 640 (Minn. 1912); Howe v. Coates, 107 N.W. 397 (Minn. 1906); Northouse v. Torstenson, 19 N.W.2d 34 (Neb. 1945); Justice v. Button, 131 N.W. 736 (Neb. 1911); Wadick v. Mace, 103 N.Y.S. 889 (N.Y. App. Div. 1st Dept. 1907),* overruled on different grounds, *83 N.E. 571 (N.Y. 1908); Irving v. Campbell, 24 N.E. 821 (N.Y. 1890); Kennedy v. Dennstadt, 154 N.W. 271 (N.D. 1915); Roberts v. McFaddin, 74 S.W. 105 (Tex. Civ. App. 1903); Madbeth, Inc. v. Weade, 129 S.E.2d 667 (Va. 1963).*

(n13)Footnote 1680. *Mostrong v. Jackson, 866 P.2d 573 (Utah Ct. App. 1993); Burton v. Mellor,154 P.2d 108 (Kan. 1944); Hensel v. Kiern, 47 Dauph. 333* (Pa.) (1939).

(n14)Footnote 1681. *Barnard v. Brown, 70 N.W. 1038 (Mich. 1897); Adkins v. Gillespie, 189 S.W. 275 (Tex. Civ. App. 1916).* The exercise of equity jurisprudence respecting the specific performance of contracts is not a matter of right in either party, but of sound and reasonable discretion in the court, and the court, in the exercise of that discretion, will not compel a party to take a title which may expose him to litigation, even though it may believe the title to be good. *Cornell v. Andrews, 35 N. J. Eq. 7* (Runyon, Ch., 1882) citing *Storys Equity Juris 742 and Pyrke v. Waddingham, 10 Hare 1.*

(n15)Footnote 1682. *Savage v. Shields, 293 F. 863 (8th Cir. 1923); Ewing v. Plummer, 140 N.E. 42 (Ill. 1923); Culley v. Dixon, 199 Iowa 136, 201 N.W. 582 (Iowa 1925); Kurtz v. Gramenz, 198 N.W. 325 (Iowa 1924); Cappel v. Potts, 185 N.W. 148 (Iowa 1921);* Praegner v. Kinnebrew, *100 S. 247 (La. 1924);* Marsh v. Lorimer, *113 S. 808 (La. 1927)* (title reasonably suggesting litigation); McMillan v. Lorimer, *113 S. 812 (La. 1927)* (title reasonably suggesting litigation); *Hershorn v. Rubenstein, 156 N.E. 251 (Mass. 1927); O'Meara v. Gleason, 140 N.E. 426 (Mass. 1923); McLaughlin v. Nelson, 202 N.W. 871 (Neb. 1925); Shonsey v. Clayton, 187 N.W. 113 (Neb. 1922); Bier v. Walbaum, 131 A. 888 (N.J. 1926); Brengard v. Meighan, 136 A. 502 (N.J. Ch. 1927); Breitman v. Jaehnal, 132 A. 291 (N.J. Ch. 1926); Sharpe v. Stretch, 130 A. 231 (N.J. Ch. 1925); McCarty v. Lingham, 146 N.E. 64 (Ohio 1924); Pearce v. Freeman, 254 P. 719 (Okla. 1927); Ammerman v. Karnowski, 234 P. 774 (Okla. 1924); Satterthwaite v. Van Dissen, 226 P. 583 (Okla. 1924); Ritter v. Hill, 127 A. 455 (Pa. 1925); Larson v. Thomas, 215 N.W. 927 (S.D. 1927); Austin v. Carter, 296 S.W. 649 (Tex. Civ. App. 1927); Blomstrom v. Wells, 239 S.W. 227 (Tex. Civ. App. 1922); Davis v. Buery, 114 S.E. 773 (Va. 1922); Empey v. N.W. & P. Hypotheekbank, 225 P. 226 (Wash. 1924); Bowden v. Laing, 138 S.E. 449 (W. Va. 1927).* It is such a title as can be sold or mortgaged to a person of reasonable prudence. *Dickerson v. Morse, 212 N.W. 933 (Iowa 1927).* The term implies a fee simple estate to the entire realty. *Herman v. Engstrom, 214 N.W. 588 (Iowa 1927).*

(n16)Footnote 1683. *Vandermade v. Appert, 5 A.2d 868 (N.J. Ch. 1939); Schoenberg v. O'Connor, 185 A. 377*

(N.J. Sup. 1935); Larson v. Thomas, 215 N.W. 927 (S.D. 1927). A title which is subject to litigation is not marketable. *Westerlind v. Dehon, 326 S.2d 24 (Fla. App. 1976).* Success in a quiet title action must depend upon the strength of the plaintiff's title and not the weakness of the defendant. *Cady v. Morton, 527 F.2d 786 (9th Cir. 1975).* If there is a threat of future litigation, there is no marketable title. *Solar Gen. Contractor Ltd. v. Urban Redevelopment, Inc., 345 S.2d 558 (La. App. 1977).*

(n17)Footnote 1684. *James v. McCombs, 936 P.2d 520 (Alaska 1997); Wilson v. Calvert, 96 F. Supp. 597 (D. Ariz. 1951); Dodd v. Mills, 240 S.W.2d 25 (Ark. 1951); Hinton v. Martin, 286 S.W. 267 (Ark. 1922); Houser v. Vose, 126 S.E. 869 (Ga. App. 1925); Kincaid v. Dobrinsky, 225 Ill. App. 85 (Ill. App. 2d Dist. 1922); Reeves v. Roberts, 242 S.W. 956 (Mo. 1922); Ogg v. Herman, 227 P. 476 (Mont. 1924); Simpson v. Stallings, 225 P.2d 139 (N.M. 1950); Pearce v. Freeman, 254 P. 719 (Okla. 1927); Wurfel v. Bockler, 210 P. 213 (Or. 1922); Veselka v. Forres, 283 S.W. 803 (Tex. Civ. App. 1926). See* Scott, Dispensing with Administration of Small Estates: A Marketable Title Problem, 41 J.B.A. Kan 337 (1972).

(n18)Footnote 1685. *McConnell v. Deal, 246 S.W. 594 (Mo. 1922); Ogg v. Herman, 227 P. 476 (Mont. 1924); Vibroplex Co. v. Jacob May Realty Co., 198 N.Y.S. 327 (N.Y. Sup. 1922).*

(n19)Footnote 1686. *Ohlbaum v. Mayer, 285 Pa. 260, 131 A. 858 (Pa. 1926).*

(n20)Footnote 1687. *Warner v. Denis, 933 P.2d 1372 (Haw. Ct. App. 1997);* Nicolopoolos v. Hill, *117 S. 185 (Ala. 1928); Bloshinski v. Falaz, 79 A.2d 798 (Pa. Super. 1951).* A slight encroachment upon municipal property does not make title unmarketable. *Sinclair v. Weber, 104 A.2d 561 (Md. 1954).* Zoning ordinance does not make title unmarketable. *Lincoln Trust Co. v. Williams Bldg. Corp., 128 N.E. 209 (N.Y. 1920);* Ronald J. Passero, Effect of Zoning Ordinances and Violations Upon Marketability of Property, *24 Albany L. Rev. 167 (1960).* The seller of property is not required to satisfy a lien unless a provision was made in the contract of sale. *Chicago Title Ins. Co. v. Eynard, 367 N.Y.S.2d 399 (N.Y. City Civ. Ct. 1975).*

(n21)Footnote 1688. *Empire Gas & Fuel Co. v. Stern, 15 F.2d 323 (8th Cir. 1926); Cleval v. Sullivan, 154 N.E. 920 (Mass 1927).*

(n22)Footnote 1689. *Flitch v. Boyle, 89 P.2d 912 (Kan. 1939); Patzman v. Howey, 100 S.W.2d 851 (Mo. 1936).* "However, a title, to be marketable, need not be free from every conceivable technical criticism, but only from those possibilities of defect which are sufficient to raise a reasonable doubt. It is not every possibility of defect or even threat of contest that will be sufficient to make a title unmarketable, for it may be practically impossible for a vendor to anticipate all imaginable objections which, if they existed, would defeat his title. * * * For instance, equity will decree specific performance of a contract for the sale of land even where the title is based upon adverse possession, if the title is so clearly proved and so free from doubt that it may serve as a proper foundation for a decree against the purchaser. * * * In other words, a title, to be marketable, must be one which a reasonably intelligent purchaser, who is well informed as to the facts, would be willing to accept in the exercise of ordinary business prudence. * * *" *Garner v. Union Trust Co., 45 A.2d 106 (Md. 1945).* Acceptance of land contract was not made conditional by requiring evidence of title since merchantability is implied in a contract to convey land. *Burkhead v. Farlow, 146 S.E.2d 802 (N.C. 1966).* Purchaser may waive partial title defect. *Schwope v. Kiesling, 538 S.W.2d 490 (Tex. Civ. App. 1976).*

(n23)Footnote 1690. *Liberty Oil Co. v. Condon Nat'l Bank, 291 F. 293 (8th Cir. 1923); Fenner v. Reeher, 230 S.W. 581 (Ark. 1921); Smith v. Huber, 277 N.W. 557 (Iowa 1938); Messenbrink v. Bliesman, 215 N.W. 232 (Iowa 1927)* (judgments against purchaser himself); *Vanderwilt v. Broerman, 206 N.W. 959 (Iowa 1926); Kurtz v. Gramenz, 198 N.W. 325 (Iowa 1924); Cappel v. Potts, 185 N.W. 148 (Iowa 1921); Bentley v. Keegan, 202 P. 70 (Kan. 1921)* (absence of notary seal on deed ten years old); *Duncan v. Clore, 224 S.W. 678 (Ky. App. 1920);* Norton v. Enos, *104 S. 194 (La. 1925); Potter v. Lumsden, 117 A. 31 (N.J. 1922); Nasha Holding Corp. v. Ridge Bldg. Corp., 223 N.Y.S. 223 (N.Y. App. Div. 2d Dept. 1927); Postley v. Kafka, 211 N.Y.S. 382 (N.Y. App. Div. 1st Dept. 1925); Bashara v. Glasscock, 289 S.W. 128 (Tex. Civ. App. 1926).* Omission of second initial of former grantor not material. *Vanderwilt v. Broerman, 206 N.W.*

959 (Iowa 1926). Doubt is resolved in favor of purchaser. *Reeves v. Roberts, 242 S.W. 956 (Mo. 1922).* Impending litigation must have some possibility of success. *Standard Realty Co. v. Gates, 132 A. 487 (N.J. Ch. 1926).*

(n24)Footnote 1691. *Alpha Portland Cement Co. v. Shirk, 227 F. 966 (7th Cir. 1915).*

(n25)Footnote 1692. *Fleming v. Burnham, 2 N.E. 905 (N.Y. 1885).* A title which reasonably suggests future litigation is not acceptable. *Kempff v. Morgan, 291 S.2d 520 (La. App. 1974),* overruled on other grounds, *Lanusse v. Gerrets, 357 S.2d 45 (La. App. 1978).*

(n26)Footnote 1693. *Wesley v. Eells, 177 U.S. 370 (1900); Turner v. McDonald, 18 P. 262 (Cal. 1888); Smith v. Hunter, 89 N.E. 686 (Ill. 1909); Williams v. Bricker, 109 P. 998 (Kan. 1910); Conley v. Finn, 50 N.E. 460 (Mass. 1898); Howe v. Coates, 107 N.W. 397 (Minn. 1906); Shonsey v. Clayton, 187 N.W. 113 (Neb. 1922); Curatelli v. Barnard, 200 A. 795 (N.J. Sup. 1938); Vought v. Williams, 24 N.E. 195 (N.Y. 1890); Kursheedt v. Union Dime Sav. Inst., 23 N.E. 473 (N.Y. 1890); Herman v. Somers, 27 A. 1050 (Pa. 1893); Schenck v. Wicks, 65 P. 732 (Utah 1901); Cummings v. Dolan, 100 P. 989 (Wash. 1909).* It was held that the recital in a prior deed in a chain of title of the existence of an unrecorded sales contract did not make the title unmarketable where the contract could not be located or identified. *L.C. Stroh & Sons, Inc. v. Batavia Homes & Dev. Corp., 234 N.Y.S.2d 401 (N.Y. App. Div. 1962). See* B.W.C., Student Author, Real Property - Unrecorded Contract Contained in Prior Conveyance - Effect of Real Property Law § 291-e on Title Marketability, *29 Brooklyn L. Rev. 349 (1962).* Contra result before statute. *Dingley v. Bon, 29 N.E. 1023 (N.Y. 1892).* Fact that major portion of premises was located in bed of proposed street made title unmarketable. *Litt v. City of N.Y., 235 N.Y.S.2d 327 (N.Y. Sup. 1962).* Easement is an encumberance. *Cape Co. v. Wiebe, 241 N.W.2d 830 (Neb. 1976); Rose v. Mitsubishi Intl. Corp., 423 F. Supp. 1162 (E.D. Pa. 1976).* Restrictive covenants are unmarketable. *Hillcrest Bldg. Co. v. Peacock, 171 S.E.2d 193 (N.C. App. 1969).*

(n27)Footnote 1694. *Ormsby v. Graham, 98 N.W. 724 (Iowa 1904). See* Lewis G. Mosburg, Statutes of Limitation and Title Examination, *13 Okla. L. Rev. 125 (1960).*

(n28)Footnote 1695. *Barnard v. Brown, 70 N.W. 1038 (Mich. 1897).*

(n29)Footnote 1696. *Shriver v. Shriver, 86 N.Y. 575 (N.Y. 1881).*

(n30)Footnote 1697. *Eggers v. Busch, 39 N.E. 619 (Ill. 1895); Reynolds v. Strong, 31 N.Y.S. 329 (N.Y. Sup. 1894).*

(n31)Footnote 1698. *Block v. Ryan, 4 App. D. C. 283 (D.C. App. 1894); Close v. Stuyvesant, 24 N.E. 868 (Ill. 1890); Brown v. Widen, 103 N.W. 158 (Iowa 1905); Horn v. Butler, 40 N.W. 833 (Minn. 1888); Rudisaile v. de Beughem, 237 S.W.2d 166 (Mo. 1951); Kane v. Rippy, 23 P. 180 (Or. 1890); Speakman v. Forepaugh, 44 Pa. 363 (Pa. 1863).*

(n32)Footnote 1699. *Hedderly v. Johnson, 44 N.W. 527 (Minn. 1890); Barrette v. Whitney, 106 P. 522 (Utah 1909).*

(n33)Footnote 1700. *Howe v. Coates, 107 N.W. 397 (Minn. 1906); Townshend v. Goodfellow, 41 N.W. 1056 (Minn. 1889); Moore v. Williams, 22 N.E. 233 (N.Y. 1889); Irving v. Campbell, 24 N.E. 821 (N.Y. 1890).* A title is not marketable if it requires examination of matters of record outside the state where ancillary administration in the state could be made to perfect the title. *Paradis v. Bancroft, 91 A.2d 925 (N.H. 1952).*

(n34)Footnote 1701. Messer-Johnson Realty Co. v. Sec. Sav. & Loan Co., *94 S. 734 (Ala. 1922).* The idem sonans rule may not be resorted to to make a title marketable even though it is usable in actions of ejectment and trespass to try title. *Douglass v. Ransom, 237 N.W. 260 (Wis. 1931).*

(n35)Footnote 1702. *Howe v. Coates, 107 N.W. 397 (Minn. 1906); Speakman v. Forepaugh, 44 Pa. 363 (Pa. 1863).*

(n36)Footnote 1703. *Kling v. A. H. Greef Realty Co., 148 S.W. 203 (Mo. App. 1912); Clinton v. Miller, 226 P.2d 487 (Mont. 1951); Pooler v. Sammet, 115 N.Y.S. 578 (N.Y. App. Div. 1st Dept. 1909).*

(n37)Footnote 1704. *Wiemann v. Steffen, 172 S.W. 472 (Mo. App. 1915).* But if the contract calls for a title approved by the vendee's attorney the provision is not against public policy and is enforceable. *Campbell v. Hart, 256 S.W.2d 255 (Tex. Civ. App. 1953).*

(n38)Footnote 1705. *In re Rodolitz Holding Corp., 232 B.R. 573 (Bankr. E.D.N.Y. 1999); Zelman v. Kaufherr, 73 A. 1048 (N.J. Ch. 1909); Salvin v. Weidemann, 95 N.Y.S.2d 434 (N.Y. App. Div. 1st Dept. 1950)* (even where the contract specified a title satisfactory to vendee's attorney); *Garibaldi v. City of Yonkers, 102 N.Y.S.2d 200 (N.Y. Sup. 1949).*

(n39)Footnote 1706. *Anderson v. Onsager, 455 N.W.2d 885 (Wis. 1990); Matter of Louis L. Lasser & Stanley M. Kahn, Partnership, 52 B.R. 957 (Bankr. E.D.N.Y. 1985);* Alexander v. Abernathy, *108 S. 849 (Ala. 1926); Tuffin v. Warfield, 237 P. 64 (Cal. App. 3d Dist. 1925); Young v. Kich, 15 N.E.2d 692 (Ill. 1938); Alyea v. Baringer, 138 N.E. 280 (Ill. 1923); Dennett v. Norwood Hous. Assn., 135 N.E. 866 (Mass. 1922); Jenkins v. Wiley, 254 S.W. 94 (Mo. 1923); Grunt v. Olsan, 139 A. 163 (N.J. Ch. 1927); Schifferdecker v. Busch, 225 N.Y.S. 106 (N.Y. Sup. 1927); Kinney v. Schlussel, 239 P. 818 (Or. 1925); Andrews v. New Bethlehem Window Glass Co., 112 A. 90 (Pa. 1920).*

(n40)Footnote 1707. *Schifferdecker v. Busch, 225 N.Y.S. 106 (N.Y. Sup. 1927).*

(n41)Footnote 1708. *Goodman v. Marx, 195 N.Y.S. 368 (N.Y. App. Div. 2d Dept. 1922).*

(n42)Footnote 1709. *Hughes v. Fairfield Lumber & Supply Co., 123 A.2d 195 (Conn. 1956); Hartley v. Williams, 287 S.W.2d 129 (Mo. App. 1956).* Requirement of re-recording of future interests held constitutional. *Tesdell v. Hanes, 82 N.W.2d 119 (Iowa 1957); Wichelman v. Messner, 83 N.W.2d 800 (Minn. 1957).* Marketable Title Act held unconstitutional. *Murrison v. Fenstermacher, 203 P.2d 160 (Kan. 1949).* Kansas' statute: Kan. Gen. Stat. Supp., § 67-612a (1959). *See* N. William Hines, Jr., Student Author, Constitutionality of the Recent Kansas Title Statute Based on Plat, *9 U. Kans. L. Rev. 57 (1960).* Denying consideration to the title examination standards adopted by the bar association. *Riggs v. Snell, 350 P.2d 54 (Kan. 1960).* Robert M. Zuber, Student Author, Validity Of Nebraska Reverter Act, 39 Nebr. L. Rev. 757 (1960); Robert W. Swenson, Marketable Title Acts, *6 Utah L. Rev. 472 (1959).*

(n43)Footnote 1710. *Contrast, Barger v. Gery, 53 A. 483 (N.J. Ch. 1902),* holding to the limited rule, with *Fahy v. Cavanagh, 44 A. 154 (N.J. Ch. 1899),* where the court stated:

> "That titles must be held marketable, although dependent on the proofs of facts, cannot be disputed. If this were not so, a vendor holding title as heir or devisee, in a large number of cases, could not have the remedy of specific performance." When the authorities speak of the hazard of litigation to which the purchaser must not be subjected, it seems to me that they must refer to a hazard which is to be determined by the chance of successful attack as viewed by the court in the suit for specific performance. When, also, they speak of a doubt or a supposed flaw as affecting the salability of a title, they must refer to the character of the doubt or flaw as the court views it, and not as it may be viewed by the intermediate judgment of the real estate market. "Some purchasers, guided by cautious counsel, will not accept a title against which the slightest possibility of doubt is suggested; and yet there is no title concerning which a possible doubt or the possibility of a future flaw cannot be raised. The authorities, I think, establish the rule as a safe one that a title dependent on a fact must be regarded as marketable when (1) the fact is so conclusively proved in the suit for specific performance that a verdict against the existence of the fact would not be allowed to stand in a court of law, and (2) where there is no reasonable ground for apprehending that the same fact cannot be, in like manner, proved, if necessary, at any time thereafter for the protection of the purchaser." In the case of marketable title the idem sonans rule must be such as to preclude questions of identity. *Douglass v. Ransom, 237 N.W. 260 (Wis. 1931).*

(n44)Footnote 1711. *Danzer v. Moerschel, 214 S.W. 849 (Mo. 1919).*

(n45)Footnote 1712. Title by affidavits held marketable. *Schmidt v. Fontron Loan & Trust Co., 211 P. 630 (Kan. 1923); Moser v. Cochrane, 13 N.E. 442 (N.Y. 1887).* Mere existence of a removable easement does not make title unmarketable. *Westerlind v. Dehon, 326 S.2d 24 (Fla. App. 1976); Gossels v. Belluschi, 348 N.E.2d 115 (Mass. App. 1976).*

(n46)Footnote 1713. *Smith v. Brown, 134 N.E.2d 823 (Ind. App. 1956); McCubbin v. Urban, 77 N.W.2d 36 (Iowa 1956); Lowell v. City of Boston, 79 N.E.2d 713 (Mass. 1948); Hebrew Home for Orphans & Aged v. Freund, 144 N.Y.S.2d 608 (N.Y. Sup. 1955); In re Dahl's Est., 248 P.2d 700 (Or. 1952). See* Michael K. Phillips, "Quiet Title Action: Proposal for Reform," 2 Ind. Leg. F. 351(1969).

(n47)Footnote 1714. *Imlach v. Seigel, 191 N.Y.S. 814 (N.Y. App. Div. 1st Dept. 1922).*

(n48)Footnote 1715. *Kane v. Rippey, 33 P. 936 (Or. 1893).* If the title defect is curable the vendee may not reject the title. Any such rejection is anticipatory breach of contract. *Cohen v. Kranz, 189 N.E.2d 473 (N.Y. 1963).*

(n49)Footnote 1716. *Chesman v. Cummings, 7 N.E. 13 (Mass. 1886)* (title determined marketable in specific performance action); *Townshend v. Goodfellow, 41 N.W. 1056 (Minn. 1889)* (refusing specific performance when question of fact involved and all parties not before the court).

(n50)Footnote 1717. *Lynbrook Gardens, Inc. v. Ullmann, 53 N.E.2d 353 (N.Y. 1943).* "A title dependent on a fact must be regarded as marketable when (1) the fact is so conclusively proved in the suit for specific performance that a verdict against the existence of the fact would not be allowed to stand in a court of law, and (2) where there is no reasonable ground for apprehending that the same fact cannot be, in like manner, proved, if necessary at any time thereafter for the protection of the purchaser. A specific performance will never be decreed at the suit of the vendor whenever the doubt concerning his title is one which can only be settled by further litigation, or when the court can see that the purchaser will, with reasonable probability, be exposed to bona fide adverse claims on the part of third persons, and to the risk of litigation for the purpose of enforcing such claims. * * * Whatever be the cause from which the doubt arises, * * * it must be something more than a mere speculation, theory or possibility. A court of justice, in all its investigations, deals with arguments more or less based upon a balance of probabilities; and in rendering its decisions must be satisfied if it reaches a conclusion which is morally certain. To admit of objections which were purely speculative, or mere possibilities, would destroy the practical efficacy of all judicial proceedings. A doubt covering the vendor's title, therefore, which can avail to defeat his remedy of specific performance, must be reasonable, and so far as it depends upon contingent events and uncertain facts their occurrence or existence must be fairly probable." *Barger v. Gery, 53 A. 483 (N.J. Ch. 1902).*

(n51)Footnote 1718. *Daniel v. Shaw, 44 N.E. 991 (Mass. 1896).* It is a great, though perhaps a common mistake, to suppose that a doubtful title can he made marketable by an opinion of a court in a case stated between vendor and vendee. *Pratt v. Eby, 67 Pa. 396 (Pa. 1871).*

(n52)Footnote 1719. *Minister, Elders, and Deacons of Reformed Protestant Dutch Church v. Madison Ave. Bldg. Co., 108 N.E.. 444 (N.Y. 1915)* (restrictive covenant in a plat affected all lot owners even though not before the court). "It is well settled, and I think so settled upon sound principles, that in suits for specific performance of contracts this court may compel a defendant to take a title, the validity of which depends upon what may be properly described as a doubtful question of law, and may itself determine that question of law for the purpose of that particular case. No harm will be done to the defendant because, by an appeal to a court of errors and appeals, that court,- which is at once a court of law and equity, may finally deter mine the question of law, and settle it as against all the world, whether parties to the suit or not." *Fahy v. Cavanagh, 44 A. 154 (N.J. Ch. 1899).* "It is further insisted, however, that, even if the title is good in fact, specific performance should not be compelled, because the questions raised remain open, inasmuch as the

grandchildren of the testator, born since the sale under the statute, are not parties to the action and are not bound by our determination. There would be much force in this position if the alleged defects in the title depended upon questions of fact or upon doubtful questions of law, but as they rest wholly on the construction of a statute and a decree made thereunder, we do not think we should hesitate, under all the circumstances, in declaring the title free from judicial doubt, and requiring the defendant to perform his contract. When the court has carefully examined and deliberately decided a question, its decision becomes a part of the common law, and is binding upon it as well as upon all the other courts of the state. The possibility that it may, at some time in the future, when other parties are before it, disregard its own precedent and decide the same question, depending on the same facts, in a different way, is so remote that it should not be permitted to arrest the development and destroy the salability of a large tract of land, possibly for a generation." *Ebling v. Dreyer, 44 N.E. 155 (N.Y. 1896).* If the property subject to a sales contract is subject to a utility easement, the vendor is not required to clear the easement until the time of passing of papers arrive. *Gossels v. Belluschi, 348 N.E.2d 115 (Mass. App. 1976).*

(n53)Footnote 1720. *Ladd v. Weiskopf, 64 N.W. 99 (Minn. 1895).*

(n54)Footnote 1721. *Reed v. Sefton, 108 P. 1095 (Cal. App. 2d Dist. 1909); Winter v. Stock, 29 Cal. 407 (Cal. 1866); Evans v Gerry, 51 N.E. 615 (Ill. 1898); Moser v. Cochrane, 13 N.E. 442 (N.Y. 1887); Murray v. Ellis, 3 A. 845 (Pa. 1886); Brackenridge v. Claridge, 44 S.W. 819 (Tex. 1898); Douglass v. Ransom, 237 N.W. 260 (Wis. 1931).* A defect in record title which can be cured by only a reference with resort to parol evidence is unmarketable. *Regan v. Lanze, 387 N.Y.S.2d 79 (N.Y. 1976).*

(n55)Footnote 1722. Ralph W. Aigler, "Title Problems in Land Transfers," 24 Mich. S. B. J. 202 1945). *See* Joel C. Davis, Water Title Examinations, *34 Rocky Mt. L. Rev. 509 (1962).* Prospect of future taxes in water district did not make title unmarketable. *Edwards v. St. Paul Title Ins. Co., 563 P.2d 979 (Colo. App. 1977).* In fact or law a reasonable defect makes title unmarketable. *Carter v. Girasuolo, 373 A.2d 560 (Conn. Super. 1976).*

(n56)Footnote 1723. *Rackouski v. Dobson, 634 N.E.2d 1229 (Ill. App. 3d Dist. 1994).* Under idem sonans variations of initials and given names were upheld. *Lyman v. Gedney, 29 N.E. 282 (Ill. 1885); Vanderwilt v. Broerman, 206 N.W. 959 (Iowa 1926); Woodward v. McCollum, 111 N.W. 623 (N.D. 1907); Hollifield v. Landrum, 71 S.W. 979 (Tex. Civ. App. 1903); Kane v. Borthwick, 96 P. 516 (Wash. 1908).* There is an implied requirement of marketable title in sales contracts, but title need not be free of all suspicion of possible doubt. *Regan v. Lanze, 366 N.Y.S.2d 512 (N.Y. App. Div. 1975),* overruled on facts, *354 N.E.2d 818 (N.Y. 1976).* To be unmarketable the defect must be such that the title is not free from reasonable doubt in law or fact. *Carter v. Girasuolo, 373 A.2d 560 (Conn. Super. 1976).* Easement are defective encumbrances. *Adams v. United Developers, Inc., 397 A.2d 503 (R.I. 1979).* "Reasonable doubt" defeats marketable title. *Darby v. Keeran, 505 P.2d 710 (Kan. 1973).*

(n57)Footnote 1724. *Peckham v. Stewart, 31 P. 928 (Cal. 1893); Bryan v. Straus Bros. & Co., 121 N.W. 301 (Mich. 1909); Campbell v. Harsh, 122 P. 127 (Okla. 1912).*

(n58)Footnote 1725. *Hatcher v. Andrews, 68 Ky. 561 (Ky. App. 1869); Isaacs v. Schmuck, 156 N.E. 621 (N.Y. 1927); Genske v. Jensen, 205 N.W. 548 (Wis. 1925).*

(n59)Footnote 1726. Discussed in, *Crawford v. Love, 614 N.E.2d 50 (Ill. App. 1st Dist. 1993). Giammatteo v. Penna, 147 A. 250 (Del. Ch. 1929); Kramer v. Ricke, 25 N.W. 278 (Iowa 1885);* Chopin v. Pollet, *20 S. 721 (La. 1896); Reeves v. Alter, 12 A. 551 (Pa. 1888); Maxon v. Gates, 116 N.W. 758 (Wis. 1908).*

(n60)Footnote 1727. *Crawford v. Love, 614 N.E.2d 50 (Ill. App. 1st Dist. 1993); Heaton v. Nelson, 194 P. 614 (Colo. 1921); Koch v. Streuter, 83 N.E. 1072 (Ill. 1908); Smith v. Huber, 277 N.W. 557 (Iowa 1938); Hewitt v. Parsley, 60 A. 619 (Md. 1905).*

(n61)Footnote 1728. *Eisenhut v. Marion De Vries, Inc., 269 N.Y.S. 483 (N.Y. Sup. 1934).* Contra, *Heaton v. Nelson, 194 P. 614 (Colo. 1921).* Contra, *Rabren v. Osmon, 613 S.2d 390 (Ala. 1993); Marchant v. Park City, 788 P.2d*

520 (Utah 1990).

(n62)Footnote 1729. *Whitman v. Larson, 568 N.Y.S.2d 485 (N.Y. App. Div. 3d Dept. 1991); Siegel v. Shaw, 148 N.E.2d 393 (Mass. 1958)* (unmarketable even where visible and seen by vendee); 3120 *Realty Corp. v. Tong, 162 N.Y.S.2d 476 (N.Y. Sup. 1957).*

(n63)Footnote 1730. *Grand Lodge A.O.U.W. v. Fischer, 21 N.W.2d 213 (S.D. 1946); Burks v. Neutzler, 289 S.W. 436 (Tex. Civ. App. 1926),* rev'd. on other grounds, *2 S.W.2d 416 (Tex. Com. App. 1928).*

(n64)Footnote 1731. *Judd v. Skidmore, 22 N.W. 183 (Minn. 1885); Russell v. Wales, 104 N.Y.S. 143 (N.Y. App. Div. 4th Dept. 1907); Horton v. Matheny, 51 N.E.2d 41 (Ohio App. 1943)* (deed 80 years old).

(n65)Footnote 1732. *Hadley Realty Corp. v. Lawyers Title Corp., 37 N.Y.S.2d 658 (N.Y. City Ct. 1942).*

(n66)Footnote 1733. *Waschak v. Moffat, 109 A.2d 810 (Pa. 1954).*

(n67)Footnote 1734. *Nu-Dwarf Farms, Inc. v. Stratbucker Farms, Ltd., 470 N.W.2d 772 (Neb. 1991); Whitman v. Larson, 568 N.Y.S.2d 485 (N.Y. App. Div. 3d Dept. 1991); Cassell v. Werny, 72 S.2d 45 (Fla. 1954)* (dictum); Van Ness v. Royal Phosphate Co., *53 S. 381 (Fla. 1910).* But see, *Cassell v. Werny, 72 S.2d 45 (Fla. 1954)* (the vendor and vendee do not contract with notice of visible easements when the vendees object prior to contracting for purchase of the property).

(n68)Footnote 1735. *Aldrich v. Hawrylo, 656 A.2d 1304 (N.J. Super. App. Div. 1995); Barder v. McClung, 209 P.2d 808 (Cal. App. 2d Dist. 1949).* Zoning restrictions are not encumbrances. *Lincoln Trust Co. v. Williams Bldg. Corp., 128 N.E. 209 (N.Y. 1920); Miller v. Milwaukee Odd Fellows Temple, 240 N.W. 193 (Wis. 1932).* Specific performance by seller was refused where zoning restriction was involved and left seller to his remedy at law. *Clay v. Landreth, 45 S.E.2d 875 (Va. 1948); Kend v. Crestwood Realty Co., 246 N.W. 311 (Wis. 1933).* Building and zoning laws in existence when the land contract was signed are not treated as encumbrances. *Dover Pool & Racquet Club, Inc. v. Brooking, 322 N.E.2d 168 (Mass. 1975).* Zoning law prohibition against restoration of nonconforming improvements on the premises was not an encumbrance to make the title unmarketable. *Goldfarb v. Dietz, 506 P.2d 1322 (Wash. App. 1973).* Contra, 1119 *Del. v. Continental Land Title Co., 20 Cal. Rptr. 2d 438 (Cal. App. 2d Dist. 1993).*

(n69)Footnote 1736. *Micbar Realty Corp. v. Truval Realty Corp., 120 N.Y.S.2d 150 (N.Y. Sup. 1952).*

(n70)Footnote 1737. *Flynn v. Korneffel, 547 N.W.2d 249 (Mich. 1996); J&L Enters. v. Jones, 614 S.2d 1151 (Fla. App. 4th Dist. 1993); Yonkers Lodge 707, B. & P.O.E. v. Bd. of Educ., 39 N.Y.S.2d 157 (N.Y. Sup. 1942).* Where law and equity are separate an encumbrance will prevent a title from being merchantable though equity could have canceled the encumbrance. *Jeffrey Structures v. Grimaldi, 142 A.2d 378 (Pa. Super. 1958).*

(n71)Footnote 1738. *Henry Waterhouse Trust Co. v. Freitas, 33 Haw. 139 (Haw. Terr. 1934).*

(n72)Footnote 1739. Greenberg v. Ray, *108 S. 385 (Ala. 1926).* Minnesota and Wisconsin have adopted a marketable title act which destroys claims against realty after a specified number of years unless the claimant is in possession or has filed a record of his claim. Minn. Stat. § 541.023(6) (1961) (40 years); Wis. Stat. § 330.15 (1961) (30 years); *B.W. & Leo Harris Co. v. City of Hastings, 59 N.W.2d 813 (Minn. 1953). See* Ralph W. Aigler, Supplement to "Constitutionality of Marketable Title Acts," *56 Mich. L. Rev. 225 (1957);* H.K. Brehmer, Limitations of Actions, etc., *30 Minn. L. Rev. 23 (1945);* Roy G.Tulane, Title to Real Property--Thirty Year Limitation Statute, *1942 Wis. L. Rev. 258.* The existence of a possibility of reverter is a flaw in the title. *Hurd v. Becker, 173 S.2d 141 (Fla. 1965).* Nor may a purchaser seek to take a partial interest. *Fries v. Fries, 470 N.W.2d 232 (N.D. 1991).*

(n73)Footnote 1740. *Warner v. Denis, 933 P.2d 1372 (Haw. App. 1997);* Wheeler v. Sullivan, *106 S. 876 (Fla. 1925); Dennett v. Norwood Hous. Assn., 135 N.E. 866 (Mass. 1922); Percy v. Miller, 251 P.2d 463 (Or. 1952).* Vendee

entitled to credit for amount paid to discharge lien. Latin-Am. Bank v. Rogers, *99 S. 546 (Fla. 1924).* An unrecorded mortgage referred to in the probate records of a predecessor in title is not an encumbrance under the *Torrens Act. Tramontozzi v. D'Amicis, 183 N.E.2d 295 (Mass. 1962).*

(n74)Footnote 1741. *Rusch v. Kauker, 479 N.W.2d 496 (S.D. 1991); Ginger v. Smith, 196 N.W. 298 (S.D. 1923); Riley v. Wheat, 187 N.W. 425 (S.D. 1922).* Termite infestation entitled vendee to reduction of purchase price. *Maguire v. Masino, 325 S.2d 844 (La. App. 1975).* A lien to be paid off out of the purchase price is not a title defect. *Lone Star Dev. Corp. v. Miller, 564 F.2d 921 (10th Cir. 1977).*

(n75)Footnote 1742. *Seerup v. Goraczkowski, 199 N.W. 94 (Minn. 1924); Paynesville Land Co. v. Grabow, 200 N.W. 481 (Minn. 1924); Olson v. Woodhouse, 199 N.W. 815 (Neb. 1924).* Restrictions on the use of land greater than those imposed by law impair the validity of the title even though beneficial. *Weiss v. Sachs, 112 N.Y.S.2d 97 (N.Y. Sup. 1952).*

(n76)Footnote 1743. *Quality Wash Group V, Ltd. v. Hallak, 58 Cal. Rptr. 2d 592 (Cal. App. 4th Dist. 1996); Kovanda v. Vavra, 633 N.W.2d 576 (Neb. App. 2001); Johnson v. Bridge, 213 P. 512 (Cal. App. 1st Dist. 1923).* An installment alimony or support judgment does not constitute an automatic lien on real property for the possible future unpaid installments. *Slack v. Mullenix, 66 N.W.2d 99 (Iowa 1954).* Violation of building code is an encumbrance. *Brunke v. Pharo, 89 N.W.2d 221 (Wis. 1958);* George P. Stephan, Marketability of Title: Violation of Building Code As an Encumbrance, *1958 Wis. L. Rev. 641.* The term "encumbrance" is more comprehensive than the term "lien" which embraces rights-of-way, easements and restrictive covenants. *Brewer v. Peatross, 595 P.2d 866 (Utah 1979).* Restrictive covenants are unmarketable. *Hillcrest Bldg. Co. v. Peacock, 171 S.E.2d 193 (N.C. 1969).*

(n77)Footnote 1744. *Frimberger v. Anzellotti, 594 A.2d 1029 (Conn. App. 1991); Warner v. Denis, 933 P.2d 1372 (Haw. App. 1997); Reilly v. Cullinane, 287 F. 994 (D.C. App. 1923);* Greenberg v. Ray, *108 S. 385 (Ala. 1926); Long v. Chandler, 92 A. 256 (Del. Ch. 1914); Davar v. Cardwell, 27 Ind. 478 (Ind. 1867); Firebaugh v. Wittenberg, 141 N.E. 379 (Ill. 1923); Shearer v. Ranger, 39 Mass. 447 (Mass. 1839); Kennedy v. Koopman, 65 S.W. 1020 (Mo. 1901); Conover v. Tindall, 20 N.J.L. 513 (N.J. 1845); Joseph Loria, Inc. v. Stanton Co., 194 N.Y.S. 270 (N.Y. App. Div. 1st Dept. 1922); McCarty v. Lingham, 146 N.E. 64 (Ohio 1924); Kneeland v. Hetzel, 229 P. 218 (Okla. 1924); Eggen v. Johnson, 194 N.W. 1021 (S.D. 1923); Armstrong v. Henson, 137 S.E. 439 (S.C. 1927).*

(n78)Footnote 1745. *City of Winson-Salem v. Yarbrough, 451 S.E.2d 358 (N.C. App. 1994); Hoskins v. Walker, 255 S.W.2d 480 (Ky. 1953).* A remainder subject to being divested by consumption of the principal by the life tenant is a cloud on the title. *Boecher v. Borth, 377 N.Y.S.2d 781 (N.Y. App. Div. 1976).*

(n79)Footnote 1746. *Hunt v. Inner Harbor Land Co., 214 P. 998 (Cal. App. 2d Dist. 1923); Lansburgh v. Market St. Ry. Co., 220 P.2d 423 (Cal. App. 1st Dist. 1950); Davis v. Dunn, 58 S.2d 539 (Fla. 1952),* Harvey T. Hahn, Title Insurance, *6 U. Det. L. Rev. 251 (1923).*

(n80)Footnote 1747. *Matter of Est. of Opatz, 544 N.W.2d 813 (N.D. 1996); Rich, Rich & Nance v. Carolina Constr. Corp., 548 S.E.2d 541 (N.C. App. 2001); Cmmw. Land Title Ins. Co. v. Stephenson, 399 S.E.2d 380 (N.C. App. 1991); Brown v. Barngrover, 47 N.W. 1082 (Iowa 1891); Campagna v. Home Owners Loan Corp., 3 N.W.2d 750 (Neb. 1942)* (unenforceable judgment is not an objection to a good title); *Agens v. Koch, 70 A. 348 (N.J. Ch. 1908); Adkins v. Gillespie, 189 S.W. 275 (Tex. Civ. App. 1916).*

(n81)Footnote 1748. *Nat'l Fin. Corp. v. Eicholz, 142 S.E. 134 (Ga. 1928).*

(n82)Footnote 1749. *Goldstein v. Ehrlick, 124 A. 761 (N.J. Ch. 1924).*

(n83)Footnote 1750. *Rosenblit v. Williams, 750 A.2d 1131 (Conn. App. 2000); Independence One Mort. Corp. v. Katsaros, 681 A.2d 1005 (Conn. App. 1996); Wilshire Serv. Corp. v. Timber Ridge Partn., 743 N.E.2d 1173 (Ind. App. 2001); Palmer v. Gelpi, 18 S.2d 59 (La. App. 1944); Rath v. Wilgus, 195 N.W. 115 (Neb. 1923); Doonan v. Killilea, 118*

N.E. 851 (N.Y. 1918) (covenant against encumbrances operates in praesenti and is broken the instant it is made, if an encumbrance exists; but, unless the assessment is then an actual lien, the covenant is not broken); *Roberts v. N.Y. Life Ins. Co., 186 N.Y.S. 422 (N.Y. App. Div. 1st Dept. 1921); Hanlon v. McLain, 242 P.2d 732 (Okla. 1952); Crutcher v. Aiken, 252 S.W. 844 (Tex. Civ. App. 1923); Gaddis v. Mayfield, 239 S.W. 1010 (Tex. Civ. App. 1922). See Tennenberger v. Sozio, 136 A. 806 (N.J. Ch. 1927)* (mortgagee acquired fee from mortgagor). Contra, where unpaid purchase price was sufficient to discharge lien. *Tapp v. Nock, 12 S.W. 713 (Ky. App. 1889).* A mere deposit by a prospective vendee without a sales contract is not an encumbrance upon land being returnable. *Henry v. Rouse, 75 N.W.2d 836 (Mich. 1956).* Mortgage paid but not released was not an encumbrance. *Boulware v. Mayfield, 317 S.2d 470 (Fla. App. 1975).*

(n84)Footnote 1751. *Seigle v. Jasper, 867 S.W.2d 476 (Ky. App. 1993); Juhan v. Cozart, 403 S.E.2d 589 (N.C. App. 1991); Gundel v. Grady, 585 N.Y.S.2d 63 (N.Y. App. Div. 2d Dept. 1992); Mills v. Solomon, 43 S.W.3d 503 (Tenn. App. 2000); Breuer-Harrison, Inc. v. Combe, 799 P.2d 716 (Utah App. 1990); Meacham v. Burgiss, 1 F.2d 47 (S.D. Fla. 1924); Orange Cove Water Co. v. Sampson, 248 P. 526 (Cal. App. 3d Dist. 1926); Moddelmog v. Cook, 330 P.2d 1113 (Colo. 1958)* (ditch easement was not marketable title, the weight of authority at least where easement interferes with the intended use); *Hershorn v. Rubenstein, 156 N.E. 251(Mass. 1927)* (passageways); *Knudson v. Trebesch, 187 N.W. 613 (Minn. 1922); Bibber v. Weber, 102 N.Y.S.2d 945 (N.Y. Sup. 1951); Whittier Ests., Inc. v. Manhattan Sav. Bank, 48 N.Y.S.2d 111 (N.Y. Sup. 1944). See* Edward M. Berman, Student Author, Marketable Title in New York State: Easements, *10 Syracuse L. Rev. 93 (1958). Nauman v. Treen Box Co., 124 A. 349 (Pa. 1924)* (railroad siding), overruled in part on other grounds, *Philadelphia Steel Abrasive Co. v. Louis J. Gedicke Sons, 23 A.2d 490 (Pa. 1942); McDermott v. Reiter, 124 A. 187 (Pa. 1924); Riley v. Wheat, 187 N.W. 425 (S.D. 1922)* (railroad right-of-way); *Thackeray v. Knight, 192 P. 263 (Utah 1920). See Morris v. Eisner, 125 A. 573 (N.J. Ch. 1924)* (driveway). Sewer nine feet in ground at edge of lot not an encumbrance. *Wheeler v. Beem, 208 P. 626 (Kan. 1922).* Private rights-of-way are held encumbrances regardless of the grantee's knowledge of their existence. *Fagan v. Walters, 197 P. 635 (Wash. 1921). See Eller v. Moore, 63 N.Y.S. 88 (N.Y. App. Div. 3d Dept. 1900).* Cf. *Wilson v. Cochran, 48 Pa. 107 (Pa. 1864).* Existence of an easement is a breach of a covenant against encumbrances. *Abstract Co. v. Roberts, 144 S.2d 3 (Fla. App. 1962).* Sewer easement held an encumbrance on the servient estate. *Robbins v. Hannen, 378 P.2d 1 (Kan. 1963).* Visual easement is not an encumbrance making title unmarketable. *Thompson v. Shaw Real Est., Inc., 173 S.E.2d 812 (Va. 1970).* An easement is an encumbrance making a title unmarketable. Easement is an encumbrance as respects marketable title. *Rhodes v. Astro-Pac, Inc., 378 N.Y.S.2d 195 (N.Y. App. Div. 4th Dept. 1976).* An easement is a fatal encumbrance on the title. *Walker v. Bush, 216 S.E.2d 285 (Ga. 1975).* A removable easement is not an encumbrance. *Gossels v. Belluschi, 348 N.E.2d 115 (Mass. App. 1976).* License is not an encumbrance being revocable. *Chicago & N.W. Transp. Co. v. City of Winthrop, 257 N.W.2d 302 (Minn. 1977).* An easement is a breach of covenant for conveyance free from encumbrances. *Rose v. Mitsubishi Intl. Corp., 423 F. Supp. 1162 (E.D. Pa. 1976).*

(n85)Footnote 1752. *In re Rodolitz Holding Corp., 206 B.R. 657 (Bankr. E.D.N.Y. 1997); Gundel v. Grady, 585 N.Y.S.2d 63 (N.Y. App. Div. 2d Dept. 1992).* Evidence that railroad right-of-way encroached onto motel property supported award of survey cost to purchasers, but did not support award of cost of curing encroachment, nor did encroachment make the title unmarketable. *Maloney v. Heer, 850 P.2d 957 (Mont. 1993); Vogt v. Shumate, 281 S.W. 514 (Ky. App. 1926); Kohoot v. Gurbisz, 139 A. 223 (N.J. 1927); Kurtz v. Busch, 128 A. 552 (N.J. Sup. 1925). See Scheinman v. Bloch, 119 A. 926 (N.J. 1923).* Decisive test of marketability of land title, though land encroaches on another's land, is whether encroachment is so material that it is likely to be contested. *Sinclair v. Weber, 104 A.2d 561 (Md. 1954);* The Effect of an Encroachment on Municipal Property on the Marketability of Title, *15 Md. L. Rev. 272 (1955).* Sidewalk encroachment of nine inches does not render title unmarketable. *Waterman v. Taub, 127 A. 676 (N.J. Sup. 1925). See* Ernest C. LaFollette, Student Author, Marketable Title in New York: Encroachments and Projections, *9 Syracuse L. Rev. 248 (1957).* Encroachment of driveways on the property to be conveyed constituted effect of merchantable title and excused the vendee from performing even though he had viewed the property. *Young v. Stevens, 190 S.2d 264 (La. App. 1966).* Dispute as to boundary line made title unmarketable. *Tarants v. Goudie, 188 N.W.2d 900 (Mich. App. 1971).* Set-back line in chain of title was an encumbrance. *Blumberg v. DiMarco, 193 A.2d 634 (Pa. Super. 1963).* Title not marketable if subject to potential encroachments. *Madbeth, Inc. v. Weade, 129 S.E.2d 667 (Va. 1963).*

(n86)Footnote 1753. *Quality Wash Group V, Ltd. v. Hallak, 58 Cal. Rptr. 2d 592 (Cal. App. 4th Dist. 1996); Gibbs v. G.K.H., Inc., 427 S.E.2d 701 (S.C. App. 1993).* Encroachment by walls of only 4.8 inches was de minimus and did not warrant removal of encroachment. *Cadodilupo v. Vozzella, 704 N.E.2d 534 (Mass. App. 1999).; Johnson v. Bridge, 213 P. 512 (Cal. App. 1st Dist. 1923); Papalia v. Hartson, 52 S.2d 775 (La. App. 1951); La Salle v. La Pointe, 102 A.2d 761 (N.J. 1954)* (if encroachment is substantial); *Isserman v. Welt, 139 A. 237 (N.J. Ch. 1927); Vassar Holding Co. v. Wuensch, 135 A. 88 (N.J. Ch. 1926); Korb v. Spray Beach Hotel Co., 88 A.2d 280 (N.J. Super. App. Div. 1952); De Felice v. Peace, 80 A.2d 321 (N.J. Super. App. Div. 1951)* (unless the encroachment is removed before closing time); *Chesebro v. Moers, 134 N.E. 842 (N.Y. 1922); Acme Realty Co. v. Schinasi, 109 N.E. 577 (N.Y. 1915); Jennings v. Baumann, 212 N.Y.S. 334 (N.Y. App. Div. 2d Dept. 1925); Klimas v. Brumbach, 190 N.Y.S. 307 (N.Y. Sup. 1921); Leo N. Levy Corp. v. Dick, 190 N.Y.S. 238 (N.Y. Sup. 1921); Perlman v. Stellwagen, 187 N.Y.S. 845 (N.Y. Sup. 1921). See* Jacobs v. Freyhan, *100 S. 726 (La. 1924). But see Gelman v. Herrmann, 193 N.Y.S. 174 (N.Y. Sup. 1922)* (bay windows 12 feet above street). A slight encroachment of a building on the street does not make title unmarketable where the prospects of municipal objections are slight. *Sinclair v. Weber, 104 A.2d 561 (Md. 1954).* Set back law on vacant land valid. *Frank v. Russell, 70 N.W.2d 306 (Neb. 1955); State ex rel. Schleck v. Zoning Bd. of App., 35 N.W.2d 312 (Wis. 1948).* Mere hardship is not sufficient; there must be unnecessary hardship. *Application of Devereux Found., 41 A.2d 744 (Pa. 1945).* If there is an invasion of an official map the title is unmarketable. *Bibber v. Weber, 102 N.Y.S.2d 945 (N.Y. Sup. 1951), aff'd, 105 N.Y.S.2d 758 (N.Y. App. Div. 2d Dept. 1951); Agliata v. D'Agostino, 124 N.Y.S.2d 212 (N.Y. Sup. 1953)* (building encroached on proposed street). *See* Ross D. Netherton, The Effect of Encroachments on the Marketability of Land Titles, *27 Chi.-Kent L. Rev. 107 (1949);* Milton R. Friedman, The Effect of Encroachments and Projections Upon Marketability of Title, *39 Cornell L. Q. 237 (1954).* Title defective and partial failure of consideration where part of property sold consisted of unvacated streets. *Halvorson v. Birkland, 171 N.W.2d 77 (S.D. 1969).*

(n87)Footnote 1754. *Hershorn v. Rubenstein, 156 N.E. 251 (Mass. 1927); Feder v. Solomon, 134 A. 917 (N.J. 1926); Richman v. Camorsil Realty Corp., 200 N.Y.S. 166 (N.Y. Sup. 1923). See Hefford v. Lichtman, 190 N.Y.S. 554 (N.Y. Sup. 1921); Taxman v. McMahan, 124 N.W.2d 68 (Wis. 1963).* An inconsequential encroachment of eaves did not render a title unmarketable. *Loeffler v. Roe, 69 S.2d 331 (Fla. 1954).* Party wall agreement running with the land is an encumbrance although standing equally on both lots. *Johnson Bros. Furn. Co. v. Rothfuss, 349 P.2d 903 (Kan. 1960); Bennett v. Sheinwald, 147 N.E. 28 (Mass. 1925).* True also where wall is wholly on vendor's land. *Higgings v. Eagleton, 34 N.Y.S. 225 (N.Y. Com. Pl. 1895).* Contra, *Weadock v. Champe, 160 N.W. 564 (Mich. 1916); Serventi v. Cella, 141 A. 747 (N.J. 1927); Hendricks v. Stark, 37 N.Y. 106 (N.Y. 1867).*

(n88)Footnote 1755. *Bethurem v. Hammett, 736 P.2d 1128 (Wyo. 1987); Shinn v. Thrust IV, Inc., 786 P.2d 285 (Wash. App. 1990); Allen v. Bowman, 10 S.2d 905 (Fla. 1943)* (title subject to building restriction covenants is unmarketable); *Lohmeyer v. Bower, 227 P.2d 102 (Kan. 1951)* (even where contract provided that the conveyance was made subject to all restrictions and easements of record, the title is unmarketable if a violation exists at the time); *C.H. Boehmer Sales Agency v. Russo, 99 S.2d 475 (La. App. 1958)* (vendor has duty to disclose that proposed use by vendee will violate zoning); *Heckrotte v. Riddle, 168 A.2d 879 (Md. 1961)* (vendee's acceptance of deed waived claim against seller for zoning violation); *Hyman v. Boyle, 214 N.W. 163 (Mich. 1927); Ogg v. Herman, 227 P. 476 (Mont. 1924); Dichter v. Isaacson, 138 A. 920 (N.J. 1927); Kutschinski v. Thompson, 138 A. 569 (N.J. Ch. 1927); Burke v. Dorfan, 137 A. 844 (N.J. Ch. 1927); Planter v. Zintz, 137 A. 317 (N.J. Sup. 1927); Junius Constr. Corp. v. Cohen, 178 N.E. 672 (N.Y. 1931)* (intentional omission by seller of known building restrictions permits buyer to rescind); *Isaacs v. Schmuck, 156 N.E. 621 (N.Y. 1927)* (covenant against sale of liquor held an encumbrance even during the 18th amendment); *Weinberg v. Sanders, 198 N.Y.S. 121 (N.Y. App. Div. 1st Dept. 1923); Lowe v. Stanton, 180 N.Y.S. 862 (N.Y. App. Div. 1st Dept. 1920); Weiss v. Sachs, 112 N.Y.S.2d 97 (N.Y. Sup. 1952); Lehman v. Reiner, 214 N.Y.S. 488 (N.Y. Sup. 1926); A. Kimball Co. v. Fox, 200 N.Y.S. 267 (N.Y. Sup. 1923); Vibroplex Co. v. Jacob May Realty Co., 198 N.Y.S. 327 (N.Y. Sup. 1922); In re Smith's Est., 65 N.Y.S.2d 457 (N.Y. Sur. 1946)* (a restriction limiting height of building constituted an encumbrance and a cloud on title); *La Course v. Kiesel, 77 A.2d 877 (Pa. 1951)* (obsolescent restrictions preventing an insurable title"); *Brunke v. Pharo, 89 N.W.2d 221 (Wis. 1958). See* Allison Dunham, Effect on Title of Violations of Building Covenants and Zoning Ordinances, *27 Rocky Mt. L. Rev. 255 (1955);* George P. Stephan, Public Land Use Regulations and Marketability of Title, *1958 Wis. L. Rev. 128.* Contra, *Somerset Sav. Bank v. Chicago Title Ins. Co.,*

649 N.E.2d 1123 (Mass. 1995). Recorded restrictions on use made title unmarketable. *Hillcrest Bldg. Co. v. Peacock, 171 S.E.2d 193 (N.C. App. 1969).*

(n89)Footnote 1756. *Westwood Homeowners Assn., Inc. v. Lane County, 847 P.2d 862 (Or. App. 1993);* Purpose of absolute title conveyed by tax deed is to clear the new title of all encumbrances placed on the property by the prior record owner. *Buk Lhu v. Dignoti, 727 N.E.2d 73 (Mass. 2000); Heaton v. Nelson, 194 P. 614 (Colo. 1921); Gates v. Parmly, 66 N.W. 253 (Wis. 1896)* (title dependent upon a tax deed is prima facie marketable). An abstract reflecting title by a tax deed entry without foreclosure proceedings being shown did not constitute "merchantable title." *Alexander v. Cleveland, 79 S.2d 852 (Fla. 1955).* Covenant in realty contract to furnish abstract of title showing marketable title not complied with where abstract showed grantor acquired title by tax deed without showing antecedent proceedings upon which tax deed was based. *Alexander v. Cleveland, 79 S.2d 852 (Fla. 1955),* Robert J. Stampfl, Student Author, Title--Tax Deeds--Marketability, *10 Miami L. Q. 599 (1956).* A tax sale is immune from attack after lapse of five years except upon proof of prior payment of taxes and under registry law purchaser from record owner thereof, without notice of defects in title thereto, cannot be affected by latent equities and secret rights in favor of former owners of land dehors public records. *Magnolia Petroleum Co. v. Marks, 74 S.2d 36 (La. 1954).* Tax titles as merchantable. *Hartley v. Williams, 287 S.W.2d 129 (Mo. App. 1956). See* Robert A. Barker, Student Author, Marketable Title in New York State: Tax Liens, *8 Syracuse L. Rev. 259 (1956);* Donald C. Carmien & Robert A. Barker, Student Authors, Marketable Title in New York State: Tax Deeds, *9 Syracuse L. Rev. 69 (1957).*

(n90)Footnote 1757. *Homestead Land Title Co. v. United States, 819 P.2d 660 (Kan. 1991); Summit Bank v. Thiel, 740 A.2d 139 (N.J. 1999); State ex rel. Dept. of Revenue v. Karras, 515 N.W.2d 248 (S.D. 1994); Dyker Meadow Land & Imp. Co. v. Cook, 53 N.E. 690 (N.Y. 1899)* (special assessments). Real estate subject to liens for taxes, such as estate, transfer or inheritance taxes, is not merchantable. A tax lien is a defect of marketable title. *Darby v. Keeran, 505 P.2d 710 (Kan. 1973).* Despite warranty, the vendee on a sales contract is liable for payment of a municipal lien placed upon the property after the execution of sales agreement. *Byrne v. Kanig, 332 A.2d 472 (Pa. Super. 1974).*

(n91)Footnote 1758. *Coates v. Shell W. E & P, Inc., 7 Cal. Rptr. 2d 187 (Cal. App. 5th Dist. 1992); Kilpatrick v. Smith, 19 N.W.2d 699 (Iowa 1945); Woelk v. Woelk, 254 P.2d 297 (Kan. 1953); Sweet v. Berry, 236 S.W. 531 (Tex. Civ. App. 1921).* In Louisiana a recorded lease is an encumbrance or burden on the land falling into the hands of the vendee. *Port Arthur Towing Co. v. Owens-Ill., Inc., 352 F. Supp. 392 (W.D. La. 1972).* A lease is an encumbrance. *Snyder v. Sperry & Hutchinson Co., 333 N.E.2d 421 (Mass. 1975).* A leasehold interest is an encumbrance. *Village of Spring Valley Urban Renewal Agency v. K.G.R. Realty Co., 371 N.Y.S.2d 579 (N.Y. Co. Ct. 1975).*

(n92)Footnote 1759. Wei1 v. Guenther, *86 P. L.J. 389* (Pa.); *Krygier v. Hoffman, 41 Luz. L. Reg. 354* (Pa.). A mineral reservation with a plenary release of all claims for injury which might be suffered by the landowner as a result of mining operations prevented the title from being merchantable. *Shel-Al Corp. v. Am. Nat'l Ins. Co., 492 F.2d 87 (5th Cir. 1974).* Reservation of outstanding mineral estate is not compatible with contract of sale of land where the vendor required to give good and merchantable title. *Brent v. Corbin, 173 S.2d 430 (Miss. 1965).* Reservation of mineral rights makes the title unmarketable. *O'Hara Group Denver, Ltd. v. Marcor Hous. Sys., Inc., 595 P.2d 679 (Colo. 1979).*

(n93)Footnote 1760. *Warner v. Doscher, 210 N.Y.S. 83 (N.Y. App. Div. 1st Dept. 1925); Jackson Terrace Homes v. Rottkamp, 40 N.Y.S.2d 340 (N.Y. Sup. 1942), aff'd, 39 N.Y.S.2d 605 (N.Y. App. Div. 2d Dept. 1942). See Nasset v. Houska, 186 N.W. 255 (N.D. 1921).*

(n94)Footnote 1761. *Union County Util. Auth. v. Josewitch, 734 A.2d 1378 (N.J. Super. 1993); Minsky v. Zieve, 152 N.E. 41 (Mass. 1926).*

(n95)Footnote 1762. *Hoarel Sign Co. v. Dominion Equity Corp., 910 S.W.2d 140 (Tex. App. 1995);* Corey v. *Clarke, 56* N.W. 1063 (Minn. 1893).

(n96)Footnote 1763. *McCoy v. Patten Ga. Corp., 401 S.E.2d 9 (Ga. 1991);* Succession of Fay, *109 S. 824 (La.*

1926). See Richman v. Stand. Oil Co., 123 A. 608 (N.J. 1924).

The fact that there are missing heirs or devisees renders the title unmarketable. *Bierhorst v. Kelly, 74 S.2d 168 (La. 1954).*

(n97)Footnote 1764. *Summers v. Correll, 853 S.W.2d 397 (Mo. App. 1993); Kincaid v. Dobrinsky, 225 Ill. App. 85 (Ill. App. 2d Dist. 1922); Ammerman v. Karnowski, 234 P. 774 (Okla. 1924); Frank v. E.R. Thomas Co., 233 P. 626 (Wash. 1925).* No administration necessary where abundant evidence that decedent had no creditors. *Schmidt v. Fontron Loan & Trust Co., 211 P. 630 (Kan. 1923).* An action for specific performance on the part of the vendor could not be prevented by a showing of liens against the property where the vendor had the ability to remove the liens at the time of closing. *Robeson-Marion Dev. Co., Inc. v. Powers Co., 183 S.E.2d 454 (S.C. 1971). See* Scott, Dispensing with Administration of Small Estates: A Marketable Title Problem, 42 J.B.A. Kan. 337 (1972).

(n98)Footnote 1765. *Blissett v. Riley, 667 S.2d 1335 (Ala. 1995); Oliver v. Schultz, 885 S.2d 699 (Ky. 1994); Waikiki Malia Hotel, Inc. v. Kinkai Props. Ltd. Partn., 862 P.2d 1048 (Haw. 1993); Nelson v. Anderson, 676 N.E.2d 735 (Ill. App. 5th Dist. 1997); Marathon Fin. Co. v. HHC Liquidation Corp., 483 S.E.2d 757 (S.C. App. 1997)* Association assessments, which were created by virtue of restrictive covenants affecting all lots in development, were not an "encumbrance." *Lakes of N. Assn. v. TWIGA Ltd. Partn., 614 N.W.2d 682 (Mich. App. 2000); George v. Colvin, 219 P.2d 64 (Cal. App. 1st Dist. 1950)* (California has extended this to cases where the vendee knew of the existence of the restriction); Hall v. Snavely, *112 S. 551 (Fla. 1927)* (character of buildings); Wheeler v. Sullivan, *106 S. 876 (Fla. 1925); Lehman v. Reiner, 214 N.Y.S. 488 (N.Y. Sup. 1926).* A restriction preventing land from being used as a church or school did not make title unmarketable. *Swinks v. O'Hara, 106 S.E.2d 186 (Ga. App. 1958).* Private restriction on use of land renders it unmarketable. *Javna v. D.J. Fredericks, Inc., 125 A.2d 227 (N.J. Super. App. Div. 1956); Lasker v. Patrovsky, 60 N.W.2d 336 (Wis. 1953).* Title containing covenant against sale of liquor was not marketable. *Hoskins v. Walker, 255 S.W.2d 480 (Ky. 1953).* Where a restrictive covenant has become unenforceable because of change in vicinage it does not affect merchantable title. *Anness v. Freeman, 294 S.W.2d 77 (Ky. 1956).* But if the restrictions are also embodied in a restrictive covenant in the vendor's deed the title is not marketable. *Stauss v. Kober, 51 S.2d 121 (La. App. 1951).* Zoning ordinance is not an encumbrance unless the prohibited use is contemplated in the sales contract. *Josefowicz v. Porter, 108 A.2d 865 (N.J. Super. App. Div. 1954).* Zoning restrictions do not affect marketability of title. *Lincoln Trust Co. v. Williams Bldg. Corp., 128 N.E. 209 (N.Y. 1920);* unless enacted subsequent to the contract. *Clay v. Landreth, 45 S.E.2d 875 (Va. 1948).* A restriction limiting height of building constituted an encumbrance and a cloud on title. *In re Smith's Est., 65 N.Y.S.2d 457 (N.Y. Sur. 1946).* Set back restrictions are not encumbrances. *Mailey v. Rubin, 130 A.2d 182 (Pa. 1957).* Where the seller of a business free and clear of encumbrances refused purchaser's demand that he comply with bulk sales law, it was a failure to perform and purchaser is entitled to return of escrow deposit. *Ashton v. Leysen, 237 S.W.2d 713 (Tex. Civ. App. 1951). See* Jack Price, Student Author, Marketability of Titles Affected by Building Restrictions, *7 Baylor L. Rev. 298 (1955);* Allison Dunham, Effect on Title of Violations of Building Covenants and Zoning Ordinances, *27 Rocky Mt. L. Rev. 255 (1955);* George D. Brown, Marketability of Land Titles as Affected by Restrictive Covenants, *13 Baylor L. Rev. 323 (1961).*

(n99)Footnote 1766. *Gepford v. Burge, 5 F.2d 829 (D. Colo. 1925); Bozdech v. Mont. Ranches Co., 216 P. 319 (Mont. 1923); Novogroder v. DiPaola, 11 Ohio App. 374 (Ohio App. 8th Dist. 1919),* rev'd on other grounds, *G/GM Real Est. Corp. v. Susse Chalet Motor Lodge, 575 N.E.2d 141 (Ohio 1991).*

(n100)Footnote 1767. *Goodman v. Marx, 195 N.Y.S. 368 (N.Y. App. Div. 2d Dept. 1922).*

(n101)Footnote 1768. *Fruhauf v. Bendheim, 6 N.Y.S. 264 (N.Y. Sup. 1889).*

(n102)Footnote 1769. *Ewing v. Plummer, 140 N.E. 42 (Ill. 1923).*

(n103)Footnote 1770. *Whitman v. Larson, 568 N.Y.S.2d 485 (N.Y. App. Div. 3d Dept. 1991); Bucciarelli v. DeLisa, 691 A.2d 446 (Pa. 1997); Tan Corp. v. Johnson, 555 N.W.2d 613 (S.D. 1996); Create 21 Chuo, Inc. v. Southwest*

Slopes, Inc., 918 P.2d 1168 (Haw. App. 1996); Suter v. Mason, 227 S.W. 782 (Ark. 1921); St. Mut. Ins. Co. v. McJenkin Ins. & Realty Co., 71 S.E.2d 670 (Ga. App. 1952); Maerlender v. Barasch, 112 N.Y.S.2d 259 (N.Y. App. Div. 2d Dept. 1952), modified, *112 N.Y.S.2d 259 (N.Y. App. Div. 2d Dept. 1952); Wood v. Evanitzsky, 79 A.2d 213 (Pa. Super. 1951),* rev'd on other grounds, *85 A.2d 24 (Pa. 1951); Flemetis v. McArthur, 226 P.2d 124 (Utah 1951).* Contra, *Leiter v. Handelsman, 270 P.2d 563 (Cal. App. 2d Dist. 1954); Gould v. Wilson, 115 N.Y.S.2d 177 (N.Y. Sup. 1952).* Sewer easement held an encumbrance. *Robbins v. Hannen, 378 P.2d 1 (Kan. 1963).* A concrete sewer three feet below the surface of the land was not an encumbrance even thought it interfered with the construction of a house on the property. Natural watercourse is not an encumbrance within the meaning of a warranty deed containing a covenant against encumbrances. *Fuller v. Drenberg, 209 N.E.2d 417 (Ohio 1965).*

(n104)Footnote 1771. An encumbrance. *Hubbard v. Norton, 10 Conn. 422 (Conn. 1835); Burk v. Hill, 48 Ind. 52 (Ind. 1874)* (if urban); *Haynes v. Young, 36 Me. 557 (Me. 1853); Kellog v. Ingersoll, 2 Mass. 97 (Mass. 1806); Sandum v. Johnson, 148 N.W. 878 (Minn. 1913)* (if urban); *Smith v. Mellen, 133 N.W. 566 (Minn. 1911)* (if urban); *Walquist v. Johnson, 173 P. 735 (Wash. 1918)* (if urban). No encumbrance. *Desvergers v. Willis, 56 Ga. 515 (Ga. 1876); Burk v. Hill, 48 Ind. 52 (Ind. 1874)* (if rural); *Sandum v. Johnson, 148 N.W. 878 (Minn. 1913)* (if rural); *Hymes v. Esty, 31 N.E. 105 (N.Y. 1892)* (knowledge of existence of highway); *Whitbeck v. Cook, 15 Johns. 483 (N.Y. Sup. 1818); Howell v. Northampton RR. Co., 60 A. 793 (Pa. 1905)* (knowledge of existence of highway); *Memmert v. McKeen, 4 A. 542 (Pa. 1886); Patterson v. Arthurs, 9 Watts 152 (Pa. 1839).* Public sewers are not encumbrances. *First Unitarian Soc. v. Citizens Sav. & Trust Co., 142 N.W. 87 (Iowa 1913); Boehringer v. Montaito, 254 N.Y.S. 276 (N.Y. Sup. 1931).*

(n105)Footnote 1772. *Joslyn v. Irwin Dick Co., 209 N.W. 889 (Minn. 1926); Ready v. Sound Inv. Co., 116 P. 1093 (Wash. 1911).* Contra, *Mandel v. Hess, 107 N.Y.S. 766 (N.Y. Sup. 1907).* Existence of water and sanitation district charges did not render a title unmarketable. *Edwards v. St. Paul Title Ins. Co., 563 P.2d 979 (Colo. App. 1977).*

(n106)Footnote 1773. *Perryman v. City Home Builders, 248 P. 605 (Okla. 1926).*

(n107)Footnote 1774. *Forster v. Scott, 32 N.E. 976 (N.Y. 1893).*

(n108)Footnote 1775. *See McClosky v. Johnston, 54 S.2d 517 (Fla. 1951)* (tax lien vendee not authorized to discharge lien in process of negotiation).

(n109)Footnote 1776. *Maeser v. Cook, Voegele & Nelson, P.A., 446 N.W.2d 697 (Minn. App. 1989); Tesdell v. Hanes, 82 N.W.2d 119 (Iowa 1957).* Marketable title statutes. Ind. Code Ann. §§ 56-1101-56-1110; Iowa Code § 614.17 (1962); Mich. Stat. Ann. § 26.1271-26.1279; Minn. Stat. § 541.023 (1961); Neb. Rev. Stat. § 76-288 (1943); N.Y. [Real Property Law] §§ 345-349, as amended Laws ch. 863-866 (1958); S.D. Codified Laws §§ 51.16B01-51.1B14 (1960 Supp.); Wis. Stat. § 330.15 (1961). Similar.

(n110)Footnote 1777. *De Felice v. Peace, 80 A.2d 321 (N.J. Super. App. Div. 1951).* One and one-half foot encroachment on the front of garage upon a public street was an incurable defect. *Sydelman v. Marici, 392 N.Y.S.2d 333 (N.Y. App. Div. 1977).*

(n111)Footnote 1778. *Choate v. Martin, 226 S.W.2d 52 (Ark. 1950).*

(n112)Footnote 1779. *Vought v. Williams, 24 N.E. 195 (N.Y. 1890); Godfrey v. Rosenthal, 97 N.W. 365 (S.D. 1903).*

(n113)Footnote 1780. *McClain v. Ricks Exploration Co., 894 P.2d 422 (Okla. App. 1994); Williams v. Bricker, 109 P. 998 (Kan. 1910).*

(n114)Footnote 1781. *Lohmeyer v. Bower, 227 P.2d 102 (Kan. 1951); Moyer v. De Vincentis Constr. Co., 164 A. 111 (Pa. Super. 1933); Miller v. Milwaukee Odd Fellows Temple, 240 N.W. 193 (Wis. 1932).*

(n115)Footnote 1782. *James v. McCombs, 936 P.2d 520 (Alaska 1997); Pfluger v. Clack, 897 S.W.2d 956 (Tex. App. 1995); Gregory v. Keenan, 256 F. 949 (D. Or. 1919); Burns v. Witter, 108 P. 129 (Or. 1910); Shapland v. Smith, 28 Eng. Rep. 994 (1778); Marlow v. Smith, 24 Eng. Rep. 698 (1723).*

(n116)Footnote 1783. *Wise v. Sebena, 808 P.2d 494 (Mont. 1991); Thompson v. Hawley, 12 P. 276 (Or. 1886).*

(n117)Footnote 1784. *Fellows v. Evans, 53 P. 491 (Or. 1898).*

(n118)Footnote 1785. *Breuer-Harrison, Inc. v. Combe, 799 P.2d 716 (Utah App. 1990); N.Y. Investors, Inc. v. Manhattan Beach Bathing Parks Corp., 243 N.Y.S. 548 (N.Y. App. Div. 2d Dept. 1930).*

(n119)Footnote 1786. *Aouate v. Hotel Europe, Inc., 792 S.2d 596 (Fla. App. 3d Dist. 2001); Winslow v. Gilstrap, 32 P.2d 767 (Or. 1934). See* Jan Edward Rehler, Improving Marketability of Real Property in Texas: Affidavits, Recitals, and the Evidentiary Effect of Recording, *49 Tex. L. Rev. 747 (1971).*

(n120)Footnote 1787. *Wollenberg v. Rose, 78 P. 751 (Or. 1904).*

(n121)Footnote 1788. *Feit v. Donahue, 826 P.2d 407 (Colo. App. 1992); Lincoln Trust Co. v. Williams Bldg. Corp., 128 N.E. 209 (N.Y. 1920); Hall v. Risley, 213 P.2d 818 (Or. 1950); Lasker v. Patrovsky, 60 N.W.2d 336 (Wis. 1953).* One contracting to purchase land subject to a zoning ordinance permitting an intended use is entitled to rely upon the ordinance as against a subsequent amendment to the ordinance prohibiting the use. *Vazza v. Board of Appeals, 269 N.E.2d 270 (Mass. 1971).*

(n122)Footnote 1789. Not marketable. *Turner v. McDonald, 18 P. 262 (Cal. 1888); Chauncey v. Town of Leominster, 52 N.E. 719 (Mass. 1899); Dutton v. Buckley, 242 P. 626 (Or. 1926).* Burden on vendee to show outstanding claims. *Schmidt v. Fontron Loan & Trust Co., 211 P. 630 (Kan. 1923); Moore v. Taylor, 32 A. 320 (Md. 1895); Hayes v. Harmony Grove Cemetery, 108 Mass. 400 (Mass. 1871); Moser v. Cochrane, 13 N.E. 442 (N.Y. 1887).* Title based on presumption of death of record holder is not marketable. *Potter v. Ogden, 59 A. 673 (N.J. Ch. 1905); Saracino v. Kosower Constr. Co., 140 A. 458 (N.J. 1928); Vought v. Williams, 24 N.E. 195 (N.Y. 1890).* Refusing a title based on presumption of death though at law the title could be held good since vendee exposed to litigation. *Saracino v. Kosower Constr. Co., 140 A. 458 (N.J. 1928); Vought v. Williams, 24 N.E. 195 (N.Y. 1890)* (accord 24-year absence). Contra, *Ferry v. Sampson, 20 N.E. 387 (N.Y. 1889)* (40-year absence).

(n123)Footnote 1790. *Schmidt v. Fontron Loan & Trust Co., 211 P. 630 (Kan. 1923)* (title marketable where there had been no administration of the estate of the deceased owner, based on affidavits of no debts); *Fahy v. Cavanagh, 44 A. 154 (N.J. Ch. 1899)* (vendee not required to take title from vendor's heirs); *Kilpatrick v. Barron, 26 N.E. 925 (N.Y. 1891)* (unmarketable where rights of unborn persons involved). A statute authorized a sale of a testator's land, but excepted from the conveyance the reversionary interest of his heirs, if any there were found to be. Because of the possible existence of such heirs, the purchasers were unwilling to complete the purchase. The court recognized the possibility, though about 60 years had gone by, but overruled the purchasers' objection. The existence of heirs is so improbable that it is not to be considered as prejudicing the title. *In re Trustees of N.Y. Protestant Episcopal Pub. Sch., 31 N.Y. 574 (1864),* approved in *Norwegian Evangelical Free Church v. Milhauser, 169 N.E. 134 (N.Y. 1864).*

(n124)Footnote 1791. Sometimes the question is partially settled by statutes limiting time in which administration can be opened after death of the deceased titleholder, see Ind. Code Ann. § 7-115. Such statutes cannot, however, protect against claims of the federal government. Affidavits permitted to show no debts and so administration unnecessary. *Van Gundy v. Shewey, 133 P. 720 (Kan. 1913); Brown v. Baxter, 94 P. 155 (Kan. 1908); Moser v. Cochrane, 13 N.E. 442 (N.Y. 1887).* Contra, *Crosby v. Wynkoop, 56 Wash. 475, 106 P. 175 (Wash. 1910).*

(n125)Footnote 1792. *Barickman v. Kuykendall, 6 Blackf. 21 (Ind. 1841)* (infant); *Holliday v. Arthur, 44 N.W.2d 717 (Iowa 1950)* (where in a guardianship sale, service was made on the guardian and not on the ward as the statute required, the title was not merchantable); *Delnay v. Woodruff, 221 N.W. 614 (Mich. 1928)* (a title may be marketable

though subjected to captious doubt or remote and improbable possibility of litigation); *Horton v. Matheny, 51 N.E.2d 41 (Ohio App. 1943)* (infant); *Moore v. Elliott, 136 P. 849 (Wash. 1913)* (unborn child).

(n126)Footnote 1793. *McCracken v. Walnut Park Garage, 68 P.2d 123 (Or. 1937).*

(n127)Footnote 1794. *Kilpatrick v. Barron, 26 N.E. 925 (N.Y. 1891)* (title depending upon a will was unmarketable where there were persons unborn who could contest the will). In some states the will must be probated within a statutory time after death to be valid as against a bona fide purchaser from the heirs for value without notice. Ind. Code Ann. § 7-115; N.Y. [Decedent Est. Law] § 46. At common law the will itself transferred title to realty in the same manner as in a deed. *Ash v. Calvert, 170 Eng. Rep. 1193 (1810).* In a few states a will does not transfer title until admitted to probate. Ind. Code Ann. § 7-124.

(n128)Footnote 1795. "It is a great, though perhaps common, mistake to suppose that a doubtful title can be made marketable by an opinion of a court on a case stated between vendor and vendee. We have not the heirs of the Rev. Robert Graham before us as parties in this action, and their rights cannot be concluded by any judgment we can give." *Pratt v. Eby, 67 Pa. 396 (Pa. 1871). See* Specific Performance--Marketable Title--Refusal of Equity to Construe a Doubtful Statute in Order to Determine the Marketability of a Title, *13 Minn. L. Rev. 158 (1928).* Some states permit a statutory determination of heirship. Ind. Code Ann. § 6-606.

(n129)Footnote 1796. *Flemetis v. McArthur, 226 P.2d 124 (Utah 1951).*

(n130)Footnote 1797. *Morgan v. Wible, 236 S.W.2d 472 (Ky. 1951); Offner v. Engelen, 102 N.Y.S.2d 97 (N.Y. Sup. 1951).*

(n131)Footnote 1798. *Foley v. Horton, 780 P.2d 638 (N.M. 1989); Kennemore v. Bennett, 755 S.W.2d 89 (Tex. 1988); Bank of Columbia v. Hagner, 26 U.S. 455 (1828).*

(n132)Footnote 1799. *Collins v. Hall, 161 S.W.2d 311 (Tex. Civ. App. 1942); Roach v. Rutherford, 4 S.C. Eq. 126 (S.C. App. 1810).*

(n133)Footnote 1800. *Five M. Palmer Trust v. Clover Contractors, Inc., 513 S.2d 364 (La. App. 4th Cir. 1987); Kutschinski v. Thompson, 138 A. 569 (N.J. Ch. 1927); Jones v. Taylor, 7 Tex. 240 (Tex. 1851).*

(n134)Footnote 1801. *Williams v. Dudley Trust Found., 675 A.2d 45 (D.C. 1996); Worley v. Nethercott, 27 P. 767 (Cal. 1891); Dunn v. Mills, 79 P. 146 (Kan. 1905).*

(n135)Footnote 1802. *Bank of Columbia v. Hagner, 26 U.S. 455 (1828); Newmyer v. Roush, 120 P. 464 (Idaho 1912); Gans v. Renshaw, 2 Pa. 34 (Pa. 1845); Jones v. Taylor, 7 Tex. 240 (Tex. 1851).*

(n136)Footnote 1803. *Kennedy v. Kennedy, 5 Ky. 464 (Ky. App. 1811).*

(n137)Footnote 1804. *Werth v. Willer, 250 N.W. 543 (N.D. 1933).* When a fatal title defect is discovered which cannot be remedied, there is an anticipatory breach. *Mid-St. Homes, Inc. v. Brown, 256 S.2d 894 (Ala. App. 1971).* If vendor cannot furnish marketable title, purchasers could rescind and recover any earnest money deposited. *Ballew v. Charter Realty ERA, 603 S.2d 877 (Ala. 1992).*

(n138)Footnote 1805. *Bailey v. Musumeci, 591 A.2d 1316 (N.H. 1991).* Vendee is entitled to specific performance for the quantity that the vendor can convey. *Green v. Gustafson, 482 N.W.2d 842 (N.D. 1992); Combs v. Loebner, 846 P.2d 401 (Or. 1993); Chesapeake Builders, Inc. v. Lee, 492 S.E.2d 141 (Va. 1997); Cowdery v. Greenlee, 55 S.E. 918 (Ga. 1906);* Hampton v. Speckenagle, 9 Serg. & Rawle 212 (Pa. 1823). A purchaser who enters into a contract to buy with actual knowledge of restrictive easements or encumbrances waives objections to such restrictions. *Rock Island YMCA v. Bester, 363 N.E.2d 413 (Ill. App. 1977).*

(n139)Footnote 1806. *Goodman v. Fisher, 131 N.Y.S.2d 184 (N.Y. Sup. 1954).* Issues as to quantum of estate conveyed are construed against the vendor. *Extraction Resources, Inc. v. Freeman, 555 S.W.2d 156 (Tex. Civ. App. 1977).*

(n140)Footnote 1807. *Van Blarcom v. Hopkins, 52 A. 147 (N.J. Ch. 1902); Garibaldi Realty & Constr. Co. v. Santangelo, 149 N.Y.S. 669 (N.Y. App. Div. 1st Dept. 1914),* aff'd. *117 N.E. 1067 (N.Y. 1917)* ("more or less" absorbed a less than 1% deficiency). But for a contra position, see *Von Bargen v. Ginsberg, 218 N.Y.S. 601 (N.Y. App. Div. 2d Dept. 1926).*

(n141)Footnote 1808. *Blumenstein v. Wegman, 14 N.Y.S.2d 525 (N.Y. Sup. 1939).* The vendee must show that he would not have made the purchase had he known of the deficiency. *Tryon v. Lyon, 118 N.Y.S. 5 (N.Y. App. Div. 4th Dept. 1909); Rech v. Borst, 63 N.Y.S.2d 552 (N.Y. Sup. 1946).* But in *Renol Holding Corp. v. Lankenau, 116 N.Y.S.2d 861 (N.Y. Sup. 1952),* the vendee recovered where he did not know when he signed the option but did when he exercised it.

(n142)Footnote 1809. *Nasha Holding Corp. v. Ridge Bldg. Corp., 223 N.Y.S. 223 (N.Y. App. Div. 2d Dept. 1927).* "Subject to any state of facts which an accurate survey will show" was a waiver. *Olive v. Suffes, 123 N.Y.S.2d 842 (N.Y. Sup. 1953).*

(n143)Footnote 1810. *Tamco Supply v. Pollard, 37 S.W.3d 905 (Tenn. App. 2000); Branch v. Walker, 247 P.2d 172 (N.M. 1952).* Sale by fixed boundaries is a "sale per aversionem" and not by acreage. *Cornish v. Kinder Canal Co., 267 S.2d 625 (La. App. 1972).* Mutual mistake as to acreage does not void a contract to sell in gross. *Williams v. Daniel, 545 S.W.2d 120 (Tenn. App. 1976).*

(n144)Footnote 1811. *Green v. Gustafson, 482 N.W.2d 842 (N.D. 1992); Combs v. Loebner, 846 P.2d 401 (Or. 1993); Chesapeake Builders, Inc. v. Lee, 492 S.E.2d 141 (Va. 1997); Cates v. Owens, 73 S.E.2d 345 (Ga. App. 1952); Schleicher County v. Hudgens, 255 S.W.2d 927 (Tex. Civ. App. 1953).* Shortage in acreage justifies awarding damages based on the difference between the market value as it was at the time of the sale and not reformation of the contract. *Alexander Myers & Co. v. Hopke, 541 P.2d 713 (Wash. App. 1976)*

(n145)Footnote 1812. *Lasiter v. Gaharan, 670 S.2d 395 (La. App. 3d Cir. 1996); Kilburn v. Pierson, 169 S.W.2d 326 (Ky. App. 1943).* Vendees entitled to be recompenses for costs in defending title against third parties. *Ready Sand & Gravel Co. v. Cornett, 171 N.W.2d 775 (Neb. 1969).*

(n146)Footnote 1813. *Miller v. Ctaig, 83 Ky. 623 (Ky. App. 1886); Gilmore v. Morgan, 25 Ky. 65 (Ky. App. 1829); Shipp v. Swann, 5 Ky. 82 (Ky. App. 1810).* Where the sale has been by the acre the vendor may recover the value of the excess acreage. *Lyons v. Keith, 316 S.W.2d 785 (Tex. Civ. App. 1958);* William R. Pakis, Student Author, Actions for Excesses or Deficiencies in Acreage of Land Sales, 11 Baylor L, Rev. 420 (1959).

(n147)Footnote 1814. *C. Lambert & Assoc., Inc. v. Horizon Corp., 748 P.2d 504 (N.M. 1988); Tamco Supply v. Pollard, 37 S.W.3d 905 (Tenn. App. 2000); Winston v. Browning, 61 Ala. 80 (Ala. 1878); Folsom v. Howell, 21 S.E. 136 (Ga. 1894); Humphries v. Haydon, 179 S.W.2d 895 (Ky. 1944); Kilburn v. Pierson, 169 S.W.2d 826 (Ky. App. 1943); McCormick v. Jones, 22 S.W. 881 (Ky. App. 1893); Weart v. Rose, 16 N. J. Eq. 290 (N.J. Ch. 1863); Marvin v. Bennett, 8 Paige Ch. 312 (N.Y. Ch. 1840); Hull v. Cunningham's Exec., 1 Munf. 330 (Va. 1810).* The measure of damages is the difference between the estimated and actual quantity. *Hays v. Hays, 25 N.E. 600 (Ind. 1890).* In Florida, where the vendor cannot give good title to all of the land that he has contracted to convey, he is entitled to specific performance for as much of the contract as he can meet and subject to an abatement of that which he cannot deliver. *Black v. Clifton, 284 S.2d 465 (Fla. App. 1973).* If there is a slight deficiency in quantity of land conveyed, the purchaser may receive a reduction price, but cannot cancel the contract. *May v. Nyman. 278 N.E.2d 97 (Ill App. 1972).* But refusing on the ground that it would be making a new contract to grant partial specific performance with abatement as to purchase price where a title defect was found. *In re Hayhurst's Est., 478 P.2d 343 (Okla. 1970).* Rescinding contract where there was

unilateral mistake as to what was included. *Beatty v. DePue, 103 N.W.2d 187 (S.D. 1960).* Where there was a mistake as to the amount of land to be sold, the measure of damage is the entire cost of replacement of the acreage deficiency. *Gonzales v. Garcia, 552 P.2d 468 (N.M. 1976).*

(n148)Footnote 1815. *Lundeen v. Lappi, 361 N.W.2d 913 (Minn. App. 1985); Williams v. Marshall, 235 P.2d 372 (Cal. 1951); Trout v. Goodman, 7 Ga. 383 (Ga. 1849).* Holding that where there has been a substantial shortage in acreage, the reduction of the purchase price is improper remedy where it reduces the consideration to less than the actual value of the land. The proper remedy is rescission of the contract. *Dlug v. Wooldridge, 538 P.2d 883 (Colo. 1975).*

(n149)Footnote 1816. *Harlan v. Buckley, 103 S.W.2d 946 (Ky. App. 1936).*

(n150)Footnote 1817. *Blumenstein v. Wegman, 14 N.Y.S.2d 525 (N.Y. Sup. 1939).*

(n151)Footnote 1818. *Marcus v. Bathon, 531 A.2d 690 (Md. App. 1987); Tamco Supply v. Pollard, 37 S.W.3d 905 (Tenn. App. 2000); McGinley v. Martin, 275 F. 267 (8th Cir. 1921);* Hill v. Johnson, *106 S. 814 (Ala. 1925); Glover v. Bullard, 278 S.W. 645 (Ark. 1926); Bell v. St. Nat'l Bank, 239 S.W. 19 (Ark. 1922); Coleman v. Edgar, 257 P. 452 (Cal. App. 3d Dist. 1927); Appleby v. Tomlinson, 122 S.E. 93 (Ga. App. 1924); Martin v. Ott, 219 P. 275 (Kan. 1923); Sanders v. Lindsey, 263 S.W. 718 (Ky. App. 1924); Head v. Hunter, 256 S.W. 12 (Ky. App. 1923); Wilson v. Morris, 233 S.W. 1049 (Ky. App. 1921);* Romero v. Rader, *106 S. 667 (La. 1925); Smith v. Bounds Package Corp., 110 A.2d 71 (Md. 1954)* (no allowance for shortage where sale by contract); *Brodsky v. Hull, 77 A.2d 156 (Md. 1950);* Fleming v. Miller, *87 S. 277 (Miss. 1921); Clippard v. Kneibert, 226 S.W. 584 (Mo. App. 1920); Ford v. Delph, 220 S.W. 719 (Mo. App. 1920); Nasha Holding Corp. v. Ridge Bldg. Corp., 223 N.Y.S. 223 (N.Y. App. Div. 2d Dept. 1927); Hunt v. Wall, 206 N.Y.S. 869 (N.Y. App. Div. 2d Dept. 1924); Wallace v. Mobley, 112 S.E. 264 (S.C. 1922); Jamison v. Thackston, 110 S.E. 389 (S.C. 1922); Young v. Weakley, 232 S.W. 949 (Tenn. 1921); Quick v. Orren, 245 S.W. 454 (Tex. Civ. App. 1922); Findlay v. State, 238 S.W. 956 (Tex. Civ. App. 1921),* aff'd. *250 S.W. 651 (Tex. 1923); Southern v. Sine, 123 S.E. 436 (W. Va. 1924).* "All that parcel of land being about 69 acres" was a sale in bulk. *Hancock v. Nashville Inv. Co., Inc., 195 S.E.2d 674 (Ga. App. 1973).* Deficiency in quantity of land conveyed is without remedy where sale is for sum in gross. Sale of platted lot is in gross and not by front foot unless so specified. *May v. Nyman, 278 N.E.2d 97 (Ill. App. 1972).* Where a sale of property is in gross and not by the acre, a mutual mistake in the number of acres does not justify a rescission of the contract. *Williams v. Daniel, 545 S.W.2d 120 (Tenn. App. 1976).* No diminution in price due to shortage if it is a sale in gross. *Seyden v. Frade, 494 P.2d 1281 (Nev. 1972).*

(n152)Footnote 1819. *Snow's Auto Supply, Inc. v. Dormaier, 696 P.2d 924 (Idaho App. 1985); Tamco Supply v. Pollard, 37 S.W.3d 905 (Tenn. App. 2000); Smith v. Hall, 140 S.E. 431 (Ga. App. 1927); In re Robinson's Est., 178 N.W. 840 (Neb. 1920); Hart v. Harding, 184 N.W. 46 (Neb. 1921); Smith v. Grizzard, 259 S.W. 537 (Tenn. 1924); Ross v. Brewer, 251 S.W. 307 (Tex. Civ. App. 1923).* No damage for deficiency where a sale in gross. *Moonves v. Hill, 360 A.2d 59 (Vt. 1976).*

(n153)Footnote 1820. *Hays v. Hays, 81 S.W.2d 926 (Ark. 1935). See Enequist v. Bemis, 55 A.2d 617 (Vt. 1947)* (where 275 acres alleged as against 200 actual in a sale in gross, it was for the jury to say whether the discrepancy was too great). Deficiency in acreage of 8.6 % did not justify rescission or abatement of purchase price. *Birch-Brook, Inc. v. Ragland, 485 S.W.2d 225 (Ark. 1972).* Where price was based on acreage, the buyer could have specific performance although there were only 83 acres instead of 200 specified in the contract. *Pickman v. Hays, 317 N.E.2d 829 (Mass. App. 1974).*

(n154)Footnote 1821. *Wiedeman v. Brown, 210 S.W.2d 764 (Ky. 1948); Sheets v. McDonald, 281 S.W. 536 (Ky. App. 1926); Vanover v. Meadors, 280 S.W. 1095 (Ky. App. 1926); Barton v. Jones, 267 S.W. 214 (Ky. App. 1924); Keown v. Brandon, 266 S.W. 889 (Ky. App. 1924); Cecil v. Knox, 242 S.W. 26 (Ky. App. 1922); Chrisman v. Ford, 237 S.W. 22 (Ky. App. 1922); Byrn v. Andrew, 224 S.W. 768 (Ky. App. 1920).*

(n155)Footnote 1822. *Von Bargen. v. Ginsberg, 218 N.Y.S. 601 (N.Y. App. Div. 2d Dept. 1926); Clark v. Merinsky, 202 N.Y.S. 273 (N.Y. Sup. 1923). See Harder v. Allred, 214 P. 1017 (Cal. App. 1st Dist. 1923).*

(n156)Footnote 1823. *Harris v. Milloway, 660 S.W.2d 174 (Ark. App. 1983); Tamco Supply v. Pollard, 37 S.W.3d 905 (Tenn. App. 2000); Glover v. Bullard, 278 S.W. 645 (Ark. 1926); Roberts v. Groover, 119 S.E. 696 (Ga. 1923); Golly v. Grinnell College Found., 213 N.W. 252 (Iowa 1927); Mahrt v. Mann, 210 N.W. 566 (Iowa 1926); Cecil v. Knox, 242 S.W. 26 (Ky. App. 1922);* Carbajal v. Tessier, *113 S. 138 (La. 1927);* Pike v. Kentwood Bank, *83 S. 904 (La. 1919); Clippard v. Kneibert, 226 S.W. 584 (Mo. App. 1920); Hart v. Harding, 184 N.W. 46 (Neb. 1921); Lantz v. Howell, 107 S.E. 437 (N.C. 1921); Duffy v. Phipps, 104 S.E. 655 (N.C. 1920); Findlay v. State, 238 S.W. 956 (Tex. Civ. App. 1921),* aff'd. *250 S.W. 651 (Tex. 1923); Griffith v. Sawyer, 221 S.W. 687 (Tex. Civ. App. 1920).*

(n157)Footnote 1824. *Preleski v. Farganiasz, 116 A. 593 (Conn. 1922); Ray v. Barrington, 297 S.W. 781 (Tex. Civ. App. 1927).*

(n158)Footnote 1825. Hill v. Johnson, *106 S. 814 (Ala. 1925); Mangham v. Cobb, 127 S.E. 408 (Ga. 1925); Black v. Chapman, 126 S.E. 877 (Ga. App. 1925); Kirkland v. Brewton, 122 S.E. 814 (Ga. App. 1924); Wigginton v. Holbrook, 237 S.W. 1063 (Ky. App. 1922);* Campbell v. Cook, *91 S. 731 (La. 1922); Musselman v. Moxley, 136 A. 48 (Md. 1927); Ratshesky v. Piscopo, 131 N.E. 449 (Mass. 1921); Ohl v. Walder, 134 A. 844 (N.J. 1926); Lafayette Bldg. Corp. v. Tait, 134 A. 875 (N.J. Ch. 1926); Wis. Realty Co. v. Lull, 187 N.W. 978 (Wis. 1922).* Deed to so many acres "more or less" did not authorize diminution of purchase price proportionate to the shortage, in absence of actual fraud. *Hancock v. Nashville Inv. Co., 195 S.E.2d 674 (Ga. App. 1973).*

(n159)Footnote 1826. *Alexander v. Hicks, 5 S.2d 781 (Ala. 1942);* Hill v. Johnson, *106 S. 814 (Ala. 1925); Mayo v. Bowen, 106 S.E. 596 (Ga. App. 1921); Kite v. Pittman, 278 S.W. 830 (Mo. App. 1926); Potter v. Lumsden, 117 A. 31 (N.J. Ch. 1922); Ray v. Barrington 297 S.W. 781 (Tex. Civ. App. 1927).*

(n160)Footnote 1827. *Vaughn v. Ray, 598 S.W.2d 772 (Tenn. 1980); Mangham v. Cobb, 127 S.E. 408 (Ga. 1925).*

(n161)Footnote 1828. *Glover v. Bullard, 278 S.W. 645 (Ark. 1926); Blaylock v. Hackel, 188 S.E. 338 (Ga. 1927); Broaddus v. Jackson, 287 S.W. 701 (Ky. App. 1926); Ray v. Barrington, 297 S.W. 781 (Tex. Civ. App. 1927); Brewer v. Ross, 290 S.W. 781 (Tex. Civ. App. 1926).* Permitting recission of contract. *Reilly v. Richards, 632 N.E.2d 507 (Ohio 1994); Shults v. Geary, 660 N.Y.S.2d 497 (N.Y. App. Div. 3d Dept. 1997).*

(n162)Footnote 1829. *Coles v. Bowne, 10 Paige 526 (N.Y. Ch. 1844).*

(n163)Footnote 1830. *Chute v. Quincy, 30 N.E. 550 (Mass. 1892).*

(n164)Footnote 1831. In the following cases, property not intended to be conveyed was, through a mistake in the description, included in the contract. *Mansfield v. Sherman, 17 A. 300 (Me. 1889).*

(n165)Footnote 1832. *Davis v. Parker, 96 Mass. 94 (Mass. 1867).*

(n166)Footnote 1833. *Joseph v. Baker, 128 S.W. 864 (Ark. 1910). See* Charles J. Engel, Jr., Student Author, Actions Where Realty Conveyance Is Defective Because of Deficiency, *7 Syracuse L. Rev. 273 (1955),* for citations on the New York law as to the effect of shortages in acreage.

(n167)Footnote 1834. *Wolcott v. Moore, 92 N.E. 880 (Ind. App. 2d Div. 1910).* Intention of the parties determines whether the sale was by the acre or in gross. *Donahoo v. Home of the Good Shepherd, Inc., 228 N.W.2d 287 (Neb. 1975).*

(n168)Footnote 1835. *Pickman v. Hays, 317 N.E.2d 829 (Mass. App. 1974); McComb v. Gilkeson, 66 S.E. 77 (Va. 1909). See Edwards v. Carter Oil Co., 288 S.W.2d 954 (Ark. 1956),* holding that where one who actually owned 11.8

acres through mistake conveyed 16.1 acres and reserved 10 acres, the grantor and grantee each took their proportionate part of the actual acreage and that the mistake was constructive notice to future purchasers. Where price was based on acreage the buyer could have specific performance although there were only 83 acres instead of 200 specified in the contract. *Yost v. Mallicote's Adminstr., 77 Va. 610 (Va. 1883).*

(n169)Footnote 1836. *Ewing v. Bissell, 777 P.2d 1320 (Nev. 1989); Beal v. Schewe, 683 N.E.2d 1019 (Ill. App. 4th Dist. 1997)* (evidence required on the face of the contract); *Tamco Supply v. Pollard, 37 S.W.3d 905 (Tenn. App. 2000); Faithful v. Gardner, 799 S.W.2d 232 (Tenn. App. 1990); Speedway Enters. v. Hartsell, 251 P.2d 641 (Ariz. 1952).*

(n170)Footnote 1837. *Paul v. Swears, 122 N.Y.S. 740 (N.Y. App. Div. 3d Dept. 1910).*

(n171)Footnote 1838. *Garibaldi Realty & Constr. Co. v. Santangelo, 149 N.Y.S. 669 (N.Y. App. Div. 1st Dept. 1914),* aff'd. *117 N.E. 1067 (N.Y. 1917).*

(n172)Footnote 1839. *F. Land Bank v. Smith, 136 N.Y.S.2d 640 (N.Y. Co. Ct. 1955)* (17 acres too large).

(n173)Footnote 1840. *Paine v. Upton, 87 N.Y. 327 (N.Y. 1882).*

(n174)Footnote 1841. *Steele v. Goettee, 542 A.2d 847 (Md. 1988); Von Bargen v. Ginsberg, 218 N.Y.S. 601 (N.Y. App. Div. 2d Dept. 1926).*

(n175)Footnote 1842. *Dierksen v. Pahl, 190 N.W. 423 (Iowa 1922).*

(n176)Footnote 1843. *Swinney v. Davidson, 166 S.W.2d 41 (Ky. App. 1942).* In Louisiana, the vendor may be given equitable relief if the price of the property is less than one-half of its value. *Alexander v. St. Dept. of Hwys., 342 S.2d 1201 (La. App. 1977).*

(n177)Footnote 1844. *DeAlonzo v. Solis, 709 S.W.2d 690 (Tex. App. San Antonio 1986); Howe v. Coates, 107 N.W. 397 (Minn. 1906)* (in Minnesota a title is not marketable if it contains a defect which can be cured only by parol evidence).

(n178)Footnote 1845. *Dalton v. Lybarger, 237 S.W. 694 (Ark. 1922);* Barclay v. Bank of Osceola County, *89 S. 357 (Fla. 1921); Aker v. Lipscomb, 253 S.W. 995 (Mo. 1923); Williams v. Ellis, 239 S.W. 157 (Mo. App. 1922); Model Plan Agency v. Diamond, 138 A. 921 (N.J. 1927); Voges v. Krezdorn, 127 S.W.2d 93 7 (Tex. Civ. App. 1939); Middleton v. Moore, 289 S.W. 1045 (Tex. Civ. App. 1926); Rabinowitz v. N. Tex. Realty Co., 270 S.W. 579 (Tex. Civ. App. 1925); Blomstrom v. Wells, 239 S.W. 227 (Tex. Civ. App. 1922); Wakeland v. Robertson, 219 S.W. 842 (Tex. Civ. App. 1920). See Crowley v. O'Neil, 271 F. 379 (D.C. App. 1921); Benjamin v. Savage, 191 N.W. 408 (Minn. 1923); Hoover v. Pontz, 114 A. 522 (Pa. 1921).* Note, however, the distinction between the requirement of an abstract showing good and merchantable title as requiring such a showing of record and thus denying a title by adverse possession. *Alexander v. Cleveland, 79 S.2d 852 (Fla. 1955).* Affidavit of adverse possession is not sufficient for marketable title. *Tri-St. Hotel Co. v. Sphinx Inv. Co., 510 P.2d 1223 (Kan. 1973). See* Developments in the Law of Statutes of Limitation, *63 Harv. L. Rev. 1177 (1950);* Limitation of Actions Affecting Titles to Real Est., Minn. Laws 1947, ch. 118, *33 Minn. L. Rev. 54 (1948);* Marketability of Title by Adverse Possession in New York, *27 St. John's L. Rev. 121 (1952).*

(n179)Footnote 1846. *Alexander v. Cleveland, 79 S.2d 852 (Fla. 1955); Simis v. McElroy, 54 N.E. 674 (N.Y. 1899); McCarty v. Helbling, 144 P. 499 (Or. 1914).*

(n180)Footnote 1847. *Day v. Mountin, 137 F. 756 (8th Cir. 1905);* McDennis v. Finch, *72 S. 352 (Ala. 1916); Gwin v. Calegaris, 73 P. 851 (Cal. 1903); Bear v. Fletcher, 96 N.E. 997 (Ill. 1911); Attebery v. Blair, 91 N.E. 475 (Ill. 1910); Constantine v. East, 35 N.E. 844 (Ind. App. 1893); Noyes v. Johnson, 31 N.E. 767 (Mass. 1885); Howe v. Coates, 107 N.W. 397 (Minn. 1906); Danzer v. Moerschel, 214 S.W. 849 (Mo. 1919); Simis v. McElroy, 54 N.E. 674*

(N.Y. 1899); Heller v. Cohen, 48 N.E. 527 (N.Y. 1897); Hennig v. Smith, 151 N.Y.S. 444 (N.Y. Sup. 1915); Stillman v. Canales, 25 Tex. 313 (Tex. 1860). See James W. Day, "Curative Acts and Limitations Acts" designed to "Remedy Defects in Florida Land Titles," *8 U. Fla. L. Rev. 365 (1955).*

(n181)Footnote 1848. *Meek v. Green, 266 S.W. 451 (Ark. 1924); Dalton v. Lybarger, 237 S.W. 694 (Ark. 1922); F. Farm Mtg. Corp. v. Schmidt, 126 P.2d 1036 (Colo. 1942); Nat'l Fin. Corp. v. Robinson, 237 S.W. 418 (Ky. App. 1922); Carey v. Riley, 201 N.Y.S. 151 (N.Y. Sup. 1923).*

(n182)Footnote 1849. *Conklin v. Davi, 388 A.2d 598 (N.J. 1978);* Messer-Johnson Realty Co. v. Sec. Sav. & Loan Co., *94 S. 734 (Ala. 1922); Smith v. Biddle, 286 S.W. 801 (Ark. 1926)* (35 years' possession); *Rehoboth Heights Dev. Co. v. Marshall, 137 A. 83 (Del. Ch. 1927)* (40 years); *Brown v. Davis, 131 A. 142 (Del. Ch. 1925); Kittinger v. Rossman, 110 A. 677 (Del. Ch. 1920);* R.E.L. McCaskill Co. v. Dekle, *102 S. 252 (Fla. 1924)*, rev'd in part on other grounds, *Clements v. Leonard, 70 S.2d 840 (Fla. 1954);* Felt v. Morse, *85 S. 656 (Fla. 1920); Parks v. Welch, 199 A. 506 (Md. 1938); Frank Novak Realty Co. v. Trustees of Orphans Home, 138 A. 250 (Md. 1927); Peper v. Traeger, 136 A. 537 (Md. 1927)* (45 years); *Mayfield v. Safe Deposit & Trust Co., 132 A. 595 (Md. 1926); McDivit v. McDivit, 129 A. 291 (Md. 1925)* (28 years); *Winer v. Hooper, 115 A. 31 (Md. 1921)* (28 years); *Singer v. Mary Byrd Wyman Memorial Assn., 114 A. 50 (Md. 1921)* (36 years); *Seloff v. Naidetsch, 110 A. 896 (Md. 1920)* (65 years); *Fahey v. Ottenheimer, 220 N.Y.S. 491 (N.Y. App. Div. 1st Dept. 1927)* (32 years); *Wilkinson v. Schwartz, 216 N.Y.S. 771 (N.Y. App. Div. 3d Dept. 1926)* (60 years); *Condon v. Quigley, 204 N.Y.S. 611 (N.Y. App. Div. 1st Dept. 1924)* (65 years); *Bologna v. Weiner, 9 N.Y.S.2d 610 (N.Y. Sup. 1938); Rossi v. Gentile, 189 N.Y.S. 145 (N.Y. Sup. 1921)* (55 years); *Poetzsch v. Mayer, 189 N.Y.S. 695 (N.Y. Sup. 1921)* (50 years); *Larson v. Thomas, 215 N.W. 927 (S.D. 1927)* (over 20 years); *Goins v. Garber, 108 S.E. 868 (Va. 1921); Bowden v. Laing, 138 S.E. 449 (W. Va. 1927); Zunker v. Kuehn, 88 N.W. 605 (Wis. 1902)* (not a good record title); *Nelson v. Jacobs, 75 N.W. 406 (Wis. 1898).* Title by adverse possession is marketable without quiet title. *Babo v. Bookbinder Fin. Corp., 551 P.2d 63 (Ariz. App. 1976).*

(n183)Footnote 1850. *Alpha Portland Cement Co. v. Shirk, 227 F. 966 (7th Cir. 1915).*

(n184)Footnote 1851. *Industrial Commn. of North Dakota v. McKenzie County Nat'l Bank, 518 N.W.2d 174 (N.D. 1994); Radovanov v. Land Title Co. of America, Inc., 545 N.E.2d 351 (Ill. App. 1st Dist. 1989); Dobbs v. Norcross, 24 N. J. Eq. 327 (N.J. Ch. 1874); Zunker v. Kuehn, 88 N.W. 605 (Wis. 1902).*

(n185)Footnote 1852. *Hennig v. Smith, 151 N.Y.S. 444 (N.Y. Sup. 1915); McLane v. Petty, 159 S.W. 891 (Tex. Civ. App. 1913).*

(n186)Footnote 1853. *Fagan v. Hook, 105 N.W. 155 (Iowa 1905)*, modified, *111 N.W. 981 (Iowa 1907).*

(n187)Footnote 1854. *Gwin v. Calegaris, 73 P. 851 (Cal. 1903).*

(n188)Footnote 1855. *Cross v. Buskirk-Rutledge Lumber Co., 201 S.W. 141 (Tenn. 1918).*

(n189)Footnote 1856. *Barter v. Palmerton Area Sch. Dist., 581 A.2d 652 (Pa. Super. 1990); Bicknell v. Comstock, 113 U.S. 149 (1885); Dickerson v. Colgrove, 100 U.S. 578 (1879);* Meeks v. Garner, *8 S. 378 (Ala. 1890); Bradbury v. Dumond, 96 S.W. 390 (Ark. 1906); Keepers v. Yocum, 114 P. 1063 (Kan. 1911); Elkins v. Thompson, 159 S.W. 617 (Ky. App. 1913); Erdman v. Corse, 40 A. 107 (Md. 1898); Conley v. Finn, 50 N.E. 460 (Mass. 1898); Barnard v. Brown, 70 N.W. 1038 (Mich. 1897); Hedderly v. Johnson, 44 N.W. 527 (Minn. 1890); Townshend v. Goodfellow, 41 N.W. 1056 (Minn. 1889); Scannell v. Am. Soda Fountain Co., 61 S.W. 889 (Mo. 1901); Wanser v. De Nyse, 80 N.E. 1088 (N.Y. 1907); Freedman v. Oppenheim, 79 N.E. 841 (N.Y. 1907); Simis v. McElroy, 54 N.E. 674 (N.Y. 1899); Smith v. Windsor Manor Co., 43 A.2d 6 (Pa. 1945); Westfall v. Washlagel, 49 A. 941 (Pa. 1901).*

(n190)Footnote 1857. *Nelson v. Jacobs, 75 N.W. 406 (Wis. 1898)*, rev'd on other grounds, *Nelson v. Stephens, 82 N.W. 163 (Wis. 1900).*

(n191)Footnote 1858. *Safe Deposit & Trust Co. v. Marburg, 72 A. 839 (Md. 1909).*

(n192)Footnote 1859. *Jackson v. Creek, 94 N.E. 416 (Ind. App. 1911).*

(n193)Footnote 1860. *Stacey v. Taylor, 264 N.W. 809 (Minn. 1936).*

(n194)Footnote 1861. *Barnard v. Brown, 70 N.W. 1038 (Mich. 1897)* (marketable title need not be a clear title of record); *Stack v. Hickey, 138 N.W. 1011 (Wis. 1912)* (it is not the fact that the grantor has good title, but the appearance of that fact of record, that renders a title merchantable).

(n195)Footnote 1862. *Geithman v. Eichler, 107 N.E. 180 (Ill. 1914)* (identity of grantor and grantee); *Attebery v. Blair, 91 N.E. 475 (Ill. 1910)* (heirship); *Prichard v. Mulhall, 118 N.W. 43 (Iowa 1908)* (heirship); *Schmidt v. Fontron Loan & Trust Co., 211 P. 630 (Kan. 1923)* (title shown); *Van Gundy v. Shewey, 133 P. 720 (Kan. 1913)* (heirship); *Commr. of Corps. & Taxn. v. Bullard, 46 N.E.2d 557 (Mass. 1943)* (permitting evidence to show woman incapable of childbearing to make a title marketable); *Austin v. Shipman, 141 S.W. 425 (Mo. App. 1911)* (heirship); *Jaeger v. Harr, 123 P. 61 (Or. 1912)* (heirship); *Crosby v. Wynkoop, 106 P. 175 (Wash. 1910)* (heirship); *Singer v. Guy Inv. Co., 111 P. 886 (Wash. 1910)* (marriage shown).

(n196)Footnote 1863. *F. Farm Mtg. Corp. v. Schmidt, 126 P.2d 1036 (Colo. 1942); Parks v. Welch, 199 A. 506 (Md. 1938); Title, Inc. v. Dubel, 9 A.2d 91 (Md. 1939); Danzer v. Moerschel, 214 S.W. 849 (Mo. 1919); Medusa Portland Cement Co. v. Lamantina, 44 A.2d 244 (Pa. 1945); Smith v. Windsor Manor Co., 43 A.2d 6 (Pa. 1945);* Permitting specific performance based on a title by adverse possession. Messer-Johnson Realty Co. v. Sec. Sav. & Loan Co., *94 S. 734 (Ala. 1932); Barnard v. Brown, 70 N.W. 1088 (1897); Johnson & Co. v. Mueller, 205 S.W.2d 521 (Mo. 1947).* Title by adverse possession was good as against a bona fide purchaser from the record owner. *Lacombe v. Headley, 104 A. 711 (N.J. Ch. 1918); Baird v. Stubbins, 226 N.W. 529 (N.D. 1929).* Title by adverse possession was unmarketable. *Simis v. McElroy, 54 N.E. 674 (N.Y. 1899); McLaughlin v. Brown, 126 S.W. 292 (Tex. Civ. App. 1910).* Title by adverse possession if proven is marketable. *Conklin v. Davis, 388 A.2d 598 (N.J. 1978).*

(n197)Footnote 1864. Contra results. *Wood v. Goodfellow, 43 Cal. 185 (Cal. 1872); Ely v. Wilson, 47 A. 806 (N.J. Ch. 1900); Murdock v. Waterman, 39 N.E. 829 (N.Y. 1895); Clark v. Grant, 109 P. 234 (Okla. 1910); Douglass v. Ransom, 237 N.W. 260 (Wis. 1931).*

(n198)Footnote 1865. *See* Lawrence Linville, Purchaser's Remedies for Absence of Marketable Title, *36 Mich. L. Rev. 56 (1937).*

(n199)Footnote 1866. *Dawidoff v. Roxana Petroleum Corp., 2 F.2d 370 (W.D. La. 1924); Lindsey v. Humbrecht, 162 F. 548 (C.C.N.D. Ga. 1907);* Boylan v. Wilson, *79 S. 364 (Ala. 1918); Kittinger v. Rossman, 112 A. 388 (Del. Ch. 1921); Diamond St. Iron Co. v. Husbands, 68 A. 240 (Del. Ch. 1898); Corson v. Thornburn, 154 N.E. 144 (Ill. 1926); Baker v. Baker, 120 N.E. 525 (Ill. 1918); Dole v. Shaw, 118 N.E. 1044 (Ill. 1918); McNutt v. Nellans, 108 P. 834 (Kan. 1910); Lowther-Kaufman Oil & Coal Co. v. Gunnell, 212 S.W. 593 (Ky. App. 1919); Garth v. Runner's Exec., 121 S.W. 681 (Ky. App. 1909); Shea v. Evans, 72 A. 600 (Md. 1909); Institution for Savings v. Puffer, 87 N.E. 562 (Mass. 1909); Hunting v. Damon, 35 N.E. 1064 (Mass. 1894); Butts v. Andrews, 136 Mass. 221 (Mass. 1884); Cunningham v. Blake, 121 Mass. 338 (Mass. 1876); Barthel v. Engle, 168 S.W. 1154 (Mo. 1914); Std. Realty Co. v. Gates, 132 A. 487 (N.J. 1926); Richman v. Std. Oil Co., 123 A. 608 (N.J. 1924); Van Riper v. Wickersham, 76 A. 1020 (N.J. 1910); Kutschinski v. Thompson, 138 A. 569 (N.J. Ch. 1927); Sharpe v. Stretch, 130 A. 231 (N.J. Ch. 1925); Pasternack v. Alter, 123 A. 885 (N.J. Ch. 1924); Thomas v. Scheible, 111 A. 519 (N.J. Ch. 1920); Kohlrepp v. Ram, 81 A. 1103 (N.J. Ch. 1911); Deseumeur v. Rondel, 74 A. 703 (N.J. Ch. 1909); Montrose Realty & Imp. Co. v. Zimmerman, 73 A. 846 (N. J. Ch. 1909); Chesebro v. Moers, 134 N.E. 842 (N.Y. 1922); Triplett v. Williams, 63 S.E. 79 (N.C. 1908); Smalley v. Bond, 218 P. 513 (Okla. 1923)* (taxes due); *Knolhoff v. Mark, 136 P. 893 (Or. 1913); Hoover v. Pontz, 114 A. 522 (Pa. 1921); Cusano v. Mecaskie, 76 Pa. Super. 221 (Pa. Super. 1920); Austin v. Carter, 296 S.W. 649 (Tex. Civ. App. 1927); Bourland v. Huffhines, 269 S.W. 184 (Tex. Civ. App. 1924); Roos v. Thigpen, 140 S.W. 1180 (Tex. Civ. App. 1911).*

Specific performance will be denied when there is a reasonable doubt as to the title, or it is reasonable to anticipate that the purchaser will be exposed to litigation. Cudd v. Wood, *89 S. 52 (Ala. 1921).* It may be possible, however, for the vendor to clear up the defects by making the adverse claimants parties to the specific performance action. *Sabin v. Rauch, 255 P.2d 206 (Ariz. 1953).* Specific performance will not be denied on this ground when the purchaser knew that the vendor did not have a complete title, and it was contemplated that he should be given time to perfect it. *Sharp v. Bremer, 185 N.W. 449 (Iowa 1921).* Now it is the uniform rule in New Jersey to decline to decree specific performance at the suit of the vendor of real estate where a reasonable doubt concerning the title exists, though rested on grounds merely debatable, but which might visit upon the purchaser litigation in that regard, and that too, where at law the title might in fact be declared good. *Van Riper v. Wickersham, 76 A. 1020 (N.J. 1910).*

(n200)Footnote 1867. *Baugh v. Johnson, 641 S.W.2d 730 (Ark. App. 1982); Burke v. Dorfan, 137 A. 844 (N.J. 1927); Bourland v. Huffhines, 269 S.W. 184 (Tex. Civ. App. 1924).* A marketable title is one of such character as should assure to the vendee the quiet and peaceable enjoyment of the property, and one which is free from encumbrance. *Barnard v. Brown, 70 N.W. 1038 (Mich. 1897).*

(n201)Footnote 1868. *McIver Park, Inc. v. Brinn, 27 S.E.2d 548 (N.C. 1943).*

(n202)Footnote 1869. *McCain v. Cox, 531 F. Supp. 771 (N.D. Miss. 1982); Wilson v. Thompson, 51 S.2d 20 (Ala. 1951)* (even where the purchaser knew of defect on date of contract); *Mitchell v. White, 14 S.2d 687 (Ala. 1943); Asbury v. Cochran, 9 S.2d 887 (Ala. 1942);* Baker v. Howison, *104 S. 239 (Ala. 1925); Winkler v. Jerrue, 129 P. 804 (Cal. App. 2d Dist. 1912); Craig v. White, 202 P. 648 (Cal. 1921);* Walton Land & Timber Co. v. Long, *185 S. 839 (Fla. 1939);* Key v. Alexander, *108 S. 883 (Fla. 1926); Sorensen v. Larue, 252 P. 494 (Idaho 1926); Marshall v. Gilster, 201 P. 711 (Idaho 1921); Cobb v. Willrett, 144 N.E. 834 (Ill. 1924); Gibb v. Merrill, 234 Ill. App. 267 (Ill. App. 2d Dist. 1924); Carter v. Bair, 208 N.W. 283 (Iowa 1926); Marx v. King, 186 N.W. 680 (Iowa 1922); Ely v. Joslin, 208 P. 628 (Kan. 1922); Dalton v. Callahan, 119 A. 380 (Me. 1923); Wiemann v. Steffen, 172 S.W. 472 (Mo. App. 1915); Justice v. Button, 131 N.W. 736 (Neb. 1911); Robert H. Smith Corp. v. Kraushaar, 34 N.Y.S.2d 356 (N.Y. Sup. 1942),* order rev'd, *37 N.Y.S.2d 679 (N.Y. App. Div. 2d Dept. 1942); Edwards Lumber & Land Co. v. Smith, 132 S.E. 593 (N.C. 1926); Huwe v. Moulton, 211 N.W. 453 (S.D. 1926); Johnson v. Ford, 245 S.W. 531 (Tenn. 1922).* Legal and not equitable title intended. *San Mateo Land Co. v. Elem, 293 F. 869 (8th Cir. 1923).* Implied covenant of "marketable title" means a title not merely good in fact but one that is free from any reasonable objection of a reasonable purchaser. It is not "marketable" if it requires examination of records outside the state. *Paradis v. Bancroft, 91 A.2d 925 (N.H. 1952).*

(n203)Footnote 1870. *Brunswick Co. v. Dart, 20 S.E. 631 (Ga. 1894); McDonald v. Minnick, 35 N.E. 367 (Ill. 1893);* Lockhart v. Smith, *16 S. 660 (La. 1895); Hill v. Hobart, 16 Me. 164 (Me. 1839); Peabody Heights Co. v. Willson, 32 A. 386 (Md. 1895);* Corey v. *Clarke, 56* N.W. 1063 (Minn. 1893); *Saracino v. Kosower Constr. Co., 140 A. 458 (N.J. 1928); Bowen v. Vickers, 2 N.J. Eq. 520 (N.J. Ch. 1839); Irving v. Campbell, 24 N.E. 821 (N.Y. 1890); Rife v. Lybarger, 31 N.E. 768 (Ohio 1892); Egle v. Morrison, 17 Ohio C.D. 497 (Ohio Cir. Ct. 1904); Sorsby v. Thom, 168 S.W.2d 873 (Tex. Civ. App. 1943); Burwell v. Sollock, 32 S.W. 844 (Tex. Civ. App. 1895).* Failure of title may be a hardship defense against specific performance as well as grounds for rescission. *Micbar Realty Corp. v. Truval Realty Corp., 120 N.Y.S.2d 150 (N.Y. Sup. 1952).* Where the contract stipulates for the satisfaction of a third person, such as the vendee's attorney or a title insurance company, the seller's obligation is deemed to have been enlarged, and title can be rejected if not satisfactory to the named person. *Flower v. Coe, 196 N.W. 139 (Neb. 1923); Beinhauer v. Morris, 126 N.Y.S. 511 (N.Y. App. Div. 1st Dept. 1911); Baker v. Kaplan, 127 A. 623 (Pa. 1925).* Where the parties had agreed upon a quitclaim deed the court in New York stated: "An agreement to make a good title is always implied in executory contracts for the sale of land, and that a purchaser is never bound to accept a defective title, unless he expressly stipulates to take such title, knowing its defects. His right to an indisputable title, clear of defects and encumbrances, does not depend upon the agreement of the parties, but is given by the law." *Wallach v. Riverside Bank, 100 N.E. 50 (N.Y. 1912).* But under similar circumstances a Minnesota court has said: "It was equivalent to saying that 'upon an examination of your title to the property, as shown by the abstract, a deed which conveys that title, although it may be defective, will be satisfactory.' The proposed vendor would then have fully and adequately performed on his part had he tendered a deed of quitclaim. * * * If it clearly appears * * * that the parties contemplated and bargained for nothing

more than a conveyance which would pass such rights and interests as the vendor might have, or that they had in view and contracted for the mere transfer of the title held by the vendor, whether defective or not, that is all a vendee can claim or insist upon." *McManus v. Blackmarr, 50 N.W. 230 (Minn. 1891).*

(n204)Footnote 1871. *Elvidge v. Brant, 267 N.W. 169 (Neb. 1936).* An abstract reflecting title by tax deed without showing the preliminary proceedings of the tax sale did not show marketable title. *Alexander v. Cleveland, 79 S.2d 852 (Fla. 1955).* Party wall agreements are an encumbrance. *Maupai v. Jackson, 124 N.Y.S. 220 (N.Y. App. Div. 1st Dept. 1910),* only if perpetual; *Feder v. Soloman, 134 A. 917 (N.J. 1926). See* Royal C. Rubright, Marketable Title--What Certifiable Copies of Court Papers Should Appear of Record--An Addendum, *34 Dicta 335 (1957);* Robert W. Swenson, Iowa Title Standards, *2 Drake L. Rev. 76 (1952), 3 Drake L. Rev. 36 (1953);* James K. Scott, Real Property and Future Interests: Standards of Title Examination, 8 Kans. L. Rev. 334 (1956); S. Raymond Dunn, Attack on the "Twenty-One Year Rule," *18 Md. L. Rev. 34 (1958);* Joseph I. Swietlik, Law of Restrictions on Land in Wisconsin, *41 Marq. L. Rev. 227 (1957);* Robert A. Barker, Student Author, Marketable Title in New York State: Tax Liens, *8 Syracuse L. Rev. 259 (1956);* Donald C. Carmien & Robert A. Barker, Student Authors, Marketable Title in New York State: Tax Deeds, *9 Syracuse L. Rev. 69 (1957);* Ernest C. LaFollette, Student Author, Marketable Title in New York: Encroachments and Projections, *9 Syracuse L. Rev. 248 (1957);* and Comment on Title Examination in Virginia, *1 W. & M. L. Rev. 139 (1958).*

(n205)Footnote 1872. *In re Rodolitz Holding Corp., 232 B.R. 573 (Bankr. E.D.N.Y 1999); Wallach v. Riverside Bank, 100 N.E. 50 (N.Y. 1912).* Purchaser entitled to merchantable title. *Mid-St. Homes, Inc. v. Brown, 256 S.2d 894 (Ala. App. 1971); Laba v. Carey, 277 N.E.2d 641 (N.Y. 1971); May v. Nyman, 278 N.E.2d 97 (Ill. App. 1972).* Purchaser entitled to marketable title. *Leawood Nat'l Bank v. City Nat'l Bank & Trust Co., 474 S.W.2d 641 (Mo. App. 1971); Laba v. Carey, 277 N.E.2d 641 (N.Y. 1971)* (unless the contract provides otherwise).

(n206)Footnote 1873. *Micheli v. Taylor, 159 P.2d 912 (Colo. 1945).*

(n207)Footnote 1874. *Madhaven v. Sucher, 306 N.W.2d 481 (Mich. App. 1981); Carter Coal Co. v. Litz, 54 F. Supp. 115 (W.D. Va. 1943).*

(n208)Footnote 1875. *Fagan v. Hook, 105 N.W. 155 (Iowa 1905),* modified, *111 N.W. 981 (Iowa 1907). Lessenich v. Sellers, 93 N.W. 348 (Iowa 1903).*

(n209)Footnote 1876. *Carter Coal Co. v. Litz, 54 F. Supp. 115 (W.D. Va. 1943).*

(n210)Footnote 1877. *Industrial Partners, Ltd. v. CSX Tranps., Inc., 974 F.2d 153 (11th Cir. 1992); Howe v. Coates, 107 N.W. 397 (Minn. 1906); Rife v. Lybarger, 31 N.E. 768 (Ohio 1892); Hawkins v. Wright, 226 P.2d 957 (Okla. 1951); Stillman v. Canales, 25 Tex. 313 (Tex. 1860).*

(n211)Footnote 1878. Greenberg v. Ray, *108 S. 385 (Ala. 1926);* Wheeler v. Sullivan, *106 S. 876 (Fla. 1925); Harris v. Bills, 213 N.W. 929 (Iowa 1927); Culley v. Dixon, 201 N.W. 582 (Iowa 1925); Ogg v. Herman, 227 P. 476 (Mont. 1924); Garber v. Stern, 138 A. 920 (N.J. 1927); Winn v. Taylor, 190 P. 342 (Or. 1921); Ritter v. Hill, 127 A. 455 (Pa. 1925); Veselka v. Forres, 283 S.W. 303 (Tex. Civ. App. 1926); Morris v. Risk, 102 S.E. 725 (W. Va. 1920).* Good and sufficient deed means warranty deed. *Ford v. Street, 106 S.E. 379 (Va. 1921).*

(n212)Footnote 1879. *Meek v. Green, 266 S.W. 451 (Ark. 1924); Williams v. Belling, 245 P. 455 (Cal. App. 1st Dist. 1926); O'Meara v. Gleason, 140 N.E. 426 (Mass. 1923); Potter v. Lumsden, 117 A. 31 (N.J. 1922); Pearce v. Freeman, 254 P. 719 (Okla. 1927); Crenshaw v. True, 295 S.W. 632 (Tex. Civ. App. 1927).*

(n213)Footnote 1880. *Deem v. Miller, 303 Ill. 240, 135 N.E. 396,* 25 A. L. R. 766 (Ill. 1922).

(n214)Footnote 1881. *Allen v. Globe Grain & Milling Co., 156 Cal. 286, 104 P. 305 (Cal. 1909); Reed v. Sefton, 11 Cal. App. 88, 103 P. 1095 (Cal. App. 2d Dist. 1909).*

(n215)Footnote 1882. *Salmon v. Perez, 545 N.E.2d 21 (Ind. App. 1st Dist. 1989); Linscott v. Moseman, 84 Kans. 541, 114 P. 1088 (Kan. 1911).*

(n216)Footnote 1883. *Ives v. Crawford County Farmers Bank, 140 Mo. App. 293, 124 S.W. 23 (Mo. App. 1910). See* Ohio State Bar Association Standards of Title Examination, *3 Clev.-Mar. L. Rev. 9 (1954).*

(n217)Footnote 1884. *Donovan v. Pitcher, 53 Ala. 411 (Ala. 1875); Converse v. Kellogg, 7 Barb. 590 (N.Y. Sup. 1850).*

(n218)Footnote 1885. *Birge v. Bock, 44 Mo. App. 69 (Mo. App. 1891).*

(n219)Footnote 1886. *Altschul v. O'Neill, 58 P. 95 (Or. 1899). See Hanlon v. McLain, 242 P.2d 732 (Okla. 1952).*

(n220)Footnote 1887. *Dingey v. Paxton, 60 Miss. 1038 (Miss. 1883); Ehle v. Quackenboss, 6 Hill 537 (N.Y. Sup. 1844).*

(n221)Footnote 1888. *Ballew v. Carter Realty Era, 603 S.2d 877 (Ala. 1992); Manke v. Peterson, 42 P.2d 39 (Wash. 1935).*

(n222)Footnote 1889. *Kinsey v. Drury, 126 A. 125 (Md. 1924); Hogsed v. Gillett, 199 P. 907 (Mont. 1921); Rollton Syndicate v. Widlitz, 219 N.Y.S. 383 (N.Y. App. Div. 2d Dept. 1927).*

(n223)Footnote 1890. *McChesney v. Oppek, 194 N.W. 882 (Minn. 1923); Hopkins v. Phillips, 76 Pa. Super. 243 (Pa. Super. 1920).*

(n224)Footnote 1891. *Block v. Ryan, 4 App. D. C. 283 (D.C. App. 1894).*

(n225)Footnote 1892. *Jones v. Gardner, 10 Johns. 266 (N.Y. Sup. 1864); Weber v. Town of Hempstead, 105 N.Y.S.2d 256 (N.Y. Sup. 1951).*

(n226)Footnote 1893. *Reynolds v. Borel, 125 P. 67 (Cal. 1890); Snowden v. Derrick, 111 P. 757 (Cal. App. 1st Dist. 1910).*

(n227)Footnote 1894. *Bart v. Wysocki, 558 S.2d 1326 (La. App.4th Cir. 1990); Attebery v. Blair, 91 N.E. 475 (Ill. 1910).*

(n228)Footnote 1895. *Geithman v. Eichler, 107 N.E. 180 (Ill. 1914).*

(n229)Footnote 1896. *Moore v. Williams, 22 N.E. 233 (N.Y. 1889); Hawkins v. Wright, 226 P.2d 957 (Okla. 1951).*

(n230)Footnote 1897. *Oakey v. Cook, 7 A. 495 (N.J. 1886).*

(n231)Footnote 1898. *Fraidin v. State, 583 A.2d 1065 (Md. 1991); Roberts v. Bassett, 105 Mass. 409 (Mass. 1870). See Frank v. Murphy, 29 N.E.2d 41 (Ohio App. 1940).*

(n232)Footnote 1899. *Kane v. Rippey, 33 P. 936 (Or. 1893).*

(n233)Footnote 1900. *Geithman v. Eichler, 107 N.E. 180 (Ill. 1914); Deem v. Miller, 135 N.E. 396 (Ill. 1922).*

(n234)Footnote 1901. *Pfluger v. Clark, 897 S.W.2d 956 (Tex. App. Eastland 1995); Garnett v. Macon, 10 F. Cas. 12 (C.C.E.D. Va. 1825); Asbury v. Cochran, 9 S.2d 887 (Ala. 1942);* Boylan v. Wilson, *79 S. 364 (Ala. 1918); Kittinger v. Rossman, 112 A. 388 (Del. Ch. 1921); Brunswick Co. v. Dart, 20 S.E. 631 (Ga. 1894); Baker v. Baker, 120 N.E. 525 (Ill. 1918); Dole v. Shaw, 118 N.E. 1044 (Ill. 1918); McDonald v. Minnick, 35 N.E. 367 (Ill. 1893); Lowther-Kaufman Oil & Coal Co. v. Gunnell, 212 S.W. 593 (Ky. App. 1919);* Lockhart v. Smith, *16 S. 660 (La. 1895); Hill v. Hobart, 16*

Me. 164 (Me. 1839); Peabody Heights Co. v. Willson, 32 A. 386 (Md. 1895); Corey v. *Clarke, 56* N.W. 1063 (Minn. 1893); *Barthel v. Engle, 168 S.W. 1154 (Mo. 1914); Thomas v. Scheible, 111 A. 519 (N.J. Ch. 1920); Bowen v. Vickers, 2 N. J. Eq. 520 (N.J. Ch. 1839); Chesebro v. Moers, 134 N.E. 842 (N.Y. 1922); Irving v. Campbell, 24 N.E. 821 (N.Y. 1890); Rife v. Lybarger, 31 N.E. 768 (Ohio 1892); Egle v. Morrison, 27 Ohio C.C. 497 (Ohio Cir. Ct. 1904); Knolhoff v. Mark, 136 P. 893 (Or. 1913); Burwell v. Sollock, 32 S.W. 844 (Tex. Civ. App. 1895).*

(n235)Footnote 1902. *Drake v. GalfneI, 171 N.Y.S. 131 (N.Y. App. Div. 2d Dept. 1918); Peplinski v. Campbell, 226 P.2d 211 (Wash. 1951).* Purchaser has no duty to complete contract if title is defective and vendor cannot perform. *Mitchell v. Evans, 375 P.2d 101.* (Colo. 1962). An interim conveyance by the optionor does not deny the optionee's right to specific performance of what is left with diminution of purchase price. *Chatham Amusement Co. v. Perry, 117 S.E.2d 320 (Ga. 1960).* An option to convey more than the optionor owns gives the optionee the right to accept compensation in lieu of that part of the land which the optionor cannot convey. *Lawton v. Byck, 124 S.E.2d 369 (Ga. 1962).* Purchase price reduced to compensate for title defects rather than to void contract. *Stack v. Irwin, 144 S.2d 648 (La. App. 1962).*

(n236)Footnote 1903. *Eller v. Newell, 141 N.W. 52 (Iowa 1913); Ranck v. Wickwire, 164 S.W. 460 (Mo. 1914); Neill v. McClung, 76 S.E. 878 (W. Va. 1912).*

(n237)Footnote 1904. *Brown v. Ardoin, 663 S.2d. 194 (La. App. 3d Cir. 1995); Cameron v. Benson, 643 P.2d 1360 (Or. App. 1982); McPherson v. Schade, 48 N.E. 527 (N.Y. 1896); Chesebro v. Moers, 134 N.E. 842 (N.Y. 1922); St. Andrew's Protestant Episcopal Church v. Crisfield Homes, Inc., 11 N.Y.S.2d 16 (N.Y. Sup. 1939).*

(n238)Footnote 1905. *Swearingen v. Beyer, 275 Ill. App. 152 (Ill. App. 2d Dist. 1934).*

(n239)Footnote 1906. Quisenberry v. Grant, *104 S. 284 (Ala. App. 1925);* Succession of Fay, *109 S. 824 (La. 1926); Ammerman v. Karnowski, 234 P. 774 (Okla. 1924). See Bourland v. Huffhines, 269 S.W. 184 (Tex. Civ. App. 1924),* aff'd. *280 S.W. 561 (Tex. Com. App. 1926).*

(n240)Footnote 1907. *Craig v. White, 202 P. 648 (Cal. 1921); Anderson v. Willson, 191 P. 1016 (Cal. App. 2d Dist. 1920); Marlowe v. Chicago Title & Trust Co., 55 N.E.2d 101 (Ill. App. 1st Dist. 1944); Dickerson v. Morse, 212 N.W. 933 (Iowa 1927); Vogt v. Shumate, 281 S.W. 514 (Ky. App. 1926); Schmidt v. Martin, 251 S.W. 999 (Ky. App. 1923); Smith v. Kurtzenacker, 180 N.W. 243 (Minn. 1920); Bozdech v. Mont. Ranches Co., 216 P. 319 (Mont. 1923); Hogsed v. Gillett, 199 P. 907 (Mont. 1921); Friedman v. Fishbein, 213 N.Y.S. 158 (N.Y. App. Div. 3d Dept. 1926); Searles v. Auld, 111 S.E. 785 (S.C. 1922); Sweet v. Berry, 286 S.W. 531 (Tex. Civ. App. 1921); Long v. Martin, 234 S.W. 91 (Tex. Civ. App. 1921),* error dismissed, *247 S.W. 827 (Tex. 1923); Le Marinel v. Bach, 196 P. 22 (Wash. 1921).*

(n241)Footnote 1908. *Smith v. Biddle, 286 S.W. 801 (Ark. 1926); Dollar v. Knight, 224 S.W. 983 (Ark. 1920); Keifer v. Dreier, 205 N.W. 472 (Iowa 1925); Trainer v. Lammers, 201 N.W. 540 (Minn. 1925); Hudson v. Barnes, 278 S.W. 395 (Mo. 1925); Quigley v. Bartlett, 260 S.W. 494 (Mo. App. 1924); Wilson v. Corcoran, 237 P. 521 (Mont. 1925); Strain v. Statler, 240 P. 614 (Okla. 1925); Peplinski v. Campbell, 226 P.2d 211 (Wash. 1951).*

(n242)Footnote 1909. *Keifer v. Dreier, 205 N.W. 472 (Iowa 1925).*

(n243)Footnote 1910. *Meek v. Green, 266 S.W. 451 (Ark. 1924); Massey v. Butts, 221 S.W. 153 (Mo. App. 1920); Moter v. Hershey, 205 N.W. 239 (S.D. 1925); Schramm v. Hoch, 241 S.W. 1087 (Tex. Civ. App. 1922); Jacobs v. Teachout, 219 P. 38 (Wash. 1923).*

(n244)Footnote 1911. *Sorensen v. Larue, 252 P. 494 (Idaho 1926); Hayne v. Fenton, 151 N.E. 877 (Ill. 1926); Lahner v. Schaum, 201 N.W. 80 (Iowa 1924); Knudson v. Trebesch, 187 N.W. 613 (Minn. 1922); Williams v. Ellis, 239 S.W. 157 (Mo. App. 1922); Hawkins v. Wright, 226 P.2d 957 (Okla. 1951); Perryman v. City Home Builders, 248 P. 605 (Okla. 1926); Wurfel v. Bockler, 210 P. 213 (Or. 1922); Gray v. McCurdy, 266 S.W. 396 (Tex. 1924); Mathews v. Caldwell, 258 S.W. 810 (Tex. Com. App. 1924); Duniven v. Turner, 259 S.W. 267 (Tex. Civ. App. 1924); Sweet v. Berry,*

236 S.W. 531 (Tex. Civ. App. 1921). See In re First Nat'l Bank, 230 S.W. 358 (Mo. App. 1921); Sheehan v. McKinstry, 210 P. 167 (Or. 1922).

(n245)Footnote 1912. *Funk v. Baird, 295 N.W. 87 (N.D. 1940).*

(n246)Footnote 1913. *Caparell v. Goodbody, 29 A.2d 563 (N.J. Ch. 1942).*

(n247)Footnote 1914. Eaton v. Sadler, *110 S. 10 (Ala. 1926);* Matthews v. Bartee, *95 S. 289 (Ala. 1923);* Messer-Johnson Realty Co. v. Sec. Sav. & Loan Co., *94 S. 734 (Ala. 1922); Block v. Citizens Trust & Sav. Bank, 207 P. 510 (Cal. App. 2d Dist. 1922); Craig v. White, 202 P. 648 (Cal. 1921); Martin v. Pritchard, 199 P. 846 (Cal. App. 3d Dist. 1921); Willingharn Loan & Trust Co. v. Moore, 128 S.E. 751 (Ga. 1925); Langford v. Berry, 22 S.E.2d 349 (Ga. App. 1942); Schofield v. Spencer, 253 P. 833 (Idaho 1926); Hayne v. Fenton, 151 N.E. 877 (Ill. 1926); Firebaugh v. Wittenberg, 141 N.E. 379 (Ill. 1923); Deem v. Miller, 135 N.E. 396 (Ill. 1922); Weberpals v. Jenny, 133 N.E. 62 (Ill. 1921); Winn v. Strong, 194 N.W. 50 (Iowa 1923); Ely v. Joslin, 208 P. 628 (Kan. 1922); Oliver v. Poulos, 44 N.E.2d 1 (Mass. 1942); Hershorn v. Rubenstein, 156 N.E. 251 (Mass. 1927); Ross & Roberts, Inc. v. Simon, 92 N.E.2d 570 (Miss. 1950)* (a contract provision that the contract shall be terminated if marketable title cannot be conveyed is automatic in its operation); *Barber v. Lang, 211 N.W. 70 (Mich. 1926); Rogers v. Gruber, 174 S.W.2d 830 (Mo. 1943); Bozdech v. Mont. Ranches Co., 216 P. 319 (Mont. 1923); Stern v. Gepo Realty Corp., 45 N.E.2d 440 (N.Y. 1942); Treibus v. McIlroy, 200 N.Y.S. 433 (N.Y. App. Div. 2d Dept. 1923); Weinberg v. Sanders, 198 N.Y.S. 121 (N.Y. App. Div. 1st Dept. 1923); Magrill v. Langan, 43 N.Y.S.2d 210 (N.Y. Sup. 1943); Obrey v. Collins, 200 N.Y.S. 175 (N.Y. Sup. 1923); McCarty v. Lingham, 146 N.E. 64 (Ohio 1924); Sec. Sav. & Trust Co. v. Latta, 247 P. 777 (Or. 1926); Rossum v. Wick, 56 N.W.2d 770 (S.D. 1953); Burks v. Neutzler, 289 S.W. 436 (Tex. Civ. App. 1926),* rev'd on other grounds, *2 S.W.2d 416 (Tex. Com. App. 1928); Sweet v. Berry, 236 S.W. 531 (Tex. Civ. App. 1921); Ackerman v. Carpenter, 29 A.2d 922 (Vt. 1943); Cutter v. Greene, 201 N.W. 373 (Wis. 1924). See* Otto A. Goth, Title Insurance in California, *39 Cal. L. Rev. 235 (1951);* Neil O. Littlefield et al., Survey of the Doctrine of Marketable Title in New England, *36 B. U. L. Rev. 100 (1956).* If title is not marketable vendee may rescind. *Guleserian v. Pilgrim Trust Co., 120 N.E.2d 193 (Mass. 1954).* True only where it would be inequitable to permit vendor to retain payments made or both have agreed to rescind. *Evangelista v. Antonio De Cubellis, Inc., 85 A.2d 69 (R.I. 1951).*

(n248)Footnote 1915. *Conklin v. Davi, 388 A.2d 598 (N.J. 1978); Price v. Immel, 109 P. 941 (Colo. 1910); Wilson v. Bolen, 152 Ill. App. 210 (Ill. App. 1st Dist. 1909); Malloy v. Foley, 133 N.W. 778 (Iowa 1911); Linscott v. Moseman, 114 P. 1088 (Kan. 1911); Jackson v. Lamb's Exec., 186 S.W.2d 9.* (Ky. 1945); *McPherson v. Kissee, 144 S.W. 410 (Mo. 1911); Van Keuren v. Siedler, 66 A. 920 (N.J. Ch. 1907); Mutchnick v. Davis, 114 N.Y.S. 997 (N.Y. App. Div. 1st Dept. 1909); Scudder v. Watt, 90 N.Y.S. 605 (N.Y. App. Div. 2d Dept. 1904); Reid v. Johnson, 121 N.Y.S. 750 (N.Y. Sup. 1909); Bruegger v. Cartier, 151 N.W. 34 (N.D. 1915); McCulloch v. Bauer, 139 N.W. 318 (N.D. 1912); Brady v. Bank of Com., 138 P. 1020 (Okla. 1913); McCarty v. Helbling, 144 P. 499 (Or. 1914); Cline v. Booty, 175 S.W. 1081 (Tex. Civ. App. 1915); Dean v. Williams, 106 P. 130 (Wash. 1910); Curtis Land & Loan Co. v. Int. Land Co., 118 N.W. 853 (Wis. 1908).*

(n249)Footnote 1916. *Walters v. Mitchell, 92 P. 315 (Cal. App. 1st Dist. 1907); Knox v. Despain, 156 Ill. App. 134 (Ill. App. 3d Dist. 1910); Beeler v. Sims, 139 P. 371 (Kan. 1914).*

(n250)Footnote 1917. *Daybill v. Lucas, 187 A. 734 (N.J. Ch. 1936),* rev'd on other grounds, *191 A. 750 (N.J. 1937).*

(n251)Footnote 1918. *Ballew v. Charter Realty ERA, 603 So. 2d 877 (Ala. 1992); San Mateo Land Co. v. Elem, 293 F. 869 (8th Cir. 1923); Baker v. Smith & Gottlieb, Inc., 132 F.2d 18 (D.C. App. 1942); Holt v. Manuel, 54 S.W.2d 66 (Ark. 1932); Hunt v. Inner Harbor Land Co., 214 P. 998 (Cal. App. 2d Dist. 1923); Heden v. Point Reyes Land Co., 196 P. 44 (Cal. 1921); Heaton v. Nelson, 194 P. 614 (Colo. 1921); Soldate v. McNamara, 109 A. 724 (Conn. 1920); Barnett v. Adams, 137 S.E. 554 (Ga. 1927)* (life estate); *Taylor v. Fowler, 118 S.E. 212 (Ga. 1923); Richards v. Jarvis, 238 P. 887 (Idaho 1925); Marshall v. Gilster, 201 P. 711 (Idaho 1921); Blunt v. Kelly, 219 Ill. App. 327 (Ill. App. 1st*

Dist. 1920); Kilpatrick v. Smith, 19 N.W.2d 699 (Iowa 1945); Benedict v. Nielsen, 215 N.W. 658 (Iowa 1927); Dickerson v. Morse, 212 N.W. 933 (Iowa 1927); Culley v. Dixon, 201 N.W. 582 (Iowa 1925); Crawford v. Hisle, 283 S.W. 1019 (Ky. App. 1926) (life estate); *Mann v. Campbell, 250 S.W. 110 (Ky. App. 1923); Colas v. Donaldson, 1 La. App. 389 (La. App. 1925); Carroll v. Boosahda, 51 S.2d 836 (La. App. 2d Cir. 1951); Wagner v. James A. Bealmear & Son Co., 109 A. 466 (Md. 1920); Porter v. Ridge, 17 N.W.2d 239 (Mich. 1945); Mellenthin v. Donovan, 209 N.W. 623 (Minn. 1926); Green v. Ruzicka, 207 N.W. 509 (Neb. 1926); Korb v. Spray Beach Hotel Co., 88 A.2d 280 (N.J. Super. L. 1952); Planter v. Zintz, 137 A. 317 (N.J. Sup. 1927); Grunt v. Olsan, 139 A. 163 (N.J. Ch. 1927); Lowe v. Stanton, 180 N.Y.S. 862 (N.Y. App. Div. 1st Dept. 1920); Hawkins v. Wright, 226 P.2d 957 (Okla. 1951); Kneeland v. Hetzel, 229 P. 218 (Okla. 1924); Rands v. Ewing, 250 P.2d 921 (Or. 1953)* (taking of part of the premises by condemnation does not justify rescission of the contract to sell); *Myers v. Fidelity-Philadelphia Trust Co., 138 A. 834 (Pa. 1927); Klee v. Silver, 88 Pa. Super. 318 (Pa. Super. 1926); Larson v. Thomas, 215 N.W. 927 (S.D. 1927); Wayne v. Butterfield, 210 N.W. 663 (S.D. 1926); Smith v. McKnight, 240 S.W.2d 368 (Tex. Civ. App. 1951); Ferguson v. Mounts, 281 S.W. 616 (Tex. Civ. App. 1926),* rev'd on other grounds, *U.S. Fidelity & Guar. Co. v. Bimco Iron & Metal Corp., 464 S.W.2d 353 (Tex. 1971); Thackeray v. Knight, 192 P. 263 (Utah 1920); Matthews v. LaPrade, 130 S.E. 788 (Va. 1925); Aust v. Matson, 222 P. 225 (Wash. 1924); Knapp v. Davidson, 192 N.W. 75 (Wis. 1923).* Failure to furnish abstract according to contract justifies rescission. *McChesney v. Oppek, 194 N.W. 882 (Minn. 1923).*

(n252)Footnote 1919. *Spivak v. Farkas, 629 N.Y.S.2d 45 (N.Y. App. Div. 1995); Holliday v. Ashford, 136 S.E. 524 (Ga. 1927); Dickerson v. Morse, 212 N.W. 933 (Iowa 1927).*

(n253)Footnote 1920. *Smith v. Robertson, 23 Ala. 312 (Ala. 1853); Tandy v. Waesch, 97 P. 69 (Cal. 1908);* Musselwhite v. Oleson, *53 S. 944 (Fla. 1910); Hill v. Winn, 60 Ga. 337 (Ga. 1878); Marsh v. Thompson, 1 N.E. 630 (Ind. 1885); Creel v. Hammans, 13 N.W.2d 305 (Iowa 1944).* In a case where plaintiff gave defendant an option to sell his land, which was subject to a past-due lien, and the consideration to be paid was more than enough to discharge the lien, it was held that the lien was not such a defect in the, title as would make plaintiff unable to carry out his agreement. *Smith v. Howard, 105 S.W. 411 (Ky. App. 1907); Sayre v. Mohney, 47 P. 197 (Or. 1896); Jackson v. McGinness, 14 Pa. 331 (Pa. 1850); Diggle v. Baulden, 4 N.W. 678 (Wis. 1880); McIndoe v. Morman, 26 Wis. 588 (Wis. 1870).*

(n254)Footnote 1921. *Zunker v. Kuehn, 88 N.W. 605 (Wis. 1902).*

(n255)Footnote 1922. *Goger v. Voecks, 57 N.W.2d 621 (Neb. 1953); Zimmerman v. Branyan, 41 A. 689 (N.J. Sup. 1898); Duncan v. Gisborn, 53 P. 1044 (Utah 1898).*

(n256)Footnote 1923. *Sutthoff v. Maruca, 106 P. 632 (Wash. 1910).* Where the vendee refuses to pay the purchase price because of title failure the vendor may rescind. *Youngblood v. Gholson, 255 S.W.2d 603 (Ky. 1953).*

(n257)Footnote 1924. *Boyce's Exec. v. Grundy, 28 U.S. 210 (1830); Newton v. Peay, 245 P.2d 870 (Or. 1952). But see Croft v. Gentry, 232 S.W.2d 424 (Tenn. App. 1949).*

(n258)Footnote 1925. *Lindlots Realty Corp. v. Suffolk County, 15 N.E.2d 393 (N.Y. 1938).*

(n259)Footnote 1926. *Greenleaf v. Queen, 26 U.S. 138 (1828); Dodd v. Mills, 240 S.W.2d 25 (Ark. 1951).*

(n260)Footnote 1927. *Ward v. Packard, 18 Cal. 391 (Cal. 1861); Perkins v. Sommers, 254 P.2d 913 (Cal. App. 2d Dist. 1953); Curran v. Heslop, 252 P.2d 378 (Cal. App. 2d Dist. 1953)* (building code violations within this rule); *Crutchfield v. Danilly, 16 Ga. 432 (Ga. 1854); Thomas v. Coultas, 76 Ill. 493 (Ill. 1875); Bryan v. Primm, 1 Ill. 59 (1822); Anderson v. Buck, 24 N.W. 10 (Iowa 1885); Nairn v. Ewalt, 32 P. 1110 (Kan. 1893); Adkins v. Stewart, 166 S.W. 984 (Ky. App. 1914); Ruffner v. Ridley, 81 Ky. 165 (Ky. App. 1883); Carr v. Callaghan, 13 Ky. 365 (Ky. App. 1823); Tretheway v. Hulett, 54 N.W. 486 (Minn. 1893); Micbar Realty Corp. v. Truval Realty Corp., 120 N.Y.S.2d 150 (N.Y. Sup. 1952); Shiffer v. Dietz, 53 How.-Prac. 372 (N.Y. Sup. 1877); Babcock v. Case, 61 Pa. 427 (Pa. 1870); Crawford v. Keebler, 73 Tenn. 547 (Tenn. 1880); Spradlin v. I. & L. Dev. Co., 253 S.W.2d 92 (Tex. Civ. App. 1952);*

Max Meadows Land & Imp. Co. v. Brady, 22 S.E. 845 (Va. 1895); Pollard v. Rogers, 8 Va. 239 (Va. 1791).

(n261)Footnote 1928. *Napier v. Elam, 14 Tenn. 108 (Tenn. 1834). See Hoskins v. Walker, 255 S.W.2d 480 (Ky. 1953)* (where the court gave rescission in the case of a condition subsequent against sale of liquor though the parties thought there was a covenant to that effect).

(n262)Footnote 1929. *Fellows v. Evans, 53 P. 491 (Or. 1898).*

(n263)Footnote 1930. Reese v. Levin, *168 S. 851 (Fla. 1936).*

(n264)Footnote 1931. *Thayer v. Magill, 55 P.2d 1272 (Cal. App. 4th Dist. 1936).*

(n265)Footnote 1932. *Callister v. Millstream Assoc., Inc., 738 P.2d 662 (Utah Ct. App. 1987); Houston v. Whitworth, 444 So. 2d 1095 (Fla. Dist. Ct. App. 1984); Sturgis v. Meadors, 266 S.W.2d 81 (Ark. 1954); Craig v. White, 202 P. 648 (Cal. 1921); Maloney v. Houston, 197 P. 661 (Cal. App. 2d Dist. 1921); Bedinger v. May, 153 N.E. 822 (Ill. 1926); Fitchner v. Walling, 279 N.W. 417 (Iowa 1938); Sharp v. Bremer, 185 N.W. 449 (Iowa 1921); McCormick v. Mclntire, 183 N.W. 589 (Iowa 1921),* modified, *185 N.W. 454 (Iowa 1921); Adadow v. Perry, 196 N.W. 190 (Mich. 1923); Trainer v. Lammers, 188 N.W. 1018 (Minn. 1922); Wilson v. Corcoran, 237 P. 521 (Mont. 1925); Larkin v. Koether, 137 A. 849 (N.J. Ch. 1927); Wurfel v. Bockler, 210 P. 213 (Or. 1922); Hammassapoulo v. Hammassapoulo, 131 S.E. 319 (S.C. 1926); Luck Land Co. v. Lindstrom, 201 N.W. 707 (S.D. 1924); Peplinski v. Campbell, 226 P.2d 211 (Wash. 1951)* (failure to furnish insurable title in reasonable time); *Mast v. Hoover, 217 P. 718 (Wash. 1923); Knapp v. Davidson, 192 N.W. 75 (Wis. 1923). See Livings v. Tyo, 253 P. 385 (Colo. 1927).* Vendor may perfect title pending suit for rescission. *Gillett v. Cheairs, 243 P. 1112 (Colo. 1926).* Purchaser with knowledge of defect should give vendor notice and a reasonable opportunity to cure the defect. *Miller v. Ruzicka, 190 N.W. 216 (Neb. 1922).* Where the purchasers failed to comply with the terms of the contract requiring the vendee to give notice of objections to title, the vendee could not rescind. *Ihlenfeldt v. Guastella, 202 N.W.2d 327 (Mich. App. 1972).* Vendor need not have marketable title until vendee makes payment. *Marlowe Inv. Corp. v. Radmall, 485 P.2d 1402 (Utah 1971).*

(n266)Footnote 1933. *Baugh v. Johnson, 641 S.W.2d 730 (Ark. Ct. App. 1982); McGowne v. Frisby, 260 S.W. 728 (Ark. 1924); Neill v. Cornish, 252 S.W. 612 (Ark. 1923); C. Life Assur. Soc. v. Impelmans, 126 P.2d 757 (Wash. 1942). See Gaffey v. Welk, 189 P. 300 (Cal. App. 3d Dist. 1920); Bryant v. Green, 235 S.W. 10 (Ky. App. 1921); Williams v. Ellis, 239 S.W. 157 (Mo. App. 1922).* But West Virginia has recognized a doctrine of constructive eviction where the vendee can prove that the grantor of a covenant of general warranty did not have a good marketable title at the time of the conveyance and that the valid title and fee was in the third party. *Brewster v. Hines, 185 S.E.2d 513 (W. Va. 1971).*

(n267)Footnote 1934. *P. Portland Cement Co. v. Placer County Land Co., 201 P. 126 (Cal. 1921).*

(n268)Footnote 1935. *Aker v. Lipscomb, 253 S.W. 995 (Mo. 1923). See Yokshas v. Damcovich, 213 N.Y.S. 68 (N.Y. App. Div. 4th Dept. 1925).*

(n269)Footnote 1936. *Singer v. Campbell, 290 S.W. 667 (Ky. App. 1927).*

(n270)Footnote 1937. *Carson v. Mikel, 216 N.W. 60 (Iowa 1927). See Levin v. Hamilton, 206 N.W. 526 (Mich. 1925).*

(n271)Footnote 1938. *Freeman v. Rose, 135 S.E. 870 (N.C. 1926).*

(n272)Footnote 1939. *Drake v. Gaffney, 171 N.Y.S. 131 (N.Y. App. Div. 2d Dept. 1918).*

(n273)Footnote 1940. *Eller v. Newell, 141 N.W. 52 (Iowa 1913); Anderson v. Boone County Abstract Co., 418 S.W.2d 123 (Mo. 1967)* (holding that a successor to the title cannot take advantage of an abstract prepared for a previous title holder, there being no privity of contract with the abstractor). *Ranck v. Wickwire, 164 S.W. 460 (Mo. 1914); Neill v.*

McClung, 76 S.E. 878 (W. Va. 1912). See Ralph W. Aigler, Supplement to "Constitutionality of Marketable Title Acts," *56 Mich. L. Rev. 225 (1957).*

(n274)Footnote 1941. *Hayes v. Harmony Grove Cemetery, 108 Mass. 400 (Mass. 1871); First African M.E. Soc. v. Brown, 17 N.E. 549 (Mass. 1888); Moser v. Cochrane, 13 N.E. 442 (N.Y. 1887); Cambreleng v. Purton, 26 N.E. 907 (N.Y. 1891).*

(n275)Footnote 1942. *Close v. Stuyvesant, 24 N.E. 868 (Ill. 1890); Burns v. Berry, 3 N.W. 924 (Mich. 1879); Doutney v. Lambie, 78 A. 746 (N.J. 1911); Deseumeur v. Rondel, 74 A. 703 (N.J. Ch. 1909).* No specific performance where there is a breach of covenant by vendor. *Vogel v. Rogers, 108 A.2d 448 (N.J. Super. App. Div. 1954).*

(n276)Footnote 1943. *Solomon v. Shewitz, 152 N.W. 196 (Mich. 1915).*

(n277)Footnote 1944. *Smith v. Bangham, 104 P. 689 (Cal. 1909); Clifton v. Charles, 116 S.W. 120 (Tex. Civ. App. 1909).*

(n278)Footnote 1945. *Watkins v. Pfeiffer, 92 S.W. 562 (Ky. App. 1906).*

(n279)Footnote 1946. *Cogito v. Dart, 33 S.E.2d 759 (Va. 1945).* One having only a limited interest in land cannot claim benefit of the marketable title act to the detriment of the other interests. *Smith v. Berberich, 95 N.W.2d 325 (Neb. 1959).*

(n280)Footnote 1947. *Bartos v. Czerwinski, 34 N.W.2d 566 (Mich. 1948).* A title policy is the responsibility of the vendor. *Madden v. Parker, 292 S.2d 392 (Fla. App. 1974).*

(n281)Footnote 1948. *Fanger v. Leeder, 99 N.E.2d 533 (Mass. 1951).*

(n282)Footnote 1949. *MTrust Corp. N.A. v. LJH Corp., 837 S.W.2d 250 (Tex. Ct. App. 1992); McLaughlin v. Lambourn, 359 N.W.2d 370 (N.D. 1985); Ladegaard v. Connell, 281 N.W. 656 (Wis. 1938).*

(n283)Footnote 1950. *LaFond v. Frame, 99 N.E.2d 51 (Mass. 1951).*

(n284)Footnote 1951. *Miller v. Dyer, 127 P.2d 901 (Cal. 1942).*

(n285)Footnote 1952. *Sturgis v. Meadors, 266 S.W.2d 81 (Ark. 1954).*

(n286)Footnote 1953. As to what constitutes an insurable title, see *Mackenzie v. McLean, 90 A.2d 515 (N.J. Super. App. Div. 1952).*

(n287)Footnote 1954. *Ward v. Downey, 213 P.2d 523 (Cal. App. 4th Dist. 1950); Brinn v. Mennen Co., 73 A.2d 541 (N.J. 1950); Salvin v. Wiedemann, 95 N.Y.S.2d 434 (N.Y. App. Div. 1st Dept. 1950). See Friedman v. Handelman, 90 N.E.2d 31 (N.Y. 1949); Hebb v. Severson, 201 P.2d 156 (Wash. 1948).*

(n288)Footnote 1955. *Korb v. Spray Beach Hotel Co., 93 A.2d 578 (N.J. Super. App. Div. 1952).*

(n289)Footnote 1956. Fambrough v. Townson, *85 S. 476 (Ala. 1920); Zempel v. Hughes, 85 N.E. 641 (Ill. 1908); Cape Girardeau-Jackson Interurban Ry. Co. v. Light & Dev. Co., 210 S.W. 361 (Mo. 1919); George Wiedemaim Brew. Co. v. Maxwell, 84 N.E. 595 (Ohio 1908); Shannon v. Freeman, 109 S.E. 406 (S.C. 1921). Alexander v. Lewes, 175 P. 572 (Wash. 1918).* Contra, however, see *O'Brien v. Perry, 62 P. 927 (Cal. 1900).*

(n290)Footnote 1957. *Atkin v. Cobb, 663 S.W.2d 48 (Tex. Ct. App. 1983); Kuhlman v. Grimminger, 327 N.W.2d 104 (Neb. 1982); Wilfamco, Inc. v. Interstate Elec. Co., 58 S.2d 833 (La. 1952).* In McCreary v. Stallworth, *102 S. 52 (Ala. 1924),* the measure of abatement, if granted, is described as follows: "Whether this abatement be looked upon as

an allowance for partial failure of consideration, or by way of compensation or damages for the loss resulting from nonperformance in 'full,' it is the measure of relief in equity, to which the vendee is entitled because of partial failure of title, when he elects to claim partial performance. It is not questioned that, if full performance is had in equity, it is a bar to an action at law for damages for a breach of the contract."

(n291)Footnote 1958. *Groskin v. Knight, 138 A. 843 (Pa. 1927).*

(n292)Footnote 1959. *Mott v. Lombard, 655 A.2d 362 (Me. 1995); Hart v. Copper Dist. Power Co., 286 N.W. 191 (Mich. 1939). See* Linda D. Schwartz, Student Author, Title Abstractor's Liability in Tort and Contract: A Right of Action for Injured Third Persons, *22 Am U. L. Rev. 455 (1973).*

(n293)Footnote 1960. *Ryder v. Garden Ests., 105 N.E.2d 854 (Mass. 1952). See* J. Clifford Rogillio, Vendor's Liability for Undeclared Mineral Leases, *52 Tul. L. Rev. 887 (1978).*

(n294)Footnote 1961. *Hanlon v. McLain, 242 P.2d 732 (Okla. 1952).*

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CHAPTER 96 Vendors and Purchasers

11-96 Thompson on Real Property, Thomas Editions § 96.18

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§ 96.18 Abstracts and Abstracters.

The contract may contemplate that the vendor will furnish the vendee with an abstract of title or, in the alternative, with title insurance. The vendor is under no duty to furnish an abstract where the contract does not require it. n1962 The vendee may waive a provision in the contract to furnish an abstract. n1963 An agreement in the contract to furnish an abstract means an abstract taken from the record, n1964 and is to be furnished the vendee on or before tender of the deed. n1965 An abstract is not contemplated to be the complete evidence of title, but is a mere synopsis of the record as to the title, n1966 but the purchaser is entitled to rely on the abstract. n1967 The abstract may be supplemented in some instances by affidavits clearing omissions and obscure and defective recitals. n1968 Under an agreement to furnish "an abstract of title" the contract was held to require a record title and would not be satisfied by furnishing extrinsic evidence of title by adverse possession. n1969 The contract may provide for the approval of the abstract by an attorney, and the attorney's decision will generally be conclusive. n1970 The provision requiring the vendor to furnish an abstract showing a good and merchantable title means that this title should be in the vendor. n1971 The abstract is generally held not defective for omission of the original government grant. n1972 The vendee has a reasonable time for the examination of the abstract, n1973 and the vendor should have a reasonable time to correct defects. n1974 Objections to defects in the abstract may be waived. n1975 The provision for a title guaranty certificate is not satisfied by tender of a Torrens certificate and title insurance. n1976

The abstracter ordinarily insures the accuracy of the work. n1977 An abstracter is not liable for loss incurred by one who at the time of taking the action resulting in the loss does not rely on the abstract. n1978 If the vendor agrees to furnish an abstract showing title, the vendee is not liable if such abstract is not furnished. n1979

Regarding title examination of the record the courts are divided on two issues. First, is the examiner required to search the history of the tract to ascertain whether there were any instruments recorded prior to the time the maker acquired title and which would be binding on the maker under the after-acquired title doctrine of warranties? Second, must the examiner search the record for instruments outside the chain of title to the tract to ascertain if there were instruments executed by the maker before the time of a link in the chain but not recorded until after the link?

The weight of authority does not place upon the vendor, in the absence of contract, the duty of furnishing an abstract of title. n1980 If the contract requires the vendor to furnish an abstract, such abstract is a condition precedent to the

vendee's liability to perform, n1981 and the vendor may not have specific performance without furnishing the abstract. n1982 The abstract must show all matters of record detrimental to the title, including grantor's marital status n1983 and all defective descriptions. n1984 Whenever a recorded map or plan is essential to the description this must be shown. n1985 The abstract must reveal the present status of all liens and encumbrances of record. n1986 It must contain an abstract of all court proceedings affecting the title. n1987 If the instrument appears in the abstract of title, it gives notice to the purchaser, even though the instrument was not itself entitled to record because of defective acknowledgment. n1988 The abstract must reveal all instruments of record affecting title to the realty. n1989 Where the chain of title depends on court proceedings the abstract must show sufficient thereof to support the title. n1990

FOOTNOTES:

(n1)Footnote 1962. *Applebaum v. Ziegler, 20 S.2d 510 (Ala. 1945);* Baker v. Howison, *104 S. 239 (Ala. 1925); Easton v. Montgomery, 27 P. 280 (Cal. 1891); Seymour v. Shaeffer, 187 P.2d 95 (Cal. App. 2d Dist. 1947); Mehler v. Huston, 57 S.2d 836 (Fla. 1952); Turn Verein Eiche v. Kionka, 99 N.E. 684; Keepers v. Yocum, 114 P. 1063 (Kan. 1911); State v. Grimes, 84 P. 1061 (Nev. 1906); Bartholomew v. Clausen, 72 P.2d 718 (Okla. 1937); Thompson v. Robinson, 64 S.E. 718 (W. Va. 1909); Hafemann v. Korinek, 63 N.W.2d 835 (Wis. 1954)* (a demand for an abstract was not an acceptance of an option where not provided for in the contract); *Clarke v. Maisch, 177 N.W. 11 (Wis. 1920). See Vanlandingham v. Jenkins, 43 S.2d 578 (Miss. 1949).* The English rule is contra. *In re Stamford, L. R. [1900] 1 Ch. 287.* A seller is not required to furnish abstract of title unless called for in the contract. *Dept. of Pub. Works & Bldgs. v. Halls, 220 N.E.2d 167 (Ill. 1966). See* John C. Payne, In Search of Title, *14 Ala. L. Rev. 11 (1961),* in which English and American methods of title search are contrasted; John C. Payne, Ames & Sams, Facilitating Title Practice: Some Ways to Solve Old Problems, *15 Ala. L. Rev. 18 (1962);* Ruford G. Patton, Title to Land: Documentary Proof of Ownership, 2 Inter-Am. L. Rev. 169 (1960). *See also* George A. Pindar, Title Examinations and Closings, *22 Mercer L. Rev. 505 (1971).*

(n2)Footnote 1963. *Pfister v. Sime, 202 N.W. 476 (S.D. 1925).*

(n3)Footnote 1964. *Savage v. Shields, 293 F. 863 (8th Cir. 1923). See* J. Philip Johnson, Examining the Abstract of Title, *46 N.D. L. Rev. 175 (1969).*

(n4)Footnote 1965. *Richards v. Jarvis, 238 P. 887 (Idaho 1925); Carver v. Van Arsdale, 143 N.E. 579 (Ill. 1924); Park v. Koopmann, 143 N.E. 80 (Ill. 1924); Nielson v. Benedict, 194 N.W. 83 (Iowa 1923).* Strict performance of obligation to furnish abstract at particular time may be waived. *Weinheimer v. Sowers, 203 P. 685 (Kan. 1922); Tierney v. Dietsch, 194 N.W. 475 (Neb. 1923).*

(n5)Footnote 1966. *Lunn v. Cummings and Lockwood, 743 A.2d 653 (Conn. Ct. App. 2000); Sheehan v. McKinstry, 210 P. 167 (Or. 1922).*

(n6)Footnote 1967. *Rankin v. Marion Phosphate Co., 12 F.2d 67 (S.D. Fla. 1926); Knudson v. Trebesch, 187 N.W. 613 (Minn. 1922); Nicholson v. Whyte, 236 S.W. 770 (Tex. Civ. App. 1921).* The abstracter's liability arises when the abstract is delivered, not when the defect is discovered. *Adams v. Greer, 114 F. Supp. 770 (W.D. Ark. 1953).* Failure to show a repealed annexation ordinance in an abstract of title was not improper. *Hewitt v. Millis, 309 N.E.2d 162 (Ind. App. 1974). See* M.P. Ames, Student Author, Liability of Abstracting Attorneys and Title Examiners, *7 Ala. L. Rev. 87 (1954).*

(n7)Footnote 1968. *Ewing v. Plummer, 140 N.E. 42 (Ill. 1923); Perry v. Ritze, 193 N.W. 758 (Neb. 1923). See Dime Sav. & Trust Co. v. Knapp, 145 N.E. 235 (Ill. 1924).*

(n8)Footnote 1969. *Creel v. Hammans, 13 N.W.2d 305 (Iowa 1944).*

(n9)Footnote 1970. *Kenney v. Walden, 113 S.E. 61 (Ga. App. 1922); Kincaid v. Dobrinsky, 225 Ill. App. 85 (Ill. App. 2d Dist. 1922); Flower v. Coe, 196 N.W. 139 (Neb. 1923)* (decision final); *Curtis v. Roberts, 230 P. 916 (Okla.*

1924); Larson v. Thomas, 215 N.W. 927 (S.D. 1927); Blomstrom v. Wells, 239 S.W. 227 (Tex. Civ. App. 1922); Sweet v. Berry, 236 S.W. 531 (Tex. Civ. App. 1921). See Mathews v. CaldweIl, 258 S.W. 810 (Tex. Com. App. 1924).

(n10)Footnote 1971. Eaton v. Sadler, *110 S. 10 (Ala. 1926).*

(n11)Footnote 1972. *Pestal v. O'Donnell, 254 P. 764 (Colo. 1927); Kincaid v. Dobrinsky, 225 Ill. App. 85 (Ill. App. 2d Dist. 1922).*

(n12)Footnote 1973. *Payne v. Meeker, 295 N.E.2d 239 (Ill. Ct. App. 1973); Durband v. Ney, 191 N.W. 385 (Iowa 1923); Bentley v. Keegan, 202 P. 70 (Kan. 1921); Stewart v. Chittick, 222 S.W. 863 (Mo. App. 1920); Nelson v. Hamra, 259 P. 838 (Okla. 1927); Spencer v. Bales, 216 P. 746 (Or. 1923); Zuelke v. Gergo, 45 N.W.2d 690 (Wis. 1951); Chandler v. Gault, 194 N.W. 33 (Wis. 1923).*

(n13)Footnote 1974. *Sweet v. Berry, 236 S.W. 531 (Tex. Civ. App. 1921).*

(n14)Footnote 1975. *Benjamin v. Savage, 191 N.W. 408 (Minn. 1923); John v. Timm, 190 N.W.. 890 (Minn. 1922); Pfister v. Sime, 202 N.W. 476 (S.D. 1925).* Purchaser may waive a defect in title to take whatever interest the seller has. *Diggs v. Siomporas, 237 A.2d 725 (Md. 1968).*

(n15)Footnote 1976. *Thomas v. Spitzer, 260 P. 833 (Cal. App. 2d Dist. 1927).*

(n16)Footnote 1977. *Watson v. Muirhead, 57 Pa. 161 (Pa. 1868)* (excused the liability of an abstracter who had relied on an attorney's opinion). Abstracter liable for negligence. *Trimboli v. Kinkel, 123 N.E. 205 (N.Y. 1919).*

(n17)Footnote 1978. *Randall v. Paine-Nichols Abstract Co., 238 P.2d 319 (Okla. 1951).*

(n18)Footnote 1979. McDennis v. Finch, *72 S. 352 (Ala. 1916); Bear v. Fletcher, 96 N.E. 997 (Ill. 1911); Constantine v. East, 35 N.E. 844 (Ind. App. 1893); Eller v. Newell, 141 N.W. 52 (Iowa 1913); Beeler v. Sims, 139 P. 371 (Kan. 1914); Lake Erie Land Co. v. Chilinski, 163 N.W. 929 (Mich. 1917); Ranck v. Wickwire, 164 S.W. 460 (Mo. 1914); Hennig v. Smith, 151 N.Y.S. 444 (N.Y. Sup. 1915); Hamburger v. Thomas, 126 S.W. 561 (Tex. 1910).*

(n19)Footnote 1980. Baker v. Howison, *104 S. 239 (Ala. 1925); Dalton v. Lybarger, 237 S.W. 694 (Ark. 1922); Griesemer v. Hammond, 123 P. 818 (Cal. App. 1st Dist. 1912); Easton v. Montgomery, 27 P. 280 (Cal. 1891); Turn Verein Eiche v. Kionka, 99 N.E. 684 (Ill. 1912); Knox v. McMurray, 140 N.W. 652 (Iowa 1913); Tapp v. Nock, 12 S.W. 713 (Ky. App. 1889); McQuary v. Mo. Land Co., 130 S.W. 335 (Mo. 1910); Smith v. First Nat'l Bank, 95 S.W. 1111 (Tex. Civ. App. 1906)* (even where the contract provides that the vendor will provide perfect title); *Clarke v. Maisch, 177 N.W. 11 (Wis. 1920).*

(n20)Footnote 1981. *Darby v. Keeran, 505 P.2d 710 (Kan. 1973); Yost Farm Co. v. Cremer, 447 P.2d 688 (Mont. 1968); Kessler v. Pruitt, 93 P. 965 (Idaho 1908); Hayne v. Fenton, 151 N.E. 877 (Ill. 1926); Pauley v. Daeges, 176 N.W. 965 (Iowa 1920); Linscott v. Moseman, 114 P. 1088 (Kan. 1911); McChesnev v. Oppek, 194 N.W. 882 (Minn. 1923); Sheehan v. McKinstry, 210 P. 167 (Or. 1922); Duniven v. Turner, 259 S.W. 267 (Tex. Civ. App. 1924).*

(n21)Footnote 1982. *Cobb v. Willrett, 144 N.E. 834 (Ill. 1924); Lillienthal v. Bierkamp, 110 N.W. 152 (Iowa 1907); Barber v. Lang, 211 N.W. 70 (Mich. 1926); Russell v. Wales, 104 N.Y.S. 143 (N.Y. App. Div. 4th Dist. 1907).*

(n22)Footnote 1983. *Bragg v. Chilcote, 176 Ill. App. 371 (Ill. App. 3d Dist. 1912).*

(n23)Footnote 1984. *Reeves v. Roberts, 242 S.W. 956 (Mo. 1922).*

(n24)Footnote 1985. *Poulton v. Magruder, 243 S.W. 512 (Tex. Civ. App. 1922),* rev'd on other grounds, *Magruder v. Poulton, 257 S.W. 533 (Tex. Com. App. 1924).*

(n25)Footnote 1986. *Attebery v. Blair, 91 N.E. 475 (Ill. 1910).*

(n26)Footnote 1987. *Smith v. Hunter, 89 N.E. 686 (Ill. 1909).*

(n27)Footnote 1988. *Woolridge v. LaCrosse Lumber Co., 236 S.W. 294 (Mo. 1921).*

(n28)Footnote 1989. *Attebery v. Blair, 91 N.E. 475 (Ill. 1910).* Abstracters are required to show each link in the chain of title, and a failure to note this on an abstract makes the maker of the abstract liable in damages to the person injured. *Marley v. McCarthy, 263 N.W. 385 (Neb. 1935).*

(n29)Footnote 1990. *Smith v. Hunter, 89 N.E. 686 (Ill. 1909).* Attorney has no lien on real property for services confined to examination of title. *Woodward v. Lawson, 167 S.E.2d 660 (Ga. 1969).*

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CHAPTER 96 Vendors and Purchasers

11-96 Thompson on Real Property, Thomas Editions § 96.19

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§ 96.19 Title Insurance.

Because of the inadequacy of protection afforded a buyer by the mere furnishing of an abstract, the practice of insuring the title through an insurance company regularly engaged in this field has developed. The title insurance policy will cover all title defects not excepted by the policy and the insurer becomes responsible to the insured for any such title defects. n1991 A policy is breached at the time of delivery if the title is then defective. n1992 A policy of title insurance ordinarily runs only to the insured and is not transferable. Title insurance issues are covered in detail in Chapter 93, above.

FOOTNOTES:
(n1)Footnote 1991. *Utting v. Commonwealth Land Title Ins. Co., 676 N.Y.S.2d 637 (N.Y. App. Div. 1998); Coast Mut. Bldg.-Loan Assn. v. Sec. Title Ins. & Guarantee Co., 57 P.2d 1392 (Cal. App. 2d Dist. 1936)* (title insurance contract construed -against insurer); *Ky. Title Co. v. Hail, 292 S.W. 817 (Ky. App. 1927)* (title insurance company liable for market value of omitted property); *Mayers v. Van Schaick, 197 N.E. 296 (N.Y. 1935)* (title insurance operates to protect a purchaser or a mortgagee against defects in or encumbrances on a title existing at the date of such insurance. It is not prospective in its operation and has no relation to liens or requirements arising thereafter and covers all burdens on title even though not a lien). Reasonable title to furnish title insurance. *Grieser v. Myers, 267 S.2d 673 (Fla. App. 1972).* Title insurance company liable for vexatious refusal to defend against alleged title defect. *Fohn v. Title Ins. Corp., 529 S.W.2d 1 (Mo. 1975).* Liability under a title insurance policy is the difference between fair market value of whole property and value remaining because of defect in title. *Fohn v. Title Ins. Corp., 529 S.W.2d 1 (Mo. 1975). See* What Constitutes a Charge, Encumbrance, or Lien Within Contemplation of Title Insurance Policy, *87 A.L.R.3d 764 (1978). See* Dale A. Whitman, Optimizing Land Title Assurance Systems, *42 Geo. Wash. L. Rev. 40 (1973). See also* Jerome J. Curtis, Jr., Title Assurance In Sales of California Residential Realty: A Critique of Title Insurance and Title Covenants with Suggested Reforms, *7 Pac. L.J. 1 (1976).*

(n2)Footnote 1992. *In re Gordon, 176 A. 494 (Pa. 1935).* Exception in title insurance policy of "tenure of present occupant" excused insurer from claims arising by adverse possession. *Bothin v. Cal. Title Ins. Co., 96 P. 500 (Cal. 1908).* Title guaranty companies are subject to suit by the insured on the title insurance contract, although no suit has been filed against the insured and no suit has been filed against the insured and no adverse claimant has taken possession of the property. *Prendergast v. S. Title Guar. Co., 454 S.W.2d 803 (Tex. Civ. App. 1970).*

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CHAPTER 96 Vendors and Purchasers

11-96 Thompson on Real Property, Thomas Editions § 96.20

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§ 96.20 Summary of Laws Requiring Sellers to Disclose Negative Background, Characteristics, and Condition of the Real Property.

Section 66.46, Wisconsin Statutes

§ 96.20(a) The Evolving Common Law Concerning Disclosures by Sellers.

A discussion of nondisclosure constituting fraud leading to rescission of an agreement for sale of realty is in § 96.15(a)(4)(i), above.

§ 96.20(a)(1) Seller's Duty to Disclose.

Historically, most of the risks associated with the purchase of real property fell on the purchaser, usually under the rubric of caveat emptor ("buyer beware"). Sellers were almost completely protected by the doctrine of caveat emptor, and had virtually no affirmative duty to disclose defects in their property to prospective buyers. n1993 In the modern era, the doctrine of caveat emptor has significantly eroded as courts have found duties to disclose in several situations described in the following paragraphs. n1994

§ 96.20(a)(2) Negligent Misrepresentation.

In keeping with the recognition that sellers and purchasers are generally not on equal bargaining terms, courts have often focused on whether a misrepresented fact about the property was discoverable by the purchaser. Courts have generally used language to the effect that sellers have a duty not to falsely represent a condition known only to them and which could not be expected to be revealed by the purchaser's diligence. n1995 The misrepresented condition must be a material fact, which courts have defined as one which has an effect on the property's value. n1996 If the seller who has made repairs to such a condition while in possession of the property is best advised to disclose the existence of the condition and the fact of the repairs. n1997 No duty may arise to disclose a condition which is not considered dangerous. n1998 Also, the doctrine of caveat emptor may still protect the seller if the defective condition is open to observation or discoverable, the purchaser has an opportunity to examine the premises, and fraud does not taint the conduct of the seller. n1999

§ 96.20(a)(3) Fraudulent Concealment.

In order to defeat a defense of caveat emptor, a buyer will likely have to prove not only that the seller actively and knowingly concealed a defect, but also that the buyer could not have detected the defect with reasonable diligence. Frequently, the court will have to determine whether the buyer should be charged with constructive notice of the defect, in effect defeating the buyer's claim. n2000 Also, if there is a question as to whether the buyer had such notice, the general move towards recognizing a duty to disclose will generally preclude an award of summary judgment in favor of the seller. n2001

§ 96.20(a)(4) Latent Defects.

Whether the seller has "negligently misrepresented" the non-existence of a defect or "fraudulently concealed" such a defect may seem a matter of semantics. What is clear, however, is that where a defect is latent, and materially affects the value of the property in question, courts will generally find a duty to disclose such defects. n2002 Thus, sellers have been required to disclose latent defects such as a weak or cracked foundation, n2003 a leaky roof, n2004 and unstable soil conditions. n2005 It should be emphasized that defects known or knowable to a buyer upon reasonable inspection do not fall within the scope of seller's duty to disclose. n2006

§ 96.20(a)(5) Legal Impairments: Easements, Building Codes, and Ordinance Violations.

The doctrine of caveat emptor remains partially intact in questions involving the disclosure of such intangible legal impairments to the property as easements, non-compliance with city ordinances, and building code violations. In such cases, courts focus on the materiality of the non-disclosed fact. Thus, if the easement or violation materially affects the value of the property, the seller will probably have a duty to disclose. n2007 By contrast, if the non-disclosed fact is not material to the sale of the property, generally no duty to disclose arises. n2008 Even if the seller is under no duty to disclose certain facts, if the purchaser directly asks about such conditions, the seller must answer truthfully. n2009 A court may also consider whether information regarding a legal impairment to the property is accessible to the purchaser. n2010

§ 96.20(a)(6) Other Intangible Defects and Special Conditions.

Some states are also moving to requiring disclosure of other intangible defects, in addition to legal impairments discussed in the preceding paragraph. Some states have enacted statutes regarding the materiality of non-physical defects, sometimes referred to as stigmas, typically providing that such defects are not material and need not be disclosed by the seller. n2011 Although the fact that a property has some non-physical defect is statutorily immaterial, the seller still has a duty to disclose information if directly asked. n2012 Similarly, if the stigma has been created by the seller, the seller may have a duty to disclose it, even if the defect is possibly imaginary. n2013

§ 96.20(a)(7) Infestation.

Courts now almost uniformly hold termite infestation to be a material and dangerous condition which must be disclosed by the seller. n2014 Termite damage can be so costly, and so difficult to detect, that most lending institutions now require a termite inspection before lending money to prospective buyers. In certain situations, the seller may also have to disclose infestation by other insects, such as roaches. n2015

§ 96.20(a)(8) Environmental Hazards.

Real property may be threatened by hazardous substances which are difficult to detect and often highly expensive to remove. In response, some states have enacted legislation requiring sellers to disclose environmental hazards to buyers. n2016 Courts have also recognized this problem, holding that such environmental hazards are dangerous and material and must be disclosed, n2017 even to the point of holding the seller liable for the real estate agent's non-disclosure. n2018

§ 96.20(b) Summary of State Statutes Requiring Disclosures by Sellers.

This section summarizes state statutes that impose on sellers of real property special disclosure requirements. Unless otherwise indicated for any one state, these state statutory provisions uniformly require sellers to disclose any material facts or conditions within their knowledge, or that should have been within the knowledge of sellers or sellers' agent that adversely affect the property or structures that are subject of transaction. These statutes may deny a cause of action if the seller made a good faith effort to disclose or if information is not within the knowledge of seller. They impose on sellers no duty to inspect but require that the buyer have opportunity to inspect. The statutory provisions set forth below summarize special disclosure provisions--applicable to sellers or to real estate licensees--in addition to the standard laws just described.

Alabama:

Code of Alabama § 34-27-85

Licensee must disclose to client all information known by licensee that is material to transaction and not discoverable by client through reasonable investigation and observation, except for confidential information. Licensee has no affirmative duty to investigate and discover the information.

§ 34-27-86

Licensee liable only for not disclosing information licensee knew or should have known about.

Alaska:

Alaska Stat. §§ 34.070.010-.70.200

Transferor of interest in residential real property (single-family dwelling, or two single-family dwellings in one building) must deliver to transferee completed written disclosure statement (*see* § 34.70.050) that notifies transferee that transferee is responsible to determine (1) whether a convicted sex offender resides in the vicinity of the property that is the subject of the real estate transaction and (2) where the transferee can obtain information on the convicted sex offender.

§ 34.70.090

A person who negligently or fails to perform duty required by this chapter is liable to transferee for amount of actual damages. Person who wilfully violates this chapter or fails to perform duty is liable to transferee for up to three times actual damages suffered.

Arizona:

A.R.S. § 11-806.03

Seller of five or fewer parcels of land other than subdivided land in unincorporated area of county and any subsequent seller of such parcel shall furnish written affidavit to buyer which must disclose whether: there is legal access to property; physical access; legal/physical access at same time; roads are publicly or privately maintained or not maintained at all; property is in flood plain or has been flooded; water, sewer, electrical, natural gas, phone, cable services; septic tank exists or must be installed; property subject to percolation test; access for emergency vehicles;

§ 33-434.01

Owner of property subject to soil remediation must, before transferring ownership, give written notice of remediation to purchaser, if owner has actual knowledge that property is subject to soil remediation. Written notice not required where soil remediation attains standards for residential uses in accordance with rules adopted.

§ 49-701.02

Owner of property who has actual knowledge that property has been used for disposal of excavated soils which do not meet predetermined residential soil remediation levels or remediation standards for residential exposure must, before transferring ownership, give written notice of disposal of excavated soils that do not meet predetermined residential soil levels or standards.

California:

Civil Code § 1102.6

Disclosure forms are included in the statute. They include inquiries into appliances, garage, pool/spa heater, water heater, water supply, gas supply, exhaust fans, defects and malfunctions in structural components, encroachments, zoning, conditions/covenants and restrictions, lawsuits. Seller must disclose knowledge of fill on property, environmental hazards (including asbestos, formaldehyde, radon gas, lead-based paint, fuel or chemical storage tanks and contaminated soil or water on subject property).

§ 1102.6d

Agent of seller must complete reasonably competent and diligent visual inspection of accessible areas of home in conjunction with seller inquiries in forms found in § 1102.6.

§ 1102.13

No transfer invalidated solely because of failure to comply with any provision of this article. However, any person who willfully or negligently violates or fails to perform duty shall be liable for actual damages suffered by transferee.

§ 1102.16

Disclosure of existence of any window security bars or safety release mechanism must be made pursuant to § 1102.6.

§ 1102.17

Seller must disclose actual knowledge that property is affected by or zoned to allow industrial use.

§ 1103 Disclosure of natural hazards upon transfer of residential property

Disclosure statement (§ 1103.2), is not a warranty. It includes requirements for disclosure by transferor of special flood hazard areas, areas of potential flooding, high fire hazard severity zone, wildland areas that may contain substantial forest fire risks, earthquake fault zone, seismic hazard zone. *See also* Public Resources Code §§ 2621.9 and 2694.

§ 1710.2

No cause of action against owner or agent for failure to disclose to transferee the occurrence of occupant's death on real property or manner of death, where death has occurred mor than 3 years prior to date transferee offers to purchase, lease

or rent property, or that occupant of that property was afflicted with, or died from Human T-Lymphotropic Virus Type III/Lymphadenopathy-Associated Virus (both AIDS related diseases).

§ 2079

Residential real property subject to these provisions includes one to four dwelling units or manufactured home or mobile home classified as personal property and intended for use as a residence.

§ 2079.3

Scope of inspection does not include areas that are reasonably and normally inaccessible nor affirmative inspection of areas off site. No duty to inspect more than unit offered for sale, such as common areas to planned development. *Padgett v. Phariss, 83 Cal. Rptr. 2d 373 (1997).*

§ 2079.4

Buyer has duty to exercise reasonable care to protect buyer, including facts known to or within diligent attention and observation of buyer

Colorado:

C.R.S. § 12-61-805 and 806

Broker may not disclose without informed consent of buyer or tenant any facts or suspicions regarding circumstances which would psychologically impact or stigmatize any real property pursuant to section *See* CRS 38.35.5-101.

§ 12-61-807

Transaction broker must disclose to all prospective buyers or tenants any adverse material facts actually known by broker, including material facts of title, physical condition of property, defects in property and environmental hazards affecting property.

§ 38.35.5-101

No cause of action against real estate broker or salesperson for failure to disclose circumstance occurring on property which might psychologically impact or stigmatize such property. Circumstances include: that occupant of property was or is at any suspected to be infected or has been infected w/ HIV or diagnosed with AIDS or any other disease unlikely to be transmitted through occupancy; that property was site of homicide or other felony or suicide

§ 38.35.7-101

Seller obligated to disclose in every contract for purchase and sale of residential real property special taxing district taxes for general obligation indebtedness. Purchasers still obligated to investigate debt financing requirements of the authorized general obligation of such districts.

Connecticut:

Conn. Gen Stat. § 20.327b

Each person who offers residential property for sale or exchange or for lease with option to buy must provide residential

report. *See* form in this section. Among other things, report must include information concerning environmental matters such as lead, radon, subsurface sewage and disposal, and a statement that information concerning the residence of a convicted criminal may be available from law enforcement agencies or department of public safety.

§ 20.327d

Seller not required to secure inspections, tests or other methods to determine physical condition of property.

§ 20.327e

Seller representations construed only to extent of seller's actual knowledge.

§ 20-329cc

Psychologically impacted property is the effect of certain circumstances surrounding real estate which includes but is not limited to fact that occupant is or was any time suspected to be infected or has been infected with HIV or fact that property was at any time suspected to have been site of homicide or felony or suicide.

§ 20-329dd

Existence of any fact or circumstance which may have psychological effect on purchaser or lessee is not material fact that must be disclosed in real estate transaction. No cause of action arises against owner or agent for failure to disclose to transferee that transferred property was psychologically impacted.

DC:

D.C. Code § 45-955

Residential property disclosure statement must contain a list of actually known defects and information concerning the following: water and sewer systems, insulation, structural systems (roof, walls, floors, foundation, basement), plumbing, electrical, heating, and air conditioning systems, history of rodents or wood-boring insects, appliances, alarm system and intercom system, garage door opener and remote control and fixtures.

§ 45-961

Duty to comply with this chapter imposed on transferor and not on any real estate agent or broker of transferor. Real estate agent not liable for omission or error unless agent or broker knowingly acts in concert with transferor to commit fraud.

§ 47-2853.198

Psychological impact on real property is not a material fact that must be disclosed in real estate transaction, nor is its non-disclosure a basis for a cause of action against owner of real property, real estate broker, salesperson, property manager, lessee, or sublessee. Psychologically impacted property is property where an occupant at any time was infected or was suspected to have been infected with HIV; occupant at any time has been diagnosed or was infected or was suspected to have been infected with AIDS or any other disease that is unlikely to be transmitted through occupancy; property at any time has or was suspected to have been site of suicide, homicide, or other felony.

Delaware:

6 Del. C. § 2572

Seller transferring real property shall disclose in writing to buyer, agent, and subagent all material defects of that property that are known at time property is offered for sale or that are known prior to time of final settlement.

§ 2574

Seller disclosure form is not warranty of any kind by seller or by any agents or subagents representing seller or buyer in the transfer and is not a substitute for any inspections or warranties that seller or buyer may wish to obtain.

24 Del. C. § 2930

Psychological impacts mean that property was or was at any time suspected to have been site of homicide, suicide, or other felony except arson; that occupant is or was any any time suspected to be infected or has been infected with HIV or diagnosed with AIDS or any other disease unlikely to be transmitted through occupancy of dwelling place. The fact that or suspicion that property might be or is psychologically impacted is not material fact that must be disclosed in real property transaction. If potential transferee makes specific written request about psychological impacts, owner or agent shall answer truthfully to best of knowledge. No duty to inquire about such impacts

Florida:

Fla. Stat. § 475.01

Real property or real estate is any interest or estate in land and any interest in business enterprises or opportunities, including leasehold, subleasehold, mineral right; real property or real estate does not include cemetery lot or right of burial in any cemetery nor renting of mobile home lot or recreation vehicle lot in mobile home park or travel park.

§ 475.278

Transaction broker has duty to disclose all known facts that materially affect property and are not readily observable to buyer. Forms are included in the statutory provisions.

§ 475.422 Disclosure

Licensee must, upon request of any other party to real state sales transaction, provide copies of termite or roof inspection reports performed on property within the year preceding effective date of contract for sale and purchase.

No provision regarding stigmatized property

Georgia:

O.C.G.A. § 10-6A-5

Broker engaged by seller must disclose the following to all parties with whom broker is working: all adverse material facts pertaining to physical condition of property located on such property, material defects, environmental contamination, other facts that could not be discovered through reasonably diligent inspection by buyer. Broker must also disclose material facts as to adverse physical conditions in immediate neighborhood (within one mile of the property) which are actually known to broker and could not be discovered by buyer upon diligent inspection of neighborhood or through review of available regulations, documents, records, maps, and statistics.

No duty on part of broker to discover or seek to discover either adverse material facts or existing adverse conditions in immediate neighborhood.. Broker not liable to buyer for providing false information to buyer if broker did not have actual knowledge and disclosed source of information. This section does not limit buyer obligation to inspect and become familiar with potentially adverse conditions on property and in neighborhood.

No provision regarding stigmatized property

Hawaii:

HRS § 508D-1

Residential real property: 1-4 dwelling units or residential condominium or cooperative apartment, primary use of which is occupancy as residence.

§ 508D-8

The fact that an occupant of residential real property was afflicted with AIDS or AIDS related complex or tested HIV positive or that the property was the site of an act or occurrence that had no effect on the physical structure or the physical environment of the residential real property or improvements are not material facts for purpose of disclosure statement.

§ 508D-9

Seller or seller's agent must prepare disclosure statement in good faith with due care. May include information based on seller's personal knowledge or on facts provided by government or third-party consultants. Neither seler nor seller's agent obligated to engage services of person in investigation, research or preparation of disclosure statement.

§ 508D-11

Disclosure statement must include notice to buyer that buyer may seek professional advice and inspection of property, notice to buyer that information in disclosure statement is representation of seller and not of seller's agent and notice of buyer's rescission rights.

§ 508D-15

Notification required when property lies in special flood hazard area, is within boundaries of noise exposure area, is within boundaries of Air Installation Compatibility Use Zone of any Air Force, Army, Navy, or Marine Corps airport as officially designated by military authorities; or within anticipated inundation areas designated on dept of defense's civil defense tsunami inundation maps. When it is questionable whether residential real property lies within any of the designated areas because of ambiguous boundary lines, ambiguity is construed in favor of seller,provided that a od faith effort was made to determine applicability of of these criteria to the subject real property

§ 508D-16

Seller liable to buyer for amount of actual damages, if any, suffered as result of seller's negligent failure to provide disclosure statement required by this chapter.

Idaho:

Idaho Code § 55-2508

Statutory provisions include seller disclosure form. Seller must specify problems with: basement water, foundation, roof condition and age, well (type), septic system (type), plumbing, drainage, electrical, heating. Seller must describe conditions that affect ability to clear title. Seller must disclose knowledge of hazardous materials or pest infestations on property, any substantial additions or alterations made without building permit, other legal or physical problems not listed.

§ 55-2801

Psychologically impacted property defined as effect of certain circumstances surrounding real property which include, but are not limited to, fact or suspicion that property might be or is impacted as result of the following: that occupant or prior occupant is or was at any time suspected of being infected or has been infected with disease determined unlikely to transmit through occupancy; that property was at any time suspected of being site of suicide, homicide, or commission of felony which had no effect on physical condition of property or its environment or structure; that registered or suspected sex offender occupied or resides near property.

§ 55-2802

No cause of action against owner or representative of owner for failure to disclose to transferee or transferee's representative that real property was psychologically impacted.

§ 55-2803

In event that purchaser advises owner's representative in writing that knowledge of whether property is psychologically impacted is an important factor in purchaser's decision to purchase property, owner's representative shall make inquiry of owner and, with consent of owner and subject to and consistent with applicable laws of privacy, shall report any findings to purchaser. If owner refuses disclosure, owner's representative shall advise purchaser or purchaser's representative that information will not be disclosed.

Illinois:

225 ILCS § 454/15-15

A licensee is person who holds valid unexpired license as real estate broker, salesperson or leasing agent. Duty of licensee representing clients is to disclose material facts concerning transaction of which licensee has actual knowledge, unless information is confidential. Material facts do not include physical conditions that do not have substantial adverse effect on value of real estate, and do not include fact situations or occurrences when located on or related to real estate not subject of transaction.

225 ILCS § 454/15-20

No cause of action against licensee for failure to disclose that former occupant of subject property was afflicted with HIV or any other medical condition, that property was site of act or occurrence that had no effect on its physical condition or environment or structures, fact situations on property not subject of transaction, or physical conditions located on property that is not subject of transaction that do not have substantial adverse effect on value of real estate that is subject of transaction.

765 ILCS § 77/5

Residential real property is real property improved with 1-4 units, units in cooperative or condominium units.

765 ILCS § 77/25

Seller must disclose material defects of which seller has knowledge. Seller not liable for errors or omissions based on reasonable belief that matter not disclosed had been corrected or if based on information provided by third party and seller had no knowledge of error or omission. Seller not obligated to make any specific investigation or inquiry in an effort to complete disclosure statement.

765 ILCS § 77/35

Statutory provisions include disclosure report form. Disclosure requirements listed include whether seller is aware of the following: property is located in flood plain or seller currently has flood hazard insurance; material defects in well or well equipment; unsafe conditions in drinking water; defects in fireplace or wood-burning stove; unsafe concentration of radon; unsafe conditions relating to asbestos, lead paint, lead water pipes, lead plumbing pipes or lead in soil on premises; mine subsidence, underground pits, settlement, sliding, upheaval or other earth stability defects; structural defects caused by termites or wood-boring insects; underground fuel storage tank; and other less significant items.

765 ILCS § 77/55

If seller fails or refuses to provide disclosure document prior to conveyance, buyer has right to terminate. A person who knowingly violates or fails to perform duty under this act or who discloses any false information is liable for actual damages and court costs, possibly attorney fees.

Indiana:

Ind. Code Ann. §§ 24-4.6-2-7

Specific disclosure form included in statutory provisions.

Required disclosures relate to foundation, mechanical systems, roof, structure, water and sewer systems, other areas. Seller may give notice to buyer that buyer may want to obtain professional advice or inspection of property and that representations in this form are not of the agent and not intended to be part of contract.

Owner must disclose that airport is located within a certain geographical distance of property as determined by Indiana real estate commission. Commission may consider difference between airport that serves commercial airlines and one that does not in determining distance to be disclosed.

§ 24-4.6-2-9

Disclosure form not a substitute for investigation or inspection.

§ 24-4.6-2-11

Owner not liable for error, omission not within actual knowledge of owner or based on information provided by third party and owner reasonably believed the information to be correct and owner not negligent in obtaining information from third party.

§ 24-4.6-2.1-2

Psychologically affected includes real estate or dwelling for sale, rent or lease where occupant was afflicted with or died from disease related to HIV, person died on the property, or property was site of felony under IC 35, criminal gang (IC § 35-49-9-1) activity, or discharge of firearm involving law enforcement officer while engaged in officer duties, or illegal manufacture or distribution of controlled substance.

§ 24-4.6-2.1-4

Owner or agent not required to disclose to transferee any knowledge of a psychologically affected property.

§ 24-4.6-2.1-5

Owner or agent not liable for refusal to disclose to transferee that dwelling or real estate is psychologically affected property or details concerning the affected nature of the dwelling or estate. However, owner or agent may not intentionally misrepresent fact concerning psychologically affected property in response to direct inquiry from transferee.

§ 25-34.1-10-11

Broker owes no duty to conduct independent inspection of the physical condition of the property. No cause of action against broker for disclosing information in compliance with this section.

Iowa:

No disclosure provision

No stigmatized property provision

Kansas:

K.S.A. § 58-30,106

Licensee is any person licensed under Kansas real estate brokers' and salespersons' license to act as a broker or salesperson.

Seller's or landlord's agent has statutory duty to disclose to client all adverse material facts about which agent actually knows, including environmental hazards affecting the property, physical condition of property, material defects in property, material defects in title or material limitations on client's ability to perform under terms of contract. Agent also has duty to advise client to seek expert advice as to material matters about which agent knows but whose specifics are beyond agent's expertise. If the licensee does give such advice, no cause of action shall arise against licensee.

Seller's or landlord's agent owes no duty to independently inspect property or independently verify accuracy or completeness of any statement made by client or any qualified third party.

Seller's or landlord's agent not liable for punitive damages for licensee's failure to perform any duty in this section, unless licensee is shown to have acted with willful or wanton conduct, fraud or malice.

§ 58-30,113

Transaction broker is not agent for either party. Transaction broker has duty to disclose to prospective seller or landlord all material facts known, including environmental hazards affecting the property, physical condition of property,

material defects in property, material defects in title or material limitations on buyer's ability to perform under terms of contract.

No stigmatized property provision

Kentucky:

KRS § 207.250

The fact that occupant of real property is or has been infected with HIV or diagnosed with AIDS is not a material fact that shall be disclosed in real estate transaction. No cause of action against owner or owner's agency or agent of transferee for failure to disclose to transferee that occupant was infected with HIV or diagnosed with AIDS.

§ 324.360

Seller disclosure form should include basement condition and whether it leaks, roof condition and whether it leaks, source and condition of water supply, source and condition of sewage service, working condition of component systems, other matters the commission deems appropriate.

Louisiana:

La. R.S. § 37:1468

Fact or suspicion that property might be or is psychologically impacted is not a material fact or material defect that must be disclosed. Psychological impact is such impact that is the result of facts or suspicions, including but not limited to: that occupant is or was at any time suspected to be or has been infected with HIV or diagnosed with AIDS, or any other disease which is highly unlikely to be transmitted through occupancy; that property was or was suspected at any time to have been site of homicide, or other felony, or suicide. No cause of action against owner or owner's agent for failure to disclose to transferee that transferred property was psychologically impacted.

Maine:

32 M.R.S. § 13273

Licensee has duty to disclose to seller any material facts of which licensee has actual knowledge or should have knowledge, and to advise seller to seek professional advice on material matters that are beyond agent's expertise.

Brokerage agency engaged by seller has duty to disclose all material defects pertaining to physical condition of property which the agency knows or should have known of.

Nothing in this subchapter precludes buyer's obligation to inspect the physical condition of the property.

33 § 171

Known defect is a condition known by seller that has significant adverse effect on value of property, significantly impairs the health or safety of future occupants of the property or, if not repaired, removed or replaced, significantly shortens the expected normal life of the premises.

§ 173

Required disclosures by seller to buyer: water supply system (type, location, malfunctions, most recent test, any problems), insulation (type and location), waste disposal system (type, size, location, malfunction, date of installment, date of most recent servicing, name of contractor who does services system, septic systems in shoreland zones), hazardous materials (includes asbestos, lead-based paint for pre-1978 homes in accordance with federal regulations, radon, underground oil storage tanks), known defects.

§ 177

Seller not liable for errors or inaccuracies if without actual knowledge or without negligence.

No stigmatized property provision

Maryland:

Business Occupations and Professions § 17-322.1

It is not a material fact relating to property offered for sale or lease that: owner or occupant is, was, or is suspected to be infected with HIV or diagnosed with AIDS; a homicide, suicide, accidental death, natural death, or felony occurred on property. It is not ground for disciplinary action against licensee under this subtitle that licensee did not disclose to prospective purchase or lessee a fact contained in this subsection.

Real Estate Code § 10-702

Residential property disclosure statement must include list of defects or information about which vendor has actual knowledge in relation to the following: water and sewer systems, insulation, structural systems, plumbing, electrical, heating, AC systems, land use matters, hazardous or regulated materials (asbestos, lead paint, radon, underground storage tanks, licensed landfills).

Massachusetts:

Mass. Ann. Laws Ch. 93 § 114

Fact or suspicion that real property may be or is psychologically impacted is not a material fact required to be disclosed in real estate transaction. Psychologically impacted means an impact being the result of facts or suspicions including, but not limited to, the following: that occupant of real property is now or has been suspected to be infected with HIV or with AIDS or any other disease which is highly unlikely to be transmitted through occupancy; that real property was site of felony, suicide or homicide; that property has been site of alleged parapsychological or supernatural phenomenon. No cause of action against seller or lessor of real property or real estate broker or salesman, by statute or at common law, for failure to disclose to a buyer or tenant that real property was or is psychologically impacted. Seller, broker, salesperson, or lessor not authorized to make misrepresentations of fact or false statement.

***See also* Ch. 93A § 2,** § **9, § 11**

Michigan:

MSA § 26.1286(57)

Seller disclosures form includes appliances, structure, flooding, damage from natural causes, basement/crawl space, insulation, roof, well, septic tanks/drain fields, heating system, plumbing system, electrical system, history of infestation, environmental problems (ie, asbestos, radon, gas, formaldehyde, lead-based paint, fuel or chemical storage

tanks, contaminated soil), mineral rights, farm or farm operation in the vicinity, proximity to special land uses (landfill, airport, shooting range), outstanding utility assessments or fees (including natural gas main extension surcharge), outstanding municipal assessments or fees, pending litigation that could affect property or seller's right to convey the property.

Buyer is advised to seek professional advice and inspections.

See also corresponding statutes in MCL § 565.951-959

Minnesota:

Minn. Stat. § 103I.235

Before signing agreement to sell or transfer real property, seller must disclose to buyer information about status and location of all know wells on the property by delivering to buyer either a statement that seller does not know of any wells on property or disclosure statement indicating legal description and county and map drawn from available information showing location of each well to extent practicable. Seller must indicate for each well whether well is in use, not in use or sealed.

§ 116.48, subd. 6

Before transferring ownership of property that owner knows contains underground or aboveground storage tank or contained underground or aboveground storage tank that had release for which no corrective action was taken, owner shall record with county recorder or registrar of titles of the county in which the property is located an affidavit containing: legal description of property where tank is located; description of tank, location of tank, and any known release from tank of regulated substance; description of any restrictions currently in force on the use of property resulting from any release and name of owner.

No stigmatized property provision

Mississippi:

See Miss. Code. Ann. § 89-1-501-523.

No stigmatized property provision

Missouri:

VAMS § 339.710

Adverse material fact may include environmental hazards, physical condition of property, material defects in property, material defects in title to property, material limitation of party's ability to perform under terms of contract.

§ 442.600

The fact that a parcel of real property or any building or structure may be psychologically impacted or may be in close proximity to a psychologically impacted real property is not a material or substantial fact that is to required to be disclosed in a sale, exchange or other transfer. Psychologically impacted property is real property in which occupant is or was at any time infected with HIV or diagnosed with AIDS or with any other disease which is unlikely to be transmitted through occupancy of a dwelling place; real property which was the site of a homicide or other felony or of

a suicide. No cause of action against agent or broker for failure to disclose to buyer or other transferee that transferred real property was psychologically impacted.

Montana:

MCA § 37-51-102

Adverse material fact is fact that should be recognized by a broker or salesperson as being of enough significance as to affect a person's decision to enter into contract to buy or sell real property. The fact that an occupant of the property has or has had a communicable disease or that the property was the site of a suicide or felony are not adverse material facts.

§ 37-51-105

The responsibility of a broker or salesperson with respect to sexual or violent offender registration information is limited to disclosure of the fact that the information may be maintained and by whom and the actual knowledge, if any, that broker or salesperson has of sexual or violent offender registration information that pertains to the property in question.

§ 37-51-313

Duties of broker or salesperson vary depending on relationship, include duty to disclose all relevant and material information that concerns the real state transaction and that is known to seller's agent not known or discoverable by seller, unless information is subject to confidentiality arising from prior or existing agency relationship on part of seller's agent.

§ 75-3-606

A disclosure statement must be provided by seller or seller's agent to buyer which includes a radon disclosure statement on real estate documents, disclosure of prior radon testing; Statute provides immunity from liability.

Nebraska:

RSN§ 76-2,120

Disclosure statement includes: conditions of appliances, electrical system, heating and cooling system, water system, sewer system, all improvements on land, defects, hazardous conditions, title conditions, utility connections as public or private.

§ 76-2416

Seller's agent is under duty to disclose all adverse material facts actually known by licensee pertaining to environmental hazards affecting property, physical condition of property, material defects in property, material defects in title, material limitations on client's ability to perform under terms of contract. No duty to conduct independent inspection of property for benefit of customer and no duty to independently verify accuracy or completeness of any statements made by client or independent inspector.

2000 Op. Atty. Gen. No. 24

Real estate licensee does not have obligation to independently verify accuracy of seller property condition disclosure statement prepared by client. Licensee should be disciplined based only on licensee's actual knowledge of an error,

inaccuracy, or omission in statement.

New Hampshire:

RSA § 477:4-c

Seller must disclose information relative to type of water supply system, location, malfunctions, date of installation, date of most recent water test, and whether or not seller has had problems such as unsatisfactory water test or water test with notations. Seller must also disclose information relative to sewage disposal system, including size of tank, type of system, location, malfunctions, age of system, date most recently serviced, and name of contractor who services system

§ 477:4-e

Owner or agent of owner not required to disclose information to buyer that property was site of homicide, other felony, suicide, unless buyer requests the information and owner or agent has knowledge.

Nevada:

NRS § 40.770

The fact that property is or has been site of a homicide, suicide or death by any other cause, except death that results from a condition of the property, or the site of any crime punishable as a felony; or occupied by a person exposed to HIV or suffering from AIDS or any disease that is not transmitted through occupancy is not material to the transaction. The fact that a sex offender resides or is expected to reside in the community is not material to the transaction, and the seller or any agent of the seller does not have a duty to disclose such a fact to a buyer or any agent of a buyer. Seller or agent is not liable to buyer in any action at law or in equity because of failure to disclose any fact that is not material to the transaction.

§ 113.100

Defect is a condition that materially affects the value or use of residential property in an adverse manner.

§ 113.120

Disclosure form provides for evaluation of condition of any electrical, heating, cooling, plumbing, and sewer systems on the property and of the condition of any other aspects of the property which affect its use or value, and allows the seller of the property to indicate whether or not each of those systems and other aspects of the property has a defect of which seller is aware.

§ 113.140

Seller is not required to disclose defect in property of which seller is not aware. A completed disclosure form is not an express or implied warranty regarding any condition of the property.

§ 645.252

Licensee acting as agent must disclose to each party any material and relevant facts, data, information which licensee knows or which lecensee should know relate to property which is subject of transaction.

New Jersey:

NJSA § 46:3C-3

Offsite conditions are conditions which may materially affect value of property being sold and are limited to following: latest Dept of Environmental Protection listing of sites included on National Priorities List, latest sites known to and confirmed by DEP and included on New Jersey master list of known hazardous discharge sites, overhead electric utility transmission lines conducting 240,000+ volts, electrical transformer substations, underground gas transmission lines, sewer pump stations, sanitary landfill facilities, public wastewater treatment facilities, airport safety zones.

§ 46:3C-8

Sellers of newly constructed residential real estate required to notify purchasers of availability of lists disclosing existence and location of off-site conditions which may affect value of residential real property being sold.

No stigmatized property provision

New Mexico:

N.M. Stat. Ann. § 47-13-2

A seller or landlord is not liable for failing to disclose and has no duty to disclose the fact or suspicion that the real property is or has been the site of a natural death, the site of a homicide, suicide, assault, sexual assault or any other felony, or owned or occupied by a person who was exposed to, infected with or suspected to be infected with HIV or diagnosed to be suffering from AIDS or any other disease not transmitted through occupancy.

New York:

Real Property Law § 443

Seller or seller's agent has duty to disclose all facts known to seller or agent materially affecting the value or desirability of property except as otherwise provided by law.

§ 443-a

It is not a material defect or fact relating to property offered for sale or lease that an owner or occupant is or was at any time suspected to be infected with HIV or diagnosed with AIDS or any other disease which has been determined by medical evidence to be highly unlikely to be transmitted through occupancy of a dwelling place; or the property is or is suspected to have been site of a homicide, suicide or other death by accidental or natural causes, or any crime punishable as a felony. Failure to disclose any of these facts is not ground for disciplinary action, but buyer may submit request for such information. Seller may choose whether or not to respond.

North Carolina:

§ 47E-4

Disclosure form must include characteristics and conditions of the following: water supply and sanitary sewage disposal system; roof, chimneys, floors, foundation, basement and other structural components and any modifications of these structural components; plumbing, electrical, heating, cooling, and other mechanical systems; present infestation by wood-destroying insects or organisms or past infestation damage that has not been repaired; zoning laws, conditions/coventants/restrictions, building codes, other land use restrictions affecting real property; encroachments;

presence of lead-based paint, asbestos, radon gas, methane gas, underground storage tank, hazardous or toxic materials (whether buried or covered), and other environmental contamination.

No stigmatized property provision

North Dakota:

N.D. Cent. Code § 9-03-08

See annotations under "Failure to Disclose Latent Defect"

No stigmatized property provision

Ohio:

ORC § 5302.30

Transferor has duty to disclose all material matters relating to physical condition of property to be transferred, including source of water supply, nature of sewer system, condition of structure (roof, foundation, walls, floors), presence of hazardous materials or substances (lead-based paint, asbestos, urea-formaldehyde foam insulation, radon gas), any material defects in property that are within actual knowledge of transferor. (*See also* § 4735.67)

See Note 24 in annotations for list of stigmatizing events.

Oklahoma:

59 O.S.A. § 858-513

The fact or suspicion that real estate might be or is psychologically impacted is not a material fact that must be disclosed. Psychological impacts include, but are not limited to: that occupant of real property is or was at any time suspected to be infected or has been infected with HIV or diagnosed with AIDS or other disease which is not transmitted through occupancy; that real estate was or was at any time suspected to have been site of a suicide, homicide, or other felony. No cause of action lies against owner of real estate or any licensee assisting owner for failure to disclose to purchaser or lessee or licensee assisting the purchaser or lessee that such real estate was psychologically impacted. In the event that purchaser or lessee who is in process of making a bona fide offer advises licensee assisting owner in writing that knowledge of such factor is important to person's decision to purchase or lease, licensee shall make inquiry of owner and report any findings with consent of owner and subject to and consistent with applicable laws of privacy. Also, if owner refuses to disclose, licensee assisting the owner shall so advise the purchaser or lessee.

60 OSA § 832

Defect is defined as condition, malfunction or problem that would have materially adverse effect on monetary value of property or that would impair health or safety of future occupants of property. Disclosure is defined as written declaration required based on actual knowledge of seller regarding certain physical conditions of property. It is not a warranty, implied or express, of any kind.

§ 833

Disclosure statement must include information within seller's knowledge of water and sewer systems (source of household water, treatment system, sprinkler system, occurrence of water in heat and air conditioning ducts, water

seepage or leakage, drainage or grading problems and flood zone status), structural systems (roof, walls, floors, foundation, basement), plumbing, electrical, heating, air conditioning systems, infestation or damage of wood-destroying organisms, major fire or tornado damage, land use matters, existence of hazardous or regulated materials and other conditions having environmental impact, any other defects known to seller, other matters the Oklahoma real estate commission deems appropriate

§ 835

Seller's liabilityi is limited to bad faith non-disclosure or non-disclosure of items within seller's knowledge.

Oregon:

ORS § 105.465

Seller's property disclosure and disclaimer statements form includes: inquiries into seller's knowledge of boundary disputes, easements or licenses, surveys and notices that would affect property; conditions, covenants and restrictions; water (household water, source, easements, treatment, irrigation, outdoor sprinkler system); sewage; insulation; structures; fixtures; common interests; environment (soil; water drainage; fill; damage from earthquake, wind, flood, fire, landslide; flood plain zone); hazardous substances, such as asbestos, formaldehyde, radon, lead-based paint; fuel or chemical storage tanks; contaminated soil or water; storage tanks, underground storage tanks); property used as illegal drug manufacturing site, other conditions or defects.

§ 537.330

Seller of real estate that includes water right shall upon accepting offer inform purchaser whether any permit, transfer approval order or certificate evidencing water right is available and that seller will deliver any permit, transfer approval order or certificate to purchaser at closing if it is available.

No stigmatized property provision

Pennsylvania:

63 PS § 455.607

Broker must disclose to prospective buyer a statement of zoning classification of property, except in cases where property is zoned solely or primarily to permit single-family dwelling.

68 § PS 1024

Seller of condo is required to give disclosures only with respect to the unit itself and not any common areas.

§ 1025

Disclosure form: seller must disclose to buyer all known material defects that are not readily observable, but this does not substitute for any inspections buyer may wish to obtain. Seller must disclose information regarding seller's expertise, occupancy, roof, basement and crawl space, termites or wood-destroying insects, dry rot, pests, structural items, additions and remodeling, water and sewage, plumbing system, heating and air conditioning, electrical system, other equipment and appliances included in sale, land (soil, fill, subsidence or other stability problems, mining, flooding, boundary disputes, hazardous substances, underground tanks, asbestos, PCBs, radon, lead paint, urea-formaldehyde foam insulation), miscellaneous (threatened legal action affecting property, violations of

state/federal/local laws or regulations relating to the property, unpaid dues to homeowner association, building/safety/fire ordinance violations, debts against property, defects in title, other material defects in property or title).

No stigmatized property provision

Rhode Island:

RI Gen. Laws § 5-20.8-2

Seller disclosure form must include information on length of seller occupancy, basement, roof, fireplaces, chimney, woodburning stove, structural conditions, insulation, termites or other pests, radon, electrical service, heating system, air conditioning, plumbing, sewage system, water system, domestic hot water, property tax, easements, deed, zoning, restrictions, building permits, minimum housing, flood plain, wetlands, multi-family or other rental property, pools and equipment, lead paint, fire, hazardous waste (including asbestos), miscellaneous.

§ 5-20.8-6

The fact or suspicion that property may be or is psychologically impacted is not a material fact requiring disclosure. Psychologically impacted property includes, but is not limited to, impacts that are a result of facts or suspicions that (1) an occupant of the property is now or has been suspected to be infected or is infected or has been infected with HIV or diagnosed with AIDS or any other disease determined to be highly unlikely to be transmitted through occupying the dwelling place; (2) the real property was or has been at any time suspected of being the site of a homicide, felony or suicide. No cause of action against seller for not disclosing psychological impacts but seller is also not authorized to make any false statements.

South Carolina:

§ 40-57-180

No cause of action against owner or agent or any party to transaction for failure to disclose in a transaction that: the subject real estate is or was occupied by person infected with virus or other disease unlikely to be transmitted through occupancy of dwelling either presently or previously occupied by the infected person; or death of occupant of property has occurred or the manner of death. Nothing precludes action against owner or agent who makes intentional misrepresentations in response to direct inquiry from buyer or prospective buyer with regard to psychological impacts or stigmas associated with the real estate.

South Dakota:

S.D. Codified Laws Ann. § 43-4-44

Disclosure statement form includes inquiries into:

Lot or title information: date home purchased/built, lines, easements, boundaries, encroachments, covenants/conditions/restrictions, pending litigation/foreclosure, zoning, building codes, currently occupied, leased, rent, fees to homeowner association (or equivalent), standing water more than 48 hours after rain, wetlands, common features with adjoining landowners.

Structural information: water penetration problems, water damage related repairs, drain tile, interior cracked walls or floors or driveways, roof leakage, type of roof covering, roof repairs, fire retardant treated plywood, roof inspection,

insulation, termite or wood-boring infestation/damage, property treated for wood boring infestation, work in last 5 years on plumbing, building electrical or any other permit, work approved by inspector, damage to property structures or improvements from natural causes or fire/smoke, sewer blockage/backup past or present.

Systems/utilities information: all features of electrical systems, heating and cooling systems, water systems.

Hazardous conditions: methane gas, radon, in house or well, radioactive material, landfill mineshaft, expansive soil, toxic materials, ureaformaldehyde foam insulation, asbestos, buried fuel/ chemical storage tank.

Miscellaneous information: public or private street location at end of driveway, flue cleaning, improvements to water system, broken window panes or seals, attachments that will not be left, other problems.

Psychological information must be disclosed. Seller must answer whether the following occurred in prior 12 months: human death by homicide, other felony committed against property or person on property.

Tennessee:

Tenn. Code Ann. § 66-5-110 and § 66-5-207

No cause of action against transferor for failing to disclose the fact or suspicion that an occupant has been or was infected with HIV or diagnosed with AIDS or other disease that is highly unlikely to be transmitted through occupancy of the dwelling place, or that the real estate was at any time suspected to have been the site of a suicide, homicide or other felony, or an act or occurrence which had no effect on physical structure of property or its physical environment or improvements.

§ 66-5-210

Disclosure form must:

Indicate whether property includes appliances listed, rain gutters, window screens, fireplaces, pumps, irrigation systems, garage door openers, intercom, antenna/satellite, spa, sauna.

Respond to inquiries into type of garage, and type of water heater, water supply, waste disposal, gas supply, roof type and age, other items.

Disclose any defects in walls, ceilings, floors, windows, doors, insulation, plumbing, sewer/septic tank, electrical system, roof, basement, foundation, sidewalks, central heating, heat pump, air conditioning.

Must disclose if seller is aware of environmental hazards (including asbestos, radon, lead-based paint, fuel or chemical storage tanks, contaminated soil or water); must disclose seller's awareness of features shared in common with adjoining landowners, changes in roads, drainage, utilities, changes in recent survey, questions about survey itself, structural modifications, landfill, settling from slippage or sliding or other soil problems, flooding/drainage, flood insurance, damage from fire, natural causes, zoning violations, neighborhood noise problems, deed restriction/obligation in subdivision, homeowner association authority, lawsuits, leased equipment; must disclose if exterior wall covering is covered with exterior insulation and finish systems (synthetic stucco) and its most recent inspection.

Texas:

Tex. Prop. Code § 5.008

Seller disclosure:

Seller must disclose known defects in all appliances, air conditioning and heating systems, plumbing, pools/patios/decks, windows, raingutters, sprinkling systems, fireplaces, carport, roof, water supply, walls, ceilings, foundation, driveways, basement, sidewalks, lighting fixtures, septics, other structural components. Seller must disclose knowledge of present and previous active termites or other wood-destroying insects and any damage caused, previous structural or roof repair, flooding, improper drainage, floodplain, flood insurance coverage, landfill, soil, fault lines, hazardous or toxic waste, asbestos components, urea formaldehyde, radon gas, lead based paint, previous fires, unplatted easements, subsurface structure or pits. Seller must disclose knowledge of any item or system in need of repair, additions/modifications, fees, common areas, lawsuits affecting the property, any condition that materially affects health or safety of an individual.

Seller has no duty to disclose information related to whether death by natural causes, suicide, or accident unrelated to condition of property occurred on property or whether previous occupant had, may have had, has, or may have AIDS, HIV related illnesses or HIV infection.

§ 5.010

Seller's disclosure of location of conditions under surface of unimproved real property: seller must provide notice in writing of transportation pipeline, including pipeline to transport natural gas, natural gas liquids, synthetic gas, liquefied petroleum gas, petroleum or a petroleum product, or a hazardous substance.

§ 5.011

Seller's disclosure regarding potential annexation: a person who sells an interest in real estate must give purchaser written notice that if property is outside limits of a municipality and may now or later be included in extraterritorial jurisdiction of municipality or may now or later be subject to annexation by municipality. (Form for such notice included.)

§ 5.012

Notice of obligations related to membership in property owners' association form.

Utah:

U.C.A. § 57-1-1

Stigmatized property is the site or suspected site of homicide, felony, suicide or dwelling place of person infected or suspected of being infected with HIV or any other infectious disease that cannot be transferred by occupancy of a dwelling place.

§ 57-1-37

Failure of owner of real property to disclose that property is stigmatized is not material fact that must be disclosed in transaction.

Vermont:

No stigmatized property provision

Virginia:

Va. Code Ann. § 55-519

Transferor of property must furnish to the purchaser either a disclaimer statement stating that owner makes no representations or warranties as to condition of real property or any improvement and that purchaser will be receiving real property "as is," with all defects which may exist except as otherwise provided in real estate purchase contract OR residential property disclosure statement disclosing physical condition of property. Form may include defects of which owner has knowledge regarding water and sewer systems, source of household water, water treatment system, sprinkler system, insulation, structural system, roof, walls, floors, foundation, basement, plumbing, electrical, heating, air conditioning systems, wood-destroying insect infestation, land use matters, hazardous or regulated materials (asbestos, lead-based paint, radon, underground storage tanks), and other material defects. Owner is not required to undertake independent investigation or inspection of property in order to make required disclosures.

§ 55-524

No cause of action against owner or real estate licensee for failure to disclose that occupant of subject real property, whether or not such real property is subject to this chapter, was afflicted with HIV or that real property was site of any act or occurrence which had no effect on physical structure of real property, its physical environment, or the improvements located thereon; or a homicide, felony, or suicide.

Washington:

Rev. Code Wash. § 64.06.020

Disclosure form includes knowledge of title issues (boundaries, easements, encroachments, joint maintenance agreements, survey, assessments against property, and conditions, covenants and restrictions), water (household water source information, irrigation, outdoor sprinkler system), sewer/septic system, structural (roof, age of house, settling, slippage, defects, pest or dry rot inspection, wood-destroying organisms), systems and fixtures (electrical, plumbing, hot water tank, garbage disposal, appliances, sump pump, heating and cooling, security), common interest (home owners' association assessments), general (settling, soil, drainage problems, fill materials, material damage from fire or natural causes, flood plain, environmental hazards such as asbestos, formaldehyde, radon, lead-based paint, fuel or chemical storage tanks, contaminated soil or water, property ever used as site for drug manufacturing.

No stigmatized property provision

West Virginia:

No stigmatized property provision

Wisconsin:

Wis. Stat. Ann. § 452.23

Broker or salesperson not required to disclose that property was site of specific act or occurrence, if act or occurrence had no effect on physical condition of property or structures on property.

Wis. Stat. Ann. § 709.03

Disclosure form requires that owner/seller must have notice or knowledge of any defects that would have significant

adverse effect on value of property and would impair health or safety of future occupants of property and limit expected normal life of premises. Seller required to disclose information about roof, electrical system, plumbing (water heater, pool, softener), heating and AC, well and water, septic and sanitary disposal system, under or above ground storage tanks, petroleum tank on property, basement and foundation, floodplain or wetland or shoreland zoning area, structure, mechanical equipment, boundaries, environmental hazards (radon, radium in water supply, lead in paint, lead in soil, lead in water supplies or plumbing, other potentially hazardous or toxic materials), asbestos, unsafe conditions relating to storage of hazardous or toxic substances on neighboring lands, termite infestations, woodburning stove or fireplace, remodeling affecting structure, tax increases, assessments, construction of public project that may affect property's value, other defects, property designated as historic building or property is in historic district.

Wyoming:

No stigmatized property provision

§ 96.20(c) Federal Disclosure Requirements Concerning Lead-Based Paint Hazards.

Congress enacted the Residential Lead-Based Paint Reduction Act, which became effective October 28, 1992. n2019 The Act required the Secretary of Housing and Urban Development and the Administrator of the Environmental Protection Agency to promulgate regulations requiring sellers or lessors of housing constructed before 1978 to disclose to the purchaser or lessee "the presence of any known lead-based paint, or any known lead-based paint hazards, in such housing and provide to the purchaser or lessee any lead hazard evaluation report available to the seller or lessor ... ." n2020 Regulations implementing these mandates for pre-1978 housing generally went in effect in 1996. n2021 Similar regulations were issued September 15, 1999, for "HUD-owned multifamily residential property or a multifamily residential property for which HUD is identified as mortgagee-in-possession. n2022 In addition to disclosure, these federal laws also require the seller to provide the purchaser or lessee with a lead hazard information pamphlet; give purchasers a 20-day opportunity to conduct a risk assessment or inspection; and attach specific disclosure and warning language to the sales or leasing contract before the purchaser or lessee is obligated under a contract to purchase or lease. n2023

The Residential Lead-Based Paint Reduction Act of 1992 also requires real estate brokers (1) to inform sellers and lessors of their obligations under the Act, (2) to inform sellers and lessors that they must certify and acknowledge all disclosures in writing, and (3) to inform sellers that buyers are entitled to conduct an inspection of the premises. Brokers must also ensure that the sellers and lessors they represent have performed their duties under the Act and have otherwise fully complied with the Act. n2024 Failure to fulfill these broker responsibilities can result in fines, criminal penalties, and civil damages. n2025

§ 96.20(d) Disclosures Required Under Land Sales Full Disclosures Acts.

Under the federal Interstate Land Sales Full Disclosure Act, as enacted in 1968 and substantially amended in 1979, developers of subdivisions are prohibited from using any instrument of transportation or communication in interstate commerce to sell a lot or subdivision without first filing a required statement of record or property report to the prospective purchaser. n2026 Many exceptions and exemptions apply to these federal requirements, and many states have enacted their own land sales disclosure provisions for intrastate subdivisions, all discussion in Chapter 78, above. n2027

FOOTNOTES:

(n1)Footnote 1993. *See, e.g., Peek v. Gurney, L.R. 6 H.L. 377 (1873)* (no duty to disclose defects in an arm's length transaction regardless of how "morally censurable" non-disclosure would be).

(n2)Footnote 1994. *See e.g., Shapiro v. Sutherland, 76 Cal. Rptr. 2d 101 (1998)* (duty of disclosure extends to

disclosure of existence of noisy neighbors where disturbance caused by those neighbors materially affected the value and desirability of the property); *Fimbel v. DeClark, 695 N.E.2d 125 (Ind. App. 1998)* (seller had duty to disclose unsuitability of soil for septic system to buyer whom seller knew wanted to build homes on the property).

(n3)Footnote 1995. *See McWilliams v. Barnes, 242 P.2d 1063, 1065 (Kan. 1952).* In *McWilliams*, the seller had informed the purchaser that certain drainpipes were connected and emptied into the city sewer system. Ten months later, the purchaser discovered that the drainpipes actually emptied into a backyard pit which overflowed with sewage. The Kansas Supreme Court found for the purchaser, holding that such facts could not be expected to be discovered by the purchaser prior to signing the contract. *Id. at 1066. See also Chapman v. Hosek, 475 N.E.2d 593 (Ill. 1985)* (misrepresentation of necessity for flood insurance and of local weather conditions). *See Gilchrist Timber Co. v. ITT Rayonier, 696 So. 2d 334 (Fla. 1997)* (noting that a seller who negligently transmits false information may be held liable for negligent misrepresentation under § 552 of the Restatement (Second) of Torts); *Billian v. Mobil Corp., 710 So. 2d 984 (Fla. App. 1998)* (where buyer sues for non-disclosure of a material defect it is not necessary to buyer's claim that seller have intended to defraud buyer).

(n4)Footnote 1996. *See, e.g., Karoutas v. Homefed Bank, 283 Cal. Rptr. 809, 811 (1991).*

(n5)Footnote 1997. *See Anderson v. Harper, 622 A.2d 319 (Pa. 1993).* Prior to selling their home to the Andersons, the Harpers made repairs to a faulty septic system, but did not obtain the required permits for such work. The court found that since the Harpers did not obtain the required permits, they could not assume that the latent, dangerous condition had been rectified. Without knowing whether the condition had been corrected, the Harpers had a duty to disclose the defect to the Andersons. *Id. at 323.*

(n6)Footnote 1998. *See Gozon v. Henderson-Dewey & Assocs., 458 A.2d 605 (Pa. 1983)* (leaky swimming pool); *Mobley v. Copeland, 828 S.W.2d 717 (Mo. 1992)* (slight electrical current in swimming pool).

(n7)Footnote 1999. *Layman v. Binns, 519 N.E.2d 642, 645 (Ohio 1988).* In *Layman,* the sellers had braced a defective basement wall with steel beams, and the wall was actually bulging when the purchasers viewed the home. *Id.* at 641. The court found no duty on the part of the sellers to expressly disclose the defective wall because the defect was not latent. *Id.* at 645.

(n8)Footnote 2000. *See Grant v. Wrona, 662 S.W.2d 227, 230-31 (Ky. 1983)* (buyer did not have constructive notice of rotten wood where the seller had covered the wood with fresh paint prior to placing the home on the market). *See also Flakus v. Schug, 329 N.W.2d 859 (Neb. 1983).* In *Flakus,* the buyers noticed one sump pump in the basement laundry room, but the seller had concealed two other sump pumps in basement closets, which went undetected until the buyers experienced significant water damage. The first sump pump was not enough to give the buyer constructive notice of the property's water defects, and the court found for the buyers on their fraudulent concealment claim. *Id. at 863. Smalls v. Blueprint Development, Inc., 497 S.E.2d 54 (Ga. App. 1998)* (buyer could not avail himself of passive concealment exception to doctrine of caveat emptor where express provision in contract noted the possibility that lots were subject to wetlands regulation).

(n9)Footnote 2001. *See George v. Lumbrazo, 584 N.Y.S.2d 704 (1992)* (summary judgment was improper because questions of fact remained as to whether the seller intentionally concealed cracks in the wall with panelling, and as to whether the buyer should have discovered the cracks); *Gantt v. Bennett, 499 S.E.2d 75 (Ga. App. 1998)* (buyer could prevail on "passive concealment" claim where seller knew of inappropriately installed sewer system, failed to disclose it, and fact was material and not apparent to the buyer).

(n10)Footnote 2002. "...Where a vendor is aware of defects or conditions which substantially affect the value or habitability of the property and the existence of which are unknown to the purchaser and would not be disclosed by reasonably diligent inspection, then the vendor has a duty to disclose the same to the purchaser ...[his] failure to disclose will give rise to a cause of action in favor of the purchaser." *Thacker v. Tyree, 297 S.E.2d 885, 888 (W. Va. 1982).*

(n11)Footnote 2003. *Id.*

(n12)Footnote 2004. *Johnson v. Davis, 480 So. 2d 625, 628-629 (Fla. 1985)* (the court stated that cases applying the doctrine of caveat emptor were "not in tune with the time and [did] not conform with current notions of justice, equity, and fair dealing.").

(n13)Footnote 2005. *Blake v. Doe, 623 N.E.2d 1229 (Ohio 1993).*

(n14)Footnote 2006. *Baylock v. Cary, 709 So. 2d 1128 (Ala. 1997)* (no duty to disclose water damage defect where buyer had knowledge of it); *Nelson v. Wiggs, 699 So. 2d 258 (Fla. App. 1997)* (flood-prone nature of property was knowable through reasonable steps to ascertain it; therefore seller had no duty to disclose it).

(n15)Footnote 2007. See, e.g., *Revitz v. Terrell, 572 So. 2d 996 (Fla. 1990)* (fraudulently obtained flood insurance was a material fact which sellers had a duty to disclose); *Curran v. Heslop, 252 P.2d 378 (Cal. 1953)* (fraudulent concealment of building code violations was a material fact which affected the value of the home and should have been disclosed).

(n16)Footnote 2008. An example of a non-disclosed fact which is not considered material to the sale is the existence of easements for public utilities, which are generally not dangerous and are to be expected. *See, e.g., Selvin v. Kelshaw, 611 A.2d 1232, 1238 (Pa. Super. Ct. 1992)* (existence of easement for municipal waterline not material; no duty to disclose even though easement not publicly recorded). *See also* Annotation, *Construction and Effect of Provision in Contract for Sale of Realty by which Purchaser Agrees to take Property "As Is" or in Its Existing Condition, 8 A.L.R. 5th 312 (1992).*

(n17)Footnote 2009. *See Kraft v. Lowe, 77 A.2d 554 (D.C. 1950)* (no duty to disclose a violative sewer system; however, seller had obligation to provide the truth when asked about the sewer).

(n18)Footnote 2010. *See Gilbey v. Cooper, 310 N.E.2d 268 (Ohio 1973)* (the state had taken a permanent easement to build a road and a temporary easement for "work purposes," neither of which was actually recorded until three days *after* the property was sold; because the purchasers could not have discovered the easements prior to completing the sale, the sellers had a duty to disclose this information); *Norris v. Mitchell, 495 S.E.2d 809 (Va. 1998)* (seller is not required to disclose restrictions of record).

(n19)Footnote 2011. The following Connecticut statutes are typical:

20-329cc "Psychologically impacted" defined:

As used in sections 20-329cc to 20-329ff, inclusive, "psychologically impacted" means the effect of certain circumstances surrounding real estate which includes, but is not limited to: (1) the fact that an occupant of real property is, or was at any time suspected to be, infected or has been infected with the human immunodeficiency syndrome, as defined in section 19a-581; or (2) the fact that the property was at any time suspected to have been the site of a homicide, other felony, or a suicide.

20-329dd Psychological Impact. No disclosure required. No cause of action.

(a) the existence of any fact or circumstance which may have a psychological impact on the purchaser or lessee is not a material fact that must be disclosed in a real estate transaction.

(b) no cause of action shall arise against an owner of real estate or his agent for the failure to disclose to the transferee that the transferred property was psychologically impacted, as defined in section 20-329cc.

Conn. Gen. Stat. §§ 20-329cc, 20-329dd.

See also Cal. Civ. Code § 1710.2; Ky. Rev. Stat. Ann. § 207.250; La. Rev. Stat. Ann. § 1468; Md. Code Ann., Real Property, § 2-120; N.C. Gen. Stat. § 39-50; Okla. Stat. tit. 59, § 858-513, N.Y. R.P.L. 443-a.

(n20)Footnote 2012. *See VanCamp v. Bradford, 623 N.E.2d 731, 738 (Ohio 1993)* (non-disclosure of rape which occurred in home after being asked about bars on windows was sufficient for jury determination of materiality).

(n21)Footnote 2013. *See Stambovsky v. Ackley, 572 N.Y.S.2d 672 (1991).* In *Stambovsky*, the seller had marketed her home as "haunted" for over ten years, but had not disclosed the fact to its eventual purchaser. The court held that having informed the public of the haunting, the seller owed the same duty to the purchaser. *Id. at 677.* "[W]here a condition which has been created by the seller materially impairs the value of the contract and is peculiarly within the knowledge of the seller or unlikely to be discovered by a prudent purchaser exercising due care with respect to the subject transaction, nondisclosure constitutes a basis for rescission as a matter of equity." *Id. at 676.*

(n22)Footnote 2014. *See Quashnock v. Frost, 445 A.2d 121 (Pa. Super. Ct. 1982).* Even an "as is" clause in the sale contract does not relieve the seller of the obligation to disclose termite infestation. *Stemple v. Dobson, 400 S.E.2d 561 (W. Va. 1990).*

(n23)Footnote 2015. *See, e.g., Weintraub v. Krovatsch, 317 A.2d 68 (N.J. 1974)* (roach infestation). The court called the no-duty-to-disclose cases, relied on by the seller, "a line of singularly unappetizing cases which [were] out of tune with [the] times." *Id. at 71.*

(n24)Footnote 2016. New Hampshire is a good example; sellers of property in New Hampshire are required to disclose the presence of radon gas and lead paint. *See* N.H. Rev. Stat. Ann. § 477:4-a.

(n25)Footnote 2017. *Schnell v. Gustafson, 638 P.2d 850 (Colo. App. 1981)* (absence of privity did not excuse a duty to disclose where seller misrepresented the fact that uranium tailings existed below the home). *See also* Annotation, *Vendor's Obligation to Disclose to Purchaser of Land Contamination from Hazardous Substances or Wastes, 12 A.L.R.5th 630 (1993).*

(n26)Footnote 2018. *See Roberts v. Estate of Barbagallo, 531 A.2d 1125 (Pa. 1987).*

(n27)Footnote 2019. *42 U.S.C. §§ 4851*-4856.

(n28)Footnote 2020. *42 U.S.C. § 4852d*(a)(1)(B).

(n29)Footnote 2021. 40 C.F.R. § 745.100 *et seq*.

(n30)Footnote 2022. 24 C.F.R. § 35.800 *et seq*.

(n31)Footnote 2023. For a more detailed discussion of these federal requirements, see Real Estate Brokerage Law and Practice, Ch. 15A, *Lead-Based Paint Disclosure*(Matthew Bender).

(n32)Footnote 2024. 24 C.F.R. § 35.94(a)-(b)(1).

(n33)Footnote 2025. For a more detailed discussion of these federal requirements, see Real Estate Brokerage Law and Practice, Ch. 15A, *Lead-Based Paint Disclosure* (Matthew Bender).

(n34)Footnote 2026. *15 U.S.C. § 1701 et seq*.

(n35)Footnote 2027. *See* §§ 78.05, 78.07.

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Add:

Moorman v. Blackstock, Inc., 661 S.E.2d 404 (Va. 2008) (action seeking specific performance of an oral contract for sale was barred by statute of frauds).

§ 96.03(d) Characteristics of the Writing. [Go To Main]

Add:

Ocean Atlantic Development Corp. v. Aurora Christian Schools, Inc., 322 F.3d 983 (7th Cir. 2003) (offer letters did not constitute binding agreements).

Add:

Brush Grocery Kart, Inc. v. Sure Fine Market, Inc., 47 P.3d 680 (Colo. 2002) (even if equitable conversion applied, it would not have shifted risk of loss, because purchaser did not have possession of the property).

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§ 96.06(b) How Equitable Conversion Affects Rights of Vendors and Purchasers. [Go To Main]

§ 96.06(b)(2) Conveying or Encumbering Title.

Add:

Wonka v. Cari, 637 N.W.2d 92 (Wis. App. 2001) (land contract, which conveyed only equitable rights, did not sever a joint tenancy with rights of survivorship).

Add:

Michehl v. Andersen, 2002 Iowa App. LEXIS 182 (Feb. 6, 2002) (the proceeds of a casualty insurance policy were awarded to vendor under a contract).

§ 96.06(b)(5) Risk of Loss.

Add:

Brush Grocery Kart, Inc. v. Sure Fine Market, Inc., 30 P.3d 810 (Colo. App. 2001) (the purchaser was required to bear the risk of loss, even though not in possession).

Add:

U.S. National Bank v. Cedeno, 2009 N.Y. Slip Op 29051 (Court enforced Terms of Sale that provided that purchaser would assume all risk of loss and damages from date of auction).

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Supp. to § 96.08 The Offer.

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Add:

Kopple v. Schick Farms, Ltd., 447 F. Supp. 2d 965 (N.D. Iowa 2006) (a letter of intent did not constitute a binding contract).

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Supp. to § 96.09 The Acceptance.

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Add:

Caldwell v. Snyder, 949 So.2d 1048 (Fla. App. 2006) (vendor's acceptance of purchaser's deposit formed a valid contract entitled to specific performance).

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Supp. to § 96.11 Terms of the Contract.

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§ 96.11(b) Modification by Mutual Consent. [Go To Main]

Add:

Best v. Edwards, 176 P.3d 695 (Ariz. App. 2008) (the purchaser's unilateral modification of an option agreement was unenforceable).

§ 96.11(e) Merger of the Contract into the Deed. [Go To Main]

Add:

Crowley Marine Associates v. Nyconn Associates, 738 N.Y.S.2d 681 (2002) (a claim of breach based on misrepresentation did not survive the closing and the delivery of the deed).

Add:

Chapdelaine v. Sochocki, 635 N.W.2d 339 (Mich. App. 2001) (the doctrine of merger did not extinguish an express easement reserved in the purchase agreement).

Add:

Chapman v. Anchor Lumber, 823 N.E.2d 594 (Ill. App. 2005) Overruled in part by, *Czarobski v. Lata, 227 Ill. 2d 364, 317 Ill. Dec. 656, 882 N.E.2d 536, 2008 Ill. LEXIS 11 (2008)* (real estate taxes provision of the contract were merged with the deed); *Moutafis v. Osborne, 777 N.Y.S.2d 194 (2004)* (the contract's merger clause prohibited oral modifications).

Add:

Neely Development Corp. v. Service First Investments, Inc., 582 S.E.2d 200 (Ga. App. 2003) (vendor's obligation to execute a restrictive covenant survived the closing because of the parties' plain and unambiguous agreement to that effect).

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Supp. to § 96.13 Time As of the Essence.

Wis. Stat. Ann. § 66.46(9)(b)(4)

Add:

Arnhold v. Ocean Atlantic Woodland Corporation, 132 F. Supp. 2d 662 (N.D. Ill. 2001) (the requirement that the closing be completed by a specified date was a material term of the agreement).

Add:

Elda Arnhold and Byzanto, L.L.C. v. Ocean Atlantic Woodland Corp., 284 F.3d 693 (7th Cir. 2002) ("drop dead" clause enforced, even though purchaser missed the deadline by only a day).

High Development Corp. v. Star of the West Company, 2009 Iowa App. LEXIS 561 (Iowa Ct. App. 2009) (when time is of the essence, courts will not grant specific performance even if buyer tenders the money one day following the closing date).

Add:

Kevan v. Modesta, 738 N.Y.S.2d 382 (2002) (statement that closing would take place on a certain date did not make time of the essence).

Add:

High Development Corp. v. Star of the West Company, 2009 Iowa App. LEXIS 561 (Iowa Ct. App. 2009) .

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Supp. to § 96.14 Statute of Frauds Issues.

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§ 96.14(a) Applicability of the Statute of Frauds. [Go To Main]

Add:

Royal Investment Group, LLC v. Wang, 961 A.2d 665 (Md. App. 2008) (a written and signed real estate contract addendum satisfied the Statute of Frauds even though it was signed after the settlement date).

Add:

Rice v. Barnes, 149 F. Supp. 2d 1297 (M.D. Ala. 2001) (an oral agreement for the sale of land was void under Alabama's statute of frauds).

§ 96.14(b) The Sufficiency of the Memorandum. [Go To Main]

Add:

Sieger v. Prehay, 791 N.Y.S.2d 657 (2005) (a letter signed by the parties failed to describe the land with sufficient certainty to satisfy the statute of frauds); *Peet v. Randolph, 157 S.W.3d 360 (Mo. App. 2005)* (the parties' writing failed to identify and describe the land for sale, precluding the remedy of specific performance); *Redwine v. Masters, 602 S.E.2d 143 (Ga. App. 2004)* (real estate contract was unenforceable because of an insufficient description); *Lexington*

Heights Development, LLC v. Crandlemire, 92 P.3d 526 (Idaho 2004) (the contract violated the statute of frauds by not containing a sufficient description of the property to be sold).

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Supp. to § 96.15 Termination of the Agreement.

Me. Rev. Stat. Ann. tit. 30-A § 5253

§ 96.15(a) Rescission of the Contract. N.J. Stat. Ann. § 55:19-20

§ 96.15(a)(1) Right of Rescission of the Contract.

Add:

Homeside Development Corp. v. Dassa Brill LLC, 27 A.D.3d 258 ; *813 N.Y.S.2d 47* (N.Y., 2006) (rescission denied because the deed restriction did not constitute an encumbrance on the marketability of the title).

Add:

Cape-France Enterprises v. Estate of Peed, 29 P.3d 1011 (Mont. 2001) (the doctrine of impossibility was applied to rescission of a real property purchase agreement).

§ 96.15(a)(4) Rescission Based on Fraud.

§ 96.15(a)(4)(i) Nondisclosure as Fraud.

Add:

Coldwell Banker Whiteside Associates v. Ryan Equity Partners, Ltd., 181 S.W.3d 879 (Tex. App. 2006) (vendors not required to disclose the zoning status of the property).

§ 96.15(b) Forfeiture of the Contract. [Go To Main]

Add:

Black v. Robinson, 2002 Iowa App. LEXIS 790 (unpublished) (contract was forfeited when purchaser failed to remedy defaults after notice).

Add:

Dempsey v. Carter, 797 N.E.2d 268 (Ind. App. 2004) (vendor's proper remedy was foreclosure, not forfeiture).

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Supp. to § 96.16 Remedies for Breach of Contract.

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Add:

Willert v. Russo, 2009 Conn. Super. LEXIS 1212 (Conn. Super. Ct. May 4, 2009) (when purchaser breaches contract, vendor chooses the remedy to pursue).

Add:

Rich v. Olah, 274 S.W.3d 878 (Tex. App. 2008) (party could recover attorney fees pursuant to the real estate contract).

Koehler v. Paniagua, 2003 Ohio App. LEXIS 1886 (No. 5-02-64, Apr. 18, 2003) (election of forfeiture remedy precluded collection of contract installment payments).

Willert v. Russo, 2009 Conn. Super. LEXIS 1212 (Conn. Super. Ct. May 4, 2009) (if vendee breaches contract, vendor may seek specific performance only if the contract or controlling law provides for such a remedy).

Add:

Willert v. Russo, 2009 Conn. Super. LEXIS 1212 (Conn. Super. Ct. May 4, 2009.

§ 96.16(b) Vendee's Right to Recover Down Payments. [Go To Main]

§ 96.16(b)(2) When Recovery Is Denied.

Add:

Thompson v. Barry Berman Realty Associates, 751 N.Y.S.2d 532 (2002) (when purchaser defaulted, vendor retained down payment as liquidated damages).

§ 96.16(d) The Nature of Specific Performance. [Go To Main]

Add:

Beazer Homes, Corp. v. VMIF/Anden Southbridge Venture, 235 F. Supp. 2d 485 (E.D. Va. 2002) (an agreement to negotiate a contract was unenforceable, so specific performance was not an available remedy).

Add:

Edisto Island Historical Preservation Society, Inc. v. Gregory, 2003 S.C. LEXIS 101 (No. 25638, Apr. 28, 2003) (vendors did not have the right to terminate the contract, so specific performance was ordered).

§ 96.16(d)(1) Requisites of an Action for Specific Performance.

Add:

D'Amico v. Brightfelt, 924 So. 2d 872 (Fla. 4th DCA 2006) (No. 4D05-1672, Fla. App., Apr. 11, 2005) (a purchaser who failed to satisfy financing requirements in the contract was not entitled to specific performance); *Singh v. Gopaul, 809 N.Y.S.2d 549 (2006)* (purchaser's action for specific performance denied because purchaser failed to establish financial capacity to purchase the property).

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Supp. to § 96.17 What Is "Merchantable" or "Marketable" Title.

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Add:

Bennett v. Guarco, 2009 Conn. Super. LEXIS 3299 (Conn. Super. Ct. Dec. 10, 2009) (title is not rendered unmarketable when driveway encroaches on neighboring property, where the neighbor does not object and denies offers to remove the encroachment); *Scott v. Turner, 345 Fed.Appx. 761 (3d Cir. Pa. 2009)* .

Add:

Bennett v. Guarco, 2009 Conn. Super. LEXIS 3299 (Conn. Super. Ct. Dec. 10, 2009) (title is not rendered unmarketable when driveway encroaches on neighboring property, where the neighbor does not object and denies offers to remove the encroachment).

Add:

Scott v. Turner, 345 Fed.Appx. 761 (3d Cir. Pa. 2009) (municipal ordinance requiring a minimum right-of-way held to be a defect rendering title unmarketable).

§ 96.17(a) Situations Making the Title Unmarketable. [Go To Main]

Add:

Haisfield v. Lape, 570 S.E.2d 794 (Va. 2002) (a line-of-sight easement made the title unmarketable).

Add:

Scott v. Turner, 345 Fed.Appx. 761 (3d Cir. Pa. 2009) (selling land that will not be subject to minimum right-of-way requirements renders the title unmarketable because of certainty of future litigation).

Add:

Bennett v. Guarco, 2009 Conn. Super. LEXIS 3299 (Conn. Super. Ct. Dec. 10, 2009) (driveway encroaching two feet by twenty feet onto neighboring property was not held to render title unmarketable, because the owner of neighboring property expressly said he did not object to the encroachment).

Add:

Bennett v. Guarco, 2009 Conn. Super. LEXIS 3299 (Conn. Super. Ct. Dec. 10, 2009) (two feet by twenty feet driveway encroaching onto neighboring property was a curable defect).

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§ 96.20(a) The Evolving Common Law Concerning Disclosures by Sellers. [Go To Main]

§ 96.20(a)(1) Seller's Duty to Disclose.

Add:

Scafe v. Property Restorations, Ltd., 2004 Ohio App. LEXIS 5801 (No. 84447, Nov. 24, 2004) (because of the "as is" clause in the contract, the purchaser bore the risk of defects in the house).

Add:

Stebbins v. Wells, 818 A.2d 711 (R.I. 2003) (real estate agents had duty to disclose); *Kailin v. Armstrong, 643 N.W.2d 132 (Wis. App. 2002)* (vendor had duty to disclose tenant's rent arrearages and delinquencies); *Malach v. Chuang, 754 N.Y.S.2d 835 (2002)* (acceptance of disclosure form waived claims for defects); *Berger-Vespa v. Rondack Building Inspectors Inc., 740 N.Y.S.2d 504 (2002)* (no negligent misrepresentation or concealment of latent defects); *Riggins v. Bechtold, 2002 Ohio App. LEXIS 3525* (No. C-010541, Jun. 28, 2002) (vendors not liable for nondisclosure). *Muir v. Merano, 882 N.E.2d 715 (Ill. App. 2008)* (sale contract terminated for failure of vendor to provide the required disclosure document).

Add:

Crawford v. Mintz, 875 N.Y.S.2d 64 (2009) (attorney fees award under claim for negligent misrepresentation that the property was connected to the city sewer system).

Berger-Vespa v. Rondack Building Inspectors, Inc., 2002 N.Y. App. Div. LEXIS 3648 (Apr. 11, 2002) (defect not concealed or misrepresented).

§ 96.20(a)(2) Negligent Misrepresentation.

Add:

Dyke v. Peck, 719 N.Y.S.2d 391 (2001) (purchaser did not rely on vendor's misrepresentation).

Katzenmeier v. Oppenlander, 178 P.3d 66 (Kan. App. 2008) (purchasers shown to have not relied on vendor's disclosure, because purchasers inspected the property prior to purchase and learned of possible water and drainage problems).

Mynes v. Brooks, 2009 Ohio 5017 (Ohio Ct. App., Sept. 14, 2009) (caveat emptor applied after house was condemned for black mold, because the buyer had notice of mold but chose not to investigate further).

§ 96.20(a)(3) Fraudulent Concealment.

Add:

Lindberg v. Roseth, 2002 Ida. LEXIS 67 (Apr. 29, 2002) (the purchasers were entitled to rely on the sellers' condition disclosure even though the purchasers had conducted their own inspection).

Klasa v. Rogers, 2004 Ohio App. LEXIS 4077 (No. 83374, Aug. 26, 2004) ("as is" clause in the contract did not protect the vendor from liability for fraudulent misrepresentation).

Sutton v. Ebby Halliday Real Estate, Inc., 279 S.W.d 418 (Tex. App. 2009) (action alleging that parties knew the property flooded and purposefully concealed that information); *Rhee v. Highland Development Corp., 958 A.2d 385 (Md. App. 2008)* (allegation of desecrating and concealing a cemetery on the property sufficed as allegation of a material defect); *Katzenmeier v. Oppenlander, 178 P.3d 66 (Kan. App. 2008)* (allegation of intentional or reckless misrepresentations that buildings were free of serious leaking and moisture problems).

Dickerson v. Strand, 904 N.E.2d 711 (Ind. Ct. App. 2009) (court held there was no fraudulent concealment when a thorough inspection would have revealed signs of termite damage without removing the siding).

§ 96.20(a)(4) Latent Defects.

Zappitelli v. Miller, 868 N.E.2d 968 (Ohio 2007) (action for rescission and money damages for vendor's failure to disclose flooding and mold problems; attorney fees could be awarded if punitive damages awarded); *Nelson v. Heer, 163 P.3d 420 (Nev. 2007)* (vendor's omitted disclosure of water damage was not the proximate cause for purchaser's

damage resulting from mold); *Fisher v. Batista, 968 So. 2d 337 (La. App. 2007)* (money damages awarded for vendor's failure to disclose plumbing defects; vendor did not act in bad faith).

Add:

Clark v. Allen, 796 N.E.2d 965 (Ohio App. 2003) (vendors did not know about and were not liable for their real estate agent's misrepresentations concerning condition of the crawl space under the house).

Add:

Humphries v. Ables, 789 N.E.2d 1025 (Ind. App. 2003) (no fraud by vendors relating to soil contamination).

Add:

Harshman II Dev. Co., LLC, v. Meijer Stores L.P., 2010 Ohio 381 (Ohio Ct. App., Feb. 5, 2010) (no duty for buyer to disclose presence of environmental wetlands on the property, because a reasonable inspection would have discovered their presence).

§ 96.20(a)(5) Legal Impairments: Easements, Building Codes, and Ordinance Violations.

Add:

Coldwell Banker Whiteside Associat es v. Ryan Equity Partners, Ltd., 181 S.W.3d 879 (Tex. App. 2006) (vendors not required to disclose the zoning status of the property).

§ 96.20(a)(7) Infestation

Add:

Dickerson v. Strand, 904 N.E.2d 711 (Ind. Ct. App. 2009) (no duty to disclose where the termite damage would have been readily discoverable with a reasonable inspection).

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CHAPTER 97 CONSTRUCTION AND DEVELOPMENT LAW

12-97 Thompson on Real Property, Thomas Editions 97.syn

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CHAPTER 97 CONSTRUCTION AND DEVELOPMENT LAW

12-97 Thompson on Real Property, Thomas Editions § 97.01

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§ 97.01 Introduction: The Players.

In this Chapter we see something of the development and construction process--the contract issues and rules that apply to the design construction and leasing of a commercial project. The final section of the chapter spotlights the legal issues in the financing of commercial development. Commercial Leasing is also covered in Chapter 44, which is in volume 5.

This chapter highlights the key issues in agreements between the owner/developer and (1) the architect, (2) the contractor, (3) the tenant, (4) the construction lender, and (5) the permanent lender. You will also see the connection between the printed form language that is so often found in these agreements and the issues that have to be resolved for the successful completion of a project.

The person at the center of the development game is the developer.

> Property Developers come in all shapes and sizes, creeds and colors. Their personal styles range from the flamboyance of a Donald Trump to the reclusiveness of a Paul Reichmann. What they have in common is a desire to assemble developments and fortunes. At the highest level, they change the face of cities, transforming the flows of people and commerce like men moving iron filings with a magnet under a map. They are not necessarily architects or construction engineers or financiers, but their skill lies in bringing these specialties together to satisfy the demands of those who need space to carry on their business. They do not draw up blueprints or erect steel or pour concrete, but they cause things to happen. n1

The unifying characteristic of successful developers is an intangible called "vision." One author described this quality as a "peculiar entrepreneurial solipsism ... at the root of capitalism's greatest achievements, and greatest disasters." n2 To run a thread through the different types of contracts unique to the development process we conjure a fictional character named Happy Golittle who has the vision of building a shopping center of her own. She has in mind a 60,000 square foot, beautifully detailed, quality space specializing in high fashion--clothing boutiques, art and furniture, maybe an upscale restaurant or two.

Happy had the good fortune of being born rich. Her father was a successful shopping center developer whose regional malls made up in percentage rents what they may have lacked in refinement. Daddy's projects were leviathans--one million square feet plus. Happy, with her masters degree in art history, has quite another type of space and clientele in mind.

Daddy is proud his daughter is finally settling down and showing some interest in a version of the family business. He knows she is probably going to lose some money, but he would rather see a little of the family fortune go down a drain at Happy's Fashion Piazza as the price of a learning experience than to see her squander millions living off of a yacht in the harbor of Ibiza.

Happy's first task is to buy a site. She confers with the best commercial broker in town who reports that there are only three or four possibilities large enough for what Happy has in mind, in the sort of market area she is thinking about.

FOOTNOTES:

(n1)Footnote 1. Peter Foster, Towers of Debt 19 (1993).

(n2)Footnote 2. Peter Foster, Towers of Debt 212 (1993).

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CHAPTER 97 CONSTRUCTION AND DEVELOPMENT LAW

12-97 Thompson on Real Property, Thomas Editions § 97.02

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§ 97.02 Background: Determining the Feasibility of a Project and Optioning a Site.

Shopping Center Developers--Happy included--and their lawyers should consider reviewing the Urban Land Institutes' Shopping Center Development Handbook, which covers the latest trends in retailing and best practices in shopping center development. It contains case studies that describe the development process for town centers, enclosed malls, power centers, and street front retail centers. And it covers small strip centers to super regional facilities as well as urban and suburban locations. It is available from the Urban Land Institute (http://www.uli.org).

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CHAPTER 97 CONSTRUCTION AND DEVELOPMENT LAW

12-97 Thompson on Real Property, Thomas Editions § 97.03

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§ 97.03 The Owner-Architect Relationship.

Happy has done her studies and decided to exercise her option. The site is in a coastal town near Los Angeles on a prime walking street well known for its small avant garde clothing stores and trendy clientele. In order to build her project, Happy will probably require the services of architects, engineers, maybe environmental consultants and geologists, a general contractor, and subcontractors.

In the following pages we consider some of the key provisions in Happy's contract with her architect and general contractor, and some of the significant features of the developer-architect-contractor-subcontractor relationship. Maybe relationship is the wrong word. Struggle or war might be closer to what often occurs on the job site.

General contractors tend to think too many subcontractors are financially irresponsible and incompetent. Subcontractors suspect that the general contractor and owner are in bed together plotting ways to make life difficult and unprofitable for the subcontractors. They also know architects who are arrogant and desire only to build monuments to themselves at the expense of everyone else in the project. Architects sometimes find general contractors inept and subcontractors indifferent to good design.

To ameliorate these suspicions, some public agencies have required the major participants in new projects to spend two or three days in an intensive series of workshops run by professional facilitators to talk through their prejudices and fears so that when problems do arise later during construction, they will have "bonded" enough to solve problems quickly instead of worsening them. Whether these "partnership" workshops succeed in stopping the players from lapsing into their old feuds isn't clear. One participant was quoted during such a session: "We're all capitalistic pigs. We're all trying to make the biggest buck we can." n3

Happy won't have the benefit of a facilitation session. She will have to deal with her architect, contractor, and subs one by one, negotiating a contract with each of them in hopes they can work well together.

§ 97.03(a) A Cautionary Note on the Owner-Architect Relationship.

Any entrepreneur causing a new project or addition to be built is, for purposes of this text, a developer. Most

commercial ventures, and many custom-built homes and remodels begin when the developer seeks out an architect. Consider the difference between the developer-architect relationship and that of lawyer-client or doctor-patient. The client engages the lawyer to battle an adversary, and the patient looks to the doctor for relief or cure. They leave matters pretty much to the professional. The developer-owner approaches the architect with the hope of creating something special, mastering a bit of space, and maybe realizing a secret dream.

The owner's dream and the architect's objectives may not be the same. The architect may see the project as a step in the architect's aesthetic development or even as a statement in the history of the built environment. The owner has a program with a time frame, cost limits, and some functions in mind that may conflict with the architect's aesthetic sensibilities or career goals. An owner enthralled with aspirations for a project is prone to self-deception about its feasibility.

The owners's desire for the project being built at a modest price is counterbalanced by the nearly universal practice of the architect's fee being a percentage of project cost. The higher the project cost, the greater the fee. This is one reason some clients cap the fee or prefer to negotiate a fixed fee.

§ 97.03(b) The Architect's Possible Functions.

An architect may perform different types of services for the owner:

(1) *Plans and Specs.* The architect prepares initial plans and specifications. Usually the architect is responsible for pulling a building permit--once the plans are completed to the owner's satisfaction. This usually involves the architects making revisions to satisfy building and fire department plan checkers.

(2) *Entitlements.* Sometimes architects are asked to oversee obtaining variances, conditional use permits, rezonings and plan amendments.

(3) *Construction Administration.* The architect may or may not participate in construction administration, overseeing the work as it progresses.

(4) *Arbitration.* The architect may or may not be charged with arbitrating disputes on site during construction that can arise among the contractor, the owner, and subcontractors.

(5) *Coordination.* In most real estate construction ventures there are at least five players: owner, architect, lender, city or other government agencies, and soils engineer. Someone needs to coordinate the activities of these players. Usually that is the developer's responsibility, but occasionally it falls to the architect.

§ 97.03(b)(1) Design Phases.

The stages of design work are usually divided into three parts. n4 The first is schematic, often taking the form of sketches on tissue paper, as the architect and owner reach decisions on the general scope and form of the project. How many stories will it be? Is parking to be located underground? Will the elevators be hydraulic or electric? The second stage is called design development, as the architect converts the scheme into three-dimensional specifics. Finally, the design is converted into construction drawings, sufficiently detailed so that contractors may bid on them, knowing what materials and labor will be required to build the project.

The line between design development and construction drawings is flexible and may be bent according to the architect's need for periodic payment. An architect hard pressed for cash may announce the completion of the design development phase rather swiftly.

§ 97.03(b)(2) Cost Conditions.

In the ordinary construction venture, once the construction drawings are completed, the project will be put to bid. Bids are offers by contractors specifying the price and terms for building the project. The developer hopes that bids will be within the project budget. If no such bids are obtained, then whether the architect has any personal exposure--usually to redraw the plans without compensation--depends on whether "cost conditions" were part of the deal between owner and architect. n5

An architect's promise to the owner that the project will be built within the owner's budget exposes the architect to greater risk than would a cost condition: liability to the owner for the excess costs of completion, or for all the owner's out-of-pocket costs if the project is abandoned.

Five possibilities exist for allocating the risk that the plan may not be buildable at the owner's price.

§ 97.03(b)(2)(i) Fixed Limit.

This is the most stringent standard, and carries a promise by the architect to design a project not to exceed a specified cost. Here is a paragraph from a contract with an architect that the author drafted. The project was a two-unit condominium. Since the author was an amateur owner-developer, he had to rely greatly on the price judgments of the architect.

> The Designer acknowledges that the Owners' budget for this Project is $325,000, exclusive of construction loan interest charges and Designer's fees but including removal of the existing structures and trees on the site to the extent required by this Project, and landscaping plans and materials. While the Designer does not warrant a Construction Contract acceptable to the Owners, the Designer understands that the Owners have no use for plans that cannot be built within its budget. The Designer also understands that the Owners will require a fixed price general contract for construction that is bonded as to performance and payment, and a fixed time for completion, with per diem liquidated damages for late performance and a sharing of construction loan interest saved for early completion. The Designer will fortify his best judgment of construction costs by early and frequent consultation with one or more general contractors and with updated material and equipment pricing data. It is the Designer's responsibility to keep the Owners informed of the Owners' option should the Owners' wishes or the Designer's threaten to push the project over budget.

The architect's plans, though spectacular, couldn't be built within the budget. Based on this paragraph, the author terminated the contract without penalty. The author did not seek a refund of fees already paid. However, if the project had been abandoned, the author might have been able to recover fees already paid based on a restitution theory.

Clients rarely seek restitution of design fees. n6 The cost of attempted recovery may be too great. If the project is abandoned, other elements of damage such as permit filing fees and excavation costs are recoverable along with the design fee if such other elements are reasonably foreseeable. Even if the architect redesigns the project so it can be built at the promised price, construction delays may prove costly and lead to recoverable damages for the client.

If the owner goes forward with the project, hiring another architect, he owes his dismissed designer compensation in quantum meruit for ideas and plans put to use in the redesign. If fees are paid to the first architect this may estop that architect from claiming compensation for work the client eventually utilizes.

Suppose an owner builds according to an architect's plans and the costs of the project exceed the fixed limit of construction costs in the owner's agreement with the architect. The architect might be liable for the difference. Architects have gotten socked with sizable judgments for cost overruns. n7

§ 97.03(b)(2)(ii) Estimates.

A promise by the architect to deliver plans within estimates of construction cost implies that the architect will take reasonable steps to estimate construction cost. A "per square foot" guess isn't enough. To estimate cost, the plans must be reduced to their component parts. How many feet of concrete will need to be poured? How many windows, of what size and thickness? How many bricks, stones, etc.? By taking these quantities off the plans and utilizing standard construction industry cost sources, the architect can make an estimate of cost that should not be far off. An estimate isn't a warranty of cost like a fixed limit promise would be, but it is pretty close.

Architects may balk at having to perform this sort of exercise. Architects are not, after all, professional estimators. (In the U.K. such estimators are called "quantity surveyors," a beautifully descriptive phrase.) The architect who does not want to double as a quantity surveyor may decline this role.

Here is how one architect, Doug Lowe, expresses his aversion to "cost conditions":

> Only under extremely unique circumstances will we accept a contract with a cost condition. There are just too many factors that architects don't have control over to make an exact prediction as to the cost of a project. We can say that other projects like the one we're designing have cost X dollars a square foot, and we think that yours will cost about the same, but it's ridiculous to expect us to guarantee an exact amount. It's a fallacy to think that the architect has complete control over every phase of the project--including the cost. Once we finish designing the project, it is basically out of our hands. Sure, we step in to make sure that the general design is being followed, but we don't draw the shop drawings n8 that affect greatly the price, so in this regard we *can't* control the price. n9

§ 97.03(b)(2)(iii) Statement of Probable Cost.

This statement made by an architect is based on a rough guess of costs based on the square footage of the project, and what projects of that size and complexity usually cost to build. It is less exacting than a "take off" from the plans of the quantities of materials and labor implied in them. The American Institute of Architects standard form contract recommends this disclaimer accompanying any promise to deliver a Statement of Probable Construction Costs or a Detailed Cost Estimate.

> It is recognized, however, that neither the Architect nor the Owner has control over the cost of labor, materials or equipment, the contractor's methods of determining bid prices, or competitive bidding, market or negotiating conditions. Accordingly, the Architect cannot and does not warrant or represent that bids or negotiated prices will not vary from ... any estimate of the Cost of the Work ... prepared or agreed to by the Architect. n10

This clause may not be enough to protect an architect who has promised within some preliminary cost estimate. An incorrect statement of probable cost is a misrepresentation, itself actionable. That may be why the AIA changed its form language in 1987 striking "statement of between the architect and the owner are construed as implied or express cost promises. Parol evidence may not be introduced if it precedes and contradicts a specific written agreement. But parol evidence is admissible to supply an omission or to clarify an ambiguity in a written:

> There are just too many factors that architects don't have control over to make an exact prediction as to the cost of a project. We can say that other projects like the one we're designing have cost X dollars a square foot, and we think that yours will cost about the same, but it's ridiculous to expect us to guarantee an exact amount. It's a fallacy to think that the architect has complete control over every phase of the project--including the cost. Once we finish designing the project, it is basically out of our hands. Sure, we step in to make sure that the general design is being followed, but we don't draw the shop drawings n11 that affect greatly the price, so in this regard we can't control the price. n12

The AIA disclaimer may not be enough to protect an architect who has promised a project within some preliminary cost estimate. An incorrect statement of probable cost is a misrepresentation, itself actionable. That may be why the AIA changed its form language in 1987, striking "statement of probable cost" and substituting "preliminary cost estimate." Even that AIA form contract will not save architects from liability for negligence when project costs soar far above the "preliminary cost estimated." Negligence may be inferred when a cost estimate "very far out of line proves that the architect did not do his work properly." n13 In one case, an engineer undertook to design a water slide for a client, on a preliminary cost estimate of $409,000. To hurry completion, the project was "fast tracked"--construction was begun before the design was completed--on a cost-plus basis. The actual cost ended up at about $1,000,000--21/2 times the original estimate. The engineer was held liable for $205,000. He had never designed a water slide, not employed a professional estimator, had not looked at other water slides, had never revised cost estimates, and had never discussed the hazards of "fast track" and "cost plus" contracting with his client. n14

The architect's liability for excess costs may also be grounded in contract theories when conversations between the architect and the owner are construed as implying or expressing cost promises. Parol evidence is admissible to supply an omission or to clarify an ambiguity in a written agreement if it precedes or contradicts a specific written agreement.

In *Malo v. Gilman*, n15 the owner testified that the architect had promised to design a project that could be built for $70,000, or $20/square foot. The $70,000 figure appeared in the contract as a "preliminary estimated cost." The lowest bid was for $105,000. In the owner's opinion, this exceeded the bounds of reasonableness and so the owner refused to pay the architect. When the architect sued for fees, the appellate court affirmed a trial court's judgment denying the fees. The court cited this among several AIA Form provisions:

> AIA Form, 1.1.1: The Architect shall consult with the Owner to ascertain the requirements of the Project and shall confirm such requirements to the Owner.
>
> Not only did the architect lose his suit for payment of the fee, he was ordered to return the $500 he had already collected towards it.

§ 97.03(b)(2)(iv) Budget.

An architect's contract may sometimes contain a statement that the architect is aware of the project budget. The AIA form documents don't define the word "budget." Anyone using it must provide their own definition. Nonetheless, we might say that a promise to design within a budget is a "best efforts" commitment--vague but better than nothing as far as the client developer is concerned.

§ 97.03(b)(2)(v) No Cost Condition.

Ultimately, an architect's liability for a cost estimate or an acknowledged budget limit can be seen to depend on many factors, including:

> (1) How difficult is the job to estimate? Remodels are usually tougher than new construction; conventional, repetitive projects are easier than one-of-a-kind innovative designs.
>
> (3) When was the prediction made? Early estimates made before completion of plans and specs are usually less reliable than estimates based on 99% completed plans.
>
> (4) How experienced is the client? When the architect's estimates prove wrong, a homeowner doing a remodel could be a better plaintiff than a tract housebuilder. (5) How far from the original estimate was the lowest bid or the actual cost of construction? "[I]t seems significant that the number of decisions denying recovery of compensation in proportion to the number of decisions allowing recovery increases

> rapidly as the percentage of excess cost increases from less than 25 percent to 25 through 75 percent to over 75 percent." n16 (6) Did the owner go forward to complete the project, knowing full well its cost would exceed the fixed limit? If so, the architect may contend that the owner failed to mitigate damage by abandoning the project or allowing it to be redesigned once the owner realized a cost overrun was imminent, and the owner should be deemed to have waived any cost condition in the contract. If the finished product is actually worth the higher cost, the owner has suffered no loss. The owner got fair value for money. The owner may have added features to the design that increased costs. The owner may have interfered with the bidding or conducted bidding in a particularly foolish way.

Even when a design professional enters a contract with no cost condition, negligence may be inferred when a cost estimate "very far out of line proves that the architect did not do his work properly." n17 In one case, an engineer undertook to design a water slide for a client, on a preliminary cost estimate of $409,000. To hurry completion, the project was "fast tracked"--construction was begun before the design was completed--on a cost plus basis. The actual cost ended up at about $1,000,000. The engineer was held liable for $205,000. He had not employed a professional estimator, had not looked at other water slides, had never revised cost estimates, had never discussed the hazards of "fast track" and "cost plus" contracting with his client. n18

§ 97.03(b)(2)(vi) Remedies.

(1) Rescission and Restitution. If the architect's plans are veering far from the program the owner set forth, at least as far as the project cost goes, a cost condition may entitle the owner to rescind by terminating the employment contract with the architect, and pay no fee. The architect may have to refund fees already paid.

(2) Specific Performance. In the ordinary construction venture, once the construction drawings are completed, the project will be put to bid. Some construction contracts call for the contractor to deliver the project at a fixed price. Fixed price bids are offered by general contractors specifying the price and terms for building the project. The developer hopes that one or more of the bids will be within the project budget. n19 If no such bids are obtained, the architect plans without compensation until she comes up with a set of plans that a general contractor will agree to bid within the budget. n20

(3) Damages. Suppose an owner builds according to an architect's plans on a cost-plus or a fixed price construction contract and the costs of the project exceed the fixed limit of construction cost in the owner's agreement with the architect. The architect might be liable for the difference. Architects have suffered sizable judgments against them for cost overruns. n21

§ 97.03(b)(3) Construction Administration.

The architect's responsibility once construction begins can range from occasional site visits to see if the contractor is generally building according to plans to detailed supervision as the owner's agent to make sure all is going exactly as planned. The architect's liability as an occasional "observer" is far less than it would be if the architect agreed to "supervise" construction on behalf of the owner. n22 Furthermore, the owner's exposure if the architect misses something important is enlarged if the architect is the owner's supervising agent. On the other hand, if the architect is there as an independent contractor only to observe, the owner is immunized from liability for errors the architect commits while at the site.

Under AIA Form B201-2007, the architect's responsibilities during construction are limited.

> 2.6.2.1. The Architect, as a representative of the Owner, shall visit the site at intervals appropriate to the stage of the Contractor's operations ... (1) to become generally familiar with and to keep the Owner informed about the progress and quality of the portion of the Work completed, (2) to endeavor to guard

the Owner against defects and deficiencies in the Work, and (3) to determine, in general, if the Work observed is being performed in a manner indicating that the Work when fully completed will be in accordance with the Contract Documents. However, the Architect shall not be required to make exhaustive or continuous on-site inspections to check the quality or quantity of the Work.

2.6.2.2. The Architect shall report to the Owner known deviations from the Contract Documents and from the most recent construction schedule submitted by the Contractor. However, the Architect shall not be responsible for the Contractor's failure to perform the Work in accordance with the requirements of the Contract Documents. The Architect shall be responsible for the Architect's negligent acts and omissions but shall not have control over or charge of and shall not be responsible for acts or omissions of the Contractor, Subcontractor, or their agents or employees, or of any other persons or entities performing portions of the Work. n23

The form language is no excuse for inadequate site supervision. One purpose circumscribing the architect's duty to keep the project under general observation is to provide a basis upon which the architect can determine whether to issue the certificate of payment. Thus, periodic visits are required and the architect has the duty to observe generally the progress of work and to insure that the contractor is compensated for the amount of work completed. It is also apparent that the architect represents the owner in protecting the owner's aesthetic interests in the quality of the work and is under a duty to endeavor to guard the owner's interests.

Admittedly, the contract documents are explicit on the provision that exhaustive, continuous on-site inspections are not required. That exhaustive, continuous on-site inspections were not required, however, does not allow the architect to close his eyes on the construction site, refrain from engaging in any inspection procedure whatsoever, and then disclaim liability for construction defects that even the most perfunctory monitoring would have prevented. n24

Among the factors that result in architects becoming liable for construction defects that could have been detected by a more thorough or frequent on-site inspection:

(1) If the architect is also hired as a construction manager. n25

(2) If the architect has a connection to the contractor that could lead to a conflict of interest.

(3) If the job is big and the architectural fee substantial.

(4) If the defect occurs at a crucial point during construction when the architect should have been there (e.g., during a concrete pour).

(5) If the architect began more frequent and intense supervision than called for in the contract, and the owner began to rely on that.

(6) If the owner was out of town or inexperienced.

(7) If the architect became aware of the defects and did nothing about them.

The AIA Form B201-2007 also attempts to limit the architect's liability when advising the owner that a contractor is due a payment for completed work:

2.6.3.2 The issuance of a Certificate for Payment shall not be a representation that the Architect has (1) made exhaustive or continuous on-site inspections to check the quality or quantity of the Work, (2) reviewed construction means, methods, techniques, sequences or procedures, (3) reviewed copies of

> requisitions received from Subcontractors and material supplies and other data requested by the Owner to substantiate the Contractor's right to payment or (4) ascertained how or for what purpose the Contract has used money previously paid on account of the Contract Sum.

Suppose Happy lets the contract go to the low bidder, and disburses funds during construction when the architect tells her to. Ten percent of the contract price is retained to assure satisfactory completion. When 90% of the contract price has been paid out, the contractor defaults by leaving the job. Happy finds another contractor willing to complete the work. In fact, the contractor left the job because he realized he had only performed two-thirds of the work required under the contact. Completion costs half a million more than the sum left in the construction fund. Is the architect liable to Happy for the half million because the architect certified payment on the basis that 90% of the work had been done instead of two-thirds?

Under AIA Form B201-2007 § 2.6.3.2, quoted above, it would seem not. But at least one court has held the architect liable under these circumstances, not only to the owner but also to the surety, directly contrary to AIA form language that the architect owes nothing to third parties. n26

§ 97.03(b)(4) Arbiter of Disputes.

Because projects are usually on tight schedules, it is in everyone's best interest that the contractor and developer quickly settle their disputes themselves. It is occasionally expedient for the architect to be a "quasi arbitrator." He is familiar with the situation, and the standard AIA Owner-Architect contract provides for it.

While it is true that the architect is being paid by the owner and could be biased in the owner's favor, the architect is the only third party familiar enough with the project who is immediately at hand to mediate owner-contractor disputes. Otherwise, the contractor and the owner would have no choice but to fight it out between themselves or find a third party who would have to take time to become familiar with the situation, or resolve it in ignorance of the project history. So the contractor may prefer the architect as arbiter. n27

As a "quasi judicial officer," the architect must exercise judgment in good faith. n28

The AIA forms prescribe binding arbitration adopting the rules of the American Arbitration Association which allow for limited discovery. Arbitration panels are not required to make a record or issue a written option, so courts cannot readily discern a basis for setting aside arbitration awards.

The AIA documents also provide for no joinder of parties. This may seem a minor technical point. But consider the case of a serious defect in the project that could be the result either of a design or construction flaw. In arbitration with the architect, the panel rules that the defect is due to a mistake in construction, so the architect is off the hook. In an arbitration with the contractor, a different panel decides it is caused by a design failure, so the contractor is off the hook. The owner gets stuck though the foul-up certainly wasn't the owner's fault.

§ 97.03(b)(5) Tort Liability.

Professor Sweet distinguishes among three potential standards of liability for architects: (1) negligence (do the reasonable); (2) professional (what other pros would do); and (3) warranty (accomplish the result desired by the client). The majority view is probably (2); the minority (3). Professor Sweet also warns not to take these distinctions too seriously. He describes a great many architect liability cases in which the formulas applied are "murky," and the results in a minority jurisdiction are indistinguishable from what would have been reached in a majority jurisdiction and vice versa. n29

The majority rule--the "reasonable architect's" performance standard--can be summed up this way: "Nobody's perfect.

The architect did what other architects doing this sort of work would have done." That is the customary and often successful defense architects use when someone is injured because a wall collapsed, a building burned, or a person tripped on the stairs.

> The responsibility resting on an architect is essentially the same as that which rests upon the lawyer to his client, or upon the physician to his patient ... . The undertaking of an architect implies that he possesses the skill and ability, including taste, sufficient to perform the required services at least ordinarily and reasonably well ... . But the undertaking does not imply or warrant a satisfactory result. n30

Implied warranty liability for architects was urged and specifically rejected in *City of Mounds View v. Walijarvi*: n31

> If every fact of structural design consisted of little more than the mechanical application of immutable physical principles, we could accept the rule of strict liability ... . But even in the present state of relative technological enlightenment, the keenest engineering minds can err in their most searching assessment of the natural factors which determine whether structural components will adequately serve their intended purpose. Until the random element is eliminated in the application of architectural sciences, we think it fairer than the purchaser of the architect's services bear the risk of such unforeseeable difficulties.

In addition, we observe that the ills which spurred the creation and expansion of the implied warranty/strict liability doctrine are not really present in this case or in the architect-client relationship generally. The implied warranty of fitness originated primarily as a means of facilitating the legitimate interests of the consuming public and bringing common-law remedies into step with the practicalities of modern industrialism. The outmoded requirement of contractual privity, coupled with manufacturers' sweeping disclaimers of liability, frequently operated to deny effective remedies to those who purchased commercial products at the bottom of a multi-tiered production and distribution network. n32 The introduction of the implied warranty doctrine created an effective remedy by allowing plaintiffs to proceed directly against the offending party without reliance on express contractual warranties.

The relationship between architect and client is markedly different.

> Finally, while it is undoubtedly fair to impose strict liability on manufacturers who have ample opportunity to test their products for defects before marketing them, the same cannot be said of architects. Normally, an architect has but a single chance to create a design for a client which will produce a defect-free structure. Accordingly, we do not think it just that architects should be forced to bear the same burden of liability for their products as that which has been imposed on manufacturers generally. n33

The architect may become strictly liable as a contractor by entering a design-build contract. Under that form of agreement, the architect becomes the general contractor ("GC") as well. Functioning and being paid as the GC, the architect becomes liable like a GC. Similarly, an architect who becomes a joint venturer in the project, becomes liable as would any other joint venture developer. Liability could be predicated on theories of negligence, strict liability or implied warranty, depending on the standard for developer liability in the jurisdiction.

Architect liability for negligence arises when the project design results in dangerous traps for the unwary, in dysfunctional spaces, and in violation of local building codes. Examples of each follow.

§ 97.03(b)(5)(i) Design Traps.

An ALR note on architect's liability for defective design begins by reminding readers of The Code of Hammurabi, under which a builder who constructed a house that collapsed and killed the owner would be put to death. n34 Today, the standard is negligence, not strict liability, so the injured plaintiff must demonstrate that the architect's design failed to meet generally prevailing safety standards.

In *Francisco v. Manson, Inc.*, n35 the plaintiff's 10-year-old son died when he fell from a 3-meter diving stand, designed by Manson, at his school's swimming pool. The court held that Manson was guilty of negligence in the design of the diving stand. Manson knew the stand would be used by children and also knew of feasible design changes that would have increased the safety of the board and stand, such as different shape, position, and materials of the guard rails, different height and rise of the steps, the addition of a Plexiglas enclosure at the top of the board, and the addition of a bed under the board. Manson was held liable for damages of almost $800,000.

Note that personal injuries aren't all the architect may be held liable for. When the roof of the Kemper Arena in Kansas City collapsed in 1979, preventing the Ringling Brothers-Barnum & Bailey Combined Shows Inc. and Ice Follies & Holiday on Ice, Inc., from staging performances and selling souvenirs, the Missouri Court of Appeals held that the architects of the Kemper Arena could be liable for negligently interfering with the entertainers' right to use and enjoy their leases. n36

Architects sometimes win malpractice suits. In one case, the architect was granted a directed verdict on a malpractice claim when a 22-month-old child fell to his death from the balcony of a 5th-floor apartment. n37 No one saw how the child got over the balcony. The height of the balcony railing was 42 inches. The child was 28 inches high. The distance between the vertical rails was 5 inches. There were 63/4 inches between the bottom rail and the floor. The District of Columbia had no code requirement for balcony designs at the time.

Here is another case which shows the limits of the architect's duty to the ultimate user of his design: a woman in a hospital parking lot with a poorly designed lighting system was kidnapped and later killed by her abductor. The court held that such a risk, not easily associated with the traditional risks of poorly designed lighting systems, was not encompassed within the duty owed by the designer. n38 More recently, a new issue has arisen concerning indoor air quality in newly built offices, sometimes referred to as "sick-building syndrome." Due to the increased concern of energy-saving HVAC systems, "stale" air occasionally results from insufficient replacement of "new" air in these energy-efficient buildings; employees report symptoms of nausea, fatigue, or headaches from working in such buildings. In some cases, employees of commercial tenants have brought action against tenants and have also named contractors, landlords, and architects as defendants. As discussed later in the chapter, owner/landlords often become the default party of blame for these suits, but architects must also be on the lookout for potential litigation that may cite architect's design as a contributing factor to the building's lack of air quality. n39

§ 97.03(b)(5)(ii) Dysfunctional Space.

Architects impliedly warrant that the plans and specifications are appropriate to the intended purpose of the project. n40 In *Bayuck v. Edson*, n41 the architect was employed to design and supervise the construction of a residence. The court found that the plans were improperly prepared in three respects: poor floor design, closets too narrow, and doors too elaborate for local artisans to fabricate. Additionally, supervision was deficient in the following respects: plycrate on the floor did not conform to specifications; kitchen tile was aesthetically displeasing; sliding doors stuck; and the fireplace cracked. The court said that the plans were so fancy that the architect should have given very close supervision, but he did not. A real estate broker testified that, without defects, the house would have been worth $50,000-60,000; but that with the defects, it was only worth $27,000-31,000. The court awarded the owners a judgment against the architect in the amount of $19,000.

§ 97.03(b)(5)(iii) Code Violations.

Architects are supposed to know the applicable building code restrictions, zoning ordinances, and set-back and parking requirements. n42 The plaintiff in *Johnson v. Salem Title Company*, n43 a pedestrian on a public sidewalk, was injured when hurricane winds caused a masonry wall to fall on him. The wall's design did not comply with a city building ordinance. The court held that even though the wall was approved by a city building inspector the architect's violation of the building ordinance constituted negligence per se. n44 The architect (contractor or subcontractor) may escape liability when the code violation results in no loss to the client, as in one case where a client decided to rip out a staircase in order to replace it with a new design. The client discovered coincidentally that the old staircase didn't conform to code, and sought damages from the architect. The violations were of improper stair height and width and handrail heights. The purpose of these code requirements was to assure safety. The clients replaced the staircase not because it was unsafe but because they no longer liked the way it looked. That didn't create a cause of action because the clients suffered no injury of the type building codes are enacted to prevent. n45 Architects usually accept the heroic burden of making sure their plans comply with all land use and building codes in existence when they obtain a building permit to construct the project. They seek to limit their exposure by insisting on form language entitling them to compensation for design changes necessitated by code changes that take place after a building permit has been obtained.

§ 97.03(b)(5)(iv) Architect's Rejoinder.

Architect Doug Lowe: n46

> All the plans we draw are imperfect. They all have omissions and mistakes. Some more than others. But all plans every architect draws are imperfect and full of mistakes. The key is to make sure that our plans don't have more mistakes and errors than the average architect in our situation would have had. Because unless we have more mistakes than others generally do we shouldn't be liable.
>
> If we draw plans that show the railing at the bottom of the stairs to extend out six inches and the code requires that it extend out twelve, we still may not be liable. It's important to understand that designing and building is an imperfect art. Every part must be designed and customized. There are going to be errors every time. Somewhere along the process 99% of them are going to be caught. If every time a railing is found to be too short the architect were forced to pay for its repair or replacement, then I'll guarantee there wouldn't be many architects.
>
> If someone gets hurt because of a short handrail and it's a clear violation of a code, and we drew it that way, then we may be liable. Even then, it would have to be shown that the contractor and the subcontractors and the building code inspector were under no duty to catch the error. We're not the only ones responsible for catching errors.

§ 97.03(b)(5)(v) Malpractice Insurance.

To deal with the negligence claims architects face, most take out malpractice insurance policies, called errors-and-omissions coverage. Whenever something goes wrong with a project, plaintiff's lawyers sue anyone and everyone who was involved with the project.

There are substantial exclusions from coverage that are of particular interest to the owner/developer. These include the failure to complete work on time and inaccuracy of estimates of probable cost. n47

In the last thirty years the number of claims per architectural firm has increased dramatically, causing the cost of malpractice insurance to skyrocket. Today, up to *one-half* of an architect's potential profits can go into insurance premiums.

§ 97.03(b)(5)(vi) How the Threat of Tort Liability Has Changed the Practice of Architecture.

In response to these astronomical insurance premiums, many architects have changed the way they operate. Some have become self-insurers, and practice without errors and omissions coverage. The architect's role in overseeing the project's construction has been curtailed. Architects choose to have less to do with overseeing construction, hoping to reduce their chances of liability. In 1961 the AIA owner-architect forms were changed to diminish the status of the site architect. Before 1961 the AIA form contract endowed the architect with the "general supervision of the work." The 1970 form called only for "periodic observation." n48

Some architects simply avoid types of projects they consider risky. For example, condominium complexes, where owners can organize through their homeowners' associations, carry an extremely high risk of a lawsuit--perhaps as high as 50%. n49 Developers sometimes may have to indemnify architects to get high-risk liability projects off the ground. n50

FOOTNOTES:

(n1)Footnote 3. Jim Carlton, *No Wonder Rome Wasn't Built in a Day--No "Facilitators,"* Wall St. J., Feb. 10, 1993, at A1, A6.

(n2)Footnote 4. AIA Document B201-2007, §§ 2.2.2, 2.2.3, 2.3, 2.4.

(n3)Footnote 5. *See* Justin Sweet, Legal Aspects of Architecture, Engineering, and the Construction Process § 15.03 (4th ed. 1989).

(n4)Footnote 6. Justin Sweet, Legal Aspects of Architecture, Engineering, and the Construction Process 212 (4th ed. 1989).

(n5)Footnote 7. See, e.g., *Kaufman v. Leard, 248 N.E.2d 480 (Mass. 1969)* .

Justin Sweet, Legal Aspects of Architecture, Engineering, and the Construction Process 222-223 (4th ed. 1989).

(n6)Footnote 8. Shop drawings are usually made by subcontractors to show the fabrication "shop" how to make component parts. Architects may be given the task of reviewing and approving these, and could be liable for approving details that aren't right. The shop drawings can provide a level of detail on how something is going to be built which, if not specified in the plan, can involve changes to those designs which are specified in the plans.

(n7)Footnote 9. Interview conducted by Adam Duncan with Doug Lowe, Director of Research, Univ. of S. Cal. Law Ctr., Los Angeles, Cal. (May 1990).

(n8)Footnote 10. AIA Document B201-2007, § 5.2.

(n9)Footnote 11. Shop drawings are usually made by subcontractors to show the fabrication "shop" how to make component parts. The project architect or engineer may be given the task of reviewing and approving these, and could be liable for approving details that aren't right. The shop drawings can provide a level of detail on how something is going to be built which, if not specified in the plan, involve changes to designs specified in the plan.

(n10)Footnote 12. Interview conducted by Adam Duncan with Doug Lowe, AIA, partner, Solberg & Lowe (May 1990).

(n11)Footnote 13. *See* Justin Sweet, Legal Aspects of Architecture, Engineering, and the Construction Process, 220 (4th ed. 1989).

(n12)Footnote 14. *Williams Engineering, Inc. v. Goodyear, Inc., 496 So. 2d 1012 (La. 1986)* .

(n13)Footnote 15. *379 N.E.2d 554 (Ind. App. 1978)* .

(n14)Footnote 16. Annotation, *Effect of Compensation of Architect or Building Contractor of Express Provision in Private Building Contract Limiting the Cost of the Building, 20 A.L.R.3d 778, 783 (1968).*

(n15)Footnote 17. Justin Sweet, Legal Aspects of Architecture, Engineering, and the Construction Process, 220 (4th ed. 1989).

(n16)Footnote 18. *Williams Engineering Inc. v. Goodyear, Inc., 496 So. 2d 1012 (La. 1986)* .

(n17)Footnote 19. *Effect of Compensation of Architect or Building Contractor of Express Provision in Private Building Contract Limiting the Cost of the Building, 20 A.L.R.3d 778, 783 (1968);* Justin Sweet, Legal Aspects of Architecture, Engineering, and the Construction Process 222-223 (4th ed. 1989); *Williams Engineering Inc. v. Goodyear, Inc., 496 So. 2d 1012 (La. 1986).*

(n18)Footnote 20. *See* Justin Sweet, Legal Aspects of Architecture, Engineering, and the Construction Process § 15.03 (4th ed. 1989).

(n19)Footnote 21. *See*, e.g., *Kaufman v. Leard, 248 N.E.2d 480 (Mass. 1969)* , discussed in Justin Sweet, Legal Aspects of Architecture, Engineering, and the Construction Process 222-223 (4th ed. 1989).

(n20)Footnote 22. The architect who undertakes the supervision of a job can become liable even when the contractor fails to follow the plans and specifications which the architect provided. As a supervisor of construction, the architect is charged with assuring (perhaps unintentionally) that the contractor's changes are sound. This is why the AIA form quoted below restricts the architect's role during construction. For a case decided against the supervising architect (who didn't use this type of form), *see Fred Hill v. Polar Pantries, 64 S.E.2d 885 (S.C. 1951)* .

(n21)Footnote 23. *See also* AIA Form B201-2007 § 2.6.1.2.

(n22)Footnote 24. Justin Sweet, Legal Aspects of Architecture, Engineering, and the Construction Process 235 (4th ed. 1989).

(n23)Footnote 25. *See, e.g., First National Bank of Akron v. Cann, 503 F. Supp. 419, affirmed 669 F.2d 415 (6th Cir. 1982).*

(n24)Footnote 26. *State v. Malvaney, 72 So. 2d 424 (Miss. 1954)* .

(n25)Footnote 27. AIA Document B201-2007, the owner-architect contract: "The Architect shall interpret and decide matters concerning the performance under, and requirements of, the Contract Documents on written request of either the Owner or the Contractor ... . § 2.6.2.3.

(n26)Footnote 28. *Lundgren v. Freeman, 307 F.2d 104, 116 (9th Cir. 1962)* (assuming the architect does act in good faith, she is immune from suit by either the developer or contractor on the soundness of her decisions).

(n27)Footnote 29. Justin Sweet, Legal Aspects of Architecture, Engineering, and the Construction Process, 302-303 (4th ed. 1989).

(n28)Footnote 30. *Coombs v. Beede, 36 A. 104 (Me. 1896)* .

(n29)Footnote 31. *263 N.W.2d 420 (Minn. 1978)* .

(n30)Footnote 32. *See generally* Prosser, Torts §§ 97, 98 (4th ed.).

(n31)Footnote 33. Justin Sweet, Legal Aspects of Architecture, Engineering, and the Construction Process, 285-86 (4th ed. 1989).

(n32)Footnote 34. Annotation, *Architect's Liability for Personal Injury or Death Allegedly Caused by Improper or Defective Plans or Designs, 97 A.L.R.3d 455, 459.*

(n33)Footnote 35. *377 N.W.2d 313 (Mich. App. 1985)* .

(n34)Footnote 36. *Chub Group of Ins. Cos. v. C.F. Murphy & Assocs., 656 S.W.2d 766 (Mo. App. 1983)* .

(n35)Footnote 37. *Noble v. Worthy, 378 A.2d 674 (D.C. 1977)* .

(n36)Footnote 38. *Crochet v. Hospital Serv. Dist. No. 1, 476 So. 2d 516 (La. App. 1985)* .

(n37)Footnote 39. *See* Stephen H. Bier, *The Evolving Law of "Sick Buildings,"* N.J. L.J. Supplement p. 12 (Aug. 21, 1995).

(n38)Footnote 40. *See, e.g., Broyles v. Brown Eng'g Co., 151 So. 2d 767 (Ala. 1963)* .

(n39)Footnote 41. *46 Cal. Rptr. 49 (1965)* .

(n40)Footnote 42. *Maritime Constr. Co. v. Benda, 262 So. 2d 20 (Fla. App. 1972)* .

(n41)Footnote 43. *425 P.2d 519 (Or. 1967)* .

(n42)Footnote 44. The contractor who "has followed plans ... furnished by the contractee, his architect, or engineer, and which have proved to be defective or insufficient, will not be responsible for loss or damage which results, at least after the work is completed, solely from the defective or insufficient plans ... ." *St. Joseph Hosp. v. Corbetta Constr. Co., 316 N.E.2d 51 (Ill. App. 1974)* .

(n43)Footnote 45. *Morris v. Horton, 27 Cal. Rptr. 2d 585 (Cal. App. 1994)* .

(n44)Footnote 46. Reconstruction of Interview with Doug Lowe, Solberg & Lowe Architects AIA, Inc., Santa Monica, Cal.

(n45)Footnote 47. Daniel S. Hapke, Jr., *Construction Industry Contracts, 23 St. Louis U. L.J. 249, 255 (1979);* Berg & O'Leary, *Preparation of Owner-Architect Agreements from the Owner's Viewpoint,* in Businessman's Guide to Construction 69, 88 (1980).

(n46)Footnote 48. *See* Justin Sweet, *Site Architects and Construction Workers: Brothers and Keepers or Strangers, 28 Emory L.J. 291, 302-311 (1979). See also* AIA Handbook ch. 9, at 4-5 (1970). In one of Professor Sweet's captivating articles, he conjures a fictional conversation between Frank Lloyd Wright and T. Bottom Line, a Risk Analyst for the Wright Foundation. Mr. Line defends the changes in the AIA documents removing from architects the right to dismiss subcontractors or the superintendent and stop the work. "Liability is a big problem." Wright protests: "When I was on the site, everyone paid attention. If I thought of a better construction technique, I ordered the superintendent to use it ... . [W]hen I built La Miniatura for Mrs. Millard in California I learned what happened when you don't keep a careful eye on the contractor. They blamed *me* when the roof leaked! That damned contractor tried to scrimp on labor and materials." Justin Sweet, *The Architectural Profession Responds to Construction Management and Design-Build: The Spotlight on AIA Documents,* 46 Law & Contemp. Probs. 69, 71 (1983).

(n47)Footnote 49. L.A. Times, Nov. 5, 1989, at K1.

(n48)Footnote 50. Interview with Frank Scardina, President, Coastal Valleys Div., Kaufman & Broad of S. Cal.,

Inc., Woodland Hills, Cal. (Nov. 8, 1989).

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CHAPTER 97 CONSTRUCTION AND DEVELOPMENT LAW

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§ 97.04 The Construction Contract.

Once plans are ready a developer needs to arrange for construction. Construction contracts can be defined by: (1) the parties to them, (2) their pricing structure, and (3) whether the design is completed before construction begins.

§ 97.04(a) Parties.

§ 97.04(a)(1) Owner/Builder.

One choice a developer faces is whether to have a general contractor oversee all aspects of construction or act as her own general contractor, and deal directly with the various subcontractors (plumbers, electricians, roofers, framers, etc., who would then be referred to as prime contractors). The owner/builder applies for the building permit and is responsible for code compliance. That responsibility is shared to some extent as each trade contractor must be licensed, and must comply with the applicable codes on its part of the job. Experienced developers often act as owner/builders. They know how projects are built, may actually have a list of seasoned, competent "subcontractors," and are prepared to oversee construction on a day-by-day basis. They have no reason to pay a general contractor 5-15% of the contract price to negotiate with and oversee trade contractors. Energetic budget-conscious neophytes may want to save money by being owner/builders. This is seldom a good idea on major projects. But developers without a track record probably won't get construction financing without an experienced general contractor in tow. n51 owner/builders they must have a contractor's license to enforce collection of the house purchase price. If the owner subcontracts all the work to subcontractors who are licensed, the owner may enforce contract claims for payment against buyers. The owner who is not licensed as a contractor may enforce contract claims as long as the owner qualified as an owner-builder and owned the property when work was done, and as long as the work was done by appropriately licensed contractors. But once the owner/builder who is not a licensed contractor sells the property, the owner/builder has no enforceable claim of payment for work done after the sale. It doesn't matter that the work was actually done by licensed subcontractors. In *Vallejo Dev. Co. v. Beck Dev. Co., 24 Cal. App. 4th 929, 29 Cal. Rptr. 2d 669, 929 (Cal. App. 1994)* , a subdivider contracted to sell lots to contractors and promised to complete subdivision improvements after the sale. The subdivider subcontracted the work to licensed subcontractors, completed it and sued the buyer/contractors for the cost of improvements. They defended because the subdivider had no contractor's license and had done the work *after* selling the site. The buyer prevailed--an admittedly harsh result geared to preserving the integrity of the contractor licensing laws.

§ 97.04(a)(2) Owner/General Contractor.

A general contractor undertakes to build a project for the owner. n52 Not all general contractors (referred to as "contractors" or "GCs") provide the same services. They possess different skills and abilities. Choosing a contractor with the skills and at a price that fits a developer's needs becomes one of the most critical decisions in the development process.

Some contractors have their own staff of subcontractors so most of the subcontracting work will be done by "in-house" personnel. (Subcontracting work refers to work like plumbing, electrical, foundation, framing, and roofing.)

Other contractors subcontract nearly everything and act as coordinators of the subcontractors. Contractors of this type may have subcontractors with whom they work regularly.

§ 97.04(a)(3) Construction Manager.

An owner may contract specially for construction management. This is a flexible term encompassing many types of owner-construction management agreements. n53

The difference between a construction manager (CM) and a general contractor is that the CM isn't obligated actually to build anything; in most states doesn't need a contractor's license; n54 doesn't contract on the CM's own behalf with subcontractors; and seldom guarantees a fixed price. The CM works usually on a cost-plus contract. n55

A construction manager (called a Project Manager in the engineer's--EJCDC--standard form) takes over many of the owner's administrative and coordinating functions. These include evaluating the design for feasibility, budgeting, cost estimating, negotiating subcontracts, scheduling, supervising and overseeing the construction job site, and monitoring the cost, timeliness and quality of performance. While some owners are able to perform these tasks "in-house," many do not know enough about construction to manage the process on their own.

As in the owner/builder arrangement, the owner contracts directly with the prime contractors who would be called subcontractors if a general contractor had been involved.

§ 97.04(a)(4) Designer-Builder.

Under the design-build format, the owner awards the contract to one firm which designs and constructs the project. n56 There are a few architects prepared both to design and construct what they build. Most large construction companies undertake design-build projects by employing the architect directly.

For the owner, "design-build" means dealing with just one firm, not two, in getting the project built. Disputes between architect and contractor are minimized (or kept out of the owner's way) since architect and contractor are working under one corporate roof.

Disputes between independent architects and contractors are not all bad for the owner. They can sometimes benefit the owner as the architect and the contractor watch each other, the architect customarily safeguarding project quality while the contractor keeps an eye on cost and timing. But often what happens is the architect and contractor end up blaming each other for problems and delays. The owner doesn't have the knowledge and experience to determine who is right, and yet the contractor demands more money and delays the project. The design-build form of contract is supposed to protect the owner from this scenario. n57

Following the collapse of a multi-story parking garage at California State University at Northridge in the January, 1994, Northridge earthquake, an engineering firm studying the system under which the university contracts for construction

faulted the use of the "design build" format. "It is our opinion that the advantages ... may not be worth the price of potentially low quality designs that even in a moderate earthquake may fail." n58 The engineers found that the designers failed to address a "series of general provisions" in the building code and that led to their conclusion the code was not complied with.

The policy choice in design-build is whether more is gained by the critical faculties of designers and builders overseeing each other's work than is lost by the internecine bickering which often comes when separate firms handle each function.

Conventionally, the design-build format has been thought to work best for projects that are easy and straightforward--a standard type of building. "When design-build contracts are used for anything other than the most standardized building types (metal or tilt-up warehouses, service stations, or fast food outlets for which standard details have been prepared), there are usually disputes concerning both the scope of the work and its quality." n59

A case has been made, though, for design/build contracts for build-to-suit projects. The case begins by pointing out that many of the participants in the traditional design-bid-build process have an incentive to get things wrong, for architects and engineers to design incomplete plans, and for contractors to charge for "extras" as plan shortcomings materialize during construction. Architects and engineers will claim compensation for additional work, contending that the gaps aren't their fault, just part of the process. Low-bidding contractors will have counted on change orders to lift their bid price into profitability.

Design/build can begin with a clear definition of the scope of work developed by all the parties involved in the project, and refined as construction proceeds. This is the way most firms develop products, and it is also the way Japanese and many European contracting firms work--with great success. By leaving the detailed design for later, as the project is actually being built, newly discovered site conditions and construction problems can be factored into the program and its specifications. (In other words, design/build is more readily combined with fast-tracking, defined below, than the traditional design-bid-build process).

> The appeal of design/build lies in its ability to control spiraling costs, establish an effective system of risk management and maintain efficient and dependable project schedules ... . The chief advantage is the accomplishment of a single course of responsibility for product delivery. n60

An additional advantage of the design-build format: it gives the owner a much improved chance of obtaining a fixed price contract. The architect doesn't have to guess what the contractor will bid and eventually charge. The contractor doesn't have to worry about the aesthetic demands the architect will make during construction.

§ 97.04(a)(5) Prime Contractors in Fast Track Projects.

In a fast track program, construction begins before all the design work has been done. This can save millions in large projects since enough of the design can have been completed to start grading and foundation work before every design detail has been decided. Theoretically, projects begun earlier should be completed earlier. Further, developers like the cash flow implications of fast tracking. They get to tap into the construction loan fund sooner.

Fast tracking opens the construction loan account early. Fast track contracting becomes popular in times of high interest rates, or when there are time limits on land-use entitlements, and is justified by harsh laws of economics. As an example, an owner may invest $10 million to build a hotel. The hotel will not bring in one dime of rent until the completion of construction. Toward the end of the job, the owner's interest costs approach $40,000 per day. The anticipated daily gross income of the hotel is $100,000 per day. This produces a motivation to *fast track* the job. n61 A fast-track project is divided into phases, and prime contractors bid one phase at a time. On one hand, this allows each trade contractor to identify and bid its work more accurately because it is bidding on a discrete portion of the job. Since the bid packages are tailored to the separate trades, each may be more detailed than when the entire project is designed

in advance. Subcontractors don't have to review the entire set of plans and specifications to scope out their parts of the work.

Fast tracking has drawbacks. Fast tracking increases the chance that in the rush, some work isn't assigned to any of the trades or contractors because the design is being done piecemeal. Also, contractors don't like to make fixed-price or G-MAX bids without the details spelled out in advance. (G-MAX, explained in the following pages, means cost-plus subject to a guaranteed maximum price.)

Sometimes fast tracking occurs unintentionally because the owner happens to be in a hurry. The project is put out to bid before the architect's plans are complete, and before the building and safety department has reviewed them, identified shortcomings, approved the architect's changes in response to the plan checker's review and issued a permit.

A contractor is entitled to charge more for costly, significant project changes. When a winning bidder is chosen on the basis of plans inadvertently fast tracked, and the plans need to be changed substantially, the contractor will be enviably situated to demand extra compensation for the numerous change orders that are sure to follow.

An experienced construction lawyer observes: "If *design build* offers the least exposure to construction disputes, *fast track* offers the most." n62 In the ensuing disputes over whether the differences justify a higher price, some cases are decided in the contractor's favor on the notion that the G-MAX only applied to the original scope of work. n63 But some cases go for the owner when the contractor had experience with the type of project and could reasonably have been expected to extrapolate from the incomplete plans to what eventually became the final plan. n64 In one case, the contractor bid $1,790,643 to construct a motel, relying on its own prior experience with comparable motels. The project ended up costing more than the G-MAX price and the contractor got stuck with the overage. n65

§ 97.04(b) Pricing.

Contracts may be priced in three basic ways: (a) "cost plus," (b) Cost Plus with a Guaranteed Maximum Price (G-MAX), or (c) lump sum or fixed price.

§ 97.04(b)(1) "Cost Plus."

In this pricing arrangement the contractor is reimbursed (usually monthly) by the owner for all construction costs. The owner also compensates the contractor for overhead. The contractor's profit comes in the form of a fee, either a percentage (5-15% usually) of construction costs, or a fixed amount paid in monthly installments or every two weeks. In competitively bid cost-plus contracts, the "costs" are paid by the owner--whatever they turn out to be. Bidders compete on the basis of the "plus"--the percentage of profit and overhead they propose to add to the contract price.

When a contractor is offered a cost-plus contract or one that is cost-plus with a guaranteed maximum, the contractor is likely to have heart flutter at the thought of the opportunities the contract presents for increasing the scope of work, loading of crews and benefiting favored subcontractors and suppliers all with resulting increase of profit to the contractor. A word of caution is in order for the contractor and his counsel, for all is not what it may seem. n66

The word of caution comes from studying the handful of cases litigated under the AIA form dealing with cost-plus contracts, Form A111 (the 2007 version is Form A102-2007). Courts often decide disputes arising under cost-plus contracts in favor of the owner and against the contractor. They cite this sentence from the AIA form: "The Contractor accepts the relationship of trust and confidence established between him and the Owner by this agreement." n67 This provision implies the contractor owes the owner the same sort of fiduciary duty as parent owes child, guardian owes ward, clergyman owes parishioner. The owner most likely to be granted "fiduciary law" protection is a novice trying to build a dream house on a tight budget. n68

Cost-plus contractors held to a fiduciary standard are rigorously second-guessed by reviewing courts to make sure they incurred no unnecessary costs. Cost-plus contractors are obliged to update the owner frequently about the costs being incurred. Cost-plus contractors must let the client know from time to time what the final cost will be. Cost-plus contractors must resist the temptation to charge the client for work the contractor does directly. n69 Their failure on any of these counts may result in the cost-plus contractor having to absorb some or all of the project cost overrun.

The biggest drawback to the owner under a cost-plus contract is not knowing in advance what the project is going to cost. A second drawback, alluded to in the "fiduciary" discussion, is that the contractor may be tempted to cheat. Contractors on any type of fee arrangement are tempted to "exaggerate" expenses, double bill, direct materials to other sites, but the temptations are far greater in a cost-plus than a fixed-price contract. The benefits of cost-plus may elude the owner who knows little of what things are supposed to cost and has no way of auditing the contractor's records. A third drawback: the cost-plus contractor has no incentive to spend as little as possible completing the project in the shortest possible time. That is why some cost-plus contracts are written to split the savings between owner and contractor of projects completed under budget or early.

Further, the higher the cost, the bigger their fees when fees are a percentage of cost. n70 That is why many "cost-plus" contracts limit the general contractor to a fixed fee instead of a percentage based on cost. At least with a fixed fee the contractor has no direct profit incentive to let the meter run on the project any longer than necessary. The contractor's profit won't grow with the cost overruns.

Defining "cost" is especially crucial in cost-plus contracts. The owner will seek to prevent the contractor from including items that should be counted as part of overhead such as telephone calls, carfare, postage, stationery, use of tools and equipment. n71 Even with the most careful drafting, disputes arise over what counts as an allowable cost.

Why are cost-plus contracts ever used? (1) Owners who care more about quality than price may be best served by cost-plus contracts. Contractors on cost-plus contracts are relieved from having to worry about getting stuck with the bill if the project runs over budget as they would on a fixed-price contract. (2) Some projects are unique. If put to fixed-price bids, contractors would overbid to protect themselves because the project is unpredictable. (3) Fast track projects are often cost-plus precisely because construction begins before detailed plans for the entire project have been completed, so the contractor really has no basis for making a fixed-price bid. (4) When the owner trusts the contractor, cost-plus may be a better deal for the owner than a fixed price bid if the project costs less to build than was estimated. The less the project costs to build, the less the owner pays.

§ 97.04(b)(2) G-MAX.

In a G-MAX the contractor promises that the project will not exceed a fixed sum. But if the project costs less, the owner pays only "cost-plus." The purpose of obligating the cost-plus contractor to commit to a guaranteed maximum price is to motivate the contractor to be efficient, and to protect the owner against liability for cost overruns. When the guaranteed maximum price is reached, the contractor will have to pay everything over the G-MAX--unless the owner required costly changes or agreed to pay more. n72 The owner and contractor entered a "cost plus with a guaranteed maximum," selecting the appropriate AIA form. The guaranteed maximum was $250,000. The owners were eventually billed and paid $593,687.79. The contractor always knew, but never told the client, that the project would run well above $250,000, and charged nearly twice his actual projected cost for his own work on the project. The owner agreed to pay some of the overrun because of changes in the plans. But the contractor was required to absorb all the excess above the G-MAX price for building the original project, including $100,000 to complete the project which the contractor left unfinished.

Under a G-MAX or fixed price contract the AIA forms provide, understandably, that subcontracts cannot be let over the contractor's reasonable objection. n73 If the owner insists on hiring a subcontractor whose bid exceeds that of the contractor's preferred lower bidder, the contractor may require an increase in the G-MAX price to cover the difference

between the two bids. n74

A contractor's G-MAX obligation should be worded clearly lest a maximum cost figure be construed as nothing more than an estimate of probable cost. This is precisely what happened in *Robinson & Wilson v. Stone*. n75 Doctors were building a medical office building, part for their own use, part for lease to other doctors. They were meticulously clear about the plans and specs for the space they were to occupy. But their construction contract made no provision for how the rented space was to be finished. When their construction lender insisted they clarify this, they added a provision that the contract price be increased $30,040 for completion of the rental offices "to the standards fixed by the plans and specifications presently in existence for the other areas of the building." The actual cost of finishing that space ended up at $85,000. The doctors contended theirs was a G-MAX contract. The court agreed with the contractor that it couldn't be since the scope of work had been so casually defined. There was no "standard" medical suite, as far the court could see. The court construed the $30,040 figure as an allowance or estimate only, not a G-MAX.

Bottom line: for a G-MAX format to succeed for the owner, the definition of the scope of work must either be so broad that any and all specific "changes" fit within the original definition of work and can't be billed as "extra," n76 or so specific and detailed that nothing is left out.

Contractors under G-MAX need to be given some incentive not to hit the max. Savings below the G-MAX may be split between owner and contractor equally or even 60-70% in the contractor's favor. Under the AIA Standard Form Between Owner and Contractor, the owner makes progress payments based on the lesser of the percentage of work actually completed or the expense incurred, divided by the G-MAX price allocated to the completed portion of the work. n77 Say the total contract price is set for a G-MAX of $100,000. Ten percent of the work is finished. It could have cost as much as $10,000 but it only cost $8,000. Under this formula, the contractor would get only $8,000. Contractors might be tempted to pad expenses so they could extract the full $10,000. After all, there may be unpleasant surprises ahead and if the contractor doesn't hedge now, she may get stuck later. An agreement to split the savings generously with the contractor dulls the edge of this temptation.

§ 97.04(b)(3) Fixed Price.

This type of pricing arrangement is supposed to inform the owner what the project will cost in advance. It works only for fairly standard and predictable projects. Also, the project plans and specs must be so detailed and complete that few questions can arise concerning what they mean. Even then, if the contact doesn't provide a clear way of pricing change orders, the final cost can skyrocket.

The advantage of a fixed-price contract to the owner is price certainty. There are some disadvantages to the owner: (1) Because the contractor under a fixed-price contract keeps all the savings, the contractor has an incentive to cut corners. So the owner needs to control quality with special diligence under a fixed-price contract. n78 (2) If the project is unique, or the plans incomplete when put to bid, the contractor will seek to protect himself against uncertainty by setting a very high fixed price. The owner may be paying a hefty risk premium measured by the difference between the fixed-price bid and what the owner would have paid on a cost-plus basis. (3) There is little point in entering a fixed-price contract with a poorly capitalized contractor who underbids the job. At some point, the contractor is likely to demand more money or quit.

§ 97.04(b)(4) Hybrids.

More than one form of price arrangement can be utilized in the same transaction. For instance, a developer might conduct bidding among qualified contractors only so they can compete in setting the contractor's fee and overhead. The contract could then be awarded to the contractor who bid the lowest fee on the basis of cost-plus with a guaranteed maximum. Or the developer could contract directly with some key trades for fixed-price contracts and with others on a cost-plus or cost-plus G-MAX.

§ 97.04(b)(5) Competitive and Negotiated Bids.

Another dimension of choice facing the owner is whether to entertain competitive bids for the job, or to negotiate directly with one or two general contractors. Many developers use aspects of both methods, seeking bids first and then negotiating with the lowest qualified bidder. Many shrewd contractors abhor competitive bidding. As Albert Reichmann put it, in a competitive bidding situation, "the bidder who makes the biggest mistake gets the job." n79

Government contracts, by law, must often be let to the lowest responsible or qualified bidder. The theory is that it fosters competition, gives everyone an equal chance to do public work, saves taxpayers money, and avoids favoritism, fraud and corruption. But it is also expensive for the many contractors who prepare bids which only one of them will win. Further, taxpayers pay a premium when governments can't negotiate privately with qualified contractors as private developers do. In the private sector, the next-to-low bidder may end up with the job, negotiating to beat the low bidder's initial prices. Public sector managers are barred from reaching "off record" deals like that. Contractors' representatives assert that government competitive bidding procedures are so elaborate, the paperwork so much greater than anything in the private marketplace, and the final selection process so rigid that contractors "routinely bid government work 10 to 30 percent higher than similar work in the private sector." n80 Almost everyone concedes that competitive bidding works poorly for goods and services that aren't standardized and easy to evaluate on completion. Yet, California courts require competitive bidding even for a construction manager type of contract. The contested rationale is that competition will reduce costs and avoid favoritism. n81

§ 97.04(b)(6) Incentives for Early or Below Budget Completion.

Should construction contracts include incentives for early performance and performance at or below budget?

The overcommitted contractor or subcontractor who anticipates a big payoff for getting the job done early or below budget may well favor the "incentive" site over other jobs.

On the other hand, many developers view these incentives as nothing but invitations to substitute cheap materials and "short cut" building techniques for quality work and a quality job. Indeed, one major homebuilder in California, well-known for rewarding employees when home sales have closed, is equally well-known for several well-publicized liability suits by disappointed home buyers alleging shoddy workmanship, defective construction, and fraud by sales personnel.

§ 97.04(c) Scheduling.

> Courts have held that it is an implied obligation of the contractor to complete the work within a "reasonable time." Despite the fact that the "reasonableness" standard is intended to be an objective rather than subjective standard, it is a standard which is nonetheless extremely difficult to define.
>
> Ultimately, what is a "reasonable time" must be determined from the totality of the events as viewed in the light of the reasonable expectancies of the parties at the time they entered into their contract. To the extent that a Schedule exists and its content is agreed to by the parties, the Schedule creates one objective means of determining what the parties considered to be "reasonable," and can therefore be an invaluable tool in and of itself in clarifying this reasonableness standard and in resolving disputes. n82

The schedule for a very simple project, such as the construction of a garage, may simply consist of starting and completion dates. As the complexity of the project increases, so does the complexity of the schedule. n83 The schedule may break the project into stages, which not only aids in management of the construction, but also provides points for progress payments. n84

The process of negotiating for control of the Project Schedule can be generally broken down into four steps: (A) choice of a scheduling method; (B) establishing the format and content of the Schedule (preparing the scheduling clause or specification); (C) submission, approval and adoption of the Schedule; (D) establishing ground rules in the contract for making changes (extensions) in the Schedule. n85

§ 97.04(c)(1) Excused Delays.

Delayed activities may or may not obstruct the critical path. If the developer's contract doesn't reserve the "float" to the developer, the contractor may have a defense for late performance if the contractor's delay didn't cause a delay in the overall project completion date.

In *Morris Mechanical Enterprises v. United States*, n86 described later, the contractor supplied an air conditioner chiller 231 days late. However, it didn't matter because the project was so far behind for other reasons, that the government wasn't ready for the chiller when it finally arrived. The most common sources of excused delays are owner-generated change orders and design changes, or other slower performing subcontractors whose work must be completed first.

§ 97.04(c)(2) The Owner Liability to One Contractor for Another Contractor's Delay.

Suppose a trade contractor (a structural contractor) agrees to a fixed price contract with a definite completion date and is delayed by another trade contractor (mechanical). Can the delayed contractor obtain damages against the owner? Is the contractor's late performance excused to the extent its delay resulted from another contractor's late performance? That depends on the owner-contractor-subcontractor arrangements. The subcontractor may not be in privity of contract with the owner and may need the general to intervene and assert the subcontractor's damage-for-delay claim against the owner. Alternately, the subcontractor may be a third party beneficiary of any provisions in the owner-general contact agreement holding the owner responsible for keeping the job moving. The general contractor or construction manager may be made primarily liable for preventable delays. But if the owner has the authority to order a contractor to increase shifts and workdays, and doesn't order the tardy subcontractor to put on double shifts and pay for accelerated deliveries, the owner may be liable for the wrongfully delayed contractor's loss. n87

On the other hand, suppose subcontractor A's tardy performance delays subcontractor B's work, and if B doesn't complete ahead of his promised due date, the general contractor, C, will be liable in liquidated damages to the owner for late completion. The contractor orders B to go on double shifts, knowing B expects reimbursement. So the contractor sues A to recover B's cost overrun which A caused. But A's contract has a liquidated damage clause, a per diem sum, for late completion. Is A's liability to the contractor limited by this, or is A liable for the actual damage the contractor's order to B caused? A's liability is clear if A promised indemnity for acceleration payments A's delay caused other subcontractors. Subcontractors wanting to protect themselves against delays caused by other subcontractors need to be sure the owner or general contractor has put in each subcontractor's contract a provision obligating that subcontractor to pay the acceleration costs its delay causes to other subcontractors.

§ 97.04(c)(3) Exonerating Owners from Liability for Delays They Could Have Prevented.

Owners often place "no damage for delay" clauses in their contracts. They hope this clause results in a delayed contractor getting only a time extension to complete his work, no cash. Such provisions are particularly important when the owner or architect caused the delay by changing the project design. However, courts are sometimes reluctant to enforce these clauses, and have held owners liable in spite of these attempts at exculpation, when the owner's delay is construed to have been in bad faith, the delay was a sort not reasonably anticipated in the normal course of construction, and the owner actively interfered with the job, or abandoned the project.

An example of bad faith: the owner knew that the contractor preparing a site for a freeway assumed the site was dry. In

fact, the owner--the state highway department--knew soil conditions to be wet (soft) and withheld that information from the contractor. n88

A number of contract provisions may achieve the same result as a "no damage for delay" clause. (1) The owner may reserve the right to delay, and such delay shall not constitute a breach. (2) The contractor's sole remedy for delay is a time extension equal to the owner's delay. (3) The contractor must give written notice at the time of the delay, or shortly thereafter, or be deemed to have waived its right to claim damages for delay. (4) A modest liquidated damage could be set as the contractor's exclusive remedy for owner's delay.

§ 97.04(c)(4) Contracts Conditions Provide for Extensions.

Construction contracts usually specify the number of days within which the work must be performed. The contract will also specify the conditions under which the contractor may request and be granted an extension of time. Extensions are frequently permitted when unexpected circumstances arise beyond the contractor's control. Many contracts provide that an extension may be granted only when the contractor requests it in writing within a certain number of days after the event that the contractor claims is the cause of the delay.

§ 97.04(c)(5) Liquidated Damages for Delays.

Construction contracts may provide for the contractor to pay the owner *liquidated damages* at a set amount for each day that the project is not finished beyond the contract completion date. The purpose is to "alleviate uncertainty over the extent of the parties' potential liability without relying on the courts." n89 This purpose is often defeated because courts will overturn liquidated damage clauses for a great many reasons--depending on the state and whether the contract is for private or public work. Some courts strike down "unreasonable" provisions, those calling for sums greatly above what the non-breaching party could expect as actual damages, or clauses intended to be punitive. n90 Some courts have let contractors off the liquidated damage hook when projects were "substantially" but not totally complete. n91

In some states the innocent party must show at least some actual harm or damage caused by the breach before the liquidated damage clause can be triggered. "[A]lthough proof of actual loss is not a prerequisite to collecting liquidated damages, a showing of some actual harm or damage is necessary ... ." n92 Setting the liquidated-damage-for-delay sum is no easy matter. A sum too high may be declared unenforceable as a penalty. A sum too low may undercompensate the non-breaching party. n93

For a developer, the main cost of delay is the lost rental, or use value, of the project. This sum may bear no necessary relationship to what it will take to motivate the contractor to perform on time. Most developers would agree that a liquidated damages clause is not just to compensate them for losses due to late completion but also to deter the contractor from being late. The penalty clause should make it cheaper for the contractor to get the job done on time than not, even if this means he has to pay overtime, hire double crews, or pay more for the expedited fabrication and delivery of materials. The sophisticated owner realizes she may be paying a premium in the form of higher bids when contractors bid on a job with such a penalty included in the contract documents.

Setting a liquidated damage fee so high it bears no reasonable relationship to owner's likely losses, the owner risks having the clause declared unenforceable as a penalty. The owner may not care. If the clause succeeds in prodding the contractor into timely performance, the clause has served its purpose. Once the delay occurs, and the liquidated damage clause is declared invalid, the owner still gets the chance in court to prove actual damage. A contractor racing to avoid a steep liquidated damages clause, like a speeding motorist late for work, may take unfortunate, potentially calamitous risks. California courts scrutinize liquidated damages clauses closely to prevent forfeitures and penalties. In other jurisdictions such clauses have been enforced with less difficulty. In Texas, for example, a contractor was allowed to collect completion costs plus 10% from a subcontractor who had failed to complete the project. Cost plus 10% was what the contract provided as the measure of damage, and that was what the contractor who completed the work sued the

subcontractor for. The Fifth Circuit Court of Appeals upheld the 10% as a reasonable and customary profit for construction work. n94

In one landmark case on the enforceability of liquidated damage clauses for late performance, n95 Bethlehem Steel was 52 days late in furnishing, erecting and painting structural steel for a highway. In accordance with a contract provision calling for $1,000/day for late performance, the City of Chicago withheld $52,000 in payment. Bethlehem Steel's argument was that the City of Chicago had sustained no damage. According to the contract the sole stated purpose of the penalty was to avoid delay in the completion of and opening of the South Route Superhighway. n96 Since the highway had opened on time, Bethlehem Steel's delay proved harmless. The court enforced the contract anyway: a promise is a promise.

The opposite result appears to have been reached in *Morris Mechanical Enterprises v. United States*. n97 A beneficiary of the General Services Administration's small business set aside program won the right to supply a 650-ton centrifugal chiller for a Federal Law Enforcement Training Center in Glynco, Georgia. The subcontractor shopped the contract with the three major suppliers in the industry. It contracted with Airtemp, a division of Chrysler Corporation, to produce the chiller because Airtemp was the only one that would guarantee a delivery date. Airtemp was very late delivering the chiller and caused the subcontractor to be 231 days late. The subcontractor stood liable for liquidated damages of $100/day--$23,100--which was withheld from a $78,763 contract. In fact, the entire job was delayed so substantially that the chiller--once on the critical path--no longer was. The court held that the subcontractor was therefore entitled to an extension of time to permit it to complete its work after the prime contractor formally prepared the site so that they were ready for the chiller.

The differences between *Bethlehem Steel* and *Morris Mechanical* help explain when liquidated damages delay clauses are enforceable and when they are not.

(1) In *Morris*, the contractor had not been able to perform on time because another contractor failed to supply a chiller on time. Bethlehem Steel had no other firm to blame for its tardy performance. Government contracts excuse contractor delays from contingencies over which they have no control. n98

(2) The fact that the highway was completed on time didn't mean the government suffered no damage due to Bethlehem's delay. Bethlehem's delay actually caused real problems to the City. The delay hindered the work of other contractors. It interrupted their production schedules, causing substantial time losses. It resulted in the subcontractor which depended on Bethlehem's timely performance having to lay off employees temporarily and posed a greater danger of accidents. It increased administrative costs and resulted in scheduling difficulties.

(3) The liquidated damage sum in *Bethlehem Steel* was probably a small percentage of the total contract. It was one-third of Morris Mechanical's gross and probably exceeded its net. Ordinarily, this wouldn't be relevant in assessing the reasonableness of a liquidated damages clause which looks to the probable loss for the innocent party--not the harm to the breaching party. But the purpose of Morris Mechanical receiving this contract was a government effort to assist small businesses. Socking them for damages in excess of their profits for delays they didn't cause and had tried their best to avoid would work against the purposes of the GSA's small business set aside program.

The court put down Bethlehem's argument on freedom of contract grounds: "There is no sound reason why persons competent and free to contract may not agree upon this subject as fully as upon any other, or why their agreement, when fairly and understandably entered into with a view to just compensation for the anticipated loss, should not be enforced." n99

A liquidated damages clause for late performance does not bar a developer from claiming--and being awarded--actual damages attributable to other aspects of the breach. A contractor who completes performance late may also have failed to perform within the budget or to build according to plans. For these items the developer may recover sums in addition

to a liquidated damages "late fee."

If the delay has been caused both by some acts of the owner (e.g., change orders) and some lack of diligence on the part of the contractor, it might make sense to apportion the blame and enforce a late-performance liquidated damages clause with an apportionment or set-off for that part of the delay attributable to the owner's acts. Especially in a comparative negligence state this would be sensible, but courts are divided in their willingness to apportion liquidated damages in these circumstances. n100

Most decisions indicate that courts are willing to apportion damages and apply the clause to that part of a delay for which the contractor is responsible, especially when the contract provides for apportionment. Unfortunately, some decisions indicate that mutual responsibility acts to abrogate a liquidated damages clause altogether, regardless of express contractual terms to the contrary. n101

Since judicial enforcement of a liquidated damages clause is so unpredictable, owners may consider using a "bonus" clause in an attempt to draft around the vagaries of liquidated damage clause enforcement. n102

For example, suppose that a developer and contractor both believe that a project can be completed in ten months, and that a fair price of the job is $100,000. The developer wants a liquidated damages clause of $300 for every day over ten months it takes to complete the project. Suppose rather than using a liquidated damages clause (which a court may later strike as punitive), the parties use a bonus instead. The contract calls for completion in twelve months at a base price of $82,000 plus a $300 per day bonus for every day that the contractor finished early, so if the contractor finishes in ten months as contemplated, she would receive $82,000 plus an $18,000 bonus (60 days at $300/day), or a total of $100,000. This provides the same incentive for a contractor as a ten-month contract for $100,000 with a $300 per day liquidated damage clause for late performance. In either case, the contractor loses $300 for every day over ten months that the contract remains uncompleted.

A court is likely to uphold the bonus clause for early performance against the challenge that it is a disguised penalty. n103 Failure to earn an early completion bonus is no default by the contractor, but rather an alternative performance in satisfaction of the contract. The contractor has a choice: perform early (in ten months) and receive a bonus; or perform on time (in twelve months) and receive the base contract price. In either case, the contractor fully performs.

Of course, if a court determined that the alternative performance was not a true option, that only one performance was really contemplated by the parties, a court might characterize the bonus clause as a disguised penalty. n104 This outcome seems most likely when the bonus component of a contract is excessively large, and it is an "all or nothing" bonus; for example, paying the contractor an $18,000 bonus for completing the contract in ten months, but no bonus for completion after that date. With a "sliding scale" bonus, the contractor would seem to have a rational choice in performance because not all would be lost by failing to perform early. n105 Only a rare "bonus" clause would drive a court to this result.

The contractor runs the risk in the "bonus" formula that if the contractor finishes late and the owner's actual damage far exceeds $300 per day, the contractor will be liable for actual damage. The "bonus" is not, after all, a liquidated damage proviso. Say the job isn't completed for 14 months. The owner may successfully contend that while the contractor would have earned $300 per day for every day the job was completed short of 12 months, the contract provided for completion in 10 months and the project wasn't completed in 10 months. Indeed, even if the contract took, say, 11 months to complete, the owner might claim actual damages for one month of delayed completion as an offset against the bonus.

Both liquidated damages and bonus payments are financial incentives, and ... "[p]eople do respond to economic incentives, often with huge advantages to everyone involved." Projects get completed more quickly, and thus anything that boosts the credibility of financial incentives will conserve resources in the future. n106

§ 97.04(c)(6) How to Assess a Late Performance Penalty When the Contractor Abandons the Job.

§ 97.04(c)(6)(i) Generally.

Sometimes a contractor abandons the job altogether. Not all courts are prepared to enforce liquidated damage for delay provisions when, instead of merely performing late, the contractor abandons the job entirely. Some courts reach the conclusion that late payment penalties aren't intended to cover total abandonment. Some hold that if the abandonment comes after the scheduled completion date, the contractor's liability is for breach of contract--not just for delay. n107 Where courts do enforce late completion fees in abandonment cases, is the original contractor liable for a late completion fee only up to the date it abandoned, or all the way to the day a replacement contractor actually finished the job? Neither, ruled the Massachusetts Supreme Judicial Court in *City of Boston v. New England Sales and Manufacturing*. n108 The abandoning contractor is liable on a late completion penalty to the day the contract reasonably should have been completed. So if the original completion date was February 1, the contractor abandoned March 1, and the contractor completed on April 1, the original contractor would be liable for two months' late fee but only if the owner demonstrated that April 1 was a reasonable completion date.

§ 97.04(c)(6)(ii) Distinguishing Substantial from Final Completion in Assessing a Late Payment Fee.

A project is considered to be substantially complete when it may be used for its intended purpose, although the construction may not yet be fully performed. There may be numerous items of work still to be corrected or completed.

Prior to the work being declared substantially complete, the contractor would have made a list of all known minor corrections, defects to be touched up, and other remaining contract requirements yet to be performed. The architect would usually check the list and supplement it with any additionally observed items. The combined so-called punch list is then attached to the architect's certificate of substantial completion.

The architect's certificate is to be co-signed by owner and contractor indicating their agreement to the respective allocations of responsibility for security, maintenance, heat, utilities, damage to the work, and insurance. The certificate also determines the time within which the punch list work is to be accomplished by the contractor. The owner is then entitled to move in and occupy the premises.

The contractor continues with the punch list, completing all remaining contract requirements within the agreed time. The contractor is not relieved of responsibility for correcting or completing any contract requirement inadvertently omitted from the punch list. n109

Sometimes a building is sufficiently complete so part of it can be occupied while corrective work takes place on other parts to finish the job. Or, the building may function well enough for some but not all its intended purposes. Under these circumstances, the owner may not be able to persuade a court to enforce a liquidated damages for delay clause if it is "far in excess of such compensatory damages as would be indicated ... ." n110 If it takes a long time to cure serious defects, the owner may be able to collect actual, provable damages attributable to the late opening and high interim operating costs but not the liquidated damages fee. That fee might be construed as applying only to "normal" construction delays.

§ 97.04(c)(6)(iii) Allocating a Liquidated Damage Payment Among Subcontractors.

If the project is completed late, a general contractor may face a stiff liquidated damage fee for late performance. The GC hopes to pass that fee forward to the subcontractors by charging each of them a ratable share of the late fee without allocating blame to avoid time-consuming finger pointing among the subcontractors. Subcontractors who performed their part of the work on time aren't going to like this. They will, predictably, try to resist the prospect of paying damages for someone else's late performance. They may be asked to sign AIA Doc. A401-2007, *Standard Form of*

Agreement Between Contractor and Subcontractor, § 3.3.1, assessing subcontractors for late performance "only to the extent caused by the subcontractor ... ." This is no panacea for the diligent subcontractor. A subcontractor's performance could *cause* a delay even though the subcontractor had not *breached* any of the terms of its contract. A careful subcontractor will agree to share liability only if its performance caused a delay *and* it failed to perform according to the time provisions in its contract in such a way as to have breached.

§ 97.04(c)(7) Rights of Third Parties to Recover for Contractor's Delay.

In *J'Aire Corp. v. Gregory*, n111 the question before the court was whether a cause of action for negligent loss of expected economic advantage could be maintained against a contractor for the losses of a third party. J'Aire Corporation operated a restaurant at the Sonoma County Airport in premises leased from the County of Sonoma. Under terms of the lease the county was to provide heat and air conditioning. In 1975 the county entered into a contract for improvements to the restaurant premises, including renovation of the heating and air conditioning systems and installation of insulation. Because the contract did not specify any date for completion of the work, J'Aire alleged the work was to have been completed within a reasonable time as defined by custom and usage. Despite requests that the contractor complete the construction promptly, the work was not completed within a reasonable time. Because the restaurant could not operate during part of the construction and was without heat and air conditioning for a longer period, J'Aire suffered a loss of $50,000 in profits for which it claimed the contractor was responsible.

The court held that the contractor had a duty to complete construction in a manner that would have avoided unnecessary injury to J'Aire's business, even though the contract was with the county. J'Aire's injury was foreseeable, proximately caused by the contractor's conduct and its damages were reasonably calculable. Accordingly, the court awarded J'Aire its damages.

§ 97.04(d) Change Orders and Extras.

While contract work is proceeding, the contractor frequently revises plans, specifications, or orders. Owners change their minds. The architect's drawings and specifications never anticipate and specify every item of material and every construction process choice to be made. Building code inspectors may require further clarification. Who determines if these changes or revisions justify additional compensation for the contractor?

One way to discourage contractors from underbidding with the intention of making up for the low bid with long lists of claimed "extras" is to price extras tightly--either setting a small percentage for profit and overhead, or disallowing profit and overhead altogether. The contractor bids the job on the assumption that for the bid price the contractor will perform only the work called for by the contract. If the drawings were incorrect and the contractor relied on them in making the bid, the contractor is entitled to recover for the extra work necessitated by the faulty drawings. n112

Sometimes the plans are ambiguous, incomplete or internally inconsistent. Change orders result when the ambiguities are resolved, additional details are provided, or the inconsistencies reconciled. Who bears the cost?

The architect will claim that the owner got a degree of specificity and detail befitting the architectural fee she agreed to pay. If the contractor had wanted the architect to draw more detailed plans, the owner should have paid the architect a higher fee.

The owner will claim that it is the duty of the contractor to detect those flaws in the plans and call them to the owner's attention before bidding the job. This is a realistic expectation in a negotiated contract. But, the contractor who is forced into a competitive bidding situation shouldn't be expected to note ambiguities because other contractors may submit lower bids and remain silent. The owner should be responsible for the plans being complete and unambiguous in a competitively-bid job. At least, that is what the contractor will argue, should the need arise.

Some changes don't cost the contractor more than the original work would have cost. Even if the parties agree that the work is extra, a dispute may arise over the amount to be paid for it.

The AIA Owner-Contractor form provides for the contract price to be adjusted when there is a construction change by (1) a mutually-agreed lump sum, (2) a unit price if the parties agree to one or one is already specified in the contract, or (3) cost as determined by the parties plus a mutually-acceptable fixed or percentage fee. These depend on the owner and contractor reaching agreement. If they can't, then the change order is billed at cost, (4) the costs of labor (including fringe benefits and workmen's comp.), materials and supplies, rental costs of machinery and equipment, bond and insurance premiums, sales taxes and permit fees, plus the "additional costs of supervision and field office personnel directly attributable to the change." n113 In most cases, the upshot is that the contractor will be limited to a recovery of his actual costs for a change order unless the owner agrees to pay more.

The Associated General Contractors provision on compensation for change orders allows the contractor, in most cases, reimbursement for his actual cost "plus reasonable amounts for overhead and profit." n114

Form construction contract provisions on change orders differ significantly on whether the change must be in writing. The AGC form allows changes to be made by "drawings, specifications, exhibits or written orders." n115 The Contractor doesn't have to perform the changes "until the owner has approved in writing the changes in the Contract Price and Contract Time." n116

But, if the owner and contractor can't agree on a price and time schedule for the extra work, the owner can, in writing, authorize the contractor to perform, if the change is a "reasonably foreseeable alteration to the Work originally contemplated by the Contract documents." n117

Taken together, these provisions give the contractor the option of (1) doing the work on a spoken instruction, and fighting later with the owner about compensation, or (2) refusing to do the work until the owner agrees with the contractor on how much to pay for it, unless the owner puts the request in writing and the order is the sort of request the contractor had expected to be getting anyway.

The contractor who does the extra work and sues later must prove:

(1) The work was outside the scope of the contract.

(2) The owner ordered the work.

(3) The owner agreed, by words or conduct, to pay extra.

(4) The contractor didn't volunteer the extras free of charge.

(5) The extras weren't necessitated by a fault of the contractor.

(6) That an owner "wanted" an item doesn't prove the owner knowingly ordered it as an extra.

(7) The contractor's claim for additional payment has to be made clear to the owner *before* the work is done. n118

A form drafted for owners specifies that "Contractor shall make no change in the work without the issuance of a written change order, and contractor shall not be entitled to compensation for any extra work performed unless the owner has issued a written change order designating work to be performed." n119

This provision won't be worth much if the owner waives it by making oral change orders, doesn't object to additional work when it is so substantial it clearly amounts to an extra, or pays for changes made without a prior written change order. n120

> The judicial attitude towards formal requirements must take into account: the contract language, the experience of the parties in construction, the need to protect public funds (when the government is the owner), the reasonable expectations of the owner, and the potential unjust enrichment that can result if the contractor is unable to recover for admittedly extra work. n121
>
> In the event of a dispute over the price or the question of whether the work is extra, the contractor must carefully weigh the following alternatives that are available to him before proceeding. First, the contractor can proceed under protest, hoping to gain the extra compensation after the completion of the job through arbitration or legal proceedings. Second, the contractor can stop work under the contract and seek recovery on a *quantum meruit* theory for the work already done. Refusing to obey the order would have some very practical disadvantages. A court might hold that the architect was correct and the contractor wrong by refusing to proceed.

The contractor has a right to resist changes of such great magnitude that they alter the general scope of work and convert the contract into one quite different from the one originally agreed. Even if offered payment on a cost-plus basis, the contractor shouldn't have to accept work on a job so greatly enlarged as not to fall within the scope of work of the agreed contract. The owner can insist on a double-sink counter top instead of a single in a bathroom remodeling contract. But when a 200-square-foot bathroom remodel becomes a 1500-square-foot second story addition, the owner is going too far and the contractor has the right to refuse the "extra." Third, if the alleged extra work is severable from the original project, such as a swimming pool is from the remainder of a house, the contractor can refuse to build the extras until the terms can be worked out, and continue building the original project.

The contractor has a fourth option--a bit risky, but potentially lucrative if the changes are so enormous they are tantamount to a completely different scope of work than the original contract. The contractor can finish the project and then sue for the entire value of the work on a *quantum meruit* theory, claiming that the original contract was mutually abandoned.

> In cases involving non-construction contracts, abandonment may start with an intent to abandon by one or both of the contracting parties and conclude with an agreement by each that the contract is terminated and of no further force and effect. Using this analytical approach, completion of the contract would be inconsistent with a holding that a contract was abandoned.
>
> In the specific context of construction contracts, however, it has been held that when an owner imposes upon the contractor an excessive number of changes, such that it can fairly be said that the scope of the work under the original contract has been altered, an abandonment of contract properly may be found. In these cases, the contractor, with the full approval and expectation of the owner, may complete the project. Although the *contract* may be abandoned, the *work* is not. n122

The contractor who wins may cash in on the actual cost or reasonable value of the work done. n123 The contractor won't be bound by any fixed price ceiling or liquidated damages clause in the original contract, as *would* the contractor who sued for breach of contract. n124

Contractors often underbid jobs to win the contract, and count on making up their losses by change orders. Some courts are quite aware of this strategy, and don't like it. There are two ways of calculating damage after liability has been established when a contractor has been damaged due to a change order. One is the detailed cost method which requires a discrete cost breakdown measuring the cost of each change. n125 The other is far easier, the total cost method. This only requires a comparison of the costs as contemplated in the original contract with the actual final cost of the entire

project--change orders included.

> When a court concludes that the cost overrun was due to the owner or architect substantially changing the terms of the contract, and was not due to the contractor deliberately underbidding the job, the court may allow the contractor to recover actual costs without requiring the use of the discrete cost method. Although many courts have questioned the use of the total cost method's application, most courts now accept the method if a four part test is met. The total cost method hinges on proof that (1) the nature of the particular losses make it impossible or highly impractical to determine them with a reasonable degree of accuracy; (2) the plaintiff's bid or estimate was realistic; (3) its actual costs are reasonable; and (4) it was not responsible for the expenses. n126

As noted earlier, if the changes had been so substantial that the final design bore only slight resemblance to the project the contractor had bid, the court might have awarded the contractor a *quantum meruit* recovery based on its actual costs. The theory courts apply in such situations is that both parties agreed to abandon the contract and yet to continue the work. So the owner should pay for the value of the work.

Happy's contract with Quick-and-Dirty requires the contractor to comply with all federal, state and local laws, ordinances, rules, regulations and lawful order of all public authorities. It has a fixed completion date, a cost ceiling, and an obligation to continue work at a specified level of progress. The contract recites that the contractor has visited the site and is familiar with it.

As work begins, the contractor discovers underground oil seepage. He stops work and insists the owner clean up the site. This is a condition unforeseen when the contractor bid the job. He promises to resume when the site is safe and clean, and the owner produces evidence that she has obtained permits certifying that the site is clean. The contractor wants to be compensated for the intervening delay.

Happy points out that the contractor promised a job for a fixed price to be completed within a specified time. Delay will equal breach. In her view, he should absorb the oil cleanup costs as part of the original bargain. Happy believes the oil seepage is common to the area, and won't be very costly or difficult to remove.

The risks of environmental contaminants could have been allocated by contract. n127 Standard contract forms by the American Institute of Architects (AIA), the Engineers Joint Contract Document Committee (EJCDC), and the Associated General Contractors (AGC) provide for the situation where subsurface or latent site conditions differ materially from those contemplated in the contract documents. n128 None of those provisions appear in this contract.

Happy and Quick-and-Dirty both appeal to the architect and ask him to allocate the cost of cleaning up the oil to the other. He decides they should split the cost, and Happy should grant a time extension equal to the time it takes to clean up the site.

QUESTION:

How will the contractor be likely to wish "cost" for extras had been defined in the contract?

ANSWER:

The contractor will want cost defined broadly to include reasonable amounts for overhead and profit as well as for office and administrative expenses.

QUESTION:

How will Happy wish "cost" for extras had been defined in the contract?

ANSWER:

The architect will want cost to be defined as the actual cost of labor paid by the contractor plus materials purchased solely to do the work involved in the cleanup less any savings that result from the change order.

§ 97.04(e) Payment Delays.

In the absence of a contract provision, the common law "conditions" rule was that the performance of services had to be fully rendered before payment was made for those services. This protected the person *receiving* services. No payment was due until *all* the service had been completed. The paying party could withhold to make sure the services were satisfactory.

Even for the best of service providers this could be bad news. Huge sums may be withheld for trivial matters. The client or owner could bargain for a deeper deduction in the agreed price than what was reasonable by threatening not to pay. The service provider might capitulate, instead of incurring the cost of a lawsuit to compel a more equitable quantum meruit payment.

Contractors protect themselves from the harshness of the conditions rule by requiring payment as work progresses. The contractor hopes to stay even with or collect a bit more than actual time and material expended. The owner or client hopes enough money has always been held back (retained) to finish the job with another contractor if the first one should falter. Not surprisingly, construction contracts generally provide for payments to be made in installments, known as "progress payments." Developers and construction lenders don't pay for work in advance. Yet few contractors want to wait until final completion and fewer still have the resources to finance a construction job that may take months or even years to complete. Thus, the compromise is for periodic payments. A contractor might call for 20% of the contract price to be paid when the foundation is in, 30% when the structure is framed and the roof on, 20% when plastering is completed, 20% on completion, and 10% thirty-five days after recording notice of completion.

The contractor hopes the payment schedule is generous enough to cover the actual costs of labor and materials expended up to the date of payment plus overhead and profit. The developer hopes the payment schedule is tight enough so that if the contractor left at any time before completion, sufficient funds would remain to pay another contractor to finish the project with a premium for the second contractor's taking over an unfinished job.

Payment may be made directly to the general contractor with the lender and owner relying on the general contractor to pay subcontractors and material suppliers in exchange for mechanics' lien waivers collected periodically. Or payment may be made directly to the general contractor on vouchers signed by the general contractor and the supervising architect or construction manager.

The owner usually pays the contractor or the subcontractors 90% of the value of the work completed each month. It is common to retain 10% of the contract price until 35 days after completion of the work under any payout scheme as security against mechanics' liens and to ensure completion.

The owner's repeated or egregious failure to make a progress or vouchered payment may give the contractor the right to rescind the contract and abandon the job. The contract could provide: Contractor shall have the right to stop work if any payment, including any payment for extra work, is not made to contractor as agreed under this contract. In the event of such nonpayment, contractor may keep the job idle until all payments are received. n129

Without such a clause, not every failure to make a periodic payment amounts to such a substantial or material breach as to justify rescission, though. n130 Rescission is legally justified only when failure to pay is extended and unreasonable, or there is an outright refusal to pay, or a total repudiation of the contract. The contractor who rescinds because the owner has failed to make a progress payment risks being in breach itself if the nonpayment is later found justified, or

not so serious a delay as to be a "material" or anticipatory breach of contract.

Alternately, the contractor's option to stop work can be circumscribed by contract: In the event of nonpayment ... contractor agrees to continue the work diligently to completion and will neither rescind this contract nor stop the progress of the work, but will submit such controversy to determination by a court of competent jurisdiction after the project has been completed. n131

The AIA form gives the Contractor the right to "stop the Work until payment of the amount owing has been received" if the "Owner does not pay the Contractor within seven days after the date established in the Contract Documents the amount certified by the Architect ... upon seven additional days' written notice to the Owner." n132

§ 97.04(f) Developer's Option When Contractor's Performance Is Late or Inadequate.

A contractor may fail to complete a project on schedule, may complete the project but not in conformity with the plans and specifications, or may abandon the job. In any of these situations, the developer may sustain damages as a result of the contractor's failure to perform. n133

§ 97.04(f)(1) Measuring Damages.

The difficult question becomes what is the measure of the developer's damages?

The rule for measuring damages as formulated in the *Restatement of Contracts* emphasizes the need for avoiding economic waste whenever possible. Section 346 provides that the measure of damages for defective or unfinished construction work shall be either:

> (1) the reasonable cost of construction and completion in accordance with the contract, if this is possible and does not involve unreasonable economic waste; or
>
> (2) the difference between the value that the product contracted for would have had and the value of the performance that has been received by the plaintiff, if construction and completion in accordance with the contract would involve unreasonable economic waste.

The comments to this section point out that the purpose of allowing recovery is to put the injured party in a position comparable to that for which he bargained (the familiar "expectation" measure of damages). The injured party is allowed either a "sum of money sufficient to produce the physical product contracted for" or "the exchange value that product would have had if it had been constructed." The two may at times be equal, but where they are not, consideration must be given to whether it would be "imprudent and unreasonable" to tear down and reconstruct the structure in question. If it is unreasonable, then "[t]he law does not require damages to be measured by a method requiring such economic waste."

§ 97.04(f)(2) When a Contractor Can Be Ejected from the Job Site.

When the contractor proceeds too slowly with the work or does not have enough employees on the job, it is difficult for the developer to know at what point a sufficient breach has occurred to give him a right to terminate the contract. The developer will be in a stronger position if the contract contains a provision that time is of the essence and gives the developer the right to take over the job if the contractor does not execute the work diligently after written notice from the developer.

If the developer ejects the contractor as a result of a legitimate material breach on the contractor's part, the contractor will be liable to the owner for damages caused by the breach. The measure of damages will generally be the amount by

which the total project cost to the developer exceeds the amount that the developer would have paid under the original contract.

Sometimes a contractor's performance is so poor that the developer will want to eject it from the job and have the work performed by another contractor. Or a subcontractor will perform so poorly the general contractor will want it out. To justify ejection from the job, the breach must be *material*, otherwise a wrongfully ejected contractor may be entitled to the entire amount of lost profits on the job.

Under the AIA form, if the Contractor fails to carry out the Work as required, the Owner may correct the deficiencies and charge the Contractor, subject to the Architect's approval. n134

The owner risks being wrong about whether the Contractor was really in default or had neglected to carry out the work. Further, changing contractors mid-project is costly. The new contractor who picks up in the middle of a job needs to find out what arrangements have been made with subcontractors and suppliers and the prices that have been negotiated and amounts already paid. A new contractor's bid is apt to be high because he knows he is taking over a problem job.

§ 97.04(g) The State Contractors Licensing Board as a Tool to Protect Against Poor and Untimely Workmanship by Contractors.

Among the remedies a disappointed developer or home improver may invoke against a poorly performing contractor or subcontractor is to file a complaint with the state's Contractors' Licensing Board.

For example, Florida Statutes § 489.129 gives the board the power to "revoke, suspend, or deny the issuance or renewal of the certificate or registration of a contractor, require financial restitution to a consumer, impose an administrative fine not to exceed $5,000, place a contractor on probation, require continuing education ..." if the contractor is found guilty of acts including:

> (d) willfully and deliberately disregarding and violating the applicable building codes or laws of the state or of any municipalities or counties thereof, and
>
> (h) committing mismanagement or misconduct in the practice of contracting that causes financial harm to a customer ... .

Other states impose punishments for different causes. Regardless of their specifics, perhaps the greatest practical value of such statutes is the developer's use of the "threat value" of going to the board to motivate a poorly-performing contractor.

§ 97.04(h) The General Contractor/Subcontractor Relationship.

One of the main functions of the general contractor is to select and contract with all the subcontractors who will be needed on a job. Depending on the project, it may take between 40 and 100 subcontractors to complete. The general contractor will want to get at least three returned bids for each trade, which may require contacting at least five subcontractors. Contacting each of them, lending them a complete set of plans, getting the bids and plans back (which can be tough), and signing the contracts with them can be very complicated.

The real work begins in the trenches with the subcontractors. Again, there are form contracts between the general contractor and the subcontractors or the owner and the prime contractors. Their provisions are as varied as those in the owner-general contractor forms we have described.

The general contractor and subcontractor have a unique relationship. Their interests are often different, if not

conflicting. The general contractor has a complex project to build. From the general contractor's point of view, all of the individual parts are interrelated and tied together by a detailed schedule. The subcontractor, on the other hand, usually doesn't care about the project as a whole. The subcontractor's main concern is to do what it was hired to do and make as big a profit as it can. The subcontractor has its own schedule to worry about, and might even be working on other jobs at the same time. As a result of these different perspectives, general contractors tend to take an adversarial stance toward subcontractors. They feel the need to keep a close eye on subcontractors in order to ensure the quality of the work and timely performance. n135 Developer Fred Johnson elaborates:

> I think of it as war between myself and the subcontractors. The superintendent has to be prepared to pull out all stops to protect his turf. These guys will get away with anything they can. They'll take as long as they can. They'll cut corners on quality. They may use inferior materials and charge you for the good ones. For all these reasons you've got to have a smart and tough superintendent who'll make the subcontractors think twice before trying any of the tricks they're so good at.
>
> Subcontractors aren't stupid when it comes to figuring out who they can push around. Like sharks, they know if they have a weak general contractor or superintendent or developer, and they won't hesitate to take advantage of the situation.

Generally, there will be fewer problems when the developer is big and has worked with the subcontractor before. Contractor Matt Greene says that in this situation "the subcontractors make their project a priority, and if there's a problem, they'll pull their crews off other jobs and fix the one for the big developer. The big developers have the leverage of offering the subcontractors work again in the future. So the subcontractors reciprocate by making them a priority." When problems do arise, general contractors like to be able to fall back on liquidated damages clauses in their contracts with subcontractors.

Subcontractors often feel that the general contractor is too quick to blame them for delays or other problems. Subcontractor Wayne C. Foglesong offers the following rejoinder in defense of subcontractors: n136

> Often, the contractor is to blame. A contractor may call and schedule a job in two weeks. We get there and he's not ready for us. It's tough when you're a subcontractor to keep a crew ready to go, and have all the materials on hand, when you can't know for sure when you're actually going to be able to do the work. All of a sudden, the contractor will call in a panic and need you the next day. I'm supposed to have a crew sitting around waiting for the call? Most of the problem with getting adequate crews on site is the fault of the contractor's scheduling.
>
> Architects are also partially responsible for the problems of subcontractors. Contractors will use a set of the architects plans in the bidding process. Then after the bid has been accepted, we'll get a new set of plans to work from. Sometimes this new set has numerous changes that make the project a lot more difficult and expensive. This slows the process down while the subcontractor submits an extra, finds new materials, and reassesses his crew requirements. Even more problematic than more detailed plans are plans with inadequate details. We're the guys who are trying to make the picture into reality. In that process there are judgment calls, items not addressed in the plans. At some point we'll call the architect to come out and tell us what he wants. This takes time. While we're waiting around, everyone's blaming the subcontractor for taking too long.
>
> Inspectors are also very tough on subcontractors ... . Inspectors are often right and the work needs to be modified before it should pass; sometimes, though, the inspectors will misread a code, or make some unreasonable demands.
>
> To a lesser extent than architects, contractors and inspectors, other subcontractors make the job of a

> subcontractor more difficult. When the subcontractor that did the work before you didn't finish it all the way, it can take days to get him back to get it ready for you.

Problems are bound to arise in any project. All parties should anticipate this fact of real estate development and try to protect themselves through careful contracting.

§ 97.04(h)(1) Estoppel by Bid.

Suppose a subcontractor decides his initial bid was too low. He has no binding promise from the general contractor at the time he makes the bid that if the general contractor gets the contract, the general contractor will hire the low-bidding subcontractor. The low-bidding subcontractor renounces his bid after the general contractor wins the contract and before the general contractor and the subcontractor reach final terms. Some courts let subcontractors out of their bids on familiar contract grounds: offers may be freely withdrawn before acceptance. The subcontractor had no deal with the general contractor before the subcontractor withdrew his offer. n137 On what legal theory, if any, could the subcontractor be liable to the general contractor? Many courts hold subcontractors to their bids on a theory of *promissory estoppel*. The subcontractor's bid is held to be irrevocable once the general contractor relies on it in formulating a bid on the prime contract. n138

§ 97.04(h)(2) Must the Contractor Pay the Subcontractor Even if the Owner Doesn't Pay the Contractor? The "Pay When Paid," "Paid If Paid" Distinction.

O enters a prime contract with C, a general contractor, to build a project. C fulfills that obligation by doing some of the work itself and subcontracting the rest. The project is successfully completed according to plans. But O never pays C. Is C obligated to pay the subcontractors anyway--even if O's failure to pay had nothing to do with any shortcoming on the part of C or the subcontractor?

The answer may depend on whether the provision regarding payment in the contract between C and the subcontractors was closer to example (A) or (B):

> (A) Contractor agrees to pay to the subcontractor upon receipt of each payment received from the owner the portion of said payment allowed to contractor on account of subcontractor's work to the extent of subcontractor's interest therein less any percentage retained under said general contract.
>
> (B) The subcontractor agrees that the prime contractor shall be under no obligation to pay the subcontractor for any work done on this construction project until and unless the contractor has been paid therefor by the owner. Payment by the owner to the contractor is a condition precedent to the contractor becoming liable for payment to the subcontractor.

Predictably, the subcontractor has a far better case for payment under (A) than under (B) when O stiffs C. n139 Explanations, in addition to the "plain meaning" rule, include: condition precedents are not favored in law; the subcontractor not being paid is too harsh a result; C prepared the contract and contracts are construed against the drafter.

A number of cases hold C liable to the subcontractor on language like that in (A). n140 C is freed of liability to the subcontractor on language like that in (B). n141

§ 97.04(i) Subcontractors May Not Have a Cause of Action in Negligence for Property Damage Against Other Subcontractors.

Architects are held liable in negligence even to those with whom the architect had entered no contract because of the risks to health, welfare, or comfort that a defective design in construction may pose. Subcontractors whose negligence

results in physical injury to the employees of other subcontractors have been held liable to other subcontractors--absent worker's compensation schemes and other statutory defenses. n142

But, one subcontractor may not be liable to another for damaging the work of the first subcontractor. The failure to exercise due care, if it creates economic loss only, isn't usually thought a sufficient predicate, standing alone, to support tort liability. A more intimate nexus, a contract or something like it, is usually required in the absence of physical injury. n143

In one recent case, during the course of construction a masonry contractor allegedly damaged the prior work of the roofer. The owner who had contracted with both subcontractors back charged the roofer for costs the owner incurred in correcting the damage to the roof. The roofer sued the masonry contractor for reimbursement.

The court denied the roofer's negligence claim. The court's reasoning began with the observation that once the building materials are incorporated into a structure they become property of the owner. They are fixtures. The subcontractor no longer has a claim for damage to what has been incorporated into the structure. At that point the subcontractor's only cause of action, if any, is for economic loss, not property damage.

The court concluded that a subcontractor could be liable for negligence to the general contractor, to the owner, and maybe to third parties physically damaged or injured--but not to another subcontractor for economic loss alone. n144

FOOTNOTES:

(n1)Footnote 51. Owner/builders need to be mindful of contractor licensing laws when they act as their own general contractors.

(n2)Footnote 52. *McKinney v. State, 693 N.E.2d 65 (Ind. 1998)* (under state deceptive consumer sales act, a construction contract is not considered a "transaction involving real property"); *Peterson Contractors, Inc. v. Herd Producing Company, Inc., 811 So. 2d 130 (La. App. 2002)* (a contractor was not liable for any defect in the work that was done in accordance with the owner's specifications.

(n3)Footnote 53. John B. Dieder, Jr., & Robert K. Cox, *Construction Management and the Specialty Trade (Prime) Contractors,* 46 Law & Contemp. Probs. 39, 42 (1983).

(n4)Footnote 54. *RCDI Construction, Inc. v. Spaceplan/Architecture, Planning & Interiors, 148 F. Supp. 2d 607 (W.D. N.C. 2001)* (contract was unenforceable under state law because it was signed by an unlicensed contractor); *Raimi v. Department of Business and Professional Regulation, 798 So. 2d 913 (Fla. App. 2001)* (suspension of license stayed while restitution payments made to victim of licensee's construction contract misconduct); *Crowe v. Hickman's Egg Ranch, Inc., 41 P.3d 651 (Ariz. App. 2002)* (contractor failed to comply with licensing requirements).

(n5)Footnote 55. *See* Note, *Allocation of Risk in the Construction Industry: The Nonprofessional Owner and the Construction Manager,* 46 Law & Contemp. Probs. 145 (1983).

(n6)Footnote 56. *See* Ralph C. Nash, Jr. & Michael K. Love, *Innovations in Federal Construction Contracting, 45 Geo. Wash. L. Rev. 309, 350 (1977). W. V. Nelson Constr. Co. v. City of Lindstrom, 565 N.W.2d 434 (Minn. App. 1997)* (an agreement for design services and building construction constituted a contract subject to competitive bidding statutes); *Heard Communications, Inc. v. Metropolitan Council, 1998 Minn. App. LEXIS 1090* (No. C7-97-2160 Sept. 22, 1998) (a contract containing a mixture of design services and building construction fell outside of the bidding statute because less than 1% of the contract fit with in the purview of the statute).

(n7)Footnote 57. James Acret, *Drafting Construction Contracts,* in Attorney's Guide to California Construction Contracts and Disputes 65-66 (CEB 2d ed. 1990).

(n8)Footnote 58. Quoted in John Chandler & Doug Smith, *Report Faults Design in CSUN Garage Collapse*, Los Angeles Times (Valley ed.), Mar. 21, 1995, pp.1, 7.

(n9)Footnote 59. Acret, Drafting Construction Contracts at 66.

(n10)Footnote 60. Todd L. Whitlock, *An Argument for Design/Build*, 9 Real Est. Fin. 87, 90 (1992).

(n11)Footnote 61. Todd L. Whitlock, *An Argument for Design/Build*, 9 Real Est. Fin. 87, 90 (1992).

(n12)Footnote 62. Todd L. Whitlock, *An Argument for Design/Build*, 9 Real Est. Fin. 87, 90 (1992).

(n13)Footnote 63. *See, e.g., Coonrod & Walz Constr. Co. v. Motel Enters., Inc., 535 P.2d 971 (Kan. 1975).* The court allowed the contractor substantial compensation in excess of the G-MAX because the court found the original plan incomplete and the disputed amount of steel was not part of the scope of work as the original specified.

(n14)Footnote 64. *Bouten Constr. Co. v. M & L Land Co., 877 P.2d 928 (Idaho 1994)* . Contract for motel contained a guaranteed maximum price. Contractor had built many of these types of motels, and didn't wait until design development drawings were completed to submit a G-MAX which later proved to be too low.

(n15)Footnote 65. *Bouten Constr. Co. v. M & L Land Co., 877 P.2d 928 (Idaho 1994)* .

(n16)Footnote 66. Robert M. Wright, *Cost Plus Contracts: The Construction Contractor--Is He a Fiduciary?*, 7 Constr. Law. 3 (Jan. 1987).

(n17)Footnote 67. The language in Form A102-2007 is "The Contractor accepts the relationship of trust and confidence established by this Agreement and covenants with the Owner to cooperate with the Architect and exercise the Contractor's skill and judgment in furthering the interests of the Owner; to furnish efficient business administration and supervision; to furnish at all times an adequate supply of workers and materials; and to perform Work in an expeditious and economical manner consistent with the Owner's interests."

(n18)Footnote 68. *H. Scott Kahle v. John McDonough Bldrs., Inc., 590 A.2d 548 (Md. 1991)* . Court held that contractor owed fiduciary duty to homeowners in a cost-plus contract for a new home. Homeowners had never undertaken a construction project of this scope. But court held that this fiduciary duty was fulfilled when contractor met with homeowners at every stage of the construction, kept them informed of work progress, and explained all changes made and costs incurred as a result of these changes.

(n19)Footnote 69. In *Jones v. J. H. Hiser Constr. Co., Inc., 484 A.2d 302 (Md. 1984)* , the Joneses hired a construction company to build a house for them. They selected a "cost-plus" contract. The contractor estimated that the house would cost $200,000. The Joneses ordered about $24,000 in changes. The contractor disbursed payments totaling $277,000 and claimed reimbursement. The Joneses had agreed to pay $240,000 during the course of construction but balked at paying more than that. Despite the contract being cost-plus, the contractor was limited to a recovery of $240,000 because, as the owner's fiduciary, the contractor had a duty to keep the owners fully informed of cost overruns well in advance of completion and the contractor had failed to do that.

(n20)Footnote 70. James Acret, California Construction Contracts and Disputes 62 (CEB 1990).

(n21)Footnote 71. From a sample contract favoring the owner: "The 'actual necessary cost' shall not include any allowance for contractor's office expense, general superintendent, or other overhead or general expense." James Acret, California Construction Contracts and Disputes 62 (CEB 1990). James Acret, California Construction Contracts and Disputes app. N, at 692 (CEB 1990).

(n22)Footnote 72. See, e.g., *A.A. and E.B. Jones Co. v. Boucher, 530 P.2d 974 (Colo. 1975)* .

(n23)Footnote 73. AIA Form A102-2007 § 10.1 (formerly AIA Form 111 § 10.1).

(n24)Footnote 74. AIA Form A102-2007 § 10.2 (formerly AIA Form 111 § 10.2).

(n25)Footnote 75. *110 Cal. Rptr. 675 (Cal. App. 1973)* .

(n26)Footnote 76. Ronald A. Milzer, *Preparing a Cost-Plus Fee with Guaranteed Maximum Cost Construction Contact*, 14 (10) Colo. Law.1786 (1986).

(n27)Footnote 77. AIA Form A102-2007 § 12.1.7 (formerly AIA Form 111 § 12.5.2).

(n28)Footnote 78. See generally Justin Sweet, Legal Aspects of Architecture, Engineering and The Construction Process 246 (2d ed. 1977).

(n29)Footnote 79. Peter Foster, Towers of Debt 27 91993).

(n30)Footnote 80. Senate *Implementation of Paperwork Reduction Act of 1980*. Hearing before the Subcommittee of the Committee on Small Business, 101st Congress 1st Session, Sept. 7, 1989. Quoted in Philip K. Howard, The Death of Common Sense 73-74 (Random House 1994); *Fratello Construction Corporation v. Tuxedo Union Free School District, 726 N.Y.S.2d 705 (2001)* (construction contract vacated because of low bidder's noncompliance with bidding process).

(n31)Footnote 81. *Carroll F. Look Construction Co., Inc. v. Town of Beals, 802 A.2d 994 (Maine 2002)* (an advertisement for bids on a road construction project was not an offer that was accepted by submitting the bid); *Garling Construction Co. v. City of Shellsburg, 641 N.W.2d 522 (Iowa 2002)* (an unsuccessful bidder did not have standing to challenge the award of a public contract); *Monarch Construction Co. v. Ohio School Facilities Commission, 771 N.E.2d 902 (Ohio Common Pleas 2002)* (the Commission's failure to follow statutory mandates in approving the construction contract rendered the contract void from the beginning).

(n32)Footnote 82. Stephen Densmore, Legal Implications of the Project Schedule 97 (unpublished paper, on file with author).

(n33)Footnote 83. *RDP Royal Palm Hotel, L.P. v. Clark Construction Group, Inc., 168 Fed. Appx. 348 (11th Cir. 2006)* , (the developer waived the "time is of the essence" provision of the construction contract after issuing hundreds of change orders and construction directives following the original completion date).

(n34)Footnote 84. Justin Sweet, Legal Aspects of Architecture, Engineering, and the Construction Process 575 (4th ed. 1989).

(n35)Footnote 85. Stephen Densmore, Legal Implications of the Project Schedule 97.

(n36)Footnote 86. *554 F. Supp. 433 (Ct. Cl. 1982)* .

(n37)Footnote 87. *Pierce Assocs. v. United States, 77-2 B.C.A. (CCH) para. 12,746 (1977).*

(n38)Footnote 88. *P.T. & L. Const. v. Dept. of Transp., 531 A.2d 1330, 1335-36 (N.J. 1987)* .

(n39)Footnote 89. Scott M. Tyler, *No (Easy) Way Out: "Liquidating" Stipulated Damages for Contractor Delay in Public Construction Contracts, 44 Duke L.J. 357 (1994).*

(n40)Footnote 90. *Westmount Country Club v. Kameny, 197 A.2d 379 (N.J. App. 1964)* . For public construction contracts, California by statute places the burden on the contractor in public construction contracts: "The sum so specified is valid as liquidated damage unless manifestly unreasonable." *Cal. Gov't Code § 14371*, repealed by and

recodified in *Cal. Pub. Cont. Code § 10226*.

(n41)Footnote 91. *See 44 Duke L.J. 386-390.*

(n42)Footnote 92. *Taos Constr. Co., Inc. v. Penzel Constr. Co., 750 S.W.2d 522, 525 (Mo. 1988)* .

(n43)Footnote 93. Annotation, *Contractual Provisions for Per Diem Payments for Delay in Performance as one for Liquidated Damages or Penalty*, 12 A.L.R.4 th 891 (1995).

Gemma Constr. Co., Inc. v. City of New York, 668 N.Y.S.2d 195 (1998) (notice and documentation requirements for most claims did not apply to claim for delay damages); *International Fidelity Ins. Co. v. County of Chatauqua, 667 N.Y.S.2d 172 (1997)* (delay damages not included in other liquidated damages provisions).

(n44)Footnote 94. *Daniel Int'l Corp. v. Fischback & Moore., 916 F.2d 1061 (5th Cir. 1990)* .

(n45)Footnote 95. *Bethlehem Steel Corp. v. City of Chicago, 350 F.2d 649 (7th Cir. 1965)* .

(n46)Footnote 96. *Northern Petrochem. Co. v. Thorsen & Thorshov, Inc., 211 N.W.2d 159 (Minn. 1973)* .

(n47)Footnote 97. *554 F. Supp. 433 (Cl. Ct. 1982)* .

(n48)Footnote 98. *See Schweigert, Inc. v. United States, 388 F.2d 697, 181 Ct. Cl. 1184 (1968)* . In the Standard Specifications for Public Works Contracts (91 Edition) a problem like the one Morris Mechanical had with Airtemp might fall within this provision: "If delays are caused by unforeseen events beyond the control of the contractor, such delays will entitle the contractor to an extension of time ... . No extension of time will be granted for a delay caused by the Contractor's inability to obtain materials unless the Contractor furnishes to the Engineer documentary proof of the inability to obtain such materials in a timely manner in accordance with the sequence of the Contractor's operations and the approved construction schedule." (Section 6-6.1, page 55).

(n49)Footnote 99. *Bethlehem Steel Corp. v. City of Chicago, 350 F.2d 649, 654 (7th Cir. 1965)* .

(n50)Footnote 100. *See* James Acret, California Construction Contracts and Disputes 80-81 (CEB 1990).

(n51)Footnote 101. *44 Duke L.J. 386a*t 382-383.

(n52)Footnote 102. The first draft of this section was prepared by Carlos Matos, March 1995.

(n53)Footnote 103. *See, e.g., House Wrecking Co. v. Sonken, 133 S.W. 355 (Mo. App. 1911)* ; 5 Arthur Linton Corbin, Corbin on Contracts § 1072 (1964).

(n54)Footnote 104. *See, e.g., Garrett v. Coast & Southern Fed. Savs. & Loan Ass'n, 511 P.2d 1197 (Cal. 1973)* (en banc). ("[W]hen it is manifest that a contract expressed to be performed in the alternative is in fact a contract contemplating but a single, definite performance with an additional charge contingent on the breach of that performance, the provision cannot escape examination in light of pertinent rules relative to the liquidation of damages.").

In *Blank v. Borden, 524 P.2d 127 (Cal. 1973)* (en banc), the court held that a "withdrawal-from-sale provision" in an "exclusive-right-to-sell contract" was not a penalty. After quoting the above passage from *Garrett*, the court stated that the "clause in question presents the owner with a true option or alternative ... ." The *Blank* court distinguished *Garrett* on the basis of whether the promisor has a "rational choice." *Id*.

Applying this line of analysis to the present hypothetical, a court would not find that a bonus was a disguised liquidated damage clause unless the contractor had no "rational choice" but to perform the contract early and receive the

bonus. As the text indicates, this is only likely with a very large "all or nothing" bonus where a contractor would lose a large portion of the contract price for failing to perform by a certain date.

(n55)Footnote 105. *Cf. South Mall Constructors v. State, 463 N.Y.S.2d 581 (N.Y.A.D. 1983)* (a sliding scale contract is not intended to "liquidate damages nor to provide for a penalty;" quoting 5 Arthur Linton Corbin, Corbin on Contracts § 1072 (1964)).

(n56)Footnote 106. Scott M. Tyler, *No (Easy) Way Out: "Liquidating" Stipulated Damages for Contractor Delay in Public Construction Contracts, 44 Duke L.J. 357, 366 (1994).*

(n57)Footnote 107. *See* Annotation, *Liability of Contractor Who Abandons Building Project Before Completion for Liquidated Damages for Delay*, 15 A.L.R.5 th 376 (1993).

(n58)Footnote 108. *438 N.E.2d 68 (Mass. 1952)* .

(n59)Footnote 109. Arthur F. O'Leary, *Conclusion of a Construction Contract*, 4 Cal. Constr. Law 11, 12 (1994).

(n60)Footnote 110. *Hungerford Constr. Co. v. Florida Citrus Exposition, Inc., 410 F.2d 1229 (5th Cir. 1969).*

(n61)Footnote 111. *598 P.2d 60 (Cal. 1979)* .

(n62)Footnote 112. *Coleman Eng'g Co. v. North American Aviation, Inc., 55 Cal. Rptr. 1 (1966)* .

(n63)Footnote 113. AIA Document A201-2007, §§ 7.33, 7.37.

(n64)Footnote 114. AGC Prime Contract: Owner and Contractor, § 15.2. Under Article 17, the owner has the right to demand documentation from the contractor to support his claim.

(n65)Footnote 115. *Id.* § 15.1.

(n66)Footnote 116. *Id.* § 15.3.

(n67)Footnote 117. *Id.* § 15.4.

(n68)Footnote 118. *Watson Lumber Co. v. Guernewig, 79 Ill. App. 2d 377, 226 N.E.2d 270 (1967)* .

(n69)Footnote 119. James Acret, California Construction Contracts and Disputes 86 (CEB 1990).

(n70)Footnote 120. *See* Annotation, *Effect of Stipulation, in Private Building or Construction Contract, That Alterations or Extras Must Be in Writing, 2 A.L.R.3d 620, 648 (1965)* (provision requiring writing is "avoided by parties to the contract where their words, acts, or conduct amount to a waiver, modification, rescission, abrogation, or abandonment ... or where the owner ... by his acts or conduct is estopped to rely on it ...").

The owner who waives may also lose claims against sureties. *See Cavanagh v. Keplinger, 266 P. 287 (Cal. 1928)* . By waiving the contract provision requiring change orders to be in writing, the owner is providing the surety a basis for being released from its obligations since it is only obligated to perform or pay for the contractor's breaches of the original contract. *See Fact Situation for Three Topics Posing Questions of Discharge of Surety, 10 Forum 1-72 (Fall 1974).*

(n71)Footnote 121. Justin Sweet, Legal Aspects of Architecture, Engineering, and the Construction Process (4th ed. 1989) 235.

(n72)Footnote 122. *C. Norman Peterson Co. v. Container Corp. of Am., 218 Cal. Rptr. 592 (1985)* .

(n73)Footnote 123. *See, e.g., Rudd v. Anderson, 285 N.E.2d 836 (Ind. App. 1973)* .

(n74)Footnote 124. Additionally, under a breach of contract theory, the contractor would have to show that the additional costs were caused by the breach. *Boyajian v. United States, 423 F.2d 1231, 1235 (Ct. Cl. 1970)* . *Barsottis, Inc. v. Consolidated Edison Co. of N.Y., 666 N.Y.S.2d 182 (1997)* (explicit terms of contract barred additional compensation); *Tips v. Hartland Devs., Inc., 961 S.W.2d 618 (Tex. App. 1998)* (implied covenant of compliance with building codes modified).

(n75)Footnote 125. *C. Norman Peterson Co. v. Container Corp. of Am., 218 Cal. Rptr. 592 (1985)* .

(n76)Footnote 126. Bernhard A. Aaen, *The Total Cost Method of Calculating Damages in Construction Cases, 22 Pac. L. J. 1185 (1991). See also, State Dep't of Trans. v. Guy F. Atkinson Co., 231 Cal. Rptr. 382 (1986)* (extremely wet soil conditions caused a substantial change in the scope of work. Arbitrator awarded contractor 65% of its claim, using "total cost" method, and court sustained award.). *See also WRB Construction v. United States, 183 Ct. Cl. 409 (1968)* ; *Amp-Rite Elec. v. Wheaten San. Dist., 580 N.E.2d 622 (Ill. 1991)* (explaining that "total cost" can be adjusted for factors such as underbidding).

(n77)Footnote 127. *See generally* Robert A. Rubin & John E. Osborn, *How to Minimize the Environmental Liability of Construction Contractors,* 8 Prac. Real Est. Law. 33 (1992); R.F. Cushman & B.W. Ficken, Hazardous Waste Disposal and Underground Construction Law (John Wiley & Sons, New York, 1987); Tort and Insurance Practice Section, Hazardous Waste on the Construction Site: Who is Liable? (ABA, 1992).

(n78)Footnote 128. The AGC form, for instance, calls for an "equitable adjustment" in the contract price and time if these conditions cause an increase or decrease in the cost or time for completion. AGC § 4.2.

(n79)Footnote 129. James Acret, California Construction Contracts and Disputes 109-110 (CEB 1990).

(n80)Footnote 130. *See Coleman Eng'g Co. v. North American Aviation, Inc., 55 Cal. Rptr. 1 (1966)* .

(n81)Footnote 131. James Acret, California Construction Contracts and Disputes 110 (CEB 1990). *See B.C. Richter Contr'g Co. v. Continental Cas. Co., 41 Cal. Rptr. 98 (1964)* .

(n82)Footnote 132. AIA Document A201-2007, § 9.7.

(n83)Footnote 133. *Chappell v. Construction Industries Recovery Fund, 835 So. 2d 339 (Fla. App. 2003)* (homeowners were entitled reimbursement from the recovery fund in the amount of the judgment they obtained against the contractor for defective work).

(n84)Footnote 134. AIA Document A201-2007 § 2.4.

(n85)Footnote 135. *Austin Homes, Inc. v. Thibodeaux, 821 So. 2d 10 (La. App. 2002)* (builder breached the construction contract by failing adequately to supervise the construction).

(n86)Footnote 136. Interview by Adam Duncan with Wayne C. Foglesong, Westlake Village, Cal. (Feb. 26, 1990).

(n87)Footnote 137. *K. L. House Constr. Co. v. Watson, 508 P.2d 592 (N.M. 1973)* (subcontractor owes general contractor nothing because general contractor had not unconditionally accepted subcontractor's bid).

(n88)Footnote 138. See Dorothy Hemmer Bishop, *The Subcontractor's Bid: An Option Contract Arising Through Promissory Estoppel, 34 Emory L.J. 421 (1995);* Janine McPeters Murphy, *Promissory Estoppel, Subcontractors' Liability in Construction Bidding Cases, 63 N.C. L. Rev. 387 (1996). See Drennan v. Star Paving Co., 333 P.2d 757, 760 (Cal. 1958)* (applying promissory estoppel).

(n89)Footnote 139. Gordon Hunt, *The "Pay When Paid" vs. "Pay If Paid" Dispute: A Substantial Issue for the 90s*, 5 Cal. Constr. L. Rptr. 11 (1995).

(n90)Footnote 140. *Yamanishi v. Bleily & Collishaw, Inc., 29 Cal. App. 3d 457 (1972)* ; *Peacock Constr. Co., Inc. v. Modern Air Conditioning Inc., 353 So. 2d 840 (Fla. 1977)* ; *Southern States Masonry, Inc. v. J. A. Jones Constr. Co., Inc., 498 So. 2d 151 (La. App. 1986)* .

(n91)Footnote 141. See *D.E.C. Elec., Inc. v. Raphael Constr. Corp., 558 So. 2d 427 (Fla. 1990)* ; *David Fanaroff, Inc. v. Dember Constr. Corp., 600 N.Y.S.2d 226 (App. Div. 1993)* .

(n92)Footnote 142. *See, e.g.*, Annotation, *Duty and Liability of Subcontractor to Employee of Another Contractor Using Equipment or Apparatus of Former*, 55 A.L.R.4 th (1987).

(n93)Footnote 143. "It is the duty of an employee of a subcontractor to exercise ordinary care for the safety of the employee of other subcontractors in a building under construction." *Johnson v. Nicholson, 324 P.2d 307, 314 (Cal. 1958)* .

(n94)Footnote 144. *Chambco v. Urban Masonry Corp., 647 A.2d 1284 (Md. 1994) vacated, Chambco v. Urban Masonry Corp., 659 A.2d 297 (Md. 1995)* .

Thompson on Real Property, Thomas Editions

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CHAPTER 97 CONSTRUCTION AND DEVELOPMENT LAW

12-97 Thompson on Real Property, Thomas Editions § 97.05

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§ 97.05 Building Codes.

The developer must satisfy local building codes. This involves obtaining a permit for the plans before the work begins, submitting the work in progress to inspector review at crucial stages during construction, and finally receiving a certificate of occupancy as a condition to taking possession and using the space.

§ 97.05(a) Authority to Enact Building Codes; Evolution from the National to the State to the Municipal Level.

Unlike many other key sectors of the national economy, the housing construction industry operates in a local, rather than a national, context. The authority to regulate construction is probably best described in a single comprehensive document that has set the standard for building code lawyers, Charles S. Rhyne's Survey of the Law of Building Codes at 7-8 (American Institute of Architects, Washington, D.C.):

> The law of building codes is grounded upon what is called the "police power" of the state. The police power is the source of all authority to enact building codes. It has never been very exactly defined, and indeed the United States Supreme Court has said that it is "incapable of any very exact definition." Broadly speaking, it is the power of the state to legislate for the general welfare of its citizens ... .
>
> This power resides in the legislature of the states and enables the legislature to pass laws such as building codes. Some states have done so. But most states have chosen to delegate a portion of their police power to local government units such as cities ... . It is under the police power delegated by the state legislature that local governmental units are able to enact building codes.

Although cities and states retain the option to enact any ordinance they wish, a degree of uniformity has been achieved through the drafting and adoption of model codes. The principal codes that shaped the current state of building codes throughout America are the *Uniform Building Code* (drafted by the International Conference of Building Officials), the *Basic Building Code* (Building Officials and Code Administrators, International, Inc.), *The Southern Standard Building Code* (Southern Building Codes Conference), and *The National Building Code* (National Board of Fire Underwriters). The former three codes were drafted largely by professional groups of building inspectors, and each is periodically updated, normally with annual supplements. All three of the former code-writing groups united in 1971 to publish a

joint code: *One and Two-Family Dwelling Code* . Additionally, the Federal Housing Administration has established minimum standards that serve as guides for all federally-financed housing programs and influence the content of the model codes, *U.S. Federal Housing Administration, Minimum Property Standards for Multi-Family Housing.*

Los Angeles is a good example of how a city can start with a model code and modify it to suit local needs. In 1986, Los Angeles adopted the Uniform Building Code (U.B.C.). n145 Since then, the city has greatly amended the U.B.C., creating one of the most restrictive building codes in the country. Los Angeles' extensive modification of the U.B.C. is largely due to the special standards needed to compensate for hillside grading and construction, undependable soil conditions, and earthquakes.

The formation and adoption of model codes and the modifications almost all cities make to them are political processes that can give rise to hotly contested battles. n146 For example, the Los Angeles Fire Department lobbied and recently won a battle with the lumber industry, banning the use of wood shingle roofing on new homes and any replacement of more than 10% of an existing roof.

In another battle waged by water conservation groups, the City of Los Angeles and other cities are enacting ordinances to limit the size of flush reservoirs in all new toilets to 1.6 gallons. The current standard is 3.5 gallons. It is estimated that this ordinance will save billions of gallons of water annually. It will also affect plumbers, plumbing supply houses, toilet manufacturers, and home buyers.

Reformers abound at every level of government with proposals for new standards and codes, or modifications of the existing ones. The distribution of power among the various levels of government makes reform diffuse and sometimes confusing.

§ 97.05(b) The Inspection Process.

A developer who has a set of plans and construction documents needs to obtain a building permit from the city in which the developer wishes to build. This is generally a complicated multi-stage process. Requirements for a building permit vary significantly from jurisdiction to jurisdiction and project to project.

Bill King, Chief Building and Mechanical Inspector for the City of Los Angeles, Van Nuys Office, explains how this process operates for single-family dwellings in his jurisdiction. n147

> With smaller projects like single-family dwellings, the process of approval can be as simple as having an architect or builder come into our office and go from window to window and get the plans signed off by each of the applicable departments. For more complicated projects, and almost anything commercial, the plans must be left. Approval can take anywhere from four to eight weeks. If there are any zoning problems, it could take a lot longer.
>
> Once the architect has drawn the plans, and an engineer has reviewed and added details to them, they are submitted to the Department of Building and Safety. At this point our department conducts a "plan check." The first stop is at the zoning counter, where we verify the legal description and make sure the existing zoning accommodates the plans. The next stop is with the structural plan checker, who looks at things like the fire walls, emergency exits, and energy efficiency aspects of the building to make sure they comply with the code. As part of a plan check review, the checker determines whether the plans need approval of the fire department, the department of public works for sewer connection, or city planning to confirm that they satisfy the General Plan or zoning ordinances. For some projects a builder may need CalTrans to sign-off. The checker indicates on the back of the permit where the plans have to go.
>
> Additionally, we have on loan from the fire department an individual whose role is to look at the

> sprinklers, fire hydrants, and sand pipes, and anything else of concern to the fire department.

John Condas, in the real estate department of a Los Angeles law firm, and teacher of land use and real estate development at the University of Southern California Graduate School of Business, points out one more big item developers may need in seeking a building permit for more complicated, multi-use projects: n148

> There will need to be evidence that all the aspects of the California Environmental Quality Act (CEQA) have been met if the approval of the building permit entails any discretionary choices on the part of the inspectors, as it almost always does in larger projects.
>
> The developer will also need to get a grading permit, and show evidence that the grading has been conducted satisfactorily.
>
> The developer will have to show there are adequate water, sewer and utilities available.

With a building permit in hand, the developer then begins a long series of relationships with various building inspectors. To get an inspection, a contractor will phone the inspector's office 24 hours in advance. The following day an inspector will visit the site and either "sign-off," not sign-off and require informally that certain things be done, write an "order to comply," or "cite" the project with a violation that needs to be fixed.

Before any cement can be poured, there needs to be a plumbing, an electrical, and a setback/forms/trenches inspection. Then the foundation can be poured.

Next, before any subfloor or floor slabs can be poured, each of the following items needs to be individually inspected and signed-off: electrical (groundwork), plumbing (drain and waste pipe), plumbing (water pipe), mechanical (groundwork), pre-slab (for soil compaction, membrane and reinforcement), and an underpinning inspection (for floor joists and girders).

The next inspections include: fireplace, decorative appliance (vent/chimney), roof (sheathing/diaphragm/frame), masonry (reinforcement and bond beam), rough plumbing, rough heating/venting/piping, rough electrical, framing (only after plumbing, electrical and heating have been signed-off), and insulation (sound/energy).

Before any tape or plaster can be installed, there needs to be an exterior lath, interior lath and drywall inspection.

Additionally, after all the above has been done, there needs to be an exterior plaster, permanent electrical pole, construction pole service, lighting standards, sewer, gas test, and water service inspection.

The final inspections include: electrical final, heating/venting final, plumbing final, grading final, fire department, police department, and structural final inspection.

Only after all of the above have been signed-off will a certificate of occupancy be issued.

While interviewing Chief Building Inspector Bill King for this project, he suggested I go "riding" out on inspection for one day with one of his inspectors. The following is a summary of that day.

> The contractor seemed shocked and a little embarrassed to see us--and he should have been. He had called to get approval on the footing so he could pour the cement foundation for a bathroom addition. The foundations had caved in from rain the previous weekend and were not anywhere near ready for approval or cement. As Jim looked at the other work that had been done, and asked a few questions, it became clear that the contractor really was not qualified to be doing certain aspects of the job. He had put in the piping for the WC (as inspectors refer to the toilet) in such a manner that it would not vent

properly. Jim took fifteen minutes to explain how to do it properly, not just so it would pass inspection, but so it would actually work. At least five times while Jim explained how to put in piping for a WC and bathtub, the contractor, who looked dazed and drugged, exclaimed "Oh wow, that's all right man!"

As we left through a living room so torn-up that I have my doubts whether the contractor would ever be able to make it livable again, Jim explained the remodel had been going on three months (and was nowhere near completion) and should have taken only three or four weeks. Through what I have to imagine has been an enormous ordeal, the wife had been living in a bedroom in the rear of the house, one of only two rooms not being remodeled. Jim commented that situations like this can lead to divorce.

For this couple, Jim's rigorous and thorough inspection saved them from dangerously poor workmanship.

Our next stop was to give the final inspection for the certificate of occupancy on another room addition in Sherman Oaks.

We arrived, knocked at an open door and then stepped in. We were at the right address, but the wrong residence. At first it was confusing. Then Jim realized that in this area zoned only for single-family houses, and not duplexes, we had stumbled onto an illegal conversion of part of the house into a second residence. Jim decided not to cite them, although he clearly could have.

Once in the correct home, Jim inspected, found everything to be in order (despite the fact the addition didn't match at all the existing structure) and asked the owner for the papers to be signed. In an exhausted gesture, the lady explained that this had been going on so long she didn't know where anything was anymore. Jim politely offered to send her a copy of her C of O.

Next stop, Stone Ridge Estates, consisting of ten custom homes off Mulholland. We went to the farthest lot so Jim could show me a huge, extravagantly beautiful home. Once there, Jim pointed out a few things, then noticed what appeared to be fire damage to the roof. We got out of the car with the air of authority of a building and safety inspector, went around back to find the entire home had been destroyed by fire. Within the last two weeks a devastating fire had essentially destroyed this 7,500-square-foot, $2.25-million, one-year-old home. Charred-through ceiling beams were scattered in the back yard next to the pool with floating toys still in it, broken glass covered the patio, sunlight came through the entirely burned-out vaulting ceiling, crude holes had been cut through the upper floor so water could drain through. Once-beautiful furniture, ruined by fire, smoke and water lay in the driveway. We later found it had taken an amazing 100,000 gallons of water to extinguish the blaze. As we walked around, Jim repeatedly stated that he was glad he hadn't been the inspector on that home. Apparently, one of the worst nightmares of an inspector is missing something on inspection, or allowing something in that's prohibited, and having a fire ensue. In those cases, the Department and the individual inspector are generally named in any lawsuit over fault.

We sought the architect of the project to ask about the fire. The architect was Lori LePel, the daughter of mega-developer Sheldon LePel. Ms. LePel had just received her architecture degree when her father decided she needed some experience. What better way to get experience, he must have thought, than building houses? Better yet, make that big houses. The burned-out house was her first project.

We found Lori LePel in her temporary office in another home she is building just a few houses away from the charred house. She was shocked to see Jim. After a brief discussion about her current projects, Jim asked about the fire. She explained that the fire had spread from a defective fireplace in the upstairs master bedroom. She suddenly became noticeably nervous. I was sitting across her desk with my legal

pad taking notes. When the subject of the fire came up she asked, again, who I was, why was I taking notes, and if she was incriminating herself.

Jim asked her if the zero-clearance fireplace she had installed had a double wall flue, as required. Her response, "What's that?"

As we talked a little more about the fire, I began to feel sorry for her. She has legitimate reason to be nervous. Most fireplace accidents are not due to negligence in the manufacturing, but negligence in the architect's design of the fireplace. Lori will likely be named in a lawsuit by the homeowners or their insurance company, as will the inspector who approved the fireplace as built.

As we left her office, we ran into Mr. Sheldon LePel ("Daddy," as Lori referred to him), who has years of experience dealing with inspectors. His first gesture, "Hello, Jim, great to see you. Come on out to the lunch truck and I'll buy you a cup of coffee." Jim noted that often when he inspects his projects, Mr. LePel has an extra pair of Lakers, Kings or USC football tickets he's not using. (Mr. LePel is a USC alumnus.) As soon as Lori had left the garage where we were all talking, Mr. LePel asked Jim to come around the side of the building to the fuse box. He had a little favor to ask. He was wondering if there was anyway he could please get approval for temporary power through the main fuse box. He was throwing a little surprise party for Lori at the house next weekend.

Next stop, Mulholland Estates. Ninety-eight lots selling today for an average of over $1.5 million. In one area, the developers had moved an unbelievable 7 million cubic yards of soil to create 18 more lots. On these lots, there are some of the most beautiful new homes in Los Angeles County. Nearly every one has a custom pool. We toured through several of these lavish homes, including one Goldie Hawn is trying to buy, as Jim gave some minor approvals to their swimming pools and jacuzzis.

At the top of a hill in Mulholland Estates, there is a 11,000-square-foot home that Wayne Gretsky recently made a reported $3.5 million offer on. Although they hadn't called for it, we decided to give them a little visit. As we walked up the driveway, I noticed some glares at Jim. The previous week, he had inspected the pool, and hadn't liked the design which featured a concrete slab pool deck over a hollow area. He required them to pull up the slab, and fill the hole. It took two entire cement trucks to fill the hole. They hadn't been and still weren't pleased.

Inside the house we met up with Jim's supervisor, David Keim, with whom I would spend the rest of the day observing the duties of a Senior Inspector. We toured around the house, turning on and off the faucets, looking in the cupboards, opening doors. Worth noting was the glass shower with a sweeping view, which featured dual shower heads, steam room capabilities, stereo speakers and wiring for a telephone. The rest of the house was equally lavish.

Jim had left ahead of Dave and me, but we caught up with him on a problem job where Jim was going to have to write an order to comply to a builder, requiring him to remove a balcony he had built on the front of his house without getting the proper variances. Zoning set-backs require that houses be a certain distance from the street. This builder had dug his foundations too close to the street some time back, and Dave and Jim had required he re-dig all the foundations. Then, the builder constructed a wall too close to the street on city property, which would preclude any future installation of sidewalks; they required him to rebuild the entire wall. Now, he had constructed a porch off the second story of the house, without any approvals. The porch violates the same set-back laws that required the builder to re-dig his foundations. Dave pulls up in his car, Jim and the builder are in the front yard looking at the porch, and Dave yells, "It's got to come off, the whole thing, off." Jim nods, the builder throws his arms in the air, and we drive off.

§ 97.05(c) The Appeals Process.

If any of the inspections is refused, the developer and contractor can appeal the decision. Generally, formal appeals are only used in extreme circumstances where great hardship would result from compliance.

Ken Astis, Director of Construction for Griffin Related Properties, explains: n149

> We had a project where the City of Santa Ana fire inspector refused to sign us off on a parking structure because it didn't have fire sprinklers. They took a hard line and refused to budge. It was going to cost us a fortune to install the sprinklers and all the piping and control equipment, so we decided to appeal their denial.
>
> In Santa Ana, to appeal a city inspector's decision, the first thing to do is to contact the head of the department and try and negotiate something with him. If that fails, the next step is to file an appeal with the city Appeal Board. In Santa Ana, the Appeal Board is a seven-member panel that hears the case and then issues a ruling. Realistically, the ruling they give is going to be final in 95% of the cases. You can appeal to the municipal court, but I can't remember hearing of a case where the courts have overruled the Appeal Board.
>
> We appealed the sprinkler requirement all the way through the Appeal Board. We lost. We installed, at enormous expense, sprinklers to protect our concrete parking structure.

Bill King explains that not all appeals are formal. In fact, most problems are settled by a Senior Inspector or a Chief Inspector: n150

> There is a problem that can arise with a builder getting different interpretations of the code from different inspectors. Through retirement, transfer or promotion, an inspector who has worked on a job may be replaced by another. Sometimes this leads to inconsistent rulings. But more often, inconsistent rulings come from a builder who has the same design being built in five different locations, with five different inspectors, and getting five different interpretations. It is for this very kind of problem that we have First Line Supervisors, Senior Supervisors and the entire appeals process.
>
> Almost every day we are faced with the situation where a plan has made it through plan check review, received certification, construction has commenced, and then an inspector finds a violation that was overlooked in plan check review. He cites the builder and requires compliance.
>
> It's important to understand that plans are very complex and difficult to follow. It's tough to see exactly what a project is going to be like by only looking at the plans. By giving a set of plans our stamp of approval, we are only saying we didn't catch any errors. We're not saying that if there are any code violations the builder is relieved of responsibility to comply. Otherwise, there'd be incentive to try and sneak things by us in plan check. Even after receiving our approval, the builder is still obligated to comply with every aspect of the code.
>
> In the event we have overlooked something in plan check, or there have been changes in the plans once construction has begun, and there's a building code violation, there are numerous ways to make the project comply. For example, suppose once construction has begun it is found that in a place where there was supposed to be a "four-hour wall" (this indicated the thickness of the wall and amount of time it would probably take for a fire to burn through it) and there is not one. We may not require the builder to tear down the entire wall and rebuild. We can provide "equivalency" by creating a water curtain (which is a row of fire sprinklers along the wall). This is just one example of the ways we are willing to work with builders in the event a violation is discovered once it's too late to fix without rebuilding.

§ 97.05(d) How Successful Developers Deal with Building Code Officials.

Architect Doug Lowe elaborates on successful--and legitimate--techniques for dealing with inspectors: n151

> If every aspect of the code were met verbatim, no building would ever be economically feasible. That's why it's so important to talk with the inspectors about the intent of the code and not just the literal reading. I know the code at least as well as they do, which makes it easier for me to convince them that my projects comply with the code's intent.
>
> It's okay to make a case before them and argue a point strongly, but once they make their decision, it's best not to keep arguing but just to accept it. They'll remember next time and may go easier on you.
>
> I'm building a house now. Every time an inspector comes and I'm not there, I get written up on something. When I'm there, there is never a problem. Being polite and explaining what's going on with a project can avoid a lot of problems. The subcontractors don't give the deference inspectors want. It turns into a power game, and the inspectors always win.

Bill King's response to Doug Lowe's quote above: n152

> I agree with him that if he's on the site and can explain to the inspector why he did what he did, it will help the inspector understand the project and may avoid certain delays.

§ 97.05(e) Gratuities and Favors for Building Inspectors.

Developer/builder Fred Johnson: n153

> In the past, about a quarter of all city inspectors expected a bottle of whisky at Christmas. Some inspectors will always show up at 11:30 for their inspection, which they know happens to be lunch time. You've got to know how to deal with these guys or they can really make your life miserable. Some need to be schmoozed and stroked; some need to be handled firmly and authoritatively. Make the wrong decision and it could be a long haul to certificate of occupancy. That's why there's a lot of talk between construction people about what type of an inspector each of them are. It's not hard to get the scoop on an inspector.

Bill King's response to Fred Johnson's quote above: n154

> I think you could change this quote, put my name at the top and I could say almost the exact same thing about developers.

Frank Scardina, formerly of Kaufman & Broad: n155

> Frequently, there are well-defined local customs concerning how a builder or owner is to show appreciation to a building inspector. Years ago, it was customary for a swimming pool contractor to instruct his client to give the inspector a bottle of Scotch or whiskey at the time of final inspection, just to show good faith and thank you for the inspector's efforts. It was explained to me as being similar to a tip at a restaurant or a card with a few dollars in it at Christmas for the postman.
>
> To a builder, an inspector's impact on a construction project extends well beyond the inspector's enforcement of local building codes. For example, you cannot start to install drywall or otherwise begin to finish the inside of a home until you have obtained a "framing" inspection. Should an inspector be "too busy" to get to your project for a week, your job stops, your subcontractors are angry because they cannot continue working, and interest on your construction loan continues to run. Needless to say, it's not

a good idea to do anything that will tend to upset your inspector.

Often, inspectors (and their bosses) who hadn't been involved or visited your construction site for months would let you know that they would be coming just before Christmas to extend their seasons greetings. It wasn't a good idea to let them leave without offering some friendly chatter and a bottle of booze or a box of candy, all in the spirit of the holiday season.

Several years ago, we experienced a major problem when a building inspector was caught taking significant bribes from several very small construction companies. He, and his lawyers, traded a "confession" to accepting several bottles of Scotch at Christmas from us for a shortened sentence. It seemed far more important to the local DA to pursue a "major" developer than the case he started with. As a result, our policy is never to give more than a firm handshake and sincere thank you to any inspector on any job--and we've suffered just a little bit as a result. Ultimately, we were able to "finesse" the issue by making a contribution to a local charity during the holiday season in the "name" of the local building department.

The issue of unauthorized acceptance and solicitation of gratuities by public employees is addressed in city, county, state and federal provisions. The State of California and the City of Los Angeles have no provision specifically addressing building inspectors acceptance of bribes, but the following city and state provisions have been held to apply to building inspectors.

City of Los Angeles Code of Ethics,
Adopted by the City Counsel July 21, 1959
Amended August 23, 1979

III. Acceptance of Favors or Gratuities

Persons in public service shall not accept money or other favors from anyone other than the city for the performance of an act which they would be required or expected to perform in the regular course of their duties; nor shall such persons accept any gifts, gratuities or favors of any kind which might reasonably be interpreted as an attempt to influence their actions with respect to city business.

California Penal Code § 68:

Every executive or ministerial officer, employee or appointee of the State of California, county or city therein or political subdivision thereof, who asks, receives, or agrees to receive, any bribe, upon any agreement or understanding that his vote, opinion, or action upon any matter then pending, or which may be brought before him in his official capacity, shall be influenced thereby, is punishable by imprisonment in the state prison for two, three or four years; and, in addition thereto, forfeits his office, and is forever disqualified from holding any office in this state.

California Penal Code § 7.6:

The word "bribe" signifies anything of value or advantage, present or prospective, or any promise or undertaking to give any, asked, given, or accepted, with a corrupt intent to influence, unlawfully, the person to whom it is given, in his or her action, vote, or opinion, in any public or official capacity.

Chief Inspector Bill King's Thoughts on Gratuities: n156

I think there is a perception of the inspection industry that comes out of New York, Chicago and some of the Eastern cities that being on the take is how the industry operates. We have an investigation

and internal affairs division. If anyone receives anything, from anybody, be it a bottle of whisky or a lunch, they have to report it.

An inspector can't even accept a lunch from a builder. That's a clear conflict of interest. I'm not going to tell you it doesn't happen, but it's the position of this department that accepting a lunch is a conflict of interest and must be reported to the department.

I'm not going to say that we don't have periodic problems with individuals violating these rules. We do. When you have 1,100 people in the department, you're going to have people cross the line. We've had to terminate employees on numerous occasions for their actions.

In one recent instance, we had an inspector with our earthquake safety division who was working with some developers who were paying him a "consultation fee." When the department looked into this one, the inspector was immediately fired for his actions and criminal prosecution was contemplated.

We've had several other instances where members of our department have been found to be receiving consultation-type fees and the individuals were fired ... .

The code is ambiguous and open to interpretation in many places. It's human nature that once an individual has developed a reputation in the industry for being legitimate and hard-working, he may not get the same degree of scrutiny that another might. Inspectors are human beings. They react to developers the same as developers react to inspectors.

I don't like to think that anyone in our department has ever been vindictive towards any builder. But there are times when a builder has tried to cheat in the past, by, for example, kicking dirt in the footings after they were inspected. When dealing with someone like this, the inspectors are going to demand that they see the footing, with the steel in it, 100% ready, no slack, before they're going to certify it and allow the builder to pour the footing. Along the same lines, if there is a quality tract home builder with a good reputation who is having ten homes inspected, and nine of them are ready and look right, but the tenth is only 75% ready, the inspector may certify all ten even though he will never see the tenth one.

It's important to remember that inspectors are human beings. They are performing as regulators, a necessary evil in our world. If you're polite, reasonable, knowledgeable, and cooperative, they are going to respond and be a lot easier to work with.

As chief inspector, most of the problems I get are not building code problems, but personality problems where the builder and the inspector didn't get along.

§ 97.05(f) Case Law: When Building Inspectors and Local Governments Are Liable for Negligent and Fraudulent Inspection and Enforcement of Building Codes.

§ 97.05(f)(1) Common Law Liability of Municipalities for Negligent Building Inspections.

[M]ajor causes of the structural failure of buildings in South Dade county, which suffered the brunt of the Aug. 24 storm (Hurricane Andrew), included inadequate design, substandard workmanship and misapplication of various building materials.

The poor construction was compounded ... by a shortage of county building inspectors and inspection supervisors and inadequate training of inspectors. n157

State governments are automatically safeguarded from tort liability by the ancient and often assailed doctrine of sovereign immunity. n158 Municipalities may or may not be. Courts in many states have conferred immunity on cities

anyway.

> Most of the cases involving the issue of a municipal corporation's liability for the negligent performance of its building inspectors duties have held or recognized the general rule that a municipality is immune from liability for the acts of its officers and employees while they are engaged in the performance of governmental functions. n159

Inroads into governmental immunity take two paths. First, only discretionary acts, not ministerial ones, are sometimes protected. The rationale is that public officials need leeway in their decision-making functions. If they were subject to tort liability for judgment calls, they would be stymied in using their best judgment. But in executing policy decisions, not making them, public officials should go by the book or risk having the book thrown at them. n160 Distinguishing the "discretionary" from the "ministerial" or "operational" is often next to impossible.

Jurisdictions are divided on whether building code officials' duties are ministerial or discretionary. n161 While the issuance of a certificate of occupancy is sometimes cited as the prototype of a purely ministerial task, a few courts have labelled it discretionary. n162

Second, some courts have accepted the premise that municipalities are immune from liability to the general public, n163 but specific statutes like the building codes may give rise to cities being liable to particular classes of individuals. A prime example of liability that falls under the special duty exception: Some courts have allowed builders to recoup losses from their having relied on negligently issued building permits. n164

In one leading case a builder got a permit for a house constructed in violation of an 18-foot setback required by the code. The builder excavated and leveled an existing structure, set the foundation forms, and requested an initial inspection. Like the plan checker, that inspector, too, overlooked the setback encroachment. After neighbors complained, the permit was revoked. The developer sued the county for damages and recovered. n165

The Washington Supreme Court expressly overruled this case in *Taylor v. Stevens County*. n166 The court retained the principal that "special relationships" may still give rise to exceptions to the public duty doctrine. But the "special relationship" required: "(1) [a] direct contract or privity between the public official and the injured plaintiff which sets the latter apart from the public, and (2) there are expressed assurances given by a public official, (3) [causing] justifiable reliance on the part of the plaintiff." n167 Building permits and inspections would not count as "expressed assurances." They "only authorize construction to proceed; they do not guarantee that all provisions of all applicable codes have been complied with." n168 Since the defendant-municipality had only approved the permits and had not offered "expressed assurances," no "special relationship" existed. The court excluded from "special relationship" compliance with building codes ruling that local governments owed no duty of care to private persons who had in fact failed to comply with all applicable codes.

The Washington Supreme Court's rationale was that "legislative enactments for the public welfare should not be discouraged by subjecting a governmental entity to unlimited liability." n169 Building codes are designed to protect public safety, health and welfare, not to protect individuals from economic loss caused by public officials performing (or misperforming) their public duties. Permit applicants and developers are in a better position to prevent such harms than are local governments. Were the local government to be held as the guarantors of the legality of permits, contractors would have a diminished incentive to conduct their own thorough investigations of the building and zone codes and make sure their projects complied. n170

At quite the opposite end of the spectrum from the position taken by the Washington Supreme Court, some jurisdictions have rejected the sovereign immunity defense entirely. If a building's construction or design violates code standards, those foreseeably injured have been allowed to establish their claims against the government just as if the perpetrators had been private entities. "A building inspector must be held to have foreseen that his alleged negligence in performing

the required inspection might have foreseeably resulted in harm to someone." n171

§ 97.05(f)(2) Statutory Immunity.

To halt the costly spread of liability many states have enacted statutes granting municipalities immunity from tort claims. Cities are protected from liability arising from discretionary functions in twenty states. n172 Thirteen states provide immunity arising from the issuance, denial, suspension, or revocation of permits or the failure to take action. n173 Eleven states provide municipal immunity from negligently performed building inspections or the failure to inspect. n174

Here are typical immunity-granting statutes:

> --A public *entity* is not liable for injury caused by misrepresentation by an employee of the public entity, whether or not such misrepresentation be negligent or intentional. (Emphasis added.) Cal. Gov't Code § 818.8.
>
> --A public *entity* is not liable for injuries caused by his failure to make an inspection, or by reason of making an inadequate or negligent inspection, of any property, other than its property ... for the purpose of determining whether the property complies with or violates any enactment or contains or constitutes a hazard to health or safety. (Emphasis added.) Cal. Gov't Code § 818.6.
>
> --A public *employee* is not liable for injuries caused by his failure to make an inspection, or by reason of making an inadequate or negligent inspection, of any property, other than the property ... of the public entity employing the public employee, for the purpose of determining whether the property complies with or violates any enactment or contains or constitutes a hazard to health or safety. Cal. Gov't Code § 821.4.
>
> --A public *employee* acting in the scope of his employment is not liable for an injury caused by his misrepresentation, whether or not such misrepresentation be negligent or intentional, *unless he is guilty of actual fraud, corruption or actual malice*. (Emphasis added.) Cal. Gov't Code § 822.2.

State immunity statutes can block recovery even by builders who rely on negligent inspections. n175

Plaintiffs try to breathe life into statutory exceptions to immunity, such as the one for "actual fraud, corruption or actual malice," n176 and sometimes succeed. In one case, a group of 100 condo buyers got past a general demurrer. They overcame the immunity statute quoted above by alleging a conspiracy between the builder-seller of their units and the county building inspectors, among others, to conceal the fact that the project was defectively, illegally and dangerously constructed in flagrant violation of the Uniform Building Code.

> We see no reason why purchasers, as intended beneficiaries of honest building inspection and as persons substantially harmed by allegedly intentionally false inspection, should not be able to maintain *an action for fraud* against the county building inspectors engaging in such misconduct. [Emphasis added.] n177

FOOTNOTES:

(n1)Footnote 145. Cal. Health & Safety Code § 18941.5, passed in that same year, required all jurisdictions within the State of California to adopt the Uniform Building Code.

(n2)Footnote 146. A city in California that wants to modify the U.B.C. must make a finding that the changes are "reasonably necessary because of local climatic, geographical, or topographical conditions." Cal. Health & Safety Code § 17958.5. The local government then has to file the finding with the State Department of Housing and Community

Development. (Cal. Health & Safety Code § 17058.7.).

(n3)Footnote 147. Reconstruction of Interview by Adam Duncan with Bill King, Chief Building Mechanical Inspector, City of Los Angeles Dep't of Bldg. and Safety, Van Nuys, Cal. (Feb. 5, 1990).

(n4)Footnote 148. Reconstruction of Interview by Adam Duncan with John Condas, Associate at Cox, Castle & Nicholson, Los Angeles, Cal. (Nov. 14, 1989).

(n5)Footnote 149. Interview by Adam Duncan with Ken Astis.

(n6)Footnote 150. Reconstruction of Interview by Adam Duncan with Bill King, Chief Building Mechanical Inspector, City of Los Angeles Dep't of Bldg. and Safety, Van Nuys, Cal. (Feb. 5, 1990).

(n7)Footnote 151. Interview by Adam Duncan with Doug Lowe, Solberg & Lowe Architects AIA, Inc., Santa Monica, California.

(n8)Footnote 152. Reconstruction of Interview by Adam Duncan with Bill King, Chief Building Mechanical Inspector, City of Los Angeles Dep't of Bldg. and Safety, Van Nuys, Cal. (Feb. 5, 1990).

(n9)Footnote 153. Reconstruction of Interview by Adam Duncan with Fred Johnson, Pres. of Fred Johnson Inv., Inc., Santa Monica, Cal. (Nov. 7, 1989).

(n10)Footnote 154. Reconstruction of Interview by Adam Duncan with Bill King, Chief Building Mechanical Inspector, City of Los Angeles Dep't of Bldg. and Safety, Van Nuys, Cal. (Feb. 5, 1990).

(n11)Footnote 155. Interview with Frank Scardina, President, Coastal Valleys Div., Kaufman & Broad of S. Cal., Inc., Woodland Hills, Cal. (Nov. 8, 1989).

(n12)Footnote 156. Reconstruction of Interview by Adam Duncan with Bill King, Chief Building Mechanical Inspector, City of Los Angeles Dep't of Bldg. and Safety, Van Nuys, Cal. (Feb. 5, 1990).

(n13)Footnote 157. Wall St. J., Oct. 8, 1992, at A6.

(n14)Footnote 158. William L. Prosser & Page Keeton, on the Law of Torts § 131, at 1032 (5th ed. 1984).

(n15)Footnote 159. Annotation, *Liability of Municipal Corporations for Negligent Performance of Building Inspector's Duties, 41 A.L.R.3d 567, 569 (1972).*

(n16)Footnote 160. Restatement (Second) of Torts § 895D(3)(a) (1977): A "public officer acting within the general scope of his authority is not subject to tort liability for an administrative act or omission [if he is engaged in] the exercise of a discretionary function."

(n17)Footnote 161. Rosemary Maccarone, Note, *Connecticut Tort Reform Act and Municipalities' and Building Officials' Liability, 20 Conn. L. Rev. 203, 233,* text at nn.46 to 49 (1987).

(n18)Footnote 162. *Fiduccia v. Summit Hill Constr. Co., 262 A.2d 920 (N.J. Super. 1970)* .

(n19)Footnote 163. *See*, e.g., *Hannon v. Counihan, 369 N.E.2d 917 (Ill. App. 1977)* ; *Texaus Inv. Corp., N.V. v. Haendiges, 761 F.2d 252 (6th Cir. 1985)* (applying Ohio law); *Hagen v. City of Sioux Falls, 464 N.W.2d 396 (S.D. 1990)* ; *Besserman v. Town of Paradise Valley, Inc., 569 P.2d 1369 (Ariz. 1977)* ; *Georges v. Tudor, 556 P.2d 564 (Wash. App. 1976)* ; *Hoffert v. Owatonna Inn Towne Motel, Inc., 199 N.W.2d 158 (Minn. 1972)* ; *O'Connor v. City of New York, 447 N.E.2d 33 (N.Y. 1983)* . One court looked for legislative intent to provide a private cause of action through the building code, but didn't find any. *Dinsky v. Town of Framingham, 438 N.E.2d 51 (Mass. 1982)* .

(n20)Footnote 164. Annotation, *Liability of Governmental Entity to Builder of Developer for Negligent Issuance of Building Permit Subsequently Suspended or Revoked, 41 A.L.R.4th 99 (1985).*

Ruf v. Honolulu Police Dept., 972 P.2d 1081 (Haw. 1999) . However, a clear majority of jurisdictions continue to adhere to the public duty doctrine.

(n21)Footnote 165. *J & B Dev. Co. v. Kings Cty., 669 P.2d 468 (Wash. 1983)* .

(n22)Footnote 166. *111 Wash. 2d 159 (1988)* .

(n23)Footnote 167. *Id. at 166* .

(n24)Footnote 168. *Id. at 167* .

(n25)Footnote 169. *Id. at 170* .

(n26)Footnote 170. *Id. at 169-70* . The Washington Supreme Court also observed that imposing liability for non-compliance with building codes is consistent with Washington's zoning vested rights doctrine. Rights don't vest except under a lawfully issued permit. The burden of lawful compliance is on the claimant in a vested rights dispute and should remain there as well when the plaintiff seeks damages resulting from a building permit negligently issued.

(n27)Footnote 171. *Coffey v. City of Milwaukee, 247 N.W.2d 132, 139 (Wis. 1976) . See also Sexstone v. City of Rochester, 32 A.D.2d 737 (N.Y. 1969)* ; *Adams v. State, 555 P.2d 235 (Alaska 1976)* . Louisiana has also expressed willingness to abandon the public duty doctrine. *Stewart v. Schmieder, 386 So. 2d 1351 (La. 1980)* ("the mere fact that a duty is of a public nature, and benefits the general public, does not require a conclusion that the city cannot be found liable for breach of that duty").

(n28)Footnote 172. *See* Rosemary Maccarone, Note, *Connecticut Tort Reform Act and Municipalities' and Building Officials' Liability, 20 Conn. L. Rev. 203, 206, n.124 (1987).* These include Alaska, California, Connecticut, Delaware, Idaho, Illinois, Indiana, Kansas, Maine, Maryland, Massachusetts, Minnesota, Nebraska, New Jersey, Nevada, North Dakota, Oklahoma, Oregon, Tennessee, and Utah. The extent of statutory immunity in California is considerable, not just for building code violations but for the performance of other code related tasks. The City of Hermosa Beach issued a Report of Residential Building Records to the Grenells in 1974 when they bought a two-unit property from Mr. and Mrs. Sheldon. The report stated that the property contained "Two dwelling units constructed by permit," and there were no apparent building or zoning code violations. In 1975 the Grenells sold the property to the Altamuras, and a report from the city indicated that only one of the two dwelling units had been constructed pursuant to a permit. The Grenells sued the city for its earlier negligent report, and lost on a demurrer. 295 *Cal. Government Code § 818.6* was cited as an absolute bar to the Grenells' claim against the city. *Grenell v. City of Hermosa Beach, 163 Cal. Rptr. 315 (Cal. App. 1980)* .

(n29)Footnote 173. *Id.* These include Alaska, California, Connecticut, Delaware, Illinois, Indiana, Maine, Massachusetts, New Jersey, North Dakota, Oklahoma, Tennessee, and Utah.

(n30)Footnote 174. *Id.* These include Alaska, California, Connecticut, Illinois, Indiana, Kansas, Nevada, New Jersey, Oklahoma, Tennessee, and Utah.

(n31)Footnote 175. Plaintiff homeowners were forced to reconstruct their home built on reliance in faulty permits. They were prepared to prove that the inspector intentionally misrepresented and suppressed the facts that construction was not up to code when he signed the job card. "No go" against the municipality, ruled the court in *Harshbarger v. City of Colton, 197 Cal. App. 3d 1335 (Cal. Ct. App. 1988).*

(n32)Footnote 176. *See* Cal. Gov't Code § 822.2.

(n33)Footnote 177. *Cooper v. Jevne, 128 Cal. Rptr. 724, 733 (1976)* .

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CHAPTER 97 CONSTRUCTION AND DEVELOPMENT LAW

12-97 Thompson on Real Property, Thomas Editions § 97.06

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§ 97.06 Understanding, Negotiating, and Drafting the Key Provisions in a Commercial Lease Related to New Construction.

The purpose of this section is to illustrate how successful leasing can be key to a successful construction project. Commercial leasing in a more general context is covered in Chapter 44. This section describes some of the most important provisions in a shopping center lease, to explain why they are there, and how some of the standard form provisions on these main issues can be improved for particular landlords and tenants.

§ 97.06(a) Happy's Lease with Georgio.

Leasing space could have been a problem for Happy because of the unusual configuration of the center. But Georgio Yrmoni, a prominent clothing designer, agreed to lease 30,000 square feet from Happy on the condition he could move in by October 1.

Georgio and Happy easily agreed to the main terms of their deal, leaving details to their lawyers. The main terms are the amount of rent, the length of the lease, the type of operation each was to run (Georgio in his shop and Happy in the balance of the center), the space to be let, parking arrangements, and cost-sharing for tenant improvements.

Some of these items are dynamically intertwined, such as the formula for determining rent and the length of the lease. With short-term leases, landlords needn't worry much in the U.S. about inflation, even if they agree to a fixed rent. For leases of longer terms, rent adjustments are customary, and take many forms. They might call for stepped increases, fixed or indexed at marked intervals. Long-term ground leases sometimes tie periodic rent reviews to appraisals of the land value, with the tenant paying a specified percentage of value. Leases of retail space commonly entitle the landlord to a percentage of the tenant's gross sales above an agreed minimum rent. n178

Georgio is a good credit risk. His lease provides significant comfort to Happy's lender, although not as much comfort as a lease with, say, a nationally owned retail chain. On the other hand, with the bankruptcy filings of major department store chains, lenders may be forced to reconsider their underwriting standards. "Big" in retailing doesn't necessarily mean financially sound anymore.

Georgio's investment in outfitting his shop will run about one million dollars, too much to be amortized over a three- to five-year lease term. Ten years, at least, perhaps with a five-year option, is what he wants.

Once Georgio signed up, three smaller accessory-selling tenants swiftly contracted for 10,000 square-foot shops.

The following materials offer a checklist of issues Georgio, Happy and their representatives must resolve. At the end of the chapter, there are a few questions about specific provisos in the lease.

§ 97.06(b) The Process.

A shopping center or office building owner will offer prospective tenants a form lease, usually prepared by an attorney, but sometimes taken "off a shelf" from a realtors' association or other printed form. n179 Tenants with little bargaining leverage will live with that lease, perhaps with minor changes in it. Anchor or major tenants that the landlord needs desperately in order to finance the project or keep it solvent--especially national or regional chains or franchises--will often demand that the landlord accept *their* form.

Once the parties agree on whose form to use, they or their negotiating representatives get to work. The reviewing party definitely is disadvantaged in having to work from someone else's form. That form won't be as familiar as its own. The form won't contain all the protective provisions added over the years. The client or the client's rep might begin by comparing the form they have been forced to accept with the one they would have used had they the choice.

The party responding to someone else's draft lease will usually send a letter with detailed specific drafting changes, comments, suggestions or a combination. They may write a new lease based on the draft with the desired provisions incorporated and unwanted ones deleted. They may send back the proffered lease with proposed changes.

Through correspondence, phone calls and meetings, the parties may be able to narrow their disagreements to an agreed list, and may then proceed to resolve these, with each side prepared to give up some points while insisting on others.

Clients are soured when lawyers run up big bills haggling over minor, technical details in a lease. That sentiment was well expressed by Bruce Eichner, a Brooklyn prosecutor turned commercial developer, who divides lease issues into two groups: "business points" and "legal points." Business points have to do with money, who spends what, who gets how much and when. Legal points are mostly about "what ifs," the chance of things going wrong. Mr. Eichner hates paying good money for lawyers to split hairs over legal points. The smarter the lawyer, the more Bruce Eichner worries about monstrous legal fees because smarter lawyers see more possibilities, more complications.

It wasn't that Bruce didn't believe that things could go wrong. On the contrary, he knew that thousands of things would go wrong, most of them totally unpredictable, unforeseen, and beyond the scope of even the most comprehensive legal draftsmanship.

The solution would be found in the real world and not in the carefully crafted and scrupulously numbered paragraphs of the agreements. Ultimately he would be thrown back on his own resources, to rant and deal as best he could. To spend $200 an hour pretending otherwise struck him as an expensive form of voodoo. n180

In many instances there is little or no bargaining between landlord and tenant over lease terms. Sometimes bargaining power is weighted heavily in favor of the lessor. Sometimes the tenant calls the tune. The lawyer representing the weaker party in these situations can do little more than analyze and explain to the tenant the implications of the lease, unless the stronger party will listen to reason and modify the more draconian provisions of the lease. n181 For all parties, it always pays to know the "default" rules--the rules that apply in the absence of a specific lease provision. On some points those rules may not be at all clear. n182

§ 97.06(c) The Usual Checklist.

Anyone drafting a shopping center lease for the first time will need a good guidebook. One of the best is Emanuel Halper's Shopping Center and Store Leases. n183 Law students might start with Lucy March, Real Property Transactions (Little Brown, 1992), a drafting "Primer" with sections on commercial leasing. Lawyers may turn to the Practicing Law Institute or state continuing education of the bar publications. We will focus on how these issues affect Happy, the developer whose story was depicted at the beginning of this chapter.

This introduction should help you understand what is at stake in commercial leasing, but it certainly is no substitute for a comprehensive leasing treatise.

Most commercial leases cover at least these items:

§ 97.06(c)(1) The Names, Authority, and Liability of the Parties.

The party signing the lease should be the correct one from a credit standpoint--the one whose credit the other party is relying on. If the lessee is a partnership or corporation, the lessor will want to verify that those who are signing the lease have legal authority to bind the partnership or corporation. The lessor will want proof of their authority--a certified copy of the partnership agreement or corporate by-laws, and a certified copy of the minutes of the meeting at which the corporation or partnership approved the deal. Alternately the lessor may accept the opinion of lessee's counsel that the person representing the lessee entity is duly authorized to *negotiate* and enter a lease on its behalf.

Determining who has the authority to negotiate for the other party is crucial. No smart lessor negotiating a lease will make concessions to the tenant's rep unless the rep can bind the tenant. If the rep lacks that authority, the lessee will *condition* her concessions on the rep getting the lessor's *approval* of the *quid pro quo* concessions the lessor is supposed to be making.

Franchises. When leasing to a franchise, the lessor wants to be sure the franchisee has a substantial net worth, no past defaults on leases or other debts, and is in fact an approved franchisee of the national chain. The lessor doesn't want the fact that it accepts *this* franchisee to mean it waives its rights to approve other operators to whom the space might be assigned or sublet later by the tenant. n184

Partnerships. When a general partnership signs a lease, partnership law provides that each general partner becomes jointly and severally liable for payments under the lease. This may not be acceptable to the partners. They may be willing to live with a share of the total liability in proportion to their partnership interest but may not be willing to pick up the costs for partners who don't pay their share. n185

Law firm partnerships have been successful in negotiating "caps" on partner liability for rent. Sometimes each partner's "several" liability for the total rent is limited to the money the landlord spent in luring the tenant: free rent, tenant improvement allowances, moving expenses, lease takeover amounts, and brokerage commissions. n186 This sum is often amortized and "burned off" over a stated period of years. Especially successful, diversified firms have even negotiated provisions exculpating the individual partner of the general partnership from personal liability.

Conversion of Partnership to LLC. Suppose the landlord enters a lease with a general or limited partnership (with a solvent individual general partner) and later, the law firm converts itself into a limited liability company ("LLC") or a limited liability partnership ("LLP"). In an LLC no members have personal liability for partnership debts except to the extent of their contributions to the partnership. Once a partnership becomes an LLC or LLP, n187 the landlord may lose the right to hold the former partners liable for a breach of the lease, absent personal guarantees. The breach would be by the LLC or LLP, not the partnership. n188 The lessor may require personal guarantees from all the general partners as a condition to allowing the LLC or LLP to replace the partnership as lessee.

§ 97.06(c)(2) Description of the Premises.

The lease should contain a site plan and be accompanied or preceded by a title policy showing the landlord owns the property the tenant assumes the landlord owns.

The use of suite numbers to identify space in office buildings may cause trouble. n189 As tenants expand or contract their space, and come and go, the lessor may renumber office suites. Suite 500 may now identify what used to be suites 500, 510 and 520. If the original lease for suite 500 specified certain terms, and the new leases for suites 510 and 520 specify different terms, then which lease applies to the new suite 500? It isn't clear. The lessor will have to seek a lease modification from the tenant unless the lease originally specified that "the premises presently known as Suite 500, 510, and 520 may be renumbered from time to time at the discretion of the lessor but all the terms applicable to the space as originally numbered will remain the same after renumbering."

Ownership. If the landlord holds only a long term ground lease, the tenant needs assurance from the ground lessor not to terminate the operating tenant's lease even if the shopping center owner, the ground lessee, defaults on the ground lease. If the landlord doesn't own the parking lot, the tenant must see a recorded document signed by the owner of the parking lot, extending a parking easement or lease to the tenant.

Comparable Space Definitions. Tenants shopping for space like to be sure prices being quoted in different buildings are truly comparable. To do this, when rent is quoted as a certain sum per square foot per month, the tenant needs to make sure "square footage" means the same thing in each building it is considering.

There are many ways of measuring space. *Gross* space is everything within the walls of a building. n190 Rent is seldom based on *gross* space unless one tenant takes the entire building.

Rent is often based on *rentable* or *leasable* space. The Urban Land Institute definitions use the phrase "gross leasable area." The Building Owners and Managers Association defines "gross rentable area." For our purposes, they may be taken as referring to the same sort of space although there are subtle differences. What matters most, though, in particular disputes over how much space the tenant must pay rent and maintenance expenses for, is the definition in the lease. n191

Rentable or *leasable* space in office buildings is measured, by one leading industry standard, from the inside surface of all outer walls of a floor, excluding vertical penetrations. n192 What about corridors, hallways, and shared bathrooms on each floor? If one tenant occupies the entire floor, these may be regarded as part of that tenant's rentable space. If more than one tenant occupies each floor, these areas, along with the building lobby, are not part of the tenant's rentable space.

Not all *rentable* space is *usable*. Mechanical rooms, interior hallways, and lavatories do not count as usable space. Think of *usable* space as space that could be carpeted. "*Rentable*" area may be 5 to 25% larger than *usable* area. n193 Nonetheless, office rent is usually calculated on *rentable or leasable* space.

Choosing Between Usable and Rentable Space in the Rent Base. Lessees don't want to pay for gross or rentable space because they will not use this space exclusively or directly. Instead, they insist on having the rent based on usable space. The Lessor will raise the per-square-foot multiplier on the smaller unit of space on which your rent is calculated. Ultimately the sum total of all the rent must justify the lessor's investment. So what difference does it make--gross, rentable, usable?

Measuring the Chosen Base. Whether tenants pay for gross, rentable or usable space, they often take their landlord's word for the volume of that space. Landlords sometimes miscalculate, often by 1% to 3%. Tenants have been known to employ independent surveyors to measure precisely the area for which they are to pay rent. Lessors have a way of

avoiding any rent decreases due to their space calculations being off a little. Their leases may provide: "For purposes of this lease, the square footage of the space rented to T shall conclusively be deemed to be 10,000 square feet, whether the tenant's space is actually 10,000 square feet or not. Any representations, plot plans, or drawings showing anything other than 10,000 square feet are to be disregarded." With this language, if the lessor's estimate of square footage is too high, the tenant will not be entitled to a rent abatement because of the "deemed to be" language. n194 If the lessor's estimate is too low, the lessor will not be entitled to a rent increase because of the "deemed to be" language.

Building Design/Efficiency. Some buildings are more efficient than others. One way of measuring efficiency is by the ratio of rentable to usable space. Currently, in downtown Los Angeles "A" office buildings, that ratio varies from 1.07 to 1.16. Why would any tenant pay for space in less efficient buildings? Because they are attracted to amenities such as wide hallways and spacious lobbies.

Another way of measuring the efficiency of space is by how well the layout of the building accommodates the tenant's needs. For example, rectangular space is easier to use than circular space. For some firms, space with windows is more valuable than space with no access to daylight or views. The time for a tenant to hire a space planner or interior designer is *before* signing a lease. If office building A offers 10,000 square feet at $28/foot and building B offers 10,000 square feet at $30/foot, the tenant will be better off with B if the B space is configured in such a way that it comfortably accommodates 50 people and the A space only 40.

Buildings that look alike may not have been built alike. You may have to keep the blinds closed all summer long in that glass enclosed corner office on the 46th floor, the one with the sweeping city view, because the air conditioning system isn't big enough to keep the office cool with the blinds open. You may have to keep half your PCs off at any one time to avoid blowing an electrical fuse. You may need to spend a fortune reinforcing the floor under your law library because the "live load" factor isn't high enough to support the books. Better to know all this before you negotiate your rent and improvement allowance, or at least hire the right technical consultants so they can specify the performance criteria you will insert in the lease as obligations of the lessor to deliver.

§ 97.06(c)(3) Common Areas and Operating Costs.

Will the tenant have the right to use the common areas? Will an office tenant have the right to put a communications satellite on the roof and run telecom wires from its space to it? At what price?

If the tenant is to pay for a share of costs in operating and maintaining common areas (hallways, parking, lobbies), how can the tenants verify that the total amount charged to the tenants for these areas doesn't exceed the landlord's actual maintenance cost? How can they be sure the landlord isn't charging them for his own business operations? Typically, the tenants aren't liable for reimbursing the costs of the landlord reletting vacant space as part of their common area assessment. But they need a way to make sure that isn't happening by verifying the common area expenses the landlord is allowed to pass through to tenants.

The lease needs to specify a procedure for determining whether an expenditure is to be treated as an expense and charged to the tenants in the year the landlord incurs it, or whether it is a capital expenditure to be amortized over its useful life so that tenants are charged only a portion of the total cost in the year the landlord spends it. If the cost is to be amortized, an interest rate should be specified.

If some tenants are bigger users of common area space than others, how are those differences to be taken into account? Here, a trade-off sometimes needs to be made between allocating costs fairly among tenants based on actual use and administrative simplicity.

Compare the law firm where young associates work nights and weekends with a bank which opens and closes at fixed times. Why should the bank pay for elevator and air conditioning service it doesn't use during off-hours? Or consider

the shopping center boutique whose high-end customers are affluent but few in number compared with the endless stream of kids drawn to a game arcade. In office buildings the use of heating, air conditioning and elevators can be computerized. After-hours users can key into the system and be charged for actual use. In shopping centers, precise allocations of common area usage aren't as readily determinable so tenants usually pay for common area maintenance based on their square footage in the center and not on the number or type of tenants they attract.

§ 97.06(c)(4) Parking.

In an office building, tenants often want designated and reserved parking spaces, not just a right to parking on a first come/first served basis. In a shopping center, major or anchor tenants will insist that no changes be made in the location and configuration of parking spaces without their consent. If the center becomes outdated, this provision will give the major or anchor tenants a veto power over changes that encroach on the parking area.

Office building leases often provide that tenants pay for parking. Some urban shopping malls are now charging for parking, too, although free parking used to be regarded as a "natural right" and still is in many areas. Will payment be based on fair market value or is the price of parking fixed? What arrangements will be made for validating parking for the tenant's guests? For valet parking?

Smart tenants with bargaining leverage don't leave parking arrangements to the landlord's discretion. Here are a few highlights from the three pages on parking which a national chain retailer demands as part of any shopping center lease it signs:

> *Parking Area Use, Maintenance and Operation.* Landlord shall throughout the term of this Lease, provide, operate and maintain the Parking Areas in good order and repair and in a safe, clean and sanitary condition and shall keep the Parking Areas properly drained and reasonably free from ice and snow. All shrubbery, trees, flower beds, grass and other landscaping within the Parking Areas shall be tended and maintained in an attractive and healthy condition.
>
> No fee is to be charged to any permittee for the privilege of parking any motor vehicle nor is any parking charge, validation or other condition to be imposed upon such parking privilege without the reasonable approval of Tenant and unless such condition is imposed uniformly upon all Parking Area maintained for retail parking; provided, however, that nothing herein contained prevents a charge being made to an occupant, tenant, subtenant or licensee as a part of a lease, license or other agreement.
>
> Landlord shall at all times during the term of this Lease provide and maintain or cause to be maintained within the Parking Area, parking facilities for not less than five (5) car spaces for every 1,000 square feet of Floor Area contained within buildings located on the Entire Premises.
>
> Except for minor changes not resulting in a violation of the parking requirements of this Lease or traffic circulation no changes shall be made in the parking layout and detail shown on Exhibit B hereto without tenant's prior written approval in each instance first obtained.
>
> If it should become necessary for parking lot attendants to be employed in connection with the operation of the Parking Area, Landlord shall furnish such service at Landlord's sole cost and expense and Tenant shall not be under any duty or obligation whatsoever to contribute toward such cost and expense or toward any other costs and expenses connected with the operation and maintenance of the Parking Areas except as expressly provided in this Lease.
>
> It is agreed that should landlord fail to comply with the aforesaid Parking Area car space ratio and minimum number of car space requirements at any time, then in such event Tenant shall have the right and option at any time thereafter to terminate the term of this Lease by notifying Landlord of tenant's

election so to do, and upon the giving of such notice by Tenant to Landlord and Landlord's failure to cure such default prior to the expiration of sixty (60) days after the giving of such notice, this Lease shall terminate and end as of the date one hundred twenty (120) days after such notice shall have been given, and Tenant shall thereupon be released from and relieved of all further obligations thereafter to accrue hereunder.

§ 97.06(c)(5) Merchants' Association; Payments to Marketing Fund.

In a shopping center, the promotion budget may have great bearing on the flow of business to the center. Tenants are usually assessed for group advertising and special events at the center. Their right to decide how this money is spent should be specified in the lease.

§ 97.06(c)(6) Term of Lease.

When will the lease begin and end? If the space isn't built yet, and isn't ready on the date scheduled for occupancy, is the tenant relieved of liability under the lease? Does the tenant have to wait until the actual scheduled move-in date to discover that the landlord can't perform on time, or will the tenant be given periodic opportunities to reject the lease if the landlord doesn't get the necessary land use entitlements, or construction financing on time, doesn't begin construction on schedule or can't lease up the center in advance of completion? If the space isn't ready on time, does the tenant get actual damages--the difference between the rent that would have been paid, and the rent the tenant is compelled to pay for space elsewhere? Only rarely will a tenant be able to bargain for this, but some major tenants have. Does the tenant get lost profits if suitable space available on demand cannot be found? This is even more difficult for a tenant to obtain by contract. A valuable option tenants may sometimes negotiate for themselves is the right to cancel after a period of years. The partners in a law firm, for instance, caught in a spiral of downsizing and falling market rents may rejoice on recalling they have the right to cancel well before the stated lease maturity date. The firm may even be able to negotiate a big immediate reduction in rent even though the cancellation option is years away if the firm is willing to trade away the cancellation right. n195

§ 97.06(c)(7) Preparation of Existing Premises.

The tenant needs to know what improvements come with the lease. In most office building projects, the landlord supplies only "core and shell." The shell is the structure itself. The core is the area inside the structure dedicated to hallways, utility closets, elevators, common area and restrooms.

Lease definitions of core and shell vary. For instance, are heating and air conditioning ducts carried only to the exterior wall of tenant's space, forcing the tenant to pay for all interior duct work out of the tenant improvement allowance (if any)? Or do the heating and air conditioning ducts run throughout the leased space so that the tenant only has to tap into them?

Will the tenant be responsible for outfitting the space, or will the landlord assume some or all of the costs of tenant improvements? If the landlord is contributing to the cost of tenant improvements, will the landlord or the tenant actually hire the contractors and oversee the work? The party who hires the contractor will be responsible to the other party for the contractor's negligent performance unless they have signed a release agreement. n196

Will the tenant have to pay rent during the fixturing period? If the landlord undertakes to outfit the space, and is late in completing the work, will the tenant be discharged from paying rent during the delay?

If the landlord has promised to pay for tenant improvements, will the landlord reimburse the tenant for the costs or will the landlord pay the contractor or subcontractors directly?

Tax Consequences of Tenant Improvement ("TI") Allowance. The tax consequences vary with the form of the lessor's payment of the TI allowance. If the landlord reimburses the tenant for costs directly, the tenant is receiving reportable income to the extent of the reimbursement and will be taxed on the TI allowance as ordinary income in the year of receipt. The tenant will be able to offset the TI allowance by deducting the actual cost of improvements, but the tenant will have to amortize the deduction over the life of the improvements.

If the landlord pays the contractors, subcontractors and material suppliers directly, the tenant receives no taxable income. The lessor amortizes the cost over the useful life of the improvement, which could be as long as 39 years, or the landlord may depreciate the allowance over the life of the lease--assuming the lease is for less than 39 years.

If the tenant pays for the work and the lessor simply abates the tenant's rent to the extent of the improvement allowance, the lessor has nothing to deduct or depreciate. The tenant doesn't have to report abated rent as income.

§ 97.06(c)(8) Maintenance, Alterations on Premises, Signs.

What obligation has the landlord to maintain the property and to what standard? Can the tenant alter the leased space? By what standard does the landlord decide how shopping center tenants decorate their display windows? Are they free to make any interior changes they want as long as the changes don't compromise the structure? Can office tenants hang signs in their windows? As mentioned earlier, newly built offices may carry with them a risk of liability to both the landlord and the contractor (and others involved in development), especially if the building is highly energy efficient. Because of commercial real-estate attorneys' recent push to assign responsibility to landlords, provisions assigning responsibility for the so-called "sick-building syndrome" may be an important part of the lease. Some lessees are even requiring landlords to provide representations and warranties regarding indoor air pollution and requiring retention of a professional to certify that indoor air quality is adequate, both prior to the tenancy and periodically throughout the term. n197

§ 97.06(c)(9) Condemnation and Destruction.

If the property is partially or entirely acquired by eminent domain, or damaged by fire, earthquake or riot, how are condemnation and insurance proceeds to be divided between landlord and tenant? Generally in condemnation, when the fee simple title is taken, the court will first determine the fair market value of the property taken. Then in a separate proceeding, the court will apportion the sum between landlord and tenant. If the total awarded sum is inadequate to compensate all the parties fully, "the inadequacy is to be shared." n198

If the tenant's rent is fixed at below-market levels, the tenant will want a sum sufficient to rent comparable space elsewhere. In other words, the tenant will want a sum equal to the present value of the difference between the contract rent and the current fair market value of the space. The mortgagee will want the first call on condemnation proceeds to pay off the loan when the entire property is taken, or to reduce its loan value proportionately in case of a partial taking. The lease should also indicate if the tenant is to be discharged of further liability on the lease and whether the landlord is obligated to rebuild in the event of a partial destruction or condemnation.

New Haven Unified Sch. Dist. v. Taco Bell Corp. n199 indicates some of the subtleties that must be taken into account in drafting lease condemnation clauses. In *Taco Bell*, the New Haven Unified School District (the "District") condemned a shopping center in which Taco Bell had operated its restaurant under a long-term lease. The lease term extended for seventeen years at the time of condemnation plus renewals and offered a substantially below market rental. After receiving notice of the District's intent to acquire the restaurant. Taco Bell succeeded in leasing a new site. Although the new location would generate higher sales, the relocation entailed a capital investment of $625,000 and a higher rent. Taco Bell sought compensation from the District for loss of goodwill at its current site which it valued between $866,000 and $963,937. The trial court rejected the District's claim that lost goodwill amounted only to $84,000 and eventually awarded Taco Bell $525,000.

On appeal, the District argued that the trial court failed to distinguish between leasehold "bonus value" and goodwill. Bonus value is the present value of the difference between the market value rents and the contracted rate through the remaining term of the lease. It is relevant to a lessee in condemnation proceedings where at the time of condemnation the contracted rental is below market rents. The District contended that the bonus value should have been deducted from Taco Bell's award. In the original lease between the lessor and lessee a provision entitling Taco Bell to the bonus value in the event of condemnation was deleted by the parties. The District construed this deletion to be an assignment of the bonus value to the lessor, guaranteeing to the lessor the actual market value of the property. The court of appeals agreed with this construction and ordered that the award be reduced accordingly.

§ 97.06(c)(10) Insurance and Indemnity.

Must the tenant maintain public liability and third-party property damage insurance? With what limits? Will the tenant be required to maintain fire and extended coverage on fixtures and merchandise? Plate glass insurance? Business interruption insurance?

§ 97.06(c)(11) Hazardous Materials.

May the tenant cause or permit hazardous or toxic materials to be used, stored, treated, disposed of, produced, generated or brought upon the site? If not, how can the tenant paint or clean the premises since most paints and cleaning fluids contain such substances?

§ 97.06(c)(12) Surrender of Premises.

At the end of the term, what physical condition must the premises be left in? What can the tenant remove? What must the tenant remove?

§ 97.06(c)(13) Defaults; Tenant's Breaches.

What conduct constitutes a default by the tenant? Certainly repeated failure to pay rent, but what about the tenant's customers using the wrong parking spaces? Or the tenants holding a sale without the landlord's prior consent? Or subleasing space to a subsidiary? What is the landlord's measure of damage for tenant's breach?

Law firm partnerships have been successful in negotiating "caps" on partner liability for rent. Sometimes each partner's "several" liability for the total rent is limited to the money the landlord spent in luring the tenant: free rent, tenant improvement allowances, moving expenses, lease takeover amounts, and brokerage commissions. n200

§ 97.06(c)(14) Landlord's Breaches.

What constitutes an act of default by the landlord? Failure to maintain books and records so tenants can determine the actual costs of common area maintenance? Breach of a promise giving the tenant an "exclusive" in a shopping center? If essential services are interrupted--the elevator stops in a high rise building, the air conditioning fails in the summer in an Atlanta shopping mall--what rent adjustment is to be made? What is the tenant's measure of damage when the landlord breaches?

§ 97.06(c)(15) Protection of Lenders.

Is the tenant obligated to subordinate its lease to the lien of a lender's mortgage? Is the tenant obligated to accept from the lender a promise not to disturb the tenant's occupancy on foreclosure? Must the tenant sign a non-disturbance clause presented by the lender even if there are provisions in it the tenant doesn't like?

Is the tenant obligated to remain in possession if the landlord sells or the lender forecloses and displaces the old landlord with a new one?

§ 97.06(c)(16) Rent: Minimum, Percentage, Tax and Insurance Pass Throughs, and Common Area Assessments.

§ 97.06(c)(16)(i) Minimum Rent.

Most shopping center leases obligate the tenant to pay a base or minimum rent. The developer hopes that the base rents will be sufficient to pay all fixed costs, especially mortgage payments. Some shopping developers look to the base rents for profits as well. Commercial lenders look to these fixed rent guarantees in determining how much they can safely lend to a shopping center developer to construct a new center. Once the center's revenue record is well-established, refinancing could be based on total rent, including some portion of rents historically collected as a percentage of gross sales above the minimum.

To protect the income stream against inflation, the shopping center landlord needs more than a fixed minimum rent. The rent must take account of three factors. The first is the general change in the value of money. No landlord entering a fifteen-year lease wants a fixed minimum rent negotiated in 1990 dollars payable in the dollars of the year 2005. The issues here, once the base rent has been agreed between landlord and tenants, are the amounts of the increases, if they are fixed sums, or the appropriate mechanism for determining increases, if they are variable, perhaps by the selection of an appropriate index (different inflation indices reflect different underlying cost changes), n201 the determination of when, exactly, the rent should be adjusted, and whether adjustments should move in both directions, or only upward. (Indexed rent provisions almost always establish a flow below which rents don't fail, even if the index slides.)

The landlord hopes to meet financing costs (mortgage payments) out of rent. If the mortgage interest rate is fixed, not adjustable, the landlord may feel less need for an indexed minimum rent. If the mortgage interest rate is adjustable, the landlord might prefer the lease index to be the same as the one in the note and mortgage.

The landlord is protected against inflation in a second way. Tenants usually pay for the landlord's operating costs for the common areas of the center--maintenance, insurance, property taxes. The landlord apportions these among the tenants.

Common-area assessments in shopping center leases typically provide that each tenant pay a fraction of the total costs. Typically, the numerator of the fraction is the floor area occupied by the tenant. The denominator would be the floor area of all the space in the shopping center. You can see readily the issues that pop out when landlords and tenants define exactly what space is to be included in numerator and denominator. The tenant wants to exclude from its numerator any unproductive spaces such as a basement or mezzanine used for storage, bathrooms, or shop offices. The landlord wants to exclude from the denominator any common areas not actually leased to rent-paying tenants such as atriums, walkways, and parking lots. If the denominator includes only *rented* space, the landlord will be in a good position to pass through 100% of all common area assessments, property taxes, insurance increases, and so forth.

Mr. Halper explains that "measurements are usually taken from the outside exterior walls to the center line of party walls. Columns are ignored for these purposes." n202

Leases often provide a means for tenants to audit management and maintenance practices to be sure they are getting their money's worth.

Why the Selection of the Base Year of a common area maintenance ("CAM") Is Important. When buildings have been open and in use for a few years, it is easy for tenants to estimate their potential liability expenses. They can look to a history of past operating expenses. But in a newly constructed building if the tenant is obligated to pay all operating expenses, the tenant will seek a CAM *cap*--an outer limit above which the landlord pays.

As mentioned before, in an expense *stop*, the tenants pay all increases in expenses above a base year. The year selected can make a big difference. Say construction begins in 1995 but the building isn't completed until 1996. Property taxes are included in the CAM. The tax assessor values the property in 1995 at $250,000 because the building was under construction on the "tax day"--the day assessments are determined for the property tax. In 1996, the building is completed by the tax day, and valued at $4,000,000. Say the tax rate is 2% of assessed value. If the landlord uses 1995 as the CAM base year, the tenants will pay property taxes assessed above $5,000 ($250,000 x 2%). In 1996, they will be paying $75,000 ($4,000,000 x .02 = $80,000--$5,000). Had 1996 been chosen as the base year, the tenants would pay nothing in taxes unless the value of the building increased above $4,000,000, or the tax rate rose above 2%.

The Connections Between Expenses Included in the CAM and Services Provided. The lessor will list everything she can think of as a cost to be passed through to the tenants. The list may go on for pages. But suppose the lessor included "security," expecting to hire a few attendants to assist shoppers with directions and disperse rowdy teenagers. The tenant expected armed, uniformed security guards. There were none. The lessor might have avoided a futile and heated dispute over whether including "security" in the list of reimbursable CAM items obligated the lessor to employ security guards by specifying that the CAM list was "for definitional purposes only, and is not a basis for imposing obligations on the lessor." n203

The lessor seeks to include all conceivable expenses within the CAM. What about capital expenditures such as a new roof? The lease needs to specify a procedure for determining whether an expenditure is to be treated as a maintenance expense and charged to the tenants in the year the landlord incurs it, or whether it is a capital improvement to be amortized over its useful life so that tenants are charged only a portion of the total cost in the year the landlord spends it. If the cost is to be amortized, an interest rate should be specified.

Tenant Audits of Lessor Expenses. Leases often provide a way for tenants to audit management and maintenance practices to be sure the tenants aren't being overcharged and are getting their money's worth. The tenants need to limit expenses to what is reasonable, actual and competitive. They need to be sure they are being charged no more than their agreed CAM formula. n204

Tenants want to be sure the lessor isn't charging them for the landlord's personal expenses, overhead, expenses incurred on other properties, or unreasonably high expenses paid to relatives or suppliers who are under-charging the lessor at other properties and making up those bargain rates by over-charging expenses to this center.

Lessors find audits time consuming and intrusive. Some lawyers suggest that lessors prohibit tenants from hiring auditors on contingent fees, fees based on how much the auditor is able to deduct from the lessor's CAM charges. Contingent fee auditors are overly aggressive as far as lessors are concerned, deluge owners with lists of allegedly inaccurate charges and badger lessors into reducing CAM charges to avoid litigation. n205

Rent Abatement for Tenant Repairs. Georgio panics when, one month after taking possession of the space in Happy's center and in the middle of the Christmas sales season, a pipe directly over his store entrance starts leaking profusely, drenching (and humiliating) his best customer. He informs Happy's maintenance supervisor who seems preoccupied with other problems. Can Georgio hire a plumber and deduct the plumbing bill from his rent?

Georgio might think that the leak makes his space unfit for commercial purposes, leaving him free to walk away from his lease. In many states this is true, n206 but probably not in California. n207 During the lease negotiations Georgio suggests the following:

> Landlord agrees that tenant may perform, or cause to be performed, any repair tenant believes necessary for the operation of the leased premises, and that landlord shall promptly reimburse tenant for all expenses incurred by tenant in connection with such repairs. Tenant is entitled to delay payment of

any rent due until such time as landlord reimburses tenant for such expenses.

Happy, however, should be wary of where such clauses may lead. Happy may disagree with Georgio as to what repairs are necessary. Also, Georgio might not care much about the price of the repair, and may go along with an expensive solution the plumber suggests to ensure the problem never, ever occurs again. Happy submits this clause as a substitute for Georgio's:

> Landlord agrees to begin diligently to make repairs required of landlord under the terms of the lease within thirty days of receiving written notice from tenant that such repairs are necessary.

One solution to these competing clauses is for the lease to specify that Georgio may only make repairs after notice to landlord of an emergency which poses the threat of immediate severe damage to tenant's property, employees, or customers, the repair of which is required by the terms of this lease to be performed by landlord.

§ 97.06(c)(16)(ii) Percentage Rent; Rationale.

Bear in mind, though, that the term "gross income" had no "definite and inflexible meaning under all circumstances." Courts interpret each lease "to ascertain the sense in which it was used by the parties ... ." n208

Exclusions From Gross: While "gross" is the customary measure used in the percentage rent clause, tenants try their best to exclude from gross sales any merchandise sold at low or no-profit margins. The tenant seeks to avoid paying rent on money it is holding as a conduit for vendors such as vending machine and telephone booth proceeds, lottery tickets and charitable collections. Typically sought after exclusions include: refunds to customers for returned merchandise, sales taxes, sales of store fixtures and equipment, bulk sales to a single purchaser following a disaster such as a fire, delivery charges and many others.

Calculating the Rent Due: The percentage rent usually doesn't "kick in" until it is larger than the minimum rent (otherwise the "minimum" rent wouldn't really be the minimum rent). For example, suppose a tenant renting 20,000 square feet was paying a minimum rent of $3 per square foot per year, and a percentage rent of 1.5% of gross sales.

The rent would never be less than the base rent, (20,000 x $3) = $60,000. The percentage rent doesn't start until gross sales are big enough so that 1.5% of them is greater than $60,000. This is

$$\frac{60{,}000}{.015} = 4{,}000{,}000$$

So, if the tenant's gross sales are $4 million or less, she pays $60,000 in rent. If they rise above $4 million (say, $5 million), she pays 1.5% of $5,000,000 ($75,000).

"Gross," Not Net: Invariably, percentage rent is a function of gross sales, not net. Why? Mr. Halper explains:

> "Gross" sales, not "net," are used because they are easier to compute and less subjective than a measure which would allow the tenant a deduction for operating expenses. Percentage rent should be based upon a tenant's sales volume and not upon the actual profits of the store. It is very difficult to determine whether or not a particular store in a chain actually makes a profit after giving effect to the allocation of the general and administrative expenses that are incurred chain wide.

If "net" were used, the individual owner of a shop might consider carrying family members as employees at high wages to reduce apparent profit levels and thus defeat a landlord's claim to percentage rent. The use of "gross" sales also provides the greatest incentive for tenants to minimize their expenses, since none of their cost savings are shared with

the landlord whose "take" depends on total volume alone.

Moreover, real estate investment trusts that invest in a property whose rent is based in part on profits lose the tax-free pass through on income from the center which they would otherwise have enjoyed under *IRC § 856(d)(2)(A)*.

Exclusions From Gross: While "gross" is the customary measure used in the percentage rent clause, tenants try their best to exclude from gross sales any merchandise sold at low or no-profit margins. Typical exclusions include: refunds to customers for returned merchandise, sales taxes, vending machine and telephone booth proceeds, sales of store fixtures and equipment, bulk sales to a single purchaser following a disaster such as a fire, delivery charges, charitable collections, and many others.

Selecting the Percentage: Percentages vary with the type of business involved. High-turnover, low-net tenants (supermarkets, department stores, drug stores) pay very small percentages (1-2%). Low-turnover, high-net tenants (jewelry stores, beauty shops, restaurants) pay greater shares (5-10%). Often, the percentage declines as gross sales increase. This is one way for the tenant to soften the impact of inflation on "gross sales." n209 Of course, the landlord is better protected against inflation by a fixed percentage increase, not a declining one. Otherwise, if tenants' expenses rose over time but profit margins declined, the percentage rent could become a significant burden.

Enforcement: For small tenants who operate their own stores, the temptation can be overwhelming to pocket cash and not report it to the landlord to avoid percentage rent. Family-run small businesses that depend on cash, like arcades or laundromats, are not likely ever to show a percentage rent. Temptation mounts especially for small tenants just at the point where the "gross" exceeds the minimum rent and percentage rent begins to kick in. Enforcement of percentage leases is by landlord audit. The tenant's gross income is often measured by the sums it reports to a government agency. The Internal Revenue Service (federal income tax returns) and the State Board of Equalization (state sales tax) are favorites. Leases provide that the landlord pay the costs of audits, but the tenant pays the cost if the audit shows substantial under-reporting of gross income.

Percentage Rent Caps: Some tenants negotiate rent caps in shopping center leases like those found in adjustable rate mortgages, to limit the amount by which the rent can increase monthly, annually, or over the life of the lease. Naturally, most landlords resist "capping."

A cap on lease payments helps tenants to persuade their lenders to finance the construction of tenant improvements secured only by an unsubordinated lease. The cap assures the leasehold mortgagee that ground rents won't skyrocket beyond the tenant's reach. "Caps" may also cut down on tenant defaults, thus benefiting landlords, too.

Tenants Excepted from Percentage Rent Obligations: Service businesses like banks, professional offices, travel agencies, and repair shops don't usually pay percentage rent. In the 1980s, the conventional wisdom was that these tenants should be kept on short leases or CPI-adjusted terms. In the 1990s, landlords who had disregarded this advice and entered long-term leases with such tenants that had fixed increases at three- or five-year intervals profited because those fixed increases assumed much higher inflation rates than actually occurred in the early 1990s.

§ 97.06(c)(17) How Office Building Rent Clauses Differ from Those in Shopping Center Leases.

The landlord's sharing a percentage of the tenant's gross income rent is justifiable in shopping centers because the center's success is a joint effort. The landlord's marketing, tenant selection and maintenance practices affect the tenant's bottom line. The same is far less true of the office building landlord. An accounting or law firm's gross income is not very sensitive to the particular location and operation of the office tower it chooses. Percentage rents in office leases appear only in retail uses such as restaurant and concession leases like the news-and-snack-stand stores on the ground floor.

Office rent clauses often provide for fixed rents with "bumps"--adjustments every five years being common. The amount of the increase could be set in advance, keyed to CPI, or tied to a later appraisal of fair market value.

Reappraisal clauses often specify arbitration for cases where the landlord and tenant can't agree on the fair rental value later. They each select an appraiser, and those two designate a third. Landlord and tenant each documents its claimed rent and the arbitrators decide usually somewhere in between. A variation is "baseball" arbitration. Each side picks a number and the arbitrator just selects one or the other. The arbitrator isn't free to choose any other sum. Fearing an "outlier" estimate could lead to the other party's preferred rent being selected, "baseball" arbitration induces compromise, often making arbitration unnecessary.

§ 97.06(c)(18) "Use," "Continuous Use," "Exclusive Use," and Assignment Clauses.

The precursor of the shopping center lease was drafted for freestanding shops--usually chain stores--fronting on sidewalks, one next to the other in "strip" commercial zones, the Main Street USA pattern. Shopping centers evolved in the U.S. only after World War II. In 1950 there were fewer than 100 such centers. By 1988, there were 17,500 with $220 billion in annual sales. At first, shopping center lawyers copied chain store leases, and eventually found them wanting.

The distinguishing features of a shopping center were that a single landlord controlled more than one store, and those stores shared a common parking lot. The owner of a single building on Main Street wasn't particularly concerned with what type of business the tenant conducted as long as it was legal and didn't do damage to the building. The owner didn't much care if the tenant closed early, opened late, conducted business on weekends or even if the tenant went out of business as long as those rent checks kept coming. Nor did the strip commercial tenant have a chance to control the sorts of shops that neighboring owners let in, and so didn't lose sleep worrying about the tenant mix on Main Street. n210

The shopping center changed all that. The center solved the ubiquitous parking shortage that plagued Main Street. It also privatized security and maintenance. Paid security guards and janitorial crews kept the center safe and clean, more than could be said for many Main Streets USA, especially in big cities. Because one landlord controlled the center, merchants looked to their lessor for protection against excessive competition and to lure other merchants whose presence would draw customers to the center.

At the core of the shopping center concept emerged merchandising principles. The power of major department stores to draw shoppers to smaller tenants was harnessed. At first, specialty shops like those selling women's shoes wanted "exclusives"--the right to be the only women's shoe salon in the mall. Soon merchants learned that comparative shopping was so important for some items that a center denying its patrons that opportunity would forfeit sales to centers less restrictive in their leasing policies.

Even the placement of shops in a center is orchestrated. Big stores anchoring the mall are placed at its ends so that shoppers drift past the smaller merchants on their way from one anchor to the other, enticed to make impulse buys at smaller stores as they make their way across.

The food sellers are clustered. The tenant mix and location are adjusted from time to time based on detailed, continuing studies of shopper behavior.

> Which stores belong in which centers is one question. Where they should go within a center is another. Traditional wisdom dictates some rules of thumb for tenant placement. Anchor stores should be placed at opposite ends of the mall and far enough from entrances to pull shoppers past smaller mall shops, or placed at the ends of side wings of the mall, or, if the mall is huge, spaced throughout.

Shops offering complementary types of products are sometimes grouped to increase traffic for each store. In other cases, shoe stores, jewelry shops, women's ready-to-wear retailers, and other stores are spaced throughout the centers to capture business from customers who may visit only part of a center when they shop.

A recent study (see Stephen Brown, *Tenant Placement in Planned Shopping Centres: Implications of an Observation Study*, Journal of Property Research, Summer 1991, pp. 179-187) of the 180,000-square-foot, two-anchor Abbycentre shopping center in Belfast, Ireland, conducted by researchers at the University of Ulster, validates most tenant placement rules of thumb. More than 40 percent of 250 shopping groups (people shopping together) studied patronized one of the anchors n211

§ 97.06(c)(19) Uses.

Shopping center leases usually contain clauses for "use," "continuous use," and "exclusives." A "use" clause defines what the tenant can sell or how the tenant can use the leased premises. A "continuous use" clause requires the tenant to be open for business continuously for certain prescribed hours and days. An "exclusive" clause is the lessor's promise to a tenant that no other tenant will offer specified goods or services in the mall.

None of these clauses are big issues in office leases. Office building lessors seldom care what uses tenants make of the premises as long as those uses are lawful, don't interfere with the peace and quiet of other tenants, and don't involve retailing. Office building owners seldom care what hours its tenants keep. And office tenants rarely insist on being the only accountants or lawyers in the building--although doctors and medical malpractice lawyers aren't thrilled to share space, ground floor banks like exclusivity, and fancy professional firms aren't paying top dollar rents to have their well-heeled clients share elevators with IRS or INS clientele.

The common law rule is that tenants are free to use leased property for any lawful purpose as long as they don't commit waste, unless the lease restricts the tenant's use. A shopping center landlord might argue that the dynamic relationship among tenants in a shopping center and the tenants' obligation to pay percentage rent both support his claim that courts should imply "use" restrictions in shopping center leases. A minority of courts will imply restrictions on use from a clause demising the premises for specific purposes. n212 But most courts don't. n213

A clause to effectively restrict the tenant's use must be specific. n214 A description of the tenant's use does not automatically limit the tenant to that use. There is a difference between a description of tenant's business and a limitation of a tenant to that particular business. n215

If the lease contains no "use" clause, and the tenant assigns or subleases, the landlord may be in for an unpleasant surprise when Benetton, say, or an Armani boutique, is replaced by a pet supply shop. n216

Without lease clauses defining the "uses" permitted to each tenant, the careful orchestration would disintegrate, and performance of the center could prove a disappointment. The shopping center lessor wants to maximize gross sales of the *entire* center. To do this it is necessary to offer a variety of complementary goods and services. If goods or services were limited to just a few types, even the most commonly sought or highly profitable, significant opportunities for sales of other types of goods or services could be lost. The lessor also seeks to maximize synergy within the center, the chance that shoppers headed into one store will make impulse purchases in others.

The lessor needs to reinforce the marketing image of the center. In a discount center, there is no room for pricey retailers. In a center for upscale shoppers who want a five-star amenity level, off-price retailing is out. Off-price retailers are often able to sell goods at prices cheaper than small boutique operators can buy those goods wholesale.

A shopping center landlord is likely to ban certain uses altogether, particularly uses that might destroy a "family oriented" shopping center, such as "adult" entertainment. n217 But such clauses must be explicit (e.g., no "topless" waitresses or waiters). Vague clauses will not do. n218

The lessor who agrees to a broad use clause risks tenants changing their stores in such a way that the character of the center is destroyed. A clause drafted too narrowly can prevent the tenant from keeping up with consumer trends. A use clause may also limit the number of potential assignees. (Is a McDonalds that agrees to sell "primarily hamburgers, soft drinks and fries" restrained from offering McPizzas and McBBQs or from assigning its lease to hotdog vendors such as Nathan's or Pinks Chili Dogs?)

In order to preserve "exclusives" the lessor has granted to other tenants, some lessors insist that restaurants attach a menu to the "use" clause and promise not to revise or add items to it without the lessor's consent. McDonalds won't go along with the menu test but many national fast food chains will.

Some use clauses purport to restrict the type of business that can be conducted in the demised space, in order to protect "exclusives" of its other tenants. But a "use" clause designed to protect the exclusive of a pizzeria fails to achieve that purpose when the lessor only prohibits tenants from subleasing or assigning to others whose "*primary*" business is selling pizza. A lessor had promised a pizzeria there would be no other pizzeria in the center. K-Mart, a tenant in the center, subleased a former "eatery express" to a rival pizzeria. The original pizzeria sued the lessor for $500,000 for breaching its exclusive. The original pizzeria lost, because K-Mart wasn't "primarily" in the pizzeria business although it had allowed a sub-lessee to sell pizza within K-Mart. n219

Drafting a "use" provision is no easy matter. One lawyer offers this example:

> [a] ladies ready-to-wear store encompasses no less than three separate and distinct types of business which should be separated within a shopping center. One such business would be "a ladies popular priced ready-to-wear store featuring blouses, skirts, separates, and sportswear." This, naturally, is different form a "ladies ready-to-wear store featuring higher priced dresses, suits, coats, and evening wear." Both of these stores are different from a "ladies specialty store featuring lingerie, foundation garments and accessories." n220

It may be that phrases like "popularly priced" are so vague as to be incapable of enforcement. In one case, a tenant had an exclusive right to sell "high quality clothing" and was protected against any other tenant offering goods of "the same quality." The master appointed by the judge found the phrase so difficult to substantiate that the exclusive became unenforceable. n221 The shopping center lessor will also seek to control the appearance of the lessee's space, insisting on the right to approve signs, window displays, exterior paint color and decor. Once there is agreement on the wording of the "use" clause, the lessor will want to be sure the "tenant will not use or *permit or suffer* use of all or any part of the property for any other use." That way, if the lessee sublets or assigns, the tenant will still be liable if the lessee's sublessee or assignee violates the use provisions.

§ 97.06(c)(20) Continuous Use.

"Continuous use" clauses are often vital to the successful functioning of a shopping center.

> [U]niform business hours for the tenants, and of a consistent approach to the enforcement of that policy, contributes materially to the success of both the mall as a whole and its individual tenants by reducing confusion among potential customers as to the availability of services and thereby encouraging the optimal level of traffic n222

Covenants by tenants agreeing to "continuous use and operation" are common, but many national chain stores and fast

food operators refuse to sign continuous use clauses. Yet when the anchors close, there is little point to most smaller retailers staying open. Tenants are sometimes able to negotiate promises that if the anchor closes its doors, the tenant may leave or be entitled to a rent reduction. n223

In one typical case, a shoe store closed but continued to pay rent. The lessor wanted to repossess the space by implying a duty to operate from the "use" clause. It read: "Lessee shall have the right to use the Premises for the retail sale ... of shoes ... and for no other purposes." Not good enough, ruled the court. The provision didn't compel the lessee to operate a shoe store. "Clearly the lease does not mandate that Morse Shoes 'shall use' the premises for the sale of shoes; it does not impose upon Morse Shoes an affirmative obligation to maintain an operational shoe store." n224

Landlords whose leases have no "continuous use" clauses sometimes petition for courts to imply them.

A lease calling for percentage rent might arguably be said to imply that the tenant will use his best efforts to generate sales. n225 The percentage rent clause was cited by the California Supreme Court in *Lippman v. Sears Roebuck & Co.*, n226 when the court implied a continuous use obligation. The court analogized to output or "requirements" contracts where one party agrees to get all or certain of its supplies for a plant or business from another. Each party has an implied obligation to stay in business. Of course, percentage rent seldom kicks in until certain minimum sales figures have been achieved. Where business is so bad the tenant is forced to close its doors, the landlord can't reasonably expect the tenant would have attained those minimum levels. So the tenant will contend that the store closure didn't defeat the landlord's expectations of a percentage. Courts divide when asked to imply a continuous use obligation in percentage leases, with most refusing. n227 That is why the issue is almost always addressed these days in shopping center leases.

One lucky South Carolina landlord persuaded the courts of that state to imply a "continuous use" clause in a lease that didn't have one, and ordered the tenant, who had boarded up, to pay $400,000 in "damages." The tenant was a popular supermarket chain, Bi-Lo, and the lead tenant in the center. The tenant had closed up shop to relocate in a competing center 135 feet from the landlord's property, and didn't want its old space to be used by a rival.

The tenant was such a successful chain that it had bargained for a lease with no percentage rent. So the tenant's bargaining position in this case robbed the landlord of one of its better (only occasionally successful) arguments, that a percentage clause implies the tenant won't shut down.

Nonetheless, the South Carolina court concluded that an anchor tenant owes an implied duty of good faith and fair dealing to the landlord and the other tenants in the center not to go out of business. "If the anchor tenant were permitted to leave the premises vacant, the landlord's purpose for signing the lease would be defeated." n228

Like most leases, this one had a "use" provision. A concurring judge believed that Bi-Lo, by going out of business and refusing to allow its lease to be terminated, was actually using the premises for a purpose other than as a supermarket.

> The lease required that "the leased premises shall be used only for the operation of a supermarket," There is abundant evidence from which it can be inferred that Bi-Lo did not merely allow the premises to stand vacant but, in fact, affirmatively used the premises for a purpose not allowed by the lease; namely as part of a scheme to stifle competition.

Of course, no landlord would want to rely on the circumstances of this case instead of contracting for a continuous use. But when the lease has no such provision, there are cases implying one--along with a great many more cases refusing.

A covenant of continuous use was also implied in a strip center that had no anchor. n229 There, the Pennsylvania Superior Court invoked the doctrine of necessary implication, based on the "clear intentions of the parties" and to "avoid injustice." n230 Similarly, a Utah appellate court held a supermarket had breached its implied obligation of good faith and fair dealing by replacing its supermarket with a "warehouse box store" despite a use clause in the lease

providing that the tenant could conduct "a supermarket, drug store and pharmacy or any other lawful retail selling business not directly in conflict or competition with another major tenant in the shopping center." n231 Of course, no landlord would want to rely on the circumstances of these cases instead of contracting for a continuous use. But when the lease has no such provision, there are cases implying one--along with a great many more cases refusing.

Imagine the hardship to the landlord whose lease has no "continuous use" clause when a lead tenant shuts its doors. In more than one neighborhood center, food markets and drug stores boarded up as mergers and acquisitions forced inefficient locations shut. It was cheaper for many a supermarket to mail the landlord the minimum monthly rent than to pay a full-time staff, and keep shelves stocked when gross sales yielded zero or negative nets.

Once a store is boarded up, other merchants in the center complain of vandalism, graffiti, declining sales, and falling morale. The most expedient option for the landlord whose lease doesn't have a continuous use provision is to buy out the tenant's lease at a premium. The space may not have been worth much to the tenant but vacated space is an even greater liability to the landlord--one she may have to pay dearly to cancel.

When major tenants close their doors, smaller tenants suffer but not in silence. n232 They often come forward claiming that the closure violates an implied covenant of their tenure--that the center would enjoy the drawing power of major anchors. Don Sherwood, a Los Angeles lawyer whose "boutique" firm specializes in negotiating and litigating leases for shopping centers, divides small tenant claims into three groups. Some want contributions to tenant improvements so they can strengthen the shopper appeal of their own space and/or rent reductions during the time the anchor space is dark. Some want out of their leases. A third group wants life-of-lease rent reductions--good even after the closed space is relet and reopened. For the first two claimants he recommends landlords adopt a conciliatory posture, mindful always that whatever break one tenant receives, other tenants will soon hear about and demand. As for the third group, litigation may be the only answer.

Retailers who may be anchor tenants themselves don't need to rely on courts implying that the withdrawal of other anchors from the center is a breach of their understanding with the landlord. Strong tenants put clauses like this one in their leases:

> *Other Tenancies in Shopping Center.* Landlord agrees that the execution and delivery of the Original Lease by Tenant was made upon the express condition that other retail store buildings shall be constructed on the Entire Premises in the locations shown on Exhibit B to the original Lease. Landlord represents and warrants that the Broadway Store contains not less than 143,407 square feet of Floor Area and the Mervyn's Store contains not less than 80,688 square feet of Floor Area.

Even with such provisions the protected tenant may have no right to veto changes in the space occupied by the named tenants and no right to damages or injunctive relief if the anchors later reduce their space in the center. n233

§ 97.06(c)(21) Exclusive Use.

§ 97.06(c)(21)(i) In General

The restrictive covenant or exclusive use provisions raise perhaps the greatest difficulty of all in fitting the shopping center lease to the operation of the center. "The tenant desires an exclusive in order to protect its investment in the premises against a competitor." n234 The exclusive may bar a similar enterprise, or restrict other tenants from selling goods. Some tenants, as mentioned, simply can't be indulged in their requests to be the exclusive purveyors of certain goods or services in the center. But others may have to be granted that limited monopoly. They won't sign up without it, and the center needs them. There is always the problem of definition. Burger King wants to be the only seller of hamburgers in the center. Can the pizza place offer hamburger subs and pizza-burgers? The Lebanese restaurant a ground lamb pita-burger?

Robert A. Silverman, a lawyer in Philadelphia, guides drafters of "exclusive" clauses:

> --Don't promise a tenant the protection of an "exclusive" against other tenants whose leases give them the right to sell anything commonly found in their types of operation, as drug stores, supermarkets and department stores customarily insist. If you do, the fried chicken restaurant chain is likely to squawk when the supermarket opens a deli and take-away counter selling--you guessed it--fried chicken wings. And the video rent shop owner will feel upstaged when the drug store starts renting video tapes. n235

The landlord was smart in taking this advice when he granted a drug store the right to be the only drug store in the center. Later, when a variety store began selling many of the same items as the drug store, the lessor was able to argue persuasively that the variety store was not a drug store because it did not fill prescriptions. n236 Had the lessor given the drug store the exclusive right to sell aspirins, the lessor would have needed a handful of them himself.

Don Sherwood reminds us:

> A lessor who grants a tenant the exclusive right to sell candy in a shopping center had better prohibit all other tenants from selling candy. If she hasn't, she has no way to protect the candy "exclusive." A better drafting technique is to grant, say, the See's Candy Shop the right to be the only candy store in the center. That way, when Saks sells Godiva chocolates, See's can't complain, since Saks isn't a candy store, even though it sells candy. n237

Another tip from Robert A. Silverman:

> --Don't promise there won't be other supermarkets in the center, just that "landlord will not enter into any lease that permits tenant to operate a supermarket." That way, if a tenant does open a supermarket without the landlord's consent, the landlord isn't automatically liable to the tenant whose exclusive was infringed. n238

This advice is especially important these days when many tenants are going bankrupt and some bankruptcy courts are willing to disregard the use provisions of leases. But smart tenants know this, too, and many are more insistent than ever that the landlord warrant there will be no competing uses in the center, not just that the landlord won't enter any. They want the landlord to be responsible for breaches by tenants of "use" and "exclusive" provisions. This can be especially difficult for the landlord who had leased space earlier in the center with no use restrictions. A tenant is not bound by exclusives the landlord extends later to subsequent tenants. The tenant who was there first may also enjoy the right to assign or sublet for a different use, or any use. So it sometimes happens that the tenant with an exclusive use on the day it takes possession later runs into direct competition as the result of an earlier tenant's assignment. The landlord is still liable on the exclusive use covenant unless the tenant had seen the exclusive on the existing leases and consented to the exceptions arising out of them.

Restrictive covenants are strictly construed, but generally upheld against challenges based on unconscionability or antitrust laws if they serve a valid business purpose and are reasonable in area and duration. However, under certain circumstances they can be illegal restraints of trade under state common law or statutes, violations of the Sherman Antitrust Act, or § 5 of the Federal Trade Commission Act, which declares unlawful "unfair methods of competition in or affecting commerce." None of these laws apply to the freestanding shop or the mini-mall. Even at 150,000 square feet, the landlord seldom needs to worry. But regional malls that are so large they can be seen as retail city centers are vulnerable. n239

Exclusives By Implication. Some authors believe a restrictively worded "use" clause implies an "exclusive," that the lessor won't rent to competing users. They base their analysis on a theory of implied and reciprocal negative easements.

Professor Burke contends that the *quid pro quo* for a tenant's promise to abide by a use restriction is an implied promise by the lessor not to compete with the tenant's use. n240

Conversely, it could be argued that the landlord's interest in maximizing gross sales throughout the center, and the tenant's interest in generating the most foot traffic may both best be served by having a number of shops in direct competition with each. Customers value the chance to compare goods and prices. Long ago, shopping center developers learned, for instance, that four or five women's shoe stores might each do better than any one of them would have done on their own. Customers simply didn't buy shoes in malls where they couldn't comparative shop. n241 The tenant who desires an exclusive should not rely on courts to imply one. The tenant should obtain an explicit promise from the landlord. The promise should be worded so as to protect the tenant's exclusive against both prior and later tenants. n242

§ 97.06(c)(21)(ii) The Separate Right of One Tenant to Enforce Its Exclusive Right Against Another Tenant. n243

Happy leases spaces in her center on exclusives for their respective uses to an ice cream parlor, a bakery, a gallery of usable art--in that sequence. When the gallery owner later subleases part of her shop to "Cake and Art," the baker protests that the "Cake and Art" vendor is violating the baker's exclusive. The landlord refuses to take action. Has the baker the right to enjoin the gallery owner and her artful cake maker directly?

First, of course, there is the problem of interpreting the lease. What restrictions were intended? Second, it has to be determined whether the bakery really has been damaged. Does "Cake and Art" really cost the baker lost sales, or are its clientele so distinct that the baker loses little or nothing? Third, there is the law of covenants and servitudes.

For covenants to run so that the original promisee may sue a successor to the original promisor, the original parties must have intended it to run, evidenced by "and her successor and assigns" appearing in the original promise--and attached both to the burden (promise) and benefit of the covenant. ("Lessor hereby covenants for her successors and assigns with lessee, for his successors and assigns ... .") The covenant must touch and concern land. Use, exclusives, and continuous operation clauses all qualify. The covenantor, covenantee, and their successors must be in privity of estate. For equitable enforcement it is sufficient that those burdened by a covenant have had timely notice of it (*i.e.,* before they acquired their interest). Notice may be actual, inquiry or constructive.

Happy leased first to the bakery, then the gallery owner.

May B sue to enjoin G's "Cake and Art" sublease? As a prior lessee, B is suing on a covenant in a lease that didn't exist when he executed his lease. But B may overcome this embarrassment of timing by invoking three theories:

> (1) In the lease with B, Happy may have expressly or impliedly promised to preserve B's bakery exclusive in later leases. G would then be on inquiry or constructive, if not actual, notice of it: Constructive, if the H-B lease were recorded; inquiry, by virtue of B's being the only bakery in the center. Even if Happy didn't promise B she would contract with later tenants not to sell baked goods, if there is a restriction of that sort in G's lease, B may successfully imply that the use restriction in B's lease evidences that an exclusive in all later leases was intended.
>
> (2) B's exclusive implies Happy promised to protect it by inserting covenants not to compete in all later leases. This is called an implied reciprocal negative servitude. To be enforceable, B must establish that G had notice of it--actual, constructive, or inquiry.
>
> (3) B could be regarded as a third party beneficiary of the covenant in G's lease restricting B's use of the premises to usable art, if G's lease was so restricted.

Suppose B retaliates by selling paintings, ceramics, and designer pot holders. Can G enforce a covenant in the H-B lease

limiting B's use of the premises to the sale of baked goods and only to the sale of baked goods? Yes, on the theory that G is a beneficiary of that covenant. The covenant was made by Happy specifically for the benefit of subsequent tenants in the center.

§ 97.06(c)(22) Assignment.

§ 97.06(c)(22)(i) The Rationale for Implying a Tenant May Assign a Lease Absent a Non-Assignment Clause.

Lease assignments can be looked at in many different ways. Leases are assigned by landlords to mortgagees as part of mortgage financing transactions. Tenants assign leases when they sell their businesses. How is it possible for both the landlord and the tenant to assign the same lease? Actually it is possible.

A lease isn't something that any one person owns. There are two parties to a lease. The lease represents some rights and some obligations to each party. What a landlord assigns is his right to receive rent and other amounts payable under the lease and the right to force the tenant to comply with the tenant's obligations under the lease. When a tenant assigns a lease, it is transferring its rights to occupy the demised premises and whatever other rights it has under the lease. n244

The right to assign is part of the tenant's exit strategy, and anyone who enters a real estate deal should plan how to make a graceful exit especially if things go badly.

Types of Lease Clauses Regarding the Tenant's Right to Assign. Leases often address the issue of tenant assignability.

(1) Some clauses restate the default rule. In the absence of a lease provision governing assignment, the tenant has the right freely to assign in most states. However, the original tenant remains liable as a surety for the rent if the assignee doesn't pay. Leases sometimes release an assigning lessee from further liability when a new tenant assumes the old lease. n245 Major retailers seek the right to assign at will--free of use restrictions.

(2) Some leases allow assignment with the prior consent of the lessor, specifying no standard by which that consent is to be exercised.

(3) Some leases require the lessor's prior written consent, and that "consent shall not be unreasonably withheld."

(4) Some leases list reasons lessors must invoke in order to justify withholding consent.

(5) Some leases permit the lessor to withhold consent in his or her "sole and absolute" discretion.

(6) Some leases permit free assignability but specify that if the assignee pays more rent than the tenant had contracted to pay, the lessor has the right to all or a percentage of it, or to a fee for assignment.

(7) Some leases absolutely prohibit the tenant's assigning.

§ 97.06(c)(22)(ii) Must the Landlord Act Reasonably if Lease Bars Assignment?

Most courts hold that if the lease absolutely bars assignment or subletting, the landlord can withhold consent arbitrarily or for no reason. n246 The Restatement allows a landlord to prohibit assignment absolutely--with no requirement that the landlord act reasonably--but only if the lease expressly gives the lessor the absolute right to withhold consent. n247 Clauses barring assignment without the lessor's consent, and specifying that the lessor may grant or deny consent in the lessor's sole discretion are also upheld in most states. In a growing number of states, n248 the lessor's disapproval must be reasonable. n249 This is the rule in a small but increasing number of states. Courts in these states justify their

requiring landlords to be "reasonable" in turning down a proffered assignee by pointing out that prohibitions against assignment are restraints on alienation, and only "reasonable" restraints are enforceable. n250 "[M]odern courts have almost universally adopted the view that restrictions on the tenant's right to transfer are to be strictly construed.." n251 Also, the UCC "good faith and fair dealing" obligation implied in every contract bars the lessor acting arbitrarily. n252 But "unreasonable consent" is only a default rule, implied when the lease calls for prior consent to an assignment without specifying any basis for the lessor's refusing consent.

§ 97.06(c)(22)(iii) If Landlord's Consent Is Required and Landlord Must Be Reasonable, What Factors Can Landlord Consider in Evaluating a Proffered Assignee or Sublessee?

Among the legitimate factors landlords may consider in assessing reasonableness: the financial responsibility of the proposed assignee or subtenant, whether the new tenant's use will require alteration of the premises, the legality of the proposed use, the nature of the occupancy, and the compatibility of the tenant's use with the uses of other tenants in the same shopping center or office building. Courts have held it improper for a landlord to reject an assignee or sublessee on considerations of personal taste, sensibility or convenience, n253 or to raise the rent. n254

§ 97.06(c)(22)(iv) "Recapture" Clauses.

If a tenant abandons the lease, the landlord who relets the property can keep the excess rent above what the departing tenant was to have paid as long as the court finds that the landlord has "accepted" the abandonment, was reletting on its own behalf, and wasn't in a position to seek compensation from the old tenant if the new tenant's rent had been lower than what the old tenant was obligated to pay. n255

What if the tenant doesn't abandon, but prefers to capture the excess rent itself by subleasing? The tenant's rights depend on what the lease provides about assignment, or what the law implies absent an express provision. The lessor doesn't have the legal right just because the tenant requests the right to assign or sublease. Such a request is not tantamount to an abandonment or anticipatory repudiation by the tenant. n256

Some leases do give the landlord the option of terminating the lease when the landlord rejects a proposed assignee. These are called "recapture" clauses. By "recapturing" the lease term, the landlord can also "recapture" the increased value of the tenancy. They give the landlord a chance to relet the premises for increased rent.

Landlords don't see why tenants should profit from the passive gains that would come their way by assigning their leases at a premium. Tenant's counsel might suggest the landlord would be incensed at the suggestion tenants should share in any premium the landlord might earn by assigning *her* interest and selling out. So why shouldn't the tenant enjoy the same privilege with his leasehold interest? Further, if market rental values decline, the landlord will almost certainly resist rent reductions as long as the original tenant is solvent and bound by the lease.

§ 97.06(c)(22)(v) The Negotiating Strategies of Commercial Landlords and Tenants Under California's Statute on the Rights of Commercial Lessors to Recapture and Bar Assignments Absolutely For No Reason.

A California appellate court thought an assigning tenant was right in trying to resist the landlord's recapturing the lease premium value even though the lease gave the landlord the right to terminate if the tenant sought to assign or sublease:

> [i]f a lessor may not unreasonably withhold consent to an assignment or a sublease, there is even more reason why he/she should not be allowed to terminate the lease without a commercially reasonable justification, since termination is much more drastic than simply withholding consent. The law does not favor forfeitures, and forfeiture provisions in leases must be strictly construed. n257

Following the appellate court opinion in this case, the California legislature enacted several amendments to clarify the rights of commercial landlords. The legislature declared that the public policy of the state favored freedom of contract,

and authorized parties to commercial leases to "negotiate and conduct their affairs in reasonable reliance on the rights and protections given them under the laws of the state." n258

After the statute was enacted, the California Supreme Court reversed the appellate court and held that the landlord had been right all along. A recapture clause under which a lessor might terminate the entire lease if the lessee asked to assign or sublease all or part of the premises was not an unreasonable restraint on alienation. It did not violate the implied covenant of good faith and fair dealing. It was separate and distinct from the landlord's obligation under the lease to act reasonably in deciding whether to accept a proffered assignee. n259

The new statute provides:

(1) Landlords (commercial and residential) may exercise all remedies against a breaching tenant, particularly the remedy of continuing to recover the rent as it falls due, if the tenant has the right to sublet or assign, "subject only to reasonable limitations."

Those limitations may take the form of standards and conditions expressed in the lease, as long as they were reasonable when the lease was first entered and later when the tenant sought to assign or sublease. Conditions and standards are presumed reasonable unless the tenant meets the burden of proving otherwise. The standards may also be those implied by law.

Implicitly, if a lease prohibits assignment or subleasing absolutely or unreasonably, the landlord is denied the remedial option of continuing to hold a breaching tenant liable as if the lease were still in effect. However, a clause requiring consent with no standard for its exercise is enforceable because courts will imply a requirement that consent may not be unreasonably withheld.

(2) The landlord is not allowed to continue holding the tenant liable for rent following a breach if the breach resulted solely because of "acts of maintenance or preservation" or "efforts to relet the property" or "the appointment of a receiver upon initiative of the lessor to protect the lessor's interest in the property." n260

(3) In a lease of real property "for other than residential purposes" the landlord "may absolutely prohibit transfer." n261 The landlord may also condition transfer of a non-residential lease on any express standard. The landlord can reserve "some or all of any consideration the tenant receives from a transferee in excess of the rent under the lease. n262

(4) If the lease makes no provision for assignment, the tenant's interest is presumed freely assignable, and all ambiguities restricting transfer are interpreted to favor transferability. n263

(5) Commercial landlords in California are now free to enforce "recapture" provisions--as long as what they are recapturing is the value of the space, and not the value of the tenant's business. n264

(6) If the lease requires the landlord's consent but provides no standard for giving or withholding consent, impliedly consent may not be withheld unreasonably. n265 The tenant has the burden of proving consent was withheld unreasonably. That burden the tenant meets automatically if the landlord fails to respond to the tenant's written request for reasons justifying its withholding. The tenant has the right to assign if the landlord withholds consent unreasonably and hasn't expressly reserved the right to do so. The lessor has no right to remove an assignee in possession.

The tenant has the right to assign if the landlord withholds consent unreasonably and hasn't expressly reserved the right to do so. The lessor has no right to remove an assignee in possession.

Thus, the California statute follows the Restatement in allowing lessors to reserve the right to refuse assignments absolutely and without cause.

Commercial landlords in California are now free to insist on "recapture," and tend to do this in two ways. First, they seek rights of first refusal when a tenant proposes to assign or sublease. Second, they reserve the right to pocket any "surplus" or "premium" that the tenant is able to charge the assignee above the contract rent.

Knowledgeable tenants modify both these approaches. The "right of first refusal" is impractical, they will contend in negotiating with their landlords, because "local brokerage representatives will be reluctant to invest time and energy in showing the premises when they are aware that the landlord could swoop in and recapture the space after all the hard work without compensation to the broker." n266

Instead, the landlord might be given a "right of first offer," obligating the tenant to present the space to the landlord before offering it to anyone else. If the landlord takes up the offer, the landlord releases the tenant from further liability on the lease. If not, the tenant is free to market the space however possible.

The catch in provisions that the tenant must remit to the landlord any premium the assignee agrees to pay above the tenant's original agreed rent is well described by one distinguished practitioner:

> Leases that require ... the profits to be delivered to the landlord are an invitation to the tenant to sublease or assign at the exact rental rate payable by the tenant, since there is no incentive for the tenant to attain a higher rental level. n267

Tenants contend that the landlord may be better off splitting a premium with the tenant, not hogging it all, so the tenant has something to gain from marketing the space aggressively.

But many landlords would prefer to discourage the tenant from trying to sublease at all. The sublease market is seldom as good as the leasing market because tenants prefer to deal directly with the landlord. The landlord wants to keep tenants out of the real estate business, and especially doesn't want them negotiating with other tenants in the building or center that the landlord sees as possible candidates for additional space. So the "total bonus value to the landlord" clause may really be just an invitation to the vacating tenant to negotiate a termination with the landlord. The landlord may not have meant it to be a revenue-generating device.

If the landlord and tenant really do agree to split the profits from the tenant's assigning or subleasing, "profits" will have to be defined in the lease. The tenant will want to recoup its marketing, brokerage, unamortized tenant improvement costs, and any rent it had to pay before it found a sublessee.

The landlord won't want the tenant to offer the space at below market rents, or rents lower than it is prepared to accept. The landlord may insist on full recapture if the tenant doesn't continue to use a majority of the originally demised space.

Recapture provisions can run five to ten pages in a closely negotiated office building lease.

§ 97.06(c)(23) Lease Takeovers.

In overbuilt markets, some landlords try to lure tenants by promising to take over the tenant's obligation under its existing lease. A landlord who induces a tenant *to breach* its present lease risks liability. n268 To establish liability for interference with a contract, the plaintiff must establish: (1) a valid contract, (2) that the defendant knew about it, (3) the defendant intended to induce the promisor to breach, (4) the promisor did breach, (5) as a result of the defendant's unjustified and wrongful conduct, (6) causing damage to the plaintiff. n269 A landlord's promise *to take over* a tenant's existing lease in a competing building isn't evidence of inducing the tenant to breach that lease. Quite the contrary! The landlord is agreeing to pay the rent on the existing lease or find a suitable assignee. Granting concessions and allowances to lure tenants from other buildings is itself no tort, just normal competitive behavior. n270 Among the

defenses available to the landlord: the tenant was dissatisfied with its old space and was looking to move anyway. n271

A landlord who takes over the tenant's old lease may figure on being able to sublet the space and make up any difference between the tenant's contract rent and what the sublessee pays. The landlord has to understand the extent of that obligation, needs copies of the lease documents, needs to know the base rent and the tenant's liability for operating expenses, insurance and taxes. The landlord also needs an opinion of counsel guaranteeing interpretation of possibly ambiguous but important provisions in the lease, particularly those concerning the use clause, the rights of the tenant to assign or sublet, the tenant's ownership right to improvements, and the tenant's obligation to restore the premises at the expiration of the old lease term.

The landlord will probably want to avoid having to pay for breaches the tenant committed before having agreed to the takeover, and will certainly resist liability for publicly imposed costs such as asbestos removal or sprinkler retrofitting.

Most "takeover" landlords negotiate an assignment of the old lease from the tenant to themselves. This has some big downsides for the "takeover" landlord. Suppose the tenant moves into the new building and breaches its lease there. The "takeover" landlord will still be liable under the assignment for the tenant's rent under the old lease.

What if the tenant doesn't vacate its former premises on time? The "takeover" landlord may be liable to the tenant's former landlord for damages caused by the delay.

Lawyers recommend that instead of assuming the old lease, the takeover landlord should agree to indemnify the tenant for the difference between its old contract rent, and the rent obtained by re-renting the old space. The "takeover" landlord conditions its indemnity on the tenant not breaching either lease and using best efforts to find a new tenant for the old space. n272 The tenant is usually allowed to offset rent in its new space against the indemnity.

§ 97.06(c)(24) Lease Extension, Options and Cancellation Rights.

Tenants often seek from landlords an option for expansion space. Landlords don't like giving tenants options on space in future years because then the landlord can't rent that space for a term that could conflict with the optionor's rights.

A tenant who succeeds in getting an option she can exercise anytime in the next three years effectively bars the landlord from renting that space for three years. If her option is exercisable only at the end of three years, the landlord can rent that space for up to three years but no longer. Of course, the landlord may luck out and find someone willing to take the space subject to the optionee's rights. But landlords approach the granting of options gingerly.

There are other risk-sharing arrangements to provide expansion space to a large tenant without either the landlord or the tenant assuming the entire risk of marketing the intended expansion space. For example, the tenant may not have to lease all of its expansion space as of the date of initial occupancy. Instead, its lease of the expansion space would start on a certain date, perhaps five or even eight years after initial occupancy. The parties would split the marketing risk until that point by the tenant paying a standby fee that may be a fraction of the rental value of the space. Or, a tenant might agree to pay a portion of the rental value until the space is leased if the space is not leased before a specified date. Under these arrangements, there must be some inducement for the landlord to lease the space to an interim user.

A variation involves either a toss-out premium to be paid by the tenant if it later elects not to occupy the standby space, or an annual standby fee that might increase with time so long as the tenant wishes to maintain its expansion options. Under this arrangement, the stand-by fee supposedly compensates the landlord on a statistical basis for the loss it incurs by not being able to commit the space for an extended lease term to an interim tenant. As the potential standby period shortens, the possibility of an interim lease also decreases. n273

The tenant firm that is sure it will need more space several years hence may be prepared to commit now for that space.

There are many ways to set future rents. The landlord and tenant can agree now to a preset rent with, perhaps, a cost of living adjustment. They can agree to a base rent with "bumps"--increases at fixed future intervals.

They can contract for rent based on the fair market value of the space as determined when the tenant acquires the new space--with arbitration if the parties can't agree. They can contract for rent based on fair market value at the date of future occupancy but with an agreed discount.

They could contract for fair market rent but with either a floor (to protect the landlord) or a cap (to protect the tenant). A typical "floor" is that the rent on future space won't be lower than the contract rent on the space the tenant already occupies. A typical "cap" is that the rent on future space won't exceed the tenant's rent on the space it already occupies by more than 25%.

Cautious tenants may want to reserve a right to back out if the rent set in the future proves unacceptable.

If the parties agree to an option, the landlord wants the tenant's option right to end well before the end of the lease term so the landlord has plenty of time to market the space. The tenant wants to be sure it doesn't lose its option, inadvertently, which can happen especially when the lease is long. The tenant wants notice by the landlord as the time to exercise the option draws near.

A valuable option tenants on a long-term lease may sometimes negotiate for themselves is the right to cancel the lease after a few years. The partners in a law firm, for instance, caught in a spiral of downsizing and falling market rents may rejoice on recalling they have the right to cancel well before the stated lease maturity date. The firm may even be able to negotiate a big immediate reduction in rent to trade away the cancellation right even though the cancellation option is years away. n274

§ 97.06(c)(25) Commencement of the Lease Term.

There are many reasons the lessor may not be in a position to deliver possession of leased space to a new tenant on time. The old tenant may hold over. The center may be under construction and not yet completed when the lease was scheduled to begin. The lessor may have contracted to make improvements to the space the tenant is scheduled to occupy but the improvements may not be finished on time. The failure to finish may be due to change orders that delayed completion--the fault of the lessor or the fault of the lessee--depending on who insisted on the changes.

The lessor's idea of when the space is ready for occupancy may differ from the tenant's. The tenant wants to see all the other tenants in place, and expects to be in a position to ring up sales before having to pay the first day's rent. The lessor wants to start collecting rent on the day liability starts accruing for payments on the lessor's permanent financing, usually the date of "substantial completion." Sometimes "completion" is defined for a shopping center or office building as the day a certificate of use is issued by the building department. n275 That certificate may be forthcoming well before each tenant's shop is outfitted with carpeting, a second coat of paint, shelving, display cases, a working telephone, signs and lighting. An alternative is for the architect to certify completion when all the requirements in the plans and specs have been fulfilled.

The tenant cannot afford to wait until the day the lease was supposed to begin to learn that the opening is delayed. The tenant needs advance notice of when the center will be open for business because the tenant must order merchandise, hire personnel, advertise, get a telephone and fax machine in place, and order stationery. The tenant expects the parking lot to be paved, elevators and escalators to be running.

The lessor expects to be forgiven if the delayed opening is due to strikes, casualties like floods or earthquakes, bad weather. The tenant doesn't care why commencement was delayed and would like to hold the landlord accountable for lost profits, moving costs, wages, the rental of temporary space and other expenses the tenant was forced to incur

because of the delayed opening. n276

The tenant's remedies for a delayed commencement caused by the lessor could be that the tenant has no obligation to take the space at all, has the option of taking the space with a rent abatement for the period of the delay plus actual damages or liquidated damages caused by the delay.

The lessor would prefer a provision like this: "If Lessor, for any reason whatever, cannot deliver possession of the Lease Premises to Lessee at the Estimated Delivery Date, this Lease shall not be void or voidable, nor shall Lessor be liable for any loss or damage resulting therefrom ... ."

§ 97.06(d) Questions About the Happy-Georgio Lease.

A shopping center developer leases land for 50 years from a landowning family eager to hedge their payments against inflation. So in their ground lease they obtain a minimum fixed rent plus "50% of all the percentage rent" which the shopping center developer receives from his retail tenants. The cunning developer doesn't enter standard percentage rent leases. Instead, his leases call for annual rent increases of 10%--fixed, not based on the retailer's "take" at all. Most of the developer's tenants end up paying less than they would with standard percentage rent clauses. When the lessors demand their 50%, the developer replies, "I don't owe you anything because I'm not collecting any percentage rent myself, just fixed rents that go up 10% a year."

QUESTION:

What argument will lessors make in their claim for something more than a fixed minimum rent?

ANSWER:

The lessors will argue that the 10% fixed rent increases take the place of percentage rent. They will contend that the tenant is acting in bad faith in structuring subleases this way. The 10% increase serves the same inflation buffering purposes as a percentage rent clause so the landlord should be entitled to half of it.

QUESTION:

How would this provision affect the tenant's claim to a share of the fixed rent increases?

Additional Rent. (i) Tenant shall pay Additional Rent to Landlord on or before the first day of March for the previous calendar years (the "Comparison Year") in the amount of one-third of the amounts by which Net Subtenant Rents for any Comparison Year (as herein defined) exceeds Net Subtenant Rents for the Base Year (as herein defined).

(ii) "Net Subtenant Rents" means Subtenant Rents less Subtenant Expenses. Herein "Subtenant Rents" means minimum rents, percentage rents, increased minimums and other consideration in the nature of rent (including any reimbursements for Subtenants Expenses from subtenants to Tenant paid to Tenant based on cash actually received) from subleases.

ANSWER:

This provision is sufficiently inclusive to protect the tenant from the landlord's ploy.

Happy wants the right to approve any assignee because she is promising her other tenants the panache of a Georgio, and they are banking on it. Georgio can imagine wanting out if business is slow. But he agrees that Happy should have the right to approve any assignees. She has a certain quality of tenant in mind which is why she negotiated this favorable lease with him.

QUESTION:

Suppose Georgio offers Happy a substitute tenant he thinks perfectly sound but she doesn't. What items might be added to a clause barring assignment without the landlord's consent to prevent Georgio being locked into a lease that is, practically speaking, unassignable?

ANSWER:

A termination provision might be added to the assignment clause so that if the landlord doesn't accept Georgio's proffered assignee, the lease will be terminated, and with it, Georgio's liability for future rent.

Alternately or in addition, criteria for Happy's acceptance of an assignee might be specified in the lease.

Georgio might be given the chance to cure objections by finding a new assignee or correcting the problem cited by the landlord with the proffered assignee.

QUESTION:

At common law, if Georgio's lease makes no provision for assignment, is he free to assign even to a tenant whose credit history is seriously blighted with default?

ANSWER:

Yes. Leases are presumably freely assignable absent provisions to the contrary.

QUESTION:

Georgio's right to assign is subject to Happy's prior written approval. The lease specifies no standard for approval. He finds a willing assignee Happy doesn't accept, and asks her why. She says, "It's my decision. Not yours." May he assign despite the lack of consent or regard Happy as being in breach of an implied obligation under the lease not to unreasonably withhold her consent for Georgio to assign?

ANSWER:

No. Under the California statute, the landlord can't refuse consent unreasonably. "Reasonable" depends in the proffered assignee's ability to perform, not the landlord's desire to capture increased rental value.

If things don't work out for Georgio in Happy's center, he will want to assign. Imagine he comes up with an assignee--The Gap. (They sell Levi Strauss merchandise, jeans and such, and are among the most successful retailers in the U.S.). Happy grows faint when she hears it. "No way. My other tenants--a custom jeweler, a Maud Frizon boutique, an art gallery--will freak and run. You must be kidding."

PROBLEM:

Describe the evidence Georgio would hope to produce in order to prevail in a trial on whether Happy was being reasonable when she said no to The Gap because its market appeal was to buyers incompatible with the image of the center, and the expectations of other tenants already in place.

ANSWER:

Georgio would need evidence that other tenants in the center will benefit from the customers drawn by The Gap.

Demographics would be useful showing The Gap shoppers to be just like those drawn to the other shops in the center. Also, evidence will help showing that The Gap is at least as good a credit risk, if not a better one than Georgio.

§ 97.06(e) Lender and Tenant.

§ 97.06(e)(1) Priority of Lien.

Apartment renters would probably not be concerned about how the landlord's lender could affect their lives. If a lease is for one year or less, the question may never arise. But if a tenant had decorated an apartment lavishly and persuaded the landlord to give a three-year lease, the question might be of some importance. With a large investment in improvements, the tenant wouldn't want to risk being evicted if the mortgagor forecloses.

§ 97.06(e)(2) When Loan Is Superior to Lease: A Surprising Twist for the Lender Relying on a Lease.

Recording act priority rules set the boundaries. If the mortgagee was there first, and had entered and recorded its deed of trust before the tenant entered the lease, the lender's interest is superior to the tenant's. On foreclosure, the tenant could be evicted. n277

In states where the lease is automatically terminated, a lender who wants to be sure its best tenants aren't given a chance to walk away just when they are most needed (following foreclosure) will want to have reserved in its mortgage the right to subordinate the mortgage to any subsequent leases. The lender will want to subordinate only partially, reserving its rights to condemnation and fire insurance proceeds, and to terminate any tenant options to buy the property.

Recently an appellate court, in *Dover Mobile Estates v. Fiber Form Products, Inc.,* n278 affirmed the California rule that if a lease is subordinate to a mortgage, so that the lender or a purchaser at foreclosure could terminate the lease, then the tenant, too, enjoys the option of terminating on foreclosure. The lender argued for the New York rule, that the superior lienor should have the option of terminating the lease or keeping the tenant in place. The court ruled no. This was an especially disappointing result for the lender in *Dover,* who had actually bought the property at foreclosure in a reliance on the lease. The lease had a clause subordinating it to prior or subsequent mortgages. So, the court elected "to follow the rule that the trustee's sale automatically terminates the lease."

The *Dover* court threw one bone to lenders fuming over the decision. A landlord could obtain a non-disturbance promise from her lender for the benefit of the tenant. Such clauses provide that the lender with a superior lien will not disturb a tenant's possession by foreclosure as long as the tenant is not in default under the lease. Commercial tenants often request "non-disturbance" clauses. After the *Dover* case, California lenders should grant them eagerly.

The Urban Land Institute *Handbook for Shopping Center Developers* recommends that all leases contain a provision subordinating the lease to the mortgagee. But the handbook reports that *major* tenants usually insist on "an explicit non-disturbance agreement ... providing that even if the building is foreclosed and sold under a deed of trust or mortgage, as long as the tenant is performing his obligations under the lease, he will not be disturbed." n279

Dover now gives lenders an incentive to confer this right on *all* subordinating tenants it wouldn't wish to leave the center following a foreclosure.

A lawyer points out that the lender needs more than a non-disturbance clause: It is dangerous to accept this [a non-disturbance clause] without the additional provision in the lease that in the event of foreclosure tenant will attorn to the purchaser at foreclosure sale. n280

However, the lender who offers a tenant a non-disturbance promise in order to avoid the risk of the tenant's leaving after a foreclosure can't condition that promise in ways unacceptable to the tenant. "Fairness," reciprocity, mutuality--these

are the goals implicit in the non-disturbance promise. The tenant who rejects a burdensome, heavily conditioned non-disturbance and attornment agreement will surely prevail.

One thoughtful federal judge gave the subordinated tenant an option less drastic than termination following a foreclosure. That court held that when a lender forecloses, a tenant subordinate to the mortgagee may have reasonable ground for insecurity based on analogy to Uniform Commercial Code principles, specifically UCC § 2-609 with respect to whether it may remain in possession. The tenant may "demand adequate assurance of due performance and until it receives such assurance may, if commercially reasonable, suspend any performance for which he has not already received the agreed return." n281

The tenant would have no right to terminate if the lender acquired title by a deed in lieu of foreclosure. This is so because (i) lease covenants respecting the property run with the land, and (ii) the purchaser from the lessor acquires the lessor's interest as it exists at the time of purchase. There is no relation back to the time the mortgage lien arose, as there is on foreclosure. When the lender becomes a grantee under a deed in lieu of foreclosure, the tenant is already in possession. The lender is treated the same as any subsequent purchaser. As a subsequent purchaser, if the lender has inquiry, constructive or actual notice of the tenant's interest, it takes subject to it.

When the lease predates the mortgage, a lease amendment may not be superior to the mortgage. A lessee in possession before the lessor mortgages the fee has an interest free of the mortgage. If the lessor defaults on the mortgage, and the mortgagee forecloses, the purchaser at the foreclosure sale takes subject to the lease as it existed when the mortgage was first entered. The lessor and lessee may have amended the lease. If the amendment came after the mortgage, the amendments are subordinate to the mortgage. To see why this makes sense, consider the example of a five-year lease at a rent below current market value that was about to expire when the lessor mortgaged the fee. The mortgagee counted on the lease expiring and rent going up. But just after the mortgage is entered, the lessor amends the lease by extending its term for another five years at the old rent in exchange for the tenant, a retail chain store, leasing additional space in another of the lessor's properties. If the lessor defaults on the mortgage, the foreclosure sale purchaser takes free of the lease extension. When a lease predates the mortgage, the mortgagee takes subject to the lease, but only to the lease as it existed at the creation of the mortgage. Otherwise, the lessor and lessee by amendment could defeat the mortgagee's reasonable expectations about the lease. n282

§ 97.06(e)(3) When the Lease Is Superior to the Loan: A Tenant's Undisclosed Purchase Option May Not Be.

If the tenant's interest is superior to the lender's, the tenant has no right to terminate its lease. Conversely, the tenant has the right to remain, and the lender cannot remove the tenant lawfully following foreclosure as long as the tenant doesn't breach its lease covenants. The tenant gets to stay no matter how big a bargain its lease has become, and even if it was precisely that bargain rent which drove the borrower into default on the loan. The tenant's interest may be superior because it was entered first and the lender took with notice, or because the lender subordinated its mortgage lien to the tenant's lease. If the tenant was there when the loan was made, the lender could acquire as security only the interest the lessor still owned. At the time of the loan, if that interest had already been diminished by the previously granted lease, the lender takes its security interest subject to the lease.

Suppose your landlord mortgaged the building after your lease was entered, and your lease contained no subordination clause. The landlord's lender probably has inquiry or actual notice of your interest either because you were in possession, or had recorded. Hence, your entitlement would survive the mortgagee's foreclosure.

If you happened to have an option to buy the building, and exercised that option, you could take free of the lien of the mortgage, if the lender had actual, inquiry or constructive knowledge of your option.

If you recorded your option or could prove the lender actually knew about it, you are home free. Suppose, though, the

option wasn't part of the lease, the lease was recorded, but the option was not. Does your possession as tenant put the lender to the duty of inquiring whether you have any interest in the property except as a tenant? Not at all, decided one California appellate court. n283 The purchaser didn't have a duty to make inquiry of a tenant because the tenant's possession was consistent with the record title and there were no circumstances indicating the tenant had additional rights. Certainly, a cautious, well-advised lender would always seek an estoppel certificate from a tenant declaring all the tenant's rights.

§ 97.06(e)(4) Scrutinizing the Lease to Close All Escape Hatches.

A prudent lender will want to be sure a major tenant can't terminate a lease without the lender's consent--even if the landlord breaches an "exclusive" clause, fails to keep the center clean, or sells the parking lot to the city housing authority. The lender will insist that the tenant's only remedies for landlord's breach of the lease are for damages and equitable relief, not termination.

Landlords often reserve the right to terminate the lease after a fire, earthquake, hurricane or other disaster, should rebuilding appear impractical. Sometimes a public agency takes part of a center in condemnation for a public use (widening a road, for instance). If the center can't function successfully without the missing piece, landlords sometimes enjoy the right to close down the center and terminate leases. Although these clauses contemplate the death of the center, they don't worry the lender much. The lender who buys at its own foreclosure sale becomes the landlord. Termination of leases under these clauses will occur at the landlord's or lender's option--not the tenant's.

Some leases also give the *tenant* the option of terminating in the event of destruction or partial condemnation. That provision is unacceptable to a lender. If the tenant decided to terminate, the lender could get stuck foreclosing on a center with yawning stretches of vacant space.

§ 97.06(e)(5) Eliminating an Embarrassing Source of Liability to a Foreclosing Lender with Many Shopping Center Loans in the Same Market Area.

The "exclusive operation" clause can be worrisome to the lender when the landlord has promised the tenant an exclusive not only over the shopping center, but also "any other property directly or indirectly owned or controlled by the landlord" within some prescribed radius. A major lender with stakes in other centers nearby could find itself easily in breach of this provision if it purchased the property at foreclosure. That is why thoughtful developers never promise exclusives to more than the shopping center proper, not to other properties they may own then or in the future. n284

§ 97.06(e)(6) Conclusion: Seeing the Lease Through the Lender's Eyes.

The bottom line is that "use," "continuous use," "exclusive use" and assignment clauses must all be drafted with a third party interest kept firmly in mind--that of the landlord's lender. Leases that lenders disapprove must be redrafted. Lenders' lawyers are paid to see that the borrower complies. The experienced landlord prefers to anticipate the lender's requirements than be forced to renegotiate the lease.

A lender in a state like California will be advised by its attorneys to give desirable tenants whose leases are subordinate to the mortgage a "nondisturbance" agreement. A non-disturbance promise is that the tenant's right to possession won't be affected by the mortgagee foreclosing. Only by extending such a promise can a California lender be sure the tenant won't have the option of terminating the lease if the lender forecloses. "Sauce for the goose, sauce for the gander," is the California rule. A lender whose superior lien gives it the right to terminate a tenant's lease on foreclosure must relinquish that right or risk the tenant's electing to terminate should the lender foreclose.

Non-Disturbance, Attornment and Subordination Agreement:

1. Provided Tenant is not in default under the terms of the Lease, the right of possession of Tenant to

the leased Premises shall not be affected or disturbed by Mortgagee in the exercise of any of its rights under the Mortgage or any note secured thereby, and any sale of the Premises pursuant to the exercise of any rights and remedies under the Mortgage or otherwise shall be made subject to Tenant's right of possession under the Lease.

2. Tenant shall attorn to Mortgagee or any purchaser of the Premises and the Lease shall continue, in accordance with its terms, between Tenant and Mortgagee or such purchaser (Mortgagee or such purchaser being hereinafter sometimes called "Successor Landlord") except that (a) notwithstanding the Lease (i) all eminent domain awards are to be paid directly to and, except as provided in clause (b) of this paragraph, retained by Successor Landlord as its sole property (except that Tenant may interpose against the condemning authority separate claims for its fixtures, moving expenses and leasehold improvements provided (1) Tenant expended its own funds therefor and (2) such claims do not reduce the amount of the award to which Successor Landlord is entitled) and (ii) all insurance proceeds are to be paid directly to and, except as provided in clause (b) of this paragraph, retained by Successor Landlord as its sole property (except that Tenant shall be entitled to the proceeds of all insurance paid for by Tenant covering Tenant's fixtures, inventory and contents), (b) if the Lease requires that all or a portion of the insurance proceeds or eminent domain award be applied toward restoration, Successor landlord agrees to allow the utilization of such net proceeds or net award (that is, in each instance, the net amount actually received and retained by Successor Landlord after deducting all necessary expenses of determination of the amount and collection thereof, including but not limited to adjustor, legal and expert fees and expenses) toward restoration in accordance with the Lease, shall (i) keep control and possession of such proceeds or award and apply same toward restoration and periodically pay contractors and vendors directly upon properly received requisitions, paid receipts, waivers of lien and other requisites imposed by Mortgagee in its then applicable standard form of Building Loan Agreement and (ii) never be required to expend toward such restoration any monies in excess of such net proceeds or net award and (c) this paragraph and paragraphs 3 and 6 hereof, if applicable, shall modify the Lease.

3. Successor Landlord shall not be (a) liable for any act or omission of any prior landlord (including Landlord), (b) liable for the return of any security deposit not actually received by Successor Landlord, (c) subject to any offsets or defenses which Tenant might have against any prior landlord (including Landlord) to the extent such offset or deduction could have been (whether or not actually) covered by Tenant by available insurance, and in no event shall any available offset or deduction be applicable to the minimum or base rent required to be paid by Tenant under the Lease but such offset or deduction (if available under this sentence) shall be applied only against rent escalations, percentage or overage rents, common area maintenance and the like, (d) bound by any advance payment of rent or additional rent made by Tenant to Landlord except for rent or additional rent applicable to the then current month, (e) bound by any amendment or modification of the Lease made without the written consent of Successor Landlord or (f) bound to effect or pay for any construction for Tenant's initial occupancy, but shall be bound to pay for construction contained in the Lease required to be performed subsequent to both the (1) opening by Tenant in the Premises for the conduct of its business and (2) commencement of Tenant's obligation to pay rent.

4. The Lease shall be subject and subordinate to the lien of the Mortgage and to all of the terms, conditions and provisions thereof, to all advances made or to be made thereunder, and to any renewals, extensions modifications or replacements thereof, including any increases therein or supplements thereto.

5. The foregoing provisions shall be self-operative. However, Tenant agrees to execute and deliver to Mortgagee or to any person to whom Tenant herein agrees to attorn such other instrument as either shall request in order to effectuate said provisions.

6. Anything herein or in the Lease to the contrary notwithstanding, in the event that Mortgagee or a

purchaser shall acquire title to the Premises, Mortgagee and such purchaser shall have no obligation, nor incur any liability, beyond Mortgagee's or purchaser's then interest, if any, in the Premises and Tenant shall look exclusively to such interest, if any, of Mortgagee or such purchaser in the Premises for the payment and discharge of any obligations imposed upon Mortgagee hereunder or under the Lease, and Mortgagee and such purchaser are hereby released or relieved of any other liability hereunder and under the Lease. Tenant agrees that, with respect to any money judgment which may be obtained or secured by Tenant against Mortgagee or such purchaser, Tenant shall look solely to the estate or interest owned by Mortgagee or such purchaser in the Premises, and Tenant will not collect or attempt to collect any such judgment out of any other assets of Mortgagee or such purchaser.

FOOTNOTES:

(n1)Footnote 178. Several state legislatures have reduced one source of risk to the landlord by prohibiting local governments from enacting commercial rent controls. *See, e.g.*, N.M. Stat. Ann. § 47-8A-1 (prohibiting enactment of rent control ordinances for *all* privately owned real property) and Cal. Civ. Code §§ 1954.25-1954.31. In California, the clamor for shop rents to be controlled arose first in Berkeley when neighborhood-serving Ma-and-Pa stores (small markets, dry cleaners, shoe repairs) began to be displaced by upscale boutiques and trendy restaurants.

(n2)Footnote 179. *See, e.g.*, *The Commercial Lease Form of the California Chapter of the Society of Industrial and Office Realtors*, *reprinted in* Marsh, Commercial Real Estate Transactions (1992) starting at page 29. *See also* Adam M. DiSciullo, *Negotiating a Commercial Lease from the Tenant's Perspective*, 18 Real Est. L.J. 27 (1989).

(n3)Footnote 180. Jerry Adler, High Rise: How 1,000 Men and Women Worked Around the Clock for Five Years and Lost $200 Million Building a Skyscraper 208 (Harper Collins 1993).

(n4)Footnote 181. *See* Sidney G. Saltz, *Do Tough Landlord Lease Forms Really Pay Off?*, 20 Real Est. Rev. 55 (Summer 1990), suggesting landlord should "lighten up" and avoid harsh lease provisions in order to improve their reputation in the commercial real estate community, and encourage tenants to renew.

(n5)Footnote 182. Here are three examples:

(1) Will the warranty of habitability implied in residential leases by many courts be implied in commercial leases? Absent an authoritative ruling, all aspects of maintenance, repair and what would happen if the property were partially or totally damaged need to be negotiated. The policy arguments for implying such a clause in favor of the tenant and against have been well drawn. The issue is not likely to be resolved one way or the other anytime soon. *See* Note, *An Economic Analysis of Implied Warranties of Fitness in Commercial Leases, 94 Colum. L. Rev. 658 (1994)* (because the lessor owns the reversion and can take advantage of economies of scale, the lessor is the most efficient warrantor). *See* Fred William Bopp III, *The Unwarranted Implication of a Warranty of Fitness in Commercial Leases--An Alternative Approach, 41 Vand. L. Rev. 1057 (1988)* (implying a warranty of fitness as basis for the lessee to terminate is unwarranted because of the superior bargaining power of many commercial tenants, but allowing tenants to plead lack of habitability as a defense to an otherwise summary action for possession would be appropriate).

(2) Is a tenant who takes under an "as is" clause liable for asbestos removal? In *Brown v. Green, 35 Cal. Rptr. 2d 598 (Cal. Sup. Ct. 1994)* , the Court observed that the answer was "context-dependent." But the Court affirmed an appellate court opinion holding the tenant liable in a case involving "the long-term lease of an entire warehouse-like building by sophisticated business partners who had substantial experience in leasing commercial property: lessees who were on written notice of at least the potential for asbestos contamination prior to executing the lease, who inspected the building and elected not to investigate the possible presence of hazardous materials before negotiating and signing an agreement that by its terms shifted the major risks of property ownership to the lessee, negated any repair obligations on the part of the lessor, and omitted any representations respecting the condition of the property. In addition, the cost of complying with the mandated work, although substantial in absolute numbers, is less than 5 percent of the total rent payable over the life of the lease."

(3) The Americans with Disabilities Act (ADA), *42 U.S. Code §§ 12101-12213*, prohibits discrimination against the disabled seeking access to "places of public accommodation." Examples of public accommodation include hotels, restaurants, movie theaters, schools, shops and banks. Barriers to access need to be eliminated. This may require installing ramps and making curb cuts. Generally in the absence of lease provisions to the contrary, the landlord is charged with the task of bringing common areas into ADA compliance and the tenant is responsible for compliance within the leased space. *See* Michael F. Jones, *Commercial Leases Under the Americans with Disabilities Act*, 22 Real. Est. L.J. 185 (Winter 1992). The landlord may be able to recoup some of the cost through common area maintenance assessments. Where a single tenant occupies an entire building, the tenant may have to pay for all the ADA upgrades. Today no careful lease fails to allocate the responsibility for compliance explicitly between landlord and tenant.

(n6)Footnote 183. Law Journal Seminar Press 1989, first published in 1979.

(n7)Footnote 184. *See* Commercial Lease Law Insider, p.1 (Brownstone Publishers, Feb. 1995).

(n8)Footnote 185. *See* Anton Natsis, *New Trends in Negotiating Office Leases*, 51 Urb. Land 42, 44 (1992).

(n9)Footnote 186. *See* Anton Natsis, *New Trends in Negotiating Office Leases*, 51 Urb. Land 42, 44 (1992).

(n10)Footnote 187. A number of states allow a partnership to transform directly into an LLC. *See, e.g.,* N.Y. LLC § 1007. This statute also provides that the conversion is not a change in the legal form of ownership. *Id.* Therefore, a clause barring assignment would not prevent the transformation.

(n11)Footnote 188. *But see Moneywatch Cos. v. Wilbers, No. CA 95-0003-055, 1955 Ohio App. LEXIS 3522* (Ohio App. 8/28/95) (Lessor agreed to change the name on the lease from that of an individual tenant to that of a corporation the tenant formed to run the business. The individual tenant was still personally liable. A change of name on the lease isn't an assignment *or a release* of personal liability.).

(n12)Footnote 189. *See, e.g., Change in Office Suite Number Makes Lease Inaccurate*, Com. Lease L. Insider, Jan. 1995, at 6.

(n13)Footnote 190. Emmanuel B. Halper, Shopping Center and Store Leases 58 (Law Journal Seminar Press 1989, first published in 1979).

(n14)Footnote 191. In one disputed lease, the premises were constructed following the execution of the lease. The plans showed a "footprint" of 13,020 square feet, as well as a 628-square-foot mezzanine containing a lunch room, bathrooms and an office. The lessor wanted to count the mezzanine as part of the gross leasable area for calculating rent. The tenant pointed out the definition in the lease of "gross leasable area": "measured from the outside face of the front and rear exterior walls and the midpoint of the common walls on either side of the Demised Premises." This came to 13,020 square feet. The lease described the leasable area as 13,029 square feet. The lessor insisted the mezzanine would have been included as part of the gross leasable area under most industry definitions. The court held that the tenant was right. The parties' intent as to the meaning of "gross leasable area" could be inferred from the lease itself without resort to industry standards. *British American Dev. Corp. v. Fay's Drug Co., Inc., 577 N.Y.S.2d 528 (N.Y.A.D. 1991)* .

(n15)Footnote 192. See Building Owner's and Manager's Ass'n, American National Standard Method for Measuring Floor Area in Office Buildings. This is how the BOMA lease measures rentable space.

(n16)Footnote 193. *See* Marvin Garfinkel, *Counseling the Tenant on Leasing a Large Office*, from ABA Section on Real Prop., Prob. & Trust Law 25, 31 (ABA 1993).

(n17)Footnote 194. *Wohl v. Owen, 580 N.Y.S.2d 854 (1992)* .

(n18)Footnote 195. *See* Kenneth A. Posner, *The Story of Law Firm X's Lease Restructuring*, Real Est. Fin. J. 29 (Winter 1994).

(n19)Footnote 196. *See, e.g., Marshall of Nashville, Tenn., Inc. v. Harding Mall Assocs., 799 S.W.2d 239 (Tenn. App. 1990)* (roofing contractor, hired by landlord and paid jointly by landlord and tenant, was negligent in making roof repairs, but tenant could not hold landlord responsible for roofer's negligence because landlord and tenant had signed a mutual release agreement providing that the parties released each other from any and all claims, liabilities and causes of action arising from the repair).

(n20)Footnote 197. *See* Stephen H. Bier. *The Evolving Law of "Sick Buildings*," N.J. L.J. Supplement, p. 12 (Aug. 21, 1995); *Real Estate and the Environment*, N.J. L.J. Supplement, p. 12 (June 8, 1992); *American States Ins. Co. v. Mathis, 974 S.W.2d 647* (Mo. App. 1998 (breach of contract is not an "accident" or "occurrence" within the coverage of the insurance policy).

(n21)Footnote 198. *State v. SouthTrust Bank, 634 So. 2d 561 (Ala. Civ. App. 1994).*

(n22)Footnote 199. *30 Cal. Rptr. 2d 469 (1994)* .

(n23)Footnote 200. *See* Anton Natsis, *New Trends in Negotiating Office Leases*, 51 Urb. Land 42, 44 (1992).

(n24)Footnote 201. *Determining the "right" price index.*

> The index normally used in leases is the *Consumer Price Index, All Urban Consumers*, applicable to the area in which the project is located ... . From the tenant's standpoint, the *CPI for Urban Wage Earners and Clerical Workers* is a better index because it tends to increase a bit more slowly than the *All Urban Consumers index* ... . Since the relevance of any of these indexes to a commercial lease is arguable at best, the particular index to be used is just a matter of negotiation. The differences between the various indexes may be slight, but the use of a more favorable index can add up to significant savings over the term of the lease.

David W. Barron, *Help for the Commercial Tenant Negotiating a Lease*, 18 Real Est. Rev. 2, 51 (Summer 1988).

(n25)Footnote 202. Emanuel B. Halper, Shopping Center and Stores Leases 58 (Law Journal Seminar Press 1989, first published in 1979).

(n26)Footnote 203. Commercial Lease Law Insider, p.6 (July 1995).

(n27)Footnote 204. *See, e.g., Enterprise-Laredo Assocs. v. Hacher's, Inc., 839 S.W.2d 822 (Tex. App. 1992).* The lease contained a "more-favored-nation" provision regarding CAM charges, that no tenant would later be charged CAM assessments on a more favorable basis than this tenant without giving this tenant the benefit of that more favorable treatment. The lessor overcharged the tenant for years. The tenant finally wised up, demanded an audit, and discovered the overcharges. The court allowed the tenant recovery with interest but only for the four years of overcharges preceding the tenant's complaint. The tenant's claim was based on breach of contract and the Texas statute of limitations for contract actions is four years from the date the cause of action arose, not the date of discovery. The overcharging had been going on longer than that. The trial court had granted the tenant's claim for relief under the Texas Deceptive Trade Practices Act but was reversed on appeal. That statute was designed as a consumer protection measure, the appellate court held, not as an alternate remedy in a breach of contract action brought by a well-represented, knowledgeable commercial tenant. To achieve a full recovery the tenant should have acted sooner.

See, e.g., Enterprise-Laredo Assocs. v. Hacher's, Inc., 839 S.W.2d 822 (Tex. App. 1992).

(n28)Footnote 205. Guard Your Books from Contingency Fees Auditors, Commercial Lease Law Insider, p.1 (July, 1995).

(n29)Footnote 206. See, e.g., Anthony J. Vlatos, Note, *An Economic Analysis of Implied Warranties of Fitness in Commercial Leases, 94 Colum. L. Rev. 658, 670 (1994).*

(n30)Footnote 207. Dicta in one California case suggested that an implied warranty of fitness applied to commercial leases for small tenants. *Four Seas Invest. Corp. v. Int'l Hotel Tenants Assoc., 81 Cal. App. 3d 604 (1978)* . Later cases have held otherwise. *Schulman v. Vera, 108 Cal. App. 3d 552 (1980)* .

(n31)Footnote 208. *Marlton Operating Corp. v. Local Textile Mills, 137 N.Y.S.2d 438 (1954)* .

(n32)Footnote 209. I. Aaron Cohen, *Advice for Landlords and Tenants on Percentage Rent,* 6 Prac. Real Est. Law. 13 (1989).

(n33)Footnote 210. Today owners of freestanding retail and office space in older urban centers are imitating the initiatives of shopping center developers. They are banding together to form business improvement districts ("BIDs"). A BID is a special assessment district where owners are assessed to pay for added security, street maintenance, clean up, and promotional activities. *See* Lawrence D. Houstoun, Jr., *Betting on BIDs,* Urban Land 13 (July 1994).

(n34)Footnote 211. David A. Mulvihill, *How Should Stores Be Mixed and Matched in Shopping Centers?,* 51 Urb. Land 48 (March 1992).

(n35)Footnote 212. *See, e.g., Julageas v. Winton, 119 Ill. App. 139 (1905)* ; *Gale v. McCullough, 84 A. 469 (Md. 1912)* .

(n36)Footnote 213. *See, e.g., Williams v. Safeway Stores, Inc., 424 P.2d 541 (Kan. 1967)* (grocery sublet to shoe retailer--court held landlord could not terminate the lease since lease contained no express language requiring use as grocery store). The same result was reached in *Riverside Realty Co. Corp. v. National Food Stores, Inc., 174 So. 2d 229 , cert. denied, 175 So. 2d 647 (La. App. 1965)* , where grocery converted the premises for storage-only purposes.

(n37)Footnote 214. *See* Annotation, *Provision in Lease as to Purpose for Which Premises Are to be Used as Excluding Other Uses,* 86 A.L.R.4 th 259 (1991).

(n38)Footnote 215. *See Chassereau v. Stuckey, 342 S.E.2d 623 (S.C. 1986)* .

(n39)Footnote 216. Sometimes tenants insist on a use clause being broader for an assignee than it was for them. Mr. Halper offers an example: "... their [the tenants'] professed opinion of their own ability may be so exalted that they may claim that, if *they* cannot succeed at selling shoes at the demised premises, nobody can. Nobody? Yes, nobody. Well if you follow their reasoning (and you might have to if no one else is interested in that space), giving them the right to assign would be meaningless unless the assignee could sell something other than shoes."

(n40)Footnote 217. Curb Unwanted Topless Entertainment, Commercial Lease Law Insider, Dec. 5, 1994, p.5.

(n41)Footnote 218. *See, e.g.,* Minex Corp. v. Shenanigans of Manhattan, Inc., N.Y. L.J., p.22, col. 1 (Aug. 9, 1994) (topless dancing not barred by lease prohibiting semi-nude entertainment).

(n42)Footnote 219. *Marini v. Pyramid Center of Empire State Co., 609 N.Y.S.2d 722 (N.Y.A.D. 1994)* .

(n43)Footnote 220. Norman M. Kranzdorf, *Problems of the Developer,* U. Ill. L.F.173, 178 (1965).

(n44)Footnote 221. *Sullivan Bros. Clothing, Inc. v. North Dartmouth Joint Venture, 332 N.E.2d 926 (Mass. 1975)* .

(n45)Footnote 222. *Freed v. Cassinelli, 1984 Ohio App. LEXIS 11265* (Ohio App. Oct. 31, 1984) .

(n46)Footnote 223. Typical promises that if the anchors leave, the tenant may depart, read like this:

(1) Landlord agrees that the execution and delivery of the Original lease by Tenant be made upon the express condition that other retail store buildings shall be constructed on the Entire Premises in the locations shown on Exhibit B to the Original Lease.

(2) Landlord represents and warrants that the Broadway Store contains not less than 143,407 square feet of Floor Area and the Mervyn's Store contains not less than 80,688 square feet of Floor Area.

The lessor might bargain for written notice and a chance to find new anchors before a tenant could depart when the old anchors left. The lessor might also seek to remove the right of the tenant to terminate and, instead, to restrict the tenant's remedy to damages based on proof of earnings lost due to the anchor's departure.

(n47)Footnote 224. *Carollton Central Plaza Assoc. v. Morse Shoe, Inc., 1989 U.S. Dist. Lexis 5842* (E.D. La., May 24, 1989) .

(n48)Footnote 225. An anchor tenant on a percentage lease was held liable to the landlord for the diminution in the value of the center caused by anchor's leasing operations with approximately 20 years remaining on a 30-year lease. The measure of damage was the difference between the value of the shopping center before and immediately after the breach. *Hornwood v. Smith's Food King No. 1, 807 P.2d 208 (Nev. 1991)* . On remand, the landlord's appraiser pegged the decreased value at $1,425,000. The tenant's appraiser saw no decrease or, at most $216,000. The trial judge entered a judgment for $1,425,000 without an evidentiary hearing. On tenant's appeal, the Nevada Supreme Court ordered the trial court to hold a hearing. *Smith's Food King No. 1 v. Hornwood, 836 P.2d 1241 (1992)* .

(n49)Footnote 226. *Lippman v. Sears Roebuck & Co.,, 280 P.2d 775 (Cal. 1955)* .

(n50)Footnote 227. *See, e.g., Casa D'Angelo, Inc. v. A & R Realty Co., 553 N.E.2d 515 (Ind. App. 1990)* (tenant has no duty to produce percentage rent so had no duty to continue operating a restaurant); *Walgreen Ariz. Drug Co. v. Plaza Ctr. Corp., 647 P.2d 643 (Ariz. 1982)* (even though base rent was low because landlord expected tenant to be a magnet to draw customers to other shops in the center, percentage rent clause creates no implied obligation for continuous operation); 2401 *Philadelphia Ave. Corp. v. Federation of Jewish Agencies, 466 A.2d 132 (Pa. Super. 1983)* (use and occupancy clause is not a covenant to use); *Fifth Avenue Shopping Center, Inc. v. Grand Union Co., 491 F. Supp. 77 (N.D. Ga. 1980)* ; *Fuller Market Basket, Inc. v. Gillingham & Jones, Inc., 539 P.2d 868 (Wash. App. 1975)* (grocery store in shopping center--no implied covenant will be implied in lease that tenant must continue to operate); *cf. Fodor v. First Nat'l Supermarkets, 589 N.E.2d 17 (Ohio St. 1992)* (in order to justify implying a lease covenant it must be clear that the reason the covenant wasn't placed in the lease is that to do so would be to state the obvious); *Kroger Corp. v. Bonny Corp., 216 S.E.2d 341 (Ga. App. 1975)* (no continuous use obligation implied from percentage lease of supermarket).

A few courts will imply a continuous use clause if the fixed-base rent is a token rent, an insubstantial sum. *See College Block v. Atlantic Richfield Co., 254 Cal. Rptr. 179 (1988)* ; *Thompson Dev. v. Kroger Co., 186 W. Va. 482, 413 S.E.2d 137 (1991)* . *See generally,* Kathleen A. Furlong and Phyllis L. Volk, *Continuous Operation Clauses* in Patrick A. Randolph, The Commercial Property Lease 71 (1993).

(n51)Footnote 228. *Columbia East Assocs. v. Bi-Lo, Inc., 386 S.E.2d 259 (S.C. App. 1989)* , *described in* Hamilton, *When the Anchor Tenant Goes Dark,* 6 Real Est. Fin. J. 83 (1991).

(n52)Footnote 229. *Slater v. Pearl Vision Center, Inc., 546 A.2d 676 (Pa. Super. 1988)* .

(n53)Footnote 230. *546 A.2d at 679. See also, Comment, Commercial Leasing: Implied Covenants of Operation in Shopping Center Leases, 95 Dickinson L. Rev. 383, 400-403 (1991).*

(n54)Footnote 231. *Olympus Hills Shopping Center, Ltd. v. Smith's Food & Drug Centers, 889 P.2d 445 (Utah App. 1994)* .

(n55)Footnote 232. Jeffery A. Trachtenberg, *When a Mall's Biggest Retailers Fall, Surviving Shops Get an Unpleasant Jolt,* Wall St. J. Oct. 25, 1990, at 1. Landlords have been held obligated to a minor tenant to assure the continuous operation of major or anchor tenants. *See Cordonier v. Central Shopping Plaza Associates, 82 Cal. App. 3d 991, 147 Cal. Rptr. 558 (1978)* .

(n56)Footnote 233. *See, e.g., Snyder's Drugstores, Inc. v. Sheehy Props., Inc. 266 N.W.2d 882 (Minn. 1978)* .

(n57)Footnote 234. Raymond W. Goldfafen, *Restrictive and Other Use Clauses, in* Randolph, The Commercial Property Lease 81 (1993).

(n58)Footnote 235. *See, e.g., Belvedere South Town Ctr., Inc. v. One Stop Pacemaker, Inc., 370 N.E.2d 249 (Ill. App. 1977)* (Pacemaker with exclusive right to be the only supermarket and liquor store in the center held entitled to be free of competition from a drugstore selling food products, despite the changing nature of a drugstore).

(n59)Footnote 236. *Rite Aid of Ohio, Inc. v. Marc's Variety Store, Inc., 638 N.E.2d 1056 (Ohio App. 1994)* .

(n60)Footnote 237. *See, e.g., Hermel, Inc. v. The Wig Chalet Boutique, Inc., 527 S.W.2d 734 (Mo. App. 1975)* (landlord's promise not to lease to any tenant whose *exclusive purpose* was the sale of wigs held not violated when McCrory's, a drugstore, granted a concession to Wig World, Inc. Wigs were held incidental to McCrory's operation).

(n61)Footnote 238. Robert A. Silverman, *Practical Suggestions for Shopping Center Use and Exclusive Use Clauses,* 5 Prac. Real Est. L. 65 (1989).

(n62)Footnote 239. *See generally* Emanuel Halper, *People and Property: The FTC and Shopping Center Leases,* 10 Real Est. Rev. 49 (1981); Norton L. Steuben, Real Est. Plan. 1025-1039 (3d ed. 1989).

(n63)Footnote 240. *See* D. Barlow Burke, Jr., Real Estate Transactions 469-71 (1993). "Use" clauses have been read to imply exclusives in a few instances. *Keating v. Preston, 108 P.2d 479 (Cal. App. 1940)* (lease of all space necessary for restaurant business held to imply a sole right to operate a restaurant in the hotel); *Belvedere Hotel Co. v. Williams, 113 A. 335 (Md. 1921)* (lease of barber shop and manicuring concession in hotel construed as intended to be concession for entire hotel).

(n64)Footnote 241. *See* Klein v. Equitable Life Assurance Soc., 477, N.E.2d 1190 (Ohio App. 1984). That one tenant was explicitly barred from discount retailing didn't bar other tenants by implication from discounting. The tenant's lease didn't obligate the landlord to make the prohibition against discount retailing storewide.

(n65)Footnote 242. *Id.*

(n66)Footnote 243. *See* Burke, Real Estate Transactions 455-62 (1993).

(n67)Footnote 244. Emanuel Halper, Shopping Center and Store Leases at 305, citing Jay Lentzner, *The Antitrust Implications of Radio Clauses in Shopping Center Leases,* 55 U. Det. J. Urb. L. (1977) (FTC consent decrees generally apply to centers with 200,000 square feet or more).

(n68)Footnote 245. Leases sometimes provide that a tenant, on assigning, is released from further liability once the new tenant assumes the old lease. *See Shadeland Dev. Corp. v. Meek, 489 N.E.2d 1192 (Ind. App. 1986)* (old tenant has no implied obligation to use reasonable care in selecting new tenant even though lessee was released of further liability

by the terms of the lease, was free to assign without lessor's consent, and lessor became owner of tenant-constructed building on any termination of the lease).

(n69)Footnote 246. Annotation, *When Lessor May Withhold Consent Under Unqualified Provision in Lease Prohibiting Assignment or Subletting of Leased Premises Without Lessor's Consent*, 21 A.L.R.4 th 188 (1983).

(n70)Footnote 247. Restatement (Second) of Property, Landlord and Tenant § 15.2(2).

(n71)Footnote 248. Jurisdictions implying a reasonableness standard include Alabama, Alaska, Arkansas, California, Colorado, Connecticut, The District of Columbia, Florida, Idaho, Illinois, Indiana, Louisiana, Nebraska, and New Mexico. *See* Note, *Julian v. Christopher: New Standards for Landlord's Consent to Assign and Sublease, 50 Md. L. Rev. 464, n.7 (1991). See 135 Santa Clara L. Rev. 845, n.83 at 860 (1995).*

(n72)Footnote 249. The rationale for California courts rejecting the majority view was put forward in *Kendall v. Ernest Pestana, Inc., 709 P.2d 837 (Cal. 1985) . See also Funk v. Funk, 633 P.2d 586 (Idaho 1981)* . Other reasons have been advanced in favor of assignability and implying a "reasonableness" standard approach. *See* Martha Wach, *Withholding Consent to Alienate: If Your Landlord Is in a Bad Mood, Can He Prevent You from Alienating Your Lease?, 43 Duke L.J. 671, 681-685.* (1993). California law on this point is now governed by the statute described later in this chapter. *See* Patrick A. Randolph, Jr., *Coping with the New Rules on Assignability of Commercial Leases,* The Commercial Property Lease 191 (ABA 1993).

(n73)Footnote 250. The Restatement (Second) of Property § 15.2(2) embraces this rationale.

(n74)Footnote 251. Powell on Real Property(R) § 17.04[1][c][ii] (Michael Allan Wolf, LexisNexis Matthew Bender).

(n75)Footnote 252. *Julian v. Christopher, 575 A.2d 735 (Md. 1990)* ; *Newman v. Hinky Dinky Omaha-Lincoln, Inc., 427 N.W.2d 50 (Neb. 1988)* . For a list of other cases using this rationale see Patrick A. Randolph, Jr., *Coping with the New Rules on Assignability of Commercial Leases,* The Commercial Property Lease 191, 201 (ABA 1993), in The Commercial Property Lease (ABA 1993).

(n76)Footnote 253. *See, e.g., Brigham Young Univ. v. Seman, 672 P.2d 15 (Mont. 1983)* ; *Schweiso v. Williams, 198 Cal. Rptr. 238, 239 (Cal. App. 1984)* .

(n77)Footnote 254. *Julian v. Christopher, 575 A.2d 735 (Md. 1990)* (Lessor sought to terminate lease unless lessees agreed to pay $150 more for an apartment. Lessor's insistence on the higher rent held to be an unreasonable basis for denying consent to assignee. Lessor is entitled only to a sublessee financially capable of paying the original contract rent.).

(n78)Footnote 255. *See, e.g., N.J. Indus. Props., Inc. v. Y.C. & V.L., Inc., 495 A.2d 1320 (N.J. 1985) , reported in 50 A.L.R.4th 369 (1986)* .

(n79)Footnote 256. *First Fed. Sav. Bank of Ind. v. Key Markets, Inc., 532 N.E.2d 18 (Ind. 1988)* .

(n80)Footnote 257. *Carma Devs. (Cal.), Inc. v. Marathon Dev. Cal., Inc., 259 Cal. Rptr. 908 (1989)* .

(n81)Footnote 258. Cal. Civ. Code § 1995.270(a).

(n82)Footnote 259. *Carma Devs. (Cal.), Inc. v. Marathon Dev. Cal., Inc., 826 P.2d 710 (Cal. 1992)* . Courts in other states have enforced the landlord's reservation in the lease of rents the tenant receives from subtenants--without the benefit of a statute on the point. *See, e.g., KCP Corp. v. The Book Press, 636 A.2d 325 (Vt. 1993)* .

(n83)Footnote 260. Cal. Civ. Code § 1951.4(c).

(n84)Footnote 261. The question the legislature failed to answer was whether a lessor could allow the lessee to assign with the lessor's prior consent "in the lessor's sole and absolute" discretion. Such clauses are probably enforceable under California common law but there is room for argument whether the statute subsumes this provision as one type of "absolute prohibition." Except for absolute prohibitions, the statute requires all other consent provisions to be subject to "express standards or conditions," or a "reasonableness" standard is implied. It isn't clear whether "sole discretion" constitutes an "express standard or condition." *See* Susan E. Myster, *Protecting Landlord Control of Transfers: The Status of "Sole Discretion" Clauses in California Commercial Leases, 35 Santa Clara L. Rev. 845 (1995).* The author argues the case for legislative clarification. The Legislature disapproved a provision that would have sanctioned lessors using a "sole and absolute" discretion standard when the statute was enacted initially.

(n85)Footnote 262. *Id.* § 1995.240.

(n86)Footnote 263. *Id.* §§ 1995.210, 1995.220.

(n87)Footnote 264. In *Ilkhchooyi v. Best, 45 Cal. Rptr. 2d 766 (Cal. App. 1995)* , an appellate court characterized as unconscionable and, hence, unenforceable, a landlord's attempt to enforce a 75% recapture because the recapture included the value of the tenant's business. The tenant was selling the business along with its interest in the lease. The 75% recapture provision applied to amounts constituting "rent or other consideration, including without limitation any consideration of a tenant's business, business opportunity, good will, a covenant not to compete and/or the like, either initially or over the term of the assignment or sublease ... ." Along with an assignment of the lease, the tenant sold personal property and a covenant not to compete and refused to share the consideration with the lessor. When the lessor returned a rent check drawn on the business account but signed by the assignee, the assignee was so distressed by the lessor's intransigence, he reduced his offer for the business by $40,000. (He had signed the check as an employee of the lessor before they had concluded their deal.) The court held the clause unenforceable but overturned a trial court punitive damage judgment of $30,000. The case may encourage tenants in a mood to challenge lessor recapture clauses to argue the premiums they are getting from assignees are not consideration for the value of the lease but consideration for the value of the tenant's business.

(n88)Footnote 265. There is a statutory exception to the rule that the landlord's consent, absent a standard, cannot be unreasonably withheld. In leases entered before September 23, 1983, landlords who reserved the right to consent can withhold it for no reason whatever. 1983 was the year that *Cohen v. Ratinoff* implemented a reasonableness-for-consent test. When the landlord conditioned assignment on consent in leases entered after September 23, 1983, the landlord's consent may not be withheld unreasonably if the lease requires consent but contains no express standard for exercise.

(n89)Footnote 266. Richard C. Mallory, *Lease Economics: Follow the Money,* 6 Real Est. Fin. J. 72, 75 (1991).

(n90)Footnote 267. *Id.*

(n91)Footnote 268. *See* Charles E. Carpenter, *Interference with Contract Relations, 41 Harv. L. Rev. 728, 735 (1928);* Jonathan Rivin, *Stealing the Other Guy's Tenants: Is It Tortious Interference?*, in Patrick A. Randolph, Jr., The Commercial Property Lease 205 (1993).

(n92)Footnote 269. *See, e.g., Charles C. Chapman Bldg. Co. v. California Mart, 82 Cal. Rptr. 830 (1969)* .

(n93)Footnote 270. Prosser, Law of Torts § 129 (5th ed. 1984). "The elements of the cause of action for intentional interference with contractual relations are (1) a valid contract between plaintiff and the third party, (2) defendant's knowledge of this contract, (3) intentional acts designed to induce a breach or disruption of the contractual relationship, (4) actual breach or disruption of the contractual relationship, and (5) resulting damage. (The elements of the cause of action for intentional interference with prospective economic advantage differ only in that the cause of action is founded on an economic relationship between the plaintiff and some third party, with the probability of future economic benefit to plaintiff.) A person cannot incur liability by giving truthful information to a third party." *Savage v. Pacific G & E, 26 Cal. Rptr. 2d 305 (1993)* .

(n94)Footnote 271. *See, e.g., Forty Exch. Co. v. Cohen, 479 N.Y.S.2d 628 (1984)* ; *Burkeimer v. Thrifty Inv. Co., 533 P.2d 449 (Wash. App. 1974)* .

(n95)Footnote 272. Anton Natsis, *New Trends in Negotiating Office Leases,* 51 Urb. Land 42, 45 (1992).

(n96)Footnote 273. Marvin Garfinkel, *Counseling the Tenant on Leasing a Large Office,* from ABA Section on Real Prop., Prob. & Trust Law 25, 28 (ABA 1993).

(n97)Footnote 274. *See* Kenneth A. Posner, *The Story of Law Firm X's Lease Restructuring,* Real Est. Fin. J. 29 (Winter 1994).

(n98)Footnote 275. But building department practices vary across the county regarding when the certificate will be issued, and there are temporary certificates, conditional certificates, and final certificates. Moreover, there can be a considerable delay between the final satisfactory inspection and the actual issuance of the piece of paper called the certificate of use.

(n99)Footnote 276. Sometimes the shopping center or office is ready for occupancy, up and running, but the tenant's space hasn't been outfitted and made ready for occupancy. Tenant improvements may be lacking. If the tenant was responsible for making the tenant improvements, delay occasioned by the improvements being late won't justify the tenant refusing to pay rent. The lease commences on the date originally agreed. If the lessor is responsible for making the tenant improvements, the lessor may become liable for the delay.

(n100)Footnote 277. *Exception:* Residential tenants in cities with rent control laws can't be evicted without "good cause," as defined in those ordinances. Lenders purchasing on foreclosure, even those whose liens pre-date the ordinance and the lease, may be subject to rent control laws. *Compare Gross v. Superior Ct., 217 Cal. Rptr. 284 (1985)* (state unlawful detainer statute held not to preempt "good cause" eviction provision protecting tenure of rent controlled tenants) *with Guttenberg Sav. & Loans Ass'n v. Rivera et al., 428 A.2d. 1289 (N.J. 1981)* (mortgagee whose loan was recorded before tenants took possession held entitled to evict tenants following foreclosure despite state "good cause" eviction statute). This result is justified because the purchaser at foreclosure acquires the lender's interest as it existed when the lessor first gave the lender a security interest in the property. The lender acquired its security title at that date. Since the lease came later, the lessee takes subject to the mortgage, assuming the mortgage was recorded or the lessee had inquiry or actual knowledge of the prior mortgage. A senior lienholder can evict the tenant after foreclosing. The subordinate lessee could have protected himself by insisting on a promise of non-disturbance from the lender before and as a condition to entering the lease. There is an old juridical twist, though, by which subordinate lessees at risk of their leases being terminated are given the right themselves to terminate their leases even when the foreclosing senior lienor would have preferred the lessee stay put. It's sort of a "what's good for the goose is good for the gander" idea. Or maybe a case of the long-buried doctrine of mutuality of remedy arising from the grave like the undead who populate a certain genre of horror movies.

(n101)Footnote 278. *270 Cal. Rptr. 183 (1990)* .

(n102)Footnote 279. Handbook for Shopping Center Developers 179 (Urban Law Institute, 2d ed. 1985).

(n103)Footnote 280. Hershman, *Leases--Pitfalls and Pratfalls, Address to Business Loan Seminar, New York Life Ins. Co., Mackinac Island, Michigan (Sept. 26-28, 1967), reprinted in* Michael Madison & Robert M. Zinman, Modern Real Estate Financing 527 (1991).

(n104)Footnote 281. *Conference Ctr. Ltd. v. Research Corp., 455 A.2d 857 (Conn. 1983)* .

(n105)Footnote 282. *R-Ranch Markets #2, Inc. v. Old Stone Bank, 21 Cal. Rptr. 2d 21 (1993)* .

(n106)Footnote 283. *Gates Rubber Co. v. Ulman, 262 Cal. Rptr. 630 (1989)* .

(n107)Footnote 284. Seneca B. Anderson, *The Mortgagee Looks at the Commercial Lease, 10 U. Fla. L. Rev. 484 (1957).*

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CHAPTER 97 CONSTRUCTION AND DEVELOPMENT LAW

12-97 Thompson on Real Property, Thomas Editions § 97.07

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§ 97.07 Special Features of Construction and Post-Construction Financing in Commercial Developments.

[Go To Supp]

§ 97.07(a) Introduction.

Real estate lenders traditionally divide into those which make construction loans, and those which fund only fully completed projects. Construction loans are made short-term to pay the costs of construction. The construction lender advances funds as construction progresses and allocates some of the loan proceeds as interest. The construction loan payoff date usually coincides with completion of the project. The construction lender is usually counting on a post-construction or permanent loan made following completion of the project to pay off the construction loan. A post-construction or permanent loan might also refinance an existing permanent loan, or allow an owner to extract appreciated value from the property, tax free.

One of the construction lender's biggest credit risks is that the project won't be completed. Even if the construction lender stages loan draws carefully, a half-finished project isn't really worth half of its total cost. Until the project is completed, the construction lender's credit risk can be sizeable.

In many cases the property is worth more vacant than just after construction begins. With good title, land use entitlements, approved plans and specs for a building, and a hazardous waste clearance, a vacant site has a demonstrable value.

Once construction begins there can be mechanic's liens, a need to have the site released from a blanket encumbrance, the obligation of the site owner to complete construction, and so on. If the proposed improvement is stopped midway, completion must either be funded, or what had been built so far must be demolished. If the site had been legally subdivided according to a subdivision map act approval, the subdivision may have to be erased of record in a proceeding sometimes called a "reversion to acreage." All of these possibilities can result in the site being worth less after construction begins than it was worth before construction.

When construction is completed, the project receives a certificate of use or occupancy. A vacant building may not be much more valuable than a vacant site. But if the project can be sold or fully leased (hopefully, at the prices or rents projected in the developer's pro forma), its value should be greater than it had been when the land was vacant.

Traditionally, the construction lender wouldn't advance funds until the developer obtained a commitment from a post-construction lender to provide a big enough loan to pay off ("take out") the construction loan once the project was finished.

The "interest" risk of the post-construction lender is long term; its loan will be in place for three to thirty years, as against maturities of six months to two years for the construction loan. The construction lender handles its interest risk through the use of variable rate loans using the prime rate, LIBOR, n285 U.S. Treasuries, lenders average cost of funds, or some other floating index. Commercial "permanent" loans are often written for fixed rates.

The credit risks of the two types of lenders are different. After completion, the construction lender's credit risk is reduced by the permanent lender's promise to finance the project on completion. In comparison, the post-construction lender often manages its credit risk by conditioning its loan commitment on the developer's ability to secure tenants whose rents will cover debt service on the project.

Construction lenders typically charge 150 to 250 basis points (i.e., 1.5-2.5%) over LIBOR, plus an origination fee between 1/4-1/2%, for a two-year period. Deals under $10 million are not typically priced using LIBOR, but rather, the Corporate Base Rate, which is 125 basis points (1.25%) higher than LIBOR. A good middle-market developer's rate would be about 150 basis points over the Corporate Base Rate, plus a 1% fee, for 18 months.

The lender's net return is not limited to the interest charged on the outstanding loan, but also includes various fees. All construction loans require an initial loan fee to cover the cost of underwriting, structuring and closing the loan. As with the interest rate, fees are subject to negotiation and vary widely between projects. For this reason, it is very important to look at total pricing, including loan fees, when comparing loans.

Although loan fees and interest rates are negotiable, the following costs generally are not. The borrower is required to pick up all legal, title and closing costs, as well as the costs of an appraisal and an outside inspector who will go out on a monthly basis at a cost of $150-1,500 per visit, depending on the complexity of the project. Sometimes the developer is able to persuade the lender to "cap" the legal, title or closing costs, with the developer paying the actual costs below the cap and the lender paying the rest. There is also an up-front fee for reviewing all the plans and specs, doing a budget estimate, and comparing the lender's budget estimate to the developer's.

§ 97.07(b) The Usual Risks and Risk Avoidance Devices of the Construction Lender.

Consider the risks of a construction lender who agrees to advance funds to a developer on a project not yet built:

Risk 1: Overbudget. Overtime. The project may cost more and take longer to build than the developer's budget forecasted.

Avoidance 1: The construction lender reviews the developer's plans and construction cost estimates for accuracy. It also reviews the construction contracts.

The construction lender attempts to obtain the developer's personal promise to complete the project on time and on budget, resisting the developer's importunities to make the loan "non-recourse." That promise is embodied in a construction loan agreement which gives the lender the right to stop funding if the developer defaults or if the project is progressing slower or more expensively than planned.

The construction lender may insist that the developer obtain a surety, performance or payment bond obligating the bond company to guarantee, complete or pay for the completion of the project.

Risk 2: Out of Balance Funding. The developer may seek larger than necessary disbursements from the construction loan in the early stages of construction, which causes the funds remaining with the lender to be insufficient to complete the project if the developer becomes insolvent or disinterested in the project.

Avoidance 2: The construction lender tries to prevent "front end loading" of the construction loan fund by estimating what each stage of the project will cost, verifying through architects and its own experts how much work has been done before each construction loan advance is to be paid to the developer, and withholding a certain percentage (from 5 to 15%), until after satisfactory completion.

Real estate lender James Moore explains, if the inspector reports that the amount funded is not going to be sufficient to complete the project, the lender has several options: n286

> First, we notify the borrower that they are "out-of-balance." At that point, our legal documentation gives us the right to stop advancing funds. They then have a ten-day period to respond or explain away our concern, or give us a check or a satisfactory guarantee to make up the amount by which they are out-of-balance. If they fail to do any of these things, and we're absolutely confident that they are out-of-balance, we can take action under the legal documents and begin withholding payments. There would have to be ample evidence of a short-fall or we'd risk legal exposure as well as damage to our reputation.
>
> We insist in all projects that there be some additional money the development can draw upon to cover change orders, upgrades, or cost overruns due to a sub having underbid the job. The typical amount would be 5% of hard costs (general contractor's costs) and 2 or 3% of soft costs (title, legal appraisal, architectural items). n287

Risk 3: Value on Completion Less Than Construction Cost. The budget may be adequate but the completed project may not be worth what it cost to build. The project may not be rentable for enough to repay the loan.

Avoidance 3: The construction lender reviews the developer's market analysis and independent appraisers verify the developer's estimate of project value. The construction lender also checks the borrower's credit history and financial resources to see if the borrower has the means to pay any deficiency that may arise between the value of the project at completion and the construction loan balance. The construction lender may--and usually does--insist that another solvent and responsible lender commit itself to make a loan on completion sufficient to pay off the construction loan.

The construction lender may insist the developer enter leases with high quality ("credit") tenants in advance of construction at rents sufficient to service a permanent loan which is big enough to pay off the construction loan.

Risk 4: Interest Rate Fluctuations Causing Project to Become Uneconomic. Interest rates may rise so high during construction that the project income upon completion, which would have been sufficient to pay the initial loan rate, will not cover the higher rate.

Avoidance 4: The lender handles its interest risk by using variable-rate construction loans which float with the bank's prime rate, LIBOR, or the corporate base rate. A few lenders make fixed rate loans. Since these are for relatively short terms (six months to two years), the lenders who make fixed-rate loans construction loans (usually savings associations) have either matched them with fixed-rate deposits or are prepared to take the gamble because of the construction loan's short maturities. A lender concerned about the ability of the project or the developer to absorb open-ended interest rate liability will make a fixed-rate loan, cap the variable rate, or urge the borrower to enter an agreement to swap its floating rate obligation for a fixed-rate one.

Risk 5: Disasters and Calamities Affecting Construction. Calamities such as strikes, bad weather, and vandalism may

prevent timely completion.

Avoidance 5: The lender requires the developer to buy "all risk" insurance against calamities and name the lender as beneficiary.

Risk 6: Diversion of Funds. The developer may divert construction funds away from the project, leaving contractors and subcontractors unpaid.

Avoidance 6: To prevent the developer from diverting funds, the lender may issue joint checks to the developer and general contractor, or insist that the contractor provide the names of all subcontractors and material suppliers on the job, and write checks directly to them. The lender will want from all subcontractors and contractors lien waivers of their rights under mechanics' lien laws.

Risk 7: Developer Distraction. The developer may be working on several projects at once and decide that this one isn't the one most deserving of her attention.

Avoidance 7: Lenders definitely prefer projects where the developer has substantial funds at risk, as the developer is less likely to lose interest in the project. To discourage the developer from "cherry picking" a more promising project and letting this one slide, the lender may insist on a mortgage on all or some of the property the developer owns or later acquires before paying off the construction loan. This is called "cross collateralization."

Under recording act principles, the priority of the construction lender's lien to other properties won't be established until it is recorded in the chain of title to those properties. Merely describing the other properties in the mortgage on the development site won't be sufficient.

Further, if the developer doesn't acquire other sites until after the construction loan is made, the after-acquired *property clause* is, at best, a promise by the developer to subject after-acquired property to the construction lender's lien. In some states, such a promise will be enforced only if the subsequently acquired site bears a functional relationship to the primary site. n288 Not only will a developer resist such a requirement, the developer's lenders on the other sites can be expected to balk at subordinating their liens or waiving their "due on encumbrance" rights which allow them to accelerate existing loans if new ones are secured by the same property.

Risk 8: Failure of Post-Construction Lender to "Take Out" the Construction Loan. When the project is completed, the construction lender is counting on being repaid by another lender providing a long-term loan to the borrower. However, the borrower may not be able to find such a lender, may find one who is not willing to lend enough to pay off the construction loan, or may find one only willing to lend when the building is leased up, or nearly so. Additionally, the post-construction lender may breach its commitment to fund or find a legal means of avoiding it.

Avoidance 8: If the developer can't obtain a commitment from a permanent or post construction lender, the construction lender may write the loan so that, upon completion of the project, the construction loan becomes a post-construction loan at very high rates, to encourage the developer to try hard to find a permanent lender.

If a loan commitment is obtained from a permanent lender, the construction lender will review its terms and insist on limiting "escape" clauses by having the permanent lender approve title, building plans and environmental audits in advance. The construction lender will make the developer's breach of the terms of the post-construction loan a breach of the construction loan.

The construction lender may obtain a promise directly from the post-construction lender to buy the construction loan on completion; the construction lender can then enforce this promise directly, instead of having to rely on its status as a third-party beneficiary of a commitment letter from the permanent lender to the developer. These are called buy-sell

agreements. They are signed by the construction and post-construction lender and often by the borrower as well. n289 They provide that when the project is completed, the post-construction lender will buy and the construction lender will sell the construction loan. Buy-sell agreements make it difficult for the borrower to finance the "take out" loan elsewhere.

Risk 9: Mechanics' Liens. The construction lender requires a first lien on the development property because it will have to assign that lien to the post-construction lender. The post-construction lender will also insist on having a secured first lien. However, if the developer fails to pay laborers and material suppliers, they may be able to assert liens superior to the construction loan. The post-construction lender won't fund its commitment until those mechanics' liens are released of record.

Avoidance 9: To assure itself a first lien, the construction lender insists on a policy of title insurance specifically protecting the lender against mechanics' liens. The astute post-construction lender will also insist that it have a first lien that is in fact superior to mechanics' liens because a title policy will not be good enough if the title insurer has defenses, exclusions or exceptions in the policy that it could invoke to avoid paying off the liens. The post-construction lender "buys" or takes an assignment of the construction loan in order to enjoy the lien priority of that earlier loan, free of any intervening liens that may have been filed after the construction project began.

§ 97.07(c) Commercial Lending Cycle.

§ 97.07(c)(1) Traditional Lenders.

Because most construction lenders won't commit themselves until the developer finds a permanent lender, the commercial lending cycle is convoluted:

Step One: The developer obtains a post-construction lender's commitment to lend upon completion.

Step Two: Armed with that commitment, the developer goes to a construction lender for a commitment letter.

Step Three: The post-construction (A) and construction lender (B) reach some form of agreement that on completion, (A) will provide sums sufficient to pay off the (B) loan.

1. That agreement may be in the form of a buy-sell: (A) agrees to buy the (B) loan, and (B) agrees to sell that loan to (A), and only to (A).

2. Or the developer/borrower may sign all the notes and mortgages at the outset, putting the documents in escrow until the project is completed. In this arrangement, called a piggyback, the developer doesn't have to do anything further. As long as (A) and (B) agree that the project is completed, (A) releases funds to pay off the (B) loan, (B) releases its mortgage or deed of trust, and the (A) mortgage is recorded.

Both of these arrangements obligate the developer to borrow and the lender to lend, with the construction lender a third-party beneficiary of the permanent lender's promise to fund on completion.

3. The developer may also resist the lender's structuring the transaction as a buy-sell or a piggyback. The developer may prefer to hold just an option commitment from the post-construction lender, retaining the freedom to shop later for a better long-term loan.

Step Four: The construction loan is closed and construction begins. Payments are disbursed as the work progresses according to a building loan agreement between the developer and the construction lender, obligating the developer to build according to agreed plans and specs.

Step Five: The construction loan is funded in stages and the project is built.

Step Six: When the terms of the post-construction lender's commitment letter have been met, the post-construction loan is closed, funds are disbursed to satisfy the construction loan and the balance, if any, is paid to the borrower.

§ 97.07(c)(2) Wall Street and the Securitization of Loans.

Securitization is a way for developers to find new, alternative sources of financing by creating a debt instruments which target an identifiable segment or subsegment of the capital market; *i.e.*, the project loan is made like a marketable security. n290 Securitization does not identify a particular type of loan transaction. The developer and her investment banker create a marketable security to sell to investors who might not have had the ability or desire to originate a traditional loan for the project. n291 The market for this product is estimated to be anywhere between $600-700 billion to $800 billion.

The issuer structures the new security to attract investors and often uses component debt and various investor assurances to do so. Component debt divides the large debt into smaller chunks, each with distinct features attractive to different subsegments. Dividing the debt this way allows the developer to meet each investor along his demand curve instead of paying the full amount to a single investor/traditional lender. The issuer also wants to give the investor sufficient information to judge the issue but remove the hassle of rigorous real estate analysis since many issues target segments without the ability to properly analyze the project. n292 Investors in these segments may reject the issue for the inability to do the analysis alone. The issuer can meet her goal by performing all the analysis a traditional lender would and providing that to the investors, getting the issue rated by an agency such as Standard and Poor's, or by enhancing her credit through either a third-party guarantor or self-enhancement (create two classes of security, one rated investment grade for investors unable or unwilling to do the real estate analysis and the other of inferior grade or unrated for non-risk adverse investors).

Developers and issuers may face problems trying to securitize commercial loans. The securitized loan may involve only one property or project, which concentrates risk. Further, the property may not be worth the remaining value of the loan, increasing the risk of loss. Lastly, there is no uniform standard of underwriting analysis and evaluation which may allow questionable loans to be securitized.

Securitization of loans runs directly into the Securities Act of 1933 n293 and Securities and Exchange Commission ("SEC") regulations compelling com-pliance with extensive registration requirements. However, the developer/issuer can avoid registration through private placement, n294 certain large mortgage transactions, n295 getting the issue guaranteed by a bank, n296 or having a state or federally chartered thrift issue the security. n297 Where no exemption applies, the issue must be registered prior to offer and sale.

§ 97.07(d) Selecting the Lender.

Experienced developers know where money can be found. Inexperienced developers use loan brokers or loan representatives of major lenders. Life insurance companies have been important sources of loan funds for commercial real estate. So have pension funds, REITs and firms such as GE capital. Commercial banks usually stick to construction loans and avoid permanent or postconstruction financing because their deposits are short-term and very interest-sensitive. Savings associations were traditionally home-lenders but forayed into commercial finance, long-term and construction loans, with sometimes disastrous results in the 1980s.

Institutional lenders are notoriously conservative, eager to stay within conventional bounds. John Maynard Keynes observed:

A "sound" banker, alas, is not one who foresees danger and avoids it, but one who, when he is ruined, is ruined in a conventional and ordinary way along with his fellows, so that no one can really blame him. n298

Developers who have a choice prefer construction lenders who won't insist on full personal liability. Construction lenders prefer lending to developers who have their own money at risk and aren't looking to lenders for one hundred percent of a project's cost. The recourse nature of the construction loan is sometimes subject to negotiation. Construction lending expert James Moore elaborates:

> Our standard underwriting, as with almost any bank, is a full-recourse loan. The larger the developer, and the more clout they have, the more often they negotiate for some limitation on recourse. For us to limit our recourse means there has got to be significant equity in the project, or a good substitute such as pre-leases or a take-out loan, that reduce our risk in the transaction. In my opinion, equity in a project, above all else, is the key consideration in negotiating limitations on recourse. I'd rather someone had their own funds at risk as an incentive to protect a project, than someone who had signed a piece of paper promising later to write a check if things go wrong. We can fight for years in court trying to collect on the borrower's written guarantee. A borrower with equity at risk is a better bet to repay a loan. n299

Of course, developers shop for the lowest interest rates and loan closing costs, but they consider other things too. Developer Roger Torriero, President of Griffin Related Properties, which has developed numerous high rise office complexes, mixed-use developments and commercial sites throughout California, particularly in Orange County, Los Angeles, and San Francisco, explains:

> When we look at a construction lender we're looking at the sophistication of the loan officers and the experience they have had with similar projects. If you get loan officers who don't know what they're doing you can spend a lot of time educating them about what's going on with the project and trying to convince them that they're secure and that it's okay to advance the funds. This can be very frustrating. Along with this we look closely at their track record for making timely advances.
>
> We also look at the recourse component. Some lenders require corporate and personal guarantees for a loan. Obviously we avoid giving personal guarantees whenever possible; in fact, we'll generally do whatever is needed to negotiate away any personal guarantee requirement. We generally have to give certain corporate guarantees, like a completion guarantee. Banks are almost always going to require some guarantee beyond the security in the project.
>
> Some lenders have very strict bonding requirements for the subcontractors. Getting the subcontractors bonded, which creates a guarantor for the completion of the subcontractors' work, can be very expensive. We like to get bonds from some of our subcontractors, like a granite supplier, for example, but we don't like to be required to have Westinghouse Elevator get a bond. There's just no need for it. Of course the main concern is almost always the interest rate and whether it's fixed or floating, and if it's floating, what index it's tied to, and at how many points over the index. n300

§ 97.07(e) Loan Participations and Syndications.

§ 97.07(e)(1) The Distinction Between Participations and Syndications.

Increasingly, commercial borrowers aren't able to deal with just one lender to finance their projects. They have to involve several. This raises special problems for the borrower and the lenders.

In a standard loan "participation" arrangement, an originating lender, frequently a commercial bank, agrees to sell all or part of a note and deed of trust, usually to other banks. The bank that puts the deal together is the "lead"; those who buy

interests in the loan are "participants." n301

Commonly, participations are structured in one of two ways:

> 1. The debt is secured by one mortgage. The debt is evidenced by a series of notes or bonds, each one for a fraction of the total debt. Each participating lender gets one of the fractionalized notes. The lead lender or a common trustee holds onto the mortgage.
>
> 2. The debt is secured by one mortgage on a single property or by many mortgages, each on a different property. The debt is evidenced by a single note. The "lead" lender sells "participation certificates" in the note to other institutions. n302 To see what these documents look like, *see* Robert H. Wiorski, *United States League of Savings Institutions Illustrative Secondary Market Agreements*, 51 U.S. League of Savings Insts. Legal Bull. 303 (1985).

An alternative to "participation" is "syndication." When lenders agree to syndicate a loan, each is directly liable to the borrower for its agreed share of the total--but only for its share. If one lender pulls out, the borrower suffers the shortfall and scrambles to make it up by using the borrower's own resources, by persuading the remaining lenders to increase their shares or by finding a new lender to join the party. In a participation arrangement, the lead bank agrees to make the loan and is solely and fully liable to the borrower. Afterwards, it may sell shares in the loan, or all of it, to others.

§ 97.07(e)(2) The Downside of Syndications and Participations.

Sharing loans is expensive; instead of one bank making an appraisal, three or four appraisers--one for each institution--may prepare estimates of value. Instead of one lawyer representing the lender, there may be one lawyer for each, and a cacophony of drafting requests, unless the borrower insists they all agree to speak through one representative. Usually the borrower is forced to pay the lender's legal fees--always a joyless burden--and one which is multiplied by the number of participating lenders.

Should there be cost overruns on a construction loan or some other default, lenders may disagree on the best course of action. Some may want to avoid foreclosure at all costs and work out a feasible repayment schedule with the borrower. Other lenders may be harsh and unforgiving, licking their chops at the chance of acquiring the troubled property through a speedy foreclosure. A well-drafted participation or syndication agreement will spell out, in the event of default, whether any bank can put the loan into foreclosure, whether a majority can pull the plug, or whether only the lead has that discretion.

Patricia Frobes, a real estate partner at the law firm of O'Melveny & Myers, cautions:

> "Work outs" are going to be complicated when many lenders own a piece of the loan. No matter how much power the loan participation documents give the lead lender, all lenders will be asked to sign off on modifications or releases of the deed of trust. n303 Moreover, in California especially, the precipitous action of any one of the lenders can put the others at legal jeopardy. Imagine, for instance, one lender takes funds from a borrower's account to cover a judgment on the note. Won't the borrower invoke CCP § 726 against all the lenders, claiming that the set-off terminates the other enforcement rights under the note and deed of trust? n304

§ 97.07(e)(3) Why Participations and Syndications Are Commonly Used.

Why then, have loan participations and syndications become so common? James Moore n305 explains:

> 1. *Portfolio diversification*: Say a lender has $1 billion to lend. It could make ten loans of $100 million

or forty loans of $25 million. The transaction costs of making forty loans will be four times greater, but if any single loan "goes sideways," it probably won't significantly affect the balance sheet or the traded value of the bank's stock. On the other hand, if the bank made only ten loans and one went bad, there might be serious balance sheet repercussions.

Another aspect of diversification is that banks not already involved in real estate may want some real estate loans in their portfolios without incurring the costs of setting up a full real estate department. They prefer buying a piece of a real estate loan from a lender experienced in underwriting such loans.

2. *Legal limits*: Banks are regulated. They have limits on how much of their total assets they can lend to any single borrower. By participating or syndicating, a lead bank with special competence in real estate lending can earn origination fees on many more loans than it could legally hold in its own portfolio.

3. *Reassurance*: Lead banks like knowing that other lenders agree with them that a loan is a good credit risk and is priced appropriately. Bank managers who find themselves with an unsalable portfolio know they've probably done something wrong. Maybe they've taken on too much risk or priced their loans below market.

4. *Customer request*: Occasionally an important customer requests the lead bank to involve another lender. The customer may have business or personal reasons for the request. A bank wanting to keep the customer happy may prefer sharing some of the customer's loans with a rival bank, rather than risk losing the customer entirely.

§ 97.07(e)(4) Regulatory or Market Pressure.

In addition to Mr. Moore's points, a fifth reason for loan participation arrangements derives from the pressure occasionally felt by banks and insurance companies to divest their real estate holdings. Wall Street stock analysts, federal and state banking regulators and insurance regulators may urge institutions to reduce the percentage of real estate in their portfolios because office and retail markets in many U.S. cities are overbuilt. Yet banks and insurance companies know there are profitable opportunities in real estate. To make real estate loans indirectly, banks may form new lending vehicles.

Here is one possible format: The bank puts up, say, $30,000,000. It then finds a pension fund willing to invest $70,000,000. The bank subordinates its $30,000,000 to the pension fund's $70,000,000. Together, they approach other institutions for an additional $100,000,000 of senior debt. The bank, in other words, will be subordinated to both groups of investors.

The resulting fund is then administered by the bank to make construction loans to builders at relatively low loan/value ratios and only on projects for which builders have already obtained buyers, tenants, and permanent loan commitments.

The bank is putting its money into an entity that makes the loan but it isn't making the loan directly. The bank's advisors are hoping that regulators and analysts won't regard the bank's investment as a real estate investment, but as something else instead (almost anything else will do).

The bank will collect substantial fees for processing and servicing the individual construction loans and managing the investment vehicle. Its rate of return should look pretty good to its stockholders. n306

§ 97.07(e)(5) Characterizing the Legal Relationship Among Loan Participants.

Because banks share participations in each others' loans so often, they sometimes lean heavily on personal relationships

and depend less on carefully drawn documents to define their respective roles and responsibilities. Informality invites confusion when a lead bank files bankruptcy, gets merged or acquired out of existence, or the debtor defaults.

§ 97.07(e)(6) Priority Between the Participants and Third-party Creditors.

Third parties may seek a share of the foreclosure proceeds by disputing the claims of the loan participants that they each have a prior security interest in a mortgage on the foreclosed property. They may contend that the loan participants are actually unsecured creditors of the lead lender. If the lead is in bankruptcy, they will try to show that the participants holding "participation certificates" were actually unsecured creditors of the bankrupt lead and not part-owners of the foreclosed mortgage. They will assert that the lead didn't sell the mortgage to the participants, but rather that the participants actually lent money to the lead to make the loan. The claim that the participants are unsecured creditors of the "lead" and not co-owners of the mortgage is strengthened if the lead commingled proceeds from the participation mortgage with proceeds from its own portfolio, or if the participants had been paid on some basis other than the yield on the underlying mortgage. The participants must prove they bought fractional shares in the underlying mortgage in order to be treated as secured creditors in bankruptcy and to share foreclosure sale proceeds as senior lienors. n307

Alternately, the participants may seek to prove that the lead bank was an agent for the participants or a trustee. As a trustee or agent the lead would owe them a fiduciary duty of care. This characterization would strengthen their claim to an ownership interest in the underlying mortgage. It also implies that if things go wrong, the lead will be accountable to the others and any funds collected on the note will belong to the participants as beneficiaries of an implied trust.

If a bankruptcy court characterizes the relationship between lead and participant as that of creditor-debtor and holds that the participants do *not* have a direct interest in the note and deed of trust, they become unsecured creditors of the lead lender in bankruptcy. n308

§ 97.07(e)(7) Lien Priority Among the Participants.

If a default occurs and foreclosure proceeds don't bring enough money to pay off all the participants, the proceeds are apportioned pro rata in the absence of a contrary agreement. n309 There is authority that the lead lender also shares in the proceeds pro rata unless it guaranteed payment to the participants. n310 Lastly, there are decisions subordinating the lead as an implied trustee or implied guarantor. Most participation agreements address and resolve this priority issue explicitly.

§ 97.07(e)(8) The Joint Venture Trap.

The most disastrous characterization for a participant is to be treated as a joint venturer with the "lead." If the debtor defaults on the underlying note and deed of trust and the participant and the lead are joint venturers, they may be liable for sharing any losses that accrue. The lead might also be able to commit the participants as joint venturers to additional debt. Most courts do not classify lead and participant as joint venturers because one feature of a joint venture is missing: an agreement to share profits and losses. In loan participations, the buyer of the loan is only agreeing to receive interest payments. n311

§ 97.07(e)(9) Title Insurance.

If the participants in a mortgage don't have direct ownership rights in the mortgage, they may not be covered by the mortgagee's title policy even though the mortgagee's assignees are protected by the ALTA extended coverage policy. They should list themselves as insureds on the policy, obtain an endorsement extending coverage to them when they enter the participation agreement, record their agreement and notify the title insurer of their interest.

§ 97.07(e)(10) The Agreement Is Crucial.

Well-advised lenders enter into detailed inter-lender agreements. n312 James Moore and Glenn Sonnenberg offer these guidelines:

> 1. One lender should be designated as an agent for the others with power to make day-to-day decisions and disburse funds.
>
> 2. Only that agent should be listed as the beneficiary in the deed of trust. When more than one beneficiary appears on title, no responsible trustee will mail a notice of default or proceed to foreclose without the written authorization of all the beneficiaries. This can result in costly processing delays.
>
> 3. All participating lenders should be given a direct interest in the security instrument even though the agent is empowered to act for them in realizing on the security. Otherwise, they could risk being general unsecured creditors of the agent instead of being secured creditors of the mortgagor.
>
> 4. Sometimes lenders will insist that the consent of a plurality or a majority of lenders be obtained as a condition to foreclosing, modifying the loan terms, accepting a deed in lieu of foreclosure, etc. This sort of requirement isn't fatal as long as the agreement specifies what the agent is to do in the event the requisite consensus isn't attained. Especially regarding the response to default, the agent should be empowered to foreclose unless the lenders first adopt a clear alternate strategy.
>
> 5. The obligations of the participant to the lead and the lead to the participants should be clearly described. If some participants fail to fund their commitment, what liability have they to the others? Are the participants relying on the lead's assessment of the credit-worthiness of the borrower and the value and earning power of the security property? Is the lead obligated to account for and disburse mortgage payments from the borrower to the participants? Is the lead obligated to provide detailed financial information about the borrower to the participants after a default and during workout negotiations? Is the lead agreeing to subordinate its interest to theirs in the event of default? n313
>
> 6. Under what conditions, if any, may the participants remove the lead? n314

§ 97.07(f) Appraisals.

Lenders need property appraisals in deciding whether to make a loan (the decision process is called underwriting). For most institutional lenders (banks, insurance companies, pension funds) the standards for those appraisals are set by regulators. n315 For instance, all lenders whose accounts are insured by the federal government must meet appraisal standards issued by the Office of Thrift Super-vision. n316 The federal rules don't require appraisals for small loans (less than $250,000). n317 For large transactions, an appraisal must be prepared by a state certified appraiser. n318 This has prodded states into regulating the appraiser profession. n319 Federal regulation requires appraisers to conform to generally accepted standards as evidenced by the Uniform Standards of Professional Appraisal Practice promulgated by the Appraisal Standards Board of the Appraisal Foundation, unless safe banking practices require a stricter standard. n320

The OTS regulations define market value:

> *Appraisal* means a written statement independently and impartially prepared by a qualified appraiser setting forth an opinion as to the market value of an adequately described property as of a specific date(s), supported by the presentation and analysis of relevant market information. n321

This seemingly innocuous definition of market value has led to heated debate between real estate industry advocates

and federal regulators. n322 Real estate industry spokespeople contend that in depressed markets the present worth of an office or shopping center property, as measured by recent sales of similar property, may not be sensible. "[A]ppraisals based on historic data and current market property values fail the test of practicality. They are comparable to looking over your shoulder to predict what's ahead." n323 They urge that appraisals be based on the "income approach--a potentially more reliable appraisal method for determining the value of investment real estate." n324 They contend that the key factors are employment growth, leasing activity, space needed per employee, impact of new development on supply, and a demand-based real estate market model. By using current market sales prices and not allowing lenders to refinance existing loans or make new ones based on projected future income streams, the OTS is accused of further depressing already depressed markets.

The real estate industry didn't urge this shift from market sales prices to rental income yields when markets were buoyant. In the 1980s, the prices people were willing to pay for property often exceeded the realistic income-generating potential of the property.

Lenders and their regulators point out that when loans go bad, distressed property is often sold at whatever price the market will bear. So the market or sales comparison approach to value is the most realistic one for them to use.

§ 97.07(f)(1) Three Approaches to Value.

Appraisers conventionally use three approaches to value: (1) the direct sales or market comparison approach, (2) the cost approach, and (3) the income approach. There are judgment calls under each approach to value.

In the direct sales or market comparison approach, the appraiser assumes no one would pay more for a property than they would for an equally desirable one (the principle of substitution). Since all properties are different, the appraiser needs to decide which "comps" to include. The appraiser can make adjustments by adding or subtracting for the features of each comp that are different from the property being appraised, such as the appraiser needing to account for differences between the subject and the comp properties in their location, time of sale, condition of sale, financing, age of the properties, quality of design and construction, square footage, number of rooms, parking spaces, condition of the building, and anything else that common sense would suggest could bear on value.

Comps aren't as useful in rapidly changing markets as in stable ones. Unique and rarely traded properties make poor candidates for this approach.

The cost approach assumes that no one would pay more for a building than what it would cost to build a new one. n325

In using the cost approach, appraisers still have to come up with a valuation for the land. For land value, they use a market comparison approach, or a variation on the income method--land residual--described later.

There are three ways to estimate the costs of improvements: (1) quantity survey, (2) unit in place, and (3) aggregate cost per unit.

The *quantity survey* involves reducing the structure to its bare components--tons of steel, number of windows, hours of labor--and pricing them. Experienced contractors are quite good at it. Others may find this a difficult procedure.

The *unit-in-place* method divides the project into bigger components that are often subcontracted (foundations, framing, dry wall, plumbing, floors, roofs). Each is valued separately and then totalled. n326

The *aggregate cost per unit* is based on rough estimates of what it costs to build similar properties based on a square or cubic foot basis.

If the appraised property is an older one, the appraiser must estimate its depreciated value, taking into account curable and incurable physical depreciation, functional obsolescence, and changes in tenant or consumer preferences that make the building economically less or more desirable than a new one.

The income approach assumes that the property is worth the discounted present value of the net future rents it will generate. This capitalization approach can be summarized by the equation V = I/R, where V is the market value of the property, I is the annual net operating income, and R is the cap rate.

The appraiser estimates the annual gross income and subtracts operating expenses from it to derive what is called the Net Operating Income (NOI = gross income less operating expenses). The NOI is independent of debt service (the interest and principal repayment on debt). Debt service is subtracted from NOI to obtain the before tax cash flow (BTCF). (NOI /ms DS = BTCF).

The "income" under this approach isn't necessarily the actual rent schedule of the appraised property. It could be the "fair rental value of the property. Cautious appraisers won't give the owner credit for *higher* rents than the lessor is currently receiving (unless the leases are about to expire). But the appraiser may regard with skepticism a current rent greater than other landlords are netting for comparable space (even if the leases in the appraised property have years to run). Tenants paying above market rents might "walk" (breach), go broke, or negotiate lower rents by threatening not to renew.

By using NOI, which is net income before deducting debt service, the investor's rate of return is being computed as if 100% cash had been paid for the property. As we saw in our earlier discussion of leveraging, the investor can increase the rate of return by borrowing at an interest rate lower than the cap rate. The investor reduces the rate of return by borrowing at an interest rate greater than the "all cash" cap rate.

We would expect cap rates to be higher than, say, the going market interest rates or a federally insured certificate of deposit of a maturity comparable to the real estate investor's contemplated holding period when the investor is purchasing a depreciating asset, when the investment comes with credit risk greater than that on a government-backed obligation, and when the realty may be hard to liquidate when the investor wants to sell it. Sometimes, though, cap rates on real property are lower than interest rates on government-insured certificates of deposit, despite the greater credit risk in real estate. This can happen when the increase in land value is expected to outpace the building's depreciation, and when building costs are rising rapidly because of inflation.

A tricky part of the income approach involves selecting a rate at which to capitalize the annual net operating income. A cap rate is an interest rate that takes into account the fact that a building is a depreciating asset. The higher the cap rate, the lower the value of the building. You can see how this is so by considering interest rates on savings. The higher the interest rate, the less money the saver needs to put in the bank in order to yield a given amount of income. Say the saver targets her income-from-savings goal at $100,000/year. If interest rates are 5%, she needs $2,000,000 to reach the goal. If rates are 10%, she only needs $1,000,000. The same relationship holds between property values and cap rates. A low cap rate translates into a bigger multiplier of income, resulting in a higher property value.

The three most common ways of determining the cap rate are: (1) market extraction, (2) band of investment, and (3) Ellwood.

The *market extraction* method involves finding recently sold properties that are like the one being appraised. The appraiser puts into the "V = I/R" equation the price those properties brought, and their net operating incomes to derive a cap rate. The appraiser comes up with a value for the property by dividing the cap rate from those other properties into the estimate of the net operating income for the appraised property. For instance, say a comparable property with $20,000 NOI recently sold for $200,000. The cap rate would be 10% because $200,000 = $20,000/10%. The appraised value for a property with a $35,000 NOI would be $350,000 (= $35,000/10%).

The *band of investment* method seeks to find the rate of return an equity investor would expect. In its simplest form the rate of return is the before tax cash flow divided by the amount of the equity investment (BTCF/equity = rate of return). By seeing what investors are willing to accept on other investments and factoring for risk, the appraiser comes up with the rate of return that would be acceptable for the appraised property. That rate becomes the cap rate in the appraiser's cost approach formula.

The *Ellwood* method employs a complicated formula designed to capture the present value of the future returns on an investment. It takes into account mortgage amortization and property appreciation or loss of equity over time. n327

If the appraiser obtains different values for the same property using these approaches, they must be reconciled.

§ 97.07(f)(2) Discounted Cash Flow.

Discounted Cash Flow (DCF) analysis, a variation on the Internal Rate of Return method, can be thought of as an extension of the income approach. While the simplicity of the income approach makes it an attractive candidate for appraising value, it also lacks flexibility.

For instance, the income approach assumes that annual returns remain constant, whereas everyone knows that annual returns on a project will fluctuate. In the early years, rents may be lower for many reasons. Few projects are completely rented upon completion and special deals are often made to induce tenants to sign during this time. Later on, a successful project may generate more income due to increased rents and higher occupancy. Or, a project may generate less-than-average income in a year it undergoes major renovation. An aging building is likely to generate less rent due to vacancy as well as depreciation. n328

"The value of property, generally speaking, is determined by its productiveness--the profits which its use brings to the owner." n329

While the simplicity of the capitalized income approach discussed earlier makes it an attractive candidate for appraising value, it lacks flexibility. Lenders are using a variation of the capitalized income method called "discounted cash flow" or "net present value" more and more frequently n330 Discounted cash flow is popularly used because it considers real costs, evaluates the time value of money and produces a figure which measures the cash impact of an investment. n331

The capitalized income approach assumes constant annual returns, though it is extremely unlikely returns will be constant. Realistically, returns on a project will fluctuate as the project matures. In early years, rents may be lower to attract tenants, or occupancy may be very low, or operating costs high since efficiencies have not been established. As time goes on, occupancy may increase, rents may be higher and operation costs reduced as the management becomes more efficient. Capital outlays to improve or expand the project may drastically reduce returns in some years. And in the end, occupancy may fall off and rents be driven down by the age of the building. n332 However, even though the income from the building has fallen, the building itself may still have "reversionary" value since it may be sold or improved to generate more income. Or the owner may have to pay in even more to have the project demolished. The income approach does not consider these fluctuations in cash flow directly. n333 DCF considers these cash inflow/outflow fluctuations while maintaining the relative simplicity of the capitalized income approach. n334

Though interest rates will not remain constant for the life of the project (nor should they be expected to), the DCF method discounts all future cash flows by a constant interest rate. This "discount rate" is derived from many factors. Rather than guessing at interest rates in the future, discounted cash flow uses a rate which reflects the cost, risk and duration of the project.

In discounting projected future earnings to present value, the objective is to use a discount rate

> which reflects an amount which an investor would expect as its rate of return on an investment of comparable risk. Capitalization rates are, therefore, a function of, among other things, prevailing market rates of return for minimal risk loans or investments, adjusted upward for the risks that the projected income stream will be achieved. n335

By viewing the project as an investment of capital for which there are alternatives, developers can compare the anticipated returns of the project with returns on the same funds invested elsewhere. Using a constant rate allows developers to consider the cost of capital, and the interest cost of doing the project and use that rate as a floor below which they cannot go, since by earning less return on the project than they are spending to finance it, they are losing money. The cost of debt is a true cost and the lowest possible discount. If developers do not make returns greater than the interest they pay for debt, they are losing money.

It is not the income or earnings of the project which is evaluated but actual cash flows. "Earnings" or "income" or "profit" are accounting terms used to measure profitability and can not be spent. Rates of return derived from income, earnings or profit do not consider the time value of money and are subject to accounting manipulation. (*For instance,* a small change in depreciation methods can greatly affect the results of a calculation based on income, profits or earnings.) Cash flows show the net monies in and out of a project, and consider not only immediate costs and incomes, but future increased rentals and or capital infusions to the project. Using the discounted cash flows to evaluate a project shows how crucial to overall profitability timing can be. Deferring taxes, impact fees, renovations etc. even for short periods can have substantial savings. (However, the savings need to be balanced with the deferral of income as well. Where the cash infusion does not generate more income, deferral is preferable. But where the infusion brings greater returns, the transaction needs to be examined carefully in light of the timing issues.) Net present values consider the time value of money and increase a developer's ability to spend money on the project over a long time.

The actual calculation for net present value (NVP) of a cash flow, a series of irregular payments, is the sum of the present values of each payment plus the present value of the reversion. Note that discounted cash flows are more accurate earlier in the analysis, because information is generally better for the earlier years, but the effect of the time value of money will tend to make errors in the later years less important. n336

The first step in calculating the (NPV) is to estimate cash flows for the expected life of the project. A typical series of flows might be:

T0 ($2,000,000) (purchase price)

T1 $130,000

T2 $200,000

T3 $225,000

T4 $223,000

T5 $230,000

T6 $150,000 (lower cash flow due to major renovation)

T7 $300,000

T8 $325,000

T9 $330,000 + $2,700,000 (last periods income plus sale of project proceeds).

An appraiser using discounted cash-flow-analysis estimates each future year's net income using data such as:

> 1. Historical operating expenses (energy bills, janitor contracts) [and] building management forecasts;
>
> 2. Existing leases and billed escalation rates;
>
> 3. Must-take space, rights of first refusal, [or] options given to existing tenants[;]
>
> 4. Market rents considering the supply and demand in existing, under-construction, and proposed buildings, and considering all building moratoria and zoning adjustments;
>
> 5. Existing financing;
>
> 6. Repair history and estimated life of major building systems (heating, ventilation, air conditioning, and roofs);
>
> 7. Commissions to leasing brokers in the area and tenant improvements allowances generally given to attract tenants in the marketplace;
>
> 8. Proposed renovations, mandatory retrofitting (asbestos removal, fire sprinklers), and possible expansions; and
>
> 9. Economic factors, including job markets in the area, for purposes of estimating general and local inflation for income and expenses.

Estimating net income yearly rather than in one "stabilized" year permits the appraiser to make detailed adjustments. Discounted cash flow also permits the appraiser and the investment officer to view the impacts that innovative financing mechanisms, such as income guarantees and master leases, will have on the property's value. n337 When calculating cash flow projections, it is important to focus on where the projections came from. Assumptions need to be realistic, not fantastic; otherwise, the end result will not be reliable. Once a reasonable range is established, the numbers can be combined in different ways to see how future incomes would change in certain situations. A sensitivity analysis looks at how income changes when one variable fluctuates between its extremes while the others remain constant. The sensitivity analysis shows how responsive income would be to swings in a particular variable's value. Where income is higher dependent on that variable remaining at or above a certain level, the developer needs to consider whether it is realistic that the variable remain constant, and the consequences of fluctuation. A second analysis is a scenario analysis, wherein multiple variables fluctuate. While it is more complicated than a sensitivity analysis, it is a more reasonable approach since a change in one variable often triggers changes in others. Using computer spreadsheets makes these calculations much simpler.

The next step in a discounted cash flow analysis is determining the discount rate for the project. The discount rate depends chiefly on interest rate expectations, the cost of debt, and equity investors' expected returns.

> [R]eal estate discount rates are market-derived ... . [I]nvestment advisors ... examine competing investments for yield rate requirements. Real estate investment does not operate in a vacuum; it competes for cash along with real estate securities, Treasury notes, stocks, bonds, gold, and other investments. The discount rates required for real estate investments therefore rise and fall according to supply and demand

> in the real estate markets and world financial markets. n338

Certainly no one can expect to know the interest rates for future years, and it is highly unlikely that interest rates will remain constant over a long period. However, the appraiser may either choose a single discount rate based on her assumptions of the costs and risks associated with the project for the reasons discussed above, or she may choose a separate rate for each cash flow based on her expectations of the interest rate at that future time. (Generally, long-term rates are higher than short-term rates so the discount rates should slowly rise over the life of the project.) The discount rate for a particular project is dependent on many things: the cost of debt, the cost of equity (the return investors expect on their money), the opportunity cost of a particular investment. n339 Consider the following various ways to reach an appropriate discount rate:

> Periodic income is discounted by a yield rate derived by investigating the market and competing investment vehicles. Generally the yield rate consists of the return rate plus the risk rate. Often it is expressed as a spread (for example, 150 basis points, or 1.5%) over U.S. Treasury issues. An inflation rate may be added to the rate as well. n340

Using a discounted cash flow allows analyzing flexibility in both the discount rate and income streams rather than constraining analysis to constant values.

Lastly, the appraiser discounts each cash flow by its respective discount rate, and then adds the discounted flows together to determine the present value of the property or project. In our example, assuming an 11% discount rate:

T0 <$2,000,000> * 1/(1+.11)[0]	= <2,000,000>/1	= $ 2,000,000.00
T1 $130,000 * 1/(1+.11)[1]	= 130,000/ 1.11	= $ 117,117.12
T2 $200,000 * 1/(1+.11)[2]	= 200,000/1.2321	= $ 162,324.49
T3 $225,000 * 1/(1+.11)[3]	= 225,000/1.367631	= $ 164,518.06
T4 $223,000 * 1/(1+.11)[4]	= 223,000/1.5180704	= $ 146,897.01
T5 $230,000 * 1/(1+.11)[5]	= 230,000/1.6850582	= $ 136,493.80
T6 $150,000 * 1/(1+.11)[6]	= 150,000/1.8704146	= $ 80,196.12
T7 $300,000 * 1/(1+.11)[7]	= 300,000/2.0761602	= $ 144,497.52
T8 $325,000 * 1/(1+.11)[8]	= 325,000/2.3045378	= $ 141,026.11
T9 ($330,000+$2,700,000) * 1/(1+1)[9]	= 3,030,000/2.5580369	= $ 1,184,502.10

Discounted Cash Flow = $277,572.33

The present value of the project is $277,572.33.

Investors and lenders sometimes refer to Internal Rate of Return or IRR of a project. The IRR is the discount rate for which the discounted cash flow of a project is 0. It is determined by a procedural counterpart to DCF analysis. n341

[IRR is the] discount rate at which the present value of all net investment returns including any return of capital from the disposal of the investment, exactly equals the capital outlay for the investment ... .

In other words, the IRR calculation is a DCF analysis solved backwards--i.e., all cash inflows and outflows are analyzed to find what discount rate can be applied to make them exactly equivalent to the original capital outlay. n342 Where DCF attempts to determine the present value of a project based on expected cash flows and discount rates, IRR measures the rate at which money in an investment grows. IRR determines the projected return on a project given projected cash flows and project value. IRRs are used to compare a potential project with other projects and investments. DCF and IRR calculations are useful for both independent and mutually exclusive projects. Wherever a DCF or IRR is positive, the project is profitable. If the developer has a choice between two projects, the one with the higher NPV (net present value) creates more wealth, and the one with the higher IRR has a faster generation of wealth. Negative NPVs and IRRs are money losers.

An appraiser estimating future income or calculating a discount rate knows that the accuracy of the forecast, even a few years into the future, is highly suspect. The likelihood that a particular future income will match his prediction is virtually nil. Dollar figures and discount rate estimates are proxies for "myriad assumptions, educated estimates and experienced hunches." n343 Discounted cash flow lets the appraiser play with a lot more glass beads in the great Glass Bead Game. n344

§ 97.07(f)(2)(i) Land Residual Approach.

When land can't be appraised by the market or sales comparison method because there aren't enough reliable "comps," the land residual approach is sometimes used. This method presumes that the building and the land can be appraised separately. The appraiser must estimate the income that the improved site can generate and find separate capitalization rates for the land and the building.

At the time of this appraisal, the building doesn't exist; nor, probably, does a lease. The appraiser must calculate what the net fair market rental value of the building would be if it were completed and successfully rented.

The appraiser determines the construction cost of the building, and assumes the building is worth that much. The appraiser then determines what the investor in the improvements needs to achieve. The appraiser searches for an appropriate annual market rate of return on the building investment: a capitalization rate appropriate to this type of an investment. The portion of the estimated annual yield necessary to satisfy the investor in the improvements is subtracted from the total *estimated* net operating income. What is left after subtracting the building investor's annual expected return is the annual residual income to land. The appraiser capitalizes that to come up with the residual value of the site.

The Appraisal Institute offers this example: n345

Estimated Building Value (based on cost of construction)	$450,000	
Net Operating Income	$85,500	
Building Value x Cap Rate Multiplier (1/.0866)		
($450,000 x.15)	- 67,500	
Residual Income to Land	$18,000	
Land Value		
(capitalized: 18,000/0.09)		200,000
Indicated Property Value		$650,000

Note that the example assigns a higher cap rate to the land (9%) than to the building (82/3%), indicating the greater riskiness of an investment in vacant land than in a built site.

This technique is often used when the land is vacant or the building is new and has no accrued depreciation. The appraiser may consider several hypothetical buildings and uses of the site to see which produces the highest net residual income attributable to the land. When the cost of producing a building exceeds the value such a building contributes to the site, this method isn't applicable.

Real estate development companies would like their lenders to appraise pre-development land this way because they can get land loans based on post-development value. Applying the land residual method to undeveloped land, the appraiser first estimates the costs of development. These are subtracted from the revenues the developer will receive from home sales when the property is fully developed. The lender then discounts costs and revenues to net present value, ascribing the difference to land value.

The land residual method of appraisal is sometimes called the "developers approach" for determining the value of undeveloped property. Courts in some states have held that testimony based on the land residual approach to value is not admissible in the valuation of undeveloped land condemned by public agencies in eminent domain proceedings. n346 The costs of development are deemed too conjectural and uncertain. So are the estimated selling prices of houses years hence. The suitability of property for development is a factor which may be considered in valuing the land through other methods such as by the market or comparable sales approach. In federal courts and many states, the land residual technique is allowed in condemnation proceedings.

Suppose a lender makes a land acquisition and development loan to the developer based on a land residual approach. The lender agrees with the developer's assumptions and appraises the land at twice the developer's original purchase price. The real estate market falters. The developer defaults, the lender ends up selling the site for less than the debt. The lender's shareholders and federal insurers could have a good cause of action against the lender's appraiser or the lender's managing directors and officers for negligence. n347

§ 97.07(f)(2)(ii) Statistical Approach.

A last type of appraisal is based on statistical analysis. The statistical approach is similar to the market comparison method, but on a much larger scale. The statistical method analyzes the sales, values and physical characteristics of up to hundreds of similar properties. Raw data is analyzed to evaluate the effect of differences in value and determine the reliability of the outcomes.

The statistical method removes much of an appraiser's subjective evaluations since the appraisal is basically the "average" of a great sample of real transactions rather than appraiser opinions or projected sales. Since the figures from the sample do not change, the analysis can be duplicated or it can reflect the average of particular segments within the sample. Once data is initially collected, the appraisal for a single property would be more cost efficient than methods which appraise each comparable property.

The statistical approach is not without drawbacks. Certain property variations may not be measurable. Attempting to compile information while either excluding the variables or using a subjective replacement for them could lead to inaccurate valuations. Furthermore, the initial cost of compiling data could be huge. n348

§ 97.07(f)(3) Appraiser Liability for Faulty Appraisals. n349

§ 97.07(f)(3)(i) Theories of Appraisal Liability.

Much of the financial crisis among savings associations and banks was attributed to faulty real estate appraisals. n350 When loans go bad soon after they are made, the borrower and lender each may turn to the appraiser to cover their losses. n351

When a loan is refused because the appraiser says it isn't worth the price the borrower is prepared to pay, the borrower may claim the appraiser caused her to lose a good deal.

Appraisers may be liable for failing to properly perform their contractual obligations and their contract liability may extend to protect assignees of the contract.

Under the Financial Institutions Reform, Recovery and Enforcement Act of 1989 (FIRREA), n352 certain standards are mandated for appraisers. Failure to comply with those standards can be a further source of liability. n353 The statute defines an appraisal violation as knowing or reckless conduct that constitutes a breach of a fiduciary duty, a violation of a law or regulation, or unsafe and unsound practices. n354

Bank appraisers may be liable on common law theories of negligence, negligent misrepresentation, or fraud. n355 The *Restatement (Second) of Torts* on negligent misrepresentation:

> One who, in the course of his business, profession or employment ... supplies false information for the guidance of others in their business transactions, is subject to liability for pecuniary loss caused to them by their justifiable reliance upon the information, if he fails to exercise reasonable care or competence in obtaining or communicating the information. n356

There are significant limits on the appraiser's liability for "false information." For instance, comment (a) indicates that the professional needs to *know* the information is false or lack any reasonable basis for making the statement. When one appraiser's unreasonably high value had been derived from false financial statements certified by independent auditors, the appraiser was held not to be the "proximate cause" of the mischief. n357

Appraisers can sometimes resist liability by distinguishing "false information" (i.e., facts) from dubious *opinions* of value. This distinction doesn't always work because "appraisers may be held accountable for their opinions in such a way that they will be considered representations of fact" n358 when the appraiser's opinions or conclusions are based on facts the appraiser got wrong.

§ 97.07(f)(3)(ii) Some Examples of Actionable Appraisal Failures.

Here are some examples of how appraisers can get things wrong:

1. --*Misdescription of Property*. The appraiser didn't describe the property properly, basing her appraisal on the house having 3800 square feet when in fact it had only 2800. "The number of bedrooms was wrong, the number of baths was wrong, the number of skylights was wrong, the number of fireplaces was wrong ... ." n359 Moreover, even though the property was in total disrepair, the shrubbery was dying, the swimming pool was dirty, there were holes in the roof due to construction, there was no covering over the construction area, the floors were warped and discolored and the new construction joints were unusable," the appraiser had reported none of this. n360

2. --*Misreading of Applicable Zoning*. "[t]he appraiser's opinion of value was based on the assumption that the land was zoned R-3, a zoning classification which permitted detached and semi-detached dwellings. In fact, however, the land was zoned R-2, which permitted only semi-detached dwellings." n361 The appraiser also projected a development permitting 24 lots on a 947-foot road, but a local ordinance permitted only a 500-foot road ending in a cul-de-sac, which would support far fewer subdivided lots.

3. --*The "Comps" Weren't Comparable*. An appraiser had used three comps in estimating the value of a home at $400,000: "[t]he first did not exist, the second was a nursery school, and was sold for its value as

> a business, and the third, which [the appraiser] said was 3,000 square feet was, in fact, half that size and it had sold for $175,000, not $375,000 as [the appraiser] claimed." n362

This decision is worrisome to appraisers because estimates of market value based on comparables inevitably involve subjective judgments. Indeed, the reason the accounting profession has "refused to adopt current market value as the basis for financial accounting is the inability of appraisers to produce consistent value conclusions." n363 But the appraiser's alleged oversight in selecting "comps" in this case was extraordinary.

§ 97.07(f)(3)(iii) When Appraisers May Prevail.

The potential for liability articulated in appellate opinions does not mean that appraisers always lose cases at trial. Often they win on the facts. The authors of a 1990 law review article saw "few reported cases that held the appraiser liable." n364 What the Wallers found was that *summary judgments* in favor of appraisers were being reversed. Plaintiffs were getting their day in court, although they didn't necessarily win after trial. Of course, the pressure to settle is great when appraisers or their insurers are facing the costs of a trial.

§ 97.07(f)(3)(iv) The Sovereign Immunity Defense.

Litigants challenging appraisals often lose summarily if the appraisal was prepared for a federal government agency. Some courts have ruled that private persons have no right to sue a federal entity unless the suit is authorized under the Federal Tort Claims Act, n365 which precludes recovery on "any claim arising out of ... misrepresentation." n366 Other courts have found for the government on the assumption that FHA and VA appraisals are made for the government as insurer or guarantor and not for the benefit of homebuyers. n367 A condition to plan approval was to fill to elevation of the 50-year flood line, which was done. No representations were made to buyer about the fill or flood line. Plaintiffs' homes were twice flooded. The Army Corp of Engineers determined that the FHA had miscalculated the flood line. Plaintiffs' claim that the U.S.' duty to provide decent housing safe from flooding was breached by the FHA's negligent failure to correctly establish the floodline was denied because plaintiff could not frame any tort cause of action without including the tort of misrepresentation). "Almost without exception, appraisers valuing property for FHA and VA financing owe a duty of care to the government only, and are therefore not liable to buyers and sellers." n368

§ 97.07(f)(3)(v) Exculpatory Language.

Here is language from a shopping center appraisal written to protect the appraiser from claims by prospective investors (clients):

> No Guaranty or Warranty

The appraiser makes no guarantee or warranty, whether implied or expressed, concerning the value set forth in the appraisal. The appraisal merely sets forth the appraiser's opinion of such value based upon the special premises provided by the client, information gathered, and assumptions made by the appraiser with respect to the Property.

> Indemnification and Hold Harmless

The client hereby indemnifies and agrees to hold the appraiser harmless from and against any liability, loss, cost or expense incurred or suffered by the appraiser as a result of any assertion or claim of any liability or responsibility for the payment of performance or any obligation of the client or which arises from any unauthorized use of the appraisal. Furthermore, notwithstanding anything to the contrary herein contained, the liability of the appraiser to the client shall be limited to the amount of the fee paid therefore as liquidated damages. Such amount is agreed upon by client and appraiser as liquidated damages due to the difficulty and inconvenience of ascertaining and measuring actual damages, and the uncertainty thereof; and no other damages, rights or remedies shall in any case be collectible, enforceable or available to the client, but client shall accept such amount as client's total damages and relief. The appraiser's

responsibility is limited to client, and the use of the appraisal by third parties shall be at the risk of client or any such third party.

Legal, Engineering, Financial, Structural or Mechanical Components; Nature, Hidden or Unapparent Conditions, and Soil

No responsibility is assumed for matters legal in character or nature, nor matters of survey, nor of any architectural, structural, mechanical or engineering nature. No opinion is rendered as to the title of the subject property, which is presumed to be good and merchantable. The property is appraised as if free and clear of all liens or encumbrances unless otherwise stated, with the seller receiving cash or its equivalent, and it is assumed that the purchaser would take advantage of maximum financing available. The property being appraised and the value estimates are based on the assumption that the property is under responsible ownership and competent management. It is assumed that there is full compliance with all applicable federal, state, and local environmental regulations and laws unless noncompliance is stated, defined, and considered in the consultation report. It is assumed that all applicable zoning and use regulations and restrictions have been complied with, unless a nonconformity has been stated, defined, and considered in the consultation report. It is assumed that all required licenses, certificates of occupancy, consents, or other legislative or administrative authority from any local, state, or national government or private entity or organization have been or can be obtained or renewed for any use on which the value estimate contained in this report is based.

Please note that no advice was given regarding soils and potential for settlement, drainage and such (seek assistance from qualified architect and/or engineer), nor matters concerning liens, title status, legal marketability and such (seek legal assistance). The lender and owner shall inspect the property before any disbursement of funds; further it is likely that the lender or owner may wish to require inspections by a qualified and licensed civil engineer or other expert.

The appraiser has inspected as far as possible, by observation, the land; however, it was not possible to personally observe conditions beneath the soil. The value estimate considers there being no such conditions that would cause a loss of value. The land or the soil of the area being appraised appears firm; however, subsidence in the area is unknown. The appraiser does not warrant against this condition or the occurrence of problems arising from soil conditions.

The appraisal is based on there being no hidden, unapparent, or apparent conditions of the property site, suboil or toxic materials which would render it more or less valuable. No responsibility is assumed for any such conditions or for any expertise or engineering to discover them.

Subsurface Rights

Subsurface rights (minerals and oil) were not considered in this appraisal unless otherwise specifically stated.

Toxic Materials

Unless otherwise stated in this report, the appraiser signing this report has no knowledge concerning the presence or absence of any toxic materials and/or hazardous substances, including without limitation asbestos, polychlorinated biphenyls, petroleum leakage, or agricultural chemicals, which may or may not be present on the property, or other environmental conditions, were not called to the attention of nor did the appraiser become aware of such during the appraiser's inspection. The appraiser has no knowledge of the existence of such materials on or in the property unless otherwise stated. The appraiser, however, is not qualified to test such substances or conditions. If the presence of such substances, such as asbestos, urea formaldehyde, foam insulation, or other hazardous substances or environmental conditions, may affect the value of the property, the value estimated is predicated on the assumption that there is no such condition on or in the property or in such proximity thereto that it would cause a loss in value. No responsibility is assumed for any such conditions, nor for any expertise or engineering knowledge required to discover them. The client is urged to retain an expert in the field of environmental impacts upon real estate, if so desired.

Terms of Full Disclosure

The State of Texas does not have a full disclosure law regarding real estate transactions. Therefore, the appraiser had to confirm all sales and rental comparables with brokers, property managers, mortgage brokers, grantors, grantees and other parties familiar with the transaction. The results are limited by the accuracy of the information supplied by the aforementioned individuals. Whenever possible, the information was verified by county records.

Disabilities Compliance

It is assumed there is full compliance with all requirements of title III, of Americans with Disabilities Act (ADA) unless noncompliance is stated, defined, and considered in the appraisal report. No responsibility is assumed by the appraiser for any such conditions or for any expertise or architectural/design knowledge and cost required to identify such noncompliance. Although the appraiser may have observed some items of possible noncompliance, a comprehensive list with related costs has not been developed. The value estimate is predicated on the assumption that there is no curable or incurable functional obsolescence, or related cost-to-cure imposed by the regulations of this law unless otherwise stated in this report. The client is urged to retain an expert in this field, if desired.

§ 97.07(f)(4) When Lenders May Be Liable for Faulty Appraisals Made Initially for the Lender.

The lender often has the deepest pocket, so it is not surprising that "[b]orrowers, equity investors, junior lenders, and participating lenders in a loan participation agreement are all potential plaintiffs in a suit to recover damages from a lender that negligently prepares or uses an appraisal opinion." n369 Defaulting borrowers will also defend against foreclosure and deficiency judgment actions by claiming they relied on the lender's faulty appraisal when they agreed to borrow. n370

Some lenders try to limit their exposure by denying borrowers access to appraisal reports. But the Equal Credit Opportunity Act was amended in 1991 to give home mortgage applicants a legal right to obtain a copy, on written demand, of the real estate appraisal information they paid for and that the lender used in granting or denying the application. n371

The buyer doesn't have to hire the appraiser directly to have standing to sue. As long as the buyer acts in direct and provable reliance on a faulty appraisal, he can sue the lender, even if the appraiser is an independent contractor, rather than an employee of the lender. n372 The plaintiff does, generally, have to show third party beneficiary status in the appraisal contract. In some states, a more liberal "foreseeable plaintiff" standard is available. n373

Courts differ over whether the borrower can justifiably rely on the lenders' appraisal. One court concluded:

> [a] financial institution acting within the scope of its conventional activities as a lender of money owes no duty of care to a borrower in preparing an appraisal of the security for a loan when the purpose of the appraisal simply to protect the lender by satisfying it that the collateral provides adequate security for the loan ... . One who seeks financing to purchase real property has many means available to assess the property's value and condition, including comparable sales, advice from a realtor, independent appraisal, contractors' inspections, personal observation and opinion, and the like. n374

On the other hand, another court observed:

> [t]he appraiser should also reasonably expect the home purchaser, who pays for the appraisal and to whom the results are reported ... will rely on the appraisal to reaffirm his or her belief the home is worth the price he or she offered to pay for it. n375

The facts in these two leading cases can serve to distinguish them. The first was a refinancing. The borrower had

already lived in the house for two years before applying for the refinancing. n376 In the second case, which the borrower won, the appraiser had overlooked major structural defects, and the borrower's purchase had been made contingent on the appraisal. n377

Courts which are reluctant to hold lenders liable to borrowers for faulty appraisals reason that borrowers could escape repaying their loans if they could reasonably rely on defects in the lender's appraisal. Lenders would then become inadvertent guarantors of the value and quality of the security property. This would work a reversal of the traditional positions of debt and equity investors. The equity investor is supposed to be at greatest risk. "[a] strong public policy exists, if our financial institutions are to remain solvent, to prevent a conventional money lender from having to ensure [the success of every investment]." n378

Don't chalk up increasing lender liability as nothing more than another example of American litigiousness. n379 The House of Lords has held that house purchasers may rely on the valuations their lenders require as a condition to making mortgage loans. n380

§ 97.07(f)(5) When Lender May Be Liable to Mortgage Investors for Faulty Appraisals Which Lure Them Into Investing.

Courts do seem to differentiate borrowers from mortgage investors in faulty-appraisal lender-liability cases. Investors in mortgage loans have been allowed to get back their total investments--with interest--from *mortgage brokers* which had used faulty independent appraisals to entice the investors. Courts reasoned that the mortgage broker hired the appraiser, could have required indemnity in its contract with the appraiser, should be given every incentive to select appraisers carefully, and can obtain insurance against loss. n381

Some who are relying on lenders' appraisals insist that lenders warrant the accuracy of appraisal information.

§ 97.07(g) The Loan Commitment.

The first binding legal document that emerges in most commercial loans is a commitment to make the loan from the lender to the borrower. It often takes the form of a letter responding to the borrower's loan application. Sometimes the commitment and application are contained in one document which the lender supplies and the borrower fills in.

The loan commitment recites the terms of the loan and the lender's requirements for making the loan. Commitments for major commercial loans are written both for construction and permanent loans. n382

Construction loans are used to finance the construction of a project. Funds are disbursed as construction progresses. Interest is paid (usually monthly) from undisbursed loan proceeds which are calculated on the sums actually drawn by the borrower. Typically, these loans are recourse or, if nonrecourse, the borrower guarantees completion of the project. The entire principal is due on completion or a short time thereafter. Permanent loans finance existing, completed projects. They are written for longer terms than construction loans. The entire principal is paid out at loan closing and repaid with interest and monthly amortization. Permanent loans are usually nonrecourse.

Some agreements are bilateral contracts, enforceable by either the lender or the borrower, obligating the lender to lend and the borrower to borrow. Others are unilateral and obligate the lender to lend but give the borrower the choice whether to borrow:

> In the early stages of the lending industry, many commitments were so-called unilateral contracts that compelled the lender to lend but gave the borrower the right to borrow or lose its commitment fee as the sole remedy. Loan commitments frequently were drafted in this fashion. As loans have become more complicated, projects larger, and rates more flexible, however, in almost every transaction (except a

standby commitment, as discussed below), the lender will require the commitment to be bilateral so the lender must loan, and the borrower must borrow. n383

§ 97.07(g)(1) The Standby Commitment.

Some agreements are bilateral contracts, enforceable by either the lender or the borrower, obligating the lender to lend and the borrower to borrow. Others are unilateral and obligate the lender to lend but give the borrower the choice whether to borrow. These are called standby commitments. n384 The borrower usually pays a hefty nonrefundable fee for a standby commitment since it is an option to borrow. Often lenders issue these for fee income, not expecting most borrowers to want the loan because the commitment contemplates a loan at a high interest rate or other onerous terms. The borrower purchases the commitment to obtain a construction loan, hoping to find better financing when the project is built. When commitment contracts are vague and don't specifically obligate the borrower to borrow, they will be read against the lender (invariably the drafter), and treated as standby commitments, even if the lender mistakenly believed it had entered a binding mutual commitment with the borrower.

§ 97.07(g)(2) Principal Reason for Breach.

The main reason borrowers and lenders are tempted to walk away from loan commitments is interest rate fluctuations. A 1% increase in the interest rate from 11% to 12%, for a 20-year loan for $15,000,000, amounts to $3,302,850. If a post-construction lender agrees to an 11% rate and rates have risen to 12% when the project is completed several years later the lender has $3,000,000 worth of incentive to find ways to avoid this commitment. Similarly, if rates go down a point, the borrower has a good reason to look elsewhere for a post-construction loan. The interest rate risk is exacerbated because long-term financing is often at fixed rates. Adjustable rates and shorter term loans (not fully amortized) have been used to mitigate the long-term lender's interest risk.

In deciding loan commitment cases, courts take into account the motivations of the parties, such as whether interest rates are rising or falling. n385

§ 97.07(g)(3) Contents of Commitment Letter.

A well drafted commitment letter will contain:

1. Identities of the parties, specifically, the entity that will be borrowing the money and the entity the lender will seek to hold liable for damages if the loan does not close. If a parent company is taking title to the property in the name of a subsidiary, the parent should be named in the commitment so the lender doesn't get stuck suing the subsidiary if the parent decides to find money on better terms elsewhere.

2. Amount of loan. n386

3. Dates and amount of loan repayments, including interest.

4. Prepayment privileges and premiums.

5. A description of the security property.

6. Commitment fee, and whether it is refundable if the borrower goes through with the loan or decides not to.

7. Deadlines for acceptance of the commitment by the borrower and for loan closing.

8. Documentation required to close the loan.

9. Conditions precedent to the lender's obligation to close. These usually include:

a. Organizational Documents.

1) Borrower's partnership, incorporation, or limited partnership documents;

2) Incumbency certificates;

3) Resolutions of directors authorizing the borrowing;

4) Good standing certificates;

5) Representations and warranties.

b. Attorney's Opinions. Opinions of counsel to the borrower (and any other necessary entity, such as a guarantor or lessee), addressing:

1) Organization of the entity;

2) Authorization for execution of the loan documents;

3) Proper execution and delivery of the loan documents;

4) Enforceability of the loan documents;

5) Absence of violations of usury laws;

6) Compliance with zoning and land use laws;

7) Absence of litigation which would affect the value of the security or the ability of the borrower to repay the loan; and

8) Such other matters as lender's counsel may request.

c. Insurance.

1) Title insurance;

2) Flood insurance;

3) Casualty and liability insurance;

4) Worker's compensation and employer's liability insurance.

d. Survey.

e. Plans and Specifications.

f. Contracts.

g. Permits.

h. Appraisals.

i. Bonds.

j. Leases.

k. Soil Test.

l. Financial Statements.

m. Environmental Report. n387

§ 97.07(g)(4) Expenses.

The commitment usually provides that the borrower will pay all of the lender's expenses in connection with preparing the loan document, whether the loan is closed or not. These include legal fees, preparation of loan documents, recording and filing fees, title insurance premiums and survey and appraisal fees. Because the borrower pays the lender's legal fees, the lender's lawyers have every incentive to bill to the max. Borrowers try to negotiate caps on legal fees or, at the very least, obtain a promise by the lender and borrower to use their best efforts to keep fees at a minimum.

§ 97.07(g)(5) Environmental Report.

Lenders appreciate the risks under the Comprehensive Environmental Response, Compensation and Liability Act ("C.E.R.C.L.A.") n388 inherent in the ownership of a contaminated site. However, under C.E.R.C.L.A. § 101(20)(a), lenders who acquire security property through foreclosure or who act to protect their security interest are protected from the Environmental Protection Agency ("E.P.A.") or Department of Justice ("D.O.J.") bringing a C.E.R.C.L.A. enforcement action against them. How lenders can lose this exemption by becoming too involved in running the business or overseeing its environmentally sensitive activities is detailed in the E.P.A.'s rules. n389 The lender doesn't risk liability just for failing to perform an environmental audit; but no informed lender wants to risk having to foreclose on a polluted property. A typical loan commitment requirement is:

> Within 30 days following applicant's acceptance of any commitment issued by lender but at least 14 days prior to closing, applicant shall furnish an environmental report to lender. Lender reserves the right to retain, at applicant's expense, an independent consultant to review any report prepared by applicant and/or conduct its own investigation of the property. Lender's obligation to fund is contingent on its approving the environmental report.
>
> Smart borrowers add this sentence:
>
> Lender will approve the environmental report prior to the applicant paying the loan commitment fee or any other fees or expenses in connection with this loan. If lender disapproves the report, the applicant has no further liability hereunder and lender will refund applicant's commitment fee, if it had been paid in advance.

Later, the lender may insist on an environmental indemnity from the borrower, promising to hold the lender harmless from any claims arising because of hazardous substances or non-compliance with environmental laws. n390 The borrower may seek to limit its liability under this provision to the time period in which the borrower owns the property.

§ 97.07(g)(6) Lease Approvals.

Here is a typical lease approval clause:

> All leases for the Property are subject to review and approval by Lender. Prior to Loan Closing, Applicant shall furnish a standard form lease for the Property for review and approval by Lender. All leases executed subsequent to such approval must substantially conform to the standard lease form and, if Lender so requires, be subject to review and approval by Lender. Without limitation, all such leases shall be for a minimum term of _____ years, shall be with bona fide, arm's length tenants, shall not contain any rental or other concessions not approved by Lender, and shall provide that the tenant pay a pro-rata share of, or increases in, tax, insurance, and other operating expenses. Biographical and financial information on each tenant shall be submitted for Lender's review and approval with each lease.

This clause straightjackets the borrower. It implicitly limits the borrowers' modifying or canceling existing leases. It slows down the process of entering new leases, or granting significant special concessions to equally desirable tenants on short notice.

A borrower might want to limit how long the lender may take before approving a lease by deeming any lease not rejected within a certain time as approved. The borrower would also prefer that leases which conform to the lender's standard form be deemed automatically approved. A borrower's form would provide:

> No additional examinations or approvals by the lender of the form for leases shall be necessary if space is leased using the approved lease form without substantial modification. As leases are signed, the lender shall be provided with a fully executed original counterpart or certified copy of each lease and any amendments thereto and guarantees thereof. Further, the borrower shall not be required to seek the prior approval of economic terms in any future leases or any modifications to leases in any transactions involving less than _____ square feet at a rental rate which is not less than the original rate under leases for similar space in effect at the time of the loan closing. Any approvals or actions to be made by the lender shall be made within ten (10) days after submission; failure to act by the lender shall constitute consent or approval, as the case may be. n391

§ 97.07(g)(7) Completion.

One seemingly innocuous term that highlights how difficult drafting a commitment letter involves defining "completion." Permanent loan commitments will always require that a project be completed by a certain date in order to fund. This deadline becomes critical for construction lenders who intensely fear losing their permanent financing. So what constitutes completion? California, by statute, defines completion as "actual completion of the work of improvement, n392 a not entirely helpful circularity.

Some permanent loan commitments are conditioned on "substantial completion," which tracks case law barring lenders from refusing to fund loans because minor work was left undone. One definition states there is substantial completion when the tenant can "occupy or utilize the project or a designated portion thereof for the use for which it is intended." This leaves it up to the parties to provide evidence as to when they each feel this condition has been met. Some contracts allow the architect to determine when substantial completion arises. A building can be considered substantially complete even though there are a number of "punch-list" items yet to be completed by the contractor. This list is usually prepared by the general contractor and submitted to the architect for approval. Typical punch-list items might include touch-up painting, the installation of missing door hardware, and the balancing of mechanical systems.

Permanent lenders sometimes specify that the permanent loan can't be closed merely upon the completion of the shell building; they require completion of various tenant finish work, or, alternately, that funds be placed in an escrow

account for completion of tenant work.

"Substantial completion" is an obviously ambiguous phrase. For this reason some prefer a tighter definition. For example, a bright-line approach would define completion as the moment the certificate of use or occupancy is issued. This definition has problems too, because it takes the deadline out of the hands of the developer, construction lender, or architect and places the decision with a governmental agency or building inspector. Building code inspectors are generally in no hurry to give these certificates, and may therefore be unmoved by a developer's plea that permanent financing may be lost. A developer with a $15,000,000 loan costing $137,000 a month in interest with a "completion" deadline closing in would probably prefer a loose "substantial completion" definition that would at least allow an impassioned plea for the permanent lender to come to the rescue and pay off the construction loan, even though the developer has yet to receive a certificate of occupancy. Moreover, the building inspector only cares whether the project complies with local codes. Many contract items including furniture and fixtures, color, graphics, floor coverings, paint, wall coverings, and decoration may be of no concern to the building inspector but are of great concern to lenders, owners, and tenants.

§ 97.07(g)(8) Assignment.

A post-construction lender doesn't want just any borrower. It is relying on the one whose loan application was approved. Consequently, the typical commitment provides:

> This agreement shall not be assigned by you without our prior written consent which may be withheld in our sole discretion. For purposes of this paragraph, any change in the control of your operation or in the composition of your entity from that originally represented to us, will be deemed an assignment.

The construction lender should find this paragraph troubling since, if the borrower defaults on either the construction or the take-out loan, the construction lender may have to foreclose. Should that occur, what happens to the post-construction lender's obligation to fund? What language does the construction lender need in the post-construction commitment letter so that it or a purchaser from it can keep the post-construction commitment in place? Obviously, the right to compel an assignment of the developer's loan to the construction lender or its purchaser at foreclosure.

Some developers have no fear of defaulting and fully expect to sell their projects on completion. They may negotiate for the right to assign the "take-out" commitment if all goes well with the project. Here is a clause one such developer negotiated in a take-out commitment:

> One time during the term of the proposed loan herein, the entire subject property may be transferred to one new, arm's-length ownership entity provided that, in Lender's sole judgment, (1) the proposed transferee meets Lender's customary credit standards, (2) the new ownership entity has a demonstrated capability in the ownership and management of buildings similar to the loan security or has retained a management firm with such demonstrated expertise, (3) the Lender's loan on the subject property at the time of transfer must not exceed 75% of value (Value determined by sales price at the time of transfer), (4) the total debt on the subject property at the time of transfer must not exceed 85% of value, and (5) at the time of transfer, the Property is producing net income after debt payment of all operating expenses sufficient to provide combined debt service (debt service on Lender's loan plus debt service on any secondary financing provided by the seller) coverage of not less than 1.15 to 1.0. The secondary loan documents shall be submitted to Lender for its review and approval prior to the transfer. Lender reserves the right to charge a processing fee equal to 1% of the loan balance for processing the approval of the permitted transfer.

§ 97.07(h) Holdbacks and Gap Financing.

The post-construction loan commitment will often provide that the borrower must achieve a certain rent roll on leases approved by the lender before it gets all of the loan proceeds. These conditions are commonly required in office buildings, shopping centers, and apartment projects. The lender will usually agree to lend a certain minimum amount--a "floor"--until the required rent roll is achieved. If the borrower-developer secures the necessary leases in time, the balance of the promised loan will be funded up to its "ceiling" or "top." (Hence, the name, floor-ceiling or floor-top loans.)

If the "floor" is $10,000,000 and the "ceiling" is $15,000,000, what might happen to a construction lender counting on a disbursement of $14,000,000 to pay off the construction loan? There is a potential "gap" of $4,000,000.

Here is suggested form language for a single disbursement deal with a holdback:

Disbursements:

1. In the amount of $ _____ (A) _____ upon completion of construction of the improvements and compliance on or before _____ (B) _____ with all of the terms and conditions herein, with repayment at the constant rate per annum aforesaid (the "Loan Disbursement"); and

2. The Loan Disbursement shall be subject to a holdback for all unfinished, unleased or unoccupied space equal to the greater of _____ (C) _____ per square foot or _____ (D) _____% of our engineer's estimate to complete the space plus our estimate of leasing commissions. Upon completion, leasing and occupancy, any amount so held back shall be subject to disbursement at the rate per square foot set forth above, within _____ (E) _____ months from the date of the Loan Disbursement but not later than _____ (F) _____ in no more than _____ (G) _____ disbursements, not more often than once very _____ (H) _____ months, and subject to and upon your compliance with the conditions and requirements contained in this Commitment including the following hereof with respect to each such disbursement of holdback funds:

a. An affidavit in form of Exhibit _____ (I) _____ attached hereto, certifying as of the date of closing the continuing status of the existing tenancies required for prior disbursement(s);

b. A rider to the policy of title insurance described above, insuring in the amount the entire indebtedness, the priority of our first lien securing the same and extending the effective date of such policy to the date of such disbursement;

c. The original lease(s) for the disbursement in question, including short form lease(s) and existing amendments which, after approval by us, shall not be amended in any way without our consent nor rent collected thereunder more than one month in advance and the tenants thereunder shall be in occupancy, which tenants as well as their guarantors thereunder shall at the time of closing be solvent and free from bankruptcy, reorganization or arrangement proceedings or a general assignment for benefit of creditors; such lease(s) to be assigned to us at the time of closing upon our form of assignment instrument, which shall be recorded;

d. Statement in form of Exhibit B attached hereto, signed by each of the tenants under the leases delivered to us prior to such disbursement;

e A dated-down certification from your architect certifying to the completion of the tenant finish work in the space for which the disbursement in question is to be made,

readiness for occupancy and such other matters as may be appropriate, together with an unconditional certificate of occupancy for such space (or such other unconditional certificate of appropriate governmental authorities evidencing compliance with all zoning, building and applicable regulations);

f. Subordination of Mortgage Agreements in the form satisfactory to our counsel, executed and acknowledged by each of the tenants under those leases delivered to us as aforesaid prior to such disbursement;

g. Such other documentation or information as we may reasonably request in connection with such disbursement;

h. No default shall exist under this Commitment or under any of the documents evidencing and securing the loan.

In the event that at the time you apply for a holdback disbursement in accordance with the foregoing, the project has achieved a leasing and occupancy level of _____ (J) _____% under leases approved by us, with all tenants thereunder in occupancy and paying rent and you have complied with the terms and conditions of this Commitment including those set forth above, the full amount of the funds being held back by us under this subparagraph shall thereupon be disbursed to you.

The amounts so disbursed hereunder will be consolidated with the existing indebtedness and the total amount thereof shall be repaid at a constant rate per annum payable monthly which when applied first to fixed interest and the balance to principal will completely amortize the consolidated indebtedness on a date _____ (K) _____ years from the first day of the calendar month immediately following the First Disbursement.

All obligation on our part to disburse any portion of the holdback funds shall terminate on the earlier of _____ (L) _____ months from the date of the Loan Disbursement or _____ (M) _____. n393

The developer may be required to fill the gap with a personal guaranty, a letter of credit, a deposit of securities or other collateral, a commitment from equity partners to contribute the necessary funds, or a letter from an institution specifically in the business of providing "gap" financing.

Those institutions agree to make loans (second mortgages if the post-construction lender will allow it) at very high rates. They charge a small ransom for the "gap" commitment letter, and their rates far exceed those that most post-construction lenders would charge for the full loan. Some of these institutions, if called upon to fund all the gap commitments they have written, simply wouldn't have the cash to do it. None of them are in business to fund, just to promise to fund. But they exist because construction lenders often insist on "gap" commitments and some developers have nowhere else to go for them.

Gaps can arise from causes other than the post-construction lender's rent roll requirements. Suppose there is a project cost overrun. The construction lender may decide to fund it if foreclosing on the incomplete project is its only other choice. The result is a gap between what the post-construction lender initially agreed to lend and the actual balance of the construction loan.

§ 97.07(i) Legitimate Reasons for the Post-Construction Lender Not to Fund.

The construction lender examines all the conditions which the post-construction lender attached to its commitment to be sure they can be met. It pushes for the post-construction lender to approve the title, survey, lease forms the borrower

will be using, environmental audits, and anything else in existence before the construction lender makes its commitment to fund in reliance on the post-construction lender's commitment letter. The form of note and security interest (mortgage or deed of trust) can be nailed down between borrower and post-construction lender quickly enough. All of these items will be summarized in a comfort or approval letter signed by the post-construction lender and addressed to the developer and the construction lender.

There are some matters which the post-construction lender just can't sign off at the outset. The most important of these is that the project has been completed substantially according to the plans and specifications the post-construction lender agreed to fund.

Permanent lenders require that any "substantial" (or an equivalent term) change in the plans be approved by them. Obviously the permanent lender can't be burdened with approving every change to a project--the height of light fixtures or the location of electrical outlets, for example. On the other hand, reducing the number of parking spaces or the total square footage of the project would be substantial.

Post-construction lenders have lost lawsuits when they refused to fund because of minor failures of completion. n394 When completion is "95% done," the post-construction lender who refuses to close its loan stands on slippery ground. However, it may legitimately insist on "holding back" sufficient funds to finish the work, escrowing these until the project architect certifies completion and the city issues a certificate of use.

§ 97.07(j) Remedies for Breach of Loan Commitments.

§ 97.07(j)(1) The Borrower's Remedies.

Although it might surprise many borrowers, remedies for a lender's breach of a loan commitment relating to real estate are generally based on the assumption that money is always readily available for borrowing. Similarly, a lender's remedies for a borrower's breach of a loan commitment are generally based on the assumption that creditworthy borrowers are ready, willing and able to close on loans. For this reason, the damages available to a non-breaching party in the context of a loan commitment are generally rather modest and the large judgments granted in other lender liability cases or for default on a loan itself are unusual. Most breaches of loan commitments are anticipatory breaches. Rarely does a party breach as a loan is being funded.

* * *

A borrower has six generally recognized possible remedies: substitute interest rate damages, reliance damages, lost equity damages, lost future profit damages, specific performance, statutory remedies and, possibly, punitive damages.

Substitute Interest Rate Damages: Damages based on a substitute interest rate are the most common awards entered for borrowers where a lender breaches a loan commitment. Such an award allows a borrower to recover as damages from the breaching lender an amount equal to the present value of the difference between the rate of interest specified in the loan commitment and the rate of interest ultimately obtained from another lender over the lifetime of the loan. If there is no change in the interest rate between the two loans, the recoverable damages generally would be the minimal expenses related to obtaining the loan from another lender.

* * *

Lost Equity Damages: Although damages based on an interest rate differential and consequential damages are the general measure of damages awarded for a lender's breach of a loan commitment, a few

borrowers have been awarded lost equity damages. If a borrower is unable to locate alternative financing following breach by a lender and as a result loses the property, the lost equity in the property may be awarded. *Landes Construction Co. v. Royal Bank of Canada, 833 F.2d 1365 (9th Cir. 1987)* (the "loss of equity" estimate of damages is a broadening of the traditional damage determination).

* * *

Lost Profits: Even more difficult for a borrower to recover against a breaching lender than the loss of equity in a real estate project are projected lost profits associated with the project. Although a few borrowers have successfully sought lost future profits caused by the lender's breach of a loan commitment, the general rule is that lost future profits that would have been derived from a new real estate project are not recoverable because such damages were not foreseeable at the time the commitment was made or because they are too speculative. n395

Developers often recover lost profits from lenders who form joint ventures with them and pull out, especially when the developer's compensation is based on future earnings and the lender cancels after the developer has spent a lot of time on the project, maybe even completing the first phase. n396

Specific Performance: Under unique circumstances, a borrower may be entitled to specific performance. The general rule is that specific performance is available only when the plaintiff has no adequate legal remedy. A party to a breached loan commitment is generally considered to have an adequate legal remedy.

* * *

A borrower's legal remedy is more likely to be deemed inadequate and specific performance granted if the borrower's inability to obtain substitute financing is related to the breaching lender's secured position in the property to which the breach of the loan commitment relates ... . Incidental damages may also be awarded in connection with a decree for specific performance. n397

Statutory Remedies: In addition to the common law remedies, new state laws have provided other remedies for a lender's breach. For instance, New York passed a comprehensive banking law that included banking board authority to promulgate regulations and rules and to impose fines or penalties for lenders that fail "to disburse funds in accordance with a written commitment or agreement to make a mortgage loan." 4 N.Y. Banking Law Section 595-a1(c).

§ 97.07(j)(2) Lenders' Remedies for Breach of Loan Commitments.

Although such an occurrence is rarely considered by borrowers, lenders also may be injured by breach of a loan commitment. The remedies available to lenders, however, are quite limited--unlike those available to borrowers. Assuming the commitment is not an "option contract," lenders may seek damages resulting from lower interest rates, if such is the case, after the loan commitment breach or liquidated damages provided for in the loan documents. Although technically not impossible, granting a lender's claim for specific performance against the borrower would have to involve unique circumstances.

Although there appear to be no reported decisions granting specific performance by a lender against a borrower, case law does indicate that in certain rare exceptions such a remedy might be available. For example, some commentators have argued that a lender should be entitled to specific performance on the grounds that each loan transaction is indeed unique. They argue that a lender may be forced to undertake a less desirable loan, that the substitute loan may contain greater risks, or that the interest rate damage calculation may be worth less to the lender than if specific performance had been ordered. D. Draper, *The Broken Loan Commitment: A Modern View of the Mortgage Lender's Remedy, 59 Cornell L. Rev.*

418, 433 (1974). However, these arguments are generally not accepted by the courts, which continue to hold that a lender's only interest is in being repaid and therefore monetary damages provide an adequate remedy. n398

A lender's damages for breach of a loan commitment, absent a liquidated damages clause, are usually the loss, if any, on a substitute loan rate of interest. A borrower's damages for a lender's breach include: any increased interest the borrower must pay on a substitute loan; foreseeable expenditures made in reliance on the loan; lost equity in the property (possibly); lost profits (rarely); specific performance (almost never); and (as yet) no punitive damages. n399

§ 97.07(j)(3) The Lender's Commitment Letter Does Not Automatically Incorporate Promises the Borrower Makes in Its Loan Application.

A borrower filled out a loan application for a "take out" commitment from Prudential Insurance Company seeking a long-term loan for $24,500,000. Above the signature line on the standard loan form, a printed document, was a promise by the borrower to give the lender a first mortgage. Along with the standard two-page application, the borrower agreed to a five-page typewritten rider with 34 conditions.

The project was the Hyatt Regency Hotel in Phoenix, Arizona. It was already under construction when the developers began arranging construction and permanent financing. Hence, there was always the possibility that mechanics' liens could arise that would have a lien priority superior to the lien of a later mortgage. Mechanics' liens in Arizona, as in many states, relate back to the commencement of construction.

To deal with the potential mechanics' lien problem the developer agreed to obtain a title company policy insuring Prudential and the construction lender, United California Bank, against mechanics' liens having priority over their mortgages.

The hotel was completed and opened for business. The construction lender and the developer informed Prudential that it was time for Prudential to fund the take-out loan. But by that time disputes between the developer, the general contractor and subcontractors had arisen. Mechanics' and material liens had been filed against the hotel.

Prudential refused to fund because it was not going to have an in fact first lien, as promised in the loan *application*. Prudential's determination not to fund based on the title insurer's guarantee of a first lien instead of a lien in fact, had been reinforced when in preliminary discussions with the title insurer. Prudential learned that the insurer was evaluating defenses to payment based on the borrower's conduct and the precise language of the policy.

Prudential argued that the terms of the loan application and its rider should be read as part of the loan commitment. Unfortunately for Prudential, the only document incorporated by reference into its loan commitment was the five-page rider, not the two-page standard loan application form which contained the borrower's promise of a first mortgage.

Ordinarily, a loan application might be considered an offer, and the lender's commitment an acceptance of the offer. But construction loan applications are so incomplete, they are difficult to construe as formal legal offers. Often, they have been compared to sales presentations.

Prudential also contended that its right to a first mortgage could be implied from the circumstances of the transaction, lending practice generally, and the borrower's warranty in its deed of trust that it was conveying free of encumbrances.

The flaw in this aspect of Prudential's argument was that it had entered the deal fully aware that a potential mechanics' lien problem existed and had agreed to accept title insurance of a first lien in place of an in fact first lien until the time for its performance had arrived.

As for the borrower's warranty against encumbrances in the deed of trust, that was construed not as an affirmative promise of a first lien but as a promise to indemnify Prudential if it suffered a loss resulting from the borrower not having had a first lien.

Prudential also claimed that it should not be required to fund into a default. The developer was insolvent. However, the loan commitment had no provision conditioning Prudential's performance on the borrower's continued solvency or no adverse change in the borrower's financial situation.

The trial court after a 76-day trial, in a 72-page opinion, found against Prudential. Its refusal to fund constituted an anticipatory repudiation. The trial court was upheld on appeal. n400

Prudential's case for refusing to fund would have been improved dramatically if its obligation to fund had been conditioned on its having a right to a first lien and a right not to fund if the borrower's financial situation deteriorated materially between the commitment and loan closing date. The "first lien" condition actually appeared in early drafts of the loan commitment but got left out as the borrower and Prudential negotiated their deal. The construction lender, UCB, might have resisted a clause giving the permanent lender a right not to fund if there were a "material adverse change" on the borrower's balance sheet. But UCB would have been hard-pressed to deny Prudential the same "first" lien priority condition it had obtained on the very loan it was to have assigned to Prudential as part of the five-party agreement.

United California Bank (now First Interstate, but hereafter referred to as UCB) made this loan as the lead bank in a participation with a number of other lenders. Following the foreclosure and lawsuit, UCB sold the hotel to a consortium of buyers for more than $30,000,000.

UCB and the developers had agreed to split the recovery (approximately $15 million) fifty/fifty. With that sum, UCB and the other participating lenders still earned less than they had expected on their investment, but didn't take too bad a loss.

When Prudential refused to fund the take-out loan, UCB considered suing for specific performance, but decided to pursue a damage action instead. An action for damages is the preferred remedy in Arizona. Specific performance is only available only if damages are proved to be an inadequate remedy. Since all UCB and the other banks wanted was a return on their investment, money damages were clearly sufficient.

Second, UCB was eager to foreclose, obtain title and sell the hotel as quickly as possible. Waiting for specific performance would have meant waiting until its lawsuit with Prudential was resolved before foreclosing and selling the hotel. Pursuing a damage claim gave them the option of selling earlier--although not, perhaps, until a trial court determined the hotel's worth as of the date of Prudential's breach.

Third, UCB's agreement with the developers to share the costs of litigation and any recovery increased the chance that one or the other of them would have provable damage. If the court found the hotel was worth more than the amount of the construction loan, the developers would have a claim for lost "equity" value. If the court found the hotel was worth less than the amount of the construction loan, UCB would have a claim for the shortfall.

UCB bid the full unpaid balance of the loan at foreclosure because, at that time, UCB believed the property was worth at least $25,000,000. A bid lower than that would have automatically been an admission that there was no equity value in the property. n401

Following the case, Prudential paid the sums, as ordered, approximately $11.5 million plus accrued interest (approximately $15 million in all). Of course, it had the benefit of those funds during the years of litigation which

coincided with record high interest rates (approaching 20% a year).

§ 97.07(j)(4) Lender and Borrower Must Show "Good Faith" in Negotiating Gaps in the Loan Commitment.

The commitment letter seldom contains "all the final and definitive terms" of the deal. When disputes arise after the commitment about the terms and conditions of the final loan, both parties are obligated to negotiate in "good faith" their differences about the documents necessary to a closing. n402 As one lawyer puts it: (1) Never stop negotiating; (2) Always appear willing to compromise. n403

The term "good faith" appears in the Uniform Commercial Code n404 and in § 206, *Restatement (Second) of Contracts* (1981) as a duty imposed in all contracts.

Definitions of "good faith" abound but there is no consensus about its proper meaning. It could be interpreted as nothing more than an admonition against intentional dishonesty (fraud) or an attempt to build community standards of fair play into all contracts. In fact, it often figures prominently in court opinions holding lenders liable for breaching their obligations under commitment letters. n405

§ 97.07(k) Alternatives to Post-Construction Financing.

Many developers don't like take-out commitments and have found construction lenders willing to live without the comfort of them.

Developer/Builder Fred Johnson, for over 25 years a successful developer of residential projects and subdivisions in California, Hawaii, and New Mexico, explains his position on take-out commitments:

> I don't use take-out commitments. In most cases in this economic climate they aren't being used any more. Years ago they were very common. In fact they were required before you could even get a construction loan. But when the interest rates started swinging up and down by 3-5% [in the late 1970s-early 1980s], they were just too risky.
>
> There are many reasons permanent lenders can invent for refusing to fund. If they don't want to fund--for say interest rate reasons--they're going to find some other reason not to. Sure, you can sue them. Maybe you'll recover something. But it won't be for six years and it'll cause a million headaches.
>
> Developers have more confidence in their projects than permanent lenders do. Therefore, the developer wants a chance to finish the project, lease it, and then get the permanent financing with a successful project in hand. I generally negotiate a mini-perm with my construction lender. This type of construction loan carries through the construction phase and lasts for between two and five years after completion. During this time I can get my leases, and find the most favorable possible 20-year loan. n406

Developer Roger Torriero on take-out commitments and mini-perms:

> Take-out commitments will rarely give the best terms available on a project, because they're issued in advance of the completion of the project the lender is taking a risk. Lenders don't take risks without compensation. The earlier in the project the take-out commitment is issued the more it's going to cost. If you get a take-out commitment before the construction, the financing terms of the take-out will almost never be as good as those you can get on a completed project.
>
> With our projects we will negotiate a standby commitment with our construction lender that gives us time once we have completed construction to find a permanent lender. The interest and terms of the standby commitment will generally be very high as an inducement by the construction lender for us to

get permanent financing. If we can't get permanent financing there's probably a reason, so the increased interest rate on the standby is justified in the lender's eyes. n407

The most common alternatives to a post-construction commitment are bullet, mini-perm, or bowtie loans, or rollover mortgages. These are defined here:

Bullet Loans. These are relatively short-term loans (with 3- to 10-year terms) with provisions for periodic interest rate adjustments (e.g., every 5 years) and with interest-only payments or with partial amortization based on long-term (e.g., 25 to 35-year) amortization schedules.

Sometimes bullet loans are structured as long-term loans (e.g., 25-year term) with a so-called provision permitting the lender to call in the loan after a stipulated period of time (e.g., 10 years), at which time the borrower must satisfy the outstanding loan balance by refinancing or by selling the property. Originally, these loans were designed for developers without takeout commitments whose construction loans had expired and who could not immediately obtain adequate post-construction financing. At present, these loans are being made primarily by life insurance companies to developers who are purchasing or refinancing existing properties with strong rental schedules. *See generally* Ling and Peiser, *Choosing Among Alternative Financing Structures*, 17 Real Est. Rev. 39, 40 (Summer 1987). Sometimes they are also used by insurance companies in a process called "matched funding" whereby monies received from pension funds (in respect to which a fixed rate of return is guaranteed under a so-called guaranteed investment contract) are loaned out as bullet loans at slightly higher rates (without any prepayment privilege) to assure the lenders of a profit spread during the matching terms of the investment contracts.

Mini-perms and Bowtie Loans. The mini-permanent loan, or mini-perm, is a combined construction-permanent loan that is relatively short-term (e.g., 7 to 10 years) and converts from an interest-only construction loan to a (pre-negotiated) fixed rate permanent loan once construction is completed. The principal advantage to the developer-borrower is that it has a number of years after construction is completed to negotiate a satisfactory post-construction loan without paying a prepayment fee; moreover, based on the accumulating equity in the project the borrower can refinance for a larger loan amount when interest rates decline and be in a position to pay off the mini-perm loan amount and cash out some tax-free equity.

The "bowtie loan" is attractive to developers because, while it features a floating rate (like the variable rate mortgage), it contains a cap on interest payments, so that any interest above a stipulated ceiling amount is deferred as a balloon payment that is not payable until the loan matures. Conversely, if rates should decline, the lower interest expenses may help offset declining revenues during a recession. These loans are made primarily by commercial banks, thrift organizations, and finance companies. They are usually short-term (e.g., loan terms of 5 to 10 years), permit prepayment without a penalty, and are secured by second as well as first mortgage liens. They derive their name from the fact that their rates move up and down in irregular patterns.

Rollover Mortgages. Ordinarily, the rollover mortgage has a long-term amortization schedule (e.g., 25 to 35 years), and because the term of the loan is so short (e.g., 3 to 5 years) it is customary for the lender to extend, or "roll over," the loan for another short-term period at the prevailing market rate of interest for short-term loans if the borrower has not refinanced elsewhere. For a discussion of these mortgage devices *see generally* Madison and Dwyer paragraph 3.04[3][d] (1989). n408

One author implies an explanation for why construction lenders and developers became so inclined in the late 1980s to proceed without the safety net of a take-out commitment.

The Perils of Prolonged Prosperity for Real Estate Markets

Anthony Downs
Senior Fellow, the Brookings Institution

> As the 1980s come to an end, the American economy as a whole is enjoying its seventh straight year of continuous prosperity. This is the longest peacetime economic expansion in American history. The vast majority of Americans benefit from prosperity, and therefore regard it as a blessing. But prolonged prosperity has also had some negative impacts upon American real estate markets ... .
>
> Prolonged prosperity also lulls many people into a false sense of economic security. It helps them forget not only past general economic maladies like unemployment and low profits, but the possibilities that particular projects may fail ... .
>
> Prolonged prosperity reduces sensitivity to risks among other key real estate players too. Lenders become less cautious about extending credit to developers, thereby contributing to over-building.

In the early 1990s, many "mini-perm" lenders learned what happens when no other lenders are ready to fund the refinancing needed to pay off the "mini-perm" at maturity. The "mini-perm" lender has the choice of foreclosing or extending the loan term. Often, the interest rates on mini-perms are structured to rise swiftly after the "pay off" date. The high rate is geared towards pushing borrowers into refinancing. But if refinancing isn't feasible because the project doesn't generate sufficient income, "disincentive" mini-perm rates can lead to bankruptcy filings. That is how many "mini-perm" lenders came to study "work out" menus (alternatives for restructuring loan repayment schedules) to avoid foreclosure.

§ 97.07(l) Keeping the Loan "at Margin" and "In Balance": The Mini-Perm Lender's Way to Call for More Borrower Equity Money When Market Values Are Falling.

Construction lenders protect themselves against having to foreclose on completed but economically un-viable projects in a number of ways.

> 1. "*At Margin*." They may require the borrower to sign a covenant to preserve the lender's original loan-to-value ratio. If the lender had promised to make a 75% loan of $75 million when the completed project looked like it would be worth $100,000,000, and the value drops to $50,000,000, the developer should pay the loan down to $37,500,000.
>
> 2. "*Loan Balance*." The borrower may also assure the lender that there will always be enough money in the construction loan account to complete the project.

If construction costs are greater than estimated, or rental income projections fall below the levels that the borrower and lender assumed when they entered their loan, the "loan balance" and "at margin" clauses give the lender the right to withhold disbursements and to demand additional equity money from the borrower.

The lender's demand for additional equity will most likely be based on an interest reserve which was calculated according to the lender's appraisal and the developer's *pro forma* showing the rent levels the building would achieve after completion. The lender and borrower would have assumed that interest on the loan would be capable of being met from rents once the project was up and running. If those rent levels come to appear unduly optimistic, they will no longer cover the interest costs as originally anticipated. The lender will want the borrower to fill the expected interest

gap ahead of time, withholding interest payments from the construction loan account and insisting the borrower pay interest now to avoid getting short-changed later.

The lender will find courts in some states reluctant to allow foreclosure absent a monetary, material default, and when the lender's "security interest" is impaired only in the sense that paper projections of revenue fall short of the lender's initial assumptions.

How bad things can get is depicted in these exhibits, supplied by James Moore. The first exhibit shows the borrower's *pro forma.* This was the developer's estimate of rental income: 95% occupancy at $2.00 per square foot per month, by the 18th month. The lender's original appraisal was more cautious: 93% occupancy at $1.95 per square foot per month. The actual rents are a disaster: 75% rented at $1.75 per square foot. In addition, the developer had expected to collect $30,000 per month in parking revenue. Instead, the developer has to give away parking to the tenants. The developer is also short $2.00 per square foot per year in expenses expected to be passed forward to tenants in their leases. The developer has had to absorb these expenses personally.

18th Month NOI

	Borrower's *Pro Forma*	Original Appraisal	Actual	
Revenue				
	95% at $2.00/s.f.	231,800		
	93% at $1.95/s.f.		221,247	
	75% at $1.75/s.f. (w/25% in free rent)			106,750
	Parking	30,000	10,000	0
Gross Effective Rent	261,800	231,247	106,750	
Expenses				
	122,000 s.f. @ $6.50/s.f./yr.	66,083	66,083	
	122,000 s.f. x 75% @ $8.50			64,813
	x 25% @ $6.00/s.f./yr.			15,250
	Capital Expenses on Ph II	N/A	N/A	15,000
Net In-	$195,717	$165,164	$11,687	

come Before Interest				
Interest on $13 MM @ 10%	$108,333	$108,333	$108,333	
	Excess/ <Shortfall>	$87,384	$56,831	<$96,646>
	Annualized Deficit			$1,159,752

PROJECT BUDGET(S) 122,000 s.f. Office Bldg.

		Original	6 mos. later	18 mos. later
Uses				
	Land	$4,152,000	$4,152,000	$4,152,000
	Pre-acquisition Costs	266,000	266,000	266,000
	Architectural/ Engineering	475,000	475,000	475,000
	Shell, Core & Site	7,625,000	7,625,000	7,625,000
	Per-	800,000	800,000	800,000

mits & Fees				
Development Fees	227,000	227,000	227,000	
Taxes, Insurance, etc.	244,000	244,000	244,000	
Commissions	450,000	450,000	450,000	
Contingency	122,000	122,000	122,000	
Tenant Improvements	(@ $20.90/s.f.)	(@ $30/s.f.)	(@ $40/s.f.)	
	2,550,000	3,660,000	4,880,000	
Interest Reserve (Net)	1,729,000	2,229,000	2,500,000	
	Total Uses	$18,640,000	$20,250,000	$21,741,000
Sources				
Original Cash Equity	$5,640,000	$5,640,000	$5,640,000	

Loan Amount	13,000,000	13,000,000	13,000,000	
Sub-sequent Equity	0	?	?	
	Total Sources	18,640,000	18,640,000	18,640,000
Ap-praised Value	$19,000,000	$18,000,000	$14,500,000	
	Loan/Value	68.4%	72.2%	89.7%
	Exposure/Value	68.4%	81.2%	111%
Bal-an-cing Is-sues:		$1,610,000	$3,101,000	

Annual NOI

	Appraisal	Actual
Rent	$23.40	$21.00
Expenses	$6.50	$8.50
NOI	$1.9MM	$1.4MM
/ 1.25 / .105 =	$14.6MM	$10.6MM
Value @ 10% cap.	$19MM	$14MM

Exhibit 1 shows the result of these project income short-falls on the interest payments that will be due on the $13,000,000 construction loan at 10% interest. If the original estimates of income had proved accurate, the lender would have had a $56,831 "cushion," as the monthly net operating income would have exceeded the debt service by that margin. Under the "actual" (presently projected) rents, there will be a shortfall of nearly $100,000 per month. The lender would prefer not waiting 18 months later to see if these sad projections materialize. It will want to treat the loan as "out of balance" much earlier, and invoke its "at margin" clause now.

The lender would call upon the borrower to "top up" the loan in a sum revealed in Exhibit 2. This exhibit shows the originally estimated uses of funds and sources of repayment. Exhibit 2 shows an exposure value of $3,101,000 18 months into the loan.

The exposure value is the difference between the original projected cost of completing and renting the project and the later projection. In Exhibit 2 we see that rents are going to be about $800,000 lower than originally estimated, and the cost of completion, mostly due to the landlord having to pay for tenant improvements in order to attract tenants, has gone up from $20.90 per square foot to $40.00 per square foot. Taking these two changes into account, the new projected cost of completion is going to be $3,101,000 greater than originally anticipated.

The exposure value of $3,101,000 is the amount it will take to complete the project that the lender had expected to be completed for $18,640,000. Now it will cost $21,741,000. Unless that $3.1 million gap is closed, the lender will get stuck with an unrented, incomplete project. The borrower could close by raising $3.1 million or the lender could fund the gap by increasing its loan from $13 million to $16.1 million. The items that have worsened from the original estimates are tenant improvements and interest reserves.

Tenant improvements represent the landlord's contribution to the tenant to cover the cost of completing the core and shell, which is all that most office developers in the U.S. provide. The tenant is responsible for making the space usable--for installing wall partitions, floor and ceiling finishes, carrying heating and air conditioning from a central source on each floor to the rest of the floor, and providing phone and telecom hookups, furniture, and window covering.

The increase in interest reserves is due to the reduction in projected rents. The interest reserve (net) is the difference between interest that will be due on the construction loan during its expected three-year duration and the projected rents available for debt service that the borrower/developer is able to collect during that period. The lender assumed the project would be completed and rented before the construction loan was repaid from the proceeds of a refinancing. The lender assumes that rents collected while the construction loan is outstanding will be allocated to the payment of interest. As projected rents fall, due to pessimism about rental market conditions, the interest reserve needs to be increased. If interest rates were to rise, interest reserves would also have to be increased.

Predictably, the developer is going to be distressed when the lender threatens to withhold construction money based on nothing more than its gloomy projections of future rents. The lender's allegation that the loan is "out of balance" isn't the result of a cost overrun which any responsible, well-capitalized developer would be prepared to pay out of pocket. Rather, this imbalance is a result of the lender's cheerless appraisal that present market conditions have deteriorated since the loan was made, and may also be influenced by the developer's lack of success to date in leasing. The developer also knows that the lender probably won't risk a delay in construction by withholding funds necessary to keep the project on track. If the lender threatens foreclosure, the developer will certainly contend that the lender's security interest isn't impaired as long as the project's value on completion will exceed or equal the construction loan balance on that date.

What can happen to the lender who isn't able to induce the borrower to cough up additional funds and guarantees is seen in Exhibit 3. The reduced rent levels translate into an annual net operating income $500,000 less than originally expected. A cautious permanent lender will discount those rents by a certain percentage and then capitalize them. Under current market assumptions regarding both the discounting and capitalization of income, the project will be worth only $14,000,000 instead of $19,000,000. A construction lender who puts up as much as indicated by the 18-month scenario of Exhibit 2--without additional borrower equity--stands to lose over $3 million on a refinancing.

In Exhibit 2, net operating income (NOI) is divided by 1.25 because permanent lenders expect a debt coverage ratio not to exceed 80%. In other words, for every dollar of debt service, lenders expect to see $1.25 of NOI. This is a standard underwriting ratio that the permanent lender will apply in determining how much of a loan to make. The .105 is the presumed interest rate, which was 10.5% at the time.

These numbers show why--based on projected rents and debt service at the time this exhibit was drawn--the most a permanent lender could be expected to lend would be $10.6 million. But the construction lender will have loaned $13 million.

That is why the construction lender stands to lose $3 million. Deducting loan origination fees and costs for the permanent loan, there will be a $3 million shortfall when the permanent loan is funded to take out the construction loan.

Another way of deriving the $3 million figure is from Exhibit 2. If someone doesn't come up with $3 million, the project will not be completed and rented. Most likely, the construction lender is going to have to advance that $3 million to get the job done. If the construction lender advances the $3 million, it will have made a loan substantially in excess of the value of the building.

No other sensible lender or buyer can be expected to come forward to bail out the hapless, under-secured construction lender. This is what the construction lender's definition and early enforcement of the "in-balance" clause is designed to prevent.

As the construction lender shifts this risk to the developer/borrower through "loan balance" and "at margin" clauses, even the most buoyant of developers may come to wish they had arranged "take out" financing in advance of the construction loan, as most developers would have done prior to the mid-1980s.

A construction lender defends the use of "loan balance" and "at margin" provisions by comparing real estate to the stock market where such provisions are common. n409

A STOCK INVESTMENT/REAL ESTATE LOAN COMPARISON

Since real estate is considered by institutional investors as an alternative to, or diversification within a stock and bond portfolio, I believe that comparing real estate to stock has some merit illustratively.

I. *A Margin Call*--When you open a margin account at a brokerage firm, and borrow $5,000 against $11,000 of IBM stock, you agree to re-margin the collateral for the loan if the stock value drops. If your IBM stock drops to $8,000 in value, you have a very short period of time to either: (a) pay down the loan to $4,000 or less; or (b) provide additional stock to increase the collateral value above $10,000. Even though you did absolutely nothing to cause the collateral value to drop, and you are not happy about the situation, you do not expect the stock broker to maintain the same loan at a higher loan to value. Yet when the same scenario happens in real estate [$15MM loan against a $20MM appraised value; 18 months later, appraised value drops to $17MM], many people view it as "unreasonable" for a lender to discuss a paydown of the loan or additional collateral.

II. *A Capital Call ("Loan Balancing")*--If IBM's shareholders voted to recapitalize the company by another 25%, then each shareholder would be given an option: (a) to increase their stock holdings by 25% to maintain their percentage ownership; or (b) allow their additional shares to be sold to another investor, thereby diluting this original shareholder's percentage ownership. In the above example, you would not expect your broker to advance $2,750 on your behalf (25% of $11,000) to protect your ownership interest in IBM. However, when a development requires additional capital (Tenant Improvements; Interest; Operating Expenses; etc.), there is automatically an expectation that the lender will cover all or *at least* part of this capital call. At least in the IBM stock example, the value of the collateral should have increased! When more interest or tenant improvements are needed, the real estate value is usually declining simultaneously.

III. *An Option*--When your IBM stock dropped from $11,000 in value to $8,000, would you sell me an option for $1.00 to buy your stock at $8,000 anytime in the next 3 years,

when I'm not willing to pay something meaningful for that option today? Of course not. You'd be taking all the downside, but giving me all the upside *for free* ($1). However, when a bank has a $15MM loan on a property appraised for $20MM, and later the costs go up by $2MM while the value drops to $18MM, most people assume it's the bank's responsibility to lend all (or most) of the $2MM increased costs. A truly non-recourse loan implies that upon maturity (*or default*), if the property is worth more than the debt, you can pay off the debt and keep the upside; if the value is below the non-recourse debt, you can give the property to the lender and avoid the additional loss. If this $2MM "out of balance" (increased costs) creates a default, the borrower can provide the $2MM to cure the default and keep the $3MM of value above the debt. If he chooses not to, why should the lender lend him $2MM of the $3MM that the borrower has to protect, and effectively give the borrower the option (for free) to walk away if the value drops by only $1MM or more?

§ 97.07(m) Shortcomings in Some of the Construction Lender's Risk Avoidance Devices.

Earlier, we listed the risks of construction lending and some of the ways lenders could reduce those risks. One risk reduction technique was the requirement of a commitment letter from a post-construction lender. The pros and cons of this device have been outlined in the preceding sections. Three other devices--bonding, direct payments to contractors, and title insurance--will now be considered.

§ 97.07(m)(1) Bonding: Surety, Payment, and Performance Bonds.

Bonds are usually required by statute for public works. They are used in private projects to give owners or lenders further comfort in the ability of their chosen general contractor to complete the job on time, on budget, leaving no unpaid subcontractors, suppliers or laborers behind who could file mechanics' liens against the project.

Bonds are costly, about one percent of the construction cost. The premium varies with the track record and resources of the contractor being bonded, and the risks of building in the particular geographic area. n410

A surety company makes its own investigations of the contractor and its own analysis of the plans and budget for a project. Thus, the mere fact that a bond has been issued by a reputable surety company provides a measure of comfort. n411

Lenders can require bonding as a means of protecting their interests. They can contract for developers to obtain bonds from a surety, guaranteeing "against unpaid claims of mechanics and materialmen and ... that the project will be completed on time for the contract price." There are several types of bonds which sureties underwrite, but the relevant ones for construction lenders are payment and performance bonds.

Performance Bonds. n412 Performance bonds guarantee that the contractor/developer will perform the work under the terms and conditions of the construction contract, subject to the amount of the bond, within the agreed cost. If the developer defaults, the surety may either complete the contract personally, or provide the lender with funds to contract with another developer to complete the contract. The surety is likely to choose the latter route because its contribution will be limited to the amount of the bond, whereas under the former option, it may well end up spending more than the bond amount. n413 A performance bond does not guarantee the lender repayment of the loan, or hold the lender harmless from collateral damage that a defaulting contractor may cause.

Payment Bonds. A payment bond, often issued with a performance bond for one premium, insures the property owner and the lender against the claims of third parties--workmen, subcontractors n414 and suppliers for labor and materials

used in completing the contract. They insure that the general contractor will pay all subcontractors the sums due. This should prevent mechanics' liens from being filed on the project property or provide funds for the release of justified liens. Both bonds are necessary in order to ensure the project will be completed without increasing the lender's exposure.

Bonding would appear to be an ideal completion assurance device. Not only does the surety provide the "owner with substantial protection at a relatively insignificant cost ... it also allows the owner a single and identifiable place to seek recovery for a default in the performance of his contract." n415 Besides adding to project cost, bonds are often not available to contractors who don't have great financial strength.

Defenses. Bonds are usually subject to numerous defenses to payment, for example:

> (1) The liability of the surety may be limited to the construction described in the original construction contract for an amount of coverage geared to the original construction price, so that the surety would not be liable for design or construction changes (which are virtually inevitable). n416

To eliminate this defense to payment the lender should contract expressly for protection if the plans are modified or time extensions are granted for completion. The lender might also contract for continued surety coverage if cost increases do not exceed the original contract price by some agreed amount--10% is common.

> (2) Losses are generally not covered if caused by matters outside the construction contract (e.g., the contract provides for a 15% holdback, but the loan agreement provides for only a 10% holdback and the developer has squandered the extra 5% of the construction funds) or for losses occasioned by violations of the construction contract (e.g., the developer makes payments in advance of dates specified in the construction contract). n417

The lender should attempt to negotiate dual obligee provisions, naming the lender as beneficiary, and immunizing the lender from defenses arising out of the contractor's actions which the lender did not expressly authorize in writing. At a minimum, the surety should be required to give the lender ample notice of the owner's failure to perform and an adequate time to cure the owner's breach of the construction agreement.

> (3) Where the bond covers a subcontractor, rather than the general contractor, the surety may argue that the failure to perform arose from the failure of the other subcontractors, not the bonded subcontractor. n418

The solution here is to "have a single general contract that covers all of the work and which is itself covered by performance and payment bonds." n419

> (4) Based on the so-called Los Angeles clause in some surety bonds, the surety may claim that its liability is conditional on the performance by other parties to the agreement. For example, where the project cost is $1 million, $800,000 to be supplied by the construction loan and $200,000 by the developer, the surety may claim its performance under the bond is conditioned on the developer, or, on default by the developer, the construc-tion lender supplying the $200,000. Or, where parts of the project are being constructed by others not covered by the surety bond, the surety company may claim that the performance of the contractor was hampered or frus-trated by the breach of other contractors. Or, the surety may claim that the contractor was prevented from performing because the developer delayed in approving a change order or making payments to subcontractors. n420

As indicated above, all these defenses can be mitigated by the lender negotiating appropriate changes to the standard form bond. Lastly, the owner is not entirely protected from a developer's default because the damage caused by default may exceed the bonded amount. Therefore, commentators have suggested that the bonds' real importance to lenders is

the knowledge the contractor was solvent enough to obtain it. n421 But the alert lender may insist that cost overruns be funded by the developer as they occur, and that the construction loan be kept "in balance." By dealing only with developers willing and able to invest additional equity as the project proceeds, construction lenders close the funding gap left open by the bond ceiling being no higher than the projected construction cost. The trouble comes when a developer who, on signing the loan agreement, appeared willing and able, later becomes reluctant or strapped for funds.

§ 97.07(m)(2) Making Payments Directly to Contractor or Subcontractors.

Frequently, the construction lender will reserve the right to make disbursement checks jointly payable to the developer and the contractor, or to the contractor and the subcontractors, or even the right to make payments directly to each subcontractor. The lender's purpose in obtaining control over the payment of disbursements is to protect itself against forged lien waivers and to forestall the improper diversion of construction loan funds from the subcontractors by either the developer or the general contractor. However, if the construction lender makes payments directly to the subcontractors, it may unwittingly become liable to the Internal Revenue Service and to the subcontractors for any unpaid or unwithheld FICA taxes.

In addition, there is case law suggesting that when a lender steps into the shoes of another party in the project, the lender must assume all of the responsibilities of that party to others and, protect the interests of the party whose prerogatives it has preempted. For example, in *M.S.M. Corp. v. Knutson Co.,* the construction lender, bypassing the developer, made loan advances directly to the contractor and was held liable, as a fiduciary, to the developer for loan funds diverted by the lender to satisfy an unrelated debt owed to it by the contractor, even though the developer owed the contractor an amount far in excess of the diverted amounts. In so holding, the Minnesota court stated that:

> When a mortgagee undertakes to disburse funds for a mortgagor under a construction contract, a fiduciary relationship arises. Under such circumstances, the mortgagee has the duty not only to apply all of the proceeds to the use of the mortgagor without diverting them for unrelated obligations incurred by contractors or subcontractors, but also to account for all of the sums, expended on behalf of the mortgagor and to furnish adequate proof of the sums paid and the purpose of the disbursement. *[167 N.W.2d 66, 68 (Minn. 1969)* (*per curiam*).] n422

§ 97.07(m)(3) Title Insurance.

The construction lender counts on a title insurance company insuring a first lien free of prior mechanics' liens. Cautious title insurers inspect the site and check the public records to make sure there are no prior mechanics' liens. But even if there were, and the insurer agreed to insure free of them anyway, as it did in *United Cal. Bank v. Prudential Ins. Co.*, the insurer may have defenses to payment. Lenders' title policies exclude from coverage any loss or damage "created" or "suffered" by the insured. In one case a construction lender agreed to fund about 75% of a project's estimated cost. The borrowers were expected to put up some of the cost as construction progressed--and didn't. For this and other reasons, the lender withheld funds from the construction loan. Subcontractors went unpaid and filed liens. The title insurer had agreed to protect the lender's lien priority, but the insurer escaped liability by arguing that the lender deliberately withheld funds, and this act "created" the mechanics' liens. n423

§ 97.07(n) Portfolio Management and Diversification.

§ 97.07(n)(1) Shifting the Interest Rate Risk: Interest Rate Swaps for Real Estate Developers and Lenders.

Construction loans are customarily written at variable rates. In contrast, post-construction financing for commercial projects is often at fixed rates. Lenders with fixed rate sources of funds (time deposits) and variable rate income from loans can swap their variable rate loans with lenders whose portfolios have just the opposite characteristics. The result of the swap is that each lender is better able to match its income with its liabilities. Developers can do the same.

Developers who customarily borrow construction loans at floating rates (prime plus) remember the early 1980s when the prime bank lending rate pushed 20%. Those who fear the possibility of a return to those rates and whose projects simply can't absorb those increases seek to swap their floating rate construction loan obligations with fixed rate obligations.

An Example of the Swap, Using Numbers n424

The following example shows how one counterparty can sell its comparative borrowing advantage to the other, while both counterparties are hedging their risks by matching their assets with their liabilities. Counterparty "X" is a highly-rated public company, capable of raising long-term, fixed rate debt at extremely favorable prices. X can borrow at a 10% fixed rate. X is a consumer finance company, and uses the money that it borrows long-term to make short-term, floating rate loans. Counterparty "Y" is a strong company, but without the name recognition and borrowing power of X. It could borrow at a fixed rate of 12%. Y is a savings and loan, and uses the money it currently borrows at short-term, floating rates to originate long-term, fixed rate mortgages.

X has a 2% borrowing advantage, which it would like to sell to Y. Furthermore, X would be better off with floating rate debt, because it has floating rate assets, and Y would be better off with fixed rate debt, because it has fixed rate assets. The solution is for X to borrow at fixed rates, and Y to borrow at floating rates; the counterparties then swap interest payments on the debt. X becomes the floating rate payor, and Y becomes the fixed rate payor.

X borrows $10,000,000 at 10% fixed rate, and Y borrows $10,000,000 at LIBOR plus75%. The75% is a spread which reflects Y's credit risk to the lender. Y then pays 10.5% interest on a notional amount of $10,000,000 to X, and X pays the LIBOR rate on a notional amount of $10,000,000 to Y. Note that the interest is calculated on the notional amount of $10,000,000; X or Y might have borrowed more or less than that amount, but chose to swap interest rates on a chosen principal amount of $10,000,000.

The result of the swap is that X is borrowing at the short-term, LIBOR floating rate. This is what X could probably do in the open market, because X is strong enough to pay no spread on LIBOR. Y is paying 10.5% fixed rate to X, and is receiving only LIBOR in return. Y must also make up the75% spread on the $10,000,000 it borrowed at LIBOR, because it is not receiving this part of the debt from X. Thus, Y's all-in cost of the swap is 10.5% paid to X, plus75% paid to its floating-rate debt--a total cost of 11.25%. Y saves75% compared to its own fixed rate cost of funds of 12%. X makes a profit of.50% from the swap, because it borrowed at 10% fixed rate, and received 10.5% from Y.

X and Y now have matched assets and liabilities. X has "sold" its comparative borrowing advantage to Y for a50% profit, and Y has saved75% on borrowing fixed rate funds. Furthermore, the swap does not reflect the liabilities on the counterparties' balance sheets--X's balance sheet continues to reflect fixed rate debt, and Y's reflects floating rate debt.

§ 97.07(n)(2) Real Estate Income Stream Swaps.

In addition to interest rate swaps, lenders also use income stream swaps to manage and diversify portfolios. n425 While an interest rate swap is basically an exchange of liabilities between parties, the real estate swap is an exchange of income streams without exchanging the underlying real estate ownership. n426 Parties to the swap exchange a payment on principal based on the return of a broad based real estate index for a payment on principal based on a return of fixed or floating interest rate. n427 By exchanging particular streams of income, lenders can recognize comparative advantages not available through an interest rate swap and realize joint savings, diversify, and hedge. n428 The risk involved in an income swap is the difference between cash flows per payment period, not the entire cash flow. Default on the swap would indicate negative contract value and bankruptcy of one party. n429 So unless the trade is misvalued by a large margin, risk of default depends only on the bankruptcy of one party.

§ 97.07(o) Caps, Floor, and Collars.

As an alternative to trading an obligation you have for one you would rather have, a person with a floating asset or obligation can buy a hedge against the rate floating too high or too low. These are called "caps," "floors," or "collars." Say your loan was at an adjustable rate which was tied to a U.S. Treasury price index. Say your adjustable rate was 9% on the day you borrowed. You want to be sure that your mortgage rate of interest will never exceed 10%. You could find a payor (a buyer) who would, for a premium or fixed fee, agree to pay the excess above 10% on your loan, should there ever be one. Thus, your obligation to your lender would be "capped" at 10%.

Your lender, on the other hand, might have promised depositors on long-term accounts a fixed rate of interest, say 9%. Having reloaned the proceeds to you at a floating rate, the lender might want to be protected against the possibility that the floating rate could fall below 9% causing a shortfall for its promised payments to its depositors. For a fee, it could purchase a promise from a payor to make up the difference between 9% and the floating rate on your loan should the latter fall below 9%. This is called a "floor."

A "collar" is a swap in which one party agrees to be the floating rate payor on the cap in exchange for the other becoming the floating rate payor on the floor.

Consider the following example: A developer borrows a construction loan at prime plus 1%. When the loan is arranged, the prime rate is 8.5%. The developer figures the deal will be profitable as long as construction loan interest is held to less than 10%, so the developer trades a cap for a floor on the loan. The developer receives a promise from the lender to pay all the interest on the loan above 10% and the developer agrees to pay no less than, say, 9% interest on that loan, even if the prime rate should fall below 9%. The lender may become the promisee on the floor and the promisor on the cap, or may sell these positions to investors.

Pricing swaps, caps, and floors is much like pricing any futures market for interest rates. It is a topic of lively concern to number-crunching financial experts. n430

Thomas McCarthy, Vice President of Finance, Maguire/Thomas Partners, in an interview February 14, 1991, thought that interest rate swaps are better hedging devices than caps, floors and collars: n431

> [Caps, floors and collars are] variations on a swap, as they're derived from the swap market. The cap allows a borrower to place a bet that the index that you choose to cap, most likely it's Eurodollar--LIBOR--will not exceed a given fixed rate. With a premium payment, you can purchase a contract that will, in essence, protect you if LIBOR ever exceeds, say, 9%. Today the 90-day LIBOR is 6.5%, roughly. If LIBOR does go above 9%, then that counterparty to that contract will pay *you* the difference. Likewise, you can sell a floor, obliging you to pay a counterparty if LIBOR goes *below* a given rate. A collar is simply a concept of selling the floor and buying a cap simultaneously. You can benefit if interest rates are in between the floor and the cap, or if they exceed the cap. But you are penalized if rates go below the floor.
>
> We feel that interest rate swaps are a more efficient execution. If one wants to bet that interest rates may be going down, then you simply swap only a portion of your loan. If I want to gain 75% of the value of the possible decline in interest rates, then I'll be swapped on 25% of my loan. I think that's a better execution, generally speaking, than a cap or a floor because there's usually a built-in premium for caps and collars. You often have to pay that premium in cash up front. That's not always true for people who have the time and expertise to analyze the market. We found that the marginal benefit was not worth the time that we were putting in to watching these products closely. We've also looked into using futures. You can create collars, floors and swaps in the futures market. But that also necessitates becoming an expert, specialized trader, and monitoring the futures market. Frankly, that's not our business. It's much easier for us to say, "I want to have half of my deal fixed. I'm going to swap it."

In residential construction financing, however, McCarthy believes that caps might be preferable to swaps because of the relatively short terms of residential construction loans.

FOOTNOTES:

(n1)Footnote 285. London Inter-Bank Offering Rate. LIBOR is the average of interbank offered rates for dollar deposits in the London market, based on quotations at five major banks.

(n2)Footnote 286. Reconstruction of Interview by Adam Duncan with James P. Moore, Vice Pres. and Mgr. of The First Nat'l Bank of Chicago's W. Div. Real Estate Dep't, Los Angeles, Cal. (Feb. 20, 1990).

(n3)Footnote 287. *Id.*

(n4)Footnote 288. *See* Garrard Glenn, Mortgages § 414, at 1649 (1943); Comment, *Mortgages--After Acquired Property Clause in Mortgage Is Valid, 28 Rocky Mtn. L. Rev. 432 (1956).*

(n5)Footnote 289. When the agreement is between construction and post-construction lenders only, it is called a "buy-sell." When the borrower signs it, too, the agreement is called a "tri-party." *See* 1 California Real Property Financing § 2.26, at 84-85 (CEB 1988) and Charles Smith & Harold A. Lubell, *The Buy-Sell Agreement,* 9 Real Est. Rev. 13 (Spring 1979).

(n6)Footnote 290. For more in-depth analysis of the securitization issue, *see* Steven R. Dantzker & Donna J. Zenor, *An Introduction to the Securitization of Real Estate Debt Financing, in* Real Estate Investment Vehicles: Emerging Financial Techniques After the Tax Reform Act (PLI Real Est. L. & Prac. Course Handbook Series No. N4-4473, 1987); Steven L. Schwarcz, *The Alchemy of Asset Securitization, 1 Stan. J.L. Bus. Fin. 133 (1994);* Joseph C. Shenker & Anthony J. Colletta, *Asset Securitization: Evolution, Current Issues and New Frontiers, 69 Tex. L. Rev. 1369 (1991);* David A. Richards, *"Gradable and Tradable": The Securitization of Commercial Real Estate Mortgages,* 16 Real Est. L.J. 99 (1987); Donald G. Glascoff, Jr. et al., *Commercial Real Estate Securitization, in* Creative Real Estate Financing 1989 (PLI Real Est. L. & Prac. Course Handbook Series No. N4-4516, 1989) (including an article entitled *Commercial Mortgage Structured Financing,* published by Standard & Poor's Corp., Sept. 9, 1985 giving vocabulary and basic transaction structure, and an article entitled *Moody's Rating System for Commercial Mortgage-Backed Securities* explaining and supporting Moody's credit analysis of single mortgage backed securities).

(n7)Footnote 291. For a comprehensive checklist of the steps toward securitization of single building financing, including a prospectus for an actual issue based on a single mortgage of a high quality office building, *see* Donald G. Glascoff, Jr. et al., *Commercial Real Estate Securitization, in Creative Real Estate Financing* 1989 (PLI Real Est. L. & Prac. Course Handbook Series No. N4-4516, 1989).

(n8)Footnote 292. How the property is appraised is extremely important in securitization. For a discussion of the interaction of discounted cash flow analysis and securitization *see* Leslie K. Beckhart, Note, *No Intrinsic Value: The Failure of Traditional Real Estate Appraisal Methods to Value Income-Producing Property, 66 S. Cal. L. Rev. 2251, 2294-95 (1993).*

(n9)Footnote 293. *15 U.S.C. §§ 77a-77aa*.

(n10)Footnote 294. § 77d(2) Securities Act of 1933, Regulation D of SEC, *17 C.F.R. §§ 230.501-508*. The offering is made to a limited number of sophisticated investors without public solicitation.

(n11)Footnote 295. § 77d(5) Securities Act of 1933. The developer can avoid the registration process by offering and selling promissory notes secured by first liens on commercial property to banks, thrifts, insurance companies and certain government bodies for at least $250,000.

(n12)Footnote 296. § 77c(a)(2) Securities Act of 1933. Securities issues or guaranteed by the U.S., federal, state, or local bodies (including FHLMC, FNMA and GNMA), and banks (subject to serious limitations) exempt from registration.

(n13)Footnote 297. § 77c(a)(5) Securities Act of 1933.

(n14)Footnote 298. *Quoted in* Peter Foster, *Towers of Debt* 298 (1993).

(n15)Footnote 299. Reconstruction of Interview by Adam Duncan with James P. Moore, Vice Pres. and Mgr. of The First Nat'l Bank of Chicago's W. Div. Real Estate Dep't, Los Angeles, Cal. (Feb. 20, 1990).

(n16)Footnote 300. Reconstruction of Interview by Adam Duncan with Roger Torriero, Pres., Griffin Related Properties, Santa Ana, Cal. (Nov. 9, 1989).

(n17)Footnote 301. *See* Yoken, *Loan Participations and Multibank Financing of California Real Estate,* 9 Cal. Real Prop. J. 31, 32 (Spring 1991).

(n18)Footnote 302. Savings Institutions Illustrative Secondary Market Agreements.

(n19)Footnote 303. Litigated cases show what can happen when the lead proceeds without clear authority. *Mansura State Bank v. Southwest Nat'l Bank, 549 So. 2d 1276 (La. App. 1989)* ; *Capitol Sav. & Loan Ass'n v. First Fin. Sav. & Loan Ass'n, 364 N.W.2d 267 (Iowa App. 1984)* .

(n20)Footnote 304. Patricia Frobes, Lecture, Real Estate Transactions Seminar, Univ. of S. Cal. Law Ctr. (Nov. 2, 1990).

(n21)Footnote 305. James P. Moore, Lecture, Real Estate Transactions Seminar, Univ. of S. Cal. Law Ctr. (Apr. 11, 1990).

(n22)Footnote 306. This example comes from a speech by Stanley Ross, Co-Managing Partner, Kenneth Leventhal & Co., Univ. of S. Cal. Law Ctr., Los Angeles, Cal. (Apr. 2, 1992).

(n23)Footnote 307. See W. H. Knight, Jr., *Loan Participation Agreements: Catching Up with Contract Law, 1987 Colum. Bus. L. Rev. 587 (1987).*

(n24)Footnote 308. *See, e.g.*, Bradford Anderson, *Loan Participations and the Borrower's Bankruptcy, 64 Am. Bankr. L.J. 39 (1990);* W. Homer Drake Jr. & Kyle R. Weems, *Mortgage Loan Participations: The Trustee's Attack, 52 Am. Bankr. L.J. 23 (1978);* Jeffrey D. Hutchins, *What Exactly Is a Loan Participation?, 9 Rut.-Cam. L.J. 447 (1978);* Kenneth M. Lapine, *Loan Participations and the Savings and Loan Association: A Sleeping Giant Stirs, 11 Akron L. Rev. 457 (1978);* Mark. E. MacDonald, *Loan Participations as Enforceable Property Rights in Bankruptcy--A Reply to the Trustee's Attack, 53 Am. Bankr. L.J. 35 (1979);* William N. Stahl, *Loan Participations: Lead Insolvency and Participants' Rights, 94 Banking L.J. 882 (1977);* Debora L. Threedy, *Loan Participations--Sales or Loans? Or Is That the Question?, 68 Or. L. Rev. 649 (1989);* Lori Laughlin Dalton, *Lead Lender Failure and the Pitfalls for the Unwitting Participant, 42 Sw. L.J. 1071 (1989).*

(n25)Footnote 309. Grant S. Nelson & Dale A. Whitman, Real Estate Finance Law 469-471 (5th ed. 2007).

(n26)Footnote 310. *Domeyer v. O'Connell, 4 N.E.2d 830 (Ill. 1936)* .

(n27)Footnote 311. *See* Jeffrey D. Hutchins, *What Exactly Is a Loan Participation?, 9 Rut.-Cam. L.J. 447 (1978).*

(n28)Footnote 312. United States League of Savings Institutions Illustrative Secondary MarketA model loan participation form was prepared by a savings association group. *See* Robert H. Wiorski, *United States League of*

Savings Institutions Illustrative Secondary Market Agreements, 51 U.S. League of Savings Insts. Legal Bull. 303 (1985).

(n29)Footnote 313. James P. Moore, Vice Pres. and Mgr. of Real Estate, The First Nat'l Bank of Chicago; and Glenn A. Sonnenberg, Real Estate Attorney with Allen, Matkins, Leck, Gamble and Mallory, who represent commercial developers and participating lenders, Lecture at Univ. of S. Cal. Law Ctr., Los Angeles, Cal. (Apr. 1, 1992). *See also Counsel's Corner, How to Protect a "Lead Bank" in Loan Participation Agreements, 91 Banking L.J. 767 (1974).*

(n30)Footnote 314. *See* Mark S. Edelstein, *Special Workout Considerations for Loan Participants*, 8 Real Est. Fin. J. 31, 34 (1993).

(n31)Footnote 315. For a full explanation of FIRREA real estate appraisal requirements *see* Christopher L. Carson et al., *Regulatory Issues in Lending and Loan Workouts in* Modern Real Estate Transactions (C937 ALI-ABA 153, 163-166 (1994) discussing appraisal requirements and methods).

(n32)Footnote 316. These minimum standards are promulgated under OTS authority granted by Title IX of the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 (Pub. L. No. 101-73, *103 Stat. 183, 511), 12 U.S.C § 3301 et seq. , 12* C.F.R. § 564.1(a).

(n33)Footnote 317. *12 C.F.R. § 564.3(a)(1).*

(n34)Footnote 318. Transactions which require an appraisal by a state certified appraiser include those for $1,000,000 or more, non-residential and residential (other than 1-to-4 family dwellings) of over $250,000, and "complex" 1-to-4 family residential loans of $250,000 or more. *12 C.F.R. § 564.3(d).*

(n35)Footnote 319. *12 C.F.R. § 564.4(e).* All 51 states and the Virgin Islands and Puerto Rico have enacted appraiser certification laws. *See, e.g., Mich. Comp. Laws § 339.2615*; *Va. Code Ann. § 54.1-2013*; *Cal. Bus. & Prof. Code § 11300*; *Fla. Stat. § 475.610*; *N.Y. Exec. Law § 160*.

(n36)Footnote 320. *12 C.F.R. § 564.4(a).*

(n37)Footnote 321. 12 C.F.R. § 564.2(a).

(n38)Footnote 322. For an argument that no appraisal accurately reflects the true market value of land, see Anthony Downs, *Today's Appraisals Are Unreliable,* Nat'l Real Est. Investor, 46 (Feb. 1992).

(n39)Footnote 323. Nicholson, *Mapping Out Demand to Determine Real Estate Values*, 51 Urb. Land 34 (July 1992).

(n40)Footnote 324. *Id.*

(n41)Footnote 325. The problem, of course, is that developers, eternal optimists, can be wrong. The decision to build is made many years ahead of the day when the property will be fully constructed and ready for use or occupancy. Seldom can developers be sure who else will be supplying new buildings during that time, and what kind of demand there will be 3 to 6 years after they begin their project.

(n42)Footnote 326. For a brief and illuminating discussion of "curable" depreciation, *see* Charles B. Warren, *Real Estate Appraisal in the 1990s*, 23 Real Est. Rev. 14 (1993).

(n43)Footnote 327. *See* Sirmans, Real Estate Finance (2d ed. 1989).

where R = overall rate.

y = equity yield rate (required before-tax internal rate of return on equity).

L	= loan-to-value ratio.
V	
C	= mortgage coefficient = y + *P* (SFF[y]%[.n]) - MC.
P	= proportion of loan paid off over holding period.
MC	= annual mortgage constant.
dep	= proportionate decrease in property value expected over holding period.
app	= proportionate increase in property value expected over holding period.
SFF[y]%[n]	= sinking fund factor at rate y for holding period.
n	= length of holding period, years.

(n44)Footnote 328. Developers veer away from DCR and IRR methods when cash income from a property is as good as it is going to be in the foreseeable future. But this is one of the times when the discipline of DCR or IRR is most needed. *See* Stephen E. Roulac, *The Demise of the IRR?,* 9 Real Est. Fin. 11 (1993).

(n45)Footnote 329. *Monongahela Navigation Co. v. United States, 148 U.S. 312, 328 (1893)* .

(n46)Footnote 330. Discounted cash flow is the present value of all present and future cash flows.

(n47)Footnote 331. The popularity has moved into the courts as well. One commentator notes that, "[c]onsistent with its general acceptance and vast application in the financial community, the 'discounted cash flow' method has become the valuation 'methodology of choice' in Delaware appraisal proceedings." Joseph E. Calio, *New Appraisals of Old Problems: Reflections on the Delaware Appraisal Proceeding, 32 Am. Bus. L.J. 1, 48-49 (1994)* (discussing generally the calculation of discounted cash flow) (footnotes omitted). Discounted cash flow analysis is also integral to the securitization of property. Leslie K. Beckhart, Note, *No Intrinsic Value: The Failure of Traditional Real Estate Appraisal Methods to Value Income-Producing Property, 66 S. Cal. L. Rev. 2251, 2294-95 (1993).*

(n48)Footnote 332. Developers veer away from Discounted Cash Flow and Internal Rate of Return calculations when cash income has stabilized and is as good as it will be in the foreseeable future. That time, however, is when the evaluation under these methods is most needed, useful and enlightening. When cash does become constant, the owner must pay even greater attention to the effects cash outflows for improvements and maintenance affect profitability, and consider whether the return generated by the constant (low) rents is worth the risks inherent in owning the project at all. A DCF or Internal Rate of Return analysis could reveal that the investment actually loses money or that returns in the market are better for projects of the same risk. *See* Stephen E. Roulac, *The Demise of the IRR?,* 9 Real Est. Fin. 11 (1993).

(n49)Footnote 333. Indirectly, these future costs and incomes may figure in the selection of the "cap" rate under the Ellwood or market extraction method.

(n50)Footnote 334. The text of this section is highly dependent on the corporate finance material from Paige Hoeper's USC Law Course entitled, "What Lawyers Should Know About Business."

(n51)Footnote 335. Christopher L. Carson et al, *Regulatory Issues in Lending and Loan Workouts in* Modern Real Estate Transactions (C937 ALI-ABA 153, 191-93 (1994) (discussing appraisal requirements and methods)).

(n52)Footnote 336. Leslie K. Beckhart, Note, *No Intrinsic Value: The Failure of Traditional Real Estate Appraisal Methods to Value Income-Producing Property, 66 S. Cal. L. Rev. 2251, 2286 (1993)* (footnotes omitted).

(n53)Footnote 337. *Id. at 2287.*

(n54)Footnote 338. *Id. at 2293.*

(n55)Footnote 339. A discount rate which includes all these interests is the "weighted average cost of capital" or the "composite cost of capital." It considers the cost of debt and equity together and compares that total with the total invested amount. The weighted average cost of capital is the least return a developer or company will need to achieve to satisfy both debtholders and equity investors. *See generally* Joseph E. Calio, *New Appraisals of Old Problems: Reflections on the Delaware Appraisal Proceeding, 32 Am. Bus. L.J. 1, 52-53 (1994)* (outlining briefly the composition of appropriate discount rates).

(n56)Footnote 340. Leslie K. Beckhart, Note, *No Intrinsic Value: The Failure of Traditional Real Estate Appraisal Methods to Value Income-Producing Property, 66 S. Cal. L. Rev. 2251, 2286 (1993). See also* James A. Amdur, *Property Taxation of Regulated Industries*, 40 Tax Law. 339, 353-56 (1987) (discussing possible components of the discount rate).

(n57)Footnote 341. The actual calculus for determining an IRR involves linear regression and complex quadratic equations and is far beyond the scope of this text. However, most financial calculators can easily handle IRR calculations.

(n58)Footnote 342. American Institute of Real Estate Appraisers, The Appraisal of Real Estate 718 9th ed. 1987.

(n59)Footnote 343. Leslie K. Beckhart, *No Intrinsic Value: The Failure of Traditional Real Estate Appraisal Methods to Value Income-Producing Property, 66 S. Cal. L. Rev. 2251, 2293-94 (1993)* (outlining the ties between discounted cash flow analysis and real market sensitivities).

(n60)Footnote 344. Hermann Hesse, Magistar Ludi, The Glass Bead Game. Translated by Richard Winston & Clara Winston: H. Holt 1990.

(n61)Footnote 345. Appraisal Institute, The Appraisal of Real Estate 474 (10th ed. 1992).

(n62)Footnote 346. Contra *Costa Water Dist. v. Bar-C Props., 7 Cal. Rptr. 2d 91 (1992) . But see* United States v. 3. 0 Acres of Land, More or Less, in *Rockbridge County, 378 F. Supp. 30 (W.D. Va. 1974)* and *Drakes Bay Land Co. v. United States, 459 F.2d 504 (Ct. Cl. 1972)* (allowing use of land residual value in eminent domain proceedings where highest and best use is for subdivision and development). *See also* United States v. 99. 66 *Acres of Land, 970 F.2d 651 (9th Cir. 1992)* (allowing residual method if judge determines subdivision is likely to occur).

(n63)Footnote 347. *See generally* Jon Shepherd, *The Liability of Officers and Directors Under the Financial Institutions Return, Recovery and Enforcement Act of 1989, 90 Mich. L. Rev. 1119 (1992).*

(n64)Footnote 348. James R. Arnold, *The Appraisal and Valuation of Contaminated Properties, in* The Impact of Environmental Law on Real Estate and Other Commercial Transactions, ALI-ABA Course of Study, C643 ALI-ABA 405, 411-12 (1991); James R. Arnold, *The Value of Contaminated Property, in* The Impact of Environmental Law on Real Estate and Other Commercial Transactions, ALI-ABA Course of Study, CA47 ALI-ABA 643, 652 (1995).

(n65)Footnote 349. The author gratefully acknowledges a Memo on negligent estate appraisals by Leslie Kent Beckhart (Sept. 26, 1991).

(n66)Footnote 350. Frank A. Vickory, *Regulating Real Estate Appraisers: The Role of Fraudulent and Incompetent Real Estate Appraisals in the S&L Crisis and the FIRREA Solution,* 19 Real Est. L.J. 3 (1990). Mr. Vickory cites a number of examples, including a federal bank examiner review of the Continental Illinois Bank portfolio, in which the vast majority of properties were financed on inflated appraisals, averaging nearly three times the properties' re-appraised value and some based on no appraisals at all.

(n67)Footnote 351. *Moody & Johnson, 560 So. 2d 304 (Fla. 1990)* (lender was allowed to maintain suit against appraiser fraud); *Kenealy v. United States, 454 U.S. 941 (1981)* (FHA, as mortgage insurer, sued an appraiser for breach of fiduciary duty. The appraiser was held liable for damages caused by inflated appraisals which he used for personalSee *Security First Fed. Savings & Loan Ass'n v. Broom, Cantrell, Moody & Johnson, 560 So. 2d 304 (Fla. 1990)* (lender was allowed to maintain suit against appraiser fraud), *overruled by Garden v. Frier, 602 So. 2d 1273 (Fla. 1992) , disapproved by Rivera v. Dep't of Corrections, 570 So. 2d 1306 (Fla. 1990) . United States v. Kenealy, 646 F.2d 699 (D. Mass. 1981) , cert. denied, Kenealy v. United States, 454 U.S. 941 (1981)* (FHA, as mortgage insurer, sued an appraiser for breach of fiduciary duty. The appraiser was held liable for damages caused by inflated appraisals which he used for personal gain.).

(n68)Footnote 352. Pub. L. No. 101-73, *103 Stat. 183,* H.R. 1278, 101st Cong. (1989). *See* Mark Lee Levine, Real Estate Appraisers' Liability § 2.8, at 16 (Clark Boardman 1991, 1992 Supp.).

(n69)Footnote 353. Kendall Thurston, *Complying with the Code and Standards,* The Real Est. Appraiser 67 (Aug. 1991); Neil Dwyer, *A Reviewer Looks at Uniform Standards,* The Real Est. Appraiser 11 (Aug. 1991).

(n70)Footnote 354. *12 U.S.C. § 1813*(u)(4). *See generally* Raymond G. Kawasaki, *Liability of Attorneys, Accountants, Appraisers, and Other Independent Contractors Under the Financial Institutions Reform, Recovery, and Enforcement Act of 1989, 42 Hastings L.J. 249 (1990).*

(n71)Footnote 355. *See generally* Annotation, *Liability to Real-Property Purchaser for Negligent Appraisal of Property's Value, 21 A.L.R.4th 867 (1983).*

(n72)Footnote 356. 3 Restatement (Second) of Torts § 552, at 126-127.

(n73)Footnote 357. *In re Investors Funding Corp. of N. Y. Sec. Litig., 566 F. Supp. 193 (S.D.N.Y. 1983)* .

(n74)Footnote 358. Whited, *Real Estate Appraiser Liability: How Far Does It Reach?,* 52 Real Est. Appraiser & Analyst 5, 12 (1986).

(n75)Footnote 359. *Foggy v. Ralph F. Clark & Assocs., 238 Cal. Rptr. 130, 132 (1987)* .

(n76)Footnote 360. *Id.*

(n77)Footnote 361. *Sadtler v. Jackson-Cross Co., 587 A.2d 727, 729 (Pa. Super. 1991)* .

(n78)Footnote 362. *Barry v. Raskov, 283 Cal. Rptr. 463, 465 (1991)* .

(n79)Footnote 363. Smith, *Value Concepts as a Source of Disparity Among Appraisals,* 45 Appr. J. 203 (1977), *quoted in* Peter J. Mastaglio, *Real Estate Appraisal Malpractice: Liability and Damages,* 87 Case & Comment 12 (Sept.-Oct. 1982).

(n80)Footnote 364. Theresa H. Waller & Neil G. Waller, *Real Estate Appraisal: The Legal Liability,* 18 Real Est. L.J. 233, 258 (1990).

(n81)Footnote 365. Federal Tort Claims Act, *28 U.S.C. § 2680*(h).

(n82)Footnote 366. *See United States v. Neustadt, 366 U.S. 696 (1961)* . The purchaser of an FHA insured house sued, claiming reliance on a faulty appraisal and overpayment for the property. The U.S. Supreme Court held the suit barred by *28 U.S.C. § 2680(h)*. However, the result in *Neustadt* was not followed by *JM Mechanical Corp. v. U.S., 716 F.2d 190 (3d Cir. 1983)* which found an exception to § 2680(h). JM was a subcontractor on a project where HUD was the insurer of the mortgage. HUD had discretion to acquire the mortgage on mortgagor's default but was required to have assurances of completion. The bonds were invalid, but HUD allowed continued work on the project without

disclosing the invalidity of the assurances. JM claimed it was led to believe the bonds were properly in place and suffered $78,800 damage as a result of the contractor's default. The court held that the government could not invoke the protection of § 2860(h) for a claim for recovery based on the government's breach of duty to perform certain acts (such as the securing of valid performance and payment bonds) and that the overlap of misrepresentation and negligence claims do not bar negligence claims. *See also Smith v. United States, 1990 U.S. Dist. LEXIS 6434 (E.D. Pa. 1990)* (plaintiffs' claim that a negligent inspection by HUD, which plaintiffs neither saw nor directly relied on, by HUD resulted in an appraisal higher than the value of the property, causing plaintiffs to overpay HUD for the house dismissed as HUD had no affirmative duty to inspect the house for the buyer, and at most HUD misled plaintiffs by its inspection and appraisal and was therefore protected by § 2680(h)).

(n83)Footnote 367. *See Gay v. Broder, 167 Cal. Rptr. 123 (1980)* (deciding that *38 U.S.C. § 1810(b)(5)* as amended was intended to protect the Veterans' Admini-stration from becoming guarantor upon inadequate security even though plaintiff had paid for the appraisal); *Baroni v. United States, 662 F.2d 287 (5th Cir. 1981) , cert. denied, 460 U.S. 1036 (1983)* (Developer submitted plans for a subdivision which were approved by the FHA (now part of HUD)).

(n84)Footnote 368. *Baroni v. United States, 662 F.2d 287 (5th Cir. 1981) . See also Gay v. Broder, 167 Cal. Rptr. 123 (1980)* . In this case, the veteran sued the appraiser for a negligent *under* valuation which forced the borrower to use more expensive conventional financing. The court saw a special danger in holding appraisers liable for undervaluing property: they might be tempted to overvalue just to avoid suits by rejected borrowers.

(n85)Footnote 369. Robin Paul Malloy, *Lender Liability for Negligent Real Estate Appraisals, 1984 U. Ill. L. Rev. 53, 96.*

(n86)Footnote 370. *See First Fed. Sav. Bank v. Knauss, 370 S.E.2d 906 (S.C. 1988)* (borrower testified he probably didn't see the appraisals before entering the loans, and so court concluded he wasn't relying on them, and held borrower subject to a deficiency judgment).

(n87)Footnote 371. *15 U.S.C. § 1691*(e).

(n88)Footnote 372. In *Barry v. Raskov, 283 Cal. Rptr. 463 (1991)* and *Christiansen v. Roddy, 231 Cal. Rptr. 72 (1986)* , mortgage brokers were held liable to investors whose money the brokers had solicited for what turned out to be bad loans based on negligent independent appraisals. *Shaucat Salahutdin v. Valley of California, Inc., 29 Cal. Rptr. 2d 463 (1994)* criticized *Christiansen* saying that *Christiansen* "ignores the overlap of the concepts of breach of a duty of care (negligence) and constructive fraud in actions against fiduciaries ... [and the] result appears to turn on whether the theory of the case is described as negligent misrepresentation or constructive fraud--essentially a matter of pleading rather than distinctions based upon the conduct of the agent."

(n89)Footnote 373. *See* 1488, *Inc. v. Philsec Inv. Corp., 939 F.2d 1281, 1290 (5th Cir. 1992)* ("... Texas courts have held that liability for the information contained in surveying reports and accounting reports may be extended to 'persons or class of persons whom the maker of the representation intends to benefit or who foreseeably may be expected to act in reliance on it'.").

(n90)Footnote 374. *Nymark v. Heart Fed. Sav. & Loan Ass'n, 283 Cal. Rptr. 53, 54, 59 (1991)* .

(n91)Footnote 375. *Larsen v. United Fed. Sav. & Loan Ass'n of Des Moines, 300 N.W.2d 281, 287 (Iowa 1981)* .

(n92)Footnote 376. In *Nymark v. Heart Fed. Sav. & Loan Ass'n, 283 Cal. Rptr. 53 (1991)* , a borrower refinanced for $100,000. Four years later, the county ordered the house to be vacated until severe, hazardous construction defects were cured. Repair estimates exceeded $50,000. The borrower refused to make any further payments and sued the lender because its loan appraisal said the home was "A+ quality" and "the roof, foundation, plumbing, mechanical, and electrical all appear OK," even though they weren't. The trial and appellate court both ruled for the lender which had cross-complained for judicial foreclosure as well as a deficiency judgment for the unsecured principal.

(n93)Footnote 377. *Larsen v. United Fed. Sav. & Loan, 300 N.W.2d 281 (Iowa 1981)* .

(n94)Footnote 378. *Fox & Carskadon Fin. Corp. v. San Francisco, 125 Cal. Rptr. 549, 552 (1975)* .

(n95)Footnote 379. *See* John W. Bagby & John C. Ruhnka, *The Controversy Over Third Party Rights: Toward More Predictable Parameters of Auditor Liability, 22 Ga. L. Rev. 149 (1987).*

(n96)Footnote 380. Claire Francis, *Mortgage Valuer's Duty of Care: Smith v. Eric S. Bush (A Firm), [1989] 18 E.G. 99,* 53 The Conveyancer Property Lawyer 359 (1989).

(n97)Footnote 381. *Barry v. Raskov, 283 Cal. Rptr. 463 (1991)* (mortgage loan broker sold a loan to an experienced saver).

(n98)Footnote 382. *See* Thomas H. Bergman & Ellen J. Samuels, *Negotiating the Commercial Loan Commitment,* 10 Prac. Real Est. Law. 11 (July 1994).

(n99)Footnote 383. Morton P. Fisher, Jr., *What You Need to Know About Loan Commitments,* 10 Prac. Real. Est. Law. 23, 25 (May 1994).

(n100)Footnote 384. Charles B. Katzenstein, The Law of Mortgage Commitments at 4-17 (1992).

(n101)Footnote 385. *See* Morton P. Fisher, Jr., *What You Need to Know About Loan Commitments,* 10 Prac. Real. Est. Law. 23, 28 (May 1994).

(n102)Footnote 386. A lender issued a loan commitment for a "maximum loan amount" of $5.25 million to be determined by an appraisal and a detailed analysis of estimated income and expenses. The borrower paid a non-refundable fee of $78,500 for the commitment. Following the appraisal, the lender agreed to lend only $4,875,000--not enough to construct the project. The borrower wanted its commitment fee returned. The lender's answer was: "take the loan offered or forfeit the fee." The borrower argued that orally the lender had promised to lend the full construction cost, was now going back on that promise and wouldn't refund the commitment fee. The court decided with the lender, holding that neither a fraud nor a negligent misrepresentation claim could supplant the written promise required by the Statute of Frauds, and here the lender never promised the full $5.25 million in writing. *Breckenridge Creste Apts., Ltd. v. Citicorp Mtg., Inc., 826 F. Supp. 460 (N.D. Ga. 1993) , aff'd, Breckenridge Creste v. Citicorp, 21 F.3d 1126 (11th Cir. Ga. 1994)* .

(n103)Footnote 387. *Commitment Letters: Content and Enforceability* by Warren Shank. Reprinted with permission from Private Placements 1989: Current Developments in Private Financings, Order No. B4-6870. Published and copyrighted by Practicing Law Institute, 810 Seventh Ave., New York, N.Y. 10019 (212) 765-5700.

(n104)Footnote 388. *42 U.S.C. 9601 et seq.*

(n105)Footnote 389. A December 11, 1995 E.P.A. and D.O.J. memo details the agencies' policy concerning C.E.R.C.L.A. enforcement against security lenders. *(60 Fed. Reg. 63517* (Dec. 11, 1995)) . Though the Final Rule on Lender Liability Under C.E.R.C.L.A. *(57 Fed. Reg. 18344* (Apr. 29, 1992)) was invalidated by the Circuit Court of Appeals for the D.C. Circuit in *Kelley v. E.P.A., 15 F.3d 1100 (D.C. Cir. 1994) , cert. denied sub nom., American Bankers Ass'n v. Kelley, 115 S. Ct. 900 (U.S. 1995)* on the grounds that the E.P.A. lacked authority to issue the Rule as a regulation, Kelley did not prevent the E.P.A. and D.O.J. from using the text of the Rule as enforcement policy. The E.P.A. and D.O.J. have embraced the former Rule as enforcement policy.

(n106)Footnote 390. For a drafting exercise involving such an indemnity, *see* Lucy Allen Marsh, Real Property Transactions 399 (1992). Insurance is also available against the discovery and removal of contaminants. *See* Glen E. Sibley, *Environmental Insurance,* 41 Urb. Land 36 (1992).

(n107)Footnote 391. Thomas H. Bergman & Ellen J. Samuels, *Negotiating the Commercial Loan Commitment*, Prac. Real Est. Lawyer11, 18 (July 1994).

(n108)Footnote 392. *Cal. Civ. Code § 3086*.

(n109)Footnote 393. Charles Zalaznick, *Analysis and Review of a Typical Institutional Real Estate Loan Commitment,* in Real Est. Dev. & Construction Financing, Real Est. L. Prac. Course, Handbook Series, 13-14 (1990).

(n110)Footnote 394. *Bank, 349 A.2d 564 (N.J. 1975)* ; *St.Paul at Chase Corp. v. Manufacturers Life Ins. Co., 278 A.2d 12 (Md. 1971) . See Selective Builders, Inc. v. Hudson City Sav. Bank, 349 A.2d 564 (N.J. 1975)* ; *St. Paul at Chase Corp. v. Manufacturers Life Ins. Co., 278 A.2d 12 (Md. 1971) , cert. denied, 404 U.S. 857 (1971) . See infra* § 97.07(j). Remedies for Breach of Loan Commitments.

(n111)Footnote 395. Beverly J. Quail, William E. Wallace III, Kenneth A. Gallo and Michael K. Hogan. *Remedies for Breach of Commitment, 3 Prob. & Prop. 47* (Sept./Oct. 1989). Reprinted with permission.

(n112)Footnote 396. *702 S.W.2d 412 (Ark. App. 1985) . United Cal. Bank v. Prudential Ins. Co., 681 P.2d 390 (Ariz. App. 1983) .*

(n113)Footnote 397. Beverly J. Quail, et al., *Remedies for Breach of Commitment, 3 Prob. & Prop. 47* (Sept./Oct. 1989). Reprinted with permission.

(n114)Footnote 398. *See, e.g., City Centre Assoc. v. TIAA, 656 F. Supp. 658 (D. Utah 1987)* (denying lender's petition for specific performance even though lender argued that its profit sharing arrangement with the borrower made the agreement unique and incapable of replication).

(n115)Footnote 399. Beverly J. Quail, William E. Wallace III, Kenneth A. Gallo and Michael K. Hogan. *Remedies for Breach of Commitment, 3 Prob. & Prop. 47* (Sept./Oct. 1989). Reprinted with permission. *Cleveland Wrecking Co. v. Hercules Constr. Corp., 23 F. Supp. 2d 287 (E.D. N.Y. 1998) , aff'd, Cleveland Wrecking Co. v. Hercules Constr. Corp., 198 F.3d 233 (2d Cir. N.Y. 1999)* (if the parties intended to negotiate in good faith to reach a final agreement because a final price had already been established, then they are not required to negotiate further).

(n116)Footnote 400. *United Cal. Bank v. Prudential Ins. Co., 140 Ariz. 238, 681 P.2d 390 (Ariz. Ct. App. 1983).*

(n117)Footnote 401. This information comes from UCB's counsel, Dan M. Durrant, *Partner,* Streich Lang, Phoenix, Ariz.

(n118)Footnote 402. *Teacher's Ins. & Annuity Ass'n of Am. v. Butler, 626 F. Supp. 1229 (S.D.N.Y. 1986) . Cleveland Wrecking Co. v. Hercules Constr. Corp., 23 F. Supp. 2d 287 (E.D. N.Y. 1998) , aff'd, Cleveland Wrecking Co. v. Hercules Constr. Corp., 198 F.3d 233 (2d Cir. N.Y. 1999)* (if the parties intended to negotiate in good faith to reach a final agreement because a final price had already been established, then they are not required to negotiate further).

(n119)Footnote 403. Beverly J. Quail, *Problems Arising in Reducing the Loan Application and Commitment Letter to the Final Loan Documents, in* Sidney A. Keyles (ed.), Commercial Real Estate Finance 80 (ABA, 1993).

(n120)Footnote 404. U.C.C. § 1-203 (every contract or duty within this act imposes an obligation of good faith in its performance or enforcement).

(n121)Footnote 405. *See* Danile R. Fischel, *The Economics of Lender Liability, 99 Yale L.J. 131, 140-141 (1989),* discussing *K.M.C. Co. v. Irving Trust Co., 757 F.2d 752 (6th Cir. 1985) .*

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(n124)Footnote 408. Michael Madison & Robert M. Zinman, Modern Real Estate Financing 418-419 (1991). Copyright /crt 1991 by Little, Brown & Company. Reprinted with permission.

(n125)Footnote 409. James A. Moore, lecture at U.S.C. Law Ctr., 11/11/92.

(n126)Footnote 410. Paul E. Roberts, *Counseling the Client in Payment and Performance Bonds*, Prac. Real Est. Law. 37, 38 (July 1994).

(n127)Footnote 411. *Id.* at 39 .

(n128)Footnote 412. *Id.* at 37 .

(n129)Footnote 413. C.A. Foster, *Construction Management and Design-Build/Fast Track Construction: A Solution Which Uncovers a Problem for the Surety*, 46 Law & Contemp. Probs. 95, 102-103 (1983).

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(n131)Footnote 415. C.A. Foster, *Construction Management and Design-Build/Fast Track Construction: A Solution Which Uncovers a Problem for the Surety*, 46 Law & Contemp. Probs. 95, 103 (1983).

(n132)Footnote 416. Michael Madison & Robert M. Zinman, Modern Real Estate Financing 642 (1991).

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CHAPTER 97 CONSTRUCTION AND DEVELOPMENT LAW

12-97 Thompson on Real Property, Thomas Editions § 97.08

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See HSH Nordbank AG New York Branch v. Swerdlow, 672 F. Supp. 2d 409 (S.D. N.Y. 2009) (the real estate construction loan agreement providing written guaranties of payment was not superseded by a supplemental intercreditor agreement.

§ 97.07(m) Shortcomings in Some of the Construction Lender's Risk Avoidance Devices. [Go To Main]

§ 97.07(m)(1) Bonding: Surety, Payment, and Performance Bonds.

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St. Paul Fire & Marine Ins. Co. v. VDE Corp., 603 F.3d 119 (1st Cir. 2010) (obligees were not permitted to prohibit surety from employing the original contractor as the completing contractor).

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CHAPTER 98 FINANCING PUBLIC-PRIVATE DEVELOPMENT AND RENEWAL AGREEMENTS THROUGH TAX INCREMENTS 1

12-98 Thompson on Real Property, Thomas Editions 98.syn

AUTHOR: Professor George Lefcoe The Law Center University of Southern California

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CHAPTER 98 FINANCING PUBLIC-PRIVATE DEVELOPMENT AND RENEWAL AGREEMENTS THROUGH TAX INCREMENTS 1

12-98 Thompson on Real Property, Thomas Editions § 98.01

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§ 98.01 Introduction.

Developers are sometimes courted by local governments eager for help in rebuilding older parts of the city. Through urban redevelopment, local governments can offer special incentives to developers willing to build politically desired projects:

1. The city as partner may provide assistance in securing the necessary land use approvals.

2. The city can pay for financial feasibility and market studies, soil reports, environmental audits, title reports, surveys, appraisals, architectural and engineering work.

3. The city may abate local property taxes.

4. In some instances federal and state grants are available, and the city may assist the developer in obtaining these special funds.

5. The city may use its eminent domain powers to acquire sites if state and local laws authorize condemnation for urban redevelopment, as many do.

6. The city can sell land to developers at less than its acquisition cost or fair market value.

7. The city can lease land to developers through a long-term ground lease, minimizing the developer's front-end equity contribution.

8. The city can hold title to the land until the developer is ready to begin construction, which can save the developer sizable land-holding costs.

9. The city can pay for site preparation costs--relocation assistance to existing owners and tenants, demolition, soil preparation, grading and construction of building pads.

10. The city can pay for parking garages, streets, curbs, gutters, sidewalks, street lighting, plazas, malls, and parks.

11. In some states the redevelopment agency can float bonds in anticipation of the increase in property taxes which the redevelopment project is expected to yield. Bond proceeds can be used to acquire redevelopment sites, subsidize the sale price to developers of those sites, underwrite the costs of affordable housing, and pay for parking garages, street improvements, landscaping, museums, city office buildings, and other amenities in the redevelopment area.

Under federal n2 and state n3 enterprise zone legislation, tax incentives are available to certain types of businesses and grants are available to local governments and community development corporations to stimulate economic development in targeted areas characterized by high unemployment rates, poverty, recent job losses and plant closures. Tax incentives include tax credits or deductions for each new job, or for each job given to residents within the zone, accelerated depreciation deductions for businesses, capital gains exclusion and ordinary loss deduction for the purchase of stock by a corporation used to purchase property within an enterprise zone, expanded tax exempt probate activity bond financing, tax increment bond financing, special assessment bond financing, and rebates or exemptions from local business gross receipts and property taxes. The city can allow the developers to collect rents from occupied buildings in slum areas. n4

FOOTNOTES:

(n1)Footnote 2. Pub. L. No. 103-66 § 13301-3, *107 Stat. 312, 548-56* (codified at *26 U.S.C. §§ 1391-1394, 1396* and *1397*). *See generally* Audrey G. McFarlane, *Empowerment Zones: Urban Revitalization Through Collaborative Enterprise*, 5 J. Affordable Hous. & Commun. Dev. L. 35 (Fall 1995).

(n2)Footnote 3. *See, e.g., S.C. Code § 12-10-10,* described in Burnet R. Maybank II & William H. Moore, Jr., Enterprise Zone Act of 1995, 7 S.C. Law 74 (Oct. 1995); *Cal. Gov't Code § 7071*.

(n3)Footnote 4. Ian S. Tattenbaum, *Note, Renewal for the 1990s: An Analysis of New York City Redevelopment Programs in Light of Title I of the Housing Act of 1949, 6 N.Y.U. Envtl. L.J. 220, 232 (1997)* (also a general example of urban redevelopment programs and the incentives they provide.).

1 Parts of this chapter have been adapted from George Lefcoe, Real Estate Transactions (Michie 1993).

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CHAPTER 98 FINANCING PUBLIC-PRIVATE DEVELOPMENT AND RENEWAL AGREEMENTS THROUGH TAX INCREMENTS 1

12-98 Thompson on Real Property, Thomas Editions § 98.02

AUTHOR: Professor George Lefcoe The Law Center University of Southern California

§ 98.02 Summary Description of Urban Renewal Programs in the U.S.

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§ 98.02(a) Goals and Assumptions of Redevelopment.

Redevelopment financing began in the late 1940s and early 1950s. n5 The ostensible purpose of the early redevelopment laws was to eliminate the physical, social, and economic liabilities caused by blight--measured conventionally by run-down and abandoned buildings, unused land, high crime rates, and low property tax revenues. n6

A subcommittee of a Presidential Advisory Committee in 1953 concluded that the problem of slums in central cities was being caused by neglect by city governments. Cities didn't adequately enforce zoning, health, and housing codes, resulting in illegal overcrowding, among other conditions. The absence of parks, garbage collection, street maintenance, and street lighting were also assailed as "some of the causes of slums." "As the blight spreads, it is inevitably followed by crime, fire, disease, and delinquency." n7

The operating assumption was that the physical deterioration of buildings contributed to social disorder, so if the "slum" buildings could be eliminated or cleaned up, crime and disease would abate. Not much was said or written in the early debates of urban renewal about jobs and poverty. That emphasis was to come much later. It also took several decades before policymakers accepted the fact that most people displaced from one area would probably just relocate nearby. As they relocated, they would find themselves even worse off than before, because so much of the low-rent housing stock had been demolished through urban renewal.

Many central city business interests and organized labor became persuaded that federal urban renewal money could be a way to help declining downtowns compete with the fast-growing suburbs. n8 Civic leaders hoped to upgrade the traditional retail centers of cities and attract property tax-paying businesses--hotels and restaurants, research parks and offices. n9

Were these programs successful? Here is a planner's view:

> From the vantage point of the mid-1980s ... many central cities, even those given up as lost causes,

> seem to be experiencing a turnaround and urban renewal projects ranging from government-sponsored convention and cultural centers to luxury apartments have played a significant role. How much of a role is hard to say. Would the renaissance have happened anyway, without displacing any poor people? In the absence of definitive studies on a city-by-city basis we cannot be certain. It is my judgment that urban renewal was a crucial factor in urban rebirth and that it took almost a generation to demonstrate a substantial return. n10

§ 98.02(b) Land Write-down.

Urban development began in the central business districts of big cities. They were often hemmed in by deteriorating low-rent housing. That housing was to be acquired by local government agencies for rehabilitation or demolition. The cleared sites were intended to be used for private projects designed, built, and occupied by private firms. Acquiring and clearing blighted sites would cost more than the vacant "green field" sites of the suburbs. To make the costs of urban sites competitive with suburban ones, the federal government was persuaded to "write down" the land cost of urban sites by giving cities grants to cover two-thirds of the cost. The city was able to meet the matching share in cash or by contributions "in kind" such as street widenings, parks, or planning services. The government grants covered the gap between what the land had cost to acquire, replat, and service with new roads and utilities, and what price developers were willing to pay. The cities sold or leased most of the cleared sites to private developers at about 30% of the actual cost. n11

§ 98.02(c) Redevelopment Has Arrived in Post-World War II Town Centers and Suburbs.

Although redevelopment got its start in cities like Baltimore, Boston, Chicago, New Haven, New York, Philadelphia, and Washington, D.C., n12 it is now a vital tool for recycling the older post-World War II suburban town centers.

Dan Young, the longtime mayor of Santa Ana, California, explains:

> We are a throw-away society. Everything in the U.S. is disposable, even cities. Once the buildings in a city are out-of-fashion and aging, the population increasingly poor and migrant, the crime rates up and school quality down, affluent people abandon it to move perhaps only fifteen minutes away to professionally landscaped, architect-designed, traffic engineered, privately funded new communities like our neighbor across the freeway, Irvine. Older cities like ours can't expect federal and state governments to lavish money on us to refurbish our infrastructure. What little funding they offer--highway money, for example--requires local matching grants. And all our local tax revenues are committed to keeping ourselves and our unionized public employees afloat. Redevelopment and tax increment financing is our only tool for survival. n13

§ 98.02(d) How the Constitutional "Public Use" Requirement Was Overcome.

Courts upheld the use of eminent domain for "slum clearance" despite challenges based on the requirement of the *Fifth Amendment to the U.S. Constitution* that "takings" of private property be for a "public use." The court evolved the notion that "public use" couldn't be equated literally with "use by the public" because not all government-acquired property has to be open to public access--defense installations, for instance. Nor does title have to vest ultimately in the government. For example, title to low- and moderate-income housing could be transferred to residents. So the phrase "public use" came to mean no more than "public purpose," "public benefit," or "public welfare." From there it was a short step to courts accepting legislative declarations of "public use and necessity" as conclusive of the "public use" question. n14

Second, to the U.S. Supreme Court, the "public use" requirement became "coterminous with the scope of a sovereign's police powers." n15 The Court has affirmed earlier case law, that "one person's property may not be taken for the benefit of another private person without a justifying public purpose, even though compensation be paid." n16 But the

Court's bottom line is that "where the exercise of the eminent domain power is rationally related to a conceivable public purpose, the Court has never held a compensated taking to be proscribed by public use clause." n17

Urban redevelopment statutes were upheld almost unanimously even though following clearance, redevelopment sites were usually sold to private redevelopers. The courts declared that resale for private use was "incidental" to the main justification for these laws: "blight" removal. Removing blight was, constitutionally, a sufficient public purpose. n18 Where once privately owned properties are acquired by eminent domain and sold to private developers, those sales have to be conditioned on the buyer clearing the site, removing blight, and building according to a publicly promulgated redevelopment plan. The "public use" finds its justification in the conditions imposed by the redevelopment agency on the private redeveloper. n19

Even though the U.S. Supreme Court articulated a lax constitutional standard and lower courts have nearly unanimously upheld redevelopment statutes, the "public use" requirement is not a judicial rubber stamp for all eminent domain cases. The Supreme Court of Mississippi, n20 Supreme Court of Florida, n21 and the Supreme Court of Delaware n22 have found an insufficient and consequential "public purpose" in condemnations which had a substantial private benefit component. The propriety of using governmental authority for these public benefit projects, even if they required taking property from one private party and turning it over to another private party, was reinforced in the 1981 *Poletown* case, n23 (discussed in more detail below, and the 1984 *Midkiff* case. n24 In *Poletown,* a viable, nonblighted residential neighborhood was condemned so the property could be turned over to a private owner for construction and operation of an automobile body plant. The proclaimed public use was alleviating unemployment and revitalizing the economic base of the community.

In *Midkiff,* the Court upheld a state statute authorizing the state to require large landowners to sell their lands to tenants at prices set by the state. Here the public use was land reform. Again, dicta from the Court showed an almost unlimited notion of the public use requirement: "The 'public use' requirement is thus coterminous with the scope of a sovereign's police powers." n25 "But where the exercise of the eminent domain power is rationally related to a conceivable public purpose, the Court has never held a compensated taking to be proscribed by the Public Use Clause." n26

Poletown was the object of considerable attention after its ruling underwent a stunning reversal in 2004 by the state supreme court that originally approved it. n27 The reversal of *Poletown* helps explain the very high interest in a similar public domain case that came before the U.S. Supreme Court in 2005.

In that case, *Kelo v. City of New London, Connecticut,* several nonblighted private residences were condemned by the city of New London, Connecticut, and the property was turned over to commercial and residential development associated with an adjacent research facility. n28 The putative public use was the public economic benefits of creating new jobs, increasing tax and other revenues, and contributing to urban revitalization. The U.S. Supreme Court affirmed the state court decision, thus approving this application of eminent domain power. n29 Justice O'Connor, the author of the *Midkiff* decision approving the use of eminent domain power to effect land reform, vigorously dissented in *Kelo,* arguing that the decision eliminated "any distinction between private and public use of property--and thereby effectively [deleting] the words 'for public use' from the *Takings Clause of the Fifth Amendment*." n30

Only a few hours after the Court announced its decision in *Kelo*, the city of Freeport, Texas, began proceedings to condemn several shrimp processing waterfront properties in order to undertake a marina development project. n31 Two days later, Boston condemned several waterfront properties for similar purposes. n32 In a dramatic backlash, the large majority of legislatures quickly introduced or pledged to introduce legislation to clarify or restrict the power of eminent domain. n33

§ 98.02(e) Policy Reactions to Redevelopment Destroying More Low-Income Housing than It Replaced.

Redevelopment was vigorously attacked as poor people were rousted from their dwellings. African-Americans and

Puerto Ricans accounted for about two-thirds of those displaced. n34 Novelist James Baldwin called "urban renewal" nothing but "negro removal." Conservative scholar and Reagan White House domestic policy advisor Martin Anderson wrote a book detailing all this called *The Federal Bulldozer*. n35

Later, exacting standards were mandated by federal and state governments for relocation assistance to dislocated individuals and firms uprooted by redevelopment. n36 Relocation programs weren't entirely satisfactory because many residents vacated as soon as areas were targeted for renewal and never received the relocation money they could have had if they had waited longer.

The more effective remedy against redevelopment becoming a thinly disguised scheme for displacing low-income tenants and homeowners is the local ballot box. Alerted to the dangers of condemnation, homeowners and resident groups mount vigorous attacks against redevelopment because they know it can result in the demolition of housing. n37 Politically savvy redevelopment agencies today are unlikely to put housing inside a project boundary and, if they do, will often commit themselves not to use eminent domain to acquire housing or small businesses.

Many state urban redevelopment laws now are written to require some replacement housing for low- and moderate-income people. For example, California law requires 20% of redevelopment-generated revenue to be used for low- and moderate-income housing. A 1984 study found that, although redevelopment agencies in California had built at least 25,000 more housing units than they had destroyed, very low-income units suffered a net loss. n38

California cities not willing to provide their statutory share of "social" housing may have to forego the use of redevelopment altogether. More than one affluent suburban town in California has canceled its proposed redevelopment project because of local political opposition to the low-income housing project the town could have had to accept. n39

The California statute also mandates that 15% of all new or rehabilitated housing units within the project area--if built by entities other than the redevelopment entity--be affordable to persons of low and moderate income housing. Instead of providing the units within the project area, this requirement may now be met outside the project area on a two-for-one basis. n40

§ 98.02(f) The Generations of Federal Programs That Replaced Urban Renewal.

Eventually federal subsidies for redevelopment were replaced by federal grants to cities directly targeted to the social and economic needs of the urban residents. One reason for the program shift to social programs and away from redevelopment was the "widespread belief among urban technicians that previous programs had failed to help the poor partly because they were too concerned by physical rebuilding and not concerned enough for the social need of residents." n41 These programs have gone through several iterations.

§ 98.02(g) Economic Development.

The trend in state and local government is to supplement or replace redevelopment activity with economic development programs, administered much the way redevelopment is. These new agencies may be given the power to formulate economic development plans and to use eminent domain and tax increment financing. Economic development agencies aren't limited to working in blighted areas or required to build housing for low- or moderate-income people. n42

§ 98.02(h) The Poletown Episode.

The controversial case of *Poletown Neighborhood Council v. City of Detroit, 304 N.W.2d 455 (Mich. 1981)* , which resulted in destruction of residential areas to make way for an automobile manufacturing plant, was unanimously overturned by the Michigan Supreme Court in *County of Wayne v. Hathcock, 684 N.W.2d 765 (Mich. 2004)* , the latter court emphasizing that an eminent domain taking must be for a public use; *Kelo v. City of New London, 843 A.2d 500*

(Conn. 2004) (the city's delegation of eminent domain power to a private, non-profit economic development corporation was held constitutional). The detailed background of *Poletown* follows.

In 1980 the General Motors Corporation announced, to immense joy in Detroit, that if the city could find a suitable site the corporation would construct an assembly plant as part of a $40 billion modernization program, described as one of the most extensive in American business history. The proposed General Motors plant, to be situated on 465 acres in Detroit and Hamtramck, could benefit from as much as $320 million in public subsidies n43

Poletown Neighborhood Council v. City of Detroit,

410 Mich. 616, 304 N.W.2d 455 (1981) **[citations omitted]**

Per Curiam.

This case arises out of a plan by the Detroit Economic Development Corporation to acquire, by condemnation if necessary, a large tract of land to be conveyed to General Motors Corporation as a site for construction of an assembly plant. The plaintiffs, a neighborhood association and several individual residents of the affected area, brought suit in Wayne Circuit Court to challenge the project.

* * *

The trial lasted 10 days and resulted in a judgment for defendants and an order on December 9, 1980, dismissing plaintiffs' complaint. The plaintiffs filed a claim of appeal with the Court of Appeals on December 12, 1980, and an application for bypass with this Court on December 15, 1980.

We granted a motion for immediate consideration and an application for leave to appeal prior to decision by the Court of Appeals to consider the following questions: Does the use of eminent domain in this case constitute a taking of private property for private use and, therefore, contravene Const. 1963, Art. 10, § 2?

Did the court below err in ruling that cultural, social and historical institutions were not protected by the Michigan Environmental Protection Act?

We conclude that these questions must be answered in the negative and affirm the trial court's decision.

This case raises a question of paramount importance to the future welfare of this state and its residents: Can a municipality use the power of eminent domain granted to it by the Economic Development Corporations Act, *M.C.L. § 125.1601 et seq.* ; M.S.A. § 5.3520(1) *et seq.*, to condemn property for transfer to a private corporation to build a plant to promote industry and commerce, thereby adding jobs and taxes to the economic base of the municipality and state?

* * *

Plaintiffs-appellants urge us to distinguish between the terms "use" and "purpose," asserting they are not synonymous and have been distinguished in the law of eminent domain. We are persuaded the terms have been used interchangeably in Michigan statutes and decisions in an effort to describe the protean concept of public benefit. The term "public use" has not received a narrow or inelastic definition by this Court in prior cases. Indeed, this Court has stated that "'[a] public use changes with changing conditions of society'" and that "'[t]he right of the public to receive and enjoy the benefit of the use determines whether the use is public or private.'"

* * *

In the instant case the benefit to be received by the municipality invoking the power of eminent domain is a clear and significant one and is sufficient to satisfy this Court that such a project was an intended and a legitimate object of the Legislature when it allowed municipalities to exercise condemnation powers even though a private party will also, ultimately, receive a benefit as an incident thereto.

The power of eminent domain is to be used in this instance primarily to accomplish the essential public purposes of alleviating unemployment and revitalizing the economic base of the community. The benefit to a private interest is merely incidental.

Our determination that this project falls within the public purpose, as stated by the Legislature, does not mean that every condemnation proposed by an economic development corporation will meet with similar acceptance simply because it may provide some jobs or add to the industrial or commercial base. If the public benefit was not so clear and significant, we would hesitate to sanction approval of such a project. The power of eminent domain is restricted to furthering public uses and purposes and is not to be exercised without substantial proof that the public is primarily to be benefitted. Where, as here, the condemnation power is exercised in a way that benefits specific and identifiable private interests, a court inspects with heightened scrutiny the claim that the public interest is the predominant interest being advanced. Such public benefit cannot be speculative or marginal but must be clear and significant if it is to be within the legitimate purpose as stated by the Legislature. We hold this project is warranted on the basis that its significance for the people of Detroit and the state has been demonstrated.

Plaintiffs' complaint also alleged that the proposed project violates the Michigan Environmental Protection Act (MEPA), *M.C.L. § 691.1201 et seq.* ; M.S.A. § 14-528(201) *et seq.* because it "will have a major adverse impact on the adjoining social and cultural environment which is referred to as Poletown." The trial court dismissed this claim, stating that "'social and cultural environments' are matters not within the purview of the MEPA and outside its legislative intent." We agree.

* * *

Coleman, C. J., and Moody, Levin, Kavanagh and Williams, JJ., concur.

Fitzgerald, Justice (dissenting).

This Court today decides that the power of eminent domain permits the taking of private property with the object of transferring it to another private party for the purpose of constructing and operating a factory, on the ground that the employment and other economic benefits of this privately operated industrial facility are such as to satisfy the "public use" requirement for the exercise of eminent domain power. Because I believe the proposed condemnation clearly exceeds the government's authority to take private property through the power of eminent domain, I dissent.

In the spring of 1980, General Motors Corporation informed the City of Detroit that it would close its Cadillac and Fisher Body plants located within the city in 1983. General Motors offered to build an assembly complex in the city, if a suitable site could be found. General Motors set four criteria for the approval of a site: an area of between 450 and 500 acres; a rectangular shape (3/4 mile by 1 mile); access to a long-haul railroad line; and access to the free-way system. The city evaluated a number of potential sites and eventually made an in-depth study of nine sites. Eight of the sites were found not to be feasible, and the ninth, with which we are concerned, was recommended. It occupies approximately 465 acres in the cities of Detroit and Hamtramck. A plan was developed to acquire the site, labeled the Central Industrial Park, under the *Economic Development Corporations Act, 1974 PA 338.* As authorized by the

statute, the project plan contemplated the use of condemnation to acquire at least some of the property within the site.

This action was brought by several residents faced with the loss of their property to condemnation as part of the project. After an expedited trial on the merits, the circuit court entered judgment for the defendants, the effect of which is to allow the pending condemnation actions under the Michigan "quick take" statute, *1980 PA 87,* to proceed.

* * *

Despite the limited value of decisions in other states, several points can be made. First, while it is difficult and perhaps futile to categorize individual states as utilizing a "broad" or "narrow" interpretation of "public use" for condemnation purposes, Michigan law seems most consistent with that of states that give a more limited construction to the term. While our decisions have sometimes used the phrase "public purpose" (a phrase often associated with a broad interpretation), the result of our decisions has been to limit the eminent domain power to situations in which direct governmental use is to be made of the land or in which the private recipient will use it to serve the public. The slum clearance cases are really the only significant departure from these principles, and, as noted above, those decisions have been sustained only because of the conclusion that the clearing of a blighted area is a public use. In this respect, the scope of "public use" in Michigan is quite similar to that in states that have rejected development projects on the theory that they would improve general economic conditions. *City of Owensboro v. McCormick, 581 S.W.2d 3* (Ky., 1979) ; *Karesh v. City Council of the City of Charleston, 271 S.C. 339, 247 S.E.2d 342 (1978)* . Certainly, we have never sustained the use of eminent domain power solely because of the economic benefits of development as have cases that allowed condemnation in similar circumstances.

Second, it is worth noting that the Maryland and Minnesota cases cited above are distinguishable in that in each it was the governmental unit that selected the site in question for commercial or industrial development. By contrast, the project before us was initiated by General Motors Corporation's solicitation of the city for its aid in locating a factory site.

The majority relies on the principle that the concept of public use is an evolving one; however, I cannot believe that this evolution has eroded our historic protection against the taking of private property for private use to the degree sanctioned by this Court's decision today. The decision that the prospect of increased employment, tax revenue, and general economic stimulation makes a taking of private property for transfer to another private party sufficiently "public" to authorize the use of the power of eminent domain means that there is virtually no limit to the use of condemnation to aid private businesses. Any business enterprise produces benefits to society at large. Now that we have authorized local legislative bodies to decide that a different commercial or industrial use of property will produce greater public benefits than its present use, no homeowner's, merchant's or manufacturer's property, however productive or valuable to its owner, is immune from condemnation for the benefit of other private interests that will put it to a "higher" use.

* * *

The condemnation contemplated in the present action goes beyond the scope of the power of eminent domain in that it takes private property for private use. I would reverse the judgment of the circuit court.

Ryan, J., concurs.

Ryan, J. (dissenting).

This is an extraordinary case.

The reverberating clang of its economic, sociological, political, and jurisprudential impact is likely to be heard and felt for generations. By its decision, the Court has altered the law of eminent domain in this state in a most significant way and, in my view, seriously jeopardized the security of all private property ownership.

This case will stand, above all else, despite the sound intentions of the majority, for judicial approval of municipal condemnation of private property for private use. This is more than an example of a hard case making bad law--it is, in the last analysis, good faith but unwarranted judicial imprimatur upon government action taken under the policy of the end justifying the means.

* * *

Stripped of the justifying adornments which have universally attended public description of this controversy, the central jurisprudential issue is the right of government to expropriate property from those who do not wish to sell for the use and benefit of a strictly private corporation. It is not disputed that this action was authorized by statute. The question is whether such authorization is constitutional.

* * *

As a general rule, when the object of eminent domain is to take land for ultimate conveyance to a private corporation to use as it sees fit, the state constitution will forbid it as a taking for private use.

* * *

Accordingly, land may not be condemned for private corporations engaged in the business of water-power mills, *Ryerson v. Brown, 35 Mich. 333 (1877)* ; cemeteries, *Board of Health v. Van Hoesen, 49 N.W. 894 (Mich. 1891)* ; or general retail, *Shizas v. Detroit, 52 N.W.2d 589 (Mich. 1952)* . In this case, land has been condemned solely for a private corporation engaged in the business of manufacturing automobiles.

It is plain, of course, that condemnation of property for transfer to private corporations is not wholly proscribed. For many years, and probably since the date of Michigan's statehood, an exception to the general rule has been recognized. The exception, which for ease of reference might be denominated the instrumentality of commerce exception, has permitted condemnation for the establishment or improvement of the avenues of commerce--highways, railroads, and canals, for example--and can be traced to the common law where it was considered an exception to a general rule.

* * *

Justice Campbell said:

"It is a principle which no respectable authority has ventured to deny, that property can never be condemned for private improvements, except where they belong to a class that cannot usually exist without the exercise of that power, and where the public welfare requires that they shall be encouraged. The improvements which unite both these conditions have been found in practice to be very few, and to be confined generally to some of the various kinds of roads or ways by land or by water." *Ryerson v. Brown, supra 343-344* (separate opinion).

* * *

It cannot for an instant be maintained, however, nor has anyone suggested, that the case before us

> falls within the instrumentality of commerce exception. In fact, the only authorities that even arguably support or justify the use of eminent domain in this case are the "slum clearance" cases.
>
> * * *
>
> Simply put, the object of eminent domain when used in connection with slum clearance is not to convey land to a private corporation as it is in this case, but to erase blight, danger and disease.
>
> The inapplicability of the slum clearance cases is evident. In the case before us the reputed public "benefit" to be gained is inextricably bound to ownership, development and use of the property in question by one, and only one, private corporation, General Motors, and then only in *the* manner prescribed by the corporation. The public "benefit" claimed by defendant to result can be achieved only if condemnation is executed upon an area, within a timetable, essentially for a price, and entirely for a purpose determined not by any public entity, but by the board of directors of General Motors. There may never be a clearer case than this of condemning land for a private corporation.
>
> * * *

The GM plant was said to have resulted in the confiscation of the residences of 3,000 people, 100 businesses, and 16 churches. n44 It spawned much scholarly commentary. n45 By 1985 a Los Angeles Times reporter was able to write: "Four years after the bulldozers swept away much of Poletown, the furious residents are long gone, the prayer vigils and the protests are over and the Cadillac, Buick and Oldsmobile luxury cars are finally starting to roll off the assembly line." n46 The plant in 1985 wasn't employing the 6,000 workers first promised, just 4,500, due to increased use of robotics. The GM plant at Hamtramck was still open, as of August 24, 1992, but by September 14, 1992, it was on GM's list of scheduled plant closures. It was listed as producing Cadillacs. n47 The plant has never prompted much new development in the neighborhood. n48 The Michigan Supreme Court reversed its position in 2004. n49

FOOTNOTES:

(n1)Footnote 5. William H. Brown, Jr., *Urban Redevelopment, 29 B.U. L. Rev. 318 (1949);* Daniel R. Mandelker, *Public Purpose in Urban Redevelopment, 28 Tul. L. Rev. 96 (1953).*

(n2)Footnote 6. Robert D. Sundby, *The Elimination and Prevention of Urban Blight, 1959 Wis. L. Rev. 73;* Judith E. Koons, *Fair Housing And Community Empowerment: Where The Roof Meets Redemption,* 4 Geo. J. on Fighting Poverty 75, 84 (Fall 1996).

(n3)Footnote 7. The President's Advisory Committee on Government Housing Policies and Programs, Dec. 1953, at 108-09, *quoted in* The Central City Problem and Urban Renewal Policy, Subcommittee on Housing and Urban Affairs, Committee on Banking, Housing and Urban Affairs, U.S. Senate, 1973, at 235-36. William E. Nelson, *The Growth of Distrust: The Emergence of Hostility Toward Government Regulation of the Economy, 25 Hofstra L. Rev. 1 (Fall 1996)* ("Slum areas are the breeding places of disease which take toll not only from denizens, but, by spread, from the inhabitants of the entire city and state. Juvenile delinquency, crime, and immorality are there born, find protection, and flourish.").

(n4)Footnote 8. *See, e.g.,* Robert A. Dahl, Who Governs?, 115-40 (1961).

(n5)Footnote 9. James H. Scheuer et al., *Disposition of Urban Renewal Land--A Fundamental Problem in the Rebuilding of Our Cities, 62 Colum. L. Rev. 959 (1962);* Curtis Berger et al., *Slum Area Rehabilitation by Private Enterprise, 69 Colum. L. Rev. 472 (1969);* Jerry Frug, *The Geography of Community, 48 Stan. L. Rev. 1047, 1081 (May 1996)* (City Land Use--Government-supported redevelopment shifted from a focus on downtown office buildings to the construction of shopping centers designed to increase central cities' attraction to middle-class metropolitan residents--even if they lived in the suburbs.); *Harvey v. City of Oklahoma City,111 P.3d 239 (Okla. 2005)* ; *Denham*

Springs Economic Development District v. All Taxpayers, etc., 894 So. 2d 325 (La. 2005) ; *Application of the Oklahoma Development Finance Authority, 94 P.3d 87 (Okla. 2004)* .

(n6)Footnote 10. Melvin R. Levin, Planning in Government 78 (1987).

(n7)Footnote 11. *See generally* Quintin Johnstone, *The Federal Urban Renewal Program, 25 U. Chi. L. Rev. 301 (1958);* Bernard J. Frieden & Lynne B. Sagalyn, Downtown, Inc. (1989).

(n8)Footnote 12. *See* Martin Anderson, The Federal Bulldozer 97, table 6.1 (M.I.T. Press 1964). The table lists the value of all urban renewal construction started by state, 1950-61. In order, the states were New York, Pennsylvania, Illinois, Virginia, Connecticut, New Jersey, California, Minnesota, and Maryland.

(n9)Footnote 13. Lecture at Real Estate Transactions, U.S.C. Law Center, Los Angeles, Cal., Apr. 10, 1992. David Ehrenfest Steinglass, *Rebuilding The Inner City: A History of Neighborhood Initiatives To Address Poverty in the United States, 22 N.Y.U. Rev. L. & Soc. Change 839* (1996-1997).

(n10)Footnote 14. *See, e.g.*, Lewis H. Weinstein, *Judicial Review in Urban Renewal, 21 Fed. B.J. 320 (1961).* Massachusetts, for example, typical of many states, wrote into its redevelopment law: "Every project undertaken or acquired under this section shall be deemed to have been undertaken or acquired to serve a public purpose." *Mass. Gen. Laws Ann. ch. 121A, § 18C(f).* In Mississippi, however, only the question of public necessity is given conclusive legislative deference. "Public use," in contrast, is judged by a much different standard, which is rooted in *§ 17 of the Mississippi Constitution*, which states: "Private property shall not be taken or damaged for public use, except on due compensation being first made to the owner or owners thereof, in a manner to be prescribed by law; and whenever an attempt is made to take private property for a use alleged to be public, the question whether the contemplated use be public shall be a judicial question, and, as such, determined without regard to legislative assertion that the use is public." Miss. Const. 1890, Art. III, § 17; *Redevelopment Agency of the City of Chula Vista v. Rados Bros., 115 Cal. Rptr. 2d 234 (2002)* (taking for city redevelopment project held to be a public use); Housing and Redevelopment Authority in *and for the City of Richfield v. Walser Auto Sales, Inc. 630 N.W.2d 662 (Minn. App. 2001)* (public purpose upheld for quick take condemnation for redevelopment).

(n11)Footnote 15. William E. Nelson, *The Growth of Distrust: The Emergence of Hostility Toward Government Regulation of the Economy, 25 Hofstra L. Rev. 1 (Fall 1996)* (The use by the Legislature of the power of taxation and of the police power in dealing with the evils of the slums has been upheld by the courts. The use of eminent domain to subsidize urban renewal was merely the beginning, however, of the judiciary's expansion of the power.); Elizabeth A. Taylor, *The Dudley Street Neighborhood Initiative and the Power of Eminent Domain, 36 B.C. L. Rev. 1061 (April 1996)* (the use of eminent domain for urban redevelopment); Robert J. Hopperton, *Standards Of Judicial Review In Supreme Court Land Use Opinions: A Taxonomy, An Analytical Framework, and a Synthesis, 51 Wash. U. J. Urb. & Contemp. L. 1, 104 (Winter 1997)* (In *Berman v. Parker, 348 U.S. 26 (1954)* , redevelopment act was upheld as constitutional exercise of the power of eminent domain.); Maureen Herr Juran, *Condemnation of Property for Economic Development by Home Rule Municipalities,* 25 Colo. Law. 53 (January 1996) (the court held that actual use or employment by the public of the land after condemnation was not the appropriate test. Instead, the main objective of the condemning authority--elimination of slum and blighted areas--was the controlling factor. Those purposes were a public use. The court determined that the acquisition and transfer of the land to private parties was incidental and a secondary consideration to the chief purpose for the action.); Robert H. Freilich, *Update On Planning and Land Use Regulatory Decisions in Favor of The Public Sector,* SB06/1 ALI-ABA 1, 19 (Aug. 1996) (Governmental action is entitled to a presumption that it legitimately advances the public interest; local governmental police powers include slum clearance, preservation of community character, etc.); Sydney Z. Searles, *The Law of Eminent Domain,* SB48 ALI-ABA 1, 6 (Jan. 1997) (What is public use?); Annotation, *What Constitutes "Blighted Area" Within Urban Renewal And Redevelopment Statutes, 45 A.L.R.3d 1096. In re Condemnation by Minneapolis Community Development Agency, 582 N.W.2d 596 (Minn. App. 1998)* (court allowed development agency to transfer property from one private owner to a private developer); *City of Batavia v. Sandberg, 677 N.E.2d 1010 (Ill. App. 1997)* (city's acquisition of commercial building

was reasonably necessary to achieve objectives of redevelopment plan and project, and city did not change nature of redevelopment project when it decided to condemn property so as to be subject to statutory approval process; acquisition and redevelopment of building did not represent change in land use, was consistent with redevelopment goal of promoting riverfront and downtown economic development by capitalizing on unique character of project area, and was consistent with goal of removing and alleviating adverse conditions by encouraging private investment of underutilized and vacant properties); *Citino v. City of Hartford Redev. Agency, 721 A.2d 1197 (Conn. App. 1998)* ; *In re* Condemnation by Redev. Auth. of City of Lancaster of Real Estate in *City of Lancaster, 682 A.2d 1369 (Pa. Commw. 1996)* ; *Grunwald v. Community Dev. Auth. of City of West Allis, 551 N.W.2d 36 (Wis. App. 1996)* (redevelopment area was a "blighted area" under Blight Elimination and Slum Clearance Act; city had reasonable grounds for concluding that property was necessary for successful redevelopment of area); *City of Jamestown v. Leevers Supermarkets, Inc., 552 N.W.2d 365 (N.D. 1996)* (city resolution designating development area for commercial properties in city's downtown area was not legally invalid on ground that city council found that development plan was consistent with sound "needs" of municipality, rather than "necessary" for municipality's welfare); *Hawaii Housing Auth. v. Midkiff, 467 U.S. 229, 240 (1984)* ; *Arrington v. Urban Redevelopment Auth. (In re Condemnation), 822 A.2d 135 (Pa. Commw. Ct. 2003)* (property was taken for a public purpose, but it could be permitted to revert to private ownership when the public purpose was discharged).

(n12)Footnote 16. *Thompson v. Consolidated Gas Corp., 300 U.S. 55, 60 (1937)* .

(n13)Footnote 17. *Hawaii Hous. Auth. v. Midkiff, 467 U.S. 229, 241 (1984)* .

(n14)Footnote 18. Transfers of property from one group of owners to another have since been upheld by the U.S. Supreme Court in other contexts as long as there was some defensible reason for the shift. In *Hawaii Hous. Auth. v. Midkiff, 467 U.S. 229 (1984)* , the Court upheld the state's condemnation of private estates for the purpose of selling the property to existing lessees. In *National R.R. Passenger Corp. (Amtrak) v. Boston & Maine Corp., 502 U.S. 807 (1991)* , the U.S. Supreme Court approved the ICC's condemnation of 49 miles of Boston and Maine track to convey it to the Central Vermont Railroad, hoping Central would upgrade the track and lease Amtrak "trackage rights" for its passenger service.

(n15)Footnote 19. Where there are no conditions limiting the buyer to use the property but the eminent domain acquisition is justified only because the redevelopment agency contemplates a "certain type" of redevelopment, "public purpose" may be lacking. For example, in *City of Vicksburg v. Thomas, 645 So. 2d 940 (Miss. 1994)* , the Mississippi Supreme Court found no public purpose in the City of Vicksburg's condemnation of Thomas' privately owned water front property for resale to Harrah's casino. The court disagreed with the city's contention that it was incumbent on Thomas to prove fraud or a "clear abuse of discretion since the legislature has made its determination of public necessity." *Id. at 942* . Instead, the court focused the issue on "whether Thomas' property would be put to an appropriate public use." *Id. at 942* . The City alleged the public benefit would come from increased employment and city taxes when Harrah's built a casino on the site. But the sales contract between the City and Harrah's did not limit the use of the site solely to that of a casino. Instead, Harrah's under applicable zoning, could have utilized the site for various uses. "The City failed to provide conditions, restrictions, or covenants in the contract with Harrah's to ensure that the property will be used for the purposes of gaming enterprise." *Id. at 942* .

(n16)Footnote 20. *See City of Vicksburg v. Thomas, 645 So. 2d 940 (Miss. 1994).* Later, in *Morley v. Jackson Redev. Auth., 632 So. 2d 1284 (Miss. 1994)* , the Mississippi Supreme Court ruled that the burden of proof as to the "public purpose" is on the condemnor. Even though the case was remanded for failure to present evidence as to its "public purpose," the court was hostile to condemnation with an incidental and indirect "public purpose" stating: "The primary purpose of the taking by [the Jackson Redevelopment Authority] ("JRA") is to sell the property to another private party who will develop the property. The incidental purpose is to remove slum and blighted conditions in downtown Jackson. This is not semantics. It is a matter of whether the *takings clause* is to have any validity at all and whether private property owners are to be afforded due process of law ... . Here, ["public purpose"] is indirect and, at best, speculative. We require much more of a showing of public purpose than is shown here." *Id. at 1290* .

(n17)Footnote 21. *Baycol, Inc. v. Downtown Dev. Agency, 315 So. 2d 451 (Fla. 1975)* . The Supreme Court of Florida, quashed the lower court's judgment for condemnation of Baycol's land for construction of a parking garage and a shopping center. The court reasoned that a private shopping center created the public need for parking and the condemning body cannot create "subsequent [public] necessity by first taking property and applying it to a private interest which constitutes basis for later created 'public need.' " *Id. at 458* .

(n18)Footnote 22. Wilmington Pkg. Auth. v. Land w/ *Improvements, 521 A.2d 227 (Del. 1986)* . The Supreme Court of Delaware sustained the lower court's determination that the primary beneficiary of the condemnation was the News Journal Company, rather than the public. *Id. at 234* . The record demonstrated that the Wilmington Parking Authority ("WPA") had disposed of 500 parking spaces within ten to twelve blocks of the project site. This fact, in conjunction with the WPA's prior business relations with the News Journal Company, rendered the taking one for private rather than public purposes.

(n19)Footnote 23. *Poletown Neighborhood Council v. Detroit, 304 N.W.2d 455 (Mich. 1981) , overruled by Wayne v. Hathcock, 684 N.W.2d. 765 (Mich. 2004)* .

(n20)Footnote 24. *Hawaii Hous. Auth. v. Midkiff, 467 U.S. 229 (1984)* .

(n21)Footnote 25. *Id. at 240* .

(n22)Footnote 26. *Id. at 241* .

(n23)Footnote 27. *Wayne v. Hathcock, 684 N.W.2d. 765 (Mich. 2004)* .

(n24)Footnote 28. *125 S.Ct. 2655 (2005)* .

(n25)Footnote 29. *See id.*

(n26)Footnote 30. *Id. at 2671* .

(n27)Footnote 31. *See* Les Christie, *Taking your home away: The Supreme Court has ruled that New London could take homes away from their owners. What next?*, CNN/Money, Aug. 2, 2005, http://money.cnn.com/2005/07/25/real_estate/investment_prop.eminent_domain_v_development/index.htm (last visited March 31, 2006).

(n28)Footnote 32. *See id.*

(n29)Footnote 33. *See id. See also* Associated Press, *States Try to Blunt Property Ruling*, July 19, 2005, http://www.foxnews.com/story/0,2933,152979,00.html (last visited March 23, 2006).

(n30)Footnote 34. Relocation from Urban Renewal Project Areas (through December 1961), Housing and Home Finance Agency, Urban Renewal Administration, Washington, D.C., table 2, at 11. Michelle Adams, *Separate and [Un]Equal: Housing Choice, Mobility, and Equalization in the Federally Subsidized Housing Program, 71 Tul. L. Rev. 413, 438-439 (Dec. 1996)* (The result of urban redevelopment was that entire square blocks of urban land were cleared, countless buildings were demolished, and thousands of black families were forced to move); Meredith Lee Bryant, *Combating School Resegregation Through Housing: A Need For A Reconceptualization of American Democracy and the Rights It Protects, 13 Harv. Blackletter J. 127, 133 (Spring 1997)* (Given the long history of discrimination, it was not surprising that most of the neighborhoods targeted for "slum clearance" were inhabited by blacks and other minorities). *Hispanics United of DuPage County v. Village of Addison, Ill., 988 F. Supp. 1130 (N.D. Ill. 1997)* (large number of Hispanic neighborhoods affected by city redevelopment plan; the citizens united in a class action suit against the city).

(n31)Footnote 35. Martin Anderson, The Federal Bulldozer 52-72(M.I.T. Press 1964).

(n32)Footnote 36. *See, e.g.,* Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970, *42 U.S.C. §§ 4601 et seq.* , amended by the Uniform Relocation Act Amendments of 1987; California Relocation Assistance Act of 1970, Cal. Gov't Code § 7260 *et seq. Stockman v. Unified Government of Wyandotte County/Kansas City, Kansas, 6 P.3d 900 (Kan. App. 2000)* (the relocation assistance plan did not violate equal protection).

(n33)Footnote 37. In the aftermath of the Los Angeles riots of 1992, when the Los Angeles Community Redevelopment Agency sought state legislative authorization to expand its work into these areas, the law was defeated because of opposition by apprehensive area residents.

(n34)Footnote 38. Ralph Anderson & Assoc., Redevelopment and Tax Increment Financing, Housing Supplement, Sacramento (1977). *Knudson v. City of Decorah, 622 N.W.2d 42 (Iowa 2000)* (senior citizen housing to be built in the urban renewal areas was considered affordable housing).

(n35)Footnote 39. *See* Amy Louise Kazmin, *Hidden Hills to Scrap Redevelopment Panel, Says It Serves No Use: The Affluent, Gated Community Admits a Mistake. It Will Disband the Agency in December and Return a Portion of the Money to the County,* L.A. Times, Nov. 17, 1990, at B3, col. 5.

(n36)Footnote 40. La. Rev. Stat. Ann. § 1468.

(n37)Footnote 41. Bernard J. Frieden & Marshall Kaplan, The Politics of Neglect: Urban Aid from Model Cities to Revenue Sharing 259 (1975). David Ehrenfest Steinglass, *Rebuilding The Inner City: A History of Neighborhood Initiatives to Address Poverty in The United States, 22 N.Y.U. Rev. L. & Soc. Change 839* (1996-1997); Catherine Michel, *Brother, Can You Spare A Dime: Tax Increment Financing in Indiana, 71 Ind. L.J. 457 (Spring 1996);* Justin D. Cummins, *Recasting Fair Share: Toward Effective Housing Law and Principled Social Policy, 14 Law & Ineq. 339 (June 1996)* (A law-and-order approach or other get-tough measures which focus on symptoms--crime and alleged irresponsibility--rather than causes--geographic, economic, and social isolation, cannot be effective. This article evaluates an alternative policy, one that takes a structurally transformative approach by affirmatively and systematically addressing housing patterns.).

(n38)Footnote 42. *See, e.g.,* Minn. Stat. Ann. § 469.090. *In re Matter of Condemnation by Minneapolis Community Development Agency, 582 N.W.2d 596 (Minn. App. 1998)* (condemning property for redevelopment may be undertaken to "provide employment opportunities, to improve the tax base, and to improve the general economy of the state").

(n39)Footnote 43. William Serrin, *Huge New G.M. Plant, Like Many, to Get Subsidies,* N.Y. Times, Feb. 25, 1981, at A12.

(n40)Footnote 44. Peter M. Millspaugh, *Eminent Domain: Is It Getting Out of Hand?,* 11 Real Est. L.J. 99 (1982).

(n41)Footnote 45. *See, e.g.,* Barry Bennett, *Eminent Domain and Redevelopment: The Return of Engine Charlie, 31 DePaul L. Rev. 115 (1981);* William Epstein, *The Public Purpose Limitation on the Power of Eminent Domain: A Constitutional Liberty Under Attack, 4 Pace L. Rev. 231 (1984);* Peter E. Millspaugh, *Eminent Domain: The Emerging Government/Business Interface, 59 U. Det. J. Urb. L. 167 (1982);* John J. Bukowczyk, *The Decline and Fall of a Detroit Neighborhood: Poletown v. G.M. and the City of Detroit, 41 Wash. & Lee L. Rev. 49 (1984);* Note, *Public Use, Private Use, and Judicial Review in Eminent Domain, 58 N.Y.U. L. Rev. 409 (1983);* Comment, *Corporate Prerogative, "Public Use" and a People's Plight: Poletown Neighborhood Council v. City of Detroit, 1982 Det. C.L. Rev. 907;* Frank I. Michelman, *Property as a Constitutional Right, 38 Wash. & Lee L. Rev. 1097 (1981);* Jennifer A. Mazzuchi, *Real Property, 42 Wayne L. Rev. 1101, 1108 (Winter 1996);* Kevin L. Cooney, *A Profit for the Taking: Sale of Condemned Property After Abandonment of the Proposed Public Use, 74 Wash. U. L.Q. 751, 762 (Fall 1996)* (The combination of the expanded definition of "public use" and the lack of accountability greatly diminishes the private property owner's protection against speculative takings); Tara J. Radin and Patricia H. Werhane, *The Public/Private Distinction and the Political Status of Employment, 34 Am. Bus. L.J. 245 (Winter 1996)* (What is particularly interesting about this case is

that GM is not a government-owned corporation, and its primary goal is profitability, not the common good. The Supreme Court of Michigan nevertheless decided that it was in the public interest for Detroit to use its authority to allow a company to take over property in spite of the protesting of the property owners).

(n42)Footnote 46. James Risen, *Poletown Becomes Just a Memory; G.M. Plant Opens, Replacing Old Detroit Neighborhood,* L.A. Times, Sept. 18, 1985, at 1.

(n43)Footnote 47. Crain Communications, Inc., Automotive News, Sept. 14, 1992.

(n44)Footnote 48. Micheline Maynard, *Companies That Go Out On a Limb: Chrysler Automaker "Didn't Turn Back" on City,* U.S.A. Today, May 18, 1992, at 4B.

(n45)Footnote 49. *Wayne v. Hathcock, 684 N.W.2d 765 (Mich. 2004)* .

1 Parts of this chapter have been adapted from George Lefcoe, Real Estate Transactions (Michie 1993).

Thompson on Real Property, Thomas Editions

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CHAPTER 98 FINANCING PUBLIC-PRIVATE DEVELOPMENT AND RENEWAL AGREEMENTS THROUGH TAX INCREMENTS 1

12-98 Thompson on Real Property, Thomas Editions § 98.03

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§ 98.03 The Formalities of Community Redevelopment.

[Go To Supp]

The procedures for establishing urban redevelopment programs usually derive from state enabling laws. The steps prescribed in them are fairly similar, although the details vary. Even within a state community practices may differ, although all the cities in the state are acting within the boundaries of the same enabling legislation. To illustrate the legal framework, here is the procedure California's redevelopment law contemplates. n50

§ 98.03(a) Form an Agency.

California cities and counties are specifically given the right to create redevelopment agencies. They do this by establishing or designating a redevelopment agency. The agency's board of directors can be appointed by elected officials (the mayor or the county board of supervisors). The city council can designate itself as the redevelopment board. Sometimes cities rely on non-profit public corporations, run like private real estate firms, to handle day-to-day redevelopment decisions.

A separate entity can mean more staff, more meetings, and a lengthy approval process, since important decisions may have to be made by both the city council or county board of supervisors and the redevelopment agency board. It can also lead to a bureaucracy which is aggressive, pro-business, and deal-oriented, and a staff easy for private developers to work with but one which may be out of touch with political reality and neighborhood sentiment. A separate board can also help isolate elected officials from the political turbulence stirred up by some redevelopment decisions.

California's Community Redevelopment Law contains strict conflict-of-interest rules as would any well-considered redevelopment law. Among these rules: No agency officer or employee who participates in the formation of the project area or approves plans or policies can acquire any interest in any property within a project area. n51

The powers of the redevelopment agencies usually include the right to use eminent domain, that is, to force reluctant owners to sell. Private property owners whose sites the agency acquires are entitled to be paid "just compensation." n52 The use of eminent domain is probably the feature of redevelopment that causes the most vocal opposition, especially

when housing and small businesses are forced out. California agencies have this authority although they often pledge not to use it in certain project areas--notably where homeowners or tenants band together and resist being forced out. n53

§ 98.03(b) Delineate a Redevelopment Area.

The legislative body of the city must designate a "survey area" from which a project area or areas may be selected. The agency then chooses one or more redevelopment areas--"areas of the community established by the adoption of a redevelopment plan within which the redevelopment agency is authorized to use its powers." n54

§ 98.03(c) Public Hearing.

Requirements for public notice and hearings vary from state to state. They may be needed to establish a redevelopment district, n55 designate a redevelopment area, declare an area blighted, or use tax increment financing. In California, both the redevelopment agency and the city are required to hold public hearings when redevelopment plans are adopted or amended, and when property is disposed of, for certain capital expenditures. In larger cities, the redevelopment agency must hold hearings every other year to review the progress of all their projects. n56

§ 98.03(d) Find and Declare Blight.

The redevelopment board can declare a project area "blighted" if it meets the statutory definition of blight. That standard focuses on the physical condition of buildings in the area--dilapidation, overcrowding--and in the layout of the land--street and subdivision layouts that are obsolete and uneconomic. n57 A blighted area is characterized by conditions that impose a serious physical, social or economic burden on a community that cannot reasonably be expected to be alleviated or reversed by private enterprise acting alone. Not every site or property in the area needs to be blighted. n58 Blight need only "predominate." But non-blighted properties can only be included if they are found necessary for the effective redevelopment of the area. n59

California redevelopment is restricted to "predominantly urbanized" defined as (eighty percent) areas, so it can't be used as a tool for developing "green field" areas. n60 Many a successful redevelopment project failed to meet the statutory standard, but no one challenged the finding of blight in time. n61 "In time" in California is within 60 days after the redevelopment plan is adopted.

One way to stop cities from using redevelopment laws for any and all general economic development programs is to close loopholes in the statutory definitions of "blight." This isn't as easy as it may seem. The Oregon legislature enacted a long, precise statutory definition of the term "blight," and required public participation and even voter referenda. Even after the state enacted all of these reforms, Oregon local governments continued inventively expanding the boundaries of their definitions of "blight" to fit local political goals which reached well beyond the statutory definitions. n62

§ 98.03(e) Draft, Adopt, and Implement a Redevelopment Plan.

The redevelopment agency and planning commission then cooperate in drafting and adopting a preliminary redevelopment plan. This plan must conform to the community's general plan, and include a legal description, an open space and street layout, the number of dwellings contemplated, and a non-discrimination clause, among other data.

The redevelopment plan may be presented to the redevelopment agency and legislative body at a joint public hearing. The documents considered at the hearing are the redevelopment plan, the environmental impact report, the implementation plan and the report to the council. The agency must present sufficient facts so that the local legislative body is able to make the findings required by law to support the ordinance adopting the redevelopment plan. The procedure is lengthy and takes approximately one year.

After adoption, the plan becomes the "fundamental document governing a redevelopment agency's activities and basically acts as the agency's charter. It is usually a very general document providing the agency with flexibility to implement its program." n63

The agency then formulates procedures for fulfilling the plan. This step usually involves soliciting proposals from private developers. Experienced agencies often enter informal discussions with business and development groups well before designating a project area and drafting a plan, because they want to be sure their plan is feasible and of interest to developers.

Part of the implementation involves a detailed financing plan describing anticipated costs and revenue sources. Most redevelopment agencies use *tax increment* financing. n64

The following case depicts how courts have justified the use of urban redevelopment and tax increment financing in situations far removed from any blighted areas--conventionally defined. It also describes tax increment financing, principal means of financing redevelopment.

SIGMA TAU GAMMA v. CITY OF MENOMONIE

288 N.W.2d 85 (Wis. 1980)

Beilfuss, Chief Justice.

This is an appeal by the plaintiff, Sigma Tau Gamma Fraternity House Corporation, from a judgment dismissing its complaint against the defendant, City of Menomonie, brought under ch. 32, Stats. The complaint challenged the right of the city to condemn its property. The plaintiff contends the condemnation is not authorized by the terms of sec. 66.46, Stats., the Tax Increment Law, and further asserts the Tax Increment Law is unconstitutional on its face and as applied because of lack of uniformity of taxation and the lack of a public purpose as required by the Wisconsin Constitution. It also alleges several substantive and procedural deficiencies which it claims invalidate the condemnation. This court granted a petition to bypass the Court of Appeals because of the state-wide importance of the issues raised.

On January 3, 1977, the City of Menomonie approved Tax Incremental District 1 to become effective May 1, 1977, pursuant to the provisions of sec. 66.46, Stats. The district consisted of Block 126, and Lots 1, 2 and 6 of Block 119 of the Original Plat of the City of Menomonie, including a portion of Fifth Avenue between Broadway and Second Streets scheduled to be vacated. Under the Tax Increment Law, sec. 66.46, Stats. (Law of 1975, c. 105), cities are authorized to create within their boundaries tax increment districts to assist them in financing needed public improvement projects in areas 25 percent of which are found to be "a blighted area," in need of "rehabilitation or conservation work" within the meaning of sec. 66.435, or suitable for "industrial sites" within the meaning of sec. 66.52. When such a district is created, a tax incremental base is determined by the Department of Revenue. The tax incremental base of a district is equal to the full aggregate value of the taxable property within the district at the time it is formed. Sec. 66.46(5). In the years following the creation of the district, all positive tax increments over and above the tax incremental base, which are due to the increased valuation of the property within the district, are upon receipt by the city treasurer deposited into a special fund to be used to pay for the costs of the project undertaken by the city. This is done until such time as the city completely recovers its costs or until the expiration of twenty years from the date of the creation of the district. Sec. 66.46(6). The effect of tax incremental financing is to require those municipalities that share the city's tax base, and that benefit from an increase in that tax base, to share in the cost of improvements in the district undertaken by the city.

As a prerequisite to the creation of a tax increment district, the planning commission is to prepare and adopt a proposed project plan which must then be approved by the local legislative body within six months after the Department of Revenue certifies to the city clerk the tax incremental base of the proposed district. Sec. 66.46(4), Stat. In this case the project plan approved by the Menomonie Planning Commission and city council called for the city's acquisition and sale of the full amount of land within the district to Mr. Donald Williams who was to construct on it a 25,000 square foot supermarket together with accompanying parking facilities and landscaping.

Williams was at that time the owner of a supermarket several blocks away from the district, but was looking for a new location where he could expand. Although the city had made earlier attempts to encourage commercial development in the area, it was not until after Williams had submitted his proposal to the city that the precise boundaries for Tax Incremental District 1 were determined.

Following completion of the project, the tax yield of the property within the district was expected to increase from $3,481 in 1976 to $24,282 per year thereafter because of the improvements. Project costs and income were estimated as follows:

Costs		Income	
Property Acquisition	$278,000	Sale of Land	$154,000
Appraisal Costs	2,000	Sale of Bonds	220,000
Relocation Costs	50,000		
Land Clearance	40,000		
Utility Relocation	4,000		$374,000
	$374,000		

The bonds were to be retired with the tax increment income generated by the improvement.

Plaintiff is the owner of Lots 6, 7 and 8 of Block 126 in the northwest corner of Tax Incremental District 1. The Sigma Tau Gamma Fraternity House is situated on Lots 7 and 8. The house itself is in satisfactory condition and presently serves as the residence of the student members of Sigma Tau Gamma Fraternity.

On January 2, 1978, the city adopted a resolution declaring the taking of plaintiff's property necessary "for the purpose of elimination of blighted and slum areas within the City of Menomonie and [to] encourage improvements within such areas pursuant to N.C. Gen. Stat. § 39-50, entitled 'Tax Incremental Law.' " Plaintiff was served with a jurisdictional offer on March 22, 1978, but did not respond. The matter was assigned to the Dunn County Condemnation Commission which, following a hearing, filed its award on June 2, 1978.

* * *

We conclude that Tax Increment Law (Sec. 66.46, Stats.) does not authorize the city to acquire property by condemnation ... and the Tax Increment Law is constitutionally valid.

The plaintiff contends that the Tax Increment Law does not itself authorize a city to condemn property, but only provides a method of financing redevelopment projects or public improvements which a city is authorized to undertake under other statutes ... .

A careful reading of the Tax Increment Law itself and the legislative declaration which accompanied it support plaintiff's position that the law was intended only as a financing vehicle for projects, not as a new and independent authorization for further urban redevelopment projects.

* * *

Certainly a city does have the power to eliminate blight by acquiring land by condemnation, but in order to exercise that power it must proceed under the specific statute authorizing condemnation for that purpose. We conclude it did not do so in this instance.

The Tax Incremental Law requires only that the city council adopt a resolution containing the finding that at least 25 percent of the property within the district is a "blighted area" or else meets one of the other criteria. Following its adoption of a resolution containing the finding, the city proceeded to acquire, by condemnation or otherwise, all of the land within the district. There is no indication in the statute itself that the legislature intended to permit a city to take all property within the district upon the mere finding that 25 percent of it was blighted.

* * *

Plaintiff next contends that the city is attempting to acquire its property for other than a public purpose. In its brief, plaintiff asks this court to conclude that the primary goal of the city in condemning its property was not the elimination of blight, but rather "to obtain an increased assessment on the property which will begin to benefit the public only after the tax increment bonds will be amortized."

The city's stated purpose in acquiring plaintiff's property is to eliminate blight in its downtown area. Assuming the area in question is blighted and acquisition of plaintiff's property is reasonably necessary for the elimination of such blight, the city has the lawful authority to condemn the Sigma Tau Gamma Fraternity House under appropriate statutory authorization.

* * *

Under the Blighted Area Law ... the purpose of the taking is to eliminate slums and blight. This purpose is accomplished by the acquisition and clearance of the blighted land. Once the public purpose is accomplished, the city may lawfully return the property to private ownership ... .

Furthermore, in order to accomplish the legitimate goal of the law ... the city could also condemn structures that were themselves unoffending, and even land that was standing vacant, if their acquisition was necessary for the elimination of the blight.

* * *

If the area in which plaintiff's property is located is blighted, and if the acquisition of plaintiff's property is reasonably necessary for the elimination of that blight, then the city may lawfully condemn plaintiff's property, despite the fact that the property itself has been properly maintained and is presently in satisfactory condition ... .

The plaintiff further contends that the Tax Increment Law violates the tax uniformity requirement of *Art. VIII, sec. 1 of the Wisconsin Constitution* ... [which] provides in part: "The rule of taxation shall be uniform ... ."

* * *

Under tax increment financing ... there is no ... disproportionate impact upon taxpayers within the same territorial boundaries of the unit imposing the tax. All taxpayers within the territorial limits of each local governmental unit--county, school or V.T.A.E. district, etc.--continue to be taxed at a uniform rate based upon valuations uniformly arrived at. No taxpayer or group of taxpayers is being singled out for preferential treatment either in the form of an exemption from taxation or a tax credit. Thus, we conclude, taxation under tax incremental financing is uniform.

A second limitation on the taxing power, however, is that taxes must be levied and expended for a public rather than a private purpose. Although often linked to the uniformity requirement, the public purpose doctrine is a separate

and inherent limitation on the power of taxation.

* * *

Plaintiff argues that under tax incremental financing, just as in negative-aid financing, the second prong of the public purpose doctrine is violated. Tax revenue from property within the tax incremental district must be surrendered by taxing authorities to the city sponsoring improvement of that area.

In this respect also, however, tax incremental financing can be distinguished. For unlike negative-aid financing, tax revenue taken from the other taxing authorities under tax incremental financing is used to accomplish a public purpose within their territorial limits. As the legislature expressly found, taxing authorities which share the cities' tax base do benefit from the expansion of that tax base which results from urban redevelopment or other public improvements. Because whatever money generated from the tax incremental district is used only to pay for public improvements in that district and because the elimination of blight is a public purpose, both requirements of the public purpose doctrine would seem to be satisfied.

We also note that if the city was unable to undertake such projects in the first place, the other taxing authorities would be completely without the additional revenue which plaintiff now claims they are forced to surrender to the city. The increased tax revenue is due, after all, to the city-sponsored project. In light of this fact, it is difficult to see how the other local governmental entities are being forced to relinquish any revenue to which they would otherwise be entitled.

For these reasons and because of the strong presumption of constitutionality to be accorded all legislative enactments, we hold the Tax Increment Law is constitutional.

Because we have determined that the Tax Increment Law authorized the financing of the statutorily described public improvements but does not authorize the acquisition of private property by condemnation, that part of the trial court judgment which approved the condemnation of the plaintiff's property by condemnation by virtue of the Tax Increment Law and the general condemnation statutes must be reversed. That part of the judgment that held the Tax Increment Law to be constitutionally valid is affirmed.

Judgment affirmed in part, reversed in part and remanded for further proceedings not inconsistent with this opinion. No appeal costs to be taxed.

* * *

The city in this case was motivated to form the tax increment district in the first place because the downtown area was stagnant and further threatened by a new shopping mall that had been built on the north end of town near an interstate highway. Without city intervention, more downtown deterioration in this city of 15,000 could have been expected.

The tax increment site consisted of a city block, one-half of an adjoining block, and the intersecting street between the two which the city vacated to create the needed parcel for the grocery store project. At the time, the site contained several stores (some vacant, dating back to the turn of the century, now in poor condition), the fraternity house, a few older houses that had been converted into student rentals, and, at the end of the block, the house of the chancellor of the University of Wisconsin-Stout. That house was also vacant because the chancellor chose not to reside in it.

The fraternity's claimed motivation for filing suit was to preserve its site--a "hallowed tradition." Counsel for the city believes the fraternity's primary motivation was to get a higher price for the house than the city was initially willing to pay.

If Sigma Tau Gamma had lost, its property would have been acquired by condemnation. The purchase price would have been set through a court-ordered valuation process. Even after the Wisconsin Supreme Court held that the city could not

condemn the property under the Tax Increment Law, the city could have started condemnation proceedings from ground zero under the Blighted Area Law. The city decided not to because "a financial decision was made that the delay in beginning the project was, in the end, going to cost more than the additional amount paid by the negotiated price. In other words, the increase in construction costs while awaiting the redevelopment law condemnation procedure, as well as the lost increase in revenue because of the more efficient store and the better location, outweighed the benefit to be obtained by completing the condemnation." n65

Having won, Sigma Tau Gamma didn't have to sell at all. But after the case was decided, the fraternity negotiated a sale of the fraternity house. With the sale proceeds, the fraternity was able to build a new house in the city.

The city sold the entire redevelopment site, including the fraternity house, to a grocery store owner, Donald Williams. Don's SuperValu of Menomonie is independently owned, but part of a voluntary marketing group called SuperValu Stores. Of course, Mr. Williams was always the "real" purchaser, so he had to approve in advance the price the city agreed to pay the fraternity. Mr. Williams financed his purchase and construction by proceeds from an industrial revenue bond which is being repaid out of tax increment funds. n66

The grocery store is a commercial success. The bondholders are paid promptly. The city has continued to use tax increment financing for other projects. Most citizens of Menomonie approve of the project. It has not resulted in a boom downtown but it has kept the downtown alive and well, a noteworthy accomplishment. n67

FOOTNOTES:

(n1)Footnote 50. Linda Mongelli Haar, *Commonwealth Of Massachusetts Article 80--Development Review and Approval*, SB06/1 ALI-ABA 175 (Aug. 1996).

(n2)Footnote 51. Cal. Health & Safety Code § 33130. *In re Condemnation of 110 Washington Street, etc., 767 A.2d 1154 (Pa. Comm. 2001)* (unlawful delegation of redevelopment authority's eminent domain powers).

(n3)Footnote 52. *U.S. Const. Amend. V.*

(n4)Footnote 53. *Id.*

(n5)Footnote 54. This quote and other parts of the note on redevelopment have been taken from a lecture entitled, "An Overview of the Legal Aspects of Redevelopment in California," given by David Aleshire, an attorney with *Rutan and Tucker. State ex rel. Tomasic v. Wyandotte County/Kansas City, Kansas, 962 P.2d 543 (Kan. 1998)* (automobile race track facility).

(n6)Footnote 55. *See, e.g.*, Ark. Code Ann. § 14-168-207; Ala. Code § 11-99-4(1).

(n7)Footnote 56. Interview with redevelopment attorney Murray O. Kane, Kane, Ballmer & Berkman, Los Angeles, April 19, 1993. *See also* David F. Beatty et al., Redevelopment Law in California (1991 ed.) at 58 *et seq.;* Cal. Health & Safety Code § 33355. *Shapiro v. San Diego City Council, 117 Cal. Rptr. 2d 631 (2002)* (city council agenda was improperly extended beyond the scope of the public notice). *Aposporos v. Urban Redevelopment Commission of the City of Stamford, 790 A.2d 1167 (Conn. 2002)* (public hearing and renewed finding of blight needed before property could be condemned).

(n8)Footnote 57. *See generally* Annotation, *What Constitutes "Blighted Area" Within Urban Renewal and Redevelopment Statutes, 45 A.L.R.3d 1096 (1972);* Annotation, *Liability of Urban Redevelopment Authority or Other State or Municipal Agency or Entity for Injuries Occurring in Vacant or Abandoned Property Owned by Government Entity, 7 A.L.R.4th 1129 (1981); Grunwald v. Community Dev. Auth. of City of West Allis, 551 N.W.2d 36 (Wis. App. 1996)* (In determining whether an area is a "blighted area" within meaning of Blight Elimination and Slum Clearance Act, municipality may focus on general overall character of area and its structures and consider area in context of its

surrounding neighbors; it is not necessary that predominance of buildings be close to unusable or have minimal value or that there be specific evidence of increased incidence of fire, crime, infant mortality, or illness); *Charleston Urban Renewal Authority v. Courtland Company, 509 S.E.2d 569 (W. Va. 1998)* (eminent domain power of urban renewal authority); *Friends of Mammoth v. Town of Mammoth Lakes Redevelopment Agency, 98 Cal. Rptr. 2d 334 (2000)* (evidence did not support findings that the project area was predominantly urbanized or suffered from blight); *Beach-Courchesne v. City of Diamond Bar, 95 Cal. Rptr. 2d 265 (2000)* (evidence supported findings that the project area was predominantly urbanized, but not that it was blighted); Housing and Redevelopment Authority in *and for the City of Richfield v. Walser Auto Sales, Inc. 630 N.W.2d 662 (Minn. App. 2001)* (the evidence established "blight"); *Rukab v. City of Jacksonville Beach, 811 So.2d 727 (Fla. App. 2002)* (landowners entitled to an additional opportunity to challenge the "blight" designation); *Aposporos v. Urban Redevelopment Commission of the City of Stamford, 790 A.2d 1167 (Conn. 2002)* (city required to make a renewed finding of blight).

(n9)Footnote 58. A good example of what blight is *not* comes from *Sweetwater Valley Civic Ass'n v. City of Nat'l City, 133 Cal. Rptr. 859 (1976)* . National City officials perceived development of an unbuilt 130 acres as an irresistible redevelopment opportunity. Most of the land--103 acres--produced far less property tax revenue than other land in National City, graced as it was with an 18-hole golf course, a driving range, and a putting green. Slapping the hands of the redevelopment agency for even thinking about condemning and redeveloping this perfectly tranquil open space, Justice Clark reminded us:

> "A finding of blight requires: (1) that the area suffer 'either social or economic liabilities, or both, requiring redevelopment in the interest of the health, safety, and general welfare' and (2) the existence of one of the characteristics of blight. (Section 33030 (fn. 3).) [I]t is not sufficient to merely show that the area is not being put to its optimum use, or that the land is more valuable for other uses."

California Redevelopment Law has now been amended to require at least two of the conditions in *Cal. Health & Safety Code § 33031* to be met, one physical, one economic. California's law also now requires the redevelopment agency to prepare an implementation plan showing specifically how the alleviation of blight is to be achieved by the proposed plan, any public improvements and any sale or lease of land to private developers. *Henry County Bd. v. Village of Orion, 663 N.E.2d 1076 (Ill. App. 1996)* (Feasibility study determining no more than four of 300 parcels of improved property within proposed real property tax increment financing (TIF) district were blighted because of inadequate utilities supported finding that financing new sewer system as redevelopment project public improvement would not substantially benefit proposed TIF district, as required under the Tax Increment Allocation Redevelopment Act.); *Hirth v. City of Hoboken, 766 A.2d 803 (N.J. Super. 2001)* (determination that area is blighted may be based on a planning consultant's report).

(n10)Footnote 59. *See Gonzales v. City of Santa Ana, 12 Cal. App. 4th 1335 (1993)* (The city's project involved a widening and beautification of Bristol Street, Santa Ana. The city had not shown why properties located on streets other than Bristol had been included. The case was remanded to give the city one last chance to prove the necessity for condemning those properties.); *Panama City Beach Community Redevelopment Agency v. State, 831 So. 2d 662 (Fla. 2002)* (undeveloped land may qualify as "blighted" area); *Fitzke v. City of Hastings, 582 N.W.2d 301 (Neb. 1998)* (land may not be added to an existing redevelopment area unless it is established that the additional land is itself blighted or substandard).

(n11)Footnote 60. State redevelopment statutes differ sharply over whether vacant sites may be condemned for urban redevelopment. *Compare Oliver v. City of Clairton, 98 A.2d 47 (Pa. 1953)* (vacant site may be included within redevelopment project boundaries and condemned) with *Beebe Imp. Corp. v. City of New York, 129 N.Y.S.2d 263 (1954)* (site consisting almost entirely of vacant land may not be taken for redevelopment under New York constitution and statutory powers granted cities).

The court in *Beebe*, relying on the language of the New York statute, observed:

> The area involved in the case at bar is at best an eyesore, and I doubt if it would be seriously contended even by plaintiff that it is not a blight on the community and a detriment to the growing residential quality of the neighborhood. But this does not necessarily mean that it is a slum or insanitary or substandard within the purview of the statute. No persons live in the area. It consists entirely of vacant land--the sheds and shacks in no sense of the word constitute improvements; the only improvements are the gasoline stations and welding plant, and these do not themselves appear to be either substandard or insanitary. I cannot regard this as a condemnation of "buildings or improvements not in themselves insanitary or substandard ... ."

Beebe Imp. Corp. v. City of New York, 129 N.Y.S.2d 263, 268 (1954) .

The Pennsylvania statute defined redevelopment area as "[a]ny area, whether improved or unimproved ... ." *Oliver, 98 A.2d at 52* .

(n12)Footnote 61. Cal. Health & Safety Code § 33030 *et seq.*

(n13)Footnote 62. Michael Newman, *Tax Increment Financing for Development and Redevelopment, 61 Or. L. Rev. 123 (1982).*

(n14)Footnote 63. David F. Beatty et al., Redevelopment in California 29 (1991). *Pequonnock Yacht Club, Inc. v. City of Bridgeport, 790 A.2d 1178 (Conn. 2002)* (city failed to establish that a proposed taking was essential to the redevelopment plan); *Designer Direct, Inc. v. Deforest Redevelopment Authority, 313 F.3d 1036 (7th Cir. 2003)* (redevelopment authority breached good faith requirements); *Circa Ltd. v. City of Miami, 79 F.3d 1057 (11th Cir. 1996)* (Private developer which had sought to build housing and retail properties on city land pursuant to redevelopment project under Florida Community Redevelopment Act (CRA) did not have property interest protected by due process clause arising out of redevelopment project, even though city commission had formally approved its redevelopment proposal, and could not recover in federal civil rights action against city after approval for plan was terminated; under CRA, city commission's final decisions about selection of proposals and execution of contracts were fully discretionary); *Minneapolis Community Development Agency v. Opus Northwest, 582 N.W.2d 596 (Minn. App. 1998)* (project not rendered illegal by failure to file an affirmative action plan); *Pequonnock Yacht Club, Inc. v. City of Bridgeport, 790 A.2d 1178 (Conn. 2002)* (deficiencies in redevelopment plan); *City of Hoboken v. City of Jersey City, 789 A.2d 668 (N.J. Sup. 2001)* (lack of a quorum in the city planning board meeting stopped redevelopment plan amendments from being approved); *JG St. Louis West Limited Liability Company v. City of Des Peres, 41 S.W.3d 513 (Mo. App. 2001)* (parking structure for a regional shopping mall held to be a necessary part of the redevelopment plan).

(n15)Footnote 64. *State ex rel. Tomasic v. Wyandotte County/Kansas City, Kansas, 962 P.2d 543 (Kan. 1998)* (automobile race track facility through tax increment financing).

(n16)Footnote 65. Letter to author from Phillip M. Steans, Bakke Norman, S.C. (Jan. 4, 1993).

(n17)Footnote 66. *St. Botolph Citizens Committee, Inc. v. Boston Redevelopment Authority, 705 N.E.2d 617 (Mass. 1999)* (parcels taken even while redevelopment was still in proposal stage).

(n18)Footnote 67. Interview by author with Phillip M. Steans, Bakke Norman, S.C., the attorney who represented the city in the lawsuit and subsequent purchase negotiations (Nov. 6, 1992).

1 Parts of this chapter have been adapted from George Lefcoe, Real Estate Transactions (Michie 1993).

Thompson on Real Property, Thomas Editions

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CHAPTER 98 FINANCING PUBLIC-PRIVATE DEVELOPMENT AND RENEWAL AGREEMENTS THROUGH TAX INCREMENTS 1

12-98 Thompson on Real Property, Thomas Editions § 98.04

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§ 98.04 Tax Increment Financing (T.I.F.).

[Go To Supp]

§ 98.04(a) How T.I.F. Works.

The number of states authorizing the use of tax increments as a primary financing mechanism for redevelopment has been on the rise. n68 One scholar counted fourteen states authorizing T.I.F. by 1979. n69 Another was able to find 30 states with tax increment financing laws on the books by 1987. n70

To understand what tax increment financing is, start with how property tax liability is determined. First, a tax base must be set. The tax base is usually the fair market value of the property to be taxed. But "assessed" value could be something other than "fair market value" because tax assessors might be using a standard other than market value, and because state law might require some other standard to be used. n71

Second, a tax rate is selected, usually by local government officials, bounded in some states by constitutional limitations.

Finally, the tax base is multiplied by the tax rate to derive the tax due.

"Tax increment" financing freezes the tax base as it existed just before the redevelopment project boundary was established. All local taxing entities continue receiving property taxes from the properties within the project area predicated on the old tax base. The old base is multiplied by the current tax rate, which is usually set each fiscal year absent constitutional rate limitations. All the property tax above that level is the tax increment. The redevelopment agency may use as much of the increment as necessary to finance the redevelopment project. n72

§ 98.04(b) Capitalizing the Tax Increment Through Municipal Bond Financing.

Future tax revenues can be used to secure present cash by the redevelopment agency selling a bond to be repaid by the anticipated cash flow. n73

To appreciate the economics of tax increment bond financing, start with the fact that redeveloped property (after it has been improved with offices and shops) usually yields a substantial tax increment. Say a developer agrees to build $200,000,000 worth of offices, shops, and condos on a vacant site. Relying on that agreement, the city places the site in a redevelopment area. At a property tax *rate* of 1%, the developer's improvements would yield a tax increment of $2,000,000 in annual property tax revenues above the pre-developed tax yield [base ($200,000,000) x rate (1%) = $2,000,000].

There are advantages to bonding the increment instead of pledging it to obtain a conventional loan. Property tax payments are a relatively secure source of repayment. The government's lien for unpaid taxes is superior to any mortgage lien. A rational over-leveraged owner may decide to stop making loan and tax payments when the value of her equity falls to zero. But even when the owner has lost her equity, a rational mortgage lender will keep making property tax payments unless the value of the property falls nearly to zero--to a price below the capitalized value of the property tax. Hence, bonds secured by property taxes can be floated for much higher loan-to-value ratios than conventional mortgages secured by the property's net cash flow.

Redevelopment agencies hope that interest on all the bonds issued by the agency will be exempt from federal income tax as is interest generally on municipal bonds. n74 Investors pay a premium for tax exempt bonds depending on their tax bracket and the supply of such bonds in the marketplace. This enables borrowers to pay less than they would pay to borrow against a conventional mortgage with interest fully taxable to the investor. However, under *I.R.C. § 141(a)* enacted as part of the Tax Reform Act of 1986, strict limits were imposed on the use of tax exempt by municipalities to facilitate industrial and other forms of private enterprise. Redevelopment bonds can qualify for tax exempt status but only with careful tax planning. n75

Cash flow from tax increments is only as secure, though, as the developer's promise to build. No buildings = no tax increment. Without increased property tax revenues, there will be no revenue to repay bondholders. For this reason, bond underwriters may require more than the developer's bare promise that tax or lease revenues will be there, on time, to pay bondholders their due. They may insist on an impeccable guarantor like a government agency or a major insurance company, bank, or "blue chip" corporation. The right guarantee helps garner a favorable rating from one of the credit agencies mentioned earlier. Otherwise, the underwriter will be selling "junk" bonds, that is, unrated securities. The guarantor, in turn, will look to a public redevelopment agency, a city, or the developer for ample security so it can pocket its hefty fee without worry. The guarantor's aspiration is to sell its signature without taking any uncovered risk:

> This overall process provides local governments with a flexible funding source for redevelopment activity that avoids much of the red-tape and delay associated with grant programs. In some states, T.I.F. also avoids the constraints of voter approval, municipal borrowing or debt limitations. However, these advantages in administrative flexibility and circumventing local political pressure create greater potential for abuse by redevelopment officials, particularly when projects appear economically feasible without such public assistance. [Footnotes omitted] n76

§ 98.04(c) Impact of Redevelopment on Other Taxing Entities.

Commentators disagree about the impact of T.I.F. on taxing entities other than the redevelopment agency. Property taxes are shared by cities, counties, school districts, special assessment districts, community colleges, and other entities. When redevelopment is financed by T.I.F., the "increment" is diverted entirely to the redevelopment agency unless a different arrangement is negotiated. The other taxing districts continue receiving tax revenues based on the pre-redevelopment valuations of property within the tax increment/redevelopment district. n77

After the redevelopment bonds are paid, the incremental property taxes are then allocated by law to those tax entities that would have received them had the redevelopment area not been created. Redevelopment agencies can forestall returning the tax base to the other underlying taxing entities when the redevelopment bonds are repaid by refinancing

their debt so it never gets repaid. n78 Another way to hoard the tax increment indefinitely is by amending the project area and continuing to expand it. When a redevelopment project area is amended, the base year for tax increment calculations stays as it was.

The Wisconsin court accepted the argument that these other public agencies aren't shortchanged by a tax-increment-funded redevelopment project because each entity continues receiving the same share of property taxes it had been getting before redevelopment. The other entities also benefit eventually when the costs of redevelopment are finally met and the tax increment is then shared by all entities. It is only fair that those entities share the burden of paying for redevelopment by deferring their receipt of revenues from the tax increment. This makes sense if the area would not have been revived but for redevelopment. The other tax-sharing entities would be no worse off. They may even be better off.

Deterioration might have continued, resulting in future property value declines. Besides, the redevelopment projects often stimulate new construction and an upgrading of property outside the project area. Property tax revenues from the surrounding area will be divided among all the taxing entities.

Still, if the new projects would have been built anyway, either in the project area or elsewhere within the same taxable boundaries, a city could use redevelopment as a device for siphoning anticipated property tax revenues away from other taxing entities. n79 This is the crux of the argument that TIF robs other taxing entities of property tax revenues:

> Imagine driving to your local voting precinct to vote in the general election. Among the various candidates and issues that you are going to vote on, is a tax millage increase proposal for the purpose of funding a development project in your municipality. You think about the pros and cons of permitting the local government to raise your taxes for that purpose and conclude that your hard earned money can be better spent on things other than municipal development. You also consider the possibility that the project may likely be funded by private investors in any event. Regardless of your thoughts that the project will ultimately benefit your neighborhood, you vote against the millage proposal because you really just feel that taxes are getting out of hand.
>
> As you are driving home, you pass your neighborhood's public elementary school. You think about the school millage increase proposal you had approved earlier the same year. A smile comes to your face because you know that you have a voice in how much a municipality can tax your property, and for what purpose. The following spring you notice that the construction crews have begun to work on the development project which had been defeated by the voters on the last election. The newspaper report explains that the project is being funded by a plan called tax increment financing, and that this will not require an added tax levy on your property. You are not really sure how this is accomplished, but you are glad that this could be done without requiring a new tax levy.
>
> What the article did not say, however, is that the development project will be funded by diverting property tax revenues (from your land) which were approved for the school districts, police department, county, and other local services. Indeed, if the project lasts for more than a year, your school district and other local services may be required to ask for an additional millage increase just so that they can stay abreast of inflation. n80

It isn't easy to tell for sure whether TIF leaves other taxing entities worse off or not. But in Alabama the local governing body must try. It must certify that "the proposed tax increment district on the whole has not been subject to growth and development through investment by private enterprise and it is not reasonable to anticipate that the land in the district will be developed without the adoption of the plan." n81

One study found Michigan cities using tax increment financing had greater property value growth, other things equal,

than cities not using it: n82

> This does not imply, however, that the growth is necessarily due to the TIF adoption. It may simply be the case that local municipal officials are in a good position to see growth coming and implement the TIF mechanism to maximize their own revenues and budgets at the expense of local school districts. This cynical view of the TIF mechanism would suggest that the mechanism is a budget manipulation tool, not an economic development tool. The results of the analysis presented in this paper do not answer this question ... . Such an analysis is not yet possible for Michigan cities due to date limitations. As a result, the causality issue awaits further investigation. n83

§ 98.04(d) The Right of Other Tax Agencies to Protest a Redevelopment Plan.

Some state legislatures are sensitive to the plight of school districts threatened by having redevelopment agencies siphon tax revenues away from them through tax increment financing. In Pennsylvania, school districts must be given a formal presentation of the proposed redevelopment tax increment district and an opportunity to meet with the redevelopment authority to discuss the project plan and tax increment financing. n84 In addition, the school district's governing body has the choice of opting to participate or not in the tax increment district. n85

Counties and school districts in California had a statutory right to protest--and used it--when they suspected cities were diverting their tax base through redevelopment. A county or other affected taxing agency could call for the creation of a fiscal review committee to identify tax effects and suggest changes in the redevelopment plan that would alleviate tax shifting burdens. The law specifically allowed a redevelopment agency to enter agreements with school districts or other taxing entities to redirect tax increment funds back to them "in lieu of taxes." n86 Faced with a challenge under this law, many redevelopment agencies negotiated contracts splitting some of the tax increment with the protesting tax entities. Seasoned redevelopment executives were often able to anticipate challenges by other taxing entities, and headed them off by making tax-splitting deals and incorporating them into the project proposed from the start. The California statute has now been amended, eliminating fiscal review committees, and instead directing agencies to pay affected taxing entities specified amounts at specified times during the life of a redevelopment plan. n87

§ 98.04(e) Statutory Limitations on T.I.F.

Cities have resorted to T.I.F. financing because municipal debt limitations often barred borrowing and general obligation bonds were often deemed too risky to the city's credit rating. Given the flexibility of this financing, there have been attempts to expand municipal financing through the use of T.I.F. For example, the Wisconsin state legislature passed a statute explicitly reciting that T.I.F. bonds did not constitute debt within the meaning of the constitution, therefore averting the constitutionally imposed debt limit. n88 The Wisconsin Supreme Court, however, held that T.I.F. bonds, regardless of the statutory recitals, were debt within the meaning of the state constitution, and therefore limited to the constitutionally imposed 5%. n89

Other states have determined that T.I.F. is not a panacea for the shortcomings of convention municipal financing and have placed limits on T.I.F. through a variety of measures. One of the most common limitations on T.I.F. is the amount of debt to be financed or the area to be included in tax increment districts. n90 Another very common measure is term limits for the development district and the underlying T.I.F. bond. n91 As the Wisconsin Supreme court noted, these limitations serve two purposes; they prevent municipalities from overextending themselves and becoming overburdened by the long-term financial obligations, and they impose the burden of repayment on "those who create the obligation, and not future generations." n92

FOOTNOTES:

(n1)Footnote 68. *See generally*, Richard Briffault, The Rise of Sublocal Structures in Urban Governance, *82 Minn. L. Rev. 503 (1997).*

(n2)Footnote 69. The earlier list of 14 appears in Davidson, *Tax Increment Financing as a Tool for Community Redevelopment*, 56 J. Urb. L. 405, 406 n.6 (1979).

(n3)Footnote 70. A list of the 30 states statutes appears in Luther, *Tax Increment Financing: Municipalities Avoiding Voter Accountability, 1987 Det. C. L. Rev. 89, 90, 91 n.7. Harvey v. City of Oklahoma City, 111 P.3d 239 (Okla. 2005)* ; *Denham Springs Economic Development District v. All Taxpayers, etc., 894 So. 2d 325 (La. 2005)* ; *Application of the Oklahoma Development Finance Authority, 94 P.3d 87 (Okla. 2004)* . *Town of Brockway v. City of Black River Falls, 702 N.W.2d 418 (Wis. App. 2005)* (city's assistance of private owner in obtaining tax increment financing did not constitute an unlawful surrender of the city's governmental authority).

(n4)Footnote 71. *Brookfield Trade Center, Inc. v. County of Ramsey, 584 N.W.2d 390 (Minn. 1999)* (although contract required that the building be valued at the minimum assessed value, Minnesota court ruled state statute required the building to be valued at the fair market value).

(n5)Footnote 72. Anderson & Assoc., Redevelopment and Tax Increment Financing, Sacramento (1974).

> A tax increment is computed by multiplying the total in property taxes levied and collected by the municipality and all other taxing entities on the taxable real property in an urban renewal project area in a year by a fraction, the numerator of which is equal to that year's market value of all taxable real property in the area minus the tax increment base and the denominator of which is equal to that year's market value of all taxable real property in the area.

Tex. Local Gov't Code Ann. § 374.033(a). *St. Louis Univ. v. Masonic Temple Ass'n of St. Louis, 220 S.W.3d 721 (Mo. 2007)* (the university was not controlled by any religious creed, and thus was permitted to use tax increment financing to construct a stadium); *Board of Directors of Indus. Development Bd. of City of Gonzales, Louisiana, Inc. v. All Taxpayers, Property Owners, Citizens of City of Gonzales, 938 So. 2d 11 (La. 2006)* (tax increment financing was not a donation of public funds to a private entity). Catherine Michel, *Brother, Can You Spare A Dime: Tax Increment Financing In Indiana, 71 Ind. L.J. 457 (Spring 1996). See also Delogu v. State, 720 A.2d 1153 (Me. 1998)* (court found application of the TIP laws proper under the "public purpose" doctrine for improvement of a private facility).

(n6)Footnote 73. *See, e.g.*, 40 C.F.R. Part 1500 (1978). Catherine Michel, *Brother, Can You Spare A Dime: Tax Increment Financing in Indiana, 71 Ind. L.J. 457, 458 (Spring 1996). Oklahoma City Urban Renewal Authority v. Medical Technology and Research Authority of Oklahoma, 4 P.3d 677 (Okla. 2000)* (tax increment financing plan was subject to constitutional voter approval); *Walser Auto Sales, Inc. v. City of Richfield, 635 N.W.2d 391 (Minn. App. 2002)* (tax increment financing district not properly established).

(n7)Footnote 74. *See* 1 Bittker & Lokken, Federal Taxation of Income, Estates and Gifts 15-1 et seq. (2d ed. 1981, 1989).

(n8)Footnote 75. *See* Larry D. Sobel & Harold Altscher, Tax Increment/Redevelopment in Tax Law & Practice, (PLI Tax Law & Estate Planning Course Handbook, No. 245, 1986); William L. Henn, Jr. & Jeanette M. Bond, The Basic Rules for Tax-Exempt Financing in Tax Law and Practice, (PLI Tax Law & Estate Planning Course Handbook, No. 365, 1996); John C. Bates, Jr. Changes Made in Tax Exempt Bond Areas When 1986 Act Ushers in New Era of Public Finance, *66 J. Tax'n 72 (1987).*

(n9)Footnote 76. Jonathan M. Davidson, *Tax Increment Financing as a Tool for Community Redevelopment*, 56 U. of Det. J. Urb. L. 403, 404, 407-08 (1979). *State ex rel. Tomasic v. Wyandotte County/Kansas City, Kansas, 962 P.2d 543 (Kan. 1998)* (automobile race track facility that would generate revenue). *But see Sinclair Marketing, Inc., v. Tax Increment Financing Commission, 1999 U.S. Dist. LEXIS 7447* (No. 99-0374-CV-W-6, W.D. Mo. May 17, 1999) Fn. 2 (on the failure of TIF to produce the funds necessary to pay back the initial investment).

(n10)Footnote 77. *See, e.g.*, Ill. Ann. Stat. § 11-74.4-8(a) (*see now* 65 ILCS 5/11-74.4-8a). *Delogu v. State, 720 A.2d 1153 (Maine 1998)* (enabling statute authorized use of credit enhancement tax increment financing to assist modernization of private shipbuilding). *See also State ex. rel. Village of Bel-Ridge v. Lohman, 966 S.W.2d 356 (Mo. App. E.D. 1998)* (describing how the Director of Finance must disperse the TIF funds received).

(n11)Footnote 78. The Texas legislature made this difficult for redevelopment agencies by requiring a two-thirds approval of the qualified electorate for tax increment bonds to be refunded. § 4332. *Harvey v. City of Oklahoma City, 111 P.3d 239 (Okla. 2005)* (city's use of tax increment financing did not violate the state constitutional prohibition of incurring long-term financing without voter approval). In Hawaii, on the other hand, the county is given carte blanche to refund bonds "for the purpose of paying or retiring or in exchange for tax increment bonds previously issued by the county." Haw. Rev. Stat. § 46-106 (1991).

(n12)Footnote 79. The use of T.I.F. funds in California is limited by a requirement that some of the money must be dedicated to low and moderate income housing--not less than 20% of all property taxes allocated to the redevelopment agency. Health & Safety Code § 33030 et seq.

Anecdotal evidence that property tax skimming is a pervasive motive for redevelopment comes from the fact that tax increment financing has so seldom been used in the one jurisdiction in California where the city and county governments are one and the same-- *San Francisco. Denham Springs Economic Development District v. All Taxpayers, Property Owners, et al., 894 So. 2d 325 (La. 2005)* (tax increment financing statute requires use of dedicated taxes for only their dedicated purposes).

(n13)Footnote 80. Joseph F. Luther, *Tax Increment Financing: Municipalities Avoiding Voter Accountability, 1987 Det. C. L. Rev. 89, 90.* Copyright 1987 by Detroit College of Law, Law Review. Reprinted with permission.

(n14)Footnote 81. Ala. Code § 11-99-4(5)(a). *See also* 40 C.F.R. § 1502 *et seq.* (project plan must state that its program could not be accomplished by private enterprise without public planning and assistance).

(n15)Footnote 82. John E. Anderson, *Tax Increment Financing: Municipal Adoption and Growth, 43 Nat'l Tax J. 155, 161 (1990).*

(n16)Footnote 83. *43 Nat'l Tax J. 155, 161-2 (1990).*

(n17)Footnote 84. Pa. Stat. Ann. tit. 53, § 6930.5(a)(1), (2).

(n18)Footnote 85. Pa. Stat. Ann. Tit. § 6930.5(a)(7).

(n19)Footnote 86. *Cal. Health & Safety Code § 33401*.

(n20)Footnote 87. *Cal. Health & Safety Code § 33607.5*.

(n21)Footnote 88. *Wis. Stat. Ann. § 66.46(9)(b)(4)*; *see also Or. Rev. Stat. § 457.440(1)(a)*. (The amount raised to pay the principal for bonded indebtedness from each urban renewal area are not subject to taxing limitation of the Oregon constitution).

(n22)Footnote 89. *Hartford v. Kirley, 493 N.W.2d 45 (Wis. 1992)* . The statute authorizing the use of T.I.F. also specifically excluded T.I.F. financing as debt under the state constitution. But the Wisconsin Supreme Court stated: "Notwithstanding the legislature's recital that T.I.F. bonds do not constitute a debt within the meaning of the constitution, the court must examine the substance of the obligations to ascertain their effect under art. XI, sec. 3." *Id. at 50* . The court then held "the resulting impairment of the City's general property tax revenues to pay T.I.F. bond obligations for [Tax Increment District] No. 4 for this period creates debt within the meaning of *art. XI, sec. 3, of the Wisconsin constitution*." *Id. at 56* .

(n23)Footnote 90. *Ala. Code § 11-99-4* (Total percentage of districts for T.I.F. does not exceed 10% of the value of the entire district); *Me. Rev. Stat. Ann. tit. 30-A § 5253* (Total area of a single district cannot be more than 2% acreage of the entire municipality, and all districts cannot be more than 5% acreage of the municipality. Total indebtedness within a county cannot be more than $50,000,000); *N.J. Stat. Ann. § 55:19-20 et seq*. (Total property in Tax Increment Districts is 5%, exception for an ordinance designated districts of 10%); *Or. Rev. Stat. § 457.420* (Maximum amount to be included in redevelopment district is 15% of total assessed value or 15% of total land of municipality for populations over 50,000 and 25% for population below 50,000); *Pa. Stat. Ann. tit. 53, § 6930.5 (6)(iv)(C)* (All T.I.F. districts cannot exceed 10% of the equalized taxable property in the municipality); *R.I. Gen. Laws § 45-33.2-3(7)* (All tax increment areas does not exceed 25% of the taxable valuation of all property subject to taxation within the town or city); *Va. Code Ann. §§ 58.1-3245.4* (Cannot exceed 10% of the assessed value of the real estate in the municipality subject to taxation. However, there is an exception for cities with population between 392,000 and 395,000 which are exempt from this limitation.).

(n24)Footnote 91. *Ala. Code § 11-99-4* (Tax increment district not to exceed 30 years, with exceptions for amendments); N.J. Stat. Ann., §§ 13:1 (Maximum redevelopment project is 20 years, with a possible extension of 10 years. Agencies can refinance the debt, but a 5-year limit on the time period in which an agency can receive tax increment from a project.); *Mich. Comp. Laws § 125.2164* (bond mature in 30 years or less); *Minn. Stat. Ann. § 469.176* (20-year limitation for a redevelopment district); *N.M. Stat. Ann. § 5-9-11* (maximum of five years for a property to be included in a T.I.F. district); *Okla. Stat. Ann. tit. 62 § 861* (the increment shall be apportioned for not more than 25 years); Mich. Comp. Laws Ann. §§ 565.701-565.703 (bond not to exceed 20 years, unless amended under sec. (8)); *Tex. Local Gov't Code Ann. § 374.035(b)* (limited bond maturity to 20 years); *Wis. Stat. Ann. § 66.46(6)(a)* (the allocation of tax increment limited to 23 years).

(n25)Footnote 92. *Hartford v. Kirley, 493 N.W.2d 51 (Wis. 1992)* .

1 Parts of this chapter have been adapted from George Lefcoe, Real Estate Transactions (Michie 1993).

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CHAPTER 98 FINANCING PUBLIC-PRIVATE DEVELOPMENT AND RENEWAL AGREEMENTS THROUGH TAX INCREMENTS 1

12-98 Thompson on Real Property, Thomas Editions § 98.05

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§ 98.05 Dealing with the Developer.

N.C. Gen. Stat. §§ 30-37 to 39-37

§ 98.05(a) Early Consultation.

Sophisticated redevelopment agencies won't initiate the redevelopment process without good reason to believe private developers actually want to develop in the designated redevelopment site. If the agency's program isn't tailored to market requirements, the agency risks getting stuck with an unusable site, an impractical plan, or both. n93

§ 98.05(b) Developer Selection Procedures: R.F.P.s, I.F.B.s, R.F.Q.s.

In California, redevelopment agencies aren't obliged to sell to the highest bidder. "No particular method or procedure is prescribed for the disposition of property." n94 If the property is sold or leased without public bidding, there needs to be a public hearing before the agency signs off in the disposition. Thus, "redevelopment agencies have been granted a unique power for a public agency--that of direct negotiation with prospective developers for the disposition of property without the need of undertaking any bidding or other competitive process." n95 Competitive bidding procedures are required in some states. n96

The selection of a single private developer to carry out the redevelopment agency's project has been sustained against an attack based on federal antitrust statutes under the state action exemption. n97

While a redevelopment agency could offer the land it has acquired to the highest competitive bidder with no strings attached, redevelopment agencies seldom do. Because they attach exacting and costly detailed conditions to the developer's reuse of the site, they are likely not to get as much for it as they would if the site were sold without "strings." But a no-strings sale would defeat the rationale for redevelopment in most situations.

Agencies commonly issue Requests for Proposals (R.F.P.s) or "invitations for bids" (I.F.B.s) based on the criteria they have promulgated and embodied in the R.F.P. document--the factors (in addition to price) that the redevelopment agency and city council are going to take into account in selecting a developer.

The cost to a developer of submitting a response to a redevelopment agency on a request for a proposal can easily amount to hundreds of thousands of dollars. An agency can keep developer selection costs low by issuing a request for qualifications (R.F.Q.) instead. An R.F.Q. describes a developer's track record and financial strength. It enables the agency to evaluate the applicants' past achievements, design skills, and financial strengths. The agency then narrows the field to a "short list" of candidates.

In a second stage submission, the applicants can be asked to offer specific project proposals. Alternately, the agency can enter negotiations with the best R.F.Q. respondent. If no deal can be struck with the most promising candidate, the agency turns to the second best proposal.

§ 98.05(c) The Disposition and Development Agreement.

Formally, a redevelopment agency usually contracts with a private developer by entering a "property disposition and development agreement" (D.D.A.) for the sale (or leasing) and redevelopment of the site. n98

The D.D.A. will detail the project to be built on the site--design, timing, land price. In California, the project must be built by some entity other than the redevelopment agency because redevelopment agencies are barred by statute from constructing buildings and holding title to land post-development.

After selecting a developer, most California redevelopment agencies don't rush directly into a D.D.A.. Instead, the agency begins with an exclusive negotiation agreement, a commitment to try to make a deal with the chosen developer. Although there is no statutory provision for formal "exclusive negotiation agreements," they are quite common in California. The developer usually makes a good faith deposit--cash, a certified check, or letter of credit--which the agency may keep if the developer fails to negotiate in good faith, or which the agency applies to any deposit requirements in the resulting D.D.A. if all goes well. The agency makes clear that entering negotiations doesn't obligate it to enter a deal without the official ratification required by statute. n99

§ 98.05(d) The Public Agenda.

Public agencies often seek "imageable" landmark buildings to give their downtown a new and brighter look. They may want a pedestrian-friendly ambience. Their wish list may include public facilities they hope the developer will pay to create--a park, a library, an art museum. Minority subcontractors will sometimes be favored, or the employment of local residents will be promoted during and after construction. Also, city redevelopment agencies want sites developed quickly because property tax revenues aren't assessable and collectible on buildings until they are built. The trade-off for achieving these objectives is that the redevelopment agency may sell the land at less than its highest price.

Cities are especially eager for projects that will produce sales tax revenues. California statutes allow cities to retain 1% of the sales taxes generated within their boundaries. That revenue helps compensate cities for the traffic and tumult that comes with making room for a retail hub. California cities that don't lure retail enterprises forfeit the sales taxes their residents pump into the coffers of nearby towns with big retailing centers--shopping centers, auto sales malls, hotels, and restaurants. n100 That is why there is such fierce competition among cities for shopping malls, car dealerships, and discount retailing. These are big sales tax money machines for local governments. The developers of these big sales tax generators often strike sweetheart deals with towns desperate for the revenue--deals which, in effect, split the future sales tax between the city and the entrepreneur.

If a legislation is enacted to allocate the sales tax based on city population, and not place-of-sale, these deals won't be as attractive to cities.

Even in states where sales taxes aren't returned to the "point of sale" city, the "discount" retailers and auto malls are sometimes attractive because of the property taxes they pay. Redevelopment projects figure significantly in competition

among cities for tax-yielding projects, because redevelopment enables cities to offer prime retailers financial incentives funded out of tax increments. Those incentives might include subsidized land costs, parking facilities, the use of eminent domain if necessary to acquire the site, and expedited land use approvals.

§ 98.05(e) Public Agenda Deal Points.

After the project design has been negotiated, experienced redevelopment lawyers urge their agency client to focus on the following deal points:

1. Obtain a fair price for the land;

2. Commit the developer by requiring early and substantial cash (debt or equity) in the project;

3. Require a hefty good faith deposit or performance guarantees;

4. Minimize public financing;

5. Defer major financial commitments on the part of the agency until the developer is firmly bound to proceed;

6. Obtain sufficient revenue from the project by way of land sale proceeds, lease rentals, tax increment and developer payments to make the project financially feasible for the agency; and

7. In a phased project, condition the developer's right to build the more attractive portions of the project (from the developer's standpoint) on the developer's commitment to complete the entire project.

§ 98.05(f) The Private Redeveloper's Agenda.

Lawyers and planners caution developers to make sure the agency is committed to go through with the project; that it has the legal authority to acquire and sell the site it is offering; that the process isn't "wired" to award the project to a favored developer; and that the submission requirements are realistic.

> Once the developer has decided that the agency is serious, honest, and responsible, he must do some research on the awarding agency's objectives. The developer should determine what the agency wants to see in the proposal, what type of development, amenities, or features it will value most, what attorneys, architects, hotel operators, or other team members will be the biggest asset, what level of minority participation will be expected, and what financial offer will probably be necessary to be competitive. Following such a realistic assessment, the developer must then assemble the right team and start to develop his proposal. n101

A developer will generally negotiate to:

1. Tie up the site early under an agreement with the agency so that it can undertake market and feasibility studies, do its planning, and contract with potential tenants;

2. Obtain agency commitments for the most public financial participation the developer can justify;

3. Obtain environmental assessments, planning approvals, and other entitlements as soon as possible;

4. Bind the agency to a realistic but firm time schedule for accomplishing its tasks under the agreement;

5. Limit the developer's obligation to proceed by conditioning it on obtaining tenant commitments and financing;

6. Minimize the developer's front-end costs for studies and development plans until the project is ready to move ahead; and

7. Divide large projects into phases so that the developer can decide which parts to build.

§ 98.05(g) Changing or Amending the Plan.

Once a deal is negotiated, a D.D.A. entered into, and work begun, large projects to be built over many years commence uncharted courses. Neither markets nor politics remain constant for long. The redevelopment agency, the developer, or both may initiate a renegotiation. The developer reacts to shifts in demands or costs. The public agency responds to elected officials who have altered their political agendas. The developer may have made concessions in obtaining land use approvals that necessitate design changes. Lenders and major tenants, seldom parties to the original negotiation, sometimes need design and scheduling changes--on very short notice. Renegotiation of the original D.D.A. is the upshot, a familiar part of the redevelopment game. n102

FOOTNOTES:

(n1)Footnote 93. New Jersey law requires that a preliminary tax increment financing plan be submitted to the state Commissioner of the Department of Community Affairs and the State Treasurer, and that it include "a list of developers who seem willing to enter into written agreements ... and the developments they propose to sponsor." Okla. Stat. tit. 16, §§ 201-203

(n2)Footnote 94. David F. Beatty et al., Redevelopment in California 135 (1991).

(n3)Footnote 95. *Id.*

(n4)Footnote 96. *See, e.g.,* Ga. Code Ann. § 36-61-10(b)(1). However, "in determining fair value," the local government "shall take into account" the uses allowed under the redevelopment plan and its restrictions on future use. Ga. Code Ann. § 36-61-10(a). Bidders are charged with notice of all the criteria embodied in redevelopment plans. *Dyson v. Dixon, 134 S.E.2d 1 (Ga. 1963)* .

(n5)Footnote 97. *Price v. City of Fort Pierce, Fla., 625 F. Supp. 979 (S.D. Fla. 1986)* .

(n6)Footnote 98. Previous owners whose properties conform to the redevelopment plan are allowed to participate. Otherwise, previous owners compete with all others as the agency selects what it regards as the best proposal. Cal. Health & Safety Code §§ 33339, 33380.

(n7)Footnote 99. David F. Beatty et al., Redevelopment in California 149-52 (1991).

(n8)Footnote 100. California law now prohibits redevelopment agencies from assisting automobile dealerships on land not previously developed for urban use. *Cal. Health & Safety Code § 33426.5(a)*. The new law also bars agencies from contracting for development on previously vacant sites of five acres or more which, when developed will generate sales tax revenues, unless the principal permitted uses are offices, hotels, manufacturing or industrial. *Cal. Health & Safety Code § 33426.5(b)*.

(n9)Footnote 101. Ian Portnoy & Bradford Perking, *Developing with a Public Agency Partner,* 15 Real Est. Rev. 75-79 (Spring 1985).

(n10)Footnote 102. Over time a community's goals for a redevelopment area may change so dramatically that it

condemns properties developed according to earlier redevelopment plans. *See Roberts v. City of Worcester, 625 N.E.2d 1365 (Mass. 1994)* (plumbing supply company bought out so land within redevelopment project area could be reused for a medical complex); *City of Las Vegas Downtown Redevelopment Agency v. Crockett, 34 P.3d 553 (Nev. 2001)* (minor changes in redevelopment plan did not necessitate formal amendments).

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CHAPTER 98 FINANCING PUBLIC-PRIVATE DEVELOPMENT AND RENEWAL AGREEMENTS THROUGH TAX INCREMENTS 1

12-98 Thompson on Real Property, Thomas Editions § 98.06

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§ 98.06 A Critique of Public-Private Co-Ventures.

Not all observers are equally sanguine about public entities, cities especially, becoming entrepreneurs in public-private development deals. Their critique stresses the following points: n103

1. Balance is needed between government and the private sector if the state is to protect individuals from the "coercive exercise of private power, while private sources of capital serve as a check on the emergence of an all too powerful state apparatus." There might be a role for government working with the private sector to provide low-income housing, job training, and housing for the homeless, but not "to get a Saks Fifth Avenue or a Neiman Marcus located in a downtown shopping center." n104

2. When local governments have a direct financial stake in a project, they are sorely tempted to grant land use approvals promiscuously, short-changing those adversely affected by redevelopment projects. Cities have approved projects at densities the ordinary developer could never achieve, densities inconsistent with sound local planning. n105 They have also protected their co-venturers by turning down projects that could potentially have competed for tenants and customers.

3. Cities take risks in these projects for which they are often unprepared and uncompensated, simply because they don't have staff as expert as the developer's in negotiating the basic deal.

4. The result is that some deals violate clauses found in many state constitutions barring gifts of public money and barring public investment in private enterprises.

5. Public financial accountability rarely accompanies redevelopment deals. Only final agreements are available for city council and public review. "Alternatives dropped along the way seldom come to light, and the complexity of the business deal increases the likelihood that few people will understand it well enough to raise informed objections." n106

6. While cities tend to calculate benefits completely, many costs are hidden. These include: "the

opportunity costs tied to below-market interest rates, deferred paybacks, tax abatements, and in-kind contributions ... ." n107

7. Because tax increment financing doesn't involve a direct property tax increase, it may escape the accessibility of voter approval in states where property tax increases would have been required. Yet the T.I.F. scheme can drain taxes from other taxing entities and, as one state court chief justice observed, "[i]f the whole project goes plop, the taxpayer is the ultimate surety." n108

The counterarguments run something like this:

1. Cities may have to join private developers in urban redevelopment and economic development "joint venture" projects in order to bring service jobs to the unemployed, unskilled underclass of the inner city and bring them back into the mainstream economy. Doing this "constitutes one of the great challenges to American city planning ... . Do you join in meeting it, or catcall from the sidelines?" n109

2. It isn't all bad for city governments to share in the profits of redevelopment, because it gives public officials a more balanced outlook in evaluating the self-serving claims of parochial homeowners and local merchants wary of competition. Local governments and school districts with surplus lands would have no incentive to put sites to better uses if they couldn't share in redevelopment gains. Moreover, redevelopment makes sense because it slows the premature conversion of open space in remote areas by making central locations feasibly developable.

3. City redevelopment agencies can and do hire expert consultants and staff to negotiate and process deals. The degree of risk a city takes has more to do with the locality's options and how much of the upside potential the city or agency desires than with city inability to assess and price risks accurately.

4. In an era of tax cutbacks and public budget deficits, cities need entrepreneurial ways of "making a buck" without raising taxes. Getting into joint ventures with private developers is a good way to raise public revenue painlessly. When local governments share in the developer's percentage rents and resale profits, the locality is appropriately rewarded for good planning, public amenities, crime-controlled environments, and other "public goods."

5. Financial accountability to the public can be increased by pressure from good government groups, counties and school districts faced with the loss of tax increments, and developers outside redevelopment boundaries seeking to secure a "level playing field" among all urban land investors.

6. "Hidden" subsidies can be outlawed or required to be made public by special statutes or requirements that the city council specifically approve all subsidies to the developer, direct or indirect.

7. T.I.F.-financed bonds could be made subject to the same voter approval as other property tax bond issues.

FOOTNOTES:

(n1)Footnote 103. *See* Richard Babcock, *The City as Entrepreneur: Fiscal Wisdom or Financial Folly, 29 Santa Clara L. Rev. 931 (1990).*

(n2)Footnote 104. Robin Paul Malloy, *Planning for Serfdom--An Introduction to a New Theory of Law and Economics, 25 Ind. L. Rev. 621, 631 (1992);* Robin Paul Malloy, Planning for Serfdom: Legal Economic Discourse and Downtown Development, 30-37 (Univ. Penn. Press 1991).

(n3)Footnote 105. This is what the plaintiff successfully argued in *Municipal Art Soc'y v. City of New York, 522 N.Y.S.2d 800 (1987)* . The city owned a redundant coliseum on a prime site in midtown Manhattan. It welcomed RFPs from private redevelopers, agreeing to adjust the sales price to the density which city planning officials would ultimately approve. Under New York City ordinances, a discretionary density bonus of up to 20% could be granted to developers who improved subway stations near their sites. In striking down the deal, the New York court wrote:

> Although the transaction may well have been structured to paint a different picture, the clear fact of the matter is that in return for the grant ... of the twenty percent floor area ratio bonus, the City is obtaining not only $35 to $40 million of local subway improvements, but an additional $57 million in cash to be employed for other purposes. This is not contemplated by the Zoning Resolution.

(n4)Footnote 106. Lynne B. Sagalyn, *Explaining the Improbable: Local Redevelopment in the Wake of Federal Cutbacks,* A.B.A. J. 429, 435 (Autumn 1990).

(n5)Footnote 107. *Id.*

(n6)Footnote 108. *Tribe v. Salt Lake City, 540 P.2d 499, 515 (Utah 1975)* (dissenting).

(n7)Footnote 109. *Peter Hall, The Turbulent Eighth Decade: Challenges to American City Planning,* 55 J. Am. Plan. Ass'n 275, 281 (1989).

1 Parts of this chapter have been adapted from George Lefcoe, Real Estate Transactions (Michie 1993).

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CHAPTER 98 FINANCING PUBLIC-PRIVATE DEVELOPMENT AND RENEWAL AGREEMENTS THROUGH TAX INCREMENTS 1

12-98 Thompson on Real Property, Thomas Editions § 98.07

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Supp. to § 98.02 Summary Description of Urban Renewal Programs in the U.S.

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§ 98.02(d) How the Constitutional Public Use Requirement Was Overcome. [Go To Main]

Add:

Valley Rural Elec. Coop., Inc. v. Shanholtzer, 982 A.2d 566 (Pa. Commw. Ct. 2009) (even if the benefit of the taking assists the individual more than the general public, a taking may be for public purpose).

§ 98.02(g) Economic Development. [Go To Main]

Add:

But see *Township of Readington v. Solberg Aviation Co., 409 N.J. Super. 282 (App.Div. 2009)* (the real reason for the use of eminent domain must be proper, otherwise the use of eminent domain is in bad faith even if the stated purpose is valid).

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Supp. to § 98.03 The Formalities of Community Redevelopment.

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§ 98.03(a) Form an Agency. [Go To Main]

Add:

Spokane Airports v. RMA, Inc., 149 Wash. App. 930 (Wash. Ct. App. 2009) (state exceeded its authority in delegating its eminent domain power to a county board); *City of Greeley v. Snyder, 2009 Colo. App. LEXIS 2055* (Colo. Ct. App. Dec. 24, 2009) (the word "acquired" did not delegate the Board eminent domain powers and the Board exceeded its authority by using that authority).

Add:

Wymberley Sanitary Works v. Batliner, 904 N.E.2d 326 (Ind. Ct. App. 2009) (a local body's administrative action cannot infringe on the power of eminent domain since eminent domain arises from state statute).

§ 98.03(d) Find and Declare Blight. [Go To Main]

Add:

City of Stockton v. Marina Towers LLC, 171 Cal. App. 4th 93 (Cal. App. 3d Dist. 2009) (for a redevelopment agency to

act with state authority, the blighting condition of the property must be so great that it affects the utilization of the area, causing a physical and economic burden on the community).

Add:

Whittaker v. County of Lawrence, 674 F. Supp. 2d 668 (W.D. Pa. 2009) (although the court determined the land was not blighted, the condemnors did not violate the taking property owner's rights because the land was needed to promote economic growth in the area).

Add:

Meramec Valley R-III Sch. Dist. v. City of Eureka, 281 S.W.3d 827 (Mo. Ct. App. 2009) (school was unable to prove the area was a green field and the condemnor provided ample evidence the area was blighted).

§ 98.03(e) Draft, Adopt, and Implement a Redevelopment Plan. [Go To Main]

Add:

Glendale Redevelopment Agency v. County of Los Angeles, 2010 Cal. App. LEXIS 745 (Cal. App. 2d Dist. May 25, 2010) (an agency is entitled to the increment only in the amount of its indebtedness, less available revenue from the tax increment financing).

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Supp. to § 98.04 Tax Increment Financing (T.I.F.).

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§ 98.04(a) How TIF Works. [Go To Main]

Add:

Glendale Redevelopment Agency v. County of Los Angeles, 2010 Cal. App. LEXIS 745 (Cal. App. 2d Dist. May 25, 2010) (court explains the rationale and process behind a redevelopment plan and a TIF). See also City of Cerritos v. Cerritos Taxpayers Assn., *108 Cal. Rptr. 3d 386 (Cal. App. 2d Dist. 2010)* ; City of Stockton v. Marina Towers LLC, *88 Cal. Rptr. 3d 909 (Cal. App. 3d Dist. 2009)* ; *Capital Fitness of Arlington Heights, Inc. v. Vill. of Arlington Heights, 915 N.E.2d 826 (Ill. App. Ct. 1st Dist. 2009)* .

§ 98.04(c) Impact of Redevelopment on Other Taxing Entities. [Go To Main]

Add:

City of Parker v. State, 992 So. 2d 171 (Fla. 2008) (dispute between city and county over validation of proposed tax-increment-financed bonds); *Geisler v. City of Wood River, 892 N.E.2d 543 (Ill. App. 2008)* (action by city residents against city and developer challenging legality of development under TIF act and municipal code).

§ 98.04(e) Statutory Limitations on T.I.F. [Go To Main]

Add:

City of Shelbina, v. Shelby County, 245 S.W.3d 249 (Mo. App. 2008) (city's TIF ordinances were held void *ab initio*).

Add:

Fallon County v. State, 223 P.3d 886 (Mont. 2009) (TIF districts must be categorized and limited to the following areas: industrial, technology, aerospace transportation and technology districts, and urban renewal plans); *Glendale Redevelopment Agency v. County of Los Angeles, 2010 Cal. App. LEXIS 745* (Cal. App. 2d Dist. May 25, 2010) (tax area limited to the proposed redevelopment area).

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Supp. to § 98.05 Dealing with the Developer.

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§ 98.05(g) Changing or Amending the Plan. [Go To Main]

Add:

Neptune Co. Asset Holdings, LLC v. Pleasant Hill Redevelopment Agency, 2010 U.S. Dist. LEXIS 1408 (N.D. Cal. Jan. 8, 2010) (even if entering a DDA is a highly regulated process, it does not necessarily follow that amending or changing the DDA does not have to follow such stringent requirements).

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CHAPTER 99 REAL ESTATE CONTRACTS

12-99 Thompson on Real Property, Thomas Editions 99.syn

AUTHOR: Professor Alan M. Weinberger School of Law Saint Louis University

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CHAPTER 99 REAL ESTATE CONTRACTS

12-99 Thompson on Real Property, Thomas Editions § 99.01

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§ 99.01 Introduction to Real Estate Contracts and Outline of Chapter.

The focus of this chapter is the negotiation and drafting of the contract for the purchase and sale of real property, both commercial and residential. The chapter also considers the rights and remedies of the parties in the event of default under agreements for the purchase and sale of real property. Although there are widespread variations from state to state in the form of contract used in real estate transactions, the chapter is organized in the order in which terms generally tend to appear in standard form agreements of sale.

The chapter addresses the provisions that are minimally necessary for a valid, legally binding and enforceable contract. However, the primary focus of the chapter is on the legal issues that tend to dominate contract negotiations among business people. The chapter contains a description and analysis of the specific contractual language used by knowledgeable legal counsel to strategically allocate the risks and potential problems inherent in the acquisition and disposition of real property, and to limit their clients' liability with respect to those risks that they agree to assume.

§ 99.01(a) Considerations from Purchaser's Perspective.

From the axiom that every parcel of real property is unique, it follows that the, preprinted standard form contract for the sale and purchase of real estate cannot, without considerable careful tailoring, adequately protect the buyer's aspirations for a particular piece of land. Yet, all too often, after vigorously negotiating the economic terms, purchasers sign the form presented to them by sellers or their real estate agents. n1 In so doing, they allow non-economic terms of transcendent importance that are buried in the small print to slip into the transaction by default. After all, the single-spaced form discourages revision and, bearing the imprimatur of a title insurance company or legal publisher, appears neutral and somewhat official. n2 But buyer's ability to develop the property for buyer's intended use--or to walk away from the deal without personal liability if buyer determines the property is unsuitable--depends upon the protective clauses buyer inserts in the form or includes in an addendum.

The purchaser's primary objective in amending the standard form purchase agreement is to transform an absolute contract into a conditional one. Purchasers do this by stipulating as a condition for settlement of the contract the removal of any obstacles which could interfere with their intended development of the property. For example, purchasers insist in the contract that they will not settle unless they can obtain satisfactory financing, zoning approval or

variance, satisfactory results from test boring, topographical or other engineering tests, sewer allocation and a title report and survey which do not disclose defects which would impair the intended development or make it unreasonably expensive. Because purchaser is not at fault for being unwilling to settle, purchaser should also require that, if the conditions are not met, purchaser is entitled to the full refund of purchaser's earnest money deposit.

§ 99.01(b) Considerations from Seller's Perspective.

In the disposition of real property the typical seller has three principal legal objectives: The first is to receive the agreed purchase price in exchange for delivering the deed of conveyance on a date certain, or to be free to promptly offer the property for sale to other prospective purchasers without interference from the contract purchaser whose interest in the property is extinguished. In other words, seller's worst nightmare is to have the subject property tied up indefinitely without any certainty that the transaction will eventually close. n3 Seller's second objective is to limit its liability to the refund of purchaser's deposit (without interest) in the event of seller's default prior to closing for any reason. Seller's third objective is to limit its open-ended or unrestricted contingent liability with respect to the subject property after closing. For example, a contractual warranty with respect to certain aspects of the property's operation need not survive closing, or may survive closing only for some limited period of time. There may be a strict monetary ceiling on seller's maximum exposure to liability for damages in the event the warranted item should prove to have been untrue.

Additional considerations arise when seller is disposing of some, but less than all, of the seller's property. In such cases, seller must consider and, if necessary, provide for the reservation of easements for access, ingress and egress, and for restrictions upon purchaser's use and development, with respect to the portion being conveyed.

FOOTNOTES:

(n1)Footnote 1. In most jurisdictions the completion of form real estate contracts by licensed real estate agents is not considered to be engaging in the unauthorized practice of law, at least where the form contract has been prepared or approved by a local bar association or legal counsel for the local association of realtors. L.S. Tellier, *Drafting, or Filling in Blanks in Printed Forms, of Instruments Relating to Land by Real Estate Agents, Brokers, or Managers as Constituting Practice of Law, 53 A.L.R.2d 788 (1957)* . "With respect to the sales contract, the majority of courts allow agents to complete standardized contracts, the form of which has been approved by an attorney, if the agent merely fills in the blank spaces." Peter J. Shedd, *Real Estate Agents and the Unauthorized Practice of Law,* 10 Real Est. L. J. 135, 138 (1981).

(n2)Footnote 2. In many jurisdictions the standard form contract has been drafted by the local board of realtors, and contains provisions for the protection of the sellers to whom its members owe fiduciary duties of loyalty, diligence and competence.

> [I]t is ... probable that the buyer ... will ... sign a printed form supplied by the real estate agent. In this he will be flying in the face of fortune and may suffer bitter regrets when he finds that the contract holds him to a bad bargain, does not express the intention of the parties or is unenforceable for indefiniteness. But sign it he will, for the American lay public is not yet convinced that a lawyer is needed at this juncture and prefers to thrust itself into the hands of the real estate agent. This is somewhat anomalous, for certainly the reputation of these agents is not above reproach and obviously they are the creatures of the seller ... .

John C. Payne, *A Typical House Purchase Transaction in the United States,* 30 Conv. & Prop. Law 194, 199 (1966). *See also Isaacs Business Ventures, Inc. v. Thompson, 636 N.Y.S.2d 906 (1996)* (vendors who claimed that the parties' oral agreement modified a real estate contract provision stating that the contract could not be changed except in writing did not present sufficient grounds to take the case out of the statute of frauds requiring a writing).

(n3)Footnote 3. Dennis M. Horn, *Negotiating a Commercial Real Estate Acquisition Contract, in* Negotiating Real

Estate Transactions 6 (Mark A. Senn ed., 1988).

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CHAPTER 99 REAL ESTATE CONTRACTS

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§ 99.02 Preliminary Provisions.

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§ 99.02(a) Identification of Parties.

A satisfactory identification of the purchaser and seller is generally a requirement of the Statute of Frauds for an enforceable contract for the sale of real property. Where either party is a corporation, the contract should state its address and jurisdiction of incorporation. A party transacting with a corporation should satisfy itself that the corporate officers who execute the contract have been duly authorized to act by resolution of the board of directors (and, if necessary, by action of the shareholders) n4 so that the contract constitutes the valid and binding obligation of the corporation. Similarly, a party transacting with a general or limited partnership should satisfy itself that the partner or partners executing the contract of sale have been duly authorized to act under the terms of the partnership agreement so that the contract constitutes the valid and binding obligation of the partnership. An opinion of legal counsel as to the formation, existence, capacity and authority of the purchasing or selling entity should be delivered upon contract execution.

Where the buyer is a limited liability entity, the seller may seek to require the personal guarantee of the principals. From the perspective of the limited liability entity itself, a precise identification of its status and the capacity in which the principals are signing the agreement may be essential as a matter of state corporation or limited partnership law to protect individual principals against personal liability under the contract. n5

Particular care is required where the purchasing entity has yet to be formed as of the date of contract formation. n6

The principals executing the agreement on behalf of a limited liability entity to be formed should expressly provide for their release from liability and the substitution of the entity as contract purchaser upon its formation. Some degree of flexibility should be reserved as to the name, jurisdiction of organization and other aspects of the to-be-formed entity. Where there has been no colorable or apparent compliance with the statutory formalities for creating a corporation, the other party may be entitled to withdraw from the contract. n7

It is familiar practice in real estate transactions for a nominee (sometimes called a "dummy" or "straw man") to sign a contract of sale as purchaser instead of the real party in interest. Absent misrepresentation, it is generally not considered

fraudulent to use a nominee for the purchase of property or for the nominee to conceal the fact that the nominee is acting for another. However, if the nominee misrepresents the principal's identity knowing that the seller would not transact if in possession of the facts, seller may refuse to convey or may obtain rescission upon discovering the principal's identity. n8

§ 99.02(b) Statement of Consideration.

By statute or case law, most jurisdictions require a statement of consideration or purchase price as essential for the enforceability of a contract of sale. n9

§ 99.02(c) Definitions.

Important terms (e.g., the parties and the subject property) that will recur throughout the document may be defined by means of a parenthetical when they first appear, or in a separate section of the document devoted to the definition of terms. Whichever format is used, the definition of terms imposes a discipline on the contract drafter which seeks to avoid a patchwork of inconsistent, confusing and potentially ambiguous cross references. Once a term has been defined, subsequent repetitions should appear with initial capitalization, and random capitalization of undefined terms should be avoided.

FOOTNOTES:

(n1)Footnote 4. Because it is tantamount to a decision to abandon the corporate enterprise, shareholder notification and participation are statutory requirements for the decision to transfer substantially all corporate assets. *See, e.g., Sterman v. Hornbeck, 457 N.W.2d 874 (Wis. App. 1990)* ; Model Business Corp. Act § 12.02 (1979).

(n2)Footnote 5. *David v. Shippy, 684 S.W.2d 586 (Mo. App. 1985)* .

(n3)Footnote 6. *See, e.g., Stanley J. How and Assoc. v. Boss, 222 F. Supp. 936 (S.D. Iowa 1963)* and *Thompson & Green Mach. Co. v. Music City Lumber Co., 683 S.W.2d 340 (Tenn. Ct. App. 1984)* .

(n4)Footnote 7. *Davane, Inc. v. Mongreig, 550 N.E.2d 55 (Ill. App. Ct. 1990)* .

(n5)Footnote 8. Milton R. Friedman, Contracts and Conveyances of Real Property 195 (5th ed. 1991).

(n6)Footnote 9. Carol A. Yzenbaard, Residential Real Estate Transactions 54 (1991).

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§ 99.03 Agreement to Sell and Convey.

Unequivocal language expressing the undertaking of seller to convey and of purchaser to acquire the subject property is generally a requirement of the Statute of Frauds for an enforceable contract for the sale of land. n10

FOOTNOTES:
(n1)Footnote 10. *Heinzel v. Backstrom, 794 P.2d 775 (Or. 1990)* (lack of express promise by purchaser to buy the property precluded specific enforcement of real estate contract); *Lim v. Choi, 501 S.E.2d 141 (Va. 1998)* (deed must evidence intent to convey; where purported deed evidences only a belief as to present ownership this is not enough to evidence intent to convey ownership).

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CHAPTER 99 REAL ESTATE CONTRACTS

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§ 99.04 Description of Property Conveyed.

Article 9 of Uniform Commercial Code

Generally, the conveyance of real property includes the land, all improvements permanently attached to the land, and items of a permanent nature affixed to the improvements which the parties probably intend to pass to the buyer upon a sale of the structure in which they are contained.

§ 99.04(a) Description of Real Property.

The Statute of Frauds in most jurisdictions provides that a contract to convey real estate is not enforceable absent a writing signed by (or on behalf of) the party against whom enforcement is sought n11 which contains a description of the real estate that is sufficiently definite to make possible an identification of the real estate with reasonable certainty. Ideally the description should either define the location, length and bearing of each boundary line, and furnish the dimensions of the subject property, or incorporate by reference information to that effect contained in a recorded plat. It is also common in the description to make reference to the source of seller's title ("being the same property conveyed to seller by deed recorded in Book ___, at Page ___") to aid the title examiner in tracing the chain of seller's title.

In the real world, however, a description meeting this ideal standard is the rare exception to the rule. Contracts, particularly in residential transactions, tend to be executed around the seller's dining room table late at night following protracted back-and-forth negotiation. Most sellers do not have readily available a current survey of the subject property from which a proper description may be prepared. It is common practice, therefore, for the contract to contain a shorthand description which often includes little more than the property's street address. In recognition of this practice, courts have tended to relax the requirement that the property description must unambiguously and precisely describe the subject property without resort to extrinsic evidence. n12 Rather, the description used in the contract should be the best legal description available. It is understood, for example, that the description of the property in the contract of sale need not be as complete as in the deed of conveyance. n13 It is essential, however, that a description by street address identify the city, county and state in which the property is located. n14

§ 99.04(b) Description of Personal Property.

§ 99.04(b)(1) Fixtures and Chattels.

Because of the indefinite nature of the rule of law that the conveyance of real property includes items which the parties would probably have intended to pass to buyer, it is in seller's interest to specify items such as dishwashers, electric ranges and other "built-ins" that are or are not intended to be conveyed. In the sale of income-producing property, it is customary to specifically exclude tenant fixtures and other property owned by tenants.

§ 99.04(b)(2) Service Contracts; Trade Names.

The disposition of commercial property constitutes the conveyance of a going concern, and includes all intangible personal property necessary for the operation of the business, such as contract rights, franchises, trade names, and telephone directory listings. Purchaser should include a clause requiring seller to assign at closing all rights under unexpired guaranties relating to the roof, furnaces, and the like. For seller's benefit, purchaser should agree to indemnify and hold seller harmless against liability under any service contracts assigned to purchaser.

FOOTNOTES:
(n1)Footnote 11. 37 C.J.S. *Statute of Frauds* §§ 201-206 (1961).

(n2)Footnote 12. *Herzog v. Ross, 196 S.W.2d 268 (Mo. 1946)* .

(n3)Footnote 13. Carol A. Yzenbaard, Residential Real Estate Transactions 53 (1991); Karl B. Holtzschue, Real Estate Contracts 35-36 (1985). *Dontzin v. Myer, 694 A.2d 264 (N.J. Super. 1997)* (description of land is sufficient if it furnishes the means by which a certain identification of land can be made); *Gagne v. Stevens, 696 A.2d 411 (Me. 1997)* (agreement to convey from 120-acre tract a tract "in the approximate size of" 30 acres plus or minus was an insufficient description to satisfy the Statute of Frauds); *Levesque Builders, Inc. v. Cadwell Hoerle, 717 A.2d 252 (Conn. App. 1998)* (all that is required by Statute of Frauds is that description of land be "reasonably certain"; reference to contract and map established this certainty); *Firstline Corp. v. Valdosta-Lowndes Cty. Indus. Auth., 511 S.E.2d 538 (Ga. App. 1999)* (contract did not make clear which 20 out of 27 acres were intended to be transferred and thus insufficiently described land, falling short of the requirements of the Statute of Frauds); *Lewis v. Adams, 979 S.W.2d 831 (Tex. App. 1998)* (where land was described only as "168.32 acres, Wm Holland Survey, A-30" and grantor owned tract of greater acreage such that precise 168.32 acres could not be identified, description was insufficient to satisfy Statute of Frauds). *But see In re Estate of Looney, 975 S.W.2d 508 (Mo. App. 1998)* (price is an essential term; method of payment is not).

(n4)Footnote 14. A description such as '309 E. Mercer Street,' without mention of city, county and state, is potentially ambiguous in that as many cities might have such an address as there are ships named 'Peerless.' The extrinsic fact that the seller happens to own only one of these myriad lots is suggestive but not conclusive. Although land is not sold 'short' as regularly as stock, people often intend to assume legal obligations to transfer real estate that they do not own (expecting to acquire it in time to perform), and sometimes they are held to such obligations irrespective of intent. Hence, if there is a 309 E. Mercer Street in Seattle, and another in Eastport, Maine, and seller only owns the one in Seattle, and has never heard of Eastport, still 'the devil himself knoweth not the mind of man.'

Curtis J. Berger and Quintin Johnstore, Land Transfer And Finance 636 (4th ed. 1993). *Key Design Inc. v. Moser, 983 P.2d 653 (Wash. 1999)* presented an invitation to the Washington State Supreme Court to alter a fifty-year old rule requiring that a contract for conveyance of platted property describe the property by correct lot number, block number, addition, city, county and state. Absent a clear showing that the rule is incorrect and harmful, the court refused to do so, especially in light of the clarity of the rule. *Micciche v. Homes by Timbers, Inc., 767 N.Y.S.2d 56 (2003)* (purchaser not entitled to rescind a real estate contract with incorrect property description, when the true description was not peculiarly within the knowledge of the vendor).

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CHAPTER 99 REAL ESTATE CONTRACTS

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§ 99.05 Purchase Price; Deposit.

§ 99.05(a) Statement of Purchase Price; Manner of Payment.

An accurate description of the amount of the purchase price, or the mechanism (e.g., appraisal) or formula (e.g., the price per acre or square foot based upon a survey of the subject property to be obtained at buyer's expense prior to closing) to be used in determining the purchase price, n15 and the terms of payment are essential to the enforceability of a real estate contract. It is common for the contract to specify the manner and form of payment of the purchase price at closing, typically by delivery of a certified or cashier's check in the case of residential transactions, and by wire transfer of federal funds in large-scale commercial transactions.

§ 99.05(b) Allocation of Purchase Price.

The contractual allocation of the purchase price among the non-depreciable land, depreciable improvements, tangible personal property and contract rights and other intangible assets may be useful for the purchaser in contesting property assessments for purposes of local ad valorem taxation, and for establishing the cost basis for purposes of depreciation. Although the parties' allocation will not be conclusive, a reasonable allocation may be of persuasive value in dealing with taxing authorities. Similarly, an allocation of the purchase price should be made for the purpose of establishing tax basis where portions of the property are subject to different zoning classifications or other factors that cause them to differ widely in value.

§ 99.05(c) Deposit.

The deposit made by the buyer at the time the contract is signed (together with accrued interest thereon, if the contract obligates the holder to maintain the deposit in an interest-bearing escrow account) n16 will be (a) refunded to buyer if a condition precedent to buyer's obligation to purchase the subject property is not satisfied or not waived, (b) applied to the purchase price if closing occurs, or (c) forfeited to seller (perhaps to be shared with the broker under the terms of the contract) if buyer defaults (perhaps as liquidated damages if the contract so provides and applicable law so permits).

§ 99.05(c)(1) Amount; Liquidated Damages.

The amount of the down payment or "earnest money" deposited by purchaser when the contract is executed is a function of the negotiating strength of the parties and local custom. It is usually determined with the possibility of purchaser's default, and the expenses likely to be incurred by seller as a result, in mind. n17 Ideally from purchaser's perspective, the purchaser's liability for failure to close for any reason whatsoever, or for no reason at all, should be limited to loss of its deposit. n18 However, the typical standard form agreement for the sale and purchase of real estate gives seller the option of proceeding against a defaulting purchaser for damages or to retain purchaser's deposit as liquidated damages.

To be upheld as liquidated damages, the deposit must represent a reasonable allocation of responsibility for the damages caused by purchaser's default, which are incapable of accurate estimation. n19

§ 99.05(c)(2) Form of Deposit; Escrow Agent.

The deposit will most commonly be made in the form of buyer's check. A promissory note is unsatisfactory to most sellers. The irrevocable, unconditional letter of credit has become the preferred form of deposit of choice in commercial real estate transactions for buyers unwilling to tie up their assets in the form of substantial cash deposits. n20

At least until the conditions precedent to buyer's obligation to acquire the property have been satisfied or waived, it is unlikely that an informed buyer would feel comfortable with delivering the deposit directly to the seller. In residential transactions, it is common for the broker to seek to hold the deposit as a control device. The title insurance company that will be searching title and conducting closing, or the attorney for either party, are other potential depositories. In any case, appropriate escrow instructions should be prepared and executed. For example, the deposit holder should be required to maintain the deposit in an interest-bearing trust account. Buyer's deposit check should be promptly deposited, and the escrow holder should confirm in writing to seller that buyer's check has cleared for payment. n21

§ 99.05(d) Financing.

§ 99.05(d)(1) Seller Purchase Money Financing.

In a large-scale commercial transaction, the form and content of the deferred purchase money promissory note and deed of trust to be delivered to seller at closing should be attached to the contract of sale as exhibits in order to avoid protracted negotiation at the closing table. n22 In residential transactions, the contract may simply obligate the parties to use the form of financing instruments in common use in the real property jurisdiction.

§ 99.05(d)(2) Assumption of Existing Indebtedness.

A portion of the purchase price may be payable by buyer becoming personally liable upon an existing mortgage by expressly assuming and agreeing to pay the mortgage. Alternatively, buyer may take title subject to the existing mortgage, but without becoming personally liable for repayment of the mortgage debt. n23 In either event, the contract should state the salient terms of seller's mortgage, including the interest rate, monthly payment, maturity, and the amount of the unpaid principal balance of the existing indebtedness as of the date of settlement, which should be confirmed by a letter from the holder of the existing financing delivered to purchaser at closing. Provision should be made for the payment of any fees to the existing lender and for allocating the risk that the existing loan contains a provision enabling the existing lender to condition its consent to any transfer of the subject property to an increase in the interest rate or other modification of the terms of payment.

FOOTNOTES:

(n1)Footnote 15. *Knoxville Med. Investors, Ltd. v. National Healthcorp L.P., 385 S.E.2d 110 (Ga. App. 1989)* .

(n2)Footnote 16. An escrow holder has no duty to deposit funds in an interest-bearing account absent instructions to do so. *Hannon v. Western Title Ins. Co., 260 Cal. Rptr. 21 (App. 1989)* .

(n3)Footnote 17. Emanuel B. Halper, *People and Property: Exculpation Clauses in Contracts*, Real Est. Rev., Spring 1979, at 69, 71.

(n4)Footnote 18. An example of a liquidated damages clause follows:

> The following shall apply if Seller cancels this contract as a result of Purchaser's default:
>
> (a) Purchaser shall pay $_____ to Seller. This amount shall be liquidated and final damages.
>
> (b) The parties have agreed upon liquidated final damages in case of a default by Purchaser because it would be difficult to calculate and prove the nature and extent of the damages which may be incurred by Seller as a result of a default by Purchaser.
>
> (c) Upon the payment of liquidated final damages, Seller and Purchaser shall be entirely relieved of liability under this contract.

Id.

(n5)Footnote 19. If the deposit does not represent such a reasonable allocation of responsibility for damages to the benefit of the vendor, the liquidated damage provision will be unenforceable because it would be construed as a penalty. *Grossinger Motorcorp v. American Nat'l, 607 N.E.2d 1337 (Ill. App. 1992)* (noting three requirements for validity of liquidated damages clause: (1) parties agreed to clause in advance, (2) the amount bears a reasonable relationship to the damages suffered, and (3) actual damages are uncertain or difficult to prove).

(n6)Footnote 20. The letter of credit has been imported into real estate transactions from international commercial transactions in which its use originated. The letter of credit is an undertaking by the issuing bank to make payment to the holder upon the presentation, before the letter's expiration date, of certain documents described in the letter. (A bank will issue a letter of credit usually for a fee generally equal to one percent of the amount of the letter of credit and the deposit in the issuing bank of its customer's funds sufficient to offset the amount of the letter of credit if the issuing bank is called upon to make payment).

The well-publicized incidence of financial institution failures in the late 1980's and early 1990's focused sellers' attention on the need to investigate and approve the financial standing of the issuers of letters of credit they accept in lieu of cash deposits under real estate contracts of sale. Letters of credit are issued under the terms and conditions of the Uniform Customs and Practices for Documentary Credits issued by the International Chamber of Commerce.

(n7)Footnote 21. Unfortunately, occasionally an escrow agent with a long-standing relationship with a purchaser may accept a buyer's deposit check subject to an informal understanding not to deposit it until instructed to do so by the buyer. If the buyer should become unwilling or unable to perform its obligation to purchase the property, the seller will have considerable difficulty collecting the deposit to which it is entitled. Although this practice will surely expose the escrow agent to liability to an injured purchaser for fraud, a state-of-the-art deposit clause along the following lines is suggested for prophylactic purposes:

> Contemporaneously with its execution and delivery of this Contract, the Purchaser has delivered to the escrow agent a deposit in the sum of $_____ (the "Deposit"). The Deposit shall be deposited by the escrow agent in an interest-bearing account and held by the escrow agent in escrow in accordance with the terms of this Contract. The escrow agent shall confirm in writing to the Seller that it has deposited the Deposit in such interest-bearing account, that the Deposit check has cleared for payment and that the escrow agent has actual funds in the amount of the Deposit in such account which the escrow agent shall hold in escrow in accordance with the terms of this Contract. All references in this Contract to the Deposit shall include all interest earned thereon. By its execution of this Contract, the escrow agent

agrees to perform its obligations under this paragraph.

(n8)Footnote 22. A typical contract provision on the subject states as follows:

At settlement Purchaser shall execute and deliver to Seller, and Seller shall accept delivery of, a deferred purchase money promissory note in the form and content of Exhibit _____, payable to the order of Seller in the amount of $_____, secured by a deferred purchase money deed of trust in the form and content of Exhibit _____.

(n9)Footnote 23. A typical contract provision on the subject states as follows:

At settlement Purchaser shall take title to the Property subject to (but shall not assume or become responsible for and makes no warranty as to the payment of) the lien of an existing first deed of trust securing a loan in the original principal amount of $_____ bearing interest at the rate of _____ percent (_____%) per annum. At settlement the unpaid principal balance thereof shall be $_____. A copy of the deed of trust and the note secured thereby and a summary of the terms thereof are attached hereto as Exhibit _____.

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§ 99.06 Representations and Warranties.n24

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§ 99.06(a) Seller's Representations and Warranties.

Perhaps the most common technique of "flushing out" problems with the subject property, n25 and thereafter compensating for property deficiencies, is for the seller to warrant the condition of the property. In order to overcome the doctrine of merger, it is necessary to provide that seller's warranties are intended by the parties to survive closing and delivery of the deed of conveyance.

Limitations on both the duration of the survivability of seller's warranties, and the maximum dollar amount of seller's liability for breach of individual warranties and of all warranties in the aggregate, are often the subject of considerable negotiation in commercial real estate transactions. Compromise over the extent of seller's warranties is often achieved by limiting the scope of seller's warranties to the best of seller's actual knowledge, with or without duty on seller's part to investigate.

A warranty that survives closing is seller's invitation to purchaser to cease investigating the subject matter of seller's warranty and to accept the substitution of seller's contractual contingent liability for some bargained-about aspect of the property. However, from seller's perspective, the costs of sale are now indeterminate, uncertain and uncontrollable. n26 Sellers seek to limit their liability for misrepresentation of fact in contracts, inadvertent or otherwise, to the return of purchaser's deposit. Knowledgeable purchasers will require seller to reimburse the cost of title examination and survey, physical inspection, attorney's fees, and other expenses incurred in contemplation of purchase.

In addition to the express representations set forth below, purchasers have been known to request sellers' general representation, imported from the disclosure requirements imposed on sellers of securities under the federal securities laws, that seller has neither made any misstatement of a material fact, nor omitted to state a material fact necessary in order to make seller's contractual representations and warranties not misleading.

§ 99.06(a)(1) Express Representations by Seller.

§ 99.06(a)(1)(A) As to Title.

Seller will be asked to warrant that it is the owner of record and in fact of the subject property, that its title to the property is marketable and insurable under a full coverage owner's title insurance policy at standard rates and without exception, and that it has the right to sell the property without the agreement of any other person. The owner's policy of title insurance is in addition to and will substitute for seller's title warranty as the primary source of protection for purchaser if a title defect arises after closing. The purpose of seller's title warranty, therefore, is to provide a basis for buyer to seek reimbursement of expenses incurred in investigating the property (including the examination of seller's title) in the event the transaction is aborted by reason of the incurably defective condition of seller's title. Seller may also be asked to warrant that there are no pending or proposed special assessments affecting the subject property.

§ 99.06(a)(1)(B) Condition of Property.

From purchaser's perspective, seller should warrant that the building is free from termites or other infestation, that there are no existing structural defects, and that the roof, the heating, ventilating, cooling, plumbing and electrical systems, the elevators and other equipment will be in good operating condition and repair on the closing date, subject to any exceptions specified on an exhibit attached to the contract. Seller's willingness and ability to make representations and warranties concerning the condition of the property will depend upon the relative negotiating strength of the respective parties, the length of time seller has owned the property (e.g., an institutional lender disposing of property owned for a brief period following foreclosure or acceptance of a deed in lieu of foreclosure may be expected to offer a reduced price or favorable financing terms in return for an "as is" sale), and the identity of the seller (e.g., an executor disposing of property owned by a decedent's estate will be reluctant to warrant the condition of the property). n27

§ 99.06(a)(1)(C) Compliance with Laws.

Seller should warrant that there are no notices, suits or judgments pending or threatened relating to violations of any building code, fire, health or other governmental regulation, ordinance or requirement affecting the subject property which have not been corrected. Knowledgeable sellers will make certain that the warranty covers violations noted or issued as of the date of the contract of sale, rather than the date of closing. n28 This limitation serves as protection against a strategic purchaser triggering a municipal inspection after the contract is signed in order to extract concessions from the seller, or escape purchaser's obligations under the contract. n29

§ 99.06(a)(1)(D) No Condemnation Threatened or Pending.

Seller should warrant that no condemnation or annexation proceedings involving the subject property are pending, and that seller has not received notice of any such proceedings threatened by any governmental entity with eminent domain or annexation authority.

§ 99.06(a)(1)(E) As to Existing Financing.

Where a portion of the purchase price is payable by purchaser assuming or taking title subject to seller's existing financing, it is customary for seller to warrant that the unpaid principal balance on the closing date will not be less or more than a specified amount, that the property may be transferred without lender's consent and without any modification of the interest rate or terms of payment of the existing debt, and that the existing indebtedness will not be in default on the closing date.

§ 99.06(a)(1)(F) As to Leases and Tenants.

In the sale of income-producing property, seller should warrant that the rent roll attached as an exhibit to the contract is accurate and complete as of the date of the contract, showing for each lease the name of the tenant, the space leased, the minimum base rental and any provision for escalations, tenant's obligation to contribute to the cost of real estate taxes, operating expenses and similar charges, the amount of any security deposited by tenant, and the commencement date of

the term and the length of the lease, including any renewal options. Seller should warrant that neither landlord nor tenant is in default under any provision of existing leases.

§ 99.06(a)(2) Implied Warranties by Seller.

Until the middle of the 20th century American courts almost universally adhered to the doctrine of caveat emptor and refused to imply any warranties in the sale of either new or existing real property. n30 This policy was based on the theory that the parties to the contract were of equal bargaining power, and the purchaser had both the ability and the opportunity to inspect the property before the conveyance. n31 With the post-World War II construction boom and resulting instances of poor quality due to hurried construction, American courts, realizing that perhaps the average homebuyer did not have the ability to make a proper inspection, n32 began to break down the strict application of caveat emptor. Further contributing to the decline of caveat emptor in real property transactions were two decisions in English courts, n33 as well as the development of the Uniform Commercial Code. n34

§ 99.06(a)(2)(A) Builder's Implied Warranties in New Construction.

Perhaps the earliest case recognizing an implied warranty was *Vanderschrier v. Aaron*. n35 In *Vanderschrier*, the purchasers sued the builder-vendor when the house they had purchased before completion was damaged because of defective construction of the sewer line. n36 The court limited its holding to homes that were still under construction when sold, stating that, "the bargain implied in law between the sellers and the buyers was the completion of the entire house in such a way that it would be reasonably fit for its intended use ... ." n37 The court refused to address warranties in completed homes "except to say only that the vendor of a completed house, in respect of which there is no work going on and no work to be done, does not generally, in the absence of some express bargain or warranty, undertake any obligation with regard to condition of the house." n38

The *Vanderschrier* limitation to homes still under construction when sold was not to last long. In 1964, the Colorado Supreme Court extended the implied warranty doctrine to homes which were completed at the time of contracting. n39 Plaintiffs had purchased a newly constructed home from the builder-vendor and, within four months, the walls began to crack. n40 In holding that an implied warranty existed, the court rejected the idea "that a different rule should apply to the purchaser of a house which is near completion than would apply to one who purchases a new house ... . To say that the former may rely on an implied warranty and the latter cannot is recognizing a distinction without a reasonable basis for it." n41 Framing the warranty in terms of applicable building codes, the court held that a home should be built in a workmanlike manner and be suitable for habitation. n42

The vast majority of states have followed *Carpenter*, either by judicial decision n43 or by statute. n44 These states now allow the original purchaser a cause of action based on an implied warranty. These implied warranties are known by various names such as "habitability," n45 "quality," n46 "workmanship," n47 or "fitness." n48

Whatever label is used, courts have had difficulty defining the parameters of the implied warranty, as well as identifying the party liable when an implied warranty is found to exist. n49 Courts also are divided over whether an implied warranty is based on contract, requiring privity, or on tort.

Generally, the implied warranty does not require that the home be perfect, but that it be reasonably suited for its intended use. n50 Thus, some courts describe the warranty as requiring that the dwelling be free from major structural defects and be constructed in a workmanlike manner. n51 Others require that the home be reasonably fit for occupancy as a place of abode, n52 thus distinguishing between homes that are uninhabitable as opposed to simply aesthetically unacceptable. n53 In addition, courts have been generally unwilling to extend an implied warranty to structures that are not part of the home. n54

Generally, only a party to the original sales contract is liable for breach of implied warranty. In the usual situation, this

will be the builder-vendor. n55 In instances where the builder and vendor are not the same person, courts have allowed purchasers to bring suit against one or the other. n56 Courts have also considered allowing actions to be maintained against lenders, subcontractors and developers with varying degrees of success. n57 A builder-vendor liability attaches only if the builder-vendor was in the business of selling homes n58 or a person regularly engaged in building, so that the sale is commercial rather than casual or personal in nature. n59 However, a recent decision has allowed the purchaser to sue a builder who was not in the business of selling homes for profit. n60

The question of whether the implied warranty of habitability is based on contract or tort is important because it will determine the requirement of privity, if any, as well as the type and amount of damages that may be awarded to the homeowner. n61

The measure of damages is the difference between the value of the home as warranted less the value at the time of acceptance, plus incidental and consequential damages, or the cost of repair of the defect, whichever is lower. n62 These damages are usually considered economic in nature with the general rule that economic losses are recoverable in contract, not tort. n63 Based on the nature of damages sought, many courts have determined that an action for breach of the implied warranty of habitability is an action in contract, and thus requires privity. n64

Unlike an action brought in contract, an action brought in tort does not generally require privity. The difference between the two actions has been said to lie in the nature of the claim. Where damages are claimed because goods purchased failed to meet some standard of quality, then the action lies in contract. However, where it is claimed that a defective product constitutes a danger to the safety of persons or property other than the product itself, the action lies in tort. n65 One court preferred to focus on activity rather than consequences. n66

COMPUTER-ASSISTED RESEARCH

LEXIS: builder or vendor w/50 "implied warrant!" w/50 "new!
construct!"

§ 99.06(a)(2)(B) Implied Warranties in Existing Construction.

While the majority of states today recognize some form of implied warranty in the sale of a newly constructed home to the first purchaser, n67 many of these states have not been as willing to extend the implied warranty to a subsequent purchaser. The problem most often arises where the home is relatively new and latent structural defects first become apparent after the original purchaser has sold the property. n68

Courts that have extended an implied warranty have relied on the rationale behind the origins of implied warranties and have generally rejected any requirement of privity. In a mobile society, it is foreseeable that a house will be resold, frequently within a short period of time. Thus, the extension of the warranty for a reasonable period of time should not place undue hardship on the builder-vendor. n69 In addition to actions based on implied warranty, courts have sometimes allowed similar actions to be based on tort or strict liability. n70

One of the earliest cases to hold that the builder-vendor's implied warranty applied to subsequent purchasers was *Barnes v. Mac Brown & Co.* n71 There the court allowed the second purchaser to recover for latent defects, not discoverable by reasonable inspection, which manifested themselves after re-sale. n72 A growing number of states have begun to allow recovery by subsequent purchasers against the builder-vendor. n73

Courts that recognize the extension of implied warranty have held that liability extends only for latent defects which are not discoverable through a reasonable inspection. n74 In addition to requiring a reasonable inspection by the purchaser, courts have also required that any defect manifest itself within a reasonable time. n75 As with the requirement of reasonable inspection, courts have given little guidance as to what constitutes a reasonable amount of time. n76 Two

states limit the time by statute to only one year, n77 while New Jersey has provided a ten-year warranty for major construction defects. n78

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LEXIS: builder or vendor w/50 "implied warrant!"

§ 99.06(a)(3) Seller's Duty to Disclose.

Historically, the risks associated with the purchase of used property have fallen on the purchaser. As with implied warranties, until recently sellers were almost completely protected by the doctrine of caveat emptor, and had no duty to disclose defects in their property to prospective buyers. n79 Today, however, this doctrine is significantly weakened, and courts have found a duty to disclose in several situations. n80

§ 99.06(a)(3)(A) Negligent Misrepresentation.

In keeping with the recognition that sellers and purchasers are generally not on equal bargaining terms, courts have often focused on whether a misrepresented fact about the property was discoverable by the purchaser. Courts have generally used language to the effect that sellers have a duty not to falsely represent a condition known only to them and which could not be expected to be discovered by the purchaser's diligence. n81 The misrepresented condition must be a material condition, which courts have defined as one which has an effect on the property's value. n82 If the seller has made repairs to such a condition while owner of the property, but is unsure of whether the condition has been completely corrected, the seller would be well-advised to disclose the existence of the condition and the state of the repairs that were made. n83 However, there may not be a duty to disclose a condition which is not considered dangerous. n84

By contrast, the doctrine of caveat emptor may still operate to protect the seller if the defective condition is open to observation or discoverable, the purchaser has an opportunity to examine the premises, and there is no evidence of fraud on the part of the seller. n85

§ 99.06(a)(3)(B) Fraudulent Concealment.

In order to triumph over a defense of caveat emptor, a buyer will likely have to prove not only that the seller actively and knowingly concealed a defect, but also that the buyer could not have detected the defect with reasonable diligence. Frequently, the court will have to determine whether the buyer should be charged with constructive notice of the defect, in effect defeating the buyer's claim. n86 Also, if there is a question as to whether the buyer had such notice, the general move towards recognizing a duty to disclose will often preclude an award of summary judgment in favor of the seller. n87

§ 99.06(a)(3)(C) Latent Defects.

Whether the seller has "negligently misrepresented" the non-existence of a defect or "fraudulently concealed" such a defect may seem a matter of semantics. What is clear, however, is that where a defect is latent, and materially affects the value of the property in question, courts will generally find a duty to disclose such defects. n88 Thus, sellers have been required to disclose latent defects such as a weak, cracked foundation, n89 a leaky roof, n90 and unstable soil conditions. n91

It should be emphasized that defects known or knowable to a buyer upon reasonable inspection do not fall within the scope of seller's duty to disclose. n92

§ 99.06(a)(3)(D) Easements, Building Codes, and Ordinance Violations.

The doctrine of caveat emptor remains partially intact in questions involving the disclosure of easements, non-compliance with city ordinances, and building code violations. In such cases, courts focus on the materiality of the non-disclosed fact. Thus, if the easement or violation materially affects the value of the property, the seller will probably have a duty to disclose. n93 By contrast, if the non-disclosed fact is not material to the sale of the property, there is generally no duty to disclose. n94 It is important to note, however, that even if there is no duty to disclose certain facts, if the purchaser directly asks about such conditions, the seller is under an obligation to answer truthfully. n95 A court may also consider whether information regarding a legal impairment to the property is accessible to the purchaser. n96

§ 99.06(a)(3)(E) Special Conditions.

With the movement from caveat emptor to disclosure in the area of physical defects, questions also have arisen as to a seller's duty to disclose non-physical defects. Many states have enacted statutes regarding the materiality of non-physical defects, sometimes referred to as stigmas, typically providing that such defects are not material and need not be disclosed by the seller. n97 Although the fact that a property has some non-physical defect is statutorily immaterial, the seller still has a duty to disclose information if directly asked. n98 Similarly, if the stigma has been created by the seller, the seller may have a duty to disclose even the presence of poltergeists. n99

§ 99.06(a)(3)(F) Infestation.

The most common infestation problem, particularly with respect to residences, is termites. Termite damage can be so costly, and so difficult to detect, that most lending institutions now require a termite inspection before lending money to prospective buyers. Not surprisingly, courts now almost uniformly hold termite infestation to be a dangerous condition, certainly material, and one which must be disclosed by the seller. n100 It has been far less frequently litigated, but in certain situations, the seller may also have to disclose infestation by other insects, such as roaches. n101

§ 99.06(a)(3)(G) Environmental Hazards.

The last half of the 20th century has seen the development of hazards far more dangerous than insect infestation. Land and buildings are threatened by substances that are difficult to detect and often highly expensive to remove. In response, some states have enacted legislation requiring disclosure of environmental hazards to buyers. n102 Courts have also recognized this problem, and have held that such environmental hazards are dangerous and material, and must be disclosed, n103 even to the point of holding the seller liable for the real estate agent's non-disclosure. n104

§ 99.06(b) Purchaser's Representations and Warranties.

Purchasers who are not individuals generally are expected to warrant that they have been duly formed, and that the parties executing the contract have been duly authorized to act on behalf of the named purchaser by all requisite action of the purchasing entity. Purchaser should also warrant that it has not dealt with any broker in connection with the acquisition of the subject property, except as specified in the contract.

§ 99.06(c) Survival of Representations and Warranties.

In order to avoid the effect of the doctrine of merger described below, the contract should specifically provide that the representations and warranties are intended to survive closing and the execution and delivery of the deed of conveyance. The issue of survivability of seller's warranties may be expected to generate heated negotiation in commercial transactions, leading to a compromise involving the development of a standard of materiality, the carving out of specific exceptions for certain representations and warranties (e.g., warranties of title), a limitation on the time of survival of other warranties, and separate dollar limitations on seller's exposure to liability for breach of individual warranties and of all warranties in the aggregate. n105

§ 99.06(d) Merger by Deed.

There is a presumption that all undertakings by the seller in the contract of sale are deemed satisfied or waived by the delivery of the deed to the purchaser at closing. Known as the doctrine of merger, this rule of law provides that seller's contractual duties and obligations are discharged upon acceptance of the deed unless they are reaffirmed in the deed or in some other document executed contemporaneously therewith, or unless they are expressly made to survive closing under the terms of the contract of sale. n106 Judicial impatience with the doctrine of merger has led to the creation of exceptions, n107 the most notable being for contractual obligations that are considered "collateral" to the deed. n108 The defense of merger is generally inapplicable in a cause of action for fraud. n109

Although commonly considered a doctrine that benefits sellers by relieving them from contractual promises not repeated in the deed of conveyance, the doctrine of merger is equally available to purchasers. Thus, restrictions on the use or development of property conveyed to purchaser that were contained in the contract of sale but did not appear in the deed of conveyance have been held merged into the deed and unenforceable against purchaser. n110

COMPUTER-ASSISTED RESEARCH

LEXIS: builder or vendor or seller w/50 merger w/50 deed

FOOTNOTES:
(n1)Footnote 24. In contract law, a warranty is basically a written or oral undertaking or stipulation that a certain fact in relation to the subject matter of the contract is or will be as it is stated or promised to be. A warranty differs from a representation in that a warranty must always be given contemporaneously with, and as a part of, the contract, while a representation precedes and induces the contract. While that is their difference in nature, their difference in consequence or effect is this: Upon the breach of a warranty, the contract remains binding, and only damages are recoverable for their breach; upon a false representation by the seller, the purchaser may elect to avoid the contract and recover the entire price paid.

William A. Thau, Negotiating the Purchase and Sale of Real Estate (Real Est. Rev. Portfolio Series No. 8 1975).

(n2)Footnote 25. The purchaser who submits the initial contract, will usually ask for broad warranties and representations with the expectation that not all of those requested will be given. It is in the seller's responses to the requested warranties and representations that the purchaser learns facts about the property and the seller.

John S. Hollyfield, *Avoiding Contract of Sale Disputes by Thoughtful Drafting*, Prac. Real Est. Law, May 1985, at 11, 14.

(n3)Footnote 26. Sam W. Galowitz, *Selling the Flawed Property*, Real Est. Rev., Spring 1979, at 25, 27.

(n4)Footnote 27. *Flom v. Stahly, 569 N.W.2d 135 (Iowa 1997)* (the contract need not employ the words "warranty" or "guaranty"; if seller made a distinct assertion of quality, intending such assertion to be believed and relied on by the seller and was so believed and relied on by the seller, the assertion will be treated as a warranty; here, seller's written representations about the type of building materials used in walls, which statements were expressly made part of the contract, constituted express warranties). *But see, Murray v. Crank, 945 S.W.2d 28 (Mo. App. 1997)* (seller's remark that roof was a "lifetime roof" did not constitute an express warranty). *See also Gibson v. Capano, 699 A.2d 68 (Conn. 1997)* (plaintiffs' claims that defendants had misrepresented termite damage and nature of termite treatment were barred by contract disclaimer clause in which buyers expressly disclaimed reliance on sellers' representations); *Richardson v. Hardin 5 P.3d 793 (Wyo. 2000)* (Defendants' summary judgment was affirmed because plaintiffs failed to meet their burden of establishing by clear, unequivocal, and convincing evidence that they relied upon false representations about condition of the foundation in entering into the buy/sell contract); *Lindberg v. Roseth, 2002 Ida. LEXIS 67* (Apr. 29,

2002) (the purchasers were entitled to rely on the vendors' representations even though the purchasers had made their own inspection); *Burgess v. Miller, 621 N.W.2d 828 (Neb. App. 2001)* (vendors disclosed condition to the best of their belief and knowledge).

(n5)Footnote 28. This will require a modification by purchaser to the standard form contract commonly used for the sale of real property in the New York City, Washington, D.C., and other metropolitan areas. Karl B. Holtzschue, Real Estate Contracts 86-87 (1985).

(n6)Footnote 29. Karl B. Holtzschue, Real Estate Contracts 87 (1985).

(n7)Footnote 30. *See Cochran v. Keeton, 252 So. 2d 307 (Ala. Civ. App. 1920) , aff'd, 252 So. 2d 313 (Ala. 1971)* ; Linda M. Libertucci, *Builder's Liability to New and Subsequent Purchasers, 20 S.W. U.L. Rev. 219 (1991).*

(n8)Footnote 31. *See Jeanguneat v. Jackie Hames Constr. Co., 576 P.2d 761 (Okla. 1978)* ; *Humber v. Morton, 426 S.W.2d 554 (Tex. 1968)* ; *Bethlahmy v. Bechtel, 415 P.2d 698 (Idaho 1966)* .

(n9)Footnote 32. For a discussion of the origins of the implied warranty of habitability, *see* Joseph C. Brown, Jr., *The Implied Warranty of Habitability Doctrine in Residential Property Conveyances: Policy Backed Change Proposals, 62 Wash. L. Rev. 743 (1987);* Caryn M. Chittenden, *From Caveat Emptor to Consumer Equity--The Implied Warranty of Quality Under the Uniform Common Interest Ownership Act, 27 Wake Forest L. Rev. 571 (1992);* Linda M. Libertucci, *Builder's Liability to New and Subsequent Purchasers, 20 S.W. U.L. Rev. 219 (1991);* Frona M. Powell, *Builder-Vendor Liability for Environmental Contamination in the Sale of New Residential Property, 58 Tenn. L. Rev. 231 (1991).*

(n10)Footnote 33. *See Conklin v. Hurley, 428 So. 2d 654 (Fla. 1983)* ; *Miller v. Cannon Hill Estates, Ltd., 2 K.B. 113 (1931); Perry v. Shannon Dev. Co., 4 All. E.R. 390, 395-396 (C.A. 1937):*

> (In the first place, the maxim caveat emptor cannot apply, since the buyer, insofar as the house is not yet completed, cannot inspect it, either by himself or by his surveyor, and, in the second place, from the point of view of the vendor, the contract is not merely a contract to sell, but also a contract to do building work, It is only natural and proper that there should be an implied undertaking that the building should be done properly).

(n11)Footnote 34. 1 A.U.L.A. 212. The Uniform Commercial Code created the implied warranty of merchantability for consumer goods sold by merchants. *U.C.C. § 2-314*. "Consumers who became accustomed to the protection of an implied warranty of merchantability in the sale of goods reasonably expected the law to protect them when they purchased new homes." Joseph C. Brown, Jr., *The Implied Warranty of Habitability Doctrine in Residential Property Conveyances: Policy Backed Change Proposals, 62 Wash. L. Rev. 743 (1987).*

(n12)Footnote 35. *140 N.E.2d 819 (Ohio App. 1957)* .

(n13)Footnote 36. *140 N.E.2d 819, 821 (Ohio App. 1957)* .

(n14)Footnote 37. *140 N.E.2d 819, 821 (Ohio App. 1957)* .

(n15)Footnote 38. *140 N.E.2d 819, 821 (Ohio App. 1957)* .

(n16)Footnote 39. *Carpenter v. Donohoe, 388 P.2d 399 (Colo. 1964)* .

(n17)Footnote 40. *Carpenter v. Donohoe, 388 P.2d 399, 400 (Colo. 1964)* .

(n18)Footnote 41. *Carpenter v. Donohoe, 388 P.2d 399, 402 (Colo. 1964)* . In a recent decision, the Illinois high

court used the same reasoning to extend the warranty to significant additions to existing residences. "An owner claiming that latent defects exist in a major addition to a structure should be provided the same protection for the addition as that given to [new home buyers]. In both cases, the owner of the house usually has little knowledge regarding the construction. The purchaser of both a completed home and an addition places the same trust in the builder that the structure being erected is suitable for living. Further, the ordinary buyer is not in a position to discover hidden defects in a structure even through the exercise of ordinary and reasonable care." *VonHoldt v. Barba & Barba Constr., 677 N.E.2d 836, 839 (Ill. 1997)* . The addition increased the size of the house by 40%. As it does with newly constructed homes, the implied warranty inures to the benefit of subsequent purchasers. In this case, however, the suit, brought eleven years after the completion of the addition was time-barred.

(n19)Footnote 42. *Id.*

(n20)Footnote 43. *See Cochran v. Keeton, 252 So. 2d 307 (Ala. Civ. App. 1920) , aff'd, 252 So. 2d 313 (Ala. 1971)* ; (implied warranty of fitness and habitability); *Alaska Pac. Assur. Co. v. Collins, 794 P.2d 936 (Alaska 1990)* ; *Richards v. Powercraft Homes, Inc., 678 P.2d 427 (Ariz. 1984)* (*en banc*); *Coney v. Stewart, 562 S.W.2d 619 (Ark. 1978)* ; *Pollard v. Saxe & Yolles Dev. Co., 525 P.2d 88 (Cal. 1974)* ; *Carpenter v. Donohoe, 388 P.2d 399 (Colo. 1964)* ; *Vernali v. Centrella, 266 A.2d 200 (Conn. 1970)* ; *Koval v. Peoples, 431 A.2d 1284 (Del. Super. 1981)* ; *Gable v. Silver, 258 So. 2d 11* (Fla. App.) , *cert. dismissed, 264 So. 2d 418 (Fla. 1972)* ; *Bethlahmy v. Bechtel, 415 P.2d 698 (Idaho 1966)* ; *Petersen v. Hubschman Constr. Co., 389 N.E.2d 1154 (Ill. 1979)* ; *Barnes v. Mac Brown & Co., 342 N.E.2d 619 (Ind. 1976)* ; *Kirk v. Ridgway, 373 N.W.2d 491 (Iowa 1985)* ; *McFeeters v. Renollet, 500 P.2d 47 (Kan. 1972)* ; *Crawley v. Terhune, 437 S.W.2d 743 (Ky. 1969)* ; *Degeneres v. Burgess, 486 So. 2d 769 (La. App. 1986)* ; *Banville v. Huckins, 407 A.2d 294 (Me. 1979)* ; *Loch Hill Constr. Co. v. Fricke, 399 A.2d 883 (Md. 1979)* ; *Weeks v. Slavick Bldrs., Inc., 180 N.W.2d 503 (Mich. App. 1970) , aff'd, 181 N.W.2d 271 (Mich. 1970)* ; *Tereault v. Palmer, 413 N.W.2d 283 (Minn. App. 1987)* ; *Brown v. Elton Chalk, Inc., 358 So. 2d 721 (Miss. 1978)* ; *Smith v. Old Warson Dev. Co., 479 S.W.2d 795 (Mo. 1972)* (*en banc*); *Chandler v. Madsen, 642 P.2d 1028 (Mont. 1982)* ; *Norton v. Burleaud, 342 A.2d 629 (N.H. 1975)* ; *Schipper v. Levitt & Sons, 207 A.2d 314 (N.J. 1965)* ; *De Roche v. Dame, 430 N.Y.S.2d 390 , appeal dismissed, 413 N.E.2d 366 (N.Y. 1980)* ; *Griffin v. Wheeler-Leonard & Co., 225 S.E.2d 557 (N.C. 1976)* ; *Dobler v. Malloy, 214 N.W.2d 510 (N.D. 1973)* ; *Jeanguneat v. Jackie Hames Constr. Co., 576 P.2d 761 (Okla. 1978)* ; *Yepsen v. Burgess, 525 P.2d 1019 (Or. 1974)* ; *Elderkin v. Gaster, 288 A.2d 771 (Pa. 1972)* ; *Sousa v. Albino, 388 A.2d 804 (R.I. 1978)* ; *Rutledge v. Dodenhoff, 175 S.E.2d 792 (S.C. 1970)* ; *Waggoner v. Midwestern Dev., 154 N.W.2d 803 (S.D. 1967)* ; *Dixon v. Mountain City Constr. Co., 632 S.W.2d 538 (Tenn. 1982)* ; *Humber v. Morton, 426 S.W.2d 554 (Tex. 1968)* ; *Rothberg v. Olenik, 262 A.2d 461 (Vt. 1970)* ; *House v. Thornton, 457 P.2d 199 (Wash. 1969)* ; *Gamble v. Main, 300 S.E.2d 110 (W. Va. 1983)* ; *Moxley v. Laramie Bldrs., Inc., 600 P.2d 733 (Wyo. 1979)* ; *cf. Association of Apt. Owners of Park Towers v. Child, 615 P.2d 756 (Haw. App. 1980)* (in dictum).

(n21)Footnote 44. *See Conn. Gen. Stat. Ann. §§ 47-116 to 47-121*; *Md. Real Prop. Code Ann. §§ 10-201 to 10-205* (1988); *N.J. Stat. Ann. § 46:3B-1* (Supp. 1989). *See also* Unif. Land Transaction Act § 2-309 13 U.L.A. 533 (warranty of suitability and quality of construction). *Emerald Texas, Inc. v. Peel, 920 S.W.2d 398 (Tex. App. 1996)* .

(n22)Footnote 45. *Spivack v. Berks Ridge Corp., 586 A.2d 402 (Pa. Super. 1990)* .

(n23)Footnote 46. *Rogers v. Lewton, 570 N.E.2d 133 (Ind. App. 1991)* .

(n24)Footnote 47. *Council of Unit Owners of Breakwater House Condo. v. Simpler, 603 A.2d 792 (Del. 1992)* .

(n25)Footnote 48. *Cochran v. Keeton, 252 So. 2d 307 (Ala. Civ. App. 1920) , aff'd, 252 So. 2d 313 (Ala. 1971)* .

(n26)Footnote 49. Linda M. Libertucci, *Builder's Liability to New and Subsequent Purchasers, 20 S.W. U.L. Rev. 219 (1991).*

(n27)Footnote 50. *Schleyhahn v. Cole, 532 N.E.2d 1136 (Ill. Ct. 1989)* ; *Petersen v. Hubschman Constr. Co., 389 N.E.2d 1154 (Ill. 1979)* ; *Jeanguneat v. Jackie Hames Constr. Co., 576 P.2d 761 (Okla. 1978)* .

(n28)Footnote 51. *Hartley v. Ballou, 209 S.E.2d 776 (N.C. 1974)* .

(n29)Footnote 52. *Jeanguneat v. Jackie Hames Constr. Co., 576 P.2d 761, 765 (Okla. 1978)* .

(n30)Footnote 53. *Goggin v. Fox Valley Constr. Corp., 365 N.E. 2d 509, 511 (Ill. App. Ct. 1977)* (if a new home is not aesthetically satisfying because of a defect in construction, such a defect does not render the home uninhabitable).

(n31)Footnote 54. *San Luis Trails Ass'n v. E.M. Harris Bldg. Co., 706 S.W.2d 65 (Mo. App. 1986)* (homeowners association had no breach of warranty cause of action for allegedly defective streets constructed by developer); *Conklin v. Hurley, 428 So. 2d 654 (Fla. 1983)* (purchasers held not entitled to recover against developer on theory of implied warranty of fitness covering collapsed seawall abutting their lots). *But see Jeanguneat v. Jackie Hames Constr. Co., 576 P.2d 761 (Okla. 1978)* (breach of implied warranty of habitability when water from well drilled by builder-vendor was not suitable for human consumption). *Board of Dirs. of Bloomfield Club Rec. Ass'n v. Hoffman Group, 712 N.E.2d 330 (Ill. 1999)* (implied warranty of habitability did not extend to condominium association's recreational clubhouse; warranty was created to cover defects that interfere with habitability of residences); *Town of Alma v. Azco Constr., Inc. 985 P.2d 56 (Colo. App. 1999)* (refusal to extend implied warranty coverage to public works project).

(n32)Footnote 55. *Carpenter v. Donohoe, 388 P.2d 399 (Colo. 1964)* ; *Evans v. J. Stiles, Inc., 689 S.W.2d 399 (Tex. 1985)* ; *Frickel v. Sunnyside Enters., 725 P.2d 422 (Wash. 1986)* ; *Duncan v. Schuster-Graham Homes, Inc., 578 P.2d 637 (Colo. 1978)* (en banc); *Richards v. Powercraft Homes, Inc., 678 P.2d 427 (Ariz. 1984)* . *Choung v. Iemma, 708 N.E.2d 7 (Ind. App. 1999)* (refusing to extend implied warranty to sale of a used home by a non-builder vendor inasmuch as "the vendor has no greater expertise than the purchaser in determining the quality of the house.").

(n33)Footnote 56. *Spivack v. Berks Ridge Corp., 586 A.2d 402 (Pa. Super. 1990)* (builder); *Kennedy v. Columbia Lumber & Mfg. Co., 384 S.E.2d 730 (S.C. 1989)* (new home purchaser may hold builder responsible for breach of implied warranty even though builder did not sell home).

(n34)Footnote 57. *Council of Unit Owners of Breakwater House Condo. v. Simpler, 603 A.2d 792 (Del. 1992)* (claim for breach of implied warranty of good quality of workmanship may lie against vendor developers that do not actually perform construction work); *Old Town Common Condo Ass'n v. O. Corp., 1990 Conn. Super. Lexis 1412* (No. Cv 85-22 70 125, Oct. 10, 1990) (bank was part of joint enterprise which designed, constructed, financed and sold condominiums); *Jordan v. Talaga, 532 N.E.2d 1174 (Ind. App. 1989)* (developers who improved land solely for the purpose of residential homebuilding with knowledge of latent defect in the property breached an implied warranty); *Hostetler v. W. Gray & Co., 523 So. 2d 1359 (La. App. 1988)* (subdivision developer). *But see Vistein v. Keeney, 593 N.E.2d 52 (Ohio App. 1990)* (no action against vendor's independent contractor).

(n35)Footnote 58. *See Mobley v. Copeland, 828 S.W.2d 717 (Mo. App. 1992)* (purchaser failed to establish that vendors were builder-vendors to whom implied warranty of habitability could be applied); *Mazurek v. Nielsen, 599 P.2d 269 (Colo. App. 1979)* (first time builder-vendor may be in the business of building if primary reason for constructing house is to resell it); *Siders v. Schloo, 188 Cal. App. 3d 1217 (1987)* (owner-builder of personal residence not in business of building new homes for sale). *Cox v. Clark, 949 S.W.2d 231 (Mo. App. 1997)* (where seller built home as personal residence and not as a commercial venture warranty of habitability is not implied on sale); *Flom v. Stahly, 569 N.W.2d 135 (Iowa 1997)* (warranty not implied because vendor was not in the business of selling homes and originally intended to live in the house).

(n36)Footnote 59. *Mazurek v. Nielsen, 599 P.2d 269 (Colo. App. 1979)* .

(n37)Footnote 60. *Rogers v. Lewton, 570 N.E.2d 133 (Ind. App. 1991)* .

(n38)Footnote 61. *See* William K. Jones, *Economic Losses Caused by Construction Deficiencies: The Competing Regimes of Contract and Tort, 59 U. Cin. L. Rev. 1051 (1991). Rousseau v. K.N. Const., Inc., 727 A.2d 190 (R.I. 1999)* raised the question of whether a home buyer could sue in tort an engineer who had reported on suitability of the

property, for economic loss only. Noting that it had "long adhered to a tradition of providing increased protection and an opportunity for recovery in cases in which consumers deal with commercial entities" (*id. at 193),* the court held that an action in tort was available even if the damages were wholly economic.

(n39)Footnote 62. *Jordan v. Talaga, 532 N.E.2d 1174 (Ind. App. 1989)* .

(n40)Footnote 63. *Vistein v. Keeney, 593 N.E.2d 52, 62 (Ohio App. 1990)* .

(n41)Footnote 64. *Smith v. Old Warson Dev. Co., 479 S.W.2d 795 (Mo. 1972)* ; *San Luis Trails Ass'n v. E.M. Harris Bldg. Co., 706 S.W.2d 65 (Mo. App. 1986)* (liability imposed for mere deterioration or loss of bargain resulting from latent structural defects is contractual); *Council of Unit Owners of Breakwater House Condo. v. Simpler, 603 A.2d 792 (Del. 1992)* (cause of action for breach of implied warranty may lie not only in contract involving new construction, but also in one involving older structures that have been substantially reconstructed); *Vistein v. Keeney, 593 N.E.2d 52, 59 (Ohio App. 1990)* (privity required with contractor where purchaser sued vendor and vendor's contractor claiming economic loss). An excellent and extended discussion of the policy reasons for abandoning the privity bar to suit by subsequent purchaser against vendor builders appears in *Nichols v. R.R. Beaufort & Assocs., 727 A.2d 174 (1999)* . In rejecting the bar, the Rhode Island Supreme Court noted that in a highly mobile society, refusal to extend the protection of the warranty to subsequent purchasers left a large class of innocent purchasers unprotected. The refusal to offer remedial avenues to such purchasers was unjustifiable in light of the fact that defects in new home construction do not always manifest themselves immediately and subsequent buyers, like original buyers, have little opportunity to inspect for such defects and a lack of knowledge and expertise to detect them.

While holding that privity will no longer be a bar to suit by a subsequent purchaser, the court was careful to restate the limitations on the legal exposure of the vendor-builder. The key limitation:

> [W]e limit the extension of implied-warranty liability to home buyers who are not in privity with the builder to latent defects existing at the time of the home's original sale that were not known to or were not reasonably discoverable by the buyer when he or she purchased the house, and "which become manifest after the subsequent owner's purchase and which were not discoverable had a reasonable inspection of the structure been made prior to the purchase."

Id. at 181 . Further, subsequent purchasers must discover such defects within a reasonable period of time, defined by the court as 10 years, after the builder has completed the work at issue. Finally, the burden of proof as to the link between the faulty workmanship and the defect is on the subsequent purchaser. *Id.* at 182 .

(n42)Footnote 65. *Sensenbrenner v. Rust, Orling & Neale, Architects, Inc., 374 S.E.2d 55 (Va. 1988)* (homeowner did not have action against architect and subcontractor who were hired by homeowner's contractor where there was no privity of contract between the homeowner and the architect and damages primarily involved economic losses).

(n43)Footnote 66. *Kennedy v. Columbia Lumber & Mfg. Co., 384 S.E.2d 730 (S.C. 1989)* ("[I]f a builder performs construction in such a way that he violates a contractual duty only, then his liability is only contractual. If he acts in a way as to violate a legal duty, however, his liability is both in contract and in tort.").

(n44)Footnote 67. *See* note 43, *above*.

(n45)Footnote 68. *See* Connie S. Cranata, Note, *From Buyer Beware to Builder Beware--The Subsequent Purchaser's Cause of Action Against the Builder, 11 Am. J. Trial Advoc. 143 (1987);* G. Scott Lutz, Note, *Latent Defects: Subsequent Home Purchasers Beware, 40 S.C. L. Rev. 1017 (1989).*

(n46)Footnote 69. *Gupta v. Ritter Homes, Inc., 646 S.W.2d 168 (Tex. 1983)* .

(n47)Footnote 70. *See* note 68, *above*.

(n48)Footnote 71. *Barnes v. Mac Brown & Co., 342 N.E.2d 619 (Ind. 1976)* (warranty extended not only to first purchaser but also to second purchaser).

(n49)Footnote 72. *Barnes v. Mac Brown & Co., 342 N.E.2d 619, 621 (Ind. 1976)* .

(n50)Footnote 73. *See Nastri v. Wood Bros. Homes, Inc., 690 P.2d 158 (Ariz. App. 1984)* ; *Blagg v. Fred Hunt Co., 612 S.W.2d 321 (Ark. 1981)* (strict liability); *Duncan v. Schuster-Graham Homes, Inc., 578 P.2d 637 (Colo. 1978)* (en banc) (in the special circumstances of the case where the builder-vendor sold house, repurchased it and then resold to plaintiffs); *Tusch Enters. v. Coffin, 740 P.2d 1022 (Idaho 1987)* ; *Redarowicz v. Ohlendorf, 441 N.E.2d 324 (Ill. 1982)* ; *Barnes v. Mac Brown & Co., 342 N.E.2d 619 (Ind. 1976)* ; *Keyes v. Guy Bailey Homes, Inc., 439 So. 2d 670 (Miss. 1983)* ; *Lempke v. Dagenais, 547 A.2d 290 (N.H. 1988)* ; *Hermes v. Staiano, 437 A.2d 925 (N.J. 1981)* ; *McMillan v. Brune-Harpenau-Torbeck Bldrs., Inc., 455 N.E.2d 1276 (Ohio 1983)* ; *Elden v. Simmons, 631 P.2d 739 (Okla. 1981)* ; *Spivack v. Berks Ridge Corp., 586 A.2d 402 (Pa. Super. 1990)* ; *Terlinde v. Neely, 271 S.E.2d 768 (S.C. 1980)* ; *Brown v. Fowler, 279 N.W.2d 907 (S.D. 1979)* ; *Gupta v. Ritter Homes, Inc., 646 S.W.2d 168 (Tex. 1983)* ; *Sewell v. Gregory, 371 S.E.2d 82 (W. Va. 1988)* ; *Moxley v. Laramie Bldrs., Inc., 600 P.2d 733 (Wyo. 1979)* ; *cf. Va. Code Ann. § 55-70-1* (warranties survive transfer of title). *But see Mobley v. Copeland, 828 S.W.2d 717 (Mo. App. 1992)* (no implied warranty of habitability where vendors were not builders).

(n51)Footnote 74. *See Tusch Enters. v. Coffin, 740 P.2d 1022 (Idaho 1987)* ; *Gupta v. Ritter Homes, Inc., 646 S.W.2d 168 (Tex. 1983)* (without defining reasonable inspection); *Sewell v. Gregory, 371 S.E.2d 82 (W. Va. 1988)* .

(n52)Footnote 75. *See Lempke v. Dagenais, 547 A.2d 290 (N.H. 1988)* ; *Jeanguneat v. Jackie Hames Constr. Co., 576 P.2d 761 (Okla. 1978)* (duration of liability is determined by a standard of reasonableness).

(n53)Footnote 76. *See* David A. Larson, *What is the Appropriate Statute of Limitations for the Implied Warranty of Habitability, 7 U. Ark. Little Rock L. J. 689 (1984).*

(n54)Footnote 77. *Md. Real Prop. Code Ann. § 10-204(b)(1)*(1988); *Va. Code Ann. § 55-70.1E* (1986).

(n55)Footnote 78. *N.J. Stat. Ann. § 46:3B-3(B)(3).*

(n56)Footnote 79. *See Peek v. Gurney, L.R. 6 H.L. 377 (1873)* (no duty to disclose defects in an arm's length transaction regardless of how "morally censurable" non-disclosure would be).

(n57)Footnote 80. Two developments, one societal and one legal, have conspired to erode the caveat emptor doctrine. First, the economic status of middle-class America has enabled families to move more often, resulting in more sales of used housing. Because of this, equal bargaining power and the purchaser's ability to properly inspect, two pillars of the caveat emptor creed, could no longer be assumed. Second, the introduction of the Uniform Commercial Code into contract law has had a significant effect on the law governing real estate sales as well. *See above* note 34. *See e.g., Shapiro v. Sutherland, 76 Cal. Rptr. 2d 101 (1998)* (duty of disclosure extends to disclosure of existence of noisy neighbors where disturbance caused by those neighbors materially affected the value and desirability of the property); *Fimbel v. DeClark, 695 N.E.2d 125 (Ind. App. 1998)* (seller had duty to disclose unsuitability of soil for septic system to buyer whom seller knew wanted to build homes on the property).

(n58)Footnote 81. *See McWilliams v. Barnes, 242 P.2d 1063, 1065 (Kan. 1952)* . In *McWilliams*, the seller had informed the purchaser that certain drainpipes were connected to and emptied into the city sewer system. Ten months later, the purchaser discovered that the drainpipes actually emptied into a backyard pit which overflowed with sewage. The Kansas Supreme Court found for the purchaser, holding that such facts could not be expected to be discovered by the purchaser prior to signing the contract. *Id. at 1066* . *See also Chapman v. Hosek, 475 N.E.2d 593 (Ill. 1985)* (misrepresentation of necessity for flood insurance and of local weather conditions); *Gilchrist Timber Co. v. ITT*

Rayonier, 696 So. 2d 334 (Fla. 1997) (noting that a seller who negligently transmits false information may be held liable for negligent misrepresentation under § 552 of the Restatement (Second) of Torts); *Billian v. Mobil Corp., 710 So. 2d 984 (Fla. App. 1998)* (where buyer sues for non-disclosure of a material defect it is not necessary to buyer's claim that seller have intended to defraud buyer).

(n59)Footnote 82. *Karoutas v. Homefed Bank, 283 Cal. Rptr. 809, 811 (1991)* .

(n60)Footnote 83. *See Anderson v. Harper, 622 A.2d 319 (Pa. 1993)* . Prior to selling their home to the Andersons, the Harpers made repairs to a faulty septic system, but did not obtain the required permits for such work. The court found that since the Harpers did not obtain the required permits, they could not assume that the latent, dangerous condition had been rectified. Without knowing whether the condition had been corrected, the Harpers had a duty to disclose the defect to the Andersons. *Anderson v. Harper, 622 A.2d 319, 323 (Pa. 1993)* .

(n61)Footnote 84. *See Gozon v. Henderson-Dewey & Assocs., 458 A.2d 605 (Pa. 1983)* (leaky swimming pool); *Mobley v. Copeland, 828 S.W.2d 717 (Mo. 1992)* (slight electrical current in swimming pool).

(n62)Footnote 85. *Layman v. Binns, 519 N.E.2d 642, 645 (Ohio 1988)* . In *Layman,* the sellers had braced a defective basement wall with steel beams, and the wall was actually bulging when the purchasers viewed the home. *Id.* at 641. The court found no duty on the part of the sellers to expressly disclose the defective wall because the defect was not latent. *Id.* at 645.

(n63)Footnote 86. *See Grant v. Wrona, 662 S.W.2d 227, 230-31 (Ky. 1983)* (buyer did not have constructive notice of rotten wood where the seller had covered the wood with fresh paint prior to placing the home on the market). *See also Flakus v. Schug, 329 N.W.2d 859 (Neb. 1983)* . In *Flakus,* the buyers noticed one sump pump in the basement laundry room, but the seller had concealed two other sump pumps in basement closets, which went undetected until the buyers experienced significant water damage. The first sump pump was not enough to give the buyer constructive notice of the property's water defects, and the court found for the buyers on their fraudulent concealment claim. *Id. at 863* ; *Smalls v. Blueprint Development, Inc., 497 S.E.2d 54 (1998)* (buyer could not avail himself of passive concealment exception to doctrine of caveat emptor where express provision in contract noted the possibility that lots were subject to wetlands regulation).

(n64)Footnote 87. *See George v. Lumbrazo, 584 N.Y.S.2d 704 (1992)* . Summary judgment was improper because questions of fact remained as to whether the seller intentionally concealed cracks in the wall with panelling, and as to whether the buyer should have discovered the cracks; *Gantt v. Bennett, 231 Ga. App. 238, 499 S.E.2d 75 (1998)* (buyer could prevail on "passive concealment" claim where seller knew of inappropriately installed sewer system, failed to disclose it, and fact was material and not apparent to the buyer).

(n65)Footnote 88. "... Where a vendor is aware of defects or conditions which substantially affect the value or habitability of the property and the existence of which are unknown to the purchaser and would not be disclosed by reasonably diligent inspection, then the vendor has a duty to disclose the same to the purchaser ... [his] failure to disclose will give rise to a cause of action in favor of the purchaser." *Thacker v. Tyree, 297 S.E.2d 885, 888 (W. Va. 1982)* .

(n66)Footnote 89. *Id.*

(n67)Footnote 90. *Johnson v. Davis, 480 So. 2d 625 (Fla. 1985)* . The court stated that cases applying the doctrine of caveat emptor were "not in tune with the time and [did] not conform with current notions of justice, equity, and fair dealing." *Id. at 628-29* .

(n68)Footnote 91. *Blake v. Doe, 623 N.E.2d 1229 (Ohio 1993)* .

(n69)Footnote 92. *Blaylock v. Cary, 709 So. 2d 1128 (Ala. 1997)* (no duty to disclose water damage defect where

buyer had knowledge of it); *Nelson v. Wiggs, 699 So. 2d 258 (Fla. App. 1997)* (flood-prone nature of property was knowable through reasonable steps to ascertain it; therefore seller has no duty to disclose it).

(n70)Footnote 93. *See, e.g., Revitz v. Terrell, 572 So. 2d 996 (Fla. 1990)* (fraudulently obtained flood insurance was a material fact which sellers had a duty to disclose); *Curran v. Heslop, 252 P.2d 378 (Cal. 1953)* (fraudulent concealment of building code violations was a material fact which affected the value of the home and should have been disclosed).

(n71)Footnote 94. An example of a non-disclosed fact which is not considered material to the sale is the existence of easements for public utilities, which are generally not dangerous and are to be expected. *See, e.g., Sevin v. Kelshaw, 417 Pa. Super. 1, 611 A.2d 1232, 1238 (Pa. Super. Ct. 1992)* (existence of easement for municipal waterline not material; no duty to disclose even though easement not publicly recorded). *See also* Annotation, *Construction and Effect of Provision in Contract for Sale of Realty by which Purchaser Agrees to take Property "As Is" or in Its Existing Condition, 8 A.L.R. 5th 312 (1992).*

(n72)Footnote 95. *See Kraft v. Lowe, 77 A.2d 554 (D.C. 1950)* (no duty to disclose a violative sewer system; however, seller had obligation to provide the truth when asked about the sewer).

(n73)Footnote 96. *See Gilbey v. Cooper, 310 N.E.2d 268 (Ohio 1973)* . In *Gilbey*, the state had taken a permanent easement to build a road and a temporary easement for "work purposes," neither of which was actually recorded until three days after the property was sold. *Id. at 269* . Because the purchasers could not have discovered the easements prior to completing the sale, the sellers had a duty to disclose this information. *Id. at 270* ; *Norris v. Mitchell, 495 S.E.2d 809 (Va. 1998)* (seller is not required to disclose restrictions of record).

(n74)Footnote 97. The following Connecticut statutes are typical:

20-329cc "Psychologically impacted" defined: As used in sections 20-329cc to 20-329ff, inclusive, "psychologically impacted" means the effect of certain circumstances surrounding real estate which includes, but is not limited to: (1) the fact that an occupant of real property is, or was at any time suspected to be, infected or has been infected with the human immunodeficiency syndrome, as defined in section 19a-581; or (2) the fact that the property was at any time suspected to have been the site of a homicide, other felony, or a suicide.

20-329dd Psychological Impact. No disclosure required. No cause of action. (a) the existence of any fact or circumstance which may have a psychological impact on the purchaser or lessee is not a material fact that must be disclosed in a real estate transaction. (b) no cause of action shall arise against an owner of real estate or his agent for the failure to disclose to the transferee that the transferred property was psychologically impacted, as defined in section 20-329cc.

Conn. Gen. Stat. §§ 20-329cc, 20-329dd (Supp. 1994). *See also Cal. Civ. Code § 1710.2*; *Ky. Rev. Stat. Ann. § 207.250*; *La. Rev. Stat. Ann. § 1468*; *Md. Code Ann., Real Property, § 2-120*; *N.C. Gen. Stat. § 39-50*; *Okla. Stat. tit. 59, § 858-513*, N.Y. R.P.L. 443-a.

(n75)Footnote 98. *See VanCamp v. Bradford, 623 N.E.2d 731, 738 (Ohio 1993)* (non-disclosure of rape which occurred in home after being asked about bars on windows was sufficient for jury determination of materiality).

(n76)Footnote 99. *See Stambovsky v. Ackley, 572 N.Y.S.2d 672 (1991)* . In *Stambovsky*, the seller had publicized and promoted her home as "haunted" for over ten years, but had not disclosed the fact to its eventual purchaser. The court held that having informed the public of the haunting, the seller owed the same duty to the purchaser. *Id. at 677.* "[W] here a condition which has been created by the seller materially impairs the value of the contract and is peculiarly within the knowledge of the seller or unlikely to be discovered by a prudent purchaser exercising due care with respect to the subject transaction, nondisclosure constitutes a basis for rescission as a matter of equity." *Id. at 676* .

(n77)Footnote 100. *See Quashnock v. Frost, 445 A.2d 121 (Pa. Super. Ct. 1982)* . Even an "as is" clause in the sale contract does not relieve the seller of his obligation to disclose termite infestation. *Stemple v. Dobson, 400 S.E.2d 561 (W. Va. 1990)* .

(n78)Footnote 101. *See, e.g., Weintraub v. Krobatsch, 64 N.J. 445, 317 A.2d 68 (N.J. 1974)* (roach infestation). The court called the no-duty-to-disclose cases, relied on by the seller, "a line of singularly unappetizing cases which [were] out of tune with [the] times." *Id. at 71.*

(n79)Footnote 102. New Hampshire is a good example. Sellers of property in New Hampshire are required to disclose the presence of radon gas and lead paint. *See N.H. Rev. Stat. Ann. § 477:4-a*.

(n80)Footnote 103. *Schnell v. Gustafson, 638 P.2d 850 (Colo. App. 1981)* (absence of privity did not relieve a duty to disclose where seller misrepresented the fact that uranium tailings existed below the home).

(n81)Footnote 104. *See Roberts v. Estate of Barbagallo, 531 A.2d 1125 (Pa. 1987)* .

(n82)Footnote 105. *Brody v. Foedish, 631 N.Y.S.2d 80 (1995)* (specific disclaimers in a real estate purchase contract negated any allegations that the written agreement was executed in reliance upon contrary oral allegations); *Ainsworth v. Perreault, 563 S.E. 2d 135 (Ga App. 2002)* ("entire agreement" clause in real estate contract).

(n83)Footnote 106. Toys '*R' Us, Inc. v. Atlanta Economic Dev. Corp., 393 S.E.2d 44 (Ga. App. 1990)* ; *St. Louis Park Inv. Co. v. R.L. Johnson Inv. Co., 411 N.W.2d 288 (Minn. App. 1987)* . *Salerno v. D'Alessandro, 213 A.D.2d 391, 623 N.Y.S.2d 305 (1995)* (the provisions in the merger clause of the contract were sufficiently specific to bar the purchasers from any claim that they were fraudulently induced to enter into the contract); *Hunt v. Kojac,, 666 N.Y.S.2d 330 (1997)* (where contract had provided that septic system was situated within boundaries of property, this provision, omitted from deed, merged into deed; suit for breach of provision barred by doctrine of merger).

(n84)Footnote 107. *See generally Durden v. Century 21 Compass Points, Inc., 541 So. 2d 1264 (Fla. App. 1989)* ; *Cohan v. Sicular, 625 N.Y.S.2d 278 (1995)* (a merger clause in the contract prevented recovery against the vendor and the vendor's attorney, but not against brokers who were not party to the contract); *Lasher v. Paxton, 956 P.2d 647 (Colo. App. 1998)* (merger doctrine did not extinguish attorney fee provision in sales contract; such provision held not to relate to the kinds of issues, specifically title, quantity, possession and emblements of land, for which merger doctrine was created); *Bruggeman v. Jerry's Enterprises, Inc., 591 N.W.2d 705 (Minn. 1999)* (by its very nature a repurchase option agreement could not be performed prior to the closing and therefore merger doctrine did not extinguish it).

(n85)Footnote 108. In *American Nat'l Self Storage, Inc. v. Lopez-Aguiar, 521 So. 2d 303 (Fla. App. 1988)* , seller warranted that sufficient water, sewer and electric service existed at the property line for a 45,000 square foot warehouse building. In fact, no such utilities were available at the perimeter of the property, and purchaser was forced to spend $25,000 to extend services to the property line. Seller claimed that the contract containing the warranty had been merged into the deed. The court rejected seller's argument on the basis that such a warranty would not usually be included in the deed and was therefore collateral to the deed or independent of the deed. The doctrine of merger would be most clearly applicable to matters of title and quantity of land. Thus, if the contract calls for 10 acres and the legal description in the deed is for only 9.5 acres, upon discovering the insufficiency a buyer would be barred by the doctrine of merger from suit on the contract provision; *Empire Mgt. & Dev. v. Greenville Assoc., 496 S.E.2d 440 (Va. 1998)* (rent guarantee clause in sales contract collateral to conveyance and did not merge).

(n86)Footnote 109. *Long v. Fitzgerald, 659 N.Y.S.2d 544 (1977)* (general merger clause in deed will not bar claim for fraudulent inducement; specific disclaimer clauses, indicating purchasers had inspected premises, were acquainted with condition and took property "as is" would bar the claim).

(n87)Footnote 110. *Thibodeaux v. Holk, 540 So. 2d 1378 (Ala. 1989)* . *See also Reed v. Hassell, 340 A.2d 157 (Del. Super. 1975)* .

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CHAPTER 99 REAL ESTATE CONTRACTS

12-99 Thompson on Real Property, Thomas Editions § 99.07

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§ 99.07 Conditions.

[Go To Supp]

The two-stage method of transferring property (i.e., the agreement of sale and subsequent closing separated by an executory period of varying length) allows fertile minds to devise conditions that may serve to release either party from its contractual obligations. Most often the conditions relate to problems of concern to purchasers (e.g., ability to obtain rezoning or institutional financing commitment). However, conditions may also relate to seller's ability to correct some deficiency. n111

It is necessary to correctly distinguish between promises and conditions. A promise creates a duty on the part of the promisor to perform, and non-performance places the promisor in breach of contract. A condition is an event that is not certain to occur but which must occur (unless excused) before performance under the contract becomes due. Generally speaking, as far as buyer is concerned, the more conditions, attached to buyer's performance, and the broader they are phrased, the better. Seller's interest is usually the opposite. As much as sellers dislike conditions, they dislike warranties more. One way to overcome a seller's reluctance to accept a highly conditioned contract of sale is to first submit a draft containing a comprehensive set of seller's warranties. Seller's response may be to a suggest that the warranties be converted into conditions.

§ 99.07(a) Conditions for Purchaser's Protection.

The buyer's imagination and negotiating clout are the only limits on the conditions which may be inserted for the buyer's protection. For example, if the land is part of an assembly, purchaser should make settlement contingent upon the acquisition of contiguous parcels. Or, if a minimum acreage is required for the intended use, purchaser's obligation should be contingent upon the receipt of a satisfactory survey. Other common contingencies are site plan and subdivision approvals by local government and the availability of utilities. Any adverse change in zoning, actual or imminent, or any exercise of the power of eminent domain prior to settlement, should be included as grounds for termination of the contract. Similarly, if a parcel is being acquired to expand a structure on adjacent land, the purchaser will want assurance that the parcel is indeed contiguous with and adjacent to the purchaser's other property. Or, if the purchaser intends to assume a deed of trust, or is relying upon a tenant for income before development begins, the receipt of satisfactory "estoppel letters" from the mortgagee or tenant should be a condition to the buyer's obligations.

From the purchaser's perspective, conditions are used to achieve several objectives: (1) as a substitute for, or to supplement, seller's representations and warranties concerning some physical status of the real property (e.g., the nature and quality of seller's title, the character of the soil and subsurface of unimproved property, the rent roll of improved property); n112 (2) to enable purchaser to meet a perceived need, absent which purchaser is unwilling to consummate the transaction (e.g., obtaining a commitment for financing, securing a new tenant for vacant space); and (3) to enable the purchaser to effect some change to the property to facilitate its intended use (e.g., rezoning, subdivision approval, building permit). n113

In addition to the foregoing legitimate objectives, the conditions described below may be drafted so as to enable less scrupulous purchasers to strategically withdraw from the contract prior to closing for any reason whatsoever without forfeiting the deposit or incurring liability for damages for breach of contract. For example, a financing condition may describe the terms of financing so narrowly (perhaps by limiting purchaser's obligation to accept financing from a single specified lender) that a buyer could effectively manipulate whether or not the condition is satisfied. A structural inspection contingency that is subject to purchaser's "satisfaction," and without affording seller the opportunity to remedy defects, may be similarly manipulated.

With the above conditions inserted in the form, the purchase agreement begins to resemble an offer for an option. Indeed, a conditional contract is a hybrid option and agreement of sale with one major difference: If the purchaser is entitled to the full refund of purchaser's deposit if a condition cannot be satisfied, then the purchaser enjoys the best of both worlds--purchaser has effectively tied up the land during the feasibility period without paying compensation to the landowner.

However, a heavily conditioned contract may backfire on an unwary or overreaching purchaser. If the enforceability of the contract depends upon purchaser's unilateral subjective determination made in its sole and absolute discretion, a court may decide that the contract is illusory and, therefore, unenforceable by either party. n114 Knowledgeable purchasers protect against this result by providing for purchaser to recover something less than the entire deposit (i.e., for some nominal forfeiture to provide sufficient consideration and mutuality of obligation) in the event the contract is terminated by purchaser for non-satisfaction of condition.

The conditions for which the purchaser negotiates should be expressly waivable at purchaser's option. Courts have permitted sellers to walk away from deals where conditions could not be satisfied, notwithstanding purchasers' claims that the conditions were intended for the sole benefit of purchasers willing to waive them. n115

Finally, purchasers should be warned that a condition imposes a duty on the intended beneficiary to act diligently and in good faith to achieve its satisfaction. n116

COMPUTER-ASSISTED RESEARCH

LEXIS: Land or property or real w/50 builder or vendor or seller & buyer or purchaser w/50 condition! or contingen!

§ 99.07(a)(1) Feasibility Study.

A study period prior to settlement enables the purchaser to agree upon a contract and obtain control over the property before expending substantial sums on thorough investigation and market studies to determine the economic viability and likelihood of success of the proposed development. n117 Purchasers use the study period to identify, analyze and resolve potential problems posed by their intended acquisition of the subject property. For example, in the acquisition of property for development, buyer requires time to determine that water, gas, electricity, storm and sanitary sewer lines and other utilities are available at the perimeter of the site in sufficient capacity to service the buyer's intended development. Sophisticated sellers should not object to a reasonable feasibility period, and will use it to their advantage

by arguing that seller warranties should be limited because the purchaser will have had ample opportunity to make an independent investigation of the parcel.

A party vested with contractual discretion must exercise that discretion reasonably and may not do so arbitrarily and capriciously. Thus, an implied obligation of good faith and fair dealing may act as a limit on the purchaser's discretion in exercising a right to terminate if the cost of performance proves to be economically impractical. n118

§ 99.07(a)(2) Financing; Sale of Existing Property.

A competent financing contingency provision will address the following considerations:

1. The maximum amount sought to be borrowed by the purchaser, using the subject property as security, without which purchaser will be unable to perform its obligation to acquire the property.

2. The period of time over which, and the rate at which, the loan will be amortized or repaid (i.e., whether the loan will be self-amortizing or require a "balloon" payment).

3. The maximum interest rate, including "points," that purchaser is willing to pay.

4. Whether seller reserves the right to obtain financing for purchaser, including the right to provide financing by deferring a portion of the purchase price on terms no less favorable to purchaser than set forth in the financing contingency provision. n119

5. Time limits for each stage of the process, i.e., purchaser's application, receipt of commitment, etc.

6. An obligation that purchaser notify seller regarding satisfaction of the contingency and provide information and documentation to support a claim of non-satisfaction.

A purchaser seeking to rely upon the non-occurrence of a financing condition as an excuse for non-performance must be prepared to prove the purchaser's reasonable efforts made in good faith to obtain financing. n120 Thus, a purchaser who applies for a loan in excess of the amount specified in the financing contingency provision, or on terms otherwise more favorable than that described in the contingency, will not be entitled to invoke the condition and obtain the return of its deposit. n121 Applications for financing must be made in a manner that would cause a lender to evaluate the request seriously and respond formally. For example, where a residential real estate sales contract permitted purchasers to cancel the contract if they could not secure financing, oral inquiries made on two occasions to a mortgage broker as to whether purchasers would qualify for a loan did not satisfy the requisite level of good faith. However, the implied obligation to make reasonable efforts to obtain financing does not include the execution of a personal guarantee by the president and sole stockholder of a corporate purchaser. n122

An agreement by purchaser to use "best efforts" to satisfy a financing contingency imposes additional obligations on purchaser to secure a mortgage. In such circumstances, three contacts and one application have been held insufficient. n123

Reasonableness, good faith and best efforts are questions for determination by the trier of fact. Summary judgment would rarely be appropriate where there is a dispute over such factual questions. n124

It is a common feature in residential transactions for purchasers to condition the acquisition on the sale of their existing residences. In markets characterized by an excess inventory of unsold houses, sellers are frequently induced by their brokers to accede to such arrangements, but only if the contract of sale contains a so-called "kick-out" clause by which the property may continue to be offered for sale in the hope of finding a purchaser willing to make an unconditional offer at the same price, in which event the first purchaser must choose between waiving its contingency or terminating

the contract. n125

COMPUTER-ASSISTED RESEARCH

LEXIS: purchaser or buyer & reasonable! or best w/5 efforts or "good faith" w/50 financ!

§ 99.07(a)(3) Structural Inspection; Soil Tests; Infestation.

In an effort to minimize risk, the developer's obligation to purchase undeveloped land should be contingent upon purchaser's approval of engineering reports regarding soil conditions and drainage.

Seller should seek to impose some standard of objectivity on buyer's part in determining whether the physical inspection condition has been met. For example, a provision that there are no defects which would constitute violations of the building code is superior to a clause requiring satisfaction to purchaser's subjective satisfaction or in purchaser's unrestricted discretion. Similarly, seller should reserve the right to cure defects identified by purchaser's inspection, and to extend the time for closing accordingly. n126

§ 99.07(a)(4) Zoning.

It should be made a condition of purchaser's obligation to close on the acquisition of the subject property that there be no proceeding pending or threatened to change or redefine the zoning classification of any portion of the property. In the acquisition of undeveloped land, the premises should be finally and effectively zoned (without right of appeal) for purposes of buyer's intended development, including satisfactory rights of ingress and egress.

Where the buyer's obligation to acquire the property is subject to its ability to secure a rezoning to permit buyer's intended development, the contract of sale should further provide for seller's required joinder in executing an application and related documents, and affirmative duty to cooperate in purchaser's rezoning effort, all without cost or liability to seller. n127

§ 99.07(a)(5) Title.

The typical standard form purchase agreement is likely to contain the condition that the property be free of encumbrances with seller's good title of record and in fact, subject, however, to conditions and restrictions of record. That would not protect the buyer in the event that a title report shows public utility easements or lack of access to a major road two conditions that could impair the intended development. The purchaser may still be required to close rather than forfeit a substantial deposit. A knowledgeable purchaser will require that title to the property be marketable, good of record and in fact, and insurable under a full coverage owner's policy of title insurance issued by a title company of purchaser's selection, at standard rates and without exception, n128 although the purchaser may allow, as "permitted exceptions," matters which would not interfere with the planned improvement of the property.

§ 99.07(a)(6) Estoppel Letters.

It is customarily a condition of purchaser's obligation to close on the acquisition of income-producing property that purchaser shall have received estoppel letters from all tenants (or, at a minimum, from all anchor tenants and a specified percentage of satellite tenants) to the effect that (a) the lease is in full force and effect, and has not been amended; (b) tenant is not entitled to any renewal or expansion rights; (c) tenant does not have an option to purchase the property; (d) tenant has not prepaid any rent other than for the current month; (e) tenant is not entitled to any free rent or other concessions or abatement; (f) all work required under the terms of the lease to be performed by landlord has been satisfactorily completed, and tenant does not claim that landlord is in default in the performance of any of landlord's obligations under the terms of the lease; and (g) there are no security deposits except as specified.

Where a portion of the purchase price is payable by purchaser assuming or taking title subject to seller's existing mortgage, the receipt of a satisfactory estoppel certificate from seller's lender should be made a condition of purchaser's obligation to close. In addition to consenting to purchaser's acquisition of the subject property and certifying the current outstanding balance, date of next payment and escrow balance, the estoppel letter should unequivocably state that the loan is in good standing without default.

§ 99.07(b) Conditions for Seller's Protection.

As was the case with conditions for purchaser's protection, a condition imposes a duty on the intended beneficiary to act diligently and in good faith to achieve its satisfaction. Thus, a contract of sale contingent upon seller obtaining subdivision approval obligates seller to make good faith efforts to obtain approval. n129

FOOTNOTES:

(n1)Footnote 111. Sam W. Galowitz, *Selling the Flawed Property,* Real Est. Rev., Spring 1979.

(n2)Footnote 112. Indeed, it should be made a condition of purchaser's obligation to acquire the property that each and every one of seller's representations and warranties be true and correct on and as of the date of settlement.

(n3)Footnote 113. Theodore H. Hellmuth, Missouri Practice-Real Estate Law § 40 (1985).

(n4)Footnote 114. *Culbertson v. Brodsky, 788 S.W.2d 156 (Tex. App. 1990)* ; *Stone Mountain Props., Ltd. v. Helmer, 229 S.E.2d 779 (Ga. App. 1976)* .

(n5)Footnote 115. *Dale Mtg. Bankers Corp. v. 877 Stewart Ave. Assocs., 518 N.Y.S.2d 411 (1987)* ; *Mann v. Addicott Hills Corp., 384 S.E.2d 81 (Va. 1989)* ; *Savino v. Deleyer, 554 N.Y.S.2d 710 (N.Y. App. Div. 1990)* ; *W.W.W. Assocs. v. Giancontieri, 565 N.Y.S.2d 440 (1990)* .

(n6)Footnote 116. *Hunt v. Shamblin, 371 S.E.2d 591 (W. Va. 1988)* ; *Jamison v. Concepts Plus, Inc., 552 A.2d 265 (Pa. Super. 1988)* .

(n7)Footnote 117. A typical contract provision on the subject states as follows:

> Purchaser shall, before the expiration of ___ (___) days after the date hereof cause, at Purchaser's cost and expense, such structural, engineering, financial and/or other tests, investigations and studies as Purchaser may determine to be made. In the event that any such tests, investigations and/or studies indicate, in Purchaser's sole discretion, that Purchaser's intended purchase and use of the Property would not be economically feasible, then in that event Purchaser shall have the right, at its option, by said date, to terminate this Agreement by giving written notice to Seller, in which event the deposit shall be returned to Purchaser and all parties shall thereupon be released from any further liability or obligation hereunder. Purchaser shall have the right, at its own risk, to enter, or cause its agents or representatives to enter upon the Property for the purpose of making any of the aforesaid tests, investigations and/or studies.

(n8)Footnote 118. *Greer Props., Inc. v. LaSalle Nat'l Bank, 874 F.2d 457 (7th Cir. 1989)* .

(n9)Footnote 119. In *Kovarik v. Vesely, 89 N.W.2d 279 (Wis. 1958)* , the court granted specific performance to a seller, rejecting buyers' claim that they should not be required to accept financing from the seller where the financing contingency was silent on the subject and the institutional lender from whom they had agreed in the contract to seek financing declined their application. Other courts have been more receptive to buyer's arguments that it is not unreasonable or in bad faith for buyer to refuse to accept financing from a private seller, perhaps because buyer prefers an institutional lender to service the loan and consider requests for waivers, forebearances and extensions in the future

in accordance with established practices, and because buyer's decision to purchase is implicitly subject to the satisfactory outcome of an institutional lender's appraisal process. *Gardner v. Padro, 517 N.E.2d 1131 (Ill. App. 1987)* .

(n10)Footnote 120. *Compare Scherer v. Nase, 591 A.2d 1086 (Pa. Super. 1991)* (oral inquiries by purchaser held insufficient to satisfy purchaser's duty of making good faith and reasonable effort to satisfy financing contingency); *Liuzza v. Panzer, 333 So. 2d 689 (La. App. 1976)* (application by purchaser to a single lending institution held insufficient); *Ng v. Simons, 495 N.Y.S.2d 456 (1985)* (held insufficient for purchaser to refuse to accept a commitment from a third bank recommended by seller after making unsuccessful mortgage applications to two banks); *Grand & St. Louis Enters. v. Powell, 807 S.W.2d 129 (Mo. App. 1991)* ; *Luttinger v. Rosen, 316 A.2d 757 (Conn. 1972)* ; *Rand v. B.G. Pride Realty, 350 A.2d 565 (Me. 1976)* (application to one lending institution sufficient where additional applications would be futile); *Katz v. Chatelain, 321 So. 2d 802 (La. App. 1975)* (existence of central appraisal system used in common by all lenders made application to single lending institution sufficient). Donald M. Zupanek, *Sufficiency of Real Estate Buyer's Efforts to Secure Financing Upon Which Sale is Contingent, 78 A.L.R.3D 880 (1977)* ; *Diaz v. Rodriguez, 782 N.Y.S.2d 448 (2004)* (purchasers defaulted on their real estate contract by failing to notify the vendor about their ability to obtain financing by the deadline).

(n11)Footnote 121. *Price v. Bartkowiak, 715 F. Supp. 76 (S.D.N.Y. 1989)* (purchaser did not make good faith effort to satisfy financing contingency in applying for 30-year loan under contract contingent upon purchaser's ability to obtain financing commitment for "at least" 25 years); *Silva v. Celella, 545 N.Y.S.2d 367 (1989)* .

(n12)Footnote 122. *Educational Placement Serv. v. Watts, 789 S.W.2d 902 (Tenn. App. 1989)* .

(n13)Footnote 123. *Grossman v. Melinda Lowell, Attorney at Law, P.A., 703 F. Supp. 282 (S.D.N.Y. 1989)* :

> Lowell failed to use her best efforts to obtain a mortgage in this case. Three telephone calls and the submission of one application, which was denied several days following the signing of the contract, did not constitute 'best efforts', when at least 50 days still remained to obtain a mortgage, and there were many other avenues that were easily explorable, such as mortgage brokers and banks situated within a reasonable distance from the property.

(n14)Footnote 124. *Educational Placement Serv., Inc. v. Watts, 789 S. W. 2d 902 (Tenn. App. 1989)* .

(n15)Footnote 125. A typical contract provision on the subject states as follows:

> This contract is contingent on the purchaser's ability to complete closing of the sale of purchaser's present house located at _____ in _____. Purchaser shall have the right to terminate this contract and receive the return of purchaser's entire deposit in the event purchaser notifies seller, before the close of business on, _____ time being of the essence, that such closing has not been consummated through no fault of purchaser. Purchaser agrees that if seller hereafter obtains a back-up contract for the sale of subject property from another buyer which is not contingent upon the sale of the buyer's existing residence, then purchaser will have 72 hours in which to amend this contract by deleting this paragraph, or this contract shall be null and void and the deposit shall be returned to purchaser in full.

(n16)Footnote 126. In *Amend v. McCabe, 664 So. 2d 1183 (La. 1995)* , the court held that a provision of a real estate sales contract requiring the vendors to provide an inspection report relating to wood -destroying pest did not require the sellers to inspect the home for structural termite damage; *Kotkin v. Aronson, 815 A.2d 962 (N.J. 2003)* (discovery of and inability to eliminate radon gas justified termination of the contract).

(n17)Footnote 127. "Although it would normally be in the seller's interest to cooperate, as the land will sell for a much higher price if it is rezoned, there are dangers that antizoning pressures will be applied and the seller will be in a

better position obligated by contract to cooperate." John S. Kellogg, *Real Estate Contracts, in* The Real Estate Handbook 96 (Maury Seldin ed., 1980).

(n18)Footnote 128. These two qualifiers are necessary to overcome the maxim, applicable to most all forms of insurance, that there is no such thing as an uninsurable risk, only a too low premium.

(n19)Footnote 129. *Savino v. Deleyer, 554 N.Y.S. 2d 710 (1990)* .

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CHAPTER 99 REAL ESTATE CONTRACTS

12-99 Thompson on Real Property, Thomas Editions § 99.08

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§ 99.08 Minimizing Environmental Liability.

[Go To Supp]

In recent decades, the possibility of liability arising from contaminated property has become a major concern of both purchasers and sellers of real property. With potential cleanup costs running into the millions of dollars and the ever increasing scope of federal and state regulation, purchasers, sellers and even lenders n130 are now cautioned to fully investigate before finalizing any transfer of property.

§ 99.08(a) Federal Environmental Laws.

A variety of federal laws and regulations impact upon the transfer and ownership of real property. Liability under federal environmental laws is generally strict, joint and several.

§ 99.08(a)(1) National Environmental Policy Act.

Enacted in 1969, The National Environmental Policy Act n131 was intended as a Congressional declaration of national environmental policy. n132 It imposes an obligation on all federal agencies to consider the impact of the agency's actions on the environment. n133 While NEPA does not require any action for purely private projects, it does require an environmental assessment whenever any federal government funds will be used in connection with private projects, such as federal financing or funding of construction projects. n134

§ 99.08(a)(2) Resource Conservation and Recovery Act.

The Resource Conservation and Recovery Act n135 was designed to create a "cradle to grave" regulatory scheme over hazardous wastes. n136 RCRA regulates the generation, transportation, handling, storage and disposal of hazardous wastes, as identified by the statute. n137 While RCRA exempts small quantity generators of hazardous waste, anyone generating more than 100 kilograms of waste per month becomes subject to the record-keeping, permit and testing requirements. n138

RCRA encompasses all active generators of hazardous wastes and disposal sites. Therefore, anyone contemplating

purchase or sale (since RCRA imposes closure and post-closure requirements) n139 of such a site should consult RCRA for all necessary compliance requirements. Mere ownership of land may be sufficient basis for liability. n140

§ 99.08(a)(3) Clean Water Act.

The Clean Water Act n141 prohibits the unauthorized discharge of pollutants into navigable waters unless a permit is obtained in compliance with the National Pollutant Discharge Elimination System. n142 To promote compliance, CWA authorizes both civil and injunctive relief, and criminal penalties and fines up to $25,000 per day per violation. n143 Liability under CWA is strict, n144 joint and several. n145

§ 99.08(a)(4) Clean Air Act.

Substantially revised in 1990, the Clean Air Act prohibits the emission of pollutants into the air in violation of EPA-promulgated standards. n146 Regulation under the CAA is achieved through the joint efforts of both state and federal agencies. n147 Penalties for violations range from administrative penalties or fines to injunctions and criminal sanctions for knowing violations. n148

§ 99.08(a)(5) Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA).

The Comprehensive Environmental Response, Compensation, and Liability Act is the most significant environmental legislation affecting the purchase, sale and financing of real property. n149 Significantly amended in 1986, n150 CERCLA is designed to be remedial in nature n151 and to provide a means for the cleanup of hazardous waste sites and releases. n152 To effect the goals of CERCLA, definitions of such terms as "release," n153 "owner or operator," n154 "facility," n155 and "contractual relationship," n156 are intentionally broad, with the potential to encompass virtually any environmental contamination by any party associated with the land. n157

§ 99.08(a)(5)(A) Liability Under CERCLA.

Emphasizing its remedial purpose, judicial interpretation of CERCLA provides that liability be construed as strict. n158 The statutory definition of liability is the standard of liability under the Clean Water Act n159 which also has been construed as strict. n160 Liability is also joint and several, n161 retroactive, n162 and can be asserted without a showing of causation. n163 Once a party has been found liable under CERCLA, liability can include costs of cleanup or remedial actions taken by either the government or a private party. n164 Costs may also include damages for injury to natural resources and the expense of any health assessment or study. n165 The total of these costs can potentially run into the millions of dollars and may far exceed the value of the property after cleanup. n166

§ 99.08(a)(5)(B) Potentially Responsible Parties.

CERCLA provides for four classes of potentially responsible parties (PRPs). n167 Once again, these categories are defined broadly and are designed to bring all possible parties within the liability of CERCLA.

The four classes of PRPs include:

1. the present owner or operator of a facility; n168

2. the owner or operator of a facility at the time any hazardous substance was disposed of;

3. any person who arranged for disposal or treatment or who arranged with a transporter for transport of a hazardous substance; and

4. any person who accepted any hazardous substance for transport to a disposal or treatment facility.

n169

Perhaps one of the most important implications of the four categories of PRPs is that the current owner or operator need not have been the party that either disposed of, or caused a release of any hazardous substances. n170 Liability of a PRP may be asserted even when there has not yet been a release but there exists a threat of release. n171

§ 99.08(a)(5)(C) CERCLA Statutory Defenses.

CERCLA provides three defenses. Two are asserted rarely. The third, while seemingly more broad, has been construed quite narrowly. n172

The first two defenses encompass acts of God and acts of war n173 and provide little in the way of practical relief to anyone facing CERCLA liability. The third defense, known as the "innocent purchaser" defense, provides greater opportunity to escape liability. n174 CERCLA § 9607(b)(3) provides that there shall be no liability imposed on a person otherwise liable who can establish, by a preponderance of the evidence, that a release was caused solely by an act or omission of a third party, other than an employee or in connection with a contractual relationship, if the party (a) exercised due care, and (b) took all precautions against foreseeable acts or omissions of any third party.

While at first glance this seems to provide an escape from liability for any party exercising due care, it has not been construed nearly so broadly. The defense excludes persons whose liability is based on a contractual relationship with a third party. n175 The term contractual relationship is extensively defined to include land contracts, deeds or other instruments transferring title or possession. n176 However, any PRP acquiring property in this way may escape liability if it can be shown that the PRP, at the time of acquisition, did not know and had no reason to know the property contained any hazardous substances. n177 This so-called "innocent purchaser" defense is predicated upon the showing of several factors, including establishing that at the time of acquisition all "appropriate inquiry into the previous ownership and uses of the property consistent with good commercial or customary practice ... were undertaken." n178

Factors such as the specialized knowledge of the PRP, relationship of the purchase price to the value of uncontaminated property, the obvious presence of contamination and the ability to detect such contamination are all to be considered by the courts. n179 These various factors have become elements of what has come to be known as environmental due diligence, and is perhaps the most important element in a successful challenge to CERCLA liability. n180 Absent a showing of the proper exercise of due care, an innocent landowner defense will not be available. n181

COMPUTER-ASSISTED RESEARCH

LEXIS: CERCLA or "comprehensive environmental response compensation and liability act" w/50 defense*

§ 99.08(b) State Environmental and Common Law Claims.

§ 99.08(b)(1) State Environmental Laws.

Various federal statutes allow states to establish their own permit programs and thus administer federal law at the state level. The Clean Water Act, for example, authorizes each state desiring to administer its own permit program for discharges to submit a plan and, upon approval by the EPA, to issue permits according to that plan. n182 The EPA retains the right to withdraw approval and administer the plan itself. n183 Similar provisions can also be found in the Clean Air Act. n184

In addition to state statutes enacted to implement clean air and clean water requirements, many states have enacted a variety of statutes regulating the transfer of contaminated property, solid waste disposal and creating their own superfund requirements. n185 Because of the potential liability associated with these regulations, it is advisable to

investigate the appropriate state regulations before a transfer of ownership is completed or even contemplated.

§ 99.08(b)(2) State Common Law Claims.

In addition to statutory liability, a variety of state common law claims may be brought asserting either additional liability or as a defense to possible liability. Common law actions may include nuisance, trespass, negligence, strict liability and misrepresentation.

A nuisance claim may assert either private or public nuisance. A private nuisance claim may be brought by an individual whose property rights have been disturbed, while a public nuisance is actionable where the property and health or safety of a considerable number of persons are threatened. n186 However, where purchasers acknowledge in the contract that they have inspected and are familiar with the condition of the property, they may be subsequently barred from asserting a claim of nuisance or trespass. n187

Some courts have held that the disposal of hazardous substances on property constituted an ultra-hazardous activity and, therefore, the former property owner could be held strictly liable to a subsequent purchaser. n188

Certain contract claims, such as fraud and misrepresentation, have been brought against sellers with varying success. One court has held that where the vendor intentionally failed to disclose mercury contamination and the purchaser detrimentally relied on the vendor's non-disclosure, a colorable claim for fraud was established. n189 In contrast, the Fourth Circuit has held that, under South Carolina law, a vendor was not required to disclose environmental problems when those problems could have been discovered through other sources and, therefore, the purchaser could not recover on the theory of negligent misrepresentation. n190

§ 99.08(c) Risk Allocation Through Contract Provisions.

Various contractual provisions and doctrines have been asserted as defenses to liability for environmental damage. These include "as is" clauses, representations, warranties, indemnifications and the doctrine of caveat emptor. While these claims have had some success, perhaps the best defense is the knowledge that comes from a thorough investigation of property before the transfer of any interest.

§ 99.08(c)(1) "As Is" Clauses.

A number of cases have dealt with the application of "as is" clauses contained in contracts of sale. As a general rule, courts have construed these clauses as merely a warranty disclaimer and, as such, preclusive only of claims based on breach of warranty. n191 The "as is" clause cannot act to shift affirmative obligations of the parties imposed by statute, independent of the contract. n192 As a result, "as is" clauses offer little protection to a seller of contaminated property unless it can be established that the "as is" clause was negotiated and was more than standard boiler-plate. n193

§ 99.08(c)(2) Representations and Warranties.

Often a purchaser will seek warranties from the seller that the property complies with all applicable laws. n194 Warranties and representations are also useful to force the seller to focus attention on the condition of the property, former uses, disposal of hazardous substances and possible spills or discharges. Environmental warranties may be conditioned as to time limitations and materiality standards.

§ 99.08(c)(3) Indemnification.

Although contractual indemnification provisions can never defeat a claim of liability asserted by the government, they may be useful in defeating or minimizing claims asserted by third parties. n195 Language found in CERCLA, while apparently contradictory, has been interpreted as allowing parties to indemnify themselves against the risk of CERCLA

liability. CERCLA § 9607(e) provides that:

No indemnification, hold harmless, or similar agreement or conveyance shall be effective to transfer from the owner or operator of any facility or from any person who may be liable for a release or threat of release under this section, to any other person the liability imposed under this section. Nothing in this subsection shall bar any agreement to insure, hold harmless or indemnify a party to such agreement for any liability under this section. n196

While the majority of courts interpret this language as allowing private parties to enter into indemnity agreements, there have been several contrary interpretations. n197 The first such interpretation construed the second sentence of § 9607(e) as completely negating the first, thereby allowing parties to negotiate freely over CERCLA liability. n198 This interpretation has been criticized as an attempt to defeat the remedial policy of CERCLA by allowing parties to attempt to indemnify themselves against government liability. n199

A second interpretation asserts that indemnification clauses between PRPs are per se invalid, and only those agreements that allocate liability to third persons, such as insurance companies, are valid. n200 This approach would allow liability to be contractually expanded, but not reduced or shifted. n201 This result has also been criticized as being opposed to the generally favored policy of freedom of contract. n202

The third, and most widely accepted, approach provides that CERCLA § 9607(e) should be read as allowing parties to negotiate, not with respect to government liability, but to reach indemnification agreements between themselves. n203 This approach seems to be the most logical. By allowing parties to indemnify against possible liability they may increase the possibility of financial responsibility, thereby supporting CERCLA's remedial goals.

Having determined that indemnification agreements between PRP's are allowable, the next issue is whether such an agreement contemplates liability such as CERCLA. Courts have held that, where there is no indication the parties contemplated such liability, the indemnification provision will not be applicable. n204 Other courts have held that, where indemnification provisions are sufficiently broad, they will indemnify against CERCLA liability despite the failure to specifically mention CERCLA. n205

Consideration should be given to requiring the indemnifying party to provide an escrow arrangement or letter of credit to ensure the ability to meet claims that may arise. n206

COMPUTER-ASSISTED RESEARCH

LEXIS: CERCLA or "comprehensive environmental response compensation and liability act" & indemni! & property

§ 99.08(c)(4) Caveat Emptor.

The doctrine of caveat emptor has been interpreted as not in keeping with the policies underlying CERCLA. n207 In reaching this conclusion courts have considered that application of the doctrine would completely bar recovery by a purchaser regardless of other equities affecting the parties. n208 While not allowed as a defense to liability, caveat emptor may be considered in mitigation of the amount due. n209

§ 99.08(c)(5) Environmental Audits.

With the ever increasing potential for environmental liability in any real estate transaction, it is in the best interests of both purchaser and seller to conduct an environmental audit to determine the likelihood of potential liability before finalizing or even entering into a contract of sale. The purpose of the environmental audit is to provide all information necessary so the parties can decide the best way to proceed with the transaction, if at all. n210 Knowledge of the environmental condition of property is of obvious importance to the purchaser's ability to establish itself as an innocent

purchaser. n211 The value of an environmental audit to the seller is in alerting it to currently unknown conditions, and the need to negotiate with the purchaser concerning allocation of the cost of cleanup before the sale. The results of the audit may suggest to seller the need to rescind the contract and keep control over the property and its cleanup. In the wake of *Fleet Factors*, many lenders will not extend credit without an environmental audit. n212

Should the parties decide to enter into a contract before conducting an environmental audit, the contract should provide for the right to terminate the contract in the event the audit shows substantial contamination. Seller may prefer to terminate the contract in order to retain control over the cleanup. n213 A termination provision should state the triggering mechanism (e.g., cleanup cost exceeding a certain dollar amount). The contract should allocate the cost of the environmental audit and require that information be kept confidential.

Both parties will want to approve the firm conducting the audit; both parties may want a representative present when samplings are taken or interviews are conducted; and both parties may request copies of all documents generated.

The audit should include a thorough site inspection, a review of the chain of title, former uses of the site, seller's environmental records, EPA files, and the conduct of soil and groundwater samples. Seller may want to restrict the times the audit is to be conducted and require advance notice so as to avoid interference with seller's business.

The contract should also provide for the consequences if contamination is found, such as indemnification, abatement of the price, postponement of the scheduled closing date to allow cleanup to occur before closing, or termination of the transaction. n214

FOOTNOTES:

(n1)Footnote 130. *See United States v. Fleet Factors Corp., 901 F.2d 1550 (11th Cir. 1990) , reh'g denied, 911 F.2d 742 (1990) , cert. denied, 111 S. Ct. 752 (1991)* (factoring company held liable as owner or operator under CERCLA since it had "participated in the financial management to a degree indicating a capacity to influence the operator's treatment of hazardous wastes"). *But see In re Bergsoe Metal Corp., 910 F.2d 668 (9th Cir. 1990)* (when sole purpose is to provide financing and lender did not participate in actual management, lender will not be considered an owner or operator under CERCLA).

(n2)Footnote 131. National Environmental Policy Act (hereinafter NEPA), *42 U.S.C. §§ 4321 et seq.*

(n3)Footnote 132. NEPA § 4331.

(n4)Footnote 133. *40 C.F.R. Part 1500 (1978).*

(n5)Footnote 134. NEPA *§ 4332* and *40 C.F.R. § 1502 et seq.*

(n6)Footnote 135. Resource Conservation and Recovery Act (hereinafter RCRA), *42 U.S.C. § 6901 et seq.*

(n7)Footnote 136. Interstate And Foreign Commerce Commission, H.R. Rep. No. 1016 pt. 1, 96th Cong., 2d Sess. 17, *reprinted in* 1980 U.S.C.C.A.N. 6119, 6120.

(n8)Footnote 137. *See* list of hazardous wastes at *40 C.F.R. § 261.1 et seq.*

(n9)Footnote 138. RCRA § 9621(d).

(n10)Footnote 139. RCRA §§ 6924-6925.

(n11)Footnote 140. *See United States v. Price, 523 F. Supp. 1055 (D.N.J. 1981) , aff'd, 688 F.2d 204 (3d Cir. 1982) .*

(n12)Footnote 141. Federal Water Pollution, Prevention and Control Act (hereinafter CWA), *33 U.S.C. § 1251 et seq.*

(n13)Footnote 142. National Pollutant Discharge Elimination System, CWA § 1342.

(n14)Footnote 143. CWA § 1319.

(n15)Footnote 144. *Klatt v. United States, 965 F.2d 743 (9th Cir. 1992)* ; *Steuart Transp. Co. v. Allied Towing Corp., 596 F.2d 609 (4th Cir. 1979)* ; CWA § 1321(f).

(n16)Footnote 145. *In re Complaint of Berkley Curtis Bay Co., 557 F. Supp. 335 (S.D.N.Y. 1983)* .

(n17)Footnote 146. Clean Air Act (hereinafter CAA), *42 U.S.C. §§ 7401 et seq.*, as amended 1990.

(n18)Footnote 147. CAA § 7408 *et seq*. The EPA sets up Air Quality Control Regions for which National Ambient Air Quality Standards (N.A.A.Q.S.) are established. Each state must create a State Implementation Plan (S.I.P.) designed to achieve the N.A.A.Q.S. within its region. The EPA must approve the S.I.P. If not approved, the EPA will set its own standards resulting in the state's loss of its ability to regulate.

(n19)Footnote 148. CAA § 7413.

(n20)Footnote 149. Comprehensive Environmental Response, Compensation, and Liability Act (hereinafter CERCLA), *42 U.S.C. § 9601 et seq.*

(n21)Footnote 150. Superfund Amendments and Reauthorization Act of 1986, Pub. L. No. 99-499, codified at *42 U.S.C. §§ 9607-9675*.

(n22)Footnote 151. *See United States v. Alcan Alum. Corp., 964 F.2d 252 (3d Cir. 1992)* .

(n23)Footnote 152. *See New York v. Shore Realty Corp., 759 F.2d 1032 (2d Cir. 1985)* .

(n24)Footnote 153. CERCLA § 9601(22). The term "release" means any spilling, leaking, pumping, pouring, emitting, emptying, discharging, injecting, escaping, leaching, dumping, or disposing into the environment (including the abandonment or discarding of barrels, containers, and other closed receptacles containing any hazardous substance or pollutant or contaminant).

(n25)Footnote 154. CERCLA § 9601(20)(A).

(n26)Footnote 155. CERCLA § 9601(9). The definition includes any building, structure, pipeline, well, pit, pond or any site or area where a hazardous substance has been deposited, stored, disposed of or otherwise come to rest.

(n27)Footnote 156. CERCLA § 9601(35)(A). The definition specifically includes land contracts, deeds, or other instruments transferring title or possession.

(n28)Footnote 157. CERCLA § 9601(9). CERCLA specifically excludes environmental contamination resulting from consumer-related products.

(n29)Footnote 158. *New York v. Shore Realty Corp., 759 F. 2d 1032 (2d Cir. 1985)* .

(n30)Footnote 159. CERCLA § 9601(32); *see* CWA § 1321.

(n31)Footnote 160. *See Klatt v. United States, 965 F.2d 743 (9th Cir. 1992)* ; *Steuart Transp. Co. v. Allied Towing Corp., 596 F.2d 609, 613 (4th Cir. 1979)* ; *United States v. Northeastern Pharmaceutical & Chem. Co., 579 F. Supp. 823 (W.D. Mo. 1984) , aff'd in part, rev'd in part and remanded, 810 F.2d 726 (8th Cir. 1986) , cert. denied, 484 U.S.*

848 (1987) .

(n32)Footnote 161. *United States v. Alcan Aluminum Corp., 964 F. 2d 252 (3d Cir. 1992)* ; *United States v. Hooker Chems. & Plastics Corp., 680 F. Supp. 546 (W.D.N.Y. 1988)* .

(n33)Footnote 162. *United States v. Hooker Chems. & Plastics Corp., 680 F. Supp. 546, 556 (W.D.N.Y. 1988)* (while CERCLA contains no unequivocal statement that its liability provisions apply retroactively, CERCLA's legislative history suggests that the statute was enacted as a means of compelling the waste disposal industry to correct past mistakes). *See also O'Neil v. Picillo, 883 F.2d 176 (1st Cir. 1989)* , *cert. denied, 493 U.S. 1071 (1990)* .

(n34)Footnote 163. *New York v. Shore Realty Corp., 759 F.2d 1032,1043 (2d Cir. 1985)* at 1043 (§ 9607(a)(1) unequivocally imposes strict liability on the current owner of a facility from which there is a release or threat of release, without regard to causation). *See also* Rufus C. Young, Jr., *Handling the Impacts of Hazardous Waste on Land Use and Redevelopment, Planning, Regulation, Litigation, Eminent Domain, and Compensation* (C629 A.L.I.-A.B.A. 739 July 1991), and Robert I. McMurray, *Hazardous Waste and Contamination Liability and Remediation, Recent Developments in Land Use Law* (Q203 A.L.I.-A.B.A. 1991, January 1991).

(n35)Footnote 164. *Purolator Prods. Corp. v. Allied-Signal, Inc., 772 F. Supp. 124 (W.D.N.Y. 1991)* .

(n36)Footnote 165. CERCLA § 9607 (a)(1)-(4)(A)-(D).

(n37)Footnote 166. *See United States v. Atlas Mineral & Chems., Inc., 797 F. Supp. 411 (E.D. Pa. 1992)* (total cleanup costs of approximately $15 million).

(n38)Footnote 167. CERCLA § 9607(a).

(n39)Footnote 168. The term "owner" is construed broadly, and can extend as far as corporate officers and stockholders depending on the extent the person participates in management. *See New York v. Shore Realty Corp., 759 F.2d 1032 (2d Cir. 1985)*United States v. Carolawn Co., (D.S.C. 1984) ; *United States v. Wade, 577 F. Supp. 1326 (E.D. Pa. 1983)* .

(n40)Footnote 169. CERCLA § 9607(a)(1)-(4).

(n41)Footnote 170. *See Greenwood Mills, Inc. v. Russell Corp., 981 F.2d 148 (4th Cir. 1992)* ; *Tanglewood East Homeowners v. Charles-Thomas, Inc., 849 F.2d 1568 (5th Cir. 1988)* (brokers, developers and construction companies may be held liable under CERCLA as owners or operators of a facility).

(n42)Footnote 171. CERCLA § 9601(22). *See New York v. Shore Realty Corp., 759 F. 2d 1032 (2d Cir. 1985)* (property owner's lack of expertise in handling hazardous waste and failure to license the facility amounted to a threat of release for purposes of CERCLA).

(n43)Footnote 172. CERCLA § 9607(b)(1)-(3).

(n44)Footnote 173. CERCLA § 9607(b)(1) and (2).

(n45)Footnote 174. CERCLA § 9607(b)(3); *Westwood Pharmaceuticals, Inc. v. National Fuel Gas Distribution Corp., 964 F.2d 85 (2d Cir. 1992)* (innocent landowner defense may apply to seller of property, if seller does not learn of hazardous substances, or discloses its knowledge, and seller exercises due care and takes precautions against foreseeable acts). For further discussion of CERCLA defenses, *see* Jeff Civins, *Environmental Law Concerns in Real Estate Transactions, 43 S.W. L.J. 819 (1990);* McMurray, *supra* note 163.

(n46)Footnote 175. *See United States v. Rohm & Haas Co., 790 F. Supp. 1255 (E.D. Pa. 1992)* (owner acquiring portion of landfill facility by conveyance was not entitled to benefit of third party defense) *reversed and remanded by*

States v. Rohm & Haas Co., 2 F.3d 1265 (3d Cir. 1993) ; *United States v. Hooker Chems. & Plastics Corp., 680 F. Supp. 546 (W.D.N.Y. 1988)* (disposer of hazardous waste could not assert third party defense against liability for response costs where it had a direct or indirect contractual relationship with one or more of the parties it claimed were solely responsible for the release).

(n47)Footnote 176. CERCLA § 9601(35)(A).

(n48)Footnote 177. *Id.*

(n49)Footnote 178. CERCLA § 9601(35)(B). *See Greenwood Mills Inc. v. Russell Corp., 981 F. 2d 148 (4th Cir. 1992)* (because environmental problems at textile plant could be uncovered by reasonable investigation and full extent of problems could have been determined from files of owner and Department of Health and Environmental Control, purchaser could not establish innocent purchaser defense).

(n50)Footnote 179. CERCLA § 9601(35)(B).

(n51)Footnote 180. *See United States v. Serafini, 706 F. Supp. 346 (M.D. Pa. 1988)* (question of fact existed as to whether defendant's failure to inspect or inquire was consistent with good commercial and customary practices when, at the time of acquisition, hundreds of abandoned drums were visible on the surface).

(n52)Footnote 181. *United States v. Monsanto Co., 858 F.2d 160 (4th Cir. 1988) , cert. denied, 490 U.S. 1106 (1989)* .

(n53)Footnote 182. CWA § 1342(b).

(n54)Footnote 183. CWA § 1342(C).

(n55)Footnote 184. CAA § 7410.

(n56)Footnote 185. *See Cal. Health And Safety Code § 25359.7*; *Colo. Rev. Stat. § 25-15-206*; Conn. Transfer Act, *Conn. Gen. Stat. § 22a-134*; Environmental Land and Water Management Act, *Fla. Stat. Ann. § 380.012-.10*; Ill. Responsible Property Transfer Act of 1988, HR 3462, Ill. Ann. Stat. ch. 111-1/2, para. 1021c(N); Superfund Law, *Kan. Stat. Ann. §§ 65-3452(a) to 3459* (1989); Environmental Response and Liability Act, *Minn. Stat. Ann. §§ 115B.01-.24*; Missouri Hazardous Waste Management Statutes, *Mo. Rev. Stat. §§ 260.350 - 260.430*; New Jersey's Environmental Cleanup Responsibility Act, *N.J. Stat. Ann., §§ 13:1* K-6 *et seq.* (prohibits transfer of industrial property title unless the site is shown to be free of hazardous waste); Pennsylvania's Hazardous Sites Cleanup Act, *35 Pa. Cons. Stat. Ann. § 6020.101 et seq.*

(n57)Footnote 186. *See New York v. Shore Realty Corp., 759 F.2d 1032 (2d Cir. 1985)* .

(n58)Footnote 187. *Niecko v. Emro Mktg. Co., 769 F. Supp. 973 (E.D. Mich. 1991)* .

(n59)Footnote 188. *T & E Indus. v. Safety Light Corp., 587 A.2d 1249 (N.J. 1991)* .

(n60)Footnote 189. *New Jersey Dep't of Envt'l Protection v. Ventron Corp., 468 A.2d 150 (N.J. 1983)* .

(n61)Footnote 190. *Greenwood Mills, Inc. v. Russell Corp., 981 F. 2d 148 (4th Cir. 1992)* .

(n62)Footnote 191. *Wiegmann & Rose Int'l Corp. v. N.L. Indus., 735 F. Supp. 957 (N.D. Cal. 1990)* ; *Southland Corp. v. Ashland Oil, Inc., 696 F. Supp. 994 (D.N.J. 1988)* ; *Channel Master Satellite Sys. v. J.F.D. Elecs. Corp., 702 F. Supp. 1229 (E.D.N.C. 1988)* .

(n63)Footnote 192. *Channel Master Satellite Sys. v. J.F.D. Elecs. Corp., 702 F. Supp. 1229, 1232 (E.D.N.C. 1988)*

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(n64)Footnote 193. *See Mardan v. C.G.C. Music, Ltd., 804 F.2d 1454 (9th Cir. 1986)* (interpreting a separate settlement agreement in a case where both parties knew the property was contaminated); *Scafe v. Property Restorations, Inc., 2004 Ohio App. LEXIS 5801* (No. 84447, Nov. 24, 2004) ("as is" clause placed risk of defects in the home on the purchaser); *Klasa v. Rogers, 2004 Ohio App. LEXIS 4077* (No. 83374, Aug. 26, 2004) ("as is" clause did not protect a vendor who fraudulently concealed water problems in the house basement).

(n65)Footnote 194. *See Nunn v. Chemical Waste Mgt., Inc., 856 F.2d 1464 (10th Cir. 1988)* .

(n66)Footnote 195. *See United States v. Atlas Minerals & Chems., Inc., 797 F. Supp. 411 (E.D. Pa 1992) Purolator Prods. Corp. v. Allied-Signal, Inc., 772 F. Supp. 124 (W.D.N.Y. 1991)* .

(n67)Footnote 196. CERCLA § 9607(e).

(n68)Footnote 197. *See Olin Corp. v. Consolidated Alum. Corp., 807 F. Supp. 1133 (S.D.N.Y. 1992)* .

(n69)Footnote 198. *See Versatile Metals, Inc. v. Union Corp., 693 F. Supp. 1563 (E.D. Pa. 1988)* ; *Chemical Waste Mgt. Inc. v. Armstrong World Indus., 669 F. Supp. 1285 (E.D. Pa. 1987)* .

(n70)Footnote 199. *Olin Corp. v. Consolidated Alum. Corp., 807 F. Supp. 1133, 1138 (S.D.N.Y. 1992)* .

(n71)Footnote 200. *A.M. Int'l, Inc. v. International Forging Equip., 743 F. Supp. 525 (N.D. Ohio 1990)* .

(n72)Footnote 201. *Olin Corp. v. Consolidated Alum. Corp.,807 F. Supp. 1133, 1138 (S.D.N.Y. 1992)* .

(n73)Footnote 202. *Id.*

(n74)Footnote 203. *Olin Corp. v. Consolidated Alum. Corp., 807 F. Supp. 1133, 1139 (S.D.N.Y. 1992)* (citing additional cases); *Purolator Prods. Corp. v. Allied-Signal, Inc., 772 F. Supp. 124 (W.D.N.Y. 1991)* ; *Channel Master Satellite Sys. v. J.F.D. Elecs. Corp., 702 F. Supp. 1229 (E.D.N.C. 1988)* ; *Southland Corp. v. Ashland Oil, Inc., 696 F. Supp. 994 (D.N.J. 1988)* .

(n75)Footnote 204. *Southland Corp. v. Ashland Oil, Inc., 696 F. Supp. 994 (D.N.J. 1988)* (indemnification agreement was not sufficient to allocate all waste disposal liability to the purchaser); *Channel Master Satellite Sys. v. J.F.D. Elecs. Corp., 702 F. Supp. 1229 (E.D.N.C. 1988)* .

(n76)Footnote 205. *Olin Corp. v. Consolidated Aluminum Corp., 807 F. Supp. 1133 (S.D.N.Y. 1992)* .

(n77)Footnote 206. *See* Penny L. Parker and John Slavich, *Contractual Efforts to Allocate the Risk of Environmental Liability: Is There a Way to Make Indemnities Worth More Than the Paper They are Written On?, 44 S.W. L.J. 1349 (1991).*

(n78)Footnote 207. *See Smith Land & Improvement Corp. v. Celotex Corp., 851 F.2d 86 (3d Cir. 1988)* .

(n79)Footnote 208. *Id. at 90 . See also T & E Indus. v. Safety Light Corp., 546 A.2d 570 (N.J. 1988)* (caveat emptor in not a ban to absolute liability unless purchaser knowingly accepts the burden of environmental liability).

(n80)Footnote 209. *Smith Land & Improvement Corp. v. Celotex Corp., 851 F. 2d 86, 90 (3d Cir. 1988)* .

(n81)Footnote 210. *See* Albert S. Skip and Samuel H. Israel, *Private CERCLA Litigation & How to Handle It? How To Avoid It?* 25(4) Real Prop. Prob. & Trust J. 705 (1991); Dale A. Guriglia, *Environmental Issues in Real Estate Contracts,* Advanced Real Estate Law In Missouri (1991).

(n82)Footnote 211. *See* § 99.08(a)(5)(C).

(n83)Footnote 212. *United States v. Fleet Factors Corp. 901 F. 2d 1550 (11th Cir. 1990)* , (secured creditor held liable as owner or operator as a result of its participation in the management of a facility to a degree which indicated a capacity to influence the treatment of hazardous waste).

(n84)Footnote 213. *See Garb-Ko, Inc. v. Lansing-Lewis Servs. 423 N.W.2d 355 (Mich. App. 1988)* (allowing seller to rescind where environmental contamination was discovered after the contract was signed).

(n85)Footnote 214. *See* Jeff Civins, *Environmental Law Concerns in Real Estate Transactions, 43 S.W. L.J. 819 (1990).*

Thompson on Real Property, Thomas Editions

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CHAPTER 99 REAL ESTATE CONTRACTS

12-99 Thompson on Real Property, Thomas Editions § 99.09

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§ 99.09 Equitable Conversion and Risk of Loss.

There is generally a hiatus, known as the executory period, between the time a real estate purchaser identifies a property on the one hand, and when the transfer of title and possession occurs. The parties theoretically could sign the contract and close simultaneously, but ordinarily do not. The reason is that purchaser's willingness to acquire the property is subject to the satisfactory resolution of various contingencies including financeability, title search and survey, structural inspection, soil tests, review of tenant leases, rezoning and the like. Although purchaser could probably investigate all of these matters and submit a non-contingent offer to purchase, most purchasers are reluctant to invest the substantial sums required to investigate a property without first obtaining the seller's commitment to sell at a mutually satisfactory price. Also, purchaser fears the loss of the property during the pre-contractual study period to a rival purchaser who studies faster, or who thinks to tie up the property before commencing the study process.

Because of the need for this hiatus period between contract formation and contract performance, it is foreseeable that the operative facts upon which the parties structured the acquisition of improved real property may change. Most dramatically, such change may be the result of fire, hurricane, tornado or other act of God. The issue of who bears the risk of loss during the executory period also arises in the context of condemnation and rezoning.

The common law risk of loss rule in a particular state is a "default" rule in the sense that it becomes operative only if the parties fail to agree and make provision in the contract of sale for their respective rights and responsibilities in the event of loss.

§ 99.09(a) Fire; Casualty.

The risk of fire or casualty loss during the executory period may be allocated in a variety of ways. n215 However, even when the risk has been allocated, questions may arise as to the allocation of insurance proceeds in the event of damage to the property.

As a general rule, in the absence of a specific provision in the contract, the risk of loss is usually allocated in one of three ways. n216 The majority rule holds that, by operation of the doctrine of equitable conversion, the vendee becomes the equitable owner of the property and, as a result, bears the risk of loss. n217 Equitable conversion operates to place

the equitable title in the vendee, while the vendor retains bare legal title. While possession is not necessary for equitable conversion, it may serve to reenforce the placing of the burden on the vendee.

Although equitable conversion remains the majority view, courts in several jurisdictions have attempted to ease the burden of its application on the vendee. These courts have held that where the vendor brings suit for either damages or specific performance, as a result of the vendee's failure to perform due to damage to the property during the executory period, the vendor will not prevail where the vendor has failed to fulfill all the contract conditions. n218 For example, where the vendor failed to meet the condition precedent of conveying marketable title, equitable conversion would not apply to place the risk of loss on the vendee. n219

A minority of states have adopted the position taken by the Uniform Vendor and Purchaser Risk Act that the risk of loss remains with the vendor during the executory period unless and until the vendee obtains possession. n220 This view is based on the belief that the party in possession is likely to have the greater interest in protecting the property. Several states have adopted this view, which leaves the risk of loss with the vendor unless and until the vendee acquires possession. n221

A third rule leaves the risk of loss with the vendor until the transfer of title. This has been termed the "Massachusetts Rule." n222 According to this interpretation, where the value of the improvements constitutes a large part of the total contract price, and the contract indicates that the buildings are an important part of the contract, the contract will be construed as no longer binding if the improvements are destroyed. n223 In this situation, the purchaser is entitled to rescission, as well as the return of its deposit. n224 If, however, the damage is not significant, or the improvements did not constitute a significant part of the contract, then the vendor is entitled to specific performance with an appropriate abatement in the contract price. n225

The best way to avoid dispute is to specifically allocate risk of loss in the contract. Any such provision should specify which party, either vendor or vendee, will incur the cost of insurance. It is also advisable to provide whether the property shall be repaired or whether the insurance proceeds should be used as an abatement of the purchase price.

It is generally held that, where the doctrine of equitable conversion is operative, both the vendee, as equitable owner, and the vendor, as the holder of legal title, have an insurable interest in the property. n226 An analogous, although somewhat different, situation arises where the parties have entered into an installment sales contract or a contract for deed. Generally, equitable conversion is applicable and both parties have an insurable interest in the property. However, unlike the typical deed of trust or mortgage, insurance proceeds will not be applied to repair of damages, regardless of whether the vendor or vendee has paid the premiums, unless the contract specifically provides. n227 This means that the vendor is entitled to have insurance proceeds either held in trust and applied to the monthly installments or applied directly to the remaining purchase price, n228 and the vendee is not entitled to rescind the contract. n229

It has also been held that where the risk of loss was on the vendor, and on the eve of closing the property was damaged by lightning, the seller was not allowed to receive the full purchase price and retain the insurance proceeds. n230 However, where property had been damaged prior to the execution of the contract and the contract made no reference to the insurance proceeds, the seller was entitled to retain the proceeds and the buyer took the property as is. n231

COMPUTER-ASSISTED RESEARCH

LEXIS: purchase* & title & allocat! w/50 risk w/50 fire or casualty or loss

§ 99.09(b) Condemnation.

The *Fifth Amendment of the Constitution* provides, in part, that private property shall not be taken for public use without just compensation. n232 Property may be condemned for a variety of government uses. n233 When the property

condemned is the subject of an executory contract, questions arise as to who, between the vendor and vendee, bears the risk of loss, or, perhaps more appropriately, who is entitled to the condemnation award. Generally, compensation is due to any person who owns or has an interest in the property at the time it is condemned, n234 which may be the owner of either the legal or the equitable title. n235

When the doctrine of equitable conversion is applicable, and the vendee is considered the equitable owner, the vendee is normally entitled to the condemnation award. n236 The same has been held when the vendee is in possession under a contract for deed, or installment contract. However, when the condemnation award is less than the remaining balance due on the contract for deed, the vendor's legal interest is considered a lien upon the condemnation award. n237 Thus, even where the market value of the remainder was adequate to protect the vendor's interest, the vendor was entitled to a lien on the entire award. n238 When the condemnation award exceeds the vendor's interest, the vendor is entitled to recover only to the extent of its interest, with the vendee entitled to the remainder. n239

Some exceptions to the general application of the doctrine of equitable conversion are applied. For example, when the contract is subject to conditions which have not been met and, therefore, the court would not enforce specific performance, the vendee will not be entitled to the condemnation award. n240 In addition, in states that have adopted the Uniform Vendor and Purchaser Risk Act, n241 a vendee who is not in possession will not be entitled to any portion of the condemnation award. n242 In this instance, the vendee is entitled to recover its deposit and no more. n243

COMPUTER-ASSISTED RESEARCH

LEXIS: "executory contract" w/50 condemn! & property

§ 99.09(c) Rezoning.

Generally, zoning laws in existence at the time of executing the contract will not be viewed as an encumbrance and the vendee must accept the property subject to existing zoning. n244 This was true even when property constituting a non-conforming use was destroyed by fire after closing and could not be rebuilt to its former condition. n245

In regard to zoning ordinances enacted during the executory period, courts are divided. One view holds that changes in zoning laws during the executory period are to be considered a mutual mistake of fact, thereby allowing the contract to be voided. n246 However, the second and more generally accepted view holds that, absent an express provision to the contrary, the vendee bears the risk of any change in zoning laws. n247

COMPUTER-ASSISTED RESEARCH

LEXIS: executory w/5 contract or period & zon!

FOOTNOTES:

(n1)Footnote 215. *Reliance Ins. Co. v. Allstate Indem. Co., 514 F. Supp. 486 (E.D. Pa. 1981)* (contract placed risk of loss on seller); *Johnson v. New York Mut. Underwriters Ins. Co., 582 N.Y.S.2d 871 (N.Y. 1992)* (contract placed risk of loss on purchaser); *Raplee v. Piper, 143 N.E.2d 919 (N.Y. 1957)* (risk of loss on vendee).

(n2)Footnote 216. *See* Roger A. Bixby, *The Vendor/Vendee Problem: How Do We Slice the Insurance Pie?* XIX Forum 112, 1983 A.B.A. Sec. Pub. Tort And Ins. Prac.

(n3)Footnote 217. *Musselman v. Mountain West Farm Bur. Mut. Ins. Co., 824 P.2d 271, 274 (Mont. 1992)* (equity vests the entire beneficial interest in the land with the buyer); *St. Paul Fire & Marine Ins. Co. v. Insurance Placement Facility, 687 F.Supp. 172 (E.D. Pa. 1988)* ; *Continental Ins. Co. v. Brown, 630 F. Supp. 302 (W.D. Va. 1986)* ; Poague v. United States, 1990 U.S. Dist. LEXIS '13719 (No. 89-1784-A, Oct. 4, 1990, E.D. Va.) (under Virginia law, when

parties enter into a valid contract for the purchase of real property, equity considers the purchaser as the equitable owner of the land).

(n4)Footnote 218. *Phillips v. Bacon, 267 S.E.2d 249 (Ga. 1980)* ; *Cooke v. Firemen's Ins. Co., 291 A.2d 24 (N.J. Super. 1972)* ; *Sanford v. Breidenbach, 173 N.E.2d 702 (Ohio App. 1960)* .

(n5)Footnote 219. *Sharbono v. Darden, 715 P.2d 433, 435 (Mont. 1986)* .

(n6)Footnote 220. *Long v. Keller, 163 Cal. Rptr. 532 (1980)* ; *Raplee v. Piper, 143 N.E. 2d 919 (N.Y. 1957)* .

(n7)Footnote 221. Unif. Vendor And Purchaser Risk Act, 9 C.U.L.A. 314 (1957); *Cal. Civ. Code § 1662*; *Hawaii, Haw. Rev. Stat. § 508-1*; Unif. Vendor And Purchaser Risk Act, § 1-3, Ill. Rev. Stat., ch. 29, para. 8.1-8.3; *Mich. Comp. Laws Ann. §§ 565.701-565.703*; *Nev. Rev. Stat. §§ 113.030-113.050*; *N.Y. Gen. Oblig. Law § 5-1311*; *North Carolina, N.C. Gen. Stat. §§ 30-37 to 39-37*; *Okla. Stat. tit. 16, §§ 201-203*; *Or. Rev. Stat. §§ 93.290-93.300*; S.D. Comp. Laws Ann. §§ 43-26-5 to 43-26-8; *Wis. Stat. Ann. § 706.12*.

(n8)Footnote 222. *Thompson v. Gould, 37 Mass. 134 (1838)* .

(n9)Footnote 223. 3615 *Corp. v. New York Life Ins. Co., 717 F.2d 1236 (8th Cir. 1983)* ; *Skelly Oil Co. v. Ashmore, 365 S.W.2d 582, 588 (Mo. 1963)* .

(n10)Footnote 224. *Skelly Oil Co. v. Ashmore, 365 S.W.2D 582 (Mo. 1963)* .

(n11)Footnote 225. *Id.*

(n12)Footnote 226. *See Musselman v. Mountain West Farm Bur. Mut. Ins. Co., 824 P.2d 271, 274 (Mont. 1992)* ; *Reliance Ins. Co. v. Allstate Indem. Co., 514 F. Supp. 486 (E.D. Pa. 1981)* (purchasers and sellers have separate insurable interests); *Vogel v. Northern Assur. Co., 219 F.2d 409 (3d Cir. 1955)* . *See also* Banks McDowell, *Insurable Interest in Property Revisited, 17 Cap. U. L. Rev. 165 (1988).*

(n13)Footnote 227. *Meade v. North Country Co-Operative Ins. Co., 501 N.Y.S.2d 944 (1986)* .

(n14)Footnote 228. *Heinzman v. Howard, 366 N.W.2d 500 (S.D. 1985)* .

(n15)Footnote 229. note 189. *Long v. Keller, 163 Cal. Rptr. 532 (1980)* .

(n16)Footnote 230. *Petrie v. LeVan, 799 S.W.2d 632 (Mo. App. 1990)* .

(n17)Footnote 231. *Laspopoulos v. Chaisson, 413 So. 2d 248 (La. App. 1982)* .

(n18)Footnote 232. *U.S. Const. amend. V.*

(n19)Footnote 233. *See Yaist v. United States, 656 F.2d 616 (Ct. Cl. 1981)* (property purchased for expansion of Everglades National Park); *Chester Litho, Inc. v. Palisades Interstate Park Comm'n, 266 N.E.2d 229 (N.Y. 1971)* (property condemned for park purposes); *Austin v. Capitol Livestock Auction Co., 453 S.W.2d 461, 13 Tex. Sup. Ct. J. 252 (Tex. 1970)* (highway expansion).

(n20)Footnote 234. *See Simmons v. Krall, 412 S.E.2d 559 (Ga. App. 1991)* ; *Alhambra Redev. Agency v. Transamerica Fin. Servs., 261 Cal. Rptr. 248 (1989)* .

(n21)Footnote 235. *Reife v. Osmers, 169 N.E. 399 (N.Y. 1929)* .

(n22)Footnote 236. *Yaist v. United States, 656 F.2d 616 (Ct. Cl. 1981)* ; *City of Austin v. Capital Livestock Auction Co., 453 S.W.2d 461 (Tex. 1970)* ; *Ingram v. Kasey's Assoc., 328 S.C. 399, 493 S.E.2d 856 (S.C. App. 1997)* (after a

small portion of property was taken through condemnation, tenant who exercised pre-existing option to purchase was entitled to abatement of price in amount of award).

(n23)Footnote 237. *Hampel v. Gleason, 225 N.W.2d 844 (Minn. 1975)* .

(n24)Footnote 238. *Id. But see Summers v. Midland Co., 209 N.W. 323 (Minn. 1926)* (where vendor's interest is not impaired vendee in possession is entitled to condemnation award).

(n25)Footnote 239. *See Alhambra Redevelopment Agency v. Transamerica Fin. Servs., 261 Cal. Rptr. 248 (1989)* (vendor's beneficiary not entitled to recover full balance of its loan but was only allowed to recover up to the amount of vendor's interest in the property); *Pierce County v. King, 287 P.2d 316 (Wash. 1955)* .

(n26)Footnote 240. *Simmons v. Krall, 201 Ga. App. 893, 412 S.E.2d 559 (Ga. App. 1991)* ; *Darien Park Dist. v. Schmidt, 388 N.E.2d 1343 (Ill. App. 1979)* .

(n27)Footnote 241. *See* note 221, *supra*.

(n28)Footnote 242. *County of Westchester v. P & M Materials Corp., 248 N.Y.S.2d 539 (1964)* .

(n29)Footnote 243. *County of Westchester v. P & M Materials Corp., 248 N.Y.S.2d 539 (1964)* .

(n30)Footnote 244. *Equity Capital Corp. v. Kreider Transp. Serv., 967 F.2d 249 (7th Cir. 1992)* (contract provided seller would deliver good and marketable title free of encumbrances except permitted exceptions which included existing zoning violations); *Kirkwall Corp. v. Sessa, 397 N.E.2d 1172 (N.Y. 1979)* (purchaser agreed to take title subject to all zoning regulations and ordinances).

(n31)Footnote 245. *Goldfarb v. Dietz, 506 P.2d 1322 (Wash. App. 1973)* .

(n32)Footnote 246. *Dover Pool & Racquet Club, Inc. v. Brooking, 322 N.E.2d 168 (Mass. 1975)* .

(n33)Footnote 247. *Scott v. Petett, 816 P.2d 1229 (Wash. App. 1991)* (no mutual mistake where contract allocated risk to purchasers and they elected to close despite fact rezoning had not been completed); *Di Donato v. Reliance Standard Life Ins. Co., 249 A.2d 327 (Pa. 1969)* (where neither vendors nor vendees knew of changes vendees were not entitled to rescind on grounds of misrepresentation as to zoning); *Biggs v. Steinway & Sons, 128 N.E. 211 (N.Y. 1920)* .

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CHAPTER 99 REAL ESTATE CONTRACTS

12-99 Thompson on Real Property, Thomas Editions § 99.10

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§ 99.10 Title.

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§ 99.10(a) Seller's Duty to Deliver.

§ 99.10(a)(1) Marketable Title.

Perhaps one of the most heavily litigated and confusing provisions in the contract for the sale of land is the requirement of marketable title. It is common for the contract to provide that title be marketable and, in the absence of a specific provision, the obligation to provide marketable title is generally presumed by implication. n248

Marketable title has been defined in a variety of ways. n249 Generally, marketable title includes title that is not open to reasonable doubt. n250 It is title that persons of reasonable prudence and intelligence, guided by competent legal advice, would be willing to take and pay fair value for. n251 Marketable title allows the record owner to hold land in peace and to be reasonably sure that no flaw or doubt would arise to disturb its market value when the time comes to sell. n252 Title that is subject to litigation is not marketable. n253 However, where the possible defect is remote n254 or only a mere possibility, n255 the purchaser will not be relieved of the duty to go forward under the contract. In the absence of a contrary meaning, merchantable title, good title and marketable title are considered synonymous. n256 Sufficiency of marketable title is a question of law for the court. n257 Marketability of title is determined at the date set for closing and the seller has until that date to cure any defects. n258

Questions concerning marketability frequently arise in two main areas: those based on chain of title defects and those based on encumbrances. Chain of title defects affect ownership in the property and make the title unmarketable. Such defects can include incorrect spelling of names, misdescription of the property and title acquired by adverse possession. n259 Courts differ as to whether a title acquired by adverse possession is marketable. A few courts have held that where the possibility of litigation is remote the title is marketable. n260 Other courts have determined that any claim of adverse possession renders a title unmarketable. n261 Today, many states have enacted statutes that are intended to cure chain of title defects, often by reason of passage of time. n262

A title that is subject to an encumbrance is not marketable. n263 Common encumbrances include easements, n264 unexpired leases, n265 unpaid taxes, n266 liens, n267 encroachments n268 and easements. n269 While zoning

ordinances will not normally render a title unmarketable, n270 an existing violation of a zoning ordinance will. n271 In addition, one recent decision has held that where the subject property was contaminated by hazardous waste the title was unmarketable. n272 Another recent decision held that title to landlocked land is not marketable. n273

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LEXIS: sale w/5 land or property or real w/50 "marketable title"

§ 99.10(a)(2) Insurable Title.

While a majority of contracts for the sale of land contain either an express or an implied provision requiring the seller to deliver marketable title, n274 the contract may instead, or in addition, require insurable title. However, an intent to accept insurable title in place of marketable title should be clear in light of the possible consequences to the purchaser. n275

When a contract requires both insurable and marketable title, the contract establishes a dual standard and the purchaser is entitled to both marketability as well as insurability. n276 However, where a contract requires that title be insurable, the title need not also be marketable. n277 Vendor's ability to deliver marketable title is irrelevant when insurable title is required by the contract. n278

When a contract requires the seller to deliver insurable title, the seller generally assumes the burden of delivering an insurable title without exception other than as provided for. n279 Where the contract provides that a specific title company shall insure the title, the purchaser need not accept the title if the named insurer will not insure. n280 It is irrelevant if a different title company will insure. However, where the contract provides only that the title be insurable without naming an insurer, the purchaser must accept the title as insured by any company, in accordance with the contract. n281 Where a particular title company has been named, the parties generally commit the decision of insurability to the judgment of the designated insurer. n282

§ 99.10(b) Evidence of Title.

§ 99.10(b)(1) Title Abstract.

An abstract of title is a concise statement in an orderly form of the substance of documents or facts appearing on the public record which affect title to real property. n283 The abstract should include all recorded encumbrances, liens and liabilities to which the property may be subject, as well as a summary of the deeds and other instruments evidencing title, arranged in chronological order. n284 The abstract may be used to determine marketability or insurability of title.

As opposed to the requirement that the seller deliver marketable title, n285 a seller is, absent a specific requirement in the contract, under no duty to deliver an abstract of title. n286 However, where the contract imposes such a duty on the seller, delivery of the abstract is a condition precedent to the purchaser's obligation to perform. n287 In addition, it is generally not sufficient for the seller to provide an abstract brought down only to the point of its grantor, but must generally bring the abstract down to a point of time within the contemplation of both parties. In order to provide the greatest protection to the purchaser, the abstract should preferably be brought down to the date of the conveyance or closing. n288

Liability of the abstractor is considered by the majority of courts to be in contract. n289 This duty is variously described as one of ordinary care and diligence, n290 or the duty to perform skillfully and diligently. n291 Recently, some courts have begun to extend liability of the abstractor to persons beyond the party who ordered the abstract and have allowed recovery by a third party who relied on the abstractor's services. n292

§ 99.10(b)(2) Preliminary Title Report.

Similar to an abstract of title, the preliminary title report or binder may be used to determine the marketability or condition of the particular title. When this duty is assumed by a title insurer it may be liable in tort for negligence in preparation. However, the contrary view holds that the purpose of the issuance of the preliminary title report, as prepared by a title insurer, is distinct from the preparation of an abstract and is prepared only to determine the insurability of the title. n293 In fact, it has been held that a title insurer owes no duty to abstract the title. n294 The distinction has been phrased as whether the issuance of the title commitment and policy places a duty on the title insurance company to search for and disclose to the insured any reasonably discoverable information that would affect the insured's decision to close the contract to purchase. n295

Cases which adopt the view that the preparer of a preliminary title report may be liable in tort generally stress that one function of the preliminary commitment is similar to that of the report of the abstractor, i.e., to provide knowledge concerning the state of title so that the purchaser may structure transactions concerning the property. n296

The view that the title insurer may be liable as an abstractor when it issues a preliminary title report has been criticized on the basis that the function of the title insurer is solely to insure title, n297 and its liability should be on the contract for insurance only. n298 Thus, a preliminary title report is simply a statement of the terms and conditions upon which the insurer is willing to issue its title policy. n299

§ 99.10(c) Title Insurance.

As opposed to other forms of insurance, in which the insurer assumes the risk of future events, n300 title insurance insures against things which have already occurred, with the title insurer attempting to eliminate risk. Title insurance is a personal indemnity contract with the main purpose to defend the insured's title. n301 It is a contract of insurance against defects in title, unmarketability, liens and encumbrances other than what is excepted in the policy. n302

The title insurer may, but need not always, conduct a search of the title prior to issuing its policy. n303 Generally the search is done by an agent or employee of the title company but may also be conducted by an outside attorney approved by the title company. n304 As opposed to other forms of insurance, the premium for a title policy is paid one time at issuance, and generally covers both the search, if any, as well as the insurance.

§ 99.10(d) Type of Deed.

The deed serves to actually transfer title. To be effective the deed must contain the names of the grantor and grantee, a description of the property and words of conveyance. n305 The Statute of Frauds requires every deed to be in writing. In addition, the deed must be delivered to be valid. n306

The most common type of deed used in real estate transaction is the general warranty deed. Other types of deeds include quitclaim deeds, special warranty deeds, executor's deeds, trustee's deeds and bargain and sale deeds. Unless the contract specifically provides for a particular type of deed, a deed that is customary to the area is acceptable.

The general warranty deed is delivered by the seller to the purchaser at closing. It provides that the grantor warrants against any acts or omissions that might affect the quality of title conveyed. n307 It should be noted that a warranty deed is not title insurance and does not eliminate the need for title insurance. n308

The warranty deed usually includes covenants of seisin, n309 against encumbrance, n310 of warranty and of quiet enjoyment. The grantor of the general warranty deed warrants not only to its grantee but also to remote grantees. n311 The giving of a warranty deed is not an assurance that the title is marketable. n312

The special warranty deed differs from the general warranty deed in that the grantor warrants only as to those acts

which occurred during its ownership. n313

As opposed to either a general or special warranty deed, a quitclaim deed provides no warranties and serves only to release, as well as convey, whatever interests the grantor has at the time of the transfer. n314 It is important to note that in some jurisdictions a grantee under a quitclaim deed may not be considered an innocent purchaser for value, which may preclude the grantee from receiving the benefit of recording statutes. n315

Similar to the quitclaim deed is the deed of bargain and sale. While it may contain covenants, it normally does not warrant title. n316 The bargain and sale deed does convey the grantor's purported title, as opposed to the quitclaim deed.

When either an executor's or trustee's deed is being used, it is important to examine either the will or trust to verify the powers of the executor or trustee to execute the deed. Local statutes granting powers of executors and trustees should also be examined. n317

FOOTNOTES:

(n1)Footnote 248. *Medallion Homes, Inc. v. Thermar Invs., Inc., 698 S.W.2d 400 (Tex. App. 1985)* ; *McCain v. Cox, 531 F. Supp. 771 (N.D. Miss. 1982)* ; *Regan v. Lanze, 354 N.E.2d 818 (N.Y. 1976)* (a purchaser is entitled to marketable title unless the parties stipulate otherwise in the contract); *Creative Living, Inc. v. Steinhauser, 355 N.Y.S.2d 897 (1974)* ; *Snowdon Farms v. Jones, 595 N.W.2d 270 (Neb. App. 1999)* (marketable title requires seller to try to cure defects through good faith efforts that are reasonable under the circumstances; while buyer may do so, seller may not then use failure to cure as grounds for rescission); *Meisels v. 1295 Union Equities Corp., 761 N.Y.S.2d 48 (2003)* (vendors not entitled to cancel real estate contract for failure to convey title free of objectionable encumbrances when they were simply unwilling to pay the expense of clearing the title).

(n2)Footnote 249. Nearly half the states have enacted marketable title acts setting forth standards to define marketability. *See, e.g.,* Florida Marketable Title Act, Fla. Stat. chs. 712.01-712.06 (1963). *See also* Kraettle Q. Epperson and Kevin A. Sullivan, *Title Examination Standards: A Status Report,* Prob. & Prop., Sept./Oct. 1990, at 16.

(n3)Footnote 250. *Brown v. Yacht Club of Coeur D'Alene, Ltd., 722 P.2d 1062 (Idaho App. 1986)* ; *Darby v. Keeran, 505 P.2d 710 (Kan. 1973)* ; *Tri-State Hotel Co. v. Sphinx Inv. Co., 510 P.2d 1223 (Kan. 1973)* ; *Brokaw v. Duffy, 59 N.E. 196 (N.Y. 1901)* (title subject to serious questions of fact which might be decided in different ways by different tribunals was not marketable).

(n4)Footnote 251. *Wilfong v. W.A. Schickedanz Agency, Inc., 406 N.E.2d 828 (Ill. App. 1980)* .

(n5)Footnote 252. *United States v. Mansion House Center N. Redev. Co., 607 F. Supp. 392 (E.D. Mo. 1985)* ; *Regan v. Lanze, 354 N.E. 2d 818 (N.V. 1976)* ; *Nixon v. Franklin, 289 S.W.2d 82 (Mo. 1956)* .

(n6)Footnote 253. *Bart v. Wysocki, 558 So. 2d 1326 (La. App. 1990)* ; *Vallery v. Belgard, 379 So. 2d 1201 (La. App. 1980)* ; *Brokaw v. Duffy, 59 N.E. 196 (N.Y. 1901)* .

(n7)Footnote 254. *Sanders v. Coastal Capital Ventures, Inc., 370 S.E.2d 903 (S.C. App. 1988)* (remote probability of litigation does not make property unmarketable); *Regan v. Lanze, 354 N.E. 2d 818(N.V. 1976)* .

(n8)Footnote 255. *Ryder v. Garden Estates, Inc., 105 N.E.2d 854 (Mass. 1952)* .

(n9)Footnote 256. *Darby v. Keeran, 505 P.2d 710 (Kan. 1973)* ; *Nixon v. Franklin, 289 S.W.2d 82 (Mo. 1956)* ; *Alexander v. Cleveland, 79 So. 2d 852 (Fla. 1955)* .

(n10)Footnote 257. *Wilfong v. W. A. Schickedanz Agency, Inc., 406 N.E. 2d 828 (Ill. App. 1180)* ; *Bethurem v. Hammett, 736 P.2d 1128 (Wyo. 1987)* ; *Jones v. Melrose Park Nat'l Bank, 592 N.E.2d 562 (Ill. App. 1992)* ; *but see Lucas v. Independent School Dist. No. 284, 433 N.W.2d 94 (Minn. 1988)* (whether a title is marketable, *i.e.,* a title is free

from reasonable doubt, must be tested from the prospective purchaser's standpoint, and not from the viewpoint either of the seller or of the court).

(n11)Footnote 258. *R.C.P.S. Assocs. v. Karam Developers, 258 A.D.2d 510, 685 N.Y.S.2d 261 (1999)* (defect of two mortgages was curable by closing and therefore purchaser committed anticipatory breach by terminating the contract).

(n12)Footnote 259. *See* Milton R. Friedman, Contracts and Conveyances of Real Property § 4.3 (5th ed. 1991) (discussing the effect on marketability of a title acquired by adverse possession).

(n13)Footnote 260. *See Conklin v. Davi, 388 A.2d 598 (N.J. 1978)* ; *Bryant v. Jones, 75 S.W.2d 34 (Ky. 1934)* .

(n14)Footnote 261. *See Finger v. Morris, 468 S.W.2d 572 (Tex. Civ. App. 1971)* .

(n15)Footnote 262. *See* note 249, *above.*

(n16)Footnote 263. *Madhavan v. Sucher, 306 N.W.2d 481 (Mich. App. 1981)* ; *Rhodes v. Astro-Pac, Inc., 363 N.E.2d 347 (N.Y. 1977)* ; *Warner v. Denis, 933 P.2d 1372 (Haw. 1997)* (where marketability of title is an issue, the term "encumbrance" is construed broadly and includes any right in a third party that diminishes the value of the land or limits its use); *In re Rodolitz Holding Corp., 206 B.R. 657 (Bankr. E.D.N.Y. 1997)* (cost of removal of bulkhead on federal property would be charged to purchaser, thus rendering title unmarketable).

(n17)Footnote 264. *See Equiptex Indus. Prods. Corp. v. Paulucci, 564 N.Y.S.2d 188 (1991)* (easement for ingress and egress running length of boundary of property was encumbrance rendering title unmarketable).

(n18)Footnote 265. *Schuler-Olson Ranches, Inc. v. Garvin, 250 N.W.2d 906 (Neb. 1977)* ; *Evans v. Faught, 42 Cal. Rptr. 133 (1965)* .

(n19)Footnote 266. *See Darby v. Keeran, 505 P.2d 710 (Kan. 1973)* ; *Smith v. Browning, 122 N.E. 217 (N.Y. 1919)* .

(n20)Footnote 267. Common forms of liens include mortgages, mechanics liens and judgment liens. Generally a mortgage lien not released at the time of closing renders title unmarketable. *Brown v. Robinson, 354 So. 2d 272 (Ala. 1977)* . Proceeds from the sale may be used by seller to release an existing mortgage or other encumbrance in order to convey marketable title. *See, e.g., Kaiser v. Wright, 629 P.2d 581 (Colo. 1981)* .

(n21)Footnote 268. *See Bethurem v. Hammett, 736 P.2d 1128 (Wyo. 1987)* ; *Zatzkis v. Fuselier, 398 So. 2d 1284 (La. App. 1981)* .

(n22)Footnote 269. *See Rhodes v. Astro-Pac, Inc., 363 N.E. 2d 347 (N.Y. 1977)* ; *Marathon Bldrs., Inc. v. Polinger, 283 A.2d 617 (Md. 1971)* ; *Aczas v. Stuart Heights, Inc., 221 A.2d 589 (Conn. 1966)* .

(n23)Footnote 270. *See Di Thomas v. David Levine Dev. Corp., 387 N.Y.S.2d 7 (1976)* .

(n24)Footnote 271. *Feit v. Donahue, 826 P.2d 407 (Colo. App. 1992)* (zoning violation which existed at time of conveyance was an encumbrance); *Voorheesville Rod & Gun Club, Inc. v. E.W. Tompkins Co., 551 N.Y.S.2d 382 (1990)* (seller's refusal to obtain subdivision approval so as to make parcel a legal lot rendered title unmarketable).

(n25)Footnote 272. *See Jones v. Melrose Park Nat'l Bank, 592 N.E.2 562 (Ill. App. 1992)* .

(n26)Footnote 273. *Howell v. Brozzetti, 246 A.D.2d 929, 667 N.Y.S.2d 831 (1998)* .

(n27)Footnote 274. *See* note 248, *above*.

(n28)Footnote 275. *See Regency Highland Assocs. v. Sherwood, 388 So. 2d 271 (Fla. App. 1980)* (title company may agree to insure a title even though there are existing lawsuits, notices lis pendens and liens, and, unless excepted in the contract, purchaser would be required to accept such title).

(n29)Footnote 276. *New York Investors v. Manhattan Beach Bathing Parks Corp., 243 N.Y.S. 548 (1930) , aff'd, 176 N.E. 6 (N.Y. 1931)* .

(n30)Footnote 277. *Creative Living, Inc. v. Steinhauser, 698 S.W.2d 400 (Tex. App. 1985)* (by contracting for an insurable title the general rule of marketability is abrogated).

(n31)Footnote 278. *Aronoff v. Lenkin Co., 618 A.2d 669 (D.C. 1992)* . The opposite is also true, so that where the contract calls for marketable title, a defect will render title unmarketable even if a title insurance company stood ready to insure it. *Nelson v. Anderson, 676 N.E.2d 735 (Ill. App. 1997)* (property was subject to a restrictive covenant).

(n32)Footnote 279. *See Newmark v. Weingrad, 352 N.Y.S.2d 660 (1974)* .

(n33)Footnote 280. *See Hudson-Port Ewen Assoc., L.P. v. Chien Kuo, 165 A.D.2d 301, 566 N.Y.S.2d 774 (1991)* ; *Robinson v. Easton, Eldgridge & Co., 93 Cal. 80, 28 P. 796 (Cal. 1892)* .

(n34)Footnote 281. *Kirkwall Corp. v. Sessa, 397 N.E.2d 1172 (N.Y. 1979); Conklin v. Davi, 388 A.2d 598 (N.J. 1978)* ; *Laba v. Carey, 277 N.E.2d 641 (N.Y. 1971)* .

(n35)Footnote 282. *See Aronoff v. Lenkin Co., 618 A.2d 669* CD.C. 1992); *Creative Living, Inc. v. Steinhauser, 355 N.Y.S.2d 897 91974)* .

(n36)Footnote 283. *See* 1 Am. Jur. 2d *Abstracts of Title* § 1 (1962); Black's Law Dictionary 10 (6th ed. 1990).

(n37)Footnote 284. *See* 77 Am. Jur. 2d *Vendor & Purchaser* § 257 (1962); Milton R. Friedman, Contracts and Conveyances of Real Property § 3.9 (5th ed. 1991).

(n38)Footnote 285. *See* § 99.10(a)(1), *above*.

(n39)Footnote 286. *Department of Pub. Works & Bldgs. v. Halls, 220 N.E.2d 167 (Ill. 1966)* .

(n40)Footnote 287. *See Corley v. Kiser, 556 S.W.2d 218 (Mo. App. 1977)* ; *Brown v. Griffin, 436 P.2d 695 (Mont. 1968)* .

(n41)Footnote 288. *See Bank of Cave City v. Abstract & Title Co., 828 S.W.2d 852 (Ark. App. 1992)* .

(n42)Footnote 289. *See Erskine Florida Properties, Inc. v. First American Title Ins. Co., 557 So. 2d 859 (Fla. 1989)* ; *Calamari v. Grace, 469 N.Y.S.2d 942 (1983)* (subject to specific exceptions, liability of title abstractor is solely to person who contracted for preparation of the abstract); *Tipton County Abstract Co. v. Heritage Fed. Sav. & Loan Ass'n, 416 N.E.2d 850 (Ind. App. 1981)* ; *J.H. Wright v. Allmon-Mack Agency, Inc., 603 S.W.2d 483 (Ark. App. 1980)* ; *Corcoran v. Abstract & Title Co. of Md., 217 Md. 633, 143 A.2d 808 (Md. 1958)* . *But see Heyd v. Chicago Title Ins. Co., 354 N.W.2d 154 (Neb. 1984)* (title insurer breaching duty to abstract title accurately may be liable in tort for all damages proximately caused by such breach); *Red Lobster Inns of Am., Inc. v. Lawyers Title Ins. Corp., 656 F.2d 381 (8th Cir. 1981)* (award of lost profits for failure of title insurer to discover use restrictions based in tort).

(n43)Footnote 290. *Tipton County Abstract Co. v. Heritage Fed. Sav. & Loan Ass'n, 416 N.E.2d 850 (Ind. App. 1981)* .

(n44)Footnote 291. *First Am. Title Ins. Co. v. First Title Serv. Co. of Fla. Keys, Inc., 457 So. 2d 467 (Fla. 1984)* .

(n45)Footnote 292. *Id.*; *Kovaleski v. Tallahassee Title Co., 363 So. 2d 1156 (Fla. App. 1978)* ; (third party reliance foreseeable); *Williams v. Polgar, 215 N.W.2d 149 (Mich. 1974)* (abstractor in fact knew third party would rely).

(n46)Footnote 293. *See Southland Title Corp. v. Superior Ct. of Cal., 282 Cal. Rptr. 425 (1991)* .

(n47)Footnote 294. *See Culp Constr. Co. v. Buildmart Mall, 795 P.2d 650 (Utah 1990)* .

(n48)Footnote 295. *Walker Rogge, Inc. v. Chelsea Title & Guar. Co., 562 A.2d 208 (N.J. 1989)* .

(n49)Footnote 296. *Bank of California, N.A. v. First Am. Title Ins. Co., 826 P.2d 1126 (Alaska 1992)* (court imposed duty on title insurer as a matter of case law but also noted that in Alaska a title insurer is required by statute to conduct a reasonable search and examination of title before issuing a policy of title insurance).

(n50)Footnote 297. *Southland Title Corp. v. Superior Ct. of Cal., 282 Cal. Rptr. 425 (1991)* .

(n51)Footnote 298. *See Bank of California, N.A. v. First Am. Title Ins. Co., 826 P.2d 1126 (Alaska 1992)* .

(n52)Footnote 299. *Culp Constr. Co. v. Buildmart Mall, 795 P.2d 650 (Utah 1990)* (insurer owed no duty to abstract title despite a statute imposing a duty to conduct a reasonable search and examination for the purpose of determining insurability of title).

(n53)Footnote 300. *See* Quintin Johnstone, *Land Transfers: Process and Processors, 22 Val. U. L. Rev. 493 (1988).*

(n54)Footnote 301. *See Title Insurance in Troubled Times: What You Need to Know* (Oct.-Nov. 1991); *see generally* James A. Pedowitz, *Twenty Common Questions About Title Insurance*, 358 PLI 9, *Title Insurance 1990: The Basics and Beyond* (Oct.-Dec. 1990).

(n55)Footnote 302. Milton R. Friedman, Contracts and Conveyances of Real Property § 3.11 (5th ed. 1991); *Walker Rogge, Inc. v. Chelsea Title & Guar. Co., 562 A.2d 208 (N.J. 1989)* ; *Heyd v. Chicago Title Ins. Co., 354 N.W.2d 154 (Neb. 1984)* .

(n56)Footnote 303. *See generally* § 99.10(b)(2), *above*.

(n57)Footnote 304. For a discussion of the attorney's role in title insurance *see*, T. Mary McDonald, *Attorneys Writing Title Insurance: The Ethical Concerns, Perils and Pitfalls*, 384 PLI 85, *Current Developments in Title Insurance* (Oct.-Nov. 1992); John L. Hosack, *Keeping Out of Trouble: RESPA, RICO and Professional Responsibility*, 384 PLI 537, *Current Developments in Title Insurance* (Oct.-Nov. 1992). For a discussion of the unauthorized practice of law in the title insurance context *see*, 16 John Alan Appleman And Jean Appleman, Insurance Law And Practice § 8651 (1981).

(n58)Footnote 305. Robert G. Natelson, Modern Law Of Deeds To Real Property §§ 5.1 to 8.24 (1992). *Mendelson v. Great Western Bank, F.S.B., 712 So. 2d 1194 (Fla. App. 1998)* (a deed description of property that is incomplete or ambiguous may be sufficient if reference to public records would identify property); *Haney's Chapel Methodist Church v. United Methodist Church, 716 So. 2d 1156 (Ala. 1998)* (a deed description of grantee as "This Community for a Union Church" did not provide sufficient identification); *Coulter & Smith, Ltd. v. Russell, 976 P.2d 1218 (Utah App. 1999)* . Vendor argued that deed description of property, "your lots west of 1700 East at 10800 South," was insufficient since land had not yet been subdivided into lots. Because zoning requirements and other public documents would clarify description, both description and price term per lot satisfied the Statute of Frauds.

(n59)Footnote 306. *See Graham v. Lyons, 546 A.2d 1129 (Pa. Super. 1988)* ; Gatts v. E.G. *T.G., G.M.B.H., 470 N.E.2d 425 (Ohio App. 1983)* .

(n60)Footnote 307. *See Bloom v. Hendricks, 804 P.2d 1069 (N.M. 1991)* .

(n61)Footnote 308. *See* § 99.10(c), *supra*.

(n62)Footnote 309. *See Avery v. McHugh, 423 S.W.2d 17 (Mo. App. 1967)* .

(n63)Footnote 310. *See Feit v. Donahue, 826 P.2d 407 (Colo. App. 1992); McClaskey v. Bumb & Mueller Farms, Inc., 547 N.E.2d 302 (Ind. App. 1989)* ; *Brewster v. Wegman, 199 So. 2d 337 (Fla. App. 1967)* .

(n64)Footnote 311. *See Ethen v. Reed Masonry, Inc., 313 N.W.2d 19 (Minn. 1981)* .

(n65)Footnote 312. *See* § 99.10(a)(1), *supra*.

(n66)Footnote 313. *See Creek v. First Nat'l Bank, 267 S.E.2d 872 (Ga. App. 1980)* .

(n67)Footnote 314. *See Wildwood Crest v. Smith, 509 A.2d 252 (N.J. Super. 1986)* ; *Reid v. Southeastern Materials, Inc., 396 So. 2d 667 (Ala. 1981)* .

(n68)Footnote 315. *See Kirby Lumber Corp. v. Williams, 124 F. Supp. 456 (E.D. Tex. 1954)* , *aff'd, 230 F.2d 330 (5th Cir. 1956)* .

(n69)Footnote 316. *Chase Fed. Sav. & Loan Ass'n v. Schreiber, 479 So. 2d 90 (Fla. 1985)* , *cert. denied, 476 U.S. 1160 (1986)* .

(n70)Footnote 317. *See Ihde v. Kempkes, 422 N.W.2d 788 (Neb. 1988)* (language in deed executed by personal representative of decedent's estate stating that personal representative had legal power and lawful authority to convey the subject property is not a warranty of title); Carol A. Yzenbaard, Residential Real Estate Transactions §§ 6.38-6.40 (1991).

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CHAPTER 99 REAL ESTATE CONTRACTS

12-99 Thompson on Real Property, Thomas Editions § 99.11

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§ 99.11 Provisions with Respect to Closing.

Because the contract of sale is the blueprint for closing, the contract drafter must anticipate and provide for the mechanics of consummating the sale at the time of contract formation.

§ 99.11(a) Closing Date and Place.

Although it is common practice for real estate sales contracts to contain a specific date, time and place for closing, there is substantial judicial authority that a contract will not be unenforceable for lack of a specified time for closing. Instead the court will imply a reasonable closing date. n318

§ 99.11(b) Seller's Obligations at Closing.

The contract should describe with specificity the documents to be executed and delivered at closing by seller, including the deed of conveyance, bill of sale, assignment of leases, and notice letters to tenants advising them of the sale and the address to which future rent payments are to be directed. Original copies of all leases and service contracts with respect to the property should be delivered to purchaser at closing.

Seller should be required to deliver exclusive possession of the property to purchaser at closing, subject only to the rights of specified tenants, if any. It is customary in residential transactions for purchaser to inspect the property after seller has vacated but prior to closing in order to determine that seller has removed all personal property and has left the property in the condition required by the terms of the contract. n319

§ 99.11(c) Purchaser's Obligations at Closing.

Purchaser will be required to pay the purchase price in full according to the terms of the contract. If a portion of the purchase price is being deferred, purchaser should be required to execute and deliver a deferred purchase money promissory note and deed of trust or mortgage in the form attached as an exhibit to the contract, or in the standard form in customary use in the real property jurisdiction. A purchaser who is not an individual may be required to deliver an opinion of counsel at closing to the effect that the documents to be executed and delivered by purchaser at closing have been duly authorized, validly executed and constitute the binding obligation of purchaser, enforceable in accordance

with their respective terms. n320

§ 99.11(d) Closing Costs; Allocation.

A provision in the contract specifically allocating the cost of title search and insurance, recordation and transfer taxes, escrow fees, lender service charges and other closing costs will prevent disputes at closing over each side's understanding of the prevailing local custom regarding such items.

§ 99.11(e) Proration of Taxes, Interest, Insurance, Delinquent Rents, Prepaid Rents.

The contract should provide for the buyer to reimburse the seller at closing for items paid in advance by the seller with respect to the period following closing which are properly the responsibility of purchaser, such as real estate taxes for the period from the closing date through the end of the real estate tax fiscal year. Conversely, if real estate taxes are paid in arrears, buyer should receive credit for the portion of the current real estate tax fiscal year during which seller had possession. n321 Condominium or homeowners' association assessments, prepaid or accrued interest on any mortgage being assumed by purchaser, and prepaid premiums for any policies of insurance with respect to the property which purchaser continues after closing should be similarly prorated. Arrangements should be made to have utility meters read on the date of settlement and bills to that date paid by seller.

Unless closing occurs on the first day of the month, rents for the month in which closing occurs should be prorated as of the closing date. Provision should also be made for the proration of percentage rentals payable annually or quarterly. Buyer should receive credit for any prepaid rents collected in advance of the closing date with respect to periods subsequent to closing. Buyer should also receive credit for any security deposits collected by the seller which the new owner will be obligated to return to the tenants.

The method of handling delinquent rentals on any leases with space tenants of the subject property may be the subject of considerable negotiation. Ideally seller would prefer to increase the purchase price by the amount of delinquent rentals, and assign to purchaser the right to collect such rentals. Alternatively, seller will seek agreement that the first rentals collected from delinquent tenants by purchaser after closing be remitted to seller to satisfy delinquencies. From purchaser's perspective, the ideal solution is to promise only to continue to bill tenants for delinquent rentals, and to remit to seller any rentals actually collected from delinquent tenants that are above and beyond the rent due for the current month. n322 Purchaser should seek seller's agreement not to pursue legal proceedings against defaulting tenants to enforce the collection of delinquent rentals after closing.

FOOTNOTES:

(n1)Footnote 318. *Seabaugh v. Sailer, 679 S.W.2d 924 (Mo. App. 1984)* .

(n2)Footnote 319. If purchaser has been allowed to take possession of the property prior to closing, the following conditions of purchaser's pre-closing occupancy should be addressed in the contract of sale: (a) the characterization of purchaser's legal status during the executory period (from seller's perspective, the arrangement should be structured as a license to facilitate summary removal if purchaser fails to close); (b) the per diem fee or other consideration to be paid by purchaser; (c) passage of the risk of loss to purchaser effective upon transfer of possession; (d) the satisfaction or waiver of all conditions upon purchaser taking possession; and (e) increasing the size of purchaser's non-refundable deposit to an amount equal to the difference between the purchase price and the amount financed so that purchaser's entire "equity" is at risk in the event purchaser fails to close. Similar issues need to be addressed in the contract in the event seller is permitted to remain in possession of the property after closing.

(n3)Footnote 320. *Daugherty v. Bruce Realty & Dev., Inc., 892 S.W.2d 332 (Mo. App. 1995)* (when a developer breached the contract by failing to complete the construction free from defective materials and in a workmanlike manner, the purchaser was relieved of the duty to appear and close).

(n4)Footnote 321. Assessments for public improvements, if any, completed prior to the date of settlement (*e.g.*, roads, sewers and, paving and the like) are customarily the responsibility of seller, even though the balance of the installments for such improvements may not become payable until after closing, on the theory that the purchase price agreed to be paid by purchaser reflects the additional value created by the existing improvements. Accordingly, such assessments should be paid by seller before closing, or allowance made for them at the time of closing. If, as is typical, assessments for public betterments are payable in annual installments, then the unpaid installments of such assessments (including those which are to become due and payable after settlement) should be discharged by seller at closing.

(n5)Footnote 322. A typical contract provision on the subject states as follows:

> During the period after settlement Purchaser shall deliver to Seller any and all rents accrued but uncollected as of the date of settlement when subsequently collected by Purchaser; provided, however, that Purchaser shall apply rents received after settlement first to payment of the current rent then due, and thereafter to delinquent rents.

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CHAPTER 99 REAL ESTATE CONTRACTS

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§ 99.12 Operation of Property During Executory Period.

Agreements for the sale and purchase of real property typically require the seller to continue to manage and operate the property in substantially the same manner as prevailed on the date of contract execution, and to maintain the property in substantially the same repair, order and condition as prevailed on the date the contract was executed, reasonable wear and tear excepted. In the case of income-producing property, seller should be required to obtain the written consent of purchaser before entering into any new lease, renewing, extending or otherwise modifying any existing lease, consenting to any sublease or assignment, or taking any action to terminate or otherwise enforce the terms of existing leases. Purchaser may be required to act reasonably and promptly in responding to such requests. Purchaser's failure to respond within a specified reasonable time after receipt of seller's request for approval may be deemed to constitute purchaser's consent. n323

Seller should agree to cooperate fully with purchaser to insure that the transfer of possession takes place without inconvenience to the tenants, and with the least possible disruption in the normal operation of the property and in the duties of the employees. Seller should not mortgage or encumber the property during the executory period. Purchaser should have access to the property during normal business hours throughout the period prior to closing. Seller should agree to furnish purchaser with all information concerning the property that purchaser reasonably requests during the executory period.

FOOTNOTES:
(n1)Footnote 323. Purchaser has a legitimate interest in requiring the ability to review and approve the identity of new tenants and the terms of new leases. However, where the property contains vacant space or if space should become vacant during the executory period, seller stands to suffer a loss if purchaser's objection prevents seller from entering into a proposed new lease and purchaser thereafter fails or refuses to close. The contract should require purchaser to make seller whole for the loss of the bargain.

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CHAPTER 99 REAL ESTATE CONTRACTS

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§ 99.13 Indemnity.

Unless the leases and service agreements themselves provide for the release of seller following a transfer of title, it is ordinarily impractical to seek to obtain the commercial property seller's release from post-closing liability under contractual obligations to third parties assumed by buyer. Buyer should indemnify seller and hold seller harmless against any loss, cost or expense incurred by seller by reason of buyer's failure to perform any duty under any tenant lease, service contract or other obligation with respect to the subject property transferred by seller and assumed by buyer at closing.

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CHAPTER 99 REAL ESTATE CONTRACTS

12-99 Thompson on Real Property, Thomas Editions § 99.14

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§ 99.14 Breach of Contract.

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While most purchasers and sellers hope and believe that the contract between them will, like most contracts, be fully performed with no problems, not all contracts are performed as planned. As a result, the contract should provide remedies which will best protect the parties in the event of breach by either party. Common remedies for breach of contract for the purchase and sale of real property include specific performance, damages, and forfeiture of deposit or liquidated damages. In addition to a provision for damages the parties should also consider the liability for attorney's fees.

§ 99.14(a) Events of Default.

Generally a party will be in default of a contract for the conveyance of real property when that party fails to meet a condition of the contract such as the inability to deliver title as required by the contract. n324 The contract may also be breached when one party repudiates before the other party has had the opportunity to fulfill all the conditions precedent. n325 In general, the buyer's failure to take title or the seller's failure to deliver title may result in a breach of the contract, with appropriate remedy to be determined according to the type of breach as well as any contract provisions.

§ 99.14(b) Remedies for Breach of Contract.

§ 99.14(b)(1) Specific Performance.

Because each parcel of land is considered unique, as a general rule damages are an inadequate remedy for the breach of a contract for the purchase and sale of real property, and specific performance will ordinarily be granted to buyer or seller. n326

However, where there is an adequate remedy at law, specific performance will not be granted. n327 In addition, specific performance may not be allowed where the contract is vague, n328 or fails to state with reasonable certainty the terms regarding parties, consideration or terms of payment, n329 or in cases of gross inadequacy of consideration. n330 When the time for performance is not indicated in the contract the court may imply a reasonable time and grant specific

performance. n331 The party requesting specific performance must be able to demonstrate that it has either offered to perform, or is ready, willing, and able to perform, all essential elements of the contract. n332

A suit for specific performance by the purchaser may be coupled with a request for abatement. Such a request may be appropriate where the purchaser may be required to accept defects in the title upon the granting of specific performance. n333 However, if the purchaser signs the contract with the knowledge that the seller is unable to convey the full interest as stated in the contract, purchaser may not request an abatement n334 but may still enforce the contract without the abatement. n335

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LEXIS: sale or purchase w/50 real! or land or property w/50 breach w/5 contract & "specific performance"

§ 99.14(b)(2) Damages.

Where the seller has breached, the purchaser may be entitled to damages under one of two rules. These are commonly known as the American Rule or loss of bargain, and the English Rule or good faith rule. n336

When the vendor has breached, the American Rule allows the purchaser to recover as damages the difference between the contract price and the market value of the property as of the date of breach, plus interest and reasonable expenses. n337 To calculate the market value it is helpful to use comparable sales or a resale of the subject property within a reasonable time of breach. n338 When there is no difference between market value and the contract price, the purchaser may be limited to nominal damages such as recovery of out-of-pocket expenses. n339

As opposed to the loss of bargain rule, the good faith rule holds that the purchaser is not entitled to the benefit of purchaser's bargain where the seller acted in good faith, believing to have good title. n340 The measure of damages here is limited to the money paid on deposit, plus expenses and interest. n341 However, where seller acts in bad faith, knowing seller did not have good title, purchaser is entitled to loss of bargain damages. n342

When the purchaser breaches the contract the seller is also entitled to damages measured by the difference between the contract price and the fair market value of the property as of the date of breach. n343

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LEXIS: breach w/50 damages w/50 "american rule" or "loss of bargain rule" or "english rule" or "good faith rule"

§ 99.14(b)(3) Forfeiture of Deposit; Liquidated Damages.

When the seller breaches a contract for the sale of land, the purchaser will normally be allowed to recover the deposit. n344 Unless the contract so provides, the purchaser is not limited to a return of the deposit and may seek damages or specific performance for seller's default.

When the purchaser is the breaching party, absent a provision otherwise or even where there is no provision, the seller will be allowed to retain any deposit made by the purchaser. n345 Often the contract will contain a provision for liquidated damages. n346 In order to be valid as a liquidated damages provision the prospective harm must be impossible or difficult to ascertain or prove, and the amount provided for must be reasonable. n347 Unless a court determines that the provision actually provides for a penalty it will usually be upheld. n348

Among the considerations appropriate to the court's determination of the propriety of the amount of the down payment as liquidated damages are the amount of money paid by buyer to seller, the period (if any) of buyer's possession, the

change in market value between contract or sale and default and the rental potential of the property during this time. n349

COMPUTER-ASSISTED RESEARCH

LEXIS: breach w/50 sale w/50 land or real or property w/50 damages w/50 deposit or liquidation

§ 99.14(b)(4) Liability for Attorney's Fees.

As a general rule, each party is responsible for its own costs of litigation, including attorney's fees. n350 Attorney's fees may be recoverable where the contract so provides n351 or where allowable by statute. n352 Pursuant to a contract provision, one court allowed both parties to recover attorney's fees from each other. n353 Since attorney's fees are not ordinarily recoverable, parties wishing to protect themselves should provide for recovery in the contract.

FOOTNOTES:
(n1)Footnote 324. *See* § 99.10(a), *above*; *see also In re Cantin, 114 B.R. 339 (Bankr. D. Mass. 1990)* ; *Riley v. Hoisington, 96 S.W.3d 743 (Ark. App. 2003)* (seller made fraudulent misrepresentations to buyers about flooding in the basement). *See also Romm v. Flax, 668 A.2d 1 (Md. App. 1995)* (the vendors' failure to provide a disclosure or disclaimer statement to the purchasers made the contract voidable at the option of the purchasers).

(n2)Footnote 325. *See McKenna v. Woods, 574 A.2d 836 (Conn. App. 1990)* ; *Berryhill v. Hatt, 428 N.W.2d 647 (Iowa 1988)* ; *Oxford Funding Corp. v. James H. Northrup, Inc., 516 N.Y.S.2d 33 (1987)* ; *Sirkin v. Hutchcraft, 507 So. 2d 765 (Fla. App. 1987)* ; *Carmel v. Dieckmann, 617 S.W.2d 459 (Mo. App. 1981)* ; *Tesmer Bldrs., Inc. v. Cimato, 629 N.Y.S.2d 594 (1995)* (unilateral rescission of the real estate contract constituted anticipatory repudiation and entitled the vendors to keep the down payment); *Truman L. Flatt & Sons Co., Inc. v. Schupf, 649 N.E.2d 990 (Ill. 1995)* (letter from purchaser's attorney to vendor's attorney did not constitute anticipatory repudiation).

(n3)Footnote 326. William B. Stoebuck and Dale A. Whitman, The Law of Property §§ 10.3-10.8 (3d ed. 2000). The doctrine of equitable conversion, previously considered in § 99.09(a), *supra*, has also provided theoretical justification for the award of specific performance to land sale purchasers. Ralph E. Boyer, et al., The Law of Property § 14.8 (4th ed. 1991). A widely discussed opinion by a New Jersey court temporarily cast some doubt on the automatic availability of specific performance. In *Centex Homes Corp. v. Boag, 320 A.2d 194 (N.J. Super. 1974)* , the court refused to grant specific performance to the developer against the defaulting contract purchaser of a unit in a 3600-unit high-rise condominium project. The court observed broadly that:

> the subject matter of the real estate transaction--a condominium apartment--unit has no unique quality but is one of hundreds of virtually identical units being offered by a developer for sale to the public.

Id. at 198 .

Subsequent decisions in New Jersey and elsewhere granting specific performance to the purchasers of condominium units would seem to confirm the opinion that "it would be unwise to read too much into the *Centex* case." John E. Cribbitt, Et Al., Principles Of The Law Of Property 181 (3d ed. 1989); *Giannini v. First Nat'l Bank of Des Plaines, 483 N.E.2d 924 (Ill. App. 1985)* ; *Pruitt v. Graziano, 521 A.2d 1313 (N.J. Super. 1987)* . A contract *vendor* of a real estate contract does not lose the right to specific performance by buying the property at a tax sale. *Kofmehl v. Steelman, 908 P.2d 391 (Wash. App. 1996)* ; *Vigneaux v. Carriere, 845 A.2d 304 (R.I. 2004)* (the purchaser was a ready, willing and able buyer and thus entitled to specific performance of the real estate contract); *Sugar v. Blum, 2004 Ohio App. LEXIS 1233* (No. 02 CA 234, Mar. 18, 2004) (because the contract was for the purchase of real estate, the court could order specific performance).

(n4)Footnote 327. *See Bissett v. Gooch, 409 N.E.2d 515 (Ill. App. 1980)* ; *Rutherford v. Impson, 366 So. 2d 944 (La. App. 1978)* . *But see Surman v. Blansett, 539 S.E.2d 890 (Ga. App. 2000)* (specific performance on a real estate contract was properly ordered where the fair market value of the property at the time the contract was executed was approximately the same as the purchase price in the contract).

(n5)Footnote 328. *See Calvary Temple Assembly of God v. Lossman, 557 N.E.2d 1309 (Ill. App. 1990)* (description of property must be clearly set forth in writing or specific performance will not be allowed).

(n6)Footnote 329. *See Bliss v. Rhodes, 384 N.E.2d 512 (Ill. App. 1978)* ; *Pitts v. Marsh, 567 P.2d 843 (Kan. 1977)* .

(n7)Footnote 330. William B. Stoebuck and Dale A. Whitman, The Law of Property § 10.5 (3d ed. 2000).

(n8)Footnote 331. *See Nixon & Nixon, Inc. v. John New & Assocs., 641 P.2d 144 (Utah 1982)* .

(n9)Footnote 332. *Darby v. Keeran, 505 P.2d 710 (Kan. 1973)* ; *Sanford v. Breidenbach, 173 N.E.2d 702 (Ohio App. 1960)* ; *Kelsey v. Crowther, 162 U.S. 404 (1896)* (vendee must tender performance in order to be entitled to specific performance); *Elbayadi v. Norton, 629 N.Y.S.2d 145 (1995)* (purchasers ready, willing and able to close on scheduled date); 28 *Properties, Inc. v. Akleh Realty Corp., 766 N.Y.S.2d 18 (2003)* (purchaser not entitled to specific performance because it could not demonstrate that it was ready, willing and able to perform pursuant to the contract at the time it moved for summary judgment).

(n10)Footnote 333. *See House v. Lala, 29 Cal. Rptr. 450 (1963)* ; *Robinson-Shore Dev. Co. v. Gallagher, 138 A.2d 726 (N.J. 1958)* ; *Destefano v. Crump, 694 So. 2d 424 (La. App. 1997)* (trial court did not abuse discretion by awarding reduction in purchase price rather than rescission); *Chesapeake Builders, Inc. v. Lee, 492 S.E.2d 141 (Va. 1997)* (buyer may compel seller to convey with an abated purchase price if the estate being purchased is deficient in either quantity or quality).

(n11)Footnote 334. *See Stugelmayer v. Ulmer, 260 N.W.2d 236 (S.D. 1977)* ; *Leonard v. Wood, 348 S.W.2d 696 (Ark. 1961)* .

(n12)Footnote 335. *Wilkinson v. Vaughn, 419 S.W.2d 1 (Mo. 1967)* .

(n13)Footnote 336. *See* Milton R. Friedman, Contracts and Conveyances of Real Property § 12.2(a) (5th ed. 1991).

(n14)Footnote 337. *Basiliko v. Pargo Corp., 532 A.2d 1346 (D.C. 1987)* ; *Miller v. Estate of Dawson, 686 S.W.2d 443 (Ark. App. 1985)* ; *Zipper v. Affordable Homes, Inc., 461 So. 2d 988 (Fla. App. 1984)* ; *Burgess v. Arita, 704 P.2d 930 (Haw. App. 1985)* ; *Steward v. Yoder, 408 N.E.2d 55 (Ill. App. 1980)* ; *Boyden v. Hill, 85 N.E. 413 (Mass. 1908)* ; *Beckstrom v. Beckstrom, 578 P.2d 520 (Utah 1978)* ; *Glezos v. Frontier Invs., 896 P.2d 1230 (Utah App. 1995)* (loss of bargain damages); *Jones v. Lee, 971 P.2d 858 (N.M. App. 1998)* (when applying loss of bargain rule, court is to determine value at date of breach and compare that value to contract price; subsequent sale price, while providing evidence of market value at time of breach, is not conclusive); *Van Lare v. Vogt, Inc., 683 N.W.2d 46 (Wis. 2004)* (economic loss doctrine applied).

(n15)Footnote 338. *Bachewicz v. America Nat'l Bank & Trust Co., 126 Ill. App. 3d 298, 81 Ill. Dec. 294, 466 N.E.2d 1096 (Ill. App. 1984)* ; *Benya v. Gamble, 321 S.E.2d 57 (S.C. App. 1984)* .

(n16)Footnote 339. *See Bachewicz v. American Nat'l Bank & Trust Co., 466 N.E.2d 1096 (Ill. App. 1984).*

(n17)Footnote 340. *See* Milton R. Friedman, Contracts and Conveyances of Real Property § 12.2(a)(2) (5th ed. 1991).

(n18)Footnote 341. *See Wolofsky v. Behrman, 454 So. 2d 614 (Fla. App. 1984)* ; *Large v. Gregory, 417 N.E.2d*

1160 (Ind. App. 1981) ; *Long v. Brown, 593 S.W.2d 371 (Tex. Civ. App. 1979)* ; *Carson v. Isabel Apts., Inc., 579 P.2d 1027 (Wash. App. 1978)* ; *Nikolis v. Reznick, 625 N.Y.S.2d 580 (1995)* (award of interest held proper, even though contract was silent as to calculation of interest); *Hegner v. Reed, 770 N.Y.S.2d 87 (2003)* (vendor retained entire down payment of $130,000 when purchasers anticipatorily breached the real estate contract for the sale of a house); *Piano 230 North Corp. v. 230 North Realty, LLC, 758 N.Y.S.2d 339 (2003)* (vendor entitled to retain down payment when purchaser refused to go forward with the closing after receiving a "time is of the essence" letter).

(n19)Footnote 342. *See Ocean Air Tradeways, Inc. v. Arkay Realty Corp., 480 F.2d 1112 (9th Cir. 1973)* ; *BGW Dev. Corp. v. Mt. Kisco Lodge No. 1552, 669 N.Y.S.2d 56 (A.D. 1998)* (purchaser may recover "loss of bargain" where seller breached in bad faith); *Sirles v. Harvey, 682 N.Y.S.2d 747 (1999)* (loss of bargain damages available only upon showing of seller's bad faith or fraud).

(n20)Footnote 343. *See Roesch v. Bray, 545 N.E.2d 1301 (Ohio App. 1988)* (sale of home one year after breach was reasonable approximation of market value at time of breach); *Van Moorlehem v. Brown Realty Co., 747 F.2d 992 (10th Cir. 1984)* ; *Aboud v. Adams, 507 P.2d 430 (N.M. 1973)* ; *but see Kuhn v. Spatial Design, Inc., 585 A.2d 967 (N.J. Super. 1991)* (in a declining market the measure of a vendor's damages when contract is breached by the buyer is the contract price less the resale price, instead of the value at the time of breach, if the resale is within a reasonable time); *Trapp v. Barley, 897 S.W.2d 159 (Mo. App. 1995)* (vendors entitled to both actual and liquidated damages); *Riley v. St. Germain, 723 A.2d 1120 (RI 1999)* . Vendees were required to pay damages for breach, including vendor's carrying costs and difference between initial contract price agreed to by vendees and price at which property ultimately sold where vendor had made reasonable effort at mitigating damages. The court noted:

> [a]lthough some purchase and sale agreements provide that the seller's remedy for a buyer's default is retention of the buyer's deposit in lieu of any further damages, this contract contained no such limiting language. To be sure, the plaintiffs are now bearing the burden of losses caused in part by a dramatically declining real-estate market. But as between the defaulting buyers and the ready-and-willing sellers, it would be unfair to require the defendants to absorb these losses when, as the trial justice found, they acted reasonably and responsibly to mitigate their damages after the plaintiffs breached the contract.

Id. at 1123.

(n21)Footnote 344. *In re Cantin, 114 B.R. 339 (Bankr. D. Mass. 1990)* ; *Merritt Hill Vineyards, Inc. v. Windy Heights Vineyards, Inc., 94 A.D.2d 947, 463 N.Y.S.2d 960 (1983)* ; *Lanusse v. Gerrets, 357 So. 2d 45 (La. App. 1978)* ; *Decker v. Strom & Strom Realtors, Inc., 695 So. 2d 803 (Fla. App. 1997)* (purchasers forfeited $28,900 escrow deposit on $300,000 property; purchasers had backed out of contract because mortgage payments would be higher than they expected but contract did not provide for this contingency).

(n22)Footnote 345. *Oxford Funding Corp. v. James H. Northrup, Inc., 516 N.Y.S.2d 33 (1987)* ; *Font v. Lazarus Homes Corp., 339 So. 2d 258 (Fla. App. 1976)* .

(n23)Footnote 346. *See* Jeffery B. Coopersmith, *Refocusing Liquidated Damages Law for Real Estate Contracts: Returning to the Historical Roots of the Penalty Doctrine, 39 Emory L. J. 267 (1990). McKeon v. Crump, 53 P.3d 494 (Ut. App. 2002)* (vendors elected the remedy of retaining the deposit as liquidated damages, which election could not be waived).

(n24)Footnote 347. *See Margaret H. Wayne Trust v. Lipsky, 846 P.2d 904 (Idaho 1993)* ; *Cegers v. United States, 7 Cl. Ct. 615 (1985)* ; *Lakshman v. Vecchione, 430 N.E.2d 199 (Ill. App. 1981)* . *Kimbrough & Co. v. Schmitt, 939 S.W.2d 105 (Tenn. App. 1996)* (liquidated damages clause was unreasonable where seller did not suffer actual damage and 15% of purchase price was not a reasonable forecast of damage in the event of breach); *Greenfield v. Shapiro, 106 F. Supp. 2d 535 (S.D.N.Y. 2000)* (Sellers were entitled to escrow fund for buyers' default on real estate contract since

liquidated damages clause controlled parties' rights and buyers had means and opportunity to discern truth of sellers' representations.).

(n25)Footnote 348. *See Hook v. Bomar, 320 F.2d 536 (5th Cir. 1963)* ; *but see Stabenau v. Cairelli, 577 A.2d 1130 (Conn. App. 1990)* (otherwise valid liquidated damages clause may not be enforced if the non-breaching party suffers no damage); *Lake Hills Swim Club, Inc. v. Samson Dev. Corp., 624 N.Y.S.2d 277 (1995)* (liquidated damages provision upheld); *CMG Realty of Conn., Inc. v. Colonnade One at Old Greenwich Ltd. P'ship, 653 A.2d 207 (Conn. App. 1995)* (liquidated damages provision held to be a penalty).

(n26)Footnote 349. *Miller v. Johnson, 958 P.2d 745 (N.M. App. 1998)* (sellers sought to retain $40,000 payment on $180,000 purchase price; held not inequitable in light of buyer's possession of property for five years, income from property during period and failure to keep the premises in good repair).

(n27)Footnote 350. *See Rutherford v. Impson, 366 So. 2d 944 (La. App. 1978) Lanusse v. Gerrets, 357 So. 2d. 45 (La. App. 1978)* ; *Klein v. Sharp, 343 N.Y.S.2d 1014 (1973)* ; *Morton v. Heathcock, 913 So. 2d 662 (Fla. App. 2005)* (purchasers were entitled to attorney fees only for frivolous claims, not simply because they prevailed); *Golconda Screw, Inc. v. West Bottoms Ltd., 894 P.2d 260 (Kan. App. 1995)* (attorney fees improperly awarded).

(n28)Footnote 351. *Saunders v. Sharp, 793 P.2d 927 (Utah App. 1990)* ; *Coe v. Crady Davis Corporation, 60 P.3d 794 (Colo. App. 2002)* (the attorney fee-shifting provision in the contract did not merge into the deed upon closing).

(n29)Footnote 352. *Clyma v. Turner, 840 P.2d 1274 (Okla. App. 1992)* ; *Berryhill v. Hatt, 428 N.W.2d 647 (Iowa 1988); but see Burgess v. Arita, 704 P.2d 930 (Haw. App. 1985)* .

(n30)Footnote 353. *Trayner v. Cushing, 688 P.2d 856 (Utah 1984)* .

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CHAPTER 99 REAL ESTATE CONTRACTS

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§ 99.15 Miscellaneous Provisions.

§ 99.15(a) Assignment of Contract Rights and Obligations.

A contract of sale is generally assignable absent specific agreement to the contrary. n354 However, where a portion of the purchase price is being financed by seller or by the buyer's assumption of existing financing upon which seller will remain liable, the vendor may be entitled to the obligation of the named contract purchaser and may not be required to accept the obligation of an assignee. n355 Similarly, where closing is contingent upon purchaser's ability to satisfy a condition, such as rezoning, that requires considerable expertise or personal effort, a restriction against assignment may be implied.

Whether or not the assignee of a contract for the purchase of real property assumes the duties of the purchaser under the contract such that the contract vendor may enforce the contract against the assignee depends upon the terms of the assignment agreement, and the facts and circumstances surrounding the assignment. n356

§ 99.15(b) Notices.

The contract of sale should describe the manner in which notices, requests and other communications are to be given (e.g., in writing and sent by registered or certified mail addressed to purchaser or seller as specified, with a copy to the respective party's attorney), and the time when notices are considered effective (e.g., forty-eight hours after depositing in the U.S. Mail, or upon receipt or refusal by the addressee to accept delivery).

§ 99.15(c) Entire Agreement; Modification and Amendment.

In order to prevent a party from claiming reliance upon prior correspondence, negotiations, or other written or oral understandings, a provision should be included under which the parties acknowledge that the contract contains their entire agreement on the subject of the transaction, and that all prior understandings and statements are merged into the contract. The provision should further provide that no waiver, modification or amendment of the contract will be valid or enforceable unless in writing and signed by the party against whom enforcement is sought.

§ 99.15(d) Time of the Essence.

The law recognizes that people make significant plans in reliance on the occurrence of closing of real estate transactions at the appointed time. n357 Accordingly, when it has been negotiated between the parties and expressly made a part of their agreement, making time of the essence is an effective, time honored tool of real estate contract administration and enforcement. It provides certainty and objectivity in the definition of rights and obligations between contracting parties. The unsatisfactory alternative would be a time for performance which is subject to adjournment and, ultimately, to a test of reasonableness applied by the trier of fact. A negotiated agreement requiring performance on a specified date and at a specified time n358 will be strictly enforced, no matter how slight the delay, without resort to litigation to determine whether the defaulting party's non-performance should be excused. n359

However, time is not of the essence unless the contract so provides. n360 Where a contract for the sale of real property does not contain a time of the essence clause, the law permits the parties a reasonable time in which to tender performance, even when the contract designates a specific date on which performance is to be tendered. If the original contract does not expressly make time of the essence, time may be made of the essence by an agreement modifying the original contract. Alternatively, either party unilaterally may make time of the essence after the contract is executed by good faith notice to the other assigning a reasonable time for completion of the transaction. n361

COMPUTER-ASSISTED RESEARCH

LEXIS: contract or agreement w/50 sale w/ 50 closing & time w/5 essence

§ 99.15(e) Liability for Brokerage Commission.

Although the absence of a reference in the contract to payment of a broker's commission does not necessarily impair enforceability, n362 the better practice is for the contract to allocate to seller the obligation to pay brokerage commissions. The broker, if willing, should execute the agreement to acknowledge its understanding that the commission is earned and payable if and only if closing occurs. n363 The contract should also address the broker's share, if any, of the earnest money deposit payable to seller as damages in the event of purchaser's default.

§ 99.15(f) Duty to Cooperate; Further Assurances.

Purchaser may be asked to cooperate with seller to accomplish a tax-free "like-kind" exchange of the subject property for other property to be acquired from a third party and transferred to the seller either simultaneously with closing on the sale of the subject property or within 180 days thereafter. n364 A knowledgeable purchaser will condition its consent upon seller's undertaking to reimburse purchaser for any additional legal fees or other expenses incurred by purchaser in connection with the exchange.

§ 99.15(g) Binding Effect.

Although the death of a party does not excuse such party's estate from performance of the decedent's obligations under the contract, it is customary for the agreement to recite the law's presumption that the parties intend for the contract to bind and inure to the benefit of their respective heirs and personal representatives. Purchaser should, therefore, seek inclusion of an option by purchaser's executor to terminate the contract in the event of purchaser's death before closing. n365

FOOTNOTES:
(n1)Footnote 354. Milton R. Friedman, Contracts and Conveyances of Real Property 182 (5th ed. 1991).

(n2)Footnote 355. Milton R. Friedman, Contracts and Conveyances of Real Property 183-4 (5th ed. 1991). *Finch v. Beneficial New Mexico, Inc., 905 P.2d 198 (N.M. 1995)* (a mortgage granted on real property that was subject to a real estate contract was not an assignment, even though legal and equitable title had passed to the purchaser before the

mortgage foreclosed).

(n3)Footnote 356. *Midtaune v. Burns, 434 N.W.2d 474 (Minn. App. 1989)* ; *P/T Ltd. II v. Friendly Mobile Manor, Inc., 556 A.2d 694 (Md. App. 1989)* ; *Treasure Valley Bank v. Long, 759 P.2d 1108 (Or. App. 1988)* .

(n4)Footnote 357. "Often interests of third parties are also at issue. The seller may have to pay his lender out of the proceeds of the sale on the day of closing. The buyer may have a loan commitment which expires if closing is delayed. Either buyer or seller may have scheduled simultaneous closings on property." Theodore H. Hellmuth, Missouri Practice-Real Estate Law § 40 (1985).

(n5)Footnote 358. The rules described in this subsection apply not only to the closing date, but also to various other dates provided in the contract, such as the time for obtaining financing commitments and correcting title defects. *See, e.g., Kakalik v. Bernardo, 439 A.2d 1016 (Conn. 1981)* . Knowledgeable practitioners do not rely upon a boilerplate time of the essence clause, but rather err on the side of caution by expressly making time of the essence with respect to each and every such deadline. *CDC Nassau Assoc. v. Fatoullah, 163 A.D.2d 227, 558 N.Y.S.2d 946 (1990)* (where contract was unclear as to dates to which time of the essence clause applied, purchaser entitled to specific performance notwithstanding failure to appear at time of closing); *Prime Group, Inc. v. Northern Trust Co., 215 Ill. App. 3d 1065, 159 Ill. Dec. 918, 576 N.E.2d 841 (Ill. App. 1990)* ; *Arnhold v. Ocean Atlantic Woodland Corporation, 284 F.3d 693 (8th Cir. 2001)* (closing required to be completed by a specific date).

(n6)Footnote 359. *See, e.g., Gorrie v. Winters, 518 A.2d 515 (N.J. Super. 1986)* (upholding seller's termination of contract for sale of nine-acre tract of land at 11:45 a.m. for purchaser's failure to appear at scheduled 11:00 a.m. closing). However, courts tend to find a waiver of the provision making time essential by the party demanding strict compliance. *See, e.g., Stevens v. Cliffs at Princeville Assocs., 684 P.2d 965 (Haw. 1984) , reconsideration denied, 744 P.2d 780* ; William B. Stoebuck and Dale A. Whitman, The Law of Property § 10.9 (3d ed. 2000); *Fairfax v. Oaks Dev. Co., 713 N.W.2d 704 (Iowa 2006)* (action by purchasers to enjoin forfeiting interest after failure to make timely payments, because notice requirements had not been met).

(n7)Footnote 360. *Limpus v. Armstrong, 322 N.E.2d 187 (Mass. App. 1975)* ("The mere fact that the agreement specified a date for closing did not make time of the essence."). In fact, the failure of the parties to fix a time for performance does not render the contract unenforceable. If the parties do not agree upon the time for performance, an agreement for performance within a reasonable time will be implied. *Buehring v. Hudson, 219 S.W.2d 810 (Tex. App. 1949)* ; *E. Shepherdstown Devs., Inc. v. J. Russell Fritts, Inc., 398 S.E.2d 517 (W. Va. 1990)* (where the contract did not fix a time for performance, a 40-month delay by purchaser in closing under contract contingent upon approval of proposed development plan by local planning officials justified seller's refusal to perform); *Lou v. Main St. Assocs., 212 A.D.2d 675, 622 N.Y.S.2d 761 (1995)* (time not of essence under the contract).

(n8)Footnote 361. The notice must be clear, distinct and unequivocal, and must fix a reasonable time within which to perform. What constitutes a reasonable time depends on the facts and circumstances of the particular case. The party giving notice need not state specifically that time is of the essence, as long as the notice specifies a time for closing and warns that failure to close on that date will result in default. *Sohayegh v. Oberlander, 547 N.Y.S.2d 98 (1989)* ; *Limpus v. Armstrong, 322 N.E.2d 187 (Mass. App. 1975)* ; *Johnson v. Gregg, 807 S.W.2d 680 (Mo. App. 1991)* ; *Mazzaferro v. Kings Park Butcher Shop, Inc., 503 N.Y.S.2d 134 (1986)* ; *Knight v. McClean, 566 N.Y.S.2d 952 (1991)* (after five-year delay in closing, seller's attempt to establish closing date two weeks from time-of-the-essence notice to purchaser held unreasonable); Karl B. Holtzschue, Real Estate Contracts 82 (1985). *Piano 230 North Corp. v. 230 North Realty, LLC, 758 N.Y.S.2d 339 (2003)* (purchaser forfeited the down payment after refusing to proceed when the vendor's attorney declared time was of the essence).

(n9)Footnote 362. *Cf. Nelson v. Rebello, 530 N.E.2d 798 (Mass. App. 1988)* .

(n10)Footnote 363. The traditional rule of law that a broker is entitled to a commission upon producing a customer

ready, willing and able to buy upon the terms and for the price given the broker by the owner has been construed to mean that, once a customer is produced by the broker and accepted by the seller, the commission is earned, whether or not the sale is actually consummated. In a minority of states, the broker is considered to have earned his or her commission only after the purchaser completes the transaction by closing the title in accordance with the provisions of the contract. *Ellsworth Dobbs, Inc. v. Johnson, 236 A.2d 843 (N.J. 1967)* ; *Tristram's Landing, Inc. v. Wait, 327 N.E.2d 727 (Mass. 1975)* ; *Winer v. Ceslik, 786 A.2d 516 (Conn. App. 2001)* (contract was void, so commission had to be returned to seller).

(n11)Footnote 364. No gain or loss on an exchange of real property is recognized if property held for productive use in a trade or business, or for investment, is exchanged solely for other such property. *I.R.C. § 1031 (1988)*. Since 1984, Congress has authorized tax-free exchanges on a non-simultaneous basis so long as closing occurs within 180 days after closing on the disposition of taxpayer's property. Me. Rev. Stat. Ann. tit. 145, § 6201(3).

(n12)Footnote 365. Milton R. Friedman, Contracts and Conveyances of Real Property 10 (5th ed. 1991).

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CHAPTER 99 REAL ESTATE CONTRACTS

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§ 99.16 Execution on Behalf of Purchaser and Seller; Counterparts.

Although the contract of sale should be signed by both parties, the Statute of Frauds requires only the signature of the party against whom enforcement is sought. There is no requirement that a signature be in any particular form so long as there is some reliable indication that the party to be charged intended to authenticate the writing. Thus, the signature need not necessarily appear at the end of the document. n366 A stamped or typewritten signature is sufficient to constitute a signed writing, n367 as is a mailgram. n368

For the convenience of the parties, the contract may provide for execution in two or more counterpart copies, which shall have the same force and evidentiary effect as if all parties had executed a single copy of the contract.

FOOTNOTES:
(n1)Footnote 366. *Smith v. Ostly, 347 P.2d 684 (Cal. 1959)* .

(n2)Footnote 367. *Irving v. Goodimate Co., 70 N.E.2d 414 (Mass. 1946)* ; *Hansen v. Hill, 340 N.W.2d 8 (Neb. 1983)* ; *Frohn v. Central Trust Co., 72 N.E.2d 303 (Ohio 1946)* .

(n3)Footnote 368. *Hessenthaler v. Farzin, 564 A.2d 990 (Pa. Super. 1989)* .

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§ 99.17 Acknowledgement and Recordation.

Particularly in a rising economic market, the seller must be prevented from seeking a more favorable deal during the executory period by "shopping" the contract of sale to other prospective purchasers. Although the contract purchaser will have a cause of action for damages against the unscrupulous seller, an unrecorded contract may not be enforceable by specific performance against the claim of a subsequent purchaser in good faith and for value without notice of the contract. n369

Accordingly, for the purchaser's protection it is advisable that the contract of sale be in recordable form and promptly recorded in the public land records to place subsequent purchasers on constructive notice of purchaser's interest in the property. In order to overcome the legitimate objection of seller's counsel that recordation of the contract will constitute a cloud on seller's title in the event of purchaser's non-performance, purchaser may execute and deliver into escrow a termination and release of the contract to be recorded upon purchaser's default.

FOOTNOTES:
(n1)Footnote 369. Karl B. Holtzschue, Real Estate Contracts 133 (1985).

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§ 99.18 Short-form Memorandum of Sale.

In order to overcome the legitimate objection to recordation expressed by sellers that the purchase price should not become a matter of public information, the parties should execute and acknowledge a recordable memorandum of sale to place third parties on constructive notice of purchaser's rights. The short-form agreement should identify the property and the parties, and state that a contractual relationship exists between them with respect to the property and the time for closing. Other terms of the full contract of sale, including the consideration, may be omitted.

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§ 99.02(b) Statement of Consideration. [Go To Main]

Add:

U.S. v. Wilson, 2010 U.S. Dist. LEXIS 32464 (E.D. Okla. 2010.) (statements of consideration must be coherent, not "ethereal")

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12-99 Thompson on Real Property, Thomas Editions Supp. to § 99.04

Supp. to § 99.04 Description of Property Conveyed.

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§ 99.04(a) Description of Real Property. [Go To Main]

Add:

Ray v. Frasure, 200 P.3d 1174 (Idaho 2009) (any contract from which a complete description can be inferred is valid)

Add:

Ray v. Frasure, 200 P.3d 1174 (Ida. 2009) (property description in a real estate contract giving only the physical address was insufficient without indication of quantity, identity or boundaries of the property).

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Supp. to § 99.06 Representations and Warranties.

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§ 99.06(a) Seller's Representations and Warranties. [Go To Main]

add new footnote 268.1 at end of subsection: n268.1

§ 99.06(d) Merger by Deed. [Go To Main]

At end of first sentence of subsection, Add new Note 105.1: n105.1

FOOTNOTES:

(n1)Footnote 268.1. *SCI Minnesota Funeral Services, Inc. v. Washburn-McReavy Funeral Corp., 779 N.W.2d 865* (Minn. App. 2010.) (Buyers shouldn't just rely on Sellers' representations if they have the ability to find out for themselves the desired information)

(n2)Footnote 105.1. *Westwinds Dev. Corp. v. Outcalt, 2009 Ohio 2948 (Ohio App. Geauga County 2009)* (holding that agreement's provision requiring purchasers to negotiate construction contract with builder was extinguished on closing)

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Supp. to § 99.07 Conditions.

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Add:

Moran v. Erk, 872 N.Y.S.2d 696 (2008) (if a real estate contract contains a provision requiring approval from the purchaser's attorney, the attorney can withhold approval for any reason or no stated reason).

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Supp. to § 99.08 Minimizing Environmental Liability.

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§ 99.08(a) Federal Environmental Laws. [Go To Main]

§ 99.08(a)(5) Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA).

§ 99.08(a)(5)(C)

Add:

Westport Ins. Corp. v. Appleton Papers, Inc., 2010 Wisc. App. LEXIS 425 (Wis. Ct. App. 2010) (only federal courts can interpret CERCLA).

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Supp. To CHAPTER 99 REAL ESTATE CONTRACTS

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Supp. to § 99.10 Title.

[Go To Main]

§ 99.10(a) Seller's Duty to Deliver. [Go To Main]

§ 99.10(a)(1) Marketable Title.

Add:

Catskill Associates, L.L.C. v. Benza, 2010 U.S. Dist. LEXIS 24070 (N.D. N.Y. 2010) (holding that litigation turns solely on whether the seller can provide a marketable title)

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12-99 Thompson on Real Property, Thomas Editions Supp. to § 99.14

Supp. to § 99.14 Breach of Contract.

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§ 99.14(b) Remedies for Breach of Contract. [Go To Main]

§ 99.14(b)(4) Liability for Attorney's Fees.

Add:

Rich v. Olah, 274 S.W.3d 878 (Tex. App. 2008) (vendor entitled to recover attorney's fees in accordance with the real estate contract).

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Supp. To CHAPTER 99 REAL ESTATE CONTRACTS

12-99 Thompson on Real Property, Thomas Editions Supp. to § 99.19

Supp. to § 99.19 Bibliography.

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Add to Books:

Lefcoe, George, *Real Estate Transactions, Finance, and Development* (6th ed. 2009).

Oman, Nathan B. "A Pragmatic Defense of Contract Law," *98 Geo. L.J. 77 (November 2009).*

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CHAPTER 100 INSTALLMENT LAND SALES CONTRACTS

12-100 Thompson on Real Property, Thomas Editions 100.syn

AUTHOR: Professor Buddy O. H. Herring School of Law Wake Forest University

§ 100.syn Synopsis to Chapter 100: INSTALLMENT LAND SALES CONTRACTS

§ 100.01 Nature of the Installment Land Sales Contract.

§ 100.02 Installment Land Sales Contracts and Mortgages Compared.

§ 100.03 Recordation of the Contract.

§ 100.04 Right to Possession Under the Land Sales Contract.

§ 100.05 Destruction of the Property Being Purchased Under Contract.

§ 100.06 The Purchaser's Right to Assign.

§ 100.07 The Purchaser's Right of Prepayment.

§ 100.08 Vendor Remedies upon Default.

§ 100.08(a) Overview.

§ 100.08(b) Forfeiture and Rescission.

§ 100.08(c) Strict Foreclosure.

§ 100.08(d) Judicial Sale.

§ 100.08(e) Specific Performance.

§ 100.08(f) Payment of the Purchase Price.

§ 100.08(g) Damages.

§ 100.09 Purchaser Protection on Default.

§ 100.09(a) Overview.

§ 100.09(b) Waiver.

§ 100.09(c) Election of Remedies.

§ 100.09(d) Redemption.

§ 100.09(e) Restitution.

N.C. Gen. Stat. § 21Title Considerations.

§ 100.10(a) Vendor's Title.

§ 100.10(b) Pre-existing Liens.

§ 100.10(c) Post-contract Liens.

§ 100.11 Bankruptcy.

§ 100.12 Bibliography.

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CHAPTER 100 INSTALLMENT LAND SALES CONTRACTS

12-100 Thompson on Real Property, Thomas Editions § 100.01

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§ 100.01 Nature of the Installment Land Sales Contract.

U.C.C. § 3-606

The installment land sales contract is one of three security devices most often used in credit transactions involving real estate. The other two are the mortgage and the deed of trust. Under the installment land sales contract, the property is sold for the payment of the purchase price in a series of installments over a period of time. n1 While there is a separate developed body of law governing mortgages and deeds of trust, the principles governing installment land sales contracts are a hybrid composed of property law and contract law. n2 The transaction involves the transfer of title to real property, and the elements of the transaction are controlled by the terms of the contract between the vendor and the purchaser.

In a normal sale of real property the contract of sale is designed to control the rights of the parties for the short period of time between the agreement to sell and the closing, usually a time span of only a few weeks; however, in the installment sales contract the relationship between the vendor and purchaser may continue for several years before the title is ultimately transferred. During this period of time, the rights of the parties are controlled by the contract. n3

The installment land sales contract has been referred to as a "poor man's mortgage." n4 In a mortgage, the promise to repay is secured by the lien on the purchased property. In a land sales contract, the purchaser's promises contained in the contract are secured by the fact that the purchaser will not receive title to the subject property until the purchase price has been fully paid. The advantage to the purchaser of the installment land contract is the fact that the owner of the property will finance the acquisition of the property. This means that the purchaser does not have to go through the lengthy and expensive and sometimes unsuccessful process of institutional financing. In light of the savings and loan crisis of the early 1990's, lending institutions became increasingly cautious in making real estate loans. Often, purchasers fail to qualify even though they are capable of making the required monthly payments. The land sales contract therefore offers an alternative to institutional financing. The land sales contract has become especially popular in the vacation home sector of the real estate market and in the purchase of farm land.

The vendor, too, enjoys the advantage of the installment land sales contract in not having to wait for the processing of one or more vendee loan applications. The vendor in an installment land sales contract usually does not convey title to

the premises until all the terms of the contract have been met. Thus, if the vendee defaults in any aspect of the contract, the vendor ordinarily has power to terminate the contract and retain title to the property and all monies paid, including any interest paid. Thus, in theory, the vendor has a quick and simple remedy on default and does not have to go through the complicated and slow statutory foreclosure procedure required for mortgages. n5

Possession of the premises is often granted to the purchaser on the condition that the purchaser remain in good standing under the contract. Under the doctrine of equitable conversion, the vendee in possession under a contract is often viewed as the equitable owner of the property and is thus usually responsible for the payment of taxes and insurance during the life of the contract and, of course, thereafter. n6 According to this doctrine, in some states the vendor's interest in an installment land sales contract is a personal property rather than a real property interest. n7 Inconsistencies may arise in those states that treat the land sales contract as a real property interest for some purposes, such as recording, but then view it as a personal property interest for other purposes, such as intestate succession. In these states, often for some purposes, such as recording, we treat the land sales contract like a real property interest, but then for other purposes, such as intestate succession, land sales contracts are treated as personal property. n8 Land installment contracts are also subject to laws prohibiting race and other discrimination in sales of housing. n9

COMPUTER-ASSISTED RESEARCH

LEXIS: installment w/1 land w/1 contract!

FOOTNOTES:

(n1)Footnote 1. Some states have tried to define the installment land sales contract by statute. The Ohio definition is as follows:

> "Land installment contract" means an executory agreement which by its terms is not required to be fully performed by one or more of the parties to the agreement within one year of the date of the agreement and under which the vendor agrees to convey title in real property located in this state to the vendee and the vendee agrees to pay the purchase price in installment payments, while the vendor retains the title to the property as security for the vendee's obligation. Ohio Rev. Code Ann. § 5313.01.

See also Cal. Civ. Code § 2985. Other states have defined the relationship by case law. *See, e.g., Boyd v. Watts, 342 S.E.2d 840 (N.C. 1986) . See also Shelter Mut. Ins. Co. v. Crunk, 102 S.W.3d 560, 564 (Mo. Ct. App. 2003)* (defining an installment land sale contract or "contract for deed").

(n2)Footnote 2. *Ellis v. Butterfield, 570 P.2d 1334, 1336 (Idaho 1977)* ; *Woods v. Cobbins, 2004 Ohio 5767 (Ohio Ct. App. 2004)* (No. 20295, Oct. 8, 2004) (a land installment contract must satisfy the statute of frauds).

(n3)Footnote 3. The contract may or may not be recorded. *Green v. Hemmert, 703 So. 2d 391 (Civ. App. Ala. 1997)* (in the absence of a statute requiring that a contract must be written or evidenced in writing, a valid contract may be partly written and partly oral); *Muina v. Canning, 717 So. 2d 550 (Fla. 1998)* (notarization and recording of an agreement is not essential for the validity of a contract for a deed); *Fadelsak v. Hagley, 2003 Ohio App. LEXIS 3117* (No. 02 CA 41, Jun. 25, 2003) (ruling that an installment land contract can be imputed from the objective manifestations and intent of the parties, regardless of the written language of the agreement).

(n4)Footnote 4. *Ellis v. Butterfield, 570 P.2d 1334 (Idaho 1977) . See also* Joel Rebecca Donelson, *The Bond for Title: A Modern Look at Alabama's Land Installment Contract*, Ala. L. Rev. 137 (1994); Note, *The Wyoming Installment Land Contract: A Mortgage in Sheep's Clothing? Or What You See Isn't What You Get, Metropolitan Mortgage & Securities Co. v. Belgarde, 816 P.2d 868 (Wyo. 1991)* , 28 Land & Water. Rev. 309 (1993); Note, *Tennessee and the Installment Land Contract: A Viable Alternative to the Deed of Trust, 21 Mem. St. U. L. Rev. 551 (1991).*

(n5)Footnote 5. Comment, *Forfeiture: The Anomaly of the Land Sales Contract,* Jeffrey W. King, *41 Alb. L. Rev. 71 (1977).*

(n6)Footnote 6. *Ruva v. Mente, 572 N.E.2d 888 (Ill. 1991)* ; *Ellis v. Butterfield, 570 P.2d 1334 (Idaho 1977)* ; *Graves v. Diehl, 958 S.W.2d 468 (Tex. App. 1997)* ; *In re Shareholders Funding, Inc., 188 B.R. 150 (Bankr. E.D. Pa. 1995)* (under Pennsylvania state law, purchaser becomes equitable owner of the property upon entry into an installment land contract); *Kopanuk v. AVCP Reg'l Hous. Auth., 902 P.2d 813 (Alaska 1995)* (the purchaser under an installment land contract is treated as the equitable owner and the vendor as holding the bare legal title merely as security for the purchase price); *In re Kane, 248 B.R. 216 (1st Cir. 2000) . But see also Construx of Ill., Inc. v. Kaiserman, 800 N.E.2d 1267 (Ill. App. Ct. 2003)* (holding that a seller under an installment land sale contract was the legal owner of the property and not merely a lienholder, and, consequently, could be held responsible for a mechanics lien, where the seller knew of and acquiesced in the improvements to the property).

(n7)Footnote 7. *Cannefax v. Clement, 786 P.2d 1377 (Utah App. 1990)* ; *Butler v. Wilkinson, 740 P.2d 1244 (Utah 1987)* ; In the *Matter of Jones, 768 F.2d 923 (7th Cir. 1985)* (applying Indiana law in a bankruptcy proceeding); *Melrose Park Nat'l Bank v. MPNB of Tucumcari, 595 P.2d 1199 (N.M. 1979)* . In each of these cases, the courts held that the vendor's interest was personal property not subject to judgment liens. The courts further held that under the doctrine of equitable conversion, the vendee's interest was real property and would be subject to judgment liens.

(n8)Footnote 8. *Teed v. Powell, 372 S.E.2d 131 (Va. 1988)* ; *In re Jones, 768 F.2d 923 (7th Cir. 1985)* .

(n9)Footnote 9. *Clark v. University Bldrs., Inc., 706 F.2d 204 (7th Cir. 1983)* ("Clark II"); *Clark v. University Bldrs., Inc., 501 F.2d 324 (7th Cir. 1974)* ("Clark I").

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CHAPTER 100 INSTALLMENT LAND SALES CONTRACTS

12-100 Thompson on Real Property, Thomas Editions § 100.02

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§ 100.02 Installment Land Sales Contracts and Mortgages Compared.

U.C.C. § 3-606(2)

Both mortgages and land sales contracts are means for financing the acquisition of real property. Under the land sales contract the seller, in effect, agrees to finance the purchase of the property by taking a purchase money mortgage. n10 In a true purchase money mortgage or deed of trust transaction, the seller transfers the title to the property to the buyer and takes back a promissory note and deed of trust or mortgage to secure the payment of the note. In the land sales contract, the contract replaces the note and deed of trust. The seller thus provides the financing and receives from the buyer a series of payments over a period of time. When all payments of principal and interest have been made, the buyer owns the property outright and free of the encumbrance of the seller's security interest.

However, in most states there are significant differences between the legal incidents of the land sales contract and the mortgage. Ostensibly, the seller has greater powers and protections under a land sales contract than under a mortgage. The seller in the land sales contract is not bound by the statutory rules governing foreclosures and deficiency judgments. n11 Also, normally a mortgagor has the right of possession, while the right of possession in land sales contracts is governed by the contract. The seller in a land sales contract typically has greater power than a mortgagee to seize the property, if it is in the hands of the buyer, and to retain all monies paid to date if there is default. n12 If there is a default under the contract, theoretically the seller can simply void the contract, retake the property and retain all monies paid. n13 The buyer, unlike the mortgagee, cannot force the sale of the property and have the proceeds applied to the debt and the excess refunded. n14

Compared to the mortgagor, the contract buyer has far fewer rights concerning redemption. Generally, there is no right to redeem the property upon payment of the amount in default. n15 Also, the buyer who is in default has no right to have payments returned to him, with only the obligation to respond in damages if the seller can show harm. n16

However, a state may declare that the land sales contract will be treated exactly as a mortgage and that the purchaser will have all the rights and remedies of a mortgagor. n17

COMPUTER-ASSISTED RESEARCH

LEXIS: land w/1 contract! w/30 record! OR installment w/1 contract! w/30 record!

FOOTNOTES:
(n1)Footnote 10. *Butler v. Wilkinson, 740 P.2d 1244 (Utah 1987)* .

(n2)Footnote 11. *See* Grant Nelson & Dale Whitman, Real Estate Finance Law § 3.27 (5th ed. 2007). However, other statutory requirements may apply. *Maxwell v. Fidelity Fin. Servs., Inc., 907 P.2d 51 (Ariz. 1995)* (statutory requirement that seller give buyer a copy of the land installment contract).

(n3)Footnote 12. *Barker v. Johnson, 591 P.2d 886 (Wyo. 1979)* ; *Paraguay Place-View Trust v. Gray, 981 P.2d 681 (Colo. App.1999)* .

(n4)Footnote 13. *Jenkins v. Wise, 574 P.2d 1337 (Haw. 1978)* .

(n5)Footnote 14. *Ellis v. Butterfield, 570 P.2d 1334 (Idaho 1977)* ; *In re Grove, 208 B.R. 845* (Bkrtcy. W.D. Pa., 1997) (under Pennsylvania law, installment land sales contracts are to be treated as mortgages for the purposes of foreclosure and execution); *Muina v. Canning, 717 So. 2d 550 (Fla. 1998)* (in an action to foreclose a contract for a deed, vendors were entitled only to the remedies available to mortgagees, not to possession free of the purchaser's equitable interest and right of redemption, notwithstanding a contract clause; contracts for deeds where the vendor agrees to convey legal title to the purchaser who pays all installments or the purchase price are only security devices; such agreements are treated under Florida law as mortgages, subject to all the rules of foreclosure); *Sams Money Purchase Pension Plan v. Jansen, 3 S.W.3d 753 (Ky. App.1999)* .

(n6)Footnote 15. *Ellis v. Butterfield, 570 P.2d 1334 (Idaho 1977)* ; *Lamberth v. McDaniel, 506 S.E.2d 295 (N.C. App. 1998)* (upon default under an installation land sales contract, the purchaser has a right to redeem the property by tendering the entire balance due, plus interest, under the contract to prevent forfeiture, which cannot be waived by contract at the time of the agreement).

(n7)Footnote 16. *See, e.g., Porter v. Smith, 486 N.W. 2d 846 (Neb 1992)* .

(n8)Footnote 17. *Brannock v. Fletcher, 155 S.E.2d 532 (N.C. 1967)* ; *In re Foreclosure of Taylor, 298 S.E.2d 163 (N.C. App. 1982)* ; Elizabeth M. Provencio, *Moving from Colonias to Comunidades: a Proposal for New Mexico to Revisit the Installment Land Contract Debate, 3 Mich. J. Race & L. 283 (Fall 1997). See also* Pennsylvania law in *In re Grove, 208 B.R. 845 (Bkrtcy. W.D. Pa. 1997)* ; *Lamberth v. McDaniel 506 S.E. 2d 295 (N.C. App. 1998)* .

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CHAPTER 100 INSTALLMENT LAND SALES CONTRACTS

12-100 Thompson on Real Property, Thomas Editions § 100.03

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§ 100.03 Recordation of the Contract.

Problems frequently arise from the failure to record real estate contracts. Some contracting parties are reluctant to record their contract, because they do not wish the details of the transaction to become a matter of public record. However, under most state recording statutes, an installment purchaser is unprotected against a subsequent purchaser for value who has no actual or constructive notice of the installment land sales contract. n18 Thus, by not recording, the purchaser runs the risk that a subsequent purchaser of the property from the record title holder will acquire superior rights. If the record owner re-sold or mortgaged the property after the unrecorded contract sale, buyer or mortgagee could acquire rights in the land superior to those of the contract buyer.

The harshness of this situation is somewhat alleviated in notice and race-notice recording states by the fact that usually the purchaser under a land sales contract is given the right of possession at the time of signing the contract; subsequent transactions will often be subject to the rights of parties in possession because possession itself gives notice to any prospective subsequent purchasers. However in a pure race state, mere possession is not sufficient to protect the land sales purchaser. Even in notice and race-notice states, there is often a question of what type of possession is sufficient to give notice. This is especially true in cases of unimproved land or land that is not to be occupied year-round. Courts are often called on to decide whether the erection of a fence or the use of the land as an occasional vacation spot is sufficient occupancy to give a subsequent purchaser notice under the statute. n19 Of course, the greatest number of land sales contracts involve just this type of land. These are not clear-cut issues and courts frequently rule against the contract purchaser who has not recorded. For this reason the purchaser should place on the public record some evidence of the contract. n20

While recording is clearly in the best interests of the purchaser, it often is not in the best interests of the vendor, and since the vendor is usually the one in the best bargaining position, the vendor may attempt to keep the contract unrecorded. One reason the vendor may be reluctant to record is the need to quickly resell the property if the purchaser defaults. In order to do this the vendor must be able to produce a clear title. If the contract has been recorded, the recording is a cloud on the title and must be cleared before the title will be marketable. While several judicial remedies are available to clear the title, resort to those remedies compromises one of the advantages of using the contract device, which is to avoid time-consuming judicial procedures. The vendor would much rather keep the title unencumbered by not recording the land sales contract.

If the contract is recorded, the vendor may attempt to avoid remedial judicial action by requiring the purchaser to execute a quitclaim deed when the land sales contract is executed. The deed is then held in escrow as long as the contract is being performed, but delivered to the vendor in case of purchaser's default. The validity of this approach is uncertain, but the vendor would be better off having the quitclaim deed executed after the date of the signing of the contract. n21 Of course, there would have to be some separate consideration, such as a waiver of default or a restructuring of the purchase terms, to support the execution of the quitclaim deed.

Some vendors attempt to resolve the recording problem by simply prohibiting the recording of the instrument or executing the document in a form that is not recordable. The purchaser can refuse to accept a contract which is not in recordable form, and an outright prohibition on recording is probably not enforceable, since it runs contrary to public policy. One state statute expressly invalidates non-recordation clauses. n22

COMPUTER-ASSISTED RESEARCH

LEXIS: land w/1 contract w/50 record! OR installment w/1 contract! w/50 record!

FOOTNOTES:

(n1)Footnote 18. American state recording statutes are usually distinguished as race-notice statutes (*e.g.*, Cal. Civ. Code § 1214), notice statutes (*e.g.*, Mass. Gen. L. ch. 183, § 4), and race statutes (*e.g.*, N.C. Gen. Stat. § 47-18(a)). *Whitaker v. Whitaker, 901 A.2d 223 (Md. App. 2006)* (failure to record a loan repayment agreement, which constituted a land installment contract); *Gorzeman v Thompson, 986 P.2d 29 (Ore. App. 1999)* .

(n2)Footnote 19. *Beals v. Cryer, 426 N.E.2d 253 (Ill. App. 1981)* .

(n3)Footnote 20. *First Fed. Sav. Bank v. Hartley, 799 N.E.2d 36 (Ind. Ct. App. 2003)* (holding that recordation of the contract will not protect the purchaser from existing encumbrances, such as a bank's mortgage, even when improvements to the land have been made).

(n4)Footnote 21. There is no question that a mortgagor can relinquish the right of redemption in a separate transaction *after* the execution of the mortgage, if there is sufficient consideration. However, it is equally clear that a mortgagor cannot relinquish the right of redemption at the time of the execution of the mortgage. Applying these principles to a land sales contract would suggest that a quitclaim deed would preferably be executed by the purchaser after the signing of the contract. *See* Grant Nelson & Dale Whitman, Real Estate Finance Law § 3.31 (5th ed. 2007); *First Ill. Nat'l Bank v. Hans, 493 N.E.2d 1171 (Ill. App. 1986)* .

(n5)Footnote 22. Ill. Stat. ch. 765 § 70/2 (1992).

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CHAPTER 100 INSTALLMENT LAND SALES CONTRACTS

12-100 Thompson on Real Property, Thomas Editions § 100.04

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§ 100.04 Right to Possession Under the Land Sales Contract.

In the typical real estate earnest money contract, possession of the premises passes at the closing when the purchaser has paid the full purchase price for the property. n23 However, in a land sales contract the parties are free to contract as to time of possession. Generally, the parties agree that the purchaser has the right to possession as soon as the contract is signed. n24 The parties are, of course, free to contract that possession may pass at any time between the signing of the land sales contract and the payment of the full purchase price.

Problems often arise if the parties fail to mention a time for possession in the contract. Under traditional vendor-purchaser law, possession passed only upon payment of the full purchase price. Thus, unless the parties agreed to an earlier time of possession, the purchaser was not entitled to possession until the full purchase price had been paid. n25 However, in the case of land sales contracts, courts have now largely reversed the old vendor-purchaser rules. Today, the courts assume that the purchaser under a land sales contract is entitled to possession upon the signing of the contract, unless the contract specifies some other time. n26 The reasoning behind this change is the growing view that the land sales contract is merely a mortgage substitute and that the vendor is holding title merely to secure a debt that is owed by the purchaser. n27 As in a purchase money mortgage situation, it would be unnecessary for the seller to retain possession of the premises.

If the right of possession is unclear, the court may also consider who pays the taxes and whether or not the purchaser is required to pay interest on the unpaid balance of the contract price. Unless the contract states to the contrary, the party who pays the taxes on the property is entitled to possession of the premises. n28 Some courts have also held that if the vendor is receiving interest on the unpaid balance, the vendor is essentially a mortgagee and that the purchaser is therefore entitled to possession. n29

The conduct of the parties can also influence a court's decision about when possession should be transferred. If the vendor allows the purchaser to take possession after the signing of the contract, many courts will assume that was the intention of the parties and will allow the purchaser to remain in possession as long as the contract is in force and not in breach. n30

Right to possession becomes an issue under contract sales when the vendor tries to collect rent from the purchaser in

possession. Courts agree that a purchaser in rightful possession is under no obligation to pay rent. n31 However, in most states, if the purchaser defaults on the terms of the contract, not only can the vendor declare the contract void, but the purchaser who remains in possession would be liable for rent. n32

COMPUTER-ASSISTED RESEARCH

LEXIS: right w/5 possess! w/50 land w/1 contract!

FOOTNOTES:

(n1)Footnote 23. *See, e.g., Rustigian v. Celona, 478 A.2d 187 (R.I. 1984)* ; *Union Farm Land Co. v. Isaacs, 179 P. 84 (Wash.1919)* ; Emmons v. State Land Office, N.W.2d 657 (Mich. 1943).

(n2)Footnote 24. *See, e.g., Jenkins v. Wise, 574 P.2d 1337 (Haw. 1978)* .

(n3)Footnote 25. *Booth Fin. Corp. v. Loretto Block, Inc., 641 P.2d 527 (N.M. App. 1982)* ; *Pitcher v. Lavritzen, 423 P.2d 491 (Utah 1967)* ; Annotation, *Effect of Failure of Contract For Sale or Exchange of Real Estate to Specify Time For Giving Possession, 56 A.L.R.2d 1272 (1957)* .

(n4)Footnote 26. *First Fed. Sav. & Loan Ass'n v. Fox, 440 So. 2d 652 (Fla. App. 1983)* .

(n5)Footnote 27. *Matter of Jones, 768 F.2d 923 (7th Cir. 1985)* .

(n6)Footnote 28. *Looney v. Farmers Home Admin., 794 F.2d 310 (7th Cir. 1986)* ; *Morris v. Weigle, 383 N.E.2d 341 (Ind. 1978)* ; *Skendzel v. Marshall, 301 N.E.2d 641 (Ind. 1973)* , *cert. denied, 415 U.S. 921 (1974)* . *See* 77 Am. Jur. 2d *Vendor and Purchaser* § 353.

(n7)Footnote 29. *Brannock v. Fletcher, 155 S.E.2d 532 (N.C. 1967)* .

(n8)Footnote 30. *Kruger v. Horton, 725 P.2d 417 (Wash. 1967)* .

(n9)Footnote 31. *Barbarita v. Shilling, 489 N.Y.S.2d 86 (1985)* .

(n10)Footnote 32. *Stapley v. American Bathtub Liners, Inc., 785 P.2d 84 (Ariz. App. 1989)* ; *Marshall v. Bare, 687 P.2d 591 (Idaho App. 1984)* .

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CHAPTER 100 INSTALLMENT LAND SALES CONTRACTS

12-100 Thompson on Real Property, Thomas Editions § 100.05

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§ 100.05 Destruction of the Property Being Purchased Under Contract.

[Go To Supp]

One issue not covered by the provisions in many land sales contracts is that of which party bears the risk of loss between the date of the execution of the contract and the date that title passes. Traditionally, under the doctrine of equitable conversion the risk of loss in a real estate contract is on the purchaser of the property, unless the contract specifies differently. n33 Some states have altered the traditional rule by statute or case law. n34 Often, the deciding factor is when the right to possession shifts. Under the Uniform Vendor-Purchaser Risk of Loss Act, the vendor retains the risk of loss for major destruction until possession has shifted to the purchaser, or until title passes, whichever occurs first. The risk of loss for minor damage remains with the purchaser.

Under most land sales contracts where the purchaser is given the right to possession, the risk of loss will shift to the purchaser, at least for major destruction. Therefore, the purchaser should insure the premises and should be required to do so under the terms of the contract. Failure to insure should be grounds for the vendor declaring the contract void, or at least the vendor should be empowered by the contract to purchase insurance and charge the cost back to the purchaser. If the vendor does insure the property and a loss occurs, many courts rule that the vendor holds the insurance proceeds in trust for the purchaser. n35 If the vendor receives more than the balance due on the contract, often the excess must be turned over to the purchaser. n36

When the *purchaser* carries the insurance and a loss occurs, the purchaser is deemed to hold the proceeds in trust for the vendor and must use the proceeds to pay off the contract. n37 Without the vendor's consent, the purchaser cannot use the insurance money to rebuild. n38 This can be a great inconvenience to the purchaser and could be altered by the contract terms. In states which treat the land sales contract more like a mortgage, often the courts will allow the purchaser to retain the proceeds and rebuild so long as the vendor's security interest is not impaired. n39

COMPUTER-ASSISTED RESEARCH

LEXIS: destruction w/5 property w/50 land w/1 contract!

FOOTNOTES:

(n1)Footnote 33. *Sharbono v. Darden, 715 P.2d 433 (Mont. 1986)* ; *Zitzelberger v. Salvatore, 458 A.2d 1021 (Pa. Super. 1983)* ; *In re Foreclosure of a D/T Given by Taylor, 298 S.E.2d 163 (N.C. App. 1982)* ; *Ridenour v. France, 442 N.E.2d 716 (Ind. App. 1982)* ; *Fellmer v. Gruber, 261 N.W.2d 173 (Iowa 1978)* .

(n2)Footnote 34. *Skelly Oil Co. v. Ashmore, 365 S.W.2d 582 (Mo. 1963)* ; *Dixon v. Salvation Army, 191 Cal. Rptr. 111 (1983)* ; *Flath v. Bauman, 722 S.W.2d 125 (Mo. App. 1986)* ; *International Ins. Co. v. Melrose Park Nat'l Bank, 495 N.E.2d 1197 (Ill. App. 1986)* ; *McDonnell v. Quirk, 491 N.E.2d 646 (Mass. App. 1986)* .

(n3)Footnote 35. *Fellmer v. Gruber, 261 N.W.2d 173 (Iowa 1978)* ; *Guzman v. Acuna, 653 S.W.2d 315 (Tex. Civ. App. 1983)* .

(n4)Footnote 36. *Davis v. Skinner, 474 So. 2d 1136 (Ala. App. 1985)* ; *Cheatwood v. De Los Santos, 561 S.W.2d 273 (Tex. Civ. App. 1978)* .

(n5)Footnote 37. *Kindred v. Boalbey, 391 N.E.2d 236 (Ill. App. 1979)* ; *Madero v. Henness, 607 N.Y.S.2d 153 (1994)* .

(n6)Footnote 38. *Meade v. North Country Co-op Ins. Co., 501 N.Y.S.2d 944 (1986)* .

(n7)Footnote 39. *Price v. Harris, 475 S.W.2d 162 (Ark. 1972)* .

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CHAPTER 100 INSTALLMENT LAND SALES CONTRACTS

12-100 Thompson on Real Property, Thomas Editions § 100.06

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§ 100.06 The Purchaser's Right to Assign.

As a general rule, unless the contract specifically prohibits assignment, a purchaser is free to assign contract rights under a land sales contract to a third party. n40 The transfer may take the form of an assignment of the original contract or a resale of the purchaser's interest by means of a new contract. If the new purchaser specifically agrees to assume all the obligations of the original contract, the new purchaser becomes primarily liable to the original vendor for the performance of all the terms of the contract. n41 Of course, the original purchaser remains liable to the original vendor, but only as a surety.

In many cases, the nature of the assignment transaction is not clear. The third party simply pays the original purchaser the equity and then begins making payments to the original vendor. No formal assignment is made, and often the contract between the parties is a mere verbal agreement for the third-party purchaser to "pick up the payments." In these cases, the courts must determine whether an assignment has been made and the third-party purchaser has thus assumed the contract, or an independent contract has been entered into between the original purchaser and the third-party purchaser. The court's determination of whether an assignment has taken place may affect the rights of the original vendor. If no assignment has taken place, there will be no privity of contract between the original vendor and the third party purchaser. Thus, the rights of the original vendor to sue the third-party vendor directly may be affected. n42

Courts in most states will enforce contract clauses that prohibit assignment by the purchaser, but they tend to construe the clauses narrowly. n43 Courts usually view these clauses the same way they view restrictive clauses on assignments and subleases in rental contracts. Thus, if the contract clause simply prohibits assignment of the purchaser's interest and the purchaser enters into a new sales contract with the third-party purchaser, the original contract clause has not been violated. n44 Similarly, courts usually hold that if the contract requires the vendor's permission prior to assignment, the vendor's permission may not be unreasonably withheld.

In cases where the contract does prohibit assignment or any transfer of the purchaser's interest, some purchasers have attacked these clauses as being unlawful restraints on alienation. These claims have met with mixed results and the courts have usually enforced the clauses, if the vendor has been able to show that a transfer would impair the security interest. n45

Where an assignment has taken place, the assignee takes only what the assignor had to assign. If there is a forfeiture clause, the assignee takes subject to the same clause and runs the risk of losing the property. If the assignor's contract requires the assignor to insure, the assignee must now insure the property. n46

COMPUTER-ASSISTED RESEARCH

LEXIS: land w/1 contract! w/50 purchaser! w/5 right! w/2 assign!

FOOTNOTES:

(n1)Footnote 40. *Bank of Toronto v. Lengkeek, 436 N.W.2d 271 (S.D. 1989)* ; *Beren Corp. v. Spader, 255 N.W.2d 247 (Neb. 1977)* ; *Baliles v. Cities Serv. Co., 578 S.W.2d 621 (Tenn. 1979)* ; *Hansen v. Stichting Mayflower Recreational Fonds, 898 F. Supp. 1503 (D. Utah 1995)* (assignment and quitclaim of installment land contract); *Clairton Corp. v. Chicago Title Ins. Co., 652 A.2d 916 (Pa. 1995)* (no judgment lien attached to a judgment debtor's equitable interest in the property under an installment land contract, where the judgment debtor never paid any purchase money to the vendor and never attempted to exercise rights under that contract, but rather assigned those rights to a related corporation); *Parkersmith Props. v. Johnson, 525 S.E.2d 491 (N.C. App. 2000)* .

(n2)Footnote 41. *Prudential Fed. Sav. & Loan Ass'n v. King, 453 P.2d 697 (Utah 1969)* ; *Lonas v. Metropolitan Mtg. & Sec. Co., 432 P.2d 603 (Alaska 1967)* .

(n3)Footnote 42. *Beren Corp. v. Spader, 255 N.W.2d 247 (Neb. 1977)* .

(n4)Footnote 43. *Dobitz v. Oakland, 561 P.2d 441 (Mont. 1977)* .

(n5)Footnote 44. *Fincher v. Miles Homes of Missouri, Inc., 549 S.W.2d 848 (Mo. 1977)* .

(n6)Footnote 45. *Terry v. Born, 604 P.2d 504 (Wash. App. 1979)* .

(n7)Footnote 46. *Clemons v. American Casualty Co., 841 F. Supp. 160 (D. Md. 1993)* (buyer under land installment contract who assumed insurance obligation was liable to mortgagee for consequential damages flowing from his default).

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CHAPTER 100 INSTALLMENT LAND SALES CONTRACTS

12-100 Thompson on Real Property, Thomas Editions § 100.07

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§ 100.07 The Purchaser's Right of Prepayment.

In general, the terms of the contract control the right of prepayment. There is no inherent right to prepay on an installment land sales contract, and in the absence of a provision granting the right to prepay, the purchaser must pay as set forth in the contract. n47

If the contract allows prepayment, but only under certain terms and upon the payment of certain fees, those terms must be complied with in order to prepay the contract. Some states have enacted statutes that allow prepayment of land sales contracts under certain conditions, even if the contract provides to the contrary. n48 At least one state has taken the position that, if the contract is silent on the subject of prepayment, prepayment will be allowed. n49 The better practice is to insert a clause in the contract dealing with prepayment; courts will usually enforce such a clause, unless its terms are extreme.

COMPUTER-ASSISTED RESEARCH

LEXIS: installment w/3 land w/3 contract! w/50 right! w/3 prepayment

FOOTNOTES:
(n1)Footnote 47. *Carpenter v. Winn, 566 P.2d 370 (Colo. App. 1977)* ; *Lett v. Grummer, 300 N.W.2d 147 (Iowa 1981)* ; *Latimer v. Grundy County National Bank, 607 N.E.2d 294 (1993)* ; *DiMarco v. Shay, 796 N.E.2d 572 (Ohio Ct. App. 2003)* (discussing the majority presumption of no right to prepayment by the purchaser in the absence of a specific contract term, against the minority rule of the presumption of the purchaser's right to prepayment).

(n2)Footnote 48. *See, e.g.,* Cal. Civ. Code § 2985.6.

(n3)Footnote 49. S.D. Codified Laws ch. 43-26.

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CHAPTER 100 INSTALLMENT LAND SALES CONTRACTS

12-100 Thompson on Real Property, Thomas Editions § 100.08

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§ 100.08 Vendor Remedies upon Default.

(d)

§ 100.08(a) Overview.

Usually, whenever a default occurs under an installment land sales contract, the purchaser is in possession of the property, and the vendor has received some payments and still holds legal title to the property. The property may have declined in value during the contract, either because of market factors or general wear and tear. It is also possible that the property will have increased in value during the period of the contract. However, most often, the vendor will face some damages as a result of the failure of the purchaser to perform. The vendor usually will want to be made whole and to receive the benefit of the bargain. One of the perceived advantages of the land sales contract is that the vendor will have a much easier time getting the land back than if a mortgage had been used. However, the remedy of resuming possession of the land may not fully compensate the vendor.

If the vendor has parted with the land and the purchaser has defaulted under the contract, the vendor has several possible remedies other than using the forfeiture provision of the contract. The vendor may bring an action for damages for breach of the contract, or may sue for specific performance, or for strict foreclosure, or for the payment of the purchase price, or the vendor may ask for a judicial sale of the property. n50

COMPUTER-ASSISTED RESEARCH

LEXIS: land w/1 contract! w/50 vendor! w/5 remed! w/15 default

§ 100.08(b) Forfeiture and Rescission.

The typical land sales contract contains a forfeiture clause which provides that if the purchaser defaults on the contract, the vendor may declare a forfeiture of the purchaser's interest in the contract. n51 The typical breach is the failure of the purchaser to make timely payments. Generally, the contract will provide that upon the breach of the contract by the purchaser (1) the vendor may *declare* the contract breached and the purchaser's interest in the land terminated, (2) the land is returned to the vendor, and (3) the vendor keeps all monies paid. However, in many situations this remedy will either not fully compensate the vendor for the loss or will grossly penalize the purchaser for the default. Historically,

many states would routinely enforce these clauses regardless of the effect on the purchaser. However, as more and more states have begun to regard the land sales contract as a substitute for a mortgage, the courts are increasingly favoring enforcement of other remedies which may be more equitable. n52

One of the problems courts face in enforcing forfeiture clauses is deciding which of the alternative remedies is proper. On one hand, if the contract provides that the vendor may declare a forfeiture upon breach of the contract, it could be argued that the contract has been rescinded. n53 If so, then the courts should attempt to put the parties where they were before the transaction took place. This would mean that the vendor should get the land back and the purchaser should get the money back. n54 To allow the vendor to get the land back and retain the monies paid would be inconsistent with the idea that the contract had been rescinded. Also, since the purchaser has used the land for a period, a rental obligation would have been incurred. In many instances the monies paid by the purchaser would exceed the rental value and the value of the improvements, and the court may consider it unfair to allow the vendor to keep the excess. n55

However, some courts view the forfeiture remedy as a contract-based procedure. If the contract provides forfeiture as a remedy upon breach, the vendor is simply declaring the contract breached and no longer has an obligation to perform; the vendor can retain the monies paid as liquidated damages. The court will be concerned about seeing that the vendor gets the benefit of the bargain or is placed in the position as if the contract had been performed. Under this theory, the value of improvements and rental value are not important. Under basic contract law, upon breach of the contract the innocent party should be returned to the position the party would have been in had the contract been performed. Thus, the purchaser would be entitled to payment of all the monies due under the contract. If the vendor gets the property back, the property will be treated as payment on the contract price. If the land value combined with the payments that have been made equal the contract price, then neither party would be entitled to any further relief. However, if the land value and the monies paid do not equal the contract price, the vendor should be entitled to recover damages. Conversely, if the land value and the payments exceed the contract price, the purchaser should get a refund. Most land sales contracts provide that the retention of the monies paid, in addition to getting the land back, is to be viewed as liquidated damages. If the court adopts the contract breach theory of forfeiture, it will then judge the validity of the retention on the monies paid as liquidated damages as it does in any other liquidated damages clause.

Often, the courts do not articulate clearly which theory they are following, and sometimes seem to adopt a hybrid of the two. A few courts have decided to allow the vendor to decide which theory to adopt. California allows the vendor to seek rescission-based damages, which are essentially the return of the property and the compensation for the rental value during the time the purchaser occupied the property, or to seek damages for breach of contract, which are essentially the benefit of the bargain damages. n56

In states that recognize the validity of the forfeiture clause, courts seem to consider the enforcement of the clause as more equitable in nature than legal. n57 Thus the courts may refuse to enforce the forfeiture clause under either theory, unless the purchaser has had a chance to redeem the land or will get back some of the money paid under the contract. n58

COMPUTER-ASSISTED RESEARCH

LEXIS: land w/1 contract! w/50 forfeit! or resci!

§ 100.08(c) Strict Foreclosure.

Many states that treat the installment land sales contract as a mortgage, n59 consequently make available the remedy of strict foreclosure. n60 Under strict foreclosure, the court states a date by which the purchaser must pay the unpaid balance of the contract, plus interest and legal charges. If the purchaser fails to make timely payment, the purchaser's rights in the property are terminated and the vendor is once again owner of the property unencumbered by the rights of the vendor. n61

Since strict foreclosure is based on the contract nature of the transaction, if the property were worth less than the damages incurred by the breach of the contract, the vendor ought to be entitled to a deficiency judgment for the difference. However, in most instances states have anti-deficiency judgment statutes which apply to strict foreclosure actions of mortgages and they may apply these statutes to strict foreclosures of land sales contracts. n62

If the property is worth more than the debt owed, then under the contract theory of damages, the purchaser would be entitled to restitution of the excess amount. However, courts have traditionally been reluctant to grant such relief. What is more likely is that if the difference between the amount owed and the value of the property is great, the court will order that the property be sold at public sale rather than allow strict foreclosure.

COMPUTER-ASSISTED RESEARCH

LEXIS: land w/1 contract! w/50 strict w/1 foreclos!

§ 100.08(d) Judicial Sale.

Another remedy available to the vendor is foreclosure by judicial sale of the property. The main difference between strict foreclosure and foreclosure by judicial sale is that the deadline for remedying the default triggers a court order for sale, rather than termination of the purchaser's rights in the property. n63 From the proceeds of the sale, the court will order the vendor to be paid and any surplus to be refunded to the purchaser or any other claimants. The advantage of this type of foreclosure for the purchaser is that there is a method to ensure that the vendor does not get a windfall; if the purchaser has built up some equity in the property, that equity may be retained by the purchaser. As in a strict foreclosure, if there is a deficiency, the vendor should be entitled to a judgment for that amount, unless a statute prevents deficiency judgments.

COMPUTER-ASSISTED RESEARCH

LEXIS: land w/1 contract! w/50 judicial w/1 sale

§ 100.08(e) Specific Performance.

Another remedy available to the vendor is that of specific performance. n64 Under this remedy, the vendor tenders title to the purchaser and demands the purchase price in full. If the purchaser fails to perform, the vendor seeks a court order for the payment of the purchase price. This remedy is most successful in cases where the original contract contains a clause accelerating the payments upon default so that it may be shown that the purchaser owes the entire purchase price.

Specific performance is an effective remedy when the purchaser has the funds to comply with the order or when the property would be very difficult to resell. However, since this is an equitable action, the purchaser will not be ordered to perform if he can show that the prior failure was involuntary. In other words, if the purchaser failed to perform because of inability to make the payments, an order to perform will not be issued if the inability to make payments has not changed. However, if the failure to perform is voluntary and the purchaser in fact has the means to comply, an order to perform will be an effective and available remedy. Also, specific performance may be available as a remedy for the purchaser to enforce against the vendor. n65 In a California case, the court granted the purchaser specific performance of a land sales contract, even though she was in default, when it found that there was sufficient security for the payment of the debt and that she had paid over half of the purchase price of the property. n66

COMPUTER-ASSISTED RESEARCH

LEXIS: land w/1 contract! w/50 specific w/1 performance

§ 100.08(f) Payment of the Purchase Price.

Some jurisdictions consider the remedy of payment of the purchase as distinct from an action for specific performance. n67 Although the two remedies may differ in form, the result is usually the same. The main difference is that a suit for specific performance is an equitable remedy and the action for payment of the purchase price is one at law. The right to a jury trial may be present in the legal action but not in the equitable proceeding.

In the action for payment of the purchase price, the vendor sues the purchaser for breach of contract and asks that the purchaser be ordered to tender the purchase price as agreed upon in the contract. Upon tender, the vendor will convey the property to the purchaser. One advantage of this remedy over specific performance is that the equitable defense of inability to perform would not be available. Of course, if, in fact, the purchaser cannot perform, ordering the purchaser to perform will be useless.

COMPUTER-ASSISTED RESEARCH

LEXIS: specific w/1 performance w/30 payment w/2 purchase w/1 price w/50 land w/1 contract!

§ 100.08(g) Damages.

One other remedy available to the vendor in the case of default by the purchaser is to affirm the existence of the contract and sue for damages for the breach of the contract. n68 This remedy is best used when the value of the land exceeds the amount owed on the contract. The measure of damages in a land sales contract case would be the difference between the fair market price and the amount still owed on the contract. n69 The vendor also has the option of keeping the contract alive and simply suing for past due installments; however, in most cases this would be a futile act. Generally, the vendor wishes to treat the breach as a material one and as substantial enough to end the contract. If the contract has been materially breached, the purchaser no longer has a right to occupy the premises and possession should be returned to the vendor. This would be so, even if there is no forfeiture clause in the contract. If the value of the land exceeds the amount due on the contract, the vendor should return the excess to the purchaser. If, however, the amount due on the contract exceeds the current value of the land, the vendor should be able to retain the property and get a damage judgment for the deficit. While this may appear to be identical to a forfeiture remedy, there is a slight difference, because in an action for damages, the vendor may not regain the land and keep all payments made if that exceeds the amount of damage suffered by the vendor.

COMPUTER-ASSISTED RESEARCH

LEXIS: land w/1 contract! w/50 damages w/15 default

FOOTNOTES:

(n1)Footnote 50. *Brannock v. Fletcher, 155 S.E.2d 532 (N.C. 1967)* ; *Buckingham v. Ryan, 953 P.2d 33 (N.M. App. 1997)* ; *Lamberth v. McDaniel, 506 S.E.2d 295 (N.C. App. 1998)* (upon default, vendor-mortgagees may choose a variety of remedies); *Paraguay Place-View Trust v. Gray, 981 P.2d 681 (Colo. App. 1999)* .

(n2)Footnote 51. *Haan v. Traylor, 79 P.3d 114 (Colo. Ct. App. 2003)* (seller must not only give notice of default to a buyer, but must also give notice of an election to terminate the contract).

(n3)Footnote 52. *See, e.g., Dempsey v. Carter, 797 N.E.2d 268 (Ind. Ct. App. 2003)* (forfeiture is only appropriate under specific circumstances and must be approached with caution).

(n4)Footnote 53. *Tromp v. Martinez, 719 P.2d 380 (Colo. App. 1986)* ; *Gordon v. Pfab, 246 N.W.2d 283 (Iowa 1976)* ; *Litz v. Wilson, 304 N.W.2d 48 (Neb. 1981)* ; *Brannock v. Fletcher, 155 S.E.2d 532 (N.C. 1967)* ; *Cedar Lane Inves. v. American Roofing Supply of Colo. Springs, Inc., 919 P.2d 879 (Colo. App. 1996)* ; *Williams v. Dudly Trust*

Found., 675 A.2d 45 (D.C. App. 1996) ; *United States v. Schecter, 251 F.3d 490 (4th Cir. 2001)* (proceeds from sale of property forfeited under a land installment contract used to discharge a mortgage on the property).

(n5)Footnote 54. *Herrington v. McCoy, 434 N.E.2d 67 (Ill. App. 1982)* ; *Farmer v. Groves, 555 P.2d 1252 (Or. 1976)* ; *Brannock v. Fletcher, 155 S.E.2d 532 (N.C. 1967) . See also Haan v. Traylor, 79 P.3d 114 (Colo. Ct. App. 2003)* (discussing principles of unjust enrichment as applied in the context of rescission of an installment land contract).

(n6)Footnote 55. *Green v. Hemmert, 703 So. 2d 391 (Ala. Civ. App. 1997) .*

(n7)Footnote 56. *Honey v. Henry's Franchise Leasing Corp. of Am., 415 P.2d 833 (Cal. 1966)* ; *In re Coykendall, 265 B.R. 859 (Bankr. N.D. Ohio 2001)* (state law did not authorize vendor to recover full contractual remedies and further damages based on fair rental value of the property).

(n8)Footnote 57. *Hatfield v. Mixon Realty Co., 269 Ark. 803, 601 S.W.2d 894 (Ark. 1980)* ; *McNorton v. Pan Am. Bank of Orlando, N.A., 387 So. 2d 393 (Fla. App. 1980)* ; *Scholwin v. Johnson, 498 N.E.2d 249 (Ill. App. 1986)* ; *Beck v. Strong, 572 S.W.2d 484 (Mo. App. 1978)* ; *In re Guido, 345 B.R. 656 (E.D. Ark. 2006)* (forfeiture clause upheld as valid); *Smith v. Jewett, 2005 Ohio App. LEXIS 3643* (No. 04 CA 96, Aug. 2, 2005) (enforcement of forfeiture clause not prohibited).

(n9)Footnote 58. *See, e.g.,* Mich. Comp. Laws Ann. § 600.5744; S.D. Codified Laws § 21-50-3; *Hicks v. King, 64 S.E. 125 (N.C. 1909) . Cody Discount, Inc. v. Merritt, 629 S.E.2d 697 (S.C. App. 2006)* (forfeiture not enforced).

(n10)Footnote 59. *Skendzel v. Marshall, 301 N.E.2d 641 (Ind. 1973)* ; *Brannock v. Fletcher, 155 S.E.2d 532 (N.C. 1967) .*

(n11)Footnote 60. *Tromp v. Martinez, 719 P.2d 380 (Colo. App. 1986)* ; *Sebastian v. Floyd, 585 S.W.2d 381 (Ky. 1979)* ; *Brannock v. Fletcher, 155 S.E.2d 532 (N.C. 1967) .*

(n12)Footnote 61. *See* Grant Nelson & Dale Whitman, Real Estate Finance Law § 7.9 (5th ed. 2007). *Hackmann v. Behm, 207 Wis. 2d 437, 558 N.W.2d 905 (Wis. App. 1996)* ; *Barnett v. Oliver, 858 P.2d 1228 (Kan. 1993) .*

(n13)Footnote 62. *Frey v. Hibbard, 577 N.E.2d 669 (Ohio App. 1989)* ; *Dalton v. Acker, 450 N.E.2d 288 (Ohio App. 1981) .*

(n14)Footnote 63. *See* Grant Nelson & Dale Whitman, Real Estate Finance Law §§ 7.9 *et seq.*, (5th ed. 2007).

(n15)Footnote 64. *See, e.g., Thompson v. Kromhout, 413 N.W.2d 884 (Minn. App. 1987)* ; *Simon Home Bldrs., Inc. v. Pailoor, 357 N.W.2d 383 (Minn. App. 1984)* ; *Glacier Campground v. Wild Rivers, Inc., 597 P.2d 689 (Mont. 1978)* ; *MacFadden v. Walker, 488 P.2d 1353 (Cal. 1971)* ; *Donahey v. Bogle, 129 F.3d 838 (6th Cir. 1997) .*

(n16)Footnote 65. *Meyer v. Kesterson, 950 P.2d 896 (Or. App. 1997) .*

(n17)Footnote 66. *MacFadden v. Walker, 488 P.2d 1353 (Cal. 1971) .*

(n18)Footnote 67. *Bafile v. Borough of Muncy, 588 A.2d 462 (Pa. 1991)* ; *Litz v. Wilson, 304 N.W.2d 48 (Neb. 1981)* ; *Trachtenburg v. Sibarco Stations, Inc., 384 A.2d 1209 (Pa. 1978) .*

(n19)Footnote 68. *Turner v. Benson, 672 S.W.2d 752 (Tenn. 1984)* ; *Nemec v. Rollo, 562 P.2d 1087 (Ariz. App. 1977)* ; *Brannock v. Fletcher, 155 S.E.2d 532 (N.C. 1967)* ; *Meyer v. Kerner, 2002 Ohio App. LEXIS 3696* (No. 12-01-10, Jun. 4, 2002) (for breach of installment contract by purchaser, vendors were entitled to an award of damages for installment payments not paid).

(n20)Footnote 69. *See* Grant Nelson & Dale Whitman, Real Estate Finance Law § 3.32 (5th ed. 2007).

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CHAPTER 100 INSTALLMENT LAND SALES CONTRACTS

12-100 Thompson on Real Property, Thomas Editions § 100.09

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§ 100.09 Purchaser Protection on Default.

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§ 100.09(a) Overview.

As noted earlier, many courts treat the land sales contract similar to a mortgage. n70 They thus offer to the purchaser a number of protections that are usually afforded to the mortgagor. For example, some states now give land sales purchasers a period of redemption to either bring payments current or to pay the total amount due. Also, courts in some states will order a judicial sale if there has been a breach of the contract, and will refund any excess amounts to the purchaser. Courts are also becoming somewhat reluctant to enforce forfeiture clauses and are requiring some sort of foreclosure procedure in the event of a breach. In addition to these protections, some equitable protections are afforded to the purchasers.

COMPUTER-ASSISTED RESEARCH

LEXIS: land w/1 contract! w/50 purchaser w/15 protect! w/15 default

§ 100.09(b) Waiver.

Often vendors are quite tolerant in dealing with purchasers in land sales contracts. Since the vendor wants the contract to be performed, the vendor often will not insist on strict compliance with the terms of the contract. This is most often true in connection with late payments. While the contract may state that time is of the essence in payment, often the vendor will willingly accept payments after the due date. After a period of time, the vendor may lose patience or, if the payment is not made, the vendor may wish to declare a forfeiture or pursue other remedies. The purchaser will argue that the conduct of the vendor has constituted a waiver of provisions of the contract and that the vendor is legally bound to accept the late payment. Many courts have accepted this argument. n71

While many states accept the theory of waiver, there is no agreement on just what conduct by the vendor will result in a waiver. Usually, acceptance of one late payment without protest will not result in a waiver. n72 However, beyond that statement there is little agreement among the courts. The cases are difficult to reconcile. It often seems that the courts are more likely to accept the waiver doctrine in cases where the purchaser has built up substantial equity, and are less

likely to accept the doctrine in cases where the purchaser has little or no equity and the payments made by the purchaser do not even equal the rental value of the property. n73

What is clear is that a waiver can take place regardless of the intent of the vendor. No court seems to require that the vendor intend the actions to be a waiver in order to find that a waiver has occurred. What is essential is a finding that the purchaser has been lulled into believing that prompt performance is not required and that late performance is acceptable. n74

Acceptance of late payments may act as a waiver of demanding prompt payment, but would not act as a waiver of payment altogether. The best protection for the vendor in accepting a late payment is to protest the late payment and insist that all future payments be made in a timely fashion and inform the purchaser that future late payments will be refused. Courts have held that such conduct will preclude use of the waiver defense. n75

The waiver defense can be invoked against any of the terms of the contract in addition to the payment provisions. Thus, not only could the vendor lose the right to insist on prompt payment, but failure to declare a forfeiture because of late payment might cause loss of the right to declare a forfeiture in the future. n76 The same would be true for failure to invoke an optional balloon payment clause.

If the vendor has engaged in conduct which would give the purchaser the right to invoke the waiver defense, the question then arises as to what the vendor can do to reinstate rights and avoid further waivers. Generally, courts required that the vendor must give the purchaser clear and reasonable notice that further non-compliance will not be accepted and that the purchaser has a reasonable time to cure his latest default. n77 The amount of time that is considered reasonable will depend on the breach and the time needed to correct the breach.

Many vendors try to avoid the waiver defense by inserting clauses in contracts which provide that acceptance of late payments or other forbearance by the vendor will not constitute a waiver. As with other self-serving clauses in contracts, these clauses are seldom enforced. n78

COMPUTER-ASSISTED RESEARCH

LEXIS: land w/1 contract! w/50 vendor! w/30 waive!

§ 100.09(c) Election of Remedies.

In a state that recognizes forfeiture as a remedy, the vendor will face the defense of election of remedies. If the vendor decides to declare a forfeiture and retake the property, the vendor may be barred from using any other remedy, including suing for any type of deficiency judgment. n79 Often the harshness of this rule is ameliorated by courts when the equities are with the vendor or there is some question whether the election has actually taken place. n80 The basis for this rule is that the vendor cannot pursue two inconsistent remedies. If the vendor chooses to pursue the forfeiture remedy, the contract is considered terminated; if the vendor pursues the breach remedy, the contract is considered still in effect.

Determining at what point in time the vendor must make the election has been a troublesome issue. Early cases suggested that as soon as the vendor sent out the forfeiture notice, the election was made and could not be changed. However, recent cases have taken a more lenient approach. Today, it is often possible to defer an election of remedies until a judgment is obtained n81 or the purchaser has materially changed position in reliance on the vendor's conduct.

COMPUTER-ASSISTED RESEARCH

LEXIS: vendor! w/15 election w/1 remed!

§ 100.09(d) Redemption.

As was stated earlier in the section on vendor remedies, one factor which makes asserting forfeiture clauses difficult is that many states now offer the purchaser a right of redemption after default similar to the mortgagor's equity of redemption. This right to reinstate or complete the contract, even after default, is granted in some states by statute. n82 In these states, the purchaser is given a set number of days either from the date of default or from the date on which the vendor sends a notice of default to cure the defect.

In states which require that the land sales contract be terminated by foreclosure, there is always a period of redemption. That period runs from the time of the notice of default until the action to foreclose is completed. n83

Some states indirectly confer a redemption period by requiring the vendor to give the purchaser notice before exercising the forfeiture clause of the contract. During the notice period the purchaser can avoid the forfeiture clause by completing the contract. n84

A few states have enacted statutes which give the purchaser a right to reinstate the contract upon payment of any amounts in default. n85 This right generally exists up until the date of forfeiture or foreclosure. Other states have accomplished the same result using the equity powers of the court in cases where the purchaser has accumulated substantial equity in the property. n86

COMPUTER-ASSISTED RESEARCH

LEXIS: land w/1 contract! w/50 redemption

§ 100.09(e) Restitution.

In some states, the purchaser is offered the protection of the equitable doctrine of restitution. In these states, to the extent that the purchaser's payments exceed the vendor's loss, the purchaser is entitled to a refund of that excess. This is a purely equitable remedy and is usually tied to the court's displeasure with the forfeiture provisions of the contract.

In California, the purchaser is entitled to restitution to the extent that the payments plus the cost of the improvements exceed the vendor's losses. n87 This is a liberal approach to restitution. In most states, the court will grant restitution only if the amount that the vendor is retaining greatly exceeds the vendor's loss. n88

COMPUTER-ASSISTED RESEARCH

LEXIS: land w/1 contract! w/50 restitution w/5 purchaser

FOOTNOTES:

(n1)Footnote 70. *Sebastian v. Floyd, 585 S.W.2d 381 (Ky. 1979)* ; *Brannock v. Fletcher, 155 S.E.2d 532 (N.C. 1967)* ; *O'Brien v. Ravenwood Apartments, Ltd., 862 N.E.2d 549 (Ohio App. 2006)* (statutory anti-deficiency defenses available to mortgagors do not apply to land installment contracts); *Muina v. Canning, 717 So. 2d 550 (Fla. 1998)* (in an action to foreclose a contract for a deed, the vendors were entitled only to the remedies available to mortgagees, not to possession free of the purchaser's equitable interest and right of redemption, notwithstanding the contract clause); *Lamberth v. McDaniel, 506 S.E.2d 295 (N.C. App. 1998)* (upon default under an installation land sales contract, the purchaser has a right to redeem the property by tendering the entire balance due, plus interest, under the contract to prevent forfeiture, which cannot be waived by contract at the time of the agreement); *Stuart v. United States Dept. of the Interior, 109 F.3d 1380 (9th Cir. 1997)* .

(n2)Footnote 71. *See, e.g., Shervold v. Schmidt, 359 N.W.2d 361 (N.D. 1984)* ; *Williamson v. Wanlass, 545 P.2d*

1145 (Utah 1976) . See also Note, *29 Mo. L. Rev. 222 (1964).*

(n3)Footnote 72. *See, e.g., Smith v. Christofalos, 392 N.E.2d 756 (Ill. App. 1979) .*

(n4)Footnote 73. *Pacific Dev. Co. v. Stewart, 195 P.2d 748 (Utah 1948) .*

(n5)Footnote 74. *Ferrara v. Collins, 457 N.E.2d 109 (Ill. App. 1983)* ; *Endres v. Warriner, 307 N.W.2d 146 (S.D. 1981) .*

(n6)Footnote 75. *Ferrara v. Collins, 457 N.E.2d 109 (Ill. App. 1983)* ; *Ryker v. Stidham, 561 P.2d 1103 (Wash. App. 1977) .*

(n7)Footnote 76. *American Nat'l Bank & Trust Co. by Village Mtg. v. Dominick, 507 N.E.2d 512 (Ill. App. 1987)* ; *Miles Homes, Inc. v. Mintjal, 307 N.E.2d 724 (Ill. App. 1974) .*

(n8)Footnote 77. *Tanner v. Baadsgaard, 612 P.2d 345 (Utah 1980) .*

(n9)Footnote 78. *Zarlengo v. Farrer, 683 P.2d 1208 (Colo. App. 1984)* ; *Woods v. Monticello Dev. Co., 656 P.2d 1324 (Colo. App. 1982) .*

(n10)Footnote 79. *Novus Equities Corp. v. EM-TY Partnership, 366 N.W.2d 732 (Minn. App. 1985)* ; *Langenes v. Bullinger, 328 N.W.2d 241 (N.D. 1982) .*

(n11)Footnote 80. Ohio Rev. Code Ann. § 5313.10; *Gruskin v. Fisher, 273 N.W.2d 893 (Mich. 1979) .*

(n12)Footnote 81. *Gruskin v. Fisher, 273 N.W.2d 893 (Mich. 1979) .*

(n13)Footnote 82. *See, e.g.,* Mich. Comp. Laws Ann. § 600.5744; S.D. Codified Laws § 21-50-3.

(n14)Footnote 83. *See, e.g.,* Fla. Stat. Ann. § 697.01; Okla. Stat. Ann. tit. 16, § 11A.

(n15)Footnote 84. *See, e.g.,* Ariz. Rev. Stat. Ann. § 33-743; Iowa Code Ann. § 656.2; Mich. Comp. Laws Ann. § 600.

(n16)Footnote 85. *See, e.g.,* Minn. Stat. Ann. § 559.21; Wash. Rev. Code Ann. § 61.30.070.

(n17)Footnote 86. *Phair v. Walker, 617 P.2d 616 (Or. App. 1980)* ; *Call v. Timber Lakes Corp., 567 P.2d 1108 (Utah 1977) .*

(n18)Footnote 87. *Lesny Dev. Co. v. Kendall, 210 Cal. Rptr. 890 (1985)* ; *Honey v. Henry's Franchise Leasing Corp., 415 P.2d 833 (Cal. App. 1966) .*

(n19)Footnote 88. *Hines v. Wells, 814 P.2d 437 (Idaho App. 1991)* ; *Clampitt v. A.M.R. Corp., 706 P.2d 34 (Idaho 1985)* ; *Heikkila v. Carver, 378 N.W.2d 214 (S.D. 1985) . See* Note, *"Equitable Adjustment" in Real Estate Contract Foreclosures: Victory for the Contract Vendee or Death of Installment Land Contract Financing? 35 S.D. L. Rev. 402 (1990).*

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CHAPTER 100 INSTALLMENT LAND SALES CONTRACTS

12-100 Thompson on Real Property, Thomas Editions § 100.10

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§ 100.10 Title Considerations.

§ 100.10(a) Vendor's Title.

Unless the contract provides otherwise, the vendor is required to tender marketable title to the property. This means that the title must be free of encumbrances and free from substantial doubts as to the validity of title. n89 Often the contract provides that the purchaser will take the property subject to easements and restrictions of record. The contract may also list some specific encumbrances which the purchaser agrees to accept.

Absent a contrary provision in the contract, the vendor does not have to furnish a title policy or in any other way prove that the title is marketable. The burden is usually on the purchaser to search the record and determine if the title is marketable. In this respect, the land sales contract is similar to an earnest money contract. However, under a land sales contract, the vendor is not required to possess marketable title until the time for delivery, which may be years after the contract is entered into. n90 Thus, while the contract is in force, the vendor does not have an obligation to have marketable title. The title could be encumbered or have defects during that time and the purchaser would have no remedy or excuse for non-performance. Because of this risk, some purchasers insert provisions in the contract that require the vendor to have marketable title before the transfer of title or, if the vendor encumbers the property, that the purchaser can suspend or cease payments or make payments on behalf of the vendor. Some state statutes prohibit the vendor from encumbering the property in an amount greater than the unpaid purchase price. n91

Thus, absent a statute or contract provision, the purchaser cannot complain about title defects until the time for transfer of title. However, if the defect is one that cannot be cured, the purchaser may be able to allege a breach of contract before the time for transfer of title. n92

COMPUTER-ASSISTED RESEARCH

LEXIS: land w/1 contract! w/50 vendor! w/15 title

§ 100.10(b) Pre-existing Liens.

As a general rule, the purchaser under a land sales contract takes the property subject to all prior recorded liens or

encumbrances. Often the purchaser will be buying property that is subject to a blanket mortgage covering not only the contract property, but additional property. The amount of the mortgaged indebtedness usually far exceeds the purchase price of the lot that is being bought. However, absent provisions for partial release in the blanket mortgage, the mortgage will not be released until the entire debt is paid. Thus, the purchaser could be making payments which the vendor applies to the blanket mortgage, but when the time comes for conveyance of title to the purchaser there is still money owed on the blanket mortgage and the mortgagee will not release the lot from the encumbrance.

The purchaser should examine the title prior to signing the contract to ascertain if there are any records of encumbrances and, if any are found, what the provisions are for lot releases. Otherwise, the only remedy may be to bring an action for breach of contract after making all the payments.

COMPUTER-ASSISTED RESEARCH

LEXIS: land w/1 w/1 contract! w/50 prior w/5 lien! or encumbrance!

§ 100.10(c) Post-contract Liens.

Generally, if the purchaser records the contract, the purchaser's interest in the property will be superior to all subsequent liens and transfers. Once recorded, the contract will put all parties on notice and will relate back to the date of the contract or recording. n93 If the contract is not recorded, the purchaser may not have priority over third parties who subsequently acquire an interest in the property without notice of the purchaser's interest. Certainly, in a race state the purchaser who fails to record will lose priority to third parties who record first. In other jurisdictions, the question of notice will be of paramount importance.

Actual notice exists in most cases where the purchaser takes possession of the land at the time the contract is signed. In states other than race states, the actual notice of possession will usually give notice to third parties and will preserve the purchaser's priority. Occasionally, the possession is deemed insufficient to give actual notice. n94

Another reason for recording the land sales contract is to preserve the purchaser's priority over subsequent judgment liens against the vendor that may attach to the property. In states which recognize that the vendor retains title under the land sales contract, a judgment lien will attach to that interest. n95 Of course, a recorded contract will have priority over the judgment lien. But if the purchaser has failed to record or the judgment creditor is not otherwise on notice of the purchaser's interest, the lien will prevail over the purchaser's interest. If equitable conversion applies to the contract, the vendor's interest may be considered as personal property and the lien may not attach. n96

COMPUTER-ASSISTED RESEARCH

LEXIS: land w/1 contract! w/50 subsequent or post-contract w/15 lien!

FOOTNOTES:

(n1)Footnote 89. *Caselli v. Messina, 567 N.Y.S.2d 972 (1990)* ; *Regan v. Lanze, 354 N.E.2d 818 (N.Y. 1976)* .

(n2)Footnote 90. *Neves v. Wright, 638 P.2d 1195 (Utah 1981)* ; *Carter v. Rich, 726 P.2d 1135 (Idaho 1986)* .

(n3)Footnote 91. *See, e.g.*, Md. Code Ann., Real Prop. § 10-103(d); Ohio Rev. Code Ann. § 5313.02(B).

(n4)Footnote 92. *Thompson v. Skowhegan Sav. Bank, 433 A.2d 434 (Me. 1981)* .

(n5)Footnote 93. *Smith v. McClam, 346 S.E.2d 720 (S.C. 1986)* ; *Life Sav. & Loan Ass'n v. Bryant, 467 N.E.2d 277 (Ill. App. 1984)* .

(n6)Footnote 94. *Nelson v. Hughes, 625 P.2d 643 (Or. 1981)* .

(n7)Footnote 95. *Heider v. Dietz, 380 P.2d 619 (Or. 1963)* ; *First Sec. Bank of Idaho, 429 P.2d 386 (Idaho 1967)* .

(n8)Footnote 96. *Cannefax v. Clement, 818 P.2d 546 (Utah 1991)* ; *Marks v. City of Tucumcari, 595 P.2d 1199 (N.M. 1979)* .

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CHAPTER 100 INSTALLMENT LAND SALES CONTRACTS

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§ 100.11 Bankruptcy.

Before 1978, purchasers under a land sales contract faced a difficult, if not impossible, task if the vendor declared bankruptcy. Under § 70(b) of the pre-1978 Bankruptcy Act, the trustee could assume or reject all executory contracts, including land sales contracts. In *In re New York Investors Mutual Group, Inc.*, n97 the court held that if the trustee rejected the contract, the purchaser could bring a suit for damages for breach of contract, but had no special claim to the property and in most cases ended up with nothing but a claim that was never paid or was paid at a fraction of its worth.

Under the 1978 Reform of the Bankruptcy Act, the purchaser under a land sales contract is accorded much more favorable treatment. While the trustee still has the right to affirm or reject the contract, n98 that right is subject to the right of the purchaser who is in possession to obtain legal title by completing payments under the contract. n99 Thus, a purchaser in possession can obtain title by completing the contract. However, if the purchaser is not in possession, the trustee may reject the contract and leave the purchaser with only an action for damages for breach, which is treated as an unsecured claim. n100 In addition, the purchaser not in possession is given a secured claim for the amount already paid; the claim for damages for breach of contract is an unsecured claim. n101

COMPUTER-ASSISTED RESEARCH

LEXIS: land w/1 contract! w/50 bankruptcy

FOOTNOTES:
(n1)Footnote 97. *143 F. Supp. 51 (S.D.N.Y. 1956)* .

(n2)Footnote 98. *11 U.S.C. § 365*(a).

(n3)Footnote 99. *11 U.S.C. § 365*(i).

(n4)Footnote 100. *11 U.S.C. § 365*(j).

(n5)Footnote 101. *11 U.S.C. § 365*(i).

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Annotation, *Applicability of Statute of Frauds to Agreement to Rescind Contract for Sale of Land, 42 A.L.R.3d 242* .

Annotation, *Modern Status of Defaulting Vendee's Right to Recover Contractual Payments Withheld by Vendor as Forfeited, 4 A.L.R.4th 993* .

Annotation, *Mortgage Foreclosure Forbearance Statutes --Modern Status, 83 A.L.R.4th 243.*

Annotation, *Necessity and Reasonableness of Vendor's Notice to Vendee of Requisite Time for Performance of Real-Estate Sale Contract After Prior Waiver of Extension of Original Time of Performance, 32 A.L.R.4th 8* .

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Annotation, *Who is "Developer" or "Agent" Within Meaning of § 1402(5), (6) of the Interstate Land Sale Full Disclosure Act (U.C.C. § 3-804, (6)), 49 A.L.R. Fed. 781* .

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Supp. To CHAPTER 100 INSTALLMENT LAND SALES CONTRACTS

12-100 Thompson on Real Property, Thomas Editions Supp. to § 100.01

Supp. to § 100.01 Nature of the Installment Land Sales Contract.

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Add:

Defined by statute: *Okla. STAT. ANN. tit. 46, § 1* (Lexis 2009) (treating installment sales contracts as mortgages).
Defined by case law: *Klein v. Meza, 4 So. 3d 51, 52 (Fla. App. 2009)* .

Add:

Long Minh Nguyen v. Hoang, 2009 Minn. App. Unpub. LEXIS 665 (holding that a contract for deed is governed by the statute of frauds).

Add:

Long Minh Nguyen v. Hoang, 2009 Minn. App. Unpub. LEXIS 665 (holding that "the vendee takes the equitable title, and is clothed with the indicia of ownership"); *United States v. Miller, 2009 U.S. Dist. LEXIS 97239 (D. Mich. 2009)* (stating that "Under Michigan law, a vendee under a land contract takes equitable title to the land, while the vendor holds legal title and an equitable lien on the land"); *Windham v. Riddle, 672 S.E.2d 578 (S.C. 2009)* .

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Supp. To CHAPTER 100 INSTALLMENT LAND SALES CONTRACTS

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Supp. to § 100.02 Installment Land Sales Contracts and Mortgages Compared.

Cal. Comm. Code § 3

Add:

Reeder v. Curry, 294 S.W.3d 851, 856 (Tex. App. 2009) (holding that "[i]f the purchaser defaults under the contract, the seller is entitled to possession of the property").

Add:

But see Reeder v. Curry, 294 S.W.3d 851, 856 (Tex. App. 2009) (holding that "seller's right to retake possession of the property under the contract's forfeiture provision may be defeated by the purchaser pleading and proving such facts as would make it inequitable to enforce it").

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Supp. to § 100.05 Destruction of the Property Being Purchased Under Contract.

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Add:

Jackson v. Scheible, 902 N.E.2d 807 (Ind. 2009) ; *In re Boudinot, 2009 Bankr. LEXIS 3995 (Bankr. E.D. Okla. 2009)* .

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Supp. To CHAPTER 100 INSTALLMENT LAND SALES CONTRACTS

12-100 Thompson on Real Property, Thomas Editions Supp. to § 100.08

Supp. to § 100.08 Vendor Remedies Upon Default.

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§ 100.08(a) Overview. [Go To Main]

Add:

Meyer v. Chieffo, 904 N.E.2d 560 (Ohio App. 2008) (vendor breached land installment contract by failing to treat mold; purchaser breached by failing to make monthly payments; remanded for new trial).

Add:

Ted Mesmer & Sons, Inc. v. Rutana, 2009 Ohio 5911 (citing that under Ohio law a purchaser's failure to pay installments on land contract permits forfeiture, and seller can bring action quieting his title and rescinding contract).

§ 100.08(b) Forfeiture and Rescission. [Go To Main]

Add:

Ted Mesmer & Sons, Inc. v. Rutana, 2009 Ohio 5911 (holding that "purchaser's failure to pay installments on land contract permits forfeiture, and seller can bring action quieting his title and rescinding contract").

Add:

Reeder v. Curry, 294 S.W.3d 851, 856 (Tex. App. 2009) (stating that "the forfeiture of the purchaser's payments and interest in the property is a harsh remedy not favored by the courts").

§ 100.08(c) Strict Foreclosure. [Go To Main]

Add:

In re Boudinot, 2009 Bankr. LEXIS 3995 .

§ 100.08(d) Judicial Sale. [Go To Main]

Add:

Long v. Burson, 957 A.2d 173 (Md. App. 2008) (vendors not entitled to excess proceeds from vendor's mortgagee's foreclosure sale of property, following purchaser's default on land installment contract).

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Supp. To CHAPTER 100 INSTALLMENT LAND SALES CONTRACTS

12-100 Thompson on Real Property, Thomas Editions Supp. to § 100.09

Supp. to § 100.09 Purchaser Protection on Default.

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§ 100.09(c) Election of Remedies. [Go To Main]

Add:

In re Sterling Mining Co., 2009 Bankr. LEXIS 2395 (Bankr. D. Idaho 2009) (disfavoring forfeiture because of harshness).

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CHAPTER 101 MORTGAGES, DEEDS OF TRUSTS AND RELATED LIENS

12-101 Thompson on Real Property, Thomas Editions 101.syn

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CHAPTER 101 MORTGAGES, DEEDS OF TRUSTS AND RELATED LIENS

12-101 Thompson on Real Property, Thomas Editions § 101.01

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§ 101.01 History, Theories and Making of Mortgages.

§ 101.01(a) Development of the English Mortgage.

One early antecedent of the modern mortgage was the gage, which seems to have begun, not as security for a debt at all, but rather as payment subject to a right to recapture the gage upon substituting a different form of payment. The gage existed in Anglo-Saxon times and was, in essence, a "redeemable forfeit" under which the land and the debt were equated so that, if there were no redemption, the gagee had no personal claim and was left only with the land. n1

By the 13th century, two types of gages were present; both put the gagee in actual possession of the land. Under the first, the *vivum vadium* (living pledge), it was agreed that the gagee would apply the rents and profits to the debt. Under the second, the *mortuum vadium* (dead pledge), the rents and profits were not applied to the debt, but were retained by the gagee as interest. The gagee who failed to apply the income to the debt was regarded as a usurer and, though technically the gage was nevertheless lawful, upon the gagee's death if the gage had not been terminated, the gagee "dies as a sinner and his chattels are forfeited to the king." n2 A gage might be usufructory or proprietary, the former giving a right only to the rents and profits and the latter giving a property right to the gagee. The gage existed only so long as the gagee actually possessed the land. Should the gagee lose possession for any reason, even by reason of being ousted by the debtor, the gage terminated, and the courts would not assist the gagee in recovering possession. Some have speculated that an equity of redemption was recognized but, whether it was or not, by the early 14th century, the law courts enforced gages strictly according to their terms. n3

Because of the Church's ban on interest, Christian lenders used the mortgage as a device to earn a profit on moneylending, but without calling it interest. Still, Christian lenders had to take possession of the land to enjoy the benefits of the mortgage. Jewish lenders did not suffer under the constraints of the Church's attitude on usury and were permitted to adhere to their own laws in commercial matters. Jewish law recognized a gage which did not require the creditor to take possession of the land; a decided advantage from the point of view of Christian lenders who were secure only so long as they succeeded in maintaining possession. The Jewish gage ceased to have any significance in England upon the banishment of the Jews by Edward I in 1290. n4

By the 15th century, the gage had been blended with the law of estates to produce a conveyance of title to the

moneylender, subject to the condition subsequent that timely payments of the debt be made. n5 Littleton explains that this device was dubbed mortgage (i.e., a dead gage) because:

> ... it is doubtful whether the feoffor will pay at the day limited such sum; and if he doth not pay, then the land which is put in pledge upon condition for the payment of the money is taken from him for ever, and so dead to him on condition. And if he doth pay the money, then the pledge is dead as to the tenant. n6

The precise point in time when the conveyance upon condition was accepted as a legitimate security device is uncertain, but by the 17th century it was not only accepted but had been supplanted by an unconditional transfer of a fee accompanied with a covenant by the grantee to reconvey on timely repayment. n7 Despite this development, mortgages still left the mortgagees in possession. Although after the enactment of the Statute of Uses in 1536 it was possible to create springing executory interests, and thus to create contingent freehold interests in mortgagees, mortgagees nevertheless bargained for immediate possession in order to collect income in the form of rents and profits rather than interest. Not until the mid-16th century were mortgagors left in possession, for by then equity had begun to compel mortgagees in possession to account to their mortgagors. n8

At the same time, the chancellor was beginning to recognize the modern redemption rights of mortgagors while the law courts literally enforced the terms of the conveyance. Before a court of law, a mortgagor had no interest in the land upon a default; after default it was too late for the mortgagor to exercise any right of entry and any undertaking by the mortgagee to reconvey was binding only if the debt were timely paid. n9 The chancellor, however, would sometimes compel a reconveyance to the mortgagor after a default, that is, would permit the mortgagor to redeem.

Various theories have been advanced to explain the chancellor's solicitude for defaulted mortgagors. The chancellor may have been influenced by Roman law which, since Justinian, had required mortgagees in possession to reconvey to their debtors once the value of the rents and profits collected was sufficient to retire the debt. n10 Whatever may have been the antecedents of the equitable right of redemption, it seems rather clear that by the early 17th century this right was being perceived as absolute. n11 At first, equity afforded relief from forfeiture only upon such equitable considerations as fraud, mistake, and unconscionability. n12 As late as 1684, Lord Nottingham was reversed for allowing redemption, the Lord Keeper remarking:

> Now, when by a contingency it happens to be a good bargain, there is no reason to raise an equity from thence to take the estate from the mortgagee. n13

Yet, by the end of the 17th century, it was firmly established that the "right of redemption could not be clogged or fettered in any way; any agreement which had this effect was void." n14 The focus was no longer on the equities of the particular case, but rather upon the conclusively presumed inequality of the relative bargaining positions of mortgagors and mortgagees. Redemption had become an absolute right because forfeiture

> puts the borrower too much in the power of the lender, who, being distressed at the time, is too inclinable to submit to any terms proposed on the part of the lender. n15

The equitable right to redeem, of course, made the titles of mortgagees after default unmarketable, since the mortgagees could not rest assured that at some future date their mortgagors would not seek equity's aid through a bill to redeem. This led, in turn, to equitable foreclosure of the right to redeem via a decree in chancery barring the redemption right if not exercised with a time stipulated in the decree. n16

§ 101.01(b) Theories of Mortgages in the United States.

In the United States three theories have been used to explain the mortgage. In most instances, the outcome of a particular controversy will not depend on the theory applied, although occasionally the theories produce conflicting

results, especially in relation to the rights of mortgagees after default. These theories are (1) the title theory, (2) the lien theory, and (3) the intermediate theory, with the lien theory being predominant in the United States.

It should be noted that it is sometimes difficult to determine to which of these theories a particular jurisdiction adheres, for a state may take a lien theory approach to certain controversies and a title theory approach to others. n17 This is particularly common in states which view themselves as title states but which do not recognize mortgagees as being entitled to possession or rents before default, a recognition that should put them in the group of states adopting the intermediate theory. n18

§ 101.01(b)(1) The Title Theory.

At one time most jurisdictions accepted the English characterization of a mortgage as a conveyance of a defeasible interest. This was probably the result of the enthusiasm with which the New York courts, which had a profound impact on the development of American equity jurisprudence, followed Lord Mansfield. n19 While the theory has now been spurned by most states, it continues in a number of them, particularly in the east. n20

Because they view mortgages as transfers of legal defeasible interests, title theory states generally confer upon mortgagees the usual incidents of ownership of a corporeal estate and thus, in the absence of a contrary agreement, recognize a right of possession in mortgagees. n21 This recognition of the right to possession distinguishes title theory states from the lien theory states. Unless the terms of the contract permit mortgagors to retain possession, mortgagees in title theory states are usually entitled to possession upon the giving of the mortgage and, in any event, may maintain legal actions to secure possession upon default. n22 Some title theory states, though they permit the parties to agree otherwise, permit mortgagors to occupy the premises until default. n23 In lien theory states, at least in theory, mortgagors cannot be denied possession except through foreclosure or, in many of them, pursuant to agreement. n24 This difference in the allocation of possessory rights can produce divergent approaches to other questions which are discussed in several succeeding sections. In general, however, the parties to a mortgage in a title theory state agree that the mortgagor may retain possession until default. It can be noted that it is usually only the respective rights of mortgagors and mortgagees after default which vary according to the theory invoked, although other issues can occasionally be impacted, such as the liability of a mortgagor for waste or the rights of mortgagees after default against tenants of their mortgagors. Likewise, mortgagees may find it easier in title theory states than in lien theory states to secure control of the security before foreclosure and sometimes can even do so without seeking foreclosure.

In title theory and lien theory jurisdictions alike, mortgage contracts almost always entitle mortgagors to keep possession until default. It has been stated that, in the absence of an express agreement permitting mortgagors to retain possession, courts are eager to find an implicit agreement to that effect; n25 the extent of the judicial enthusiasm is, however, open to question. n26 Moreover, the title and lien theory states are not different in determining the rights of strangers to the mortgages, for even title theory states recognize the preeminent title of mortgagors in non-mortgage contexts. Thus, Massachusetts refused to excuse a trespass on the grounds that the plaintiff had mortgaged the premises, n27 and in Tennessee the title theory is "only applied when necessary to protect the mortgagee's security afforded by the estate." n28

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LEXIS: title pre/1 theory w/50 mortgage

§ 101.01(b)(2) The Lien Theory.

In most American states, the legal concept of a mortgage as a transfer of a legal title has been totally eclipsed by the view of the equity courts that title remains in the mortgagor and that the mortgagee holds only a lien as security. n29 Unlike title theory states where the "mortgage is one thing at law and another in equity" (an estate in the former and

security in the other), n30 in lien theory jurisdictions the mortgagor retains both legal and equitable title while the mortgagee is remitted to lienholder status. n31 Until the interest of the mortgagor is extinguished through foreclosure, all the usual legal incidents of ownership belong to the mortgagor, most importantly the right of possession, although through the appointment of a receiver or under a clause assigning rents and profits mortgagees in lien theory states can sometimes reap some of the possessory benefits before foreclosure. n32

The lien theory is, in part, the product of statutes restricting the legal remedies of mortgagees. The first of these enactments took place in South Carolina in 1791 and decreed that mortgagees could not maintain actions for possession after default. n33 Typically, the statutes provide that mortgagees may not take possession except via foreclosure. n34 Variants include statutory provisions that, unless the parties otherwise agree, mortgagees are not entitled to possession before foreclosure, n35 as well as statutes denying possession to mortgagees before foreclosure notwithstanding contrary agreements. n36 Lien theory states are not in agreement about the enforceability of mortgage agreements granting possessory rights to mortgagees after default and before foreclosure. As indicated, some statutes clearly render such agreements unenforceable, n37 but some courts without the aid of statutory enactments have refused to enforce the agreements on the grounds that they are inconsistent with the characterization of mortgages as liens. n38 Other lien theory states see nothing inappropriate in agreements conferring possessory rights on mortgagees after default and before foreclosure. n39

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LEXIS: lien pre/1 theory w/50 mortgage

§ 101.01(b)(3) The Intermediate Theory.

Other states n40 strike a position intermediate between the title and lien theories, holding that, prior to default, mortgagees hold mere liens or, "at best, a superficial title," n41 but that after default they acquire a legal interest. The primary distinction between title states and intermediate theory states is that, in the absence of a contrary agreement, the mortgagee in the intermediate theory states is not entitled to possession until default, while in the title theory states the mortgagee is entitled to possession upon the giving of the mortgage. It is therefore difficult to believe that so-called title theory states which do not give possession to mortgagors until defaults are not, in reality, intermediate theory states. n42

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LEXIS: intermediate pre/1 theory w/50 mortgage

§ 101.01(b)(4) Deeds of Trust.

Although in a very few circumstances, deeds of trust, where they are accepted as legitimate security devices, produce results different than those that would obtain under a mortgage, n43 in most states the rights of the trustor and beneficiary are equated with those of mortgagor and mortgagee. n44

§ 101.01(c) Form and Requisites of Mortgages.

At common law, to create a mortgage valid between the mortgagor and mortgagee no particular form is necessary beyond the basic requirements of an underlying obligation to be secured and a written and delivered manifestation of the mortgagor's intent to secure the obligation with his realty. n45 It is basic law that there can be no mortgage without a debt, but the evidence of debt can take any number of forms and need not be a personal obligation. n46 Whether a mortgage is regarded as a transfer of a legal interest or simply as the creation of a lien, for purposes of the statute of frauds it is regarded as an interest in realty and therefore is unenforceable unless evidenced by a writing satisfying the statute of frauds; n47 in addition, the writing must be delivered if it is to take effect as a mortgage. n48 Security

agreements falling short of the requirements for legal mortgages may nevertheless be deemed as equitable mortgages. n49

Despite the simplicity of the requirements for a valid mortgage, however, mortgages typically contain many more provisions than a simple manifestation of intent to encumber land because, without more, mortgages, though valid between the parties, may not survive transfer of the encumbered premises to third parties. In order to preserve mortgages against third parties claiming interests in the premises, prudence dictates that the mortgage be recorded n50 and that the secured obligation be described with some specificity. n51

Lenders desiring to secure federal insurance on their secured loans or to place their loans through the secondary market must employ terms approved by the appropriate federal agency. n52 Because of the dominant role of the federal government in the secondary mortgage market, it can be plausibly maintained that a federal common law of mortgages has evolved. The prevalence of uniform forms for mortgage documents and the role of the federal courts in adjudicating disputes involving the federal government or its instrumentalities as mortgagees seem to be producing, in many respects, somewhat uniform forms for debts secured by mortgages and for the mortgages themselves.

§ 101.01(c)(1) The Mortgage Obligation.

Without a debt there can be no mortgage, n53 but the debt need not be one for which anyone is personally liable, and there is respectable authority that it need not be supported by consideration. n54 This does not mean that consideration must be given for the mortgage since a security interest in land, like any other interest in realty, can be created by gratuitous conveyance. n55 Thus, a mortgage can be given to secure a debt previously incurred by the mortgagor or by someone else. n56 Whether the secured debt must itself be supported by consideration is another matter which has generated some confusion in the cases and is discussed below in this section. n57 While dictum often appears in decisions to the effect that personal liability is required on the obligation, n58 such language should not be taken at face value. n59 Surely, the secured obligation can be one for which the mortgagor or a third party is personally liable and, in most cases, there is personal liability, as where the purchaser of land gives the seller a personal promissory note in partial payment of purchase price together with a purchase money mortgage. Yet, there seems little doubt that personal responsibility is not essential, as is evident from cases upholding mortgages given to secure non-recourse notes. n60

The underlying obligation, with the possible exception of the so-called "gift" mortgages and debts which are time-barred under the statute of limitations, must be enforceable. It must be collectible from the debtor's general assets, in which case the debtor is personally bound, or out of the specified property, as is true, for example, where a mortgage is given to secure a non-recourse note. Thus, if the mortgagor has a valid defense to enforcement of the obligation, there is no debt and hence no mortgage. n61 A debt unenforceable because of fraud practiced on the mortgagor cannot be secured by a mortgage; n62 however, debts unenforceable against mortgagors may become enforceable against subsequent grantees and/or the interests of such grantees. n63

The question arises whether a debt unsupported by consideration can be secured by a mortgage. A square split of authority exists over validity of gift mortgages, that is, mortgages given to secure gratuitous promises. The American Law Institute at its annual meeting in 1991 tentatively adopted the position that consideration is simply not required, n64 but the reporters acknowledged the division in the case law. n65 An obligation unenforceable between the original parties may become enforceable if the benefit of the obligation is transferred to a holder in due course or if, under common law principles, the obligor is estopped from asserting a defense against a subsequent good faith purchaser of the chose in action.

Title theory states generally uphold mortgages securing debts which have become unenforceable because of the running of the statute of limitations upon the debt. In these jurisdictions, mortgagees may foreclose, but they are not entitled to deficiency judgments. n66 The theory seems to be that the limitation period affects only the debt, not the mortgagee's title and remedies based on that title. Further, the debtor is entitled to no equitable relief unless the debtor does equity

by paying the debt despite the running of the statute of limitations on the personal liability. Similar reasoning has led to decisions in both title and lien theory states that trustees under deeds of trust may foreclose even though the underlying debt is unenforceable under the statute of limitations. n67 Most lien theory states are in accord with the title theory states on the effect of the running of the statute upon mortgages, but many of them refuse to enforce mortgages after the debts are time-barred. n68 While enforcing security interests after the debts have become unenforceable because of the limitation period may seem inconsistent with the general requirement that the debt be enforceable, it can be reconciled with the general principle by limiting the general principle to cases where substantive defenses to the enforcement of the obligation exist. Of course, this rationale does not explain decisions enforcing mortgages given to secure gratuitous promises.

Only obligations capable of being reduced to a liquidated sum can be secured by mortgages. n69 Nearly all mortgage obligations are promises to pay money, usually to repay with interest the amount of the loan. Often the amount of the loan is uncertain, as in the cases of open accounts, home equity loans, and construction loans. Nevertheless, in these latter types of cases, the amount owing at any particular time can be determined in monetary terms. When the obligation cannot be reduced to monetary terms, it is impossible to establish a redemption price or to ascertain whether a foreclosure sale has produced a surplus. Such considerations caused one court to doubt that a promise to consent to a zoning application could be secured by a mortgage. n70 Similarly, a promise to provide emotional support was held incapable of being secured under a mortgage. n71 The requirement that the debt be liquidated can be satisfied at the time of foreclosure, even though at an earlier time it could not have been met. n72

Unless it is within the statute of frauds, the obligation secured by a mortgage does not have to be written. n73 In almost all cases, however, the obligation is evidenced by a writing, usually a note or bond, which exists independently of the mortgage, and the terms of which may or may not be incorporated into the mortgage. n74 It is generally agreed that, regardless of whether the obligation itself must be reduced to writing, the terms of the obligation need not be set forth in the mortgage. Certainly, between the original parties to the transaction there should be no concern over including the terms of the obligation in the mortgage so long as the debt can be established by competent evidence. n75 When the rights of third parties--usually successors in interest to mortgagees--become involved, it is occasionally required by judicial decision or statute that certain minimal information about the debt be stated in the mortgage, but by the weight of authority mortgages are valid against third parties, even if they supply no information about the debt other than the identity of the mortgagee. n76 That the debt need not be specifically described in the mortgage is justified on the ground that, if the mortgagee is identified, third parties should be able to ascertain the terms of the obligation by making inquiry of the mortgagee. n77 In practice, third parties make such an inquiry even when the terms of the obligation are set forth in great detail in the mortgage because, without inquiring, they would be unable to determine if the original amount of the debt had been reduced through payments or perhaps increased as the result of accumulated interest, late charges, and the like. It should, therefore, be difficult for third parties to assert that they have been misled where they have not inquired of the mortgagee.

A few states require that some terms of the obligation be specifically included in the mortgage. In Illinois, the amount of the mortgage, if known, should be stated, as well as the maturity date. n78 In Kentucky the amount of the debt should also be stated. n79 Georgia requires a statement of the maturity date. n80 The Colorado Supreme Court has intimated that the debt must be described in the security instrument, n81 but a decision of the Colorado Court of Appeals has denied the existence of such a requirement. n82 In California an acceleration clause in connection with certain residential mortgages is not valid unless it is set forth in its entirety in both the evidence of indebtedness and the security instrument, although failure to include the clause in both instruments presumably will not invalidate the security instrument itself. n83

In practice the major provisions of the obligation are normally identified in the mortgage. Commonly, the mortgage will recite that it is given to secure a promissory note and will identify the principal amount of the note. Other information may also be given. Although this information may not be required, its inclusion occasionally can raise problems where the information is inaccurate. If a discrepancy exists between the actual terms of the debt and the description thereof in

the mortgage, it is clear that as between the parties to the transaction the actual terms govern. n84

Although the debt is enforceable between the original parties according to its terms, despite an erroneous description in the security instrument, it has been suggested that third parties can be misled by such discrepancies, especially by a recitation understating the amount of the debt. n85 Where the amount has been overstated, the mortgage is generally upheld unless the mis-description was designed to defraud others. n86 Because of the reality that the amount owing on an obligation so often varies during its lifetime and because of the practice of third parties making inquiry of mortgagees about the balance when taking a conveyance of or encumbrance on the encumbered property, it is usually held that third parties cannot rely on recitations of the amount in the security instrument but should ascertain the amount by making inquiry of the secured parties. n87 This reasoning seems equally applicable to understatements of the amount of the debt. n88

Mortgages are often given to secure future extensions of credit (future advance clause) or even all present and future loans (dragnet clause). Such mortgages are discussed in some detail *infra,* n89 but it bears noting in the present context that they are enforceable and can be cited as further support of the view that the amount of the debt need not be recited in the security instrument. n90

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LEXIS: mortgage or deed pre/2 trust and obligation or
debt w/15 enforc! w/15 writing or deliver!

§ 101.01(c)(2) The Security Instrument.

A legal security instrument may take one of two forms. In all states it can take the form of a mortgage, and in about half of the states it can appear as a deed of trust. The legal requirements for the security instrument are generally identical for each type of instrument, with the exception that for deeds of trust a trustee should be named. Whether a security interest is regarded as a defeasible legal title or as a lien, it is an interest in real property and thus is subject to the statute of frauds and to the usual delivery requirements for instruments affecting title to realty. n91 The statute of frauds will usually be satisfied by a writing that (1) identifies the mortgagor and mortgagee (and also the trustee if intended), n92 (2) describes the realty interest encumbered, and (3) manifests the intent to make the realty interest security for a debt. n93 For a discussion of the specificity with which these matters should be addressed, the reader is referred to the chapter dealing with conveyances. n94

In title theory states, it is arguable that additional technical requirements must be met. n95 A simple manifestation to encumber title as security might not suffice in some title theory states. Words of conveyance, such as "transfer," "bargain and sell," and the like, may be necessary suggesting that language "mortgaging" the land might not suffice; n96 further, words of inheritance might be necessary to mortgage the land for a period beyond the mortgagor's lifetime. n97 It has been contended that even in lien theory states the legal requirements for a conveyance must be met to create a formal mortgage, n98 but this position has not won wide acceptance. n99 In all likelihood, such concerns are relatively insignificant, since legally defective mortgages even in title and lien theory states alike will invariably be salvaged as equitable mortgages. n100

Where all the requirements for an enforceable legal mortgage are not present, but the parties intended to create a security interest in land, the courts of equity often will give effect to that intention by treating the transaction as an equitable mortgage. The situations in which equitable mortgages arise are treated in § 101.08(a) through 101.08(b)(4).

As previously noted, n101 it is seldom required that the debt be described in the mortgage.

Under the Uniform Land Transactions Act, the requirement for an enforceable mortgage is merely a "security

agreement containing a description of the collateral" signed by the debtor. n102 Several states have similar provisions easing the technical requirements for formal mortgages. n103

COMPUTER-ASSISTED RESEARCH

LEXIS: security pre/1 interest w/50 mortgage or deed pre/2 trust w/50 writing or deliver!

§ 101.01(d) Federal Influence.

Since the New Deal, the federal government has taken an increasingly significant role in influencing the law of mortgages in the country. Until the 1970's the federal government concentrated on regulating lenders. The national government chartered saving and loan associations and gave them a preference in making real estate loans. Most importantly, the federal government in granting mortgage insurance through the Federal Housing Administration, was instrumental in causing lenders to make long-term loans with full amortization of principal and interest in lieu of the short-term loans with balloon payments that had been so common. By the early 1970's the federal government shifted its focus away from the lenders and to the secondary market; that is, it concentrated its efforts on developing and maintaining a nation-wide market for the sale of mortgage debt, and in the course of this effort promulgated essentially uniform forms for mortgage documentation. n104

Several factors contributed to the change in the federal orientation. First, the savings and loans associations faced stiff competition for mortgage money from other lenders, such as real estate investment trusts and pension funds. Secondly, interest rates began to experience great fluctuations, which often made it difficult for savings and loan associations to make loans, because they were compelled to pay greater interest to their depositors than they could recoup from the loan portfolios. In this environment, the federal government saw its role as developing a market for the associations to market their portfolios in order to generate capital for new loans or, as Professor Burke expresses it, "to keep the mortgage portfolios of the associations current, so that their borrowing would be at rates lower than their lending." n105 Congress thus authorized the Federal National Mortgage Association (FNMA), which had formerly dealt primarily in Federal Housing Administration and Veterans Administration loans, to purchase conventional mortgage loans as well and then to sell them to investors. The market thereby enabled lenders in areas of the nation where funds are not readily available to market their loans in the secondary market to investors in other regions and, although selling their loans at a discount, to realize an immediate profit and to obtain new funds for further loans. n106 FNMA, although originally created as a federal agency, is today a private corporation with several appointees of the President of the United States on its board of directors. n107 The Government National Mortgage Association and the Federal Home Loan Mortgage Corporation also play a role in maintaining the secondary market. n108

In the context of the law of mortgages, the significance of this federal cultivation of the secondary market is two-fold. First, in order to provide purchasers some assurance of what they are buying, FNMA and FHLMC collaborated in producing uniform note and mortgage forms for use in loans to be sold in the secondary market. n109 Secondly, the use of these federally approved forms permits arguments to be made that a uniform federal common law should be employed in resolving disputes arising under them, at least where the federal government or its instrumentality is a litigant.

The federally approved forms are not uniform in the strict sense, since there is an effort to tailor them to acceptable peculiarities of local law.

While the law of mortgages, like that of real property generally, is usually thought of as the exclusive domain of the states, the pervasive involvement of the federal government in the field often raises issues of federal preemption. The federally approved mortgage form provides that it "shall be governed by federal law and the law of the jurisdiction in which the Property is located." n110 The courts have been grappling for some time with the conflicts that can arise between the local and federal law with respect to mortgagors and mortgagees.

A leading case illustrating the problem is *United States v. Stadium Apartments, Inc.,* n111 in which the federal government successfully argued that a foreclosure of a mortgage held by it could not be subject to Idaho's statutory redemption right. The mortgage in question provided for a waiver of the right to redeem statutorily "to the extent permitted by law" without specifying federal or state law. The Ninth Circuit, however, concluded that, when a federally insured mortgage is involved, federal common law should be invoked to protect the "federal program against loss." n112 Numerous other decisions have agreed that no statutory redemption right survives a foreclosure by the federal government or its instrumentalities. n113 On the other hand, the Ninth Circuit also subjected a foreclosure of a Farmers Home Administration loan to state statutory redemption rights, finding that federal policy would be advanced by permitting statutory redemption of Farmers Home Administration loans. n114 Some cases suggest that federal law determines the remedies available to the federal government or its instrumentality. The federal government has succeeded in securing the appointment of a receivership where state law would not countenance the appointment. n115 It has recovered deficiency judgments in the face of a state anti-deficiency statutes. n116

The Supreme Court has asserted that, while federal law is determinative of these types of controversies, state law may often be incorporated in the federal law. In *United States v. Kimbell,* n117 the Court indicated that the federal interest in a national standard, and the impact of a state rule upon the federal interest involved, should play a prominent role in determining whether the federal law should incorporate the state rule. This method of analysis has resulted in holdings that a foreclosure of a Small Business Administration loan is subject to state statutory redemption rights. n118

COMPUTER-ASSISTED RESEARCH

LEXIS: mortgage or deed pre/2 trust w/50 foreclos! w/50 preempt! w/50 federal

§ 101.01(e) Mortgage Loan Contracts.

§ 101.01(e)(1) Formation and Terms.

Contracts to lend and borrow money on the security of a mortgage or deed of trust are governed by the traditional rules of contract formation. These agreements are commonly referred to as loan commitments and range from the comparatively straightforward undertakings by home mortgage lenders to extremely detailed agreements to finance large construction projects. An enforceable loan commitment requires agreement on the terms of the loan, the realty which will serve as security, and mutuality of obligation. n119 With respect to the terms, parties must agree upon the principal amount of the loan, the rate of interest, and the terms of repayment. n120 The security must be described with sufficient specificity to permit it to be located. In most states commitments are within the statute of frauds, at least if they are for amounts above levels established by statute and, accordingly, must be reduced to a writing. n121

The requirement for mutuality of obligation is a common source of difficulty. Under general common law principles, a promise unsupported by consideration is unenforceable. Both parties to a commitment must be obligated to perform before a legally enforceable contract is formed. A promise by a lender is not binding without consideration. The necessary consideration may take two forms: a reciprocal promise by the borrower to borrow, or the actual receipt of something of some tangible value to the lender. Borrowers are seldom willing to obligate themselves to close a loan since they desire the choice of accepting more favorable terms from other lenders if available before closing. Often, however, borrowers pay a fee to their lenders as consideration for keeping their offers to lend open for a time. This fee, sometimes referred as a loan commitment fee or a stand-by fee, is sufficient consideration to support the promise to lend and, in effect, recreates in borrowers an option to close or not. n122 These commitment fees must be distinguished from the myriad of other fees which typically accompany commitment agreements. Appraisal fees, documentation fees, processing fees, and related charges are not meant to support a promise by the lender to lend and, although they may be non-refundable, they do not by themselves provide consideration for any promise to fund the loan.

Under most residential loan commitments, it is fairly apparent that the parties did not intend to impose an obligation on the borrower to close the loan. Residential loan commitments are almost always either options to borrow or, in all too many instances, merely statements of intent to lend. Where the lender receives no consideration for a firm offer to lend, and simply indicates that it is willing or prepared to make a particularly described loan, the lender is free to decline to fund the loan, as many residential borrowers learn when interest rates climb between the time they thought they had commitment and closing. In many commercial loans and especially with construction commitments, though, the agreement makes it clear that the lender is assuming a legal obligation to fund the loan and the lender receives a legitimate commitment fee to support the undertaking. Where the lender is legally obligated to fund the loan, the question becomes whether the commitment fee was merely consideration to support the promise to fund or was payment intended as liquidated damages in the event the borrower refused to close the loan. Numerous courts have treated commitment fees as valid provisions for liquidated damages. n123 It would seem that the commitment fee could not be both consideration for an option and liquidated damages, for there would be no obligation to be breached and compensated for by damages if the borrower merely held an option; yet, courts occasionally speak of the fees as both creating options and constituting liquidated damages. n124

When it comes to determining whether the borrower is legally obligated to close the loan, results are often difficult to predict. With residential loans, the documents usually make it fairly clear that no such duty was undertaken. In these loans, even though a commitment fee may have been paid to the lender, it was meant only to render the lender's promise to fund irrevocable; the lender's promise was not given to support any reciprocal promise by the borrower to accept the loan. Apart from these typical residential cases, the documents vary so greatly that it is impossible to generalize. Often there are ambiguities in the commitment agreements. Here, as with the residential commitment, there is the possibility of finding that the borrower held an option with no obligation to close. Secondly, particularly with permanent construction lenders who typically demand a hefty deposit when the commitment is executed, the deposit may be treated as a vehicle for giving the lender liquidated damages in the event the borrower opts not to close the loan. Under this construction, although the borrower would be obliged to close, forfeiture of the deposit would be the lender's sole remedy.

COMPUTER-ASSISTED RESEARCH

LEXIS: loan or mortgage pre/1 commitment w/50 require! or enforce!

§ 101.01(e)(2) Remedies for Breach by Lender.

Upon breach by a lender of an enforceable commitment contract, the borrower has two potential remedies: damages and specific performance.

If the borrower has been able to secure financing from another source after the breach, on terms more favorable than those in the breached contract, the damages should be limited to recovery of any commitment and other fees paid to the lender and the costs incurred in preparing to close the breached loan contract. n125 But, if more favorable financing could not be obtained, the damages should also include the present value of the increased loan contract. n126 Computing the value of these increased costs is relatively simple, if an appropriate interest rate to use in making the calculation can be established. n127 One could reduce to present value all payments that would have been made under the breached agreement and that will be made under the new one; the difference would represent the borrower's damages. n128 Consequential damages would also include lost opportunities, so long as the proof is not speculative. n129 One court allowed recovery for equity in property lost because of the breach. n130

Specific performance is usually denied borrowers, absent proof that the lender's conduct has made it difficult or impossible for the borrower to secure new financing. Mere breach by the lender does not entitle the borrower to specific performance since, presumably an adequate legal remedy exists. But, where the lender simply refused to fund the loan but has partially performed before repudiating the commitment, leaving the borrower with an unfinished construction

project and a recorded cloud on his title, an adequate legal remedy may not be available, since other lenders will probably refuse credit. In this situation, specific performance may be available.

COMPUTER-ASSISTED RESEARCH

LEXIS: loan or mortgage pre/1 commitment w/50 remedy!
or breach or damage

§ 101.01(e)(3) Remedies for Breach by Borrower.

Where a borrower fails to close the loan when legally obligated to do so, the redress of the lender should be restricted to money damages. Specific performance is not a proper remedy where the legal remedies afford adequate compensation. Since lenders seek merely a profit on their loans, legal relief in the form of monetary awards seems sufficient. n131

However, damages too are not always available to lenders. Usually lenders are able to place the funds with other borrowers on terms equally favorable to the lenders as the terms in the commitment agreement with the breaching borrower. If such is the case, recovery should be limited to unreimbursed costs incurred in preparing to close the rejected loan and any lost interest on the funds between the date of the commitment and replacement of the funds elsewhere. Where the actual loss to the lenders is offset by greater profits on a later placement of the funds, no damages would have been sustained.

Upon suffering a default, lenders are obliged to attempt to mitigate their damages by making reasonable efforts to place the funds elsewhere.

If the lender is unable to obtain comparable or better terms to place the funds, damages are, of course, appropriate and should be measured by computing the present value of all payments that would have been received under the agreement which was breached and of all payments under the replacement loan. The difference between these figures with interest thereon would seem the appropriate measure. n132

COMPUTER-ASSISTED RESEARCH

LEXIS: loan or mortgage pre/1 commitment w/50 remedy!
or breach or damage

FOOTNOTES:
(n1)Footnote 1. Harold D. Hazeltine, *The Gage of Land in Medieval England, 17 Harv. L. Rev. 549 (1904).*

(n2)Footnote 2. *Id. at 552.*

(n3)Footnote 3. Theodore F.T. Plucknett, A Concise History of the Common Law 603-4 (5th ed. 1956); George E. Osborne, Mortgages § 1, p. 5 (2d ed. 1970).

(n4)Footnote 4. Osborne, *supra* note 3, § 3 at 6.

(n5)Footnote 5. Plucknett, *supra* note 3, at 606-8.

(n6)Footnote 6. Littleton, § 332, *quoted at* Plucknett, *Id.* at 606.

(n7)Footnote 7. Osborne, *supra* note 3, § 5 at 11-12; Plucknett, *supra* note 3, at 607.

(n8)Footnote 8. Osborne, *supra* note 3, § 5 at 10.

(n9)Footnote 9. Plucknett, *supra* note 3, at 607, Grant S. Nelson & Dale A. Whitman, Real Estate Finance Law 6-7 (5th ed. 2007).

(n10)Footnote 10. C.C., Williams, Jr., *Clogging the Equity of Redemption, 40 W.Va. L. Rev. 31, 33-4 (1933).*

(n11)Footnote 11. William F. Walsh, A Treatise on Mortgages § 3 at 9 (Chicago 1934) (the process "may be regarded as complete by 1625"); Holdsworth, in describing the same period, concludes that "[these results were only gradually reached." 5 Holdsworth, A History of English Law 332 (3d ed. 1927).

(n12)Footnote 12. *Id. at 33d.*

(n13)Footnote 13. *Bonham v. Newcomb, 1 Vern. 232, 23 Eng. Rep. 435 (1684) , reversing Lord Nothingham at 1 Vern. 214, 23 Eng. Rep. 422 (1683)* .

(n14)Footnote 14. 6 Holdsworth, *supra* note 11 at 664. *See also Jennings v. Ward, 2 Vern. 520, 23 Eng. Rep. 935 (1705)* : "A man shall not have interest for his money, and a collateral advantage besides for the loan of it, or clog the redemption with any by-agreement."

(n15)Footnote 15. *Toomes v. Conset, 3 Atk. 261, 261-2, 26 Eng. Rep. 952, 952-3 (1745)* .

(n16)Footnote 16. *How v. Vigures, 1 Chan. Rep. 32, 21 Eng. Rep. 499 (1629)* ; Plucknett, *supra* note 3, at 608; *Nelson & Whitman, supra* note 9, at 8.

(n17)Footnote 17. Comment, *The Mortgagee's Right to Rents And Profits Following a Petition in Bankruptcy, 60 Iowa L. Rev. 1388, 1390 (1975). See also Matter of Perimeter Park Inv. Assocs., 1 B.R. 473, 475 (Bankr. N.D. Ga. 1979)* .

(n18)Footnote 18. *See infra* note 136. *See also* Comment, *The Mortgagee's Right To Rents After Default, 50 Yale L.J. 1424 (1941).*

(n19)Footnote 19. Leonard A. Jones, A Treatise on the Law of Mortgages of Real Property § 48 (8th ed. Indianapolis 1928). *Block Island Land Trust v. Washington Trust Co., 713 A.2d 199 (R.I. 1998)* (The title theory of mortgages is a fiction designed to aid in decision making).

(n20)Footnote 20. The title theory states appear in the following statutes and cases: Ala. Code § 35-10-26; *Hardy v. Gissendaner, 369 F. Supp. 481, 483 (M.D. Ala. 1974)* ; *In re Thomas, 121 B.R. 94 (Bankr. D. Ala. 1990)* ; *Baxter v. Southtrust Bank of Dothan, 584 So. 2d 801, 804 (Ala. 1991)* ; *Bailey Mtg. Co. v. Gobble-Fite Lumber, 565 So. 2d 138, 143 (Ala. 1990)* ; *Lloyd's of London v. Fidelity Sec. Corp., 105 So. 2d 728 (Ala. App. 1958)* ; *Harris v. Collins, 150 S.W.2d 749 (Ark. 1941) . Cf. Bank of Oak Grove v. Wilmot State Bank, 648 S.W.2d 802 (Ark. 1983)* ; *565 A.2d 252.* (Conn. App. 1990) ; *Conference Center Limited v. TRC-- The Research Corp. of New England, 455 A.2d 857 (Conn. 1983)* ; *State v. Stonybrook, Inc., 181 A.2d 601 (Conn. 1962)* ; *Turner Advertising Co. v. Garcia, 311 S.E.2d 466 (Ga. 1984)* ; *Matter of Perimeter Park Inv. Assocs., 1 B.R. 473 (Bankr. N.D. Ga. 1979)* (both as to security deeds); *Me. Rev. Stat. Ann. tit. 33, § 502*; *Martel v. Bearce, 311 A.2d 540 (Me. 1973)* ; *Gilman v. Wills, 66 Me. 273 (1877)* ; *Negron v. Gordon, 366 N.E.2d 241 (Mass. 1977)* ; *Carpenter v. Suffolk Franklin Sav. Bank, 291 N.E.2d 609 (Mass. 1973)* ; *Maglione v. Bancboston Mtg. Corp., 557 N.E.2d 756 (Mass. App. 1990)* . However, mortgagor entitled to possession until default, which may put the state in the intermediate theory camp. *See infra* note 23. *Cf. In re Prichard Plaza Assocs. P'ship, 84 B.R. 289 (Bankr. D. Mass. 1988)* ; *Meyers v. American Oil Co., 5 So. 2d 218 (Miss. 1941)* ; *Frank v. Colonial & United States Mtg. Co., 38 So. 340 (Miss. 1905)* , but mortgagor allowed to retain possession until default, which may put the state in the intermediate theory camp. *Houle v. Guilbeault, 40 A.2d 438 (R.I. 1944) . Cf. Simmons v. Brown, 7 R.I. 427 (1863)* ; *Peoples Bank of Polk County v. McDonald, 31 B.R. 597 (Bankr. E.D. Tenn. 1983)* ; *Vaughn v. Vaughn, 45 S.W. 677 (Tenn. 1898)* ; *Rassman v. American Fid. Co., 460 A.2d 461 (Vt. 1983)* ; *Crahan v. Chittenden, 74 A. 86 (Vt. 1909)* , but mortgagor entitled to keep possession until default, which may put the state in the intermediate

theory camp.

(n21)Footnote 21. *Nelson & Whitman, supra* note 9, at § 4.1.

(n22)Footnote 22. *Darling Shop v. Nelson Realty Co., 79 So. 2d 793 (Ala. 1954)* . Jones on Mortgages § 67 (8th ed. 1928).

(n23)Footnote 23. "Until default in the performance or observance of the condition of a mortgage of real estate, the mortgagor and his heirs and assigns may hold and enjoy the mortgaged premises and receive the rents and profits thereof, unless otherwise stated in the mortgage." M.G.L.A. tit. 183, § 26. *See also* note 136, *infra*.

(n24)Footnote 24. *Roosevelt Sav. Bank of City of N.Y. v. State Farm Fire & Cas. Co., 556 P.2d 823 (Ariz. 1976)* ; *Martyn v. First Fed. Sav. & Loan Ass'n, 257 So. 2d 576 (Fla. App. 1971)* ; *Chambers v. Cranston, 558 P.2d 271 (Wash. App. 1976)* ; *State Bank of Lehi v. Woolsey, 565 P.2d 413 (Utah 1977)* .

(n25)Footnote 25. *Nelson & Whitman, supra* note 9, § 4.1.

(n26)Footnote 26. *See* Jones on Mortgages § 825 (8th ed. 1928) (agreement will not be inferred from mere permissive occupancy by mortgagor or from custom).

(n27)Footnote 27. *Harlow Realty Co. v. Cotter, 187 N.E. 118 (Mass. 1933)* .

(n28)Footnote 28. *Lieberman, Loveman & Cohn v. Knight, 283 S.W. 450, 453 (Tenn. 1926)* .

(n29)Footnote 29. A study published in 1965 listed 28 lien theory states: Arizona, California, Colorado, Florida, Hawaii, Idaho, Indiana, Iowa, Kansas, Kentucky, Louisiana, Michigan, Minnesota, Montana, Nebraska, Nevada, New Mexico, New York, North Dakota, Oklahoma, Oregon, South Carolina, South Dakota, Texas, Utah, Washington, Wisconsin, and Wyoming. Note, *Proposed Changes in Minnesota Mortgage Law 50 Minn. L. Rev. 331, 339 (1965).*

Alaska, Illinois, and Kansas should also be included:

Brand v. First Fed. Sav. & Loan Ass'n, 478 P.2d 829, 831 (Alaska 1970) ; *Kelley/Lehr & Assocs. v. O'Brien, 194 Ill. App. 3d 380, 141 Ill. Dec. 426, 551 N.E.2d 419 (Ill. App. 1990)* ; *In re* Application of Small Bus. Admin. for Exemption from *Ad Valorem Taxation, 797 P.2d 879 (Kan. App. 1990)* .

Missouri, too might be a lien theory state. *Belote v. McLaughlin, 673 S.W.2d 27 (Mo. 1984)* . *Cf. Pine Lawn Bank & Trust Co. v. M.H. & H., Inc., 607 S.W.2d 696 (Mo. App. 1980)* (mortgagee entitled to possession upon default). *See also Nelson & Whitman, supra* note 9, § 4.2.

(n30)Footnote 30. Thompson on Real Property § 4651 (1958 Repl.).

(n31)Footnote 31. *Matter of Clark, 738 F.2d 869, 871 (7th Cir. 1984)* ("Under Wisconsin law, a mortgagee has only a lien on the mortgaged property even after a judgment of foreclosure is entered. Neither equitable nor legal title passes until the foreclosure sale is held."); *Woodsam Associates, Inc. v. Commissioner, 198 F.2d 357 (2d Cir. 1952)* ; *McMillan v. Richards, 9 Cal. 365 (1858)* .

(n32)Footnote 32. *State Bank of Lehi v. Woolsey, 565 P.2d 413 (Utah 1977)* ; *Chambers v. Cranston, 558 P.2d 271 (Wash. App. 1976)* .

(n33)Footnote 33. *S.C. Code Ann. § 29-3-10* (1991).

(n34)Footnote 34. *Minn. Stat. Ann. § 559.17* (1988); *Or. Rev. Stat. § 86.010* (1988); *Wash. Rev. Code Ann. § 7.28.230* (1992).

(n35)Footnote 35. *Cal. Civ. Code § 2927*.

(n36)Footnote 36. *Colo. Rev. Stat. Ann. § 38-35-117*; *Martinez v. Continental Enters., 730 P.2d 308 (Colo. 1986)* .

(n37)Footnote 37. *Id.*

(n38)Footnote 38. *Ganbaum v. Rockwood Realty Corp., 308 N.Y.S.2d 436 (1970)* ; *Rives v. Mincks Hotel, 30 P.2d 911 (Okla. 1934)* ; State *ex rel. Gwinn, Inc. v. Superior Ct., 16 P.2d 831 (Wash. 1932)* .

(n39)Footnote 39. *Kinnison v. Guaranty Liquidating Corp., 115 P.2d 450 (Cal. 1941)* ; *Penn Mut. Life Ins. Co. v. Katz, 297 N.W. 899 (Neb. 1941)* ; *Dick & Reuteman Co. v. Jem Realty Co., 274 N.W. 416 (Wis. 1937)* .

(n40)Footnote 40. *Walker's Adm'x v. Farmers' Bank, 14 A. 819 (Del. 1888)* ; *In re Bethesda Air Flights Ltd. P'ship., 117 B.R. 202 (Bankr. D. Md. 1990)* ; *In re Bond, 122 B.R. 39 (Bankr. D. Md. 1990)* ; *Tripe v. Marcy, 39 N.H. 439 (1859)* . *McCorristin v. Salmon Signs, 244 N.J. Super. 503, 582 A.2d 1271 (N.J. 1990)* ; *Guttenberg Sav. & Loan Ass'n v. Rivera, 428 A.2d 1289 (N.J. 1981)* ; *In re Westchase I Assocs., 119 B.R. 521 (Bankr. W.D.N.C. 1990)* ; *Stevens v. Turlington, 119 S.E. 210 (N.C. 1923)* ; *Levin v. Carney, 120 N.E.2d 92 (Ohio 1952)* ; *Taylor v. Quinn, 39 N.E.2d 627 (Ohio App. 1941)* . *Cf. Hunter Sav. Ass'n v. Georgetown of Kettering, Inc., 14 B.R. 72 (Bankr. S.D. Ohio 1981)* ; *In re Wynnewood House Assocs., 121 B.R. 716 (Bankr. E.D. Pa. 1990)* ; *Tryon v. Munson, 77 Pa. 250 (1875)* ; *Vaughn v. Vaughn, 45 S.W. 677 (Tenn. 1898)* . *Cf. Bertha v. Smith, 110 S.W.2d 474 (Tenn. 1938)* ("not strict" in applying the theory); *Crahan v. Chittenden, 74 A. 86 (Vt. 1909)* ; *In re Vienna Park Props., 120 B.R. 332 (Bankr. S.D.N.Y. 1990)* ; *Faulkner v. Brockenbrough, 25 Va. 245 (1826) (Va. 1826).*

(n41)Footnote 41. Thompson on Real Property § 4652, at 21.

(n42)Footnote 42. *See* note 136, *infra*. These states include Massachusetts, Mississippi, and Vermont.

(n43)Footnote 43. 3. *Chaparral Dev. v. RMED Int'l, 170 Ariz. 309, 823 P.2d 1317 (Ariz. 1991)* .

(n44)Footnote 44. *Interstate Land Corp. v. Patterson, 797 P.2d 1101 (Utah App. 1990)* .

(n45)Footnote 45. *In re Kelley, 7 B.R. 384 (Bankr. D.S.D. 1980)* ; *Nee v. L.C. Smith, Inc., 624 P.2d 4 (Nev. 1981)* .

(n46)Footnote 46. *Nelson & Whitman, supra* note 9, § 4.1.

(n47)Footnote 47. *Federal Deposit Ins. Corp. v. Willis, 497 F. Supp. 272 (S.D. Ga. 1980)* ; *Matter of Sumner, 4 B.R. 560 (Bankr. D.N.J. 1980)* ; *In re Atkinson, 126 B.R. 713 (Bankr. N.D. Tex. 1991)* ; Northstream Investments, Inc. v. 1804 Country Store Co., 697 N.W.2d 762 (S.D. 2005) (the whole transaction of a mortgage assignments must also be evidenced in writing, according to South Dakota statute).

(n48)Footnote 48. *Godley v. Piedmont Land Sales, Inc., 505 F. Supp. 397 (E.D. Ky. 1978)* (deed of trust).

(n49)Footnote 49. Gerrard Glenn, Mortgages, Deeds of Trust, and Other Security Devices as to Land § 9 at 46-7; § 17.2 at 100-1. (Charlottesville and New York, 1943).

(n50)Footnote 50. *Wells Fargo Bank v. PAL Invs., Inc., 157 Cal. Rptr. 818 (Cal. App. 1979)* ; *Cloverleaf Dev., Inc. v. Provence, 616 S.W.2d 16 (Ark. 1981)* .

(n51)Footnote 51. *Poyzer v. Amenia Seed & Grain Co., 381 N.W.2d 192, 195 (N.D. 1986)* .

(n52)Footnote 52. Several federal model forms are found in *54 Federal Register 27609* (June 29, 1989).

(n53)Footnote 53. *In re Janis, 125 B.R. 274 (Bankr. D. Ariz. 1991)* ; *Bramblett v. Bramblett, 310 S.E.2d 897 (Ga.*

1984) ; *County of Keith v. Fuller, 452 N.W.2d 25 (Neb. 1990)* ; *Turner v. Domestic Inv. & Loan Corp., 375 A.2d 956 (R.I. 1977)* .

It is often said that the debt must be capable of being reduced to value, *e.g., Borsheim v. Owan, 467 N.W.2d 95 (N.D. 1991)* , but this should not be equated with requiring personal liability.

(n54)Footnote 54. *Nelson & Whitman, supra* note 9, § 2.3.

(n55)Footnote 55. *National City Bank of Chicago v. Wagner, 216 F. 473 (7th Cir. 1914)* , *cert. denied, 235 U.S. 698 (1914)* ; *Safety Fed. Sav. & Loan Ass'n v. Thurston, 648 P.2d 267 (Kan. 1982)* ; *C & D Invs. v. Beaudoin, 364 N.W.2d 850 (Minn. App. 1985)* ; *Continental Bank v. Barclay Riding Academy, Inc., 459 A.2d 1163 (N.J. 1983)* . *See also* Clarence Barnes, *Consideration in Mortgages 19 KY. L. J. 146 (1931).*

(n56)Footnote 56. *Pioneer Annuity Life Ins. Co. v. National Equity Life Ins. Co., 765 P.2d 550 (Ariz. App. 1988)* ; *Crum v. United States Fid. & Guar. Co., 468 So. 2d 1004 (Fla. App. 1985)* ; *Peterson Bank v. Langendorf, 483 N.E.2d 279 (Ill. App. 1985)* ; *Huffine v. Riadon, 541 S.W.2d 414 (Tenn. 1976)* .

(n57)Footnote 57. *See infra* text at notes 64-65.

(n58)Footnote 58. *County of Keith v. Fuller, 452 N.W.2d 25 (Neb. 1990)* (express or implied contract to pay a sum of money necessary); *Johnson v. Johnson, 33 S.E.2d 784 (Va. 1945)* ("security for money").

(n59)Footnote 59. *See generally* cases cited at *Nelson & Whitman, supra* note 9, § 2.1 at n.10.

(n60)Footnote 60. *Lebowitz v. Commissioner of Internal Revenue, 917 F.2d 1314 (2d Cir. 1990)* ; *Lamm v. Commissioner of Internal Revenue, 873 F.2d 194 (8th Cir. 1989)* ; *Georgetown Assocs. v. Home Fed. Sav. & Loan Ass'n, 795 S.W.2d 252 (Tex. App. 1990)* .

(n61)Footnote 61. *Coon v. Shry, 289 P. 815 (Cal. 1930)* ; *Keith, Mack, Lewis & Allison v. Boraks, 483 So. 2d 560 (Fla. App. 1986)* ; *Lillienstern v. First Nat'l Bank, 288 S.W. 477 (Tex. Civ. App. 1926)* . *Atwood v. Fisk, 101 Mass. 363 (1869)* (no mortgage where debt founded on unlawful consideration).

(n62)Footnote 62. *Dodd v. Harper, 670 S.W.2d 646 (Tex. App. 1983)* .

(n63)Footnote 63. *See* § 101.05(b)(3), *infra.*

(n64)Footnote 64. Restatement (Third) of Property-Security (Mortgages) § 1.2, comment b.

(n65)Footnote 65. Restatement (Third) of Property-Security (Mortgages) § 1.2 at 18, Reporters' Note.

(n66)Footnote 66. *Belknap v. Gleason, 11 Conn. 160 (1836)* ; *Elkins v. Edwards, 8 Ga. 325 (1850)* ; *Norton v. Palmer, 8 N.E. 346 (Mass. 1886)* .

(n67)Footnote 67. *Welch v. Security-First Nat'l Bank, 143 P.2d 770 (Cal. App. 1943)* ; *Phinney v. Levine, 359 A.2d 636 (N.H. 1976)* . In California, though a trustee's sale may be held after the limitation period has run, a judicial foreclosure may not. *Flack v. Boland, 77 P.2d 1090 (Cal. 1938)* .

(n68)Footnote 68. Foreclosure permitted after debt time-barred: *Michigan Ins. Co. v. Brown, 11 Mich. 265 (1863)* ; *Slingerland v. Sherer, 49 N.W. 237 (Minn. 1891)* ; *Hulbert v. Clark, 28 N.E. 638 (N.Y. 1891)* .

No foreclosure allowed after debt time-barred: *Martinez v. Continental Enters., 730 P.2d 308 (Colo. 1986)* .

(n69)Footnote 69. *County of Keith v. Fuller, 452 N.W.2d 25 (Neb. 1990)* ; *Borsheim v. Owan, 467 N.W.2d 95*

(N.D. 1991) .

(n70)Footnote 70. *Matter of Jeffrey Towers, Inc., 291 N.Y.S.2d 41 (1968)* .

(n71)Footnote 71. *Bethlehem v. Annis, 40 N.H. 34 (1860)* .

(n72)Footnote 72. *E.g.*, mortgages to secure open accounts, *e.g., Shirras v. Caig, 11 U.S. 34, 3 L. Ed. 260 (1812)* ; mortgages to secure future advances, discussed at § 101.06(f), *infra. See* Restatement (Third) of Property-Security (Mortgages) § 1.4.

(n73)Footnote 73. *Dool v. First Nat'l Bank, 290 P. 478 (Cal. App. 1930)* .

(n74)Footnote 74. With few exceptions, the terms of the mortgage should never be incorporated into the evidence of indebtedness since doing so might bar negotiability. 39 *College Point Corp. v. Transpac Capital Corp., 22 A.D.3d 663* (N.Y.A.D. 2 Dept. 2005) (certificate of acknowledgment may be attached to mortgage; it is presumed duly executed unless evidence shows it was not so executed); *In re Stubbs, 330 B.R. 717 (Bkrtcy. N.D. Ind. 2005)* (invalid acknowledgement because it did not specify who acknowledged mortgage execution before attesting officer); *Carson v. McNeal, 375 F. Supp. 2d 509 (S.D.Miss. 2005)* (In Mississippi, defective deed of trust not properly notarized still valid between original parties, even when not deemed constructive notice to other parties.).

(n75)Footnote 75. *In re Sweatte, 76 B.R. 822 (Bankr. W.D. Okla. 1987)* ; *Pioneer Annuity Life Ins. Co. v. National Equity Life Ins. Co., 765 P.2d 550 (Ariz. 1988)* (blank for description of obligation not completed); *Burt's Spirit Shop, Inc. v. Ridgeway, 576 A.2d 1267 (Conn. 1990)* (principal and interest not stated in mortgage); *Security Bank v. Hawk, 517 N.E.2d 886 (Ohio 1988). Contra United States v. Four Parcels of Real Prop., 870 F.2d 586 (11th Cir. 1989)* .

(n76)Footnote 76. *Bank of Oak Grove v. Wilmot State Bank, 648 S.W.2d 802 (Ark. 1983)* ; *Commercial Factors of Denver v. Clarke & Waggener, 684 P.2d 261 (Colo. App. 1984)* ; *Hampshire Nat'l Bank of S. Hadley v. Calkins, 339 N.E.2d 244 (Mass. App. 1975)* .

Dart v. Bogue Co. v. Slosberg, 522 A.2d 763 (Conn. 1987) (nature of debt and amount should be stated). *But see In re Carnes, 331 B.R. 229 (Bkrtcy. W.D. Pa. 2005)* (Mortgage unenforceable under statute of frauds when only husband signed the mortgage and property held by husband and wife as tenants by the entireties).

(n77)Footnote 77. *See, e.g., Harper v. Edwards, 20 S.E. 392 (N.C. 1894)* .

(n78)Footnote 78. *Northridge Bank v. Lakeshore Commercial Fin. Corp., 365 N.E.2d 382 (Ill. App. 1977)* ; *Flexter v. Woomer, 197 N.E.2d 161 (Ill. App. 1964)* ; *Metropolitan Bank v. Godfrey, 23 Ill. 579 (1860)* .

(n79)Footnote 79. *Peoples Bank v. Morgan County Nat'l Bank, 266 Ky. 308, 98 S.W.2d 936 (Ky. 1936)* .

(n80)Footnote 80. *United Bank v. West Central Georgia Bank, 620 S.E.2d 654 (Ga. App. 2005)* (maturity date requirement satisfied even if no express language in mortgage indicates that it is the maturity date, when promissory note referenced in mortgage does expressly provide that the date is the maturity date.).

(n81)Footnote 81. *Smith v. Haertel, 244 P.2d 377 (Colo. 1952)* .

(n82)Footnote 82. *Commercial Factors of Denver v. Clarke & Waggener, 684 P.2d 261 (Colo. App. 1984)* .

(n83)Footnote 83. *Cal. Civ. Code § 2924.5*.

(n84)Footnote 84. *Brown v. First Nat'l Bank, 75 So. 2d 141 (Ala. 1954)* ; *Pacific Fruit Exch. v. Duke, 284 P. 729 (Cal. App. 1930)* ; *E.E.E., Inc. v. Hanson, 318 N.W.2d 101 (N.D. 1982)* ; *Mortgage Assocs. v. Hendricks, 187 N.W.2d 313 (Wis. 1971)* ; *First Fed. Sav. & Loan Ass'n of Coffeyville v. Hutchinson, 591 P.2d 1189 (Okla. App. 1978)* ; *In re*

Borriello, 329 B.R. 367 (Bkrtcy. E.D.N.Y. 2005) (In New York, mortgage must contain language indicating the property is security for debt).

(n85)Footnote 85. *Nelson & Whitman, supra* note 9, § 2.4. *See also Ferguson v. Peoples Nat'l Bank, 1990 Tenn. Lexis 431 (Tenn. App. 1989)* .

(n86)Footnote 86. *Holt v. Creamer, 34 N.J. Eq. 181 (1881)* ; *First Fed. Sav. & Loan Ass'n of Coffeyville v. Hutchinson, 591 P.2d 1189 (Okla. App. 1978)* .

(n87)Footnote 87. *Cabbage v. Citizens Bank, 214 S.W.2d 572 (Tenn. App. 1948)* .

(n88)Footnote 88. *Cf. Nelson & Whitman, supra* note 9, § 2.4 at 27 ("Where the amount is understated it cannot, of course, be enforced beyond the stated sum as against subsequent purchasers and encumbrancers, and, presumably, any creditors who actually rely on the incorrect amount.").

(n89)Footnote 89. *See* § 101.06(f), *infra*.

(n90)Footnote 90. *County of Keith v. Fuller, 452 N.W.2d 25 (Neb. 1990)* (dragnet clause enforceable if debt within contemplation of parties).

(n91)Footnote 91. *Carson v. McNeal, 375 F. Supp. 2d 509 (S.D.Miss. 2005)* (In Mississippi, deed need not be delivered to be valid).

(n92)Footnote 92. *Bank of Christiansburg v. Evans, 163 Va. 804, 178 S.E. 1 (Va. 1935)* ; *In re Carnes, 331 B.R. 229 (Bkrtcy. W.D. Pa. 2005)* (Mortgage unenforceable under statute of frauds when only husband signed the mortgage yet property held by husband and wife as tenants by the entireties); *Rockstad v. Erikson, 113 P.3d 1215 (Alaska 2005)* (Mortgage enforceable in Alaska although only husband signed mortgage when husband and ex-wife held property as tenants in common); *Countrywide Home Loans, Inc. v. Kim, 898 So. 2d 250 (Fla. App. 2005)* (Mortgage enforceable in Florida although only husband signed mortgage when husband and wife held property together since wife would have signed if asked, knew about the mortgage, and inadvertently did not sign).

(n93)Footnote 93. *E.g., Cal. Code Civ. Proc. § 1971*; *In re Miller, 320 B.R. 203 (Bkrtcy. N.D. Ala. 2005)* (Without proper acknowledgement, in Alabama mortgage instrument still considered effective under equitable mortgage idea); *In re Fisher, 320 B.R. 52 (E.D. Pa. 2005)* (In Pennsylvania, mortgage is required to have acknowledgment).

(n94)Footnote 94. *See* § 94.02(b)(7), *supra*.

(n95)Footnote 95. For example, a seal may be required for legal mortgages. *Peckham v. Haddock, 36 Ill. 38 (1864)* ; *Dunn v. Raley, 58 Mo. 134 (1874)* .

(n96)Footnote 96. *Conn. Gen. Stat. § 49-10*.

(n97)Footnote 97. *Goodman v. Randall, 44 Conn. 321 (1877)* (grantor's name omitted from body though signature acknowledged); *Sedgwick v. Laflin, 92 Mass. 430 (1865)* ; *Allendorff v. Gaugengigl, 16 N.E. 283 (Mass. 1888)* (mortgage to "grantee" encumbers only for mortgagor's lifetime); *Smith v. Haskins, 45 A. 741 (R.I. 1900)* (same for mortgage to "successors and assigns"); *Wilson v. King, 27 N.J. Eq. 374 (1876)* (without words of inheritance, mortgagee acquires life estate for mortgagor's life).

(n98)Footnote 98. Walsh, *supra* note 11, § 53 at 53; § 13 at 72.

(n99)Footnote 99. Osborne, *supra* note 3, § 23 at 33-34.

(n100)Footnote 100. Osborne, *supra* note 3, § 23 at 33.

(n101)Footnote 101. *See supra* text accompanying notes 76-83.

(n102)Footnote 102. Uniform Land Transactions Act § 3-203(a). *In re Rothacre, 326 B.R. 398 (Bkrtcy. E.D. Ky. 2005)* (street address was enough of a description to give third parties notice--see. Bankr.Code, *11 U.S.C.A. § 544(a)(3).*).

(n103)Footnote 103. *Cal. Civil Code § 2948*; *Ohio Rev. Code Ann. § 5302.12*; 39 *College Point Corp. v. Transpac Capital Corp., 22 A.D.3d 663* (N.Y.A.D. 2 Dept. 2005) (certificate of acknowledgment may be attached to mortgage; it is presumed duly executed unless evidence shows it was not so executed); *In re Duback, 330 B.R. 337 (Bkrtcy. D.R.I. 2005)* (Rhode Island does not automatically find mortgage void when legal description contains error) (a sufficient description is one in which a person can figure out the parameters with the help of extrinsic evidence); *Texas Commerce Bank National Association v. Joseph, 2003 Ohio App. LEXIS 947* (No. 81097, Mar. 6, 2003) (mortgage was valid even though only one of two attesting witnesses was actually present when the mortgagors signed the mortgage).

(n104)Footnote 104. D. Barlow Burke, Jr. The Law of Federal Mortgage Documents § 1.1.2 (-) 1.1.8 at 2-19.

(n105)Footnote 105. *Id.* § 1.1.3 at pp. 7-8.

(n106)Footnote 106. Frequently, the lenders act as the collection agents of the purchasers of their loans and thus continue to derive income from the loans after they have been placed in the secondary market.

(n107)Footnote 107. *12 U.S.C. § 1716,* § 1723; Michael H. Schill, *Uniformity or Diversity: Residential Real Estate Finance Law in the 1990's and the Implications of Changing Financial Markets 64 S. Cal. L. Rev. 1261 (1991).*

(n108)Footnote 108. *See, e.g., First Gibraltar v. Morales, 19 F.3d 1032 (5th Cir. 1994)* (federal statutes and regulations dealing with reverse annuity mortgages and line of credit security transactions preempt Texas homestead law); *Cadle Company II v. Lewis, 864 P.2d 718 (Kan. 1993)* (federal statute of limitations governs foreclosure claim and claim on debt brought by assignee of FDIC).

(n109)Footnote 109. "We decided that, to the maximum extent possible, we would try to standardize the mortgage documents and have a uniform document throughout the United States ... . But one of the biggest problems in conventional mortgages is this continued diversity among the States. This diversity is a large factor in the unwillingness of many large institutional investors to invest in the conventional mortgage." Statement of James E. Murray, General Counsel of FNMA, *quoted at* Burke, *id.* at § 1.1.4 at 11.

(n110)Footnote 110. FNMA/FHLMC Uniform Instrument Form.

(n111)Footnote 111. *425 F.2d 358 (9th Cir. 1970)* .

(n112)Footnote 112. *Id. at 362* . Also holding that foreclosure is not subject to state statutory redemption rights: *Thwaites Place Assocs. v. Secretary of H.U.D., 638 F. Supp. 301 (S.D.N.Y. 1986) , aff'd, 833 F.2d 1003 (2d Cir. 1986)* ; *United States v. Victory Hwy. Village, 662 F.2d 488 (8th Cir. 1981)* , and *United States v. Scholnick, 606 F.2d 160 (6th Cir. 1979)* .

(n113)Footnote 113. *See, e.g., United States v. Great Plains Gasification Associates, 813 F.2d 193 (8th Cir. 1987)* ; *United States v. Curry, 561 F. Supp. 429 (D. Kan. 1983)* .

(n114)Footnote 114. *United States v. Ellis, 714 F.2d 953 (9th Cir. 1983)* .

(n115)Footnote 115. *United States v. View Crest Garden Apts., Inc., 268 F.2d 380 (9th Cir. 1959) , cert. denied, 361 U.S. 884 (1959)* .

(n116)Footnote 116. *United States v. Haddon Haciendas Co., 541 F.2d 777 (9th Cir. 1976)* ; *United States v.*

Merrick Sponsor Corp., 421 F.2d 1076 (2d Cir. 1970) .

(n117)Footnote 117. *440 U.S. 715 (1979)* . *See also United States v. Copper, 709 F. Supp. 905 (N.D. Iowa 1988)* .

(n118)Footnote 118. *United States v. Pastos, 781 F.2d 747 (9th Cir. 1986)* . *See also Great Southwest Life Ins. Co. v. United States, 860 F.2d 896 (9th Cir. 1988)* ; *United States v. Thornburg, 835 F. Supp. 543 (E.D. Cal. 1993)* (states statute of limitations governs claim of Small Business Administration security given by guarantor).

(n119)Footnote 119. *Sonnenblick-Goldman Corp., 420 F.2d 1169 (7th Cir. 1981)* ; *Hartrampf v. Citizens & S. Realty Investors, 157 Ga. App. 879, 278 S.E.2d 750 (Ga. App. 1981)* ; *Bank of El Paso v. T.O. Stanley Boot Co., 809 S.W.2d 279 (Tex. App. 1991)* ; *Zweiback v. U.S. Bank, N.A. (In re Rosen Auto Leasing, Inc.), 2004 Bankr. LEXIS 1399* (Bankr. D. Neb., 2004) (a contribution of $300,000 by a shareholder to the debtor was considered a secured loan transaction, and not an equity deal, because the shareholder received a lien on debtor's real estate).

(n120)Footnote 120. *McErlean v. Union Nat'l Bank, 414 N.E.2d 128 (Ill. App. 1980)* ; *Jamestowne on Signal, Inc. v. First Fed. Sav. & Loan Ass'n, 807 S.W.2d 559 (Tenn. App. 1990)* ; *Farm Credit Services of America v. Dougan, 704 N.W.2d 24 (S.D. 2005)* .

(n121)Footnote 121. *E.g., Ariz. Rev. Stat. Ann. § 44-101* ($250,000); Ark. Stat. Ann. § 4-59-101 ($10,000); *Cal. Civ. Code § 1624* ($100,000); *Colo. Rev. Stat. § 38-10-124*; 1240 *Tex. Bus. & Com. Code § 26.02*. Many statutes cover only business loans or loans made by professional lenders. *Mark Andrew of the Palm Beaches, Ltd. v. GMAC Commer. Mortg. Corp., 265 F. Supp. 2d 366 (S.D. N.Y. 2003)* (According to Florida Law, all credit agreements must be made in writing to be valid, an oral agreement will not suffice to enforce the terms of a loan.).

(n122)Footnote 122. *Goldman v. Connecticut Gen. Life Ins. Co., 248 A.2d 154 (Md. App. 1968)* ; *Rollingbrook Inv. Co. v. Texas Nat'l Bank of Baytown, 790 S.W.2d 375 (Tex. App. 1990)* .

(n123)Footnote 123. *Shel-Al Corp. v. American Nat'l Ins. Co., 492 F.2d 87 (5th Cir. 1974)* ; *Regional Enters. v. Teacher's Ins. & Annuity Ass'n, 352 F.2d 768 (9th Cir. 1965)* ; *White Lakes Shopping Ctr., Inc. v. Jefferson Std. Life Ins. Co., 490 P.2d 609 (Kan. 1971)* ; *Continental Assur. Co. v. Van Cleve Bldg. & Constr. Co., 260 S.W.2d 319 (Mo. App. 1953)* ; and *Boston Road Shopping Ctr., Inc. v. Teacher's Ins. & Annuity Ass'n, 213 N.Y.S.2d 522 (1961)* .

(n124)Footnote 124. *Capital Holding Corp. v. Octagon Dev. Co., 757 S.W.2d 202 (Ky. App. 1988)* ; *Kensington Ptnrs., L.P. v. Columbian Mut. Life Ins. Co., 2005 Ohio 884 (Ohio App. 2005)* (the creditor was allowed to retain the commitment and loan fees because the debtor did not satisfy the conditions precedent of closing the loan).

(n125)Footnote 125. *Sparks v. Farmer's Fed. Sav. & Loan Ass'n, 183 W. Va. 315, 395 S.E.2d 559 (W. Va. 1990)* ; *Johnson v. Oconee State Bank, 487 S.E.2d 369 (Ga. App. 1997)* .

(n126)Footnote 126. *See Rubin v. Pioneer Sav. & Loan Ass'n, 334 N.W.2d 424 (Neb. 1983)* (differences in interest rates merely evidence of damages from which trier of fact may draw its own inferences).

(n127)Footnote 127. Professors Nelson and Whitman observe that the case law offers little guidance in selecting the proper rate. *Nelson & Whitman, supra* note 9, § 12.3 at 853 n.31.

(n128)Footnote 128. *Lincoln Nat'l Life Ins. Co. v. NCR Corp., 603 F. Supp. 1393 (N.D. Ind. 1984)* .

(n129)Footnote 129. Courts appear to take a jaundiced view of claims for lost profits. *Nelson & Whitman, supra* note 9, § 12.3. *But see Hucks v. Utah, 806 P.2d 200, 203 (Utah App. 1990)* .

(n130)Footnote 130. *United Calif. Bank v. Prudential Ins. Co., 681 P.2d 390 (Ariz. App. 1983)* .

(n131)Footnote 131. *See* Roger D. Groot, *Specific Performance of Contracts to Provide Permanent Financing 60*

Cornell L. Rev. 718, 727-36 (1975).

(n132)Footnote 132. *Lincoln Nat'l Life Ins. Co. v. NCR Corp., 603 F. Supp. 1393 (N.D. Ind. 1984)* .

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CHAPTER 101 MORTGAGES, DEEDS OF TRUSTS AND RELATED LIENS

12-101 Thompson on Real Property, Thomas Editions § 101.02

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§ 101.02 Rights and Duties Before Default.

§ 101.02(a) Possession.

§ 101.02(a)(1) Mortgagor's Right to Possession.

Whether the mortgagor is entitled to possess the encumbered property is dependent upon the theory of mortgages espoused by the particular jurisdiction and the enforceability of provisions in the mortgage agreement addressing the right to possession.

In title theory states, the mortgagor, absent an agreement to the contrary, is not entitled to possession because legal title to the possessory estate has been transferred to the mortgagee. n133 Similarly, intermediate states afford the mortgagor the right to possession until default at which time the title to the possessory estate passes to the mortgagee who may take possession unless precluded from doing so by agreement. n134 In practice, in both types of jurisdictions, most mortgages provide that the mortgagor may keep possession until default and often authorize the mortgagee to elect to take possession upon a default. It has been asserted that courts in title theory states are quick to find agreements between mortgagors and mortgagees conferring the right to possession on the former at least until default, n135 but the issue does not appear to have arisen in recent years. The dearth of authority is probably evidence of the prevalence of express agreements favoring the possessory right of the mortgagors. It is worth noting that statutes in some title theory states require that mortgagors of residential property intended for their personal use be permitted to occupy the premises until default notwithstanding the general rule in those states. n136

Lien theory states, which regard the mortgagor as an owner who cannot be divested of the incidents of ownership except by foreclosure or perhaps agreement, recognize a possessory interest in the mortgagor. Mortgagors in lien theory states, except where there are enforceable provisions in their mortgage agreements to the contrary, retain all the usual incidents of legal possession, including the right to lease the premises to others. n137 One limitation on the prerogatives of mortgagors, however, is the law of waste. Frequently, mortgages contain rents and profits clauses which purport to grant mortgagees the right to the income from the property upon default and the right to take possession in order to effect the collection. Such clauses have received varied receptions in lien theory states and are the subject of § 101.02(a)(c)(3), *infra.*

On this issue the deed of trust deserves separate comment. Despite the theoretical legal title of the trustee, that title is usually regarded as existing solely for security purposes, and the trustee is not afforded the right to possession simply because of the deed of trust. n138 In adjudicating possessory claims under deeds of trust, courts resolve them by reference to the principles governing mortgages. In title theory states, the beneficiary is entitled to possession under a deed of trust unless the trustor and beneficiary have otherwise agreed, which, of course, they almost always have. n139 In lien theory states, the trustor is entitled to possession until foreclosure unless there is an enforceable agreement conferring possession on the beneficiary. n140

COMPUTER-ASSISTED RESEARCH:

LEXIS: "title theory" "lien theory" /s possession

§ 101.02(a)(2) Mortgagee in Possession.

In both title and lien theory states, mortgagees sometimes take, or find themselves in, possession of the encumbered property. Of course, in title theory jurisdictions, they are legally entitled to possession unless by agreement or conduct they have renounced or conditioned the right. n141 Lien theory states are divided about the enforceability of agreements purporting to entitle mortgagees to possession upon default by mortgagors, although most of them permit mortgagees to take possession with the consent of their mortgagors. Regardless of the basis of the mortgagees' possession, however, they assume significant burdens upon assuming the status of a mortgagee in possession.

A mortgagee in possession is one lawfully occupying the premises. n142 However, the mortgagee's possession must be founded upon the mortgage, whether the justification be consent or good faith entry, if the mortgagee is to avoid being classified as trespasser; n143 otherwise, the mortgagee in possession will be treated as a trespasser. n144

In title theory states, where mortgagees are entitled to possession except where they have somehow renounced the right, as by agreement with the mortgagors, it is relatively simple for them to acquire the status of a mortgagee in possession. Any taking of possession under color of the mortgage, except perhaps one effected by force, n145 would confer "mortgagee in possession" status on the mortgagee. In intermediate theory states, the same result would obtain so long as the mortgagor was in default at the time of entry by the mortgagee.

Lien theory states justify awarding possession lawfully to mortgagees in the face of their general recognition of the mortgagor as owner upon a finding that the mortgagor has consented to the mortgagee's entry. In some lien theory states, mortgagors may voluntarily put their mortgagees in possession after a default. n146 In many lien theory states, this consent may be given in the mortgage itself as, for example, through a rents and profits clause. n147 Even without consent on the part of the mortgagor, lien theory states often confer "mortgagee in possession" status upon mortgagees who take possession in the good faith belief that the mortgage authorizes entry. The most common example of such an entry is that of a mortgagee purchasing at a defective foreclosure sale by the mortgagee. n148 Here, the mortgagee may not have acquired a perfect title to a possessory estate, but the foreclosure sale was based upon the mortgage and the mortgagee's claim to possession is traceable to the mortgage. Where, however, the defect renders the foreclosure sale void, and not merely voidable, it has been held that the purchasing mortgagee in possession is not a mortgagee in possession. n149

Factual disputes can arise as to whether the actions of a mortgagee have amounted to the taking of possession and, of course, because of the rather onerous burdens cast upon mortgagees in possession, mortgagees are well advised to be circumspect in their dealings with the mortgaged premises to avoid the unwanted assumption of those burdens. The mere receipt of rents under a rents and profits clause will probably not make one a mortgagee in possession, n150 while managing the property in the absence of the mortgagor probably will. n151

Despite the major responsibilities imposed on mortgagees in possession, there are also several advantages. First, once

mortgagee in possession status is gained, the mortgagee is entitled to retain possession until the mortgagor redeems or the mortgage is foreclosed. n152 The right of the mortgagee to keep possession is graphically illustrated by cases allowing mortgagees to remain in possession until payment or foreclosure, where the statute of limitations has run on the mortgage debt. n153 Even a forcible reentry by the mortgagor will not terminate the possessory right of a mortgagee in possession. n154 Other advantages include being in a position to oversee the mortgaged property, to avoid threatened waste by the mortgagor, and to collect rents, although these benefits can often be obtained by less burdensome means. A mortgagee in possession is also entitled to full damages from those tortiously injuring the property. n155

Mortgagees in possession assume obligations to their mortgagors and to others. To their mortgagors they are bound (1) to manage the property in a prudent manner, and (2) to apply the net income to the mortgage debt. n156 Mortgagees in possession are not true fiduciaries, but courts often speak as though their duties closely approximate those of true fiduciaries. Mortgagees in possession are required to exercise reasonable care in protecting the property. n157 They must make necessary repairs. n158 Because the duty includes exercising reasonable care to render the property productive, they are chargeable with the rental value of the property after deducting the costs of taxes and other necessary expenses paid. n159

As possessors, mortgagees in possession owe third parties the usual obligations which the law of torts imposes upon possessors and, in addition, may incur liabilities in tort and contract in connection with managing the property. n160

According to the majority view, mortgagees in possession who pay necessary property taxes do so in satisfaction of their duty to protect the mortgagor's interest and not to acquire an adverse interest; similarly, in purchasing the property at a tax sale, mortgagees in possession take title on behalf of the mortgagor. n161 Some jurisdictions permit a mortgagee not in possession to appropriate a tax title for the mortgagee's own benefit. n162 Mortgagees in possession are not entitled to compensation for the value of their personal services in managing and protecting the property n163 unless the mortgagor has agreed to compensation and local law enforces such an agreement. n164

Because junior lienors have interests in the equity of redemption, mortgagees in possession owe them the same duties owed the mortgagor. n165

Mortgagees in possession receive all rents and profits on behalf of the mortgagor and must apply them to the mortgage debt and account to the mortgagor. n166 However, it is only the net income which must be set off against the mortgage debt, since the mortgagee is entitled to credit for expenditures incurred in fulfilling the duty to manage the property. Unless the parties arrange a private accounting, an accounting can be compelled only in an equitable proceeding to redeem brought by the mortgagor or in a foreclosure proceeding brought by the mortgagee. n167 The mortgagor in demanding an accounting must also do equity by offering to pay the mortgage debt.

It is generally agreed that the occupancy of a mortgagee in possession, by itself, cannot form the basis of an adverse possession claim n168 although some states hold otherwise. n169 Possession following a breach in the mortgagee's duty to account has been treated as the commencement of adverse possession. n170

Although mortgagees in possession may enter into leases encumbering subordinate interests, such leases are subject to the right of mortgagors to redeem. n171 This view has been carried to the extreme of giving a mortgagor the benefit of improvements made by a tenant of a mortgagee in possession. n172

Mortgagees in possession also owe third parties the usual tort obligations the law imposes on possessors of land. n173 They have also been held liable for damages on real covenants running with the land. n174 In title theory jurisdictions liability results from the succession of the estate from mortgagor to mortgagee, which places the covenantee and mortgagee in privity of estate; n175 lien theory states are divided on the issue, with most holding that, since legal title remains in the mortgagor until foreclosure, there is no succession of interest between mortgagor and mortgagee and hence no privity of estate between the covenantee and mortgagee. n176 Because the burdens of covenants can run in

equity without privity of estate, it would seem that mortgagees in possession could be bound by equitable servitudes. n177 There is also the risk that, in taking possession, mortgagees will so involve themselves in the management of the property or business conducted there that they incur tort and contract liabilities arising out of such involvement.

As a remedy for default, a receivership often holds greater attraction to mortgagees than taking possession as a mortgagee in possession. While receivership is not always an available remedy, n178 it should always be at least considered by a secured party contemplating becoming a mortgagee in possession. A recurring problem is that facing construction lenders whose developer-mortgagors have abandoned the project before completion. The lender may be entitled to the appointment of a receiver but, if not, must then choose between foreclosing against the uncompleted project or completing construction. Under the first course, the lender runs the risk that foreclosure will not bring a sufficient price to retire the construction loan. The second course converts the lender into a mortgagee in possession with all the concomitant obligations. Moreover, many other liabilities can be thrust upon those who become mortgagees in possession, not the least of which is the possibility of being responsible for hazardous material clean-up costs under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA). n179

COMPUTER-ASSISTED RESEARCH

LEXIS: "mortgagee in possession" /s dut**
wast** account**

§ 101.02(b) Receiverships.

A court of equity has inherent authority to appoint a receiver to take charge of mortgaged property and to collect the rents and profits. The power is not dependent on provisions in the security instrument authorizing the appointment, nor does such a provision in the instrument give a right to the appointment. n180 Once appointed, the receiver becomes an officer of the court with duties owed to both mortgagors and mortgagees. n181 The grounds for securing the appointment of a receiver vary among the states, but, since receiverships are creatures of equity, the presence of equitable grounds is essential, n182 such as insolvency of the mortgagor, n183 inadequacy of the security, n184 threat of waste, n185 existence of a rents and profits clause, n186 and the non-availability of adequate legal remedies. n187 Mortgagees often seek receivership to avoid the liabilities of mortgagees in possession when their mortgagors have defaulted and abandoned or neglected the encumbered property.

The usual objective in seeking a receiver is the preservation of the physical or financial security, and indeed it is often held that proof of impending waste is essential to the appointment of a receiver. n188 Thus, if a mortgagor is neglecting to care for the property, a receiver may be sought to take physical possession in order to maintain the premises. The financial worth of the security may also be safeguarded by a receiver applying income to the payment of real estate taxes and other charges against the property. n189 A secondary objective is sometimes to dampen the mortgagor's resistance to foreclosure. Some mortgagors, while in possession, do all they can to forestall foreclosure by asserting unmeritorious defenses; once a receiver takes over the property, the incentive to persist in such conduct may be abated. n190

While a receiver can be appointed in conjunction with foreclosure proceedings, foreclosure is not a prerequisite for appointment. Nevertheless, receivership is more easily obtained when foreclosure is proceeding simultaneously than otherwise. n191 At least in title theory states, it can be contended that mortgagees have adequate legal remedies in ejectment after default, since they are then usually entitled to possession. Should mortgagees in title theory states seek foreclosure along with the appointment of a receiver, equity regards as done what ought to be done and, to preclude prejudice to the foreclosing mortgagees occasioned by the time lag between the petition for foreclosure and the foreclosure sale, may in appropriate circumstances appoint a receiver to serve pending foreclosure. n192

The foreclosing mortgagee should not be subjected to depreciation in the value of the property while the foreclosure is

pending, and thus, regardless of the applicable theory, a receiver should be appointed in conjunction with foreclosure upon a showing that the property value will decline if the mortgagor is left in possession or that, without the rents and profits, the security will be inadequate. n193 Even if a mortgagee does not wish to institute a foreclosure, n194 though grounds for foreclosure exist, a receivership would seem nevertheless appropriate where misconduct by the mortgagor poses a threat to the adequacy of the security. Still, courts often erect additional hurdles. A common additional factor often mentioned in the cases is the insolvency of the mortgagor, but insolvency is little more than a "make-weight reason," for mortgagees bargain for security in specific property and should not be forced to accept the general credit of their debtors in substitution. n195 The key is whether the evidence establishes that a receivership is necessary to avoid prejudice to mortgagees while foreclosure is pending. If prejudice is demonstrated, appointment should be available whether a judicial or private foreclosure is pending. On the other hand, inadequacy of security even when accompanied by mortgagor insolvency should not suffice without proof that waste or other threatened impairment is likely unless equity intervenes and appoints a receiver.

In lien theory states, the right of mortgagors to possession and all its fruits until foreclosure, including rents and profits, might be seen as placing a formidable barrier in the path of mortgagees seeking a receivership. Yet, these states generally proceed according to the same rules as title theory states. n196

In some jurisdictions, a provision in the security instrument can be crucial in establishing the secured party's entitlement to a receiver. In some states, a clause conferring entitlement to a receiver upon certain contingencies may be enforced without the usual showing of waste, debtor insolvency, or inadequacy of security. n197 In California, for example, a rents and profits clause may be the basis for a specific performance action seeking the appointment of a receiver to collect the rents and profits without proof of inadequate security and the like. n198 In other jurisdictions, such provisions do not obviate the need to establish independent equitable grounds. n199

COMPUTER-ASSISTED RESEARCH

LEXIS: mortgage! trust w/15 appoint! w/15 receiver!
w/15 grounds entitle!

§ 101.02(c) Rents and Profits.

§ 101.02(c)(1) Mortgage Antedating Lease.

The right of a mortgagee to enforce leases made by a mortgagor after a mortgage has been given often varies depending upon whether the title or lien theory of mortgages is followed. Privity of estate or privity of contract must exist between parties before they are mutually bound and benefitted by covenants in a lease. It is rare that a tenant undertakes a contractual obligation for the benefit of a prior mortgagee, and therefore the rights of the prior mortgagee against the tenant are usually dependent upon a finding that privity of estate exists between them.

Under the title theory, there is no privity of estate between a prior mortgagee and a subsequent tenant. This is because in entering into the later lease, the mortgagor is not transferring any interest of the mortgagee. Additionally, it may be observed, in this situation the mortgagor has kept a reversion and thus, not having assigned the entire interest to the tenant, does not create that mutual and successive privity necessary to establish privity of estate between the mortgagee and the tenant. n200 As a result, the mortgagee can neither enforce the tenant's lease obligations nor be held responsible for the mortgagor's obligations as landlord. n201 Should the mortgagor default, the mortgagee may, of course, foreclose or assert the title theory mortgagee's right of possession. If the mortgagee elects to take possession, the mortgagee thus asserts the priority of the mortgage and repudiates the mortgagor's right to let the premises, thereby giving the tenant the option of accepting the mortgagee as a new lessor or of vacating the premises and terminating the rental obligations. n202 In addition, whether or not the mortgagee has taken possession, if the mortgagee has taken an assignment of rent and profits, the mortgagee will be able to enforce the burdens of the lease against the subsequent tenant as a contract

assignee. The tenant's liability here is based on privity of contract, and the lack of privity of estate, even in title theory states, should be immaterial. In contrast, not having assumed the burdens of the lease, the mortgagee should not be held personally responsible for the mortgagor's obligations under the lease. n203

On the other hand, the tenant in title theory states, just as in lien theory ones, will have taken the leasehold subject to the prior mortgage, since the mortgagor could transfer to the tenant no greater rights than the mortgagor held. Therefore, the mortgagee, unless barred by agreement or otherwise, n204 may oust the tenant from the premises upon a breach of the mortgage debt. Privity between the mortgagee and the tenant is not necessary to enable the mortgagee to enforce interests in the premises antedating the lease. This right in the mortgagee to evict the subsequent tenant puts the mortgagee in a position to compel the tenant either to vacate the premises or to agree to such terms as the mortgagee proposes. Often mortgagees offer to allow the tenant to remain upon the condition that the tenant tender performance due under the lease with the mortgagor to the mortgagee; where the tenant agrees to the proposal, a contractual relationship is established between the mortgagee and the tenant, who then becomes the tenant of the mortgagee rather than the mortgagor.

In lien theory states, the rights of mortgagees against subsequent tenants of their mortgagors are vastly different. In lien theory states mortgagors are entitled to possession until foreclosure, absent an enforceable agreement providing otherwise. The enforceability of such agreements is discussed at § 101.02(c)(3), *infra*. Consequently, even after a default by mortgagors, mortgagees cannot demand that tenants tender performance to them under penalty of eviction for refusing to do so, unless an enforceable rents and profits clause gives rise to such entitlement. Until foreclosure, the relevant privity of estate is between the mortgagor and the tenant, leaving contractual privity based upon a rents and profits clause or other agreement as the only potential basis for holding the tenant personally bound to the mortgagee.

Although most jurisdictions agree that junior leases are destroyed by a foreclosure in which the lessees are joined, there is a split of authority on the question whether such leases survive foreclosure if the tenants are omitted from the foreclosure. n205

COMPUTER-ASSISTED RESEARCH

LEXIS: mortgagee w/50 (rent or profit) w/50 (subsequent or junior) w/15 (lessee or tenant)

§ 101.02(c)(2) Mortgages After Leases.

As in the cases of leases antedating mortgages, the theory to which a particular state subscribes can be critical in determining the ability of the mortgagee to claim the benefits of a lease made before the mortgage.

In title theory states, where the lease exists at the time the mortgage is given, the mortgagor is transferring to the mortgagee a landlord's reversion and consequently is putting the tenant and the mortgagee in privity of estate. n206 The mortgagee is therefore entitled to claim the benefit of all covenants binding the tenant, including the covenant to pay rent, and may be obliged to perform the lessor's obligations under the lease. n207 Despite the privity between them, tenants may continue to pay rent to their mortgagors until their mortgagees notify them that henceforth rents are to be paid to the mortgagees. n208 It would seem, though, that the mortgagee might not be bound to perform the lessor's undertakings until default by the mortgagor since until default the mortgagor may retain a right of entry which should preclude that type of privity between the mortgagee and the tenant necessary for the burdens of covenants to run to the mortgagee; upon default, the right of entry is gone, and the mortgagee is completely substituted for the tenant. n209 With respect to the benefits of the tenant's covenants, however, complete substitution is unnecessary to establish privity between the mortgagee and the tenant. n210

Although in title theory states mortgagees have sufficient privity with tenants under leases antedating the mortgage to enforce the undertakings of tenants under the leases, it is generally held that this right is not self-executing. The right is

not exercisable until the mortgagee notifies the tenant of an election to enforce the covenants. Thus, after notice, the tenant must pay rent to the mortgagee rather than to the mortgagor. Rents, however, which were due but unpaid when the notice was given, as well as rents paid in advance to the mortgagor before notice, are not among the entitlements of the mortgagee. n211

In lien theory states the same rule governs mortgages given after leases as governs those given before leases. n212 In both cases, to the mortgagor is entitled to possession and all its incidents, including the rights to let and collect rents, until foreclosure. The mortgagor does not hold a sufficient interest in the premises to claim the benefit of any covenants in the lease, except perhaps where the mortgage contains a rents and profits clause. Such a clause purports to assign rents to the mortgagee and can take a variety for forms. The law governing such clauses is not uniform and is taken up in § 101.02(c)(3), *infra.*

The right to enforce the tenants' covenants aside, in neither title nor lien theory jurisdictions may a mortgagee evict a tenant except upon a breach by the tenant of a dependent covenant in the lease. Because the lease preceded the mortgage, the mortgagee took subject to the lease and thus is subordinate to the tenant's possessory interest. Of course, in title theory states, if the tenant were to default in performing obligations under the lease, the mortgagee could elect to exercise any rights to terminate the lease by reason of the tenant's breach given under the lease or local law. In doing so, the mortgagee would assume the status of a mortgagee in possession with its accompanying liabilities. In lien theory states, even a breach by the tenant will not permit the mortgagee to terminate the lease, since that prerogative belongs to the mortgagor until foreclosure.

The existence of a lease can raise questions in the context of foreclosure, a matter taken up in § 101.04(b)(3), *infra.*

COMPUTER-ASSISTED RESEARCH

LEXIS: (rent or profit) w/50 (prior or senior) w/15 lease w/50 (subsequent or junior) w/15 mortgag"

§ 101.02(c)(3) Rents and Profits Clauses.

Most mortgages contain provisions transferring the rents and profits to the mortgagee. n213 These clauses take a number of forms. They can purport to be absolute and present assignments of the income from the premises. n214 More likely, they will transfer the rents and profits merely as "further security." In fact, some courts hold that clauses purporting to work absolute, present assignments, at least presumptively, create only inchoate security interests. n215 The presence or absence of the common clause reciting that the assignment "is for further security," may be quite probative of whether an absolute assignment will be recognized. n216 No matter the form or interpretation of these clauses, they are designed to permit mortgagees to take possession and collect rents or to secure the appointment of a receiver when the mortgagees believe their security is in jeopardy. Often the clause is worded as a conditional assignment providing that, upon mortgagor default, the mortgagee shall be entitled to rents or that a receiver may be appointed to take control of the premises and collect the rent. Such a conditional assignment of rents has been upheld as a self-perfecting assignment upon default. n217

Rents and profits clauses may be invoked independently of foreclosure actions. n218 The clauses do not, however, cover general business income derived from a mortgagor's operations on the premises. n219

In title and intermediate states, mortgagees will be entitled to take possession and collect rents without rents and profits clauses although even in these states an assignments clause can aid in securing the appointment of a receiver. n220

In lien theory states, these clauses have received varied treatment. They have been found totally unenforceable in some lien jurisdictions as constituting impermissible clogs on the mortgagor's right to possession until foreclosure. n221 It is sometimes held that absolute assignments conditioned on default are enforceable and self-executing upon default,

although this approach is not carried to the logical conclusion that, upon default, the mortgagee is burdened with the status of a mortgagee in possession. n222 The usual view in lien theory jurisdictions seems to be that the clauses, even if worded as absolute assignments, create a type of security interest which is not self-executing; that is, which requires some action by the mortgagee to become operative, or at least to presume that such was the intent of the parties. n223 In many of these jurisdictions, perfection requires the taking of possession by the mortgagee, the appointment of a receiver, or the sequestration of rents by court order. n224 A demand on the tenant for the rents may sometimes suffice. n225 California courts, for example, although they acknowledge the possibility of an absolute, present assignment of rents and profits, have never accorded such an interpretation to a rents and profits clause, and have insisted upon some action by the mortgagee to perfect the security interest. n226 In 1996, the California legislature for all practical purposes abolished the distinctions among the various types of assignments of rents and profits by providing that all assignments should be deemed perfected upon recordation and setting methods for their enforcement. n227

A major consideration facing any mortgagee wanting to perfect a security interest under a rents and profits clause is the possibility that, unless perfection is made through the appointment of a receiver, the mortgagee may become a mortgagee in possession. It is generally accepted that the mere collection of rent will not constitute one a mortgagee in possession. However, the mortgagee in collecting rents may become entangled in the operation of the property to such an extent that the mortgagee will be treated as a possessor and, hence, become saddled with the burdens of a mortgagee in possession. The risk of becoming a mortgagee in possession can be avoided by securing the appointment of a receiver to collect the income from the property. It is to ease the task of securing the appointment of a receiver that rents and profits clauses are often included in security instruments, for in many jurisdictions the appointment is more readily available where the clause is present than when it is not. n228

COMPUTER-ASSISTED RESEARCH

LEXIS: (mortgage or trust) w/50 (rents or profits or assignment) w/15 (provision or clause) w/50 perfect!

§ 101.02(d) Waste and Other Injury to Premises.

§ 101.02(d)(1) Waste by Mortgagors.

The security instrument almost always contains a covenant by the mortgagor to refrain from waste, but even in the absence of such an undertaking, the mortgagor, by common law or statute, may not commit waste. The mortgagee, too, if in possession, by reason of the duties imposed on mortgagees in possession, must avoid wasteful conduct; usually the mortgagee also has affirmative obligations that go beyond avoiding waste. Waste is of three types: voluntary, permissive, and ameliorative. Voluntary waste has been defined as the intentional injuring or destroying of the premises, or the unprivileged alteration of the nature and character of the premises. n229 Permissive waste is the failure to exercise that degree of care over the premises which a prudent owner would display in protecting them, n230 and it may include failing to pay property taxes. n231 Ameliorative waste occurs when changes are made in the property which increase its value. n232 It is not clear, however, in lien theory states, that permissive waste is actionable. n233

While title and lien theory states differ as to the requisites for waste, they both generally agree that mortgagors lawfully in possession are privileged to deal with the property as such property is customarily used. In title theory states, this flows from the fictional license given mortgagors let into possession by their mortgagees, n234 and in lien theory states it is a corollary of the mortgagor's title to a possessory interest.

Title and lien theory jurisdictions disagree as to whether waste requires proof of impairment of the mortgagee's security. When a mortgagor is let into possession in title theory states, the law of waste relating to landlord-tenant law is used by analogy to determine the permissible conduct of the mortgagor. Because the mortgage in these states granted legal title to the possessory estate to the mortgagee, mortgagors who have been allowed to take possession have been characterized as tenants at will, tenants at sufferance, tenants for a terms, or *sui generis* tenants. n235 Landlords have

more than a security interest in the leased premises; they have a legitimate interest in receiving the premises back at the end of their leases in the same condition in which they stood at the time they were let. While their tenants do not guarantee that the property will be returned to the lessors in their condition at the commencement of the lease, they are obliged to refrain from waste without regard to whether their acts or omissions have any impact on the value of the property. Accordingly, because of this analogy to landlord/tenant law, a determination of whether a mortgagor commits waste involves no consideration of impairment of the mortgagee's security; rather, the diminution in the value of the premises occasioned by the waste, limited by the outstanding balance on the mortgage debt, constitutes the damages recoverable in title theory states. n236 Since the amount collected cannot exceed the mortgage debt and must be credited against the debt, mortgagors suffer no undue hardship. n237

In lien theory states, in contrast, it is difficult to conceive of mortgagors in possession as committing waste since they own legal possessory estates. Nevertheless, in recognition of the legitimate security interests of mortgagees, lien theory states treat unprivileged acts or omissions by mortgagors as waste to the extent they impair the security. n238 The leading case in these jurisdictions is *Van Pelt v. McGraw*, n239 recognizing the tort of impairing security. Despite some early decisions restricting the tort of impairing security to intentional acts, negligence is today a sufficient basis. n240 The *Van Pelt* case has received legislative sanction in some statutes. n241 Thus, lien theory states recognize a legal claim for damages against mortgagors whose conduct results in a diminution in the adequacy of mortgagee's security. n242 However, a judgment for damages is often unavailable against the original mortgagor until a foreclosure sale is conducted to test the adequacy of the security, and, if the sale price proves inadequate, the availability of a deficiency judgment renders moot any inquiry into liability in waste. n243 An issue can sometimes arise in lien theory states with anti-deficiency statutes as to whether mortgagors can be held accountable for impairing security. n244

There is some confusion about what constitutes an impairment of security under the lien theory. Many lien theory states articulate a standard which almost parrots that employed in the title theory states: diminution in value attributable to the waste. n245 Others require proof that the waste has reduced the value of the security below the amount of the debt. n246

Despite the divergence of title and lien theory states over the need to show impairment of security in establishing a damage claim, impairment is a consideration in all states when mortgagees resort to equity in seeking to prevent waste. Injunctive relief will be denied, in most title and lien theory states, where there is no threat to the security. n247 For security to be adequate, the value of the property after the waste must be more than equal to the mortgage debt, for a prudent lender will certainly want a cushion. It would seem that adequacy should be measured at the time relief is sought, rather than with reference to the time the debt was contracted, since the property value may have increased or decreased greatly or the debt may have been significantly reduced in the interim.

Because the waste is fundamentally a tort, rather than a contractual breach, successors in interest to the mortgagor are usually held to the same standards as govern original mortgagors. n248 There is some authority to the effect that the successors are not bound to avoid permissive waste unless they are contractually obliged to do so. n249 Non-assuming grantees have been held bound by the same obligations respecting waste as bind original mortgagors. n250

COMPUTER-ASSISTED RESEARCH

LEXIS: (mortgagor or successor or assignee)
/p waste /p impair! /s security /p
(remed! damage)

§ 101.02(d)(2) Waste by Third Parties.

When persons other than the mortgagor or the mortgagor's successor injure the property, courts apply the same principles in establishing the mortgagee's remedies against the third parties as they would follow if the mortgagor were involved.

Mortgagors, too, may proceed against third parties who injure the property, and generally are entitled to collect full damages to the property, although they must share such recoveries with their mortgagees. n251 Even in title theory states, in which--as between mortgagors and mortgagees--the latter are regarded as legal owners, in disputes between mortgagors and third parties a legal title is recognized in the mortgagors.

In title theory states, just as lessors have redress in tort against third parties injuring the leased premises, so mortgagees, as owners of the legal estate, are entitled to damages from the third parties. This may seem inconsistent with the majority view in the United States that owners of limited real estate interests are limited to recovery for injuries to those interests and cannot collect full damages. n252 But the position is not as harsh as it may at first appear since the mortgagee must credit any recovery against the mortgage debt and remit any surplus to the mortgagor, who is thus being compensated for the injuries to the mortgagor's interest.

In lien theory states, mortgagees hold protected interests in their security, and those impairing the security are held legally responsible whether they be mortgagors or others. It was once thought that third persons could not be held liable in waste to mortgagees unless they had knowledge of the mortgages. n253 There is also some question whether third parties are responsible to mortgagees for permissive waste. n254

Of course, successors of original mortgagors can bind themselves contractually to maintain the premises and to refrain from actions injurious to the premises and thereby incur contractual obligations to mortgagees. n255 An assuming grantee should, therefore, be personally bound to the mortgagee on a covenant to repair if the mortgagee qualified as an intended beneficiary. It is conceivable that a non-assuming grantee would be bound, in title theory states, by covenants respecting maintenance on the rationale that the burden runs with the land. n256

COMPUTER-ASSISTED RESEARCH

LEXIS: third party waste remed! damage

§ 101.02(e) Application of Hazard Insurance Proceeds.

A somewhat controversial question is whether mortgagors or mortgagees are entitled to the proceeds of a hazard policy received after an insured loss. The standard mortgage requires the mortgagor to maintain fire insurance on the mortgaged property. Federal law requires certain mortgagors to insure against floods. There is some variance in the standard mortgage provisions addressing the application of the proceeds, but usually both mortgagor and mortgagee are insured as their interests may appear. n257 A literal reading of such policy language has prompted some courts to allow mortgagees to collect the policy proceeds and apply them to reduction or satisfaction of the mortgage debt against the wishes of their mortgagors and without showing insufficiency of remaining security. n258 As an Arkansas court held, in construing an agreement that the mortgagor keep the premises "insured at all times with a Co-Insurance clause," such a provision "constitutes an appropriation in advance of the insurance money to the satisfaction of the mortgage indebtedness." n259 Other courts have been more protective of the desires of mortgagors who want to use the proceeds to rebuild or repair.

One California intermediate appellate court has ruled that, under the implied covenant of good faith and fair dealing, mortgagees may not prohibit application of the proceeds to rebuilding except where the security is impaired. n260 Another California court went so far as to hold that mortgagors were entitled to the insurance proceeds even if they did not intend to rebuild so long as the mortgagee's security was not impaired. n261 A third California court refused to allow foreclosure for failure to maintain insurance coverage, as required by agreement, in the absence of impairment of security. n262 The holdings of the latter two cases were abrogated by the California legislature, but the legislature expressly stated its intention not to vitiate the holding of the first case. n263

Other courts view the insurance as designed to maintain the adequacy of the mortgagee's security. They conclude that, so long as the proceeds are used to rebuild, there is no impairment and that the terms of the policy do not by themselves give the mortgagee the right to control the proceeds. n264

COMPUTER-ASSISTED RESEARCH

LEXIS: insurance /s mortgagor or trustor /s rebuild or repair

§ 101.02(f) Prepayment Penalties.

A debtor has no right, except where the loan agreement or a statute n265 provides otherwise, to pay a debt before maturity, because the creditor is entitled to the benefit of the loan agreement, including interest over the agreed-upon life of the loan. n266 Many mortgage agreements, however, provide that, upon the payment of a penalty (commonly unearned interest for several months), the borrower may nevertheless prepay all or part of the outstanding indebtedness. In addition, mortgage agreements usually contain acceleration clauses permitting lenders to call the full loan due upon a default or other happening, and these clauses may or may not also call for a prepayment penalty when the loan is accelerated. n267

Where mortgagors voluntarily prepay all or part of the outstanding balance of their loans, there is usually no question of the enforceability of a prepayment penalty clause except, perhaps, as to the reasonableness of the amount of the penalty. Most courts seem to view these clauses as simply providing an alternative means of performance for mortgagors with the result that prepayment is not viewed as a breach; this approach renders immaterial any inquiry into the reasonableness of the charge since it is not designed as compensation for any breach. n268 Some courts have asked whether the penalty clauses constitute unenforceable penalties rather than valid provisions for liquidated damages, n269 although this approach seems to be in some disfavor. n270

Most of the litigation involving prepayment penalty clauses has taken place in the context of accelerations. n271 One study n272 has concluded that earlier cases refusing to sanction prepayment penalties upon accelerations have been undercut by later cases. In the early 1980's, lenders often employed prepayment penalty clauses that were sufficiently ambiguous as to permit arguments that they applied only upon voluntary prepayments. n273 Sometimes these decisions were based on the finding that, because the entire outstanding balance became due upon an acceleration, there was no prepayment except possibly where the debtor has intentionally defaulted. n274 In reaction to these types of decisions, lenders began using prepayment penalty clauses which clearly purported to entitle them to a penalty upon both voluntary prepayments and accelerations, and the courts now seem willing, at least with regard to non-residential loans, to enforce these clauses according to their terms. n275

Legislation may impose limitations on the amount of prepayment penalty. In Virginia, for example, loans of less than $75,000 secured by the borrower's residence may be prepaid upon payment of a penalty that cannot exceed 2% of the outstanding balance. n276 In California, in the case of certain loans secured by residential property, prepayment penalties are authorized during the first five years of the loan but limits are placed upon the amount of the penalties, n277 but no prepayment penalty can be collected upon an acceleration pursuant to a due-on-sale clause where the loan is secured by certain residential property. n278

COMPUTER-ASSISTED RESEARCH

LEXIS: mortgage w/50 prepayment pre/1
penalty or accelrat! w/5 (clause or
provision)

FOOTNOTES:

(n1)Footnote 133. *In re* Small Bus. Admin. for Exemption from *Ad Valorem Taxation, 797 P.2d 879 (Kan. App. 1990)* ; *Teachers Ins. & Annuity Ass'n of Am. v. Oklahoma Assocs. P'ship, 798 P.2d 618 (Okla. 1990)* .

(n2)Footnote 134. M.G.L.S., ch. 183, § 26; *In re Westchase I Assocs., 119 B.R. 521 (Bankr. W.D.N.C. 1990)* ; *Maglione v. Bancboston Mortg. Corp., 29 Mass. App. Ct. 88 (Mass. App. Ct. 1990); Federal Home Loan Mortg. Corp. v. Van Sickle, 52 Conn. App. 37, 726 A.2d 600 (1999)* (Foreclosure by mortgagee does not make mortgagor's tenant a trespasser).

(n3)Footnote 135. Nelson & Whitman, *supra* note 9, § 4.1 at 144.

(n4)Footnote 136. *E.g., Mass. Gen. L. ch. 183, § 26. In re Westchase I Assocs., 119 B.R. 521 (Bankr. W.D.N.C. 1990)* ; *In re Roberts, 26 B.R. 397 (Bankr. D. Me. 1983)* .

(n5)Footnote 137. *In re Kurth Ranch, 110 B.R. 501 (Bankr. D. Mont. 1990)* ; *In re Thymewood Apts., Ltd., 123 B.R. 969 (Bankr. S.D. Ohio 1991)* ; *In re* Small Bus. Admin. for Exemption from *Ad Valorem Taxation, 797 P.2d 879 (Kan. App. 1990)* .

(n6)Footnote 138. *Bank of Italy Nat'l Trust & Sav. Ass'n v. Bentley, 20 P.2d 940 , cert. denied 290 U.S. 659 (Cal. 1933)* ; *McMillan v. United Mtg. Co., 412 P.2d 604 (Nev. 1966)* ; *Utah Mtg. & Loan Co. v. Black, 618 P.2d 43 (Utah 1980)* . In other contexts, deeds of trusts are sometimes treated differently than mortgages. Unlike a mortgage in a lien theory state, a deed of trust may be enforceable after the statute of limitations has run on the debt. *See infra* text accompanying note 342.

(n7)Footnote 139. *Parkway Bank & Trust Co. v. Gleich, 572 N.E.2d 1055 (Ill. App. 1991)* ; *In re Kress Rd. Partnership, 134 B.R. 301 (Bankr. N.D. Ill. 1991)* .

(n8)Footnote 140. *Long v. Williams, 671 P.2d 1048 (Idaho 1983)* .

(n9)Footnote 141. *See supra* text accompanying notes 21, 133-136.

(n10)Footnote 142. *Walden-Page Mem. Hosp., Inc. v. Founders, Inc., 418 P.2d 343 (Okla. 1966)* ; *Phillips v. Latham, 523 S.W.2d 19 (Tex. Civ. App. 1975)* ; *Bussiere v. Roberge, 714 A.2d 894 (N.H. 1998)* (Mortgagee-in-possession does not have authority to evict co-trustee).

(n11)Footnote 143. Nelson & Whitman, *supra* note 9, § 4.24, at 202-3.

(n12)Footnote 144. *Gomez v. Bobker, 508 N.Y.S.2d 215 (1986), appeal denied, 507 N.E.2d 322, 514 N.Y.S.2d 1026 (1987).*

(n13)Footnote 145. An assumption of possession without legal process or consent from the mortgagor may preclude qualifying as a mortgagee in possession. *See Diversified, Inc. v. Walker, 702 S.W.2d 717 (Tex. App. 1985)* , writ refused n.r.e. (1986) (possession under void decree); *Webb v. Dickson, 165 So. 2d 103 (Ala. 1964)* (chattel mortgage).

(n14)Footnote 146. Robert Kratovil, *"Mortgages--Problems in Possession, Rents, and Mortgages Liability" 11 De Paul L. Rev. 1, 6 (1961). E.g., Erickson v. First Nat'l Bank, 697 P.2d 1332 (Mont. 1985)* .

(n15)Footnote 147. 1180 *Anderson Ave. Realty Corp. v. Miona Equities Corp., 465 N.Y.S.2d 511 (1983)* .

(n16)Footnote 148. *Aetna Life Ins. Co. v. Avalon Orchards, Inc., 505 N.Y.S.2d 216 (1986)* ; *Zapata v. Torres, 464 S.W.2d 926 (Tex. Civ. App. 1971)* .

(n17)Footnote 149. *Diversified, Inc. v. Walker, 702 S.W.2d 717 (Tex. App. 1985)* , writ refused n.r.e. (1986).

(n18)Footnote 150. *Lee v. Ski Run Apts. Assocs., 57 Cal. Rptr. 496 (1967)* .

(n19)Footnote 151. *Sea Castle Apts., Ltd. v. Santa Monica Rent Control Bd., 279 Cal. Rptr. 672 (1991)* ; *McCorristin v. Salmon Signs, 582 A.2d 1271 (N.J. 1990)* ; *Teachers Ins. & Annuity Ass'n v. Oklahoma Tower Assocs. Ltd. P'ship, 798 P.2d 618 (Okla. 1990)* .

(n20)Footnote 152. *Martinez v. Continental Enters., 697 P.2d 789 (Colo. App. 1984)* , *aff'd in part, rev'd in part, 730 P.2d 308 (Colo. 1986)* ; *Cuellar v. Cook, 367 S.W.2d 915 (Tex. Civ. App. 1963)* .

(n21)Footnote 153. *Spect v. Spect, 26 P. 203 (Cal. 1891)* ; *Walden-Page Mem. Hosp., Inc. v. Founders, Inc., 418 P.2d 343 (Okla. 1966)* ; *Jasper State Bank v. Braswell, 111 S.W.2d 1079 (Tex. 1938)* ; *Martinez v. Continental Enters., 697 P.2d 789 (Colo. App. 1984)* , *aff'd in part, rev'd. in part, 730 P.2d 308 (Colo. 1986)* ; *Knight v. Hilton, 79 S.E.2d 871 (S.C. 1954)* ; *In re Olick, 221 B.R. 146 (Bankr. E.D. Pa. 1998)* (Mortgagee-in-possession's duty to collect rent).

(n22)Footnote 154. *Cory v. Santa Ynez Land & Imp. Co., 91 P. 647 (Cal. 1907)* .

(n23)Footnote 155. *McCorristin v. Salmon Signs, 582 A.2d 1271 (N.J. 1990)* .

(n24)Footnote 156. *Gaumer v. Hartford-Carlisle Sav. Bank, 451 N.W.2d 497 (Iowa 1990)* ; *Aetna Life Ins. Co. v. Avalon Orchards, Inc., 505 N.Y.S.2d 216 (1986)* .

(n25)Footnote 157. *Davis v. Stewart, 154 P.2d 447 (Cal. App. 1944)* ; *Wise v. Layman, 150 N.E. 368 (Ind. 1926)* ; *McCorristin v. Salmon Signs, 582 A.2d 1271 (N.J. 1990)* ; *New York & Suburban Fed. Sav. & Loan Ass'n v. Sanderman, 392 A.2d 635 (N.J. 1978)* ; *Conaway v. Thomas, 224 P. 965 (Okla. 1924)* .

(n26)Footnote 158. *Hirsh v. Arnold, 148 N.E. 882 (Ill. 1925)* ; *Bowen v. Boughner, 224 S.W. 653 (Ky. 1920)* ; *MacFarlane v. Thompson, 135 N.E. 869 (Mass. 1922)* ; *Scherer v. Bang, 128 A. 258 (N.J. 1925)* ; *Gordon v. Krellman, 202 N.Y.S. 682 (1924)* ; *Mills v. Mutual Bldg. & Loan Ass'n, 6 S.E.2d 549 (N.C. 1940)* ; *Hearn v. Yoder, 143 P.2d 1009 (Okla. 1943)* ; *Koury v. Sood, 62 A.2d 649 (R.I. 1948)* .

(n27)Footnote 159. *Shadow Lawn Sav. & Loan Ass'n v. Palmarozza, 463 A.2d 384 (N.J. 1983)* ; *Central Pa. Sav. Ass'n v. Carpenters of Pa., Inc., 463 A.2d 414 (Pa. 1983)* ; *Trustco Bank v. Eakin, 681 N.Y.S.2d 410 (N.Y. App. Div. 1998)* .

(n28)Footnote 160. *Ford Motor Credit Co. v. Garcia, 595 S.W.2d 602 (Tex. Civ. App. 1980)* ; *Gathright v. Russell, 383 S.W.2d 441 (Tex. Civ. App. 1964)* .

(n29)Footnote 161. *Findley v. Tyler, 300 S.W.2d 598 (Ark. 1957)* ; *Crofts v. Johnson, 313 P.2d 808 (Utah 1957). Contra Teasly v. Dreyfus, 39 So. 2d 377 (Ala. 1949)* .

(n30)Footnote 162. *Moore v. Boagni, 35 So. 716 (La. 1903)* ; *Cornell v. Woodruff, 77 N.Y. 203 (1879)* ; *Jones v. Black, 88 P. 1052* , dissenting opinion *90 P. 422 (Okla. 1907)* .

(n31)Footnote 163. *Earp v. Earp, 283 Cal. Rptr. 43 (1991)* .

(n32)Footnote 164. Agreement enforceable: *Johns v. Moore, 336 P.2d 579 (Cal. 1959)* , *reh'g denied*; *Brooks v. Adams, 115 So. 2d 578 (Fla. 1959)* ; *MacNeil Bros. Co. v. Cambridge Sav. Bank, 135 N.E.2d 652 (Mass. 1956)* ; *Mallick v. Sakaria, 501 N.Y.S.2d 145 (1986). Contra Snow v. Warwick, 20 A. 94 (R.I. 1890)* .

(n33)Footnote 165. *Anglo-California Bank v. Field, 98 P. 267 (Cal. 1908)* ; *Miami Gardens, Inc. v. Conway, 102 So. 2d 622 (Fla. 1958)* ; *New York & Suburban Fed. Sav. & Loan Ass'n v. Sanderman, 392 A.2d 635 (N.J. 1978)* .

(n34)Footnote 166. *Johns v. Moore, 336 P.2d 579 (Cal. App. 1959)* , *Ewert v. Anderson, 359 N.W.2d 293 (Minn.*

App. 1984) ; 24th & *Dodge Ltd. Pshp. v. Acceptance Ins. Co., 269 Neb. 31* (Neb., 2005) (a corporation and the insurers were not in actual possession of the mortgaged property, and therefore were not negligent in their failure to collect rents under the assignment of rents).

(n35)Footnote 167. *Green v. Thornton, 96 P. 382 (Cal. App. 1908)* ; *Eisen v. Kostakos, 282 A.2d 421 (N.J. 1971)* .

(n36)Footnote 168. *Prusa v. Beasley, 335 P.2d 346 (Okla. 1958)* ; *May v. Jeter, 141 S.E.2d 655 (S.C. 1965)* .

(n37)Footnote 169. *Crumbaker v. Kelly, 601 P.2d 1199 (Nev. 1979)* . *Cf. Cal. Civ. Proc. Code § 346.*

(n38)Footnote 170. *Elliott v. Moffett, 74 A.2d 164 (Pa. 1950)* .

(n39)Footnote 171. *Loepker v. Wesselman, 569 N.E.2d 321 (Ill. App. 1991)* .

(n40)Footnote 172. *In re Jackson Tanker Corp., 69 B.R. 850 (Bankr. S.D.N.Y. 1987)* .

(n41)Footnote 173. Nelson & Whitman, *supra* note 9, § 4.26.

(n42)Footnote 174. *Gallagher v. Bell, 516 A.2d 1028 (Md. App. 1987)* .

(n43)Footnote 175. *Toney Schloss Props. Corp. v. Berenholtz, 220 A.2d 910 (Md. 1966)* ; *Williams v. Safe Deposit & Trust Co., 175 A. 331 (Md. 1934)* .

(n44)Footnote 176. *Johnson v. Sherman, 15 Cal. 287 (1860)* ; *Cargill v. Thompson, 59 N.W. 638 (Minn. 1894)* ; *Amco Trust, Inc. v. Naylor, 317 S.W.2d 47 (Tex. 1958)* .

(n45)Footnote 177. Nelson & Whitman, *supra* note 9, § 4.26.

(n46)Footnote 178. *See* § 101.02(b), *infra.*

(n47)Footnote 179. *42 U.S.C. § 9601 et seq.* (1988). G. Van Velsor Wolf, Jr., *Lender Environmental Liability Under the Federal Superfund Program 23 Ariz. St. L.J. 531 (1990);* Roger J. Marzulla & Brett G. Kappel, *Lender Liability Under the Comprehensive Environmental Response, Compensation and Liability Act 41 S.C. L. Rev. 705 (1990);* Gary L. Klotz & Ellen C. Siakotos, *Lender Liability Under Federal and State Environmental Law: Of Deep Pockets, Debt Defeat and Deadbeats 92 COM. L.J. 275 (1987).*

(n48)Footnote 180. *Bank of Woodland v. Stephens, 79 P. 379 (Cal. 1904)* ; 366 *Fourth St. Corp. v. Foxfire Enters., 540 N.Y.S.2d 489 (1989)* ; *Clinton Capital Corp. v. One Tiffany Place Devs., Inc., 492 N.Y.S.2d 427 (1985)* . *Cf. Barclays Bank v. Superior Ct., 137 Cal. Rptr. 743 (1977)* (existence of provision evidence of entitlement to receiver).

(n49)Footnote 181. *In re Hart, 822 P.2d 264 (Wash. 1992)* .

(n50)Footnote 182. *United States v. Drexel View II, Ltd., 661 F. Supp. 1120 (N.D. Ill. 1987)* ; *Federal Land Bank of Omaha v. Haworth, 414 N.W.2d 650 (Iowa App. 1987)* .

(n51)Footnote 183. *Mutual Benefit Life Ins. Co. v. Frantz Klodt & Son, 237 N.W.2d 350 (Minn. 1975)* .

(n52)Footnote 184. *Federal Land Bank v. Victor, 440 N.W.2d 667 (Neb. 1989)* .

(n53)Footnote 185. *First Fed. Sav. & Loan Ass'n v. National Blvd. Bank of Chicago, 433 N.E.2d 1036 (Ill. App. 1982)* ; *Federal Land Bank of Omaha v. Heeren, 398 N.W.2d 839 (Iowa 1987)* .

(n54)Footnote 186. *See* § 101.02.03(C), *infra.*

(n55)Footnote 187. *Mutual Benefit Life Ins. Co. v. Frantz Klodt & Son, 237 N.W.2d 350 (Minn. 1975)* .

(n56)Footnote 188. *Chromy v. Midwest Fed. Sav. & Loan Ass'n, 546 So. 2d 1172 (Fla. App. 1989)* ; *Atco Constr. & Dev. Corp. v. Beneficial Sav. Bank, 523 So. 2d 747 (Fla. App. 1988)* ; *Community State Bank v. Cottington, 444 N.W.2d 484 (Iowa 1989)* . Such proof may not be required in some states where circumstances exist which the parties have agreed will justify the appointment of a receiver. *See* § 101.02(i)(3), *infra.*

(n57)Footnote 189. *E.g., United States v. Drexel View II, Ltd., 661 F. Supp. 1120 (N.D. Ill. 1987)* .

(n58)Footnote 190. Bergman, *Appointing and Paying Receivers in the Mortgage Foreclosure Action 62 N.Y. STATE BAR J. 34, 34-5 (1990).*

(n59)Footnote 191. *In re Century Inv. Fund VIII Ltd. P'ship, 937 F.2d 371 (7th Cir. 1991)* .

(n60)Footnote 192. Nelson & Whitman, *supra* note 9, § 4.34.

(n61)Footnote 193. "Inadequacy of the mortgage security, clearly established, is the usual reason for the appointment of a receiver ..." Walsh, *supra* note 11, § 78 at 328.

(n62)Footnote 194. Perhaps, because there is no pre-payment privilege under mortgage debt bearing a high interest rate, which the mortgagee does not want to lose by accelerating a foreclosing.

(n63)Footnote 195. Walsh, *supra* note 11, § 78 at 328. Cases holding mortgagor insolvency unnecessary include *Buck v. Stuben, 88 N.W. 483 (Neb. 1901)* ; *Cohn v. Bartlett, 169 N.Y.S. 604 (1918)* .

(n64)Footnote 196. "It seems clear that the lien theory is simply the establishment at law of the equity theory of mortgages, and therefore equity's power to protect and conserve the income during the period required for the foreclosure proceedings in cases of clearly established inadequacy of security for the mortgage debt is in no way affected by the lien theory ..." Walsh, *supra* note 11, § 78 at 229-30.

(n65)Footnote 197. Or. Rev. Stat. § 86.155.2 (1988).

(n66)Footnote 198. *Barclays Bank v. Superior Ct., 137 Cal. Rptr. 743 (1977)* ; *Mines v. Superior Ct., 16 P.2d 732 (Cal. 1932)* . The clause raises a presumption of entitlement to a receiver, leaving the door open for the mortgagor to overcome the presumption by proof of no prejudice to the mortgagee.

(n67)Footnote 199. *E.g., Chromy v. Midwest Fed. Sav. & Loan Ass'n, 546 So. 2d 1172 (Fla. App. 1989)* .

(n68)Footnote 200. Jerome J. Curtis, Jr., *Assignments and Subleases: An Archaic Distinction, 17 Pac. L.J. 1247, 1249-51 (1986).*

(n69)Footnote 201. *Kelly/Lehr & Assocs. v. O'Brien, 551 N.E.2d 419 (Ill. App. 1990)* ; *Hembree v. Mid-America Fed. Sav. & Loan Ass'n, 580 N.E.2d 1103 (Ohio 1989)* .

(n70)Footnote 202. John J. Gearen, et al., *Into Harms' Way: Now That Harms v. Sprague Has Established The Lien Theory Of Mortgages In Illinois, Does Foreclosure Cutoff Junior Lease Or Can A Mortgagee Elect To Preserve Them? 34 De Paul L. Rev. 449, 458 (1985)* . *Federal Home Loan Mortgage Corp. v. Van Sickle, 726 A.2d 600 (Conn. App. Ct. 1999)* (successor in interest to foreclosing mortgagee is not held to a lease made subsequent to the mortgage).

(n71)Footnote 203. *Chicago City Bank & Trust Co. v. Walgreen Co., 272 Ill. App. 434 (1933)* . Robert Kratovil, *Mortgages-- Problems in Possession, Rents, and Mortgagee Liability 11 De Paul L. Rev. 1, 21 (1961).*

(n72)Footnote 204. In intermediate theory states, mortgagees are denied possession until default.

(n73)Footnote 205. *Hembree v. Mid-America Fed. Sav. & Loan Ass'n, 580 N.E.2d 1103 (Ohio App. 1989)* (terminated though lessee not joined; lease mere personal right to possession). *See infra* text accompanying note 407. Gearen et al., *Into Harm's Way: Now That Harms v. Sprague Has Established The Lien Theory Of Mortgages in Illinois, Does Foreclosure Cut Off Junior Lease Or Can A Mortgagee Elect To Preserve Them* ? *34 De Paul L. Rev. 449 (1985)* .

(n74)Footnote 206. 4 Am. L. Prop. § 16.89 at 161 (A. James Casner, ed. 1952).

(n75)Footnote 207. Comment, *The Effect of a Mortgage Foreclosure on a Lease Executed Subsequent to a Mortgage 17 Wash. L. Rev. 37, 38 (1942).* For a rather harsh criticism of this view, Walsh, *supra* note 11, § 18 at 95-6. "In the case of the prior tenant the collecting of the rent by the mortgagee as grantee of the reversion before enforcement of the mortgage for default is in direct violation of the essence of the transaction which is to give the mortgagee security and security only."

(n76)Footnote 208. 4 Am. L. Prop. *supra* note 206, § 16.89 at 166 (1952).

(n77)Footnote 209. *Id.* § 9.6 at 361. "In jurisdictions where the common law theory of mortgages is followed, the default of the mortgagor terminates his legal interest in the premises so that the entire privity of estate has vested in the mortgagee immediately, thereby making the mortgagee liable upon all covenants in the lease, notwithstanding the fact that the mortgagor remains in possession and foreclosure suit is instituted."

(n78)Footnote 210. *See* § 42.03(d), *supra*.

(n79)Footnote 211. Nelson & Whitman, *supra* note 9, § 4.20.

(n80)Footnote 212. 4 Am. L. Prop. *supra* note 206, § 16.93 at 174 (1952).

(n81)Footnote 213. *In re Winslow Ctr. Assocs., 50 B.R. 679 (Bankr. E.D. Pa. 1985)* (distinguishing assignment and pledge); *Taylor v. Brennan, 621 S.W.2d 592 (Tex. 1981)* (distinguishing automatic assignment upon default and security interest); *NCNB Texas Nat'l Bank v. Sterling Projects, Inc., 789 S.W.2d 358 (Tex. App. 1990)* . *See also In re Vienna Park Props., 120 B.R. 332 (Bankr. S.D.N.Y. 1990)* ; *Kezner v. Landover Corp., 942 P.2d 1003 (Wash. App. 1997)* .

(n82)Footnote 214. *Farm Credit Services of America v. Dougan, 704 N.W.2d 24 (S.D. 2005)* ; *Sovereign Bank v. Schwab, 414 F.3d 450* (C.A.3 (Pa.) 2005).

(n83)Footnote 215. *In re Kurth Ranch, 110 B.R. 501 (Bankr. D. Mont. 1990)* ; *NCNB Texas Nat'l Bank v. Sterling Projects, Inc., 789 S.W.2d 358 (Tex. App. 1990)* . Howard J. Weg, *The Secured Creditor's Rights to Rents From Real Property* 17 Real Est. L.J. 29, 35-36 (1988). 24th & *Dodge Ltd. Partnership v. Acceptance Ins. Co., 269 Neb. 31 (Neb. 2005)* .

(n84)Footnote 216. *In re Charles D. Stapp of Nevada, 641 F.2d 737 (9th Cir. 1981)* . Patrick A. Randolph, *When Should Bankruptcy Courts Recognize Lenders' Rents Interests* ? *23 U.C. Davis L. Rev. 833, 845-849 (1990).*

(n85)Footnote 217. *In re Century Inv. Fund VIII Ltd. P'ship, 937 F.2d 371 (7th Cir. 1991)* ; *F.D.I.C. v. International Prop. Mgt., Inc., 929 F.2d 1033 (5th Cir. 1991)* ; *In re Charles D. Stapp of Nev., 641 F.2d 737 (9th Cir. 1981)* , purporting to follow Nevada law; *In re Ventura-Louise Prop., 490 F.2d 1141 (9th Cir. 1974)* , purporting to apply California law (dicta in California decisions suggest that the Ninth Circuit correctly evaluated California law. Roger Bernhardt, California Mortgage and Deed of Trust Practice § 5.10, 247 (2d ed. 1990); these decisions pre-date the enactment of Cal. Civ. Code § 2938; *Matter of Sansone, 126 B.R. 16 (Bankr. D. Conn. 1991)* ; *In re Pine Lake Village Apt. Co., 17 B.R. 829 (Bankr. S.D.N.Y. 1982)* ; *In re Winslow Ctr. Assocs., 50 B.R. 679 (Bankr. E.D. Pa. 1985)* ; *Matter of Gotta, 47 B.R. 198 (Bankr. W.D. Wis. 1985)* ; *In re Epco Newport News Assocs., 14 B.R. 990 (Bankr. S.D.N.Y. 1981)* .

(n86)Footnote 218. *Oakbrooke Assocs., Ltd. v. Insurance Comm'r of Calif., 581 So. 2d 943 (Fla. App. 1991)* ; *In re Fluge, 57 B.R. 451 (Bankr. D.N.D. 1985)* . *Cf. In re Winzenburg, 61 B.R. 141 (Bankr. N.D. Iowa 1986)* .

(n87)Footnote 219. *In re Shore Haven Motor Inn, Inc., 124 B.R. 617 (Bankr. S.D. Fla. 1991)* (income from hotel is personalty, not rents). *Cf. F.D.I.C. v. Hartwig, 463 N.W.2d 2 (Iowa 1990)* (clause covers conservation reserve program payments); *In re Northport Marina Assoc., 136 B.R. 911 (Bankr. E.D.N.Y. 1992)* (revenues from leasing boat slips are "rents").

(n88)Footnote 220. *In re Somero, 122 B.R. 634 (Bankr. D. Me. 1991)* ; Weg, *supra* note 215, at 29, 33, n. 10.

(n89)Footnote 221. *Virginia Beach Fed. Sav. & Loan Ass'n v. Wood, 97 B.R. 71 (Bankr. N.D. Okla. 1988)* , *aff'd 901 F.2d 849 (10th Cir. 1990)* ; *In re Burris, 107 B.R. 342 (Bankr. E.D. Okla. 1989)* , *vacated in part, 109 B.R. 1018 (Bankr. E.D. Okla. 1990)* ; all based on earlier Oklahoma laws. Under the prior Oklahoma law, mortgagee not entitled to rents unless receiver appointed or mortgagee in possession. Currently, assignments are recognized in Oklahoma. Okla. Stat. tit. 46, § 4. *Teachers Ins. & Annuity Ass'n v. Oklahoma Tower Assocs. P'ship, 798 P.2d 618 (Okla. 1990)* .

(n90)Footnote 222. *In re Century Inv. Fund VIII Ltd. P'ship, 937 F.2d 371 (7th Cir. 1991)* ; *F.D.I.C. v. International Prop. Mgt., Inc., 929 F.2d 1033 (5th Cir. 1991)* ; *In re Charles D. Stapp of Nev., 641 F.2d 737 (9th Cir. 1981)* ; *In re Ventura-Louise Props., 490 F.2d 1141 (9th Cir. 1974)* ; *In re Pine Lake Village Apt. Co., 17 B.R. 829 (Bankr. S.D.N.Y. 1982)* ; *Matter of Gotta, 47 B.R. 198 (Bankr. W.D. Wis. 1985)* .

(n91)Footnote 223. *E.g., United States v. American Nat'l Bank & Trust Co., 573 F. Supp. 1319 (N.D. Ill. 1983)* (dictum); *Bevins v. Peoples Bank & Trust Co., 671 P.2d 875 (Alaska 1983)* ; *In re Tucker, 95 B.R. 796 (Bankr. D. Colo. 1989)* ; *In re Colter, Inc., 46 B.R. 510* , *aff'd, Consol. Capital Income Trust v. Colter, Inc., 47 B.R. 1008 (Bankr. D. Colo. 1984)* ; *In re K.N.M. Roswell Ltd. P'ship, 126 B.R. 548 (Bankr. N.D. Ill. 1991)* ; *In re Constable Plaza Assocs., 125 B.R. 98 (Bankr. S.D.N.Y. 1991)* ; *In re Rancourt, 123 B.R. 143 (Bankr. D.N.H. 1991)* ; *Jefferson Sav. & Loan Ass'n v. Adams, 802 S.W.2d 811 (Tex. App. 1991)* ; *In re Landing Assocs., 122 B.R. 288 (Bankr. W.D. Tex. 1990)* .

(n92)Footnote 224. *United States v. American Nat'l Bank & Trust Co., 573 F. Supp. 1319 (N.D. Ill. 1983)* (possession by mortgagee or receiver); *In re Brandon Assoc., 128 B.R. 729 (Bankr. W.D. Va. 1991)* (possession or receivership); *In re Winzenburg, 61 B.R. 141 (Bankr. N.D. Iowa 1986)* (foreclosure or receivership); *In re Flower City Nursing Home, Inc., 38 B.R. 642 (Bankr. W.D.N.Y. 1984)* (claim for possession, receivership, or sequestration); *In re Babco, Inc., 28 B.R. 656 (W.D. Pa. 1983)* (foreclosure or sequestration). Weg, *supra* note 215 at 29, 34.

(n93)Footnote 225. *E.g., In re Southern Gardens, Inc., 39 B.R. 671 (Bankr. S.D. Ill. 1982)* ; *Bevins v. Peoples Bank & Trust Co., 671 P.2d 875 (Alaska 1983)* ; 1180 *Anderson Ave. Realty Corp. v. MinaEquities Corp., 465 N.Y.S.2d 511 (1983)* . *Cf. Democratic Central Comm. of D.C. v. Washington Metro. Area Transit Comm'n, 21 F.3d 1145 (D.C. Cir. 1994)* (mere demand for possession does not entitle mortgagee to collect rents).

(n94)Footnote 226. Roger Bernhardt, California Mortgage and Deed of Trust Practice § 5.10 at 247, § 5.12 at 249-51 (2d ed. 1990). *Cf. M.D.F.C. Loan Corp. v. Greenbrier Plaza Partners, 26 Cal. Rptr. 2d 596 (Cal. App. 1994)* . In the early 1990s, the California legislature enacted two statutes designed to insure secured parties priority over trustees in bankruptcy with respect to rents and profits. They provide respectively that both absolute assignments and assignments for additional security shall be deemed perfected upon recordation. *Cal. Civ. Code §§ 2938, 2938.1*. Despite the legislative concern with the priorities in bankruptcy, one of the sections has been invoked in a dispute not involving a bankruptcy trustee. *MDFC Loan Corp. v. Greenbrier Plaza Partners, id. Cf. In re GOCO Realty Fund I, 151 B.R. 241 (Bankr. N.D. Cal. 1993)* (absoulte assignment not self-executing). Florida has enacted similar legislation. *Fla. Stat. Ann. § 697.06*.

(n95)Footnote 227. *Cal. Civ. Code § 2938*.

(n96)Footnote 228. *See* § 101.02(b), *supra*.

(n97)Footnote 229. See § 70.06(a), *supra. McNeese v. Hutchinson, 724 So. 2d 451 (Miss. App.1998)* (Foreclosure based on waste will be appropriate only when the waste committed by the debtor diminished the fair market value of the property); *D.A.N. Joint Venture, Ltd. P'ship v. Binafard, 116 Fed. Appx. 93* (9th Cir., 2004) (poor or deferred maintenance and service, numerous code violations, or unsafe or illegal conditions of the building constituted bad faith waste by the mortgagor).

(n98)Footnote 230. *Bloomingdale State Bank v. Capitol Bank of Chicago, 451 N.E.2d 599 (Ill. App. 1983)* (question not reached).

(n99)Footnote 231. Failure is waste: *Osuna v. Albertson, 184 Cal. Rptr. 338* , *hearing denied,* (1982); *Nielsen v. Heald, 186 N.W. 299 (Minn. 1922)* ; *Abernethy v. Orten, 71 P. 327 (Or. 1903). Contra Camden Trust Co. v. Handle, 26 A.2d 865 (N.J. 1942)* ; *Nippon Credit Bank, Ltd. v. 1333 North California Boulevard, 103 Cal. Rptr. 2d 421 (2001)* (failure to pay property taxes constituted waste).

(n100)Footnote 232. *See* § 70.06(d), *supra*.

(n101)Footnote 233. David A. Leipziger, *The Mortgagee's Remedies for Waste 64 Cal. L. Rev. 1086, 1094 (1976).*

(n102)Footnote 234. *Searle v. Sawyer, 127 Mass. 491 (1879)* .

(n103)Footnote 235. Walsh, *supra* note 11, § at 111-2; Nelson & Whitman, *supra* note 9, § 4.1. By the end of the 17th century in England, when it became customary for mortgagors to be permitted to retain possession, the mortgagor "began to be regarded not only as an equitable owner but also as a kind of tenant; as such, he was liable in an action on the case for waste." Leipziger, *supra* note 233 at 1086, 1092.

(n104)Footnote 236. *First Nat'l Bank v. Sproull, 16 So. 879 (Ala. 1894)* ; *Application of Busse, 464 N.E.2d 651 (Ill. App. 1984)* ; *Delano v. Smith, 92 N.E. 500 (Mass. 1910)* ; *Jaffe-Spindler Co. v. Genesco, Inc., 747 F.2d 253 (4th Cir 1984)* .

(n105)Footnote 237. *W. & R. Inv. Co. v. Edwards Supply Co., 24 N.E.2d 518 (Mass. 1939)* ; *Gooding v. Shea, 103 Mass. 360 (1869)* .

(n106)Footnote 238. *Douglas v. Lowery, 266 N.E.2d 107 (Ill. App. 1971)* .

(n107)Footnote 239. *4 N.Y. 110 (1850)* .

(n108)Footnote 240. Leipziger, *supra* note 233, at 1086, 1093-4.

(n109)Footnote 241. *E.g., Cal. Civ. Code § 2929.*

(n110)Footnote 242. *Lavenson v. Standard Soap Co., 22 P. 184 (Cal. 1889)* ; *Williams v. Chicago Exhibition Co., 58 N.E. 611 (Ill. 1900)* ; *Jackson v. Turrell, 39 N.J.L. 329 (1877)* ; *George v. Fowler, 978 P.2d 565 (Wash. Ct. App. 1999)* (upheld clause in mortgage prohibiting prepayment).

(n111)Footnote 243. "It should be clearly understood that the remedy of damages is of no value against the original mortgagor who is liable on the mortgage indebtedness and against whom a judgment for any deficiency will be taken on foreclosure of the mortgage." Walsh on Mortgages § 22 at 110-11 (1934). Walsh, *supra* note 11, § at 110-11. One case has held that a claim for waste before foreclosure is premature. *Taylor v. McConnell, 19 N.W. 196 (Mich. 1884)* .

(n112)Footnote 244. *Cornelison v. Kornbluth, 542 P.2d 981 (Cal. 1975)* (mortgagor liable only for "willful" waste).

(n113)Footnote 245. *European American Bank v. Dupont Bldg. Assoc., 567 So. 2d 971 (Fla. App. 1990)* ;

President & Dirs. of Manhattan Co. v. Mosler Safe Co., 284 N.Y.S. 145 (1935) . This formulation has been distinguished from the title theory standard in that the latter permits recovery of the value of severed property without regard to impairment. Nelson & Whitman, *supra* § 4.4.

(n114)Footnote 246. *Sumitomo Bank of Calif. v. Taurus Dev., Inc., 229 Cal. Rptr. 719 (1986)* (amount below outstanding indebtedness); *Monte Enters. v. Kavanaugh, 303 S.E.2d 194 (N.C. App. 541 1983)* ; Frio Inv., Inc. v. 4*M-IRC/Rohde, 705 S.W.2d 784 (Tex. App. 1986)* ; *Payne v. Snyder, 661 S.W.2d 134 (Tex. App. 1983)* .

(n115)Footnote 247. "The rule in equity that the mortgagor will be restrained from acts threatening permanent damage only because of threatened injury to the security, not as restraining legal waste, is as well established in the common as in the lien states." Walsh, *supra* note 11, § 22 at 112. *Edelman v. Poe, 103 So. 2d 333 (Ala. 1958)* ; *Williams v. Chicago Exhib. Co., 58 N.E. 611 (Ill. 1900)* ; *Stowell v. Pike, 2 Me. 387 (1823)* ; *Stewart v. Finkelstone, 92 N.E. 37 (Mass. 1910)* ; *Pettengill v. Evans, 5 N.H. 54 (1829)* ; *Fidelity Trust Co. v. Hoboken & M.R. Co., 63 A. 273 (N.J. 1906)* ; *In re Tremblay, 43 B.R. 221 (Bankr. D. Vt. 1984)* .

(n116)Footnote 248. David A. Leipziger, *The Mortgagee's Remedies for Waste 64 Cal. L. Rev. 1086, 1129 (1976).*

(n117)Footnote 249. *Id.*

(n118)Footnote 250. *Prudential Life Ins. Co. v. Spencer's Kenosha Bowl, Inc., 404 N.W.2d 109 (Wis. 1987)* .

(n119)Footnote 251. Mortgagees entitled to so much of damages collected by mortgagor as represent impairment of security: *McCorristin v. Salmon Signs, 582 A.2d 1271 (N.J. Super. 1990)* ; *Garrow v. Brooks, 196 A. 460 (N.J. 1938)* .

(n120)Footnote 252. William B. Stoebuck and Dale A. Whitman, The Law of Property § 4.1 (23rd ed. 2000).

(n121)Footnote 253. Leipziger, *supra* note 233, 1086, 1093-94.

(n122)Footnote 254. *Id.* at 1086, 1129-32.

(n123)Footnote 255. *Price v. Harris, 475 S.W.2d 162 (Ark. 1972)* (argument that assuming grantee not bound by promises to maintain insurance "without merit").

(n124)Footnote 256. The usual requirements for the running of a burden seem to be met. Privity of estate before the transfer to the non-assuming grantee existed between the mortgagor and mortgagee, and an absolute transfer from the mortgagee to the grantee would effect a total substitution and put the mortgagee and grantee in privity of estate. Covenants respecting maintenance touch and concern the land. *Cf.* Leipziger, *The Mortgagee's Remedies for Waste 64 Cal. L. Rev. 1086, 1130 (1976)* Leipziger, *supra* note 233 at 1086, 1130. (at one time, grantee not liable "unless the mortgage contained covenants defining and prohibiting [permissive waste, and unless the grantee *assumed* the mortgage and thereby became liable on the covenants (emphasis added)].

(n125)Footnote 257. *San Roman v. Atlantic Mut. Ins. Co., 672 N.Y.S.2d 396 (1998)* (Mortgagee gets the proceeds of an insurance policy held by the mortgagor for benefit of mortgagee).

(n126)Footnote 258. *Price v. Harris, 475 S.W.2d 162 (Ark. 1972)* ; *Savarese v. Ohio Farmers' Ins. Co., 260 N.Y. 45, 182 N.E. 665 (N.Y. 1932)* . *Walter v. Marine Office of Am., 537 F.2d 89 (5th Cir. 1976)* ; *Lee v. Royal Indem Co., 108 F.3d 651 (6th Cir. 1997)* .

(n127)Footnote 259. *Price v. Harris, 475 S.W.2d 162, 163-4 (Ark. 1972)* .

(n128)Footnote 260. *Schoolcraft v. Ross, 81 Cal. App. 3d 75, 146 Cal. Rptr. 57 (1978)* .

(n129)Footnote 261. *Kreshek v. Sperling, 204 Cal. Rptr. 30 (1984)* .

(n130)Footnote 262. *Freeman v. Lind, 226 Cal. Rptr. 515 (1986)* .

(n131)Footnote 263. Historical and Statutory Notes, Cal. Civ. Code § 2924.7.

(n132)Footnote 264. *Cottman Co. v. Continental Trust Co., 182 A. 551 (Md. 1936)* ; *Starkman v. Sigmond, 184 N.J. Super. 600, 446 A.2d 1249 (N.J. 1982)* .

(n133)Footnote 265. *E.g.*, Va. Code § 6.1-330.81 (privilege to prepay certain loans on payment of penalty up to 1% of outstanding balance). *Metropolitan Life Ins. Co. v. Strnad, 876 P.2d 1362 (Kan. 1994)* (no right to prepay mortgage note in absence of agreement).

(n134)Footnote 266. *Pacific Trust Co., TTEE v. Fidelity Fed. Sav. & Loan Ass'n, 229 Cal. Rptr. 269 (1986)* ; *Promenade Towers Mut. Hous. Corp. v. Metropolitan Life Ins. Co., 597 A.2d 1377 (Md. 1991)* ; *Geller v. Fairmont Assoc., 568 N.Y.S.2d 202 (1991)* ; 2550 *Olinville Ave., Inc. v. Crotty, 566 N.Y.S.2d 500 (1991). Contra Hatcher v. Rose, 407 S.E.2d 172 (N.C. 1991)* (prior to statutory change); *Young v. Sodaro, 456 S.E.2d 31 (W. Va. 1995)* . West Virginia aligned herself with the majority position on this issue in 1995.

(n135)Footnote 267. Debra-Pogrund Stark, *New Developments in Enforcing Prepayment Charges After An Acceleration of a Mortgage Loan* 26 Real Prop., Prob. & Tr. J. 213 (1991). *In re AE Hotel Venture, 321 B.R. 209 (Bkrtcy. N.D. Ill. 2005)* (when lender decides to accept prepayment penalty, it terminates right to interest over period of years) (prepayment penalty can be agreed to be due after acceleration already requested) (prepayment penalty not enforced in Illinois).

(n136)Footnote 268. *E.g., Lazzareschi Inv. Co. v. San Francisco Fed. Sav. & Loan Ass'n, 99 Cal. Rptr. 417, 420 (1971)* .

> In the case, there has been no breach. The borrower has the option, clearly spelled out in the promissory note, of making one or more pre-payments ... . This is not a situation of liquidated damages. Although the word 'penalty' is used, ... there is not penalty in the sense of retribution for breach of an agreement.

There are sometimes statutory limitations on the amount of the "penalty."

(n137)Footnote 269. Debra-Pogrund Stark, *Prepayment Charges in Jeopardy: The Unhappy and Uncertain Legacy of In re Skyler Ridge* 24 Real Prop., Prob. & Tr. J. 191 (1989).

(n138)Footnote 270. *Stark, supra* note 269, at 231-2. citing *In re Schaumburg Hotel Owner Ltd. P'ship, 97 B.R. 943 (Bankr. N.D. Ill. 1989)* and two unpublished decisions.

(n139)Footnote 271. *Draper v. American Funding Limited, 285 Cal. Rptr. 640 (1991)* ; *Gutzi Assocs. v. Switzer, 264 Cal. Rptr. 538 (1989)* (pre-payment penalty clause not an unreasonable restraint on alienation); *Crest Sav. & Loan Ass'n v. Mason, 581 A.2d 120 (N.J. 1990)* .

(n140)Footnote 272. *Stark, supra* note 269 .

(n141)Footnote 273. *E.g., Tan v. California Fed. Sav. & Loan Ass'n, 189 Cal. Rptr. 775 (1983)* .

(n142)Footnote 274. *Ferreira v. Yared, 588 N.E.2d 1370 (Mass. App. 1992)* ; *Clinton Capital Corp. v. Straeb, 589 A.2d 1363 (N.J. Super. 1990)* . *Florida Nat'l Bank of Miami v. Bankatlantic, 557 So. 2d 596 (Fla. App. 1990)* (penalty allowed upon acceleration upon mortgagor's intentional default).

(n143)Footnote 275. *Stark, supra* note 269, at 224-26, *citing, inter alia Eyde v. Empire of Am. Fed. Sav. Bank, 701 F. Supp. 126 (E.D. Mich. 1988)* ; *Camelot Ltd. v. Union Mut. Life Ins. Co., 742 P.2d 831 (Ariz. App. 1987)* ; *Golden Forest Props. v. Columbia Sav. & Loan Ass'n, 248 Cal. Rptr. 316 (1988)* ; *Pacific Trust Co., TTII v. Fidelity Fed. Sav. & Loan Ass'n, 229 Cal. Rptr. 269 (1986) . See also Shadoan v. World Sav. & Loan Ass'n, 268 Cal. Rptr. 207 (1992)* .

(n144)Footnote 276. Va. Code Ann. §§ 6.1-330.81 & 6.1-330.83.

(n145)Footnote 277. Cal. Civ. Code § 2954.9.

(n146)Footnote 278. Cal. Civ. Code § 2954.10.

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CHAPTER 101 MORTGAGES, DEEDS OF TRUSTS AND RELATED LIENS

12-101 Thompson on Real Property, Thomas Editions § 101.03

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§ 101.03 Termination of Mortgages.

§ 101.03(a) Termination of Mortgage by Reconveyance or Release.

Mortgages can be terminated in a number of ways. The most obvious method is by the voluntary act of the secured party, usually by reconveyance and release on payment of the debt. In title theory states and under deeds of trusts, where theoretically a legal title is transferred when the security is given, a deed of reconveyance is an appropriate device to terminate the security interest, n279 although any written and delivered instrument manifesting the intent to renounce the mortgage should suffice. n280 In lien theory jurisdictions, mortgage liens may be terminated by release. n281 A release on the margin of the recorded copy of a mortgage or a deed of trust may suffice to terminate a security interest in land. n282

A reconveyance is a written instrument, delivered to the mortgagor or his successor, transferring the legal title of a mortgagee or trustee. n283 It must satisfy the usual requirements for deeds in that it must name a grantor and grantee, describe the realty, and manifest the intent to transfer the interest of the mortgagee or trustee. In California, and perhaps elsewhere, it is customary to reconvey to "the person or persons legally entitled thereto" rather than reconvey to specific grantees by name in order to avoid conducting title examinations to identify and designate as grantees all those with interests of record in the property.

A release can take the form of a separate writing whereby the mortgagee renounces all interest in the property or indicates that the debt is satisfied. n284 It may also take the form of notation in the margin of the copy of the security instrument in the official records. n285 The notation should be signed by the mortgagee or duly authorized agent in the presence of the custodian of the official records. n286

Mortgages and deeds of trust may be terminated without a reconveyance or release, but, until a reconveyance or release is recorded, title will be unmarketable.

COMPUTER-ASSISTED RESEARCH

LEXIS: marginal pre/1 release or reconveyance w/20

mortgag! or trustee or beneficiary

§ 101.03(b) Wrongful Release of Deed of Trust.

The title of a trustee under a deed of trust puts the trustee in a position to release the security via a deed of reconveyance or release. Occasions can arise in which the trustee, in good faith or otherwise, reconveys in violation of the terms of the security agreement. While such wrongful conduct will render the trustee liable to the secured party, courts are not in agreement about the efficacy of the reconveyance with respect to the rights of purchasers and encumbrancers after the wrongful reconveyance.

Certainly, subsequent purchasers and encumbrancers who have knowledge of the wrongful reconveyance or who do not part with value take their interests subject to the equitable right of the beneficiary under the wrongfully terminated deed of trust to set aside the reconveyance. Unless the later purchasers or encumbrancers qualify as bona fide purchasers or encumbrancers for value, it makes little difference whether the wrongful reconveyance is deemed void or voidable, for in either case the equitable right of the beneficiary is superior. Thus, if a trustee reconveys without authorization to do so and the lack of authority is known to a subsequent mortgagee, the mortgagee takes subject to the right of the beneficiary to have the reconveyance vitiated.

However, it has sometimes been held that a reconveyance by a trustee without authority is utterly void. Under this reasoning, a reconveyance made while the debt was outstanding and without the consent of the beneficiary was set aside even as against a subsequent bona fide purchaser or encumbrancer. n287 Yet, courts are divided about the proper characterization of an unauthorized reconveyance by a trustee. Many hold the reconveyance merely voidable, and thus unassailable, after a transfer to a bona fide purchaser or encumbrancer. n288

Trustees are personally liable to beneficiaries under deeds of trusts for damages occasioned by the loss of security resulting from a wrongful reconveyance. n289

COMPUTER-ASSISTED RESEARCH

LEXIS: I. wrongful w/1 discharge or release w/5 mortgage
II. wrongful w/1 discharge or release w/5 deed pre/2
trust

§ 101.03(c) Termination by Payment.

Under the rubric that there can be no mortgage without a debt, an accepted payment of the debt automatically terminates a mortgage in lien theory jurisdictions. n290 This cannot be said of all payments under deeds of trust or under mortgages in title theory states. While timely payment extinguishes the mortgage in title theory states, because the condition subsequent which qualified the mortgagee's title has occurred, i.e., payment at or before maturity, n291 acceptance by the mortgagee of a delinquent payment in these states does not terminate the mortgagee's title, which becomes legally absolute upon default. n292

> [I]t is well settled in this State, that upon payment *after* condition broken, the *legal* estate remains in the mortgage, until it is released, so that the mortgager [sic] cannot maintain a writ of entry against him ... n293

In lien theory states, payment, whether timely or not, discharges the lien *ipso facto*:

> The mortgage being a mere security for a debt, it must follow that the payment of the debt, whether before or after default, will operate as an extinguishment of the mortgage. n294

With respect to deeds of trust, the effect of payment upon the trustee's powers, as opposed the right, to conduct a foreclosure sale is problematical. It has been stated that the deed of trust is extinguished by payment, n295 and even that a subsequent purchase by an innocent purchaser at a foreclosure is void. n296 In any event, it would seem that the trustee is bound to reconvey to the trustor upon payment and may be liable for damages flowing from a refusal to reconvey. n297

To have the effect of terminating the mortgage, the payment must be made to a party entitled to it. Under the law of negotiable instruments, when an instrument is held by a holder in due course, payment made to anyone else is ineffective. Thus, if a mortgagee has negotiated a mortgage note to a holder in due course, subsequent payment of the note to the mortgagee will not terminate the mortgage, because the holder in due course was the only party to whom proper payment could be made. It is immaterial that the holder in due course did not cause notice of the transfer to be recorded in the land records or that the mortgagor was unaware of the negotiation. The debtor is entitled to production of the negotiable instrument upon tendering payment, regardless of whether the payment is periodic or final. Not having insisted upon production of the instrument, the debtor takes the risk that the mortgagee has negotiated the note to a holder in due course who, in most states, is entitled to enforce the mortgage as well as the note. n298 When the evidence of indebtedness is not held by a holder in due course or is not negotiable, the common law rule would give the mortgagor the benefit of payments made to the mortgagee until the assignee of the obligation notified the mortgagor of the transfer. n299

Although accepted payment may terminate a mortgage, the mortgagor's title is clouded by any unreleased recorded mortgage. If the secured party refuses to execute the necessary instrument to remove the cloud, an action may be commenced to compel the release. n300 A refusal of the secured party to deliver the required instrument gives rise to a claim for damages. n301

COMPUTER-ASSISTED RESEARCH

LEXIS: mortgage or (deed pre/2 trust) w/50
wrongful w/1 (discharg! or reconvey!
or releas!)

§ 101.03(d) Termination by Tender.

A timely, but rejected, tender of the debt discharges a mortgage while leaving the debt itself enforceable as an unsecured obligation. n302 In title theory states, the timely tender is the occurrence of the condition which determines the title of the mortgagee. n303 Most lien theory states seem to reach the same result in the apparent belief that the improper rejection should forfeit the lien. n304 Seemingly at variance with cases permitting a trustee's sale after the debt is time-barred, n305 it has been held that a rejected tender terminates a power of sale under deed of trust. n306

Tenders which are not timely are treated differently in title and lien theory states. Title theory states reason that a late tender has no effect on the mortgage, since the condition divesting the mortgagee's title can only occur at or before maturity, n307 although equity may enjoin foreclosure in such circumstances. n308 Since mortgagees do not hold title in lien theory states, most lien theory states treat late and timely tenders alike. n309 Rejections of tenders made before they are payable have no effect on the security interest, since mortgagees are entitled to interest as agreed. n310

Mortgagors may not be significantly advantaged by the termination of their mortgages upon improper rejections of tenders. Foreclosure may be barred because of the rejection, but the underlying debt remains collectable. n311 However, the rejection will preclude collection of interest, costs, and attorney fees accruing thereafter. n312 Courts will not remove the cloud on the mortgagor's title represented by the discharged mortgage merely as a result of the improper rejection, because equity requires actual payment before it will compel termination; however, such relief may be available if the tender is kept good. If the debtor desires judicial assistance in clearing the title or in recovering

possession from a mortgagee in possession, the debtor must pay the debt. n313

To have the effect of terminating a mortgage or deed of trust, a tender must be correct, unconditional and unambiguous. n314 To be correct, the tender must be in the medium and amount due and made to the creditor by one entitled to make the tender. n315 Further, the party making the tender must have the present ability to perform forthwith. n316 Although a tender must be unconditional, the mortgagor or trustor may be entitled to demand surrender of the evidence of indebtedness, together with a release of the security. n317 In some states, however, the party receiving payment may not be obliged to release the security for a period of time after payment. n318 Except where authorized by state statute or the federal bankruptcy laws, a tender merely of arrears made after an acceleration of the entire balance of the mortgage debt is not a correct tender. n319

A stranger is not entitled to redeem a mortgage by making an officious tender. It would seem that anyone with an interest in the property that would be affected by foreclosure should be entitled to the benefit of a rejected tender. n320

Tender must be made to the creditor or one authorized by the creditor to receive payment. n321 It has been held that a trustee under a deed of trust does not have, merely by virtue of the office, authority to receive payment on behalf of a beneficiary. n322

A tender must be kept good, according to the majority of jurisdictions, if it is to have any impact on the security. n323 Even where the tender need not be maintained to effect a discharge, interest will continue to accrue unless the tender is kept good. n324 Some courts, in dealing with this issue, distinguish between timely and delinquent tenders, requiring that the tender be maintained only for delinquent tenders. n325

Where the mortgagor is indebted to the mortgagee on several obligations, the mortgagor is entitled to designate the debt to which a tender is to be applied. However, if the debtor omits to designate the account to which a payment is to be credited, the creditor may make the selection. n326

Where a mortgage debt is payable in installments, a rejected tender of one installment may render the claim to that installment unsecured, but it will not affect the security for future installments. n327

COMPUTER-ASSISTED RESEARCH

LEXIS: mortgage or (deed pre/2 trust) w/50
reject! or refus! w/15 timely or valid
w/15 tender!

§ 101.03(e) Termination by Merger.

In accord with the principle that, when two or more interests in land vest in common ownership, the interests shall unite to form a single interest, it would seem that a mortgagee who acquires the mortgagor's interest should be deemed to have one interest rather than to hold separately the mortgage and the equity of redemption. n328 Similarly, a release of a mortgage to a mortgagor should effect a merger. n329 In most states a merger is presumed when both a mortgage and the equity come into common ownership. n330 Yet, because circumstances can arise in which merger would produce unintended and unjust results, the presumption is rebuttable.

Probably the best illustration of a case in which merger would produce an unfair result is that of a first mortgagee accepting a deed in lieu of foreclosure while a junior mortgage is outstanding. In such a case, were merger applied, the first mortgagee would be deemed an owner subject to one mortgage which was formerly a second mortgage. If the value of the land were less than the sum of the debts secured by both mortgages, merging the first with the equity and thereby elevating the junior to a senior position would unjustly enrich the junior who, without any change of position, would

acquire a first mortgage. To avoid this unjust result, courts traditionally refuse merger when doing so would adversely affect the party holding the successive interests. In the above example, therefore, the first mortgagee, after accepting the "in lieu deed," holds two distinct interests; the equity of redemption and the first mortgage, which do not merge. n331 In reaching this result, courts often acknowledge that the parties did not intend a merger, but even where parties gave no thought to the issue, and where they clearly contemplated terminating the senior mortgage, the tendency is to find no merger. n332 In effect, the court presumes an intention in accord with the interests of the party holding the several interests.

A related question is the effect on the underlying debt of a transfer of the equity to a mortgage. Normally, the acquisition of the equity by a mortgagee purchasing at the mortgagee's own foreclosure has no impact on the debt other than to reduce it by the net proceeds of the foreclosure sale, unless an anti-deficiency or fair value statute is applicable. n333 Where the equity is acquired by deed in lieu of foreclosure, it is likely the parties will have agreed about the impact of the transfer on the debt, usually stipulating that the debt is discharged. n334 However, there is always the risk that a court will characterize the "in lieu deed" as an equitable mortgage. n335 The results are not so straightforward where the mortgagee acquiring the equity held several encumbrances on the property. Where a mortgagee acquires the equity burdened by a prior encumbrance securing another debt held by the same mortgagee, that other debt should be discharged. This follows from the fact that the mortgagee is taking subject to the senior encumbrance so that the land is the primary fund while the mortgagor becomes a surety. A mortgagee with a first and second mortgage, who purchases the property at a foreclosure of the junior mortgage, will be presumed to have taken the amount of debt secured by the senior mortgage into consideration in bidding at the sale and to have taken subject to the first mortgage, with the result that the debt secured by the senior mortgage is discharged. Had the mortgagee purchased at the foreclosure of the senior mortgage, there would have been no impact on the debt secured by the junior mortgage, because purchasers do not take subject to junior encumbrances. n336

COMPUTER-ASSISTED RESEARCH

LEXIS: merg! w/15 mortgage w/15 equity pre/2
redemption /s owner or mortgagee

§ 101.03(f) Termination Under Statutes of Limitation.

Statutes of limitations can significantly affect the respective rights of mortgagors and mortgagees, but the statutes governing claims on the debt must be distinguished from those governing claims against the security. n337 Although the debt may be rendered unenforceable because a limitation period has run, it is possible that the mortgagee might nevertheless be entitled to foreclose the mortgage or succeed in ejectment. n338

Theoretically, in lien theory states there should be no right to proceed against the security once the debt is unenforceable, since the mortgage lien is dependent on the debt. n339 In practice, though, lien theory states do not always follow the theory to its logical conclusion. Nevertheless, the interplay between the theory of mortgages espoused in a particular jurisdiction and the effect of the running of the limitation period on the debt is not insignificant.

Title theory states generally hold that statutes of limitation governing contract actions are immaterial in determining the right of mortgagees to proceed against the security. Having gotten legal title to a possessory estate upon the making of the mortgage, mortgagees in these states have an interest in the realty that will be unaffected by the running of the statute on the debt. Rather, unless the mortgagors have conducted themselves in such a way as to extinguish their mortgagees' claims by adverse possession, the mortgagees may foreclose or, where permitted, eject the mortgagors. n340 It has been held that a mortgagor in possession after a default does not hold adversely unless the mortgagor takes possession without the consent of the mortgagee or successfully resists attempts by the mortgagee to take possession. n341

Trustees under deeds of trust also hold a legal title, and, it has been held, this title may survive the running of the statute of limitations on the debt even though, under local law, mortgages would create only liens which would not survive the running of the statute. n342 Since a trust continues until its purposes are fulfilled, there is no limitation period governing the exercise of the trustee's powers, including the power of sale.

Upon a showing of prejudice by reason of the delay in foreclosing, courts in title theory jurisdictions may estop a mortgagee from going against the security. n343 Also, if the debt has been in default long enough to raise a presumption that it has been paid, foreclosure may not be allowed in title theory states. n344

Lien theory states are in disarray on the question of the impact of the running of the statute of limitations on the debt upon the mortgagee's remedies against the security. In theory, it would seem that they would hold that, once the debt is time-barred, so too is the recourse against the property, but most of them appear to handle the matter as though they were title theory states. n345 They reason that the remedies on the debt are separate from those against the security. n346 Other lien theory states, recognizing that a mortgage is merely security, conclude that the security cannot be realized once the debt is unenforceable. n347 California, a lien theory state, while precluding foreclosure of a mortgage once the debt is time-barred, does allow trustee sales thereafter on the ground that trustees hold title. n348 In contrast, with the refusal to grant mortgagors affirmative relief upon a rejected tender of payment, n349 lien theory states which deny recourse against the security after the debt is time-barred do authorize judicial action to remove the cloud on the title represented by the unenforceable mortgage. n350

Non-claim statutes barring claims of creditors against a decedent's estate have been held inapplicable to foreclosure actions. n351

A debtor may revive a mortgage debt after it has become time-barred. An acknowledgment of the debt will start the statute of limitations running anew and, when the debt was formerly secured by a mortgage, will revive the mortgage as well. n352 Similarly, an acknowledgment of the debt while the limitation period is running serves to establish a new starting point under the statute and thus to extend the time for both the debt and the mortgage. n353

Interesting questions can arise about the effect of a revival or extension by a predecessor upon subsequent grantees or encumbrancers. If a debt and mortgage have been rendered unenforceable under the statute of limitations by the time of the subsequent transfer or encumbrance, the action of the mortgagor will not revive the mortgage against the subsequent transferee or encumbrancer though it will suffice to revive the debt against the mortgagor. n354 If an effective revival or extension of the debt and mortgage preceded the transfer or encumbrance, the transferee or encumbrancer should take subject to the mortgage, although that transferee or encumbrancer will have no personal liability on the revived debt without assuming it. n355 However, if the property is transferred or encumbered while the statute is running on the debt, and before an extension is given, courts are in disagreement about the impact on the transferee or encumbrancer. Most would probably decide in favor of the mortgagee, believing that, because the debt was enforceable at the time of the later transfer or encumbrance, the transferee or encumbrancer took subject to the power of the mortgagor to extend the mortgage. n356 Others conclude that the transferee or encumbrancer is not bound by intervening extensions so long as the mortgagee is notified of the transfer or encumbrance before the extension. Under this latter view, it has been held that recordation of the transfer or encumbrance constitutes notice to the mortgagee. n357

Successors in interest to mortgagors may, by their own acts, extend or revive debts and the mortgages securing them. Assumptions by grantees, whether before or after the statute has run, normally extend or revive the debt assumed and the security interest. n358 A transfer to a non-assuming grantee, however, should only extend or revive the mortgage and will not subject the grantee to personal liability. n359

COMPUTER-ASSISTED RESEARCH

LEXIS: terminat! or barred or barring w/15

statute pre/2 limitations

FOOTNOTES:
(n1)Footnote 279. *Norwest Bank Neb. v. Kizzle, 446 N.W.2d 204 (Neb. 1989)* (deed of trust); Cal. Civ. Code § 2941 and *Pintor v. Ong, 259 Cal. Rptr. 577 (Cal. App. 1989)* (deed of trust). *See also Johnson v. Ryan, 206 N.W. 871 (Wis. 1926)* ; *Cooper v. Cano, 84 Cal. Rptr. 2d 922 (Cal. App. 1999)* .

(n2)Footnote 280. Cal. Civ. Code § 2941, subd. (b); *Barnes v. Upham, 111 A. 842 (Conn. 1920)* .

(n3)Footnote 281. *First Nat'l Bank of Fairbanks v. Taylor, 488 P.2d 1026 (Alaska 1971)* ; *In re BFA Liquidation Trust, 331 B.R. 907 (D.Ariz. 2005)* (release of developers mortgage on individual lots allowed if purchasers paid 12,500 dollars).

(n4)Footnote 282. Ariz. Rev. Stat. Ann. § 11-33-707(B); Nev. Rev. Stat. § 106.260; Tenn. Code Ann. § 66-25-201; Wash. Rev. Code Ann. § 365.04.060. *Thompson v. Thomas, 499 S.W.2d 901 (Tenn. App. 1973)* ; *General Elec. Credit Corp. v. Lunsford, 167 S.E.2d 414 (Va. 1969)* ; *McKinley v. Lamar Bank, 919 So. 2d 918 (Miss. 2005)* (trustee's deed of trust cancellation not a valid release because trustee previously assigned the deed to the bank).

(n5)Footnote 283. *In re Pichel's Estate, 178 A.2d 762 (Pa. 1962)* ; *Aetna Life Ins. Co. v. McElvain, 363 N.W.2d 186 (S.D. 1985)* .

(n6)Footnote 284. *Kincade v. Kincade, 577 N.Y.S.2d 436 (1991)* ; *DiMaruo v. Taylor, 599 A.2d 1358 (R.I. 1991)* .

(n7)Footnote 285. *See* note 279, *supra.*

(n8)Footnote 286. Nev. Rev. Stat. § 106.260; Tenn. Code Ann. § 66-25-201.

(n9)Footnote 287. *Briggs v. Davis, 20 N.Y. 15 (1859)* .

(n10)Footnote 288. *Firato v. Tuttle, 308 P.2d 333 (Cal. 1959)* .

(n11)Footnote 289. *E.g., Carter v. Continental Land Title Co., 285 Cal. Rptr. 413 (1991)* .

(n12)Footnote 290. *Puz v. Martin, 778 P.2d 1276 (Ariz. 1989)* ; *Winnett v. Roberts, 225 Cal. Rptr. 82 (1986)* ; *Matherne v. Purdy, 576 So. 2d 621 (La. App. 1991)* ; *First Fed. Sav. & Loan Ass'n of Bismark v. Scherle, 356 N.W.2d 894 (N.D. 1984)* ; *Moore v. Benjamin, 280 N.W. 340 (Wis. 1938)* ; *In re BFA Liquidation Trust, 331 B.R. 907 (D. Ariz. 2005)* (release of developers mortgage on individual lots allowed if purchasers paid 12,500 dollars).

(n13)Footnote 291. *Bowden v. Turner, 24 So. 2d 429 (Ala. 1946)* ; *Munson v. Munson, 30 Conn. 425 (1862)* ; *Piea Realty Co. v. Papuzynski, 172 N.E.2d 84 (Mass. 1961)* ; *Barnes v. Lee Sav. Bank, 162 N.E.2d 666 (Mass. 1959)* .

If a mortgage is viewed as a legal conveyance accompanied by a covenant on the part of the mortgagee to reconvey on timely payment, it would seem that timely payment should not ipso facto terminate the mortgage but rather, under the maxim that equity regards as done that which ought to be done, that timely payment would affect only the equitable title. *See supra* text accompanying note 7.

(n14)Footnote 292. *Stewart v. Crosby, 50 Me. 130 (1863) . Cf. West Lumber Co. v. Schnuck, 51 S.E.2d 644 (Ga. 1949)* ; *Overholt v. Merchants & Planters Bank, 637 S.W.2d 463 (Tenn. App. 1982)* .

(n15)Footnote 293. *Stewart v. Crosby, 50 Me. at 134* (emphasis in original).

(n16)Footnote 294. *McMillan v. Richards, 9 Cal. 365, 411 (1858)* .

(n17)Footnote 295. *Wyman v. Roesner, 439 A.2d 516 (D.C. 1981)* .

(n18)Footnote 296. *Tipton v. Holt, 610 S.W.2d 659 (Mo. App. 1981)* .

(n19)Footnote 297. *Pintor v. Ong, 259 Cal. Rptr. 577 (1989)* (allowing damages, including damages for emotional distress, for failure of trustee to reconvey). The duty to reconvey may not arise until demand is made. Cal. Civ. Code § 2941.

(n20)Footnote 298. *See* § 101.05(b)(2)(ii), *infra.*

(n21)Footnote 299. *See* § 101.05.02(b)(2)(i), *infra.* This result would also obtain with respect to those non-negotiable instruments governed by the Uniform Commercial Code. U.C.C. § 3-305(a)(2) (1990). The pre-1990 version of the Code extended Article 3 to non-negotiable instruments which would be negotiable but for the absence of language making them payable either to order or bearer. U.C.C. § 3-805 (1989). Such instruments are excluded from the coverage of Article in the 1990 version. U.C.C. § 3-104, Comment 2 (1990).

(n22)Footnote 300. *Mitchell v. Oliver, 327 S.E.2d 216 (Ga. 1985)* ; *Mr. U Inc. v. Mobil Oil Corp., 249 N.W.2d 909 (Neb. 1977)* ; *Washington Mut. Bank, F.A. v. Shelton, 892 So. 2d 547* ((Fla. App. 2005) .

(n23)Footnote 301. The claim may be based upon a statute, *e.g.*, Cal. Civ. Code § 2941.5, or on a common law contract theory, *Tenneco Oil Co. v. Clevenger, 363 So. 2d 316 (Ala. App. 1978)* ; *Skorpios Props., Ltd. v. Waage, 374 A.2d 165 (Conn. 1976)* .

(n24)Footnote 302. *Orient Petr. Co. v. Wichita State Bank & Trust Co., 16 F.2d 417* , *reh'g. denied, 17 F.2d 263 (5th Cir. 1926)* . *Mr. U Inc. v. Mobil Oil Corp., 249 N.W.2d 909 (Neb. 1977)* ; *contra Karnes v. Barton, 272 S.W. 317 (Tex. App. 1925)* (re vendor's lien).

(n25)Footnote 303. *Shields v. Lozear, 34 N.J.L. 496 (1869)* . However, it would seem that, if the mortgage is viewed as a transfer of title burdened by covenant to reconvey on timely payment, legal title should remain in the mortgage while equitable title would pass to the mortgagor. *See* note 292, *supra.*

(n26)Footnote 304. *Jensen v. Franklin, 340 P.2d 832 (Mont. 1959)* ; *Mid-State Homes, Inc. v. Jackson, 519 P.2d 472 (Okla. 1974)* ; *contra Keese v. Parnell, 132 S.E. 620 (S.C. 1925)* . *See also Pesce v. Nor-Shore Assocs., 277 N.Y.S.2d 307 (1967)* (statute authorizing judicial canceling of mortgage upon refusal of tender should be strictly construed).

(n27)Footnote 305. *See infra* text accompanying note 342.

(n28)Footnote 306. *Tipton v. Holt, 610 S.W.2d 659 (Mo. App. 1981)* ; *Crane v. Mabry, 802 P.2d 696 (Or. 1990)* .

(n29)Footnote 307. *Strong v. Merchants Mut. Ins. Co., 309 N.E.2d 510 (Mass. App. 1974)* ; *Sandler v. Green, 192 N.E. 39 (Mass. 1934)* ; *Shields v. Lozear, 34 N.J.L. 496 (1869)* .

(n30)Footnote 308. *Garrett v. Cobb, 80 So. 79 (Ala. 1918)* .

(n31)Footnote 309. *Tipton v. Holt, 610 S.W.2d 659 (Mo. App. 1981)* ; *Kortright v. Cady, 21 N.Y. 343 (1860)* .

(n32)Footnote 310. *Rhorer v. Bila, 23 P. 274 (Cal. 1890)* ; *Bowen v. Julius, 40 N.E. 700 (Ind.1895)* ; *Moore v. Kime, 61 N.W. 736 (Neb. 1895)* ; *Hatcher v. Rose, 389 S.E.2d 442 (N.C. 1990)* ; *Pyross v. Fraser, 64 S.E. 407 (S.C. 1909)* .

(n33)Footnote 311. *Kortright v. Cady, 21 N.Y. 343 (1860)* ; *Murray v. O'Brien, 105 P. 840 (Wash. 1909)* .

(n34)Footnote 312. U.C.C. § 3-603(c) (1990); *Strickland v. Coleman, 824 S.W.2d 188 (Tex. App. 1991)* . The tender may have to be kept good to stop the accrual of liability for interests, costs, and attorney fees. *Nelson v. Loder, 30 N.E. 369 (N.Y. 1892)* .

(n35)Footnote 313. *McClellan v. Coffin, 93 Ind. 456 (1892)* ; *Cowles v. Marble, 37 Mich. 158 (1877)* ; *Nelson v. Loder, 30 N.E. 369 (N.Y. 1892)* .

(n36)Footnote 314. *Gaffney v. Downey Sav. & Loan Ass'n, 246 Cal. Rptr. 421 (1988)* , *rev. denied*; *Johnson v. Midland Bank & Trust Co., 715 S.W.2d 607 (Tenn. App. 1986)* ; *Fillion v. David Silvers Co., 709 S.W.2d 240 (Tex. App. 1986)* ; *Crane v. Mabry, 802 P.2d 696 (Or.1990)* .

(n37)Footnote 315. *Fleet Real Estate Funding Corp. v. Frampton, 812 P.2d 416 (Okla. App. 1991)* ; *Knudson v. Fenimore, 169 P.2d 478 (Okla. 1916)* ; *Brown v. Financial Sav., 828 P.2d 412 (N.M. 1992)* .

(n38)Footnote 316. *Napue v. Gor-Mey West, Inc., 220 Cal. Rptr. 799 (1985)* ; *Mr. U Inc. v. Mobil Oil Corp., 249 N.W.2d 909 (Neb. 1977)* . *See also Crane v. Mabry, 802 P.2d 696 (Or. 1990)* .

(n39)Footnote 317. *Enid Conservative Inv. Co. v. Porter, 145 P. 805 (Okla. 1914)* .

(n40)Footnote 318. Cal. Civ. Code § 2941; *Hernandez v. Westoak Realty & Inv. Co., 771 S.W.2d 876 (Mo. App. 1989)* ; *Mr. U Inc. v. Mobil Oil Corp., 249 N.W.2d 909 (Neb. 1977)* .

(n41)Footnote 319. *Jenkins v. Thyer, 760 S.W.2d 932 (Mo. App. 1988)* ; *Thielecke v. Davis, 260 S.W.2d 510 (Mo. 1953)* . For discussion under the bankruptcy laws, *see* § 101.07(h)(4), *infra.*

(n42)Footnote 320. *Walthour-Flake Co. v. Brown, 307 S.W.2d 215 (Ark. 1957)* ; *Bowman v. Poole, 91 S.E.2d 770 (Ga. 1956)* ; *Dollar Sav. Bank v. Duff, 112 A. 23 (Pa. 1920)* ; *Swain v. Kayko, 205 N.W.2d 621 (Mich. 1973)* ; *North Coast Mortgage Inv., Inc. v. Dunning, 813 P.2d 1254 (Wash. 1991)* .

(n43)Footnote 321. *King v. Finch, 60 Ind. 420 (1878)* ; *Boyce v. Pritchett, 36 Ky. 231 (1838)* ; *Roberson v. Clevenger, 86 S.W. 512 (Mo. App. 1905)* .

(n44)Footnote 322. *Cornish v. Woolverton, 81 P. 4 (Mont. 1905)* ; *Wynn v. Grant, 81 S.E. 949 (N.C. 1914)* .

(n45)Footnote 323. *White v. Eddy, 81 So. 628 (Ala. 1919)* ; *Sewell v. Neilsen, Monroe, Inc., 706 P.2d 81 (Idaho 1985)* ; *Knollenberg v. Nixon, 72 S.W. 41 (Mo. 1903)* ; *Keese v. Parnell, 132 S.E. 620 (S.C. 1925)* .

(n46)Footnote 324. *Sylvester v. Animal Emergency Clinic of Oahu, 828 P.2d 745 (Haw. App. 1990)* ; *In re Harlem River Drive, 122 N.Y.S.2d 866 (1953)* ; *Nelson v. Loder, 30 N.E. 369 (N.Y. 1892)* .

(n47)Footnote 325. *Kortright v. Cady, 21 N.Y. 343 (1860)* (tardy tender need not be kept good); *Crain v. McGoon, 86 Ill. 431 (1877)* (only tardy tender need be kept good); *White v. Eddy, 81 So. 628 (Ala. 1919)* (all tenders must be kept good). *See also Parker v. Beasley, 21 S.E. 955 (N.C. 1895)* .

(n48)Footnote 326. *Village of Winfield v. Reliance Ins. Co., 212 N.E.2d 10 (Ill. App. 1965)* ; *Van Dusseldorp v. State Bank of Bussey, 395 N.W.2d 868 (Iowa 1986)* ; *Leeds v. Gifford, 5 A. 795 (1886)* .

(n49)Footnote 327. *Mid-State Homes, Inc. v. Jackson, 519 P.2d 472 (Okla. 1974)* .

(n50)Footnote 328. *Flagler Fed. Sav. & Loan Ass'n of Miami v. Crestview Condo. Ass'n, 595 So. 2d 198 (Fla. App. 1992)* . At common law successive do not merge so as to destroy intervening contingent remainders created simultaneously. Modernly, contingent remainders are not subject to artificial destruction by merger.

(n51)Footnote 329. *See* § 101.03(b), *supra.*

(n52)Footnote 330. *C.T.W. Co. v. Rivergrove Apts., Inc.,582 So. 2d 18 (Fla. App. 1991)* ; *Priess v. Buchsbaum, 332 Ill. App. 565, 76 N.E.2d 195 (Ill. App. 1947)* ; *Kansas Seventh Day Adventist Conf. Ass'n v. Williams, 134 P.2d 626 (Kan. 1943)* ; *Santa Cruz v. State, 78 So. 2d 900 (Miss. 1955)* ; *Gimbel v. Venino, 39 A.2d 489 (N.J. 1944)* ; *Lothstein v. Fitzpatrick, 138 P.2d 919 (Or. 1943)* . *Cf. Equitable Trust Co. v. Delaware Trust Co., 61 A.2d 529 (Del. 1948)* ; *Matter of Estate of Ozier, 587 N.E.2d 77 (Ill. App. 1992)* ; *Lutz v. Cunningham, 38 N.W.2d 638 (Iowa 1949)* ; *Miller v. Martineau & Co., 983 P.2d 1107 (Ut. App. 1999)* (parties must intend that a merger occur).

(n53)Footnote 331. *Nebco & Assocs. v. U.S., 23 Cl. Ct. 635 (1991)* ; *Burns v. Charles W. Shepard & Co., 166 So. 416 (Ala. 1936)* ; *Carpenter v. Pacific States Sav. & Loan Ass'n, 64 P.2d 1102, 66 P.2d 656 (Cal. App. 1937)* ; *Downstate Nat'l Bank v. Elmore, 587 N.E.2d 90 (Ill. App. 1992)* ; *Aladdin Heating Co. v. Trustees of Central States, 563 P.2d 82 (Nev. 1977)* ; *Stantons v. Thompson, 49 N.H. 272 (1870)* .

(n54)Footnote 332. A few courts find a merger where the owner of the several interests was negligently unaware of the junior interest. *See also Construction Mach. of Ark. v. Roberts, 819 S.W.2d 268 (Ark. 1991)* (fact that mortgagee after accepting "in lieu" deed conveyed to third party convincing evidence that merger intended).

(n55)Footnote 333. Unless precluded by legislation, *see* § 101.07(q), *infra* a mortgagee purchasing at his own foreclosure sale is entitled to deficiency judgment equal to the difference between his bid and amount of the debt if the debt is greater.

(n56)Footnote 334. *Nebco & Assocs. v. U.S., 23 Cl. Ct. 635 (1991)* ; *Rogers v. Mulkey, 147 P.2d 62 (Cal. App. 1944)* ; *Flora Bank & Trust v. Czyzewski, 583 N.E.2d 720 (Ill. App. 1991)* .

(n57)Footnote 335. *See Janus Properties, Inc. v. First Florida Bank, N.A., 546 So. 2d 785 (Fla. App. 1989)* and § 101.08.01, *infra* discussing treating deeds as mortgages.

(n58)Footnote 336. *Mid Kan. Fed. Sav. & Loan Ass'n v. Dynamic Dev. Corp., 804 P.2d 1310 (Ariz. 1991)* ; *Resolution Trust Corp. v. Westridge Ct. Joint Venture, 815 S.W.2d 327 (Tex. App. 1991)* . For discussion of anti-deficiency and fair value legislation, *see* §§ 101.07(f), 101.07(g), *infra.*

(n59)Footnote 337. *Pitts v. Pastore, 561 So. 2d 297 (Fla. App. 1990)* ; *Willow Tree Invs. Inc. v. Wilhelm, 465 N.W.2d 849 (Iowa 1991)* .

(n60)Footnote 338. *Ryan v. Zaffiro, 166 N.E.2d 246 (Ohio App. 1960)* ; *Dye v. United States Farm Servs. Agency, 129 Fed. Appx. 320 (7th Cir. 2005)* (property owner's action against a U.S. agency to force a mortgage foreclosure was barred by the statute of limitations).

(n61)Footnote 339. Unless one distinguishes between void and voidable obligations in light of the fact that the time bar renders a claim merely voidable.

(n62)Footnote 340. *Williamson v. Shoults, 423 So. 2d 874 (Ala. App. 1982)* .

(n63)Footnote 341. *Matter of Lake Townsend Aviation, Inc., 361 S.E.2d 409 (N.C. 1987)* . *Reid v. Wilkerson, 149 S.E.2d 700 (Ga. 1966)* ; *See also* Comment, *Mortgages --Quieting Title--Adverse Possession by Mortgagee As Grounds For 25 Ill. L. Rev. 563 (1931).*

(n64)Footnote 342. *Brant v. Hargrove, 632 P.2d 978 (Ariz. 1981)* ; *Monterey S. P. Partnership v. W. L. Bangham, Inc., 49 Cal. 3d 454, 261 Cal. Rptr. 587, 777 P.2d 623 (Cal. 1989)* ; *Bank of Italy v. Bentley, 20 P.2d 940 (Cal. 1933). Contra, Walcker v. Benson and McLaughlin, 904 P.2d 1176 (Wash. App. 1995)* .

(n65)Footnote 343. *Freda v. Commercial Trust Co. of N.J., 570 A.2d 409 (N.J. 1990)* .

(n66)Footnote 344. *Williamson v. Shoults, 423 So. 2d 874 (Ala. App. 1982). Contra De Anza Land & Leisure Corp. v. Raineri, 669 P.2d 1339 (Ariz. 1983)* .

(n67)Footnote 345. *First Nat'l Bank of Madison v. Kolbeck, 19 N.W.2d 908 (Wis. 1908)* .

(n68)Footnote 346. *Cracco v. Cox, 414 N.Y.S.2d 404 (1979)* ; *Lincoln Nat'l Life Ins. Co. v. Kelly, 17 N.W.2d 906 (N.D. 1945)* .

(n69)Footnote 347. *De Anza Land & Leisure Corp. v. Raineri, 669 P.2d 1339 (Ariz. 1983)* ; *Carson Redev. Agency v. Adam, 186 Cal. Rptr. 615 (1982)* ; *Martinez v. Continental Enters., 730 P.2d 308 (Colo. 1986)* ; *In re Application of Rosewell, 537 N.W.2d 761 (Ill. 1989)* ; *Duty v. Graham, 12 Tex. 427 (1943)* ; *Miller v. Diversified Loan Serv. Co., 382 S.E.2d 514 (W. Va. 1989)* .

(n70)Footnote 348. *Bank of Italy v. Bentley, 20 P.2d 940 (Cal. 1933)* .

(n71)Footnote 349. *See supra* text accompanying note 313.

(n72)Footnote 350. Cal. Civ. Code §§ 882.020 - 882.040. *See also* Paul E. Basye, Clearing Land Titles 217 (1983 Supp.).

(n73)Footnote 351. *Harter v. Lenmark, 428 N.W.2d 596 (Minn. App. 1988)* .

(n74)Footnote 352. *Schmucker v. Sibert, 18 Kan. 104 (1877)* ; *Schifferstein v. Allison, 15 N.E. 275 (Ill. 1888)* ; *Wilson v. Butt, 190 S.E. 260 (Va. 1937). Contra Sanford v. Bergin, 103 P. 333 (Cal. 1909)* (statute providing that the mortgage is "extinguished" by the running of the limitation period on the debt); *O'Malley v. Chevy Chase Bank, 766 A.2d 964 (D. C. App. 2001)* (the number of times the trustor could cure a default was not limited by the deed of trust).

(n75)Footnote 353. *Berthoud Nat'l Bank v. Smith, , 158 Ariz. 271, 762 P.2d 558 (Colo. App. 1988)* .

(n76)Footnote 354. *Davis v. Savage, 168 P.2d 851 (N.M. 1946)* .

(n77)Footnote 355. *Steeves v. Nispel, 273 N.W. 50 (Neb. 1937)* . *But see Franklin v. Zarmstorf, 15 N.W.2d 190 (Neb. 1944)* (later statute rendered extension not executed in accordance with statute ineffective even against those with notice). Frederick P. Storke & Don W. Sears, *Discharge of Security Transactions 26 Rocky Mt. L. Rev. 155, 131 (1954).*

(n78)Footnote 356. *Hess v. State Bank, 226 P. 257 (Wash. 1924)* .

(n79)Footnote 357. *Filipini v. Trobock, 66 P. 587 (Cal. 1901)* .

(n80)Footnote 358. *Contra Sanford v. Bergin, 103 P. 333 (Cal. 1909)* ; *Lowe v. Jackson, 140 S.E.2d 1 (N.C. 1965)* .

(n81)Footnote 359. *Curtis v. Holee, 195 P. 395 (Cal. 1921)* .

Thompson on Real Property, Thomas Editions

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CHAPTER 101 MORTGAGES, DEEDS OF TRUSTS AND RELATED LIENS

12-101 Thompson on Real Property, Thomas Editions § 101.04

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§ 101.04 Foreclosure.

§ 101.04(a) Strict Foreclosure.

At common law the mortgagee's legal title became absolute upon default, since thereafter the condition of timely payment, upon which the mortgagor was entitled to re-enter or the mortgagee was bound to reconvey, could not occur. The mortgagor's equity of redemption, however, survived the default, and the chancellor permitted the mortgagor to redeem so long as laches or some other equitable defense was not established. As a consequence, the mortgagee's legal title was subject to destruction at any time the chancellor should permit redemption and, hence, unmarketable. To remove the cloud on the mortgagee's title, a proceeding in equity could be instituted seeking the setting of a time certain within which the mortgagor could redeem; the right would be lost if not exercised within the time allotted. n360 The procedure was known as strict foreclosure and, once the allowed period expired, the mortgagee's title was good both at law and in equity.

Strict foreclosure is seldom permitted in the United States, where it is thought it too often unjustly enriches mortgagees by allowing them to acquire land worth much more than the balance of the secured obligation. n361 Foreclosure by public sale is the preferred foreclosure method because it allows the value of the property to be tested by auction and requires that any sale surplus be distributed to mortgagors or others whose interests are extinguished by the foreclosure. In a few states, though, strict foreclosure remains a generally accepted foreclosure device, n362 and many states permit it at the behest of a purchaser at a prior foreclosure from which a necessary party was omitted. n363 Thus, if a junior lienor was not made a party to the earlier foreclosure, the purchaser at that foreclosure will not be compelled to foreclosure against the omitted junior by sale but may foreclose strictly. Kansas seems to allow strict foreclosure at the discretion of the court. n364 Strict foreclosure may be denied where a junior encumbrancer was intentionally omitted from a foreclosure. n365 Where a mortgagor or mortgagor's successor has been omitted, though, the preference for foreclosure by sale is so strong that strict foreclosure is generally unavailable. n366 Some states recognize strict foreclosure as a remedy of sellers under installment land contracts after breach by buyers. n367

A deficiency judgment may be available in a strict foreclosure proceeding to the extent that the value of interest foreclosed is less than the amount owing on the debt. n368

Where the value of the interest strictly foreclosed exceeds the amount of the debt, the mortgagor or successor may sometimes be entitled to any profit realized by the mortgagee on a later sale of the property. n369

COMPUTER-ASSISTED RESEARCH

LEXIS: mortgage /15 strict! /5 foreclos!

§ 101.04(b) Judicial Foreclosure.

Foreclosure through a judicially supervised sale is a lawful method of foreclosure in every state, and it is the only sanctioned method in about half of the states. n370 By a judicial foreclosure, the mortgagee seeks a determination of the amount of the indebtedness due and an order for the sale of the security at public auction. Though statutes usually prescribe the procedure to be followed in judicial foreclosures, the sale is normally conducted by an officer of the court, usually the sheriff, or a master or referee appointed for the purpose by the court. n371 In most states the sale is subject to court confirmation, which must be obtained for title to pass to the purchaser at the sale. n372 If court confirmation is not required by statute, it can be required by the order authorizing the sale. n373 Foreclosing lienors wanting to bid at their own foreclosures should consider the consequences of full credit bids under local law, for by purchasing for the full amount of the debt they may be barred from asserting that the property was worth less than the debt and, as a result, be precluded from seeking a deficiency judgment. n374

As a species of equitable relief, foreclosure is not a matter of right, and the court is to consider the equities in determining whether to decree foreclosure. n375 Accordingly, foreclosure has been denied where a mortgagee failed to comply with regulations under the Agricultural Credit Act n376 regarding restructure rights of the mortgagor n377 and also where a mortgagee accelerated the balance of the debt when the mortgagor made a periodic payment during a grace period. n378

A claim on the debt may be joined with the foreclosure action. n379 When a claim on the debt is joined in the foreclosure action, the mortgagee is entitled to a personal judgment against the mortgagor for any deficiency between the balance on the debt and the proceeds of the foreclosure sale unless restricted by statute n380 or equitable considerations. Even a mortgagee who purchases at the foreclosure sale and who thus sets the sale price may be entitled to a deficiency. n381 Except in states with on statutes, mortgagees may split their claims on the debt and under the mortgage. n382 In states with on statutes, a failure to join all claims in a single proceeding may work the forfeiture of the omitted claims. n383

The proceeds of the sale are applied first to the expenses of sale and then to the obligation. Mortgagees senior to the mortgage foreclosed are not entitled to share in the surplus because their interests are not affected by the foreclosure. n384

Those who owned junior interests that were "sold out" at the foreclosure are entitled to share in any surplus in accord with the relative priorities. n385

COMPUTER-ASSISTED RESEARCH

LEXIS: mortgage or (deed pre/2 trust) w/50
judicial! w/5 foreclos!

§ 101.04(b)(1) Necessary Parties to Judicial Foreclosure.

A judicial foreclosure is designed to transfer to the sale purchaser whatever title the mortgagor held at the time the mortgage was given. n386 Mortgagees bargain for the right, upon default, to sell via foreclosure that interest on the faith

of which they extended credit. If foreclosure purchasers were to buy subject to subsequent charges, that faith would prove false. Upon a proper foreclosure, therefore, the purchaser takes title free of subsequent encumbrances. n387 Yet, before a judicial foreclosure can cut off junior interests, the owners of those interests are entitled to their day in court. Because of the pervasive involvement of the courts in judicial foreclosures, common law and constitutional concepts of procedural due process dictate that the owners of junior interests be made parties to the proceedings if their interests are to be affected by the proceedings. n388 The interest of any junior encumbrancer omitted from the foreclosure action is not affected by the action, n389 and a foreclosure sale, even if confirmed by the court, will not affect the interest, so the purchaser takes subject to the omitted interest. n390

Mortgagors or their successors are also entitled to procedural due process so that, if they are not made parties to the foreclosure action, and given notice and an opportunity to defend, n391 their interests survive the foreclosure. n392 However, mortgagors who have transferred all their interest need not be joined. n393

Because of the common law doctrine of lis pendens, those who acquire interests in the property after a foreclosure action has been commenced are not necessary parties although, in many states, this is true only as to interests acquired after a notice of lis pendens has been placed in the land records. The lis pendens doctrine subjects all interests acquired after a suit has begun to the outcome of the litigation. The harshness of the common law doctrine, which operates against subsequent takers even though they are unaware of the litigation and have no means of discovering it, has led to the enactment of statutes requiring the recordation of a notice of lis pendens in the land records if subsequent takers are to be subjected to the doctrine. n394 Thus, once the action has begun and, where necessary, a notice of lis pendens has been recorded, later takers will be subject to the result of the litigation whether or not made parties, and foreclosing mortgagees need not be concerned about locating and making them parties to the action. n395

Owners of interests created before the mortgage being foreclosed was given are not necessary parties because a foreclosure will have no impact on their interests. Nevertheless, senior interests may be extinguished under the recording statutes as a result of a completed foreclosure. n396 The recording acts often operate to destroy prior interests which are not evidenced in the land records in favor of subsequent purchasers and encumbrancers. The purchaser at the foreclosure sale, at least if not the foreclosing mortgagee, may qualify as a subsequent purchaser and thus prevail over prior interests not evidenced in the land records. Except in states with pure race recording statutes, actual knowledge of the unrecorded interest will deny the purchaser protection, n397 and often inquiry notice will have the same effect.

Mortgagees purchasing at their own foreclosures may qualify as bona fide purchasers for value under the recording statutes. Some recording statutes n398 provide simply that unrecorded interests may be void with respect to subsequent judgments, and under this type of statute it would seem that mortgagees are entitled to the benefit of the judgments directing or confirming the sale. Moreover, recording statutes that merely protect subsequent bona fide purchasers for value, without any explicit provisions for judgments, have been interpreted as covering foreclosing mortgagees. n399 In California, a state where actual notice normally precludes priority under the recording statute, even mortgagees purchasing with actual knowledge of unrecorded interests are extended the protection of the recording statute. n400

Persons who would otherwise be necessary parties, but whose interests do not appear of record when a foreclosure action is commenced, may be omitted from the proceedings. n401 Thus, it would seem that foreclosing mortgagees do not have to conduct title examinations to discover junior interests under instruments recorded after commencement of the foreclosure action. The interests of such individuals are extinguished to the same extent as if they had been joined, provided that the purchaser at the foreclosure sale qualifies as a protected person under the recording act. n402

COMPUTER-ASSISTED RESEARCH

LEXIS: I. foreclos! w/50 (joinder join!) w/50
(necessary or proper) w/15 part!
II. foreclos! w/50 (lis pre/1 pendens) w/15

record! w/50 ("bona fide" or "good faith")
w/15 purchaser

§ 101.04(b)(2) Rights of Mortgagor or Successor Omitted from Judicial Foreclosure.

Mortgagors and their successors who are not joined in a judicial action are not affected by any judgment or sale resulting from the proceedings. n403 Because purchasers at foreclosure sales acquire only the estate of the mortgagor at the time the mortgage was given, those owning interests which antedate the mortgage will not be affected by the foreclosure and are therefore not necessary parties. n404 When a mortgagor or successor has been omitted, the foreclosure purchaser takes title subject to the redemption interest of the omitted mortgagor or successor. n405 The omitted mortgagor or successor is entitled to redeem by paying the purchaser a sum equal to the amount of the debt secured at the foreclosure regardless of whether the purchaser paid a greater or a lesser sum. Before foreclosure, the mortgagor or successor could have redeemed for this amount and, since the mortgagor or successor is not affected by the proceedings, may still do so. Upon redeeming from the purchaser, the mortgagor or successor reacquires whatever interest was held when the mortgage was given, and the purchaser is left with the redemption price.

COMPUTER-ASSISTED RESEARCH

LEXIS: judicial! w/5 foreclos! w/50 mortgagor or
successor w/20 omit! w/5 party or parties

§ 101.04(b)(3) Rights of Junior Encumbrancers Omitted from Judicial Foreclosure.

The interests of junior lienors, like those of mortgagors, with the exception in a very few states of the interests of junior lessees, are not affected by judicial foreclosures to which they were not made parties. Despite the general rule that junior encumbrances are destroyed by a foreclosure, a purchaser at a foreclosure sale under a senior mortgage takes subject to any subordinate interests held by those not joined in the action. The omitted junior mortgagee is, therefore, entitled to foreclose the junior mortgage against the purchaser or seek damages. n406

Several states, though, hold that junior leases are cut off even if the tenants are omitted from the foreclosure proceeding. n407

Foreclosure of the junior mortgage by an omitted junior mortgagee is not always a viable remedy, since such a foreclosure will revive the senior mortgage which was foreclosed in the proceedings from which the junior mortgagee was omitted. n408 The revived senior encumbrance will then be held by the purchaser at the senior encumbrancer's foreclosure. Should the omitted junior mortgagee foreclose the junior mortgage, the purchaser at the junior mortgagee's foreclosure sale will take subject to the revived senior encumbrance and, thus, unless the property has a value in excess of the debt secured by the revived senior mortgage, lively bidding is unlikely at the foreclosure sale for the junior mortgage. Further, because the purchaser in the foreclosure from which the junior mortgagee was omitted acquired the equity of redemption, the purchaser has the right to redeem from the junior mortgagee. This right can be exercised at any time before foreclosure of the junior mortgage.

Foreclosure is not the only remedy available to omitted junior encumbrancers, for they may also "redeem the mortgage" by paying to the purchaser the amount due on the debt secured by the senior mortgage when it was foreclosed. n409 From the omitted junior's perspective, the first mortgage and the equity do not merge in the purchaser at the foreclosure from which the junior mortgagee was omitted; the omitted junior mortgagee may therefore redeem the senior mortgage in the hands of the purchaser. The junior mortgagee then holds two mortgages: the original junior mortgage and the senior mortgage acquired through redemption.

Regardless of the action taken by the omitted junior mortgagee (either foreclosure or redemption), the purchaser at the

senior foreclosure sale can always thwart the junior mortgagee. If the omitted junior mortgagee forecloses, the purchaser who then holds the revived senior mortgage can foreclose the revived mortgage and join the junior mortgagee. In many states, this second foreclosure of the senior encumbrance may be by strict foreclosure. n410 If the omitted junior mortgagee redeems, the purchaser who then holds the equity of redemption can redeem the senior mortgage acquired by the junior mortgagee by tendering the amount secured by the senior mortgage, which amount is the identical sum used by the junior mortgagee to redeem the senior mortgage.

COMPUTER-ASSISTED RESEARCH

LEXIS: forecl! w/50 junior w/15 omit!

§ 101.04(b)(4) Confirmation of the Sale.

In many states, probably most, n411 title does not pass to the purchaser at a judicial foreclosure until the sale is confirmed by the court. n412 Yet, not all states require confirmation. n413 Where confirmation is required, the successful bidder merely acquires the right to a judicial hearing to determine whether the sale should be confirmed and, without confirmation, acquires no legal interest in the realty, despite the acceptance of the bid by the party conducting the sale. n414 Upon acceptance, however, the purchaser cannot withdraw the bid and, subject to court confirmation, is contractually bound to close the sale. n415 In many states, though, the contract contains an implied covenant of marketable title on the part of the seller so that the purchaser will not be compelled to take a defective title. n416 If a defect in the sale proceedings produces a cloud on the title, it is generally agreed that the purchaser cannot be forced to close the transaction. n417 Equitable defenses, such as misrepresentation, may also justify a bidder's refusal to pay. n418

Desirous of encouraging responsible bidding at foreclosure sales, courts are somewhat reluctant to deny confirmation and generally do so only upon proof of prejudice to interested parties. n419 Failure to comply with statutory regulations of foreclosure sale may justify denying confirmation, n420 but generally a showing of prejudice is also required. n421 While confirmation lies within the discretion of the court, it is legal discretion requiring proof of recognized grounds if confirmation is to be denied. n422 Grounds are limited to matters surrounding the sale and do not include matters that could have been raised in the proceedings seeking an order of foreclosure. n423 This limitation follows from the fact that the order of foreclosure constitutes an appealable order so that an appeal lies though no confirmed sale has been had. n424

Improper behavior in the conduct of the sale can be grounds for denying confirmation. Confirmation may be denied if the purchaser and another collude to injure the mortgagor. n425 Where conflicting representations as to the terms of the sale are made in the notices, which may have influenced potential bidders, confirmation has been denied. n426 Failure to provide accurate notice of the place and time of the sale or to provide an accurate description of the realty has also been treated as justification for denying confirmation. n427

Inadequacy of the purchase price, without other factors, is seldom regarded as a sufficient basis for denying confirmation. n428 Some courts deny confirmation of sales for prices grossly disproportionate to the value of the land, n429 and a few have indicated a willingness to deny confirmation where the bid was not sufficiently inadequate to shock their consciences. n430 Nevertheless, it is generally accepted that inadequacy in the price, when coupled with slight evidence of some irregularity, will justify refusing confirmation. n431 In other states, confirmation may be denied unless the price bid equalled or exceeded the fair value of the land or that value is credited toward the debt. n432

Regardless of the existence of grounds, confirmation should be granted unless the court is persuaded that a higher price can be had on a resale than the bid returned for confirmation. n433

COMPUTER-ASSISTED RESEARCH

LEXIS: judicial w/5 foreclos! w/50 confirmation

§ 101.04(c) Private Foreclosure.

§ 101.04(c)(1) Private Foreclosure Generally.

In about half of the states, foreclosure can be effected by a private sale without judicial authorization or supervision. Typically, such a sale is made by a trustee under a deed of trust that confers a private power of sale exercisable upon default and request from the beneficiary, but mortgagees can also be empowered by the terms of the mortgage to conduct a private sale. n434 Secured parties usually prefer private over judicial foreclosure, because private sales are normally less time-consuming and expensive than judicial sales.

Private foreclosure is available only where the security instrument authorizes it. Even with such authorization, the secured party may elect to foreclose judicially. n435 The mere filing of an action to foreclose should not constitute an election to forego private foreclosure, because such an election occurs only upon the entry of a judgment of foreclosure. n436 In some states, judicial foreclosure is the only viable option for secured parties wanting to take deficiency judgments, since such judgments are sometimes forbidden after a private foreclosure. n437 Further, where uncertainty exists over the priorities of competing encumbrances, judicial foreclosure would seem preferable in order to obtain a court determination of the priorities. n438 Judicial foreclosure may be the only avenue of recourse against the property, other than perhaps obtaining and foreclosing a judgment lien in an action on the debt, where the security takes the form of an equitable mortgage since mortgage substitutes usually contain no provisions authorizing private foreclosure.

Private foreclosures can be highly regulated by statute. The California statutes, for example, require that defaulting mortgagors or trustors be afforded a three-month period within which to cure defaults and that both a notice of default and an election to sell and a notice of sale be recorded and served on the mortgagor or trustor, or their successors, junior lienors, and those who have requested notice. n439 Other states have similar requirements. n440 In contrast, notice requirements in some states are minimal at best, and some of them would appear to be unconstitutional. n441 The place and conduct of the sale may also be regulated by statute.

A properly conducted private foreclosure sale will transfer to the purchaser whatever title the mortgagor or trustor held when the security interest was created. n442 The purchaser will take subject to such interests as predate the interest being foreclosed unless the recording statutes or the common law priority principles produce a contrary result. n443 Yet, due to the high degree of statutory regulation of private foreclosures, opportunities abound for defects to arise in the conduct of these sales, giving rise to disputes over the finality of the sale. n444 Similarly, this pervasive regulation opens the door to claims that sufficient state action is present to entitle affected parties to due process safeguards which are often not afforded under the statutes. n445 Nevertheless, in the main, private foreclosure usually provides a relatively rapid and effective means of foreclosure.

COMPUTER-ASSISTED RESEARCH

LEXIS: "power of sale" or "private sale" w/10
foreclosure

§ 101.04(c)(2) Purchaser's Title; Faulty Sales.

If a private foreclosure sale is conducted in perfect compliance with all statutory and constitutional requirements, as well as with the requirements set forth in the security instrument, the purchaser acquires good title to whatever interest or estate the mortgagor or trustor held when the foreclosed mortgage or deed of trust was given. n446 When the sale is flawed by a failure to comply with one or more of these requirements, n447 the title acquired by the purchaser depends

upon the nature of the flaw and whether the purchaser qualifies as a bona fide purchaser for value.

Theoretically, the purchaser at a private sale is buying a legal title. Under a deed of trust, the trustee holds a legal title in trust for both the trustor and the beneficiary and has the power to convey that title upon default and request of the beneficiary. A mortgagee too, holding a power of sale, can convey a legal title; in a title theory state, the mortgagee with such a power acquired a legal title when the mortgage was created, and in lien theory states, though the mortgagee obtained only a lien, the power enables the mortgagee to transfer the mortgagor's legal title. But, when the power is exercised in violation of the laws or of the security instrument terms, questions arise as to whether compliance with the laws or instrument provisions is a prerequisite for the exercise of the power so that the purported sale is utterly void, or whether the violation is merely sufficiently egregious as to produce a voidable sale, or whether it is so insignificant as to have no impact on the sale.

§ 101.04(c)(2)(i) Void Sales.

Courts frequently speak of flaws in private sales so serious that they produce a void sale. Of course, no sale is ever void in the absolute sense since the mortgagor, trustor, or his successor may elect to take no steps to set the sale aside, that is, in effect to ratify the sale. What the courts mean in denominating a sale as void is that adversely affected parties may have the sale set aside even though the property passed into the hands of a bona fide purchaser. n448 In this sense of the term, there are very few void sales. Most of the cases in which a sale to a bona fide purchaser was set aside involved sales by trustees or mortgagees who lacked the power to sell. n449 Thus, where a trustee was authorized by the deed of trust to sell upon request of the beneficiary but sold without such a request, the purchaser's title was found void. n450 So too, a void sale resulted where there was no default since, without a default, there is no power to foreclose. n451 Under the federal bankruptcy laws, it should be noted, a sale after a bankruptcy petition has been filed may be void. n452

Some courts have been moved to characterize as void those sales that produce fundamentally unfair results; but in most of these cases the foreclosing creditor was the purchaser and did not qualify as a bona fide purchaser, so that the decisions can be defended on the ground that the sales were merely voidable. n453 Nevertheless, despite the tendency to treat defects as, at most, resulting in a voidable rather than void title, "substantially defective sales have been held void where the defect lay in a particular as to which ...[a] statutory provision was regarded as mandatory ... ." n454 In Oregon, under this approach, a trustee's sale has no effect on the interests of persons entitled to but not given notice of the sale. n455 Unfortunately, the cases provide no "bright line" to distinguish between those defects which are so substantial as to produce void sales and those which result in merely voidable title. n456

COMPUTER-ASSISTED RESEARCH

LEXIS: foreclosure w/15 private or trustee
w/50 void w/3 sale

§ 101.04(c)(2)(ii) Voidable Sales.

Where a defect is not so egregious as to make the sale utterly void but not so inconsequential as to be overlooked, the sale will be voidable; that is, it can be set aside at the request of an injured party so long as the legal title has not been transferred to a bona fide purchaser. This follows from the traditional common law rule that a subsequent bona fide purchaser of a legal title takes free of hidden equities. The right of an injured party to set aside a deed because of flaws that produce only a voidable title is an equitable right cut off by transfer to a bona fide purchaser. A purchaser at a private foreclosure sale may qualify as a bona fide purchaser. A mortgagee purchasing at a sale conducted by the mortgagee will not likely qualify as a bona fide purchaser, since the mortgagee/purchaser should be aware of the irregularity which makes the sale voidable; but a beneficiary under a deed of trust may qualify by making an adequate bid and taking without notice of the flaw. n457

Various formulations have been employed to describe when a voidable sale occurs. Sometimes abuse of the power of sale coupled with injury is identified as the standard. n458 The most frequently articulated standard is that the flaw must have actually chilled the bidding, for without such effect no prejudice is established. n459 One recent decision indicated that the presence of an unjust extreme was necessary before a sale would be set aside. n460

A sale is neither void nor voidable merely because the price received at the foreclosure sale was inadequate or less than the fair value of the interest sold. n461 However, inadequacy in the price when accompanied by some irregularity, however slight, is often said to be sufficient basis for rendering the sale voidable. n462 On the other hand, some courts will set the sale aside where the inadequacy is so gross as to shock the conscience and to raise a presumption of fraud. n463

Except where sufficient state action is present to entitle affected parties to procedural due process, it is generally held that such parties are entitled only to such notice as required by statute or the security instrument. n464

Even where by statute the mortgagor is entitled to notice at the last known address, the party conducting the sale might not be obliged to take steps to ascertain the mortgagor's address, but may rely on the last address known to such party. n465 Thus, where the requirements of the security instrument and of applicable statutes are satisfied, the lack of actual notice to affected parties does not render a private sale voidable. n466

Many states have statutory presumptions of the truthfulness of recitations in the foreclosure deed that proper notice has been given. n467 Where the purchasers qualify as bona fide purchasers and receive deeds containing such recitations, the sale cannot be set aside on grounds of lack of notice absent a finding that state action is sufficiently present to entitle the "sold-out" parties to procedural due process. n468

Because of the conflict inherent in purchasing at a sale conducted by the purchasing party, most states characterize a purchase by a mortgagee conducting the sale as voidable. n469 Likewise, a voidable title results when a trustee purchases at a sale the trustee conducts. n470 On the other hand, where an independent trustee conducts the sale under a deed of trust, most courts conclude that the obligations of the trustee sufficiently insulate the beneficiary so that a purchase by the beneficiary is not voidable by reason of the purchase alone. n471

Private sales have also been set aside as voidable where collusive or unconscionable conduct has suppressed bidding at the sale. Although, as a general rule, the party conducting the sale may accept, and indeed may be obliged to accept, the highest bid even if it is the only bid submitted, n472 the party conducting the sale nevertheless owes the mortgagors and others with interests affected by the sale the duty of acting fairly and reasonably to protect their interests. n473

Where several parcels are covered by the security instrument, the debtor often has the right to insist that foreclosure proceed against each parcel separately. n474 Where the debtor makes a timely demand for sale by parcels, but the sale is in bulk, the sale may be set aside. n475

COMPUTER-ASSISTED RESEARCH

LEXIS: private w/15 sale or foreclos! w/50
voidable

§ 101.04(c)(3) Due Process and Private Foreclosure.

Although most courts which have been asked to pass on the question have concluded that private foreclosures brought by private parties do not entail sufficient state involvement to trigger the procedural due process requirements of the *14th Amendment*, n476 some courts have found otherwise. Further, it would seem that procedural due process

guarantees are always implicated when the government is the foreclosing mortgagee. n477

The 14th Amendment to the Federal Constitution provides, among other matters, that no state shall deprive anyone of property without due process of law. Due process has been held to include notice of proceedings and adequate opportunity to appear before a tribunal to state one's case. Where state action is involved, the Constitution demands that reasonable steps be taken to provide actual notice to defendants of suits filed against them. Notice by publication does not suffice if reasonable means are available to give actual notice; in those instances, such steps to give actual notice must be taken. n478

Notice other than by publication to mortgagors, their successors, and junior encumbrancers is statutorily not required at all in some states, n479 while in others notice is statutorily sufficient if delivered at the address set forth in the mortgage or elsewhere, even though such address is not the actual address of the party and even though the foreclosing mortgagee is aware of or has the means of discovering the true address. n480 In light of the constitutional requirement that reasonable steps be pursued to provide actual notice, the validity of private foreclosure sales is questionable where concerned parties were not personally alerted to the proceedings and where reasonable steps were not taken to provide them with actual notice. Yet, unless state action within the meaning of the 14th Amendment can be found, those adversely affected by a foreclosure have no constitutional basis for complaint if they are not afforded notice of the foreclosure or given hearing before the sale.

While other bases n481 for finding state action in a private foreclosure have been advanced, only one of them has won wide acceptance: that is, that the state is directly or indirectly involved in the sale. State involvement may be predicated upon participation of state officials in the conduct of a private foreclosure instituted by private mortgagees or in the institution of private foreclosure by the government as mortgagee.

It is rare that the state is deemed to participate in private foreclosures, since private foreclosures sales usually do not require any involvement by the government. In North Carolina, however, state officials do participate in private foreclosures, and this participation has prompted decisions invalidating private foreclosures where the procedural due process obligations imposed on the states by the *14th Amendment* have not been satisfied. n482

When the government is the foreclosing mortgagee, state action is, of course, present. n483 States and their instrumentalities are bound by the due process clause of the 14th Amendment when foreclosing mortgages held by them, and the federal government is similarly bound by the due process provisions of the 5th Amendment. Not all entities connected with the federal government, though, are regarded as instrumentalities of the government for purposes of the due process clause. Those entities that lend federal funds and take back security interests surely are constrained by the due process clause. The Farmers Home Administration has been held to be acting for the United States in foreclosing mortgages it took as security for such loans. n484 Likewise, a federal agency foreclosing privately on a mortgage it had insured and then, after default, accepted from the mortgagee would be acting for the government. n485 With other types of entities, matters are not so clear. Some federally chartered corporations, organized to provide some public benefit, are wholly owned by the United States; others are owned wholly or partially by private investors. The Federal National Mortgage Association (FNMA), for example, is entirely privately owned, but its policies are heavily regulated by the government, and several of its directors are appointed by the president. Notwithstanding the high degree of government regulation, the Sixth Circuit ruled that, in foreclosing its mortgages, FNMA does not act as the government. n486 The Federal Land Bank, which is a wholly-owned cooperative, has also been found not to be subject to the due process constraints in foreclosing its mortgages. n487

In the event that a private foreclosure sale is found to have been concluded in violation of due process entitlements, the impact on the rights of those who trace their titles to the foreclosure is unclear. n488

COMPUTER-ASSISTED RESEARCH

LEXIS: private w/15 sale or foreclosur! w/50 due pre/1
process

§ 101.04(d) Foreclosure by Entry.

Several state statutes permit foreclosure by self-help; that is, they allow mortgagees to secure possession of the premises peaceably without judicial oversight or sanction and bar the equity of redemption if possession is maintained for a specified period of time. n489 The period of time during which possession must be kept varies from one year in New Hampshire to three years in Massachusetts. n490 The statutes require that notice of foreclosure by entry and possession be given the mortgagor or successor. In Massachusetts, filing a certificate of entry in the land record satisfies the notice requirements, n491 while elsewhere other types of notice are called for. n492

Deficiency judgments are possible after foreclosure by entry and possession. n493

COMPUTER-ASSISTED RESEARCH

LEXIS: foreclos! w/15 peaceable w/15 entry or possess!

§ 101.04(e) Marshalling: General Principles.

Because it often happens that several parcels have been encumbered to secure a debt and that others besides the mortgagor have subordinate interests in one or more of these parcels which could be prejudiced by a foreclosure, equity, in an effort to minimize the prejudice to the junior interest holders, has traditionally fettered the discretion of the secured party to determine the order in which the senior secured party will foreclose on the various parcels. In general, equity requires the senior encumbrancer to marshal the claims against the security to preserve, if possible, the claims of the junior interest holders.

Fact patterns raising marshalling issues frequently fall into one of two categories. This has led to two articulations of the marshalling principles, but all too often situations arise in which the categories are blended. In the first category are cases in which the mortgagor has given a mortgage on several parcels to one creditor and a junior mortgage on a smaller number of parcels to a second creditor. In this scenario, the first mortgagee is said to have two funds from which to seek satisfaction, i.e., the parcels covered by the mortgage not included in the junior's mortgage as well as the parcels covered by the junior's mortgage, while the junior mortgagee has only one fund, i.e., those parcels covered by the junior mortgage. Because a foreclosure by the senior mortgagee against any parcel covered by the junior mortgagee would destroy the junior mortgagee's interest in that parcel, equity may compel the senior to proceed first against those parcels not encumbered by the junior mortgage. If foreclosure against those parcels does not produce sufficient funds to satisfy the senior's debt, then foreclosure by the senior against the remaining parcel or parcels will be allowed. n494

The second category relates to successive transfers of parcels encumbered by a blanket mortgage, most simply illustrated where the mortgagor, owning two parcels, mortgages them both for the same debt and then sells one to a third party while retaining the other. Here, the inverse order of alienation aspect of marshalling is applied to require the mortgagee to proceed first against the retained parcel before foreclosing against the equity of the mortgagor's grantee. n495 Of course, this result assumes that the grantee did not assume or "take subject to" all or part of the mortgage debt; otherwise, to prevent the mortgagee from interfering with the surety relation between the mortgagor and the grantee and/or the grantee's land, the mortgagee should be required to go first against the grantee or the grantee's parcel. n496

Because cases arise in which both the two funds and the inverse order of alienation principles seem applicable, adherence to the traditional formulations can produce confusion. n497 Consider the facts of a 1990 Oklahoma case, n498 *Equitable Life Assurance Soc'y v. Lane*, in which an insurance company held a first mortgage on a 140-acre parcel, and a bank held a second mortgage on 139 of those acres, and Lane held title to the single acre covered by the

insurance company's mortgage but not covered by the bank's mortgage. Under the two funds rule, the bank argued that the senior mortgage should be foreclosed first against the one acre held by Lane. Lane, on the other hand, argued that since his deed preceded the bank's mortgage, the inverse order of alienation principle should be applied to preclude foreclosure against his property until all other parcels had been exhausted.

Neither principle of marshalling should be invoked when doing so would prejudice the secured party against whom it is sought to compel marshalling. n499 A secured party with a senior position should not be subjected to a risk of losing the full satisfaction of the secured claim. n500 In passing on requests to marshal, courts often inquire into whether the security not encumbered by the junior's interest will be adequate to discharge the senior lienor's claim; for, if it is not, the senior should not be forced to suffer the burden of bringing several actions in order to avoid loss of the security of junior encumbrancers. n501 Nor should marshalling be applied where the rights of parties other than the senior mortgagee and the mortgagor might be jeopardized. n502

Marshalling may be invoked whether foreclosure is by court proceeding or by private sale. However, if one entitled to marshal does not demand it before foreclosure, the right may be lost. Where a foreclosure takes place in a bankruptcy proceeding, an affirmative request to marshal through an adversary proceeding is required. n503

COMPUTER-ASSISTED RESEARCH

LEXIS: marshal! /50 foreclos!

§ 101.04(e)(1) Two Funds Rule.

The two funds rule provides that, as between competing mortgagees, where a senior mortgagee has more distinct parcels as security than a junior mortgagee, the senior mortgagee must first proceed against the parcels not burdened by the junior encumbrance. The principle is designed to prevent the destruction of junior security interests where senior mortgagees will not be injured by deferring foreclosure on the parcels burdened by junior mortgages until it can be determined if enough can be realized from the sale of the lands burdened only by the senior mortgages to retire the senior debts.

It has been held that three requirements are necessary to marshal under this rule.

> More specifically, before a court of equity will marshal assets between two persons it must appear that (1) they are creditors of the same debtor, (2) there are two funds belonging to that debtor, and (3) only of the creditors has the right to resort to both funds. n504

Thus, marshalling was denied where the blanket senior mortgage holder was a creditor of a partnership and the other mortgagee was a member of the partnership since the partnership and partner were distinct debtors. n505 Nor was marshalling permitted where one mortgagor was a corporation and the other mortgagor was the owner of all or a major portion of the shares in the corporation. n506

As a general rule, mortgagors are not permitted to invoke the two funds rule since applying it to them would bring about the unilateral modification of their contracts with their mortgagees, who bargained for the right to reach all the debtor's mortgaged property at any time upon default. n507 However, if the mortgagor should become a junior mortgagee, the mortgagee ought then to be in a position to compel marshalling. For example, if the mortgagor subdivides land and conveys one of the resultant parcels to a third party and takes back a second mortgage as security for part of the purchase price, the blanket mortgagee should be compelled to foreclose first against the parcel held by the third person.

COMPUTER-ASSISTED RESEARCH

LEXIS: marshal! /50 two pre/1 fund /50 senior or junior
/50 mortgag!

§ 101.04(e)(2) Inverse Order of Alienation.

The cornerstone of the inverse order of alienation principle is that a purchaser who buys encumbered property and pays the full purchase price (that is, a buyer who neither assumes nor takes "subject to" the mortgage debt) has a right to expect the seller to discharge the mortgage. In such a case, as between the seller and buyer, the buyer's land is surety, and the seller is principal obligor. n508 Thus, where the seller has previously encumbered several parcels to secure a debt and then sells one of them to a buyer, who pays the full contract price, upon a default, the buyer should be able to force the mortgagee to respect this principal-surety relationship, if the mortgagee can do so without injury to the mortgagee's interest, and to proceed against the seller's retained parcels before seeking recourse against the buyer's property. The buyer has an equity in the retained land of the seller so as to compel marshalling.

The operation of the inverse order of alienation principle seems almost self-evident with respect to encumbered lands retained by mortgagors; but such is not the case when the mortgagor has transferred the mortgagor's equity in all the encumbered lands. Assume that after mortgaging two lots to secure a single debt, the mortgagor sells one lot to A and later the other lot to B, neither of whom assumes or "takes subject to" the mortgage debt. Before the sale to B, A clearly had the right to expect the mortgagee to proceed first against the lot retained by the mortgagor. But does this right survive the transfer of the second lot to B? Some courts would answer affirmatively if B has notice of the prior equity of A to marshal against the mortgagor under the general rule that a purchaser of legal title takes subject to prior equities of which the purchaser is aware. Surely, this ought to be the result where B has actual knowledge of the prior conveyance to A, for then B should also appreciate that A may have had the right to compel the mortgagee to go against the lot B now owns. The difficult question is whether the recordation of the deed to A should put B on notice of A's prior equity in B's lot. The result should turn upon whether the deed from the mortgagor to A is in B's chain of title, n509 and that is a matter about which jurisdictions are divided. Some hold that A's deed is not in B's chain, since it does not convey an interest in the land B was buying. Others hold that all deeds from the common grantor are in all subsequent grantees' chains of title. n510 If A did not record A's deed and if B had no actual knowledge of that deed, it would seem that B is protected under the recording acts from a claim by A to marshal against B. n511

A mortgagor's grantee who assumes or takes "subject to" the mortgage debt is not entitled to the benefit of the inverse order of alienation principle, since such a grantee and/or the grantee's land, as between the grantee and the mortgagor, is the principal obligor. In fact, in such cases, the mortgagor, with respect to any retained mortgaged lands, can compel marshalling against the land transferred to the grantee. n512 Thus, in the example last given, if A had assumed the mortgage debt or taken "subject to" it, not only would A be unable to force the mortgagee to proceed against the mortgagor's retained land first if that could be done without injury to the mortgagee, but the mortgagor would be able to force the mortgagee to proceed first against A's land if the mortgagee would not be harmed by deferring foreclosure against the mortgagor's land. n513

Where there are successive junior mortgages on parcels burdened by a senior blanket mortgage, the inverse order of alienation principle can also be applied. Suppose, after giving a mortgage on two parcels to secure a single debt, a mortgagor borrows from X and gives X a second mortgage on one of the parcels and later borrows from Y and gives Y a second mortgage on the remaining parcel. Before the mortgage to Y, X could compel the senior mortgagee to proceed first against the parcel then retained by the mortgagor under either the two funds or the inverse order of alienation principles. Here the two funds principle seems inapposite since both X and Y cannot invoke it simultaneously, for that would leave the senior mortgagee unsecured. Some states in such facts resort to the inverse order of alienation rule, holding that the earlier right of X to force marshalling against the mortgagor's retained land created in that land an equity in favor of X in that land which survived the mortgaging of the retained parcel to Y. n514 These courts are treating successive junior mortgagees just as they would successive purchasers of the equity. n515 Other courts refuse to employ the inverse order of alienation rule against competing successive junior mortgagees. Reasoning that the later

junior mortgagees would invariably be rendered totally unsecured if the blanket mortgagees were forced to go against them first, these courts prorate the senior's debt among the juniors. n516

COMPUTER-ASSISTED RESEARCH

LEXIS: marshal! w/50 inverse pre/1 order w/5 alienat!
w/50 senior or junior w/15 mortgage!

FOOTNOTES:
(n1)Footnote 360. *See* § 101.01(a), *supra.*

(n2)Footnote 361. *S.B.D., Inc. v. Sai Mahen, Inc., 560 N.E.2d 86 (Ind. App. 1990) . See also Ward v. Bond & Trust Co., 243 F.2d 476 (9th Cir. 1957) , reh'g denied,* (1957); *Duraflex Sales & Serv. Corp. v. Mechanical, 110 F.3d 927 (2d Cir. 1997)* ; *New Milford Sav. Bank v. Jajer, 708 A.2d 1378 (Conn. App. 1999)* (Strict foreclosure and practice book rule).

(n3)Footnote 362. Conn. Gen. Stat. Ann. § 49-15; *Hartford Federal Sav. & Loan Ass'n v. Tucker, 491 A.2d 1084 , cert. denied, 474 U.S. 920 (1985)* (available at discretion of court); *Connecticut Sav. Bank v. Burger, 579 A.2d 1097 (Conn. App. 1990)* (junior encumbrancer may insist on foreclosure by sale). On July 24, 1991, a search by the author for "strict foreclosure after 1989" in LEXIS produced 54 Connecticut cases of strict foreclosure; *Atlantic Oceanic Kampgrounds, Inc. v. Camden Nat'l Bank, 473 A.2d 884 (Me. 1984)* ; Vt. Stat. Ann. tit. 12, § 4528 (1973); Vt. R. Civ. Proc. § 80.1(a), (g) (1988); *Ward v. Ward, 583 A.2d 577 (Vt. 1990)* ; *Aldrich v. Lincoln Land Corp., 294 A.2d 853 (Vt. 1972)* ; *In re Chase, 328 B.R. 675 (Bkrtcy. D. Vt. 2005) .*

(n4)Footnote 363. *Eastern Idaho Prod. Credit Ass'n v. Placerton, Inc., 606 P.2d 967 (Idaho 1980)* ; *Citicorp Mtg., Inc. v. Pessine, 570 A.2d 481 (N.J. Super. 1990) , cert. denied, 584 A.2d 213 (N.J. 1990)* ; *Western Bank, Santa Fe v. Fluid Assets Dev. Corp., 806 P.2d 1048 (N.M. 1991) .*

(n5)Footnote 364. *Banker's Mtg. Co. v. O'Donovan, 20 P.2d 809 (Kan. 1933)* ; *Henthorn v. Sec. Co., 79 P. 653 (Kan. 1905)* ; *Mid Kan. Fed. Sav. & Loan of Wichita v. Zimmer, 755 P.2d 1352 (Kan. App. 1988) .*

(n6)Footnote 365. *McGraw v. Premium Fin. Co. of Mo., 637 P.2d 472 (Kan. App. 1981)* ; *Powell v. Giddens, 555 A.2d 4 (N.J. Super. 1989)* ; *Western Bank v. Fluid Assets Dev. Corp., 806 P.2d 1048 (N.M. 1991) .*

(n7)Footnote 366. *Contra Banker's Mtg. Co. v. O'Donovan, 20 P.2d 809 (Kan. 1933) .*

(n8)Footnote 367. *Porter v. Smith, 486 N.W.2d 846 (Neb.1992)* ; *Murphy v. Murphy, 466 N.W.2d 87 (Neb. 1991)* ; *Beitelspacher v. Winther, 466 N.W.2d 638 (S.D. 1991)* ; *Chamberlain Livestock Auction, Inc. v. Penner, 462 N.W.2d 479 (S.D. 1990)* ; *Post v. Schwall, 460 N.W.2d 794 (Wis. 1990) .*

(n9)Footnote 368. *Factor v. Fallbrook, 593 A.2d 520 (Conn. App. 1991)* ; *Fairfield Plumbing & Heating Supply Corp. v. Kosa, 600 A.2d 1 (Conn. 1991)* (applies to strict foreclosure of judgment liens as well as mortgages); *Eichman v. J & J Bldg. Co., 582 A.2d 182 (Conn. 1990)* ; *Hammond v. Stiles, 567 A.2d 444 (Me. 1989)* ; *Licursi v. Sweeney, 594 A.2d 396 (Vt. 1991)* ; *LaFarr v. Scribner, 549 A.2d 651 (Vt. 1988) .*

(n10)Footnote 369. In Maine, if the mortgagee sells the property to a bona fide purchaser within two years of the expiration of the redemption period, he must pay to the debtor the surplus. Me. Rev. Stat. Ann., tit. 14, § 6204-B. *Cf. Atlantic Oceanic Kampgrounds, Inc. v. Camden Nat'l Bank, 473 A.2d 884 (Me. 1984)* (denying obligation to account for surplus under earlier statute).

(n11)Footnote 370. Nelson & Whitman, *supra* note 9, § 7.11 at 505-06.

(n12)Footnote 371. *E.g., Rio Rico Properties v. Santa Cruz County, 834 P.2d 166 (Ariz. Tax 1992)* ; *Acadian Bank v. Foret, 602 So. 2d 1097 (La App. 1992)* ; *Greenwood Founders Bank & Trust Co. v. Upsher, 830 P.2d 1355 (Okla. 1992)* ; *Federal Nat'l Mtg. Ass'n v. Brooks, 405 S.E.2d 604 (S.C. 1991)* .

(n13)Footnote 372. Not true in California. Cal. Civ. Proc. Code § 873.290. *See also* Ohio Rev. Code Ann. § 2329.31.

(n14)Footnote 373. *Armstrong v. Csurilla, 817 P.2d 1221 (N.M. 1991)* ; *Laub v. Warren Guar. Title & Mtg. Co., 8 N.E.2d 258 (Ohio App. 1936)* (decided before the enactment of Ohio Rev. Code Ann. § 2329.31).

(n15)Footnote 374. *Alliance Mortgage Co. v. Rothwell, 44 Cal. Rptr. 2d 352 (Cal. 1995)* .

(n16)Footnote 375. *First Tex. Sav. Ass'n v. Comprop Inv. Props., Inc., 752 F. Supp. 1568 (M.D. Fla. 1990)* ; *Bank of Hawaii v. Horwoth, 787 P.2d 674 (Haw. 1990)* ; *Rosselot v. Heimbrock, 561 N.E.2d 555 , juris. mot. overruled, 534 N.E.2d 1212 (Ohio 1989)* ; *Tower Funding, Ltd. v. David Berry Realty, Inc., 755 N.Y.S.2d 413 (2003)* (a defense of usury could not be used to prevent the mortgage foreclosure); *BCGS, LLC. v. Jaster, 700 N.E.2d 1075 (Ill. App. 1998)* (Disapproval of judicial foreclosure justified if a party was unfairly prejudiced).

(n17)Footnote 376. *12 U.S.C. § 2001* - 2279aa-14 (1988 & Supp. I 1989 & Supp. II 1990).

(n18)Footnote 377. *Farm Credit Bank of Spokane v. Debuf, 757 F. Supp. 1106 (D. Mont. 1990)* .

(n19)Footnote 378. *Baypoint Mtg. v. Crest Premium Real Estate Invs. Retirement Trust, 214 Cal. Rptr. 531 (1985)* . Because of the grace period, the court in *Baypoint Mortgage* reasoned time was not of the essence so that foreclosure would be inequitable.

(n20)Footnote 379. *Faber v. Althoff, 812 P.2d 1031 (Ariz. 1990) , reconsideration denied* (1991).

(n21)Footnote 380. *See* § 101.07(g), *infra.*

(n22)Footnote 381. *Capital Bank v. Needle, 596 So. 2d 1134 (Fla. App. 1992) , reh'g denied* (1992); *In re Brown, 126 B.R. 481 (Bankr. D. Md. 1991)* ; *Kennebec Fed. Sav. & Loan Ass'n v. Kueter, 695 A.2d 1201 (Me. 1997)* .

(n23)Footnote 382. *United States v. Whitney, 602 F. Supp. 722 (W.D.N.Y. 1985)* ; *Darnell v. Denton, 669 P.2d 981 (Ariz. 1983) , reh'g denied; Standard Bank & Trust Co. v. Callaghan, 574 N.E.2d 711 (Ill. App. 1991) , appeal denied, 584 N.E.2d 140 (Ill. 1991)* ; *First Ind. Fed. Sav. Bank v. Hartle, 567 N.E.2d 834 (Ind. App. 1991)* ; *Bank of Pennsylvania v. G/N Enters., 463 A.2d 4 (Pa. Super. 1983). Contra Citibank, N.A. v. Covenant Ins. Co., 567 N.Y.S.2d 983 (1991) . See also Baker v. Gardner, 770 P.2d 766 (Ariz. 1988)* ; *Southwest Sav. & Loan Ass'n v. Mason, 747 P.2d 604 (Ariz. App. 1987) , vacated 751 P.2d 526 (1988)* .

(n24)Footnote 383. *See infra* text accompanying note 818.

(n25)Footnote 384. *Davis v. Huntsville Prod. Credit Ass'n, 481 So. 2d 1103 (Ala. 1990)* ; *Sumitomo Bank of Calif. v. Davis, 6 Cal. Rptr. 2d 381 (1992)* ; *Garcia v. Stewart, 906 So. 2d 1117 (Fla. App. 2005)* (senior mortgages do not partake of the surplus).

(n26)Footnote 385. *Bailey Mtg. Co. v. Gobble-Fite Lumber Co., 565 So. 2d 138 (Ala. 1990)* ; *Arkansas Teacher Retirement Sys. v. Coronado Props., Ltd., 801 S.W.2d 50 (Ark. App. 1990)* ; *Murray v. Chulak, 300 S.E.2d 493 (Ga. 1983)* ; *William H. Metcalfe and Sons v. Canyon Defined Benefit Trust, 569 A.2d 669 (Md. 1990)* ; Liberty View Ltd. P'ship v. 90 West Assocs., 571 N.Y.S.2d 376 (1991) ; *Farmers Trust Co. v. Bomberger, 523 A.2d 790 (Pa. Super. 1987)* ; Third Nat'l Bank in *Nashville v. McCord, 688 S.W.2d 446 (Tenn. App. 1985) , application for permission to appeal denied* (1985); *Garcia v. Stewart, 906 So. 2d 1117 (Fla. App. 2005)* ; *Fidelity Bank v. King, 109 P.3d 180* (junior lienholder not entitled to surplus because lienholder did not join the foreclosure action); *Bank of America, N.A. v. BA*

Mortgage, LLC, 111 P.3d 226 (N.M.App. 2005) .

(n27)Footnote 386. *United States v. United Penn Bank, 608 F. Supp. 685 (M.D. Pa. 1985)* , *aff'd, 786 F.2d 1149 (3d Cir. 1986)* .

(n28)Footnote 387. *Fleet Real Estate Funding Corp. v. Koch, 805 P.2d 1206 (Colo. App. 1991)* .

(n29)Footnote 388. *Citicorp Mtg., Inc. v. Pessine, 570 A.2d 481 (N.J. Super. 1990)* , *cert. denied, 584 A.2d 213 (N.J. 1990)* ; *District of Columbia v. Mayhew, 601 A.2d 37 (D.C. 1991)* ; *Hembree v. Mid-America Federal Sav. & Loan Ass'n, 580 N.E.2d 1103 (Ohio App. 1989)* ; *Philadelphia Hous. Auth. v. Barbour, 592 A.2d 47 (Pa. Super. 1991)* , *appeal granted, 598 A.2d 284 (Pa. 1991)* ; *States Resources Corp. v. The Architectural Team, Inc., 433 F.3d 73 (1st Cir. 2005)* (inform junior parties interested in purchasing property); *In re Oligbo, 328 B.R. 619 (Bkrtcy. E.D.N.Y. 2005)* (lease tenants or month-to-month tenants need not be included) (anyone with title or a lien on property after mortgage created should be included); *Rockaway Imp., LLC. v. Danco Transmission Corp., 9 Misc.3d 210 (N.Y.City Civ.Ct. 2005)* (tenants should be included in foreclosure proceedings); *English v. Bankers Trust Co. of California, N.A., 895 So. 2d 1120 (Fla. App. 2005)* (include holder of fee simple).

(n30)Footnote 389. *United Cos. Fin. Corp. v. Mellon Fin. Servs. Corp. No. 7, 922 F.2d 270 (5th Cir. 1991)* (service by mail sufficient); *Island Fin., Inc. v. Ballman, 607 A.2d 76 (Md. App. 1992); Snyder v. New Hampshire Sav. Bank, 592 A.2d 506 (N.H. 1991)* (strict foreclosure); *Abdoney v. York, 903 So. 2d 981 (Fla. App. 2005)* (even if senior and junior mortgagee are same person and junior interest intentionally left out); *In re Oligbo, 328 B.R. 619 (Bkrtcy. E.D.N.Y. 2005)* (if necessary parties left out of foreclosure proceeding, their rights survive foreclosure).

(n31)Footnote 390. *In re Comcoach Corp., 19 B.R. 231 (Bankr. S.D.N.Y. 1982)* ; *Arkansas Teacher Retirement Sys. v. Coronado Props., Ltd., 801 S.W.2d 50 (Ark. App. 1990)* ; *Baldi v. Chicago Title & Trust Co., 446 N.E.2d 1205 (Ill. App. 1983)* ; *Snyder v. New Hampshire Sav. Bank, 592 A.2d 506 (N.H. 1991)* , *reh'g denied* (1991).

(n32)Footnote 391. *NCNB South Carolina v. Floyd, 399 S.E.2d 794 (S.C. App. 1990)* (notice mailed to address supplied at time of loan sufficient); *New Brunswick Sav. Bank v. Markouski, 587 A.2d 1265 (N.J. 1991)* (personal service or service by mail required if address reasonably ascertainable); *Western Bank, Santa Fe v. Fluid Assets Dev. Corp., 806 P.2d 1048 (N.M. 1991)* (notice by publication insufficient); *Alliance Mortg. Co. v. Pastine, 104 P.3d 405 (Kan.App. 2005)* ((service of notice of mortgagee sale sufficient, even though not served additional notice of sherriff's sale, where published notice is all the law required); *Salomon Bros. Realty Corp. v. Alvarez, 22 A.D.3d 482* (N.Y.A.D. 2 Dept. 2005) (deceased mortgagor's heirs must be joined); *Ridge Realty v. Goldman, 701 N.Y.S. 2d 69 (1999)* .

(n33)Footnote 392. *Wittman v. Chrysler Corp., 245 Cal. Rptr. 20 (1988)* ; *Brost v. L.A.N.D., Inc., 680 P.2d 453 (Wash. App. 1984)* . *In re Oligbo, 328 B.R. 619 (Bkrtcy. E.D.N.Y. 2005)* (if necessary parties left out of foreclosure proceeding, their rights survive foreclosure).

(n34)Footnote 393. *Hutchison v. Barr, 190 P. 799 (Cal. 1920)* .

(n35)Footnote 394. *Dobbins v. Economic Gas Co., 189 P. 1073 (Cal. 1920)* ; *Fingerhut Corp. v. Suburban Nat'l Bank, 460 N.W.2d 63 (Minn. App. 1990)* .

(n36)Footnote 395. *See, e.g., Agribank, FCB v. Rodel Farms, Inc., 623 N.E.2d 1016 (Ill. 1993)* (mortgagee need not join tenant in possession under lease recorded after recording of lis pendens; tenant's actual possession did not impart notice to mortgagee).

(n37)Footnote 396. The lis pendens doctrine does not operate against prior interests. *Garcia v. Stewart, 906 So. 2d 1117 (Fla. App. 2005)* (unnecessary parties include lienholders before mortgage was created).

(n38)Footnote 397. *Bremen Bank & Trust Co. of St. Louis v. Muskopf, 817 S.W.2d 602 (Mo. App. 1991)* , *reh'g*

and/or transfer denied (1991); *Hembree v. Mid-America Fed. Sav. & Loan Ass'n, 580 N.E.2d 1103 (Ohio App. 1989)* .

(n39)Footnote 398. *E.g.,* Cal. Civ. Code § 1214.

(n40)Footnote 399. *In re Southerton Corp., 46 B.R. 391 (M.D. Pa. 1982)* ; *Valentine v. Portland Timber & Holding Co., 547 P.2d 912 (Wash. App. 1976)* . Some older cases may have denied bona fide purchaser status to foreclosing mortgages, but it is doubtful that "they represent the law, even on their home grounds." Edgar Noble Durfee & Austin Fleming, *Res Judicata and Recording Acts: Does A Judgment Conclude Non-Parties of Whose Interests The Plaintiff Has No Notice? 28 Mich. L. Rev. 811, 821 (1930).*

(n41)Footnote 400. *Redondo Improvement Co. v. O'Shaughnessy, 143 P. 538 (Cal. 1914)* ; *Johnson v. Home Owners' Loan Corp., 116 P.2d 167 (Cal. App. 1941)* ; *but see* Roger Bernhardt, California Mortgage and Deed of Trust Practice § 3.20 at 116 (2d ed. 1990).

(n42)Footnote 401. *In re Capital Mtg. & Loan, Inc., 35 B.R. 967 (Bankr. E.D. Cal. 1983)* (junior mortgagee of record should be joined). *Cf. McGraw v. Premium Fin. Co. of Mo., 637 P.2d 472 (Kan. App. 1981)* (actual or constructive knowledge before judgment requires joinder); *Citicorp Mtg., Inc. v. Pessin, 570 A.2d 481 (N.J. Super. 1990)* , *cert. denied, 584 A.2d 213 (N.J. 1990)* ; *NC Venture I, L.P. v. Complete Analysis, Inc., 22 A.D.3d 540* (N.Y.A.D. 2 Dept. 2005) (fire insurer and mortgagor's estate were not necessary parties because fire had destroyed any property interest); *Diamond Benefits Life Ins. Co. v. Troll, 77 Cal. Rptr. 2d 581 (Cal. App. 1998)* (A necessary party inadvertently omitted).

(n43)Footnote 402. *McGraw v. Premium Finance Co. of Mo., 637 P.2d 472 (Kan. App. 1981)* ; *Farm Credit Bank v. Martinson, 453 N.W.2d 816 (N.D. 1990)* , *cert. denied, 498 U.S. 846 (1990)* , *aff'd, 478 N.W.2d 810 (N.D. 1991)* .

(n44)Footnote 403. *Diamond Benefits Life Ins. Co. v. Troll, 77 Cal. Rptr. 2d 581 (Cal.App. 1998)* (Easement holder not bound by foreclosure judgment if not named as a party).

(n45)Footnote 404. *Federal Land Bank of St. Paul v. Asbridge, 474 N.W.2d 490 (N.D. 1991)* .

(n46)Footnote 405. *Citicorp Mtg., Inc. v. Pessin, 570 A.2d 481 (N.J. Super. 1990)* , *cert. denied, 584 A.2d 213 (N.J. 1990)* .

(n47)Footnote 406. *Western Bank v. Fluid Assets Dev. Corp., 806 P.2d 1048 (N.M. 1991)* ; *McDonald v. D.P. Alexander & Las Vegas Boulevard, LLC, 123 P.3d 748 (Nev. 2005)* (junior interest holder can institute action when omitted); *Federal Home Loan Mortg. Corp. v. Bauer, 950 P.2d 399 (Or. App. 1997)* ; *Robey v. Long Beach Mortg. Corp, 124 P.3d 221 (Okla. 2005)* (remedy of junior interest holder includes damages in the amount of the current value of property and attorney fees).

(n48)Footnote 407. *McDermott v. Burke, 16 Cal. 580 (1860)* ; *Dover Mobile Estates v. Fiber Form Products, Inc., 270 Cal. Rptr. 183 (1990)* ; *Bank of America Nat'l Trust & Sav. Ass'n v. Hirsh Mercantile Co., 148 P.2d 110 (Cal. App. 1944)* ; *Dolese v. Bellows-Claude Neon Co., 245 N.W. 569 (Mich. 1932); Contra, Como, Inc. v. Carson Square, Inc., 648 N.E.2d 1247 (Ind. App. 1995)* . *But see, Prestwood v. Weissinger, 945 So. 2d 458 (Ala. Civ. App. 2005)* (all interests cut off unless redemption occurs as specified in state statute).

(n49)Footnote 408. *Citicorp Mtg., Inc. v. Pessin, 570 A.2d 481 (N.J. Super. 1990)* ; *Garcia v. Stewart, 906 So. 2d 1117 (Fla. App. 2005)* (senior interest not terminated in junior interest foreclosure sale).

(n50)Footnote 409. *Citicorp Mtg., Inc. v. Pessin, 570 A.2d 481 (N.J. Super. 1990)* , *cert. denied, 584 A.2d 213 (N.J. 1990)* (assignee of junior mortgage may redeem to avoid strict foreclosure); *Hembree v. Mid-America Fed. Sav. & Loan Ass'n, 580 N.E.2d 1103 (Ohio App. 1989)* ; *In re Oligbo, 328 B.R. 619 (Bkrtcy. E.D.N.Y. 2005)* (In New York, tenant has right to redeem landlord's mortgage). *But see*: *Abdoney v. York, 903 So. 2d 981 (Fla. App. 2005)* (although

omitted from proceeding, not even allowed original right to redeem after filing of certificate of sale).

(n51)Footnote 410. *See* note 363, *supra.*

(n52)Footnote 411. Nelson & Whitman, *supra* note 9, § 7.15.

(n53)Footnote 412. *Coppola v. Superior Ct., 259 Cal. Rptr. 811 (1989) , reh'g denied*; *Powers v. Ellis, 520 P.2d 431 (Haw. 1974)* ; *Allstate Mtg. Corp. of Fla. v. Strasser, 277 So. 2d 843 (Fla. App. 1973)* (sale final unless objections filed with court within 10 days); *American Civil Liberties Union of Wis., Inc. v. Thompson, 455 N.W.2d 268 (Wis. 1990)* ; *Washington Trust Co. v. Smith, 699 A.2d 73 (Conn. 1997)* .

(n54)Footnote 413. *Federal Land Bank of Spokane v. Heidema, 727 P.2d 1336 (Mont. 1986) , reh'g denied* (1986); *P.I.E. Employees Fed. Credit Union v. Bass, 759 P.2d 1144 (Utah 1988) , reh'g denied* (1988). In California, the decree of foreclosure directs the sheriff or a receiver to conduct the sale and execute and deliver a deed to the purchaser. Cal. Civ. Proc. Code § 712.010 (levying officer); *Id*., § 712.080 (receiver).

(n55)Footnote 414. *Brent v. Staveris Dev. Corp., 741 P.2d 722 (Haw. App. 1987)* ; *Kleven v. Brunner, 429 N.W.2d 384 (Neb. 1988)* ; *Hatch v. Shold, 87 N.W. 908 (Neb. 1901)* ; *Morgan v. Texas Am. Bank/Levelland, 793 P.2d 1337 (N.M. 1990)* . It has been held that, until confirmation, the purchaser holds an equitable title. *Zimmerman v. Rose, 206 P. 336 (Kan. 1922)* ; *In re* Application of Small Bus. Admin. for Exemption from *Ad Valorem Taxation, 797 P.2d 879 (Kan. App. 1990)* ; *Ameribank, N.A. v. Quattlebaum, 505 S.E.2d 476 (Ga. 1998)* (Notice of confirmation of sale is a duty of the court and is not delegable).

(n56)Footnote 415. *Champaign County Bank & Trust Co. v. Brewer, 380 N.E.2d 54 (Ill. App. 1978)* ; *Little Falls Sav. & Loan Ass'n v. Chas. O. Holmberg & Sons, 397 A.2d 717 (N.J. Super. 1978)* .

(n57)Footnote 416. *Zepp v. Darnall, 59 A.2d 774 (Md. 1948)* ; *Aaron v. Kent, 581 N.Y.S.2d 933 (1992)* ; *Jorgensen v. Endicott Trust Co., 100 A.D.2d 647, 473 N.Y.S.2d 275 (1984). Contra Osterberg v. Union Trust Co., 93 U.S. 424 (1876)* ; *Boggs v. Fowler, 16 Cal. 559 (1860)* ; *McCarthy v. State Bank of Townsend, 170 P. 15 (Mont. 1918)* .

(n58)Footnote 417. *Boggs v. Fowler & Hargrave, 16 Cal. 559 (1860)* .

(n59)Footnote 418. *Gomez v. Bobker, 490 N.Y.S.2d 416 (1985)* ; *Scala v. Levensen, 95 N.Y.S.2d 850 (1950)* .

(n60)Footnote 419. *Wood River Dev., Inc. v. Armbrester, 547 So. 2d 844 (Ala. 1989) , reh'g denied* (1989); *Northeast Sav., F.A. v. Hopkins, 578 A.2d 136 (Conn. App. 1990)* ; *Fidelity Bond & Mtg. Co. v. Lucas, 523 N.Y.S.2d 125 (1987)* ; *American Fed. Sav. & Loan Ass'n of Tacoma v. McCaffrey, 728 P.2d 155 (Wash. 1986) , reconsideration denied* (1987); *Citibank, N.A. v. Grant, 21 A.D.3d 924* (N.Y.A.D. 2 Dept. 2005) (no prejudice shown and thus confirmation not denied); *Wells Fargo Bank Minnesota, N.A. v. Foret, 894 So. 2d 492 (La.App. 4 Cir. 2005)* (does not include filing for injunction regarding sale filed after completion of the judicial sale).

(n61)Footnote 420. *Miller v. Wentz, 155 P.2d 240 (Okla. 1945)* ; *Bankers Trust Co. of Cal., N.A. v. Bregant, 661 N.W.2d 498 (Wis. App. 2003)* (Where all other statutes were complied with in sheriff's foclosure sale, bylaw provisions of homeowner's association were not sufficient to overturn sale).

(n62)Footnote 421. *See* note 417, *supra.*

(n63)Footnote 422. *Boyd v. Bradley, 388 S.W.2d 107 (Ark. 1965) , reh'g denied* (1965); *Northeast Sav., F.A. v. Hopkins, 578 A.2d 136 (Conn. App. 1990)* ; *Cicoria v. Gazi, 901 So. 2d 282* (Fla. App. 5 Dist. 2005) (grounds may include insufficient notice, grossly low purchase bid, inattendance of mortgagor or mortgagor's attorney due to accident or mistake); NYCTL 1998- 1 *Trust and Bank of New York v. Oneg Shabbos Inc., 8 Misc.3d 645 (N.Y.Sup. 2005)* (exorbitant legal fees may be ground for denying confirmation).

(n64)Footnote 423. *Strother v. Wilkinson, 233 P. 719 (Okla. 1925) . See also Willis v. Nowata Land and Cattle Co., 789 P.2d 1282 (Okla. 1989) , reh'g denied* (1990); *In re Rocco, 319 B.R. 411 (Bkrtcy. W.D. Pa. 2005)* (mortgage transaction matters must be raised at time of foreclosure order).

(n65)Footnote 424. *Symon-Ryals Group, Inc. v. Citizens Southwest Mtg. Co., 334 So. 2d 144 (Fla. App. 1976)* ; *Powers v. Ellis, 520 P.2d 431 (Haw. 1974)* ; *Hunter v. Hunt, 178 S.W.2d 609 (Ky. 1944) .*

(n66)Footnote 425. *Wood River Dev., Inc. v. Armbrester, 547 So. 2d 844 (Ala. 1989) , reh'g denied* (1989); *Copsey v. Sacramento Bank, 66 P. 7 (Cal. 1901) , modified, 66 P. 204 (Cal. 1901)* ; *National Reserve Life Ins. Co. v. Kemp, 339 P.2d 368 (Kan. 1959) .*

(n67)Footnote 426. *Bates v. Schuelke, 215 N.W.2d 874 (Neb. 1974) . See also Tarleton v. Griffin Federal Sav. Bank, 415 S.E.2d 4 (Ga. App. 1992) .*

(n68)Footnote 427. *Shaw v. Polk, 237 S.W. 703 (Ark. 1922)* ; *Cicoria v. Gazi, 901 So. 2d 282* (Fla. App. 5 Dist. 2005) (must hold evidentiary hearing after confirmation denied because mortgagor may not have received notice, to determine if mortgagor should have been sent notice).

(n69)Footnote 428. *Danbury Sav. & Loan Ass'n v. Hovi, 569 A.2d 1143 (Conn. 1990)* ; *Shipp Corp., Inc. v. Charpilloz, 414 So. 2d 1122 (Fla. App. 1982)* ; *Federal Sav. & Loan Ins. Corp. v. Hamilton, 786 P.2d 1190 (Mont. 1990)* ; *Investors Sav. Bank v. Phelps, 397 S.E.2d 780 (S.C. 1990)* ; *First Fin. Sav. Ass'n v. Spranger, 456 N.W.2d 897 (Wis. 1990) . Cf. Government Nat'l Mortg. Ass'n v. Belue, 411 S.E.2d 894 (Ga. App. 1991)* ; *First Wisc. Nat'l Bank of Oshkosh v. KSW Invs., Inc., 238 N.W.2d 123 (Wis. 1976)* ; *Suring State Bank v. Giese, 246 N.W. 556 (Wis. 1933) . States Resources Corp. v. The Architectural Team, Inc., 433 F.3d 73 (1st Cir. 2005)* ; *Casey v. National Information Services, Inc., 906 So. 2d 710 (La.App. 1 Cir. 2005)* ; *Firstar Bank NA v. Goldman, 2004 U.S. Dist. LEXIS 9944 (D. Ill. 2004)* (a sale price at 30% below market value was not enough to disturb confirmation). *But see Baskurt v. Beal, 101 P.3d 1041 (Alaska 2004)* (court set aside a foreclosure sale where purchase price was 15% below sale price).

(n70)Footnote 429. *Ballentyne v. Smith, 205 U.S. 285 (1907)* ; *In re Stanley Eng'g Corp., 164 F.2d 316 (3d Cir. 1947) , cert. denied sub nom. Root v. Galman, 332 U.S. 847 (1948)* (rule changed by statute). *Ananko v. Harsanyi, 91 B.R. 231 (Bankr. D. N.J. 1988)* ; *States Resources Corp. v. The Architectural Team, Inc., 433 F.3d 73 (1st Cir. 2005)* (whether grossly inadequate determined by comparing to fair market value).

(n71)Footnote 430. *Bowery Sav. Bank v. Harbert Offset Corp., 558 N.Y.S.2d 821 (1990) , aff'd, 571 N.Y.S.2d 506 (1991)* ; *United Okla. Bank v. Moss, 793 P.2d 1359 (Okla. 1990)* ; *California Joint Stock Land Bank v. Gore, 55 P.2d 1118 (Or. 1936)* ; *Holt v. Citizens Cent. Bank, 688 S.W.2d 414 (Tenn. 1984)* ; *First Wis. Nat'l Bank of Oshkosh v. KSW Invs., Inc., 238 N.W.2d 123 (Wis. 1976) .*

(n72)Footnote 431. *Wood River Dev., Inc. v. Armbrester, 547 So. 2d 844 (Ala. 1989)* ; *Wood v. Drury, 43 P. 763 (Kan. 1896)* ; *United Okla. Bank v. Moss, 793 P.2d 1359 (Okla. 1990) .*

(n73)Footnote 432. *First Nat'l Bank of Louisville v. Childress-Ross Props., Inc., 377 S.E.2d 533 (Ga. App. 1989)* ; *McClure v. Delguzzi, 767 P.2d 146 (Wash. App. 1989)* ; *Verex Assur. Inc. v. AABREC, Inc., 436 N.W.2d 876 (Wis. 1989) .*

(n74)Footnote 433. *Iona State Bank v. Blair, 43 P. 686 (Kan. 1869)* ; *Farmers' Bank of Grass Lake v. Quick, 39 N.W. 752 (Mich. 1888) .*

(n75)Footnote 434. Nelson & Whitman, *supra* note 9, § 7.19. *Northrop v. Polling, 761 A.2d 872 (Me. 2000) .*

(n76)Footnote 435. *E.g., Mid Kan. Fed. Sav. & Loan Ass'n of Wichita v. Dynamic Dev. Corp., 804 P.2d 1310 (Ariz. 1991) .*

(n77)Footnote 436. *In re Phillips, 124 B.R. 712 (Bankr. W.D. Tex. 1991)* ; *In re Madigan, 122 B.R. 103 (Bankr. 9th Cir. 1991)* ; *Vlahovich v. Cruz, 261 Cal. Rptr. 565 (1989)* .

(n78)Footnote 437. *See, e.g.,* Cal. Civ. Proc. Code § 580d. *Simon v. Superior Ct., 5 Cal. Rptr. 2d 428 (1992)* , *rev. denied*; *Coppola v. Superior Ct., 211, 259 Cal. Rptr. 811 (1989)* , *reh'g denied.*

(n79)Footnote 438. *See, e.g., Stewart v. Underwood, 704 P.2d 275 (Ariz. 1985)* .

(n80)Footnote 439. Cal. Civ. Code § 2924(c). *Williams v. Kimes, 949 S.W.2d 899 (Mo. 1997)* .

(n81)Footnote 440. *E.g.,* Alaska Stat. § 34.20.070 (1990); Ariz. Rev. Stat. Ann. §§ 35-809(B) to 33-809; *Id*. at § 33-813 (1990); Idaho Code § 45-1506; *Allied Capital Corporation v. Cravens, 67 S.W.3d 486 (Tex. App. 2002)* (trustee advertised the foreclosure sale beyond the minimum statutory requirements).

(n82)Footnote 441. Some statutes require only notice by publication, *e.g.* Minn. Stat. Ann. § 580.03 (although service as in a civil action to be made of occupant); Miss. Code § 89-1-55. For a discussion of constitutional entitlements to procedural due process in the context of private foreclosures, *see* § 101.04.03(C), *infra.*

(n83)Footnote 442. *Homestead Sav. v. Darmiento, 281 Cal. Rptr. 367 (1991)* ; *Dover Mobile Estates v. Fiber Form Prods., Inc., 270 Cal. Rptr. 183 (1990)* .

(n84)Footnote 443. *Fleet Real Estate Funding Corp. v. Koch, 805 P.2d 1206 (Colo. App. 1991)* .

(n85)Footnote 444. *See* § 101.04(c)(2)(i)&(ii), *infra.*

(n86)Footnote 445. *See* § 101.04(c)(3), *infra.*

(n87)Footnote 446. *San Francisco Design Center Assocs. v. Portman Cos., 38 Cal. Rptr. 2d 280 (Cal. App. 1995)* (trustee's sale extinguishes subordinate lease). *Cf. In re Fischer, 184 B.R. 41 (Bankr. M.D. Tenn. 1995)* (purchaser takes subject to tax liens).

(n88)Footnote 447. *Skelton v. Washington Mutual Bank, 61 S.W.3d 56 (Tex. App. 2001)* (the wife's homestead interest in property covered by purchase money lien, and deed of trust was not superior to the lien); *Tustian v. Schriever, 34 P.3d 755 (Utah 2001)* (one who financed fixtures used in a mobile home had no interest in the excess proceeds from sale of the realty).

(n89)Footnote 448. *Griffin v. Roberts, 364 S.E.2d 698 (N.C. App. 1988)* ; *Swindell v. Overton, 314 S.E.2d 512 (N.C. 1984)* ; *Peoples Fed. Sav. & Loan Ass'n v. Graham, 352 S.E.2d 511 (S.C. App. 1987)* . *Cf. Rosenberg v. Smidt, 727 P.2d 778 (Alaska 1988)* , *reh'g denied,* (if defect merely "voidable" sale cannot be set aside after transfer to bona fide purchaser). *See infra* § 101.04(c)(2)(ii); *Manard v. Williams, 952 S.W.2d 387 (Mo. App. 1997)* .

(n90)Footnote 449. *E.g., Dickens v. Calhoun First Nat'l Bank, 398 S.E.2d 517 (Ga. App. 1990)* ; *Wills v. Chesapeake W. Ry., 16 S.E.2d 649 (Va. 1941)* . *See also Oxford Fin. Cos. v. Velez, 807 S.W.2d 460 (Tex. App. 1991)* , *writ denied* (1991) (violation of consumer protection legislation voids sale to third-party purchaser at foreclosure of mechanic's lien); *Shepard v. Boone, 99 S.W.3d 263 (Tex. App. 2003)* (Where a mortgage company was not a holder of a negotiable instrument, the company was not entitled to pursue foreclosure). Bank of America v. La Jolla Group II, *28 Cal. Rptr. 3d 825 (2005)* (because the trustors and the beneficiary had entered into an agreement to cure the default on a deed of trust, the beneficiary had no right to sell the property afterward and the sale was declared invalid).

(n91)Footnote 450. *Winters v. Winters, 820 S.W.2d 694 (Mo. App. 1991)* ; *Graham v. Oliver, 659 S.W.2d 601 (Mo. App. 1983)* .

(n92)Footnote 451. *Hauger v. Gates, 269 P.2d 609 (Cal. 1954)* ; *Tipton v. Holt, 610 S.W.2d 659 (Mo. App. 1981)* ;

Bradford v. Thompson, 470 S.W.2d 633 (Tex. 1971) , cert. denied 405 U.S. 955 (1972) .

(n93)Footnote 452. *Bailey v. Campbell, 829 P.2d 667 (Okla. 1991) , reh'g granted in part and modified* (1992); *Graham v. Pazos de la Torre, 821 S.W.2d 162 (Tex. App. 1991) . Cf. Tim Wargo & Sons v. Equitable Life Assur. Soc'y of United States, 809 S.W.2d 375 (Ark. App. 1991)* (involving judicial foreclosure); *In re Schleier, 290 B.R. 45 (Bankr. S.D. N.Y. 2003)* (Where a debtor had paid the filing fee for his bankruptcy petition, a foreclosure sale that took place after the filing was void).

(n94)Footnote 453. *Little v. CFS Service Corp., 233 Cal. Rptr. 923 (1987)* (lack of notice, in absence of statutory recitation that notice was given, may produce void sale).

(n95)Footnote 454. *Little v. C.F.S. Serv. Corp., 233 Cal. Rptr. 923, 925 (1987)* .

(n96)Footnote 455. *Baggao v. Mascaro, 714 P.2d 261 (Or. App. 1986)* .

(n97)Footnote 456. *Little v. C.F.S. Serv. Corp., 233 Cal. Rptr. 923, 925 (1987)* .

(n98)Footnote 457. *Cf.* G. Nelson & D. Whitman, *supra* note 9, § 7.20. A mortgagee or beneficiary making only a credit bid will probably not qualify as a bona fide purchaser. 20th *Century Plumbing Co. v. Sfregola, 179 Cal. Rptr. 144 (1981) . See also Amco Ornamental Iron, Inc. v. Wing, 31 Cal. Rptr. 2d 564 (Cal. App. 1994)* (sole trustee exercising power of sale for own benefit).

(n99)Footnote 458. *Garris v. Federal Land Bank of Jackson, 584 So. 2d 791 (Ala. 1991) , reh'g denied* (1991).

(n100)Footnote 459. *Security Sav. & Loan Ass'n v. Fenton, 806 P.2d 362 (Ariz. 1990) , review denied* (1991); *Concept Mgt., Ltd. v. Carpenter, 405 S.E.2d 119 (Ga. App. 1991)* ; *Wansley v. First Nat'l Bank of Vicksburg, 566 So. 2d 1218 (Miss. 1990)* ; *Pentad Joint Venture v. First Nat'l Bank of La Grange, 797 S.W.2d 92 (Tex. App. 1990)* ; *Occidental/Nebraska Fed. Sav. Bank v. Mehr, 791 P.2d 217 (Utah App. 1990)* , (1991).

(n101)Footnote 460. *Thomas v. Johnson, 801 P.2d 186 (Utah App. 1990)* ; *Gilroy v. Ryberg, 667 N.W.2d 544 (Neb. 2003)* (Where all statutory requirements were met for foreclosure sale, and no injustice occurred, the sale was not voidable).

(n102)Footnote 461. *Security Sav. & Loan Ass'n v. Fenton, 806 P.2d 362 (Ariz. 1990) , review denied* (1991); *Georgetown Assocs. v. Home Fed. Sav. & Loan Ass'n, 795 S.W.2d 252 (Tex. App. 1990)* ; *In re Lindsay, 59 F.3d 942 (9th Cir. 1995)* ; *West End Assocs. v. Sea Green Equities, 166 B.R. 572 (D.N.J. 1994)* (absent some great windfall, inadequacy alone is an insufficient reason to set aside). *But see Bascom Constr., Inc. v. City Bank and Trust, 629 A.2d 797 (N.H. 1993)* (mortgagee required to take reasonable steps to obtain fair price and may be required to establish reserve price or, if adequate bid not forthcoming, to adjourn the sale).

(n103)Footnote 462. *Pentad Joint Venture v. First Nat'l Bank of La Grange, 797 S.W.2d 92 (Tex. App. 1990)* ; *Nautical Landings Marina, Inc. v. First Nat'l Bank of Port Lavaca, 791 S.W.2d 293 (Tex. App. 1990)* ; *Greater Southwest Office Park, Ltd. v. Texas Commerce Bank Nat'l Ass'n, 786 S.W.2d 386 (Tex. App. 1990)* , superseded by statute as stated in *Resolution Trust Corp. v. Westridge Ct. Joint Venture, 812 S.W.2d 327 (Tex. App. 1991)* .

(n104)Footnote 463. *Cromer v. De Jarnette, 51 S.E.2d 201 (Va. 1949)* ; *Hopkins v. Givens, 89 S.E. 871 (1916)* .

(n105)Footnote 464. Perez v. 222 Sutter St. Partners, 272 Cal. Rptr. 119 (1990) , *review denied; Hankins v. Administrator of Vets. Affairs, 555 P.2d 483 (Nev. 1976) . Cf. United States v. East Half (E 1/2) Section Twelve (12), 131 F.R.D. 171 (D. Neb. 1990)* (United States must provide direct notice); *Cf. Bank-Fund Staff Fed. Credit Union v. Cuellar, 639 A.2d 561 (D.C. 1994)* (notice defective if it does not advise mortgagor of reinstatement of rights). *Williams v. Kimes, 996 S.W.2d 43 (Mo. 1999)* (insufficient notice made the foreclosure and sale voidable).

(n106)Footnote 465. *I.E. Assocs. v. Safeco Title Ins. Co., 702 P.2d 596 (Cal. 1985)* ; *Walker v. McAnnany, 802 P.2d 876 (Wyo. 1990)* .

(n107)Footnote 466. *Walker v. McAnnany, 802 P.2d 876 (Wyo. 1990)* (may rely on address given in mortgage).

(n108)Footnote 467. *Cal. Civ. Code § 2924*.

(n109)Footnote 468. *Little v. C.F.S. Serv. Corp., 233 Cal. Rptr. 923 (1987)* . For a discussion of procedural due process in the mortgage context, *see* § 101.04.03(C), *infra.*

(n110)Footnote 469. *McLeod v. Bullard, 84 N.C. 515 (1881) , approved on reh'g, 86 N.C. 210 (1882) . Swindell v. Overton, 302 S.E.2d 841 (N.C. App. 1983) , rev'd in part on other grounds, 314 S.E.2d 512 (1984). Contra Mass. Gen. Laws ch. 183, § 25* (allowed unless mortgage states otherwise).

(n111)Footnote 470. *Smith v. Credico Indus. Loan Co., 362 S.E.2d 735 (Va. 1987). Contra Stephens, Partain & Cunningham v. Hollis, 242 Cal. Rptr. 251 (1987)* .

(n112)Footnote 471. *Moreland v. Marwich, Ltd., 629 P.2d 1095 (Colo. App. 1981)* ; *Swindell v. Overton, 302 S.E.2d 841 (N.C. App. 1983) , rev'd in part on other grounds, 314 S.E.2d 512 (N.C. 1984)* ; *Greater Southwest Office Park, Ltd. v. Texas Commerce Bank N.A., 786 S.W.2d 386 (Tex. App. 1990)* , superseded by statute as stated in *Resolution Trust Corp. v. Westridge Ct. Joint Venture, 815 S.W.2d 327 (Tex. App. 1991) , writ denied* (1992).

(n113)Footnote 472. *Lake Hillsdale Estates, Inc. v. Galloway, 473 So. 2d 461 (Miss. 1985)* ; *Thomas v. Johnson, 801 P.2d 186 (Utah App. 1990)* .

(n114)Footnote 473. *Wood River Dev., Inc. v. Armbrester, 547 So. 2d 844 (Ala. 1989) , reh'g denied* (1989); *Hatch v. Collins, 275 Cal. Rptr. 476 (1990) . Cf. Georgetown Assocs. v. Home Fed. Sav. & Loan Ass'n, 795 S.W.2d 252 (Tex. App. 1990)* (mortgagee owes no duty of good faith).

(n115)Footnote 474. *Lake Hillsdale Estates, Inc. v. Galloway, 473 So. 2d 461 (Miss. 1985)* .

(n116)Footnote 475. *Garris v. Federal Land Bank of Jackson, 584 So. 2d 791 (Ala. 1991)* ; *Lake Hillsdale Estates, Inc. v. Galloway, 473 So. 2d 461 (Miss. 1985)* ; *Hoer v. Wurdack, 766 S.W.2d 673 (Mo. App. 1989)* (sale not set aside where debtor notified of bulk sale and did not object).

(n117)Footnote 476. *Vail v. Derwinski, 946 F.2d 589, 593 n.9 (8th Cir. 1991)* ("Most state courts considering due process challenges to non-judicial foreclosure statutes have upheld the procedure on the ground that there is not state action.").

(n118)Footnote 477. *Vail v. Derwinski, 946 F.2d 589 (8th Cir. 1991)* .

(n119)Footnote 478. *Mennonite Bd. of Missions v. Adams, 462 U.S. 791 (1983)* ; *Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306 (1950)* .

(n120)Footnote 479. *E.g., Minn. Stat. Ann. § 580.03* (6 weeks published notice sufficient; however, personal service required on person in possession at least 4 weeks before sale); *Miss. Code § 89-1-55* (1991) (3 weeks published notice and posting at courthouse).

(n121)Footnote 480. *I.E. Assocs. v. Safeco Title Ins. Co., 702 P.2d 596 (Cal. 1985)* (duty to notify at last address actually known).

(n122)Footnote 481. *Encouragement theory*: State action has been found by finding state encouragement of private foreclosures. *Garner v. Tri-State Dev. Co., 382 F. Supp. 377 (E.D. Mich. 1974) . Cf. Kenly v. Miracle Props., 412 F.*

Supp. 1072 (D. Ariz. 1976) ; *Lawson v. Smith, 402 F. Supp. 851 (N.D. Cal. 1975)* . The majority of the cases, however, view private foreclosure as a matter of private agreement which the state may regulate but which it does not encourage. *Warren v. Government Nat'l Mtg. Ass'n, 611 F.2d 1229 (8th Cir. 1980) , cert. denied, 449 U.S. 847 (1980)* ; *Homestead Sav. v. Darmiento, 281 Cal. Rptr. 367 (1991) , review denied; Leininger v. Merchants & Farmers Bank, 481 So. 2d 1086 (Miss. 1986)* .

Governmental function theory: The notion that those conducting a private function perform a governmental function was rejected in *Barrera v. Security Bldg. & Inv. Corp., 519 F.2d 1166 (5th Cir. 1975)* .

Judicial enforcement theory: The suggestion that the state is involved when a court directs the removal of a recalcitrant mortgagor after private foreclosure was rejected in *Federal Nat'l Mtg. Ass'n v. Howlett, 521 S.W.2d 428 (Mo. 1975) , reh'g denied* (1975). *See also Flagg Bros., Inc. v. Brooks, 436 U.S. 149 (1978)* .

(n123)Footnote 482. *Turner v. Blackburn, 389 F. Supp. 1250 (W.D.N.C. 1975)* .

(n124)Footnote 483. *United States v. East Half (E 1/2) Section Twelve (12), 131 F.R.D. 171 (D. Neb. 1990)* ; *Mennonite Bd. of Missions v. Adams, 462 U.S. 791 (1983)* .

(n125)Footnote 484. *Ricker v. United States, 417 F. Supp. 133 (D. Me. 1976)* , order supp., *434 F. Supp. 1251 (D. Me. 1976)* .

(n126)Footnote 485. *Federal Deposit Ins. Corp. v. Morrison, 568 F. Supp. 1240 (N.D.Ala. 1983) , rev'd on other grounds, 747 F.2d 610 (11th Cir. 1984) . Cf. Warren v. Government Nat'l Mtg. Ass'n, 611 F.2d 1229 (8th Cir. 1980) , cert. denied, 449 U.S. 847 (1980)* .

(n127)Footnote 486. *Northrip v. Federal Nat'l Mtg. Ass'n, 527 F.2d 23 (6th Cir. 1975) . See also Bankers Life Co. v. Denton, 458 N.E.2d 203 (Ill. App. 1983)* ; *Roberts v. Cameron-Brown Co., 556 F.2d 356 (5th Cir. 1977) , reh'g denied, 559 F.2d 1217 (5th Cir. 1977)* .

(n128)Footnote 487. *DeLaigle v. Federal Land Bank of Columbia, 568 F. Supp. 1432 (S.D. Ga. 1983) . Cf. Smith v. Russellville Prod. Credit Ass'n, 777 F.2d 1544 (11th Cir. 1985)* ; *Aberdeen Prod. Credit Ass'n v. Jarrett Ranches, Inc., 638 F. Supp. 534 (D.S.D. 1986)* .

(n129)Footnote 488. *See* G. Nelson & D. Whitman, *supra* note 9, at § 7.29 at 584-85.

(n130)Footnote 489. *Me. Rev. Stat. Ann. tit. 145, § 6201(3). Mass. Gen. Laws Ann. ch. 244, §§ 1, 2. N.H. Rev. Stat. Ann. § 479:19. R.I. Gen. Laws § 34-23-3. HRPT Advisors, Inc. v. MacDonald, Levine, Jenkins & Co., 686 N.E.2d 203 (Mass. App. 1997)* .

(n131)Footnote 490. *Mass. Gen. Laws Ann. ch. 244, § 1*; *Hull v. Attleboro Sav. Bank, 33 Mass. App. 18 (1992)* ; *Wornat Dev. Corp. v. Vakalis, 529 N.E.2d 1329 (Mass. 1988)* ; *N.H. Rev. Stat. Ann. § 479:19*.

(n132)Footnote 491. *Hull v. Attleboro Sav. Bank, 33 Mass. App. 18 (1992)* ; *Wornat Dev. Corp. v. Vakalis, 529 N.E.2d 1329 (Mass. 1988)* .

(n133)Footnote 492. Notice by publication in a newspaper, for example, is required in New Hampshire. *N.H. Rev. Stat. Ann. § 479:19*.

(n134)Footnote 493. *Wornat Dev. Corp. v. Vakalis, 529 N.E.2d 1329 (Mass. 1988)* (because no power of sale is involved, deficiency allowed even though debtor not notified upon foreclosure that a deficiency possible).

(n135)Footnote 494. Cases illustrating the two funds principle include *In re Carley Capital Group, 128 B.R. 652*

(Bankr. W.D. Wis. 1991) ; *Gaumer v. Hartford-Carlisle Sav. Bank, 451 N.W.2d 497 (Iowa 1990)* ; *Union Bank & Trust Co. v. Farmwald Dev. Corp., 450 N.W.2d 274 (Mich. App. 1989)* ; *In re Estate of Hansen, 458 N.E.2d 264 (N.D. 1990)* . *See also William H. Metcalfe & Sons v. Canyon Defined Benefit Trust, 569 A.2d 669 (Md. 1990)* ; *Country Express Stores v. Sims, 943 P.2d 374 (Wash. App. 1997)* ; *In re Laufenberg, 2004 Bankr. LEXIS 1428 (Bankr. D. Kan. 2004)* (marshalling was not available to the owners because they had no ownership interests in the property nor were they creditors with claims secured by one of the two properties).

(n136)Footnote 495. *Commonwealth Land Title Co. v. Kornbluth, 220 Cal. Rptr. 774 (1985)* .

(n137)Footnote 496. *In re Beacon Distributors, Inc., 441 F.2d 547 (1st Cir. 1971)* .

(n138)Footnote 497. In an insightful article, published in 1953, two commentators suggested that analysis would be aided by replacing the two funds and inverse order of alienation articulations with the dual concepts of suretyship marshalling and lien marshalling. Frederic P. Storke & Don W. Sears, *Transfer of Mortgaged Property, 38 Corn. L. Q. 185, 201-2 (1953).*

(n139)Footnote 498. *Equitable Life Assurance Soc'y v. Lane, 793 P.2d 312 (Okla. App. 1990)* .

(n140)Footnote 499. *In re Century Brass Prods., Inc. v. Colonial Bank, 95 B.R. 277 (Bankr. D. Conn. 1989)* ; *First Interstate Bank of Calif. v. H.C.T., 828 P.2d 405 (Nev. 1992)* ; *In re Estate of Hansen, 458 N.W.2d 264 (N.D. 1990)* ; *Associates Realty Credit Ltd. v. Brune, 568 P.2d 787 (Wash. 1977)* .

(n141)Footnote 500. *Victor Gruen Assocs. v. Glass, 338 F.2d 826 (9th Cir. 1964)* .

(n142)Footnote 501. *Assocs. Realty Credit Ltd. v. Brune, 568 P.2d 787 (Wash. 1977)* .

(n143)Footnote 502. *Gaumer v. Hartford-Carlisle Sav. Bank, 451 N.W.2d 497 (Iowa 1990)* (neither the senior nor others with interest in the double fund and who are common debtors should be prejudiced); *SCD Chem. Distrib., Inc. v. Maintenance Research Lab., 477 N.W.2d 434 (Mich. App. 1991)* ; *Associates Realty Credit Ltd. v. Brune, 568 P.2d 787 (Wash. 1977)* .

(n144)Footnote 503. *In re El Paso Truck Ctr., Inc., 129 B.R. 109 (Bankr. W.D. Tex. 1991)* .

(n145)Footnote 504. *Enloe v. Franklin Bank & Trust Co., 445 N.E.2d 1005, 1008 (Ind. App. 1983)* . *See also First Nat'l Mercantile Bank & Trust Co. v. Hazen, 96 B.R. 924 (Bankr. W.D. Mo. 1988)* ; *In re Franchise Sys., 46 B.R. 158 (Bankr. N.D. Ga. 1985)* ; *Bartley v. Pikeville Nat'l Bank & Trust Co., 532 S.W.2d 446 (Ky. App. 1976)* ; *Schaller v. Castle Dev. Corp., 698 A.2d 1106 (Md. 1997)* .

(n146)Footnote 505. *Savings & Loan Corp. v. Bear, 154 S.E. 587 (Va. 1930)* .

(n147)Footnote 506. *Voest-Alpine Trading USA Corp. v. Vantage Steel Corp., 919 F.2d 206 (3d Cir. 1990)* ; *In re Vermont Toy Works, Inc., 135 B.R. 762 (Bankr. D. Vt. 1991)* ; *In re San Jacinto Glass Indus., 93 B.R. 934 (Bankr. S.D. Tex. 1988)* .

(n148)Footnote 507. *Sowell v. Federal Reserve Bank of Dallas, 268 U.S. 449 (1925)* ; *In re Estate of Stein, 206 N.Y.S.2d 488 (1960)* ; *Associates Realty Credit Ltd. v. Brune, 568 P.2d 787 (Wash. 1977)* . *See also In re Mitchell, 101 B.R. 278 (Bankr. W.D. Okla. 1988)* .

(n149)Footnote 508. *See* § 101.05.(a)(5), *infra.*

(n150)Footnote 509. *Commonwealth Land Title Co. v. Kornbluth, 220 Cal. Rptr. 774 n. 4 (1985)* (constructive notice sufficient).

(n151)Footnote 510. *See* § 92.07(d), *supra.*

(n152)Footnote 511. It has even been held on such facts the one in B's position can marshall against *Gray v. H.M. Loud & Sons Lumber Co., 87 N.W. 376 (Mich. 1901)* .

(n153)Footnote 512. *In re Beacon Distributors, Inc., 441 F.2d 547 (1st Cir. 1971)* .

(n154)Footnote 513. *Epperson v. Cappellino, 298 P. 533 (Cal. App. 1931)* .

(n155)Footnote 514. *In re Shull, 72 B.R. 193 (Bankr. D.S.C. 1986)* .

(n156)Footnote 515. *See supra* text accompanying note 505.

(n157)Footnote 516. *Newby v. Fox, 133 P. 890 (Kan. 1913)* .

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CHAPTER 101 MORTGAGES, DEEDS OF TRUSTS AND RELATED LIENS

12-101 Thompson on Real Property, Thomas Editions § 101.05

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§ 101.05 Transfers of Mortgages.

§ 101.05(a) Transfer of the Interests of Mortgagors.

§ 101.05(a)(1) General Principles: Transferability and Direct Restraints on Alienation.

The traditional policy of the common law in favor of alienability extends to mortgaged interests of estates which are themselves alienable. Thus, a mortgagor who has encumbered a fee simply retains an alienable interest while one who has mortgaged an estate for years may or may not hold an alienable interest, depending on whether the lease contains valid restrictions on transfer. In lien theory states certainly the mortgagor, as the holder of legal title to a possessory estate, holds an alienable interest, but title theory states recognize the reality that, wherever legal title might reside technically, the mortgagor is in fact an owner of a sufficiently significant interest that the mortgagor is entitled to alienate it. n517 Of course, unless recording statutes or common law rules of priority provide otherwise, the transferee of mortgaged premises will take them subject to the mortgage under the familiar rule that one can pass no greater rights than one has.

A transfer by a mortgagor will have no effect on the personal liabilities, if any, of the transferor on the underlying debt, since the privity of contract between the transferor and the transferor's mortgagee cannot be severed without the consent of the mortgagee. n518

The common law policy favoring alienability cannot be frustrated by a covenant between mortgagor and mortgagee prohibiting alienation. Surely, this principle applies to direct restraints on alienation. No court would, for example, enforce a provision in a mortgage that the premises could not be alienated without the consent of the mortgagee. Mortgages typically create no direct restraints on the transfer of the mortgagor's interest, but they customarily contain provisions that arguably erect indirect barriers to alienation. The most common illustration of a potentially indirect restraint is the due-on-sale or due-on-encumbrance clause, which authorizes the mortgagee to accelerate the mortgage debt upon any transfer or encumbering of the land. Other examples are clauses calling for an increase in the interest rate upon transfer, or prohibiting transfer by assumption. The indirect restraints have received inconsistent treatment; however, most states have countenanced them and in 1982 federal legislation preempted the field to a great extent.

COMPUTER-ASSISTED RESEARCH

LEXIS: mortgage or deed pre/2 trust and direct pre/1
restraint w/5 alienat!

§ 101.05(a)(2) General Principles: Indirect Restraints on Alienation.

While direct restraints on the alienability of mortgaged land are void in every jurisdiction, the enforceability of indirect restraints has provided fertile ground for litigation and legislation. An indirect restraint can be defined as one which, although not prohibiting a transfer or working a forfeiture upon an attempt to transfer, has in practice the effect of inhibiting alienation. A provision calling for the forfeiture of the land to the mortgagee upon an attempt to sell it would clearly be a void direct restraint on alienation. A provision permitting the mortgagee to accelerate a debt upon such attempts, however, would not be treated as a direct restraint because no absolute bar to transfer or forfeiture upon attempt to transfer is created; rather, the debt must be paid upon demand before a transfer can be consummated. n519

The prevailing attitude seems to be that indirect restraints are valid and enforceable according to their terms. Thus, a provision calling for an increase in the interest rate on the mortgage debt upon a transfer has been upheld, n520 as has been a contractual prohibition of transfer by assumption. n521 Most courts even have enforced due-on-sale clauses in the face of arguments that they not only deter sales to buyers wanting to assume or take subject to a mortgage, but also discriminate between mortgagors bound by due-on-sale provisions and those without such clauses in their mortgages by making it more difficult for those with the clause to sell their property than those without the clause. Some courts, on the other hand, have been susceptible to arguments that some indirect restraints, and particularly the due-on-sale clause, constitute unenforceable restraints. n522

The general principle is that indirect restraints are valid only if reasonable. In determining whether the restraint is reasonable, most jurisdictions look to the interests of the lenders and conclude that, so long as some legitimate interest of the lenders is served, enforcement is proper. Thus, for example, mortgagees in most states have been permitted to accelerate loans upon transfer under due-on-sale clauses in times of rising interest rates on the grounds that the lenders have a legitimate interest in calling existing loans with relatively low interest rates in order to reinvest the proceeds in higher yielding loans. When interest rates rise, lenders must pay high rates to attract funds from investors; if these same lenders must continue to lend funds to assuming grantees under outstanding loans carrying comparatively low interest rates, the lenders' profit margins may be jeopardized, and funds that would be available for new loans if the outstanding loans could not be called would be unavailable for new borrowers. n523 In contrast, other courts balance the interests of the lenders and borrowers alike to determine the reasonableness of an indirect restraint. This weighing of interests caused some of them to prohibit automatic enforcement of the due-on-sale clauses except where the transfer impaired the lender's security. n524 Although there is very little case law on indirect restraints other than the due-on-sale clause, n525 it would seem that the same factors considered in evaluating due-on-sale clauses would be weighed in passing upon other types. n526

COMPUTER-ASSISTED RESEARCH

LEXIS: mortgage or deed pre/2 trust & indirect or reasonable pre/1 restraint w/5 alienat!

§ 101.05(a)(3) Indirect Restraints on Alienation: Federal Preemption.

In the controversy over automatic enforcement of due-on-sale clauses, pressures from the real estate and lending industries prompted Congress to pass the Garn-St. Germain Depository Institutions Act in 1982. This act makes due-on-sale clauses enforceable and restricts enforceability of due-on-encumbrance clauses. The act covers lenders of all kinds and is not restricted to those loans made or insured by the federal government or its agencies or by those in the business of lending. n527 Further, it covers a wide variety of loans, including every "loan, mortgage, advance, or credit sale secured by a lien on real property." n528

Due-on-sale clauses are rendered enforceable by the Act, which expressly provides that state laws to the contrary are preempted. n529 The act defines a sale under a due-on-sale clause as:

> a contract provision which authorizes a lender, at its option, to declare due and payable sums secured by the lender's security instrument if all or any part of the property, or an interest therein, securing the real property loan is sold or transferred without the lender's prior written consent. n530

This broad definition in its inclusion of a transfer of "an interest" covers not only a conveyance of title but also the creation of junior encumbrances, although other provisions in the act prevent acceleration upon the creation of a junior encumbrance under certain circumstances. The Federal Home Loan Bank Board, pursuant to power conferred upon it by the Act to promulgate regulations interpreting the Act, n531 ruled that installment land contracts fall within the phrase "[l]oan secured by a lien on real property." n532 All loans, whether made before or after 1982 are covered, but Congress did provide for a window period, which has now closed, during which loans in states in which due-on-sale clauses were not automatically enforceable would continue to be governed by local law. n533 During the window period, states within a window were authorized to extend window period protection to loans outstanding on the effective date of the act. n534

The act also preempts local law and outlaws acceleration on any of the following grounds: n535

1. creation of junior encumbrances which do not impair security.

2. creation of purchase money security interests for household appliances.

3. transfer by devise, descent or operation of law upon the death of a joint tenant or a tenant by the entirety.

4. granting of leases of less than three years, so long as they do not involve an option to buy.

5. transfer upon the debtor's death to a relative.

6. transfer to a spouse or child.

7. transfer to a spouse incident to a divorce, separation, or property settlement agreement.

8. transfer to a self-settled, inter vivos trust which does not involve a transfer of occupancy.

9. transfer described in regulations of the Director of the Office of Thrift Supervision and, until its abolition in 1989, the Federal Home Loan Bank Board, until the Board's abolition in 1989. n536

The federal ban on acceleration on these grounds, however, applies only when the loan is secured by residential realty with less than five dwelling units or by a residential manufactured home. When other types of security are involved, acceleration would be permissible. Further, under the regulations, the transferee must occupy the land to qualify for preemption when the transfer results from the mortgagor's death or where the transferee is the mortgagor's spouse or child, or when the transfer is incident to a divorce. n537

While there is nothing in the Act to compel mortgagees to exercise their rights under due-on-encumbrance clauses, if a lender permits a transferee to assume a loan, the regulations mandate release of the original debtor. n538 This requirement has been characterized as resting on a "rather thin reed" and without "justification for it in the Act." n539

COMPUTER-ASSISTED RESEARCH

LEXIS: due pre/2 sale or accelerat! w/50 indirect or
reasonable pre/1 restraint w/5 alienat!

§ 101.05(a)(4) Transfers by Assumption.

§ 101.05(a)(4)(i) Creation of Assumption Obligation.

In alienating encumbered property, mortgagors or their successors may transfer with or without an assumption of the underlying debt by their grantees. A transfer by assumption is one whereby the transferee assumes or agrees to become personally liable on the mortgage debt. It is common to refer to a transfer in which the transfer does not assume the mortgage debt as a transfer "subject to" the mortgage; but it should be noted that even grantees who assume the debt also take subject to the mortgage in the sense that their interests are burdened by and subordinate to the mortgage.

The transfer to an assuming grantee must meet the usual requirements for a writing and delivery that govern transfers of realty interests generally. The assumption of the mortgage debt, though usually expressly provided for in the instrument of transfer, can be made in a separate writing, and is generally enforceable even if totally parol. n540 The promise could be performed within a year unless prepayment within a year, even with penalty, is prohibited and is regarded as a promise to pay the assuming grantee's own debt to the grantor rather than a promise to pay the grantor's debt to the mortgagee. n541 By statute in a few states, assumption promises must be in writing to be enforceable. n542

When the assumption promise is contained within the instrument of transfer, there is no need for the assuming grantee to sign the instrument since under the doctrine of deed poll the acceptance of the deed by the grantee is the equivalent of the grantee's signature. n543

A few states are willing to presume a promise to assume where the mortgage debt has been credited against the purchase price. n544 This position seems wrong since the odds are that, where the grantee does not expressly assume the obligation, both the grantor and the grantee in all likelihood contemplate simply a transfer subject to the mortgage with no personal liability on the grantee. n545 Sometimes a duty on the part of the grantee is assumed to indemnify the grantor even though doing so forces the grantor to redeem before going against the grantee. n546

Absent fraud or mistake, the parol evidence rule should bar proof that, despite a recitation in a deed that the grantee assumes an existing mortgage debt, the parties to the transaction did not intend an assumption. n547 Nevertheless, there is some authority for the position that, at least in an action against the grantee by the mortgagee, parol evidence can be used to show no assumption was intended. Thus, evidence of a side agreement between the mortgagor and a grantee under a deed containing an assumption clause to the effect that the former would discharge the debt has sometimes been held, in an action by the mortgagee against the grantee, to establish that no assumption was meant. n548

The presence of a covenant against encumbrances is not generally a bar to receipt of evidence that an assumption was intended. It would seem that, when the evidence of assumption rests in parol, the parol evidence rule would preclude proof of the assumption in the face of the grantor-covenantor's warranty. Despite this theoretical objection to the proof, the parol evidence is admitted. n549 Receipt of extraneous evidence is not precluded by a deed reciting that title is transferred subject to a mortgage but containing no assumption. Here, there is no contradiction between the instrument and the proof since, even with an assumption, the transfer would be subject to the mortgage. n550

COMPUTER-ASSISTED RESEARCH

LEXIS: mortgage or debt or (deed pre/2 trust) w/15
assum! w/50 writing or deliver! or parol

§ 101.05(a)(4)(ii) Rights and Duties Under Assumptions.

A mortgagor is not relieved of any personal liability on the mortgage debt by reason of an assumption by a grantee. The same is true of an assuming grantee who has transferred his interest to a grantee who has assumed the debt. The obligation on the debt is based on contract and, despite the transfer of the security, privity of contract continues between the mortgagor and the mortgagee. In the absence of defenses such as estoppel or the running of the statute of limitations, consent by the obligee is necessary to terminate the mortgagor's personal liability.

Notwithstanding the continuing personal liability of the mortgagor, the mortgagee is usually entitled to enforce the assumption promise against the assuming grantee personally. Thus, after an assumption, the mortgagee has two in personam claims on the debt, one against the mortgagor on the original debt and the other against the grantee on the assumption promise; these claims are in addition to the mortgagee's foreclosure rights against the land. Unless precluded by a one action rule, the mortgagee may proceed against the land by foreclosure and later go against the assuming grantee for any deficiency. n551 The theoretical justification for allowing the mortgagee the benefit of the assumption varies from state to state, but the prevailing theory is that the mortgagee is the third party beneficiary of the promise to assume, that is, that privity of contract exists between the assuming grantee and the mortgagee. n552 Some states, however, reject this basis and rely upon principles of subrogation.

Under the third party beneficiary theory, the mortgagee must be shown to have been intended to have the benefit of the promise. n553 The trend in states recognizing mortgagees as potential beneficiaries of assumption promises is to presume that the parties to the assumption transaction intended to confer a benefit on the mortgagee; but this is not always true. It may be that the mortgagor was bargaining for a promise benefitting only himself and not the mortgage. Some states continue to recognize a distinction between creditor and donee beneficiaries despite the abandonment of these categories by the Restatement of Contracts in favor of a single category of intended beneficiaries. n554 In such states, a promise to assume given to a mortgagor who had no personal liability or given to a successor to a mortgagor who had not assumed would not benefit the mortgagee. There are also differences as to when the mortgagee's rights vest as a third party beneficiary so that the assuming grantee and the promisor are not permitted by agreement to rescind or modify the assumption promise. n555

The competing subrogation theory permits the mortgagee to reach the mortgagor's rights as surety to enforce the assumption promise. n556 In equity, a suretyship relationship is present where there exists a common creditor of two debtors and where there is an agreement between the debtors that one of them will discharge the obligation. In the case of an assumption, the common debtors are the mortgagor, who is liable on the original mortgage obligation, and the assuming grantee, who is liable on the assumption promise; the assumption promise establishes that, as between them, the grantee is to pay the mortgage debt and treat the mortgagor as a surety. n557 In equity the common creditor is entitled to be subrogated to rights held by the surety against the principal debtor. Although from the creditor's perspective there are two principal debtors, the mortgagor and the assuming grantee, from the perspective of the mortgagor and assuming grantee the latter is the primary obligor and the former a surety. Accordingly, the mortgagee is subrogated to the rights of the mortgagor against the assuming grantee. As has been frequently observed, the subrogation theory is built on circular reasoning. Its goal is to give the mortgagee a claim against the assuming grantee, but the theory requires a predicate in the form of a claim held by the mortgagee against the assuming grantee. There is no need for subrogation if the mortgagee already holds a claim against the assuming grantee. n558 Yet, the theory retains its adherents and often produces results at variance with those obtained under the third party beneficiary theory. Professor Williston sought to avoid some of inconsistency in the subrogation theory by suggesting that the mortgagee simply attached the assuming grantee's promise to the mortgagor. n559

Under both theories, the rights of the mortgagee can rise no higher than those held by the mortgagor against the assuming grantee. This is obvious under the subrogation theory, where the mortgagee is simply subrogated to the mortgagor's rights against the assuming grantee; but it is also true under the other theory, which recognizes that defenses held by the assuming grantee against the grantor are also assertable against the mortgagee. n560 If an

assumption is the result of a fraud practiced by the mortgagor upon the assuming grantee, the fraud may constitute a defense by the grantee to an action by the mortgagee on the promise. n561

Though the assuming grantee is entitled to assert against the mortgagee any defenses the grantee has against the mortgagor, the assuming grantee is not entitled to any defenses the mortgagor may have against the mortgagee. This rule is based on the view that to permit the assuming grantee the benefit of the mortgagor's defenses against the mortgagee would unjustly enrich the grantee who, having assumed the debt, would obtain title for less than the agreed price if the grantee were allowed to raise defenses of the grantor. Accordingly, it has been held that the fact that the original loan was usurious is not a good defense in an action by the mortgagee against the assuming grantee. n562 Identical reasoning prevents those who have taken "subject to" a mortgage from avoiding foreclosure by invoking their mortgagors' defenses. n563 If the assuming party is a junior lienor, rather than a purchaser, courts are divided about the application of the rule barring the assuming party from asserting the defenses of the transferor. Those courts that deny the mortgagor's defenses to assuming lienors stress that no privity of contract exists between the mortgagee and the assuming junior lienor; those taking the contrary position emphasize that there is no unjust enrichment in the case of an assuming lienor whose interest is confined to the recovery of his debt. n564

One of the practical differences between the two theories involves modifications and rescissions of assumption agreements between assuming grantees and their grantors. Under the subrogation theory, if the grantor and assuming grantee modify or rescind the assumption agreement, the subrogation rights of the mortgagee are subject to the modification or rescission. n565 Thus, under this view, the grantee and grantor are free to rescind the assumption and leave the mortgagee without recourse against the grantee.

In contrast, where the mortgagee is viewed as a third party beneficiary, once the mortgagee's rights have vested they cannot be compromised by the actions of the mortgagor and mortgagee. Under the First Restatement of Contracts, which distinguishes between creditor and donee third party beneficiaries, the rights of a donee third party beneficiary vest immediately upon the formation of the contract, while those of creditor third party beneficiaries do not vest until suit is brought by the beneficiary, or the beneficiary otherwise changes position in reliance on the contract. n566 Under this view, where the transferor has no personal liability on the mortgage debt, such as when the transferee has taken subject to the debt, the mortgagee is a donee third party beneficiary with an immediately vested right. n567 The Second Restatement of Contracts abolishes the distinction between donee and creditor third party beneficiaries in favor of a single classification of intended beneficiaries. The rights of intended beneficiaries, according to the Second Restatement, vest when the beneficiary "materially changes his position in justifiable reliance on the promise or brings suit on it or manifests assent to it at the request of the promisor or promisee." n568 There is also authority to the effect that the rights vest upon knowledge of and consent by the beneficiary. n569

A second practical difference between the two theories is in the treatment of the rights of mortgagees against assuming grantees whose grantors have no personal liability on the mortgage debt. Although the discussion of assumptions has focused mainly upon assumption promises made to original mortgagors by their immediate grantees, an assumption can be made to a prior grantee of the mortgagee. In such cases, whether the mortgagee has any recourse personally against the assuming grantee can depend upon whether the person to whom the assumption promise was made was personally liable on the mortgage debt and upon whether the third party beneficiary or subrogation theory is applied. Under the third party beneficiary theory, even such donee beneficiaries may have rights under the contract, and therefore mortgagees can enforce assumptions where the promisee was not personally liable (as would be the case if the promisee had taken "subject to" and not assumed the debt). n570 Under the subrogation theory, in contrast, the mortgagee is able to enforce the assumption promise only if the grantor-promisee is personally liable to the mortgagee, for only then would the requisite of a common creditor of two debtors be present. n571

Because of the suretyship relationship between the mortgagor and an assuming grantee, the mortgagor will have a right against the assuming grantee for any sums the mortgagor is compelled to pay to the mortgagee which should have paid by the assuming grantee. n572 Upon an acceleration following a default, for example, the mortgagee may sue the

assuming grantee personally or foreclose. But if, instead, the mortgagee elects to proceed against the mortgagor, while the mortgagor would be obliged to discharge the mortgage debt, the mortgagor would in turn be entitled to indemnity from the assuming grantee under the assumption agreement. Further, whenever a surety discharges an obligation of a principal debtor, the surety is subrogated to all rights the creditor has against the principal debtor. Therefore, in the example, the mortgagor upon discharging the debt steps into the shoes of the mortgagee and acquires the status of mortgagee. As a result, not only is the mortgagor entitled to indemnity on the assumption promise, but the mortgagor may foreclose the mortgage. The mortgagor is also subrogated to the mortgagee's rights under the assumption promise; but there is no point in distinguishing between the rights of the mortgagor and of the mortgagee under that promise, since the remedies against the assuming grantee are identical under each. Because a surety must discharge the creditor's claim in order to acquire subrogation rights, the mortgagor is not subrogated to any rights of the mortgagee under the mortgage or on the chose in action of the mortgagee on the assumption promise until the mortgagor pays the mortgagee's claims. However, upon being sued by the mortgagee, the mortgagor is, of course, entitled to implead the assuming grantee. n573 Had the mortgagee, in the first instance, gone against the land by means of foreclosure or against the assuming grantee on the assumption promise and obtained satisfaction, there would be no need for subrogation since the mortgagee by this election of remedies would have put liability where it ultimately belonged, that is, on the assuming grantee. n574 Finally, the mortgagee retains his mortgage despite the assumption, for the mortgagor could grant only the encumbered interest to the assuming grantee.

In summary, after an assumption, the mortgagee holds three interests: (1) a claim personally against the mortgagor on the original debt, (2) a claim personally against the assuming grantee, as long as the requirements of the third party beneficiary theory or the subrogation theory are satisfied, on the promise to assume, and (3) a right to go against the land by foreclosing the mortgage. The mortgagee may pursue these claims in any order, unless state on or anti-deficiency laws require otherwise. Both the mortgagor and the assuming grantee are personally and primarily liable to the mortgagee; but between them a suretyship relationship exists which relegates the mortgagor to a position of surety.

COMPUTER-ASSISTED RESEARCH

LEXIS: mortgag! w/20 assum! w/20 subrogat! or suret!

§ 101.05(a)(5) Transfers Subject to a Mortgage.

A grantee of encumbered property always takes title subject to the encumbrance unless the recording statute or common law principles of priority require a contrary result. Nevertheless, it is common to limit the phrase "subject to the mortgage" to transfers of mortgaged property in which the transferee does not assume the mortgage debt, and in this section it is so employed.

A conveyance subject to a mortgage, like a transfer with assumption, does not relieve the mortgagor of any personal liability on the mortgage debt; but, unlike the assumption situation, the transferee does not enter into privity of contract with the mortgagee and acquires no personal liability for that debt because the transferee does not assume it. n575 A mortgage debt does not run with the land so as to bind successors of the mortgagor personally, although certainly successors taking subject to the mortgage are at risk of losing their interests through foreclosure. n576

A suretyship relationship is established when a transfer subject to a mortgage takes place, but it is different from that relationship arising under an assumption and varies with the terms of the transfer. When land is sold subject to a mortgage, the terms of the sale must be examined to determine whether the seller received the full contract price or deducted all or part of the amount of the mortgage debt from that price, in order to determine where parties are meant to place ultimate responsibility for discharging the debt. Of course, the non-assuming grantee has no personal liability on the mortgage debt to anyone; but if the amount of the debt was deducted from the purchase price, it may be inferred that the buyer and seller alike envisioned that the buyer would discharge the debt even though the buyer assumed no

personal liability; n577 they contemplated that the land should bear responsibility for the debt. The seller, having deducted the amount of the debt from the purchase price, had the right to expect the buyer's land to discharge the debt and exonerate the seller. While it may seem strange to view land as a debtor, that is how equity traditionally views it when a buyer takes land subject to a mortgage and receives a credit toward the purchase price. In this situation, the elements of a suretyship relationship exist in that a common creditor, the mortgagee, has two claims, one on the debt against the mortgagor and the other under the mortgage against the land, while between these two the land is primarily chargeable. Of course, the creditor may ignore the surety status of the mortgagor and proceed against the mortgagor alone, but the mortgagor would, upon paying the debt, be subrogated to the rights of the mortgagee under the mortgage and be entitled to foreclose it. n578

On the other hand, where the buyer pays the full contract price to the mortgagor, the principal-surety relationship would be reversed, for then the mortgagor implicitly is primarily obligated to exonerate the land. n579 The land, in effect, would be the surety, and the mortgagor the principal obligor. If, on default, the mortgagee now were to go against the mortgagor alone, there would be no subrogation rights, since the surety would not have been called upon to respond for the principal's debt. In contrast, were the mortgagee to foreclose the mortgage, the grantee would be subrogated to the mortgagee's rights on the debt. n580

COMPUTER-ASSISTED RESEARCH

LEXIS: subject w/4 mortgage or deed pre/1
trust w/20 w/20 surety! or primary

§ 101.05(a)(6) Post-Transfer Dealings with Mortgagees.

Because transfers of mortgaged premises, whether by assumption or not, create suretyship relationships, mortgagees must carefully consider the obligations the law of suretyship imposes on them in dealing with the mortgagors and their grantees. A fundamental principle of suretyship law is that a creditor, in dealing with a principal obligor, must do nothing to prejudice the subrogation rights of the surety. In the mortgage context, this principle is implicated in dealings between the mortgagee and the surety, whether the surety be the mortgagor, a mortgagor's successor, or the land itself. Agreements between principal obligors and mortgagees have the potential of compromising the right of sureties to pay the debt when due and then invoke their subrogation rights, thus imperiling the mortgagee's rights against the surety.

Upon a transfer by a mortgagor to an assuming grantee or to a grantee who "takes subject to" the mortgage debt, a suretyship relationship arises between the transferor and the transferee and/or the land. n581 Where the transferor is a mortgagor with personal liability on the debt n582 or a prior assuming grantee, n583 the transfer does not relieve the transferor of liability to the mortgagee; but this does not alter the fact that, as between the parties to the transfer, the transferor has become surety for the transferor and/or the land. In dealing with the transferee or the land, the secured party must respect this suretyship relationship or risk losing the claims against the surety.

The common illustration of this phenomenon is that of a mortgagee granting to an assuming grantee an extension of time to pay the debt. Because of the extension, the mortgagee has no right to foreclose against the land until the extension period has elapsed and, consequently, until that time the mortgagor cannot be subrogated to any right to foreclose upon the failure of the assuming grantee to pay the debt at its original due date. Because the mortgagor bargained for the right to be subrogated to a right to foreclose upon default under terms of the original debt, so the theory goes, the mortgagor has been prejudiced by the extension and should be totally discharged. n584 Other instances include the release of the personal liability of an assuming grantee and the release of the security, both of which are the usual consequences of the acceptance of a deed in lieu of foreclosure by the secured party. n585

Because mortgagors also have subrogation rights against the land when their grantees "take subject to" a mortgage debt, actions by mortgagees prejudicing those rights may effect a discharge of the liability of the mortgagors. Most states in

these situations hold that the mortgagor is discharged only to the extent of the value of the security when the extension or other modification is given. n586 Others will reduce the mortgagor's liability only to the extent, if any, that the worth of the security has declined after the extension or other modification, reasoning that there can be no prejudice beyond that extent. n587 California, at least where the debt is not evidenced by a promissory note, has given a total discharge on these facts. n588 It has sometimes been held, however, that the modification given to a grantee who took "subject to" has no effect on the mortgagor's liability to the mortgagee. n589

For a modification to have any effect upon the mortgagor's liability to the mortgagee, the mortgagee at the time of the modification must have notice of the surety status of the mortgagor. n590 In almost all cases, though, this requirement is easily met, for in dealing with a grantee the creditor will either be actually aware of an assumption or of a taking "subject to" or, at least, should be expected to inquire about the relation between grantee and the mortgagor so as to have knowledge of the suretyship relationship imputed to the creditor. n591

Mortgagees are able to avoid the normal consequences of granting modifications and releases through the simple expedient of reserving the rights of the sureties at the time of the modification or release, or even at the time the debt is incurred. The common law recognized that creditors could reserve rights against sureties despite their dealings with principal obligors, n592 although it may not have allowed a reservation unless the surety had consented to it either when the debt was incurred or when the subsequent modification or release was given. n593 Section 3-606(1) of the pre-1990 version of the Uniform Commercial Code provided:

> The holder discharges any party to the instrument to the extent that without such party's consent the holder
>
> (a) without express reservation of rights releases or agrees not to sue any person against whom the party has to the knowledge of the holder a right of recourse or agrees to suspend the right to enforce against such person the instrument or collateral or otherwise discharges such person ... ; or
>
> (b) unjustifiably impairs any collateral for the instrument given by or on behalf of the party or any person against whom he has a right of recourse.

By the reservation, the right of the creditor to proceed against the surety "as of the time when the instrument was originally due" is preserved, and similarly preserved is the right of the surety to pay the debt according to its original tenor and thereupon to proceed, by subrogation, against the assuming grantee and/or the land as though the modification had never been given. n594 The theory is that the reservation of rights prevents the mortgagor from being prejudiced by the modification, since the surety may pay the debt according to its original tenor immediately after the modification or release and the exercise forthwith the subrogation rights. n595 However, since there is usually no requirement that the mortgagor be given notice of the modification, let alone of the reservation of rights, this theory sounds rather hollow. n596 For example, when an extension is given the grantee and no notice is given to the mortgagor, the mortgagor may easily assume that the debt was paid at its original maturity date and will be quite surprised later to learn that an extension had been given and that the mortgagor could have paid the debt and then been subrogated to the mortgagee's rights against the grantee and/or the land.

Although it has no direct application to dealings between mortgagees and grantees of mortgagors, the 1990 version of the Uniform Commercial Code did away with the traditional rules discharging obligors to negotiable instruments whenever they grant extensions or modifications to principal obligors. The main thrust of the 1990 reforms was to condition such a discharge on a showing of injury to those secondarily liable for affecting a discharge through an extension or modification. n597 It also prohibits reservations of rights at the time of a modification or extension, though

it permits them in the original agreement. While this reform is salutary, it unfortunately does not address dealings between mortgagees and the grantees of mortgagors, because the 1990 Code provisions address only dealings with parties to the instruments, and the grantees, unless they endorse the instrument, are not parties. n598

COMPUTER-ASSISTED RESEARCH

LEXIS: discharg! or releas! /15 mortgagor or
trustor w/50 modif! or exten!

§ 101.05(b) Transfer of Mortgagees' Interests.

§ 101.05(b)(1) General Principles.

One fundamental principle governs the transfer of the interests of mortgagees: the mortgage follows the debt. Accordingly, in the absence of countervailing considerations such as the rights of holders in due course or of those who rely on the recording statutes, transfers of the interests of secured parties are effected by assignments of the underlying debt, and whoever holds the debt will also have the benefit of the mortgage without a formal transfer of the security interest. The focus, therefore, of inquiries involving purported transfers of a mortgagee's interest should begin with the debt, for normally the owner of the debt, by reason solely of that ownership, will own the mortgage.

Controversies arising out of transfers of mortgagees' interests fall into two main categories. First, there are the competing claims of successive transferees of the debt and mortgage as to priority. Where the mortgagee has made successive purported assignments of the debt, the common law maxim "*Qui prior est tempore potior est jure*" n599 presumptively obtains, although the law of negotiable instruments, the recording statutes, and equitable considerations often give preference to subsequent transferees. Second, there are cases involving the validity of defenses of mortgagors and their successors against transferees of the mortgage debt. Here, the beginning premise is that the mortgagee's transferee can have no greater rights than the transferor had and hence should be subject to all defenses that could have been asserted against the grantor, but, as with the case of successive transfers, other principles often free the transferee from being limited to the defenses of the debtor. The first category of disputes is sometimes said to involve latent equities, being latent or hidden in the sense that they would not normally be discoverable by a subsequent assignee upon inquiry of the transferor, who would be unlikely to admit the previously transferred right. The second category is frequently described as involving patent equities since they are usually readily discoverable by making inquiry of the debtor, who is not likely to be reticent about asserting defenses.

COMPUTER-ASSISTED RESEARCH

LEXIS: mortgagee w/15 transfer! or assign! or convey!
w/50 claim or equity or defense

§ 101.05(b)(2) Successive Transfers (Latent Equities).

In determining the relative priorities between mortgagees' successive transferees, it is necessary to distinguish between obligations governed by the Uniform Commercial Code and those governed by general contract principles. If the mortgage debt is represented by a negotiable instrument, the Code determines the priorities of competing claimants to the instrument although the Code itself may in certain instances incorporate non-Code law. n600 The pre-1990 version of the Code also applied when the instrument lacked negotiability merely because it was not payable to order or bearor. n601

§ 101.05(b)(2)(i) Obligations Not Governed by the Uniform Commercial Code.

Two different common law approaches are used to determine priority between successive assignees of a debt. One view

is to prefer the first assignee under the rubric "first in time, first in right," unless a later assignee qualifies as a bona fide purchaser for value and meets one of certain additional requirements. This is the view taken by the *Restatement of Contracts*:

> Except as otherwise provided by statute, the right of an assignee is superior to that of a subsequent assignee of the same right from the same assignor, unless
>
> (a) the first assignment is ineffective or revocable or is voidable by the assignor or by the subsequent assignee; or
>
> (b) the subsequent assignee in good faith and without knowledge or reason to know of the prior assignment gives value and obtains
>
> (i) payment or satisfaction of the obligation,
>
> (ii) judgment against the obligor,
>
> (iii) a new contract with the obligor by novation, or
>
> (iv) possession of a writing of a type customarily accepted as a symbol or as evidence of the right assigned. n602

The provisions of the *Restatement* position that are most often relevant in the mortgage context are subsections (b)(i) and (b)(iv). Under those provisions a subsequent good faith purchaser of the mortgage debt will prevail if the purchaser obtains satisfaction or acquires possession of the non-negotiable evidence of indebtedness, provided the evidence is regarded as a customary symbol of the debt.

The second view is that the first assignee to notify the obligor of the assignment has priority. n603

Under the *Restatement* position, the subsequent assignee prevails only by taking the interest in good faith and without reason to know of the prior assignment. Thus, a subsequent assignee with actual knowledge of an earlier assignment will take subject to it. In the mortgage context, it becomes important to determine whether recordation of a prior assignment of the mortgage provides notice to later assignees of the obligation. It would seem that, unless the subsequent assignee has reason to know that the obligation is secured by a mortgage, that assignee would have no reason to examine the land records, and that in turn would render recordation irrelevant. n604 Where the later assignee has reason to know that the debt is secured by land, constructive notice of prior assignments is imputed to the later assignee. n605 The recording statutes usually provide that recordation of a mortgage assignment is notice to subsequent assignees so that, once an assignment is recorded, whatever the common law rules would say about priorities is irrelevant, the recording statutes mandate that subsequent assignees are subordinate. n606 At first blush, it may appear that imparting notice of a recorded mortgage assignment to a subsequent assignee is inconsistent with the view that the mortgage follows the debt. While the transfer of a security interest in land is usually recorded to preserve priority over subsequent grantees and encumbrancers, assignments of chooses in action are not normally recorded in the land records. Thus, it could be contended that, since the debt is the primary interest, relative priorities should be determined under the law of contracts. However, such an argument overlooks the fact that the mortgage assignment is also an assignment of the debt and, unlike the case with negotiable instruments, no negotiation of an instrument is necessary to effect an assignment. n607

COMPUTER-ASSISTED RESEARCH

LEXIS: mortgage or (deed pre/2 trust) w/50 priority w/50 successive or subsequent w/15 transfer! or assign!

§ 101.05(b)(2)(ii) Obligations Governed by the Uniform Commercial Code.

When the Uniform Commercial Code is applicable, distinctions must be drawn between holders in due course and other claimants to the instrument. A holder in due course acquires title good against all other claimants regardless of the order of transfers to the competing transferees. Those who are not holders in due course are "subject to a claim of a property or possessory right in the instrument or its proceeds ... ." n608

A holder in due course is one who, among other things, acquires possession of the instrument, properly endorsed if the instrument is order paper, without notice of defenses or claims to the instrument. n609 The underlying goal of imparting negotiability to certain instruments would be severely compromised if holders in due course were expected to examine the land records before purchasing an instrument. Accordingly, the Code provides that recordation in the land records "does not of itself constitute notice of a ... claim to the instrument." n610 The fair inference to be drawn from this provision is that recordation will not impute knowledge of a prior recorded mortgage assignment to a subsequent holder. n611 Some courts, however, have distinguished between the subsequent holder's status as a secured party and as a creditor, concluding that record notice will not impact on the holder in due course status with respect to the instrument, but will prevent the holder from attaining priority with respect to the security. n612 Under the Code, it would seem that, if one of several claimants to an instrument is a holder in due course, the holder will prevail without regard to the order of recordation and even without regard to whether the transfer to him is recorded at all. Further, under the maxim that the mortgage follows the debt, the holder in due course should also have the benefit of the mortgage regardless of whether the holder has recorded an assignment of the mortgage. Likewise, the law of negotiable instruments rather than of property should operate to confer priority to a prior holder in due course of a note secured by a mortgage over a later assignee who acquired only a copy of the note. n613

Where none of the competing claimants to the instrument is a holder in due course, the Code provides that one "taking an instrument ... is subject to a claim of a property or possessory right in the instrument or its proceeds ... ." n614 Under this provision, it would seem that non-Code law determines whether another claim exists, that is, the applicable law of contracts discussed in the preceding section. Although the Code empowers a holder of a negotiable instrument who is not a holder in due course to enforce the instrument against an obligor, the Code does not address the question of ultimate ownership of the instrument or its proceeds. Thus, for example, a holder may enforce the instrument against its maker even though the holder took the instrument with notice of a prior assignment of the claim represented by the instrument and thus did not qualify as a holder in due course. On these facts, the holder may have taken subject to the right of the prior assignee and, accordingly, should hold the proceeds for the account of the prior assignee. n615

Although the recordation of an assignment in the land records may not always provide notice to assignees, and while such recordation should never constitute notice to holders in due course, nevertheless, one court held that the doctrine of lis pendens subjects assignees and holders in due course alike to the outcome of suits pending at the time of assignment or negotiation. n616 This decision seems out of step with contemporary notions of negotiability. n617 Under the common law doctrine of lis pendens, all transferees take subject to the outcome of litigation pending at the time of the transfer in which rights in the property transferred are involved. n618 Thus, it is arguable that, where a suit is pending over a negotiable instrument, a negotiation from one of the litigants is subject to the outcome of the suit. n619 On the other hand, subjecting those taking negotiable instruments to the burden of examining court records seems just as incompatible with negotiability as forcing them to examine the land records. The harshness of the rule subjecting assignees and holders to the doctrine is mitigated somewhat by frequent statutes limiting the rule to cases where a notice of lis pendens is placed in the land records, n620 but general notions of negotiation would suggest that those who would otherwise qualify as holders in due course should not be denied that status because of notice imputed to them under the land records. n621

COMPUTER-ASSISTED RESEARCH

LEXIS: negotiable w/1 instrument w/50

mortgag! or "deed of trust" w/50
transfer or negotiation w/50 notice
w/10 record!

§ 101.05(b)(3) Defenses of Obligors (Patent Equities).

§ 101.05(b)(3)(i) General Principles.

Despite the general common law rule that an assignee has no better rights than the assignor against an obligor, there are instances where defenses good against the assignor are not valid against the assignee. This section examines the impact of a transfer by a mortgagee upon defenses of mortgagors and their successors. It will be recalled that these defenses are often referred to as patent equities, because they should be readily discoverable upon making inquiry of the obligor and are thus not concealed as are the claims of prior assignees, who are said to hold latent equities.

Under the common law of contracts, an assignee takes subject to all real n622 and personal defenses n623 of the assignor, and this rule governs mortgage assignments except where the law of negotiable instruments provides otherwise. The recording act too can sometimes preclude an otherwise valid defense, but almost invariably the defense is payment, so the role of the recording act in this context is deferred to the section on payment. n624 Hence, if a mortgagee obtains the mortgagor's non-negotiable note secured by a mortgage, but the mortgagor has a personal defense on the note, such as fraud, that defense will be good against both the mortgagee and any assignee of the mortgagee. However, where the obligation takes the form of a negotiable instrument and is negotiated to a holder in due course, the result is otherwise. Here, in keeping with the purpose of encouraging the use of negotiable paper as a medium of exchange, the holder in due course takes free of personal defenses. n625 Fraud being one of the personal defenses, the mortgagor cannot defend an action on the note brought by the holder in due course on the ground that the note was fraudulently obtained by the mortgagee.

COMPUTER-ASSISTED RESEARCH

LEXIS: mortgage or (deed pre/2 trust) & successive or
subsequent w/15 transfer! or assign! w/50
defense or patent

§ 101.05(b)(3)(ii) Payment and Mortgage Assignments.

Payment is a personal defense. It is therefore a defense good against an assignee, but not good against a holder in due course. Where a mortgage assignee is not a holder in due course, the common law of contracts provides that all payments made to the mortgagee's assignee before the obligor is notified of the assignment are good and can be credited against the debt. n626 The prudent assignee, if not a holder in due course, should therefore make inquiry of the obligor before taking the assignment in order both to alert the obligor of the impending assignment and to ascertain whether any payments have been made to the assignor. On the other hand, if the benefit of the obligation has been transferred to a holder in due course, the holder in due course is, in nearly all cases, entitled to payment whether or not notice has been given to the obligor. n627 Some consumer protection legislation gives mortgagors and their successors the benefit of payments made to transferors of the debt after the transfer but before notification of the transfer, thereby treating alike payments to assignees and holders in due course. n628 It is, therefore, incumbent on one making payment on a negotiable instrument to insist on production of the instrument, for, if the instrument has been negotiated to a holder in due course, payment to someone else will be no defense to a claim by the holder in due course. Of course, it is the rare obligor who insists on production of an instrument when making a periodic payment on a negotiable instrument, but nevertheless these rules are well established.

Because mortgagors cannot be expected to conduct title examinations every time they make a payment, recordation of a

mortgage assignment is usually not deemed notice to mortgagors, who thus may continue to make payments to mortgagees until they have other notice of the assignment. n629 However, in this connection, it should be reemphasized that notice is almost always irrelevant where the assignee is also a holder in due course. n630 Nevertheless, as against a successor to the mortgagor who acquires the interest after recordation of the assignment, the recorded assignment does provide notice, at least if the successor has reason to know the debt is secured by real estate and thus can be expected to search the land records. n631 The difference in treatment of obligors whose interests arise before and after the recordation of a mortgage assignment is justified by the reality that, while most debtors do not search the land records every time they make a payment, those who acquire interests in the realty after the recordation usually inspect the records before accepting the conveyance.

Despite the foregoing, some decisions indicate that, if a final payment rather than an installment payment, is tendered, the obligor should insist on production of the evidence of the debt, even though it is not a negotiable instrument. Under this approach, a final payment to a mortgagee who cannot produce the non-negotiable evidence of indebtedness is no defense against an assignee who holds the instrument. n632

COMPUTER-ASSISTED RESEARCH

LEXIS: holder pre/3 course w/20 payment
w/50 mortgag! or assign! or transfer!

FOOTNOTES:
(n1)Footnote 517. Walsh, *supra* note 11, § 49 at 202.

(n2)Footnote 518. *See* § 101.05(a)(4)&(5), *infra.*

(n3)Footnote 519. *Casey v. Business Men's Assur. Co., 706 F.2d 559 (5th Cir. 1983)* ; *Lake v. Equitable Sav. & Loan Ass'n, 674 P.2d 419 (Idaho 1983)* ; *Martin v. Peoples Mut. Sav. & Loan Ass'n, 319 N.W.2d 220 (Iowa 1982)* ; *First Fed. Sav. & Loan Ass'n v. Jenkins, 441 N.Y.S. 373 (1981)* .

(n4)Footnote 520. *Casey v. Business Men's Assur. Co., 706 F.2d 559 (5th Cir. 1983)* ; *Western Life Ins. Co. v. McPherson K.M.P., 702 F. Supp. 836 (D. Kan. 1988)* ; *Tierce v. APS Co. & Campus Apts. Co., 382 So. 2d 485 (Ala. 1979)* ; *Great N. Sav. Co. v. Ingarra, 423 N.E.2d 128 (Ohio 1981)* .

(n5)Footnote 521. *Eyde Brothers Dev. Co. v. Equitable Life Assur. Society, 697 F. Supp. 1431 (W.D. Mich. 1988)* ; *Patterson v. Tirollo, 581 A.2d 74 (N.H. 1990)* .

(n6)Footnote 522. For a good description of the competing arguments and citations to conflicting decisions, see *Olean v. Treglia, 463 A.2d 242 (Conn. 1983)* .

(n7)Footnote 523. See Nelson & Whitman, *supra* note 9, § 5.21.

(n8)Footnote 524. *Wellenkamp v. Bank of America, 582 P.2d 970 (Cal. 1978)* , is the best known of these cases. For other cases, *see* Nelson & Whitman, *supra* note 9, § 5.22 at 325-6 nn. 19-23.

(n9)Footnote 525. Nelson & Whitman, *supra* note 9, *supra* § 5.22.

(n10)Footnote 526. *Id.* (Contending that, while an increased interest-on-sale clause is less burdensome than a due-on- sale clause since the principal need not be produced forthwith, logic suggests that they should be enforceable only to the extent that due-on-sale clause are enforced).

(n11)Footnote 527. *12 U.S.C. § 1701j-3(a)(2).*

(n12)Footnote 528. *12 U.S.C. § 1701j-3(a)(3).*

(n13)Footnote 529. "Notwithstanding any provision of the constitution or laws (including the judicial decisions) of any State to the contrary ... ." *12 U.S.C. § 1701j-3(b)(1).*

(n14)Footnote 530. *12 U.S.C. § 1701j-3(a)(1).*

(n15)Footnote 531. *12 U.S.C. § 1701j-3*(e)(1).

(n16)Footnote 532. *12 C.F.R. § 591.2(h).*

(n17)Footnote 533. The window period expired in 1985. *12 U.S.C. § 1701j-3(c)(1)(1992). Phillips v. Superior Court, 692 P.2d 1038 (Ariz. 1984)* .

(n18)Footnote 534. *12 U.S.C. § 1701j-3(c)(1)(A).* Several states availed themselves of this opportunity. *See Ariz. Rev. Stat. Ann. § 33-1571* (extending period to October 14, 1987); *N.M. Stat. Ann. §§ 48-7-19, 48-7-20* (extending non-enforceability indefinitely); *Mich. Comp. Laws § 445.1626. See also Los Quatros, Inc. v. State Farm Life Ins. Co., 800 P.2d 184 (N.M. 1990)* .

(n19)Footnote 535. *12 U.S.C. § 1701j-3(d).*

(n20)Footnote 536. The Federal Home Loan Bank Board was abolished in 1989, when its functions were transferred to the Director of the Office of Thrift Supervision. Pub.L. 101-73, Title IV, § 401(a)(2), *103 Stat. 354, 12 U.S.C. § 1437* (Repealed); *12 U.S.C. § 1462(a)(e).*

(n21)Footnote 537. *12 C.F.R. § 591.5(b)(1)(v).*

(n22)Footnote 538. *12 C.F.R. § 591.5(b)(4).*

(n23)Footnote 539. Nelson & Whitman, *supra* note 9, § 5.24.

(n24)Footnote 540. *Hopkins v. Warner, 41 P. 868 (Cal. 1895)* ; *Chicago Title Ins. Co. v. Sotomayor, 394 F. Supp. 2d 452* (D.Puerto *Rico 2005)* (assumption enforceable even though the mortgage was not recorded).

(n25)Footnote 541. *Van Schouwen v. Connaught Corp., 782 F. Supp. 1240 (N.D. Ill. 1991)* ; *I.H.M., Inc. v. Central Bank of Montgomery, 340 So. 2d 30 (Ala. 1976)* ; *Rosenberg v. Rolling Inn, Inc., 129 A.2d 924 (Md. 1957)* ; *Dakota Bank and Trust v. Funfar, 443 N.W.2d 289 (N.D. 1989)* . Walsh, *supra* note 11, § 50 at 207-8.

(n26)Footnote 542. *E.g., Cal. Civ. Code § 1624(f)*; *N.J. Stat. Ann. § 46:9-7.1*; N.Y. Gen. Oblig. § 5-705; *Karagianis v. G.F.C. Consumer Disct. Co., 34 B.R. 108 (Bankr. E.D. Pa. 1983)* .

(n27)Footnote 543. *See* § 82.06, *supra.*

(n28)Footnote 544. *Townsend v. Ward, 27 Conn. 610 (1858)* ; *Ray v. Lobdell, 72 N.E. 1076 (Ill. 1904)* ; *Skach v. Gee, 484 N.E.2d 441 (Ill. App. 1985)* ; *Ralph L. Shirmeyer, Inc. v. Indiana Revenue Board, 99 N.E.2d 847 (Ind. 1951)* ; *Dimmitt v. Johnson, 203 N.W. 261 (Iowa 1925)* .

(n29)Footnote 545. Nelson & Whitman, *supra* note 9, § 5.8; Walsh, *supra* note 11, § 50 at 209 n. 16.

(n30)Footnote 546. *Masgai v. Masgai, 333 A.2d 861 n.5 (Pa. 1975)* ; *Heaney v. Riddle, 23 A.2d 456 (Pa. 1942)* .

(n31)Footnote 547. *Montoya v. Cherry Creek Dodge, Inc., 708 P.2d 491 (Colo. 1985)* ; *Barkhausen v. Continental Ill. Nat'l Bank & Trust Co., 115 N.E.2d 640 (Ill. App. 1953)* ; *Simon v. Norcross, 353 N.E.2d 789 (Mass. App. Ct. 1976)* ; *Pierce v. Flynn, 656 S.W.2d 42 (Tenn. App. 1983)* .

(n32)Footnote 548. *Pioneer Sav. & Trust v. Ben-Shoshan, 826 P.2d 421 (Colo. App. 1992)* ; *Nebraska Wesleyan Univ. v. Smith, 202 N.W. 625 (Neb. 1925)* .

(n33)Footnote 549. Whitney, "Evidence--Parol--As to Third Parties--Assumption of Mortgage," *12 Wisc. L. Rev. 405 (1937).*

(n34)Footnote 550. *Lahey v. Hackley Union Nat'l Bank, 259 N.W. 130 (Mich. 1935)* ; *McFarland v. Melson, 20 S.W.2d 63 (Mo. App. 1929)* .

(n35)Footnote 551. *Dail v. Campbell, 12 Cal. Rptr. 739 (1961)* ; *Smith v. General Invs., Inc., 150 So. 2d 862 (Miss. 1963)* ; *Frank v. Applebaum, 259 N.W. 302 (Mich. 1935)* ; *Herbert v. Corby, 11 A.2d 240 (N.J. 1940)* . *See also Bankers Mtg. Corp. v. Jacobs, 613 F. Supp. 1579 (D. Va. 1985)* ; *First Fid. Bank v. Travelers Mortg. Servs., 693 A.2d 525 (N.J. Super. App. Div. 1997)* .

(n36)Footnote 552. *United States v. Inorganics, Inc., 109 F. Supp. 576 (E.D. Tenn. 1952)* ; *Ringwood v. Foreign Auto Works, Inc., 786 P.2d 1350 (Utah 1990)* .

(n37)Footnote 553. *Peterson v. Johnson, 56 Wis. 2d 145, 201 N.W.2d 507 (Wis. 1972)* .

(n38)Footnote 554. Restatement (Second) of Contracts § 133 (1979).

(n39)Footnote 555. *See infra* text accompanying notes 566-569.

(n40)Footnote 556. *Capac State Sav. Bank v. McKnight, 191 N.W.2d 55 (Mich. App. 1971)* .

(n41)Footnote 557. *Sigmen v. Arizona Dep't of Real Estate, 819 P.2d 969 (Ariz. 1991)* ; *Cely v. DeConcini, McDonald, Brammer, Yetwin, & Lacy, P.C., 803 P.2d 911 (Ariz. App. 1990)* ; *Matthews v. Saleen, 812 P.2d 1186 (Colo. App. 1991)* .

(n42)Footnote 558. Note, "Suretyship Releases in the Law of Mortgages," *4 U. Chi. L. Rev. 469, 476 (1937);* Corbin, "Contracts for the Benefits of Third Persons," *27 Yale L.J. 1008, 1015-1016 (1918);* Nelson & Whitman, *supra* note 9, § 5.12.

(n43)Footnote 559. Williston, "Contracts for the Benefit of a Third Person," *15 Harv. L. Rev. 767, 768 (1902).*

(n44)Footnote 560. *United States v. Inorganics, Inc., 109 F. Supp. 576 (E.D. Tenn. 1952)* .

(n45)Footnote 561. *Capac State Sav. Bank v. McKnight, 191 N.W.2d 55 (Mich. App. 1971)* .

(n46)Footnote 562. *Griffin v. Federal Dep. Ins. Corp., 532 So. 2d 1358 (Fla. App. 1988)* ; *Zimmerman v. Rubymar Corp., 230 N.Y.S.2d 609 (1962)* .

(n47)Footnote 563. *Irwin v. Grogan-Cole, 590 So. 2d 1102 (Fla. App. 1991)* .

(n48)Footnote 564. Nelson & Whitman, *supra* note 9, § 5.17.

(n49)Footnote 565. *Biddel v. Brizzolara, 30 P. 609 (Cal. 1883)* ; *Brice v. Nat'l Bondholders Corp., 1 S.E.2d 426 (Ga. 1939)* .

(n50)Footnote 566. Restatement of Contracts §§ 142, 143 (1932).

(n51)Footnote 567. *Somers v. Avant, 261 S.E.2d 334 (Ga. 1979)* .

(n52)Footnote 568. Restatement (Second) of Contracts § 311(3) (1979).

(n53)Footnote 569. *Palmer v. Radio Corp. of Am., 453 F.2d 1133 (5th Cir. 1971)* .

(n54)Footnote 570. Nelson & Whitman, *supra* note 9, § 5.12. *See also Pioneer Sav. & Trust v. Ben-Shoshan, 826 P.2d 421, 424-25 (Colo. App. 1992)* .

(n55)Footnote 571. *Matter of Quinco Corp., 389 F.2d 900 (6th Cir. 1968)* ; *Dail v. Campbell, 12 Cal. Rptr. 739 (1961)* ; *Mottashed v. Central & Pac. Imp. Corp., 47 P.2d 525 (Cal. App. 1935)* ; *Prudential Ins. Co. v. Bass, 191 N.E. 284 (Ill. 1934)* .

(n56)Footnote 572. *In re Hubbard, 89 B.R. 920 (Bankr. N.D. Ala. 1988)* ; *Toler v. Baldwin County Sav. & Loan Ass'n, 239 So. 2d 751 (Ala. 1970)* ; *Best Fertilizers of Ariz. v. Burns, 571 P.2d 675 (Ariz. 1977)* ; *Foremost Life Ins. Co. v. Department of Ins., 395 N.E.2d 418 (Ind. App. 1979) , vacated on other grounds 409 N.E.2d 1092 (Ind. 1980)* ; Orosco v. Flammia, No. 04-98-00582-*CV, 1999 Tex. App. LEXIS 1766 (1999)* .

(n57)Footnote 573. *Robson v. O'Toole, 187 P. 110 (Cal. App. 1920)* .

(n58)Footnote 574. *Frago v. Sage, 737 S.W.2d 482 (Mo. App. 1987)* .

(n59)Footnote 575. *Snidow v. Hill, 197 P.2d 801 (Cal. App. 1948)* ; *Dorothy Edwards Realtors, Inc. v. McAdams, 525 N.E.2d 1248 (Ind. App. 1988)* ; *Prudential Ins. Co. of Am. v. Spencer's Kenosha Bowl, Inc., 404 N.W.2d 109 (Wis. 1987)* .

(n60)Footnote 576. *Esplendido Apartments v. Metropolitan Condo. Ass'n, 778 P.2d 1221 (Ariz. 1989)* ; *Del Rio Land, Inc. v. Haumont, 514 P.2d 1003 (Ariz. 1973)* ; *Morrison v. Morse, 77 N.W. 561 (Minn. 1898)* .

(n61)Footnote 577. *Mid Kan. Fed. Sav. & Loan Ass'n v. Dynamic Dev. Corp., 804 P.2d 1310 (Ariz. 1991)* ; *Pritchett v. Kidwell, 461 A.2d 57 (Md. App. 1983)* .

(n62)Footnote 578. *Cady v. Barnes, 208 F. 361 (N.D. Ohio 1913)* ; *The Finance Co. of America, 234 A.2d 611 (Md. 1967)* ; *Missouri v. Stubbs, 642 S.W.2d 103 (Mo. 1982)* ; *Kessler v. Tarrats, 466 A.2d 581 (N.J. Super 1983) , aff'd, 476 A.2d 326 (1984)* .

(n63)Footnote 579. Nelson & Whitman, *supra* note 9, § 5.1; Walsh *supra* note 11 § 52 at 227.

(n64)Footnote 580. *Id.*

(n65)Footnote 581. *Prigal v. Kearn, 557 So. 2d 647 (Fla. App. 1990)* (assumption); *Schmuckie v. Alvey, 758 S.W.2d 31 (Ky. 1988)* ; *Branch Banking & Trust Co. v. Kenyon Inv. Corp., 332 S.E.2d 186 (N.C. App. 1985)* (assumption); *First Interstate Bank of Wash. v. Nelco Enters., 822 P.2d 1260 (Wash. App. 1992)* (non-assumption).

(n66)Footnote 582. *Berg v. Liberty Fed. Sav. & Loan Ass'n, 428 A.2d 347 (Del. 1981)* ; *West Point Corp. v. New North Miss. Fed. Sav. & Loan Ass'n, 506 So. 2d 241 (Miss. 1986)* ; *State ex rel. LeFevre v. Stubbs, 642 S.W.2d 103 (Mo. 1982)* .

(n67)Footnote 583. *Matthews v. Saleen, 812 P.2d 1186 (Colo. App. 1991)* ; *Moss v. McDonald, 772 P.2d 626 (Colo. App. 1988)* .

(n68)Footnote 584. *Moss v. McDonald, 772 P.2d 626 (Colo. App. 1988)* ; *First Fed. Sav. & Loan Ass'n of Gary v. Arena, 406 N.E.2d 1279 (Ind. App. 1980)* . *See N.C. Gen. Stat. § 21* 45-45.1 (1991).

(n69)Footnote 585. *Prigal v. Kearn, 557 So. 2d 647 (Fla. App. 1990)* ; *Branch Banking & Trust Co. v. Kenyon Inv. Corp., 332 S.E.2d 186 (N.C. App. 1985)* .

(n70)Footnote 586. *Branch Banking & Trust Co. v. Kenyon Inv. Corp., 332 S.E.2d 186 (N.C. App. 1985)* ; *Warren v. Washington Trust Bank, 575 P.2d 1077 (Wash. App. 1978)* . *See also* Nelson & Whitman, *supra* note 9, § 5.19. *See also N.C. Gen. Stat. § 45-45.1* (1991).

(n71)Footnote 587. *North End Sav. Bank v. Snow, 83 N.E. 1099 (Mass. 1908)* .

(n72)Footnote 588. *Mortgage Guar. Co. v. Chotiner, 64 P.2d 138 (Cal. 1936)* .

(n73)Footnote 589. *Pfeifer v. W.B. Worthen Co., 74 S.W.2d 220 (Ark. 1934)* .

(n74)Footnote 590. *Hemenway v. Miller, 807 P.2d 863 (Wash. 1991)* . *U.C.C. § 3-605(g)* (1990); *U.C.C. § 3-606* (1989).

(n75)Footnote 591. *Murray v. Marshall, 94 N.Y. 611 (1884)* .

(n76)Footnote 592. *Fisher v. Denver Nat'l Bank, 45 P. 440 (Colo. 1896)* ; *Matthews v. Saleen, 812 P.2d 1186 (Colo. App. 1991)* .

(n77)Footnote 593. *Drescher v. Fulham, 52 P. 685 (Colo. App. 1898)* ; *Matthews v. Saleen, 812 P.2d 1186 (Colo. App. 1991)* ; *First Fed. Sav. & Loan Bank v. Arena, 406 N.E.2d 1279 (Ind. App. 1980)* ; *Calvo v. Davies, 73 N.Y. 211 (1878)* .

(n78)Footnote 594. *U.C.C. § 3-606(2)* (1989). For a discussion of 1990 version of the U.C.C., *see infra* text accompanying notes 597-598.

(n79)Footnote 595. *United States v. Hays, 877 F.2d 843, 845-6 n. 6 (10th Cir. 1989)* .

(n80)Footnote 596. White & Summers, Uniform Commercial Code § 13-17 at 502 (3rd ed. 1988).

(n81)Footnote 597. *U.C.C. § 3-605 (c)* and *(d)*.

(n82)Footnote 598. Or. Rev. Stats. § 880.080, Comment 6.

(n83)Footnote 599. He who is first in time is preferred in law. *Southern Mississippi Planning and Development District v. Alfa General Insurance Corporation, 790 So. 2d 818 (Miss. 2001)* (assignment of deed of trust also transferred priority status).

(n84)Footnote 600. Comment 2, *U.C.C. § 3-104*.

(n85)Footnote 601. *U.C.C. § 3-804*.

(n86)Footnote 602. Restatement (Second) of Contracts § 342 (1979). *Fidelity & Deposit Co. of Maryland v. Ticor Title Ins. Co., 943 P.2d 710 (Wash. App. 1997)* .

(n87)Footnote 603. Comment 2, Restatement (Second) of Contracts § 342 (1979).

(n88)Footnote 604. *See Strong v. Jackson, 123 Mass. 60, 64 (1877)* ("The reference upon the note to the mortgage, under the circumstances, is of much significance.").

(n89)Footnote 605. *Stein v. Sullivan, 31 N.J. Eq. 409 (1879)* ; *Greene v. Warnick, 64 N.Y. 220 (1876)* .

(n90)Footnote 606. *Mott v. German Hosp., 37 A. 757 (N.J. 1897)* .

(n91)Footnote 607. *Seabury v. Hemley, 56 So. 530 (Ala. 1911)* . *Cf. Kirby v. Palos Verdes Escrow Co., 227 Cal.*

Rptr. 785 (1986) ; *Domarad v. Fisher & Burke, Inc., 76 Cal. Rptr. 529 (1969)* (assignment of deed of trust without transfer of debt is nullity).

(n92)Footnote 608. *U.C.C. § 3-306*.

(n93)Footnote 609. Alaska Stat. § 09.45.90 (1990).

(n94)Footnote 610. *U.C.C. § 3-302(b)* (1990).

(n95)Footnote 611. *Landmark Sav. Bank v. Bott, 583 So. 2d 586 (La. 1991)* ; *Soloff v. Dollahite, 779 S.W.2d 57 (Tenn. App. 1989)* ; *Citizens Valley Bank v. Pacific Materials Co., 503 P.2d 491 (Or. 1972)* . *See also Cal. Comm. Code § 3*-304 comment 15 (provision removes uncertainty about effect of constructive notice through recordation).

(n96)Footnote 612. *Wood v. Sparks, 59 S.W.2d 361 (Tex. App. 1933)* , *reh'g. denied, 63 S.W.2d 1109 (1933)* . Before the enactment of U.C.C., Massachusetts courts ruled that record notice deprived the subsequent holder of priority both with respect to the instrument and the security, but the Uniform Commercial Code would seem to preclude such holdings today. *Murphy v. Barnard, 38 N.E. 29 (Mass. 1894)* .

(n97)Footnote 613. *American Bank of the South v. Rothenberg, 598 So. 2d 289 (Fla. App. 1992)* .

(n98)Footnote 614. *U.C.C. § 3-306* (1990).

(n99)Footnote 615. *U.C.C. § 3-301* recognizes that a holder may enforce an instrument "even though the person is not the owner of the instrument or is in wrongful possession of the instrument."

(n100)Footnote 616. *First Md. Fin. Servs. Corp. v. District Realty Title Ins. Corp., 548 A.2d 787 (D.C. 1988)* (doctrine precludes holder in due course status).

(n101)Footnote 617. *Picerne v. Redd, 47 A.2d 906 (R.I. 1946)* (doctrine inapplicable to negotiable instruments); *Stavros v. Karkomi, 349 N.E.2d 599 (Ill. App. 1976)* (doctrine applicable to personalty except negotiable paper).

(n102)Footnote 618. Restatement (Second) of Judgments § 44 (1982). *See also* Page's *Ohio Rev. Code Ann., § 2703.26* (1981). Many jurisdictions limit the doctrine to suits involving realty. *Wigram v. Buckley, 3 Ch. (L.R.) 483 (1894); Parke v. Superior Ct., 88 Cal. Rptr. 352 (1970)* ; *Kirk v. Bauman, 336 So. 2d 125 (Fla. App. 1976)* . Some extend it to personalty. *Larkins-Warr Trust v. Ray, 232 P.2d 156 (Okla. 1951)* ; others extend it to personalty but exclude negotiable paper. *Stavros v. Karkomi, 349 N.E.2d 599 (Ill. App. 1976)* ; *Picerne v. Redd, 47 A.2d 906 (R.I. 1946)* .

(n103)Footnote 619. *First Md. Fin. Servs. Corp. v. District Realty Title Ins. Corp., 548 A.2d 787 (D.C. 1988)* .

(n104)Footnote 620. *E.g., Ala. Code § 35-4-135* (1991); *Cal. Civ. Code § 3146*; *N.J. Stat. Ann. § 2A:15-7* (1987); *N.M. Stat. Ann. § 38-1-14* (1991).

(n105)Footnote 621. *See supra* note 605.

(n106)Footnote 622. Real defenses include infancy; duress, lack of capacity, illegality that makes the debt a nullity, fraud in the factum, and discharge in bankruptcy. *U.C.C. § 3-305(a)(1)*.

(n107)Footnote 623. The personal defenses are all those not classified as real defenses, the most frequently occurring examples being failure of consideration and fraud in the inducement.

(n108)Footnote 624. *See* § 101.05(b)(3)(ii), *infra*.

(n109)Footnote 625. *Am West Sav. Ass'n v. Farmers Mkt. of Odessa, Inc., 753 F. Supp. 1339 (W.D. Tex. 1990)* .

(n110)Footnote 626. *Buffalo Pipeline Co. v. Bell, 694 S.W.2d 592 (Tex. App. 1985)* , *writ refused n.r.e.* (1985); *Horbal v. Moxham Nat'l Bank, 697 A.2d 577 (Pa. 1997)* .

(n111)Footnote 627. *State Bank of Culbertson v. Dahl, 617 P.2d 1295 (Mont. 1980)* ; *Groover v. Peters, 203 S.E.2d 413 (Ga. 1973)* ; *Assets Realization Co. v. Clark, 123 N.Y.S. 1105 (1909)* , *aff'd, 98 N.E. 457 (N.Y. 1912)* ; *Bank One, NA v. Dillon, 2005 Ohio 1950* (Ohio App. 9 Dist. 2005) (although assignee did not record mortgage in timely manner, assignee still had ability to enforce mortgage in foreclosure proceeding).

(n112)Footnote 628. Wyoming has interpreted the Uniform Consumer Credit Code as permitting assuming grantee to pay original mortgagee until actual notice of assignment received. *Young v. Hawks, 624 P.2d 235 (Wyo. 1981)* . The Uniform Land Transactions Act has similar provisions. Uniform Land Transactions Act § 3-206(c) (1975). *See also Md. Code, Real Prop., § 7-103(b)* (1988 Repl.).

Several states have attempted to mitigate the harshness of the rule that payments made to a transferor after negotiation to a holder in due course may not credited toward the debt by sanctioning payments to transferors before recordation of the transfer. *Kan. Stat. Ann., §§ 58-2321* and *58-2322* (1983); *N.M. Stat. Ann. §§ 48-7-2* and *48-7-3* (1987 Repl.). *See also Wagner v. GMAC Mtg. Corp. of Iowa, 775 S.W.2d 71, 73 (Tex. App. 1989)* ("... when a mortgage is assigned to another party, a payment made in good faith without notice of the assignment to the original creditor operates as a defense to a suit by the assignee"; but not clear from the case whether the assignee was also a holder in due course).

(n113)Footnote 629. *Giorgi v. Pioneer Title Ins. Co., 454 P.2d 104 (Nev. 1969). Contra Dotto v. Ciamboli, 148 A. 197 (1929)* , *aff'd, 154 A. 631 (N.J. 1931)* .

(n114)Footnote 630. *Supra* note 621. Northstream Investments, Inc. v. 1804 Country Store Co., 697 N.W.2d 762(S.D. 2005) (Even if a mortgage is not recorded, the assignment is still valid).

(n115)Footnote 631. *Rucker v. State Exch. Bank, 355 So. 2d 171 (Fla. App. 1978)* ; *In re American Equity Corp. of Pinellas, 332 B.R. 645 (Fla. 2005)* (Florida and North Carolina find that assigned deed of trust interests are perfected when the assignment is recorded, even without inclusion of the deed of trust note).

(n116)Footnote 632. *In re Columbia Pacific Mtg., Inc., 22 B.R. 753 (Bankr. W.D. Wash. 1982)* ; *Johnstone v. Mills, 22 B.R. 753 (Bankr. W.D. Wash. 1982)* .

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CHAPTER 101 MORTGAGES, DEEDS OF TRUSTS AND RELATED LIENS

12-101 Thompson on Real Property, Thomas Editions § 101.06

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§ 101.06 Priorities.

§ 101.06(a) Priorities Generally.

The relative priority of competing encumbrances determines who are necessary parties to a foreclosure and the order in which the claimants are entitled to be satisfied out of the security. The basic maxim is "first in time, first in right." n633 Unless within one of the exceptions to this principle, then, the order in which the competing encumbrances attach fixes their relative priorities. Thus, where a mortgagor has given two successive mortgages on the same property, the mortgage given first is superior to the other so that the first mortgagee is not a necessary party to a foreclosure of the second mortgage, since the first mortgage will not be affected by a foreclosure of the second; in addition, in the event of a foreclosure of the mortgage given first, the first is entitled to be satisfied from the foreclosure sale proceeds before the second mortgagee is entitled to participate. The exceptions to this basic principle are the focus of this part. Rent control statutes and similar types of legislation may confer on mortgagors' tenants rights superior to those of mortgagees. For example, the New Jersey anti-eviction statute protects tenants from foreclosures under mortgages antedating the tenancy. n634

COMPUTER-ASSISTED RESEARCH

LEXIS: mortgage or (deed pre/2 trust) w/15 priority or
record!

§ 101.06(b) Recording Statutes and Common Law Priorities.

Even in the absence of a recording statute, the common law sometimes produces results at variance with the "first in time, first in right" principle. Where the competitors each claim legal interests, the "first in time, first in right" principle is invariably followed at common law, n635 and the same approach is usually taken where they each claim equitable interests. n636 When, however, one competitor holds an equitable interest and the other a legal one, the common law departs from the principle if the earlier claim is equitable while the latter legal claim is held by a good faith purchaser for value. n637 The preference for the subsequent good faith purchaser of a legal interest over a prior equitable interest can have contemporary application where the earlier interest is an equitable mortgage or a vendor's lien. Here, even without a recording statute, the subsequent purchaser or legal mortgagee in good faith of a legal interest will take free of

the prior equitable interests, and the order of recordation should not affect the result. If a subsequent legal mortgagee with no notice of a prior equitable mortgage should record first, there should be no question of the priority of the legal mortgage, but even if the prior equitable mortgagee records first, the subsequent legal mortgagee taking in good faith before that recordation ought to prevail, since the legal mortgagor would have priority under the common law and because the recording statutes, excepting pure race statutes, are not designed to protect prior claimants who do not record. n638

Of course, all states have enacted recording statutes which can operate to deny one, including a mortgagee, a priority to which one would be entitled under these common principles of priority. n639 Transferees enjoy the relative priorities of their transferors. Thus, the assignee of a senior lien retains priority over a junior lien recorded before the transfer. n640

COMPUTER-ASSISTED RESEARCH

LEXIS: mortgage or (deed pre/2 trust) w/50 record! pre/1 (act or statute)

§ 101.06(c) Purchase Money Mortgages.

A purchase money security interest has priority, as a general rule, over all other encumbrances. n641 A purchase money security interest is one given to secure a debt incurred to finance the acquisition of property. It may be given to secure a debt held by a seller who extended credit in selling the property, n642 or it may be security given a third party lender who advanced funds used to buy the property. n643 In either case, the purchase money mortgagee will usually have priority over competing liens. Under the general maxim, "first in time, first in right," the purchase money mortgagee will be superior to those acquiring encumbrances after the purchase money security interest attached, absent other considerations. n644 The preference accorded a purchase money security interest is justified by the realization that, if credit had not been extended by the purchase money creditor, the asset would not have been acquired by the debtor and thus made available to satisfy the purchaser's other creditors. n645

Under this principle, mortgagees under security agreements containing after-acquired *property clauses* are subordinated to purchase money mortgagees. n646 Similarly general judgment liens are junior to subsequent purchase money mortgages. n647 The purchase money mortgage also has priority over federal tax liens. n648

It often happens that several purchase money security interests are created at the same time. A seller, for example, may take back a buyer's note and mortgage for part of the purchase price while a lending institution lends the buyer funds to pay the balance of the price and also takes a mortgage. In such cases, it is presumed that the seller-mortgagee has priority over the third-party lender although both, as purchase money mortgagees, have priority over others. This is because the law has traditionally favored sellers, who part with property on the faith of a mortgage, over third-party lenders, who part only with money. n649 Nevertheless, the presumption can be overcome by proof of an agreement by the seller to subordinate the seller's interest to that of the third-party lender. Lending institutions, of course, desire to have first position and often are precluded by law from taking junior mortgages. The prudent third-party lender will accordingly enter into a written subordination agreement with the seller before advancing funds. Without such an agreement third-party lenders are in jeopardy of taking second place vis-a-vis vendor-mortgagees. The third-party lender may prevail because of the recording act or, if the vendor's interest is merely equitable, because of the common law principle that a subsequent mortgagee in good faith takes free of prior equities. n650 Of course, neither the recording statutes, except the pure race statutes, nor the common law priority rules will avail a third-party lender who has notice of the prior interest of the vendor. If a third-party purchase money mortgagee is unaware that the vendor is advancing credit, the third-party lender should prevail in states with notice recording statutes and, if the lender records first, in those states with race or race-notice statutes. An intermediate appellate court in California, refusing to recognize the similarity between vendors' liens and purchase money mortgages held by sellers, ruled that a third-party purchase money mortgage had priority over a vendor's lien even where the third-party mortgagee had knowledge of the lien. n651 In discounting the mortgagee's knowledge of the vendor's lien, this decision is highly questionable since it repudiates

the traditional notion that a purchaser with knowledge of a superior claim, be it legal or equitable, takes subject to it.

Occasionally, third-party lenders attempt to attain priority over sellers by requiring that their mortgages be recorded before those of the sellers. This approach may succeed if it can be shown that the seller and third-party lender agreed that priority would be established by the order of recordation, but usually the order of recordation alone will not subordinate the sellers' mortgages. n652

Unless they are recorded, the common law priority afforded to purchase money mortgagees often proves illusory with respect to subsequent encumbrances. Subsequent grantees and encumbrancers who lack notice of prior encumbrances have priority under the recording statutes over prior unrecorded encumbrances, and this is true with respect to prior unrecorded purchase money mortgages. n653 Thus, a seller who does not record a purchase money mortgage may lose the priority otherwise enjoyed over a third-party purchase money mortgagee if the latter is not otherwise aware of the seller's mortgage. Of course, in states with race or race-notice recording statutes, the subsequent third-party lender would have to record the lender's own mortgage first to overcome the seller's priority.

COMPUTER-ASSISTED RESEARCH

LEXIS: purchase pre/1 money w/5 mortgage or deed pre/2
trust or security w/15 priority or record!

§ 101.06(d) Subordination Agreements.

A subordination agreement is an undertaking by a mortgagee to reverse priority between the mortgagee's interest and another encumbrance. The other encumbrance may be one already in existence, as when a construction lender agrees to lend construction monies only if an existing mortgagee agrees to subordinate to the construction mortgage. It may also be an encumbrance created simultaneously with that held by the promisee of the agreement, as when a third-party purchase money mortgagee agrees with a seller purchase money mortgagee that the third-party's mortgage will have priority. Finally, it may be a future encumbrance, as when a seller takes back a purchase money mortgage but agrees to subordinate it to a future construction mortgage. n654

Subordination agreements may be executory or executed. Executory subordination agreements may not be self-executing and, for a number a reasons, equity may decline specifically to enforce them, thereby leaving priorities as they stand and the promisee with only a claim for money damages. Once the subordination agreement has been performed, however, priorities are reversed, and the promisor will have a heavy burden if the promisor seeks to set the subordination aside.

There is some disagreement among the courts as to what constitutes a subordination. What is the proper characterization of an express "subordination" to a future mortgage or of the agreed upon recordation of a subordinated mortgage after recordation of the subordinating one? Should a provision in a purchase money mortgage whereby the seller, rather than agreeing to subordinate to a future construction mortgage, purports presently to subordinate to such a mortgage be deemed to have given an executory contract to subordinate or simply to have taken a junior mortgage? Some argue: n655

> When the seller contracts initially to receive a junior lien, there is no issue of the alteration of the priority of his lien ... . In this situation, the seller receives a *second lien*, which is exactly what he bargained for. (Emphasis in original.) n656

The California decisions seem to treat such provisions as subordinations:

> In our view there is no justification, legal or otherwise, which would call for a different result

whether the seller in a joint transaction records first and then agrees that his lien will be subordinated or whether he agrees that the lender may achieve priority through first recording. n657

The distinction between taking a junior encumbrance and taking a senior one and agreeing to subordinate it can be crucial to priorities. As discussed in the next section, a subordination agreement may be subject to certain contingencies, usually actions of the mortgagee, but with an executed junior mortgage, it is difficult to conceive that the relative priorities have not been indelibly established.

§ 101.06(d)(1) Executory Subordination Agreements.

A subordination agreement, like any other contract, must be certain in its terms, and further, to be specifically enforceable, those terms must be equitable.

Some courts require the inclusion of certain terms which define and limit the promisor's risk before they will enforce executory subordination agreements. n658 Presumably, the absence of these terms will also preclude successful pursuit of a legal action for breach of an undertaking to subordinate. The California Supreme Court has indicated that the standard is "terms that will define and minimize" the risk to the subordinating lienor. n659 That California case involved an agreement to subordinate to a construction loan and, although the court declined to enforce the agreement specifically, it is difficult to determine whether it so declined because it felt the terms of the agreement were too uncertain or too harsh, i.e., the terms were not sufficiently just to prompt equitable relief. In any event, the deficiencies in the agreement upon which the court relied were (1) no requirement that loan proceeds be invested in the mortgaged property, (2) no guaranty that the advances would not exceed the value of improvements, and (3) no ceiling on the amount of the advances. Other courts are taking the same tack, refusing to enforce subordination agreements unless they not only set forth with some specificity the terms of the mortgage loan to which the promisor agrees to subordinate, but also provide some assurance that the promisor will not be unduly prejudiced. North Carolina, for example, reasoning that contracts calling for future agreement on material terms are void for uncertainty, refused to enforce a promise to subordinate on request to a future lien securing any "amount as may be reasonably requested." n660 By these standards, it would seem that an enforceable subordination agreement should establish a maximum debt to which the promisor agrees to subordinate, together with the maximum interest rate and loan period, and also stipulate that the loan proceeds be invested in the property. n661

Not all courts adhere to such rigid standards for enforcing subordination agreements. n662

COMPUTER-ASSISTED RESEARCH

LEXIS: mortgage or (deed pre/2 trust) and executory
w/15 subordinat! w/15 agreement or contract

§ 101.06(d)(2) Executed Subordination Agreements.

Once a mortgagee actually subordinates to another encumbrance, the arguments that could have been raised to defeat enforcement of the promise often disappear. If the executed subordination identifies the encumbrance to which it is subordinated, or if the terms of the debt were known to the promisor when the subordination was executed, it is difficult to contend that the terms of the subordination agreement were uncertain. Of course, it may still be that an executed subordination is inequitable, as, for example, in not providing that funds advanced be invested in the property; such a claim, however, may be countered with the argument that, having in fact subordinated and the promisee having changed position in reliance on the executed subordination, the promisor is estopped from seeking to set the subordination aside. n663 Nevertheless, executed subordinations have sometimes been set aside on the ground that the subordination was subject to conditions which had not occurred.

In accepting the benefits of a subordination agreement, a lender may expressly or implicitly assume obligations to the subordinating mortgagee, and the faithful performance of these obligations may be a condition of the subordination. Should the condition not be fulfilled, the subordination itself will then be vitiated. The easiest cases in this area involve express conditions. n664 A few courts, however, are willing to infer conditions. n665 The California courts have gone so far as to assume that a subordination executed by a seller in favor of a construction lender is implicitly conditioned upon investment of construction funds in the property. n666 Under this reasoning, construction lenders, aware of the seller's subordination, even though they may have no direct dealings with the seller, obtain priority over the seller only to the extent that advances are actually invested in the property. n667 Kentucky has held that the beneficiary of a subordination is implicitly bound to apply any payments the beneficiary receives from the mortgagor toward the debt secured by the mortgage. n668 It appears that most courts are unwilling to accept the notion of implied conditions, however. n669 This reluctance may be particularly strong where all parties to the subordination are experienced lenders. n670

COMPUTER-ASSISTED RESEARCH

LEXIS: mortgage or (deed pre/2 trust) w/50 executed w/15 subordinat! w/15 agreement or contract

§ 101.06(e) Replacement Mortgages.

Mortgagees sometimes release their security and take back another security interest to replace the security released, giving rise to questions about the relative priorities of the substitutionary security and encumbrances that attached after the released security interest attached. Certainly, if no changes in the underlying debt accompanied the substitution of security, the intervening encumbrancers should not rise in priority merely because the former senior mortgagee substituted another mortgage. n671 The intervening encumbrancers should have been aware of the released mortgage when they extended credit and did not rely on the release. But, if changes were made in the debt when the substitution was effected, and if those changes reflect additional extensions of credit, the intervening encumbrancers are in the position to claim that, to the extent that further credit has been extended, the substituted security should be junior.

In resolving disputes between competing mortgagees when a substitution of security interests has taken place, courts entertain a presumption that the parties to the substitution intended no adverse consequences for the mortgagee. n672 Thus, absent proof that the mortgagee meant to subordinate the mortgage, the presumption is that the subordination was not intended. Competing encumbrancers, however, are not bound by any agreement between the parties to a substitution, and upon detrimentally relying upon the release may establish priority over the substituted mortgage. n673

If the substitution were recorded before other parties extended credit, the subsequent creditors would certainly be junior. If the substitution were not recorded after the releases, and if credit were later extended on the faith of the release, the equities might very well favor the later creditors; but cases of substitutions not accompanied by a simultaneous recordation of the release and the substitute mortgage are rather rare.

Where the underlying debt is modified and secured by the substituted mortgage, the question turns on whether the intervening encumbrancers are prejudiced by the modification. To the extent that the debt of the mortgagor is increased by the modification, prejudice is generally established. If the principal amount of the debt is increased, the mortgagee will retain priority only with respect to the former principal balance and will be subordinate with respect to the increase. Similar treatment is afforded modifications which increase the rate of interest. A modification which merely extends the repayment schedule is usually presumed beneficial to other creditors, since they are not immediately threatened with foreclosure of the senior mortgage and the need to redeem or lose their security. n674

COMPUTER-ASSISTED RESEARCH

LEXIS: mortgage or (deed pre/2 trust w/5 replac! or substitut!

§ 101.06(f) Future Advances.

Mortgages often secure not only sums loaned at or before the time the mortgages are given, but also sums to be loaned in the future. Such mortgages are said to secure future advances. n675 The most common examples of such mortgages are the construction mortgage, which secures sums to be disbursed in installments during the course of construction, and the home equity mortgage, which secures revolving lines of credit. Questions can arise as to the priority of such mortgages to the extent that other encumbrances intervene between the giving of the mortgage and the subsequent advances.

Often priority is possible only if the security instrument meets certain statutory requirements. n676 Sometimes specific headings must appear in the instrument, n677 particular language must be included respecting advances, n678 the period during which advances may be made must be set forth, n679 or the maximum amount to be secured must be stated. n680

The orthodox view is that an earlier mortgage confers priority with respect to advances over intervening encumbrancers only if the advance was obligatory or, if not obligatory, made without actual knowledge of the intervening encumbrance. n681 In a few states, constructive notice of an intervening encumbrance imparted by the land records will deny the earlier encumbrancer priority with respect to optional advances. n682 A minority but growing view is that no distinction between obligatory and optional advances should be drawn and that either type should have priority over intervening liens. n683 The reporters for the Restatement, Third, on Mortgages, identified 36 states which, under various conditions, grant priority to optional advances. n684 There may well be a trend toward the minority position, at least where the total amount secured does not exceed the maximum indebtedness stated in the security instrument. n685

The rationale of the orthodox view is to protect mortgagors who, if optional advances under prior mortgages are given priority, will find themselves unable to borrow. Prior mortgagees would be reluctant to make advances once they are aware of subsequent encumbrances, and later lenders would also hesitate to extend credit lest they be rendered insecure through future advances by earlier mortgagees. Nevertheless, because of the difficulties in distinguishing obligatory and optional advances, the orthodox view has come under attack.

Under the traditional view, of course, it is not always easy to determine if a particular disbursement is optional or not. In the typical case of a construction lender vying with a subcontractor, can it be said that advances made by the former are truly obligatory, where the loan agreement obliged the constructor to advance funds at various stages of construction provided construction was proceeding in a manner satisfactory to the lender? A lender who retains a great deal of discretion, for example, in advancing monies runs the risk that the advances will be found to be optional. One lender was found to have made optional payments under a loan agreement authorizing disbursements "at such times and in such amounts as the Lender shall determine." n686 Conditioning advances upon a construction lender's verification of the cost of completed work was found not to leave the lender with such discretion as would render the disbursement optional. n687 Some speculate that there may be a trend to liberalize the definition of "obligatory" in an effort to preserve the priorities of construction lenders who make advances or expend funds to save a project from collapsing. n688

Construction lenders may elect to make advances not strictly mandatory in the belief that doing so is essential to completion of a project and to maintaining the value of their investment in it. Should the economic necessity or, perhaps, reasonableness of such disbursements be considered in determining whether they should be labelled optional or obligatory? The cases are divided. Where a construction lender took over and completed a project after the contractor-borrower's default, one court held, the lender had not acted as a volunteer but had fulfilled the duty of a mortgagee in possession to prevent deterioration and thus made obligatory advances. n689 Many courts, in contrast, would not have so characterized the disbursements, finding that the lender had no duty to disburse. n690

Recognizing the economic factors under which construction lenders often are compelled to make what might be characterized as optional advancements, California preserves their priority if the optional advances are used to discharge certain mechanics' liens or to pay the cost of the improvement. n691

Difficulties may also arise if lenders waive compliance with the terms of the loan agreement and disburse funds when the conditions precedent to the obligation to disburse have not been met. If the conditions were waived in the belief that doing so was essential to the economic survival of the project, the same type of considerations described in the preceding paragraphs are present. Yet, disbursements in the absence of compliance with certain stipulations have been treated as optional. n692

Several legislatures have attempted to avoid the obligatory-optional quagmire for construction mortgages by eliminating the mortgagor's default and/or occurrence of conditions that may relieve the lender of the duty to disburse as a basis for characterizing disbursements as optional. n693 This approach parrots the Uniform Land Transactions Act, the Uniform Simplification of Land Transfers Act, and the Uniform Land Security Interest Act. n694 The comments to these acts indicate the intent is to preserve the priority of a lender even though, at the time an advance is made, the "borrower's breach or other circumstance might justify refusal to make the advance." n695

Statutes have also been enacted to maintain the relative priority of home equity or other revolving line of credit mortgages. n696 The North Carolina statute preserves the lender's priority if the "lender is obligated," n697 but it appears that the obligation may be ephemeral since the statute contemplates that the lender may "[reserve] the right to cancel or terminate the obligation." n698

The traditional solicitude for the ability of mortgagors to obtain further financing may not be consistent with maintaining the priority of advances without regard to whether they are obligatory or optional. In an effort to reconcile abolition of the need to distinguish between obligatory and optional advances with this concern for mortgagors, some jurisdictions recognize a so-called "cut-off" right in mortgagors. n699 By serving such a notice on the mortgagee, the mortgagor removes any further disbursements from the coverage of the mortgage, thus enhancing the mortgagor's ability to secure secured financing from other lenders.

The standard American Land Title Association Loan policy excludes future advances from coverage, other than sums expended to protect the security, although most insurers will endorse their policies to insure the validity and priority of mortgages as they relate to later advances. n700

COMPUTER-ASSISTED RESEARCH

LEXIS: mortgage or (deed pre./2 trust) w/50 obligat! or option! w/15 future pre/2 advance

§ 101.06(g) Subrogation.

Where one pays another's debt, other than as a volunteer, the payor often is deemed to acquire by operation of law the rights the creditor formerly had against the debtor. Payment by one who is not a volunteer, in effect, brings about a transfer of the creditor's rights to the payor; the payor is said to be subrogated to the creditor's rights against the debtor and against the debtor's property. Where the payment is paid to protect the interests of the payor or to satisfy the payor's liability as a surety, the subrogation right is usually described as legal subrogation n701 and, sometimes as equitable subrogation. n702 In the context of mortgages, this type of subrogation can be illustrated in those cases in which a mortgagor is compelled to pay the mortgage debt after an assuming grantee breaches the assumption agreement. In such a case, upon paying a debt which should have been discharged by the assuming grantee, the mortgagor is subrogated to the rights of the mortgagee and entitled to foreclose the mortgage against the assuming grantee.

Another type of subrogation, unlike legal or equitable subrogation, arises because of an agreement between one who pays another's debt and either the debtor or the creditor. This type of subrogation is based on contractual expectations of the payor and is generally referred to as conventional subrogation. n703

Under both types of subrogation, the interest to which the payor is subrogated can retain its relative priority over other interests in the property. n704 Thus, where three mortgages encumber the land, the third mortgagee may discharge the first mortgage to preserve the third mortgage from being sold out and be equitably subrogated to the first mortgage, leaving the second mortgagee in second position behind the mortgage to which the payor is subrogated but still ahead of the third mortgage.

§ 101.06(g)(1) Legal, Sometimes Called Equitable, Subrogation.

Only those who discharge another's debt in order to protect their own interests or fulfill their obligations as surety for the debt are entitled to legal subrogation. n705 Those who pay the debt as mere acts of charity or who do so under no economic or legal compulsion are deemed to have made a simple gift and thus are denied subrogation rights. n706 One who lends funds to be used to discharge an existing secured obligation runs the risk of being treated as a volunteer unless the lender is interested in discharging the lien in order to preserve a junior interest of the lender or is entitled to conventional subrogation. n707

One is not a volunteer when one pays a debt on which one is personally liable as a surety. Certainly, a guarantor of a mortgage note is not a volunteer when paying the note upon demand after unsuccessful presentment to the primary obligor. In such a case, the guarantor was never a primary obligor. However, one who was once a primary obligor can later become remitted to surety status. Suppose a mortgagor transfers to an assuming grantee and that the grantee later grants a second, non-purchase money mortgage. Here, though the mortgagor was and remains a primary obligor from the perspective of the mortgagee, at least as between the mortgagor and the assuming grantee, the grantee has become a primary obligor and the mortgagor is now a surety. Should the mortgagor become compelled to pay the debt, the mortgagor should be subrogated to the first mortgagee's right with priority over the second mortgagee.

Even where the grantee takes "subject to" the first mortgage, the mortgagor, upon payment of the debt should be subrogated to the first mortgagee's priority over the second mortgagee although there would be no rights *in personam* against the non-assuming grantee to which the mortgagor could be subrogated. n708 Arizona dissents from this view and refuses to subrogate mortgagors to the rights of their mortgagees against non-assuming grantees, on the theory that payment of the debt by the mortgagor discharges the debt and the mortgage so that there is nothing to which the mortgagor can be subrogated. n709 This view is based upon the pre-1990 Uniform Commercial Code which provides that reacquisition of an instrument by one who is a party to the instrument with no right thereon against another discharges the liability of all parties to the instrument. n710 The Uniform Commercial Code provision, however, was probably not intended to apply where the party reacquiring the instrument is a "surety for another party." n711 The position also clashes with recognition that subrogation rights are available to mortgagors who pay the mortgage debt after an assumption by a grantee, n712 for reacquisition under either rationale would extinguish the debt. n713 Section 3-601(3) was omitted from the 1990 version of the Uniform Commercial Code.

One who pays a secured debt in order to protect one's own junior interest is not a volunteer and is entitled to equitable subrogation. Thus, a mortgagee who had subordinated the mortgage to another mortgage is subrogated to the rights of the senior mortgagee upon payment on the senior obligation. n714 Similarly treated are cotenants who discharge debt secured by a lien on their property. n715

COMPUTER-ASSISTED RESEARCH

LEXIS: mortgage or (deed pre/2 trust) w/50 equitable or legal w/5 subrogat!

§ 101.06(g)(2) Conventional Subrogation.

Where one advances funds to discharge a mortgage pursuant to an agreement, explicit or implicit, that the new lender will step into the shoes of the mortgagee whose debt is paid with the funds advanced, the new lender should be subrogated to the rights of the creditor whose debt is discharged. n716 The new lender, of course, is not legally obligated to advance the funds and is not advancing them to preserve the lender's own interest in the property and is, therefore, not entitled to legal subrogation. Nevertheless, the lender made the loan in the expectation of security, and the loan preserved the interest of junior secured parties, who would be unjustly enriched if they were given priority over the new lender. Certainly, the new lender would have been given priority if the new lender had taken an assignment of the mortgage discharged with the funds advanced, and the equities between the new lender and lienors junior to the mortgage discharged are not really changed by the failure of the new lender to obtain an assignment. Thus, it is generally held that one advancing funds to discharge an encumbrance is subrogated to the rights of the party whose claim is discharged, if the funds are advanced with the understanding that the lender will be secured. n717 In recognizing subrogation here, equity is fulfilling the expectations of those who advance money in the reasonable expectation of acquiring a senior security. n718

Loans made with no expectation of security do not entitle the lenders to priority over subordinate encumbrances. Parents who lend a child funds to discharge a mortgage obligation with no agreement that they will succeed to the rights of the mortgagee will not be subrogated to rights and priorities of the mortgagee whose encumbrance is removed with the loan proceeds. n719 Nor will a lender who refinances a mortgage loan, by that fact alone, be subrogated to the rights of the mortgagee whose encumbrance is satisfied. n720

It has been said that a lender with actual knowledge of junior liens cannot reasonably expect to acquire senior status over those liens by lending money to discharge a senior lien. n721 Yet, it is difficult to understand how knowledge that junior encumbrances exist justifies denying subrogation, since the junior interests are benefitted by the payment of the senior encumbrance in the sense that it has not been foreclosed against them and because there is no prejudice to the junior encumbrancers, who are in the same position after the new loan as before it. n722 Indeed, it would seem that, so long as the new lender bargained for security, the lender should not be treated as a volunteer and should have expectations fulfilled. Knowledge that junior liens exist should not, of itself, preclude a finding that the new lender advanced funds in the expectation of priority. n723

Most courts hold that constructive notice will not bar subrogation and priority over junior mortgages. n724 Some courts, however, do deny priority to lenders who negligently fail to discover intervening encumbrances. n725

COMPUTER-ASSISTED RESEARCH

LEXIS: mortgage or (deed pre/2 trust) w/50 conventional or contractual w/5 subrogat!

§ 101.06(h) Competing Real Estate and Chattel Security Interests.

It frequently happens that a creditor acquires a security interest in a chattel which is attached to real estate burdened by, or which is later burdened by, a real estate mortgage. Before the adoption of the Uniform Commercial Code, the decisions and statutes in this area were "complicated and voluminous, but now [are] obsolete" because of the adoption of the Uniform Commercial Code. n726

Except for excluding "ordinary building materials incorporated into an improvement," n727 the Code does not provide much guidance as to what constitutes a fixture, leaving the definitional task to the law of real property generally. n728 Thus, resort must still be made to earlier case law to determine whether a particular chattel has, for some purposes at least, metamorphosed into realty. A fixture has been defined as "realty with a chattel past and fear of a chattel future." n729 It is an attachment to real estate which may be classified for some purposes as land and for others as personalty.

Thus, for example, an attachment made to land by a tenant may be treated as removable personalty in a dispute between the tenant and the landlord, but treated as land in a dispute between the tenant and a purchaser from the landlord believing in good faith that the landlord had made the annexation.

Section 9-313 contains the principal provisions of the Uniform Commercial Code for resolving priority controversies between real estate mortgagees and those who claim security interests in chattels affixed to the land. Section 9-313(4)(b) lays down the basic premise that a perfected security interest in a fixture has priority over real estate interests, including real estate mortgages, which are not matters of record at the time the chattel security interest is perfected. Of course, as is so often true with broad legal rules, there are numerous exceptions to this rule contained in other parts of § 9-313, but the starting point is that, between lienors claiming realty and chattel interests, the first to record has priority. In essence, subject to the exceptions, the Code creates a pure race recording system for priorities. "Perfection by a fixture filing" is the term of art employed in the Code to denote recording of a security interest in a chattel. A fixture filing is the filing in the office of the custodian of the land records of a financing statement that covers "goods which are or are to become fixtures ... ." n730

Those claiming security interests in fixtures may also acquire an encumbrance by taking and recording a real estate mortgage or deed of trust, n731 and a prudent creditor may consider perfecting by both a fixture filing and a real estate mortgage recordation.

In accord with the general "first to file or record" n732 principle, but subject to exceptions described below, a prior recorded real estate mortgage will have priority over a subsequent perfected security interest, n733 and a subsequent real estate mortgage will have priority over a earlier security interest in the fixture if the real estate mortgage is recorded before the security interest is perfected.

COMPUTER-ASSISTED RESEARCH

LEXIS: fixture or chattel w/15 mortgage or security w/15 priority or record!

§ 101.06(h)(1) Purchase Money Security Interests.

One exception to the "first to file or record" principle is that purchase money security interests in fixtures, which arise before the goods become fixtures, are ahead of prior real estate interests, provided that a fixture filing is made before the goods become fixtures or within 10 days thereafter. n734 Perfection within the 10 days following annexation is good only against prior real estate claimants; real estate mortgages arising during the 10-day period thus have priority over security interests in fixtures unless they are perfected by fixture filing before the real estate mortgages are recorded. n735 Many states took a similar approach as a matter of common law before the promulgation of the Code in the belief that real estate mortgagees would be unjustly enriched if the result were otherwise. n736 The Code continues this approach although the 10-day limitation will operate to subordinate even purchase money fixture security interests to prior real estate interests if there is no fixture filing within 10 days of annexation. n737

The special treatment afforded purchase money security interests in fixtures is denied to such interests perfected after the recordation of a real estate construction mortgage. n738

COMPUTER-ASSISTED RESEARCH

LEXIS: fixture or chattel w/15 purchase pre/1 money w/5 mortgage or security

§ 101.06(h)(2) Factory or Office Machinery and Domestic Appliances.

Another exception to the "first to file or record" principle involves factory and office machinery and replacements of

domestic appliances. n739 Security interests in such goods may have priority over real estate interests if they are perfected by any method permitted in Article 9 of the Code. The drafters felt that this special exception was necessary because of the difficulty in many cases of determining whether machinery and appliances have become fixtures. Of course, if it is clear under applicable law that the machinery or appliances have not become fixtures, a fixture filing would not be required to perfect a security interest, but, in order to obviate the need to litigate the issue, the Code simply provides that an Article 9 security interest, no matter how perfected, will be valid against real estate interest in certain cases. n740

To qualify for this special treatment, factory and office machinery must be readily removable. If the machinery is readily removable, the security interest will also have priority over construction mortgagees relying on the general preference for construction mortgages under section 9-313(6). n741

Domestic appliances qualify under this exception only if they are replacements of consumer goods. n742 Original installations of appliances are not covered because of a desire to "facilitate financing of original appliances in new dwellings as part of the real estate financing of the dwellings." n743 The restriction of such appliances to consumer goods further limits the exception to goods "used or bought for use primarily for personal, family, or household purposes." n744 For example, appliances installed by landlords for use by residential tenants are not covered by the exception. n745

COMPUTER-ASSISTED RESEARCH

LEXIS: I. fixture w/15 (factory or office) pre/1 machin!
II. domestic pre/1 appliance w/15 replac!

§ 101.06(h)(3) Judgment Liens.

Real estate liens obtained through judicial proceedings will be junior to any security interest in fixtures perfected by any means authorized by Article 9 of the Code before the real estate lien is recorded. n746 While the "first to file or record" principle functions in this context, the security interest in fixtures thus may be perfected by means other than a fixture filing.

The intent of this exception is to preserve against the claims of a trustee in bankruptcy the priority of security interests obtained through legal or equitable proceedings, but not perfected by a fixture filing. n747

COMPUTER-ASSISTED RESEARCH

LEXIS: fixture w/15 judgment or (real pre/1 estate)
w/1 lien

§ 101.06(h)(4) Removal Rights of Debtor.

A security interest in fixtures, even if unperfected by any means, is superior to a real estate interest if the debtor has the right to remove the fixture as against the real estate owner or encumbrancer. n748 This provision is primarily of benefit to those taking security interests in goods from tenants who install fixtures on leased premises. n749 If a tenant, for example, purchases goods on credit and gives the seller a security interest in them, and if the tenant then affixes the goods to the land but is legally entitled to remove them as against the landlord, the security interest will have priority over a competing real estate mortgage even though the seller does not perfect the security interest.

COMPUTER-ASSISTED RESEARCH

LEXIS: fixture w/15 security w/50 remov!

§ 101.06(h)(5) Construction Mortgages.

The current version of the Uniform Commercial Code contains a simple and direct provision affording real estate construction lenders who record their mortgages priority over subsequently perfected purchase money security interests in goods which become fixtures. n750 The priority accorded construction mortgages also attaches to mortgages given to refinance construction mortgages.

No distinction is made between obligatory and optional advances in giving priority to construction mortgages which are recorded before the perfection by a fixture filing of a security interest in fixtures. n751 Mortgages given to secure debts incurred in improving a building after completion of construction are not entitled to this special treatment, even if they are funded through an advance clause in a construction mortgage. n752

The 1962 version of the Uniform Commercial Code gave priority to construction mortgagees only if they were recorded before the claimant of the security interest in goods had made or contracted to make disbursements without knowledge of the security interest and before it was perfected. n753 This provision denied construction lenders priority, with respect to subsequent advances, over vendors taking security interests in fixtures if the vendors filed a security agreement before the advance. n754 Because of the concerns of construction lenders, some states refused to adopt the earlier version of § 9-313.

COMPUTER-ASSISTED RESEARCH

LEXIS: construction pre/1 mortgage w/15 priority or record!

§ 101.06(h)(6) Security in Crops.

The Uniform Commercial Code includes crops within its definition of goods. n755 Nevertheless, so long as questions of priorities between or among competing secured creditors are not involved, it is clear that real estate mortgages can attach to crops grown on mortgaged land, even though an Article 9 financing statement has not been filed. In title theory states, the mortgagee may, upon default, take possession of the premises and the crops. n756 Where strict foreclosure is permitted, the foreclosing mortgagee can become the owner of the crops. In lien theory states, though, the mortgagor's interest in the crops will not be lost until foreclosure or until a rents and profits clause is properly invoked by the mortgagee. However, regardless of the theory of mortgages in force, crops actually harvested by a mortgagor lawfully in possession of the land belong to the mortgagor free of the mortgage lien. n757

When competing creditors claim security in crops, some claiming security as real estate mortgagees and others as holders of Article 9 security interests, it would seem that the relative priorities ought to be determined under Article 9 in light of its inclusion of crops within its definition of goods. After reviewing pre-Code decisions, Professor Grant Gilmore concluded:

> No discernible consensus, even on a regional scale, resulted from the considerable amount of priority litigation of this type which dragged through the courts between 1925 and 1940. Many of the cases involved atypical or weird fact situations and, even when they did not, the courts seem instinctively to have preferred narrow holdings to broad ones ... The impression gained by reading through a substantial number of these cases may be thus summed up: the crop mortgagee won over the real estate mortgagee more often than not, but rarely in a way that decisively or clearly established the crop mortgage priority for future cases; the situations in which the crop mortgage won and those in which it lost were in many jurisdictions nearly indistinguishable from each other n758

However, because n759 the Code governs the validity and priority of security interests in goods, n760 regardless of what may have been the rule before its adoption for determining priorities in crops, it seems clear that today the Code, not real estate law, governs "secured financing of crops." n761

The Code provides that no security interest in crops is enforceable against the debtor or others with respect to the crops unless the debtor has signed a security agreement describing the collateral and the land (or the secured party possesses the collateral, an unlikely scenario), value has been given, and the debtor has rights in the collateral. n762 When these requirements have been met, the security interest in crops is said to attach. n763 A real estate mortgage presumably may qualify as a security agreement if it specifically covers crops as well as land. n764

Validity of the security interest, however, must be distinguished from its perfection, for the priority of a security interest over competing liens is often dependent on its perfection. The general principle for determining priorities under the Code is that priority is dependent on the order of filing or perfection. n765 However, where there has been no filing or perfection, the order of attachment determines priorities. n766 In the case of crops, the filing of a financing statement is the only method of perfection, except in the most unlikely circumstance that the crop lender retains possession of the collateral. n767 The Code offers three alternatives for states to select as to where financing statements shall be filed. Only two of the alternatives specifically address financing statements dealing with crops, these providing for filing of a financing statement over crops "in the office of the _____ in the county where the land is located." n768 These two alternatives do not require of themselves that the filing be in the land records, but only in some specified office in the county where the land is located. It would therefore seem that a real estate mortgage specifically covering crops recorded in the land records would constitute a perfected security interest only if the local version of the Code permitted perfection by filing in the land records. If a financing statement, by local law, must be filed somewhere other than in the land records, a prior real estate mortgage filed only in the land records would not constitute a perfected security interest in the crops even if it specifically mentioned crops.

Section 9-312(2) provides a major exception, designed especially for crop financiers, to the general rule that the order of perfection should determine the priorities of competing security claims. If the requirements of this section are met, the crop financier will have priority over some earlier security interests even though those earlier interests are perfected and even though the later secured party has knowledge of the earlier interests. Section 9-312(2) grants this extraordinary priority where the crop financier gives "new value ... to enable the debtor to produce the crops during the production season" so long as the value is given "not more than three months before the crops become growing crops by planting or otherwise ... ." This special priority, however, is granted only over such earlier security interests as secure debts due more than six months before the crops become growing crops, and is therefore almost meaningless.

> The scope of this provision is carved down almost to insignificance by the last clause in it which provides that the security interest which meets the three tests above enjoys priority only over interests that secure "obligations due more than six months before the crops become growing crops ... ." That is, subsection (2) entitles one to priority only over obligations more than six months overdue at the time the crops in question become growing crops. n769

COMPUTER-ASSISTED RESEARCH

LEXIS: crop w/15 security w/15 priority

FOOTNOTES:

(n1)Footnote 633. *United States v. Roberts, 788 F. Supp. 555 (S.D. Fla. 1991)* : *ICM Mtg. Corp. v. Herring, 758 F. Supp. 1425 (D. Colo. 1991)* ; *In re Cutty's-Gurnee, Inc., 33 B.R. 934 (Bankr. N.D. Ill. 1991)* ; *Baxter v. Southtrust Bank of Dothan, 584 So. 2d 801 (Ala. 1991)* ; *American National Bank v. Clark, 660 N.W. 2d 530 (Neb. App. 2003)* (mortgagee subrogated to rights of prior lienholders); *D.A.T. Hospitality, LLC v. D.A.T. Hospitality, 291 B.R. 438* (S.D. Ohio, 2003) (properly recorded mortgage was a lien on the premises from the day of recording and had priority to a

subsequently filed mechanic's lien); *In re Laufenberg, 2004 Bankr. LEXIS 1428 (Bankr. D. Kan. 2004)* (marshalling was not available to the owners because they had no ownership interests in the property nor were they creditors with claims secured by one of the two properties).

(n2)Footnote 634. *Chase Manhattan Bank v. Josephson, 638 A.2d 1301 (N.J. 1994)* .

(n3)Footnote 635. 4 American Law of Property § 17.1 (A. James Casner, ed. 1952). *In re American Equity Corp. of Pinellas, 332 B.R. 645 (Fla. 2005)* (Florida and North Carolina find that assigned deed of trust interests are perfected when the assignment is recorded, even without inclusion of the deed of trust note). *In re Fisher, 320 B.R. 52 (E.D. Pa. 2005)* (In Pennsylvania, mortgage is required to have acknowledgment); *Fidelity & Deposit Co. of Maryland v. Ticor Title Ins. Co., 943 P.2d 710 (Wash. App. 1997)* ; *New York Life Ins. & Annuity Corp. v. Hammocks Community Ass'n, 622 So. 2d 1369 (Fla. 1993)* (subsequent mortgage subordinate to assessments under prior recorded amendment to declaration of covenants).

(n4)Footnote 636. *Sauget v. Villagomez, 228 F.2d 374 (9th Cir. 1955)* ; *Home Fed. Sav. & Loan Ass'n v. Cook, 525 N.E.2d 151 (Ill. App. 1988)* .

(n5)Footnote 637. 4 Am. L. Prop. § 17.1 (A. James Casner, ed. 1952). *See Hinsdale Fed. Sav. & Loan Ass'n v. Gary-Wheaton Bank, 427 N.E.2d 963 (Ill. App. 1981)* ; *Cole Taylor Bank v. Cole Taylor Bank, 586 N.E.2d 775 (Ill. App. 1992)* .

(n6)Footnote 638. Am. L. Prop. § 17.10 (A. James Casner, ed., 1952). *In re Unglaub, 332 B.R. 303 (Bkrtcy. N.D. Ill. 2005)* (In Colorado, interest not protected against bona fide purchaser that records first). *Ripley v. Piehl, 700 N.W.2d 540 (Minn.App. 2005)* (not a bona fide purchaser in Minnesota if actual, implied or constructive notice).

(n7)Footnote 639. See § 92.04, *supra. Fed. Natl. Mtge. Assn. v. Roberts, 2005 Ohio 3820* (Ohio App. 5 Dist. 2005) (assignee properly recorded in Ohio when both the mortgage assignment and promissory note were recorded); *Bank of New York v. Nally, 820 N.E.2d 644 (Ind. 2005)* (to give later purchasers notice in New York, a mortgage must not only be recorded in the appropriate county but also contain a proper legal description of the property); *Kalange v. Rencher, 30 P.3d 970 (Idaho 2001)* (subsequent creditor's deed of trust had priority over a vendor's security interest that was not recorded until after the deed of trust was recorded).

(n8)Footnote 640. *Bank Western v. Henderson, 874 P.2d 632 (Kan. 1994)* .

(n9)Footnote 641. *United States v. Guinn, 751 F. Supp. 953 (D. Utah 1990)* ; *United Okla. Bank v. Moss, 793 P.2d 1359 (Okla. 1990)* ; *Fleet Mtg. Corp. v. Stevenson, 575 A.2d 63 (N.J. 1990)* ; *C & L Lumber and Supply, Inc. v. Texas Am. Bank/Galeria, 795 P.2d 502 (N.M. 1990)* ; *Slate v. Marion, 408 S.E.2d 189 (N.C. App. 1991)* ; *In re Luna Pier Land Development, LLC, 325 B.R. 735 (Bkrtcy. E.D. Mich. 2005)* (priority even over later purchase money mortgages). A33-705 (enacted in 1996); *Rothermich v. Weber's St. Charles Lanes, Inc., 957 S.W.2d 509 (Mo. App. 1997)* ; *Guffey v. Creutzinger, 984 S.W.2d 219 (Tenn. App. 1998)* (Purchase money mortgages have priority regardless of whether the purchase money was paid by a vendor or a third party).

(n10)Footnote 642. *In re Mirkin, 100 B.R. 221 (Bankr. E.D. Pa. 1989)* ; *Sink v. Meadow Wood Country Estates, Inc., 18 Conn. App. 559* A. 2d 725 (Conn. App. 1989) .

(n11)Footnote 643. *In re Norris, 138 B.R. 467 (Bankr. E.D. Pa. 1992)* ; *Van Patten v. Van Patten, 784 P.2d 218 (Wyo. 1989)* . A loan to finance the acquisition and improvement of land has been deemed a purchase money loan. *Resolution Trust Corp. v. Bopp, 850 P.2d 939 (Kan. 1993)* .

(n12)Footnote 644. Such other considerations include the recording acts, subordination agreements, rights of subsequent bona fide purchasers, and the mechanics lien laws.

(n13)Footnote 645. *First Interstate Bank of Utah v. Internal Revenue Serv., 930 F.2d 1521 (10th Cir. 1991)* ; *Fleet Mtg. Corp. v. Stevenson, 575 A.2d 63 (N.J. Super. 1990)* . Courts also speak of title coming to the mortgagor already burdened by the purchase money mortgage. *C & L Lumber & Supply, Inc. v. Texas Am. Bank/Galeria, 795 P.2d 502 (N.M. 1990)* .

(n14)Footnote 646. This is said to represent the "great weight of authority." Note, "Priority of Purchase Money Mortgages," *29 Va. L. Rev. 491, 496 (1943).*

(n15)Footnote 647. *United States v. Dailey, 749 F. Supp. 218 (D. Ariz. 1990)* ; *C & L Lumber & Supply, Inc. v. Texas Am. Bank/Galeria, 795 P.2d 502 (N.M. 1990)* ; *Garrett Tire Ctr. Inc. v. Herbaugh, 740 S.W.2d 612 (Ark. 1987)* ; *Fleet Mtg. Corp. v. Stevenson, 575 A.2d 63 (N.J. Super. 1990)* .

(n16)Footnote 648. *United States v. Guying, 751 F. Supp. 953 (D. Utah 1990)* ; *Belland v. O.K. Lumber Co., 797 P.2d 638 (Alaska 1990)* .

(n17)Footnote 649. *Schoch v. Birdsall, 51 N.W. 382 (Minn. 1892)* ; *Rader v. Dawes, 651 S.W.2d 629 (Mo. App. 1983)* .

(n18)Footnote 650. *Supra,* § 101.06.02.

(n19)Footnote 651. *Brock v. First South Sav. Ass'n, 10 Cal. Rptr. 2d 700 (1992)* .

(n20)Footnote 652. *Rader v. Dawes, 651 S.W.2d 629 (Mo. App. 1983)* .

(n21)Footnote 653. *Neslin v. Wells, Fargo, & Co., 104 U.S. 428 (1882)* ; *Brauner v. Lamper, 555 So. 2d 935 (Fla. App. 1990)* ; *Shade v. Wheatcraft Indus. Inc., 809 P.2d 538 (Kan. 1991)* . *But see In re Luna Pier Land Development, LLC, 325 B.R. 735 (Bkrtcy. E.D. Mich. 2005)* (priority over later purchase money mortgage although first purchase money mortgage not recorded).

(n22)Footnote 654. *In re Southwest Banking Corp., 156 F.3d 1114 (11th Cir. 1998)* (Contracting out of equitable distribution of debtor's assets among creditors through subordination agreement).

(n23)Footnote 655. *Southern Floridabanc Fed. Sav. & Loan Ass'n v. Buscemi, 529 So. 2d 303 (Fla. App. 1988)* ; *Comptroller of State of N.Y. v. Gards Realty Corp., 416 N.Y.S.2d 821 (1979)* ; *Bratcher v. Buckner, 109 Cal. Rptr. 2d 534 (2001)* (a subordination agreement did not entirely subordinate an earlier-recorded deed of trust).

(n24)Footnote 656. 3 Miller & Starr, Current Law of California Real Estate § 8:167 at 654 (2d ed. 1989), *quoted in Protective Equity Trust No. 83 v. Bybee, 2 Cal. Rptr. 2d 864 (1992)* .

(n25)Footnote 657. *Middlebrook-Anderson Co. v. Southwest Sav. & Loan Ass'n, 96 Cal. Rptr. 338, 344 (1971)* , *quoted in Protective Equity Trust No. 83 v. Bybee, 2 Cal. Rptr. 2d 864, 869 (1992)* .

(n26)Footnote 658. Except in California litigation in this area is rather sparse. *MCB Ltd. v. McGowan, 359 S.E.2d 50, 52 (N.C. App. 1987)* ("Only one jurisdiction, California, has dealt extensively with the problem of enforcement of subordination provisions.").

(n27)Footnote 659. *Handy v. Gordon, 422 P.2d 329, 330 (Cal. 1967)* .

(n28)Footnote 660. *MCB Ltd. v. McGowan, 359 S.E.2d 50, 53 (N.C. 1987)* .

(n29)Footnote 661. Nelson & Whitman, *supra* note 9, § 12.9.

(n30)Footnote 662. *Ranier v. Mount Sterling Nat'l Bank, 812 S.W.2d 154 (Ky. 1991)* ; *Calcasieu Marine Nat'l*

Bank of Lake Charles v. Scarlett Invs. 556 So. 2d 911 (La. App. 1990); BJI Corp. v. Larry W. Corp., 443 A.2d 1096 (N.J. Super. 1982) ; *Bankers Trust Co. of California, N.A. v. Breaux, 900 So. 2d 980 (La.App. 5 Cir. 2005)* (no certain form required to make subordination agreements enforceable; even if ambiguous, enforceable if intent can be found).

(n31)Footnote 663. *American Century Mtg. Invs. v. Unionamerican Mtg. and Equity Trust, 355 A.2d 563 (D.C. 1976)* ; *VATACS Group, Inc. v. HomeSide Lending, Inc., 276 Ga. App. 386* ; *623 S.E.2d 534 (Ga. App. 2005)* (although subordination agreement only expressly mentioned one of second security interest holder's deeds, other language indicated that both were included).

(n32)Footnote 664. *Collins v. Home Sav. & Loan Ass'n, 22 Cal. Rptr. 817 (1962)* .

(n33)Footnote 665. *Burkons v. Ticor Title Ins. Co. of Cal., 813 P.2d 710 (Ariz. 1991)* ; *Dickens v. First Am. Title Ins. Co. of Ariz. 784 P.2d 717 (Ariz. 1989)* ; *B.J.I. Corp. v. Larry W. Corp., 443 A.2d 1096 (N.J. Super. 1982)* .

(n34)Footnote 666. *Middlebrook-Anderson Co. v. Southwest Sav. & Loan Ass'n, 18 Cal. App. 3d 1023, 96 Cal. Rptr. 338 (1971)* ; *Miller v. Citizens Sav. & Loan Ass'n, 56 Cal. Rptr. 844 (1967)* .

(n35)Footnote 667. *Protective Equity Trust No. 83 Ltd. v. Bybee, 2 Cal. Rptr. 864 (1992)* .

(n36)Footnote 668. *Ranier v. Mount Sterling Nat'l Bank, 812 S.W.2d 154 (Ky. 1991)* .

(n37)Footnote 669. *Inversiones Inmobiliarias Internacionales de Orlando Sociedad Anomina v. Barnett Bank of Cent. Fla. 584 So. 2d 110 (Fla. App. 1991)* ; *Rockhill v. United States, 418 A.2d 197 (Md. 1980)* ; *Conshohocken Fed. Sav. & Loan Ass'n v. Period & Country Homes, Inc., 520, 430 A.2d 1173 (Pa. Super. 1981)* ; *Tuscarora, Inc. v. B.V.A. Credit Corp., 241 S.E.2d 778 (Va. 1978)* .

(n38)Footnote 670. *Owens-Corning Fiberglas Corp. v. Texas Commerce Bank, 763 P.2d 335 (Nev. 1988)* ; *Duraflex Sales & Serv. Corp. v. W.H.E. Mech. Contractors, 110 F.3d 927 (2d Cir. 1997)* .

(n39)Footnote 671. *East Boston Sav. Bank v. Ogan, 701 N.E.2d 331 (Mass. 1998)* (Refinancing mortgagee should obtain priority).

(n40)Footnote 672. *United States v. Guinn, 751 F. Supp. 953 (D. Utah 1990)* ; *Hilco, Inc. v. Lenentine, 698 A.2d 1254 (N.H. 1997)* ; *Mackiewicz v. J.J. & Assocs., 514 N.W.2d 613 (Neb. 1994)* (senior mortgagee does not lose priority upon discharging mortgage of record and simultaneously taking new mortgagee unless such was his intent).

(n41)Footnote 673. *Marine Bank of Appleton v. Hietpas, Inc., 439 N.W.2d 604 (Wis. App. 1989)* .

(n42)Footnote 674. *Randall v. Southern Diversified Props., Inc., 306 S.E.2d 518 (Ga. 1989)* ; *Shane v. Winter Hill Fed. Sav. & Loan Ass'n, 492 N.E.2d 92 (Mass. 1986)* ; *Citibank, N.A. v. Kenney, 17 A.D.3d 305* (N.Y.A.D. 2 Dept. 2005) (person with replacement mortgage still has priority over junior mortgagee because person did not waive right to seniority and junior mortgagee did not detrimentally rely on the change).

(n43)Footnote 675. *Gardner v. Guldi, 724 So. 2d 186 (Fla. App. 1999)* (Evidence used to determine future advances).

(n44)Footnote 676. Leidner, "An Overview of Mechanics' Liens and Future Advance Mortgages," 3 Prac. Real Est. Law 39, 42 (1987). *The Money Store Investment Corp. v. Summers, 822 N.E.2d 223 (Ind.App. 2005)* (statute gives priority for future advances up to the amount stated in mortgage and not limited by that stated in the mortgage provision about future advances).

(n45)Footnote 677. *E.g., Conn. Gen. Stat. Ann. § 49-4b(b)*(1990); *Ohio Rev. Code Ann. § 5301*, N.D. Cent. Code § 2-19-06.1; *42 Pa. Const. Stat. § 8143(F)* (1991). *See In re Kirk, 133 B.R. 914* (Bankr. S.D. Ohio) .

(n46)Footnote 678. *E.g., Conn. Gen. Stat. Ann. § 49-4b(b)-(d).*

(n47)Footnote 679. *E.g., Fla. Stat. Ann. § 697.04* (1991).

(n48)Footnote 680. *E.g., Conn. Gen. Stat. Ann. § 49-4b(c)(3)*; *Fla. Stat. Ann. § 697.04(1)(b)*; UCC Article 9; *N.Y. Real Prop. Law § 281(2)* (Consol. 1992); *Or. Rev. Stat. § 86.155(2)(a)*; *Ohio Rev. Code Ann. § 5301.232*. *The Money Store Investment Corp. v. Summers, 822 N.E.2d 223 (Ind.App. 2005)* (statute gives priority for future advances up to the amount stated in mortgage and not limited by that stated in the mortgage provision about future advances).

(n49)Footnote 681. *Kimbell Foods, Inc. v. Republic Nat'l Bank, 557 F.2d 491 (5th Cir. 1977)* ; *In re Johnson, 124 B.R. 648 (Bankr. E.D. Pa. 1991)* ; *Kirk v. Ameritrust Co., 133 B.R. 914 (Bankr. S.D. Ohio 1991)* ; *In re Cole, 60 B.R. 325 (Bankr. E.D. Pa. 1986)* ; *In re Hunt, 48 B.R. 472 (Bankr. N.D. Ohio 1985)* ; *Watson Constr. Co. v. AMFAC Mtg. Corp., 606 P.2d 421 (Ariz. 1979)* ; *Colonial Bank v. Marine Bank, 448 N.W.2d 659 (Wis. 1989)* ; *Perry v. Carolina Bldrs. Corp., 493 S.E.2d 814 (N.C. App. 1997)* .

(n50)Footnote 682. *Tyler v. Butcher, 734 P.2d 1382 (Or. App. 1987)* ; *Lincoln Fed. Sav. & Loan Ass'n v. Platt Homes, Inc., 449 A.2d 553 (N.J. 1982)* .

(n51)Footnote 683. *In re Shapiro, 109 B.R. 127, 133-34 (Bankr. E.D. Pa. 1990)* ; *Fidelity Sav. Ass'n of Kan. v. Witt, 665 P.2d 1108 (Kan. App. 1983)* ; *First Nat'l Bank v. Fink, 736 P.2d 909* (1987 Kan.).

(n52)Footnote 684. *Restatement (Third) Property-Security* (Mortgages) 56-61.

(n53)Footnote 685. *E.g., Kan. Stat. Ann. § 58-2336*; *Mo Rev. Stat. § 443.055*; *N.H. Rev. Stat. Ann. § 479:3*; *N.C. Gen. Stat. § 45-68(A)(1)(a)*.

(n54)Footnote 686. *National Bank of Wash. v. Equity Invs., 506 P.2d 20 (Wash. 1973)* .

(n55)Footnote 687. *Irwin Concrete, Inc. v. Sun Coast Props., Inc., 653 P.2d 1331 (Wash. App. 1982)* .

(n56)Footnote 688. *In re Johnson, 124 B.R. 648 (Bankr. E.D. Pa. 1991)* .

(n57)Footnote 689. *Central Pa. Sav. Ass'n v. Carpenters of Pa., 463 A.2d 414 (Pa. 1983)* ; *cf. In re Johnson, 124 B.R. 648 (Bankr. E.D. Pa. 1991)* . *See also MacFarlane v. Thompson, 135 N.E. 869 (Mass. 1922)* ; *Cedar v. W.E. Roche Fruit Co., 134 P.2d 437 (Wash. 1943)* .

(n58)Footnote 690. *New York & Suburban Fed. Sav. & Loan Ass'n v. Fi-Pen Realty Co., 133 N.Y.S.2d 33 (1954)* . Skipworth, *"Should Construction Lenders Lose Out on Voluntary Advances If a Loan Turns Sour?* 5 Real Est. L.J. 221-223 (1977).

(n59)Footnote 691. *Cal. Civ. Code § 3136*. Kratovil & Werner, *"Mortgages For Construction and the Lien Priorities Problem--The 'Unobligatory' Advance," 41 Tenn. L. Rev. 311, 317-318 (1974).*

(n60)Footnote 692. *J.I. Kislak Mtg. Corp. v. William Matthews Bldr., Inc., 287 A.2d 686 (Del. Super. 1972) , aff'd, 303 A.2d 648 (Del. 1973)* ; *Community Lumber Co. v. California Pub'g Co., 10 P.2d 60 (Cal. 1932)* .

(n61)Footnote 693. *E.g., Cal. Com. Code § 9313(1)(c),* comment 4(e); *Fla. Stat. Ann. § 697.04*; *Kan. Stat. Ann. § 84-9-313(1)(c),* comment 4(e). *See also Silver Waters Corp. v. Murphy, 177 So. 2d 897 (Fla. 1965)* .

(n62)Footnote 694. Uniform Land Transactions Act § 1-201(14): "An advance is made 'pursuant to commitment' if the obligor has bound himself to make it, whether or not a default or other event not within his control has relieved or may relieve him from his obligation;" Uniform Simplification of Land Transfers Act § 1-201(14); Uniform Land Security Interest Act § 111(19).

(n63)Footnote 695. Uniform Land Transactions Act § 1-201, comment 14 (1975); Uniform Simplification of Land Transfers Act, § 1-201, comment 14 (1976); Uniform Land Security Interest Act 301(c) comment 18 (1985).

(n64)Footnote 696. *E.g., N.C. Gen. Stat. § 45-82*; *N.Y. Real Prop. Law § 281(2)* (Consol. 1992); *Or. Rev. Stat. § 86.155.2*; *Tenn. Code Ann. § 47-28-103* (1991).

(n65)Footnote 697. *N.C. Gen. Stat. § 45-81(a)(1).*

(n66)Footnote 698. *N.C. Gen. Stat. § 45-81(b).*

(n67)Footnote 699. *E.g., N.C. Gen. Stat. § 45-72*; *R.I. Gen. Laws § 34-25-4.*

(n68)Footnote 700. Harold E. Leidner, *An Overview of Mechanics' Liens and Future Advance Mortgages,* 3 Prac. Real Est. Law. 39, 45 (1987).

(n69)Footnote 701. *H & S Transp. Co. v. Harrison, 939 F.2d 355 (6th Cir. 1991)* .

(n70)Footnote 702. *Universal Title Ins. v. United States, 942 F.2d 1311 (8th Cir. 1990)* . *Ripley v. Piehl, 700 N.W.2d 540 (Minn.App. 2005)* (equitable subrogation if justifiable mistake of fact and to avoid hurting innocent others).

(n71)Footnote 703. *Id. at 942 F.2d 1311, 1311 (8th Cir. 1990)* ; *United States Fid. & Guar. v. Slifkin, 200 F. Supp. 563 (N.D. Ala. 1961)* .

(n72)Footnote 704. *Mortoro v. Maloney, 580 So. 2d 822 (Fla. App. 1991)* ; *Klotz v. Klotz, 440 N.W.2d 406 (Iowa 1989)* ; *Home Owners' Loan Corp. v. Papara, 3 N.W.2d 730 (Wis. 1942)* .

(n73)Footnote 705. *Han v. United States, 944 F.2d 526 (9th Cir. 1991)* ; *Blackford v. Dickey, 789 S.W.2d 445 (Ark. 1990)* ; *Bank of New York v. Nally, 820 N.E.2d 644 (Ind. 2005)* (must discharge whole debt to be entitled to equitable subrogation); *Society of the Roman Catholic Church of the Diocese of Lafayette, Inc. v. Interstate Fire & Casualty Co., 126 F.3d 727 (5th Cir. 1997)* ; *Dietrich Indus., Inc. v. United States, 988 F.2d 568 (5th Cir. 1993)* (purchaser paying debt secured by senior lien as part of purchase price is not a volunteer and is equitably subrogated to senior lien with priority over intervening junior lien).

(n74)Footnote 706. *Fidelity Nat'l Title Ins. v. United States, 907 F.2d 868 (9th Cir. 1990)* ; *Commercial Std. Ins. v. American Employers Ins., 209 F.2d 60 (6th Cir. 1954)* .

(n75)Footnote 707. *C & L Lumber & Supply Co., v. Texas Am. Bank/Galeria, 795 P.2d 502 (N.M. 1990)* ; *E. Sav. Bank, FSB v. Pappas, 829 A.2d 953 (D.C. App. 2003)* (Doctrine of equitable subrogation gave bank priority interest in foreclosure action).

(n76)Footnote 708. *First Am. Title Ins. Co. v. United States, 848 F.2d 969 (9th Cir. 1988)* (mortgagee purchasing at foreclosure retains priority over intervening federal tax lien). But see AOD *Federal Credit Union v. State Farm Fire and Cas. Co., 931 So. 2d 31 (Ala. Civ. App. 2005)* (does not acquire first priority status because only two of three payees signed and money given to a bank rather than mortgagee).

(n77)Footnote 709. *United States v. Polk, 822 F.2d 871 (9th Cir. 1987)* ; *Best Fertilizers of Arizona, Inc. v. Burns, 570 P.2d 179 (Ariz. 1977)* .

(n78)Footnote 710. *U.C.C. § 3-601(3).*

(n79)Footnote 711. *Litwin v. Barrier, 626 P.2d 1232 (Kan. 1981)* , quoting 2 Bender's Uniform Commercial Code Service § 5-04(1) (1972): "Unless maker is in fact a surety for another party to the instrument, his payment to the holder in exchange for the canceled note discharges not only his own obligation but also that of all other parties to the

instrument."

(n80)Footnote 712. *Stanford v. Aulick, 605 P.2d 465 (Ariz. 1979)* .

(n81)Footnote 713. *See also* Nelson & Whitman, *supra* note 9, § 5.9.

(n82)Footnote 714. *Brown v. Bellamy, 566 N.Y.S.2d 703 (1991)* .

(n83)Footnote 715. The payor-cotenants are subrogated to the mortgagees' claims, if any, against the non-paying cotenants and to the mortgagees' right to foreclose on the interests of the non-paying owners.

(n84)Footnote 716. *In re White, 183 B.R. 713 (Bankr. M.D. N.C. 1995)* .

(n85)Footnote 717. *G.R.W. Eng'rs, Inc. v. Elam, 557 So. 2d 725 (La. App. 1990)* ; *Fleetwood v. Med Ctr. Bank, 786 S.W.2d 550 (Tex. App. 1990)* ; *Rock River Lumber Corp. v. Universal Mtg. Corp. of Wis., 262 N.W.2d 114 (Wis. 1978)* .

(n86)Footnote 718. *Leonard v. Brazosport Bank, 628 S.W.2d 216 (Tex. App. 1982)* , error refused; *Rock River Lumber Corp. v. Universal Mtg. Corp. of Wis., 262 N.W.2d 114 (Wis. 1978)* ; *Houston v. Bank of Am. Fed. Sav. Bank, 78 P.3d 71 (Nev. 2003)* (Where investors had notice of a bank's prior interest in a property, they did not acquire a senior interest in the property).

(n87)Footnote 719. *Blackford v. Dickey, 789 S.W.2d 445 (Ark. 1990)* ; *Leser v. Smith, 189 N.W. 38 (Mich. 1922)* .

(n88)Footnote 720. *C & L Lumber & Supply, Inc. v. Texas Am. Bank/Galeria, 795 P.2d 502 (N.M. 1990)* .

(n89)Footnote 721. Nelson & Whitman, *supra* note 9, § 10.1. *Picker Fin. Group L.L.C. v. Horizon Bank,, 293 B.R. 253 (Bankr. M.D. Fla. 2003)* (Where a third lender paid off a first position lien but had constructive notice of a second position lien, under Florida's traditional view, the third lender was not entitled to equitable subrogation).

(n90)Footnote 722. *Potter v. United States, 111 F. Supp. 585 (D.R.I. 1953)* ; *In re Allen, 32 B.R. 93 (Bankr. D. Or. 1983)* ; *Klotz v. Klotz, 440 N.W.2d 406 (Iowa 1989)* (subrogation should be liberally applied so long as innocent parties not injured).

(n91)Footnote 723. In *Fleetwood v. Med Ctr. Bank, 786 S.W.2d 550 (Tex. App. 1990)* , the new lender was denied priority over intervening liens, not because it was aware of them, but because of the peculiar facts of the case it would have been inequitable to grant the lender priority. *See also Rock River Lumber Corp. v. Universal Mtg. Corp. of Wis., 262 N.W.2d 114 (Wis. 1978)* (knowledge of intervening mechanics liens did not deprive the new lender of priority); *Providence Inst. for Sav. v. Sims, 441 S.W.2d 516 (Tex. 1969)* (actual knowledge does not preclude subrogation).

(n92)Footnote 724. *Han v. United States, 944 F.2d 526 (9th Cir. 1991)* ; *In re Hubbard, 89 B.R. 920 (Bankr. N.D. Ala. 1988)* ; *Smith v. State Sav. & Loan Ass'n, 223 Cal. Rptr. 298 (Cal. App. 1985)* ; *Rusher v. Bunker, 782 P.2d 170 (Or. App. 1989)* ; *Bank of New York v. Nally, 820 N.E.2d 644 (Ind. 2005)* (subrogation not barred because failure to discover other mortgage not at level of culpable negligence).

(n93)Footnote 725. *Universal Title Ins. v. United States, 942 F.2d 1311 (8th Cir. 1990)* ; *Mutual Life Ins. v. Grissett, 500 F. Supp. 159 (M.D. Ala. 1980)* (culpable negligence required); *In re Hubbard, 89 B.R. 920 (Bankr. N.D. Ala. 1988)* ; *Goldome Realty Credit Corp. v. Harwick, 504 A.2d 463 (N.J. Super. 1989)* ; *Union Planters Bank, N.A. v. FT Mortg. Cos., 794 N.E.2d 360 (Ill. App. 2003)* (Where a mortgage company was free from gross negligence in searching a title for encumbrances, the doctrine of conventional subrogation is applicable).

(n94)Footnote 726. Ray Andrews Brown, The Law of Personal Property § 16.19 at 580 (3d ed. Walter B. Raushenbush, ed. 1975); *In re K & L Lakeland, Inc., 128 F.3d 203 (4th Cir. 1997)* .

(n95)Footnote 727. *U.C.C. § 9-313(2)*.

(n96)Footnote 728. *U.C.C. § 9-313(1)(a)*: "... goods are 'fixtures' when they become so related to particular real estate that an interest in them arises under real estate law."

(n97)Footnote 729. A. J. Casner and W. B. Leach, Cases and Text on Property 607 n.1 (3d ed. 1984), attributing the comment to Professor E. H. Warren.

(n98)Footnote 730. *U.C.C. § 9-313(1)(b)*.

(n99)Footnote 731. *U.C.C. § 9-313(3)*: "This Article does not prevent creation of an encumbrance upon fixtures pursuant to real estate law."

(n100)Footnote 732. Tenn. Code Ann. § 66, Comment 3(b).

(n101)Footnote 733. *Matter of Cliff's Ridge Skiing Corp., 123 B.R. 753 (Bankr. W.D. Mich. 1991)* ; *Parsons v. Lender Serv., 801 P.2d 739 (Okla. App. 1990)* .

(n102)Footnote 734. *U.C.C. § 9-313(4)(a)*. In addition, the interest of the debtor must be of record or the debtor must be in possession of the realty. *Scott v. Ford Motor Credit Co., 691 A.2d 1320 (Md. 1997)* ; *General Elec. Capital Commercial Automotive Finance v. Spartan Motors Ltd., 675 N.Y.S.2d 626 (1998)* (Prior security interest is subject to perfected purchase money security interest).

(n103)Footnote 735. *U.C.C. § 9-313*, Comment 3(a).

(n104)Footnote 736. Nelson & Whitman, *supra* note 9, § 9.1.

(n105)Footnote 737. *In re Beabout, 110 B.R. 883 (Bankr. S.D. Ill. 1990)* .

(n106)Footnote 738. *U.C.C. § 9-313(6)*. *See infra* § 101.06.08(E).

(n107)Footnote 739. *U.C.C. § 9-313(4)(c)*.

(n108)Footnote 740. *U.C.C. § 9-313*, Comment 4(d).

(n109)Footnote 741. *Id.*

(n110)Footnote 742. *U.C.C. § 9-313(4)(c)*.

(n111)Footnote 743. *U.C.C. § 9-313*, Comment 4(d).

(n112)Footnote 744. *U.C.C. § 9-109(1)*.

(n113)Footnote 745. *U.C.C. § 9-313*, Comment 4(d).

(n114)Footnote 746. *U.C.C. § 9-313(4)(d)*.

(n115)Footnote 747. Conn. Gen. Stat. § 52-278(e)(a)(1), Comment (4)(c) (1990). Under *11 U.S.C. § 547(e)(1)(B)*, the trustee in bankruptcy generally may avoid "a transfer of a fixture ... [where] ... a creditor on a simple contract can acquire a judicial lien that is superior to the interest of the transferee."

(n116)Footnote 748. *U.C.C. § 9-313(5)(b)*.

(n117)Footnote 749. *U.C.C. § 9-313*, Comment 6.

(n118)Footnote 750. *U.C.C. § 9-313(6)*.

(n119)Footnote 751. *U.C.C. § 9-313*, Comment 4(e).

(n120)Footnote 752. *Id.*

(n121)Footnote 753. *U.C.C. § 9-313(4)(c)*.

(n122)Footnote 754. The 1962 version treated "each advance under a construction mortgage as a separate subsequent loan, but then [got] into difficulties of language as to the times of actual advance and the times of commitment." U.C.C., General Comment on the Approach of the Review Committee for Article 9, para. A-12 (1972).

(n123)Footnote 755. *U.C.C. § 9-105(1)(h). Underwood Grain Co. v. Harthun, 563 N.W.2d 278 (Minn App. 1997)* .

(n124)Footnote 756. *Brown, supra* note 714 The Law of Personal Property § 17.3 at 595 (3d ed. 1975).

(n125)Footnote 757. *Id.*

(n126)Footnote 758. G. Gilmore, Security Interests in Personal Property § 32.3 at 860-61 (1965).

(n127)Footnote 759. *U.C.C. § 9-105(1)(h)*.

(n128)Footnote 760. *U.C.C. § 9-102(1)*.

(n129)Footnote 761. *United States v. Newcomb, 682 F.2d 758 (8th Cir. 1982)* ; *In re Kruse, 35 B.R. 958, 965 (Bankr. D. Kan. 1983) . See also Matter of Olson, 101 B.R. 134 (Bankr. D. Neb. 1989)* .

(n130)Footnote 762. *U.C.C. § 9-203(a)*.

(n131)Footnote 763. *U.C.C. § 9-203(2)* ("unless explicit agreement postpones the time of attaching").

(n132)Footnote 764. *U.C.C. § 9-402(6)*.

(n133)Footnote 765. *U.C.C. § 9-312(5)(a)*.

(n134)Footnote 766. *U.C.C. § 9-312(5)(b)*.

(n135)Footnote 767. *U.C.C. § 9-302(1)(a)*.

(n136)Footnote 768. *U.C.C. § 9-401*, Second and Third Alternatives for subsection (1).

(n137)Footnote 769. Summer and White, Uniform Commercial Code § 24-7 at 1150.

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CHAPTER 101 MORTGAGES, DEEDS OF TRUSTS AND RELATED LIENS

12-101 Thompson on Real Property, Thomas Editions § 101.07

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§ 101.07 Mortgagor Relief Statutes.

§ 101.07(a) Mortgagor Relief Statutes Generally.

Both federal and state legislation afford mortgagors and trustors significant avenues to avoid the usual remedies against them and their property in the event of a default.

The federal bankruptcy laws have long provided refuge for distressed debtors, not only by discharging their debts but also by permitting the delay of foreclosure proceedings and even allowing foreclosure sales to be set aside. In fact, bankruptcy law plays a major role in the field of real estate security interests.

Many states, too, have enacted protective measures for secured debtors. Much of the state legislation came out of the Depression in the 1930's, when so many faced the loss of their homes, businesses, and farms through foreclosure. While much of this legislation was later repealed, a great deal of it survives and, indeed, some of it was reenacted in the 1980's, particularly in agricultural states. State relief measures come in varied forms, ranging from moratoria on foreclosures, to bans on deficiency judgments and requirements that the fair market value of the interest foreclosed be credited toward the debt. One common state provision permits redemption after foreclosure.

§ 101.07(b) Moratorium Legislation.

During the Great Depression, many states enacted laws providing for staying foreclosures, although most of the moratorium legislation was subsequently repealed. While an occasional moratorium statute is struck down on constitutional grounds, n770 they are generally upheld as reasonable exercises of the police power. n771 They are said to regulate remedies rather than to affect rights. n772

The recession of the 1980's and early 1990's rekindled legislative interest in this type of legislation and prompted several legislatures to enact or reenact such laws. Iowa, for example, the first state to pass a moratorium act in the 1930's, amended the moratorium statute in 1985 to authorize courts to continue foreclosure proceedings for certain periods upon a declaration by the governor of an economic emergency. n773 Minnesota, as well, passed legislation permitting judicial continuance of certain foreclosure actions. n774

COMPUTER-ASSISTED RESEARCH

LEXIS: foreclos! w/50 moratorium pre/1 legislation or statute

§ 101.07(c) Statutory Redemption.

§ 101.07(c)(1) Statutory Redemption Generally.

In addition to the common law right of equitable redemption, which allows mortgagors and their successors and junior encumbrancers to redeem at any time before foreclosure, many states have created a statutory right to redeem after foreclosure. n775 In some states, though, statutory redemption may not be available to junior encumbrancers.

While this form of redemption is solely a creation of statute and while the various statutes vary considerably, several generalizations are appropriate. First, the right does not arise until the equitable right of redemption has been foreclosed. n776 Accordingly, those who have been omitted from prior foreclosure proceedings, because they still hold their rights to redeem equitably, may not redeem statutorily. n777 Secondly, the consequences of redemption by junior encumbrancers are different under each type of redemption. A junior encumbrancer who redeems statutorily obtains whatever interest was acquired by the party from whom the encumbrancer redeems; normally this interest is a fee simple, although the interest may be subject to statutory redemption rights held by others; a junior lienor redeeming equitably is simply subrogated to the interest of senior lienors. n778 Third, the redemption price varies between the two types of redemptions. The price to redeem statutorily is the price paid by the purchaser at the foreclosure sale from which the redemption is made, but the price to redeem before foreclosure is the debt secured. n779 It must be noted, however, that if the purchaser held an encumbrance subordinate to the one foreclosed, a junior encumbrancer redeeming statutorily from the purchaser often must pay, in addition to the purchase price, the amount of the purchaser's lien. n780 Fourth, the debtor is invariably allowed to continue to occupy the property during the redemption period.

Most states with statutory redemption make it available after judicial and private foreclosure sales. n781 Several states do not permit statutory redemption after a private foreclosure. n782 Missouri permits a statutory redemption after only a private foreclosure. n783

Statutory redemption is said to provide several protections to mortgagors. Probably the objective most often cited is to encourage full value bidding at foreclosure sales on the theory that bidders will realize that, unless they offer an adequate price, mortgagors will redeem after the sale. Other purposes are (1) to provide an easily available device for avoiding allegedly wrongful foreclosure without the litigation efforts to set the sale aside would entail, (2) to overcome the adverse effects of temporary declines in land values, and (3) to allow debtors to occupy the property during the redemption period. n784 Statutory redemption has been the subject of considerable criticism, such as frustrating the realization of the goals it is designed to serve and encouraging adverse consequences. It is often argued, for example, that it discourages full value bidding because bidders will not offer a full value bid when the mortgagor or the mortgagor's successor will be entitled to possess the land for some time into the future, and because the mere possibility of a post sale redemption deters full value bidding. Other criticisms are that statutory redemption encourages debtors to default and allows foreclosed debtors to continue to occupy the property after foreclosure with little incentive to husband it. n785

COMPUTER-ASSISTED RESEARCH

LEXIS: foreclos! w/50 statutor! w/1 redemption or
redeem!

§ 101.07(c)(2) Statutory Redemption by Mortgagors and Their Successors.

All states with statutory redemption permit mortgagors and their successors to redeem. A successor in interest is one who has succeeded to the mortgagor's interest, n786 but one who has acquired a mere lien or mortgage is not deemed a successor in interest. n787 Yet, to be a successor in interest, one need not acquire the entirety of the mortgagor's equity, for buyers under installment land contracts and widows claiming dower have been deemed successors. n788 A mortgagor who has transferred the interest is not entitled to redeem.

Although others may also have a right to redeem statutorily, a redemption by a mortgagor or the successor terminates the rights of all others to redeem. n789

Statutory redemption by a mortgagor or a successor restores the redemptioner to the estate before the foreclosure, but jurisdictions divide over the effect of the redemption upon encumbrances which had been cut off by the foreclosure. In California, none of these encumbrances is revived upon a statutory redemption, and further, no judgment lien for any deficiency can attach to the property, although the judgment lien may attach to other property of the judgment debtor. n790 In some states, liens on which the redemptioner is personally liable reattach; in these states, redemptions by a non-assuming grantee would not cause the liens to reattach. n791 In other states, junior liens will be revived, but the lien of the mortgage which was foreclosed will not be. n792

COMPUTER-ASSISTED RESEARCH

LEXIS: (mortgagor or successor or grantee or assignee)
w/15 statutor! w/5 redemption or redeem!

§ 101.07(c)(3) Statutory Redemption by Encumbrancers.

Most states with statutory redemption make it available to junior encumbrancers as well as to mortgagors and their successors. n793 Thus, junior encumbrancers whose interests were destroyed may be able to redeem.

In nearly all states which permit statutory redemption by junior encumbrancers, a redemption by them confers the title of the foreclosure sale purchaser upon the junior encumbrancer who redeems. n794 This places the redeeming junior in a position quite different from that of a redeeming mortgagor or mortgagor's successor. As previously observed, n795 the redeeming mortgagor or mortgagor's successor often reacquires the foreclosed interest subject to revived mortgages and other encumbrances. The junior encumbrancer who redeems, however, acquires the full interest of the purchaser at the foreclosure sale and, as the purchaser's interest is not subject to the claims of sold-out juniors, neither is the redeeming junior. n796 The interest of a redeeming junior may be subject to the statutory redemption rights of others. n797

Statutes vary in the procedures for redemptions by sold-out juniors. Some grant each junior a period of time within which to redeem in the order of their relative priorities. Thus, for example, a second mortgagee may be afforded the right to redeem for a specified period after the redemption rights of the mortgagor or the successor have expired and thereafter a third mortgagee may be given a like opportunity after the redemption rights of the second have expired or been exercised. n798 If the second mortgagee had redeemed within the allotted time, the third mortgagee would be entitled to redeem from the second mortgagee by paying the aggregate of the debt formerly secured by the second mortgagee's mortgage, and the sum paid by the second mortgagee to redeem from the purchaser. If the second mortgagee had declined to redeem during the time allowed, the third mortgagee could redeem from the foreclosure purchase by paying the sum paid by the purchaser. n799

Other states follow what is known as scrambling redemption, under which the sold-out junior mortgagees may redeem in any order, but earlier redemptions by remote sold-out junior mortgagees can be effectively avoided by more senior mortgagees who redeem later. n800 Under this approach, redeeming junior mortgagees must pay any senior encumbrancers from whom they redeem the redemption price paid by the senior encumbrancers and the amount of the

seniors' encumbrances. n801 For example, assume that Blackacre is subject to a first mortgage securing a debt of $50,000 held by E1, a second mortgage securing a debt of $25,000 held by E2, and third mortgage held by E3 securing a debt of $10,000. E1 forecloses and purchases at the foreclosure sale for $50,000. Under the scrambling system, E3 may redeem before E2 by paying $50,000 to E1. But if that occurs, E2 may thereafter redeem from E3 by paying E3 the same amount ($50,000). Now, if E3 wishes to redeem again, E3 must deal with E2, who has succeeded to the rights of the purchaser, and thus to redeem, E3 must pay E2 $75,000.

In some jurisdictions sold-out junior encumbrancers may not redeem until a time certain has passed during which the mortgagor or the mortgagor's successor is given the exclusive right to redeem statutorily. n802 In others, the respective redemption periods of mortgagors or their successors and of junior encumbrancers overlap. n803 But, whatever the scheme, a redemption by a mortgagor or successor terminates the right of any junior encumbrancer to redeem. n804

States take different approaches to the effect of redemption by sold-out junior encumbrancers upon the debts owed them. Though nearly all these states concur that the redeeming junior encumbrancers acquire title free of all encumbrances that were destroyed by the foreclosure, some hold that the debt is extinguished to the extent that the value of the property exceeded the redemption price. n805 Thus, if a first mortgagee who was owed $15,000 foreclosed and became the purchaser at the foreclosure sale for $12,000, a second mortgagee with a debt of $20,000 could redeem from the sale by paying the first mortgagee $12,000. Yet, if the land had a value of $32,000, the debt owed the second mortgagee would be extinguished because the redemption price was exactly $20,000 less than the value of the property. Iowa takes the novel approach of requiring the redeeming junior encumbrancer to state what amount will be applied toward the debt and permitting the re-redemption from the junior encumbrancer by those who believe the land is worth more than the sum of the redemption price and the amount applied by the redeeming junior encumbrancer. n806 Of course, the problem does not arise where the effect of redemption by the junior encumbrancer is to revive the junior encumbrance. n807

COMPUTER-ASSISTED RESEARCH

LEXIS: junior or subsequent w/5 encumbrancer or
lienholder or redemptioner w/15 statut! w/5
redemption or redeem!

§ 101.07(d) Right of First Refusal Statutes.

Minnesota farmers who lose their farms to foreclosure are entitled, in certain instances, to buy them back from mortgagees who become purchasers at a foreclosure sale where the mortgagees later sell the property. The foreclosed farmers are given a statutory right of first refusal in these cases. n808 A similar right is afforded farmers throughout the nation in connection with loans under the Farm Credit System. n809

In Minnesota the right of first refusal creates an insurable interest even after the period of statutory redemption has expired. n810 Apparently, farmers can waive the benefits of the Minnesota first refusal law by backdating their mortgages to a time preceding the enactment of the statute. n811

COMPUTER-ASSISTED RESEARCH

LEXIS: right pre/2 first pre/1 refusal w/50 foreclos!
or mortgagor

§ 101.07(e) One Action Statutes.

Several western states n812 have enacted so-called "one action" statutes, which in theory are designed to compel

secured parties to prosecute all claims on, and arising out of, the debt in a single proceeding. Minnesota also has a one action statute covering lands used in agricultural production on or before March 22, 1986. n813

These statutes, while obviously protecting debtors from having to defend multiple suits, often have the additional effect of requiring the secured parties to proceed against the security first before obtaining judgments against the debtors personally, and hence are often described as "security first" statutes. Thus, in California, the applicable statute not only requires that all relief be sought in one action, but, by limiting the amount of any personal judgment to the deficiency between the debt and the foreclosure sale price, it also mandates that foreclosure precede entry of a personal judgment. n814 The application of these statutes is not as straight forward as may first appear, since some steps taken by secured parties may not be deemed actions and because courts recognize certain exceptions to the operation of the statutes.

Although at first blush it might appear that any invocation of a judicial action by a mortgagee would constitute an action, California courts permit secured parties who dismiss their suits before judgment to escape the prohibition of the one action statute. n815 Thus, a mortgage may not be foreclosed once a judgment is obtained on the debt, n816 but a settlement reached after the institution of suit may not constitute an action under the California statute. n817 The entry of the mortgagor's default may not constitute an action in California, so long as a judgment is not entered thereon. n818 Yet, certain remedies pursued privately so closely resemble an action, at least in their impact on mortgagors and trustors, that questions can arise about the application of the one action statute. Foreclosure by the exercise of a private power of sale, while not much different from a judicial foreclosure in the eyes of most mortgagors, has not usually been regarded as an action. n819 Lenders accordingly may pursue multiple security by successive private foreclosures, since earlier non-judicial foreclosure will not be treated as an action. n820 Other forms of self-help, however, may be treated as actions. Private measures taken, other than private foreclosure, that produce funds which the creditor applies to the debt, might be viewed as actions, e.g., a setoff of the amount in a bank account against a mortgage debt by the bank-mortgagee. n821 Nevada, on the other hand, has not treated setoffs as actions. n822

Disapproving case law to the contrary, the California Supreme Court in 1990 concluded that judicial action is essential before an action under that state's on statute can be found, but the court nevertheless also found that a private setoff violates the statute, since it frustrates the "security first" principle inherent in the statute:

> Section 726 embodies more than the "on" rule ... . [the section] and the statutory scheme of which it is a part require a secured creditor to proceed against the security before enforcing the underlying debt ... [Citation omitted.] This rule is hornbook law in California and warrants no extended discussion. n823

In accord with this reasoning, a California lender, in a decertified opinion, was found to have violated the on statute when it secured an order directing a receiver to apply receipts to the debt and then later sought private foreclosure. n824 While the appointment of a receiver itself is not viewed as an action under the statute, n825 the application of the rents to the debt by the receiver may be perceived of as contrary to the "security first" principle. A prejudgment attachment in Korea was held to violate the security first aspect of California's one action statute because it was "a provisional remedy ... substantially beyond the mere filing of a lawsuit." n826

Also, California legislation specifically provides that secured parties may obtain the appointment of receivers to enter and inspect the security to locate hazardous substances without invoking that state's one action statute. Further, in the case of environmentally impaired security, secured parties may, within limits, elect to waive the security and proceed as unsecured parties. n827

The on rule may be used as a sword or a shield by mortgagors and trustors. If a secured party institutes action without joining all claims secured by the debt, the action should be dismissed on motion of the debtor. Thus, an action on the debt not accompanied by a prayer for foreclosure should be dismissed on request of the mortgagor. Yet, if the debtor allows judgment to be entered against the debtor without objecting to a violation of the on statute, the violation may thereafter be used as a defense to any later action taken against the debtor. n828

It has been held that guarantors are not protected by one action statutes, because a contract of guaranty is an undertaking separate and apart from the debt guaranteed. n829 Accordingly, mortgagees have been permitted without sanction to proceed against guarantors personally without first going against the principal debtors or the security. n830 Similarly, mortgagees are not barred by the one action rule from proceeding first against the principal obligors or their property before suing on the guaranty. n831 However, mortgagees who do proceed first against the principal debtors or their property may nevertheless forfeit rights to proceed later against the guarantors, if their actions interfere with the guarantors' subrogation rights against the principal obligors or their assets. Thus, where deficiency judgments were barred after a private foreclosure, a creditor which first foreclosed non-judicially was held to have lost its rights against a guarantor because the creditor's action had destroyed rights against the principal debtor to which the guarantor could have been subrogated but for the non-judicial foreclosure. n832

It is generally recognized that a lender whose security has become legally worthless is not bound by the one action rule. n833 The worthless security exception is not triggered if purely economic factors have rendered the security worthless; only legal or physical factors can be the predicate for the exception. If the property is physically destroyed through no fault of the creditor, action on the debt is proper without joining a claim to foreclose. n834 Similarly, because a junior mortgage is destroyed by the foreclosure of a senior encumbrance, a sold-out junior may sue on the debt without also seeking foreclosure, the courts having rejected the suggestion that a sold-out junior encumbrancer is responsible for the destruction of the security by failing to outbid others at the foreclosure sale of the senior encumbrance. n835 Declines in value for economic reasons provide no escape from the one action statutes. A junior mortgagee is, therefore, not relieved from the constraints of the one action rule merely because a decline in property values has left no equity on which to foreclose. n836

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LEXIS: foreclos! w/50 one pre/1 action w/5 action or
rule

§ 101.07(f) Fair Value Statutes.

Many states statutorily limit deficiency judgments after foreclosure to the difference between the greater of the fair value of the land and the foreclosure sale price, on the one hand, and the amount of the debt. n837 The obvious purpose of this legislation is to avoid unjustly enriching mortgagees who may purchase encumbered lands at foreclosure for less than the fair value and then claim a deficiency equal to the difference between the foreclosure sale price and the debt. n838 Other terms besides "fair" may be used to describe the value to be credited against the debt, n839 but it seems clear that the foreclosure sale price should not be determinative of the amount of the deficiency.

Some fair value statutes apply only where the secured party is the purchaser at the foreclosure sale. n840 Others apply only where foreclosure is by private, as opposed to judicial, sale. n841

A common difficulty under these statutes is defining the fair value. Although some statutes speak of the "fair market value," n842 under others the present fair market value at the time of the foreclosure sale is not necessarily the "fair" value. n843 It is often said the fair value is the "intrinsic or potential worth of the property on the open market." n844 The Washington statute contemplates a price a competitive bidder would pay under normal circumstances. n845 The North Dakota Court, while listing several factors to be considered in determining the fair value, has essentially left the determination to triers of fact on an ad hoc basis. n846 The factors cited by the North Dakota Courts include the amount of the mortgage, the amount of junior mortgages, fluctuation in land values, the amount of the debt, and the foreclosure sale price. n847 The existence of a statutory redemption right is also a relevant factor. n848 Such vagueness seems designed to sanction relief on subjective bases to their defaulting neighbors and reflects a legislative determination that lenders should "share the risk of loss if market values fall." n849 Florida's legislation explicitly authorizes determination

of deficiency judgments in accord with "equitable principles" n850 although, in light of the judicial construction of this statute, n851 it is "inaccurate to assert that Florida is a 'fair value' jurisdiction." n852

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LEXIS: deficiency /50 fair pre/1 value w/5 statut! rule

§ 101.07(g) Anti-Deficiency Statutes.

§ 101.07(g)(1) Types of Statutes.

In addition to the one action and fair value statutes, which restrict the amount of deficiency judgments or the methods of obtaining them, there are also statutes prohibiting them altogether in many situations.

At least one jurisdiction once outlawed deficiency judgments in all situations. North Dakota had such a total ban from 1933 until 1951, when the state was forced to relax the ban because of the refusal of the Federal Farm Bank to make loans in the state until deficiencies were permitted. n853

Some states prohibit deficiency judgments on purchase money obligations secured by mortgages and deeds of trust. n854 California prohibits any deficiency on purchase money obligations held by sellers and also on purchase money obligations held by third party lenders if the security is residential property. n855 Oregon, too, treats security interests given to sellers somewhat differently than purchase money security interests given to third party lenders. n856 South Dakota will not permit a deficiency after any foreclosure of a purchase money security interest. n857 Iowa does not allow deficiencies on debts secured by agricultural lands. n858

Some states do not sanction deficiency judgments after foreclosure by private sale. California has an outright prohibition in such cases. n859 Georgia mortgagees and beneficiaries cannot obtain deficiencies after private foreclosure unless the sales are returned for judicial confirmation. n860 Other states with statutory restrictions on deficiencies after a non-judicial foreclosure include Alaska n861 and Washington. n862

Deficiency judgments are sometimes forbidden where the secured party is the foreclosure purchaser. n863 In Colorado, the amount of the deficiency will be adjusted where the mortgagee fails to submit a bid based on a good faith estimate of the value of the security. n864

Under these statutes intriguing questions can arise as to what constitutes a deficiency. In the purest sense, a deficiency is a judgment for the difference between the amount of the mortgage debt and the foreclosure sale price, yet some courts have expanded it to include other monetary claims. The North Carolina Court, for example, has held that a secured party's obligation for attorney's fees incurred in connection with a statutory redemption could not be recouped, the court treating the claim for the fees as one for a deficiency. n865 California has held that even a claim for waste committed by a beneficiary under a deed of trust is unenforceable as a deficiency unless the waste is "willful." n866 On the other hand, California has allowed a claim for fraud against third parties to be prosecuted by a mortgagee which purchased the security after making a full credit bid on foreclosure, at least if the fraud influenced the bid. n867 Sold-out junior encumbrancers who, of course, have no security on which to foreclose and hold only an unsecured claim have been treated in California as seeking a deficiency when suing on the debt. n868 Under this view the claim on the debt itself is characterized as a deficiency, even though no foreclosure has taken place under the claim. In North Carolina and Utah, in contrast, sold-out junior encumbrancers are not seen as seeking deficiencies when they sue on the debt. n869 Once a foreclosure has taken place though, it would seem that any later claim on the debt *in personam* against the debtor would be for a deficiency, whether the foreclosure was by judicial or private sale. Foreclosure against other security, after one foreclosure has failed to generate sufficient bidding to discharge the debt, may not be equated with a deficiency judgment. A second foreclosure does not itself produce a personal judgment against the debtor, and so California

mortgagees and beneficiaries may foreclose by private sale against multiple securities in successive foreclosures without running afoul of either California's ban on deficiency judgments after a private sale or of the state's one action statute. n870

Debtors' pre-default waivers of the protection of these anti-deficiency acts are generally unenforceable. n871 Indirect attempts by lenders to avoid the statutes have generally proven unsuccessful. Thus, where a husband and wife guaranteed a purchase money loan to their inter vivos revocable trust, they were regarded as the real borrowers, whose protections under the California restriction of deficiencies on purchase money obligations could not be waived. n872 Similarly, mortgagors who executed the loan documents as guarantors rather than as borrowers did not forfeit the protection of the North Dakota anti-deficiency law. n873

Attempts by mortgagees and beneficiaries to escape the restraints of the anti-deficiency statutes, by waiving the security and then arguing that they no longer hold secured obligations, have usually been unsuccessful. Thus, in many of these states, purchase money secured lenders may not elect to forego foreclosure and seek only a personal judgment. n874 In other states, secured parties may elect between a personal judgment and foreclosure. n875 Frequently, these decisions denying mortgagees and beneficiaries the right to waive the security are founded upon the "security first" principle underlying many one action statutes. n876 The anti-deficiency statutes generally do not protect guarantors. n877

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LEXIS: mortgage or (deed pre/1 trust) w/15 anti-deficiency

§ 101.07(g)(2) "Non-Standard" Transaction Exception.

Despite literal requirements of the anti-deficiency statutes, courts may look to the purposes underlying the legislation and decline to apply the ban of deficiency judgments when persuaded that the debt arose out of a transaction not meant by the legislature to be covered by the anti-deficiency statutes.

In the leading California case of *Brown v. Jensen*, n878 those legislative goals in the case of purchase money obligations were said to be (1) to discourage overvaluation of property and (2) to prevent the economic downturn that might result if purchasers were subjected to personal liability as well as the loss of their land. n879 Other states have followed California in accepting these objectives. Where the value of the security is not attributable to the price agreed to by a vendor-mortgagee, the California courts have carved out an exception to the anti-deficiency prohibition on purchase money debts, saying that the ban applies automatically only to "standard" transactions. Accordingly, several California decisions have permitted vendor-beneficiaries under deeds of trust to collect deficiency judgments after their security interests were destroyed by the foreclosure of senior construction encumbrances to which the vendors had subordinated their deeds of trusts. n880 In these cases, the courts reasoned that the purchasers, rather than the sellers, controlled the value of the security, since it was the construction contemplated by the purchasers that constituted the major ingredient in the worth of the property. Permitting sold-out sellers to collect deficiencies in such cases, so goes the reasoning, deters purchasers from overvaluing the property. n881 Yet, if the project financed by a secured loan to which the seller subordinates does not have major impact on the value of the security, California's ban of purchase money deficiencies will apply, since the seller then plays a greater role in establishing the valuation than the buyer. n882 Nor does the mere subordination of a seller's security alone trigger the "non-standard" exception. n883

A number of other situations are treated as "non-standard" and thus not governed by California's prohibition on purchase money deficiencies. Where assets other than the property purchased are given as security, sellers are permitted to collect deficiencies on the ground that, since the property purchased is not used as security, there is no encouragement of overvaluation. n884 Purchase money obligations which are unsecured are exempt from the prohibition. n885 Likewise, the prohibition can be circumvented by representing the debt by several evidences of indebtedness and securing some of them with parcels other than the parcel purchased. n886 In so dividing the debt, care

must be taken to fractionalize it, that is, to insure that the total of all instruments of indebtedness does not exceed the amount financed, for, if it does, then the property purchased may constitute security for all the instruments and thus bring all instruments within the purchase money deficiency prohibition. n887

Whether other states with prohibitions on purchase money deficiencies will follow California's lead in recognizing that only "standard" transactions are covered remains to be seen. North Carolina, at least, has adamantly refused to do so, holding that its statute imposes an absolute bar to all deficiencies on purchase money secured obligations. n888 Alaska has indicated an unwillingness to exclude any type of transaction from that state's anti-deficiency laws. n889

The "non-standard" transaction exception appears to be limited to restrictions on deficiencies under purchase money obligations. Prohibitions on deficiencies following a private foreclosure sale seem enforceable in all contexts. This makes sense because the rationale for forbidding deficiencies after private sale is quite different from that outlawing them on purchase money obligations. California originally adopted the ban on deficiencies after a private foreclosure in an effort to encourage adequate bidding at private sales. When the California statute was enacted, judicial foreclosures were subject to statutory redemption rights if deficiencies were sought, but private sales were never subject to statutory redemption. The prohibition on deficiencies after non-judicial foreclosures was meant to equalize "judicial and non-judicial foreclosure sales, by burdening them, respectively, with the risk of redemption and a deficiency bar." n890 In Arizona the legislative objective in forbidding deficiencies after private foreclosures on residential realty is to "abolish personal liability" of all who encumber such lands. n891 In view of such purposes, a distinction between "standard" and "non-standard" seems inapposite.

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LEXIS: anti-deficiency w/5 statut! & except! w/15 purchase pre/1 money

§ 101.07(h) Mortgages and Bankruptcy Laws.

The Constitution of the United States grants the national government the power to enact bankruptcy laws. n892 These debtor relief laws have superiority over all conflicting state laws, including those dealing with the rights and liabilities of parties to mortgages and deeds of trust. n893 Thus, in a very real sense, there is a uniform national mortgage law whenever a mortgagor voluntarily files a bankruptcy petition or is involuntarily thrust into bankruptcy proceedings by a creditor.

One of the primary concerns of the Bankruptcy Act is to preserve as much as possible of the debtor's estate so that as many assets as possible can be applied to satisfy the claims of his creditors. In the mortgage context, the Act seeks to do this in three ways. First, there is the "automatic stay" of all suits and foreclosures upon the mere filing of a bankruptcy petition; after the petition is filed, no creditor is allowed to take any action against the debtor without permission of the bankruptcy court. Second, the bankruptcy court is often authorized to modify the terms of the debtor's obligations; for example, in some cases, the bankruptcy court may set aside a creditor's acceleration of the balance due on mortgage note. Third, the bankruptcy trustee's "avoidance powers" allow certain transfers and contracts of the debtor's assets, including sales of the property through foreclosure, to be set aside. Before each of these three vehicles can be described in detail, an examination of the various types of bankruptcies is in order.

§ 101.07(h)(1) Types of Bankruptcy.

All bankruptcy proceedings are commenced by filing a petition in the United States Bankruptcy Court. The petition may be filed either by a debtor seeking relief from creditors or by creditors fearful that their claims against the debtor or the debtor's property are in jeopardy. With the exception of most business reorganizations, once the petition is filed, the court will appoint a "trustee in bankruptcy," whose primary responsibility is to take charge of the debtor's assets and manage them for the benefit of the debtor and the creditors, although in many instances the debtor is permitted to

continue to conduct affairs under the supervision of the bankruptcy court. There are four types of bankruptcy proceedings, and the powers of the trustee and the powers of the bankruptcy court vary depending upon the type of proceeding.

§ 101.07(h)(1)(i) Straight Bankruptcy (Chapter 7).

A proceeding under Chapter 7, n894 commonly called "straight bankruptcy," contemplates the rapid settlement of the debtor's affairs. All creditors are invited to present their claims to the trustee in bankruptcy, who will liquidate the debtor's assets in an effort to satisfy as many of his debts as possible. Inevitably, the debtor's estate will be insufficient to permit the total satisfaction of the debts, and each unsecured creditor will receive pro rata satisfaction. Once the estate has been liquidated, the bankruptcy court will grant the debtor a "discharge in bankruptcy," which relieves the debtor of all further liability on the debts. n895 Chapter 7 is called "straight bankruptcy" because it contemplates a quick liquidation and discharge. Unlike the other types of bankruptcies, in Chapter 7 there is no effort to give the debtor a period of time to restructure his financial affairs, and the bankruptcy court has no power to modify any of the obligations of the debtor.

Because there is no power to modify obligations in Chapter 7, the rights of secured creditors must be respected. Although secured creditors are subject to the automatic stay and cannot foreclose without permission from bankruptcy court, their liens must be honored and they normally have no difficulty in having the stay lifted. In the event a mortgagee forecloses after the automatic stay is lifted but does not realize enough at the foreclosure sale to discharge his claim fully, the creditor is treated as an unsecured creditor to the extent of the deficiency and will share ratably with other unsecured creditors.

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LEXIS: (chapter pre/1) or (straight pre/1 bankruptcy)
w/50 settl! or liquidat!

§ 101.07(h)(1)(ii) Wage Earner Plan (Chapter 13).

In a Chapter 13 n896 bankruptcy, the debtor is afforded a period of time, usually three years, to attempt financial rehabilitation. n897 If, at the end of the period, the debtor has not discharged all the obligations, the estate will then be liquidated and the debts discharged just as in Chapter 7. n898 Many debtors prefer Chapter 13 to Chapter 7 because their personal senses of honor compel them to seek to pay all their debts rather than run away from their obligations immediately. Some feel there is less social stigma attached to a Chapter 13 than to a Chapter 7 bankruptcy.

Chapter 13 is available only if the debtor's unsecured obligations do not exceed $100,000 and the secured debts do not exceed $350,000. n899

In Chapter 13, however, because the purpose is to give the debtor time to recover financially, the bankruptcy court is authorized to modify many of the obligations. For example, as is discussed *infra* n900 the court may set aside accelerations of debts secured by land other than the debtor's principal residence. Similarly, in keeping with the goal of allowing the debtor opportunity for rehabilitation, the debtor is usually permitted to retain possession of his property while the plan is in effect, although technically the title to the assets has passed to the trustee in bankruptcy. n901 This feature often makes Chapter 13 preferable to Chapter 7 for individual debtors. Under Chapter 13 they are not compelled, as they are under Chapter 7, to forego immediately the enjoyment of their non-exempt assets and they have the hope, if they succeed in discharging their debts over the life of the plan, of keeping their assets. In Chapter 7, on the other hand, with the exception of exempt assets, rather prompt liquidation follows filing the petition.

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LEXIS: chapter pre/1 13 w/50 rehbilitat! or reorganiz!

§ 101.07(h)(1)(iii) Reorganization (Chapter 11).

Chapter 11 n902 is intended primarily for businesses seeking to rehabilitate themselves much like Chapter 13 is directed at individual debtors with the same objectives. Nevertheless, despite its focus on business entities, Chapter 11 can be used by individuals n903 and, in a few cases, Chapter 11 offers individuals better protection than Chapter 13. In general, Chapter 11 contemplates a reorganization plan which has been approved by each class of the debtor's creditors, but creditors who are not impaired by the plan cannot veto the plan n904 and, in certain cases, impaired creditors who object to the plan can be forced to accept it. n905 This latter feature is commonly known as "cram-down." However, the plan cannot be "crammed down" on secured creditors unless the plan provides:

1. that the creditors retain their security interests and receive deferred cash payments equal to the value of their interest in the security, or

2. that the security be sold free of the security interest which then shall attach to the proceeds of the sale, or

3. that the creditors receive the "indubitable equivalent" of their claims. n906

It is beyond the scope of this work to examine the complexities of reorganizations, but two observations about the relation between Chapter 11 bankruptcy and mortgagees' rights are noteworthy. First, although each class of creditors must approve a plan by a vote representing a majority of creditors in the class and two-thirds of the debts in that class, n907 individual real estate mortgagees are almost always deemed to be distinct classes. n908 This makes sense in view of the fact that mortgagees hold security interests in parcels of land, each of which is unique, and the fact that, where several mortgages exist on the same parcel, they each have a unique priority which sets them apart from the others. The only exception to this rule is in cases of co-mortgagees holding concurrently a debt secured by the same mortgage. n909 Second, in Chapter 11, the bankruptcy court has broad power to modify the terms of debts, even those secured by mortgages. n910

Mortgagees under Chapter 11 face an important election of remedies early in the proceedings. Under section 1111 of the Bankruptcy Code they must elect either (1) to limit the amount of their secured debt to the value of the mortgaged land at the time the plan is approved and assume the status of unsecured creditors to the extent the amount of the debt is more than the value of the land, or (2) to retain their mortgage to secure the full amount of their claim and forego all claims for deficiencies if foreclosure, whenever the stay is lifted, does not bring enough to retire the claim. If a mortgagee believes there will not be enough assets in the estate to permit a full recovery as an unsecured creditor but also thinks the security, though currently of insufficient worth to offer adequate protection, will appreciate in value during the plan sufficiently to afford full protection, the mortgagee will opt for the second choice. Often the bankruptcy court will not lift the automatic stay to permit mortgage foreclosure during a plan because the debtor might need the use of the security if the plan is to have any chance of success. n911 Thus, mortgagees must carefully consider the potential for appreciation of the security during the plan in making the section 1111 election.

More often than not, the debtor in a Chapter 11 proceeding will be permitted to continue using assets in the estate during the plan in spite of the title held by the bankruptcy trustee. As in Chapter 13 plans, the debtor's chances of successful rehabilitation (reorganization under Chapter 11) may require that the debtor have the use of the property

during the plan.

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LEXIS: chapter pre/1 11 w/50 corporate or business
w/15 reorganiza! w/50 mortgage "deed of trust"

§ 101.07(h)(1)(iv) Family Farmer Plan (Chapter 12).

Most family farmers do not qualify for the Wage Earner Plan (Chapter 13) because the amount of their debt loan exceeds the Chapter 13 ceilings, so the Family Farmer Plan was created under Chapter 12 n912 in 1986. Chapter 12 closely resembles the Wage Earner Plan, but differs profoundly in the way it treats mortgagees.

Unless reenacted, Chapter 12 was to expire in 1998. n913

There is nothing comparable to the Section 1111 election under Chapter 12. Under Chapter 12, mortgagee liens are restricted to the value of the security at the time the plan is approved, n914 and mortgagees may not elect to retain the full amount of their liens as they can in Chapter 11 proceedings. n915 Further, under Chapter 12, if the security is inadequate when the plan is approved, any claim the mortgagees might have for a deficiency is limited to the amount they would receive if the debtor's estate were liquidated at once. n916 Under Chapter 11, in contrast, mortgagees, by electing to limit their mortgages to the value of the security when the plan is approved, obtain the right to be treated as unsecured creditors with respect to the difference between the debt and the value of the security and therefore may share in any subsequent appreciation in the value during the plan. Not so under Chapter 12, where the debtor can write the debt down to the "current depressed value of his land": n917

> The debtor, under Chapter 12, is allowed to keep his land, pay the former secured debtor [sic] only "liquidation value" on the newly created unsecured debt, and receive a bankruptcy discharge on the rest of the debt, while the creditor is precluded from sharing in any future appreciation of the land. n918

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LEXIS: mortgage or "deed of trust" w/50 chapter pre/1
12

§ 101.07(h)(2) The Automatic Stay.

Once a bankruptcy petition is filed in the bankruptcy court all pending judicial and non-judicial actions against the debtor are automatically stayed, and no other judicial or non-judicial actions may be taken against the debtor, nor may pending actions be prosecuted, until the bankruptcy court lifts the stay. n919 This is true for all types of bankruptcies. Creditors wishing to continue actions already underway when the petition was filed, or desiring to commence actions against the debtor, may do so only if the stay is lifted by order of the bankruptcy court, and any actions taken before the stay is lifted are void. n920 Section 362(d) of the Bankruptcy Code authorizes lifting the stay:

(1) for cause, including lack of adequate protection of an interest in the property of such Mortgagee; or

(2) with respect to a stay of an act against property, if--

(A) the Mortgagor does not have an equity in such property; and

(B) such property is not necessary to an effective reorganization.

Because the application of Section 362(d) varies somewhat with the type of bankruptcy proceeding, the grounds for lifting the stay are discussed separately in the next subsection under separate headings relating to the four kinds of bankruptcy.

Nevertheless, regardless of the type of bankruptcy, the automatic stay attaches as soon as the petition is filed. Thereafter, unless the bankruptcy court lifts the stay, all pending judicial actions, including judicial foreclosures, are stayed. Notice to third parties, while desirable, is not necessary to impose the stay, as the filing of the bankruptcy petition alone suffices. n921 Likewise, pending private foreclosures are also stayed, whether or not notice has been given to the party conducting the private sale. n922 However, the bankruptcy court has discretion to relieve secured parties who are not given notice of and are otherwise unaware of the bankruptcy proceedings from the normal consequences of violating the automatic stay. The court may, for example, decline to set aside a private foreclosure conducted after the filing of the bankruptcy petition on proof that the secured party had no notice of the bankruptcy case. n923

§ 101.07(h)(2)(i) The Automatic Stay in Chapter 7 Bankruptcies.

Even though a Chapter 7 bankruptcy envisions a speedy liquidation of the debtor's estate, there may be occasions when a mortgagee does not wish to delay foreclosure until the bankruptcy case is concluded. Mortgagees are entitled under Chapter 7, as in any other type of bankruptcy, to petition the bankruptcy court to lift the stay under Section 362(d)(1) and (2). Because straight bankruptcy contemplates no period of rehabilitation or reorganization, the provisions of Section 362(d)(2) relating to a finding that the property is not necessary for an effective reorganization are not germane.

Thus, in Chapter 7 bankruptcies, when a mortgagee seeks a lifting of the automatic stay, the only issues to be resolved are whether the interest of the secured party is adequately protected under Section 362(d)(1) and whether, under Section 362(d)(2), the debtor has an equity in the mortgaged premises. Unless the value of the security can be shown to be in danger of declining during the relatively short time involved in a Chapter 7 proceeding, it is unlikely mortgagees can establish a lack of adequate protection under Section 362(d)(1). There is some dispute over the meaning of "adequate protection" in Section 362(d)(1). Many decisions indicate that the term refers to a decline in value after the filing of the bankruptcy petition. n924 Others suggest that, so long as the secured party has an adequate equity cushion, protection is adequate. n925 A lack of equity, in any event, is the more usual basis for lifting the stay in Chapter 7. Section 544 of the Bankruptcy Code directs the trustee to abandon the security if the debtor has no equity in it. Without an equity in the property, there will be no surplus generated from a foreclosure sale to be applied to the claims of unsecured creditors, and there is thus no legitimate trustee's interest in continuing to hold the security as part of the debtor's estate.

COMPUTER-ASSISTED RESEARCH

LEXIS: chapter pre/1 7 or straight pre/1 bankruptcy
w/50 automatic pre/1 stay

§ 101.07(h)(2)(ii) The Automatic Stay in Chapter 13 Bankruptcies.

Unlike straight bankruptcies, wage earner plans under Chapter 13 contemplate a lengthy period during which the debtor

attempts rehabilitation. Because rehabilitation often depends upon the debtor being able to use property encumbered by mortgages, Section 362(d)(2) may apply to proceedings under Chapter 13 since "reorganization" arguably includes a wage earner's plan. The decisions, however, are divided on the question. A number of courts interpret "reorganization" as referring only to proceedings under Chapter 11. n926 Others accept the broader interpretation of the term. n927 One court has concluded that the requirement of necessity should be more strict under Chapter 13 than under Chapter 11. n928 If Section 362(d)(2) does apply in Chapter 13 proceedings, lack of equity alone will not justify lifting the stay; in addition, under Section 362(d)(2), the secured party would have to establish that the property is not necessary to the effective implementation of the plan. Of course, the secured party might succeed in lifting the stay under Section 362(d)(1) by showing that the security is not adequately protected.

COMPUTER-ASSISTED RESEARCH

LEXIS: chapter pre/1 13 w/50 automatic pre/1 stay

§ 101.07(h)(2)(iii) The Automatic Stay in Chapter 11 Bankruptcies.

Clearly, Section 362(d)(2) applies to Chapter 11 proceedings, as is apparent in the reference to an effective reorganization. Under this provision, it will be recalled, the stay may be lifted if (1) the debtor has no equity and (2) the security is not necessary for an effective reorganization. Unfortunately, controversy surrounds the meaning of "equity" when property is burdened by several encumbrances. n929 Most decisions employ the common understanding of the term and define "equity" as the difference between the market value of the security and all encumbrances against it, n930 but some courts have given the term a narrower definition by ignoring all encumbrances junior to the encumbrance held by the creditor seeking to have the stay lifted. n931 Junior mortgagees obviously prefer the latter definition since it increases the odds they will be able to retain their liens until the reorganization is completed.

Even if the debtor has no equity in the security, the stay will not be lifted under Section 362(d)(2) unless the property is not necessary for an effective reorganization. This requires a realistic evaluation of the probable success of the plan and findings that the plan will be effective and that the property is needed to implement the plan. n932

Section 363(d)(1) is also available in Chapter 11 proceedings, but subject to the conflict over the meaning of "adequate protection" previously mentioned. Even so, secured parties prefer to base their cases for lifting the stay on Section 362(d)(2) rather than on Section 362(d)(1) because, under the latter, courts often provide additional protection in lieu of lifting the stay. n933

COMPUTER-ASSISTED RESEARCH

LEXIS: chapter pre/1 11 or reorganization w/50 automatic pre/1 stay

§ 101.07(h)(2)(iv) The Automatic Stay in Chapter 12 Bankruptcies.

The stay provisions respecting Chapter 12 proceedings are much like those governing Chapter 11 bankruptcies, since both types of proceedings contemplate a period of reorganization. n934 In one major respect, however, it is easier for the debtor to avoid a lifting of the stay under Chapter 12 than under Chapter 11. In addition to the types of evidence useful in Chapter 11 bankruptcies to show that a creditor is adequately protected and thus not entitled to have the stay lifted under Section 362(d)(1), Chapter 12 provides that a creditor is adequately protected if the creditor receives the reasonable rental value of the farmland. n935 Hence, the farmer-debtor can defeat an effort by a mortgagee to have the stay lifted simply by paying a reasonable rent to the mortgagee. n936

COMPUTER-ASSISTED RESEARCH

LEXIS: chapter pre/1 12 w/50 automatic pre/1 stay

§ 101.07(h)(3) Avoidance Powers.

In keeping with the goals of sequestering as many assets as possible in order to apply them to satisfaction of the debtor's creditors, the Bankruptcy Code contains several provisions empowering the trustee in bankruptcy to recapture for the debtor's estate assets voluntarily or involuntarily transferred before the bankruptcy petition was filed. The thrust of these provisions is to enable the trustee to set aside transfers made by the debtor before filing which were in fraud of creditors or which resulted in giving preference to one or more creditors. But, they go much further than addressing these rather obvious situations, for they also permit the trustee, under certain circumstances, to attack foreclosure sales and recover for the debtor's estate property sold at regularly conducted foreclosure sales. Further, one of them gives the trustee priority over prior secured creditors who fail to perfect their interests under state law. Each of these provisions granting the trustee powers to avoid transfers is discussed separately in the following sections.

§ 101.07(h)(3)(i) Hypothetical Bona Fide Purchaser Status of the Trustee.

Under Section 544(a)(3) of the Bankruptcy Code, the trustee in bankruptcy is treated as a bona fide purchaser with a perfected interest under state law. This provision gives the trustee priority over prior purchasers and encumbrancers who have not perfected their interests under state law before the bankruptcy petition is filed. Perfection, in the mortgage context, means recording one's mortgage in the land records under state law. Section 544(a)(3) thus grants the trustee priority over any mortgagees who have not recorded their mortgages by the time the bankruptcy petition is filed. n937 State law determines whether earlier interests have been perfected; accordingly, the trustee has been found to take subsequent to a security interest given to a former spouse in a divorce decree, which under state law was sufficient to put subsequent purchasers on notice of the interest. n938

It makes no difference under Section 544 that the trustee might have actual knowledge of prior unrecorded mortgages, for the statute expressly renders the trustee's actual knowledge irrelevant. n939 However, inquiry notice of off-record claims may suffice to disqualify the trustee as a bona fide purchaser if such notice under state law deprives one of such status. n940 Thus, if the mortgagee under an unrecorded mortgagee were in possession of the premises and if, under state law, possession imparts notice, the trustee would probably be denied the benefits of Section 544(a)(3). n941 The trustee is not required to record anything in the land records since the Section creates the fiction that the trustee has done whatever is required under state law to perfect.

Although the trustee takes free of prior unrecorded liens, the debts secured by them are not extinguished, since the Section permits the trustee to avoid only such transfers and obligations as are voidable. State law may make prior unrecorded transfers voidable, but the recording statutes have no effect on the underlying obligations secured by unrecorded mortgages.

COMPUTER-ASSISTED RESEARCH

LEXIS: bankruptcy and trustee w/15 bona pre/1 fide or
good pre/1 faith w/15 purchaser

§ 101.07(h)(3)(ii) Preferential Transfers.

One policy underlying the Bankruptcy Code is that creditors who are similarly situated should be treated equally. If, for example, in an effort to keep a creditor at bay, a debtor on the eve of bankruptcy makes a payment to the creditor, the creditor is advantaged vis-a-vis other similarly situated creditors. To prevent such preferment, Section 547 of the Bankruptcy Code authorizes the trustee to set aside any transfer made to a creditor within 90 days of the filing of the bankruptcy petition if the debtor was insolvent when the transfer occurred and if the creditor received more than could

have been obtained through a Chapter 7 liquidation. Insolvency is presumed. n942 In certain cases, the relevant period is one year instead of 90 days. n943

Section 547(a)(3) can be the basis for setting aside a regularly conducted mortgage foreclosure sale where the foreclosing mortgagee was the successful bidder at the sale. n944 A common difficulty in successfully invoking Section 547(a)(3) is proving that the foreclosure produced less than would have been realized under a Chapter 7 liquidation. n945 Perhaps the price received at a regularly conducted foreclosure sale will be conclusively presumed to establish the liquidation value, as it has for purposes of establishing "reasonably equivalent value" under section 548 of the Bankruptcy Act dealing with fraudulent transfers. n946 Theoretically, foreclosure sale purchases by creditors other than the foreclosing mortgagee could qualify as voidable preferences.

COMPUTER-ASSISTED RESEARCH

LEXIS: bankruptcy and trustee w/15 (set or setting) pre/1 aside w/50 preferential w/15 transfer or conveyance

§ 101.07(h)(3)(iii) Fraudulent Transfers.

Section 548 of the Bankruptcy Code permits transfers in fraud of creditors made within one year of the filing of the bankruptcy petition to be set aside. In 1994, the United States Supreme Court resolved a debate among the lower courts about whether a regularly conducted foreclosure sale would ever produce a sales price that was not a reasonably equivalent value. The Court held that the price obtained at a regularly conducted foreclosure is conclusively presumed to be for a reasonably equivalent value. n947

Before the Supreme Court's resolution of the matter, there had been disagreement among the lower courts about whether a regularly conducted foreclosure sale could ever constitute a fraudulent transfer under the Bankruptcy Code. The Fifth Circuit Court of Appeals had held that a foreclosure sales price less than 70% of the market value of the security was not in exchange of "reasonably equivalent value." n948 Another court went so far as to conclude that, for purposes of Section 548, the transfer occurred not at the foreclosure sale but rather upon the creation of the security interest. n949 The Bankruptcy Code, however, was amended in 1984 to include foreclosures within the term "transfer" as used in the section and, as noted, the Supreme Court has now ruled that a regularly conducted foreclosure sale cannot produce a fraudulent transfer under Section 548. n950

COMPUTER-ASSISTED RESEARCH

LEXIS: bankruptcy and trustee w/15 set! pre/1 aside w/50 fraud! w/15 transfer or conveyance

§ 101.07(h)(4) Setting Aside Accelerations in Bankruptcy.

In bankruptcies under Chapters 11, 12, and 13 it is often possible to set aside an acceleration of a mortgage debt under the power given the bankruptcy court to approve plans modifying the rights of secured creditors.

In Chapter 11 bankruptcies, reorganization plans must be acceptable to each class of creditors or, unless the plan is crammed down, must leave those classes of creditors which reject the plan unimpaired. Since parties secured under a real estate mortgage are usually a distinct class, n951 this means that, unless the cram down requirements are satisfied, a plan cannot be forced upon them unless they are deemed unimpaired. However, deceleration under a plan cannot alone cause impairment, with the result that the mortgagee after deceleration is usually not impaired and thus the plan may be approved without such mortgagee's consent. n952

In Chapter 12 plans, deceleration is clearly permissible. n953

In Chapter 13 proceedings (wage earner plans) the power to modify is often invoked to avoid an acceleration of the mortgage debt after a default. The statutory authorization for modification in Chapter 13 proceedings excludes from the court's modification powers "a claim secured only by a security interest in real property that is the debtor's principal residence," n954 but it also grants the court power to "provide for the curing or waiving of any default." n955 Concluding that a cure is not a modification, the United States Supreme Court has held that a wage earner's plan may provide for setting aside or "decelerating" the acceleration of a mortgage debt secured by a debtor's residence. n956

Questions arise in each type of bankruptcy as to when, if ever, the debtor's right to decelerate ends. n957 It is generally accepted that deceleration is not authorized if the bankruptcy proceedings are not commenced until after a foreclosure sale has been conducted to collect the accelerated debt and any applicable statutory redemption period has expired. n958 Whether the mere entry of a judgment directing foreclosure should terminate deceleration rights is an unsettled question. n959 Some courts have allowed deceleration during any statutory redemption period following foreclosure. n960 In chapter 13 proceedings, home mortgagors are not entitled to strip down the value of an oversecured mortgagee's secured to the value of the security--a remedy generally available under Section 506(a) of the Bankruptcy Act--and then seek a modification of the unsecured portion of the claim. n961 In chapter 11 proceedings, however, most courts have allowed the secured portion of a loan secured by a residence to be stripped down to the value of the security. n962

COMPUTER-ASSISTED RESEARCH

LEXIS: bankruptcy or chapter w/1 (7 or 11 or 13)
w/50 declerat! or accelerat! /50 mortgage or (deed pre/2 trust)

§ 101.07(h)(5) Installment Land Contracts in Bankruptcy.

Section 365 of the Bankruptcy Code authorizes the trustee in bankruptcy to accept or reject the executory contracts of the debtor in order to permit the utilization for the debtor's estate of advantageous contracts and the repudiation of those detrimental to the estate. An issue sometimes arises whether installment land contracts qualify as executory contracts under this Section. The trend among state courts seems to be to regard these agreements as disguised security devices or as equitable mortgages rather than as contracts. The federal courts, however, are not in agreement as to the proper role of state law in characterizing these contracts under Section 365. Many bankruptcy courts have looked to state law and indicated that, if state law treats installment land contracts as security devices, Section 365 is inapplicable. n963 Other federal courts hold that federal law determines whether installment land contracts fall within the Section. n964 Professor Countryman's conclusion that an executory contract under Section 365 is one that either party may yet materially breach, n965 has influenced some courts to hold that state law is relevant only in determining whether material breaches are still possible and that, if so, Section 365 is applicable. n966 Under this latter view, if according to state law a forfeiture of the debtor-vendee's rights under the agreement has been lawfully declared by the vendor after a default by the debtor-vendee and neither party then has any further liability, there would presumably no longer be an executory contract under Section 365; but, if after the default state law recognizes continuing liabilities, including merely an obligation to make restitution, an executory contract under Section 365 may exist. n967

Where the debtor is the purchaser under an installment land contract, this section permits the trustee in bankruptcy to accept the contract only if the seller is given adequate assurance of future performance and compensated for all defaults. n968 If these conditions are not met, the contract is deemed rejected. If the contract is treated as a security device, the buyer's trustee will avoid Section 365 and then claim the benefits of the automatic stay.

If the seller is in bankruptcy, the trustee in bankruptcy may accept or reject installment contracts, except where the buyer is in possession of the property. However, a buyer in possession has the right to continue making the periodic payments and to demand a conveyance after the last payment. n969 Even if the contract is treated as a mortgage, at least where the buyer is in possession, the results should not differ greatly from those which would flow from Section 365. Whether the buyer is deemed an installment vendee or a mortgagor, the buyer should have the right to continue

performance and to expect counter-performance. As a mortgagor, the buyer would have title subject to the mortgage; as a contract obligee in possession, the buyer would be similarly protected under Section 365. If the buyer were not in possession, though, the characterization of status is quite significant. As a contract vendee not in possession, the buyer's rights are subject to repudiation by the trustee, and the land may be lost; as a mortgagor, again, the buyer has good title subject to the mortgage and can salvage the title through redemption.

COMPUTER-ASSISTED RESEARCH

LEXIS: bankruptcy and installment or land w/2 contract or agreement or deed

FOOTNOTES:

(n1)Footnote 770. *Federal Land Bank of Wichita v. Story, 756 P.2d 588 (Okla. 1988)* (contract clauses of federal and state constitutions violated); *Federal Land Bank of Omaha v. Lockard, 446 N.W.2d 808 (Iowa 1989)* (*equal protection clause* violated by restricting moratorium to certain class of creditors).

(n2)Footnote 771. *Home Bldg. & Loan Ass'n v. Blaisdell, 290 U.S. 398 (1934)* .

(n3)Footnote 772. *City Consumer Servs. v. Peters, 815 P.2d 234 (Utah 1991)* .

(n4)Footnote 773. *Iowa Code Ann. § 654.15*. Before 1985 the statute was limited to cases of default arising from "draught, flood, heat, hail, storm, or other climatic conditions or by reason of the infestation of pest which affect the land in controversy, or when the governor ... by reason of a depression shall have by proclamation declared a state of emergency to exist. *See* Benton, *Iowa's Mortgage Moratorium Statutes: A Constitutional Analysis, 33 Drake L. Rev. 303* (1983-4). Though the governor's declaration of an economic emergency was originally valid only for a year, legislation has periodically extended it. Historical and Statutory Note, *Iowa Code Ann. § 654.15*.

(n5)Footnote 774. *Minn. Stat. Ann. §§ 583.20 - 583.32*.

(n6)Footnote 775. Such statutes exist in about half of the states. Powell on Real Property(R) § 37.46 (Michael Allan Wolf ed., LexisNexis Matthew Bender); *Wandler v. Lewis, 567 N.W.2d 377 (S.D. 1997)* ; *Millay v. Cam, 955 P.2d 791 (Wash. 1998)* (Tolling of statutory redemption).

(n7)Footnote 776. "Where it exists, the right to statutory redemption begins when the party's equity of redemption ends." Powell on Real Property(R) § 37.46 (Michael Allan Wolf ed., LexisNexis Matthew Bender).

(n8)Footnote 777. *Trauner v. Lowrey, 369 So. 2d 531 (Ala. 1979)* ; *Valentine v. Portland Timber & Holding Co., 547 P.2d 912 (Wash. App. 1976)* .

(n9)Footnote 778. *E.g.*, omitted juniors redeeming equitably acquire the revived liens which had previously been foreclosed. *See, supra* text accompanying note 406.

(n10)Footnote 779. *Cal. Code Civ. Proc. § 729.060*; *Colo. Rev. Stats. § 38-38-302*; *Or. Rev. Stats. § 880.080*. *Astoria Federal Sav. & Loan Ass'n v. Nong Yaw Trakansook, 18 A.D.3d 586* (N.Y.A.D. 2 Dept. 2005) (the cost to redeem is the principal plus interest due, foreclosure costs, and other costs associated with the sale); *In re Loehwing, 320 B.R. 281 (Bkrtcy. D.N.J. 2005)* (right to redeem after sale must also include cost of employing sheriff at sale); *Skelton v. J&G, LLC, 922 So. 2d 926 (Ala. Civ. App. 2005)* (to redeem one must pay the amount of debt or show a valid reason why one cannot pay); *Sodano v. Faithway Deliverance Center, Inc., 18 A.D.3d 534* (N.Y.A.D. 2 Dept. 2005) (not able to redeem because money not given to court before foreclosure).

(n11)Footnote 780. *Alaska Stat. § 09.35.230* (1991); *Cal. Code Civ. Proc. § 729.060(b)(5)*. This principle applies even where the purchaser held two liens and purchased at the foreclosure of the most senior of them. *Salsbery v. Ritter, 306 P.2d 897 (Cal. 1957)* .

(n12)Footnote 781. *Or. Rev. Stat. Ann. § 23.560*; Nelson & Whitman, *supra* note 9, § 8.4. *Skelton v. J&G, LLC, 922 So. 2d 926 (Ala. Civ. App. 2005)* (ability to redeem after sale but only if before confirmation of the sale to purchaser).

(n13)Footnote 782. *Alaska Stat. § 09.45.90* (available after "judgment of foreclosure"); *Cal. Code Civ. Proc. § 729.010* (available only if deficiency judgment entered; such judgment forbidden after private sale.) *Cal. Code Civ. Proc. § 580d*.

(n14)Footnote 783. Mo. Stat. Ann. § 443.410.

(n15)Footnote 784. Bauer, *Statutory Redemption Reconsidered: The Operation of Iowa's Redemption States in Two Counties Between 1881 and 1980, 70 Iowa L. Rev. 343, 402-03 (1984).*

(n16)Footnote 785. Comment, *The Statutory Right of Redemption in California, 52 Cal. L. Rev. 846 (1964).*

(n17)Footnote 786. *Call v. Thunderbird Mtg. Co., 375 P.2d 169 (Cal. 1962)* .

(n18)Footnote 787. *Phillips v. Hagart, 45 P. 843 (Cal. 1896)* .

(n19)Footnote 788. *Forty-Four Hundred East Broadway Co. v. 4400 East Broadway, 660 P.2d 866 (Ariz. App. 1983)* (re installment buyer); *Martin v. Sprague, 11 N.W. 143 (Minn. 1881)* (re dower).

(n20)Footnote 789. *Farmers Prod. Credit Ass'n v. McFarland, 374 N.W.2d 654 , reh'g denied* (Iowa 1985); *Colon v. Option One Mortgage Corporation, 319 F.3d 912 (7th Cir. 2003)* (the debtor's right to cure a default expires at the completion of the foreclosure sale).

(n21)Footnote 790. *Cal. Code Civ. Proc. § 729.080(e). See also Farmers Prod. Credit Ass'n v. McFarland, 374 N.W.2d 654 (Iowa 1988)* (lien of junior mortgagee does not reattach although he may be entitled to a judgment lien); *Kirklevington v. Kirklevington, 848 S.W.2d 453 (Ky. 1993)* (mortgagee may not redeem statutorily, and statutorily redeeming mortgagor takes title free of junior liens formerly securing nonrecourse debt).

(n22)Footnote 791. *Franklin v. Spencer, 789 P.2d 643 (Or. 1990)* (judgment lien reattaches). *See* Madsen, *Equitable Considerations of Mortgage Foreclosure and Redemption in Utah: A Need for Remedial Legislation, 1976 Utah L. Rev. 327, 355 (1976).*

(n23)Footnote 792. *Newman v. American Nat'l Bank, 780 P.2d 336 (Wyo. 1989)* ; *Colo. Rev. Stat. § 38-38-304(1)* (Supp. 1991).

(n24)Footnote 793. *Cf. Cal. Code Civ. Proc. § 729.020* (only the "judgment debtor or the judgment debtor's successor in interest" may redeem).

(n25)Footnote 794. *E.g., Colo. Rev. Stat. § 38-38-304(3)*.

(n26)Footnote 795. *Supra* § 101.07.03(B).

(n27)Footnote 796. Illinois is an exception in treating statutory redemptions by juniors like those by mortgagors in that the redeeming junior's lien is revived and secures the amount of any deficiency together with the sum paid to effect the redemption. In Illinois a creditor may redeem from his own sale. Nelson & Whitman, *supra* note 9, § 8.7.

(n28)Footnote 797. *E.g., Colo. Rev. Stat. § 38-38-304(3)*.

(n29)Footnote 798. In Colorado, for example, the owner or others personally liable on the debt are given a 75- or 90-day period within which to redeem (the period depending on whether an agricultural mortgage is involved) and, after

this period has lapsed, the senior lienor has 10 days within which to redeem, and junior lienors have in succession 5-day periods within which to redeem. *Colo. Rev. Stat. § 38-38-303*.

(n30)Footnote 799. *Colo. Rev. Stat. § 38-38-303*.

(n31)Footnote 800. *Alaska Stat. § 09.35.240*; *Or. Rev. Stat. Ann. § 23.550*.

(n32)Footnote 801. *Or. Rev. Stat. Ann. § 23.550*. Of course, if the foreclosure had been subject to the senior encumbrance, this principle would not apply since the senior encumbrance would not have been affected by the foreclosure.

(n33)Footnote 802. *E.g., Ariz. Rev. Stat. § 12-1282*.

(n34)Footnote 803. *E.g.,* Utah R. Civ. Proc., Rule 69(f).

(n35)Footnote 804. *Call v. Thunderbird, 25 Cal. Rptr. 265 (1962)* (under earlier California statute).

(n36)Footnote 805. *Sprague v. Martin, 13 N.W. 34 (Minn. 1882)* .

(n37)Footnote 806. *Iowa Code Ann. §§ 628.13, 628.17*, and *628.19*.

(n38)Footnote 807. In Illinois redemption by the junior revives his mortgage which is then security for the mortgage debt and the monies spent to redeem. *Ogle v. Koerner, 29 N.E. 563 (Ill. 1892)* .

(n39)Footnote 808. *Minn. Stat. Ann. § 500.24, subd. 6*.

(n40)Footnote 809. *12 U.S.C. § 2219a*.

(n41)Footnote 810. *Crowell v. Delafield Farmers Mut. Ins. Co., 463 N.W.2d 737 (Minn. 1990)* .

(n42)Footnote 811. *Travelers Ins. Co. v. Horseshoe Lake Farms, Inc., 456 N.W.2d 453 (Minn. App. 1990)* .

(n43)Footnote 812. Cal. Code Civ. Proc. § 726; Idaho Code Ann. § 6-101; Mont. Code Ann. § 71-1-222; Nev. Rev. Stat. § 40.430; N.D. Cent. Code § 32-19-06; Utah Code Ann. § 78-37-1.

(n44)Footnote 813. Minn. Stat. Ann. § 582.31 (1988 & Supp. 1992) (agricultural mortgagee must elect between judgment on the debt on which to execute and foreclosure with deficiency judgment; statute expires July 1, 1993).

(n45)Footnote 814. *Security Pac. Nat'l Bank v. Wozab, 800 P.2d 557 (Cal. 1990) , reh'g denied* (1991); case *Bank of America v. Daily, 199 Cal. Rptr. 557 (1984)* ; *Winkleman v. Sides, 88 P.2d 147 (Cal. App. 1939)* ; *Eastern Idaho Prod. Credit Ass'n v. Placerton, Inc., 606 P.2d 967 (Idaho 1980)* . *Frazier v. Neilsen & Co., 769 P.2d 1111 (Idaho 1989)* (re deeds of trust).

(n46)Footnote 815. *Security Pac. Nat'l Bank v. Wozab, 800 P.2d 557 (Cal. 1990) , reh'g denied* (1991). *Cf. Frazier v. Neilsen & Co., 769 P.2d 1111 (Idaho 1989)* (filing suit on debt constitutes waiver of security).

(n47)Footnote 816. *Frazier v. Neilsen & Co., 769 P.2d 1111 (Idaho 1989)* .

(n48)Footnote 817. *In re Tidrick, 105 B.R. 584 (Bankr. C.D. Cal. 1989)* .

(n49)Footnote 818. *In re Madigan, 122 B.R. 103 (Bankr. 9th Cir. 1991)* .

(n50)Footnote 819. *Hatch v. Security-First Nat'l Bank, 19 Cal. 2d 254, 120 P.2d 869 (1942)* . The matter may be moot under statutes prohibiting personal judgments after such sales. *E.g.,* Cal. Civ. Proc. Code, § 580d. Nevertheless,

even under such a statute, secured parties have been permitted to proceed privately against multiple security in succession. *Freedland v. Greco, 289 P.2d 463 (Cal. 1955)* .

(n51)Footnote 820. *Phillips v. Utah State Credit Union, 811 P.2d 174 (Utah 1991)* .

(n52)Footnote 821. *See Bank of Am. v. Daily, 199 Cal. Rptr. 557* , *reh'g denied* (1984), *disapproved, Security Pac. Nat'l Bank v. Wozab, 800 P.2d 557 (Cal. 1990)* , *reh'g denied* (1991).

(n53)Footnote 822. *United States v. Cail, 746 F. Supp. 1035 (Nev. 1990)* (some type of judicial action required).

(n54)Footnote 823. *Security Pac. Nat'l Bank v. Wozab, 800 P.2d 557 (Cal. 1990)* , *reh'g denied* (1991).

(n55)Footnote 824. *Great Am. First Sav. & Loan Ass'n v. Bayside Devs., 284 Cal. Rptr. 194 (1991)* (ordered not published). *But see* 500 *Ygnacio Assocs., Ltd., 27 C.B.C.2d 1009, 141 B.R. 191 (Bankr. N.D. Cal. 1992)* .

(n56)Footnote 825. Cal. Civ. Proc. Code § 564, subd. (d).

(n57)Footnote 826. *Shin v. Superior Court (Korea Nat'l Bank), 31 Cal. Rptr. 2d 587 (Cal. App. 1994)* .

(n58)Footnote 827. Cal. Civ. Proc. Code § 2929.5; Cal. Civ. Proc. Code §§ 564, 726.5.

(n59)Footnote 828. *Aplanalp v. Forte, 275 Cal. Rptr. 144 (App. 1990)* .

(n60)Footnote 829. *Coombs v. Heers, 366 F. Supp. 851 (Nev. 1973)* ; *Adams v. Wallace, 51 P. 14 (Cal. 1897)* ; *Component Sys. Corp. v. Eighth Judicial Dist. Ct., 692 P.2d 1296 (Nev. 1985)* ; *First Nat'l Bank v. Barengo, 536 P.2d 487 (Nev. 1975)* .

(n61)Footnote 830. *Coombs v. Heers, 366 F. Supp. 851 (D. Nev. 1973)* ; *First Nat'l Bank v. Barengo, 536 P.2d 487 (Nev. 1975)* .

(n62)Footnote 831. *Murphy v. Hellman Commercial Trust & Sav. Bank, 185 P. 485 (Cal. App. 1919)* .

(n63)Footnote 832. *Union Bank v. Gradsky, 71 Cal. Rptr. 64 (1968)* . Where the debt is a purchase money obligation on which a deficiency judgment is barred by applicable legislation, no prejudice to the subrogation rights occurs when the creditor proceeds first against the debtor's property since there never was a right in personam against the debtor to which the guarantor could have been subrogated. *Bauman v. Castle, 93 Cal. Rptr. 565 (1971)* .

(n64)Footnote 833. *Barbieri v. Ramelli, 23 P. 1086 (Cal. 1890)* ; *In re* Disalvo, 2 Cal. Bankr. Ct. Rep. 59 (9th Cir. BAP 1998) (One action rule still applies if security is worthless).

(n65)Footnote 834. *Cohen v. Marshall, 239 P. 1050 (Cal. 1925)* .

(n66)Footnote 835. *Roseleaf Corp. v. Chierighino, 27 Cal. Rptr. 873 (1963)* ; *Brown v. Jensen, 259 P.2d 425 (1953)* .

(n67)Footnote 836. *Giandeini v. Ramirez, 54 P.2d 91 (Cal. App. 1936)* ; *Barbieri v. Ramelli, 23 P. 1086 (Cal. 1890)* ; *Lockhart Co. v. Equitable Realty, Inc., 657 P.2d 1333 (Utah 1983)* .

(n68)Footnote 837. Among these states are Cal. Civ. Proc. Code § 726(b); Idaho Code § 6-108; Nev. Rev. Stat. §§ 40.457 & 40.459 ("fair market value"); N.C. Gen. Stat. § 45-21-36; N.D. Cent. Code § 32-19-06; Wash. Rev. Code Ann. § 61.12.060; Utah Code Ann. § 57-1-32 ("fair market value").

In Colorado, an adjustment in the amount of the deficiency claim is appropriate where a mortgagee whose bid is not

submitted in good faith purchases the security at foreclosure. *First Nat'l Bank of S.E. Denver v. Blanding, 885 P.2d 324 (Colo. App. 1994)* .

(n69)Footnote 838. *First Sec. Bank v. Felger, 658 F. Supp. 175 (D. Utah 1987)* .

(n70)Footnote 839. *See supra* note 832.

(n71)Footnote 840. Me. Rev. Stat. Ann. § 6324; N.C. Gen. Stat. § 45-21-36; S.D. Codified Laws Ann. § 21-48-14.

(n72)Footnote 841. *Richmond Mtg. & Loan Corp. v. Wachovia Bank & Trust Co., 185 S.E.2d 482 (N.C. 1936)* , *aff'd, 300 U.S. 124 (1937)* ; *First Sec. Bank v. Felger, 658 F. Supp. 175 (Utah 1987)* (Utah Code Ann. § 57-1-32 covers sale "under a trust deed").

(n73)Footnote 842. Nev. Rev. Stat. §§ 40.457, 40.459; Utah Code Ann. § 57-1-32.

(n74)Footnote 843. *Rainer Mtg. v. Silverwood Ltd., 209 Cal. Rptr. 294 (1985)* ; *Federal Land Bank of St. Paul v. Bergquist, 425 N.W.2d 360 (N.D. 1988)* .

(n75)Footnote 844. *Rainer Mtg. v. Silverwood Ltd., 209 Cal. Rptr. 294, 300 (1984)* . *See also First Nat'l Bank v. Intermont, Inc., 384 N.Y.S.2d 259 (1976)* ; *First Wis. Nat'l Bank of Oshkosh v. KSW Invs., Inc., 238 N.W.2d 123 (Wis. 1976)* ; *New Haven Sav. Bank v. West Haven Sound Dev., 459 A.2d 999 (Conn. 1983)* ; *Kennebec Sav. Bank v. Chandler, 447 A.2d 824 (Me. 1982)* .

(n76)Footnote 845. *National Bank v. Equity Invs., 506 P.2d 20 (Wash. 1973)* .

(n77)Footnote 846. *Federal Land Bank of St. Paul v. Bergquist, 425 N.W.2d 360, 364 (Minn. 1988)* ("We believe the Legislature intended to let the jury decide, on the basis of the facts in each individual case, whether a deficiency judgment is appropriate.").

(n78)Footnote 847. *Id. at 364* .

(n79)Footnote 848. *Rainer Mtg. v. Silverwood Ltd., 209 Cal. Rptr. 294 (1984)* .

(n80)Footnote 849. *Id. at 363; see also Rainer Mtg. v. Silverwood Ltd., 209 Cal. Rptr. 294, 299 (1984)* .

(n81)Footnote 850. Fla. Stat. Ann. § 45.031(7).

(n82)Footnote 851. Particularly *Fed. Dep. Ins. Corp. v. Circle Bar Ranch, Inc., 450 So. 2d 921 (Fla. App. 1984)* , and *Lloyd v. Cannon, 399 So. 2d 1095 (Fla. App. 1981)* , *rev. denied, 408 So. 2d 1092 (Fla. 1981)* .

(n83)Footnote 852. Nelson & Whitman, *supra* note 9, § 8.3.

(n84)Footnote 853. N. D. Cent. Code § 32-19-07. For background of North Dakota legislation, *see First State Bank of Coopertown v. Ihringer, 217 N.W.2d 857 (N.D. 1974)* ; *see also H & F Hogs v. Huwe, 368 N.W.2d 553 (N.D. 1985)* (clarifying part of holding in *Ihringer*). In North Dakota, deficiency judgments may be obtained under mortgages of commercial property given after August 1, 1993. *N.D. Cent. Code § 2-19-06.1*.

(n85)Footnote 854. A purchase money loan may include a loan to buy a lot and construct a home on it. *Citgo Petroleum Corp. v. Hopper, 429 S.E.2d 6 (Va. 1993)* .

(n86)Footnote 855. Cal. Civ. Proc. Code, § 580b.

(n87)Footnote 856. Or. Rev. Stat. § 88.070 (vendor not entitled to deficiency after judicial foreclosure); Or. Rev. Stat. § 88.075 (third party purchase money lender loaning up to $50,000 if security is primary or secondary

single-family residence not entitled to deficiency); Or. Rev. Stat. § 86.770 (no deficiency allowed after private sale except for commercial loans). *See Federal Ins. Deposit Corp. v. Burdell, 766 P.2d 1032 (Or. 1988)* .

(n88)Footnote 857. S. D. Codified Laws Ann. § 44-8-20 (as to obligations incurred after June 30, 1933). *See Federal Land Bank of Omaha v. Schley, 293 N.W. 879 (S.D. 1940)* .

(n89)Footnote 858. Iowa Code Ann., § 654.6.

(n90)Footnote 859. Cal. Civ. Proc. Code, § 580d. *Trust One Mortg. Corp. v. Invest America Mortg. Corp., 134 Cal. App. 4th 1302* ; *37 Cal. Rptr. 3d 83* (Cal. App. 4 Dist. 2005) .

(n91)Footnote 860. Ga. Code Ann., § 44-14-161.

(n92)Footnote 861. Alaska Stat. § 34.20.100. *See Hull v. Alaska Fed. Sav. & Loan Ass'n, 658 P.2d 122 (Alaska 1983)* .

(n93)Footnote 862. Wash. Rev. Code Ann., § 61.24.100 (unless debt not primarily for personal, family, or household purposes).

(n94)Footnote 863. Fla. Stat. Ann. § 702.06.

(n95)Footnote 864. *First Nat. Bank of S.E. Denver v. Blanding, 885 P.2d 324 (Colo. App. 1994)* .

(n96)Footnote 865. *Colson & Colson Constr. Co. v. Maultsby, 405 S.E.2d 779 (N.C. App. 1991)* .

(n97)Footnote 866. *Cornelison v. Kornbluth, 542 P.2d 981 (Cal. 1975)* .

(n98)Footnote 867. *Alliance Mortgage Co. v. Rothwell, 44 Cal. Rptr. 2d 352 (1995)* .

(n99)Footnote 868. *Brown v. Jensen, 259 P.2d 425 (Cal. 1953)* .

(n100)Footnote 869. *City Consumer Servs. v. Peters, 815 P.2d 234 (Utah 1991)* ; *Blanton v. Sisk, 318 S.E.2d 560 (N.C. App. 1984)* .

(n101)Footnote 870. *Hatch v. Security-First Nat'l Bank, 120 P.2d 869 (Cal. 1942)* . Successive judicial foreclosures would violate California's one action statute. *Walker v. Community Bank, 111 Cal. Rptr. 897 (1974)* .

(n102)Footnote 871. *Rettner v. Shepherd, 282 Cal. Rptr. 687 (1991)* ; *SCN Mortgage Corp. v. White, 440 S.E.2d 868 (S.C. 1994)* (contractual waiver of appraisal rights unenforceable, *overruling Tri-South Mortgage Inves. v. Fountain, 221 S.E.2d 861 (S.C. 1976))* .

(n103)Footnote 872. *Torrey Pines Bank v. Hoffman, 282 Cal. Rptr. 354 (1991)* .

(n104)Footnote 873. *First Nat'l Bank & Trust of Williston v. Ashton, 436 N.W.2d 215 (N.D. 1989)* .

(n105)Footnote 874. *Baker v. Gardner, 770 P.2d 766 (Ariz. 1989)* ; *Ross Realty Co. v. First Citizens Bank & Trust Co., 250 S.E.2d 271 (N.C. 1979)* ; *Bank One v. Beauvais, 934 P.2d 809 (Ariz. App. 1997)* .

(n106)Footnote 875. *Tanner v. Shearmire, 772 P.2d 267 (Idaho App. 1989)* ; *Frazier v. Neilsen & Co., 769 P.2d 1111 (Idaho 1989)* ; *Family Bank of Commerce v. Nelson, 697 P.2d 216 (Or. App. 1985)* . There appears some legislative unhappiness with *Frazier. Tanner v. Shearmire, 772 P.2d 267, 270, n.3 (Idaho App. 1989)* .

(n107)Footnote 876. *See* § 101.07(e) *supra.*

(n108)Footnote 877. *Adams v. Cooper, 442 S.E.2d 141 (N.C. 1994)* .

(n109)Footnote 878. *259 P.2d 425 (Cal. 1953)* . *See also Baker v. Gardner, 160 Ariz. 98, 770 P.2d 766 (1988)* ; *Ross Realty v. First Citizens Bank & Trust, 250 S.E.2d 271 (N.C. 1979)* .

(n110)Footnote 879. *Birman v. Loeb, 75 Cal. Rptr. 2d 294 (Cal. App. 1998)* (Antideficiency statutes do not bar actions for fraud).

(n111)Footnote 880. *Long v. Superior Ct., 216 Cal. Rptr. 337 (1985)* ; *Spangler v. Memel, 498 P.2d 1055 (Cal. 1972)* .

(n112)Footnote 881. *Spangler* held that overvaluation in a construction context is best prevented by imposing the risk of failure on the buyer rather than the seller, and that stabilization is not furthered by making the seller rather than the buyer bear the loss after the senior foreclosure has eliminated both interests. Roger Bernhardt, California Mortgage and Deed of Trust Practice 166 (1979).

(n113)Footnote 882. *Thompson v. Allert, 285 Cal. Rptr. 367 (1991)* , *reh'g denied* (1991).

(n114)Footnote 883. *Budget Realty, Inc. v. Hunter, 157 Cal. App. 3d 511, 204 Cal. Rptr. 48 (1984)* .

(n115)Footnote 884. *Roseleaf Corp. v. Chierighino, 27 Cal. Rptr. 873, 378 P.2d 97(Cal. 1963)* .

(n116)Footnote 885. *Jonathan Manor, Inc. v. Artisan, Inc., 56 Cal. Rptr. 14 (1967)* .

(n117)Footnote 886. *Freedland v. Greco, 289 P.2d 463 (Cal. 1955)* .

(n118)Footnote 887. *See* Bernhardt *supra* note 226 at 211-13.

(n119)Footnote 888. *Barnaby v. Boardman, 330 S.E.2d 600 (N.C. 1985)* .

(n120)Footnote 889. *Adams v. FedAlaska Fed. Credit Union, 757 P.2d 1040 (Alaska 1988)* ("... the judicial gloss necessary to make California's system practicable is cumbersome. It would be even more cumbersome in Alaska because this state lacks California's legislative foundation.").

(n121)Footnote 890. Roger Bernhardt, California Mortgage and Deed of Trust Practice 166 (1979).

(n122)Footnote 891. *Baker v. Gardner, 770 P.2d 766 (Ariz. 1989)* .

(n123)Footnote 892. U.S. Const., art. I, § 8, cl. 4.

(n124)Footnote 893. *Moore v. Bay, 284 U.S. 4 (1931)* .

(n125)Footnote 894. *11 U.S.C. § 701 et seq.*

(n126)Footnote 895. *11 U.S.C. § 727.*

(n127)Footnote 896. *11 U.S.C. § 1301 et seq* . *In re Venuto, 343 B.R. 120 (E.D. Pa. 2006)* (the court was required to decide whether debtors' completion of their plan had cured the default and reinstated the mortgage).

(n128)Footnote 897. Without court approval the plan period may not exceed three years, and the court may not extend the plan period beyond five years. *11 U.S.C. § 1322*(c).

(n129)Footnote 898. *11 U.S.C. § 1328.*

(n130)Footnote 899. *11 U.S.C. § 109*(e).

(n131)Footnote 900. *See infra* § 101.07(h)(4).

(n132)Footnote 901. *11 U.S.C. § 1306*(b).

(n133)Footnote 902. *11 U.S.C. § 1101 et seq.*

(n134)Footnote 903. *Toibb v. Radloff, 501 U.S. 157 (1991)* .

(n135)Footnote 904. *11 U.S.C. § 1126*(f) ("conclusively presumed to have accepted the plan").

(n136)Footnote 905. *11 U.S.C. § 1129.*

(n137)Footnote 906. *11 U.S.C. § 1129* (b).

(n138)Footnote 907. *11 U.S.C. § 1126*(c).

(n139)Footnote 908. *In re Richard Buick, Inc., 126 B.R. 840 (Bankr. E.D. Pa. 1991)* ; *In re Holthoff, 58 B.R. 216 (Bankr. E.D. Ark. 1985)* ; *In re Sullivan, 26 B.R. 677 (Bankr. W.D.N.Y. 1982)* .

(n140)Footnote 909. *In re Greystone III Joint Venture, 102 B.R. 560, n.10 (Bankr. W.D. Tex. 1989)* ; *In re Palisades-on-the-Desplaines, Ltd., 89 F.2d 214 (7th Cir. 1937)* .

(n141)Footnote 910. *In re Dilts, 126 B.R. 470 (Bankr. W.D. Pa. 1991)* ; *In re* E.I. Parks No. 1 Ltd. P'ship, 122 B.R. 549 (Bankr. W.D. Ark. 1990) .

(n142)Footnote 911. *See infra* § 101.07(h)(2)(iii), (3) and (4).

(n143)Footnote 912. *11 U.S.C. § 1201 et seq* .

(n144)Footnote 913. An act to extend the period during which chapter 12 of title 11 of the United States Code remains in effect, and for other purposes, P.L. 103-65, § 1, *107 Stat. 311 (1993).*

(n145)Footnote 914. This is due to the provisions of *11 U.S.C. § 506*(a), which provides that an allowed claim of a secured creditor's claim is secured to the extent of the value of that interest in the security and is unsecured to the extent the claim exceeds the value of the security. *See In re Hochmuth, 76 B.R. 266 (Bankr. D. Md. 1987)* .

(n146)Footnote 915. *11 U.S.C. §§ 1222*(b)(2), 1225(a)(5).

(n147)Footnote 916. *11 U.S.C. § 1225*(a)(4).

(n148)Footnote 917. Shapiro, *An Analysis of the Family Farmer Bankruptcy Act of 1986, 15 Hofstra L. Rev. 353, 376 (1987).*

(n149)Footnote 918. *Id.*

(n150)Footnote 919. *11 U.S.C. § 362*(a). *Oles v. Curl, 65 S.W.3d 129 (Tex. App. 2001)* (foreclosure sale and purchase were void as contrary to the automatic stay).

(n151)Footnote 920. *Maritime Elec. Co. v. United Jersey Bank, 959 F.2d 1194 (3d Cir. 1991)* .

(n152)Footnote 921. *In re Bresler, 119 B.R. 400 (Bankr. E.D.N.Y. 1990)* .

(n153)Footnote 922. *In re Burns, 112 B.R. 763 (Bankr. E.D. Va. 1990)* .

(n154)Footnote 923. *In re Jones v. Garcia, 63 F.3d 411 (5th Cir. 1995)* .

(n155)Footnote 924. *La Jolla Mtg. Fund v. Rancho El Cajon Assocs., 18 B.R. 283 (Bankr. Cal. 1982)* ; *Matter of Continental Airlines, 134 B.R. 536 (Bankr. D. Del. 1991)* ; *In re Rollingwood Apts., Ltd., 133 B.R. 906 (Bankr. S.D. Ohio 1991)* ; *In re BBT, 11 B.R. 224 (Bankr. D. Nev. 1983)* ; *In re* Swansee *Consol. Resources, Inc., 127 B.R. 1 (Bankr. D. R.I. 1991)* .

(n156)Footnote 925. *In re Heath, 79 B.R. 616 (Bankr. E.D. Pa. 1987)* .

(n157)Footnote 926. *In re Fischer, 136 B.R. 819 (Bankr. D. Alaska 1992)* ; *In re Rhoades, 34 B.R. 168 (Bankr. D. Vt. 1983)* .

(n158)Footnote 927. *In re Hines, 723 F.2d 333 (3d Cir. 1983)* ; *In re Shelby, 127 B.R. 682 (Bankr. N.D. Ala. 1991)* ; *In re Scott, 121 B.R. 605 (Bankr. E.D. Okla. 1990)* ; *In reTaras , 136 B.R. 941 (Bankr. E.D. Pa. 1992)* ; *In re Crouse, 9 B.R. 400 (Bankr. S.D. Tex. 1981)* .

(n159)Footnote 928. *In re Wilks, 123 B.R. 555 (Bankr. W.D. Tex. 1991)* .

(n160)Footnote 929. *In re* Jug in the *Berkshires, Inc., 46 B.R. 892 (Bankr. D. Mass. 1985)* .

(n161)Footnote 930. *In re Westchester Ave. Marina Realty, Inc., 124 B.R. 161 (Bankr. S.D.N.Y. 1991)* ; *In re Morysville Body Works, Inc., 86 B.R. 51 (Bankr. E.D. Pa. 1988)* ; *In re Rye, 54 B.R. 180 (Bankr. D.S.C. 1985)* .

(n162)Footnote 931. *In re Cote, 27 B.R. 510 (Bankr. D. Or. 1983)* ; *In re Palmer River Realty, Inc., 26 B.R. 138 (Bankr. D.R.I. 1983)* .

(n163)Footnote 932. *United Savings Ass'n of Tex. v. Timbers of Inwood Forest Assocs. 484 U.S. 365 (1988)* ; *Matter of Canal Place Ltd. P'ship, 921 F.2d 569, 24 C.B.C.2d 998 (5th Cir. 1991)* ; *In re Sun Valley Ranches, Inc., 823 F.2d 1373 (9th Cir. 1987)* ; *In re Jones, 119 B.R. 996 (Bankr. N.D. Ind. 1990)* .

(n164)Footnote 933. *In re Augustus Court Assocs., 46 B.R. 619 (Bankr. E.D. Pa. 1985)* .

(n165)Footnote 934. *In re Kerns, 111 B.R. 777 (Bankr. S.D. Ind. 1990)* .

(n166)Footnote 935. *11 U.S.C. § 1205*(b).

(n167)Footnote 936. *In re Anderson, 137 B.R. 819 (Bankr. D. Colo. 1992)* ; *In re Anderson, 88 B.R. 877 (Bankr. N.D. Ind. 1988)* ; *In re Turner, 82 B.R. 465 (Bankr. W.D. Tenn. 1988)* ; *In re Kocher, 78 B.R. 844 (Bankr. S.D. Ohio 1987)* .

(n168)Footnote 937. *Matter of New Concept Realty & Dev., Inc., 753 F.2d 804 (9th Cir. 1985)* ; *In re Fisher, 320 B.R. 52 (E.D. Pa. 2005)* (mortgage not considered recorded when notary was not present at execution, failed to attest to name on document as mortgagor, and failed to attest that mortgagor executed documents of own will).

(n169)Footnote 938. *Watkins v. Watkins, 922 F.2d 1513 (10th Cir. 1991)* .

(n170)Footnote 939. *In re Professional Inv. Properties 955 F.2d 623, 627, n.2 (9th Cir. 1992)* ; *McCannon v. Marston, 679 F.2d 13 (3d Cir. 1982)* ; *Bank of New York v. Nally, 820 N.E.2d 644 (Ind. 2005)* (constructive notice of mortgage exists when mortgage recorded and acknowledged).

(n171)Footnote 940. *In re Professional Inv. Properties 955 F.2d 623 (9th Cir. 1992)* ; *In re Probasco, 839 F.2d*

1352 (9th Cir. 1988) ; *Matter of Plunkett, 89 B.R. 776 (Bankr. E.D. Wis. 1988)* ; *In re Huffman, 408 F.3d 290 (Ohio 2005)* (Although Ohio statute presumes proper mortgage execution, it is found invalid under Ohio's constitution, and thus statutory presumption did not support mortgage that was not properly witnessed nor give notice to bona fide purchaser).

(n172)Footnote 941. *See In re Fletcher, 124 B.R. 501 (Bankr. E.D. Mich. 1990)* (inquiry notice imputed through possession of tenant).

(n173)Footnote 942. *11 U.S.C. § 547*(f).

(n174)Footnote 943. *11 U.S.C. § 101*(28).

(n175)Footnote 944. *In re Ehring, 900 F.2d 184 (9th Cir. 1990)* ; *In re Williams, 124 B.R. 311 (Bankr. C.D. Cal. 1991)* ; *Max Sugarman Funeral Home v. A.D.B., 127 B.R. 508 (Bankr. D.R.I. 1989)* ; *Matter of Fountain, 32 B.R. 965 (Bankr. Mo. 1983)* .

(n176)Footnote 945. *In re Ehring, 900 F.2d 184 (9th Cir. 1990)* ; *Max Sugarman Funeral Home v. A.D.B. Investors, 127 B.R. 508 (Bankr. D.R.I. 1989)* .

(n177)Footnote 946. *BFP v. Resolution Trust Co., 511 U.S. 531 (1994)* .

(n178)Footnote 947. *BFP v. Resolution Trust Co., 511 U.S. 531 (1994)* .

(n179)Footnote 948. *In re Zedda, 103 F.3d 1195 (5th Cir. 1997)* ; *Newark Branch, NAACP, 134 F.3d 113 (11th Cor. 1998)* ; *Durrett v. Washington Nat'l Ins. Co., 621 F.2d 201, 23 C.B.C. 95, 23 C.B.C. 95 (5th Cir. 1980)* .

(n180)Footnote 949. *In re Alsop, 14 B.R. 982 (Bankr. D. Alaska 1981) , aff'd, 22 B.R. 1017 (D. Alaska 1982)* .

(n181)Footnote 950. *BFP v. Resolution Trust Co., 511 U.S. 531 (1994)* ; *In re Armstrong, 217 B.R. 569 (Bankr. E.D. Ark. 1998)* (Gambling check by Chapter 7 debtor).

(n182)Footnote 951. *See supra* § 101.08.08(A)(3).

(n183)Footnote 952. *11 U.S.C. § 1124*(2). *See* Douglas G. Baird, the Elements of Bankruptcy 240 (Westbury, N.Y. Foundation Press 1992).

(n184)Footnote 953. *11 U.S.C. § 1222*(b)(3).

(n185)Footnote 954. *11 U.S.C. § 1322*(b)(2).

(n186)Footnote 955. *11 U.S.C. § 1322*(b)(3). *In re Bartlett, 353 B.R. 398 (D. Vt. 2006)* (Chapter 13 debtors have right to cure the default on their mortgage); *In re Tewell, 355 B.R. 674 (N.D. Ill. 2006)* (cure of mortgage default under Chapter 13 plan not permitted when due-on-sale clause in the mortgage had been violated); *In re Woodford, 354 B.R. 153 (W.D. Ky. 2006)* (right to cure default by selling residence ended when the sale occurred).

(n187)Footnote 956. *Nobelman v. American Sav. Bank, 508 U.S. 324 (1993)* .

(n188)Footnote 957. For an excellent description of the various approaches taken in chapter 13 proceedings, *see In re Glenn, 760 F.2d 1428 (6th Cir. 1985)* .

(n189)Footnote 958. *In re McKinney, 84 B.R. 751 (Bankr. D. Kan. 1988)* (chapter 12).

(n190)Footnote 959. *Matter of Tynan, 773 F.2d 177 (7th Cir. 1985)* (no deceleration after judgment in chapter 13); *contra In re Tucker, 131 B.R. 245 (Bankr. D. Me. 1991)* . *Valente v. Sav. Bank of Rockville, 34 B.R. 362 (Bankr. D.*

Conn. 1983) (decleration permissible after entry in chapter 11).

(n191)Footnote 960. *In re Johnson, 29 B.R. 104 (Bankr. S.D. Fla. 1983)* ; *contra In re Braker, 125 B.R. 798 (Bankr. 9th Cir. 1991)* .

(n192)Footnote 961. *Nobleman v. American Sav. Bank, 508 U.S. 324 (1993)* . *Nobleman* is inapplicable to the claims of junior mortgagees whose security interests have become worthless as the result of the foreclosure of senior liens.

(n193)Footnote 962. *In re Mitchell, 177 B.R. 900 (E.D. Mo. 1994)* ; *Wade v. Bradford, 39 F.3d 1126, 32 C.B.C.2d 568 (10th Cir. 1994)* .

(n194)Footnote 963. *Heartline Farms, Inc. v. Daly, 934 F.2d 985 (8th Cir. 1991)* ; *In re Streets & Beard Farm Pt'ship, 882 F.2d 233 (7th Cir. 1989)* ; *In re Bertelsen, 65 B.R. 654 (Bankr. C.D. Ill. 1986)* ; *In re Waldron, 65 B.R. 169 (Bankr. C.D. Ill. 1986)* ; *Shaw v. Dawson, 48 B.R. 857 (Bankr. D.N.M. 1985)* .

(n195)Footnote 964. *In re Speck, 798 F.2d 279 (8th Cir. 1986)* ; *Matter of Wall Tire Distribs., Inc., 110 B.R. 614* (Bankr. M.D. Ga. 199) ; *In re Coffman, 104 B.R. 958 (Bankr. S.D. Ind. 1988)* . *But see Cameron v. Pfaff Plumbing & Heating, Inc., 966 F. 2414 (8th Cir. 1992)* ("However, the holding that state law governs § 365 issues originated with an agreement to that effect by the parties in Speck, and therefore we limit that holding to the installment land sale contracts there at issue.").

(n196)Footnote 965. Vern Countryman, *Executory Contracts in Bankruptcy: Part I, 57 Minn. L. Rev. 439, 460 (1973).*

(n197)Footnote 966. *In re Terrell, 892 F.2d 469 (6th Cir. 1989)* ; *In re Streets & Beard Farm Pt'ship, 882 F.2d 233 (7th Cir. 1989)* ; *In re Cochise College Park, Inc., 703 F.2d 1339 (9th Cir. 1983)* .

(n198)Footnote 967. *In re Terrell, 892 F.2d 469, 472-3 (6th Cir. 1989)* .

(n199)Footnote 968. *11 U.S.C. § 365*(b).

(n200)Footnote 969. *11 U.S.C. § 365*(i).

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CHAPTER 101 MORTGAGES, DEEDS OF TRUSTS AND RELATED LIENS

12-101 Thompson on Real Property, Thomas Editions § 101.08

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§ 101.08 Equitable Mortgages and Miscellaneous Liens.

§ 101.08(a) Absolute Deeds Intended as Security.

For centuries, equity has received proof that deeds purporting to convey an absolute legal and equitable interest were, in fact, meant to grant only a security interest and, upon a finding of such intent, has recognized an equity of redemption in the grantor. Because oppressed debtors are often enticed into delivering absolute conveyances to their creditors upon the creditors' assurances to reconvey upon discharge of the debts, equity has traditionally guarded the interests of the grantors in such situations and, despite the absence of a legal mortgage, has treated the conveyance as an equitable mortgage. n970 Almost all American jurisdictions agree, but at least one state will accept evidence outside the conveyance only if offered to establish grounds to reform the conveyance. n971

The evidence that security only was intended may be written or oral. n972 The statute of frauds is not a bar to proof by parol that a deed absolute on its face was meant as a mortgage. n973 The English statute, adopted in 1677, by its terms did not apply to trusts or confidences that arise by implication or construction of law. n974 Because equity had so long enforced equitable mortgages, it is usually held that the equitable mortgage based upon the grantor's intent to grant a security interest is such a trust or confidence. n975 An occasional statute codifies the rule. n976

The parol evidence rule bars the use of parol evidence to contradict the plain meaning of a writing unless grounds for rescission or reformation (fraud, mistake, and the like) exist. It is therefore possible that the parol evidence rule may prevent proof that a deed was meant as a security device, even though the statute of frauds might not stand in the way of the proof. If the deed does not clearly and unambiguously preclude the notion that it was intended as security, the parol evidence rule should not rule out the use of evidence outside the deed to establish an equitable mortgage. Thus, if the deed merely purports to transfer title to the grantee, but does not indicate whether the grantee is to hold for the grantee's own use or for the benefit of another, the deed by its terms may be regarded as dealing only with the legal title, so that parol evidence would be proper to establish that an equitable mortgage was intended. However, the parol evidence rule may preclude resort to parol evidence if the deed recites that the grantee is to hold for the grantee's own use, since the evidence would then be proffered in an effort to contradict the plain meaning of the deed. n977

Proof that the conveyance was intended as security must establish that the grantor was indebted to the grantee and that

the conveyance was intended by the grantor as a security device. An equitable mortgage is not established simply by proof that the grantor executed a note at the same time as the deed, evidence that the note or some other obligation was intended to be secured by the conveyance also being necessary. n978 Intent that the transfer create only a security interest can be established circumstantially. Among the factors to be considered on the question of intent are (1) the existence of a debt, (2) the relationship between the parties, (3) the availability of legal advice, (4) the sophistication and circumstances of the parties, (5) the adequacy of consideration, and (6) the possession of the property. n979 Where the grantor continues to occupy the premises and to pay the property taxes and hazard insurance premiums and where the consideration received by the grantor is much less than the value of the property, the inference is particularly strong that a security device was intended. n980 Where the grantee takes possession, and pays the property taxes and insurance premiums, the contrary inference may well arise. n981

The *sine qua non* for establishing that the deed was meant as a mortgage is proof of an underlying debt. While a legal mortgage can exist where there is no underlying personal debt, n982 courts appear unwilling to find an equitable mortgage without proof of an underlying personal obligation. n983 The debt may arise at the time of the conveyance, or it may be a pre-existing obligation.

The grantor bears the risk of non-persuasion on the issue of whether a deed absolute was meant as a security device. The majority of states require clear and convincing proof. n984

Often the deed is accompanied by other writings, and the question arises whether the deed and the other writing may together establish an equitable mortgage. Thus, the grantee may lease the land back to the grantor and bestow on the grantor-lessee an option to buy the land, or the grantee may simply execute an option to purchase in favor of the grantor. In such cases, grantors frequently contend that the option was actually intended to confer redemption rights and that an equitable mortgage was created. n985

A major theoretical argument against allowing proof that the deed and collateral documents give rise to an equitable mortgage is the parol evidence rule since arguably the evidence is offered to contradict the meaning of the written provisions. Indeed, one court has refused to admit parol evidence where the lease-back and option agreement recited that the transaction was "not for purposes of security." n986 Still, at least in the absence of such a stipulation, most courts do not allow the parol evidence rule to block the proof. n987

The types of proof that may establish an equitable mortgage where other writings exist besides the deed absolute are identical with those to which resort is had in the case of absolute deeds standing alone. The existence of a debt is often said to be essential. n988 One court found the conclusion that an equitable mortgage existed "inescapable" where the grantee accepted a conveyance to save the property from foreclosure and gave the grantor a lease-back and option to purchase. n989

COMPUTER-ASSISTED RESEARCH

LEXIS: absolute pre/1 conveyance w/50 parol w/50 intend! or intent w/15 security

§ 101.08(b) Installment Land Contracts.

§ 101.08(b)(1) Installment Land Contracts Generally.

Agreements for the purchase of land calling for payment of the sale price over time and deferring the transfer of title to the purchaser until all or a specified portion of the price is paid have been treated in several different ways. Traditionally they were viewed as contracts to be enforced as written. Because installment land contracts invariably stipulate that time is of the essence, any default by the buyer could be the predicate for forfeiture of rights under the contract. If the buyer missed a payment, the seller could elect to terminate the contract and retain all previous payments. Because of the

harshness of forfeiture of the buyer's previous payments, coupled with the loss of the right to complete the contract and acquire title, many courts and some legislatures restrict the remedies available to sellers upon breaches by buyers. So pervasive are the efforts to ameliorate the harshness of the traditional approach, that two scholars have concluded, "While forfeitures are still occasionally judicially enforced, it nevertheless can be safely stated that in no jurisdiction today will a vendor be able to assume that forfeiture provisions will be automatically enforced as written." n990 In a number of states, these contracts have come to be equated with mortgages, and it is possible that the trend is in that direction. n991

Sellers resort to the installment land contract in an effort to deny their buyers the redemption rights so central to mortgages and to avoid procedural and time-consuming requirements of foreclosure. Certainly, in the sellers' ideal world nothing could surpass an installment land contract enforceable according to its terms. Should a buyer miss a single installment, the seller, under the provision which makes time of the essence, could simply exercise the right to declare the contract at an end, require forfeiture of installments already paid, and re-acquire marketable title to the land. Buyers would have no right to reinstate the contract by late tender of the missed installment or to redeem by tendering the remaining unpaid balance. Likewise, upon breach by buyers, sellers would have no need to resort to foreclosure, would hold title free of any statutory redemption rights, and would be able to sell to another purchaser. It has been observed that land installment contracts have been particularly common in those states which do not recognize foreclosure by private sale since, in those jurisdictions, sellers may feel that the burdens of judicial foreclosure are too heavy to be endured. n992 Where foreclosure by private sale is allowed, sellers forego the right to private foreclosure when they employ the installment land contract unless the contract authorizes a private foreclosure. n993

COMPUTER-ASSISTED RESEARCH

LEXIS: installment or land w/2 contract or agreement or deed

§ 101.08(b)(2) Installment Land Contract as an Equitable Mortgage.

By statute or case law a number of states have come to view the installment land contract as a mortgage. In these states the contract may not give rise to a legal mortgage since the usual requirements of legal mortgages are missing, but the contract is seen as an equitable mortgage. As an equitable mortgagee, the seller is thus unable to invoke the contractual remedy of forfeiture and must resort to foreclosure to terminate the purchaser's interest in the land. n994

Statutory recognition of the installment land contract is sparse and often equates land installment contracts with mortgages only in limited situations. Oklahoma has addressed the question directly and unambiguously by a statute mandating that installment land contracts shall be deemed to be mortgages if the contract contemplates that the buyer shall take possession of the property. n995 The Maryland statute restricting sellers to the same remedies as are available to mortgagees covers only residential property sold to individuals. n996 Ohio treats installment land contracts as mortgages only if the security is residential property and either the contract has been in effect for five years or 20% of the principal has been paid. n997

Courts without the aid of legislation have been moving toward equating installment land contracts with mortgages. Often, however, the equation is neither absolute nor automatic as the courts struggle to fit the installment land contract into the mold of a mortgage. The most recent pronouncement on the issue by the California Supreme Court perhaps best exemplifies the judicial efforts in the area. After a long series of cases curtailing the prerogatives of sellers under installment land contracts, the California court recognized an unqualified right in vendees, who have made "substantial payments" under the contract, to redeem by tendering the unpaid balance on the contract. n998 Yet, the court refused to grant redemption rights to buyers who had not made substantial payments on the debt, leaving the question for future consideration. n999 In restricting its holding to situations in which there has been a substantial reduction in the debt, the California court was following the leads of several other courts, which so far have been unwilling to extend mortgagor status to buyers who have not substantially reduced the principal. n1000

It may be that a few courts have shed all fetters preventing equating land installment contracts with mortgages and always treat them as mortgages without regard to the wilfullness of a buyer's breach or the amount by which the debt has been reduced. Professors Nelson and Whitman, relying in part on the practice of sellers in Florida, speculate that Florida has done so. n1001

Where land installment contracts are regarded as a species of equitable mortgage, buyers may be exposed to the usual risks of those claiming only equitable interests, that is, they may lose their interests upon a conveyance of the legal interest to a bona fide purchaser for value. Few courts have explicitly stated that foreclosure is the only method by which the interest of buyers under these contracts may be extinguished. n1002 Unless foreclosure is necessary, sellers may continue to declare forfeiture of their buyers' rights upon default and thereby compel the buyers to take some action to have the respective rights of the parties determined. Until the buyers take the initiative, it is arguable that sellers, after declaring a forfeiture, hold a legal title which they can transfer to third party bona fide purchasers free of the buyers' claims. On the other hand, the mere presence of land installment contract in the land records may suffice to deny subsequent purchasers bona fide status. Still, until the buyers do something affirmatively, the risk is always present, where foreclosure is not required, that their equitable interests may be lost.

A frequent action taken by buyers in default is suit for specific performance of the contract after a rejected tender of either the arrearages or the full unpaid balance. Despite the usual inclusion of "time is of the essence clauses" in the contracts, many courts have been receptive to these claims for specific performance. n1003 Because of the discretionary nature of equitable relief, the results of these actions are not uniform. It has been held, for example, that a buyer in wilful breach is not entitled to specific performance. n1004 Likewise, buyers who appear before the chancellor with unclean hands have been denied relief. Thus, a buyer who failed to maintain hazard insurance and to keep the premises in good repair was denied redemption rights. n1005 Laches, too, might be a basis for denying relief to defaulting buyers if they wait too long after a forfeiture is declared to take some action to avoid the forfeiture. n1006 A buyer's action for specific performance is the equivalent of a bill to redeem, and, while some courts acknowledge as much and afford buyers the full panoply of mortgagors' rights, others, by weighing such factors as the amount by which the debt has been reduced and the bona fides of buyers, seem reluctant to accord buyers all the rights of mortgagors. n1007

Even when they hesitate to treat the buyer in all respects as the equivalent of a mortgagor, courts strive in other ways to assist buyers to avoid total forfeitures of their rights to complete the contract as well as of their payments before defaults. These courts strain to find waivers by sellers of their rights to declare forfeitures and require sellers to make restitution to buyers of such payments as are necessary to avoid unjustly enriching the sellers.

COMPUTER-ASSISTED RESEARCH

LEXIS: installment or land w/2 contract or agreement or deed w/50 equitable pre/1 mortgage

§ 101.08(b)(3) Waiver of Sellers' Rights to Declare Forfeiture.

The typical installment land contract permits the seller, upon a default by the buyer, to declare the buyer's rights under the contract forfeited and to retain all sums already paid by the buyer. n1008 Courts are reluctant to enforce such draconian measures, and, in an effort to avoid them, seize on past failures to accelerate upon buyers' delinquencies to find that sellers have waived their rights to call the unpaid balances due upon later defaults in paying installments, thereby conferring upon the buyers "a right analogous to an equity of redemption." n1009

> The waiver cases vary and are difficult to reconcile. In some cases rather innocuous forbearances by vendors have been translated into favorable holdings for vendees, while in other quite substantial leniency has been unavailing. n1010

Once sellers have waived the right to insist on timely payment of installments, they may reinstate the right by clearly informing the buyers that strict compliance with the payment schedule will be required henceforth:

> Where a party accepts late payments it may waive or suspend its right to timely payments and its right to declare a forfeiture unless the buyer is given a definite and written notice of the intention to require strict compliance with the contract in the future. n1011

Oregon will not permit forfeiture unless the buyer first is given an opportunity to cure the default and fails to do so. n1012

COMPUTER-ASSISTED RESEARCH

LEXIS: installment or land w/2 contract or agreement or deed w/15 waiv! or forfeit!

§ 101.08(b)(4) Election of Remedies by Sellers.

Where forfeiture is a permissible remedy for sellers after a default by buyers, most states require the sellers to choose between that remedy and damages. n1013 Under this view, after obtaining what amounts to strict foreclosure, sellers "are barred from seeking to recover the mortgage equivalent of a deficiency judgment ..." n1014 An election of remedies is required to prevent unjust enrichment that would result if sellers could recover the land and collect damages equal to the difference between the contract price and the amount of payments made by buyers before forfeiture. n1015

The authorities are divided about whether a mere declaration of forfeiture upon default constitutes an election of remedy that precludes later action for damages. The tendency is to require something more than a simple declaration of forfeiture, such as a final judgment of forfeiture or the actual receipt of some benefit after the declaration of forfeiture. The resumption of possession after declaring a forfeiture is the receipt of such a benefit as to constitute an election. n1016

§ 101.08(b)(5) Restitution of Payments in Excess of Sellers' Damages.

Many jurisdictions, even some that do not treat installment land contracts as equitable mortgages, will not allow sellers to retain payments made by buyers which exceed the actual damages occasioned by the buyers' breaches. Recognizing the unjust enrichment that results from sellers who both reclaim the land and simultaneously retain all payments made by buyers, these require sellers to make restitution to their buyers if the payments made before default exceed the seller's damages. n1017 In many respects, these courts are invoking a fair value procedure for installment land contracts since they require that any appreciation in the value of the property be credited against the debt. n1018 If the land has doubled in value between the date of the contract and the time of the buyer's breach, the seller under this approach is entitled to the land but will probably not be able to recover damages for the breach and will be compelled to return to the buyer all payments made because the interim appreciation, which is now the seller's, will likely have produced more than ample compensation for any injury the breach occasioned the seller. Even if the land has declined in value, the seller will be permitted to retain only as much of the payments as necessary to make him whole.

Differences exist as to how the restitutionary amount is to be calculated. Two formulae have been employed: (1) the amount by which the buyer's payments exceed the difference between the value of the land at forfeiture and the sale price, and (2) the amount by which the buyer's payments exceed the fair value of the buyer's occupancy of the land.

The first approach is designed to limit the amount which the seller may retain to a sum equal to the benefit of the bargain plus any incidental expenses. Under this formula, where the land has declined in value in the time between sale and forfeiture, the seller's damages are the difference between the contract price and the value of the property at the time of forfeiture, and, if the payments exceed that amount, restitution must be made to the extent of the excess. n1019 The

seller is entitled not only to the agreed purchase price but also to any interest thereon stipulated in the sales contract. n1020 In computing the seller's damages, therefore, the current unpaid balance at forfeiture should be compared with the total of the value of the land and the amount of all payments made by the buyer. Suppose the sales price were $120,000, calling for 120 monthly payments of $1,585.81, n1021 and that the buyer breaches and the seller lawfully declares a forfeiture when the buyer misses the 61st payment after making 60 timely payments. Though the total payments made aggregated $95,148.60, the price will have been reduced by only $45,363.51, leaving an unpaid balance of $74,636.48, because part of each payment represented interest of 10% per year. In order to compute seller's actual damages and compensate for loss of investment up to the time of forfeiture, one should not subtract the value of the land at forfeiture from the unpaid balance; doing so in the hypothetical would require the seller to make restitution to the buyer in the amount of $65,148.60. n1022 Rather, one should ask what should the seller legitimately be expected to have at the time of forfeiture and compare that with what the seller actually has at that time. In the hypothetical, the forfeiture occurred when the 61st payment was due; at that time, the seller expected to have in hand $199,082.38. n1023 In fact, the seller had the land, worth $90,000, plus the 60 installments which, we may presume, were invested at the stated interest rate and are now worth in the aggregate $123,823.70. Thus, the seller now should have $14,741.32 more than if the buyer had not breached ($213,823.70 less $199,082.38) and to that extent may be compelled to make restitution to the buyer.

On the other hand, if forfeiture took place when the buyer missed the 13th payment, the combination of the land and the payments made and compounded would not meet the seller's investment expectations and, except where deficiencies would be prohibited, n1024 the seller would be entitled to $23,577.63 from the buyer:

Seller's anticipated receipts after 13 months		$133,670.28
Value of land	$ 90,000.00	
12 payments compounded	$ 20,092.65	
Deficiency	$ 23,577.63	
	$133,670.28	$133,670.28

Under the second approach, after forfeiture, the seller may retain out of the buyer's total payments only a sum sufficient to compensate the seller for the buyer's occupancy of the land under the contract. n1025

Obviously, both of these approaches cannot be used simultaneously. One or the other can be applied, but not both. The California Supreme Court has held that the seller may elect between them, observing that to allow the buyer to make the selection would amount to permitting all buyers, at their option, to convert their installment contracts into leases. n1026 Subsequently, in *Petersen v. Hartell,* n1027 the California Court severely limited the power of sellers to declare forfeitures by holding that, except where buyers had not made substantial payments, the sole remedy of sellers is to foreclose. Nevertheless, restitution remains a possibility in California, where at foreclosure the property sells for a price that, together with the payments previously received by the seller, will give the seller more than the original sales price plus incidental expenses.

Even though some courts are concerned about avoiding unjust enrichment to sellers who lawfully forfeit the rights of buyers under installment land contracts, some seem reluctant to compel restitution except in extreme cases. Several courts require restitution only if it would be unconscionable to do otherwise. n1028 Apparently, these courts will require a large discrepancy between the actual damages and the total payments and, even then, may not be sympathetic with buyers who breach toward the end of the contract period on the theory that the seller has removed the property from the market for a long period and should be compensated for lost opportunities by means of the forfeited payments. n1029

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LEXIS: installment or land w/2 contract or agreement or deed w/15 restitution!

§ 101.08(c) Vendors' Liens.

In England the doctrine developed that sellers of land who conveyed to their buyers without receiving the full sales price retained a lien to secure that price. The lien arose even without a contractual understanding that the seller would retain a security interest in the land until the debt was discharged. As Lord Eldon put it:

> It goes upon this; that a person, having got the estate of another shall not, as between them, keep it, and not pay the consideration. n1030

It was thought that natural equity required that the seller who extends purchase money credit retain security for the purchase money obligation. The lien is thus implied in law and not in fact, since it is not dependent upon an agreement for security. n1031 The lien, however, arises only in equity since a legal lien by implication of law is dependent upon retention of possession by the creditor whereas the vendor's lien exists notwithstanding the passage of title and possession to the purchaser. n1032

This doctrine has been accepted in the majority of American states although in some it may be rejected as conflicting with the policy that interests in realty should be evidenced by recordable instruments. n1033 A few states reach results comparable with those attained under the doctrine by treating the purchaser as a trustee for the seller until the purchase price is paid. n1034

If the instrument of transfer recites that a vendor's lien is retained or that the full purchase has not been paid, most of the cases treat the lien as an equitable mortgage rather than as an implied lien. n1035 The taking of a purchase money mortgage has been deemed a waiver of the lien n1036 although there is no reason that the lien and express security interest could not coexist. n1037 It would seem that the taking of an express security interest should be treated as a lien replacement analogous to a mortgage replacement, so that intervening lienors, with notice of the vendor's lien, should not rise in priority merely because the vendor accepts a mortgage as a replacement of the vendor's lien. n1038

Although the lien normally arises in favor of a seller, others may sometimes be entitled to an implied vendor's lien. Some courts have recognized the lien in favor of third party beneficiaries of the sales contract. Thus, if the parties agree that the sales price shall be paid to a third party, the third party may be entitled to the lien. n1039 A seller's real estate broker has also been permitted a vendor's lien if the listing agreement gave the broker an interest in the price. n1040

Where the doctrine exists, a presumption that a vendor's lien is retained arises from the mere fact that title was transferred without full payment. While this presumption is rebuttable, proof that the seller did not intend to retain a purchase money security interest or was ignorant of the doctrine will not overcome the presumption. n1041 Rebuttal of the presumption requires a clear showing that the seller did not desire security. n1042 A recitation in the instrument of transfer that full payment was made or an acknowledgment of such payment will overcome the presumption but is not necessarily fatal to the claim of lien, since the seller may nevertheless offer affirmative proof that full payment was not made. n1043

Disputes can arise between claimants of a vendor's lien and third party lenders who also extend purchase money credit to vendees. If a third party lender is aware that a seller is financing part of the purchase price, the third party lender should appreciate that the seller may retain a vendor's lien, unless the seller is somehow precluded from asserting it; yet, uncertainty exists about the priority of a third party in such a situation. n1044 Because the lien arises only in equity, it will be defeated by a transfer of the legal title to a subsequent bona fide purchaser for value, a result consonant with both the common law rules of priorities and most recording statutes. n1045 It has priority over prior judgments against

the vendee for the same reasons that purchase money mortgagees come ahead of such interests. n1046

§ 101.08(d) Mechanics' Liens.

All states provide statutory liens for those who supply labor or materials for the improvements of land. The statutes creating these liens, commonly referred to as mechanics' liens or mechanics' and materialmans' liens, vary greatly from state to state. Yet, the basic policy behind all mechanics' lien statutes is that those who invest labor and material in improving land ought to have a security in the land or improvement to secure their compensation claims. A common feature of the various statutory schemes is that the lien may attach when labor or materials are furnished to a project, without the necessity for the execution or recordation of any writing, so that those subsequently acquiring interests or liens upon the land will take subject to the lien, even though the existence of the lien could not be discovered by an examination of the land records. This viability of unrecorded mechanics' liens against subsequent parties makes it imperative that subsequent parties examine the property before taking a conveyance or lien in order to satisfy themselves that no recent improvement has taken place. Of course, mechanics' liens are subordinate to prior interests and encumbrances, except those unrecorded interests which would be subordinated to the mechanics' lien under a recording statute.

This survey of mechanics' lien law is included in this chapter dealing primarily with mortgages in order to provide a more comprehensive perspective on this type of real property encumbrance. An independent and more detailed exposition of the law of mechanics' liens is found in the following chapter, Chapter 102, "Mechanics' Liens."

§ 101.08(d)(1) Persons Entitled to Mechanics' Liens.

As a general rule, all those who supply labor or materials to improve real property with the actual or imputed consent of the owner are entitled to a mechanics' lien. n1047 The California statute typifies the broad range of potential mechanics' line claimants:

> Mechanics, materialmen, contractors, subcontractors, lessors of equipment, artisans, architects, registered engineers, licensed land surveyors, machinists, builders, teamsters, and draymen, and all persons and laborers of every class performing labor upon or bestowing skill or other necessary services on, or furnishing materials or leasing equipment to be used or consumed in or furnishing appliances, teams, or power contributing to a work of improvement shall have a lien ... n1048

The lien claimants must not be volunteers, that is, they must have furnished labor or materials at the instance of an owner. This consent, however, need not be direct or actual. Those who have been retained by an owner to improve land, often general contractors, have the authority to retain others--subcontractors, laborers, suppliers, and others--to assist in the project, and these other persons may then be entitled to a mechanics' lien. California, for example, while limiting the lien to those supplying labor or material "at the instance of the owner or of any person acting by his authority," also makes anyone having charge of the project "the agent of the owner" for purpose of arranging for others to supply labor and material. n1049 In some states, no direct dealings upon the part of anyone with the owner is essential; in these states, an owner is deemed to have authorized an improvement if the owner does not object to the project after becoming aware of it, n1050 and some of them provide that, by failing to file a notice of non-responsibility within a designated period of time after learning of the improvement, an owner shall be deemed to have authorized it. n1051

Even in jurisdictions giving direct liens to all claimants, the liens of those who have not contracted with an owner directly should not include services and materials which were known to be beyond the terms of the main contract. A general contractor, for example, may be presumed to have authority to bind the owner by contracting with subcontractors, but that presumption should not be entertained where subcontractors are aware that the general contractor is exceeding authority. Actual or constructive notice of the general contract should suffice to deny a lien to those providing services or material not contemplated by the contract. n1052 Some statutes permit an owner to record

the main contract and, thereby, to impart constructive notice of its provisions to those dealing with the general contractor. n1053 Those not parties to the main contract may even be obliged to read the agreement to determine that the work or material they are to provide is within the authority of the general contractor to contract. n1054

It is generally held that those engaged in activities for which a license is required are not entitled to an mechanics' lien unless they are duly licensed. n1055 The employees of unlicensed contractors, however, are entitled to a lien despite their employer's unlicensed status. n1056

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LEXIS: mechanic! pre/1 lien! or claimant

§ 101.08(d)(2) Amount of Lien.

For those who have contracted directly with an owner, the price stipulated in the contract establishes the maximum amount of the lien. n1057 The lien of a general contractor dealing directly with an owner is, therefore, limited to the contract price.

States are divided about the lien amount for those who have not dealt with an owner directly, *e.g.*, subcontractors and suppliers who have dealt only with the general contractor. Some states recognize a direct claim of such persons independent of the contract price agreed upon by the owner and without regard to payments by the owner to the general contractor, n1058 but others regard the rights of those who did not deal directly with the owner as derivative and thus limit the subcontractor's lien to the contract price under the prime contract less payments made by the owner thereunder. n1059

In those states giving subcontractors direct claims against owners, the contract price does not set a ceiling on the liability of the owners, since subcontractors are given a lien for up to the lesser of their contributions to the project or their own contract prices. n1060 Further, in these jurisdictions, the amount of the subcontractor's lien is not reduced by any payments made by the owner to the general contractor; in some of these states, however, it is only payments made by the owner within a stipulated time period before receiving notice of the subcontractors' claims that cannot be credited against the claims of the subcontractors. n1061 Thus, where a general contractor has agreed to complete a project for $100,000 and then has retained a subcontractor to complete a portion of the project for a price of $20,000, the subcontractor under this view will have a lien for $20,000 or, if the fair value of his contribution is less than $20,000, for the smaller sum. This lien may exist even though the owner has paid the full $100,000 stipulated in the contract with the general contractor, who has not in turn compensated the subcontractor. A number of states in this group permit owners to establish the contract price as a ceiling on their liability either by posting a bond or by recording the contract with the general contractor. Others make the contract price a ceiling but deny owners credits for payments made to the general contractor, which has the effect of exposing owners to the possibility of paying the contract price twice. n1062

It is sometimes provided, in states with direct lien statutes, that those who have not contracted directly with the owner must notify the owner of their claims within a stipulated time period time after beginning to contribute to the project. In California, for example, a subcontractor's lien will be lost unless the subcontractor serves a preliminary notice on the owner, on the general contractor, and on any construction lender within twenty days of beginning performance. n1063

In those jurisdictions which deny subcontractors direct claims against owners for the amount of their contract or contribution, their lien amounts can rise no higher than the amount due on the main contract at the time the subcontractors' liens are filed. n1064 This means that the lien amount for anyone with no direct contractual relation with the owner is restricted to the amount stated in the main contract and must be reduced by any payments made on that contract by the owner before the subcontractor's lien is asserted. The protection of owners under this approach may be dependent upon their meeting statutory requirements, such as obtaining from general contractors verified statements of

amounts owed subcontractors. n1065

Some states follow the direct claim approach in most cases, but employ the derivative approach where the lien is a claim on owner-occupied residential property. n1066

In the Uniform Construction Lien Act, the commissioners on uniform state laws recommended adoption of the derivative approach but, aware of the popularity of the direct lien tack, they presented an alternative which would provide for such an approach, except in owner-occupied residential situations. n1067

COMPUTER-ASSISTED RESEARCH

LEXIS: mechanic! pre/1 lien w/50 amount or value w/50 direct or derivative w/15 claim

§ 101.08(d)(3) Attachment and Perfection.

A mechanics' lien will be lost unless perfected by filing a notice of lien. Usually the statutes provide that this notice must be recorded and served within a certain time after the claimant has completed performance. In California, for example, unless a notice of completion or cessation has been recorded, the notice of a claim of lien must be filed within 90 days of completion of the project. n1068 It has been held that the time for filing the notice of claim cannot be extended by a "delayed provision of some trivial amount of work" after performance has been substantially completed. n1069

Furthermore, after perfection, the claimant must sue to foreclose it judicially within a stipulated period. n1070 Failure to commence suit within the stipulated period may forfeit the lien. n1071

COMPUTER-ASSISTED RESEARCH

LEXIS: I. mechanic! pre/1 lien w/50 attach! w/15 time or date
II. mechanic! pre/1 lien w/50 perfect! w/50 notice

§ 101.08(d)(4) Priorities.

Statutes usually provide that, once perfected, a mechanics' lien relates back to the time the improvement commenced. n1072 Usually, the liens of all improvers on a common project share a common priority. n1073 Under this approach, the lien of a subcontractor who does not begin work until the general contract is nearly completed will relate back to the first time any work under the general contract was performed. n1074 Other views are that each claimant's lien has priority from the time the claimant's first contribution is made n1075 or from the execution of a contract n1076 or recordation of the claimant's claim. n1077

Of course, under the recording statutes and common law rules of priorities, mechanics' liens may also have precedence over prior interests or liens not evidenced in the land records. n1078

Conflicts frequently arise between construction lenders with prior recorded construction mortgages and subsequent mechanics' lien claimants. Although mechanics' liens are usually junior to prior mortgages and liens, claimants often argue that disbursements made by the construction lender during the course of construction were optional and thus should be subordinated to previously attached mechanics' liens. The treatment of optional advances and the difficulties of distinguishing obligatory and optional advances is discussed at § 101.06(f). At this juncture, it should simply be recalled that, in most jurisdictions, if a payment is deemed optional with the construction lender, the previously attached mechanics' liens will have priority even though the construction mortgage was recorded before work on the improvement commenced. On the other hand, the construction lender will retain priority with respect to obligatory

advances.

In a few states, statutes provide a means to give a mechanics' lien claimant priority over obligatory advances by construction lenders. Under these statutes, mechanics' lien claimants may serve a "stop notice" on the construction lender or an owner which will have the effect of giving the claimant priority over any undisbursed construction monies in the hands of the lender or owner. n1079 The construction mortgage will retain priority with respect to funds disbursed before the stop notice was given. Because a dispute between general contractors and their subcontractors involving the propriety of a stop notice may hinder completion of a project, some statutes preclude stop notices where a bond is filed. n1080

COMPUTER-ASSISTED RESEARCH

LEXIS: mechanic! pre/1 lien w/50 priority w/15 lien! or claimant

§ 101.08(d)(5) Waiver.

Certainly holders of mechanics' liens may waive or release them. Indeed, it is common practice for construction lenders to require waivers before each draw under a construction loan. n1081 The drafting of a waiver or release may call for careful attention. In California, for example, waivers and releases are ineffective unless they substantially follow forms set out by statute. n1082 Because of the favored status of mechanics' liens, waivers are strictly construed in favor of the claimant. n1083 Thus, waivers given in the course of the claimant's work will be presumed to relate solely to work completed and not to potential liens for future work. n1084

A basic difference of opinion exists concerning the power of general contractors to deny mechanics' liens to their subcontractors through a "no lien" clause in the original agreements with the owners. States which regard the subcontractors' rights as deriving from those of the general contractor tend to enforce against the subcontractors provisions in the main contract that no liens shall be asserted. n1085 Under this view, subcontractors may be bound to ascertain the terms of the general contracts and may have imputed to them knowledge of "no lien" clauses in the general contract, at least where the terms of their own contracts with the general contractor incorporate the terms of the general contract. n1086 In some of these states, the subcontractors will not be bound by the provision unless they have actual or record notice of it when their contribution commences. n1087 Where subcontractors hold direct lien rights, the tendency is to hold that they are not subject to "no lien" clauses in the general contract. Reflecting this approach is a California statute which provides:

> Neither the owner nor original contractor by any term of their contract, or otherwise, shall waive, affect, or impair the claims and liens of other persons whether with or without notice except by their written consent n1088

COMPUTER-ASSISTED RESEARCH

LEXIS: mechanic! pre/1 lien w/15 waiv! or releas!

§ 101.08(e) Judgment Liens.

All states have statutory provisions authorizing judgment liens upon the lands of judgment debtors. No such liens exist at common law, and therefore the particular statutes of each state must be consulted in determining the scope of judgment liens. n1089 It is generally provided that judgments constitute general charges upon the lands of a judgment debtor from the date the judgment is docketed n1090 or the judgment or abstract of judgment is recorded in the land records. n1091 The judgment lien is thus distinguishable from a mere execution lien, which is effective only upon levy or issuance. n1092

Generally, to have the effect of creating a lien, a judgment must be final, and be for a sum certain or payable in installments. n1093

A judgment lien constitutes a lien on the debtor's interests in realty in the local jurisdiction, usually a county, n1094 in which the judgment is docketed or an abstract is recorded. It may thus attach to lands outside the county in which the judgment is rendered upon the recording of the judgment or an abstract in other jurisdictions. The judgments of federal courts can give rise to judgment liens upon recordation in the appropriate local offices of the state. n1095

A judgment lien should be distinguished from a lis pendens or memorandum of suit pending. While a judgment lien arises only after a judgment has become final, litigants can sometimes acquire interests in an adversary's lands as of the date of the commencement of suit, by recording in the land records a lis pendens or a memorandum of suit pending. The purpose of the lis pendens is to put subsequent purchasers and encumbrancers on notice of the pending litigation, and to subject them to the outcome of the suit. Unlike the judgment lien, the lis pendens is not itself a lien but merely a device to subordinate subsequent takers to the results of the suit. Not all claims in litigation can be protected by a lis pendens, for the statutes usually permit the recordation of a lis pendens only in connection with claims to an interest in the property. In California, for example, the lis pendens is proper in "any action concerning real property or affecting the title or the right of possession of real property," n1096 while the Minnesota statute covers actions "in which title to, or any interest in or lien upon real property" is involved. n1097

The duration of a judgment lien varies from state to state. The length of time the lien is valid ranges from 20 years n1098 to one year. n1099 All states apparently permit judgment liens to be extended beyond their normal life span by filing a renewal before the expiration. n1100 Some statutes even permit the revival of expired judgment liens. n1101

The nature of the property affected by a judgment lien also varies among the states. Most legal interests are subject to them in all states, and many states also subject equitable interests to judgment liens. n1102 However, in some jurisdictions, equitable interests are not subject to judgment liens so that equitable proceedings are necessary to reach such assets. n1103 Among the interests that are sometimes immune from the lien are rents and lessors' reversions. n1104 Realty interests acquired by the judgment debtor after the general judgment lien arises are subject to it. n1105

Judgment liens are junior to all interests existing at the time of attachment unless, under the applicable recording statute, judgment lien creditors are protected against prior unrecorded interests. Many states have recording acts that limit their protection to "purchasers," and many courts in construing such statutes do not regard judgment lien creditors as purchasers. n1106 In contrast, other statutes expressly cover judgment lien creditors. n1107 Although the California recording statute includes "judgments affecting title" within its scope, the California courts have held that a prior, unrecorded conveyance is superior to a subsequent judgment lien, reasoning that judgment liens attach only to a debtor's actual interest. n1108 In California, judgment liens, presumably because they arise from judgments for sums certain, do not qualify as "judgments affecting title" under that state's recording act.

Generally, judgment liens are superior to all interests arising after they have attached. They are, however, subordinate to purchase money liens. n1109

COMPUTER-ASSISTED RESEARCH

LEXIS: I. judgment pre/1 lien w/50 attach! w/15 record
II. judgment pre/1 lien w/50 priority w/15 subsequent or junior w/15 interest or encumbrance

§ 101.08(f) Innocent Improver Liens and Related Remedies.

All states provide remedies of one kind or another to those who make improvements on lands they do not own, but the

grounds for relief vary tremendously from jurisdiction to jurisdiction. Most states have enacted statutes which address the subject, n1110 but common law principles also may coexist alongside these statutes. In reviewing the cases, therefore, care must be taken not only to distinguish between those based on legislation and on case law, but also to note differences in statutory language and interpretation.

At common law, one who improves another's property without the consent of the owner makes, in essence, a gift of the improvement to the owner. The improvement becomes a permanent part of the land, and the landowner is under no legal obligation to compensate the improver for the enhanced value of the land attributable to the improvement. These principles apply whether the improver believes in good faith to be the owner of the land or is a willful trespasser. n1111

§ 101.08(f)(1) Equitable Innocent Improver's Lien.

Equity overcame the rigidity of the common law rule by permitting an innocent improver relief in two circumstances. First, the improver was given a lien to secure a reimbursement right when the improver was misled by the owner into making the improvement or the owner acquiesced in the improvement by standing silently by while the improvement was underway. n1112 Second, equity compelled the owner to set-off the value of the improvements against any claim for rents and profits. In this approach, equity followed the civil law, which awarded good faith improvers expenses incurred in improving another's land up to the value of the improvement. While equity did not go so far as the civil law in allowing a direct claim against the owner, it did give the owner a choice between accepting the improvement without compensation for any use or occupancy by the innocent improver, and recovery of the rental value reduced by the value of the improvements. n1113 The equitable lien is often based on the principle that those seeking equity must do equity.

The law courts adopted the equitable standard when, in connection with a successful ejectment claim, a landowner sought mesne profits in trespass. At law, as in equity, absent acquiescence or misrepresentation on the part of the owner, the sole remedy of the innocent improver lay in setoff; no direct claim for reimbursement was recognized. n1114

Many American courts, in the absence of a statute providing otherwise, continue to adhere to the rules prohibiting a direct claim for reimbursement, unless the owner has engaged in conduct estopping the owner from treating the improvement as the equivalent of a gift. n1115 Illustrative of the appeal of this view are the words of Chancellor Kent:

> There is no moral obligation which should compel a man to pay for improvement upon his own land, which he never authorized, and which originated in tort. n1116

Yet, the number of states in the majority camp may be declining as many n1117 accept the view that unjust enrichment, rather than the owner's conduct alone, should be the focus. n1118 Joseph Story laid the groundwork for discarding the traditional rules in *Bright v. Boyd* n1119 in 1841. Indeed, it has been speculated that Story's opinion would have prevailed long ago had not legislatures enacted improvers' statutes which inhibited judicial innovation. n1120 Under the minority view, the innocent improver is entitled to a lien without regard to the conduct of the owner. One approach gives the improver the choice of removing the improvement, if that can be effected without injuring the land, or asserting a lien on the land for the increased value that was conferred. n1121 Another approach gives the improver the option of claiming a lien or buying the land for its fair market value less the value of the improvement. n1122

It is often asserted, under either the majority or minority view, that the lien or set-off exists only in favor of those making permanent improvements in good faith and under color of title. n1123 Differences exist as to the import of each of the requirements of good faith and color of title. Although an occupier who fails to obtain title by adverse possession may nevertheless be entitled to a lien for improvements, n1124 some courts deny good faith status to improvers who believe they own the land but are aware of claims of others to it. n1125 Under this view, mere knowledge of another claim, even if the improver earnestly felt that the claim was spurious, would deny the improver a lien or set-off right. n1126 Further, without the aid of a statute, it is generally held that the improver must have color of title, that is, a written instrument on which the belief was founded. This is a particularly harsh requirement in cases of good faith

mistakes as to the location of a boundary between contiguous parcels, when the improvement straddles the boundary and was built in the belief that the improvement was entirely on the improver's land. n1127

COMPUTER-ASSISTED RESEARCH

LEXIS: innocent or (good pre/1 faith) w/15 improver w/15 lien w/50 equit!

§ 101.08(f)(2) Statutory Liens and Related Remedies for Innocent Improvers.

Statutes exist, probably in all states, attempting to protect the expectations of innocent improvers, but often they impose requirements similar to those of the judicially recognized equitable liens. Some can be used by the improvers only defensively, harkening back to the traditional restrictions on the equitable improver's lien. The statutes usually protect only good faith improvers, raising the same kinds of quibbles over the definition of good faith that plague claims under the equitable lien. n1128 Frequently, the statute requires that the improver have acted under a color of title, n1129 have been in adverse possession, or have occupied the land for at least a specified period of time. A common statutory provision leaves the improver's remedy in the hands of the owner by giving the owner a choice between paying for the improvement or selling the land to the improver. n1130

COMPUTER-ASSISTED RESEARCH

LEXIS: innocent or (good pre/1 faith) w/15 improver w/15 lien w/50 statut!

FOOTNOTES:

(n1)Footnote 970. *Johnson v. Johnson, 33 S.E.2d 784 (Va. 1945)* . "Doubtless the courts have been influenced by the fact that the economic necessities of the transferor may lead him to assent to an oral mortgage." Austin Wakeman Scott, Abridgment of the Law of Trusts, § 44.3 at 105-6.

(n2)Footnote 971. *Rourk v. Brunswick County, 266 S.E.2d 401 (N.C. App. 1980)* ; *Conner v. Ridley, 248 N.C. 714, 104 S.E.2d 845 (N.C. 1958)* .

(n3)Footnote 972. *Wensel v. Flatte, 27 Ark. App. 5, 764 S.W.2d 627 (Ark. App. 1989)* ; *Beelman v. Beelman, 460 N.E.2d 55 (Ill. App. 1984)* ; *Steckelberg v. Randolph, 404 N.W.2d 144 (Iowa 1987) , aff'd in part, rev'd in part, 448 N.W.2d 458 (Iowa 1989) , reh'g denied* (1989); *Abberton v. Stephens, 747 S.W.2d 334 (Mo. App. 1988)* ; *Fisher v. Koper, 499 A.2d 1001 (N.H. 1985)* ; *Eagle's Nest, Inc. v. Malt, 319 S.E.2d 685 (N.C. App. 1984)* .

(n4)Footnote 973. Restatement (Second) of Trusts § 44 (1959).

(n5)Footnote 974. 29 Car. 2, c. 3.

(n6)Footnote 975. *O'Connor v. Lewis, 776 P.2d 1228 (Mont. 1989)* ; *Amsterdam Lumber v. Dyksterhouse, 586 P.2d 705 (Mont. 1978)* (written evidence of intent required); *Fisher v. Koper, 499 A.2d 1001 (N.H. 1985)* ; *French v. Boese, 623 P.2d 1070 (Or. 1981)* .

(n7)Footnote 976. Cal. Civ. Code § 2925.

(n8)Footnote 977. *Albers v. Nelson, 809 P.2d 1194 (Kan. 1991)* (although dealing with written side agreement providing that the agreement was "not for purposes of security").

(n9)Footnote 978. *Wensel v. Flatte, 764 S.W.2d 627 (Ark. App. 1989)* ; *Earp v. Earp, 283 Cal. Rptr. 43 (1991)* ; *Williams v. Roundtree, 478 So. 2d 1171 (Fla. App. 1985)* ; *Brenneman Mech. & Elec., Inc. v. First Nat'l Bank of Logansport, 495 N.E.2d 233 (Ind. App. 1986)* .

(n10)Footnote 979. *Flack v. McClure, 565 N.E.2d 131 (Ill. App. 1990)* ; *Christensen v. Nelson, 873 P.2d 917 (Idaho 1994)* (relevant factors: existence of debt, survival of debt after execution of instrument, prior negotiations, inadequacy of consideration, grantor's financial condition, and intention of the parties).

(n11)Footnote 980. *Sweet v. Luster, 513 So. 2d 1240 (Miss. 1987)* (possession by grantor); *Sims v. Sims, 502 So. 2d 722 (Ala. 1987)* (consideration).

(n12)Footnote 981. *Abberton v. Stephens, 747 S.W.2d 334 (Mo. App. 1988)* (no equitable mortgage where grantee took subject to prior mortgage, paid the taxes and insurance, and received the deed in an amicable avoidance by the grantor of foreclosure).

(n13)Footnote 982. *General Glass Corp. v. Mast Constr. Co., 766 P.2d 429 (Utah App. 1988)* .

(n14)Footnote 983. *Robinson v. Builders Supply & Lumber Co., 586 N.E. 316 (Ill. App. 1991) , reh'g denied* (1992); *Flack v. McClure, 565 N.E.2d 131 (Ill. App. 1990)* ; *Abberton v. Stephens, 747 S.W.2d 334 (Mo. App. 1988)* ; *Eagle's Nest, Inc. v. Malt, 319 S.E.2d 685 (N.C. App. 1984)* .

(n15)Footnote 984. *Duvall v. Laws, Swain & Murdoch, 797 S.W.2d 474 (Ark.App. 1990)* ; *Flack v. McClure, 565 N.E.2d 131 (Ill. App. 1990)* ; *Winegar v. Froerer Corp., 813 P.2d 104 (Utah 1991)* ; Nelson & Whitman, *supra* n.9, § 3.7 at 47-48.

(n16)Footnote 985. *Essex Prop. Servs. v. Wood, 587 A.2d 1337 (N.J. Super. 1991)* ; *Albers v. Nelson, 809 P.2d 1194 (Kan. 1991)* .

(n17)Footnote 986. *Albers v. Nelson, 809 P.2d 1194 (Kan. 1991)* .

(n18)Footnote 987. Cunningham & Tischler, *Disguised Real Estate Security Transactions As Mortgages in Substances, 26 Rutgers L. Rev. 1, 11-13 (1972).*

(n19)Footnote 988. *Baxter v. Southtrust Bank of Dotham, 584 So. 2d 801 (Ala. 1991)* .

(n20)Footnote 989. *Essex Prop. Servs. v. Wood, 587 A.2d 1337, 1339 (N.J. Super. 1991)* .

(n21)Footnote 990. Nelson & Whitman, *supra* note 9, § 3.27.

(n22)Footnote 991. Freyfogle, *The Installment Land Contract As Lease: Habitability Protections and the Low-Income Purchaser, 62 N.Y.U. L. Rev. 293, 295 (1987);* McGovern, *Forfeiture, Inequality of Bargaining Power, and the Availability of Credit: An Historical Perspective, 74 NW. U. L. Rev. 141, 157-161 (1979).*

(n23)Footnote 992. Nelson & Whitman, *supra* § 3.27.

(n24)Footnote 993. *See* Bernhardt, California Mortgage and Deed of Trust Practice, § 6.5 at 260 (1979) (inclusion of sale clause "beginning to appear" in California installment land contracts).

(n25)Footnote 994. *White v. Brousseau, 566 So. 2d 832 (Fla. App. 1990) , reh'g denied* (1990); *Cliff & Co. v. Anderson, 777 P.2d 595 (Wyo. 1989)* .

(n26)Footnote 995. Okla. Stat. Ann., tit. 16, § 11A.

(n27)Footnote 996. Md. Real Prop. Code Ann. §§ 10-101 to 10-108.

(n28)Footnote 997. Ohio Rev. Code § 5313.05-10.

(n29)Footnote 998. *Petersen v. Hartell, 707 P.2d 232, 236 (Cal. 1985)* .

(n30)Footnote 999. *Id. 234 n.1* (1985) .

(n31)Footnote 1000. *Phillips v. Nay, 456 N.E.2d 745 (Ind. App. 1985)* ; *Skendzel v. Marshall, 301 N.E.2d 641 (Ind. 1973) , cert. denied, 415 U.S. 921 (1974) , aff'd on reh'g, 339 N.E.2d 57 (Ind. 1975)* ; *Call v. LaBrie, 116 A.D.2d 1034, 498 N.Y.S.2d 652 (1986)* ; *Bean v. Walker, 464 N.Y.S.2d 895 (1983) . Cf. Looney v. Farmers Home Admin., 794 F.2d 310 (7th Cir. 1986)* (buyer's interest payments and appreciation sufficient to avoid forfeiture under Indiana law).

(n32)Footnote 1001. Nelson & Whitman, *supra* note 9, § 3.29.

(n33)Footnote 1002. The California Supreme Court did so in *Petersen v. Hartell, 707 P.2d 232 (Cal. 1985)* .

(n34)Footnote 1003. *H & L Land Co. v. Warner, 258 So. 2d 293 (Fla. App. 1972) , reh'g denied* (1974); *PR Pension Fund v. Nakada, 809 P.2d 1139 (Haw. App. 1991)* ; *Jenkins v. Wise, 574 P.2d 1337 (Haw. 1978)* .

(n35)Footnote 1004. *MacFadden v. Walker, 488 P.2d 1353 (Cal. 1971)* . Subsequently, the California Supreme Court ruled that a wilfully defaulting buyer who had paid a substantial part of the debt was entitled to redeem. *Petersen v. Hartell, 707 P.2d 232 (Cal. 1985)* .

(n36)Footnote 1005. *The Spicks Bros. Painting Contractors v. Worthen Bank & Trust Co., 771 S.W.2d 258 (Ark. 1989)* ; *Adam Smith Enters. v. Barnes, 539 So. 2d 549 (Fla. App. 1989) . Cf. New England Sav. Bank v. High Ridge, Inc., 1991 Conn. Super. LEXIS 2292* (Conn. Super. Ct., No. 09 71 13, Oct. 3, 1991).

(n37)Footnote 1006. *Perona v. Stark, 562 P.2d 743 (Ariz. 1977)* (forfeiture enforced after grace period of 9 months).

(n38)Footnote 1007. *E.g., Dallam v. Hedrick, 826 P.2d 511 (Kan. 1990)* .

(n39)Footnote 1008. *See Steinhoff v. Fisch, 847 P.2d 191 (Colo. Ct. App. 1992)* .

(n40)Footnote 1009. Grant S. Nelson & Dale A. Whitman, *Installment Land Contracts--The National Scene Revisited, 1985 B.Y.U. L. Rev. 1, 12.*

(n41)Footnote 1010. *Id. at 13.*

(n42)Footnote 1011. *Allabastro v. Wheaton Nat'l Bank, 395 N.E.2d 1212, 1217 (Ill. App. 1979)* , quoted at *City of Chicago v. Chicago Title & Trust Co., 563 N.E.2d 65, 70 (Ill. App. 1990) . See also Angus Hunt Ranch, Inc. v. Reb, Inc., 577 P.2d 645 (Wyo. 1978)* .

(n43)Footnote 1012. *Elsasser v. Wilcox, 596 P.2d 974 (Or. 1979)* .

(n44)Footnote 1013. *Porter v. Smith, 486 N.W.2d 846 (Neb. 1992)* .

(n45)Footnote 1014. *Id.*

(n46)Footnote 1015. *Trans West Co. v. Teuscher, 618 P.2d 1023 (Wash. App. 1980)* .

(n47)Footnote 1016. *Gruskin v. Fisher, 273 N.W.2d 893 (Mich. 1979)* ; *Covington v. Pritchett, 428 N.W.2d 121 (Minn. App. 1988)* ; *Porter v. Smith, 486 N.W.2d 846 (Neb. 1992)* .

(n48)Footnote 1017. *Kudokas v. Balkus, 103 Cal. Rptr. 318 (1972)* ; *Gomez v. Pagaduan, 613 P.2d 658 (Haw. App. 1980)* ; *Hines v. Wells, 814 P.2d 437 (Idaho App. 1991)* ; *Clampitt v. A.M.R. Corp., 706 P.2d 34 (Idaho 1985)* ; *Heikkila v. Carver, 378 N.W.2d 214 (S.D. 1985). Contra Maxton Bldrs., Inc. v. Lo Galbo, 502 N.E.2d 184 (N.Y. 1986)* . John A. Sebert, *Punitive and Nonpecuniary Damages in Actions Based on Contract: Toward Achieving the Objective of*

Full Compensation, 33 UCLA L. Rev. 1565, 1643 (1986); Arthur L. Corbin, *The Right of a Defaulting Vendee to the Restitution of Installments Paid, 40 Yale L.J. 1013, 1023-1027 (1931).*

(n49)Footnote 1018. For a discussion of fair value statutes generally, *see* § 101.07(f) *supra.*

(n50)Footnote 1019. *Clampitt v. A.M.R. Corp., 706 P.2d 34 (Idaho 1985) , reh'g denied* (1985) (provided difference is so disproportionate).

(n51)Footnote 1020. *Gomez v. Pagaduan, 613 P.2d 658 (Haw. App. 1980)* .

(n52)Footnote 1021. This is the monthly payment needed to amortize the price fully at 10% annual interest over 10 years.

(n53)Footnote 1022. That this should be the approach, where the value of the land declined after sale, was suggested in *Honey v. Henry's Franchise Leasing Corp., 415 P.2d 833 (Cal. 1966)* , but the suggestion is surely inappropriate since it ignores the seller's expectation damages. Nelson & Whitman, *supra*, note 9, at 103-4 n.48.

(n54)Footnote 1023. Using the standard formula for compounding interest (A=PX(1+1/12) gives us $120,000 *(1.00833)/f6/f1 or $199,082.38.

(n55)Footnote 1024. Cal. Civ. Proc. Code § 580(d).

(n56)Footnote 1025. *Clampitt v. A.M.R. Corp., 706 P.2d 34 (Idaho 1985)* , *reh'g denied* (1985); *Weyher v. Peterson, 399 P.2d 438 (Utah 1965)* .

(n57)Footnote 1026. *Honey v. Henry's Franchise Leasing Corp., 415 P.2d 833 (Cal. 1966)* .

(n58)Footnote 1027. *707 P.2d 232 (Cal. 1985)* .

(n59)Footnote 1028. *Sawyer v. Marco Island Dev. Co., 301 So. 2d 820 (Fla. App. 1974) , cert. denied, 312 So. 2d 757 (Fla. 1975)* ; *Warner v. Rasmussen, 704 P.2d 559 (Utah 1985)* .

(n60)Footnote 1029. *Sawyer v. Marco Island Dev. Co., 301 So. 2d 820 (Fla. App. 1974) , cert. denied, 312 So. 2d 757 (Fla. 1975)* ; *Heikkila v. Carver, 378 N.W.2d 214 (S.D. 1985) , reh'g denied* (1985) ("substantial disparity").

(n61)Footnote 1030. *Mackreth v. Symmons, 15 Ves. 329 (1808)* .

(n62)Footnote 1031. *Lincoln Nat'l Life Ins. Co. v. Overmyer, 530 N.E.2d 784 (Ind. App. 1988)* ; *Easterling v. Ferris, 651 P.2d 677 (Okla. 1982)* ; *Mid-America Steel, Inc. v. Bjone, 414 N.W.2d 591 (N.D. 1987)* ; *Tri-State Nat'l Bank v. Saffren, 726 P.2d 1081 (Wyo. 1986)* .

(n63)Footnote 1032. *Brock v. South Sav. Ass'n in Receivership, 10 Cal. Rptr. 2d 700 (1992)* ; *Figlio v. Shelley Ford, Inc., 804 S.W.2d 84 (Tenn. App. 1991)* .

(n64)Footnote 1033. *E.g.,* W. Va. Code § 38-1-1.

(n65)Footnote 1034. *Smith v. Smith, 37 N.E.2d 425 (Ohio App. 1941)* .

(n66)Footnote 1035. *Atlantic Fed. Sav. & Loan Ass'n v. Kitimat Corp., 143 So. 2d 719 (Fla. App. 1962)* ; *Skendzel v. Marshall, 301 N.E.2d 641 (Ind. 1973)* ; *Weaver v. Blake, 300 N.W.2d 52 (S.D. 1980) . See also Prell v. Trustees of Baird and Warner Mtg. & Realty Trust, 386 N.E.2d 1221 (Ind. App. 1979)* .

(n67)Footnote 1036. *Summer & Co. v. DCR Corp., 351 N.E.2d 485 (Ohio 1976)* ; *Zapata v. Torres, 464 S.W.2d 926 (Tex. App. 1971)* .

(n68)Footnote 1037. *Century Bank v. Keiler, 461 So. 2d 328 (La. App. 1984)* (a vendor's lien may coexist with a vendor's mortgage).

(n69)Footnote 1038. *See Rader v. Dawes, 651 S.W.2d 629 (Mo. App. 1983) , reh'g denied* (1983).

(n70)Footnote 1039. *Dahlke v. Dahlke, 155 Neb. 169, 51 N.W.2d 266 (Neb. 1952) .*

(n71)Footnote 1040. *Winston v. Ahlman, 131 So. 2d 487 (Fla. App. 1961)* ; *Duncan v. State, 202 Tenn. 431, 304 S.W.2d 625 (Tenn. 1957) .*

(n72)Footnote 1041. *Stringfellow v. Ivie, 73 Ala. 209 (1882) .*

(n73)Footnote 1042. *Weaver v. Blake, 300 N.W.2d 52 (S.D. 1980)* (lien exists unless clear proof vendor intended to waive and did not rely on security).

(n74)Footnote 1043. *Daniel v. Daniel, 108 So. 42 (Ala. 1926) .*

(n75)Footnote 1044. *Brock v. First South Sav. Ass'n, 10 Cal. Rptr. 2d 700 (1992)* (acknowledging the priority of purchase money mortgages held by sellers but refusing to extend similar treatment to vendors' liens); *Baccus v. Westgate Management Corp., 981 S.W.2d 383 (Tex.App. 1998)* (Superiority of assigned vendor's lien).

(n76)Footnote 1045. *See e.g.,* § 102.04, *infra.*

(n77)Footnote 1046. *Lawyers Title Ins. Corp. v. Valteau, 563 So. 2d 260 (La. 1990) .*

(n78)Footnote 1047. *Metropolitan Fed. Bank of Iowa v. A.J. Allen Mech. Contractors, 477 N.W.2d 668 (Iowa 1991)* ; *Kokomo Tube Co. v. Dayton Equip. Servs. Co., 123 F.3d 616 (7th Cir. 1997) .*

(n79)Footnote 1048. *Cal. Civ. Code § 3110. Cf. Phillips-Klein Cos. v. Tiffany Pt'ship, 474 N.W.2d 370 (Minn. App. 1991)* (securing financing, zoning variance, or lease arrangement not deemed improvement).

(n80)Footnote 1049. *Borello v. Eichler Homes, Inc., 34 Cal. Rptr. 648 (1963)* ; Cal. Civ. Code § 3110.

(n81)Footnote 1050. *See Primo Team, Inc. v. Blake Constr. Co., 3 Cal. App. 4th 801, 4 Cal. Rptr. 2d 701 (1992) .*

(n82)Footnote 1051. *Cal. Civ. Code § 3129*; *Baker v. Hubbard, 161 Cal. Rptr. 551 (1980)* ; *Fondren v. K/L Complex Ltd., 800 P.2d 719 (Nev. 1990) .*

(n83)Footnote 1052. Cal. Civ. Code § 3124.

(n84)Footnote 1053. *Id.*

(n85)Footnote 1054. *Parsons Constr. Co. v. Gifford, 262 N.W. 508 (Neb. 1935) , overruled on other grounds, Gillespie v. Hynes, 95 N.W.2d 457 (Neb. 1959) .*

(n86)Footnote 1055. Cal. Bus. & Prof. Code § 7031; *Capital Constr. Co. v. Plaza West Coop. Ass'n, 604 A.2d 428 (D.C. 1992)* ; *Roth v. Thompson, 825 P.2d 1241 (N.M. 1992)* ; *B & F Bldg. Corp., 564 N.E.2d 650 (N.Y. 1990)* ; *Govert Copier Painting v. Van Leeuwen, 801 P.2d 163 (Utah App. 1990) . Cf. Gene Taylor & Sons Plumbing Co. v. Corondolet Realty Trust, 611 S.W.2d 572 (Tenn. 1981) .*

(n87)Footnote 1056. *Rich-Lee Equip. Rentals, Inc. v. Intermountain Constr. Co., 145 Cal. Rptr. 106 (1978)* ; *Borello v. Eichler Homes, Inc., 34 Cal. Rptr. 648 (1963) .*

(n88)Footnote 1057. *Lambert v. Superior Court (Mac Ewen), 279 Cal. Rptr. 32 (1991)* ; *Ringer v. Graham, 331*

S.E.2d 373 (S.C. 1985) ; *Basic Modular Facilities v. Ehsanipour, 83 Cal. Rptr. 2d 462 (Cal. Ct. App. 1999)* (upholding trial court's discretion to reduce excessive lien).

(n89)Footnote 1058. *E.g.,* Neb. Rev. Stat. § 52-136(1)(b) (except for occupied residential property); Pa. Stat. Ann. tit. 49, § 1303 (1966). *Louie's Floor Covering, Inc. v. DePhillips Interests, Ltd., 378 N.W.2d 923 (Iowa 1985)* (except for owner-occupied dwellings); *Bryan v. Stempkowski, 88 Pa. Super. 390 (1926)* ; *Becker v. Hopper, 138 P. 179 (Wyo. 1913)* .

(n90)Footnote 1059. *E.g.,* Fla. Stat. Ann. § 713.06(1)(3); N.Y. Lien Law § 4. *Davis v. Gobble-Fite Lumber Co., 592 So. 2d 202 (Ala. 1991)* ; *W.G. Glenney Co. v. Bianco, 604 A.2d 1345 (Conn. App. 1992)* ; *Porter Lumber Co. v. Tim Kris, Inc., 530 So. 2d 398 (Fla. App. 1988)* ; *Ridge Sheet Metal Co. v. Morrell, 517 A.2d 1133 (Md. App. 1986)* (re lien on single-family dwelling); *Pine Gravel, Inc. v. Cianchette, 514 A.2d 1282 (N.H. 1986)* ; *Ace Contr'g Co. v. Garfield & Arma Assocs., 560 N.Y.S.2d 382 (1990)* ; *Stovall Bldg. Supplies, Inc. v. Mottet, 406 S.E.2d 176 (S.C. App. 1990)* , *cert. denied* (1991). *See also* Marion W. Benfield, Jr., *The Uniform Construction Lien Act: What, Whither, and Why, 27 Wake Forest L. Rev. 527, 540-1 (1992).* Comment, *Mechanics' Liens and Surety Bonds in the Building Trades, 68 Yale L.J. 138, 144, n.22, 144, n.30 (1958).*

(n91)Footnote 1060. *E.g.,* Cal. Civ. Code § 3123:

The liens ... shall be direct liens, and shall be for the reasonable value of the labor, services, equipment, or materials furnished or for the price agreed upon by the claimant and the person with whom he or she contracted, whichever is less. The lien shall not be limited in amount by the price stated in the contract [of the owner with the person he or she dealt]. Recent cases following this approach include *Heating & Plumbing Eng'rs, Inc. v. H.J. Wilson Co., 698 P.2d 1364 (Colo. App. 1984)* and *Vulcraft v. Midtown Bus. Park Ltd., 800 P.2d 195 (N.M. 1990)* .

(n92)Footnote 1061. Benfield, *supra* note 1059.

(n93)Footnote 1062. Comment, *Mechanics' Liens and Surety Bonds in the Building Trades, 68 Yale L.J. 138, 145 n.35 (1958).*

(n94)Footnote 1063. Cal. Civ. Code § 3097. *See also Md. Real Prop. Code Ann. § 9-104* ("within 90 days after doing the work or furnishing the materials").

(n95)Footnote 1064. *Davis v. Gobble-Fite Lumber Co., 592 So. 2d 202 (Ala. 1991)* ; *W. G. Glenney Co. v. Bianco, 27 Conn. App. 199, 604 A.2d 1345 (Conn. App. 1992)* ; *Grubb Contractors v. Abbott, 579 A.2d 1185 (Md. App. 1990)* (under statute covering single family dwellings); *Bricklayers Local Union No. 92 v. Markoff, 562 N.Y.S.2d 599 (1990)* ; *Ace Contr'g Co. v. Garfield & Arma Assocs., 560 N.Y.S.2d 382 (1990)* ; *Stovall Bldg. Supplies, Inc. v. Mottet, 406 S.E.2d 176 (S.C. App. 1990)* .

(n96)Footnote 1065. *A.Y. McDonald Mfg. Co. v. State Farm Mut. Auto. Ins. Co., 587 N.E.2d 623 (Ill. App. 1992)* .

(n97)Footnote 1066. *E.g.,* Iowa Code Ann. § 572.14; Neb. Rev. Stat. § 52-136(1), (2).

(n98)Footnote 1067. Uniform Construction Lien Act § 207 (Alternative A) and (Alternative B). Benfield *supra* note 1059.

(n99)Footnote 1068. Cal. Civ. Code §§ 3115, 3116. *See also* Iowa Code Ann. §§ 572.8 to 572.9 (within 90 days of furnishing last of materials or performing last of labor). *In re Johnson, 232 B.R. 399 (Bankr. W.D. Mo. 1999)* (Perfection occurs on the day that the proper authorities receive the documents).

(n100)Footnote 1069. *Atenasio v. Modern Counter Tops & Cabinets, Inc., 1991 Conn. Super. LEXIS 3064* .

(n101)Footnote 1070. *E.g.,* Cal. Civ. Code § 3144 (generally suit must be instituted within 90 days of recordation

of claim of lien).

(n102)Footnote 1071. *E.g.*, Cal. Civ. Code § 3144, subd. (b): "If the claimant fails to commence an action to foreclose the lien within the time limitation provided in this section, the lien automatically shall be null and void and of no further force and effect."

(n103)Footnote 1072. Robert Kratovil, Modern Mortgage Law and Practice, § 214 at 138-40. *Tile House, Inc. v. Cumberland Fed. Sav. Bank, 942 S.W.2d 904 (Ky. 1997)* ; *In re Elm Ridge Associates, 234 F.3d 114 (2d Cir. 2000)* .

(n104)Footnote 1073. *E.g.*, Colo. Rev. Stat. § 38-22-106 (1982 Repl.); Del. Code Ann. § 2720; Mich. Comp. Laws Ann. § 570.119; Ohio Rev. Code Ann. § 1311.13 (Page 1979); Tex. Prop. Code § 53.122.

(n105)Footnote 1074. *Adams Insulation Co. v. Los Portales Assocs. Pt'ship, 804 P.2d 841 (Ariz. App. 1991)* ; *Farmers & Mechs. Sav. Bank v. Garofalo, 595 A.2d 341 (Conn. 1991)* ; *J. Walters Constr. Co. v. Greystone S. Pt'ship, 817 P.2d 201 (Kan. App. 1991)* ; *M.D. Marinich, Inc. v. Michigan Nat'l Bank, 484 N.W.2d 738 (Mich. App. 1992)* ; *Bank El Paso Nat'l Ass'n v. Featherlite Corp., 792 S.W.2d 472 (Tex. App. 1990)* .

(n106)Footnote 1075. *Northwestern Nat'l Bank v. Metro Center, Inc., 303 N.W.2d 395 (Iowa 1981)* .

(n107)Footnote 1076. *Steinberg v. Chicago Title & Trust Co., 491 N.E.2d 1294 (1986)* .

(n108)Footnote 1077. Iowa Code Ann. § 572.17; Mass. Gen. Laws Ann. ch. 254, § 27. *See also* Minn. Stat. Ann. § 514.05 ("As against a bona fide purchaser, mortgagee or encumbrancer without actual or record notice, no lien shall attach prior to the actual and visible beginning of the improvement ... .").

(n109)Footnote 1078. *E.g.*, Cal. Civ. Code § 3134: generally the lien is "preferred to any lien, mortgage, deed of trust, or other encumbrance upon the work of improvement and the site, which attaches subsequent to the commencement of the work of improvement, and also to any lien, mortgage, deed of trust, or the encumbrance of which the claimant had no notice and which was unrecorded at the time of commencement of the work of improvement." *See also* Conn. Gen. Stat. Ann. § 49-33(d).

(n110)Footnote 1079. Cal. Civ. Code §§ 3156 - 3176.5; N.J. Stat. Ann. § 2A:44 - 77; Va. Code Ann. § 43-11.

(n111)Footnote 1080. *E.g.*, Cal. Civ. Code § 3161.

(n112)Footnote 1081. *E.g., J.M. Process Sys. v. W.L. Thompson Elec. Co., 578 N.E.2d 264 (1991)* ; *Thompson & Peck, Inc. v. Division Drywall, Inc., 696 A.2d 326 (Conn. 1997)* ; Laurence, Robert. "At Home with Bankruptcy Code: Residential Leases, Installment Sales Contracts, and Home Mortgages" *61 Am. Bank. L. J. 125 (Jan. 1987).*Mann, Roberta F. "The Not-so Little House on the Prairie: The Hidden Costs of the Home Mortgage Interest Deduction," *32 Ariz. St. L.J. 1347 (Winter 2000);* Noble-Allgire, Alice. "Attorney Approval Clauses in Residential Real Estate Contracts--Is Half a Loaf Better Than None?" *48 Kan. L. Rev. 339 (Jan. 2000).*

(n113)Footnote 1082. Cal. Civ. Code § 3262.

(n114)Footnote 1083. *Metropolitan Fed. Bank of Iowa v. A.J. Allen Mech. Contractors, 477 N.W.2d 668 (Iowa 1991)* .

(n115)Footnote 1084. *Phillips-Klein Cos. v. Tiffany Pt'ship, 474 N.W.2d 370 (Minn. App. 1991)* .

(n116)Footnote 1085. *Ramco Indus. v. Trustees of Univ. of Ill., 589 N.E.2d 672 (Ill. App. 1992)* ; *Patrick McGuigan Roofing Co. v. Kallman, 592 A.2d 1368 (Pa. Super. 1991)* (court enforces clause but regards it as unfair).

(n117)Footnote 1086. *Ridgecrest Const. Co. v. American Nat'l Bank & Trust Co. of Chicago, 563 N.E.2d 986 (Ill.*

App. 1990) .

(n118)Footnote 1087. *E.g., Pa. Stat. Ann. tit. 49, § 1402* (subcontractors not bound unless agreement recorded or they have actual notice).

(n119)Footnote 1088. Cal. Civ. Code § 3262(b).

(n120)Footnote 1089. *Smith v. Venus Condo. Ass'n, Inc., 352 So. 2d 1169 (Fla. 1977)* , *reh'g denied* (1978); *Curtis Mfg. Co. v. Barela, 415 P.2d 361 (N.M. 1966)* ; *Philadelphia Nat'l Bank v. Taylor, 218 A.2d 246 (Pa. 1966)* .

(n121)Footnote 1090. *E.g.,* Ga. Code Ann. § 9-12-01; N.C. Gen. Stat. § 1-234; Va. Code Ann. § 8.01-458.

(n122)Footnote 1091. Cal. Civ. Proc. Code § 697.310; Ohio Rev. Code § 2329.02.

(n123)Footnote 1092. *E.g.,* Cal. Civ. Proc. Code § 697.710. *Von Segerlund v. Dysart, 137 F.2d 755 (9th Cir. 1943)* .

(n124)Footnote 1093. *E.g.,* Cal. Civ. Proc. Code § 697.310 ("abstract of a money judgment").

(n125)Footnote 1094. Or city where cities are separate from counties, *e.g.,* Virginia.

(n126)Footnote 1095. *E.g.,* Cal. Civ. Proc. Code § 697.060; Ohio Rev. Code § 2329.02; Wash. Rev. Code Ann. § 4.56.190 (judgment of United States District Court rendered in Washington).

(n127)Footnote 1096. Cal. Civ. Proc. Code § 409.

(n128)Footnote 1097. Minn. Stat. Ann. § 557.02.

(n129)Footnote 1098. Conn. Gen. Stat. Ann. § 52-380a.

(n130)Footnote 1099. Ohio Rev. Code Ann. § 2339.50 (certain judgments of the court of appeals or supreme court). *See also* Okla. Stat. Ann. tit. 12, § 801; Wyo. Stat. § 1-17-336.

(n131)Footnote 1100. *E.g.,* Ariz. Rev. Stat. § 12-1612; Cal. Civ. Proc. Code § 683.180; Idaho Code § 10-1111 (1990).

(n132)Footnote 1101. Kan. Stat. Ann. § 60-2418.

(n133)Footnote 1102. *Kimm v. Kimm, 464 N.W.2d 468 (Iowa App. 1990)* ; *Hannah v. Martinson, 232 Mont. 469, 758 P.2d 276 (Mont. 1988)* ; *In re Upset Sale, Tax Claim Bur. of Berks County, 479 A.2d 940 (Pa. 1984)* ; *Butler v. Wilkinson, 740 P.2d 1244 (Utah 1987)* .

(n134)Footnote 1103. *In re Romano, 426 F. Supp. 1123 (N.D. Ill. 1977)* ; *Wilkinson v. Wilkinson, 124 Cal. Rptr. 870 (1975)* ; *Mercantile Collection Bur. v. Roach, 15 Cal. Rptr. 710 (1961)* ; *Mutual Bldg. & Loan Ass'n of Las Cruces v. Collins, 516 P.2d 677 (N.M. 1973)* , *overruled on other grounds* in *Marks v. Tucumcari, 595 P.2d 1199 (1979)* ; *Action Realty Co. v. Miller, 215 N.W.2d 629 (Neb. 1974)* .

(n135)Footnote 1104. Cal. Civ. Proc. Code § 697.340(a).

(n136)Footnote 1105. *E.g.,* Cal. Civ. Proc. Code § 697.340 (b). *Cf. Philadelphia Nat'l Bank v. Taylor, 218 A.2d 246 (Pa. 1966)* (at common law judgment lien does not attach to after-acquired property though by statute lien of execution does).

(n137)Footnote 1106. "Nearly all of the statutes which protect only 'bona fide purchasers' have been construed not

to include judgment creditors in that term; those which protect 'all persons except the parties to the conveyance or the like have received a more mixed reception in the courts when the right of subsequent judgment creditors are at stake." Stoebuck and Whitman, The Law of Real Property § 11.10 note 14.

(n138)Footnote 1107. *Lowery v. Wilson, 200 S.E. 861 (N.C. 1939)* ; *Eagle Lumber Co. v. Trainham, 365 S.W.2d 702 (Tex. App. 1963) , writ refused n.r.e.* (1963).

(n139)Footnote 1108. 20th *Century Plumbing Co. v. Pol Invs., Inc., 157 Cal. Rptr. 818 (1981)* ; *Wells Fargo Bank v. Pol Invs., Inc., 157 Cal. Rptr. 818 (1977)* ; *Livingston v. Rice, 280 P.2d 52 (Cal. App. 1955)* ; *Davis v. Perry, 8 P.2d 514 (Cal. App. 1932)* ; *Iknoian v. Winter, 270 P. 999 (1928)* ; *House v. Ponce, 109 P. 161 (Cal. App. 1910)* .

(n140)Footnote 1109. *E.g., C & L Lumber & Supply, Inc. v. Texas Am. Bank/Galeria, 795 P.2d 502 (N.M. 1990)* .

(n141)Footnote 1110. *Urez v. Superior Ct., 235 Cal. Rptr. 837 (1987)* ; *State v. Taylor, 368 S.E.2d 601 (N.C. 1988)* .

(n142)Footnote 1111. *Manning v. Wingo, 577 So. 2d 865 (Ala. 1991)* .

(n143)Footnote 1112. *James v. Bailey, 370 F. Supp. 469 (D.V.I. 1974)* ; *Prince v. Crow, 589 So. 2d 161 (Ala. 1991) , reh'g denied* (1991); *Hartman v. Hartman, 297 N.E.2d 203 (Ill. App. 1973)* ; *Jim Walter Corp. & Mid-State Homes, Inc. v. Gates, 370 So. 2d 928 (Miss. 1979)* .

(n144)Footnote 1113. John Henry Merryman, *Improving the Lot of the Trespassing Improver, 11 Stan. L. Rev. 456, 467 (1959).*

(n145)Footnote 1114. Robert C. Casad, *The Mistaken Improver--A Comparative Study, 19 Hastings L.J. 1039, 1040-1 (1968).*

(n146)Footnote 1115. Characterizing this as the majority view, W. W. Ferrier, Jr., *A Proposed California Statute Compensating Innocent Improvers of Realty, 15 Cal. L. Rev. 189, 189-90 (1927);* Casad, *id.* at 1043; Merryman, *supra* note 1113, at 465.

(n147)Footnote 1116. 2 James Kent, Commentaries on American Law 338.

(n148)Footnote 1117. *E.g., Pull v. Barnes, 350 P.2d 828 (Colo. 1960)* ; *Stevens v. Crowder, 273 So. 2d 793 (Fla. App. 1973)* ; *Smith v. Long, 281 P.2d 483 (Idaho 1955)* ; *Hatcher v. Briggs, 6 Or. 31 (1876)* . For an excellent review of the case law, *see Somerville v. Jacobs, 170 S.E.2d 805 (W. Va. 1969)* .

(n149)Footnote 1118. *Cole Taylor Bank v. Cole Taylor Bank, 586 N.E.2d 775 (Ill. App. 1992)* ; *Manning v. Wingo, 577 So. 2d 865 (Ala. 1991)* . It has been said that the traditional view is now a "[b]are majority." *Voss v. Forgue, 84 So. 2d 563, 564 (Fla. 1956)* . *Shick v. Dearmore, 442 S.W.2d 198 (Ark. 1969)* (improver may remove improvement if no injury to land).

(n150)Footnote 1119. *4 F. Cas. 127 (C.C.D. Me. 1841)* (No. 1,875).

(n151)Footnote 1120. *Ferrier, supra,* note 1115, at 190; Casad, *supra,* note 1114, at 1045-50.

(n152)Footnote 1121. *Jim Walter Corp. & Mid-State Homes, Inc. v. Gates, 370 So. 2d 928 (Miss. 1979)* ; *Pull v. Barnes, 350 P.2d 828 (Colo. 1960) , reh'g denied* (1960).

(n153)Footnote 1122. *Somerville v. Jacobs, 170 S.E.2d 805 (W. Va. 1969)* .

(n154)Footnote 1123. *Prince v. Crow, 589 So. 2d 161 (Ala. 1991) , reh'g denied* (1991); *In re Holder's Estate, 355*

N.E.2d 333 (Ill. App. 1976) ; *Worley v. Ehret, 343 N.E.2d 237 (Ill. App. 1976)* .

(n155)Footnote 1124. *Benson v. Taralseth, 382 N.W.2d 649 (N.D. 1986)* .

(n156)Footnote 1125. Casad, *supra*, note 1114, at 1051.

(n157)Footnote 1126. *Mid-State Homes, Inc. v. Anderton, 283 So. 2d 426 (Ala. 1973)* ; *Stevens v. Crowder, 273 So. 2d 793 (Fla. App. 1973)* .

(n158)Footnote 1127. Casad, *supra*, note 1114, at 1052; Merryman, *supra*, note 1113, at 467 n.58. *See also Hackett v. Hackett, 228 S.E.2d 758 (N.C. App. 1976)* (no color of title where improver claimed only a leasehold).

(n159)Footnote 1128. *E.g.*, Ark. Stat. Ann. § 34-1423. *Jones v. Jones, 737 S.W.2d 654 (Ark. App. 1987)* , *reh'g denied* (1987) (no good faith if aware of another's claim).

(n160)Footnote 1129. *E.g.*, Ark. Stat. Ann. § 34-1423. *Baker v. Ellis, 432 S.W.2d 871 (Ark. 1968)* .

(n161)Footnote 1130. Merryman, *supra* note 1113, at 456, 467 (1959).

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CHAPTER 101 MORTGAGES, DEEDS OF TRUSTS AND RELATED LIENS

12-101 Thompson on Real Property, Thomas Editions § 101.09

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Supp. To CHAPTER 101 MORTGAGES, DEEDS OF TRUST AND RELATED LIENS

12-101 Thompson on Real Property, Thomas Editions Scope

Scope

Add new § 101.09. Add new section:

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Supp. To CHAPTER 101 MORTGAGES, DEEDS OF TRUST AND RELATED LIENS

12-101 Thompson on Real Property, Thomas Editions Supp. to § 101.09

Supp. to § 101.09 A Review of Mortgage History and the Subprime Mortgage Crisis.1 This section was written by Prof. David A. Thomas.

Add new § 101.09.

Add new section:
[Go To Main]

§ 101.09(a) A Brief Review of the History of Medieval Mortgages. [Go To Main]

§ 101.09(a)(1) Lender Rights in the 14th and 15th Centuries: Title and Possession.

Under the form of mortgage used in 14th- and 15th-century England, the lender took fee simple ownership and possession of the borrower's property. Only if the debt were satisfied would the lender be obligated to return the property to the borrower. Today conveyancers would call this a fee simple subject to condition subsequent. While holding the property, the lender had, among other significant rights, the right to collect and keep rents and profits without applying them to the loan balance. This was important, because, at the time, charging interest on the loan was considered to be usury and to be unlawful.

§ 101.09(a)(2) In the 17th Century: Borrower Retains Possession.

The next major development in mortgage law was a custom by which the borrower remained in possession, even though the lender continued to hold title to land. Under a provision for entry the lender had the right to take possession at any time. If the lender did take possession, rents and profits from the mortgaged property had to be applied to the mortgage debt. The change in custom from the lender taking possession of the property to the borrower usually being left in possession of the property occurred between about 1600 and 1650.

The provision for lender's entry was then displaced by a custom requiring the lender, who held the estate or title, to reconvey when the debt was fully satisfied. However, if payment was not made promptly, when required, the borrower forfeited the right to insist on reconveyance, and the lender's estate in the land became absolute.

§ 101.09(a)(3) Equitable Relief: Late Payments Permitted in Limited Circumstances.

When it became clear that English common law courts would enforce forfeitures of borrowers' rights for even the most technical and excusable failures to pay exactly on time, the chancery courts began to intervene with equitable relief. Initially, borrowers were permitted to make late payments if they could show that tardiness had been caused by fraud, duress, misrepresentation or accident.

§ 101.09(a)(4) Equitable Relief: A Right of Redemption for Borrowers.

By the 17th century, about the time borrowers were beginning to retain possession of their mortgaged property, courts recognized a right in the borrower to tender full payment within a reasonable time after the due date. This right to redeem originating from principles of equity came to be called the equity of redemption and came to be recognized as an inherent equitable estate in land. So, in summary, during the seventeenth century mortgages in England came to consist of a loan from the mortgagee, a conveyance of legal title from the mortgagor to the mortgagee, and retention by the mortgagor of an equitable title consisting of the right of possession and the right of redemption should the loan go into default. This is a description of the "title theory" of mortgages in England, because the mortgagee obtains title. Because this theory was prevailing during the American colonial era, American states initially incorporated the "title theory" into their own jurisprudence. Even when the mortgagor remained in possession, American courts recognized legal title in the mortgagee.

§ 101.09(a)(5) Equitable Relief for Lenders: Right to Foreclose the Right of Redemption--Strict Foreclosure.

Lenders, meanwhile, were frustrated by the equitable right of redemption and sought for some way to more clearly define and limit the extent of this right. Equity courts came to recognize and enforce the lender's right to bring closure to the right of redemption, so that it didn't last indefinitely. If, some time after the payment due date and redemption still had not occurred, at the lender's request, a court of equity could order payment of the debt, interest and costs within a fixed period of time; if that payment was not forthcoming in the allotted time, the right of redemption was considered extinguished, or foreclosed. This procedure still exists in some American jurisdictions today under some circumstances, and it is called strict foreclosure. It offers a right to redeem the property by paying off the outstanding debt, but does not include a foreclosure sale. Thus it "forecloses" the equity or right of redemption without a so-called foreclosure sale.

§ 101.09(a)(6) More Equitable Relief for Borrowers: The Right to a Foreclosure Sale.

But strict foreclosure could still be harsh for mortgagors, so equity stepped in once again. Equity had already recognized a right of redemption in mortgagors, and equity had recognized in mortgagees a right to put limits on the right of redemption. Now equity courts in America insisted that, in most instances, the right of redemption could be foreclosed *only* by a public sale of the mortgaged property, rather than by forfeiture of the land to the mortgagee, as under strict foreclosure. Only when the mortgaged land was successfully conveyed following a public sale could the right of redemption be considered extinguished or foreclosed, which, of course, is why such a sale is commonly called a foreclosure sale.

§ 101.09(a)(7) More Relief for Borrowers: Statutory Redemption.

Now American mortgage law had in place the two great equitable protections for borrowers: the right of redemption, and the right to insist on a public sale of the property as a requirement to "foreclose" the right of redemption. Some states have taken redemption a step further, and by statute have added another redemption period AFTER the foreclosure sale.

§ 101.09(a)(8) Change from "Title Theory" to "Lien Theory."

At the same time, the fundamental nature of mortgages was changing in American law. The basic assumption of the "title" theory, that legal title was in the mortgagee until the debt was paid or the mortgage foreclosed, was giving way to the "lien" theory, recognizing in the mortgagee not title but only a security interest in the mortgaged land. Under the title theory, the mortgagees have at least a theoretical right to possession even before foreclosure, but under the lien theory mortgagees have no right of possession until there has been a valid foreclosure. Today only eight states and the District of Columbia hold to the title theory and even these accept the notion that the mortgagee holds title for security purposes only.

§ 101.09(b) More Recent Mortgage History: The Great Depression. [Go To Main]

The subprime mortgage crisis and associated stresses in the entire finance system are inevitably compared with the profound crises of the Great Depression. Mortgage foreclosures were a significant feature of the Depression's financial disasters. However, it is worth noting that mortgage lending and mortgage defaults and mortgage foreclosures of the Depression era only faintly resembled today's mortgages. In the years leading up to the financial crash and the Depression, it was common for residential mortgages to require somewhat manageable payments for a few years and then a substantial balloon payment, under the assumption that the mortgagor in the meantime could have either gathered enough resources to make the balloon payment or could refinance at current market interest rates. Local mortgage lenders were generally not able to make many long-term loans at fixed interest rates (and that is still true today), so the balloon payment system enabled lenders to recapture and recycle their lending capital into new mortgage loans. Understandably, defaults and foreclosures skyrocketed in times of massive job loss and slumping economic activity generally during the Depression. Some remedial state legislation from that time, including especially anti-deficiency judgment legislation, still exists in many states.

§ 101.09(c) Modern Mortgages and the "American Dream." D.C. Code Ann. §§ 2-2603 to 2-2614

Mortgage loan availability is widely viewed as a key part of the "American dream," the aspiration held by many to actually own or be buying their own homes, and not to be lifelong renters and tenants. The main feature of mortgage loan practice that enables the substantial majority of Americans to reasonably aspire to this "dream", even when they don't possess large lump sums of cash to spend on housing, is the long-term loan with level or "amortized" payments of principal and interest, secured by a mortgage or trust deed. Given enough time over the life of the loan, most people can make the monthly payments if that's what they choose to do.

§ 101.09(c)(1) Rise of the "Secondary Market."

Most of our local financial institutions would not have the resources to make many such loans without swiftly depleting their lendable assets. However, if a local lending institution, after originating a mortgage, could sell or "assign" the mortgage to another institution with deeper resources, the local lender could continue its business of originating local mortgages. And so the Federal National Mortgage Association (now widely referred to as Fannie Mae) was organized in 1938 to purchase residential and other mortgages from originating local lenders. Now, after several organizational transformations Fannie Mae and its companion institution Freddie Mac, are "government-sponsored enterprises" primarily engaged in purchasing residential mortgages originated by local lenders. To obtain the capital required to make these purchases, these entities issue publicly traded stock, issue debt instruments (that is, bonds and notes) that at least appear to have the backing of the U.S. government, and issue mortgage-related securities.

These entities have played a profoundly important role in creating the so-called "secondary market" in mortgages. It is

this "secondary market" that has made massive amounts of capital available for long-term mortgage lending, extending access to the American dream to millions.

Another characteristic of modern American mortgages is that many fortunes are made in the mortgage lending industry, not only through the revenues of the mortgage loans themselves, but also through the fees generated by the processes of originating and servicing the mortgages. This revenue opportunity has combined with the pressure to expand the capital assets available for mortgage lending and the social appeal of widening access to the American dream to create massive pressures leading to the subprime mortgage and related financial crises.

§ 101.09(c)(2) Sources of Capital for the "Secondary Market."

Other than through Fannie Mae and Freddie Mac, the most common sources for the money to buy mortgages from their originators, that is, for the secondary mortgage market, comes most commonly from the following sources:

(1) The individual mortgage is sold to an investor institution. The purchaser has the right to collect the payments and to foreclose in case of default.

(2) The mortgagee may use one or more mortgages as collateral for a loan. If the original mortgage goes into default, the second lender can deem itself to be the holder of the mortgage loan, can demand that mortgage payments be made directly to it, and can foreclose the mortgage or sue on the original note.

Both of these methods attracted to the mortgage markets capital from investors who were interested directly in mortgages as investments.

(3) The third source of capital for the secondary market came from investors who had no particular interest in mortgages as mortgages, but were interested in investing in securities, including securities based on mortgages. This third source of capital is generated by a pool of mortgages being assembled and pledged as collateral, not for loans, but for securities issued by the entity that does the pooling. That entity could be the original mortgagee or an assignee of the original mortgagee. While these securities are outstanding, the mortgages and accompanying promissory notes are often held by a trustee or other custodian. An independent servicing agent is engaged to manage the mortgages backing the securities, and this may include collecting monthly payments of principal and interest, monitoring defaults, and even pursuing foreclosures if necessary.

The structuring of these mortgage-backed securities has become increasingly diverse, complicated and sophisticated, and is sometimes not well-understood even by the large institutional investors who are the main customers. Nevertheless, this method of generating investment capital has attained enormous significance, because it has attracted major investors (and huge additional amounts of capital) who would otherwise not be interested in and active in the secondary mortgage market.

The following statistics emphasize the impact of the secondary mortgage market, recalling that Fannie Mae and Freddie Mac have been mainly responsible for creating and stimulating the secondary mortgage market. A recent survey revealed that in 2006 Fannie Mae held or had outstanding mortgage-backed securities representing 23% of all U.S. residential mortgage debt. Fannie Mae and Freddie Mac together held or had outstanding mortgage-backed securities representing 17% of ALL U.S. mortgage debt, residential or commercial.

§ 101.09(c)(3) Origins of the "Subprime" Mortgage Crisis.

As more capital has become available, one result has been more pressure to originate new mortgages. This pressure has led to making mortgage loans to persons who would not qualify under traditional guidelines. Those who could qualify under traditional guidelines are generally referred to as "prime" borrowers. Those who could not qualify under

traditional guidelines are referred to as "subprime" borrowers.

Several factors contributed to subprime borrowers becoming eligible for mortgage loans. One of the most important of these factors was changes in government laws and regulations that both enabled subprime lending to occur and made it more attractive to lenders and borrowers alike. In 1980, state-imposed caps on interest rates were pre-empted by federal legislation.[2] Beginning in 1982, lenders were permitted to offer adjustable rate mortgages. [3] In 1986 , the Tax Reform Act retained residential mortgage loans as the only consumer loans whose interest payments were tax deductible.

Federal deregulation permitted lenders to charge a risk premium to less creditworthy borrowers in the form of higher interest rates and fees. Equally importantly, deregulation allowed lenders to market new and more complex types of mortgage products, including adjustable rate mortgages and loans with balloon payments and negative amortization, which expanded the pool of eligible borrowers and helped lenders control for interest-rate risk.[4]

§ 101.09(c)(4) Characteristics of "Subprime Borrowers."

More statistics provide some context for subprime lending. About 75% of the 43 million first mortgages in the U.S. have been issued to "prime borrowers." "Subprime borrowers" have 13-14% of these first mortgages. The typical characteristics of these "subprime borrowers" are weak credit histories from delinquent payments, previous judgments, bankruptcies or other chargeoffs; low credit scores; high debt burden ratios; and high loan-to-value ratios. The balance of 11-12% of first mortgages have been issued to borrowers who may have good credit but have risks in their record, such as high debt-to-income ratios or inability to fully document their income.

A "subprime" loan issued to a "subprime" borrower will usually have higher origination costs, higher closing costs, and of course higher interest rates. It may have a low introductory interest rate that soon changes to a permanent and higher adjustable rate. It may have prepayment penalties. In short, a "subprime" loan and mortgage to a "subprime" borrower imposes the harshest terms on those with the least ability to meet those terms.

§ 101.09(c)(5) Predatory Lenders Who Pursue "Subprime Borrowers."

This situation has attracted an inordinate amount of predatory lending practices. Predatory lending practices can and do occur in the prime mortgage market, but are less likely to occur in that setting. Prime borrowers are more sophisticated and more likely to shop for the best loan terms, while prime lenders are more likely to be subject to federal and state regulation and oversight.[5] Subprime borrowers offer a "much more fertile ground for predatory lending practices": difficulty in obtaining financing in the past may cause subprime borrowers to underestimate their creditworthiness and accept the first terms offered without shopping around; they may have fewer options available to them because they have been traditionally underserved by financial institutions; they may have less awareness of options. Subprime lenders are less likely to be subject to governmental oversight. At least two-thirds of subprime mortgages are not subject to the oversight and reporting provisions of the most important regulatory act, the Community Reinvestment Act.

§ 101.09(c)(6) Prevalence of Predatory Lending in Minority Communities.

These factors have led to a dramatic increase of subprime lending in some minority communities. In these communities, subprime lending has made the American dream available to many who could not have obtained a mortgage a few years earlier, often because of discrimination, redlining and more restrictive lender estimates of perceived risk. In 2006, homeownership in America reached an all-time high of 69%, with much of the recent growth in poor communities and minority communities.

On the positive side for these communities, subprime lending has meant enlarged access to credit and some satisfaction of a pent up demand. This is borne out by a few more statistics. In 2005, more than 50% of all mortgages issued to

African-American borrowers were subprime; 40% of mortgages issued to Hispanic families were subprime. The disproportionate number of foreclosures among subprime mortgages will undoubtedly eventually mean a disproportionate number of foreclosures among minority borrowers.

One reason for this is that for many subprime mortgage brokers and mortgage originators, reward came come from the number of mortgages arranged and originated. "They worked hard to make as many deals as possible, as quickly as possible, regardless of the borrower's ability to meet the demands of the mortgage."[6] Subprime lending has also brought out the worst in many subprime borrowers, who have been accurately described as "utterly reckless" in their financial practices.[7]

§ 101.09(d) The Collapse. [Go To Main]

In 2006, approximately 20% of all new mortgages were subprime, and 25% of mortgage securitizations were back by subprimortgages. And a disproportionate number of these were originated in minority communities. How did this structure collapse?

"With the weakening of the home mortgage market, the drive to continue to issue mortgage-backed securities led many lenders to loosen their underwriting criteria and write riskier loans."[8] The result has been rising defaults, bankrupt lenders, devalued securities and nervous markets. Here are some of the causes:

1. Mortgage brokers and loan originators in the subprime market were typically much more sophisticated than the borrowers. The borrowers may not have realized how unfavorable certain terms were, that they could have bargained over some terms, or that they could have shopped around. Borrowers may have been too optimistic about their ability to refinance in difficult times, because real estate values were continuing to rise. Subprime brokers and lenders may have exploited borrowers' lack of sophistication.

2. Subprime brokers and lenders, and mortgage brokers and lenders generally, have functioned in a system that leads to faulty loans and imposes little accountability. These brokers and lenders are compensated according to the number of loans closed. Non-bank (and therefore non- or less-regulated) lenders made 50% of subprime loans in 2006. Mortgage brokers now have "unclear" loyalties. They bring the parties together but have no fiduciary duties to the borrowers; thus, they need have no concern about the soundness and viability of the mortgages, once the mortgages are successfully signed. According to one study, 50% of subprime loans involved a broker; only 28% of prime loans involved a broker. Another study showed that 64% of loans to African-Americans involved a broker; only 38% of loans to whites involved a broker.[9]

3. Before the financial crisis, if subprime borrowers did become aware of their unfavorable terms, they were often able to refinance under more favorable terms, because their property values were rising. Refinancing in strong real estate markets also helped avoid defaults. The strong real estate markets also prompted a continuing lending frenzy, which was further fueled by lowered underwriting criteria. This continuing stream of mortgages and refinances generated more fees for brokers and originators. "The interest of the brokers and originators is to enter into as many mortgages as possible and get them into the market as securities as soon as quickly as possible ... With an advantage in information, no accountability and little risk, brokers and originators in the subprime market were able to engage in aggressive [originating and packaging], leaving borrowers and holders of securities with no recourse and [eventually] devalued assets."[10]

4. More recent securitization agreements for mortgage-backed securities require originators to take back loans in early default. Originators are undercapitalized for such buybacks, and often go into bankruptcy when the number of defaulted loans is too heavy. A very large number of subprime originators have filed for bankruptcy or gone out of business.

5. If an originator cannot be forced to buy back a securitized loan in early default, the investors face difficulties in handling the default and taking steps to avoid foreclosure. The servicer is often not permitted to deviate from the strict terms of the securitized loans and thus is restricted in workout options for avoiding default.

6. In 2006, home prices and real property values generally stopped rising, then flattened and then fell dramatically in most areas. Interest rates rose. Higher interest rates and other more onerous loan terms commenced for many subprime borrowers. Defaults rose dramatically. Defaults hurt both those who had invested directly in mortgages, and those who invested indirectly through mortgage-backed securities. With mortgage-backed securities comprising such a large part of great institutional investing, great financial houses were threatened with collapse.[11] Some collapsed, and some had to be "rescued." All had to review their asset valuations, leading to a widespread halt of lending activity.

§ 101.09(e) The Persistence of Mortgage Fraud. [Go To Main]

Another unfortunate side effect of the subprime lending crisis has been a boom in mortgage rescue fraud and associated activities. Here are a few typical scenarios:

> Mortgage Rescue Fraud: The prelude to this scam is a landowner/borrower who becomes delinquent in mortgage or property tax payments, so that a foreclosure sale or tax sale threatens the owner with loss of title to the property. The scammer appears as a "rescuer," offering to buy the property to prevent the sale. The rescuing scammer pays the delinquency and a discounted purchase price on the property, and leases the property back to the former owner, who often fails to realize that he or she is now a tenant and not an owner. If rent payments under the lease become delinquent, eviction follows (with no rights or possibilities of redemption). Alternatively, the rescuing scammer lends the owner enough money to pay the delinquencies, receiving a lien in return. If foreclosure threatens again, the scammer, now holding a lien, is able to obtain the property through exercise of redemption rights.
>
> Unnecessary Financing Fraud: In this type of scam, the landowner is induced to refinance and use the cash for some purpose, which may or may not be especially urgent. The benefit for the lender or broker is to collect the fees and costs associated with the lending transaction. If the owner/borrower has poor credit, then even higher interest rates, loan origination fees and closing costs will be assessed.
>
> Predatory Lending Generally: This covers a wide range of schemes. A common form is bait and switch: the borrower is led to believe that the loan is a conventional, market-rate interest loan with ordinary closing costs. At the closing, papers for a much different loan have been prepared. Changes may include a short term adjustable interest rate, a higher interest rate, prepayment penalties, and numerous added and sometimes exorbitant fees. The fact that all of this may be contrary to federal and state law never comes to the attention of the ordinary borrower.

Other common practices under the general heading of predatory lending are

> Loan flipping, which consists of frequent refinancing loans, with excessive fees charged with each loan transaction.
>
> Excessive fees generally, which may include all fees not justified on economic grounds (that is, not justified what the services are really worth); financing of points; fees and penalties for pre-payment; financing credit insurance; extraordinary balloon payments; and lending amounts based on the borrower's total assets rather than on income and ability to pay.

Senior citizen fraud by undue influence. Senior citizens are particularly susceptible to persons seeking to induce a refinancing of the senior's property, which often has significant equity, and someone else is then able to use the borrowed money for personal purposes. The senior citizen homeowner may not be a willing or aware participant, but is induced to sign documents or is victimized by someone with power of attorney.

§ 101.09(f) Mortgage Fraud and Predatory Lending Legislation Among the States. Idaho Code § 30-1437

The web site for the National Conference of State Legislatures has a helpful chart of current state laws on predatory lending.[12] This information should be of interest to ordinary citizens as well as to lawyers and legislators. At this web site one will find entries for about 35 states and the District of Columbia which have enacted some form of predatory lending laws. This chart, in addition to giving the state statutory citations, also indicates whether the legislation addresses any of six critical issues: whether loan flipping is banned; whether negative amortization (payments too low to reduce the balance owing) is banned; whether pre-payment penalties are banned; whether financing or credit insurance is banned; whether some form of consumer credit counseling is required; and whether debt-to-income requirements or limits are imposed.[13]

§ 101.09(f)(1) Federal Pre-Emption.

Some stir among the state legislatures has been caused by the U.S. Supreme Court's decision in the case of Watters v. Wachovia Bank, N.A., issued on April 17, 2007.[14] The Court held that the mortgage business of a national bank, including its state-chartered mortgage company subsidiary, was not subject to the "licensing, reporting, and visitorial regimes of the several states," but rather is subject only to regulation by the federal Office of the Comptroller of the Currency. A wide range of federal legislation attempts to address problems of predatory lending. Among these are the Truth in Lending Act, the Home Ownership Equity Protection Act, the Equal Credit Opportunity Act, and the Federal Trade Commission Act.[15]

§ 101.09(f)(2) Important Issues in the State Legislation.

The main difficulty with state predatory lending legislation is the fine-tuning required to make sure the targeted bad actors are hit, but that the entire lending industry is not unduly regulated or even suppressed. The most vulnerable homeowners, and those disproportionately affected by predatory practices, are elderly, minority and low-income owners. State legislation may attempt to target those who prey on these vulnerable populations, or may consist of much broader regulations imposed on the entire lending community. This broad approach may permit victims to sue all parties connected with the transactions in any way, including lenders, trusts that issue securitized loans, and even investors in the securities backed by those loans, all of whom may be innocent of any actual fraud. This broader legislative approach may therefore produce the unintended consequence of inhibiting the flow of credit altogether, but especially to high risk or credit-impaired borrowers. The reduction in predatory lending infractions may come at the cost of many legitimate loans that are not made. The broader legislative approach is often characterized by unlimited assignee liability and vague compliance procedures, which may discourage mortgage lenders from those markets. Also, because of the *Watters* decision, this type of state legislation may eventually be pre-empted with respect to national banks, national savings associations and their respective state operating subsidiaries.

Other experts have concluded that some well-intended reform legislation can go too far. "Ironically, the Office of the Comptroller of the Currency (OCC) has stated that there exists substantial empirical evidence that certain 'anti-predatory statutes can impede the flow of mortgage credit, especially to low income and higher-risk borrowers, and that any reduction in predatory abuses resulting from these measures is probably achieved at the expense of many legitimate loans.' "[16]

Here are samples of issues faced in individual states:

Arizona

Arizona was a state without predatory lending legislation but did consider proposed legislation in the 2007 state legislative session. This state, like so many others, has been plagued by mortgage fraud. Here are a couple of examples from Phoenix. One investment company executive was convicted of taking money from investors to buy pre-foreclosure houses, and then failing to return the money when he didn't go through with the purchases. He is serving a five-year prison term. This same person is also named as a co-conspirator with five others in an indictment issued in March, 2007. These five persons consisted of a former title insurance escrow officer, two former bank loan officers, and two former housing counselors for the disadvantaged.

According to the indictment, these people sought out owners who were in default on FHA mortgages, and offered to buy the houses. Through HUD's pre-foreclosure program, these struggling homeowners would be helped in structuring a deal to have the properties appraised and then sold for as much as possible in the current market. The federal agency, which insured the mortgages, would then pick up the difference. The indicted defendants allegedly inserted themselves into the pre-foreclosure counseling process (that is, they posed as legitimate government officials), submitting documents to HUD making it appear that the houses were worth less than they actually were worth and then purchasing the houses for the deflated prices. The defendants would then sell the houses for much more money, leaving HUD to satisfy the mortgages. This is a sample of the kind of conduct Arizona would hope to address with its predatory lending legislation.

Illinois

Overbreadth has been at issue in Illinois. Illinois has recognized predatory lending as a major problem. Here are comments of a Chicago title company senior executive on the nature and scope of the problem in Illinois:

> The fraud may extend beyond the borrower to the end lenders. The media is replete with examples of first level lenders or brokers inflating borrowers' income statements, appraisals of land and suggesting higher sales prices with payments back after closing to both buyers and sellers, most of which may be categorized as mortgage fraud. The difference is often in perspective: a consumer sees predatory lending; a lender sees mortgage fraud.
>
> The opportunities for illegal gain with relatively low risk are so great that the "eastern European mafia" and Chicago street gangs have joined this activity. These activities have been documented by stories in *The Chicago Tribune* in November, 2005 and the *Chicago Sun-Times* and other media last year.
>
> The damage caused by these activities extends beyond the initial victims to the communities as a whole. When the foreclosures are over, often the buildings are abandoned. They are taken over by vagrants or used by street gangs for drug, weapon and other illegal activities. Many have burned, with the municipality having to bulldoze the remainder. The streets in those neighborhoods become unsafe. Property values decline. There is even a measurable decline in tax revenues due to the phenomenon, as assessed values for taxes decline.[17]

Illinois has enacted both a predatory lending act and a mortgage rescue fraud act. The High Risk Home Loan Act was enacted in 2003. One negative impact of that law was to diminish the number of high-risk loans being offered and closed. Another law required criminal and credit background checks and an exam for "loan originators." Twenty-nine thousand persons applied to be loan originators during the initial registration period, but 40% of those failed the exam and 800 failed to pass the background checks.

In 2006 the Illinois state legislature passed the Predatory Lending Database Pilot Program Act. Under this act, in the areas designated for the pilot program, essentially the southwest quarter of the city of Chicago, brokers were required to enter information about the prospective transaction into a database. If the numbers so indicated, the borrowers would be required to undergo mortgage counseling, for a standard fee of $300, to be paid by the broker. Closing agents would then ensure compliance with this and other procedures before being permitted by the computer to actually complete the transaction. For various reasons, the process was so cumbersome and the benefits so invisible that housing sales and the associated lending activity dropped by nearly 50% in the first few months the pilot program was in effect. In February, 2007, the governor of Illinois suspended the pilot program.

Illinois' Mortgage Rescue Fraud Act, as is typical of other states, exempts most lenders, lawyers and real estate brokers. There is no exemption for family members, who could get trapped into liability for noncompliance through innocent and well-intended efforts to help a relative in financial trouble.

New Jersey and Pennsylvania

One expert compared the respective predatory lending legislation in the neighboring states of Pennsylvania and New Jersey from the perspective of collateral damage to lending activity generally. Here is his assessment:

> The federal Home Ownership and Equity Protection Act (HOEPA) of 1994 ... classifies mortgage loans with relatively high interest rates and fees as potentially predatory, and imposes on them a wide range of consumer protections. Conduct also associated with predatory lending includes orally contradicting written disclosures within the loan document, balloon payments, loan flipping, unnecessary credit insurance, and making loans the lender knows cannot reasonably be paid back.
>
> However, not all of these practices necessarily equate to predatory lending on their face. Predatory lending can only occur where a customer is actually taken advantage of by a lender or mortgage broker, because a loan transaction which takes advantage of one consumer may actually be beneficial to another, depending upon that consumer's current situation and, more importantly, that consumer's knowledge of his or her options. This distinction is fundamental to a comprehensive understanding of the differences between Pennsylvania and New Jersey's anti-predatory lending laws, because while the Pennsylvania Act requires that a "lender purposefully engage in a pattern or practice of material violations," to be subject to civil liability, the New Jersey Act imposes strict liability without reference to the circumstances or context in which the loan is made."[18]

Indiana

Indiana is a state plagued with a relatively high number of foreclosures. Indiana excuses new homebuyers from property tax liability for one year, intending thereby to reduce defaults and foreclosures. Here are some features of Indiana's mortgage rescue fraud legislation:

Establishes notice requirements regarding foreclosures on real property.

Provides that a homeowner may rescind: (1) contracts with foreclosure consultants; and (2) foreclosure reconveyance agreements.

Provides that a homeowner may rescind a foreclosure reconveyance agreement at any time before midnight of the seventh business day after the homeowner's transfer of the interest in the real property that is the subject of the agreement.

Requires a homeowner who rescinds: (1) a contract with a foreclosure consultant; or (2) a foreclosure conveyance agreement; to repay certain amounts advanced in connection with the contract or the agreement not later than 30 days after the date of rescission.

Prohibits foreclosure consultants and foreclosure purchasers from certain actions.

Requires foreclosure purchasers to: (1) ensure that title to real property is reconveyed to the homeowner in a timely manner if reconveyance is required under a foreclosure reconveyance agreement; or (2) pay the homeowner an amount equal to 66% of the net proceeds from any resale of the property, if the property is sold within 18 months of entering into the agreement.

Requires a foreclosure purchaser to make a detailed accounting of the basis for the amount of payment made to the homeowner if the real property is resold within 18 months.

Provides that a violation of the statute concerning mortgage rescue protection fraud is a deceptive act that is actionable by the attorney general. Allows a homeowner to bring an action for damages for a violation of the mortgage rescue protection fraud laws.

Allows a court to award treble damages for a willful or knowing violation of the mortgage rescue protection fraud laws.

Requires the Indiana housing and community development authority to maintain a list of nonprofit organizations that offer counseling or advice to homeowners in foreclosure or loan defaults.

Excludes certain banks, trust companies, governmental entities, attorneys, and other persons from the law.

Utah

Utah's legislation in the area of predatory lending is called the "Utah High Cost Home Loan Act."[19] This is a rather brief batch of legislative provisions, but it contains quite a number of anomalies and surprises.

Extensive definitions attempt more precisely to limit the scope of which transactions, persons and institutions are impacted by this legislation. In particular, the legislation applies to any mortgage transaction fitting the definition of a "high cost mortgage."

A "high cost mortgage" is a mortgage that meets any one of several definitions. (1) It can be a borrower credit transaction that is a first mortgage on the borrower's principal dwelling and whose interest is more than 8% higher than treasury securities at a referenced point in time. (2) It can be a junior or subordinate mortgage on the principal dwelling that is more than 10% higher than the applicable treasury securities rate. (3) It can be a transaction whose total points and fees will exceed 8% of the total loan amount or $400, subject to consumer price indexing. These three items seem clearly related to the business of regulating high-cost mortgages. The fourth way to identify a high-cost mortgage does not: any loan made by or originated through a person licensed to conduct residential mortgage loans is swept into the definition of a high-cost loan.

Following the definitions, the Act lists several types of conduct that, in connection with high-cost mortgages, are prohibited or regulated in some way.

1. Prepayment penalties are not completely prohibited, but are limited in their timing and amount. A prepayment penalty for a high cost mortgage is prohibited if the mortgage is paid off by a loan from the same lender or an affiliate of the same lender that made the loan being paid off.[20]

2. Negative amortization (a schedule of payments that are too small to actually reduce the overall indebtedness) is prohibited.[21]

3. Financing points and fees may not exceed 8% of the total loan amount, unless certain additional disclosures are made, the language of those disclosures being stated verbatim in the statute.[22]

4. Single premium credit life insurance is prohibited.[23]

5. Encouraging default is prohibited (a provision made applicable to all loans, whether or not defined as high-cost home loans).[24]

For violation of any of these provisions, the Act specifies no penalties or other consequences. One is forced to conclude under these circumstances that the main consequence of a violation is the unenforceability of any provisions in mortgage transactions that are in violation of these statutory prohibitions. A possible additional consequence is a challenge to violators' licensure under the Residential Mortgage Practices Act.[25]

In addition to these prohibitions, the act imposes several affirmative duties in connection with high-cost loans. One duty relates to an arbitration clause, if any is included, which must meet the standards in the Utah Arbitration Act.[26] Failure to meet this requirement invalidates the arbitration clause.

Another affirmative duty is to fill in all "lines, figures, forms, and blanks that regulate, govern, control, and authorize a mortgage ... before the documents are signed."[27] Again, no penalties are mentioned for violation of this provision, but presumably any borrower who had been induced to sign a mortgage document in blank would potentially have a cause of action for rescission.

Lenders are also required to provide copies of all documents,[28] and to give notice of all relevant available consumer information to borrowers.[29] No penalties are mentioned for failure to meet these requirements. On the contrary, the act declares that failures to meet those disclosure requirements or the disclosure requirements that ameliorate restrictions on financing points and fees "does not affect the enforceability of the loan or any of its terms."[30] Presumably, if such failures were part of a pattern of deceit or other misconduct in a high-cost mortgage transaction, that would lend weight to a plaintiff's claims for rescission or damages.

One issue relevant to state legislation in this area is whether the laws impose strict liability for violations. Predatory lending legislation in other jurisdictions that may be viewed as overly broad often imposes such liability without negligence, so that some legitimate lending activity is discouraged or even prohibited. In the case of the Utah High Cost Home Loan Act, no provision seems to limit violators to those who intend harm or who are negligent, so in this sense the Act targets conduct regardless of the associated intent or consequences. However, the Act also does not describe or impose any kind of liability, penalty or consequence for violations, so one could hardly say that this is an act based on strict liability. It may be strict, but there is no liability. By way of constructive contrast, the Indiana legislation prescribes specific consequences for any violations.

Under these circumstances, probably the main practical reasons for lenders and brokers to observe the commands of the Utah High Cost Home Loan Act are that its requirements are inherently fair and to forestall borrower challenges to the validity of the transactions.

change § 101.09 Bibliography to § 101.10 Bibliography.

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CHAPTER 102 MECHANICS' LIENS 1

12-102 Thompson on Real Property, Thomas Editions 102.syn

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CHAPTER 102 MECHANICS' LIENS 1

12-102 Thompson on Real Property, Thomas Editions § 102.01

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§ 102.01 Definition and Function.

§ 102.01(a) Background.

§ 102.01(a)(1) Definitions.

A *mechanics' lien* is a security interest created by state statute "for the purpose of securing priority of payment of the price or value of work performed and materials furnished in erecting, improving, or repairing a building or other structure, and as such attaches to the land as well as buildings and improvements erected thereon." n2 Thus, mechanics' liens provide contractors, subcontractors, laborers and material suppliers a lien on property they improve as a means of collecting money they are owed for having contributed to the improvement. An *improvement* is a "valuable addition made to property ... or an amelioration in its condition, amounting to more than mere repairs or replacement, costing labor or capital, and intended to enhance its value, beauty or utility." n3

These days the term "mechanic" refers to car repairers, but in colonial times it referred to any manual worker or artisan, and included all skilled construction workers such as carpenters and masons. n4 Statutes define who is eligible to claim a mechanics' lien. n5 Although most states allow contractors other than the prime contractor to attach a mechanics' lien, other states protect the homeowner by giving only the prime contractor the right to attach such a lien. n6 Statutes often purport to protect "contractors." Although you may be able to recite good working definitions of terms such as "contractor" and "subcontractor," never assume that you know what those words mean in a particular mechanics' lien statute. For example, the Pennsylvania mechanics' lien statute defines a "contractor" to include under some circumstances materialmen, architects and engineers. n7 On the other hand, Florida's definition of "contractor" expressly excludes materialmen. n8

Two jurisdictions restrict lien rights to two tiers: (1) the prime contractor and (2) those contracting with the prime contractor. Other states extend protection to three or four tiers, or to all providers of goods and services. The Uniform Construction Lien Act would protect all subcontractors, but only those material suppliers who can prove their materials were intended for the particular work of improvement may attain a mechanics' lien. n9

§ 102.01(a)(2) History.

Reconstructing California's Mechanics' Lien Laws n10

Mechanics' lien laws form an integral part of American jurisprudence, and are literally tied to the development of this country. In 1791, this nation's first mechanics' lien law was enacted by the Maryland General Assembly as a means to facilitate the construction of the new capital city of Washington. n11 Several sister states followed suit by enacting their own mechanics' lien laws. n12 Presently, all fifty states, including the District of Columbia and Puerto Rico, have enacted some form of mechanics' lien statutes. n13

[Mechanics' lien laws are usually creatures of statute, but some are enshrined in state constitutions. n14]

Although there appears to be no direct evidence as to the specific cause which gave rise to the system of mechanics' lien laws enacted throughout the United States, n15 several theories have been advanced to explain their origin. For example, it has been suggested that mechanics' lien laws owe their existence, at least in part, to the analogous provisions of early maritime law which granted a lien against a ship to seamen who furnished material or supplied labor to the vessel. n16 Some believe that mechanics' lien laws developed as an outgrowth of the common law lien granted to artificers who increased the value of chattels committed to their possession; n17 while still others contend that mechanics' lien laws took their shape from civil law, which has long recognized a lien right in the builder. n18 Most legal theorists seem to agree that mechanics' lien laws, as a whole, were adopted out of a desire to build up a young and growing nation, and to induce the aid of laborers, who were often poorly able to sustain losses incident to business, and were particularly liable for the frauds of the dishonest. n19

Finally, it may be inferred that mechanics, at least initially, were given priority treatment because of this newly emerging nation's desire to build up cities, coupled with the capital shortages this country faced during the latter part of the 18th century, and continuing into the 19th century. n20 Thus, without the assistance of a strong private banking system, n21 it is likely that the government and private developers primarily relied upon mechanics for credit.

§ 102.01(b) Function.

The mechanics' lien can best be described as a form of security for improvements made to the liened property. n22 Like a trust deed, judgment lien or attachment lien, a mechanics' lien is an interest in property held to secure the payment of an obligation. The obligation arises when a property owner fails to pay the mechanic for the improvements made according to their contract. The unpaid laborer or materialman obtains security against the property to ensure payment through a mechanics' lien. Suppliers with no lien rights, or who fail to perfect their rights under state law, still possess the right to sue on their contracts as unsecured creditors. n23

Mechanics' liens provide contractors, subcontractors and material suppliers an effective means of collecting money they are owed. n24

A mechanics' lien is foreclosed by a court-ordered sale of the property after the court determines the validity and amount of the mechanics' claim and its lien priority. The mechanic is paid from the sale proceeds.

The right to record and foreclose a mechanics' lien affects the vital interests of owners, contractors, subcontractors, architects, engineers, material suppliers, lenders, subdividers, developers and title companies.

§ 102.01(c) The Risk for Developers and Construction Lenders.

The risk for developers and construction lenders of a mechanics' lien proving superior to their interests in the property is significant. That is why developers and lenders usually insist the general contractor must keep the property free of liens and supply owners and lenders with a list of all potential mechanics' lienors and satisfactory evidence that they have been paid, along with signed lien waivers. The construction lender is particularly concerned because if the priority of

the mechanics' liens relates back to a date before the construction loan was recorded, it could be superior to the construction lender's lien. n25

§ 102.01(d) Rationale.

The classic rationale behind mechanics' lien laws is the theory of unjust enrichment. n26 Laborers and materialmen are deemed worthy of lien protection since they increased the value of the property by supplying labor and materials in good faith. A landowner whose property has been improved at her request should not be able to enjoy the benefit of this improvement without paying for it; hence, it is only fair that the property stand as security for the debt incurred because of the improvement. n27 A landowner who does not pay those who enhance the value of her property should fare no better than a tenant who would be evicted for not paying rent or a defaulting car buyer who would lose her car if she stopped making payments. Accordingly, a property owner who does not pay the improver of her property risks incurring a mechanics' lien on the property and, with it, subsequent foreclosure on that lien.

"In so far as the acts only give a lien in favor of a contractor who has a direct contract with the owner (prime contractor), the laws are not particularly unique." n28 In one significant respect, mechanics' lien laws are an anomaly. They extend lien rights to those with whom the property owner had no dealings, such as subcontractors and material suppliers.

Generally, a seller of goods or services not paid by the buyer has no claim against subsequent purchasers of those goods or services. In fact, an unpaid seller has a claim against goods still in the hands of the buyer only if the buyer agrees to give the seller a security interest in the goods. n29

Mechanics' liens are "a kind of boot-strap finance ... almost a subsidy, almost a kind of government credit to encourage the building and improvement of land." n30 These laws encourage contractors, subcontractors and material suppliers to provide their work and materials on credit to owners and developers. Material suppliers and contractors finance a "work of improvement" by deferring payment and extending credit to owners, contractors and subcontractors. They rely on mechanics' liens on the improved property to secure payment instead of looking exclusively to the creditworthiness of those with whom they contract.

Mechanics' liens also "protect subcontractors from the possible financial instability of their general contractors by imposing upon property owners a limited duty to ensure that subcontractors are paid." n31 This policy encourages owners and lenders to oversee the use of construction funds and construction loan proceeds, to secure lien releases and issue joint checks payable to the ultimate supplier or subcontractor. Sometimes, however, the owner or lender ends up paying for the same service twice since under many state statutes the owner is responsible for making payment on the mechanics' lien even though she may have already disbursed payment to the contractor, and never contracted directly with the liening subcontractor. n32

> [I]n many cases, the law protects not against a windfall to an owner as much as against the dishonesty or insolvency of the prime contractor whom the owner selects to coordinate construction activity on the project. Thus, if not in original formulation, then at least in present application, mechanics' lien legislation is a response to the hazardous nature of the business and the perilous financial position in which many construction companies all too often find themselves. n33

Opponents of mechanics' lien laws see no reason to justify the creation of statutory liens. The late Professor Allison Dunham, in analyzing why Colorado's Mechanics' Lien Laws weren't repealed observed: "[T]he lumber yards could give good credit and sell their accounts receivable if they could assure the bank that the accounts receivable were secured by mechanics' liens." n34 Perhaps creditors should be more cautious and not be able to rely on mechanics' liens to secure payment. Often, the practical value of a mechanics' lien depends on how well conceived and efficient the project is, what stage of completion it reaches before the owner defaults, and how the market views the project at the

date of foreclosure. These are imponderables which make mechanics' liens a second-best substitute for responsible credit policies.

The lien laws not only secure the unpaid claimant, they also protect the entire construction industry, one of the most bankrupt-prone of all endeavors, from the domino effect of a contractor's nonpayment. A major contractor who goes unpaid may be unable to pay the framing contractor who in turn, may be unable to pay the material supplier who extended lumber on credit. If the job is big enough, and the contractor, subcontractors and material suppliers vulnerable enough, a developer's bankruptcy could lead to severe financial stress for many others.

> Labor and materials contractors are in a particularly vulnerable position. Their credit risks are not as diffused as those of other creditors. They extend a bigger block of credit, they have more riding on one transaction, and they have more people vitally dependent upon eventual payment. They have much more to lose in the event of default. There must be some procedure for the interim protection of contractors in this situation. A contractor must have some protection against subsequent bona fide purchasers between the time he completes the work and the time he gets a judgment. n35

§ 102.01(e) Mechanics' Lien Is for the Value of the Work.

The mechanics' lien is generally only good for work done or materials supplied which are incorporated into a building. n36 A bill for personnel training, for instance, or for shipping chemicals or beverages to a building would not be lienable. n37

The unpaid lienor is entitled to the contract price except when the value of the work is less than the contract price. A freely entered, negotiated contract price is good evidence of the value of the work to the owner. n38 The lien can never exceed the "reasonable value" of the work or materials on the day the lien is filed. n39

In some states laborers or material suppliers without contracts are able to lien property on the basis of quantum meruit. n40

Quantum meruit is an equitable action based on a contract implied in law which requires: (1) a benefit conferred upon the defendant by the plaintiff; (2) an appreciation or knowledge of the benefit by the defendant; and (3) the acceptance or retention by the defendant of the benefit under such circumstances as to make it inequitable for the defendant to retain the benefit without payment of its value. n41

Mechanics' lienors do not get to lien for all the damages they could collect in a contract action. Excluded from their lien claims are "delay, acceleration and impact damages, attorneys' fees, and certain types of profit and overhead." n42 The purpose of mechanics' liens is to "secure reimbursement for services and materials actually contributed to a construction site, not to facilitate recovery of consequential damages ... ." n43

§ 102.01(f) Mechanics' Lien Laws Reverse the Doctrine of Accession and Can Result in Owners Forfeiting the Value of Their Land.

Sellers of appliances have the option of repossessing any chattel sold on credit. Car repairers can keep the car until the owner pays the repair bill. Personal property is removable and not subject to mechanics' liens unless so attached to the site as to have become a fixture n44 Thus, a mechanics' lien does not reach the homeowner's automobile parked in the garage or her piano in the living room. If the improver can remove the improvement from the land with no damage to either the improvement or the land, the improver is allowed to do so. n45 But those who damage the improvements or the land have no right to reclaim their materials because, under the ancient "law of accession," personal property affixed to the land belongs to the property's owner. n46

Although mechanics' lien laws prevent the manifest unfairness of unpaid contractors enriching a landowner, these laws sometimes create a countervailing inequity. In most states, the owner of the site risks losing the value of the land in a mechanics' lien foreclosure sale even though some of that value was there before the mechanics' lienor came along.

Theoretically, if the site is worth more than the improvements on it, that value should result in a foreclosure sale price greater than the mechanics' lien. If the project was halted before completion, though, potential bidders may be reluctant to assume the risks of an already failed project. In a few states, the inequity of a site owner forfeiting site value to a mechanics' lienor is avoided by allowing the lienor to assert priority only up to the value of the improvement, not to the value of the land. n47 Under these statutes, the court may determine the value of the site and set that sum aside from the mechanics' lien foreclosure sale proceeds for the benefit of the landowner. In most other states no such set-aside takes place. The owner of the site may forfeit pure site value in a mechanics' lien foreclosure action. However, when the improvement is located on a vast tract of land, the lien may not attach to the entire site but only to "so much as may be required for the convenient use and occupation thereof" n48 or "only that part of the surrounding tract that is considered reasonably necessary to the economical intended use of the building." n49

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LEXIS: law w/2 accession w/30 mechanic! lien!

§ 102.01(g) Constitutionality of Mechanics' Lien Laws.

Mechanics' liens have been challenged as violations of federal and state constitutional due process.

The constitutional challenge to the mechanics' lien law is based on the fact that the lienor can cloud the owner's title by commencing work and recording a lien which involves no more than filing a piece of paper at the local recording office. The owner has no right to know about the recordation beforehand in order to launch a speedy court challenge to expunge the lien if the owner deems the underlying claim to have been invalid.

Mechanics' liens could attach at any of eight times under most mechanics' lien laws. The first opportunity an owner has to challenge the lien in court is when the lienor initiates a lawsuit to foreclose the lien. This occurs long after the lien "attaches" by law in most states.

T1: When O and K enter their contract.

T2: When K begins buying materials, spending money or incurring other expenditures in reliance on the contract (such as by turning away other work).

T3: When K goes to O's property and commences work.

T4: When K tells O he reserves the right to file a mechanics' lien if O does not pay on time (preliminary notice).

T5: When K completes the work.

T6: When K records a mechanics' lien.

T7: When K files a lawsuit to foreclose the lien, serving and naming O as defendant.

T8: When K wins the lawsuit.

Most unsecured judgment creditors can only perfect a lien on the debtor's assets at T8. A purchaser under a

purchase-and-sale agreement or an installment contract vendor, because they have an interest in the security property that predates the breach, get the benefit of T7 attachments. Only mechanics' lienors are given a T3 attachment date despite the fact that the first judicial hearing on the validity of the lien occurs at T7.

In California, for example, a foreclosing mechanics' lienor must record a notice of *lis pendens*. The property owner under the *lis pendens* statute may bring an action to expunge. In an expungement suit, the *lienor* has the burden of establishing the "probable validity" of the lien. The mechanics' lienor who fails to establish the probable validity of the lien runs substantial risk of having to pay the property owner's legal fees. n50 One exception, mentioned earlier, is in Maryland, the birthplace of mechanics' liens in the U.S. The Maryland Supreme Court struck down that portion of Maryland's mechanics' lien law purporting to create a lien relating back to the visible commencement of the project. Under the Maryland court's constitutional guidance, mechanics' liens in that state relate back no further than the time "the claimant prevails either in a suit to enforce the claimed lien or in some other appropriate proceeding providing notice and a hearing (i.e., a declaratory judgment action)." n51 That is T8.

Courts in other states see no problem in the T3 or T6 attachment dates. Courts explaining the conclusion that the mechanics' lien laws raise no insurmountable due process barrier usually start with the following factors, taken from U.S. Supreme Court opinions, for determining the constitutionality of prejudgment attachment statutes:

(1) Is there a "state action," making the *14th Amendment* applicable?

(2) What private interest is affected? Is a "significant property interest" affected?

(3) Do the procedures authorizing the lien risk an "erroneous deprivation" of a property right? Would additional safeguards have "probable value" in avoiding the risk of erroneous deprivation?

(4) Does the party seeking the prejudgment attachment have an ancillary interest in the property?

Here is how state courts apply these factors to the mechanics' lien law situation:

(1) State action is universally held to be present in the mechanics' lien situation. State laws authorize the creation and recordation of mechanics' liens. There is nothing startling here since the lien is purely a statutory (or state constitutional) creation.

(2) State courts differ on whether a "significant property interest" is disturbed by the recordation of a mechanics' lien. Some courts see the deprivation as sufficient to merit close evaluation of the constitutional challenge n52 because a mechanics' lien clouds the property owner's title, impairs the owner's ability to sell or mortgage, and taints her credit rating. The lien could even place her in technical default of an existing mortgage if the mortgage has an insecurity clause, n53 or in default of a construction loan agreement if the owner is required to keep the property lien free.

A number of courts have dismissed constitutional "due process" challenges to mechanics' liens, seeing mechanics' liens as involving only minimal deprivations of property. The deprivation is said to be minimal because the owner continues to enjoy the use, possession and right to sell despite the lien. n54

(3) The risk of an erroneous deprivation comes because the lien claimant can attach, repossess or lien property without even so much as an affidavit and complaint justifying the deprivation, reviewed *ex parte* by a judge. If the lien claimant has to post a bond, the risk of erroneous deprivation is reduced. n55

(4) Courts are more tolerant of prejudgment attachment when the attaching party has an ancillary interest in the property. One example is when the vendor of goods is under an installment sale contract. n56 The U.S. Supreme Court upheld prejudgment attachment laws triggered by *ex parte*, judge-reviewed affidavits when the attaching party was an

installment contract vendor but not when the party seeking to garnish the debtor's wages was an unsecured general creditor. n57

The bottom line is that even in states where courts see the deprivation resulting from the recordation of the lien as significant, mechanics' lien laws have survived constitutional challenges in state courts more often than not. However, the one statute the U.S. Supreme Court upheld most recently, the Connecticut statute, permitted prejudgment attachments of real property only when a claimant submits an affidavit of probable cause to a judge, including information showing a likelihood the claimant will prevail. n58 No prior notice and hearing was provided but post-attachment notice was required and the debtor was given an opportunity for a post-attachment hearing.

Most mechanics' lien laws do not require the lienor to submit an affidavit of probable cause to a judge showing the likelihood the claimant will prevail. No prompt post-attachment notice is required, and there is no statutory opportunity for a post-attachment hearing. n59

State courts upholding mechanics' lien laws point to the strict time limits in which liens must be filed or lost and the time frame in which, after filing, the lien claimant must initiate a foreclosure action or lose the lien. n60 Owners are forewarned that their state's law may require contractors and subcontractors to provide in their agreements a prominent warning in oversize type which clearly states that failure to pay may lead to a mechanics' lien against the project. n61 Statutory preliminary notice requirements also impose on those intending to preserve their lien rights a duty to notify owners of that intent shortly after commencing work on the site.

Mechanics' lien statutes offer a variety of ways owners and lenders can protect themselves against a lien's impact. Owners can usually have the lien released entirely by providing a bond. They may also petition for injunctive relief. n62 Finally, mortgage lenders, the main contenders for priority over mechanics' liens, may obtain title insurance that they, in fact, possess a lien free of such liens.

COMPUTER-ASSISTED RESEARCH

LEXIS: due process w/30 mechanic! lien!

FOOTNOTES:
(n1)Footnote 2. Black's Law Dictionary 981 (6th ed. 1990).

(n2)Footnote 3. Black's Law Dictionary 757 (6th ed. 1990). *North Carolina ex rel. L.C. v. A.W. ex rel. R.W., 713 N.E.2d 775 (Ill. App. 1999)* (a lien is a legal claim upon property for payment of a debt; thus there must be a debt for there to be a lien); *See also Dorr v. Sacred Heart Hosp., 597 N.W.2d 462 (Wis. App. 1999)* (a lien presupposes the existence of a debt); *Montgomery County v. May Dep't Stores Co., 721 A.2d 249 (Md. 1998)* ; *Haz Mart Response, Inc. v. Certified Wastes Services Ltd., 910 P.2d 839 (Kan. 1996)* ; *Fairfax v. Ramirez, 982 P.2d 375 (Idaho App. 1999)* .

(n3)Footnote 4. *See* § 102.03(a) & (b), *infra*, for a detailed discussion on who may secure a mechanics' lien.

(n4)Footnote 5. *High Plains Oil, Ltd v. High Plains Drilling Program 1981, Ltd., 946 P.2d 1382 (Kan. 1997)* (Authority for liens on personal property must be created by statute and facts in any case must establish the statute's applicability or no lien exists); *see also Chapman v. Wells, 557 N.W.2d 725 (N.D. 1996)* ; *Fairfax v. Ramirez, 982 P.2d 375 (Idaho. App. 1999)* ; *Winkler Const. Co., Inc. v. Jerome, 734 A.2d 212 (Md. 1999)* ; *Gulfside Properties Corp. v. Chapman Corp., 737 So. 2d 604 (Fla. App. 1999)* .

(n5)Footnote 6. *See* Marion W. Benfield, Jr., *The Uniform Construction Lien Act: What, Whither, and Why, 27 Wake Forest L. Rev. 527, 530 n. 20 (1992). See, e.g., Tenn. Code Ann. § 66* 11 14 (stating that only the prime contractor can attach a mechanics' lien against a homeowner).

(n6)Footnote 7. *See Pa. Stat. Ann. tit. 49, § 1201(4)*.

(n7)Footnote 8. *Fla. Stat. Ann. § 713.01(2)*.

(n8)Footnote 9. U.C.L.A. § 204; 7 U.L.A. 148, 152.

(n9)Footnote 10. Greg Swedelson, unpublished paper on file with author.

(n10)Footnote 11. Act of the General Assembly of Maryland, c.45, § 10 (1791). The first mechanics' lien law was said to be enacted at the urging of Thomas Jefferson and James Madison. *See Barry Properties v. Fick Bros. Roofing Co., 353 A.2d 222, 224 (Md. Ct. App. 1976)* ; *Freeform Pools v. Strawbridge, 179 A.2d 683, 685, n.1 (Md. App. 1962)* .

(n11)Footnote 12. *See* Henry Farnam, Chapters In The History Of Social Legislation In The United States To 1860 155 (Carnegie Institute of Washington 1938) (tracing the geographical spread of mechanics' lien laws in the United States).

(n12)Footnote 13. *See* Comment, *The Constitutional Validity of Mechanics' Liens Under Due Process Clause , 55 B.U. L. Rev. 263, 268, n.31 (1975).*

(n13)Footnote 14. California's mechanics' lien law was added to the California Constitution in 1879: "Mechanics, persons furnishing materials, artisans, and laborers of every class, shall have a lien upon the property upon which they have bestowed labor or furnished material for the value of such labor done and material furnished." Cal. Const. art. XIV, § 3 (1992). In carrying out the constitutional mandate, the legislature can't deny, destroy, or hamper the exercise of lien rights, *Hammond Lumber Co. v. Moore, 286 P. 504 (Cal. App. 1930)* , but it does have the power to prescribe reasonable requirements for enforcement, *Hughes Bros. v. Hoover, 3 Cal. App. 145 (Cal. Ct. App. 1906)*, including the requirement that the claimant file a written claim in a prescribed manner. *Wm. R. Clarke Corp. v. Safeco Ins. Co. of America, 938 P.2d 372 (Cal. 1997)* ("Pay if paid" provision in construction subcontract, whereby payment by owner to general contractor was condition precedent to general contractor's obligation to pay subcontractor for work subcontractor performed, was unenforceable as contrary to public policy, as provision effected an impermissible indirect waiver or forfeiture of subcontractor's constitutionally protected mechanics' lien rights in event of nonpayment by owner.); *Capitol Steel Fabricators, Inc. v. Mega Constr. Co., Inc., 58 Cal. App. 4th 1049 (1997)* (Pay when paid clause of school public works construction subcontract which unambiguously deferred subcontractor's payment until there had been transfer of moneys from school district to contractor violated public policy by effecting impermissible indirect waiver or forfeiture of subcontractor's constitutionally protected mechanics' lien rights in event of nonpayment by property owner, and, thus, was not enforceable.); *Koudmani v. Ogle Enters., Inc., 47 Cal. App. 4th 1650 (1996)* (Section of California Constitution conferring on laborers and materialmen a right to assert mechanics' liens for value of labor and material provided in improvement of real property gave such laborers and materialmen only an inchoate right to a lien, which was meaningless unless it was exercised by recording claim of lien.).

(n14)Footnote 15. Samuell Phillips, A Treatise On The Law Of Mechanics Liens § 6 (3rd ed. 1893).

(n15)Footnote 16. *See Id.*; Matthew E. Marsh, California Mechanics' Lien Law (5th ed. 1990).

(n16)Footnote 17. *See* Comment, *The Constitutional Validity of Mechanics' Liens Under Due Process Clause , 55 B.U. L. Rev. 263, 268, nn.28-29 (1975).* The common law artisan's lien gave one who took a chattel into his possession in order to repair or improve it, the right to keep the unfinished product until payment was rendered.

(n17)Footnote 18. *See* Louis Boisot, A Treatise On Mechanics' Lien Laws § 5 (1897).

(n18)Footnote 19. *See id.* at § 4 (explaining that the American system of mechanics' liens was a spontaneous growth, originating in the needs of a new and rapidly growing country); Farnam, *supra* note 12 ; *Phillips, supra* note 15 .

(n19)Footnote 20. *See* Arthur Nussbaum, A History Of The Dollar, Revolution And Reorganization 41 (1957) (claiming that in 1786, the scarcity of paper money in part led to the insurrection known as Shay's Rebellion). *See also* James Hurst, A History Of Money In The United States 1774-1970 61 (1973) (citing the scarcity of fluid capital which was predominant throughout the North Atlantic coast in the 1820s).

(n20)Footnote 21. *See* Arthur Nussbaum, A History Of The Dollar, Revolution And Reorganization 46-52 (1957) (although private banks were erected in the 1780s, it wasn't until 1791 that a bank was created so as to be accessible to the public at large, and to serve community needs.).

(n21)Footnote 22. *See e.g., Haz-Mat Response, Inc. v. Certified Waste Servs., Ltd., 910 P.2d 839 (Kan. 1996)* (stating that Kansas' mechanics' lien statute was "for the purpose of providing effective security to any persons furnishing labor, equipment, material, or supplies used or consumed for the improvement of real property under a contract with the owner"). For comment *see* Julian Johnson, *Debtor-Creditor: When is an Improvement not an Improvement? Interpretation of the Kansas Mechanics' Lien Statute, 36 Washburn L.J. 499 (1997).*

(n22)Footnote 23. *AABCO Sheet Metal Co., Inc. v. Lincoln Center For Performing Arts, Inc., 663 N.Y.S.2d 490 (N.Y.Sup. 1997) aff'd, AABCO Sheet Metal Co. v. Lincoln Ctr. for Performing Arts, Inc., 249 A.D.2d 39 (N.Y. App. Div. 1998)* (Primary purpose underlying enactment of Lien Law, which makes property owner or general contractor a trustee for the benefit of unpaid subcontractors and materialmen, is to ensure that laborers and materialmen are paid); *Bee Spring Lumber Co. v. Pucossi, 943 S.W.2d 622 (Ky. 1997)* (Purpose of mechanics' and materialmen's lien statute was to provide suppliers and laborers of building materials some financial security in collecting their contract price by allowing real property to be encumbered for amount of debt); *Duraflex Sales & Serv. Corp. v. W.H.E. Mech. Contractors, 110 F.3d 927 (2d Cir. 1997)* (Goal of Connecticut mechanics' lien statute is to provide remedy in form of security for contractor's labor and materials); *Canron Corp. v. City of New York, 674 N.E.2d 1117 (N.Y. 1996)* (Primary purpose of New York Lien Law is to ensure that those who have directly expended labor and materials to improve real property, or public improvement, at direction of owner or general contractor receive payment for work actually performed); *In re Mueller, 215 B.R. 1018* (8th Cir. BAP (Minn.) 1998) (under Minnesota law a lien does not constitute an interest in land).

(n23)Footnote 24. *Anthony Julian Railroad Construction Co., Inc. v. Hay Ellen Drive Associates, 717 A.2d 294 (Conn. App. 1998)* (property execution is not the proper remedy for foreclosing a mechanics' lien).

(n24)Footnote 25. Ronald J. Mann, *The First Shall Be Last: A Contextual Argument for Abandoning Temporal Rules of Lien Priority, 75 Tex. L. Rev. 11 (Nov. 1996);* Marjorie Ramseyer Bardwell, What Title Insurance Does Cover--The Big Print, 416 PLI/Real 161, 168 (Nov. 1996) (lack of priority of the lien of the insured mortgage over any statutory lien for services, labor or material); Michael W. Homer & David J. Burns, *Utah Construction Law: Recovery for Nonpayment, 9 Utah B.J. 8 (May 1996)* (Should "the commencement to do work or furnish materials on the ground for the structure or improvement" occur before a lending institution records its mortgage or deed of trust, all the mechanics' liens have priority over the lender. This is true even if the deed of trust or mortgage was executed prior to the commencement of work but "was unrecorded at the time the building, structure or improvement was commenced, work begun, or first material furnished on the ground."); Lester M. Bliwise, *Mortgage Lending Documentation* 418 PLI/REAL 9, 39 (May 1997) (How could lenders protect themselves--if Borrower fails to complete the Project when and as required by the Loan Agreement or if, at any time, the Project is subject to any Mechanics' Lien, then Guarantor shall fully indemnify Lender); Oscar H. Beasley, *Highlights of Residential and Commercial Coverage for Lenders and Owners; Exhibits,* 416 PLI/REAL 191, 222 (Nov. 1996) (Mechanics' lien); *Duraflex Sales & Serv. Corp. v. W.H.E. Mech. Contractors, 110 F.3d 927 (2d Cir. 1997)* (Under Connecticut law, as predicted by federal Court of Appeals, priority of intermediate mechanics' lien would be neither impaired nor improved by partial subordination of first mortgage lien in favor of third mortgage lienholder); *Eyster v. S.A. Birnbaum Contracting, Inc., 662 N.E.2d 201 (Ind. App. 1996)* (Date on which mortgage is recorded is dispositive for determining its priority with respect to a mechanics' lien). *But see, In re* 455 CPW Assocs., 192 B.R. 85 (Bankr. S.D.N.Y. 1996) (Purchase money mortgages are exempt from operation of New York Lien Law provided that mortgage is recorded prior to filing of lien and that instrument of

conveyance contains trust fund covenant); *Old Colony Ventures I, Inc. v. SMWNPF Holdings, Inc., 924 F. Supp. 1076 (D.Kan. 1996)* (Although original mortgage which secured future advances to project owner and was filed before contractor's work begun had priority over contractor's mechanics' lien, mechanics' lien had priority over advances made pursuant to modification increasing the loan-limit of mortgage); *Ohio Farmers Ins. Co. v. Commercial Ctr. Contrs. Corp., 676 N.E.2d 928 (Ohio App. 1996)* (Surety's mechanics' lien on shopping center did not have priority over lender's mortgage lien, which was recorded before the filing of the mechanics' lien); *Wade v. Farnsworth, 917 P.2d 967 (N.M. App. 1996)* (Statute preventing attachment of materialmen liens or subcontractor liens if property owner pays "all and any" of contract amount to general contractor before liens are filed requires that owner pay all amounts still owing under original contract and any valid modifications to contract; partial payment to contractor is not sufficient to discharge liens that are subsequently imposed on property); *Ohio Farmers Ins. Co. v. Commercial Ctr. Contrs. Corp., 676 N.E.2d 928 (Ohio App. 1996) , appeal dismissed, Ohio Farmers Ins. Co. v. Commercial Ctr. Contr. Corp., 77 Ohio St. 3d 1473 (1996)* .

(n25)Footnote 26. "Ancient authority enunciates the purpose of the mechanics' lien: to prevent unjust enrichment of a property owner at the expense of a laborer or material supplier." *Industrial Asphalt v. Garrett Corp., 226 Cal. Rptr. 17, 19 (Cal. App. 1986)* . However, unjust enrichment and mechanics' liens are two separate remedies. Unjust enrichment results in an implied-in-fact contract in which the improver, who did not have a contractual relationship with the owner, lender, or contractor, may be able to recover in *quantum meruit* if the other party was unjustly enriched. A mechanics' lien is a statutory remedy granted when the owner contracts for an improvement in which the mechanic performs services or supplies goods, but does not pay for the improvement. *Ayotte Bros. Constr. Co. v. Finney, 680 A.2d 330 (Conn. App. 1996)* (Evidence established that owner-lessor whose lease contemplated construction of building in connection with lessee's business was unjustly enriched as result of improvements that subcontractor made on property, notwithstanding owner's contention that option to purchase clause in lease prevented her from being unjustly enriched; even if lessee exercised option, owner would be benefitted because sale price would reflect subcontractor's work that enhanced property's value); *DCB Constr. Co., Inc. v. Central City Dev. Co., 940 P.2d 958 (Colo. App. 1996)* (Claim based on "contract implied in law," or "unjust enrichment," is not based upon any contract, as such; obligation arises not from consent of parties, as in case of contracts which are express or implied in fact, but from law of natural, immutable justice and equity); *EFCO Corp. v. U.W. Marx, Inc., 124 F.3d 394 (2d Cir. 1997)* (Under New York law, principle that landowner is not liable to subcontractor for work performed on owner's property in furtherance of subcontract in absence of agreement to pay general contractor's debt or circumstances giving rise to such obligation is equally applicable when parties are primary contractor and second-tier subcontractor rather than landowner and subcontractor). H. Hugh McConnell, *Distinguishing Quantum Meruit and Unjust Enrichment in the Construction Setting, 71 Fla. B.J. 88 (March 1997)* (One should not look to recover in quantum meruit unless there have been direct dealings between the parties that create the basis for the contract to be implied "in fact." In contrast, unjust enrichment is a legal fiction described as "an obligation imposed by law to do justice even though it is clear that no promise was ever made or intended."). *But see,* Annotation, *Discharge of Mortgage and Taking Back of New Mortgage as Affecting Lien Intervening Between Old and New Mortgages, 43 A.L.R.5th 519 (1996)* (The intervening lienholder would be unjustly enriched if given the priority position.); *DCB Constr. Co. v. Cent. City Dev. Co., 940 P.2d 958 (Colo. App. 1996) , aff'd, DCB Constr. Co. v. Cent. City Dev. Co., 965 P.2d 115 (Colo. 1998)* .

(n26)Footnote 27. "The purpose of the Mechanics' Liens Act is to protect those who in good faith furnish labor or materials for construction of buildings or public improvements. It balances the owner's benefit of its bargain with the subcontractor's right to be paid for the labor and materials he or she furnishes in good faith." *Premier Elec. Constr. Co. v. American Bank of Chicago, 658 N.E.2d 877, 883 (Ill. App. 1995)* .Mark Sauer, *Ohio's New and Improved Mechanics' Lien Statutes: In Pursuit of Legitimacy, 22 Ohion.U. L. Rev. 895 (1996)* (The legislature must *balance* the application of the law in regards to bankers, homeowners, contractors, subcontractors, laborers and materialmen against the support of the public. Thus, mechanics' lien law will be more effective if the involved parties feel that their interests are being properly protected and that they can receive justice. Legitimacy is achieved through both procedure and result. While adherence to the proper procedure will certainly give a person the impression that he is being treated fairly, the law must also strive to reach a just result.). *Struebing Constr. Co., Inc. v. Golub-Lake Shore Place Corp., 666 N.E.2d 846 (Ill.*

App. 1996) (Mechanics' Lien Act attempts to balance rights and duties of owners, subcontractors, and materialmen.) *See also, Alliance Steel, Inc. v. Piercy, 660 N.E.2d 1341 (Ill.App. 1996)* .

(n27)Footnote 28. Marion W. Benfield, Jr., *The Uniform Construction Lien Act: What, Whither, and Why, 27 Wake Forest L. Rev. 527 (1992).*

(n28)Footnote 29. Marion W. Benfield, Jr., The Uniform Construction Lien Act: What, Whither, and Why, *27 Wake Forest L. Rev. 527, 528 (1992).*

(n29)Footnote 30. Lawrence M. Friedman, A History Of American Law 244 (2d ed. 1985).

(n30)Footnote 31. *Conrad Am. v. Cooperative Grain & Prod. Co., 488 N.W.2d 450, 453 (Iowa 1992)* . Michael Noone and Robert E. Benson, *The "Pay-When-Paid" Dilemma*, 25 Colo. Law. 79 (Nov.1996) (Despite the notion that parties should be able to expressly contract for pay-when-paid provisions, courts remain reluctant to enforce these provisions against subcontractors for several reasons: (1) they believe that subcontractors are an oppressed class that needs protection and operates at the mercy of prime contractors; (2) they believe that general contractors are in the best position to assess and avoid or bear the risk of nonpayment or postponement of payment; and (3) they are opposed to forfeiture).

(n31)Footnote 32. *See infra* § 102.02(a)(1). *Alliance Steel, Inc. v. Piercy, 660 N.E.2d 1341 (Ill. App. 1996)* (Under Mechanics' Lien Act, subcontractor may give property owner written notice of its claim (and thereby protect itself against subsequent disbursements) any time after subcontractor enters into its contract with general contractor, but no later than 90 days after subcontractor's completion of contract. However, under Mechanics' Lien Act, even if subcontractor never gives notice of its claim to property owner, it is property owner's duty, before making any payments, to require that general contractor provide it with sworn written statement listing subcontractors and amounts due or to become due to each. Under Mechanics' Lien Act, property owner is protected against subcontractors not listed or amounts understated on the sworn written statement which it receives from general contractor, unless such omissions are with the knowledge or collusion of property owner); *Commerce Partnership 8098 Ltd. P'ship v. Equity Contracting Co., Inc., 695 So. 2d 383 (Fla. App. 1997)* (Subcontractor could not recover from owner on quasi contract claim if owner made payment to or on behalf of general contractor covering benefits that contractor conferred on subject property); *Roofing & Sheet Metal Supply Co. of Tulsa, Inc. v. Golzar-Nejad Khalil, Inc., 925 P.2d 55 (Okla. 1996)* (Property owner suffers risk of loss under materialman's lien statutes, i.e., the risk that contractor will not pay materialman, if owner pays contractor within 90 days without making check jointly payable to contractor and materialman); *Struebing Constr. Co., Inc. v. Golub-Lake Shore Place Corp., 666 N.E.2d 846 (Ill. App. 1996)* (Subcontractor's lien rights extended to amount of payments that owner made to contractor after owner received notice of subcontractor's claim, not just to amount due subcontractor's immediate contractor); *Controlled Demolition, Inc. v. F.A. Wilhelm Constr. Co., Inc., 84 F.3d 263 (7th Cir. 1996)* (Personal liability provision of Indiana mechanics' lien statute, which allows subcontractor to give notice of personal liability claim, does not actually deal with liens, but instead creates right for subcontractors to sue owners of property directly when general contractor fails to pay them, and does not create secured interest).

(n32)Footnote 33. Lawrence Ponoroff, *Construction Claims in Bankruptcy: Making the Best of a Bad Situation, 11 Bankr. Dev. J. 343, 403 n. 19* (1994-95). *Browning v. Gaster Lumber Co., 475 S.E.2d 576 (Ga. 1996)* (Purpose for materialman's liens statutes is need to protect construction industry and those in its employ.)

(n33)Footnote 34. Allison Dunham, *Reflections of a Drafter, 43 Ohio St. L.J. 569 (1982).*

(n34)Footnote 35. *Cook v. Carlson, 364 F. Supp. 24, 29 (D.S.D. 1973)* .John W. Fisher, II, *The Scope of Title Examination in West Virginia: Can Reasonable Minds Differ? 98 W. Va. L. Rev. 449 (Winter 1996)* (Once the lien attaches to the property under *Section 38-2-17 of W. Va. Code*, the lien can be perfected *against subsequent purchasers* and is valid against subsequent deeds of trust and other liens arising after that date); *Sullivan v. Buckland Meadow*

Assocs., 1996 Conn. Super LEXIS 2094 (No. Cva2 512365, Aug. 12, 1996) (Where the vendor has improved real estate and the purchaser has consented to and cooperated in the improvements pursuant to an executory contract of sale, the lien of a materialman for materials furnished the vendor is binding on both the vendor and the purchaser, notwithstanding the fact that the purchaser received and recorded the deed before the lien was filed for record and recorded); *Owen Lumber & Millwork, Inc. v. National Equity Corp., 940 S.W.2d 66 (Tenn. App. 1996)* (Where supplier of construction materials for new house properly filed notice of materialmen's lien within 90-day period, general contractor's conveyance of house within 90 days of completion did not extinguish materialmen's lien, even though warranty deed from general contractor to purchasers had been recorded before supplier's notice of lien was filed; purchasers knew that they were purchasing new construction and that vendor was not only property owner but builder as well, and neither purchasers nor deed of trust holder availed themselves of statute establishing protection from unregistered liens); *F. Scott Jay & Co., Inc. v. Vargo, 685 A.2d 799 (Md. App. 1996)* (Owner need only allege that it is bona fide purchaser for value to claim benefit of exemption in statute providing that land or building thereon cannot be subject to mechanics' lien if, prior to establishment of lien, legal title was granted to bona fide purchaser for value. It is mechanics' lien claimant's burden to show that owner is not bona fide purchaser for value, for purposes of bona fide purchaser exemption, and owner need offer no evidence of his status except in response to evidence first offered by claimant tending to show that owner is not bona fide purchaser for value); *See also, IA Constr. Corp. v. Carney, 672 A.2d 650 (Md. 1996)* (statute providing that, upon mortgage foreclosure sale, all liens and encumbrances on such property must be satisfied in accordance with their priority, recognizes extinguishment of junior mechanics' lien upon foreclosure of senior mortgage to same extent as junior judgment lien would be extinguished upon foreclosure of senior mortgage); *Delmont Mech. Servs., Inc. v. Kenver Corp., 677 A.2d 1241 (Pa. Super. 1996)* (General contractor was not owner or reputed owner of property for purposes of mechanics' lien law and, thus, subcontractor who listed general contractor as owner of property on lien claim failed to comply with mechanics' lien law section requiring lien claim to state name of owner or reputed owner even though first contract between parties incorrectly stated that general contractor was owner of property where general contractor never had ownership interest in property and second contract between parties included correct name of property owner. As a result, the subcontractor was not allowed to claim against the subsequent bona fide purchaser of the property); *Skillstaff of Colorado, Inc. v. Centex Real Estate Corp., 973 P.2d 674 (Colo. App. 1998)* (the agency that provided temporary employees to a subcontractor, which failed to pay the agency, was not entitled to assert a mechanics' lien).

(n35)Footnote 36. *John Holmes Construction, Inc. v. R.A. McKell Excavating, Inc., 131 P.3d 199 (Utah 2006)* (infrastructure improvements to a residential lot are not improvements to a residence that would qualify for a mechanics' lien). Lienable improvements have included: providing concrete for sewer and water laterals, engineering and surveying services to obtain municipal approval, and disposal of contaminated soil at a landfill. *See Riverwood Park, Inc. v. Central Ready-Mixed Concrete, Inc., 536 N.W.2d 722 (Wis. App. 1995)* ; *Charles H. Sells, Inc. v. Chance Hills Joint Venture, 622 N.Y.S.2d 422 (N.Y. Sup. Ct. 1995)* ; *Midwest Envtl. Consulting & Remediation Servs., Inc. v. People's Bank of Bloomington, 620 N.E.2d 469 (Ill. App. 1993)* .Juliann Johnson, *Debtor-Creditor: When is an Improvement Not an Improvement? Interpretation of the Kansas Mechanics' Lien Statute* [*Haz-Mat Response, Inc. v. Certified Waste Services Ltd., 910 P.2d 839 (Kan. 1996)] , 36 Washburn L.J. 499 (Summer 1997);* Mark Sauer, *Ohio's New and Improved Mechanics' Lien Statutes: In Pursuit of Legitimacy, 22 Ohio N.U. L. Rev. 895, 900 (1996)* (*Ohio Revised Code section 1311.011(B)* subjects mechanics' liens to certain conditions. That subsection had applied to liens for "work done." It now reads "labor or work performed or materials furnished."). *Thompson and Peck, Inc. v. Division Drywall, Inc., 696 A.2d 326 (Conn. 1997)* (Unpaid workers' compensation insurance premiums owed by subcontractor were not "materials" or "services" under mechanics' lien statute, since such premiums had not enhanced the property in some physical manner, laid groundwork for physical enhancement of the property, or played essential part in scheme of physical improvement of the property); *Moore & Moore Gen. Contractors, Inc. v. Basepoint, Inc., 485 S.E.2d 131 (Va. 1997)* (Mechanics' lien was valid where seller furnished cabinets for building project and cabinets were delivered, accepted, installed, and added value to structure, and fact that cabinets were removed before memorandum was filed was irrelevant); *Rotarius v. Edwards, 936 P.2d 401 (Or. App. 1997)* (Rock supplier who delivered substitute fill material that had been authorized by property owners' agent and was used in construction project had valid construction lien, even though material was subsequently removed and made available to supplier to reclaim; statute did not require

material to become part of completed project for lien to be valid); *Robert Plan Corp. v. Greiner-Maltz Co., Inc., 655 N.Y.S.2d 648 (N.Y. App. 1997)* (Statutory definition of "improvement," for purposes of mechanics' liens arising from services for improvement of real property, which included real estate brokerage services to obtain lessee for nonresidential property, did not encompass services allegedly performed by lessee's brokerage firm in locating property for lessee to lease); *L.J. Keefe Co., Inc. v. Chicago & Northwestern Transp. Co., 678 N.E.2d 41 (Ill. App. 1997)* (In determining whether furnishing materials in construction of land constitutes "improvement," for purposes of Mechanics' Lien Act, relevant inquiry is whether work performed has enhanced value of land to be charged with lien); *Randall Stanley Architects, Inc. v. All Saints Community Corp., 555 N.W.2d 802 (S.D. 1996)* (Equitable theory of quasi contract or unjust enrichment did not apply to create implied contract between property owner and architect, so that architect had no basis for mechanics' lien against property, where nonprofit corporation, which had signed contract to buy the property, contracted with architect to provide design services for that property, nonprofit failed to pay architect for its services, nonprofit was unable to obtain financing to buy the property, and, pursuant to terms of arrangement with architect, architect furnished its services gratuitously); *Roofing & Sheet Metal Supply Co. of Tulsa, Inc. v. Golzar-Nejad Khalil, Inc., 925 P.2d 55 (Okla. 1996)* (Materialman that, as result of contractor's diversion of materials delivered to construction site, dropped off more materials at site than were ever incorporated in roof repair project was not entitled to lien against property); *Printz Servs. Corp., v. Main Elec., Ltd., 949 P.2d 77 (Colo. App. 1997)* (Mechanics' liens could not attach for preliminary architectural work performed on construction project at contractor's request before contractor's agreement with property owner came into force and, thus, deed of trust recorded after architectural work was completed had priority over mechanics' liens; liens did not relate back to date work was first commenced by architect, even though prime contract with owner was eventually signed and it contained provision for payment of architect); *Lyons Sav. v. Gash Assocs., 665 N.E.2d 326 (Ill. App. 1996)* (Mechanics' lien claimant's remedial cleaning of grease, oil, and debris left behind by other lien claimants who performed renovations to building was part of improvement to property and thus lienable); *TPST Soil Recyclers of Washington, Inc. v. W. F. Anderson Construction, Inc., 957 P.2d 265 (Wash. App. 1998)* (disposal of contaminated soil from property is not an improvement qualifying for relief through a mechanics' lien); *Coleman v. Sterling Castings Corp., 224 B.R. 85 (N.D. Ind. 1998)* (employee could not use mechanics' lien to make a claim for wages and various benefits); *Printz Servs. Corp. v. Main Elec., Ltd., 949 P.2d 77 (Colo. App. 1997) , aff'd in part, rev'd in part, Main Elec., Ltd. v. Printz Servs. Corp., 980 P.2d 522 (Colo. 1999)* ; *Coleman v. Sterling Castings Corp., 224 B.R. 85 (N.D. Ind. 1998) , aff'd, In re Bluffton Casting Corp., 186 F.3d 857 (7th Cir. Ind. 1999)* ; *Payless Cashways, Inc. v. Payless Cashways, 230 B.R. 120 (8th Cir. 1999) , aff'd, Amtech Lighting Servs. v. Payless Cashways, Inc., 203 F.3d 1081 (8th Cir. 2000)* .

(n36)Footnote 37. *See In re T. Brady Mech. Servs., 133 B.R. 441 (Bankr. N.D. Ill. 1991) . See also Haz-Mat Response, Inc., v. Certified Waste Servs. Ltd., 910 P.2d 839 (Kan. 1996)* (finding that hazardous waste removal as part of regular maintenance is not lienable); *Phillips-Klein Co., Inc. v. Tiffany P'ship, 474 N.W.2d 370 (Minn. App. 1991)* (holding that obtaining zoning variances and financing, and coordinating leasing arrangements are not lienable activities).

(n37)Footnote 38. *See, e.g., Gardner v. Hatch, 408 N.W.2d 879 (Minn. App. 1987)* (stating that the contract price was evidence that the plumbing charge was reasonable); *In re American Fabricators, Inc., 197 B.R. 987 (Bankr. M.D. Fla. 1996)* (Test for determining whether "extras" are lienable under Florida's mechanic lien law is whether work was performed in good faith, within reasonable time, and pursuant to terms of contract, and whether work is necessary to finish job.).

(n38)Footnote 39. *See Umbaugh Bldrs., Inc. v. Parr Co. of Suffolk, 385 N.Y.S.2d 698, 701 (1976)* (finding that the lien should be valued by the labor and materials used in constructing the concrete grandstand instead of the contract price which "may have been inflated"). *See also Cal. Civ. Code § 3123* (limiting the amount of a mechanics' lien to "the reasonable value of the labor, services, equipment, or materials furnished or for the price agreed upon by the claimant and the person with whom he or she contracted, whichever is less"); *Greenland Homes, Inc. v. E & S Marketing Resources, Inc., 227 B.R. 710 (S.D. Ind. 1998)* (advertising work is not an improvement that qualifies for the protection of a mechanics' lien); *Thomas Hake Enterprises, Inc. v. Betke, 703 N.E.2d 114 (Ill. App. 1998)* (no attorneys' fees

awarded under mechanics' lien). Ronald A. May, *Annual Survey of Fidelity and Surety Law, 1996--Part I, 64 Def. Couns. J. 121, 128 (Jan. 1997)* (The mechanics' lien statute and the California Constitution limit the recovery for a mechanics' lien to the reasonable value of the labor, services, equipment and materials furnished or for the price agreed on by the claimant and those with whom they contracted); *Midlands Rental & Machin., Inc. v. Christensen Ltd. P'ship, 566 N.W.2d 115 (Neb. 1997)* (Testimony of equipment rental company's sales manager, an individual with 11 years' experience in renting construction equipment, was sufficient to establish reasonable rental value of equipment leased by subcontractor, for purposes of setting amount of rental company's construction lien); *Zalay v. Ace Cabinets of Clearwater, Inc., 700 So. 2d 15 (Fla. App. 1997)* (Construction lien statute providing that property owner who has properly retained all sums required to be retained, and who has made no improper payments, will be liable to unpaid subcontractors and materialmen only to extent retainage is intended to define extent of lien accorded to lienors for materials or services provided prior to litigation; it is not intended to preclude lien for lienors' costs and attorney fees in lien foreclosure action); *Vugterveen Sys., Inc. v. Olde Millpond Corp., 560 N.W.2d 43 (Mich. 1997)* (Real property owner could use all payments made on contract with first general contractor as defense to drywall subcontractor's construction lien, under Construction Lien Act provision limiting construction liens to price set forth in contract); *Roofing & Sheet Metal Supply Co. of Tulsa, Inc. v. Golzar-Nejad Khalil, Inc., 925 P.2d 55 (Okla. 1996)* (Materialman may have lien only for that amount of material used in construction project).

(n39)Footnote 40. *See, e.g., A.K. & R. Whipple Plumbing & Heating v. Guy, 47 P.3d 92 (Utah Ct. App. 2002)* (for attorney fee purposes, neither the contractor nor the subcontractor was the successful party in a mechanics' lien foreclosure action); *Eddings v. Lippe, 802 S.W.2d 139 (Ark. 1991)* (affirming the trial court's decision which denied the plaintiff's mechanics' lien claim since there was no contract, but allowed the plaintiff to collect in quantum meruit); *Artsmith Development Group, Inc. v. Updegraff, 868 A.2d 495 (Pa. Super. 2005)* (mechanics lien statute did not authorize recovery for attorney fees and interest). *See also Murray v. Crest Constr., Inc., 900 S.W.2d 342, 345 (Tex. 1995)* (finding that although the subcontractor may not generally recover in quantum meruit when he has an express contract covering the services or materials furnished, an exception is made for construction contracts). Robert L. Meyers, III, *Construction Law, 49 S.M.U. L. Rev. 805, 812* (May-June 1996) (mechanics' liens and quantum meruit).

(n40)Footnote 41. *Bennett Heating & Air Conditioning, Inc. v. Nationsbank of Md., 654 A.2d 949, 956 (Md. 1995)* . *See also* William F. Frey & Gerard Mantese, *Limits On A Subcontractor's Right to Bring A Quantum Meruit Claim Against the Property Owner, 71 Mich. B.J. 1042 (1992). Compare with*, H. Hugh McConnell, *Distinguishing Quantum Meruit And Unjust Enrichment In The Construction Setting, 71 Fla. B.J. 88 (March 1997)* (One should not look to recover in quantum meruit unless there have been direct dealings between the parties that create the basis for the contract to be implied "in fact." In contrast, unjust enrichment is a legal fiction described as "an obligation imposed by law to do justice even though it is clear that no promise was ever made or intended"). *Bennett Heating & Air Conditioning, Inc. v. Nationsbank of Md., 103 Md. App. 749, 654 A.2d 949 (1995) aff'd in part, rev'd in part and remanded, Bennett Heating & Air Conditioning, Inc. v. Nationsbank of Md., 674 A.2d 534 (Md. 1996)* .

(n41)Footnote 42. Robert J. Cathcart, *Mechanics' Lien Damages: Turning Construction Law Briefing Costs Into a Lien Claim*, Constr. L. Briefing 1 (Allen et al., Fall 1991). *See, e.g., Royster Constr. Co. v. Urban W. Communities, 47 Cal. Rptr. 2d 684 (Cal. App. 1995)* (holding that attorney's fees are not recoverable because such fees did not contribute to the reasonable value of the improvement); *Lambert v. Super. Ct., 279 Cal. Rptr. 32, 36 (Cal. App. 1991)* (finding that delay and interest damages were not part of the lien even though the contract described them as extra work). However, the California legislature has allowed the recovery of plaintiff's attorney's fees for the perfections of stop notices. *See infra* § 102.05. *Zalay v. Ace Cabinets of Clearwater, Inc., 700 So. 2d 15 (Fla. App. 1997)* (Construction lien is not intended to preclude lien for lienors' costs and attorney fees in lien foreclosure action); *Johnson v. Blankenship, 679 N.E.2d 505 (Ind. App. 1997)* (Award of $20,500 in attorney fees to worker who recovered $5,775 in action against building owner to enforce mechanics' lien, was supported by complexity and length of case, and finding that worker had performed contracted-for repair work in workmanlike manner); *Amnesia Int'l, Inc. v. Sunhouse Int'l, Inc., 675 So. 2d 707 (Fla. App. 1996)* (Contractor who was prevailing party on lien claim was entitled to attorneys' fees and costs pursuant to construction lien statute); *First Gen. Servs. v. Perkins, 918 P.2d 480 (Utah App. 1996)* (Where claims

asserted by plaintiff and defendant with respect to mechanics' lien are sufficiently interrelated such that counterclaims would, if successful, defeat lienholder's principal claim, or, if lien is asserted through counterclaim, successful prosecution of principal claim will defeat lien claim, successful party is entitled to attorney fees regardless of whether that party was seeking to enforce lien or to defend against it); *Utilities Constr. Co., Inc. v. Wilson, 468 S.E.2d 1 (S.C. App. 1996)* (In action to foreclose mechanics' lien, although owner of property did not request attorney fees in her answer, electrical contractor was not prejudiced as contractor had notice of potential award of attorney fees given mandatory language of mechanics' lien statutes); *Turner v. Mountain Eng'g & Constr., Inc., 915 P.2d 799 (Mont. 1996)* (Mortgagee was entitled to award of attorney fees under construction lien statute for expenses incurred in successfully defending lien foreclosure action by construction lien creditors who performed work on mortgaged property, where mortgagee was not only attempting to determine priority of his mortgages and foreclose on them, he was also defending against construction lienholders' foreclosure suits); *Haz-Mat Response, Inc. v. Certified Waste Servs. Ltd., 910 P.2d 839 (Kan. 1996)* (Hazardous waste removal was not lienable, that is, not subject to mechanics' lien, as it was part of maintenance program that was necessary in normal course of owner's business, and evidence failed, as a matter of law, to demonstrate that the removal was "improvement of real property" within meaning of mechanics' lien statute; removal was not part of overall plan to improve property, would not necessarily enhance value of property, would presumably allow business to continue as it had before, and there was no evidence that removal would adapt property for new or further purposes); *Lyons Sav. v. Gash Assocs., 665 N.E.2d 326 (Ill. App. 1996)* (Mechanics' lien claimant's remedial cleaning of grease, oil, and debris left behind by other lien claimants who performed renovations to building was part of improvement to property and thus lienable. However, mechanics' lien claimant's charge for scrubbing tile and grout on walls and floor ceramic tile and sealing grout for 18 washrooms was for nonlienable maintenance, given lack of evidence that work was necessitated by mess of renovation left by other lien claimants, and therefore claimant's priority over mortgage recorded before contract for work performed was made was properly reduced by amount of charge); *Vernon Hills III Ltd. P'ship v. St. Paul Fire & Marine Ins. Co., 678 N.E.2d 374 (Ill. App. 1997)* (*Delay:* Failure of lienholder to commence suit within 30 days of receipt of written notice of demand to sue, made pursuant to Mechanics' Lien Act, operates to forfeit and remove mechanics' lien); *Columbia Sav. Ass'n, F.A. v. McPheeters, 911 P.2d 187 (Kan. App. 1996)* (Given mechanics' lienholder's failure to take affirmative steps to foreclose or defend lien within statutory period, it did not have meritorious defense to bank's action so as to justify permitting it to file answer out of time); *Johnson v. Blankenship, 679 N.E.2d 505 (Ind. Ct. App. 1997) , aff'd, Johnson v. Blankenship, 688 N.E.2d 1250 (Ind. 1997)* ; *Artsmith Development Group, Inc. v. Updegraff, 868 A.2d 495 (Pa. Super. 2005)* (mechanics lien statute did not authorize recovery for attorney fees and interest).

(n42)Footnote 43. *Lambert v. Super. Ct., 279 Cal. Rptr. 32, 37 (Cal. App. 1991)* .

(n43)Footnote 44. *See, e.g., Energrey Enters. v. Oak Creek Energy Sys., 119 B.R. 739 (Bankr. E.D. Cal. 1990)* (holding that turbine wind towers could be personal property, not fixtures, because they were taxed as personal property and could actually be moved from one location to another to gain wind advantage; however, the foundations of the wind towers were considered fixtures); *Samedan Oil Corp. v. Ultra Fabricators, Inc., 737 So. 2d 846 (La. App. 1999)* (Liens are to be strictly and narrowly construed against claimants and liberally construed in favor of property owners, because liens are in derogation of the rights of owners); *but see Winkler Const. Co, Inc. v. Jerome, 734 A.2d 212 (Md. 1999)* (the court stated that historically mechanics' liens have been construed in the most liberal manner in favor of mechanics and materialmen); *Ceci Bros., Inc. v. Five Twenty-One Corp., 724 A.2d 541 (Conn. App. 1999)* ; *Energrey Enters. v. Oak Creek Energy Sys., 119 B.R. 739 (Bankr. E.D. Cal. 1990) , aff'd, Energrey Enters. v. Oak Creek Energy Sys., 119 B.R. 739 (Bankr. E.D. Cal. 1990)* .

(n44)Footnote 45. *See B.B. & B. Constr. Co. v. FDIC, 875 S.W.2d 48, 51-52 (Ark. 1994)* (stating that "[i]t still remains that as between a materialman and a prior mortgagor, 'first in time, first in right' is the law in Arkansas unless the materialman can remove the improvement from the land").

(n45)Footnote 46. For a detailed discussion on the law of accession and the removal of fixtures, *see* Ronald W. Polston, *The Fixtures Doctrine: Was It Ever Really the Law?, 16 Whittier L. Rev. 455 (1995). But see DeAngelo v. Brazauskas, 655 N.E.2d 165 (N.Y. 1995)* (allowing a builder who innocently built a house on the wrong lot to remove it,

restore the land, and pay damages to the landowner instead of letting the landowner retain the house under the doctrine of accession).

(n46)Footnote 47. *See, e.g., 770 ILCS 60/16* (formerly cited as Ill. Rev. Stat. ch. 82, para. 16); *Ark. Code Ann. § 18-44-101*; *Tex. Prop. Code Ann. § 53.123*; *Va. Code Ann. § 43-21*.

(n47)Footnote 48. *Cal. Civ. Code § 3128*.

(n48)Footnote 49. *See Northeast Brick Co. v. Street Road Shopping Ctr., 50 Pa. D. & C.2d 614 (1970)* . There is one way the owner may prevent mechanics' lienors from seizing site value. Sell to a separate but related entity, a trust, a corporation or partnership in which the seller has a major stake, and take back a note and mortgage for most of the purchase price. Record the mortgage before the visible commencement of work on the site. In most states the result is that mechanics' liens are subordinate to the land seller's prior recorded mortgage.

(n49)Footnote 50. *See* Rodney Moss, *Lis Pendens and the Enforcement of Mechanics' Liens*, 5 Cal. Constr. L. 8 (Feb. 1995); Michael W. Homer & David J. Burns, *Utah Construction Law: Recovery for Nonpayment, 9 Utah B.J. 8 (May 1996);* Michael R. Marsh, *Mechanics' & Materialman's Liens: A Review of Selected Issues*, 1997 Haw. B.J. 6 (April 1997); John W. Fisher, II, *The Scope of Title Examination in West Virginia: Can Reasonable Minds Differ? 98 W. Va. L. Rev. 449, 526 (Winter 1996)* (Lis Pendens).

(n50)Footnote 51. *Barry Props. v. Fick Bros. Roofing Co., 353 A.2d 222, 235 (Md. 1976)* .

(n51)Footnote 52. *See Ruocco v. Brinker, 380 F. Supp. 432 (S.D. Fla. 1974)* ; *Connolly Dev., Inc. v. Superior Court, 553 P.2d 637 (Cal. 1976)* ; *Silverman v. Gassett, 553 S.W.2d 581 (Tenn. 1977)* ; *Shaumyan v. O'Neill, 987 F.2d 122 (2d Cir. 1993)* (validating prejudgment attachment statute for written home improvement statutes); *Loigman v. Kings Landing Condominium Ass'n, Inc., 734 A.2d 367 (N.J. Super. Ch. 1999)* (Filing of a lien is a form of 'taking' and property owner is entitled to constitutionally-guaranteed due process). Rosalie Berger Levinson, State and Federal Constitutional Law Developments, *29 Ind. L. Rev. 823, 832 (1996)* (Since neither the labor nor the material can be reclaimed once it has become a part of the realty, this is the only method by which workmen or small businessmen who have contributed to the improvement of the property may be given a remedy against a property owner who has defaulted on his promise to pay).

(n52)Footnote 53. These were the factors cited by the U.S. Supreme Court in *Connecticut v. Doehr, 501 U.S. 1 (1991)* . Major adjustments in the operation of mechanics' lien laws may be caused by bankruptcy proceedings. *Poindexter Excavating, Inc. v. Downey, 198 B.R. 292 (S.D. Ind. 1996) , aff'd, In re Pearson Constr. Co., 234 F.3d 1273 (7th Cir. 2000)* .

(n53)Footnote 54. *F.C.C., Inc. v. Reuter, 867 A.2d 819 (R.I. 2005)* (mechanics' lien statute did not cause an unconstitutional deprivation of due process rights); *Spielman-Ford v. Hanson's, Inc., 379 F. Supp. 997 (D.C. Ariz. 1973) , aff'd, 417 U.S. 901 (1974)* ; *Tucker Door & Trim v. Fifteenth St. Co., 221 S.E.2d 433, 434 (Ga. 1975)* ; *Nelson-Am. Devs. v. Enco Eng'g, 337 So. 2d 729, 731 (Ala. 1976)* ; *Bankers Trust Co. v. El Paso Pre-Cast Co., 560 P.2d 457, 462 (Colo. 1977)* ; *Home Bldg. Corp. v. Ventura Corp., 568 S.W.2d 769, 774 (Mo. 1978)* ; *Pentecostal Church of God v. Bruce-Rogers Co., 599 S.W.2d 702, 703 (Ark. 1980)* ; *In re Thomas Cary, Inc., 412 F. Supp. 667, 671 (E.D. Va. 1976)* ; *B & P Dev. v. Walker, 420 F. Supp. 704, 705 (W.D. Pa. 1976) . See also Cook v. Carlson, 364 F. Supp. 24, 27 (D.S.D. 1973)* .

(n54)Footnote 55. John W. Maupin & W. Dudley McCarter, *Public Works Projects, 52 J. Mo. B. 94, 95* (March/April 1996) (The Missouri public works bond statute, like the mechanics' lien statute, is liberally construed to provide protection for those who furnish work and labor for the project.).

(n55)Footnote 56. *Compare Shaumyan v. O'Neill, 987 F.2d 122 (2d Cir. 1993)* with *Connecticut v. Doehr, 501 U.S. 1 (1991)* . In *Shaumyan*, Connecticut's prejudgment attachment statue was upheld when invoked by a home

improver. In *Doehr*, the U.S. Supreme Court saw the issues in a tort suit as far more complicated than those in a simple home improvement contract. Consequently, the chance in an ex parte proceeding of an erroneous property deprivation was seen as greater.

(n56)Footnote 57. *See, e.g., Mitchell v. W.T. Grant Co., 416 U.S. 600 (1974)* (upholding Georgia's prejudgment attachment law when invoked by a conditional seller trying to attach sold but unpaid goods under a law much like Connecticut's, except the Georgia creditor was required to post a bond).

(n57)Footnote 58. *Conn. Gen. Stat. § 52-278(e)(a)(1)*.

(n58)Footnote 59. The home improver in *Shaumyan* had installed storm windows in a Yale professor's house. *Id.* The professor did not think the windows did the job they were supposed to do. The improver agreed to put in new windows on a time and materials basis, foregoing profit and overhead. The professor refused to pay the final bill. The improver took advantage of Connecticut's prejudgment attachment statute. This was the very statute the U.S. Supreme Court struck down in *Doehr*. *Id.* In that case, the litigant was claiming $75,000 in damages as a result of losing a fist fight. Yet the Second Circuit Court of Appeals upheld the improver's claim under the state Contract Lien Law, citing as support the fact that the improver could have enjoyed even better rights under the state mechanics' lien law.

(n59)Footnote 60. *Hanley v. Kajak, 661 So. 2d 1248 (Fla. App. 1995)* (Commencement of action against subcontractor for discharge of lien did not result in waiver of statutory requirement that subcontractor file contractor's final affidavit as condition precedent to maintenance of lien foreclosure action).

(n60)Footnote 61. *See, e.g., Cal. Civ. Code § 3098*; *Mich. Comp. Laws § 570.1108a*.

(n61)Footnote 62. *See PDS Eng'g & Constr., Inc. v. Double RS, 627 A.2d 959 (Conn. Super. 1992)* (upholding Connecticut's mechanics' lien law against constitutional due process challenge by mortgagee because the statute allows release of the lien by posting a bond, and when the mechanics' lien has been released by bond, the principal or surety may apply to superior court to have the claim underlying the lien declared invalid or reduced).

1 Parts of this chapter have been adapted from George Lefcoe, Real Estate Transactions (Michie 1993).

Thompson on Real Property, Thomas Editions

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CHAPTER 102 MECHANICS' LIENS 1

12-102 Thompson on Real Property, Thomas Editions § 102.02

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§ 102.02 Some Inequities of the Mechanics' Lien Laws and How States Have Attempted to Alleviate Them.

[Go To Supp]

§ 102.02(a) The Double Liability Problem.

§ 102.02(a)(1) An Owner May Have to Pay Twice for the Same Work.

Potential injustice inherently exists in the mechanics' lien laws because an owner, or prime contractor who is required by law to protect the owner's property from mechanics' lien claims, may be required to pay twice for the same work or materials in order to protect the property from foreclosure or a mechanics' lien cloud on title. n63 For example, suppose O hires K to build a house for $250,000, which K completes. O pays K the $250,000, then K goes bankrupt before paying everyone on the job. The unpaid subcontractors and material suppliers record $50,000 worth of mechanics' liens against the property. In order for O to keep the property from being sold to satisfy the mechanics' liens, O is forced to pay off the $50,000 worth of claims. This results in O paying $300,000 for the house instead of the $250,000 she agreed to pay.

Courts unsympathetic to the owners' plight have declared that one purpose of mechanics' lien statutes is "to give security to a materialman whose materials have enhanced the value of an owner's property and to give him preference over an owner" when the materialman has not been paid for supplies or services rendered. n64 Since a mechanics' lien only results in instances in which the property owner consented to the improvement, n65 the owner is free to select his or her own contractor. Therefore, the owner is "in a position to protect himself or herself and all parties concerned before any risks are assumed by anyone by making arrangements that will insure the payment of such lienable debts as may be incurred by the contractor selected to do the work." n66

On the other hand, a variation of the argument may be turned against the liening subcontractor or supplier. Had the lienor checked out the credit of the prime contractor or insisted on payment in advance, the lienor would not have needed the lien. In fact, subcontractors are often better positioned than homeowners to make sound judgments about the creditworthiness of the contractors with whom they deal. Not surprisingly, many states have revised their lien laws to protect homeowners from double liability. n67

§ 102.02(a)(2) Liability.

In a very few states, New York n68 and Maine n69 among them, recovery by a subcontractor or material supplier is limited to the amount owed and unpaid to the original contractor. The subcontractor is treated as an equitable subrogee of the contractor and can only claim payment out of the amount, if any, due and unpaid from the owner to the general contractor. n70 If no money is due the contractor, there is no fund upon which the subcontractor's lien may attach, n71 and the subcontractor may not look to the owner of the premises for satisfaction n72 unless the owner is personally liable by direct contract. n73

In most states (including California) owners can be liable to unpaid subcontractors even after paying their general contractors in full. They have various ways to protect themselves against the risk of double liability.

§ 102.02(a)(2)(i) Bonds.

The owner may require the contractor to furnish a labor and material ("payment") bond. This guarantees that the contractor will pay for all the work and materials used in the project. Otherwise, the owner has the right to call upon the bonding company to pay for and remove any mechanics' lien claims that may arise against the property.

Bonding is standard for major contractors working on multi-million-dollar contracts where the costs of bonding can be readily absorbed. These contractors are financially capable of offering bonding companies the collateral, letters of credit or other assurances needed to obtain the bonds. On the other hand, public works programs geared to encourage bidding from minority contractors need to waive bonding requirements or find ways to help these and other smaller firms meet them.

Bonding is needed most when it is least likely to be available. Small and undercapitalized contractors do modest-sized jobs for individual property owners on tight budgets. In these situations, few contractors have the credit necessary to get a bond. The costs of such bonds as are available will be prohibitive to the owner and the contractor.

§ 102.02(a)(2)(ii) Waivers and Releases. n74

An owner may require the contractor to obtain signed mechanics' lien releases from all subcontractors and material suppliers who work on the project. n75 A release is a lien waiver. There are four types: (a) absolute, (b) unconditional, (c) conditional, limited or partial, and (d) subordination. A valid *absolute release* waives all rights under the lien laws, whether or not the contractor, subcontractor or supplier has been paid. n76 Consideration is generally required for a lien waiver to be valid, although this is not always so. n77 Not surprisingly, many states outlaw blanket waivers extracted by owners or general contractors in advance as a condition to doing business. n78

What is the point of the statutory lien if any subcontractor or material supplier is required to waive it in order to get work?

Under an *unconditional release*, the contractor signs a statement that the contractor is receiving a check for final payment and that, after the check has been paid by the bank, all of the contractor's liens are released. n79 This typically takes place at the conclusion of the job. In California, a warning must appear in big type in the unconditional release which states:

> NOTICE: THIS DOCUMENT WAIVES RIGHTS UNCONDITIONALLY AND STATES THAT YOU HAVE BEEN PAID FOR GIVING UP THOSE RIGHTS. THIS DOCUMENT IS ENFORCEABLE AGAINST YOU. IF YOU SIGN IT, EVEN IF YOU HAVE NOT BEEN PAID. IF YOU HAVE NOT BEEN PAID, USE A CONDITIONAL RELEASE FORM. n80

Some states require unconditional and conditional releases to conform to certain language. n81

A *limited* or *unconditional release* provides that the lien is waived only for work done or materials furnished through a specified date. n82 Lenders try to avoid situations where contractors or subcontractors sign releases before they are paid by issuing joint checks n83 payable to the general contractor or owner and the subcontractor, hoping the subcontractor will not endorse the check until he is paid.

A *subordination waiver* preserves the mechanics' lien, but subordinates it to the lien of the construction mortgage or other named secured creditors. n84 A subordination waiver may be valid if a third party relies on it even if the waiver would not otherwise be valid. n85 Where absolute waivers are void it is not clear if subordination agreements are also invalid. This may be similar to the situation where a land seller signs an otherwise unenforceable subordination agreement. While the buyer may not be able to enforce the agreement, a lender who relies on the agreement may be able to do so. n86

§ 102.02(a)(2)(iii) Joint Checks.

The owner may issue checks made payable jointly to the contractor and to the various subcontractors to whom payment is due. Again, if an unpaid subcontractor signs a check, repudiation is allowed by some courts and not by others. n87

Lien releases and joint checks are standard construction industry practice even though they don't offer 100% protection for the owner or construction lender.

§ 102.02(a)(2)(iv) Recordation of Bonded Contract.

In California, before commencement of the work, an owner may file a copy of the prime contract in the County Recorder's office and record a payment bond for not less than 50% of the contract price. n88 The payment bond guarantees payment of all mechanics' lien claims and effectively protects the owner from paying more than the contract price. This procedure offers the best protection for the owner, but is the least often used because few owners know about it and, in any event, bonding is a costly and bureaucratic exercise for the novice. n89

§ 102.02(a)(2)(v) Retainage.

An owner holds back some portion of the contract price to make sure the contractor has paid the subcontractors and material suppliers. n90 This sum is called retainage. It is held until the mechanics' lien filing period has expired. In California, owners can file a notice of completion when a job is done, and all but the general contractor have 30 days after that to file their liens. General contractors have 60 days. In between these two periods the owner should have been able to verify whether any liens were filed, and to pay out the retainage to the general contractor. In Texas the withholding of retainage is mandated by statute. n91

§ 102.02(b) Secret Liens.

"Secret mechanics' liens" can prove to be a serious inequity to owners, contractors, and construction lenders. n92 "Secret liens" arise when subcontractors file liens on a site for work which the owner (and maybe even the general contractors) never knew about. Suppose O has a prime contract with K for the construction of a house. K enters into a subcontract with S to do the framing and S contracts with L to buy the lumber. Neither O nor K knows where S gets the materials. After S completes S's part of the job, S bills K in full, assuring him that all materials used in the job have been paid for. K pays S in full and O reimburses K, but S then declares bankruptcy without paying L. Therefore, 29 days after the notice of completion, L records a mechanics' lien on the property since L was never paid for the lumber supplied to the job. Both O and K have a theoretical right to require S to pay L, but this is of no use since S had declared bankruptcy. Therefore, O will either have to pay L's mechanics' lien claim in order to free the property or else impose responsibility on K. The problem is that L had the right to record a mechanics' lien but neither O nor K was able to find out about that right until it was too late for them to protect their interests.

Under these facts, K would usually be held responsible since most prime contracts and state statutes require the prime contractor to keep the property free of mechanics' liens. To protect O's interest, O will generally withhold final payment to K until 35 days after the notice of completion is filed, thereby insuring that K will end up paying off the claim.

COMPUTER-ASSISTED RESEARCH

LEXIS: secret w/2 mechanic! w/2 lien!

§ 102.02(b)(1) Preventing "Secret" Liens: The Preliminary Notice.

Many states require potential lienors to notify site owners and construction lenders that if unpaid, they could lien the property. n93

A preliminary notice contains:

(1) a general description of the work, equipment or materials furnished, or to be furnished;

(2) name and address of the potential claimant;

(3) name of the person who ordered or contracted for the work, equipment, or material;

(4) description of the job site sufficient for identification; and

(5) a statement in boldface type that if bills are not paid in full for labor, services, equipment or materials furnished, or to be furnished, the improved property may be subject to mechanics' liens, and that the owner may wish to protect itself by requiring mechanics' lien releases before making full payment to the contractor. If there is a construction lender, the claimant must also furnish the construction lender with an estimate of the total price of the work, and equipment or materials to be furnished to the project. n94

The purpose of the preliminary notice requirement is to enable owners, contractors, and construction lenders to identify potential mechanics' lien claimants early enough in the project to ensure that every potential claimant is paid for the work, equipment or materials provided. n95

§ 102.02(b)(2) Who Must Get Notice.

State statutes prescribe who is entitled to notice and those statutes have to be satisfied for the lien to be valid when it is eventually filed. n96 The owner must always be notified unless the potential lienor has contracted directly with the owner. n97 In California, a preliminary notice must be given to the owner, the original contractor, and the construction lender if there is one. n98 If the claimant is dealing directly with the owner/builder, notice does not have to be sent to the owner; just to the construction lender if there is one. The notice must be served by hand delivery, registered or certified mail; n99 this requirement has been strictly construed. n100 A proof of service affidavit is required to demonstrate proper service; n101 courts have consistently held that oral preliminary notices are not sufficient to comply with the statutory preliminary notice requirement. n102

One court held the preliminary 20-day notice enforceable against the owner even though it was not given to the prime contractor. The court opined that the person who needed to receive the notice (the owner) received it, while the person who already knew the claimant's identity (the prime contractor) did not need to receive the notice. n103 The notice to the owner would not, however, have affected the rights of the construction lender who was not notified. Nonetheless, an argument can be made that the statutory requirement for a preliminary notice isn't satisfied by the owner's knowledge

that the contractor exists and is on the job, or by the contractor's knowledge that a sub exists because the sub dealt with the contractor directly.

James Acret, the dean of California's mechanics' lien law bar, contends that a subcontractor should have to notify the contractor because the contractor will be responsible for ensuring that all potential lienors are paid and will probably have a check-off system for making payments and procuring lien releases--based on securing releases from all those subcontractors who served preliminary notices. Should a subcontractor fail to mail that notice to the contractor, the subcontractor's potential claim may slip through the safety net for making sure everyone on the job has been paid and has released their mechanics' lien claims.

In any event, potential lienors should always serve the owner, contractor and lender with a preliminary notice, and not rely on any cases forgiving a lienor from serving the notice.

Even a general contractor must meet the same requirements as a subcontractor and material supplier and give preliminary notice when: (1) dealing with someone other than the owner such, as a lessee, architect, or other general contractor; or (2) contracting for only a portion of the job.

COMPUTER-ASSISTED RESEARCH

LEXIS: noti! w/30 mechanic! w/5 lien!

§ 102.02(b)(3) Effect of Late Notice.

The mechanics' lien claimant may give notice at any point during the job. However, mechanics' lien rights are lost for any work or material furnished outside the statutory notice period. n104

§ 102.02(b)(4) Recording of Preliminary Notice.

Very few states require the preliminary notice to be recorded. By recording, the potential lien claimant clouds the owner's title early in the construction process. This upsets owners, antagonizes general contractors, alarms construction lenders, and in most cases proves to be a totally unnecessary precaution because mechanics and material suppliers are usually paid on time. The few statutes which require the recordation of the preliminary notice force the potential claimant to an unpleasant choice: record and risk the ill will that follows or waive lien rights. n105

In California a mechanic has the option of filing the preliminary notice with the county recorder who places it in a separate index of preliminary notices. n106 The preliminary notice isn't treated as an interest in land. It isn't recorded in the grantor-grantee index. The county recorder mails notification when a notice of completion or notice of cessation has been recorded. Failure of the county recorder to mail the notification does not affect the period within which a claim of lien is required to be recorded.

§ 102.02(b)(5) Protecting the Bona Fide Purchaser.

Too many homebuyers never realized when they smelled the fresh paint and admired the newly installed kitchen cabinets that soon after the close of escrow laborers and suppliers would file mechanics' liens and those liens would relate back to the day work first began. The extensive remodeling job made the house more alluring. The buyer already paid for the improvements once in the form of an increased purchase price. Only by waiting out the full lien filing period, and checking the property constantly to make sure the lien filing date is not being tolled by additional work, can homebuyers safely rely on the record title being lien free.

One place where homebuyers do not have to worry about the risk of secret mechanics' liens is in Maryland. As a

constitutional matter, the Maryland courts hold that liens relate back no further than the day a lien claimant secures a judgment for the underlying claim. This means that, even for work done before or during the executory period, new owners are not liable for uncontracted-for work. Such buyers take title free of any mechanics' liens that were not reduced to judgment before closing. n107

The homebuyer could try to get title insurance protection against mechanics' liens, but purchasers can seldom find title insurers willing to insure them against such liens. A Florida statute requires that title insurers cover purchasers against mechanics' liens when sellers provide affidavits that there are no unpaid mechanics. n108 This is easier in Florida because all mechanics' liens relate back to the recordation of the underlying construction contract. Except for that provision, the state legislature would be requiring title insurers to assume a substantial risk for off-record defects. Due to the Florida recordation requirement for construction contracts and its relation-back rule, the Florida title insurer covering purchasers against mechanics' liens is covering a defect of records and can therefore assess the type of indemnity it should require of the owner before assuming the risk.

FOOTNOTES:

(n1)Footnote 63. Some states have enacted legislation in an attempt to limit the instances in which an owner will be required to pay twice for the same work. For example, Michigan statutes have specified a series of notice and other requirements to inform the owner of the identity of the subcontractors. If a subcontractor fails to follow the notice requirements, he may lose his right to a mechanics' lien.

(n2)Footnote 64. *Bee Spring Lumber Co. v. Pucossi, 943 S.W.2d 622 (Ky. 1997)* (When the owner had paid portion of contract price to the general contractor and when the general contracted later failed to complete the contract and failed to pay subcontractors or suppliers for the work or materials furnished, the legislature did not intend to protect those owners who have the opportunity of owning a vacation or second home in addition to their primary residence by allowing a dollar-for-dollar credit against the lien properly filed by the subcontractors or the suppliers); *Wade v. Farnsworth, 917 P.2d 967 (N.M. App. 1996)* (Statute preventing attachment of materialmen liens or subcontractor liens if property owner pays "all and any" of contract amount to general contractor before liens are filed requires that owner pay all amounts still owing under original contract and any valid modifications to contract. Partial payment to contractor is not sufficient to discharge liens that are subsequently imposed on property, and therefore the statute provides a protection to materialmen and subcontractors even at the expense of requiring owners to make double payment); *Better Roofing Materials Co. v. Sztukouski, 183 S.W.2d 400 (Mo. App. 1944)* .

(n3)Footnote 65. Consent may be express or implied by "the owner's execution of the prime contract." Lawrence Ponoroff, *Construction Claims in Bankruptcy: Making the Best of a Bad Situation, 11 Bankr. Dev. J. 343, 403 n. 19* (1994-95).

(n4)Footnote 66. *Better Roofing, 183 S.W.2d at 404* ; *Construction One, Inc. v. Shore Thing, Inc., 2003 Ohio App. LEXIS 1290* (No. 81135, Jan. 23, 2003) (mechanics lien was not valid against the interest of the lessor).

(n5)Footnote 67. *See* Marion W. Benfield, Jr., *The Uniform Construction Lien Act: What, Whither, and Why, 27 Wake Forest L. Rev. 527, 541 (1992).*

(n6)Footnote 68. N.Y. Lien Law § 4 ("If labor is performed for, or materials furnished to, a contractor or subcontractor for an improvement, the lien shall not be for a sum greater than the sum earned and unpaid on the contract at the time of filing the notice of lien, and any sum subsequently earned thereon. In no case shall the owner be liable to pay by reason of all liens created pursuant to this article a sum greater than the value or agreed price of the labor or materials remaining unpaid, at the time of filing notice of such liens ... .").

(n7)Footnote 69. *See Pond Cove Millwork Co. v. Steeves, 598 A.2d 1181 (Me. 1991)* (homeowners entitled to invoke the double payment defense because subcontractors could not establish there was a balance due on the contract when the homeowners received notice of the mechanics' liens).

(n8)Footnote 70. *Tibbetts Contr'g Corp. v. O & E Contr'g Co., 206 N.E.2d 340 (N.Y. 1965)* .

(n9)Footnote 71. *Van Clief v. Van Vechten, 29 N.E. 1017 (N.Y. 1892)* .

(n10)Footnote 72. *Wyncoop v. People, 153 N.Y.S.2d 836 (App. Div. 1956) , aff'd, 150 N.E.2d 771 (N.Y. 1958)* .

(n11)Footnote 73. *Hutton Bros. v. Gordon, 23 N.Y.S. 770 (1893)* .

(n12)Footnote 74. The author is grateful to Dan Cavana for research done on waivers and releases when he was a student at the University of Southern California Law Center in Spring of 1995.

(n13)Footnote 75. *Snydergeneral Corp. v. Lee Parcel 6 Assocs. Ltd. Partnership, 681 A.2d 1008 (Conn. App. 1996)* (Agreement between subcontractor and general contractor, under which subcontractor waived and relinquished right to any and all liens or claim of liens, clearly and unambiguously waived subcontractor's rights to assert mechanics' lien against debtor's real property).

(n14)Footnote 76. *See, e.g., Walker & Laberge Co., Inc. v. First Nat'l Bank, 146 S.E.2d 239 (Va. 1966)* . In Illinois, the courts had allowed owners and general contractors to specifically enforce contractual waivers of mechanics' lien rights in construction contracts. Construction contract provisions were enforceable, absent proof of fraud, that "no contractor or subcontractor shall have the right to assert any mechanics' liens or materialmen's liens against title" to the property being improved. *Ridgeview Constr. Co., Inc. v. American Nat'l Bank and Trust Co., 628 N.E.2d 1060 (Ill. App. 1993)* . The Illinois legislature got rid of lien waiver enforcement through the Mechanics' Lien Act, *770 ILCS 60/1.1* (formerly cited as Ill. Rev. Stat. ch. 82, para. 1.1). That provision declared "an agreement to waive" a mechanics' lien "in anticipation of and in consideration for the awarding of a contract or subcontract ... against public policy and unenforceable." *R. W. Dunteman Company, v. C/G Enterprises, Inc., 692 N.E.2d 306 (Ill. 1998)* (statute voiding lien waivers as against public policy is not unconstitutionally vague).

(n15)Footnote 77. *See, e.g.,* Robert Kratovil & Harry Q. Rhode, *Mechanics' Lien Waivers and the Requirement of Consideration, 14 DePaul L. Rev. 243 (1965)* (criticizing the general requirement that there be consideration); *Greensburg Dep. Bank v. GGC-Goff Motors, 851 S.W.2d 476, 478 (Ky. 1993)* (holding that a waiver requires consideration unless a third party detrimentally relies on the waiver, in which case the waiver may be implied); *Walker & Laberge Co., Inc. v. First Nat'l Bank, 146 S.E.2d 239 (Va. 1966)* (stating that waivers require consideration). But see *William Aupperle & Sons, Inc. v. First Nat'l Bank & Trust, 329 N.E.2d 458, 462 (Ill. App. Ct. 1975)* (holding that when a waiver pertains only to one of several remedies, and does not modify other remedies, the waiver is valid even if consideration is lacking); *Landvatter Ready Mix, Inc. v. Buckey, 963 S.W.2d 298 (Mo. App. E.D. 1997)* (For waiver of mechanics' lien to be valid, it must be supported by consideration or must induce party receiving waiver to detrimentally change its position in reliance upon waiver); *McCartin McAuliffe Mechanical Contractor, Inc. v. Midwest Gas Storage, Inc., 685 N.E.2d 165, 173 (Ind. App. 1997)* (Mechanics' liens can be waived but the waiver should be supported by consideration in order to be effective).

(n16)Footnote 78. *See, e.g., Cal. Civ. Code § 3264(a)* and *(b)*; *N.Y. Lien Law § 34* (waivers are against public policy and unenforceable unless delivered with or after payment, although agreements to subordinate or release after a lien notice is filed may be valid); Mich. Stat. Ann. § 26.315(155) (waivers as part of a contract for improvements are invalid); *MCK Building Associates, Inc. v. St. Lawrence University, 754 N.Y.S.2d 397 (2003)* (the fact that the subcontractor executed lien waivers did not preclude recovery in quantum meruit for wrongful termination of the subcontract).

(n17)Footnote 79. *Cal. Civ. Code § 3262(3)*; *Tharp v. Keeter/Schaefer Investments, L.P., 943 S.W.2d 811 (Mo. App. 1997)* (As between subcontractor and owner, lien waivers executed by subcontractor waived the right to mechanics' lien for only amounts shown on waivers, not for retainage shown on each invoice, though owner did not make "side letter" acknowledging that it had not made full payment, where each lien waiver showed only amount of payment received, and it was evident that owner understood that consideration recited in each lien waiver was only 90%

of amount owed.).

(n18)Footnote 80. *Cal. Civ. Code § 3262(3)* and *(4)*.

(n19)Footnote 81. California requires specific language that is in the statute. *12 U.S.C. § 1735-5* and *12 U.S.C. § 1735-5.* Michigan requires that the forms in the statute be substantially used. Mich. Stat. Ann. § 26.316(15).

(n20)Footnote 82. *See, e.g., Cal. Civ. Code § 3262(1)* and *(2)*. Conditional releases in California are not good to cover "any [amounts] retained before or after the release date; extras furnished before the release date for which payment has not been received; extras or items furnished under a written change order which has been fully executed by the parties prior to the release date are covered by this release unless specifically reserved by the claimant in this release." Contractors, subcontractors and suppliers need to be sure they aren't owed anything up to the release date when the release purports to cover labor and materials furnished up to the release date. *See Halbert's Lumber, Inc. v. Lucky Stores, Inc., 8 Cal. Rptr. 2d 298 (Cal. App. 1992)* . A lumber company signed a release good for material furnished "through May 19, 1986 only." On May 15, the lumber had been delivered to the job site but the supplier had not yet sent a bill for that lumber. After the supplier sent the bill, it was not paid. The lumber company tried to enforce its mechanics' lien rights but found itself estopped by its own release. The court ruled against the lumber supplier and stated, "A release is intended to be a release, not a glorified receipt." *Id. at 299* . Potential lienors in states other than California who supply "extras" need to exercise similar caution. They will lose their lien claims if they sign conditional releases for work on materials furnished through a certain date, and extras were provided before that date for which they had not yet been paid. *J.A. Jones Constr. Co. v. Super. Ct., 33 Cal. Rptr. 2d 206 (Cal. App. 1994)* . After the Jones case, potential lienors in California are protected by statute as long as the lien release specifically excludes extras. In Florida, a right to claim of lien may not be waived in advance and may be waived only to the extent of labor, services, or materials furnished as of the date of release, or furnished though a certain date. *Fla. Stat. Ann. § 713.20(2)*. *Terry Matthews, Inc. v. C & L Contracting, Inc., 959 F. Supp. 1434 (W.D. Okla. 1997)* (Under Oklahoma law, subcontractor's execution of final release and waiver of lien agreement with general contractor did not prevent subcontractor from establishing validity of its lien and its substantive right to recover from contractor for extra work and materials furnished by subcontractor after execution date of release and waiver of lien agreement).

(n21)Footnote 83. *See supra* § 102.02(a)(2)(iii).

(n22)Footnote 84. *See, e.g., Greensburg Dep. Bank v. GGC-Goff Motors, 851 S.W.2d 476 (Ky. 1993)* .

(n23)Footnote 85. Courts in Kentucky will find an implied subordination waiver if a third party detrimentally relied on an otherwise invalid waiver. *Id. See also* Ellen L. Sostman & Duncan J. Forsyth, *Mechanics' Lien Waivers in Connecticut: The Myths and the Realities, 63 Conn. B.J. 195, 201 (1989).*

(n24)Footnote 86. *See, e.g., Schneider v. Ampliflo Corp., 196 Cal. Rptr. 172 (Cal. App. 1983)* .

(n25)Footnote 87. Arizona holds that when a materialman endorses a check, he "will be deemed to have been paid the money due him, up to the amount of the joint check as long as there is no other agreement between the owner or general contractor and the materialman as to the allocation of the proceeds." *Brown Wholesale Elec. Co. v. Beztak of Scottsdale, Inc., 788 P.2d 73, 76 (Ariz. 1990)* . *Roofing & Sheet Metal Supply Co. of Tulsa, Inc. v. Golzar-Nejad Khalil, Inc., 925 P.2d 55 (Okla. 1996)* (Materialman that, as result of contractor's diversion of materials delivered to construction site, dropped off more materials at site than were ever incorporated in roof repair project was not entitled to lien against property in question, where property owner's payment pursuant to *joint check* before contractor's diversions were discovered was more than sufficient to pay for such materials as were actually used in repair project; property owner could treat materialman's deliveries as if they were made pursuant to single contract, and was not subject to any materialman's lien claim simply because materials were delivered after property owner's payment for materials that were incorporated in roof).

(n26)Footnote 88. Cal. Civ. Code § 3235. *Kruzel v. Leeds Bldg. Prods., Inc., 470 S.E.2d 882 (Ga. 1996)* (At all

times after materialmen filed their claims of lien, owner of real property had unilateral option to post bond and discharge liens).

(n27)Footnote 89. *Id.* §§ 3161, 3162. This procedure also frees construction funds from any possible stop notice claim.

(n28)Footnote 90. *Western Landscape Constr. v. Bank of Am. Nat'l Trust & Sav. Ass'n, 58 Cal. App. 4th 57 (Cal. App. 1997)* (Lien and stop notice waiver form, signed by subcontractors upon receiving progress payments from construction loan lender, specifying that it did not "cover any retention," did not extinguish right of subcontractor to receive as retention the sums owed to subcontractor for work done which were withheld pursuant to contract until completion of all work); *Zalay v. Ace Cabinets of Clearwater, Inc., 700 So. 2d 15 (Fla. App. 1997)* (Construction lien statute, providing that property owner who has properly retained all sums required to be retained, and who has made no improper payments, will be liable to unpaid subcontractors and materialmen only to extent of retainage, is intended to define extent of lien); Property owners' right to set off against retainage, for costs of settling mechanics' liens and of remedying deficiencies in general contractor's performance, had priority over and reduced amounts available for payment to subcontractors and materialmen who had issued notices of personal liability (PLN) pursuant to Indiana PLN statute. *Poindexter Excavating, Inc. v. Downey, 198 B.R. 292 (S.D. Ind. 1996) , aff'd, In re Pearson Constr. Co., 234 F.3d 1273 (7th Cir. 2000)* .

(n29)Footnote 91. Texas law requires the owner of real property on which a contractor is making improvements to retain 10% of the contract price of the improvements or, if there is no contract price, 10% of the reasonable value of the completed work, until 30 days after the contractor's work is completed. Tex. Prop. Code Ann. § 53.101. The mechanics' lien claimant has a lien on the "retainage" if the claimant sends the owner proper notice of the unpaid claim and files a proper lien affidavit within 30 days after completion of the project. *General Air Conditioning Co. v. Third Ward Church of Christ, 426 S.W.2d 541 (Tex. 1968)* (where subcontractor entitled to lien of up to 10% of contract price, even though lien not filed within 30 days after completion).

(n30)Footnote 92. *In re Badger Lines, Inc., 590 N.W.2d 270 (Wis. 1999)* (secret liens are not favored by the courts); *See also, In re Badger Lines, Inc., 199 B.R. 934 (Bkrtcy. E.D. Wis. 1996)* ("Secret" or self-perfecting liens should be the exception.), *rev'd, In re Badger Lines, Inc., 202 F.3d 945 (7th Cir. Wis. 2000)* .

(n31)Footnote 93. *Time when notice is required:* before or during furnishing any labor or material, New Hampshire; before any labor or material is furnished, where the building contract and specifications are not recorded (they usually are recorded), New Jersey; 10 days' notice of amount of labor or material to be furnished before labor or material is furnished, Arkansas; 10 days after furnishing of labor or materials, Oregon; 20 days after furnishing labor or materials, except general laborers, Nevada; within 45 days after furnishing labor or materials if no direct contract with owner, Florida; 60 days after furnishing labor or materials, Connecticut, Indiana, and Washington; 10 days after furnishing labor or material if contract is directly with owner, otherwise 60 days, Wisconsin; 90 days after furnishing labor or material if no direct contract with owner, Massachusetts; if alteration or repair, before furnishing last labor or material, if new work or substantial alteration, 90 days after furnishing last labor or material, Pennsylvania; 120 days after furnishing labor or materials, Rhode Island; 30 days after completion of building, District of Columbia; 10 days before filing lien statement, Colorado.

In Iowa, the contractor who intends to use subcontractors is required by statute to warn the property owner that the subcontractors "may enforce a lien upon the improved property if they are not paid ... even if the parties have no direct contractual relationship with the owner." Iowa Code § 572.13(2). The warning leaves the owner the burden of figuring out who the subcontractors are. *Tadir Air, Inc. v. FGH Realty, Inc., 746 N.Y.S.2d 160 (2002)* (dismissal of the mechanics lien foreclosure action occurred when the defendant was not properly served); *Northeast Restoration Corp. v. K & J Construction Co., 757 N.Y.S.2d 542 (2003)* (a defective notice of lien rendered the lien invalid); *Murdock Construction Management, Inc. v. Eastern Star Missionary Baptist Church, Inc., 766 N.E.2d 759 (Ind. App. 2002)* (a construction manage who provided only supervisory services was not considered a laborer who was entitled to a

mechanics lien).

(n32)Footnote 94. Cal. Civ. Code § 3097(c)(1); Ariz. Rev. Stat. Ann. § 33.992.01; Ohio Rev. Code Ann. § 1311.04.

(n33)Footnote 95. *Griess & Ginder Drywall, Inc. v. Moran, 561 N.W.2d 815 (Iowa 1997)* (Statutory advance notice of lien did not excuse late filing. Purpose behind advance lien notice provisions is to protect homeowners from secret liens arising after owner has paid contractor; implicit in this purpose is notion that homeowners are generally unfamiliar with contractor's use of subcontractors and owner's direct lien responsibility to subcontractors).

(n34)Footnote 96. *See* Annotation, *Sufficiency of Designation of Owner in Notice, Claim, or Statement of Mechanics' Lien, 48 A.L.R.2d 153 (1973); Kerth v. Lake Ozark Construction Industries, Inc., 225 B.R. 686 (E.D. Mo. 1998)* (contractor failed to plead that notice had been given).

(n35)Footnote 97. A lessor may be deemed in a "direct contract" with a tenant's contractor if the lessor knows the tenant has hired a contractor, is allowed by statute to file a notice of non-responsibility to free the lessor's interest in the property from the lien of the tenant's contractor, and fails to file the notice. *See Arthur Gensler, Jr. & Assocs. v. Garry Barrett, Inc., 499 P.2d 503 (Cal. 1972) . See also Dondren v. KK Complex, Ltd., 800 P.2d 719 (Nev. 1990) . Gauzy Excavating & Grading Co. v. Kersten Homes, Inc., 934 S.W.2d 303 (Mo. 1996)* (Statutory mechanics' lien notice is designed to warn inexperienced property owners of danger to them which lurks in mechanics' lien statute); *FCC Constr., Inc. v. Casino Creek Holdings, Ltd., 916 P.2d 1196 (Colo. App. 1996)* (General contractor's statement of mechanics' lien that failed to name each subcontractor and did not list amounts owed to each subcontractor complied with statute requiring notice of lien to include amount due and name of person who furnished material or performed labor and, thus, lien was valid where property owner dealt directly with general contractor and general contractor hired subcontractors); *Pezzuco Construction, Inc. v. Melrose Associates, 764 A.2d 174 (R.I. 2001)* (mechanics' lien lost for failure to fulfill lis pendens filing requirement); *Texas Wood Mill Cabinets, Inc. v. Butter, 117 S.W.3d 98 (Tex. App. 2003)* (purchasers had constructive notice of mechanics' lien).

(n36)Footnote 98. Cal. Civ. Code § 3097.

(n37)Footnote 99. *Id.* § 3097(f). *Morse Bros., Inc. v. Kemp Constr., Inc., 935 P.2d 464 (Or. App. 1997)* (Subcontractor effected delivery of its notice of right to lien on principals of real estate development business when it mailed notice via certified mail, postal carrier delivered notice to correct address despite subcontractor's use of business' old address, and receptionist for company with which business shared offices signed return receipt, as agent for business, even though receptionist did not recall receiving notice and principals claimed they never received notice).

(n38)Footnote 100. *Romak Iron Works v. Prudential Ins. Co. of Am., 163 Cal. Rptr. 869 (Cal. App. 1980)* .

(n39)Footnote 101. Cal. Civ. Code § 3097.1.

(n40)Footnote 102. *Windsor Mills v. Richard B. Smith, Inc., 77 Cal. Rptr. 300 (Cal. App. 1969)* ; *Kim v. JF Enters., 50 Cal. Rptr. 2d 141 (1996)* ; *Gauzy Excavating & Grading Co. v. Kersten Homes, Inc., 934 S.W.2d 303 (Mo. 1996)* (Original contractor must provide notice in writing and notice that comports with words used in mechanics' lien notice statute before filing valid mechanics' lien); *Garage Doors of Indianapolis, Inc. v. Morton, 682 N.E.2d 1296 (Ind. App. 1997)* (When materialman agrees to supply materials and services to contractor rather than to owners of real estate, materialman must furnish written notice to owners of his intention to hold lien as condition precedent to holding mechanics' lien). *But see, Vugterveen Sys., Inc. v. Olde Millpond Corp., 560 N.W.2d 43 (Mich. 1997)* (Conversation between real property owner and drywall subcontractor fulfilled notice-of-furnishing requirement of Construction Lien Act, as conversation supplied all necessary information to owner, including identity of subcontractor, work to be performed, and property to be improved; accordingly, owner could not assert defense to subcontractor's construction lien based on failure to provide notice of furnishing).

(n41)Footnote 103. *Industrial Asphalt, Inc. v. Garrett Corp., 226 Cal. Rptr. 17 (Cal. App. 1986)* . But see *Barr Lumber Co., Inc. v. Old Ivy Homebldrs., Inc., 40 Cal. Rptr. 2d 717, 720 (Cal. App. 1995)* (holding that the procedures for naming parties must be strictly followed and, therefore, notice to the general partner was insufficient notice to lien the assets of the limited partnership). The notice to the owner would not, however, have affected the rights of the construction lender who was not notified. Nonetheless, an argument can be made that the statutory requirement for the contractor to receive a preliminary notice is not satisfied by the owner's knowledge that the subcontractor exists and is on the job.

(n42)Footnote 104. *Jim Morgan Elec. Co. v. Smith, 684 N.E.2d 121 (Ohio Com. Pl. 1996)* (Having made no attempt to determine whether notice of commencement had been filed until after it completed work on project, subcontractor could not raise any technical omission in notice of commencement filed by property owner to excuse its own failure, as prerequisite to preserving its mechanics' lien, to file a notice of furnishing within 21 days after it first performed work on project; subcontractor could not have relied on any such omission).

(n43)Footnote 105. *Eyster v. S.A. Birnbaum Contracting, Inc., 662 N.E.2d 201 (Ind. App. 1996)* .

(n44)Footnote 106. Cal. Civ. Code § 3097(o)(1).

(n45)Footnote 107. *See York Roofing, Inc. v. Adcock, 634 A.2d 39 (Md. 1993)* (holding that tenant was a bona fide purchaser and therefore was free of all mechanics' liens which were not established before equitable title passed despite knowledge by the tenant that subcontractors had not been paid).

(n46)Footnote 108. Const. art. XIX, § 13 states: "If at closing the seller signs an affidavit swearing that no improvements have been made to the property within the past 90 days for which payment has not been made in full, the title policy may not except from coverage any lien or right to lien for services, labor, or material furnished which is imposed by law and not shown by the public record."

1 Parts of this chapter have been adapted from George Lefcoe, Real Estate Transactions (Michie 1993).

Thompson on Real Property, Thomas Editions

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CHAPTER 102 MECHANICS' LIENS 1

12-102 Thompson on Real Property, Thomas Editions § 102.03

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§ 102.03 The Mechanics of the Mechanics' Lien Law.

[Go To Supp]

§ 102.03(a) Who May Secure a Mechanics' Lien? The Range of Answers Among the Several States.

Mechanics' lien statutes give liens against the real estate being improved to persons who supply services (including labor) and materials for the improvement. In about half the states, any person who supplies services or materials is allowed a lien, no matter how far removed the person is from the owner. Other states limit those who can secure a lien to two tiers (prime contractor, subcontractor), three tiers (prime contractor, subcontractor, subcontractor) or four tiers. A few others allow a lien of two tiers plus all materialmen and laborers, and one gives a lien to all who contract with licensed contractors n109

§ 102.03(b) Who May Secure a Mechanics' Lien in California?

In California, a party is entitled to the benefits of the Mechanics' Lien Law if: (1) the party contributes to a work of improvement, (2) at the request of the owner, the owner's actual agent, or the owner's *statutory agent*. Every contractor, subcontractor, architect, builder, or other person having charge of all or any portion of the job, is a *statutory agent* of the owner for purposes of the Mechanics' Lien Law. n110

It has been held that material suppliers who furnish materials to other materialmen are not entitled to mechanics' liens, under the rationale that the material suppliers were not dealing with the owner, the owner's actual agent, or the owner's statutory agent, and therefore were not entitled to lien on the property. n111 Since persons who supply materials to an owner's statutory agent have mechanics' lien rights while persons who supply materials to a material supplier do not, it is critical and often difficult to determine whether a party is a statutory agent or a materialman. Courts have addressed this issue in the context of a material supplier supplying materials to a person who is arguably either a material supplier or a subcontractor (statutory agent).

In analyzing this question, one court has held that the essential feature that distinguishes a subcontractor from a material supplier is that subcontractors construct a definite, substantial part of the work of improvement in accordance with plans and specifications. n112 The distinction between a subcontractor and a material supplier depends on whether the materials furnished are standard items produced from designs already in existence, or items that must be specially

designed and fabricated for the specific construction project. n113 Materials available off the shelf cause the provider to be labelled a material supplier. The material suppliers would *not* be entitled to mechanics' lien rights. n114

Another line of cases has addressed the mechanics' lien rights of engineers and architects on projects that were never built. State courts have divided on whether engineers and architects are entitled to mechanics' liens. Even where they are, they may have nothing to lien if the project they design or engineer is never commenced. n115 On the other hand, the plans and specifications alone can enhance the value of a site if they are used to secure entitlements, construction financing or a sale. California courts granted lien rights to architects and engineers of unbuilt projects, n116 but the legislature substituted a new statute, a Design Professionals Lien, n117 which is more restrictive. n118

State legislatures have extended lien protection to gardeners, n119 interior designers, n120 and land surveyors. n121

Generally, lien laws require contractors and subcontractors to be licensed in order to claim a lien. n122

§ 102.03(c) Contents and Effect of a Mechanics' Lien.

A mechanics' lien is a one page document that must be signed and verified (sworn to) by the claimant. The document must contain:

(1) description of the work done or materials furnished; n123

(2) description of the property where the work was done;

(3) name of the owner, or reputed owner, of the property; n124

(4) name of the person who hired the claimant; and

(5) statement of the balance due. n125

The filing and recording of a mechanics' lien at the county recorder's office places the world on constructive notice of the claim against the property. The mechanics' lien becomes a *cloud* or *encumbrance* on the property's title, making it difficult for the owner to sell, lease, or borrow against the property. Title companies issuing "first lien" protection to lenders whose mortgages are obviously subordinate to mechanics' liens often do so only by extracting promises of indemnity from the developer, owner or general contractor. They are tempted by developers who look financially solid and promise big title insurance premiums. n126

While the construction job is in progress, the title to the job site is clouded regardless of whether any mechanics' liens have been recorded, since everyone who has contributed to the job has the *right* to record a mechanics' lien which would take priority over any interest the landowner could convey.

§ 102.03(d) Time Limits for Filing and Recording the Lien and Foreclosure Action.

In accordance with the policy of the law against clouds on title, there are specific statutory time restrictions associated with the filing and recording of a mechanics' lien and the related foreclosure lawsuit. n127

State statutes require the suit to be reduced to judgment within a certain time after the claim of lien was first filed--or the lien will be lost. n128

Methods of shortening the mechanics' lien filing period vary from state to state.

In California, the time for filing may be shortened if the owner files and records a *notice of completion* n129 or *notice of cessation*. n130 There are specific rules and procedures applicable to each which must be complied with in order to gain their benefits.

In Florida, mechanics' lien claimants may record a notice of lien at any time during construction and up to 90 days after final work is completed. n131 Florida doesn't have a procedure to shorten this filing period. After the recording of the claim of lien, the claim must be served on the owner within 15 days or else become voidable. Once the claim of lien is recorded and notice to the owner has been served within the required time period, the claimant has one year to commence an action in the proper court to enforce the lien. n132 The right of action to enforce the claim of lien is extinguished one year after the claim of lien is recorded. The owner may shorten this one-year period to 60 days by recording a *Notice of Contest of Lien*. n133 Once a mechanics' lien is recorded within the statutory period, the lien claimant has another period of time to file a lawsuit to *foreclose* on the lien. n134 Because mechanics' liens do impair the liquidity of owners, the statutes must be observed meticulously, or the lien right is lost. n135

§ 102.03(e) Foreclosure Suit Must Be Diligently Prosecuted.

To further the policy of the law against clouds on title, courts have made it clear that even if a lien claimant files the foreclosure suit within the statutory period, the claimant must still diligently prosecute it to trial. The strategy of delaying prosecution, in order to keep the property tied up and thereby gain leverage in coercing the owner to pay off the claim, may be risky. One court ordered dismissal of a plaintiff's complaint because the plaintiff, after filing suit within the 90-day period, failed to serve a copy of the summons and complaint on the defendant for four months. n136 The foreclosure action must be brought "in a proper court" which has been held to be the court in the county where the land is located. n137

§ 102.03(f) Lis Pendens.

Immediately after filing a foreclosure action, in many states the lienor needs to record a notice of lis pendens in order to give constructive notice of the pending foreclosure suit to anyone who might purchase or otherwise deal with the property. The effect of recording a notice of lis pendens is to subject all subsequent dealings with the property to the outcome of the foreclosure suit. In some states the recordation of the mechanics' lien is itself sufficient to put all subsequent purchasers on notice and no lis pendens filing is required. n138

§ 102.03(g) Clearing Up the Cloud: The Release Decree.

Many states give the owner ways to remove the cloud of a mechanics' lien from the property's title. n139 New York has statutorily prescribed three ways an owner can extinguish a mechanics' lien and obtain title clear of it: (a) obtaining a release decree against the claimant; n140 (2) filing a motion to discharge for failure to foreclose or prosecute within the statutory period; n141 and (3) filing a bond to take the place of the property as security on the claim. n142

Similarly, in California, an owner can post a *release bond* for one and one-half times the amount of the mechanics' lien claim, executed by a corporate surety company, guaranteeing payment of any sum which the claimant recovers plus the costs of the suit. When the release bond is recorded, the cause of action to foreclose the mechanics' lien is terminated and the owner is entitled to dismissal of the action. The effect is to substitute the liability of the bonding company for a lien on the real property as security for payment of the mechanics' lien claim. n143

§ 102.03(h) Slander of Title/Malicious Prosecution.

The recording of a mechanics' lien claim is absolutely privileged and therefore cannot be the basis of an action for slander of title. n144 But a claimant who records a tardy claim of mechanics' lien risks an action for malicious prosecution. n145

FOOTNOTES:

(n1)Footnote 109. *Introductory Comment to Article 5 of the Uniform Simplification of Land Transfer Act,* 14 U.L.A. 271. *Carter-Jones Lumber Co. v. Northwestern PA Humane Soc., 913 A.2d 1002 (Pa. Cmwlth. 2006)* (an animal shelter served a purely public purpose and was exempt from mechanics' liens under state law); *Velez v. Community Commerce Bank, 2002 Cal. App. Unpub. LEXIS 1872* (No. B150852, Jun. 4, 2002) (an unlicensed contractor may not recover any compensation for services rendered); *Callos, Inc. v. Julianelli, 752 N.Y.S.2d 398 (2002)* (a contractor who was not licensed at the time it performed the work was not entitled to foreclose on a mechanics lien for the work); *See, e.g., Biette v. Scott Dugas Trucking & Excavating, Inc., 676 A.2d 490 (Maine 1996)* ; *J. S. Sweet Co., Inc. v. White County Bridge Comm'n, 714 N.E.2d 219 (Ind. App. 1999)* (State law liens may not be asserted against federally owned lands and buildings). See also, *Union Pacific R. Co. v. Midland Equities Inc., 45 F.Supp. 2d 685 (E.D. Mo. 1999)* (under Missouri law, property held for the benefit of the public which is necessary for public use is not subject to mechanics' lien.); *Union P. R. Co. v. Midland Equities Inc., 45 F. Supp. 2d 685 (E.D. Mo. 1999) , aff'd in part, rev'd in part, and remanded, Union P. R. Co. v. Midland Equities Inc., 212 F.3d 386 (8th Cir. Mo. 2000)* ; *Tilt-Up Concrete, Inc. v. Star City/Federal, Inc., 621 N.W. 2d 502 (Neb. 2001)* (state Construction Lien Act did not extinguish the contractor's common-law right to sue for breach of contract). *Badger Lumber Co., Inc. v. Redd, 583 S.E.2d 76 (W. Va. App. 2003)* (materialman was not in a class entitled to a mechanics' lien).

(n2)Footnote 110. Cal. Civ. Code § 3110. *Schmitt v. Tri Counties Bank, 83 Cal. Rptr. 2d 257 (Cal. App. 1999)* .

(n3)Footnote 111. *Harris & Stunston, Inc. v. Yorba Linda Citrus Ass'n, 26 P.2d 654 (Cal. App. 1933)* (plaintiff sold water softeners to materialmen who installed them); *Wilson & Bros. v. Hind, 45 P. 695 (Cal. 1896)* (one who furnishes doors, sashes, blinds, and other stock material to a materialman cannot claim a lien on the building for such material).

(n4)Footnote 112. *Theisen v. County of Los Angeles, 352 P.2d 529, 537 (Cal. 1960)* .

(n5)Footnote 113. *Id. Basic Modular Facilities, Inc. v. Ehsanipour, 83 Cal Rptr. 2d 462 (Cal. App. 1999)* ; *see also F.B. Mattson Co., Inc. v. Tarte, 719 A.2d 1158 (Conn. 1998)* ; *In re Payless Cashways, Inc., 230 B.R. 120 (8th Cir. 1999) , aff'd, Amtech Lighting Servs. v. Payless Cashways, Inc., 203 F.3d 1081 (8th Cir. 2000)* .

(n6)Footnote 114. *Piping Specialties Co. v. Kentile, Inc., 40 Cal. Rptr. 537 (Cal. App. 1964)* . To the extent that Cal. Civ. Code § 3110 and these cases have the effect of limiting the California constitutional guarantee of mechanics' liens to materialmen, they may be in violation of the constitutional mandate.

(n7)Footnote 115. *See, e.g., Anthony & Assocs. v. Muller, 598 A.2d 1378 (R.I. 1991)* (Engineering and architectural firms could not bring action under mechanics' lien law for payment of preconstruction services when property owner never commenced construction. Their appropriate remedy was in contract.).

(n8)Footnote 116. *Nolte v. Smith, 11 Cal. Rptr. 261 (Cal. App. 1961)* ; *McDonald v. Filice, 60 Cal. Rptr. 832 (Cal. App. 1967)* ; *In re Morrell, 42 B.R. 973 (Bankr. N.D. Cal. 1984) . See also Design Assocs. v. Welch, 36 Cal. Rptr. 341 (Cal. App. 1964)* (denying lien where work failed to benefit property and approval to proceed was not given).

(n9)Footnote 117. Cal. Civ. Code §§ 3081.1 to 3081.10.

(n10)Footnote 118. On unbuilt projects, certified architects, registered professional engineers, and licensed land surveyors who furnish services based on a written contract with a landowner can lien the land if the project is never commenced, as long as: (1) the constructing landowner still owns the property at the time the lien is recorded; (2) a building permit was issued for the project; (3) the design professional records her lien no later than 90 days after she knows or has reason to know the project isn't going to be commenced; (4) 10 days before recording the lien, she gives the landowner notice, by registered or certified mail, of her intention to record it. The lien can't take priority over a construction loan deed of trust. If the project is commenced, the design professional's right becomes the same as any other mechanics' lien claimant. To the extent the statute denies enforcement of a lien the California Constitution

sanctions, the statute is unconstitutional. *Parsons et al. v. Kern County Employees Ret. Ass'n, 7 Cal. Rptr. 2d 456 (Cal. Ct. App. 1992)* .

(n11)Footnote 119. N.Y. Lien Law § 3.

(n12)Footnote 120. Fla. Stat. Ann. §§ 713.01(14)(f), 713.03.

(n13)Footnote 121. Cal. Civ. Code § 3110.

(n14)Footnote 122. *See, e.g.*, Fla. Stat. Ann. § 713.02. *See also In re Branson Mill, Inc., 120 B.R. 1006 (Bankr. W.D. Mo. 1990)* (architects who were registered out of state could not lien in a state where they were not registered). *But see Cassell Bldg. Corp. v. Rice, 46 Pa. D. & C. 3d 98 (1986)* . *Fla. Stat. Ann. § 713.02* ("no lien shall exist in favor of any contractor, subcontractor, or sub-subcontractor unless such contractor, subcontractor, or sub-subcontractor is licensed as a contractor pursuant to the laws of the jurisdiction within which he is doing business").

(n15)Footnote 123. *Bale v. Barnhart, 798 N.E.2d 750 (Ill. App. 2003)* (lien failed to accurately identify the contract and thus did not satisfy statutory requirements).

(n16)Footnote 124. A mechanics' lien was held invalid when the lien identified the previous owners, not the present ones with whom the mechanic had contracted. "The state of the title of the Property was a matter of record and Boots [the contractor] could have named David Weis [present owner] as a defendant and failed to do so." *In re David Weis Wholesale Jewelers, Inc., 138 B.R. 503, 504 (Bankr. W.D. Pa. 1992)* .

(n17)Footnote 125. Cal. Civ. Code § 3084. Upon recordation of the document, California requires the county recorder, within 10 days, to notify the property owner by mail of the lien. Even if the owner does not receive notice from the county recorder, the lien will still retain its force, effect and priority. Cal. Gov't Code § 27297.5. *Andy Stricker, P. E., v. Taylor, 975 P.2d 930 (Or. App. 1999)* (no recovery beyond contract price allowed); *Basic Modular Facilities, Inc. v. Ehsanipour, 83 Cal. Rptr. 2d 462 (1999)* (excessive mechanics' lien reduced to proper amount); *Structure and Design, Unlimited, Inc. v. Contemporary Concepts Building and Design, Inc., 151 S.W.3d 904 (Mo. App. 2004)* (lien unenforceable because it did not contain a true and just account).

(n18)Footnote 126. *W. P. Barber Lumber Co. v. Celania, 674 N.W.2d 62 (Iowa 2004)* (judgment of foreclosure on a mechanics' lien did not render owner personally liable to lien claimant).

(n19)Footnote 127. Generally, a California mechanics' lien claimant has 90 days after the completion of the work of improvement to record her mechanics' lien. Cal. Civ. Code § 3115. The 90-day time period begins to run from the completion of the work as a whole, in contrast to the completion of the claimant's portion of the job. This is based on the theory that a potential lien claimant can always find out when the 90-day period starts to run by going to the job and observing whether the job has been finished. Regardless, the lien claimant is not required to wait until the job is finished to record the mechanics' lien. The claimant can record it at any time after finishing the claimant's part of the job up until 90 days after the entire work of improvement is completed. *Century Superior Gunite, Inc. v. Rodriguez, 173 Cal. Rptr. 661 (Cal. App. 1961)* . The claimant must provide the owner written notice that a claim of lien has been filed. For a detailed discussion of California's mechanics' lien laws, *see* Craig Penner Bronstein, *Trivial(?) Imperfections: The California Mechanics' Lien Recording Statutes, 27 Loy. L.A. L. Rev. 735 (1994). Marple v. Sorg, 646 N.Y.S.2d 543 (1996)* ; *Controlled Demolition, Inc. v. F.A. Wilhelm Constr. Co., Inc., 84 F.3d 263 (7th Cir. 1996)* (Under Indiana law, no requirement exists that, in order to issue Notice to Commence Suit to holder of mechanics' lien which will start 30-day period in which suit must be filed in order to avoid having lien declared null and void, issuer itself must have recordable interest in property); *Koudmani v. Ogle Enters., Inc., 47 Cal. App. 4th 1650 (1996)* (Section of California Constitution conferring on laborers and materialmen a right to assert mechanics' liens for value of labor and material provided in improvement of real property gave such laborers and materialmen only an inchoate right to a lien, which was meaningless unless it was exercised by recording claim of lien); *Mansion Supply Co. v. Bapat, 679 A.2d 1249 (N.J. Super. Ct. Law Div. 1996)* , *rev'd, Mansion Supply Co., Inc. v. Bapat, 702 A.2d 509 (N.J. Super. 1997)* ; *Jim Morgan*

Elec. Co. v. Smith, 684 N.E.2d 117 (Ohio 1996) (Where subcontractor failed to file its notice of furnishing to protect its lien rights until approximately 48 days after it last performed work on project, none of subcontractor's work was covered by the notice); *United Sav. Ass'n of Texas, F.S.B. v. Jim Carpenter Co., 475 S.E.2d 788 (Va. 1996)* (Ninety-day period for perfecting mechanics' lien begins to run, as against materialman who furnishes materials under a single, continuous contract, from date last item was delivered); *Metromont Materials Corp. v. Cargill, Inc., 473 S.E.2d 498 (Ga. App. 1996)* (failure to file required statutory notice in first lien action precluded later claim); *Precision Walls, Inc. v. Crampton, 196 B.R. 299 (Bankr. E.D.N.C. 1996)* (Under North Carolina mechanics' lien statute, subcontractor was not entitled to secured creditor status for preference purposes based on its contention that it could have perfected its liens had it not received payments); *Riddle v. Newton Crane Serv., Inc., 661 N.E.2d 6 (Ind. App. 1996)* (Filing of notice of intention to hold mechanics' lien by subcontractor is timely if lien is filed within 60 days of date when last work is done by subcontractor); *Pierson D. Construction, Inc. v. Yudell, 863 So. 2d 413 (Fla. App. 2003)* (failure to deliver a contractor's affidavit within 60 days of notice of contest of lien precluded contract or from foreclosing on the lien); *John Holmes Construction, Inc. v. R.A. McKell Excavating, Inc., 101 P.3d 833 (Utah App. 2004)* (the subcontractor had 90 days from the time the labor was furnished in which to file the mechanics' lien).

(n20)Footnote 128. *See, e.g.*, Pa. Stat. Ann. tit. 49, § 1701(d) (Supp. 1992) (five years). Crowded court dockets are no defense. *Brann & Stuart Co. v. Consolidated Sun Ray, Inc., 253 A.2d 105* (Pa.) , *cert. denied, 396 U.S. 840 (1969)* ; Cal. Civ. Code § 3147 (suit must be brought to trial within two years after it is filed); Fla. Stat. Ann. §§ 713.21(3), 713.22(1) (claimants must sue within one year of the date on which the claim was recorded); N.Y. Lien Law § 17 (action to foreclose lien must be brought within one year after notice of the lien has been filed). *But see Mansion Supply Co., Inc. v. Bapat, 679 A.2d 1249 (N.J. Super. 1996)* (Materialman on home construction project, which had filed demand for arbitration in accordance with statutory requirements, had up to 40 additional days to file contractor's lien claim, depending upon when arbitrator reached his decision, and was not bound by 90-day time limit generally applicable, under New Jersey construction lien law, to all contractors other than those performing work on residential construction contracts); *Carey v. Maynard, 603 S.E.2d 515 (Ga. App. 2004)* (the lien was unenforceable because of the lienholder's failure to comply with the statutory notice requirements).

(n21)Footnote 129. Cal. Civ. Code § 3117. After a notice of completion is properly recorded, subcontractors and suppliers have 30 days and original contractors have 60 days to record mechanics' liens, rather than the usual 90 days.

A notice of completion is a document, verified and recorded by the owner, that describes the property, names the prime contractor, and specifies what date the work of improvement was completed. The notice of completion must be recorded within the 10-day window after the job is completed. If it is recorded before completion of the job or 10 days after completion, the notice of completion is ineffective and all mechanics' lien claimants have 90 days from actual completion to record mechanics' liens. *Munger & Munger v. McBratney, 280 P.2d 232 (Cal. App. 1955)* .

When a work of improvement consists of separate residential units, the owner may record a notice of completion as each unit is finished. Therefore, a subdivider may record separate notices of completion covering each house as it is finished, rather than waiting until the entire subdivision is completed. Cal. Civ. Code § 3131. However, it has been held that an apartment house type condominium project is a single project requiring one notice of completion at the end of the entire job. *E.D. McGillicuddy Constr. Co. v. Knoll Recreation Ass'n, 107 Cal. Rptr. 899 (Cal. App. 1973)* .

A developer or subdivider may enter into separate original contracts for the various phases of her project, like grading, framing, plumbing concrete work, etc. If so, the developer is said to be "subbing everything out." Under the terminology of the Mechanics' Lien Law, each of these contracts is a "separate original contract." Accordingly, the developer may record a notice of completion within 10 days after the completion of each separate original contract and the 60-day mechanics' lien period will commence running from the recording of each such notice for persons filing claims under that contract. Cal. Civ. Code § 3117 (Deering 1992). This effectively gives a developer who subcontracts out most of the work an advantage over an owner who employs a prime contractor, so far as cutting off mechanics' liens is concerned. Howard S. Wright Construction Co. v. BBIC Investors, LLC, *38 Cal. Rptr. 3d 769 (2006)* (recording period

for mechanics' lien begins when work is complete, that is, performed, excused or otherwise discharged).

(n22)Footnote 130. If work on a project stops for a continuous period of 60 days, the mechanics' lien period starts to run automatically and every claimant must record a mechanics' lien within 90 days thereafter. Cal. Civ. Code § 3086(c). An owner may shorten this period by filing a *notice of cessation*. Cal. Civ. Code § 3116. It may be recorded any time after work on a project has been stopped and has the same effect on the filing period as a *notice of completion*. The notice of cessation is valid for 30 days and must be signed and verified by the owner, state the date when the cessation occurred, and describe the property. Cal. Civ. Code § 3092.

(n23)Footnote 131. Fla. Stat. Ann. § 713.08(5).

(n24)Footnote 132. *Id.* § 713.22(1).

(n25)Footnote 133. *Id.* § 713.22(2).

(n26)Footnote 134. In California, a mechanics' lien claim is void and without effect if a foreclosure action is not commenced within 90 days after the recording of the claim. Cal. Civ. Code § 3144.

(n27)Footnote 135. *See* James L. Windsor, *Perfection and Enforcement of a Mechanics' Lien in Virginia: A Defense Lawyer's Perspective, 25 U. Rich. L. Rev. 291 (1991).*

(n28)Footnote 136. *Bernard v. Parmelee, 6 Cal. App. 537 (Cal. Ct. App. 1907); Columbia Sav. Ass'n, F.A. v. McPheeters, 911 P.2d 187 (Kan. App. 1996)* (Mechanics' lienholder did not have meritorious defense to bank's petition to foreclose mortgages on real property upon which mechanics' lien was filed, and thus could not file answer to petition out of time, given mechanics' lienholder's failure to take affirmative action to foreclose or defend its lien within one-year statutory period; bank's filing of mortgage foreclosure action did not toll period for foreclosing mechanics' lien, even though action was filed within that period and named mechanics' lienholder as party, inasmuch as statute required affirmative action on lien on part of mechanics' lienholder); *Vernon Hills III Ltd. P'ship v. St. Paul Fire & Marine Ins. Co., 678 N.E.2d 374 (Ill. App. 1997)* (Failure of lienholder to commence suit within 30 days of receipt of written notice of demand to sue, made pursuant to Mechanics' Lien Act, operates to forfeit and remove mechanics' lien).

(n29)Footnote 137. *Douglas v. Donner Pines, Inc., 140 Cal. Rptr. 839 (Cal. App. 1977) . See also Halbert's Lumber, Inc. v. Burdett, 249 Cal. Rptr. 285 (Cal. App. 1988)* .

(n30)Footnote 138. *Compare Julius v. Callahan, 63 Minn. 154 (Minn. 1895); First Nat'l Bank v. Dent, 683 P.2d 722 (Alaska 1984)* ; *Collins v. Stockwell, 671 P.2d 394 (Ariz. 1983)* (no lis pendens necessary) with *McKenzie v. Fellows, 52 So. 628 (Miss. 1910)* ; *General Fire-Proof Door Corp. v. Citibank, 544 F. Supp. 191 (S.D.N.Y. 1982)* (lis pendens required). *CLG, Inc. v. BAT-JAC Contracting, Inc., 646 N.Y.S.2d 50 (N.Y.A.D. 1996)* (Failure to file notice of pendency within six-month period set forth in Lien Law was fatal to action brought to foreclose on mechanics' lien); *Metromont Materials Corp. v. Cargill, Inc., 473 S.E.2d 498 (Ga. App. 1996)* (Concrete supplier did not comply with statutory requirement that it file notice of lien action within 14 days of bringing action; therefore, his claim of the lien was precluded); *Pezzuco Construction, Inc. v. Melrose Associates, 764 A.2d 174 (R.I. 2001)* (lien voided because notices were not sent by prepaid registered or certified mail).

(n31)Footnote 139. Cal. Civ. Code § 3143.

(n32)Footnote 140. N.Y. Lien Law, art. 2, § 19(1).

(n33)Footnote 141. *Id.* §§ 19(2), 21(2).

(n34)Footnote 142. *Id.* § 19(4).

(n35)Footnote 143. If the plaintiff does not bring suit to foreclose on the lien within 90 days after its recording,

Cal. Civ. Code § 3154 provides another method of clearing title. After the 90-day period, the property owner is entitled to file a petition in the proper court for a *release decree* which effectively removes the cloud from the title. Section 3154 has been held to release the property *from the lien* itself, thereby extinguishing the lien rather than simply releasing the claim of lien. *Maris Mgt. Corp. v. Assured Drywall & Textures, 199 Cal. Rptr. 309, 312 (Cal. App. 1984)* . This is important since it effectively nullifies the former practice of recording successive claims of lien.

Before the adoption of Cal. Civ. Code § 3154 in 1979, if a claimant's mechanics' lien was void because a foreclosure suit had not been filed with 90 days after the lien was recorded, the claimant could always record a new claim of mechanics' lien, provided it was done within the applicable statutory time period (e.g., 90 days after the work of improvement was completed or 30 days after the notice of completion was recorded, if applicable). Under Cal. Civ. Code § 3154, the re-recording is now barred. *Koudmani v. Ogle Enters., Inc., 47 Cal. App. 4th 1650 (Cal. App. 1996)* (Contractor's inchoate right to mechanics' lien against property does not become actual lien encumbering property until claim of lien is recorded).

(n36)Footnote 144. Cal. Civ. Code § 47; *Frank Pisano & Assocs. v. Taggart, 105 Cal. Rptr. 414 (Cal. App. 1972)* .

(n37)Footnote 145. *Sanguinetti & Arnaiz Dev. Co. v. A. Teichert & Sons, 230 Cal. Rptr. 7 (Cal. App. 1986)* (not officially published). *Brown v. Simonis, 205 B.R. 939 (Bankr. S.D. Calif. 1997)* .

1 Parts of this chapter have been adapted from George Lefcoe, Real Estate Transactions (Michie 1993).

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CHAPTER 102 MECHANICS' LIENS 1

12-102 Thompson on Real Property, Thomas Editions § 102.04

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§ 102.04 Priorities.

[Go To Supp]

§ 102.04(a) Defined.

Every lien against real property, whether a mechanics' lien, an attachment lien, or a lien created by a deed of trust, has a specific priority. Liens of higher priority are satisfied in full before liens of lower priority are paid. This hierarchy of priorities is determined by state statute. The statutory scheme as between mechanics' lienholders and mortgagees is intended to protect prior mortgagees from losing their seniority. n146

§ 102.04(b) Parity of Liens Among Mechanics.

All mechanics' liens on the same work of improvement are afforded *equal* priority. If there is not enough money to satisfy all of the mechanics' liens, satisfaction will be pro rata among all the mechanics' lienholders. For example, assume a foundation contractor and a painting contractor have mechanics' liens of $5,000 and $10,000 respectively. Both liens are foreclosed on and the sale produces $9,000. The $9,000 will be distributed pro rata to the two claimants, with the foundation and painting contractors getting $3,000 and $6,000 respectively.

§ 102.04(c) Priorities Impacting the "Relation Back to Visible Commencement" Rule.

In thirty states, including California, mechanics' liens enjoy priority over any encumbrance that attaches after the work of improvement was commenced. n147 For example, suppose O borrows money from L to build a house and gives L a trust deed on the property as security, which L immediately records. Five days later, O hires K to build the house and K begins construction. Under these facts, L's trust deed would have priority over K's mechanics' lien claim since it was recorded before K began construction on the project. Now assume O gives L a trust deed and then hires K who begins to pour the foundation. Later, L records the trust deed. Assuming K did not actually know about the existence of the trust deed when K started work, K's mechanics' lien claim would have priority over the trust deed. Further, in most states the liens of all applicable subcontractors and suppliers would "prime" the trust deed lien since all mechanics' liens share the same priority and take their priority from the commencement of construction, regardless of when they were filed. n148

What makes this even more critical is the fact that the practical utility of a mechanics' lien as a security device often

depends on whether the mechanics' lien has priority over the construction loan deed of trust. For example, suppose O, a builder, wants to buy a piece of land and build apartments. O finds a suitable parcel owned by S, who agrees to sell the land for $200,000; $50,000 down and $150,000 in the form of a promissory note secured by a subordinated second trust deed. O takes the plans and the land purchase agreement to L, a lending institution, and obtains a commitment for a $1,000,000 construction loan. At the close of escrow, O is the owner of the property, which is subject to a first trust deed of $1,000,000 and a second trust deed of $150,000. Building commences and halfway through the project, O becomes unable to pay the persons who have worked on the project. At this point, L has disbursed $500,000 of the construction loan, the building is half completed, 10 contractors and material suppliers have recorded mechanics' liens totaling $200,000, and the property has a value, in its partially completed state, of $500,000.

If the mechanics' liens do not have priority over the trust deeds, the claimants must look to the "equity" in the property to satisfy their claims. Here, L's first trust deed secures the $500,000 distributed during construction, plus construction loan interest, and S's second trust deed is $150,000. Accordingly, there is no equity and the mechanics' liens (as well as the second trust deed) are practically worthless. But if the mechanics' liens had priority over the first and second trust deeds, they would be of great value, because property worth $500,000 would be available to satisfy their claims, which amount to only $200,000. Thus, the foreclosure value of a mechanics' lien usually depends on whether it has priority over the construction deed of trust and any other trust deeds that may be secured by the property.

Further, if the trust deed is determined to have priority over the mechanics' lien claims, the liens are wiped out, or "eliminated," by a non-judicial foreclosure sale. The trust deed holder (or buyer at sale) will take title free of the lien claims. If the mechanics' lien claims are determined to have priority over the trust deed, the buyer at the public auction takes the property free of the trust deed. The proceeds of the sale are divided among the mechanics' lien claimants, and any surplus goes to the trust deed holder.

Lenders want their trust deeds to have first priority over all other encumbrances and therefore seek to obtain a title insurance policy to insure first priority. Before writing a policy, title insurance companies inspect the premises to make certain that no work of improvement has begun. They generally refuse to insure priority of a first trust deed if an inspection of the premises reveals that materials or equipment have been brought to the site, foundation stakes have been set, test holes dug, brush removed, the water meter set, demolition started, or foundations excavated.

The all-or-none outcomes in most mechanics' lien/construction lender priority disputes aren't inevitable in Indiana where a Solomon-esque equitable apportionment rule applies. n149

COMPUTER-ASSISTED RESEARCH

LEXIS: priorit! w/15 mechanic! lien! w/30 commenc! w/5 work! or project! w/5 improv!

§ 102.04(d) Defining "Commencement of Work of Improvement."

In the states where the mechanics' lien relates back to the commencement of the work of improvement n150 or site improvement work, n151 it is critical to understand what constitutes "commencement" of a work of improvement. One court has defined it as work or labor on the ground, the effects of which are apparent and easily seen by everybody, such as digging of foundations. n152

This visible commencement requirement serves a dual function. First, it provides the reasonable person with notice that construction has commenced. Second, it provides notice of the particular work of improvement to which the lien is to attach.

The visible commencement requirement presents a problem of definition. It requires an inspection of the site and a personal judgment. Does the staking, measuring, fencing, and digging of test holes on the property constitute

"commencement"? How about clearing, grading, filling or demolition? Or excavation and foundation work? Or delivery of materials to the site?

A review of the cases on what counts as "visible commencement" shows the vagaries of the requirement. Excavation work for the foundation has been held to constitute the commencement of a work of improvement. n153 On the other hand, the mere preparation of the land for the construction of a building has generally been held insufficient. n154 Installing temporary fencing "solely for security and liability purposes" has been held not to "improve the property." n155 Further, the work must be the start of the same improvement for which the lien is claimed. n156 In one case, the court held that moving a steam shovel to the site, digging a test hole, and driving stakes to outline the building did not constitute the commencement of construction. Therefore, the mortgage recorded after the above work commenced was superior to the mechanics' liens. The court explained that the work must be such as would inform an ordinary person that the erection of a building upon the land had started, which this activity did not. n157 In another case, wrecking an existing building and removing it did not constitute an actual and visible beginning of the improvement. n158 However, other cases have recognized that destroying an old building may constitute commencement. n159

One court held that the delivery of the first item of materials to the building site constituted commencement. n160 Other courts have taken the position that placing materials on the site does not constitute commencement. n161

COMPUTER-ASSISTED RESEARCH

LEXIS: commenc! w/2 work w/2 improvement! w/30 mechanic! lien!

§ 102.04(e) State Priority Rules.

"Visible commencement" is the "relation back" point under most states' mechanics' lien laws. n162 The second most popular time in which mechanics' liens fasten to the property is the date each lienor first furnishes materials or labor to the job. The difficulties of determining the commencement of such individual services or supplies is surely greater than determining the beginning of the entire work of improvement which, as we have seen, can be quite problematic anyway. There is also the possibility that an intervening mortgage will divide the lien claimants into prior and subsequent groups, creating a conflict with mechanics' lien statutes which provide for equal priority among all mechanics' lien claimants. n163

Texas mechanics' liens attach to the improved property at the earliest of three events: (1) the visible commencement of construction of improvements on the site; (2) the delivery of visible material to the relevant site; or (3) the recordation of a written construction contract or sworn affidavit evidencing an oral construction contract. n164 All liens arising on the job "relate back" to the earliest of these three events.

In states which don't allow liens to *relate back* to visible commencement, construction lenders are given a decisive edge in priority disputes with mechanics. In Rhode Island, a mechanics' lien attaches only when the notice of intention to lien is filed. n165 In New York and Vermont, the priority of the lien is determined by the date the lien is actually filed. n166 In Florida and Nebraska a mechanics' lien attaches only when specific notices are recorded. n167

Under Florida's most recently enacted law, the owner/developer must *record* a notice of commencement before the improvement is commenced and post a *Notice of Commencement*. n168 The improvement must be commenced within 90 days thereafter. n169 If a person supplies labor or materials to a construction site in Florida without verifying that the owner has recorded a notice of commencement, the person is at risk of having no effective mechanics' lien rights. In Florida, a construction lender can search the public records to see if there are potential prior lienors before "signing off" on its construction loan and recording its mortgage or deed of trust. The lender doesn't have to guess whether "commencement" has yet begun.

Condominium projects raise special problems under mechanics' lien laws. In a condominium, each unit or apartment is individually owned. The condo owners each retain an undivided interest in common areas serving all the owners (party walls, stairwells, hallways, recreation areas). The owners delegate management to a board which often employs a professional management company to oversee day to day maintenance and repairs. Suppose the landscaping company isn't paid for its work. Does it have a lien against all of the units for the entire bill, or must it apportion the lien among the individual unit owners?

State condominium statutes typically mandate apportionment at the time of foreclosure but not at the time the lien is filed. There is a good reason for this. In the case of condo projects under construction, the declaration of condominium and the accompanying condo map dividing the project into individual units may not be recorded until the project is completed. Therefore, at the time the mechanic has to file a lien or lose it, no individual units may exist, just a project under construction which has not yet been subdivided into legal individual units. If the declaration of condominium and the condo map is filed before the lien is foreclosed, the mechanic may then become obliged by state law to apportion the lien among the individual units. n170

Whether grading is enough to trigger "visible commencement" is often a close call. In California, special rules apply to the mechanics' lien rights of furnishers of "site improvements," defined by statute to include the demolition or removal of improvements, trees, vegetation, the drilling of test holes, grading, filling, street and sidewalk work, and sewer and public utility work. n171 California gives priority to a mechanics' lien for site work over any construction loan, no matter when recorded. n172 There is one exception to this priority--mechanics' liens for site work are not given priority if the loan proceeds are left in the control of the lender under an agreement with the borrower to apply the proceeds to the payment of claims for work done on the job and to withhold any disbursements to the borrower until the lender has received satisfactory evidence that all mechanics' liens have been paid and the time for filing has expired. n173

If site work is contracted for separately, it is deemed to be a separate work of improvement and the commencement of the site work does not constitute commencement of the rest of the project. n174 Suppose O contracts with G to grade O's land. After G finishes his work, O borrows $200,000 from L, secured by a first trust deed which L immediately records. O then contracts with K to build a house on the land. K is unpaid so he records a mechanics' lien on the property. In this situation, the trust deed would have priority over K's mechanics' lien, even though the grading was started before the trust deed was recorded, because the grading was a separate contract and therefore did not constitute the commencement of the house. G's lien, of course, would be superior to L's deed of trust. n175

§ 102.04(f) Optional and Obligatory Advances; Summary of the Law Governing the Priorities of an Intervening Lienor and a Prior Mortgagee's Future Advances. n176

Almost always, construction loan disbursements are "future advances." The lender advances funds as construction progresses, either in stages according to progress or on vouchers from subcontractors and material suppliers.

Even if a deed of trust is recorded before the commencement of construction, it may lose priority for *optional* future advances. On the other hand, the trust deed will continue to secure priority for *obligatory* future advances. A future advance is optional if the lender had no contractual obligation to make it.

Construction advances are usually considered obligatory since most construction loan agreements give the borrower the right to demand disbursements if certain conditions are satisfied. n177 However, if a lender disburses funds when it does not have to, those disbursements may be labeled "optional." n178

Some loans give the lender enormous discretion, providing for advances "at such times and in such amounts as the lender shall determine" and only if "in the judgment of the lender" all the work done to that point has been "good and workmanlike." This sort of discretionary language was cited by one court in characterizing all disbursements under it as optional. n179

Other standard construction loan provisions make future advances potentially optional. The construction loan agreement may give the lender the right to stop funding if the project is over budget, or if mechanics' liens have been filed on the security property. Most construction loans require that, at all times, sufficient funds remain with the lender to complete the project. Most construction loans provide that the developer's failure to pay any laborer or material supplier on the project, *for any reason*, constitutes a default under the loan agreement. On default the lender may refuse to make future disbursements, so a lender who continues to advance funds after a purely technical default could be said to be making optional advances.

The construction lender could lose its lien priority for future advances even though without those funds the project would have come to a grinding halt and the mechanics' lienors would have lost everything as the construction lender foreclosed. For this reason some courts hold that obligatory advances remain obligatory even though there may be nullified conditions precedent to the lender's obligation to disburse funds. As long as the sums are to be advanced in a definite and particular manner, these courts are willing to classify all such disbursements as obligatory despite the lender having elected to overlook the borrower's failure to satisfy the conditions precedent. n180

§ 102.04(g) Only the Sum of the Optional Advance Is Subordinated to the Lien of the Intervening Lienor.

A lender who makes an optional advance to the owner after a mechanics' lien right has arisen against the property loses its lien priority even under a prior recorded deed of trust, but only up to the amount of the optional payment. n181

For example, suppose O borrows $200,000 from L, secured by a trust deed on Blackacre. The trust deed gives L the right to lend an additional $10,000 to O, which will automatically become secured by the existing trust deed. After the trust deed is recorded, O hires K to remodel the house. K performs the remodeling job, is unpaid, and records a mechanics' lien. One week later, O borrows an additional $10,000 from L and gives L a promissory note which provides that the additional advance is secured by the original trust deed. In this scenario, L would have priority as to the $200,000, but the additional advance of $10,000 would be junior to the mechanics' lien claims.

§ 102.04(h) Intervening Lienor Must Give Prior Lienor Notice to Prime Future Advances.

A mortgagee loses priority for optional advances only to those intervening liens of which he had notice at the time he made the advance. But the law is far from clear about what counts as notice. n182 A construction lender may be put on "imputed" or implied actual notice by the fact that the lender is funding the construction. Lenders must realize that mechanics' liens often attach to property under construction. In states which require potential lienors to serve preliminary notice of a mechanics' reservation of the right to perfect a lien, the construction lender who received such notice knows there is the possibility of a lien being filed later. Generally, lenders are not bound by constructive notice of liens recorded after they record their deeds of trust or mortgages. Otherwise, lenders would have to make title searches before each constructive advance or risk losing priority to intervening lienors. It is more efficient for the intervening lienor actually to notify the holder of prior recorded interests. The prudent intervening lienor would order a title search anyway before advancing funds. In this respect, the intervening lienor is like a late-arriving party guest; she is expected to call attention to her late arrival on the scene by ringing the doorbell and not to wait outside on the off-chance that the host will pop out looking for her.

§ 102.04(i) Statutory Attempts to Abolish or Modify the Optional/Obligatory Distinction.

Many states have tackled the optional/obligatory problem by statute, prodded by construction and equity lenders.

Some states redefined notice to mean only actual written notice delivered to the mortgagee. The intervening lienor only gets a lien better than the prior mortgagee's lien for future advances if that prior mortgagee had actual written notice of the intervening lienor's intention to make a loan. States with this type of law include Alaska, Maine, Nebraska, North

Dakota, Ohio, Rhode Island, Tennessee, Vermont, and West Virginia.

In a few states the term "obligatory" has been redefined so that if a lender makes a commitment to fund a borrower but has the right to discontinue funding on the borrower's default, and decides not to invoke that right, the lender's lien priority for future advances is protected anyway. Originally drawn from *U.C.C. § 9-105(i)(k)*, this refinement of the concept of obligatory has been enacted in Illinois, North Carolina, Ohio and Rhode Island. As long as the sums are to be advanced in a definite and particular manner, these courts are willing to classify all such disbursements as obligatory despite the lender having elected to overlook the borrower's failure to satisfy one or more precedent conditions. n183 In these states a construction lender can continue funding a project in default and rest assured that its future advances will have the same lien priority as its original mortgage.

A number of states have eliminated the optional/obligatory distinction entirely. These are Hawaii, Idaho, Kansas, Kentucky, Maryland, New Hampshire, New Jersey, New Mexico, New York, South Carolina, South Dakota, and Washington. Even in these states though, courts must decide when modifications of the original construction loan agreement are so substantial as to treat the modification as a new contract and move back the lender's lien priority. n184

About a dozen states attempt to make sure that in liberalizing their future advance laws they aren't cutting off the borrower's chance to find decent junior secured financing. The borrower is allowed to serve a "cut off" notice on the senior mortgagee which freezes advances at their current levels. When the senior mortgagee gets that cut-off notice from the borrower, it knows its future advances could be subordinated to the lien of an intervening creditor. Thereafter, subsequent lenders can safely take junior mortgages on the property without worrying about the lien priority of senior mortgagees for advances made after the cut-off date. Under most of these statutes the junior lienor is still subject to the accrual of interest on the senior loan, the senior's costs of enforcement and foreclosure, and any advances the senior might make to protect the security property.

Some statutory cut-off notice provisions make advances made after receipt of the notice unsecured. (Alaska, Florida, Maine, Missouri, Nebraska, Nevada, North Carolina, Ohio, and Rhode Island.)

Some statutory cut-off notice provisions allow the senior lender a security interest, but one subordinated to the lien of the intervening creditor. (Montana, Virginia, Tennessee.)

Construction loans are not subject to a cut-off notice in Missouri, Ohio, and Tennessee. The construction lender's advances are subject to a good faith requirement by courts in other states.

§ 102.04(j) How the Abolition of the Optional/Obligatory Distinction Works in Florida.

By statute, Florida is among the states which eliminated the distinction between optional and obligatory advances. n185 The priority of all future advances accrues as if they were made on the date the mortgage was first executed, even if no funds had been disbursed up to that date. The advances are secured only up to the total principal amount of indebtedness specified in the mortgage plus interest and negative amortization. But advances a lender makes for taxes, insurance, or under a construction loan agreement "to enable completion of the contemplated improvement ... are secured by the mortgage ... even though the mortgage ... does not provide for future advances, or the advances ... cause the total indebtedness to exceed the face amount stated in the instrument." n186

Arguably, the Florida law actually helps some unpaid contractors, subcontractors, and suppliers. In states which adhere to the optional/obligatory distinction, a lender risks losing its lien priority after the borrower has committed even the slightest breach of the construction loan agreement. By foreclosing at once, the lender preserves its lien priority for funds later advanced to complete the project. But this can harm the borrower and the borrower's creditors because the lender's foreclosure often wipes out all mechanics' liens junior to it. Foreclosure also means delay, which will probably cause a decline in the value of the project due to vandalism and attrition. Moreover, start-up costs can be significant

following foreclosure. So even though everyone is hurt by foreclosure, including the foreclosing lender and the unpaid mechanics, lenders foreclose to avoid being hung out to dry on the: optional/obligatory distinction. n187

§ 102.04(k) California Partially Eliminated the Optional/Obligatory Distinction.

California lawmakers went part way towards freeing construction lenders of the incentive, created by the optional/obligatory distinction, to foreclose at the first sign of trouble. But only part way.

In California, optional advances have priority over mechanics' liens if the advances themselves are used either for payment of mechanics' liens on the job or for payment of the costs of the work of improvement. n188 For the lender, this limitation is doubly burdensome. The lender must make sure "optional" funds actually get into the right hands to protect its lien priority for those funds. More problematical, the lender can't use "optional" funds to reimburse itself for construction loan interest or loan administration fees. Only advances made up to the amount of the lender's original obligatory commitment, as shown by the trust deed, are given this special priority. Any advances beyond that would lose priority to the mechanics' liens.

> [This law] makes foreclosure the remedy of choice for lenders confronted with a breach of a construction loan agreement. Negotiation and workouts are not viable alternatives because no advance after a breach can be legally compelled; therefore, as an optional advance, lenders must ensure that recorded mechanics' liens are paid first and thereafter ensure that all further advances are used to pay for the costs of construction.
>
> * * *
>
> If the lender is the successful bidder at the foreclosure sale, it will take the property free of all junior--including mechanics'--liens, complete the project using the same funds that it would have been willing to advance to the borrower (if not for Section 3136), and sell the now-completed project with some hope that it will not only recoup the original loan amount plus accrued interest, but that it may turn a profit. If the lender is the unsuccessful bidder at the foreclosure sale, the lender will be paid off in full, and the successful bidder will take the property free of all liens. In either event, this legislative scheme virtually guarantees greater losses to junior lienholders because their liens become more frequently foreclosed by the First Lien than if the construction lender were permitted to make optional advances to pay for the costs of construction and enhance the value of the security held by all lienholders. n189

§ 102.04(l) Protecting the Owner's Equity Against the Claims of a Tenant's Mechanics and Material Suppliers.

NOTICE OF NON-RESPONSIBILITY, James Acret, California Construction Law Manual (4th ed., Shepard's/McGraw-Hill, 1990) at 247-251:

> Improvements Not Ordered by Owner
>
> Suppose O rents its house to T. Without O's knowledge, T contracts with K to paint the house. After the job is finished, K records a mechanics' lien and promptly files suit against both T and O to foreclose the lien. O did not know the house was being painted, and never heard of K until the complaint was served.
>
> The fundamental purpose of the Mechanics' Lien Law is to prevent the owner from being unjustly enriched at the expense of the contractor. [Citation omitted] But it would not be fair to hold O responsible for work he did not ask for and knew nothing about. n190
>
> Suppose T signs a lease with O under which T agrees to have the house painted once a year. T hires

K to paint the house, and K liens the job. This situation is different, because O inserted a provision in the lease that required T to get the painting done. Under these circumstances, should O have his property improved while K goes unpaid?

Suppose K paints O's house at the request of T. O knew nothing about the contract until O saw K working on the job. Should O now be able to sit back, knowing its property is being improved, and not warn K that he denies liability for any mechanics' lien claim?

In theory, strangers to landowners should not be able to impose liability for mechanics' liens on the interests of landowners. But if the improvement is made at the request of the landowner or agent, or at the instigation of the landowner, or if the landowner learns of the work and does not object to the improvement, the interest of the owner is subject to mechanics' lien claims.

California Civil Code § 3094 states that where work is done with the knowledge of the owner, the interest of the owner is subject to mechanics' lien claims unless the owner posts a *notice of non-responsibility* on the property and records a copy at the county recorder's office. The notice must be signed and verified by the owner or agent, and contain a description of the property. n191

Effect of Notice of Non-responsibility

The effect of the notice of non-responsibility, when properly posted and recorded, is to relieve the owner's interest from liability for mechanics' lien claims. But if the owner finds out about the actual performance of construction work and does not post and record the notice, its interest is subject to mechanics' liens. The idea is to let contractors and suppliers know exactly where they stand.

The timing of the notice is important. Like a notice of completion, if a notice of non-responsibility is posted and recorded prematurely, it is invalid. If it is posted and recorded too late, it is invalid. In order to be effective, it must be neither too soon, nor too late, but just right. To be just right, the notice must be posted and recorded within 10 days after the owner "shall have obtained knowledge" of the work. This means knowledge of actual construction, not merely knowledge of plans to construct. There must have been an actual commencement of work on the ground, the effects of which are apparent and easily seen by everyone, such as beginning to dig a foundation.

Suppose O signs a lease with T, its tenant, by the terms of which T must remodel and improve a theater building on O's land. The plans and specifications for the remodel job must be presented to and approved by O. T starts the improvements under the lease, and O immediately posts and records a notice of non-responsibility. Later, T defaults on the lease and O takes possession of the property. Meanwhile, K has recorded a mechanics' lien claim.

That was the situation in *Ott Hardware Co. v. Yost, 159 P.2d 663 (Cal. 1945)* . The court held that the notice of non-responsibility was ineffective. Where a landowner enters into a lease which requires that improvements be made, the owner is actually participating in the improvement project. Under these circumstances, it would not be fair for the owner to pay nothing, and have the property improved at the expense of contractors and suppliers.

The court found a notice of non-responsibility ineffective in *Los Banos Gravel Co. v. Freemen, 130 Cal. Rptr. 180 (Cal. 1976)* , where it labeled the lessors "participating owners." The lease prepared by the owner required the tenant to commence construction of a service station and restaurant within 120 days and surrender the premises at the end of the three-year lease in as good a condition as reasonable use and wear would permit. The owner received as rent a percentage of sales in addition to a minimum monthly payment. The court concluded these factors worked to make the lessors participating owners with the lessee in construction of the improvements.

The result was different, however, in *Baker v. Hubbard, 161 Cal. Rptr. 551 (Cal. 1980)* , where the owner of a 50-year-old building entered into a five-year lease which prohibited the tenant from making any alterations to the premises without the written consent of the owner. Without the owner's knowledge, the tenant undertook to improve the property. The owner first learned of the tenant's activities by observing construction materials on the property. The same day, the owner purchased a Wolcott Notice of Non-responsibility form, prepared it, posted it, and recorded a copy. The form did not contain a space for verification, and neither the posted nor the recorded notice was verified as required by *Cal. Civil Code § 3094*.

In a mechanics' lien foreclosure action, the court held that the notice of non-responsibility was valid despite the lack of verification, as the only purpose of a verification is to assure good faith. Because no prejudice arose from the lack of verification, the notice of non-responsibility was valid. Therefore, the lien was foreclosed only to the extent of the tenant's leasehold interest.

Many states have no provision for the lessor to post and record a notice of non-responsibility. Some state mechanics' lien laws subject the lessor to the tenant's mechanics' liens for "knowingly permitting" the work to be done." n192

In most states without a notice-of-nonresponsibility law, a lessor's interest in real property can't be subjected to a mechanics' lien for work contracted for by a tenant, n193 unless the lessor has actually consented to be liable for the work, n194 benefitted substantially from it, n195 or impliedly consented because the tenant was bound by its lease to undertake the improvements. n196

There must be some other evidence that the lessee was acting as the agent of the lessor in making improvements to the leased premises, however, mere acquiescence or inactive consent by the lessor of the leased premises to the improvements by the lessee is not sufficient to constitute a finding of agency between the lessor and lessee for the purpose of asserting a mechanics' lien against the property interest of the lessor. n197

The lessor's interest might be subject to a lien for improvements ordered by the tenant if the lessor required the work as a condition of the lease, reserved prior approval of the lessor's plans and specs, or supervised the work actively and substantially as the leasehold improvements were installed. Participation could also take the form of the lessor sharing leasehold profits likely to be augmented by the improvement, or the lessor having the right to recapture title to the improvements at the end of the lease where the lease term is shorter than the useful life of the improvements. In all these situations, the lessor risks becoming a "participating owner" subject to liens arising from the tenant's improvements. The unpaid mechanics could file suit against the lessor as a participating owner, under a theory of quasi-contract or unjust enrichment, subject to the lessor's no-privity-of-contract defense. n198 With imminent exposure, lessors are smart to "select a responsible lessee, and then provide careful administration and oversight to make sure that the lessee pays all obligations arising from renovation." n199

COMPUTER-ASSISTED RESEARCH

LEXIS: protect! w/5 own! w/5 equity w/30 tenant! w/5 mechanic! or supplier!

FOOTNOTES:

(n1)Footnote 146. *See Home Lumber Co. v. Kopfmann Homes, Inc., 535 N.W.2d 302, 304 (Minn. 1995)* ; *Reynolds v. E & C Assocs., 693 A.2d 278 (R.I. 1997)* (Claims of mechanics' lienholders were junior to prior recorded mortgage of bank); *Adirondack Trust Co. v. Thomas J. Bien & Assocs., 645 N.Y.S.2d 288 (N.Y. Sup. 1996)* (Building loan contract did not materially misrepresent net sum available to mortgagor for improvements to property, and, therefore, mortgage did not lose priority to subsequently filed mechanics' lien); *In re* 455 CPW Assocs., 192 B.R. 85 (Bankr. S.D.N.Y 1996) . But see, *In re Exec Tech Partners, 107 F.3d 677 (8th Cir. 1997)* (Normally, holder of prior deed of trust *maintains its*

priority over mechanics' lien for later improvements to property; however, deed of trust holder waived its priority over general contractor's mechanics' lien by its extensive involvement in construction project); *Lyons Sav. v. Gash Assocs., 665 N.E.2d 326 (Ill. App. 1996)* (Claimants established that contract price was accurate measure of value of enhancements, and thus that they had priority over previously recorded mortgage); *Giant Supply Corp. v. City of New York, 670 N.Y.S.2d 29 (N.Y.A.D. 1998)* (city's prevailing wages lien had priority over subcontractor's mechanics' lien, regardless of when mechanics' lien was filed); *In re* 455 CPW Assocs., 192 B.R. 85 (Bankr. S.D.N.Y. 1996) , aff'd, *Herbert Constr. Co. v. Greater N.Y. Sav. Bank, 1999 U.S. Dist. LEXIS 13306* (No. 96 civ. 367, 2476, S.D.N.Y. Aug. 30, 1999).

(n2)Footnote 147. Arizona; Arkansas; California (Cal. Civ. Code § 3134); Connecticut; Delaware; Georgia; Idaho; Iowa; Kansas; Kentucky; Louisiana; Maryland; Massachusetts; Mississippi; Minnesota; Nebraska; Nevada; New Hampshire; New Mexico; North Carolina; Ohio; Oklahoma; Pennsylvania; South Carolina; South Dakota; Vermont; Utah; West Virginia; Washington. In a few states, a recorded mortgage may obtain a degree of priority even though recorded after work began. These states are *Florida, Hawaii, New Jersey, New York, North Dakota, and Rhode Island. EDSA/Cloward, L.L.C. v. Klibanoff, 122 P.3d 646 (Utah App. 2005)* (mechanics' lien priority not established by recording); *IA Constr. Corp. v. Carney, 672 A.2d 650 (Md. App. 1996)* .

(n3)Footnote 148. Iowa law is an exception. *See Metropolitan Federal Bank v. A.J. Allen Mechanical Contractors, Inc., 477 N.W.2d 668 (Iowa 1991)* . *City of Westminster v. Brannan Sand & Gravel Co., Inc., 940 P.2d 393 (Colo. 1997)* (Subcontractor that paved roads dedicated as public could not avail itself of statute providing that mechanics' liens related back to time when lienholder commenced work, to obtain priority date preceding dedication and acceptance of property, as mechanics' lien could not be filed against *public property*, and thus subcontractor's lien was invalid).

(n4)Footnote 149. *See In re Venture Props., Inc., 139 B.R. 890 (Bankr. N.D. Ind. 1990)* .

(n5)Footnote 150. Cal. Civ. Code § 3134.

(n6)Footnote 151. *Id.* § 3137.

(n7)Footnote 152. *English v. Olympic Auditorium, 20 P.2d 946, 948 (Cal. 1933)* . *See also Arthur B. Siri, Inc. v. Bridges, 11 Cal. Rptr. 322 (Cal. App. 1961)* (logging of timber on outskirts of community in a timber area would not necessarily constitute commencement); *Owen Lumber & Millwork, Inc. v. National Equity Corp., 940 S.W.2d 66 (Tenn. App. 1996)* (Materialman's lien rights became fixed when supplies were delivered to construction site, since lien rights are established from the date of visible commencement of operation).

(n8)Footnote 153. Annotation, *What Constitutes "Commencement of Building or Improvement" for Purposes of Determining Accrual of Mechanics' Lien, 1 A.L.R.3d 822, 830 (1965); Simmons Brick Co. v. Hetzel, 236 P. 357 (Cal. App. 1925)* .

(n9)Footnote 154. Annotation, *What Constitutes "Commencement of Building or Improvement" for Purposes of Determining Accrual of Mechanics' Lien, 1 A.L.R.3d 822, 824 (1965).*

(n10)Footnote 155. *Lambert Steel Co., Inc. v. Heller Financial, Inc., 20 Cal. Rptr. 2d 453 (1993)* .

(n11)Footnote 156. *Lamoreaux v. Andersch, 150 N.W. 908 (Minn. 1915)* .

(n12)Footnote 157. *North Shaker Blvd. Co. v. Harriman Nat'l Bank, 153 N.E. 909 (Ohio 1924)* . *See also Schalmo Bldrs., Inc. v. Malz, 629 N.E.2d 52 (Ohio 1993)* (soil tests and staking do not constitute visible commencement).

(n13)Footnote 158. *Carr-Cullen v. Deming, 222 N.W. 507 (Minn. 1928)* .

(n14)Footnote 159. *Ketcham v. Land Title & Trust Co., 101 A. 764 (Pa. 1917)* ; *Nixon v. Cydon Lodge No. 5, 43 P. 236 (Kan. 1896)* .

(n15)Footnote 160. *Sontag v. Abbott, 344 P.2d 961 (Colo. 1959)* .

(n16)Footnote 161. *Farmers' Bank v. Winslow, 3 Minn. 86 (1859)* .

(n17)Footnote 162. As of 1983, based on Frank F. Sprower, *State-by-State Summary of Laws Relating to Mechanics' Liens,* N.Y.L.J. (Nov. 16, 1983), at 38. Michael W. Homer & David J. Burns, *Utah Construction Law: Recovery for Nonpayment, 9 Utah B.J. 8, 9 (May 1996);* Mark Sauer, *Ohio's New and Improved Mechanics' Lien Statutes: In Pursuit of Legitimacy, 22 Ohio N.U. L. Rev. 895, 906 (1996);* William R. Bruce, *1996 Real Estate Legislation: What You Don't Know Can Hurt You, 32 Tenn. B.J. 13* (Nov./Dec. 1996); Annotation, *Discharge of Mortgage and Taking Back of New Mortgage as Affecting Lien Intervening Between Old and New Mortgages, 43 A.L.R.5th 519 (1996)* .

(n18)Footnote 163. *Gagnon's Hardware & Furniture, Inc. v. Michaud, 721 A.2d 193 (Me. 1998)* (mortgagee's interest not subordinated to mechanics' lien, because mortgagee did not consent to suppliers providing materials).

(n19)Footnote 164. Tex. Prop. Code Ann. § 53.124. *In re Huber Contracting, Ltd., 347 B.R. 205 (W.D. Tex. 2006)* (Texas Property Code gives holders of mechanics' liens preference over other creditors, but not over a contractor's secured creditors).

(n20)Footnote 165. R.I. Gen. Laws § 34-28-4.

(n21)Footnote 166. N.Y. Lien Law § 13; Vt. Stat. Ann. tit. 9, § 1921.

(n22)Footnote 167. Fla. Stat. Ann. § 713.07; Neb. Rev. Stat. § 52-139.

(n23)Footnote 168. Fla. Stat. Ann. § 713.13(1). *See* Fred R. Dudley et al., Construction Lien Reform: The Equilibrium of Change, *18 Fla. St. U. L. Rev. 257 (1991).*

(n24)Footnote 169. Fla. Stat., Ann. § 713.13(2).

(n25)Footnote 170. *See, e.g., Metco, Inc. v. Moss Creek, Inc., 601 A.2d 802 (Pa. 1992)* .

(n26)Footnote 171. Cal. Civ. Code § 3102.

(n27)Footnote 172. Cal. Civ. Code § 3137.

(n28)Footnote 173. *Id.* § 3137(c).

(n29)Footnote 174. *Id.* § 3135. *See, e.g., Lambert Steel Co., Inc. v. Heller Financial, Inc., 20 Cal. Rptr. 2d 453 (1993)* .

(n30)Footnote 175. The owner/builder who is capable of acting as its own general contractor and "subcontractors" everything may be able to treat the work of each subcontractors as a separate work of improvement under some state mechanics' lien statutes. The owner/builder can also shorten the lien filing period under some statutes by filing a separate notice of completion for each contract.

(n31)Footnote 176. This is a summary of Reporters' Note to Restatement (Third) of Property--Security (Mortgages) § 2.3 (Tent. Draft No. 1, 1991).

(n32)Footnote 177. *See, e.g., Swinerton & Walberg Co. v. Union Bank, 101 Cal. Rptr. 665 (Cal. App. 1972)*

(finding that general contractor was entitled to an equitable lien against undisbursed construction loan funds); *Raymond Int'l, Inc. v. Realbanc, Inc., 260 N.W.2d 484 (Neb. 1977)* (holding lien priority of construction mortgage begins when recorded even though advances are made as building progresses); *Strouss v. Simmons, 657 P.2d 1004, 1015-16 (Haw. 1982)* (finding that advancements made for the maintenance and protection of the property have the same priority as underlying construction mortgage, but interest on the amounts disbursed by the construction mortgagee did not retain priority).

(n33)Footnote 178. If there is a dispute as to whether the construction advances are obligatory or optional, the court may look solely to the controlling documents to determine the nature of the advances. For example, in *Home Lumber Company v. Kopfmann Homes, Inc.*, the bank did not lose lien priority merely because it disbursed money without full compliance with the loan agreement conditions since the agreement classified the advances as obligatory. *535 N.W.2d 302, 304-6 (Minn. 1995)* . *Lennar Northeast Partners v. Buice, 49 Cal. App. 4th 1576 (1996)* (When deed of trust secures optional future advances, priority of security for future advances is determined by circumstances when advances are made; if at that time senior lender has notice of other liens, other liens have priority).

(n34)Footnote 179. *Irwin Concrete, Inc. v. Sun Coast Props., Inc., 653 P.2d 1331 (Wash. App. 1982)* .

(n35)Footnote 180. Alvin L. Arnold & Marshall E. Tracht, *Construction Lending: Waiver of Conditions Does Not Render Advances Optional*, 25 Real Est. L. Rep. 7 (Jan. 1996). *Schalmo Bldrs., Inc. v. Malz, 629 N.E.2d 52 (Ohio 1993)* .

(n36)Footnote 181. *W.P. Fuller & Co. v. McClure, 191 P. 1027 (Cal. App. 1920)* .

(n37)Footnote 182. *Powder Mtn. Painting v. Peregrine Joint Venture, 899 P.2d 279, 281 (Colo. App. 1994)* (holding the mechanics' lien junior to an unrecorded deed of trust since the mechanic had "inquiry notice" of the deed of trust in knowing that the lienor financed the project and held a continuing interest in the property).

(n38)Footnote 183. *Schalmo Bldrs., Inc. v. Malz, 629 N.E.2d 52 (Ohio App. 1993)* . Lender was obligated to advance funds as construction of the buildings progressed and, although such "advancements were conditioned upon the owners' compliance with certain procedures, they were undoubtedly to be advanced in a definite sum and in a particular manner" and, hence, obligatory. *Id. at 55* . Ronald J. Mann, *The First Shall Be Last: A Contextual Argument for Abandoning Temporal Rules of Lien Priority, 75 Tex. L. Rev. 11, 24 (Nov. 1996)* (First-in-Time Priority in Context: Construction Contracting).

(n39)Footnote 184. Section 22 of New York's Mechanics' Lien Law requires a building loan agreement to be recorded, along with any subsequent modifications. New York courts have had to decide what modifications are truly prejudicial to the interests of mechanics' lienors justifying the subordination of the lender's loan to theirs and what modifications don't prejudice mechanics' lienors' rights so greatly as to justify placing them ahead of the construction lender. *See In re Lynch III Props. Corp., 125 B.R. 857 (Bankr. E.D.N.Y. 1991)* .

(n40)Footnote 185. Fla. Stat. Ann. § 697.04; Ford, *Future Advance Financing in Florida, 63 Fla. B.J. 27 (1989).*

(n41)Footnote 186. Fla. Stat. Ann. § 697.04(1)(b). However, if a senior lienor promises a junior it won't make future advances and does, this statute won't give the senior lienor a lien priority for those advances it promised the junior lienor it wouldn't make. *NCNB Nat'l Bank of Florida, N.A. v. Barnett Bank of Tampa, N.A., 560 So. 2d 360 (Fla. Dist. Ct. App. 1990)* . Nor does a senior lienor obtain priority for future advances used to pay off an unrelated civil suit not "necessary for the protection of the security of or title" of the mortgaged property. *United States v. First Nat'l Bank of Crestview, 513 So. 2d 179 (Fla. Dist. Ct. App. 1987)* .

(n42)Footnote 187. *See, e.g., Yost-Linn Lumber Co. v. Williams, 9 P.2d 324 (Cal. App. 1932)* . The loan agreement gave the lender the option of halting all funding if work stopped for 30 days. The lender elected to complete the project without foreclosing. A mechanics' lienor was made prior to the lender's lien to the extent of funds disbursed from the

construction loan after the developer abandoned and the lender took over.

(n43)Footnote 188. Cal. Civ. Code § 3136.

(n44)Footnote 189. Gene Berk, Lien-Tos: Half-Finished Buildings and the Priority of Construction Liens (original paper on file with author, final version printed at *32 Santa Clara L. Rev. 315, 334 (1992)).*

(n45)Footnote 190. Mechanics' liens attach to the work of improvement "if at the commencement of the work or of the furnishing of the materials ... the land belonged to the person who caused such work of improvement to be constructed, but if such person owned less than a fee simple estate ... then only his interest ... is subject to such lien." *Cal. Civ. Code § 3128*. If O leases property to T, and T orders a work of improvement from K, K has the right to lien T's leasehold but not O's fee. That is as it should be since K's work would, in most cases, only enhance the value of T's leasehold. T has no incentive to contract for improvements with value that survives past the end of T's lease term. However, if such work is obligated by the owner to the tenant the landlord may be forced to pay. *See A & W. Electrical Contractors, 576 N.W.2d 112 (Iowa 1998)* .

(n46)Footnote 191. Other states have similar laws. Colo. Rev. Stat. § 38.22-105. A landlord failing to notify the lessee's mechanic may be held to acquiesce in the mechanic's work. *A- 1 Plumbing & Heating Co. v. Thirteenth Street Corp., 616 P.2d 141 (Colo. 1980)* . A discussion of the landlord's liability for work contracted by the tenant appears in Harry D. Miller & Marvin B. Starr, California Real Estate § 26.16 (2d ed. 1990). Mark Sauer, *Ohio's New and Improved Mechanics' Lien Statutes: In Pursuit of Legitimacy, 22 Ohio N. U. L. Rev. 895, 912 (1996);* Annotation, *Landlord's Liability to Third Party for Repairs Authorized by Tenant, 46 A.L.R.5th 1 (1997)* (Complaint, averring that notice of nonresponsibility not given, Section 7(a).); *Miller v. Ogden, 935 P.2d 1205 (Or. 1997)* (lienor seeking to assert construction lien on property was required to establish that owner had knowledge of improvement made upon property prior to completion of construction project and failed to post notice of nonliability as to improvement within three days.); *DCB Constr. Co. v. Cent. City Dev. Co., 940 P.2d 958 (Colo. Ct. App. 1996) , aff'd, DCB Constr. Co. v. Cent. City Dev. Co., 965 P.2d 115 (Colo. 1998)* . (the Lessor gave actual notice to DCB, the contractor, before any work commenced that it would not be liable for any work performed. DCB performed its work placing sole reliance upon the lessee and upon its financial condition. The fact that such reliance was apparently misplaced, and DCB hads not received the consideration promised by the lessee, dids not render the lessor's retention of any benefits bestowed inequitable).

(n47)Footnote 192. *Miller v. Reed, 302 N.E.2d 131 (Ill. App. 1973)* ; Ill. Rev. Stat. ch. 82, para. 1 (*see now* 770 ILCS 60/1).

(n48)Footnote 193. *Roman v. Zuppardo, 407 So. 2d 65 (La. 1981)* ; *Interiors Contr'g, Inc. v. Navalco, 648 P.2d 1382 (Utah 1982)* .

(n49)Footnote 194. *Newton Assocs. v. Northeast Structures, Inc., 546 A.2d 310 (Conn. 1988)* .

(n50)Footnote 195. *Fischback & Moore, Inc. v. Presteel Corp., 398 A.2d 397 (Me. 1979)* (lease granted tenant the right to make the improvements and granted tenant an option to purchase at a price higher than that the landlord had just paid for the property).

An instructive landlord liability case is *Lake Forest, Inc. v. Cirlot Co., 466 So. 2d 61 (La. Ct. App. 1985)* . Lake Forest granted Favret Construction the exclusive right to operate a sand pit for 20 months, paying Lake Forest a percentage of the selling price of the materials removed from the pit. The lease prohibited recordation. Favret subcontracted to fill the pit with water every 30 days and alter the slopes. Favret's subcontractors didn't know Favret was a lessee of Lake Forest. When Favret didn't pay the subcontractors, they filed mechanics' liens on the lessor's interest in the land. The court held Lake Forest's land subject to the subcontractors' liens because Lake Forest shared profits and thus benefitted directly from improvements to the sand pit and the subcontractors had no way to know of Favret's position as lessee because the

lease wasn't recorded.

(n51)Footnote 196. *Stroh Corp. v. K & S Dev. Corp., 247 N.W.2d 750 (Iowa 1976)* .

(n52)Footnote 197. *Dunlap v. Hinkle, 317 S.E.2d 508, 512 (W. Va. 1984)* .

(n53)Footnote 198. *Clemens Graf Droste zu Vischering v. Kading, 368 N.W.2d 702 (Iowa 1985)* .

(n54)Footnote 199. James Deepenbrock, et al., *Lessor Liability for Mechanics' Liens Under the California Participating Owner Doctrine*, Miller & Starr, Cal. Real Est. Newsalert 155, 157 (1993).

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CHAPTER 102 MECHANICS' LIENS 1

12-102 Thompson on Real Property, Thomas Editions § 102.05

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§ 102.05 Stop Notices.

Stop notice rights are praised by mechanics' lien claimants and dreaded by construction lenders, construction loan fund holders, and owners. The recording of a stop notice creates a duty on the construction lender to withhold from the borrower, in quasi-trust, undisbursed construction funds in the amount of the mechanics' lien claim. The effect is similar to the levy of a writ of attachment on a bank account and effectively ties up the money until a court can decide who is entitled to be paid. A stop notice against the owner does the same thing, freezing undisbursed construction funds in the owner's hands.

In those states with a stop notice remedy (California and Washington among them) anybody who is entitled to mechanics' lien rights is also entitled to utilize the stop notice.

The following illustrates how valuable stop notice rights can be for a mechanics' lien claimant. Suppose O, a builder, purchased land for $350,000. O paid a $200,000 cash downpayment and the seller took back a purchase money second trust deed for $150,000. Next, O obtained a construction loan for $500,000, which was secured by a first trust deed. All deeds of trust were recorded before any construction commenced. Halfway through construction, O abandoned the project, using some of the construction funds to purchase a Rolls Royce. By that point, the construction lender had disbursed $250,000 of the $500,000 construction loan and the market value of the partially completed house was $400,000. Unpaid subcontractors and material suppliers recorded mechanics' liens of $200,000 against the property.

Since the market value of the property ($400,000) equals the amount of the first and second trust deed ($250,000 + $150,000), the inferior mechanics' liens are practically worthless; however, the mechanics' lien claimants may still get paid if they exercise stop notice rights against the construction fund.

In our example, the lender is still holding $250,000 in undisbursed funds. The mechanics' lien claimants can assert their stop notice rights to recover their $200,000 claim from the undisbursed $250,000 balance of the construction loan fund. If they follow the requisite procedures (which include bonding in many of the states with stop notice laws, including California) the end result will be a judgment ordering the construction lender to pay the stop notice claimant out of the undisbursed balance of the construction loan funds. In this example, the claimants could get paid 100% on the dollar by asserting their stop notice rights, whereas they would have gotten nothing by asserting their mechanics' lien rights.

A subcontractor could submit a large, disputed claim to stop further disbursements of construction funds, forcing the project to a halt and coercing the developer to settle the dispute quickly in order to keep the project alive and on track. For this reason one commentator has argued for the creation of a summary proceeding so that stop notice claims "could be quickly adjudicated." n200 Stop notice laws have been upheld against challenges that they violate the procedural due process rights of borrowers and lenders. n201

The construction lender's idea about how much money is in a construction loan account may not be the same as the courts'. The lender deducts interest and fees "off the top." Courts may insist that stop notice claims take priority over these disbursements. n202 A court could order a lender to "top up" a depleted construction loan fund by restoring the interest and fees it had earlier removed.

Other states have enacted variations on the stop notice theme. In Texas, if a subcontractor or material supplier gives the owner notice of an unpaid claim, this triggers a mechanism which "traps" any funds in the hands of the owner. n203 Once the owner receives proper notice, she should immediately withhold payments otherwise due to the original contractor in the amount necessary to pay the claim for which she received the notice. n204 Although the withholding of funds is discretionary, n205 if the owner has received the required notice and the subcontractor successfully secures a lien, the owner is liable and her property is subject to a lien for any money paid to the original contractor after the owner was authorized to withhold funds. However, the owner is not liable for any amounts paid to the original contractor before she was properly notified to withhold funds. n206

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LEXIS: stop notice! w/30 mechanic! lien!

§ 102.05(a) Contents of a Stop Notice.

A stop notice, like a mechanics' lien, is a simple document that must contain seven things:

(1) The name of the claimant.

(2) A notice that the claimant has furnished, or agreed to furnish, work or materials to the project.

(3) A description of the kind of work or materials furnished.

(4) The name of the person who ordered the work or materials.

(5) The total value of all the work or materials agreed to be furnished.

(6) The value of the work and materials already furnished.

(7) A verification. n207

Stop notices usually include the following, although they are not required:

(1) A description of the job site.

(2) The balance due.

(3) A demand that the construction lender hold back enough money from the construction loan funds to

satisfy the demand of the claimant.

A stop notice may be delivered personally or by registered or certified mail. To be effective, a stop notice must be accompanied by a bond that is one and one-quarter times the amount of the claim, protecting the owner, contractor, and fund holder against all damages sustained as a result of the stop notice. n208

§ 102.05(b) Time Limits and Procedure.

Like California mechanics' liens, a preliminary 20-day notice is required. The notice must be given within 20 days after the claimant first furnishes work or materials to the job site. Similarly, if the claimant does not give the notice within the first 20 days, the claimant loses the stop notice rights for all work performed or material furnished more than 20 days before the notice was given. On public works, if the claimant fails to give the preliminary notice within 20 days, all stop notice rights are lost on the job. n209

To be valid, a stop notice must be filed before the expiration of the mechanics' lien period and may be filed before payment is due. n210 Like a mechanics' lien, a stop notice expires unless suit is filed before the expiration of the statute of limitations period. Suit must be filed no later than 90 days after the expiration of the mechanics' lien period and no earlier than 10 days after the service of the stop notice. n211 This differs from the statute of limitation on the filing of a mechanics' lien suit. The latter runs 90 days from the *recording* of the mechanics' lien while the former runs from the *expiration* of the time within which the mechanics' lien could be recorded.

FOOTNOTES:

(n1)Footnote 200. Richard Paroutaud, *Mechanics' Liens: The "Stop Notice" Comes to Washington, 49 Wash. L. Rev. 685, 699 (1974).*

(n2)Footnote 201. *Connolly Dev., Inc. v. Superior Ct., 553 P.2d 637 (Cal. 1976) , appeal dismissed, 429 U.S. 1056 (1977) . See* Note, *Connolly Development, Inc. v. Superior Court: Procedural Due Process and the California Construction Industry--The Stop Notice, 13 Cal. W. L. Rev. 489 (1977).*

(n3)Footnote 202. *See Familian Corp. v. Imperial Bank, 262 Cal. Rptr. 101 (1989) ,* for an excellent analysis of this issue.

(n4)Footnote 203. Tex. Prop. Code Ann. § 53.081; *Lonergan v. San Antonio Loan & Trust Co., 104 S.W. 1061 (Tex. 1907) .*

(n5)Footnote 204. Tex. Prop. Code Ann. § 56.081(b); *First Nat'l Bank v. Sledge, 616 S.W.2d 954 (Tex. 1981) , aff'd in part, rev'd in part on other grounds, 653 S.W.2d 283 (Tex. 1983)* ; *Hunt Devs., Inc. v. Western Steel Co., 409 S.W.2d 443 (1966) .*

(n6)Footnote 205. Tex. Prop. Code Ann. § 53.081(b).

(n7)Footnote 206. *Id.* § 53.084; *Trinity Universal Ins. Co. v. Palmer, 412 S.W.2d 691 (1967) .*

(n8)Footnote 207. Cal. Civ. Code § 3103.

(n9)Footnote 208. *Id.* § 3083.

(n10)Footnote 209. *Id.* § 3098.

(n11)Footnote 210. *Id.* § 3159.

(n12)Footnote 211. *Id.* § 3172.

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CHAPTER 102 MECHANICS' LIENS 1

12-102 Thompson on Real Property, Thomas Editions § 102.06

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§ 102.06 Equitable Liens.

§ 102.06(a) In General.

When a construction lender retains funds under a construction loan agreement on a failed project, subcontractors and contractors have sometimes been able to establish an equitable lien to those funds. The rationale for the lien is that the lender, upon foreclosing, receives the benefit of the subcontractor's or contractor's performance and thus enjoys an enhanced security value for its note. The lender should not get the benefit of work and materials not yet paid for. Of course, if the lender had disbursed funds to the owner to pay the subcontractors, and the owner had diverted the money, the construction lender may not have been unjustly enriched. It paid once for the work the subcontractor had done and, if unpaid subcontractors were allowed equitable liens, it may result in the lender having to pay a second time. n212

For a while, California courts actively impressed unspent construction funds with equitable liens in favor of mechanics who had failed to perfect their statutory mechanics' liens or stop-notice rights. n213 Perhaps courts felt the lender should have done more to prevent the diversion of construction loan disbursements in the first place. The California legislature put an end to equitable liens by making statutory rights, the mechanics' lien and stop-notice laws the exclusive remedies for "all persons furnishing labor, services, equipment, or materials unless they had a direct contract with the lender." n214

Some state courts honor equitable liens. n215 A Florida lender foreclosed on condo units, obtained title at its own foreclosure sale, and was sued by an unpaid contractor. The lender could not claim it had already paid the contractor because the sum due the contractor had never been disbursed from the loan fund. Since the contractor's efforts had enhanced the value of the lender's security, and the lender still had the funds that had originally been earmarked for payment to the contractor, the court granted the contractor an equitable lien on the completed condo project and ordered the lender to pay the contractor. n216

An equitable lien could leave the lender short of funds to complete a project. For example, if the owner diverts funds and depletes the construction loan account before the project is finished, the construction lender will be forced to foreclose and come up with additional funds to complete the work. In this situation, seldom will the lender have been unjustly enriched by the contribution made by an unpaid subcontractor. Both the subcontractor and the lender are

victims of the developer's hanky panky. For this reason, courts in Florida, n217 Arizona n218 and the Fourth Circuit U.S. Court of Appeals n219 have denied contractors equitable lien priority over a construction loan when the mortgagee forecloses on an *incomplete* project, unless the lender committed fraud or induced contractors to forego protecting their legal interests.

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LEXIS: equitable lien! w/30 construction

§ 102.06(b) Title Insurance Protection Against Mechanics' Liens for the Construction Lender.

Statutes in thirteen states absolutely prohibit title insurers from insuring mortgage lenders' legal priority over mechanics' liens under any circumstances. n220 In states where title insurers may insure lenders against mechanics' liens, insurers make every effort to except and exclude all known liens that are superior to the lender's security interest. Construction lenders' title policies exclude from coverage any lien or encumbrance 'not known to the Company, not recorded in public records at the date of policy and any statutory lien for services, labor or materials ... which is contracted for and commenced subsequent to date of policy. n221 When specific liens appear of record, they are listed and excepted from coverage in Schedule B.

Construction lenders may be able to purchase a special endorsement to cover known, existing mechanics' liens and the removal of the above exception. The construction lender might also purchase a special endorsement insuring obligatory future advances, funds the lender had a "legal obligation to disburse contained in a written agreement." n222

When an insurer is taking a risk by insuring against known or potential mechanics' liens, the prudent title insurer will want to limit its exposure as much as possible. It will seek to institute a system for obtaining copies of timely lien waivers and possibly an indemnity from the developer. The insurer will inspect to make sure no work was commenced before the mortgage loan is recorded, and will document that with photos taken immediately before the mortgage is recorded. The insurer will also seek agreements from potential mechanics' lien claimants to subordinate their lien rights to the construction mortgage. Lastly, the insurer will condition its liability on a continuation search of the property's title to make sure no liens have been recorded before each advance is made. The insurer may also want an affidavit from the insured that it has not received any notice of adverse claims and that the loan is not in default as each advance is made. n223

Even when a title insurer agrees to cover a construction lender against mechanics' liens, there are certain defenses to coverage in the form policy. The 2006 ALTA Loan Policy 14 insures the construction lender's lien priority over mechanics' liens subject to various exclusions. One exclusion is for: "Defects, liens, encumbrances, adverse claims or other matters ... created, suffered, assumed or agreed to by the insured claimant."

Suppose a lender stops disbursing funds on a construction loan because it is "out of balance." This means the lender has determined that the money left in the loan fund is not sufficient to complete the job. The lender stops funding or threatens to stop funding, hoping the borrower will personally fund the next few phases of the construction to the point where the money left in the loan account will finish the job. If the borrower does not come up with the cash, the lender has the right to declare the loan in default, assuming it was supposed to remain "in balance." Suppose the loan was never adequate to pay the full costs of construction and the lender knows it. The borrower halts the project when the lender stops disbursing funds. Then when mechanics and suppliers are not paid, they cease working and file liens instead.

Are those liens covered under the Construction Loan Policy 7(b)? Or are they excluded because they were "created, suffered, assumed or agreed to" by the construction lender? Excluded, held the courts in *Bankers Trust Co. v. Transamerica Title Ins.* n224 and *Brown v. St. Paul Title Ins. Corp.* n225 Covered, held the Sixth Circuit in *American*

Sav. & Loan Ass'n v. Lawyers' Title Ins. Corp. n226

COMPUTER-ASSISTED RESEARCH

LEXIS: equitable lien! w/30 construction

FOOTNOTES:

(n1)Footnote 212. L. Wearen Hughes & Beth A. Dunning, *Holding on to What You Have Been Paid: Defending a Preference Action Against a Contractor, Subcontractor or Supplier*, 16 Constr. L. 15 (Jan. 1996); *Ten Hoeve Bros., Inc. v. City of Hartford, 1996 Conn. Super. LEXIS 1211* (No. CV93-07040205, May 13, 1996).

(n2)Footnote 213. *See A-1 Door & Materials Co. v. Fresno Guaranteed Sav. & Loan Ass'n, 40 Cal. Rptr. 85 (Cal. 1964)* .

(n3)Footnote 214. *Cal. Civ. Code § 3264. See* George Lefcoe & Mark Schaffer, *Construction Lending and the Equitable Lien, 40 S. Cal. L. Rev. 439 (1967).*

(n4)Footnote 215. *Town Concrete Pipe of Wash., Inc. v. Redford, 717 P.2d 1384 (Wash. App. 1986)* (refusing to read Washington's stop-notice statute as barring equitable liens); *Embree Constr. Group, Inc. v. Rafcor Inc., 411 S.E.2d 916 (N.C. 1992)* (finding that, although the state mechanics' lien statute denies relief to unpaid contractors or subcontractors who only had privity with the insolvent owner, the statute does not bar equitable relief against the lender for undisbursed construction funds). *See* William H. Higgins, Construction Lending B General Contractor v. Lender, *54 N.C. L. Rev. 952 (1976).*

(n5)Footnote 216. *Blosam Contractors, Inc. v. Republic Mtg. Investors, 353 So. 2d 1225 (Fla. App. 1977) , cert. denied, 359 So. 2d 1218 (Fla. 1978)* .

(n6)Footnote 217. *Giffen Indus. v. Southeastern Assocs. Inc., 357 So. 2d 217 (Fla. App. 1978)* .

(n7)Footnote 218. *Pioneer Plumbing Supply Co. v. Southwest Sav. & Loan Ass'n, 428 P.2d 115 (Ariz. 1967)* .

(n8)Footnote 219. *Urban Sys. Dev. Corp. v. NCNB Mortgage Corp., 513 F.2d 1304 (4th Cir. 1975)* .

(n9)Footnote 220. These are Alabama, Alaska, Colorado, Illinois, Maine, Michigan, Missouri, Montana, Oregon, Tennessee, Virginia, and Wyoming. *See* L. Stewart Bohan, *Managing the Risk of Mechanics' Lien Coverage*, 8 Prac. Real Est. Law. 43, 46 (July 1992).

(n10)Footnote 221. American Land Title Association [hereinafter ALTA] Loan Policy 3 (2006).

(n11)Footnote 222. ALTA Construction Loan Policy Endorsement B (1987).

(n12)Footnote 223. L. Stewart Bohan, *Managing the Risk of Mechanics' Lien Coverage*, 8 Prac. Real Est. Law. 43, 48-53 (July 1992).

(n13)Footnote 224. *594 F.2d 231 (10th Cir. 1979)* .

(n14)Footnote 225. *634 F.2d 1103 (8th Cir. 1980)* .

(n15)Footnote 226. *793 F.2d 780 (6th Cir. 1986)* .

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CHAPTER 102 MECHANICS' LIENS 1

12-102 Thompson on Real Property, Thomas Editions § 102.07

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§ 102.07 Conclusion.

We can see that state legislatures are trying to use mechanics' lien laws to balance the rights of unpaid laborers or material suppliers against the clouds on title such liens can create.

Only certain classes of claimants are protected under each state's mechanics' lien law. Some state laws also limit the claimants who can claim liens by trade. If the owner didn't contract directly with the claimant, statutes delineate those whose contracts can lawfully result in the owner's property being subjected to a lien. The claimant must prove that the work or materials went into the liened property.

Generally, mechanics' liens relate back to the same starting date so that foundation diggers aren't inevitably given better claims than roofers. In most states, that date is "visible on-site commencement."

This subjective standard has been replaced in a few states by more objective events, like the filing of a notice of commencement, the recordation of the lien, the filing of the foreclosure action, or obtaining a favorable judgement in the foreclosure action.

Potential mechanics' lienors are usually required to serve notice of their claims on those who may *not* know of them, to avoid "secret" liens. A few states require these "preliminary notices" be recorded. Most states don't require preliminary notices to be recorded, probably on the assumption that if all goes well and everyone is paid, there would be no reason to alarm lenders, cloud owners' titles, and clutter public records prematurely.

Most states do require mechanics' lien claimants who haven't been paid promptly to record their claims of liens within specified, strictly construed time limits. The time for recording is long enough so that the claimant has good reason to be apprehensive about payment before having to record the lien.

All mechanics' lienors are given specified times within which to initiate lawsuits to foreclose on their liens. They must also prosecute their cases expeditiously or risk losing their liens. But even if they lose their lien rights, they still possess common law causes of action for payment, based on their contracts.

Statutes generally give owners a chance to free their property from liens, once recorded, through bonds, release decrees, or other devices. In Maryland, mechanics' liens take priority only when the lienor wins a judgement on the underlying claim. The efficacy of mechanics' lien releases or joint checks, signed by a claimant in duress who hasn't actually been paid, varies from state to state and case to case. But they are universally used as the owner's first line of defense against mechanics' liens.

Construction lenders rely on title insurance for protection against mechanics' liens in states where title insurers aren't prohibited by law from writing such policies. That reliance is sometimes misplaced because mechanics' lien endorsements come with carefully worded exceptions to coverage.

The first step in perfecting or defending a mechanics' lien is to know the current version of your state mechanics' lien law "inside and out." n227

FOOTNOTES:
(n1)Footnote 227. *See* Michael G. Walsh, *How to Defend Against a Mechanics' Lien,* 8 Prac. Real Est. Law. 13, 21 (1992).

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CHAPTER 102 MECHANICS' LIENS 1

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§ 102.08 Bibliography.

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Annotation, "How far is public property subject to mechanics' liens," 26 A.L.R. 326 .

Annotation, "Knowledge of owner of improvements or repairs, intended or in process under orders of lessee or vendee, as 'consent,' which will subject his interest to mechanics' liens," 4 A.L.R. 685 .

Annotation, "Labor in examination, repair, or servicing of fixtures, machinery, or attachments in building, as supporting a mechanics' lien, or as extending time for filing such a lien," *51 A.L.R.3d 1087.*

Annotation, "Mechanics' lien for services of person supervising construction of building, architect, etc.," 60 A.L.R. 1257 .

Annotation, "Mortgagee-Lender's Duty, in Disbursing Funds, to Protect Mortgagor Against Outstanding or Potential Mechanics' Liens Against the Mortgaged Property," *30 A.L.R.4th 134.*

Annotation, "Priority as between mechanics' lien and purchase-money mortgage," 72 A.L.R. 1516 .

Annotation, "Right to mechanics' lien against fee for work or material furnished under contract with, or consent of, life tenant," 97 A.L.R. 870 .

1 Parts of this chapter have been adapted from George Lefcoe, Real Estate Transactions (Michie 1993).

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Supp. To CHAPTER 102 MECHANICS' LIENS

12-102 Thompson on Real Property, Thomas Editions Supp. to § 102.02

Supp. to § 102.02 Some Inequities of the Mechanics' Lien Law and How States Have Attempted to Alleviate Them.

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§ 102.02(a) The Double Liability Problem. Ind. Code Ann. § 28-1-21-23(b)(7)

§ 102.02(a)(1) An Owner May Have to Pay Twice for the Same Work.

Add:

Carolina Bldg. Services' Windows & Doors, Inc. v. Boardwalk, LLC, 658 S.E.2d 924 (N.C. 2008) (a subcontractor may assert whatever lien the general contractor has against the owner's real property relating to the project).

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Supp. To CHAPTER 102 MECHANICS' LIENS

12-102 Thompson on Real Property, Thomas Editions Supp. to § 102.03

Supp. to § 102.03 The Mechanics of the Mechanics' Lien Law.

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§ 102.03(c) Contents and Effect of a Mechanics' Lien. [Go To Main]

Add:

Alliance Steel, Inc. v. Piland, 187 P.3d 111 (Kan. App. 2009) (the lien was defective because the supplier claimant failed to correctly identify the contractor that ordered the materials).

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Supp. to § 102.04 Priorities.

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Add:

Cordeck Sales, Inc. v. Construction Systems, Inc., 887 N.E.2d 474 (Ill. App. 2008) (mechanics' lien had priority over mortgage lien).

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Supp. To CHAPTER 102 MECHANICS' LIENS

12-102 Thompson on Real Property, Thomas Editions Supp. to § 102.08

Supp. to § 102.08 Bibliography.

12 C.F.R. 29.6

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Lefcoe, George. *Real Estate Transactions, Finance, and Development* (6th ed. 2009).

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CHAPTER 103 FEDERAL AND STATE SECURITIES REGULATION OF REAL ESTATE TRANSACTIONS

13-103 Thompson on Real Property, Thomas Editions 103.syn

AUTHOR: Professor David A. Thomas J. Reuben Clark Law School Brigham Young University

§ 103.syn Synopsis to Chapter 103: FEDERAL AND STATE SECURITIES REGULATION OF REAL ESTATE TRANSACTIONS

29.9Introduction to the Chapter.

12 C.F.R. 545.34(c)Brief History of Federal Securities Regulation.

12 C.F.R. 545.33(f)(2)Real Estate Transactions Subject to Federal Securities Regulation.

§ 103.03(a) Definitions of Securities in Various Real Estate Transactions.

§ 103.03(a)(1) Notes.

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§ 103.03(a)(3) Stock.

§ 103.03(a)(4) Oil, Gas and Other Mineral Rights.

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§ 103.08(uu) Virginia.

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CHAPTER 103 FEDERAL AND STATE SECURITIES REGULATION OF REAL ESTATE TRANSACTIONS

13-103 Thompson on Real Property, Thomas Editions § 103.01

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§ 103.01 Introduction to the Chapter.

This chapter describes how federal and state governments affect certain real estate transactions through securities laws and regulations. The chapter identifies those real estate transactions that are subject to securities laws and regulations and then describes in some detail the usual processes required for compliance with those laws and regulations. The most significant of these requirements are imposed by federal law. States have similar and complementary laws and regulations and also impose licensing requirements on those who regularly deal in securities, including securities affecting real estate transactions.

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CHAPTER 103 FEDERAL AND STATE SECURITIES REGULATION OF REAL ESTATE TRANSACTIONS

13-103 Thompson on Real Property, Thomas Editions § 103.02

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§ 103.02 Brief History of Federal Securities Regulation.

The Transportation Act of 1920 contained provisions for the first permanent federal regulation of securities. n1 That act regulated securities by requiring railroad common carriers to obtain authorization from the Interstate Commerce Commission before issuing their own securities or accepting obligations with respect to securities from any other entity. Because the main objective of the act was to insure adequate rail transportation service, achieving investor protection through securities regulation was only one of several ways to accomplish that objective. n2

In March, 1933, President Franklin D. Roosevelt called for legislation to regulate securities as part of a broader program to restore the nation's financial health. Congress reacted swiftly, and the Securities Act of 1933 became effective in May, 1933. n3 The act reflected a policy decision favoring greater disclosure over heavier direct regulation, and to implement this policy required use of registration statements and prospectuses as prerequisites to offering securities to the public. Under the act, material misrepresentations or omissions in the disclosures required during the registration process or in prospectuses could result in civil liabilities and criminal penalties. The focus of the 1933 securities legislation was the initial distribution or offering of securities in the stream of interstate commerce. As for subsequent trading of such securities, the main regulation was left to the 1934 Securities Exchange Act. n4

Specifically, the Securities Exchange Act of 1934 sought to generate more and better information on behalf of and from those who traded in securities, to regulate the securities markets, and to prevent and remedy fraud in securities trading. To accomplish this, the 1934 Act required stock exchanges to register with the Securities Exchange Commission (SEC), and the SEC was empowered to regulate certain practices of the stock exchanges, as well as to require current information from companies issuing securities, and to enforce margin rules. As the act has been amended in subsequent years, its regulatory reach has extended to a broader group of issuing companies, to associations of securities broker-dealers, to takeover bids, and to processes for clearance and settlement.

The depression decade of the 1930's saw enactment of other major securities acts following the basic acts of 1933 and 1934. These subsequent securities acts included the Public Utilities Holding Company Act of 1935, the Trust Indenture Act of 1939, the Investment Company Act of 1940, and the Investment Advisers Act of 1940. Since that decade there has been virtually no major securities legislation except for the Securities Investors Protection Act of 1970 and portions of the Bankruptcy Reform Act of 1978.

The objective of the Public Utilities Holding Company Act of 1935 n5 was to reform several of the worst accounting and securities manipulation practices in the public utilities companies. By this act, a scheme of direct regulatory intervention was introduced into the public utilities sector; this intervention was a more heavy-handed approach than the less onerous disclosure schemes featured in the earlier securities acts.

The next securities regulation act was the 1939 Trust Indenture Act, n6 which incorporated both regulatory and disclosure approaches. This act requires the appointment of independent trustees to protect the rights of those who purchase securities issued under trust indentures. These securities are often bonds or other debt securities issued by a pension trust or a trust created as security for a bond issue, and they may be issued only under indentures approved or qualified by the SEC; as part of the process of becoming so qualified, the issuers must meet disclosure requirements which are similar to those in other SEC registration procedures.

The regulatory approach, as opposed to the disclosure approach, was also a part of the Investment Company Act of 1940. n7 This act regulated investment companies, which, as defined in the act, are securities issuers that are engaged primarily in the business of investing, reinvesting or trading in securities. Investment companies are also issuers that are in the business of issuing face-amount securities of the installment type or acquiring investment securities having a value of more than 40% of the acquirer's total assets. n8 Following amendments under the Investment Company Amendments Act of 1970 n9 and the Small Business Investment Incentive Act of 1980, n10 the present Investment Company Act seeks to correct abuses in sales practices, to regulate investment advisers' fees, to enable greater shareholder participation in management, to strengthen capital structures, and to improve the quality of available accounting information.

The Investment Advisers Act was also promulgated in 1940. This act requires investment advisers to register with the SEC and identifies certain fraudulent and deceptive practices which are made illegal under the act. n11

The Securities Investor Protection Act of 1970 is intended to provide protection against broker insolvency. n12 To accomplish this, brokers and dealers must pay annual assessments for an investor protection fund, which fund is also backed by the federal government.

Of concurrent authority with the federal regulation of securities and of those who deal in securities are similar securities regulations in each of the states, commonly under the heading "blue sky laws." The major federal enactments recognize the concurrent jurisdiction and usefulness of state regulation, specifically preserving "all other rights and remedies that may exist at law or in equity." n13 Common law rights of action under state law have been recognized in cases involving the federal securities laws and those common law rights are preserved unless explicitly rejected. n14

The Private Securities Litigation Reform Act of 1995, intended to reduce abusive litigation and coercive settlements, imposed new regulations and requirements on private plaintiff class actions. n15

FOOTNOTES:

(n1)Footnote 1. Now codified as *49 U.S.C. § 11*,301.

(n2)Footnote 2. The relationship of investor protection to the main purpose of the 1920 Transportation Act was expressed by the U.S. Supreme Court as "the establishment of a new federal railway policy to insure adequate transportation service by means of securing a fair return on capital devoted to the service, restoration of impaired railroad credit, and regulation of rates, security issues, consolidations and mergers in the interest of the public." *Schwabacher v. United States, 334 U.S. 182, 191-192 (1948)* .

(n3)Footnote 3. *15 U.S.C. § 77a et seq* .

(n4)Footnote 4. *15 U.S.C § 78 et seq*.

(n5)Footnote 5. *16 U.S.C. §§ 791a*-825r.

(n6)Footnote 6. *15 U.S.C. § 77aaa et seq*.

(n7)Footnote 7. *15 U.S.C. § 80a-1 et seq*.

(n8)Footnote 8. *15 U.S.C § 80a-3*(a). "Face-amount certificates of the installment type" are securities which obligate the issuer to pay a certain amount on specific dates after the investor makes a series of required installment payments." *Id.* at §§ 80a-2(a)(15), 80a-4(1).

(n9)Footnote 9. *84 Stat. 1413.*

(n10)Footnote 10. *94 Stat. 2275.*

(n11)Footnote 11. *15 U.S.C. § 80b-6 et seq*.

(n12)Footnote 12. *15 U.S.C. § 78aaa et seq.* The act was amended in 1978, *92 Stat. 249,* and in 1982, *96 Stat. 1409.*

(n13)Footnote 13. *15 U.S.C. § 77p* (Securities Act of 1933), § 78bb(a) (Securities Exchange Act of 1934), § 77zzz (Trust Indenture Act of 1939).

(n14)Footnote 14. *See* 1 Louis Loss & Joel Seligman, Securities Regulation 420, and cases cited in n.146 (4th ed. 2006).

(n15)Footnote 15. P.L. 10467 (Dec. 22, 1995); *Mathews v. Kidder, Peabody & Co., Inc., 161 F.3d 156 (3d Cir. 1998)* (securities litigation reform act removes fraud in the sale of securities as a predicate act for a private cause of action under RICO); *Santiago Gonzalez v. Santiago, 141 F. Supp. 2d 202 (D. P. R. 2001)* (defendants not entitled to attorney fees and costs under the Private Securities Litigation Reform Act); *Burton v. Ken-Crest Services, Inc., 127 F. Supp. 2d 673 (E.D. Pa. 2001)* (Private Securities Litigation Reform Act bars an action arising from an alleged conspiracy to mislead employees about pension plan investments).

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CHAPTER 103 FEDERAL AND STATE SECURITIES REGULATION OF REAL ESTATE TRANSACTIONS

13-103 Thompson on Real Property, Thomas Editions § 103.03

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§ 103.03 Real Estate Transactions Subject to Federal Securities Regulation.

§ 103.03(a) Definitions of Securities in Various Real Estate Transactions.

It is important to identify those real estate transactions that involve securities subject to federal or state regulation, but what constitutes a security in a normal financial context might not constitute a security in the context of a real estate transaction. Therefore, the objective of this section is to identify those types of real estate transactions that are likely to involve or generate securities subject to federal or state regulation. Even if it is determined that certain real estate transactions and their securities instruments are subject to such regulation, it may also be ultimately determined that broad exemptions in those federal and state acts apply in the context of real estate transactions and may diminish or even eliminate the need for following the normal registration or other procedures that are part of securities regulation.

The extremely broad definition of "security" in the federal securities acts was intended to encompass the instruments then known to be securities and also to anticipate instruments that might be devised in the future that could also function as securities. A "security" is defined in the 1933 Securities Act as follows:

> The term "security" means any note, stock, treasury stock, bond, debenture, evidence of indebtedness, certificate of interest or participation in any profit-sharing agreement, collateral-trust certificate, preorganization certificate or subscription, transferable share, investment contract, voting-trust certificate, certificate of deposit for a security, fractional undivided interest in oil, gas, or other mineral rights, any put, call, straddle, option or privilege on any security, certificate of deposit, or group or index of securities (including any interest therein or based on the value thereof), or any put, call, straddle, option, or privilege entered into on a national securities exchange relating to foreign currency, or, in general, any interest or instrument commonly known as a "security", or any certificate of interest or participation in, temporary or interim certificate for, receipt for, guarantee of, or warrant or right to subscribe to or purchase, any of the foregoing. n16

In the 1934 Securities Exchange Act is another definition of "security," which differs from the 1933 act definition somewhat in its structure but as a definition is quite equivalent in its coverage:

> The term "security" means any note, stock, treasury stock, bond, debenture, certificate of interest or participation in any profit-sharing agreement or in any oil, gas, or other mineral royalty or lease, any collateral-trust certificate, preorganization certificate or subscription, transferable share, investment contract, voting-trust certificate, certificate of deposit, for a security, any put, call, straddle, option, or privilege on any security, certificate of deposit, or group or index of securities (including any interest therein or based on the value thereof), or any put, call, straddle, option, or privilege entered into on a national securities exchange relating to foreign currency, or in general, any instrument commonly known as a "security"; or any certificate of interest or participation in, temporary or interim certificate for, receipt for, or warrant or right to subscribe to or purchase, any of the foregoing; but shall not include currency or any note, draft, bill of exchange, or banker's acceptance which has a maturity at the time of issuance of not exceeding nine months, exclusive of days of grace, or any renewal thereof the maturity of which is likewise limited. n17

The U.S. Supreme Court has attempted to minimize the technical differences in wording between the two definitions and has "repeatedly ruled that the definitions ... are virtually identical and will be treated as such in our decisions dealing with the scope of the term." n18

These definitions in some cases go too far and in some cases not far enough. The types of securities listed in the definitions are neither exhaustive nor can they be taken too literally. For instance, not every note is a security. In recognition of this, the preface to both of the securities definitions declares that the listed examples in the definitions apply only in the context of when they are "used in this chapter," and they do not apply if "the context otherwise requires--." n19 With this warning, therefore, it is possible that a particular instrument is not a security even if it fits into one of the types listed in the definitions; or an instrument may be a security even if it does not appear in the listed types of definitions.

More essential to characterizing an instrument or a transaction as a security is the economic substance of the instrument or transaction. No comprehensive definition of the substantive economic characteristics commonly found in a security are given in the federal securities acts, but in examining the judicial interpretations of the various types of securities listed in the definitions, certain characteristics emerge as especially important.

The extended discussion of particular types of securities in the following pages focuses on those types of securities most likely to appear in real estate transactions. These include notes; evidences of indebtedness; stock; oil, gas and other mineral rights; investment contracts; interests in trusts; and equipment trust certificates.

§ 103.03(a)(1) Notes.

Although the federal securities definitions make reference to "any note" as being a security, obviously some types of notes, such as a personal note given as part of a consumer credit transaction, are not treated as securities for purposes of federal securities regulation. n20 Determining which kinds of notes *are* considered securities has occupied much judicial attention. The U.S. Supreme Court decision in *Reves v. Ernst & Young* n21 made an attempt to resolve that question with a four-part test. According to *Reves*, a note is considered a security if it meets each of the four criteria described in the opinion:

1. A note is likely to be considered a security

> if the seller's purpose is to raise money for the general use of a business enterprise or to finance substantial investments and the buyer is interested primarily in the profit the note is expected to generate... n22

The note is probably not a security if it

> is exchanged to facilitate the purchase and sale of a minor asset or consumer good, to correct for the seller's cash-flow difficulties, or to advance some other commercial or consumer purpose ... n23

2. The note is probably a security if the court, in examining the plan for distributing the notes, determines that there is "common trading [in the notes] for speculation or investment." n24

3. A note will probably be considered a security if the public perception of the note is that it is a security. It was significant that the notes in the *Reves* case were advertised as "investments."

4. If "some other factor such as the existence of another regulatory scheme significantly reduces the risk of the instrument, thereby rendering application of the Securities Acts unnecessary," n25 the note will probably not be considered a security subject to federal regulation.

One scholar has pointed out that the criteria are essentially the same as the criteria in *SEC v. W.J. Howey Co.*, n26 a decision the *Reves* court explicitly rejected. n27

§ 103.03(a)(2) Evidences of Indebtedness.

According to the 1933 Securities Act, but not to the 1934 Securities Exchange Act, "any evidence of indebtedness" is included in the definition of a security. As declared by one court, an evidence of indebtedness includes "all contractual obligations to pay in the future for consideration presently received"; n28 as a definition of a security, however, this description is a bit too broad. For instance, a promissory note could be an evidence of indebtedness, just as it could be a note within the definition of the preceding section, but it is probably not the type of interest intended to come under the coverage of the definition of evidence of indebtedness as a security. More likely the term "evidence of indebtedness" refers to instruments such as loan commitments and guarantees n29 and investment certificates. n30 Most loan commitments, however, are obtained from lenders in the ordinary course of business and do not fall under the definition of "evidence of indebtedness" as a security. n31 An evidence of indebtedness that is considered a security subject to federal regulation probably meets the same criteria as for notes in the preceding section.

Because of judicial decisions, the absence of "evidence of indebtedness" from the section of securities definitions in the 1934 Securities Exchange Act probably is not significant. In a decision under the 1934 Act, the U.S. Supreme Court held that a bank certificate of deposit was not a security, but did not rely on the absence of the "evidence of indebtedness" wording from the 1934 Act's definition in reaching its decision. n32 However, several years earlier, a lower federal court had held an open-account loan to be not a security under the 1934 Act, precisely because the "evidence of indebtedness" wording was not in the Act. n33

§ 103.03(a)(3) Stock.

The federal definition of a security includes "any" stock, but not all shares corresponding to interests in an enterprise or entity are considered stock for securities regulation purposes. To be a security within the federal definitions, the stock must be part of an arrangement involving

> an investment of money in a common enterprise with profits to come solely from the efforts of others ... The touchstone is the presence of an investment in a common venture premised on a reasonable expectation of profits to be derived from the entrepreneurial or managerial efforts of others ... By contrast, when a purchaser is motivated by a desire to use or consume the item purchased--to occupy the land or to develop it themselves--... the securities laws do not apply. n34

§ 103.03(a)(4) Oil, Gas and Other Mineral Rights.

Securities regulation may be imposed on "any ... fractional undivided interest in oil, gas, or other mineral rights ... ." n35 Such fractional undivided interests may arise when exploration and production companies, in seeking access to oil, gas and other mineral resources, obtain leasehold interests from owners of the land that they consider most promising. These leaseholds are for the mineral rights only and are given in return for consideration composed of cash, periodic rental payments, and fractional shares, or royalty interests, of the value of minerals actually produced from the leased land. If the lessor, as consideration for the lease, actually obtains an interest in the value of production, that interest is almost always a fractional share of the entire royalty, with the balance of the fraction being held by the lessee, and that is also a fractional share.

Even though the definition of a security includes a "fractional interest," it has been held that the royalty interest held by a landowner/lessor is not a fractional interest, despite the fact that such an interest is itself a fraction of the entire royalty. Only if the royalty right held by the lessor is further divided for sale to others is a "fractional interest" created that is a security subject to federal regulation. Without being so divided, the lessor's royalty right is considered a mere leasehold interest that was not intended for regulation as a security. n36 Sometimes the lessor's royalty interest is not divided, but is repackaged and sold to the public in ways that subject it to securities regulation under some other portion of the definition. For example, a security is formed if royalty rights are offered in the form of contracts for delivery of the mineral production or its value, n37 or if the royalty rights are conveyed to a trustee, who then issues participating trust certificates for beneficial interests in the royalties. n38 Offerings of mineral rights may be considered securities under investment contract criteria. n39

It is perhaps in consideration of these variants that the 1934 Act defines mineral rights as securities in terms even more broad than those of the 1933 Act, referring to "any ... certificate of interest or participation in any profit-sharing agreement or in any oil, gas, or other mineral royalty or lease." n40 This wording is broad enough that the issue of whether a landowner's royalty interest remains whole or has become fractional may be avoided.

§ 103.03(a)(5) Investment Contracts.

"[A]ny ... investment contract" is included in the definitions of a security found in both the 1933 and the 1934 Acts. A judicial definition of investment contract was delivered in a U.S. Supreme Court case involving an offering of units of a citrus grove development, combined with a contract for managing the property and distributing the proceeds to investors. The Court directly addressed the definition of investment contract by declaring that

> an investment contract for purposes of the Securities Act means a contract, transaction or scheme whereby a person invests his money in a common enterprise and is led to expect profits solely from the efforts of the promoter or a third party, it being immaterial whether the shares in the enterprise are evidenced by formal certificates or by nominal interests in the physical assets employed in the enterprise. n41

Before this case, holdings in other courts had treated the various segments of such schemes as separate transactions, one for the sale and the other for the management of real property. This position was rejected in the *Howey* case, whose holding took into account the overall effect of the land sales contract, warranty deed and service contract, concluding that all of these elements in combination constituted an investment contract.

The definition of investment contract in *Howey* has been subsequently refined in other cases, and now it is not required that the consideration for the investment contract consist only of money; n42 a variety of concepts of "common enterprise" have arisen; n43 the profits that are expected by the investors may consist either of income earnings or of capital appreciation; n44 and it is only required that expected profits come "significantly" from the efforts of others, rather than "solely" from the efforts of others. n45 Even under this expanded definition, a mere real estate investment which may possibly produce profit from general increases of land values in the area does not render the investment a

security under the definition of investment contract. Only if the project relies on the efforts of others to develop or manage the property would the scheme include the additional elements required for such an investment to be treated as a security. n46

It is, of course, common for the sale of real or personal property to be coupled with retention and management of the property by the seller, and if that is the case the arrangement is treated as an investment contract or some other form of security. Such schemes that have involved real property have included cemetery plots, n47 orchards and vineyards, n48 other farm land, n49 and mortgage servicing plans. n50 Some of these arrangements have been conducted under the partnership form of business organization. If such a partnership entity is a limited partnership, with limited partners being the passive investors, most likely the investment will be considered a security, especially if the interests are transferable and are offered to the public. n51 However, if some responsibility for managing the enterprise has been delegated to the limited partners, quite likely the arrangement will not be found to be a security. n52

No security is at issue when the transaction consists only of the sale of real property, without management or other agreements attached; the arrangement is still not a security even when the property is transferred in the form of shares, such as stock in a cooperative or in some condominium arrangement. n53 Among those arrangements, however, resort condominiums or time-share properties that are sold with emphasis on profits to be expected from the units being rented out during certain times of the year will be treated as securities. n54 Even the sale of an undeveloped lot will be treated as a security if the sale is clearly for investment rather than for the buyer's use, and if the promotion heavily emphasizes the economic inducements. n55

§ 103.03(a)(6) Interests in Trusts.

Interests in trusts are subject to federal securities regulation, but only in a very narrow sense. Trusts are not even directly mentioned in the federal securities definitions, but in the 1933 Act's definition of a person, a trust is included. n56 In this context trusts are subject to securities regulation only "where the interest or interests of the beneficiary or beneficiaries are evidenced by a security." n57 Thus, federal securities regulation is limited to Massachusetts or business trusts, a form of business organization used when property is conveyed to a trustee who manages it on behalf of beneficiaries, and the interests of the beneficiaries are evidenced by transferable certificates. Therefore, the interests in real estate investment trusts are considered securities, n58 and interests in other forms of real estate enterprises which have the purpose of holding interests in real estate for investment purposes are also considered securities. These forms of enterprise include syndicates, partnerships, joint ventures and other incorporated or unincorporated issuers of securities. n59

§ 103.03(a)(7) Equipment Trust Certificates.

One of the ways in which securities regulation is applied is by identifying certain issuers that are subject to such regulation. An issuer of an equipment trust certificate is subject to federal securities regulation, an issuer meaning "the person by whom the equipment or property is or is to be used." n60 In one important respect the treatment of equipment trust certificates as securities touches upon real estate transactions: a conveyance of land and buildings to a trustee who then issues a long-term lease to the grantor and further issues certificates of shares in the trustee/lessor's interest in equipment to beneficiaries, is considered a security. n61

§ 103.03(b) Real Estate Securities and Transactions Subject to Federal Securities Regulation.

In the preceding sections are discussions of certain instruments that can be considered as securities subject to federal regulation when involved in real estate transactions. From those sections it may be perceived that certain common forms of business organization that are used for acquiring and holding real estate investments are typically subject to federal securities regulation. These forms of business organization or activity include real estate investment trusts (in which parties pool capital in a trust that is formed to invest in real estate), real estate syndications (which is a more general

term for any organization in which members pool funds to invest in real estate), n62 partnerships (which are entities in which participants pool their funds and sometimes their efforts for real estate investments, agreeing to function in various roles such as a general partner or a limited partner), and joint ventures, a general term for enterprises in which participants pool their resources for a single business enterprise without forming either a partnership or a corporation, and in which they have equal rights and duties).

Also apparent from the preceding sections is the perspective that certain types of real estate activities and real estate instruments are subject to securities regulation. These activities or instruments include activities in which a loan is given in return for a note or some other evidence of indebtedness, and the surrounding circumstances reinforce the suggestion that the loan is actually an investment rather than a lending transaction; shares of stock representing an investment in a common enterprise which is based on the investor's expectation of profits resulting from the efforts of others, rather than shares representing interest in real property which is to be used or occupied by the shareholders; any activities in which fractional shares of landowner mineral royalty interests are transferred to others; investment contracts whose provisions call for profits to be realized not only from appreciation in property value but also from agreements by issuers to retain possession of the realty and to develop or manage property; and certain sale/lease-back arrangements by which a trust is a lessor of equipment and issues certificates of interest to the trust beneficiaries.

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FOOTNOTES:
(n1)Footnote 16. *15 U.S.C. § 77b*(1); *Securities and Exchange Commission v. TLC Investments and Trade Co., 179 F. Supp. 2d 1149 (C.D. Cal. 2001)* (real estate investments treated as securities); *Jacob v. Schlichtman, 622 N.W.2d 852 (Neb. 2001)* (a bond necessary for transfer of property in a replevin action is not a security in a state action under an in forma pauperis statute).

(n2)Footnote 17. *15 U.S.C. § 78c*(a)(10).

(n3)Footnote 18. *Landreth Timber Co. v. Landreth, 471 U.S. 681 (1985)* .

(n4)Footnote 19. *15 U.S.C. §§ 77b,* 78c(a).

(n5)Footnote 20. *See, e.g., Hunssinger v. Rockford Bus. Credits, Inc., 745 F.2d 484, 492 (7th Cir. 1984)* (to give a note when purchasing consumer goods is not to participate in a securities transaction).

(n6)Footnote 21. *494 U.S. 56 (1990)* .

(n7)Footnote 22. *Id. at 66* . *Plains Electric Generation and Transmission Cooperative, Inc. v. New Mexico Public Utility Commission, 967 P.2d 827 (N.M. 1998)* (a cooperative's agreement with a company is not a security within the meaning of the Public Utility Act).*Pollack v. Laidlaw Holdings, Inc., 27 F.3d 808 (2d Cir. 1994)* , *cert. denied, 513 U.S. 963 (1995)* (under the "family resemblance" test a note is presumed to be a security unless it resembles one of the categories statutorily defined as not a security).

(n8)Footnote 23. *Id.* at 66 . *Smidt v. Drobny, 1997 U.S. Dist. LEXIS 20746 (N.D. Ill. 1997)* (Defendant refused to deliver securities pursuant to promissory note made to plaintiff after the value of the securities went up on the ground the note was intended as a loan); *United States v. G & T Enters., 978 F. Supp. 1232 (N.D. Iowa 1997)* (Assignment is given as security for the payment of and the performance of all covenants and agreements of assignor in that certain note), *aff'd, 149 F.3d 1188 (8th Cir. Iowa 1998)* .

(n9)Footnote 24. *Id. at 66* . *Trust Co. v. N.N.P., Inc., 104 F.3d 1478 (5th Cir. 1997)* (National Mortgage

Association Certificates were investment instruments because of their inherent risk, and defendant cannot get around it by UCC filing); *Ausa Life Ins. Co v. Ernst & Young, 1997 U.S. Dist. LEXIS 21357 (S.D.N.Y. 1997)* (Plaintiffs justifiably relied on JWP's financial statements and Ernst & Young's unqualified reports on those financial statements to analyze the investment quality of JWP's Notes). *See*, James W. Everett, Jr., "Are Promissory Notes Securities?" *40 UCC L.J. 1 (Fall 2007).*

(n10)Footnote 25. *Id. Local 875 I.B.T. Pension Fund v. Pollack, 992 F. Supp. 545 (E.D.N.Y. 1998)* (Defendant failed to properly monitor the investment of the $9.3 million in the note which had been made by ignoring the SEC bulletin regarding prime note bank fraud forwarded to the Trustees by Prudential Securities).

(n11)Footnote 26. *328 U.S. 293 (1946)* .

(n12)Footnote 27. James D. Gordon III, *Interplanetary Intelligence About Promissory Notes as Securities, 69 Tex. L. Rev. 383, 403 (1990); Countryside, L.P. v. Comm'r, T.C. Memo 2008-3 (T.C. 2008)* (privately issued promissory notes included in a liquidation distribution were not considered marketable securities); *State v. McGuire, 735 N.W.2d 555 (Wis. App. 2007)* (a promissory note issued by the defendant to the sole investor qualified as a security).

(n13)Footnote 28. *United States v. Austin, 462 F.2d 724* (10th Cir.) , *cert. denied, 409 U.S. 1048 (1972)* .

(n14)Footnote 29. *Id.*

(n15)Footnote 30. *B. K. Med. Sys. v. Clesh, 770 F.2d 1067 (3d Cir. 1985)* .

(n16)Footnote 31. *McGovern Plaza Joint Venture v. First of Denver Mtg. Investors, 562 F.2d 645 (10th Cir. 1977)* .

(n17)Footnote 32. *Marine Bank v. Weaver, 455 U.S. 551 (1982)* .

(n18)Footnote 33. *Zeller v. Bogue Elec. Mfg. Corp., 476 F.2d 795* (2d Cir.) , *cert. denied, 414 U.S. 908 (1973)* .

(n19)Footnote 34. *United Housing Found., Inc. v. Forman, 421 U.S. 837 (1975)* . *See also Landreth Timber Co. v. Landreth, 471 U.S. 681 (1985)* .

(n20)Footnote 35. *15 U.S.C. § 77b*(1).

(n21)Footnote 36. *SEC v. C.M. Joiner Leasing Corp., 320 U.S. 344 (1943)* ; *Penturelli v. Spector, Cohen, Gadon & Rosen, P.C., 779 F.2d 160 (3d Cir. 1985)* (coal leases).

(n22)Footnote 37. *SEC v. Crude Oil Corp. of Am., 93 F.2d 844 (7th Cir. 1937)* .

(n23)Footnote 38. *SEC v. Jones, 12 F. Supp. 210* (S.D.N.Y.) , *aff'd, 79 F.2d 617 (2d Cir. 1935)* , *rev'd on other grounds sub nom. Jones v. SEC, 298 U.S. 1 (1936)* .

(n24)Footnote 39. *SEC v. Goldfield Deep Mines Co., 758 F.2d 459 (9th Cir. 1985)* .

(n25)Footnote 40. *15 U.S.C. § 78c*(a)(10).

(n26)Footnote 41. *SEC v. W.J. Howey Co., 328 U.S. 293 (1946)* .

(n27)Footnote 42. *International Bhd. of Teamsters v. Daniel, 439 U.S. 551 (1979)* .

(n28)Footnote 43. *See, e.g., Milnarik v. M-S Commodities, Inc., 457 F.2d 274* (7th Cir.) , *cert. denied, 409 U.S. 887 (1972)* ; *SEC v. Koscot Interplanetary, Inc., 497 F.2d 473 (5th Cir. 1974)* ; *SEC v. Glenn W. Turner Enters., Inc., 474 F.2d 476* (9th Cir.) , *cert. denied, 414 U.S. 821 (1973)* .

(n29)Footnote 44. *Tcherepnin v. Knight, 389 U.S. 332 (1967)* .

(n30)Footnote 45. *SEC v. Glenn Turner Enters., Inc., 474 F.2d 476* (9th Cir.) , *cert. denied, 414 U.S. 821 (1973)* .

(n31)Footnote 46. *United Housing Found., Inc. v. Forman, 421 U.S. 837 (1975)* ; *McCown v. Heidler, 527 F.2d 204 (10th Cir. 1975)* ; *Contract Buyers League v. F & F Inv., 300 F. Supp. 210, 224 (N.D. Ill. 1969)* , *aff'd sub nom. Baker v. F & F Inv., 420 F.2d 1191* (7th Cir.) , *cert. denied, 400 U.S. 821 (1970)* .

S.E.C. v. Current Financial Services, Inc., 100 F. Supp. 2d 1 (D.D.C. 2000) ("investment agreements" were securities); *Steinhardt Group Inc. v. Citicorp, 126 F.3d 144 (3d Cir. 1997)* (a "securitization" transaction involving a pool of delinquent residential mortgage loans was not an investment contract).

People v. Destro, 2008 Colo. App. LEXIS 896 (Colo. Ct. App. May 29, 2008) (unpublished case) (a scheme of buying real estate and selling it to investors qualified as an investment contract and thus as a security); *S.E.C. v. Merrill Scott & Associates, Ltd., 505 F. Supp. 2d 1193 (D. Utah 2007)* (foreign investment schemes promoted for tax advantages, asset protection or profits were considered investment contracts and therefore securities); *Majors v. South Carolina Securities Com'n, 644 S.E.2d 710 (S.C. 2007)* (an investment opportunity in tax lien certificates was considered an investment contract and therefore a security); *S.E.C. v. Merchant Capital, LLC, 483 F.3d 747 (11th Cir. 2007)* (interests in registered limited liability partnerships were investment contracts and therefore securities).

(n32)Footnote 47. SEC v. Kaanehe Litig. Rels., 3756 (D. Haw. 1967); *SEC v. Mount Vernon Mem. Park, 664 F.2d 1358* (9th Cir.) , *cert. denied, 456 U.S. 961 (1982)* (decided under the Investment Company Act).

(n33)Footnote 48. *SEC v. Tung Corp. of Am., 32 F. Supp. 371 (N.D. Ill. 1940)* (trees); *State v. Agey, 88 S.E. 726 (N.C. 1916)* (orchards); *Kerst v. Nelson, 213 N.W. 904 (Minn. 1927)* (vineyards).

(n34)Footnote 49. *Prohaska v. Hemmer-Miller Dev. Co., 256 Ill. App. 331 (1930)* .

(n35)Footnote 50. *Los Angeles Trust Deed & Mtg. Exch. v. SEC, 285 F.2d 162 (9th Cir. 1960)* , *cert. denied, 366 U.S. 919 (1961)* .

(n36)Footnote 51. *SEC v. Murphy, 626 F.2d 633 (9th Cir. 1980)* .

(n37)Footnote 52. *Rodeo v. Gillman, 787 F.2d 1175 (7th Cir. 1986)* .

(n38)Footnote 53. *United Housing Found. v. Forman, 421 U.S. 837 (1975)* ; *SEC v. W.J. Howey Co., 328 U.S. 293 (1946)* ; *SEC v. C.M. Joiner Leasing Corp., 320 U.S. 344 (1943)* .

(n39)Footnote 54. Sec. Act Rel. No. 5347 (1973).

(n40)Footnote 55. *Aldrich v. McCulloch Props., Inc., 627 F.2d 1036 (10th Cir. 1980)* ; *McCown v. Heidler, 527 F.2d 204 (10th Cir. 1975)* ; *Firth v. Lu, 12 P.3d 618 (Wash. App. 2000)* (a purchase motivated by a desire to use or consume the products of the land is not an investment premised on a reasonable expectation of profits and is not a security under federal securities law).

(n41)Footnote 56. *15 U.S.C. § 77b*(2).

(n42)Footnote 57. *Id.*

(n43)Footnote 58. Sec. Act Rel. 4422 (1961).

(n44)Footnote 59. *See* SEC Form S-11, which is used for registration of real estate investment trusts and the other forms of business entities for holding real estate investments.

United States Securities and Exchange Commission v. Infinity Group Company, 212 F.3d 180 (3d Cir. 2000) (property transfer contracts under which investors contributed money to a trust were considered securities).

(n45)Footnote 60. *15 U.S.C. § 77b*(4).

(n46)Footnote 61. *See* 2 Louis Loss & Joel Seligman, Securities Regulation 1056 (3d ed. 1989); *S.E.C. v. ETS Payphones, Inc., 123 F. Supp. 2d 1349 (N.D. Ga. 2000)* (a sale and leaseback arrangement was a security when all profit expectations were dependent upon the ability of the seller to generate revenue).

(n47)Footnote 62. Real estate syndications generally take the form of limited partnership interests or interests in joint or profit-sharing ventures. Sec. Act Rel. No. 4877 (1967).

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CHAPTER 103 FEDERAL AND STATE SECURITIES REGULATION OF REAL ESTATE TRANSACTIONS

13-103 Thompson on Real Property, Thomas Editions § 103.04

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§ 103.04 How to Comply with Federal Securities Regulation Requirements for Real Estate Transactions.

The federal government's method of securities regulation is to present to potential securities investors full disclosure of accurate information related to the investment. With such full and accurate information, an investor who is also attempting to assess market forces is theoretically able to make more sound investment decisions. In addition to promoting and facilitating full and accurate disclosure, the various federal securities regulations also attempt to prevent or at least make more difficult the kinds of fraudulent conduct which have traditionally occurred in the processes of offering and selling securities. The rather straightforward method for achieving both of these purposes is to require that those who offer securities register the securities with the Securities and Exchange Commission, and, in the course of registration, to submit the information necessary to inform investors and put them in a better position to avoid being victimized by fraudulent conduct. In certain typical situations where avoiding fraudulent conduct or obtaining the full information seems less important for investor protection, broad exemptions from the registration and other securities requirements have developed, which exemptions apply either to particular types of securities or to particular types of securities transactions. Even where an exemption exists, however, some other less onerous filing and information requirements may be imposed and, in any event, the prohibitions against fraud still apply in full force. All of these provisions that apply to securities generally also apply fully to securities that emerge from various real estate transactions. In the sections to follow, various compliance requirements and exemptions provisions are described as they apply to securities generally, and those also apply fully to securities connected with real estate transactions.

§ 103.04(a) Registration of Securities in Real Estate Transactions.

§ 103.04(a)(1) When Registration Is Required.

Once an instrument has been identified as a security according to the various statutory definitions discussed in the preceding paragraphs, as interpreted by various cases, then usually the issuer of that security must go through a process of registration before issuance may occur. Any security that is to be offered or sold through interstate commerce or mail, and which is not otherwise exempt, must be registered. Moreover, any security *may* be registered even if it is not *required* to be registered. n63

The constitutional basis for the 1933 Securities Act is the federal government's power to regulate interstate commerce, and the 1933 Act prohibits using means of interstate commerce, communication, transportation, or the mails to sell,

offer to sell, carry, buy, or offer to buy any security, or even to carry a prospectus relating to a security, unless certain registration requirements have been met. n64 Some of those restrictions are lifted when a registration statement is filed; other restrictions are removed when the filed registration statement becomes effective. Stated in another way, it is unlawful to use interstate means in selling or transporting a security, unless a registration statement for the security is in effect. n65 It is unlawful to use interstate means for transporting a prospectus relating to a security or for transporting a security for sale or delivery after sale, unless that security is accompanied by a prospectus and the prospectus contains certain information required in the registration process. n66 It is unlawful to use interstate means for offering to sell or buy a security, with a prospectus or by some other means, unless a registration statement has been filed and the filing is not at the time subject to a refusal order or a stop order. n67

§ 103.04(a)(2) The Process of Registration: Filing.

To register a security an issuer must file a registration statement in triplicate; one of the three copies must be signed by the

> issuer, its principal executive officer or officers, its principal financial officer, its comptroller or principal accounting officer, and the majority of its board of directors or persons performing similar functions. n68

When the registration statement and the required fee are received by the SEC, the registration statement is deemed filed: n69 the registration fee is an amount equal to 10th of one percent of the maximum proposed offering price of the securities, and not less than $100. n70

Once a registration statement has been filed, it is open to public inspection and copying. n71 After the filing of the registration statement has occurred, issuers may make offers to sell securities, but these offers may be made only by writing and by proper prospectus.

§ 103.04(a)(3) Determination of the Date of Effectiveness.

Once the filing date of the registration statement has been established, the next important date is the effective date. A registration statement (or an amendment to a filed registration statement) becomes effective on the twentieth day after filing, unless the SEC has agreed to an earlier effective date, n72 or has delayed the effective date because of problems with the statement or amendment. n73 From and after the effective date of the registration statement, sales may be made when the sale transaction is accompanied by a proper prospectus. n74

§ 103.04(a)(4) Summary of Information Required for Securities Filings.

The registration statement is in essence a statement of certain required information, and the basic information requirements are described in Schedule A of *15 U.S.C. § 77aa;* if a security issued by a foreign government or one of its political subdivisions is to be registered, the registration statement must meet the information requirements set out in Schedule B of *15 U.S.C. § 77aa.* n75

Schedule A is reproduced in Appendix 1 of this chapter. The main categories of the information required under Schedule A are summarized as follows:

> a. names and addresses of the issuers and all principal parties associated with or having an interest in the issuer;
>
> b. a description of the issuer's business organization and activities and financial structure, including copies of such fundamental instruments as corporate articles and bylaws, trust instruments and partnership agreements;

c. a description of the securities to be offered, including proposed uses for the funds raised, compensation of principal officers, and commissions and other expenses related to the offering;

d. a description of the issuer's contracts and transactions that are not in the ordinary course of business; and

e. a current balance sheet and a current profit and loss statement for the issuer and for any business to be acquired with proceeds from the offering.

§ 103.04(a)(5) Summaries of Forms Most Frequently Used in Securities Filings for Real Estate Transactions.

Because various types of securities or the transactions in which they are used can be substantively quite different, the SEC has promulgated several different registration forms for use with certain types of securities or with transactions in which securities are a part. Those different forms each indicate which items of the Schedule A requirements described above are needed for that particular transaction or security. A list of the registration statement forms currently in use is found in Appendix 2.

Three of those specialized forms relate to real estate transactions and are summarized below to give a general understanding of the scope and depth of information required to register securities connected with real estate transactions. The first form thus described is Form S-1, which is the general form of registration statement; this form is reproduced in Appendix 3. The other form is Form S-11, which is for securities of certain real estate companies; this form is reproduced in Appendix 4. Form S-18, formerly used for securities whose offering price is $7,500,000 or less, was rescinded in 1992. One other specialized form, Form S-10 for registering oil and gas interests or rights, was rescinded in 1982.

§ 103.04(a)(5)(i) Summary of Form S-1, Registration Statement Under the Securities Act of 1933.

Form S-1 is the general registration form used for most transactions and is used if none of the specialized forms are appropriate. The instructions for Form S-1 combine the instructions from two extensive regulations, Regulation C (which contains the general requirements for registration statements) n76 and Regulation S-K (which contains requirements relating to the non-financial portions of registration statements). n77 The provisions of Regulation C are reproduced in Appendix 5 and those of Regulation S-K are contained in *17 C.F.R. Sections 229.10 to .915*.

In part I of Form S-1 the registrant is required to provide the types of information which should appear in the prospectus that is prepared as part of the securities offering. The detailed information requirements for part I are found in various provisions of Regulation S-K, as noted in the parenthetical statements below, and those requirements may be summarized as follows:

a. information for the covers of the prospectus (Reg. S-K Items 501 and 502);

b. information on risk factors connected with the offering (Reg. S-K Item 503);

c. how the proceeds will be used (Reg. S-K Item 504);

d. determining the offering price (Reg. S-K Item 505);

e. dilution by insider purchasing (Reg. S-K Item 506);

f. selling by security holders (Reg. S-K Item 507);

g. the plan of distribution (Reg. S-K Item 508);

h. characteristics of securities being registered (Reg. S-K Item 202);

i. interests held by named experts and counsel (Reg. S-K Item 509);

j. information about the issuer (Reg. S-K Items 101-201, 301-404, 510); and

k. the SEC position on indemnification for Securities Act liabilities (Reg. S-K Item 510).

In Part II of Form S-1 the applicant must provide types of information other than the information that would be required in the prospectus. The details of these requirements are found in various provisions of Regulation S-K, are noted in the parenthetical statements below, and may be summarized as follows:

a. other expenses of issuance and distribution (Reg. S-K Item 511);

b. provisions for indemnifying officers and directors (Reg. S-K Item 702);

c. details of recent sales of unregistered securities (Reg. S-K Item 701);

d. exhibit and financial statement schedules (Reg. S-K Item 601); and

e. a description of the undertakings (Reg. S-K Item 512).

The format, handling and other procedural rules for registration statements generally, including for registrations using Form S-1, are found in Regulation C.

§ 103.04(a)(5)(ii) Summary of Form S-11, for Registration Under the Securities Act of Securities of Certain Real Estate Companies.

One who wishes to register securities that are issued by a real estate investment trust would use Form S-11. Form S-11 would also be used by any other issuer

> whose business is primarily that of acquiring and holding for investment real estate or interests in real estate or interests in other issuers whose business is primarily that of acquiring and holding real estate or interests in real estate for investment. n78

Form S-11 and the general requirements of the 1933 Act are usually not applicable to an investment company that is covered by the Investment Company Act of 1940.

In Part I of Form S-11, the applicant must provide the types of information that are required to appear in the prospectus which is prepared as part of the offering. Details of those requirements are found in various provisions of Regulation S-K and are summarized as follows:

a. information for the covers of the prospectus (Reg. S-K Items 501 and 502);

b. information on the risk factors and earnings ratio (Reg. S-K Item 503);

c. determining the offering price (Reg. S-K Item 505);

d. dilution by insider purchasing (Reg. S-K Item 506);

e. selling by security holders (Reg. S-K Item 507);

f. the plan of distribution (Reg. S-K Item 508);

g. how the proceeds will be used (Reg. S-K Item 504);

h. selected financial data (Reg. S-K Item 301);

i. management's discussion and analysis of the issuer's financial condition and the results of operations (Reg. S-K Item 303);

j. information about the registrant;

k. the registrant's policies with respect to certain debt and securities transactions;

l. the investment policies of the registrant in real estate or real estate interests, in real estate mortgages, in securities of or interests in persons primarily engaged in real estate activities, and in investments in other securities;

m. descriptions of real properties held or to be acquired by registrant;

n. certain operating data pertaining to registrant's real properties;

o. tax treatment of registrant and its security holders;

p. market price of and dividends on the registrant's common equity and related stockholder matters (Reg. S-K Item 201);

q. description of registrant's securities (Reg. S-K Item 202);

r. description of pending legal proceedings involving registrant (Reg. S-K Item 103);

s. security ownership held by management and certain beneficial owners (Reg. S-K Item 403);

t. directors and officers (Reg. S-K Item 401);

u. executive compensation (Reg. S-K Item 402);

v. description of certain insider transactions and relationships (Reg. S-K Item 404);

w. information about the selection, management and custody of the registrant's investments;

x. the registrant's policies with respect to certain insider transactions or activities;

y. limitations of insider liability;

z. financial statements and information (Reg. S-K Items 302 and 304); and

aa. the interests of the named experts and counsel (Reg. S-K Items 302 and 304).

In Part II of Form S-11, the applicant must provide information other than the information that should appear in the prospectus. Details of those requirements are found in various provisions of Regulation S-K and may be summarized as follows:

a. other expenses of issuance and distribution (Reg. S-K Item 511);

b. sales to special parties;

c. recent sales of unregistered securities (Reg. S-K Item 701);

d. provisions for indemnifying officers and directors (Reg. S-K Item 702);

e. how the proceeds from the stock being registered are to be treated;

f. financial statements and exhibits (Reg. S-K Item 601); and

g. undertakings (Reg. S-K Item 512).

Instructions for the format, handling and other procedural rules for this registration statement are drawn from Regulation C and are incorporated into the instructions for this form.

§ 103.04(a)(6) Procedures for Filing; Summary of Post-Filing Requirements.

In addition to the substantive information requirements contained in the instructions for the various registrations statements, additional procedural requirements are imposed by Regulation C. By way of example, the basic requirements of registration statements specify that the statement must be filed in triplicate; n79 at the same time Regulation C requires an additional ten copies to be filed with the Commission for use in the examination process. n80

When the document preparation is complete, then the registration material and the appropriate fee are received by the SEC and the date of this receipt is designated as the filing date. n81 Usually the registration materials are deposited with or sent to the principal office of the SEC in Washington, D.C., n82 but in some cases it is possible to file the materials in a different location. For instance, the registration statement for securities to be offered at a competitive bidding may be filed at any regional or branch office of the SEC. n83

It is very important to determine the precise filing date, because usually the "effective date" of the filing is entirely dependent upon the filing date. In most registrations, the effective date of the registration occurs exactly twenty days after the filing date. The filing date is also important because it is the time at which an issuer may begin the offering processes, n84 and the effective date is important because that marks the time at which an issuer may begin sales and deliveries. n85 The effective dates that routinely arise exactly twenty days after the filing date have been defined as beginning at the expiration of nineteen 24-hour periods following 5:30 p.m. Eastern Time on the date of filing. n86 For applicants using specialized registration forms, occasionally the time of the effective date differs from the usual twenty-day period. For instance, when an applicant uses Form S-8, which is to be used for securities offered to employees under an employee benefit plan, registrations are effective automatically and immediately upon filing. n87

Other circumstances may arise which delay the effective date beyond the period of twenty days after the filing date. When the SEC determines that the registration materials are inaccurate or deficient in some respect, it may issue an order that delays the effective date until those deficiencies have been corrected as required by the order. n88 Before it

issues such an order, the SEC gives notice by personal service to the registrant within ten days of the filing date, and the notice must state that the registrant has opportunity for a hearing within ten days after service. n89 When the applicant amends the registration as required, the SEC then issues a statement or declaration to that effect, and the registration statement, as amended, becomes effective upon the original effective date or upon the date of the declaration, whichever is later. n90

Occasionally, an applicant will submit an amendment to a registration statement without waiting for an SEC notice. Such an amendment is deemed filed when it is actually received by the SEC. n91 The filing of an amendment, either upon the applicant's own initiative or upon SEC order, alters the effective date in one of two ways. If the amendment is filed before the basic registration statement has reached its effective date, the basic registration statement is considered as having been filed on the date when the amendment was filed, and the effective date for the amended registration statement then normally occurs twenty days after the amended filing date. n92 If the amendment is filed after the basic registration statement has already reached its effective date, the amended registration statement is assigned an effective date as determined by the SEC, "having due regard to the public interest and the protection of investors." n93

An applicant may also request that the SEC accelerate the effective date of a registration statement, and in considering such requests the SEC invokes the same standard of due regard to the public interest and protection of investors. n94 It is also possible for an applicant to file an amendment for the express purpose of delaying the effective date of a registration statement. For such an amendment, a filing date is assigned as necessary to achieve the desired delay in the effective date of the registration statement. n95

In addition to the process by which the SEC issues an order resulting in an amendment to registration materials, the SEC may also issue a stop order suspending the effectiveness of the registration statement, any time it finds an omission or misstatement of material fact in the registration materials. n96 It should be remembered that in none of these SEC actions, whether delaying or stopping a registration or permitting a registration to go on to effective date, is the SEC issuing judgments about the merits of the securities, and it must be especially emphasized that acceptance of a filing is not an approval or endorsement of the securities by the SEC. n97

One further post-registration procedural requirement is imposed on issuers. After a registration is accepted and sales have taken place, most issuers must file with the SEC four copies of Form SR, Report of Sales of Securities and Use of Proceeds Therefrom, at the end of the first three-month period following the effective date and every six months thereafter, until the proceeds from the offering have been used or the offering itself has come to a conclusion. n98

§ 103.04(a)(7) Registration Exemptions and Alternative Offering Procedures for Real Estate Transactions.

§ 103.04(a)(7)(i) Overview of Securities Exemptions.

Even if the arrangements of a particular real estate transaction fit the definition of a security, and even if it is determined that the security is subject to the securities regulation provisions of federal or state law, it is still possible that complete compliance with those provisions is not required because of exemptions that may apply. Exemptions may apply either to types of securities or to types of transactions. Of the several types of securities that are exempted from federal registration requirements, most are not of the types that would be involved in real estate transactions. However, among the statutorily exempted securities that could be found in real estate transactions are "certificates issued by a receiver or by a trustee or debtor in possession in a case under Title 11, with approval of the court"; n99 securities exchanged by an issuer exclusively among its existing security holders (except under Title 11); n100 securities exchanged for securities for claims or for property interests (or partly for cash, which exchanges typically take place in reorganizations), if the statutory fairness requirements are met; n101 and securities offered or sold only to persons residing within a single state or territory, and sold by an issuer that is resident in or incorporated and doing business in that particular jurisdiction, which is the so-called intrastate issues exemption. n102 The statutory exemption provisions are found in *15 U.S.C. § 77c*.

The statutory exemptions for certain types of securities exist side by side with certain regulatory exemptions resulting from the statutory authority given to the SEC to prescribe by regulation certain other exemptions for small issues and issues of limited character. In exercise of this regulatory authority, the SEC has fashioned some exemptions that do relate to real estate transactions, including exemptions for qualified issues amounting to no more than $1,500,000; for fractional undivided interests in oil or gas rights that do not exceed $250,000; and for shares of stock offered or sold in the so-called private offerings.

The statutory and regulatory exemptions for securities described in the preceding paragraphs must also be considered in connection with statutory and regulatory exemptions for certain securities transactions. Among the exempt transactions are several that likely pertain to real estate transactions, including transactions by a person who is not an issuer, certain private offerings, large sales of real estate mortgage notes, and sales to accredited investors.

When securities are under any form statutory exemptions, whether the exemption relates to specific securities or to transactions, the issuer does not need to submit information to the SEC and the prospectus or other offering literature may have form and content as chosen by the issuer. n103 If, on the other hand, the exemption is a regulatory rather than a statutory exemption, then the issuer must observe any auxiliary or additional requirements or substitute requirements imposed by the regulation. n104

In the following paragraphs the principal securities exemptions and transactions exemptions that may pertain to real estate transactions are discussed.

§ 103.04(a)(7)(ii) Intrastate Issues as Exempted Securities.

The Securities Act of 1933 is generally not applied to issues that are offered or sold to residents in a single state or territory, if the issuer is a person resident or doing business or is a corporation doing business in that state or territory. n105 This exemption is a statutory exemption and is described in the statutory language as an exemption for securities based on the statute. In practice, the exemption ostensibly for securities is treated as an exemption for transactions, because what is being exempted is the manner of offering and selling the securities rather than the securities themselves. Also there is a regulatory counterpart to this statutory exemption, found in Rule 147, under which the SEC attempts to provide some objective criteria for determining eligibility for the statutory exemption. n106 However, the statutory exemption may stand on its own and if the issuer does not meet the specific criteria for eligibility found in the regulations of Rule 147, the issuer may still qualify directly under the terms of the statute. n107 An example of how the regulation's requirements go beyond the statute is the explicit and objective standard in Rule 147 that an issuer must have derived at least 80% of its gross revenues from the state or territory in which it seeks to place its intrastate issue under the exemption. n108 As already stated, if an issuer does not meet the 80% standard, it may still qualify for the intrastate exemption directly under the terms of the statute. Rule 147 also requires that resales be deferred until nine months after the initial offering closes, n109 and that in the written materials describing the offer, the resale limitation must be disclosed. n110 Rule 147 is available from the SEC on the Internet at http://www.sec.gov.

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LEXIS: intrastate w/5 issue! w/30 exempt! w/5 securit! w/30 real estate

§ 103.04(a)(7)(iii) Small Issues as Exempted Securities (Regulation A).

Another statutory exemption pertaining to securities is the SEC authority to exempt from registration certain offerings that are so small in value or otherwise limited in character that the need for protection of investors and the public generally does not require invoking registration provisions. n111 The statutory limit for this exemption is for offerings that do not exceed $5,000,000 in value.

The SEC has also promulgated regulations explaining the details of this exemption, known as Regulation A, n112 and under this regulation, despite the $5,000,000 statutory ceiling, the small issue exemption is extended only to issues of not more than $1,500,000 in value. n113 Regulation A is available from the SEC on the Internet at http://www.sec.gov.

An issuer who has its principal place of business operations in the U.S. or Canada is eligible for exemption under Regulation A. n114 The exemption may not be available if the principals or underwriters of the issuer have had their securities-related conduct questioned during the recent past under proceedings that are still pending or that were resolved unfavorably. n115 When an offering seeks to invoke the exemption of Regulation A, a statement based on Form 1-A must be prepared and submitted. n116 Form 1-A is available from the SEC on the Internet at http://www.sec.gov. That statement must usually be filed in the SEC regional office in the region where the issuer conducts its principal business operations. n117 That offering statement should also include the offering circular (copies of which are also to be provided to offerees or purchasers,) and the content of that offering circular as it pertains to offers and sales is also prescribed by regulation. n118 This exemption is an example of a statutory exemption that is rather severely altered by regulation, and, even if the exemption applies, there are additional filing requirements imposed by regulation. Reports of sales under this exemption must be submitted within 30 days after the end of each six-month period following the date of the original offering. n119

COMPUTER-ASSISTED RESEARCH

LEXIS: small w/5 issue! w/30 exempt! w/5 securit! w/30 real estate

§ 103.04(a)(7)(iv) Certain Fractional Oil and Gas Issues as Exempted Securities (Regulation B).

Another exemption that may apply to real estate transactions is for certain fractional undivided interests in oil and gas rights offered for less than $250,000. n120 This exemption is described in Regulation B, and Regulation B is available from the SEC on the Internet at http://www.sec.gov.

The fractional undivided interests in oil and gas rights to which this exemption may apply include landowners' royalty interests, overriding royalty interests, working interests, participating interests, and certain oil and gas payments, such as rights to participate in the proceeds from the sale of oil and gas. n121 This exemption is not available to an offeror if the offeror or one of its principals has committed securities violations or other similar misconduct during the past several years. n122

Although this exemption excuses the offeror from meeting the standard securities requirements, the regulation imposes alternative requirements. For instance, at least ten days before the offering begins, the offeror must file with the SEC four copies of an offering sheet that contains certain information required in the regulation. The required information is contained on one of four schedules and the schedule to be used is determined by the type of interest being offered. n123 The appropriate offering sheet must be in the hands of the offeree before an offer may be made and at least 48 hours before a sale may be made. n124 Not more than 15 days after an offering sheet has expired, the offeror must file a report on Form 1-G (Report of Sales of Oil or Gas Interests Pursuant to Regulation B); n125 and not more than three months after the conclusion of the offering, the offeror must file with the SEC and send to securities purchasers a report on Form 3-G (Report of Results of Offering). n126 Form 3-G is available from the SEC on the Internet at http://www.sec.gov.

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LEXIS: fractional w/5 (oil or gas) w/5 (issue! or interest!) w/30 exempt! w/5 securit! w/30 real estate

§ 103.04(a)(7)(v) Transactions by a Non-Issuer as Exempted Transactions.

When securities transactions are conducted by a non-issuer, a statutory exemption is available, n127 but an accompanying regulation, Rule 144, n128 sets out additional criteria and standards for determining if the exemption is available. Where the basic statutory exemption extends to "transactions by any person other than an issuer, underwriter, or dealer," but such transactions are not normally part of a securities distribution, Rule 144 imposes conditions designed to insure that those who invoke the exemption are not underwriters engaged in a distribution. The text of Rule 144 is available from the SEC on the Internet at http://www.sec.gov.

Rule 144 is not exclusive and does not limit the availability of any other applicable exemption. n129 If an offeror does not meet the qualifications of Rule 144, some other regulatory or even statutory exemption may be available.

Because the exemptions under Rule 144 usually pertain to transactions conducted by a non-issuer, the exemption may be conditioned upon making adequate disclosure about the issuer. One way in which adequate disclosure occurs is if the issuer is subject to the reporting requirements imposed by the 1934 Securities Exchange Act, and has been so for at least 90 days prior to the transaction to be exempted. Normally, the Rule 144 public disclosure standards are met by the Securities Exchange Act reporting requirements. n130 For issuers, Rule 144 may be satisfied if the offeror has made available to the public certain information equivalent to that specified in Rule 15c2-11(a)(5). n131 The provisions of Rule 15c2-11 is available from the SEC on the Internet at http://www.sec.gov.

For the exemption based on Rule 144, several important restrictions are in effect. For instance, under this exemption, the securities to be sold must have been held for at least two years before sale; n132 Rule 144 imposes various limitations on the amount of securities that may be sold during any three-month period; n133 and Rule 144 also imposes limitations on the manner of sale. n134 The offeror also must file an additional form if the sales as proposed during any three-month period are in excess of either 500 shares or an aggregate sale price of $10,000. Form 144 (Notice of Proposed Sale of Securities Pursuant to Rule 144) n135 is available from the SEC on the Internet at http://www.sec.gov.

COMPUTER-ASSISTED RESEARCH

LEXIS: transaction! w/5 non-issue! w/30 exempt! w/5 securit! w/30 real estate

§ 103.04(a)(7)(vi) Private Offerings as Exempted Transactions (Regulation D).

An important statutory exemption for transactions is found in the language of the 1933 Securities Act stating that the act "shall not apply to ... transactions by an issuer not involving any public offering." n136 The SEC has taken a rather narrow view of this exemption, permitting it to apply to banks in their lending activities and to larger institutional purchasers of securities and to small groups of related persons in business ventures. But if the exemption is sought for transactions involving speculative securities offered to uninformed and unrelated persons, the SEC believes that the exemption will not serve the public policies of the securities statutes. Therefore, the private offering exemption would not apply when a company offers shares of its stock to certain "key" employees. n137

Even though this exemption is a statutory exemption, the SEC has again promulgated regulations to accompany the statute, which regulations are more detailed and specific in defining how to qualify for and apply the exemption. The principal regulation accompanying this statutory exemption for private offerings is Regulation D, which is available from the SEC on the Internet at http://www.sec.gov. n138 Under the terms of Regulation D, the exemption for private offerings applies to issuers only and is an exemption for transactions rather than for securities. n139

In Regulation D are found general rules applied to all of the types of exemptions authorized under Regulation D (which general requirements are contained in Rule 502), n140 and Regulation D also has specific rules for different types of private offering exemptions. A common question is whether separate sales are a part of the same offering. In an offering consisting of separate sales, it must be determined whether integration rules apply so that the eligibility of the entire

offering can be determined. n141 Regulation D also has rules determining whether particular purchasers are entitled to receive information about the securities before they make the purchase. No such requirement is applied to sales to certain sophisticated investors, but the requirement of prior information must be met for certain other investors. n142 In general, for an offering governed by the provisions of Regulation D, it is not permissible to advertise for or recruit purchasers from among the general public. n143

Sales that do occur under the exemption of Regulation D are usually considered restricted, which means that those securities may be resold only after certain time and registration requirements have been met. n144 As with other exempt offerings, a post-offering reporting requirement is imposed; within 15 days after the first sale, an issuer must file with the SEC a completed Form D (Notice of Sales of Securities Pursuant to Regulation D or Section 4(6)). The provisions of Form D is available from the SEC on the Internet at http://www.sec.gov.

One of the important specific exemptions under Regulation D is found in Rule 504, n145 which rule eliminates registration requirements for offerings of $1,000,000 or less. Another important exemption is in Rule 505, which exempts offerings of up to $5,000,000 if not more than 35 investors are participating in the offering. n146 Even this restriction of the number of the purchasers is removed, under the exemption described in Rule 506, if all the purchasers are either accredited investors or are otherwise experienced and knowledgeable in finance and business matters. n147

Any of these exemptions in Regulation D can apply to real estate transactions. For example, an undivided equity interest in a land syndication or a participation interest in a real estate joint venture may qualify as a private offering, but only if the issuers comply fully with the applicable information and disclosure requirements. n148 An intrastate issue exemption has also been applied to a partnership interest in a real estate syndicate which was formed to complete the purchase and lease back of a motel. n149

COMPUTER-ASSISTED RESEARCH

LEXIS: private w/5 offering! w/30 exempt w/5 securit! w/5 transaction! w/30 real estate

§ 103.04(a)(7)(vii) Large Sales of Real Estate Mortgage Notes as Exempted Transactions.

One exemption that applies exclusively to real estate transactions is the statutory exemption for large sales of real estate mortgage notes. n150 This extremely detailed exemption was added to the Securities Act in 1975 and, because of its detail, no further elaboration has been provided through additional rules or regulations. The exemption applies to promissory notes secured by first liens on real estate with structures, and to "participation interests in such notes." n151 If the notes are originated by a federally supervised or state supervised financial institution, then no sale may be for less than $250,000, the purchase price must be paid in cash not more than 60 days after the time of sale, and each purchaser must buy for its own account only, in order for the exemption to apply. n152 Notes originated by a federally approved mortgagee are subject to the same restrictions and also may be sold to a qualified lending institution or insurance company. n153 These parties may also enter into non-assignable contracts to buy or sell such notes, and, if the contract will be completed within two years, such transactions are also exempt. If the restrictions as to qualified purchasers and sellers and as to minimum value of purchases are observed, certain resales of these notes are also permitted under this exemption.

§ 103.04(a)(7)(viii) Sales to Accredited Investors as Exempted Transactions.

A new exemption for offers or sales to accredited investors was added in 1980 by the Small Business Issuers' Simplification Act. n154 This statutory exemption has no accompanying rules or regulations, although the statute does require the issuer to file "such notice with the Commission as the Commission shall prescribe." n155 Of particular interest in this statutory exemption is a legislative definition of "accredited investor," which refers to several kinds of institutional investors and to

> any person who, on the basis of such factors as financial sophistication, net worth, knowledge and experience in financial matters, or amount of assets under management qualifies as an accredited investor under rules and regulations which the Commission shall prescribe. n156

It is also required under this exemption that the offering not exceed $5,000,000 in value and that there be no advertising or public solicitation in connection with the transaction. n157

§ 103.04(b) Penalties for Violations of Registration Requirements.

§ 103.04(b)(1) False Registration Statements.

A registration statement is materially false if it omits a material fact or contains an untrue statement of a material fact, and any person whose acquisition of a security is affected by such false information has a cause of action against various parties responsible for the false registration statement. Such defendants are jointly and severally liable and include any persons who signed the statement, directors or partners of the issuer (either present or named with consent as future directors or partners), and underwriters. To some of these parties certain defenses are available that invoke the defendant's good faith and reasonable belief in the truth of the contents of the statements. n158 However, these defenses based on good faith are not available to the issuer. Actions brought for such claims must be commenced within one year after the omission or untrue statement is discovered or should have been discovered, but in no event more than three years after the public offering occurred. n159

Damages, will vary according to whether the original purchaser still holds the security or has transferred it, but the damages may not exceed the original public offering price of the security plus appropriate costs and fees. n160

§ 103.04(b)(2) Violations in Registration and Prospectus Procedures; Penalties for False Prospectus Contents and False Communications.

Apart from the consequences of making offerings with false registration statements, civil liability can result from offering or selling a security in violation of any of the Securities Act requirements for registration and for the prospectus. n161 Liability can also result from engaging in such offering or selling of a security when using any interstate means of transportation or communication. n162 In those actions, only the party who actually offers or sells a security is liable to the purchaser, and, if the purchaser knew that the items were false and misleading, or knew that the defendant did not know that, the defendant will escape liability.

If the successful plaintiff in such an action still owns the security, the measure of damages is the purchase price plus interest, less income received. n163

If the legal action is based upon such false communications and false prospectus contents, it must be commenced within one year after the omission or untrue statement was discovered or should have been discovered, but in no event more than three years after the public offering was conducted. n164 Actions based on registration and prospectus violations must be brought within one year after the violation occurs and, if discovery is delayed, in no event more than three years after the sale. n165

§ 103.04(b)(3) Summary of the Anti-Fraud Provisions.

Making offerings of securities that are subject to the requirements of federal regulations is often expensive and time consuming, and issuers and offerors often make great efforts to fit within one of the exemptions. Even then, alternative reporting requirements are often imposed by the exemptions. Whether securities being offered are fully subject to regulation or are exempt from some of the requirements, certain restrictions imposed by federal law apply in every case, inasmuch as all securities offerings under the jurisdiction of federal securities regulation must comply with the anti-fraud provisions of the securities acts. n166

In general, these anti-fraud provisions prohibit any person or entity connected with the offer or sale of securities from using any means or instruments to defraud, from obtaining money or property by misrepresenting or omitting statements of material fact, or from engaging in any activity that operates as a fraud or deceit, especially if the mails or other means of interstate commerce or communication are used. n167 The anti-fraud provisions also impose requirements on those who endorse securities for consideration, principally that the endorsers must disclose the fact and the amount of consideration they receive for their endorsements. n168

Noted below are summary descriptions of illegal activities in connection with securities that have commonly been held to violate the anti-fraud provisions:

a. churning or artificially stimulating activity in accounts to create the impression of an active market; n169

b. cross-trading for profit between customer accounts by a broker which does not disclose its true capacity; n170

c. selling stock in a fictitious corporation; n171

d. delivering forged imitations of genuine bonds; n172

e. use of advantageous inside information; n173

f. receiving kickbacks on sales induced by failure to disclose; n174

g. excessive or unfair mark-ups and mark-downs; n175

h. manipulating market price through artificial stimulation of apparent market activity; n176

i. making purported payments to purported investors to create the impression of return on investments; n177

j. selling unregistered securities as part of a public offering; n178

k. operating as issuers corporations whose purpose is to promote pyramid sales and multi-level distributorship plans, in which recruitment rather than sales is the function; n179

l. use of misleading sales literature; n180

m. depriving the issuer of part of the proceeds from sales of the offering; n181

n. inadequate supervision of salesmen or others involved in the offering; n182 and

o. withholding shares from the public offering in order to make private sales. n183

Also prohibited by the anti-fraud provisions of the securities acts are certain failures to disclose material items of information. Examples of material matters whose non-disclosure has been held fraudulent include insolvency of the broker, n184 financial information about the issuer, n185 accurate information about the market history of the stock, n186 information about a merger involving the issuer, n187 purchaser charges, n188 seller's profits or commissions, n189 authorship of published materials, n190 changes in investment advice, n191 and failure to disclose that sales were

short sales (in which the seller does not yet actually own or possess the securities at the time of sale). n192

Even a party not directly participating in fraudulent conduct can still be held liable or guilty for various forms of conduct which are deemed to be aiding and abetting the fraudulent conduct. Aiding and abetting was established when it was shown that the fraud that was committed by the primary party was known of by the alleged aider and abetter, who also gave substantial assistance to the commission of the fraud. n193 Sometimes attorneys and accountants who advise issuers are charged as aiders and abetters. n194

By way of summary, it can be said that fraud as an element in offering or selling any security is prohibited by statute whenever the mails or interstate transportation or communication are used. The statute prohibits the persons from using "any device, scheme, or artifice to defraud," from obtaining "money or property by means of any untrue statement of a material fact or any omission to state a material fact," or from engaging "in any transaction, practice, or course of business which operates or would operate as a fraud or deceit upon the purchaser." n195

As mentioned before, the anti-fraud provisions apply to all securities under federal jurisdiction, including those that are exempted, n196 and they also apply to the transactional exemptions. n197

Enforcement of the anti-fraud provisions is typically accomplished by the SEC, which usually seeks either injunctive measures or refers the matter to the Attorney General for criminal prosecution. n198 The federal anti-fraud provisions make no specific reference to a private right of action and federal courts continue to be divided over whether a private right of action should be implied in the federal law. n199

Likewise, there is no indication in the statute whether a private right of action to enforce anti-fraud provisions applies in state courts, which are given concurrent jurisdiction over enforcement actions under the 1933 Securities Act. n200

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LEXIS: anti-fraud w/5 provision! w/30 securit! w/2 act! w/50 real estate

FOOTNOTES:
(n1)Footnote 63. *15 U.S.C. § 77f*(a).

(n2)Footnote 64. *15 U.S.C. § 77e.*

(n3)Footnote 65. *15 U.S.C. § 77e*(a).

(n4)Footnote 66. *15 U.S.C. §§ 77e*(b), 77j.

(n5)Footnote 67. *15 U.S.C. § 77e*(c).

(n6)Footnote 68. *15 U.S.C. § 77f*(a).

(n7)Footnote 69. *15 U.S.C. § 77f*(c).

(n8)Footnote 70. *15 U.S.C. § 77f*(b).

(n9)Footnote 71. *15 U.S.C. § 77f*(d).

(n10)Footnote 72. *15 U.S.C. § 77h*(a).

(n11)Footnote 73. *15 U.S.C. §§ 77h*(b), (d) and (e).

(n12)Footnote 74. *15 U.S.C. § 77e.*

(n13)Footnote 75. *15 U.S.C. § 77g.*

(n14)Footnote 76. 17 C.F.R. §§ 230.400 to 230.499.

(n15)Footnote 77. 17 C.F.R. §§ 229.1 to 229.802.

(n16)Footnote 78. SEC Form S-11, A.

(n17)Footnote 79. *15 U.S.C. § 77f*(a).

(n18)Footnote 80. 17 C.F.R. § 230.402(b).

(n19)Footnote 81. *15 U.S.C. § 77f*(c).

(n20)Footnote 82. 17 C.F.R. § 230.455.

(n21)Footnote 83. 17 C.F.R. § 230.445(b).

(n22)Footnote 84. *15 U.S.C. § 77e*(a).

(n23)Footnote 85. *15 U.S.C. § 77e*(c).

(n24)Footnote 86. 17 C.F.R. § 230.459.

(n25)Footnote 87. 17 C.F.R. §§ 230.456, 230.462.

(n26)Footnote 88. *15 U.S.C. § 77h*(b).

(n27)Footnote 89. *Id.*

(n28)Footnote 90. *Id.*

(n29)Footnote 91. 17 C.F.R. § 230.474.

(n30)Footnote 92. *15 U.S.C. § 77h*(a).

(n31)Footnote 93. *15 U.S.C. § 77h*(c).

(n32)Footnote 94. 17 C.F.R. § 230.461.

(n33)Footnote 95. 17 C.F.R. § 230.473.

(n34)Footnote 96. *15 U.S.C. § 77h*(d).

(n35)Footnote 97. 17 C.F.R. § 231.3115.

(n36)Footnote 98. 17 C.F.R. § 230.463.

(n37)Footnote 99. *15 U.S.C. § 77c(a)(7)*.

(n38)Footnote 100. *15 U.S.C. § 77c(a)(9)*.

(n39)Footnote 101. *15 U.S.C. § 77c(a)(10)*.

(n40)Footnote 102. *15 U.S.C. § 77c(a)(11)*.

(n41)Footnote 103. It should be noted that the statutory exemption for intrastate offerings provides exemption only from the registration requirements of the 1933 Securities Act. Registration requirements of the 1934 Securities and Exchange Act and all anti-fraud provisions still apply even to securities offered under the intrastate exemption.

(n42)Footnote 104. Sec. Act Rel. No. 217 (1934).

(n43)Footnote 105. *15 U.S.C. § 77c*(a)(11).

(n44)Footnote 106. 17 C.F.R. § 230.147.

(n45)Footnote 107. 17 C.F.R. § 230.147, Preliminary Note 1.

(n46)Footnote 108. 17 C.F.R. § 230.147(c).

(n47)Footnote 109. 17 C.F.R. § 230.147(e).

(n48)Footnote 110. 17 C.F.R. § 230.147(f)(3).

(n49)Footnote 111. *15 U.S.C. § 77c*(b)

(n50)Footnote 112. *17 C.F.R. §§ 230.251 to 230.263*.

(n51)Footnote 113. *17 C.F.R. § 230.251(b)*.

(n52)Footnote 114. 17 C.F.R. §§ 230.252(a)(1) and (2).

(n53)Footnote 115. N.C. Gen. Stat., ch. 24.

(n54)Footnote 116. W. Va. Code, ch. 31.

(n55)Footnote 117. *Id.*

(n56)Footnote 118. Cal. Bus. & Prof. Code 20242.5, *230.255*.

(n57)Footnote 119. *17 C.F.R. § 230.257*.

(n58)Footnote 120. 17 C.F.R. §§ 230.300 to 230.346.

(n59)Footnote 121. 17 C.F.R. § 230.300(a)(1).

(n60)Footnote 122. 17 C.F.R. § 230.306.

(n61)Footnote 123. 17 C.F.R. § 230.326.

(n62)Footnote 124. 17 C.F.R. §§ 230.310(b) and (d).

(n63)Footnote 125. 17 C.F.R. § 230.316(a).

(n64)Footnote 126. 17 C.F.R. § 230.316(b).

(n65)Footnote 127. *15 U.S.C. § 77d*(1).

(n66)Footnote 128. 17 C.F.R. § 230.144.

(n67)Footnote 129. 17 C.F.R. § 230.144(j).

(n68)Footnote 130. 17 C.F.R. § 230.144(c).

(n69)Footnote 131. 17 C.F.R. § 230.144(c)(2).

(n70)Footnote 132. 17 C.F.R. § 230.144(d).

(n71)Footnote 133. 17 C.F.R. § 230.144(e).

(n72)Footnote 134. 17 C.F.R. § 230.144(f). These limitations generally require that Rule 144 transactions be conducted either through a broker or through a "market maker" as defined in the 1934 Securities Exchange Act. "Market maker" is there defined as "any specialist permitted to act as a dealer, any dealer acting in the capacity of block positioner, and any dealer who, with respect to a security, holds himself out (by entering quotations in an inter-dealer communications system or otherwise) as being willing to buy and sell such security for his own account on a regular or continuous basis." *15 U.S.C. § 78c*(a)(38).

(n73)Footnote 135. 17 C.F.R. § 230.144(h).

(n74)Footnote 136. *15 U.S.C. § 77d*(2).

(n75)Footnote 137. *17 C.F.R. § 231.4552*; *SEC v. Ralston Purina Co., 346 U.S. 119 (1953)* .

(n76)Footnote 138. 17 C.F.R. §§ 230.501 to 230.508.

(n77)Footnote 139. 17 C.F.R. § 230.501(g); Preliminary Note 4 to Regulation D.

(n78)Footnote 140. 17 C.F.R. § 230.502.

(n79)Footnote 141. 17 C.F.R. § 230.502(a).

(n80)Footnote 142. 17 C.F.R. § 230.502(b).

(n81)Footnote 143. 17 C.F.R. § 230.502(c).

(n82)Footnote 144. 17 C.F.R. § 230.502(d).

(n83)Footnote 145. 17 C.F.R. § 230.504.

(n84)Footnote 146. 17 C.F.R. § 230.505.

(n85)Footnote 147. 17 C.F.R. § 230.506.

(n86)Footnote 148. *Andrews v. Blue, 489 F.2d 367 (10th Cir. 1973)* ; SEC v. Royal Hawaiian Mgt. Corp. & Ryan, 1966-1967 CCH Dec. § 91,982 (C.D. Cal. 1967).

(n87)Footnote 149. *Pawgan v. Silverstein, 265 F. Supp. 898 (S.D.N.Y. 1967)* .

(n88)Footnote 150. *15 U.S.C. § 77d*(5).

(n89)Footnote 151. *15 U.S.C. § 77d*(5)(A).

(n90)Footnote 152. *15 U.S.C. §§ 77d*(5)(A)(i)(a), (b) and (c).

(n91)Footnote 153. *15 U.S.C. § 77d*(5)(A)(ii).

(n92)Footnote 154. *15 U.S.C. § 77d*(6).

(n93)Footnote 155. *Id.*

(n94)Footnote 156. *15 U.S.C. § 77b(a)(15).*

(n95)Footnote 157. *15 U.S.C. § 77d*(6).

(n96)Footnote 158. *15 U.S.C. §§ 77k*(b), (c), and (f). *State v. Fashion Place Assocs., 638 N.Y.S.2d 26 (1996)* .

(n97)Footnote 159. *15 U.S.C. § 77m.*

(n98)Footnote 160. *15 U.S.C. § 77k*(e).

(n99)Footnote 161. *15 U.S.C. § 77l(a)(1). First Presbyterian Church of Mankato, Minn. v. John G. Kinnaird & Co., 881 F. Supp. 441 (D. Minn. 1995)* (intentional and negligent misrepresentation).

(n100)Footnote 162. *15 U.S.C. § 77l(a)(2).*

(n101)Footnote 163. *Id.*

(n102)Footnote 164. *15 U.S.C. § 77m.*

(n103)Footnote 165. *Id.*

(n104)Footnote 166. *15 U.S.C. § 77q*(c).

(n105)Footnote 167. *15 U.S.C. § 77q*(a); *McMahan Securities Co. L.P. v. Aviator Master Fund, Ltd., 868 N.Y.S.2d 669 (2008)* (broker-dealer's alleged fraud by negligent misrepresentation). *Gray v. First Winthrop Corp., 82 F.3d 877 (9th Cir. 1996)* ; *In re JDN Realty Corp. Securities Litigation, 182 F. Supp. 2d 1230 (N.D. Ga. 2002)* (real estate counsel for corporation not held primarily liable for securities fraud).

S.E.C. v. Kirkland, 533 F.3d 1323 (11th Cir. 2008) (complaint alleging that defendant fraudulently enticed investors to buy unregistered securities).

(n106)Footnote 168. *15 U.S.C. § 77q*(b).

(n107)Footnote 169. Newkirk v. Hayden, Stone & Co., 1964-1966 CCH Dec. § 91,621 (S.D. Cal. 1965).

(n108)Footnote 170. *Norris & Hirschberg, Inc. v. SEC, 177 F.2d 228 (D.C. Cir. 1949)* .

(n109)Footnote 171. *Sherwood v. United States, 300 F.2d 603 (5th Cir. 1962)* .

(n110)Footnote 172. *Seeman v. United States, 90 F.2d 88 (5th Cir. 1937)* .

(n111)Footnote 173. In the Matter of Jack Schaefer, 1975-1976 CCH Dec. § 80,322 (Admin. Proc. File No. 3-2783, 1975).

(n112)Footnote 174. *United States v. Fields, 592 F.2d 638 (2d Cir. 1978) , cert. denied, 442 U.S. 917 (1979)* .

(n113)Footnote 175. *In re* Blumenfeld, 1979-1980 CCH Dec. § 82,396 (Admin. Proc. File No. 3-5282, 1979).

(n114)Footnote 176. *SEC v. Scott Taylor & Co., 183 F. Supp. 904 (S.D.N.Y. 1959)* .

(n115)Footnote 177. *SEC v. Universal Serv. Ass'n, 106 F.2d 232 (7th Cir. 1939)* .

(n116)Footnote 178. In the Matter of Benjamin, 1957-1961 CCH Dec. § 76,616 (1958).

(n117)Footnote 179. SEC v. Steed Indus., 1974-1975 CCH Dec. § 94,917 (N.D. Ill. 1974).

(n118)Footnote 180. In the Matter of First Maine Corp., 1957-1961 CCH Dec. § 76,642 (1959); *Las Campanas Ltd. P'ship v. Pribble, 943 P.2d 554 (N.M. App. 1997)* (Minor technical violation didn't give purchaser right to rescind the contract); *Securities and Exchange Commission v. Kings Real Estate Investment Trust, 222 F.R.D. 660 (D. Kan. 2004)* (individual investor, seeking to recover a $1 million-dollar investment was permitted to intervene in an SEC civil enforcement action against a real estate investment trust).

(n119)Footnote 181. In the *Matter of Bankers Sec. Co., 6 S.E.C. 631 (1940)* .

(n120)Footnote 182. In the Matter of Shearson, Hammill & Co., 1964-1966 CCH Dec. § 77,306 (1965).

(n121)Footnote 183. In the Matter of H. Hentz & Co., 1969-1970 CCH Dec. § 77,853 (1970).

(n122)Footnote 184. In the Matter of Leo G. MacLaughlin Sec. Co., 1964-1966 CCH Dec. § 77,317 (1966).

(n123)Footnote 185. *Danser v. United States, 281 F.2d 492 (1st Cir. 1960)* .

(n124)Footnote 186. SEC v. R.A. Holman & Co., 1964-1966 CCH Dec. § 91,554 (S.D.N.Y. 1965).

(n125)Footnote 187. *SEC v. National Student Mktg. Corp., 538 F.2d 404 (D.C. Cir. 1976) cert. denied, White and Case v. SEC, 429 U.S. 1073 (1977)* .

(n126)Footnote 188. In the Matter of Peoples Sec. Co., 1957-1961 CCH Dec. § 76,687 (1960).

(n127)Footnote 189. *SEC v. Torr, 15 F. Supp. 315 (S.D.N.Y. 1936) , rev'd on other grounds, 87 F.2d 446 (2d Cir. 1937)* .

(n128)Footnote 190. In the Matter of Axe Sec. Corp., 1964-1966 CCH Dec. § 77,148 (1964).

(n129)Footnote 191. Butcher v. Sherrerd, 1971-1972 CCH Dec. § 78,466 (1971).

(n130)Footnote 192. *United States v. Naftalin, 441 U.S. 768 (1979)* .

(n131)Footnote 193. *Fund of Funds, Ltd. v. Arthur Andersen & Co., 567 F.2d 225* (2d Cir. (1977) .

(n132)Footnote 194. Parquitex Partners v. Registered Fin. Planning Servs., 1987 CCH Dec. § 93,255 (D. Or. 1987) (attorney; dictum); Ackerman, Jablonski, Porterfield & De Ture v. Alhadeff, 1986-1987 CCH Dec. § 92,756 (W.D. Wash. 1986) (accounting firm; motion to dismiss denied).

(n133)Footnote 195. *15 U.S.C. § 77q*(a). *In re Impac Mortg. Holdings, Inc. Securities Litigation, 554 F. Supp. 2d 1083 (C.D. Cal. 2008)* (mortgage securities fraud class action based on officers' statements).

(n134)Footnote 196. *15 U.S.C. § 77q*(c).

(n135)Footnote 197. *See, e.g., United States v. Roylance, 690 F.2d 164 (10th Cir. 1982)* ; *Spatz v. Borenstein, 513 F. Supp. 571 (N.D. Ill. 1981)* .

(n136)Footnote 198. *15 U.S.C. § 77t*(b).

(n137)Footnote 199. *See, e.g., Herman & MacLean v. Huddleston, 459 U.S. 375 (1983)* (reserving decision on whether a private right of action is implied in the anti-fraud decisions); *Kirshner v. United States, 603 F.2d 234 (2d Cir. 1978) , cert. denied, 442 U.S. 909 (1979)* (implying a private right of action); *Newman v. Prior, 518 F.2d 97 (4th Cir. 1975)* (holding no private right of action is implied).

(n138)Footnote 200. *15 U.S.C. § 77v*(a).

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CHAPTER 103 FEDERAL AND STATE SECURITIES REGULATION OF REAL ESTATE TRANSACTIONS

13-103 Thompson on Real Property, Thomas Editions § 103.05

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§ 103.05 Federal Regulation of Broker-Dealers in Real Estate Transactions.

§ 103.05(a) Definitions of Securities Brokers and Dealers.

In addition to regulation of securities and securities transactions and issuers of securities, much attention in the federal securities regulation scheme has focused on brokers and dealers, who usually are the parties offering and selling the securities to the general public. Regulation of securities at point of sale is believed to be very effective in eliminating much potential misconduct from securities transactions.

In the context of federal securities regulation, a broker means "any person engaged in the business of effecting transactions in securities for the account of others, but does not include a bank." n201 The closely related concept of dealer

> means any person engaged in the business of buying and selling securities for his own account, through a broker or otherwise, but does not include a bank, or any person insofar as he buys or sells securities for his own account, either individually or in some fiduciary capacity, but not as part of a regular business. n202

§ 103.05(b) Securities Brokers and Dealers Who Are Subject to Federal Securities Registration Requirements.

When brokers and dealers are determined to be subject to federal jurisdiction, the basic requirement they must meet is to be registered according to the provisions of the 1934 Securities Exchange Act. This requirement applies to all brokers and dealers which are not natural persons; or who are natural persons not associated with a broker or dealer which is not a natural person (unless the natural person broker or dealer deals exclusively in intrastate commerce and does not use any facility of a national securities exchange); and who use the mails or any means or instrumentality of interstate commerce "to effect any transactions in, or to induce or attempt to induce the purchase or sale of, any security" (except exempt securities, commercial paper, bankers' acceptances, or commercial bills). n203

Some brokers and dealers are exempt from registration requirements because they are conducting business entirely within a state or in connection with certain banking instruments, but the SEC has also created other exemptions by rule

or order. n204 Under this rulemaking authority of the SEC, brokers and dealers enjoy exemptions for transactions in corporate shares that represent ownership in corporate apartment developments, n205 for transactions involving certain foreign brokers and dealers, n206 for transactions involving foreign underwriters participating in certain foreign distributions of American securities, n207 for transactions in variable annuities of insurance companies, n208 and for certain transactions by certain non-bank lenders under Small Business Administration approval, if the lender does not engage in transactions for its own account; n209 brokers and dealers also enjoy a limited exemption for a natural person who is a member of a national securities exchange, extending for 45 days after termination of the person's association with a registered broker or dealer. n210

§ 103.05(c) Summary of Federal Registration Requirements for Securities Brokers and Dealers.

§ 103.05(c)(1) How to Apply for Registration.

At the federal level, a broker or dealer registers by filing with the SEC an application on Form BD, which is available from the SEC on the Internet at http://www.sec.gov. n211 Form BD requires that information be provided about the organizational and financial relationships and background of the broker or dealer. The regulation governing this registration further requires that

> Every broker or dealer who files an application for registration on Form BD ... shall file with such application, in duplicate original, a statement of financial condition as of a date within 30 days of the date in which such statement is filed ... n212

In the statement of financial condition, the instructions for which is available from the SEC on the Internet at http://www.sec.gov, the applicant is required to disclose the nature and amount of assets and liabilities and net worth of the applicant, a computation of the applicant's aggregate indebtedness and net capital, which computation shall comply with the requirements pertaining to the applicant's business or national securities exchange. n213

Within 45 days after submission of the application, the SEC must act, n214 and upon SEC action the application will either be granted or will become the subject of further administrative proceedings to determine whether it should be denied. The applicant is given notice and opportunity for hearing in connection with these proceedings. Any proceedings for denial must be concluded within 120 days from when the application was submitted. n215

Occasionally a broker or dealer will apply to register another broker or dealer which is yet to be formed or organized and is to be a successor to the applicant, or in fact a successor will have already been formed or organized shortly after the application is submitted. If the SEC grants the application of the initial registrant, but in the meantime, a successor has been created, the successor may accept the original registration as its own any time within 45 days after the application was granted. n216 If that occurs, then the successor must file its own follow-up application on Form BD within 30 days after becoming the successor, and then the SEC may take up to an additional 45 days to act on the application from the successor. Under some circumstances, when an unregistered broker-dealer succeeds a registered broker-dealer and then files a Form BD, the later application will be deemed filed by the predecessor. n217 In that case, the original registration could remain in effect for a successor for up to 75 days. n218

If the successor-applicant is a fiduciary such as an executor, a trustee in bankruptcy, or a receiver, that fiduciary has 30 days after beginning the fiduciary duties in which to file a Form BD with the required fiduciary information. n219

§ 103.05(c)(2) Conduct That May Lead to Denial, Suspension or Revocation of Applications and Registrations.

A broker-dealer application for registration can be denied on the same grounds that the registration itself can be denied, n220 and those prohibitions also apply to "persons associated" with the broker or dealer. Those associated persons are statutorily defined as follows:

> the term "person associated with a broker or dealer" or "associated person of a broker or dealer" means any partner, officer, director, or branch manager of such broker or dealer (or any person occupying a similar status or performing similar functions), any person directly or indirectly controlling, controlled by, or under common control with such broker or dealer, or any employee of such broker or dealer, except that any person associated with a broker or dealer whose functions are solely clerical or ministerial shall not be included in the meaning of such term for purposes of section 78o(b) of this title (other than paragraph (6) thereof). n221

Of course, it is statutorily prohibited to engage in activities as a broker or dealer without being registered. n222 It is also prohibited wilfully to make a false or misleading statement in an application for registration. The SEC can deny an application for registration or revoke the registration itself when it discovers such false and misleading statements. Revocations have been considered or issued for misleading statements about the location of the applicant's principal office, n223 about whether the applicant engaged in prior sales in a prohibited capacity, n224 about a prior broker-dealer relationship and conducting transactions while insolvent, n225 about a listing of capital, n226 about a balance sheet, n227 and about prior violations of restrictions on aggregate indebtedness. n228

Revocations in other cases have been issued for failure to disclose. Failures to disclose resulting in revocation or denials of registration have included failures to disclose change of address, n229 a connection with another firm, n230 a control person, n231 registrant's majority stockholder as a beneficial owner, n232 a felony conviction, n233 an injunction, n234 and a prior broker-dealer relationship. n235

Revocations have also occurred for the following types of misconduct: artificially depressing and otherwise manipulating the price of a security or the market; n236 conducting boiler-room operations; n237 converting customer funds and securities; n238 failure to carry out a customer order; n239 failure to file annual reports of financial condition; n240 felony conviction of one of the registrant's controlling persons; n241 fraudulent conduct in offering and selling securities; n242 fraudulent intent to distribute securities; n243 issuing a false offering circular; n244 making false entries in books and records; n245 making an improper inducement to purchase; n246 misapplying sales proceeds; n247 misrepresentations in making sales; n248 not disclosing client costs; n249 not disclosing market control; n250 paying operating expenses with client funds; n251 previous SEC restrictions and conditions not met; n252 record-keeping violations; n253 selling registrant's own stock improperly; n254 selling unregistered securities; n255 and violating capital requirements. n256

Registration suspensions or denials have been issued for the following offenses: failure to control employees' unlawful activities; n257 failure to file an address change; n258 failure to file an annual report; n259 failure to notify the SEC of a license suspension by the state; n260 and selling unregistered securities. n261

COMPUTER-ASSISTED RESEARCH

LEXIS: securit! broker! or dealer! w/15 den! or suspen! or revo! w/5 application! or registration! w/50 real estate

§ 103.05(d) Rules for Brokers and Dealers to Ensure Financial Responsibility and Customer Protection.

In addition to the prohibitions against broker-dealer conduct involving deceit, other regulations attempt to insure the financial reliability of brokers and dealers, again as a means of protection for investors. Thus the SEC imposes certain rules regarding financial responsibility and customer protection, which rules apply to brokers and dealers who use the mail or some other instrumentality in interstate commerce in offering and selling securities. n262 These rules, which are very technical, impose requirements relating to net capital, n263 the conditions under which a broker or dealer may use a customer's free credit balance, n264 and certain other standards for customer protection, including physical control of securities and maintenance of reserves when using customer funds. n265 These rules are available from the SEC on the Internet at http://www.sec.gov.

§ 103.05(e) Standards of Conduct for Securities Brokers and Dealers.

Brokers and dealers are also subject to the prohibitions contained in the 1934 Securities Exchange Act, which require them to refrain from offering or selling securities "by means of any manipulative, deceptive, or other fraudulent device or contrivance," n266 or from engaging "in any fraudulent, deceptive, or manipulative act or practice," or from making any fictitious quotation. n267

The regulations issued in connection with these statutory prohibitions describe several practices deemed to be "manipulative, deceptive, or other fraudulent device or contrivance." These prohibited practices include any act which operates as a fraud or deceit upon any person, untrue and omitted statements of material fact, misrepresentations as to the merits of a security implied by broker-dealer registration, failure to disclose issuer control of a broker-dealer, failure to disclose a broker-dealer's interest in the distribution, excessive purchases from discretionary accounts, representations that sales are at "market" prices without substantiating grounds or information, and use of pro forma balance sheets. n268

Other fraudulent practices are identified in Commission rules, and these include hypothecation of customers' securities under certain circumstances, accepting a sale price for securities without prompt transmission of the consideration, not making certain disclosures when extending credit in connection with a securities transaction, and distributing securities without complying with prospectus requirements. n269 Other rules prohibit fictitious quotes n270 and certain sales practices for low-priced securities. n271

§ 103.05(f) Rules for Transactions in Penny Stocks.

The Penny Stock Reform Act of 1990 prohibits brokers and dealers from using the mails or other means of interstate commerce for offering or selling penny stock unless they have complied with the requirements of the Act. The requirements, to be supplemented by regulation, went into effect on April 15, 1992. n272

§ 103.05(g) The Requirement of Securities Association Membership.

Even after the procedures and burdens of registration are met, a broker or dealer must comply with substantial reporting requirements and is also required either to become a member of a registered securities association or to conduct business solely on a national securities exchange of which it is a member. n273 The National Association of Securities Dealers, Inc. (NASD) is the only securities association which has been registered by the SEC.

If a broker or dealer wishes to join the NASD, the applicant must first send to the NASD district office where the broker or dealer has its principal place of business:

(1) a copy of its current submission to the Securities and Exchange Commission pursuant to Rule 15b1-2(c) under the Securities Exchange Act of 1934;

(2) its most recent trial balance, balance sheet, supporting schedules and computation of net capital;

(3) a copy of its written supervisory procedures;

(4) a list of all officers, directors, general partners, employees and other persons who will be associated with it at the time of admission to membership;

(5) a description of business activities in which it intends to engage; and

(6) such other relevant information and documents as may be requested by the District Office. n274

After the information has been submitted, a representative of the applicant must appear in a "pre-membership interview," where the following points will be covered:

(1) the nature, adequacy, source and permanence of applicant's capital and its arrangements for additional capital should a business need arise;

(2) the applicant's proposed recordkeeping system;

(3) the applicant's proposed internal procedures, including compliance procedures;

(4) the applicant's familiarity with applicable NASD rules and federal securities laws;

(5) the applicant's capability to properly conduct the type of business intended in view of the:

A. number, experience and qualifications of the persons to be associated with it at the time of its admission to membership;

B. its planned facilities;

C. arrangements, if any, with banks, clearing corporations and others, to assist it in the conduct of its securities business;

D. supervisory personnel, methods and procedures; and

(6) other factors relevant to the scope and operation of its business. n275

After the interview, the district office has 30 days to notify the applicant whether the application has been granted, denied, or granted subject to restrictions or modifications. If the applicant is dissatisfied, a review can be conducted by the district committee, if a request is made within fifteen days after notification of the determination from the district office. At this review the applicant may appear and present evidence and the review committee's determination shall be made "within a reasonable time." n276

A further review is available if the district committee determination is not acceptable to the applicant, and this review is conducted by the Board of Governors if the applicant so requests within fifteen days after being notified of the committee's determination. The Board of Governors also is required to issue its determination within a reasonable time. n277

The determination from the Board of Governors is subject to review by the Securities and Exchange Commission upon request by the applicant. n278 Each of these review proceedings is an independent review and is not bound to any extent by any of the preceding actions.

As part of the membership application process for the broker or dealer, certain persons within the brokership or dealership are required to be registered. Among these persons are all of the broker's or dealer's principals, n279 all representatives, n280 and all assistant representatives for order processing. n281 Each of these persons must pass a qualification examination which is appropriate to the duties and category of registration for such person.

COMPUTER-ASSISTED RESEARCH

LEXIS: (national association w/1 securities dealers) or nasd w/15 membership w/5 requir! w/50 real estate

FOOTNOTES:

(n1)Footnote 201. *15 U.S.C. § 78c*(a)(4).

(n2)Footnote 202. *15 U.S.C. § 78c*(5).

(n3)Footnote 203. *15 U.S.C. § 78o*(a)(1).

(n4)Footnote 204. *15 U.S.C. § 78o*(a)(2).

(n5)Footnote 205. 17 C.F.R. § 240.15a-2.

(n6)Footnote 206. 17 C.F.R. § 240.15a-6.

(n7)Footnote 207. *12 U.S.C. § 1201j-3*(b)(3), Interpretive Release No. 7366 (July 9, 1964).

(n8)Footnote 208. *17 C.F.R. § 241*, Interpretive Release No. 8389 (Aug. 29, 1968).

(n9)Footnote 209. 17 C.F.R. § 240.15a-5.

(n10)Footnote 210. 17 C.F.R. § 240.15a-4.

(n11)Footnote 211. The registration requirement is statutorily imposed by *15 U.S.C. § 78o*(b)(1). The regulatory requirement to use Form B-D is in 17 C.F.R. § 240.15b1-1, and the authority to promulgate the form is in 17 C.F.R. § 249.501.

(n12)Footnote 212. 17 C.F.R. § 240.15b1-2.

(n13)Footnote 213. 17 C.F.R. § 240.15b1-2(a).

(n14)Footnote 214. *15 U.S.C. § 78o*(b)(1).

(n15)Footnote 215. *15 U.S.C. § 78o*(b)(1)(B).

(n16)Footnote 216. *15 U.S.C. § 78o*(b)(2)(A).

(n17)Footnote 217. 17 C.F.R. § 240.15b1-3(b).

(n18)Footnote 218. 17 C.F.R. § 240.15b1-3(a).

(n19)Footnote 219. 17 C.F.R. § 240.15b1-4.

(n20)Footnote 220. *15 U.S.C. §§ 78o*(b)(1) and (4); *First Presbyterian Church of Mankato, Minn. v. John G. Kinnaird & Co., 881 F. Supp. 441 (D. Minn. 1995)* (intentional and negligent misrepresentation).

(n21)Footnote 221. *15 U.S.C. § 78c(a)(18)*.

(n22)Footnote 222. *15 U.S.C. § 78o*(a)(1).

(n23)Footnote 223. In the *Matter of Phillips, 5 S.E.C. 634 (1939)* .

(n24)Footnote 224. *Holman & Co., Inc., 42 S.E.C. 866 (1965)* .

(n25)Footnote 225. Fliederbaum, Mooradian & Co., 1961-1964 CCH Dec. § 76,951 (1963).

(n26)Footnote 226. Associated Underwriters, Inc., 1961-1964 CCH Dec. § 76,916 (1963).

(n27)Footnote 227. *Maine Corp., 38 S.E.C. 882 (1959)* .

(n28)Footnote 228. *Lando-Host & Co., 5 S.E.C. 572 (1939)* .

(n29)Footnote 229. Security Serv., Inc., 1961-1964 CCH Dec. § 76,230 (1963).

(n30)Footnote 230. *Walston & Co., 7 S.E.C. 937 (1940)* .

(n31)Footnote 231. *Financial Counsellors, Inc. v. S.E.C., 339 F.2d 196 (2d Cir. 1964)* .

(n32)Footnote 232. *Maine Corp., 38 S.E.C. 882 (1959)* .

(n33)Footnote 233. *Kent, dba Ralph C. Kent & Co., 4 S.E.C. 204 (1938)* .

(n34)Footnote 234. *Marks, dba Monroe Marks Company, 9 S.E.C. 669 (1941)* .

(n35)Footnote 235. Fliederbaum, Mooradian & Co., 1961-1964 CCH Dec. § 76,951 (1963); Associated Underwriters, Inc., 1961-1964 CCH Dec. § 76,916 (1963).

(n36)Footnote 236. Thomas L. McGhee, 1984 *CCH Dec. 77,198 (1984)* ; *Abrahams, 18 S.E.C. 61 (1945)* ; *Scone Invs., L.P. v. American Third Mkt. Corp., 1998 U.S. Dist. LEXIS 5903 (S.D.N.Y. 1998)* (Brokers and control persons conspired together to devise and implement an unlawful scheme to manipulate the market prices of thinly traded "penny stock" securities).

(n37)Footnote 237. *B. Fennekohl & Co., 41 S.E.C. 210 (1962)* .

(n38)Footnote 238. *James E. Scott & Co., 28 S.E.C. 30 (1948)* .

(n39)Footnote 239. *Investment Serv. Co., 41 S.E.C. 148 (1962).*

(n40)Footnote 240. *Samson, Roberts & Co., 42 S.E.C. 612 (1965)* .

(n41)Footnote 241. *Lockaby, dba J. S. Lockaby & Co., 29 S.E.C. 271 (1949)* .

(n42)Footnote 242. *Holman & Co., 42 S.E.C. 866 (1965)* ; *Primavera Familienstiftung v. Askin, 173 F.R.D. 115 (S.D.N.Y. 1997)* (alleging defendant misrepresented mortgage-backed securities as "risk balanced," "market neutral"); *National Western Life Ins. Co. v. Merrill Lynch, 1997 U.S. Dist. LEXIS 9706 (S.D.N.Y. 1997)* (alleging Merrill Lynch fraudulently concealed the fact that the sponsor of cooperative housing had no assets of its own).

(n43)Footnote 243. In the *Matter of Reinhardt & Co., 4 S.E.C. 749 (1939)* .

(n44)Footnote 244. *American Sec. Assocs., 41 S.E.C. 624 (1963)* .

(n45)Footnote 245. *Armstrong, Jones & Co., 42 S.E.C. 888 (1968).*

(n46)Footnote 246. *Siesfeld, dba Leo G. Siesfeld & Co., 11 S.E.C. 746 (1942)* ; *Potter v. American Medicare Corp., 484 S.E.2d 43 (Ga. App. 1997)* (falsely inducing plaintiff to purchase its stock).

(n47)Footnote 247. *Kahn & Co., 42 S.E.C. 671 (1965)* .

(n48)Footnote 248. *Billings Assocs., Inc., 43 S.E.C. 641 (1967)* . *In re Newbridge Networks Sec. Litig., 962 F. Supp. 166 (D.D.C. 1997)* (Statements about product sale are misleading in light of declining sales); *Meadows v. SEC, 119 F.3d 1219 (5th Cir. 1997)* (Registered broker-dealer misrepresented the operation of venture and its financial situation to investors and kept silence in return for payment), *reh'g denied, 1997 U.S. App. LEXIS 31093 (5th Cir. 1997)*

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(n49)Footnote 249. *Hughes v. S.E.C., 174 F.2d 969 (D.C. Cir. 1949)* .

(n50)Footnote 250. *Sterling Sec. Co., 39 S.E.C. 487 (1959)* .

(n51)Footnote 251. Jay Morton & Co., 1961-1964 CCH Dec. § 76,909 (1963).

(n52)Footnote 252. *Leeby, dba Lawrence R. Leeby & Co., 32 S.E.C. 307 (1951)* .

(n53)Footnote 253. *Security Planners Assocs., Inc., 44 S.E.C. 738 (1971)* .

(n54)Footnote 254. *Investment Registry of Am., Inc., 21 S.E.C. 745 (1946)* .

(n55)Footnote 255. *Shaw, 26 S.E.C. 538 (1947)* ; *SEC v. Parkersburg Wireless L.L.C., et al., 991 F. Supp. 6 (D.D.C. 1997)* (Defendant sold unregistered securities to unemployed and retired and old investors through high-pressure phone solicitations).

(n56)Footnote 256. *Whitney & Co., Inc., 40 S.E.C. 1100 (1962)* .

(n57)Footnote 257. *Reynolds & Co., 39 S.E.C. 902 (1960)* .

(n58)Footnote 258. In the *Matter of Farnick, dba Kellogg Brokerage Co., 5 S.E.C. 570 (1939)* .

(n59)Footnote 259. *Winterhalter, dba Harold E. Winterhalter Co., 42 S.E.C. 774 (1965)* .

(n60)Footnote 260. In the *Matter of Duncan Collins & Co., 4 S.E.C. 27 (1938)* .

(n61)Footnote 261. *Lloyd, Miller & Co., 41 S.E.C. 200 (1962)* .

(n62)Footnote 262. *15 U.S.C. § 78o*(c)(3).

(n63)Footnote 263. 17 C.F.R. § 240.15c3-1.

(n64)Footnote 264. 17 C.F.R. § 240.15c3-2.

(n65)Footnote 265. 17 C.F.R. § 240.15c3-3.

(n66)Footnote 266. *15 U.S.C. § 78o*(c)(2).

(n67)Footnote 267. *Id.* *First Presbyterian Church of Mankato, Minn. v. John G. Kinnaird & Co., 881 F. Supp. 441 (D. Minn. 1995)* (intentional and negligent misrepresentation).

(n68)Footnote 268. 17 C.F.R. §§ 240.15c1-2-240.15c1-9.

(n69)Footnote 269. 17 C.F.R. §§ 240.15c2-1-240.15c2-5, 240.15c2-8.

(n70)Footnote 270. 17 C.F.R. §§ 240.15c2-6, 240.15c2-7.

(n71)Footnote 271. 17 C.F.R. § 240.15c2-6.

(n72)Footnote 272. *15 U.S.C. § 78o*(g). *See* Pub. L. 101-429, *104 Stat. 931 (1990).*

(n73)Footnote 273. *15 U.S.C. § 78o*(b)(8).

(n74)Footnote 274. NASD Manual, By-laws Schedule C, Part I, § (1)(a).

(n75)Footnote 275. NASD Manual, By-laws Schedule C, Part I, § (1)(c).

(n76)Footnote 276. NASD Manual, By-laws Schedule C, Part I, § (2)(a) through (c).

(n77)Footnote 277. NASD Manual, By-laws Schedule C, Part I, § (2)(d) through (g).

(n78)Footnote 278. NASD Manual, By-laws Schedule C, Part I, § (2)(f).

(n79)Footnote 279. NASD Manual, By-laws Schedule C, Part II.

(n80)Footnote 280. NASD Manual, By-laws Schedule C, Part III.

(n81)Footnote 281. NASD Manual, By-laws Schedule C, Part IV.

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CHAPTER 103 FEDERAL AND STATE SECURITIES REGULATION OF REAL ESTATE TRANSACTIONS

13-103 Thompson on Real Property, Thomas Editions § 103.06

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§ 103.06 The Complementary Relationship of Federal and State Securities Regulation of Real Estate Transactions.

At the federal level, the major attempt to correct abuses in the quality of securities offered and sold throughout the country was embodied in the 1933 Securities Act, which imposed various disclosure and registration requirements in securities issues. The Securities Exchange Act of 1934, on the other hand, attempted to correct abuses in the securities distribution process by imposing registration and qualification requirements on parties who were involved in offering or selling securities.

The respective requirements of the 1933 and 1934 federal securities acts impact independently. Thus instruments may need to be registered as securities under the 1933 Act, and the broker-dealers who distribute those interests may also need to be registered under the 1934 Act. Or a securities issue that is exempt from registration under the 1933 Act may nevertheless need to be distributed by broker-dealers who are required to be registered under the 1934 Act. Together the basic federal securities laws are intended to enhance the integrity of the offering and the integrity of the distribution process.

Most states also adhere to this view, requiring--in addition to registration of securities issues--the registration of broker-dealers, as well as of persons who function as salespersons or agents for broker-dealers. n282 All states impose some regulation of securities activities through their so-called "blue sky" laws, and federal legislators have refrained from pre-empting the securities regulation field for federal regulation alone. Certainly the intrastate exemption for securities offered and sold solely within a single jurisdiction is at least partially justified on the assumption that such offerings are subject to statute regulation. Another example of federal accommodation of state regulation is the federal recognition of concurrent state court jurisdiction over Securities Act enforcement actions. n283 State law influence may also be seen in those cases "borrowing" state blue sky law limitation of actions periods to apply in federal securities law enforcement cases. n284

The combined effect of federal and state regulation of the securities distribution processes is to enhance the reliability and fairness of securities distribution in the following ways:

1. Persons who play a role in the distribution process should be registered and found to be qualified.

2. Standards of suitability are established for prospective investors.

3. Restrictions are imposed on how long an offer can be outstanding, how investment commitments may be made, and how payments may be made.

4. Limits are established for imposing and administering the offering expenses and marketing fees.

5. Impermissible marketing techniques are identified.

6. Certain reports, to both investors and regulatory officials, are required.

FOOTNOTES:

(n1)Footnote 282. Section 201(a) of the *Uniform Securities Act* requires that broker-dealers and sales representatives be licensed or exempted from licensing, and Section 201(b) prohibits a broker-dealer from employing a salesperson who is not licensed or not exempt. *State v. 7040 Colonial Road Associates Co., 671 N.Y.S.2d 938 (1998)* (state attorney general action against a cooperative corporation which had offered real estate securities for sale); *State v. Metz, 671 N.Y.S.2d 79 (1998)* (action to enjoin sponsors from selling real estate securities in connection with sponsorship of cooperative apartment complexes).

(n2)Footnote 283. *15 U.S.C. § 77v*(a).

(n3)Footnote 284. *See, e.g., Herm v. Stafford, 663 F.2d 669 (6th Cir. 1981)* ; *Parrent v. Midwest Rug Mills, 455 F.2d 123 (7th Cir. 1972)* ; Hudson v. Capital Mgt. Int'l, Inc., 1982-1983 CCH Dec. § 99,222 (N.D. Cal. 1982); SEC v. T & D Management Co., 1981-1982 CCH Dec. § 98,266 (D. Utah 1981); *Reid v. Madison, 438 F. Supp. 332 (E.D. Va. 1977)* ; *Corey v. Bache & Co., Inc., 355 F. Supp. 1123 (S.D. W. Va. 1973)* ; *Eureka Homestead Soc. v. Zirinsky, 1997 U.S. Dist. LEXIS 6343* (E.D. La. May 7, 1997) (Eureka's Blue Sky Law claims are not viable; it cannot show that it did not know or should not have known of the "untruth[s] or omission[s]"); *Cooperativa De Ahorro Y Credito Aguada v. Kidder, Peabody & Co., 129 F.3d 222* , Fed. Sec. L. Rep. (1st Cir. 1997) (Federal courts applied the local statute of limitations to claims under section 10(b), but thereafter the Supreme Court adopted a one-and three-year limitations period for such claims. Congress then passed a new statute providing that local statutes of limitations should continue to govern suits filed prior to the Supreme Court decision, and allowing reinstatement of claims that had already been dismissed under the new Supreme Court rule).

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CHAPTER 103 FEDERAL AND STATE SECURITIES REGULATION OF REAL ESTATE TRANSACTIONS

13-103 Thompson on Real Property, Thomas Editions § 103.07

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§ 103.07 State Regulation of Securities Broker-Dealers in Real Estate Transactions.

The activities of states in regulating securities and those who distribute them fall with particular force in real estate transactions. Added to the substantial federal registration requirements for broker-dealers are separate sets of broker-dealer registration requirements in each of the states. Broker-dealers who engage in securities transactions are subject to these diverse regulations, and one type of real estate transaction--the real estate "syndicate" or "syndication"--has been peculiarly susceptible to the jurisdiction of state and federal securities regulation. In the remainder of this section, the concept of syndicates will be explained and their characteristics as securities clarified. In the following section will be found summaries of state licensing and registration requirements for securities broker-dealers, including those whose securities activities extend to real estate transactions, such as syndications.

§ 103.07(a) "Syndicate" and "Syndication" Defined.

The terms "syndicate" and "syndication" have achieved such broad and common usage that modern writers on the subject seem to not bother to define them. Yet the very breadth of the terms makes it difficult for the novice to comprehend the precise concepts embodied in the words. In its most basic and simplistic sense, a syndicate is a group, and a syndication is the activity undertaken by the group, an activity which for purposes of this chapter is a real estate investment. The terms "syndicate" and "syndication" are, however, used interchangeably, so that the definition is stated by one author as follows:

> A syndication is, most simply, a group form of investment. This group has been assembled to make and operate a specific business enterprise. The most common form of group real estate investment is the limited partnership. Ownership interests in limited partnerships are considered to be securities. Securities must be registered pursuant to Section 5(a) of the Securities Act of 1933 unless an exemption from registration is available. n285

While a syndicate may be formed for many purposes other than real estate investments, in fact, almost all syndications are real estate syndications. The real estate syndication has been specifically defined as "a direct participation investment in an entity organized to engage in the acquisition, development and/or management and sale of real estate." n286 Embodied in this definitional statement are several unique characteristics of real estate syndicates and syndications:

1. They are "direct participation" investments, and the syndicate (although not the individual investors) frequently participates actively in the development and management of the property. The direct control over the investment is an attractive feature of a syndication.

2. Investment benefits--cash flow, equity accrual, and tax advantages, if any--accrue directly to the syndicate participants, rather than being subject to the rather more fickle fluctuations of the securities markets.

3. The group aspect of the syndicate both opens a wider range of investments to the combined invested assets and permits the risk to be spread among a larger number of investors.

4. Even though the syndicate is active in managing the investment, the individual investors are passive limited partners, needing no special expertise or other resources in order to realize a return on their investment. This division of responsibility is a key to understanding the appeal of the real estate syndicate:

> Real estate syndication represents the combination of the capital of the passive investors and the entrepreneurial contributions and managerial skills of the promoter. The latter, usually in the role of the general partner in a limited partnership, performs the entrepreneurial function of bringing together the many elements necessary to make a real estate deal. He orchestrates the regulatory issues, the tax factors, the financial questions, the economic forces, the managerial problems, the legal considerations, the money sources. The syndicator packages the investment and his is a multi-faceted task whose responsibilities are continuing and changing over time. He makes available to investors a collection of professional talent that few could afford on an individual basis. n287

The appeal of the limited partnership form for real estate syndicates thus lies in its limited liability for the limited partner investors, direct "flow-through" tax benefits, and centralized professional management.

A distinction may be drawn between private and public syndications. The private syndicate is a limited partnership with a relatively small group of affluent investors whose investments are obtained under private offering rules, rather than the more complex public offering rules. The public syndicate raises money from a larger number of small investors through fully regulated public offerings.

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LEXIS: syndicat! w/5 real estate w/30 securit!

§ 103.07(b) Real Estate Investment Syndications as Securities.

Investments in real estate syndications are almost always considered securities under both federal and state securities laws. This does not mean that all syndications investments are regulated in the same way by securities laws, but it does mean that they are within regulatory jurisdiction. Under the 1933 Federal Securities Act,

> The term security means any note, ... evidence of indebtedness, certificate of interest or participation in any profit-sharing agreement, ... preorganization certificate or subscription, transferable share, investment contract, ... or, in general, any interest or instrument commonly known as a "security", or any certificate of interest in or participation in, temporary or interim certificate for, receipt for, guarantee of, or warrant or right to subscribe to or purchase, any of the foregoing. n288

The definition of a security in the various states is essentially the same, because most states have adopted a version of the Uniform Securities Act, which defines a security with the same language as the federal act. n289

Thus, the typical real estate syndication in which "the non-promoting co-venturers [i.e., investors who are limited partners] are simply furnishing money, with the hope of profiting from the skill with which the syndicator puts their money to use," n290 is clearly a security under federal n291 and state law.

The determination that investors' interests in real estate syndications are securities is of enormous legal importance. It means that the full range of regulatory apparatus is invoked for many ventures, and those ventures that do not come under the various disclosure and registration requirements enjoy that circumstance only because they have qualified for one or more exemptions created under securities law. n292 Moreover, an intriguing interplay between federal and state securities laws has emerged, so that in certain situations federal regulation is relaxed if state regulation is vigorous.

COMPUTER-ASSISTED RESEARCH

LEXIS: real estate w/2 invest! w/5 syndicat! w/30 securit!

FOOTNOTES:
(n1)Footnote 285. Jay B. Berstein, The Professional Syndicator: A Guide for Creating Limited Partnerships 1 (1981).

(n2)Footnote 286. Lewis G. Mosburg, Jr., Real Estate Syndicate Offerings Law & Practice 3 (1974).

(n3)Footnote 287. Stephen E. Roulac, Real Estate Syndication Digest, 1972; *Principles and Applications* 1 (1972).

(n4)Footnote 288. *15 U.S.C. § 77b(a)(1).*

(n5)Footnote 289. *Uniform Securities Act* § 401(l). The following American jurisdictions have adopted some version of the Uniform Securities Act, including its definition of a security: Alabama, Alaska, Arkansas, Colorado, Connecticut, Delaware, District of Columbia, Georgia, Hawaii, Idaho, Indiana, Iowa, Kansas, Kentucky, Maine, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, Montana, Nebraska, Nevada, New Hampshire, New Jersey, New Mexico, North Carolina, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Carolina, South Dakota, Tennessee, Utah, Virginia, Washington, West Virginia, Wisconsin, and Wyoming.

(n6)Footnote 290. Lewis G. Mosburg, Jr., Real Estate Syndicate Offerings Law & Practice 13 (1974).

(n7)Footnote 291. *S.E.C. v. W.J. Howey Co., 328 U.S. 293 (1946)* ; *S.E.C. v. C.M. Joiner Leasing Corp., 320 U.S. 344 (1943)* .

(n8)Footnote 292. *Adler v. William Blair & Co., 648 N.E.2d 226 (Ill. App. 1995)* , *app. denied, 657 N.E.2d 615 (Ill. 1995)* (fraud, misrepresentation and breach of fiduciary duty alleged by investors who purchased limited partnership interests in a real estate syndication).

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CHAPTER 103 FEDERAL AND STATE SECURITIES REGULATION OF REAL ESTATE TRANSACTIONS

13-103 Thompson on Real Property, Thomas Editions § 103.08

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§ 103.08 Summary of State Registration and Licensing Requirements for Securities Brokers and Dealers.

In this section is provided a summary of each state's licensing and registration requirements applicable to brokers, dealers and associated persons under that state's "blue sky" securities regulation laws. Of course, these requirements apply to any broker-dealers who are participating in real estate transactions, including syndications, that are deemed to be securities under state law and regulation. This information is shown in a somewhat uniform format for each state.

§ 103.08(a) Alabama.

Dealers and salespersons must register.

Principals must register upon dealer registration.

The term of registrations is one year ending December 31.

An examination is required.

Fees: $200 for a dealer; $50 for an agent.

Statutory reference: Ala. Code § 8-6-3.

§ 103.08(b) Alaska.

Broker-dealers and agents must register.

An examination is required unless the applicant is exempt.

As established by regulation.

Statutory reference: Alaska Stat. §§ 45.55.030 to .060.

§ 103.08(c) Arizona.

Dealers and salespersons must register.

The term of registration is one year.

An examination may be required of prospective dealers and salespersons.

Fees: $300 for dealer; $40 for salespersons.

Statutory reference: Ariz. Rev. Stat. Ann. §§ 44-1941 to-1981.

§ 103.08(d) Arkansas.

Broker-dealers and agents must register.

The term of registration is one year.

An examination is required unless the applicant is exempt.

$ 300 for broker-dealers; $75 for agent.

Statutory reference: Ark. Stat. Ann. §§ 23-42-301 to-308.

§ 103.08(e) California.

Broker-dealers and agents must be licensed.

The term of the license is one year.

An examination is required.

Fees: $300 for broker-dealers, plus the broker-dealer's share of costs and expenses, based on the number of the broker-dealers' agents and offices.

Statutory reference: Cal. Corp. Code §§ 25200-25402; Cal. Bus. & Prof. Code §§ 10131.3, 10153.9.

§ 103.08(f) Colorado.

Broker-dealers and sales representatives must be licensed.

The term of the license is one year.

An examination is required if applicant is not federally registered.

Fees: For a broker-dealer, $145 for the application and $130 for the annual fee; for a sales representative, $15 for the application and $25 for the annual fee.

Statutory reference: *Colo. Rev. Stat. §§ 11-51-401* to -708.

§ 103.08(g) Connecticut.

Broker-dealers and agents must be registered.

The term of registration is one year.

An examination is required.

Fees: Broker-dealer registration is $250, and renewal is $150; agent registration is $50, and renewal is $50.

Statutory reference: Conn. Gen. Stat. Ann. 36-474 to 36-482 transferred to *Conn. Gen. Stat. Ann. 36b-2 to 36b-14*; 36-483 repealed; 36-484 transferred to *Conn. Gen. Stat. Ann. 36b-15 to 36b-33*.

§ 103.08(h) Delaware.

Broker-dealers and agents must be registered.

The term of registration is one year.

An examination is required.

Fees: $250 for broker-dealer; $50 for an agent.

Statutory reference: Del. Code Ann. tit. 6, §§ 7313-7329.

§ 103.08(i) District of Columbia.

Broker-dealers and agents must be licensed.

The term of the license is one year.

An examination is required for agents and sole-proprietor broker-dealers.

Fees: $250 for initial or renewal license for a broker-dealer; $25 for initial or renewal license for an agent. Examination fee is $25.

Statutory reference: *D.C. Code Ann. §§ 2-2603 to 2-2614*.

§ 103.08(j) Florida.

Dealers and associated persons must register; registration with the S.E.C. is also required, except for dealer-issuers.

The term of registration is one year.

An examination may be required of applicant and one or more principals or general partners.

Fee: $200 for a dealer, plus $100 for each branch office in the state; $40 for associated persons.

Statutory reference: Va. Code Ann. § 6.1-330.33.

§ 103.08(k) Georgia.

Dealers, limited dealers, salespersons, limited salespersons must register.

The term of registration is one year.

An examination is required.

Fees: $250 for initial registration of dealers and limited dealers, $100 for annual renewal; $50 for initial registration of salespersons and limited salespersons, $40 for annual renewal.

Statutory reference: Ga. Code Ann. §§ 10-5-3, 10-5-4.

§ 103.08(l) Hawaii.

Dealers and salespersons must register.

The term of registration is one year.

An examination may be required.

Fees: $200 for dealers; $50 for salespersons.

Statutory reference: *Hawaii Rev. Stat. §§ 485A-410*.

§ 103.08(m) Idaho.

Broker-dealers and salespersons must register.

The term of registration is one year.

An examination is required.

Fees: $100 for a broker-dealer; $20 for a salesperson.

Statutory reference: Fee is in *Idaho Code § 30-1437*.

§ 103.08(n) Illinois.

Dealers and salespersons must register.

The term of registration is one year.

An examination is required unless waived.

Fees: $300 for dealers; $40 for salespersons.

Statutory reference: Ill. Rev. Stat. ch. 1211/2, §§ 137.1 to .2-12b.

§ 103.08(o) Indiana.

Broker-dealers and agents must register.

The term of registration is one year.

An examination is required unless exempt.

Fees: $250 for broker-dealer initial registration, $125 for renewal; $100 for investment advisor initial registration; $50 for renewal. $25 for agent initial registration, $25 for renewal.

Statutory reference: Ind. Code Ann. §§ 23-2-1-8 to-14.

§ 103.08(p) Iowa.

Broker-dealers and agents must register.

The term of registration is one year.

An examination is required for agents.

Fees: $200 for broker-dealers, registration and renewals; $30 for agents, registration and renewals.

Statutory reference: Iowa Code Ann. §§ 502.301 to .304.

§ 103.08(q) Kansas.

Broker-dealers and agents must register.

The term of registration is one year.

An examination may be required.

Fees: $300 for broker-dealers, initial and renewal; $50 for agents, initial and renewal.

Statutory reference: Kan. Stat. Ann. § 17-1254.

§ 103.08(r) Kentucky.

Broker-dealers and agents must register.

The term of registration is one year.

An examination may be required.

Fees: $120 for broker-dealers, initial and renewal; $100 for investment advisors, initial and renewal. $50 for agents, initial and renewal.

Statutory reference: Ky. Rev. Stat. § 292.330.

§ 103.08(s) Louisiana.

Dealers and salespersons must register.

The term of registration is one year.

An examination is required.

Fees: $250 for dealers; $60 for salespersons.

Statutory reference: La. Rev. Stat. Ann. §§ 51.703 to .704.

§ 103.08(t) Maine.

Broker-dealers and sales representatives must be licensed.

The term of the license is one year.

An examination may be required.

Fees: $200 initial fee for broker-dealers plus $50 for each branch office in this State, $200 renewal fee for broker-dealer plus $30 for each branch; $200 initial fee for investment advisor, $100 renewal; $40 sales representatives, initial and renewal.

Statutory reference: Me. Rev. Stat. Ann. tit. 32, §§ 10301 to 10314.

§ 103.08(u) Maryland.

Broker-dealers and agents must register.

The term of registration is one year.

An examination is required.

Fees: $250 for broker-dealers, initial and renewal; $35 for agents, initial and renewal.

Statutory reference: Md. Ann. Code §§ 11-401 to -417.

§ 103.08(v) Massachusetts.

Broker-dealers and agents must register.

The term of registration is one year.

An examination is required.

Fees: $300 for broker-dealers, original and renewal; $40 for agents, original and renewal.

Statutory reference: Mass. Gen. Laws Ann. ch. 110A, §§ 201 to 204.

§ 103.08(w) Michigan.

Broker-dealers and agents must register.

The term of registration is one year.

An examination is required.

Fees: $250 annual fee for broker-dealers; $30 annual fee for agents. An examination fee may be required.

Statutory reference: Mich. Comp. Laws. Ann. §§ 451.601 to .604.

§ 103.08(x) Minnesota.

Broker-dealers and agents must be licensed.

The term of the license is one year.

An examination may be required.

Fees: $200 for broker-dealers, initial and renewal; $50 for agents, initial and renewal.

Statutory reference: (fees in 80A.28).

§ 103.08(y) Mississippi.

Broker-dealers and agents must register.

The term of registration is one year.

An examination is not required.

Fees: $200 for broker-dealers, initial and renewal; $50 for agents, initial and renewal.

Statutory reference: Miss. Code Ann. §§ 75-71-301 to -333.

§ 103.08(z) Missouri.

Broker-dealers and agents must register.

The term of registration is one year.

An examination is required unless exempted.

Fees: $200 initial and $100 renewal for broker-dealers; $50 initial and renewal, agents.

Fees: As required by the Secretary of State.

§ 103.08(aa) Montana.

Broker-dealers and salespersons must register.

The term of registration is one year.

An examination is required.

Fees: $200 for broker-dealers, initial and renewal; $50 for salespersons, initial and renewal.

Statutory reference: *Mont. Code Ann. 30-10-201* to -210.

§ 103.08(bb) Nebraska.

Broker-dealers, issuer-dealers, and agents must register.

The term of registration is one year.

An examination is required for issuer-dealers and agents.

Fees: $250 for broker-dealers, $100 for issuer-dealers, $40 for agents.

Statutory reference: Neb. Rev. Stat. §§ 8-1103, 8-1108.01.

§ 103.08(cc) Nevada.

Broker-dealers and sales representatives must be licensed.

The term of the license is one year.

An examination is required.

Fees: $55 for sales representatives, initial and annual.

Statutory reference: Nev. Rev. Stat. §§ 90.310 to .440.

§ 103.08(dd) New Hampshire.

Broker-dealers, issuer-dealers and agents must be licensed.

The term of the license is one year.

An examination may be required.

Fees: $200 for license, $50 for application, $100 for amendment broker-dealers; $50 for issuer-dealers; $25 for application in case of issuer-dealers' agents; $25 for amended license in case of agents.

Statutory reference: (fees are in N.H. Rev. Stat. Ann. § 421-B:31).

§ 103.08(ee) New Jersey.

Broker-dealers, agents, and issuers must register.

The term of registration is two years.

An examination is required.

Fees: as set by rule of the bureau chief.

Statutory reference: N.J. Stat. Ann. §§ 49:3-56 to -65.

§ 103.08(ff) New Mexico.

Broker-dealers and sales representatives must be licensed.

The term of the license is one year.

An examination is required.

Fees: $300 for broker-dealers; $35 for sales representatives.

Statutory reference: N.M. Stat. Ann. §§ 58-13B-3 to -19.

§ 103.08(gg) New York.

Dealers, brokers and salespersons must register (issuers must register as broker-dealers).

The term of registration is four years.

An examination is required.

Fees: $800 for brokers and dealers; $800 for issuers for offerings over $500,000 and $200 for issuers for offerings under $500,000; $100 for salespersons. The fee for real estate broker-dealers is $200, plus $10 for each partner, officer, director or principal.

Statutory reference: N.Y. Gen. Bus. L. §§ 359-e to 359-f.

§ 103.08(hh) North Carolina.

Dealers and salespersons must register.

The term of registration is one year.

An examination is required for salespersons.

Fees: $200 for dealers, initial and renewal; $55 for sales persons, initial and renewal.

Statutory reference: N.C. Gen. Stat. §§ 78A-36 to -40.

§ 103.08(ii) North Dakota.

Dealers and salespersons must register.

The term of registration is one year.

An examination is required.

Fees: $200 for dealers, registration and renewal; $50 for sales representatives.

Statutory reference: N.D. Cent. Code §§ 10-04-10 to -19.

§ 103.08(jj) Ohio.

Dealers and salespersons must be licensed.

The term of the license is one year.

An examination is required unless waived.

Fees: The initial and renewal fee for dealers is computed at $30 for each salesperson employed, with a minimum of $150 and a maximum of $5,000; $50 for salespersons, initial and renewal; $75 examination fee for each dealer applicant; $50 examination fee for each salesperson applicant.

Statutory reference: Ohio Rev. Code Ann. §§ 1707.14 to .19.

§ 103.08(kk) Oklahoma.

Broker-dealers and agents must register.

The term of registration is one year.

A written and/or oral examination may be required.

Fees: $300 for broker-dealers, initial and renewal; $50 for broker-dealer agent, issuer agent, or broker-dealer principal, initial and renewal.

Statutory reference: (fees are in Okla. Stat. tit. § 412).

§ 103.08(ll) Oregon.

Broker-dealers, salespersons, and mortgage brokers must register.

The term of registration is one year.

An examination may be required.

Fees: $100 initial fee and $50 renewal fee for broker-dealers and mortgage brokers; $15 initial fee and a renewal fee of $15 plus a $5.

Statutory reference: Or. Rev. Stat. §§ 59.165 to .225.

§ 103.08(mm) Pennsylvania.

Broker-dealers and agents must register.

The term of registration is one year.

An examination is required.

Fees: Not specified in the statute.

Statutory reference: Pa. Stat. Ann. tit. 70, §§ 1-301 to -306.

§ 103.08(nn) Rhode Island.

Brokers, salespersons, and limited salespersons must be licensed.

The term of the license is effective until expiration, revocation, or withdrawal.

An examination is required.

Fees: $250 for broker-dealers, plus $50 for each branch office; $50 for sales representatives.

Statutory reference: R.I. Gen. Laws §§ 7-11-101 to -215.

§ 103.08(oo) South Carolina.

Broker-dealers and agents must register.

The term of registration is one year.

An examination is required.

Fees: $300 for broker-dealers; $100 for agents.

Statutory reference: S.C. Code Ann. §§ 35-1-410 to -620.

§ 103.08(pp) South Dakota.

Broker-dealers and agents must register.

The term of registration is one year.

An examination may be required.

Fees: $150 for broker-dealers, initial and renewal; $125 for agents, initial and renewal.

Statutory reference: S.D. Codified Laws Ann. §§ 47-31A-201 to -204.

§ 103.08(qq) Tennessee.

Broker-dealers, issuer-dealers, and agents must register.

The term of registration is one year.

An examination may be required.

Fees: $200 for broker-dealers, initial and renewal; $50 for agents, initial and renewal.

Statutory reference: Tenn. Code Ann. §§ 48-2-109 to -124.

§ 103.08(rr) Texas.

Dealers, agents, and salespersons must register.

The term of registration is one year.

An examination is required.

Fees: $75 for dealers' original application, $40 for renewal; $35 for salesperson's original application, $20 for renewal.

Statutory reference: (fees are in Tex. Rev. Civ. Stat. Ann. ch. 269, art. 581-35).

§ 103.08(ss) Utah.

Broker-dealers and agents must register.

The term of registration is one year.

An examination is required.

Fees: Not specified in the statute.

Statutory reference: Utah Code Ann. §§ 61-1-1 to -6.

§ 103.08(tt) Vermont.

Broker-dealers and sales representatives must register.

The term of registration is one year.

An examination is not required.

Fees: $250 for dealers; $45 for sales representatives.

Statutory reference: *Vt. Stat. Tit. 9 §§ 4213 to 4219*.

§ 103.08(uu) Virginia.

Broker-dealers and agents must register.

The term of registration is one year.

An examination may be required.

Fees: $200 for broker-dealers, initial and renewal; $30 for agents, initial and renewal.

Statutory reference: Va. Code §§ 13.1-504 to -506.

§ 103.08(vv) Washington.

Broker-dealers and salespersons must register.

The term of registration is one year.

An examination is required unless exempt.

Fees: $150 for broker-dealers' original registration, $75 for renewals; $40 for salespersons' original registration, $20 for renewals.

Statutory reference: (fees are in Wash. Rev. Code § 21.20.340).

§ 103.08(ww) West Virginia.

Broker-dealers and agents must register.

The term of registration is one year.

An examination is required for agents.

Fees: $250 for broker-dealers; $55 for agents.

Statutory reference: W. Va. Code §§ 32-2-201 to -204.

§ 103.08(xx) Wisconsin.

Broker-dealers and agents must be licensed.

The term of the license is one year.

An examination is required.

Fees: $200 for broker-dealers, initial and renewal; $30 for agents, initial and renewal. Broker-dealers pay an additional $30 for each office in Wisconsin.

Statutory reference: (fees are in Wis. Stat. § 551.52).

§ 103.08(yy) Wyoming.

Broker-dealers and agents must register.

The term of registration is one year.

An examination is required for agents, unless exempted.

Fees: $200 for broker-dealers; $35 for agents.

Statutory reference: Wyo. Stat. §§ 17-4-103 to-106.

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CHAPTER 103 FEDERAL AND STATE SECURITIES REGULATION OF REAL ESTATE TRANSACTIONS
§ 103.09 Appendices.
Appendix 1 Schedule A of 15 U.S.C. § 77aa.

13-103 Thompson on Real Property, Thomas Editions Appendix 1.syn

AUTHOR: Professor David A. Thomas J. Reuben Clark Law School Brigham Young University

§ 1.syn Synopsis to Appendix 1: Schedule A of 15 U.S.C. § 77aa.

77aa. Schedule of information required in registration statement

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CHAPTER 103 FEDERAL AND STATE SECURITIES REGULATION OF REAL ESTATE TRANSACTIONS
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Appendix 1 Schedule A of 15 U.S.C. § 77aa.

13-1 Thompson on Real Property, Thomas Editions 77aa

AUTHOR: Professor David A. Thomas J. Reuben Clark Law School Brigham Young University

§ 77aa Schedule of information required in registration statement

SCHEDULE A

(1) The name under which the issuer is doing or intends to do business;

(2) the name of the state or other sovereign power under which the issuer is organized;

(3) the location of the issuer's principal business office, and, if the issuer is a foreign or territorial person, the name and address of its agent in the United States authorized to receive notice;

(4) the names and addresses of the directors or persons performing similar functions, and the chief executive, financial and accounting officers, chosen or to be chosen if the issuer be a corporation, association, trust, or other entity; of all partners, if the issuer be a partnership; and of the issuer, if the issuer be an individual; and of the promoters in the case of a business to be formed, or formed within two years prior to the filing of the registration statement;

(5) the names and addresses of the underwriters;

(6) the names and addresses of all persons, if any, owning of record or beneficially, if known, more than 10 per centum of any class of stock of the issuer, or more than 10 per centum in the aggregate of the outstanding stock of the issuer as of a date within twenty days prior to the filing of the registration statement;

(7) the amount of securities of the issuer held by any person specified in paragraphs (4), (5) and (6) of this schedule, as of a date within twenty days prior to the filing of the registration statement, and, if possible, as of one year prior thereto, and the amount of the securities, for which the registration statement is filed, to which such persons have indicated their intention to subscribe;

(8) the general character of the business actually transacted or to be transacted by the issuer;

(9) a statement of the capitalization of the issuer, including the authorized and outstanding amounts of its capital stock

and the proportion thereof paid up, the number and classes of shares in which such capital stock is divided, par value thereof, or if it has no par value, the stated or assigned value thereof, a description of the respective voting rights, preferences, conversion and exchange rights, rights to dividends, profits, or capital of each class, with respect to each other class, including the retirement and liquidation rights or values thereof;

(10) a statement of the securities, if any, covered by options outstanding or to be created in connection with the security to be offered, together with the names and addresses of all persons, if any, to be allotted more than 10 per centum in the aggregate of such options;

(11) the amount of capital stock of each class issued or included in the shares of stock to be offered;

(12) the amount of the funded debt outstanding and to be created by the security to be offered, with a brief description of the date, maturity, and character of such debt, rate of interest, character of amortization provisions, and the security, if any, therefor. If substitution of any security is permissible, a summarized statement of the conditions under which such substitution is permitted. If substitution is permissible without notice, a specific statement to that effect;

(13) the specific purposes in detail and the approximate amounts to be devoted to such purposes, so far as determinable, for which the security to be offered is to supply funds, and if the funds are to be raised in part from other sources, the amounts thereof and the sources thereof, shall be stated;

(14) the remuneration, paid or estimated to be paid, by the issuer or its predecessor, directly or indirectly, during the put year and ensuing year to (a) the directors or persons performing similar functions, and (b) its officers and other persons, naming them wherever such remuneration exceeded $25,000 during any such year;

(15) the estimated net proceeds to be derived from the security to be offered;

(16) the price at which it is proposed that the security shall be offered to the public, or the method by which such price is computed, and any variation therefrom at which any portion of such security is proposed to be offered to any persons or classes of persons, other than the underwriters, naming them or specifying the class. A variation in price may be proposed prior to the date of the public offering of the security, but the Commission shall immediately be notified of such variation;

(17) all commissions or discounts paid or to be paid, directly or indirectly, by the issuer to the underwriters in respect of the sale of the security to be offered. Commissions shall include all cash, securities, contracts, or anything else of value, paid, to be set aside, disposed of, or understandings with or for the benefit of any other persons in which any underwriter is interested, made, in connection with the sale of such security. A commission paid or to be paid in connection with the sale of such security by a person in which the issuer has an interest or which is controlled or directed by, or under common control with, the issuer shall be deemed to have been paid by the issuer. Where any such commission is paid the amount of such commission paid to each underwriter shall be stated;

(18) the amount or estimated amounts, itemized in reasonable detail, of expenses, other than commissions specified in paragraph (17) of this schedule, incurred or borne by or for the account of the issuer in connection with the sale of the security to be offered or properly chargeable thereto, including legal, engineering, certification, authentication, and other charges;

(19) the net proceeds derived from any security sold by the issuer during the two years preceding the filing of the registration statement, the price at which such security was offered to the public, and the names of the principal underwriters of such security;

(20) any amount paid within two years preceding the filing of the registration statement or intended to be paid to any

promoter and the consideration for any such payment;

(21) the names and addresses of the vendors and the purchase price of any property, or good will, acquired or to be acquired, not in the ordinary course of business, which is to be defrayed in whole or in part from the proceeds of the security to be offered, the amount of any commission payable to any person in connection with such acquisition, and the name or names of such person or persons, together with any expense incurred or to be incurred in connection with such acquisition, including the cost of borrowing money to finance such acquisition;

(22) full particulars of the nature and extent of the interest, if any, of every director, principal executive officer, and of every stockholder holding more than 10 per centum of any class of stock or more than 10 per centum in the aggregate of the stock of the issuer, in any property acquired, not in the ordinary course of business of the issuer, within two years preceding the filing of the registration statement or proposed to be acquired at such date;

(23) the names and addresses of counsel who have passed on the legality of the issue;

(24) dates of and parties to, and the general effect concisely stated of every material contract made, not in the ordinary course of business, which contract is to be executed in whole or in part at or after the filing of the registration statement or which contract has been made not more than two years before such filing. Any management contract or contract providing for special bonuses or profit-sharing arrangements, and every material patent or contract for a material patent right, and every contract by or with a public utility company or an affiliate thereof, providing for the giving or receiving of technical or financial advice or service (if such contract may involve a charge to any party thereto at a rate in excess of $2,500 per year in cash or securities or anything else of value), shall be deemed a material contract;

(25) a balance sheet as of a date not more than ninety days prior to the date of the filing of the registration statement showing all of the assets of the issuer, the nature and cost thereof, whenever determinable, in such detail and in such form as the Commission shall prescribe (with intangible items segregated), including any loan in excess of $20,000 to any officer, director, stockholder or person directly or indirectly controlling or controlled by the issuer, or person under direct or indirect common control with the issuer. All the liabilities of the issuer in such detail and such form as the Commission shall prescribe, including surplus of the issuer showing how and from what sources such surplus was created, all as of a date not more than ninety days prior to the filing of the registration statement. If such statement be not certified by an independent public or certified accountant, in addition to the balance sheet required to be submitted under this schedule, a similar detailed balance sheet of the assets and liabilities of the issuer, certified by an independent public or certified accountant, of a date not more than one year prior to the filing of the registration statement, shall be submitted;

(26) a profit and loss statement of the issuer showing earnings and income, the nature and source thereof, and the expenses and fixed charges in such detail and such form as the Commission shall prescribe for the latest fiscal year for which such statement is available and for the two preceding fiscal years, year by year, or, if such issuer has been in actual business for less than three years, then for such time as the issuer has been in actual business, year by year. If the date of the filing of the registration statement is more than six months after the close of the last fiscal year, a statement from such closing date to the latest practicable date. Such statement shall show what the practice of the issuer has been during the three years or lesser period as to the character of the charges, dividends or other distributions made against its various surplus accounts, and as to depreciation, depletion, and maintenance charges, in such detail and form as the Commission shall prescribe, and if stock dividends or avails from the sale of rights have been credited to income, they shall be shown separately with a statement of the basis upon which the credit is computed. Such statement shall also differentiate between any recurring and nonrecurring income and between any investment and operating income. Such statement shall be certified by an independent public or certified accountant;

(27) If the proceeds, or any part of the proceeds, of the security to be issued is to be applied directly or indirectly to the purchase of any business, a profit and loss statement of such business certified by an independent public or certified

accountant, meeting the requirements of paragraph (26) of this schedule, for the three preceding fiscal years, together with a balance sheet, similarly certified, of such business, meeting the requirements of paragraph (25) of this schedule of a date not more than ninety days prior to the filing of the registration statement or at the date such business was acquired by the issuer if the business was acquired by the issuer more than ninety days prior to the filing of the registration statement;

(28) a copy of any agreement or agreements (or, if identical agreements are used, the forms thereof) made with any underwriter, including all contracts and agreements referred to in paragraph (17) of this schedule;

(29) a copy of the opinion or opinions of counsel in respect to the legality of the issue, with a translation of such opinion, when necessary, into the English language;

(30) a copy of all material contracts referred to in paragraph (24) of this schedule, but no disclosure shall be required of any portion of any such contract if the Commission determines that disclosure of such portion would impair the value of the contract and would not be necessary for the protection of the investors;

(31) unless previously filed and registered under the provisions of this subchapter, and brought up to date, (a) a copy of its articles of incorporation, with all amendments thereof and of its existing bylaws or instruments corresponding thereto, whatever the name, if the issuer be a corporation; (b) copy of all instruments by which the trust is created or declared, if the issuer is a trust; (c) a copy of its articles of partnership or association and all other papers pertaining to its organization, if the issuer is a partnership, unincorporated association, joint-stock company, or any other form of organization; and

(32) a copy of the underlying agreements or indentures affecting any stock, bonds, or debentures offered or to be offered.

In case of certificates of deposit, voting trust certificates, collateral trust certificates, certificates of interest or shares in unincorporated investment trusts, equipment trust certificates, interim or other receipts for certificates, and like securities, the Commission shall establish rules and regulations requiring the submission of information of a like character applicable to such cases, together with such other information as it may deem appropriate and necessary regarding the character, financial or otherwise, of the actual issuer of the securities and/or the person performing the acts and assuming the duties of depositor or manager.

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CHAPTER 103 FEDERAL AND STATE SECURITIES REGULATION OF REAL ESTATE TRANSACTIONS
§ 103.09 Appendices.
Appendix 2 Availability of SEC Forms Currently in Use.

13-103 Thompson on Real Property, Thomas Editions Appendix 2.syn

AUTHOR: Professor David A. Thomas J. Reuben Clark Law School Brigham Young University

§ 2.syn Synopsis to Appendix 2: Availability of SEC Forms Currently in Use.

Appendix 2 Scope

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Appendix 2 Availability of SEC Forms Currently in Use.

13-103 Thompson on Real Property, Thomas Editions Appendix 2

AUTHOR: Professor David A. Thomas J. Reuben Clark Law School Brigham Young University

Scope

A complete and current list of forms is found on the SEC's website (http://www.sec.gov/about/forms/secforms.htm). The website also provides the forms themselves. Registrants may be required to file electronically, either via EDGAR (corporate and fund registrants) or via IARD (investment advisers), rather than on printouts of the forms.

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CHAPTER 103 FEDERAL AND STATE SECURITIES REGULATION OF REAL ESTATE TRANSACTIONS
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Appendix 3 Form S-1.

13-103 Thompson on Real Property, Thomas Editions Appendix 3.syn

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§ 3.syn Synopsis to Appendix 3: Form S-1.

Appendix 3 Scope

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13-103 Thompson on Real Property, Thomas Editions Appendix 3

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Scope

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CHAPTER 103 FEDERAL AND STATE SECURITIES REGULATION OF REAL ESTATE TRANSACTIONS
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Appendix 4 Form S-11.

13-103 Thompson on Real Property, Thomas Editions Appendix 4.syn

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§ 4.syn Synopsis to Appendix 4: Form S-11.

Appendix 4 Scope

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13-104 Thompson on Real Property, Thomas Editions 104.syn

AUTHOR: Professor George Lefcoe The Law Center University of Southern California

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3Bibliography.

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CHAPTER 104 THE PROMISSORY NOTE IN REAL ESTATE TRANSACTIONS 1

13-104 Thompson on Real Property, Thomas Editions § 104.01

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§ 104.01 Note Formalities.

§ 104.01(a) The Difference Between the Note and the Deed of Trust.

Few first-time homebuyers can afford Polonius' captious advice, "Neither a borrower nor a lender be." They buy their homes on credit, signing promissory notes (I.O.U.s) in the process. However, by themselves, these promises to repay don't offer lenders sufficient assurance of repayment, especially for the considerable sums needed to buy a house. Borrowers could easily overcommit themselves later with additional borrowings, lose their jobs, or just become careless in paying on their I.O.U.s. So lenders almost always insist that buyers pledge their newly-bought homes as security for their loan. In this case, the financing document which secures the collateral is known as a mortgage. Other types of security interests include deeds of trust, ground leases, and installment land contracts.

There are several differences between notes and security instruments. The former is a promise to repay a debt and evidences that money was loaned to the borrower, while the latter pledges specific property that the lender can seize and sell to repay the underlying debt if the borrower reneges on his promise to pay.

Another difference is that "the obligation is more important than the security." n2 Valid notes can exist unsecured. Banks customarily lend money without demanding collateral or other security. That's what credit card financing is. On the other hand, the validity and enforceability of a security interest depends entirely on the existence of an underlying, outstanding obligation. No obligation, no mortgage.

The primacy of the obligation is evidenced in many legal rules. Inconsistencies between the note and the mortgage are resolved in favor of the note's provisions. n3 When a lender assigns a note, the purchaser of the note also gets the mortgage along with it, even if the lender hadn't meant to transfer the mortgage. n4 If a mortgage lender assigns a mortgage without assigning the underlying note, the assignee cannot foreclose the mortgage. n5 If the originating lender sells the loan first to A and then to B but delivers the note to lender A and only a copy of the note to lender B, A's interest is superior to B's. A prevails even though B knows nothing of A's interest and A doesn't record the assignment of the mortgage until after B records its assignment. The law of negotiable instruments, and not the recording acts, determines the outcome. A wins because A has possession of the note. n6

Once the debt is repaid, the lender is absolutely bound to release the security instrument. If a lender or trustee fails to execute a reconveyance or satisfaction on demand when the debt is paid, he can be held liable for any damage the buyer suffers as a result--including lost sales or financing opportunities. n7

§ 104.01(b) Contents of the Note and the Deed of Trust.

Provisions regarding repayment of the debt appear in the note, such as: (1) the amount of the loan principal, (2) the rate of interest, (3) the term to maturity (length of time you have to repay the debt), (4) whether the borrower can pay early (prepayment), (5) the penalty for making payments late, and so on. Provisions about preservation of the security property appear in the deed of trust, such as the pledgor's promises to maintain the property in good condition, keep it adequately insured for the benefit of the lender, and pay all property taxes and special assessments when due to avoid liens.

Some provisions surface both in the note and the deed of trust. One such provision is a "due-on-sale" clause which gives the lender the option of declaring all debt immediately due if the borrower sells the property without the lender's prior approval of the buyer. n8 These clauses are included in notes because a sale could affect the lender's exposure on the debt if the new buyer takes over payments on the debt and is a poor credit risk. They are included in security instruments because a sale could also affect the value of the security property if the new borrower is a property destroyer, or lets property tax and insurance bills slide.

§ 104.01(c) Secured Promises Need Not Be for Money.

Say your neighbor promises to let you share her new tennis court if you waive your rights under the local zoning code to a five-foot separation between where her court begins and your lot line ends. Could your right to use the court be secured by a deed of trust on it? What if your law firm's new landlord promises to pay your rent on the lease you're abandoning in order to move into his building. Can the landlord's obligation be secured by a mortgage on the new building? (Assuming these mortgages are valid, why might you prefer them to an easement to use the tennis court or a promise by your landlord to pay rent on your former space?)

Most secured obligations are for the repayment of money, but a mortgage can be valid even if it doesn't secure an obligation to repay money. It can secure the "performance of an act," n9 such as a promise by the mortgagor to furnish water and sewer facilities, n10 to build a driveway, n11 to construct an apartment house, n12 to use property for church purposes, n13 or to supply the property owner with food, shelter, and "the necessities of life" for the rest of her days. n14 To be mortgageable, though, these promises must be "readily translatable into money, albeit without precision." n15

There are two reasons that mortgage obligations must be readily reducible to cash. One is simply to facilitate a court-ordered assessment of damages.

The second is more complicated. Defaulting mortgagors are protected against forfeitures of the "equity" value in their properties. They owe their lenders a repayment of debt, plus interest and costs. But no more. Once the lender forecloses and pockets a sum sufficient to pay off the loan, any surplus from the foreclosure sale belongs to the property owner. To determine the surplus, an estimate has to be made of the value of the debtor's performance. The creditor's right to foreclose becomes problematic if the obligation lacks liquidity. n16 That is why smart creditors stipulate liquidated damages for the performance of promises not already reduced to a dollar amount.

§ 104.01(d) Oral Promises to Make Loans.

The English Statute of Frauds requires that certain types of contracts be written in order to be enforceable, among which are contracts for interests in land. But what about promises to make loans secured by a mortgage or deed of trust? Are

they promises regarding an "interest in land?" The borrower's promise to convey to the lender a security interest in real property definitely involves an "interest in land" and needs written confirmation to satisfy the Statute of Frauds. n17 But the lender's loan commitment is a promise to lend money. Nonetheless, some courts have thought the Statute of Frauds applies to both. n18 Even the lender's promise contemplates a security interest. Other courts have been receptive to plaintiff borrowers and granted damages for the lender's breach of an oral promise to make a loan even though the borrower's promise to convey a mortgage was unenforceable because it was also oral only. These cases hold the lender's promise not within the Statute of Frauds. n19

In reality, the lender will almost always require the borrower to sign a note evidencing the loan well before the lender actually advances funds. Some lenders give borrowers written and enforceable loan commitments, by which they obligate themselves to make the loan. Loan commitments are more readily available to commercial borrowers than to homebuyers.

Many loans are not subject to the Statute of Frauds, so lenders have convinced the legislatures of 35 states to adopt some form of the American Banker's Association's model statute requiring that credit agreements be written in order to be enforceable. n20 However, these statutes do not apply to real estate mortgages and other security agreements.

FOOTNOTES:

(n1)Footnote 2. Roger Bernhardt, California Mortgage and Deed of Trust Practice 15 (2d ed. 1990). *Vernor v. Southwest Federal Land Bank Association, 77 S.W.3d 364 (Tex. App. 2002)* (a promissory note was not void for lack of a co signature); *ABN Amro Mortgage Group, Inc. v. Stantz, 2004 Ohio 2089 (Ohio Ct. App. 2004)* (a mortgagor who did not execute a promissory note did not owe money to the mortgagee pursuant to a note).

(n2)Footnote 3. *Pacific Fruit Exch. v. Duke, 284 P. 729 (Cal. App. 1930)* . *See* Ann M. Burkhart, Third Party Defenses to Mortgages, *1998 B.Y.U. L. Rev. 1003;* R. Wilson Freyermuth, Enforcement of Acceleration Provisions and the Rhetoric of Good Faith, *1998 B.Y.U. L. Rev. 1035.*

(n3)Footnote 4. *Kernohan v. Manss, 41 N.E. 258 (Ohio 1895)* . The holder of a note and mortgage sold the mortgage along with a forged copy of the note. Then it sold the genuine note to a subsequent purchaser. The court held that the subsequent purchaser had priority to the underlying debt upon foreclosure of the mortgage. *Lewis v. Hare, 275 B.R. 586, 591 (Bankr. D. Colo. 2002)* (At common law the security attaches to the deed of trust).

(n4)Footnote 5. *Kluge v. Fugazy, 536 N.Y.S.2d 92 (1988)* .

(n5)Footnote 6. *American Bank of the South v. Rothenberg, 598 So. 2d 289 (Fla. App. 1992)* .

(n6)Footnote 7. *Satine v. Koier, 164 A.2d 913 (Md. 1960)* . The mortgagor was entitled to additional construction costs incurred as a result of a delay in obtaining financing, which was itself caused by the mortgagor's refusal to reconvey title. *See generally* Warden in 55 Am. Jur. 2d *Mortgages* 491 (1971): "In addition to the statutory penalty, a mortgagor is generally permitted to recover for losses which proximately result from the refusal of the mortgagee to discharge the mortgage." *Kiowa Tribe of Oklahoma v. Manufacturing Technologies, Inc., 523 U.S. 751 (1998)* (Indian tribe entitled to sovereign immunity on note which it had signed, even though the note related to the tribe's commercial activities).

(n7)Footnote 8. "Due-on-sale" clauses are discussed in § 104.08(a), *infra*.

(n8)Footnote 9. *Cal. Civ. Code §§ 2872, 2920*.

(n9)Footnote 10. *Valley Vista Land Co. v. Nipomo Water & Sewer Co., 72 Cal. Rptr. 181 (1968)* .

(n10)Footnote 11. *Jeffrey Towers, Inc. v. Straus, 297 N.Y.S.2d 450 (1969)* .

(n11)Footnote 12. *Pawtucket Inst. for Sav. v. Gagnon, 475 A.2d 1028 (R.I. 1984)* .

(n12)Footnote 13. *Congregational Church Bldg. Soc. v. Osborn, 94 P. 881 (Cal. 1908)* .

(n13)Footnote 14. *Thompson v. Glidden, 445 A.2d 676 (Me. 1982)* .

(n14)Footnote 15. *Application of Jeffrey Towers, Inc., 291 N.Y.S.2d 41, 45 (1968)* . The court upheld the validity of a mortgage securing the borrower's promise to install a sewer main, construct a driveway, and complete an apartment house, but held that the mortgage could not secure the borrower's promise to consent to zoning applications because the monetary value of the borrower's cooperation was too speculative. *Kissinger v. Genetic Evaluation Center, Inc., 618 N.W.2d 429 (Neb. 2000)* (promissory note held supported by adequate consideration).

(n15)Footnote 16. Grant S. Nelson & Dale A. Whitman, Real Estate Finance Law § 2.2, at 20-23 (5th ed. 2007).

(n16)Footnote 17. *See Sleeth v. Sampson, 142 N.E. 355 (N.Y. 1923)* .

(n17)Footnote 18. *See Bozzi v. Greater Delaware Valley Sav. & Loan Ass'n, 389 A.2d 122 (Pa. 1978)* , holding that oral agreements to lend money in consideration for a mortgage must be in writing pursuant to the Statute of Frauds. *See also Philips Credit Corp. v. Regent Health Group, Inc., 953 F. Supp. 482, 517 (S.D.N.Y. 1997)* (In New York a mortgage on real property is governed by the statute of frauds and must be in writing to be enforceable); George A. Nation, III, The Clardy Case: Lessons for Lenders Concerning Commitment Letters And Other Pre-Loan Contracts, *114 Banking L.J. 347, 365 n.3 (1997).*

(n18)Footnote 19. *See Sleeth v. Sampson, 142 N.E. 355 (N.Y. 1923)* . *See Landes Constr. Co. v. Royal Bank of Canada, 833 F.2d 1365 (9th Cir. 1987)* (judgment against bank for $18.5 million upheld).

(n19)Footnote 20. 1989 Joint Task Force of the Committee on Consumer and Commercial Financial Services.

1 Parts of this chapter have been adapted from George Lefcoe, Real Estate Transactions (Michie 1993).

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CHAPTER 104 THE PROMISSORY NOTE IN REAL ESTATE TRANSACTIONS 1

13-104 Thompson on Real Property, Thomas Editions § 104.02

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§ 104.02 How Much to Borrow.

§ 104.02(a) Underwriting Standards; Qualifying the Borrower.

Every prudent lender is trying to unearth answers to the big question: Will the borrower be able and willing to repay the debt on schedule? Mortgage lenders refer to the four "Cs" of underwriting: collateral, capacity, character, capital.

Collateral is the value of the security property.

Capacity is the borrower's income. Lenders commonly utilize two ratios to aid them in determining whether a buyer is a good credit risk. n21 One is the ratio of a borrower's income to her fixed installment debt (car loans, credit card balances, student loans), called a "total debt ratio" (TDR). The TDR includes mortgage payments. If the lender's cutoff was 38%, a borrower whose income was $100,000 would not be given a loan if her total debts exceeded $38,000 a year.

This concern may be warranted since research conducted by a high-volume insurer of low downpayment home loans indicates that borrowers with ratios higher than 33% and total debt ratios in excess of 38% have a 60% higher delinquency rate than standard borrowers. n22

The second ratio is the borrower's net income to the borrower's total housing costs (the mortgage repayment, taxes, insurance and, perhaps, maintenance). Presently, ratios higher than 32% are worrisome to most mortgage lenders.

The formulas and ratios change from time to time, with richer households generally paying smaller shares of their net income for housing than poorer ones. U.S. households actually spend between 15 and 40% of their income for housing.

Character is the borrower's past credit history, including bankruptcies or foreclosures. Even though a loan applicant may not have huge credit card or personal debts before buying a house, the borrower could always go on a binge after getting the mortgage. On the other hand, behavior is usually patterned so credit histories are taken as reliable indicators of creditworthiness.

Capital is cash or liquid assets at the borrower's disposal to make the down payment and tough out a temporary health

set back or job loss. Thus, net worth is taken into account and is defined as the total of the borrower's assets minus liabilities.

All in all, the mortgage underwriter will need the following mass of data to process a loan:

- ID numbers for savings and checking accounts;
- signed forms authorizing institutions to release account information so the borrower's claimed assets can be verified;
- account numbers for money market funds;
- credit card balances;
- loan documents on outstanding debt;
- retirement fund verifications;
- a list of assets and outstanding mortgages or other liens against them;
- the borrower's last two years' tax returns;
- verifications of employment;
- appraisals of property that the borrower owns;
- a credit report;
- written explanations for any blemishes in the applicant's credit history.

With increased computerization, this costly and annoying process is streamlined.

§ 104.02(a)(1) Pre-approved Mortgages.

Some prospective homebuyers want to enter the marketplace armed with more than a vague idea of their borrowing ability. They seek commitments by lenders or mortgage brokers to make a loan of a certain amount, contingent on the appraised value of the property selected. Not many lenders issue these commitments, which are also known as "pre-approved" mortgages.

On the other hand, obtaining advance commitments isn't necessarily in the borrowers' best interests. They must pay an up-front fee for them, and one-third of the pre-approved mortgages are never used because the borrowers find better loans elsewhere. But in a tight housing market when values are rising swiftly, borrowers with a financing commitment have an edge when bidding against buyers who insist on "financing contingency" loopholes in any contract they sign. n23

Some borrowers just meet with a friendly loan officer at a bank or mortgage broker before commencing their house search, disclose their financial situation, and obtain the loan officer's informal estimate of how much money they could expect to borrow.

§ 104.02(a)(2) Filing False Loan Applications.

"Where fraudulent loan applications were once an immeasurably tiny portion of total loans, they now account for between 4% and 10% of all applications taken nationwide." n24

Lenders aren't universally cautious in their underwriting standards--the procedures they use to qualify borrowers. Lately, in a rush to cut expenses and increase business volume, lenders have employed loan brokers on a pure commission basis. No loan means no commission for the broker. Although this incentive system rewards efficient brokers, it also encourages reckless underwriting practices. Sometimes, commission-dependent brokers are tempted to encourage borrowers to misstate the facts: "Forget about the alimony, automobile, and student loan payments," they may urge. "It will only slow down the approval." Striving to be competitive, lenders only compound the problem by offering loan applicants quick approvals. They churn out speedy reviews of a loan applications by not bothering to closely verify what the applicant reports. These loans are sometimes called "E-Z qualifiers." Loan brokers can often get questionable applicants qualified when they know that the borrower's application won't be thoroughly scrutinized. n25

Don't fall into the trap. Filing false statements on bank loan documents is a federal offense. n26 The U.S. Government can seize your house if you bought it with proceeds from a loan you got by making false statements in your loan application, and your lender is F.D.I.C.-insured. n27 The legal standard for forfeiture is similar to that required for a search warrant, probable cause. Anthony Paul Feher lost his house at 4031/2 Skyline Drive, La Habra Heights, California, because he claimed to have been employed at Action Garage Door 1984-86 and the owner of the company declared Mr. Feher had never been employed there. n28

The Case of Mr. Jones: n29 Real Estate Fraud
and Lending as Underwriting Practices in Laguna Beach

by Diane D. Stalder

Mr. Jones was a fairly competent and successful licensed real estate broker. In the early 1980s, however, Mr. Jones fell on hard times as interest rates rose above 20% and, according to Mr. Jones, you couldn't give real estate away.

Jones decided to take matters into his own hands and create deals, even without a buyer. He established the Irvine Corporation, which he advertised as a relocation service for people whose jobs caused them to move into and out of homes in the Orange County area. The fact that the sellers would immediately move out of the area helped Jones in several ways. They were anxious to sell their homes in a bad market and it would be much more difficult for them to check him out.

Jones advertised to find sellers in this position, saying that he had buyers from out-of-town looking for homes. He said that he was a broker and would broker the deal. Jones actually became the broker *and* the buyer by assuming a number of false identities. Jones would offer the legitimate sellers a very reasonable (good) price for their home with two conditions:

1. Sellers accept 90% of the price from a bank loan and the other 10% on what Jones termed a 2nd Trust Deed, which was actually a promissory note from the buyer. No money down.

2. Sellers pay the points on the loan and commission to Jones, usually 6% of the purchase price. Jones obtained the loan from the bank (at the historically high rates of interest), paid the sellers 90% of the purchase price, and collected the commission and points. Sellers left town with the assurance that the buyers would be paying off the balance.

Jones did this for some 29 properties, all private homes, assuming seven different identities and

acting as buyer and broker in the process. At times, his wife or a friend would appear as the buyer.

Jones would take over each property and then lease it out, again for a reasonable price. He pocketed the rent money. Jones never made any interest or principal payments on the bank loans. He was hoping interest rates would go down and property prices would rise. He would then be able to refinance and sell to legitimate buyers, pay back the banks and make a profit. Rates did not fall quickly enough.

It wasn't long before banks foreclosed and, discovering that the buyers did not really exist, uncovered Jones's scam. Jones was arrested. Jones was convicted on mail and real estate fraud and received five years. *18 U.S.C. §§ 1341, 1342*. He was ordered to pay $210,000 in restitution upon release. Jones escaped from Lompoc after 13 months of service. Eighteen months later, he was apprehended as a fugitive and returned to incarceration at Terminal Island, where he got an additional 60 days for escape, and another eight months of parole time denied. He will spend over forty months in prison.

In calculating his parole, the fraud offense was rated according to the amount of loans, which added up to some $4 million, even though the lenders' actual loss was under $500,000. The significant "real loss" was the default of the promissory notes to the sellers for 10% and the approximately $40,000 the banks claimed they forfeited, mostly in administrative costs. Since houses were so difficult to sell at the time, with interest rates approaching 20%, sellers wouldn't have agreed to take back notes if they could have sold for cash instead. The 10% represented, for most sellers, a calculated gamble, one where the dice were loaded against them, as it turns out.

Jones's monetary gains were the commissions and rents he collected totalling less than $150,000. The parole commission seemed fixated on the $4 million figure and had a hard time understanding "where the money went." Most of it went, of course, to the sellers. Jones is convinced he did his sellers a service and that morally he is not particularly culpable, although he realizes the false identities and escape were not bright moves. He really blames the whole affair on bad market conditions at the time and still probably thinks about the money he lost out on and the prison term he could have avoided "had the market taken an upswing in time...."

For prospective borrowers, there is a message here about lender underwriting standards. Lenders may not be as meticulous when they originate loans as they become once a default occurs. But the penalties for "fudging" the loan application can put borrowers behind bars.

Penalties can also involve professionals--lawyers, accountants, appraisers--having their licenses suspended or revoked.

§ 104.02(b) How Much Is Enough: Leverage and the Down Payment.

Should you borrow as much as a lender is willing to lend, or should you accumulate a larger down payment before jumping into home ownership? n30 Borrowing money is known as "leveraging" because it magnifies the effect of gains and losses that come from investing with the use of borrowed funds.

The advantage of leveraging to the max is that you enhance your financial return if the value of the property increases at a rate greater than your after-tax cost of borrowing. This is known as "positive leverage." Conversely, if values lag, your losses will be even larger because you leveraged yourself. This is known as "negative leverage."

Cautious homebuyers worry about another aspect of "leveraging"--whether they can comfortably shoulder their debt in the event of a temporary wage loss. Statistically, default and foreclosure rates are the highest when borrowers only make small down payments.

LEVERAGE DEFINED **n31**

[Leverage is the relationship between net operating income (NOI) and debt service (D/S). Net operating income is gross income minus all expenses except debt service. Expenses include taxes, insurance, and maintenance. Debt service is principal plus interest. When NOI > D/S, leverage is positive. When D/S < NOI, leverage is negative.]

To explain how leverage works, let us start with an investor who buys a $10 million apartment house that yields $1,500,000 after expenses. On an all-cash purchase, he will earn a 15 percent cash yield on his investment. Suppose instead that he borrows to make the purchase: first, $5,000,000, then $9,000,000. If the mortgages bear 12 percent interest, and if the annual debt service (that is, the combined amount of interest and principal reduction) is designed to pay off the mortgages in 25 years, the cash flow and cash yield appear below:

(a) *$5,000,000 mortgage, $5,000,000 cash down payment*
Cash flow before debt service.....$1,500,000
Less debt service..... $633,000
Cash flow after debt service.....$867,000
Cash yield on $5,000,000 down payment.....17.34%

(b) *$9,000,000 mortgage, $1,000,000 cash down payment*
Cash flow before debt service.....$1,500,000
Less debt service..... $1,139,400
Cash flow after debt service.....$360,600
Cash yield on $1,000,000 down payment.....36.06%

If we were to continue to project cash yield based on ever-shrinking down payments, the investment return would approach infinity. And by placing elsewhere the cash that mortgaging replaces, the investor can expand and diversify his holdings.

[The easiest way to appreciate the impact of leverage is to imagine the investor is able to put the original $10 million into one project all cash, two projects with 50% down, or 10 projects at $1,000,000 each.]

It is useful to understand how leverage can bring a geometric increase in investment return. Note that it depends upon the investor turning a profit on the borrowed funds; this, in turn, depends upon a favorable spread between the "points" (points equal percentage) of debt service and the "free and clear" rate of return on the investment. To illustrate this principle with the $5,000,000 mortgage:

(1) Free and clear return (at 15%)
on $5,000,000 of borrowed funds.....$750,000

(2) Debt service (at 12.66 points)
on $5,000,000 mortgage.....$633,000

(3) Profit on the borrowed funds
(1 minus 2).....$117,000

(4) Profit on the equity or down

payment funds.....$750,000

(5) Overall cash flows (3 plus 4).....$867,000

Thus our investor has enhanced his rate of return by adding to the regular 15 percent yield that his down payment generates, the $117,000 profit on the borrowed moneys. By increasing the spread between free-and-clear return and debt service costs, or by increasing the ratio of borrowed to equity capital, the investor will improve his leverage advantage. To test your understanding, repeat this calculation for a $9,000,000 mortgage.

It follows, inevitably, that leverage will produce negative results if the assumptions above are reversed and the mortgage debt service costs exceed the free-and-clear rate of investment return. Suppose, in our example, that the free-and-clear return on an all-cash investment is only $1,300,000 (13 percent) and that the investor can only obtain a 15-year mortgage on any moneys that he borrows. If we assume the same 12 percent interest rate, the annual debt service for each $1,000,000 of mortgage comes to $144,600 (14.46 points). We now have an unfavorable spread between the "points" of debt service and the "free and clear" rate of investment return. The impact on cash yield, assuming a $5,000,000 mortgage, appears below:

$5,000,000 mortgage, $5,000,000 cash down payment

Cash flow before debt service.....$1,300,000

Less debt service.....$723,000

Cash flow after debt service.....$577,000

Cash yield on $5,000,000 down payment.....11.54%

And, as the borrowed funds increase, the disadvantage grows geometrically. You might work out the figures for a $6,000,000 mortgage, a $7,000,000 mortgage, etc.

With medicine, one dose may be restorative, five doses fatal. So, too, with leverage. If it is too great, it may ruin. The investor (and the lender) gamble that operating income will be enough to carry the debt. In the first example, where $5,000,000 was borrowed, $867,000 was left after debt service; when $9,000,000 was borrowed, only $360,000 remained. These amounts, $867,000 and $360,000, are the margin of solvency. If the margin disappears (rentals down, expenses up), the investor faces the uninviting options of finding cash elsewhere or defaulting on his loan, unless he is able to refinance the debt so as to reduce or postpone the debt service requirements. Needless to say, the slimmer the margin of solvency, the shakier the investment. History records more than one real estate empire that was leveraged into oblivion.

Note:

(1) The False Promise of Positive Leverage Analysis. Rents may sink below projected levels. Expenses may float far above gross income. But D/S remains stubbornly at the level promised in the note. The false promise of positive leverage analysis is that despite present NOI exceeding D/S by comfortable margins, it may not always. The more highly leveraged the project, the greater the chance that the debtor will lose the project if what begins as a positive relationship of NOI to D/S turns negative.

(2) Cash Flow vs. Net Return as Measures of Leverage. The above analysis rests on "cash in" and "cash out" as the basis for determining whether taking on debt is a good idea or a bad one. On the expense side, the authors include payments of both principal *and* interest--not interest alone. Some investors exclude

repayments of principal in their "cost of funds" calculation, regarding principal repayments as a build-up of equity and not part of the price of borrowed funds.

On the earnings side, the authors count only net income (rent minus taxes, insurance, and maintenance). They exclude unrealized appreciation, even if the property's value is taking off. This is understandable, since what goes up can come down and investors with appreciating property don't actually pocket their profits until they sell or refinance. Nonetheless, some methods for calculating returns on real estate (or other) investments take into account property appreciation. Also, investors who don't plan to sell quickly may be able to borrow against appreciated value.

One danger of including unrealized appreciation is that investors may wind up borrowing heavily and happily in deals that produce negative cash flows. They think that they are leveraging positively because they have a positive sum after subtracting interest costs from net annual returns (income after expenses + appreciation). The fallacy of this calculus is readily seen when unrealized appreciation disappears in a real estate market downturn.

Among the people who used this errant method of calculating investment returns were many southern California homebuyers in 1987 and 1988. Who could have faulted them in 1988, when house prices rose 30% while interest rates fluctuated between 9.5-10.5%? Unfortunately, in 1989, home prices remained steady in some places and declined as much as 10% in others. Buyers who were paying interest rates of 10-11% experienced the pitfalls of negative leverage. By 1992, some California home prices had plummeted 20-33% from their 1989 highs, the dangers of negative leverage became ever more apparent, and the rate of foreclosures increased.

The owners of highly leveraged commercial properties suffered too, as office and shopping center rents plunged below the owners' "break even" line. Owners were forced to dig into their own pockets to meet mortgage payments or lose their properties through foreclosure.

§ 104.02(c) Where Homebuyers Go for Financing. n32

There are several types of lending institutions which fund mortgage loans. Among them are: mortgage brokers, mortgage bankers, savings banks, commercial banks and consumer finance lenders.

Originations of Residential Mortgages by Type of Lender (1990) n33

Mortgage Brokers. Mortgage brokers don't lend money. Rather, they help borrowers get loans by locating lenders and "packaging" applications so that loans can be processed quickly. Once the borrower has been approved and the funds disbursed, the mortgage broker's job is done. Mortgage brokers earn their money by charging part of the loan origination fee as commission, and by charging application and other service fees.

The major drawback with using mortgage brokers is that they have no control over the funding of the loan or the loan terms. Lenders are free to change the loan terms at any time before the loan closes and can also delay the loan by requesting for additional information. The advantage to using mortgage brokers is that they have quick and efficient access to a vast number of lenders. With so many lenders to choose from, chances are the borrower will get better loan terms than he could on his own.

Mortgage bankers borrow money from lenders to make their own loans. Because they are in a position to place billions of dollars of impound accounts with commercial banks at low interest rates, they enjoy the benefit of open lines of credit at bargain rates. Mortgage bankers then package and sell groups of their loans to investors in the secondary market. Unlike mortgage brokers, mortgage bankers also service mortgages for the investors and handle defaults on payments.

Mortgage bankers have four sources of income:

(1) Loan origination fees, usually one percent of the loan amount, paid by the borrower;

(2) The difference between what they pay for bank credit and what they earn in interest on mortgages held during 30-90 days before selling them in the secondary market;

(3) The sale premium they earn when interest rates fall during the 30-90 days they are holding for sale the loans they have originated;

(4) Servicing fees, ranging from 25 to 50 basic points % to % of loan principal, plus late fees and prepayment penalties. The loan servicer usually pockets late charges and prepayment fees. These are seldom passed along to the mortgage purchaser.

They then package and sell groups of their loans to investors in the secondary market. Unlike mortgage brokers, mortgage bankers also service mortgages for the investors and handle defaults on payments. They make their money by charging loan origination fees to borrowers and servicing fees to investors. They also make money on the spread between the interest rates accepted by their borrowers and the rates specified by their investors.

Mortgage banks differ from banks in that they are not chartered by either the state or federal governments. Some states do regulate mortgage banks, but they are not members of the Federal Reserve System. The accounts of their investors, unlike bank depositors, aren't insured by the Federal Deposit Insurance Corporation (F.D.I.C.). Mortgage bankers are often called "noninstitutional" or "nonregulated" lenders. Except for minimal state regulation, the only real "requirements" placed upon them are by their investors and insurers who specify limits on mortgage sizes, ratios, lending areas and types of loans.

Consumer Finance Lenders. Consumer finance lenders make credit card loans, auto loans, home equity loans, and purchase money loans, among others.

Life Insurance Companies. Life insurance companies often work with mortgage brokers who find loans for them. In 1950, life insurance companies held about 19% of all single-family mortgages, especially F.H.A.-insured loans, and were content with the moderate yields and great safety of these loans. Competition for yields forced them to cut down their home mortgage lending so that they accounted for less than 2% of all home loans originated in 1990. Chasing higher yields, they invested in commercial real estate and are now experiencing the inevitable corollary between risk and return.

Savings and Loans (now called Savings Banks). Savings and loan institutions pool the savings of individuals for investment in residential mortgages. They hold more mortgage debts and originate more mortgages than any other institutions. In fact, over 80% of S&L assets are held in one- to four-family mortgage loans and 30-40% of all residential mortgages are originated by S.&L.'s.

Originally, S.&.L.s only financed homes within their local lending area.

Recently, savings banks have also participated in the secondary market as both buyers and sellers. Some have even formed mortgage banking subsidiaries to originate loans for sale in the secondary market.

Savings banks must be chartered either by a state or by the federal government. If they are federal institutions, they must also meet certain federal lending standards promulgated by the Federal Savings and Loan Insurance Corporation and the Federal Home Loan Bank Board. Because the F.S.L.I.C. and the

F.H.L.B.B. have been dissolved, lending standards are now enforced by the F.D.I.C.

In the 1980s, regulators encouraged savings associations to try to increase their yields by investing in acquisition and development loans to homebuilders, construction loans for all types of projects, including office buildings, shopping centers and resorts, and "joint ventures" with developers. Some of these projects failed to sell or rent at the prices which savings association underwriters had anticipated.

Because savings associations were capitalized very thinly, losses on portfolio loans meant insolvency in some instances.

Congress created the Resolution Trust Corporation to "resolve" these troubled institutions through liquidation, merger with stronger institutions or acquisition by investors who could improve management and provide more capital. Furthermore, federal regulations have increased the capital requirements for savings and commercial banks. The amount of capital an institution must retain depends on how risky its loan portfolio is. Regulators require less capital to support portfolios of residential mortgage loans than portfolios of commercial properties or construction loans.

Commercial Banks. Commercial banks also accumulate funds and reloan them, but they generally use shorter-term, time- and demand-deposit accounts to fund their loans. Historically, commercial banks preferred short-term loans, especially construction loans. Now they are becoming significant lenders for single-family home loans and participate actively in the secondary mortgage markets, sometimes organizing mortgage pools of loans they originate.

Some commercial bank holding companies own mortgage banks. Commercial banks loan mortgage bankers money to originate loans and then are paid back when the mortgage bankers sell those loans in the secondary market. Commercial banks are also the largest income-property lenders, and the largest lenders for construction loans.

Commercial banks are chartered by either a state or the federal government. All federally-chartered and some state-chartered banks belong to the Federal Reserve System. Congress has given the Federal Reserve some authority to regulate all banks. All state and federally chartered banks insured by the FDIC are subject to its rules.

§ 104.02(d) Is There Mortgage Broker or Lender Liability for Aggressive Loans? Fiduciary Duty Contrasted with Duty to Counsel.

If your lender is overly optimistic about your future earnings prospects and the buoyancy of local property markets and allows you to borrow far more than you can repay and maybe more than the property is worth, do you have a possible defense to nonpayment?

Court opinions are divided on whether lenders generally owe borrowers a fiduciary duty. n34 Such a duty is created when one person undertakes to act "primarily for another's benefit...". n35 From a distance, in the lender-borrower relationship one seems to be on one's own, which is why banks are not usually thought to owe depositors or borrowers a fiduciary duty. n36 However, special circumstances could create a fiduciary duty for the lender. n37 For instance, a bank could hold itself out as an advisor and evolve a connection with a customer, inducing the customer to believe that the lender had the customer's best interests in mind and not its own:

> ... a bank whose officer strongly suggests that a borrower buy a particular enterprise or property would run a high risk of owing a fiduciary responsibility to that borrower, particularly if the borrower had dealt with the bank for a long time and trusted the officer. n38 In one case, a widow was advised by her banker to sell her ranch to repay the $200,000 she owed the bank--a bank she had dealt with for 24

> years and had often received financial advice from. A bank vice-president who assisted her with the sale had entered a partnership agreement with the ranch purchasers a few days before the sale. The court held that the bank owed the widow a fiduciary duty which was breached when the vice-president failed to disclose his interest in the transaction. n39 As a result, the widow was allowed to rescind the sale.

One author has made the case that the lender becoming the borrower's fiduciary arises far more commonly than cases like the widow's would imply. Whenever the relationship transcends the bargained-for attributes of an arm's length contract and becomes one of trust as the borrower comes to rely on the lender, often to the lender's pecuniary benefit the lender is often characterized as a fiduciary. The borrower's claim to damages for breach of that relationship depends on whether the borrower can show "a causal link between the lender's breach of its corresponding fiduciary duty." If so, all that remains is to measure damage. n40

However, the fiduciary characterization is more likely to materialize after a loan agreement is concluded than while lender and borrower are negotiating loan terms. The "contract" model usually describes accurately the loan origination relationship. Once the loan is entered, the lender then processes the loan, services it, and reviews requests for forbearance or extensions. During these stages of the lender-borrower relationship (processing, servicing, recasting), a fiduciary situation may evolve.

In comparison to whatever obligation banks owe their borrowers, do mortgage brokers owe their borrowers more? Mortgage brokers aren't lenders; rather, they are the borrower's agent and are paid to find the best lending source for the borrower. So courts have sometimes imposed an additional duty on mortgage brokers--not a fiduciary duty, but a duty of disclosure.

In one case, two pensioners used the services of a mortgage broker who aided them in obtaining a loan that required a $400 monthly payment when the borrowers' total monthly income, all from social security, was $500. The court gave this instruction to the jury:

> As a fiduciary, First Alliance Mortgage Company had a duty to disclose in writing and orally explain the material facts of the transaction to the [borrowers]. In addition, *it had a duty to counsel* and to draw to the attention of the Rogers' unfavorable material terms of the loans. n41

The loan was for $28,500. The jury found for the plaintiffs in the sum of $1 million. On appeal, the case was remanded for retrial on the issue of punitive damages. n42

Counsel for the borrowers had relied on *Wyatt v. Union Mortgage* n43 for the proposition that:

> ... the mortgage broker's obligation to make disclosure extends beyond bare written disclosure of the terms of a transaction to duties of oral disclosure and counseling regarding the unfavorable material term of the loan. It does not mean that [the lender] had a duty to decide for the [borrowers] whether or not the loan should be taken.

What, exactly, is meant by a "duty of oral disclosure *and counseling*"? Is it enough for the mortgage broker to explain the terms of the loan or must he also offer advice to the borrower on whether the loan is a good one and whether the borrower will be able to repay, given her income and other obligations? Mortgage brokers hope disclosure will suffice. Borrowers sometimes expect more, especially when they rely on mortgage brokers or lenders for advice.

FOOTNOTES:

(n1)Footnote 21. Kenneth R. Harney, Relaxed Standards for Home Loans Bring Surge in Mortgage Defaults, Daily Record, June 30, 1995, at 7.

(n2)Footnote 22. Kenneth R. Harney, Relaxed Standards for Home Loans Bring Surge in Mortgage Defaults, Daily Record, June 30, 1995, at 7.

(n3)Footnote 23. *See* Sing, *Preapproved Mortgage Has Advantages*, L.A. Times, Aug. 20, 1988, at D3.

(n4)Footnote 24. Greg Benson, retail banking expert at a Washington trade association, *quoted in* Kathy M. Kristof, *The Pinocchi Papers*, L.A. Times, July 21, 1993 at D1, col. 2.

(n5)Footnote 25. For a description of how overanxious borrowers falsify loan application information, *see Kuhn v. Spatial Design, Inc., 585 A.2d 967 (N.J. Super. A.D. 1991)* . The trial court found that the borrowers "were encouraged to submit such an application by Prudential's dependably credulous way of dealing with income and asset information submitted to it." *585 A.2d at 969* . This was a "no documentation" loan. Prudential never made the loan because the borrowers got cold feet and decided to kill the deal by "coming clean" with the lender, prompting the lender to cancel its loan commitment. The buyers' obligation to purchase was contingent on the commitment.

(n6)Footnote 26. *18 U.S.C. § 1014.*

(n7)Footnote 27. *United States v. Platenburg, 657 F.2d 797 (5th Cir. 1981)* (the financial institution must be F.D.I.C. insured for criminal prosecution under *18 U.S.C. § 1014*).

(n8)Footnote 28. United States v. 4031/ 2 Skyline Dr., 797 F. Supp. 796 (C.D. Cal. 1992) . In this case, the loan was not in default and the lender did not initiate the seizure. This was an "easy-qualifier" loan with a 25% down payment so the lender didn't verify employment. The case is not being appealed. The Robert Bruss Cal. Real Est. L. Newsl., January 1993, at 1. The proceedings were in rem, civil. There is an innocent owner exception to civil forfeiture under the law, but Mr. Feher did not plead it. *See generally* Gregory Pulles et al., FIRREA: A Legislative History and Section-by-Section Analysis 1424-26 (1992).

(n9)Footnote 29. Name changed for privacy purposes.

(n10)Footnote 30. Or should you keep your downpayment and pledge assets as collateral for the downpayment? With a pledged asset mortgage, the lender accepts assets, typically certificates of deposit (C.D.s), equivalent to the amount of the downpayment as collateral for the mortgage. The interest on the pledged C.D.s continues to accrue to the owner during the pledge period. When the mortgagor achieves the agreed-upon minimum equity in the property, the lender releases its interest in the collateral. Although the borrower may pay a slightly higher interest rate for this variation of a zero-down loan, the borrower has the advantage of earning interest on the collateral, whereas no interest is earned on the traditional cash downpayment. Kenneth R. Harney, *More Lenders Now OK Collateral in Place of a Down Payment*, Los Angeles Times, Feb. 18, 1996, at K4.

(n11)Footnote 31. Allan Axelrod et al., Land Transfer and Finance 133-35 (3d ed. 1986). Copyright © 1986 by Little, Brown & Company Reprinted with permission.

(n12)Footnote 32. Significant portions of this section have been based on information from Robert Kratovil & Raymond J. Werner, Real Estate Law 327 (9th ed. 1988).

(n13)Footnote 33. Grant S. Nelson & Dale A. Whitman, Real Estate Transfer, Finance, and Development 908 (4th ed. 1992).

(n14)Footnote 34. *Compare Barrett v. Bank of America, 183 Cal. App. 3d 1362 (1986)* (where the court found that a fiduciary duty existed between a bank and its borrower) with *Bloomfield v. Nebraska State Bank, 465 N.W.2d 144 (Neb. 1991)* (where the court refused to impose a fiduciary duty on the bank). *See also Price v. Wells Fargo Bank, 213 Cal. App. 3d. 465 (Cal. App. 1989)* (stating that Barret was inconsistent with both past authority and current trends in the law); see Cecil J. Hunt III, The Price of Trust: An Examination of Fiduciary Duty and the Lender-Borrower

Relationship, *29 Wake Forest L. Rev. 719 (1994); see also Travel Serv. Network, Inc. v. Presidential Fin. Corp. of Mass., 959 F. Supp. 135, 144 (D. Conn. 1997)* (Lender-debtor relationship generally does not give rise to fiduciary relationship under Massachusetts law); *ADT Operations, Inc. v. Chase Manhattan Bank, 662 N.Y.S.2d 190, 195 (1997)* (Fiduciary duty is not created between bank and its customer by mere communication of confidential information from customer to bank, which is a necessary incident of virtually any extension of credit). Compare *Klein v. First Edina National Bank, 196 N.W.2d 619 (Minn. 1972)* (fiduciary duty may exist in "special circumstances").

(n15)Footnote 35. Black's Law Dictionary 625 (6th ed. 1990).

(n16)Footnote 36. *See* Comment, *Recent Lender Liability Decisions in Nebraska: A Rational Approach, 25 Creighton L. Rev. 631, 656 (1992);* Comment, *The Fiduciary Controversy: Injection of Fiduciary Principles into the Bank-Depositor and Bank-Borrower Relationship, 20 Loy. L.A. L. Rev. 795, 810 (1987).*

(n17)Footnote 37. *Kim v. Sumitomo Bank, 17 Cal. App. 4th 974 (Cal. App. 1993)* (In California, a lender normally does not owe a fiduciary duty to the borrower. In this case, the court discusses and rejects the argument that lenders who effectively "control" the borrowers may cause a fiduciary duty to arise); *In re King Street Investments, Inc., 219 B.R. 848 (B.A.P 9th Cir. 1998)* (A mortgage broker engaged in constructive fraud in breach of his fiduciary duty to the lenders by making misrepresentations to the lenders).

(n18)Footnote 38. Rosse, Comment, *Recent Lender Liability Decisions in Nebraska: A Rational Approach, 25 Creighton L. Rev. at 631, 661 (1992).*

(n19)Footnote 39. *Deist v. Wachholz, 678 P.2d 188 (Mont. 1984)* .

(n20)Footnote 40. Cecil J. Hunt III, The Price of Trust: An Examination of Fiduciary Duty and the Lender-Borrower Relationship, *29 Wake Forest L. Rev. 719, 726 (1994).*

(n21)Footnote 41. The appellate opinion is unpublished. Wright v. First Alliance Mortgage Co., appealing Case No. SOC 75629.

(n22)Footnote 42. *598 P.2d 45 (Cal. 1979)* .

(n23)Footnote 43. Harris, *The Effect of Real Rates of Interest on Housing Prices*, 2 J. Real Est. Fin. & Econ. 47 (1989). There is a sizeable amount of finance literature on this theme. *See* Patric H. Hendershott, *Real User Costs and the Demand for Single-Family Housing*, 2 Brookings Papers on Econ. Activity 401 (1980); Patric H. Hendershott, *Home Ownership and Real House Prices: Sources of Change, 1965-1985*, 7 Housing Fin. Rev. 1 (1988).

1 Parts of this chapter have been adapted from George Lefcoe, Real Estate Transactions (Michie 1993).

Thompson on Real Property, Thomas Editions

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CHAPTER 104 THE PROMISSORY NOTE IN REAL ESTATE TRANSACTIONS 1

13-104 Thompson on Real Property, Thomas Editions § 104.03

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§ 104.03 The Rate of Interest and Monthly Payment Levels.

§ 104.03(a) The Effect of Interest Rates on Potential Homebuyers.

Lenders and borrowers see interest rates from different angles. Interest is income to the lender; without it, there can be no profits. Repayment of principal alone would leave the lender in a hole since the lender's cost of doing business is roughly 2-4% per annum for each dollar of loans processed and serviced. ("Service" means to collect monthly payments, monitor defaults and, if necessary, foreclose.)

Most homebuyers are sensitive to interest rates. That is why home sales can be dramatically affected by interest rate levels. Nonetheless, even at times when rates reached historic highs (the late 1970s), home prices climbed rapidly and buyers just kept coming, while in 1990-91 with rates at historic lows--below 10%--home sales were sluggish.

Professor Jack C. Harris offers this explanation:

> Buyers off-set the rate of interest against their expectations of inflation, after-tax mortgage costs, and annual appreciation in home prices. Buyers who believe interest rates could get lower and house prices might fall still further stay out of the market even when rates are historically low. Buyer who believe interest rates driven by inflation are going to rise and house prices are also likely to go up, are likely to buy even when rate are at historic highs. n44

So, although interest rates are important, their effect is also hedged by buyer expectations about both money and housing market futures.

§ 104.03(b) "Affordability": The Factors That Determine Monthly Payment Levels.

Besides interest rates, borrowers are also concerned about "affordability," as measured by monthly payment levels. The borrower's ability to pay depends on the down payment and the monthly costs of the mortgage, not just the nominal after-tax rate of interest. The monthly payment is a composite of: (1) the amount borrowed, (2) the arrangements for the repayment of principal, (3) the maturity or length of the loan, and (4) the interest rate. Only a formula which accounts for all four variables can adequately show how the monthly payment is derived.

The monthly payment level will depend in part on how the principal amount borrowed is to be repaid. One option (now prohibited by statute in many states) allows the borrower to defer making any principal repayments until the end of the term. This was common in the U.S. until the Great Depression. Up to that time, lenders had allowed borrowers to refinance when the loan expired, but the credit crunch of the Depression left many lenders squeezed for cash. They couldn't afford to refinance, so borrowers defaulted in record numbers when lenders called in their loans. There was nowhere borrowers could turn for refinancing.

If the loan principal isn't amortized (paid off) during the term of the loan, the big final payment is called a balloon payment. A "balloon" is a lump-sum repayment of principal to make up for principal deferred during the life of the loan. The advantage of the balloon is that, to the extent the principal repayment is deferred, monthly payments are lower. The drawback is that the balloon, when it descends, can crush the borrower, causing foreclosure and loss of the property. Optimistic borrowers often expect to refinance their loans as balloons float their way. They are depending on money being available on terms they can afford in the distant future. They are also taking a big risk--predicting the weather is a lot easier than guessing which way the winds of mortgage finance will blow.

Nearly all home loans provide for self-amortization during the loan term so that all the principal will have been repaid at the end of the term.

> The more typical form of self-amortizing mortgage involves *level payment* debt service, that is, equal (usually monthly) debt service installments. Given this objective, the calculation of the (monthly) installment derives from a formula with three variables: original principal balance, the length of the loan, and the rate of interest. Tables that aid in the computation are readily available, for example, from banks and mortgage brokers.
>
> You should be aware of the changing relationship between interest and principal in the level payment mortgage; with each installment the interest component gets smaller while the amortization grows. Take, for example, a $50,000, 12 percent, 30-year mortgage, carrying monthly debt service of $514.50. Each installment of debt service goes first toward the payment of interest on the unpaid loan; whatever sum remains goes then into principal reduction. Allocation of interest and principal for the first three months and the final month appears in Table 2-8.
>
> Notice also, how slowly amortization proceeds via the level payment mortgage. Table 2-9 shows the percent of unpaid debt remaining at 5-year intervals on this hypothetical loan.
>
> The usual alternative to a *level payment* self-amortizing mortgage is the so-called *constant amortization* (declining payment) loan, which one sees more often in investment situations. This method of amortization requires equal amounts of principal reduction in each installment. Again using the example of a $50,000, 12 percent, 30-year mortgage, the schedule of debt service appears in Table 2-10.
>
> Over the thirty years, if the hypothetical mortgages go to term, the level payment mortgage will be far more costly. Why is that? n45

Monthly Level Payments (Dollars) to Amortize $1000 Various Amortization Periods and Interest Rates

Term in Years					
14.0	15.53	13.32	12.44	12.04	11.85
13.0	14.93	12.65	11.72	11.28	11.06
12.0	14.35	12.00	11.01	10.53	10.29
11.0	13.77	11.37	10.32	9.80	9.52

10.0	13.22	10.75	9.65	9.09	8.78
9.0	12.67	10.14	9.00	8.39	8.07
8.0	12.13	9.56	8.36	7.72	7.34

1	$514.50	$500.00	$14.50	$49,985.50
2	514.50	499.86	14.64	49,970.86
3	514.60	499.71	14.79	49,956.07
--	--	--	--	--
--	--	--	--	--
360	514.50	5.00	509.50	0

5	$48,830	97.66
10	46,710	93.42
15	42,855	85.71
20	35,845	71.69
25	23,120	46.24
30	0	0

1	$638.88	$500.00	$138.88	$49,861.12
2	637.49	498.61	138.88	49,722.24
3	636.10	497.22	138.88	49,583.36
--	--	--	--	--
--	--	--	--	--
360	140.27	1.39	138.88	0

The combination of interest and principal repayment, stated as a percentage of the total loan obligation, is called the *constant*. For instance, if your interest rate is 10% but your monthly payments are 11.5% of the amount borrowed, your constant would be 11.5%. The extra 1.5% above the interest rate isn't an error on the part of your lender; it is explained by the fact that you are repaying some principal each month, in addition to interest. Most homebuyers are less concerned about the interest rate than the constant the total amount of the monthly payment.

If repayment of principal was the same each month and the interest rate was fixed, then monthly payments would decline to reflect the fact that as the principal was being progressively repaid, the interest on the unpaid balance was being reduced proportionately. With *constant amortization of principal* there is no uniform *constant* monthly payment. No two monthly payments are the same. Most first-time buyers would hate this because their biggest mortgage payment burdens would occur early in the borrowing cycle, when they can least afford them.

§ 104.03(c) Fixed vs. Adjustable Rate Mortgages (F.R.M.s vs. A.R.M.s).

§ 104.03(c)(1) The Rationale for A.R.M.s.

Conceptually, the nominal or contract rate of interest can be divided into two separate parts. One part is the "real" rate of interest. The other part accounts for the fact that the underlying value of the principal is subject to inflation. Without

this second component of interest, the lender would get back in *real* dollars less than he loaned, even if the debt was fully repaid in *nominal* dollars.

Lenders making fixed-rate loans have no choice but to estimate what the inflation rate will be over the life of the loan, which can be especially difficult for long-term obligations. The lender must build the inflation assumption into the rate. If the lender has guessed too low a number, it loses. For long-term obligations, this loss can be significant. On the other hand, if the lender over-estimates the rate of inflation and interest rates fall below the contracted fixed rate, borrowers will prepay their loans in order to refinance at the lower rates

Complicating the fixed-rate lender's dilemma is the fact that they must compete in open markets where their competitors may have made guesses different from theirs about future inflation. Since most institutional lenders are highly leveraged and must pay their savers competitive yields, they don't enjoy the luxury of staying out of the market when they believe that current interest rates underestimate future inflation risks.

As a vivid example of the risks of making fixed-rate loans, consider what happened in the early 1980s. Fixed mortgage interest rates on long-term mortgage loans written in the 1960s and early 1970s were lower than the rates of inflation in the 1978-82 period. Borrowers were delighted to repay deflated debts, but lenders got caught in the squeeze between the rising costs of funds (rates on deposits) and low yielding, long-term fixed-rate mortgage loans. Many institutions have yet to recover.

In response, Congress enacted a law in 1982 authorizing all lenders to make residential mortgage loans at fluctuating interest rates. n46 These loans are called adjustable rate loans (A.R.M.s). An adjustable rate loan removes the lender's guesswork about inflation by tying the rate to an index which will ride with inflation. As inflation and market competition for savings push up the rates lenders must pay to keep deposits, mortgage borrowers with ARMs absorb these increases in the form of higher mortgage interest rates.

Borrowers also benefit from adjustable rate loans because they generally carry initial contract rates of interest well below those of equivalent fixed-rate loans. The lower starting rates of interest allow many first-time homebuyers to qualify for the loan they need, whereas they would have been priced out of the fixed-rate loan market. In addition, some lenders lure borrowers by offering special first-year rates on A.R.M.s well below current fixed-rate loans. These are called "teaser" rates. There has been some regulatory pressure to limit these teaser rates because they can fool inattentive borrowers into underestimating how high their payments will rise as soon as the "teaser" period ends, usually in six months or a year. n47 Also, some bank regulators are insisting that banks consider only the permanent rate, and not the "teaser" rate, when qualifying borrowers.

§ 104.03(c)(2) Truth-in-Lending.

The Federal Consumer Protection Act of 1968 (Truth-in-Lending) n48 imposes special disclosure obligations on lenders originating ARMS, in addition to the mandatory loan disclosures of amount financed, finance charges and the borrower's three-day right to cancel. n49 Implementation of Truth-in-Lending is entrusted to the Federal Reserve Board through a regulation known as Regulation Z, which was revised in 1980 by the Truth-in-Lending Simplification Act.

The error tolerance in finance charge disclosures has been increased by the Truth in Lending Amendments of 1995. n50 Home mortgage lenders will be protected from excessive penalties and liability for small technical and calculation errors in the finance charge and annual percentage rate disclosures. The disclosure on a home equity loan is treated as accurate if it does not vary from the actual finance charge by $100 (the prior limit was $10). A variance that equals 1/2 to 1 percent of the loan amount on a non-purchase money mortgage is allowed; up to 1 percent on refinance loans.

The impetus for this legislation was the 1994 Eleventh Circuit ruling in *Rodash v. AIB Mortgage Co.*, in which rescission of a home equity mortgage was upheld because the lender failed to "clearly and conspicuously disclose" the

borrower's three-day right to cancel and erroneously included $226 in charges and tax in the amount financed instead of the finance charge. n51 After the *Rodash* ruling, numerous class action and individual lawsuits were subsequently filed by borrowers attempting to get out of their loan obligations on the basis of the TILA violations with rescission penalties. Retroactive lender relief is provided for *Rodas*-based class actions that were still pending certification on January 1, 1995, and individual actions filed after June 1, 1995.

The Home Ownership and Equity Protection Act of 1994 has expanded Truth-in-Lending to include high-interest "home improvement and remodeling" loans. n52 Additional disclosure requirements and restrictions have been added for "high-rate" home equity and mortgage refinance loans, whether used for home improvement or general purposes, that are secured by a principal dwelling. Home equity lines of credit and principal residence purchase loans are exempt.

A loan is "high rate" if the APR exceeds the yield on Treasury securities by more than 10% or the borrower's total points and fees exceed the greater of 8% of the loan or $400. n53 Credit cannot be extended without a determination of the borrower's ability to repay the loan. n54 Negative amortization is prohibited. n55 Loans of five years or less must be fully amortized because balloon payments are not allowed. n56 Prepayment penalties are generally prohibited and the rate of interest after default may not be increased. n57

§ 104.03(c)(3) Computing the Rate; Choosing the Index.

Adjustable rate obligations are computed by adding the indexed rate, say, the six-month or one-year Treasury bill, to a margin, between 2-3% usually. The combined total is the interest rate the borrower pays. (Index + margin = interest rate.) n58

The chosen index must be regularly published on a recognized financial instrument. The borrower's interest rate is revised from time to time as the chosen index moves up or down with inflation. Since the index chosen will never be zero and may itself incorporate a premium above the rate of inflation, the lender receives that inflation-proof "kicker" as an additional "real" return above the margin.

There are several indexes to which variable rates are keyed. They don't move identically, a factor borrowers rarely consider, but should in choosing a loan. n59

Each lender has its favorite index. Some lenders feel comfortable with indexes based on the cost of funds from depositors, the Office of Thrift Supervision (O.T.S.) n60 or the Federal Reserve System. Because these indices reflect the lenders' cost of funds, they offer the lender protection against a mismatch between income and expenses.

Many key institutional investors care only about the spread between mortgage yields and the other investments available to them measured against U.S. Treasury obligations. So "T-bill" rates are also sometimes used as the base rate against which "adjustables" are played. Short-term (three and six months) "T-bill" rates are more volatile than one year "T-bill" rates, and all "T-bill" rates are more volatile than the "cost of funds" indices.

As capital flows have become global, an international measure, L.I.B.O.R., is frequently seen in U.S. mortgages. L.I.B.O.R. stands for the London Interbank Offered Rates. n61

> The push for L.I.B.O.R. mortgages comes mainly from foreign banks and thrifts that buy mortgages in bulk. L L.I.B.O.R. is the benchmark interest rate at which many of these institutions raise money, so they are eager to have L.I.B.O.R.-linked assets on the other side of the balance sheets, too. n62

While "T-bill" rates are sometimes vulnerable to domestic policy manipulation, L.I.B.O.R. is relatively free of government interference because the U.K. keeps its hands off private bank transactions in non-U.K. currency.

A.R.M.s must state an adjustment period between one rate change and the next. A loan with an annual adjustment is called a one-year A.R.M. Lenders using the one-year Treasury bill rate as an index usually adjust the interest rate annually.

Borrowers have a harder time figuring out their liability on adjustable-rate loans than they do on fixed-rate loans. So do lenders.

> Federal regulators have growing concerns that savings and loans may be erroneously overcharging many holders of adjustable-rate mortgages and have asked all thrifts to check their method of calculating the payments.
>
> Private consultants said the over-charges in most cases aren't huge in the range of $500 to $1,000 over the life of the loan but one consultant estimated in testimony on Capitol Hill that the total amount thrifts owe customers could be $8 billion to $15 billion. n63

§ 104.03(d) "Caps" on Adjustables.

At first, borrowers weren't receptive to adjustable rates because they could envision those indexes taking off and leaving them in the dust, with no way to keep up their monthly payments. The challenge of luring borrowers into accepting adjustable rate mortgages was met by placing "caps" or limits on how variable the rate would be. n64 The use of "caps" is so widespread now that an American Bar Association committee guide to homebuying advises: "If an adjustable rate mortgage does not contain rate caps, you should not accept that mortgage." n65

The three types of adjustable rate caps are: (1) payment, (2) annual, and (3) life-of-loan. "Annual" and "life-of-loan" caps are usually ceilings on the chargeable rate of interest. The borrower pays the full allowable rate up to the cap limit. The "payment" cap pertains to the combined principal and interest due, assuring the concerned borrower that next month's payment will never exceed this month's by more than a fixed percentage.

Annual caps restrict the amount by which the *interest* rate levied in any subsequent year can exceed the *rate* that existed in the first (or base) year. A 2-point cap means that if the rate in year one was 9%, the rate in the following year can't be greater than 11%, even if the underlying index increased by more than 2%. The borrower under an annual cap can't be liable for a rate greater than what the lender is able to charge in that year. The unpaid obligation is just carried forward to future years. For instance, if the index actually rises by 3 points to 12% in year two, the 3rd point can be carried forward into the next year in a loan with a 2-point annual cap.

Anticipating the possibility that cumulative liability under annual caps could eventually drive rates beyond the borrower's reach, life-of-loan caps guarantee that the interest rate won't ever surpass a certain figure. A 5% life-of-loan cap on a loan that began at 10% ensures that the interest rate will never exceed 15%.

A loan with a cap on monthly payments but no life-of-loan or annual cap on interest can result in "negative amortization." "Negative amortization" means that the borrower's debt may be growing over time, not shrinking, as it would with each payment on a fixed-rate loan.

The following provides an example of negative amortization: Suppose you take out a 30-year, $150,000 ARM with a starting rate of 9% and a payment cap of 7.5%. Your monthly payments for principal and interest would start at about $1,207.

One year later, rates have increased to 13%, which would make the monthly amount due about $1,664. But your payment cap of 7.5% means that your monthly payment can't be more than $1,298, which is $366 short of the amount due.

What happens to this deficiency? Even though you don't have to pay it now, don't think that you are getting off easy. The lender simply adds it to the outstanding balance of your loan, meaning that you'd owe *more* money, not less, with each passing month.

Negative amortization isn't too bad if your property value is increasing quickly or if you are getting big pay increases. In these cases, your equity is growing at a much faster rate than your loan balance is rising. Moreover, there are some benefits to loans that have the potential of negative amortization.

Most of these loans have lower introductory rates that make mortgages easier to get. The borrower's income can support more debt because the beginning payments will be relatively low. Also, most lenders allow their borrowers to pay a little bit extra each month to avoid negative amortization. Therefore, these loans offer more flexibility than fixed-rate loans, which require a fixed monthly payment. n66

Of course, the very life-of-loan or annual interest cap that assures borrowers that they aren't getting in over their heads also defines the boundary above which the lender is no longer able to match its cost of deposits with the interest charged to borrowers.

Still, lenders are at least partially benefitted by "caps" on the borrower's obligations. When rates are adjusted upward with no limits, borrowers tend to default if their personal incomes don't track interest rates very well. Defaults mean losses to the lender, not only of interest, but sometimes of principal as well. So, while a "cap" does leave the lender open to the risk of wild interest rate fluctuations above the cap, it also helps lenders avoid the deadly default rates that "uncapped" loans could trigger. Even with caps, defaults on adjustable rate loans are higher than on fixed-rate loans. n67

Choosing between Fixed and Adjustable-rate Mortgages

Lower initial rates	Borrower may be financially strapped when the full rate kicks in
If rates decline, the borrower's goes down automatically without refinancing	If interest rates arise, A.R.M. rates go up too
A.R.M.s are easier to assume whereas fixed-rate loans are generally not assumable	Traditionally, home buyers don't want A.R.M.s
Loan points and fees are usually lower than for fixed-rate loans	Points and fees are deductible in the year they are paid by homebuyer
Some A.R.M.s allow conversion to fixed rates sometime in the future	Some fixed-rate loans allow later conversion to an A.R.M.
"Caps" limit how much loan payments can increase in any year or over the life of the loan	Caps can lead to negative amortization

§ 104.03(e) Note Fixed for Five Years, Adjustable Thereafter.

Some loan programs combine fixed and variable rates in different combinations. In the loan excerpted below, the rate is fixed for the first five years and then switches to an adjustable rate with caps.

1. BORROWER'S PROMISE TO PAY

In return for a loan that I have received, I promise to pay U.S. $558,400.00, plus interest, to the order of the Lender. The Lender is California Federal Bank, a Federal Savings Bank.

I understand that the Lender may transfer this Note. The Lender or anyone who takes this Note by transfer and who is entitled to receive payments under this Note is called the "Note Holder."

2. INTEREST

Interest shall be charged on unpaid principal beginning on the date I receive principal and continuing until the full amount of principal has been paid. I will pay interest initially at a yearly interest rate of 10.250%. The interest rate I pay shall be changed in accordance with Section 4 of this Note. n68

The interest rate required by Section 2 and Section 4 of this Note is the rate I will pay both before and after any default described in Section 8.2 of this Note.

3. PAYMENTS

3.1 Time and Place of Payments

I will pay principal and interest by making payments every month.

I will make my monthly payments on the first day of each month beginning on November 01, 1990. I will make these payments every month until I have paid all of the principal and interest and any other charges described below that I may owe under this Note. My monthly payments shall be applied first to interest and other charges then due and the remainder to principal. If, on October 01, 2020, I still owe amounts under this Note, I will pay those amounts in full on that date, which is called the "Maturity Date."

I will make monthly payments at Lender's principal office, any of Lender's branches, or at any other location that the Note Holder may designate.

3.2 Initial Amount of My Monthly Payments

The initial amount of each of my monthly payments shall be U.S. $5,003.84. This amount may change.

4. INTEREST RATE CHANGES

4.1 Change Dates

My interest rate may change on the first day of October, 1995, and on the first day of the month every 1 month(s) thereafter. Each date on which my interest rate could change is called a "Change Date."

4.2 The Index

Any changes of the interest shall be based upon an index. The "Index" is

"Monthly weighted average cost of funds for the 11th District Savings Institutions," as computed monthly by the Federal Home Loan Bank of San Francisco and made available in their information bulletin "Monthly Weighted Average Cost of Funds for the 11th District Savings & Loans."

The Index figure which is used to calculate the interest rate is called the "Index Value." If the Index is no longer available, the Note Holder will choose a new index that is based upon comparable information. The Note Holder will give me notice of this choice.

4.3 Calculation of Interest Rate Changes

On or before each Change Date, the Note Holder will calculate my new interest by adding 2.500% to the most recent Index Value available as of the date 15 days before the Change Date. The Note Holder will then round the result of this addition to the nearest one-eighth of one percentage point (0.125%). Subject to the limits stated in Section 4.4 of this Note, this rounded amount shall be my new interest rate until the next Change Date.

4.4 Limitations on Interest Rate Changes

THE SECTIONS BELOW WHICH APPLY TO MY LOAN ARE: (C), (D).

(c) My interest rate shall never be greater than 13.950% as long as I do not sell or transfer the property which is subject to the Security Instrument described in Section 12. After any sale or transfer of that property, the interest rate shall never be greater than 13.950% or an interest rate that is more than 3.7000% greater than the interest rate at the time of such sale or transfer (whichever is higher).

(d) In no event shall my interest rate be less than 7.0000%.

5. MONTHLY PAYMENT CHANGES

THE SECTIONS BELOW WHICH APPLY TO MY LOAN ARE:

5.1, 5.2, 5.3, 5.4.

5.1 Payment Change Dates

My monthly payment may change beginning on the first day of November, 1995, and on that day every 12 month(s) thereafter. Each of these dates is called a "Payment Change Date." I will pay the amount of my new monthly payment each month beginning on each Payment Change Date.

5.2 Calculation of Monthly Payment Changes

Before each Payment Change Date, the Note Holder will calculate the amount of the monthly payment that would be sufficient to repay the unpaid principal that I am expected to owe at the Payment Change Date in full on the maturity date in substantially equal installments at the interest rate effective during the month preceding the Payment Change Date. The result of this calculation is called the "Full Payment." Unless Section 5.3 below requires me to pay a different amount, my new monthly payment will be in the amount of the Full Payment.

5.3 Limitations on Monthly Payment Changes

Any increase or decrease in my monthly payment, calculated as described in Section 5.2 of this Note, shall be limited to an amount that is no more than 7.5000% of the amount of my monthly payment immediately before such increase or decrease, except on the 6th Payment Change Date and on each succeeding 5th Payment Change Date thereafter. On those Change Dates, I will begin paying the Full Payment as my monthly payment until my monthly payment changes again. I also will begin paying the Full Payment as my monthly payment on the final Payment Change Date.

5.4 Additions to My Unpaid Principal

My monthly payment, as required by this Section 5, could be less than the amount of the interest portion of the Full Payment. If so, each month that my monthly payment is less than the interest portion, the Note Holder will subtract the amount of my monthly payment from the amount of the interest portion and will add the difference to my unpaid principal. The Note Holder also will add on the amount of this

difference to my unpaid principal each month. The interest rate on the interest added to principal will be the rate required by Section 4 of the Note.

7. EXTENSION AND DECREASE OF TERM

If at any Change Date my monthly payment is to be increased, the notice I receive will show what extension of the term of this Note, if any, would result in Amortization at a monthly payment substantially the same as that I am then paying. I will have an option to extend the term as shown in that notice. I may exercise that option by giving notice to the Note Holder of my intent to do so, on a form which Note Holder provides, within the time the Note Holder states in the Notice. In no event, however, shall the total term of this Note exceed 480 months. At any time that I have extended the term of this Note, my monthly payment will not be decreased. On any Change Date on which my payment amount is subject to change, if the calculation of a monthly payment described in Section 5 of this Note would result in a decrease in my monthly payment, the Note Holder will reduce the term of this Note to the term at which the unchanged monthly payment would result in Amortization. When my monthly payment is an amount which would result in Amortization over a term ending at the Maturity Date, future monthly payments will be changed as described in Section 5 of this Note.

9. BORROWER'S RIGHT TO PREPAY

I have the right to make payments of principal at any time before they are due. A payment of principal only is known as "Prepayment." When I make a Prepayment, I will tell the Note Holder in writing that I am doing so. I may make a full Prepayment or Partial Prepayments without paying any Prepayment charge. The Note Holder will use all of my Prepayments to reduce the amount of principal that I owe under this Note. If I make a partial Prepayment, there will be no changes in the due dates or in the amount of my monthly payment unless the Note Holder agrees in writing to those changes. My partial Prepayment may reduce the amount of my monthly payments after the first monthly payment change in accordance with Section 5.1 of this Note following my partial Prepayment. However, any reduction due to my partial Prepayment may be offset by an interest rate increase.

THIS NOTE CONTAINS PROVISIONS FOR INTEREST RATE CHANGES WITHOUT CORRESPONDING PAYMENT CHANGES AND MAY ALLOW DEFERRED INTEREST TO BE ADDED TO MY UNPAID PRINCIPAL. THE PRINCIPAL AMOUNT I MUST REPAY COULD BE GREATER THAN THE AMOUNT ORIGINALLY BORROWED. THIS IS SOMETIMES CALLED "NEGATIVE AMORTIZATION."

§ 104.03(f) Usury Laws.

§ 104.03(f)(1) History and Policy.

Legal limits on the amount of interest a lender may charge are on the statute books in all states but two, Massachusetts and New Hampshire. The antecedents of these laws, repugnant to free market principles, can be traced to the Old Testament, n69 the New Testament (St. Luke 6:35), n70 the writings of Plato and Aristotle, ancient Roman law (Tacitus, The Annals, Book VI, ch. 16), and Eighteenth Century English Law *(12 Annals 2*, ch. 16 (1713)).

In the course of its history the concept of usury has covered a variety of meanings. Originally it referred to all returns derived from the lending of capital and carried no moral opprobrium. With the growing condemnation of the financial abuses of the moneylenders the term came to be confined to credit transactions carrying excessive charges and thus acquired a distinct ethical connotation. In the Middle Ages all direct payments for loans were deemed usurious and condemned as sinful. In modern times the term was again narrowed down and now it refers only to excessive loan charges, while the

> payment of moderate rates is covered by the more neutral term interest...
>
> The ethical nature of the concept of usury renders it impossible to formulate permanent and definite criteria of what constitutes a usurious transaction. As long as freedom of contract remains the corner stone of economic organization, it is not the economist but the legislator who must decide at what point a voluntary economic transaction constitutes an abuse of economic freedom and thus an act of usury. n71

Like all forms of price control, usury laws have their defenders who want to shield hapless consumers from overreaching lenders, and critics who argue that these laws force the least creditworthy borrowers into the arms of the most lawless lenders. In a classic analysis of U.S. usury laws, Professor Marion Benfield concluded that usury laws, as applied to home mortgage loans, only worked to disadvantage consumers and housing producers. n72 When market interest rates, buoyed by inflation, floated above usury ceilings, mortgage lenders either withdrew, risked making loans at illegal rates, or invented ways around the usury limits that courts would not interfere with. These evasive devices always cost borrowers a premium to cover the transaction cost. n73

§ 104.03(f)(2) An Example of a Usury Law.

As a specific example, here is a California usury law enacted by popular initiative in 1919, and amended by voter initiative in 1976. n74 CALIFORNIA CONSTITUTION,
ARTICLE XV. USURY § 1.Interest rates

Section 1. The rate of interest upon the loan or forbearance of any money, goods, or things in action, or on accounts after demand, shall be 7 percent per annum but it shall be competent for the parties to any loan or forbearance of any money, goods or things in action to contract in writing for a rate of interest:

(1) For any loan or forbearance of any money, goods, or things in action, if the money, goods, or things in action are for use primarily for personal, family, or household purposes, at a rate not exceeding 10 percent per annum; provided, however, that any loan or forbearance of any money, goods or things in action the proceeds of which are used primarily for the purchase, construction or improvement of real property shall not be deemed to be a use primarily for personal, family or household purposes; or

(2) For any loan or forbearance of any money, goods, or things in action for any use other than specified in paragraph (1), at a rate not exceeding the higher of (a) 10 percent per annum or (b) 5 percent per annum plus the rate prevailing on the 25th day of the month preceding the earlier of (i) the date of execution of the contract to make the loan or forbearance, or (ii) the date of making the loan or forbearance established by the Federal Reserve Bank of San Francisco on advances to member banks under Sections 13 and 13a of the Federal Reserve Act as now in effect or hereafter from time to time amended (or if there is no such single determinable rate of advances, the closest counterpart of such rate as shall be designated by the Superintendent of Banks of the State of California unless some other person or agency is delegated such authority by the Legislature).

No person, association, copartnership or corporation shall by charging any fee, bonus, commission, discount or other compensation receive from a borrower more than the interest authorized by this section upon any loan or forbearance of any money, goods or things in action.

However, none of the above restrictions shall apply to any obligations of, loans made by, or forbearances of, any building and loan association ... or to any corporation ... or any credit unions ... or any duly licensed pawnbroker or personal property broker, or any loans made or arranged by any person licensed as a real estate broker by the State of

California and secured in whole or in part by liens on real property, or any bank ... or any nonprofit cooperative association ... or credit from any federal intermediate credit bank ... or to any successor in interest to any loan or forebearance exempted under this article... The Legislature may from time to time prescribe the maximum rate per annum of, or provide for the supervision, or the filing of a schedule of, or in any manner fix, regulate or limit, the fees, bonuses, commissions, discounts or other compensation which all or any of the said exempted classes of persons may charge or receive from a borrower in connection with any loan or forbearance of any money, goods or things in action.

The rate of interest upon a judgment rendered in any court of this state shall be set by the Legislature at not more than 10 percent per annum. Such rate may be variable and based upon interest rates charged by federal agencies or economic indicators, or both.

In the absence of the setting of such rate by the Legislature, the rate of interest on any judgment rendered in any court of the state shall be 7 percent per annum.

The provisions of this section shall supersede all provisions of this Constitution and laws enacted thereunder in conflict therewith.

§ 104.03(f)(3) The Federal Preemption of State Usury Laws.

Federal law, namely the Depository Institutions Deregulation and Monetary Control Act of 1980, n75 preempts state usury laws, at first only as to certain loans those secured by first liens on residential real estate, and made by certain "federally related" lenders. It was later expanded to cover state-chartered residential lenders and most residential mortgages. n76 There is no requirement that the borrower live in the house or that the funds be used to purchase it.

The law was a comprehensive banking regulation overhaul. It permitted banks to pay interest on checking accounts and liberalized savings association investment rules. Before that, regulated lenders were only allowed to pay interest on time or savings accounts. This had given savings associations an edge in competing with banks for savings dollars. Also, other intermediaries were offering money-market-based investments to savers, threatening both banks and savings associations with liquidity problems.

Congress saw that banks and S.& L.s (now called savings banks) would have to pay savers more in order to retain deposits, and could do so only if their revenues from interest charges rose to cover the increased cost of deposits. State usury ceilings would break the chain of rising interest rates necessitated by the then-rampant inflation. Hence, the Act. It was aimed at helping savings associations and banks survive in the early 1980s when double-digit inflation was driving many of them into the ground.

Excluded from the federal usury preemption are second mortgages, commercial loans n77 (other than those secured by first liens on residential real estate) and loans made by institutions not defined in the act as "federally related." All commercial and savings banks and credit unions insured by the federal government are "federally related." Pension funds, non-banking corporations, and individual lenders are not.

The federal preemption only protects lenders on loans made after December 22, 1979. Moreover, states had the option of reinstating their usury laws, by statute or vote of the people, if they did so within 3 years. Fifteen states and Puerto Rico did. n78 Twelve of these jurisdictions permit any rate of interest as long as it is disclosed. n79

§ 104.03(f)(4) The Four Elements Necessary to Establish Usury Under State Law.

For a loan to be usurious, four elements must be present. It must be: (a) a loan; (b) made above the legal interest limit; (c) with intent to violate the law; (d) of funds absolutely, not contingently repayable.

§ 104.03(f)(4)(i) What Is a Loan: Distinguishing "Sales" from "Loans."

Usury laws limit the rate of interest on loans, but these laws don't attempt to set limits on rents or sales prices. This tempts lenders desiring rates of interest above the usury ceiling to avoid labelling the loan as a loan. Sometimes the lender "buys" the security property from the borrower, allows the borrower to lease it back and at the end of the lease term to exercise an option to repurchase the property. The lease payments and option price substitute for interest. The "lender" pegs the option at a price so far below the property's true value, the "borrower" is sure to exercise it.

The Equitable Mortgage. Leases and contracts are forms often used to disguise what are really secured loans in order to evade usury laws because usury laws don't apply to sales prices or rents. Just because the parties to a transaction call their deal a sale and leaseback, or a sale with a lease and option to purchase, doesn't mean that courts are bound to that characterization. Courts can be persuaded to reclassify a transaction and call it a mortgage when they have been convinced it was really a security interest disguised as something else.

When courts re-classify a transaction as a mortgage loan, the resulting legal estate or interest is called an *equitable* mortgage. An equitable mortgage is a transaction in some other form that one of the parties can persuade a court to recast as if it had been a mortgage all along.

> A mortgage can be equitable because either the form of transfer does not create a lien--rather, it creates less (as, for example, where a contract of sale is executed) or creates more (as, for example, where a deed, absolute on its fee, is used)--or because the alleged mortgagor has himself only an equitable interest in the property. n80

The Typical Loan Disguised as a Sale Transaction. Many attempts to evade usury laws by disguising loans as sales take this form: the owner, who is really the borrower, sells property worth $75,000 to the lender at a discounted price of $50,000. The owner/borrower retains the right to repurchase the property at the end of one year for $70,000. Courts have had little trouble piercing these veiled sales to unfurl the underlying loan. In effect, the "lender" has loaned the owner $50,000, secured by property worth $75,000, for an interest charge of $20,000 (70,000--50,000). n81

There is a special irony in the loan-disguised-as-a-sale. Many early mortgage loans took this form. The borrower deeded property to the lender on the condition that the borrower could regain title by repaying the debt on its due date. If a borrower was even a day late, he lost the security property. It was precisely to prevent such forfeitures of title that English equity courts gave borrowers time extensions before allowing lenders to close out (foreclose) the borrower's title. The right to pay late was called the "equity" of redemption because it was courts of equity which first bestowed this redemption right on borrowers. So the loan-disguised-as-a-sale has an ancient lineage. Originally deployed to deprive the borrower of her equity of redemption, it is widely used in attempts to evade usury laws.

The Sale Accompanied by a True Purchase Money Loan. One class of creditors has been excused from observing usury limits because the loan element was lacking: sellers of homes or goods who take back credit for part of the purchase price. When the seller of goods or a house takes back an I.O.U., the seller is "forbearing" to collect the full purchase price. Technically, the seller is making a loan to the buyer. It makes little difference to the buyer to be making periodic payments to the seller instead of a third-party lender.

Yet, in the nineteenth century, courts started protecting sellers against usury claims. They reasoned that the seller's primary intent was not to make a loan, but rather to make a sale. The loan was "incidental" to the seller's main objective. Courts also saw no point in subjecting sellers to usury laws which they could easily evade by jacking up the price of a credit sale proportionately. These transactions have been regarded as:

> [n]ot a subterfuge devised to conceal what was in fact a loan ... the sale of one's own property is not a loan whatever by the terms or conditions of the purchase... He [the owner] may offer to sell at a designated price for cash or at a much higher price on credit, and a credit sale will not constitute usury

> however great the difference between the two prices, unless the buying and selling was a mere pretense. n82

We can only guess why courts never regarded the premium a seller might charge for goods bought on credit as a form of disguised interest. n83 Professor Benfield suggests that this is just another example of how the judiciary sanctioned legitimate, arm's-length transactions, despite the usury laws.

The seller later may modify the loan, perhaps agreeing to defer payment in exchange for a higher interest rate. If the court regards the change as a modification, the seller preserves the "purchase money" status of the loan. n84 If the court sees the change as having created a new loan, the new loan lacks "purchase money" status and the lender becomes susceptible to usury sanctions if the interest rate exceeds usury limits. n85 The new loan could be usurious even though the original loan being purchase money was exempted from usury laws by federal preemption and common law. Consider the case of the good-hearted seller who answers her buyer's plea for reduced monthly payments by knocking down the interest on a purchase money loan from 12% to 11%, in a state where 10% is the usury cap. When she magnanimously consents to enter a refinancing at 11%, she could inadvertently fall into the usury trap. Courts eager to avoid tripping up the generous seller, classify the transaction as a modification and hold the modified reduced rate not usurious. In this way, they to avoid producing "a somewhat absurd and clearly inequitable result." n86 To facilitate this result, the seller should document the change as a modification and never cancel the old note to substitute a new one in its place.

The absurdity of the "new loan"/"modification" distinction can be seen by this example: Suppose purchase money borrowers fall behind in their payments. The loan is overdue. The borrowers want to extend the loan maturity date because they can't repay the loan on time. The seller agrees to extend the maturity date of the loan, in exchange for an increase in the interest rate from 10% to 15% (a rate above the usury ceiling, but comparable to market rates at the time). The lender could refuse, insist the overburdened borrower pay on time, let the borrower default, and then foreclose. The purchase money lender would purchase the security property at foreclosure. Then the lender could resell the home subject to a new 15% loan. This loan would clearly be "purchase money." As such, it would enjoy an automatic usury exemption. But if the lender had simply substituted a new loan for the old one and saved the borrower the costs and distress of foreclosure, the substituted loan would probably have been usurious. Some courts have thought this anomaly absurd. "If the parties could lawfully avoid the usury laws indirectly by going through the foregoing convoluted process, there should be no reason why they should not be able to do so *directly*." n87

Distinguishing a Joint Venture from a Loan. If L advances funds to B for investment on the understanding that L is to receive half the profits, the fact that the anticipated profit level could yield L a return far above 10% doesn't necessarily mean L has committed usury. For usury laws to apply, the transaction needs to be a loan, not a joint venture or partnership. The criteria distinguishing a loan from a joint venture include: whether B is unconditionally obligated to repay L; whether repayment is entirely contingent on the venture's generating profits; whether L and B share losses as well as gains; and whether L and B share responsibility for making investment decisions.

Selling the Loan. Another important "sale or loan" question arises when the original lender sells the loan. Suppose a bank, having made a loan of $1,000 at 10%, sells the note to an investor for $500. The result is that the investor who bought the note is collecting interest at a rate greater than 10%-20% in this case.

These transactions aren't regarded as usurious; they are "sales" of notes in the secondary mortgage market. The borrower is paying only the legal rate of interest on the $1,000 actually borrowed. It is the originating lender who loses $500 by selling the loan at a discount. Usury laws are dedicated to protecting borrowers, not lenders, from "excessive" charges. n88

A deviously clever lender, seizing upon the distinction between originating a loan and buying an existing loan, might try to disguise an origination as a sale. The lender would do this by setting up a "straw" lender who would make the loan

and immediately sell it to the "true" and "usurious" lender at a deep discount. The borrower *who receives only the discounted sum* has a good claim of usury against the "straw." The borrower can reach the true lender only by proving that the straw was acting for the lender all along. n89

It is sometimes difficult to tell whether an originating lender is selling a loan or just borrowing against it. If the primary lender merely borrows money from a secondary lender, pledging the deeds of trust obtained from the borrowers as collateral for the loan, the lender might be subject to usury limits. In one example of an obvious sale, Lender 1 sells a loan or group of loans to Lender 2 for a fixed sum. This transaction would not fall under the ambit of usury laws. But suppose Lender 1 guarantees Lender 2 against losses, retains the right to service the loans and even enjoys a right to repurchase them. Suppose as well that Lender 2 only paid 70-80% of the loans' fair market value. This "sale" may well be recharacterized as a "loan." Furthermore, not only might it be usurious, if Lender 1 went bankrupt, Lender 2 could be classified a general, unsecured creditor, not the owner of the loans. n90

§ 104.03(f)(4)(ii) What Is "Interest"? n91

In determining whether a particular payment is "interest" for usury purposes, courts are not as concerned about what the borrower pays, as they are with what the lender receives as a charge for the use of money. But an informed borrower who is comparative shopping for a loan will consider the total costs of the loan. To the borrower, it doesn't matter whether the money paid is classified as "interest" or just "fees." Instead of waiting for the loan closing documents to see what the loan finally costs, she will ask in advance about all the charges she will have to pay to close the loan, which may include more than just the face amount of interest on the note and origination fees such as points and discounts.

(1) *Lender Fees*: Lenders charge fees for originating loans, committing themselves to make a loan at a fixed future date, getting appraisals, credit reports, surveys, and title insurance, administering loan escrows, preparing mortgages, recording and processing loans, and paying for underwriters' fees and legal work (possibly on the high side, since lawyers know their clients are passing these costs along to borrowers who desperately want the loans and probably won't question the fees). n92 Fees are not treated as interest if they are charges for something other than the use of money, especially if the fee is paid to a third party--lawyer, appraiser, or escrow agent. n93

Here is one law professor's critique of the general rule that fees aren't counted as interest for usury purposes:

> The common-law rule was that closing costs paid out immediately to third parties (e.g., survey fees, title charges, and taxes) are not includable as interest because they are not compensation to the lender. Although some of the charges are incurred at the lender's insistence, courts reasoned that it is ultimately in the borrower's self-interest to be certain of boundaries and the title's validity. This theory fails to justify not allocating at least part of those lender-required fees to the interest rate; nor is it persuasive when applied to payments for property appraisal, credit checks, and attorney review of loan agreements. The benefit of these latter tasks inures almost entirely to the lender. Despite these objections, state legislatures ratified the common law when they drafted detailed usury law definitions of interest after 1966.
>
> Under the common law, charges that the lender retains to pay for its own performance of loan-related services are also not interest, as long as these charges are "reasonable." Because courts rarely found lender charges unreasonable, this rule effectively excluded lender-retained closing costs from classification as interest. Nevertheless, this rule was followed by legislative codifications in the 1960's and 1970's. n94

(2) *Points and Discounts*: What about "points" and discounts from the amount borrowed? "Points" refer to the percentage of the loaned amount which the borrower pays the lender for the loan. "Discounts" are deductions from the face amount of the loan. A loan of $100,000 at two points costs the borrower $2,000. A loan discounted by two points

will net the borrower $98,000, although her repayment will be calculated as if she had received the full $100,000.

For usury purposes, courts treat "points" and discounts as interest if they are paid by the *buyer*. n95 They are then amortized over the estimated or actual life of the loan when making usury calculations. "Seller-paid points were not often challenged because homebuyers were not aware that they were paid. When they were challenged, they posed difficult questions." n96

Incidentally, a lender's preference for "point" v. "interest" income depends quite a lot on federal tax and accounting practice. Lenders whose stock is actively traded on securities markets are eager for "income now" to boost their current reported earnings and thus push up the value of their stock. When conventional accounting practice allowed lenders to count points as earnings in the year the loan was made, they got as many "points" "up front" as they could. Current accounting practice requires that points and "original issue" discounts be amortized over the life of the loan. Most loans are paid before maturity. Since "points" are amortized over the stated life of the loan and are not recognizable as income sooner than the stated maturity unless the loan is prepaid, income from point-taking or discount-charging is understated. As a reult, you will see ads offering "no-point" loans. When loans are prepaid before maturity, the lender can then count as income the revenue from points or discounts not already booked.

Sometimes lenders charge borrowers a commitment fee in exchange for the lender's promise to make a loan at a later date. The lender's commitment letter gives the borrower the option of taking the loan or not. Is the commitment fee "interest" for usury calculations?

The common-law authorities generally agreed that bona fide commitment

fees are not interest because the fee is not paid for the use of money, but only for the option of later using it. In the integrated home sale and loan transaction, however, this "option" is almost always exercised, as the homebuyers will use most or all of the precommitted mortgage money. After 1966, a few states did redefine interest to include mortgage commitment fees under some circumstances. n97

(3) *Late Charges and Prepayment Penalties*: Late charges and prepayment penalties are legitimate costs of doing business and are deductible as interest paid by the borrower if otherwise qualified under the Internal Revenue Code. n98 They are also taxable income for lenders. But they aren't interest for usury calculations because the borrower has the option of avoiding the charges by paying on the scheduled due date. n99

Similarly, even though borrowers may deduct interest on purchase money loans made by sellers and the sellers are taxed on the income they receive from the loan, the loans are treated as part of a sale and thus escape the usury net. Moreover, sellers who take back notes for part of the purchase price and charge interest at less than 9% risk having some of the principal recharacterized as interest for federal income tax purposes. n100

§ 104.03(f)(4)(iii) Intent.

"Intent" to make a usurious loan is a question of fact, not law. n101 That means the trial court's determination will usually be upheld. "A review of the plethora of decisions involving the issue of usury indicates a great deal of apparent inconsistency. Different cases with similar facts reach opposite conclusions." n102 An unspoken premise is that usury laws are intended to penalize lenders for exploiting the necessitous and unwary. So the comparative sophistication of the parties matters. Once a court decides to treat a transaction as a usurious loan, the element of intent is readily overcome. Lenders are presumed to know the law. Usually, all the borrower needs to prove is that the lender voluntarily and consciously accepted interest at more than the legal maximum.

The "intent" element gives courts a chance to uphold deals that seem reasonable, even though they could be analyzed as disguised, usurious loans. Say a film or TV producer runs short of cash and promises a financial angel the right to buy

stock in the production company or project at a favorable price, with a repurchase option or even a repurchase obligation. The investor's return on the cash put up might exceed the usury limit, but the risks of film production are great, the investor's return was justified by the risk, and the borrower initiated the deal and even suggested using purchase options to skirt the usury laws. Later, the borrower invokes the usury law and seeks treble damages. California courts, in several cases like this, have found no "intent" to commit usury and have enforced the deals as agreed upon. n103

In other situations, California courts found the requisite intent where the lender contracted for "disguised" interest in sums that seemed excessive in light of the risk. In one case, the plaintiff owned 182 acres that it was trying to develop for a golf course (120 acres) and some houses (62 acres). A teamsters union pension fund had agreed to lend $500,000 to finance the project in two years, but couldn't advance the funds before that time. The plaintiff ran short of cash while developing the golf course and tried to borrow against the teamster loan commitment.

The defendants agreed to loan $500,000 at 91/2%, ostensibly. But in reality, the defendant-lender wanted 10% on top of that, so the plaintiff-borrower was persuaded to grant the defendant an option to buy the residential acreage (62 acres) at $3,000 per acre--a price well below its market value. As part of the deal, the defendant gave the plaintiff a reciprocal option to repurchase the 62 acres and thereby erase the lender's bargain deal. Under the option, the plaintiffs could repurchase the land at $800 per acre in the first year of the loan, $1,600 in the second, $3,200 in the third, $4,000 in the fourth, and $4,800 in the fifth year, but not until the $500,000 had been repaid.

The plaintiff breached, but won a judgment that the loan terms were usurious. He didn't have to pay interest on the $500,000 note, and got back the interest he had already paid.

The defendant-lender appealed and lost. At trial, it came out that the lender and developer had agreed to a 91/2% loan with 10 "points." The lender felt that he couldn't make a decent profit on any less of a return than that. The repurchase option had been set to yield about $50,000 per year ($800 x 62 acres) to the lender, in addition to its fixed 91/2% return. Thus, lender received an effective return of nearly 20% per year. The court found the evidence sufficient to show usurious intent. n104

§ 104.03(f)(4)(iv) "Absolutely, Not Contingently, Repayable."

This criterion denotes the difference between equity and debt. The classic formulation appears in the *Restatement of Contracts* § 527 (1932). It excepts any repayment obligation from usury, "... if the repayment promised on failure of the condition to occur is materially less than the amount of the loan or debt with the highest permissible interest...." Comment a:

> If the probability of the occurrence of the contingency on which the diminished payment is promised is remote, or if the diminution should the contingency occur is slight as compared with the possible profit to be obtained if the contingency does not occur, the transaction is presumedly usurious.

Hence, the contingent interest feature escapes usury on the Restatement's terms if: (1) the borrower's promise to pay is conditional, (2) the portion of the repayment at a fixed rate is "materially" below the usury ceiling, (3) the contingency that could cause the lender to lose the right to the interest above the usury limit is more than remote, and (4) the lender's loss if the contingency failed would be more than "slight."

Bondholders and mortgagees are usually guaranteed repayments in the sense that the borrower promises repayment absolutely. By contrast, shareholders have no right to dividends; these are discretionary or "contingent" and depend entirely on profits and corporate practice. In fact, you might have to sell your stock at a loss. Therefore, equity interests with no guarantee of repayment do not count as loans.

Contingent yields on loans are also exempt.

> It is the general rule that a loan in consideration of a share of profits, income, or earnings, in lieu of, in addition to, interest, is not usurious, in the absence of certainty that the arrangement would produce a return in excess of the legal rate of interest, *even though the principal is to be repaid in any event.* [Emphasis added] n105

Consider three cases:

(1) A creditor is promised a full return of principal at the highest legal rate of interest *plus* a share in the debtors' profits. This deal oversteps the Restatement's bounds of the "contingency" rule. First, the creditor gets the highest legal rate of interest no matter what happens. Any debtor profit--a dime's worth--will push the creditor's yield over the usury limit line. Second, there is only a slight chance that the enterprise will never make a profit. Why would anyone invest if they thought otherwise?

(2) A lender agrees to forego *any* fixed and definite return in exchange for a percentage of net (i.e., after expenses) profit. Even if that percentage eventually yields the lender a sum greatly exceeding the usury limit, the lender isn't violating usury laws. The lender isn't receiving any interest, you might say, or, alternately, all of the return is totally contingent because none of it is absolutely repayable. n106

(3) The debtor guarantees the lender a partial return of principal and a very high interest rate--but lower than the usury limit--plus an equity "kicker" based on the debtor's profit. This case is a close one. The contingency exemption might or might not save the lender. You can see the determining factors by reviewing the first two examples.

§ 104.03(f)(5) Exempt Lenders.

Many types of lenders are exempt from usury laws, either by federal or state law. Most lenders, including banks, are exempt from state usury laws under the Depository Institutions Deregulation and Monetary Control Act of 1980, n107 but not all lenders are covered by the federal preemption. For instance, pension funds do not enjoy the benefit of the preemption. Moreover, if a nonexempt lender arranges a loan through a bank which is exempt, this won't protect the nonexempt lender from otherwise being subject to a state's usury law.

Equally significant, the federal law only applies to lenders whose loans are "secured by a first lien on residential real property." n108 On loans secured by commercial property or home equity loans, lenders are still potentially subject to state usury laws. California, Connecticut, Colorado and Delaware exempt banks. Savings banks are exempt in California, Colorado, Connecticut, Florida, Illinois, Louisiana, Minnesota, Ohio, South Dakota, and West Virginia. n109

To see how subtle some lender exemptions are, consider the real estate broker's exception in California. Loans made or "arranged" by real estate brokers are exempt under Article XV of the California Constitution. To *make* a loan, the broker must actually be supplying the loan funds. To *arrange* a loan, the broker must act as an intermediary and collect fees for arranging the loan, in order for the lender to rest assured that the transaction will be exempt from usury laws.

In *Jones v. Kallman*, n110 a loan qualified for exemption because it was "arranged" by a licensed real estate broker, even though the broker had only "minimal participation" in arranging it. The court held that some "compensation" to the broker would be necessary to exempt the loan from the state usury law. "Points" were paid to a partner of the broker, who put a portion of the points into the partnership business, thereby "compensating" the broker. n111

This is an important case since many real estate brokers facilitate the closing of deals by seeking financing for their clients. Under *Jones*, real estate brokers can now claim exemptions as "arrangers" and cite fees received as proof of it.

Any California lender working with a real estate broker can provide funding under the broker's "arranging" exemption, and probably be free of usury constraints.

§ 104.03(f)(6) The Corporate Borrower Exemption.

The usury laws in about thirty states exempt corporate borrowers. n112 In other states, usury rate limits for corporate borrowers are above those for noncorporate borrowers.

> The corporate exception statutes fix differing qualifications for the exemption. Many of them provide blanket corporate exemptions, but in some states there are special limitations. In New York, for example, the exemption does not apply to a corporation whose principal asset is a one- or two-family dwelling if it was organized within 6 months prior to the execution of any notes or security instruments issued in connection with the loan. The Washington statute makes a corporate borrower subject to the usury law on obligations on which an individual is also liable.
>
> There has been a split of authority as to whether the exemption statutes apply to a corporation organized specially for the purpose of taking advantage of them. In New York it is permissible to form a corporation for the express purpose of avoiding the usury laws, and the same result has been reached in Maryland and Illinois on an estoppel theory.
>
> On the other hand, New Jersey has taken a very hard line, holding that the defense of usury is available where a corporation is formed in an attempt to avoid the usury statutes. In 1956, the New Jersey Supreme Court suspended from practice for a year a lawyer who had arranged an incorporation for the purpose of avoiding the usury statute. Florida also has decisions inferring that general usury statutes apply where the incorporation is for the sole purpose of avoiding them. Even in New York, there are limits to the corporate exemption rule. In a case where the husband and wife, owners of a small incorporated retail hardware business, borrowed money through the corporation for the purpose of making a down payment on a home they were purchasing, the court held that the corporate exemption did not apply.
>
> The effect of the corporate usury exemption, in spite of the cases holding that it cannot be used for the sole purpose of avoiding the usury statutes and in spite of exclusions from the corporation exceptions like those in New York and Washington, is to provide a vehicle by which borrowers for a business purpose can escape the general usury laws. Incorporation may be inconvenient and may increase the total cost of the loan, but the incorporation method can be and is used to provide financing which would not otherwise be available. n113

§ 104.03(f)(7) Penalties.

State usury laws vary hugely in their penalties for breach. Some work a forfeiture of principal and interest. n114 Others relieve the debtor of the obligation to pay any interest at all. n115 Some disallow only the collection of that amount of interest which exceeds the usury limit and impose no other penalty. n116 Some laws discharge the borrower from paying any interest, allow the borrower to offset interest paid against the principal due, and provide damages for treble the amount of excess interest actually paid. n117 Willful usury is a felony in some states, punishable by up to five years in state prison, n118 and a misdemeanor in nearly a dozen others. n119 There are relatively short statutes of limitations, though.

Lenders retain the right to foreclose on a deed of trust even if the underlying note was usurious; however, the debt may be reduced because of the usury violation.

§ 104.03(f)(8) Savings Clauses.

Some lenders try to limit their usury damage exposure by using savings clauses. Usury savings clauses are designed to negate the intent element, i.e., that the lender voluntarily and consciously accepted interest exceeding the legal maximum. They reduce charges to legal limits, with no refunds for past overcharges. However, courts have found loans usurious, notwithstanding the inclusion of such clauses. n120

Whether the inclusion of a usury savings clause negates per se a lender's intent to charge usurious interest was the subject of a recent decision of the Florida Supreme Court in Jersey Palm-Gross, Inc. v. Paper. n121 The plaintiff real estate partnership, faced with a purchase money loan that was almost due, urgently needed a $200,000 bridge loan for construction of an office building. The defendant real estate developer declined their offer of an equity partner interest upon investment of $200,000, but agreed to an 18-month loan of $200,000 at 15% interest (total interest of $45,000). Shortly before closing, the defendant insisted on a 15% equity interest as additional consideration. The equity interest, valued at $90,000, effectively raised the interest rate to 45%. The legal interest limit in Florida is 25%, with forfeiture of the principal as a penalty for usury. n122When the developer sued the borrowers for repayment of the loan that was in default, the borrowers defended on the basis that the loan was an unenforceable debt because it was usurious. The developer appealed the trial court's order of forfeiture, arguing that the court had failed to consider a usury savings clause in the promissory note when the issue of intent was determined.

The Supreme Court approved and adopted the appellate ruling that a usury savings clause was only "one factor to be considered in the overall determination of whether the lender intended to exact a usurious interest rate. Such a standard strikes a balance between the legislative policy of protecting borrowers from overreaching creditors and the need to preserve otherwise good faith, albeit complex, transactions which may inadvertently exact an unlawful interest rate." n123 Holding that a usury savings clause cannot by itself preclude a usury finding, the court reasoned that a contrary holding would permit a lender to circumvent the usury laws by merely including a disclaimer of usurious intent in a contract with a clearly usurious interest rate.

Borrowers have no right to waive their protection under the usury law. So savings clauses aren't exculpatory per se. A "savings" clause did rescue the lender in *Arneill Ranch v. Petit.* n124 California's usury law provides for floating rates capped at 5% above the Federal Reserve Bank, San Francisco, discount rate. The rate in *Arneill Ranch* was tied to prime, and below the usury ceiling on the day the loan was entered. The prime rate increased faster than the discount rate and the lender found itself with a loan earning interest above the usury ceiling. The court invoked a savings clause in the note to justify its conclusion that the lender hadn't intended to make a usurious loan.

A lender also successfully invoked a savings clause in a more doubtful situation in *In re Dominquez.* n125 The maximum allowable rate under the usury law at the time of the loan was 16.5%. The contract interest rate was 17% and thus above the usury ceiling on the day the note was written. Nonetheless, the court invoked the savings clause as evidence the lender lacked intent to make a usurious loan.

§ 104.03(f)(9) Choice of Laws.

Suppose a lender doing business in New York agrees to lend money to a California corporation for a development project in California. The loan is executed and funds are disbursed and repaid in New York. The loan agreement specifies that New York law is to govern the transaction.

The borrower defaults and the lender sues in California. The borrower contends that California law should apply, under which corporations enjoy the protection of the usury law. In New York, they don't. Which state's usury law will the courts apply to the contract?

The governing standard is the *Restatement (Second) of Conflict of Laws* § 203 (1971):

> The validity of a contract will be sustained against the charge of usury if it provides for a rate of interest that is permissible in a state to which the contract has a substantial relationship and is not greatly in excess of the rate permitted by the general usury law of the state of the otherwise applicable law...

"Substantial relationship" is defined as a "normal and natural relationship to the contract and the parties." Comment C, § 203.

Many cases on conflict of laws and usury have ruled that states do not have such an overwhelming public policy concern in its usury laws as to override the contracting parties' decision to choose the law of another state, as long as there was some nexus between the parties, the transaction and the other state. n126

In this case, California courts will honor the New York choice-of-law agreement. They see support for their view that the state doesn't have an uncompromising public policy preference for its own usury laws, because the law itself exempts most institutional lenders. Further, California was one of those states that elected *not* to opt out of the federal usury preemption statute. Therefore, we shouldn't expect California courts to set aside a "choice of law" provision merely because it frees the lender from California's usury law.

Nonetheless, the parties still must demonstrate that their contract has a reasonable relationship to the state whose law they have chosen. Practically, this means that usury disputes concerning contracts with choice of law provisions can't be readily resolved on the pleadings. An evidentiary trial is usually going to be necessary. n127

One way a lender might avoid the ordeal of an evidentiary trial is to add a choice-of-jurisdiction provision to its documentation, requiring that the case be tried in a state which is more friendly to the parties' choice of law rules. n128

FOOTNOTES:

(n1)Footnote 44. Harris, *The Effect of Real Rates of Interest on Housing Prices,* 2 J. Real Est. Fin. & Econ. 47 (1989). There is a sizeable amount of finance literature on this theme. *See* Patric H. Hendershott, *Real User Costs and the Demand for Single-Family Housing,* 2 Brookings Papers on Econ. Activity 401 (1980); Patric H. Hendershott, *Home Ownership and Real House Prices: Sources of Change, 1965-1985,* 7 Housing Fin. Rev. 1 (1988).

(n2)Footnote 45. Allan Axelrod et al., Land Transfer and Finance 178-80 (3d ed. 1986).

(n3)Footnote 46. *12 U.S.C. § 3801 et seq.* The statute also allowed other alternative mortgage instruments, such as the shared appreciation mortgage, the reverse annuity mortgage and the graduated payment loan described in Chapter 15, *infra*.

(n4)Footnote 47. This has been done by secondary market makers who insist that monthly payments on the loans they purchase not rise by more than 7.5% in any year. *See* William N. Eskridge, Jr., *One Hundred Years of Ineptitude: The Need for Mortgage Rules Consonant with the Economic and Psychological Dynamics of the Home Sale and Loan Transaction, 70 Va. L. Rev. 1083, 1171 n.276 (1984).*

(n5)Footnote 48. *15 U.S.C. § 1601 et seq.*

(n6)Footnote 49. *Beach v. Ocwen Fed. Bank, 523 U.S. 410 (U.S. 1998)* (The borrowers obtained a load in 1986. In 1991 they stopped making mortgage payments, and in 1992 the lender commenced a foreclosure action. The borrowers hoped to rescind the mortgage based on the lender's violation fo the Truth in Lending Act (TILA). The Supreme Court held that the TILA allows borrowers to sue for damages within 1 year of closing, and allows borrowers to allege damages in defense even if the 1-year time period has expired. However, borrowers cannot ask for rescission fo the mortgage after the 3-year time period regardless of their procedural posture in the litigation. The 3-year time period is not a statue of limitation. The 3-year time limit on rescission is based on the very clear Congressional intent that borrowers should not be able to rescind based on TILA after 3 years have passed since closing.); *Green Tree*

Acceptance, Inc. v. Anderson, 981 P.2d 804 (Okla. Ap. 1999) (The lender brought suit to foreclose a mortgage. The borrower claimed he did not understand the nature of the transaction and the legal implications of mortgaging his house. Borrowers was allowed to counter-claim seeking damages under the Truth in Lending Act and asserting that he was never told of his rights to rescind); *Berkeley Federal Bank & Trust v. Siegel, 669 N.Y.S.2d 334 (N. Y. App. Div 1998)* (The lender commenced foreclosure proceedings and the borrower asserted TILA and demanded rescission. The court determined that the foreclosure proceeding could continue, if the borrower failed to tender the loan principal in a timely manner); *Truth in Lending-Recession, Consumer Remedies and Creditor Defenses in closed-End Transactions, 19 U. Tol. L. Rev. 491,* (1988).

(n7)Footnote 50. *15 U.S.C. § 1605(F).*

(n8)Footnote 51. *16 F.3d 1142 .*

(n9)Footnote 52. *12 C.F.R. 226.32(a).*

(n10)Footnote 53. *12 C.F.R. 226.32(a).*

(n11)Footnote 54. *15 U.S.C. § 1639(h).*

(n12)Footnote 55. *15 U.S.C. § 1639(f).*

(n13)Footnote 56. *15 U.S.C. § 1639(e).*

(n14)Footnote 57. *15 U.S.C. § 1639(c), (d).*

(n15)Footnote 58. Some researchers have suggested that the margin depends on how tight the caps are on the loan, the length of the rate adjustment frequency, the type of index used, the contract rate, the loan size, the up-front fees, and the call for prepayment and other options (*e.g.,* "due-on-sale" features). *See, e.g.,* Jarjisu Sa-aadu & Clemon F. Sirmans, *The Pricing of Adjustable Rate Mortgage Contracts,* 2 J. Real Est. Fin. & Econ. 253 (1989); *Bastin v. First Indiana Bank, 694 N.E.2d 740 (Ind. App. 1998)* (Borrower had taken an adjustable rate mortgage and sued the lender claiming that the lender had improperly calculated the interest rate. The rate was to be based on the average rate of 6 month U.S. Treasury bills and could be adjusted every 6 months. The lender initially obtained the rate information from the Federal Reserve Board statistical report and later began obtaining the rates from the Wall Street Journal. The borrower argued that in a period of increasing rates, the one week timing difference between the publication of the rates from the 2 sources hurt the borrower. The court held that the lender was required to use the Federal Reserve Board statistical report); *Hubbard v. Fidelity Federal Bank, 91 F.3d 75 (9th Cir. 1996)* (The lender was supposed to send notice of the annual payment adjustment between 30 and 45 days before the payment adjustment took place. The lender began to send the notices 65 days before the change and the borrower alleged that the lender was therefore improperly calculating the interest rate. The borrowers were allowed a breach of contract claim, but it was limited by the statute of limitations); *Circle Mortg. Corp. v. Kline, 645 So.2d 75 (Fla. Dist. Ct. App. 1994)* (The borrower claimed diminution in the value of his loan caused by the lender's breach in failing to execute new documents that stated the interest rate for his adjustable rate mortgage. The court held that the damages would be too speculative considering the borrower had not sold his home, and there was evidence that the loan wouldn't lose much value if it were refinanced).

(n16)Footnote 59. Several articles have been written on how consumers can compare fixed vs. adjustable rates. James Alm & James R. Follain, *Consumer Demand for Adjustable Rate Mortgages,* 6 Housing Fin. Rev. 1 (1987); Michael R. Asay, *Pricing and Analysis of Adjustable Rate Mortgages,* 45 Mortgage Banking 61 (Dec. 1984); Upinder S. Dhillon et al., *Choosing Between Fixed and Adjustable Rate Mortgages,* 19 J. Money, Credit and Banking 260 (1987); Statman, *Fixed Rate or Index-Linked Mortgages from the Borrower's Point of View: A Note,* 17 J. Fin. & Quantitative Analysis 451 (1982).

(n17)Footnote 60. The O.T.S. has taken the place of the Federal Home Loan Bank Boards, and maintains Federal

Home Loan A.R.M. (Adjustable Rate Mortgage) Indexes, including the widely used 11th O.T.S. (formerly F.H.L.B.) index.

(n18)Footnote 61. This index is the average of interbank offered rates for dollar deposits in the London market based on quotations at five major banks.

(n19)Footnote 62. Anders, *U.S. Lenders Tie Mortgages to London Interbank Rate,* Wall St. J., Aug. 3, 1988, at B1.

(n20)Footnote 63. Duke, *Adjustable-Rate Mortgage Errors Spark Concerns,* Wall St. J., Oct. 26, 1990, at A16.

(n21)Footnote 64. Jan K. Brueckner, *The Pricing of Interest Rate Caps and Consumer Choice in the Market for Adjustable-Rate Mortgages,* 5 Housing Fin. Rev. 119 (1986); Christopher L. Peterson, *Truth, Understanding, and High-Cost Consumer Credit: The Historical Context of the Truth in Lending Act, 55 Fla. L. Rev. 807 (2003).*

(n22)Footnote 65. A.B.A. Standing Comm. on Lawyers' Title Guaranty Funds, Buying or Selling Your Home 14 (1991); *Preston v. First Bank of Marietta, 473 N.E.2d 1210 (Ohio App. 1983)* (Borrowers brought suit against their lender, challenging the lender's ability to raise interest rates according to the variable rate mortgage agreement. The court held for the borrowers, determining that the terms of the variable rate mortgage were too vague to be valid. The agreement put no limits on the interest rate or the amount the borrowers must pay. The lenders could enforce an interest rate increase, but the borrowers could not enforce an interest rate decrease); *but see Murello Constr. Co. v. Citizens Home Sav. Co., 505 N.E.2d 637 (Ohio App. 1985)* (variable rate loans are valid despite the lack of an ascertainable standard for computing the interest payments, at least in commercial settings. The court distinguished this case from Preston by stating that the borrowers in Preston were "unsophisticated consumers," whereas the borrowers in this case were "astute businessmen and their attorneys").

(n23)Footnote 66. Myers, *Negative-Amortization Stirs Unease,* L.A. Times, Oct. 21, 1990, at K8.

(n24)Footnote 67. Jarjisu Sa-aadu, *Legal Restrictions, Credit Allocation and Default Risk under Fixed and Adjustable Rate Mortgages,* 7 Housing Fin. Rev. 225 (1988). The author studied defaults for 1979-1985 at First Federal Savings and Loan Association, Davenport, Iowa. Among his conclusions: A.R.M. defaults are the same regardless of the index used, and "the practice of capping may not be effective in reducing default risk and/or the reduction achieved through capping may not completely offset the risk of negative amortization engendered by capping." *Id.* at 245.

(n25)Footnote 68. *See Harris v. Coles, 60 S.W.3d 848 (Tenn. App. 2001)* (maker of promissory note is required to pay only simple interest).

(n26)Footnote 69. *Deuteronomy* 23:19: "Thou shalt not lend upon usury to thy brother...."; 23:20: "Unto a stranger thou mayest lend upon usury...." (King James).

(n27)Footnote 70. "But love your enemies, and do good, and lend, expecting nothing in return...." (New American Standard).

(n28)Footnote 71. Pascal Salin, *Usury,* 15 Encyclopedia of the Social Sciences, 193-94 (Edwin Robert Anderson Seligman ed. 1934). *See generally* Guyora Binder & Robert Weisberg, *Cultural Criticism of Law, 49 Stan. L. Rev. 1149, 120106 (1997);* Cindy T. Beal, Note & Comment, *Recent Changes in the Texas Usury Statutes--Do They Affect Common Law Usury Claims? 3 Tex. Wesleyan L. Rev. 421, 424 (1997).*

(n29)Footnote 72. Marion Benfield, *Money, Mortgages, and Migraine--The Usury Headache, 19 Case W. Res. L. Rev. 819 (1968).* Professor Benfield did see great advantages, however, in legislation which limited interest rates on small loans to consumers. "The enactment of small loan laws substantially improved the position of the consumer-borrower of small sums by supplanting low usury rates which provided a reasonable profit for credit suppliers. Social science researchers have made it clear that such laws do lower interest rates to consumers and that, in

their absence, in more recent times, rates have been five or six times higher than the small loan rates." *Id. at 840 n.108. See also* Richard Lewis Peterson & Gregory, A. Falls, Impact of a Ten Percent Usury Ceiling: Empirical Evidence (Credit Research Center, Purdue Univ. 1981) (Credit was more available to low income borrowers in Little Rock, Arkansas, with a 10% usury ceiling, than in most states permitting higher rates)

(n30)Footnote 73. *Id.*

(n31)Footnote 74. *See* Section 104.03(f)(3) *below*.

(n32)Footnote 75. *12 U.S.C. § 1735-5*.

(n33)Footnote 76. *12 U.S.C. § 1735-5*. The primary usury preemption was contained in the Alternative Mortgage Transactions Parity Act, *12 U.S.C. § 3801 et seq.*, and now applies to any loan that is: (1) Secured by residential real property, stock in a residential housing corporation, or a first lien on a manufactured home; and (2) *Made by a lender insured or* regulated by an agency of the federal government, approved by the Secretary of Housing and Urban Development for participation in a mortgage insurance program under the National Housing Act, or who is an individual financing the sale or exchange of the individual's principal residence [emphasis added]; or (3) Made, insured, guaranteed, supplemented, or assisted in any way by an officer or agency of the federal government or under or in connection with a housing, urban development or related program administered by a federal officer or agency; or (4) Eligible for purchase by the Federal National Mortgage Association, the Government National Mortgage Association, or the Federal Home Loan Mortgage Corporation or is from a financial institution from which it could be purchased by the Federal Home Loan Mortgage Corporation; or (5) Made by a creditor who makes or invests in residential loans including loans or credit sales secured by first liens on manufactured homes, aggregating more than $1,000,000 per year; or (6) Made by any creditor who sells manufactured homes financed by loans or credit sales, if the creditor has an arrangement to sell or does sell the loans or credit sales to another lender, institution, or creditor that does not make or invest in residential real estate loans or credit sales secured by first liens on manufactured homes aggregating more than $1,000,000 per year. Many states have adopted usury laws governing retail installment sales, small loans, second mortgages, and pawnbrokers. *See* National Consumer Law Center, Usury and Consumer Credit Regulation (1987 & Supp.) 37. *See also Varr v. Olimpia, 53 Cal. Rptr. 2d 106 (1996)* .

(n34)Footnote 77. *In re Stipetich, 294 B.R. 635 (W.D. Pa. 2003)* (the investment loan constituted a commercial loan because it was used for an investment in a commercial enterprise and therefore was excludable from Maryland's usury laws.

(n35)Footnote 78. The fifteen states are Alaska, Colorado, Georgia, Idaho, Iowa, Kansas, Maine, Massachusetts, Minnesota, Nebraska, Nevada, North Carolina, South Carolina, South Dakota, and Wisconsin. *See* William N. Eskridge, Jr., *One Hundred Years of Ineptitude: The Need for Mortgage Rules Consonant with the Economic and Psychological Dynamics of the Home Sale and Loan Transaction, 70 Va. L. Rev. 1083, 1109 n.92 (1984).* California didn't opt to retain its usury law over the federal preemption. Thus, in California the buyer of a shopping center or office building would be protected under the California usury law, but a homebuyer would not be, since the federal statute preempts the state usury law on residential, but not commercial transactions.

(n36)Footnote 79. Charles L. Edson & Barry G. Jacobs, Secondary Mortgage Market Guide, App. C, at 10-15 n.7 (1991).

(n37)Footnote 80. D. Barlow Burke, Jr., Real Estate Transactions 222 (1993).

(n38)Footnote 81. *See, e.g., Golden State Lanes v. Fox, 42 Cal. Rptr. 568 (1965)* . In this case, the "buy back" was mandatory. But even if it had taken the form of an "option," and the value of the "security" property greatly exceeded the option price, the "borrower" would be under pressure to exercise the option; *Crim v. E.F. Hutton, Inc., 381 S.E.2d 492 (S.C. 1989)* (A customer loaned money to his stockbroker. When the stockbroker defaulted, the customer sued the stockbroker's company. The court concluded that the advance was a loan and not a sale of a security, the broker was not

acting in the scope of his employment, and therefore the company could not be liable. The court held that a security is "an investment in a common venture premised on a reasonable expectation of profits to be derived from the entrepreneurial or managerial efforts of others").

(n39)Footnote 82. *Verbeck v. Clymer, 261 P. 1017, 1019 (Cal. 1927)* ; *Mandelino v. Fribourg, 242 N.E.2d 823 (N.Y. 1968)* .

(n40)Footnote 83. If the seller were subject to the Truth in Lending Act (TILA), it might violate the TILA to include the premium a seller charges for buying on credit as part of the "amount financed" instead of including it in the "finance charge." Further, the time price doctrine has been abolished in many Retail Installment Sales Acts and other statutes regulating credit sales. *See* National Consumer Law Center, Usury and Consumer Credit Regulation 12426 (1987).

(n41)Footnote 84. *Lakeview Meadows Ranch v. Bintliff, 111 Cal. Rptr. 414 (1973)* .

(n42)Footnote 85. If the buyer and seller agree to a *new* loan taking the place of the vendor's original purchase money loan, the seller is susceptible to a usury challenge on the new loan. *Ghirardo v. Antonioli, 17 Cal. Rptr. 2d 664(1993) , overruled by Ghirardo v. Antonioli, 924 P.2d 996 (Cal. 1996)* .

(n43)Footnote 86. *D.C.M. Partners v. Smith, 278 Cal. Rptr. 778, 781 (1991)* . Modifications of the original purchase money loan aren't usurious. If the buyer and seller agree to a new loan taking the place of the vendor's original purchase money loan, the seller is susceptible to a usury challenge on the new loan. *Ghirardo v. Antonioli, 17 Cal. Rptr. 2d 664 (1993)* .

(n44)Footnote 87. *DCM Partners v. Smith, 278 Cal. Rptr. 778, 782 (1991) . See also Ferrigno v. Cromwell Dev. Assoc., 689 A.2d 1150, 115354 (Conn. App. 1997)* (Rights and obligations of parties are fixed at time that mortgage note is executed, so that an obligation that is not usurious at its inception will not become usurious as result of subsequent events).

(n45)Footnote 88. Federal tax law requires lenders' "original issue discounts" to be spread over the life of the loan in computing their income for tax liability purposes. *26 U.S.C. § 1272.* But the rules are limited to the "original issue" discount. The lender *selling* a loan at a discount is in quite a different position than one who made the loan originally with "points" or at a discount. The lender selling at a loss is then allowed to deduct it against "like kind" gains. *26 U.S.C. § 163*(e).

(n46)Footnote 89. *Janisse v. Winston Inv. Co., 317 P.2d 48 (Cal. App. 1957) . See* Eugene E. Glushon, *The California Usury Law: The Lender's Trap and the Borrower's Windfall?, 43 Cal. St. B.J. 56 (1968). But see White v. Seitzman, 230 Cal. App.2d 756 (Cal. App. 1964)* .

(n47)Footnote 90. *See, e.g., In re Lemons and Assocs., 67 B.R. 198 (Bankr. D. Nev. 1986)* ; *Major's Furniture Mart, Inc. v. Castle Credit Corp., 602 F.2d 538 (3d Cir. 1979) . See also* Robert D. Aicher & William J. Fellerhoff, *Characterization of a Transfer of Receivables as a Sale or a Secured Loan upon Bankruptcy of the Transferor, 65 Am. Bankr. L.J. 181 (1991);* Homer Kripke, *Conceptual Obsolescence in Law and Accounting--Finance Relations Between Retailer and Assignee of Retail Receivables, 1 B.C. Indus. & Com. L. Rev. 55, 60-61 (1959).*

(n48)Footnote 91. For useful background on various ways of calculating interest, *see* National Consumer Law Center, Usury and Consumer Credit Regulation 63 *et seq.* (1987).

(n49)Footnote 92. For lenders regulated as real estate brokers, California has enacted dollar limits for some of these fees and charges, *e.g.*, capping appraisal, credit report, and other loan processing fees at 5% of the principal loan amount or $390, whichever is greater, but not to exceed $700 in any event. *Cal. Bus. & Prof. Code §§ 10241(a), 10242*.

(n50)Footnote 93. *Phipps v. Guar. National Bank of Tallahassee, 2003 U.S. Dist. LEXIS 16984* (No. 03-420-CV-W-GAF, W.D. Mo., Sep. 17, 2003) (origination and discount fees were considered "interest").

(n51)Footnote 94. William N. Eskridge, Jr., *One Hundred Years of Ineptitude: The Need for Mortgage Rules Consonant with the Economic and Psychological Dynamics of the Home Sale and Loan Transaction, 70 Va. L. Rev. 1083, 1092-93 (1984).* Reprinted with permission.

(n52)Footnote 95. *Fausett & Co. v. G & P Real Estate, Inc., 602 S.W.2d 669 (Ark. 1980)* (discounting loans can violate usury law where the effective rate of interest would exceed the usury limit).

(n53)Footnote 96. Eskridge, *70 Va. L. Rev. at 1093.*

(n54)Footnote 97. *Id. at 1093-94.*

(n55)Footnote 98. *26 U.S.C. § 163.*

(n56)Footnote 99. *See Lazzareschi Inv. Co. v. San Francisco Fed. Sav. & Loan Ass'n*, § 104D(4), *infra*. *Garcia v. Tex. Cable Partners, 114 S.W.3d 561 (Tex. App. 2003)* (late fee was not usurious because it did not constitute interest).

(n57)Footnote 100. *26 U.S.C. § 1274* (1992).

(n58)Footnote 101. *Janisse v. Winston Inv. Co., 317 P.2d 48 (Cal. App. 1957) . But see White v. Seitzman, 230 Cal. App.2d 756 (Cal. App. 1964) .*

(n59)Footnote 102. Harry D. Miller and Marvin B. Starr California Real Estate 646 (2d ed. 1989).

(n60)Footnote 103. *Lindsey v. Campbell, 282 P.2d 948 (Cal. App. 1955)* ; *Martyn v. Leslie, 290 P.2d 58 (Cal. App. 1955) .*

(n61)Footnote 104. *Mission Hills Dev. Corp. v. Western Small Business Inv. Co., 260 Cal. App. 2d 923 (1968) .*

(n62)Footnote 105. *Concord Realty v. Continental Funding, 776 P.2d 1114, 1122 (Colo. 1989) , citing* Annotation, *Agreement for Share in Earnings of or Income from Property in lieu of, or in Addition to, Interest as Usurious, 16 A.L.R.3d 475 (1967). But see Dikeou v. Dikeou, 928 P.2d 1286 (Colo. 1997) .*

(n63)Footnote 106. *Thomassen v. Carr, 58 Cal. Rptr. 297 (Cal. App. 1967)* (where the lender received 30% of the developer's sale profits, the transaction was not usurious).

(n64)Footnote 107. *12 U.S.C. § 1735f-7* exempts "federally related" lenders.

(n65)Footnote 108. *Id.*

(n66)Footnote 109. This list comes from Marion Benfield, *Money, Mortgages, and Migraine--The Usury Headache, 19 Case W. Res. L. Rev. 819, 851 (1968).* Since the article was written in 1968, anyone needing current information needs to check his or her state's current usury law.

(n67)Footnote 110. *244 Cal. Rptr. 609 (Cal. App. 1988) .*

(n68)Footnote 111. The broker's right to collect a fee for this service was challenged as a "kickback" from the lender. "Kickbacks" in real estate settlements or closings are prohibited by the federal Real Estate Settlement and Procedures Act (R.E.S.P.A.). *12 U.S.C. § 2607.* The court, in *McCarrick v. Polonia Fed. Sav. & Loan Ass'n, 502 F. Supp. 654 (D. Pa. 1980)* ruled that such fees aren't kickbacks.

(n69)Footnote 112. Where corporate borrowers are denied the usury defense, they are denied it against national

banks as well. 12 C.F.R. § 7.7310.

(n70)Footnote 113. Benfield, *Money, Mortgages, and Migraine--The Usury Headache, 19 Case W. Res. L. Rev. 819, 849-51 (1968).*

(n71)Footnote 114. Ark. *Const. art. XIX, § 13*; *Conn. Gen. Stat. § 37-8. See also Ferrigno v. Cromwell Dev. Assoc., 689 A.2d 1150, 1152 (Conn. App. 1997)* (As usury penalty, no action may be brought to collect principal or interest on any loan with interest rate in excess of 12%).

(n72)Footnote 115. *Neb. Rev. Stat. § 45-105. See also Barton v. Moore, 558 N.W.2d 746, 748 (Minn. 1997)* (Court held that loan found to be usurious under state law subjected lender to loss of the interest).

(n73)Footnote 116. *Pa. Stat. Ann. tit. 41 § 501*.

(n74)Footnote 117. Cal. Uncod. Init. Meas. & Stat. 1919, Act 1919-1 § 3(a). The borrower may be denied the treble damage remedy if he was the guiding hand and had initiated the transaction. *White v. Seitzman, 41 Cal. Rptr. 359 (1964)* .

(n75)Footnote 118. Cal. Uncod. Init. Meas. & Stat. 1919, Act 1919-1 § 3(b).

(n76)Footnote 119. *See, e.g.,* A.R.S. 41.

(n77)Footnote 120. Ronald Friend, *Shared Appreciation Mortgages, 34 Hastings L.J. 329, 348 (1982).* Two cases finding the loans usurious anyway are: *Oklahoma Preferred Fin. & Loan Corp. v. Morrow, 497 P.2d 221 (Okla. 1972)* and *Southwestern Investment Co. v. Hockley County Seed & Delinting, Inc., 511 S.W.2d 724 (Tex. 1974)* . Compare *Imperial Corporation of America v. Frenchman's Creek Corp., 453 F.2d 1338 (5th Cir. 1972)* , where the interest exceeded the legal limit by $3,835, but the entire amount of interest was not forfeited because of the clause. Instead, the excess interest was applied to the principal balance. *See also Coastal Cement Sand Inc. v. First Interstate Credit Alliance Inc., 956 S.W.2d 562, 572 (Tex. App. 1997)* (Savings clause is ineffective against usury claim if it directly contradicts explicit terms of contract).

(n78)Footnote 121. *658 So. 2d 531, 535 (Fla. 1995)* .

(n79)Footnote 122. *Fla. Stat. ch. 687.071(7).*

(n80)Footnote 123. *Jersey Palm-Gross, Inc. v. Paper, 658 So. 2d 531, 535 (Fla. 1995)* .

(n81)Footnote 124. *Arneill Ranch v. Petit, 134 Cal. Rptr. 456 (Cal. App. 1976) . See also Parhms v. B & B Ventures, Inc., 938 S.W.2d 199 (Tex. App. 1997)* (Late payment provision of land contract did not unequivocally call for usurious interest and usury savings clause was effective).

(n82)Footnote 125. *In re Dominquez, 995 F. 2d 883 (9th Cir. 1993)* .

(n83)Footnote 126. *Ury v. Jewlers Acceptance Corp., 38 Cal. Rptr. 376 (1964)* ; *Gamer v. Forgan, 135 Cal. Rptr. 230 (1976)* . In *Continental Mortgage Investors v. Sailboat Key, Inc., 395 So. 2d 507 (Fla. 1981)* , the lender was in Massachusetts and the loan was made and repaid there. The agreement specified that Massachusetts law was to apply. The borrower and property were in Florida. The court upheld the parties' choice-of-law provision because the provision was agreed upon by both parties in good faith, wasn't devised to evade usury laws, and Massachusetts had a "normal relation" with the transaction.

(n84)Footnote 127. *Mencor Enters. v. H.E.T.S. Equities Corp., 235 Cal. Rptr. 464 (1987)* .

(n85)Footnote 128. *See* Note, *Choice-of-Law, Venue, and Consent-to-Jurisdiction Provisions in California*

Commercial Lending Agreements: Can Good Draftsmanship Overcome Bad Choice-of-Law Doctrine?, 23 Loy. L.A. L. Rev. 1337 (1990).

1 Parts of this chapter have been adapted from George Lefcoe, Real Estate Transactions (Michie 1993).

Thompson on Real Property, Thomas Editions

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CHAPTER 104 THE PROMISSORY NOTE IN REAL ESTATE TRANSACTIONS 1

13-104 Thompson on Real Property, Thomas Editions § 104.04

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§ 104.04 The Length of the Term: Is Shorter Better?

Mortgage loans are typically long-term; twenty- to thirty-year lengths are common. For the borrower, the trade-off in the length of the loan is apparent: lower monthly payments vs. greater interest payments over the life of the loan.

The borrower's monthly payment burden can be eased by detaching the loan's due date from the amortization of principal schedule. In Canada, for instance, most home loans are amortized as if they had been written for 25 years, yet all the principal becomes due and payable every five years. Canadian lenders allow refinancing every five years as a matter of course, but at prevailing market rates. If they didn't, borrowers would face big balloon payments. Here is an example of the borrower's trade-off:

Monthly Mortgage Payments n129

> Suppose Mr. Matthews buys a home for $106,250. He puts down $21,250 in cash and gets a 30-year, fixed-rate mortgage for $85,000 at 10 percent interest--in other words, a "conventional" loan at market rates and terms. Monthly payments for principal and interest total $745.94.
>
> At the end of 30 years, Matthews has made 360 mortgage payments and spent a total of $268,537. Of the money paid to the lender, $85,000 was principal and $183,537 was interest--an amount substantially greater than the apparent acquisition price of the property.
>
> But a 30-year loan is not the only way to organize a mortgage. Within the bounds of a 10 percent interest rate, Matthews--or you or I--could easily cut the interest bill for an $85,000 loan by $100,000--or more. Suppose, for example, that Matthews decides to increase his mortgage payment by $5.09 a day--not an unreasonable expense in the context of a $100,000 home or an era when a good hamburger costs five dollars anyway. Let's look at what happens:
>
> -- Monthly payments rise to $898.73.
>
> -- The debt to the lender is reduced at a far faster rate than would have been possible with payments of $745.94 per month.

-- Because principal payments have been increased, the length of the loan is shortened from 360 months to 187 months. In other words, the loan term is now 15.58 years rather than 30 years.

-- Interest costs are slashed by just over $100,000.

(See Table 1).

Loan size	$85,000	$85,000
Interest rate	10 percent	10 percent
Monthly payment	$745.94	$898.73
Extra monthly cost	None	$152.79
Number of payments	360	187
Potential interest cost	$183,536.90	$83,062.37
Potential cash saving	None	$100,474.53

Ask yourself: If you were Matthews, would you set aside $38.20 a week--hardly the cost of a meal for two at many restaurants--to cut your mortgage bill by $100,000? Is it worth spending $152.79 a month to knock out almost 15 years of mortgage payments?

Raising monthly mortgage payments is only one path to lower financing costs.

Many homeowners with 30-year fixed rate mortgages are refinancing them with 15-year fixed rate loans. n130

For the lender the 30-year vs. 15-year amortization trade-off is also complicated. Longer loan terms give the lenders more interest over the life of the loan, but shorter loan maturities give lenders the chance to reevaluate the credit risk periodically and to refinance if they are satisfied with it or cash out if they aren't. Shorter maturities also enable lenders to re-lend prepaid funds at prevailing market rates.

Some borrowers justify the higher cumulative interest they pay on longer term loans because: (1) they don't plan to hold the property for anywhere near as long as the loan maturity; (2) they itemize their deductions and consider the *after*-tax costs of mortgage interest; and (3) they are discounting the absolute amounts to present value. n131

Another reason why borrowers may not be too concerned about paying more cumulative interest is that stretching payments over a longer period of time lowers the loan's monthly payments. Cash-strapped borrowers can more easily qualify for loans and wealthier buyers get bigger loans for nicer houses. Reducing the monthly payment by just $37 could lower the annual income needed to qualify for a loan by more than $1,200. n132 In high-cost areas where larger loans are needed, the savings can have an even more dramatic impact.

FOOTNOTES:

(n1)Footnote 129. Peter G. Miller, The Common-Sense Mortgage 2-3 (3d ed. 1987). Excerpt and Table following copyright © 1985, 1986, 1987 by Peter G. Miller. Reprinted by permission of Harper Collins Publishers Inc.

(n2)Footnote 130. *See* Lucinda Harper, *Mortgage Refinancings Bring Increase in Payments as 15-year Term Spreads,* Wall St. J., Oct. 7, 1992, at A2, col. 2. "There's a mix of people opting for shorter mortgages. Some are baby-boomers who want to have enough equity in the house to borrow against by the time the kids go to college. Others are nearing retirement and don't want the continued burden of monthly mortgage payments." *Id.*

(n3)Footnote 131. Allan Axelrod et al., Land Transfer and Finance 136 (3rd ed. 1986).

(n4)Footnote 132. From Myers, *Some Lenders Now Offering 40-Year Loans,* L.A. Times, Feb. 5, 1989, at H1. The calculation was done for a 40-year mortgage as compared to a 30-year mortgage.

1 Parts of this chapter have been adapted from George Lefcoe, Real Estate Transactions (Michie 1993).

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CHAPTER 104 THE PROMISSORY NOTE IN REAL ESTATE TRANSACTIONS 1

13-104 Thompson on Real Property, Thomas Editions § 104.05

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§ 104.05 Prepayment.

§ 104.05(a) Why Borrowers Prepay.

Once a borrower has carefully chosen a loan of ideal length why would such a borrower ever have a change of heart and want to pay it off before maturity?

§ 104.05(a)(1) Refinancing for Lower Rates, to Cash Out, to Reduce Risks, to Simplify Their Lives.

The borrower may want to refinance to take advantage of lower market rates of interest or convert the rising equity value into cash by increasing the size of her loan. Homeowners also pay off debts ahead of maturity either because they want to decrease the amount of risk in their lives by reducing their leverage (debt/equity ratios), or because they don't want to be bothered by having to keep track of monthly payments.

§ 104.05(a)(2) Tax-Motivated Refinancing.

Some refinancings are tax-motivated. Before 1986, all interest payments were deductible, whether on home loans, car loans, or unsecured borrowings. Since then, only *consumers* can deduct only interest on home loans. Rather complex rules circumscribe the interest deductions allowed on funds borrowed for use in a trade, business or passive investment activity, to acquire investment property or to produce portfolio income. n133 As interest deductions for personal consumption were being phased out, tax-conscious homeowners shifted as much of their borrowing as they could to home loans. For some, this meant borrowing on the "equity" by taking out a new junior loan. For others, it meant refinancing by paying off present loans and obtaining newer, larger ones.

Congress tried to limit homeowners converting non-deductible interest to deductible by refinancing their mortgages. Congress "capped" the deductibility of home mortgage and home equity interest payments. n134 No tax-motivated homeowner refinances without first checking with an accountant to determine the extent to which interest on the refinanced loan will be deductible under present (and ever-changing) rules.

A second category of tax-motivated refinancing occurs as a borrower's loan repayments shift from being mostly deductible interest in the early years of the loan to mostly non-deductible repayments of principal in the later years.

n135 Refinancing, say, a 30-year loan in the 20th year of its life, restores the borrower's ability to benefit from the mortgage interest deduction.

§ 104.05(a)(3) Sale-Triggered Refinancing.

Many prepayments are triggered when homeowners sell. Their lenders may "call" their loans or their buyers may insist that the old loans be paid off because they are paying all cash, or because they want a new and bigger loan, a more favorable interest rate, a lender they like better, or a fixed instead of an adjustable rate.

§ 104.05(a)(4) Default-Induced Refinancing.

Prepayments may also be forced on borrowers if they default. Should the lender foreclose, the mortgage will be prepaid out of foreclosure sale proceeds.

§ 104.05(b) Why Lenders Care About Prepayments.

Lender attitudes about prepayment vary.

§ 104.05(b)(1) Protecting Portfolio Matches.

Pension funds and insurance companies generally disfavor prepayment. They often hold long-term mortgages in their portfolios to match accrual on long-term obligations and prepayments could upset this balance.

§ 104.05(b)(2) Minimizing the Interest Risk.

Some lenders which raise their capital in short-term money markets welcome prepayments. The shorter loan maturities prevent them from getting squeezed between rising short-term costs of funds and declining long-term mortgage rates.

Some lenders are indifferent to prepayment because they have hedged their interest rate risks by selling their loans immediately after originating them.

§ 104.05(b)(3) Minimizing the Credit Risk.

Prepayments can be heaven-sent for lenders who have made risky loans on thin borrower equities. They are joyful to greet returning principal they weren't sure they would ever see again.

§ 104.05(b)(4) Estimating the Premiums and Discounts Attributable to Interest Rate Fluctuations.

To see the connection between interest rate fluctuations and the right to prepay, consider this example: in January, 1990, a borrower gets a 30-year $150,000 mortgage loan, with a fixed interest rate at 12%, the going rate at the time. Monthly payment: $1,542.92. Two years later, interest rates have fallen to 10%. What is the then-present value of the right to receive payments under this 2-year-old loan? The principal balance will have been reduced to $148,842.42, but the loan will be worth $173,760--only if the borrower can't prepay. A 12% loan sells for a premium in a 10% market. Conversely, if rates rose to 14%, the loan would be worth $129,566.08, a discount of $19,276.34.

§ 104.05(b)(5) Keeping the Premium and Avoiding the Discount Caused by Rate Fluctuations.

Some lenders don't like prepayment because they want to lock in rates on mortgages to prevent cost-conscious borrowers from refinancing when long-term rates fall.

§ 104.05(b)(6) Speculating On High-Risk Loans Being Prepaid at Full Face Value.

Prepayments are a boon to certain loan investors who bought the loans at a discount, hoping that they would later be paid off at full face value. Say a trust deed investor buys a loan in default on a rundown but well-located property. He gets a deep discount for the loan because it is in default. Later, a developer comes along to buy and rehab the property; however, he needs to refinance in order to obtain the necessary construction funds. To do so, the developer must clear the record of the outstanding mortgage debt by paying it off at par. The loan purchaser then pockets a whopping gain equal to the discount at which he bought the loan.

§ 104.05(b)(7) Prepayment: The Secondary Market Challenge.

Unpredictable prepayments can pose a serious risk to individual and institutional investors who buy mortgage loans in the secondary market. These mortgage buyers are eager to pocket the margins above Treasury yields that government-insured (F.H.A., V.A.) loans offer when packaged into bonds issued by the Federal National Mortgage Association and other similar institutions.

Prepayment privileges are analogous to a bond issuer's right to call the obligation and prepay it before the scheduled maturity date. When such a right exists, it puts the investor on notice not to rely on the premium yield because it can be lost if the entire investment is suddenly repaid.

A stockbroker quoted in the Wall Street Journal explained it very well when he said that the biggest problem for mortgage investors is: "[Y]ou don't know when you're going to get paid." n136 The frequency of prepayments fluctuates with changes in the economy, interest rates, and the housing market. Purchasers of mortgage-backed securities are particularly worried when rates go down and prepayments speed up; this scenario is exactly the opposite of what the mortgage holder wants. One analyst figures that bullish investors expecting a steady stream of income over, say, seven years at today's prepayment rates, could find their investment paid off in as little as 21/2 years if interest fell just 1.5%. n137 They would find the mortgage game a losing one since mortgage bonds would "shorten up" just when they wanted them to stay long. "Similarly, if rates rose substantially, prepayments would slow down, so the mortgage security would transform itself into a very long-term bond just when it was best to do the opposite." n138

Prepayment patterns are so important that guessing them right can bring instant riches while guessing them wrong can bring ruin. Therefore, trying to predict prepayment patterns has become a major enterprise for academic researchers. None have been hugely successful to date, even though reams of pages have been filled with mathematical models attempting to do the trick.

Michael Lewis, in *Liar's Poker*, n139 an account of life at Salomon Brothers, describes how the firm tried to guess which homeowners "with 4, 6 and 8 percent home mortgages were irrationally insisting on paying down their home loans when the prevailing mortgage rate was 16 percent." To analysts at Salomon "The American homeowner became ... a sort of laboratory rat. The researchers charted how previously sedentary homeowners jumped and started in response to the shock of changes in the rate of interest." n140 Once researchers were satisfied that one group of homeowners was more likely than another to pay off low-interest loans, Salomon would buy them--at steep discounts, of course, and reap windfall gains when they were paid in full.

§ 104.05(c) Prepayment: A Right or a Privilege.

In its simplest form, a prepayment penalty is a fee that a borrower is contractually obligated to pay if he or she chooses to pay off a debt prior to its scheduled retirement date. n141

Few mortgage notes omit references to prepayment. They either allow it (with or without an accompanying fee), or prohibit it (typically, for a period of years shorter than the stated maturity of the loan). The simplest way of the note signaling that the maker has a right to prepay is for the promise to pay a specified sum to be followed by the words "or more." The maker who has the option of paying a specified sum "or more" may discharge the note by prepayment. n142

Prepayment prohibitions are typically referred to as "lock-in" clauses, graphic enough. What about when the note omits reference to prepayment privileges? Does the law presume that the borrower has the right to prepay in the absence of a note clause barring it? Here is the surprising answer:

> Contrary to what is probably pervasive popular belief, a mortgagee has a common law right to refuse an early tender or "prepayment" of principal or interest. This rule is derived from the classic case of Brown v. Cole, 14 L.J. (N.S.) Ch. 167, Chancery, 1845, where the court stated that if mortgagors "were allowed to pay off their mortgage money any time after the execution of the mortgage, it might be attended with extreme inconvenience to mortgagees, who generally advance their money as an investment." n143

Certainly the right to prepay is worth something to the borrower. It also makes a loan less valuable to a lender than if the borrower were locked in. One researcher recently estimated the value of prepayment at 1.4% per year per dollar of loan. A borrower for whom prepayment without penalty is important can shop for a form that allows it. Since form notes invariably treat the issue explicitly, there isn't much current litigation on whether prepayment is a right or a privilege. When the promissory note or mortgage is silent on the issue, many jurisdictions follow the common law. In *Patterson v. Tirollo*, the New Hampshire Supreme Court reaffirmed state laws on negotiable instruments, holding that absent an express prepayment right in the promissory note, a mortgagor has no legal right to pay a debt in advance of the maturity date.

However, several courts and one state legislature now allow homeowners a right to prepay unless the note expressly disallows it. For example, the Pennsylvania Supreme Court in *Mahoney v. Furches* held that a rebuttable presumption of a prepayment right exists where the mortgage note is silent. The court reasoned promotion of the policy against restraints on alienation outweighed the policy of protecting a mortgagee's investment interest from anticipation.

The legislatures of California n144 and New Mexico n145 have given homebuyers more than the benefit of a default rule. Here is the California statute:

> ... where the original principal obligation is a loan for residential property of four units or less, the borrower under any note or evidence of indebtedness secured by a deed of trust or mortgage or any other lien on real property shall be entitled to prepay the whole or any part of the balance due, together with accrued interest, at any time. n146

California's statute doesn't apply to buyers of *commercial* property or apartments of more than four units. n147 Presumably, their greater ability to negotiate specific loan conditions leaves them with less need of legislative protection in their dealings with lenders.

The California legislature could have chosen a less intrusive route by reversing the common-law presumption against prepayment. It could have put the drafting burden on lenders by legislating, as Florida and Indiana have done, that borrowers have the right to prepay, absent express language in the note to the contrary. n148 This might have been sensible since lenders are in a better position than borrowers to appreciate that silence on prepayment doesn't imply acquiescence. Under a presumption-only rule, lenders could block prepayment simply by spelling out in their mortgage or deed of trust forms, "the borrower has no right to pay off this loan early." The California legislature went further, giving owner-occupiers of one-to-four unit residential property the absolute right to prepay without penalty after five years. Before then, the lender may charge no more than six months interest on the amount prepaid which exceeds 20% of the original principal amount. n149 California also bars charges on prepayments which occur after rate increases in variable rate mortgages. n150

The legislature did carve out an exception for noncommercial sellers taking back purchase money loans where

prepayment could trigger dire tax consequences. n151 These lenders can lawfully prohibit prepayment, but only in the year of sale.

State and national banks may impose prepayment penalties on adjustable-rate mortgage loans, n152 and federally chartered savings banks may impose prepayment penalties on fixed and adjustable rate mortgage loans. n153 These rights must be reserved by contract. However, the U.S. Department of Housing and Urban Development (HUD), which regulates all FHA-insured and VA-guaranteed home mortgages, allows mortgagors to prepay at any time without penalty. n154 These are home loan and apartment loan programs.

§ 104.05(c)(1) Involuntary Prepayment.

A prepayment provision is usually invoked by the lender when the mortgagee takes voluntary action to pay the principal balance on the mortgage in advance of the maturity date. But, what if the mortgage indebtedness is paid prior to term through an involuntary action such as a condemnation proceeding to take the encumbered property by eminent domain? Can the lender enforce the prepayment provision?

Some jurisdictions consider prepayment provisions to be applicable only to a voluntary decision by the borrower to prepay the mortgage. In *Jala Corp. v. Berkeley Sav. & Loan Ass'n*, a New Jersey appellate court held that a prepayment provision that was silent on condemnation only contemplated a voluntary exercise by the mortgagor of the right to prepay, not an involuntary exercise of the right by reason of a taking in eminent domain. An Ohio district court quoted *Jala* extensively in holding that absent an express agreement, a mortgagor who sold the encumbered property under direct threat of condemnation was not liable for payment of the prepayment penalty. The trial court in a New York case held that an express provision for payment of a prepayment penalty in the event of condemnation would be enforceable when apportioning a condemnation award

The lesson here is clear. A well-drafted prepayment provision should include an express provision that the parties to the agreement have contemplated the possibility of condemnation and agreed that the prepayment penalty is payable in the event of condemnation of the encumbered property by eminent domain.

§ 104.05(d) Prepayment Charges: Is the Sky the Limit?

§ 104.05(d)(1) The Six Months' Interest Charge.

Notes often allow prepayment for a price. The overwhelming majority of prepayment fees in home mortgages allow the borrower to prepay up to 20% of the principal in any one year, above which the lender may levy a charge of six months unpaid interest on the prepaid balance. n155

§ 104.05(d)(2) Legislative and Regulatory Curbs on Prepayment Fees.

Many states prohibit or limit entirely prepayment fees in residential mortgages. n156 Prepayment fees in Veterans Administration (V.A.) guaranteed or Federal Housing Administration (F.H.A.) insured loans are prohibited and these loans may be prepaid at any time. n157 The Federal National Mortgage Association (F.N.M.A.) and the Federal Home Loan Mortgage Corporation (F.H.L.M.C.) do not enforce prepayment clauses in the home mortgages they own.

§ 104.05(d)(3) What Are the Lender's Actual Damages When a Loan Is Prepaid?

The Cost of Replacing the Funds. When their prepayments are challenged, in court and out, articulate lenders assert that it costs something to replace an old loan with a new one. They should be able to charge the prepaying borrower the costs of finding and making a new loan.

Consumer advocates regard this claim as preposterous, a "double" tax, because lenders are well compensated for

refinancing costs by the fees they charge the new borrower. The old borrower pays the cost of the reconveyance. The cost of originating the new loan is assessed against new borrowers in the form of processing fees, document preparation charges, appraisal and credit checking fees, loan escrow fees, and origination fees. Any borrower who has actually paid these charges and fees can readily attest that lenders have overlooked nothing in making sure that all their expenses are reimbursed.

Loss of Interest on Prepaid Funds Between the Time the Old Loan Is Paid and a New Loan Is Made. Lenders also contend that they lose interest during the time it takes to reloan prepaid monies.

Consumer advocates rejoin, "In the dark ages before mass lending and computerized fund placement systems, this may have been true. But today money in vast quantities can be shifted around the globe with the punch of a key. Within a matter of hours, a day or two if the lender is badly managed, redeposited funds are back in play."

The Lender Needs Protection Against the Borrower Prepaying When Rates Fall. One argument supporting prepayment charges relates to interest rate fluctuations. When rates rise, borrowers clutch their below-market loans like umbrellas in a downpour. When rates fall, they drop them fast. n158 Lenders take a drubbing come rain or shine in the money market, and prepayment charges are their only protection against getting washed out.

In response, prepayment fee opponents contend that: (1) interest rate fluctuations are part of what the lender already charges the borrower in setting rates; (2) at most, this rationale would only justify prepayment penalties when borrowers repay loans whose rates are above current market rates. Lenders don't need protection when borrowers repay loans whose rates are lower than prevailing market rates because they are actually getting a windfall; (3) the prepayment penalty commonly assessed in residential loans--six months interest on the amount prepaid which exceeds 20% of the original balance--bears no connection to the lender's interest rate loss when loans with above-market rates are prepaid.

When the borrower voluntarily sells and pockets a substantial capital gain to boot, many courts are sympathetic to lenders, and condone their skimming off just a little of the cream that the borrower might never have enjoyed but for the initial loan. Lenders count on most long-term mortgage loans being prepaid before maturity, 7-11 years for most 30-year loans, and expect fees from prepayments.

Many bankruptcy courts have been unsympathetic to prepayment fees. Borrowers selling on the eve of, or during bankruptcy, aren't going home with full pockets. Giving secured lenders prepayment fee gravy can mean depriving hungry unsecured creditors of anything.

§ 104.05(d)(4) The Legal Challenge to Prepayment Penalties.

One of the leading challenges to prepayment penalties was brought by Mr. Lazzareschi. He thought he had a good case when he took San Francisco Savings and Loan Association to court in 1967. They wouldn't allow him to prepay a $300,000 loan on property used for commercial purposes at 5% in a 9% market unless he paid them $9,130.32 as a prepayment charge. n159 "They should thank me, not penalize me," was the thrust of his argument in *Lazzareschi Investment Co. v. San Francisco Federal Savings and Loan Association*, "They will be able to reloan this $300,000 at a rate higher than they are getting on it right now."

Mr. Lazzareschi's legal argument had three parts:

(a) *Is a Prepayment Fee a Penalty?* In real estate contracts, California courts let sellers pocket only so much of a breaching buyer's downpayment as absolutely necessary to cover the seller's actual loss from the breach. Lazzareschi didn't see why lenders shouldn't likewise get their hands slapped for trying to squeeze more from prepaying borrowers than the prepayment really cost the lender. If individual sellers aren't allowed to recover unless they experience an actual loss, why should lenders be?

The court answered: prepayment isn't a breach because it is the borrower's voluntary choice. The court in *Lazzareschi* held, as most courts do, that the fee wasn't a penalty because it was the borrower who elected to prepay. The prepayment privilege was exercisable solely at the borrower's discretion. It is like an option contract. The prepayment fee is what the borrower pays for exercising the option to prepay. Option fees aren't ever regarded as "penalties." A sensible borrower who isn't profiting from the exercise of the option won't exercise it. So prepayment fees shouldn't be treated as if they were penalties for breach.

(b) *Should Prepayment Provisions Be Tested Against Rules Concerning Liquidated Damages*? If they were, they would probably be unenforceable. First, money damages are always easy to estimate in prepayment cases. The lender's actual loss is readily calculable. It is the present value of the differential between the contract rate and the market rate at the date of prepayment, multiplied by the repaid principal. Furthermore, the price loans bring in the secondary market can be used to determine "market value at date of breach."

Moreover, the customary penalty of six months' interest on the unpaid principal balance above 20% bears no reasonable relationship to the lender's probable loss.

In a rising market the lender has no loss. It can relend the funds at a mark-up above what the prepaying borrower had contracted to pay. In a falling market, six months' interest would give the lender too much or too little depending on the gap between the contract rate and the market rate at date of breach. Anyway, that is the borrower's case against prepayment penalties as invalid liquidated damages.

Many courts, including California's, reject the application of liquidated damages criteria to prepayments. Liquidated damages rules only apply when a contract has been breached. A borrower exercising a prepayment privilege isn't breaching the contract at all. The borrower is electing an alternate route to performance of the contract. The prepayment fee isn't meant to be an estimate of the lender's damage in the event of a breach of contract--like a late payment penalty, for instance. Rather, it is the price for the borrower deciding to go with an alternate performance.

The theory of "voluntary alternate performance" fails, of course, when the prepayment is triggered by the mortgaged property being taken by eminent domain, destroyed by a casualty, or when the lender exercises its option to accelerate upon default or a change in ownership.

Some bankruptcy courts have rejected the "voluntary alternate performance" theory. Since at common law borrowers have no right to prepay, a prepayment is a breach of the contract to borrow money for a fixed time. "[T]he charge is a liquidated damage provision inserted to compensate the lender for the breach of early payment, and is not part of an alternative performance." n160 Bankruptcy courts may regard prepayments resulting from reorganizations as involuntary, and may therefore be prepared to characterize prepayment fees as penalties for breach.

(c) *Usury*. Add the six months prepaid interest to the face interest on the loan, and it will sometimes add up to more than the state statutory interest rate maximum under usury laws. Should prepayments be regarded as "interest," and subjected to usury limits? n161

Most institutional lenders are exempt from state usury limits by federal law. But even if they weren't, the *Lazzareschi* court explained that the fee isn't a charge for the use of money. It is a charge for NOT using the money. n162

Nonetheless, the court in *Lazzareschi* acknowledged that some prepayment penalties could be so high as to bump into the ceiling of "unconscionability." The six months' interest fee wasn't held unreasonable or unconscionable in *Lazzareschi* because it was exactly the sum allowed at the time by the Federal Home Loan Bank Board in all residential loans subject to its jurisdiction (virtually all savings associations in the U.S.) until 1984. Currently, savings banks are free to contract for any rate. n163

§ 104.05(d)(5) Impact of Prepayment Fee on Sellers.

Sellers are well advised to calculate the dent a prepayment charge will make in their net sale proceeds before committing themselves to a fixed selling price. To save the prepayment fee, some sellers shift this cost to the buyer by contract. Buyers who have to pay the prepayment fee may try harder to assume the existing loan and think twice before electing to refinance.

§ 104.05(d)(6) Yield Maintenance Fees.

Commercial prepayment fees are often computed on the basis of "yield maintenance." This is the sum which, if invested at prevailing market rates, will give the lender its bargained rate of return. The formula should be constructed to take into account the unpaid balance of the loan, accrued interest, and the original loan term. n164 Here is a typical "yield maintenance" provision for a fixed-rate mortgage:

> The "Note Prepayment Fee" shall be (i) the present value of all remaining payments of principal and interest, discounted at the Treasury Rate, less (ii) the amount of principal being prepaid, but shall not be less than zero. The "Treasury Rate" shall be the annualized yield on securities issued by the United States Treasury having a maturity equal to the remaining term of the Loan, as quoted in Federal Reserve Statistical Release H. 15 (519) under the heading "U.S. Government Securities--Treasury Constant Maturities" for the date most nearly two weeks before the prepayment date (or a comparable rate if this rate is no longer published), adjusted to reflect a monthly payment interval. If the above rate is not available for a term equal to the remaining term of the loan, the Treasury Rate shall be determined by interpolating between the yields on securities of the next longer and the next shorter maturity. n165

This sort of yield maintenance provision has been enforced in non-bankruptcy situations, but has been set aside in several bankruptcy cases as an "unreasonable fee, cost or charge...." n166 One court faulted a yield maintenance clause that had failed to credit the borrower by discounting to present value and also because it used the market rate for U.S. Treasury notes instead of the market rate for first mortgages due on the day that the loan would have been repaid. n167 The reason the Treasury note rate gives the mortgage lender too much is that the mortgage lender will be able to loan prepaid funds at a premium above the Treasury note rate. Under the yield maintenance formula the prepaying borrower receives no credit for that premium. "It would have been permissible for the parties to have chosen an index rate such as that for U.S. Treasury notes that differs from the market for long term first mortgages, provided that some appropriate adjustment to bring this note up to the first mortgage rate was included." The same note was also faulted for containing no discount for present value. The prepayment fee provision had one more flaw; it had a floor, obligating the borrower to pay 1% of the prepaid principal, even if the yield maintenance clause produced a zero net to the lender. The lender defended this as a way of recouping the costs it had incurred in originating the loan. The court rejected the argument because the lender had given the borrower no credit against transaction costs for the time the loan had been in effect. Also, the sum in the case ($150,000) exceeded any reasonable cost imputed to loan origination. Another bankruptcy court went further; the loan was prepaid at a time when interest rates were higher than the contract rate. Since the lender could have invested the loan proceeds at a higher rate, the bankruptcy court decided to credit the borrower with this windfall. n168 Lazzareschi would have been delighted, but lenders' counsel aren't pleased by these results. n169

A yield maintenance fee provision that would protect the lender's expectations of return and protect the borrower by discounting the loss to present value and eliminating fixed percentage premiums might use the following calculation to determine the prepayment fee:

> Multiply the outstanding principal balance which is being prepaid by the difference between the interest rate then in effect on the note and the Reference Rate (defined as U.S. Treasury Notes, market rate on conventional first mortgages, etc.), on a monthly basis, to arrive at a Monthly Payment Differential. The present value would reflect the number of scheduled monthly payments foregone as a

result of the prepayment, the size of the Monthly Payment Differential, and the Reference Rate, by discounting an annuity (using the standard formula for the present value of an annuity) equal to the Monthly Payment Differential for the number of months remaining, to an interest rate equal to the Reference Rate. n170

§ 104.05(d)(7) Are Partial Payments Allocated to the Final Payments Due on the Loan or to Current Payments?

Say a borrower has lots of cash in December and January, so the borrower makes six months of loan payments in advance. In February and March, the borrower runs short of cash. May the lender foreclose or must it allocate the early payments to cover the February and March deficits? Courts differ in their answers.

One California court held that the borrower was out of luck because the prepayments are applied to the last payment due, n171 but a Texas court found *for* the borrower and required the lender to apply the prepaid sums to current payments. n172

§ 104.05(d)(8) Lender Who Mistakenly or Inadvertently Waives a Prepayment Fee Can't Recover It Later from the Borrower.

In 1988 the borrowers borrowed $7,060,000 at 10.25% on a loan due in 1995. A year later, they wanted to refinance when rates fell to 9%. But their note called for a prepayment fee. It would have come to $653,998.74 at that time. They called their loan servicer to ask what fee it would charge if they refinanced elsewhere to take advantage of falling rates. "Nada," they were told. So they refinanced and paid off the old loan. Fifteen months later, the lender discovered its mistake and went after the borrowers for the big prepayment fee.

"Get outta here," the appellate court told the lender. (The court's actual words were the judicial equivalent: "Under the circumstances, recovery by CalFed would be inequitable.") Recovery would be inequitable because: (1) the lender benefits by having the loan fully paid off 5.5 years earlier than its stated maturity, (2) the borrowers would not have refinanced to save less than $90,000 a year for 5.5 years if they had known they would have to pay $653,998.74 for the privilege; (3) the mistake was all the lender's, not the borrower's fault. n173

§ 104.05(d)(9) Who Benefits and Who Pays When a Form Mortgage Gives the Borrower the Right to Prepay Without Penalty?

Prepayment is a matter of right in the M.A. form note. Under such a note, the borrower, in effect, enjoys the benefit of the right to prepay without a penalty. This is like a call provision in a bond or stock where the debtor can compel the holder of the note to sell at a prearranged price the original contact price in the case of mortgage loans. The lender or the purchaser of a loan in the secondary mortgage market assumes the risk of prepayment. The risk is that the debtor will compel the lender to sell the note and mortgage at its full face value precisely when it is actually more valuable when the face interest rate is above current market rates, so that the market value of the note is greater than its original contract price. This risk has a price. Lenders who originate or trade in residential mortgages exact that price in the form of higher interest rates than they would accept on mortgage notes where the borrower assumes the prepayment risk by agreeing to pay a steep fee for the right to prepay.

Not all borrowers would place the same value on the right to prepay, given a choice, when the loan is first entered. If all borrowers were given no choice but to accept loans with prepayment provisions, homeowners who didn't expect to pay off mortgages early would be asked to subsidize those who did expect to prepay. Among the most likely to refinance are high-income borrowers with greater liquidity and big equities in their houses. They are in a better position to refinance when interest rates fall than minority and low-income borrowers. They have an easier time finding mortgage money when they desire it. They can offer refinancing lenders safer loans because they have larger equities in their houses.

They are more likely to sell and to refinance in connection with a sale as they "trade up" to more expensive houses, or as they relocate for better jobs. Low-income households are less mobile, n174 less likely to find lucrative employment elsewhere, and have a harder time refinancing.

There is an exception to this rule. Defaulting borrowers automatically trigger an involuntary prepayment when the lender is forced to take back the property through foreclosure. Low-income borrowers are at greater risk of default since they possess thinner cash reserves to cover expenses in times of personal crisis job loss or protracted illness.

What low-income borrowers need who have limited funds for down payments is the chance to buy default insurance instead of paying higher mortgage interest rates for prepayment insurance they are not likely to use.

For this reason, two researchers concluded: "The rules of the mortgage market, with the near-total ban on prepayment penalties, amounts to more than just a subsidy of the wealthier borrowers by the poorer; it is one of the reasons that restrict poor people from getting a mortgage in the first place." n175

They argue that low-income households would be better off putting the money they saved by agreeing to prepayment penalties towards default insurance. By purchasing extra default insurance, they would make their loans less risky, and more attractive, to lenders. Many low-income borrowers who don't qualify for loans with automatic prepayment rights but also have no borrower-purchased default insurance would qualify if only they could take that portion of the interest rate presently going to cover the lender's prepayment risk and apply it to the purchase of default insurance.

Professor Chinoy and Isaac F. Megbolugbe, the Director of Housing Research at M.A., divide the mortgage market into four groups:

> (1) Low-income borrowers are disproportionately attracted to mortgages insured by the FHA or guaranteed by the VA. VA and FHA loan principal ceilings are lower; loans are capped at the median sales price in the county. These loans also carry low down payment requirements (3% of the first $25,000, 5% of the typical average, with closing costs financeable). Therefore, government-backed loans are more attractive than other types of loans to the low-to moderate-income buyer. Almost half of African-American and Hispanic borrowers finance through the FHA and VA programs. Under these loans, the default risk is insured by mortgage insurance funded by the borrower and paid into a fund called Mutual Mortgage Insurance. Shortfalls are covered by the full faith and credit of the U.S. Treasury, in other words, federal taxpayers. The default insurance premium ranges from 3.8 to 6.5% of the present value of the loan balance.
>
> (2) Many savings banks and other lenders sell their mortgages to M.A. or F.H.L.M.C.government-sponsored, privately owned institutions. They promulgate form mortgages and will only buy mortgages conforming to those form instruments. Lenders originating loans with lower than 80% loan-to-equity ratios must lay off part of the default risk by having the borrower purchase private mortgage insurance.
>
> (3) Private firms unregulated have created secondary market vehicles, buying loans from mortgage brokers and other originators and selling them in pools to investors. Units of Prudential, General Motors, General Electric, Chase Manhattan and Citicorp are among them.
>
> (4) Finally, there are lenders who originate loans to hold in their own portfolios.

The point is that each group uses a form that treats default risk and prepayment risk uniformly throughout its portfolio. Borrowers aren't presented a choice of trading more default protection for less prepayment protection or vice versa. Mortgages are sold like cars with few options. Everyone has to buy a sunroof in some dealerships. No one can get one

at any price from other manufacturers. There is no chance of trading off a sunroof for a more powerful engine or antilock brakes. This forces cross-subsidies to buyers who like the features that come with the standardized package from those who would have preferred to pay less and live without these features.

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§ 104.05(d)(10) The New Generation of Prepayment Charges.

Some lenders are offering borrowers loans with prepayment penalties but not the draconian six months' interest of yesteryear which penalized the borrower for prepaying anytime a sum often greatly in excess of the lender's actuarial loss due to prepayments, with no benefit to the borrower who agreed to it. Under one of the new generation of prepayment penalties, the borrower has the choice of agreeing to pay a charge of 2% of the outstanding loan amount for prepaying in the first three years of the loan. In exchange, the lender reduces the interest rate or closing costs by a sum comfortably exceeding the 2%. The trade-off is extremely attractive to borrowers pretty confident they won't be prepaying in the first three years. n176 Borrowers not interested in the trade-off are given mortgages prepayable without penalty, but pay a higher interest rate for it.

§ 104.05(d)(11) Impact of Prepayment Fee on Sellers.

Sellers are well-advised to calculate the dent a prepayment charge will make in their net sale proceeds before committing themselves to a fixed selling price. To save the prepayment fee, some sellers shift this cost to the buyer by contract. Buyers who have to pay the prepayment fee may try harder to assume the existing loan and think twice before electing to finance.

FOOTNOTES:
(n1)Footnote 133. *26 U.S.C. §§ 163,* 469.

(n2)Footnote 134. There is a $1,000,000 cap on acquisition indebtedness. Debt incurred in a refinancing is acquisition indebtedness up to the balance of the acquisition debt just prior to the refinancing. For example, say a homeowner takes out a $200,000 loan to buy a house. The homeowner pays the loan down to $180,000 and refinances. The homeowner can deduct mortgage interest on the refinancing only up to $180,000. But the homeowner will probably be able to treat the sum above $180,000 as a "home equity" loan and deduct up to $100,000 of it. U.C.A. 63.

(n3)Footnote 135. In the early stages of repayment, most of the debt service goes towards paying interest on the loan. As the loan nears maturity, most of the principal has been repaid, so that the interest portion of the debt service becomes minimal; most of the debt service goes towards principal repayment. Because only interest is tax-deductible, a borrower starts to lose this deduction as the loan matures.

(n4)Footnote 136. Donnelly, *Mortgage Bonds: Safe but Not Risk Free,* Wall St. J., Mar. 14, 1990, at C1. Lenders without clauses barring prepayment for at least a few years see their investments in long-term loans as a "heads we lose, tails you win" game.

(n5)Footnote 137. *Id.*

(n6)Footnote 138. *Id.*

(n7)Footnote 139. Michael M. Lewis, Liar's Poker 118 (1989).

(n8)Footnote 140. Kevin W. Brown Usury and Consumer Credit Regulation 148 (1987).

(n9)Footnote 141. National Consumer Law Center, Usury and Consumer Credit Regulation 148 (1987).

(n10)Footnote 142. Harry D. Miller & Marvin B. Starr, California Real Estate 222 (2d ed. 1989).

(n11)Footnote 143. Grant S. Nelson & Dale A. Whitman, Real Estate Transfer, Finance, and Development 521 (4th ed. 1992). California follows the majority rule presumptively barring prepayment. *Smiddy v. Grafton, 124 P. 433 (1912)* . *Brannon v. McGowan, 683 So.2d 994 (Ala. 1996)* ; *George v. Fowler, 978 P.2d 565 (Wash. App. 1999)* (Holding that prepayment was a privilege, and lenders were entitled to earn a fee for prepayment by the borrower. Even an absolute prohibition of prepayment is not unduly restrictive, because the lender is merely guaranteeing a rate of return.); *Prudential Ins. Co. of America v. Rand & Reed Powers Partnership, 141 F.3d 834 (8th Cir. 1998)* (An Iowa statute prohibited penalties charged by the lender on prepayment of a loan used to purchase agricultural land. However, completely barring prepayment is allowed, because completely barring prepayment is not a penalty).

(n12)Footnote 144. *Cal. Civ. Code § 2954.9(a)(1)*.

(n13)Footnote 145. *N.M. Stat. Ann. § 56-8-30*.

(n14)Footnote 146. *Cal. Civ. Code § 2954.9(a)(1)*. A similar provision enacted by the New Mexico legislature was enforced in favor of the buyer of a "recreational" (second) residence in *Naumburg v. Pattison, 711 P.2d 1387 (N.M. 1985)* .

(n15)Footnote 147. *Cal. Civ. Code § 2954.9(a)(3)*.

(n16)Footnote 148. *Ind. Code Ann. § 28-1-21-23(b)(7)*; *Fla. Stat. Ann. § 697.06*.

(n17)Footnote 149. *Cal. Civ. Code § 2954.9(b)*.

(n18)Footnote 150. *Cal. Civ. Code § 1916.5(a)(5)*.

(n19)Footnote 151. A vendor who desires installment sale reporting of gain under § 453 of the Internal Revenue Code could lose the benefit of that provision if the purchaser-borrower prepaid. The installment sale provisions allow sellers to match their gains for tax purposes with their actual receipt of payment, instead of having to pay up on the paper profit in the year of sale. Case and statutory law is sympathetic to these vendor-lenders. *See, e.g., Williams v. Fassler, 167 Cal. Rptr. 545, 549 (1980)* , which upheld a prepayment penalty of 50% as valid, "if the penalty is reasonably related to the obligee's anticipated risk of incurring increased tax liability upon the occurrence of the prepayment."

California allows a seller taking back a loan secured by a deed of trust to prohibit prepayment during the calendar year in which the sale and loan take place, as long as the seller does not take back four or more such deeds of trust during such calendar year. *Cal. Civ. Code § 2954.9(a)(3)*. However, the legislature hasn't directly addressed the question of whether a seller wanting more than a one-year deferral of capital gains taxes on the sale can reserve the right to a prepayment penalty equal to his accelerated tax liability if the borrower prepays.

(n20)Footnote 152. *See 12 C.F.R. 29.6, 29.9*.

(n21)Footnote 153. *12 C.F.R. 545.34(c)*; *12 C.F.R. 545.33(f)(2)*.

(n22)Footnote 154. *See, e.g., 24 C.F.R. 203.22(b), 234.37(b)*.

(n23)Footnote 155. Frank S. Alexander, *Mortgage Prepayment: The Trial of Common Sense, 72 Cornell L. Rev. 288, 316 (1987).*

(n24)Footnote 156. *41 Pa. Cons. Stat. § 405*; *N.J. Stat. Ann. 46:10B-2, 10B-3*; Ill. Ann. Stat. ch. 17, para. 6404(2)(a) (see now RSA 2000) (for loans with interest rates of more than 8%); RSA 2000 (no fee if mortgage is paid off after five years); RSA 2000 (no penalty if home loan is paid off after three years, 1% of prepaid amount collectible as fee before that); RSA 2000 (owner-occupied 1-6-unit dwelling penalties only available for prepayment in first year of loan not to exceed three months' interest); RSA 2000-9 (20% prepayable free in any year, maximum charge of six months' interest in excess of 20% prepaid in a 12-month period); *Glukowsky v. Equity One, Inc., 821 A.2d 485 (N.J. Super. 2003)* .

(n25)Footnote 157. 38 C.F.R. § 36.4310, 24 C.F.R. § 203.22(b).

(n26)Footnote 158. Jerry Green & John B. Shoven, *The Effects of Interest Rates on Mortgage Prepayments*, 18 J. Money, Credit and Banking 41 (1986).

(n27)Footnote 159. *99 Cal. Rptr. 417 (1971)* .

(n28)Footnote 160. *In re A. J. Lane & Co., 113 B.R. 821, 825 (Bankr. D. Mass. 1990) . But see In re Financial Center Assoc., 140 B.R. 829 (Bankr. E.D N.Y. 1992)*

(n29)Footnote 161. *See, also Gulf Coast Inv. Corp. v. Prichard, 438 S.W.2d 658 (Tex. Civ. App. 1969) (Dallas 1969) writ refused 447 S.W.2d 676 (Tex. Sup. Ct. J. 1969)* .

(n30)Footnote 162. *See, also Boyd v. Life Ins. Co. of the Southwest, 546 S.W.2d 132 (Tex. 1977)* (holding that prepayment charges do not constitute interest for usury purposes). Annotation, *Usury as Affected by Repayment of, or Borrower's Option to Repay, Loan Before Maturity, 75 A.L.R. 2d 1265 (1961).*

(n31)Footnote 163. 12 C.F.R. § 545.34(c).

(n32)Footnote 164. *Warrington 611 Assocs. v. Aetna Life Ins. Co., 705 F. Supp. 229 (D.N.J. 1989)* .

(n33)Footnote 165. James L. Lipscomb, Structuring Complex Real Estate Transactions 20 (1992 Cum. Supp.).

(n34)Footnote 166. RSA 2000.

(n35)Footnote 167. *In re Skyler Ridge, 80 B.R. 500 (Bankr. C.D. Cal. 1987)* . The parties agreed that the yield maintenance clause should be regarded as a liquidated damage provision. *But see In re Financial Center Assoc., 140 B.R. 829 (Bankr. E.D N.Y. 1992)* .

(n36)Footnote 168. *In re Kroh Bros. Dev. Co., 88 B.R. 997 (Bankr. W.D. Mo. 1988)* .

(n37)Footnote 169. James L. Lipscomb, Structuring Complex Real Estate Transactions 22 (1992 Cum. Supp.).

(n38)Footnote 170. Robert S. Greenbaum, *Yield Maintenance on Mortgage Prepayment--Another Trap for the Unwary*, Metro. Corp. Counsel, Feb. 1996, at 59.

(n39)Footnote 171. *Smith v. Renz, 265 P.2d 160 (Cal. App. 1954)* .

(n40)Footnote 172. *Bradford v. Thompson, 470 S.W.2d 633 (Tex. 1971) . See also Steen v. Bump, 649 N.Y.S.2d 731 (1996)* . Annotation, *Excess of Payment for One Period as Applicable to Subsequent Period under Contract or Mortgage Providing for Periodic Payments, 89 A.L.R. 3d 947 (1979).*

(n41)Footnote 173. *California Fed. Bank v. Matreyek, 10 Cal. Rptr. 2d 58 (1992)* .

(n42)Footnote 174. *See* Peter Chinoy & Isaac F. Megbolugbe, Hedoni, *Mortgages*, 5 J. Housing Res. 1 (1994).

(n43)Footnote 175. *Peter Chinoy*, quoted in Michael Quint, A Mortgage Penalty, or a Plus? New York Times, Oct. 25, 1994, at C1.

(n44)Footnote 176. *Michael Quint, A Mortgage Penalty, or a Plus?, New York Times*, Oct. 25, 1994, at C1.

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CHAPTER 104 THE PROMISSORY NOTE IN REAL ESTATE TRANSACTIONS 1

13-104 Thompson on Real Property, Thomas Editions § 104.06

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§ 104.06 Late Payments.

Most notes, secured or unsecured, levy a "late payment" charge. They have two purposes: (1) to prod borrowers into making timely payments, and (2) to reimburse lenders for the costs of cajoling the tardy, and the loss of earnings on the late payment. The charge could be a fixed dollar amount, a percentage of the late installment, or a percentage of the unpaid balance of the entire debt.

§ 104.06(a) Legal Theories: Usury and Liquidated Damage Analysis.

In a handful of court fights, challengers have argued that late charges are a form of additional interest and so should be kept within usury limits, or that late charges are a penalty for partial breach and should be evaluated against liquidated damage standards. n177

Courts have generally rejected the usury analysis because the purchaser can avoid the charge by paying on time. Moreover, the severe penalties that accompany usury infractions also steer courts away from the usury route. n178 On the other hand, Louisiana courts view late charges as additional interest for the lender's extending the credit. n179

The liquidated damage characterization has a larger judicial following, although some courts reject it because they perceive late charges, like prepayment fees, as a contract or option for an alternate performance. n180

Some would argue that lenders don't need liquidated damage clauses for late payments. Actual damages should suffice because the lender's loss can be readily estimated when the breach occurs by determining the earnings foregone and the costs of collection.

In a leading case on the topic, *Garrett v. Coast and Southern Federal Savings Loan Association*, n181 the California Supreme Court held that a charge of two percent of *the entire principal balance of the debt* was invalid as a penalty. The lender was only damaged by being deprived of payment actually past due. Because only a portion of the principal debt was past due, a late charge could not lawfully be a function of the balance of the entire debt. To be valid, the court held that the late payment charge had to be a function of the amount of money overdue or a fixed dollar sum based on the lender's actual cost of collection. This analysis is widely followed.

§ 104.06(b) Statutory Limits.

Many states have enacted legal limits on late charges. n182 The limit for F.H.A. and V.A. loans is 4%. n183 Federal regulators have preempted state late charge rules for federally chartered savings banks. n184 The Federal Housing Administration has done the same for federally insured or guaranteed mortgages. n185

§ 104.06(c) Stay of Foreclosure During Late Charge "Grace" Period.

Most loans provide a grace period--10 or 15 days--before the late payment penalty accrues. n186 An unintended consequence of the grace period may be that the lender is barred from foreclosing on a chronically late borrower as long as the borrower brings the debt current within the late payment "grace" period. n187

Justice Johnson, J., defended this result in *Baypoint Mtg. Corp. v. Crest Premium Real Estate Invs. Retirement Trust* n188:

> One of the most important functions of the law is to maintain a proper balance between creditor and debtor. To this end, it attempts to match the creditor's remedy to the debtor's default. Major defaults justify drastic remedies; minor defaults only warrant lesser remedies. Thus, where the debtor is unable or unwilling to pay at all the creditor is entitled to recapture the security the debtor gave for the loan. By threatening this ultimate loss the creditor often succeeds in pressuring the recalcitrant debtor into coming up with the money to pay the debt after all. If not, the creditor is at least made whole or as nearly whole as he can be by return of the property the debtor put up to secure the loan.
>
> In this case, appellant Crest Premium asks this court to sanction the use of this same drastic remedy to deal with a minor and common failure of debtors--making installment payments a few days after the initial "due date." This is the functional equivalent of employing a blunderbuss to kill a gnat. Indeed, the loan papers in this case afforded the creditor a remedy more in keeping with the nature of the debtor's offense--a 10 percent "late payment fee" which is imposed after 10 days' delay when the gnat at least could be said to have turned into a fly.
>
> Great mischief could be visited on creditor-debtor relations in California were we to accept Crest Premium's invitation. To allow creditors to impose foreclosure--and its attendant expenses--whenever a debtor is a few days late in a monthly payment would open up thousands or perhaps millions of California homeowners and other debtors to an extraordinary additional financial burden. Moreover, the threat of such a severe penalty would place undue pressure on debtors, thus destroying the important but delicate balance between creditors and debtors.

§ 104.06(d) Acceleration on Default.

Mortgage notes provide that in the event of default the entire debt becomes due and payable. This is called acceleration. Without an acceleration clause, the lender would have to file a separate foreclosure suit each month the borrower missed a payment.

While "equity abhors forfeiture and penalties," an acceleration of debt on a mortgage is regarded as neither a forfeiture nor a penalty. n189 The borrower got the loan proceeds. Acceleration is the first logical step in the lender's reaching the security property for repayment.

> An action to foreclose a mortgage is equitable in nature... In a suit of equitable cognizance to foreclose a real estate mortgage the trial court may refuse foreclosure where there has been a technical default due to a mistake or mere venial inattention and of no damage to the mortgage security or prejudice to the mortgagee. n190

Courts have stayed acceleration when the borrower was one day late in making a payment because time had not been declared to be of the essence in the note or deed of trust, n191 the lender had consistently accepted late payments on a debt amply secured, n192 or the lender had accepted payments by mail and a mailed check was never received, but the mortgagor cut a new check within a week of being notified of the default. n193

On the other hand, there are states in which lenders are allowed to accelerate even against borrowers ready to pay up, whose nonpayment or partial payment was due to an honest mistake or a clerical error. The leading case strictly enforcing an acceleration clause against a borrower ready to cure the default is *Graf v. Hope Bldg. Corp.* n194 A clerk cut a check $401.87 short of the required $6,121.56 payment. As soon as the error was caught, the lender was informed. But it never demanded the correct payment. Instead, it waited until the grace period expired and initiated foreclosure. The opinion provided an impassioned dissent by Justice Cardozo:

> When an advantage is unconscionable depends upon the circumstances. It is not unconscionable generally to insist that payment shall be made according to the letter of a contract. It may be unconscionable to insist upon adherence to the letter where the default is limited to a trifling balance, where the failure to pay the balance is the product of mistake, and where the mortgagee indicates by his conduct that he appreciates the mistake and has attempted by silence and inaction to turn it to his own advantage. n195

Despite Justice Cardozo's words often cited outside New York to justify stays of acceleration, strict enforcement of acceleration clauses is the law in New York to this day. n196 The *Graf* rule does *not* apply in New York to payments made late but within the grace period, payments lost in the mail, or where the lender had waived tardiness.

§ 104.06(e) "Arrears" vs. Advance Payment Schedules.

Notes secured by mortgages or deeds of trust often call for payments to fall due monthly "in arrears" at the end of the month during which the obligation accrued. This is quite a pleasant surprise to former tenants who almost always had been required to pay rent monthly in advance. The present value of the deferral over a 30-year lease equals one month's interest. Some mortgages, though, do call for payment in advance, just like leases, and others for payment in the middle of the month.

FOOTNOTES:

(n1)Footnote 177. *In re Brunswick Apartments of Trumbull County, Ltd., 169 F.3d 333 (6th Cir. 1999)* (The language of the promissory note which allowed the lender to assess a 5% penalty on each late installment payment did not authorize the lender to assess a 5% penalty on the final balloon payment).

(n2)Footnote 178. Grant S. Nelson & Dale A. Whitman, Real Estate Finance Law 443-47 (5th ed. 2007).

(n3)Footnote 179. Federal courts have decided late charges are interest, at the behest of out-of-state lenders seeking courts to rule that federal law preempting "interest rates" also preempted state limitations on late charges. *Greenwood Trust Co. v. Massachusetts, 971 F.2d 818 (1st Cir. 1992)* ; *Hill v. Chemical Bank, 799 F. Supp. 948 (D. Minn. 1992)* . "While in those cases, it was consumers in states with good consumer protection laws who lost, the precedent is a double-edged sword which may on other occasions support a borrower's argument that late fees are interest." National Consumer Law Center, Usury and Consumer Regulations 69 (1993 Cum. Supp).

(n4)Footnote 180. *Id.*

(n5)Footnote 181. *511 P.2d 1197 (Cal. 1973)* . In 1978, the California legislature revised RSA 2000 to change from establishing presumptive invalidity of liquidated damages clauses to establishing presumptive validity of liquidated damages clauses.

(n6)Footnote 182. Regulated rates typically range from 2% to 6% of the overdue sum. *See, e.g.,* U.C.C. 2.5925, 1974 (setting a 5% late charge maximum); RSA 2000, art. 1 (4% of payment past due, disclosed in advance to borrower); Or. Rev. Stat., tit. 9, ch. 86 (not to exceed 5% of delinquent sum, if reserved by contract, and 15 days overdue); Va. Code Ann., tit. 6.1, ch. 7.3 (not to exceed 5% of sum overdue, free of acceleration, if reserved in contract with borrower, made later than 7 days after due date); RSA 2000, art. 17 (secondary mortgage loans not to exceed 5% of payment overdue made 15 or more days later); Mass. Gen. Laws Ann. Part II, tit. 1, ch. 38 (3% of sum overdue, if more than 15 days late, applies only to residential mortgage loans, 14 dwelling units).

In California, the late payment fee on a mortgage or trust deed secured by an owner-occupied, single-family dwelling is 6% of the installment due or $5, whichever is greater. A payment is not late until ten days after the due date of the installment. The borrower has to occupy the property within 90 days of signing the deed of trust or mortgage.

If the security property is anything but a single-family, owner-occupied dwelling, the late payment fee is 10% of the installment due or $5, whichever is greater. On a balloon payment loan, the late charge is measured by the largest single monthly installment previously due, other than the balloon payment, multiplied by the sum of one plus the number of months occurring since the late payment charge began to accrue. RSA 2000. Bus. & Prof. Code § 10242.5(a) and (c).

(n7)Footnote 183. 24 C.F.R. § 203.25, 38 C.F.R. § 36.4212(c).

(n8)Footnote 184. RSA 2000.

(n9)Footnote 185. *12 U.S.C. § 1715b*.

(n10)Footnote 186. *Miller v. Balcanoff, 566 So.2d 1340 (Fla. Dist. Ct. App. 1990)* (The fact that there was a 10-day "grace" provision included in the promissory note did not authorize the lender to accelerate the entire obligation if payments were more than 10 days late).

(n11)Footnote 187. *214 Cal. Rptr. 531 (1985)* .

(n12)Footnote 188. *168 Cal. App.3d at 831-32, 214 Cal. Rptr. at 539-40.*

(n13)Footnote 189. *Jacobson v. McClanahan, 264 P.2d 253 (Wash. 1953)* .

(n14)Footnote 190. *Beal v. Mars Larsen Ranch Corp., Inc., 586 P.2d 1378, 1382 (Idaho 1978)* .

(n15)Footnote 191. *Bisno v. Sax, 346 P.2d 814, 818 (Cal. Dist. Ct. App. 1959)* . *See also Jenkins v. U.S.A. Foods, Inc., 912 F. Supp. 969 (E.D. Mich. 1996)* .

(n16)Footnote 192. *Kreiss Potassium Phosphate Co. v. Knight, 124 So. 751 (Fla. 1929)* . *See generally*, Robert R. Rosenthal, *The Role of Courts of Equity in Preventing Acceleration Predicated Upon a Mortgagor's Inadvertent Default, 22 Syracuse L. Rev. 897 (1971).*

(n17)Footnote 193. *Kerin v. Udolf, 334 A.2d 434 (Conn. 1973)* .

(n18)Footnote 194. *Graf v. Hope Bldg. Corp., 171 N.E. 884 (N.Y. 1930)* .

(n19)Footnote 195. *171 N.E. at 888* .

(n20)Footnote 196. Bruce J. Bergman, *Strict Acceleration in New York Mortgage Foreclosure--Has the Doctrine Ended?, 8 Pace L. Rev. 475 (1988).* The author concludes: "... the doctrine, although sometimes criticized, has not been persuasively or effectively limited or changed." 8 Page at 534. But *Graf* did *not* apply to payments made late but within the grace period, payments lost in the mail, or where the lender had waived tardiness.

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CHAPTER 104 THE PROMISSORY NOTE IN REAL ESTATE TRANSACTIONS 1

13-104 Thompson on Real Property, Thomas Editions § 104.07

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§ 104.07 Difference Between "Assuming" and Taking "Subject to."

§ 104.07(a) When the Distinction Matters.

A buyer may elect to finance a home purchase by arranging a new loan or by keeping the existing loan in place. The buyer's rights will depend on whether the seller's note is assumable and whether it has a due-on-sale clause accelerating the total unpaid balance of the debt if the seller transfers the property without the lender's prior consent. If the buyer decides to keep the existing loan in place, the buyer can either assume it or take subject to it. Here is the difference.

A new buyer takes *subject to the deed of trust* if the deed of trust was duly recorded, or if the buyer actually knows about it and hasn't arranged for the seller to pay it off at closing. A new buyer *assumes the note* if the buyer agrees personally to repay the balance of the debt due.

The difference between a purchaser taking "subject to" the deed of trust and "assuming" the note becomes significant only when the debt exceeds the value of the security property. A buyer taking "subject to" the deed of trust risks losing the property through foreclosure if the debt goes into default. An *assuming* grantee is at an even greater risk. Not only does the assuming grantee risk foreclosure on default but, in addition, will be personally liable to cover any deficiency between the debt and what the foreclosure sale yields.

§ 104.07(b) Protecting the "Subject to" Buyer.

A buyer who plans to keep the existing financing in place needs to condition the obligation to purchase on the lender allowing the buyer to assume or take subject to the loan. The buyer needs to confirm the principal and interest due and whether the loan is in good standing. If tax and insurance impound accounts exist, they should be verified and prorated on closing. n197

§ 104.07(c) How the Buyer Becomes an Assuming Grantee.

Typically, L, the lender, has reserved the right to approve A's successors (A being the original borrower). As a condition of loan transfer approval, L will insist that B (the new buyer) sign an agreement personally *promising to repay* the balance of the debt. n198 By signing that agreement, B will become an "assuming grantee."

The formalities necessary for the buyer to become an assuming grantee vary from state to state. In most states, including New York and California, the agreement to assume must be in writing. New York also requires that the amount assumed be stated and that the writing be signed and acknowledged at the time of the conveyance. n199 In California, the assumption agreement must be in writing signed by the assuming grantee or appear in the conveyance itself (which is not signed, ordinarily, by the grantee). n200

Pennsylvania treats a conveyance subject to a mortgage as the buyer's implied assumption of the debt. But only the seller--not the lender--can sue on the implied assumption. n201

Parol evidence is admissible to establish that an assumption was truly intended. Some courts require that the evidence be "clear and convincing." n202

Suppose, though, that the buyer never promises the *lender* to pay off the old debt but does promise the *seller* to pay it off. Can the lender sue the buyer directly on the promise the buyer made to the seller if the buyer doesn't pay? Yes, on several theories. The most common theory is that the lender is a third-party beneficiary of the buyer's promise to the seller. n203 Another theory is that the buyer's assumption promise is an asset of the seller's that the lender can reach with the aid of equity, an equitable assets theory advanced by Professor Williston. n204 Other concepts have been invoked to justify giving the lender standing to sue the buyer directly. n205 Although the practical consequences of each theory vary, n206 the point is that the lender can sue the buyer on a promise the seller made to the lender to pay the debt. Some states have statutory limits barring lenders from claiming deficiency judgments against buyers. But, in the absence of these statutes, the issue of personal liability casts a shadow that few informed buyers or sellers would overlook in the overbuilt, default-riddled era of the early 1990s.

§ 104.07(d) Effect on Seller of Buyer Assuming or Taking Subject to the Existing Loan.

Does the seller care whether the buyer meticulously continues payments to the lender once the deal closes? Isn't the seller out of the picture when the buyer moves into the house and starts paying the mortgage? Not necessarily.

Once the seller signs a promissory note to a lender, the seller can't cut the ties to the lender by later contracting to sell the property. When a grantee assumes the existing mortgage, the grantee becomes the primary obligor for the debt. The land is the primary fund for repayment, then the grantee, but the grantor remains as the lender's surety for the grantee. n207

If the lender recovers against the original seller, the seller may seek reimbursement from her buyer if the buyer had assumed the debt. Even if the buyer only took "subject to" the debt but the lender recovers against the seller, almost all states allow the seller to stand in the lender's shoes and *foreclose* to secure reimbursement. n208 This right is called subrogation. Only in Arizona has the seller's right of subrogation been denied when the buyer took "subject to" the existing mortgage. n209

The lender can excuse the original borrower from liability on the note by entering what is called a novation agreement, or a release, and thereby accept the buyer as the sole obligor on the debt. F.H.A.-approved lenders have been instructed to prepare such releases when a homeowner sells to a creditworthy purchaser who executes an agreement to assume and pay the mortgage debt. n210 Fees can be charged for the releases. n211

The lender may inadvertently release the seller by altering the terms of the underlying obligation in ways that increase the seller's exposure. That certainly would be true if the lender and buyer agreed to raise the interest rate or increase the principal without the seller's consent. n212 It would also be true if the lender released all or part of the security property from the lien of the mortgage. Courts have differed on whether the grantor would be totally discharged n213 or discharged only to the extent of the value of the property released. n214

States differ on whether extending the date for principal repayment discharges a surety (which is what the seller becomes). The majority rule is that the seller is discharged if the extension was made without his consent. n215 In some states, the seller remains liable despite the time extension, to the extent of the difference between the unpaid debt and the value of the property on the day the debt was originally due. n216 The reasoning for this rule is that the seller is no worse off for the extension and might be better off if the buyer eventually pays up. n217

The case for releasing the seller is certainly compelling when the value of the security property drops like a stone during the extension period and the lender wants the seller to cover the deficiency gap. n218 When the value hasn't declined though, the seller's case for release seems less convincing. The Uniform Commercial Code, which governs negotiable notes, allows a surety to get off the hook when the lender grants a time extension or a material modification, but only to the extent the extension or modification results in the surety recovering less from the primary debtor. n219

Lenders try to seal off all of the original obligor's escape routes. In a typical deed of trust form, you will find a clause stating that the lender can grant a later owner a time extension or other modification without releasing "the liability of the original Borrower or Borrower's successor in interest." At least one court has held that this language will allow the lender to extend the time for payment without discharging the seller (the original obligor). n220 But it isn't explicit enough to keep the seller on the hook if the lender also raises the interest rate on the debt. n221

Provisions in the note may oblige an assuming grantee to "keep all of the promises made in this note." Also, the original borrower may waive the right to insist that the note holder demand payment first from the new buyer (presentment), and the right to notice if the new buyer has missed payments (notice of dishonor).

FOOTNOTES:

(n1)Footnote 197. For a more in-depth discussion, *see* Robert Kratovil & Raymond J. Werner, Real Estate Law 363 (9th ed. 1988).

(n2)Footnote 198. *Connecticut Savings Bank v. Obenauf, 758 A.2d 363 (Conn. App. 2000)* (transferee of property not liable for promissory debt note owed solely by transferor).

(n3)Footnote 199. *N.Y. Gen. Oblig. Law § 5-705*.

(n4)Footnote 200. 171 *Cal. Civ. Code 1624(f)*.

(n5)Footnote 201. *Steinert v. Galasso, 63 A.2d 443 (Pa. 1949)* .

(n6)Footnote 202. *Cassidy v. Bonitatibus, 497 A.2d 1018 (Conn. App. 1985)* .

(n7)Footnote 203. *See* Grant S. Nelson & Dale A. Whitman, Real Estate Finance Law 296-298 (5th ed. 2007).

(n8)Footnote 204. Samuel Williston, *Contracts for the Benefit of a Third Person, 15 Harv. L. Rev. 766, 767 (1902).*

(n9)Footnote 205. *See* Grant S. Nelson & Dale A. Whitman, Real Estate Finance Law 298-300 (5th ed. 2007).

(n10)Footnote 206. Roger Bernhardt, California Mortgage and Deed of Trust Practice 417 (2d ed. 1990).

(n11)Footnote 207. Roger A. Cunningham & Saul Tischler, *Transfer of the Real Estate Mortgagor's Interest, 27 Rutgers L. Rev. 24 (1973).*

(n12)Footnote 208. *Seward v. New York Life Ins. Co., 152 S.E. 346 (Va. 1930)* .

(n13)Footnote 209. *Best Fertilizers of Arizona, Inc. v. Burns, 570 P.2d 179 (Ariz. 1977)* .

(n14)Footnote 210. F.H.A. Mortgage Letter 90-9 (Mar. 20, 1990). The V.A. has a similar rule, 38 C.F.R. §§ 4209, 4232, 4285, as amended by Fed. Reg. 37468 (Sept. 12, 1990).

(n15)Footnote 211. The original borrower can consent to continued liability which would happen, presumably, only when the lender wasn't entirely satisfied with the successor's credit.

(n16)Footnote 212. *Oellerich v. First Fed. Sav. & Loan Ass'n of Augusta, 552 F.2d 1109 (5th Cir. 1977)* (interpreting Georgia law).

(n17)Footnote 213. *Hughes v. Tyler, 485 So. 2d 1026 (Miss. 1986)* .

(n18)Footnote 214. *Mann v. Bugbee, 167 A. 202 (N.J. 1933)* . Presumably, if the debt was reduced in proportion to the release, the surety should remain contingently liable for the balance due since she wouldn't have been injured by the release. *See also Bissonnette v. Wylie, 693 A.2d 1050, 1056 (Vt. 1997)* (Proper measure of amount surety may offset against his liability due to impairment of collateral is extent to which collateral was discharged for consideration below its actual value).

(n19)Footnote 215. *Union Mut. Life Ins. Co. v. Hanford, 143 U.S. 187 (1892)* (interpreting Illinois law); *Antisdel v. Williamson, 59 N.E. 207 (N.Y. 1901)* .

(n20)Footnote 216. *Feigenbaum v. Hizsnay, 175 N.Y.S. 223 (1919) . See, also Petters v. Storm, 272 N.W. 409 (Neb. 1937)* , for the principle that a mortgagee cannot hold a mortgagor liable for any deficiency that the mortgagee himself caused.

(n21)Footnote 217. However, in a California case, the lender extended the due date on the loan for two years, at the new buyer's request. That alone was held sufficient to justify letting the seller, the original obligor, off the hook. *Braun v. Crew, 192 P. 531 (Cal. 1920)* .

(n22)Footnote 218. George Neff Stevens, *Extension Agreements in the "Subject-To" Mortgage Situation, 15 U. Cin. L. Rev. 58 (1941).*

(n23)Footnote 219. *U.C.C. § 3-605*.

(n24)Footnote 220. *First Fed. Sav. & Loan Ass'n of Gary v. Arena, 406 N.E.2d 1279 (Ind. 1980)* .

(n25)Footnote 221. *Id.*

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CHAPTER 104 THE PROMISSORY NOTE IN REAL ESTATE TRANSACTIONS 1

13-104 Thompson on Real Property, Thomas Editions § 104.08

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§ 104.08 Restrictions on the Borrower's Right to Assign or Borrow.n222

§ 104.08(a) Due-on-Sale.

§ 104.08(a)(1) The Difference Between Due-on-Sale Clauses and Prohibitions Against Sale.

The borrower remains the owner of the security property even though it is encumbered. A mortgagor or trustor can sell her equity freely and without the lender's consent. The doctrine barring "restraints on alienation" would not allow lenders to restrict the borrower's *right to sell*.

Technically, the rights of the mortgagee are not impaired by the borrower selling her equity. n223 After the sale, the original mortgagor remains liable on the debt (unless discharged by the lender), the new owner either takes subject to the lender's security interest or assumes it, and the lien remains as good against the property as it ever was.

Lenders may nonetheless use "due-on-sale" clauses to restrict indirectly the borrower's right to sell. n224 A "due-on-sale" clause gives the lender the option of declaring all of the unpaid debt immediately due and payable if the borrower sells the security property without the lender's prior consent. In other words, before selling the security property, the borrower would have to pay off the loan, unless the lender were willing to keep the loan in place for the new buyer.

§ 104.08(a)(2) Why Homeowners Don't Like Due-on-Sale Clauses.

Homeowners prefer having the option of passing along their existing loans to their buyers, especially if the loans are at below-market rates.

Tempers flared over the "due-on-sale" issue in the late 1970s and early 1980s, when inflation drove mortgage rates close to 20%. Homeowners with 7-10% fixed-rate loans desperately wanted to pass those loans onto their buyers as an added incentive. Many homeowners would then take back a junior purchase money loan, if necessary, to make the deal work. But lenders were equally determined to call in as many of those deeply below-market loans as they could. The rate of inflation exceeded the nominal rate of interest on many of these loans so that *real* rates of interest were negative. No wonder borrowers wanted to pass these loans along and lenders wanted to call them in.

§ 104.08(a)(3) The Legal Battle Congress Resolved in Favor of Lenders.

About a dozen state courts and legislatures were extremely friendly to the borrowers and insisted, through case law or statutes, that buyers be allowed to assume existing loans if they proved creditworthy and the transfer wouldn't result in an impairment of the lender's security. n225

Congress came down hard on the side of the lenders, whose deposits it was insuring for billions, and preempted the field. It enacted the Garn-St. Germain Act, under which lenders are entitled to enforce due-on-sale clauses with certain modest limitations, described later. n226

The federal law applies to every "loan, mortgage, advance, or credit sale secured by a lien on real property." Every secured lender is protected by the act.

§ 104.08(a)(4) Why Lenders Use Due-on-Sale Clauses.

Lenders use due-on-sale clauses for four reasons: (1) to make sure that the new borrower is a good credit risk, (2) to reappraise the security property to see if it is still valuable enough to justify keeping the debt in place, (3) to bring the loan interest rate and its terms in line with prevailing market rates and terms, and (4) to reduce the volume of real estate loans in their portfolios.

The third objective is so important that due-on-sale clauses are far more likely to be found in fixed rate than in adjustable rate loans. Most adjustables are "freely assumable." n227

§ 104.08(a)(5) Why Due-on-Sale Clauses Are Optional, Not Automatic.

Well drafted "due-on-sale" clauses avoid accelerating loans *automatically* when the mortgagor sells for three reasons: (1) lenders want to forestall clever borrowers from selling and later trying to avoid prepayment penalties by claiming that the loan was called as a result of the "due-on-sale" provision; (2) lenders often allow assumption. They are happy with the new buyer and the loan (adjusted to the prevailing market rates); and (3) the federal law protecting all lenders against state interference with the enforcement of due-on-sale clauses was written to apply only to optional acceleration clauses. n228

§ 104.08(a)(6) Congressional Limits on Lenders' Rights to Invoke Due-on-Sale Clauses in Residential Transactions.

The act does place some limits on the situations in which home mortgage lenders (those secured by "less than five dwelling units") are free to invoke their due-on-sale clauses. The limits described below do not apply to lenders on commercial property--anything other than properties secured by less than five dwelling units. Here is the statutory list of transactions in which home mortgage lenders are prohibited from deploying due-on-sale clauses:

> (1) the creation of a lien or other encumbrance subordinate to the lender's security instrument which does not relate to a transfer of rights of occupancy in the property; n229
>
> (2) the creation of a purchase money security interest for household appliances;
>
> (3) a transfer by devise, descent, or operation of law on the death of a joint tenant or tenant by the entirety;
>
> (4) the granting of a leasehold interest of three years or less not containing an option to purchase;

(5) a transfer to a relative resulting from the death of a borrower;

(6) a transfer where the spouse or children of the borrower become an owner of the property;

(7) a transfer resulting from a decree of a dissolution of marriage, legal separation agreement, or from an incidental property settlement agreement, by which the spouse of the borrower becomes an owner of the property;

(8) a transfer into an inter vivos trust in which the borrower is and remains a beneficiary and which does not relate to a transfer of rights of occupancy in the property; or

(9) any other transfer or disposition described in regulations prescribed by the Federal Home Loan Bank Board. n230

Congress passed a law "encouraging" lenders utilizing "due-on-sale" powers "to permit an assumption of a real property loan at the existing contract rate or at a rate which is at or below the average between the contract and market rate ... and nothing in this section shall be interpreted to prohibit any such assumption." n231 The statute only encourages, it doesn't require, lenders to give assuming borrowers a rate break. Presumably, though, homebuyers will seldom be interested in assuming a loan at rates above current market.

§ 104.08(a)(7) States Could Opt Out of the Federal Rule Favoring Due-on-Sale Clauses but Only as Applied to State Chartered Lenders.

The federal law gave states the option of applying their own rules to due-on-sale clauses appearing in the mortgages of *state-chartered and regulated* lending institutions. Maine, n232 Massachusetts, n233 New York, n234 South Carolina, n235 and Wisconsin n236 exercised their option. In these states, due-on-sale clauses are enforceable if they are written by a federally chartered lender, but they might not be if the loan is written by a state-chartered lender. State law must be consulted to determine their enforceability in those five states.

§ 104.08(b) Due-on-Encumbrance: Restrictions on the Borrower's Right to Further Borrowing.

A due-on-encumbrance clause gives the lender the right to declare the entire unpaid balance of the debt due and payable if the borrower takes out another loan secured by the same property without the lender's consent.

§ 104.08(b)(1) Why Senior Lenders Sometimes Benefit from Borrower's Obtaining Second Mortgages.

Why should a senior lender care if a borrower takes on junior debt? The presence of other potential payors should calm the senior creditor. The junior lender becomes a second potential source of repayment for the senior. If the senior's debt isn't paid on time and it forecloses, the junior lien will be erased if there isn't enough money from the sale to pay them all. Thus, juniors have an incentive to forestall foreclosure sales by doing their best to make sure that the debtor doesn't default, even if this means personally making payments the borrower skips.

A senior lender won't lose its lien priority to a junior creditor unless the senior later decides to modify its loan terms in a way that jeopardizes the junior's security interest without the junior's consent.

One advisor counsels purchasers of junior liens:

> If you are a junior lien holder, a letter should be written to the senior lender advising him of your address and telephone number and that you are also a lender on the property. Assure him that you recognize your responsibility to protect senior lenders, and state your willingness to step in to cover any defaults. Such a letter, coupled with a request that you be notified of any default, often goes a long way

> toward encouraging the senior's goodwill.
>
> Attaining the senior's goodwill can be valuable if the borrower defaults in his obligations: Unless the senior is agreeable to some other arrangement, the borrower's failure to keep up his payments will ordinarily compel you to step in and cover senior defaults. Furthermore, unless you've given the senior appropriate notice ... an uncooperative senior may not bother informing you of a default in his loan until he gets around to commencing foreclosure--after as much as a year's past due payments have accumulated. And unless the senior is obliging enough to coordinate his efforts with you, the borrower's filing bankruptcy will trigger independent legal action by the senior, the cost of which may be deducted from your security. n237

Senior creditors know that junior lienors are another potential source of repayment but they defend due-on-encumbrance clauses anyway.

§ 104.08(b)(2) Why Lenders Don't Like to See Borrowers Encumber Property Too Much.

They point out that borrowers can stretch themselves too thin through subsequent borrowing. If a borrower has little or no cash in a project, the borrower may be tempted to make riskier moves. If things go badly, the lender gets stuck with the downside loss. If things go well, the borrower keeps the gravy above the loan amount. Lenders like to know the borrower has something to lose if things go badly. As one scholar puts it: "In the extreme case in which the value of the firm equals the value of outstanding debt, the firm has nothing to lose and everything to gain by adopting a 'shoot the moon' strategy." n238 Furthermore, once a project is heavily mortgaged, the borrower may decide not to invest in it even if the investment would be profitable because too much of the yield will go to pay off loans.

Lenders also fear that commercial developers, especially, would lose any incentive to "mind the store" if they were free to mortgage away all their equity. They would direct their personal attention and talents to projects in which they had substantial equities, and not to projects "owned" by their lenders. Finally, there is compelling evidence that borrowers are much more likely to default on properties with no equities or negative equities, than on properties in which they have substantial equity.

§ 104.08(b)(3) Why Homeowners Need Home Equity Loans.

For homeowners, a due-on-encumbrance clause can work a great hardship. Many homeowners have no substantial assets except the equity values in their houses. They may need to borrow for health emergencies and tuition, or just to stay solvent. Forcing them to get their home mortgage lender's approval before taking on junior debt might result in compromising their access to a home equity loan which could be their best source of ready cash in an emergency.

A due-on-encumbrance clause doesn't prohibit the debtor from borrowing more. It only stops her from encumbering property which is already secured. The borrower can still obtain unsecured loans, and these can burden a borrower even more since unsecured financing is quite costly.

§ 104.08(b)(4) The Congressional Word on Due-on-Encumbrance Clauses.

Congress voted to protect homeowners by prohibiting due-on-encumbrance clauses in home loans. Lenders are thus barred from calling in loans merely because their borrowers pledged their house to secure a home equity loan. (An "equity" loan is any loan secured by whatever value the debtor still has in the property after at least one secured debt.)

In contrast, Congress didn't prohibit lenders from pulling the plug on commercial developers who borrow against already encumbered property. In these situations, state law governs. Where state courts find due-on-encumbrance clauses to be "unreasonable restraints on alienation" or otherwise objectionable, such clauses are unenforceable.

§ 104.08(b)(5) Possible State Court Responses to Commercial Lenders' Due-on-Encumbrance Clause Enforcement Practices.

Consider the circumstances under which a state court might grant or deny a lender the right to enforce a due-on-encumbrance clause:

Case One: the lender makes a first mortgage loan of $100,000 when the security property was worth $150,000. Its value is now $300,000. The borrower wants to borrow a second $100,000. The lender will refinance the existing loan but only at a rate much higher than the borrower is currently paying, and greater than what other lenders are charging for a second or "home equity" loan. If the borrower goes elsewhere for junior funding the lender threatens to call the senior loan, especially if its interest rate is below market.

The lender in this case can be said to be engaging in opportunistic behavior. The borrower will certainly contend that the lender is attempting to obtain a benefit not contemplated by the initial agreement at the borrower's expense. The lender will rejoin that it contemplated using this clause as a way to call loans in a rising market.

Case Two: The senior lender makes the same loan but this time, the borrower's financial situation has deteriorated and the value of the security property is now $125,000. The borrower seeks another $25,000 in secured debt. n239

Here, the borrower's claim that the lender is engaging in opportunistic behavior is unpersuasive. The senior lender's fears of loss are justifiable. If the lender believes that enforcing the due-on-encumbrance clause will help preserve the security interest it had bargained for, it is easy to see why courts might agree and allow the lender to call the loan if the borrower infringes on a due-on-encumbrance provision.

§ 104.08(b)(6) Drafting and Interpreting "Due-on" Clauses.

Even in those circumstances where a senior lienor could enforce a due-on-encumbrance clause, the lender still needs to have reserved that right in its note and mortgage. Suppose the loan only contains a "due-on-sale" clause but makes no mention of "encumbrances?" The mortgage prohibits the "sale or transfer of all or any part of the property or any interest in it." Does this encompass a "mortgage or further encumbrance?" The answer is not obvious. n240

Lenders can argue that a "sale" includes an encumbrance since the very point of any security instrument is to give the lender the *right to sell* the property in the event of default.

Borrowers can respond that ambiguities are read against the drafter, which is generally the lender. So, if the lender had meant to prohibit further secured borrowing, it should have said so plain and clear. Thoughtful drafting keeps these types of disputes at a minimum.

If a Senior Lienor Doesn't Accelerate When the Borrower Incurs Junior Encumbrances, Is the Senior Lienor Barred from Accelerating When the Junior Lien Is Foreclosed?

The statutory exception barring home mortgage lenders from invoking due-on-sale or due-on-encumbrance clauses expressly allows lenders to accelerate when those devices are accompanied by transfers of rights to occupancy in the property.

A junior lien results in a change in the right to occupy the property only on foreclosure when the original borrower is displaced by the purchaser at the foreclosure sale. Despite this, at least two courts have held that even on foreclosure, the lender may not accelerate. The statutory "change of occupancy" language only applies at "the creation of a lien." It makes no explicit provision for lien foreclosures. "... [t]he lender should reasonably anticipate that the borrower could default and the second lien could be foreclosed upon." n241

Fewer than one loan in a hundred results in foreclosure. So, arguably, it would be wrong to require the senior lienor to act as if every borrower who takes out a home equity loan is headed down the road of default.

When the lender forecloses on the junior lien, some courts have held that the senior lienor should not have to live with the purchaser at foreclosure anymore than it would have been obliged to accept any other substitute owner. Congress must not have intended that result when it enacted the "occupancy transfer" exception.

"Foreclosure of the second mortgage ... transfer title, all incidents of ownership, and occupancy to third parties with whom the first mortgage holder has not dealt." n242

A dissenting judge in the above case observed:

> The effect of the majority's ruling will be to limit the availability and increase the cost of equity loans, since secondary lenders must now face a new threat to their security in the event of a foreclosure. Such a ruling harms the homeowner, contradicts the deed of trust at issue, and is inconsistent with our law. n243

§ 104.08(c) The Double Whammy: Prepayment Penalties Coupled with Due-on-Sale or Due-on-Encumbrance Clauses.

A borrower who is desperately eager to sell her house and equally anxious to avoid paying a prepayment penalty needs to find a buyer willing to take title subject to the loan in place. Her efforts can be thwarted by a lender who refuses to accept the buyer and, instead, invokes a due-on-sale clause, calling the loan and demanding a prepayment fee.

Some courts see nothing wrong with a lender including both prepayment penalty and due-on-sale clauses in the same mortgage, as long as they aren't invoked concurrently. A court which sanctioned the use of both those clauses in the same loan explained it this way:

> The two provisions, rather than working contemporaneously, are used as economic complements to one another. While the *due-on-sale clause* enables a lender to require early payment of lower than market interest rate loans, the *prepayment penalty* is used to discourage refinancing by the borrower when market interest rates fall below the rate on the borrower's existing loan. The two provisions, therefore, are used by lenders to achieve different goals. Both are at least arguably necessary to protect a lender's long term loan portfolio. n244

Still, if the lender enforces both a steep prepayment fee and a due-on-sale clause at the same time, he puts the borrower in a tight bind. Suppose a young lawyer buys a house for $300,000, putting $60,000 down. Later, she learns that her firm is going out of business and that her services will no longer be needed. She finds a job in a city 200 miles away and decides to sell her house. Her mortgage of $240,000 calls for a prepayment penalty of six months' interest. The interest rate is 10%, fixed, and the loan is fully amortized over a 25-year term.

She lists her house for $325,000. Her best offer is $320,000. After paying a 6% brokerage commission, title and closing costs, she would be left with just enough to pay off the loan and start looking again for a comparable house where she found her new job.

But what about the prepayment penalty of nearly $12,000? Her "equity" would be reduced from $60,000 to $48,000 if she had to pay it. So instead, she shifts the prepayment fee obligation to her buyer in the purchase-and-sale contract. (Note that if the buyer decides to take subject to the existing loan, no one will have to pay the $12,000. This gives her buyers a powerful incentive--$12,000 worth--to think twice before objecting to keeping the loan in place).

What if the lender should turn down the buyer? The lender might reject the buyer because of his credit history or because interest rates have risen and the lender wants a higher rate of interest. The seller will be able to avoid the prepayment penalty only by finding a better qualified buyer or a buyer willing to pay the higher interest rate.

Maybe the lender is exercising the due-on-sale clause in hopes of getting paid off because it wants to have less money invested in real estate mortgages. Perhaps its regulators have increased the lender's capital requirements and the lender is calling real estate loans like crazy to firm-up its liquidity picture. Under these circumstances, prepayment will be unavoidable if the seller still needs to sell. Will the seller be liable for the prepayment fee if the prepayment was involuntary?

The borrower may see no reason why she should have to pay a penalty for prepayment. Her only choice is to pay off the old loan or forfeit the right to sell her house. Conversely, lenders see no reason why they shouldn't collect prepayment penalties even when the buyer was willing to keep the loan in place but the lender wasn't. After all, the borrower needn't have sold. Further, if prepayment penalties weren't due on these occasions, a borrower could avoid them by threatening a sale and daring the lender to invoke the clause. The borrower could then claim that the acceleration was involuntary and that the lender's right to levy a prepayment fee was forfeited.

The borrower has the edge when the prepayment clause doesn't expressly apply to both involuntary and voluntary accelerations. In these cases, courts are likely to hold that the prepayment clause was only intended to be applied for voluntary prepayments. n245 Nowadays though, most prepayment penalty clauses are written to come into play whether the loan is paid off voluntarily or not, and even when prepayment follows the lender's rejection of a proffered potential buyer.

In some states, these clauses are enforced as written. n246 Some state legislatures n247 and courts n248 prohibit prepayment penalties when the prepayment results from lenders accelerating debts under a due-on-sale clause on owner-occupied residences.

The Federal Home Loan Bank Board, under its authority to promulgate regulations under the Garn-St. Germain Act, prohibits prepayment penalties if a lender "exercises a due-on-sale clause by written notice." n249

§ 104.08(d) "Lock-ins" and Due-on-Sale Clauses.

The lender's simultaneous enforcement of "lock-in" *and* due-on-sale clauses can also frustrate a borrower's efforts to sell the security property. Many commercial loans contain "lock-in" clauses, barring prepayment for a period of years--usually five to seven. n250

Suppose the owner of an office building or shopping center wants to sell, but the loan agreement has "lock-in" and "due-on-sale" clauses. The lender refuses to allow the prospective borrower to assume the loan and threatens foreclosure if the owner sells without consent.

"All right, we'll refinance," says the owner.

"No, you can't for five years," replies the lender.

Proceeding with the sale without securing the lender's approval is dangerous, unless the buyer has enough cash to repay the old loan when it is called; new lenders won't be easy to find once a notice of default has been filed.

The practical result is that the borrower can't sell during the "lock-in" period. Prospective buyers can't get the lender's approval to assume the existing loan, and the seller can't pay off the old loan because of the lock-in.

Borrowers have sometimes petitioned for court relief from this "double whammy." n251 In one decided case the borrower lost, although the court acknowledged that there could be "special circumstances" justifying relief. Obviously, commercial borrowers can't count on courts to release them from their loan agreements if they tie themselves up this way.

FOOTNOTES:

(n1)Footnote 222. *See* Telephone Equipment Network, Inc. v. T/A Westchase Place, Ltd., No. 01-01-00650-*CV, 2002 Tex. App. LEXIS 2104 (Tex. App. 2002)* (a landlord may obtain a prejudgment attachment of tenant's property to prevent holder of promissory note from improperly selling that property with intent to defraud landlord).

(n2)Footnote 223. *Purdy v. Irwin, 18 Cal. 350 (1861)* ; 44 Cal. Jur. 3d 678 (1978).

(n3)Footnote 224. *Spanish Oaks, Inc. v. Hy-Vee, Inc., 655 N.W.2d 390 (Neb. 2003)* .

(n4)Footnote 225. *See* Grant S. Nelson & Dale A. Whitman, Real Estate Transfer, Finance, and Development 471 (8th ed. 2009); Richard C. Maxwell, *The Due-on-Sale Clause: Restraints on Alienation and Adhesion Theory in California, 28 U.C.L.A. L. Rev. 197 (1980).*

(n5)Footnote 226. *96 Stat. 1505, 12 U.S.C. § 1705-3,* as amended Nov. 30, 1983, *97 Stat. 1237.*

(n6)Footnote 227. *See* Paula C. Murreay Due-on-Sale Clauses in Adjustable Rate Mortgages, 12 Real Est. L.J. 229 (1984).

(n7)Footnote 228. Presumably, the act would not protect lenders inserting increased-interest-on-transfer clauses in their loans, allowing assumptions, but at higher rates. However, lenders wouldn't need federal protection against state courts if they were using increased interest clauses. The doctrine most cited by state courts to strike down due-on-sale clauses was that those clauses unduly restrained the borrowers' right to aliennate mortgaged property. Increased-interest clauses probably wouldn't run afoul of state court "restraint" rules as long as the rate didn't exceed market rates at the time.

(n8)Footnote 229. The transactions to which due-on-sale clauses can apply include: sales of the property by installment sale contract, long-term leases with options, or other devices in which junior financing is made, usually by the vendor, to facilitate a disguised sale.

A borrower who sells and takes back a purchase money loan invites the lender's accelerating under a due-on-sale clause. Sometimes borrowers attempt to evade these provisions by entering long-term installment sale contracts. They remain the primary obligor on the existing mortgage loan. The new buyer enters a contract of sale and takes possession. The buyer makes payments on the contract sufficient to enable the seller to pay the existing debt. When the buyer has paid enough to establish an equity of her own in the property, most installment sale contracts allow the buyer to obtain a deed and a purchase money mortgage.

Is the installment sale contract a sale or transfer sufficient to justify the lender accelerating under a due-on-sale clause? Or must the lender wait until the contract is executed and the property deeded? Courts are divided. In one sense, the acceleration can be seen as unjustified because the seller, the original borrower, remains the legal owner. The federal exemption for junior financing doesn't apply "to a transfer of rights of occupancy in the property." Installment contracts usually involve a change in possession.

The typical due-on-sale clause explicitly anticipates and precludes the use of an installment sale contract as a way to evade acceleration on sale: "If all or any part of the Property OR ANY INTEREST IN IT IS SOLD OR TRANSFERRED... ." The sale under a contract certainly counts as the transfer of an interest in the property. *See New*

Home Fed. Sav. & Loan Assn., 482 A.2d 625 (Pa. 1989) .

(n9)Footnote 230. *12 U.S.C. § 1701j-3(d)*.

(n10)Footnote 231. *12 U.S.C. § 1201j-3(b)(3)*.

(n11)Footnote 232. *Me. Rev. Stat. Ann. tit. 9-A, § 1-110*.

(n12)Footnote 233. *Mass. Gen. L. ch. 183, § 60*.

(n13)Footnote 234. *N.Y. Banking Law § 6-g*.

(n14)Footnote 235. *S.C. Code Ann. § 29-3-10*.

(n15)Footnote 236. *Wis. Stat. § 138.053*.

(n16)Footnote 237. George Coats, Smart Trust Deed Investment in California 93 (2d ed. 1988).

(n17)Footnote 238. Daniel R. Fischel, *The Economics of Lender Liability, 99 Yale L.J. 131, 134 (1989).*

(n18)Footnote 239. A majority of state courts which confronted a comparable "restraints on alienation" challenge to the enforcement of due-on-sale clauses before the federal law was enacted upheld these clauses as reasonable per se when lenders invoked them just to raise rates to prevailing market levels. *See* Grant S. Nelson & Dale A. Whitman, Real Estate Transfer, Finance, and Development 460, text at n.4 (4th ed. 1992).

(n19)Footnote 240. Annotation, *Validity and Enforceability of Due-on-Sale Real-Estate Mortgage Provisions, 61 A.L.R. 4th 1070 (1988).*

(n20)Footnote 241. *Blitz v. Marion, 786 P.2d 490, 492 (Colo. App. 1989) . See also Matter of Ruepp, 321 S.E.2d 517 (N.C. App. 1984)* .

(n21)Footnote 242. *Unifirst Federal Sav. v. Tower Loan of Miss., 524 So. 2d 290, 293 (Miss. 1986)* .

(n22)Footnote 243. *Unifirst Federal Sav., 524 So. 2d at 295.* The dissent pointed out that the phrase "sold or transferred" in a due-on-sale clause does not explicitly include the granting of a lien, or the enforcement, execution or foreclosure of such a lien.

(n23)Footnote 244. *McCausland v. Bankers Life Ins. Co., 757 P.2d 941, 946 (Wash. 1988)* . While the text of the court's opinion ascribes "different goals" to prepayment and due-on-sale clauses, the paragraph itself ascribes the same goal--minimizing the lender's interest risk--to both clauses. The lender invokes due-on-sale when the market rate of interest exceeds the loan contract rate. The lender invokes prepayment when the market rate of interest is lower than the contract rate. *See generally* Annotation, *Validity and Construction of Provision of Mortgage or Other Real-Estate Financing Contract Prohibiting Prepayment for a Fixed Period of Time, 81 A.L.R.4th 423 (1990). But see Warrington 611 Assoc. v. Aetna Life Ins. Co., 705 F. Supp. 229 (D. N.J. 1989)* ; *George v. Fowler, 978 P.2d 565 (Wash. App. 1999)* (A prepayment penalty does not conflict with the due-on-sale clause).

(n24)Footnote 245. *Tan v. California Fed. Sav. & Loan Ass'n, 189 Cal. Rptr. 775 (1983)* . When the loan is prepaid out of fire insurance proceeds, or a condemnation award, courts have held that the implied covenant of good faith prohibits the lender from electing to have the funds used to pay down the loan and charging a prepayment penalty. *Milstein v. Security Pac. Nat'l Bank, 103 Cal. Rptr. 16 (1972)* ; 999 v. *C.I.T. Corp., 776 F.2d 866 (9th Cir. 1985) . But see Biancalana v. Fleming, 45 Cal. App. 4th 698 (Cal. App. 1996)* (Unlike the Tan case, there was no ambiguity in the terms that could be resolved against the lender).

(n25)Footnote 246. *Pacific Trust Co. T.T.E.E. v. Fidelity Fed. Sav. & Loan Ass'n, 229 Cal. Rptr. 269 (1986)* .

(n26)Footnote 247. *See Cal. Civ. Code § 2954.10*. California allows lenders on all nonresidential loans to enforce their borrowers' waivers of this statutory protection. But waivers after January 1, 1984, "shall be separately signed or initialed by the obligor and its enforcement shall be supported by evidence of a course of conduct by the obligee of individual weight to the consideration in that transaction for the waiver or agreement." *See also N.Y. Real Prop. Law § 254-a*; *Va. Code Ann. § 6.1-330.33* (no prepayment penalty when lender accelerates under due-on-sale clause).

(n27)Footnote 248. *Slevin Container Corp. v. Provident Fed. Sav. & Loan Ass'n, 424 N.E.2d 939 (Ill. 1981)* ; *Crockett v. First Fed. Sav. & Loan Ass'n, 224 S.E.2d 580 (N.C. 1976)* .

(n28)Footnote 249. The Federal Home Loan Bank Board doesn't allow prepayment fees if the lender refuses to permit the purchaser of property to assume the mortgage. *50 Fed. Reg. 46749* (codified at 12 C.F.R. § 591.5(b)(2). *See also In re LHD Realty Corp., 726 F.2d 327 (7th Cir. 1984)* (prohibiting mortgagee from accelerating on a due-on-sale clause and concurrently levying a prepayment penalty).

(n29)Footnote 250. In *Trident Ctr. v. Connecticut Gen. Life Ins. Co., 847 F.2d 564 (9th Cir. 1988)* , the note provided that the borrower was prohibited from prepaying the $56,500,000 loan for the first 12 years of its 15-year maturity. The note also gave the lender the right to accelerate if the borrower defaulted, and in that event to charge a 10% prepayment fee. The borrower wanted to prepay in order to refinance at lower rates, and argued that the 10% prepayment fee-on-default-and-acceleration gave the borrower an implicit option to escape the 12-year lock-in and to prepay early by paying the 10% penalty. The court observed that the loan documents "squarely address the precise issue that is the subject of this dispute; to all who read English, they appear to resolve the issue fully and conclusively." Nonetheless, the court allowed the borrower the chance to introduce "extrinsic evidence of possible ambiguity," applying California law.

(n30)Footnote 251. *Eyde Bros. Dev. Co. v. Equitable Life Assurance Soc. of the United States, 697 F. Supp. 1431 (W.D. Mich. 1988) , aff'd without opinion, 888 F.2d 127 (6th Cir. 1989)* .

1 Parts of this chapter have been adapted from George Lefcoe, Real Estate Transactions (Michie 1993).

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CHAPTER 104 THE PROMISSORY NOTE IN REAL ESTATE TRANSACTIONS 1

13-104 Thompson on Real Property, Thomas Editions § 104.09

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§ 104.09 Tailoring Note Provisions to Lender's Risks.

Most institutional mortgage lenders (savings and commercial banks, credit unions) are "go betweens," collecting money from savers and passing it along to borrowers.

Broadly speaking, the green goods business contains two discernible sources of risk: an interest and a credit risk. Loan applicants who appreciate the type of risk a lender has in mind may be in a better position to satisfy the lender's needs for documentation and other assurances. Lenders who appreciate the distinction between credit and interest risk should be able to draft more coherent loan provisions and apply existing provisions sensibly.

§ 104.09(a) Interest Risk.

The interest risk is that fluctuations in interest rates will devalue a lender's loans without a corresponding decrease in its obligations. It is similar to the risk faced by any retailer whose profits depend on the spread between her cost of goods plus overhead and her sales prices. The lender's stock-in-trade are "green goods"--savings and checking accounts and funds borrowed from other sources. It sells money for a price--and earns interest and fee income. When the interest rates paid to savers plus the cost of making mortgage loans exceed what borrowers are paying in interest, the intermediary is in big trouble.

Lenders seek to avoid this risk (a) by indexing mortgage rates to savings costs so that the rates paid to savers are matched with the rates charged to borrowers; (b) by shifting the risk to others by selling their mortgage loans on origination and pocketing fees on the sale; and (c) purchasing various financial instruments to hedge against interest rate fluctuations.

§ 104.09(b) Credit Risk.

The credit risk is that the debt won't be paid. There are two types of credit risks: security and collection. The security aspect is simply that the value of the security property on foreclosure may not be sufficient to pay off the debt. That is why loans are seldom made for more than 90% of the value of the security property, and are often considerably less. The bigger the cushion between the loan and the value of the security property, the less the security risk. Moreover, as property values are expected to fluctuate over the life of a loan, amortization of principal is essential in minimizing

security risks. With each repayment of principal, the effective loan-to-value ratio declines. n252

The second aspect of the credit risk deals with collecting from the borrower. Prospective borrowers whose income and wealth are not ample enough to support their debt service are supposed to be ferreted out by credit checks and minimum ratios of income to debt service, but it isn't easy to predict when calamity will strike a region or a family. When borrowers default, lenders often ascribe it to an "improper regard for obligations," but for borrowers of modest means, defaults aren't necessarily a voluntary choice. Usually, these borrowers get caught short of cash by job layoffs or illness before they have had time to build up any equity in their homes.

The credit risk refers to the repayment of both principal and interest on the debt. Some students approaching the rather theoretical dichotomy between credit and interest risk wrongly confuse the phrase "interest risk" with whether the borrower will make timely payments of interest. That is part of the credit risk. Of course, all payments of principal and interest, whether timely or late, give the lender the opportunity to relend the funds at prevailing market rates. In this sense, the line between credit and interest risk may seem blurry. But on relending the funds, the lender still must face the challenge of placing them with creditworthy borrowers and on terms that will keep the lender from getting caught in an interest squeeze. Therefore, whether the borrower will make timely payments really falls under credit risk.

Both the "security" and "collection" aspects of the credit risk are exacerbated in markets where property values are declining rapidly. "Security" declines because loan-to-value ratios deteriorate when values slip away. "Collection" problems ensue when some borrowers decide to abandon their houses and their loans because they realize that their repayments of principal are not producing equity value.

Sometimes, in attempting to avoid one type of risk, lenders inadvertently expose themselves to the other. Consider the consequences of the lender's turning to adjustable rate loans in order to reduce their interest risk.

Two factors influence a lender's credit risk. The ratio of the monthly loan payment to the borrower's income and the ratio of the loan debt to the value of the house. On a fixed-rate loan, as long as the borrower's nominal income doesn't decrease, her payment/income level never deteriorates over the life of the loan. With each monthly payment, a little more of the principal debt is repaid. As long as the house doesn't lose its value, the lender's loan-to-value ratio gets better each month.

With an adjustable rate loan, it is quite possible for the debt service to outpace the borrower's income. The "caps" on the loan which ease the monthly payment burden may also create negative amortization, causing the loan balance actually to increase over time. If the value of the house doesn't rise proportionately, the lender's loan-to-value ratio on an adjustable loan can easily increase over time. Thus, the lender's credit risk may run amok as it attempts to curb its interest risk--to the dismay of federal agencies that pushed banks into adjustable rate lending.

> In a superficially conceived effort to reduce the deposit-insurance subsidy to interest-volatility risk, deposit insurers have encouraged thrifts to make ARMs [adjustable rate mortgages] instead of FRMs [fixed rate mortgages]... They failed to adjust mortgage-insurance premiums and house-appraisal and mortgagor-qualification practices to take account of the distinctly greater dangers of default that are occasioned by the built-in graduated *payment shock* dictated by sharp first-year interest-rate buy downs and by the possibilities of negative amortization and downward trends in the future price of housing. n253

§ 104.09(c) Why Most Savers Are Oblivious to the Riskiness of Savings and Commercial Bank Portfolios.

Most bank *savers* are oblivious either to interest or credit risks for the simple reason that their bank accounts are insured by instrumentalities of the federal government. For them, an account of up to $100,000 is as good as a U.S. Treasury note. Given so lush a source of capital at such favorable rates, it is no wonder that many savings associations failed as a

result of unwise investments. (What would you be tempted to do if you could borrow for your fantasy investments with the federal government assuring your creditors against loss?!)

FOOTNOTES:
(n1)Footnote 252. *St. Bernard Sav. and Loan Ass'n v. Cella, 856 F. Supp. 1166 (E.D. La. 1994)* (A loan was conditioned on creditworthiness, and the bank was not required to disclose its reasons for changing the terms of the loan, even though the revisions were not related to increased credit risk).

(n2)Footnote 253. Richard L. Kane, *Change and Progress in Contemporary Mortgage Markets,* in Housing and the New Financial Markets 270 (Richard L. Florida ed. 1986). Tania Davenport, *Note: An American Nightmare: Predatory Lending in the Subprime Home Mortgage Industry, 36 Suffolk U. L. Rev. 531 (2003).*

1 Parts of this chapter have been adapted from George Lefcoe, Real Estate Transactions (Michie 1993).

Thompson on Real Property, Thomas Editions

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CHAPTER 104 THE PROMISSORY NOTE IN REAL ESTATE TRANSACTIONS 1

13-104 Thompson on Real Property, Thomas Editions § 104.10

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§ 104.10 Secondary Markets and Negotiability.

§ 104.10(a) The Secondary Market: Why Mortgage Notes Are Sold. n254

Mortgage payments constitute one of the largest monthly cash flows in the U.S. However, most mortgagors neither realize nor care about the complexity of the mortgage-trading business. They send their monthly payments to a loan servicer and try to forget about the whole ordeal until next month's payment falls due.

Mortgagors may not realize that their loan payments probably don't wind up in their lender's hands; more than half of all home mortgages are sold into the "secondary" mortgage market by the lenders who originated them. Federal law does require that lenders alert their borrowers that their loans might be sold, but the significance of this disclosure is probably lost on most borrowers. n255

On the other side of the secondary mortgage market are mortgage investors. They buy and sell mortgages and other loans. Mortgages are often pooled so that cross-country or even international investors may wind up owning a piece of the same mortgage pool. The process is called "securitization" because the ultimate investor ends up owning a security--an undivided interest in a large number of mortgages--rather than owning individual mortgages. Although the mortgage trading business didn't start until the 1970s, in 1991 the secondary mortgage market contained over $1.2 trillion worth of mortgages.

The yields on mortgage-backed securities are about one percentage point higher than on government bonds. Mortgage-backed securities usually have triple-A ratings, which make them favored investments among insurance companies and pension funds. They get those ratings because the underlying mortgage loans are government insured, government guaranteed, privately insured, or because the security instrument itself is guaranteed by a solvent quasi-governmental agency or by a solvent and respected private firm.

Mortgage-backed bonds are more secure than individual mortgage loans originated by any one local lender, because by "pooling" loans the risk of default is spread among thousands of borrowers in different parts of the country. n256 A recession in one part of the country won't hit lenders there nearly as hard if they had sold local loans and bought into pools of loans originated throughout the country.

Savings banks and other institutions which make loans can (1) keep them, (2) sell them, or (3) use them as collateral and borrow against them.

Mortgage originators like savings and commercial banks have become comfortable selling their mortgage loans. They free themselves of possible risks from interest rate fluctuations. They leverage their capital in order to make more loans. By selling the loans they originate, they multiply the total amount they can invest in loans. The income they earn from the process of originating loans is based on the volume of new lending they are able to do. Quite often, the originating lenders continue to service the loans and earn fees for servicing loans. That is why mortgagors may not realize that their loan has been sold; the originating lender continues to collect monthly payments. n257

Originating lenders don't get to pass all the credit risk to the mortgage purchaser because they are usually required to buy back bad loans and replace them with good ones, and to coinsure losses from the loans they sell. Also, it is always possible for a well managed savings bank to sell good mortgages it originated and unintentionally to buy into a portfolio of poorly secured mortgages.

Here is how the "secondary" mortgage market works. First, the lender makes the loan.

Second, the originating lender sells the loan to an entity like the Federal Home Loan Mortgage Corporation ("Freddie Mac" or "F.H.L.M.C."), the Federal National Mortgage Company ("Fannie Mae" or F.N.M.A.), the Government National Mortgage Association ("Ginnie Mae" or G.N.M.A.), or a private investment banking or securities firm. These institutions buy vast amounts of home loans from savings banks and other lenders.

Freddie Mac was created by Congress in 1970 to promote the growth of the secondary market for conventional home mortgages. n258 The funds generated by the sale of mortgage-backed securities are its primary source of money for mortgage purchases. Both Freddie Mac and Fannie Mae are private corporations with statutory authority to purchase mortgages that meet their eligibility requirements. Ginnie Mae is a federal agency that issues government-guaranteed securities backed by FHA, VA, and Farmers Home Administration ("FmHA") mortgages.

Usually, an institution will line up investors before beginning to create a pool, for fear of being stuck with millions, if not billions, of dollars in unwanted mortgages. Typical investors might include a savings bank seeking to hedge against rising interest rates and insurance companies looking for safer yields higher than they could get from government bonds.

Large institutions don't have to sell their loans to get their cash out of them. They can securitize pools of their own loans. In 1977, Bank of America became the first private institution to do that. n259

Third, the issuing institution may enhance the credit of the pool by guaranteeing its repayment or pledging to add other assets to the pool if some of the mortgages go into default. The secondary market maker may insist that the originating lender promise to buy back loans in default or assume some or all of the loss. It may also elect to deal only in loans insured by the F.H.A., guaranteed by the V.A., or insured by private mortgage insurers.

Fourth, the issuer resells interests in the mortgages in standardized pools, enabling investors to buy mortgages in multimillion-dollar batches without having to laboriously scrutinize each mortgage.

Fifth, the issuers make a secondary market in these securities by trading in them for their own or their clients' accounts.

The first mortgage pools were "pass-throughs." The buyer in a pass-through takes an undivided interest in the underlying mortgages. An investor in a pass-through is exposed to the full prepayment risk. The risk is that mortgagors will prepay when rates fall (called contraction risk) and slow down their prepayments when rates rise (called the

extension risk).

In 1983, the Federal Home Loan Mortgage Corporation (F.H.L.M.C.) offered a new type of security called a collateralized mortgage obligation (C.M.O.). In a C.M.O., the issuer retains title to the mortgages and pledges to make payments to holders of participation certificates in the mortgage pool. The payment schedule can be quite different than what the participation certificate holder would have received in a direct pass-through. For one thing, some investors didn't want monthly mortgage payments even though most mortgages are paid monthly. The C.M.O. issuer is able to provide payments quarterly, annually, or on whatever schedule the investor prefers.

The evolution of C.M.O.s was limited only by the creativity of securities brokers and the preferences of potential investors. For instance, a $100 million mortgage pool might consist of four groups of certificates called tranches, with average lives of 3, 7, 10 and 20 years, respectively. The 3-year tranche might receive a variable yield tied to a financial index, while the 20-year tranche might receive a fixed 8% yield.

In the earliest C.M.O.s, all principal repayments on the underlying mortgages were pledged to a group of certificate holders who got back their entire investment before any principal repayments went to investors in the second group. n260

Later, C.M.O.s allowed the prepayment risk to be split up and specifically apportioned among the tranches. The holders of the 3-year tranche might get the first prepayments, the holders of the 7-year the next. Often there will be a category of bonds that pay no interest until they mature or are called. (These are called zero coupon bonds because they don't have any interest coupons the bondholder can clip and cash in.) The zero coupon bondholders get fully repaid out of the mortgage principal when all the holders of the other tranches are fully paid. Bonds in tranches are sold to investors whose financial needs are met by a particular tranche.

When a commercial bank organizes a mortgage pool it might prefer to sell its mortgage loans to the pool rather than pledging them as *collateral* because the sale reduces the banks asset and capital requirements. These are called pay-throughs.

Most of these mortgage pools are REMICs--real estate mortgage investment conduits. A REMIC is a creature of the tax code. n261 It is treated as a pass-through entity, which means that the REMIC itself is exempt from taxation and all of its income is allocated and taxed to the REMIC holders. n262

The secondary mortgage market creates liquidity for mortgage originators and mortgage investors. Liquidity has brought investors into the mortgage market, investors who would otherwise have bought government securities or corporate bonds. By increasing the supply of mortgage capital, the secondary mortgage market has reduced home mortgage interest rates.

The benefit to borrowers can be measured by looking at the spread between Treasury bills and home mortgages of the same maturity before the secondary market existed (say, 1963) and the rate spread today. In 1963, there was a spread of 200 basis points (two percentage points) between the 30-year T-bill and 30-year mortgage rates. Today, that spread is around 100 basis points. n263

Liquidity and volatility seem to go hand-in-hand, causing mortgage rates to become extremely sensitive to changes in the credit markets. If a Dutch pension fund can buy a share of a Des Moines home mortgage, the underlying interest rate available to Des Moines homebuyers is going to be sensitive to global interest rates, which the Dutch pension fund will see as alternatives to its buying a share in a mortgage pool.

§ 104.10(b) Negotiability.

§ 104.10(b)(1) The Implications of Negotiability.

A note can be negotiable or non-negotiable, but this has nothing to do with whether the lender can sell (or assign) the note. Notes and mortgages are presumed saleable absent explicit language to the contrary.

This may strike borrowers as unfair because their right to assign their mortgage debt is usually hemmed in by a due-on-sale clause. Yet, the lender's right to sell the loan isn't subject to the borrower's prior approval. The crucial difference between the debtor's and creditor's positions is that the creditor is assigning the *right* to receive money. The debtor is assigning the *obligation* to pay back a loan. Most creditors legitimately question a substitution of one debtor for another while few debtors care who pockets their monthly payments.

"Negotiability" means that the note can pass from the original creditor to a "holder in due course" free of certain defenses the debtor may have had against the original creditor. "To take free of a mortgagor's defenses, the assignee must win on both issues. He must both hold a negotiable note and be a holder in due course." n264 The theory is that negotiable notes are like money and should be freely transferable; loan purchasers shouldn't have to worry about the possible invalidity of the paper.

The lost defenses are "personal" ones, not "real." The "real" ones survive the note being negotiated.

The Uniform Commercial Code lists some of the "real" defenses. n265 They include, among others, infancy, duress, illegality of the transaction, and "fraud that induced the obligor to sign the instrument with neither knowledge nor reasonable opportunity to learn of its character or its essential terms." n266 Among the "personal" defenses: The original lender never actually made its promised loan or the debtor actually paid off the loan before her lender sold the note. The buyer of a negotiable note takes free of all "personal" defenses.

The distinction between "real" and "personal" defenses parallels the difference between contracts that are voidable and those that are void. A void contract is really no contract at all--because of a forgery, for instance, or some other defense amounting to illegality or a lack of mutual assent to form a contract. A voidable contract is one which a party can elect to invalidate because, say, she was induced to sign it by a misrepresentation or because of a failure of consideration--the original creditor never disbursed all the loan funds the debtor is now being sued to repay.

In almost all states *the holder in due course* of a negotiable note secured by a mortgage takes the mortgage as well as the note free from defenses that the mortgagor would have had against the original mortgagee. n267 Lenders have generally carried the day in establishing legal protection for mortgages identical to that of the note. If the note is negotiable, so is the accompanying mortgage.

You can see how the consequences of negotiability can be harsh to the borrower. If the borrower never got the loan proceeds, or paid off the loan after the lender had sold the note to a "holder in due course," the borrower would still be liable for the face amount of the note. Moreover, generally speaking, the mortgage "follows" the note so the present holder of the note can foreclose if the borrower doesn't pay. n268 Like bankruptcy and limited liability for corporations, negotiability sacrifices a few deceived innocents for the sake of the many in the marketplace.

In the case of home loans, the benefits of negotiability can be measurable. Two authors compared the price of adjustable rate loans in Chicago, where they are held to be non-negotiable, with comparable adjustable rate loans in the District of Columbia, where they are legally negotiable. They found that the Chicago rates were higher and attributed the differential to the non-negotiability feature, concluding that borrowers are best served, too, by negotiability. n269

What can borrowers do to protect themselves? They could insist on seeing the note before making each payment and demand its return after making their final payment. Individual lenders might be able to comply with this request, but institutional lenders probably wouldn't. They often store notes in remote locations and don't record each payment on the

back of the note as they did in days of yore. Because borrowers usually pay by check or by authorized bank account withdrawal, any borrower who asked to see the note each month would be regarded as an extremely odd duck.

Lenders sometimes ask borrowers to sign duplicate notes because they "lost" the original. Borrowers should be wary of these requests. The lender could sell the note to someone who didn't realize it was a duplicate and the borrower could end up having to pay the same debt twice if the original note was never destroyed.

Mortgage purchasers can protect themselves against unknown infirmities between the mortgagor and the original mortgagee by obtaining a statement signed by the mortgagor stating that he has no defenses to the enforcement of the mortgage. This document is variously called a *waiver of defenses, estoppel certificate, no set-off certificate,* or *declaration of no defenses*. n270 A certificate offers better protection than the holder-in-due-course doctrine because it protects the mortgage purchaser against both real and personal defenses.

An estoppel certificate signed by the maker of the note doesn't protect the note purchaser against defenses or claims belonging to third parties. But the purchaser of the note may prevail against some third party claims if he has no notice of them and the note is non-negotiable for reasons other than the way it was negotiated. n271

§ 104.10(b)(2) The U.C.C. Requirements for Negotiability.

To be negotiable, the U.C.C. requires that the note: (1) contain an unconditional promise to pay a fixed amount of money and no other promise by the maker; (2) be payable on demand or at a definite time; (3) be payable to order or to the bearer at the time it is issued or first comes into possession of a holder; and (4) be for a fixed amount of money. n272

§ 104.10(b)(2)(i) Unconditional Promise to Pay.

(i) Incorporating Non-Pecuniary Obligations of the Mortgagor Into the Note Jeopardizes Its Negotiability. The condition requiring an unconditional promise to pay money and no other promise would arguably be violated if the provisions of the deed of trust regarding property maintenance, covenants against illegal uses, and the like were incorporated into the note. But by statute the negotiability of the note isn't jeopardized by a "promise or power to maintain or protect collateral." n273 Negotiability would, however, be destroyed by language that "the debtor hereby grants a security interest in the property." n274 These promises involve acts other than paying money. Hence, lenders who expect to sell their notes and want them to be negotiable are careful not to incorporate by reference the terms of the deed of trust into the note. n275 The farthest they may go and still claim negotiability is to refer to the existence of the accompanying deed of trust. n276

(ii) Adjustable Rate Notes Were Often Held Non-Negotiable Under U.C.C. Language Requiring Notes to be for a Fixed Amount of Money, but Court Opinions, Revised U.C.C. Provisions, and State Statutes Are Reinstating Their Negotiability. A section of the U.C.C. had conditioned negotiability on instruments bearing a "sum certain." n277 A U.C.C. comment specified that the "sum certain" had to be capable of being determined from "the instrument itself without reference to any outside source." n278 Early cases in the 1980s successfully challenged adjustable rates as non-negotiable. These court opinions held that adjustable loans were not for a "sum certain" because the rate of interest couldn't be determined by reading the face of the note. n279

Later courts, particularly in 1991 and 1992, realized that the overriding purposes of the U.C.C., predictability and flexibility to address new commercial realities, were being thwarted by this literal reading of the "sum certain" standard. n280 Nearly half of all mortgage loans are adjustable, and the literal reading of the U.C.C. was resulting in their being declared non-negotiable. The idea of the U.C.C. was for commercial law to track changing commercial realities, not to throw roadblocks in the way. Judges became persuaded to read the "sum certain" phrase not as requiring mathematical certainty but commercial certainty. Anyone signing an adjustable-rate loan can calculate the sum due, even if the note

itself doesn't specify a fixed rate. Lenders tell borrowers anyway, when the rate changes. By 1993, eight state courts had decided the issue, five for and three against negotiability. n281

To assure the negotiability of adjustable-rate loans in the future, almost all states have enacted statutes making them negotiable. Most of these statutes are based on a revised U.C.C. provision deleting the "sum certain" language, and substituting a "fixed amount of money" standard which applies only to the loan principle. n282 Any interest rate fixed or adjustable is sufficient. Some statutes sanction as negotiable any loan calling for "a stated rate of interest" if the rate is readily ascertainable by a publicly available index or its equivalent. n283

A number of states adopted statutory language one commentator has described as "relatively unique." n284

§ 104.10(b)(2)(ii) Negotiation vs. Assignment.

The condition "payable to order or bearer" focuses on the process by which the note is transferred. If an instrument is payable to order it is negotiated by delivery with any necessary endorsement. If payable to bearer it may be negotiated by delivery. n285 "Notes secured by mortgages are nearly always in order rather than bearer form. Hence, both endorsement and delivery are essential elements in the negotiation." n286

The requisite process of negotiation is violated if the note purchaser takes as an "assignee." One who obtains a payment on *the order of* the original payee *isn't bound* by the terms of the original transaction. n287 A contract assignee assumes all the rights and obligations of her assignor. n288 Those rights and obligations include the very defenses that the "holder in due course" hopes to shed.

§ 104.10(b)(3) "Holder in Due Course" (H.D.C.) Defined.

Only holders in due course enjoy the benefits of negotiability. To be a "holder in due course," a person must be a holder n289 of a negotiable instrument "who takes the instrument (a) for value; (b) in good faith; and (c) without notice that it is overdue or has been dishonored or of any defense against or claim to it on the part of any person." n290 The "holder in due course" is another way of describing a bona fide purchaser.

§ 104.10(b)(3)(i) For Value.

Many notes and mortgages especially junior liens, are sold at deep discounts. Does the purchaser of a note who pays only a fraction of its face value automatically find himself outside the protected circle of H.D.C.s? Absolutely not, if the price he paid reflected the credit or interest risk inherent in the transaction. Very deep discounts have been allowed in certain cases ($7,000 for an $11,064 note, for instance). n291

§ 104.10(b)(3)(ii) Good Faith.

Sometimes the purchaser of a note has been so "closely connected" to the originator that borrowers were allowed to raise defenses against the note purchaser that they had against the originating lender. Most of these cases concern home improvement scams where a smooth talking salesman persuades an unsophisticated homeowner to sign a contract for, say, wood or aluminum siding, along with a mortgage and note, all at an exorbitant price. The work is never done or badly done, and the note is swiftly negotiated to a cooperating lender. Where the note-purchasing lender drafts the seller's forms, approves the seller's procedures in advance, checks the debtor's credit, buys all or most of the seller's paper, and there is common or related ownership and management, the lender has sometimes lost the benefit of its H.D.C. status. n292

§ 104.10(b)(3)(iii) Notice.

What counts as "notice" is illustrated by *U.C.C. § 3-304*. For instance, the purchaser of a note has notice that something

is wrong if the purchaser knows that it is overdue, that the obligation is void, or that it has already been paid. Notice here is measured by a subjective standard (what the purchaser knew or probably knew) and not by an objective standard (what the purchaser should have known). Although *U.C.C. § 1-201(25)* does inculpate the purchaser of a note who has "reason to know" something is amiss, most courts accept that as long as the purchaser doesn't have actual notice of the debtor's defenses against the original creditor, she takes free of them. The debtor's only action would be against the original lender if the note had been partly or fully paid, and negotiated to a purchaser without notice of the payment. n293

§ 104.10(b)(4) The Importance of Possession of a Note.

A borrower who appreciates what "negotiability" means will demand that the note be handed over in exchange for the final payment. Anticipating this, responsible lenders store notes carefully.

Here is how one investor in second deeds of trust puts it:

> Possession of the original of the note carries with it a presumption of ownership, regardless of whether the bearer is the note's named owner. Without the original note, your position in any nonjudicial foreclosure or litigation will be made more difficult. For that reason, the original of the note should be kept in a safe deposit box or similarly secure location.
>
> Other documents are important, but they don't need as careful safekeeping [as the note]. Deeds of trust, assignments, and other recorded papers can all be duplicated from records maintained by the county recorder, and the copies will be considered admissible as evidence in court when certified by the county recorder. Replacement title policies and escrow papers can be obtained from their places of origin; missing insurance policies and appraisals are major inconveniences when lost, but their absence is seldom fatal. A missing or lost note, however, can be more than an inconvenience.
>
> Before safekeeping the original note, make a photocopy, front and back, for your current files. The photocopy will save digging out the original note should a question arise (as almost invariably it does) concerning its exact wording. And if the original is somehow destroyed or misplaced, a photocopy showing all the original note's signatures will save you much inconvenience later, should foreclosure be necessary. n294

The priority of a promissory note secured by a mortgage, a transaction that creates an interest in real estate, is established by recordation in the county real estate records and governed by the recording act statute of the jurisdiction. However, an assignment of a promissory note to a third party to secure an obligation owed to the third party, even if secured by a mortgage or other collateral, creates a security interest in the obligor's note, not the underlying collateral. Therefore, perfection of an assigned promissory note is governed by *U.C.C. 9-304*, which requires possession of "goods, instruments, money, negotiable documents or chattel paper" to perfect the holder's interest. n295

Consider the investors in *In re* Sprint Mortgage Bankers Corp. who loaned money to a mortgage broker in return for assignment of the notes and mortgages given to the mortgage broker by borrowers. n296 The lenders never took possession of the notes because they assumed that recordation of promissory notes secured by real estate mortgages would be sufficient to perfect their interests and secure their lien priority.When the mortgage broker filed Chapter 7 bankruptcy, a New York appellate court upheld the bankruptcy court's determination that the unperfected notes were a part of the debtor's estate and the lenders were unsecured creditors with interests subordinate to the bankruptcy trustee. The court noted that although *U.C.C. 9-104* states that Article 9 generally does not apply to the transfer of an interest in or lien on real estate, the interest created in this transaction was a security interest in an instrument to which Article 9 would control, not the recording act statute. This case further demonstrates the importance of possession of a promissory note.

§ 104.10(b)(5) Does the Borrower Have a Right to Notice of Sale or Assignment of Note? n297

Suppose D, the debtor, prepays the note and L, the lender, writes out a receipt verifying the prepayment. But L had previously sold the note to H and no one told D that L had done so. In fact, H didn't learn about the prepayment until he initiated collection proceedings against D on the due date. Is D liable to H anyway, or does H lose out for not having notified D before purchasing the note from L? If H had notified D of its intent to purchase or had requested an estoppel certificate from D, H might have found out L's little secret, i.e., that the debt had already been paid off.

In most states, purchasers of negotiable notes don't need to notify the mortgagors that they are the new owners. Moreover, if the mortgagors continue to make payments to the original mortgagees, they cannot claim credit for those payments on the underlying debt.

If the note is negotiable, the note purchaser can force the debtor to pay off the note a second time. The debtor's only recourse would be against the original lender. This is a cheerless prospect, especially if the creditor is in bankruptcy.

The only way to protect themselves from paying twice is to demand production of the note and obtain endorsement of each payment thereon. There is no practical way to do this when the lenders are institutional. Two leading experts conclude: "The law should be changed to make payment to the assignor binding until notice of the assignment has been given." n298

The rule that the H.D.C. of a negotiable note has no obligation to notify the mortgagor has also been soundly criticized for its "great potential for mischief and unfairness, since it produces far different results than most lay mortgagors would expect." n299

When the note is *non-negotiable*, the borrower won't be liable twice for repayments she makes to the original creditor, until she has actually been notified that the note has been assigned. The general law of contracts protects the obligor if the obligator has received no notice that the debt has been assigned and doesn't know that it has. The obligator can continue paying the original lender with impunity and will be credited with all the payments made to the original lender until the obligator learns that the note has been sold.

The note purchaser who is required to notify the mortgagor of an assignment must do so personally. He can't just record the assignment. The reason is obvious: mortgagors should not have to search the public records every time they need to make a payment. n300 Moreover, it doesn't take a heroic effort for the assignee to mail personal notice to the mortgagor. Purchasers of the property from the mortgagor, though, are held responsible for recorded assignments. n301 They would have come across them anyway in searching title before they bought the property.

§ 104.10(b)(6) Why the Lack of Notice When a Note Is Sold Doesn't Result in Massive Losses to Borrowers.

§ 104.10(b)(6)(i) Many Loans Continue to Be Serviced by the Originating Lender.

Mortgage buyers often contract to have the originating lender continue servicing the loan. "Servicing" includes collecting monthly payments from the borrower and remitting them to the new owner of the note, keeping tax and insurance impound accounts, paying the borrower's property tax and insurance premiums when they come due, pursuing delinquent borrowers and foreclosing if instructed by the note holders.

Servicing fees are usually paid as a percentage of the principal debt. The servicer also keeps the "float" on the impound accounts which is the interest rate it can earn on those accumulated payments less what it pays borrowers on them.

§ 104.10(b)(6)(ii) Federal Law Requires Both the Old and New Servicing Agent to Inform the Borrower of the Change.

Federal law requires lenders to inform prospective borrowers what the institution's servicing policies are. n302 With an actual transfer of servicing, the law prescribes that the old servicer let the borrower know the change is about to happen, fifteen days ahead of time. Then, the new servicer is supposed to notify the borrower the switch has happened, fifteen days afterwards.

§ 104.10(b)(6)(iii) The New Owner of the Note May Be Estopped from Disclaiming Responsibility for Payments the Debtor Makes to the New Owner's Servicing Agent.

The market for servicing rights has grown rapidly because there are enormous economies of scale in the business. This means that a local lender may be induced to sell its servicing right to a large, remote institution. "Mix ups"--loan payments not properly credited or lost--are common when loan servicers change.

Once the purchaser of a note authorizes it to be serviced by the originating lender or some other institution, the note purchaser, as principal, bears responsibility for the misdeeds of its agents.

If the purchaser of the note changes servicing agents without informing the borrower, it may be estopped from denying the validity of payments the borrower made to the old servicer. The "course of dealing" has misled the borrower into believing that the servicing agent originally designated is still legally empowered to collect payments.

If the servicing agent absconds with the borrower's money, the loss would probably have to be borne by the principal, not the mortgagor.

§ 104.10(b)(6)(iv) The New Holder of the Note May Not Have Perfected Its Status as a Holder in Due Course.

Sometimes the loan originator doesn't actually sell its loans. It pledges them as collateral in order to obtain financing for its operations. Mortgage bankers often work this way. They borrow on lines of credit from commercial banks, originate loans with those borrowed funds, and eventually sell the loans in the secondary market. Between the time they originate a loan and find a buyer for it, they may pledge the loans they originate to the commercial bank, usually for periods of six to eight weeks.

The mortgage banker seldom actually endorses the notes over to the commercial banks. Sometimes the mortgage broker even retains possession of the documents. Even if the bank obtains possession, it may not be treated as the purchaser of the notes but rather as the originator's creditor. Without an endorsement, delivery, or intent to purchase, the commercial bank is not protected as a holder-in-due-course.

§ 104.10(b)(6)(v) Lenders Do Usually Notify Borrowers Where They Are Supposed to Send Their Payments When Servicing Agents Are Changed.

Borrowers are usually notified when their servicing agents change. Lenders want borrowers to mail their payments to the right place. They don't relish being forced to invoke "negotiability" claims in order to get paid. Each time a new servicing agent takes over, borrowers usually can expect to receive notice of it.

§ 104.10(b)(6)(vi) The Phony Notice Scam.

Reliance on this process has led to "loan servicing scams." Con artists write official-seeming requests to borrowers, directing loan payments to their own post office boxes, which are often out of town. Smart borrowers, on receiving a notice, ask for verification signed by an officer of the old loan servicer. They also insist that the new loan servicer provide an 800-number, payment coupons, and an authorization-to-receive-payment letter signed by a corporate officer.

The Uniform Consumer Credit Code obliterates the H.D.C. doctrine by providing that a seller "may not take a negotiable instrument other than a check ... as evidence of the obligation of the consumer." n303 When a merchant or contractor takes back the consumer's note for payment, the transaction is called a consumer credit sale. Purchasers of consumer paper resulting from consumer credit sales under to the U.C.C.C. are responsible for overseeing their vendor's business operations, at the risk of going to court against dissatisfied consumers carrying valid defenses to payment. They can't claim H.D.C. status.

A truly shifty and well-advised seller could try to side-step this statutory assault on the H.D.C. doctrine by separating the sale from the loan. The seller could form an independent financing corporation to make loans to consumers (consumer loans). The consumers would borrow first and buy later. The financing corporation would sell the consumers' notes, maybe even before the consumers had used the loan proceeds to buy whatever the seller was palming off. The purchasers of the note would be holders in due course from a lender, and not a seller. Hence, they would not be subject to U.C.C.C.'s injunction against sellers taking anything but checks as negotiable instruments from consumers. n304

To catch these clever sellers, the U.C.C.C. listed various connections between sellers and lenders that would disqualify lenders from claiming H.D.C. status when the paper they were buying was consumer loans: the lender knew what the seller was up to, the lender was related to the seller, the seller guaranteed the loan, the lender supplied the seller with contract documents, the loan was conditioned on the consumer's making the particular purchase, and the lender knew about earlier complaints from the seller's customers. n305

The U.C.C.C. is limited in application. It only protects individual debtors, not organizations, and only for purchases serving a personal, family, household or agricultural purpose. n306 The U.C.C.C. doesn't apply to most mortgages because they are given to secure the repayment of money and not to secure purchase contracts for goods or services. The U.C.C.C. would apply when a homeowner gives a home improvement contractor a note and mortgage to secure payment of the contract. The Code does not apply if the debt is secured by a mortgage and the interest rate is 12% or lower. n307 If the sale involves goods or services such as home improvements, and not an interest in land, the Code only applies if the amount financed does not exceed $25,000 adjusted according to changes in the Consumer Price Index. n308

§ 104.10(b)(6)(vii) Servicer Liability for Truth-in-Lending Violations.

Servicers of loans purchased by the Federal Home Loan Mortgage Corporation (F.H.L.M.C.) are required to accept a conveyance of the mortgage loan. The servicer reconveys the loan to Freddie Mac, while retaining the right to service the loan. At least one district court held that this momentary possession of legal title made the servicer an assignee of the lender who could be held liable for Truth in Lending Act (T.I.L.A.) violations committed by the original mortgagee. n309 The T.I.L.A. Amendments of 1995 clarified that a loan servicer will not be treated as an assignee if legal title is held merely for administrative convenience and the loan servicer is not or was not the mortgagee. n310

§ 104.10(b)(6)(viii) Electronic Promissory Notes: The Wave of the Future?

The promissory note would become a part of cyberspace if the Uniform Commercial Code (U.C.C.) were amended to permit the use of electronic promissory notes in addition to the traditional paper-based promissory notes. Article 3-104 of the U.C.C. requires a writing for a negotiable instrument. But, commentators James A. Newell and Michael R. Gordon have concluded that processing, recording, and storing promissory notes via electronic media would streamline the mortgage servicing and origination processes and increase profitability through the substantial reduction of the servicing costs associated with creating, handling, transporting and storing paper promissory notes. n311

Considering the voluminous increase in the sale of mortgages into the secondary market, the cost savings could be significant. In 1993, mortgage lenders originated 1.01 trillion dollars in mortgages. n312 As part of this mortgage process, the mortgage industry creates millions of promissory notes.

Although this idea is novel, the shift from paper-based documents to electronic records is a growing trend in commercial transactions. Letters of credit, federal income tax returns and other traditionally paper-based documents now have electronic analogs. Most of the mortgages purchased by the Federal Home Loan Mortgage Corporation ("Freddie Mac") are pooled electronically for the issuance of participation certificates (mortgage-backed securities), which are in turn "issued" as an electronic "book entry" in the computerized records of a Federal Reserve Bank.

The hypothetical model posed by Newell and Gordon envisions an electronic promissory note that is generated as part of an electronic mortgage origination. If the mortgage is sold in the secondary market, the promissory note could be electronically transferred to a depository entity, such as a clearing corporation, that would maintain records of ownership, administer the transfer of notes, and perform other storage and negotiation duties. Signatures and endorsements for negotiation and transfer of holder-in-due-course status could be affixed electronically, using identification and security codes unique to the endorser. Delivery could be effected through electronic transmission of the note to the depository entity, which would hold the note as custodian for the note-holder.

Although possession of a promissory note is important for recognition and enforcement of the holder's ownership rights, the language in the U.C.C. with respect to physical possession and paper writings could be revised to recognize an electronic counterpart, such as a paper reproduction of the original electronic note certified by the depository entity. As the commentators put it:

> Furthermore, the Code [U.C.C.] will need to recognize that the most important attributes of a promissory note, whether paper-based or electronic-based, are the rights possessed by the holder, i.e., the contract rights and the holder-in-due-course status. For a holder, the continued legal recognition of these rights is far more important than the means by which the rights are set down and preserved. An electronic promissory note, which can be negotiated, notwithstanding the fact that the note is not represented by a paper-based memorial, should be a permissible alternative under the law of commerce. n313

FOOTNOTES:

(n1)Footnote 254. *See* Raymond J. Anders, *A Loan's Odyssey: How a Home Mortgage Got Into a Huge Pool that Lured Investors,* Wall St. J., Aug. 17, 1988, at A1, and Kratovil & Werner, Real Estate Law 276-77 (9th ed. 1988). The Federal Home Loan Mortgage Corporation publishes a journal called *Secondary Mortgage Markets*.

(n2)Footnote 255. *12 U.S.C. § 2605(a)*: "Each person who makes a federally related mortgage loan shall disclose to each person who applies for the loan, at the time of application for the loan, whether the servicing of the loan may be assigned, sold, or transferred to any other person at any time while the loan is outstanding."

(n3)Footnote 256. One of the reasons Congress chartered the Federal National Mortgage Association (F.N.M.A.) was to provide a geographic spread, to even out regional differences in interest rates, and to create a means of spreading the risks inherent in mortgage portfolios that were heavily concentrated in one state or region.

(n4)Footnote 257. G.N.M.A., F.N.M.A., the F.H.L.M.C., and other secondary market mortgage buyers require that their loan servicers adhere to detailed rules and regulations. G.N.M.A., for instance, requires that the servicer meet certain eligibility requirements, enter a Servicing Agreement, consent in writing to service the loan, and have an office "with servicing facilities satisfactory" to G.N.M.A. within approximately 100 miles of the mortgaged property. 24 C.F.R. § 350.1.

(n5)Footnote 258. James A. Newell and Michael R. Gordon, *Electronic Commerce and Negotiable Instruments (Electronic Promissory Notes), 31 Idaho L. Rev. 819, 823 (1995).*

(n6)Footnote 259. Frank J. Fabozzi, The Handbook of Mortgage-Backed Securities 151 (Probus 1992).

(n7)Footnote 260. *See generally id.*

(n8)Footnote 261. *I.R.C. § 860A.*

(n9)Footnote 262. *See* Boris I. Bittker & Lawrence Lokken, 3 Federal Taxation of Income, Estate and Gifts § 58.3.2 (rev. 3d ed. 2005, Supp. 2009).

(n10)Footnote 263. *See* The Wall Street Journal, Sept. 28, 1992, at C15, col. 2. The spread between C.M.O.s and U.S. Treasuries on that day ranged from 90 (20-year seasoned issues) to 115 (2-year new issues).

(n11)Footnote 264. D. Barlow Burke, Jr., Real Estate Transactions 263 (1993), citing *First Maryland Fin. Serv's Corp. v. District Realty Title Ins. Corp., 548 A.2d 787 (D.C. App. 1988)* (note, negotiable, holder not in due course).

(n12)Footnote 265. *U.C.C. § 3-305(a)*. Ann M. Burkhart, *Restatement of Mortgages Symposium: Third Party Defenses to Mortgages, 1998 BYU L. Rev. 1003.*

(n13)Footnote 266. *U.C.C. § 3-305(a)(1)*. The "real/personal" or "void/voidable" distinction lends to inventive legal arguments. In one case, an *unlicensed* contractor did some work. The work may have been paid for by a note and second trust deed on which the borrower defaulted. The court held that the borrower's default would be excused if the borrower could prove that the note was payment for the construction work. The note would then have been illegal (void), ruled the court, because under state law, unlicensed contractors can't sue to enforce contracts for which a license is required. *Wilson v. Steele, 259 Cal. Rptr. 851 (1989)* .

(n14)Footnote 267. A few states have reversed or modified the H.D.C. doctrine. *See* Grant S. Nelson & Dale A. Whitman, Real Estate Finance Law § 5.30, at 421 n.1 (5th ed. 2007).

(n15)Footnote 268. *But see, Johnson v. Howe, 223 N.W. 148 (Minn. 1929)* . The mortgagor can continue paying the mortgagee after the mortgagee has been assigned until the mortgagor receives actual notice of the assignment. The H.D.C. of the negotiable note may have a suit against the original maker despite failure to notify her of the assignment, but can't foreclose the mortgage if the debt has been repaid once.

(n16)Footnote 269. *See* Janine S. Hiller & Stephen P. Ferris, *Variable Interest Rates and Negotiability: A Response, 94 Com. L.J. 48, 52-53 (1989).*

(n17)Footnote 270. Robert Kratovil & Raymond J. Werner, Real Estate Law 325 (9th ed. 1988).

(n18)Footnote 271. *See* Grant S. Nelson & Dale A. Whitman, Real Estate Finance Law (2d ed. 1985) 391-92.

(n19)Footnote 272. *U.C.C. 3-104* is codified in *Cal. Com. Code § 3104*:

> Form of Negotiable Instruments; "Draft"; "Check"; "Certificate of Deposit"; "Note." (1) Any writing to be a negotiable instrument within this division must:
>
> (a) Be signed by the maker or drawer; and
>
> (b) Contain an unconditional promise or order to pay a sum certain in money and no other promise, order, obligation or power given by the maker or drawer except as authorized by this division; and
>
> (c) Be payable on demand or at a definite time; and
>
> (d) Be payable to order or to bearer.
>
> (2) A writing which complies with the requirements of this section is

(a) A "draft" ("bill of exchange") if it is an order;

(b) A "check" if it is a draft drawn on a bank and payable on demand;

(c) A "certificate of deposit" if it is an acknowledgement by a bank of receipt of money with an engagement to repay it;

(d) A "note" if it is a promise other than a certificate of deposit.

(3) As used in other divisions of this code, and as the context may require, the terms "draft," "check," "certificate of deposit" and "note" may refer to instruments which are not negotiable within this division as well as to instruments which are so negotiable.

(n20)Footnote 273. *U.C.C. 3-104*. is codified in *Cal. Com. Code 3104*: Form of Negotiable Instruments; "Draft"; "Check"; "Certificate of Deposit"; "Note." (1) Any writing to be a negotiable instrument within this division must: (a) Be signed by the maker or drawer; and (b) Contain an unconditional promise or order to pay a sum certain in money and no other promise, order, obligation or power given by the maker or drawer except as authorized by this division; and (c) Be payable on demand or at a definite time; and(d) Be payable to order or to bearer. (2) A writing which complies with the requirements of this section is (a) A "draft" ("bill of exchange") if it is an order; (b) A "check" if it is a draft drawn on a bank and payable on demand; (c) A "certificate of deposit" if it is an acknowledgement by a bank of receipt of money with an engagement to repay it; (d) A "note" if it is a promise other than a certificate of deposit. (3) As used in other divisions of this code, and as the context may require, the terms "draft," "check," "certificate of deposit" and "note" may refer to instruments which are not negotiable within this division as well as to instruments which are so negotiable.

(n21)Footnote 274. *U.C.C. § 3-112(1)(c)*.

(n22)Footnote 275. *U.C.C. § 3-112(1)*.

(n23)Footnote 276. "A promise or order is not unconditional if the instrument ... states that it is subject to or governed by any other agreement." U.C.C. § 3.105(2).

(n24)Footnote 277. *U.C.C. § 3-104(1)*b.

(n25)Footnote 278. *U.C.C.§ 3-106* cmt. 1.

(n26)Footnote 279. One diligent author counted ten cases decided on the subject in the past one hundred years and found eight cases against the negotiability of adjustable-rate loans, two in favor. Gary B. Tillman, Variable Interest Rates, Negotiability, and the Sum Certain Requirement, *22 U.C.C. L.J. 36 n.3 (1989). See, e.g., Taylor v. Roeder, 360 S.E.2d 191 (Va. 1987)* . (The borrower's loan was adjustable, three points over the Chase Manhattan prime rate. Because the interest rate couldn't be determined from the face of the instrument alone, the Virginia Supreme Court held that the sum was not certain, and hence couldn't be negotiable). *See also Doyle v. Trinity Sav. & Loan Ass'n, 869 F.2d 558 (10th Cir. 1989)* ; Gary B. Tillman, The Effect of Variable Interest Rates on Negotiability, *48 Ia. L. Rev. 710 (1988).*

(n27)Footnote 280. Note, A Call to Arms: Denial of Negotiability to Variable Rate Notes Interferes with the Secondary Mortgage Market's Ability to Price Risk Efficiently, *22 Cumberland L. Rev. 745 (1992). See also* Rockwell, Basic Considerations in Reviewing Commercial Loan Documents, 6 Prac. Real. Est. Law 13, 1819 (Sept. 1990).

(n28)Footnote 281. *See* Janine S. Hiller, Variable Interest Rates and Negotiability: Conflict and Crisis, *46 Okla. L. Rev. 257, 260-61 (1993).*

(n29)Footnote 282. *U.C.C. 3-104(a)*; *U.C.C. Rev. Art. 3, 3*-112(b): Interest may be stated in an instrument as a

fixed or variable amount of money or it may be expressed as a fixed or variable rate or rates. The amount or rate of interest may be stated or described in the instrument in any manner and may require reference to information not contained in the instrument. If an instrument provides for interest, but the amount of interest payable cannot be ascertained from the description, interest is payable at the judgment rate in effect at the place of payment of the instrument and at the time interest first accrues.

(n30)Footnote 283. These are based on a 1987 Discussion Draft amending *U.C.C. 3-106(2)*.

(n31)Footnote 284. Janine S. Hiller, Variable Interest Rates and Negotiability: Crisis and Conflict, *46 Okla. L. Rev. 257, 272 (1993).*

(n32)Footnote 285. *U.C.C. § 3-201(b)*.

(n33)Footnote 286. Grant S. Nelson & Dale A. Whitman, Real Estate Transfer, Finance, and Development 486 (4th ed. 1992).

(n34)Footnote 287. *U.C.C. § 3-305(b)* subjects the assignee to all defenses of any party which would be available in an action on a simple contract.

(n35)Footnote 288. The use of the word "assignment," in California at least, doesn't necessarily affect "its character as an endorsement." *Cal. Com. Code § 3202(4)*.

(n36)Footnote 289. A "holder" is a "person in possession of a negotiable instrument that is payable either to bearer or to the order of the person in possession," or a "person in possession of a document of title if the goods are deliverable either to bearer or to the order of the person in possession." *U.C.C. 1-201(21)*.

(n37)Footnote 290. *U.C.C. § 3-302*. When the assets or liabilities of a bank or savings association are taken over by the FDIC or the FSLIC, the assets are seldom endorsed to them, so the federal regulators would not be "holders in due course" under state law. To be a "holder in due course," a person must be a holder of a negotiable instrument who takes "the instrument (i) for value, (ii) in good faith, (iii) without notice that the instrument is overdue or has been dishonored or that there is an uncured default with respect to payment of another instrument issued as part of the same series, (iv) without notice that the instrument contains an unauthorized signature or has been altered, (v) without notice of any claim to the instrument described in Section 3-306, and (vi) without notice that any party has a defense or claim in recoupment described in Section 3-305(a)." *UCC 3-302(a)(2). See* W. Robert Gray, *Limitations on the FDIC's D'Oench Doctrine of Federal Common-Law Estoppel: Congressional Preemption and Authoritative Statutory Construction, 31 S. Tex. L.J. 245 (1990).*

(n38)Footnote 291. *Wilson v. Steele, 259 Cal. Rptr. 851 (1989)* .

(n39)Footnote 292. James J. White & Robert S. Summers, Uniform Commercial Code § 17-6 (5th ed. 2007). Some states have simply abolished the holder-in-due-course defense for some retail sales. The holder of a promissory note under these laws is subject to the same defenses as the original vendor. *See, e.g., Vt. Stat. Ann tit. 9, § 2455*.

(n40)Footnote 293. For a recent case on what counts as notice, *see Krilich v. Milliken Mtg. Co., 554 N.E.2d 422 (Ill. App. 1990)* . When defendant purchased the note, it was visibly altered and the rider contained different terms than the note. The discrepancy raised a fact sufficient to take the case to the jury. The disputed fact: was the defendant notified of the borrower's defense that the note had been altered without her consent?

(n41)Footnote 294. George Coats, Smart Trust Deed Investment in California 92-93 (2d ed. 1988). *Markin v. Chebemma Inc., 526 F. Supp. 2d 890 (N.D. Ill. 2007)* (action by bearer of promissory note undertaken in exchange for real property).

(n42)Footnote 295. *U.C.C. 9-304*.

(n43)Footnote 296. note. *177 B.R. 4 (E.D.N.Y. 1995)* .

(n44)Footnote 297. *See generally* Annotation, *Recording Assignment of Mortgage*, 89 A.L.R. 171 (1934). *See also* Robert Kratovil & Raymond J. Werner, Real Estate Law 326-27 (9th ed. 1988).

(n45)Footnote 298. Robert Kratovil & Raymond J. Werner, Real Estate Law 398 (9th ed. 1988).. The authors point out that the U.C.C. has made this change in Article 9 for notes secured by chattel paper.

(n46)Footnote 299. Grant S. Nelson & Dale A. Whitman, Real Estate Finance Law 393 (2d ed. 1985). *See also* Id. At 469-449 (5th ed. 2007).

(n47)Footnote 300. *See, e.g., Minn. Stat. Ann. § 507.32*: "The record of an assignment of a mortgage shall not in itself be notice of such assignment to the mortgagor, the mortgagor's heirs or personal representatives, so as to invalidate any payment made by either of them to the mortgagee."

(n48)Footnote 301. *Erickson v. Kendall, 191 P. 842 (Wash. 1920)* .

(n49)Footnote 302. *12 U.S.C. § 2605*.

(n50)Footnote 303. U.C.C.C. (Uniform Commercial Credit Code) § 3.307. Other scams may involve promissory notes. *See, e.g., Hodges v. Swafford, 863 N.E.2d 881 (Ind. App. 2007)* (in exchange for lenders paying off the mortgage, the mortgagor transferred the deed to the house to the lenders and entered into a contract to buy the house back; lenders were required to deed the house back to the mortgagor, who was ordered to execute a promissory note and mortgage in favor of the lenders).

(n51)Footnote 304. *Id.*

(n52)Footnote 305. U.C.C.C. § 3.405(1).

(n53)Footnote 306. *Id.* § 1.301(12)(a)(iii).

(n54)Footnote 307. *Id.* § 1.031(12)(b)(ii).

(n55)Footnote 308. *Id.* §§ 1.01(12)(a)(v), 1.106(1).

(n56)Footnote 309. *Myers v. Citicorp Mortgage, Inc., 878 F. Supp. 1553 (D. Ala. 1995)* .

(n57)Footnote 310. Truth in Lending Act Amendments of 1995, 7, *104 H.R. 2399* (codified at *15 U.S.C. § 1641(F)*).

(n58)Footnote 311. James A. Newell & Michael R. Gordon, *Electronic Commerce and Negotiable Instruments (Electronic Promissory Notes), 31 Idaho L. Rev. 819 (1995).*

(n59)Footnote 312. *Id.*

(n60)Footnote 313. *Id.*

1 Parts of this chapter have been adapted from George Lefcoe, Real Estate Transactions (Michie 1993).

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CHAPTER 104 THE PROMISSORY NOTE IN REAL ESTATE TRANSACTIONS 1

13-104 Thompson on Real Property, Thomas Editions § 104.11

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§ 104.11 Bibliography.

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Annotation, Effect on bona fides of purchaser of promissory note of fact that there is interest due and unpaid upon it, 40 *A.L.R.* 832 .

Annotation, Necessity of introducing evidence to show reasonableness of attorney's fees where promissory note provides for such fees, *18 A.L.R. 3d 733.*

Annotation, Promissory notes as securities under sec. 2(1) of Securities Act of 1933 *(15 U.S.C.A. sec 77b*(1)), and sec. 3(a)(10) of Securities Exchange Act of 1934 (*15 U.S.C.A. sec. 78c(a)(10)*), *39 A.L.R. Fed. 357* .

Annotation, Validity of provision in promissory note or other evidence of indebtedness for payment, as attorneys' fees, expenses, and costs of collection, of specified percentage of note, *17 A.L.R. 2d 288.*

1 Parts of this chapter have been adapted from George Lefcoe, Real Estate Transactions (Michie 1993).

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CHAPTER 105 ALTERNATIVE DISPUTE RESOLUTION IN REAL PROPERTY MATTERS

13-105 Thompson on Real Property, Thomas Editions 105.syn

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§ 105.syn Synopsis to Chapter 105: ALTERNATIVE DISPUTE RESOLUTION IN REAL PROPERTY MATTERS

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CHAPTER 105 ALTERNATIVE DISPUTE RESOLUTION IN REAL PROPERTY MATTERS

13-105 Thompson on Real Property, Thomas Editions § 105.01

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§ 105.01 Introduction.

This chapter provides a general survey description of various methods of Alternative Dispute Resolution (ADR) and how they may be applied to real property matters. The ADR methods discussed here represent ADR in its fullest sense, which includes techniques for avoiding litigation entirely as well as processes that accelerate or shorten the litigation process. Some techniques, such as negotiation and compromise, apply in both contexts.

In real property matters, resort to the courts for dispute resolution is inexplicable and unsatisfactory to many who have experienced firsthand the frustrating delays, expenses and occasional inconsistencies of such litigation; thus, there is great and growing fervor behind the quest for alternative means of dispute resolution. This seems especially apparent when the property values at issue have not been large nor the legal issues complex.

It should be remembered, however, that access to the courts is a fundamental right and should not lightly be restricted. Therefore, state and federal legislation has arisen to encourage rather than mandate certain types of alternative dispute resolution. Such legislation may restrict or limit access to the courts in some circumstances, but usually will not foreclose it entirely. The impact of such ADR legislation is noted in the chapter.

COMPUTER-ASSISTED RESEARCH

LEXIS: alternative dispute resolution w/30 real w/1 property

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CHAPTER 105 ALTERNATIVE DISPUTE RESOLUTION IN REAL PROPERTY MATTERS

13-105 Thompson on Real Property, Thomas Editions § 105.02

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§ 105.02 Devices for Settling Claims or Shortening Litigation.

§ 105.02(a) In General.

All types of disputes, whether or not related to real property, may be resolved by one or more of the techniques discussed in this section. An infinite variety of factors may motivate a party to enter into an accord or a compromise, for example, but certainly chief among them is the desire to obtain some benefit from a claim while avoiding the time and expense of even ordinary, not to mention protracted, litigation. The mutuality of benefits derived from these arrangements depends heavily on the attorneys' skills as negotiators.

§ 105.02(b) Mini-Trial.

To conduct a mini-trial, the parties select a qualified person to function as a private judge. Then, a short trial of issues in dispute is carried out before the judge. The trial, however, is not intended to be binding; its main purpose is to permit the parties to present the strengths of their respective cases, expose them to adversarial questioning and a thoughtful judicial response, and then attempt to reach a settlement after those views have been aired and evaluated. The usual context for the mini-trial is a dispute between corporations, and the trial is attended by corporate officers who have authority to conclude settlement agreements. Negotiations between those persons toward settlement following the mini-trial may be aided by comments from the "judge," who--while remaining impartial--may be invited to explain a judge's views of how the parties' positions will fare in the courts. The mini-trial is thus a form of structured negotiation that could even shift into a form of mediation. n1

One variant of the mini-trial is the mini-arbitration, a proceeding in which the parties conduct the "trial" before an arbitrator and then accept the arbitrator's decision as binding. n2

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LEXIS: mini-trial w/50 property

§ 105.02(c) Summary Jury Trial.

Another variant of the mini-trial is the summary jury trial, in which the parties present their cases before a jury of lay persons rather than before a group of corporate executives. The case presentations are oral arguments and summations only, with no examination of witnesses. The "jury" then renders a verdict, which is usually advisory only. After the presentations, the lawyers may question the "jurors," and, armed with such additional insights into the strengths and weaknesses of their positions, may enter into a settlement conference with the judge. n3

The mini-trial and the summary jury trial are most useful in cases involving complex issues between wealthy parties. In the real property context, it is possible that litigation involving title to large tracts of land or major nuisance or mineral claims could be of such proportions as to benefit from the somewhat elaborate and expensive "dry run" represented by the mini-trial and summary jury trial methods.

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LEXIS: summary w/1 jury w/1 trial w/50 property

§ 105.02(d) Accord and Satisfaction.

If one party's conduct results in harm to another party, with a claim or cause of action based thereon, the offending party may offer to satisfy the claim with some substitute performance or consideration. This offer is the accord. n4 If the proffered accord is accepted, the performance of what was offered as the accord is the satisfaction. n5 When the accord is followed by the satisfaction, it bars the original claim. n6

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LEXIS: accord w/1 satisfaction w/50 property

§ 105.02(e) Compromise and Settlement.

The process of compromise and settlement both resembles accord and satisfaction and differs from it. As with accord and satisfaction, a compromise is the offer to tender an alternative performance in response to a disputed claim, and the settlement is the actual performance of the proffered compromise. n7 However, a compromise is valid and enforceable even before settlement occurs, n8 whereas, the accord is not effective to bar the original claim, until the satisfaction occurs. n9 Furthermore, while the accord and satisfaction may relate to any claim, even undisputed or liquidated, n10 a compromise and settlement may pertain only to disputed claims. Also, an accord or satisfaction applies only to claims relating to the person or personal property, n11 whereas, a compromise and settlement may apply to all types of claims, including conflicting claims to real property. n12

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LEXIS: compromise w/1 settlement w/50 property

§ 105.02(f) Novation and Release.

A novation and a release can result either from an accord and satisfaction or from a compromise and settlement. If either the accord or the compromise is accepted as a substitute promised performance, the original obligation of performance is extinguished and a novation results. n13 If the compromise or accord relinquishes a claim or discharge of performance, it may be termed a release.

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LEXIS: novation w/1 release w/50 property

FOOTNOTES:

(n1)Footnote 1. Eric D. Green, *Getting Out of Court--Private Resolution of Civil Disputes, 28 Boston Bar J. 11* (May/June 1984); Eric D. Green, *Reading the Landscape of ADR-- The State of the Art of Extrajudicial Forms of Dispute Resolution, 100 F.R.D. 513 (1983).*

(n2)Footnote 2. Roger Borovoy, *Alternative Dispute Resolution in Technical Litigation, 100 F.R.D. 527 (1983); Browning v. Kelly, 1997 Conn. Super. LEXIS 3299* (unreported) (defendant's motion for summary judgment granted when plaintiff failed to rebut admissions in mini trial).

(n3)Footnote 3. *Federal Procedure Rule Service, District Court of Michigan, Western District Rule 44b; The New ADR Rules in the Western District of Michigan,* 2 Alternatives 10 (October 1984).

(n4)Footnote 4. *Grove v. Winter, 554 N.E.2d 722 (Ill. App. 1990)* ; *International Union, United Auto., Aerospace, & Agr. Implement Workers of Am. (UAW) v. Yard-Man, Inc., 716 F.2d 1476 (6th Cir. 1983)* ; *S. Leo Harmonay, Inc. v. Binks Mfg. Co., 597 F. Supp. 1014 (S.D. N.Y. 1984)* ; *Stahl Mgt. Corp. v. Conceptions Unlimited, 554 F. Supp. 890 (S.D. N.Y. 1983)* ; *So v. 514 10th Street Associates, L.P., 834 A.2d 910 (D.C. 2003)* (Part performance of an executory agreement to compromise a claim does not amount to accord and satisfaction).

(n5)Footnote 5. *Polin v. Major, 502 N.E.2d 355 (Ill. App. 1986)* ; *Priem v. Shires, 697 S.W.2d 860 (Tex. Civ. App. 1985)* ; *Allan Constr. Co., Inc. v. Dahlstrom Corp., No. 03 96 00469 CV, 1997 Tex. App. LEXIS 4673 (Tex. App. 1997)* (unpublished) (accord and satisfaction by transfer of title to properties resulting from dispute between highway construction contractors); *Frantz v. Piccadilly Place Condominium Ass'n, Inc., 597 S.E.2d 354 (Ga. 2004)* (Without a bona fide dispute or controversy as to the amount of the judgment, a condominium association's acceptance of a check from a unit owner marked "settlement in full" did not constitute an accord and satisfaction); *Hollingsworth v. State Farm Fire & Cas. Co., 2005 U.S. Dist. LEXIS 3694* (E.D.Pa., 2005) (an offer for a compromise settlement is only a starting point of negotiation if the opposite party does not acknowledge or respond to it, and is therefore not binding).

(n6)Footnote 6. *Seger v. Drews, 784 P.2d 133 (Or. App. 1989)* ; *Harrison v. Lucero, 525 P.2d 941 (N.M. App. 1974)* . Accord and satisfaction cannot be reached by the unilateral actions or claims of a party. *Pueblo Bank & Trust Co. v. Steele, 110 F.3d 74 (10th Cir. 1997)* (unpublished opinion); *First Bank of Missouri v. Bac O'Flint Ltd., 104 F.3d 358 (4th Cir. 1996)* ; *Minnesota Chippewa Tribal Hous. Corp. v. Reese, 978 F. Supp. 1258 (D. Minn. 1997)* ; *Baums Dairy Farms, Inc. v. United States, 996 F. Supp. 705 (E.D. Mich 1998)* ; *McMahon v. New London County Mut. Ins. Co., 1999 Conn. Super. Lexis 2338* , *Pogge v. Department of Revenue, 703 So. 2d 523 (Fla. App. 1997)* .

(n7)Footnote 7. *Harding v. Will, 500 P.2d 91 (Wash. 1972)* ; *Clayton v. Henry, No. 05 96 01898 CV, 1999 Tex. App. LEXIS 1305 (Tex. App. 1999)* (unpublished) (failed challenge to compromise settlement agreement).

(n8)Footnote 8. *Matter of Thompson's Estates, 601 P.2d 1105 (Kan. 1979)* ; *Blaylock v. Akin, 619 S.W.2d 207 (Tex. Civ. App. 1981)* ; *New York Air Brake Corp. v. General Signal Corp., 873 F. Supp. 747 (N.D.N.Y. 1995)* (settlement agreement).

(n9)Footnote 9. *Flagel v. Southwest Clinical Psychiatrist, P.C., 755 P.2d 1184 (Ariz. App. 1988)* ; *Goslin v. Racal Data Commun., Inc., 468 So. 2d 390 (Fla. App. 1985)* ; *Reily Elec. Supply, Inc. v. Hollenberg, 535 So. 2d 1321 (La. App. 1988)* ; *Bestor v. American Nat'l Stores, Inc., 691 S.W.2d 384 (Mo. App. 1985)* ; *BancOhio Nat'l Bank v. Abbey Lane, Ltd., 13 Ohio App. 3d 446 (Ohio App. 1984)* ; *Mercury Marine Div., Brunswick Corp. v. Costas, 342 S.E.2d 632 (S.C. App. 1986)* ; *Rhea v. Marko Constr., 652 S.W.2d 332 (Tenn. 1983)* .

(n10)Footnote 10. *Bowater North Am. Corp. v. Murray Mach., Inc., 773 F.2d 71 (6th Cir. 1985)* ; *Barry Props., Inc. v. Blanton & McCleary, 525 A.2d 248 (Md. App. 1987)* ; *Fortner v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 687 S.W.2d 8 (Tex. App. 1984)* .

(n11)Footnote 11. *Hershey v. Simpson, 725 P.2d 196 (Idaho App. 1986)* .

(n12)Footnote 12. *In re Fischer, Key Bar Invs., Inc. v. Fischer, 116 F.3d 388 (9th Cir. 1997)* , *amended* by *127 F.3d 819 (9th Cir. 1997)* .

(n13)Footnote 13. *Malanca v. Falstaff Brewing Co., 694 F.2d 182 (9th Cir. 1982)* ; *Malmstrom v. Kaiser Alum. & Chem. Corp., 231 Cal. Rptr. 820 (1986)* ; *Quealy v. Anderson, 714 P.2d 667 (Utah 1986)* ; *Patton v. TPI Petroleum, Inc., 356 F. Supp. 2d 921 (E.D. Ark. 2005)* (a provision in a commercial tenant agreement cannot suffice as a novation of a pre-existing section of the lease, if the provision does not relate to that section).

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CHAPTER 105 ALTERNATIVE DISPUTE RESOLUTION IN REAL PROPERTY MATTERS

13-105 Thompson on Real Property, Thomas Editions § 105.03

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§ 105.03 Arbitration.

§ 105.03(a) Arbitration Defined and Distinguished.

Arbitration is a nonjudicial process of investigating and resolving matters in dispute between parties. n14 Parties who resort to arbitration generally expect it to be more efficient, less expensive and less formal than litigation. n15 Like litigation, arbitration functions as both a fact-finding process, and a process for resolving the matters in dispute, and for determining an award for the prevailing party. Both the factual and remedial determinations resulting from an arbitration process are binding on the parties and are not intended merely to be submitted to a court for judicial approval. Judicial intervention in the arbitration process is appropriate only when difficulties in enforcement arise or when claims of impropriety in the arbitration proceedings are pressed.

§ 105.03(b) The Common Law of Arbitration.

Although arbitration usually takes place because parties have agreed to arbitrate and today is subject to much statutory regulation, a common law of arbitration nevertheless exists. The common law of arbitration will not recognize a right of one party to force another to arbitrate a dispute, even under a prior agreement. n16 This means that private arbitration agreements are revocable at will by either party.

Once the parties enter arbitration, by their common consent, several principles of the common law of arbitration are applicable:

(1) no right of jury trial and no right to resort to a court for instruction in the law is recognized;

(2) the arbitrator is not required to explain reasons for the award; and

(3) only limited judicial review of the award is permitted. n17

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LEXIS: arbitration w/30 common law

§ 105.03(c) Statutory Modification of Arbitration Law.

State arbitration statutes began to appear in the early decades of the 20th century and made private arbitration agreements specifically enforceable by either party. n18 In some states the statutory provisions did not make major changes in the common law of arbitration, but simply supplemented the common law. n19 Other state statutes, beginning with New York's arbitration act in 1921, n20 made significant changes in the common law of arbitration, but did not abolish it. n21 Comprehensive arbitration statutes in yet other states have completely abrogated the common law of arbitration in their jurisdictions. n22

In 1956, the National Conference of Commissioners on Uniform State Laws issued a revised Uniform Arbitration Act, modeled after the New York act, which had also been followed in several other states. This uniform act has now been adopted in 28 states and the District of Columbia, and substantially similar legislation has been enacted in 14 additional states.

The constitutionality of some state arbitration statutes has been challenged by arguments that the statutes deprive parties of property without due process of law, n23 or improperly extend judicial powers to private persons, n24 and impair contract obligations. n25 All the statutes have withstood such attacks.

§ 105.03(d) Requirements, Scope and Effect of Arbitration Agreements.

Under common law, agreements to submit present or future disputes to arbitration may be either oral or written. n26 However, common law also requires that such a submission agreement be in writing if the eventual arbitration award will achieve what the parties could do only in writing, such as determine the title to land. n27 In those states where the submission agreement is governed by statute rather than the common law, such agreements almost always must be in writing, and this requirement is strictly enforced. n28 In jurisdictions where common law and statutory arbitration co-exist and the parties do not specify which set of rules they choose to follow, the choice of rules will be inferred from the parties' conduct. n29

If agreements or contract clauses require parties to arbitrate future disputes, those agreements or clauses may, without more formalization, suffice as submission agreements if they apply to all such future disputes. n30 However, under some state arbitration statutes, such agreements do not actually achieve the submission of a dispute to arbitrations, but may be the basis for compelling a submission. n31

Submission agreements must contain provisions that identify the issues or matters subject to arbitration, confer jurisdiction over the parties, and empower the arbitrator to resolve the dispute. If the content of submission agreements is defined by statute, the parties must strictly comply with the statutory requirements, because those requirements are usually held to be jurisdictional. n32

Some submission agreements are self-executing, so that parties may proceed directly to the arbitration process; other agreements may contain only the commitment to arbitrate, and still require the appointment of arbitrators and submission of the matter to those appointees before further proceedings can take place. n33

It is also possible for the parties to submit to arbitration a matter already in litigation. Under common law n34 and under some arbitration statutes, such a submission terminates the litigation and the jurisdiction of the court. n35 Under other statutes, the litigation is merely stayed pending the outcome of the arbitration. n36

In a related issue, it has been held that merely entering into an agreement to submit a matter for arbitration, without actually undertaking the arbitration process, will not stop the running of the statute of limitations. n37 However, a party to the submission agreement may be estopped from asserting the statute of limitations as a defense if the arbitration agreement was the cause for delaying subsequent litigation. n38

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LEXIS: arbitration w/5 agreement! w/30 require! or scope! or effect!

§ 105.03(e) The Arbitration Award.

§ 105.03(e)(1) Technical Requirements.

The decision of an arbitrator or of arbitrators is called the award. Unless otherwise required by statute or by the parties' agreement, the award need only express the result of the arbitration, without supporting rationale. n39 Many of the state arbitration statutes also require the award to be in writing and to be signed by the arbitrators n40 and, in some instances, even acknowledged. n41

According to the common law of arbitration, unless the parties have agreed to accept a decision by a majority of the arbitrators, the award must be based on a unanimous decision of the arbitrators. n42 Under most arbitration statutes a decision supported by a simple majority of the arbitrators suffices for a valid award. n43

The arbitration award should consider and dispose of all the issues required to be resolved by the submission agreement. n44 Also, the award must not deal with issues outside the terms of the submission agreement, n45 and an award on such matters is void. n46

Arbitrators are required to be fair and just in their decisions, n47 but they are not required to follow rules of common law, unless that is required by the terms of the submission agreement or by statute. n48

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LEXIS: arbitration w/5 award! w/30 require!

§ 105.03(e)(2) Enforcement of the Award.

Under common law an arbitration award is not self-enforcing. n49 Therefore, a party seeking enforcement of an arbitration award against a recalcitrant party must bring a judicial action on contract; the contract theory is appropriate, because the award is subsumed into the submission agreement. n50 Under statutory arbitration, unless common law remedies are also available, the statutory procedure for enforcement should be followed. n51

The plaintiff in an enforcement action can establish a *prima facie* case by presenting evidence showing a valid award regular on its face; thereafter, the burden is on the defendant to impeach the award. n52

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LEXIS: arbitration w/5 award! w/30 enforc!

§ 105.03(e)(3) Impeachment or Vacation of the Award.

To discredit or invalidate an arbitration award is referred to as impeachment. In general, at common law, arbitration awards will be impeached or set aside only if the arbitrators lacked jurisdiction, the arbitrators exceeded their authority, or if the arbitrators' conduct was tainted by fraud, gross negligence, or other serious misbehavior. n53 An award will be impeached for a mistake of law only if the arbitrators were required to follow substantive law in determining the award. n54

If an arbitration award is to be vacated, it must be under one or more provisions of the applicable arbitration statute. Arbitration statutes generally list the grounds for vacating an award as they are found in the Uniform Arbitration Act:

procurement [of the award] by corruption, fraud or other undue means;

evident partiality by an arbitrator;

exceeding of powers by arbitrators;

refusal by arbitrators to postpone hearings or hear evidence so as to substantially prejudice the rights of a party;

absence of a valid arbitration agreement or technical defects in the conduct of the proceedings. n55

An arbitration award can also be set aside for a material mistake that clearly appears on the face of the award, such as an arithmetic mistake. n56 Also, an arbitrator's mistake that will cause the award to operate in a way they did not intend can be a ground for setting aside the award. n57

COMPUTER-ASSISTED RESEARCH

LEXIS: arbitration w/5 award! w/30 impeach! or vacat!

§ 105.03(f) Compulsory Arbitration.

In some jurisdictions, as a matter of course, civil claims below a certain amount are submitted by the court to an arbitration panel, or even to a single arbitrator. If a party disagrees with the result of the arbitration under those circumstances, a trial de novo may be held. However, if the new trial does not produce a more favorable result for the party requesting the trial, that party must pay costs to the other party and will be denied interest from the time of the award. Statutes that impose "compulsory arbitration" or that afford the parties no choice or alternative with respect to arbitration have generally been held unconstitutional, because they deprive parties of the right to trial by jury; n58 however, if a statutory "compulsory arbitration" requirement is coupled with the right of appeal or the right to an original trial after arbitration, even with certain financial risks attached, such statutes have been upheld. n59

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LEXIS: compulsory w/2 arbitration

§ 105.03(g) Real Property Issues Amenable to Arbitration.

Subject to any limitations imposed by an applicable arbitration statute, parties generally may have real property disputes submitted to and determined by arbitration. n60 An arbitration award cannot actually convey title (although it can authorize a conveyance), n61 or determine such issues as whether a river bank has been formed by accretion or avulsion, n62 but it can settle a boundary dispute. n63

A party to a real property dispute has slightly different remedies under arbitration than under ordinary litigation. A real property disputant may seek to enforce the performance of the arbitration agreement itself. Under common law arbitration, the remedy for breach of an agreement to arbitrate is only an action for breach of contract to recover whatever damages can be proved from the breach. n64 In contrast to other real property actions, specific performance will not be granted, n65 unless arbitration of certain issues was a condition precedent to commencing court action on a larger matter. n66 If the arbitration agreement is under authority of a state statute rather than common law, the performance of the agreement is usually enforceable by either specific performance or an action for damages. n67

COMPUTER-ASSISTED RESEARCH

LEXIS: arbitration w/30 real w/1 property

§ 105.03(h) Evaluation of Arbitration as an Alternative to Litigation.

As is evident from the statutory and case law that has grown up around the concept of arbitration, an arbitration proceeding can be complex, protracted, and often subject to major litigation after the arbitration proceeding. In the view of some, arbitration is potentially so cumbersome and expensive that, as a method of alternative dispute resolution, it has lost some appeal. n68 However, arbitration enjoys great and growing popularity for some kinds of cases, almost to the point of being the exclusive dispute resolution method. n69

COMPUTER-ASSISTED RESEARCH

LEXIS: arbitration w/30 litigation w/15 alternative!

FOOTNOTES:
(n1)Footnote 14. *Christmas v. Cimarron Realty Co., 648 P.2d 788 (N.M. 1982)* .

(n2)Footnote 15. *Mayflower Ins. Co. v. Pellegrino, 261 Cal. Rptr. 224 (1989)* ; *Village of Cairo v. Bodine Contr'g Co., 685 S.W.2d 253 (Mo. App. 1985)* ; *Reynolds v. Whitman, 663 N.E. 2d 867 (Mass. App. 1996) , cert. denied, 665 N.E.2d 1004 (Mass. 1996)* (Court supports arbitration for divorce cases because it is efficient, reduces court congestion, and minimizes acrimony. Needs to be reviewed by judge, particularly in the disposition of property); *Cacheris v. Mayer Homes, Inc., 969 S.W.2d 876 (Mo. App. 1998)* (arbitration is intended to be easier and faster than trial court determination).

(n3)Footnote 16. *Howard County Bd. of Educ. v. Howard County Educ. Ass'n, Inc., 487 A.2d 1220 (Md. App. 1985)* ; *International Union, United Auto. Aircraft, etc. v. Benton Harbor Malleable Indus., 242 F.2d 536* (6th Cir.) , *cert. denied, 355 U.S. 814 (1957)* ; *Phillips v. American Underwriters Life Insurance Co., 2002 Cal. App. Unpub. LEXIS 3268* (No. B147850, Mar. 8, 2002) (both parties' consent was required for the arbitration provision of the real estate agreement to be enforceable).But see *Sheller by Sheller v. Frank's Nursery & Crafts, Inc., 957 F. Supp. 150 (N.D. Ill. 1997)* (Prior agreement to arbitrate was upheld, case stayed pending arbitration); *Bel Ray Co. v. Chemrite Ltd., 181 F.3d 435 (3d Cir. 1999)* .

(n4)Footnote 17. *Bernhardt v. Polygraphic Co. of Am., Inc., 350 U.S. 198 (1956)* ; *Valenti v. Hopkins, 926 P.2d 813, n.3 (Or. 1996)* ; *Raffaelli v. Raffaelli, 946 S.W.2d 139 (Tex. App. 1997)* .

(n5)Footnote 18. *Snyder v. Superior Court in and for Amador County, 74 P.2d 782 (Cal. App. 1930)* ; *Finsilver, Still & Moss v. Goldberg, Maas & Co., 171 N.E. 579 (N.Y. 1930)* .

(n6)Footnote 19. *King v. Beale, 96 S.E.2d 765 (Va. 1957)* .

(n7)Footnote 20. *N.Y. Civ. Prac. L. & R. § 7501 et seq.*

(n8)Footnote 21. *Wark & Co. v. Twelfth & Sansom Corp., 107 A.2d 856 (Pa. 1954)* ; *Britex Waste Co. v. Nathan Schwab & Sons, 12 A.2d 473 (Pa. Super. 1940)* .

(n9)Footnote 22. *Kelso-Burnett Co. v. Zeus Dev. Corp., 437 N.E.2d 26 (Ill. App. 1982)* ; *Crofoot v. Blair Holdings Corp., 260 P.2d 156 (Cal. App. 1953)* ; Hedges v. Carrigan, *11 Cal. Rptr. 3d 787 (2004)* (United States Arbitration Act preempted compliance with certain conditions precedent in the arbitration clause of a real estate contract); *Murphy v. Murphy, 2004 Tex. App. LEXIS 1420* (No. 2 02 449 CV, Feb. 12, 2004) (an agreement for the sale of two properties in

Colorado was held to affect interstate commerce, so the Federal Arbitration Act and not the Texas arbitration law applied).

(n10)Footnote 23. *Wenger v. Finley, 541 N.E.2d 1220 (Ill. App. 1989)* ; *Finsilver, Still & Moss v. Goldberg, Maas & Co., 171 N.E. 579 (N.Y. 1930)* .

(n11)Footnote 24. *Moss v. Department of Mental Health, 406 N.W.2d 203 (Mich. App. 1987)* ; *Snyder v. Superior Court of Amador County, 74 P.2d 782 (Cal. App. 1930)* .

(n12)Footnote 25. *Conejo Valley Unified Sch. Dist. v. William Blurock & Partners, Inc., 169 Cal. Rptr. 102 (1980)* ; *Berkovitz v. Arbib & Houlberg, Inc., 130 N.E. 288 (N.Y. 1921)* .

(n13)Footnote 26. *Wetzel v. Sullivan, King & Sabom, P.C., 745 S.W.2d 78 (Tex. App. 1988)* ; *Lilley v. Tuttle, 117 P. 896 (Colo. 1911)* ; *Red Springs Presbyterian Church v. Terminix Co. of N.C., 458 S.E.2d 270 (N.C. App. 1995)* (The parties' signature on the contract established a valid agreement to arbitrate a dispute).

(n14)Footnote 27. *Id.*

(n15)Footnote 28. *Apex Realty, Inc. v. Schick Realty, Inc., 577 A.2d 534* (N.J. Eq.) , *appeal denied, 604 A.2d 597 (N.J. 1990)* ; *Application of Downer Corp., 304 P.2d 756 (Cal. App. 1956)* ; *Marcus & Millichap Real Estate Inv. Brokerage Co. v. Hock Inv. Co., 80 Cal. Rptr.2d 147 (Cal. App. 1998)* (sellers did not initial arbitration clause in purchase agreement, so there was no agreement to arbitrate); *Rhode v. E & T Invs., Inc., 6 F. Supp. 2d 1322 (M.D. Ala. 1998)* (statute precludes arbitration of express/written warranty claims by buyer of manufactured home, referring to Magnuson Moss Warranty Federal Trade Commission Improvement Act, 101 *et seq., 15 U.S.C. § 2301 et seq.*); *C & L Enterprises, Inc. v. Citizen Band Potawatomi Indian Tribe of Oklahoma, 532 U.S. 411 (2001)* (arbitration provisions in a contract constituted a waiver of the tribe's sovereign immunity against lawsuits to enforce the arbitration award).

(n16)Footnote 29. *Brennan v. General Acc., Fire & Life Assur. Corp., 574 A.2d 580 (Pa. 1990)* ; *Pick Indus., Inc. v. Gebhard-Berghammer, Inc., 56 N.W.2d 97 (Wis. 1953)* ; *Bank v. International Bus. Mach. Corp., 915 F. Supp. 491 (D. Mass. 1996)* , *rev'd by, 99 F.3d 46 (1st Cir. 1996)* (partner opposing mortgage purchase by partnership was not required to submit issue to arbitration); *Insignia Homes, Inc. v. Hinden, 675 So. 2d 673 (Fla. App. 1996)* ; *Louise Gardens of Encino Homeowners' Association, Inc. v. Truck Insurance Exchange, Inc., 98 Cal. Rptr. 2d 378 (2000)* (agreement subject to statutory contractual arbitration law).

(n17)Footnote 30. *Stein v. Drake, 254 P.2d 613 (Cal. App. 1953)* ; *Ex parte Napier, 723 So. 2d 49 (Ala. 1998)* (unsuccessful challenge of unconscionability to arbitration clause related to purchase of mobile home, although purchasers were in their seventies and had never completed high school); *Williams v. Aetna Fin. Co., 700 N.E.2d 859 (Ohio 1998)* (arbitration clause held unconscionable and unenforceable because lender and home repair pitchman conspired to defraud purchaser); *Green Tree Agency, Inc. v. White, 719 So. 2d 1179 (Ala. 1998)* (no duty to disclose that installment contract contains arbitration clause covering future disputes); *Rogers v. Peinado, 101 Cal. Rptr. 2d 817 (2000)* (arbitration clause in contract barred one party from maintaining an action for malicious prosecution against the other party); *Halloran v. Buccheiri, 2003 Ohio App. LEXIS 5047* (No. 82745, Oct. 23, 2003) (an arbitration provision in an agreement between owners and an architect did not apply to the architect's subsequent services as a subcontractor); *Lemmon v. Lincoln Property Co. 307 F. Supp. 2d 1352* (M.D. Fla, 2004) (Arbitration agreement containing all inclusive language is enforceable if it is not vague, even if it contains claims under civil right acts); Wolschlager v. Fidelity Nat. Title Ins. Co., *4 Cal. Rptr. 3d 179 (Cal. App. 2003)* (incorporation of an arbitration clause into a contract through the incorporation of a document is valid if the incorporation is clear, unequivocal, and easily accessible).

(n18)Footnote 31. *Newburger v. Lubell, 177 N.E. 424 (N.Y. 1931)* ; *In re Smith, 276 N.Y.S. 221 (1934)* ; *Scheele v. Justices of the Supreme Court of the State of Arizona, 257 F.3d 1082 (9th Cir. 2001)* (requirements of arbitration rules do not constitute a taking); *Fradella v. Seaberry, 952 So. 2d 195 (Miss. App. 2006)* (an arbitration provision requiring to submit claims against the realtor to arbitration was not supported by consideration).

(n19)Footnote 32. *Commercial Factors Corp. v. Kurtzman Bros., 280 P.2d 146 (Cal. App. 1955)* ; *Hill v. National Auction Group, Inc., 873 So. 2d 244 (Ala. App. 2003)* (in an arbitration provision in a listing agreement between owner and auctioneer, a bidder was not subject to the provision as a third party beneficiary).

(n20)Footnote 33. *Turner Constr. Co. v. H & S Forming of S. Florida, Inc., 567 So. 2d 1036 (Fla. App. 1990)* ; *Crofoot v. Blair Holdings Corp., 260 P.2d 156 (Cal. App. 1953)* ; *Ellis Constr., Inc. v. Vieux Carre Resort Properties, L.L.C., 934 So. 2d 206 (La. App. 2006)* (arbitration right preserved by preliminary injunction); *Abel Homes at Maranja Villas, LLC v. Hernandez, 960 So. 2d 891 (Fla. App. 2007)* (right to arbitration waived by failure to submit timely demand for arbitration).

(n21)Footnote 34. *Pick Indus., Inc. v. Gebhard-Berghammer, Inc., 56 N.W.2d 97 (Wis. 1953) . But see Laur & Mack Contracting Co. Inc. v. Di Cienzo, 651 N.Y.S. 2d 831 (1996)* .

(n22)Footnote 35. *Crofoot v. Blair Holdings Corp., 260 P.2d 156 (Cal. App. 1953)* ; *Ross Brothers Construction Co., Inc. v. International Steel Services, Inc., 383 F.3d 867 (7th Cir. 2002)* (arbitration clause was valid so district court was required to transfer the affected claim to arbitration).

(n23)Footnote 36. *Mountain Plains Constructors, Inc. v. Torrez, 785 P.2d 928 (Colo. 1990)* ; *Carpenter v. Bloomer, 148 A.2d 497 (N.J. Super. 1959)* ; *Sheller v. Frank's Nursery & Crafts, Inc., 957 F. Supp. 150 (N.D. Ill. 1997)* (Prior agreement to arbitrate was upheld, case stayed pending arbitration); *Cecala v. Moore, 982 F. Supp. 609 (N.D. Ill. 1997)* (Suit for violation of Residential Real Property Disclosure Act stayed pending arbitration according to provision in realty sales agreement).

(n24)Footnote 37. *Dresser v. Bindi, 271 Cal. Rptr. 137 (1990)* ; *Hornblower v. George Washington Univ., 31 App. D.C. 64 (1908)* .

(n25)Footnote 38. *Martin v. Potashnick, 217 S.W.2d 379 (Mo. 1949)* .

(n26)Footnote 39. *Apex Realty, Inc. v. Schick Realty, Inc., 577 A.2d 534* (N.J. Eq.) , *appeal denied, 604 A.2d 59 (N.J. 1990)* ; *Bryson v. Higdon, 21 S.E.2d 836 (N.C. 1942)* ; *Bradfordt Co. v. Hallmark Bldrs., Inc., 205 B.R. 971 (Bankr. M.D. Fla. 1996)* .

(n27)Footnote 40. *Griffith Co. v. San Diego College for Women, 289 P.2d 476 (Cal. 1955)* .

(n28)Footnote 41. *Griffith Co. v. San Diego College for Women, 289 P.2d 476 (Cal. 1955)* ; *Sandford Laundry v. Simon, 35 N.E.2d 182 (N.Y. 1941)* .

(n29)Footnote 42. *Twait v. Farmers Mutual Hail Ins. Co., 91 N.W.2d 575 (Iowa 1958)* .

(n30)Footnote 43. *Travelers Indem. Co. v. Walton, 384 So. 2d 939 (Fla. App. 1980)* ; *Clinton Water Ass'n v. Farmers Constr. Co., 254 S.E.2d 692 (W. Va. 1979)* .

(n31)Footnote 44. *Johnston v. Johnston, 554 N.Y.S.2d 851 (1990)* ; *Mercury Oil Refining Co. v. Oil Workers Inter'l Union, 187 F.2d 980 (10th Cir. 1951) , disapproved on other grounds, Textile Workers Union v. Lincoln Mills of Ala., 353 U.S. 448 (1957)* ; *Mehler v. The Terminix International Company L.P., 205 F.3d 44 (2nd Cir. 2000)* (to be covered by the arbitration clause of the contract, the suit need only arise out of or relate to the contract); *Cold Mountain Builders, Inc. v. Lewis, 746 A.2d 921 (Maine 2000)* (arbitrator acted within the range of his discretion); *Sweatt v. International Development Corporation, 531 S.E.2d 192 (Ga. App. 2000)* (arbitrator exceeded authority); *Pacific Development, L.C. v. Orton, 23 P.3d 1035 (Utah 2001)* (arbitrator exceeded authority). *Nobles v. Rural Community Insurance Services, 303 F. Supp. 2d 1292 (M.D. Ala. 2004)* (an arbitration decision concerning insurability of land estopped the insurer from re litigating that issue).

(n32)Footnote 45. *Daley v. City of Hartford, 574 A.2d 194 (Conn. 1990) , cert. denied, 498 U.S. 982 (1991)* ; *Carr v. Kalamazoo Vegetable Parchment Co., 92 N.W.2d 295 (Mich. 1958)* .

(n33)Footnote 46. *Lynch v. Three Ponds Co., 656 P.2d 51 (Colo. App. 1982)* ; *Niles-Bement-Pond Co. v. Amalgamated Local 405, I. U., U. A., A. & A., 97 A.2d 898 (Conn. 1953)* .

(n34)Footnote 47. *Jacob v. Pacific Export Lumber Co., 297 P. 848 (Or. 1931)* ; *Gerdetz v. Central Or. Irrig. Co., 163 P. 980 (Or. 1917)* .

(n35)Footnote 48. *Johnston v. Johnston, 554 N.Y.S.2d 851 (1990)* ; *Morganti, Inc. v. Boehringer Ingelheim Pharmaceuticals, Inc., 563 A.2d 1055 (Conn. App. 1989)* ; *Zelle v. Chicago & N.W.R. Co., 65 N.W.2d 583 (Minn. 1954)* ; *Park Construction Co. v. Independent Sch. Dist. No. 32, Carver County, 11 N.W.2d 649 (Minn. 1943)* .

(n36)Footnote 49. *Weber v. Lynch, 375 A.2d 1278 (Pa. 1977)* ; *Kennecott Utah Copper v. Becker, 195 F.3d 1201 (10th Cir. 1999)* .

(n37)Footnote 50. *Richardson v. Harris, 818 P.2d 1209 (Nev. 1991)* ; *Lewiston-Auburn Shoeworkers Protective Ass'n v. Federal Shoe, Inc., 114 A.2d 248 (Me. 1955)* ; *Machu Pichu, Ltd. v. Massan Shipping Ind., 1997 U.S. Dist. LEXIS 20299* (E.D. La.) ; *Lee County v. Fort Myers Airways, Inc., 688 So. 2d 389 (Fla. App. 1997)* ; *Sylvester v. Abdalla, 903 P.2d 410 (Or. App. 1995)* (attorney fees awarded for successful resistance to exception to arbitrator's award); *Busconi v. Dighello, 668 A.2d 716 (Conn. App. 1995) , cert. denied, 670 A.2d 3321 (Conn. 1996)* (lien foreclosure action based on federal court's judgment confirming arbitration award); *Spearhead Constr. Corp. v. Bianco, 665 A.2d 86 (Conn. App. 1995) , appeal denied, 667 A.2d 554 (Conn. 1995)* (enforcement of arbitration judgment); *Zelvin v. JEM Builders, Inc., 942 A.2d 455 (Conn. App. 2008)* (application by vendors to vacate or modify the award; vendors failed to show that arbitrators manifestly disregarded the law in awarding money damages.).

(n38)Footnote 51. *Wm. C. Blanchard Co. v. Beach Concrete Co., Inc., 297 A.2d 587 (N.J. Super. 1972)* ; *Carpenter v. North River Ins. Co., 436 S.W.2d 549 (Tex. Civ. App. 1968)* .

(n39)Footnote 52. *Mork v. Eureka-Security Fire & Marine Ins. Co., 42 N.W.2d 33 (Minn. 1950)* .

(n40)Footnote 53. *Board of Educ. of Bremen Community High Sch. Dist. No. 228, Cook County v. Bremen Dist. No. 228 Joint Faculty Ass'n, 449 N.E.2d 960 (Ill. App. 1983) , aff'd in part, rev'd in part, 461 N.E.2d 406 (Ill. 1984)* ; *Coleman Co. v. International Union, United Auto., Aircraft and Agr. Implement Workers of Am., 317 P.2d 831 (Kan. 1957)* ; *Durkin v. Cigna Property & Casualty, 986 F. Supp. 1356 (D. Kan. 1997)* (motion to vacate denied because arbitrator held not to have exceeded his authority); *Cacheris v. Mayer Homes, Inc., 969 S.W.2d 876 (Mo. App. 1998)* (vacation of award only under limited circumstances, referring to V.A.M.S. 435.405); *Floyd Co. Bd. of Educ. v. EUA Cogenex Corp., 1999 U.S. App. Lexis 29692 (6th Cir. 1999)* ; *Conmac Corporation v. Southern Diversified Development, Inc., 539 S.E.2d 532 (Ga. App. 2000)* (arbitration panel overstepped its authority in modifying an award); *Sweatt v. International Development Corporation, 531 S.E.2d 192 (Ga. App. 2000)* (arbitrator exceeded authority in the content of the award).

(n41)Footnote 54. *Holman v. Trans World Airlines, 737 F. Supp. 527 (E.D. Mo. 1989)* ; *Board of Educ. of Bremen Community High Sch. Dist. No. 228, Cook County v. Bremen Dist. No. 228 Joint Faculty Ass'n, 449 N.E.2d 960 (Ill. App. 1983) , aff'd in part, rev'd in part, 461 N.E.2d 406 (Ill. 1984)* ; *Moshonov v. Walsh, 94 Cal. Rptr. 2d 597 (2000)* (arbitrator's decision to not award attorney's fees was final and not subject to judicial review).

(n42)Footnote 55. Uniform Arbitration Act § 12. *Metrobuild Associates, Inc. v. Nahoum, 857 N.Y.S.2d 564 (2008)* (trial court exceeded its authority in vacating arbitration award). *Wittich v. Wittich, 948 So. 2d 195 (La. App. 2006)* (party not entitled to have arbitration award vacated); *Birkey Design Group, Inc. v. Egle Nursing Home, Inc., 687 A.2d 256 (Md. App. 1997)* ; *Chen v. Chen, 688 A.2d 636 (N.J. Super. 1997)* ; *Labenski v. Kraizberg, 651 N.Y.S.2d 62 (1996)* ; *Zackiva Communications Corp. v. Milberg Weiss Bershad Spechrie & Lerach, 636 N.Y.S.2d 768 (1996)* (no ground for

vacating arbitration award), *abrogated by, 666 N.Y.S.2d 985 (1997)* (only regarding discovery issue); *Hill v. Cloud, 648 So. 2d 1383 (La. App. 1995)* (no grounds for vacating arbitration award); *Gobegic Medical Care Facility v. AFSCME Local 992, AFL CIO, 531 N.W.2d 728* (Mich. App.) (arbitrator's decision vacated because it was contrary to public policy), *app. denied, 549 N.W.2d 560 (Mich. 1995)* ; *Americrete, Inc. v. West Alabama Lime Co., 758 So. 2d 415 (Miss. 2000)* (the court in affirming the award has a duty to issue its reasoning and thus must make findings of fact and conclusions of law when requested); *Zelvin v. JEM Builders, Inc., 942 A.2d 455 (Conn. App. 2008)* (application by vendors to vacate or modify the award; vendors failed to show that arbitrators manifestly disregarded the law in awarding money damages); *Board of Managers of 225 East 57th Street Condominium v. Campaniello Real Estate, 837 N.Y.S.2d 644 (2007)* (arbitration award vacated because the arbitrator exceeded her authority in determining powers of real estate company).

(n43)Footnote 56. *Hough v. Osswald, 556 N.E.2d 765* (Ill. App.) , *appeal denied, 561 N.E.2d 692 (Ill. 1990)* ; *Stradinger v. City of Whitewater, 277 N.W.2d 827 (Wis. 1979)* ; *Joint School Dist. No. 10, City of Jefferson v. Jefferson Educ. Ass'n, 253 N.W.2d 536 (Wis. 1977)* ; *Trafalgar House Const., Inc. v. MSL Enters., Inc., 494 S.E.2d 613 (N.C. App. 1998)* (referring to Construction Industry Arbitration Rules of American Arbitration Association (CIAR) as being consistent with state law, G.S. § 567.149(a)(3)); *Connecticut Valley Sanitary Waste Disposal, Inc. v. Zielinski, 763 N.E.2d 1080 (Mass. 2002)* (arbitration award could not be modified based on the receipt of additional evidence).

(n44)Footnote 57. *Hoboken Manufacturers' R.R. Co. v. Hoboken R.R. Warehouse & Steamship Connecting Co., 27 A.2d 150 (N.J. Ch. 1942) , aff'd, 31 A.2d 801 (N.J. App. 1943)* ; *Standard Constr. Co. v. Hoeschler, 14 N.W.2d 12 (Wis. 1944)* .

(n45)Footnote 58. *Brooklyn Caledonian Hosp. v. Cintron, 557 N.Y.S.2d 842 (1990)* ; *United Farm Workers Nat'l Union v. Babbitt, 449 F. Supp. 449 (D. Ariz. 1978)* ; *Attorney General v. Johnson, 385 A.2d 57 (Md. 1978)* ; *Hays County Appraisal Dist. v. Mayo Kirby Springs, Inc., 903 S.W.2d 394 (Tex. App. 1995)* (statute requiring binding arbitration held unconstitutional), *aff'd on appeal after remand, 1997 Tex. App. LEXIS 5876* (No. 03 97 00029 CV, Nov. 13, 1997, Tex. App.) (unpublished); *Government of Virgin Islands v. 0.459 Acres of Land, 886 F. Supp. 2 (D. V.I. 1995)* (joint stipulation to enter binding arbitration was an enforceable contract), *rev'd on other grounds by, 75 F.3d 860 (3rd. Cir. 1996)* .

(n46)Footnote 59. *American Universal Ins. Co. v. DelGreco, 530 A.2d 171 (Conn. 1987)* ; *A. Fred Miller, Att'ys at Law, P.C. v. Purvis, 921 P.2d 610 (Alaska 1996)* (compulsory arbitration over attorney's fees upheld using an "arbitrary and capricious standard" of review); *Shimko v. Lobe, 706 N.E.2d 354 (Ohio App. 1997)* (compulsory Arbitration upheld due to safeguards, including limited review before the Court of Common Pleas); *Kedzior v. CDC Dev., 704 N.E.2d 54 (Ohio App. 1997)* ; *Desiderio v. NASD, 1999 U.S. App. Lexis 23269 (2d Cir. 1999)* ; Segal v. Silberstein, *67 Cal. Rptr. 3d 426 (2007)* (arbitration required by parties' business operating agreements).

(n47)Footnote 60. *Cox v. Heuseman, 97 S.E. 778 (Va. 1919)* ; *Garrison v. Palmas Del Mar Homeowners Ass'n, Inc., 538 F. Supp. 2d 468* (D. Puerto Rico) (a claim of right to make repairs to property was subject to arbitration). *JPMorgan Chase Bank v. Reibestein, 824 N.Y.S.2d 259 (2006)* (landlord's breach of contract claim was arbitrable); *Harris v. Green Tree Fin., 1997 U.S. Dist. LEXIS 20792* (E.D. Pa.) (motion to compel arbitration denied due to unconscionability), *rev'd and remanded by 183 F.3d 173 (3d Cir. 1999)* ; *Baker v. Conoco Pipeline Co., 280 F. Supp. 2d 1285* (N.D. Okla. 2003 (an arbitration provision in an easement "touched and concerned" the land).

(n48)Footnote 61. *Vail v. American Way Homes, Inc., 435 A.2d 993 (Conn. 1980)* ; *Fore v. Berry, 78 S.E. 706 (S.C. 1913)* ; *Kedzior v. CDC Dev., 704 N.E.2d 54 (Ohio App. 1997)* (Court held lower court erred in referring case to arbitration because the statute indicated arbitrators had no jurisdiction to decide a title claim for real property).

(n49)Footnote 62. *State v. Loy, 299 N.W. 908 (N.D. 1941)* .

(n50)Footnote 63. *Fehrman v. Bissell Lumber Co., 204 N.W. 482* (Wis.) , *rehearing denied, 205 N.W. 905 (Wis.*

1925) .

(n51)Footnote 64. *Thompson v. Phillips Pipe Line Co., 438 P.2d 146 (Kan. 1968)* ; *Goerke Kirch Co. v. Goerke Kirch Holding Co., 176 A. 902 (N.J. App. 1935)* .

(n52)Footnote 65. *Gamble v. Sukut, 302 P.2d 553 (Or. 1956)* ; *Office & Professional Employees Int'l Union v. Brownsville Gen. Hosp., 186 F.3d 326 (3d Cir. 1999)* .

(n53)Footnote 66. *Palmer v. Clark, 106 Mass. 373 (1871)* .

(n54)Footnote 67. *Amalgamated Ass'n of S.E.R.M.C.E. v. Pittsburgh Ry. Co., 142 A.2d 734* (Pa.) , *cert. denied, 358 U.S. 882 (1958)* .

(n55)Footnote 68. Roger Borovoy, *Recent Developments in Alternative Forms of Dispute Resolutions (ADR), 100 F.R.D. 499 (1983). But see Board of Managers of Courtyards at Woodlands Condo. Ass'n v. IKO Chicago, Inc., 697 N.E.2d 727, 732 (Ill. 1998)* ("It is a well established principle that arbitration is a favored alternative to litigation by state, federal and common law because it is a speedy, informal, and relatively inexpensive procedure for resolving controversies arising out of commercial transactions."); *Cole v. Hiller, 715 So. 2d 451 (La. App. 1998)* (strong public policy favoring arbitration as alternative to litigation).

(n56)Footnote 69. *Rosenberg v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 170 F.3d 1 (1st Cir. 1999)* .

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CHAPTER 105 ALTERNATIVE DISPUTE RESOLUTION IN REAL PROPERTY MATTERS

13-105 Thompson on Real Property, Thomas Editions § 105.04

AUTHOR: Professor David A. Thomas J. Reuben Clark Law School Brigham Young University

§ 105.04 Conciliation.

Conciliation facilitates communication between the parties by an emphasis on ensuring that the parties fully and correctly understand each other's positions and motivations by whatever sequence of conferences and consultations best accomplishes that. n70 By contrast with mediation, discussed below, conciliation lacks mediation's more formal structure of joint and separate meetings with the parties.

If a statute directs a party to attempt conciliation, n71 and conciliation is defined as the attempt to reach a reasonable, voluntary, and mutual understanding, what constitutes fulfillment of the statutory duty often depends on the intransigence of the other party. n72

COMPUTER-ASSISTED RESEARCH

LEXIS: conciliation w/50 real w/1 proeprty

FOOTNOTES:
(n1)Footnote 70. Frank E.A. Sander, *Varieties of Dispute Processing, 70 F.R.D. 111 (1976).*

(n2)Footnote 71. *See, e.g., 29 U.S.C. § 626*(b).

(n3)Footnote 72. *Oscar Mayer Co. v. Evans, 441 U.S. 750 (1979)* ; *Marshall v. Sun Oil Co. (Delaware), 605 F.2d 1331* (5th Cir.) , *rehearing denied, 610 F.2d 818 (5th Cir. 1979)* ; *In re Spectrum Techs., Inc., 183 B.R. 360 (Bankr. E.D.N.Y. 1995)* (request for conciliation conference and appeal of conciliation order).

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CHAPTER 105 ALTERNATIVE DISPUTE RESOLUTION IN REAL PROPERTY MATTERS

13-105 Thompson on Real Property, Thomas Editions § 105.05

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§ 105.05 Negotiation and Mediation.

Negotiation is the process whereby parties confer for the purpose of agreeing to go forward in a matter or to settle a dispute. It may be appropriately undertaken at any stage in the legal relations of parties, from the beginning to post-trial matters. n73 Parties rely on negotiation either to prevent a dispute from arising by anticipating and reaching agreement on issues of potential conflict, or to reach a settlement or accommodation after the issues have come into conflict. As a mechanism for dispute resolution, it is an alternative to litigation.

Sometimes, negotiations may be assisted by mediation, a process by which a neutral party helps the negotiating parties identify issues and possible solutions. n74 Normally, the mediator has no independent authority and serves only the functions assigned by agreement of the parties. While mediation may seem inhibited by this requirement of voluntary participation by the parties, it retains a significant advantage over negotiation as a dispute resolution device, in that the parties retain control over every aspect of the dispute. n75 The usual sequence for mediation is for the mediator to meet with all parties together and then separately with each party. n76

COMPUTER-ASSISTED RESEARCH

LEXIS: negotiat! or mediat! w/50 real w/1 property

FOOTNOTES:
(n1)Footnote 73. Roger Fisher, *What about Negotiation as a Specialty?, 69 ABA Journal 1221 (Sept. 1983).*

(n2)Footnote 74. Joseph B. Stulberg, *Negotiation Concepts and Advocacy Skills: The ADR Challenge, 48 Albany L. Rev. 719 (1984);* Note, *Protecting Confidentiality in Mediation, 98 Harv. L. Rev. 423 (1984); Mills v. Vilas County Board of Adjustments, 660 N.W.2d 705 (Wis. App. 2003)* (refusal to enforce mediation agreement).

(n3)Footnote 75. Frank E.A. Sander, *Diversifying Legal Solutions,* 35 *Harvard L. Bull.* 4 (Summer/Fall 1984); *Yaekle v. Andrews, 195 P.3d 1101 (Colo. 2008)* (a provision of the Dispute Resolution Act enabled the parties to convert an agreement reached during mediation into an enforceable court order); *DR Lakes Inc. v. Brandsmart U.S.A. of West Palm Beach, 819 So. 2d 971 (Fla. App. 2002)* (the statutory privilege of confidentiality did not apply to communications made during mediation); *Ong v. Mike Guido Properties, 668 So. 2d 708 (Fla. App. 1996)* ; *Suarez v.*

Jordan, 35 S.W.3d 268 (Tex. App. 2000) (court ordered mediation).

(n4)Footnote 76. Frank E.A. Sander, *Varieties of Dispute Processing, 70 F.R.D. 79, 111 (1976); Peacock v. Spivey, 629 S.E.2d 48 (Ga. App. 2006)* (owner of allegedly contaminated property voluntarily signed a mediation agreement and was not entitled to a jury trial on the issue of whether he was under duress at the time he signed the mediation agreement).

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CHAPTER 105 ALTERNATIVE DISPUTE RESOLUTION IN REAL PROPERTY MATTERS

13-105 Thompson on Real Property, Thomas Editions § 105.06

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§ 105.06 Consensual References; Factfinders.

Some states have adopted statutes authorizing consensual references, known colloquially as "rent-a-judge." Under such statutes, the parties agree to hire a retired judge or other qualified person to conduct a private but complete trial of their dispute. After hearing the dispute, the private judge reaches a decision and the ruling has the same force as a court judgment. n77

The obvious advantages of this procedure are the ability to choose a qualified--even an expert--person to try the case, better control over the timing of hearing and trial schedules, flexibility of procedures, confidentiality, and efficiency.

Under a wide variety of statutes, most states permit limited issues of fact or law to be referred to third parties. n78 In most of these states, however, the private judge's determinations are not accorded the weight of a regular verdict or judgment.

COMPUTER-ASSISTED RESEARCH

LEXIS: consensual w/1 reference! w/50 real w/1 property
rent-a-judge w/50 real w/1 property

FOOTNOTES:
(n1)Footnote 77. *Self-help: Extra Judicial Rights, Privileges and Remedies in Contemporary American Society, 37 Vand. L. Rev. 845, 1015 (1984);* Eric D. Green, *Getting Out of Court--Private Resolution of Civil Disputes, 28 Boston Bar J. 11* (May/June 1984); Note, *The California Rent-A-Judge Experiment: Constitutional and Policy Considerations of Pay-As-You-Go Courts, 94 Harv. L. Rev. 1592 (1981).*

(n2)Footnote 78. Eric D. Green, *Getting Out of Court--Private Resolution of Civil Disputes, 28 Boston Bar J. 11* (May/June 1984); Note, *The California Rent-A-Judge Experiment: Constitutional and Policy Considerations of Pay-As-You-Go Courts, 94 Harv. L. Rev. 1592 (1981).*

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CHAPTER 105 ALTERNATIVE DISPUTE RESOLUTION IN REAL PROPERTY MATTERS

13-105 Thompson on Real Property, Thomas Editions § 105.07

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§ 105.07 Ombudsman.

An ombudsman performs functions very similar to those of a conciliator or mediator, but usually in the context of a dispute between a private person and a governmental agency. n79 The ombudsman may have a specific commission from the agency or legislature to deal with complaints from the public. Certain powers of investigation may also be conferred on the ombudsman, including powers to subpoena, and to obtain and examine records and other information. An ombudsman's proposed solutions are not binding, but often are influential or persuasive in dealing with the affected government agency. n80

COMPUTER-ASSISTED RESEARCH

LEXIS: ombudsman w/50 real w/1 property

FOOTNOTES:
(n1)Footnote 79. Paul R. Verkuil, *The Ombudsman and the Limits of the Adversary System, 75 Colum. L. Rev. 845 (1975). See e.g., A.R.S. 41* 1312 (Ombudsman for Private Property Rights); *O.R.S. 446.543* (Manufactured Dwelling Park Ombudsman); *U.C.A. 63* 34 13 (Private Property Ombudsman).

(n2)Footnote 80. *Self-help: Extra Judicial Rights, Privileges and Remedies in Contemporary American Society, 37 Vand. L. Rev. 845, 1031 (1984).*

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§ 105.08 Bibliography.

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CHAPTER 106AT PROPERTY LAW IN AUSTRIA 1

13-106AT Thompson on Real Property, Thomas Editions 106AT.syn

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§ 106AT.syn Synopsis to Chapter 106AT: PROPERTY LAW IN AUSTRIA 1

§ 106AT.01 History of Property Law in Austria.

§ 106AT.01(a) Austrian Peoples in Prehistory.

§ 106AT.01(b) Austrian Peoples in Historic Times.

§ 106AT.01(c) Early Austrian Land Law.

§ 106AT.02 The First Austrian Civil Code.

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§ 106AT.06(c)(1) Land Transfer Tax (Grunderwerbsteuer).

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§ 106AT.06(c)(3) Land Tax (Grundsteuer).

§ 106AT.06(c)(4) Land Value Tax (Bodenwertabgabe).

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CHAPTER 106AT PROPERTY LAW IN AUSTRIA 1

13-106AT Thompson on Real Property, Thomas Editions § 106AT.01

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§ 106AT.01 History of Property Law in Austria.

§ 106AT.01(a) Austrian Peoples in Prehistory.

The earliest known inhabitants in the area of modern Austria were the so-called Danubian Groups of wanderers. These groups gathered in villages consisting of clusters of pile-dwellings near the lakes found abundantly in the Alps. Hunters and other food collectors ventured from the villages up into the mountains, but it was not until the late Bronze and Iron Ages that people started making the mountain areas their homes.

During the middle of the Bronze Age tribes of Celts invaded and dominated the area until Roman armies entered in 15 B.C. n2 The Romans occupied the territory south of the Danube river and built many cities and roads, the remains of which can still be found in Austria today. When Roman rule collapsed in A.D. 476, many wandering tribes of Germans, Asians and Hungarians entered and passed through Austria.

§ 106AT.01(b) Austrian Peoples in Historic Times.

By the sixth century A.D., the Donau Plateau and the foothills of the Alps were inhabited by Bavarians who probably immigrated from the east. Simultaneously, great movements of Slavic peoples were taking place throughout the land that is now modern Austria and Germany. Late in the eighth century A.D., Austria came under the rule of Charlemagne, but when his death led to the breakup of the Frankish empire, invaders once again asserted themselves, especially the Magyars of Hungary in the early 900's.

The Magyars were conquered by Germany's Otto I in 955, and Austria would remain under the rule of German monarchs for the next several centuries. In 976 Otto I gave control of the Austrian lands to Leopold I, a member of the Babenburg family. The Babenburgs ruled until King Ottokar of Bohemia gained control of the Babenburg duchies. In 1273 Rudolf I, a member of the Habsburg family, was elected the Holy Roman Emperor by the princes of Germany, and though the Habsburg family control would wax and wane through many years, they remained in power until the First World War.

§ 106AT.01(c) Early Austrian Land Law.

Bavarian land law prevailed in Austria until late in the fourteenth century. Under this essentially feudal system, private property rights held by ordinary people were extremely limited, and most land was used on a communal basis. For example, groups of small villages (Dorfgemeinden) used the surrounding grazing fields and forests collectively. Also, inhabitants shared the responsibility for building and maintaining the wells, roads, and bridges.

Even into the eighteenth century, only a few freeholders existed in a land system that was still dominated by a landed aristocracy:

> Except for a few freeholders (*Freisassen*), whose number was always insignificant, the country was divided into thousands of domains (*Herrschaften*) in which the lord performed all the functions of a sovereign. As a rule there were several villages in such a district, communities which in the main governed only themselves, subject to "custom, privileges, and the provincial constitution." n3
>
> [L]andowners [lords] allocated fields to the peasants. Depending on whether land was located within the village community or on the lord's demesne, the fields were called rustic (*rustikal*) or domestic (*domestikal*) ... Both rustic and domestic fields could either be bought by the peasant or held in usufruct only. But even where a purchase had taken place, the lord retained overlordship (*Obereigentum*) and reversionary right (*Heimfallsrecht*)... n4

Throughout this time, the serfdom that persisted was theoretically mitigated by rules permitting peasants to buy their way out of their feudal obligations.

FOOTNOTES:

(n1)Footnote 2. Erich Zollner & Theresa Schussel, Das Werden Osterreichs 15 (1985).

(n2)Footnote 3. Edith M. Link, The Emancipation of the Austrian Peasant 1740-1798 14.

(n3)Footnote 4. *Id.* at 15.

1 The abbreviations which commonly occur in this chapter include: ABGB (Allgemeines Burgerliches gesetzbuch or General Civil Code), the English translation revised and annotated by Paul L. Baeck; BGBL (Bundesgazetteblatt or Federal Statute Gazette); GBG (Grundbuchgesetz or Land register law); MG (Mietengesetz or Rent/Lease law); LPG (Landpachtgesetz or real estate lease law); KleingartenG (Kleingartengesetz or small-garden law); WEG (Wohnungseigentumsgesetz 1975 or Apartment/Condominium law).

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CHAPTER 106AT PROPERTY LAW IN AUSTRIA 1

13-106AT Thompson on Real Property, Thomas Editions § 106AT.02

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§ 106AT.02 The First Austrian Civil Code.

Under the Empress Maria Theresa and the influence of Enlightenment philosophies, the development of the first Austrian civil code commenced. The code was to promote the notion that all persons should be permitted to hold and enjoy property, that laws should be stable and certain, and applied consistently throughout the state, and enforced uniformly in the courts.

Austria's first civil code drew heavily from Roman law and from natural law principles popular during the Age of Enlightenment. The first draft of this code was rejected by the Empress because of its excessive length and lack of clarity. Further drafts were then produced during the reigns of Joseph II and Leopold II. Finally, under Francis II a legislative board was set up to complete the drafting process, and in 1811 the Austrian Civil Code (Allgemeines Burgerliches Gesetzbuch fur die Deutschen Erblander, or ABGB) was enacted. n5

For the most part, this civil code remains in force today.

FOOTNOTES:
(n1)Footnote 5. The ABGB came into force on January 1, 1812.

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CHAPTER 106AT PROPERTY LAW IN AUSTRIA 1

13-106AT Thompson on Real Property, Thomas Editions § 106AT.03

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§ 106AT.03 The Present Austrian Civil Code.

§ 106AT.03(a) Modern Validity of the Civil Code.

The Austrian Civil Code has remained in force despite changes of Austrian government during the twentieth century. When Austria's constitution was enacted in 1920, it provided for promulgation of laws outside the constitution through publication of those laws in the Federal Statutes Gazette (BGBL). The ABGB remained in force even during World War II, despite the *Anschluss,* when Austria became part of Germany. After World War II, the Allied powers permitted Austrians to establish a democratic government, n6 and the government re-enacted the constitution and the ABGB in 1947. The constitution also guarantees the right of ownership of property free from the intervention of government. n7

§ 106AT.03(b) The Structure of the Austrian Civil Code.

The ABGB (Civil Code of Austria) is divided into an introductory section and three parts. In the introduction the code is declared applicable to all persons, whether individual or corporate. The first part of the ABGB is known as the "rights of persons" and includes the law of marriage, the rights between parents and children, and the law concerning guardianship and curatorship.

The second part of the ABGB is the law of property, divided into two subdivisions, real property rights and personal property rights. Although the majority of real property rights are in fact found in the section which bears its title, many of the rights necessary to conduct a real estate transaction are found throughout the code and ancillary law. Under the sections for personal property rights are found most provisions of general contract and probate laws.

The third part of the ABGB covers rights which are common to the first two parts, such as provisions for sureties and guaranties, and the laws of obligations and provision covering prescription and adverse possession.

§ 106AT.03(c) Interpretation of the Civil Code.

Under the civil code the principle of plain meaning governs:

> No other interpretation shall be attributed to a particular provision of the law than that which is

apparent from the plain meaning of the language employed and from the clear intent of the legislator. n8

Neither the concept of case law jurisprudence nor the principle of stare decisis are officially recognized under the ABGB:

> If a case can be decided neither from the language nor from the natural sense of the law, similar situations which are determined by reference to the laws and the purpose of related provisions must be taken into consideration. Should the case still remain doubtful, then it must be decided upon the carefully collected and well-considered circumstances in accordance with the natural principles of justice. n9
>
> The decisions issued in individual cases and the opinions handed down by the courts in particular litigations never have the force of law; they cannot be extended to other cases or to other persons. n10

Since the courts are only to render justice in light of the law as promulgated by the legislature, no equitable power exists. Generally, laws which are enacted by the legislature do not have a retroactive effect, unless the legislature explicitly directs a law to affect pending litigation. n11

FOOTNOTES:

(n1)Footnote 6. The Constitution is known as the Bundes-Verfassungsgesetz or B-VG and was last amended in 1979.

(n2)Footnote 7. B-VG art. 5.

(n3)Footnote 8. ABGB art. 6.

(n4)Footnote 9. ABGB art. 7.

(n5)Footnote 10. ABGB art. 12.

(n6)Footnote 11. ABGB art. 8.

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CHAPTER 106AT PROPERTY LAW IN AUSTRIA 1

13-106AT Thompson on Real Property, Thomas Editions § 106AT.04

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§ 106AT.04 Real Property Rights Under the Civil Code.

§ 106AT.04(a) Ownership and Possession of Property.

Austrian law draws a distinction between rights in rem and obligatory rights, a distinction which is based on Roman law. Therefore, the rights which are said to affect the land (in rem) are found in the second part of the code under real rights, whereas the rights concerning property as between persons are found in the other two sections of the code. The code makes a sharp distinction between movable and immovable property.

Rights in property are said to belong to a person without regard to any other certain persons. n12 The ABGB defines real property rights as possession, ownership, pledge, easement, and inheritance. n13 Immovable property is "possessed by setting foot upon, bordering, fencing in, marking or working therein." n14

An owner who has taken possession of property may protect it by use of suitable force. n15 If an owner believes that the construction of a new building on adjacent land will harm the owner's land, the owner may obtain an injunction, and the court is required under the code to act as fast as is expedient. n16 Other rights protected under the code include rights of ancient lights, right of way, access to waterways and highways, and the right to pasture. n17

Under the code, acquisition of property can occur not only by ordinary conveyance, but also through accretion n18 or through operation of law. n19

§ 106AT.04(b) Transfer of Real Property.

Real property is obtained by acquisition of title through the legally prescribed manner of acquisition. n20 In order to transfer land, the seller must have a certified deed of title entered into the land register. If there is only an agreement to sell land, it is enforceable as to the parties involved, but does not impart notice to the world. The ABGB contains a specific provision for an earnest money agreement, which is similar to that commonly used in the United States. n21 Once the deed has been entered into the land register, the document itself is immaterial as to proof of ownership. Therefore, title searches are unknown in Austria.

Land can be transferred only through delivery and acceptance. n22 The delivery of property can be accomplished

through a conveyance (commonly referred to as declaration) that shows the name of the acceptor. n23 The conveyance or declaration must then be entered into the land register, which entry is termed intabulation. n24 The instrument to be entered must conform to all applicable legal requirements, such as the requirement that it be notarized. n25 Included in the instrument must be the exact designation of the transferor, the acceptor, the description of the real estate to be transferred, the legal basis of the transfer, the place and date of the instrument in question, and the transferor's express declaration of consent to intabulation (entry in the register) of the acceptor as owner of the property. n26

All encumbrances recorded in the land register are transferred with the property and remain in force. n27 Transfers of land in rural areas are subject to local government control.

§ 106AT.04(c) Co-Ownership of Real Property.

Co-ownership is recognized under the ABGB; however, the different forms of concurrent ownership have not been codified, but are left to the contracting or transacting parties to decide and describe in detail the form of ownership they desire. This description will be entered into the land registry, and thereby will become official as to all disputes. Concurrent ownership can be created by contract, law, will, or declaration. n28

§ 106AT.04(d) Interests in the Land of Another.

Easements can be created by contract and must be entered into the land registry to be enforceable. n29 Mortgages on lands are created by having the mortgagee's name and the sum due entered into the land register. n30 The entry is made by presenting a mortgage deed bearing the mortgagor's signature, execution of judgment, or similar instrument. n31 Priority between mortgages is based on first in time. Default by the mortgagor can result in a forced sale, with any surplus going to the mortgagor. Mortgage interests are assignable under most circumstances. n32

§ 106AT.04(e) Prescription and Adverse Possession.

Under the original ABGB, acquisition of land rights through prescription and adverse possession was possible. However, under the present land registry law, no real property rights may be obtained through adverse possession or prescription. The ABGB still recognizes adverse possession of personal property.

§ 106AT.04(f) Foreign Ownership of Real Property in Austria.

Aliens have essentially the same property rights as Austrian citizens. n33 Also recognized as "persons" who can have rights under Austrian law are foreign governments, foreign corporations, and agricultural organizations. n34 An additional requirement imposed on foreign ownership of land, however, is that it must be registered with the real estate transactions office (*Grundverkehrsbeh/Uorde*), and that office must issue a permit before the transaction may take place. Local government subdivisions in Austria may also impose their own requirements for the transfers of land interests when foreigners are involved.

FOOTNOTES:
(n1)Footnote 12. ABGB art. 307.

(n2)Footnote 13. ABGB art. 308.

(n3)Footnote 14. ABGB art. 312.

(n4)Footnote 15. ABGB art. 344.

(n5)Footnote 16. ABGB art. 340.

(n6)Footnote 17. ABGB arts. 472 *et seq.*

(n7)Footnote 18. ABGB arts. 404, 411 *et seq.*

(n8)Footnote 19. ABGB art. 1342.

(n9)Footnote 20. ABGB art. 380.

(n10)Footnote 21. ABGB art. 908.

(n11)Footnote 22. ABGB art. 425.

(n12)Footnote 23. ABGB art. 428.

(n13)Footnote 24. ABGB art. 431.

(n14)Footnote 25. ABGB art. 432.

(n15)Footnote 26. ABGB art. 433.

(n16)Footnote 27. ABGB art. 443.

(n17)Footnote 28. ABGB art. 825.

(n18)Footnote 29. ABGB art. 472 *et seq.* ; specifically enumerated easements can be found at ABGB art. 477.

(n19)Footnote 30. ABGB arts. 447 *et seq.*

(n20)Footnote 31. ABGB art. 450.

(n21)Footnote 32. ABGB arts. 545 *et seq.*

(n22)Footnote 33. ABGB art. 33. For some rights sought by aliens under Austrian law, the alien must show that the same right is available to an Austrian citizen in the alien's own country.

(n23)Footnote 34. ABGB art. 26.

1 The abbreviations which commonly occur in this chapter include: ABGB (Allgemeines Burgerliches gesetzbuch or General Civil Code), the English translation revised and annotated by Paul L. Baeck; BGBL (Bundesgazetteblatt or Federal Statute Gazette); GBG (Grundbuchgesetz or Land register law); MG (Mietengesetz or Rent/Lease law); LPG (Landpachtgesetz or real estate lease law); KleingartenG (Kleingartengesetz or small-garden law); WEG (Wohnungseigentumsgesetz 1975 or Apartment/Condominium law).

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CHAPTER 106AT PROPERTY LAW IN AUSTRIA 1

13-106AT Thompson on Real Property, Thomas Editions § 106AT.05

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§ 106AT.05 The Land Registry Law.

§ 106AT.05(a) History of the Land Register.

Some form of land register has existed throughout much of Austria's history. The need for uniformity in tax collection procedures led to the earliest form of land registers. In conveyancing, land registers were not used during early medieval times, because the parties simply conducted land transfers between themselves, usually by means of a symbolic exchange before witnesses. In later medieval times a formal transfer (*Auflassung*) before a court, effected through a form of deed or acknowledgement, became common. Beginning in the twelfth century, larger cities developed their own conveyancing and mandatory registration procedures; often the *Auflassung* was combined with an official entry into a register (*Eintragung*). The reception of Roman law threatened, but did not replace, the Germanic tradition as to registration.

In 1871 a national land registry law (*Grundbuchgesetz or GBG*) was promulgated. However, amendments to and commentary on the 1871 law introduced so much complication that a total revision was promulgated in 1955.

§ 106AT.05(b) The Modern Land Register. n35

The purpose of the land registry law is to make real property ownership and transfer precise and predictable. The registry gives notice to potential purchasers and creditors, and the state uses the registry for assessing taxes.

The land registry is divided into the main book (*Hauptbuch*) and a deed collection (*Urkundensammlung*). In order to be effectual, all transfers, conveyances, servitudes, and encumbrances must be entered into the main book. n36 Deeds can be entered into the deed collection. The categories of information entered into the main book are strictly limited, but anything that appears on the deed or conveying instrument can be entered into the deed collection. In a conveyancing dispute over facts outside the main book, information from the deed collection may be used. If entries in the main book and deed collection are in conflict, the main book entries are controlling.

Land registry records are maintained for all real estate within Austrian territory, are kept at the district courts, and are freely accessible to the general public. The good faith purchaser is protected against matters not entered in the land register and of which the purchaser has no knowledge. Where multiple good faith conveyances of the same land occur,

the party making the earlier entry in the registry will prevail. n37 The losing party in those circumstances will have an action in contract against the seller. Separate registers for railroads and mining claims are maintained.

The main book of the land register is divided into a property status section (*Gutbestandblatt*), an ownership section (*Eigentumsblatt*), and an encumbrance section (*Lastenblatt*). In the property status section, land parcels are listed according to an assigned number and type, such as residential or agricultural. Certain servitudes are also listed in this section. In the ownership section is information concerning the type of ownership the present possessor has, how the land was conveyed to the present owner, and from whom the property was conveyed. If the transaction is a lease, the terms of the lease will also be entered. The encumbrance section of the main book lists all encumbrances on the land, including rights such as reversionary interests and mortgages.

§ 106AT.05(c) Notarization of the Transfer.

Before any transaction, encumbrance, or mortgage can be entered into the land register, the documents effecting the transactions must be notarized. A notary public is appointed by the government and functions for life or until the appointment is revoked. Although the notary public is appointed for a specific judicial district, notarial functions can be performed anywhere in Austria.

FOOTNOTES:
(n1)Footnote 35. Grundbuchgesetz (GBG, or Land Register Law), BGBl. No. 39/1955. This law was most recently amended in 1979.

(n2)Footnote 36. GBG § 4.

(n3)Footnote 37. ABGB art. 440.

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CHAPTER 106AT PROPERTY LAW IN AUSTRIA 1

13-106AT Thompson on Real Property, Thomas Editions § 106AT.06

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§ 106AT.06 Property Laws Outside the Civil Code.

§ 106AT.06(a) Landlord/Tenant Law.

Under Austrian law, the lease between a landlord and a tenant is completely obligatory and is considered a matter of contract law; the landlord is the creditor and the tenant is the debtor. Because the landlord/tenant relationship is obligatory, the landlord has a lien on the tenant's chattels.

Landlord/tenant relationships fall into one of two types:

> If the tenant can use the premises without further work, the law speaks about *Miete*. The most basic and familiar example is the *Miete* of an apartment. If, however, the tenant must do some work to obtain the benefit from the premises for which he pays rent, the legal expression is *Pacht*. This distinction is one of substance because, in certain respects, the mutual rights between landlord and tenant are different if the relation is that of *Miete* rather than that of *Pacht*. n38

Both *Miete* and *Pacht* are based upon a contract, and under the law they come together under the heading of *Bestandvertrag* (Contract of Granting). Austrian landlord/tenant law can be found under the *Mietgesetz* (MG or Lease Law). n39 The first sections of the lease law identify those agreements that are subject to the law. n40 The lease law regulates the rent rates and lists variances and exemptions to the general rules. Under the lease law the lessee is required to return the leased space to the lessor in the same condition as when it was let, subject to reasonable wear and tear. n41

The assignability of the lease agreement may be restrained or prohibited by the lease agreement, but the lessor may still be required to show good cause for refusal. n42 The lease law explicitly prohibits the landlord from terminating the lease except for "important reasons," such as non-payment of rent. n43 As in most American jurisdictions, the landlord must follow specific procedures to evict a tenant.

The lease law assigns rights and protections to both the lessor and the lessee. For instance, the law imposes a warranty of habitability and lessor duties to pay all taxes on the property, make repairs that are needed, and provide for the essentials of water, light, heat, and sanitation. n44

Slightly different legal relationships arise in the land lease law n45 and the small-garden law. n46 The land lease law is very similar to the *Mietgesetz* , except that it applies only to unimproved land. The small-garden law has become significant in regulating the massive checkerboards of small leased garden plots found abundantly around large European cities. The law applies to gardens larger than 120 square meters and smaller than 650 square meters and contains restrictions on the terms of the lease contracts for such areas.

§ 106AT.06(b) Property Rights Between Husband and Wife.

Complete or partial community property is available to couples who make and have notarized an appropriate contractual agreement. n47 Without such an agreement, if a spouse is simply added to the land register as an owner, in the event of divorce, he or she receives one half the value of the property if it is sold. n48

§ 106AT.06(c) Taxes on Real Property.

§ 106AT.06(c)(1) Land Transfer Tax (*Grunderwerbsteuer*). n49

Usually a real property transfer is subject to a 3.5% tax on either the sale price or the determined value of the property. Exemptions apply to certain donative and probate transfers.

§ 106AT.06(c)(2) Property Tax (*Verm/Uogenssteuer*). n50

For Austrian residents a property tax of about 1% is assessed against all holdings, whether in Austria or abroad. For non-resident Austrians or for resident aliens, the tax is assessed only against holdings in Austria.

§ 106AT.06(c)(3) Land Tax (*Grundsteuer*). n51

This tax is levied by the municipality and varies throughout the country. The tax is paid by the owner of the property.

§ 106AT.06(c)(4) Land Value Tax (*Bodenwertabgabe*). n52

This is an annual tax of 1% assessed on unused parcels of land that are worth more than 200,000 Austrian schillings.

FOOTNOTES:

(n1)Footnote 38. Paul L. Baeck & Hans Kapfer, The General Civil Code of Austria 212 (1972). An example of a *Miete* is a lease for a room, while a lease of a going business would be a *Pacht*.

(n2)Footnote 39. Law of Dec. 7, 1922, BGBL. No. 872, as amended in Law of June 22, 1929, BGBl. No. 210.

(n3)Footnote 40. Austrian law differentiates between the lease of an apartment, a small garden, and an empty lot.

(n4)Footnote 41. MG § 18.

(n5)Footnote 42. MG § 18a.

(n6)Footnote 43. MG §§ 19 *et seq.*

(n7)Footnote 44. MG §§ 6 *et seq.*

(n8)Footnote 45. Landpachtgesetz (LPG), Law of Nov. 26, 1969, BGBL. No. 451.

(n9)Footnote 46. Law of Dec. 16, 1958, BGBL. No. 6/1959.

(n10)Footnote 47. ABGB art. 1233.

(n11)Footnote 48. ABGB art. 1236.

(n12)Footnote 49. Law of July 2, 1987, BGBL. No. 309.

(n13)Footnote 50. Law of July 7, 1954, BGBL. No. 192, amended by, Law of November 24, 1987, BGBL. No. 606.

(n14)Footnote 51. Law of July 13, 1955, BGBL. No. 149; the current version is the Law of November 10, 1982, BGBL. No. 570.

(n15)Footnote 52. Law of Dec. 15, 1960, BGBL. No. 285, amended by Law of July 10, 1973, BGBL. No. 383.

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CHAPTER 106BR PROPERTY LAW IN BRAZIL

13-106BR Thompson on Real Property, Thomas Editions 106BR.syn

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§ 106BR.syn Synopsis to Chapter 106BR: PROPERTY LAW IN BRAZIL

§ 106BR.01 History of Property Law in Brazil.

§ 106BR.01(a) Discovery and Colonization.

§ 106BR.01(b) Achieving Independence and Stability.

§ 106BR.01(c) Historical Foundation of Property Rights.

§ 106BR.02 Basic Principles of the Brazilian Property Law.

§ 106BR.02(a) Types of Interests in Real Property.

§ 106BR.02(a)(1) Immovable and Movable Property.

§ 106BR.02(a)(2) Rights that Arise or May Be Created.

§ 106BR.02(a)(2)(i) Emphyteusis.

§ 106BR.02(a)(2)(ii) Servitudes.

§ 106BR.02(a)(2)(iii) Usufruct.

§ 106BR.02(a)(2)(iv) Use.

§ 106BR.02(a)(2)(v) Habitation.

§ 106BR.02(a)(2)(vi) Mortgage.

§ 106BR.02(b) Acquiring and Securing Real Property Rights.

§ 106BR.02(b)(1). Registration of the Transfer Title in the Official Notary.

§ 106BR.02(b)(2). Accession.

§ 106BR.02(b)(3). Prescription.

§ 106BR.02(b)(4). Succession.

§ 106BR.03 Landlord/Tenant Law.

§ 106BR.03(a) Formation of a Lease Contract.

§ 106BR.03(b) Duties, Responsibilities and Liabilities of the Lessee.

§ 106BR.03(c) Responsibilities of the Landlord.

§ 106BR.04 Taxation.

§ 106BR.05 Land Use Law.

§ 106BR.06 Bibliography.

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CHAPTER 106BR PROPERTY LAW IN BRAZIL

13-106BR Thompson on Real Property, Thomas Editions § 106BR.01

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§ 106BR.01 History of Property Law in Brazil.

§ 106BR.01(a) Discovery and Colonization.

Competition between Portuguese and Spanish explorers in the fifteenth century led to the Treaty of Tordesillas, adopted on June 7, 1494, which limited Spanish rights to territory more than 1,110 miles west of the Cape Verde Islands. Thus confirmed in its rights to explore Africa and the sea routes to India, Portugal sent a fleet under Pedro Alvares Cabral, who was driven far off course and touched the Brazilian coast on April 22, 1500. Cabral claimed the land for Portugal and sent a report to the king.

Portugal granted a brazilwood concession in 1503, and in 1530 sent a fleet to drive out the French and set up settlements and an administrative system. Forced to rely on private interests for colonizing, Portugal in 1533 divided the Brazilian coastline into 15 parallel strips, extending inland as far as the then-uncertain demarcation established by the Treaty of Tordesillas. These huge land grants varied in their north-south dimensions from 90 to 360 miles wide, and were granted as semi-feudal captaincies to twelve private persons, who agreed to colonize, develop and defend their grants. As financial ventures, most of the captaincies eventually failed, but they did succeed in planting permanent colonies on the coast. Further exploration and colonization pushed Brazil's boundaries in all directions and, in the west, well beyond the line of the Tordesillas Treaty.

The proprietary, or donatory, system proved inadequate to the tasks of colonization. The aristocrats received their lands under essentially feudal rights and obligations, including judicial rights, but had inadequate resources to administer their holdings. Consequently, the king established control over the entire colony by establishing a central colonial administration beginning in 1549. The hereditary rights and privileges of the captains were eventually absorbed by royal governors, and new captaincies under the new governance arrangements were created.

When Spain and Portugal united, between 1580 and 1640, the combined parent government pursued a single colonial policy, which was tightly controlled by the central government and its colonial governors and agents. This control was much diminished in the more remote areas, where huge private landholdings were administered as private feudal holdings following the traditions of the early captains. Indeed, because of these feudal origins, a type of feudalism still dominates landholding in the Brazilian backcountry.

In 1736 a reform of colonial governance created a ministry that framed laws for the entire country and appointed and supervised governors. All remaining hereditory captaincies were abolished.

§ 106BR.01(b) Achieving Independence and Stability.

The notion of independence for Brazil first arose in the late 18th century, and a revolution in Portugal in 1820 gave it decisive impetus. In an essentially peaceful transition, prince Dom Pedro remained in Brazil when his father King John returned to Portugual from Brazilian exile. When the Portuguese Cortes sought to impose the old restrictive controls over Brazil, Dom Pedro was formally proclaimed constitutional emperor of Brazil in 1822. Military leaders revolted in 1889 and established a republic.

In the disorder that spread all over Latin America in the first half of the nineteenth century, following the emergence of independent republics from the former colonies, policies of land distribution planted the seeds of present and future social disorder. The republics distributed huge grants of land to politically prominent persons, resulting in very large estates held by very few persons, and-because of primogeniture, debt, slavery and peonage-the vast majority of the agrarian population in perpetual economic oppression. A property-owning middle class, such as was so vital to prosperity in the northern American nations, simply did not arise.

In more modern times, the Brazilian government has tried several methods of effecting land reform, most importantly taxation of idle land and of the large plantations. These efforts have yielded only modest results.

The first of several modern Brazilian constitutions was promulgated in 1946. In 1985, after periods of military rule, civilians began governing Brazil as a federal republic.

§ 106BR.01(c) Historical Foundation of Property Rights.

The early colonizing nobles who received the colonial captaincies were awarded title to the land by means of a "donation letter." The property interest thus granted was perpetual and inheritable. Donees were obligated to promote population growth in the territory, defense, good utilization of the natural resources and propagation of the catholic faith. To the humbler colonists the captains gave unproductive land called "Sesmarias," so they can found villages with local administration, including a judicial system. These colonists were exempted from certain taxes.

The captaincies ("Capitanias") or donatory system fell into decline as the captains failed to find adequate resources to carry out their responsibilities, and the captaincies were eventually turned back to royal control. Thereafter the king sought to establish more centralized control over the entire colony.

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CHAPTER 106BR PROPERTY LAW IN BRAZIL

13-106BR Thompson on Real Property, Thomas Editions § 106BR.02

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§ 106BR.02 Basic Principles of the Brazilian Property Law.

§ 106BR.02(a) Types of Interests in Real Property.

§ 106BR.02(a)(1) Immovable and Movable Property.

In Brazil, the term *bens imoveis* means immovable property. Under the Brazilian Civil Code (BCC) property is considered either immovable or movable property; property includes intellectual property (which is considered movable). Under article XX of the BCC, immovable property cannot be moved to another place without destroying its substance. On the other hand, movable property can be moved to another place and maintain its substance without damage. This classification is similar to the common-law distinction between real and personal property. Under article 674 of the BCC, property rights arise through emphyteusis, servitude, usufruct, use, habitation, chattel mortgage, antichresis and mortgage, all described in the following paragraphs.

§ 106BR.02(a)(2) Rights that Arise or May Be Created.

§ 106BR.02(a)(2)(i) Emphyteusis.

As stated in article 678 of the BCC, emphyteusis is an interest in the real property in which the owner of a non-productive parcel of land can sell rights in the land to another, who pays an annual rent to the seller. Under a contract of emphyteusis, while the seller lives, the grantee is required to pay rent.

§ 106BR.02(a)(2)(ii) Servitudes.

According to article 695 of the BCC, servitudes are restrictions imposed on the use of the land, often by governments or utilities companies seeking to acquire rights. A common example would be an electric power company acquiring servitudes upon lands in order to place its cables. Governments acquire servitudes to construct and improve water systems, railroads, highways and streets. Various types of uses maintained for ten to fifteen years may give rise to a prescriptive right in the servitude use. According to the Public Registration Act (Law No. 6.015 of Dec. 13, 1973), servitudes much be registered.

As any other real property right, servitudes must be registered in the Official Notary as prescribed by the Public Registration Act (law No. 6.015 of December 31, 1973).

§ 106BR.02(a)(2)(iii) Usufruct.

When a landowner separates rights of enjoyment from the other rights associated with ownership of real property, a usufruct arises. A usufruct right can be separated and transferred to another without the property owner losing the other rights that have been retained.

As stated in article 713 of the BCC, the person who receives the land has the right to enjoy its facilities and fruits. One who receives a right of usufruct may retain and enjoy and own the produce of the land for the period of that right. At the end of the usufruct period, the holder of that right must return the property in essentially the same condition in which it was received, natural deterioration and wear and tear excepted. Usufructs are transferable.

The usufruct is often granted for the period of the recipient's life. It is common for parents while living to divide the property among their children, reserving for themselves the usufruct during their lives and avoiding disputes among heirs after their death.

§ 106BR.02(a)(2)(iv) Use.

Use is similar to the usufruct, except that the use was intended to help a person and the person's family with property rights that would provide for their personal necessities, usually without rent or other payment, as described under Habitation, below. Article 745 of the BCC establishes that the rules regarding usufruct are applicable to the use. The use is today rare because its function is fulfilled by the usufruct.

§ 106BR.02(a)(2)(v) Habitation.

The habitation is a variant of the use in which a person receives land for a family dwelling and has no obligation to pay rent to the landowner. Article 748 of the BCC sets forth that rules governing the usufruct are applicable to the habitation. As with the use generally, this property right is today not common.

§ 106BR.02(a)(2)(vi) Mortgage.

A mortgage is a property right by which the owner gives to the creditor a security interest in the immovable property. Under the BCC mortgages may be either voluntary or legal. The voluntary mortgage is entered into voluntarily by the debtor in favor of the creditor. The legal mortgage, under article 827 of the BCC, is imposed by a court in favor of a party with an interest in the property, such as a divorced former spouse, children of parents in the process of divorce, and a governmental entity with a claim for property taxes.

As with any other interest over immovable property, the mortgage must be registered under the Public Registration Act (Law No. 6.015 of December 31, 1973) as either a voluntary or a legal mortgage.

The creditor under a legal mortgage has two options to recover payment of the debt. One option is to wait until someone buys the property at a public auction. If there are no buyers, the other option is to take the property itself. Of course, in the case of deficiences, where the value of the property is not enough to cover the debt, the creditor may seek further recovery in the debtor's other property.

The sale of the property at a public auction is not the only way a debtor may be freed from the obligation. According to article 849 of the BCC, the mortgage also is extinguished by destruction of the property, by the retiring of the obligation, by the creditor forgiving the debt, and by the statute of limitations.

Mortgages created prior to 1997 are governed by prior law, according to which the borrower holds legal title to the property. Mortgages created after 1997 are governed by Law 9514, whereby a trustee holds title with fiduciary duty to the borrower. The law was changed to avoid judicial foreclosure, which could last as long as seven years. Under the new law, lenders can foreclose in six months to one year. Operations under the new law drastically reduce the cost of mortgages to financial institutions.

§ 106BR.02(b) Acquiring and Securing Real Property Rights.

§ 106BR.02(b)(1). Registration of the Transfer Title in the Official Notary.

The real property interests can be transferred only by registering the title with an Official Notary. Movable (or personal) property interests are transferred by actual or symbolic delivery to the transferee (*traditio*). The BCC, under articles 531 through 535, establishes the basic requirements and what kind of acts are subject to registration in the Official Notary. In addition, the Public Registration Act gives a detailed description of the process itself.

Under articles 531 and 532 of the BCC are provisions governing registration of titles regarding a real property interest created by act *inter vivos* and *causa mortis*, by judicial decisions in division (partition) actions and by *inventarios e partilhas*.

Among the *inter vivos* acts is the sale contract; no special form is required for a valid contract to sell a property interest. The contract may be a private or public instrument, but both have to be registered in order to transfer the property. The greatest advantage of the public instrument over the private is that the former only can be invalidated under severe conditions and substantial proof. The private instrument, if not signed by two witnesses, who confer an execution power to it, can be easily avoided.

See John C. Martin, "Bringing Dead Capital to Life: International Mandates for Land Titling in Brazil, *31 B.C. Int'l & Comp. L. Rev. 121-136 (2008).*

§ 106BR.02(b)(2). Accession.

Under article 530, II of the BCC, property may be acquired by accession, which is the incorporation of movable property into immovable property, by either natural or artificial forces. According to article 536 of the BCC, accession can occur in five different ways: island formation, *aluviao, avulsao, abandono do alveo* and construction of facilities and plantation.

The first four ways of accession are no longer regulated by the BCC. Their provisions are stipulated in the Water Code (Law No. 23.643 of July 10, 1934), which brings together all laws regulating riparian and prior appropriate rights over water and over land contiguous to waters.

§ 106BR.02(b)(3). Prescription.

The property obtained by prescription is property a person occupies or uses without interruption over a period of time as prescribed by law, after which the person is considered the owner of the property or property right.

Prescription is governed by articles 550 through 553 of the BCC and many other laws, including some Constitutional provisions.

Prescription of land is normally accomplished after the passage of twenty years without interruption and opposition. Under the "Statute of the City" enacted in 2001, an individual or family may obtain title to urban land of up to 250 square meters upon meeting certain conditions. They must use the property as their residence for five years without interruption or opposition, and they must not own any other land. A person may gain title to urban land through this

means only once. (Sec. V Art. 10 of statute)

To obtain title to rural land by this means, the family or individual must still reside on the land for five years without interruption or opposition, but they must also make the land productive in some way. The land can be up to 50 hectares (about 125 acres) in size. The limitation to one use of usurpation per person does not apply to rural land, nor does the requirement that the individual not own any other land. A shorter period may apply in special circumstances, such as five years for acquiring rights to up to 300 square meters of land in towns. Also it is necessary to bring an action to declare the possessor the legitimate owner of the land and the decision of this action is registered with the Official Notary.

Article 183, Section 3 of the Brazilian Constitution prohibits the prescription of public lands.

§ 106BR.02(b)(4). Succession.

Succession means transmitting property from a deceased person to the person's spouse and descendents.

Until the Brazilian Constitution of 1988, there was a difference between legitimate and illegitimate children, but after the Constitution of 1988, there can be no distinction among the children, who are all considered legitimate under the law.

Before 1988, there was also difficulty in dealing with a couple who had formed a union without marriage. Under the old laws, unmarried women suffered severe prejudice regarding the division of the assets because frequently the men who lived with them were married and had many children. Even if an unmarried woman decided to litigate in court to obtain part of the assets, conservative courts did not recognize her rights. Since 1988, some of that problem has been alleviated, but some laws still favor the married woman over the unmarried woman living with the married man.

As yet, no marital and property rights have been conferred on a survivor companion from a homosexual union.

Normally, the surviving spouse is entitled to receive 50% of all assets of the *de cujus*, and the other 50% of the assets has to be divided among the descendants in equal parts. This partition of the property is made only after all debts are paid. If the assets are insufficient to pay all debts, the creditors of the deceased person cannot sue the spouse or descendants for the debts.

It is necessary for a judicial decision to affirm the distribution of assets in order for those interests to be registered. When the survivors agree with the manner of the distribution of the assets, the judicial decree is easy to obtain, but when there is disagreement about division, the court, according to its best judgment, has to determine the distribution. All of these matters can be settled by testament, but use of testaments is not yet widespread in Brazil.

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CHAPTER 106BR PROPERTY LAW IN BRAZIL

13-106BR Thompson on Real Property, Thomas Editions § 106BR.03

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§ 106BR.03 Landlord/Tenant Law.

The relationship between landlords and tenants of urban property is regulated under the Lease Act (Law No. 8.245 of October 18, 1991). Other laws regulate leases of rural properties, hotels, apartment-hotels, and commercial property.

As with any contract under Brazilian Law, the contract of lease has to have, according to article 82 of the BCC, a capable agent to sign the contract, a lawful and possible object, and--if required by the law--the prescribed form.

§ 106BR.03(a) Formation of a Lease Contract.

The lease contract is formed between landlord and tenant with the simple manifestation of willingness to enter into the contract. No specific form is required, and the contract may be either oral or in writing. The contract must include information concerning the property covered by the lease and the consideration to be paid.

§ 106BR.03(b) Duties, Responsibilities and Liabilities of the Lessee.

The lessee is responsible to conserve the lease property and to pay the lease consideration in the amount and due time accorded. The lessee also has the duty to permit the landlord to inspect the lease property.

§ 106BR.03(c) Responsibilities of the Landlord.

The landlord has the responsibility to permit the lessee to use the lease property without opposition and ensure that the property is safe.

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CHAPTER 106BR PROPERTY LAW IN BRAZIL

13-106BR Thompson on Real Property, Thomas Editions § 106BR.04

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§ 106BR.04 Taxation.

Real property transfer taxes may be imposed on property transactions. This tax is a state tax, regulated entirely by each individual state. Under these state laws any acquisition of property or of a property right is taxed at a rate which varies from 0.5% to 4%. The tax is to be paid by the party acquiring the property or property right.

Property taxes are assessed by municipality. Taxes are different for urban and rural land. Each municipality with a population of 20,000 or more must create a master plan with an urban zone boundary (*delimitacao da zona urbana*), separating the urban land from the rural. For urban property tax purposes, land is assessed according to the value of the land plus the value of the building, not taking into account income derived from tenants or other sources.

For rural property tax, only the value of the land itself is assessed, and the value of any buildings is ignored.

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CHAPTER 106BR PROPERTY LAW IN BRAZIL

13-106BR Thompson on Real Property, Thomas Editions § 106BR.05

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§ 106BR.05 Land Use Law.

The government has a duty to expropriate rural property that is not performing its social function. Two types of rural land that cannot be expropriated: small and medium sized rural property, if the owner does not own any other property; and productive property. If the government expropriates rural land and grants that land to a private party, that party cannot sell or lease the land to another party for a period of ten years.

For urban land, the municipal government can penalize landowners of unbuilt, unused, or underused land. The Brazilian Constitution mandates that all municipalities of over 20,000 people must have a master plan. To avoid the designation of "underused," land must be used according to the municipality's master plan. Penalties for landowners of unbuilt, unused, or underused land include compulsory subdivision or construction, increased property taxes (to a maximum of 15% of the value of the property), or expropriation. Expropriation is a last resort and can be used by the municipality only seven years after giving notice to the landowner.

Municipalities retain the right to expropriate urban or rural land for public need.

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CHAPTER 106BR PROPERTY LAW IN BRAZIL

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CHAPTER 106CA PROPERTY LAW IN CANADA

13-106CA Thompson on Real Property, Thomas Editions 106CA.syn

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§ 106CA.syn Synopsis to Chapter 106CA: PROPERTY LAW IN CANADA

§ 106CA.01 Brief History of Canada.

§ 106CA.01(a) Prehistory of Human Occupation in Canada.

§ 106CA.01(b) Historical Human Occupation in Canada.

§ 106CA.01(c) Establishing British Dominance in Canada.

§ 106CA.01(d) Beginning of Canadian Independence.

§ 106CA.02 Canada's Two Legal Systems.

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§ 106CA.04 Property Law in the Provinces.

§ 106CA.04(a) Property Law in a Common Law Province: Alberta.

§ 106CA.04(a)(1) Estates in Land.

§ 106CA.04(a)(2) Leasehold Estates.

§ 106CA.04(a)(3) Descent and Distribution.

§ 106CA.04(a)(4). Mortgages.

§ 106CA.04(a)(5) Taxation.

§ 106CA.04(a)(6) Environment.

§ 106CA.04(b) Property Law in the Civil Law Province of Quebec.

§ 106CA.04(b)(1) Estates and Ownership Rights in Land.

§ 106CA.04(b)(2). Leasehold Estates.

§ 106CA.04(b)(3) Descent and Distribution.

§ 106CA.04(b)(4) Hypothecs on Immovables (similar to Mortgages).

§ 106CA.04(b)(5) Taxation.

§ 106CA.04(b)(6) Environment.

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CHAPTER 106CA PROPERTY LAW IN CANADA

13-106CA Thompson on Real Property, Thomas Editions § 106CA.01

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§ 106CA.01 Brief History of Canada.

§ 106CA.01(a) Prehistory of Human Occupation in Canada.

Canada's prehistory of human occupation, it is believed, commenced upon the receding of the last ice age, between 15,000 and 7,000 years ago. The peoples who thinly inhabited the land all across Canada were unspecialized in culture, relying for subsistence on hunting, gathering and fishing. About 4,000 years ago the ancestors of people now generally known as Eskimos migrated into the Arctic coastlands. Cultural and economic advances and differentiation among these native peoples had occurred by the time Europeans first began arriving to explore and settle.

§ 106CA.01(b) Historical Human Occupation in Canada.

Norse Viking settlements appeared on Canada's east coast about 1,000, A.D., but were eventually abandoned, and to some extent forgotten. Europeans searching for rich fishing waters probably produced contact with the eastern coastline of Canada in the mid-1400's, and John Cabot's exploratory visits began in 1497. In 1534 and 1535, Jacques Cartier sailed deep into the St. Lawrence estuary and claimed a vast area for France. In 1583, an English expedition asserted a claim in Newfoundland. French exploration under Champlain extended deep into the interior beginning in 1615.

§ 106CA.01(c) Establishing British Dominance in Canada.

When the War of Spanish Succession ended under the Treaty of Utrecht in 1713, the British by the treaty terms were able to take control of vast areas of Canada, including Nova Scotia, Newfoundland and Hudson's Bay. A few years later a series of conflicts broke out between British and French interests in Canada, and the Treaty of Paris in 1763 conferred on the British control over virtually all of French Canada. Quebec was governed under British law from 1763 to 1774, and then thereafter was permitted its own governing officials and to apply French civil law.

§ 106CA.01(d) Beginning of Canadian Independence.

With the Constitutional Act of 1791, England gave Canada a representative parliamentary government, that was nevertheless criticized for a too strong executive and a lack of democracy. The English and French colonies experienced a series of conflicts, and the various Canadian colonies were legislatively united in 1840. Further study and reform

produced a confederation known as the Dominion of Canada in 1867. The terms of the dominion were embodied in the British North America Act, also laying the foundation for the current constitution, through the Constitution Act of 1867 and the Constitution Act of 1982. The 1982 act also formalized a bringing "home" of the Canadian Constitution, so that amendments were not subject to the approval of the British monarch. This removed the last traces of colonial control.

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CHAPTER 106CA PROPERTY LAW IN CANADA

13-106CA Thompson on Real Property, Thomas Editions § 106CA.02

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§ 106CA.02 Canada's Two Legal Systems.

Most of Canada is under a common law system, both a general common law and a common law in each province with slight local differences. This is a result of the colonies having "received" the English common law at different dates, and then having independently developed their common law and legislation from the reception date on.

In the province of Quebec, the civil law governs private law. This civil law is based on the Napoleonic Code, which was drawn from the Code of Justinian issued in the late stages of the Roman Empire. General Canadian public law, including constitutional and criminal law prevail in Quebec as elsewhere in Canada. General Canadian law also prevails in those subject areas that were assigned by constitution to the federal government, such as bankruptcy and negotiable instruments.

Substantive law in Quebec is found in the Civil Code of Quebec, which was first published in 1866, and was updated in 1994.

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CHAPTER 106CA PROPERTY LAW IN CANADA

13-106CA Thompson on Real Property, Thomas Editions § 106CA.03

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§ 106CA.03 Division of Power Under the Constitution.

The Canadian Constitution divides legislative power between the federal government and the provinces. The subject areas under this division are known as "heads of power." Thirty heads of power are assigned exclusively to the federal government under Section 91 of the Constitution Act. Section 92 assigns 15 heads of power, including property and civil rights in the province. n1

During the 19th century, Canadian provinces and territories enacted married women's property acts, permitting married women to hold title to property independent of their husbands. In the 20th century, hold married couples' residences in joint tenancy became common. Rules of primogeniture disappeared throughout the country. Beginning with Alberta and Saskatchewan in the early 20th century, the common-law provinces enacted so-called testators' family maintenance or dependants' relief legislation, permitting a will to be set aside if insufficient provision was made for surviving spouse and dependants. A rule of fairness also prevails in dividing marital assets upon dissolution of the marriage.

Recording of land documents differs somewhat among the provinces. A deed registration system, in which land titles are established a chain of predecessors in title, is used in the Atlantic provinces and southern Ontario. The four western provinces and northern Ontario use a land titles or Torrens system, with only the validity of the immediately preceding title at issue.

FOOTNOTES:
(n1)Footnote 1. Constitution Act, 1867, § 92(13).

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CHAPTER 106CA PROPERTY LAW IN CANADA

13-106CA Thompson on Real Property, Thomas Editions § 106CA.04

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§ 106CA.04 Property Law in the Provinces.

As ordained in the Constitution, property law is largely left to provincial legislation and decisions. Below are brief discussions of property law in Alberta, as representative of a typical common-law province, and property law in Quebec, the singular and important example of property law in a civil law province.

§ 106CA.04(a) Property Law in a Common Law Province: Alberta.

§ 106CA.04(a)(1) Estates in Land.

Canadian law generally recognizes the estates of fee simple and life estate. Fee tail has been abolished everywhere but Manitoba. n2 A conveyance is presumed to convey a fee simple interest. Tenancy by the entirety is not recognized, but is considered joint tenancy. n3 The Rule in Shelley's Case does not apply, because it is not compatible the Torrens system of title registration. Condominium ownership in Alberta is governed by legislation. n4

Rights of dower, n5 except with respect to homestead rights, n6 and curtesy are abolished in Alberta; n7 a surviving spouse obtains a life estate in the real and personal property of the decedent spouse. n8

Adverse possession may occur, and is based on a ten-year period of occupancy, with tacking permitted. n9

When land is held in concurrent tenancy, such as joint tenancy or tenancy in common, any co-owner may apply to the court for a partition order. n10

The common law rule against perpetuities is in force, except as governed by the Perpetuities Act. n11

§ 106CA.04(a)(2) Leasehold Estates.

The usual common law rules regarding landlords and tenants are in effect, except as modified by several statutory enactments. n12 The statute of frauds requires that leases for more than three years should be in writing, subject to the usual exceptions to the statute.

§ 106CA.04(a)(3) Descent and Distribution.

Descent and distribution of decedents' estates are governed by rules found in the Intestate Succession Act.

§ 106CA.04(a)(4). Mortgages.

Mortgages may be the forms of common law mortgage, equitable mortgage, or, most commonly, the statutory mortgage, described as a registered charge against lands in statutory form under the Land Titles System. The mortgagor remains in possession and retains the title. n13 The Land Titles Act provides various standard forms.

§ 106CA.04(a)(5) Taxation.

Various levels and entities of local government are authorized to impose land taxes. n14

§ 106CA.04(a)(6) Environment.

The provincial minister of the Environment has broad powers under the Environmental Protection and Enhancement Act. n15

All mines, minerals and public lands in the province belong to the provincial government, except those already alienated or leased. The Environmental Protection and Enhancement Act may require may require remediation of land used in mining, exploring or similar activities, with a standard that the land must be returneed to equivalent land capability.

§ 106CA.04(b) Property Law in the Civil Law Province of Quebec.

§ 106CA.04(b)(1) Estates and Ownership Rights in Land.

Land in Quebec is held by an owner in "free tenure," or as independently of the government as possible. The basic provisions of property law pertaining to individual persons are contained in the Quebec Civil Code. The Code embodies the two basic principles that there is a right of private ownership in land that land should be able to circulate freely. Legislation other than the code regulates public interests in land.

Under the Quebec civil law, property is considered immoveable or movable. Immoveable property consists of land, appurtenance, and rights in land. Rights in land generally are subject to recording in the land titles registration system. Rights of ownership can be ownership itself, a right in the land consisting of some prerogative or privilege, and a creditor's right to take and sell the property in satisfaction of a debt.

Ownership is considered unitary, so most forms of joint ownership are not recognized, with exceptions for condominiums n16 and some types of ownership by married persons. Less than full rights of ownership can be rights of usufruct (possessing and using the property of another for a specific period) and emphyteusis, essentially a long-term lease in land (usually 10-100 years). n17 Quebec law also recognizes "real servitudes," whereby one owner of land has rights of use or control in the land of another. n18 Creditors' rights are known as privileges or "hypothec," essentially equivalent to a mortgage in a common-law jurisdiction.

The equivalent of adverse possession in Quebec is called acquisitive prescription. The possession of immovable property must be peaceful, continuous, public and unequivocal for a period of ten years. n19

Under some circumstances, land may be held in undivided co-ownership, which is similar to concurrent tenancies in common-law jurisdictions. n20

The customary civil law rules regarding perpetuities are in effect in Quebec. n21 Private or social trusts may be perpetual. The duration of personal trusts is limited to two ranks of beneficiaries of fruits and revenues and one rank of capital beneficiaries whose eligibility to receive comes into existence within 100 years of the trust's creation.

§ 106CA.04(b)(2). Leasehold Estates.

The Civil Code of Quebec contains detailed rules for all leases, and additional rules for leases of dwellings. n22

§ 106CA.04(b)(3) Descent and Distribution.

The Civil Code of Quebec governs the intestate succession n23 and testate succession. n24

§ 106CA.04(b)(4) Hypothecs on Immovables (similar to Mortgages).

Hypothecs on immovables are similar to mortgages in common-law jurisdictions, and are governed in detail by the Civil Code of Quebec. n25

§ 106CA.04(b)(5) Taxation.

Various levels and entities of local government are authorized to impose land taxes under authority of the Revised Statutes of Quebec. n26

§ 106CA.04(b)(6) Environment.

Protection of the environment is governed by the provisions of the Environment Quality Act. n27 Mining rights in the public land are administered under by the Minister of Natural Resources under provisions of the Mining Act. n28 Additional regulating provisions are in the Quebec Mining Companies Act n29 and the Mining Duties Act. n30

FOOTNOTES:

(n1)Footnote 2. Revised Statutes of Alberta, 2000 (hereinafter *RSA 2000*), c. L-7, § 9.

(n2)Footnote 3. *Id.* at L-7, Part 1.

(n3)Footnote 4. Condominium Ownership Act, *RSA 2000*, c. C-22.

(n4)Footnote 5. *Id.* at c. L-7, § 3).

(n5)Footnote 6. *Id.* at c. D-15.

(n6)Footnote 7. *Id.* at c. L-7, § 4.

(n7)Footnote 8. *Id.* at §§ 18, 23.

(n8)Footnote 9. Limitations Act, *RSA 2000*, c. L-12, §§ 2-2; Land Title Act, *RSA 2000*, c. L-4, § 74.

(n9)Footnote 10. *RSA 2000*, c. L-7, §§ 15, 27.

(n10)Footnote 11. Perpetuities Act, *RSA 2000*, c. P-5, § 2.

(n11)Footnote 12. Land Titles Act, *RSA 2000*, c. L-4; Mobile Home Sites Tenancies Act, *RSA 2000*, c. M-20; Residential Tenancies Act, *RSA 2000*, c. R-17.1.

(n12)Footnote 13. Land Title Act, *RSA 2000*, c. L-4, § 114.

(n13)Footnote 14. *RSA 2000*, c. M-26, § 353.

(n14)Footnote 15. ***Id.*** at c. E-12.

(n15)Footnote 16. Divided Co-Ownership of Immovables, Civil Code of Quebec (hereinafter CCQ), §§ 1038-1109.

(n16)Footnote 17. CCQ, §§ 1119, 1195-1211).

(n17)Footnote 18. CCQ, §§ 1119, 1177-1194.

(n18)Footnote 19. CCQ, §§ 922, 2918.

(n19)Footnote 20. CCQ, §§ 1010, 1012-1037.

(n20)Footnote 21. CCQ, §§ 1271-1273.

(n21)Footnote 22. CCQ, §§ 1851-2000.

(n22)Footnote 23. CCQ, §§ 427, 523s, 585, 625, 638, 653, 662-666, 670-679, 682-684, 688, 696, 749, 867-870.

(n23)Footnote 24. CCQ, §§ 707-711.

(n24)Footnote 25. CCQ, §§ 2644, 2681, 2693-2695, 2801, 2934-3075.

(n25)Footnote 26. *See, e.g.*, An Act Respecting Municipal Taxation, Revised Statutes of Quebec (hereinafter RSQ), c. F-2.1.

(n26)Footnote 27. RSQ, c. Q-2.

(n27)Footnote 28. Arts. 3-4, RSQ, c. M-13.1.

(n28)Footnote 29. RSQ, c. C-47.

(n29)Footnote 30. RSQ, c. D-15.

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CHAPTER 106CH PROPERTY LAW IN SWITZERLAND

13-106CH Thompson on Real Property, Thomas Editions 106CH.syn

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§ 106CH.syn Synopsis to Chapter 106CH: PROPERTY LAW IN SWITZERLAND

§ 106CH.01 History of Property Law in Switzerland.

§ 106CH.01(a) Swiss Peoples in Prehistory.

§ 106CH.01(b) Development of a Civil Code and Code of Obligations.

§ 106CH.02 The Fundamental Law of Modern Switzerland.

§ 106CH.02(a) The General Structure of the Civil Code.

§ 106CH.02(b) Multilingual Interpretations of the Civil Code.

§ 106CH.03 Real Property Rights Under the Civil Code.

§ 106CH.03(a) Ownership and Possession of Property.

§ 106CH.03(b) Transfer of Real Property.

§ 106CH.03(c) Co-Ownership of Real Property.

§ 106CH.03(d) Interests in the Land of Another.

§ 106CH.03(e) Prescription and Adverse Possession.

§ 106CH.03(f) Rules Relating to Perpetuities.

§ 106CH.03(g) Foreign Ownership of Swiss Land.

§ 106CH.03(h) The Land Register Law.

§ 106CH.03(i) Notarization of the Transfer.

§ 106CH.04 Real Property Rights Under the Code of Obligations: Landlord/Tenant Law.

§ 106CH.05 Other Swiss Real Property Laws.

§ 106CH.05(a) Property Rights Between Husband and Wife.

§ 106CH.05(b) Taxes on Real Property.

§ 106CH.05(b)(1) Land Transfer Tax.

§ 106CH.05(b)(2) Property Tax.

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CHAPTER 106CH PROPERTY LAW IN SWITZERLAND

13-106CH Thompson on Real Property, Thomas Editions § 106CH.01

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§ 106CH.01 History of Property Law in Switzerland.

§ 106CH.01(a) Swiss Peoples in Prehistory.

Human habitation of the area that is now modern Switzerland goes back at least as far as the most recent ice age. Primitive peoples were forced to live in higher elevations because of glaciers in the valleys, and archaeological and anthropological evidence reveals groups of such prehistoric people living in caves. n1 As the glaciers receded, some of the people moved to the valleys and richly forested areas, often founding small communities on the shores of lakes.

In the centuries before the dominance of Rome, numerous tribes wandered into and out of Switzerland, but the most important of these were tribes of Celts. Around 400 B.C. many groups of Celts are known to have crossed the Alps and settled in Switzerland. It is uncertain when the Celts and Romans first encountered each other in Switzerland, but by 15 B.C., Rome had completed its military occupation of Switzerland. n2

Following the breakup of the Roman Empire, inhabitants of Switzerland experienced incursions from many wandering tribes, including tribes from Italy and Germany, and some of these settled to become part of the ethnic base for the Swiss people. Beginning in the sixth century A.D., and for three centuries thereafter, most of Swiss territory was included in the domains of Frankish rulers, and thereafter numerous small principalities in Switzerland owed allegiance to the Kingdom of Burgundy or the Holy Roman Empire.

The Swiss Confederation, which continues in governance to this day, arose first in 1291, when the peoples of three valleys, the Uri, Schwyz, and Unterwalden, declared an alliance of states independent of local and foreign lords. This alliance, which styled itself the "Ewiges Bundnis," or eternal alliance, was successful in turning back the assaults of the unhappy overlords and kings, usually by means of battles in which Swiss peasant soldiery triumphed over the medieval military aristocracy.

Although Swiss communities were theoretically independent, in fact the Swiss people shared fully in Europe's feudal history:

> Freemen who were landless offered their services to a powerful neighbor in return for shelter, support, and protection. Known to the Romans as a *patrocinium*, this practice survived through the

> Middle Ages. An adverse result was the loss of status as a freeman and reduction to that of serf.
>
> If he were a small landowner and poor, living in fear of losing all to his oppressors, he could surrender his land to a powerful neighbor -- usually a noble, able to resist any and all marauders and, because of his political, social, and military prestige, virtually immune from oppression by others. Transfer of ownership of one's land under this arrangement was originally not irrevocable. The title was transferred for a stated number of years or a lifetime. In return, the donor gained protection from the lord to whom he became a vassal. Use of land continued to be his and he was freed of the hazards and obligations that stemmed from ownership. The arrangement was known as *precarium* tenure. n3

As was typical throughout medieval Europe, members of the aristocracy and higher officials of the church became great feudal landholders. Even during the hegemony of feudalism, more regions of Switzerland joined the confederation that had been founded late in the thirteenth century. These regions were known then and now as cantons, and between the sixteenth and early nineteenth centuries the total number of confederated cantons rose to thirteen. Although technically subject to the rule of the Holy Roman Emperor, the cantons in reality functioned as nearly autonomous states. With the Peace of Westphalia in 1648, following the Thirty Years' War, the major European powers accepted the confederation as independent of any foreign ruler.

In early 1798, Napoleon conquered most of Switzerland and founded the Helvetica Republic. With Napolean's fall Switzerland regained its independence and, in 1815, reconstituted the federation under the Congress of Vienna. Switzerland's neutrality was guaranteed through the Second Peace of Paris in the same year.

Until 1848 the cantons maintained their unity as they had ever done, through multilateral agreements and treaties concluded by individual cantons. In 1848 the governments of the cantons attempted to create a new constitution modeled roughly after the United States Constitution. This constitution was rewritten in 1874, and this 1874 version remains in force today.

§ 106CH.01(b) Development of a Civil Code and Code of Obligations.

The basic law of Switzerland has roots in both Roman and Germanic law. The Germanic legal tradition can be traced back to a series of so-called "Barbarian Laws" compiled in Europe's Dark Ages beginning in the fifth and sixth centuries A.D.

Early in the fifth century A.D., the Germanic tribes of Visigoths, Burgundians and Franks, who had been mercenaries of Rome, established their independence from the Empire and introduced Germanic legal customs and institutions into Gaul and surrounding areas. Written codes of laws began to appear, often containing separate provisions for the Germanic inhabitants and for the Roman citizens living in the tribal territories.

The Visigothic laws, and more particularly the Code of Euric, are believed to have directly or indirectly influenced most Germanic law codes thereafter. The Code of Euric, from circa A.D. 476, shows some Roman influence. The Lex Romana Visigothorum was promulgated by the Visigothic king Alaric II in A.D. 506 to govern Romans living in Visigothic territories. This collection is also known as the Breviarium Alaricianum (Breviary of Alaric). The Leges Visigothorum is a collection of laws that had been issued by Euric's successors, applying to both Gothic and Hispano-Roman subjects. The collection was promulgated in A.D. 654, and replaced the Lex Romana Visigothorum.

Euric's code seems to have been the immediate source for the early codes of both the Salian Franks n4 and the Burgundians, n5 and the Bavarian n6 and Lombard n7 codes also show Visigothic influence. Another early Frankish code, the Lex Ribuaria, n8 was based on the Salian code, and it in turn influenced the codes of the continental Angles and Saxons of the Carolingian Age.

The best known of these early Germanic codes--indeed the oldest Germanic code that is completely preserved--is the Lex Salica, which has been described as "primarily a penal law ... concerned with the redress of crimes (murder, theft, mutilation, exploitation of women) by monetary means." n9 The Lex Salica and the other early codes consist of both individual "statutes" and precedential judicial sentences ("Weisthuemer"), but they do not refer to most customs of daily living, such as occupancy of land, personal property, commercial dealings, inheritance, family relationships, and class privilege. The only references to land law in the Lex Salica are provisions requiring money payment for damage to agricultural fields, n10 blocking the way of another, n11 and improper fencing and enclosing. n12

Several of these Germanic law codes specifically influenced the Swiss:

> The most widely used of the Germanic codes were the Leges Alemannorum--first the Pactus Alemannorum of about 580 which was, in effect, agreed to by the inhabitants, and then the Lex Alemannorum of about 720, a more formal collection of laws. Of secondary influence were the later Frankish codes, the Lex Burgundium of about 500 and the Lex Romana Curiensis of about 750. These collections of Germanic law prevailed throughout the Alpine regions except in the west, where the Romansch population continued to apply a version of Roman law along with Germanic law. n13

During this period, the cantons were varied in which laws they accepted and applied. Even after Napolean's invasion and occupation had introduced the Swiss to outside influences and to the attractions of codification, the cantons continued to act independently in determining which laws or codes to adopt. Some cantons looked to the French Code Civil, while others modeled their codes after Austrian laws, and yet others made a fresh start.

With the adoption of the constitution, and its revision in 1874, one of the exclusive powers granted to the federal government under the Constitution of 1874 was the administration of the law of obligations. The Swiss Code of Obligations was enacted in 1881. The Swiss Civil Code, prepared by the renowned legal scholar Eugen Huber, was enacted in 1907, went into force in 1912, and incorporated the Code of Obligations as part 5. The Code of Obligations retains its own unique numbering system.

FOOTNOTES:

(n1)Footnote 1. James Murray Luck, A History of Switzerland 1 (1985).

(n2)Footnote 2. *Id.* at 4.

(n3)Footnote 3. *Id.* at 15.

(n4)Footnote 4. The Code of the Salian Franks, or Lex Salica, is attributed to Clovis, A.D. 481-511.

(n5)Footnote 5. The Burgundian Code was compiled between A.D. 483 and 532. The Lex Romana Burgundionum was issued ca. A.D. 500, for application to Roman citizens living in the Burgundian kingdom.

(n6)Footnote 6. The Lex Baiuvariorum is dated from about 744-748, A.D.

(n7)Footnote 7. The Leges Langobardorum were promulgated between 643 and 755, A.D.

(n8)Footnote 8. The Lex Ribuaria is believed to have been promulgated after 596, A.D., for the Ripuarian or western Franks.

(n9)Footnote 9. Laws of the Alamans and Bavarians 19 (Theodore John Rivers trans. 1977).

(n10)Footnote 10. Title 9.

(n11)Footnote 11. Title 31.

(n12)Footnote 12. Title 34.

(n13)Footnote 13. 2 Thomas H. Reynolds and Arturo A. Flores, Foreign Law: Current Sources of Codes and Legislation , Switzerland, § 1 (1991).

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CHAPTER 106CH PROPERTY LAW IN SWITZERLAND

13-106CH Thompson on Real Property, Thomas Editions § 106CH.02

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§ 106CH.02 The Fundamental Law of Modern Switzerland.

Modern Switzerland is a republican federation consisting of 26 cantons and half-cantons governed by a federal constitution. n14 In order to amend the constitution a majority of the popular vote of a majority of cantons must assent. Half cantons have less representation than full cantons in the legislature.

All the cantons are equally autonomous. Each canton has a republican government consisting of executive, legislative, and judicial branches. In their judicial branches, the justices of the supreme court are elected by the legislature and have a tenure only as long as the legislature permits.

Federal law is superior to cantonal law. n15 As in the Tenth Amendment of the U.S. Constitution, any power not enumerated by the Swiss Federal Constitution is left to the cantons. n16 Generally, newer laws prevail over conflicting prior laws. There is no established judicial rule of stare decisis, but prior decisions, especially those of the Swiss equivalent of the Supreme Court, n17 are given much weight. In resolving conflicts between laws, usually the more specific law governs a general law. The constitutional Court, whose primary purpose is to interpret the constitution, issues decisions which are binding throughout Switzerland.

For the most part, the laws which regulate property are the federal constitution, the Civil Code, and the Code of Obligations. For matters not covered by any of those sources, a judge will look to customary law. n18 The judges in Switzerland also rely heavily on the writings of legal scholars in reaching decision on matters that lie outside the Codes. Occasionally, the Swiss High Court announces decisions that impact on fundamental property rights. These may be in cases concerning zoning restrictions and expropriation under the federal constitution, as well as on matters governed by customary law. For example, an owner of a private forest must care for the timber, and because the total number of trees in Switzerland may not be diminished, must either receive permission to fell trees or must plant replacement trees. n19

§ 106CH.02(a) The General Structure of the Civil Code.

The Civil Code consists of four parts and the Code of Obligations. The four parts of the code are (1) the Law of Persons, (2) Family Law, (3) Inheritance Law, and (4) the Law of Property (Sachenrecht).

§ 106CH.02(b) Multilingual Interpretations of the Civil Code.

All the laws of Switzerland are issued in all three official languages. n20 In considering a case based on the Civil Code the court must first decide which translation best reflects the legislative intent. Theoretically, all three official language versions are authentic and should have equal force at law, but sometimes the court prefers a language version other than the language in which the text of the law was originally drafted and enacted.

FOOTNOTES:

(n1)Footnote 14. The Federal Constitution of Switzerland came into force on May 29, 1874.

(n2)Footnote 15. Federal Constitution, art. 6, § 2.

(n3)Footnote 16. Cost. Fed. art. 3. Although very similar to the United States version, the cantons have in fact retained more significant areas of potential legislative activity.

(n4)Footnote 17. The Swiss Supreme Court and many of the cantons' highest courts publish many of their decisions.

(n5)Footnote 18. Cc art. 1.

(n6)Footnote 19. Entscheidungen des Bundesgerichts 104 Ib 221, 106 Ib 136.

(n7)Footnote 20. The three official languages of Switzerland are German, French, and Italian. The fourth language spoken in Switzerland, Romansch, is recognized as an "official" language of Switzerland, but is not recognized as official under the law.

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CHAPTER 106CH PROPERTY LAW IN SWITZERLAND

13-106CH Thompson on Real Property, Thomas Editions § 106CH.03

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§ 106CH.03 Real Property Rights Under the Civil Code.

§ 106CH.03(a) Ownership and Possession of Property.

Rights in the ownership of property are recognized under the federal constitution, and private property cannot be abolished. n21 If private land is taken by the government, compensation is required. n22 These broad rights have recently come under restriction; agricultural land may not be resold for a period of ten years, and non-agricultural land may not be resold for a period of five years. n23

Under the Civil Code, ownership of property includes the right to use and dispose of the land. n24 Enjoyment of these rights, however, may not interfere with another's use and enjoyment of land. Actual freedom of use is also restricted by zoning laws and by license requirements for the construction of improvements on land. The exact zoning requirements are left to each canton. However, the federal government has imposed a duty upon every canton to establish some sort of zoning regulation and administration.

§ 106CH.03(b) Transfer of Real Property.

Laws governing the transfer of land are found in both the Code of Obligations and the Civil Code. The original conveyance is governed by the Code of Obligations, n25 and the subsequent transfer of land and entry of the transaction into the land register are covered by the Civil Code. Swiss law distinguishes between the sale of land and the transfer of land.

The sale of land is accomplished through a contract of sale, and the contract provisions must conform to strict rules. The price and description of the land must be specific, so the transaction can be entered into the land register with the utmost accuracy. The contract must be notarized, again as an aid to the authenticity and accuracy of the land register. n26 Real property transfers are not complete until the notarized deed is entered in the land register.

All sales contracts, including those for real property, include implied warranties. One implied warranty assures that the item to be sold is fit for the particular purpose for which it is sold. Seller representations in connection with the transaction are considered express, and enforceable warranties. n27 The seller also warrants that the measurements which are in the contract, and which will subsequently be entered into the land register, are correct. n28 A five-year

statute of limitations applies to claims of defects. The Code of Obligations also provides that risk of loss shifts to the buyer when the buyer takes possession. n29

Earnest money is also known under Swiss law. Under the Civil Code, earnest money is considered a source of evidence that the contract has been entered into. If the contract is not fulfilled by the buyer, the seller must refund the money. If the money is to be forfeited by the buyer in the event of failure to purchase, then the contract of sale must explicitly declare the earnest money as subject to forfeiture and also the circumstances under which forfeiture may occur.

Interests in real property can also be acquired through a judgment or inheritance. In the case of a judgment, an order would be issued to have the land register amended. If acquisition occurs by inheritance, the new owner announced in the will must request that the land register be amended.

§ 106CH.03(c) Co-Ownership of Real Property.

Under the Civil Code common ownership (Miteigentum/copropriete) is available. n30 The division of the interests can be in any form desired by the parties, as long as it can be entered into the land register, and the concurrent interests must be entered into the land register to be effective. Property can also be owned in a community of ownership under a partnership or other structure. n31 Co-ownership may also occur in condominium form, n32 and is considered a form of quasi-ownership under the Civil Code. Such interests are fully recognized and alienable under the laws governing the land register.

The law of the canton, (which can vary widely) in which the property is located, determines how the common areas must be administered.

§ 106CH.03(d) Interests in the Land of Another.

One may obtain an interest in the land of another through the acquisition of a mortgage (Grundpfandverschreibung, Hypotheque) or mortgage note (Schuldbrief, Cedules hypothecaires), the difference being that mortgage notes are negotiable instruments issued in the name of the bearer. n33 The debt which the mortgage secures may be present, future, or contingent.

In order to be valid and effective, both types of mortgage interests must be entered into the land register. In order to be entered, the real estate interests must be described with specificity and the amount of the mortgage must be stated in Swiss francs.

In most cases, any encumbrance upon the property must be entered into the land register to be binding upon a subsequent purchaser.

Servitudes can either run with the land or be applicable only as between specific persons. Also on this point, specificity is required in the land register entry.

§ 106CH.03(e) Prescription and Adverse Possession.

Prescription and adverse possession of personal property are possible under Swiss law. However, because the land register imparts notice to all the world, prescription and adverse possession do not apply to real property interests.

§ 106CH.03(f) Rules Relating to Perpetuities.

A testator may designate the party to receive a reversionary interest when an interest less than full ownership is to be transferred upon death, but this is the limit of the power of testamentary disposition of land. A usufruct interest in favor of an entity may not endure for more than 100 years.

§ 106CH.03(g) Foreign Ownership of Swiss Land.

Any investment in real estate in Switzerland by an alien requires that the purchaser have a license. n34 In order to obtain a license to own property, the alien individual or business entity must follow both the federal and cantonal requirements for the license. No restrictions apply to aliens who have lived in Switzerland for at least ten years. n35

Vacation homes, apartments, and condominiums may only be purchased inside certain areas, and the number which may be sold to aliens is subject to quotas under federal supervision and allotted yearly to the cantons. An alien who does not follow the laws concerning acquisition by aliens will not only be prohibited from ever owning real property in Switzerland, but may be subject to criminal prosecution, which may include a fine, imprisonment, or both.

§ 106CH.03(h) The Land Register Law.

Similar to many countries with roots in Germanic law, the real property law of Switzerland protects the good faith acquisition of land. The Civil Code states that the purchaser in good faith should be able to exercise confidence in the entries of the Land Register. n36 Nevertheless, an entry in the land register is only valid if the underlying transaction is legal. n37

The land register is a collection of survey maps divided into parcels. Only one half of the country has been surveyed, and therefore in the unsurveyed portions cantonal and customary law govern. The land register is technically open to all, but because of the propensity of foreign governments to use Switzerland for investment, mainly due to its banking secrecy laws, there is now a bureaucracy which must be confronted in order to see the land register.

§ 106CH.03(i) Notarization of the Transfer.

All contracts for the sale of property must be properly notarized in order to be valid and effective. Notaries are subject to strict regulation administered by the cantons. Therefore, a notary's authority only extends to the boundaries of the canton in which the notary resides.

FOOTNOTES:
(n1)Footnote 21. Swiss Constitution art. 22.

(n2)Footnote 22. *Id.*

(n3)Footnote 23. Code of Obligations art. 218, as amended in Federal Decree of Oct. 6, 1989.

(n4)Footnote 24. Cc art. 641.

(n5)Footnote 25. Contracts for the sale of land are governed by the Code of Obligations arts. 216-221. Article 221 declares that all Code of Obligations provisions applicable to sales (arts. 187-215) are also applicable to sales of real property.

(n6)Footnote 26. Code of Obligations art. 216.

(n7)Footnote 27. *Id.* at art. 197.

(n8)Footnote 28. *Id.* at art. 219.

(n9)Footnote 29. *Id.* at art. 220.

(n10)Footnote 30. Cc art. 651.

(n11)Footnote 31. *Id.*

(n12)Footnote 32. *Id.* at arts. 712a *et seq.*

(n13)Footnote 33. Cc arts. 793-874.

(n14)Footnote 34. *See* Federal Statute on Acquisition of Real Property by Nonresidents of Dec. 16, 1983.

(n15)Footnote 35. This requirement is only five years for persons who are citizens of most EC countries.

(n16)Footnote 36. Cc art. 973.

(n17)Footnote 37. *Id.* at art. 974.

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CHAPTER 106CH PROPERTY LAW IN SWITZERLAND

13-106CH Thompson on Real Property, Thomas Editions § 106CH.04

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§ 106CH.04 Real Property Rights Under the Code of Obligations: Landlord/Tenant Law.

Landlord/tenant law in Switzerland is strictly a contractual matter and thus the law covering leases is found in the Code of Obligations. n38 However, this area of the law has also received much legislative attention, by both federal and cantonal legislatures, mostly in matters of lessee rights and rent control. The tenant is protected in the habitability of the premises, as well as in the procedures the landlord must follow in order to evict the tenant. The cantonal laws covering rent control are typically very restrictive.

The Code of Obligations also ensures that unless otherwise stipulated there is an implied right to sublease. Lessees wishing to ensure their continued occupancy even after sale by the landlord can have such an agreement entered into the land register.

FOOTNOTES:
(n1)Footnote 38. Code of Obligations arts. 253-274.

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CHAPTER 106CH PROPERTY LAW IN SWITZERLAND

13-106CH Thompson on Real Property, Thomas Editions § 106CH.05

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§ 106CH.05 Other Swiss Real Property Laws.

§ 106CH.05(a) Property Rights Between Husband and Wife.

Spouses are free to arrange their property interests by contract in any way they please. In the event they do not have a legally binding contract, then Civil Code provisions apply. All property and income received by either spouse become part of the community property; n39 property that one spouse owned prior to marriage or received after dissolution of the marriage is not community property. Also, property that is solely for the use of one spouse part of the community property. n40 Upon dissolution of the marriage, that property which constitutes the community property is divided in half for distribution to the former spouses.

§ 106CH.05(b) Taxes on Real Property.

§ 106CH.05(b)(1) Land Transfer Tax.

A land transfer tax is levied by each canton and therefore varies. A two percent tax on the purchase price or market value of the real property transferred would be typical.

§ 106CH.05(b)(2) Property Tax.

Some cantons also levy a property tax similar to that found in most states in the United States.

FOOTNOTES:
(n1)Footnote 39. Cc arts. 221-246.

(n2)Footnote 40. Cc arts. 196-220.

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CHAPTER 106CL PROPERTY LAW IN CHILE

13-106CL Thompson on Real Property, Thomas Editions 106CL.syn

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§ 106CL.syn Synopsis to Chapter 106CL: PROPERTY LAW IN CHILE

§ 106CL.01 Brief History of Property Law in Chile.

§ 106CL.02 Forms of Property Ownership.

§ 106CL.02(a) Generally.

§ 106CL.02(b) Prescription.

§ 106CL.02(c) Community Property.

§ 106CL.02(d) Mortgages.

§ 106CL.02(e) Mines and Minerals.

§ 106CL.03 Real Property Transactions.

§ 106CL.03(a) Deeds.

§ 106CL.03(b) Sales of Real Property.

§ 106CL.03(c) Real Property Records.

§ 106CL.03(d) Registration.

§ 106CL.04 Taxation of Real Property.

§ 106CL.05 Foreign Ownership of Chilean Real Property.

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CHAPTER 106CL PROPERTY LAW IN CHILE

13-106CL Thompson on Real Property, Thomas Editions § 106CL.01

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§ 106CL.01 Brief History of Property Law in Chile.

The area now known as Chile was taken over by Spanish *conquistadores* beginning in 1535, and Santiago, the present capital, was founded by Pedro de Valdivia in 1541. The feudal system of 16th century Spain was then transplanted to Chile. Under that feudal system, succession by primogeniture prevailed, so younger brothers frequently sought their fortunes in the New World campaigns of conquest. If they were successful and became landowners, they usually organized their estates with a town at the center and the natives as the peasant work force:

> This system became known as the *encomienda* system under which the settlers who came after the *conquistadors* obtained land grants from the Crown. These estates often included one or more Indian communities whose inhabitants were legally "commended," or entrusted, by the Crown to the Protection of the Spanish landowner. The Amerindians were forced to work a specified number of days each week and to perform other tasks on the estate, while the landowner was required to "civilize" the Indians and convert them to Christianity. n1

After 1542, the duration of the *encomienda* was by law limited to three generations of landowners. In addition to the *encomienda*, land was distributed by inheritance, as a military prize, by grant from the Crown, and by assignment upon the founding or enlarging of a village or town.

During the colonial era, some of Spain's land management practices were adopted by the colonies, but not all. When registers of mortgages were mandated for Spain in 1539 and again in 1713, this system was not accepted in the New World colonies. A different mortgage registration scheme of 1768 was accepted by the governing colonial council in 1768.

In modern times, land reform has been the main theme of Chilean property law. A conservative land reform scheme was enacted in 1962, but it directly affected only a small portion of the land. A new land reform effort between 1964 and 1969 similarly fell far short of its projected extent. After 1970, frustration with the slow pace of reform and worsening economy led to some land seizures by peasants, which seizures were not resisted by the government.

FOOTNOTES:

(n1)Footnote 1. *The Legal System of Chile*, *in* 10 Modern Legal Systems Cyclopedia § 1.2(C) (Kenneth Robert Redden & Linda L. Schlueter eds. 1991).

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CHAPTER 106CL PROPERTY LAW IN CHILE

13-106CL Thompson on Real Property, Thomas Editions § 106CL.02

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§ 106CL.02 Forms of Property Ownership.

§ 106CL.02(a) Generally.

The Chilean Constitution guarantees all persons equal rights, including the right to property. n2 Therefore, at the constitutional level there are no restrictions on the ownership of property. This even applies to foreigners, who may own property in Chile virtually without restriction. Owners may not have their property taken by public authority except for the public good. n3 Concurrent ownership is recognized, and tenants in common may dispose of their shares without the consent of the other tenants in common. n4

§ 106CL.02(b) Prescription.

Real property interests may be obtained by prescription, after a time (usually five years for real property and two years for personal property) of uninterrupted possession for the required period of time. Prescription does not run against a recorded title, unless the prescriptive title is also recorded. The prescriptive period is suspended during periods of legal disability (including against married women) and as between spouses. Real property interests can also be acquired by extraordinary prescription, based on uninterrupted possession for ten years; in such case no title need be shown and there is no suspension on behalf of incapacitated persons.

§ 106CL.02(c) Community Property.

Generally, all property acquired during the marriage becomes part of the community, except gifts of real property, which remain part of the recipient's estate.

§ 106CL.02(d) Mortgages.

In general, mortgages may be placed only on real property and real estate rights. Personal property such as machinery, pictures, and statuary may be included in mortgages on realty when the personal property forms a part of the realty. Agrarian pledges may cover animals and their products, machinery and tools, seeds, crops, fruits, and lumber. Such pledges must appear in a public instrument and be recorded in a special registry in the office of the real property registrar.

§ 106CL.02(e) Mines and Minerals.

The state is considered the owner of all mineral and fossil substances, even if private parties own the surface rights. Private persons may obtain concessions to extract the mineral resources in accordance with the mining code. Such concessions are transferable, mortgageable and irrevocable and are regulated by the same civil laws that regulate real estate and fixed assets. Taxes on mineral concessions are assessed at an annual rate per hectare. If the tax is not paid, the concession is offered at public auction, at which each bidder must deposit the amount of unpaid tax. The owner of the mining concession is not allowed to bid, but may avoid the sale by paying double the amount of tax. Any such sale does not include the mining buildings and accessories, unless the former owner fails to remove them within one year.

FOOTNOTES:
(n1)Footnote 2. Chilean Constitution of 1980, *Capitulo* III, art. 19, para. 24.

(n2)Footnote 3. *Id.*

(n3)Footnote 4. *Id.* Codigo Civil, art. 1812.

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CHAPTER 106CL PROPERTY LAW IN CHILE

13-106CL Thompson on Real Property, Thomas Editions § 106CL.03

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§ 106CL.03 Real Property Transactions.

Transfers of rights in immovable property are not perfected or effective until such writing is properly recorded or filed for record in a public registry. Trusts as known in common law jurisdictions are not known in Chilean law, but the freedom of contract that exists in Chile makes it possible to structure real property relationships substantially similar to those of a trust.

§ 106CL.03(a) Deeds.

All transfers of title to real estate must be by public instrument and must contain a true statement of the consideration involved. The tax on the transfer must be paid at the time the document is executed before the notary, or, if executed in a foreign country, at the time it is authenticated in Chile. Deeds must be recorded in the registries of property. Both grantor and grantee must sign the deed and both must therefore be present before the notary at the same time. An absent party must be represented by an attorney in fact. The original deed, if executed in Chile, must remain in the files of the Chilean notary who gives to either party a certified copy, which has the effect of an original in courts of law. If the deed is executed abroad, it must be authenticated by a Chilean consul or diplomatic agent.

§ 106CL.03(b) Sales of Real Property.

In sales of real property, the seller usually is obligated to deliver title and provide warranty of title; n5 the buyer is required to pay the price and to register the transaction. n6

Sales of real property must be recorded. In the absence of an agreement to the contrary, the vendor warrants the thing sold and the title thereto; and in any case the vendor is liable for hidden defects in the thing sold if known to the vendor and not called to the buyer's attention. In private sales of real property rescission may be asked within four years by the vendor, if it is found that the price received is less than one-half the just value of the property, and by the buyer if the value is less than one-half the price paid. A sales contract between spouses not permanently divorced and between father or mother and children is void. n7

§ 106CL.03(c) Real Property Records.

The following documents must be recorded in the registry of properties:

documents conveying or declaring the ownership of real estate and real rights;

documents constituting, conveying, modifying or renouncing rights of usufruct, mortgage and certain other rights in real estate; and

judgments declaring the ownership of real property or the definitive possession of the property of absent persons.

Other documents relating to real property or real property rights, such as leases or attachments, may be recorded so as to constitute notice to third parties.

In Chile, recordation is necessary to acquire, modify, transfer, or extinguish rights in immovable property. n8 Documents filed for record are checked for external formalities and checked against previously recorded instruments affecting the same property. n9 Recorders must also verify that the person who appears as vendor or mortgagor in the filed document has the power to grant that particular interest according to previous recordings. The recorder must check the appropriate entry indicating the source from which the grantor received title. If the grantor is not the prior recorded grantee, the document is denied the privilege of recordation until the irregularity is cleared up. n10

A recorder in Chile is law trained, n11 and may be personally liable for errors in recording and for issuing an erroneous certification of registry. n12

§ 106CL.03(d) Registration.

The basic priority principle for Chilean and all Latin American registry systems is that priority goes to the first to record, regardless of when the deed is executed and possession is delivered to the purchaser. n13

Real property interests, including easements, leases and deeds, must be registered if they are to be perfected. n14 These interests are registered in the land register, kept by the *Conservador* of Real Property, and transferred by registration. But entries in the land register do not create rights, since neither the validity and efficacy of the registered rights nor the factual description of the real property are warranted. Registration of ownership merely proves and guarantees possession. Legislation dealing with registration of title to real estate contains a comprehensive set of requirements for the entries of the land records, and recorders are given the authority to suspend or refuse the recordation of instruments that do not comply with those statutory provisions.

FOOTNOTES:
(n1)Footnote 5. *Id.* art. 1824.

(n2)Footnote 6. *Id.* art. 1871.

(n3)Footnote 7. *Id.* art. 1796.

(n4)Footnote 8. *Id.* arts. 670, 686.

(n5)Footnote 9. *Id.* art. 13.

(n6)Footnote 10. *Id.* arts. 14, 80.

(n7)Footnote 11. *Id.* art. 7.

(n8)Footnote 12. *Id.* arts. 96-97.

(n9)Footnote 13. *Id.* arts. 14, 66.

(n10)Footnote 14. *Id.* art. 1801.

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§ 106CL.04 Taxation of Real Property.

Chilean real property is subject to national and municipal territorial taxes based on assessed value of the property. Also imposed are assessments for street lighting, street paving and certain other municipal services. Value assessments are made every five to ten years, but may be adjusted annually. Certain properties of low value are exempt. An additional real estate tax is imposed at a flat 7% rate, except tax rates on agricultural land may vary from 4% to 10%.

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§ 106CL.05 Foreign Ownership of Chilean Real Property.

Property in Chile may be acquired without restrictions by foreigners, except that Peruvians may not obtain land in the frontier zones.

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CHAPTER 106CN PROPERTY LAW IN THE PEOPLE'S REPUBLIC OF CHINA

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§ 106CN.syn Synopsis to Chapter 106CN: PROPERTY LAW IN THE PEOPLE'S REPUBLIC OF CHINA

§ 106CN.01 History.

Article 42 ConstTypes of Real Property Interests.

§ 106CN.02(a) Real Property Interests Under the Constitution.

§ 106CN.02(b) Real Property Interests Under Recent Legislation and Regulations.

§ 106CN.02(c) Real Property Interests in Houses.

§ 106CN.03 Creation, Transfer, and Termination of Real Property Interests.

§ 106CN.03(a) In Cities and Townships.

§ 106CN.03(b) In the Countryside.

§ 106CN.03(c) Registration and Conveyance of Real Property Interests in Houses.

§ 106CN.04 Restrictions on Ownership of Property by Foreigners.

§ 106CN.05 Bibliography.

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CHAPTER 106CN PROPERTY LAW IN THE PEOPLE'S REPUBLIC OF CHINA

13-106CN Thompson on Real Property, Thomas Editions § 106CN.01

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§ 106CN.01 History.

Before the collapse of the last Chinese Empire in 1911, every acre of land in China was held by the Emperor. The Emperor himself was the sole owner of the land in the true sense of the word. In order to achieve effective control of the land, the Emperor usually divided the land into districts, provinces or prefectures and granted them to his immediate relatives and warriors as awards; those grantees usually held immediately by the Emperor in socage or military service. The grantees then assigned the rights to use the land, and delegated the duties to render military, pecuniary, agricultural and construction services to loyal followers. Assignments and delegations took place at every level until they reached the level of actual possession, held by so-called landlords and villein tenants. This system was kept alive for hundreds and even thousands of years, more by the political administration than by any form of legislation. Governors and ministers served both administrative and judicial functions. Occasionally, the Emperor would send a roving commissioner to hear some complaints; however, land issues were seldom encountered because so little protection was accorded villein rights.

Between the years of 1911 and 1949, China witnessed dramatic changes in land ownership. The Emperor abdicated, and many people declared absolute ownership of the land in their possession. However, soon the warlords began taking the place of the Emperor in their local regions. For mutual support and benefit, the warlords let the claimants draft claims and deeds. No more than two copies were allowed to be executed, one held by the claimant and one by the warlords. The warlords were committed to providing the villeins with security and stability, while in return the villein claimants, subordinated themselves and agreed to render military and pecuniary services. These widely varied arrangements prevailed until Jiang Qieshek secured full power nationwide, when the management of land became uniform again. Jiang's government relied on taxes as the major source of revenue, so for the first time in Chinese history people could obtain fee simple absolute in land without subordinating their vested interest to various overlords. Conveyance of land through land sale contract, execution of deed and probate of wills was no longer a novelty.

When Mao Zedong came to power in 1949, he started a land-ownership revolution from the bottom of the social hierarchy. Only the people who were actually farming the land could claim ownership or an interest in the land. n1 However, before this reform had proceeded very far, political considerations took over; landholders were made to surrender their ownership to the nearest municipal authority that had centralized management and control. n2 Farmers still farmed the land, but their return was based upon the hours they worked on the farm and on their involvement in

political activities more than on their legal interest in the land. When there was a big harvest, they surrendered most of it to the government. The community then made a distribution of the rest to all its members. During years of natural disasters, the community could apply on behalf of its people for relief and even some government aid. The whole system was built upon the theory that every parcel of land as well as all the natural resources belonged to the public or a community as a whole. It was assumed that the government could better judge the people's needs, and that it was more appropriate to let the government hold the wealth and distribute or redistribute it as it saw fit. As people lost their incentive to take care of the land much waste occurred.

More recently, Deng Xiaoping moved the landholding arrangements back toward self-governance and more private ownership. The land itself is still state-owned, but farmers have been given the right to exclusive use of the parcels of land assigned to them. Transfer or conveyance of land is in reality an assignment of the right to use land.

In contrast to holdings of farmland, the history of residential ownership in China did not go through so many changes. Even during the time of Mao, people from the country were allowed to build their own houses within certain zones. They paid a nominal fee every year of occupancy. Failure to pay the fee could result in forfeiture of the dwelling to the state or reconveyance to the community. However, since the fee was very nominal, defaults rarely occurred.

Some political considerations interfered with residential landholding. During the late 1980s and early 1990s, the government would send people to confiscate or tear down the house if the householders violated the one-child family planning policy and there were no other effective means to punish or deter them. In cities where most of the houses and apartment buildings are built and owned by the state or factories or institutions, tenants are more or less tenants for life.

As part of the outcome of the first Opium War, China ceded Hong Kong island to the British by the Treaty of Nanking in 1842; additional territory was ceded in 1860 and 1898, with the British interest being characterized as a 99-year lease. Accordingly, in 1997 Hong Kong was turned over to the People's Republic of China, which committed to keeping Hong Kong law essentially unchanged for several decades. Hong Kong law is an amalgam of old Chinese law and custom, the English common law system as modified by the Hong Kong legislature, and the Basic Law imposed by the communist Chinese government after the handover, which Basic Law leaves most aspects of Hong Kong law and economy unchanged.

FOOTNOTES:

(n1)Footnote 1. Land Ownership Reformation Law, enacted in 1950, and the Constitutional Law, passed in 1954, enabled farmers to claim full and absolute ownership of land. They were allowed to sell, rent or put a lien on their land. Huang, Frank Xianfeng. "The Path of Clarity: Development of Property Rights in China." *17 Colum. J. Asian L. 191 (Spring 2004).*

(n2)Footnote 2. The Draft of Amendment of the Rules and Regulations Concerning the Work of the People's Community in the Countryside explicitly authorized state ownership and collective community ownership of land. Private ownership of land was eliminated from the constitution. The draft was published in September 1962.

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CHAPTER 106CN PROPERTY LAW IN THE PEOPLE'S REPUBLIC OF CHINA

13-106CN Thompson on Real Property, Thomas Editions § 106CN.02

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§ 106CN.02 Types of Real Property Interests.

§ 106CN.02(a) Real Property Interests Under the Constitution.

According to the latest Constitution of the People's Republic of China enacted during the Fifth National Conference of the National People's Congress held in 1982, all of the land in the cities is owned by the state:

> Except for the land that is owned by the state in pursuit of specific regulations, all of the land in the country and the outskirts of the cities is owned collectively by communities.

The land used for building houses and for the assigned family agricultural plots is owned collectively by communities.

By use of eminent domain power the state may take over any land in the public interest.

No institution or individual is allowed to intrude on and occupy land or engage in sale, renting or any other form of land transfer in violation of law.

Every institution or individual must use the land reasonably: n3

Except for those stipulated by law to be owned collectively by communities, all of the mineral resources, waters, forests, mountains ridges, prairies, uncultivated land, sea banks and other natural resources are owned by the state, that is, owned by the people as a whole.

No institution or individual is allowed to usurp any means to encroach upon or damage the natural resources. n4

§ 106CN.02(b) Real Property Interests Under Recent Legislation and Regulations.

Until 2007, several documents have regulated real property interests in China. These will probably now be affected, to one degree or another, by a new basic property law, part of the Chinese Civil Code, enacted by the National People's Congress in March, 2007, and effective October 1, 2007. The new law contains 247 articles and decrees that "the property of the state, the collective, the individual and other obligees is protected by law, and no units or individuals

may infringe upon it." Thus, both state property and individual property are to be given equal protection under Chinese law; this is seen as an improvement in protections for private property. The law prohibits various forms of illegal possession, looting, sharing, withholding, and destroying state property, and adds to agricultural lands protections from seizure. When property owned by collectives, whether agricultural or residential, is subject to compulsory takings, compensation must be paid.

About ten other important documents regulate real property interests held by persons or institutions. According to the Rules Regarding the Management of Land, the right to use the land owned by the state or collectively by communities may be transferred with compensation. n5

This "does not include subterranean resources, trovers buried and found underneath the land or public utilities." n6

Qualified "companies, corporations or any other forms of organizations and individuals residing inside or outside the territory of the People's Republic of China, may acquire the right to use of the land for land development, utilization and management if they apply in accordance with the other articles of this regulation." n7

"The tenants who acquired the right to use of the land, may transfer, assign or incur a lien on the right, or use it for any other economic activities during the terms of their contract with the state." n8

"Maximum terms for special use of land:

(1) 70 years for residential uses;

(2) 50 years for industrial uses;

(3) 50 years for the use of or for education, science and technology, culture, health and sports;

(4) 40 years for the use of commercial, tourist and recreational activities;

(5) 50 years for comprehensive or any other unlisted types of uses." n9

"Every institution and individual engaging in the actual use of the land is under an obligation to maintain the land in a sound condition and commit it to reasonable uses." n10 These rights are essentially to be continued under the new basic property law, under the loosely translated title of right of use in land for construction. This is considered analogous to a civil law usufructory right, rather than as a form of ownership. Under the new law, as under the prior law, these rights are subject to termination for failure to complete the construction, and generally may be renewed upon expiration. n11 The new law provides for basic protection of lawfully created property rights. n12

The prior Chinese law is described as loosely recognizing easements and other rules governing relationships of adjoining and nearby landowners.

"The right of easement, interests in water, drainage, interests in air and sunlight of neighboring real estate owners or real estate interest claimers are decided upon the principle of fairness and promotion of production and maintenance. People who commit nuisance or waste that causes damages to their neighbors must be enjoined and pay for the damages." n13 The new basic law of property straightforwardly defines an easement interest. n14

§ 106CN.02(c) Real Property Interests in Houses.

In the General Provisions of the Civil Law of the People's Republic of China, houses are classified as personal property. People may obtain full and absolute ownership of them. n15

A person may transfer ownership of houses by will. In case a person dies intestate or fails to dispose of property properly, the property will descend to the decedent's heirs or escheat to the state.

People residing in cities and townships may apply for permission to build or expand their own houses, within certain zoning restrictions, provided that they have genuine housing needs and have obtained approval from either their work unit or the local residential committee. The construction must not take more than 20 square meters for each legitimate resident. Thus the size of permissible construction is dependent upon the number of people in the household. Within a month after the construction is completed, the applicant may submit the construction permission and construction drafts for review and verification and obtain a certificate of ownership from officials concerned. n16

The policies and rules with regard to house construction and ownership in the countryside have been comparatively consistent. It is easier to apply for a parcel of land to build a house for oneself and would-be-married children. There is no limit of 20 square meters per person. The amount of land one can get depends on the area one resides in as well as the density of the population of one's community. Thus, in general, the communities have more latitude in deciding the amount of land they want to use for residential construction.

FOOTNOTES:

(n1)Footnote 3. Constitutional Law of the People's Republic of China, art. 10, ch. 1; Collection of Laws of the People's Republic of China, 5 (1989).

(n2)Footnote 4. *Id*. at p. 5, art. 9.

(n3)Footnote 5. The Rules Regarding the Management of Land, art. II, ch. 1. The Rules were enacted on June 25, 1986, during the 16th Conference of the Standing Committee of the 6th National People's Congress, and were later amended and went into effect on December 29, 1988.

(n4)Footnote 6. *Temporary Regulations Regarding Sales and Transfers of the Right to Use State-Owned Land in Cities and Townships of the People's Republic of China*, art. 2, ch. 1, published on May 19th, 1990 by the State Department.

(n5)Footnote 7. *Id.* art. 3.

(n6)Footnote 8. *Id.* art. 4.

(n7)Footnote 9. *Id.* art. 12, ch. 2.

(n8)Footnote 10. *Id.* art. 7, ch. 2.

(n9)Footnote 11. Chinese Civil Code, Ch. XIV, Art. 149.

(n10)Footnote 12. Chinese Civil Code, Ch. XIV, Art. 66.

(n11)Footnote 13. The General Provisions of the Civil Law of the People's Republic of China, art. 83, ch. 85 (1986).

(n12)Footnote 14. Chinese Civil Code, Ch. XIV, Art. 156-169. which is normally to be created by the state in state lands. It is unclear whether the holder of a land use right is authorized to create an easement in the land held under the right.

(n13)Footnote 15. The General Provisions of the Civil Law of the People's Republic of China were enacted by the 4th National Conference of the National People's Congress on April 12, 1986. Some of the articles relating to real

property interests were amended and updated by later regulations, such as the Law of the Management of Land.

(n14)Footnote 16. Procedures for the Control of Building of Residential Houses by Individuals in Cities and Townships, arts. 2, 3, 5 (1983).

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CHAPTER 106CN PROPERTY LAW IN THE PEOPLE'S REPUBLIC OF CHINA

13-106CN Thompson on Real Property, Thomas Editions § 106CN.03

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§ 106CN.03 Creation, Transfer, and Termination of Real Property Interests.

§ 106CN.03(a) In Cities and Townships.

"There are three ways the state may use to transfer possession and the use of land:

(1) negotiation;

(2) bidding;

(3) auction." n17

"Full amount of the contract price must be paid within 60 days after the land use sales contract ... is signed. The state may declare rescission of the contract and request compensation for damages if the purchaser fails to pay within the time limit or to pay in full." n18

"If the state fails to provide the land offered under the contract, the purchaser may rescind the contract and request for pecuniary damages." n19

"After paying off the full contract price, the purchaser may register with qualified government agencies and obtain a certificate of right to use the land." n20

"Before a purchaser may change his committed use of the land, he must first get approval from the government agencies, sign his signature on the amended contract and register for the new use of land." n21

An assignment contract should be executed before a party transfers the right to use the land for compensation, exchange or as a gift. All of the rights and obligations specified in the original contract are assumed to be transferred to the transferee. Failure of a transferee to adhere to the original terms and committed uses will result in the forfeiture of the assignment. The fixtures attached to the land transfer with the right to use the land. Registration of the change of title is required before a party may claim full ownership. If the assignment contract price is much lower than the market price,

the state has the first right of refusal. n22

A lease contract should be executed before a holder of the right to use the land leases the land. The lessee should commit to the same terms and obligations as under the original sales contract. n23

A lien or a mortgage may be placed upon a holder's right to use the land. All parties involved should sign the contract. In case an obligor fails to honor all the obligations and declares dissolution or bankruptcy, the obligee may become a holder of the right to use the land. Registration is required for the change of title. n24

The right to use the land automatically terminates upon the expiration of provisions of the sales contract. Fixtures attached to the land escheat to the state without compensation. Certificate of the right to use the land must be returned to the agencies. In case a holder applies to extend or renew the contract, a new contract must be signed, the contract price must be paid and registration be made again. n25

The right to use land may be revoked and a certificate may be cancelled if a holder falls into the following categories:

(1) the institution is dissolved or moved;

(2) without approval from the original grantor, the holder lets the land sit idle for 2 consecutive years;

(3) the holder fails to adhere to the approved uses;

(4) the public roads, railroads, airports or mines are declared to be abandoned. n26

§ 106CN.03(b) In the Countryside.

The transfer of the right to use land in the countryside is similar to the transfer of land in cities and townships. Rights and obligations are stipulated, contracts are signed and reconveyance is subject to tight scrutiny. However, as the land in the countryside is generally owned collectively by communities, and it is more often than not used for agricultural, fishing and mining purposes, it is much easier to procure an extension or a renewal of the original contract. n27

Disputes over the ownership and right to use of land are heard and settled by the people's government at various levels. n28

§ 106CN.03(c) Registration and Conveyance of Real Property Interests in Houses.

House owners must register with the local housing and management committee and obtain a certificate of ownership or title after investigation and verification are completed. The same administrative procedures occur when there is a transfer of title or the present condition of the house is changed. n29

Sales of privately owned houses are closed in the office of the local housing and management committee. The seller must produce a certificate of title and personal identification card, while the buyer must submit a testimonial paper proving intent to purchase the described house. An officer then cancels the certificate of title held by the seller and issues a new one for the buyer. n30

An owner-lessor who sells the house while there is an outstanding lease contract must notify the lessee 3 months before completion of the sale and the lessee has the first right of refusal to purchase the house. n31

A lease contract must be executed and filed with the local housing and management committee. No deposit is allowed to be taken. Assignment of a lease contract must be accepted by the lessor. The obligation of maintenance is on the

lessor. n32

A sales contract is invalid if the seller has no title to the house. It may also be void if the seller fails to acquire consent from other joint tenants or tenants in common. However, the sale will be valid if the buyer is a bona fide purchaser for value and the joint tenants or tenants in common have knowledge of the sale and fail to raise objections in a timely manner to the sale. n33 With most Chinese urban housing units in the form of apartments in multi unit buildings, it is important that the new basic property law defines the occupants' interests. The unit owner has exclusive ownership of the unit and a form of common ownership of the non exclusive areas, which are left largely undefined. n34 Governance by a type of owners' associations is provided for in the new law, with control shared by local government and the owners. n35 Meanwhile, rural property rights have not been integrated fully into the new Chinese property law. n36

FOOTNOTES:
(n1)Footnote 17. *Id.* art. 13, ch. 2.

(n2)Footnote 18. *Id.* art. 14.

(n3)Footnote 19. *Id.* art. 15.

(n4)Footnote 20. *Id.* art. 16.

(n5)Footnote 21. *Id.* art. 18.

(n6)Footnote 22. *Id.* arts. 19, 20, 21, 23, 25 and 26, ch. 3.

(n7)Footnote 23. *Id.* arts. 28-30, ch. 4.

(n8)Footnote 24. *Id.* arts. 32-38, ch. 5. *See Gregory M. Stein, "Mortgage Law in China: Comparing Theory and Practice," 72 Missouri L. Rev. 1315 (Fall, 2007)* . The new basic property law largely continues prior mortgage law and practices. Chinese Civil Code, Ch. XIV, Arts, 186, 192, 194.

(n9)Footnote 25. *Id.* arts. 39-42, ch. 6.

(n10)Footnote 26. *Id.* art. 19, ch. 3.

(n11)Footnote 27. Procedural Provisions Regarding the Implementation of the Rules of the Management of Land (1991).

(n12)Footnote 28. *Id.* ch. 2.

(n13)Footnote 29. Chapter 2, Regulations on the Management of Privately-Owned Housing in Cities (published on December 17th, 1983).

(n14)Footnote 30. *Id.* ch. 3.

(n15)Footnote 31. *Id.* ch. 3.

(n16)Footnote 32. *Id.* ch. 4.

(n17)Footnote 33. Opinions of the Supreme People's Court on Matters Concerning the Implementation of the Civil Affairs Policies and Civil Laws, § 6 (1984).

(n18)Footnote 34. Chinese Civil Code, Ch. XIV, Arts. 70, 72.

(n19)Footnote 35. Chinese Civil Code, Ch. XIV, Arts. 75, 83.

(n20)Footnote 36. *See* Benjamin W. James, Expanding the Gap: How the Rural Property System Exacerbates Chinas Urban Rural Gap, *20 Colum. J. Asian L. 451 (2007).*

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CHAPTER 106CN PROPERTY LAW IN THE PEOPLE'S REPUBLIC OF CHINA

13-106CN Thompson on Real Property, Thomas Editions § 106CN.04

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§ 106CN.04 Restrictions on Ownership of Property by Foreigners.

Foreign investors may obtain the right to use land in the same way as most of the Chinese do, except for two additional restrictions:

(1) The foreign investors must incorporate in China or they may join with a Chinese corporation through joint venture;

(2) the foreign investors must engage in comprehensive development or cultivation of the land, and their proposals or feasibility studies are subject to approval and review of related government agencies. n37

Foreigners may acquire full ownership of houses in China as may other Chinese. They, however, have to abide by the strict recording and registration rules. In case transfer of title and production of documents are made in a foreign country, related documents must be notarized by the foreign ministry or its diplomatic corps and authenticated by the Chinese diplomatic corps. n38

FOOTNOTES:
(n1)Footnote 37. Temporary Provisions Concerning Comprehensive Development of Land by Foreign Investors (1990).

(n2)Footnote 38. Provisions of the Ministry of Urban and Rural Construction and Environmental Protection on the Management of Housing Owned by Foreigners (1984).

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CHAPTER 106CN PROPERTY LAW IN THE PEOPLE'S REPUBLIC OF CHINA

15-106CN Thompson on Real Property, Thomas Editions § 106CN.05

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CHAPTER 106DE PROPERTY LAW IN GERMANY 1

13-106DE Thompson on Real Property, Thomas Editions 106DE.syn

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§ 106DE.syn Synopsis to Chapter 106DE: PROPERTY LAW IN GERMANY 1

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§ 106DE.02 Germanic Landholding Customs According to Roman Observers.

§ 106DE.03 The Leges Barbarorum, or Barbarian Laws, of the Germanic Peoples.

§ 106DE.04 The Empire of Charles the Great and the Growth of Feudalism.

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CHAPTER 106DE PROPERTY LAW IN GERMANY 1

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§ 106DE.01 Germanic Peoples in Prehistory.

During the first two millennia, B.C., peoples of Germanic culture were concentrated in the area between the estuaries of the Weser and Oder rivers. A change in climate, about 800 B.C., forced Germanic tribes southward into Celtic territory and eastward into the area between the Oder and Vistula rivers. Persisting population pressures forced Germanic tribes into further conflicts with the Celts, culminating, in the 3rd century B.C., in complete victory for the Germanic tribes occupying the area known now as central and eastern Germany.

By this time the Germanic tribes consisted of three main groups: the northern group eventually became the Norwegians, Danes and Swedes; the eastern group, occupying lands between the Oder and Vistula rivers, emerged as the Goths, Vandals, Burgundians, and Lombards; and the western group consisted of tribes inhabiting the areas of Jutland, Schleswig-Holstein and north central Germany. As the Romans advanced along the Rhine during the 2nd century B.C., some of the western tribes became partially Romanized or at least exposed to Roman culture.

1 Abbreviations occurring in this chapter include: GG for Grundgesetz (Basic Law or Constitution), BGB for *B/Uurgerliches Gesetzbuch* (Civil Code of FRG); BGBl for *Bundesgesetzblatt* (Federal Statutes Gazette); FRG for former Federal Republic of Germany; GDR for former German Democratic Republic; RGBl for *Reichsgesetzblatt* (Precursor of the BGBl).

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CHAPTER 106DE PROPERTY LAW IN GERMANY 1

13-106DE Thompson on Real Property, Thomas Editions § 106DE.02

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§ 106DE.02 Germanic Landholding Customs According to Roman Observers.

As a result of his military activity in western Europe during the 1st century B.C., Julius Caesar recorded a few observations about the Germanic tribes he encountered. The Germanic people appeared to rely mostly on flocks and herds as their form of wealth. They held their flocks and herds privately, while their land was held in communal ownership. Differences in wealth between individual German families were not large, and such differences were inhibited by the practice of reallocating parcels of land to different kindreds or clans annually. n2

By the time the Roman Tacitus recorded his information about early Germanic tribes, early in the 2nd century A.D., some changes in the land customs had occurred, or else the customs were different from the Germanic peoples described by Julius Caesar. n3 The amounts and locations of the annual land distributions were influenced by social standing, and were made to individual persons rather than to kindred groups. Wealth disparities widened as certain persons were able to accumulate wealth faster. It has been hypothesized that this change occurred after the Germanic tribes were exposed to Roman goods and the Roman monetary system, which stimulated their desire for private property; the land allocation system was then modified to favor private holdings and production. n4

Seven of the 46 chapters in Tacitus' Germania describe the laws and legal customs of ancient Germans, with the comment on landholding as follows:

> Land proportioned to the number of inhabitants is occupied by the whole community in turn, and afterwards divided among them according to rank. A wide expanse of plains makes the partition easy. They till fresh fields every year, and they have still more land than enough; with the richness and extent of their soil, they do not laboriously exert themselves in planting orchards, inclosing meadows, and watering gardens. n5

While landholding appears to have been regulated, there is no indication that any system of estates in land was recognized.

On succession, Tacitus reported the following:

> ...[E]very man's own children are his heirs and successors, and there are no wills. Should there be no

> issue, the next in succession to the property are his brothers and his uncles on either side. The more relatives he has, the more numerous his connections, the more honoured is his old age; nor are there any advantages in childlessness. n6

Although Tacitus did not mention what sort of property was subject to succession, presumably heirs inherited only items of personal property.

FOOTNOTES:

(n1)Footnote 2. Julius Caesar, De Bello Gallico 6.22.

(n2)Footnote 3. The Roman Tacitus is the single best source of information on ancient Germanic social and legal customs, but some consider his credibility compromised by his manifest anti-Roman and pro-German moralizing. Also, it is unlikely that he ever directly observed any Germans in their native habitat. *See* Cornelius Tacitus, De Originie et Situ Germanorum xix (John G. C. Anderson ed. 1938) (editor's introduction).

(n3)Footnote 4. 7 E. A. Thompson, The Early Germans (1965).

(n4)Footnote 5. *Id.* at ch. 26.

(n5)Footnote 6. *Id.* at ch. 20.

1 Abbreviations occurring in this chapter include: GG for Grundgesetz (Basic Law or Constitution), BGB for *B/Uurgerliches Gesetzbuch* (Civil Code of FRG); BGBl for *Bundesgesetzblatt* (Federal Statutes Gazette); FRG for former Federal Republic of Germany; GDR for former German Democratic Republic; RGBl for *Reichsgesetzblatt* (Precursor of the BGBl).

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CHAPTER 106DE PROPERTY LAW IN GERMANY 1

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§ 106DE.03 The *Leges Barbarorum*, or Barbarian Laws, of the Germanic Peoples.

As the Roman Empire disintegrated and surrendered its western provinces to Germanic invaders, an official collection of imperial statutes gathered under Theodosius II, the Theodosian Code, was issued by consent of the emperor Valentinian III in A.D. 438. This code may have influenced various Germanic rulers who issued their own law codes in the decades that followed. These collections of laws exhibit varying degrees of influence from Roman and Christian sources, and some were intended to apply different legal rules to Germanic and Roman people living in the same area. These laws of the barbarians, or *Leges Barbarorum* , are summarized below.

The Visigothic laws, and more particularly the Code of Euric, are believed to have directly or indirectly influenced most Germanic law codes thereafter. The Code of Euric, from ca. A.D. 476, shows some Roman influence. The *Lex Romana Visigothorum* was promulgated by the Visigothic king Alaric II in A.D. 506, to govern Romans living in Visigothic territories. This collection is also known as the *Breviarium Alaricianum* (Breviary of Alaric). The *Leges Visigothorum* is a collection of laws that had been issued by Euric's successors, applying to both Gothic and Hispano-Roman subjects. The collection was promulgated in A.D. 654, and replaced the *Lex Romana Visigothorum*.

Euric's code seems to have been the immediate source for the early codes of both the Salian Franks n7 and the Burgundians, n8 and the Bavarian n9 and Lombard n10 codes also show Visigothic influence. Another early Frankish code, the *Lex Ribuaria* , n11 was based on the Salian Code, and it in turn influenced the codes of the continental Angles and Saxons of the Carolingian age.

The best known of these early Germanic codes--indeed the oldest Germanic code that is completely preserved--is the *Lex Salica* , which has been described as "primarily a penal law...concerned with the redress of crimes (murder, theft, mutilation, exploitation of women) by monetary means." n12 The *Lex Salica* and the other early codes consist of both individual "statutes" and precedential judicial sentences ("*Weisthuemer*"), but they do not refer to most customs of daily living, such as occupancy of land, personal property, commercial dealings, inheritance, family relationships, and class privilege. The only references to land law in the *Lex Salica* are provisions requiring money payment for damage to agricultural fields, n13 blocking the way of another, n14 and improper fencing and enclosing. n15

FOOTNOTES:

(n1)Footnote 7. The Code of the Salian Franks, or Lex Salica, is attributed to Clovis, 481-511, A.D.

(n2)Footnote 8. The Burgundian Code was compiled between 483 and 532, A.D. The Lex Romana Burgundionum was issued ca. A.D. 500, for application to Roman citizens living in the Burgundian kingdom.

(n3)Footnote 9. The Lex Baiuvariorum is dated from about A.D. 744-748.

(n4)Footnote 10. The Leges Langobardorum was promulgated between A.D. 643 and A.D. 755.

(n5)Footnote 11. The Lex Ribuaria is believed to have been promulgated after A.D. 596, for the Ripuarian or western Franks.

(n6)Footnote 12. Laws of the Alamans and Bavarians 19 (Theodore John Rivers trans. 1977).

(n7)Footnote 13. Title 9.

(n8)Footnote 14. Title 31.

(n9)Footnote 15. Title 34.

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13-106DE Thompson on Real Property, Thomas Editions § 106DE.04

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§ 106DE.04 The Empire of Charles the Great and the Growth of Feudalism.

For most Europeans, little changed as rule passed from the Merovingian to the Carolingian dynasty. As emperor, Charles the Great followed the Frankish custom under which he considered property and revenues of the empire as his family property. Compensation to his principal supporters, servants and counselors was paid by gifts of land, usually with requirements of military service attached. However, upon the death of Charlemagne, Germanic society suffered a relapse:

> The decades that followed Charles's death witnessed the rapid disintegration of the Empire he had created. Empire and papacy alike became immersed in an abyss of anarchy and barbaric lawlessness. The governing principles of society were the law of force on the one hand and the need for protection on the other. In the course of the ninth century the State lost all contact with the urban tradition and became completely agrarian. The life of the feudal nobility was spent in warfare and private feuds. From their strongholds the feudal lords terrorized peaceful villagers and passing travelers. n16

Despite the lawlessness of the aristocracy, the disintegration of a strong monarchy meant that the people could turn only to local feudal lords for protection; thus society became increasingly feudalized in the 9th century A.D. Land grants under such circumstances became increasingly hereditary, and through subinfeudation a hierarchy of vassalage eventually developed. These feudal landholding arrangements, either on lands of the monarch or of a member of the aristocracy, have been described as follows:

> The land was divided into estates which were self-sufficient units...In the center of each estate was located the Maierhof, surrounded by the huts of the peasants, each of whom had a small strip of land attached to his dwelling...Part of the arable land that surrounded the village was set aside for the exclusive use of the king or lord. What remained was parceled out among the peasant tenants. The fields were divided into three parts (three-fallow system, *Dreifelderwirtschaft*), one of which was used for the planting of the summer crop, the second for the winter crop, while the third part would lie fallow... The cultivation of the fields was a communal and coDEperative enterprise, although each peasant harvested the crop from his own strips of land.
>
> ...The lord gave the peasant protection, furnished the land, built a mill and a village church, and

> administered justice in the territory that he had learned to consider his own, either by inheritance or by special grant. The peasant in turn, enjoyed the security that went with the hereditary right to the possession of his strip of land, he took his share of the agricultural produce, and returned the privileges extended to him by making certain payments and rendering certain services to the lord, exactments whose extent and nature were determined by custom. Theoretically still a serf, the peasant of the Carolingian period had actually become a tenant, and although still unfree, this peasant tenant, being exempt from the burden of military and court service, was envied by many a small freeholder. n17

In post-Carolingian Europe, eventually a dynasty of Saxon monarchs, beginning in A.D. 919, ruled over a smaller empire consisting mostly of German territory. Once order was restored and population growth resumed, additional land was sought through conquest and colonization of territory among Slavs and Hungarians to the east and southeast, and later into the north. For many of the peasants, answering a plea for colonists in the east meant becoming a free tenant. The general disappearance of serfdom resulted from a shift of economic conditions.

FOOTNOTES:

(n1)Footnote 16. 1 Kurt F. Reinhardt, Germany: 2000 Years 44 (1961).

(n2)Footnote 17. *Id.* at 49-50; Draeger, Tonya R. "Property as a Fundamental Right in the United States and Germany: A Comparison of Takings Jurisprudence," *14 Transnat'l Law. 363 (Fall 2001).*

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CHAPTER 106DE PROPERTY LAW IN GERMANY 1

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§ 106DE.05 Introduction of Roman Law During the Middle Ages.

During the Middle Ages, re-discovery of the documents of classical civilization, including descriptions of Roman law, was influential in German legal history. As the central power of the German-based Holy Roman Empire declined, and that of individual principalities increased, there was no common system of German courts or private law. Exposure to principles of Roman law led in 1495 to the *Reichskam-mergerichtsordnung* adopting, or receiving, Roman law as the basis of decisions in imperial courts, in the absence or aid of local laws. Germanic local laws had by this time also assumed some written form in the *Sachsenspiegel* (1221-1227) and the *Schwabenspiegel* (1275). Subsequent city laws, such as in Nuremberg and Frankfurt, were modified to include elements of the received Roman law.

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CHAPTER 106DE PROPERTY LAW IN GERMANY 1

13-106DE Thompson on Real Property, Thomas Editions § 106DE.06

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§ 106DE.06 The Movement Toward Codification and Enactment of the Civil Code (BGB).

Impetus toward codification grew slowly, and culminated only in codes for certain areas, such as Bavaria in 1756 and the Prussian states in 1794. The Napoleanic rule in German territory was too brief to produce a legal code, and the political reaction thereafter delayed comprehensive codification until German unification under Bismarck's leadership. Commercial law had been unified in the German states as early as 1848 and 1861 and certain imperial laws on courts, procedure and bankruptcy had become effective in 1879. Finally, on January 1, 1900, a comprehensive code of private law went into effect in the form of the Civil Code, or *B/Uurgerliches Gesetzbuch* .

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CHAPTER 106DE PROPERTY LAW IN GERMANY 1

13-106DE Thompson on Real Property, Thomas Editions § 106DE.07

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§ 106DE.07 Sources of Property Law After Promulgation of the Civil Code (BGB).

§ 106DE.07(a) The Continuing Validity of the BGB.

The *B/Uurgerliches Gesetzbuch* or Civil Code (hereafter referred to by its familiar designation BGB) has remained essentially in effect since its promulgation, through World War I, the Weimar Republic, the National Socialist era and World War II, the creation of the Federal Republic of Germany and adoption of its *Grundgesetz*, Basic Law, and now in a unified Germany.

Upon the creation of the modern German state after World War II, the *Grundgesetz*, or Basic Law, which would be viewed by an American as Germany's constitution, was promulgated. The *Grundgesetz* protects the ownership and inheritability of land holdings:

> (1) Property and the right of inheritance are guaranteed. Their content and limits shall be determined by the laws.
>
> (2) Property imposes duties. Its use should also serve the public weal. n18

Other legal protections of property rights previously in force in Germany are adopted by the *Grundgesetz* to the extent they were not in conflict with the *Grundgesetz*:

> (1) Law in force before the first meeting of the *Bundestag* shall remain in force in so far as it does not conflict with this Basic Law. n19

Thus the BGB remains in force after adoption of the *Grundgesetz* . With the reunification of the Federal Republic and the German Democratic Republic, or the absorption of the latter by the former, the BGB has been given even wider application.

The judiciary n20 also plays a limited role in fashioning German property law. If an issue before a court is not governed by a statutory provision or available interpretation, the court may provide the interpretation, often derived by analogy

from other areas of the law. The courts are guided by the principles in the Swiss Civil Code, which direct the judge in such a situation to rely on customary law or on a rule that the judge would enact if in the position of a legislator. n21

§ 106DE.07(b) Organization of the BGB Property Law Provisions.

The BGB consists of five books, including the introductory general part (*Allgemeiner Teil*), the law of obligations, the law of things (property), family law and the law of succession. In the law of property, a major distinction is drawn between movable and immovable property.

Almost all German land law is contained within the BGB. Some supplemental legal regulation is found in a few ancillary laws and in the Ordinance on the Land Register. Although federal law controls most aspects of property law, the regional and municipal governments (*Kreisen*) administer this law and control local zoning ordinances and pre-emption rights.

FOOTNOTES:
(n1)Footnote 18. GG art. 14(1) and (2).

(n2)Footnote 19. *Id.* at art. 123(1).

(n3)Footnote 20. The activities of the judiciary "shall be bound by law and justice." GG art. 20, § 3.

(n4)Footnote 21. Norbert Horn et al., German Private and Commercial Law 61 (1982); Crosswhite, Anastasia B. "Women and Land: Aristocratic Ownership of Property in Early Modern England," *77 N.Y.U. L. Rev. 1119* (October, 2002).

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§ 106DE.08 Property Law Under the BGB.

§ 106DE.08(a) Types of Property Interests.

§ 106DE.08(a)(1) Ownership.

Among the basic rights enumerated in the *Grundgesetz* are guarantees of the rights of property and inheritance n22 and the inviolability of the home. n23 The concept of ownership is set forth in the BGB:

> The owner of a thing may, in so far as the law or the rights of third parties permit, deal with the thing as he pleases and exclude others from interfering with it in any way. n24

Thus defined, ownership most closely resembles the fee simple absolute interest known in American property law. As stated in the BGB, German ownership interests are explicitly subject to the requirements that ownership activities be legal and not interfere with the rights of third parties.

The kinds of ownership rights or interests one can create in property are limited to those types of rights or interests specifically authorized by law. Only authorized interests may be recorded, and, with certain exceptions, only recorded interests are valid and enforceable. The exceptions are interests that arise out of the law of obligations, security titles and inchoate ownership. Also, occasionally, social developments create pressure to recognize new property interests, which may be authorized by laws other than the original BGB. For instance, a landowner may now allow another to build on the owner's land, n25 and ownership rights in one floor of a multi-level building may be granted. n26

German law makes no distinction between legal and equitable or beneficial ownership of property, and for the most part does not recognize less than absolute interests, such as future interests. By way of exception, recognition is accorded leasehold interests with statutory limits. Owners have the right to press a legal claim against any party that acts adversely to the owner's interests n27 and to demand possession from a wrongful possessor. n28 Under the BGB, an owner has a claim against any other party who acts adversely to the owner's interest. n29 Likewise, the owner can demand possession from a wrongful possessor. n30

Only ownership in defined things is recognized. Thus, one cannot convey "all the land that I own"; a specific

description would be necessary for an effective conveyance.

German law recognizes both joint ownership (*Bruchteilgemein-schaft*) and tenancy in common (*Gesamthandsgesellschaft*). To be valid and effective, such coDEwnership must be entered with specificity into the land register. n31

Under Article IX the American-German Treaty of Friendship of 1954, reciprocal rights to acquire, hold, and dispose of real and personal property are guaranteed to German and American citizens. Foreigners who own property in Germany are protected against uncompensated taking by the government.

§ 106DE.08(a)(2) Possession.

Possession is not recognized as a right, but as a factual circumstance that may give rise to rights:

> Possession is regarded not as a right in itself, but as physical relation to a thing, namely the exercise of factual control over it, and is protected by the BGB against invasion and infringement by third parties, regardless of the possessor's title. n32

The importance accorded possession under German property law means that even a possessor who is not the owner may have certain direct rights of action, such as the right of a tenant to take action directly against one who disturbs the tenant's possession, rather than acting through the landlord.

§ 106DE.08(a)(3) Interests in the Land of Another.

The BGB recognizes certain interests that one may hold in the land of another, including servitudes, n33 encumbrances, n34 and personal servitudes. n35 Among the recognized servitudes are profits, *usufrucht*, n36 licenses, and rights of way. Recognized encumbrances include restrictive building covenants, easements, and mortgages.

German law recognizes security interests in land (real or land securities (*Realkredit*), under the *Grundpfandrechte*) as arising from mortgages (*Hypothek*) n37 and rent obligations (*Grundschuld*). n38 The beneficiary under any real security may seek a remedy against the burdened land, usually by means of a forced auction which is regulated by statute: n39

> Mortgage and rent charge differ in that the validity of mortgage depends on the legal status of the secured debt, while rent charge does not, but the two forms have grown so alike that in practice they are virtually interchangeable. n40

§ 106DE.08(a)(4) Protection of Property Interests.

Under German law, the owner of property has an absolute right to exclude all others from the property, as long as the owner remains within the legal limits of other applicable laws. Self-help in the protection of real property is an absolute right which remains available to the modern German property owner. However, self-help may only be applied when the owner has been dispossessed. n41 Many actions in tort exist for the protection of rights of ownership. n42 The owner is constrained by reasonableness and applicable regulation under public, planning, and environmental laws.

§ 106DE.08(b) Acquisition and Delivery of Property.

Ownership of land can only be acquired through a contract of sale n43 and an obligation under the principle of abstraction. In principle, the contract of sale and the obligation, or *Auflassung*, are seen as strictly separate, or abstracted. This distinction has generated many artificial complications and now most real property transfers combine everything into one document.

§ 106DE.08(b)(1) The Principle of Abstraction.

Somewhat similar to the earnest money agreement, a real property transaction under German law is achieved by means of a contract and then a subsequent performance:

> The principle of abstraction, which has been known to cause problems even to German students, lays down that, while contract and transfer are connected in the sense that the latter is performance of the former and that the former constitutes a justification or causa for the latter, they are nevertheless to be treated as separate or abstract even though they often constitute a single unit in legal reality. n44

§ 106DE.08(b)(2) The Contract of Sale.

The contract for the sale of land must be notarized. n45 If the documents memorializing the sale are an offer and acceptance, then both documents must be notarized. However, in the event that a notary is not utilized, the sale will become binding when it is entered into the land register.

§ 106DE.08(b)(3) Transfer (*Auflassung*).

The transfer, or obligation, as it is often termed, consists of the actual performance of the contract of sale, the payment of monies and the entry of new ownership in the land register. Pursuant to the BGB, the transfer (*Auflassung*) must be declared in the presence of both parties. n46 If an agent represents a party, the agent must be authenticated or certified. n47 Where the transfer occurs as a result of a judgment of a court, the parties' presence is not necessary. Although the transfer is distinct from the contract, in common practice a single document constitutes both a contract of sale and a transfer. Unless the transaction in question comes under one of several exemptions, a tax on the transaction will be applicable. The transaction will not be binding until entered into the land registry. n48

§ 106DE.08(b)(4) Notarization of the Contract and the Transfer.

Regardless of what kind of transaction occurs, the transfer must be notarized. n49 If the land is improved, or is land available for development, then under the Federal Building Law n50 local authorities may have a public right of pre-emption, and a declaration of intent not to exercise pre-emption rights must be made before the transfer can take place. For agricultural and forest land, a similar process must be followed under the Law of Dealings on Land. n51

§ 106DE.08(b)(5) Prescription and Adverse Possession.

While acquisition of movable property by prescription is possible under the BGB, n52 no acquisition of real property interests through adverse possession or prescription can occur because of the requirement that every interest in land must be recorded.

FOOTNOTES:

(n1)Footnote 22. GG art. 14(1).

(n2)Footnote 23. *Id.* at art. 13.

(n3)Footnote 24. BGB § 903.

(n4)Footnote 25. This is permitted under the *Erbbaurecht* (Heritable Building Rights Ordinance). The right to build may not be granted for a period longer than 99 years and, of course, is usually granted for shorter periods of time.

(n5)Footnote 26. This is permitted under the *Wohnungseigentumsgesetz* (Residential Property Law).

(n6)Footnote 27. BGB § 823, § 1.

(n7)Footnote 28. *Id.* at § 985.

(n8)Footnote 29. *Id.* at § 823, § 1.

(n9)Footnote 30. *Id.* at § 985.

(n10)Footnote 31. *Id.* at §§ 1008-1011.

(n11)Footnote 32. Norbert Horn, et al., German Private and Commercial Law 171 (1982).

(n12)Footnote 33. BGB §§ 1018-1029.

(n13)Footnote 34. *Id.* at §§ 1105-1112.

(n14)Footnote 35. *Id.* at §§ 1090-1093.

(n15)Footnote 36. *Id.* at § 1030 (*Niessbrauch*).

(n16)Footnote 37. *Id.* at § 1113 *et seq* .

(n17)Footnote 38. *Id.* at § 1191 *et seq* .

(n18)Footnote 39. *Gesetz Uber die Zwangversteigerung* und *Zwangverwaltung*, promulgated 20 May 1898, RGBl, 773.

(n19)Footnote 40. Norbert Horn et al., German Private and Commercial Law 184 (1982).

(n20)Footnote 41. BGB § 985.

(n21)Footnote 42. These include actions against trespass, nuisance, and the threat of intrusion. *See Id.* at §§ 906, 1004.

(n22)Footnote 43. BGB § 313.

(n23)Footnote 44. Norbert Horn, et al., German Private and Commercial Law 69 (1982).

(n24)Footnote 45. BGB § 313.

(n25)Footnote 46. *Id.* at § 925.

(n26)Footnote 47. *Grundbuchordnung* § 29.

(n27)Footnote 48. BGB § 873.

(n28)Footnote 49. *Id.* at § 313.

(n29)Footnote 50. *Bundesbaugesetz*, Law of 23 June 1960, BGBl I, 341.

(n30)Footnote 51. *Grundstucksverkehrsgesetz* .

(n31)Footnote 52. BGB § 937.

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§ 106DE.09 The Ordinance on the Land Register.

The land register was established as an aid to certainty in matters of land ownership. n53 Absolute rights as to defined things are made public, and clearly ascertainable to the public at large, through the registration system. Land registration is especially significant because so-called equitable remedies are not recognized by German courts. The local municipal court has jurisdiction over all the land in its district.

§ 106DE.09(a) Land Register Requirements.

Only those dispositions of land which have either been entered or cancelled are eligible for recording in the land register. Either entry or cancellation can be altered by a judgment of the court or by consent of all parties. No entry is necessary for rights which transfer by operation of law, such as the law of succession, although the successor is advised to apply for correction of the register.

The Land Registry is not a register of deeds; in fact, deeds do not exist under German law. It is a register of titles showing the current legal disposition of real property. The land register reflects rights which affect the described property directly, but not necessarily matters which affect only the owner, such as personal judgments. Public charges or obligations of the owner are not entered.

The land register is divided into three sections. Part I is a register of the current owner of the property and lists in an abbreviated form encumbrances which may be on the land. Part II lists in detail the information concerning the encumbrances. Part III lists security interests which affect the land. By analysis of all three parts of the land register, the prospective purchaser or creditor can see a complete picture of the current status of the property in question. All supposed encumbrances or security interests in property which are not registered property are afforded no legal significance. In the event that a creditor finds that a security interest is improperly recorded, the creditor has a cause of action to require the debtor owner to correct the mistake. But if the land has been sold or otherwise conveyed, the offended creditor has only a cause of action for unjust enrichment against the debtor.

§ 106DE.09(b) Priority Under the Land Register.

Priority under the land register is usually given by the date of entry, subject to modification by agreement of the parties.

§ 106DE.09(c) Bona Fide Purchasers.

German property law is especially sensitive to the protection of the principle of good faith. Thus one who takes possession without knowledge of extenuating rights takes that property with absolute rights, free of any encumbrances. n54 Only that knowledge which can come through the Land Register is imputed to the purchaser.

If one loses property due to the negligence or fraud of another, the remedy rests on the rules of unjust enrichment. n55 The harmed party never has recourse against the person who acted in reliance on the land register without notice.

FOOTNOTES:
(n1)Footnote 53. *Grundbuchordnung* of 24 March 1897, RGBl 139, as promulgated on 5 August 1935, RGBl I, 1073.

(n2)Footnote 54. BGB § 892.

(n3)Footnote 55. *Id.* at § 816.

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§ 106DE.10 Ancillary Real Property Laws.

While the BGB addresses most of the issues associated with absolute ownership of land, it has little provision for other real property interests. Such provisions have been added by so-called ancillary legislation, which has also become an integral part of German property law.

§ 106DE.10(a) Heritable Building Rights Law (*Erbbaurecht*).

Building rights under German law are constrained by rigid zoning laws which direct where and how any building may be constructed. Under the BGB only the absolute owner of real property was allowed to build upon it. This changed as modern commercial and social pressures led to the promulgation of the Heritable Building Rights Law. n56 This law permits a heritable building right to be held by one other than the owner for periods of up to 99 years, although most such interests are for shorter periods. The owner receives an annual payment during the life of the right. Upon expiration of the period, the land reverts to the owner, who then must pay for the improvements. During the term of the heritable building right, the holder of the right is considered the owner.

§ 106DE.10(b) The Law of Home Ownership. n57

This enactment made possible the ownership of a single story of a building. n58 The possessors of such rights are considered special owners of their respective floors or apartments, as coDEwners of the entire parcel of land, and as co-responsible for common areas of the building. Such a form of real property ownership is used widely in modern Germany as a means of making property interests available to persons otherwise unable to afford absolute ownership.

§ 106DE.10(c) Obligatory Rights Relating to Land.

The BGB does not direct its attention to the creation of obligatory rights as they pertain to land. However, through analogy from other areas of the law, scholars and the judicial system have been able to identify certain principles which are made applicable to interests in land.

Under the legal rules relating to suretyship, identical to those found in American jurisprudence, a valid written surety instrument obligates the surety to the extent of all the surety's assets, including real property interests. n59

Under the BGB, when a person purchases property on credit, the vendor retains all ownership until the purchase price has been paid in full. n60 Many purchasers, however, want some recognition and protection of property rights before they have paid the sum in full. German law now recognizes inchoate ownership. n61 "It is treated as a real right of an independent variety, 'like ownership, only less.'" n62

§ 106DE.10(d) Homesteads.

Homesteads can be created under German law n63 when land is expropriated and granted to a person by one of the states (*Laender*), municipalities, or certain private or public corporations. Such a real property holding is entered into the Land Register; however the possessor is restricted in alienation and security rights.

§ 106DE.10(e) Property Rights of Married Couples.

Although women are guaranteed rights equal to those of men under the German Basic Law, n64 additional equal rights legislation has also been enacted. n65 Property acquired by a married couple is considered within the "community of acquisition," similar to American community property. n66 Married persons' property rights are governed by Book Four of the BGB, dealing with *Familienrecht* (the law of families).

§ 106DE.10(f) Landlord/Tenant Law.

The basic provisions governing the relationship of landlords and tenants are found in Book Two of the BGB on contract law. The tenant is guaranteed possession and quiet enjoyment, and has a right of action against either the landlord or the disturbing tenant if the quiet enjoyment is disturbed. n67 The tenant in possession has the rights of ownership associated with possession; most remedies for the breach of such rights are found in German tort law. Although the BGB is silent as to rights and responsibilities in common areas, local ordinances provide some remedies for tenants. The landlord/tenant contract is usually standardized (*Deutscher Einheitsmietvertrag*), and some local governments have made the use of this contract form mandatory.

§ 106DE.10(g) Taxes on Real Property.

All real property holdings are taxable under the capital tax that is assessed against all assets (*Vermogenssteuer*). The percentage of tax is different for corporations and individuals, and many exceptions apply. A separate real property tax may be levied based upon special value (*Einheitswert*).

A tax of up to 7 percent may be levied when land is transferred if none of a host of exceptions apply, and this tax must be paid before the transfer may be recorded in The Land Registry. A capital gains tax may also be applicable to the transfer of real property, if the transaction is not part of the vendor's normal business and the transfer is viewed as speculative.

FOOTNOTES:

(n1)Footnote 56. *Erbbaurecht, Verordnung* of 15 January 1919.

(n2)Footnote 57. *Gesetz uber das Wohnungseigentum* und *das Dauerwohnrecht* of 15 March 1951, BGBl I, 175.

(n3)Footnote 58. The drafters of the BGB had expressly excluded such a possibility for fear of disorder and conflict.

(n4)Footnote 59. BGB § 765 *et seq* .

(n5)Footnote 60. *Id.* at § 455.

(n6)Footnote 61. BGHZ 20, 88.

(n7)Footnote 62. Norbert Horn, et al., German Private and Commercial Law 183 (1982).

(n8)Footnote 63. *Verordnung* of 10 May 1920, as amended.

(n9)Footnote 64. GG 3, P2; art. 117.

(n10)Footnote 65. *Gleichberechtigungsgesetz* of 18 June 1957 (BGB1 1957 I 609), amending the BGB.

(n11)Footnote 66. BGB § 1363 *et seq* .

(n12)Footnote 67. *Id.* at § 535.

1 Abbreviations occurring in this chapter include: GG for Grundgesetz (Basic Law or Constitution), BGB for *B/Uurgerliches Gesetzbuch* (Civil Code of FRG); BGBl for *Bundesgesetzblatt* (Federal Statutes Gazette); FRG for former Federal Republic of Germany; GDR for former German Democratic Republic; RGBl for *Reichsgesetzblatt* (Precursor of the BGBl).

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CHAPTER 106DE PROPERTY LAW IN GERMANY 1

13-106DE Thompson on Real Property, Thomas Editions § 106DE.11

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§ 106DE.11 Effects of Reunification on German Property Law.

On October 3, 1990, the Federal Republic of Germany (FRG) and the German Democratic Republic (GDR) were unified as one country. Under Article 23 of the Basic Law n68 all of the GDR came under the Basic Law of the Federal Republic of Germany, and hence under the BGB as of the date of accession. The Unification Treaty restated the applicability of these laws and also included stipulations for reprivations and restitution of confiscated property.

The legal systems of the FRG and the GDR could not have been more different prior to reunification. While the Federal Republic's laws found their origin in the civil and Germanic law traditions surrounded by a capitalistic society, the German Democratic system was centrally located within a confining communist system. Only personal use of real property was possible in the East, not ownership. Property in the GDR was classified as coDEperative property, people's property, and property of citizens' social organizations. The state exercised great rights of pre-emption, offering only symbolic compensation for acts of confiscation.

§ 106DE.11(a) The Current Status of Reprivation and Restitution.

The Unification Treaty provides that confiscated properties are to be returned upon demand. In the event that such a return is impossible, then compensation is required under the Basic Law. In practical terms, much of the property confiscated has been put to public use and will be judged impossible to return.

Millions of Germans will be affected by the resolution of these problems, and it will probably take several decades to resolve them. Under the Unification Treaty, confiscations which occurred between 1945 and 1949 are not to be returned to the prior owner. Instead, parliament will arrive at a compensation which is expected to be far below true market value, thus generating even more controversy.

§ 106DE.11(b) The Activities of the *Treuhandanstalt*.

The reorganization and privatization of properties within the GDR began under the communist government on July 1, 1990. The administration of this program has now fallen fully upon the government of the reunified FRG, which relies on its *Treuhandanstalt* (trustee administration) to conduct affairs much like the government bodies that have dealt with the American savings and loan association liquidations.

The difficulties of the *Treuhand* administration have combined with the problems of restitution for confiscated properties to somewhat hinder the assimilation of the new federal states of the East into the mainstream of German economic life. The consequence of all this turmoil for real property ownership is that as long as the contested title is expressed upon The Land Register, the alienation of these properties will be restricted, since prospective buyers will be aware of potential future complications.

FOOTNOTES:
(n1)Footnote 68. GG art. 23 states in pertinent part: "[T]his Basic Law shall apply in the territory of the Laender of [twelve named Laender]. In other parts of Germany it shall be put into force on their accession."

1 Abbreviations occurring in this chapter include: GG for Grundgesetz (Basic Law or Constitution), BGB for *B/Uurgerliches Gesetzbuch* (Civil Code of FRG); BGBl for *Bundesgesetzblatt* (Federal Statutes Gazette); FRG for former Federal Republic of Germany; GDR for former German Democratic Republic; RGBl for *Reichsgesetzblatt* (Precursor of the BGBl).

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CHAPTER 106DK PROPERTY LAW IN DENMARK

13-106DK Thompson on Real Property, Thomas Editions 106DK.syn

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§ 106DK.syn Synopsis to Chapter 106DK: PROPERTY LAW IN DENMARK

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§ 106DK.02(d) Ownership of Danish Land by Foreigners.

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CHAPTER 106DK PROPERTY LAW IN DENMARK

13-106DK Thompson on Real Property, Thomas Editions § 106DK.01

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§ 106DK.01 Brief History of Danish Law.

§ 106DK.01(a) Customary Law in Denmark.

Denmark, like the other Scandinavian countries, differs from other European nations in that its legal system does not rest upon a foundation of Roman law. n1 Thus, comprehensive legal codes, such as those promulgated by France and Germany, are not a part of Danish law and jurisprudence. Nor has Denmark followed the pattern of the United Kingdom and the United States in developing an extensive common law based on judicial decisions. Instead, much of Danish Law is based on custom. In this respect Denmark falls somewhere between Sweden, which gives less weight to custom than Denmark, and Norway, whose jurisprudence relies even more on custom. n2

The heavy reliance on customary law in Denmark has produced a jurisprudence that is especially national in character. The outside influences that most affect the Danish legal system are those from Sweden and Norway, along with some English and American developments.

§ 106DK.01(b) Provincial Laws.

The oldest known sources of Danish written law are the so-called provincial laws of the 12th and 13th centuries. n3 During this period the distinct but similar customary laws of the three areas known as Zealand, Scania and Jutland were reduced to writing. These provincial laws revealed an agricultural economy in a social structure based on kinship, but gradually adjusting to the presence of a powerful church and king. A passage from the preamble of the Jutland provincial law opens with the simplistic declaration that "The law shall be honest and just, bearable in accordance with the customs of the country...." n4 In addition to invoking the customary law, the provincial laws also enjoined loyalty to the monarch.

The Jutland code, one of the sets of provincial laws, was drafted in 1240. Together with the "Laws of Thord" it was ratified in 1326 by the Danish king and the Council of State and made the law of all of Denmark. By this time the Jutland code contained some canon law. n5

During the late 13th century, the Danish monarchy grew weaker, leading to the issuance in 1282 of the "recheche," a document similar in significance to the British Magna Carta of 1215. The "recheche" further limited royal prerogatives

by requiring that an annual assembly be called to debate the state of the realm. n6 When the Protestant Reformation reached Denmark, with its ideology that public authority rested on a divine foundation, the power of the monarchy grew relatively stronger, and the canon law element in Danish law receded. Royal legislation increased, so that by the mid-16th century, Denmark even attempted to promulgate a code. n7

§ 106DK.01(c) The Danish Code.

The conditions for the Danish Code had emerged by 1660, when the Danish monarchy had gained the support of the clergy and the middle class, and had become an absolute monarchy. This "divine-right" absolutism was given a constitutional foundation by the Royal Act of 1665. Thereafter, in 1683, a legal code, published as the *Danish Code of King Christian V* , abolished all previous royal statutes and provincial laws; however, the provisions of the Danish Code itself were largely drawn from the provincial laws, although some Roman law concepts were added in the 18th century, and some German legal theory notions entered into the Code in the 19th century. In general, however, the Code was not based on any coherent notion of legal theory, and contained jurisprudential inconsistencies. n8 The Code has since been supplanted in piecemeal fashion by legislation and today can no longer be considered the foundation of Danish law. n9

§ 106DK.01(d) Emergence of Legal Theory in Denmark.

The possibility for indigenous development of legal theory in Denmark arose with the founding of the University of Copenhagen in 1479, but a formal legal examination was not introduced until 1736. Passing the examination did not become a qualification for a judgeship or higher level public administration position until 1821.

At first, the Danish legal education curriculum was based on natural law and Roman law, and Danish law was sometimes included beginning late in the 16th century. This approach to Danish jurisprudence was greatly altered early in the 19th century by the work of the great Danish legal scientist Anders Sandoe Orsted. He favored a historical approach to the law that removed natural law as an authoritative source. Orsted's activities as a drafter of legislation and as a legal philosopher were influenced somewhat by foreign law; he combined his familiarity with foreign law, foreign judicial practice, and a comprehensive knowledge of Danish law to create a system of Danish law which was much more coherent than those previously known. Orsted was instrumental in turning away a proposal to replace the Danish Code, because he feared suddenly abrogating law developed through centuries on the basis of people's characteristics, their customs and familiar conditions.

Orsted did not produce a comprehensive and systematic exposition of Danish law, but he laid the intellectual foundation for Danish legal scientists to do so in later years.

§ 106DK.01(e) Danish Law in the 19th and 20th Centuries.

A parliamentary form of government was established in Denmark by the Danish Constitution of June 5, 1849, and various items of comprehensive legislation followed. Also, in the mid-1800's, the idea of a Nordic federation gained support and eventually led to a number of laws adopted uniformly by Denmark, Sweden and Norway. These acts covered such topics as sales of goods, contracts, commissions, commercial agency, commercial travellers, hiring, purchasing, insurance contracts, promissory notes, marriage, property ownership relations of spouses, and capacity and guardianship. The progress of common legislation was optimistically summarized a generation ago:

> In the field of family law there are greater differences between the various Nordic acts than in the field of the law of property and contracts, although it has been possible to demonstrate uniformity in the principles of family legislation at least until recent years.
>
> Nordic legal cooperation has also resulted in provisions regarding the implementation of bankruptcy, etc.

Nordic legal cooperation is still being continued, and in the field of civil law, it has resulted, in later years, in new rules on marriage as well as in legislation on adoption, succession, one's right to one's name, and a number of acts regarding intellectual property, such as acts on copyright, trade marks, and patents. A proposal regarding common Nordic rules on extinction and vindication of personal property is still under debate, but does not appear likely to be adopted. A proposal regarding legislation in the field of torts has been adopted in Norway, Sweden, and Finland, but not yet in Denmark. n10

FOOTNOTES:

(n1)Footnote 1. Ditlev Tamm, *A Survey of Danish Legal History, in* Danish Law: A General Survey 21 (Hans Gammeltoft-Hansen et al., eds. 1982).

(n2)Footnote 2. Lester Bernhardt Orfield, The Growth of Scandinavian Law 14 (1953).

(n3)Footnote 3. Ditlev Tamm, *A Survey of Danish Legal History, in* Danish Law: A General Survey 21 (Hans Gammeltoft-Hansen et al., eds. 1982).

(n4)Footnote 4. *Id.* at 22.

(n5)Footnote 5. Lester Bernhardt Orfield, The Growth of Scandinavian Law 15 (1953).

(n6)Footnote 6. Ditlev Tamm, *A Survey of Danish Legal History, in* Danish Law: A General Survey 23 (Hans Gammeltoft-Hansen, et al., eds. 1982).

(n7)Footnote 7. *Id.* at 24.

(n8)Footnote 8. Danske Komite for Sammanlignende Retsforskning, Danish and Norwegian Law: A General Survey 10-11 (1963).

(n9)Footnote 9. Ditlev Tamm, *A Survey of Danish Legal History, in* Danish Law: A General Survey 26 (Hans Gammeltoft-Hansen et al., eds. 1982).

(n10)Footnote 10. *Id.* at 35.

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CHAPTER 106DK PROPERTY LAW IN DENMARK

13-106DK Thompson on Real Property, Thomas Editions § 106DK.02

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§ 106DK.02 Danish Real Property Law.

§ 106DK.02(a) General Principles.

As in other continental European legal systems, Danish law is divided into the law of things and the law of claims. The law of things deals with rights of disposal in such things as real property, personal property, uses and easements. The law of claims covers transfer of rights and specific contractual rights such as tenancy. Mortgages and pledges are an entirely separate branch of jurisprudence. Property rights are protected by the Danish Constitution:

> The right of property shall be inviolable. No person shall be ordered to surrender his property except where required by the public interest. It can be done only as provided by statute and against full compensation. n11
>
> Where the public interest requires that a person surrenders his personal or real property for public use, he should be fully compensated by the treasury. n12

The property rights thus protected include all private proprietary rights, including uses, mortgages and claims. n13 The somewhat absolute wording of the constitutional provisions is, in practice, mitigated by the levy of taxes and by "general limitations" on property rights which subject them to various types of governmental regulation. Such limitations appeared even in the 19th century, by means of laws such as the Nature Preservation Act, the Town Planning Act and the Building Regulation Act. A 20th century example is the 1949 Agricultural Holdings Act. The most severe regulatory limitations have resulted from urban planning in the 20th century.

§ 106DK.02(a)(1) Impact of Urbanization.

The small size of Denmark and the density of its population have resulted in elaborate regulatory schemes governing land use. n14 Generally, no construction can be started without prior approval from municipal authority, except for some farm houses. Permission is again required before the finished buildings may then be used. Detailed regulations apply to such areas as sewage, insulation, and water, as well as various aspects of town planning. Easements may not be created without local council approval. n15 In relations between adjoining landowners, although regulatory legislation

has an impact, rights and duties are still defined principally by judicial decisions. n16

§ 106DK.02(a)(2) Impact of Environmental Regulation.

Private property rights in Denmark have also been significantly affected by environmental regulation. The Nature Conservation Act and the Environmental Protection Act form the core of the Danish conservation efforts. The Nature Conservation Act is intended to protect the landscape, waterways, lakes, and forests, while the Environmental Protection Act deals with noxious emissions and general protection of the ecological structure. Certain activities which pose an environmental threat are identified by the environmental ministry, and anyone proposing to conduct such an activity must obtain prior ministry approval. Approval, once granted, is usually secure from revocation, but the whole process tends to encourage voluntary compliance.

Subsurface rights are subject to an unusual legal arrangement, as a result of environmental concerns. Subsurface mineral resources that can usefully be extracted, but were not discovered until after February 23, 1932, are owned by the state. Commercially exploitable resources identified prior to that date were subject to private ownership. The result of this ownership is that the government owns most of the oil and natural gas reserves.

Even as to those resources subject to private ownership, limitations are imposed. Prior government authorization is required prior to extraction, and restoration of the site is required when extraction is completed. n17

§ 106DK.02(b) Transfers of Real Property Interests.

The Danish law governing transfers of real property is preoccupied with the rights of third parties, or, viewed another way, with protecting the rights of the parties to the transfer from challenges by third parties. Most Danish real property transfers are transfers by agreement or transfers of execution by levying creditors.

§ 106DK.02(b)(1) Transfers by Agreement and Registration.

Transfers of real property may be based on contract or a money claim entitling the creditor to levy execution. The transfer can be made only by one rightfully entitled to dispose of the property. The most important aspect of real property transfers lies in the registration requirements. n18

Under Denmark's land registration system, all parcels of land are registered and entered as numbered parcels on charts maintained by the Minister of Agriculture. All information pertaining to any individual parcel of land is kept together. The system of recording or registering is considered a judicial function and is administered at the local level, where each "county" maintains a land registry. Difficulties in registration, including a refusal by the local official to perform a registration, may be pursued in the courts.

A right in real estate must be registered in order to enjoy legal protection. n19 An unregistered right is extinguished when the holder of a competing right registers the right in good faith. Good faith means that the holder is unaware of unregistered rights and this ignorance is not due to gross negligence. It is not required that value have been given to acquire the right; a right that is obtained by gift and registered enjoys the full protection of registration. Only rights derived from rights already registered can be registered. If one acquires a right based on a right not previously registered, protection can be obtained only by registering both transfers.

Under Danish registration procedure, upon receipt of the real property transfer document from an applicant, which document must include the applicant's name and address, it is entered in an "application book." Application entries are made chronologically, and legal rights related to application are determined by the date the application is received and entered by the Land Registry. Entries will be accepted only if the document is properly signed and a copy is attached.

Property interests are sometimes not subject to extinguishment by non-registration, such as when the competing right is based on forgery, false certification, incapacity or violent duress. In these circumstances, the holder of the conflicting interest will not succeed even if acting in good faith; however, the state awards the good faith holder an indemnity.

Some rights do not require registration, such as leases, n20 assignments of registered mortgages, taxes or rates levied on real property and prescriptive rights acquired before the Land Registration Act in 1927 (provided that their prescriptive period of twenty years had lapsed prior to that date).

§ 106DK.02(b)(2) Transfers by Prescription.

Property interests may be acquired by prescription following possession for twenty years. The statutory foundation for prescription is in the 1683 Danish Code of King Christian V. n21 When real property interests were transferred by oral ceremonies at periodic meetings among community elders, the passing away and failing memories of such witnesses gave rise to the rules of prescription as a means of providing protection for old titles. Fulfillment of the twenty-year requirement must be proven by the user; it is not necessary to prove that the use or occupancy was adverse to the owner's interest; however, the use must have been visible or otherwise apparent.

§ 106DK.02(b)(3) Transfers by Inheritance.

Although some transfers of property at death are achieved by operation of legislation and by will, most transfers are by intestate succession. This is the most common practice in Denmark. n22 Intestate succession is regulated by the Inheritance Act. Adopted and illegitimate children generally enjoy the same rights as natural and legitimate issue.

The will in Danish law is one of the few documents which is subject to rules of form. n23 A testator must be 18 years old or married, and the document must be in writing and must be signed or confirmed before either a notary public or two witnesses.

§ 106DK.02(b)(4) Regulations on the Sale of Real Property.

With a few exceptions, undivided property can usually be sold without restriction. Among the exceptions is a rule that no single person can acquire more than two farms other than by marriage or inheritance. Also, a farm can only be purchased by a natural person who lives on the premises and farms as a principal activity. Foreigners seeking to acquire Danish real estate must first obtain permission from the Ministry of Justice, subject to current European Community law. n24 In some circumstances, principally in areas zoned for urban development and when lots of over 6,000 square meters are being offered, the real estate must be first offered to the public before it can be sold privately. For land in some recreational areas, the public, rather than the designated purchaser, has the right to enter into the purchase contract.

§ 106DK.02(c) Landlord and Tenant Law.

Traditionally, apartments could only be rented, and not owned. However, in recent years apartment ownership has become possible. Protection for renters in the form of restrictions on rights of termination by the landlord, and rent controls, have been in place since the 1930's.

§ 106DK.02(d) Ownership of Danish Land by Foreigners.

Subject to current requirements of the European Community, foreigners must obtain permission from the Ministry of Justice before they can acquire real estate in Denmark. For the purpose of this requirement, a foreigner is a non-resident of Denmark.

FOOTNOTES:

(n1)Footnote 11. Constitution of Denmark, § 73.

(n2)Footnote 12. *Id.* at § 105.

(n3)Footnote 13. Danske Komite for Sammanlignende Retsforskning, Danish and Norwegian Law: A General Survey 131 (1963).

(n4)Footnote 14. Jesper Berning, *Property Law, in* Danish Law: A General Survey 180 (Hans Gammeltoft-Hansen et al., eds. 1982).

(n5)Footnote 15. *Id.* at 180-181.

(n6)Footnote 16. Danske Komite for Sammanlignende Retsforskning, Danish and Norwegian Law: A General Survey 136 (1963).

(n7)Footnote 17. *Id.* at 181-183.

(n8)Footnote 18. Transfers of chattel ownership are evidenced by possession rather than registration, and easements are not included in the registration protections.

(n9)Footnote 19. Danish Land Registration Act, § 1.

(n10)Footnote 20. However, pre-payments of rent longer than six months must be registered in order to gain protection from extinction. *Id.*

(n11)Footnote 21. §§ 5-5-1, 5-5-3.

(n12)Footnote 22. Jorgen Norgaard, *The Law of Inheritance, in* Danish Law: A General Survey 97 (Hans Gammeltoft-Hansen et al., eds. 1982).

(n13)Footnote 23. *Id.* at 107.

(n14)Footnote 24. Jesper Berning, *Property Law, in* Danish Law: A General Survey 184 (Hans Gammeltoft-Hansen et al., eds. 1982).

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CHAPTER 106EG PROPERTY LAW IN EGYPT

13-106EG Thompson on Real Property, Thomas Editions 106EG.syn

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§ 106EG.syn Synopsis to Chapter 106EG: PROPERTY LAW IN EGYPT

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CHAPTER 106EG PROPERTY LAW IN EGYPT

13-106EG Thompson on Real Property, Thomas Editions § 106EG.01

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§ 106EG.01 History.

§ 106EG.01(a) Traditional Islamic Roots.

"The development of the law of real property in Egypt is essentially a development from a traditional law, mostly Islamic in character, to a modern law, mostly defined in Western terms, but still retaining some of the characteristics of the traditional system." n1 This characterization of property law in Egypt also reflects contemporary Egyptian life, where Islamic tradition is intertwined with the Western practices.

The traditional Islamic system of land tenure is a product of the classical Islamic law known as "the *Shari'a*," as well as administrative or "*qanun* law." n2

> [Although] Muslim jurists did not develop a cohesive theory of property rights, they did develop certain basic principles. According to the classical jurists, a thing in order to be owned must have the following attributes: it must have some value; must be capable of ownership; and its use must be permitted. n3

Islamic law dictated which things were not qualified to be owned. n4

Scattered throughout the *Shari'a*, especially in the sections dealing with contracts, acquisition of property, and state revenue, are various statements of principles which, when brought together, sketch an outline system of land tenure:

> According to this system land holdings are basically of three types: holdings of private property held in full ownership, holdings of *waqf* lands, i.e. lands held in perpetuity with the income devoted for the upkeep of a charity or the family of the constitutor of the *waqf* and holdings of state-owned lands with various conditions of tenure. n5

The first two types mentioned above were dealt with extensively in the *Shari'a*; however, the third category, though arguably the most important in terms of revenue and production, was dealt with only passingly. As a result, the state regulated state-owned lands through the *qanun* or administrative law. n6

> The *Shari'a* was regarded by all, including the jurists, as a divinely ordained code of morality designed to shape a virtuous community on earth and prepare human beings for the hereafter. To enforce it was the responsibility, indeed the raison d'etre, of the state, and to transgress against it a sin as much as a crime. n7

§ 106EG.01(b) Original Types of Land Tenure Contemplated by the Shari'a.

§ 106EG.01(b)(1) Taxable Private Holdings.

In early Islamic centuries classification of real property was not based on ownership rights as much as on the amount of tax the state could obtain, based on the amount of revenue generated by the land. n8 Lands were classified as either *ushri* or *kharaji*, depending on the type of tax paid.

The *ushri* (tithe) was a religious tax paid by the absolute owner of cultivated land as part of almsgiving (*zakat*). Usually, the tax amounted to approximately one-tenth of the produce of the land. n9 The *ushri* landholder acquired this status by converting to Islam, if the landholder was a member of an Arabian tribe or if the land was included as spoils of war acquired by the invading Moslem soldiers.

The *kharaj* was the tax levied on the non-Muslim landholders. It is not known if these lands were held in *mulk* (full ownership); however, the tax came to be viewed as a rent or tribute. n10 The tax levied on the *kharaj* holder could be as high as one-half of the produce. n11

§ 106EG.01(b)(2) State-Owned Holdings.

Lands that were neither *ushri* or *kharaj* were part of the state domain. The state held the lands in full ownership and was clearly the proprietor. When conquered by the state, these lands were conveyed or conceded as an *iqta'tamlik* (a concession of full ownership) or an *iqta'istighlal* (a concession of the right to use property, with title remaining vested in the state). The latter form in later centuries became the "feudal system" of the Islamic empire. *Mawat* or "dead lands" were those lands deemed to be ownerless and uncultivated (normally stretches of desert); however, jurists held that ownership of *mawat* lands was nevertheless vested in the state. n12

§ 106EG.01(b)(3) *Waqf* Landholdings.

Waqf lands were in a class of their own, because of their unique characteristics of inalienability and perpetuity of title. n13 "The title (*raqabah*) was immobilized forever and the usufruct was to be used for the support of a charitable organization or a family (with a reversion to charity in the case of extinction of the family)." n14

Waqf lands were not to be leased for long periods of time, and because of this restriction, improvement on the land was deterred rather than encouraged. In the centuries that followed, however, legal devices were created to circumvent the restriction and bring about long-term leases. These leases in Egypt were most commonly known as "*ijaratayn*, *hikr* or *khuluw*." n15

Contrary to the laws established in the *Shari'a*, "in later centuries the state allowed the holders of its concessions to constitute their interests in *waqf*." The *Shari'a* permits only *mulk* lands to become *waqf*. Holders of concessions did not have title to dedicate in perpetuity and as such their *waqfs* were termed "untrue" or "unsound." n16

Kharaji lands were later assimilated into the state domain category, where the state gradually succeeded to possession of those lands possibly through escheat or confiscation, but more likely by the introduction of tax farming and assignments of the land to pay state debts. Subsequently, a feudal system was established where the *kharaji* lands were assigned to the "feudal lords." n17

§ 106EG.01(c) Pre-19th Century Historical Developments.

The feudal system was in full force by the time the Mamluks came to power in the thirteenth century. Under the Mamluk system,

> all state-domain lands held by private individuals were subject to the disposition of the state. Also, just as *kharaji* lands had been assimilated into the state domain, much former *mulk* land and even *waqf* land, was taken over by the state and regulated as state domain under *qanun* law. n18

These lands were then distributed to mainly military fief holders as concessions and the state allowed a form of *waqf* (*rizqah ahbasiyah*) on the usufruct of these state lands. n19

The Ottomans ruled over Egypt beginning in 1517, adding their own modifications to the feudal system of land tenure. Changes included abolishing the Mamluk fiefs and re-establishing tax farms from the land that had reverted to state domain. The tax farmers were given the right to collect taxes from the *kharaj* and retain the portion over that which they were required to pay the state. n20 The tax-farmers were granted land for their personal use, and eventually they acquired rights to the land similar to those of the fiefs in Mamluk times. n21 "Those rights included a life interest in the tax farm with the power to alienate, mortgage, or lease that interest," and their children were given priority to succeed to the rights at the death of the tax-farmer. The tax-farmers were even granted certain justiciable powers over the peasants working on their land. n22 In theory these lands were state lands, although their form of land tenure was different.

This system of land tenure continued into the nineteenth century, at which time there were three forms of property holdings: private property (*mulk*), *waqfs* and state lands. The *mulk* lands were limited to the urban areas and agricultural lands were almost entirely state-held lands (directly through the royal domain or through state farms). However, private property holdings and state lands became more and more difficult to distinguish, because of the expanding property rights of state landholders. n23

§ 106EG.01(d) Influences from the 19th Century to the Modern Civil Code.

§ 106EG.01(d)(1) Muhammad Ali to Ismali.

Muhammad Ali was appointed governor in 1805 by the ruling Ottoman Empire. When he came to power, his main objective in the area of land tenure was to reassert the diminished state rights in state land. Immediately tax-farms were abolished and replaced with a burdensome direct tax system, within which even the lands granted to tax-farmers for their private use were subject to tax. Former tax exempt lands such as the *rizqah ahbasiyah* were made subject to the tax and other property holdings were confiscated, leaving former landholders with only a life estate. "By destroying the privileged position of the nobility, Muhammad Ali laid the ground for the later development of extensive private property holdings by the peasantry." n24

In 1829 Muhammed Ali began redistribution of the land by granting uncultivated land (not included in the cadaster). n25 These lands eventually became indistinguishable from private property and by the mid-1800's under Said private property holdings were significantly increased. n26

Three important decrees followed that increased individual interests in property. First, the Decree of Ismail (1863-79) allowed *kharaj* landholders to dispose of property at will, previously allowed only with *mulk* lands. Second, the Muqabalh Law of 1871 allowed *kharaj* owners to purchase the fee simple ownership of their land. Third, the Decree of 1896 finally abolished all distinctions between *kharaj* and *mulk* lands, declaring both as "lands of full ownership." n27

§ 106EG.01(d)(2) Ottoman Charter of 1841.

The Ottoman Charter of 1841 gave Egypt the right to enact its own land law, rather than adhere to Ottoman law. As a

result of the Charter, Egypt never adopted the Ottoman Land Law of 1858 or the Majallah, the Ottoman Civil Code. n28

§ 106EG.01(d)(3) Mixed and National Courts.

The Mixed Courts were created in 1876 "to protect foreign interests and the promulgation of the Mixed Civil Code to be used in those courts, based on the Napoleonic Code." n29 The National Courts were created in 1882 to protect and promulgate the National Civil Code and national interests. n30 Both were based on the Napoleonic Code, probably a remnant of the 1798 Napoleonic invasion.

However, there still remained a considerable amount of Islamic law, because of the unique nature of Egyptian land tenure, which could not be covered by a non-Islamic code. In 1889 Mixed Courts were ordered to apply all Egyptian laws pertaining to lands, embankments and canals. The *Shari'a* Courts, however, still had jurisdiction over all matters involving the *waqf*. n31

Among the codes' greatest contributions to Egyptian property law was organization, "by clearly defining property rights and means of acquiring and disposing of those rights." Another contribution was the distinction between the private and public domain of state-owned lands, which later under the 1948 council of the state proved to be important. n32

FOOTNOTES:

(n1)Footnote 1. Farhat J. Ziadeh, *Law of Property in Egypt: Real Rights, 26 Am. J. Comp. L. 239 (1978).*

(n2)Footnote 2. *Id.*

(n3)Footnote 3. Herbert J. Liebesney, The Law of the Near and Middle East 223 (1975).

(n4)Footnote 4. *Id.* For example, wine and pork are forbidden under the Islamic Code and were therefore forbidden for ownership. However, jurists were divided as to whether non-Muslims could own forbidden things.

(n5)Footnote 5. Farhat J. Ziadeh, Property Law in the Arab World 1 (1979).

(n6)Footnote 6. *Id.*

(n7)Footnote 7. Abraham Marcus, *Real Property and Society in the Premodern Middle East: A Case Study, in* Property Social Structure and Law in the Modern Middle East 109 (Ann Elizabeth Mayer ed. 1985).

(n8)Footnote 8. Farhat J. Ziadeh, *Law of Property in Egypt: Real Rights, 26 Am. J. Comp. L. 238 (1978).*

(n9)Footnote 9. Farhat J. Ziadeh, Property Law in the Arab World 2 (1979).

(n10)Footnote 10. Farhat J. Ziadeh, *Law of Property in Egypt: Real Rights, 26 Am. J. Comp. L. 241 (1978).*

(n11)Footnote 11. Farhat J. Ziadeh, Property Law in the Arab World 2 (1979).

(n12)Footnote 12. Farhat J. Ziadeh, *Law of Property in Egypt: Real Rights, 26 Am. J. Comp. L. 241 (1978).*

(n13)Footnote 13. Farhat J. Ziadeh, Property Law in the Arab World 2 (1979).

(n14)Footnote 14. Farhat J. Ziadeh, *Law of Property in Egypt: Real Rights, 26 Am. J. Comp. L. 242 (1978).*

(n15)Footnote 15. Farhat J. Ziadeh, Property Law in the Arab World 3 (1979).

(n16)Footnote 16. *Id.*

(n17)Footnote 17. Farhat J. Ziadeh, *Law of Property in Egypt: Real Rights, 26 Am. J. Comp. L. 242 (1978).*

(n18)Footnote 18. *Id.*

(n19)Footnote 19. *Id.*

(n20)Footnote 20. *Id.*

(n21)Footnote 21. *Id. at 243.*

(n22)Footnote 22. Farhat J. Ziadeh, Property Law in the Arab World 3 (1979).

(n23)Footnote 23. Farhat J. Ziadeh, *Law of Property in Egypt: Real Rights, 26 Am. J. Comp. L. 243 (1978).*

(n24)Footnote 24. *Id.*

(n25)Footnote 25. The cadaster was a public register of land ownership used in assessing taxes. *Id. at 244.*

(n26)Footnote 26. *Id.*

(n27)Footnote 27. *Id.*

(n28)Footnote 28. *Id.*

(n29)Footnote 29. *Id. at 245.*

(n30)Footnote 30. *Id.*

(n31)Footnote 31. *Id.*

(n32)Footnote 32. *Id.*

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CHAPTER 106EG PROPERTY LAW IN EGYPT

13-106EG Thompson on Real Property, Thomas Editions § 106EG.02

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§ 106EG.02 The New Civil Code.

§ 106EG.02(a) Introduction.

On October 15, 1949, the new civil code was adopted. n33 This new Egyptian Civil Code was drafted by an Egyptian jurist and a French jurist and superseded all previous codes. The new civil code is a combination of the *Shari'a*, the old codes, jurisprudence from Egyptian courts, and a variety of modern civil codes from twenty European, Asian, African and American nations.

> Fortunately for the drafters of the Code, there had been so much consolidation of real property laws in previous reform measures that their work consisted primarily of revising the law relating to only one form of land tenure, private ownership. State lands and *waqf* lands, the two other categories of land holdings, were regulated by provisions of the Code in a manner consistent with other provisions of civil law. The later abolition of the family *waqf* and the restrictions on land ownership effected after the Revolution of 1952 affected property rights, but for the most part the provisions of the Civil Code continue in force today. n34

§ 106EG.02(b) Aspects of Real Property.

§ 106EG.02(b)(1) Ownership of Real Property.

§ 106EG.02(b)(1)(i) Rights of Ownership.

Article 802 of the new Civil Code defines ownership as the exclusive right to use, enjoy and dispose of a thing. n35 When adopting the Code, the Senate required that the whole Code be consistent with the "social function" doctrine of ownership, although this is not made explicit in the Code. This means that an owner is protected in rights ownership, as long as those rights do not conflict with a public interest or with a worthy special interest. n36

Article 803 provides that ownership of land "includes that which lies above and below the surface of the land to the extent that it can be beneficially used by the owner." n37 However, the state may use the airspace and the land below the surface as a matter of public interest, if that use does not damage the property. An owner can be deprived of

property only as prescribed by law and with restitution. n38

§ 106EG.02(b)(1)(ii) Restrictions on Ownership.

The first restriction on ownership is a general prohibition against abuse of rights. n39 Article 807 states:

(1) The owner must not exercise his rights in an excessive manner detrimental to his neighbor's property.

(2) The neighbor has no right of action against his neighbor for the usual unavoidable inconveniences from neighborhood, but he may claim the suppression of such inconveniences if they exceed the usual limits, taking in consideration ... custom, the nature of properties, their respective situations and the use for which they are intended.

Two other restrictions are embodied in the principles of ancient lights and privacy, which are particularly important in Islamic countries, and rules on the free alienability of land. n40 As to ancient lights and privacy, Article 819 does not allow a neighbor to have a direct view into his neighbor's property unless the view is of a distance of more than one meter (barring a prescriptive right, in which case the neighbor cannot build within one meter distance). If it is not a direct view, then the view must be of a distance of at least half a meter. A light shaft must be built above the normal height of a person and must be for only air and light and not for a view into a neighbor's property (Article 821).

As to alienability, it may be restricted if a contract or will contains a clause stipulating the inalienability of property, but such a clause will only be valid if based on a legitimate reason and limited to a reasonable duration. n41 Legitimate reason is deemed to mean the protection of a lawful interest of a party to the will or contract and a reasonable duration is the duration of the life of any of the parties. n42

§ 106EG.02(b)(1)(iii) Joint Ownership.

Article 825 of the Civil Code defines joint ownership as follows: "When two or more persons are owners of the same thing, but their respective shares are not divided, they are co-owners and, in the absence of proof to the contrary, their shares are deemed equal."

The joint owner has rights limited to the share, although the right may affect the entire property. The joint owner has rights of use of the entire property and of its fruits, but is limited by the rights of the other joint owners.

Article 826 provides that the joint owner may alienate the share as long as it does not cause damage to the other joint owners.

Special types of joint ownership include obligatory joint ownership, family joint ownership, and joint ownership of stories in a building. Obligatory joint ownership is when "the co-owners of a property held in common cannot demand its partition if it follows from the use to which the property is intended that it should always remain in common (Article 850)."

Family joint ownership was derived from Swiss and Italian law. This joint ownership may be created through an agreement limited to fifteen years, with flexibility as to withdrawal of any of the co-owners with six months notice. The purpose of such a joint ownership is to limit it to family members who may have a common interest in property. n43

Islamic law is the major contributor to the law governing joint ownership in stories of a building.

> The Code delineates the parts of a building which are owned in common under a joint ownership agreement and stipulates the rights of the co-owners in the jointly-owned premises. The Code outlines the obligation of the owner of a lower story to make repairs of the lower story to prevent higher stories from falling (Art. 859). In the case of the building falling the owner of the lower story is bound to rebuild his story, and the Code provides remedies for his failing to do so (Art. 860). n44

§ 106EG.02(b)(2) Acquisition of Real Property.

§ 106EG.02(b)(2)(i) Appropriation.

Article 874 of the Code states:

If ... an Egyptian cultivates or plants uncultivated land or builds thereon, he becomes forthwith owner of the part cultivated, planted, or built on, even without the authority of the state, but he loses his ownership by non-use for five consecutive years during the first fifteen years following his acquisition of ownership.

A 1958 amendment limited the reclamation areas and a 1964 amendment imposed a requirement of state authority. Under the Land Reform Act, some of the *mawat* lands that could be irrigated through subterranean waters were sold rather than acquired through improvement. These lands were subject to several conditions.

§ 106EG.02(b)(2)(ii) Succession.

The laws of inheritance in the Code are completely governed by the *Shari'a*. All outstanding debts must be settled prior to any distribution to heirs. n45 In practice, this means that:

> (1) the property is subject to the real rights of the estate's creditors, which are akin to the rights of a mortgage;
>
> (2) the heirs may dispose of the property if they register their rights of inheritance with the proper government bureau, but such disposal is subject to the rights of creditors; and
>
> (3) the registration of the rights of the creditors renders those rights effective as against third parties. n46

§ 106EG.02(b)(2)(iii) Accession.

Accession is the joining of two distinct properties without an agreement between the owners. n47 This occurs when an owner of land acquires materials that are not part of the land, but to remove them would cause serious damage. The owner who acquires by accession must pay the value of the materials plus indemnification, if indemnity is due (Art. 923). If a landowner in good faith builds accidently on a neighbor's land, a court may rule for the transfer of that land to the builder as long as adequate compensation is paid (Art. 928). n48

Accession by natural forces, such as shifting of river banks, usually does not change ownership. n49

§ 106EG.02(b)(2)(iv) Contract.

Transfer of property by contract is the most common type of transfer, other than by inheritance. n50

> While the code stipulates that ownership of movables and immovables may be transferred by contract (Art. 932), it also provides that real rights over immovable property, including ownership, are not transferred between parties or as regards third parties unless the law regulating the publication of real rights (*al shahr alaqari*) is observed (Art. 934). n51

Ownership is considered to have been transferred at the time of contract only if the registration has already occurred. n52 Registration has been traditionally filed under the names of the parties; however, a 1964 law creates a system of registration based on plots of land, with implementation depending on a new cadastral survey.

§ 106EG.02(b)(2)(v) Preemption.

Article 935 defines preemption as "one's right to substitute himself in place of the purchaser in certain sales of immovable property, subject to certain conditions." The Civil Code's provisions of preemption are based on a combination of the two different laws in the Mixed and National Codes. The preemption doctrine was retained in the new Civil Code, despite great opposition, because it was considered historically significant. n53 However, the doctrine was severely restricted. n54

§ 106EG.02(b)(2)(vi) Possession.

The new Civil Code attempted to define possession, but it was defeated by the senate and therefore there is no definition of possession in the Code. Possession includes acquisition, transfer, and loss. There is no adverse possession. n55

Possession can be transferred in two ways: (1) By the effect of law, as with an heir and; (2) as a means of disposal, such as contract or bequest. n56 "Possession ceases when the possessor abandons actual control over the right or when he loses it any other way." n57

§ 106EG.02(b)(3) Types of Interests in Real Property.

§ 106EG.02(b)(3)(i) Usufruct.

The Egyptian Code does not define usufruct. The right of usufruct is a real right for the use and exploitation of a thing that belongs to another. n58 Usufruct is a right attached to the land and terminates at the death of the usufructuary. n59 "In Egypt, ... ownership of a right of usufruct is uncommon because the right does not arise by operation of law between spouses or between parents and children and only rarely does a person give a right of usufruct to another by contract or will." n60 Article 985 of the Civil Code provides that "... a usufruct may be bequeathed to successive persons only if they are alive at the time of the bequest ... [and may include] a child en ventre."

Article 993 provides that if the usufruct terminates before the harvest period, because of an expired term or the death of the usufructuary, the period is extended to ripening of the crops.

Articles 987-995 provide for extinction of the right as a result of non-use over a period of fifteen years; they also regulate the uses of the property, the liability of the usufructuary for normal expenses, and repairs to maintain the property.

§ 106EG.02(b)(3)(ii) *Hikr.*

"*Hikr* is a lease whose duration is longer than that of an ordinary lease and creates a right in the lessor." n61 Egypt has recognized long leases on *waqf* property for modest rents. The lessee can exploit the land and repair it extensively in exchange for the rent paid. n62

The Code relies on Islamic law to establish the rules regulating *hikrs*. Article 999 limits the duration of the *hikrs* to sixty years. Article 1012 established that all *hikrs* must be on lands recognized as *waqfs*. Article 936(d) provides for the extinction of the *hikr* through preemption either by the holder of the *hikr* or the owner of the property. Article 1000 provides that a "... *hikr* can only be concluded with the permission of a judge upon a showing of expediency." Article 1001 provides that "... the grantee of a *hikr*, having a real interest, may dispose of it and transmit it by inheritance."

Article 1002 establishes that improvements made on the *hikr* belong to the grantee. Article 1004 provides that a *hikr* cannot be concluded for less than the rent given for similar lands. Finally, Article 1011 establishes that if the *hikr* is not used in thirty-three years it reverts to the status of a *waqf*.

Two types of *hikr* are recognized: (1) "two rents" (*ijaratayn*) and (2) *khuluw al-intifa*. Under the first, the *hikr* is paid under two rents. The first rent is a lump sum for the value of the building and the second is an annual payment related to the value of the land. The second type of *hikr* is "a contract by which a *waqf* leases property for an indefinite period of time for a fixed rent." n63 *Hikrs* have little significance in the modern era, especially after a 1952 law abolishing *waqfs* .

§ 106EG.02(b)(3)(iii) Servitudes.

Article 1015 of the Egyptian Civil Code defines servitude "as a right which limits a property owner's enjoyment of his land and which exists for the benefit of land belonging to another person." Servitudes contain three elements: the dominant tenement, the servient tenement and the benefit which the servient tenement provides for the dominant tenement. n64

Servitudes survive transfers, are transmitted to the dominant owner, and continue to burden the servient tenement. According to Article 1015 of the Civil Code a servitude may be imposed upon state property, provided that it is not incompatible with the use for which such property is intended. n65

Servitudes are created by contract or prescription, when there is a discernible object indicating the existence of the servitude. If the servitude is not apparent or visible, it cannot be obtained through a prescription. According to the Civil Code, a prescription may also be created by specification (*takhsis*) of the original owner of the land. n66 "A specification is created when the owner of two separate properties places a visible marker between the two properties, thereby creating a dominant-servient relationship between them, which would indicate the existence of a servitude if the two properties belonged to different owners." n67

Extinction of a servitude occurs after fifteen years of non-use, unless created for the benefit of a *waqf,* in which case the period is thirty-three years. A servitude may also end if it is no longer useful or its burden is disproportionately greater than its benefit. However, if the burden outweighs the benefit, compensation may be required for the forfeiture of the servitude. n68

§ 106EG.02(b)(4) Real Securities.

§ 106EG.02(b)(4)(i) Mortgage.

The Code defines mortgage as "... a contract by which a creditor acquires a real right over an immovable pledged to the payment of his debt, by which he obtains preference over ordinary creditors and secured creditors following a rank to proceeds from a sale of the immovable. A right to the proceeds from a sale of the immovable obtains to the creditor even if the debtor has sold the pledged property to a third person." n69

According to Article 1041, a mortgage is indivisible, and if the heirs inherit mortgaged property, it continues to be mortgaged for the entire outstanding debt. Article 1031 requires that the mortgage only be constituted through a *rasmi* (authentic or official document). A mortgage ranks solely from the date of its registration, regardless of whether it secures a conditional, future or contingent debt.

§ 106EG.02(b)(4)(ii) Judgment Charge.

A judgment charge, which differs from a mortgage in its mode of acquisition, may, if obtained in good faith by a creditor, be imposed on immovable property of the debtor as security for a claim. If the debtor dies, a creditor cannot obtain a judgment charge. n70

§ 106EG.02(b)(4)(iii) Pledge.

Article 1096 of the Egyptian Civil Code defines the pledge as "... a contract by which a person undertakes, as security for his debt or the debt of a third person, to give possession of property (or a real right in property) to a creditor or a person chosen by both parties to take possession in place of the creditor." Possession is retained until the debt is paid; however, in the event of default the right or pledge may be sold to satisfy the debt.

§ 106EG.02(b)(4)(iv) Privileged Right.

Article 1130 of the Egyptian Civil Code defines the privileged right as a preference accorded to a particular right because of its quality. The commentary of the Code explains that it is the right itself which is privileged, and not the creditor holding the right, and that law determines which rights are to be privileged, as well as how privileged rights are to be ranked.

Three reasons for according preferences are: (1) expenses incurred for the common good by a creditor benefit all creditors and should therefore have preference (legal proceedings for the sale and preservation of property are privileged against that property); (2) a public policy argument that taxes and duties are privileged, only preempted by legal proceedings; (3) movables for their repair and preservation are secured by a privileged right against the movable. n71

> The general rules relating to privileges are similar to those governing pledges and mortgages. A privilege cannot exist against a good-faith holder of a movable (Art. 1133). A privileged right against immovable property is subject to the same rules as mortgages, to the extent that such rules are compatible with that type of privilege right (Art. 1134). Finally, privileges are extinguished by the operation of the same rules which extinguish mortgages and pledges (Art. 1136). n72

§ 106EG.02(b)(5) Leases.

§ 106EG.02(b)(5)(i) Introduction.

General provisions of the Civil Code deal with the elements of a lease, the effects of a lease, the assignment of a lease and sublease, the termination of a lease and the death or insolvency of the lessee. n73 The Code places responsibility on the lessor to enable the lessee to enjoy the leased property.

> The principal obligations of the lessor to the lessee under the new code are the obligations to: (1) deliver the leased property and its accessories, (2) maintain the leased property in the same state it was at the time of delivery, (3) abstain from doing anything which may disturb the lessee in his enjoyment of the leased property and warrant against any disturbance or damage based on a lawful claim by any other lessee or any successor in title of the lessor, and (4) warrant against all defects which prevent or appreciably diminish the enjoyment of all property (Arts. 564, 567, 571, 576). n74

§ 106EG.02(b)(5)(ii) Agricultural Leases.

The Code addresses agricultural leases; however, they have since been modified and supplemented by the provisions in the Agrarian Reform Law of 1952. The Civil Code deals with cattle and agricultural fixtures on the land, defines the agricultural year, establishes use and maintenance of a land's fertility, prevents the lessee from destroying crop or seed, protects the lessee's right to harvest, and requires the lessee to allow the succeeding lessee to prepare the land for sowing.

The Reform Act established rent ceilings, the length of time a lease could run (which was later extended), and required that valid leases be in writing. The Reform Act also limited agricultural leases only to those who worked the land

themselves.

§ 106EG.02(b)(5)(iii) Waqf Lease.

The *waqf* lease, prior to the new Civil Code, was always placed under Islamic courts' jurisdiction and never categorized with normal leases, except under the National Code. Articles 628-634 of the Civil Code adopted provisions from Islamic law to protect the *waqf* lease. According to the Code:

> The *nazir* (guardian) of the *waqf* property has the right to let property, but a beneficiary of a *waqf* has no such right unless the constitutor of the *waqf* specifically grants it to him or unless the *nazir* or a judge authorizes him to exercise it. ... The *nazir*, with certain exceptions, may not lease *waqf* property for more than three years, and leases of *waqf* property made for grossly inadequate consideration are invalid. n75

§ 106EG.02(b)(6) Landlord/Tenant Law.

In the past, landlord/tenant law had been governed by a lease contract with no restrictions. With practically the entire population living on about three percent of the total land of Egypt, population density and congestion have forced more clear-cut regulation of landlord/tenant law. The state has also stepped in on this previously "free relationship between owners and tenants," because of the need to keep social balance and political stability in a country where much recent change has keenly affected the housing market. n76

In recent years there has been a migration to Cairo, raising demand for housing and at the same time increasing rents ten to fifteen times within three years. n77 Previous laws controlling rents had left investors and landlords bitter, and many now sell their separate units (*tamlik*) in the free market even before construction is complete. n78 In 1977, the government tried to limit the sale of *tamlik* in order to increase the availability of rental flats, but investors found ways to avoid the restricting law. n79 As a result there has been an increase of "informal housing" and of the practice of paying "key money" n80 to obtain a rent-controlled flat. n81

FOOTNOTES:
(n1)Footnote 33. *Id.*

(n2)Footnote 34. *Id.*

(n3)Footnote 35. *Id.* at 250.

(n4)Footnote 36. *Id.*

(n5)Footnote 37. *Id.* at 251.

(n6)Footnote 38. *Id.*

(n7)Footnote 39. Farhat J. Ziadeh, Property Law in the Arab World 27 (1979).

(n8)Footnote 40. *Id.* at 28.

(n9)Footnote 41. *Id.* at 29.

(n10)Footnote 42. *Id.*

(n11)Footnote 43. *Id.* at 31-33.

(n12)Footnote 44. Farhat J. Ziadeh, *Law of Property in Egypt: Real Rights, 26 Am. J. Comp. L. 252 (1978).*

(n13)Footnote 45. *Id. at 253.*

(n14)Footnote 46. *Id. at 253-54.*

(n15)Footnote 47. *Id. at 254.*

(n16)Footnote 48. *Id.*

(n17)Footnote 49. Art. 918: Alluvium deposited by a river belongs to the adjoining owner. Art. 919: Land uncovered by the sea belongs to the state. Art. 920: Retreat or flooding of water does not change ownership boundaries of land. Art. 921 changed by Law No. 100 of 1964, which states that lands uncovered by a river and islands that form in a channel belong to the state.

(n18)Footnote 50. Farhat J. Ziadeh, *Law of Property in Egypt: Real Rights, 26 Am. J. Comp. L. 254 (1978).*

(n19)Footnote 51. *Id. at 254-55.*

(n20)Footnote 52. *Id. at 255.*

(n21)Footnote 53. *Id.*

(n22)Footnote 54. The right of preemption may be exercised by the following, listed in preferential order: (1) the bare owner; (2) the co-owner in common; (3) the usufructuary; (4) in the case of a *hikr*; (5) the neighboring owner in some cases, as when a servitude exists, buildings are upon the land, or if the land is on both sides of the property and at least half the value of the land has been sold.

A person may not exercise a preemptive right if: (1) the sale is by public auction; (2) the sale is made to relatives; (3) the property sold is for religious purposes or to be annexed to property already for that purpose.

The Code requires that the preemptor notify both the purchaser and the vendor of intentions to preempt (Arts. 940-491), notify within a strict time limit (Art. 943), and deposit the full sale price of the property with the court of the district in which the property is situated, prior to any action towards preemption (Art. 942).

(n23)Footnote 55. Farhat J. Ziadeh, Property Law in the Arab World 51 (1979).

(n24)Footnote 56. *Id.*

(n25)Footnote 57. *Id.* at 52.

(n26)Footnote 58. *Id.* at 61.

(n27)Footnote 59. *Id.*

(n28)Footnote 60. Farhat J. Ziadeh, *Law of Property in Egypt: Real Rights, 26 Am. J. Comp. L. 260 (1978).*

(n29)Footnote 61. *Id. at 261.*

(n30)Footnote 62. *Id.*

(n31)Footnote 63. *Id. at 261-262.*

(n32)Footnote 64. *Id. at 263.*

(n33)Footnote 65. *Id.*

(n34)Footnote 66. *Id.*

(n35)Footnote 67. *Id. at 263-264.*

(n36)Footnote 68. *Id. at 264.*

(n37)Footnote 69. Article 1030 of the Egyptian Civil Code.

(n38)Footnote 70. Farhat J. Ziadeh, *Law of Property in Egypt: Real Rights, 26 Am. J. Comp. L. 266 (1978).*

(n39)Footnote 71. *Id. at 268.*

(n40)Footnote 72. Ziadeh, p. 269.

(n41)Footnote 73. *Id.* at 248.

(n42)Footnote 74. *Id.*

(n43)Footnote 75. *Id.* at 249.

(n44)Footnote 76. Milad M. Hanna, *Real Estate Rights in Urban Egypt: The Changing Sociopolitical Winds, in* Property Social Structure in the Modern Middle East 189 (Ann Elizabeth Mayer ed., 1985).

(n45)Footnote 77. *Id.* at 200.

(n46)Footnote 78. *Id.* at 204.

(n47)Footnote 79. *Id.* at 205.

(n48)Footnote 80. *Id.* at 207.

(n49)Footnote 81. *Id.* at 206-7.

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CHAPTER 106EG PROPERTY LAW IN EGYPT

13-106EG Thompson on Real Property, Thomas Editions § 106EG.03

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§ 106EG.03 Recent Changes in Egyptian Property Law.

§ 106EG.03(a) Agricultural Reforms.

Many changes occurred under Nasser's "revolutionary regime"; among them were:

> those relative to the reclamation of land, the ownership of land formed by the action of water, the abolition of private *waqfs* and the placing of lands of charitable *waqfs* and of the private domain of the state beyond the pale of acquisitive prescription, and the virtual elimination of *hikr*. All these changes were predicated upon the Agrarian Reform Law of 1952 (no. 178) and the philosophy on which it was based. n82

The Agrarian Reform Law brought about sweeping land ownership reform and targeted large landowners by limiting the amount of land a person could own to 200 acres. Gradually, this ownership area has been expanded. The Agrarian Reform Law also limited the minimum period of leases to three years, although this, too, was later extended. Leases were required to be in writing. n83

§ 106EG.03(b) Foreign Ownership of Land.

Nasser's Administration attacked foreign ownership of Egyptian land, either by severely restricting or banning it outright. n84 In 1963, land owned by foreigners was expropriated. However, when Sadat came to power, a policy of allowing foreigners to own land was re-introduced. "He promised repatriation and guaranteed both foreign and domestic investors that their properties would not be expropriated. Sadat has also given $10 million in compensation to Americans whose holdings were confiscated by Nasser in 1961." n85

However, the move towards allowing foreigners to own property has been slow. In 1978, foreigners were not allowed to own property worth more than 1,000 Egyptian pounds. This is a sore subject, particularly with non-Egyptian Arabs who would like to purchase land in Egypt. n86

FOOTNOTES:
(n1)Footnote 82. Farhat J. Ziadeh, *Law of Property in Egypt: Real Rights, 26 Am. J. Comp. L. 271 (1978).*

(n2)Footnote 83. *Id.* at 270.

(n3)Footnote 84. David F.Forte, *Egyptian Land Law: An Evaluation, 26 Am. J. Comp. L. 276 (1978).*

(n4)Footnote 85. *Id. at 276.*

(n5)Footnote 86. *Id. at 277.*

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CHAPTER 106ES PROPERTY LAW IN SPAIN

13-106ES Thompson on Real Property, Thomas Editions 106ES.syn

§ 106ES.syn Synopsis to Chapter 106ES: PROPERTY LAW IN SPAIN

§ 106ES.01 Civil Code and Regional Systems ("Regimenes Forales")

§ 106ES.01(a) Constitution of 1978

§ 106ES.02 Rights In Rem

§ 106ES.02(a) Concept and Classification

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§ 106ES.03 Limited Rights In Rem

§ 106ES.03(a) Usufruct

§ 106ES.03(b) Use and Habitation

§ 106ES.03(c) Easement

§ 106ES.03(d) Ground Rents (Censos)

§ 106ES.03(e) Emphyteutic Ground Rents

§ 106ES.03(f) Surface

§ 106ES.03(g) Option

§ 106ES.03(h) Pre-emption and Redemption

§ 106ES.03(i) Mortgage

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§ 106ES.03(k) Antichresis

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§ 106ES.04 Lease

§ 106ES.04(a) Rustic Lease

§ 106ES.04(b) Urban Lease

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§ 106ES.05(a) Acquisition of Real Properties

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CHAPTER 106ES PROPERTY LAW IN SPAIN

13-106ES Thompson on Real Property, Thomas Editions § 106ES.01

§ 106ES.01 Civil Code and Regional Systems *("Regimenes Forales")*

[Go To Supp]

The legal system of real property in Spain is the result of a long and rich history based on Roman law, which constitutes the core of the Spanish legal tradition. Law on the Peninsula evolved with the Visigothic invasion at the beginning of the 5th century. This resulted in the entry of Germanic law which coexisted with the law of Hispanic people. The legal unification and territorial application of a sole legal system took place with the promulgation in the 7th century of the *Liber Judiciorum.* In the 13th century this was translated and adapted in Castile, where it was known as *Fuero Juzgo*. The importance of Muslim rule from the 8th century over large parts of the Peninsula and the long period of reconquest, which ended with the taking of Granada in 1492 must also be noted. During this period many kingdoms were set up. These kingdoms were unified under a sole crown with the marriage of Isabella of Castile and Ferdinand of Aragon. However the legal institutions of each kingdom did not disappear as a result of the unification of the kingdoms. In some cases, and as a result of subsequent historic events, the regional systems were recognized and maintained as a privilege for the services rendered to the nation.

Given this history anyone who comes into contact for the first time with the Spanish legal system should not be surprised that different private legal systems coexist. Real property law is not only ruled by the Civil Code and other State legislation, but many regions have their own law in this matter, particularly Aragon, the Balearic Islands, Catalonia, Galicia, the Basque Country and Navarre.

§ 106ES.01(a) Constitution of 1978

The Constitution of 1978 created a new territorial organization system. Spain is currently divided in 17 autonomous regions (*Comunidades Autonomas)* and 2 autonomous cities, and each one has its own parliament, executive government and judicial authority that has jurisdiction over matters arising in its territory.

Therefore the promulgation of the Constitution and the subsequent development of the so called State of Autonomous Communities, with the passing of the relevant Statutes of Autonomy (*Estatutos de Autonomia)* by each autonomous

region, resulted in the creation of the different regional legal systems. When considering this structure one must bear in mind that "the main principle of their relationship with State law is not the principle of normative hierarchy, or of succession in time, but the principle of competence in matters, in accordance with the Constitution and the Statutes" (Lacruz Berdejo and others, *"Elementos de Derecho Civil--I Parte General, Vol. I" Ed. Dykinson* (Madrid, 2008).

Given the nature of this work, we shall limit our presentation on Spanish real property rights to the common law, based on the Civil Code and other State regulations.

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CHAPTER 106ES PROPERTY LAW IN SPAIN

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§ 106ES.02 Rights *In Rem*

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§ 106ES.02(a) Concept and Classification

The definition and classification of rights *in rem* has been and still is the object of doctrinal discussion. The classic distinction between rights *in rem* and credit rights or rights *in personam* is still commonly used as starting point.

Rights *in rem* are defined as the domination or power of men over things. This domination, or ownership, is protected by the legal system, in principle *erga omnes*. Rights *in rem* can be total or limited. The latter can be classified as enjoyment rights *in rem* (usufruct, easement, use and habitation, emphyteutic, ground rents and surface rights), acquisition rights *in rem* (option, pre-emption and redemption) and guaranty rights *in rem* (mortgage, pledge and *antichresis*).

Ownership is defined in the Civil Code as the right to enjoy and dispose of a thing, without greater limitations than those set forth in the laws. The Code also provides that the owner shall have an action against the holder and the possessor of the property to reclaim it (art. 348 CC).

Limited rights *in rem* involve other people's things, and grant to their holders limited rights and actions to prevent third parties from disturbing the exercise of their right or not recognizing it.

§ 106ES.02(b) Acquisition of Rights *In Rem*

Art. 609 of the Civil Code sets forth that "ownership is acquired by occupancy. Ownership and other rights over property are acquired by law, by gift, by testate and intestate succession, and as a result of certain contracts by tradition. They may also be acquired by prescription."

The list of the Civil Code has been criticized but it may be useful to define the different ways to acquire rights *in rem*:

> (a) Occupancy: property capable of appropriation without an owner, such as game or wild fish, hidden treasure and abandoned movable things are acquired by occupation (art. 610 CC). Therefore occupancy can be used to acquire ownership, not limited rights *in rem*, of movable property, by taking control of a thing with the intent of acquiring it for oneself.

(b) Discovery of a hidden treasure: a hidden treasure is defined as the hidden and ignored deposit of money, jewellery or other precious objects, when it is unknown who they legitimately belong to (art. 352 CC). Hidden treasure shall belong to the owner of the land on which it is found. However, when the discovery happens by chance on another's property, or on State property, half shall correspond to the discoverer. If the objects discovered should be of interest to science or art, the State may acquire them for their fair value. Payment shall be distributed in accordance with the above provisions (art. 351 CC).

(c) Finding: a person who finds a movable thing, which is not a treasure, must return it to its owner. If the owner is unknown, he must immediately consign it with the mayor of the municipality where it was found. The mayor shall publish the finding on two consecutive Sundays. If the owner does not appear within two years counting from the second publication, the thing found or its value shall be awarded to the person who found it. If the owner should appear in time, he shall be obliged to pay, as an award to the person who found it, approximately 5% of the value of the thing (art. 615 and 616 CC)

(d) Accession: ownership of the property shall, pursuant to the right of accession, entitle the owner to everything produced thereby, or naturally or artificially joined or incorporated thereto (art. 353 CC).

(e) Gift: a gift is an intentional liberality whereby a person gratuitously disposes of a thing in favor of another person, who accepts it (art. 618 CC).

(f) Succession (arts. 657 to 1087 CC): succession takes place pursuant to the will of a person expressed in a testament--testamentary succession--and, where intestate, by operation of law--legal succession--. A person who succeeds pursuant to universal title is a heir, and a person who succeeds pursuant to specific title is a legatee.

(g) Prescription (arts. 1930 to 1975 CC): ownership of movable property prescribes after three years of uninterrupted good faith possession, or six years without any other condition. Ownership and other rights *in rem* over real property prescribe after ten years' possession for persons resident in Spain, and twenty for those persons that are not residing in Spain, in good faith and with just title. Ownership and other rights in rem over real property also prescribe as a result of thirty years of uninterrupted possession, without requiring any title or good faith, and without distinction between residents and non-residents, save in case of some easements (art. 1959 CC).

(h) Delivery (arts. 1095, 1462 to 1464 CC): the effect of transfer takes place when in the operation of an agreement between the parties, the *tradens* delivers the property with the intent to transfer ownership. Therefore the Spanish system follows the theory of title and manner: the purchaser by means of the agreement or title acquires a credit against the vendor, the right to request the delivery of the thing or right. The acquisition of ownership or a right *in rem* takes place only upon delivery (manner).

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CHAPTER 106ES PROPERTY LAW IN SPAIN

13-106ES Thompson on Real Property, Thomas Editions § 106ES.03

§ 106ES.03 Limited Rights *In Rem*

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§ 106ES.03(a) Usufruct

Usufruct entitles one to enjoy another's property with the obligation to preserve its form and substance, unless otherwise authorized by the deed pursuant to which it was created, or the law (art. 467 CC).

Usufruct is created by law (for example, usufruct rights of the surviving spouse set forth in the CC), by the will of individuals expressed in acts *inter vivos* or in a last will and testament and by prescription (art. 468 CC).

§ 106ES.03(b) Use and Habitation

Use entitles a person to receive from among the natural, industrial or economic products resulting from a thing belonging to another, those which are sufficient for the needs of the holder of the right and his family, even if the latter should increase in size. Habitation entitles a person to occupy in another's house the necessary rooms for himself and the persons in his family (art. 524 CC). These rights are regulated by the title establishing them, and subsidiarily by the CC.

§ 106ES.03(c) Easement

An easement is an encumbrance imposed on real property for the benefit of another property belonging to a different owner. The real property in whose favor the easement is constituted is called a dominant tenement; the property subject to it is the servient tenement (art. 530 CC). Easements may also be established for the benefit of one or several persons or a community to whom the encumbered property does not belong (art. 531 CC).

The CC sets forth a classification of the different kinds of easements, distinguishing the following ones:

- continuous or discontinuous, depending on the use.

- apparent or non-apparent, depending on whether they present external signs or indications of their existence. (art. 532 CC).

- positive or negative. A positive easement is that which imposes on the owner of the servient tenement the obligation to allow something to be done or to do it himself, and a negative easement is that which forbids the owner of the servient tenement from doing something which would be lawful if the easement did not exist (art. 533 CC).

- Legal or voluntary, depending on whether the easement is established by law or by the will of the owners.

§ 106ES.03(d) Ground Rents (*Censos*)

A ground rent is constituted when certain real properties are earmarked for the payment of an annual rent or annuity as remuneration for a capital sum received in cash, or for the full or limited ownership transferred in respect of the same properties (art. 1604 CC).

This is, as mentioned above, a limited right *in rem* on real property which is subject to the encumbrance of paying a rent or annuity. If the owner or person in possession fails to pay, the real property given as a guaranty may be disposed of in order to collect the payment with the proceeds of the sale.

§ 106ES.03(e) Emphyteutic Ground Rents

The ground rent is emphyteutic where one person assigns in favor of the other useful ownership of a property, and reserves for himself legal ownership and the right to receive from the emphyteutic lessee an annual pension due to his ownership (art. 1605 CC). The emphyteutic lessee has a right to the produce of the property and any accessions thereof, and shall have the same rights as the owner to any treasures and mines discovered on the property constituting the subject matter of the emphyteutic ground rent (art. 1632 CC). Another distinctive feature is that the emphyteutic lessee may dispose of the emphyteutic property and any accessions *inter vivos* and by last will and testament, except for the rights of the direct owner and subject to the other provisions of the CC.

§ 106ES.03(f) Surface

This right is mentioned but not regulated in the CC. It is defined in the Land Act (Royal Legislative Decree 2/2008, of June 20) as a right *in rem*. The right permits the surface lessee to build constructions and buildings on the slope, projection and subsoil of property of another. The lessee keeps the temporal ownership of the constructions and buildings built. This right may also be granted on constructions or buildings already built or on dwellings, premises or privative elements of constructions or buildings.

For the surface right to be duly incorporated it must be granted in a public deed, and registered in the Property Registry.

The public deed must state the duration of the surface right. The right may not exceed ninety nine years.

The surface right may only be granted by the owner of the land.

The surface right may be subject to consideration. If it is for consideration, it may be payment of a lump sum or a periodic canon, or the allocation of dwellings or premises or lease rights in favor of the owner of the land, or a combination of some of the above. This is notwithstanding the total reversion of the buildings at the end of the term agreed to upon constitution of the surface right.

§ 106ES.03(g) Option

An option is the right that the owner of a thing grants to a third party in order to acquire it, paying the agreed price and any other stipulated amounts (DIEZ-PICAZO y GULLON, *Sistema de Derecho Civil*, vol. III, Ed. Tecnos). The option

agreement may be for consideration or not.

To become effective vis-a-vis third parties the option must be registered in the Property Registry. Art. 14 of the Mortgage Regulation provides that option to purchase agreements or express covenants or stipulations expressly determining this in any other contract subject to registration, may be registered as long as, in addition to the usual requirements for registration, they meet the following requirements:

1. Express agreement between the parties regarding registration.

2. Stipulated price for the acquisition of the property and price agreed for the granting of the option, if any.

3. Term for the exercise of the option, which shall not exceed four years.

Options in leases or other contracts may have a duration greater than 4 years, but shall only be effective between the parties and not vis-a-vis third parties. Unless otherwise agreed to between the parties an option expires upon tacit or legal extension of the lease agreement.

§ 106ES.03(h) Pre-emption and Redemption

Pre-emption entitles the rights holder to acquire a thing before a third party for the same price that the latter would be willing to pay.

Redemption entitles the holder thereof to acquire a thing that has been sold, for the same price paid by the third party under the same conditions set forth in the acquisition agreement.

There are pre-emption and redemption rights established by law (for example, the right of the lessee to acquire the leased property in case of sale--art. 25 Urban Lease Act--) but they can also be agreed between the parties.

§ 106ES.03(i) Mortgage

A mortgage directly and immediately subjects the property it encumbers, no matter who its possessor is, to the performance of the obligation it was created to secure (art. 1876 CC). Therefore it is a right *in rem* of guaranty, which grants a right to compel the sale of the mortgaged property, and use the resulting price as consideration for the principal obligation that has been secured.

The constitution of a mortgage requires the granting of a public deed and registration in the Property Registry.

Depending on their origin, mortgages can be classified as legal or voluntary. Voluntary mortgages are those agreed between the parties or imposed by the owner of the secured properties, and may only be constituted by those who are able to freely dispose of them or, if they may not, they are authorized by the laws to constitute a mortgage (art. 138 of the Mortgage Law). Legal mortgages are those expressly established by law. This legal provision means that the persons in favor of whom the law grants a legal mortgage have the sole right to request the incorporation of a special mortgage that is sufficient enough to guarantee their right (art. 158 ML).

The general rule is that a mortgage may be constituted to secure any kind of obligation and shall not alter the unlimited personal liability of the debtor set forth under art. 1911 CC (art. 105 ML). However, the public deed of incorporation of the voluntary mortgage may establish that the secured obligation is only covered by the mortgaged properties. If that happens the liability of the debtor and the action of the creditor, by virtue of the mortgage, are limited to the amount of the mortgaged properties, and shall not affect the remaining properties of the debtor (art. 140 ML). In practice and

unlike what happens in other countries, the application of the covenant of limitation of liability to the mortgaged properties is not usual. Therefore, in the context of a general fall of real estate prices, it is not surprising that the sale value of the mortgaged real property is less than the secured debt, and therefore the execution of the mortgage does not release the debtor, who shall continue to be personally liable with all its present and future properties for the unpaid part of the debt.

§ 106ES.03(j) Pledge

There are two kinds of pledge depending on whether the thing subject to pledge is delivered to the creditor, a third party or not.

A pledge with a change in possession, regulated in the CC, is a right *in rem* guaranty, which grants the right to dispose of the thing pledged and use the resulting amount to pay the credit. Pledge contracts may secure all kinds of obligations, and all movable things which are subject to trade may be pledged, provided that they are capable of being possessed. The correct constitution of a pledge requires, in addition to an agreement by common consent, giving possession of the thing to the creditor or to a third party. No pledge shall be effective against a third party unless the certainty of its date is set forth in a public instrument.

A pledge without change of possession is regulated under the law of Movable Mortgage and Pledge without Displacement (law of December 16, 1954), which establishes a *numerus clausus* of the things capable of being pledged: agricultural fruits, crops, forest products, animals, certain machines, tools and the products from agricultural and farming exploitations, stored merchandises and raw materials and paintings, sculptures, pieces of china, books and any other thing of artistic or historic value. Credits and other rights corresponding to the holders of agreements, licenses, administrative concessions or grants may be subject to pledge without change in possession as long as the law or the relevant constitutive title authorizes their sale to a third party. Credit rights, even future credits, may be subject to pledge without change in possession as long as they are not represented by securities and are not considered as financial instruments for purposes of Royal Decree-law 5/2005, of March 11, of Urgent Reforms to boost Productivity and improve Public Contracting. To be effectively constituted they shall be registered in the Registry of Movable Goods.

§ 106ES.03(k) *Antichresis*

Pursuant to *antichresis* the creditor acquires the right to receive the economic benefits of real property belonging to the debtor. The receipts are allocated first to any interest, if due, and subsequently to the principal (art. 1881 CC).

The creditor is obliged to pay any taxes and charges that the property may be subject to, and the necessary expenses for the conservation and repair of the property. He may deduct any amounts spent from the economic benefits produced. If the debtor does not pay the debt in time, the creditor may claim, according to the Civil Procedure Law, the payment of the debt or the sale of the property.

§ 106ES.03(l) Time-sharing

Law 42/1998, of December 15, which regulates time-sharing rights in real property used for tourism and tax rules, meant not only the transposition of Directive 94/47/CE, but also the development of a broader internal regulation. The aim was to regulate a new legal concept which was remarkably on the increase in a booming Spanish tourism sector. A new time-sharing right *in rem* was created, which could also be configured as a variant of a seasonal lease.

By virtue of time-sharing right in real property one is entitled to enjoy, exclusively, during a specific period each year, an accommodation capable of being used independently and which has the appropriate furniture for this purpose, and complementary services.

The yearly period of use may never be less than seven days in a row. The duration of this right may be from three to fifty years.

This right must be granted in a public deed and registered in the Property Registry. The law establishes a minimum content for the agreement (art. 9).

The acquirer of time-sharing rights has a term of ten days from the signature of the agreement to desist at his own discretion without any cost. He may also terminate the agreement within three months if the latter does not contain any of the references or documents required by law, or if the acquirer has not been sufficiently informed. The mentioned terms are also important because any advance payment by the acquirer to the transferor before expiry of these terms is forbidden.

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CHAPTER 106ES PROPERTY LAW IN SPAIN

13-106ES Thompson on Real Property, Thomas Editions § 106ES.04

§ 106ES.04 Lease

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Leases are regulated by Law 49/2003, of November 26, regarding Rustic Lease and law 29/1994, of November 24, regarding Urban Lease.

Subsidarily they are addressed in the Spanish Civil Code (Book IV, Title VI, Chapters I and II--articles 1542 to 1582).

§ 106ES.04(a) Rustic Lease

Law 49/2003 covers lease agreements on properties to be used for agricultural, ranching and forestry purposes. A specific type of exploitation of a property can also be the object of a lease agreement, as long as the parties expressly state this and attach an inventory to the agreement. It is possible to simultaneously have leases for different types of exploitation of the same property.

Under Law 49/2003 both property and exploitation lease agreements incorporate the right of agricultural production and other rights inherent in the leased property or exploitation.

§ 106ES.04(b) Urban Lease

Law 29/1994 covers lease agreements on urban properties and distinguishes two kinds of urban leases:

-- Housing lease:

Housing leases are lease agreements on habitable properties to be used as permanent housing by the lessee. It also applies to furniture, store rooms, parking places or any other places leased as an accessory to the property.

Legal dispositions regarding housing leases are aimed at protecting the lessee. Therefore any clause contained in the agreement which modifies the legal dispositions against the interests of the lessee is

considered null and void.

The duration of housing leases is negotiated between the parties. However, if the duration of the agreement is less than five years, then it is automatically extended for further one year terms up to a minimum duration of five years. The lessee has the option to terminate the lease with 30 days notice.

By law the lessee must provide a rental deposit equal to, at least, one month's rent. It is common practice for a lessor to request a rental deposit that is higher or even to ask for a bank guaranty.

-- Lease for a use other than housing:

These are lease agreements on properties that are for purposes other than the one described above. It includes seasonal lease agreements and lease of properties to be used for industrial, commercial, professional, recreational, cultural or educational purposes.

The duration of leases for a use other than housing can be freely agreed between the parties.

The lessee must provide a rental deposit equal, at least, to two monthly rental payments. It is common practice for lessors to request a rental deposit of more than that required by law or to ask for a bank guaranty.

When a business or professional activity is carried out at the leased property, the lessee may sublease the property or assign the lease agreement without the lessor's consent. Unless otherwise agreed by the parties, the lessor is entitled to a ten per cent increase in the rent if there is a partial sublease, and a twenty per cent increase if there is an assignment of the agreement or total sublease of the property. Changes in the person of the lessee as a consequence of merger, transformation or spin-off of the lessee company are not considered as an assignment, but unless otherwise agreed by the parties, the lessor shall be entitled to the rent increase mentioned above.

Unless otherwise agreed between the parties, upon termination of a lease agreement for a property which has served for the previous five years as the site where sales to the public are made, the lessee shall be entitled to compensation from the lessor, as long as the lessee has communicated four months in advance of the termination date its intention not to extend the agreement for at least five more years and for a market rent.

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CHAPTER 106ES PROPERTY LAW IN SPAIN

13-106ES Thompson on Real Property, Thomas Editions § 106ES.05

§ 106ES.05 Tax

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We address below the taxes on the different legal transactions involving real property, and the ownership of rights *in rem*. There are distinctions between investment in properties, the term when ownership thereof is held and, finally, the transfer of properties. However in view of the limited and synthetic nature of this presentation, we shall not discuss the enormous variations on taxes, particularly indirect taxes, established for particular situations and circumstances.

§ 106ES.05(a) Acquisition of Real Properties

Upon acquisition of a property for consideration, whether monetary or in kind, the purchaser is subject to one of the following indirect taxes, which are exclusive of each other. These are applicable whether the purchaser has its tax residence in Spain or not.

If the seller is a businessman or a professional and the property is new, Value Added Tax (VAT) is applicable. VAT taxes the entire building process, from the beginning until the end, in one go and at the moment of transfer by the developer. Further transfers are VAT-free but subject to Transfer Tax and Stamp Duty (*Impuesto sobre Transmisiones Patrimoniales y Actos Juridicos Documentados-ITPyAJD*). The general rule is for the seller to charge VAT to the purchaser. From July 1, 2010, the applicable VAT is 8% of the value of the property in case of housings, and 18% in case of business premises.

When the transfer is subject to *ITPyAJD*, and has been for consideration, it is generally subject to a tax rate of 7 to 8 % of the value of the property (the automous regions, the Basque Country and Navarre, may modify it).

On the other hand if the transfer is granted in a public deed, which is normally the case, in addition to VAT and ITPyAJD it is also subject to a Documented Legal Acts tax at a rate of 0,5 % of the value of the property, unless the autonomous regions, the Basque Country or Navarre have ruled otherwise.

Finally, with respect to an acquisition by inheritance or donation of a property, the person receiving the property is subject to the Inheritance and Donation Tax, with a progressive tax rate depending on the value of the acquired

property. In these cases no indirect tax is applicable.

§ 106ES.05(b) Ownership of Real Properties

Any person or entity who is the owner of a property, either rustic or urban, is subject to a local tax (from the town hall where the property is located) which accrues yearly. This Real Estate Tax (*Impuesto sobre Bienes Immuebles-IBI*) is paid by residents and non-residents in Spain, at a rate of 1% of the so called property value, which is determined by town halls and updated every year.

In addition to *IBI* if the owner of a property is a legal person non-resident in Spain that does not carry out economic activities in Spain, it shall be subject to another yearly tax, the Special Tax on Real Properties of Non Resident Entities (*Gravamen Especial sobre Bienes Inmuebles de Entidades No Residentes*), which amounts to 3% of the property value.

Income obtained, if any, from real properties, for example, due to a lease to a third party, shall be subject to the Income Tax *(Impuesto sobre la Renta de las Personas Fisicas-IRPF)*, Company Tax (*Impuesto sobre Sociedades-IS*) or Income Tax for Non Residents *(Impuesto sobre la Renta de No Residentes-IRNR)*.

Furthermore rents obtained from real properties in the scope of an economic activity may be subject, in some cases, to the Tax on Commercial and Professional Activities (*Impuesto sobre Actividades Economicas-IAE*), a local tax.

§ 106ES.05(c) Transfer of Real Properties

In the realm of direct taxes, the capital gain resulting from the sale of a property, if any, due to the difference between purchase value and sale value is subject to the *IRPF*, *IS* or *IRNR*. Regarding *IRPF* the capital gain is subject to a fixed rate of 19% (up to 6.000 [Euro]) and 21% for the excess.

If *IS* is applicable, the capital gain is usually subject to the general rate of 30%, unless the property is subject to the economic activity carried out by the entity and the transfer value is invested again in the acquisition of other elements corresponding to the relevant activity. In this case the tax would be reduced to 18%.

When applying the *IRNR* there is a distinction depending on whether the property is subject or not to a permanent establishment in Spain. If it is, the tax shall be the same as the tax under the *IS*. If it is a non-resident without a permanent establishment, the capital gain is subject to a fixed rate of 19%. Furthermore in these cases the purchaser of the property is obliged to withhold and pay to the Public Treasury 3% of the price agreed, as payment on account of *IRNR* corresponding to the non-resident.

Finally, with the transfer of urban properties a local tax is also accrued, the so called "Local Capital Gains Tax" (*Plusvalia Municipal*), which taxes the increase in the value of the land where the property is located from the date of its purchase to the date of its transfer.

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Supp. To CHAPTER 106ES PROPERTY LAW IN SPAIN

13-106ES Thompson on Real Property, Thomas Editions Supp. to § 106ES.01

Supp. to § 106ES.01 Civil Code and Regional Systems ("Regimenes Forales")

[Go To Main]

The legal system of real property in Spain is the result of a long and rich history based on Roman law, which constitutes the core of the Spanish legal tradition. Law on the Peninsula evolved with the Visigothic invasion at the beginning of the 5th century. This resulted in the entry of Germanic law which coexisted with the law of Hispanic people. The legal unification and territorial application of a sole legal system took place with the promulgation in the 7th century of the *Liber Judiciorum.* In the 13th century this was translated and adapted in Castile, where it was known as *Fuero Juzgo*. The importance of Muslim rule from the 8th century over large parts of the Peninsula and the long period of reconquest, which ended with the taking of Granada in 1492 must also be noted. During this period many kingdoms were set up. These kingdoms were unified under a single crown with the marriage of Isabella of Castile and Ferdinand of Aragon. However the legal institutions of each kingdom did not disappear as a result of the unification of the kingdoms. In some cases, and as a result of subsequent historic events, the regional systems were recognized and maintained as a privilege for the services rendered to the nation.

Given this history anyone who comes into contact for the first time with the Spanish legal system should not be surprised that different private legal systems coexist. Real property law is not only ruled by the Civil Code (CC) and other State legislation, but many regions have their own law in this matter, particularly Aragon, the Balearic Islands, Catalonia, Galicia, the Basque Country and Navarre.

§ 106ES.01(a) Constitution of 1978 [Go To Main]

The Constitution of 1978 created a new territorial organization system. Spain is currently divided into 17 autonomous regions (*Comunidades Autonomas)* and 2 autonomous cities, and each one has its own parliament, executive government and judicial authority with jurisdiction over matters arising in the territory.

Therefore the promulgation of the Constitution and the subsequent development of the so-called State of Autonomous Communities, with the passing of the relevant Statutes of Autonomy (*Estatutos de Autonomia)* by each autonomous region, has resulted in the creation of the different regional legal systems. When considering this structure one must bear in mind that "the main principle of their relationship with State law is not the principle of normative hierarchy, or

of succession in time, but the principle of competence in matters, in accordance with the Constitution and the Statutes" (Lacruz Berdejo and others, *"Elementos de Derecho Civil--I Parte General, Vol. I" Ed. Dykinson* (Madrid, 2008).

This chapter presents Spanish real property rights on issues important to the common law, based on the Civil Code and other State regulations.

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Supp. To CHAPTER 106ES PROPERTY LAW IN SPAIN

13-106ES Thompson on Real Property, Thomas Editions Supp. to § 106ES.02

Supp. to § 106ES.02 Rights In Rem

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§ 106ES.02(a) Concept and Classification [Go To Main]

The classic distinction between rights *in rem* and credit rights or rights *in personam* is still commonly used as starting point.

Rights *in rem* are defined as the domination or power of men over things. This domination, or ownership, is protected by the legal system, in principle *erga omnes*. Rights *in rem* can be total or limited. The latter can be classified as enjoyment rights *in rem* (usufruct, easement, use and habitation, emphyteutic, ground rents and surface rights), acquisition rights *in rem* (option, pre-emption and redemption) and guaranty rights *in rem* (mortgage, pledge and *antichresis*).

Ownership is defined in the Civil Code as the right to enjoy and dispose of a thing, without greater limitations than those set forth in the laws. The Code also provides that the owner shall have an action against the holder and the possessor of the property to reclaim it (art. 348 CC).

Limited rights *in rem* involve other people's things, and grant to their holders limited rights and actions to prevent third parties from disturbing the exercise of their right or not recognizing it.

§ 106ES.02(b) Acquisition of Rights *In Rem* [Go To Main]

Art. 609 of the Civil Code sets forth that "ownership is acquired by occupancy. Ownership and other rights over property are acquired by law, by gift, by testate and intestate succession, and as a result of certain contracts by tradition. They may also be acquired by prescription."

This list of the Civil Code has been criticized but it may be useful to define the different ways to acquire rights *in rem*:

(a) **Occupancy**: property rights capable of appropriation without an owner, such as game or wild fish, hidden treasure and abandoned movable things, are acquired by occupation (art. 610 CC). Therefore occupancy can be used to acquire ownership, not limited rights *in rem*, of movable property, by taking control of a thing with the intent of acquiring it for oneself.

(b) **Discovery of a hidden treasure**: a hidden treasure is defined as the hidden and ignored deposit of money, jewelry or other precious objects, when it is unknown who they legitimately belong to (art. 352 CC). Hidden treasure shall belong to the owner of the land on which it is found. However, when the discovery happens by chance on another's property, or on State property, half shall belong to the discoverer. If the objects discovered should be of interest to science or art, the State may acquire them for their fair value. Payment shall be distributed in accordance with the above provisions (art. 351 CC).

(c) **Finding**: a person who finds a movable thing that is not a treasure must return it to its owner. If the owner is unknown, he must immediately consign it with the mayor of the municipality where it was found. The mayor shall publish the finding on two consecutive Sundays. If the owner does not appear within two years counting from the second publication, the thing found or its value shall be awarded to the person who found it. If the owner should appear in time, he shall be obliged to pay, as an award to the person who found it, approximately 5% of the value of the thing (art. 615 and 616 CC).

(d) **Accession**: ownership of the property shall, pursuant to the right of accession, entitle the owner to everything produced thereby, or naturally or artificially joined or incorporated thereto (art. 353 CC).

(e) **Gift:** a gift is an intentional liberality whereby a person gratuitously disposes of a thing in favor of another person, who accepts it (art. 618 CC).

(f) **Succession** (arts. 657 to 1087 CC): succession takes place pursuant to the will of a person expressed in a testament--testamentary succession--and, where intestate, by operation of law--legal succession. A person who succeeds pursuant to universal title is an heir, and a person who succeeds pursuant to specific title is a legatee.

(g) **Prescription** (arts. 1930 to 1975 CC): ownership of movable property prescribes after three years of uninterrupted good faith possession, or six years without any other condition. Ownership and other rights *in rem* over real property prescribe after ten years' possession for persons resident in Spain, and twenty for those persons not residing in Spain, in good faith and with just title. Ownership and other rights in rem over real property also prescribe as a result of thirty years of uninterrupted possession, without requiring any title or good faith, and without distinction between residents and non-residents, save in case of some easements (art. 1959 CC).

(h) **Delivery** (arts. 1095, 1462 to 1464 CC): the effect of transfer takes place when in the operation of an agreement between the parties, the *tradens* delivers the property with the intent to transfer ownership. Therefore the Spanish system follows the theory of title and manner: the purchaser by means of the agreement or title acquires a credit against the vendor, the right to request the delivery of the thing or right. The acquisition of ownership or a right *in rem* takes place only upon delivery (manner).

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Supp. to § 106ES.03 Limited Rights In Rem

[Go To Main]

§ 106ES.03(a) Usufruct [Go To Main]

Usufruct entitles one to enjoy another's property with the obligation to preserve its form and substance, unless otherwise authorized by the deed pursuant to which it was created, or the law (art. 467 CC).

Usufruct is created by law (for example, usufruct rights of the surviving spouse set forth in the CC), by the will of individuals expressed in acts *inter vivos*, or in a last will and testament and by prescription (art. 468 CC).

§ 106ES.03(b) Use and Habitation [Go To Main]

Use entitles a person to receive from among the natural, industrial or economic products resulting from a thing belonging to another, those resources that are sufficient for the needs of the holder of the right and his family, even if the latter should increase in size. Habitation entitles a person to occupy in another's house the necessary rooms for himself and the persons in his family (art. 524 CC). These rights are regulated by the title establishing them, and subsidiarily by the CC.

§ 106ES.03(c) Easement [Go To Main]

An easement is an encumbrance imposed on real property for the benefit of another property belonging to a different owner. The real property in whose favor the easement is constituted is called a dominant tenement; the property subject to it is the servient tenement (art. 530 CC). Easements may also be established for the benefit of one or several persons or a community to whom the encumbered property does not belong (art. 531 CC).

The CC sets forth the following classification of easements:

- continuous or discontinuous, depending on the use.

- apparent or non-apparent, depending on whether they present external signs or indications of their existence. (art. 532 CC).

- positive or negative. A positive easement is that which imposes on the owner of the servient tenement the obligation to allow something to be done or to do it himself, and a negative easement is that which forbids the owner of the servient tenement from doing something which would be lawful if the easement did not exist (art. 533 CC).

- Legal or voluntary, depending on whether the easement is established by law or by the will of the owners.

§ 106ES.03(d) Ground Rents (*Censos*) [Go To Main]

A ground rent is constituted when certain real properties are earmarked for the payment of an annual rent or annuity as remuneration for a capital sum received in cash, or for the full or limited ownership transferred in respect of the same properties (art. 1604 CC).

This is, as mentioned above, a limited right *in rem* on real property which is subject to the encumbrance of paying a rent or annuity. If the owner or person in possession fails to pay, the real property given as a guaranty may be disposed of in order to collect the payment with the proceeds of the sale.

§ 106ES.03(e) Emphyteutic Ground Rents [Go To Main]

The ground rent is emphyteutic where one person assigns in favor of the other useful ownership of a property, and reserves for himself legal ownership and the right to receive from the emphyteutic lessee an annual pension due to his ownership (art. 1605 CC). The emphyteutic lessee has a right to the produce of the property and any accessions thereof, and shall have the same rights as the owner to any treasures and mines discovered on the property constituting the subject matter of the emphyteutic ground rent (art. 1632 CC). Another distinctive feature is that the emphyteutic lessee may dispose of the emphyteutic property and any accessions *inter vivos* and by last will and testament, except for the rights of the direct owner and subject to the other provisions of the CC.

§ 106ES.03(f) Surface [Go To Main]

This right is mentioned but not regulated in the CC. It is defined in the Land Act (Royal Legislative Decree 2/2008, of June 20) as a right *in rem*. The right permits the surface lessee to build structures on the slope, projection and subsoil of property of another. The lessee keeps the temporal ownership of the structures built. This right may also be granted on structures already built or on dwellings, premises or privative elements of structures.

For the surface right to be duly incorporated it must be granted in a public deed, and registered in the Property Registry.

The public deed must state the duration of the surface right. The right may not exceed ninety nine years.

The surface right may only be granted by the owner of the land.

The surface right may be subject to consideration. If it is for consideration, it may be payment of a lump sum or a periodic amount, or the allocation of dwellings or premises or lease rights in favor of the owner of the land, or a combination of some of the above. This is notwithstanding the total reversion of the buildings at the end of the term agreed to upon constitution of the surface right.

§ 106ES.03(g) Option [Go To Main]

An option is the right that the owner of a thing grants to a third party in order to acquire it, paying the agreed price and any other stipulated amounts (DIEZ-PICAZO y GULLON, *Sistema de Derecho Civil*, vol. III, Ed. Tecnos). The option agreement may be for consideration or not.

To become effective vis-a-vis third parties the option must be registered in the Property Registry. Art. 14 of the Mortgage Regulation provides that options to purchase agreements or express covenants or stipulations expressly determining this in any other contract subject to registration, may be registered as long as, in addition to the usual requirements for registration, they meet the following requirements:

1. Express agreement between the parties regarding registration.

2. Stipulated price for the acquisition of the property and price agreed for the granting of the option, if any.

3. Term for the exercise of the option, which shall not exceed four years.

Options in leases or other contracts may have a duration greater than 4 years, but shall only be effective between the parties and not vis-a-vis third parties. Unless otherwise agreed to between the parties an option expires upon tacit or legal extension of the lease agreement.

§ 106ES.03(h) Pre-emption and Redemption [Go To Main]

Pre-emption entitles the rights holder to acquire a thing before a third party for the same price that the latter would be willing to pay.

Redemption entitles the holder thereof to acquire a thing that has been sold, for the same price paid by the third party under the same conditions set forth in the acquisition agreement.

Pre-emption and redemption rights may be established by law (for example, the right of the lessee to acquire the leased property in case of sale--art. 25 Urban Lease Act), but they can also be agreed between the parties.

§ 106ES.03(i) Mortgage [Go To Main]

A mortgage directly and immediately subjects the property it encumbers, no matter who its possessor is, to the performance of the obligation it was created to secure (art. 1876 CC). Therefore it is a right *in rem* of guaranty, which grants a right to compel the sale of the mortgaged property, and use the resulting price as consideration for the principal

obligation that has been secured.

The constitution of a mortgage requires the granting of a public deed and registration in the Property Registry.

Depending on their origin, mortgages can be classified as legal or voluntary. Voluntary mortgages are those agreed between the parties or imposed by the owner of the secured properties, and may only be constituted by those who are able to freely dispose of them or, if they may not, they are authorized by the laws to constitute a mortgage (art. 138 of the Mortgage Law). Legal mortgages are those expressly established by law. This legal provision means that the persons in favor of whom the law grants a legal mortgage have the sole right to request the incorporation of a special mortgage that is sufficient enough to guarantee their right (art. 158 ML).

The general rule is that a mortgage may be constituted to secure any kind of obligation and shall not alter the unlimited personal liability of the debtor set forth under art. 1911 CC (art. 105 ML). However, the public deed of incorporation of the voluntary mortgage may establish that the secured obligation is only covered by the mortgaged properties. If that happens the liability of the debtor and the action of the creditor, by virtue of the mortgage, are limited to the amount of the mortgaged properties, and shall not affect the remaining properties of the debtor (art. 140 ML). In practice and unlike what happens in other countries, the application of the covenant of limitation of liability to the mortgaged properties is not usual. Therefore, in the context of a general fall of real estate prices, it is not surprising that the sale value of the mortgaged real property is less than the secured debt, and therefore the execution of the mortgage does not release the debtor, who shall continue to be personally liable with all its present and future properties for the unpaid part of the debt.

§ 106ES.03(j) Pledge [Go To Main]

There are two kinds of pledge depending on whether the thing subject to pledge is delivered to the creditor, a third party or not.

A pledge with a change in possession, regulated in the CC, is a right *in rem* guaranty, which grants the right to dispose of the thing pledged and use the resulting amount to pay the credit. Pledge contracts may secure all kinds of obligations, and all movable things that are subject to trade may be pledged, provided that they are capable of being possessed. The correct constitution of a pledge requires, in addition to an agreement by common consent, giving possession of the thing to the creditor or to a third party. No pledge shall be effective against a third party unless the certainty of its date is set forth in a public instrument.

A pledge without change of possession is regulated under the law of Movable Mortgage and Pledge without Displacement (law of December 16, 1954), which establishes a *numerus clausus* of the things capable of being pledged: agricultural fruits, crops, forest products, animals, certain machines, tools and the products from agricultural and farming exploitations, stored merchandises and raw materials and paintings, sculptures, pieces of china, books and any other thing of artistic or historic value. Credits and other rights corresponding to the holders of agreements, licenses, administrative concessions or grants may be subject to pledge without change in possession as long as the law or the relevant constitutive title authorizes their sale to a third party. Credit rights, even future credits, may be subject to pledge without change in possession as long as they are not represented by securities and are not considered as financial instruments for purposes of Royal Decree-law 5/2005, of March 11, of Urgent Reforms to boost Productivity and improve Public Contracting. To be effectively constituted they shall be registered in the Registry of Movable Goods.

§ 106ES.03(k) *Antichresis* [Go To Main]

Pursuant to *antichresis* the creditor acquires the right to receive the economic benefits of real property belonging to the debtor. The receipts are allocated first to any interest, if due, and subsequently to the principal (art. 1881 CC).

The creditor is obliged to pay any taxes and charges that the property may be subject to, and the necessary expenses for the conservation and repair of the property. He may deduct any amounts spent from the economic benefits produced. If the debtor does not pay the debt in time, the creditor may claim, according to the Civil Procedure Law, the payment of the debt or the sale of the property.

§ 106ES.03(l) Time-Sharing [Go To Main]

Law 42/1998, of December 15, which regulates time-sharing rights in real property used for tourism and tax rules, meant not only the transposition of Directive 94/47/CE, but also the development of a broader internal regulation. The aim was to regulate a new legal concept which was remarkably on the increase in a booming Spanish tourism sector. A new time-sharing right *in rem* was created, which could also be configured as a variant of a seasonal lease.

By virtue of a time-sharing right in real property one is entitled to enjoy, exclusively, during a specific period each year, an accommodation capable of being used independently and which has the appropriate furniture for this purpose, and complementary services.

The yearly period of use may never be less than seven days in a row. The duration of this right may be from three to fifty years.

This right must be granted in a public deed and registered in the Property Registry. The law establishes a minimum content for the agreement (art. 9).

The acquirer of time-sharing rights has a term of ten days from the signature of the agreement to desist at his own discretion without any cost. He may also terminate the agreement within three months if the latter does not contain any of the references or documents required by law, or if the acquirer has not been sufficiently informed. The mentioned terms are also important because any advance payment by the acquirer to the transferor before expiry of these terms is forbidden.

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Supp. To CHAPTER 106ES PROPERTY LAW IN SPAIN

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Supp. to § 106ES.04 Lease

[Go To Main]

Leases are regulated by Law 49/2003, of November 26, regarding Rustic Lease and law 29/1994, of November 24, regarding Urban Lease.

Subsidarily they are addressed in the Spanish Civil Code (Book IV, Title VI, Chapters I and II--articles 1542 to 1582).

§ 106ES.04(a) Rustic Lease [Go To Main]

Law 49/2003 covers lease agreements on properties to be used for agricultural, ranching and forestry purposes. A specific type of exploitation of a property can also be the object of a lease agreement, as long as the parties expressly state this and attach an inventory to the agreement. It is possible to simultaneously have leases for different types of exploitation of the same property.

Under Law 49/2003 both property and exploitation lease agreements incorporate the right of agricultural production and other rights inherent in the leased property or exploitation.

§ 106ES.04(b) Urban Lease [Go To Main]

Law 29/1994 covers lease agreements on urban properties and distinguishes two kinds of urban leases:

-- Housing lease:

Housing leases are lease agreements on habitable properties to be used as permanent housing by the lessee. It also applies to furniture, store rooms, parking places or any other places leased as an accessory to the property.

Legal dispositions regarding housing leases are aimed at protecting the lessee. Therefore any clause contained in the agreement which modifies the legal dispositions against the interests of the lessee is considered null and void.

The duration of housing leases is negotiated between the parties. However, if the duration of the agreement is less than five years, then it is automatically extended for further one year terms up to a minimum duration of five years. The lessee has the option to terminate the lease with 30 days notice.

By law the lessee must provide a rental deposit equal to at least one month's rent. It is common practice for a lessor to request a rental deposit that is higher or even to ask for a bank guaranty.

-- Lease for a use other than housing:

Lease agreements on properties for purposes other than the one described above include seasonal lease agreements and lease of properties to be used for industrial, commercial, professional, recreational, cultural or educational purposes.

The duration of leases for a use other than housing can be freely agreed between the parties.

The lessee must provide a rental deposit equal to at least two monthly rental payments. It is common practice for lessors to request a rental deposit of more than that required by law or to ask for a bank guaranty.

When a business or professional activity is carried out at the leased property, the lessee may sublease the property or assign the lease agreement without the lessor's consent. Unless otherwise agreed by the parties, the lessor is entitled to a ten per cent increase in the rent if there is a partial sublease, and a twenty per cent increase if there is an assignment of the agreement or total sublease of the property. Changes in the person of the lessee as a consequence of merger, transformation or spin-off of the lessee company are not considered as an assignment, but unless otherwise agreed by the parties, the lessor shall be entitled to the rent increase mentioned above.

Unless otherwise agreed between the parties, upon termination of a lease agreement for a property which has served for the previous five years as the site where sales to the public are made, the lessee shall be entitled to compensation from the lessor, as long as the lessee has communicated four months in advance of the termination date its intention not to extend the agreement for at least five more years and for a market rent.

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Supp. to § 106ES.05 Tax

Bill of Rights

This section addresses below the taxes on the different legal transactions involving real property, and on the ownership of rights *in rem*. There are distinctions between investment in properties, the term when ownership thereof is held and, finally, the transfer of properties. This brief section does not discuss the enormous variations in taxes, particularly indirect taxes, established for particular situations and circumstances.

§ 106ES.05(a) Acquisition of Real Properties Art. 59, Constitution

Upon acquisition of a property for consideration, whether monetary or in kind, the purchaser is subject to one of the following indirect taxes, which are exclusive of each other. These are applicable whether the purchaser has its tax residence in Spain or not.

If the seller is a businessperson or a professional and the property is new, Value Added Tax (VAT) is applicable. VAT taxes the entire building process, from the beginning until the end, at one time which is at the moment of transfer by the developer. Further transfers are VAT-free but subject to Transfer Tax and Stamp Duty (*Impuesto sobre Transmisiones Patrimoniales y Actos Juridicos Documentados-ITPyAJD*). The general rule is for the seller to charge VAT to the purchaser. From July 1, 2010, the applicable VAT is 8% of the value of the property in case of housings, and 18% in case of business premises.

When the transfer is subject to *ITPyAJD*, and has been for consideration, it is generally subject to a tax rate of 7 to 8 % of the value of the property (the automous regions, the Basque Country and Navarre, may modify it).

On the other hand if the transfer is granted in a public deed, which is normally the case, in addition to VAT it is also subject to a Documented Legal Acts tax at a rate of 0.5 % of the value of the property, unless the autonomous regions, the Basque Country or Navarre have ruled otherwise.

Finally, with respect to an acquisition by inheritance or donation of a property, the person receiving the property is subject to the Inheritance and Donation Tax, with a progressive tax rate depending on the value of the acquired

property. In these cases no indirect tax is applicable.

§ 106ES.05(b) Ownership of Real Properties [Go To Main]

Any person or entity who is the owner of a property, either rural or urban, is subject to a local tax (from the town hall where the property is located) which accrues yearly. This Real Estate Tax (*Impuesto sobre Bienes Immuebles-IBI*) is paid by residents and non-residents in Spain, at a rate of approximately 1% of the so-called property value, which is determined by town halls and updated every year.

In addition to *IBI* if the owner of a property is a legal person non-resident in Spain that does not carry out economic activities in Spain, it shall be subject to another yearly tax, the Special Tax on Real Properties of Non Resident Entities (*Gravamen Especial sobre Bienes Inmuebles de Entidades No Residentes*), which amounts to 3% of the property value.

Any income obtained from real properties, for example, due to a lease to a third party, shall be subject to the Income Tax *(Impuesto sobre la Renta de las Personas Fisicas-IRPF)*, Company Tax (*Impuesto sobre Sociedades-IS*) or Income Tax for Non Residents *(Impuesto sobre la Renta de No Residentes-IRNR)*.

Furthermore rents obtained from real properties used in an economic activity may be subject, in some cases, to the Tax on Commercial and Professional Activities (*Impuesto sobre Actividades Economicas-IAE*), a local tax.

§ 106ES.05(c) Transfer of Real Properties [Go To Main]

In the realm of direct taxes, the capital gain resulting from the sale of a property, if any, due to the difference between purchase value and sale value is subject to the *IRPF*, *IS* or *IRNR*. Regarding *IRPF* the capital gain is subject to a fixed rate of 19% (up to 6.000 [Euro]) and 21% for the excess.

If *IS* is applicable, the capital gain is usually subject to the general rate of 30%, unless the property is subject to the economic activity carried out by the entity and the transfer value is invested again in the acquisition of other elements corresponding to the relevant activity. In this case the tax would be reduced to 18%.

When applying the *IRNR* there is a distinction depending on whether the property is subject or not to a permanent establishment in Spain. If the owner is, the tax shall be the same as the tax under the *IS*. If it is a non-resident without a permanent establishment, the capital gain is subject to a fixed rate of 19%. Furthermore in these cases the purchaser of the property is obliged to withhold and pay to the Public Treasury 3% of the price agreed, as payment on account of *IRNR* corresponding to the non-resident.

Finally, with the transfer of urban properties a local tax also accrues, the so called "Local Capital Gains Tax" (*Plusvalia Municipal*), which taxes the increase in the value of the land where the property is located from the date of its purchase to the date of its transfer.

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CHAPTER 106EU PROPERTY LAWS IN THE EUROPEAN UNION AND THEIR IMPACT ON MEMBER STATES

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FOOTNOTES:
(n1)Footnote 1. Samuel Smith, Esq., contributed significantly to the research and writing of this section.

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CHAPTER 106EU PROPERTY LAWS IN THE EUROPEAN UNION AND THEIR IMPACT ON MEMBER STATES

13-106EU Thompson on Real Property, Thomas Editions § 106EU.01

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§ 106EU.01 The Structure and Governance of the European Union.

In 1951, six European countries signed the Treaty of Paris and thereby formed the European Coal & Steel Community (ECSC). n2 This treaty sought to create a common market for raw materials that are often used to make weapons. The theory was that a common community would be less likely to go to war with itself. The success of this treaty led to the Treaty of Rome in 1957. n3 With this document the European Economic Community (EEC) was born and remains the basis of the European Union (EU). In 1987, the Treaty of Rome was amended by the Single European Act which created more economic and social uniformity among the Member States. n4 The most significant treaty for the establishment of the EU as central governing entity was the Maastricht Treaty on European Union, signed in 1993. n5 Here, the Treaty of Rome was furthered amended to advance the economic purposes of the European community and clarify certain points of conflict.

In 1997, the EU again convened to sign another amendment to the Treaty on European Union. n6 This was done to prepare the EU economic changes, provision for threats to security and public health and crime. n7 The Treaty of Amsterdam directed the EU to have another conference where further changes would be made to the Treaty on European Union. In 2001, the Treaty on European Union was again amended in Nice to prepare for enlargement of the EU. n8 It included changes in voting structures and increased cooperation among the member states. To this date no further treaties have been signed by the Member States. However, in May of 2004 ten new Member States were admitted into the EU.

The four essential organs that make up the EU are the European Council of Ministers (Council), the European Commission (Commission), the European Parliament (EP) and the European Court of Justice (ECJ). Each of these organs works in cooperation with the others in order to achieve the goals set out in the Treaties on the European Union.

The Council consists of representatives from governments of the Member States, and has the primary legislative power within the EU. Its acts are binding upon the Member States. The four different types of legislation that the Council can enact are Regulations, Directives, Decisions and Recommendation or Opinions. The Regulations are directly operative within each of the Member States and do not require any further legislation by them. The Directives are binding objectives given to the Member States but allow each Member State the freedom to implement the measures according

to national policies. Decisions are binding upon those to whom they are addressed. Finally, Recommendation or Opinions are persuasive ideas but are not binding. Council Presidents are in office for six months at a time and the presidency rotates among the Member States. The powers of the Council are checked by the Commission who has the sole power to initiate legislation. n9

The Commission is the executive organ of the EU, with primary responsibility to propose legislative measures, ensure that legislation is followed, and prosecute when proper legislative procedures are not followed. It consists of twenty commissioners from each of the Member States. These commissioners are appointed for five years by common agreement among the Member States. The Commission is able to act quickly because there are limited checks on its authority; however, it is not accountable to the people. n10 Instead, accountability rests on the European Parliament (EP).

With 626 members, the EP represents the entire populace of the Member States of the EU. It is designed to express the political sentiments of the various constituencies throughout Europe. Representatives or MEPs are elected directly by the people and serve five-year terms. EP has the power to censure the Commission, and has a limited veto power over legislation. In the latest version of the Treaty on the European Union the EP was given what is called "co-decision procedure." This basically requires legislation to pass through the EP before it can be made into EU law. n11 For the EU to ultimately enforce all of the laws that could potentially be created by all of these organizations it is necessary to have a supreme court that settles disputes concerning the treaties and legislative materials of the EU.

That court is the European Court of Justice (ECJ), which is the ultimate authority for resolving legal disputes within the realm of EU law. n12 It handles legal actions against both EU institutions and Member States. Its fifteen judges serve six-year terms. Article 177 of the Treaty on the European Union (Treaty) details its jurisdiction and competency. Decisions from the ECJ include interpretations of the Treaty on the validity of EU institutions and resolution of disputes of law that implicate the Treaty. n13 In addition to the ECJ there is a lower level court called the Court of First Instances with limited jurisdiction. These decisions may be appealed to the ECJ. Additionally, the Advocate General can deliver opinions concerning legal issues, which opinions are not binding upon the parties.

The main aim of the EU was once the unification of a common market but recently it has become more concerned with social affairs, equality and fundamental humans rights. These fields of law have traditionally been left to the Member States but more and more the EU is treading into areas such as property law and creating EU common law.

In addition to the organization that has become known as the European Union, another group is the Council of Europe, presently consisting of 45 member nations.

FOOTNOTES:

(n1)Footnote 2. Treaty Instituting the European Coal and Steel Community, Apr. 18, 1951, 261 U.N.T.S. 140.

(n2)Footnote 3. Treaty Establishing the European Economic Community, Mar. 25, 1957, 298 U.N.T.S. 11.

(n3)Footnote 4. Single European Act, June 29, 1987, O.J. (L 169) 1 (1987), 2 C.M.L.R. 741 (1987) (amending Treaty Establishing the European Economic Community).

(n4)Footnote 5. Treaty on European Union, Feb. 7, 1992, O.J. (C 224) 1 (1992) (amending Treaty Establishing the European Economic Community, as amended by Single European Act) [hereinafter Maastricht Treaty].

(n5)Footnote 6. Treaty of Amsterdam Amending the Treaty on European Union, the Treaties Establishing the European Communities and Certain Related Acts, Oct. 2, 1997, O.J. (C 340) 1 (1997).

(n6)Footnote 7. *Id*.

(n7)Footnote 8. Treaty of Nice Amending the Treaty on European Union, The Treaties Establishing the European Communities and Certain Related Acts, Feb. 26, 2001, O.J. (C 80) 1 (2001).

(n8)Footnote 9. *See* Council's Website available at atue.eu.int/en/summ.htm.

(n9)Footnote 10. *See* Commission's Website available at ateuropa.eu.int/comm/index_en.htm.

(n10)Footnote 11. *Available at* europa.eu.int/eur-lex/en/about/abc/.

(n11)Footnote 12. Treaty on European Union, Feb. 7 1992, Title VI, Art. 35, O.J. (C 224) (1992) [hereinafter Treaty].

(n12)Footnote 13. *See generally id*.

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CHAPTER 106EU PROPERTY LAWS IN THE EUROPEAN UNION AND THEIR IMPACT ON MEMBER STATES

13-106EU Thompson on Real Property, Thomas Editions § 106EU.02

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§ 106EU.02 The Council of Europe and Property Law.

"European Community" is a term that includes the European Union and the member countries of the Council of Europe. Therefore the property laws and regulations within the European Community include Treaties of the EU, Regulations from the EU, case law from the ECJ, as well as Treaties of the CoE and case law from the ECHR.

The most significant legal document within the Council of Europe is the Convention for the Protection of Human Rights and Fundamental Freedoms. n14 As the name implies, fundamental freedoms and human rights are protected by governments who are signatories to this document. With regard to property, Protocol 1, Article 1 of the Convention provides: n15

> **Protection of property**
>
> Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.
>
> The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties. n16

The objective of this article has been clarified in the following statement: "By recognizing that everyone has the right to the peaceful enjoyment of his possessions, Article 1 (P1-1) is in substance guaranteeing the right of property. This is the clear impression left by the words 'possessions' and 'use of property.' " n17 The terms "right to property" and "right of property" were used to describe the subject matter of draft documents that were forerunners to this article. n18 Another policy behind this article is to guard against arbitrary confiscation of property. n19 Three distinct rules are embodied in the Article:

The first rule, in the first sentence of the first paragraph, states, "every...person is entitled to the peaceful enjoyment of

his possession." n20 This is a general rule that "enunciates the principle of the peaceful enjoyment of property." n21 The second rule, in the second sentence of the first paragraph, states, "[n]o one shall be deprived of his possessions," subject to certain conditions. n22 This rule covers deprivation of possessions unless there is sufficient justification based on the stated conditions. n23 The third rule, found in the second paragraph, "recognizes that the States are entitled, among other things, to control the use of property in accordance with the general interest, by enforcing such laws as they deem necessary for th[at] purpose." n24 The three rules are interwoven. n25

The ECHR follows a two-step analysis in determining whether a Member State has violated these rules. n26 This analysis first determines whether there is an interference with a property right and then whether this interference was justified; if the interference is not justified then a violation has occurred. n27

According to the first step in the analysis, n28 an interference occurs when national laws, permits, or decrees significantly reduce the possibility of property use or the very substance of its ownership. n29 If a right to property becomes "precarious and defeasible" then an interference has occurred. n30 In the case of *Sporrong and Lonnroth v. Sweden*, n31 the government issued expropriation permits on properties in a section of Stockholm in order to prepare for the construction of a highway outlet from the city center. n32 Later the government issued prohibitions on construction for these same properties, which kept the owners from building and even selling their land for market value. n33 The ECHR found that this amounted to an interference under the first test of P1-1. Similarly, in France there is a law requiring landowners to join an association which will allow the general public to use their land to hunt. n34 Landowners who wished to exclude hunters from their land were denied this property right and brought a P1-1 claim in the ECHR. n35 The court found that the right to exclude is a fundamental property right. n36 Therefore, the French hunting law was found to be an interference under P1-1. In another case, the British government seized some coins that were illegally imported into England. n37 Here the ECHR found that by seizing the coins an interference with a property right had occurred, however, the court quickly moved to the second prong in order to determine whether this interference constituted a violation of the P1-1 rules. n38

Once an interference has been identified then one must ask whether the interference is justified. An interference is justified if it achieves "a 'fair balance' between the demands of the general interest of the community and the requirements of the protection of the individual's fundamental rights." n39 Whether a "fair balance" has been achieved depends upon two factors: the legitimacy of the interference's aim and the proportionality between the aim sought and means employed. n40 In testing for a fair balance the court recognizes that the Member States enjoy a wide "margin of appreciation" in choosing which policies will best suit their needs. n41

A legitimate aim is one which confers a direct benefit on the general public interest. n42 In *James v. the United Kingdom*, landowners brought a P1-1 claim against the government because of a law which compelled the landowners to sell their land to long-term leaseholders who met certain requirements. n43 The law was enacted in order to reform real property laws that lead to social injustices. n44 The court found that since the legislation promoted the public interest and enhanced social justice within the community it was a legitimate aim. n45 In *Chassgnou v. France*, the court also found that the hunting law served the legitimate purpose of regulating hunting and encouraging rational management of wildlife. n46 In sum, a legitimate aim can be reached by any bona fide social, economic or political policies that seek to benefit the public interest. n47

Finally, there must be "a reasonable relationship of proportionality between the means employed and the aim sought to be realized." n48 In *Sporrong*, this proportionality was expressed as a balancing test. n49 The balance is between the property owner's right to "peaceful enjoyment" and the public interests. n50 When the burden on the property owner is proportional to the benefit enjoyed by the public then a fair balance has been reached. n51 In *Chassagnou*, the hunting law "upset the fair balance" between the property owners' rights and the general public's interests because the property owners were compelled to allow hunters onto their property allegedly without a significant benefit to the general public, since other hunting lands were available. n52 In *Sporrong*, the court found that the expropriation permits and prohibitions on construction on useful land were out of balance with the rights of the property owners since no actual

benefit ever inured to the general public and no measures were taken to remedy the situation. n53

The objective of Article 1 of Protocol 1 is to protect property owners from arbitrary interference with their property and to enable full enjoyment of the property. n54 These goals are often achieved through legal reforms that come about because of the decisions rendered by the ECHR. Member States are given a wide margin of discretion, or appreciation, to determine what is in their public's best interest. However, often the means employed by the Member States infringe upon guaranteed property rights. n55 In these cases the Community law intrudes into areas traditionally left to the competency of the Member States.

The policy behind the Convention is to unify Europe along the lines of fundamental human rights. By agreeing to a single standard, which is the Convention, the Member States are able to gradually discard those property laws which do not conform and thus achieve greater unity until each one has substantially similar property laws.

FOOTNOTES:
(n1)Footnote 14. *Id*.

(n2)Footnote 15. *Id*. at Protocol 1, Art. 1. [hereinafter P1-1] This protocol was added to the Convention in 1952 as an addition to the fundamental rights which were outlined in the original document.

(n3)Footnote 16. *Id*.

(n4)Footnote 17. Marckx v. Belgium, A31 Eur.Ct.H.R. (1979) at para. 63.

(n5)Footnote 18. *Id*.

(n6)Footnote 19. James v. U.K., 3/1984 Eur.Ct.H.R. (1986) at para. 42.

(n7)Footnote 20. *P1-1*.

(n8)Footnote 21. Sporrong and Lonnroth v. Sweden, 7151/75; 7152/75 Eur.Ct.H.R. (1982) at para. 61.

(n9)Footnote 22. *P1-1*.

(n10)Footnote 23. Sporrong, at para. 61.

(n11)Footnote 24. *Id*.

(n12)Footnote 25. *Id*. at para. 38.

(n13)Footnote 26. *See generally id*.

(n14)Footnote 27. *Id*. at para 57.

(n15)Footnote 28. *Id*. at para. 58.

(n16)Footnote 29. *Id*. at para. 60.

(n17)Footnote 30. *Id*.

(n18)Footnote 31. *Id*. at 1.

(n19)Footnote 32. *Id*.

(n20)Footnote 33. *Id*.

(n21)Footnote 34. Chassagnou v. France, 25088/94 Eur.Ct.H.R. (1999) at para. 13.

(n22)Footnote 35. *Id*.

(n23)Footnote 36. *Id*. at para. 74.

(n24)Footnote 37. Agosi v. U.K., 9118/80 Eur.Ct.H.R. (1986).

(n25)Footnote 38. *Id*. at para. 49-50.

(n26)Footnote 39. Chassagnou, at para. 75.

(n27)Footnote 40. *Id*. at paras. 76 & 80; *See also* James, at para. 50.

(n28)Footnote 41. *Id*. at para. 75; Sporrong, at para. 69; Agosi, at para. 52; James, at para. 46.

(n29)Footnote 42. *See* James, at para. 47.

(n30)Footnote 43. *Id*.

(n31)Footnote 44. *Id*. at § C.

(n32)Footnote 45. *Id*. at para. 41.

(n33)Footnote 46. Chassagnou, at para. 79.

(n34)Footnote 47. James, at para. 45.

(n35)Footnote 48. *Id*. at para. 50.

(n36)Footnote 49. Sporrong, at para. 73.

(n37)Footnote 50. *Id*.

(n38)Footnote 51. *Id*.

(n39)Footnote 52. Chassangou, at para. at 85.

(n40)Footnote 53. Sporrong, at para. 72-73.

(n41)Footnote 54. *P1-1*.

(n42)Footnote 55. *See* James; Sporrong; Chassangou.

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CHAPTER 106EU PROPERTY LAWS IN THE EUROPEAN UNION AND THEIR IMPACT ON MEMBER STATES

13-106EU Thompson on Real Property, Thomas Editions § 106EU.03

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§ 106EU.03 The European Union and Property Law.

§ 106EU.03(a) Principal Property Laws and Regulations of the European Union.

The most important legal document in the EU is the Treaty on European Union (Treaty) with its various amendments and revisions. This is the document that gives life to the EU through a complex organization of institutions, Foreign Ministers, Commissioners, Members of Parliament and a "Supreme" court (aka. The European Court of Justice). As set forth in the Maastricht Treaty, the objectives of the EU are to promote economic and social progress, achieve sustainable development, strengthen and protect the rights of citizens of the Member States, develop the Union into an area of security and freedom and create a common market. n56 In order to achieve these objectives the Council of Ministers has legislative power to enact regulations which Member States incorporate into their domestic laws. n57 Often these regulations impact the property laws of the Member States. n58 In addition, the Treaty provides in Article 6 that

> The Union is founded on the principles of liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law, principles which are common to the Member States.
>
> The Union shall respect fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms signed in Rome on 4 November 1950 and as they result from the constitutional traditions common to the Member States, as general principles of Community law. n59

Embodied in Article 6 are the guarantees found in the Convention such as the right to "peaceful enjoyment" of one's property and possessions. n60 The legislative regulations produced by the Council must take into account these fundamental Community policies toward property. To secure this fundamental right to property the European Court of Justice (ECJ) hears cases where the Council Regulations come into conflict with the Convention and thereby create common property law in the European Community.

§ 106EU.03(b) Property Case Law of the European Court of Justice.

"In all Member States, numerous legislative measures have given concrete expression to [the] social function of the right to property. Thus in all the Member States there is legislation on agriculture and forestry, water supply, protection of the environment and town and country planning." n61 These national measures restrict the use of property and infringe upon the full use of property, but do so for the public interest without creating a disproportionate burden on any one individual.

The fundamental rights analysis concerns whether Council Regulations are violations of property rights. Member States incorporate Council Regulations into their domestic laws, domestic laws among the Member States become more similar and unified, and thus help achieve the goal of the EU. The ECJ decides whether these laws are valid according to the Convention for countries which are members of the CoE and according both Convention and Treaty for countries who are members of the EU.

In the case of *Hauer v. Land Rheinland-Pfalz*, the plaintiff had applied for a permit allowing her to plant a vineyard on her property. n62 The application was denied under German law due to the unsuitability of the land. The plaintiff appealed the decision. While the appeal was pending, the Community through the Council adopted Regulation No. 1162/76 which prohibits Member States from issuing new vineyard permits for a period of three years. n63 The purpose of the Regulation was to re-establish a market for wine and stop overproduction within the Member States. n64 The court of appeals in Germany held that the land was suitable for a vineyard; however, it could not grant the planting permits due to the prohibition in Regulation No. 1162/76. Therefore, this case was brought to the ECJ in order to decide whether the Council Regulation infringed upon fundamental property rights and property rights guaranteed by the German Constitution. n65

The court first pointed out that there was no deprivation of property under Protocol 1, Article 1 of the Convention. n66 However, the court did find an interference with a property due to the control which the regulation imposed on the landowner's right to plant. n67 The court determined that the interference was justified as a remedy for overproduction of wine. Since the aim focused on a benefit to the public, and no one party was disproportionately burdened, the Regulation was justified. n68 It is interesting to note that in this case the German government was ready to issue a planting permit to the plaintiff but because of the Council Regulation was unable to do so. n69

In the case of *Wachauf v. Bundesamt fur Ernaehrung und Forstwirtschaft*, n70 Council Regulation 857/84 n71 dealing with milk production quotas was called into question. The aim of the regulation was to curb growth of milk production by fixing quotas, or reference quantities, on individual holdings and attaching a levy when milk quotas are exceeded. n72 The plaintiff was a tenant farmer, who through his own labors, had earned the rights to produce milk based on the reference quantities set forth in the regulation. Upon the expiration of the lease, the tenant sought compensation because he was going to definitively cease to produce milk and therefore give up his property rights. n73 The court made it clear that the property right of milk production is a right that runs with the land. n74 However, the court stated "that the Community legislature intended that at the end of the lease the reference quantity should in principle return to the lessor who retakes possession of the holding, subject, however, to the Member States' power to allocate all or part of the reference quantity to the departing lessee." n75 This rule could have the effect of precluding the lessee from benefiting from the system of compensation inherent in the regulation because the lessor can refuse to consent to compensation. n76

The court declared that it would be unacceptable for a farmer who has earned production rights to lose those unused rights upon the expiration of the lease. n77 Therefore the court stated that "community rules which, upon the expiry of the lease, had the effect of depriving the lessee, without compensation, of the fruits of his labor and of his investments in the tenanted holding would be incompatible with the requirements of the protection of fundamental rights in the Community legal order." n78 And these requirements also bind the Member States "when they implement Community rules, the Member States must, as far as possible, apply those rules in accordance with those requirements." n79

The Council Regulation was upheld because the Member States had a sufficient margin of appreciation to allow for

compensation to lessee like the plaintiff and therefore, it did not infringe upon those protected fundamental property rights. n80 However, in order to conform to this holding the Member States would have to alter their domestic property laws in a way that would provide compensation to or otherwise protect the property right of tenant farmers in the future. n81 Along these same lines other cases have held that "it cannot be left to the national authorities and courts to determine the substantive content of [] fundamental [property] right[s]. It is possible and to be expected that they should have a certain discretion with regard to the detailed formulation of the rules to protect the interests of tenants but it must ultimately be the Court of Justice which lays down the limits on that discretion, a not altogether easy task."

Again, it is clear that the EU has taken steps to unify the European Community by outlining the goals that each Member State should accomplish in the area of property law. On the other hand there are only two areas in which the ECJ may truly intrude into national legislation: "first, where the national legislation implements Community rules, and secondly, but more indirectly, in cases where a Treaty provision derogating from the principle of freedom of movement is relied on by a Member State in order to justify a restriction on freedom of movement stemming from that Member State's legislation." n82

The EU institutions and their courts must be careful to allow Member States to resolve concerns of fundamental rights, mainly because each one knows better what their citizens' needs are. n83 The institutions of the EU are set up in order to achieve greater economic unity and secure common freedoms but not to legislate in areas of law traditionally left to the Member States. This is a very delicate and fine line, walked by both the Member States and the EU.

FOOTNOTES:

(n1)Footnote 56. *See Maastricht Treaty*, cited *supra* note 5 at Art. 2.

(n2)Footnote 57. *Id*. at Art. 7.

(n3)Footnote 58. *See, e.g.*, Council Directive 93/53/EEC, O.J. 1993 L 175; *see also* Case C-20/00, Booker v. Scottish Ministers, [2003] E.C.R. I-7411 (analyzing the validity of Council Regulation 93/53/EEC).

(n4)Footnote 59. *Maastricht Treaty*, at Art. 6.

(n5)Footnote 60. *P1-1*.

(n6)Footnote 61. Case 44/79, Hauer v. Land Rheinland-Pfalz, [1979] E.C.R. 3727, at para. 20.

(n7)Footnote 62. *Id*. at para. 1.

(n8)Footnote 63. *Id*. at paras. 2-3.

(n9)Footnote 64. *Id*. at para. 8.

(n10)Footnote 65. *Id*. at para. 5.

(n11)Footnote 66. *Id*. at para. 19.

(n12)Footnote 67. *Id*.

(n13)Footnote 68. *Id*. at para. 30.

(n14)Footnote 69. *Id*. at para. 3.

(n15)Footnote 70. Case 5/88, Wachauf v. Bundesamt fur enrahrung und Forstwirtschaft, [1989] E.C.R. 2609.

(n16)Footnote 71. Council Regulation No. 857/84, O.J 1984 L90.

(n17)Footnote 72. Case C-2/92, The Queen v. Ministry of Agriculture, Fisheries and Food, [1993] E.C.R. I-955, at para. 2.

(n18)Footnote 73. *See* Wachauf, at para. 2.

(n19)Footnote 74. *See id*. at paras. 13-14.

(n20)Footnote 75. *Id*.

(n21)Footnote 76. *Id*. at para. 16.

(n22)Footnote 77. *Id*.

(n23)Footnote 78. *Id*. at para. 19.

(n24)Footnote 79. *Id*.

(n25)Footnote 80. *Id*. at para. 21.

(n26)Footnote 81. *See* The Queen, at para. 16.

(n27)Footnote 82. *Id*. at para. 31.

(n28)Footnote 83. *Id*. at para. 33.

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CHAPTER 106FR PROPERTY LAW IN FRANCE

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§ 106FR.syn Synopsis to Chapter 106FR: PROPERTY LAW IN FRANCE

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§ 106FR.01(b) Landholding Before the Romans.

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CHAPTER 106FR PROPERTY LAW IN FRANCE

13-106FR Thompson on Real Property, Thomas Editions § 106FR.01

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§ 106FR.01 History of Property Law in France.

§ 106FR.01(a) Introduction.

The historical development of French property flows from two distinct cultural streams. One stream, issuing from the south, is the sophisticated written law introduced by the Romans. The other stream emanated from the north with the vigorous and varied customary law of the Celtic and Germanic peoples. The migrations of the latter inevitably confronted the conquering advances of the former to give French law its vitality. French law has also been influenced by canon law, especially as applied by specialized courts during the Middle Ages. n1

§ 106FR.01(b) Landholding Before the Romans.

When Julius Caesar invaded Gaul in the 1st century B.C., he found a land without specific boundaries, occupied in large part by nomadic Celtic tribes. These tribes travelled and settled where they pleased in the land and sometimes they resumed migrations even before beginning true settlements. Caesar describes land distribution and landholding customs among some of the Celtic tribes that he encountered:

> None of them [members of the tribe] possesses any settled amount of land of his own; and none of them has any enclosed fields; but each year the chiefs and the magistrates distribute the land to the families and to the male relatives ... The following year they are compelled to trade places. n2

Tacitus, another contemporary Roman observer, describing Germanic customs of the same era, told of an "en bloc" ownership by the Germanic community, the extent of which was determined by the number of cultivators. He also described a system of repartition and crop rotation among the members of the community, based at least partially on social rank. n3

As to other landholding customs among the Gauls, they were probably similar to those of contemporary British Celts, to some of whom they were related and with whom they communicated often. Where farming was practiced, the most common pattern for the British Celts was the cultivation of small rectangular fields marked off by low banks of earth or rocks or some similarly conspicuous boundary. Such land, along with grazing land, was held by family groups, so that clusters of fields would have been worked by farmers connected through blood ties. The rights to use these fields would

quite likely have been passed on to kinship descendants. n4

§ 106FR.01(c) Landholding During and After Roman Rule.

After Gaul became a province of Rome, its lands were considered as belonging to the Roman people or to the Emperor. Although varied landholding arrangements were introduced, a typical form of ownership was a lease to a private persons under a revocable tenure known as a *precarium* in consideration of the payment of tax. n5 Roman concepts of land were disseminated throughout Gaul through distribution of land to discharged legionary veterans and through the growth of Roman cities and commerce.

The eventual enfeeblement of Roman public authority in Gaul strengthened the power of the great private landholding proprietors. Pressure from invading barbarians and weakened imperial military forces required the fortifying of many towns and prompted great landholders to set themselves as feudal lords in the 5th century A.D. These magnates became independent of local public authorities such as municipal magistrates and maintained private militias and their own tribunals; they exercised authority over the inhabitants of their estates and collected the equivalent of taxes from them. n6

Early in the 5th century A.D., the Germanic tribes of Visigoths, Burgundians and Franks, who had been mercenaries of Rome, established their independence from the Empire and introduced Germanic legal customs and institutions into Gaul. Written codes of laws began to appear, often containing separate provisions for the Germanic inhabitants and for the Roman citizens living in the tribal territories.

The Visigothic laws, and more particularly the Code of Euric, are believed to have directly or indirectly influenced most Germanic law codes thereafter. The Code of Euric, from ca. A.D. 476, shows some Roman influence. The Lex Romana Visigothorum was promulgated by the Visigothic King Alaric II in A.D. 506, to govern Romans living in Visigothic territories. This collection is also known as the Breviarium Alaricianum (Breviary of Alaric). The Leges Visigothorum is a collection of laws that had been issued by Euric's successors, applying to both Gothic and Hispano-Roman subjects. The collection was promulgated in A.D. 654, and replaced the Lex Romana Visigothorum.

Euric's code seems to have been the immediate source for the early codes of both the Salian Franks n7 and the Burgundians, n8 and the Bavarian n9 and Lombard n10 codes also show Visigothic influence. Another early Frankish code, the Lex Ribuaria, n11 was based on the Salian code, and it in turn influenced the codes of the continental Angles and Saxons of the Carolingian Age.

The best known of these early Germanic codes--indeed the oldest Germanic code that is completely preserved--is the Lex Salica, which as been described as "primarily a penal law ... concerned with the redress of crimes (murder, theft, mutilation, exploitation of women) by monetary means." n12 The Lex Salica and the other early codes consist of both individual "statutes" and precedential judicial sentences ("Weisthuemer"), but they do not refer to most customs of daily living, such as occupancy of land, personal property, commercial dealings, inheritance, family relationships, and class privilege. The only references to land law in the Lex Salica are provisions requiring money payment for damage to agricultural fields, n13 blocking the way of another, n14 and improper fencing and enclosing. n15

Under these Germanic tribal rulers, what had been Roman public lands passed to the Germanic chieftains, who kept part and distributed the rest to their principal followers. Some tribes established themselves as guests on the lands of wealthy Romans, at first sharing only the revenue and produce of the lands, but later claiming a share of ownership and title. n16

§ 106FR.01(d) The Emergence of Feudalism.

During these Dark Ages, when the Merovingian Dynasty passed from the scene and the Carolingian Dynasty emerged, the evolution of landholding patterns into forms of feudalism continued uninterrupted. For most people in France, these

feudal arrangements only gradually emerged and changed in response to changes in social conditions. In the 9th century A.D., the emperor Charles the Great followed the Frankish custom under which he considered property and revenues of the empire as his family property. Compensation to his principal supporters, servants and counselors was paid by gifts of land, usually with requirements of military service attached. However, upon the death of Charlemagne, Germanic society suffered a relapse:

> The decades that followed Charles's death witnessed the rapid disintegration of the Empire he had created. Empire and papacy alike became immersed in an abyss of anarchy and barbaric lawlessness. The governing principles of society were the law of force on the one hand and the need for protection on the other. In the course of the ninth century the State lost all contact with the urban tradition and became completely agrarian. The life of the feudal nobility was spent in warfare and private feuds. From their strongholds the feudal lords terrorized peaceful villagers and passing travelers. n17

Despite the lawlessness of the aristocracy, the disintegration of a strong monarchy meant that the people could turn only to local feudal lords for protection; thus society became increasingly feudalized in the 9th century A.D. Land grants under such circumstances became increasingly hereditary and through subinfeudation a hierarchy of vassalage eventually developed. These feudal landholding arrangements, either on lands of the monarch or of a member of the aristocracy, have been described as follows:

> The land was divided into estates which were self-sufficient units ... In the center of each estate was located the lord's domain, surrounded by the huts of the peasants, each of whom had a small strip of land attached to his dwelling ... Part of the arable land that surrounded the village was set aside for the exclusive use of the king or lord. What remained was parceled out among the peasant tenants. The fields were divided into three parts, one of which was used for the planting of the summer crop, the second for the winter crop, while the third part would lie fallow... The cultivation of the fields was a communal and co-operative enterprise, although each peasant harvested the crop from his own strips of land.
>
> * * *
>
> The lord gave the peasant protection, furnished the land, built a mill and a village church, and administered justice in the territory that he had learned to consider his own, either by inheritance or by special grant. The peasant in turn, enjoyed the security that went with the hereditary right to the possession of his strip of land, he took his share of the agricultural produce, and returned the privileges extended to him by making certain payments and rendering certain services to the lord, exactments whose extent and nature were determined by custom. Theoretically still a serf, the peasant of the Carolingian period had actually become a tenant, and although still unfree, this peasant tenant, being exempt from the burden of military and court service, was envied by many a small freeholder. n18

The great domains of the Frankish period were divided into farms, with a portion reserved for the owner, and the rest granted to tributary cultivators, who had to pay quit-rents to the lord and perform various duties on the lord's land. The uncultivated lands, such as pastures and woods, were left for common use by all the cultivators of the domain. n19

In summary, during the feudal era in France the property relationships to be found on a typical great domain consisted of:

> 1. The lord's manor and land which he kept to be worked by slaves, servants and tenants.
>
> 2. Lands held subject to servile tenures by "coloni," "lites," and slaves. The "coloni" were perhaps less bound to the soil than the slaves, but their burdens were quite heavy. Those burdens included dues (among which were taxes collected by hearth or head, field rent paid in kind, fees for the use of property belonging to the lord, and supplies or money for the army) and services (plowing and manual labor on

the lord's domain). n20

3. Lands held by free tenure or by a tenure at will, subject to quit rents, annual rents, and similar compulsory dues. The tenancy at will (precaire) was used especially in the case of lands belonging to the Church. The folk law seems to have merged the Roman "precarium" with the Roman lease, fusing the two into a Frankish institution. The "precaire" was sometimes revocable, sometimes temporary in duration, sometimes for life, and sometimes perpetual and hereditary. Regardless of the durations of such "precarious" tenure, the tenant or grantee owed an annual charge in money or in kind to the grantor; this was sometimes a rent charge, and at other times was purely nominal. n21

4. Benefices or lands held by tenure in exchange for military service to the grantor. The benefices eventually became hereditary and were thus transformed into fiefs.

The "precaire" and the "benefice" differed in that the precaire was economic in character and the benefice was political. n22

The alod, or freehold, was land held in free and full ownership and was therefore outside the feudal system. n23 It was not subject to feudal dues, nor charges for its dues, nor transmission fees. Under French feudalism, the alod was partially absorbed into the system as a form of landholding similar to a fief or copyhold, especially if the holder of the alod needed the protection of the seignior, or lord. In parts of France still governed by custom, all land was presumed to be non-allodial fief or copyhold until shown otherwise; in other parts land was considered allodial unless shown otherwise. The seigniors, who still had the right to administer justice even on allodial land, took advantage of the confusion and began treating some allodial lands as fiefs. n24 The Edict of August 1692 abolished the noble freehold while leaving the villein alod undisturbed, but even by 1789 the question of rights over the alod was still not resolved. n25

As the French monarchy grew stronger, the king eventually claimed universal lordship over any land not owned by the seigniors. This resulted in fees being owed to the king in case of sale or alienation.

In the north of France, a system of social organization and landholding known as the Germanic March arose. The Germanic March consisted of the village (including dwellings with their yards and gardens), arable lands divided into parcels available for private ownership, and common areas open to use by all inhabitants. n26 This arrangement began to break down in the 15th century, and during the 16th and 17th centuries, the lords frequently used violence or the invention of false titles to secure the rights in the commons, wasteland and unoccupied areas in these communities. A typical tactic would be to press a false claim of community indebtedness, which claim would be withdrawn if the commons areas would be sold to the claimant at bargain prices. n27

§ 106FR.01(e) The Influence of Canon Law.

Through canon law the Church in France sought to reduce violence by removing the right or practice of violent self-help. Under canon law, if a party sought to take possession by force from a third party who was withholding the property, the attacker forfeited all rights to that property. n28 In place of self-help through force, legal actions for possession were introduced.

§ 106FR.01(f) Conflict Between Monarchy and Aristocracy over Rights of Commons.

In the 16th and 17th centuries, the monarchy and the aristocracy, with the peasants caught in between, found themselves feuding over rights of commons. The nobles regarded rights of commons as having been created by the lords, because they arose at a time when the peasants were incapable of land ownership. Therefore, rights of commons, having been created by the lords, could also be modified by the lords.

Based on this rationale, the lords began exercising triage, or confiscation of one-third of the commons areas. Triage was exercised in the 17th century by the Lords, who claimed that while they had abandoned ownership to the inhabitants, they had not abandoned use. Up to one-third of such common areas as had been earlier surrendered without rent or quit-rent reserved could be taken back by the lord, who nevertheless had to leave enough to meet the needs of the local populace. Alternatively in the 18th century, lords exercised the so-called right of restriction, by which they took up to two-thirds of the commons area, with the one-third being left to the people, in which full ownership was acknowledged.

The monarchy and its supporters, on the other hand, maintained that rights of commons had existed before feudalism, that the lands therefore belonged to the monarch, and that the lords had received their fiefs only on the condition that they preserved for the people the commons rights. n29

§ 106FR.01(g) The Impact of the French Revolution.

Claims to the commons by both the aristocracy and the monarchy were abolished under the law introduced during the French Revolution. The Declaration of April 13-20, 1791, stated that: "the right ... of appropriating waste and abandoned or barren and devastated lands, uncultivated or unoccupied possessions, desert lands, common passageways and waste lands for public pastures shall no longer exist for the benefit of the former lords." Triage was abolished, and communes were able to gain back some of the lands they had lost to seignorial encroachments. The revolutionaries also tried to change the right of commons into private ownership, but had to call an end to this program because of the abuses and inequities that resulted. n30

The domains of the crown, of the clergy, and of the emigres (nobles who had fled the fury of the revolutionaries) passed into the hands of small proprietors. The revolutionaries reestablished ownership according to principles of Roman property law and put into the channels of trade the property of the clergy and of the crown. n31

Napoleon promulgated the Napoleonic Civil Code of 1804, and the legislation contained in that code is still today the basis of French civil law. Book II and Book III of the code deal with things and the different modes of ownership and the different ways of acquiring ownership. The Napoleonic Codes transformed and modernized French law through the synthesis of the diverse influences of Roman law, customary law, canon law, revolutionary ideology, legislation from the monarchy and the personal ideas of Napoleon.

There has not been a revision of the Code since its inception; however, the Constitution of 4 October 1958 confers on the legislature jurisdiction over all matters concerning succession and gifts. It also lets the legislature define the fundamental principles of ownership and of real rights and obligations; the details of these matters are left to government regulations.

FOOTNOTES:

(n1)Footnote 1. Jean Brissaud, A History of French Private Law ix, 317 (Rapelje Howell trans., 2d French ed. 1968).

(n2)Footnote 2. Julius Caesar, The Gallic War 347 (Edwards trans. 1979).

(n3)Footnote 3. Jean Brissaud, A History of French Private Law 32, 33 (Rapelje Howell trans., 2d French ed., 1968).

(n4)Footnote 4. *See* § 2.03, *supra*.

(n5)Footnote 5. Jean Brissaud, A History of French Public Law 53 (James W. Garner trans. 1915).

(n6)Footnote 6. *Id.* at 56.

(n7)Footnote 7. The Code of the Salian Franks, or Lex Salica, is attributed to Clovis, A.D. 481-511.

(n8)Footnote 8. The Burgundian Code was compiled between A.D. 483 and 532. The Lex Romana Burgundionum was issued circa A.D. 500 for application to Roman citizens living in the Burgundian kingdom.

(n9)Footnote 9. The Lex Baiuvariorum is dated from about A.D. 744-48.

(n10)Footnote 10. The Leges Langobardorum were promulgated between A.D. 643 and 755.

(n11)Footnote 11. The Lex Ribuaria is believed to have been promulgated after A.D. 596 for the Ripuarian or western Franks.

(n12)Footnote 12. 5 Laws of the Alamans and Bavarians 19 (Theodore John Rivers, trans. 1977).

(n13)Footnote 13. Title 9.

(n14)Footnote 14. Title 31.

(n15)Footnote 15. Title 34.

(n16)Footnote 16. *Id.* at 61-62.

(n17)Footnote 17. 1 Kurt F. Reinhardt, Germany: 2000 Years 44 (1961).

(n18)Footnote 18. *Id.* at 49-50.

(n19)Footnote 19. Experts have disagreed over whether these arrangements were simply extensions of practices from ancient times, but with new subservience to powerful lords for security purposes, or a novel creation stimulated by conditions of the times, or a natural byproduct of the Roman landholding practices for wealthy owners, or resulted from the combined influences. *See* Jean Brissaud, A History of French Private Law 43 (Rapelje Howell trans., 2d French ed. 1968).

(n20)Footnote 20. *Id.* at 137.

(n21)Footnote 21. Jean Brissaud, A History of French Public Law 144-145 (James W. Garner trans. 1915).

(n22)Footnote 22. *Id.* at 142, 247.

(n23)Footnote 23. *Id.* at 247.

(n24)Footnote 24. *Id.* at 292-93.

(n25)Footnote 25. Jean Brissaud, A History of French Private Law 293 (Rapelje Howell trans., 2d French ed. 1968).

(n26)Footnote 26. *Id.* at 35; Jean Brissaud, A History of French Public Law 246-47 (James W. Garner trans. 1915).

(n27)Footnote 27. Jean Brissaud, A History of French Private Law 46-47 (Rapelje Howell trans., 2d French ed., 1915).

(n28)Footnote 28. *Id.* at 317.

(n29)Footnote 29. *Id.* at 23.

(n30)Footnote 30. *Id.* at 48-50.

(n31)Footnote 31. Jean Brissaud, A History of French Public Law 549 (James W. Garner trans. 1915).

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CHAPTER 106FR PROPERTY LAW IN FRANCE

13-106FR Thompson on Real Property, Thomas Editions § 106FR.02

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§ 106FR.02 Acquisition of Real Property.

§ 106FR.02(a) The Nature of Real Property.

French law distinguishes between two types of property: movables (roughly equivalent to personal property) and immovables (roughly equivalent to real property). According to the French Civil Code, property is immovable by its nature or by its purpose or because of the object to which it is attached. n32 Thus, objects furnished by the landowner (even including seed and animals employed in cultivation) to the tenant farmer or sharecropper for the use and development of the land are immovables by purpose as are such movables affixed by plaster, lime or cement. n33 Usufruct (rights of enjoyment) of immovables, servitudes or easements, and causes of action to recover immovables are all considered immovables, n34 as are real property mortgages and certain other liens.

§ 106FR.02(b) How Real Property Is Acquired.

§ 106FR.02(b)(1) Accession.

Accession refers to land or property which is joined with and incorporated into real property. n35 For example, by means of accession pavement constructed by the German army during the Second World War was found to be part of the property held by a private landowner, who has thus been held responsible for damage caused to a third party by the pavement's collapse. n36 The same principle of accession also applies to land acquired through acts of nature, such as alluvial lands.

§ 106FR.02(b)(2) Succession.

Succession is the passage of property from the decedent to the survivors, without regard to the nature or the origin of the property. n37 In France, children inherit from their ascendants (ancestors) without regard to gender or primogeniture, or whether they are the issue of different marriages. They also inherit in equal portions and per capita, when they are all of the first degree and inheriting in their own right; they inherit per stirpes, when some or all of them are taking by representation. n38 If the decedent leaves no posterity, and has no brother or sister, the succession is divided in half between the ascendants on the mother's side and those on the father's side. The closest relative on a particular side receives the entire half assigned to his or her part of the family. n39 In this the French law both resembles and differs

from the 6 Uniform Probate Code6 found in several American states, which provides for equal distribution on both sides of the family, but allows for distribution by representation on each side. n40 The illegitimate child has the same rights as a legitimate child under French law, and is entitled to inherit as if he or she were legitimate, as are the child's ascendants. n41

§ 106FR.02(b)(3) Prescription.

Prescription is the acquisition of title by adverse possession. In order to prescribe, possession must be continuous and uninterrupted, peaceful, public, unequivocal, and under a claim of ownership. For prescription to be awarded, judges must find that possession included material acts characteristic of such possession. In these cases, the judges themselves have the authority to decide whether or not an act is characteristic of possession. n42

Peaceful possession includes a lack of physical or moral violence, during both the inception and duration of the possession. n43 The limitation period for prescription is 30 years, unless the adverse possessor has apparent title and acts in good faith, in which case the period is reduced. Good faith is always presumed; according to Article 2268 of the Civil Code, the person alleging bad faith must prove it. If there is no showing of bad faith, the limitation period is reduced to 10 years, if the true owner lives in the jurisdiction of the Court of Appeals where the land is situated, and 20 years if the owner lives in another jurisdiction. n44 Possession periods may be tacked. n45

§ 106FR.02(b)(4) Contract.

Every creation or transfer of a real property interest by contract must be by notarial act registered upon the Register of Real Estate Mortgages. This includes deeds of sale, deeds of gift, contracts creating rights of usufruct or servitudes, long term leases, attachment liens, and contracts creating or dissolving tenancy in common and condominiums.

§ 106FR.02(b)(5) Sale.

A sale is final between parties as soon as agreement is reached as to the thing and the price, even if delivery has not yet taken place or the price has not been paid. n46 Under French law, a promise of sale is equivalent to a sale when the parties agree as to property and price. n47 However, a promise to sell real estate is void if not stated in a notarized writing or private act registered at the tax registry office within ten days after acceptance by the buyer. If the promise to sell was made with payment of a deposit, either party may withdraw, but must pay a penalty. If the withdrawing party is the party that made the deposit, that party forfeits the deposit upon withdrawing; if the withdrawing party is the party that received the deposit, that party must return double the amount of the deposit upon withdrawal. n48

Sellers of property must set forth clearly the obligation they are assuming. An obscure or ambiguous statement will be construed against the seller. n49 A seller's two main obligations are to deliver and warrant the property being sold. n50 The delivery obligation is fulfilled when the seller hands over the keys of the building or delivers the documents of title to the buyer. n51 The seller also warrants the peaceful enjoyment of the property and the absence of hidden faults or latent defects. n52 The parties may, by contract, add to or subtract from this legal obligation. n53 However, sellers may not escape liability for problems caused by themselves. n54 If the purchaser is dispossessed through a breach of warranty, the seller must refund the purchase price, reimburse any income the purchaser had to turn over to the dispossessing party and expenses incurred by both the buyer and the dispossessor, and must pay any other damages as well as contract costs. This warranty also applies to anyone to whom the buyer subsequently sells the property. n55

The buyer's main obligation is to deliver the price agreed upon. n56

FOOTNOTES:
(n1)Footnote 32. C. civ. 516 (Dalloz).

(n2)Footnote 33. *Id.* at 525.

(n3)Footnote 34. *Id.* at 526.

(n4)Footnote 35. C. civ. 551.

(n5)Footnote 36. 1973 Bull. Civ. II, No. 306.

(n6)Footnote 37. C. civ. 732 (Dalloz).

(n7)Footnote 38. *Id.* at 745.

(n8)Footnote 39. *Id.* at 746.

(n9)Footnote 40. 6 Uniform Probate Code § 2-103(4)6.

(n10)Footnote 41. C. civ. 757, 758 (Dalloz).

(n11)Footnote 42. *Id.* at 2229; 1972 Bull. Civ. III, No. 101.

(n12)Footnote 43. 1969 Bull. Civ. III, No. 348.

(n13)Footnote 44. C. civ. 2262, 2265 (Dalloz).

(n14)Footnote 45. *Id.* at 2235.

(n15)Footnote 46. *Id.* at 1583.

(n16)Footnote 47. *Id.* at 1589.

(n17)Footnote 48. *Id.* at 1590.

(n18)Footnote 49. *Id.* at 1602.

(n19)Footnote 50. *Id.* at 1603.

(n20)Footnote 51. *Id.* at 1605.

(n21)Footnote 52. *Id.* at 1625.

(n22)Footnote 53. *Id.* at 1627.

(n23)Footnote 54. *Id.* at 1628.

(n24)Footnote 55. P. Dupont Delestraint, Droit Civil, Principaux Contrats 27 (3d ed. 1973).

(n25)Footnote 56. C. civ. 1759 (Dalloz).

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CHAPTER 106FR PROPERTY LAW IN FRANCE

13-106FR Thompson on Real Property, Thomas Editions § 106FR.03

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§ 106FR.03 Types of Interests in Real Property.

§ 106FR.03(a) Ownership.

Ownership under French law is defined by Article 544 of the Civil Code as the right to enjoy and dispose of things in the most absolute manner, provided the use is not prohibited by statute or regulation. Ownership of the soil carries with it ownership of what is above and beneath it. Thus, the owner may excavate as much as desired, and draw from the earth all the products beneath the property, unless prohibited in some manner by law or regulation relating to mines, or by police laws and regulation. The owner is also entitled to build and construct whatever desired, as long as some aspect of that activity is not prohibited by the exceptions contained in the Title of Servitudes or Burdens on Land. n57

§ 106FR.03(b) Usufruct.

Usufruct is the right to enjoy property owned by another, in the same way an owner would, but on the condition of preserving the substance of the property. n58 It is analogous to a life estate in that it gives the right to a person to use and enjoy the property while another remains vested with the underlying title. The usufruct may be created either by operation of law or by gift or sale. n59 Unless exempted by the instrument creating the usufruct, the usufructuary (one who benefits from the usufruct) must often give security to ensure that the rights will be enjoyed prudently, without damage to the property. n60 However, the usufructuary takes things as they are, and is required to prepare an inventory of the movables and a description of the immovables before entering into their enjoyment. n61 The usufructuary is obligated only to maintain the property. All major repairs, unless arising from lack of maintenance, are chargeable to the owner, n62 but neither the owner nor the usufructuary is required to rebuild structures deteriorating from old age. The usufructuary may enjoy the fruits of existing mines on the property, but may not open up new mines, and is not entitled to keep any treasure found on the property. n63

The usufruct may be extinguished through the death of the usufructuary, the expiration of the time for which it was granted, the consolidation in the same person of the rights of ownership and usufruct, the non-use of the usufruct for thirty years, or the total loss of the property that the estate was based on. n64 A usufruct may also end because the usufructuary abuses the property through neglect or damage. n65 This particular feature of the usufruct indicates that in France, as well as in the United States, waste actions can be maintained in order to preserve the rights of the reversionary owner of the property. France, however, allows creditors of the usufructuary to intervene in litigation, to

protect their rights, and to offer to repair the damage and give security for the future preservation of the property. Depending on the seriousness of the circumstances, judges may either extinguish the usufruct completely, or permit the owner to reenter the property under condition of paying the usufructuary (or assigns) a fixed sum until the time when the usufruct would have terminated. n66

§ 106FR.03(c) Servitudes.

Servitudes are burdens imposed upon one property for the use and benefit of a property belonging to another owner. n67 These burdens are both prohibitory and prescriptive: French law seems to have incorporated the American concepts of easements, real covenants and equitable servitudes, as well as zoning and preventive nuisance law, into its laws governing servitudes. French servitudes, generally, arise from the natural location of the premises, or from obligations imposed by law, or from agreements between the owners. n68 An example of a servitude arising from the location of the properties occurs when one of the properties is situated on higher ground than the other: the owner of the lower ground cannot build an obstruction that will prevent naturally occurring run-off water from passing through the lower property; conversely, the owner of the higher property cannot use the property in a way that exacerbates the effects of run-off on the lower property. n69 This example is similar to regulation of land use by nuisance law in the United States.

Servitudes established by law must have some public, community or private benefit. n70 Typical of these are servitudes to facilitate the construction or repair of roads and other public or community works. n71 An interesting example of a servitude established by law is the right of property owners in cities to require neighbors to participate in the construction and repair of fences separating houses, yards and gardens. n72 Likewise, all property owners are required to build roofs in such a manner that rain water can only drain on the owner's property or on public property; the water may not be directed to the neighbor's property. n73 An owner of landlocked land is entitled to a right-of-way, but must pay an indemnity proportionate to the damage caused by use of the neighbor's property. n74

According to Article 686 of the Civil Code, landowners may establish whatever servitudes they desire on their land, or in favor of their land; however, these servitudes run with the land and may not be based on a mere personal promise to another. In a recent case it was held that a doctor could not sell property while reserving the right to object to the creation of another medical office in the building he was selling, because the covenant did not relate to the building itself. n75

Continuous and open (apparent from visible exterior works) servitudes are acquired by document of title or by possession for 30 years. n76 Continuous but hidden servitudes and intermittent servitudes may only be established by documents of title. n77 However, witnesses or presumptions may serve to present needed additional evidence if the instrument of title alone is somehow insufficient to establish proof of the servitude. n78 The establishment of a servitude presumes the grant of everything necessary for its use; thus, a servitude to draw water from the well of another necessarily implies a right of way to the well. n79

§ 106FR.03(d) Tenancy in Common.

Tenancy in common exists when several persons are concurrent owners of a specific tract, usually obtained simultaneously by succession or gift. Each tenant in common is entitled to use and enjoy the object of the tenancy, as long as use is for normal purposes and in a manner compatible with the rights of the other tenants. If one of the tenants uses the property exclusively, that tenant must pay consideration to the other tenants. n80

Administration and disposition of the common tenancy requires the consent of all of the tenants, but they may delegate to one or several of them general administrative powers. Special authority is required for actions that do not relate to the normal administration of the tenancy, as well as the renewing and the cancellation of leases. n81 However, if a tenant acts without the consent of co-tenants in selling part of the property, the sale will still be valid. n82 Revenues from the

common tenancy go to its increase, absent an agreement to divide them. Each tenant has a right to these benefits and makes good the losses incurred through the tenancy in proportion to the tenant's respective interest in it. n83 Each tenant is also entitled to an annual share of the revenues, less expenses. n84

Article 815 of the Civil Code provides that any tenant may ask for partition at any time, unless either contract or law prevents it. For example, if a tenant requests it, a tribunal may delay partition for up to two years, if the immediate partition would diminish the value of the asset. Interestingly, French law protects farming families by preventing the partition of farmland at the death of the landowner under certain conditions; the spouse (if she is a co-owner) or minor children can actually request the delay of partition for a maximum of five years. This delay may be renewed until the spouse dies or the youngest child reaches the age of majority. n85 An agreement not to partition may not exceed five years in duration, although it is renewable at the end of the five-year period. n86

The concept of joint tenancy, as it is known in the United States, does not exist under French law.

§ 106FR.03(e) Condominium.

Ownership of condominium shares, in French law, gives the right to use the property and, at dissolution, to receive a predetermined part of the company's real estate holding.

§ 106FR.03(f) Mortgage.

A mortgage is a right over immovables encumbered for the performance of an obligation, which right follows those immovables into whatever hands they pass. n87 Mortgages are either legal, judicial or conventional; they exist solely in those cases and forms authorized by law. n88 Such cases, however, include only immovable property and immovable accessories which are in commerce, as well as their usufruct. n89

A legal mortgage is created by law. By way of examples, legal mortgages can arise in the following circumstances, creating rights in the parties indicated:

Spouses, over the property owned by the other spouse;

Minors, or adults under guardianship, over the property of the guardian or the legal administrator;

The State and local and regional governments of France, over the property of some administrators.

A judicial mortgage, on the other hand, arises in favor of a person who obtains a judgment, such as by means of a debt, or of back taxes, for instance (similar to a judgment lien in the United States).

The conventional mortgage, other than the legal or judicial mortgage, may be granted only by one who has the capacity to alienate the property. The possibility of rescission, if any, and any conditions upon the ownership are handed down with the mortgage. n90 A husband cannot, for example, mortgage the family dwelling without the consent of his spouse; although his obligation remains the same, the mortgage is simply not valid. Article 215 of the Civil Code states that the spouse who did not consent to the mortgage has the right to demand its annulment.

In the past the conventional mortgage was bound by very strict procedural rules. It could only be granted by an instrument executed in authentic form in the presence of two notaries, or before a notary and two witnesses. This requirement has since been repealed, but a valid mortgage still requires a description of the specific nature and location of the immovables encumbered; such provisions may not be supplied later to cure a defect in the instrument. n91 Furthermore, and perhaps with the same goal of protecting the mortgagor against imprudence, after-acquired property may not be mortgaged. However, if a debtor does not own sufficient property to secure the debt, the debtor may consent that particular items of subsequently acquired property items be specifically encumbered upon their acquisition. n92

Article 2134 of the Civil Code governs the priorities among creditors and mortgagors:

> As among the creditors, a mortgage, whether legal, judicial or conventional, ranks only from the date of inscription by the creditor in the mortgage register in the form and manner prescribed by law ...
>
> The order of priority among creditors with liens or mortgages and the holders of negotiable liens, insofar as the latter encumber property deemed to be immovable, is determined by the dates when the respective documents of title were published ...

The French statute governing recording is thus the equivalent of a race statute: whoever records first, wins.

FOOTNOTES:

(n1)Footnote 57. *Id.* at 552.

(n2)Footnote 58. *Id.* at 578.

(n3)Footnote 59. *Id.* at 579.

(n4)Footnote 60. *Id.* at 601.

(n5)Footnote 61. *Id.* at 600.

(n6)Footnote 62. *Id.* at 605.

(n7)Footnote 63. *Id.* at 598.

(n8)Footnote 64. *Id.* at 617.

(n9)Footnote 65. *Id.* at 618.

(n10)Footnote 66. *Id.*

(n11)Footnote 67. *Id.* at 637.

(n12)Footnote 68. *Id.* at 639.

(n13)Footnote 69. *Id.* at 640.

(n14)Footnote 70. *Id.* at 649.

(n15)Footnote 71. *Id.* at 650.

(n16)Footnote 72. *Id.* at 663.

(n17)Footnote 73. *Id.* at 681.

(n18)Footnote 74. *Id.* at 682.

(n19)Footnote 75. *Id.* at 686, Comment 5.

(n20)Footnote 76. *Id.* at 690.

(n21)Footnote 77. *Id.* at 691.

(n22)Footnote 78. 1965 Bull. Civ. I, No. 483.

(n23)Footnote 79. C. civ. 696 (Dalloz).

(n24)Footnote 80. *Id.* at 815-9.

(n25)Footnote 81. *Id.* at 815-8.

(n26)Footnote 82. 1987, Bull. Civ. I, No. 197.

(n27)Footnote 83. C. civ. 815-10 (Dalloz).

(n28)Footnote 84. *Id.* at 815-11.

(n29)Footnote 85. *Id.* at 815-1.

(n30)Footnote 86. *Id.* at 1873-3.

(n31)Footnote 87. *Id.* at 2114.

(n32)Footnote 88. *Id.* at 2115, 2116.

(n33)Footnote 89. *Id.* at 2118.

(n34)Footnote 90. *Id.* at 2124, 2135.

(n35)Footnote 91. *Id.* at 2129.

(n36)Footnote 92. *Id.* at 2130.

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CHAPTER 106FR PROPERTY LAW IN FRANCE

13-106FR Thompson on Real Property, Thomas Editions § 106FR.04

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§ 106FR.04 Landlord/Tenant Law.

§ 106FR.04(a) Formation of a Lease Contract.

Under French law, a lease may be either written or oral. However, rules for oral leases applied to rural land differ from the rules applied to leases of houses. n93 A person leasing in France would be well-advised in any case to prepare the lease in writing, because if an oral lease has not been fully performed and one of the parties denies its existence, proof from witnesses may not be received at all. n94 If the dispute concerns price, the rule of "buyer beware" applies. The lessor's evidence will be presumed correct, unless the lessee demands an appraisal by experts; if the appraisal exceeds the price the lessee declared, then the lessee is also liable for the expense of the experts.

§ 106FR.04(b) Duties, Responsibilities and Liabilities of the Lessee.

A lessee has an obligation to furnish the dwelling with enough furniture; otherwise the lessee may be evicted at the landlord's discretion, unless the lessee gives to the lessor adequate security for the rent. n95 The lessee must use the property as a good administrator would n96 and for the purpose for which it was intended. n97 The lessee is also required to pay rent. In case of a dispute as to the amount of rent, the lessee must still pay rent, unless a court judgment intervenes in the lessee's favor. n98

Article 1754 of the Civil Code designates the specific repairs for which the tenant is responsible (unless a contrary clause is part of the contract):

> To fireplaces, back-plates, sides and tops of mantelpieces;
>
> To replastering the base of walls of apartments and other places of abode to the height of one meter;
>
> To panes of glass, unless they have been broken by hail or other extraordinary accidents ...
>
> To doors, casements, windows, partitions or shutters of shops, hinges, bolts and locks.

The main concern seems to be with ordinary wear-and-tear where it occurs most frequently, such as at the bottom of the

walls, and with the prevention of fires and break-ins. The next section of the Civil Code states that none of these repairs are even chargeable to the tenant if they are needed only because of decay or "act of God." n99 Furthermore, if the tenant must make repairs that the landlord should have made, the tenant may deduct those repair expenses from rent. n100

In case of fire, the tenant is automatically assumed to be responsible and liable, unless the tenant can prove either that the fire was an "act of God," or occurred because of some other circumstance beyond the control of the tenant, or was communicated from an adjoining house. n101

§ 106FR.04(c) Responsibilities of the Landlord.

The landlord is obligated to deliver the premises in good repair and to maintain them in good repair for the duration of the lease (with the exceptions mentioned above). n102 Under the covenant of quiet enjoyment, the landlord is also responsible for hidden defects, but only if these actually prevent the use of the premises and were unknown to the renter at the time the lease was signed. n103 This implied covenant of quiet enjoyment also prohibits renting the premises to another party or materially modifying the premises. n104

§ 106FR.04(d) Government Intervention in the Rental Market.

Since 1948, the French government has rather heavily regulated the rental market in the heavily populated and rapidly expanding population areas. Among the protections now afforded some renters in those areas are rent ceilings, as well as assurance that as long as they fulfill their obligations under the rent contract (especially paying rent) they may not be ejected at the expiration of the rent contract. Renters may be displaced at the end of a contract if the owner has decided to build or has decided to inhabit the premises. However, even in these cases, requirements of notice and justification by the landlord are sometimes imposed.

FOOTNOTES:
(n1)Footnote 93. *Id.* at 1714.

(n2)Footnote 94. *Id.* at 1715.

(n3)Footnote 95. *Id.* at 1752.

(n4)Footnote 96. "Bon pere de famille" is the expression used in the French Code, which means wise head of the family.

(n5)Footnote 97. *Id.* at 1728.

(n6)Footnote 98. 1969 Bull. Civ. III, No. 285.

(n7)Footnote 99. *Id.* at 1755.

(n8)Footnote 100. 1985 Bull. Civ. V, No. 89.

(n9)Footnote 101. C. civ. 1733 (Dalloz).

(n10)Footnote 102. *Id.* at 1720.

(n11)Footnote 103. P. Dupont Delestraint, Droit Civil, Principaux Contrats 48 (3d ed. 1973).

(n12)Footnote 104. *Id.*

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CHAPTER 106GB PROPERTY LAW IN GREAT BRITAIN (ENGLAND AND WALES)

13-106GB Thompson on Real Property, Thomas Editions 106GB.syn

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§ 106GB.syn Synopsis to Chapter 106GB: PROPERTY LAW IN GREAT BRITAIN (ENGLAND AND WALES)

§ 106GB.01 History.

§ 106GB.02 Types of Real Property Interests.

§ 106GB.02(a) Legal Estates in Real Property.

§ 106GB.02(a)(1) Fee Simple Absolute in Possession.

§ 106GB.02(a)(2) Term of Years Absolute.

§ 106GB.02(a)(3) Concurrent Ownership of Legal Estates.

§ 106GB.02(b) Legal Interests in the Land of Another.

§ 106GB.02(b)(1) Easement, Right, or Privilege in Land, Equivalent in Duration to a Legal Estate.

§ 106GB.02(b)(2) A Rentcharge in Possession Imposed on Land, Either Perpetual or for a Term of Years Absolute.

§ 106GB.02(b)(3) A Charge by Way of Legal Mortgage.

§ 106GB.02(b)(4) Charges on Land That Are not Created by an Instrument.

§ 106GB.02(b)(5) A Right of Entry Connected with a Term of Years Absolute or with a Rentcharge.

§ 106GB.02(c) Equitable Interests in Land.

§ 106GB.02(d) Land Ownership by Aliens.

§ 106GB.03 Conveyancing.

§ 106GB.03(a) Creation of a Contract.

§ 106GB.03(b) Registration of Land.

§ 106GB.03(c) Registration of Land Charges.

§ 106GB.03(d) Conveyance of Registered Title.

§ 106GB.03(e) Conveyance of Unregistered Title.

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CHAPTER 106GB PROPERTY LAW IN GREAT BRITAIN (ENGLAND AND WALES)

13-106GB Thompson on Real Property, Thomas Editions § 106GB.01

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§ 106GB.01 History.

Various forms of property ownership were recognized among the inhabitants of the British Isles well before the earliest manifestations of the present legal system began to form. Whoever the earliest prehistoric inhabitants of Britain were, they had been subsumed within the waves of Celtic invaders who had arrived in the later centuries of the pre-Christian era. By the time of Julius Caesar's first reconnaissance probe on the British Isles in 55 B.C., the earlier Celtic peoples were living in what archaeologists describe as a Late Bronze Age civilization, and the more recent Celtic invaders had introduced Iron Age characteristics. In their relationship to the land, it has been said that Britain's

> people lived either in isolated farms or in hut-villages, situated for the most part on the gravel of river-banks or the light upland soils such as the chalk downs or oolite plateaux, which by that time had been to a great extent cleared of their native scrub; each settlement was surrounded by small fields, tilled either with a foot plough...or else at best with a light ox-drawn plough which scratched the soil without turning the sod; the dead were burnt and their ashes, preserved in urns, buried in regular cemeteries. Thus the land was inhabited by a stable and industrious peasant population, living by agriculture and the keeping of live stock, augmented no doubt by hunting and fishing. n1

The most recently arrived Celtic invaders, specifically the Belgae, also followed the practice of marking the boundaries of the territories under their dominance by means of a continuous rampart and ditch. n2

Caesar followed his reconnaissance with an invasion the following year, in 54 B.C., but the conquest was not completed and Romans then became preoccupied with events closer to Rome. Not until the reign of Claudius, in A.D. 43, did the Romans return and, by conquest, gain the better part of Britain. Even this wholesale political change did not alter the Celtic customs of landholding, except in the few urban areas that became so thoroughly romanized that Roman law was applied, especially as between Roman citizens. For a few, the rise of Roman Britain meant that isolated farms became villas, and substantial farm houses replaced Iron Age dwellings, n3 but for perhaps 85% of the British population "their pre-Roman lifestyles survived into and through the Roman occupation." n4

With the increase of barbarian aggressions throughout the Roman Empire in the 5th century A.D., the Roman legions were withdrawn from Britain. The Romano-Britons eventually succumbed to the persistent attacks and invasions from

Angles, Saxons and Jutes, crossing over from north Germany and the Danish peninsula.

These Germanic invaders had different land-holding customs. From earliest times, as agriculture became more prominent among them, chieftains had made distributions of land annually to kindred groups. Eventually, the distributions were made to individuals, some of whom began to accumulate wealth. These customs underwent substantial change when the invasions of Britain enabled whole tribes to leave their Germanic homelands and settle anew:

> The passage of time and opportunities for conquest produced quite different land distribution practices among the early Anglo-Saxons in Britain. Land freshly conquered or pioneered by Anglo-Saxon settlers was divided by lot, with a number of tracts kept in reserve as commons or as defensive buffers. Holdings assigned to individual warriors who became settlers were permanent, not subject to the annual reallocations practiced by their ancestors... Apart from contributing to physical survival, holding an individual portion of land was a prerequisite for sharing in the use and product of the commons, for voting in public assemblies, and for going to court. Ownership of land therefore signified both freedom and franchise. n5

As kingship developed among the Anglo-Saxons in Britain, the kings took over large tracts of subjugated land, granting substantial portions to their chief warrior companions. Most of such land was actually worked by peasants, and most of the land was eventually impressed with obligations of military service, bridge construction, fortress maintenance, taxation and other labor projects. When land was conveyed, the grantee held only for life, unless special permission was obtained to pass the holding to a descendant. Written documents called charters came into use for granting lands to the church, so that such land came to be called "bookland." Those who held bookland often had rights of alienation or devise, but other granted lands, called "laenland" or "loan land," could be alienated or inherited only with the lord's permission or charter. The large tracts of land not held as bookland or loan land were held as "folk land," a term of uncertain meaning, but probably subject to certain customary rights based on occupancy.

As the watershed event of the Norman Conquest neared, probably most Anglo-Saxon land was occupied under some sort of manorial economy. Within the manorial system typical over much of England, the lord of the manor held the land, but it was actually worked and occupied by peasants who owed services and rents to the lord, and in addition were in some form of personal servitude to the lord, in return for rights to occupy and till their plots of land. Personally free peasant farmers were more numerous in the eastern and northern areas of England, where Viking invaders of the ninth and tenth centuries A.D., had been most dominant.

After the Norman Conquest, which commenced in A.D. 1066, the landholding arrangements among the peasants were left intact, but most English lands changed lords. Within two decades after the Conquest began, the 4,000-5,000 English lords who held land before the Conquest had been replaced by 1,400-1,500 Norman lords. The Norman feudal customs, those customs establishing the conditions under which land was held, began to replace their English counterparts, creating greater emphasis on the military obligations of chief tenants and bringing about greater uniformity in the landholding practices overall. Inheritability, the most important attribute of property, had become widely recognized by the beginning of the twelfth century.

Along with inheritability, other important property rights, such as alienability and devisability, achieved increasing acceptance during the Middle Ages. The persistent impulse on the part of some to render land freely alienable so its inherent market value could be realized, was countered by others who sought to limit the ability of descendants to transfer away portions of great family holdings. Various forms of landholding, called estates in land, were recognized by the courts, but then often came to be restricted or even abolished by royal decree or statute. The various kinds of estates, with their individual attributes or incidents, together formed a complex and highly technical system of property rights.

Once the legal rules governing those property interests formed and stabilized, the rules tended to become rigid, resulting in occasional injustices for property owners whose situations had not been anticipated by the rules. For such, the monarch was prepared to dispense individual justice, but not necessarily in conformance with the "common law" rules, the rules emanating from the law common to all of England. These alternative rules came to be known as equity, because their purpose was to do justice and equity in cases not covered adequately by common law rules. Thus equity decrees produced a second set of property rules, parallel to and often in concurrent jurisdiction with common law rules, which rules further complicated property rights in England.

Because land was considered the ultimate form of wealth, the most affluent and ambitious persons in England sought to accumulate as much as possible with the broadest incidents or rights. Property holding was closely associated with social status, so that not only the size of landholdings, but also the type of ownership--the particular kind of estate by which one held property--correlated closely with one's social class. Persons who were not bound in some way to the land under a manorial economy were considered free, and the property interests they typically held were called freeholds. Conversely, the peasants or serfs typically owed such heavy duties of labor service and farm produce to their feudal lords, that they were considered not free to leave the land, and the forms of property holding typical for this class were labeled as non-freeholds or unfree tenures. Medieval serfs usually held land by arrangements akin to the modern leasehold, a right to occupy the land for a period of time in consideration of services or produce paid to the landlord. These property interests, or tenures, retain even in England today the labels of freehold or unfree, even though the social status distinctions are no longer relevant.

As England emerged from feudalism, the feudal obligations of military service or other kinds of service given in return for landholding also became irrelevant. Eventually the legal and equitable rules were adjusted to enable landholders more easily to obtain the money value of property by conveying various kinds of interests in the property, practices that were less acceptable in a feudal society which relied on well-known landholders to loyally perform their service obligations. Yet some of the old elements of property law with feudal origins and complexities lingered on, only reluctantly responsive to changes in economy and society.

To boldly achieve a system of general property law fit for modern society, the English Parliament culminated an extensive period of law reform by enactment of the Property Acts of 1925, consisting of several statutory components: the unrepealed portions of earlier reform acts, especially of the Law of Property Act of 1922 n6 and the Law of Property (Amendment) Act of 1924; n7 the Settled Land Act of 1925; n8 the Trustee Act of 1925; n9 the Law of Property Act of 1925; n10 the Land Registration Act of 1925; n11 the Land Charges Act of 1925; n12 and the Administration of Estates Act of 1925. n13 Since 1925, specific areas of property law have also been subject to reform statutes, including, among others, the Perpetuities and Accumulations Act, n14 the Law of Property (Joint Tenants) Act, n15 the Matrimonial Homes Act, n16 the Leasehold Reform Act, n17 another Law of Property Act, n18 the Charging Orders Act, n19 and the Limitation Act. n20 Particularly during the twentieth century, English land law reforms have been characterized by increasing governmental regulation to achieve public benefits or protections at the expense of purely private interests in land.

FOOTNOTES:

(n1)Footnote 1. R. G. Collingwood & J. N. L. Myres, Roman Britain and the English Settlements 20 (1937).

(n2)Footnote 2. *Id.* at 28.

(n3)Footnote 3. Peter Salway, Roman Britain 234-235 (Oxford, 1981).

(n4)Footnote 4. David A. Thomas, *The Disappearance of Roman Law from Dark Age Britain*, B.Y.U. L. Rev. 563, 583.

(n5)Footnote 5. David A. Thomas, *Anglo-Saxon Antecedents of the Common Law*, Per Author *1985 B.Y.U. L. Rev. 453, 467.*

(n6)Footnote 6. 12 & *13 Geo. 5,* c. 16; Law of Property (Amendment) Act, 15 & *16 Geo. 5,* c. 5.

(n7)Footnote 7. 15 & *16 Geo. 5,* c. 5.

(n8)Footnote 8. 15 & *16 Geo. 5,* c. 18.

(n9)Footnote 9. 15 & *16 Geo. 5,* c. 19.

(n10)Footnote 10. 15 & *16 Geo. 5,* c. 20.

(n11)Footnote 11. 15 & *16 Geo. 5,* c. 21.

(n12)Footnote 12. 15 & *16 Geo. 5,* c. 22, later replaced by the Land Charges Act of 1972, c. 61.

(n13)Footnote 13. 15 & *16 Geo. 5,* c. 23.

(n14)Footnote 14. 1964, c. 55.

(n15)Footnote 15. 1964, c. 63.

(n16)Footnote 16. 1967, c. 75.

(n17)Footnote 17. 1967, c. 88.

(n18)Footnote 18. 1969, c. 59.

(n19)Footnote 19. 1979, c. 53.

(n20)Footnote 20. 1980, c. 24.

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CHAPTER 106GB PROPERTY LAW IN GREAT BRITAIN (ENGLAND AND WALES)

13-106GB Thompson on Real Property, Thomas Editions § 106GB.02

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§ 106GB.02 Types of Real Property Interests.

§ 106GB.02(a) Legal Estates in Real Property.

As a result of the 1925 property acts, English law recognizes only two types of legal estates, an estate being an interest in land of defined duration. n21 These estates recognized in law are the fee simple absolute in possession and the term of years absolute. Apart from these estates and the legal property interests described in § 106GB.02(b) *infra*, all other estates, interests, and charges relating to land are treated as equitable interests.

§ 106GB.02(a)(1) Fee Simple Absolute in Possession.

The fee simple absolute is the form of land ownership with the maximum cognizable interests associated with land ownership, and the ownership is potentially infinite in duration; as an "in possession" interest, the fee simple absolute is a presently possessory interest rather than an interest that will become possessory at some time in the future.

§ 106GB.02(a)(2) Term of Years Absolute.

The term of years absolute means any right to possess land for a period of fixed and certain duration, even for less than a year, and can include periodic tenancies. It need not be a presently possessory interest, and can be created to commence at some time in the future less than 21 years from the time the lease was created.

§ 106GB.02(a)(3) Concurrent Ownership of Legal Estates.

If a conveyance is made to multiple tenants in common directly or to multiple trustees, the number of concurrent owners is limited to four. n22 The limitation of concurrent ownership to four owners is not so explicit as to joint tenants, but is so treated under English law. n23

§ 106GB.02(b) Legal Interests in the Land of Another.

English law also recognizes five types of legal estates that constitute interests in the land of another.

§ 106GB.02(b)(1) Easement, Right, or Privilege in Land, Equivalent in Duration to a Legal Estate.

Easements, rights or privileges in land equivalent in duration to a legal estate, include the right to use the land of another in a certain way, or to prevent a certain use of the land of another, or to take something from the land of another, typically called easements and profits. They are considered legal interests if their specified duration is similar to one of the two legal estates, either perpetual or limited to a fixed and certain time.

§ 106GB.02(b)(2) A Rentcharge in Possession Imposed on Land, Either Perpetual or for a Term of Years Absolute.

A rentcharge is a right to periodic payment of a sum of money imposed as a burden on land. For a rentcharge to be a legal interest, the party obligated to pay must be in possession of the property, even if the charge itself commences at a future date; further, the duration of the rentcharge must be a duration similar to one of the two legal estates, either perpetual or limited to a fixed and certain time. Since 1977, severe restrictions have been placed on the creation of new rentcharges.

§ 106GB.02(b)(3) A Charge by Way of Legal Mortgage.

The legal mortgage is created either by conveying a term of years absolute subject to being defeated by redemption, or by a deed creating a charge by way of legal mortgage. This is an interest in land, given as security for the repayment of a debt, and which is extinguished upon full repayment. If default occurs, the mortgagee has certain rights in the land which may be employed to obtain satisfaction of the debt.

§ 106GB.02(b)(4) Charges on Land That Are not Created by an Instrument.

These encumbrances consist of obligations similar to the now abolished land taxes and tithe rentcharges. Land taxes were abolished in 1963 and tithe rentcharges were abolished in 1936. The charges considered to be legal interests consist of periodic payments burdening the land by operation of law.

§ 106GB.02(b)(5) A Right of Entry Connected with a Term of Years Absolute or with a Rentcharge.

A typical right of entry considered to be a legal interest is the landlord's right to enter premises under a legal term of years absolute if the tenant fails to pay the rent or observe other covenants of the term.

§ 106GB.02(c) Equitable Interests in Land.

All interests in land other than those described above are considered equitable interests. This means, for instance, that a life estate or a fee tail is no longer a legal estate, but can exist within the framework of a trust. So if the legal estate in fee simple is vested in a trustee, then the beneficial or equitable interests defined by the trust instrument can take the form of a life estate or a fee tail or numerous variants of those interests. Other interests that are no longer legal in nature but are still recognized as equitable interests are restrictive covenants and other interests under trust.

The basic distinction between legal and equitable interests is that a purchaser who buys property without notice of an adverse legal right is bound by the right (so the present holder is protected), while a purchaser who buys without notice of an equitable interest takes free of the equitable interest (so the present holder is not protected from a bona fide purchaser). The important changes in property law made in 1925 were intended to reduce the number of legal estates and interests and thus protect purchasers, and also to protect holders of equitable interests.

Holders of equitable interests are protected by the ability to register their interests of a commercial (economic) nature under the Land Charges Act of 1925. Registration of the equitable interest confers notice on all, and any potential purchaser is bound by such notice. Indeed, if no registration of the equitable interest has occurred, the purchaser is not

bound even if actual notice has occurred by some other means. Certain equitable interests not specifically covered by the Land Charges Act are still subject to the old doctrine of constructive notice. Apart from equitable interests registrable under the Land Charges Act, only the now severely limited legal estates and legal interests in the land of another can be registered for title purposes under the Land Registration Act of 1925.

§ 106GB.02(d) Land Ownership by Aliens.

Since 1914 aliens have been permitted generally to hold and acquire land in the same ways as British citizens. n24

FOOTNOTES:
(n1)Footnote 21. David J. Hayton, Megarry's Manual of the Law of Real Property 28 (1982).

(n2)Footnote 22. Law of Property Act of 1925, sec. 34.

(n3)Footnote 23. David J. Hayton, Megarry's Manual of the Law of Real Property 310 (1982).

(n4)Footnote 24. Status of Aliens Act, 4 & *5 Geo. 5*, c. 17, s. 17 (1914).

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CHAPTER 106GB PROPERTY LAW IN GREAT BRITAIN (ENGLAND AND WALES)

13-106GB Thompson on Real Property, Thomas Editions § 106GB.03

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§ 106GB.03 Conveyancing.

Closely connected with the procedures for conveying real property are the legal rules for registering land titles and for conducting transactions in unregistered land titles. By the term registration is meant a system of certified titles guaranteed by the government, which replaces the routine of making a separate investigation of the state of the title each time a transaction occurs involving that title. In other words, an examination of the register is substituted for the search that traditionally involves review of the abstract of the deed and of encumbrances on the title, and inspection of the property. It is estimated that about 75% of current conveyancing activity in England and Wales concerns registered land. Whether land is registered or unregistered, conveyances usually begin with preliminary negotiations and inquiries, the creation of a draft contract, and the execution of a formal contract, and culminates with carrying out the terms of the contract by exchange of consideration and title documents on the completion day agreed upon by the parties.

In this section, the basic outline of the registration law is described, followed by a summary of contract procedure for the sale of land, and descriptions of conveyancing procedure after the contract is executed for registered and unregistered title, respectively.

§ 106GB.03(a) Creation of a Contract.

In the typical case where a fee simple interest is being sold for money, the parties will enter into a contract before the transaction actually occurs. Even before entering into the contract, the purchaser should conduct a preliminary examination of title and inspection of the property. If items seem to be not entirely in order, a form called Inquiries before Contract will be prepared to note such items and then sent to the vendor. A search of local land charges (public encumbrances) should be made, and an inquiry of the pertinent local authority is made by a standard form to learn of encumbrances that are not registrable. These contract procedures are typical whether the land to be conveyed is registered or unregistered.

§ 106GB.03(b) Registration of Land.

Some areas of England and Wales have been designated as compulsory areas, within which registration of title is required if the proposed conveyance results from the sale of a fee simple or from the creation or assignment of certain leases. For other transactions in the compulsory areas, registration is optional. The constantly expanding compulsory

areas are concentrated in urban regions, so that they now cover about half the area and three-fourths the population of England and Wales. Outside the compulsory areas, applications to register now will not be accepted in all but a limited class of cases and where certain public housing units are sold to tenants. In a conveyance of registered land, the legal interest does not pass to the purchaser until the purchaser is registered as the new proprietor of the title.

§ 106GB.03(c) Registration of Land Charges.

The Land Charges Act of 1925 and its successor, the Land Charges Act of 1972, greatly increased the types of rights that can be registered and thus protected against purchasers without notice. If an interest is properly registered, the registration constitutes notice to all persons for all purposes. The types of interests entitled to be registered are land charges (generally, equitable interests that are of value because of their effect on another's land), n25 pending actions (both an ordinary *lis pendens* and actions in bankruptcy), n26 writs and orders affecting land, n27 and deeds of arrangement (similar to receiverships). n28 The land charges category is the most comprehensive type of registrable interest. This consists of charges (that is, interests or encumbrances) imposed on land by statute; certain legal mortgages; an obligation owed to a tenant for life or statutory owner for discharging death duties or other liabilities; general equitable charges (such as an unpaid vendor's lien); a contract to convey or create a legal estate (including purchase options and pre-emptive rights); death duties, restrictive covenants, and certain equitable easements; certain annuities; and a spouse's right to enter and occupy a house owned by the other spouse.

§ 106GB.03(d) Conveyance of Registered Title.

When parties have entered into a contract for the sale of registered land, the vendor gives the purchaser authorization to make a search of the Land Register, which is otherwise not open to public inspection. n29 The vendor also provides copies or abstracts of documents noted on the register, such as those that impose encumbrances on the land. If any unfavorable or unexpected entries appear in the register, the parties conduct a process of inquiries or "requisitions" and responses to achieve satisfaction of the contract terms. If this process is completed successfully, the purchaser fills in a draft transfer form, with any appropriate special clauses, and sends the form to the vendor for approval. Upon approval, a clean copy is prepared by the purchaser and sent to the vendor for execution. A few days before the day fixed for completion or closing, another search, called an official search, of the register is conducted to learn of any new entries. Following the official search, a priority period begins, now 30 days, within which the register is closed to certain new entries and the transaction must be completed: n30

> Before expiry of the priority period afforded by the official search certificate, [the purchaser] will attend upon [the vendor] to receive the duly executed transfer and the land certificate in return for [the purchaser's] banker's draft for the moneys due under [the vendor's] completion statement. Unlike the unregistered land position, the legal title does not pass until [the purchaser] has lodged his application to register the transfer with the appropriate District Land Registry, and [the purchaser] must ensure that this is done before expiry of the priority period afforded by the official search certificate. n31

§ 106GB.03(e) Conveyance of Unregistered Title.

When parties have entered into a contract for the conveyance of unregistered title, the vendor delivers to the purchaser an abstract of title. The abstract begins with a document in the chain of title that constitutes a good "root of title," which is now required to be only 15 years old or more, n32 and summarizes the documents and events that have affected the title subsequent to the root of title. n33 For encumbrances or transactions subsequent to the root of title, the Land Charges Register must be searched. As an alternative to the abstract, an epitome may be prepared, which summarizes the essential facts in the chain of title and provides photocopies of the supporting documents.

If the abstract or epitome raises questions on the part of the purchaser, further information may be requested of the vendor by a series of written questions or requirements for corrective action called "requisitions on title." The vendor answers the requisitions and the parties go through further requisitions and answers until appropriate and mutually

satisfactory terms for the transaction are worked out.

The purchaser then prepares a draft conveyance (deed) n34 on a standard form and sends the form to the vendor for approval. When any amendments by either party are included and approved, a new, formal copy is prepared by the purchaser and sent to the vendor for signature. The parties then determine a day for completion or closing, and shortly before then the purchaser conducts an official search of the land charges register. A search certificate is issued, which begins the priority period, within which new entries of certain interests are subordinated or "postponed," until the expiration of 30 working days. The completion should occur before the priority period expires.

At the completion, the vendor delivers the title deeds n35 and the signed conveyance to the purchaser, n36 who pays the purchase price. A completion statement will have been previously prepared to show the exact amount due after apportioning rates (taxes) and other charges to the date of completion. The purchaser would thereafter typically submit an application to register the conveyance with the Land Registry.

FOOTNOTES:
(n1)Footnote 25. Land Charges Act of 1972, §§ 2-4.

(n2)Footnote 26. Land Charges Act of 1972, § 5.

(n3)Footnote 27. Land Charges Act of 1972, § 6.

(n4)Footnote 28. Land Charges Act of 1972, § 7.

(n5)Footnote 29. Land Registration Act of 1925, §§ 112, 112A.

(n6)Footnote 30. The official search certificate protects the purchaser against entries of certain interests made in the thirty working days following the day of the certificate, referred to as the priority period. Such entries made during the period are subordinated, or "postponed," to the purchaser's interest if the purchaser's application of registration is received at the appropriate registry before expiration of the priority period.

(n7)Footnote 31. David J. Hayton, Megarry's Manual of the Law of Real Property 156 (1982).

(n8)Footnote 32. Law of Property Act of 1969, § 23.

(n9)Footnote 33. A root of title document is one that (1) deals with the entire legal and equitable interest, (2) accurately and adequately describes the property, (3) shows nothing to cast doubt on the title, and (4) is at least fifteen years old.

(n10)Footnote 34. A conveyance of a legal estate must be by deed. Law of Property Act of 1925, § 52(1).

(n11)Footnote 35. The vendor may retain title deeds that relate to additional land of the vendor, that create a trust which continues in existence, or that relate to the appointment or discharge of trustees. As to any retained deeds, the vendor must provide the purchaser with an acknowledgement of the purchaser's right to have the deeds produced, plus an undertaking for their safekeeping. Law of Property Act of 1925, § 64.

(n12)Footnote 36. The purchaser will sign the conveyance only if it contains some obligation that the purchaser must observe toward the vendor, such as conformity to restrictive covenants.

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CHAPTER 106IN PROPERTY LAW IN INDIA

13-106IN Thompson on Real Property, Thomas Editions 106IN.syn

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§ 106IN.syn Synopsis to Chapter 106IN: PROPERTY LAW IN INDIA

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CHAPTER 106IN PROPERTY LAW IN INDIA

13-106IN Thompson on Real Property, Thomas Editions § 106IN.01

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§ 106IN.01 Brief History of India.

§ 106IN.01(a) Prehistory of India.

The earliest written documents from what is present-day India date from approximately 1500, B.C. All information about India prior to that time, therefore, shall be treated in this chapter as the prehistory of India.

Such evidence of India's prehistory shows that from as early as 30,000 through 4,000, B.C., hunter-gatherer peoples living in Stone Age conditions inhabited parts of India. n1 By 7000, B.C., pastoral and agricultural communities had come into existence. The earliest known civilization in India is called the Harappan civilization, named for some of its ruins first discovered in a place called Haripah in northwest India. The origin of this culture is unknown; the time of its entry into India, if indeed it was not indigenous to India, is unknown. Scholars believe the cultural had acquired some urban characteristics by 2600, B.C. n2 "Harrapan cities were trading and craft production centers, set within the mixed economies--farming, herding, hunting and gathering--of the wider Indus region and dependent on these surrounding economies for food and raw materials ... . Workshops in larger Harrapan towns and sometimes even whole settlements existed for the craft production of traded items." n3 Some of these cities and smaller settlements may have been planned communities. n4 This society was contemporary with nearby Mesopotamian and Egyptian societies, but, in contrast, apparently had no written texts, monuments or large statues.

§ 106IN.01(b) The Early History of India.

By 1800, B.C., the Harappan civilization had mysteriously disappeared, its communities either abandoned or occupied by peoples with a different culture. A few generations after this disappearance, peoples now referred to as Indo-Aryans gradually migrated from areas of modern Iran and Afghanistan into the Punjab region of northwest India. With its Reg-Veda and numerous other ancient hymns, and its Sanskrit language, this nomadic, pastoral and warrior Aryan culture achieved a distinct identity. n5 Even though much of Sanskrit writing remains unintelliglble, it still marks the beginning of India's historical period. With iron-age technology, by the early centuries of the post-Christian era this "Sanskrit-based Aryan culture in which competing Hindu, Buddhist, and Jaina religions vied for dominance had spread its cultural hegemony through all settled regions of the subcontinent." n6 This led to a second Indian urbanization that developed from 600 to 300, B.C.

In this period, population grew and cities emerged, both in the plains and along trade routes. It was a time of vigorous religious development and "volatile and competitive" political life. n7 By 327, A.D., armies of Alexander the Great had penetrated into Indian territory, and after his death in 323, A.D., a Seleucid dynasty founded by one of his generals continued in power for about a century. Elsewhere in India, one of the greatest emperors, Ashoka, reigned from c. 268-233, B.C., and created an enormous empire, judging from his widespread edicts inscribed in rocks and pillars. Trade between the Roman empire and the eastern and western coasts of India continued between the first century, B.C., and the seventh century, A.D. A series of regional tributary political systems was stabilized during the so-called Gupta dynasty, c. 320-550, A.D. "By the seventh century elites who identified with a Sanskrit-based, Aryan culture dominated atll regions of the Indian subcontinent." n8

In the seventh century, A.D., Islamic armies invaded India and in various degrees maintained a dominance in India until the 18th century. During the 16th and 17th centuries, the Portuguese, Dutch, English and French established trade with India and engaged in a variety of conflicts and struggles to maintain and expand those trading interests. During the middle of the 18th century the French and English trading companies engaged in open warfare for control of the Indian trade, with the English emerging supreme. The ruling British East India Company came under governmental regulation beginning with a series of laws in 1773, and by 1833 the company controlled most of India. Indeed, England's "Charter Act of 1833 abolished the East India Company's commercial functions, opening all of Asia to private trade and ending the company's existence as a commercial body. It left the company's government structures in place, however, as a bureaucratic shell through which Parliament would continue to govern India." n9 In 1858, after having survived serious native revolts, the British abolished the East India Company and placed India directly under the rule of the British Crown. Queen Victoria became empress of India in 1876. One-third of India was ruled by almost 600 "Princely States" under British supervision.

A nationalist movement for Indian independence from England was led by Mohandas Gandhi from 1920 to 1948. In 1947, India became independent from Great Britain, and a Dominion of the Commonwealth, and east and west Pakistan were partitioned from India. India became a republic in 1950.

FOOTNOTES:

(n1)Footnote 1. Judith E. Walsh, *A Brief History of India* 6 (2004).

(n2)Footnote 2. *Id.*

(n3)Footnote 3. *Id.* at 9.

(n4)Footnote 4. *Id.* at 11.

(n5)Footnote 5. *Id.* at 13, 17-18.

(n6)Footnote 6. ***Id.*** at 20.

(n7)Footnote 7. *Id.* at 33.

(n8)Footnote 8. *Id.* at 58.

(n9)Footnote 9. *Id.* at 104.

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CHAPTER 106IN PROPERTY LAW IN INDIA

13-106IN Thompson on Real Property, Thomas Editions § 106IN.02

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§ 106IN.02 Governmental and Legal Foundations for Property Law in Modern India.

A new Indian Constitution, one of the longest and most detailed written constitutions in the world, became law in 1950. The Constitution's preamble guaranteed to all citizens the rights of justice, liberty, equality and fraternity. It created the Republic of India as a national government, which was also a federation of regional state governments. "The union government is divided into three distinct, but not entirely separate, branches: the executive, legislative, and judicial. The executive leadership is drawn from and is responsible to the legislative body. The Constitution provides for a judiciary that is free from executive or legislative interference in its deliberations." n10

Statutes, customary law and case law are also sources of law in India. The statutes are enacted by the national Parliament, by state legislatures and by union territory legislatures. Despite this federal diversity, the India court system is a "single integrated system of courts to administer both the union and the state laws." n11

Fundamental rights in India are defined in Articles 12-35 of the Constitution. Originally Article 9(1) included the fundamental rights to acquire, hold and dispose of property among those fundamental rights, but that particular provision fell victim to a lengthy controversy over judicial review in India. n12 The controversy centered on *Article 31 of the Constitution*, providing that no person could be deprived of property except by authority of law and only for compensation. These provisions as written interfered with Indian attempts at land reform.

Land reform in India long remained at the "level predetermined by the British Indian Tenancy Acts," n13 which secured rights of peasants holding directly from their landlords. Many of the rural poor were unprotected.

> Of course, there were ceilings on landholdings imposed by legislation and there was the prohibition of subletting of land. But in the absence of a proper record of rights, breaches of the law were hard to prove and this type of legislation remained a mere eyewash. n14

Resistance to land reform ultimately rested on the constitutional guarantees of property rights, and the Indian courts accepted these arguments. This led to constitutional amendments severely limiting the courts' powers of judicial review, including judicial review rights over even constitutional amendments. After many constitutional amendments, many judicial decisions, and significant political upheavals, judicial review over whether even constitutional amendments

conformed to the basic structure of the constitution was mostly restored, but property rights were removed from the category of fundamental rights and now is classed as an ordinary right.

Now the Constitution of India simply regulates the government's acquisition or extinguishment of estate or rights therein, n15 and proclaims, "No person shall be deprived of his property save by authority of law." n16 Articles 294-296 deal, respectively, with "Succession to property, assets, rights, liabilities and obligations in certain cases," "Succession to property, assets, rights, liabilities and obligations in other cases," and "Property accruing by escheat or lapse or as *Bona Vacantia*."

Under Article 39(b), the government is directed to ensure "that the ownership and control of the material resources of the community are so distributed as best to subserve the common good."

FOOTNOTES:

(n1)Footnote 10. Chun-Chi Young, "The Legal System of the Republic of India," in 9 Linda L. Schlueter (ed.), *Modern Legal Systems Cyclopedia* 9.80.16 (2001).

(n2)Footnote 11. Price Waterhouse, *Doing Business in India* 4 (1989).

(n3)Footnote 12. Ruediger Wolfram and Rainer Grote (gen. eds.), "India," VIII *Constitutions of the Countries of the World* 11-15 (2006); P. P. Pandit, "Constitutional Protections of Property in India," in *Some Aspects of Indian Law Today* 15-24 (1964); Lalit Bhasin, *The Law of Land Acquisition in India* (Sao Paulo Conference on the Law of the World, 1981).

(n4)Footnote 13. Hermann Kulke and Dietmar Rothermund, *A History of India* 317 (1986).

(n5)Footnote 14. *Id.* at 318.

(n6)Footnote 15. Constitution of India, Article 31A.

(n7)Footnote 16. Constitution of India, Article 300A.

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CHAPTER 106IN PROPERTY LAW IN INDIA

13-106IN Thompson on Real Property, Thomas Editions § 106IN.03

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§ 106IN.03 Basic Indian Property Law.

Basic Indian property law is extensively a product of statutory enactment. The principal laws and rules on selected property topics are described below.

§ 106IN.03(a) Estates in Land.

Under India property law, the term immovable property includes essentially all that is meant by real property in English law. Despite this civil law terminology, Indian property law still rests on a foundation of English law, including the estates of fee simple and life estate well-recognized in English law.

§ 106IN.03(b) Concurrent Estates.

The concurrent estates of tenancy in common and joint tenancy are recognized in India. The tenancy in common is presumed if the nature of the concurrent estate is not specified.

§ 106IN.03(c) Leaseholds.

A registered instrument is required for a lease of immoveable property for a term exceeding one year or for a year-to-year term. Leases for other terms can be created by oral agreement and transfer of possession. Permission of tax authorities may be required for leases above a certain value.

§ 106IN.03(d) Gifts.

All gifts of immoveable property must be made by registered instrument.

§ 106IN.03(e) Succession.

Among the significant property topics regulated by major statutory enactments are several succession statutes. The Indian Succession Act of 1952 governs intestate succession for Parsis (professing the Zoroastrian religion), Indian Christians, Jews and others. The Hindu Succession Act of 1956 governs intestate succession among Hindus. Muslim

succession, testate and intestate, is governed by Sunni and Shia doctrines. n17

§ 106IN.03(f) Wills.

As mentioned above, a variety of statutory and customary approaches to testate and intestate succession are set forth in several Indian succession laws, mostly corresponding to one's professed religion. The Indian Succession Act of 1925 governs wills, and these laws as they relate to formalities are closely patterned after the English model.

§ 106IN.03(g) Real Estate Transactions.

Real property in India is generally included in the statutory references to immoveable property. The Transfer of Property Act governs conveyances of property to living persons, such term including a company, association or body of individuals, whether or not incorporated. Actual conveyances of immoveable property interest over a certain value can be made only by registered instrument; other transfers can be made by delivery. Real estate contracts do not create interests in the property.

These rules also apply to mortgages. In certain large cities, equitable mortgages on immoveable property are created by the debtor delivering documents of title to the creditor for the purposes of securing the loan.

Other transactions involving the conduct of the parties or operation of law, but not delivery of title documents, where property is made security for payment of money, are called legal charges.

The Industrial Policy (1991) invites and regulates foreign investment, including foreign direct investment in virtually all sectors.

§ 106IN.03(h) Special Rules.

Conveyances of immoveable property to charitable trusts, or of agricultural property to one who will not use the property for agriculture require prior approval from appropriate government officials. Also, agricultural lands are subject to laws limiting the amount of such land that may be held.

§ 106IN.03(i) Title Registration.

The Indian Registration Act governs registration of documents of transfer. No registration should occur unless the proper authorities have certified that arrangements have been made to satisfy all existing liabilities relating to the property.

§ 106IN.03(j) Stamps.

Transactional documents must bear the appropriate stamps, as determined by federal and state law and according to varying rates, under authority of the Indian Stamp Act of 1899. Stamp duty is to be paid on all documents that are registered, and averages 12-13%, a relatively high rate. Efforts to avoid registration are often intended to avoid paying the stamp tax.

§ 106IN.03(k) Taxation.

§ 106IN.03(k)(1) Estate Tax.

The estate tax was abolished in India with respect to deaths occurring after March 16, 1985. Income tax is subject to special rules and rates for residential rental income (house property).

§ 106IN.03(k)(2) Wealth Tax.

The Wealth Tax Act of 1957 imposed an annual tax, similar to a property tax, on 1% of the value of various kinds of property above a certain value, including buildings and appurtenant lands used for residential or commercial purposes, urban land, and land held for investment.

§ 106IN.03(l) Environmental Regulation.

Environmental regulation and protection in India is a vast subject with an enormous amount of statutory detail. It suffices, for purposes of this chapter, to list below the principal governing statutes, to illustrate the scope and diversity of environmental regulation: n18

The Atomic Energy Act of 1962

The Delegated Legislation Provisions Act (Amendment, 2004) (delegating much regulation authority to the states)

The Environmental Protection Act of 1986

The Factories Act of 1948

The Forest Conservation Act of 1980

The Indian Forest Act of 1927

The Insecticides Act of 1968

The National Environment Policy 2004

The National Environment Tribunal Act (1995)

The Public Liability Insurance Act (1991) (relating to hazardous materials)

The Water Prevention and Control of Pollution Act of 1974

The Water Prevention and Control of Pollution Cess Act of 1977

The Wildlife Protection Act of 1974

FOOTNOTES:

(n1)Footnote 17. Chun-Chi Young, "The Legal System of the Republic of India," in 9 Linda L. Schlueter (ed.), *Modern Legal Systems Cyclopedia* 9.80.34-35 (2001).

(n2)Footnote 18. *See also,* Aditya Shankar and Saptak Sanyal, "Property Rights and Sustainable Development in India," *22 Colum. J. Asian L. 235-257 (2009).*

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CHAPTER 106IT PROPERTY LAW IN ITALY

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§ 106IT.syn Synopsis to Chapter 106IT: PROPERTY LAW IN ITALY

§ 106IT.01 Constitutional Foundation to Private Property in Italy

§ 106IT.02 Property and the 1942 Italian Civil Code

§ 106IT.03 Property and the 1942 Civil Code Basic Principles of the Italian Property Law

§ 106IT.04 State Property in Italy

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bill of rightsAccession

§ 106IT.08 Union, Commingling and Specification

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§ 106IT.11 Acquiring and Securing Real Property Rights

§ 106IT.12 Adverse Possession or Acquisitive Prescription ("Usucapione")

§ 106IT.13 Other Interests in Real Property

§ 106IT.14 Emphyteusis

§ 106IT.15 Servitudes

§ 106IT.16 Usufruct

§ 106IT.17 Use and Habitation

§ 106IT.18 Surface Rights

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CHAPTER 106IT PROPERTY LAW IN ITALY

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§ 106IT.01 Constitutional Foundation to Private Property in Italy

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When, at the outset of the postwar reconstruction in the 1940s, the Assembly of Constitutional Framers had to establish the foundations of the newly born Italian Republic, the regulation of property was one of the most heated issues brought to the fore of public debate. The Constitutional Assembly, which was elected in the aftermath of a controversial referendum that decided to abolish the monarchy and opted for a republican form of state, was the clear expression of a divide in the society. The Assembly was comprising three major constituencies: a strong communist and socialist party, a strong christian-democratic party and a significant liberal party. Each of the three constituencies had a firmly held ideological view on the functions and the regulation that property should have. A liberal tradition had been enshrined in the 1848 Albertine Constitution, which at article 29 provided: *"All properties without exceptions are inviolable. Nonetheless, when the public interest legally ascertained requires it, it might be required to cede all or part of them for a fair indemnity"*. Marxists stressed the need for a reform toward collectivization of property and at half ground, Catholics leaned toward a functional view of property as a means to grant dignity and personal development. To compromise, the framers found a formula that would allow any possible actual future application: from a neo-capitalistic economy to collectivization and echoing the roman tradition of Gaius (*res publicae sunt aut privatae*, Inst., II, par.10) they provided at *Article 42 Const.*: *"Property is public and private. Economic assets belong to the State, local authorities or citizens. Private Property is recognized and granted by the law which sets the ways by means of which it might be acquired, enjoyed and its limitations in order to assure the social function of it and to made it accessible to everyone. In cases set by the law and for an indemnity, private property may be expropriated for general interest."*

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CHAPTER 106IT PROPERTY LAW IN ITALY

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§ 106IT.02 Property and the 1942 Italian Civil Code

article 136 (3) of the Constitution

Italian civil code (ICC) is heavily indebted to the roman tradition and to the legislative technique of the Code Napoleon, from which it drew the most important norms on property. The Civil Code's framers preferred the technique of wide legal definitions and general concepts given by the Code Napoleon which constituted the most important model from which they took inspiration. The Civil Code comprises six books and property is regulated by the third book (from Article 810 to Article 1171), which is divided into nine different subdivisions or "titles". The third book gives a complete regulation of property: it defines what assets might be objects of property and the different kinds of real property rights and interests in the land of others, it provides norms about confining properties, it regulates co-ownership and condominiums, it defines possession and ownership and sets rules on claims and protection of possession and ownership.

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CHAPTER 106IT PROPERTY LAW IN ITALY

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§ 106IT.03 Property and the 1942 Civil Code Basic Principles of the Italian Property Law

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In Italy, assets are divided into movable (*"beni mobili"*) and immovable property (*"beni immobili"*), a distinction similar to the common-law concepts of personal and real property. Under article 812 of the civil code, the ground, the natural resources, the watercourses, the trees and the buildings or other constructions and in general what is naturally incorporated to the ground are immovable property. All other goods are movable property. Natural energy is considered a movable property.

An important subset of movable property is composed by registered movable property (*"beni mobili registrati"*): vehicles and boats are among registered movable property, because they must be registered in special public registry. Even if such assets are not incorporated in the ground, they are subject to rules on transferability that are similar to those set for immovable property.

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§ 106IT.04 State Property in Italy

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Under the civil code, the shore, the beaches, the ports, the rivers, the torrents, the lakes and other public waters so defined by special laws as well as buildings and constructions made for national defense are state property ("*demanio pubblico*"). Also, roads, highways, railways, airports, aqueducts, buildings that are recognized by special laws as of historical interest are State property. State property cannot be sold or be the object of individual property rights and is protected and regulated by the State. Except for State property, property rights on movable or immovable property can arise through transfer from a previous legitimate owner (derivative constitution of right) or through prescription, occupation, or acquisition.

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CHAPTER 106IT PROPERTY LAW IN ITALY

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§ 106IT.05 Acquiring Real Property Rights_

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Under the Italian civil code, except for State property, property rights interests can be acquired in nine different ways: seven of them are defined as "original acquisitions of interests" because the resulting interest do not derive from the property of a previous owner. Original acquisition of rights are: occupation, invention, accession, specification, union, commingling, prescription. Two of them are defined derivative acquisition of rights and they are: transfer by contract and succession.

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CHAPTER 106IT PROPERTY LAW IN ITALY

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§ 106IT.06 Occupation and Invention

Constitution, Art. 9

By occupation a property interest on movables that do not belong to anybody (*res nullius*) may be acquired. Two conditions are necessary for occupation to be effective: one has to (1) take possession of the immovable (2) with the intention of becoming the owner of the occupied movable. Immovables cannot be effectively occupied because immovables that do not belong to anybody are considered to belong to the State. Under the civil code, movables that do not belong to anybody are: chattels that have been abandoned with the intention of losing the property interest, the catch from fishing. Traditionally wild animals had been considered as if they were not owned by anyone (*"res nullius"*), but a strict regulation of hunting has excluded wild animals (*"ferae naturae"*) from the goods of which one can obtain property by taking possession on it.

Different from movables that do not belong to anybody are movables that have been lost. If someone finds a movable that has been lost (*"invention"*), she has to return the lost item to the owner if she knows him or, if not, she has to deliver the lost movable to the relevant office of the local authority where the good has been found. Once one year has passed and the owner has not claimed the lost movable, the finder becomes the owner of the lost item. If the lost movable is claimed, the finder has the right to an indemnity equal to a tenth of the value of the movable. Also, treasures found in the soil may be acquired through invention if they are found by the owner of the soil. If the treasure is found by someone other than the owner of the soil, the finder has to share fifty percent of the value of the treasure with the owner of the soil. However, treasures that have historical, archeological or artistic value belong to the State.

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§ 106IT.07 Accession

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A traditional principle provides that property on the most important good may entail property on something that is ancillary to it. Through accession, a movable that is incorporated to an immovable may become part of the immovable. For example, if somebody realizes a building on a soil of which he is the owner, he becomes the owner of the building as long as it is embedded in the soil. Under the civil code, when somebody, who acts in good faith, realizes a building on the land of another, the latter has the right at his option to pay the cost of the works or to pay the increase in value that the land has gained because of the new building. The owner of the land will be entitled to obtain the demolition of the new building at the builder's cost only if the builder was in bad faith and has realized the building while he was aware that the land belonged to somebody else. Accession may occur also between two immovables: for example when an upstream piece of land is dragged by a river and join a downstream piece of land.

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CHAPTER 106IT PROPERTY LAW IN ITALY

13-106IT Thompson on Real Property, Thomas Editions § 106IT.08

§ 106IT.08 Union, Commingling and Specification

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Union (*"unione"*) or commingling (*"commistione"*) occurs when two movables are united or commingled in order to form a different object. In this case, the finished product belongs to the owner of the most important of the commingled properties. If the components of the new object are of equal importance and they cannot be easily separated, the owners of the components become co-owners of the new object. Specification (*"specificazione"*) occurs when somebody uses raw material that belongs to somebody else to realize a new finished product: it is the case of the sculptor who uses somebody's else marble. The sculptor becomes the owner of the raw material but he has to pay a fair price for the material he used. Like in anglo-american case law, the civil code provides a test similar to the *"disproportionate value"* test if the raw material one used is far more valuable than the finished product. In this event, as it happens in the case of a goldsmith who uses somebody's else gold, the owner of the raw material becomes owner of the finished product but he has to compensate the labor costs.

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CHAPTER 106IT PROPERTY LAW IN ITALY

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§ 106IT.09 Possession

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The Italian civil code provides protection not only to property rights but also to possession. A traditional definition draws the line between possession and property in that while the former is a "matter of fact", the latter is a "matter of law". Under article 1140 c.c., possession is the power exercised on something in a way that appears to correspond to the exercise of the right of ownership: like in Anglo-American property law, one may generally be said to have possession on something if he has dominion and control over it. Therefore, the difference between title and possession is the same between being the owner and behaving like the owner. According to a latin tradition, possession requires the intention of being the owner (*"animus possidendi"*): therefore if someone holds something on the basis of a contract that recognizes that sombody else owns the good, she will not possess the good. In other words, when the possessor is not the owner himself, possession must be inconsistent with owner's rights and without the owner's consent: holding an article with the owner's consent gives rise to a bailment ("*detenzione"*).

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CHAPTER 106IT PROPERTY LAW IN ITALY

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§ 106IT.10 *Bona fide* Purchaser of Movables and Valid Transfer Of Property Interest

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Personal property may be acquired through possession: a general rule is usually condensed in the motto "possession counts as title" (*"possesso vale titolo"*). This is a strikingly different approach from what most Anglo-American jurisdictions do with reference to *bona fide* purchasers. In these jurisdictions, "a seller cannot convey better title than that which he holds". The rule "possession counts as title" aims at making trade and transfer of movables easy and safe. Under article 1153 of the civil code, if somebody receives a movable from somebody who is not the actual owner, he acquires nonetheless the ownership of the movable if he was in good faith when he took possession of the good and obtained it through a formally valid title. The acquisition of the property right interest of the *bona fide* purchaser does not depend on the status or qualification of the seller, who could indifferently be a layperson or a merchant.

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CHAPTER 106IT PROPERTY LAW IN ITALY

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§ 106IT.11 Acquiring and Securing Real Property Rights

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Under Italian law, real property interests can be transferred from a previous owner to another owner only by a contract in writing or by a public instrument made by a notary public, who has to follow certain forms provided by law ("Atto pubblico").

Italy has a recording system ("registri immobiliari") that allows to deal with conflicting claims on the same parcel and differently from what is for example the Autrian system, its recording system has a personal basis. Therefore the search for title has to be done not on the land parcel but rather on the chain of persons who owned the land. In Italy, there is also a public register that is based on parcels of land, the cadaster ("Catasto"): however it has mainly tax purposes. To be recorded in the recording system, the contract has to be notarized by a public notary.

In the Italian recording system, not only real property interests but also claims on property are registered. Italy has realized what is generally called a "pure race statute": the subsequent purchaser that records before the earlier purchaser is protected whether or not he has actual notice of the earlier conveyance. However, in the event the subsequent purchaser had actual notice of the previous sale, the previous purchaser will be able to claim damages against the seller and the subsequent purchaser.

With reference to real property, a seller cannot convey better title than that which he holds: therefore if somebody buys from a previous owner whose title was invalid, the owner with a valid title might claim his title against the subsequent purchaser who bears the risk of being evicted ("evizione"). However, such strict rule is softened for the subsequent bona fide purchaser who bought on the basis of a formally valid title that has been registered in the recording system. If the above-mentioned condition occurs, the civil code provide a statute of limitations of five years after which the subsequent owner cannot be evicted.

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CHAPTER 106IT PROPERTY LAW IN ITALY

13-106IT Thompson on Real Property, Thomas Editions § 106IT.12

§ 106IT.12 Adverse Possession or Acquisitive Prescription (*"Usucapione"*)

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The principle "possession counts as title" does not apply in relation to real property, with reference of which the rule "a seller cannot convey better title than that which he holds" applies. However, real property might be acquired through the joint occurrence of possession and the passage of time. It may happen that real property be possessed by somebody who has not a valid title. If such a situation drags on for a significant stretch of time, the possessor ends up acquiring a valid title. It has no relevance whether or not the possessor is in good faith, even though such aspect might affect the length required to acquire a valid title.

Like in most Anglo-American jurisdictions, in order to result in prescription, possession has to be open (notorious and visible), exclusive, actual and continuous. If possession has been gained by the use of force or violence, the term for prescription starts running once the violence has ended or the possession has become visible and notorious.

As we said, the length of time for acquiring a valid title on a real property varies. To acquire a valid title on real property, possession has to be continuously held for twenty years. However, if the purchaser of the real property was in good faith and bought the real property from a non-owner on the basis of a formally valid title that has been filed with the land registry, he will acquire a valid title in ten years. The possessor or a registered movable will have to hold the property for three years.

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§ 106IT.13 Other Interests in Real Property

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In Italy, as discussed above, the regulation of property is indebted more to the roman tradition than to feudalism: this has created a legal framework and an economic structure where unrestricted property is the rule and minor interests in real property are the exceptions. To use concepts that derive from a common-law background, fee simples (an unrestricted and endless right to a land or real estate, save the application of zoning rules) are the most common status of property rights. However, the civil code provides a regulation of six minor interests (or estate) other than property. Minor interests usually coexist and limit the unrestricted use of an estate.

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§ 106IT.14 Emphyteusis

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Among minor interests, emphyteusis is the largest in content: once it used to be very common because it was a way for noblemen to obtain a rent from unused lands, but it has now declined in use, even because it has not been favored by the parliament who has introduced rules to redeem the property of lands subject to emhyteusis (law n. 607 of 1966 and 1138 of 1970).

As stated in article 958 of the ICC, emphyteusis is a perpetual interest in the real property and if a limitation in duration is provided for, emphyteusis has to last at least twenty years. Emphyteusis can be transferred by contract (*inter vivos*) or it can be bequeathed (*mortis causa*).

The holder of a emphyteusis, the emphyteuta, has the same rights to enjoy of the estate of an owner subject to two duties: (1) he has to improve the estate and (2) he has to pay periodic rent. Even if it is an interest more common in countryside, emphyteusis can be agreed on any kind of real estate.

The emphyteuta may redeem the property on the land paying an amount equal to the value of fifteen years of capitalized rent. On the other hand, if the emphyteuta does not comply to his duties to improve the land or paying the rent, the owner can judicially obtain the re-assignment of the property.

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§ 106IT.15 Servitudes

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According to article 1027 of the ICC, servitudes are burdens imposed on the use of the land, to the advantage of an adjoining land. Even though servitudes are born mostly to regulate adjoining lands, they have been used to allow passage of aqueducts, electric system, railroads and other public utility's network on somebody's else land. Usually the latter are imposed by a public authority with a decision that has the same value of a judgement.

The content of servitudes is heterogeneous. By servitude, a right to pass through a land or a right to draw water from a land to the benefit of another land may be obtained. Servitudes may also have a negative content whereas the owner of a land burdened by a servitude may be prevented from building over a certain height if this impedes the view of an adjoining land that enjoys a view-servitude.

They may arise voluntarily by a contract signed between the owners of two adjoining lands. However, if someone owns a land that is surrounded by other lands that prevent him to access a public road from his parcel, he may obtain a judicial decision that gives rise to a servitude on one adjoining land.

Servitudes, like other minor real interests, may be acquired or lost by adverse possession if the servitude is used (or non used) for twenty years.

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§ 106IT.16 Usufruct

Bill of Rights

When a landowner separates rights of enjoyment, which are given to a life tenant, from the other rights associated with ownership of real property, a usufruct arises. The usufruct is usually given for the duration of tenant's life, if it is granted to a company it cannot exceed thirty years.

In common law, the most similar estate to usufruct is life estate (or estate for years). An usufruct right can be separated and transferred to another without the property owner losing the other rights that have been retained (he remains what is called a *"naked owner" "nudo proprietario"* as he owns a *"naked property" "nuda proprieta"*). However, the life tenant must respect the economic destination of the asset he holds in usufruct.

As stated in article 981 of the Italian Civil code, the life tenant has the right to enjoy its facilities and fruits. Fruits include both natural produce (if the usufruct is on a cultivated land) or rents if the estate is rented out.

Costs for maintaining the estate are divided between the life tenant and the owner: all extraordinary costs for repairs are born by the naked owner whereas the costs for ordinary repairs are born by the life tenant. The former pays all taxes related to property and the latter pays the taxes related to income from the use of the land.

At the end of the usufruct period, the life tenant must return the property in essentially the same condition in which it was received, natural deterioration and wear and tear excepted. Usufructs are transferable. Usufruct usually arises voluntarily from a contract or a will, but the civil code provides for a mandatory usufruct given to the parents on the assets owned by a minor.

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§ 106IT.17 Use and Habitation

Bill of Rights

Use is similar to the usufruct, except that the use gives a tenant the right to enjoy fruits of an estate as long as they are necessary to fulfill a person's and the person's family needs. The habitation is a variant of the use in which a person receives land or a real estate for a family dwelling and has no obligation to pay rent to the landowner. Article 1026 of the Italian civil code establishes that the rules regarding usufruct are applicable to the use and the habitation. Nowadays, these property rights are not common because usufruct is usually used instead.

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§ 106IT.18 Surface Rights

Bill of Rights

The right of surface gives the holder the right to build and own a building on (or under) somebody else's soil. The surface agreed by contract suspends the occurrence of accession. The right of surface might be perpetual or established for years. If its duration is limited, once it expires the accession rules make the building become property of the soil's owner. The surface interest may end by prescription if the building is not realized within 20 years from the beginning of the right.

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Supp. to § 106IT.01 Constitutional Foundation of Private Property in Italy

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When, at the outset of the postwar reconstruction in the 1940s, the Assembly of Constitutional Framers had to establish the foundations of the newly born Italian Republic, the regulation of property was one of the most heated issues subject to public debate. The Constitutional Assembly, which was elected in the aftermath of a controversial referendum that decided to abolish the monarchy and opted for a republican form of state, was the clear expression of a divide in the society. The Assembly was comprised of three major constituencies: a strong communist and socialist party, a strong Christian-democratic party and a significant liberal party. Each of the three constituencies had a firmly held ideological view on the functions and the regulation that property should have. A liberal tradition had been enshrined in the 1848 Albertine Constitution, which at article 29 provided: *"All properties without exceptions are inviolable. Nonetheless, when the public interest legally ascertained requires it, it might be required to cede all or part of them for a fair indemnity"*. Marxists stressed the need for a reform toward collectivization of property and less extreme, Catholics leaned toward a functional view of property as a means to grant dignity and personal development. To compromise, the framers found a formula that would allow any possible actual future application: from a neo-capitalistic economy to collectivization and echoing the roman tradition of Gaius (*res publicae sunt aut privatae*, Inst., II, par.10) they provided at *Article 42 Const*.: *"Property is public and private. Economic assets belong to the State, local authorities or citizens. Private Property is recognized and granted by the law which sets the ways by means of which it might be acquired, enjoyed and its limitations in order to assure the social function of it and to make it accessible to everyone. In cases set by the law and for an indemnity, private property may be expropriated for general interest."*

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The Italian Civil Code (ICC) is heavily indebted to the Roman tradition and to the legislative technique of the Code Napoleon, from which it drew the most important norms on property. The Civil Code's framers preferred the technique of wide legal definitions and general concepts given by the Code Napoleon which constituted the most important model from which they took inspiration. The Civil Code comprises six books and property is regulated by the third book (from Article 810 to Article 1171), which is divided into nine subdivisions or "titles." The third book gives a complete regulation of property: it defines what assets might be objects of property and the different kinds of real property rights and interests in the land of others, it provides norms about confining properties, it regulates co-ownership and condominiums, it defines possession and ownership and sets rules on claims and protection of possession and ownership.

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Supp. to § 106IT.03 Property and the 1942 Civil Code Basic Principles of the Italian Property Law

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In Italy, assets are divided into movable (*"beni mobili"*) and immovable property (*"beni immobili"*), a distinction similar to the common-law concepts of personal and real property. Under article 812 of the Civil Code, the ground, the natural resources, the watercourses, the trees and the buildings or other constructions and in general what is naturally incorporated into the ground are immovable property. All other goods are movable property. Natural energy is considered a movable property.

An important subset of movable property consists of registered movable property (*"beni mobili registrati"*): vehicles and boats are among registered movable property, because they must be registered in a special public registry. Even if such assets are not incorporated into the ground, they are subject to rules on transferability that are similar to those set for immovable property.

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Under the Civil Code, the shore, the beaches, the ports, the rivers, the torrents, the lakes and other public waters so defined by special laws as well as buildings and constructions made for national defense are state property ("*demanio pubblico*"). Also, roads, highways, railways, airports, aqueducts, and buildings that are recognized by special laws as of historical interest are State property. State property cannot be sold or be the object of individual property rights and is protected and regulated by the State. Except for State property, property rights on movable or immovable property can arise through transfer from a previous legitimate owner (derivative constitution of right) or through prescription, occupation, or acquisition.

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Supp. to § 106IT.05 Acquiring Real Property Rights

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Under the Italian Civil Code, except for State property, property rights interests can be acquired in nine different ways: seven of them are defined as "original acquisitions of interests" because the resulting interest do not derive from the property of a previous owner. Original acquisition of rights are: occupation, invention, accession, specification, union, commingling, prescription. Two of them are defined derivative acquisition of rights and they are: transfer by contract and succession.

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Supp. to § 106IT.06 Occupation and Invention

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By occupation a property interest in movables that do not belong to anybody (*res nullius*) may be acquired. Two conditions are necessary for occupation to be effective: one has to (1) take possession of the immovable (2) with the intention of becoming the owner of the occupied movable. Immovables cannot be effectively occupied because immovables that do not belong to anybody are considered to belong to the State. Under the civil code, movables that do not belong to anybody are: chattels that have been abandoned with the intention of losing the property interest and the catch from fishing. Traditionally wild animals had been considered as if they were not owned by anyone (*"res nullius"*), but a strict regulation of hunting has excluded wild animals (*"ferae naturae"*) from the goods of which one can obtain property by taking possession on it.

Different from movables that do not belong to anybody are movables that have been lost. If someone finds a movable that has been lost (*"invention"*), the finder must return the lost item to the owner if known or, if not, the finder must deliver the lost movable to the relevant office of the local authority where the good has been found. Once one year has passed and the owner has not claimed the lost movable, the finder becomes the owner of the lost item. If the lost movable is claimed, the finder has the right to an indemnity equal to a tenth of the value of the movable. Also, treasures found in the soil may be acquired through invention if they are found by the owner of the soil. If the treasure is found by someone other than the owner of the soil, the finder has to share fifty percent of the value of the treasure with the owner of the soil. However, treasures that have historical, archeological or artistic value belong to the State.

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Supp. to § 106IT.07 Accession

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A traditional principle provides that property in the most important good may include property on something that is ancillary to it. Through accession, a movable that is incorporated into an immovable may become part of the immovable. For example, if somebody discovers a building on soil of which he is the owner, he becomes the owner of the building as long as it is embedded in the soil. Under the Civil Code, when somebody, who acts in good faith, discovers a building on the land of another, the latter has the right at his option to pay the cost of the works or to pay the increase in value that the land has gained because of the new building. The owner of the land will be entitled to obtain the demolition of the new building at the builder's cost only if the builder acted in bad faith and has constructed the building while he was aware that the land belonged to somebody else. Accession may occur also between two immovables: for example when an upstream piece of land is dragged by a river and joins a downstream piece of land.

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Supp. to § 106IT.08 Union, Commingling and Specification

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Supp. to § 106IT.09 Possession

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Supp. to § 106IT.10 Bona fide Purchaser of Movables and Valid Transfer of Property Interest

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Supp. to § 106IT.11 Acquiring and Securing Real Property Rights

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With reference to real property, a seller cannot convey better title than that which he holds; therefore if somebody buys from a previous owner whose title was invalid, the owner with a valid title might claim his title against the subsequent purchaser who bears the risk of being evicted ("evizione"). However, this strict rule is softened for the subsequent bona fide purchaser who bought on the basis of a formerly valid title that has been registered in the recording system. If the above-mentioned condition occurs, the Civil Code provides a statute of limitations of five years after which the subsequent owner cannot be evicted.

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Supp. to § 106IT.12 Adverse Possession or Acquisitive Prescription ("Usucapione")

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As in most Anglo-American jurisdictions, in order to result in prescription, possession has to be open (notorious and visible), exclusive, actual and continuous. If possession has been gained by the use of force or violence, the term for prescription starts running once the violence has ended or the possession has become visible and notorious.

As stated above, the length of time for acquiring a valid title on real property varies. To acquire a valid title on real property, possession has to be continuously held for twenty years. However, if the purchaser of the real property acted in good faith and bought the real property from a non-owner on the basis of a formerly valid title that has been filed with the land registry, he will acquire a valid title in ten years. The possessor or a registered movable will have to hold the property for three years.

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In Italy, as discussed above, the regulation of property is indebted more to the Roman tradition than to feudalism; this has created a legal framework and an economic structure where unrestricted property is the rule and minor interests in real property are the exceptions. To use concepts that derive from a common-law background, the fee simple (an unrestricted and endless right to a land or real estate, save the application of zoning rules) is the most common form of property rights. However, the Civil Code provides a regulation of six minor interests (or estate) other than property. Minor interests usually coexist and limit the unrestricted use of an estate.

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Supp. To CHAPTER 106IT PROPERTY LAW IN ITALY

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Supp. to § 106IT.14 Emphyteusis

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Among minor interests, emphyteusis is the largest in scope: once it used to be very common because it was a way for noblemen to obtain a rent from unused lands, but it has now declined in use, because it has not been favored by the parliament who has introduced rules to redeem the property of lands subject to emhyteusis (law n. 607 of 1966 and 1138 of 1970).

As stated in Article 958 of the ICC, emphyteusis is a perpetual interest in the real property and if a limitation in duration is provided for, emphyteusis has to last at least twenty years. Emphyteusis can be transferred by contract (*inter vivos*) or it can be bequeathed (*mortis causa*).

The holder of a emphyteusis, the emphyteuta, has the same rights to enjoy of the estate of an owner subject to two duties: (1) he has to improve the estate and (2) he has to pay periodic rent. Even though it is an interest more common in the countryside, emphyteusis can be agreed on any kind of real estate.

The emphyteuta may redeem the property on the land by paying an amount equal to the value of fifteen years of capitalized rent. On the other hand, if the emphyteuta does not comply with his duties to improve the land or pay the rent, the owner can judicially obtain the re-assignment of the property.

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Supp. to § 106IT.15 Servitudes

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According to Article 1027 of the ICC, servitudes are burdens imposed on the use of the land, to the advantage of an adjoining land. Even though servitudes are created mostly to regulate adjoining lands, they have been used to allow passage of aqueducts, electric system, railroads and other public utilities on somebody's else land. Usually the latter are imposed by a public authority with a decision that has the same value of a judgement.

The content of servitudes is heterogeneous. By servitude, a right to pass through a land or a right to draw water from a land to the benefit of another land may be obtained. Servitudes may also have a negative content whereby the owner of a land burdened by a servitude may be prevented from building over a certain height if this impedes the view of an adjoining land that enjoys a view-servitude.

They may arise voluntarily by a contract signed between the owners of two adjoining lands. However, if someone owns land that is surrounded by other lands that prevent access a public road from his parcel, he may obtain a judicial decision that gives rise to a servitude on adjoining land.

Servitudes, like other minor real interests, may be acquired or lost by adverse possession if the servitude is used (or not used) for twenty years.

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Supp. to § 106IT.16 Usufruct

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When a landowner separates rights of enjoyment, which are given to a life tenant, from the other rights associated with ownership of real property, a usufruct arises. The usufruct is usually given for the duration of a tenant's life; if it is granted to a company it cannot exceed thirty years.

In common law, the most similar estate to usufruct is life estate (or estate for years). A usufruct right can be separated and transferred to another without the property owner losing the other rights that have been retained (he remains what is called a *"naked owner" "nudo proprietario"* as he owns a *"naked property" "nuda proprieta"*). However, the life tenant must preserve the economic value of the asset he holds in usufruct.

As stated in Article 981 of the Italian Civil Code, the life tenant has the right to enjoy its facilities and fruits. Fruits include both natural produce (if the usufruct is on cultivated land) or rents if the estate is rented out.

Costs for maintaining the estate are divided between the life tenant and the owner: all extraordinary costs for repairs are borne by the naked owner whereas the costs for ordinary repairs are borne by the life tenant. The former pays all taxes related to property and the latter pays the taxes related to income from the use of the land.

At the end of the usufruct period, the life tenant must return the property in essentially the same condition in which it was received, natural deterioration and wear and tear excepted. Usufructs are transferable. Usufruct usually arises voluntarily from a contract or a will, but the Civil Code provides for a mandatory usufruct given to the parents on the assets owned by their minor child.

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Supp. to § 106IT.17 Use and Habitation

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Use is similar to the usufruct, except that the use gives a tenant the right to enjoy fruits of an estate as long as they are necessary to fulfill the tenant's personal and family needs. The habitation is a variant of the use in which a person receives land or real estate for a family dwelling and has no obligation to pay rent to the landowner. Article 1026 of the Italian Civil Code establishes that the rules regarding usufruct are applicable to the use and the habitation. Nowadays, these property rights are not common because usufruct is usually used instead.

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Supp. to § 106IT.18 Surface Rights

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The right of surface gives the holder the right to build and own a building on (or under) somebody else's soil. The surface right agreed by contract suspends the occurrence of accession. The right of surface might be perpetual or established for years. If its duration is limited, once it expires the accession rules make the building the property of the soil's owner. The surface interest may end by prescription if the building is not constructed within 20 years from the beginning of the right.

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CHAPTER 106JP PROPERTY LAW IN JAPAN

13-106JP Thompson on Real Property, Thomas Editions 106JP.syn

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§ 106JP.syn Synopsis to Chapter 106JP: PROPERTY LAW IN JAPAN

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CHAPTER 106JP PROPERTY LAW IN JAPAN

13-106JP Thompson on Real Property, Thomas Editions § 106JP.01

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§ 106JP.01 Brief History of Japanese Property Law.

Before the 7th century A.D., Japanese law was unwritten and dealt mostly with rituals of ancestor worship and the relationships of clans and families. Only in some of the laws now governing the imperial household may be found any remnants of this prehistoric law.

When Chinese influence reached Japan by way of Korea during the 7th century, the accompanying priests helped create a new moral structure in Japan. This same moral structure still forms the basis of Japanese social ethics. The result of this new influence for development of law was the Taiho Code of A.D. 701, which was based on Chinese law. The Taiho Code did not draw a clear line between morality and law or between private law and public law -- its aim was to preserve moral order and harmony in human relationships. In this code much attention was given to the form of government, the hierarchy of offices, and the discipline of officials and subjects. Most of the legal rules, therefore, would be described today as "public law." The few rules of private law dealt mostly with family and succession matters. Some family regulations were in the nature of public law, because order in the family was considered essential to harmonious world order.

With the weakening of central authority, a feudal system developed in the 12th century and persisted until the 19th century. During the feudal period, the government was ruled by a succession of military houses and the old, formal Chinese laws were modified to fit feudal conditions, and later to accommodate the military government that was controlled by a single dynasty for the final three hundred years of the period. Separate sets of laws and traditions governed the Imperial Court, warriors, commoners, and outcasts. The ownership of land was at first restricted to the warrior classes, but merchants gradually overcame this handicap and gained a substantial economic position. Law, for the most part, consisted of private instructions and regulations for officials, and were rarely or only partially publicized.

In 1868 the ruling Tokugawa family was overthrown by opposition clans, which then established government controls in the Emperor Meiji. This was followed by the re-establishment of a strong central government, the abolition of the feudal regime, and the abandonment of the policy of isolation which had secluded Japan from the rest of the world for three hundred years.

Meanwhile, a second wave of foreign influence had commenced with the coming of the "black ships" under the

American Commodore Perry in 1853. This resulted in opening the country to trade and shipping and the adoption of Western technology. New laws were adopted to accommodate a society changing from agricultural and feudal to industrial and commercial. New laws enabled Japan to obtain better trade treaties and also reduce foreign extra-territorial privileges.

The new laws were based, principally, on the continental European legal system. The commercial code, the bankruptcy law and the code of civil procedure were derived from the counterpart German codes; the criminal code and the code of criminal procedure were influenced by their French counterparts.

The first Japanese Civil Code compilation commission was formed in 1875, but the entire Civil Code was not enacted until 1898. The delay was caused by uncertainty about how to frame laws dealing satisfactorily with family and succession. Eventually a two-part code was adopted, one part containing the general provisions based mostly on continental European law, and the other with provisions on family and succession, drawn largely from traditional law and custom. This two-part code was still in force when Western occupation commenced at the end of World War II.

With the inception of that occupation, law in Japan came under increased influence of Anglo-Saxon legal ideas. The revision of the Civil Code in 1947, under the direction of occupation authorities, essentially completed the transition of Japanese civil law to European law.

The new post-war constitution included principles regarding marriage and family, which thus once again became matters of public law. The adoption of this new constitution on January 1, 1948, also hastened the revision of the Civil Code, which was already underway. The new Civil Code was created by a committee consisting of ministerial officials, judges, scholars, lawyers, journalists, and representatives of both houses of the Diet. Women were also included on the committee. This committee worked with occupation lawyers to articulate reforms that were carried out under the military occupation. With the exception of one article, the revision of the Civil Code dealt almost exclusively with family law, Books 4 and 5 of the old civil code. The property laws of Book 2 were generally not the subject of revision.

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CHAPTER 106JP PROPERTY LAW IN JAPAN

13-106JP Thompson on Real Property, Thomas Editions § 106JP.02

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§ 106JP.02 Property Interests Recognized in Japan.

§ 106JP.02(a) General Concepts.

Land and things fixed to land are considered immovables. Things are considered fixed to the land if they are closely attached, such as buildings and fixtures, or form a body with the land, such as water and minerals. Rights in real property are known as real rights. Real rights may be created by intention of the parties coupled with delivery or registration. n1

§ 106JP.02(b) Possessory Rights.

Japanese law distinguishes between:

legal possession and natural possession;

possession by just title and possession by unjust title;

possession in good faith and possession in bad faith;

defective possession and non-defective possession;

faulty possession and faultless possession; and

continuous possession and non-continuous possession.

Possessory rights are acquired by holding things with the intention of so doing on one's own account, n2 or are acquired through a representative. n3

§ 106JP.02(c) Ownership.

"An owner has the right of freely using, receiving profits of, and disposing of the thing owned within the restrictions of laws and ordinances." n4 "The ownership of land, within the restrictions of laws and ordinances, extends above and

under the surface." n5

§ 106JP.02(c)(1) Civil Code Provisions Relating to Various Aspects of Land Ownership.

§ 106JP.02(c)(1)(i) Limits on Ownership of Buildings.

1. When several persons each own a portion of a building divided into parts, the parts in common use of the building and its accessories are presumed to be jointly owned by them.

2. The expenses of repairing and other charges for the parts in common use are shared proportionately according to the value of the portion owned by each. n6

§ 106JP.02(c)(1)(ii) Restrictions Between Adjacent Owners.

§ 106JP.02(c)(1)(ii)(a) Right of Using Adjacent Land.

a. The owner of land can demand the use of adjacent land within the limits necessary for constructing or repairing fences and walls or buildings on or near the boundary, but cannot enter the dwelling house of an adjacent owner unless with the latter's consent.

b. In the case of the preceding paragraph, the adjacent owner who has sustained damages, can claim compensation. n7

§ 106JP.02(c)(1)(ii)(b) Right of Thoroughfare.

a. When a piece of land is surrounded by other land and so has no passage to the public road, the owner of such land may pass over the surrounding land in order to reach the public road.

b. The same applies when there is no outward passage except by pond, marsh, river, canal, or sea or ocean, or when there is a considerable difference in height between the land and the public road on account of a cliff or bank. n8

c. In the case of the preceding article the place and method of passage must be so chosen as to meet the needs of the person who is entitled to the right of passage and yet cause as little damage as possible to the surrounding land. The person who has the right of passage may construct a road when it is necessary. n9

d. The person who is entitled to the right of passage must pay just compensation for any injury caused to the land passed over, but the compensation can be paid annually. n10

e. When in consequence of partition, a plot of land comes into being which has no passage to the public road, the owner of such piece of land may pass to the public road only through the piece of land owned by the other co-partitioners. In this case the owner need not pay any compensation.

f. The provisions of the preceding paragraph apply correspondingly when the owner of a piece of land has assigned a part thereof. n11

§ 106JP.02(c)(1)(ii)(c) Rights with Respect to Running Water.

a. The owner of land cannot prevent water from naturally flowing in from adjacent land. n12

b. When the course of water is obstructed upon a lower piece of land by accident, the owner of the higher land may, at the owner, own expense, construct works necessary for its drainage.

c. The owner of the lower piece of land is under no obligation to facilitate the outflow of water. n13

d. When works relating to a water course constructed "A" piece of land for collecting, draining, or conducting water, cause or may cause damage to "B" piece of land, the owner of "B" can cause the owner of "A" to make repairs or drain off the water or construct preventative works if necessary. n14

e. In the case of the preceding two articles, when there is a special custom with regard to the incidence of expenses, such custom is followed. n15

f. The owner of land cannot construct roofs or other structures which cause rain water to fall directly upon adjacent land. n16

g. The owner of the bed of a canal or other water course cannot change the course of water or the width of the bed when the land on the opposite shore belongs to another person.

h. When the land on both shores belongs to the owner of the bed of the watercourse, the owner can change the course of water or the width, but the water must be restored to its natural course at its lower mouth. n17

i. The owner of higher land may conduct water through lower land for the purpose of draining land under water (marsh land) or of discharging superfluous water in household, agricultural or industrial use until it reaches a public highway, a public stream, or a drain, but the owner must so select the place and method as to cause the least possible damage to the lower land. n18

§ 106JP.02(c)(1)(ii)(d) Right of Using Adjacent Works.

a. The owner of land can, for the purpose of conducting the water on the land, use the works constructed by the owner of a higher parcel of land.

b. In the case of the preceding paragraph, a person who uses the works of another person must bear the expenses of their construction and preservation in proportion to the benefit derived therefrom. n19

§ 106JP.02(c)(1)(ii)(e) Right of Using the Opposite Shore.

The owner of the bed of a watercourse may, when it is necessary to construct a dam, rest the dam on the opposite shore, but must pay compensation for any damages which may arise in consequence. The owner of the opposite shore who owns apart of the bed of water may use the dam but must bear a share of the expenses in accordance with the provisions of the preceding article. n20

§ 106JP.02(c)(1)(ii)(f) Territorial Boundary Rights.

a. The owner of land may, by sharing expenses with the owner of the adjacent land, construct a thing indicating the boundary, notwithstanding the non-consent of the other party. n21

b. The expenses of constructing and preserving the boundary marks are to be borne in equal shares by adjacent owners, but the expenses of measurement (survey) are to be borne in shares proportionate to the extent of the area of each parcel of land. n22

§ 106JP.02(c)(1)(ii)(g) Rights of Fencing.

a. When two buildings belonging to different owners are separated by unoccupied land, either owner can construct a fence on the boundary line at the common expense of both owners.

b. When the parties concerned cannot come to an agreement, the fence of the preceding article shall be wood or bamboo and six feet in height [so as to avoid an unreasonably expensive material used in construction]. n23

c. The expenses of constructing and preserving the fence are to be borne in equal shares by the adjacent owners. n24

d. One of the adjacent owners may construct a fence of a better material or of a greater height than fixed in paragraph 2 of article 225, but must bear the consequent increase of expense. n25

e. When there is a custom differing from the provisions of the preceding three articles, such custom is to be followed. n26

§ 106JP.02(c)(1)(ii)(h) Rights of Mutual Ownership.

a. The boundary marks, fences, walls and ditches constructed on the boundary line are presumed to belong in common to the adjacent owners. n27

b. The provisions of the preceding article do not apply to a wall which stands on a boundary line and which forms a part of one of the buildings.

c. The same rule applies to that part of the wall between two buildings of unequal height which rises above (overtops) the lower building, but this does not apply to walls built for the prevention of fire. n28

§ 106JP.02(c)(1)(ii)(i) Right of Improving Fences and Walls.

a. One of the adjacent owners may increase the height of the wall jointly owned, notwithstanding the non-consent of the other owner; but if the wall cannot support the strain of the superstructure that owner must strengthen or re-construct the wall and pay the entire expense. The additional part of the wall increased in height in accordance with the preceding paragraph is exclusively owned by the person who has constructed it. n29

b. In case of the preceding article, the adjacent owner who has suffered damage can demand compensation. n30

§ 106JP.02(c)(1)(ii)(j) Right of Cutting Trees.

When the branches of trees and bamboos on adjacent land encroach over the boundary line, the owner of such trees and bamboos can be required to top off the branches. When the roots of trees and bamboos on adjacent land encroach across the boundary line they can be cut off. n31

§ 106JP.02(c)(1)(ii)(k) Restrictions Relating to Works on Boundary Lines.

a. In constructing a building, a distance of at least eighteen inches must be left from the boundary line.

b. When any person is about to construct a building contrary to the provisions of the preceding

paragraph, the owner of the adjacent land may require the person to abandon or modify the construction; but after one year has elapsed from the commencement of the construction, or after the building is finished, only compensation for damages can be demanded. n32

c. Any person who constructs at a distance of less than three feet from the boundary line a window or a veranda which overlooks the grounds of another person must attach a screen thereto.

d. The distance of the preceding paragraph is measured from that point of the window or veranda which is nearest to the adjacent land in a straight line to the boundary line. n33

e. When there are customs different from the provisions above such customs are to be followed. n34

f. In digging a well, a cistern, a cesspool, or a receptacle for manure, a distance of at least six feet must be left from the boundary line and in digging a pond, a cellar or a water-closet vault, at least three feet.

g. In laying waterpipes under ground or digging ditches, a distance of at least one half of its depth must be left from the boundary line, but it need not exceed three feet. n35

h. When the works of the preceding article are made in the neighborhood of a boundary line, necessary precautions must be taken in order to prevent the collapse of earth and sand or the infiltration of water or filthy liquids. n36

§ 106JP.02(c)(2) Acquisition of Ownership.

Ownerless immovables belong to the state, n37 but the owner of an immovable acquires the ownership of a thing that has been attached to the immovable property as its accessory, "but this does not affect the right of another person who has attached the thing by virtue of a title." n38 Ownership rights in both movables and immovables may be acquired by prescription, possession, partition, transfer and succession.

§ 106JP.02(c)(3) Concurrent Ownership.

Japanese law recognizes a form of concurrent ownership called "co-proprietorship," which can arise from contract, succession, legacy, marital relationship, or accident (such as confusion of property). The principal Civil Code rules relating to the rights of co-owners are as follows:

§ 106JP.02(c)(3)(i) Ownership by a Joint Owner.

Each joint owner may use, in proportion that owner's share, the whole of the common property. [The common object must be so used as not to interfere with the joint use of the other participants.] n39

§ 106JP.02(c)(3)(ii) Presumption of the Shares of Joint Owners.

In case of doubt, the shares of the different joint owners are presumed to be equal. n40

§ 106JP.02(c)(3)(iii) Alteration of Common Property.

None of the joint owners may make any alteration to the common property without the consent of the other joint owners. n41

§ 106JP.02(c)(3)(iv) Management and Preservation of Common Property.

Matters relating to the management of common property are, except in the case of the preceding article, decided by a vote of the majority, each joint owner having the number of votes proportionate to the value of such owner's share, but acts of preservation may be done by either of the joint owners. n42

§ 106JP.02(c)(3)(v) Expenses of Management of Common Property.

a. Each joint owner is bound to pay the expenses of management and the other charges of the common property in proportion to such owner's share.

b. If the obligations of the preceding paragraph are not performed within one year, the other joint owners can acquire the share of the party in default upon payment of suitable compensation. n43

§ 106JP.02(c)(3)(vi) Obligations Among Joint Owners.

An obligation which one of the joint owners possesses with regard to the common property against another joint owner may also be exercised against the latter's singular successor. n44

§ 106JP.02(c)(3)(vii) Effect of Joint Ownership.

When one of the joint owners renounces such owner's share or dies without an heir, the share reverts to the other joint owners. n45

§ 106JP.02(c)(3)(viii) Partition of Common Property.

a. Each joint owner can at any time demand the partition of the common property, but a contract may be concluded not to partition it for a period not exceeding five years.

b. Such contract can be renewed, but the renewal time must not exceed five years. n46

c. This does not apply to common property mentioned in Articles 208 [where building is owned in parts] and 209 [in cases of boundary marks and other common property constructed on the boundary line]. n47

§ 106JP.02(c)(3)(ix) Commonage and Iriai-ken.

Commonage is a type of customary rural servitude by which the inhabitants of certain villages have rights to cut grass and timber and to conduct water into their fields, and to use a forest or plain in common. *Iriai-ken* is a form of joint ownership based on the customs of each locality. Japanese law permits persons with rights of commonage or *iriai-ken* to obtain partition of their separate portions under some circumstances. n48

§ 106JP.02(d) Superficies.

Superficies is the right to use the land of another for support of things--such as structures, trees, and bamboos--which the user, called the superficiary, owns. n49 It is considered a real right, a highly valuable right in rem, similar to a lease, and with some features of ownership. It is enforceable against third persons. Superficies is similar to the German heritable building right. In case the period of time for duration of a superficies has not been fixed by the act of creation, the superficiary can at any time renounce the right, if there is no special custom. But when a rent is to be paid, either one years previous notice must be given or rent for one year paid, in order to renounce. n50 Upon termination of the superficies, the superficiary can remove the structures or trees and bamboos upon restoring the land to its original state. However, if the landowner gives notice of intent to purchase them and offers to pay their current value, the superficiary may not unreasonably refuse the offer. n51

§ 106JP.02(e) *Emphyteusis.*

Emphyteusis is common among Japanese peasants and is a kind of permanent tenancy. With a duration of 20 to 50 years, n52 it enables poor farmers to rent the land of others and gain a livelihood by farming. An *emphyteusis* is a real right by which the land of another person can be used in consideration of paying a rent and is exercised for the purpose of agriculture or stock-farming. n53

An *emphyteuta* has the right of possessing the land, and may transfer the right, unless prohibited by the act of creation, or in violation of the right of the landowner. n54 An *emphyteuta* owns the fruits produced on the land at their separation.

An *emphyteuta* must maintain the land in its original state and cannot make alterations to the land that cause permanent damage. n55 The *emphyteuta's* obligation to pay rent is so firm that no rebate is possible even after damage to the land or loss of farming revenue caused by irresistible force. n56 Bankruptcy or two years delinquency in rent payment can cause termination of the *emphyteusis*. n57

§ 106JP.02(f) Servitudes.

A servitude is a real right, to use the land of another person for the benefit of one's own land. n58 Servitudes are distinguished as pertaining to arable land and building land, as positive and negative, as continuous and discontinuous, and as apparent (visible) and non-apparent. Servitudes may be acquired by prescription. n59 If a servitude involves use of structures on the servient land, the servient land owner may also use the structures, if there is no interference with the servitude use. n60

§ 106JP.02(g) Preferential Rights.

"A preferential right is a special right of obtaining performance in preference to all others, which right is given by the law to holders of certain obligations for their protection." n61

"1. A preferential right may be exercised against money or other things which the debtor receives in consequence of the sale, letting, extinction, or damage of its subject; but the privileged creditor must seize (attach) the money or other thing previous to the payment or delivery thereof. 2. The same applies with regard to considerations for real rights created by the debtor in the subject of the preferential right." n62 The holder of the preferential right may exercise the right against the whole thing retained until performance of the whole of the obligation. n63

A general preferential right is one by virtue of which any movable or immovable property among properties of the debtor may be seized and the performance of the obligation obtained therefrom. n64 The preferential right for hiring or letting of immovables exists in the movables of the hirer with regard to the rent of the immovables and other obligations of the hirer arising from the relation of hiring. n65

A preferential right in immovables arises with regard to expenses for the preservation of immovables, for work done upon immovables, and for the purchase price and accrued interest for immovables. n66 Preferential rights also exist for obligations of leases of land, for assigned or sublet leases, in liquidations of leased property, and for money received as security for rent. n67

§ 106JP.02(h) Liens.

"1. A lien is a right which the possessor of a thing has of retaining such thing until the performance of the obligation is obtained when the possessor has an obligation in the possessor's favor arising on account of the thing possessed. 2. The conditions of a lien are that: a. A thing belonging to another person be possessed; b. that possession has not been

obtained by an illegal act; c. that the obligation is one which arises on account of the thing possessed; d. that the performance of the obligation is due. 3. The lien-holder may exercise the right against the whole thing retained until performance of the whole of the obligation." n68

A lien-holder may reap the fruits of the thing retained and appropriate them to the performance of the obligation in preference to other creditors. n69

The debtor may demand the extinction of the lien upon depositing appropriate security. n70

§ 106JP.02(i) Pledges.

A pledge is a class of credit against things. A pledgee/creditor has the right of possessing the thing received from the debtor or a third person as security for an obligation and subsequently of obtaining the performance of the obligation out of the thing, by selling the thing or demanding the sale by auction, in preference to the creditors. n71 Pledge is not a real right which has independent and separate existence like ownership, superficies or *emphyteusis*, but is an accessory real right which exists for the purpose of securing the obligation which is its principal; therefore, when there is no principal obligation there is no pledge which secures it, and when the principal obligation is extinguished the accessory pledge is likewise extinguished. Pledge differs from mortgage in that the pledgee must possess the thing which has been received as a security from the debtor or a third person, and the pledgor or creator therefore cannot, be allowed to possess the thing pledged.

§ 106JP.02(j) Mortgages.

A mortgage is an accessory real right in an immovable that is in the possession of another person. The mortgage is indivisible and has a preferential right and the right of pursuit. A mortgage has no effect on the rights of third persons unless it is registered. A superficies and an *emphyteusis* can also be made the subject of a mortgage, although most leases cannot be mortgaged. n72

FOOTNOTES:
(n1)Footnote 1. 1 Annotated Civil Code of Japan, art. 176 (J. E. de Becker trans. 1979) (hereafter "Civil Code").

(n2)Footnote 2. *Id.* art. 180. Scott, Geoffrey R. "The Cultural Property Laws of Japan: Social, Political, and Legal Influences." 12 Pac. Rim L. & Pol'y J. 315 (March, 2003); West, Mark D. "Losers: Recovering Lost Property in Japan and the United States." *37 Law & Soc'y Rev. 369* (June, 2003).

(n3)Footnote 3. *Id.* art. 182.

(n4)Footnote 4. *Id.* art. 206.

(n5)Footnote 5. *Id.* art. 207.

(n6)Footnote 6. *Id.* art. 208.

(n7)Footnote 7. *Id.* art. 209.

(n8)Footnote 8. *Id.* art. 210.

(n9)Footnote 9. *Id.* art. 211.

(n10)Footnote 10. *Id.* art. 212.

(n11)Footnote 11. *Id.* art. 213.

(n12)Footnote 12. *Id.* art. 214.

(n13)Footnote 13. *Id.* art. 215.

(n14)Footnote 14. *Id.* art. 216.

(n15)Footnote 15. *Id.* art. 217.

(n16)Footnote 16. *Id.* art. 218.

(n17)Footnote 17. *Id.* art. 219.

(n18)Footnote 18. *Id.* art. 220.

(n19)Footnote 19. *Id.* art. 221.

(n20)Footnote 20. *Id.* art. 222.

(n21)Footnote 21. *Id.* art. 223.

(n22)Footnote 22. *Id.* art. 224.

(n23)Footnote 23. *Id.* art. 225.

(n24)Footnote 24. *Id.* art. 226.

(n25)Footnote 25. *Id.* art. 227.

(n26)Footnote 26. *Id.* art. 228.

(n27)Footnote 27. *Id.* art. 229.

(n28)Footnote 28. *Id.* art. 230.

(n29)Footnote 29. *Id.* art. 231.

(n30)Footnote 30. *Id.* art. 232.

(n31)Footnote 31. *Id.* art. 233.

(n32)Footnote 32. *Id.* art. 234.

(n33)Footnote 33. *Id.* art. 235.

(n34)Footnote 34. *Id.* art. 236.

(n35)Footnote 35. *Id.* art. 237.

(n36)Footnote 36. *Id.* art. 238.

(n37)Footnote 37. *Id.* art. 239.

(n38)Footnote 38. *Id.* art. 242.

(n39)Footnote 39. *Id.* art. 249.

(n40)Footnote 40. *Id.* art. 250.

(n41)Footnote 41. *Id.* art. 251.

(n42)Footnote 42. *Id.* art. 252.

(n43)Footnote 43. *Id.* art. 253.

(n44)Footnote 44. *Id.* art. 254.

(n45)Footnote 45. *Id.* art. 255.

(n46)Footnote 46. *Id.* art. 256.

(n47)Footnote 47. *Id.* art. 257.

(n48)Footnote 48. *Id.* arts. 258-263.

(n49)Footnote 49. *Id.* art. 265.

(n50)Footnote 50. *Id.* art. 268.

(n51)Footnote 51. *Id.* art. 269.

(n52)Footnote 52. *Id.* art. 278.

(n53)Footnote 53. *Id.* art. 270.

(n54)Footnote 54. *Id.* arts. 272-273.

(n55)Footnote 55. *Id.* art. 271.

(n56)Footnote 56. *Id.* arts. 274-275.

(n57)Footnote 57. *Id.* art. 276.

(n58)Footnote 58. *Id.* art. 281.

(n59)Footnote 59. *Id.* art. 283.

(n60)Footnote 60. *Id.* art. 288.

(n61)Footnote 61. *Id.* art. 303.

(n62)Footnote 62. *Id.* art. 304.

(n63)Footnote 63. *Id.* art. 305.

(n64)Footnote 64. *Id.* art. 306.

(n65)Footnote 65. *Id.* art. 312.

(n66)Footnote 66. *Id.* arts. 326-328.

(n67)Footnote 67. *Id.* arts. 315-316.

(n68)Footnote 68. *Id.* art. 296.

(n69)Footnote 69. *Id.* art. 297.

(n70)Footnote 70. *Id.* art. 301.

(n71)Footnote 71. *Id.* art. 342.

(n72)Footnote 72. *Id.* art. 369.

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CHAPTER 106JP PROPERTY LAW IN JAPAN

13-106JP Thompson on Real Property, Thomas Editions § 106JP.03

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§ 106JP.03 Restrictions on Ownership of Property by Foreigners.

Foreigners and foreign corporations may acquire, possess, and sell land in Japan, as a general rule. The Alien Land Law of Japan provides that Japan may apply reciprocal restrictions if the home country of the alien restricts land ownership by Japanese nationals; but the Japanese-American Treaty of Friendship, Commerce, and Navigation provides for mutual "national treatment" of Japanese nationals in the United States and United States nationals in Japan.

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CHAPTER 106JP PROPERTY LAW IN JAPAN

13-106JP Thompson on Real Property, Thomas Editions § 106JP.04

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§ 106JP.04 Land Tax.

Japan imposes a recordation tax on land sales at the rate of 5% of the value listed in the fixed assets register. A stamp tax is also imposed on documents used to evidence the establishment, transfer, or change of a property right. Fixed assets are appraised by a city appraiser and the appraised value is listed in the land register, building register, or supplemental building register. On this appraisal is based a fixed assets tax of 1.4% annually, payable in four installments, with an exemption of Y20,000 for land and Y30,000 for houses. Ownership for the purposes of this tax is determined on the 1st day of each year. There is also a city tax, which varies as to city. In Tokyo, the city tax is 0.1% of the appraised value. One who acquires an interest in an immovable must report the transaction for tax purposes, or be subject to a penalty for failure to report. The tax applies to the purchase, new construction, addition, remodelling, or gift of immovable property. In the case of an acquisition, the tax is 3% of the value as listed in the fixed assets register. Transactions under Y10,000 for land, or Y100,000 for new construction of a building, or Y50,000 for purchase of a building, are exempted from this tax. For additions or remodeling, the tax is 3% of the increased value, amounts under Y100,000 being exempted. If one buys land for construction of a dwelling and within one year builds a new dwelling upon that land, the price of the land is taxed at 3% of the value over Y600,000.

The land tax is levied on and collected from the persons who are registered in the Land Register as owners at the commencement of the period when the tax becomes due. In cases where the land is subject to a pledge of any duration or a superficies exceeding 100 years, the tax is levied on any person registered as pledgee or superficiary in the Land Register. Foreigners are taxed for land the same way as Japanese landowners.

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CHAPTER 106KE PROPERTY LAW IN KENYA

13-106KE Thompson on Real Property, Thomas Editions 106KE.syn

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§ 106KE.syn Synopsis to Chapter 106KE: PROPERTY LAW IN KENYA

§ 106KE.01 Historical Background: From Colonial to Independent Status.

§ 106KE.02 Historical Development of Land Law in Kenya.

§ 106KE.02(a) Customary Land Law.

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§ 106KE.02(a)(1)(ii) Land Rights Among the Gikuyu.

§ 106KE.02(a)(1)(iii) Land Rights Among the Gusii.

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§ 106KE.05 How Land Ownership Originates.

§ 106KE.05(a) Registration.

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§ 106KE.05(b)(1) Under the Government Lands Act.

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§ 106KE.05(b)(3) Under the Registered Land Act.

§ 106KE.06 Taxation of Real Property.

§ 106KE.07 Ownership of Real Property by Foreigners.

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CHAPTER 106KE PROPERTY LAW IN KENYA

13-106KE Thompson on Real Property, Thomas Editions § 106KE.01

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§ 106KE.01 Historical Background: From Colonial to Independent Status.

Although the British entered East Africa in the area that is now Kenya about the middle of the 19th century, Germany was the first to take official colonial action, by declaring the region a protectorate in 1885. In 1886, England and Germany entered into an agreement permitting England to annex from the protectorate an area including modern Kenya. A second agreement in 1890 more clearly defined the boundaries of the respective territories. Thereafter England assigned certain administrative duties to the Imperial British East Africa Company, but in 1895 declared a protectorate directly over East Africa. In 1920, the British annexed Kenya as a colony, known as the Colony and Protectorate of Kenya. n1

British administration of Kenya as a colony gradually moved Kenya toward independence. Following a constitutional conference and a new constitution, general elections were held in 1963, the same year Kenya was granted powers of internal self-government. On December 12, 1963, the country officially became a member of the Commonwealth of Nations, and on December 12, 1964, Kenya became a Republic with a president as head of state. n2 This progression from a colony to an independent nation has had profound effect on the land law of Kenya.

FOOTNOTES:
(n1)Footnote 1. Charles Mwalimu, The Kenyan Legal System: An Overview 3-5 (1988); *see* T. Jackson, *The Legal System of Kenya, in* 6 Modern Legal Systems Cyclopedia 6.260.5 (Kenneth R. Redden ed. 1990).

(n2)Footnote 2. Charles Mwalimu, The Kenyan Legal System: An Overview 11-12 (1988).

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CHAPTER 106KE PROPERTY LAW IN KENYA

13-106KE Thompson on Real Property, Thomas Editions § 106KE.02

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§ 106KE.02 Historical Development of Land Law in Kenya.

Land law in Kenya is diverse and complex, clearly the product of the area's history as a land of native settlement and foreign colonization:

> The Land Law of Kenya is a history of its development from customary law to modern statute law. But, this development and the advent of independence has brought its problems. There are in Kenya, two systems of substantive law, three systems of conveyancing and five systems of registration... There are, in fact, twenty-nine statutes to say nothing of subsidiary legislation, embracing the subject of land law in Kenya, either specifically applied or of general application. The substance of the Land Law of Kenya is bulky and complex and finding its whereabouts more difficult still. n3

In a very general sense, customary law governs the land relationships among the native Africans, while modern statutory law governs land relationships among those who came as colonists. This section will discuss the substance of customary law and its present state. This will be followed by a history of modern statutory law.

§ 106KE.02(a) Customary Land Law.

§ 106KE.02(a)(1) General Summary of Customary Land Law.

Within the native lands, the substantive land law is based on customary law and varies from tribe to tribe. However, some generalizations may be made. Land in east Africa was traditionally held communally, controlled either by the clan or by the elders of the clan. According to the native perspective, the clan did not actually "own" the land; rather, God owned the land, and the elders were designated trustees to administer and manage the land for the benefit of the clan.

§ 106KE.02(a)(1)(i) Land Rights Among the Bantu.

In practice, the enjoyment of land rights among the Bantu was typical:

> The basis of Bantu land tenure was that the individual had inheritable rights as a *user* of his arable

> lands; but with regard to grazing lands, forest, and salt licks, he shared with the clan or tribe the beneficial use of such natural sources or wealth that had come into the possession of the tribe either by conquest or by original occupation. This does not imply individual ownership of fields, nor individual rights to misuse land. Ownership, insofar as there was such a concept, was usually vested in the ancestor spirits who played a very real part in the life of the African and who symbolized his community past, present, and future. Every clan member had the right to claim support from the clan land, either through the "shifting agriculture" based on individual shambas, or among pastoral tribes through the unrestricted individual right to run stock on what was regarded as communal land; but this right was more a preemptive, possessory right than one of property. Sale was normally unthinkable, if not forbidden. n4

§ 106KE.02(a)(1)(ii) Land Rights Among the Gikuyu.

Even though most landholding under customary law was communal, n5 some tribes did recognize forms of individual ownership of land. For example, some land of the Gikuyu tribe could be held by an individual tribe member

> for an indefinite period, under a developed and workable customary law. He had the following rights therein or therefrom. He could lease it to another, the rental given by the *mohoi* or *mothami* (tenant) to his landlord being a gourd of beer whenever he brewed it, and the performance of certain small services; he could sell or mortgage the land or the trees which grew on it; when he died, the land passed in accordance with the customary law of succession; he might evict trespassers, or grant an easement to his neighbor so that he might pass, with or without cattle, across his land; he could define the boundaries by setting fixed markers, such as a line of trees or lillies... The methods by which the Mugikuyu became a proprietor of land were four, viz., by hunting right, sale, inheritance and exchange. n6

If the member decided to sell the land, the clan had the first option to purchase. Despite these customs, large portions of Gikuyu land were not subject to individual ownership rights. n7

§ 106KE.02(a)(1)(iii) Land Rights Among the Gusii.

Customary law of the tribes has also changed with the times, as illustrated by the Gusii of western Kenya. Initially, the Gusii had no controllers or spokesmen to manage their affairs at the tribal level. The father or grandfather of each family was the central authority. The tribe maintained coherence through a mutual loyalty or solidarity based on the notion that tribal members were all descended from a common ancestor. n8 The Gusii were constantly to more productive lands, and land was readily available. Consequently, no central authority was needed for allotment of the land. Customs for land distribution and management developed as required with each relocation; when conflicts arose between clans, the Gusii clans would fight among themselves for control of land, according to recognized Gusii customs.

These patterns changed as good lands became scarce. Beginning in the 1920's, Gusii families, traditionally located on scattered plots, had to consolidate their holdings and defend against encroachments by other tribes. n9 Clans were no longer able to expand into unclaimed land, but had to look within their own traditional territories to meet their land needs.

After the period of consolidation, individual land rights came to be recognized when a structure was built on the land. If a hut were constructed, for instance, the land immediately surrounding it would be claimed as an individual holding. To expand the individual holdings, a family member would be sent to build another hut nearby. Through this process, legal and social concepts of estate ownership had developed by the late 1940's. n10 Within ten years after the consolidation of landholdings had occurred, the Gusii territory had been divided into estates with recognized boundaries. Enforcement of these boundaries was primarily according to the strength of each group.

Within the clan's landholdings lived dwellers, those who had settled in clan territory, but did not belong to the clan by way of descent. Among the dwellers, land could never be permanently alienated, but use rights could be temporarily transferred. In order to obtain rights to build on the land, the dweller would have to obtain permission through some distant relative. If land were available and permission obtained, the dweller could have rights in land on much the same basis as could a regular clan member. n11

As illustrated by the Gusii, many tribes in Kenya introduced individual ownership of land between the 1920's and the 1950's, but were forced to rely on their customary law, rather than on the statutory law that was by then available and applicable to non-tribal lands. This resort to uncoordinated development of customary law has led to chaos in Kenyan land law by customary right.

In summary, the Gusii people developed lines of segmentation that were drawn around patrimonial and territorial interests. This was based on the principle that every corporate group of lineage type, every family, and every individual was entitled to portions that were ideally all equal, scaled to average needs. Enforcement of these lines was primarily by fighting and a rudimentary legal process. n12

§ 106KE.02(b) British Colonial Approach to Land Law.

§ 106KE.02(b)(1) For Native Lands.

British colonial policy required that the native inhabitants manage their land under one system of law, i.e., their own customary law, and that the European settlers abide by the rules of a separate system. At bottom the separation enabled the European settlers, who were conspicuously in the minority, to retain power over colonial affairs by ostensibly constitutional and legal means. n13 While Africans tried to work out landholding under a maze of varied and fluid customary rules, British land rights were governed by statutory law resembling the common law in England. The British also determined that the best way to preserve native land rights was to create reserves or special areas for natives, where they could remain isolated and insulated from the effects of European settlement. n14 Within those areas, however, the colonial government offered little protection for native land rights.

The earliest colonial legislation regarding native land in Kenya was the Crown Lands Ordinance of 1902, which allowed the Commissioner to grant leases of Crown lands consisting in part of native lands or villages, so long as the natives were not in actual occupation. n15 This act was repealed in 1915 and replaced by the Government Lands Act, which was intended to promote European settlement in the Kenyan highlands and to maintain racial segregation. The Act gave the colonial government the power to vest in the Crown any Crown lands n16 reserved for the benefit of an African tribe, thus making the Africans, in effect, tenants at will of the colonial government. As to lands held under customary law, the natives had to claim rights of protection from the government, and tribes could not assert rights of ownership or alienate land. n17

The Native Lands Trust Ordinance enacted in 1930 enlarged the protection of native land rights by setting aside certain areas of state land as permanent reserves for the benefit of the African tribes. n18 However, the protection of native land rights became somewhat illusory because of provisions allowing incursions into African areas for certain public purposes, such as exploiting gold discoveries, which began in 1933. n19

Another attempt at improving protection for native land rights was the Native Lands Trust Ordinance Act of 1938. This act and other legislation were intended to prevent interference with native land rights from the Kenya legislature. Even though heavily amended, the basic provisions of this Act remain in effect today as the Trust Land Act. n20 Even this legislation, however, did little to recognize and preserve African land claims under customary law, n21 and to the contrary, formally extinguished all native rights in lands outside the boundaries of the native areas. n22

In 1959, the colonial government enacted legislation allowing for the registration of consolidated tribal land designated

as "special areas," and for the acquisition of individual native titles to these lands. This new legislation was the Native Lands Registration Ordinance of 1959, soon renamed the Land Registration (Special Areas) Act. This act has since been repealed and its provisions re-enacted in both the Registered Land Act, which covers registration matters, and the Land Adjudication Act, which includes the land adjudication and consolidation provisions. n23

The result of these provisions was that natives were able to register land. Under the provisions of the Land Adjudication Act, original titles to land were obtained through the process of land consolidation, or converting several fragmented pieces of native land into a contiguous, unified holding, which improves the productivity of the land. When land was ready for consolidation, the rights of each individual tribal member were determined according to customary law, and the consolidated holding was then registered in the name of the new owner. Former owners of portions of the consolidated parcel were compensated by an allocation of an equivalent parcel of other land, to which they obtained legal title. n24

§ 106KE.02(b)(2) For Non-Native Lands.

The basic territorial land law for non-Africans was the Indian Transfer of Property Act of 1882, along with local ordinances. Based on the contemporary English common law of real property, the act provided for freehold estates and individual leaseholds in areas specifically set aside for European occupation. n25 These basic legal rules are still in effect, and in matters not covered by the act, rules of English law are applicable. In addition to the Indian Transfer of Property Act, provisions of the Indian Transfer of Property Act also apply. Together, these acts govern all transactions in land not governed by customary law, and land registered under the Registered Land Act. n26

Other statutes and regulations provide additional detailed legal rules for European land rights in Kenya:

Rights to parcels of land in private occupation were first recognized by the East Africa Land Regulations of 1897, under which certificates of occupancy for terms of twenty-one years were issued in respect of such rights. By virtue of the East Africa (Land Acquisition) Order, 1901, the Government received its authority to alienate parcels of land. The East Africa Land Regulations of 1897 had in fact replaced the land regulation of the Imperial East Africa Company, which had published them in 1897. The regulations of 1897 in their turn were repealed by the Crown Lands Ordinance 1902. n27

The Crown Lands Ordinance of 1902 provided for alienation of land by way of sales of freehold; purchasers were required to mark their land. The Government Lands Act of 1915 repealed the Crown Lands Ordinance and introduced a system for registration of deeds, provided authority for the Commissioner to execute conveyances for the occupation of Crown lands on behalf of the Governor, and allowed for disposal of state land within townships. The act also allowed the Commissioner of Lands to grant leases of town plots for any term not exceeding ninety-nine years, and leases on agricultural lands for up to 999 years. n28

Along with the Government Lands Act, the Registration of Documents Act, passed in 1897, instituted a country-wide system for registration of deeds. n29 Also, the Land Titles Act of 1908 provided for adjudicating claims and for registering titles. n30 Under the Land Titles Act, a claimant may be awarded a certificate of title from the Recorder of Titles. This certificate is conclusive evidence against all persons (including the government) that the person is the owner of the land. However, once a certificate of ownership is given by the Recorder of Titles, it must be registered or else it is void.

The Registration of Titles Act of 1920 ended the applicability of Land Titles Act provisions for lands coming within the jurisdiction of the Registration of Titles Act. This act also permitted or required transfer of titles from registers created under the Government Lands Act, the Land Titles Act and the Registration of Documents Act, whereupon those registers would close. n31

Apart from titles registered under the Registered Land Act, most land titles in Kenya are registered under the Registration of Titles Act. Registration under the Government Lands Act has been almost eliminated by this act, but since conversion under this act is voluntary, some titles remain in the old registry. n32

The Registered Land Act of 1963 was intended to unify land law in Kenya and eventually all registrations are to be under this Act. n33

The 1963 Act uses predominantly English terms to describe customary interests in land and makes accommodation for certain features of customary law. For aspects of land law not covered by the Act, English law is used. n34

When it became effective, the 1963 Act automatically applied to all land to which the Land Registration (Special Areas) Act had applied, which was generally all land in the former special areas which had been consolidated and in the settlement scheme areas. As for the areas to which the Government Lands Act, the Registration of Titles Act and the Land Titles Act now apply, the 1963 Act will eventually apply to these areas on a district by district basis. n35 Also, as land is consolidated under the Land Adjudication Act, and titles consolidated or other land are given to persons affected by the consolidations, those title registrations are also recorded under the 1963 Act. n36

The effect of registration under the 1963 Registered Land Act is to establish one of two forms of estate or interest in land, modeled after the English 1925 Law of Property Act. n37 The system is a registration of title, and registration, rather than possession of the deed, proves title.

FOOTNOTES:

(n1)Footnote 3. T. Jackson, *The Legal System of Kenya, in* 6 Modern Legal Systems Cyclopedia 6.260.12-.13 (Kenneth R. Redden ed. 1990).

(n2)Footnote 4. Ann P. Munro, *Land Law in Kenya, in* Africa and Law: Developing Legal Systems in African Commonwealth Nations 76-77 (Thomas W. Hutchinson ed. 1968).

(n3)Footnote 5. Krisham M. Maini, Land Law in East Africa 22 (1967) (*see also* on p. 17 of this work a table summarizing the methods of acquiring title, rights and interest in land of six Kenya tribes).

(n4)Footnote 6. *Id.* at 3.

(n5)Footnote 7. *Id.* at 4 (also noting that principles of individual ownership were more predominant in the Kiambu area).

(n6)Footnote 8. Phillip Mayer & Iona Mayer, *Land Law in the Making, in* African Law: Adaption and Development 51-52 (Hilda Kuper ed. 1956).

(n7)Footnote 9. *Id.* at 54.

(n8)Footnote 10. *Id.* at 65.

(n9)Footnote 11. *Id.* at 74.

(n10)Footnote 12. Mayer, *supra* note 19, at 77.

(n11)Footnote 13. Ann P. Munro, *Land Law in Kenya, in* Africa and Law: Developing Legal Systems in African Commonwealth Nations 76-77 (Thomas W. Hutchinson, ed. 1968).

(n12)Footnote 14. *Id.* at 81.

(n13)Footnote 15. Krishan M. Maini, Land Law in East Africa 22 (1967).

(n14)Footnote 16. Crown land includes all lands occupied by the African tribes of Kenya and all lands reserved for the use of the members of any African tribe, except the land in the special areas.

(n15)Footnote 17. Krishan M. Maini, Land Law in East Africa 26-27 (1967). Under the act, special reserves were established for the natives. However, the Governor was granted power to abolish those reserves, if the land was no longer required for the use and enjoyment of the tribes. Additionally, the act set up special settlement areas for the settlement of the natives. However, as with the reserves, the Governor could abolish these areas also. Furthermore, land in these special areas could not be registered.

(n16)Footnote 18. The act is now repealed.

(n17)Footnote 19. *Id.* at 35-36.

(n18)Footnote 20. *Id.* at 36. The Trust Land Act presently allows for the setting aside of Trust land, and preserves the existing African land rights recognized under the customary law of a tribe, as long as they are not contrary to any statutory law.

(n19)Footnote 21. *Id.*

(n20)Footnote 22. Ann P. Munro, *Land Law in Kenya, in* Africa and Law: Developing Legal Systems in African Commonwealth Nations 82 (Thomas W. Hutchinson ed. 1968).

(n21)Footnote 23. Krishan M. Maini, Land Law in East Africa 37 (1967). The Land Consolidation Act provides for the ascertainment of rights and interests in, and for the consolidation of, land in the special areas (Trust Land); the Land Adjudication Act provides for the ascertainment and recording of rights and interests in Trust land where the Land Consolidation Act does not apply.

(n22)Footnote 24. *Id.* at 37-41.

(n23)Footnote 25. Ann P. Munro, *Land Law in Africa, in* Africa and Law: Developing Legal Systems in African Commonwealth Nations 78-79 (Thomas W. Hutchinson ed. 1968).

(n24)Footnote 26. Krishan M. Maini, Land Law in East Africa 42-43 (1967).

(n25)Footnote 27. *Id.* at 21.

(n26)Footnote 28. *Id.* at 28.

(n27)Footnote 29. The act required registration of all documents conferring any right, title, or interest to be registered, except for documents registrable under the Registration of Titles Act, the Government Lands Act, or the Registered Land Act.

(n28)Footnote 30. *Id.* at 23.

(n29)Footnote 31. *Id.* at 26.

(n30)Footnote 32. *Id.* at 34.

(n31)Footnote 33. *Id.* at 163.

(n32)Footnote 34. *Id.* at 163.

(n33)Footnote 35. *Id.* at 164.

(n34)Footnote 36. *Id.* at 41.

(n35)Footnote 37. *Id.* at 174.

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CHAPTER 106KE PROPERTY LAW IN KENYA

13-106KE Thompson on Real Property, Thomas Editions § 106KE.03

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§ 106KE.03 Summary of Current Statutory Land Law in Kenya.

The welter of various tribal customary law for land is matched by a swarm of statutes and regulations, many of which are intended to expand or contract in their applicability over a period of time:

> All the land in Kenya is divided into two categories: (a) Special Areas, basically Trust Land (including the old Native Land Units) and private freehold, totaling 50,000 square miles of territory; and (b) Crown Lands, that is, special reserves, alienated and unalienated land, and private freehold, constituting the remaining 174,000 square miles of territory.
>
> The Special Areas are governed by two laws: (a) the Trust Land Act (formerly the Native Lands Trust Ordinance, 1939), which defines the Special Areas and provides for agricultural and township plot leases of up to thirty-three years...; and (b) the Land Registration (Special Areas) Act which was enacted as the Native Lands Registration Ordinance No. 27 of 1959, and which provides for the ascertainment of rights and interests in land, the consolidation of land holdings, and the registration of land titles in these areas. In addition, it provides for the control over subsequent transactions involving such land through the Land Control (Special Areas) Regulations, 1961, which replaced the Land Control (Native Lands) Ordinance No. 28 of 1959.
>
> The Crown Lands are governed principally by three laws. First, the Crown Lands Act, which provides for 999-year leases for agricultural land... The English form of conveyancing was introduced to Kenya through its predecessor, the Crown Lands Ordinance, 1915. The second law governing the Crown Lands is the Registration of Titles Act, which was enacted in 1919 and which has provided a Torrens-type title registration system for all land outside the Special Areas. The third law governing Crown Lands is the Land Titles Act which was enacted in 1908 and which provides for the certification and registration of titles or interests in immovable property within certain prescribed coastal areas.
>
> * * *
>
> The Registered Land Act No. 25 of 1963 came into force on August 16, 1963. The provisions of this act... are intended to obliterate the distinction between Special Areas and Crown Lands by providing a

single system of land-titled registration and land transfer. This system will gradually be extended to cover all land previously covered by other laws. n38

The Registered Land Act of 1963 repeals the Indian Transfer of Property Act of 1882 and has superseded part of the Land Registration (Special Areas) Act. What was left of the latter act was renamed the Land Adjudication Act, and it allows for converting African interests into freehold statutory estates, which then can be registered.

Thus, in the Special Areas, tenures and interests under customary law are being investigated and recorded (after consolidation and adjudication) under the Land Adjudication Act, and then registered under the Registered Land Act. Crown Land is also registered and subject to the conveyancing provisions set forth in the Registered Land Act. n39

FOOTNOTES:

(n1)Footnote 38. Ann P. Munro, *Land Law in Kenya, in* Africa and Law: Developing Legal Systems in African Commonwealth Nations 100-101 (Thomas W. Hutchinson ed. 1968).

(n2)Footnote 39. *Id.* at 102.

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CHAPTER 106KE PROPERTY LAW IN KENYA

13-106KE Thompson on Real Property, Thomas Editions § 106KE.04

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§ 106KE.04 Types of Real Property Interests.

The Kenya property statutes use the word "proprietorship" rather that the word "ownership." Under the Registration of Titles Act, the word "proprietor" means a person or corporation registered under the Act as the owner of land or as a lessee from the government. Under the Registered Land Act, "proprietor" is defined as: (a) in relation to land or a lease, the person named in the register as the proprietor thereof; and (b) in relation to a charge of land or a lease, the person named in the register of the land or lease as the person in whose favor the charge is made.

§ 106KE.04(a) Freehold Estates.

Under the Registered Land Act of 1963, the registration of a person as the proprietor of land vests in that person the absolute ownership of that land. n40 Some concern had been raised, because the now repealed Land Registration (Special Areas) Act declared that the effect of registration of the freehold estate was to vest the fee simple, and the use of that term has special connotations in England. However, the Registered Land Act of 1963 refers to absolute ownership rather than fee simple. Other statutes still refer to the so-called "fee simple" estate; these include, for instance, the Land Titles Act, n41 the Government Lands Act, n42 and the Registration of Titles Act. n43

Under the Registered Land Act of 1963, the proprietor with an absolute ownership obtains rights that cannot be defeated except as provided by the Act, and the land is held free from all other interests and claims. n44

§ 106KE.04(b) Leasehold Estates.

Under the Registered Land Act of 1963, a proprietor of land may lease the land to any person for a definite term, or for the life of the lessor or of the lessee or for a period which, though indefinite, may be determined by the lessor or the lessee. n45 The act also allows for periodic tenancies, but they may not be registered. n46

Any lease for a period exceeding two years or for the life of the lessor or the lessee must be registered and must be in the prescribed form. n47 The Act also allows a lease to be made for a period to commence on a future date, not being later than twenty-one years from the date on which the lease is executed, if it is registered. A lease to commence more than twenty-one years in the future, or upon the fulfillment of a condition that may occur more than twenty-one years in the future, is void. n48

Leases from the government to private persons are not provided for under the Government Lands Act but are authorized under the Indian Transfer of Property Act. This Act also provides statutory forms for registration of written leases which are for a period exceeding one year.

The Registration of Titles Act contains a provision for the creation of a lease for a term exceeding twelve months by presenting for registration a lease in the prescribed form. n49 Such a lease must be registered to be valid, but a lease for a term not exceeding twelve months is valid even if not registered. n50

§ 106KE.04(c) Concurrent Ownership.

The Registered Land Act of 1963 provides for concurrent ownership and partition, both for joint proprietors and proprietors in common. These are recognized as forms of legal, but not equitable, ownership. Co-ownership is limited to five proprietors unless otherwise permitted by the Minister. n51

No joint proprietor is entitled to any separate share in the land, and dispositions of the land may be made only by all joint proprietors. When one joint proprietor dies, that interest vests in the surviving proprietor or proprietors jointly. Severance of the joint proprietorship is accomplished by completing the correct form and registering the joint proprietors as proprietors in common. n52

Each proprietor in common is entitled to an undivided share in the whole, and on the death of a proprietor in common, the decedent's share is administered as part of the decedent's estate. A proprietor in common may not deal with the undivided share in favor of any person other than another proprietor in common, except with the consent of the remaining proprietors. Such consent may not unreasonably be withheld. n53 Partition of land owned in common may be made by any one or more of the proprietors, or any person in whose favor an order has been made for an undivided share in the land. n54

§ 106KE.04(d) Interests in the Land of Another.

The Kenyan statutory law on easements, profits, licenses and restrictive agreements has been summarized as follows:

No provision is made in respect of easements, *profits-a-prendre*, licenses, and restrictive covenants in the Government Lands Act, Land Titles Act, Registration of Titles Act or the Indian Transfer of Property Act. Questions concerning the said rights arise not infrequently and it is difficult to comprehend why this important aspect of rights in land was not included in the said enactments. The framers of the Registered Land Act were aware of the shortcoming in the law and thought fit to make provision in respect of the said rights in the act as these are matters which are best covered by registration. n55

§ 106KE.04(d)(1) Easements.

An easement is defined as the right attached to a parcel of land which allows the proprietor of the parcel either to use the land of another in a particular manner or to restrict its use to a particular extent, but does not include a profit. n56 The proprietor of land or of a lease may grant an easement over the land to the proprietor or lessee of other land for the benefit of that other land by an instrument in the prescribed form, or by a grant or reservation in either an instrument of transfer or in a lease. n57

§ 106KE.04(d)(2) Profits.

A profit is defined as the right to go on the land of another and take a particular substance from that land, whether of the soil or the products of the soil. n58 A profit may be granted by the proprietor of land or of a lease by an instrument in the prescribed form. The instrument must indicate whether it is to be enjoyed in gross or as appurtenant to other land,

and whether it is to be enjoyed by the grantee exclusively or in common with the grantor. To complete the grant, it must be registered as an encumbrance, and the instrument must be filed. n59

§ 106KE.04(d)(3) Licenses.

A license is not qualified for registration under the Act, but a licensee's interest may still be protected by lodging a caution. n60

§ 106KE.04(d)(4) Restrictive Agreements.

Any restrictive agreement must be registered to be binding on the proprietor of the land burdened by it or on a subsequent acquirer of the land. A restrictive agreement is an agreement by which one proprietor agrees to restrict construction or other use and enjoyment of the land for the benefit of the proprietor of other land. When the agreement is contained in an instrument other than a charge or a lease, the Registrar notes the restrictive agreement in the encumbrances section of the register. n61 The restrictive agreement is also effective as to successors in title. Racially restrictive agreements are void. n62

§ 106KE.04(d)(5) Mortgages.

Although mortgages are governed by the Government Lands Act and charges are governed by the Registration of Titles Act, various substantive elements of mortgage law are still found in the 1882 Indian Transfer of Property Act. Under the Government Lands Act, a mortgage or charge must be created by an instrument in writing and registered. n63 The act also recognizes equitable mortgages by deposit of documents of title in Forms A and B of the Schedule to the Act.

The Registration of Titles Act provides for statutory charges when land is intended to be charged or made security in favor of any person by having the proprietor or lessee execute a statutory form, which must then be registered. n64 When registered, the property is subject to the same security and to the same powers and remedies on the part of the chargee as if it were under legal mortgage. n65 The Act also allows for a charge to be created by deposit of documents of title to land, and evidenced by a prescribed instrument. n66

Under the Registered Land Act, a proprietor may charge the land, lease or charge to secure the payment of an existing or future or contingent debt or other money or money's worth or the fulfillment of a condition by an instrument in the prescribed form. n67 The form must specify the date for repayment, and if no date is specified it shall be deemed to be repayable three months after service of demand in writing by the chargee. The charge is completed by registration as an encumbrance. The charge does not operate as a transfer, but has effect only as security. n68 The Act also lists the agreements implied in a charge.

Charged land may be redeemed after paying the principal and interest on the date specified in the charge. The charged land nay be redeemed before this time by paying the interest on the principle secured up to that date. If payment is late, the land may still be redeemed by giving three month's notice or paying three months' interest in lieu thereof. n69 The act makes no provision for the creation of an equitable mortgage or charge by deposit of title deed. Thus, it appears that equitable charges and mortgages cannot be created.

FOOTNOTES:
(n1)Footnote 40. Registered Land Act, § 27.

(n2)Footnote 41. Land Titles Act § 20(2)(a).

(n3)Footnote 42. Government Lands Act § 3.

(n4)Footnote 43. Registration of Titles Act § 3 (providing that the person named as proprietor of the land is the

absolute and indefeasible owner) and Form B(2) (indicating that the grant is in fee).

(n5)Footnote 44. Registered Land Act § 28.

(n6)Footnote 45. *Id.* at § 45.

(n7)Footnote 46. *Id.* at § 46.

(n8)Footnote 47. *Id.* at § 47.

(n9)Footnote 48. *Id.* at § 51.

(n10)Footnote 49. *Id.* at § 40.

(n11)Footnote 50. *Id.* at § 41.

(n12)Footnote 51. *Id.* at § 101.

(n13)Footnote 52. *Id.* at § 102.

(n14)Footnote 53. *Id.* at § 103.

(n15)Footnote 54. *Id.* at § 104.

(n16)Footnote 55. Krishan M. Maini, Land Law in East Africa 245-246 (1967).

(n17)Footnote 56. Registered Land Act § 3.

(n18)Footnote 57. *Id.* at § 94.

(n19)Footnote 58. *Id.* at § 3.

(n20)Footnote 59. *Id.* at § 96.

(n21)Footnote 60. *Id.* at § 100.

(n22)Footnote 61. *Id.* at § 95.

(n23)Footnote 62. *Id.*

(n24)Footnote 63. Government Lands Act § 100.

(n25)Footnote 64. Registration of Titles Act § 46.

(n26)Footnote 65. *Id.*

(n27)Footnote 66. *Id.*, Form U in the First Schedule.

(n28)Footnote 67. Registration of Land Act § 65.

(n29)Footnote 68. *Id.*

(n30)Footnote 69. *Id.* at § 72.

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CHAPTER 106KE PROPERTY LAW IN KENYA

13-106KE Thompson on Real Property, Thomas Editions § 106KE.05

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§ 106KE.05 How Land Ownership Originates.

Ownership of land in east Africa arises in two ways: the first is through an initial allotment from the state; the second and more common way is through inheritance by which the heir claims the land under customary law. To gain recognition of ownership from the state, the land must be entered on the register. Thus, the person will submit evidence of the claim of ownership to the state, which may accept or reject the claim. If accepted, the land is entered or "brought on" to the register and the claimant is registered as proprietor. Normally, a freehold estate is granted. n70

§ 106KE.05(a) Registration.

Two systems of land registration prevail in Kenya, one for registration of deeds and one for registration of titles. Under the system for registration of deeds, the deed or other document dealing with land rather than the title is registered. If a purchaser wants to insure that the proprietor has good root of title, a search should be made through all the recorded documents concerning the land. Such a search protects a purchaser only against unregistered documents, but it does not reveal whether any of the registered conveyances or assignments are valid, because the documents are not inspected when received. Thus the search does not guarantee title.

In Kenya, a system of deed registration was introduced by the East African Registration Regulations in 1901 and is now known as the Registration of Documents Act. It provides that all documents conferring or extinguishing any right, title or interest shall be registered. n71 Such a document is to be filed for registration within two months of the transaction and must describe the land. n72 The system now has nearly been superseded by the registration of title system. n73

The registration of title system title is assured by the state, which is responsible for maintaining a compiled register which is conclusive evidence of title. Conveyancing is facilitated by eliminating the need to investigate the title to a good root and the need to examine documents to establish their validity. n74

Registration of title is governed by several statutes in Kenya. When land is registered under the Registered Land Act, the person named as proprietor of land is declared the absolute and indefeasible owner. The title is then indefeasible, subject only to overriding interests stated in the Act. Although older statutes in Kenya, such as the Government Lands Act and the Registration of Titles Act, also provide for registration of titles, the Registered Land Act is intended to unify

all of these provisions in one statute for the future.

§ 106KE.05(b) Conveyancing.

§ 106KE.05(b)(1) Under the Government Lands Act.

Under the Government Lands Act, no evidence of sale or other transfer *inter vivos* of land is receivable in a civil court, unless the sale or transfer is effected by an instrument in writing that has been properly registered. n75 No statutory form of transfer is prescribed by the Act; however, any proprietor of either the fee or the lease may transfer the interest to another through the use of a deed in accordance with the English form of conveyancing, executed by both the transferor and transferee. The deed follows the pattern of private conveyancing by reciting first the root of the title and then subsequent changes in ownership.

§ 106KE.05(b)(2) Under the Registration of Titles Act.

Under the Registration of Titles Act, a proprietor is defined as a person or corporation registered under the Act as the owner of land or a lessee from the government. n76 A proprietor is issued land through a grant which is defined as any conveyance, agreement for sale, lease or license for a period exceeding three years, made by and on behalf of the government, and includes a certificate of title: n77

> The certificate of title issued by the registrar to any purchaser of land upon a transfer or transmission by the proprietor thereof shall be taken by all courts as conclusive evidence that the person named therein as proprietor of the land is the absolute and indefeasible owner thereof, subject to the encumbrances, easements, restrictions and conditions contained therein or endorsed thereon, and the title of such proprietor shall not be subject to challenge, except on the ground of fraud or misrepresentation to which he is proved to be party. n78

The word "land" also includes an estate for a term of years.

Transfers of land or rights of way or other easements are also provided for by having the registered proprietor execute a statutory form. The form describes the land, refers to the grant or certificate of title, and contains an accurate statement of the land and easement, or the easement, intended to be transferred or created, and a memorandum of all leases, charges and other encumbrances to which the land may be subject, and of all rights-of-way, easements and privileges intended to be transferred. n79 Statutory forms are also provided for transfer of land and leases. The effective words of transfer are "hereby transfer all my right, title and interest in the said piece of land." n80 A transferor may also transfer only part of the land by issuing a certificate of title for only the transferred part.

§ 106KE.05(b)(3) Under the Registered Land Act.

Under the Registered Land Act, a proprietor is defined as follows: in relation to land or a lease, the person named in the register as the proprietor thereof; and in relation to a charge of land or of a lease, the person named in the register of the land or lease as the person in whose favor the charge is made. n81

The nature of a proprietor's title is either absolute (freehold) or leasehold, but the Act does not use the word freehold. If absolute, the proprietor may apply for and receive a land certificate, and, if a leasehold, a certificate of lease may be granted if the estate is for a period exceeding twenty-five years.

A proprietor may transfer the land, lease or charge to any person, with or without consideration, by an instrument in the prescribed form. Registration of the transferee as proprietor of the land, lease or charge and filing the instrument completes the transfer. n82 A transfer may not be expressed to take effect on the happening of an event or the fulfillment of any condition. n83

Land may also be transferred subject to a charge or to a lease. n84

FOOTNOTES:
(n1)Footnote 70. Krishan M. Maini, Land Law in East Africa 208 (1967).

(n2)Footnote 71. Registration of Documents Act § 4.

(n3)Footnote 72. *Id.* at §§ 8-9.

(n4)Footnote 73. Under the 1915 Government Lands Act a system of deed registration is also used, but it is very similar to a registration of titles system, because a deed is not accepted for registration unless it appears valid, and the deeds are noted in the register.

(n5)Footnote 74. Maini, *supra* note 6, at 134.

(n6)Footnote 75. Government Lands Act § 100.

(n7)Footnote 76. Registration of Titles Act § 2.

(n8)Footnote 77. *Id.*

(n9)Footnote 78. *Id.* at § 23(1).

(n10)Footnote 79. *Id.* at § 34.

(n11)Footnote 80. *Id.*, Form F of First Schedule.

(n12)Footnote 81. Registered Land Act § 3.

(n13)Footnote 82. *Id.* at § 85.

(n14)Footnote 83. *Id.* at § 87.

(n15)Footnote 84. *Id.* at §§ 90-93.

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CHAPTER 106KE PROPERTY LAW IN KENYA

13-106KE Thompson on Real Property, Thomas Editions § 106KE.06

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§ 106KE.06 Taxation of Real Property.

Some property is subject to local taxation, but the amounts are not a significant portion of a person's overall tax burden. Before 1985, a capital gains tax could be levied on the sale of a private residence if the seller had not lived in the house continuously for at least three years prior to the transfer; however, the capital gains tax was suspended in June 1985.

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CHAPTER 106KE PROPERTY LAW IN KENYA

13-106KE Thompson on Real Property, Thomas Editions § 106KE.07

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§ 106KE.07 Ownership of Real Property by Foreigners.

The legal status of aliens is governed by the Kenya Constitution and by various statutes. The principal pertinent laws are the Kenyan Citizenship Act of 1963, the Immigration Act of 1967, and the Aliens Restriction Act of 1973. These laws affect aliens in matters of citizenship, immigration and property ownership. n85

In Kenya's 1979 Constitution an alien is defined in Arts. 87-98 as any person who is not a citizen of Kenya either by birth or naturalization. Article 75 of the Constitution guarantees the right to own property without interference from the Kenyan government, but for aliens, this guarentee is subject to certain restrictions in the statutes and as described in the following comment:

Section 3 of the Alien Restriction Act of 1973 empowers the Minister responsible for internal security to impose an order or other restriction prohibiting aliens from engaging in any activity he specifies. These orders, however, are to be imposed only when there is a state of war between Kenya and another country, during a state of emergency, and when there is an actual or perceived imminent danger to the welfare of the country. The Foreign Investment Protection Act of 1964, however, protects alien businesses and enterprises from government compulsory acquisition, unless such compulsory expropriation is for state purposes carried out under Article 75 of the Kenyan Constitution. In case of compulsory acquisition by the state, the alien is entitled to full and prompt compensation as required by this article of the Kenyan Constitution.

Under the Land Control Act of 1967 all transactions in land are void unless carried out with the consent of the Land Control Board of the area. Section 9 of this law therefore provides that:

In deciding whether to grant or refuse consent in respect of a controlled transaction, the Land Control Board shall... refuse consent in any case in which the land or share is to be disposed of by way of sale, transfer, lease, exchange or partition to a person who is not a citizen of Kenya...

The President of Kenya, however, can exempt any land transaction or any person from all the provisions of this law via publication of a notice in the government gazette. Aliens may also benefit from § 3 of the Government Lands Act of 1915, which enables the President of Kenya to alienate land for any purpose. n86

FOOTNOTES:

(n1)Footnote 85. Charles Mwalimu, The Kenyan Legal System: An Overview 55 (1988).

(n2)Footnote 86. *Id.* at 55-56.

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CHAPTER 106KR PROPERTY LAW IN SOUTH KOREA

13-106KR Thompson on Real Property, Thomas Editions 106KR.syn

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§ 106KR.syn Synopsis to Chapter 106KR: PROPERTY LAW IN SOUTH KOREA

§ 106KR.01 Brief History of the Republic of Korea.

§ 106KR.02 Governmental and Legal Foundations for Property Law in Modern Korea.

§ 106KR.03 Basic South Korean Property Law.

§ 106KR.03(a) Estates in Land.

§ 106KR.03(a)(1) Adverse Possession.

§ 106KR.03(a)(2) Condominium Ownership.

§ 106KR.03(a)(3) Concurrent Estates.

§ 106KR.03(b) Leaseholds.

§ 106KR.03(c) Foreign Ownership of Land.

§ 106KR.03(d) Gifts.

§ 106KR.03(e) Succession.

§ 106KR.03(f) Wills.

§ 106KR.03(g) Real Estate Transactions.

§ 106KR.03(h) Title Registration.

§ 106KR.03(i) Stamps.

§ 106KR.03(j) Taxation.

§ 106KR.03(k) Environmental Regulation.

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CHAPTER 106KR PROPERTY LAW IN SOUTH KOREA

13-106KR Thompson on Real Property, Thomas Editions § 106KR.01

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§ 106KR.01 Brief History of the Republic of Korea.

Tungusic people from central Asia, a branch of the Mongoloid race, may have begun inhabiting the Korean peninsula between 10,000 and 5,000 years ago. Various legends tell of Tungusic people invading from China. When a military figure named Wiman took control of northwestern Korea in 194, B.C., Korea's recorded history began. Chinese invaders conquered that area in 108, B.C. A Korean ruler emerged in another part of the peninsula in about 100, A.D., and Koreans took over the Chinese-dominated areas in 313, A.D.

Thereafter, various kingdoms and federations rose and fell for several centuries throughout the peninsula. In 1392, A.D., the Yi dynasty established a dominance that lasted until the Japanese annexed Korea in 1910.

Japanese power over Korea resulted directly from Japan's victory over Russia in the Russo-Japanese War of 1904-1905. Japan ordered the Korean army to be disbanded in 1907 and then annexed Korea to Japan in 1910. From then until World War II, various nationalist groups sought to oppose the Japanese hegemony, but could not unite their efforts.

Although the Soviet Union had agreed to a four-power trusteeship over Korea when World War II ended, it reneged and the result was that Japanese forces surrendered to Americans south of the 38th parallel of north latitude, and to the Russians north of the 38th parallel. Soon thereafter, all Japanese in Korea returned to Japan. The Soviets blocked and obstructed all attempts at uniting the two Koreas. A U.N.-supervised election took place in the south on May 10, 1948, and the new Republic of Korea National Assembly promulgated a democratic constitution on July 17, 1948. On August 15, 1948, American military commanders transferred sovereign authority to the Koreans, who inaugurated Syngman Rhee as president.

On June 25, 1950, north Korean armies launched a massive military invasion of south Korea, in an attempt to unify the two Koreas by force. The Korean War ended by armistice and the establishment of a demilitarized zone neat the 38th parallel in July, 1953.

During the ensuing decades turbulent relations with the north and fractious internal politics have led to various governmental changes and seemingly not impeded remarkable economic growth. The First Republic founded in 1948 has now evolved into the current Sixth Republic.

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CHAPTER 106KR PROPERTY LAW IN SOUTH KOREA

13-106KR Thompson on Real Property, Thomas Editions § 106KR.02

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§ 106KR.02 Governmental and Legal Foundations for Property Law in Modern Korea.

In April, 1948, the U.S. military governors in Korea promulgated the "Ordinance of the Rights of the Korean People," containing many rights similar to the American *Bill of Rights*, including a prohibition of deprivation of property without due process of law. Some of these probably influenced the 1948 Constitution. That Constitution "largely lost its relevance" with the outbreak of the Korean War. n1 Following the war and the unsettled domestic political situation, the Constitution was amended several times and with some fundamental substantive changes resulting. Two articles of the current Constitution relate directly to property rights. Article 16 declares, "All citizens shall be free from intrusion into their place of residence. In case of search or seizure in a residence, a warrant issued by a judge upon request of a prosecutor shall be presented." Article 23 addresses property rights:

> (1) The right of property of all citizens shall be guaranteed. The contents and limitations thereof shall be determined by statute.
>
> (2) The exercise of property rights shall conform to the public welfare.
>
> (3) Expropriation, use or restriction of private property from public necessity and compensation therefor shall be governed by statute. In such a case, just compensation shall be paid.

In Article 59, "Types and rates of taxes shall be determined by statute."

"Most of the substantive law in the Republic of Korea is contained in the Civil Code, originally promulgated in 1958. The Civil Code is divided into five 'books'... Book II, 'Real Rights,' deal with property, ... and Book V, 'Succession,' covers succession in family headship as well as succession to property." n2

FOOTNOTES:
(n1)Footnote 1. Rainer Grote, "Republic of Korea: Introductory Note," in Ruediger Wolfram and Rainer Grote (gen. eds.), VIII *Constitutions of the Countries of the World* 5 (2006);

(n2)Footnote 2. Margaret O. Steinbeck, "Legal System of the Republic of Korea (South Korea)," in 2A Kenneth

Robert Redden (ed.), *Modern Legal Systems Cyclopedia* 2A.10.33-34 (1991).

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CHAPTER 106KR PROPERTY LAW IN SOUTH KOREA

13-106KR Thompson on Real Property, Thomas Editions § 106KR.03

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§ 106KR.03 Basic South Korean Property Law.

§ 106KR.03(a) Estates in Land.

The Civil Code provides for the following forms of ownership: n3

Ownership (fee simple)

Possession, superior to parties without rights

Superficies, which are rights in another's land while owning structures or trees on that land

Easements

Deposit lease (the right to use and take profits from the land of another)

Commonage, based on old customs of use of a forest or plain in common. n4

§ 106KR.03(a)(1) Adverse Possession.

A person may obtain ownership through adverse possession by possessing real property peacefully and openly, with intent to own, for 20 years or more, and by making registration thereof. n5

§ 106KR.03(a)(2) Condominium Ownership.

Separate ownership of individual units in a multiple-unit structure is recognized. Unit owners have tenancies in common interests in common areas. n6

§ 106KR.03(a)(3) Concurrent Estates.

Tenancy in common with the usual incidents is recognized by the Korean Civil Code. n7

§ 106KR.03(b) Leaseholds.

A lease is not considered a property right. n8 A lease can be recorded only with the consent of the owner. One who holds a recorded building on leased land can maintain that lease against persons who acquire title to the land. n9

§ 106KR.03(c) Foreign Ownership of Land.

Foreigners are not permitted to buy land, and face some difficulties in attempting to purchase a house. A foreign company with foreign investments may own property and land necessary for the performance of its business activities, if approved by the Economic Planning Board. Under the Alien Land Act, enterprises with 50 percent or more foreign equity ownership are required to obtain approval from the Minister of Home Affairs for ownership of land except for land designated by the Government for special purposes. n10

§ 106KR.03(d) Gifts.

Property acquired by gift is subject to a gift tax. The gift tax in Korea is payable by residents who acquire property by gift and by nonresidents who acquire Korean property by gift. Rates range from 10% to 50%. n11

§ 106KR.03(e) Succession.

The rules of descent and distribution for real property are set forth in the Civil Code. n12 Korea does not recognize dower or curtesy rights.

§ 106KR.03(f) Wills.

Persons 17 years of age and older may make valid wills, n13 and the Civil Code provides forms and formalities for various kinds of wills. n14

§ 106KR.03(g) Real Estate Transactions.

Transfer of real property is accomplished by agreement of the parties and upon registration. n15 Registration is required for creation or transfer of real rights in immovable property, including ownership, superficies, servitudes, deposit leases, and mortgages.

Korea has no statute of frauds, but does require a writing for such items as wills and articles of incorporation. n16

Two types of security liens recognized in the Civil Code are the possessory lien and the mortgage. n17 A mortgage is defined in the Civil Code as an encumbrance on a specific item of property whereby the creditor obtains a preferential position in order to satisfy the obligation out of proceeds realized from the sale of the property; the encumbrance occurs without transferring ownership or possession. n18 Priority among multiple mortgages on the same property is determined by the order of registration. n19 No lien rights similar to mechanics' liens are recognized.

§ 106KR.03(h) Title Registration.

As mentioned above, registration is required for creation or transfer of real rights in immovable property, including ownership, superficies, servitudes, deposit leases, and mortgages.

§ 106KR.03(i) Stamps.

A stamp tax is one of the national taxes that may be imposed by national legislation.

§ 106KR.03(j) Taxation.

"Types and rates of taxes shall be determined by statute." n20 National taxes in Korea are imposed by the national legislature, and local taxes are imposed by local authorities.Korean national law provides for income, value added, gift and inheritance taxes, among others. n21 Local taxes that may relate to real property include acquisition tax, registration, inhabitant tax, property tax, composite land tax, city planning tax, community facility tax, area development tax, among others.

Inheritance tax in Korea is payable by residents who acquire property by inheritance and by nonresidents who acquire Korean property by inheritance. Rates range from 10% to 50%. n22

§ 106KR.03(k) Environmental Regulation.

Korea has numerous laws to regulate and protect the environment. Included among them are the following:

Basic Environmental Policy Act and Its Enforcement Decree

Act on Environment, Traffic and Disaster, etc. Impact Assessment

Liability for Environment Improvement Expenses Act

Environment Dispute Mediation Act

Natural Environment Preservation Act

Noise and Vibration Regulation Act

Water Environment Preservation Act

Noxious Chemical Substance Control Act

Atmospheric Environment Preservation Act

Odor Prevention and Sea Pollution Prevent Act and Its Enforcement Decree

Wastes Management Act

Soil Environment Preservation Act

Drinking Water Control Act

Law Relating to Transboundary Movements of Waste and Its Disposal

Indoor Air Quality Control in Public Facilities Act

Act Relating to Promotion of Economy and Reutilization of Resources

FOOTNOTES:
(n1)Footnote 3. Civil Code of Korea (hereafter CC) § 185.

(n2)Footnote 4. CC §§ 192, 211, 279, 291, 302, 303.

(n3)Footnote 5. CC § 245.

(n4)Footnote 6. *See*, Law Relating to the Ownership and Management of Multiple-Unit Buildings.

(n5)Footnote 7. CC §§ 262-264.

(n6)Footnote 8. CC § 621; Law of Protection of Lease of House 1.

(n7)Footnote 9. CC § 622.

(n8)Footnote 10. Margaret O. Steinbeck, "Legal System of the Republic of Korea (South Korea)," in 2A Kenneth Robert Redden (ed.), *Modern Legal Systems Cyclopedia* 2A.10.18 (1991).

(n9)Footnote 11. *See*, Inheritance Tax and Gift Tax Law.

(n10)Footnote 12. CC §§ 1000, 1001.

(n11)Footnote 13. CC § 1063.

(n12)Footnote 14. CC §§ 1066-1070.

(n13)Footnote 15. CC § 186.

(n14)Footnote 16. CC §§ 1068-1069; Commercial Code 229.

(n15)Footnote 17. CC §§ 320, 356).

(n16)Footnote 18. CC § 356.

(n17)Footnote 19. Real Property Registration Law 5.

(n18)Footnote 20. *Art. 59, Constitution* of Korea.

(n19)Footnote 21. *See*, Income Tax Law; Inheritance Tax and Gift Tax Law.

(n20)Footnote 22. *See*, Inheritance Tax and Gift Tax Law.

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CHAPTER 106KZ PROPERTY LAW OF THE REPUBLIC OF KAZAKHSTAN

13-106KZ Thompson on Real Property, Thomas Editions 106KZ.syn

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§ 106KZ.syn Synopsis to Chapter 106KZ: PROPERTY LAW OF THE REPUBLIC OF KAZAKHSTAN

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§ 106KZ.02(b)(1) Land Occupied by Buildings.

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§ 106KZ.09 Taxes.

§ 106KZ.10 Ownership of Subsoil Use Rights.

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CHAPTER 106KZ PROPERTY LAW OF THE REPUBLIC OF KAZAKHSTAN

13-106KZ Thompson on Real Property, Thomas Editions § 106KZ.01

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§ 106KZ.01 Overview of Real Property Law in Kazakhstan.

During the Soviet period, land in the Republic of Kazakhstan [RK] belonged unconditionally to the State. n1 The State exercised sole ownership of land during the first years of Kazakhstan's independence, following the Soviet Union's disintegration. The 1993 Constitution provided that land, its soil, water, flora and fauna, and other natural resources are owned *exclusively* by the State. n2 The 1993 Constitution, however, marginally relaxed the state's control: it allowed non-state actors to possess land on behalf of the State in certain instances. n3 The 1995 Constitution further relaxed the State's hold on land: it eliminated the word "exclusively" from the clause on State ownership of land, and added a sentence providing that the land "may also be privately owned under the terms and conditions set forth in the law." n4

On January 24, 2001, the RK adopted the Law on Land (the "Land Law"). The main features of the Land Law included: (1) the establishment of limits on the size of land plots granted to private parties, (2) introduction of restrictions applying to foreigners, and (3) reduction of the duration of long-term land use from 99 years to 49 years.

On June 20, 2003, the new Land Code, predicated upon the legal status of the Land Law, was adopted ("Land Code"). Under the Land Code, the sale and leasing of buildings by and to private commercial entities is permitted, and is generally free from excessive State regulation. n5 The State's participation in private transactions involving land and buildings primarily is limited to title registration n6 and levying of taxes. n7

Under the Land Code, an owner may (1) possess, (2) use, and (3) alienate (sell, and otherwise dispose of) its land plot. n8 The owners of buildings [improved property] on the land enjoy rights identical to the owner of the land under the Civil Code. n9 The right to own the land arises from: (1) a grant, (2) transfer or (3) inheritance, including succession resulting from a legal entity's reorganization. n10

FOOTNOTES:
(n1)Footnote 1. Konstitutsiya (Osnovnoi Zakon) Kazakhskoi Sovetskoi Sotsialisticheskoi Respubliki ot 20 aprelya 1978 goda [Constitution (the Primary Law) of the Kazakh Soviet Socialist Republic dated April 20, 1978], art. 11. This article states in pertinent part that the land, its subsoil, water, and forests shall belong exclusively to the state.

(n2)Footnote 2. Konstitutsiya Respubliki Kazakhstan ot 28 yanvarya 1993 goda [Constitution of the Republic of Kazakhstan dated January 28, 1993], art. 46. (emphasis added).

(n3)Footnote 3. *Id.*

(n4)Footnote 4. Konstitutsiya Respubliki Kazakhstan ot 30.08.1995 [Constitution of the Republic of Kazakhstan dated Aug. 30, 1995, with amendments and additions as of May 21, 2007], art. 6.3.

(n5)Footnote 5. *See*, Zemel'nyi Kodeks Respubliki Kazakhstan [Land Code of the Republic of Kazakstan], Ch. 2 (the "Land Code").

(n6)Footnote 6. *See generally*, Zakon Respubliki Kazakhstan O Gosudarstvennoi Registratsii Prave na Nedvizhimoe Imushestvo i Sdelok s nim [Law of the Republic of Kazakhstan On State Registration of Rights to Immovable Property and Transactions with it] (the "Law on Reg'n of Immovable Property").

(n7)Footnote 7. *See generally*, Kodeks Respubliki Kazakhstan O Nalogah i Drugih Obyazatel'nyh Platezhah v Byudzhet (Nalogovyi Kodeks) [Code of the Republic of Kazakhstan On Taxes and Other Obligatory Payments to the Budget (the "Tax Code")], ch. 53-56 for the land tax, and ch. 57-58 for property tax.

(n8)Footnote 8. Land Code, art. 21.

(n9)Footnote 9. Grazhdanskiy Kodeks Respubliki Kazakhstan [Civil Code of the Republic of Kazakhstan] (the "Civ. Code"), art. 188.2.

(n10)Footnote 10. Land Code, art. 22.

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CHAPTER 106KZ PROPERTY LAW OF THE REPUBLIC OF KAZAKHSTAN

13-106KZ Thompson on Real Property, Thomas Editions § 106KZ.02

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§ 106KZ.02 Forms of Ownership of Real Property.

Under Kazakhstan law, the term "real estate" (or, as it is commonly called "immovable property") includes, *inter alia*, land and buildings. The law treats land and buildings as separate objects of real property. The mechanisms for acquiring ownership rights to such objects are summarized below.

§ 106KZ.02(a) Buildings.

Generally, buildings or other structures located on land may be bought, inherited, bartered, or received as gifts. Any transfer of ownership rights necessitates State registration. An owner of a building under construction cannot transfer the unfinished building as immovable property before it has been registered with the pertinent State authority. The unfinished building, however, may be transferred as movable [personal] property instead. Such a transfer does not require State registration.

From a practical standpoint, transfers of real property involve the risk of a third party's challenge, based on, for instance, the seller's voidable title. The "good faith purchaser" provisions of the Civil Code n11 provide some protection against this risk. Generally, pursuant to such provisions, a purchaser will (subject to certain exceptions) qualify as a *bona fide* purchaser of the object of purchase so long as that purchaser neither knew nor should have known that the seller's rights to the property were not properly acquired. Purchasers of real estate also may obtain title insurance to protect themselves from potential future claims of third parties.

§ 106KZ.02(b) Land Plots.

Under the Land Code, a land plot can be held under: (a) private or State ownership; n12 (b) a right for temporary land use (lease) for consideration; n13 (c) a right of permanent land use; n14 (d) a right of temporary free of charge land use; n15 (e) a right of secondary land use (sublease); n16 and, (f) service land allotment (the right of temporary land use of a plot of land granted by the State to certain categories of civil servants free of charge). n17 In addition, third parties may enjoy easement rights over a land plot under a right of limited use of another's land plot (servitude). n18

Under the Civil Code, n19 any items of material value found underneath the soil (treasure) shall be divided equally

between the land owner and the individual who found them unless agreed upon otherwise. If the land owner did not consent to his land being excavated in search of hidden treasure, then any such treasure found belongs solely to the land owner. n20 If the items constituting the "discovered treasure" also have historic and cultural value, they are transferred to the State while the finder and owner of land are entitled to monetary remuneration in the amount of fifty percent of the value of the discovered items. n21

§ 106KZ.02(b)(1) Land Occupied by Buildings.

Under the Land Code, the holder of title to a building is also entitled to ownership or lease of the land plot occupied by such building, n22 except for specific cases envisaged by the RK Land Code. Therefore, if a buyer has acquired title to a building located on a State-owned land plot, such buyer shall have the exclusive right to lease or purchase such underlying land from the State owner. Any privately owned land plot containing improved real property may be sold to a third party only as an indivisible whole constituting the land and improved property (unless the building is owned by such third party).

FOOTNOTES:
(n1)Footnote 11. Civ. Code, art. 261.

(n2)Footnote 12. Land Code, art. 3.

(n3)Footnote 13. *Id.* art. 35.

(n4)Footnote 14. *Id.* art. 34.

(n5)Footnote 15. *Id.* art 36.

(n6)Footnote 16. *Id.* art. 38.

(n7)Footnote 17. *Id.* art. 41.

(n8)Footnote 18. *Id.* Ch. 7.

(n9)Footnote 19. Civ. Code, art. 247.

(n10)Footnote 20. *Id.*

(n11)Footnote 21. *Id.*

(n12)Footnote 22. Land Code, art. 52.1.

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CHAPTER 106KZ PROPERTY LAW OF THE REPUBLIC OF KAZAKHSTAN

13-106KZ Thompson on Real Property, Thomas Editions § 106KZ.03

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§ 106KZ.03 Title, Registration and Insurance.

§ 106KZ.03(a) Technical inspection.

Surveying of a land plot by an authorized governmental agency is a prerequisite for any real estate transaction. Once the land plot survey is completed, the land plot is recorded in the State Legal Cadastre and is assigned a cadastre serial number. n23

Completed buildings are also subject to technical inspection. Immediately following the commissioning of the building by the relevant authority, the owner arranges, at its own expense, for preparation of a "technical passport," that is, governmental approval of the completed works, of the building by the technical inventory authorities. Buildings must have technical passports as a prerequisite for title to the completed building being registered.

§ 106KZ.03(b) State Registration.

Under RK law, State registration is required to transfer title to a purchaser of real estate, (a land plot and/or improved property), and to transfer the underlying agreement. n24 Title is conveyed from the seller to the purchaser upon State registration.

A lease/sublease and/or easement concluded for a period of one year or more, and mortgage agreements in relation to real estate, are subject to state registration. An agreement for a lease, mortgage or easement is deemed concluded only upon State registration and is deemed null and void in the absence of such registration. n25 Title to real property, as well as any encumbrance (lease or mortgage), is registered in the State Legal Cadastre maintained by the Kazakhstan Ministry of Justice and its territorial (local) offices.

Real estate may be the subject of a sale or lease/mortgage agreement, only if the seller's/lessor's rights have been previously registered in the State Legal Cadastre. State registration is certified by a special registration endorsement on the document indicating the substance of the transaction (for example, a sale-purchase agreement, lease agreement, or mortgage agreement).

FOOTNOTES:

(n1)Footnote 23. *Id.* art. 152-54.

(n2)Footnote 24. Law on Reg'n of Immovable Property, art. 4.1.

(n3)Footnote 25. *Id.*, art 4 & 5.

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CHAPTER 106KZ PROPERTY LAW OF THE REPUBLIC OF KAZAKHSTAN

13-106KZ Thompson on Real Property, Thomas Editions § 106KZ.04

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§ 106KZ.04 Forms of Leases And Restrictions on Basic Terms.

Lease rights to real estate are acquired by virtue of a written real estate lease agreement. The parties are free to establish any term of lease, though the right to temporary land use for consideration may either be short-term (up to 5 years) or long-term (from 5 to 49 years). n26 Therefore, when the State acts as a landlord, the duration of the lease cannot exceed 49 years. In instances where land is in private ownership, there is no limitation as to the duration of the lease.

A valid lease agreement must be executed as a single document signed by the authorized representatives of the parties, and include certain material terms with respect to the real property in question. For example, a lease agreement must provide information with respect to the identity, exact location, type of permitted use and cadastre number of the property and the rent amount payable under the lease. Notarization of real property lease agreements is not required. A lease agreement of a building concluded for a period one year or more is subject to State registration n27 and is considered valid only from the moment of registration.

§ 106KZ.04(a) Land Leases.

Both the Civil Code n28 and the Land Code n29 govern land leases. Some of the Codes' provisions on landlord-tenant law are mandatory and the parties may not modify those rules in their agreement. Such mandatory provisions usually concern unilateral termination rights of landlords under State land lease contracts, maximum lease terms and currency requirements.

§ 106KZ.04(a)(1) Termination.

A lease may be terminated prior to its stated term upon the occurrence of circumstances specifically provided for in the lease agreement. If the lease term is not specified, either party may terminate the lease upon three months' prior notice, unless another period is stipulated in the lease agreement. n30 In accordance with applicable law, a lease agreement may be terminated by the court upon a claim of either party in the event of a material breach of the other party's obligations. Extra-judicial unilateral termination is possible only if specifically stipulated in the lease agreement.

§ 106KZ.04(a)(2) Renewability.

Under general rules governing leases, all tenants have a right of first refusal to renew the lease agreement, unless the agreement provides otherwise. n31 Furthermore, owners of real estate situated on a plot of land are entitled by statute to rights of use to the land on which such real estate is located. n32

§ 106KZ.04(a)(3) Assignment, Sublease and Mortgage.

Unless otherwise provided by the land lease agreement, an assignment, sublease or mortgage of rights and obligations under land leases with State authorities does not require the prior consent of the other party. The sublease of a land plot (or its part) shall be based on a sublease contract and is subject to notification to the relevant authority at the place of the land plot location. n33

§ 106KZ.04(b) Commercial Leases.

The legal framework regulating commercial leases in the RK stipulates a number of mandatory provisions of law that cannot be varied by contract. Some of the more important mandatory rules are discussed below.

§ 106KZ.04(b)(1) Recovery of Operating Expenses; Taxes.

The lease agreement determines operating costs chargeable to tenants. Each taxpayer, however, is obliged to pay its own taxes. n34 This provision is usually interpreted by the tax authorities so as to include not only the physical act of paying the tax, but also bearing of the tax burden. Expenses in connection with current repairs, made by the tenant with a view to preserve and maintain the real estate object and not compensated by the landlord according to the contract of lease, shall be deducted from the tax base.

§ 106KZ.04(b)(2) Remedies in the Event of Breach.

The landlord may terminate the lease through judicial proceedings in the event of a tenant's breach of the lease agreement, only if the landlord has served a prior "cure" notice to the tenant and given the tenant a reasonable time to cure the breach. n35 The lease agreement may not waive the landlord's statutory right. Likewise, the tenant may terminate the lease through judicial proceedings in the event of the landlord's breach of certain duties described in the Civil Code (*e.g.* to undertake a major maintenance of the leased property). n36 Notably, the tenant is not obliged to serve a "cure" notice upon the landlord, and thus the latter is not provided with any grace period to cure the breach.

In case of early termination that accords with the lease agreement, damages are payable if stipulated in the lease agreement. Should a lease agreement be terminated by a court decision due to the material breach of a party, the claimant may be awarded damages for breach of contract. The law requires the non-defaulting party to mitigate its damages in order to have a valid claim for compensation of lost profit from the other party. n37

§ 106KZ.04(b)(3) Casualty/Condemnation.

The landlord is responsible for any defects in the leased property which prevent the tenant, in part or in full, from using the leased property. n38 Arguably, a casualty or condemnation affecting the leased premises could be construed as a "defect" in the lease property. In the event of such defects, the tenant has an option at law to:

(a) demand that the landlord cure those defects at no cost to the tenant;

(b) reduce the rent accordingly;

(c) withhold the amount of expenses incurred in curing the defects from the rent, upon advance notice to the landlord; or

(d) demand early termination of the lease. n39

If the landlord has been notified by the tenant of the tenant's claim or its intention to cure the defects of the leased property at the landlord's expense, then the landlord has an option either to substitute promptly another similar property free from defects for the leased property, or to cure the defects itself at its cost. n40 The tenant is free to accept or reject the substitute offered by the landlord. The law does not identify what would be a "similar (or analogous) property". Such substitute presumably must be capable of performing similar functions or achieving similar results as the original leased property would have performed or achieved had it been free from defects. Given that the acceptance of the substitute is the tenant's right, it follows that it is the tenant who determines the "similarity" of the substitute, and its suitability for his needs. If the rent is insufficient to cover the tenant's damages resulting from defects in the leased property, the tenant has a claim against the landlord for that part of the damages not covered by rent. n41

§ 106KZ.04(b)(4) Ownership of Tenant's Improvements.

The law distinguishes between two types of improvements: detachable and non-detachable. Non-detachable improvements are those that may not be detached without damage to the property. Any detachable improvements the tenant makes at his own expense remain his property, unless otherwise provided in the lease agreement. n42 The tenant's non-detachable improvements are made at its own expense, and with the prior consent of the landlord, shall remain on the premises upon termination of the lease, but the tenant shall be entitled to compensation for the value of the improvements made, unless the lease agreement stipulates otherwise. n43 The value of improvements is established at the date of termination. If the tenant makes non-detachable improvements without the landlord's consent, the landlord is under no obligation to pay any compensation to the tenant. n44

§ 106KZ.04(b)(5) Tenant's Right to Sublease.

A tenant may transfer his rights and obligations under the lease agreement to a third party, or pledge his lease rights, or contribute the lease rights to the charter capital of a company, but in each case only with the landlord's prior consent. n45 In all the aforementioned cases, other than transfer of lease, the tenant remains primarily liable to the landlord under the lease agreement.

FOOTNOTES:
(n1)Footnote 26. Land Code, art.35.

(n2)Footnote 27. Law on Reg'n of Immovable Property, art. 4.4.

(n3)Footnote 28. Civ. Code, Ch. 29.

(n4)Footnote 29. Land Code, Ch. 4.

(n5)Footnote 30. Civ. Code, art. 545.2.

(n6)Footnote 31. *Id.*, art. 557.

(n7)Footnote 32. Land Code, art. 37.

(n8)Footnote 33. *Id.*, art. 38.

(n9)Footnote 34. Tax Code, art. 26.

(n10)Footnote 35. Civ. Code, art. 556.

(n11)Footnote 36. *Id.*

(n12)Footnote 37. *Id.*, art. 350.4.

(n13)Footnote 38. *Id.*, art. 548.1.

(n14)Footnote 39. *Id.*

(n15)Footnote 40. *Id.*, art. 548.2.

(n16)Footnote 41. *Id.*, art. 548.3.

(n17)Footnote 42. Civ. Code, art. 555.1.

(n18)Footnote 43. *Id.*, art. 555.2.

(n19)Footnote 44. *Id.*, art. 555.3.

(n20)Footnote 45. *Id.*, art. 551.

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CHAPTER 106KZ PROPERTY LAW OF THE REPUBLIC OF KAZAKHSTAN

13-106KZ Thompson on Real Property, Thomas Editions § 106KZ.05

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§ 106KZ.05 Mortgage of Real Estate, Enforceability and Foreclosure.

§ 106KZ.05(a) Mortgage Agreements.

The mortgage of real estate is widely used in the RK to secure loans. The main law governing mortgages is the Law "On Mortgages of Immovable Property" ("Mortgage Law") enacted in December 1995.

A mortgage agreement enters into force as of the date of its State registration, and it is not necessary to notarize the mortgage agreement. n46 Registration of creditor's rights as a mortgagee provides protection against the debtor's disposing of the mortgaged assets in bad faith without the creditor's knowledge.

§ 106KZ.05(b) Validity and Enforceability of Mortgages.

§ 106KZ.05(b)(1) Enforceability of Mortgages, Existence of Non-Contractual Mortgages.

In the vast majority of cases, a mortgage over real estate arises as a result of a mortgage contract. In some instances, however, a non-contractual mortgage (pledge) can be created automatically as a matter of law. Examples of situations where this may arise are as follows:

(a) if a recipient of an annuity transfers a land plot or some other immovable property to the payee of the annuity, the payments are automatically secured by pledge rights to the property;

(b) unless otherwise provided by law or agreement, if the owner of a land plot mortgages it, the mortgage will extend to all buildings belonging to the mortgagor, located or being developed on the applicable land plot;

The above mortgages do not require the consent of the mortgagor, who is usually a debtor under a claim to be secured. The law requires that such non-contractual mortgages be registered simultaneously with the debtor's title.

§ 106KZ.05(b)(2) Priority of claims.

Mandatory rules govern priority among creditors upon the distribution of proceeds from foreclosure (sale of mortgaged real estate). The following claims have priority over those secured by a contractual mortgage:

- enforcement costs;

- personal injury claims;

- salary and severance pay claims, and other labor and personal service-related claims;

Since this order of priority results from mandatory legal rules, lenders cannot contractually improve their position of priority (seniority) with the borrower.

§ 106KZ.05(c) Enforcement and Foreclosure Mechanism.

§ 106KZ.05(c)(1) Who May Foreclose and Which Remedies May Be Exercised.

A mortgage creditor may act to foreclose on the mortgage. If a debtor is insolvent, any creditor may file a bankruptcy petition that potentially may lead to bankruptcy foreclosure proceedings.

§ 106KZ.05(c)(2) Bankruptcy vs. Enforcement of Mortgage.

Enforcement mechanisms are regulated by the Civil Code (for collection proceedings) and the Law "On Bankruptcy" dated January 21, 1997 No. 67-I (for enforcement through bankruptcy proceedings). The creditor holding rights under a mortgage may elect either to foreclose on the mortgage or to file a bankruptcy petition against the debtor (other circumstances permitting). Since it is impossible to conduct collection proceedings and bankruptcy proceedings simultaneously, a creditor must choose between the two types of proceedings.

In collection proceedings, and so long as the debtor is solvent, the mortgage creditor obtains the proceeds of the sale of the mortgaged asset in the first place provided that there are no other creditors pursuing their claims through collection proceedings. If, however, there are multiple creditors (and, therefore, more than one 'enforcement writ') and the assets are insufficient to meet all creditors' claims, the proceeds are distributed in the following order:

- enforcement costs;

- personal injury claims;

- copyright claims;

- claims secured by mortgage;

- tax and fiscal claims;

- all other claims.

Lower ranking claims are satisfied only after higher ranking claims have been reimbursed in full. In the event that the funds are insufficient to reimburse all of the equally ranking creditors, then the funds are distributed pro rata to the size of their claims. The same principle applies to bankruptcy proceedings.

However, if during collection proceedings and before relevant assets are ordered to be sold, a bankruptcy proceeding

with respect to the debtor is initiated, the collection proceeding is suspended (akin to an automatic stay). The mortgage creditor would have a similar third ranking priority in both types of proceedings. As a result, even if the collection proceeding is suspended because of the bankruptcy proceeding, the mortgage creditor may participate in the bankruptcy proceeding. The creditor secured by mortgage must file his claim in bankruptcy proceeding no later than two months following the moment that the notice of bankruptcy proceeding is published.

Bankruptcy proceedings usually involve several creditors. Therefore, they are routinely regulated, and thus likely to take more time, as opposed to collection proceedings.

Under RK law, parties may not agree that real property becomes the property of the mortgage creditor in case of default by the creditor, that is, for example, in case of insolvency of the creditor.

§ 106KZ.05(c)(3) Non-Judicial Foreclosure.

Non-judicial foreclosure over real estate is possible if such option is clearly envisaged in the mortgage agreement. Non-judicial foreclosure is prohibited when: (i) the mortgage agreement requires third party consent; (ii) mortgaged property has significant historical, artistic, or other cultural value for society, or (iii) the mortgaged property is real estate that is common property, and one of the proprietors does not give written approval for the settlement of the pledgeholder's (pledgee's) claims

§ 106KZ.05(c)(4) Requirements For Exercising Remedies; Enforcement Timeframe; Sensitivities and Restrictions.

The procedure for enforcing creditors' rights in collection proceedings is the same regardless of whether the claims are secured or unsecured: only the priority of the creditors to the proceeds collected is different.

Collection proceedings generally entail the following steps:

- obtaining an enforceable decision;

- obtaining a writ of enforcement;

- instructing the court bailiff to take a specified collection measure and payment of his fees;

- the court bailiff's execution of the requested collection measure and notification to the debtor;

- collection.

Remedies are not restricted to monetary damages. For example, in the event of a payment default, a creditor may enforce a termination clause permitting acceleration of the loan.

FOOTNOTES:
(n1)Footnote 46. Mortgage Law, art. 6.2 & 6.3.

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CHAPTER 106KZ PROPERTY LAW OF THE REPUBLIC OF KAZAKHSTAN

13-106KZ Thompson on Real Property, Thomas Editions § 106KZ.06

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§ 106KZ.06 Zoning.

Zoning designation of a land plot is important. If the purchased land is intended to be used for purposes other than its existing zoning designation, the buyer must change such designation to adapt it to the intended purposes. Zoning designation is changed upon application to the local municipality, provided that such change does not contravene the zoning regulations effective within a given municipality.

Under the Law on Architectural, Town Planning and Construction Activity in the RK (the "Town Planning Law") dated July 16, 2001, urban territories are divided into various zones with appropriate construction rules for different zones.

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CHAPTER 106KZ PROPERTY LAW OF THE REPUBLIC OF KAZAKHSTAN

13-106KZ Thompson on Real Property, Thomas Editions § 106KZ.07

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§ 106KZ.07 Eminent Domain.

Articles 84-88 of the Land Code regulate the area of eminent domain. Article 84 of the Land Code states that a land plot may be (1) judicially taken from the owner (2) for the State's purposes (3) if there is no other means for satisfying the State's needs, (4) provided that the owner of the land plot is compensated appropriately. The state may request the landlord to sell his property only when public interest is involved: the construction of roads, defense needs, building of new neighborhoods and districts and etc. n47

FOOTNOTES:
(n1)Footnote 47. Land Code, art. 84.2.

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CHAPTER 106KZ PROPERTY LAW OF THE REPUBLIC OF KAZAKHSTAN

13-106KZ Thompson on Real Property, Thomas Editions § 106KZ.08

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§ 106KZ.08 Restrictions on Foreign Ownership.

Foreign individuals or legal entities cannot hold *a right of permanent land use* of a land plot. A "foreign" legal entity under RK law is an entity incorporated under the laws of a foreign country that derives its formal existence from that foreign incorporation. Accordingly, a foreign company establishing a wholly owned Kazakh subsidiary, such as a Limited Liability Partnership or a Joint Stock Company, is exempt from the restriction prohibiting foreign ownership of land and entitled to hold a right of permanent land use of a land plot.

Therefore, foreign legal entities that have established a wholly owned company in the RK are permitted to *own and lease land* in Kazakhstan. They also may enter into construction (including reconstruction) contracts and utilities agreements. However, foreign legal entities may not own land plots intended for agricultural purposes and forestry. These restrictions do not apply to Kazakhstan legal entities with foreign capital.

In addition, a foreign individual that obtains the status of a permanent resident of the RK may purchase land and improved property primarily for the purpose of individual residence. A foreign individual, with or without permanent residence, cannot own agricultural or forestry land. However, the State may impose restrictions on the duration and use of that property.

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CHAPTER 106KZ PROPERTY LAW OF THE REPUBLIC OF KAZAKHSTAN

13-106KZ Thompson on Real Property, Thomas Editions § 106KZ.09

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§ 106KZ.09 Taxes.

The following chart summarizes the two types of taxes directly affecting owners of real estate:

Type of tax	*Tax base*	*Tax rate*
Property tax (for individuals)	An average annual residual value of real property calculated through a certain formula	Rate varies depending on the value of real property
Property tax (for legal entities)	An average annual residual value of real property or related immovable property according to accounting data	Legal entities pay property tax at the rate of 1.5 percent of the tax base.
Land Tax	Area of the land plot	Rate varies depending on the category, designation, and quality of land, *e.g.* rate of tax on land in Almaty that is not occupied by housing facilities is KZT 28.95 per square meter. The land occupied by housing facilities is taxed at the rate of KZT 0.96 per square meter.

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CHAPTER 106KZ PROPERTY LAW OF THE REPUBLIC OF KAZAKHSTAN

13-106KZ Thompson on Real Property, Thomas Editions § 106KZ.10

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§ 106KZ.10 Ownership of Subsoil Use Rights.

1. The Republic of Kazakhstan has significant oil and gas reserves, as well as major deposits of minerals, including but not limited to, uranium, gold, zinc, copper, lead, coal, nickel, and aluminum bauxite. The extractive industries account for approximately 60% of exports and constitute the main applications of foreign direct investment. The legislative base for subsoil use is critical to rights of ownership and use of resources below the ground surface. The legal framework is the Law of the Republic of Kazakhstan as of January 27, 1996 No 2828 on Subsoil and Subsoil Use them (amended and supplemented as of 07/07/2006) [The Subsoil Law]. n48

2. The Constitution of the Republic of Kazakhstan provides in Section I, Article 6(3) that the State owns all land and all natural resources. n49 Secondary legislation hence establishes private ownership of land and natural resources and allocates the right of ownership over subsoil use, with the State retaining substantial authority over grants of concession. Special regulations apply to private ownership of subsoil intended to meet governmental needs in strategic and scarce types of mineral raw materials; to ensure national security, preserve environment, and protect population; or conserve subsoil portions to save mineral stocks for the future generations.

3. The term "Subsoil" is defined as "part of the earth's crust underneath the topsoil, or in the case of its absence, underneath the earth's surface and the bottom of seas, lakes, rivers and other reservoirs which extends up to the depths accessible for performing subsoil use operations with account of scientific and technological advance". n50 The term "subsoil use right" is, "a right to possess and use subsoil within the contractual territory which is granted to subsoil users in accordance with this Law". n51

4. A "subsoil user" is an individual or juridical entity [domestic or foreign] that acquires a right to perform operations upon the subsoil, for personal or commercial purposes. Subsoil use rights comprise the right to possess and the right to use the subsoil within the terms of a State grant. Article 10 of the Subsoil Law delineates subsoil use rights by providing that "The right to use subsoil shall be granted to perform the following operations":

1. Governmental geological research of subsoil;

2. Exploration;

3. Extraction;

4. Combined exploration and extraction; or

5. Construction and/or maintaining of underground facilities not related to exploration and/or extraction.

Subsoil use holders are divided into two classes: (1) holders of a permanent right to use the land and its subsoil, including the right of alienability, and (2) holders of a temporary right to use the land and its subsoil. n52

5. Subsoil use rights arise from allocation by the State, transfer from another subsoil user, or succession in title [*e.g.*, company holding subsoil use right is reorganized or acquired in a merger]. n53 With certain exceptions for "bargain-based contracts", a holder acquires subsoil use rights by entering into a contract with the competent State authority, that is, the Ministry of Energy and Mineral Resources [MEMR]. n54 The MEMR conducts open or restricted tenders advertised in the mass media regarding acquisition of rights in a subsoil plot. n55 The winner of the tender selected by the Tender Board is obliged to enter into a contract with the MEMR. n56

6. The MEMR uses standardized contracts for granting ownership of the right governing subsoil use: (1) product separation contracts, (2) concession contracts, and (3) work or service contracts. n57 The State and the contractor establish terms by mutual consent provided they are consistent with the laws of Kazakhstan. Major contractual issues are: taxation, forfeit for failure to observe contractual norms, compliance with Kazakhstan content [*e.g.*, requirement to retain Kazakhstan labor and formula to set wages], the conditions of exploration and extraction, duration of the contract, and its territorial scope. n58 The MEMR monitors compliance of the holder with its contract obligations. In the event of contractual violation, the MEMR has the competence to require correction of the violation. n59 In the event the holder fails to correct the contractual violation, the MEMR has the authority to invalidate the contract under the terms of the Subsoil Law. n60

7. Subsoil users have the following statutory rights: n61

1. Independence to exercise subsoil rights based on the contract;

2. Use the products of activity, including mineral raw materials;

3. Construct necessary industrial and social facilities on the allocated territory and, by agreement, to use common facilities or telecommunications on or outside the contractual territory;

4. Negotiate prolongation of the contract within the framework of Kazakhstan law;

5. Hire subcontractors;

6. Transfer wholly or partially rights of ownership in subsoil use to another party provided the transfer is consistent with the Law on Subsoil and subsoil use; and

7. Terminate activities by conforming to Kazakhstan legislation

Excepting for the State pre-emptive right, the rights of the subsoil user are protected under the law and are insulated from the retroactive application of subsequent legislation. n62

8. Subsoil users are obliged by the Subsoil Law: (1) to protect the environment, human life and health, (2) to exploit the

subsoil efficiently, (3) to preserve natural landscapes and geomorphic structures, (4) to avoid risks capable of leading to soil degradation, and (5) to maintain the natural state of waters. n63 Subsoil users also must apply rational and complex measures to effectuate the contract. n64 Violations of mandatory rules subject the subsoil user to liability established by Kazakhstan law. n65

9. The State retains a pre-emptive right in the event of any intended alienation by a subsoil user of its license, participation rights in the subsoil user, or transfer of its rights to an entity that influences its decision-making. n66 The pre-emptive right shall not be exercised on terms less favorable than those offered by competing purchasers. The purpose of the pre-emptive right is to block shareholders' pre-emptive rights and to prevent off-shore transactions designed to dispose of subsoil use rights in Kazakhstan. n67

10. In addition, the State retains the right to require a subsoil user to renegotiate the terms of its contract when the State deems that the deposit is of "strategic importance", and that its use constitutes a "material alteration" to Kazakhstan's economic interests or a threat to its national security. n68 Refusal to renegotiate may result in suspension or termination of the contract.

11. Disputes are settled according to the dispute settlement provisions of the contract. Article 71-1 requires parties to enter into negotiations to settle a dispute prior to proceeding to litigation or international arbitration.

FOOTNOTES:
(n1)Footnote 48. The Law of the Republic of Kazakhstan as of January 27, 1996 No. 2828 On subsoil and subsoil use (amended and supplemented as of 07/07/2006) [Subsoil Law]. The Law contains 10 parts and 76 Articles.

(n2)Footnote 49. The Constitution of the Republic of Kazakhstan (Date needed; Official citation).

(n3)Footnote 50. Article 1(28), Subsoil Law.

(n4)Footnote 51. Article 1(38), Subsoil Law.

(n5)Footnote 52. Article 11, Subsoil Law.

(n6)Footnote 53. Article 12(1)(1)(2) and (3), Subsoil Law.

(n7)Footnote 54. Article 13(1), Subsoil Law.

(n8)Footnote 55. Articles 41-1 to 41-7, Subsoil Law.

(n9)Footnote 56. Article 41-7(8), Subsoil Law.

(n10)Footnote 57. Article 42(1), Subsoil Law.

(n11)Footnote 58. Articles 42, 42-1 and 43-1, Subsoil Law.

(n12)Footnote 59. *See generally*, Part 2 of the Subsoil Law, Articles 7 & 8.

(n13)Footnote 60. Articles 45, 45-1 & 45-2, Subsoil Law.

(n14)Footnote 61. Article 62, Subsoil Law.

(n15)Footnote 62. *Id.*

(n16)Footnote 63. *See generally*, Parts 6 & 7, Articles 47 & 54, Subsoil Law.

(n17)Footnote 64. Article 63, Subsoil Law.

(n18)Footnote 65. *E.g.*, Articles 45 (Contract declared invalid); 45-1 (Suspension of Contract); 45-2 (Amendment and Cancellation of Contract); and Article 71-1, Subsoil Law.

(n19)Footnote 66. Article 71, Subsoil Law.

(n20)Footnote 67. *Id.* Note that the concept of "material alteration" is defined neither in the Law nor in judicial decisions.

(n21)Footnote 68. Subsoil Law, amendment of 24 October 2007 signed by President Nursultan Nazarbayev.

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CHAPTER 106MX PROPERTY LAW IN MEXICO

13-106MX Thompson on Real Property, Thomas Editions 106MX.syn

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§ 106MX.syn Synopsis to Chapter 106MX: PROPERTY LAW IN MEXICO

§ 106MX.01 History of Property Law in Mexico.

§ 106MX.02 Types of Property Interests.

§ 106MX.02(a) The Usufruct.

§ 106MX.02(b) Servitudes.

§ 106MX.02(c) Security Interests.

§ 106MX.03 Co-Ownership.

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§ 106MX.05(a) Publicity.

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§ 106MX.06 Wills and Intestate Succession.

§ 106MX.07 Leases.

§ 106MX.08 Ownership of Mexican Property by Foreigners.

§ 106MX.09 Taxation of Property.

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CHAPTER 106MX PROPERTY LAW IN MEXICO

13-106MX Thompson on Real Property, Thomas Editions § 106MX.01

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§ 106MX.01 History of Property Law in Mexico.

The region of Mexico was inhabited perhaps as long as 15,000 to 20,000 years ago. It seems likely that even 10,000 years ago a wetter climate supported more abundant vegetation and animal life than at present. Even larger animals, such as mammoths, elephants, buffalos, antelopes and horses were able to sustain themselves. The earliest people may have immigrated along with and hunted some of the larger animals. The people who inhabited this area apparently lived in groups with a certain hierarchy and order.

Between 7,000 and 5,000 B.C., the inhabitants of the Mexican central plateau changed their hunting-based economy into a mixed farming and hunting society. Findings from 3,000 B.C. show widespread domestication of animals such as the peacock, *escuincle* (mutt), turkey, and Chihuahua dogs.

This economic pattern was broken in about 2,000 B.C., when maize made its appearance and became the most important food of these ancient settlers. Maize also led to the refining of the textile industry, ceramics, the decorative use of feathers, and other arts as well as the developing of certain sports. With these refined products came specialization, exchange of products, and the rise of non-agricultural classes, such as nobles, priests, merchants, sculptors, and other artisans.

The position of the upper classes was strengthened as warfare yielded slaves, who then made possible the creation of the great architectural monuments left by the Maya, Mixtec, Aztec, Zapotec, Toltec, and Chichemecas civilizations.

Although these great civilizations of ancient Mexico developed out of the surplus created by the prevailing maize agriculture, the primitive agricultural techniques exhausted the soil and forced the people to migrate, leaving fields and cities behind.

The evidence of these ancient cultures shows irrigation systems, religious rituals, and elaborate cities and markets.

The Olmec civilization flourished between the 9th and the 1st centuries B.C., in the area of the Mexican Gulf coast. Thereafter, it decayed and passed many of its features on to the Teotihuacan civilization. The Aztec civilization appeared around the 4th century and came to the Mexican valley from the Yucatan peninsula. The Aztecs transformed

their aristocratic government to a monarchy.

As the Aztec empire developed, their real property was governed by public rather than private law. Some land was owned by the monarch as personal property and other lands were used to support the monarch's military leaders for the duration of their services. Some lands held by these noble followers were held for life only and were inalienable. n1

The Aztecs were divided into clans called *Calpullis*, and families of a clan held land as tenants in common. The tenancy vested if the family remained on the land for two years. The Aztec clan also held lands for community, religious, military, certain public purposes, and for the king's purposes. Some of these lands were used to pay taxes and for other public expenses.

By the time Montezuma II began ruling in 1502, the Aztec empire was in decline:

> The spirit of this emperor was weakened, for he believed in assorted bad omens. His enormous empire, comprising perhaps as many as ten million people, was too large for the means of communication available at the time; it lacked the coherence that can only be based in common ideals; and it was generally hated by its subject tribes. Hence, a mere handful of some four hundred and fifty Spaniards were able to conquer where their limited number made it at first appear improbable. n2

With Cortez's conquest of Mexico in 1520, two great cultural streams converged, the Aztec and the Hispanic. The Hispanic current carried its law, which was *Castilian*, and applied that law to its Latin American empire. New Spain became a new kingdom of the empire. Soon after the Conquest, Indian affairs were handled through a Council of Indies similar to the Council of Castile. However, the supreme power remained in Spain, the economic interests of the New Spain were subordinated to those of her European sovereign, and European Spaniards were privileged relative to New World Spaniards.

The property law of New Spain also reflected the shifting legal currents in Spain and Europe. Very early in New Spain's colonial history, large dynastic landholdings emerged as the *conquistadores* were given huge land grants for the services they had rendered. Economic disparities with the natives were further exacerbated as the Indians were usually required to render services to the governing class. Spaniards' holdings were increased as they purchased or seized adjacent lands. n3

The Spanish Roman Church also became a large landholder, and so, in the 19th century became a target of reform. In the *Leyes de Reforma* of Benito Juarez it was decreed that "anyone, especially the tenant of a church property, could buy it for a very small price by making a claim or *denuncia*. The claim was necessary since many farms or houses were in the names of priests but were, in fact, Church property." n4

The reform was mostly ineffective, because the peasants did not have any money to buy lands; or their religious beliefs prevented them from buying church lands. On the other hand, the wealthy class did buy, very cheaply, most of the Church's real property. The result of the reform laws, then, was to impoverish the church and threaten many of its charitable activities on behalf of the landless poor.

Strengthening of large landholders continued under Porfirio Diaz. Many enormous *Latifundios* (large tracts of privately owned lands) were granted, not to Mexican peasants, but to foreign companies or individuals who would hopefully promote progress. Sometimes corrupt politicians took lands intended for support of the Indians. Many prominent persons took "advantage of the political climate that favored landholders, merchants, and investors to the detriment of the general population." n5

Such injustices fomented deep discontent among the peasants. Civil unrest eventually resulted in a new constitution in 1917. This constitution not only opened the way for land reform, but also dealt with another abuse, the aggressive

acquisition and use of Mexican real property by foreign governments.

The 1917 constitution solved this problem because Mexican law forbade foreigners to own any real estate in Mexico. A non-Mexican seeking to acquire land the acquirer's had to agree not to seek the protection of his or her government. Article 27 of the Constitution proclaims that original ownership of the land and water belongs to the Mexican nation and that dominion over these lands can be conveyed to private individuals. Also, the Mexican nation has the right to limit ownership of private property to protect public interest and to make a just and fair distribution.

The constitution divided and distributed many *Latifundios* to small landowners and peasants. Small landholdings were given protection, and takings for public needs were to fairly compensated.

Now, only Mexicans by birth or naturalization may freely acquire property over lands or waters or obtain concessions to exploit mines. Religious orders and churches of any faith are not allowed to own any type of property in Mexico. Social services or welfare institutions, businesses, or corporations can own only the real estate needed for their purposes. Foreigners cannot buy land within 50 kilometers of the seashore (31 miles) or 100 kilometers (62.5 miles) of the borders with other countries.

Mexico also exerts sovereignty over its natural resources:

> All waters and territorial seas belong to the nation, as do all minerals, salts, ore deposits, natural gas, and petroleum. With respect to all this, the dominion of the nation is inalienable, but the federal government may grant concessions to exploit them to individuals or Mexican corporations that fulfill all the requirements of the law. n6

FOOTNOTES:

(n1)Footnote 1. Gillermo F. Margadant, An Introduction to Mexican Law 20 (1980).

(n2)Footnote 2. Adolph F.A. Bandelier, On the Social Organization and Mode of Government of the Ancient Mexicans 12 (1879).

(n3)Footnote 3. Alberto Mayagoitia, A Layman's Guide to Mexican Law 13 (1976).

(n4)Footnote 4. *Id.*

(n5)Footnote 5. *Id.*

(n6)Footnote 6. *Id.*

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CHAPTER 106MX PROPERTY LAW IN MEXICO

13-106MX Thompson on Real Property, Thomas Editions § 106MX.02

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§ 106MX.02 Types of Property Interests.

Real property rights under Mexican law include the traditional Roman components of ownership, the *jus disponendi*, the *fructus*, and the *usus*. The *jus disponendi* is the right to dispose of the property by gift, sale, will, or even destruction. The *fructus* is the right to the fruits or income of the property, such as rent, interest, dividends, and crops from land. The *Usus* is the right to enjoy and use the property. These attributes collectively constitute ownership and cannot be separated. However, ownership may be shared. n7

Under the Mexican Civil Code, the following items are considered real property:

a. Land the buildings attached to it;

b. Plants and trees, so long as these are attached to the ground, and their attached fruits;

c. Everything that is permanently attached to real property;

d. Statues, paintings and reliefs which are permanently affixed to buildings;

e. Pigeon houses, beehives, fish ponds or similar breeding places, when they are part of the farm;

f. Machinery, storage vessels, tools or utensils intended by the owner of the farm for its operation, directly and exclusively;

g. Fertilizers intended for the cultivation of a farm, which are on the land where they are to be used, as well as the seed necessary for the cultivation of the farm;

h. The electrical appliances and accessories attached to the ground or to the buildings on the land, unless there is an agreement to the contrary;

i. Springs, ponds, cisterns and water courses;

j. Breeding stock and work animals;

k. Dams and irrigation works, as well as piers;

l. Rights *in rem* in real property are also considered to be real property;

m. Rolling stock of railroads, telephone and telegraph lines and fixed radio-telegraph stations. n8

Property rights are secured by the constitution n9 and civil code. n10 Private property may be taken by the government only for public purposes and only with compensation. Property exhibiting characteristics of national culture may be so taken.

In addition to sale, gift and exchange, property may be acquired by adverse possession, either after five years if in good faith, or after 10 years, if in bad faith. n11

§ 106MX.02(a) The Usufruct.

A *usufruct* can be created by contract or by operation of law, and it is a temporary right to the use of and fruits of the property. Both the *usus* and *fructus* are temporarily assigned to the *usufructuary* who also has the power to alienate the *usufruct* to another within some limitations. A limited form of *usufruct* is recognized in the right to use a habitation; this is limited to the temporary use of dwelling, is not alienable, and is analogous both in concept and in social function to the common law life estate and widow's interest. n12

§ 106MX.02(b) Servitudes.

The servitude corresponds to the common law easement. A servitude is a burden on the servient tenement and runs with

the land, as does an easement under the common law. The servitude is commonly used for drainage, canals, aqueducts, pipelines, rights of way, and utility lines. n13

§ 106MX.02(c) Security Interests.

The chattel mortgage is not recognized, but the ordinary mortgage is very common in Mexico. Livestock, farm machinery, crops, and other agricultural items may be covered by the mortgage lien as fixtures. Other special provisions exist for maritime shipping and commercial aviation. A mortgage may be conveyed in favor of a third party by endorsing the negotiable instrument, without notice to the mortgagor. The security interests of mortgages include the natural accessions to the mortgaged property, improvements made by the owner, movable objects permanently incorporated into the property by the owner, new buildings built by the owner, and additions to mortgaged buildings. n14

In Mexico it is necessary to distinguish between the civil pledge and the commercial pledge. Under the commercial pledge, the creditor or third party must be given actual possession of the property. Under the civil pledge, constructive possession suffices.

The conditional sale contract is another common security in Mexico, either as a sale subject to rescission (*venta sujeta a clausula rescisoria*), or a sale with title reserved (*venta con reserva de dominio*). The trust (*fideicomiso*) is used for complicated land development transactions. The lender or principal creditor in such a transaction is prohibited from acting as trustee. To secure the interest of a foreign lender with a trust requires a permit from the central bank.

FOOTNOTES:

(n1)Footnote 7. James E. Herget & Jorge Camil, An Introduction To The Mexican Legal System 48 (1978).

(n2)Footnote 8. The Mexican Civil Code art. 750 (hereafter "Civil Code").

(n3)Footnote 9. Const. art. 27.

(n4)Footnote 10. Civil Code art. 830.

(n5)Footnote 11. *Id.* arts. 1151-1157.

(n6)Footnote 12. *Id.* arts. 980-1048.

(n7)Footnote 13. *Id.* arts. 1057-1134.

(n8)Footnote 14. *Id.* arts. 2893-2943.

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CHAPTER 106MX PROPERTY LAW IN MEXICO

13-106MX Thompson on Real Property, Thomas Editions § 106MX.03

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§ 106MX.03 Co-Ownership.

Co-ownership is common in Mexico, but no right of survivorship is recognized. Each co-owner has right to require a partition of the property. n15

FOOTNOTES:
(n1)Footnote 15. *Id.* arts. 938-979.

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CHAPTER 106MX PROPERTY LAW IN MEXICO

13-106MX Thompson on Real Property, Thomas Editions § 106MX.04

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§ 106MX.04 Transfer of Ownership.

The voluntary transfer of land in Mexico may be accomplished by sale, donation or devise. Involuntary transfers are achieved by judicial orders, by inheritance, and by prescription. Transactions are required to be formalized through a notary and by recordation in the public registry (*registro publico*). n16

FOOTNOTES:
(n1)Footnote 16. Juan F. Moreno, "Closing the Deal: Buying Residential Land in Mexico's 'Restricted Zone,'" *38 Ariz. Att'y 30* (March, 2002).

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CHAPTER 106MX PROPERTY LAW IN MEXICO

13-106MX Thompson on Real Property, Thomas Editions § 106MX.05

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§ 106MX.05 The Recording System.

Under Mexico's recording system, an instrument which creates, extinguishes, modifies, or otherwise affects rights *in rem* in inmovables may be recorded. The documents recorded are documents executed by a notary, by judges, and by administrative judges. This recording law is based on the principles of publicity, legality, specification, priority, and sequence. n17

§ 106MX.05(a) Publicity.

If an instrument transfers an interest to another party, then it is normally effective even if it is not recorded. But to be effective against third parties, the instrument needs to be properly recorded. In Mexico a person is not considered a third party if he or she has notice of the transaction or did not act in good faith.

§ 106MX.05(b) Legality.

The registrar may refuse to record any type of document which is not legally valid. For example, the registry determines from the records whether the grantor has the power to convey the property, whether the parties to the instrument have the legal capacity to act, whether the instrument complies with external formalities, and whether the property is properly defined.

§ 106MX.05(c) Specification.

Specification means that the conveyance has be specific as to the nature of the obligation, type of ownership, amount of lien, and individual parcels.

§ 106MX.05(d) Priority.

Priority is the familiar "first in time, first in right." The first instrument to be recorded will prevail against other conveyances. If a registrar refuses to record an instrument because of invalidity, the registrar must nevertheless enter a preventive inscription on the record to preserve the priority of the instrument, in case it should later be determined that the instrument is recordable.

§ 106MX.05(e) Sequence.

A party seeking to record an instrument must indicate the source of the grantor's title. This requirement links the instrument chronologically to show the source of each grantor's interest. However, the Mexican Supreme Court has interpreted this law to mean that when two parties are asserting ownership based upon a record title, the first to be recorded (principle of priority) does not necessarily prevail. Rather, the chain of title must be traced back to the earliest recording from a common grantor or, if no common grantor appears, then the priority principle applies.

FOOTNOTES:
(n1)Footnote 17. *Id.* arts. 2999-3074.

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CHAPTER 106MX PROPERTY LAW IN MEXICO

13-106MX Thompson on Real Property, Thomas Editions § 106MX.06

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§ 106MX.06 Wills and Intestate Succession.

Property may be devised through either of two types of wills, ordinary and special wills. Ordinary wills are classified as public open, public closed, and holographic wills. Public open wills are executed before the notary and three witnesses with the full panoply of formalities--signatures, readings aloud, certification, and the enrollment in the notary's records. Public closed wills are privately executed. A public closed will is signed by the executor, sealed in an envelope, and presented to the notary. The notary certifies then the will before witnesses and testators, makes an entry of protocol, and gives the will to the testator. A holographic will is a will written entirely by the hand of the testator. Formalities such as sealing wax and fingerprints are required. This type of will must be deposited in the general archives of the notarial office to be effective. Special wills include private, military, maritime, and foreign wills. Upon intestate succession the title to property vests immediately in the heirs, each of whom has the right to partition or to purchase other heirs' shares. n18

FOOTNOTES:
(n1)Footnote 18. *Id.* arts. 1281-1791.

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CHAPTER 106MX PROPERTY LAW IN MEXICO

13-106MX Thompson on Real Property, Thomas Editions § 106MX.07

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§ 106MX.07 Leases.

Under Mexican leases, the lessor is the sole "owner," and the lessee does not acquire a property interest in the premises. Residential leases may not exceed ten years, commercial leases are limited to 15 years, and industrial leases are limited to 20 years. Low income property leases may be extended indefinitely. Leases with rent above a certain amount must be in writing and leases for rural property must be in the form of public documents. Leasehold rights may not be transferred without the consent of the lessor. n19

FOOTNOTES:
(n1)Footnote 19. *Id.* arts. 2398-2496.

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CHAPTER 106MX PROPERTY LAW IN MEXICO

13-106MX Thompson on Real Property, Thomas Editions § 106MX.08

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§ 106MX.08 Ownership of Mexican Property by Foreigners.

Immigrants to Mexico may own Mexican real property after obtaining a permit to buy land. Non-residents and tourists may not purchase Mexican land. Indirect ownership by means of a trust is permissible, especially of recreational property in the resort areas. Such properties may also be leased or rented to others by the trust foreign beneficiary.

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CHAPTER 106MX PROPERTY LAW IN MEXICO

13-106MX Thompson on Real Property, Thomas Editions § 106MX.09

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§ 106MX.09 Taxation of Property.

Under the Mexican national law, a federal stamp tax is imposed on transactions required to be in writing, including sales and leases of real property located in Mexico. City taxes are also usually imposed on rental income.

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CHAPTER 106PH PROPERTY LAW IN THE PHILIPPINES

13-106PH Thompson on Real Property, Thomas Editions 106PH.syn

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§ 106PH.syn Synopsis to Chapter 106PH: PROPERTY LAW IN THE PHILIPPINES

§ 106PH.01 Brief History of the Philippines.

§ 106PH.01(a) Prehistory of the Philippines.

§ 106PH.01(b) The Early History of the Philippines.

§ 106PH.01(c) Summary of Modern Filipino Legal History.

§ 106PH.02 Governmental and Legal Foundations for Property Law in the Modern Philippines.

§ 106PH.03 Basic Filipino Property Law.

§ 106PH.03(a) Estates in Land.

§ 106PH.03(b) Foreign Ownership of Land.

§ 106PH.03(c) Concurrent Estates.

§ 106PH.03(d) Leaseholds.

§ 106PH.03(e) Succession.

§ 106PH.03(f) Wills.

§ 106PH.03(g) Real Estate Transactions.

§ 106PH.03(h) Special Rules.

§ 106PH.03(i) Title Registration.

§ 106PH.03(j) Stamps.

§ 106PH.03(k) Taxation.

§ 106PH.03(k)(1) Estate Tax.

§ 106PH.03(k)(2) Property Tax.

§ 106PH.03(l) Environmental Regulation.

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CHAPTER 106PH PROPERTY LAW IN THE PHILIPPINES

13-106PH Thompson on Real Property, Thomas Editions § 106PH.01

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§ 106PH.01 Brief History of the Philippines.

§ 106PH.01(a) Prehistory of the Philippines.

Fossils of early humans in the Philippines resemble specimens also found in Java and China. Most Filipinos are descended from people who came from Taiwan or people who migrated along the peninsulas of southeast Asia and through the islands of Indonesia. The first immigrants by sea probably came about 11,000 B.C. Various subsequent migrating groups introduced a series of advancing levels of economy and culture. Both prehistoric and historic migrations have produced a fantastic variety of ethnic groups in the Philippines, with at least 45 distinct ethnic groups. Speakers of Cebuano and Tagalog are the two largest language groups. These two groups, considered the Filipino language, are with English, the official languages of the Philippines.

§ 106PH.01(b) The Early History of the Philippines.

Filipinos for centuries lived in independent communities under customary, unwritten rules or laws. Researches have found evidence of at least two written law codes, dating from the 13th and 15th centuries, A.D. The customary laws dealt with property rights, among many other subjects. n1

When Ferdinand Magellan landed in the Philippines in 1521, even though he was killed there, the way was opened for introduction of Spanish rule over the Filipino archipelago. From that time until Philippine independence in 1898, Spanish laws and codes prevailed in the Philippines.

§ 106PH.01(c) Summary of Modern Filipino Legal History.

Later in that same year, in December, 1898, the Treaty of Paris terminating the Spanish-American War provided for Spain to cede the Philippines to the United States. "Upon the establishment of American sovereignty, the political laws of the Philippines were totally abrogated and Spanish laws, customs and rights of property inconsistent with the U.S. Constitution and with American principles and institutions were superseded." n2

The Americans established a Commonwealth government intended to prepare for Philippine independence, and the Filipinos adopted their own Constitution in 1935. Later that year they elected their first executive and legislative

officials.

From December, 1941, when the Japanese invaded the Philippines to open World War II there, until 1944, the Japanese occupied the Philippines and even produced a constitution in 1943. A Commonwealth government in exile returned to power in 1945, and the Philippine Republic was inaugurated on July 4, 1946. Filipinos ratified a new Constitution in 1973.

The new Constitution introduced a parliamentary system with merged executive and legislative powers. The prime minister became the chief executive and the president became head of state, a largely symbolic and ceremonial office. However, by a series of parliamentary maneuvers and constitutional amendments, this system was never implemented. Instead, it was changed into a modified presidential/parliamentary system. The president declared the inauguration of the Fourth Republic in 1981. The electorate ratified a new Constitution on Feb. 2, 1987. It establishes three branches of government and a *bill of rights* similar to those in the United States.

FOOTNOTES:
(n1)Footnote 1. Myrna S. Feliciano, "The Legal System of the Philippines," in 9 Linda L. Schlueter (ed.), *Modern Legal Systems Cyclopedia* 9.290.5 (2001).

(n2)Footnote 2. *Id.* at 9.290.6.

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CHAPTER 106PH PROPERTY LAW IN THE PHILIPPINES

13-106PH Thompson on Real Property, Thomas Editions § 106PH.02

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§ 106PH.02 Governmental and Legal Foundations for Property Law in the Modern Philippines.

The Constitution of 1986 contains basic provisions protecting property rights. "No person shall be deprived of life, liberty, or property without due process of law, nor shall any person be denied the equal protection of the law." n3 "The right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures of whatever nature and for any purpose shall be inviolable ... ." n4 "The liberty of abode and of changing the same within the limits prescribed by law shall not be impaired except upon lawful order of the court." n5 "Private property shall not be taken for public use without just compensation." n6

Contemporary Filipino law is drawn partly from Spanish law and partly from the law of the United States, thus being a mixed civil law and common law system. Many Codes modeled on civil law codes are in effect, as are statutes modeled on U.S. statutes. U.S. case law is cited and considered persuasive.

Of the 26 codes in force today, the codes relating to property are the Civil Code, the Code of Agrarian Reforms, the National Building Code, the Forestry Reform Code, the Real Property Tax Code, the Water Code, and the Philippine Environment Code.

The Civil Code, adopted in 1950, replaced the Spanish Civil Code of 1889. Two of its four books are Property and Different Modes of Acquiring Ownership. The Code of Agrarian Reforms embodies the basic land reform rules and has been controversial.

FOOTNOTES:
(n1)Footnote 3. Art. III, Sec. 1.

(n2)Footnote 4. Art. III, Sec. 2.

(n3)Footnote 5. Art. III, Sec. 6.

(n4)Footnote 6. Art. III, Sec. 9.

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CHAPTER 106PH PROPERTY LAW IN THE PHILIPPINES

13-106PH Thompson on Real Property, Thomas Editions § 106PH.03

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§ 106PH.03 Basic Filipino Property Law.

Property described as immovable property in Philippine law is similar to real property in a common law system, although the concept of immovable property is broader. n7 The principal laws and rules on selected property topics are briefly described below.

§ 106PH.03(a) Estates in Land.

Under Philippine property law, the term immovable property includes much of what is meant by real property in a common law system. Immovables include, among other things: lands, buildings, roads and structures of all kinds attached to the soil; trees, plants, and growing fruits while they are attached to the land; everything fixed or attached to an immovable; and "contracts for public works, and servitudes and other real rights over immovable property." n8 This covers essentially all that is meant by real property in Anglo-American common law.

The Civil Code declares that "Ownership may be exercised over things and rights." n9 The enumerated ownership rights include:

Right to enjoy and dispose of a thing, including a right of action to recover it. n10

Right to exclude. n11

Right to enclose or fence. n12

The owner may not use the thing "in such a manner as to injure the rights of a third person," n13 may not prohibit interference that is "necessary to avert an imminent danger and ... threatened danger ... ." n14 "No person shall be deprived of his property except by competent authority and for public use and always upon payment of just compensation." n15

"The owner of a parcel of land is the owner of its surface and of everything under it ... ." n16 "Hidden treasure belongs to the owner of the land, building, or other property on which it is found." n17

The owner of property also owns the natural fruits, the industrial fruits and the civil fruits, e.g., rents. n18

"Whatever is built, planted or sown on the land of another and the improvements or repairs made thereon, belong to the owner of the land," n19 subject to exceptions specified in the code. n20

One who holds a legal or equitable title to or interest in the real property may bring a quiet title action. n21 Dower and curtesy interests are not recognized.

Another form of the property right traditional in civil law jurisdictions is the usufruct. In the Philippines, "Usufruct gives a right to enjoy the property of another with the obligation of preserving its form and substance, unless the title constituting it or the law otherwise provides." n22 Servitudes are covered in Articles 613-693 and nuisance in Articles 694-707 of the Civil Code.

Philippine law also recognizes the concept of the family home: "The family home is the dwelling house where a person and his family reside, and the land on which it is situated. If constituted as herein provided, the family home shall be exempt from execution, forced sale or attachment, except as provided in Articles 232 and 243." n23

§ 106PH.03(b) Foreign Ownership of Land.

Under the general rule, only Filipino citizens, or entities owned at least 60% by Filipinos, are entitled to acquire land in the Philippines. Numerous exceptions relating to married couples and dual citizens and other special circumstances also apply. n24 Foreign nationals and corporation may enter into long-term leases, for up to 50 years, renewable for up to 25 years.

§ 106PH.03(c) Concurrent Estates.

The Civil Code recognizes and regulates co-ownership. n25 The Code makes detailed provisions for rights of partition, and does not recognize a right of survivorship. Specific co-ownership provisions are made for owners of different stories of a house. n26

§ 106PH.03(d) Leaseholds.

Leases of terms for one year or longer are required to be in writing, subject to exceptions. Leases of things for more than 99 years are not valid. n27 Leases may be recorded in the Registry of Property, n28 and if unrecorded, are not binding on third persons. n29 A lessee does not have a right to assign without the lessor's consent, n30 but does have a right to sublet with the lessor's consent, unless the lease agreement provides otherwise. n31 The Civil Code contains detailed provision for regulation of leaseholds. n32

§ 106PH.03(e) Succession.

Detailed rules of succession are provided in the Civil Code n33 and also in Art. 190 of Executive Order 209. Intestate succession is covered by Arts. 960 to 1014 of the Civil Code.

§ 106PH.03(f) Wills.

The Civil Code also governs formalities and other requirements for wills. n34 Persons under 18 are not authorized to make a will. n35 Wills must be in writing and executed in a language or dialect known to the testator. n36

§ 106PH.03(g) Real Estate Transactions.

A contract of mortgage may be applied to immovables and alienable real rights in connection with immovables. n37 "In addition to the requisites stated in Article 2085, it is indispensable, in order that a mortgage may be validly constituted, that the document in which it appears be recorded in the Registry of Property. If the instrument is not recorded, the mortgage is nevertheless binding between the parties." n38

"The form, extent and consequences of a mortgage, both as to its constitution, modification and extinguishment, and as to other matters not included in this Chapter, shall be governed by the provisions of the Mortgage Law and of the Land Registration Law." n39

By contract of antichresis, a creditor acquires the right to receive the fruits of an immovable of his debtor, and to apply them to the payment of the interest, if owing, and thereafter to the principal of the debt. n40

§ 106PH.03(h) Special Rules.

"Mining claims and rights and other matters concerning minerals and mineral lands are governed by special laws. n41

§ 106PH.03(i) Title Registration.

"The Registry of Property has for its object the inscription or annotation of acts and contracts relating to ownership and other rights over immovable property." n42 "For determining what titles are subject to inscription or annotation, as well as the form, effects, and cancellation of inscriptions and annotations, the manner of keeping the books in the Registry, and the value of the entries contained in special books, the provisions of the Mortgage Law, the Land Registration Act, and other special laws shall govern." n43 The Philippine registration system is a Torrens system.

§ 106PH.03(j) Stamps.

Document stamp taxes are required for documents, instruments, loan agreements, acceptances, assignments, sales and transfers of obligations. n44

§ 106PH.03(k) Taxation.

§ 106PH.03(k)(1) Estate Tax.

A graduated estate tax is imposed nationwide, payable within six months of the decedent's death, when the estate tax returns are due. n45

§ 106PH.03(k)(2) Property Tax.

Real estate taxes are also imposed, with different rates from region to region and city to city. n46

§ 106PH.03(l) Environmental Regulation.

The Department of Environment and Natural Resources is the chief government agency responsible for protecting, conserving, managing, developing and exploring the environment and natural resources. The principal laws enacted or decreed for these purposes are:

National Pollution Control Decree of 1976 n47

Prevention, Control and Abatement of Air Pollution Decree n48

Marine and Pollution Decree of 1976 n49

Environmental Impact Statement System n50

Toxic Substances and Hazardous and Nuclear Waste Control Act of 1990 n51

National Integrated Protected Areas Systems Act n52

Philippine Clean Air Act of 1999 n53

Ecological Solid Waste Management Act of 2000 n54

FOOTNOTES:

(n1)Footnote 7. Civil Code of the Philippines (hereafter CC), Art. 415.

(n2)Footnote 8. *Id.*

(n3)Footnote 9. CC Art. 427.

(n4)Footnote 10. CC Art. 428.

(n5)Footnote 11. CC Art. 429.

(n6)Footnote 12. CC Art. 430.

(n7)Footnote 13. CC Art. 431.

(n8)Footnote 14. CC Art. 432.

(n9)Footnote 15. CC Art. 435.

(n10)Footnote 16. CC Art. 437.

(n11)Footnote 17. CC Art. 438.

(n12)Footnote 18. CC Art. 441.

(n13)Footnote 19. CC Art. 445.

(n14)Footnote 20. CC Arts. 446-465.

(n15)Footnote 21. CC Arts. 476-481.

(n16)Footnote 22. CC Art. 562. Usufructs are governed by Arts. 562-612 of the Civil Code.

(n17)Footnote 23. CC Art. 223.

(n18)Footnote 24. Batas Pambansa 185; Republic Act 8179.

(n19)Footnote 25. CC Arts. 484-501.

(n20)Footnote 26. CC Art. 490.

(n21)Footnote 27. CC Art. 1643.

(n22)Footnote 28. CC Art. 1648.

(n23)Footnote 29. CC Art. 1646.

(n24)Footnote 30. CC Art. 1649.

(n25)Footnote 31. CC Art. 1650.

(n26)Footnote 32. CC Arts. 1642-1688.

(n27)Footnote 33. CC Arts. 774-1105.

(n28)Footnote 34. CC Arts. 783-959.

(n29)Footnote 35. CC Art. 797.

(n30)Footnote 36. CC Art. 804.

(n31)Footnote 37. CC Art. 2124.

(n32)Footnote 38. CC Art. 2125.

(n33)Footnote 39. CC Art. 2131. The basic mortgage provisions are in Arts. 2124-2131 of the Civil Code.

(n34)Footnote 40. CC Art. 2132.

(n35)Footnote 41. CC Art. 519.

(n36)Footnote 42. CC Art. 708.

(n37)Footnote 43. CC Art. 711.

(n38)Footnote 44. Republic Act 9243.

(n39)Footnote 45. Republic Act 8424.

(n40)Footnote 46. Republic Act 5447.

(n41)Footnote 47. Presidential Decree (hereafter PD) 984.

(n42)Footnote 48. PD 1181.

(n43)Footnote 49. PD 979.

(n44)Footnote 50. PD 1586.

(n45)Footnote 51. Republic Act 6969.

(n46)Footnote 52. Republic Act 7586.

(n47)Footnote 53. Republic Act 8749.

(n48)Footnote 54. Republic Act 9003.

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CHAPTER 106PL PROPERTY LAW IN POLAND

13-106PL Thompson on Real Property, Thomas Editions 106PL.syn

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§ 106PL.syn Synopsis to Chapter 106PL: PROPERTY LAW IN POLAND

§ 106PL.01 Historical Background of Polish Property Law.

§ 106PL.01(a) Property Law in the Middle Ages.

§ 106PL.01(b) Property Law in the 19th Century.

§ 106PL.01(b)(1) Partitions Times (1795-1918).

§ 106PL.01(b)(2) Napoleonic Era-Temporary Reemergence of Poland.

§ 106PL.01(c) Regaining Independence in the First Half of the 20th Century.

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§ 106PL.02 Current Laws Regarding Real Property in Poland.

§ 106PL.02(a) The Constitution of the Republic of Poland.

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§ 106PL.02(b)(2) Ownership and Possession.

§ 106PL.02(b)(3) Transfer of Ownership.

§ 106PL.02(b)(4) Limited Property Rights.

§ 106PL.02(b)(4)(i) Usufruct.

§ 106PL.02(b)(4)(ii) Easement.

§ 106PL.02(b)(4)(iii) Mortgage.

§ 106PL.02(b)(4)(iv) Perpetual Usufruct.

§ 106PL.02(c) Land and Mortgage Register.

§ 106PL.02(d) Lease and Tenancy (Dzierzawa).

§ 106PL.02(d)(1) Basic Principles of Lease and Tenancy.

§ 106PL.02(d)(1)(i) Lease Between Entrepreneurs.

§ 106PL.02(d)(1)(ii) Eviction.

§ 106PL.02(e) Foreign Ownership of Real Property in Poland.

§ 106PL.02(e)(1) Limited Acquisition of Real Property By Foreigners.

§ 106PL.02(e)(2) Permits.

§ 106PL.02(f) Investing in Real Property in Poland.

§ 106PL.02(f)(1) Local Spatial Development Plan.

§ 106PL.02(f)(2) Zoning Decisions.

§ 106PL.02(f)(3) Building Permit.

§ 106PL.02(f)(3)(i) Permit To Use Constructed Premises.

§ 106PL.02(g) Taxes and Fees on Real Property.

§ 106PL.02(g)(1) Civil Law Transactions Tax (Known as "PCC").

§ 106PL.02(g)(2) Value Added Tax.

§ 106PL.02(g)(3) Perpetual Usufruct Fee.

§ 106PL.02(g)(4) Property Tax.

§ 106PL.02(g)(5) Fee for the Exclusion from Agricultural Production.

§ 106PL.03 Bibliography.

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FOOTNOTES:
(n1)Footnote 1. New York Attorney/Partner Not admitted in Poland.

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CHAPTER 106PL PROPERTY LAW IN POLAND

13-106PL Thompson on Real Property, Thomas Editions § 106PL.01

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§ 106PL.01 Historical Background of Polish Property Law.

§ 106PL.01(a) Property Law in the Middle Ages.

The Polish legal system in the Middle Ages was based on a feudal monarchy (*patrimonium*), which was characterized by the belief that the country was the private property of its monarch.

In the Middle Ages in Poland, there were four classes of people who varied in their rights and obligations: peasants, middle class, knighthood/nobility and clergy.

In most cases, the right to property was granted to nobility and clergy by the monarch. In addition, the land was acquired by virtue of acquisitive prescription, acquisition of land belonging to no-one, or transfer of ownership. The transfer of ownership required the presence of a clerk from a local court, transferor and transferee, the neighbors and other witnesses. The transfer of ownership had to be registered in the land books, otherwise it was null and void.

In the Middle Ages in Poland, the ownership of real property depended on membership in a particular social class. The largest and also the poorest social group--the peasants--did not own property, but were obliged to perform many duties as a result of their serfdom.

§ 106PL.01(b) Property Law in the 19th Century.

§ 106PL.01(b)(1) Partitions Times (1795-1918).

In 1795, Poland disappeared from the political map of Europe when its territory was divided between Russia, Prussia and Austro-Hungary. Before it regained independence, the former Polish lands were governed by three separate legal systems. The most important legal acts regulating the civil relationships were: volume X of the Rules of the Russian Empire (*Zwod Praw Cesarstwa Rosyjskiego*) of 1832, the Prussian BGB of 1896 and the Austrian ABGB of 1811.

On the annexed territories, property law was regulated by some statutes *e.g.*, the statute on the privileges and mortgages (1818, 1825). Following the introduction of this statute, the land and mortgage register became an important tool in

establishing the existence of mortgages securing the repayment of loans. Land and mortgage registers became widely respected and had a significant impact on economic relations.

§ 106PL.01(b)(2) Napoleonic Era-Temporary Reemergence of Poland.

In 1807, the Kingdom of Warsaw was established, although it was under the domination of Napoleonic France.

By virtue of the constitution of the Kingdom of Warsaw, Napoleon's Civil Code of 1804 was introduced into the territory of the Kingdom of Warsaw. Napoleon's Civil Code was based on the principles of Roman and natural law and provided for the distinction of main property rights (such as ownership, usufruct, easement) and dependent property rights (pledge, mortgage), as well as between ownership and possession. According to Napoleon's Civil Code, the transfer of ownership did not require the transfer of possession, and acquisitive prescription required at least 10 years of uninterrupted possession.

§ 106PL.01(c) Regaining Independence in the First Half of the 20th Century.

Initially, after Poland regained independence in 1918, the legislation of the three annexing countries (i.e., the laws of Russia, Germany, and Austro-Hungary) applied.

In 1919, a codification committee was appointed and began work on the unification of the main areas of law, including civil law and civil procedure. Fundamental legal principles were agreed upon: ownership was considered as the center of the legal system and the inviolability of ownership was recognized by the Constitution, although some exceptions were allowed. Expropriation was accepted only for high social usefulness, for consideration and only in accordance with law.

Since 1933, the transfer of ownership of real property must be accomplished by means of a notarial deed.

§ 106PL.01(c)(1) World War II.

During World War II, Poland was first divided between Nazi Germany and the USSR. Further, Western Poland was annexed directly into the Third Reich and became subject to German law. The area under German control not annexed directly into the Third Reich became subject to the so-called General Government /Generalne Gubernatorstwo/ (GG). In practice, the law in the GG was adopted almost exclusively by the General Governor. Polish law, which applied earlier, was preserved only to a minor extent.

In the areas annexed by the USSR, Soviet authorities introduced "revolutionary social and legal order," which was based on liquidation of private ownership, forced expropriation of landowners and nationalization of industry, banks and mines.

§ 106PL.01(c)(2) Polish People's Republic (PRL).

§ 106PL.01(c)(2)(i) Influence of Soviet Union.

In the period between the end of the World War II and the first free elections in 1989, Poland was strongly influenced by the law and philosophy of the Soviet Union.

§ 106PL.01(c)(2)(ii) Expropriation and Nationalization.

Political and ideological premises caused the post-war authorities to specifically regulate the legal status of the properties located within the area of Warsaw. In compliance with the provisions of the decree of October 26, 1945 on Ownership and Usufruct of Land within the Area of Warsaw (Journal of Laws No. 50, item 279, as amended;

hereinafter the Decree), the title to all land within the area of the capital city was transferred to the capital city of Warsaw, while the existing owners were granted rights to hold land in perpetual tenancy.

Pursuant to the Act of January 3, 1946 on the Takeover of the Fundamental Sectors of the National Economy by the State, the Peoples Republic of Poland acquired the ownership (without compensation or for minor compensation) of, *inter alia*, industrial, mining, communications, banking and insurance enterprises.

§ 106PL.01(c)(2)(iii) Civil Code 1964.

The Civil Code was adopted in 1964, above all, due to the need to unify Polish civil law and modernize existing provisions. Before the effective date of the Civil Code, civil-law relations were governed by a number of rather inconsistent legal acts.

The adopted Civil Code referred to, for instance, so-called socialist ownership, which was vested in the state and social organizations of working people. The state property could not be acquired by acquisitive prescription. For ideological and political reasons, the title to land or other state-owned properties could not be transferred to private individuals.

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CHAPTER 106PL PROPERTY LAW IN POLAND

13-106PL Thompson on Real Property, Thomas Editions § 106PL.02

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§ 106PL.02 Current Laws Regarding Real Property in Poland.

The first open elections which took place in 1989 led to a series of reforms, which culminated in Poland joining the European Union in 2004, but in fact, this process of reform has still been occurring to date.

Real property law in Poland is governed by several legal acts, and is best described by starting with the most fundamental issues (right to own private property), then basic principles (right to transfer property), and finally particular provisions (zoning, development, etc.) Such fundamental principles are stipulated in the Constitution, n2 basic principles are addressed in the Polish Civil Code, n3 and several other legal acts n4 provide the many detailed provisions.

§ 106PL.02(a) The Constitution of the Republic of Poland.

The Polish Constitution is the supreme law of the country, and provisions regarding real property are contained in the key chapters n5 of the Constitution. Those chapters also deal with the protection of the democratic system of elections and civil rights. The most important principles refer to the protection by the state of the right to ownership and inheritance. n6 According to the Polish Constitution, the right of ownership can be restricted only by a law passed by the Parliament, and only insofar as it does not violate the nature/essence of the ownership right itself. n7 In the Constitution, the term property right has broad meaning, referring both to movables and immovables. Under the Constitution, expropriation n8 can be conducted legally, only if it serves public purpose and for fair compensation.

§ 106PL.02(a)(1) Civil Code.

The Polish Civil Code regulates basic terms and concepts regarding property law, such as ownership, n9 co-ownership, n10 movable and immovable property, and protection of ownership rights. These are mandatory provisions of the Civil Code and cannot be regulated otherwise in any contract between particular parties.

§ 106PL.02(a)(2) Property Laws Not Contained in the Civil Code.

In addition to the provisions of the Civil Code, there are detailed statutory regulations referring to the right to a

cooperative flat, the land and mortgage register, and construction law, to name a few.

Private International Law determines the law that governs international personal and property relations within the scope of civil, family, and labor law. n11 According to its provisions, the law chosen by the parties, provided that this law is connected with the obligations, may govern the contractual relations of these parties. n12 However, the legal status of real estate and any rights or obligations related thereto, shall be governed by the law of the state in which that real estate is located. n13

Regarding taxation and tax residence, as an example, according to the Treaty on the Avoidance of Double Taxation executed between Poland and the United States of America, n14 if any person sells, exchanges a real property, or performs any other transaction with relation to that property, which is situated on the territory of the other party of the agreement, n15 the income such party obtains from that transaction is subject to taxation in both the country where such person has place of residence or registered office and in the country where the real estate is located. n16 Thus, the sale of property in Poland is subject to tax in Poland and the jurisdiction of Polish law.

§ 106PL.02(b) Real Property Under the Civil Code.

§ 106PL.02(b)(1) Co-Ownership of Real Property.

The Polish Civil Code provides for two types of co-ownership: n17 joint co-ownership and fractional co-ownership. As opposed to fractional ownership, joint co-ownership n18 is combined with certain legal relationships (marital joint co-ownership, civil law partnership). Fractional co-ownership means that at least two persons have fractional proprietary rights in one property. In the case of fractional co-ownership, each of the co-owners is entitled to dispose of his/her/its right. n19 However, in order to dispose of the co-owned property as well as to perform acts beyond the ordinary management of that property (including encumbering it with a mortgage, extensive renovation), the consent of all co-owners is required. n20

In certain cases it is difficult to obtain the consent from all of the co-owners for particular action. The Polish Civil Code provides that in such cases the co-owners having at least 50% of the shares in the property are entitled to apply to the court for such consent. n21

§ 106PL.02(b)(2) Ownership and Possession.

Ownership is the fullest legal form of the use of a property under Polish law. The owner may, within the limits specified by statutory law and the principles of community life and to the exclusion of other persons, use a property in accordance with the socio-economic purpose of his right. n22 In particular, the owner may derive benefits and other income from that property and dispose of that property. n23

The term "Land ownership" includes not only the proprietary rights to the surface, but also to the space above and below that surface. n24

Polish law provides for some limitation of an owner's rights. For instance, the owner of a property, in exercise of his right, should abstain from acts that would excessively disturb the use of neighboring properties. n25 Although the owner has the right to build on his/her/its land, he/she/it should not carry out construction works in a manner threatening the neighboring properties with a loss of subjacent or lateral support. n26

The Polish Civil Code distinguishes between ownership and possession. n27 Contrary to ownership, possession is not a legal but factual status, *i.e.*, the possessor is a factual holder of the property (although the possessor may have a legal title to the property, *e.g.*, lease or usufruct agreement). n28 Nevertheless, both possession n29 and ownership n30 are legally protected.

§ 106PL.02(b)(3) Transfer of Ownership.

In Poland, there are 3 ways of obtaining legal title to the property: acquisition, inheritance and acquisitive prescription (hostile possession).

The purchase of real property is governed by special rules. A sale agreement relating to the property must be executed in the form of a notarial deed. n31 In practice, usually preliminary sale agreements are executed. n32 The Polish Civil Code does not stipulate the form of preliminary sale agreements but the buyer's interest is best secured if such preliminary sale agreement is also executed in the form of a notarial deed. In such case, if the seller refuses to execute the final sale agreement, the buyer may demand the issuance of a court decision (forcing specific performance). n33

Prior to the purchase of real property, the buyer should verify the entries and annotations in the land and mortgage register in order to make sure that the seller is the owner of that property and that there are no encumbrances on it.

The Polish Civil Code stipulates that inheritance shall be governed by the applicable legal provisions on inheritance which are in force at the moment of the death of the decedent. n34 In Poland there are two ways of inheriting: by virtue of a testament n35 or by virtue of statutory provisions. n36 Special provisions apply to the inheritance of agricultural land, depending on the date of the death of the decedent. n37

Acquisitive prescription (hostile possession) means acquisition of ownership by extended possession and it is a legal tool that provides for the possibility of eliminating the discrepancies between the actual situation and the legal status of ownership. According to the Polish Civil Code, a possessor of a real estate who is not an owner (or co-owner) shall acquire the ownership of that real estate if he/she/it possesses that real estate uninterruptedly for at least 20 years as an autonomous possessor in good faith. n38 If the possessor is acting in bad faith, the uninterrupted possession of the real estate must last for at least 30 years before the possessor acquires the right of ownership. n39

§ 106PL.02(b)(4) Limited Property Rights.

Contrary to the right of ownership, limited property rights ensure only limited rights towards a property. The catalogue of such rights is listed in the Polish Civil Code. n40 All limited property rights, except for a Pledge, n41 may be established over a real estate. The economic purpose of the establishment of limited property rights may be various: mortgage and pledges are used as a security for claims (mostly credits), whereas the right to a cooperative flat is established for residential purposes. Usufruct may constitute a basis for production activity or ensure usage of real estate for particular periods during the year (timesharing is a form of usufruct).

Limited property rights are established by an agreement, n42 court decision, administrative decision, or acquisitive prescription.

Limited property rights, with a few exceptions, may be transferred from one party to another.

§ 106PL.02(b)(4)(i) Usufruct.

According to the Polish Civil Code, usufruct is a legal form of using another party's property in a way similar to its owner. n43 The user is entitled to use a property and take profit from it. Usufruct is non-transferable. n44

Timesharing n45 is one of the forms of the usufruct. Timesharing is created by an agreement between an entrepreneur and a natural person for at least a 3-year period. Timesharing enables use of a specified apartment or house of another in a particular period of each calendar year in exchange for payment.

§ 106PL.02(b)(4)(ii) Easement.

An easement is a limited property right encumbering one's property on behalf of the owner of another real estate or a specific person. n46 As a result, the performance of the rights of the owner of the encumbered real estate is limited (in most cases due to the fact that the owner of the dominant real estate is entitled to use the encumbered property within the designated scope). n47

An easement is established by virtue of an agreement between the owner of the property, which is to be encumbered, and the beneficiary of the easement, or by the virtue of a court verdict, administrative decision or as a result of acquisitive prescription. n48

Among various easements, the Polish Civil Code provides for the transmission easement n49 (sluzebnosc przesylu). The transmission easement enables the transmission companies to use someone else's property in order to maintain the transmission facilities (electricity transmission lines, gas pipelines, water connections).

§ 106PL.02(b)(4)(iii) Mortgage.

In Poland a mortgage is a key form used in order to secure cash receivables. A mortgage can only be established over real estate. n50 Detailed stipulations governing mortgage are included in the Land and Mortgage Register and Mortgages Act.

In Poland mortgages may be established in an agreement (voluntary mortgage) n51 or by a court decision (forced mortgage or judicial mortgage). n52 Contrary to a voluntary mortgage, which in practice is used to secure bank credit, forced mortgage is established without the approval of the owner, and sometimes against the owner's will. Mortgage becomes valid, binding and enforceable security upon final registration by an appropriate court in the relevant land and mortgage register. n53

§ 106PL.02(b)(4)(iv) Perpetual Usufruct.

Land owned by the State Treasury or local community or their subsidiaries which is located within the administrative borders of towns, or lands situated outside these borders but included in the master plan of a town and designated to serve its economic needs, may be let for perpetual usufruct n54 to natural and legal persons for 99 years. n55 In exceptional circumstances, the perpetual usufruct may be created for a period not shorter than 40 years. Perpetual usufruct is established against payment. n56

The perpetual usufructuary is obliged to exercise his/her/its rights in accordance with the agreement on perpetual usufruct. n57 The agreement on perpetual usufruct provides, inter alia, for designated usage of the property, permitted constructions, method of calculating the value of any buildings erected by a perpetual usufructuary and the fee for perpetual usufruct. n58

According to the Polish Civil Code, the perpetual usufructuary is the owner of any buildings and other structures located on the land which is the subject of perpetual usufruct. n59 However, upon the termination of perpetual usufruct, the ownership of these buildings is transferred to the owner of the land for a consideration specified in the agreement on perpetual usufruct. n60

A contract for perpetual usufruct shall be concluded in the form of a notarial deed. The transfer of perpetual usufruct also requires a notarial deed. n61

§ 106PL.02(c) Land and Mortgage Register.

The land and mortgage register is an official register kept in the district courts n62 which defines the legal status of a

particular real estate. n63 In Poland, the land and mortgage registers include the description of a real estate and ownership thereof, entries of limited property rights and claims of third persons. n64

The main purpose of the land and mortgage register is to ensure safety of transfer of ownership. The registration of entry in the land and mortgage registers has its legal consequences: it is deemed that the right disclosed in the land and mortgage registers is registered in accordance with the actual legal status, n65 and a right deleted from the land and mortgage register does not exist. n66

The principle of priority provides that the rights registered in the land and mortgage registers have priority over those which have not been registered. n67 Moreover, the priority of limited property rights registered in the land and mortgage registers depends on the date of the registration (the sooner, the higher priority). n68

§ 106PL.02(d) Lease and Tenancy (*Dzierzawa*).

§ 106PL.02(d)(1) Basic Principles of Lease and Tenancy.

Under Polish law, there are two agreements allowing use of another's property in consideration for payment of rent: lease and tenancy.

Under a lease agreement the lessor undertakes to give the lessee a *res* for a specified or unspecified period of time, whereas the lessee undertakes to pay the lessor the agreed rent. n69 Under a tenancy agreement, the lessee is not only entitled to use the property, but also to benefit from it. n70 Therefore, the most common subject of the lease is a residential or office space, whereas a farm, agricultural land, plant or enterprise are the typical subject of tenancy agreements.

§ 106PL.02(d)(1)(i) Lease Between Entrepreneurs.

According to the Polish Civil Code, n71 a lease agreement concluded by entrepreneurs n72 for a period exceeding 30 years, will, upon the lapse of 30 years, be considered as if it was concluded for an indefinite period of time, and therefore be easily terminated by virtue of a termination notice.

§ 106PL.02(d)(1)(ii) Eviction.

If any person occupies the real property without any legal title (*e.g.*, the lease agreement expired or was terminated as a result of lessee's failure to pay the rent), the owner may demand the eviction of such person. n73 Eviction is performed by a court bailiff n74 according to special procedure. Currently, no eviction can be performed, if no substitute premises are provided for the evicted person. In case of entrepreneurs, eviction procedure is regulated in the Polish Civil Code. n75 There is no requirement for providing substitute premises for an evicted entrepreneur.

§ 106PL.02(e) Foreign Ownership of Real Property in Poland.

§ 106PL.02(e)(1) Limited Acquisition of Real Property By Foreigners.

The acquisition of real property by foreigners is regulated by the Act on the Acquisition of Real Estates by Foreign Persons. n76 Foreigners n77 must first obtain permission of the Minister of Interior and Administration, to purchase property or shares in a commercial company with a registered office in Poland, which is the owner or a holder of a perpetual usufruct of property in Poland. n78

§ 106PL.02(e)(2) Permits.

Permission by the Minister of Interior and Administration is granted in the form of an administrative decision, only if

there is no probability of a threat to the defense or national security or interruption to public order. n79 Upon applying for permission, a foreigner must prove his/her/its link to the Republic of Poland. Circumstances confirming a foreigner's contact with the Republic of Poland may include, n80 in particular: possessing Polish nationality or Polish origin; celebrating marriage with a citizen of the Republic of Poland; possessing a permit to reside for a definite time or to settle; possessing membership of a managing body of entrepreneurs previously mentioned; conducting business of agricultural activities on the territory of the Republic of Poland in compliance with the provisions of Polish legislation.

Since Poland's accession to the European Union (May 1, 2004) the above mentioned rules do not apply to foreigners from the territory of the European Economic Area. n81 However, there are some exceptions. For instance, the purchasing of agricultural real property by foreigners from the territory of the European Economic Area requires a permit within 12 years following the accession of Poland to the European Union. n82 Finally, it is not necessary to receive the permission from the Minister of Internal Affairs and Administration for acquisition of a separate living accommodation within the meaning of the Act on the Ownership of Premises. n83

§ 106PL.02(f) Investing in Real Property in Poland.

§ 106PL.02(f)(1) Local Spatial Development Plan.

The Local Spatial Development Plan is a fundamental act passed by the local commune n84 in order to establish the functions of the land and planned investments. n85 A Local Spatial Development Plan includes mandatory principles of sustainable territorial and economic development, functional zoning and indication of areas for housing and other direct investments; general proposals for technical infrastructure systems; the location of main roads and other technical networks; and the most important preservation areas due to their economic, natural, and cultural value. n86

Local Spatial Development Plans do not cover the whole territory of Poland. If such a plan has been adopted for the property to be developed, the design and construction works must be performed in strict compliance with the terms and conditions set out in the plan. n87 If there is no Local Spatial Development Plan for the area where the investment is planned (which happens frequently), Zoning Decisions must be obtained. n88

§ 106PL.02(f)(2) Zoning Decisions.

If no Local Spatial Development Plan has been adopted for the particular area, it is necessary to obtain a zoning decision to proceed with the investment/construction works.

A zoning decision is an administrative decision granted by the village administrator, mayor or president of a city n89 (depending on the size of the commune) upon a request of any person (there are no objections to issue this decision to a number of different applicants at the same time). n90

A zoning decision specifies the type of allowed investment, parameters of such investment and the site including the whole infrastructure. n91 Moreover, a zoning decision provides for the following steps, opinions, agreements and conditions that must be fulfilled by the investor (*e.g.*, the permission for cutting down trees, agreement with the conservation officer). n92

§ 106PL.02(f)(3) Building Permit.

In Poland, most construction works can begin only upon the issuance of a final building permit. n93 In some cases the mere notification of the envisaged construction works is sufficient (this applies to some small construction works and renovations). n94

A building permit is a decision issued by a local mayor (president of a town) n95 in an administrative procedure to which the investor and the owners of the properties located within the planned investment's interference zone are

parties. The building permit authorizes the commencement or continuation of a specified building or performance of particular construction works other than the construction of an object. A building permit expires if the construction works are not initiated within 3 years or a break in the works exceeds 3 years. n96

§ 106PL.02(f)(3)(i) Permit To Use Constructed Premises.

This permit is an administrative decision allowing for the use of a building and is issued by a local construction supervision inspector after the performance of an inspection of that building. n97 Inspection is performed in order to establish whether the construction was carried out in compliance with the construction designs and other construction law regulations such as fire risks, sanitary and environmental issues. n98

§ 106PL.02(g) Taxes and Fees on Real Property.

§ 106PL.02(g)(1) Civil Law Transactions Tax (Known as "PCC").

The tax on civil law transactions is imposed on the contracts of sale or exchange of things and property rights. n99 This tax applies to transactions of sale of the property, perpetual usufruct, and the co-operative members' right to an apartment. In transaction of sale a buyer is obliged to pay the tax. n100 The tax base and rate differ depending on the type of contract concluded. For instance, in the case of a contract of sale the tax base is the market value of the property and the tax rate amounts to 2% of this value. n101 The tax is payable within 14 days of the date of the execution of the contract at the bank account of the relevant tax office. n102

§ 106PL.02(g)(2) Value Added Tax.

In some cases, the sale of real estate may be subject to Value Added Tax (VAT). The obligation to pay VAT depends on the identity of the seller, the frequency of real estate sales and the parameters of the property.

There are huge differences between VAT and civil transaction tax: if VAT is paid in conjunction with a particular transaction, no civil transaction tax is due.

§ 106PL.02(g)(3) Perpetual Usufruct Fee.

By virtue of contract, the perpetual usufructuary is obliged to pay an initial fee amounting to 25% of the value of the land and an annual fee of 0.3%-3% of the estimated value of the land, depending on the purpose of the perpetual usufruct. n103 The fee may be lowered by a competent body in some specific cases, for instance in relation to some non-profit organizations or cultural and educational associations.

§ 106PL.02(g)(4) Property Tax.

Property tax in Poland is one of the local taxes n104 and is collected by the village administrator, mayor or president of a city (depending on the size of the commune). n105 It is paid annually by the owner of property or perpetual usufructuary n106 in the amount that depends on the size of the property. n107 The tax is calculated regardless of the property's market value. Each commune council specifies by resolution the rate of the property tax for estates situated within its boundaries. n108 However, the tax rate cannot exceed the limit set in the statute. n109

§ 106PL.02(g)(5) Fee for the Exclusion from Agricultural Production.

Under Polish law, n110 construction works cannot be commenced n111 on arable land comprising organic or forest land other than that owned by the State Treasury, without the consent of the Minister of the Agriculture or Minister of the Environment, expressed in the form of an administrative decision. n112 The consent for the exclusion of the land from agricultural production entails the payment of one-off and annual fees, n113 the value of which depends on the

type of soil. n114

FOOTNOTES:
(n1)Footnote 2. Constitution of the Republic of Poland dated April 2,1997 (Journal of Laws of 1997, No. 78, item 483), available in English at http://www.trybunal.gov.pl/index2.htm.

(n2)Footnote 3. Act of April 23, 1964 Civil Code (Journal of Laws of 1964, No. 16, item 93 as amended).

(n3)Footnote 4. *E,g*, Act on Planning and Spatial Development, Act on Land and Mortgage Registers and Mortgages, Act on Protection of Rights of Occupants, Housing Resources of Municipalities and Changes to the Civil Code, Act on Taxes and Local Fees, Private International Law.

(n4)Footnote 5. Chapter I and II of the Constitution of the Republic of Poland of April 2, 1997.

(n5)Footnote 6. Art. 21 § 1 of the Constitution of the Republic of Poland of April 2, 1997.

(n6)Footnote 7. Art. 64 § 3 of the Constitution of the Republic of Poland of April 2, 1997.

(n7)Footnote 8. Art. 21 § 2 of the Constitution of the Republic of Poland of April 2, 1997.

(n8)Footnote 9. Article 140 of the Polish Civil Code.

(n9)Footnote 10. Article 195 of the Polish Civil Code.

(n10)Footnote 11. Art. 1 of the Act of November 12, 1965 Private International Law (Journal of Laws of 1965, No. 46, item 290).

(n11)Footnote 12. Art. 25 § 1 of the Act of November 12, 1965, Private International Law.

(n12)Footnote 13. Art. 25 § 2 of the Act of November 12, 1965, Private International Law.

(n13)Footnote 14. Agreement between the Government of the People's Republic of Poland and the Government of the United States of America dated October 8, 1974 on the Avoidance of Double Taxation and Prevention of Fiscal Evasion with Respect to Taxes on Income (Journal of Laws of 1976, No. 31, item178).

(n14)Footnote 15. Art. 7 of the Agreement between the Government of the People's Republic of Poland and the Government of the United States of America dated October 8,1974 on Avoidance of Double Taxation and Prevention of Fiscal Evasion with Respect to Taxes on Income.

(n15)Footnote 16. Art. 14 of the Agreement between the Government of the People's Republic of Poland and the Government of the United States of America dated October 8,1974 on Avoidance of Double Taxation and Prevention of Fiscal Evasion with Respect to Taxes on Income.

(n16)Footnote 17. Article 196 § 1 of the Polish Civil Code.

(n17)Footnote 18. Article 196 § 2 of the Polish Civil Code.

(n18)Footnote 19. Article 198 of the Polish Civil Code.

(n19)Footnote 20. Article 199 of the Polish Civil Code.

(n20)Footnote 21. Article 199 of the Polish Civil Code.

(n21)Footnote 22. Article 140 of the Polish Civil Code.

(n22)Footnote 23. Article 140 of the Polish Civil Code.

(n23)Footnote 24. Article 143 of the Polish Civil Code.

(n24)Footnote 25. Article 144 of the Polish Civil Code.

(n25)Footnote 26. Article 147 of the Polish Civil Code.

(n26)Footnote 27. Article 336 of the Polish Civil Code.

(n27)Footnote 28. Article 336 of the Polish Civil Code.

(n28)Footnote 29. Article 344 of the Polish Civil Code.

(n29)Footnote 30. Article 222 of the Polish Civil Code.

(n30)Footnote 31. Article 158 in conjunction with 73 § 2 of the Polish Civil Code.

(n31)Footnote 32. Article 389 of the Polish Civil Code.

(n32)Footnote 33. Article 64 of the Polish Civil Code.

(n33)Footnote 34. Art. LI. of the Act dated April 23, 1964 Provisions Introducing Civil Code (Journal of Laws of 1964, no. 16, Item 94).

(n34)Footnote 35. Article 941 of the Polish Civil Code.

(n35)Footnote 36. Article 931 of the Polish Civil Code.

(n36)Footnote 37. Articles 1058-1088 of the Polish Civil Code.

(n37)Footnote 38. Article 172 § 1 of the Polish Civil Code.

(n38)Footnote 39. Article 172 § 2 of the Polish Civil Code.

(n39)Footnote 40. Article 244 of the Polish Civil Code.

(n40)Footnote 41. Article 306 of the Polish Civil Code.

(n41)Footnote 42. According to Article 245 of the Polish Civil Code, legal provisions regulating the transfer of ownership apply accordingly to the establishment of limited property rights.

(n42)Footnote 43. Article 252 of the Polish Civil Code.

(n43)Footnote 44. Article 254 of the Polish Civil Code.

(n44)Footnote 45. Art. 1. of the Act dated July 13, 2000 on Protection of Acquirers of the Right to Use Buildings or Residential Premises in the Prescribed Time in Any Year and Changes of Acts: Civil Code and Code of Offences and Act on Land and Mortgage Registers and Mortgage. (Journal of Laws of 2000, No. 74, item 855).

(n45)Footnote 46. Article 285 § 1 of the Polish Civil Code.

(n46)Footnote 47. Article 285 § 1 of the Polish Civil Code.

(n47)Footnote 48. Article 292 § 1 of the Polish Civil Code.

(n48)Footnote 49. Article 305 § 1 of the Polish Civil Code.

(n49)Footnote 50. Art. 65 of the Act of July 6, 1982 on Land and Mortgage Register and Mortgage.

(n50)Footnote 51. Art. 65 of the Act of July 6, 1982 on Land and Mortgage Register and Mortgage.

(n51)Footnote 52. Art. 109 of the Act of July 6, 1982 on Land and Mortgage Register and Mortgage.

(n52)Footnote 53. Art. 67 of the Act of July 6, 1982 on Land and Mortgage Register and Mortgage.

(n53)Footnote 54. Article 232 of the Polish Civil Code.

(n54)Footnote 55. Article 236 of the Polish Civil Code.

(n55)Footnote 56. Article 238 of the Polish Civil Code.

(n56)Footnote 57. Article 233 of the Polish Civil Code.

(n57)Footnote 58. Article 239 of the Polish Civil Code.

(n58)Footnote 59. Article 235 of the Polish Civil Code.

(n59)Footnote 60. Article 239 of the Polish Civil Code.

(n60)Footnote 61. Article 234 of the Polish Civil Code.

(n61)Footnote 62. Art. 23 of the Act of July 6, 1982 on Land and Mortgage Register and Mortgage. (Journal of Laws of 2001, no. 124, item 136).

(n62)Footnote 63. Art. 1 of the Act of July 6, 1982 on Land and Mortgage Register and Mortgage.

(n63)Footnote 64. Art. 16 of the Act of July 6, 1982 on Land and Mortgage Register and Mortgage.

(n64)Footnote 65. Art. 3 § 1 of the Act of July 6, 1982 on Land and Mortgage Register and Mortgage.

(n65)Footnote 66. Art. 3 § 2 of the Act of July 6, 1982 on Land and Mortgage Register and Mortgage.

(n66)Footnote 67. Art. 11 of the Act of July 6, 1982 on Land and Mortgage Register and Mortgage.

(n67)Footnote 68. Art. 12 of the Act of July 6, 1982 on Land and Mortgage Register and Mortgage.

(n68)Footnote 69. Article 659 of the Polish Civil Code.

(n69)Footnote 70. Article 693 of the Polish Civil Code.

(n70)Footnote 71. Article 661 § 2 of the Polish Civil Code.

(n71)Footnote 72. In Poland an entrepreneur is any entity registered in the register of entrepreneurs of the National Court Register or sole entrepreneur conducting business activity under his own name, registered in the register of entrepreneurs kept by an administrative officer of a commune, mayor or president of a town.

(n72)Footnote 73. Article 13 of the Act of June 21, 2005 on Protection of Rights of Occupants, Housing Resources of Municipalities and changes to the Civil Code. (Journal of Laws of 2005, No. 31, item 266).

(n73)Footnote 74. Article 14 of the Act of June 21, 2005 on Protection of Rights of Occupants, Housing Resources

of Municipalities and changes to the Civil Code. (Journal of Laws of 2005, No. 31, item 266).

(n74)Footnote 75. Article 222 of the Polish Civil Code.

(n75)Footnote 76. The Act dated March 24, 1920 on Acquisition of Real Estates by Foreigners (Dz. U. 2004, Nr 167, poz. 1758).

(n76)Footnote 77. In this Act, a foreigner shall mean: a natural person not possessing Polish citizenship; a legal person having its seat abroad; a company not being a legal person, of persons previously mentioned, having its seat abroad, established in compliance with the legislation of foreign states; a legal person and a commercial partnership not being a legal person, having its seat on the territory of the Republic of Poland, controlled directly or indirectly by persons or companies previously mentioned.

(n77)Footnote 78. Art. 1 of the Act dated March 24, 1920 on Acquisition of Real Estates by Foreigners.

(n78)Footnote 79. Art. 1a of the Act dated March 24, 1920 on Acquisition of Real Estates by Foreigners.

(n79)Footnote 80. Art. 1a § 2 of the Act dated March 24, 1920 on Acquisition of Real Estates by Foreigners.

(n80)Footnote 81. Art. 8 § 2 U of the Act dated March 24, 1920 on Acquisition of Real Estates by Foreigners. European Economic Area-consist of all European Union members states and Norway, Iceland and Liechtenstein.

(n81)Footnote 82. Art. 8 § 2 of the Act dated March 24, 1920 on Acquisition of Real Estates by Foreigners.

(n82)Footnote 83. Article 2 of the Act dated June 24, 1994 on the Ownership of Premises (Journal of Laws, of 2000, No 80, item 903).

(n83)Footnote 84. Art. 3 of the Act dated March 24,1920 on Acquisition of Real Estates by Foreigners (Journal of Laws of 2003, No. 80, item 717).

(n84)Footnote 85. Art. 15 § 2 of the Act dated March 27, 2003 on Planning and Spatial Development.

(n85)Footnote 86. Art. 15 § 2 of the Act dated March 27, 2003 on Planning and Spatial Development.

(n86)Footnote 87. Article 81 § 1 of Polish Construction Law.

(n87)Footnote 88. Art. 60 of the Act dated March 27, 2003 on Planning and Spatial Development.

(n88)Footnote 89. Art. 60 of the Act dated March 27, 2003 on Planning and Spatial Development.

(n89)Footnote 90. Art. 63 of the Act dated March 27, 2003 on Planning and Spatial Development.

(n90)Footnote 91. Art. 64 in conjunction with Art. 54 of the Act dated March 27, 2003 on Planning and Spatial Development.

(n91)Footnote 92. Art. 64 in conjunction with Art. 54 of the Act dated March 27, 2003 on Planning and Spatial Development.

(n92)Footnote 93. Art. 28 i 39 of the Act of July 7, 1994 r. Polish Construction Law (Journal of Laws of 2006, No. 156, item 1118).

(n93)Footnote 94. Article 30 of Polish Construction Law.

(n94)Footnote 95. Article 82 § 2 of Polish Construction Law.

(n95)Footnote 96. Article 37 of Polish Construction Law.

(n96)Footnote 97. Article 55 of Polish Construction Law.

(n97)Footnote 98. Article 59a of Polish Construction Law.

(n98)Footnote 99. Art. 1 of the Act of September 9,2000 on Tax on Civil Law Transactions (Journal of Laws of. 2007, No. 68, item 450).

(n99)Footnote 100. Art. 4 of the Act of September 9,2000 on Tax on Civil Law Transactions.

(n100)Footnote 101. Art. 7 § 1 of the Act of September 9,2000 on Tax on Civil Law Transactions.

(n101)Footnote 102. Art. 10 of the Act of September 9,2000 on Tax on Civil Law Transactions.

(n102)Footnote 103. Art. 72 of the Act dated August 21, 1997 on Real Estate Management (Journal of Laws of 2004, No. 261, item 2603).

(n103)Footnote 104. Art. 1 of the Act dated January 12, 1991 on Taxes and Local Fees (Journal of Laws of 2006 No 121, item 844).

(n104)Footnote 105. Art. 1c of the Act dated January 12, 1991 on Taxes and Local Fees.

(n105)Footnote 106. Art. 3 § 1 of the Act dated January 12, 1991 on Taxes and Local Fees.

(n106)Footnote 107. Art. 4 § 1 of the Act dated January 12, 1991 on Taxes and Local Fees.

(n107)Footnote 108. Art. 5 § 1 of the Act dated January 12, 1991 on Taxes and Local Fees.

(n108)Footnote 109. Art. 5 § 1 i § 2 of the Act dated January 12, 1991 on Taxes and Local Fees.

(n109)Footnote 110. Act on Protection of Agricultural and Forest Land (Journal of Laws of 2004 No. 121, Item 1266).

(n110)Footnote 111. Article 3 of the Act on Protection of Agricultural and Forest Land.

(n111)Footnote 112. Article 7 of the Act on Protection of Agricultural and Forest Land.

(n112)Footnote 113. Article 12 § 1 of the Act on Protection of Agricultural and Forest Land.

(n113)Footnote 114. Article 12 § 7 of the Act on Protection of Agricultural and Forest Land.

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CHAPTER 106PL PROPERTY LAW IN POLAND

13-106PL Thompson on Real Property, Thomas Editions § 106PL.03

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CHAPTER 106RO REAL PROPERTY LAW IN ROMANIA

13-106RO Thompson on Real Property, Thomas Editions 106RO.syn

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§ 106RO.syn Synopsis to Chapter 106RO: REAL PROPERTY LAW IN ROMANIA

§ 106RO.01 History of Property Law in Romania.

§ 106RO.01(a) Property in the Era of Geto Dacians; Property in Dacia When It Was A Roman Province.

§ 106RO.01(b) Property Ownership During the Medieval Period.

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CHAPTER 106RO REAL PROPERTY LAW IN ROMANIA

13-106RO Thompson on Real Property, Thomas Editions § 106RO.01

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§ 106RO.01 History of Property Law in Romania.

§ 106RO.01(a) Property in the Era of Geto Dacians; Property in Dacia When It Was A Roman Province.

The presence and stability of Geto Dacians on the Romanian territory since the second millennium B.C. has been mentioned by historical sources.

During the existence of the Geto Dacian state (until year 106 A.D.) there are mentioned two types of property, and these referred to the private lands of the aristocracy and the lands of the territorial community of the free peasants who possessed the land as a collective, a form of commonly held property. However, they exercised individual rights of possession over the arable land.

With the extension of slave-owning relationships, disparity of wealth and great private property developed. n1

The collective property of the territorial community in the main referred not only to the land but also to slaves and cattle. The land of the community was divided within lots and was given to individuals or families for their use for a period of one (1) year. In the following year the parcels of land were redistributed within the community by the drawing of lots.

Therefore, in the Geto-Dacian State Era within the territorial community the land was collectively possessed but there existed signs that private property was developing.

When Dacia became a Roman province, after the military confrontations between the Dacians and Romans between 85 and 106 A.D. there were at the same time two forms of property: a) provincial/rustic property and b) the Roman property called the "proprietate quiritara".

Ownership over the provincial property was exercised by the free local residents from the province.

According to an ancient rule the conquered land became the property of the Roman state known as the "ager publicus," but in reality the land ownership was retained by the local population.

The councillors of those times considered that the locals from the provinces had a right of possession and usufruct over the land. When a provincial local died, the land could be transferred to his heirs. Also, the land could be transferred between living persons by simple transfer.

§ 106RO.01(b) Property Ownership During the Medieval Period.

The Medieval Era refers to the period of the Romanian history between the ancient era of Dacia and the modern era.

Land played an important role in the Medieval Era for the agricultural communities, as agriculture was the main work of such communities.

In order to work the land the communities had a common ownership right over the land that they worked on and this was referred to as the "joint property domain." For this purpose the community's members had a common right of use over the entire joint property domain. Sometimes, with the community's approval, parts of the joint property domain could be individually and personally used under the supervision and control of the community.

The ground from where there was extracted silver, gold or iron ores was considered to be under common ownership.

Property in Medieval Era referred to a personal ownership over the land based on an individual's work for the maintenance and development of land, which represented part of the joint property domain.

The first parcels of land to be detached from the joint property domain were the parcels of land on which a community's members has established their house and the yard.

The same process happened with fields by delimitation plots of land and which in this way were permanently distributed to the respective families.

§ 106RO.01(c) Changes to the Old Norms During Early Feudalism.

The period of Early Feudalism corresponded with the period where in the Carpathians region during the tenth to thirteenth Century there were formed the so called "countries" as political state organizations.

Although the maintenance of the territorial communities during the earlier feudalism was determined by the old juridical norms which were observed, there could be created new norms and old ones could be modified.

Due to the development of agricultural tools and the extension of agricultural land there can be identified a development of private property. Many of the lands were valued by the families who were trying to take these properties out of the common regime.

Therefore instead of the norm which prohibited a member of the community from transferring any part of the territory of the community there emerged a norm which permitted the transfer of a land to the relatives of the transferor and the other members of the community had preference right to buy the land.

§ 106RO.01(d) Property Ownership During the Era of "Moldova and Tara Romaneasca".

In Moldova and Tara Romaneasca the feudal society reached maturity with full state independency. Although there was Ottoman domination, the "law of the country" represented the main juridical source.

A main characteristic of the developed feudalism was the existence of more types of property ownership as follows:

a. *The great feudal property* was formed when the territorial community started to disappear.

b. *The property of the territorial community* started to have new characteristics similar to private property and consisting of the local household and agricultural lots. The forests, the pastures and waters remained the property of the state.

c. *The property of the free peasants*, which consisted of their household, the agricultural land that they worked, tools and cattle. This type of property disappeared as it was taken by the feudal owner.

d. *The property of the craftsmen*, which was exercised by them over their workshops and their work tools.

e. *The property of the slaves*, referring to their shelters.

FOOTNOTES:
(n1)Footnote 1. Strabon, VII, 3, 12.

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CHAPTER 106RO REAL PROPERTY LAW IN ROMANIA

13-106RO Thompson on Real Property, Thomas Editions § 106RO.02

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§ 106RO.02 Property Legislation Before the Communist Era.

§ 106RO.02(a) Agrarian Reform Under the Romanian rule of Alexandru Ioan Cuza.

During the revolution of 1848 and during and after the Unification of the Romanian countries from 24th January 1859, the peasants acquired the right to receive ownership over the lands that they were using and occupying.

On 14th August 1846 the Land Law n2 was adopted, according to which "The villagers are and remain the landlords of the lands they have already possessed in a surface established according to this law".

After adoption of the Land Law, most of the lands became the property of the peasants who occupied such lands depending of their economic status, and depending on the number of cattle they owned.

As a result of this law the peasants obtained recognition of rights over the lands by converting their right of use over the land to ownership over the same land.

§ 106RO.01(b) The First Romanian Civil Code.

Under Alexandru Ioan Cuza and considering that the previous existing civil norms at that time were no longer applicable with respect to their content and form, the first Romanian Civil Code came into force on 1st December 1865. The Romanian Civil Code was inspired by the provisions of the French Civil Code adopted during Napoleonic period.

Although there have been several attempts to modify the Code during the years 1940, 1971 and 2004 the Romanian Civil Code adopted under Alexandru Ioan Cuza has remained substantially unmodified.

A chapter regarding property was allocated in the Romanian Civil Code and special attention was given to the main attributes of the property. The Code also mentioned the differences between the various forms of the possession of goods.

The first Romanian Civil Code stipulated provisions with regard to the goods that husband brought within the marriage, the principle of the freedom for a husband to choose between the separation of goods regime, the community of goods

and the dowry regime. n3

The Code provided that the property could be transferred by deeds concluded between persons or by inheritance.

§ 106RO.01(c) The Romanian Constitution in 1866.

When the reign of Alexandru Ioan Cuza ended and the German prince Carol de Hohenzollern--Sigmaringen became the successor to the Romanian throne, the country created a fundamental law.

In July 1866 the First Constitution of Romania was adopted. This fundamental law was structured on eight titles with chapters and sections. Under this fundamental law, property was declared sacred and inviolable.

After the extension of the national territory of Romania in 1918 a new constitution was adopted on 29th March 1923.

During the Communist period the Constitution of 1923 was modified in 1948, 1952 and 1965. After the revolution in 1989 a new constitution was adopted in 1991 and the current constitution was subsequently adopted.

The current Constitution of Romania came into force on 29th October 2003 and it was adopted on the basis of a national referendum.

According to the current Constitution of Romania private property is guaranteed and protected by law.

FOOTNOTES:
(n1)Footnote 2. Land Law, art. 1.

(n2)Footnote 3. Civil Code, art. 1223, 1224, 1260, 1287.

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CHAPTER 106RO REAL PROPERTY LAW IN ROMANIA

13-106RO Thompson on Real Property, Thomas Editions § 106RO.03

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§ 106RO.03 Land/Property Holding During the Communist Era.

The appointment of Government of Petru Groza on 6th March 1945 represented the installation of the communism regime in Romania.

Beginning March 23, 1945, the Land Reform law expropriated agricultural lands with a surface bigger than fifty hectares. In total one million four hundred sixty eight thousand nine hundred forty six hectares were expropriated, of which one million one hundred and nine thousand five hundred sixty two hectares were distributed to the families of peasants.

The land reform in 1945 aimed to abolish the great landed properties and families. According to the Land Law 187 dated 1945 regarding the application of the land reform, all the expropriated properties became the property of the state without payment of any compensation.

The major principles of land ownership and property were set forth in the Romanian Constitution from 1952 issued under the Communists as follows:

Article 6: "The foundation of the socialist social economic formation is the socialist property over the production resources and which have the form of either the state property (joint property of the people), or in the form of the cooperative-collectivist property (the property of the collective agricultural households or the property of the cooperative organizations)"

Article 8: "The land in the Republic Romania belongs to those who work".

Article 9: "... The peasants, members of the collective households have a personal use of the plot of land besides their house and personal household on that land ... -in accordance with the collective agricultural household".

Article 12: "The private property right of the citizens of the Republic Romania over their incomes and savings arising out of their work, incomes over the house and the auxiliary household, over the objects of domestic and personal use as well as the right of inheritance over the citizens' private property are to be protected by law."

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CHAPTER 106RO REAL PROPERTY LAW IN ROMANIA

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§ 106RO.04 Legal Remedies in Relation To Property Against the Abuses Committed in the Communist Era.

During and after the communist period when expropriations and confiscation of properties by the state were specific to that regime, the Romanian legislation referred to laws as a means of acquisition and reacquisition of property.

Land Law 18 dated 1991 is one example of the applicable post communist property legislation in Romania by which there "is established the private property right over the lands that are in the patrimony of the agricultural cooperatives by reconstitution or constitution of the property right." n4

Land Law 18 refers to and is applicable to those persons who brought land to the agricultural cooperatives. Also subject to this law are the persons from whom the land was taken in any way by the Communist regime and the heirs of such persons.

Law 10 dated 2001 establishes the juridical regime for buildings abusively taken over by the state between 6th March 1945 and 22nd December 1989, the communist era. This law provided the legal conditions for the restitution of such buildings to those entitled to receive them either in kind or through compensation.

Currently in Romanian there are thousands of applications and pending court trials based on these two laws.

FOOTNOTES:
(n1)Footnote 4. Land Law no 18 /1991, art. 8.

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CHAPTER 106RO REAL PROPERTY LAW IN ROMANIA

13-106RO Thompson on Real Property, Thomas Editions § 106RO.05

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§ 106RO.05 Private Ownership Rights.

The Romanian Civil Code defines at article 480 the ownership right as "the right that entitles someone to exclusively enjoy and dispose of an asset, within the limits determined by law." The ownership right comprises three attributes: possession, use and disposal.

Currently, n5 the Parliament is adopting a new Civil Code, but until the date when it enters into force (this being subject to a further regulation) the provisions of the current Civil Code on property rights remains fully applicable.

§ 106RO.05(a) The Legal Limitations on the Rights of Ownership.

The legal limitations on ownership rights are to be seen in relation to: a) the exercise by the state of the disposal of state assets (assets of public interest or use are not subject to private disposal); b) the relationship of neighborhood properties (i.e. there are specific obligations that have to be respected by the owners of adjoining properties); c) the use of the subsoil of land for works of general interest (the state public authority may use the subsoil of any real estate property, provided that the owner of the property is indemnified against all damages or prejudices caused to the soil).

Private property is protected equally by law, irrespective of the holder. All possessions and belongings acquired by legal means can not be confiscated; the ownership is presumed to have been acquired under legal conditions.

According to *article 44 of the Constitution* "no property can be expropriated unless there is a cause of public interest and after payment of compensation."

§ 106RO.05(b) The Acquisition of Lands By Foreign Citizens.

The acquisition of lands by foreign citizens is regulated by the Law 312/2005. n6

The citizen of an EU member state, stateless citizens domiciled in a member state or in Romania, as well as the legal persons incorporated in accordance with the legislation of an EU member state, may acquire the ownership right over land for second homes under the same conditions established for Romanian legal and natural persons.

Foreign citizens, stateless citizens and legal persons of a third state may acquire ownership over lands under the conditions provided by the international treaties, based on reciprocity.

Foreign citizens, stateless citizens and legal persons of a third state can not acquire ownership over lands in conditions more favorable than the ones applicable to a citizen of a member state and to a legal person incorporated according to the legislation of a member state.

FOOTNOTES:
(n1)Footnote 5. 2010.

(n2)Footnote 6. Published in the Official Gazette Part 1, no. 1008/14th November 2005 and entered into force on 1st January 2007.

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CHAPTER 106RO REAL PROPERTY LAW IN ROMANIA

13-106RO Thompson on Real Property, Thomas Editions § 106RO.06

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§ 106RO.06 Public Ownership Rights.

The public ownership right is the ownership right of the State or its territorial administrative units over the assets that, by their nature or by an express legal provision, are deemed to be of public use and utility. Under *article 136 (3) of the Constitution* the following assets are made the exclusive object of public ownership: any resources of the subsoil, the national air space, the ways of communication, the waters with potential use as suppliers of energy, the beaches, the territorial sea, and the natural resources of the economic zone and the continental shelf.

§ 106RO.06(a) The Public Administration Right.

Public property assets may be entrusted by administrative acts to autonomous administrative bodies as well as to central and local entities. These entities are entitled to have their own patrimony, to accomplish their own objectives and to participate in all matters in accordance with their legal capacity. An important qualification is that the holders of such administrative rights do not have the right of disposal over the goods and assets entrusted to them.

§ 106RO.06(b) The Concession of Public Property.

A concession granted by an authority holding public property assets is by way of a concession contract in which an authority or public institution (the "Grantor") transfers to another person (the "Grantee") for a determined period not exceeding forty nine (49) years, the right and the obligation to carry on an activity or public service of national/local interest, on its own risk and responsibility and to pay the agreed royalty.

The Grantor may be a ministry or other specialized institutions of public administration. The Grantee may be any legal or natural person, irrespective of citizenship or nationality, except for a public legal person.

The procedure to grant the concession contract is provided by Government Emergency Ordinance no. 54/2006 n7 regarding the regime of the concession contracts for the public assets, and by the Government Emergency Ordinance no. 34/2006 n8 regarding the assignment of the public procurement contracts, of the public works and services concession contracts. Such procedure can be by auction or by direct negotiation. The principles governing these procedures refer to transparency, equal treatment, non-discrimination and free competition. The main criterion of assigning the contract is the price, but there are also other elements to be considered, such as the economic and financial capacity of the Grantee,

environmental protection, and specific conditions given the nature of the asset that is subject of the concession.

The holder of a concession right does not have a right of disposal over the asset which is the object of a concession contract.

§ 106RO.06(c) The Renting of Public Property.

The renting contract will contain clauses referring to the exploitation of the specific assets. The renting is always perfected following a public auction as mentioned by article 15 of the Law 213/1998. n9

FOOTNOTES:
(n1)Footnote 7. Published in the Official Gazzete Part I, no. 569/30th June 2006.

(n2)Footnote 8. Published in the Official Gazzete Part I, no. 418/15th May 2006.

(n3)Footnote 9. Published in the Official Gazzete Part I, no. 488/24th November 1998.

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CHAPTER 106RO REAL PROPERTY LAW IN ROMANIA

13-106RO Thompson on Real Property, Thomas Editions § 106RO.07

AUTHOR: Nicholas Hammond Hammond, Bogaru & Associates Romania

§ 106RO.07 The Forms of Property Rights.

As a general rule the right over property is unconditional and unequivocal and can belong to one or more owners. The ownership of an asset or a number of assets may be vested in several owners.

There are cases when a property right can be acquired through a contract concluded in breach of the conditions of capacity required by law for a valid transfer (i.e. conclusion of a contract by a party who is under a disability which is subsequently confirmed).

§ 106RO.07(a) Conditional Ownership Provided By the Will of the Parties.

A property may be transferred by a contract, conditional upon the non-occurrence of an event so that if the event occurs then the transfer is not effective. The property right transferred under such condition is characterized by the fact it is uncertain. If the condition occurs the transferee will return the asset to the transferor. If the condition is not accomplished, the right of the transferee of ownership is retroactively included in the transferee's patrimony.

§ 106RO.07(b) Conditional Ownership by Law.

The Civil Code makes specific references to transfers which are revocable in certain circumstances proscribed by law.

Any donation concluded between spouses is revocable. The donor spouse is entitled to revoke the donation at any time without justification and the property right transferred to the donee spouse is uncertain depending on the decision of the donor spouse.

Other examples are gifts (deemed as current donations, with insignificant economic value) by persons having no direct relatives at the moment the gift is transmitted and which are likely to be revoked by law if the donor will have direct descendents.

§ 106RO.07(c) Voidable Ownership.

If a property right is acquired by a voidable contract the ownership right is voidable at the option of the purchaser

within three years from the date of signing the contract. The contract can be confirmed by the person who is entitled to invoke the void nature of the contract. Such confirmation may be express or implied within the legal time limits. By the express or implied act the property right of the acquirer is retroactively consolidated.

§ 106RO.07(d) Common Ownership.

Common ownership exists when one or more persons exercise simultaneously the ownership rights over an asset or group of assets.

§ 106RO.07(d)(1) Temporary co-ownership.

Normally, temporary co-ownership arises as a consequence of a succession, when a decedent leaves several heirs, each of whom is entitled to a share of the assets or rights in the estate. Temporary co-ownership may also result from the agreement of the parties or from co-possession.

Co-owners do not have an exclusive right over a specific asset. Each co-owner is entitled to use of the asset on the condition that the right of the other co-owners is not violated and the nature of the asset is not affected. The legal acts relating to the asset require the agreement of all the co-owners. In exceptional cases a co-owner can act without the consent of the other co-owners if it can be shown that the act was necessary for the preservation of the asset.

Temporary co-ownership is terminated by the division of the assets according to law. Also a co-owner can become an exclusive owner by purchase, succession or by other legal means.

§ 106RO.07(d)(2) Perpetual/Forced Co-Ownership.

Imposed co-ownership affects goods that by their nature or designation are to be used by several parties. The goods constituting such co-ownership are ancillary goods and rights.

The Civil Code mentions the following cases of such co-ownership: co-ownership over the common parts of the buildings with flats designed as dwellings, co-ownership over the things necessary for the use of two adjoining premises, co-ownership over common divisions and enclosures (partition walls, fences), co-ownership over the things deemed as family goods (documents, pictures or paintings).

§ 106RO.07(d)(3) Joint Ownership.

Joint ownership pertains to an asset that belongs to all joint-owners; there is no allocated part of the asset.

The Civil Code regulates the joint ownership of spouses. All goods acquired by the spouses during their marriage are deemed as goods in joint ownership, even if the property contract indicated only one spouse, the purchase was carried out using the assets of one spouse only, or the good may have been acquired during the period when the spouses were separated. Spouses cannot conclude conventions by which the joint ownership due to marriage is circumvented.

There is a presumption that the spouse who exercises ownership rights over the common assets is considered to have the consent of the other spouse and that he/she is mandated to represent the other. This relates even to business assets. Joint ownership ceases once the marriage is terminated.

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CHAPTER 106RO REAL PROPERTY LAW IN ROMANIA

13-106RO Thompson on Real Property, Thomas Editions § 106RO.08

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§ 106RO.08 Acquisition of Property.

§ 106RO.08(a) Acquisition by Law.

The Civil Code makes reference to the acquisition of property rights by an individual by donation or gift, a purchaser for value in good faith (Article 485), co-ownership (article 597 and 598); and rights of ownership acquired by adverse possession(art 1909).

§ 106RO.08(b) Acquisition by Order of a Judge.

The ownership property can arise as a result of a judge's order confirming such right. In practice, there have been orders in matters such as the expropriation of land for public utility, or in cases where the signature of one of the parties to a transfer contract is required, the parties previously undertaking such an obligation by a pre-sale agreement.

§ 106RO.08(c) Acquisition by Contract.

In contracts for the transfer of rights in or over property, the transfer arises at the moment both parties agree and sign the contract, even if the actual possession of the asset does not occur immediately, such as where the payment of the price is not paid immediately. In order for there to be a transfer of ownership by simple agreement several conditions must be accomplished. The asset must be the property of the transferor; the asset must exist at the moment of signature; the asset must be defined; and there is no provision in law or contract that postpones the transfer of ownership to a subsequent date.

By Law 247/2006 n10 lands with or without buildings can only be transferred or acquired by either sale or gift by a document executed in authenticated form. In other cases the contract is void.

§ 106RO.08(d) Acquisition by Administrative Contract.

The administrative deed is as legal contract and conveys real rights such as property rights.

The following administrative acts create or transmit real rights: a) the decisions of the local commissions by the

application of Law no. 18/1991 (Land Law) by the reconstruction constitution of private ownership rights over agricultural or forest lands; b) orders issued by a prefect by which are reconstructed or constituted the private ownership over agricultural lands in accordance with Law no. 18/1991; c) decisions of the Government or public administrative authorities regarding administration right over public assets by autonomous administrations, central and local entities.

§ 106RO.08(e) Acquisition by Delivery.

The Civil Code article 644 refers to the delivery of goods, as distinct from real estate, as a means of the acquisition of property. Such cases are for example a gift or the handing over of bearer bonds where the property right is transferred at the moment the bond is handed over.

§ 106RO.08(f) Acquisition by Incorporation.

Ownership rights may be acquired by the incorporation of good into another good by either natural force (i.e. formation of an island) or artificial force (i.e. constructions, plantations).

§ 106RO.08(g) Acquisition by Succession.

By succession, the patrimony of a deceased person is transmitted to his/her heirs. Heirs are persons who survived the deceased and who have the capacity to inherit. The civil code stipulates two types of succession: legal and testamentary succession.

§ 106RO.08(h) Acquisition by Prescription.

Prescription is a way of acquiring the property by exercising possession over real estate for the period of time provided by law. This period of time is thirty (30) years when the possessor does not hold a property contract and ten (10) years when the possessor holds a contract and the act of possession is made in good faith. Assets which are public property are not subject to prescription. In respect of the movables, these are acquired by the simple act of good-faith possession, no time limit being imposed.

FOOTNOTES:
(n1)Footnote 10. Published in the Official Gazzete Part I, no. 201/03rd March 2006.

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CHAPTER 106RO REAL PROPERTY LAW IN ROMANIA

13-106RO Thompson on Real Property, Thomas Editions § 106RO.09

AUTHOR: Nicholas Hammond Hammond, Bogaru & Associates Romania

§ 106RO.09 The Cadastre and Real Estate Publicity.

On the basis of the Law 7/1996 n11 there are organized the cadastre and real estate publicity offices (Land Registry). Their responsibility is to register the cadastral documentation and the claims related to the land book registration.

The land book registrations have a limited role-to make the rights registered known to third parties. The rights that are acquired take effect at the date the respective contract is concluded, the land book registration recording such rights.

The real estate publicity office by its representatives will issue to the rightful person (who lodged a claim in this respect) the resolution of land book registration and the land book excerpt of information.

The registration is not a guarantee of title.

FOOTNOTES:
(n1)Footnote 11. Published in the Official Gazzete Part I, no. 653/22nd July 2005.

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CHAPTER 106RU PROPERTY LAW IN RUSSIA

13-106RU Thompson on Real Property, Thomas Editions 106RU.syn

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§ 106RU.syn Synopsis to Chapter 106RU: PROPERTY LAW IN RUSSIA

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§ 106RU.01(a) From Serfdom to Emerging Democracy.

§ 106RU.01(b) Russian Land Law and Landholding During the Communist Era.

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FOOTNOTES:

(n1)Footnote *. Bryant Bair, J.D., Brigham Young University Law School, 2008, assisted significantly with researching and writing this section of Chapter 106, especially in Russian language materials.

(n2)Footnote 1.

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CHAPTER 106RU PROPERTY LAW IN RUSSIA

13-106RU Thompson on Real Property, Thomas Editions § 106RU.01

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§ 106RU.01 Historical Background of Russian Land Law

§ 106RU.01(a) From Serfdom to Emerging Democracy.

Russia was one of the last great nations to emerge from medieval patterns of landholding. This is indicated by the well-known fact that serfdom in Russia was not formally and legally abolished until 1861, and, of course, the transition to more modern types of property ownership required much time thereafter. In Russia of 1861, over 20 million of the 60 million Russians lived in a form of serfdom, working the land but not owning it, and subject to numerous other personal restrictions and impositions from the approximately 100,000 owners of the land they occupied. The legislation abolishing serfdom also conferred on the liberated serfs rights to purchase the land from the landowners. These owners, however, typically overvalued the land sold, and the sale transactions often left the former serfs heavily in debt or in some other form of economic bondage little different from their former status as serfs. n1

Land rights of the owning class were also uncertain during this period, with confiscations frequently occurring. n2

Thus, the land law reforms begun in the 1860s were largely ineffective, and those millions who had been poor, landless, and in some form of subjugation to wealthy landowners were still so when the communist revolution occurred in 1917.

§ 106RU.01(b) Russian Land Law and Landholding During the Communist Era.

Surprisingly, in the early years of Lenin's rule following the communist takeover of Russia in 1917, some forms of private land ownership were tolerated. When the Second All-Russia Congress of Soviets decreed the state as owner of all land and income-producing assets, it was applied to lands owned by the Tsar, the nobility and the church, while lands owned by peasants were exempted. The Second All-Russia Congress of Soviets issued a decree that established the state as owner of all land and income-producing assets. n3 This decree socialized all of the land that belonged to the Tsar, the nobility and the Church while exempting the land owned by the peasants. n4 Even most of this land came under state control following Lenin's nationalization initiative beginning in 1922. n5 This initiative was legitimized in the 1924 Soviet Constitution authorizing the state "to establish general principles of exploitation and use of the earth, as well as those of the sub-soil, the forests, and the waters of the territories of the Union." n6 The decree of 1922 and the 1924 Constitution established the legal regime of state-owned land, but in fact most land remained at the time in private ownership, especially in provincial areas not yet fully affected by the communist revolution.

Toleration of land in private ownership swiftly ended when Lenin died in 1924 and Josef Stalin seized control of the state. n7 Stalin had become party General Secretary in 1922 and, after consolidating his power upon Lenin's death, imposed a draconian collectivization program in the early 1930s. Under this program, the state acted, often with violence, to seize both land and assets of the landowning peasants, called Kulaks, creating large, collective agricultural operations, and integrating agriculture into nationwide economic planning. n8 The process evicted and dispossessed over five million Kulaks from their villages and caused the deaths of up to 11 million peasants in the resulting famine. n9 Collectivization was basically complete by the mid-1930s and resulted in most agricultural lands coming under actual state ownership and control. n10

§ 106RU.01(c) Characteristics of Landholding During the Communist Era.

Legal regulation of Soviet landholding emerged and evolved only gradually, impeded by the recovery from the ravages of World War II and the preoccupation with the Cold War. Use rights in land were granted to state organizations, collectives and to individual citizens. The 1968 Fundamentals of Legislation of the USSR and the Union Republics declares the principle of state ownership of land, methods for distributing land, types of land tenure, and the rights and duties of land users. n11 The *Fundamentals* also set forth provisions for a strict zoning of land into three categories: agricultural land n12, land in urban areas or other populated localities, n13 land of industry, including non-agricultural land, n14 state forests, n15 state waters, n16 and state reserve land. n17

The general principles for land ownership set forth in Section I may be briefly described as follows:

Article 7: Provides for land use by "collective farms, state farms and other agricultural government, co-operative and non-government enterprises, organizations and institutions; industrial transport and other non-agricultural government, co-operative and non-government enterprises, organizations and institutions; citizens of the USSR."

Article 8: Allots land to these entities free of charge.

Article 9: Authorizes land tenure either for a specified term or for unlimited time. Land allotted to collective farms is assigned permanently or for an unlimited time. Other land can be granted for a short term of up to three years or a long term of between three and ten years. The term can be extended if required for production.

Article 11: Limits a user's right to uses compatible with the designated type of land. Land uses includes building a dwelling and other structures, planting crops and trees, using meadows and pastures, using common minerals, peat and water resources. A right to be compensated for losses to the land is also established. Duties imposed on the land user include a duty to not interfere with neighbor's use of his land. The restoration of allotments of land used in strip mining or any other activity that changes the land must be accomplished during the course of work, or if this is impossible, within one year of completion. The restoration must return the lands to "a condition making them suitable for agriculture, forestries or fisheries" in accordance with the designated type of land.

Article 13: Declares the responsibility for improving soil and protecting land from erosion is shared equally between the land users and the government.

Articles 14 and 15: Describes how permanent or temporary tenure may be terminated for a variety of reasons. In the cases of organizations, enterprises, and institutions the termination may occur if the plot is no longer needed by the organization or if the organization becomes defunct. The tenure of a citizen may be voluntarily released or be terminated when all members of the family move to another location or all members of the family die. (If a citizen attempts to sell, mortgage or otherwise transfer ownership of the land, the person may be stripped of tenure. Additionally, failure to fulfill duties outlined in the law will also result in confiscation of the land. n18 Tenure for both organizations and persons can be terminated at the expiration of the term, because of state need, or the non-development

of the plot of land for 2 years.

Articles 18 and 19: Although the land is state owned, a compensation system is in effect for damages or losses caused by the withdrawal of a plot of land for state use, not caused by the user's conduct. If the plot is non-agricultural and is withdrawn, the compensation would be paid by the enterprise or organization that was subsequently allotted the plot of land. If the land withdrawn is agricultural, the organization would be required to additionally compensate for loss of agricultural production. As we will see later, this concept has carried on to modern Russian law.

§ 106RU.01(c)(1) Regulation of Agricultural Land.

The following articles of Section II of the 1968 *Fundamentals of Legislation* pertain to regulation of agricultural land:

Article 23: Collective farms, government organizations, and citizens can be granted agricultural land for unlimited (permanent) use while other enterprises are limited to temporary use. Users of agricultural land have duties imposed upon them in addition to those outlined in Article 11 of Section I. Land users are required to employ the most efficient methods of farming. They were also required to develop irrigation systems, ensure proper drainage and to treat soils with "lime and gypsum."

Articles 24-26: Members of collectives and select other groups are allowed to hold small "household" plots of land for their family use. These plots are allotted first to the collective and then doled out to the households in the collective for their use. The members of collectives are entitled to these plots while workers on state farms and other organizations do not necessarily have such a right. The possession of a plot of land is retained when the user is called to active military service, begins a course of study, or holds an elective office.

§ 106RU.01(c)(2) Regulation of Lands of Populated Localities.

Section III of the *Fundamentals of Legislation* governs all land within the boundaries of cities, townships, and populated rural locations. Control and planning regarding this land is delegated to the Union Republics with the exception of "land used by railway, water, air and pipe-line transport and by the mining industry. ..." n19 Land within the city limits that is used by collectives is exempt from the planning process and is allotted to the collective permanently. n20

FOOTNOTES:

(n1)Footnote 1. William P. Kratzke, "Russia's New Land Code: A Two Percent Solution," *12 Minn. J. Global Trade 109, 112-113 (2003).*

(n2)Footnote 2. Lee A. Farrow, *Between Clan and Crown: The Struggle to Define Noble Property in Imperial Russia* 158 (2004).

(n3)Footnote 3. *Fundamentals of Legislation in the USSR and the Union Republics* 10 (Progress Publishers 1968, Murad Saifulin and Yuri Sdobnokov, trans., 1974).

(n4)Footnote 4. Stephen B. Butler and Sheila O'Leary, "Survey of the Emerging Land Law of the Russian Federation," 1 *Parker Sch. J.E. Eur. L.* 541-542 (1994).

(n5)Footnote 5. Stephen B. Butler and Sheila O'Leary, "Survey of the Emerging Land Law of the Russian Federation," 1 *Parker Sch. J.E. Eur. L.* 542-543 (1994).

(n6)Footnote 6. Konstitutsiia SSSR (1924) [Konst. SSSR] art. 1(m). Later versions of the constitution published in 1936 and 1977 also contained similar language, continuing state control of property. Stephen B. Butler and Sheila O'Leary, "Survey of the Emerging Land Law of the Russian Federation," 1 *Parker Sch. J.E. Eur. L.* 543 (1994).

(n7)Footnote 7. Martin Malia, *The Soviet Tragedy: A History of Socialism in Russia 1917-1991* 154, 169 (The Free Press, 1994).

(n8)Footnote 8. University of Leyden, *Soviet Law After Stalin: Part I* 162 (A.W. Sijthoff-Leyden, 1977).

(n9)Footnote 9. Martin Malia, *The Soviet Tragedy: A History of Socialism in Russia 1917-1991* 196-198 (The Free Press, 1994).

(n10)Footnote 10. University of Leyden, *Soviet Law After Stalin: Part I* 162 (A.W. Sijthoff-Leyden, 1977).

(n11)Footnote 11. *Fundamentals of Legislation in the USSR and the Union Republics*, Sec. I (Progress Publishers 1968, Murad Saifulin and Yuri Sdobnokov, trans., 1974).

(n12)Footnote 12. *Fundamentals of Legislation in the USSR and the Union Republics*, Sec. II (Progress Publishers 1968, Murad Saifulin and Yuri Sdobnokov, trans., 1974).

(n13)Footnote 13. *Fundamentals of Legislation in the USSR and the Union Republics*, Sec. III (Progress Publishers 1968, Murad Saifulin and Yuri Sdobnokov, trans., 1974).

(n14)Footnote 14. *Fundamentals of Legislation in the USSR and the Union Republics*, Sec. IV (Progress Publishers 1968, Murad Saifulin and Yuri Sdobnokov, trans., 1974).

(n15)Footnote 15. *Fundamentals of Legislation in the USSR and the Union Republics*, Sec. V (Progress Publishers 1968, Murad Saifulin and Yuri Sdobnokov, trans., 1974).

(n16)Footnote 16. *Fundamentals of Legislation in the USSR and the Union Republics*, Sec. VI (Progress Publishers 1968, Murad Saifulin and Yuri Sdobnokov, trans., 1974).

(n17)Footnote 17. *Fundamentals of Legislation in the USSR and the Union Republics*, Sec. VII (Progress Publishers 1968, Murad Saifulin and Yuri Sdobnokov, trans., 1974).

(n18)Footnote 18. *Fundamentals of Legislation in the USSR and the Union Republics*, Sec. I, Art. 50 (Progress Publishers 1968, Murad Saifulin and Yuri Sdobnokov, trans., 1974).

(n19)Footnote 19. *Fundamentals of Legislation in the USSR and the Union Republics*, Sec. III, Arts. 30-31 (Progress Publishers 1968, Murad Saifulin and Yuri Sdobnokov, trans., 1974).

(n20)Footnote 20. *Fundamentals of Legislation in the USSR and the Union Republics*, Sec. III, Art. 32 (Progress Publishers 1968, Murad Saifulin and Yuri Sdobnokov, trans., 1974).

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CHAPTER 106RU PROPERTY LAW IN RUSSIA

13-106RU Thompson on Real Property, Thomas Editions § 106RU.02

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§ 106RU.02 Land Legislation of the Post-Soviet Era.

The demise of the government of the Soviet Union did not signal an immediate and total change in land rights. Commentators have noted that, in this period of transition from state control of land to a freer market system, change has been slow and every reform has been contested. The politicians elected to the Duma and to local offices are often the same people who held power under the communist system, and they typically resist the transition to private land ownership. n21 Nevertheless, the period has seen rapid changes in property law, many changes introduced by legislation and executive decrees, as described below.

§ 106RU.02(a) The Land Reform Law of 1990.

This was the first of legislative reforms of land law in the post-Soviet era and provides for private ownership of land. n22 This reform, however, did not establish a market for land and the state remained the only entity that could buy land from citizens. n23 Additional restrictions on the alienability of land were also included in the law. n24

§ 106RU.02(b) The Law on Peasant Holding.

This law directed the reorganization of the state collective farms into a form of private enterprise. n25 Members of the collectives also gained an interest in land. The interest could be an ownership interest or the newly created life-long inheritable possession or a right of permanent use. These interests in land were not alienable because the law still did not provide a market structure for the exchange of land. n26

§ 106RU.02(c) Land Code of 1991.

This code represents a comprehensive attempt to update Russian property law, and it sets forth many details about incidents of land ownership. The Code zones land according to its purpose and use, and establishes standards for the sale of land, the payment of the price of land, and leasing. It restricts ownership of different types of land to certain types of land interests; foreign entities are limited to long-term leases. n27

§ 106RU.02(d) 1993 Constitution of the Russian Federation.

The 1993 Constitution's main effect on property law is to integrate and reconcile the old and new property laws. Article 9 declares the basic regulatory scheme for land in Russia:

(1) Land and other natural resources shall be utilized and protected in the Russian Federation as the basis of life and activity of the people living in the corresponding territories

(2) Land and other natural resources may be in private, state, municipal, and other forms of ownership.

This Constitution also provides for private ownership and alienation of land. n28

§ 106RU.02(e) Civil Code of 1994.

This code effectively replaces the patchwork of legislation that preceded it with a homogeneous body of law. In combining the laws of the former Soviet Union with the laws passed since its fall, it creates a consistent body of law. n29

FOOTNOTES:

(n1)Footnote 21. William P. Kratzke, "Russia's New Land Code: A Two Percent Solution," *12 Minn. J. Global Trade 109, 116-118 (2003).*

(n2)Footnote 22. William P. Kratzke, "Russia's New Land Code: A Two Percent Solution," *12 Minn. J. Global Trade 109, 118 (2003).*

(n3)Footnote 23. *Fundamentals of Legislation in the USSR and the Union Republics*, Sec. I, Art. 32 (Progress Publishers 1968, Murad Saifulin and Yuri Sdobnokov, trans., 1974).

(n4)Footnote 24. For instance, land can be seized by the government if it is not being used for its designated purpose or is being used only inefficiently.

(n5)Footnote 25. William P. Kratzke, "Russia's New Land Code: A Two Percent Solution," *12 Minn. J. Global Trade 109, 117 (2003).*

(n6)Footnote 26. *Fundamentals of Legislation in the USSR and the Union Republics*, Sec. I, Art. 32 (Progress Publishers 1968, Murad Saifulin and Yuri Sdobnokov, trans., 1974).

(n7)Footnote 27. Grazhdanskii Kodeks [GK] [Civil Code] Article 257 (Rus.).

(n8)Footnote 28. Konstitutsiia Rossiiskio Federatsii]Konst. RF] [Constitution] Article 10.

(n9)Footnote 29. William P. Kratzke, "Russia's New Land Code: A Two Percent Solution," *12 Minn. J. Global Trade 109, 120 (2003).*

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CHAPTER 106RU PROPERTY LAW IN RUSSIA

13-106RU Thompson on Real Property, Thomas Editions § 106RU.03

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§ 106RU.03 Current Laws Regarding Property in Russia.

Land law in Russia today is governed by the 1993 Constitution, the Land Code of the Russian Federation, n30 and several Presidential Decrees. The 1993 Constitution states in article 9 that "recognition and equal protection shall be given to private, state, municipal, and other forms of ownership." n31 More specifically, the Constitution states that "[land] and other natural resources may be in private, state, municipal and other forms of ownership." n32 The Civil Code of the Russian Federation establishes the alienability of land n33 and the rights of citizens and judicial persons to own land. The several modes of possession established by the constitution are discussed in the Land Code, and include State, n34 Federal, n35 Regional, n36 and Municipal. n37 The reforms set forth in the Land Code apply only to urban and dacha (country home) properties, but not to agricultural and forestry land.

§ 106RU.03(a) Acquisition of Property.

Property rights may be acquired by finding, manufacture, purchase, acquisitive prescription (adverse possession), and inheritance. n38 The finders concept is codified in Article 227 of the Civil Code. The finder of an item must return the item to the owner, if the owner is known. Otherwise the finder must report the find to the police or to other local government authority. The owner may recover for loss or damage to the found item only if the loss or damage occurred intentionally or due to gross negligence.

§ 106RU.03(a)(1) Finding.

The regulations for establishing ownership in the finder are set out in Article 228. The statute of limitations is six months, after which the finder may claim ownership. If the finder declines to take ownership of the found item, the ownership is vested in the municipality in which it was found.

Buried or concealed treasure is governed by Article 233. The ownership of the treasure is vested in equal shares in the finder and the owner of the land on which it was found. If the finder, without permission, was present on the land or digging the treasure vests entirely in the owner of the land. If the treasure is of historical or cultural value the item is subject to transfer to the state. The finder and landowner are entitled to 50% of the value of the treasure in equal shares, unless the finder was unauthorized, in which case the owner receives the entire 50% share.

The Civil Code includes language establishing finders rules for neglected animals, n39 articles that have no owner, n40 and abandoned property. n41

§ 106RU.03(a)(2) Manufacture or Construction.

If a person creates goods from material of which the person had legal ownership, the ownership of the newly created item is vested in the person. n42 The construction of immovable property on land owned by the builder does not immediately vest ownership in the builder, but rather vests when the property is registered with the state. If a person builds immovable property on land owned by another, ownership does not vest in the builder. n43 The arbitrary building is subject to demolition at the expense of the builder and the builder holds no rights to make any transaction relating to the property. Arbitrary structures include those built without government authorization or in violation of code. If the arbitrary structure is built on the land of another, the builder may keep the property and gain ownership rights if the builder acquires title to the property on which it was built.

§ 106RU.03(a)(3) Conversion.

If a person converts materials owned by another to a new manufactured product, the ownership of that new product rests in the owner of the materials from which it was made. n44 The owner of the materials must compensate the converter for the value of the conversion, unless the conversion was made in bad faith; n45 in case of bad faith, the owner of the materials has a right to the materials and an award of damages for any losses sustained. n46

§ 106RU.03(a)(4) Acquisitive Prescription.

This is ownership acquired similarly to adverse possession in common law jurisdictions. The statute of limitations established in the Civil Code is 15 years for immovable property and 5 years for other property. n47 Property must be held in good faith, openly, and uninterruptedly. n48 Ownership does not vest until the acquirer registers the immovable property with the State after 15 years of possession. The possessor has the right to protect the property against all claimants except the actual owner. A prescriptive possessor may join the possessory times of successive possessors if there was no break in possession.

§ 106RU.03(b) Termination of Property Rights.

§ 106RU.03(b)(1) Renunciation of Right of Ownership (Abandonment).

An owner of property may renounce his status as owner and effectively abandon the property. n49 Intent need not be declared, but may be manifest by specific actions that indicate an intent to abandon the property. Abandonment does not relieve the owner of duties, such as paying taxes and responsibility for condition of the land, until the property is acquired by another.

§ 106RU.03(b)(2) Confiscation.

The Civil Code allows for the confiscation of property as punishment or sanction for the commission of certain crimes or other breaches of the law. n50 The government is not required to pay any compensation for the taking. The criminal code lists the violations of law that allow for the confiscation of property.

§ 106RU.03(b)(3) Withdrawal of Land (Eminent Domain).

The right of the government to withdraw a plot of land for public use is similar to the doctrine of eminent domain as understood in the United States. The government entity seeking must show in court that the purpose for which the plot is withdrawn cannot be achieved without the withdrawal. n51 The land must be purchased by the state in order to compensate the property owner. In similar action, the government can requisition property during natural disasters and

other extraordinary circumstances. n52 In these cases, the government must compensate the owner for the property or for the use of the property. The owner may also sue for the return of the property at the end of the situation that gave rise to the taking if the property. The owner may contest the award received for use of the property in court if unsatisfied with the amount provided.

§ 106RU.03(b)(4) Levying Execution on the Property for the Owner's Obligations.

In the event a landowner is unable to meet debt obligations, a creditor may sue in court for property owned by the debtor to satisfy the debt. n53

§ 106RU.03(c) Types of Ownership Entities.

§ 106RU.03(c)(1) Common Ownership.

Russian law recognizes only two types of concurrent ownership. Participatory ownership is roughly analogous to a tenancy in common under Anglo-American law. n54 Joint ownership is similar to a joint tenancy. n55 The Civil Code also recognizes a mode of concurrent ownership known as the (Farmer's) Economy, a type of unincorporated cooperative farm. n56

§ 106RU.03(c)(1)(i) Participatory Ownership.

Property held in participatory ownership is held in equal shares or as determined by agreement of the parties and, if not established by agreement. n57 If one participant contributes to the property financially, that participant's share of the property is increased an equivalent amount. n58 If the improvement is divisible and not attached to the property, ownership of the improvement vests in the improving participant. n59 Participants are required to contribute to any taxes, upkeep or maintenance of the property in order to maintain their participatory share. n60 Participants may transfer their shares, n61 but other participants have a right of first refusal, n62 unless the share is subject to levying execution. n63 Participants may partition their property, either by agreement or by court action. n64

§ 106RU.03(c)(1)(ii) Joint Ownership.

The rules for joint ownership are basically the same as those of participatory ownership. n65 The property is held in common with equal rights to use and all of the owners may transact business related to the property without the consent of the other parties. Division or partition of the property requires a determination of the participatory share each owner possesses. No right of survivorship is recognized: if one joint owner dies, a determination will be made to set the participatory share of the deceased. This participatory share is then available as part of decedent's estate to be passed on to heirs. n66

§ 106RU.03(c)(1)(iii) Peasant (Or Farmer's) Economy.

This type of ownership is the successor to the collective farm and the Peasant Land Holding, and allows for members of a collective farm to hold their land, livestock, equipment, and other assets in joint ownership. n67 Because the assets are held in joint ownership, the shares of the participants are presumptively equal. n68 This form also provides for the produce of the farm to be common property of the entire group, subject to division by agreement. n69 A single person withdrawing from the group cannot force the partition of the whole economy, but rather is given a monetary award. n70 The Code also provides for a cooperative formed on the base of a peasant economy. n71

§ 106RU.03(c)(2) Marital Property.

Under Russian marital property law, all property acquired by spouses during marriage is presumptively held in joint ownership. n72 Property that a spouse owned before the marriage remains in individual ownership, unless the property

is improved or otherwise significantly increased in value with marital assets, in which case the property is converted into marital property. n73 The improvements must be significant in nature for this to have effect. n74 Foreclosure on obligations entered into separately by one spouse can reach the participatory share of the property that the spouse would have been entitled to if the joint property was partitioned under article 252 of the Civil Code. n75 Upon the death of one spouse, the deceased spouse's participatory share is then eligible to be inherited by that spouse's heirs. n76

Upon dissolution of the marriage, property that is considered joint property may be divided by agreement of the spouses or, failing in this, by the courts. n77 If the division is to be made in court, the spouses' participatory shares are presumptively equal unless otherwise provided for in contract. n78 Besides property owned by the spouses before marriage, any property obtained after separation and cessation of conjugal relations, property acquired exclusively for children, and personal use items obtained during the marriage are exempted from division. n79

Judges, when dividing marital property, are allowed to vary from the presumptively equal concept in cases when an unequal division would better serve the interests of the children involved. If one spouse squandered marital assets to the detriment of the family, he or she may find be assigned a smaller share of the property. Tied to the participatory share of common property assigned to each spouse, common debt is distributed in proportion to the participatory share assigned. n80

The Russian Family Code sets forth a complex system of spousal support, n81 child support, n82 parental support, n83 and other familial support. n84 The law spells out in fairly specific detail who owes what support to whom; however, the judges exercise discretion in determining specific amounts, usually based on the financial and family situations of the payer and the recipient. n85

§ 106RU.03(d) Types of Ownership Interests.

Current Russian Property law recognizes five types of ownership interests in land: ownership, inheritable life-long possession, permanent use, lease, and easement. The Land Code defines five different terms in relation to interests in land:

Owners of plots of land--possess plots of land under a right of ownership.

Users of land--possess and use plots of land by the right of permanent (infinite) use or by the right of free use for a term.

Tenants--possess and use state owned plots of land by a right of lifetime inheritable possession.

Lessees of plots of land--possess and use private or state owned plots of land under a lease or sub-lease.

Holders of Easements--possess a limited right to use another's plot of land. n86

§ 106RU.03(d)(1) Ownership.

Ownership is the most full form of property ownership recognized in Russia today. This form of ownership was firmly established by the Constitution of the Russian Federation in 1993. n87 The constitution provided that a citizen may alienate an interest in land to another without using the state as an intermediary. n88 The citizen may also create interests in land in another in the form of a lease n89 or mortgage on the land.

Land ownership includes rights to the surface, water located within the boundaries of the plot, forests located on the plot, rights to the airspace above the plot and rights to everything located under the plot. n90 Exercise of these rights is subject to the all other laws of use and zoning and must not infringe on the rights of other land owners. n91

Owners of land have the right to build on their land, subject to the designation assigned to that land. n92 Unless provided for in contract or law, the landowner acquires ownership of the immovable property. Ownership in property built on the owner's land also automatically vests in the owner. n93

§ 106RU.03(d)(1)(i) Inheritable Life Long Possession.

Inheritable life long possession is an interest in land that is no longer possible to acquire under the current code. n94 Those who held such interests at the time the law was enacted are allowed to retain those interests but rights of alienability are limited. Tenants possess full use rights, including the right to build on the land and to rent the land to another, but the only method for transferring the property is through inheritance. n95 Citizens are allowed to convert their life-long inheritable use into a clear title to the property once without additional cost. n96

§ 106RU.03(d)(1)(ii) Permanent Use.

The right of permanent use may arise in one of two ways; either the right is granted from a state agency that is authorized to grant plots of land in such a way n97 or it arises when an individual, who does not own the land, owns a building situated on that land. n98 Those whose interest is in an entire plot of land may only act within the limits of the law and of the act that granted him the use of the land. Unless otherwise provided for, the user of land may use the land according to that act to build or install immovable property on the premises. Users of land may only grant fixed-term use of the land to others and may not collect compensation for this use. n99 If a legal entity is reorganized the right of permanent land use is passed to the new legal entity. n100

Owners of immovable property situated on land that they do not own gain a right of permanent use to the land on which the building or other immovable property is located. n101 If ownership to the immovable property is transferred the right of permanent use is transferred with it. If the land user loses the right to permanent use, the rights of the owner of the immovable property may be determined in an agreement with the owner of the land. Absent an agreement, the issue may be decided in court. The decision of the court can fall into one of three categories. First, the owner may demand the immovable property be removed and the land restored to its previous state. Second, if the building cannot be demolished for reasons of law or the building clearly is valued more than the land on which it stands, the court can allow the owner of the building to acquire the land or the landowner to acquire the building. Third, the court may stipulate conditions on which the land is to be used. n102

§ 106RU.03(d)(1)(iii) Lease.

Leases are the least restricted interests in land, in terms of who may possess the interest. Foreign citizens and legal entities are allowed to hold leases as long as the property does not have a state interest and is not of historical importance. n103 Those who own the buildings located on a plot of land are given a preferential right to lease or acquire the land. n104 A lessee also has a preferential right to a new lease at the expiration of the term of the lessee's lease. n105 If the land is to be leased from a private individual, the terms of the lease are set out in contract and the price is negotiated between the parties. If the lease is from the state, the amount of payment for the lease is figured by a set formula. n106

The lessee is allowed to sublease the property to another without consent, if notice is given to the owner. This right may be altered by contract. n107 The code does not provide for the lease to be assigned or all rights and duties of the lease transferred.

§ 106RU.03(d)(1)(iv) Easements.

The Land Code authorizes creation of both public and private easements. n108 The owner of the encumbered property may demand compensation from the easement holder for the use. n109

A public easement is described as a "legal act of a ... government body in the cases when it is required for ensuring interests of the state, local government or local public without plots of land being taken." n110 The following situations give rise to public easements: right of way; use for public utilities; use in drainage works; use of water; passage of cattle; hunting, fishing, and gather plants; prospecting and research; and free access to a coastline. n111

The easement imposed must be the least burdensome for the plot of land to which it attaches and may be either permanent or temporary. n112 If the easement makes use of the land by the landowner impossible, a court may require the governmental easement holder to purchase the land or to grant another plot of land of commensurate value. If the inconvenience caused by the public easement is significant, but not so severe to make use of the land impossible, then the landowner may seek payment for the loss of use. n113 As with all interests in land, an easement is subject to state registration. n114

§ 106RU.03(e) Land Registration.

Transactions relating to real property are registered with the government. In Russia, all interests in land and immovable property are subject to mandatory state registration, to include ownership rights, leases and subleases greater than one year, mortgages and trusts. n115 Because private ownership of land is relatively new, the registration requirement is also new. Only interests obtained after the registration law was passed in 2001 are required to be registered. n116 Property interests in Russia are assigned a unique number in a national system of registration. n117

The responsibility to ensure clear title through a records search is greatly simplified by the centralized registration system. Instead of an attorney or title search agent filing through the county records or even compiling their own set of land records, all that is required to obtain an extract showing the title to the land is to present an identity card to the Single State Register of Rights. n118 One weakness of this system is that the registration law has been in effect less than a decade.

§ 106RU.03(f) Zoning.

The zoning system in the Russian Federation is similar to that of the former Soviet Union, including virtually the same categories. n119 The zoning system is more comprehensive and restrictive than zoning laws in the United States. Zoning of Russian property also deals with the alienability of certain types of property. n120

FOOTNOTES:
(n1)Footnote 30. Zemelnyi Kodeks [ZK] [Land Code] (Russ.).

(n2)Footnote 31. Zemelnyi Kodeks [ZK] [Land Code] (Russ.) Art. 9(1).

(n3)Footnote 32. Zemelnyi Kodeks [ZK] [Land Code] (Russ.) Art. 9(2).

(n4)Footnote 33. Zemelnyi Kodeks [ZK] [Land Code] (Russ.) Arts. 209 and 260.

(n5)Footnote 34. Zemelnyi Kodeks [ZK] [Land Code] (Russ.) Art. 16.

(n6)Footnote 35. Zemelnyi Kodeks [ZK] [Land Code] (Russ.) Art. 17.

(n7)Footnote 36. Zemelnyi Kodeks [ZK] [Land Code] (Russ.) Art. 18.

(n8)Footnote 37. Zemelnyi Kodeks [ZK] [Land Code] (Russ.) Art. 19.

(n9)Footnote 38. Civil Code Ch. 14.

(n10)Footnote 39. Civil Code Art. 230.

(n11)Footnote 40. Civil Code Art. 225.

(n12)Footnote 41. Civil Code Art. 226.

(n13)Footnote 42. Civil Code Art. 218.

(n14)Footnote 43. Civil Code Art. 222.

(n15)Footnote 44. Civil Code Art. 220(1).

(n16)Footnote 45. Civil Code Art. 220(2).

(n17)Footnote 46. Civil Code Art. 220(3).

(n18)Footnote 47. Civil Code Art. 234.

(n19)Footnote 48. Civil Code Art. 234(1).

(n20)Footnote 49. Civil Code Art. 236.

(n21)Footnote 50. Civil Code Art. 243.

(n22)Footnote 51. Civil Code Art. 239.

(n23)Footnote 52. Civil Code Art. 242.

(n24)Footnote 53. Civil Code Art. 237.

(n25)Footnote 54. Civil Code Arts. 245-252.

(n26)Footnote 55. Civil Code Arts. 253-255.

(n27)Footnote 56. Civil Code Arts. 257-259.

(n28)Footnote 57. Civil Code Art. 245(1).

(n29)Footnote 58. Civil Code Art. 245(3).

(n30)Footnote 59. Civil Code Art. 245(3).

(n31)Footnote 60. Civil Code Art. 249.

(n32)Footnote 61. Civil Code Art. 246.

(n33)Footnote 62. Civil Code Art. 250.

(n34)Footnote 63. Civil Code Art. 255.

(n35)Footnote 64. Civil Code Art. 252.

(n36)Footnote 65. Civil Code Art. 256.

(n37)Footnote 66. Civil Code Art. 1150.

(n38)Footnote 67. Civil Code Art. 257.

(n39)Footnote 68. Civil Code Art. 258.

(n40)Footnote 69. Civil Code Art. 257.

(n41)Footnote 70. Civil Code Art. 258.

(n42)Footnote 71. Civil Code Art. 259.

(n43)Footnote 72. Civil Code Art. 256.

(n44)Footnote 73. Civil Code Art. 256(2).

(n45)Footnote 74. Civil Code Art. 256(2).

(n46)Footnote 75. Civil Code Art. 256(3) and (4).

(n47)Footnote 76. Civil Code Art. 1150.

(n48)Footnote 77. Family Code Art. 38.

(n49)Footnote 78. Family Code Art. 39(1).

(n50)Footnote 79. Family Code Art. 38.

(n51)Footnote 80. Family Code Art. 39(2).

(n52)Footnote 81. Family Code Arts. 89, 90, 92.

(n53)Footnote 82. Family Code Arts. 80, 81, 83-86.

(n54)Footnote 83. Family Code Arts. 87, 88, 97.

(n55)Footnote 84. Family Code Arts. 93-96.

(n56)Footnote 85. Family Code Art. 98.

(n57)Footnote 86. Land Code Art. 5.

(n58)Footnote 87. *Constitution, Art. 9*.

(n59)Footnote 88. Civil Code Art. 209.

(n60)Footnote 89. Civil Code Art. 260.

(n61)Footnote 90. Civil Code Art. 261.

(n62)Footnote 91. Civil Code Art. 261(3).

(n63)Footnote 92. Civil Code Art. 263.

(n64)Footnote 93. Civil Code Art. 263.

(n65)Footnote 94. Land Code Art. 21.

(n66)Footnote 95. Land Code Art. 21.

(n67)Footnote 96. Land Code Art. 21.

(n68)Footnote 97. Civil Code Art. 268.

(n69)Footnote 98. Civil Code Art. 271.

(n70)Footnote 99. Civil Code Art. 270.

(n71)Footnote 100. Civil Code Art. 268.

(n72)Footnote 101. Civil Code Art. 271.

(n73)Footnote 102. Civil Code Art. 272.

(n74)Footnote 103. Land Code Art. 22. Law also appears to prohibit leasing of agricultural land to foreign citizens or entities).

(n75)Footnote 104. Land Code Art. 35.

(n76)Footnote 105. Land Code Art. 22.

(n77)Footnote 106. Land Code Art. 22.

(n78)Footnote 107. Land Code Art. 22(6).

(n79)Footnote 108. Land Code Art. 23.

(n80)Footnote 109. Land Code Art. 23(6).

(n81)Footnote 110. Land Code Art. 23(2).

(n82)Footnote 111. Land Code Art. 23(3).

(n83)Footnote 112. Land Code Art. 23(4) and (5).

(n84)Footnote 113. Land Code Art. 23(7).

(n85)Footnote 114. Land Code Art. 23(9).

(n86)Footnote 115. Federal Law of the Russian Federation on the State Registration of Rights to Real Estate and of Transactions with It 2001, Art. 4.

(n87)Footnote 116. Federal Law of the Russian Federation on the State Registration of Rights to Real Estate and of Transactions with It 2001, Art. 4.

(n88)Footnote 117. Federal Law of the Russian Federation on the State Registration of Rights to Real Estate and of Transactions with It 2001, Art. 1.

(n89)Footnote 118. Federal Law of the Russian Federation on the State Registration of Rights to Real Estate and of Transactions with It 2001, Art. 7.

(n90)Footnote 119. Land Code Chs. XIV-XVIII.

(n91)Footnote 120. Land Code Art. 95.

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CHAPTER 106ZA PROPERTY LAW IN SOUTH AFRICA

13-106ZA Thompson on Real Property, Thomas Editions 106ZA.syn

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§ 106ZA.syn Synopsis to Chapter 106ZA: PROPERTY LAW IN SOUTH AFRICA

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§ 106ZA.08 Bibliography

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CHAPTER 106ZA PROPERTY LAW IN SOUTH AFRICA

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§ 106ZA.01 History of Property Law in South Africa

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§ 106ZA.01(a) Colonization

Prior to the arrival of the Colonialists from Europe, the majority of the indigenous inhabitants of South Africa were nomadic and did not recognize the concept of individual land ownership. The area of land governed by the tribe was owned or vested in the monarch that governed the tribe; alternatively, in the tribe itself.

In 1652, the Dutch East India Company established a settlement at the Cape under Jan van Riebeeck. With their arrival, a very simple system of registration of land began. This early land registration was based on a *placaat* of Charles V of Holland, which was passed in 1529. The *placaat* provided that every sale of immovable property was to occur in the presence of a Judge. A further Dutch edict of 1650 provided that written registers should be kept of all such transactions.

An early issue that arose in the Cape was the fact that there were no Judges present before whom such transactions could take place. As a solution, two members of the *Politieke Raad* were appointed so that deeds could be executed. Title Deeds were executed and registered in this manner until 1828, after which a Registrar of Deeds was formally appointed due to the establishment of a Supreme Court. The office of Registrar of Deeds was established in terms of Ordinance 39 of 1828.

In 1828, the Registrar of Deeds had the additional task of being the Registrar of slaves.

As settlers arrived at the Cape from Europe, they were granted land so that the development of the land could commence and communities could be established. These transfers were called "Grants" and were referred to as such because they described the very first time that a portion of property was transferred to and owned by an individual.

Prior to 1882, no formal land registers were maintained. Grants and Deeds of Transfer were simply numbered and placed in chronological order. Registers recording the history of each portion of land and a system of numbering portions of land for identification purposes did not exist. In addition, there was no Index or Register kept of the owners

of the various portions of land. This made ascertaining the identity of the owner of a specific portion of land an incredibly arduous task.

Prior to 1844, Grants and Deeds were drafted by Government officials. In 1844, Advocates were authorized to do so.

In 1859, due to intensifying public dissatisfaction as a result of delays in the Deeds Office at Cape Town, the Government appointed a committee to investigate possible alternative methods of registration and transfer of land. The committee recommended that land registers should be created in which the Grant and subsequent registration history of each portion of land could be recorded. Sadly, only farm registers were opened and portions of land were never properly identified.

Land was not granted to the indigenous people. During this period, land was taken from the indigenous tribes that inhabited the Cape, and as expansion continued inland, this trend continued. This conduct caused great tension between the colonizers and the local tribes, such as the Xhosa and Zulu, which escalated and resulted in well-documented bloodshed.

The discovery of diamonds in the Northern Cape in 1867 and gold in the Witwatersrand area in 1886 changed South Africa forever and resulted in both an economic and population boom in the respective areas.

There was also conflict between the Dutch and British settlers, who initially arrived at the Cape in 1795. This led to the first Anglo-Boer war in 1880, and a second in 1899.

§ 106ZA.01(b) The Union of South Africa

On May 31, 1910, the Union of South Africa was established. Four colonies existed in South Africa at the time; namely, the Cape, Natal, the Orange Free State and the Transvaal. The Union was a self-governing authority within the British empire, and negotiations excluded the majority black population and deprived them of more of their land. This led to the formation of the African National Congress (ANC) in 1912.

The Black Land Act 27 of 1913, together with the Natives (Urban Areas) Act 21 of 1923 limited black land ownership to existing tribal territories--a result of which was the calculated separation of the races.

The Union Statute, Act 13 of 1918 was the first legislation passed governing the registration of deeds and the transfer of immovable property within the Union. The Union Statute was repealed and replaced by the Deeds Registries Act 47 of 1937.

This Act sets out the procedure and requirements of acquiring rights to land. The main purpose of the Deeds Registries Act is to regulate administrative aspects of the registration of land and to provide owners with protection and security.

The Deeds Registries Act is a combination and codification of the principles of the transfer of land ownership and the administration thereof in South Africa. The Deeds Registries Act is primarily concerned with the transfer and registration of real rights to immovable property.

§ 106ZA.01(c) The Apartheid Era

The National Party (NP) came into power in 1948 when they were successful in the national election. Shortly thereafter, the National Party enacted the policy of separate development of the races, otherwise known as "Apartheid." Apartheid became official government policy.

Under Apartheid, black people were severely restricted to certain occupations, paid far lower wages than other citizens

for similar work, and could not vote. Only white people could vote or run for public office. People of Asian-Indian descent and those of mixed race also had very limited political rights.

In 1950, the government promulgated legislation providing for the creation of Bantu nations or "Bantustans." The Group Areas Act 41 of 1950 resulted in the physical separation of the races by creating different residential areas for each of the different race groups, as prescribed by the Act.

This led to "forced removals" of entire communities in circumstances where they were living in the "wrong" areas. The Group Areas Act further prevented black people from purchasing, owning, or leasing property in areas designated for other race groups.

Due to the ongoing oppression, the black majority began to rise up and protest. On March 21, 1960, sixty-nine black protestors were killed by police and government officials at Sharpeville.

South Africa left the commonwealth in 1961 and became a Republic.

In 1964, the Rivonia Trials were held and Nelson Mandela, Walter Sisulu and other ANC activists were sentenced to life imprisonment for Treason due to their opposition to Apartheid.

In 1976, approximately six hundred people were killed in anti-Apartheid protests. During 1977, the United Nations Security Council imposed a mandatory arms embargo against South Africa. On October 19, 1977, several political organisations, including the ANC, and various newspapers, were banned.

During June 1988, approximately two million black South African workers staged a huge strike in defiance of Apartheid laws. Due to ever-increasing national and international pressure, the then President, P W Botha, resigned on August 14, 1989 and was replaced by F W De Klerk.

In 1990, the government lifted its ban on the ANC, PAC and other various political parties. On February 11, 1990, Nelson Mandela was released from prison after serving twenty-seven years.

In 1993, negotiations took place between the relevant role players, in terms of which basic principles for a new democratic Constitution were agreed. During 1993, an interim Constitution was promulgated providing for non-racial, multi-party democracy, the creation and implementation of a *Bill of Rights* and the end of Apartheid. During 1993, the Interim Constitution came into effect and paved the way for the creation of the Final Constitution.

In April 1994, South Africa held its first non-racial democratic elections, as a result of which Nelson Mandela was inaugurated as the country's first democratically elected President.

§ 106ZA.01(d) Democracy Begins

§ 106ZA.01(d)(1) Constitution Invalidates Race-Related Property Restrictions

On February 4, 1997, South Africa's Final Constitution came into effect. The Constitution of the Republic of South Africa, Act 108 of 1996, is the supreme law of the Republic of South Africa, and any law or conduct inconsistent with it is therefore invalid. The *Bill of Rights* contained in Chapter 2 thereof is the cornerstone of democracy in South Africa.

It enshrines the rights of all people in the country and affirms the democratic values of human dignity, equality and freedom.

Section 25(1) of the Final Constitution states that "no one may be deprived of property except in terms of law of general

application, and no law may permit arbitrary deprivation of property." Subsection (5) goes on to say that "the state must take reasonable legislative and other measures, within its available resources, to foster conditions which enable citizens to gain access to land on an equitable basis."

Section 25 read with sections 8(1) and 39(2) of the Final Constitution envisages the development of South African property law in terms of the spirit, purport and object of the *Bill of Rights*.

Section 2 of the Final Constitution has ensured that all of the discriminatory Apartheid laws which are in obvious conflict with Constitutional principles, are now invalid and have been repealed. To this extent, all references to "race" have been removed from all documents registered in the Deeds Registries and every South African citizen, regardless of their race, is free to own, purchase and lease property within the Republic.

§ 106ZA.01(d)(2) Constitution Provides for Land Redistribution

Under the new Constitutional dispensation, the previously disadvantaged majority black population who were deprived of their land and forcibly removed from their homes are now afforded the opportunity of regaining the land under what is referred to as "land redistribution."

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CHAPTER 106ZA PROPERTY LAW IN SOUTH AFRICA

13-106ZA Thompson on Real Property, Thomas Editions § 106ZA.02

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§ 106ZA.02 An Introduction to South African Property Law

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§ 106ZA.02(a) The South African Land Registration System

South Africa's legal system is comprised of both common law and civil law--civil law in the form of legislation and the rules and regulations that inform and give content to the legislation. South African common law is uncodified and is comprised of case law that is influenced by English and Roman-Dutch law, depending on the specific area concerned.

South African property law is primarily based on the ancient principles of Roman law, but some traces of Germanic law can also be identified. Accordingly, many of the rights that one has in and to property in South African law are based on ancient Roman law principles that have survived the test of time and are still widely applicable throughout Europe.

South Africa has one of the most comprehensive and secure land registration systems in the world. Every portion of land in South Africa has been measured and surveyed by a trained and educated land surveyor. The property is then plotted and depicted on a diagram or a general plan which is kept in the Surveyor General's office for the area where the property is situated.

As a result, whenever an individual needs to ascertain the particulars of a specific portion of land, they can simply conduct a search at the Surveyor General's office on that property. The diagram will reflect the boundary lines, size and rights that are registered over or in favor of that portion of land. The deeds registry will not permit a portion of land to be transferred to another individual if a diagram or general plan does not exist for that portion of land.

The South African land registration system is a fantastic one for many reasons. An individual can virtually always ascertain the identity of the owner of a specific portion of land. In certain countries, ownership of property is not always noted in public registers and cannot always be verified.

Every portion of land is then registered in a deeds registry. The deeds registry or deeds office is a public office, state owned and controlled, and its records and the documents kept there are open for inspection by the public. Thus, any individual can inspect the details of a property or its owner.

Whenever a portion of land is transferred, hypothecated, alienated, or granted, a certified copy of the diagram, mentioned above, together with the deed recording the details of the property and the reason for the transfer or hypothecation, is executed and registered at the deeds registry. Once it is executed, the seal and signature of the Registrar of Deeds is placed thereon and it is filed for record purposes at the particular deeds registry.

The financial institutions that grant loans to purchasers to purchase land register bonds over the land in order to record and secure their real rights in and to the said property. This hypothecation is also recorded and registered in the deeds registry and the deed pertaining to the portion of land is endorsed in order to reflect the hypothecation.

The land cannot be transferred or disposed of unless the bond has either been cancelled or the owner has obtained the financial institution's consent to register a further bond over that portion of land. A bond cannot be cancelled unless the bond holder has provided its written consent, in the prescribed form, to do so.

The documents necessary for the transfer, hypothecation, and alienation of land are prepared and drafted by a conveyancer. A conveyancer is an admitted attorney who has passed a practical examination in the law and practice of conveyancing and who has been admitted as a conveyancer by the High Court of South Africa. The conveyancer will appear in the Deeds Registry in order to execute the deeds in the presence of the registrar of deeds.

§ 106ZA.02(b) The Deeds Registry

There are nine Deeds Registries in South Africa. They are located in Pretoria, Johannesburg, Bloemfontein, Pietermaritzburg, Cape Town, Vryburg, King Williams Town, Nelspruit and Kimberley.

Each Deeds Registry has a very specific jurisdiction with regards to the position of the land that is to be registered and recorded in it. The person in charge of each Deeds Registry is called the Registrar of Deeds.

The Chief Registrar of Deeds is based in Pretoria and it is the duty of the Chief Registrar of Deeds to ensure uniformity in the procedures and practices of the Deeds Registries and to maintain very high standards for the deeds.

To ensure that the standards do not drop, controllers and examiners are employed by every Deeds Registry to examine and inspect every deed submitted for registration. If a deed does not comply with the requirements of the Deeds Registries Act 47 of 1937, it is rejected and cannot be registered.

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CHAPTER 106ZA PROPERTY LAW IN SOUTH AFRICA

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§ 106ZA.03 Immovable and Movable Property Defined

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The word "land" is often used as a synonym for immovable property. However, the definition of what comprises immovable property, as set out in section 102 of the Deeds Registries Act 47 of 1937, is wider than simply referring to "land."

Section 102 defines immovable property to include, *inter alia*, land, any registered long lease (a lease for ten years or more), a registered right of leasehold, and a registered right of initial ownership.

Generally speaking, immovable property is land and everything that has acceded to the land by either natural or other (man-made) means and cannot be detached from the land without being materially damaged, altered, or having its very nature completely altered.

The importance of being able to define something as immovable property is that ownership and rights in and to the property can be registered in a Deeds Registry and can be mortgaged by means of a mortgage bond. This provides the owner, lessee, mortgagee, or mortgagor with greater security.

Movable property is property that can be readily moved and relocated from one place to another. Movable property can be attached to immovable property and still remain movable property.

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CHAPTER 106ZA PROPERTY LAW IN SOUTH AFRICA

13-106ZA Thompson on Real Property, Thomas Editions § 106ZA.04

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§ 106ZA.04 Acquiring and Securing Real Property Rights

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§ 106ZA.04(a) Real Rights to Property

A real right is an absolute right. Real rights are primarily rights that a person has in and to a thing. The thing, or object of the right, is bound to the person. In the case of *Denel (Pty) Ltd v Cape Explosive Works Limited* 1999 (2) SA 419 (T), at page 433J , the court described a real right as "a direct power or absolute control over a thing."

In South African property law, there are various categories and examples of real rights to property. Individuals can have a real right in and to their own property as well as the property of another. When one enjoys a real right with respect to a thing that is not owned by them, this is referred to as a limited real right.

A real right is a claim or a right that an individual has to a thing against the public at large. Therefore, the holder of a real right can enforce that right against the public at large. For example, ownership is a real right and it offers complete control, by the owner, over that thing.

Section 102 of the Deeds Registries Act 47 of 1937 defines a real right as "including any right which becomes a real right upon registration." South African law does not have a closed list of real rights and new real rights in and to property can develop.

§ 106ZA.04(b) Securing Real Property Rights

One secures and protects a real right by registering the right in the Deeds Office. In terms of section 3(1) of the Deeds Registries Act 47 of 1937, the Registrar of Deeds has a duty to register specific real rights as set out in that section.

In the case of *Denel (Pty) Ltd v Cape Explosive Works Limited* 1999 (2) SA 419 (T), at page 438B , the court confirmed that when a real right is established by way of registration of the right in the Deeds Registry, it is "maintainable against the whole world."

§ 106ZA.04(c) Acquiring Real Property Rights

In South African property law there is a distinction between original and derivative acquisition of real rights. The original acquisition of a real right is a unilateral act carried out by the person who acquires that real right. The real right is newly created and is not obtained from a predecessor. The real right is thus free from any limitation. Prior to the unilateral action taking place, the real right did not exist. The best example of this would be expropriation by the government.

The derivative acquisition of a real right is a bilateral transaction between the person who is the holder of the real right and the person who wishes to acquire the real right. The person acquiring the real right acquires the right with all of the limitations and blemishes that the real right is subject to. A good example of such a transaction is the purchase and sale of land by way of a written agreement of sale.

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CHAPTER 106ZA PROPERTY LAW IN SOUTH AFRICA

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§ 106ZA.05 Real Rights in Property

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§ 106ZA.05(a) Ownership

Private ownership is universally a highly valued and protected real right. Notwithstanding the inherent quandary of accepting one definition for the concept of ownership, in South African property law, ownership is the real right that potentially confers the most complete or comprehensive control over a thing, which means that the right of ownership entitles owners to do with their property as they see fit, subject to the limitations imposed by public and private law. n1

In the case of *Gien v Gien* 1979 (2) SA 1113 (T) at page 1120 , the court defined ownership as:

> *"The right of ownership is the most comprehensive real right that a person can have in respect of a thing. The point of departure is that a person can, in respect of immovable property, do with and on his property as he pleases. This apparently unfettered freedom is however, a half-truth. The absolute power of an owner is limited by the restrictions imposed thereon by the law."*

Ownership of immovable property can be derived via a grant, private treaty or sale, prescription or expropriation. Ownership is unlimited in duration and is an independent real right as it is not dependant on or derived from any other right.

Ownership of immovable property in South Africa is effected by way of entering into and concluding a written agreement of sale in terms of the provisions of the Alienation of Land Act 68 of 1981.

A conveyancer then drafts a deed of transfer and transfers the property from the seller to the purchaser by executing and registering the deed in the Deeds Registry. The deed of transfer constitutes the purchaser's title deed to the property. Ownership passes to the purchaser upon registration of transfer.

§ 106ZA.05(b) Servitudes

Servitudes are limited real rights in immovable property that are registered and recorded in the Deeds Registry. A servitude entitles the holder thereof to either:

1. The undisturbed use and enjoyment of another person's property; or

2. To demand that another person refrain and desist from exercising certain rights that they have stemming from their right of ownership with respect to their property.

In *Dreyer v Letterstedt's Executors* (1865) 5 Searle 88 at page 99, the court defined a servitude as "a real right to an advantage out of the property of another."

It is the direct relationship of the real right of servitude between the holder thereof and the property over which they hold the servitude that distinguishes it from a personal contractual right with the owner of the property over which they enjoy the servitude.

South African law distinguishes between two different types of servitudes, namely personal and praedial servitudes. A praedial servitude is a servitude between two pieces of land. The servitude is created in favor of the dominant tenement property over the servient tenement property. The servitude confers a real right on the dominant tenement property and creates a burden on the servient tenement property.

The owner of the dominant tenement property is entitled to enforce the servitude over the servient tenement property. The servitude exists with the property and thus transfers from owner to owner and continues to exist despite the property being transferred to a new owner.

A personal servitude is a servitude created in favour of a specific individual to whom it provides the right to the undisturbed use and enjoyment of another's property.

The personal nature of the servitude means that it is not transferable and ceases to exist when the individual in whose favor it was created, dies. Good examples common personal servitudes are *usufructs, usus* and *habitatio*.

Servitudes can be created by the state government by way of a grant over state land, agreement between individuals and owners of land, statute or prescription.

One can also approach the High Court of South Africa to enforce or create a servitude. The court order granted by the High Court will either bring the servitude into existence or compel compliance with an existing servitude.

§ 106ZA.05(c) Mortgage Bonds

A mortgage bond is a form of hypothecation of immovable property which confers a limited real right to an individual or entity over the property of another with the object of securing payment of a debt or performance of an obligation. n2

Traditionally, a mortgage bond is a bilateral written agreement concluded between a debtor (traditionally the owner of the property) and a creditor (traditionally a financial institution, such as a bank) in terms of which the creditor obtains a real right over the immovable property of the debtor as security for the fulfilment of the debtor's obligations in terms of the agreement.

A mortgage bond is classified as real security in that if the debtor is unable to meet the obligations in terms of the agreement (*i.e.*: fails to repay the debt), the creditor can demand that the immovable property, being the asset bonded as security, be sold and that the proceeds of the sale are used to satisfy the claim.

A mortgage bond is a written instrument that is signed by both the creditor and the debtor. It is then registered by a conveyancer in a Deeds Registry. A mortgage bond is cancelled by registering and executing a deed, in the prescribed form, in a Deeds Registry. A mortgage bond can only be cancelled with the consent of the creditor.

§ 106ZA.05(d) Lease

A lease is a bilateral agreement whereby one person or other entity agrees to provide another with the temporary, undisturbed, use and enjoyment of property in return for the payment of rental.

In terms of the provisions of the Formalities with respect to Leases of Land Act, 18 of 1969, a long lease is a lease for a period of no less than ten years, for the length of the natural life of the lessee, or is renewable from time to time at the behest of the lessee indefinitely, which periods, when added together, constitute a period not less than ten years.

In terms of section 1(2)(a) of the Formalities in respect of Leases of Land Act, 18 of 1969, a long lease is not valid for a period of greater than ten years unless it has been registered in the deeds registry against the title deed of the leased property.

The title deed of the leased property will then be endorsed with an annotation reflecting the fact that a long lease has been entered into in relation to that property. The long lease, once registered, provides the lessee with a limited real right in and to the leased property.

FOOTNOTES:
(n1)Footnote 1. Johannesburg Municipal Council v Rand Townships Registrar 1910 TPD 1314 at 1319.

Regal v African Superslate (Pty) Ltd 1963 (1) SA 102 (A) at 106 to 107.

Page 91 Silberberg and Schoeman's The Law of Property, Fifth Edition.

(n2)Footnote 2. Grotius 2 48 1.

Page 357 Silberberg and Schoeman's The Law of Property, Fifth Edition.

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CHAPTER 106ZA PROPERTY LAW IN SOUTH AFRICA

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§ 106ZA.06 Sectional Title and Shareblock Ownership

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In Roman law, the principle of *superficies solo cedit* provides that an individual who owns land also owns all of the buildings that are situated on the land. There is no differentiation between the land and the immovable structures situated thereon. In terms of the Deeds Registries Act 47 of 1937, land is transferred without any reference to the buildings or structures thereon. This means that prior to legislative enactments, it was impossible for an individual to be the owner of a defined portion of a piece of land or part of a building. With residential property becoming increasingly expensive and rare, the need for apartment blocks to be built and sold was becoming great.

The South African legislature created what is now commonly referred to as "sectional ownership," or the ownership of a part of a portion of land or a building. On September 17, 1986, the Sectional Titles Act 95 of 1986 was promulgated. This new Act replaced the earlier 1971 Sectional Titles Act. The new Act was heavily based on the Strata Titles Act 17 of 1961 of New South Wales, Australia.

The Sectional Titles Act 95 of 1986 created a new type or class of property defined as a "unit." The unit can be owned by an individual. The unit comprises of a part of the building or "section" and an undivided share in the common parts of the building or land known as the "common property."

Being the owner of a sectional title unit also means that the individual will automatically become a member of an association of sectional owners. The entire sectional scheme is governed by the association which is called a Body Corporate.

Another form of collective ownership and an alternative to Sectional Title ownership is Share Block ownership. In terms of the Share Blocks Control Act, 59 of 1980, a single entity referred to as a Share Block company, either owns or controls an immovable property. Members of the Share Block company acquire personal rights of occupation of specific parts of the property based on their membership in the Share block company.

One becomes a member in the Share Block company by purchasing shares in the company and this in turn provides the company with share capital enabling the company to either purchase property or construct additional structures. The purchase of a share in the Share Block company provides the holder of the share with the right to use and occupy a specific portion of the immovable property.

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CHAPTER 106ZA PROPERTY LAW IN SOUTH AFRICA

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§ 106ZA.07 Taxation

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The primary form of taxation on the acquisition of immovable property in South Africa is prescribed by the Transfer Duty Act, 40 of 1949. In terms of the Transfer Duty Act, 40 of 1949, transfer duty is payable on the acquisition of immovable property, on the transfer of real rights and on the cancellation of real rights. Transfer duty is a form of government tax and is payable prior to registration taking place in the Deeds Registry. It is payable to the South African Revenue Service.

The amount of transfer duty payable is calculated as a percentage of the total consideration paid for the property. Depending on the purchase price of the property, transfer duty varies between 0% and 8% for individuals, and 10% for juristic persons.

In certain limited cases, Value Added Tax (VAT) can be raised on the sale of immovable property. The obligation to pay VAT largely depends on the nature and identity of the seller. VAT is charged at the rate of 14% of the purchase price of the property. VAT is a form of government tax and is payable to the South African Revenue Service.

When selling an immovable property that is not your principle residential property, and if the property is sold for over one million rand more than it was purchased for, Capital Gains Tax might be levied by the South African Revenue Service on the consideration received by the seller from the purchaser.

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Supp. to § 106ZA.01 History of Property Law in South Africa

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§ 106ZA.01(a) Colonization [Go To Main]

Prior to the arrival of the Colonialists from Europe, the majority of the indigenous inhabitants of South Africa were nomadic and did not recognize the concept of individual land ownership. The area of land governed by the tribe was owned or vested in the monarch that governed the tribe; alternatively, in the tribe itself.

In 1652, the Dutch East India Company established a settlement at the Cape under Jan van Riebeeck. With their arrival, a very simple system of registration of land began. This early land registration was based on a *placaat* of Charles V of Holland, which was passed in 1529. The *placaat* provided that every sale of immovable property was to occur in the presence of a Judge. A Dutch edict of 1650 also provided that written registers should be kept of all such transactions.

An early issue that arose in the Cape was that there were no Judges present before whom such transactions could take place. As a solution, two members of the *Politieke Raad* were appointed so that deeds could be executed. Title Deeds were executed and registered in this manner until 1828, after which a Registrar of Deeds was formally appointed due to the establishment of a Supreme Court. The office of Registrar of Deeds was established in terms of Ordinance 39 of 1828.

In 1828, the Registrar of Deeds had the additional task of being the Registrar of slaves.

As settlers arrived at the Cape from Europe, they were granted land so that the development of the land could commence and communities could be established. These transfers were called "Grants" and were referred to as such because they described the very first time that a portion of land was transferred to and owned by an individual from the state.

Prior to 1882, no formal land registers were maintained. Grants and Deeds of Transfer were simply numbered and placed in chronological order. Registers recording the history of each portion of land and a system of numbering portions of land for identification purposes did not exist. In addition, there was no Index or Register kept of the owners of the various portions of land. This made ascertaining the identity of the owner of a specific portion of land an

incredibly arduous task.

Prior to 1844, Grants and Deeds were drafted by Government officials. In 1844, Advocates were authorized to do so.

In 1859, due to intensifying public dissatisfaction as a result of delays in the Deeds Office at Cape Town, the Government appointed a committee to investigate possible alternative methods of registration and transfer of land. The committee recommended that land registers should be created in which the Grant and subsequent registration history of each portion of land could be recorded. Sadly, only farm registers were opened and portions of land were never properly identified.

Land was not granted to the indigenous people. During this period, land was taken from the indigenous tribes that inhabited the Cape, and as expansion continued inland, this trend continued. This conduct caused great tension between the colonizers and the local tribes, such as the Xhosa and Zulu, which escalated and resulted in well-documented bloodshed.

The discovery of diamonds in the Northern Cape in 1867 and gold in the Witwatersrand area in 1886 changed South Africa forever and resulted in both an economic and population boom in the respective areas.

There was also conflict between the Dutch and British settlers, who initially arrived at the Cape in 1795. This led to the first Anglo-Boer war in 1880, and a second in 1899.

§ 106ZA.01(b) The Union of South Africa [Go To Main]

On May 31, 1910, the Union of South Africa was established. Four colonies existed in South Africa at the time; namely, the Cape, Natal, the Orange Free State and the Transvaal. The Union was a self-governing authority within the British empire, and negotiations excluded the majority black population and deprived them of more of their land. This led to the formation of the African National Congress (ANC) in 1912.

The Black Land Act 27 of 1913, together with the Natives (Urban Areas) Act 21 of 1923 limited black land ownership to existing tribal territories--a result of which was the calculated separation of the races.

The Union Statute, Act 13 of 1918 was the first legislation passed governing the registration of deeds and the transfer of immovable property within the Union. The Union Statute was repealed and replaced by the Deeds Registries Act 47 of 1937.

This Act sets out the procedure and requirements for acquiring rights to land. The main purpose of the Deeds Registries Act is to regulate administrative aspects of the registration of land and to provide owners with protection and security.

The Deeds Registries Act is a combination and codification of the principles of the transfer of land ownership and the administration thereof in South Africa. The Deeds Registries Act is primarily concerned with the transfer and registration of real rights to immovable property.

§ 106ZA.01(c) The Apartheid Era [Go To Main]

The National Party (NP) came into power in 1948 when they were successful in the national election. Shortly thereafter, the National Party enacted the policy of separate development of the races, otherwise known as "Apartheid." Apartheid became official government policy.

Under Apartheid, black people were severely restricted to certain occupations, paid far lower wages than other citizens for similar work, and could not vote. Only white people could vote or run for public office. People of Asian-Indian descent and those of mixed race also had very limited political rights.

In 1950, the government promulgated legislation providing for the creation of Bantu nations or "Bantustans." The Group Areas Act 41 of 1950 resulted in the physical separation of the races by creating different residential areas for each of the different race groups, as prescribed by the Act.

This led to "forced removals" of entire communities in circumstances where they were living in the "wrong" areas. The Group Areas Act further prevented black people from purchasing, owning, or leasing property in areas designated for other race groups.

Due to the ongoing oppression, the black majority began to rise up and protest. On March 21, 1960, sixty-nine black protestors were killed by police and government officials at Sharpeville.

South Africa left the commonwealth in 1961 and became a Republic.

In 1964, the Rivonia Trials were held and Nelson Mandela, Walter Sisulu and other ANC activists were sentenced to life imprisonment for Treason due to their opposition to Apartheid.

In 1976, approximately six hundred people were killed in anti-Apartheid protests. During 1977, the United Nations Security Council imposed a mandatory arms embargo against South Africa. On October 19, 1977, several political organizations, including the ANC, and various newspapers, were banned.

During June 1988, approximately two million black South African workers staged a huge strike in defiance of Apartheid laws. Due to ever-increasing national and international pressure, the then President, P W Botha, resigned on August 14, 1989 and was replaced by F W De Klerk.

In 1990, the government lifted its ban on the ANC, PAC and other various political parties. On February 11, 1990, Nelson Mandela was released from prison after serving twenty-seven years.

In 1993, negotiations took place between the relevant role players, in terms of which basic principles for a new democratic Constitution were agreed. During 1993, an interim Constitution was promulgated providing for non-racial, multi-party democracy, the creation and implementation of a Bill of Rights and the end of Apartheid. During 1993, the Interim Constitution came into effect and paved the way for the creation of the Final Constitution.

In April 1994, South Africa held its first non-racial democratic elections, as a result of which Nelson Mandela was inaugurated as the country's first democratically elected President.

§ 106ZA.01(d) Democracy Begins [Go To Main]

§ 106ZA.01(d)(1) Constitution Invalidates Race-Related Property Restrictions

On February 4, 1997, South Africa's Final Constitution came into effect. The Constitution of the Republic of South Africa, Act 108 of 1996, is the supreme law of the Republic of South Africa, and any law or conduct inconsistent with it is therefore invalid. The Bill of Rights contained in Chapter 2 thereof is the cornerstone of democracy in South Africa.

It enshrines the rights of all people in the country and affirms the democratic values of human dignity, equality and

freedom.

Section 25(1) of the Final Constitution states that "no one may be deprived of property except in terms of law of general application, and no law may permit arbitrary deprivation of property." Subsection (5) goes on to say that "the state must take reasonable legislative and other measures, within its available resources, to foster conditions which enable citizens to gain access to land on an equitable basis."

Section 25 read with sections 8(1) and 39(2) of the Final Constitution envisages the development of South African property law in terms of the spirit, purport and object of the Bill of Rights.

Section 2 of the Final Constitution has ensured that all of the discriminatory Apartheid laws that are in obvious conflict with Constitutional principles, are now invalid and have been repealed. To this extent, all references to "race" have been removed from all documents registered in the Deeds Registries and every South African citizen, regardless of their race, is free to own, purchase and lease property within the Republic.

§ 106ZA.01(d)(2) Constitution Provides for Land Redistribution

Under the new Constitutional dispensation, the previously disadvantaged majority black population who were deprived of their land and forcibly removed from their homes are now afforded the opportunity of regaining the land under what is referred to as "land redistribution."

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Supp. to § 106ZA.02 An Introduction to South African Property Law

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§ 106ZA.02(a) The South African Land Registration System [Go To Main]

South Africa's legal system is comprised of both common law and civil law--civil law in the form of legislation and the rules and regulations that inform and give content to the legislation. South African common law is uncodified and is comprised of case law that is influenced by English and Roman-Dutch law, depending on the specific area concerned.

South African property law is primarily based on the ancient principles of Roman law, but some traces of Germanic law can also be identified. Accordingly, many of the rights that one has in and to property in South African law are based on ancient Roman law principles that have survived the test of time and are still widely applicable throughout Europe.

South Africa has one of the most comprehensive and secure land registration systems in the world. Every portion of land in South Africa has been measured and surveyed by a trained and educated land surveyor. The property is then plotted and depicted on a diagram or a general plan which is kept in the Surveyor General's office for the area where the property is situated.

As a result, whenever an individual needs to ascertain the particulars of a specific portion of land, they can simply conduct a search at the Surveyor General's office on that property. The diagram will reflect the boundary lines, size and rights that are registered over or in favor of that portion of land. The deeds registry will not permit a portion of land to be transferred to another individual if a diagram or general plan does not exist for that portion of land.

Under the South African land registration system a person can virtually always ascertain the identity of the owner of a specific portion of land.

Every portion of land is registered in a deeds registry. The deeds registry or deeds office is a public office, state owned and controlled, and its records and the documents kept there are open for inspection by the public. Thus, any individual can inspect the details of a property or its owner.

Whenever a portion of land is transferred, hypothecated, alienated, or granted, a certified copy of the diagram,

mentioned above, together with the deed recording the details of the property and the reason for the transfer or hypothecation, is executed and registered at the deeds registry. Once it is executed, the seal and signature of the Registrar of Deeds is placed thereon and it is filed for record purposes at the particular deeds registry.

The financial institutions that grant loans to purchasers to purchase land register bonds over the land in order to record and secure their real rights in and to the said property. This hypothecation is also recorded and registered in the deeds registry and the deed pertaining to the portion of land is endorsed in order to reflect the hypothecation.

The land cannot be transferred or disposed of unless the bond has either been cancelled or the owner has obtained the financial institution's consent to register a further bond over that portion of land. A bond cannot be cancelled unless the bond holder has provided its written consent, in the prescribed form, to do so.

The documents necessary for the transfer, hypothecation, and alienation of land are prepared and drafted by a conveyancer. A conveyancer is an admitted attorney who has passed a practical examination in the law and practice of conveyancing and who has been admitted as a conveyancer by the High Court of South Africa. The conveyancer will appear in the Deeds Registry in order to execute the deeds in the presence of the registrar of deeds.

§ 106ZA.02(b) The Deeds Registry [Go To Main]

There are nine Deeds Registries in South Africa. They are located in Pretoria, Johannesburg, Bloemfontein, Pietermaritzburg, Cape Town, Vryburg, King Williams Town, Nelspruit and Kimberley.

Each Deeds Registry has a very specific jurisdiction with regards to the position of the land that is to be registered and recorded in it. The person in charge of each Deeds Registry is called the Registrar of Deeds.

The Chief Registrar of Deeds is based in Pretoria and it is the duty of the Chief Registrar of Deeds to ensure uniformity in the procedures and practices of the Deeds Registries and to maintain very high standards for the deeds.

To ensure that the standards do not drop, controllers and examiners are employed by every Deeds Registry to examine and inspect every deed submitted for registration. If a deed does not comply with the requirements of the Deeds Registries Act 47 of 1937, it is rejected and cannot be registered.

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Supp. to § 106ZA.03 Immovable and Movable Property Defined

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§ 106ZA.04(a) Real Rights to Property [Go To Main]

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Section 102 of the Deeds Registries Act 47 of 1937 defines a real right as "including any right which becomes a real right upon registration." South African law does not have a closed list of real rights and new real rights in and to property can develop.

§ 106ZA.04(b) Securing Real Property Rights [Go To Main]

One secures and protects a real right by registering the right in the Deeds Office. In terms of section 3(1) of the Deeds Registries Act 47 of 1937, the Registrar of Deeds has a duty to register specific real rights as set out in that section.

In the case of *Denel (Pty) Ltd v Cape Explosive Works Limited* 1999 (2) SA 419 (T), at page 438B , the court confirmed that when a real right is established by way of registration of the right in the Deeds Registry, it is "maintainable against the whole world."

§ 106ZA.04(c) Acquiring Real Property Rights [Go To Main]

In South African property law there is a distinction between original and derivative acquisition of real rights. The original acquisition of a real right is a unilateral act carried out by the person who acquires that real right. The real right is newly created and is not obtained from a predecessor. The real right is thus free from any limitation. Prior to the unilateral action taking place, the real right did not exist. The best example of this would be expropriation by the government.

The derivative acquisition of a real right is a bilateral transaction between the person who is the holder of the real right and the person who wishes to acquire the real right. The person acquiring the real right acquires the right with all of the limitations and blemishes that the real right is subject to. A good example of such a transaction is the purchase and sale of land by way of a written agreement of sale.

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Supp. To CHAPTER 106ZA PROPERTY LAW IN THE REPUBLIC OF SOUTH AFRICA

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Supp. to § 106ZA.05 Real Rights in Property

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§ 106ZA.05(a) Ownership [Go To Main]

Private ownership is universally a highly valued and protected real right. South African property law, ownership is the real right that potentially confers the most complete or comprehensive control over a thing, which means that the right of ownership entitles owners to do with their property as they see fit, subject to the limitations imposed by public and private law. n1

In the case of *Gien v Gien* 1979 (2) SA 1113 (T) at page 1120 , the court defined ownership as:

> *"The right of ownership is the most comprehensive real right that a person can have in respect of a thing. The point of departure is that a person can, in respect of immovable property, do with and on his property as he pleases. This apparently unfettered freedom is however, a half-truth. The absolute power of an owner is limited by the restrictions imposed thereon by the law."*

Ownership of immovable property can be derived via a grant, private treaty or sale, prescription or expropriation. Ownership is unlimited in duration and is an independent real right as it is not dependant on or derived from any other right.

Ownership of immovable property in South Africa is effected by way of entering into and concluding a written agreement of sale in terms of the provisions of the Alienation of Land Act 68 of 1981.

A conveyancer then drafts a deed of transfer and transfers the property from the seller to the purchaser by executing and registering the deed in the Deeds Registry. The deed of transfer constitutes the purchaser's title deed to the property. Ownership passes to the purchaser upon registration of transfer.

§ 106ZA.05(b) Servitudes [Go To Main]

Servitudes are limited real rights in immovable property that are registered and recorded in the Deeds Registry. A servitude entitles the holder thereof to either:

1. The undisturbed use and enjoyment of another person's property; or

2. To demand that another person refrain and desist from exercising certain rights that they have stemming from their right of ownership with respect to their property.

In *Dreyer v Letterstedt's Executors* (1865) 5 Searle 88 at page 99, the court defined a servitude as "a real right to an advantage out of the property of another."

It is the direct relationship of the real right of servitude between the holder thereof and the property over which they hold the servitude that distinguishes it from a personal contractual right with the owner of the property over which they enjoy the servitude.

South African law distinguishes between two different types of servitudes, namely personal and praedial servitudes. A praedial servitude is a servitude between two pieces of land. The servitude is created in favor of the dominant tenement property over the servient tenement property. The servitude confers a real right on the dominant tenement property and creates a burden on the servient tenement property.

The owner of the dominant tenement property is entitled to enforce the servitude over the servient tenement property. The servitude exists with the property and thus transfers from owner to owner and continues to exist despite the property being transferred to a new owner.

A personal servitude is a servitude created in favour of a specific individual to whom it provides the right to the undisturbed use and enjoyment of another's property.

The personal nature of the servitude means that it is not transferable and ceases to exist when the individual in whose favor it was created, dies. Good examples common personal servitudes are *usufructs, usus* and *habitatio*.

Servitudes can be created by the state government by way of a grant over state land, agreement between individuals and owners of land, statute or prescription.

One can also approach the High Court of South Africa to enforce or create a servitude. The court order granted by the High Court will either bring the servitude into existence or compel compliance with an existing servitude.

§ 106ZA.05(c) Mortgage Bonds [Go To Main]

A mortgage bond is a form of hypothecation of immovable property which confers a limited real right to an individual or entity over the property of another with the object of securing payment of a debt or performance of an obligation. n2

Traditionally, a mortgage bond is a bilateral written agreement concluded between a debtor (traditionally the owner of the property) and a creditor (traditionally a financial institution, such as a bank) in terms of which the creditor obtains a real right over the immovable property of the debtor as security for the fulfilment of the debtor's obligations in terms of the agreement.

A mortgage bond is classified as real security in that if the debtor is unable to meet the obligations in terms of the agreement (*i.e.*: fails to repay the debt), the creditor can demand that the immovable property, being the asset bonded as security, be sold and that the proceeds of the sale are used to satisfy the claim.

A mortgage bond is a written instrument that is signed by both the creditor and the debtor. It is then registered by a conveyancer in a Deeds Registry. A mortgage bond is cancelled by registering and executing a deed, in the prescribed form, in a Deeds Registry. A mortgage bond can only be cancelled with the consent of the creditor.

§ 106ZA.05(d) Lease [Go To Main]

A lease is a bilateral agreement whereby one person or other entity agrees to provide another with the temporary, undisturbed, use and enjoyment of property in return for the payment of rental.

In terms of the provisions of the Formalities with respect to Leases of Land Act, 18 of 1969, a long lease is a lease for a period of no less than ten years, for the length of the natural life of the lessee, or is renewable from time to time at the behest of the lessee indefinitely, which periods, when added together, constitute a period not less than ten years.

In terms of section 1(2)(a) of the Formalities in respect of Leases of Land Act, 18 of 1969, a long lease is not valid for a period of greater than ten years unless it has been registered in the deeds registry against the title deed of the leased property.

The title deed of the leased property will then be endorsed with an annotation reflecting the fact that a long lease has been entered into in relation to that property. The long lease, once registered, provides the lessee with a limited real right in and to the leased property.

FOOTNOTES:
(n1)Footnote 1. Johannesburg Municipal Council v. Rand Townships Registrar 1910 TPD 1314 at 1319.

Regal v African Superslate (Pty) Ltd 1963 (1) SA 102 (A) at 106 to 107.

Page 91 Silberberg and Schoeman's The Law of Property, Fifth Edition.

(n2)Footnote 2. Grotius 2 48 1.

Page 357 Silberberg and Schoeman's The Law of Property, Fifth Edition.

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Supp. to § 106ZA.06 Sectional Title and Shareblock Ownership

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In Roman law, the principle of *superficies solo cedit* provides that an individual who owns land also owns all of the buildings that are situated on the land. There is no differentiation between the land and the immovable structures situated thereon. In terms of the Deeds Registries Act 47 of 1937, land is transferred without any reference to the buildings or structures thereon. This means that prior to legislative enactments, it was impossible for an individual to be the owner of a defined portion of a piece of land or part of a building. With residential property becoming increasingly expensive and rare, the need for apartment blocks to be built and sold was becoming great.

The South African legislature created what is now commonly referred to as "sectional ownership," or the ownership a part of a portion of land or a building. On September 17, 1986, the Sectional Titles Act 95 of 1986 was promulgated. This new Act replaced the earlier 1971 Sectional Titles Act. The new Act was heavily based on the Strata Titles Act 17 of 1961 of New South Wales, Australia.

The Sectional Titles Act 95 of 1986 created a new type or class of property defined as a "unit." The unit can be owned by an individual. The unit comprises of a part of the building or "section" and an undivided share in the common parts of the building or land known as the "common property."

Being the owner of a sectional title unit also means that the individual will automatically become a member of an association of sectional owners. The entire sectional scheme is governed by the association which is called a Body Corporate.

Another form of collective ownership and an alternative to Sectional Title ownership is Share Block ownership. In terms of the Share Blocks Control Act, 59 of 1980, a single entity referred to as a Share Block company either owns or controls an immovable property. Members of the Share Block company acquire personal rights of occupation of specific parts of the property based on their membership in the Share block company.

One becomes a member in the Share Block company by purchasing shares in the company and this in turn provides the company with share capital enabling the company to either purchase property or construct additional structures. The purchase of a share in the Share Block company provides the holder of the share with the right to use and occupy a

specific portion of the immovable property.

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Supp. to § 106ZA.07 Taxation

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The primary form of taxation on the acquisition of immovable property in South Africa is prescribed by the Transfer Duty Act, 40 of 1949. In terms of the Transfer Duty Act, 40 of 1949, transfer duty is payable on the acquisition of immovable property, on the transfer of real rights and on the cancellation of real rights. Transfer duty is a form of government tax and is payable prior to registration taking place in the Deeds Registry. It is payable to the South African Revenue Service.

The amount of transfer duty payable is calculated as a percentage of the total consideration paid for the property. Depending on the purchase price of the property, transfer duty varies between 0% and 8% for individuals, and 10% for juristic persons.

In certain limited cases, Value Added Tax (VAT) can be imposed on the sale of immovable property. The obligation to pay VAT largely depends on the nature and identity of the seller. VAT is charged at the rate of 14% of the purchase price of the property. VAT is a form of government tax and is payable to the South African Revenue Service.

When selling an immovable property that is not one's principle residential property, and if the property is sold for over one million rand more than it was purchased for, Capital Gains Tax might be levied by the South African Revenue Service on the consideration received by the seller from the purchaser.

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Special Tax Alert: Housing Assistance Act of 2008

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§ SA0010b.syn Synopsis to Chapter SA0010b: Special Tax Alert: Housing Assistance Act of 2008

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Special Tax Alert: Housing Assistance Act of 2008

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Overview

On July 30, 2008, the President signed into law the ***American Housing Rescue and Foreclosure Prevention Act of 2008***, n1 designed to help the housing market and reform lending practices. Included in that Act is the ***Housing Assistance Tax Act of 2008***, n2 which provides some tax breaks for new home buyers and current home owners, as well as brings changes to the **REIT rules**, the **low-income housing tax credit**, the **tax-exempt bond requirements**, **and other technical tax changes**. This Alert will summarize the more significant tax changes in the *Housing Assistance Tax Act*, **including the changes to the exclusion of gain on sale of a principal residence.**

FOOTNOTES:
(n1)Footnote 1. H.R. 3221, P.L. 110-289.

(n2)Footnote 2. Division C of H.R. 3221, Sec 3000(a).

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Special Tax Alert: Housing Assistance Act of 2008

1-SA0010b Thompson on Real Property, Thomas Editions § STA.01

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§ STA.01 Credit for First-Time Home Buyers

The *Housing Assistance Tax Act* provides for a refundable tax credit equal to the lesser of $7,500 ($3,750 for married individuals filing separately) or 10 percent of the purchase price of a principal residence. n3 The credit is allowed for the tax year in which the taxpayer purchases the home. The credit phases out for taxpayers with modified adjusted gross income between $75,000 and $95,000 ($150,000 to $170,000 for joint returns), n4 and is not available for purchases from a related party. n5 A taxpayer is considered a first-time home buyer if the individual (and the individual's spouse) had no ownership interest in a principal residence during the three-year period prior to the date of purchase of the home. n6 However, a taxpayer will not be entitled to the credit if (1) the taxpayer was entitled to the Washington D.C. homebuyer credit for any prior year; n7 (2) the taxpayer's home financing is from tax-exempt mortgage revenue bonds; n8 (3) the taxpayer is a non-resident alien; n9 or (4) the taxpayer disposes of the residence (or it ceases to be the taxpayer's principal residence) before the close of the tax year for which the credit otherwise would be allowable. n10

The credit is recaptured ratably, with no interest charge, over 15 years, beginning in the second taxable year after the year in which the home is purchased. n11 Thus, the credit is more like an interest-free loan from the government to the taxpayer. For example, if the taxpayer purchases the home in 2008, and a $7,500 credit is allowable on the 2008 return, annual repayments of $500 per year for 15 years [$7,500 / 15 years, or 6 2/3 percent of the credit] begin with the 2010 return. If the taxpayer sells the home (or ceases to use the property as a principal residence), prior to complete repayment of the credit, any remaining repayment amount is due on the tax return for the year in which the home is sold (or is no longer used as a principal residence). n12 There are exceptions to this recapture payment upon certain events, such as death, certain involuntary conversions, transfers between spouses or incident to divorce, and where gain on sale does not exceed the recapture amount. n13

The provision applies to a principal residence purchased by the taxpayer on or after April 9, 2008 and before July 1, 2009. n14 In addition, a taxpayer purchasing a home during the eligible period in 2009 can elect to treat the purchase as if it occurred on December 31, 2008 for purposes of taking the credit on their 2008 return. n15

FOOTNOTES:
(n1)Footnote 3. I.R.C. § 36(a), (b); *H.R. 3221 Sec. 3011.*

(n2)Footnote 4. I.R.C. § 36(b)(2).

(n3)Footnote 5. I.R.C. § 36(c)(3)(A)(i).

(n4)Footnote 6. I.R.C. § 36(c)(1). The term "principal residence" has the same meaning as in I.R.C. § 121.

(n5)Footnote 7. I.R.C. § 36(d)(1), referring to the credit in I.R.C. § 1400C.

(n6)Footnote 8. I.R.C. § 36(d)(2).

(n7)Footnote 9. I.R.C. § 36(d)(3).

(n8)Footnote 10. I.R.C. § 36(d)(4).

(n9)Footnote 11. I.R.C. § 36(f).

(n10)Footnote 12. I.R.C. § 36(f)(2).

(n11)Footnote 13. I.R.C. § 36(f)(3) & (4).

(n12)Footnote 14. I.R.C. § 36(h). If a home is being constructed, it will be considered as purchased on the date that the taxpayer first occupies the residence. I.R.C. § 36(c)(3)(B).

(n13)Footnote 15. I.R.C. § 36(g).

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Special Tax Alert: Housing Assistance Act of 2008

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§ STA.02 Property Tax Deduction for Non-Itemizers

The *Housing Assistance Tax Act* creates a new standard deduction for state and local real property taxes. n16 Prior to this Act, a taxpayer had to itemize deductions, rather than take a standard deduction, in order to deduct property taxes. Note that the standard deduction for the 2008 tax year is $ 5,450 for unmarried taxpayers and $10,900 for joint returns. n17 Thus, taxpayers would itemize their deductions when the total of all itemized deductions exceeded these amounts.

The *Housing Assistance Tax Act* allows a "real property tax deduction" for non-itemizers in addition to the standard deduction amount indicated above. n18 Taxpayers can deduct up to $500 for single taxpayers ($1,000 for joint returns) for real property taxes paid. n19

The usefulness of this provision is quite limited. The deduction is currently available only for the 2008 tax year. n20 In addition, most taxpayers with a home mortgage will have enough itemized deductions from home mortgage interest and property taxes to justify itemizing their deductions rather than taking the standard deduction.

Thus, this new provision will mainly benefit those homeowners who have no mortgage on their home. Moreover, unlike the first-time home buyers' credit discussed above, which is a refundable tax credit, the property tax is a deduction, meaning that the actual economic benefit to the taxpayer depends on the taxpayer's tax bracket. For example, a $1,000 property tax deduction to a couple in the 15 percent tax bracket is only equal to a $150 savings.

FOOTNOTES:

(n1)Footnote 16. H.R. 3221, Sec. 3012, amending I.R.C. § 63.

(n2)Footnote 17. *Rev. Proc. 2007-66, 2007-45 I.R.B. 970.*

(n3)Footnote 18. I.R.C. § 63(c)(1)(C).

(n4)Footnote 19. I.R.C. § 63(c)(7). For taxpayers itemizing their deduction, the full amount of property taxes will still be deductible as an itemized deduction. I.R.C. § 164(a)(1).

(n5)Footnote 20. I.R.C. § 63(c)(1)(C).

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§ STA.03 Changes to Exclusion of Gain on Sale of Principal Residence

Under current law, homeowners may exclude gain on the sale of their principal residence, provided certain conditions are met. n21 These rules allow the exclusion of $250,000 of gain on the sale of a principal residence ($500,000 for joint returns), provided the taxpayer both owned and used the residence as his or her principal residence for two out of the five years preceding the sale. Although vacation or rental properties do not qualify for the gain exclusion because they are not the "principal residence" of the taxpayer, taxpayers could move into a second residence and convert it to their principal residence for two years, and thus qualify for the gain exclusion. Prior to the *Housing Assistance Tax Act*, all appreciation in such a property was eligible for gain exclusion, provided the dwelling had been used as a principal residence for at least two years.

The new provision enacted by the *Housing Assistance Tax Act* provides that gain allocated to periods of nonqualified use are not eligible for the I.R.C. Section 121 exclusion. n22 The "nonqualified use" is the period that the dwelling was not used by the taxpayer or the taxpayer's spouse as a principal residence. Thus, the new requirement requires the recognition of gain from sale in an amount equal to the portion of time the house was not used as a principal residence compared to the total period the taxpayer owned the property. The balance of the gain on sale remains eligible for the $250,000/$500,000 exclusion.

This new provision applies only to sales or exchanges after 2008. n23 In addition, periods before 2009 are not considered "nonqualified use," regardless of their actual use. n24 Thus, this tax planning opportunity has not been shut down retroactively.

For example, assume a taxpayer buys a property on January 1, 2009, for $400,000, and uses it as a rental property for two years, claiming depreciation deductions of $20,000. On January 1, 2011, the taxpayer converts the property to his principal residence. On January 1, 2013, the taxpayer moves out, and on January 1, 2014, the taxpayer sells the property for $700,000. $20,000 of the gain, attributable to prior depreciation deductions, is not eligible for the exclusion under I.R.C. § 121 (both prior to and after the *Housing Assistance Tax Act* changes). n25 Of the remaining $300,000 of gain, 40% of the gain (2 years of rental divided by five years of ownership), or $120,000, is allocated to nonqualified use and is not eligible for the gain exclusion under I.R.C. § 121. Since the remaining gain of $180,000 is less than the maximum

of $250,000 that can be excluded by a single taxpayer, the $180,000 of gain is excluded from income. n26

FOOTNOTES:
(n1)Footnote 21. I.R.C. § 121.

(n2)Footnote 22. I.R.C. § 121(b)(4), enacted by *H.R. 3221 Sec. 3092.*

(n3)Footnote 23. *H.R. 3221 Sec. 3092*(b).

(n4)Footnote 24. I.R.C. § 121(b)(4)(C)(i).

(n5)Footnote 25. I.R.C. § 121(d)(6).

(n6)Footnote 26. Joint Committee on Taxation, Technical Explanation of Division C of H.R. 3221, JCX 63-08.

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Special Tax Alert: Housing Assistance Act of 2008

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§ STA.04 Changes to REIT Rules

The *Housing Assistance Tax Act* made several changes to the technical requirements of Real Estate Investment Trusts ("REITs"). Specifically:

- Foreign currency gain recognized under I.R.C. § 987 or § 988 can be excluded solely for the computation of the REIT's 75% and 95% income tests. n27 The excluded amounts are excluded from both the numerator and the denominator in the income test calculations. n28

- The percentage of the value of REIT assets that can be held in securities of a taxable REIT subsidiary is increased from 20% to 25%. n29

- The prohibited transaction safe harbor for dealer sales is changed by reducing the holding period from four years to two years. n30 In addition, the sales test of the prohibited transaction safe harbor rules is changed from 10% of the aggregate bases of the REIT assets to either 10% of aggregate bases or 10% of the fair market value of the assets. n31

- The Act expands the taxable REIT subsidiary exception for hotel, motel, and other transient facilities so that it also applies to health care facilities. Thus, a taxable REIT subsidiary is permitted to rent a health care facility from its parent REIT and hire an independent contractor to operate the facility. The rents paid to the REIT parent will be qualifying rental income for purposes of the 75% and 95% income tests. n32

- The changes to the REIT provisions are generally effective for tax years beginning after the date of enactment. However, the rules treating certain foreign currency gain as excluded income for purposes of the income test apply to income recognized after the date of enactment, and the provisions relating to the prohibited transactions tax safe harbor apply to sales made after the date of enactment. n33

FOOTNOTES:

(n1)Footnote 27. I.R.C. § 856(c)(2), (c)(3).

(n2)Footnote 28. I.R.C. § 856(n), added by *H.R. 3221 Sec. 3031*(a).

(n3)Footnote 29. I.R.C. § 856(c)(4)(B)(ii), amended by *H.R. 3221 Sec. 3041*.

(n4)Footnote 30. I.R.C. § 856(b)(6)(C) and (D), amended by *H.R. 3221 Sec. 3051*(a).

(n5)Footnote 31. I.R.C. § 856(b)(6)(C)(iii), amended by *H.R. 3221 Sec. 3052.*

(n6)Footnote 32. I.R.C. § 856(d)(8)(B); § 856(d)(9); and § 856(l)(3), amended by *H.R. 3221 Sec. 3061*.

(n7)Footnote 33. H.R. 3221, Sec. 3071.

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Special Tax Alert: Housing Assistance Act of 2008

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§ STA.05 Low Income Housing Tax Credit Changes

The *Housing Assistance Tax Act* also liberalized certain aspects of the low-income housing tax credit.

- The low-income housing credit provided in I.R.C. § 42 may be claimed over a ten-year period by owners of certain residential rental properties that are occupied by tenants having incomes under specified levels. However, the low-income housing credit is allowable only if the owner of the qualified building receives a housing credit allocation from the State or local housing credit agency. The aggregate credit authority provided annually to each state for 2008 is $2.00 per resident, with a minimum amount allowed for small population states. The *Housing Assistance Tax Act* increases from $2.00 per resident to $2.20 per resident the allocation authority provided annually to each state for calendar years 2008 and 2009, and increases the minimum cap for small population states by 10% for those years. n34

- The calculation of the annual low-income housing credit amount is designed to produce a credit equal to 70% of the building's qualified basis over the 10-year period of the credit (for non-Federally subsidized construction). The credit percentage for each year is adjusted monthly by the I.R.S. based on the Applicable Federal Rate. Because interest rates have been so low, the actual percentage for this credit had been about 7.8 percent annually. The *Housing Assistance Tax Act* provides a temporary applicable percentage of nine percent for newly-constructed non-Federally subsidized buildings placed in service after the date of enactment and before December 31, 2013. n35

- If a portion of the eligible basis of a low-income building is Federally-subsidized, the building is ineligible for the 70% credit and instead may be eligible for the 30% credit. The *Housing Assistance Tax Act* changes the definition of Federal subsidy for these purposes to include only obligations the interest on which is exempt from tax under I.R.C. § 103. The definition of Federal subsidy used to include Federal loans if the interest rate was less than the Applicable Federal Rate. Thus, effective for buildings placed in service after the date of enactment, additional buildings may become eligible for the 70% credit. n36

- A higher credit amount (91% instead of the 70% credit, and 39% instead of the 30% credit) is currently allowed for buildings located in certain high-cost areas. The *Housing Assistance Tax Act* adds an additional type of building eligible for the higher credit amount: any building designated by the state housing credit agency as requiring the enhanced credit in order for such building to be financially feasible. n37

In addition, certain other technical changes were made to the low-income housing credit, such as:

- Increasing the amount that must be spent on rehabilitation expenditures in order to qualify those amounts for a low-income housing credit; n38

- Increasing the amount of the building that may be used for community service facilities; n39

- Modifying the basis reduction rule for federal grants that are received during the compliance period; n40

- Modifying the definition of "related party" for purposes of the prohibition on purchasing a qualifying building from a related party; n41

- Modifying the exceptions to the rule requiring a period of at least ten years between the date of an eligible building's acquisition and the date it was placed in service; n42

- Eliminating the present-law prohibition against providing the low-income housing credit to buildings receiving moderate rehabilitation assistance under section 8(e)(2) of the United States Housing Act of 1937; n43

- Modifying the carryover allocation rule, which allows an allocation of the low-income housing credit after the close of the calendar year in which the building is placed in service; n44

- Eliminating the bond-posting requirement upon a change in ownership of the building, to avoid recapture of the credit, and replacing it with an extended statute of limitations; n45

- Adding two additional criteria that a State must use in its allocation of credits among potential low-income housing projects: (1) the energy efficiency of the project, and (2) the historic nature of the project; n46

- Adding an additional exception to the general rule that student housing is not eligible for the low-income housing credit in the case of a student who was previously under the care and placement responsibility of a foster care program; n47

- Modifying the measurement of an area's median gross income, for qualification for low-income housing, for projects in certain rules areas; n48

- Clarifying the rule that units in a qualified low-income housing project must be available for use by the general public; n49

- Excluding, in certain circumstances, military basic housing allowances in determining a tenant's low-income eligibility; n50 and

- Excluding, in certain circumstances, military basic housing allowances in determining a tenant's

low-income eligibility; and

- Conforming the tax-exempt bond rules to the low-income housing credit rules in several respects (the "next available unit rule," the rules applicable to full-time students, and the rules concerning single room occupancy units). n51

FOOTNOTES:

(n1)Footnote 34. I.R.C. § 42(h)(3)(I), as amended by *H.R. 3221 Sec. 3001*.

(n2)Footnote 35. I.R.C. § 42(b)(2), as amended by *H.R. 3221 Sec. 3002*(a).

(n3)Footnote 36. I.R.C. § 42(i)(2)(A), as amended by *H.R. 3221 Sec. 3002*(b).

(n4)Footnote 37. I.R.C. § 42(d)(5)(B)(v), as amended by *H.R. 3221 Sec. 3003*(a).

(n5)Footnote 38. I.R.C. § 42(e)(3)(A)(ii), as amended by *H.R. 3221 Sec. 3003*(b).

(n6)Footnote 39. I.R.C. § 42(d)(4)(C)(ii), as amended by *H.R. 3221 Sec. 3003*(c).

(n7)Footnote 40. I.R.C. § 42(d)(5)(A), as amended by *H.R. 3221 Sec. 3003*(d).

(n8)Footnote 41. I.R.C. § 42(d)(2)(D)(ii), as amended by *H.R. 3221 Sec. 3003*(e).

(n9)Footnote 42. I.R.C. § 42(d)(6), as amended by *H.R. 3221 Sec. 3003*(f).

(n10)Footnote 43. I.R.C. § 42(c)(2), as amended by *H.R. 3221 Sec. 3004*(a).

(n11)Footnote 44. I.R.C. § 42(h)(1)(E)(ii), as amended by *H.R. 3221 Sec. 3004*(b).

(n12)Footnote 45. I.R.C. § 42(j)(6), as amended by *H.R. 3221 Sec. 3004*(c).

(n13)Footnote 46. I.R.C. § 42(m)(1)(c), as amended by *H.R. 3221 Sec. 3004*(d).

(n14)Footnote 47. I.R.C. § 42(i)(3)(D)(i), as amended by *H.R. 3221 Sec. 3004*(e).

(n15)Footnote 48. I.R.C. § 42(i)(8), as amended by *H.R. 3221 Sec. 3004*(f).

(n16)Footnote 49. I.R.C. § 42(g)(9), as amended by *H.R. 3221 Sec. 3004*(g).

(n17)Footnote 50. I.R.C. § 142(d)(2)(B)(ii), as amended by *H.R. 3221 Sec. 3005*.

(n18)Footnote 51. I.R.C. §142(d)(3)(C), as amended by *H.R. 3221 Sec. 3008*(a); I.R.C. § 142(d)(2)(C), as amended by *H.R. 3221 Sec. 3008*(b); I.R.C. § 142(d)(2)(D), as amended by *H.R. 3221 Sec. 3008*(c).

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Special Tax Alert: Housing Assistance Act of 2008

1-SA0010b Thompson on Real Property, Thomas Editions § STA.06

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§ STA.06 Changes Related to Tax-Exempt Housing Bonds

The *Housing Assistance Tax Act* has made several changes to temporarily liberalize the rules regarding tax-exempt housing bonds. The Act authorizes an additional $11 billion of volume cap for 2008 for the purpose of issuing qualified mortgage bonds or private activity bonds for qualified residential rental projects. n52 The mortgage bonds issued under the new volume cap may be used to finance either new mortgages or qualified subprime loans. The *Housing Assistance Tax Act* also creates an exception to the "new" mortgage requirement for qualified mortgage bonds by authorizing the use of such bonds to refinance a qualified subprime loan. n53 Furthermore, bonds guaranteed by Federal Home Loan Banks are now eligible for treatment as tax-exempt bonds. n54 Also, the first-time home buyer requirement for qualified tax-exempt mortgage bonds is waived for residences located in Presidentially declared disaster areas. n55

FOOTNOTES:

(n1)Footnote 52. I.R.C. §146(d)(5), as amended by *H.R. 3221 Sec. 3021*(a).

(n2)Footnote 53. I.R.C. §143(k)(12), as amended by *H.R. 3221 Sec. 3021*(b).

(n3)Footnote 54. I.R.C. §149(b)(3)(A)(iv), as amended by *H.R. 3221 Sec. 3023.*

(n4)Footnote 55. I.R.C. §143(k)(11), as amended by *H.R. 3221 Sec. 3026.*

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Special Tax Alert: Housing Assistance Act of 2008

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§ STA.07 Repeal of AMT Limitations on Tax-Exempt Housing Bonds, Low Income Housing Credit, and Rehabilitation Credit

In determining alternative minimum tax ("AMT"), a taxpayer's taxable income is modified to take into account certain preference items. n56 The *Housing Assistance Tax Act* modifies these preference items by providing that tax-exempt interest on (i) certain exempt facility bonds used to provide qualified residential rental projects, (ii) qualified mortgage bonds, and (iii) qualified veterans' mortgage bonds, is not an item of tax preference. n57 In addition, the Act allows the low-income housing tax credit and the rehabilitation credit to offset AMT liability. n58

FOOTNOTES:
(n1)Footnote 56. *See* I.R.C. § 55(b)(2)(B) and § 57.

(n2)Footnote 57. I.R.C. §57(a)(5)(C)(iii), as amended by *H.R. 3221 Sec. 3022*(a).

(n3)Footnote 58. I.R.C. §38(c)(4)(B), as amended by *H.R. 3221 Sec. 3022*(b).

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Special Tax Alert: Housing Assistance Act of 2008

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§ STA.08 Modifications to Gulf Opportunity Zone Incentives

Under current law, a taxpayer who suffers a casualty loss can deduct that loss, subject to certain limitations, in the year in which the loss occurred, or, if a disaster loss was in a Presidentially-declared disaster area, the deduction can be taken in the year prior to the disaster. n59 Any subsequent reimbursements of those losses are generally taken into income when received. The *Housing Assistance Tax Act* contains a provision allowing taxpayers who claimed a casualty loss to a principal residence resulting from Hurricanes Katrina, Rita, or Wilma, and who receive a grant as reimbursement in a subsequent year, to elect to file an amended return for the taxable year in which the deduction was taken, rather than taking the reimbursement amount into income in the taxable year received. The time for filing the amended return is three years after the original due date for filing the tax return or one year after the date of enactment of the *Housing Assistance Tax Act*. Any underpayment of tax resulting from the reduction or elimination of the casualty loss deduction is not subject to any interest or penalty if the tax is paid not later than one year after the filing of the amended return. n60

In addition, the *Housing Assistance Tax Act* removes the deadline of January 1, 2008, for the commencement of construction for self-constructed Gulf Opportunity Zone extension property which qualifies for additional first-year depreciation. However, the placed-in-service date of December 31, 2010, and the progress expenditure date of January 1, 2010 are not modified. n61

FOOTNOTES:
(n1)Footnote 59. I.R.C. § 165(i)(1).

(n2)Footnote 60. *H.R. 3221 Sec. 3082*(a).

(n3)Footnote 61. I.R.C. §1400N(d)(3)(B), as amended by *H.R. 3221 Sec. 3082*(b).

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§ STA.09 Miscellaneous Items

- The *Housing Assistance Tax Act* increases from 35% to 50% the percentage of the property that may be leased to a tax-exempt entity in a disqualified lease without requiring allocation of rehabilitation expenditures under the rehabilitation credit. n62

- In order to avoid withholding on the disposition of a U.S. real property interest by a foreign person, a transferor can issue an affidavit to the transferee of the property, indicating that the transferor is not a foreign person. n63 The *Housing Assistance Tax Act* provides an alternate procedure: in lieu of furnishing a non-foreign affidavit to the transferee, a transferor may furnish such affidavit to a qualified substitute. n64

- Corporations otherwise eligible for bonus depreciation under I.R.C. § 168(k) may elect to claim additional research or minimum tax credits in lieu of claiming depreciation under I.R.C. § 168(k) for eligible qualified property placed in service after March 31, 2008. n65

FOOTNOTES:

(n1)Footnote 62. I.R.C. §47(c)(2)(B)(v)(I), as amended by *H.R. 3221 Sec. 3025.*

(n2)Footnote 63. I.R.C. § 1445(a).

(n3)Footnote 64. I.R.C. §1445(b)(9), as amended by *H.R. 3221 Sec. 3024.*

(n4)Footnote 65. I.R.C. §168(k)(4), as amended by *H.R. 3221 Sec. 3081.*

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Special Tax Alert: Housing Assistance Act of 2008

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§ STA.10 Revenue Offsets

The nearly $15 billion cost of the *Housing Assistance Tax Act* is offset by the following provisions:

- **Modification of Principal Residence Gain Exclusion.** As discussed above, I.R.C. § 121, excluding gain from the sale of a principal residence, is modified to eliminate gain exclusion due to periods of nonqualified use. n66

- **Increased Information Reporting.** The *Housing Assistance Tax Act* n67 adds I.R.C. § 6050W, effective for returns for calendar years beginning December 31, 2010, which requires an information return for reporting payments made in settlement of payment card and third-party payment transactions. Thus, under this provision, a bank that enrolls a business to accept credit cards and contracts with the business to make payment on credit card transactions is required to report to the I.R.S. the business's gross credit card transactions for each calendar year. The bank is also required to provide a copy of the information report to the business.

- **Delay in Application of Worldwide Allocation of Interest.** In order to determine its taxable income from foreign sources, a taxpayer must allocate and apportion deductions between items of U.S.-source and foreign-source gross income. The American Jobs Creation Act of 2004 modified the rules for allocating interest expense, effective for taxable years beginning after December 31, 2008. The *Housing Assistance Tax Act* delays the effective date of the worldwide interest allocation rules for two years, until taxable years beginning after December 31, 2010. n68

- **Timing of Corporate Estimated Taxes.** The *Housing Assistance Tax Act* makes two changes to the corporate estimated tax payment rules. First, for corporations with assets of at least $1 billion, the payments due in July, August, and September, 2013, are increased by 16.75 percentage points of the payment otherwise due, and the next required payment is reduced accordingly. However, the similar provision in the Tax Increase Prevention and Reconciliation Act of 2005, scheduled for the July, August, and September 2012 payments, is repealed and the general rule applies (such corporations are required to

make quarterly estimated tax payments based on their income tax liability). n69

FOOTNOTES:

(n1)Footnote 66. I.R.C. §121(b)(4), as amended by *H.R. 3221 Sec. 3092.*

(n2)Footnote 67. Sec. 3091(a).

(n3)Footnote 68. I.R.C. §864(f)(5)(D) & (6), as amended by *H.R. 3221 Sec. 3093.*

(n4)Footnote 69. *H.R. 3221 Sec. 3094,* modifying Sec. 401(1) of the Tax Increase Prevention and Reconciliation Act of 2005.

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Special Tax Alert: Emergency Economic Stabilization Act of 2008 Includes Real Estate Tax Changes 1

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§ ch0015sa2.syn Synopsis to Chapter ch0015sa2: Special Tax Alert: Emergency Economic Stabilization Act of 2008 Includes Real Estate Tax Changes 1

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STA2.00 Overview

On October 3, 2008, as a stabilizer to the troubled economy, the President signed into law H.R. 1424, n1 which includes the Emergency Economic Stabilization Act of 2008 (Division A of H.R. 1424), the Energy Improvement and Extension Act of 2008 (Division B of H.R. 1424), and the Tax Extenders and Alternative Minimum Tax Relief Act of 2008 (Division C of H.R. 1424). This legislation authorizes the Federal government to purchase and insure certain types of troubled assets, as well as provides tax incentives for energy production and conservation, extends expiring tax provisions, and provides certain individual income tax relief. Specifically related to real estate, H.R. 1424 extends an expiring tax provision allowing non-itemizers a standard deduction for real property taxes, provides additional tax relief related to federally declared disasters, extends the exclusion on home mortgage debt relief, provides more favorable depreciation for certain assets, and extends the deduction for environmental remediation costs.

FOOTNOTES:
(n1)Footnote 1. H.R. 1424, P.L. 110-374.

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1-ch0015sa2 Thompson on Real Property, Thomas Editions STA2.01

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STA2.01 Property Tax Deduction for Non-Itemizers

The Housing Assistance Tax Act of 2008, n2 which was enacted on July 30, 2008, created a new standard deduction for state and local real property taxes. n3 Prior to that Act, a taxpayer had to itemize deductions, rather than take a standard deduction, in order to deduct property taxes. The Housing Assistance Tax Act created a "real property tax deduction" for non-itemizers in addition to the standard deduction amount. n4 Under this provision, taxpayers can deduct up to $500 for single taxpayers ($1,000 for joint returns) for real property taxes paid. n5 However, as originally enacted, the deduction was only available for the 2008 tax year. n6 H.R. 1424 extends the provision to include the 2009 tax year also. n7

FOOTNOTES:
(n1)Footnote 2. H.R. 3221, P.L. 110-289.

(n2)Footnote 3. H.R. 3221, Sec. 3012, amending I.R.C. § 63.

(n3)Footnote 4. For 2008, the standard deduction amount is $5,450 for unmarried taxpayers and $10,900 for joint returns. *Rev. Proc. 2007-66, 2007-45 I.R.B. 970.*

(n4)Footnote 5. I.R.C. § 63(c)(7). For taxpayers itemizing their deduction, the full amount of property taxes will still be deductible as an itemized deduction. I.R.C. § 164(a)(1).

(n5)Footnote 6. I.R.C. § 63(c)(1)(C).

(n6)Footnote 7. H.R. 1424, Division C Section 204.

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1-ch0015sa2 Thompson on Real Property, Thomas Editions STA2.02

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STA2.02 Losses Attributable to Federally Declared Disasters

H.R. 1424 makes several tax changes to benefit taxpayers victimized by disasters.

Changes to Casualty Loss Deduction:

Internal Revenue Code § 165 allows an individual to deduct personal casualty losses. However, these deductions are currently limited for personal (non-business) casualty losses in several respects. Prior to H.R. 1424, an individual could deduct a personal casualty loss only to the extent that the loss exceeds $100 from each casualty. n8 For taxable years beginning after December 31, 2008, H.R. 1424 raises this limit to $500, n9 but the limit returns to $100 for taxable years beginning after December 31, 2009.

In addition, I.R.C. § 165 generally allows a deduction for aggregate net casualty and theft losses only to the extent that they exceed 10% of a taxpayer's adjusted gross income (AGI) for the year. n10 H.R. 1424 waives the 10% of AGI limit for losses attributable to a federally declared disaster n11 occurring after December 31, 2007, and before January 1, 2010. n12

Increase in Standard Deduction by Disaster Casualty Loss:

Prior to H.R. 1424, taxpayers had to itemize deductions in order to deduct casualty losses. H.R. 1424 adds a "disaster loss deduction" as a component of the standard deduction. n13 This disaster loss deduction is the net casualty loss attributable to a federally declared disaster occurring before January 1, 2010. This provision will benefit taxpayers with a disaster loss whose other itemized deductions are less than their standard deduction.

Expensing of Qualified Disaster Expenses:

H.R. 1424 adds new I.R.C. § 198A, which provides for expensing of certain qualified disaster expenses. Under this new

Code section, a taxpayer may elect to treat any "qualified disaster expense" as a deductible expense for the year in which it is paid or incurred. The expenses covered by this provision include expenses incurred in connection with a trade or business or business-related property for the repair of such property, or the removal of debris from, or demolition of structures on, real property damaged or destroyed as a result of a federally declared disaster. n14 This provision allows a current deduction for expenses that might otherwise have to be capitalized. n15 This provision applies to federally declared disasters occurring after December 31, 2007 and before January 1, 2010.

Net Operating Losses Attributable to Federally Declared Disasters:

H.R. 1424 provides a special five-year carryback period for net operating losses to the extent the NOL is created by a federally declared disaster. n16 The normal carryback period is two years, or three years for certain casualty losses. n17 This provision applies to losses arising in tax years beginning after December 31, 2007 in connection with disasters declared after that date, and only with respect to disasters occurring before January 1, 2010. n18

Temporary Relief Provisions for Midwestern Disaster Area and Hurricane Ike:

H.R. 1424 includes a number of temporary tax relief provisions for victims of severe storms, tornados, and flooding in the states of Arkansas, Illinois, Indiana, Iowa, Kansas, Michigan, Minnesota, Missouri, Nebraska, and Wisconsin. These provisions apply to federally declared disasters between May 20 and August 1, 2008. n19 In addition, temporary tax-exempt bond financing and low-income housing tax relief was provided for areas damaged by Hurricane Ike. n20

FOOTNOTES:
(n1)Footnote 8. I.R.C. § 165(h)(1).

(n2)Footnote 9. H.R. 1424, Division C Section 706(c).

(n3)Footnote 10. I.R.C. § 165(h)(2).

(n4)Footnote 11. A "federally declared disaster" is any disaster subsequently determined by the President to warrant assistance by the Federal government under the Robert T. Stafford Disaster Relief and Emergency Assistance Act. *See* H.R.1424, Division C Section 706(a), substituting "federally declared disaster" for "Presidentially declared disaster" several places in the Code.

(n5)Footnote 12. H.R. 1424, Division C Section 706(a), adding I.R.C. § 165(h)(3). For purposes of applying the 10% of AGI limit to other personal casualty losses, losses deductible under this provision are disregarded. Thus the provision has the effect of treating disaster losses attributable to federally declared disasters as a deduction separate from all other casualty and theft losses.

(n6)Footnote 13. H.R. 1424, Division C Section 706(b), adding I.R.C. § 63(c)(1)(D), for disasters declared in taxable years beginning after December 31, 2007.

(n7)Footnote 14. H.R. 1424, Division C Section 707, adding I.R.C. § 198A.

(n8)Footnote 15. *See* I.R.C. § 263 and Prop. Reg. § 1.263(a)-3(f)(3)(iv).

(n9)Footnote 16. H.R. 1424, Division C Section 708, amending I.R.C. § 172.

(n10)Footnote 17. I.R.C. § 172(b)(1)(A)(i) and § 172(b)(1)(F).

(n11)Footnote 18. I.R.C. § 172(j)(1)(A)(i)(I).

(n12)Footnote 19. *See* H.R. 1424 Division C Section 702.

(n13)Footnote 20. *See* H.R. 1424 Division C Section 704.

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STA2.03 Extension of Gain Exclusion Resulting from Debt Discharge on Home Mortgages

The Mortgage Forgiveness Debt Relief Act of 2007, which was enacted on December 20, 2007 n21 gave relief to taxpayers in foreclosure by amending I.R.C. §108 to exclude from a taxpayer's gross income any discharge of debt on a qualified principal residence. Many taxpayers facing a foreclosure of their home may have debt relief in the amount of the difference between the adjusted issue price of the debt being cancelled and the amount used to satisfy the debt (typically the value of the property), which amount is income under I.R.C. § 108 unless certain exceptions apply. n22 Homeowners may also have relief of indebtedness income from a modification of their current loan, including changes to a loan's adjustable interest rate provisions. n23

The Mortgage Forgiveness Debt Relief Act of 2007 excluded from the gross income of a taxpayer any discharge of indebtedness income by reason of a discharge, in whole or in part, of "qualified principal residence indebtedness." n24 Qualified principal residence indebtedness means up to $2 million of acquisition indebtedness n25 with respect to a taxpayer's principal residence. n26

As originally enacted, this relief from discharge of indebtedness income on qualified principal residence debt was available only for three years, on debt discharged beginning January 1, 2007 and ending on December 31, 2009. n27 H.R 1424 has extended this provision for three additional years, for discharges of debt on or after January 1, 2010 and before January 1, 2013. n28

FOOTNOTES:
(n1)Footnote 21. P.L. 110-142, § 2.

(n2)Footnote 22. I.R.C. §§ 108(a)(1)(A) - (D).

(n3)Footnote 23. *See* Treas. Reg. § 1.1001-3.

(n4)Footnote 24. I.R.C. § 108(h)(2).

(n5)Footnote 25. Acquisition indebtedness is defined in I.R.C. § 163(h)(3)(B) as any indebtedness incurred in

acquiring, constructing, or substantially improving any qualified residence of the taxpayer, for purposes of the home mortgage interest deduction of I.R.C. § 163(h), provided the debt is secured by the residence. Acquisition indebtedness will also include debt resulting from the refinancing of the original acquisition indebtedness, up to the amount of the refinanced debt, but not necessarily home equity loans.

(n6)Footnote 26. Principal residence has the same meaning for this purpose as under I.R.C. § 121. I.R.C. § 108(h)(5). Note that the taxpayer can have only one principal residence. Thus, this exclusion will not apply to vacation or second homes, even though the taxpayer may be able to deduct the mortgage interest on the second home under I.R.C. § 163(h).

(n7)Footnote 27. I.R.C. § 108(a)(1)(E).

(n8)Footnote 28. H.R. 1424, Division A Section 303, amending I.R.C. § 108(a)(1)(E).

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STA2.04 Fifteen Year Straight Line Depreciation Extended for Certain Real Estate Improvements

Generally the cost of non-residential real property must be depreciated over a 39-year recovery period. n29 However, certain qualified leasehold improvements and qualified restaurant improvements can be depreciated over a 15-year recovery period. n30 That 15-year recovery treatment was available for qualified leasehold or restaurant improvements that were placed in service prior to January 1, 2008. H.R. 1424 has extended this provision to qualified leasehold or restaurant improvements placed in service prior to January 1, 2010. n31 In addition, the definition of qualified restaurant property for this purpose is expanded to include new construction. n32 Prior to this change, qualified restaurant property included improvements to a building but not the building itself.

H.R. 1424 adds another category of 15-year property, and provides that qualified retail improvements that are placed in service after December 31, 2008 and prior to January 1, 2010 can be depreciated over 15 years. n33 Qualified retail improvement property for this purpose is defined as any improvement to an interior portion of a non-residential building if the portion is open to the general public and used in the retail trade or business of selling tangible personal property to the general public, and the improvement is placed in service more than three years after the building was placed in service. The covered improvements do not include expenditures attributable to the enlargement of the building, any elevator or escalator, any structural component benefiting a common area, or the internal structural framework of the building. n34

In addition, H.R. 1424 allows machinery or equipment used in a farming business to be depreciated over a 5-year period, where the original use of the property begins with the taxpayer after December 31, 2008, and the property is placed in service before January 1, 2010. Certain types of property are excluded from this category. n35

FOOTNOTES:
(n1)Footnote 29. I.R.C. § 168(c).

(n2)Footnote 30. I.R.C. § 168(e)(3)(E)(iv) and (v).

(n3)Footnote 31. H.R. 1424, Division C Section 305(a), amending I.R.C. § 168(e)(3)(E)(iv) and (v).

(n4)Footnote 32. H.R. 1424, Division C Section 305(b), amending I.R.C. § 168(e)(7).

(n5)Footnote 33. H.R. 1424, Division C Section 305(c), adding I.R.C. § 168(e)(3)(E)(ix) and § 168(e)(8).

(n6)Footnote 34. I.R.C. § 168(3)(8)(C).

(n7)Footnote 35. H.R. 1424, Division C Section 505, amending I.R.C. § 168(e)(3)(B).

1 This special alert also appears in Powell on Real Property[(R)] (Michael Allan Wolf ed., LexisNexis Matthew Bender) and Real Estate Financing (LexisNexis Matthew Bender).

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Special Tax Alert: Emergency Economic Stabilization Act of 2008 Includes Real Estate Tax Changes 1

1-ch0015sa2 Thompson on Real Property, Thomas Editions STA2.05

AUTHOR: By Patricia Hughes Mills, J.D., L.L.M. Professor of Clinical Accounting University of Southern California's Leventhal School of Accounting

STA2.05 Deduction of Environmental Clean-Up Costs

Under I.R.C. § 198, a taxpayer may elect to currently deduct certain environmental clean-up costs -- the expenses of remedying environmental contamination -- that would otherwise have to be capitalized. However, this election expired for expenses paid or incurred after December 31, 2007. H.R. 1424 extends this provision for expenses paid or incurred on or before December 31, 2009. n36

FOOTNOTES:
(n1)Footnote 36. H.R. 1424, Division C Section 318, amending I.R.C. § 198(h).

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Special Tax Alert: Emergency Economic Stabilization Act of 2008 Includes Real Estate Tax Changes 1

1-ch0015sa2 Thompson on Real Property, Thomas Editions STA2.06

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STA2.06 Miscellaneous Provisions

H.R. 1424 also includes the following extenders:

- The deduction for energy efficient commercial buildings provided in I.R.C. § 179D(h) has been extended for five years, through December 31, 2013. n37

- The 30% credit for solar property, fuel cell property, and microturbine property has been extended for eight years, through December 31, 2016, and the category "combined heat and power system property" has been added to the list of property eligible for the energy credit. n38

- The increased rehabilitation credit allowed by I.R.C. § 1400N(h) for structures in the Gulf Opportunity Zone is extended for one year to December 31, 2009. n39

FOOTNOTES:
(n1)Footnote 37. H.R. 1424, Division B Section 303.

(n2)Footnote 38. H.R. 1424, Division B Section 103, amending I.R.C. § 48.

(n3)Footnote 39. H.R. 1424, Division C, Section 320.

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Special Tax Alert: American Recovery and Reinvestment Act of 2009: Changes Affecting Real Estate *

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§ ch0015sa3.syn Synopsis to Chapter ch0015sa3: Special Tax Alert: American Recovery and Reinvestment Act of 2009: Changes Affecting Real Estate *

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Special Tax Alert: American Recovery and Reinvestment Act of 2009: Changes Affecting Real Estate *

1-ch0015sa3 Thompson on Real Property, Thomas Editions STA3.00

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STA3.00 Overview

On February 17, 2009, President Obama signed into law H.R. 1, n1 the American Recovery and Reinvestment Act of 2009, of which Title 1 Division B is the American Recovery and Reinvestment Tax Act of 2009 (the "2009 Recovery Act"). While generally aimed at creating jobs and providing economic relief to stimulate the economy, the 2009 Recovery Act is a combination of government spending programs and tax cuts. This special tax alert discusses several changes affecting real estate, including amendments to the first-time homebuyer's credit, a liberalization to the S corporation built-in gains rules, and changes impacting the low-income housing tax credit.

FOOTNOTES:
(n1)Footnote 1. P.L. 111-5

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Special Tax Alert: American Recovery and Reinvestment Act of 2009: Changes Affecting Real Estate *

1-ch0015sa3 Thompson on Real Property, Thomas Editions STA3.01

AUTHOR: By Patricia Hughes Mills, J.D., L.L.M. Professor of Clinical Accounting University of Southern California's Leventhal School of Accounting

STA3.01 Changes to First-Time Homebuyer's Credit

In hopes of spurring the housing industry, the 2009 Recovery Act enhances the first-time homebuyer's credit. n2 A refundable credit for first-time homebuyers equal to the lesser of $7,500 ($3,750 for married individuals filing separately) or 10 percent of the purchase price of a principal residence was added by the Housing Assistance Tax Act of 2008 (the "2008 Act"). n3 The 2009 Recovery Act increases the maximum amount of the credit to $8,000 ($4,000 for married individuals filing separately). (As provided in the Housing Assistance Tax Act, the credit phases out for taxpayers with modified adjusted gross income between $75,000 and $95,000 ($150,000 to $170,000 for joint returns, n4 and is not available for purchases from a related party). n5

This credit originally applied to principal residences purchased on or after April 9, 2008 and before July 1, 2009. The 2009 Recovery Act has extended the credit to apply to principal residences purchased before December 1, 2009. In addition, prior to the 2009 Recovery Act, a taxpayer could elect to treat a residence purchased in 2009 (and before July 1) as if it occurred on December 31, 2008 for purposes of taking the credit on the taxpayer's 2008 return. This election is still available for homes purchased prior to the December 1, 2009 date.

As originally enacted, the homebuyer's credit had to be recaptured ratably, with no interest charge, over 15 years, beginning in the second taxable year after the year in which the home was purchased. n6 Thus, the credit was more like an interest-free loan from the government to the taxpayer. For example, if the taxpayer purchased the home in 2008, and a $7,500 credit was allowable on the 2008 return, annual repayments of $500 per year for 15 years [$7,500 / 15 years, or 6 2/3 percent of the credit] began with the 2010 return. However, to make home buying more attractive, the 2009 Recovery Act waives this recapture rule for home purchases made in 2009 (prior to the December 1, 2009 deadline). n7

For principal residences purchased in 2008, if the taxpayer sells the home (or ceases to use the property as a principal residence), prior to complete recapture of the credit, any remaining recapture amount is due on the tax return for the year in which the home is sold (or is no longer used as a principal residence). n8 There are exceptions to this recapture payment upon certain events, such as death, certain involuntary conversions, transfers between spouses or incident to divorce, and where gain on sale does not exceed the recapture amount. n9

The 2009 Recovery Act has liberalized this recapture rule also, and provides that for a principal residence purchased after December 31, 2008 and before December 1, 2009, this recapture rule will apply only if the taxpayer sells the home (or ceases to use the property as a principal residence), during the 36-month period beginning on the date of the purchase of that residence by the taxpayer. n10

As originally enacted, the *I.R.C. § 36* homebuyer's credit did not apply if the taxpayer was entitled to the Washington, D.C. homebuyer's credit. For residences purchased after December 31, 2008 and prior to December 1, 2009, the 2009 Recovery Act allows qualifying taxpayers to take the more generous credit under *I.R.C. § 36*, but denies them the D.C. credit. n11

If a purchase of a residence was financed with the proceeds of qualified mortgage revenue bonds, it was originally not eligible for the homebuyer's credit. The 2009 Recovery Act eliminated that restriction, so that the purchase of a home may now be financed with qualified mortgage revenue bonds. n12

FOOTNOTES:

(n1)Footnote 2. P.L. 111-5, Title 1, Division B, Sec. 1006, amending www.asoc.org.

(n2)Footnote 3. P.L. 110-289, Sec. 3011(a), adding *I.R.C. § 36*.

(n3)Footnote 4. *I.R.C. § 36(b)(2)*.

(n4)Footnote 5. *I.R.C. § 36(c)(3)(A)(i)*.

(n5)Footnote 6. *I.R.C. § 36(f)*.

(n6)Footnote 7. *I.R.C. § 36(f)(4)(D)*, as amended by P.L. 111-5. Note that this recapture rule is waived for 2009 purchases, even if the taxpayer elects to take the credit for a 2009 purchase on his or her 2008 return. *I.R.C. § 36(g)*, as amended by P.L. 111-5.

(n7)Footnote 8. *I.R.C. § 36(f)(2)*.

(n8)Footnote 9. *I.R.C. § 36(f)(3)* & www.oosa.unvienna.org/Reports/intlagree.pdf.

(n9)Footnote 10. www.oosa.unvienna.org/SpaceLawreaties.html, as amended by P.L. 111-5.

(n10)Footnote 11. www.oosa.unvienna.org/SpaceLaw/gares/index.html, *1400C(e)(4)*, as amended by P.L. 111-5.

(n11)Footnote 12. *I.R.C. § 36(d)(2)*, as amended by P.L. 111-5.

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Special Tax Alert: American Recovery and Reinvestment Act of 2009: Changes Affecting Real Estate *

1-ch0015sa3 Thompson on Real Property, Thomas Editions STA3.02

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STA3.02 S Corp Built-in-Gain Provisions Liberalized

The *Housing Assistance Tax Act* allows a "real property tax deduction" for non-itemizers in addition to the standard deduction amount indicated above. n18 Taxpayers can deduct up to $500 for single taxpayers ($1,000 for joint returns) for real property taxes paid. n19

S corporations are taxed as flow-through entities, similar to partnerships, with the S corporation itself generally not subject to tax. n13 However, if a corporation that was formerly a C corporation elects to be taxed as an S corporation, the net appreciation in its assets at the time the S election became effective ("net built-in gain") is subject to a corporate level tax, if that built-in gain is recognized within 10 years of becoming an S corporation. n14 This results in two levels of tax on the disposition of former C corporation assets, since the S corporation shareholders also report on their personal returns their share of S corporation income. n15 Any built-in gains recognized during this 10-year period by the S corporation are taxed at the highest corporate tax rate, currently 35%. n16

The 2009 Recovery Act has reduced the 10-year recognition period, presumably to stimulate sales of assets, or to reduce the tax burden on S corporations forced to sell assets. Under the new law, for S corporation tax years beginning in 2009 and 2010, the 10-year recognition period is reduced to seven years. Thus, for 2009 and 2010, no corporate-level tax is imposed on the net recognized built-in gain of an S corporation if the seventh tax year in the recognition period preceded such year. n17 This amendment applies to taxable years beginning after December 31, 2008. n18

For example, if a corporation made an S election that was effective January 1, 2002, the built-in gain rules would cease to apply to any built-in gains recognized in 2009, since seven tax years preceded 2009. Such a corporation could sell assets in 2009 or 2010 with one level of taxation on the built-in gain, which otherwise would have been subject to two-levels of taxation.

FOOTNOTES:
(n1)Footnote 18. I.R.C. § 63(c)(1)(C).

(n2)Footnote 19. I.R.C. § 63(c)(7). For taxpayers itemizing their deduction, the full amount of property taxes will still be deductible as an itemized deduction. I.R.C. § 164(a)(1).

(n3)Footnote 13. *I.R.C. § 1363*.

(n4)Footnote 14. *I.R.C. § 1374*. The purpose of this provision is to prevent corporations from avoiding the 1986 repeal of the *General Utilities* rule by electing S corporation status prior to liquidating. *See I.R.C. § 336*, as amended by P.L. 99-514.

(n5)Footnote 15. *I.R.C. § 1366*. Gains are not "built-in gains" to the extent that the appreciation accrued while the entity was an S corporation. *I.R.C. § 1374(d)(3)*.

(n6)Footnote 16. *I.R.C. § 1374(b)(1)*; *I.R.C. § 11(b)*.

(n7)Footnote 17. *I.R.C. § 1374(d)(7)(B)*, as amended by P.L. 111-5, Sec, 1251(a).

(N8)Footnote 18. P.L. 111-5, Sec. 1251(b).

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Special Tax Alert: American Recovery and Reinvestment Act of 2009: Changes Affecting Real Estate *

1-ch0015sa3 Thompson on Real Property, Thomas Editions STA3.03

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STA3.03 Changes Impacting the Low-Income Housing Tax Credit

The low-income housing credit n19 is a tax credit available for owners of certain low-income housing buildings. A fixed amount of credits is provided annually to each state, and the State or local housing credit agency allocates credits to owners of qualified low-income housing properties. n20

Due to the economic downtown, potential investors, with reduced taxable income, are less attracted to low-income housing tax credits. In order to give States added flexibility and encourage the building of low-income housing, the Treasury will allow States to elect to receive a grant to a State's housing credit agency, up to a certain maximum amount based on the State's credit allocation. n21 The State's low-income housing credit limit for 2009 is reduced by the amount of the grant.

A State housing credit agency receiving this grant must use the grant to make subawards to finance the construction, or acquisition and rehabilitation, of qualified low-income buildings. n22 Any building receiving grant money from a subaward is required to satisfy the low-income housing credit rules. Any grant funds not used to make subawards before January 1, 2011 must be returned to the Secretary of the Treasury. n23

Grants under this program will not be taxable income to the recipient, and will not reduce the tax basis of a qualified low-income building. n24

FOOTNOTES:
(n1)Footnote 19. *See I.R.C. § 42*.

(n2)Footnote 20. The credit authority provided to each State for calendar year 2009 is $2.30 per resident, with a minimum annual cap of $2,665,000 for certain small population states. *Rev. Proc. 2008-66, 2008-45 I.R.B. 1107* . Projects that also receive financing with proceeds of tax-exempt bonds issued subject to the private activity bond volume limit do not require an allocation of the low-income housing credit.

(n3)Footnote 21. P.L. 111-5, Sec. 1602.

(n4)Footnote 22. P.L. 111-5, Sec. 1602(c).

(n5)Footnote 23. P.L. 111-5, Sec. 1602(d).

(n6)Footnote 24. *I.R.C. § 42(i)(9)* as added by P.L. 111-5, Sec. 1404.

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Special Tax Alert: American Recovery and Reinvestment Act of 2009: Changes Affecting Real Estate *

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STA3.04 Pass-Through of Tax Credit Bond Credits by RICS and REITS

Holders of certain tax credit bonds receive a tax credit in lieu of interest. The credit is treated as interest that is includible in gross income. n25 A regulated investment company ("RIC") which holds qualified tax credit bonds n26 may pass-through those credits to its shareholders. n27 Prior to the 2009 Recovery Act, the Secretary had not prescribed procedures for the pass-through of the credit to RIC shareholders.

Under the 2009 Recovery Act, a RIC can make an election to pass-through credits on tax credit bonds, n28 with future Treasury guidance to prescribe rules concerning the time and manner of making the election and methods for determining a shareholder's proportionate share of the credits. n29 An electing RIC may not itself take any of the credit, and must report the interest income with an offsetting dividends paid deduction. Each RIC shareholder is required to include a share of the credits as interest, and is allowed a proportional share of the credits. n30 A qualified tax credit bond for this purpose, with respect to RICs, will now also include a build America bond, as defined in *I.R.C. § 54AA(d)*, and any other bond for which a tax credit is allowable. n31

With respect to real estate investment trusts ("REITs") holding qualified tax credit bonds, the REIT is likewise allowed to pass through the credits (together with the income that relates to the credits) to the REIT beneficiaries (shareholders). n32

FOOTNOTES:
(n1)Footnote 25. *I.R.C. § 54A(f)*.

(n2)Footnote 26. The following bonds are qualified tax credit bonds: qualified forestry conservation bonds, new clean renewable energy bonds, qualified energy conservation bonds, a qualified zone academy bonds, and qualified school construction bonds. *See I.R.C. § 54A(d)(1)*.

(n3)Footnote 27. *I.R.C. § 54A(h)*, prior to amendment by P.L. 111-5, Sec. 1521(b)(2).

(n4)Footnote 28. *I.R.C. § 853A*, added by P.L. 111-5, Sec. 1541(a), effective for tax years after 2/17/2009.

(n5)Footnote 29. *I.R.C. § 853A(f)*.

(n6)Footnote 30. *I.R.C. § 853A(b)*.

(n7)Footnote 31. *I.R.C. § 853A(e)(1)*.

(n8)Footnote 32. *I.R.C. § 54A(h)*, as amended by P.L. 111-5, Sec. 1541(b)(2).

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Special Tax Alert: American Recovery and Reinvestment Act of 2009: Changes Affecting Real Estate *

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STA3.05 Changes to Residential Energy Efficient Property Credit

Prior to the 2009 Recovery Act, a 10% tax credit was available for the purchase of qualified energy efficiency improvements to a taxpayer's principal residence. n33 Qualified improvements included insulation materials, exterior windows and doors, certain roofing, as well as the purchase of specific energy efficient heating or cooling equipment. This credit was available for property improvements made after December 31, 2005 and before January 1, 2008, with a maximum $500 credit allowable to a taxpayer with respect to the same dwelling for all taxable years. Thus, the credit expired for calendar year 2008.

The 2009 Recovery Act reinstates the non-business energy credit of *I.R.C. § 25C* for expenditures made and property placed in service during 2009 or 2010. n34 In addition, the 2009 Recovery Act increased the credit amount to 30% with a maximum credit of $1,500. n35

FOOTNOTES:
(n1)Footnote 33. *I.R.C. § 25C.*

(n2)Footnote 34. *I.R.C. § 25C(g)*, as amended by P.L. 111-5, Sec. 302(a).

(n3)Footnote 35. *I.R.C. § 25C(a), (b)*. The $500 lifetime limit was eliminated.

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Special Tax Alert: American Recovery and Reinvestment Act of 2009: Changes Affecting Real Estate *

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STA3.06 Alternative Minimum Tax Changes

The 2009 Recovery Act made several changes to the Alternative Minimum Tax ("AMT"), including:

- Increasing the AMT exemption amounts for 2009 to $70,950 (up from $69,950 in 2008) for married couples filing jointly, n36 and to $46,700 (up from $46,200 in 2008) for unmarried taxpayers. n37

- Providing that tax-exempt interest on private activity bonds issued in 2009 and 2010 will no longer be a tax preference item for AMT purposes, meaning the interest will be exempt for AMT purposes also. n38

- Allowing personal credits to offset AMT through 2009. n39

FOOTNOTES:
(n1)Footnote 36. *I.R.C. § 55(d)(1)(A)* as amended by P.L. 111-5, Sec. 1012(a)(1).

(n2)Footnote 37. *I.R.C. § 55(d)(1)(B)* as amended by P.L. 111-5, Sec. 1012(a)(2).

(n3)Footnote 38. *I.R.C. § 57(a)(5)(C)(vi)*, as amended by P.L. 111-5, Sec. 1503(a).

(n4)Footnote 39. P.L. § 1011(a)(1).

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Special Tax Alert: American Recovery and Reinvestment Act of 2009: Changes Affecting Real Estate *

1-ch0015sa3 Thompson on Real Property, Thomas Editions STA3.07

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STA3.07 Depreciation Provisions

Although not generally applicable to real property, the 2009 Recovery Act made several changes to the depreciation and expensing rules for tangible personal property assets, including

- Extending the bonus depreciation rules of *I.R.C. § 168(k)*; n40

- Extending through 2009 the increased amount ($250,000) that can be expensed under *I.R.C. § 179*. n41

FOOTNOTES:
(n1)Footnote 40. P.L. 111-5, Sec. 2001(a).

(n2)Footnote 41. P.L. 111-5, Sec. 1202(a).

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Special Tax Alert: American Recovery and Reinvestment Act of 2009: Changes Affecting Real Estate *

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STA3.08 Expanded Net Operating Loss Carryback for Small Businesses

A business net operating loss ("NOL") can generally be carried back two years and forward 20 years. n42 The 2009 Recovery Act provides that an eligible small business may elect a three-, four-, or five-year carryback period for 2008 NOLs. n43 This temporary extension of the NOL carryback period allows taxpayers who experienced economic downturns to use more of those losses to obtain refunds of income taxes from prior years.

FOOTNOTES:
(n1)Footnote 42. *I.R.C. § 172(b)(1)(A).*

(n2)Footnote 43. *I.R.C. § 172(b)(1)(H),* as amended by P.L. 111-5, Sec. 1211(a).

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Special Tax Alert: American Recovery and Reinvestment Act of 2009: Changes Affecting Real Estate *

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AUTHOR: By Patricia Hughes Mills, J.D., L.L.M. Professor of Clinical Accounting University of Southern California's Leventhal School of Accounting

STA3.09 Qualified Small Business Stock Gain Exclusion

Prior to changes made by the 2009 Recovery Act, noncorporate taxpayers could exclude 50% of the gain recognized on the sale or exchange of "qualified small business stock" that was acquired at original issue and held for more than five years. n44 Under the 2009 Recovery Act, the percentage exclusion for qualified small business stock is increased to 75% for stock issued after February 17, 2009 and before January 1, 2011. n45

FOOTNOTES:
(n1)Footnote 44. *I.R.C. § 1202*.

(n2)Footnote 45. *I.R.C. § 1202(a)(3)*, as amended by P.L. 111-5, Sec. 1241.

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SPECIAL TAX CREDIT ALERT ON THE WORKER, HOMEOWNERSHIP, AND BUSINESS ASSISTANCE ACT OF 2009: EXTENSION OF AND CHANGES TO THE FIRST-TIME HOMEBUYER'S CREDIT 1

15-SA Tax-2 Thompson on Real Property, Thomas Editions SA Tax-2.syn

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§ SA Tax-2.syn Synopsis to Chapter SA Tax-2: SPECIAL TAX CREDIT ALERT ON THE WORKER, HOMEOWNERSHIP, AND BUSINESS ASSISTANCE ACT OF 2009: EXTENSION OF AND CHANGES TO THE FIRST-TIME HOMEBUYER'S CREDIT 1

§ STA1.00 Changes to Tax Credit

§ STA1.01 Extension of Tax Credit

§ STA2.02 Limitations to Tax Credit

§ STA2.03 Claim on Prior Year's Return

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SPECIAL TAX CREDIT ALERT ON THE WORKER, HOMEOWNERSHIP, AND BUSINESS ASSISTANCE ACT OF 2009: EXTENSION OF AND CHANGES TO THE FIRST-TIME HOMEBUYER'S CREDIT 1

1-SA Tax-2 Thompson on Real Property, Thomas Editions § STA1.00

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§ STA1.00 Changes to Tax Credit

On November 6, 2009, President Obama signed into law H.R. 3548,Tax-2_and_@_STA1.00)_and_footnotes(n1);.vk n1 **the Worker, Homeownership, and Business Assistance Act of 2009**, which enacted several changes to the current first-time homebuyer's tax credit. The credit was originally enacted as part of the Housing Assistance Tax Act of 2008 (the "2008 Act")Tax-2_and_@_STA1.00)_and_footnotes(n2);.vk n2 as a $7,500 credit that expired on July 1, 2009, and was expanded to an $8,000 credit that expired on December 1, 2009, by the American Recovery and Reinvestment Act of 2009.Tax-2_and_@_STA1.00)_and_footnotes(n3);.vk n3

FOOTNOTES:
(n1)Footnote 1. P.L. 111- ___.

(n2)Footnote 2. P.L. 110-289, Sec. 3011(a), adding *I.R.C. § 36*.

(n3)Footnote 3. P.L. 111-5, Title I, Division B, Sec. 1006, amending Ind. Code Ann. § 32-1-7.

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SPECIAL TAX CREDIT ALERT ON THE WORKER, HOMEOWNERSHIP, AND BUSINESS ASSISTANCE ACT OF 2009: EXTENSION OF AND CHANGES TO THE FIRST-TIME HOMEBUYER'S CREDIT 1

1-SA Tax-2 Thompson on Real Property, Thomas Editions § STA1.01

AUTHOR: By Patricia Hughes Mills, J.D., L.L.M. Professor of Clinical Accounting University of Southern California's Leventhal School of Accounting

§ STA1.01 Extension of Tax Credit

Viewed as an important measure to continued economic recovery, **the tax credit has now been extended to residences purchased before May 1, 2010**.Tax-2_and_@_STA1.01)_and_footnotes(n1);.vk n4 In addition, taxpayers who enter into a binding written contract before May 1, 2010, to close on the purchase of a principal residence before July 1, 2010 may also still be eligible for the credit.Tax-2_and_@_STA1.01)_and_footnotes(n2);.vk n5

In addition to extending the time during which the first-time homebuyer's credit is available, H.R. 3548 also extended the credit to taxpayers who are not "first-time" homebuyers. *I.R.C. § 36(c)(6)* now allows "**long-time residents**" -- those taxpayers who have owned and used the same residence as their principal residence for any 5-consecutive-year period during the prior 8-year period -- to take the credit on the purchase of a new residence.Tax-2_and_@_STA1.01)_and_footnotes(n3);.vk n6 However, the maximum credit allowed for these "long-term residents" is only $6,500.Tax-2_and_@_STA1.01)_and_footnotes(n4);.vk n7

The new legislation will also make the credit available to **higher-income taxpayers**. Prior to the enactment of H.R. 3548, the homebuyer's credit was phased out for taxpayers with modified adjusted gross income between $75,000 and $95,000 ($150,000 to $170,000 for joint returns). The phase-out now starts at $125,000, rather than $75,000 (and $ 225,000 for joint returns).Tax-2_and_@_STA1.01)_and_footnotes(n5);.vk n8

FOOTNOTES:

(n1)Footnote 4. *I.R.C. § 36(h)*, as amended by H.R. 3548, Sec. 11(a).

(n2)Footnote 5. *I.R.C. § 36(h)(2)*, as amended by H.R. 3548, Sec. 11(a).

(n3)Footnote 6. *I.R.C. § 36(c)(6)*, as amended by H.R. 3548, Sec. 11(b).

(n4)Footnote 7. *I.R.C. § 36(b)(1)(D)*, as amended by H.R. 3548, Sec. 11(c).

(n5)Footnote 8. *I.R.C. § 36(b)(2)(A)(i)(II)*, as amended by H.R. 3548, Sec. 11(c)(2).

1 This special alert also appears in Powell on Real Property[(R)] (Michael Allan Wolf ed., LexisNexis Matthew Bender) and Real Estate Financing (LexisNexis Matthew Bender).

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SPECIAL TAX CREDIT ALERT ON THE WORKER, HOMEOWNERSHIP, AND BUSINESS ASSISTANCE ACT OF 2009: EXTENSION OF AND CHANGES TO THE FIRST-TIME HOMEBUYER'S CREDIT 1

1-SA Tax-2 Thompson on Real Property, Thomas Editions § STA2.02

AUTHOR: By Patricia Hughes Mills, J.D., L.L.M. Professor of Clinical Accounting University of Southern California's Leventhal School of Accounting

§ STA2.02 Limitations to Tax Credit

H.R. 3548 does, however, add new limitations.

New Cap on Home Price

For purchases after the date of enactment (November 6, 2009), the credit cannot be claimed on the purchase of a residence if its purchase price exceeds **$800,000**.Tax-2_and_@_STA1.02)_and_footnotes(n1);.vk n9

Anti-Abuse Provisions

Several new anti-abuse provisions were added.

- In order to be eligible for the homebuyer's credit, the taxpayer must now **be at least 18 years old**,Tax-2_and_@_STA1.02)_and_footnotes(n2);.vk n10 and not be claimed as a dependent by another taxpayer for the year of purchase.Tax-2_and_@_STA1.02)_and_footnotes(n3);.vk n11

- Moreover, the taxpayer must attach a **properly executed copy of the settlement statement** used to complete the purchase in order to take the credit.Tax-2_and_@_STA1.02)_and_footnotes(n4);.vk n12

- The homebuyer's credit is not available if the residence is purchased from a **related party**, and H.R. 3548 has expanded the definition of related party to include relatives of the taxpayer's spouse.Tax-2_and_@_STA1.02)_and_footnotes(n5);.vk n13

FOOTNOTES:
(n1)Footnote 9. *I.R.C. § 36(b)(3)*, as amended by H.R. 3548, Sec. 11(d).

(n2)Footnote 10. IND. CODE ANN § 32-1-7, as amended by H.R. 3548, Sec. 12(a).

(n3)Footnote 11. *I.R.C. § 36(d)(3)*, as amended by H.R. 3548, Sec. 11(g).

(n4)Footnote 12. IOWA CODE § 567.1, as amended by H.R. 3548, Sec. 12(b).

(n5)Footnote 13. IOWA CODE § 567.1, as amended by H.R. 3548, Sec. 12(c).

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§ STA2.03 Claim on Prior Year's Return

As before its amendment, the homebuyer credit for a home purchased in 2009, or now prior to the expiration date in 2010, can be claimed on the prior year's tax return. Thus, a taxpayer purchasing a home in 2010 that qualifies for the credit will be able to take the credit on their 2009 return, thus obtaining the benefit of the credit earlier.Tax-2_and_@_STA2.03)_and_footnotes(n1);.vk n14

FOOTNOTES:
(n1)Footnote 14. IOWA CODE § 567.1, as amended by H.R. 3548, Sec. 11(a)(3).

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